SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 22, 2021 4:40 PM FILING ID: CF3070151651B CASE NUMBER: 2020CV34319
IN RE: Plaintiff: ERIC COOMER, Ph.D. vs. Defendants: DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C., RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADNESS MEDIA, INC., dba CONSERVATIVE DAILY, JAMES HOFT, TGP COMMUNICATIONS LLC, dba THE GATEWAY PUNDIT, MICHELLE MALKIN, ERIC METAXAS, CHANEL RION, and HERRING NETWORKS, INC., dba ONE AMERICA NEWS NETWORK Proposed Respondent: District Court for the City and County of Denver Honorable Marie Avery Moses Case Number 2020CV034319	▲ **COURT USE ONLY** ▲
Attorneys for Petitioners Herring Networks, Inc., dba 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 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) 609-7500 Email: bkimrey@vedderprice.com jpark@vedderprice.com bclark@vedderprice.com	Case No.:
Petition of Herring Networks, Inc., d/b/a One America News Network, and Chanel Rion for Rule to Show Cause Pursuant to C.A.R. 21	

CERTIFICATE OF COMPLIANCE

I certify that this Petition complies with the requirements of C.A.R. 21 and C.A.R. 32. Although C.A.R. 21 does not contain a word limit, I certify that this brief contains 9,499 words, below the 9,500-word limit set forth in C.A.R. 28(g)(1) for principal briefs.

/s/ Richard A. Westfall

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INTRODUCTION

Petitioners Herring Networks, Inc., d/b/a One America News Network ("OAN"), and Chanel Rion ("Rion," collectively, the "OAN Defendants" or "Petitioners"), request that this Court issue a rule to show cause why the Honorable Judge Marie Avery Moses should not recuse herself.

THE PARTIES

Petitioners are OAN, a national cable television news network, and Rion, OAN's Chief White House Correspondent. OAN and Rion are two of the defendants in the District Court for the City and County of Denver Case Number 2020CV034319.

The proposed Respondent is the District Court for the City and County of Denver (the "Trial Court").

THE COURT AGAINST WHICH RELIEF IS SOUGHT

The Honorable Marie Avery Moses of the District Court for the City and County of Denver issued the order challenged here. The contested order was issued in the proceedings captioned *Eric Coomer, Ph.D v. Donald J. Trump For President, Inc., et al.,* Case Number 2020CV034319.

RULING COMPLAINED OF AND RELIEF SOUGHT

On December 12, 2021, the Trial Court denied Petitioners' motion to recuse, holding that the judge is not biased or prejudiced and has no "bent of mind" against OAN Defendants or their counsel.

NO OTHER ADEQUATE REMEDY IS AVAILABLE

This Court has repeatedly held that a rule to show cause under Colorado Rule of Appellate Procedure ("C.A.R.") 21 is appropriate when "appellate review will not provide an adequate remedy." *People v. Nozolino*, 298 P.3d 915, 918 (Colo. 2013). Here, appellate review would not adequately remedy the harm to Petitioners if forced to proceed before a judge who is prejudiced against them. Moreover, if the current judge continues to adjudicate this case, Petitioners' counsel faces the specter of either withdrawing or being unfairly disqualified by the Trial Court, effectively depriving Petitioners of their choice of counsel. *See People v. Hoskins*, 333 P.3d 828, 834 (Colo. 2014) ("[I]f the trial court's ruling is allowed to stand, Petitioners must proceed to trial without their counsel of choice.").

This Court has regularly granted Rule 21 relief when a district court judge has denied a motion to recuse. *See, e.g., Klinck v. District Court*, 876 P.2d 1270, 1277 (Colo. 1994) (rule issued and recusal required); *Goebel v. Benton*, 830 P.2d 995, 998 (Colo. 1992) (same); *Brewster v. District Court*, 811 P.2d 812, 814 (Colo. 1991) (same). The Court should take the same action here.

ISSUE PRESENTED

Whether the judge, acting on behalf of the Trial Court, abused her discretion in denying Petitioners' motion to recuse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Dr. Coomer's lawsuit

On December 23, 2020, plaintiff Eric Coomer ("Dr. Coomer") sued more than a dozen defendants, including OAN and Rion, claiming he was defamed in news coverage, pleadings, podcasts, etc., that reported statements Dr. Coomer was alleged to have made concerning his role in the 2020 presidential election. On February 4, 2021, Dr. Coomer filed his First Amended Complaint. *See* **Exhibit A** ("Complaint" or "Compl.").

Dr. Coomer alleges he was defamed by statements made by defendant Joseph Oltmann that in late September 2020, Oltmann heard someone who was identified as "Eric from Dominion" say during a conference call among antifa leaders that the other callers should not worry about "[w]hat are we gonna do if f-ing Trump wins?" the upcoming presidential election because "Trump is not gonna win. I made f-ing sure of that. Hahahaha." (Compl. ¶ 52).

Oltmann ran a Google search for "Eric," "Dominion," and "Denver, Colorado" and discovered that Dr. Coomer was the Director of Product Strategy and Security for Dominion Voting Systems. (Compl. ¶ 52). Dominion is one of the

country's largest vendors of voting machines and voting systems; according to Dr. Coomer's lawsuit, "Dominion provided election related services to at least thirty different states during the 2020 presidential election." (Compl. ¶ 45).

Dr. Coomer alleges that among many media appearances, Oltmann appeared on OAN in a report hosted by Rion in which Oltmann recounted the call and described his subsequent research into Dr. Coomer. (Compl. ¶ 61).

B. The judge's biased handling of the case

In late May 2021, Judge Moses became the third judge assigned to this case. By that time, the defendants had all filed special motions to dismiss pursuant to C.R.S. § 13-20-1101, Colorado's "anti-SLAPP statute," and Judge Sheila Ann Rappaport had denied Dr. Coomer's request for anti-SLAPP discovery. The present judge's involvement immediately changed the trajectory of the case and tilted the balance in favor of Dr. Coomer, as reflected in the following timeline of events.

- **June 8, 2021:** In one of the present judge's first actions, she *sua sponte* reversed Judge Rappaport's May 21, 2021 Order rejecting anti-SLAPP discovery. The Court allowed sweeping one-way discovery by Dr. Coomer that included significant document productions and depositions of every defendant, flying in the face of the anti-SLAPP statute's purpose (efficiency

for the defense in light of First Amendment values). *See* Declaration of Blaine C. Kimrey ("Kimrey Decl."), **Exhibit B**, ¶ 10.

