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DISTRICT COURT, COUNTY OF DENVER, COLORADO
Court Address:
1437 Bannock Street
Denver, Colorado 80202

▲COURT USE ONLY▲

Plaintiff:

ERIC COOMER

Defendants:

DONALD J. TRUMP FOR PRESIDENT, INC., Et al.

Case # 20-CV-34319

Div. 409

Attorney for Defendants Joseph Oltmann, FEC United, and Shuffling Madness Media, Inc. d/b/a Conservative Daily
Andrea M. Hall
THE HALL LAW OFFICE, LLC
P.O. Box 2251
Loveland, CO 80539
(970) 419-8234
andrea@thehalllawoffice.com
Atty. Reg. #: 036410

DEFENDANTS JOSEPH OLTMANN/FEC UNITED, INC./SHUFFLING MADNESS MEDIA, INC. dba CONSERVATIVE DAILY'S RESPONSE IN OPPOSITION TO THE PLAINTIFF'S SECOND MOTION FOR SANCTIONS

Defendants, Joseph Oltmann, FEC United, Inc., and Shuffling Madness Media, Inc., by andthrough their attorney, The Hall Law Office, LLC, hereby tender their Response in Opposition to the Plaintiff's Second Motion for Sanctions, stating as follows:

PLAINTIFF'S FACTUAL ALLEGATIONS

1. The Plaintiff alleges that on July 7, 2021, Mr. Oltmann stated under oath that he knew the "name

of the individual" who gave him access to the September call and the "identity of the other participants on that call". He was not asked whether he knew any individual's full or baptismal name, nor did it occur to him that he was being asked that question. He did, in fact, know the name, whether that was a given name, a "moniker", or sobriquet of the individual who gave him access to the call, and similarly, the names used by certain participants on the call, including Heidi/Sean (?) Beadle, Yan/Yani, Sam, Bev, and Brian, and R.D. *Transcript, Joseph Oltmann, p. 14, l. 14-p. 20, l. 14, Exhibit B (Note: not yet read and signed).* Mr. Oltmann's testimony was truthful, as was his testimony during his deposition and neither conflicted with the other.

Mr. Oltmann would also note that he gave **five** depositions, for a total of **sixteen** hours, representing himself, each of the defendant entities, and CD Solutions, which is not a named party in this action. At each of the entity depositions, the Plaintiff improperly attempted to question Mr. Oltmann about his own actions, rather than any actions he took as the representative for the entity, went far outside the bounds of the limited discovery order, ignored counsels' objections to the scope of the depositions, and continued to attempt to obtain general discovery, abusing the limited discovery he was granted.

2. Plaintiff also claims, falsely, that Mr. Oltmann, "repeatedly conversed with his lawyers during questioning…" and cites three excerpts from Mr. Oltmann's deposition transcript in support of his false assertion. Mr. Oltmann did not converse with his lawyers during questioning, as is clear from the transcript, and was, in fact, improperly and gratuitously admonished for **looking at** his attorneys.

> Q. Then there's a dash RD knows. Who's RD?
> What do those initials stand for?
> What are you looking at, Mr. Oltmann?
> A. My attorney.
> Q. Who is RD? The lawyer can't give you the
> answer. I can't -- this is not their deposition. This is
> your deposition.

Exhibit B, p. 20, ll. 19-25.

3. The Plaintiff then makes the false claim that Mr. Oltmann "took an unscheduled early 'bathroom' break (within nine minutes of the prior break during a pending question". No question was pending when Mr. Oltmann took a break, which Mr. Cain improperly refused to agree to:

A. Can we take a quick break? I need to use
the restroom. I just drank a bunch of water.
Q. Well, let me -- let me ask you a follow-up,
then we can take the break, it relates to the question
that I just asked you.
A. All right. I'll answer it…

Exhibit B, p. 85, l. 24-p. 86, l. 4.

