DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO Address of Court: 1437 Bannock Street Denver, CO 80202	DATE FILED: October 4, 2021 10:12 AM FILING ID: EBCFDDF8B9A92 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 REPLY IN SUPPORT OF 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

CONTAINS CONFIDENTIAL INFORMATION
ACCORDING TO OMNIBUS PROTECTIVE ORDER

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I. Introduction

In opposing the Motion to set aside the Omnibus Protective Order entered pursuant to C.R.C.P. 26(c) on September 24, 2021 (the "Motion"), plaintiff Eric Coomer has fully retreated from his previous argument that "[t]he Sunlight is said to be the best of disinfectants" (Pl.'s Second Mot. For Sanctions at p. 1.), now taking the position that a continued shadow on the Court's docket is fine, as long as ***he*** is still free to litigate this case in the press. This is an astounding position for a defamation plaintiff to take, claiming that ***he*** should be allowed to freely share case information with the press, denigrate his opponents, and try to turn the public tide (and potential jury pool) against them, but ***Defendants*** should not be able to share anything about this case with the public. That is inconsistent with the law, fundamental notions of fairness, and common sense. The docket should be open to the public, and the Court should set aside the Omnibus Protective Order in its entirety.[1]

Dr. Coomer's Response rests in large part on the extremely flawed belief that his deposition should be sealed because it contains "character evidence" that would be "inadmissible as evidence in a trial." (Response, pp. 3, 6). As set forth in greater detail below, *infra* p. 7, this is a fundamental

[1] Dr. Coomer's claim that he asked to withdraw the July 19, 2021 protective order because "the witnesses Joseph Oltmann alleged existed did not, in fact, exist" (Response, p. 2) is nonsensical. Dr. Coomer's Omnibus Response to Defendants' anti-SLAPP motions actually ***confirmed*** the existence of such witnesses. Five individuals referenced in that brief were given confidential treatment consistently with the protective order stating that "the Court has determined 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 to the claims at the heart of this suit and is discoverable." (Emphasis added). Thus, Dr. Coomer's treatment of these five individuals suggests that they were, or Dr. Coomer believes they may have been, on the antifa call. Individuals 1, 3, and 4 were in Mr. Oltmann's notes as possibly being on the call, and Individual 1 has specifically described a call on September 25, 2020, that matches the description of what Mr. Oltmann refers to as the antifa call. Moreover, in his deposition, Mr. Oltmann identified an individual named "RD" as the person who gave him access to the call, confirming yet another such witness. *See* Deposition of Joseph Oltmann, attached as **Exhibit A**, at 22:12-23:9.

misunderstanding of defamation law — by definition, defamation plaintiffs put their character at issue by filing suit. The contents of Dr. Coomer's deposition absolutely would be admissible at trial, but his brief deposition is just the beginning. If this case proceeds beyond the anti-SLAPP motions (which it should not), Dr. Coomer would be subject to much more in-depth, invasive, and uncomfortable discovery. If Dr. Coomer believes that he can litigate his defamation claims without having his reputation and character carefully examined in open Court, he has been poorly advised on the nature of a defamation claim, and he may wish to reconsider the path he has chosen.

The Court has exceeded its authority in the Omnibus Protective Order by ignoring the presumption of openness, applying the protections in an uneven and biased fashion, ignoring the Defendants' legitimate interest in transparency, and incorrectly treating Dr. Coomer's testimony as confidential. The Omnibus Protective Order therefore should be set aside.

II. Argument

A. The Court has exceeded its authority to protect information related to this case.

1. There is a presumption of openness, and any restrictions should be narrowly tailored.

While arguing for a broad protective order that would give him a strategic advantage, Dr. Coomer relies on cases finding that there should be a presumption of open public access to the Court's docket and that any protections should be narrowly tailored. "[U]nless there exists a legitimate reason for non-disclosure, any member of the public is entitled to review all public records. There is no requirement that the party seeking access must demonstrate a special interest in the records requested." *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996). "[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." *Id.* "C.R.C.P. 121 § 1–5 squarely ***places the burden upon the party seeking to limit access to a court file*** to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files." *Id.* (emphasis added).

Here, no party sought to seal Dr. Coomer's deposition, nor has any party sought to seal the indisputably public documents (such as newspaper articles and public hearing transcripts) that the Court has suppressed *sua sponte*. (Motion, pp. 3-4). The Court even sealed the Motion itself, even though it contained no confidential information, no party asked that it be sealed, and the public has an interest in understanding how the docket in this case is being cloaked. Thus, although the burden of overcoming the presumption of openness has not been met, the Court has adopted a presumption in favor of sealing Defendants' filings that is contrary to the law.

