DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO Address of Court: 1437 Bannock Street Denver, CO 80202	DATE FILED: December 7, 2021 12:37 PM FILING ID: E2B1149BF68CF 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 COURT'S NOVEMBER 21, 2021 ORDER

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In its November 21, 2021 Order Regarding Plaintiff's Motion for Expedited Relief from the OAN Defendants' Evidentiary Objections (the "Order"), the Court summarily rejected (by its count) 4,937 evidentiary objections raised by defendants Herring Networks, Inc., d/b/a One America News Network ("OAN"), and Chanel Rion ("Rion," together with OAN, the "OAN Defendants"), held that Vedder Price P.C. attorneys Blaine C. Kimrey, Jeanah Park, Bryan K. Clark and Julia L. Koechley had engaged in misconduct that could subject them to having their *pro hac vice* admissions revoked, and *sua sponte* awarded sanctions against the OAN Defendants in the form of fees and costs incurred by plaintiff Dr. Eric Coomer ("Dr. Coomer") in responding to the objections. The Order instructed Dr. Coomer to file a fee affidavit (which he did on November 23, 2021) and gave the OAN Defendants 14 days to object. (Order, p. 9). Within the 14 days allotted by the Court, the OAN Defendants move to set aside the Court's Order.

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.

I. Factual and Procedural Background

At the close of the anti-SLAPP hearing on October 14, 2021, the Court developed a plan for how evidentiary objections should be submitted. The Court instructed the parties as follows:

> I would like each party to make a chart of what exhibits they think that I'm considering. You are going to submit your charts to all of the other parties. . . . Then we're going to have a column where there's going to be — it's going to be defendants' objections to the exhibits. . . . Then we're going to have a third column, which is plaintiff's response in a concise statement to why this evidence is admissible. And we're going to go through that and do that for every party.

Transcript of Anti-SLAPP Hearing, Volume II, 584:18-585:13. After the parties went off the record, the Court addressed the fact that the objections would be voluminous. Park asked whether the parties should object to each objectionable paragraph in the declarations, and the Court said the parties should go paragraph-by-paragraph. *See* Declaration of Jeanah Park ("Park Decl."),

attached as **Exhibit A**, at ¶¶ 9-12. Kimrey then noted that the objection document was going to be "like 500 pages," to which the Court responded, "I'm so looking forward to it." *See* Declaration of Blaine C. Kimrey ("Kimrey Decl."), attached as **Exhibit B**, at ¶¶ 29-32. The Court then asked "how long is it going to take you all to make this ***gargantuan document***?" (Kimrey Decl. ¶ 33).

The parties exchanged charts of their proposed exhibits on October 29, 2021. Dr. Coomer submitted a 91-page chart of proposed evidence that comprised 2,850 pages and hundreds of video clips, totaling more than 27.5 GB of data. *See* Docket No. CA278A7C978F2. That chart reflected ***703 pieces of evidence***. (Kimrey Decl. ¶ 36). For the OAN Defendants, 10 timekeepers spent more than 460 hours carefully researching and analyzing all of Dr. Coomer's proposed evidence. (Kimrey Decl. ¶¶ 37-38). As Kimrey and the Court anticipated, the document was "gargantuan," with more than 5,000 objections asserted on November 13, 2021. (Kimrey Decl. ¶ 40).

On November 17, 2021, Dr. Coomer filed his Motion for Relief from the OAN Defendants' Evidentiary Objections ("Dr. Coomer's Motion"). *See* Docket No. AD5C5C9AC4598. Dr. Coomer's Motion asked the Court to "order the OAN Defendants to amend their objections within five days to (1) eliminate all unfounded, frivolous, and/or bad faith objections, and (2) remove all objections to evidence against other Defendants that do not otherwise implicate the OAN Defendants." (Dr. Coomer's Motion, p. 7). Notably, although Dr. Coomer "reserve[d] the right to request monetary sanctions," he did not do so. (Dr. Coomer's Motion, p. 8).

On November 18, 2021, the Court entered an Order requiring the OAN Defendants to respond to Dr. Coomer's Motion by 5:00 p.m. Mountain on November 19, 2021. The OAN Defendants filed their response at 2:35 p.m. Mountain on November 19, 2021 (a Friday), explaining why so many objections were necessary and proposing that the parties meet and confer to try to narrow the scope of the evidentiary issues. *See* Docket No. AEC20433C53C9.

