

<p>DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, COLORADO</p> <p>Address of Court: 1437 Bannock Street Denver, CO 80202</p>	<p>DATE FILED: December 29, 2021 11:34 AM FILING ID: 299EF1F1D9ABD CASE NUMBER: 2020CV34319</p>
<p>Plaintiff: ERIC COOMER, Ph.D.</p> <p>v.</p> <p>Defendants: DONALD J. TRUMP FOR PRESIDENT, INC., <i>et al.</i></p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for defendants Herring Networks, Inc., d/b/a One America News Network, and Chanel Rion: Richard A. Westfall, No. 15295 Westfall Law, LLC 5842 W. Marquette Drive Denver, Colorado 80235 Telephone: (720) 904-6022 Email: rwestfall@westfall.law</p> <p>Blaine C. Kimrey (<i>Pro Hac Vice</i>) Jeanah Park (<i>Pro Hac Vice</i>) Bryan K. Clark (<i>Pro Hac Vice</i>) Vedder Price P.C. 222 N. LaSalle Street, Suite 2600 Chicago, Illinois 60601 Telephone: (312) 609-7500 Facsimile: (312) 609-5005 Email: bkimrey@vedderprice.com jpark@vedderprice.com bclark@vedderprice.com</p>	<p>Case Number: 2020CV034319</p> <p>Courtroom: 409</p>
<p style="text-align: center;">DEFENDANTS HERRING NETWORKS, INC., D/B/A ONE AMERICA NEWS NETWORK, AND CHANEL RION'S REPLY IN SUPPORT OF MOTION TO SET ASIDE THE COURT'S NOVEMBER 21, 2021 ORDER</p>	

TABLE OF CONTENTS

	Page
I. The OAN Defendants’ evidentiary objections were valid and in good faith, and the Colorado Supreme Court did not affirm the Nov. 21 Order	1
II. The Motion is not time-barred	2
III. The standards for reconsideration do not apply, but even if they did, the Motion meets those standards because the Court made manifest errors of fact and law	3
IV. The Court exceeded its discretion in awarding attorneys’ fees	4
V. Conclusion	5

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bell v. Simpson</i> , 918 P.2d 1123 (Colo. 1996).....	2
<i>Estate of Milstein v. Ayers</i> , 955 P.2d 78 (Colo. App. 1998).....	2
<i>Matter of Estate of Jones</i> , 704 P.2d 845 (Colo. 1985).....	4
<i>Meredith v. Zavaras</i> , 954 P.2d 597 (Colo. 1998).....	2
<i>Stepanek v. Delta County</i> , 940 P.2d 364 (Colo. 1997).....	4
<i>Todd v. Hansen</i> , 2018 WL 10322878 (D. Colo. Apr. 24, 2018).....	2
Statutes	
C.R.S. § 13-17-101, <i>et seq.</i>	1, 4, 5
Other Authorities	
C.R.C.P. 6	3
C.R.C.P. 11	1, 4, 5
C.R.C.P. 121 § 1-15	2, 3

Plaintiff Dr. Eric Coomer's Response to 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 (Filing ID 4F8A73985D236, the "Response") is most notable for what it omits: Dr. Coomer does not contend that he sought sanctions in the motion leading to the Nov. 21 Order, he does not contend that the Court satisfied the requirements under C.R.S. 13-17-101, *et. seq.*, for awarding sanctions, and he does not contend that the Court was correct that the OAN Defendants' counsel engaged in misconduct that would justify withdrawing their *pro hac vice* applications. Instead, Dr. Coomer argues that the OAN Defendants' evidentiary objections were excessive, that the Motion to Set Aside (Filing ID E2B1149BF68CF, the "Motion") was two days late, and that the sanctions were justified under C.R.C.P. 11. As set forth below, all of these arguments lack merit. Because Dr. Coomer has not addressed the remaining arguments in the Motion, the Court should consider them uncontested. Accordingly, the Motion should be granted, and the Court should either set aside the Nov. 21 Order or require briefing of the C.R.S. 13-17-101 standards and an evidentiary hearing.

I. The OAN Defendants' evidentiary objections were valid and in good faith, and the Colorado Supreme Court did not affirm the Nov. 21 Order.