…MS. HALL: Charlie, and I'm going to at
this point say we need to take a break and go off the
record.
MR. CAIN: I'm not agreeing to it. I
mean, you can do what you want, but I want to get to the
bottom of this.
MS. HALL: And I understand -- there's no
question posed, and he asked for a break about four
questions ago. So I'm asking for a break.
A. Just a quick break just to use the
restroom, and I'll be right back.
Q. (By Mr. Cain) You're going to do it no
matter what. I'm just saying I'm in the middle of a
topic, and so I'm not -- it's not an agreed-upon break.
MS. HALL: Okay. Break. We'll come back
in a few minutes. Thank you.
THE DEPONENT: I'm just going to use the
restroom. I'll be right back.

Exhibit B, p. 88, l. 16-p. 89, l. 8.

Q. (By Mr. Cain) Okay. Mr. Oltmann, before
the break, I was asking you about the access to the
Facebook pages. It wasn't an agreed break. I don't want
to know if you -- the substance of your conversations, but
did you confer with counsel during the last break?
MS. HALL: Objection.
A. I didn't, no. I went to the bathroom like
I told you I was going to.
Q. (By Mr. Cain) So you didn't confer with
counsel?
A. I did not.

Exhibit B, p. 89, ll. 15-25.

4. Finally, the Plaintiff claims that Mr. Oltmann refused to provide the identity of the individual who sent him the Facebook posts, despite the fact that Plaintiff's counsel had stipulated to the individual being covered by the protective order. This statement, too, was false.

Q. In the hearing, we stipulated that the
protective order would be covered by the Facebook conduit
as well. So they are protected, and that's our position

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and stipulation. So --
A. It is my position that that has not been
stipulated. It is also my position that having Eric
Coomer have access to this individual would be a danger
to this person, given Eric Coomer's history with antifa.
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Exhibit B, p. 87, ll. 6-13. Prior to the deposition, Mr. Oltmann had reviewed the July 7, 2021 transcript and knew that Plaintiff's counsel had not, in fact, stipulated to the protection of that individual's identity. He stated, "put it in the protection order, and I feel that the person is protected, then I may be compelled to release that information." *Exhibit B, p. 90, ll. 5-7.* Plaintiff's counsel refused to do so, repeating the false statement that they had previously stipulated to the inclusion. *Id., p. 90, ll. 10-13.* They had not, and the identity of the individual was not included in the protection order, as they well knew. The Plaintiff's counsel are no strangers to *ex parte* contact with the Court's staff, as billing records plainly show, know precisely how to reach staff, and, because all counsel were available, there would have been no impropriety in contacting the Court, but were unwilling to make any such attempt. Neither did they make any attempt to do so before the depositions the next day, when they could have actually obtained the information they claim to need.

5. The Plaintiff also alleges that Mr. Oltmann "failed to disclose communications from an individual known only as "The Researcher". *Motion* ¶ *9.* This, too, is false. All written information received from the Researcher was disclosed on July 9, 2021, in a document Bates Numbered 81-198 (Coomer investigation 81-198).

Direct upload	9/9/2021 4:43 PM	File folder	
Second supplemental Disclosures	7/27/2021 10:08 AM	File folder	
Third Supplemental Disclosures	9/3/2021 1:24 PM	File folder	
Coomer FB 1-80	7/9/2021 4:35 PM	Adobe Acrobat Docu...	5,802 KB
Coomer investigation 2 199-203	7/9/2021 8:31 PM	Adobe Acrobat Docu...	1,129 KB
Coomer investigation 81-198	7/9/2021 4:41 PM	Adobe Acrobat Docu...	5,106 KB
Joe Privilege Log 20180829	7/14/2021 9:09 PM	Adobe Acrobat Docu...	145 KB
Joe's notes from call bates 205	7/20/2021 8:14 AM	Adobe Acrobat Docu...	1,584 KB
Oltmann FEC Shuffling MM Privilege Log	7/9/2021 8:36 PM	Adobe Acrobat Docu...	44 KB
request #1a production 204-206	7/9/2021 8:39 PM	Adobe Acrobat Docu...	1,368 KB