- **July 2, 2021:** Before holding an evidentiary hearing, the judge found "probable falsity" as to Oltmann's statements regarding the conference call. (Kimrey Decl. ¶ 11; Transcript of July 2, 2021 Hearing, **Exhibit C**, 39:2-4).
- **July 7, 2021:** The judge found that Oltmann was "not credible" and reiterated that his statements regarding the conference call were "probably false." (Kimrey Decl. ¶ 12; Transcript of July 7, 2021 Hearing, **Exhibit D**, 91:3-7).
- **August 10, 2021:** Despite the availability of safe and effective virtual depositions during the COVID-19 pandemic and Oltmann's concerns about his personal safety, the judge ordered Oltmann to appear in person for his deposition on August 11, 2021. (Kimrey Decl. ¶ 13).
- **August 23, 2021:** Despite ordering the defendants to respond to extensive discovery, the judge denied certain defendants' request for reciprocal discovery. (Kimrey Decl. ¶ 14).
- **August 29, 2021:** The judge sanctioned Oltmann and his counsel for his failure to appear at the deposition on August 11, 2021 (as well as other discovery missteps), but she changed her position on whether the deposition had to occur in person and allowed the rescheduled deposition to occur

virtually. (Kimrey Decl. ¶ 15).

- **September 7, 2021:** The judge *sua sponte* issued an order designating Dr. Coomer's ***entire deposition*** confidential pursuant to the protective order, even though no party had requested such confidentiality. (Kimrey Decl. ¶ 16).
- **September 17, 2021:** In Petitioners' lead counsel Blaine Kimrey's first appearance before the Trial Court,[1] the judge took him to task for stating: "To us this is not like a summary judgment procedure, because anti-SLAPP motions, they're decided without any discovery and things that occurred since our motions were filed that we could not have known, . . . such as Mr. Coomer ***imploding [in] the New York Times***." (Kimrey Decl. ¶ 17; Transcript of September 17, 2021 Hearing, **Exhibit E**, 16:9-12). The judge also declined OAN Defendants' request to extend the date for the anti-SLAPP hearing to allow for discovery of Dr. Coomer because "with anti-SLAPP, the requirement is that we get this to hearing as quickly as possible." (Kimrey Decl. ¶ 18; Transcript of September 17, 2021 Hearing, 11:15-17). This is clearly inconsistent with the judge's allowing Dr. Coomer to engage in four months of fulsome one-way discovery, and it fails to acknowledge that the

[1] Kimrey had appeared in the case only 10 days earlier, after former lead counsel Bernie Rhodes had been forced to withdraw because of severe medical issues. *See* Docket B8BA751B28997.

purpose of an expedited anti-SLAPP procedure is to benefit the ***defendant***, not the plaintiff.

- **September 22, 2021:** The judge denied the defendants' request to take the depositions of ***nine declarants*** who were undisclosed by Dr. Coomer until their declarations were filed in support of Dr. Coomer's omnibus anti-SLAPP response. (Kimrey Decl. ¶ 19). The judge blamed the defendants for their "failure to pursue the available avenues of discovery in a timely manner," even though the identities (or even existence) of most of the declarants were not known to the defendants until September 17, 2021, and even though some defendants had asked for, and been denied, discovery twice. (*Id.*). The judge also stated, without describing what information she was referring to, that OAN Defendants' motion seeking discovery contained confidential information that was not redacted and stated that the briefing should have been filed as "suppressed." (*Id.*). The only document that was "suppressed" on the docket by the Clerk as a result of the order was a transcript of the September 17, 2021 hearing, which is not confidential because the hearing occurred in open court. *See* Docket D98938CEAED81.
- **September 24, 2021:** The judge *sua sponte* reiterated the designation of Dr. Coomer's ***entire deposition*** confidential. (Kimrey Decl. ¶ 20).

- **October 7, 2021:** The judge denied the unopposed *pro hac vice* application of Vedder Price associate Julia Koechley because it was inadvertently filed under seal. (Kimrey Decl. ¶ 11). The judge noted that multiple documents had been filed as "suppressed" by OAN Defendants since October 1, 2021, and questioned whether this was a "clerical error, or if counsel is flagrantly misrepresenting the scope of the Omnibus Protective Order." (*Id.*). As OAN Defendants explained in a motion for partial reconsideration, Docket A59AB061BB54B, a clerical error by then newly hired local counsel Richard Westfall's paralegal had led to the inadvertently suppressed filings, and there was no strategic advantage to be gained by filing, for instance, *pro hac vice* applications under seal. (*Id.*). In response to the order, OAN Defendants refiled as public all documents that previously had been filed inadvertently under seal. *See* Docket FA5B431D4E222, 9A5225FE807AA, DB730634B4821, 46E7E99E65106, 562EA1B47FCF5, B9EAF95E6523D, 3F5C201A5F888.
- **October 8, 2021:** The judge entered an order ***granting*** in large part OAN Defendants' motion to set aside the protective order and unseal documents, including lifting the protective order on Dr. Coomer's deposition, but used that order to make her first threat to revoke the *pro hac vice* status of Vedder

Price attorneys. (Kimrey Decl. ¶ 22). The Trial Court's order claimed that the OAN Defendants (1) misrepresented the Court proceedings, (2) used their pleadings to intimidate others, and (3) misapprehended the state-wide procedures regarding court access. (*Id.*). As discussed below, none of those positions has merit.

- **October 11, 2021:** The OAN Defendants filed a motion for partial reconsideration, asking the judge to reconsider her positions about purported improprieties by OAN Defendants, strike those portions of the October 8, 2021 Order that unfairly threatened OAN Defendants with sanctions, and grant OAN Defendants' request that the Trial Court and/or Clerk immediately render public certain documents. (*See* Kimrey Decl., ¶ 22; Docket A59AB061BB54B). With respect to the first point, the motion explained that because Westfall's paralegal was new to the case, she filed some documents as "suppressed" that the attorneys at Vedder Price did not request to be "suppressed." (*Id.*). And because Vedder Price did not have full access to the docket, the OAN Defendants' attorneys did not recognize that these documents had been suppressed by the paralegal at filing. (*Id.*). Counsel thought that the Trial Court and/or its Clerk had suppressed the documents. (*Id.*). With respect to the second point, the OAN Defendants explained that

their assertions of fact and law were simply advocacy, not intimidation. (*Id.*). And with respect to the third point, the motion explained that counsel understood the state-wide requirements and despite the confusion caused by the paralegal's inadvertent clerical error, there remained many documents on the docket that were improperly sealed. (*Id.*).

