

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202</p>	<p>DATE FILED: October 1, 2021 4:56 PM FILING ID: 3087C195D76E6 CASE NUMBER: 2020CV34319</p>
<p>ERIC COOMER, Ph.D., Plaintiff</p> <p>vs.</p> <p>DONALD J. TRUMP FOR PRESIDENT, INC., et al., Defendants</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiff Charles J. Cain, No. 51020 ccain@cstrial.com Steve Skarnulis, No. 21PHV6401 skarnulis@cstrial.com Bradley A. Kloewer, No. 50565 bkloewer@cstrial.com Zachary H. Bowman, No. 21PHV6676 zbowman@cstrial.com CAIN & SKARNULIS PLLC P. O. Box 1064 Salida, Colorado 81201 719-530-3011/512-477-5011 (Fax)</p> <p>Thomas M. Rogers III, No. 28809 trey@rklawpc.com Mark Grueskin, No. 14621 mark@rklawpc.com Andrew E. Ho, No. 40381 andrew@rklawpc.com RECHTKORNFELD PC 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900</p>	<p>Case Number: 2020cv034319 Division Courtroom: 409</p>
<p>PLAINTIFF'S RESPONSE TO DEFENDANTS HERRING NETWORKS, INC. DBA ONE AMERICA NEWS NETWORK AND CHANEL RION'S MOTION TO SET ASIDE THE PROTECTIVE ORDER ENTERED PURSUANT TO C.R.C.P. 26(C) AND TO UNSEAL COURT RECORDS DESIGNATED AS PROTECTED OR SUPPRESSED</p>	

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 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, as well as any related joinders filed by the other Defendants prior to or after this filing.

I. INTRODUCTION

1. There should be no dispute that there are legitimate safety concerns surrounding this case. Dr. Coomer is more than aware of those concerns after having been subjected to vitriol, harassment, and credible threats to his safety due to Defendants' defamation against him. Dr. Coomer is also fully aware of the harm, the loss of privacy and reputation, that has been caused by Defendants' false allegations. Privacy and reputation are "at the root of any decent system of ordered liberty" and the protection of a person's reputation from unjustified invasion and wrongful hurt reflects "no more than our basic concept of the essential dignity and worth of every human being." *Keohane v. Stewart*, 882 P.2d 1293, 1297-98 (Colo. 1994) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring)).

2. Given the public scrutiny that arose from and continues with Defendants' defamation of Dr. Coomer, there are also significant concerns surrounding the publicity of this proceeding and the potential threat to a fair and impartial trial—especially given Defendants' propensity to publish prejudicial and misleading attacks on Dr. Coomer's character. The Court is well within its authority to protect individuals involved in this

case from threats to their safety, privacy, and reputation, as well as to preserve the judicial integrity of this proceeding. This is not a light task given that privacy and reputation, once lost, are extremely difficult to restore. That task is complicated given that the restoration of reputation includes Dr. Coomer's right to respond to Defendants' public defamation of him.

3. To be clear, Dr. Coomer's request regarding the withdrawal of the July 19, 2021 protective order turned on the fact that the witnesses Joseph Oltmann alleged existed did not, in fact, exist. His supposed conduit remains unidentified to this day. Oltmann only identified one other witness who could corroborate his claim about the Antifa call and that individual has already disputed his account in a Declaration filed by Plaintiff. With no involvement in the claims in dispute, Dr. Coomer believed this witness and the others who provided testimony that is subject to the current protective order would be free of threat. However, given Defendants' mischaracterization of those witnesses' statements in their motion, and the other Defendants' joinder therein, it appears that is not the case. While Dr. Coomer has an interest in redeeming his reputation, he defers to the Court's determination in its Omnibus Protective Order of how best to protect parties and witnesses while the claims are being litigated. To the extent the Omnibus Protective Order impedes his ability to discover relevant information, Dr. Coomer reserves his right to seek specific relief from the Court.

4. Notably, Defendants recognize good cause for protecting Oltmann's alleged witnesses where no credible evidence of any threat has been established, but not for Dr. Coomer who has put forward uncontroverted evidence of credible death threats.

The incongruity of Defendants' position is not lost on Dr. Coomer and should not be lost on the Court.

5. Similarly, Dr. Coomer has legitimate concerns regarding Defendants' use of his deposition, which the Omnibus Protective Order currently protects. To be clear, Dr. Coomer is more than happy to provide his sworn testimony in a public forum during the course of this judicial proceeding. He has nothing to hide. However, Dr. Coomer's concerns regarding the misuse of his deposition have already been realized, as it was not conducted for purposes of authenticating Dr. Coomer's Facebook posts or establishing Defendants' reliance on those posts but, instead, to harass and attack Dr. Coomer personally. *See Exhibit A, Coomer Dep. Tr., in its entirety.* Plaintiff respectfully requests that the Court fully review this transcript and compare the questions posed by Ms. Powell's counsel with the reasons represented to the Court for conducting the deposition in the first instance.