As Mr. Oltmann testified, he was uncertain whether the other information came from the Researcher, *Exhibit B, p. 52, ll. 4-11,* or whether he learned it though telephone contact with the Researcher. *Deposition of CD Solutions, Exhibit C, p. 65, ll.6-9, p. 65, l.15-p. 66, l. 8* Mr. Oltmann did not "fail to disclose communications from 'The Researcher'" as Plaintiff contends, and the deposition was "suspended" when Mr. Oltmann was unable to provide Bates Numbers for the emails he provided (it is not possible to Bates Number emails provided in native format), but it was not his responsibility to do that. He identified the previously-disclosed information for Plaintiff's counsel repeatedly, but counsel was apparently sufficiently unfamiliar with the disclosures to continue:

> Q. (By Mr. Skarnulis) Okay. My question is:
> Have you provided documents in this litigation that would evidence coming into the Joe Otto account?
> A. I produced every email coming to the Joe Otto account. That is pertaining to Eric Coomer.
> Q. That's not my question. How -- have you produced documents that would show that; that would say Joe Otto?
> A. Yes, I have.
> Q. In the email address?
> A. I provided you with screenshots because the raw files, you could not read. You asked for native files broken out, so I provided that. Those files could not be put back together or in their native format because that's what you asked for, so I took screenshots as was directed by the Court, where it said to take screenshots of those emails. I took screenshots of those email.
> Every single one of the emails related to Eric Coomer from Conservative Daily -- info@conservative-daily.com or Joeotto@conservative-daily.com.
> And the only difference -- differentiator was the email I used to get into to look at all of those root accounts. So your IT people could even tell you what I'm telling you is accurate.
>
> *Exhibit C, p. 60, l.24-p. 61, l. 24.*
>
> A. All of the emails that came in I provided, came in either from info@conservative-daily.com or through Joeotto@conservative-daily.com. There was never

an email of Joeotto@conservative-daily.com.
Q. What email address did the researcher use?
A. From the email that I'm looking at right
now, it shows that it came into contact@FECUnited.com.
That was then forwarded to Joe@FECUnited.com.
Q. Did the researcher ever email a
Conservative Daily address?
A. Yes.
Q. When?
A. The email that we have in discovery
dated -- or excuse me, that shows and you've received
it -- is 1001_conservative-daily -- -daily_ 01052021.eml.
It was dated and it came into
info@conservative-daily.com, and this says on
January 5th, 2021, at 5:20 p.m.
It was provided in the discovery. The
document that I sent over that shows on this document is
what I just stated clearly.

Exhibit C, p. 62, ll. 2-22. There was no reason to "suspend" the deposition.

6. Four emails between Mr. Oltmann and Sidney Powell, or members of her staff, were found after the deposition, which had not been disclosed because they had been filed in an "attorney-client" folder with communications he had with an attorney who assisted him before this suit was filed, due to the attorney having involved on the emails. *Declaration of Joseph Oltmann, Exhibit A.* Despite an exhaustive search of his email communications, complete details of which search were provided in discovery, the emails were not found. *Id.* When counsel discovered them, and determined that they were not privileged, they were disclosed immediately, consistent with Mr. Oltmann's obligations to update any previous disclosures. The Plaintiff already had these emails, which were produced by Ms. Powell, and contained nothing of any moment concerning this case, and the Plaintiff's customary red herring about matters irrelevant to the issues now before the Court does not alter the fact that this case is not, ostensibly, about Dominion Voting Systems, and he suffered no prejudice of any kind from the late disclosure.

7. Similarly, the Plaintiff was not prejudiced in any way by Mr. Oltmann's failure to provide the identity of the individual who gave him the Facebook posts, as Dr. Coomer has now admitted, under

oath, that the posts were genuine, and not, as he insisted to the Denver Post, a fabrication by Mr. Oltmann. Coomer had already admitted this to the New York Times in a published article prior to the September depositions, as well. It is clear from the deposition transcript that if his counsel had actually wanted to obtain the information, all that was necessary was to request the individual's inclusion in the protective order, which could likely have been done on the spot, and certainly could have been done prior to the next day's depositions. Dr. Coomer's insistence on knowing (or, as is more probable, having Mr. Oltmann confirm) this individual's identity can have no proper purpose of any kind, because this is no longer at issue, and has no evidentiary value. The patent inference is that this information matters to the Plaintiff for the sole purpose of retribution, if it matters at all, rather than simply serving as a vehicle for further motions seeking to punish Mr. Oltmann.