- **October 11, 2021:** The judge entered a Civility Order, including a list of words and phrases that counsel should not say, such as "in an effort to mislead the court," "outrageous," "absurd," and "ridiculous." (Kimrey Decl. ¶ 23).
- **October 11, 2021:** The judge entered an order again denying the defendants the right to take discovery of Dr. Coomer's declarants before the anti-SLAPP hearing, claiming that the defendants did not seek discovery in a timely manner, even though they had no way of knowing what witnesses Dr. Coomer would present and even though some defendants had already been denied reciprocal discovery twice. (Kimrey Decl. ¶ 24). The judge also adopted an incorrect evidentiary standard for the upcoming anti-SLAPP hearing, concluding that: "The Court will not be weighing the evidence presented by the parties or resolving conflicting factual claims. The Court's inquiry is limited to whether Plaintiff has stated a legally sufficient claim and made a *prima facie* factual showing sufficient to sustain a favorable judgment. 'It

accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.' *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016)." (*Id.*). Such a standard is inconsistent with the applicable law applying a clear and convincing admissible evidence standard, *Diversified Management, Inc. v. Denver Post*, Inc., 653 P.2d 1103, 1109 (Colo. 1982), and plainly would favor Dr. Coomer.

- **October 12, 2021:** The judge sanctioned Oltmann again, holding that "Defendant Oltmann shall not be permitted to contest Plaintiff's evidence or claims regarding the source, manner or timing of Defendant Oltmann's receipt of information regarding Plaintiff's Facebook posts" and requiring him to pay fees and costs. (Kimrey Decl. ¶ 25).
- **October 13, 2021:** The anti-SLAPP hearing began. The judge allotted 6.5 hours of argument to the ***single plaintiff*** and 7.5 hours to the ***14 defendants***. (Kimrey Decl. ¶ 27).
- **October 14, 2021:** The judge threatened Kimrey with the Civility Order for stating that OAN did not reach Dr. Coomer for comment because Dr. Coomer "was in hiding at the time, and if he went to his door, he'd show up with a shotgun," even though Dr. Coomer put that information in a declaration submitted to the Court. Kimrey responded by saying, "Your Honor, there's

nothing I said that violates the civility order. I'm familiar with the civility order. I have to address the facts in this case. This is a free speech case. I've tried very hard not to say the words that you told me not to say. But I've got to be able to convey the messages here because I have to represent my client. So I appreciate your sustaining my objection. Thank you." (Kimrey Decl., ¶ 28; Transcript of anti-SLAPP Hearing Volume II, **Exhibit F**, 373:8-374:12).

- **October 25, 2021:** The judge entered an Order allowing Dr. Coomer ***150 pages*** for his proposed findings of fact and conclusions of law and limiting each defendant group to ***20 pages***, plus a 20-page joint filing, if they could reach an agreement. (Kimrey Decl. ¶ 34).
- **November 3, 2021:** The judge denied two motions by the OAN Defendants (including the October 11 motion for partial reconsideration) without explanation, simply stamping "Denied" on the top of the motions. (Kimrey Decl. ¶ 35).
- **November 21, 2021:** On a Sunday afternoon, the judge entered an Order (**Exhibit G**, "Nov. 21 Order") in response to a motion for relief filed four days earlier by Dr. Coomer related to OAN Defendants' evidentiary objections. Even though OAN Defendants had not filed their evidentiary objections with the Trial Court (but had instead served Dr. Coomer with them), the parties had

not adequately met and conferred about the objections, Dr. Coomer had not asked for all of OAN Defendants' objections to be struck, and Dr. Coomer had not requested sanctions, the judge unilaterally and summarily denied nearly all of OAN Defendants' evidentiary objections and *sua sponte* awarded sanctions in the form of fees and costs against OAN Defendants. The judge held that although "88 objections may have merit and will require a response from Plaintiff" (*Id.*, 2) (emphasis in original), the remaining 4,937 objections were all "asserted in bad faith" and were "frivolous, vexatious or groundless." (*Id.*, 4). The judge summarily denied all of those objections and held that the four attorneys who had appeared *pro hac vice* on the signature block of the objections had engaged in "misconduct," noting that this misconduct "supports an immediate revocation of the *pro hac vice* status of these four Vedder Price P.C. attorneys." (*Id.*, 8). The judge also held that these attorneys had engaged in previous "misconduct," and cited four alleged examples. (*Id.*). The judge also said attorneys who did not want to be "conflated" with these attorneys should avoid signing future pleadings. (*Id.*, 9). The judge then ordered Dr. Coomer to address the remaining evidentiary issues and awarded attorneys' fees and costs against OAN Defendants. (*Id.*). In the Nov. 21 Order (entered on a Sunday afternoon only four days after Dr. Coomer had filed his

motion), the judge appeared to be enraged at the OAN Defendants' counsel, writing, "*Pro hac vice* admission is a privilege, and the Vedder Price P.C. attorneys are abusing that privilege through their unrelenting efforts to undermine the integrity of these proceedings. It will not be tolerated." (*Id.*).[2]

C. The judge's denial of recusal

Based on the judge's actions, culminating with the unwarranted counsel disqualification threats and *sua sponte* sanctions order against the OAN Defendants on November 21, 2021, Petitioners filed a motion to recuse (**Exhibit H**, "Motion") on December 7, 2021, accompanied by supporting declarations as required under Colorado Rule of Civil Procedure 97 and a motion to set aside the Nov. 21 Order (**Exhibit I**). Just five days later, before any other party in the case had an opportunity to provide its response to the Motion and again on a Sunday, the judge issued her order denying recusal. *See* **Exhibit J** ("Dec. 12 Order"). The Dec. 12 Order reflected a dramatic change in tone — in an apparent attempt to recast earlier intemperate rulings — but the judge cannot rewrite the history of the case. The chart

[2] The judge's unfair treatment of the defendants continued after the Nov. 21 Order. In a December 5, 2021 Order, the judge *sua sponte* barred evidence from defendant Defending the Republic, Inc. ("DTR") that it had not been formed when the allegedly defamatory statements were made, even though Dr. Coomer stipulated to the evidence. When DTR sought reconsideration, the judge entered a briefing schedule that required DTR to file a reply brief on three days' notice, between Christmas and New Year's Day.

below compares the antiseptic language used by the judge in the Dec. 12 Order and her descriptions of her prior statements with the actual language used by the judge in her prior orders.