On November 21, 2021 (Sunday, two days later), the Court entered the Order, holding that although "88 objections may have merit and will require a response from Plaintiff" (Order, p. 2) (emphasis in original), the remaining 4,937 objections were all "asserted in bad faith" and were "frivolous, vexatious or groundless." (Order, p. 4). The Court summarily denied all of those objections, held that the four attorneys who had appeared *pro hac vice* on the signature block of the objections had engaged in "misconduct," and noted that this alleged misconduct "supports an immediate revocation of the *pro hac vice* status of these four Vedder Price P.C. attorneys." (Order, p. 8). The Court also held that these attorneys had engaged in previous "misconduct," and cited five alleged examples that are discussed in detail below. (Order, p. 8). The Court also said attorneys who did not want to be "conflated" with these attorneys should avoid signing future pleadings. (Order, p. 9). The Court then ordered Dr. Coomer to address the remaining evidentiary issues and awarded attorneys' fees and costs against the OAN Defendants. (Order, p. 9).

On November 23, 2021, Dr. Coomer's attorneys filed the Affidavit of Charles J. Cain Relating to Attorney's Fees and Costs. *See* Docket No. 282D4A141AFDA, attached as **Exhibit C** (the "Fee Affidavit"). The Fee Affidavit seeks an award of fees and costs in the amount of $15,174.00. (Fee Affidavit, ¶ 10).

II. Argument

A. The Court should withdraw its summary denial of the OAN Defendants' evidentiary objections.

Four days after the filing of Dr. Coomer's Motion and only two days after receiving the OAN Defendants' Response, the Court entered the Order, summarily denying "4,937" evidentiary objections and ordering Dr. Coomer to respond to "88" evidentiary objections. The table at pages 2-4 of the Order required Dr. Coomer to respond to ***239*** objections, nearly three times as many as the Court suggested. (Kimrey Decl. ¶ 45). Thus, even based on the Court's analysis, there are

more potentially relevant objections and fewer "bad faith" objections than indicated.

Regardless, the Court should reconsider its "blanket" ruling on evidentiary issues. *See, e.g., Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 255 (Cal. App. 1st Dist. 2009) (overturning blanket ruling on 764 evidentiary objections). "When a trial court issues such a ruling, the 'appellate court [is] left with the nebulous task of determining whether the ruling that was purportedly made was within the authority and discretion of the trial court and was correct.'" *Twenty-Nine Palms Enterprises Corp. v. Bardos*, 210 Cal. App. 4th 1435, 1447 (Cal. App. 4th Dist. 2012). Thus, the Court should set aside its Order summarily rejecting the detailed objections.

The Court adopted the argument advanced by Dr. Coomer that the sheer volume of the objections equates to bad faith. (Order, p. 7). But as explained in the OAN Defendants' Response, the number of objections was dictated by the amount of evidence proposed by Dr. Coomer. Moreover, the Court discussed in open court that the chart it was requesting would be "gargantuan," yet still instructed the parties to assert their objections "paragraph-by-paragraph." (Kimrey Decl. ¶ 33; Park Decl. ¶ 12). Because of the large evidentiary submission by Dr. Coomer, it was necessary for the OAN Defendants (in the interests of presenting and preserving their objections) to submit a large set of objections. (Kimrey Decl. ¶ 41). The OAN Defendants' lead counsel, Kimrey, personally reviewed all of the objections asserted by the OAN Defendants and spent more than ***80 hours*** reviewing the evidence and the applicable rules. (Kimrey Decl. ¶ 39). Park also personally reviewed the objections and spent nearly ***110 hours*** doing so. (Park Decl. ¶ 13). All of the objections were asserted in good faith. (Kimrey Decl. ¶ 40). After the Court's Order, the objections and the Court's Order were reviewed by Vedder Price General Counsel Michael Mulcahy, a litigator with nearly 30 years of experience. *See* Declaration of Michael Mulcahy ("Mulcahy Decl."), attached as **Exhibit D**, at ¶¶ 1-2. Mulcahy sees no evidence that the

objections were asserted in bad faith or were frivolous. (Mulcahy Decl. ¶¶ 3-5).

