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| DISTRICT COURT, DENVER COUNTY, COLORADO<br>1437 Bannock Street<br>Denver, CO 80202 | DATE FILED: September 29, 2021 3:42 PM<br>FILING ID: C4CB1A5F20C1B<br>CASE NUMBER: 2020CV34319 |
| ERIC COOMER, Ph.D.,<br>Plaintiff<br><br>vs.<br><br>DONALD J. TRUMP FOR PRESIDENT, INC., et al.,<br>Defendants | ▲ COURT USE ONLY ▲ |
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**PLAINTIFF'S RESPONSE TO DEFENDANTS HERRING NETWORKS, INC. dba ONE AMERICA NEWS NETWORK AND CHANEL RION'S MOTION FOR PARTIAL RECONSIDERATION AND JAMES HOFT AND TGP COMMUNICATIONS, LLC dba THE GATEWAY PUNDIT'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**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Eric Coomer, Ph.D. (Dr. Coomer) files this Response to Defendants Herring Networks, Inc. dba One America News Network and Chanel Rion's Motion for Partial Reconsideration, as well as Defendants James Hoft and TGP Communications, LLC dba The Gateway Pundit'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, as well as any related joinders filed by the other Defendants prior to or after this filing.

## *A. Defendants' motions fail to establish a manifest error of fact or law with the Court's September 22 Order.*

1. Defendants Herring Networks, Inc. dba One America News Network and Chanel Rion (collectively, OAN) filed their motion to strike and for extension to reply on September 22, 2021, with several other Defendants filing joinders thereto.[1]

2. The Court entered its Order Regarding OAN's motion on September 22, 2021, denying in part OAN's request to strike Dr. Coomer's evidence and, instead, reserving evidentiary objections for the hearing on October 13-14, 2021; granting in part OAN's request for an extension on reply briefing and extending the deadline for all anti-SLAPP reply briefs to 11:00 a.m. on October 4, 2021; and denying OAN's request for depositions of the requested nine declarants. Consistent with this Order, Dr. Coomer reserves his right to respond to Defendants' evidentiary objections at the October 13-14, 2021 hearing.

[1] *See generally* OAN Mot. to Strike; *see also* Oltmann, et al. Joinder, filed Sept. 22, 2021; Trump Campaign Joinder, filed Sept. 22, 2021; Powell, et al. Joinder, filed Sept. 22, 2021; Metaxas Joinder, filed Sept. 23, 2021; Giuliani Joinder, filed Sept. 24, 2021.

3. On September 23, 2021, Defendants James Hoft and TGP Communications, LLC dba The Gateway Pundit (collectively, The Gateway Pundit) filed another motion to strike and for extension to reply that mirrored OAN's motion and sought the same relief already addressed by the Court with another Defendant filing a joinder thereto.[2] However, the Court's September 22, 2021 Order addressed the relief The Gateway Pundit sought, rendering its motion moot. To the extent The Gateway Pundit intended its motion to serve as a motion for reconsideration of the Court's September 22, 2021 Order, it failed to establish a manifest error of law or fact necessitating reconsideration and should be denied. *See* C.R.C.P. 121 § 1-15(11); *see also Fox v. Alfini*, 432 P.3d 596, 603 (Colo. 2018) (recognizing motions for reconsideration are not devices intended to relitigate the same issues).

4. On September 27, 2021, OAN filed its motion for partial reconsideration of the Court's September 22, 2021 Order and again requested the Court permit OAN to depose nine declarants within the scope of their Declarations (or strike the Declarations altogether) and to extend the anti-SLAPP hearing until after those depositions are completed (if not struck). *See* OAN Mot. to Reconsider at 6-7. Other Defendants have filed joinders thereto.[3] OAN also fails to establish a manifest error of law or fact necessitating reconsideration and its motion to reconsider should be denied. *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (listing limited

[2] *See generally* Gateway Pundit Mot. to Strike (acknowledging the motion was nearly identical to OAN's motion); *see also* Giuliani Joinder, filed Sept. 24, 2021.