LANGUAGE USED IN DEC. 12 ORDER	**LANGUAGE PREVIOUSLY USED BY THE JUDGE**
"[T]his judge has significant respect for the legal knowledge and skills possessed by counsel for the OAN Defendants as was reflected at the hearings held on October 13 and 14, 2021." (Dec. 12 Order, 3).	"The misconduct occasioned by the filing of [the evidentiary objections] supports an immediate revocation of the *pro hac vice* status of these four Vedder Price P.C. attorneys, particularly given the numerous prior instances of misconduct which have previously been noticed and addressed by this Court." (Nov. 21 Order, 7-8). "*Pro hac vice* admission is a privilege, and the Vedder Price P.C. attorneys are abusing that privilege through their unrelenting efforts to undermine the integrity of these proceedings. It will not be tolerated." (*Id.*, 9).
"This gentle admonition does not in any way suggest bias or prejudice against the OAN Defendants or counsel." (Dec. 12 Order, 7).	"Mr. Kimrey, I'm going to interrupt you, because you are new to this. We have had a great run so far of no *ad hominem* type attacks during these conferences. So if he can keep things as professional as possible, I would appreciate it." (Transcript of September 17, 2021 Hearing, 16:13-17). "[D]uring Mr. Kimrey's first appearance in this matter on September

LANGUAGE USED IN DEC. 12 ORDER	**LANGUAGE PREVIOUSLY USED BY THE JUDGE**
	17, 2021, he used pejorative language regarding Plaintiff and was cautioned by this Court." (Nov. 21 Order, 8).
"[R]eminding counsel of their obligations under the Civility Order does not demonstrate any sort of bias or prejudice." (Dec. 12 Order, 11).	"MR. KIMREY: OAN could not follow up with Dr. Coomer because he was in hiding at the time, and if he went to his door, he'd show up with a shotgun. THE COURT: I'll strike your last comments because they are completely irrelevant to the issues that were being discussed. You all know that. I will refer you to the civility order." (Transcript of anti-SLAPP Hearing Volume II, 373:16-374:1).
"[T]he Court has never expressed any hostility or disrespect towards the OAN Defendants or their counsel." (Dec. 12 Order, 13).	"The misconduct occasioned by the filing of [the evidentiary objections] supports an immediate revocation of the *pro hac vice* status of these four Vedder Price P.C. attorneys, particularly given the numerous prior instances of misconduct which have previously been noticed and addressed by this Court." (Nov. 21 Order, 7-8). "*Pro hac vice* admission is a privilege, and the Vedder Price P.C. attorneys are abusing that privilege through their unrelenting efforts to undermine the integrity of these proceedings. It will not be tolerated." (*Id.*, 9).

LANGUAGE USED IN DEC. 12 ORDER	**LANGUAGE PREVIOUSLY USED BY THE JUDGE**
"[T]he record demonstrates that the Court has been measured in its response to counsel's violation of court orders and counsel's misconduct." (Dec. 12 Order, 15).	"The sheer volume of the 4,937 frivolous, vexatious and groundless objections raised by the OAN Defendants is staggering. The Court finds 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." (Nov. 21 Order, 7). "The Court notes that the inclusion of the word 'Alleged' in the title of this pleading is snide, unwarranted and a violation of this Court's Civility Order." (*Id.*). "The misconduct occasioned by the filing of [the evidentiary objections] supports an immediate revocation of the *pro hac vice* status of these four Vedder Price P.C. attorneys, particularly given the numerous prior instances of misconduct which have previously been noticed and addressed by this Court." (*Id*., 7-8). "*Pro hac vice* admission is a privilege, and the Vedder Price P.C. attorneys are abusing that privilege through their unrelenting efforts to undermine the integrity of these proceedings. It will not be tolerated." (*Id.*, 9).

But even in the Dec. 12 Order, the judge could not refrain from unwarranted harsh criticism, holding that her prior decisions were justified 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, 13) (emphasis added).

ARGUMENT

I. Legal standard

"Ordinarily, the question of whether a judge should be disqualified in a civil case is a matter within the discretion of the trial court." *Johnson v. District Court*, 674 P.2d 952, 955 (Colo. 1984). "However, 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." *Id.* at 955-956; *see also In re Estate of Elliott*, 993 P.2d 474, 482 (Colo. 2000) (holding that recusal is required when appearance of possible prejudgment and bias exists).

Disqualification of a judge is governed by Colorado Rule of Civil Procedure 97. It provides that "[a] judge shall be disqualified in an action in which [s]he is interested or prejudiced. . . ." C.R.C.P. 97. "The test for disqualification under this

rule is whether the motion and supporting affidavits allege sufficient facts from which it may reasonably be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased, against a party to the litigation." *Bruce v. City of Colorado Springs*, 252 P.3d 30, 36 (Colo. App. 2010). The judge must accept factual statements as true. *Id*.

"'Prejudice' is not easily defined [s]ince it is a mental condition or status, a certain 'bent of mind' it cannot be demonstrated, ordinarily, by direct proof. Prejudice in the present procedural context has been described by our court as 'a leaning toward one side of a question involved, from other considerations than those belonging to it, or a bias in relation thereto which would in all probability interfere with fairness in judgment.'" *Smith v. District Court*, 629 P.2d 1055, 1057 (Colo. 1981) (internal citations omitted). "When assessing the grounds for disqualification raised in a motion, the judge must consider the Code of Judicial Conduct as well as the statutes and procedural rules." *Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635, 639 (Colo. 1987).

II. The judge abused her discretion in denying recusal.

The judge ignored or mischaracterized many of the facts set forth in the Motion and supported by accompanying declarations from Petitioners' counsel that demonstrate prejudice or, at minimum, the appearance of prejudice. Under the

applicable test, the judge cannot pick and choose among the facts asserted by the moving party, but rather must accept factual statements as true. *See Johnson*, 674 P.2d at 956. The verified facts presented in the Motion and ignored by the judge are summarized in the following chart.

ISSUES RAISED IN MOTION	**HANDLING BY THE JUDGE**
The judge allowed sweeping one-way discovery that is inconsistent with the purpose of the anti-SLAPP statute. (Motion, 2).	***Ignored.*** The fact that the judge's *sua sponte* decision to allow broad one-way discovery is inconsistent with the purpose of the anti-SLAPP statute is relevant to demonstrating her bias, but was not addressed in the Dec. 12 Order.
The judge found "probable falsity" as to Oltmann's statements before an evidentiary hearing. (Motion, 2).	***Ignored.*** The Dec. 12 Order, summarily and without citation to legal authority, states "The Court is only addressing the allegations that relate directly to the OAN Defendants and their counsel. The other allegations raised by the OAN Defendants and counsel are not considered here because 1) they are merely complaints about this Court's legal rulings; and 2) do not have bearing on this Court's conduct in relation to the OAN Defendants and counsel." (Dec. 12 Order, 6). In taking this position, the judge ignores critical evidence of her bias against ***all*** defendants. The Court's rush to judgment on Oltmann's credibility is fundamental to the claims against all defendants, all of whom relied on Oltmann as a source.