The OAN Defendants asserted specific objections to avoid argument from Dr. Coomer that "omnibus" objections were waived. (Kimrey Decl. ¶ 43). While Dr. Coomer complained about the number of objections, he has taken the opposite position with respect to other defendants, claiming in his final evidentiary submission that "boilerplate, general objections standing alone waive any actual, specific objections." *See, e.g.,* Docket No. 41594EC7E055B, at pp. 1-3. The OAN Defendants asserted specific objections to ensure their positions were preserved.

There is no evidence that the OAN Defendants acted in bad faith — in fact, they ***stipulated*** to ***248*** pieces of evidence (Kimrey Decl. ¶ 44), making clear that they did not assert every imaginable objection. Moreover, the speed with which the Court analyzed the objections suggests that the volume was not unreasonable. The Court ruled on more than 5,000 objections in just four days. Thus, the law firm representing Dr. Coomer certainly should have been able to review and respond to the objections in the time allowed by the schedule set by the Court.

While ordering Dr. Coomer to respond to 239 objections, the Court only gave ***seven*** examples of evidentiary objections to justify summarily denying more than 4,500 evidentiary objections. The seven examples provided by the Court do not demonstrate "bad faith" — in fact, the Court did not even explain why it overruled these objections. The OAN Defendants certainly understand that the Court disagrees with them on the merits of these objections, but they were asserted in good faith and based on the governing law. *See Remote Switch Sys., Inc. v. Delangis,* 126 P.3d 269, 275-76 (Colo. App. 2005).[1] The seven examples do not justify summary disposition of the remaining objections because of the flaws reflected in the chart below:

[1] Notably, the Court on December 5, 2021, ruled on Dr. Coomer's objections to the OAN Defendants' evidence, and although the Court overruled 26 of Dr. Coomer's 32 objections, it did not say that any of the objections were "frivolous" or made in "bad faith."

COURT'S EXAMPLE	EXPLANATION
"I did not participate in an Antifa conference call or boast about my supposed ability to rig the election."—Objection: CRE 404(a)—Improper testimony about whether another witness is telling the truth on a particular occasion. (Order, p. 4)	This statement by Dr. Coomer effectively characterized defendant Joseph Oltmann as having lied about hearing someone on the antifa call identifying himself as Eric from Dominion and saying "Don't worry about the election, Trump is not gonna win. I made f-ing sure of that. Hahahaha." This evidence therefore is inadmissible under C.R.E. 404(a). Moreover, it is improper evidence of credibility that is in direct conflict with Oltmann's testimony and thus should be disregarded by the Court under *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 84 (2007).
"I was never contacted by Rion or OAN regarding this broadcast or any other stories about me."—Objection: C.R.E. 401/402/403–No relevance to Dr. Coomer's burden of producing clear and convincing admissible evidence that the OAN Defendants exhibited knowing falsity or reckless disregard for the truth (subjective awareness of probable falsity) with the allegedly defamatory statements made by the OAN Defendants "of and concerning" Dr. Coomer; any probative value outweighed by undue prejudice because statement is misleading; Dr. Coomer had gone into hiding and was armed and dangerous. (Order, p. 4)	Dr. Coomer's not having been contacted is irrelevant to his claims. *See Curto v. N.Y. Law Journal*, 144 A.D.3d 1543, 1544 (N.Y. App. Div. 2016) ("[I]t is well settled that there is no requirement that the publication report the plaintiff's side of the controversy."). It is also misleading and prejudicial because, as Rion testified, she tried to contact him but he had gone into hiding. Moreover, Dr. Coomer himself testified that he warned those trying to speak with him that he "was armed with a shotgun and that he was trespassing and told him to leave immediately." *See* Response in Opposition to anti-SLAPP Motion, Exh. A, ¶ 20.
"Metaxas said that I had engaged in 'extremely criminal' actions and would spend the rest of my life in jail." Six Objections Raised: C.R.E. 401/402/403 – No relevance to Dr. Coomer's burden of producing clear and convincing admissible evidence that the OAN Defendants exhibited knowing falsity or reckless disregard for the truth (subjective awareness of probable falsity) with the allegedly	An unauthenticated statement by another defendant has no relevance to whether the OAN Defendants defamed Dr. Coomer or displayed actual malice in doing so. Through the meet and confer process, the OAN Defendants offered Dr. Coomer the opportunity to specify which evidence he did not plan to use against the OAN Defendants, but he chose not to do so. Thus, the OAN Defendants were forced to stand by their objections, particularly given (as discussed below) the conspiracy claims asserted by Dr. Coomer. Evidence that other defendants may have described Dr. Coomer's actions as "extremely criminal" is irrelevant

