DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO Address of Court: 1437 Bannock Street Denver, CO 80202	DATE FILED: September 22, 2021 8:35 AM FILING ID: D98938CEAED81 CASE NUMBER: 2020CV34319
Plaintiff: ERIC COOMER, Ph.D. v. **Defendants**: DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*	▲ **COURT USE ONLY** ▲
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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

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Pursuant to C.R.C.P. 121 § 1-15, defendants Herring Networks, Inc., d/b/a One America News Network ("OAN"), and Chanel Rion (the "OAN Defendants"), through their attorneys, file this 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 ("Motion"), and state the following:

I. Introduction

Discovery has been one-sided, overbroad, and extremely unfair in this matter given the purpose of the anti-SLAPP statute and First Amendment values. And plaintiff Eric Coomer has doubled (or tripled, perhaps quadrupled) down on this unfairness by filing an anti-SLAPP response brief that is massive, effectively exceeding the 150-page limit by more than double with declarations that don't state facts but instead rely on impermissible opinions and legal argument, citing approximately 10 gigabytes of alleged evidence, and violating numerous Colorado rules of evidence. In the face of that, the OAN Defendants are expected to file an anti-SLAPP reply brief by Monday and appear for a hearing October 13 and 14. This circumstance if not remedied would flout the First Amendment and due process.

When the Colorado General Assembly passed this state's anti-SLAPP statute in 2019, it declared "that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process." C.R.S. § 13-20-1101(1)(a). "Anti-SLAPP laws are designed to prevent SLAPPs by ending them early and without great cost to the SLAPP target." *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 65, 52 P.3d 685, 693 (2002) (internal citation omitted).[1] The automatic stay of

[1] As this Court has recognized, there are no reported decisions interpreting Colorado's anti-SLAPP statute, C.R.S. § 13-20-1101. (June 8, 2021 Order at 2.) Therefore, case law addressing application of discovery principles under California's anti-SLAPP legislation is instructive. (*Id.*)

discovery "is the anti-SLAPP law's primary mechanism for preventing SLAPP defendants from having to spend exorbitant amounts of money to defend themselves." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192, 106 P.3d 958, 966 (Cal. 2005). Despite these principles, this Court reversed Judge Rapaport's prior discovery order and granted plaintiff Eric Coomer more than four months to take an unprecedented amount of discovery in the face of the anti-SLAPP statute's automatic stay of discovery. The Court also has barred Defendants from taking any discovery, other than a recently ordered limited two-hour deposition of Plaintiff this Thursday.

The OAN Defendants filed their Special Motion to Dismiss Pursuant to Colorado's anti-SLAPP Statute, Colo. Rev. Stat. § 13-20-1101 (the "anti-SLAPP Motion"), on April 30. ***Nearly five months later***, after more than four months of discovery against all of the defendants, including hundreds of pages of documents produced by the defendants and approximately 40 hours of deposition testimony from **16** different defense witnesses, Plaintiff filed on September 17 his 150-page response ("Omnibus Response"), containing 182 exhibits, totaling 10 gigabytes of data (equivalent to about 5,100 pages and more than 50 hours of audio and video files).

Plaintiff's Omnibus Response also relies on **nine substantive declarations**, eight of which are from previously undisclosed witnesses (the "Declarations").[2] Four of these declarants are undisclosed purported expert witnesses retained by Plaintiff who render opinions on election security and technology, intellectual property and social media, journalism ethics, and the QAnon movement. The Declarations total over 250 pages and cite nearly 300 reports, articles, or other alleged sources of information that the OAN Defendants have not had the opportunity to review.

Included among these Declarations is testimony by "Individual 1," who describes himself

[2] The eight previously undisclosed Declarations are from the following witnesses: plaintiff Eric Coomer, Frederick W. Brown, Jr., J. Alex Halderman, Doug Bania, Mike Rothschild, Marty Golingan, and Individuals 1, 3 and 4.

as having "consistent and vocal involvement in the Black Lives Matter movement" and as having emerged as a leader of that movement. (Decl. of Individual 1, attached to Plaintiff's Omnibus Response, ¶ 4.) Individual 1 **corroborates** that a conference call he attended with "roughly 15-20 other Denver activists" occurred on September 25, 2020—at or around the same date that defendant Joseph Oltmann has consistently stated he attended the conference call that is at issue in this case. (*Id.* ¶ 10.) Additionally, by cloaking the identities of "Individuals 2, 3, 4 and 5" anonymously under this Court's July 19, 2021 Protective Order, Plaintiff has **now admitted** that each of these individuals attended the September 25, 2020 "Antifa conference call" referenced in the Protective Order. That Order specifically defines "Confidential Information" only as the "identity of persons involved in the alleged 'Antifa conference call' at issue in this case (referred to herein as Confidential Information)." (July 19, 2021 Protective Order at 1.) Plaintiff would have no reason to hide the identities of "Individuals 1-5" unless they attended the "Antifa conference call at issue in this case."

