

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202</p>	<p>DATE FILED: December 28, 2021 2:34 PM FILING ID: 4F8A73985D236 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 HERRING NETWORKS INC. dba ONE AMERICA NEWS NETWORK AND CHANEL RION'S MOTION TO SET ASIDE THE COURT'S NOVEMBER 21, 2021 ORDER</p>	

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Eric Coomer, Ph.D. (Dr. Coomer) files his Response to Herring Networks Inc. dba One American News Network and Chanel Rion's Motion to Set Aside the Court's November 21, 2021 Order (the Motion), and asks the Court to deny the Motion as it fails to establish grounds for reconsideration. The Motion is also time barred. Regardless, the legal arguments and evidence raised fail to meet the standard for a motion to reconsider, even if such a motion had been filed within the 14-day window permissible for requesting such relief.

I. PROCEDURAL BACKGROUND

1. On November 13, 2021, all Defendants in this action provided Plaintiff with a list of objections to the evidence Plaintiff submitted in conjunction with his September 17, 2021 Omnibus Response to all Defendants' Special Motions to Dismiss pursuant to C.R.S. § 13-20-1101. Some Defendants raised no objections, some raised a few, and some raised roughly a couple dozen. Herring Networks Inc. dba One American News Network (OAN) and Chanel Rion's (collectively, the OAN Defendants), however, submitted 1,215 pages of objections, totaling more than 5,000 individual objections. In numerous instances, the OAN Defendants spent dozens of pages lodging multiple objections to every single sentence of various declarations submitted by Plaintiff, including even lodging objections to declarants' statements of their own names, ages, and credentials.

2. In light of the 15-day reply deadline established by the Court at the October 14, 2021 hearing, on November 17, 2021, Plaintiff filed a Motion for Expedited

Relief from the OAN Defendants' Evidentiary Objections, wherein he highlighted for the Court the excessive, frivolous, vexatious, dilatory, and bad faith nature of the 5,000+ objections. On November 19, 2021, the OAN Defendants filed a response, and on November 21, 2021, the Court issued an Order. The Court found that 88 of the OAN Defendants' 5,025 discrete objections may have merit and ordered a response from Plaintiff. The Court also ordered sanctions against the OAN Defendants for their conduct, and ordered Plaintiff to submit an affidavit as to attorney fees and costs, to which the OAN Defendants would then have 14 days to respond.

3. On November 23, 2021, Plaintiff filed the Affidavit of Charles J. Cain Relating to Attorney's Fees and Costs. On December 7, 2021, 16 days after the November 21, 2021 Order, the OAN Defendants filed a Motion to Set Aside the Court's November 21, 2021 Order. The OAN Defendants note that they had filed the Motion within the 14 days allotted by the Court to respond to Plaintiff's fee affidavit, but the Motion is not designated as a response to the affidavit, and does not actually address the substance of the affidavit in any meaningful way. Instead, the Motion requests that the Court "reconsider its 'blanket' ruling on evidentiary issues." Motion, at p. 4. Despite being a Motion to Reconsider, the Motion neither cites to nor attempts to meet the standard for such motions.

4. On December 22, 2021, the OAN Defendants filed their second Petition for Rule to Show Cause Pursuant to C.A.R. 21 with the Colorado Supreme Court, wherein they attempted to appeal the Court's denial of their Motion to Recuse. The Rule 21 Petition dedicated several pages to discussion of the November 21, 2021 Order. *See* OAN Petition,

at pp. 12-17, 21, 24-26, 34-35, 37-40. On December 27, 2021, the Colorado Supreme Court denied the Petition.

II. ARGUMENT

A. *The OAN Defendants' Motion is time barred.*

5. Pursuant to C.R.C.P. 121 1-15(11), a motion to reconsider “shall be filed within 14 days from the date of the order, unless the party seeking reconsideration shows good cause for not filing within that time. Good cause for not filing within 14 days from the date of the order includes newly available material evidence and an intervening change in the governing legal standard.”

6. Here, the OAN Defendants are seeking reconsideration of the Court's November 21, 2021 Order, but they did not seek that relief until December 7, 2021, 16 days after the November 21, 2021 Order issued. That they have fashioned the Motion as a response to Plaintiff's affidavit of fees does not change the analysis. The Motion does not substantively address the affidavit for fees, but instead expressly argues reconsideration. The Motion is, therefore, time barred. The OAN Defendants make no argument that good cause allows an extension of the deadline, nor could they. The OAN Defendants present no new evidence in the Motion, and the governing legal standard has not changed.