The overly broad and one-sided sealing of the docket is the latest aspect of this case to fly in the face of the First Amendment. The Colorado Supreme Court has recognized that a court order barring the publishing of transcripts can constitute an unconstitutional prior restraint. *See People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004). "The term 'prior restraint' describes 'administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Id.* "Prior restraint of publication is an extraordinary remedy attended by a heavy presumption against its constitutional validity. . . . The thread running through [the prior restraint cases] is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Id.*

Dr. Coomer actually cites the *Bryant* case in his Response to argue that restrictions can be imposed to guard against "an evil that is great and certain" (Response, p. 4), but he omits the

beginning of that passage, which says that "[t]o justify a prior restraint, the state must have an interest of the 'highest order' it seeks to protect," "[t]he restraint must be the narrowest available to protect that interest," and the interest "cannot be mitigated by less intrusive measures." *Bryant*, 94 P.3d at 628. Here, the Omnibus Protective Order fails to meet this standard, particularly given that it is being applied inconsistently with its terms to seal public documents (such as the Motion, newspaper articles, and hearing transcripts) that do not contain any information that the Court has deemed confidential.

Dr. Coomer argues that the Omnibus Protective Order is justified by threats to Dr. Coomer's safety as well as "concerns regarding the integrity of this proceeding itself." (Response, p. 5). Defendants do not dispute that the safety of the parties is at issue in this case (and question why the Court is holding a two-day in-person anti-SLAPP hearing despite the danger of extremist violence at the hearing and during a global pandemic). Indeed, shortly before the Response was filed, the OAN Defendants' counsel sent an email to Dr. Coomer's counsel seeking to address the possibility of extra security for ***all*** parties at the upcoming anti-SLAPP hearing. *See* **Exhibit B**. While claiming that Defendants have a "clear disregard" for the risk of violence associated with this litigation (Response, p. 5), Dr. Coomer's counsel refused to split the cost of enhanced security (suggesting his concerns about security are feigned, whereas Defendants' concerns are real). *See* Exh. B. Moreover, Dr. Coomer continues to advocate for the release of defendant Joe Oltmann's deposition even though Mr. Oltmann has experienced threats of violence arising from his coverage of Dr. Coomer. *See* Oltmann Dep., 21:1-22:1, 97:16-98:8, 141:14-18. It is ironic that Dr. Coomer would complain about "disparate treatment" (Response, p. 5) while condoning unequal treatment of the parties. Dr. Coomer wants to continue leaking testimony from some Defendants to the press while being protected from the consequences of his own words and actions. The parties should be

treated equally, and the Court's current approach is inconsistent with the presumption of openness and is not tailored to enhance the safety of ***all parties***.

2. The OAN Defendants have established a legitimate public interest in maintaining the openness of the docket.

Dr. Coomer asserts that the OAN Defendants "cannot establish a legitimate basis to set aside the Court's Omnibus Protective Order" (Response, p. 7), but this is not true. As an initial matter, the OAN Defendants do not bear the burden of proof — the burden is on the party seeking to limit access to the docket. *See Anderson*, 924 P.2d at 1126. But regardless, the OAN Defendants have established a clear public interest in the outcome of this litigation. Long before the 2020 presidential election, there were public questions about the adequacy and security of Dominion voting machines. In 2017, Georgia voters filed a lawsuit regarding the security of Dominion machines, and in October 2020, the federal judge in that case credited testimony from an "array of experts and subject matter specialists [that] provided a huge volume of significant evidence regarding the security risks and deficits in the [Dominion] system," finding that those risks were neither "hypothetical nor remote." *Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1278, 1341 (N.D. Ga. 2020). Dr. Coomer was at the heart of these public controversies, regularly appearing publicly to speak on behalf of Dominion, including giving public testimony in the *Curling* case. Given the newsworthy allegations of voter fraud in the 2020 presidential election, this case is obviously of national (even global) interest to media on all sides of the political spectrum. Indeed, it is disingenuous for Dr. Coomer to argue that the public has no interest in this case when his own counsel has been quoted in the press as recently as September 23 discussing this case. *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/. Additionally, multiple news outlets have covered

the developments in this case over the past several weeks. For example:

- The Rachel Maddow Show on MSNBC has done multiple segments in which the host reads in a very biased fashion from defendant Rudolph Giuliani's deposition in this case. *See, e.g.*, https://www.msnbc.com/rachel-maddow/watch/rudy-giuliani-under-oath-reveals-baseless-origins-of-trump-big-lie-claims-122458181721 (last visited October 3, 201).