ISSUES RAISED IN MOTION	**HANDLING BY THE JUDGE**
The judge ordered Oltmann to appear in person for his deposition despite concerns for his personal safety. (Motion, 2).	***Ignored.*** Same issue as discussed above. The Trial Court's unreasonable treatment of Oltmann shows bias against all defendants.
The judge denied certain defendants' request for reciprocal discovery. (Motion, 3).	***Ignored.*** Same issue as discussed above. The judge's denial of reciprocal discovery is critical to understanding the judge's unfair handling of the subsequent declarations submitted by Dr. Coomer in opposition to the anti-SLAPP motions and Petitioners' objections to those declarations.
Despite changing her position on whether Oltmann's deposition must occur in person, the judge sanctioned Oltmann. (Motion, 3).	***Ignored***. Same issue as discussed above. The judge's propensity for sanctioning defendants is relevant to the judge's bias against ***all*** defendants.
The judge *sua sponte* designated Dr. Coomer's entire deposition as confidential. (Motion, 3).	***Ignored.*** Same issue as discussed above. The judge's *sua sponte* and preemptive efforts to protect the plaintiff demonstrates the judge's bias against ***all*** defendants.
Kimrey's comment about Dr. Coomer "imploding" in the *New York Times* (Motion, 3).	***Mischaracterized.*** The Dec. 12 Order frames this interaction as a "gentle admonition" from the judge. (Dec. 12 Order, 7). But this ignores the fact that the judge subsequently relied on this interaction as evidence that Petitioners' counsel engaged in "misconduct." *See* Nov. 21 Order, 8 ("[D]uring Mr. Kimrey's first appearance in this matter on September 17, 2021, he used

ISSUES RAISED IN MOTION	HANDLING BY THE JUDGE
	pejorative language regarding Plaintiff and was cautioned by this Court."). The language used by Kimrey at the September 17 hearing was a non-event, but the judge has claimed otherwise in subsequent rulings and is now attempting to rewrite the history of the case.[3]
Petitioners' October 11, 2021 Motion for Reconsideration of the Court's sanctions threat. (Motion, 5).	***Ignored.*** Although this relates directly to OAN Defendants, it was nonetheless ignored by the judge. The October 11 motion is significant because it explained to the judge that the alleged "misconduct" engaged in by counsel was the result of innocent clerical errors by local counsel Richard Westfall's paralegal. Thus, after October 11, 2021, the judge's continued reliance on these events as evidence that counsel has allegedly

[3] In downplaying this interaction, the judge points to an earlier order in this case by Judge Eric Johnson, before the present judge and Vedder Price were involved, that "informed all counsel of the high standards of professionalism to which Judge Johnson expected counsel to adhere" and claims that her comment at the status hearing was merely intended to make Kimrey aware of that standard. (Dec. 12 Order, 7-8). But Judge Johnson's order is distinguishable. First, the April 27, 2021 order was in response to a motion by Oltmann that included an introduction that Judge Johnson described as "an offensive assault on Mr. Coomer, much of it personal, that does nothing to address or support the legal issue presented." The present judge has not argued, nor could she argue, that Kimrey did anything comparable. Second, even though Judge Johnson made such a finding and ordered portions of the briefing to be stricken, he ***did not*** sanction any party or threaten to disqualify counsel.

ISSUES RAISED IN MOTION	**HANDLING BY THE JUDGE**
	acted improperly demonstrates clear bias and unfair treatment.
The judge sanctioned Oltmann a second time based on alleged deposition conduct. (Motion, 6).	***Ignored.*** As discussed above, the judge claimed that this has no relevance to recusal. But the judge's propensity for sanctioning defendants is relevant to the judge's bias against ***all*** defendants.
The judge threatened Kimrey with the Civility Order simply for stating evidence that had been submitted to the Trial Court by Dr. Coomer. (Motion, 7).	***Mischaracterized.*** As an initial matter, the judge took issue with the fact that she was not provided with a copy of the transcript. (Dec. 12 Order, 11). But that is the result of her own actions — defendants sought to have a private court reporter designated as the official court reporter, but while the judge allowed the private court reporter at the October 13 and 14 anti-SLAPP hearing, she held that the Trial Court would record the proceedings and the transcription of that recording would be the Trial Court's official record. *See* October 12, 2021 Order. The private court reporter made a record of the hearing, to which Petitioners have referred. The official transcript from the Trial Court has been ordered but still is not ready, two months after the hearing. And Petitioners were wary of providing an "unofficial" transcript to the judge for fear that she could consider it to be some form of misconduct warranting revocation of *pro hac vice* admission. (This shows

ISSUES RAISED IN MOTION	**HANDLING BY THE JUDGE**
	the type of tightrope counsel is forced to walk based on the Nov. 21 Order and the judge's behavior generally.) And Petitioners offered to provide the judge a copy of the transcript and a digital recording of the hearing, but the judge declined that offer, instead suggesting that Petitioners failed to provide the transcript to her. Regardless, the judge's characterization of this interaction is flawed. The Dec. 12 Order refers to it as "reminding counsel of their obligations under the Civility Order." In reality, the judge said, "I'll strike your last comments because they are completely irrelevant to the issues that were being discussed. You all know that. I will refer you to the civility order." (Transcript of anti-SLAPP Hearing Volume II, 373:23-374:1). Moreover, the judge's discussion ignores the fact that the information she took issue with Kimrey's sharing was evidence submitted to the Trial Court ***by Dr. Coomer***. The judge's assumption that any negative fact about Dr. Coomer equates with "incivility" shows her bias. And if counsel can't criticize Dr. Coomer in a defamation case brought by Dr. Coomer, counsel can't diligently represent OAN Defendants in this case, period. That the judge is attempting to prevent legitimate advocacy by counsel in this

ISSUES RAISED IN MOTION	**HANDLING BY THE JUDGE**
	defamation case is itself an affront to the First Amendment.
The judge discussed with Petitioners' counsel in open court the fact that the evidentiary objections would be sizable. (Motion, 12).	***Ignored.*** One of the most compelling facts to demonstrate that the judge's handling of the evidentiary objections was unreasonable is that she openly characterized to all counsel on October 14 that the objections would be "gargantuan." To then assert that the length of the objections is evidence of bad faith shows tremendous unfairness and bias. Yet the Dec. 12 Order completely ignores this conversation (which was recorded by Colorado Public Radio — a recording that OAN Defendants offered to the judge, which the judge ignored). (Kimrey Decl. ¶ 30).
Petitioners' arguments regarding the substance of the evidentiary objections. (Motion, 11).	***Ignored/mischaracterized.*** The Motion incorporated by reference the detailed substantive arguments made by Petitioners in the motion to set aside the Nov. 21 Order, which are directly relevant to whether the Nov. 21 Order was reasonable and whether the judge showed bias. The judge largely ignored those arguments, instead broadly characterizing Petitioners' position as "OAN Defendants continue to argue that it was entirely appropriate for them to file 5,025 discrete evidentiary objections" (Nov. 21 Order, 12) — again foregoing any substantive discussion and focusing