[3] *See* Oltmann et al. Joinder, filed Sept. 28, 2021; Hoft-TGP Joinder, filed Sept. 29, 2021; Trump Campaign Joinder, filed Sept. 29, 2021; Defending the Republic Joinder, filed Sept. 29, 2021.

grounds warranting reconsideration and finding it is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing). Instead, OAN's motion merely re-urges arguments it previously raised; misstates and misapplies the applicable law underlying those arguments; and fails to provide good cause for the untimely discovery sought.

5. Separately, OAN dedicates a portion of its motion to reconsider to making *ad hominem* attacks against Dr. Coomer. *See* OAN Mot. to Reconsider at 4. These attacks are not relevant to the issues in dispute in this proceeding.[4] These attacks are not relevant to the relief OAN seeks and can be struck without affecting the legal and factual arguments asserted. *See generally* OAN Mot. to Reconsider. This is a court of law, not a court of public opinion. Attacks like these have no place here. Such attacks were addressed early on by the Court in an effort to promote professionalism, which the parties since then have primarily met.[5] That OAN has recently substituted counsel and that counsel is potentially less knowledgeable of the case history is no excuse for turning to personal attacks where legal arguments fail.

### *B. Defendants' motions are divorced from the context of the procedural mechanism sought.*

6. Defendants' motions to strike and for reconsideration seemingly are based on a fundamental misunderstanding of the nature and purpose of the anti-SLAPP statute.

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[4] Significant briefing has already occurred regarding the relevance of the Facebook posts, as well as Defendants' objectionable use of those posts in this proceeding. *See, e.g.*, Pl.'s Resp. to Powell Mot. for Forthwith Order Granting Limited Discovery, Sept. 03, 2021, at ¶ 3; Pl.'s Omnibus Resp., Sept. 17, 2021, at ¶ 151, n.441; Pl.'s Resp. to OAN 12(b)(5) Mot. to Dismiss, Mar. 26, 2021, at ¶ 15 n.18; *see also* Sept. 7, 2021 Order, at 3 (finding that "the connections between personal Facebook posts that express political ideology and the Defendants' statements at issue in this lawsuit are remote.").

[5] *See* Apr. 27, 2021 Order Granting Pl.'s Mot. to Strike.

Defendants primarily take issue with the procedural mechanism afforded under the anti-SLAPP statute, which is invoked in limited circumstances and used to determine legal sufficiency of the claims at the beginning of a case. *See* C.R.S. 13-20-1101, *et seq*.; *see also Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016). Specifically, when sought by defendants the statute stays all discovery, except in limited circumstances that are primarily intended to protect plaintiffs from the dismissal of meritorious claims. *See* 13-20-1101(b); *see also Lafayette Morehouse, Inc. v. Chronicle Publ. Co.*, 37 Cal. App. 4th 855, 868 (1995). Meaning under this statute defendants generally have the obligation to reply to prima facie evidence put on by plaintiffs in response to defendants' special motions to dismiss without having the opportunity to discover that evidence in advance. Defendants should be aware that prima facie evidence includes "supporting affidavits," C.R.S. § 13-20-1101(3)(b), and "evidence capable of being admitted at trial," *Sweetwater Un. High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 63 (Cal. 2019). That Dr. Coomer put forward prima facie evidence in support of his claims is not then grounds for discovery—especially given that the majority of the evidence offered was evidence obtained in the course of the limited discovery the Court granted, which Defendants have had an equal amount of time to review, and within the respective Defendants' possession and control.[6] Defendants cite no authority that supports such a basis for discovery under the anti-SLAPP statute.

[6] *See* Pl.'s Omnibus Resp., Exhibits A-1, A-2, B-1, B-2, B-3, B-4, B-5, B-6, B-8, B-9, B-10, B-11, B-12, C-1, C-2, D-1, D-2, D-3, D-4, D-5, D-6, E-1, E-2, E-3, E-3a, E-4, E-5, E-6, E-7, E-8, E-9, E-10, E-11, E-12, E-13, E-14, E-17, E-18, E-19, E-20, F-1, F-2, F-3, F-4, G-1, G-2, G-3, G-4, G-5, G-6, G-7, G-8, G-9, H-1, H-2, H-3, I-1, I-2, I-3, I-4, J-1, J-2, J-4, K-1, K-2, K-4, K-5, K-6, K-7, L-1, M-1, M-2, M-3, M-4, M-5, M-6, M-8.