In total, the Omnibus Response and all of the attached declarations and their exhibits total **715 pages**, which Plaintiff had nearly five months to prepare. Yet the OAN Defendants are currently required to file their reply to Plaintiffs' massive filing within only six business days and to limit it to 15 pages. And the Court and has ordered a multi-day hearing to take place in less than one month (on October 13 and 14).

At the September 17 status hearing, before the OAN Defendants knew they would face such a massive anti-SLAPP response filing, the undersigned counsel for the OAN Defendants suggested that the Court extend the briefing schedule to accommodate Plaintiff's two-hour limited deposition, which is scheduled to take place on Thursday (two business days before Defendants' reply briefs are due). (September 17, 2021 Tr. of Proceedings ("Sept. 17 Tr.") at 9:12-11:11,

attached as Exhibit A.) Plaintiff's counsel—who said nothing about the approximately 5,100 pages of exhibits and nine witnesses whose declarations Plaintiff was about to unleash that same day—opposed any extension and, incredibly, objected to the defendants' attaching any evidence to their reply briefs. (*Id.* at 15:23-16:6.) The Court (not knowing what Plaintiff was about to file) declined to extend the anti-SLAPP briefing schedule or the October 13-14 hearing date. (*Id.* at 11:12-12:3.)

II. Relief requested

First, Plaintiff's Declarations and any arguments relying on them should be struck because the Declarations violate Colorado Rules of Evidence 403, 608, 701, 702 and 801, at minimum. The Declarations offer improper lay opinion testimony and contain a variety of hearsay statements citing unauthenticated documents and unknown sources that the OAN Defendants have been unable to question the declarants about or challenge. The Declarations also offer unreliable and improper expert witness testimony from four purported experts that Plaintiff failed to disclose until he filed his Omnibus Response. Moreover, any potential probative value of the Declarations is outweighed by the undue prejudice to the OAN Defendants, who have been ambushed by this mountain of new purported evidence that Plaintiff surprised them with in his Omnibus Response.

Second, the Court should extend the anti-SLAPP reply brief deadline to at least October 4 to allow the OAN Defendants sufficient time to respond to the over 5,100 pages and more than 50 hours of recordings presented by Plaintiff in the Omnibus Response. Forcing the OAN Defendants to file their reply by September 27 would unduly prejudice them and prevent them from presenting all of their arguments in support of their anti-SLAPP Motion.

Third, if the Court declines to strike the Declarations, the Court should allow the OAN Defendants to take the depositions of the nine declarants, limited to the scope of their Declarations,

and extend the anti-SLAPP reply brief deadline and hearing to allow the OAN Defendants to take this limited discovery. Here, good cause exists to allow limited discovery because without the depositions of Plaintiff's nine declarants, the OAN Defendants will have no opportunity to cross-examine them or test their knowledge or qualifications, which would severely undermine the OAN Defendants' due process rights and their ability to defend themselves. Indeed, forcing the OAN Defendants to file their reply to Plaintiff's cumulative 5,100 page Omnibus Response in ten days and prepare for a two-day hearing three weeks thereafter will unduly prejudice them.

In contrast, the relief sought here will not unduly prejudice Plaintiff because the hearing has already been delayed as a result of this Court's June 8 order allowing Plaintiff to take written and oral discovery of defendants (including, but not limited to, **16 depositions** of various defendants). Accordingly, to the extent the Court does not strike the nine Declarations, the OAN Defendants request that the Court extend the hearing date to December 2021 (or thereafter) and extend the due date for the OAN Defendants' reply brief in support of their anti-SLAPP motion until 28 days before the anti-SLAPP hearing.

III. Argument

A. The Court should strike the nine declarations and any argument relying on them and extend the anti-SLAPP reply deadline.