COURT'S EXAMPLE	EXPLANATION
defamatory statements made by the OAN Defendants "of and concerning" Dr. Coomer; any probative value outweighed by undue prejudice; C.R.E. 602 – Lack of foundation; C.R.E. 901 – Lack of authentication; C.R.E. 1002 – Secondary evidence not admissible where original records still exist. (Order, p. 5)	to determining whether the OAN Defendants defamed Dr. Coomer, but allowing such a statement to be used as evidence against the OAN Defendants creates a high likelihood that they will be unfairly tainted by the actions of others. Additionally, this statement lacks foundation and violates the best evidence rule. The video itself shows what Metaxas said — Dr. Coomer's description of what Metaxas said is irrelevant.
"Examples of some of those threats are attached to this Declaration as Exhibit A-17." Objection—C.R.E. 106—Documents and statements are incomplete and do not present all of the messages purportedly received by Dr. Coomer. (Order, p. 5)	As set forth in the objection, the "examples" are incomplete and thus, C.R.E. 106 applies. Moreover, the OAN Defendants also objected under C.R.E. 401/402/403 because any threats received by Dr. Coomer are irrelevant to the question of whether the OAN Defendants defamed Dr. Coomer, and the presentation of these threats has the potential to inflame the finder of fact and unfairly prejudice the OAN Defendants. This is particularly true in context because Dr. Coomer says the "threats" at issue were "a direct consequence of Metaxas's false statements." Thus, they have no relevance to the claims against the OAN Defendants. But the Court ignored these objections (as well as the comparable objections to the lines about Metaxas that preceded this quoted line) and has now summarily denied them.
For each piece of evidence that did not directly reference OAN or Ms. Rion (and even some pieces of evidence that did reference them), the OAN Defendants lodged the following objections: C.R.E. 401/402/403 – No relevance to Dr. Coomer's burden of producing clear and convincing admissible evidence that the OAN Defendants exhibited knowing falsity or reckless disregard for the truth (subjective awareness of probable falsity) with the allegedly defamatory statements made by the OAN Defendants "of	Dr. Coomer took issue with the objections raised by the OAN Defendants related to evidence that did not directly reference them because the OAN Defendants made "objections to evidence against other Defendants, to which those Defendants themselves have not objected." (Dr. Coomer's Motion, p. 3). But the Court contends just the opposite, stating that "there is more than one issue in this case and such evidence is plainly relevant to Plaintiff's claim of civil conspiracy." (Order, p. 6). This paradox shows precisely why the OAN Defendants needed to assert objections: It is unclear how Dr. Coomer intends to use this evidence, thus the OAN Defendants were required to respond to all of it as if it would be used against them — and the Court seems to agree that it will be used against them.