6. Defendants now seek to publish his deposition, knowing that the contents of it would be inadmissible as evidence in a trial and, if disclosed, would create a substantial risk of further harm to Dr. Coomer. Indeed, some Defendants have already violated the Omnibus Protective Order by disclosing alleged details of the deposition in order to personally attack Dr. Coomer and this Court. Specifically, on September 30, 2021, Jim Hoft published an article in the Gateway Pundit relying on a "confidential source" to mischaracterize Dr. Coomer's deposition. *See Exhibit B.* However, this deposition was only attended by the court reporter, certain parties to the case, and their counsel. Thus, the source could only be amongst the Defendants.

7. This conduct has no place in a judicial proceeding. Defendants' ongoing efforts to publicly denigrate Dr. Coomer make clear the risk they pose and the remedial measures necessary to prevent prejudice and preserve the fair and orderly administration of justice.

II. ARGUMENT

A. ***The Court properly exercised its authority to protect information related to this case.***

8. The Court's authority to protect parties, witnesses, and the integrity of its judicial proceeding is well-recognized. The Colorado Rules of Civil Procedure authorize the Court to limit access to court files when the harm to the privacy of a person in interest outweighs the public interest. *See* C.R.C.P. 121 § 1-5(2). While broad claims that filings contain personal, private, or confidential information are generally insufficient to warrant suppression, courts have found heightened expectations of privacy or confidentiality to exist in circumstances involving sexual assault accusations, trade secrets, defamatory material, and threats to national security. *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1127 (Colo. App. 1996) (collecting cases). The Court may order parties to file certain documents and information under seal where such heightened expectations exist. *See* C.R.C.P. 26(c). Further, to protect the parties' rights to a fair trial, the Court is authorized to impose reasonable restrictions on the release of information by any lawyer, party, witness, court official, or government employee within its jurisdiction. *See Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *see also People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004) (recognizing that restrictions may be "necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated

by less intrusive measures”). The Colorado Rules of Professional Conduct already circumscribe communications that attorneys can disclose related to pending legal proceedings and identify certain subjects that are “more likely than not” to have a material prejudicial effect, including: the character, credibility, reputation or criminal record of a party or witness; the identity of a witness; the expected testimony of a party or witness; or information inadmissible as evidence at trial that would create a substantial risk of prejudice. *See* R.P.C. 3.6, cmt.5.

9. Despite Defendants’ conclusory assertions, the public interest does not outweigh the likelihood of harm to the individuals involved in this litigation. The facts and circumstances surrounding the scope of documents and information identified in the Court’s Omnibus Protective Order go beyond basic privacy considerations into legitimate concerns for safety, as well as concerns regarding the integrity of this proceeding itself.¹ Defendants have acknowledged the validity of threats to safety as a basis for a protective order in relation to Oltmann’s alleged witnesses, where no credible evidence of a threat has been established, but not for Dr. Coomer, who has put forward uncontroverted evidence of credible death threats caused by Defendants’ defamation. Defendants have no explanation for such disparate treatment. In fact, many of the Defendants in this case have established a clear disregard, if not active incitement, for violence against Dr. Coomer.

¹ The cases Defendants rely upon are factually distinguishable. *See, e.g., Anderson*, 924 P.2d at 1127-28 (denying suppression of *all* court files where defendant made no showing how the possible harm outweighed the public interest, but expressly noting that it did “not mean to suggest that a less restrictive order, limiting access to certain, selected documents within the record, might not be justified”); *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001) (denying suppression of court files based solely on plaintiff’s statement that “doing so would ‘protect [him] from any further emotional and financial harm’”).

10. Defendants further fail to identify what specific interest they claim the public has in the information protected by the Omnibus Protective Order. *See* OAN Mot. at 7-8. This is especially pertinent to Dr. Coomer's deposition, which is primarily inadmissible character evidence intended to cause him unfair prejudice.² Defendants have already illustrated how they intend to use this deposition, with several Defendants violating the Court's Omnibus Protective Order and identifying details from it to disparage Dr. Coomer.³ The Colorado Rules of Professional Conduct proscribe such disclosures by Defendants' counsel to the media. *See* R.P.C. 3.6. That proscription should equally apply to Defendants. It is unclear whether the harm Defendants have already caused Dr. Coomer can be remediated. This judicial proceeding should not be used to cause more harm. Defendants' continued disregard of the Court's Orders undermines the administration of this proceeding, as well as the protections intended for parties and witnesses.