Evidence may be considered at the anti-SLAPP motion stage only if it is reasonably possible that the evidence set out in supporting affidavits, declarations, or their equivalent will be admissible at trial. *Sweetwater Union High School Dist. v. Gilbane Bldg. Co.*, 6 Cal. 5th 931, 947 (Cal. 2019). Evidence that would be barred at trial by the hearsay rule, or because it is speculative, is not based on personal knowledge, or consists of impermissible opinion testimony cannot be considered at the anti-SLAPP motion stage because it is not capable of being admitted at trial. *Id*., *see also Tuchscher Dev. Enterprises, Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219,

1238 (Cal. Ct. App. 2003) (affirming trial court's grant of anti-SLAPP motion and noting reviewing court could not draw reasonable inferences from plaintiff's declaration because of its evidentiary problems).

Here, the Court should strike the nine previously undisclosed Declarations attached to the Omnibus Response and any arguments that rely on the Declarations because they contain improper lay opinion testimony in violation of Colorado Rule of Evidence 701; they contain incurable hearsay in violation of Colorado Rule of Evidence 801; they render improper expert opinions in violation of Colorado Rules of Evidence 702; they offer opinions about ultimate legal issues, thereby usurping the role of the factfinder; they offer opinions about the credibility of other witnesses in violation of Colorado Rule of Evidence 608; and their probative value is outweighed by the danger of unfair prejudice to the OAN Defendants, in violation of Colorado Rule of Evidence 403.

1. The five declarations of Plaintiff's purported "fact" witnesses should be struck because they contain hearsay and offer improper opinion testimony in violation of Colorado Rules of Evidence 801 and 701.

Under Colorado Rule of Evidence 801, hearsay is an out of court statement offered in evidence for the truth of the matter asserted. C.R.E. 801; *see also People v. Shifrin*, 342 P.3d 506, 517 (Colo. App. Ct. 2014). With regard to lay testimony, Colorado Rule of Evidence 701 provides that "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understand the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or otherwise specialized knowledge within the scope of Rule 702." C.R.E. 701. The purpose of these qualifications is to ensure that lay testimony serves the . . . objective of putting the trier of fact in possession of an accurate reproduction of the event. *See People v. McFee*, 412 P.3d 848, 863 (Colo. Ct. App. 2016) (holding that admission of lay opinion testimony about interview was error).

A witness may not provide an opinion as to whether another witness is telling the truth on a specific occasion. C.R.E. 608; *People v. Battigalli-Ansell*, 493 P.3d 376, 384 (Colo. Ct. App. 2021). "Testimony that another witness is credible is especially problematic where the outcome of the case turns on that witness' credibility." *Id.* (citing *Venalonzo v. People*, 388 P.3d 868, 878 (Colo. 2017)).

The Declarations of Plaintiff's purported "fact" witnesses (Golingan, Coomer and Individuals 1, 3 and 4) violate Colorado Rules of Evidence 608, 701 and 801 and should be struck because they contain hearsay statements and offer improper opinion evidence. Below is a representative sample of the hearsay or improper opinion statements made by various declarants:

DECLARANT	**IMPROPER STATEMENT**	**OBJECTION**	**CITATION**
Marty Golingan	"This interview was replayed as part of the special report and was a good example of Ms. Rion failing to verify the credibility of her sources."	Improper Opinion	Golingan Decl. ¶ 11
Marty Golingan	"I considered the original reporting out of DC to be 'weird' and often the stories were not fact checked."	Improper Opinion	Golingan Decl. ¶ 12
Marty Golingan	"Based on my experience at OAN, I know for a fact that we aired false stories. The 'Dominionizing the Vote' report is a good example of one of those."	Hearsay, Improper Opinion	Golingan Decl. ¶ 16
Marty Golingan	"I understand Charles Herring has sworn in a declaration that he has discussed the Chanel Rion 'Dominion-izing the Vote' with his staff as well as OAN as an organization. If he did so, he did not do it in my presence or in the presence of any other news producers in San Diego to my knowledge."	Hearsay, Improper Opinion Regarding Charles Herring's Credibility	Golingan Decl. ¶ 16
Individual 1	"On September 25, 2020, I participated in a zoom conference call with roughly 15-20 other Denver activists, where we discussed the escalating threat of violence from [Joey] Camp and how best to counter his tactics peacefully. As the administrator of the call, I was generally familiar with all of the call	Hearsay, Improper Opinion	Individual 1 Decl. ¶ 10