COURT'S EXAMPLE	EXPLANATION
and concerning" Dr. Coomer; any probative value outweighed by undue prejudice. The Court notes that there is more than one issue in this case and such evidence is plainly relevant to Plaintiff's claim of civil conspiracy. (Order, p. 6).	But the OAN Defendants strongly disagree that ***all*** of the evidence related to other defendants is "plainly relevant" to the conspiracy claim — evidence of actions by other defendants, with no connection to the OAN Defendants, cannot demonstrate a conspiracy with the OAN Defendants. Even if some small portion of the hundreds of pieces of evidence submitted by Dr. Coomer could be relevant for these purposes, it is improper for the Court to summarily hold that all of it is relevant for these purposes or to hold that the OAN Defendants acted in bad faith in objecting on this basis. Moreover, the OAN Defendants made numerous other objections to this sort of evidence, but the Court has chosen to ignore and summarily deny these objections simply because it disagrees with the OAN Defendants' objections under C.R.E. 401/402/403. This is improper.
PX 43 Text messages between Rudy Giuliani and Charles Herring: Objections: C.R.E. 401/402/403 – No relevance to Dr. Coomer's burden of producing clear and convincing admissible evidence that the OAN Defendants exhibited knowing falsity or reckless disregard for the truth (subjective awareness of probable falsity) with the allegedly defamatory statements made by the OAN Defendants "of and concerning" Dr. Coomer; any probative value outweighed by undue prejudice; C.R.E. 901 – Lack of authentication. The Court notes that on page 114 of Mr. Herring's deposition he authenticated PX 43 as a text exchange between himself and Mr. Giuliani. (Order, p. 6).	The substance of these text messages have no relevance whatsoever to the allegedly defamatory statements at issue in this case, nor are they probative of a "conspiracy" – particularly given that they are dated February 27, 2021, long after the allegedly defamatory statements were published. Accordingly, they are not relevant. Moreover, the authentication for the text messages was not set forth in Dr. Coomer's chart. The proper course would have been for Dr. Coomer to respond in the chart to the OAN Defendants' objection by noting where and how they were authenticated. Instead, Dr. Coomer successfully avoided doing the work by seeking relief from the Court and ultimately having the Court do the work of finding where the text messages were authenticated.
CLIP 50, 07-30-21 Charles Herring/Herring Networks, Inc. dba One America News Network Depo 17:9-21. Objections: C.R.E.	The Court has not addressed the fact that this specific video clip from Charles Herring's deposition is irrelevant to the claims asserted against the OAN Defendants and it is unfairly prejudicial because it is

COURT'S EXAMPLE	EXPLANATION
401/402/403 – No relevance to Dr. Coomer's burden of producing clear and convincing admissible evidence that the OAN Defendants exhibited knowing falsity or reckless disregard for the truth (subjective awareness of probable falsity) with the allegedly defamatory statements made by the OAN Defendants "of and concerning" Dr. Coomer; any probative value outweighed by undue prejudice; C.R.E. 106 and 1002 – The full deposition is the best evidence of its content. The Court notes that on Page 199, the OAN Defendants do not stipulate to the admissibility of the deposition of Charles Herring. (Order, pp. 6-7)	incomplete and taken out of context. This isolated video clip is not the best evidence of the deposition — rather, the best evidence of the deposition is the full deposition. Moreover, the Court is incorrect that the OAN Defendants have not stipulated to the admissibility of the Herring's deposition. The referenced passage on page 199 states: "The OAN Defendants' specific objections to the excerpts or exhibits Dr. Coomer intends to rely on are set forth in greater detail herein, in response to any specific excerpt or exhibit identified by Dr. Coomer." This is consistent with the good faith and appropriate objection stated here. But the OAN Defendants do not object to the entire Herring deposition and in fact they have submitted it into evidence themselves on multiple occasions.

These seven examples do ***not*** include any of the three examples included in Dr. Coomer's Motion.

It appears the Court's Order was based solely on the number of objections asserted by the OAN Defendants. But the OAN Defendants asserted all objections in good faith, and the Court's summary disposition of the OAN Defendants' objections resulted in the denial of meritorious objections. The 10 objections set forth in the chart attached as **Exhibit E** were all denied with no explanation. This list is just a small illustration of the problem. Moreover, the Court summarily rejected objections related to at least 188 pieces of evidence that have been objected to (without accusations of bad faith or frivolity) by other defendants. (Park Decl. ¶ 14).

Accordingly, the Court should set aside the portion of the Order summarily denying thousands of good faith objections raised by the OAN Defendants.