ARGUMENT

The Plaintiff seeks sanctions under C.R.C.P. 37, but makes no showing that he has complied with the rule. Rule 37 (a) states:

> "If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in which the action is pending for an order compelling an answer."

The Plaintiff did not apply to the Court for an order compelling an answer. Further, Mr. Oltmann stated clearly that he would provide the information regarding the individual who provided the Facebook posts, if that individual was added to the protective order, and instead of doing that, the Plaintiff's attorneys falsely stated that they had stipulated to that at the July 7 hearing, and made no attempt to actually protect the individual. They had deliberately avoided having this identity included in the protective order prior to the deposition, and deliberately avoided doing so during the deposition. The point of the question was not a legitimate need to obtain the information; it was a strategy to set Mr. Oltmann up for sanctions, and the Plaintiff apparently reasoned that he would win either way – either he could obtain confirmation of the

individual's identity, unprotected, and wreak his vengeance, or he would not obtain the information, and could wreak it on Oltmann.

Rule 37 was amended in 2015 for just this reason: abusive discovery conduct led, too often, to preclusion of evidence, and in accordance with the Colorado Supreme Court's direction in *Pinkstaff v. Black & Decker (U.S.) Inc.,* 211 P.3d 698, 703 (Colo. 2009)("unless enforcement of procedural requirements is essential to shield substantive rights, litigation should be determined on the merits and not on formulistic application of the rules"). The *Pinktsaff* Court held that "When discovery abuse are alleged, courts should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party" *Id.* (citing *In re People v. Lee,* 18 P.3d 192, 197 (Colo. 2001)).

Further, Rule 37(2)(A) provides that if a party fails to make a disclosure required by C.R.C.P. 26, any other party may move to compel disclosure and for appropriate sanctions. However, the rule expressly requires that the movant certify a good faith conferral has occurred and that s/he has attempted to secure the disclosure without court action. Had the Plaintiff simply requested that the individual be added to the protective order, he would have received what he sought, but he made no attempt to secure the disclosure by reasonable, available, means. His failure to comply with the rule is particularly egregious, given that the gravamen of his complaint here is that these Defendants failed to comply with the rule, and his non-compliance makes sanctions unavailable for any alleged violation by these Defendants.

The Plaintiff was not prejudiced in any way by Mr. Oltmann's failure to identify the individual, because the individual's identity is irrelevant to any issue in this case, and the purported reason for the Plaintiff's need for this information has since been proved to be categorically untrue. Dr. Coomer's statements concerning the posts being fabricated were false, and he has admitted that they were false. The same is true of the Sidney Powell emails, which the Plaintiff already had, which contain no information of

any weight, and which were inadvertently withheld, and disclosed immediately when found.

The Plaintiff's contentions that counsel and/or Defendants FEC United, and Shuffling Madness Media engaged in discovery misconduct are false, and sanctions are wholly unwarranted. There was no improper conduct or coaching of any deposition witness at any time by counsel. Counsel provided everything they received from Mr. Oltmann, FEC United, Shuffling Madness Media, and CD Solutions, after working diligently to secure all responsive information. Counsel cannot know what they do not know, or provide what they aren't aware of, and bear no culpability for a client's inadvertent failure to disclose emails.