DECLARANT	IMPROPER STATEMENT	OBJECTION	CITATION
	participants, who were visible during the call."		
Individual 3	"In my professional opinion as a reporter who has covered far left groups for several years, I find the suggestion of a conference call with 'Antifa' activists, especially those who might espouse or participate in political violence, to be highly implausible."	Hearsay, Improper Opinion	Individual 3 Decl. ¶ 19
Individual 3	"I also do not think it is credible that an individual such as Dr. Coomer, a man in his 50's with a Ph.D. in nuclear physics, would ever be welcome or trusted amongst individuals affiliated with 'Antifa.'"	Improper Opinion Regarding Oltmann's Credibility	Individual 3 Decl. ¶ 19
Individual 4	"I was not present on a call where anyone was identified as 'Eric from Dominion' or 'Eric, the Dominion guy.'"	Improper Opinion Regarding Oltmann's Credibility	Individual 4 Decl. ¶ 5
Eric Coomer	"Despite several conspiratorial claims to the contrary, Dominion voting machines are not capable of performing 'bulk adjudication.'"	Improper Opinion	Coomer Decl. ¶ 6
Eric Coomer	"As a company, Dominion Voting System's financial and ethical interest was always in developing election security technology that served to improve reliability, security, transparency, and auditability."	Improper Opinion	Coomer Decl. ¶ 8
Eric Coomer	"Over the next several weeks, I became aware that Oltmann, FEC United, and Conservative Daily continued to make false statements about me in Colorado, including on a local radio station, 710 KNUS, broadcast in Denver, Colorado."	Hearsay, Improper Opinion	Coomer Decl. ¶ 21
Eric Coomer	"On November 21, and 22, 2020, Defendants Chanel Rion (Rion) and One America News Network (OAN) broadcast a special thirty-minute show titled 'Dominion-izing the Vote.' … During this pre-recorded show, Rion makes several false claims regarding the 2020 election."	Hearsay, Improper Opinion	Coomer Decl. ¶ 34

The above representative statements demonstrate the inherent unreliability and impropriety of the Declarations of the above five "fact" witnesses submitted by Plaintiff. They should be

struck, and any argument by Plaintiff in reliance on these Declarations also should be struck.

2. The four declarations of Plaintiff's purported experts should be struck because they violate Colorado Rules of Evidence 702 and 403 and this Court's June 8, 2021 discovery order.

Additionally, the Court should strike the Declarations of Plaintiff's four purported experts because they were previously undisclosed and contain opinions that are not relevant and are unreliable and inadmissible. C.R.E. 702 and C.R.E. 403 govern the admissibility of expert testimony. *People v. Martinez*, 74 P.3d 316, 323 (Colo. 2003). C.R.E. 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." C.R.E. 702. In applying C.R.E. 702, a court should "focus on the reliability and relevance of the proffered evidence and … determine[e] as to (1) the reliability of the scientific principle, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury." *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2011). In deciding whether an expert should be permitted to provide certain opinions, a court must also consider C.R.E. 403's limitations on the admissibility of evidence. *Battigalli-Ansell*, 493 P.3d at 384; *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….").

In his Omnibus Response, Plaintiff relies on the opinions of four purported experts in the fields of election security (Halderman), journalism ethics (Brown), intellectual property (Bania) and the QAnon movement (Rothschild). Until September 17, none of these individuals had been previously disclosed to any of the defendants. And the introduction of purported expert testimony goes far beyond the scope of allowable discovery under the anti-SLAPP statute and this Court's June 8, 2021 discovery order (which the OAN Defendants still contend was improper).

While an expert may offer testimony that embraces an ultimate issue to be decided by the

trier of fact, he is not permitted to opine on how the law applies to that fact because doing so usurps the function of the jury or ultimate factfinder. *See* C.R.E. 704; *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011); *Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. Ct. App. 2000) (noting that an expert may not usurp the function of a court by expressing an opinion of the applicable law or legal standards). To determine whether expert testimony usurps the function of the jury, the court examines a number of factors, including whether the testimony was subject to cross-examination and whether the testimony expressed an opinion on the applicable law or legal standards, thereby usurping the function of the court. *Rector*, 248 P.3d at 1203.