7. Further, that the procedural mechanism Defendants sought limits discovery does not deprive Defendants of their due process rights to discovery in the litigation generally. Again, Defendants have cited no authority that supports such a challenge to the anti-SLAPP statute and, instead, turn to inapposite cases addressing the right to a cross-examine witnesses at trial.[7] Defendants purposefully sought a procedural mechanism that stays discovery and now complain that discovery is stayed. They could have avoided the procedural posture of which they now complain by not filing special motions to dismiss under the anti-SLAPP statute. But by filing them, it is incumbent upon Dr. Coomer to present evidence, which he did. That does not reopen discovery. Defendants will have more than ample opportunity to conduct discovery of Dr. Coomer's claims in the future.

### *C. Defendants have failed to establish good cause for the discovery sought under the anti-SLAPP statute.*

8. Defendants have the burden of establishing good cause for the discovery they seek—depositions of the declarants in the declarations Dr. Coomer filed in support of his response to Defendants' special motion to dismiss under the anti-SLAPP statute. C.R.S. § 13-20-1101(6). The sole basis for the relief Defendants seek is that they were allegedly unaware of the declarations in advance of Dr. Coomer's response to Defendants' special motion to dismiss.[8] As addressed above, Defendants offer no support for such a

[7] *See Aspen Props. Co. v. Preble*, 780 P.2d 57, 58 (Colo. App. 1989) (finding defendant was denied due process of law when his attorney was expelled from the courtroom for improper attire during trial in landlord/tenant dispute).

[8] The specific declarants include: (1) Dr. Coomer; (2) Frederick W. Brown, Jr., a forty-year Denver Post reporter and editor and a retired University of Denver journalism instructor; (3) Dr. J. Alex Halderman, an expert OAN itself has identified in reporting; (4) Dr. Mike Rothschild, author of *The Storm is Upon Us:*

request, which misapprehends the purpose and functions of the anti-SLAPP statute generally. *See supra* at § I(B). Beyond a general assertion of Defendants' right to confront witnesses, Defendants have failed to specify the types of information they are seeking or why they need to obtain that discovery from these respective witnesses. *See Lafayette,* 37 Cal. App. 4th at 867-68 (finding a party requesting discovery in an anti-SLAPP suit must demonstrate that the other party or a witness possesses evidence needed by the other party to carry its burden of proof); *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 593 (2003) (finding a request for discovery in an anti-SLAPP proceeding must include, "some explanation of 'what additional facts [the party] expects to uncover"). Looking to the declarations themselves, it is unclear how the information contained therein could surprise Defendants when it directly aligns with the factual allegations contained in Dr. Coomer's complaint, which Dr. Coomer had the burden to support. Further, Defendants have had more than sufficient time to seek and prepare evidence in support of any alleged Antifa conference call, Dr. Coomer's alleged participation in such call, or Dr. Coomer's alleged rigging of the presidential election for purposes of their special motions to dismiss. In fact, Defendants themselves sought and obtained an extension prior to filing their special motions to dismiss, affording them over three

*How QAnon Became a Movement, Cult, and Conspiracy Theory of Everything*; (5) Doug Bania, an expert in intellectual property, social media and internet infringement, and other intangible assets; (6) Marty Golingan, a former employee of OAN's; and (7) three Individuals identified by Defendant Oltmann as allegedly participating in the alleged Antifa conference call, who have no knowledge of any call, no knowledge of Dr. Coomer, and no knowledge of Dr. Coomer's participating in such a call. *See* Omnibus Resp., Exhibits A, N-R, T-U, W.

months to prepare their motions.[9] Defendants could have but did not support their special motions with their own factual or expert witnesses to support their allegations against Dr. Coomer. That was directly in line with Defendants' conscious disregard of factual and expert witnesses publicly rejecting the election-rigging narrative underpinning their defamatory publications regarding Dr. Coomer.

