DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO Address of Court: 1437 Bannock Street Denver, CO 80202	DATE FILED: December 23, 2021 11:38 AM FILING ID: 7516E9B633F6C 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 STAY PROCEEDINGS

Pursuant to Colorado Rule of Appellate Procedure 21(f), defendants Herring Networks, Inc., d/b/a One America News Network ("OAN"), and Chanel Rion (the "OAN Defendants"), through their attorneys, respectfully move the Court to stay this proceeding in its entirety pending the Colorado Supreme Court's ruling on the OAN Defendants' Petition challenging this Court's December 12, 2021 Order denying the motion to recuse the Honorable Marie Avery Moses (the "Petition," attached without exhibits as **Exhibit A** and pending as Colorado Supreme Court Case No. 2021SA000382).

Certification Pursuant to C.R.C.P. 121 § 1-15(8): Undersigned counsel has conferred with counsel for plaintiff Dr. Eric Coomer ("Dr. Coomer"), who opposed the relief requested.

In support of this motion, the OAN Defendants state as follows:

I. Introduction

C.A.R. 21 allows a party to request that the Colorado Supreme Court exercise original jurisdiction "when an order . . . will place a party at a significant disadvantage in litigating the merits of the controversy." *Sanchez v. Dist. Ct. in & for Larimer Cty.*, 624 P.2d 1314, 1316 (Colo. 1981). The Court's December 12, 2021 Order denying the OAN Defendants' motion to recuse (the "Dec. 12 Order") meets this standard. Indeed, the Colorado Supreme Court has repeatedly granted relief under C.A.R. 21 where a district court judge has denied a motion to recuse. *See, e.g., In re Estate of Elliott*, 993 P.2d 474, 482 (Colo. 2000) (rule issued and recusal required); *Klinck v. District Court*, 876 P.2d 1270, 1277 (Colo. 1994) (same); *Goebel v. Benton*, 830 P.2d 995, 998 (Colo. 1992) (same); *Brewster v. Dist. Ct. of the Seventh Jud. Dist*., 811 P.2d 812, 814 (Colo. 1991) (same); *Johnson v. Dist. Ct. in & for Jefferson Cty.*, 674 P.2d 952, 957 (Colo. 1984) (same).

Because the OAN Defendants believe that the Court abused its discretion in denying the motion to recuse, the OAN Defendants have filed a Petition with the Colorado Supreme Court pursuant to C.A.R. 21. For the reasons highlighted below, the OAN Defendants now respectfully request that this Court stay the proceeding in its entirety pending the Colorado Supreme Court's resolution of the OAN Defendants' Petition. *See* C.A.R. 21(f)(1) ("If the petitioner seeks a temporary stay in connection with the petition pending the court's determination whether to issue a rule to show cause, a stay ordinarily must be sought in the first instance from the lower court or tribunal.").

II. Relevant Background

On Sunday, November 21, 2021, this Court entered an Order Regarding Plaintiff's Motion for Expedited Relief from the OAN Defendants' Evidentiary Objections (the "Nov. 21 Order"). Although the parties had not adequately met and conferred, Dr. Coomer had not asked for all of the OAN Defendants' objections to be struck, and Dr. Coomer had not requested sanctions, the Nov. 21 Order denied nearly all of the OAN Defendants' good-faith objections to the evidence proposed by Dr. Coomer, *sua sponte* awarded sanctions in the form of fees and costs against the OAN Defendants, accused the OAN Defendants' legal team of misconduct, and threatened to revoke the *pro hac vice* admissions of four of the Vedder Price P.C. attorneys.

Thereafter, on December 7, 2021, the OAN Defendants filed a motion to recuse (Filing ID 5737FFDEC319F), which is incorporated here by reference, asserting that the Nov. 21 Order was the culmination of a series of events reflecting the Court's bias against the OAN Defendants and their legal team (as well as the defendants generally). The Court denied the motion to recuse just five days later on Sunday, December 12, 2021, before any other party had a chance to respond to the motion. The Petition to the Colorado Supreme Court seeking relief under C.A.R. 21 was filed on December 22, 2021.

II. Argument

The Colorado Court of Appeals previously acknowledged the lack of Colorado case law regarding the standards applicable to whether a stay should be granted pending appeal before concluding that "the federal standards for analyzing whether or not to grant a stay are well reasoned and should be applied." *Romero v. City of Fountain*, 307 P.3d 120, 122 (Colo. App. 2011). The "federal standards" require that a court consider the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (quoting *Nken v. Holder*, 129 S. Ct. 1749, 1752 (2009)). The factors are not prerequisites, but are instead "interrelated considerations that must be balanced together." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (cited with approval in *Romero*, 307 P.3d at 123).

While *Romero* is not analogous to this matter (because it involved appeal of an order denying injunctive relief and request for a stay pursuant to C.A.R. 8), an application of the factors utilized therein demonstrates that a stay is warranted here.

A. The OAN Defendants are likely to succeed on their Petition pursuant to C.A.R. 21.

As set forth at length in the OAN Defendants' Petition and incorporated here by reference, the judge plainly abused her discretion by ignoring and/or mischaracterizing the facts set forth in the affidavits attached to the motion to recuse, which must be accepted as true in ruling on the motion. *See Johnson*, 674 P.2d at 955-56 ("Where an attorney for one of the litigants signs a verified affidavit alleging conduct and statements on the part of a trial judge which, if true, show bias or prejudice or the appearance of bias or prejudice on the part of the trial judge, it is an abuse of discretion if that judge does not withdraw from the case, even though he or she believes the statements are false or that the meaning attributed to them by the party seeking recusal is erroneous.").