The declarations of Plaintiff'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 Oltmann. For example, Frederick 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.) 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.) J. Alex Halderman, Plaintiff'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.) Doug Bania, Plaintiff's purported social media expert, attaches an unauthenticated report published by "Advance Democracy, Inc." and purports to testify about Plaintiff's damages, opining that nearly 9,000 "QAnon-related Twitter accounts" mentioned Plaintiff by name and that many of them

contained "violent and threatening language" directed at Plaintiff. (Bania Decl. ¶ 12.) Finally, Mike Rothschild, Plaintiff'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 because, according to 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.)

Plaintiff has not demonstrated that these purported experts are qualified as experts in the fields in which they purport to practice, nor has Plaintiff demonstrated that the testimony proffered by these purported experts comports with C.R.E. 702. The OAN Defendants have had no opportunity to strike or limit, much less investigate, any of the purported experts' testimony. The Court should strike each of the declarations of Halderman, Bania, Brown, and Rothschild and any arguments relying on their declarations because of the unfair surprise and prejudice to the OAN Defendants, because this "expert" testimony is beyond the scope of the limited discovery permitted by the Court, and because the declarations violate various Colorado Rules of Evidence.[3]

3. The Court should extend the OAN Defendants' reply deadline.

Because of the sheer volume of evidence that the OAN Defendants are currently forced to respond to by September 27, this Court should extend the reply deadline to allow the OAN Defendants to properly respond to Plaintiff's gargantuan Omnibus Response. Forcing the OAN Defendants to respond in 10 days would contravene the anti-SLAPP statute and the due process rights of the OAN Defendants. Nothing in the anti-SLAPP statute suggests that the plaintiff is allowed (1) virtually unlimited discovery against the defendants over the course of more than four

[3] In addition to the specific violations addressed herein, the Declarations also violate Colorado Rules of Evidence 401, 402, 602, 901 and 1002, and the OAN Defendants reserve their right to raise additional objections at a later time.

months and (2) to rely on numerous undisclosed fact and purported expert witnesses while (3) the defendants are allowed virtually no discovery and a reply briefing period of only 10 calendar days. The current schedule in light of what Plaintiff filed Friday is deeply unfair and a violation of the OAN defendants' due process rights. Accordingly, the OAN Defendants request that the Court extend the briefing schedule to allow the OAN Defendants to file their reply by October 4, 2021.

B. To the extent the Court refuses to strike the Declarations, the Court should allow the OAN Defendants to take the depositions of the Declarants and extend the reply deadline and hearing commensurately.

If the Court declines to strike the Declarations, the Court should permit the OAN Defendants to take the depositions of the nine declarants limited to the scope to their declarations and extend the reply deadline and hearing date to accommodate these depositions. Nothing in Colorado's anti-SLAPP statute prohibits a defendant from obtaining discovery. As the Court has previously recognized, to show good cause for discovery, a party requesting discovery in an anti-SLAPP suit must demonstrate that a witness possesses evidence needed to carry a party's burden at a hearing on the Special Motions to Dismiss. Sept. 7, 2021 Order at 2 (citing *Lafayette Morehouse, Inc. v. Chronicle Pub'g Co.*, 44 Cal. Rptr. 2d 46, 54 (1995)).

Here, good cause exists to allow the depositions of the nine declarants because the OAN Defendants should be afforded the right to cross-examine these witnesses about their testimony. "A civil litigant's right to due process of law includes the right to cross-examine witnesses and to have an opportunity for rebuttal." *Aspen Props. Co. v. Preble*, 780 P.2d 57, 58 (Colo. Ct. App. 1989). Failure to allow the OAN Defendants this minimum amount of discovery would violate the OAN Defendants' due process rights and would unduly prejudice them because they otherwise have had no opportunity to question or cross-examine these witnesses. This is true in the case of all nine declarants, but especially so in the case of "Individual 1," whose testimony **corroborates** that a conference call of Denver activists affiliated with the Black Lives Matter movement and

other social justice efforts occurred on September 25, 2020, which is the same time Oltmann has represented consistently that he attended the conference call in which he heard "Eric from Dominion" discuss the election. Notably, Individual 1 does not identify everyone who attended the call, nor does he provide any evidence or testimony that Oltmann did not attend the call.