9. This is especially important in the context of a special motion to dismiss under C.R.S. § 13-20-1101 where Defendants' burden of proof is limited to establishing a protected act under the statute. *See* C.R.S. § 13-20-1101(2); *see also Kieu Hoang v. Phong Minh Tran*, 60 Cal. App. 5th 513, 524 25 (2021). If Defendants meet that burden, which Dr. Coomer disputes, the burden shifts and Dr. Coomer must establish that his claims are legally sufficient. *See* C.R.S. § 13 20 1101(3)(a). Dr. Coomer did so with a raft of evidence, including fact and expert witnesses, documents, audio and video proof.

10. Defendants do not seek discovery here for purposes of their burden of proof but, instead, seek it for purposes of raising factual challenges to Dr. Coomer's evidence in response. This misunderstands the analysis before the Court, which does not weigh evidence or resolve conflicting factual claims. *See Baral*, 376 P.3d at 608-09. It is a legal determination and not a factual one. *See id.* Under this analysis, the Court accepts Dr. Coomer's evidence as true and limits its evaluation of Defendants' evidence to determining whether it defeats Dr. Coomer's evidence as a matter of law. *See id.* Defendants' factual challenges have no bearing on the legal merits of Dr. Coomer's claims.

[9] *See* C.R.S. § 13-20-1101(5) (providing 63 days to file special motions to dismiss after service); *see also* Order dated Mar. 24, 2021 (extending deadline for all defendants' anti-SLAPP motions to April 30, 2021). Defendants were served in January 2021.

11. Finally, Defendants' motions for additional discovery should be denied on timing alone. There is no basis under the anti-SLAPP statute that entitles Defendants to knowledge of Dr. Coomer's witnesses or evidence in advance of his response to their special motions to dismiss. *See* 13-20-1101, *et seq*. However, to the extent Defendants legitimately believed such a basis exists, Defendants took no efforts to request this information in the months Defendants had prior to filing their special motion to dismiss, let alone the time afforded to them after filing their special motions to dismiss. They waited until Dr. Coomer filed his response to see the evidence he offered in support and then sought discovery in support of their replies. Defendants offer no support for such gamesmanship. Moreover, as a practical and procedural consideration, it is unclear when or how Defendants would even offer this evidence. Like motions for summary judgment, Defendants had the burden to assert their arguments and evidence in their special motions to dismiss. *See Wallman v. Kelly*, 976 P.2d 330, 332 (Colo. App. 1998); *see also In Interest of L.B.*, 413 P.3d 176, 184 (Colo. App. 2017). Reply briefs are limited to responding to arguments and evidence raised in a response. The reasons for this are pragmatic and plain. To consider evidence offered for the first time in reply deprives the non-moving party of the opportunity to respond. *See Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 196 (10th Cir. 1992). This deprivation is only compounded when a moving party seeks discovery *after* the non-movant's responsive briefing is filed, to shore up a reply brief. Defendants' dilatory request would not only subvert procedural protections but unnecessarily prolong resolution of the special motions to dismiss.

## PRAYER

For these reasons, Plaintiff Dr. Eric Coomer respectfully requests that the Court deny Defendants Herring Networks, Inc. dba One America News Network, and Chanel Rion's Motion for Partial Reconsideration, as well as Defendants James Hoft and TGP Communications, LLC dba The Gateway Pundit'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, as well as any related joinders filed by the other Defendants prior to or after this filing. Dr. Coomer further requests such other and further relief to which he may be justly entitled.

Respectfully submitted,

*/s/ Charles J. Cain*
Charles J. Cain, No. 51020
Steve Skarnulis, No. 21PHV6401
Bradley A. Kloewer, No. 50565
Zachary H. Bowman, No. 21PHV6676
Thomas M. Rogers III, No. 28809
Mark Grueskin, No. 14621
Andrew Ho, No. 40381

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Defendants Herring Networks, Inc. dba One America News Network, and Chanel Rion's Motion for Partial Reconsideration, as well as Defendants James Hoft and TGP Communications, LLC dba The Gateway Pundit'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 has been served on all parties receiving notice through ICCES on this 29th day of September 2021.

*/s/ Charles J. Cain*
Charles J. Cain