- The Business Insider Web site has covered this same testimony. *See* https://www.businessinsider.com/rudy-guiliani-says-he-got-election-fraud-evidence-from-facebook-2021-10 (last visited October 3, 2021).

- The *New York Times* reported on a memo from the Trump campaign that was produced in discovery and attached to Dr. Coomer's omnibus anti-SLAPP response. *See* https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html (last visited October 3, 2021).

- The *Washington Post* reported on the same memo. *See* https://www.washingtonpost.com/politics/2021/09/22/trump-dominion-giuliani-powell-memo/ (last visited October 3, 2021).

Because of the Court's Omnibus Protective Order and the manner in which it is being applied, these media outlets are only able to get Dr. Coomer's inaccurate side of the story. Dr. Coomer claims to have concerns about the integrity of these proceedings (Response, p. 2), but this sort of biased, one-sided coverage is just as likely to influence the potential jury pool as any information that may be released related to Dr. Coomer.

Moreover, after Dr. Coomer's explosive interview in *New York Times Magazine* and his deposition, it is absurd that Dr. Coomer continues to say that his Facebook posts have no relation to the election controversy. The existence of violent, profane, deeply offensive, extremely left-wing Facebook posts from a high-ranking executive at a voting machine company that is already the source of nationwide scrutiny is newsworthy because the posts reveal a potential motive for the problems with Dominion's systems. For example, on July 21, 2016, Dr. Coomer published on Facebook to approximately 300 "friends" that "[o]nly an absolute FUCKING IDIOT could ever vote for that wind-bag fuck-tard FASCIST RACIST FUCK" and stated that his opinions were his

own and "not necessarily the thoughts of my employer, though if not, I should probably find another job . . . Who wants to work for complete morons?" (Deposition of Eric Coomer, attached to the Response as Exhibit A, at Exh. P23, p. 0072). Dr. Coomer also has described himself as being "antifascist," and Dr. Coomer admits that "antifa" is a truncation of "antifascist." (Coomer Dep., 108:1-23).

This is precisely the type of information that Dr. Coomer — despite his previous willingness to share these views with an audience of 300 Facebook friends — now wants to conceal from public view. Dr. Coomer wants the media to continue biased and incomplete reporting without being able to report on what Dr. Coomer has said (beyond self-serving statements from his counsel). Indeed, although the protective order bars disclosure only of "[t]he deposition of Plaintiff [Dr. Coomer] which occurred on September 23, 2021" and says nothing about commentary or characterizations of his testimony, Dr. Coomer claims that multiple Defendants (but notably not the OAN Defendants) have "violated" the protective order simply by talking about Dr. Coomer's deposition and the *sua sponte* protective order that followed. (Response, p. 3).[2]

Again, the OAN Defendants are merely asking the Court to treat the public docket with the presumption of openness that is required by Colorado law and treat all parties equally.

3. Dr. Coomer's deposition testimony is admissible evidence in a defamation case.

Dr. Coomer repeatedly asserts that his deposition should be sealed because it contains "inadmissible character evidence intended to cause him unfair prejudice." (Response, p. 6). This is plainly incorrect because by filing a defamation suit, Dr. Coomer has placed his character

[2] Dr. Coomer separately claims that the OAN Defendants' earlier briefing was sealed because it "included protected information . . . in violation of the Court's orders" (Response, p. 8), but Dr. Coomer does not identify what "protected information" he is referring to. As set forth at pp. 3-4 of the Motion, the OAN Defendants' earlier filings did not violate the protective order.

squarely at issue. As set forth in *Koehane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994), a case cited by Dr. Coomer, "the tort of defamation existed to redress and compensate individuals who suffered serious harm to their reputations." Of course, the finder of fact cannot be expected to evaluate the purported harm to Dr. Coomer's reputation without understanding his public reputation generally. For that reason, Colorado Rule of Evidence 405(b) recognizes that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct." And the Colorado Supreme Court has recognized that character evidence is an appropriate source of discovery in defamation cases. *See Williams v. District Court, Second Judicial Dist., City and County of Denver*, 866 P.2d 908, 912 (Colo. 1993) (rejecting defamation plaintiff's argument that certain discovery requests sought "inadmissible character evidence" because "information concerning his past sexual history may lead to evidence of [plaintiff's] reputation, and whether it has been harmed by the alleged actions of the defendants").