Moreover, by cloaking the identities of Individuals 1 through 5 under the Court's Protective Order, Plaintiff has admitted that each of these individuals also attended the September 25, 2020 "Antifa conference call" at issue in this case. The Court's Protective Order defines "Confidential Information" as "information concerning the identity of persons involved in the alleged 'Antifa conference call' at issue in this case (referred to herein as Confidential Information)." July 19, 2021 Order at 1. Plaintiff would have no reason to hide the identities of Individuals 1 through 5 unless they attended the September 2020 conference call. Now that they have come forward, the OAN Defendants have the right to depose Individuals 1, 3 and 4, who attended the call this Court has already determined is "at the heart of this suit and is discoverable." (*Id.*)

Finally, in his newly submitted Declaration, Plaintiff testifies about various activities and conference calls he attended between September 25, 2020 and October 2, 2020, to refute the contention by defendant Oltmann that Oltmann heard "Eric from Dominion" discuss the election. (Coomer Decl., attached to Omnibus Response, at ¶¶ 40-46.) Notably, Plaintiff does not testify that he did not attend the September 25 call with Individual 1 and other Denver activists. Instead, he attests that "I did not participate in any 'Antifa' conference call on that day" and attests that "I was focused solely on investigating and mitigating a display issue discovered in Georgia. . . ." (*Id.* ¶ 40.) The OAN Defendants should be permitted to question Plaintiff about whether he attended the September 25 call with Individuals 1-5, and what was discussed if so.

In contrast to the significant prejudice that the OAN Defendants would suffer if limited

discovery is not allowed, allowing this limited discovery would not prejudice Plaintiff, who created this situation by going beyond the scope of the Court's limited discovery order, relying on nine previously undisclosed Declarations, and failing to disclose the existence of eight of these witnesses to the Court or the defendants until last Friday evening. Indeed, when Plaintiff originally requested his "limited discovery," he argued that he should be allowed discovery because the defendants submitted declarations in support of their anti-SLAPP motions. (Pl.'s Mot. for Expedited Discovery, p. 6 ¶ 7.) Similarly, at minimum, the OAN Defendants should be permitted the opportunity to depose each of the nine Plaintiff witnesses about their Declarations.

Plaintiff also argued previously that "the requested discovery will allow this Court to develop a complete, albeit truncated, evidentiary record in a case of significant national importance and importance to the jurisprudence of the state of Colorado." (*Id.*, p. 8 ¶ 13.) The OAN Defendants agree that this case involves significant national importance and importance to the jurisprudence of the state of Colorado. But the allowance of one-sided wide-ranging discovery only by Plaintiff under these circumstances would turn the anti-SLAPP statute on its head. And allowing Plaintiff to rely on the testimony of nine witnesses without being subject to cross-examination or application of the Rules of Evidence would violate fundamental notions of fairness and due process. *See Preble*, 780 P.2d at 58.

Colorado's anti-SLAPP statute provides that the hearing must be scheduled "not more than twenty-eight days after the service of the motion unless the docket conditions of the court require a later hearing." C.R.S. § 13-20-1101(5). Here, the first anti-SLAPP motion was filed on March 1, 2021 and the current October hearing date is therefore already six months delayed. At the last hearing, the Court noted that it had availability for a hearing in December, which would delay the hearing date only by another two months. Therefore, the OAN Defendants request that, if the

Court does not strike the nine declarations attached to the Omnibus Response, the Court allow the OAN Defendants to take the depositions of the nine declarants, limited to three hours each, extend the hearing date to December 2021 (or thereafter) and extend the due date for the OAN Defendants' reply brief in support of their anti-SLAPP motion until 28 days before the hearing.

IV. Conclusion

WHEREFORE, the OAN Defendants request that the Court strike the Declarations, grant the OAN Defendants until at least October 4, 2021, to file their anti-SLAPP reply, and, if the Declarations are not struck, grant the OAN Defendants' request to depose the nine declarants within the scope of their Declarations and extend the anti-SLAPP hearing until after those depositions are completed (with the anti-SLAPP reply brief due 28 days before the hearing setting).

Respectfully submitted on September 22, 2021.

Certification Pursuant to C.R.C.P. 121 § 1-15(8): Undersigned counsel has conferred with counsel for Plaintiff, who opposes the relief requested in the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 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/ Stephen K. Dexter