B. The Court should withdraw its assertions that Vedder Price attorneys have engaged in misconduct.

Based in part on the belief that the OAN Defendants asserted evidentiary objections in bad

faith (which, as described above, is not the case), the Court held that four Vedder Price lawyers have engaged in "misconduct" and will be subject to "immediate revocation of their *pro hac vice* admission in this case" if they engage in further misconduct. (Order, p. 9) (emphasis in original). The Colorado Supreme Court has held that denial of *pro hac vice* admission is "effectively the same as a disqualification." *Liebnow v. Bos. Enterprises Inc*., 296 P.3d 108, 113 n.1 (Colo. 2013). The Court's stated interest in disqualifying must be balanced with "the countervailing importance, in both the criminal and civil contexts, of continued representation of parties by counsel of their choice." *In re Estate of Myers*, 130 P.3d 1023, 1025 (Colo. 2006). "[D]isqualification of an attorney may not be based on mere speculation or conjecture, but only upon the showing of a clear danger that prejudice to a client or adversary would result from continued representation" and disqualification should not be used to "discipline or punish." *Id.* at 1026.

The revocation of *pro hac vice* admission from Vedder Price attorneys would deprive the OAN Defendants of their chosen counsel. Moreover, the suggestion that revocation of *pro hac vice* admission may be imminent will impact counsel's ethical and good faith advocacy for the OAN Defendants. The Court should withdraw its claims of "misconduct" against Vedder Price attorneys because none of the actions referenced in the Order amounts to "misconduct." As set forth above, the OAN Defendants acted in good faith in asserting their evidentiary objections. This is reinforced by the fact that six different defendant groups joined the OAN Defendants' objections on or around November 13, 2021, at least in part and ***none*** of those defendants was sanctioned or accused of misconduct.

The Court's accusations of "misconduct" perhaps stem more from previous actions of the OAN Defendants' counsel. But the issues addressed in the Order (p. 8) have been explained in previous briefing. First, the OAN Defendants did not misrepresent Court proceedings. (Order, p.

8). As the OAN Defendants explained in their Motion for Partial Reconsideration dated October 11, 2021, Docket No. A59AB061BB54B, which the OAN Defendants incorporate by reference here, most issues raised by the Court were the result of an innocent mistake by local counsel Richard Westfall's paralegal, which does not equate to any form of intentional misconduct. This innocent mistake also accounts for certain documents that were inadvertently filed under seal (and have since been refiled publicly). (Order, p. 8). Second, the OAN Defendants have not used their pleadings to intimidate others. (Order, p. 8). The Court takes issue with the following sentence: "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." *See* Docket No. EBCFDDF8B9A92, p. 2. This is simply a statement of fact and applicable law intended to rebut Dr. Coomer's argument that his deposition testimony is irrelevant "inadmissible character evidence." Third, the OAN Defendants did not misapprehend state-wide procedures regarding access to court records and transcripts. (Order, p. 8). Many documents on the docket in this case are "Protected" or "Suppressed" that should not be. In their Motion for Partial Reconsideration, the OAN Defendants identified 59 such documents and asked the Court to order the Clerk to unseal them, but the Court summarily rejected that relief without explanation and most of the improperly designated documents remain hidden from public view.

The only remaining "misconduct," then, is Kimrey's alleged use of "pejorative language regarding Plaintiff" in a hearing on September 17, 2021. The statement in question was as follows: "To us this is not like a summary judgment procedure, because anti-slap motion, they're decided without any discovery. And things that occurred since our motions were filed that we could not have known, about such as Mr. Coomer ***imploding [in] the New York Times***." *See* Transcript of

September 17, 2021, 16:9-12 (emphasis added). But this is not disrespectful language — it is advocacy. While Kimrey used figurative and colorful language to describe Dr. Coomer's *New York Times Magazine* interview, it is undisputed that Dr. Coomer made multiple statements in the *Times* that support the defendants' positions, including that Dr. Coomer "felt . . . a powerful sense of regret — because the Facebook posts were, in fact, authentic," and that Dr. Coomer "had screwed up." *See* Article attached as **Exhibit F**.

