DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO Address of Court: 1437 Bannock Street Denver, CO 80202	DATE FILED: September 27, 2021 3:46 PM FILING ID: C4B754893D0BD 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 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

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Defendants Herring Networks, Inc., d/b/a One America News Network ("OAN"), and Chanel Rion (the "OAN Defendants"), through their attorneys, respectfully move the Court to set aside the Omnibus Protective Order entered pursuant to C.R.C.P. 26(c) on September 24, 2021, and to unseal all court records presently designated as either "protected" or "suppressed."[1]

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

Thursday, plaintiff Eric Coomer requested that the Court dissolve the protective order entered on July 17. (Pl.'s Second Mot. For Sanctions at p. 1.) Dr. Coomer even went so far as to quote Justice Louis Brandeis — "The Sunlight is said to be the best of disinfectants." It's ironic that Dr. Coomer would quote Justice Brandeis in a case **against the press**. And it should be no surprise to anyone that media defendants OAN and Chanel Rion wholeheartedly agree that the sun disinfects — it also reveals the truth and outs liars.

Despite Dr. Coomer's summoning the sun, the Court didn't grant the relief requested by Dr. Coomer. Instead, the Court, *sua sponte*, entered an even broader protective order on September 24 (the "Protective Order"). To be clear, none of the parties in this litigation requested that this new Protective Order be entered. And particularly vexing to the OAN Defendants is that the Protective Order was used to seal Dr. Coomer's deposition (which had occurred one day earlier),

[1] The OAN Defendants agree that currently undisclosed names of people on the antifa call should not be publicly disclosed to the extent necessary to protect defendant Joseph Oltmann's and his sources' safety. But the OAN Defendants note that Mr. Oltmann testified under oath and under threat of penalty of perjury that he was on the call, and his name has already been disclosed. Mr. Oltmann also testified under oath that plaintiff Eric Coomer was on the call. And Mr. Oltmann has been corroborated that the call occurred based on Individual 1's declaration, submitted by Dr. Coomer in support of his anti-SLAPP response. OAN reserves the right to move to unseal the names of those currently undisclosed.

even though Dr. Coomer had just requested the exact opposite relief and despite the fact that his counsel didn't utter a single objection about confidentiality or give a single instruction about sealing any part of the transcript during Dr. Coomer's deposition.

The Protective Order should thus be set aside, and all documents marked as "protected" or "suppressed" under the Protective Order (or the previous protective order) should be unsealed.

II. Relevant background

A. The initial protective order was entered to protect defendant Joseph Oltmann's concerns.

At the July 7 evidentiary hearing, Mr. Oltmann expressed concern about disclosing the identity of his conduit to the antifa call. In response, the Court stated, "I am sensitive and appreciative of **Mr. Oltmann's** concerns on what — what he experienced and also what he is concerned that others may experience as a result of the disclosure of [the identity of the person that we are referring to as the conduit, as well as other individuals that participated in the conference call]. So the Court is inclined to issue a protective order under Rule 26(c) that prohibits the parties from disclosing the information the [sic] **Mr. Oltmann** does provide outside of the courtroom." (July 7 Tr. at 92.) (Emphasis added). In other words, despite the Court's having found that there was a "probable falsity" that the antifa call ever occurred (which reiterated the Court's July 2 finding without any evidentiary hearing), **a protective order was to be entered to protect Oltmann's concerns about disclosing the identities of the individuals on that call.** (July 2 Tr. at 35–39, July 7 Tr. at 88–92, and July 7 Minute Order.)

On July 14, Dr. Coomer filed a motion for entry of a protective order, noting that it had been sent to counsel for defendants Mr. Oltmann, FEC United, and Shuffling Madness Media, Inc., d/b/a Conservative Daily (the "Oltmann Defendants"), on July 12 but asserting that a response had not been received. The Court entered a protective order pursuant to C.R.C.P. 26(c) on July 19

that is virtually identical to Dr. Coomer's proposed protective order. Therein, the Court found that "**information concerning the identity of persons involved in the alleged 'Antifa conference call'** at issue in this case (referred to herein as Confidential Information) is highly relevant of the claims at the heart of this suit and is discoverable." (July 19 Protective Order at p. 1.) (Emphasis added.)

B. The Court *sua sponte* sealed records beyond the protective order's reach, thereby unfairly prejudicing the defendants.

After entry of the protective order, the Court began expanding the order far beyond its reach to *sua sponte* seal numerous court records by designating them as either "protected" or "suppressed" in a manner that is unfairly prejudicial to the defendants. For example, the Court suppressed the entirety of the OAN Defendants' 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 (the "Motion"), including the attached exhibit (a transcript of a ***public*** September 17 court hearing) and proposed order, finding that the OAN Defendants "did not redact [information subject to the Court's July 19, 2021 protective order] from their Motion." (Sept. 22 Order at p. 2.)