In courts nationwide, "it is well-established . . . that the character of the plaintiff in a defamation case is at issue." *World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1138 (10th Cir. 2006); *see also Gov't of Virgin Islands v. Grant*, 775 F.2d 508, 511 & n. 4 (3d Cir. 1985); *Longmire v. Ala. State Univ.*, 151 F.R.D. 414, 419 (M.D. Ala. 1992); *Daniels by Glass v. Wal-Mart Stores, Inc.*, 634 So. 2d 88, 93 (Miss. 1993). A defamation plaintiff cannot "put his reputation at issue as a sword, only to later attempt to shield from discovery any negative peer information that clearly may relate to the same issue, and to the defense to this claim." *Levin v. WJLA-TV Corp*., 51 Va. Cir. 57, *2 (1999). "A plaintiff places his reputation at issue when he or she sues for defamation if only because a jury may award damages for injury to reputation. If defamation is proved, a jury must decide whether to award merely nominal damages . . . as would

be appropriate if, for example, a plaintiff did not have much of a reputation to injure." *Rulon v. City of Colton*, 2015 WL 1609018, *4 (Cal. App. 4th Apr. 10, 2015).[3]

Thus, Dr. Coomer is simply wrong in asserting that evidence of his "character" would not be admissible at trial — "he put his character at issue by filing a defamation suit claiming his reputation was harmed." *Petti v. Fraker*, 2020 WL 10356604, *10 (D. Wyo. Dec. 30, 2020). In fact, if this case proceeds beyond the anti-SLAPP stage (which it shouldn't), Dr. Coomer will be subject to much more discovery about his reputation and character. *See, e.g., Posey v. Swissvale Borough*, 2013 WL 2896870, n. 5 (W.D. Pa. June 13, 2013) ("[T]he defamation plaintiff thereby places his entire character at issue, and [plaintiff] will have to confront searching discovery into his criminal past and his reputation more generally."). Such evidence will be critical to the outcome of this case, and it would be inappropriate to shield it from public view. Accordingly, the Omnibus Protective Order's sealing of Dr. Coomer's entire deposition transcript is unjustified.

B. The OAN Defendants are unfairly prejudiced by the Court's Omnibus Protective Order.

Dr. Coomer does not deny (nor could he deny) that he and his counsel are attempting to litigate this case in the press by granting interviews with Dr. Coomer's lead counsel and floating incomplete and biased details of the litigation to like-minded and biased media outlets. Yet Dr. Coomer audaciously claims to have concerns that publicity in this case is a "potential threat to a fair and impartial trial." (Response, p. 1). Under the current framework, Defendants are the parties who are at risk of an unfair trial because Dr. Coomer and his counsel are being allowed to share their false version of events with the media without Defendants having the opportunity to respond with any substance — or even being able to direct reporters to Defendants' pleadings on the docket.

[3] Although this is an unpublished opinion under California Rule of Court 8.1115, its reasoning is still persuasive and relevant here.

Dr. Coomer is spreading a one-sided narrative about this case to the media that has the potential to heavily influence potential jurors while Defendants are effectively gagged by the Omnibus Protective Order. This is highly prejudicial to Defendants and inconsistent with both the First Amendment and due process.

It is also ironic that Dr. Coomer cites Colorado Rule of Professional Conduct 3.6 as barring ***hypothetical*** disclosures by Defendants' counsel when Dr. Coomer's lead counsel is ***literally quoted in the press about this case.*** (Motion, p. 5). Rule 3.6(b)(2) clearly states that a lawyer may share "information in the public record," and Dr. Coomer has no basis to conclude that Defendants or their attorneys would do anything other than that if the Court's docket was open to the public. Dr. Coomer again tries to take refuge in his flawed understanding of what a defamation case is about, arguing that Rule 3.6(a) bars lawyers from making statements "materially prejudicing" the proceeding and again claiming that "character information" is prejudicial. Of course, as explained above, *supra* p. 7, Dr. Coomer's character is squarely at issue in this litigation. Moreover, if Defendants and their attorneys were allowed to share Dr. Coomer's deposition testimony and it resulted in prejudice to Dr. Coomer, that prejudice would be fair because of ***his own words***, not any extrajudicial statements by a Defendant or their counsel.

The Omnibus Protective Order clearly prejudices Defendants' ability to ensure a fair and impartial proceeding by preventing a balanced and accurate public narrative.

III. Conclusion

For the foregoing reasons, the Motion should be granted, the Omnibus Protective Order entered pursuant to C.R.C.P. 26(c) on September 24, 2021 should be set aside, and the Court should unseal all court records presently designated as either "protected" or "suppressed" (absent good cause shown, such as Mr. Oltmann's legitimate safety concerns).

Respectfully submitted on October 4, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October 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