The abuse of discretion is clear here because, when taken as true, the facts demonstrate prejudice or, at the very least, the appearance of prejudice, making disqualification proper. (Petition, pp. 4-18). For example, the Court *sua sponte* awarded fees and costs against the OAN Defendants in the Nov. 21 Order based on the evidentiary objections asserted in response to the

evidence proposed by Dr. Coomer. (Nov. 21 Order, p. 9). In their motion to set aside the Court's Nov. 21 Order (Filing ID E2B1149BF68CF, which has not yet been ruled on and which is incorporated here by reference) and in their motion to recuse, the OAN Defendants explained that their evidentiary objections were proper and made in good faith (Mot. to Recuse, p. 11), and they set forth the statutory requirements that must be followed before awarding fees and costs as sanctions. (Mot. to Recuse, p. 14). The Court disregarded the OAN Defendants' explanation and the argument that the fees and costs awarded against the OAN Defendants were improper. Instead, the Court concluded that the threat to revoke the *pro hac vice* admissions of four of the Vedder Price P.C. attorneys in response to the evidentiary objections was proper because "[f]aced with counsel for the OAN Defendants' efforts to subvert the judicial process, a reasonable person would view the Court's actions as appropriate in the circumstances." (Dec. 12 Order, p. 13).

The Colorado Supreme Court has found that judicial disqualification was proper in factually similar cases. *See e.g.*, *Goebel*, 830 P.2d at 998 (finding that disqualification was required when a judge "made several, on the record, derogatory references to the petitioners and their counsel" and "made rulings based on his own social philosophy," among other things); *Brewster*, 811 P.2d at 814 (finding that disqualification was required when the judge made disparaging remarks about counsel and issued contempt orders that were not supported by the record); *In re Estate of Elliott*, 993 P.2d at 481-82 (finding that disqualification was required when a judge "prejudged [a party]'s guilt," "allowed 'marked personal feelings' toward [a party] to affect her judgment in the proceedings," and became "personally embroiled in the controversy"). Because there is a likelihood that the Colorado Supreme Court will similarly find that disqualification is proper here, the first factor weighs in favor of granting a stay.

B. The OAN Defendants will be irreparably injured absent a stay.

"The purpose of statutes and court rules which provide for the disqualification of a trial judge is to guarantee that no person is forced to litigate before a judge with a 'bent of mind.'" *Johnson*, 674 P.2d at 956 (quoting *People v. Botham*, 629 P.2d 589, 595 (Colo. 1981)). As detailed in the OAN Defendants' motion to recuse and Petition, the OAN Defendants will be unfairly prejudiced if forced to litigate this matter before this Court because counsel cannot effectively advocate for their clients because of fear that the Court will assert an unjustified basis to disqualify them from the case. (Mot. to Recuse, pp. 8-9; Petition, pp. 28-32). Indeed, the Court's orders have so severely limited their ability to represent the OAN Defendants that the attorneys at Vedder Price P.C. are considering whether to withdraw from this case. (Mot. to Recuse, p. 9; Petition, p. 29). Because it would be unduly prejudicial to force the OAN Defendants to proceed before the present judge while the Petition regarding her denial of the motion to recuse is pending before the Colorado Supreme Court, the second factor weighs in favor of granting a stay.

C. The requested stay will not substantially injure any of the parties in this case, but continuing to litigate while the Petition is pending before the Colorado Supreme Court could potentially injure all parties.

The requested stay would not prejudice or injure Dr. Coomer or any of the other defendants. The anti-SLAPP discovery ordered by the Court has closed, and there is no overall case schedule that a stay would undermine.

But all parties could potentially be injured if the Court rules on substantive issues — such as the pending anti-SLAPP motions — while the Petition remains pending before the Colorado Supreme Court. *See Johnson*, 674 P.2d at 957 (finding that "[i]t would be incongruous to permit a disqualified judge to rule on a discretionary motion, such as a request for a change of venue, which affects the substantial rights of the parties. Accordingly, the motion for a change of venue

must be decided by the judge to whom this case is assigned"). As such, the requested stay would reduce the burden of litigation on the parties and on the Court by ensuring that a judge with authority to rule on the substantive issues of this case (whether it be the present judge or a different judge) is on the bench to make those rulings.

D. Public interest favors the requested stay because there is an interest in public confidence in the judicial system.

Confidence in the integrity and impartiality of the judicial system is of great public interest. *See Johnson*, 674 P.2d at 956 ("Although the trial judge is convinced of his or her own impartiality, if it nonetheless appears to the parties or to the public that the judge may be biased or prejudiced, the same harm to public confidence in the administration of justice occurs."); *Goebel*, 830 P.2d at 999 (finding that "the judge's actions or comments have compromised the appearance of fairness and impartiality such that the parties or the public are left with a substantial doubt as to the ability of the judge to fairly and impartially resolve pending litigation"); *People v. Dist. Ct. in & for Third Jud. Dist.*, 560 P.2d 828, 833 (1977) (finding that "appearances can be as damaging to public confidence in the courts as actual bias or prejudice."); *Klinck*, 876 P.2d at 1274 (noting that "the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would the actual presence of bias or prejudice").

The requested stay would aid in ensuring public confidence in the judicial system because it would suspend any district court rulings until a ruling on the OAN Defendants' Petition. The fourth factor accordingly also weighs in favor of granting a stay.

IV. Conclusion

For the foregoing reasons, the OAN Defendants respectfully request that the Court stay the proceeding in its entirety pending the Colorado Supreme Court's ruling on the OAN Defendants' Petition challenging this Court's December 12, 2021 Order denying their motion to recuse.

Respectfully submitted December 23, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd 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