But the Motion didn't violate the protective order. The Motion didn't include the names of any previously unknown individuals who participated in the antifa call or any identifying information of any previously unknown individuals who participated in the call. And Mr. Oltmann — the only party to this litigation who had expressed concerns about disclosing the identities of the individuals on the call — joined the Motion.

The Motion perhaps was suppressed because of inclusion of facts set forth in Dr. Coomer's 150-page Omnibus Response to the defendants' anti-SLAPP Motions (which relied on, in part, the declaration of an unnamed Individual 1 who corroborated the Oltmann Defendants' claim that an antifa call occurred by asserting that a conference call of Denver activists took place on September

25, 2020) (the "Omnibus Response"). Notably, the OAN Defendants did not identify the people whose identities Dr. Coomer filed under seal. Nonetheless, the OAN Defendants' filings were sealed as "protected." But Dr. Coomer's Omnibus Response did not receive a "protected" or "suppressed" designation and instead remains accessible to the public.

This is not the only example of the Court's extending the original protective order beyond its reach to *sua sponte* seal court records. For example, the Court designated as protected an article published for ***public*** consumption by *New York Times Magazine* when attached to Sidney Powell and Sidney Powell, P.C.'s (the "Powell Defendants") Motion for Forthwith Order Granting Limited Discovery, as well as a transcript from a ***public*** July 2, 2021 hearing when attached to the Oltmann Defendants' Renewed Motion for Reciprocal Discovery and Joinder in the Powell Defendants' Motion for Forthwith Order Granting Limited Discovery.

C. On a media tour about this litigation, Dr. Coomer and his counsel requested to withdraw the protective order.

While the defendants continually have their filings, without their request, classified *sua sponte* by the Court as protected and/or suppressed, Dr. Coomer's filings remain public as he and his counsel litigate in the press. On September 22, *The New York Times* published an article discussing documents submitted in support of Dr. Coomer's Omnibus Response, including (1) an alleged Trump Campaign memo regarding Dr. Coomer's prior employer, Dominion Voting Systems; (2) a summary of the testimony given by defendant Rudolph Giuliani during a deposition taken pursuant to this Court's order; and (3) the word-for-word testimony given by Sean Dollman, a representative of defendant Donald J. Trump for President, Inc., during a deposition taken pursuant to this Court's order. *See* Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows*, NEW YORK TIMES, Sept. 22, 2021, https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html.

A day later, on September 23, the *Ark Valley Voice* published an article based on an interview given by Dr. Coomer's counsel, Charlie Cain ("Mr. Cain"), about this litigation. *See* Jan Wondra, *Court Filing Reveals Trump's Voter Fraud Claim Was a Big Lie From The Beginning,* ARK VALLEY VOICE, Sept. 23, 2021, https://arkvalleyvoice.com/court-filing-reveals-trumps-voter-fraud-claim-was-a-big-lie-from-the-beginning/. The article contains direct quotes from Mr. Cain regarding Dr. Coomer's Omnibus Response, this Court's prior orders, and the status of the protection and/or suppression of certain documents filed in this litigation. Regarding the last point, the article says:

> "In this case, the [Omnibus Response] is being reviewed, but the filing is public," said Cain. "That has been widely quoted — we embedded a lot of the exhibits in the filing."
>
> Cain explained that all the exhibits and deposition transcripts are all still protected "or at least they were as of yesterday," said Cain, "with the exception of the Trump memo, which was published yesterday in The New York Times.
>
> According to Cain, there is more to come out. "Not all of the defendants moved for a confidentiality clause, or to have the information suppressed," he added. "So from my standpoint – it's going to all come out and its pretty explosive."

Based on Mr. Cain's statements, it comes as no surprise that Dr. Coomer doubled down and requested that the Court withdraw the Protective Order in his September 22 Second Motion for Sanctions Against the Oltmann Defendants. Dr. Coomer specifically requested that the Court enter an "order withdrawing the July 19, 2021 protective order, thus allowing full transparency with respect to the facts and proceedings in this case. This order does not violate the privacy interests of the witnesses who willingly provided the Court with declarations in support of Dr. Coomer's recently-filed response." (Pl.'s Second Mot. for Sanctions at p. 8.)