11. Instead, Defendants point to a broad public interest in elections generally. *See* OAN Mot. at 7. Again, Defendants collapse the distinction between the election and the information they seek to release. For example, Dr. Coomer's Facebook posts, the

² While Defendants' deposition of Dr. Coomer as a whole is objectionable, specific lines of questioning best illustrate Defendants' intent. *See, e.g.*, Exhibit A, Coomer Dep. Tr., Sept. 23, 2021, at 9:2-17, 14:20-15:12, 35:7-36:8, 85:24-86:18, 101:20-104:25, 107:3-111:9.

³ *See* Omnibus Protective Order, Sept. 24, 2021; Sept. 7, 2021 Order (designating Dr. Coomer's deposition as confidential); *see also* Exhibit B, Jim Hoft, *Far Left Judge Marie Avery Moses Issues Protective Order on Eric Coomer's Deposition After He Comes Across as Completely Unhinged – But Not on Defendants Including The Gateway Pundit*, Sept. 30, 2021; Exhibit C, Joe Oltmann, TELEGRAM, Sept. 30, 2021 (republishing article).

purpose for the deposition, have no relation to the election.⁴ To the extent there is any public interest in Dr. Coomer, Defendants fail to identify that this interest—and this litigation—arose solely from their defamation of Dr. Coomer.⁵ There is clear constitutional case law establishing that Defendants’ defamation cannot serve as the basis for a public interest and constitutional defense.⁶ Similarly, that defamation should not be used to permit Defendants to publish further character attacks on Dr. Coomer.

12. Defendants cannot establish a legitimate basis to set aside the Court’s Omnibus Protective Order, as well as the Court’s September 7, 2021 Order designating Dr. Coomer’s deposition as confidential. As such, Dr. Coomer respectfully requests the Court deny Defendants’ motion.

B. Defendants are not prejudiced by the Court’s Omnibus Protective Order.

13. Separately, Defendants argue that they are prejudiced by the Court’s Omnibus Protective Order. Defendants primarily take issue with the fact that their September 22, 2021 Motion to Strike was suppressed, whereas Dr. Coomer’s Omnibus Response was not suppressed. *See* OAN Mot. at 3. However, that suppression occurred because Defendants included protected information in their motion in violation of the

⁴ 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 Dr. Coomer has briefed this issue extensively, most recently in his response to Defendants’ anti-SLAPP motions. *See* Pl.’s Omnibus Resp., Sept. 17, 2021, at § VI(A)(ii).

⁶ *See id.* at ¶¶ 165-67.

Court's orders.⁷ In contrast, Dr. Coomer's Omnibus Response complied with the Court's Order and suppressed or redacted protected information included with that filing. To the extent Defendants are concerned about the public availability of their filing, they can refile their motion with the appropriate information redacted or attached as suppressed. The Court clarified this issue in its September 22, 2021 Order. Defendants, as parties to this litigation, also have access to this information and can review it for purposes of the case.

14. Defendants otherwise take issue with not being able to disclose protected information to the press. *See* OAN Mot. at 7-8. It is unclear how this protection prejudices Defendants in the proceeding. Statements to the press are not acts of petition. *See Seidl v. Green Tree Mortg. Co.*, 30 F. Supp. 2d 1292, 1314-15 (D. Colo. 1998); *see also Green Acres Trust v. London*, 688 P.2d 617, 623 (Ariz. 1984). Further, all parties are bound to the Omnibus Protective Order, meaning Dr. Coomer is also limited from disclosing information subject to the order.⁸ And if there is additional information that necessitates protection, Defendants can also seek a protective order. *See* C.R.C.P. 26(c), 121 § 1-5. Moreover, there is no prejudice in preventing Defendants from publishing inadmissible and highly prejudicial character evidence like the information sought in Dr. Coomer's deposition. Defendants' counsel again is already proscribed from such publications under the Colorado Rules of Professional Conduct. Defendants themselves should be too. Despite Defendants' assertions, their use of this information is not a search

⁷ *See* Protective Order, July 19, 2021.

⁸ *See generally* Omnibus Protective Order, Sept. 24, 2021.

for truth, which will be determined in this proceeding. Instead, it is merely an effort to twist the public narrative, generate clicks, and denigrate Dr. Coomer in the court of public opinion.

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 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, 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
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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 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 has been served on all parties receiving notice through ICCES on this 1st day of October 2021.

 /s/ Charles J. Cain
Charles J. Cain