In describing the evidentiary objections raised by the defendants, Dr. Coomer omits that the OAN Defendants served their objections before almost every other defendant served theirs and that on November 13, 2021, six different defendant groups joined the OAN Defendants' objections (which supports the fact that they were valid and made in good faith). And the OAN Defendants did not object to names, ages, or credentials (Response, p. 1), except to the extent the credentials related to purported expertise on a given topic.

Additionally, Dr. Coomer is incorrect that "[t]he propriety of the Court's November 21, 2021 Order has already been affirmed by the Colorado Supreme Court." The Nov. 21 Order was not the subject of the petition. And the Colorado Supreme Court's order of December 27, 2021

simply denied the OAN Defendants' petition for a rule to show cause on the issue of recusal, without giving any reasoning. Denial of a petition under C.A.R. 21 is not a substantive ruling on the underlying merits. *See, e.g., Meredith v. Zavaras*, 954 P.2d 597, n.5 (Colo. 1998) ("Although we denied the [] petition for relief pursuant to C.A.R. 21, that denial is not dispositive of this case."); *Bell v. Simpson*, 918 P.2d 1123, n.3 (Colo. 1996) ("Our denial of [the plaintiff]'s C.A.R. 21 petition did not indicate that we considered the merits of [the plaintiff]'s argument."); *Estate of Milstein v. Ayers*, 955 P.2d 78, 85 (Colo. App. 1998) ("The supreme court's refusal to issue a rule to show cause and to exercise original jurisdiction upon a petition for an extraordinary writ has no substantive significance. It indicates neither approval nor disapproval of the trial court ruling upon which the original proceeding is brought."); *Todd v. Hansen*, 2018 WL 10322878, *2 (D. Colo. Apr. 24, 2018) ("[T]he denial of an original petition for an extraordinary writ by the Colorado Supreme Court does not indicate that the court has considered the merits of the argument.").

II. The Motion is not time-barred.

The Motion is not time-barred because it complied with the Court-ordered schedule, and barring relief based on the alleged "delay" would be unjust. The Nov. 21 Order gave Dr. Coomer until December 13, 2021 to file an affidavit reflecting attorneys' fees, and the OAN Defendants 14 days thereafter to object. *See* Nov. 21 Order, p. 9. Dr. Coomer accelerated the schedule by filing the affidavit November 23, 2021. *See* Filing ID 282D4A141AFDA. Consistently with the schedule established in the Nov. 21 Order, the OAN Defendants objected 14 days thereafter by filing the Motion. *See* Filing ID E2B1149BF68CF. Thus, the Motion was timely under the Court's schedule, and it was not a motion for reconsideration under C.R.C.P. 121 § 1-15.

If, as Dr. Coomer contends, the deadline would have been 14 days after the Nov. 21 Order, that would have been December 5, 2021 (a Sunday), which would have rolled to Monday,

December 6, 2021, under the applicable rule. *See* C.R.C.P. 6(a)(1). Thus, if that deadline applied, the Motion was one day late (not two days). A one-day difference should not be dispositive, and the OAN Defendants have good cause for filing on December 7, 2021 because that was the deadline set by the Court for them to object. Regardless, it would be manifestly unjust for an issue as important as the imposition of sanctions to rise or fall on the difference of one day.

III. The standards for reconsideration do not apply, but even if they did, the Motion meets those standards because the Court made manifest errors of fact and law.

As set forth above, the Motion was not a motion for reconsideration, therefore the standards set forth in C.R.C.P. 121 § 1-15 do not apply. But even if the reconsideration standards applied, the Motion meets those standards because the Court made manifest errors of fact and law. For instance:

- The Court improperly denied the OAN Defendants' objections in a blanket fashion. (Motion, p. 4).
- The Court didn't address the specific legal arguments raised by the OAN Defendants in connection with specific objections. (*Id.* at pp. 6-9).
- The Court *sua sponte* awarded fees and costs without complying with the applicable statutory requirements. (*Id.* at p. 13).
- The Court didn't address Dr. Coomer's failure to adequately meet and confer. (*Id.* at p. 13).
- The Court didn't acknowledge the statements made by the Court on the record at the October 14, 2021 hearing regarding the objection process. (*Id.* at p. 1).
- The Court didn't acknowledge the statements made by the Court off the record after the October 14, 2021 hearing regarding the objection process. (*Id.* at pp. 1-2).
- The Court didn't acknowledge the significant time and costs incurred by the OAN Defendants in preparing the objections (which demonstrates they were the result of hard, painstaking work rather than frivolous). (*Id.* at p. 2).
- The Court didn't acknowledge the testimony of the OAN Defendants' counsel regarding their good-faith analysis of the evidence and objections. (*Id.*).
- The Court didn't acknowledge that the OAN Defendants stipulated to 248 pieces of evidence identified by Dr. Coomer. (*Id.* at p. 5).