ISSUES RAISED IN MOTION	**HANDLING BY THE JUDGE**
	only on the number of objections. This is evidence of the judge's prejudice.
The judge suggested that Petitioners' attorneys should remove their name from pleadings if they disagreed with the approach. (Motion, 10, 14).	***Ignored.*** The judge's including of fourth-year associate Koechley (whom the judge met in person at the anti-SLAPP hearing and therefore had to have known is a newer attorney) in the Nov. 21 Order was deeply unfair and punitive, and her attempt to divide Petitioners' legal team with her warnings about "conflation of conduct" (Nov. 21 Order, 9) demonstrates prejudice against Petitioners and their counsel. But the judge ignored this issue in the Dec. 12 Order.
The judge disregarded the statutory requirements for an award of fees and costs as sanctions. (Motion, 14).	***Ignored.*** The Dec. 12 Order failed to address in any way the fact that the judge awarded fees and costs against Petitioners *sua sponte* in the Nov. 21 Order, without making any effort to meet the statutory requirements. This obviously is unfair and prejudicial to Petitioners.

The judge abused her discretion by ignoring and/or mischaracterizing these facts, and these facts alone (taken as true) are more than adequate to establish prejudice or the appearance of prejudice. When combined with the facts that the judge did consider (but failed to properly interpret), it is difficult to imagine how a reasonable person looking at the evidence objectively could conclude that the judge

has not demonstrated prejudice against Petitioners. The judge closed the Dec. 12 Order with a section titled "Totality of the Circumstances" in which she said in conclusory fashion that "the Court has never expressed any hostility or disrespect towards the OAN Defendants or their counsel." (Dec. 12 Order, 13). But there is no way to reach that conclusion while considering the "totality of the circumstances."

Additionally, the subjective/objective test employed by the judge in the Dec. 12 Order does not have any foundation in relevant case law, but rather is based on a non-binding ethics opinion, C.J.E.A.B. Opinion 2021-02, which addressed the narrow issue of "[w]hether judges must disqualify themselves when a friend appears before the judge." That issue is distinguishable from the recusal issue faced by the judge. Moreover, C.J.E.A.B. Opinion 2021-02 simply states that "many jurisdictions apply a two-part test with subjective and objective components to determine if disqualification is necessary." Petitioners are not aware of any Colorado case that has adopted this standard. Accordingly, the judge's subjective feelings about her impartiality are largely irrelevant, and the Court should base its decision on the objective facts — many of which the judge simply ignored.

III. The judge's conduct reflects unfair prejudice warranting recusal.

Even if the judge had applied the proper standards and analysis, a rule should issue and recusal should be ordered because the judge abused her discretion in finding that there was no evidence of prejudice.

A. The judge's *sua sponte* threats of revoking counsel's *pro hac vice* admissions constitute unfair prejudice.

The Trial Court's repeated, *sua sponte* threats of revoking counsel's *pro hac vice* admissions were unsupported and demonstrated bias against Petitioners and their counsel. Petitioners will be (and already have been) unfairly prejudiced by these actions because Petitioners' counsel cannot effectively advocate for their clients while fearing that the judge will assert an unjustified basis to disqualify them. Petitioners would be unfairly prejudiced if the judge deprived them of their choice of counsel without justification, *see In re Estate of Myers*, 130 P.3d 1023, 1025 (Colo. 2006), but even if the judge never acts on her threats, the threats have caused Petitioners' counsel to consider reining in their appropriate, ethical, and well-founded advocacy for fear of having admissions revoked. (Kimrey Decl. ¶ 47). To fulfill their ethical obligations to their clients and effectively advocate for them, counsel must be able to take the actions that they feel are justified and appropriate based on the facts, law, and applicable rules of professional responsibility. It is inappropriate for them to also be required to consider what arguments the judge

might disagree with so strongly that she will disqualify counsel, or what commonly used legal terms the judge might deem "uncivil." The Trial Court's orders have so severely limited their ability to represent Petitioners that the attorneys at Vedder Price are considering whether to withdraw from this case if this Court does not issue a rule to show cause and order the judge's recusal. (Kimrey Decl. ¶ 47).

This Court has repeatedly held that conduct similar to what the judge has engaged in constitutes unfair prejudice and warrants recusal. In *Klinck*, 876 P.2d at 1277, the court held disqualification was required when a judge interrupted counsel during a hearing to accuse him of improprieties, reprimanded him when he commented on the court's delay, and advised him to keep co-counsel "on a short leash." The Court found there was sufficient evidence of "an absence of the impartiality necessary to assure . . . a fair trial." *Id*. Attempting to rebut the applicability of *Klinck*, the judge states that she "has not used any denigrating language such as placing an attorney on a 'short leash'" (Dec. 12 Order, 14), but the fact that she has not used this exact language does not mean that her threatening orders have not constrained Petitioners' counsel's ability to litigate this case and in fact put counsel on a "short leash."

Similarly, in *Goebel*, 830 P.2d at 998, the Court held 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. The Court held 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." *Id*. at 999. The judge claims that *Goebel* is distinguishable because it involved *ex parte* communications by the judge in question (Dec. 12 Order, 14), but the judge ignores the Court's language about the judge's on-the-record criticism of counsel (which the judge has done repeatedly) and the judge's rulings based on his social philosophy.

In *Brewster*, 811 P.2d at 814, the Court found disqualification was required when the judge made disparaging remarks about counsel and issued contempt orders that were not supported by the record. The judge argues that this case is distinguishable because she did not hastily find attorneys in contempt without following normal procedures and sentence them to jail. (Dec. 12 Order, 14). But *Brewster* is analogous in that the judge hastily sanctioned Petitioners without following proper procedures and threatened counsel's *pro hac vice* admittance.

The judge's repeated threats to revoke the *pro hac vice* admission status of Vedder Price attorneys, coupled with her suggestion that any Vedder Price lawyers disagreeing with a pleading should remove their names from the signature block, is

the court's effort to keep counsel "on a short leash." It is difficult to imagine a shorter leash, given the judge's repeated threats, the Civility Order, and the judge's rehashing of inconsequential filing errors that have been explained and resolved. Moreover, the judge has made disparaging remarks about the attorneys at Vedder Price that are either entirely unjustified or based on clerical errors not even made by Vedder Price that have since been explained and resolved. Yet the judge has refused to acknowledge those facts, instead repeating her inaccurate claims of misconduct and using them to support escalating rhetoric and sanctions against Petitioners and their counsel.