B. *The OAN Defendants have failed to establish grounds for reconsideration.*

7. While permitted, motions to reconsider interlocutory orders of the Court are disfavored and only granted in limited circumstances. C.R.C.P. 121 § 1-15(11). By rule, a party moving for reconsideration must show more than a disagreement with the Court's decision. *Id.* Such a motion must allege a manifest error of law or fact that clearly

mandates a different result or other circumstances resulting in manifest injustice. *Id.* It is not intended to revisit issues already litigated or raise issues that could have been raised in prior briefing. *See People v. Schaufele*, 325 P.3d 1060, 1068 (Colo. 2014) (Boatright, J. concurring); *Steele v. Law*, 78 P.3d 1124, 1128 (Colo. App. 2003). Instead, grounds warranting reconsideration include intervening changes in law; previously unavailable evidence; or the need to correct misapprehension of facts or controlling law. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). At no point in the OAN Defendants' Motion do they cite this standard, nor do they attempt to present their argument in conformity with the standard. In any case, none of these grounds are present here.

8. Instead, the OAN Defendants' grounds for reconsideration primarily re-urge the arguments and evidence they raised in their November 19, 2021 Response to Plaintiff's Motion for Expedited Relief. *Compare* OAN Mot. to Set Aside November 21, 2021 Order, *with* OAN Resp. at pp. 7-14. This does not involve a change in law or any newly available evidence. Rather, the OAN Defendants again argue the good faith with which they admit to having clocked more than 400 hours of work compiling a 1,215 page document which subjects virtually every single sentence of multiple declarations to multiple objections.

9. Nor has there has been any mistake here, except perhaps the one committed by the OAN Defendants in claiming that more than 5,000 discrete objections were lodged in good faith, and not to needlessly increase the cost of litigation while harassing both

Plaintiff and the Court. This is insufficient to support reconsideration of the Court's November 21, 2021 Order.

10. The propriety of the Court's November 21, 2021 Order has already been affirmed by the Colorado Supreme Court, which denied the OAN Defendants' Petition for Rule to Show Cause on December 27, 2021.

C. *The Court was within its discretion in ordering attorney's fees.*

11. The OAN Defendants assert that "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.*" The statute referenced "sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including a claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious." C.R.S. § 13-17-101. The statute addresses various factors for the Court to consider in addressing a motion seeking fees under the statute. C.R.S. § 13-17-103. Plaintiff made no reference to C.R.S. § 13-17-101 *et. seq.* in his Motion for Expedited Relief.

12. Attorney fees may also be assessed as a sanction for violating C.R.C.P. 11. *Stearns Mgmt. Co. v. Missouri River Servs., Inc.*, 70 P.3d 629, 633 (Colo. App. 2003). C.R.C.P. 11 imposes the following independent duties on an attorney or a litigant who signs a pleading: (1) before a pleading is filed, there must be a reasonable inquiry into the facts and the law; (2) based on this investigation, the signer must reasonably believe that the pleading is well grounded in fact; (3) the legal theory asserted in the pleading must be based on existing legal principles or a good faith argument for the modification of existing

law; and (4) the pleading must not be filed for the purpose of causing delay, harassment, or an increase in the cost of litigation. *Maul v. Shaw*, 843 P.2d 139 (Colo. App. 1992). Unlike C.R.S. § 13-17-103, Rule 11 does not include an 8-factor analysis. Plaintiff expressly referenced C.R.C.P. 11 in his Motion for Expedited Relief. *See* Pl.’s Mot., at p. 7.

13. Whether to award attorney fees under § 13–17–102 or as a sanction under C.R.C.P. 11 is a decision committed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *E-470 Pub. Highway Auth. v. Jagow*, 30 P.3d 798, 805 (Colo. App. 2001), *aff’d*, 49 P.3d 1151 (Colo. 2002) (citing *Redmond v. Chains, Inc.*, 996 P.2d 759 (Colo. App. 2000); *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. App. 1995); *see also Stearns Mgmt. Co. v. Missouri River Servs., Inc.*, 70 P.3d 629, 633 (Colo. App. 2003).

14. In its November 21, 2021 Order, the Court found that “these objections are designed to subvert the judicial process, to harass another party, to needlessly increase the cost of litigation, and to unnecessarily expand the proceedings through improper conduct.” Order, at 7. These findings are consistent with the language of C.R.C.P. 11, which prohibits pleadings which are “interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.” C.R.C.P. 11(a).

15. The Court had discretion to award sanctions under Rule 11, and the Court’s findings indicate Rule 11 was the basis for the Order. As a result, the OAN Defendants arguments with respect to C.R.S. § 13-17-101 *et. seq.* are misplaced.

PRAYER

For the reasons stated, Plaintiff prays the Court deny Herring Networks Inc. dba One American News Network and Chanel Rion’s Motion to Set Aside the Court’s November 21, 2021 Order, and for such other and further relief to which he may be entitled.

Respectfully submitted,

 /s/ Charles J. Cain
Charles J. Cain, No. 51020
Steve Skarnulis, No. 21PHV6401
Bradley A. Kloewer, No. 50565
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Mark Grueskin, No. 14621
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Defending the Republic Inc.’s Motion to Reconsider Ruling Regarding Consideration of Defending the Republic’s Lack of Existence in Ruling on Special Motion to Dismiss has been served on all parties receiving notice through ICCES on this 27th day of December 2021.

 /s/ Charles J. Cain
Charles J. Cain