If the reconsideration standards applied, these manifest errors of fact and law would provide the Court with sufficient justification to reconsider the Nov. 21 Order.

IV. The Court exceeded its discretion in awarding attorneys' fees.

Dr. Coomer does not dispute that the Court didn't follow the requirements under C.R.S. 13-17-101, *et. seq.* for awarding sanctions; instead, Dr. Coomer argues that the Court had the discretion to award attorneys' fees under C.R.C.P. 11. But the Nov. 21 Order does not cite Rule 11, and although Dr. Coomer referenced Rule 11 in his motion, he simply stated, "Plaintiff believes that the OAN Defendants should be given an opportunity to amend their objections and, ***if that effort fails, Plaintiff will likely seek relief under C.R.C.P. 11.***" Filing ID AD5C5C9AC4598, p. 7 (emphasis added). This obviously is not a motion for fees under Rule 11.

That presumably is because Rule 11 doesn't apply here, and even if it did, it has not been satisfied. Rule 11 applies to "pleadings" filed with the Court. *See* C.R.C.P. 11(a); *see also Matter of Estate of Jones*, 704 P.2d 845, 847 (Colo. 1985) ("Pleadings' are the formal allegations by the parties of their respective claims and defenses, and are intended to provide notice of what is to be expected at trial."). The OAN Defendants did not file the objections with the Court; they only served the objections on Dr. Coomer, and the objections were still subject to a meet and confer process that never occurred. Moreover, Rule 11 contains a safe harbor provision stating that "[r]easonable expenses, including a reasonable attorney's fee, ***shall not be assessed*** if, ***after filing***, a voluntary dismissal or ***withdrawal is filed as to any claim, action or defense, within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense.***" *Id.* (emphasis added); *see also Stepanek v. Delta County*, 940 P.2d 364, n. 4 (Colo. 1997) ("We note that C.R.C.P. 11 provides an opportunity for attorneys to withdraw pleadings within a reasonable time after

discovering that the pleading lacks merit.”). Again, this contemplates a filing with the Court, which never occurred. Regardless, the OAN Defendants were never given the opportunity to avail themselves of this safe harbor. Sanctions were awarded against the OAN Defendants in the first order entered by the Court that gave any indication that the Court intended to summarily overrule most of the objections. Thus, even if Dr. Coomer and/or the Court had invoked Rule 11 and even if it had been appropriate to do so, the Court should not have awarded sanctions but should have afforded the OAN Defendants the opportunity to withdraw their objections. Accordingly, under any test, the Court exceeded its discretion in awarding attorneys’ fees.

V. Conclusion

For the foregoing reasons, the Court should either set aside the Nov. 21 Order or require briefing of the C.R.S. 13-17-101 standards and an evidentiary hearing. Given that Dr. Coomer did not even request that the OAN Defendants be sanctioned, the OAN Defendants respectfully submit that the former approach is the most sensible.

Respectfully submitted December 29, 2021,

By: /s/ Richard A. Westfall
Richard A. Westfall, No. 15295
5842 W. Marquette Drive
Denver, Colorado 80235
Telephone: (720) 904-6022
Email: rwestfall@westfall.law

By: /s/ Blaine C. Kimrey
Blaine C. Kimrey (*Pro Hac Vice*)
Jeanah Park (*Pro Hac Vice*)
Bryan K. Clark (*Pro Hac Vice*)
Vedder Price P.C.
222 N. LaSalle Street, Suite 2600
Chicago, Illinois 60601
Telephone: (312) 609-7865
Facsimile: (312) 609-5005
Email: bkimrey@vedderprice.com
jpark@vedderprice.com
bclark@vedderprice.com

CERTIFICATE OF SERVICE

I hereby certify that on this 29th 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