The judge's claim that OAN Defendants' evidentiary objections were asserted in bad faith is without merit, as set forth in greater detail below. *Infra* 32. Similarly flawed are the judge's assertions about counsel's lack of civility, which are based solely on concerns about Kimrey's use of the word "imploding" in the September 17 hearing and the use of the word "alleged" in the title of the evidentiary objections. Under no standard would the use of two innocuous words constitute a basis for withdrawing the *pro hac vice* admissions of Petitioners' counsel. Indeed, the judge is so quick to assume Petitioners' counsel are acting in bad faith that she admonished Kimrey under the Civility Order during the hearing on October 14, 2021, after Kimrey said OAN did not reach Dr. Coomer for comment because Dr. Coomer "was

in hiding at the time, and if he went to his door, he'd show up with a shotgun," despite the fact that Dr. Coomer has admitted to that fact and voluntarily put that information in a declaration submitted to the Trial Court. *See* Kimrey Decl., ¶ 28; Transcript of anti-SLAPP Hearing Volume II, 373:8-374:12.

The judge's threats to revoke the *pro hac vice* admissions of the Vedder Price lawyers are unjustified, and the OAN Defendants are adversely impacted by those threats because of the impact on their counsel's ability to fully and effectively advocate for the OAN Defendants. These threats reflect the court's deep unfair prejudice against the OAN Defendants and their counsel.

B. The judge's arbitrary and capricious handling of the evidentiary objections constitutes unfair prejudice.

The judge also demonstrated her unfair prejudice against the OAN Defendants by arbitrarily and capriciously denying thousands of good-faith evidentiary objections simply because the judge's "bent of mind" led her to conclude that the sheer volume of objections meant they were asserted in bad faith. The OAN Defendants' objections were not asserted in bad faith and were not frivolous. Rather, the judge demonstrated tremendous bias against the OAN Defendants and their counsel, assuming the worst despite having no reason to do so.

At the close of the anti-SLAPP hearing on October 14, 2021, the judge developed a plan for submission of evidentiary objections. The judge 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 judge addressed the fact that the objections would be voluminous. Petitioners' counsel Jeanah Park asked whether parties should object to each objectionable paragraph in the declarations, and the judge said parties should go paragraph-by-paragraph. *See* Declaration of Jeanah Park ("Park Decl."), **Exhibit K**, ¶¶ 9-12. Kimrey then noted that the objection document was going to be "like 500 pages," to which the judge responded, "I'm so looking forward to it." (Kimrey Decl. ¶¶ 29-32). The judge then asked "how long is it going to take you all to make this ***gargantuan document***?" (Kimrey Decl. ¶ 33) (emphasis added).

The parties exchanged charts of 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

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 judge anticipated, the evidentiary objection document was "gargantuan," with more than 5,000 objections asserted on November 13, 2021. (Kimrey Decl. ¶ 40). Although the judge has erroneously asserted that OAN Defendants "filed" these objections (Dec. 12 Order, 12), that is not true — the OAN Defendants served them under the protocol established by the judge.

On November 17, 2021, Dr. Coomer filed his Motion for Relief from OAN Defendants' Evidentiary Objections. *See* Docket AD5C5C9AC4598. Dr. Coomer's motion asked the Trial 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, 7). Although Dr. Coomer "reserve[d] the right to request monetary sanctions," he did not do so. (Dr. Coomer's Motion, 8). Four days later (after requiring the OAN Defendants to respond in 48 hours), the judge entered the Nov. 21 Order.

Petitioners question whether the judge could have fully analyzed more than 5,000 evidentiary objections in just four days, as the judge has claimed (as noted, it

took 10 timekeepers more than 460 hours to review the evidence and prepare the objections). (Kimrey Decl. ¶ 38). Any analysis done in that time period was necessarily hasty and proceeded on the unfair assumption that the vast majority of the objections were frivolous just because of their length.

Remarkably, the judge turned this argument on its head in the Dec. 12 Order, suggesting it is some sort of admission of an effort to "subvert the judicial process, harass another party and needlessly increase the cost of litigation." (Dec. 12 Order, 12). To the contrary, Petitioners' position is that the proper handling of this evidence — the immense volume of which was dictated by Dr. Coomer's evidentiary designations — is a lengthy, painstaking process. Indeed, the only parties subject to increased litigation costs and harassment as a result of this exercise ***were Petitioners and their counsel***. Given the complexity of the evidentiary issues, Petitioners believe a meaningful substantive analysis of the objections could not be completed in four days without an underlying presumption that the objections were invalid. If, however, it is the judge's position that she completed a full review of the objections and prepared the Nov. 21 Order in four days, it further undermines her argument that the objections were asserted only to "subvert the judicial process, harass another party and needlessly increase the cost of litigation," because Dr. Coomer's counsel

presumably could have moved with the same speed and easily met the judge's deadline.

The handling of the objections was particularly troubling because (1) the OAN Defendants had addressed the likely length of the evidentiary submission with the judge on October 14, 2021, and were told to assert all objections in paragraph-by-paragraph form (Kimrey Decl. ¶¶ 29-33), (2) Dr. Coomer's counsel failed to adequately meet and confer with the OAN Defendants' counsel before filing the motion, despite strict instructions by the judge about what a meet and confer should entail, *see* Transcript of July 2, 2021 Hearing, Docket FAD883C25BE15, Exh. 12, 7:5-8 ("I will take this opportunity to remind everybody that deferral is -- conferral is not just making a phone call saying, do you object? Conferral is attempting to work out the differences of opinion."); *Anderson v. Holguin, Jr.*, 2018 WL 11222764, *1 (Colo. Dist. Ct. April 20, 2018) (holding that a good-faith effort to confer requires "holding meaningful negotiations" and denying motion for failure to adequately meet and confer), (3) there was no "emergency" requiring Dr. Coomer to seek expedited relief, yet the judge allowed him to do so and ordered the OAN

Defendants to file a response within 48 hours, and (4) Dr. Coomer's motion did not ask the Trial Court to summarily deny all of the OAN Defendants' objections.[4]

The proper course was for the parties to fill out the evidentiary chart as ordered by the judge, meet and confer, and submit the final version on November 29, 2021. The judge could have ruled on the objections thereafter. Instead, the judge *sua sponte* and without justification denied thousands of objections (while giving only seven examples of objections she apparently disagreed with but that weren't even highlighted as objectionable by Dr. Coomer) and sanctioned the OAN Defendants.