D. The Court entered a broader protective order against the request of Dr. Coomer himself.

Despite the above, the Court entered the new Protective Order "*sua sponte* to remedy certain administrative issues related to prior protective orders entered in this matter." (Protective Order at p. 1.) In doing so, the Court expanded the prior protective order, declaring that the following is "Confidential information" that "should be protected from disclosure outside of these proceedings:"

- "Information containing the identity of persons involved in the alleged 'Antifa conference call' at issue in this case;"
- **"The deposition of Plaintiff [Dr. Coomer] which occurred on September 23, 2021;"** and
- "The Court's Disclosure Re: Ex Parte Communication and attached Exhibit 1 dated 9/22/2021."

(Protective Order at p. 2.) (Emphasis added.) Again, no parties requested that the Court enter this Protective Order.

III. Argument

A. The Court should set aside the Protective Order and unseal all court records presently designated as either "protected" or "suppressed" because there is a presumption under Colorado law that court records are to be open.

"Courts have historically recognized a common law right, though not an absolute right, of access to government records, including judicial records. This right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes." *Lanphere & Urbaniak v. State of Colo.*, 21 F.3d 1508, 1511 (10th Cir. 1994) (internal citations and quotations omitted); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

The Colorado Open Records Act ("CORA") has replaced this common law right. *Lanphere*, 21 F.3d at 1511. CORA contains a broad legislative declaration that "all public records shall be open for inspection" unless otherwise specifically provided by CORA or by law. Colo.

Rev. Stat. § 24-72-201. The Colorado Rules of Civil Procedure authorize district courts to limit access to court files only "upon a finding that the harm to the privacy of a person in interest outweighs the public interest." C.R.C.P. 121 § 1-5. "[T]he rule creates a presumption that all court records are to be open; it allows a court to limit access in only one instance and for only one purpose (when the parties' right of privacy outweighs the public's right to know); and it grants to every member of the public the right to contest the legitimacy of any limited access order." *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996). As such, the fact that a court record contains personal and confidential information does not warrant the sealing of a court record. *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001). The "prospective injury to reputation" similarly does not warrant the sealing of a court record as that is "an inherent risk in almost every civil lawsuit." *Id.*; *see also Anderson*, 924 P.2d at 1127 (finding that "it is unreasonable, as a matter of law, for the parties to litigation to expect or to assume that all of the court files will remain private"). This is especially true where the lawsuit is one of public interest. *See Times-Call Publishing Co. v. Wingfield*, 410 P.2d 511, 514 (Colo. 1966) (finding that because an election contest was a matter of public interest, it would be an abuse of discretion for a court to deny a publishing company access to the court file).

B. Public interest outweighs any potential harm to the privacy of the individuals involved in this litigation.

Here, as shown by the media coverage of this litigation and the number of individuals in attendance at the ***public*** court hearings, this matter is certainly of public interest. And that interest outweighs any alleged harm to Dr. Coomer, the defendants, or the individuals whom Dr. Coomer is relying on as witnesses.[2] Indeed, Dr. Coomer even admitted that the prior protective order did "not violate the privacy interests of the witnesses who willingly provided the Court with

[2] But *supra* n. 1.

declarations in support of Plaintiff's recently-filed response." (Pl.'s Second Mot. for Sanctions at p. 8.) Despite this, the Court entered a new Protective Order.

While Dr. Coomer and his counsel attempt to bask in the "sun" (if sunshine can be cast as biased and ill-informed media exposure), many of the defendants' filings are sealed despite their desires from the public as "protected" and/or "suppressed."

Of its own accord, the Court has inappropriately sealed numerous documents, including the OAN Defendants' Motion (which the Court denied in part). *See Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (citing *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)) ("Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view."). Further, the Court has even inappropriately **suppressed transcripts from court hearings that were open to the public and that numerous members of the public attended**. *See Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 165 (2d Cir. 2013) ("The transcript of a proceeding is so closely related to the ability to attend the proceeding itself that maintaining secrecy is appropriate only if closing the courtroom was appropriate.").

The Protective Order and the Court's actions are not only inappropriate, but also unfairly prejudicial to the defendants. Accordingly, as Mr. Cain (again, Dr. Coomer's lead counsel) stated in his interview with the *Ark Valley Voice*, the court records should "all come out" and be made available to the public. Then maybe *The New York Times* and *Ark Valley Voice* (and those that would follow their footsteps) will tread with more balance under the light of a truly disinfecting sun.

IV. Conclusion

WHEREFORE, for the foregoing reasons, the OAN Defendants respectfully request that this Court set aside the Omnibus Protective Order entered pursuant to C.R.C.P. 26(c) on September 24, 2021 and unseal all court records presently designated as either "protected" or "suppressed" (absent good cause shown, such as Mr. Oltmann's, for legitimate safety concerns).

Respectfully submitted on September 27, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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/ Richard A. Westfall