For the Court to police the language of the litigants to this degree — in a First Amendment case, no less — is untenable. While the OAN Defendants have abided by the Court's Civility Order, the Order applies the civility requirement so broadly that the Court suggests the OAN Defendants' use of the word "alleged" in describing evidence that is subject to pending objections is "snide" and a violation of the Civility Order. (Order, p. 7). That the Court may disagree with the OAN Defendants on the merits of the evidentiary objections does not warrant findings of misconduct and assertions that counsel's *pro hac vice* admissions may be revoked. *See, e.g., Klein v. Tiburon Development LLC*, 405 P.3d 470, 478 (Colo. App. 2017). The three shareholders at Vedder Price P.C. who were accused of misconduct in the Order, Kimrey, Park, and Clark,[2] have been practicing for 23, 19, and 13 years respectively, are collectively admitted to practice law in 19 jurisdictions around the country, and have been collectively admitted *pro hac vice* in at least 41 additional jurisdictions nationwide. (Kimrey Decl. ¶¶ 4-6; Park Decl. ¶¶ 4-6; Declaration of Bryan K. Clark ("Clark Decl."), attached as **Exhibit G**, at ¶¶ 4-6). None of them has ever been subject to disbarment or discipline or has had a client sanctioned. (Kimrey Decl. ¶ 7; Park Decl. ¶ 7; Clark

[2] For the Court to call out by name fourth-year associate Julia Koechley is particularly unfair and punitive. Although Koechley supports the relief sought here and intends to continue vigorously representing the OAN Defendants, her name has been removed from the signature block because of the Court's threats related to "conflation of conduct." (Order, p. 9).

Decl. ¶ 7). They are confident that they have not engaged in any misconduct here, and their firm's general counsel agrees. (Mulcahy Decl. ¶ 6). Accordingly, the Court should withdraw its assertions that Vedder Price P.C. attorneys have engaged in misconduct.

C. The Court should withdraw the award of fees and costs.

The Court also erred in awarding sanctions against the OAN Defendants in the form of fees and costs. Dr. Coomer's Motion did not seek fees and costs, and it was inappropriate for the Court to award them *sua sponte*, without giving an opportunity to address the applicable statutory factors. *See, e.g., Irwin v. Elam Constr., Inc*., 793 P.2d 609, 611 (Colo. App. 1990) ("A proper determination of the issue requires a hearing in order to afford the parties an opportunity to address those statutory factors and to enable the court to make informed findings prior to entry of an award."). For this reason alone, the sanctions award should be withdrawn. Additionally, the Court never should have ruled on Dr. Coomer's Motion at all because Dr. Coomer's counsel failed to adequately meet and confer. *See Anderson v. Holguin, Jr.*, 2018 WL 11222764, *1 (Colo. Dist. Ct. April 20, 2018).

But regardless, the Court's Order is invalid because it fails to comply with the statutory requirement for an award of sanctions. Although the Court cites no statutory basis for the award of fees, the Court appears to be invoking C.R.S. § 13-17-101, *et seq*., which provides the Court with authority to award fees in response to "frivolous, groundless, and vexatious" actions. As set forth above, the evidentiary objections were not frivolous, groundless, or vexatious, and the sanctions should be withdrawn. Additionally, the Order is procedurally deficient. The Colorado Supreme Court has unequivocally held that to award attorneys' fees, the Court must hold a hearing and must consider eight statutory factors. *Pedlow v. Stamp*, 776 P.2d 382, 384-85 (Colo. 1989). The statute "requires that the trial court then enter findings of fact and conclusions of law as to

whether the claim or defense is 'frivolous' or 'groundless.' And, if a claim or defense is deemed to be frivolous or groundless, the trial court must make findings of fact sufficient to justify the amount of attorneys' fees awarded, if any." *Id.* at 385.[3]

Here, the Court plainly did not conduct a hearing on an award of attorneys' fees (or even take argument on the fee issue). Moreover, the Order is devoid of any findings of fact or conclusions of law supporting the conclusion that the OAN Defendants' objections were "frivolous" or "groundless" (other than the blanket assertion that the sheer number of objections indicates bad faith). And there is no indication that the Court engaged in the statutorily required eight-part analysis. Accordingly, the Court should withdraw the award of sanctions both as a procedural matter and because the objections were made in good faith.

III. Conclusion

The Court should withdraw the Order in its entirety.

[3] The eight factors to be considered are: "(a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted; (b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action; (c) The availability of facts to assist a party in determining the validity of a claim or defense; (d) The relative financial positions of the parties involved; (e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith; (f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict; (g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy; and (h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court." C.R.S. § 13-17-103(1).

Respectfully submitted December 7, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December 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