The Plaintiff requests that Mr. Oltmann's Special Motion to Dismiss be stricken, and erroneously asserts that the sanction is "narrowly tailored" to address the misconduct, which consists of a failure to provide irrelevant information, engineered by Plaintiff's counsel, and an inadvertent failure to find emails, which were disclosed immediately when they were located. The Defendants recognize that it is within the Court's discretion to impose discovery sanctions, even for inadvertent failures to disclose, but that discretion is not without limit. "We hold that the harm and proportionality analysis under Colorado Rule of Civil Procedure 37(c) remains the proper framework for determining sanctions for discovery violations." *Catholic Health Initiatives Colo. v. Earl Swennson Assoc, Inc.* 2017 CO94, ¶ 1. Here, the Plaintiff has not been even marginally harmed, yet he seeks, effectively, a default judgment on the Anti-SLAPP issue, and seeks to convince the Court that, despite the clearly-expressed legislative purpose underlying § 13-10-1001, that defendants not be subjected to the burden of attorneys' fees and litigation costs in meritless SLAPP lawsuits, this Court should ignore it, default Mr. Oltmann, FEC United, and Shuffling Madness Media, and compel them to shoulder the immense costs of litigation in this case. They so urge not because he has been harmed, or prejudiced, but because he has been piqued, and has a personal hatred for these defendants.

"[I]t is unreasonable to deny a party an opportunity to present relevant evidence based on a

draconian application of the pretrial rules" *Trattler v. Citron,* 182 P.3d 674, 682 (Colo. 2008). "We reaffirm the principle that sanctions should be directly commensurate with the prejudice caused to the opposing party." *Id.* (citing *Kwik Way Stores, Inc. v. Caldwell,* 745 P.2d 672, 677 (Colo. 1987). The Plaintiff seeks a draconian sanction, and does so without any showing of prejudice or harm. The imposition of such a sanction is unwarranted, and the Motion must be denied.

Finally, the Plaintiff asks the Court to vacate the protective order, on grounds that vacating that order "allows Plaintiff greater latitude to investigate the facts that Oltmann has chosen to hide." The Plaintiff's only need to "investigate" the identity of the individual who provided the Facebook pages is retributive, and the very purpose the protection order was intended to guard against. There is nothing else to "investigate", as Mr. Oltmann does not know further information about the individual who gave him access to the September call, now confirmed by the Plaintiff's own witness, (Individual 1) who likely has significantly more information about who was on that call than Mr. Oltmann does, and, once again, the Plaintiff's "need" to confirm the identity of that individual is similarly retributive, and for no proper purpose. Under no circumstances should the protective order be vacated as to the identity of the individual, whose safety would be gravely endangered by that action.

The Exhibits Plaintiff attached to his Motion are almost entirely irrelevant, and do not demonstrate that Mr. Oltmann, counsel, FEC United, Shuffling Madness Media, or CD Solutions engaged in misconduct. For instance, Exhibit 1 is apparently attached in case the Court is unaware of its orders; Exhibit 2 is irrelevant, and does not address discovery misconduct; the point of Exhibit 3 is unclear, but it does not address discovery misconduct at the September depositions, and appears to have no purpose other than an inflammatory one; Exhibit 4 purports to establish discovery misconduct by counsel, but does not, though it does establish that Mr. Oltmann insisted that the identity he was asked to provide be protected by court order prior to being released; Exhibit 5 does not demonstrate discovery misconduct – it establishes that Mr. Oltmann provided the information he had; Exhibits 6-9 are utterly irrelevant to the

issue of discovery misconduct, and Exhibit 10 does not establish that Mr. Oltmann provided an untruthful or "evasive" answer. They are apparently attached to suggest that the Plaintiff's allegations are supported by evidence, but they are not, and the exhibits are gratuitous.

CONCLUSION

Wherefore, for the reasons set forth herein, the Plaintiff's Motion for Sanctions should be denied in its entirety, no sanctions should be imposed, and the protective order should remain in place to protect the identity of the individual it was intended to protect.

Respectfully Submitted this 29th day of September, 2021

By: /s/ Andrea M. Hall

Attorney for Defendants Oltmann/FECUnited/Shuffling Madness Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2021, I electronically filed foregoing Response with the Clerk of the Court using the ICCES electronic filing system, which will send an electronic copy of this filing to all counsel of record.

/s/ Andrea M. Hall