With her Nov. 21 Order, the judge essentially adopted a rule against Petitioners stating, "If you object and I disagree with you, I'll sanction you." Typically, if a judge disagrees with an objection, the judge overrules it (with specificity, not in omnibus fashion). A judge does this so the appellate court can consider what objections were properly sustained, what were properly denied, and whether those rulings are reversible error. *See Hall v. Time Warner, Inc*., 63 Cal. Rptr. 3d 798, 806 (Cal. Ct. App. 2007) ("Rulings on evidentiary objections involve an exercise of discretion, and it is the trial court's responsibility to rule on the objections in the first instance."). Notably, anti-SLAPP appeal is as of right, and

[4] Petitioners' substantive arguments related to the evidentiary objections are set forth in detail in their Motion to Set Aside the Nov. 21 Order, *see* Exh. I, which has not yet been ruled upon by the judge.

review by the appellate court is *de novo*. *See* C.R.S. § 13-20-1101(7). To that end, in her December 5, 2021 rulings on Dr. Coomer's objections to the OAN Defendants' evidence, the judge analyzed each objection and overruled 26 of Dr. Coomer's 32 objections (in other words, 81 percent of them), but did not accuse him of bad faith, claim the objections were frivolous, or sanction him.

The judge's one-sided handling of the evidentiary objections is therefore further evidence of unfair prejudice.

C. The judge's unprecedented behavior constitutes unfair prejudice.

The judge's actions in this case are unprecedented in the experience of Petitioners' counsel and unfairly prejudice Petitioners by making it impossible for counsel to fulfill their obligations to the OAN Defendants without risking unwarranted censure of counsel and sanctions to clients. The judge's actions have been so extreme and unpredictable that Petitioners' counsel have no ability to discern how she will react to arguments in the future. The three shareholders at Vedder Price accused of misconduct in the Nov. 21 Order, Blaine Kimrey, Jeanah Park, and Bryan Clark, 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."), **Exhibit L**, ¶¶ 4-6). None of them has ever previously been subject to disbarment or discipline, or has had a client sanctioned. (Kimrey Decl. ¶ 7; Park Decl. ¶ 7; Clark Decl. ¶ 7). Throughout their careers, they have provided services both to the legal community and the community at large. (Kimrey Decl. ¶ 3; Park Decl. ¶ 3; Clark Decl. ¶ 3). In their practices, the judge's actions are completely unprecedented.

Because of the seriousness of the judge's allegations, Vedder Price has brought this matter to its General Counsel, Michael R. Mulcahy, a litigator with nearly 30 years of experience. (Declaration of Michael Mulcahy ("Mulcahy Decl."), **Exhibit M**, ¶¶ 1-3). Mulcahy has reviewed the objections asserted by OAN Defendants as well as the Nov. 21 Order and sees no evidence that objections were asserted in bad faith or were frivolous. (Mulcahy Decl. ¶¶ 4-6). Vedder Price supports the recusal effort. (Mulcahy Decl. ¶ 7).

Moreover, the judge disregarded the statutory requirements for awarding fees and costs, sanctioning the OAN Defendants *sua sponte*, without letting them address the applicable statutory factors, without holding an evidentiary hearing, and without making findings of facts or conclusions of law related to the statutory requirements. *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."). Although the Nov. 21 Order cites no statutory basis for the award of fees, the judge appears to be invoking C.R.S. § 13-17-101, *et seq*., which provides the Trial 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. But regardless, this Court has unequivocally held that to award attorneys' fees, the Trial 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.[5]

[5] 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

Thus, the judge's unprecedented and unsupported actions demonstrate further unfair prejudice against Petitioners and their counsel that warrants recusal.

IV. The judge's conduct presents significant concerns under the Colorado Code of Judicial Conduct.

The judge's conduct, as described above, raises a number of concerns under the Colorado Code of Judicial Conduct that must be considered as part of the recusal analysis. *Zoline*, 732 P.2d at 639. Those issues are set forth in the chart below:

APPLICABLE RULE	**CONCERNS IN THIS CASE**
Rule 1.2: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."	The judge's one-sided handling of this case and unprecedented threats and sanctions do not promote the public confidence in the impartiality of the Trial Court and create, at minimum, the appearance of impropriety.
Rule 2.2: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."	The judge's demonstrable bias raises genuine concerns about her ability to handle this case fairly and impartially.
Rule 2.3(A): "A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice."	As reflected above, the judge has demonstrated a clear and unfair prejudice against OAN Defendants and their counsel.

settlement as related to the amount and conditions of the ultimate relief granted by the court." C.R.S. § 13-17-103(1).

APPLICABLE RULE	CONCERNS IN THIS CASE
Rule 2.8(B): "A judge shall be patient, dignified, and courteous to litigants, . . . lawyers, . . . and others with whom the judge deals in an official capacity . . . ."	The judge's unreasonable threats to OAN Defendants' counsel based on word choice and inadvertent clerical errors outside their control are plainly inconsistent with this rule.

Because of these significant issues under the Code of Judicial Conduct, recusal is appropriate.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Petitioners respectfully request this Court issue a rule to show cause why the Honorable Judge Marie Avery Moses should not recuse herself as the trial judge in the underlying civil case.

INDEX OF SUPPORTING DOCUMENTS

EXHIBIT A: Plaintiff's First Amended Complaint (February 4, 2021)

EXHIBIT B: Declaration of Blaine C. Kimrey (December 7, 2021)

EXHIBIT C: Transcript of July 2, 2021 Hearing

EXHIBIT D: Transcript of July 7, 2021 Hearing

EXHIBIT E: Transcript of September 17, 2021 Hearing

EXHIBIT F: Transcript of anti-SLAPP Hearing Volume II (October 14, 2021)

EXHIBIT G: The November 21, 2021 Order

EXHIBIT H: OAN Defendants' Motion to Recuse (December 7, 2021)

EXHIBIT I: OAN Defendants' Motion to Set Aside Nov. 21 Order (December 7, 2021)

EXHIBIT J: The December 12, 2021 Order

EXHIBIT K: Declaration of Jeanah Park (December 7, 2021)

EXHIBIT L: Declaration of Bryan K. Clark (December 7, 2021)

EXHIBIT M: Declaration of Michael Mulcahy (December 7, 2021)

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2021, a true and correct copy of the foregoing **Petition of Herring Networks, Inc., d/b/a One America News Network, and Chanel Rion for Rule to Show Cause Pursuant to C.A.R. 21** was electronically served via the Integrated Colorado Courts E-Filing System (ICCES), which will send an electronic copy of this filing to all counsel of record for the parties below and to the district court.

Duly authorized signature on file in the offices of Richard A. Westfall

By: /s/ Richard A. Westfall