Ex. 1

OAN's Opening Letter Brief

Jackson Walker LLP

Charles L. Babcock
(713) 752-4210 (Direct Dial)
(713) 308-4110 (Direct Fax)
cbabcock@jw.com

September 16, 2024

The Honorable Moxila A. Upadhyaya
U.S. District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW
Washington, D.C. 20001

Re: Protective Order Concerning Deposition of Robert Herring, Sr. in *US Dominion, Inc., et al. v. Herring Networks Inc., et al.*, No. 1:21-cv-2130-CJN-MAU (D.D.C.)

Dear Judge Upadhyaya:

Federal Rule of Civil Procedure 26(c) authorizes you to forbid the deposition of a party–defendant where, as here, the witness has a "medical condition and diagnosis of Alzheimer's disease." *Smith v. Yeager*, 322 F.R.D. 96, 98–101 (D.D.C. 2017) (denying relief but contrasting with *Hometown Folks*, *infra*, where relief was granted). The rule requires the movant to demonstrate good cause "in light of the relevant facts and circumstances of [the] particular case." *Id.* at 99.

The movants have shown good cause based upon the attached Declaration of Bobby Herring, Jr. (Ex. D)[1] and the findings and opinions of (i) Dr. Daniel A. Martell, a fellow of the National Academy of Neuropsychology (Ex. A); (ii) Dr. R. Ryan Darby, MD, an assistant professor of Neurology at the Vanderbilt University Medical Center (Ex. B); and (iii) Dr. Park Dietz, MD, MPH, PhD, a Diplomat to the American Board of Psychiatry and Neurology (Ex. C)—all of whom have reviewed Mr. Herring's medical records and examined him. They agree that [redacted] Ex. C at 11. Dr. Dietz states, in concurring with Drs. Martell and Darby:

[redacted]

[1] Coincidentally Bobby Herring was in the middle of his deposition on September 12, 2024, when the attorneys (Ross and Babcock) broke to attend the hearing which has resulted in this letter.

[redacted]

Id.

Dr. Martell adds that Mr. Herring's [redacted] Ex. A at 11. Bobby Herring states that his father [redacted] Ex. D at ¶¶ 3–5.

This clear and unrebutted evidence demonstrates that Mr. Herring Sr. should be protected from the deposition process and is incompetent to testify under Federal Rule of Evidence 601 which provides that "[e]very person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision." Here, Plaintiffs have alleged a single count of defamation under state law.

In the District of Columbia, "[i]n assessing the competency of a witness, a trial judge must evaluate the ability to accurately perceive, recall, and relate purported facts, as well as testify truthfully." *Vereen v. United States*, 587 A.2d 456, 457 (D.C. 1991), citing *Hilton v. United States*, 435 A.2d 383, 387 (D.C. 1981) ("Competency depends upon the witness' capacity to observe, remember, and narrate as well as an understanding of the duty to tell the truth").[2]

The relief requested here was granted in *Hometown Folks, LLC v. S & B Wilson, Inc.*, No. 1:06-CV-81, 2007 WL 2227817 (E.D. Tenn. July 31, 2007), *objections overruled*, No. 1:06-cv-81, 2007 WL 3132609 (Oct. 18, 2007). The plaintiff there moved to compel an 83-year-old defendant suffering from dementia to respond to discovery. *Id.* at *1. The court denied the plaintiff's request and instead entered a protective order in the defendant's favor. *Id.* at *9.

Respectfully submitted,

Charles L. Babcock

CLB:wmb

[2] The law is the same in California, where Mr. Herring, Sr. resides. *See* Cal. Evid. Code § 701(a) ("A person is disqualified to be a witness if he or she is . . . [i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or . . . [i]ncapable of understanding the duty of a witness to tell the truth.").

Attachments

cc: William Haggerty (Ford, Walker, Haggerty & Behar LLP)
Jonathan J. Ross (Susman Godfrey LLP)
Davida Brook (Susman Godfrey LLP)
Stephen Shackelford (Susman Godfrey LLP)

Ex. 2

Dominion's Response Letter Brief

SUSMAN GODFREY L.L.P.
A REGISTERED LIMITED LIABILITY PARTNERSHIP
SUITE 5100
1000 LOUISIANA STREET
HOUSTON, TEXAS 77002-5096
(713) 651-9366
FAX (713) 654-6666
WWW.SUSMANGODFREY.COM

SUITE 1400
1900 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067-6029
(310) 789-3100

SUITE 3000
401 UNION STREET
SEATTLE, WASHINGTON 98101-2683
(206) 516-3880

ONE MANHATTAN WEST
NEW YORK, NEW YORK 10001-8602
(212) 336-8330

JONATHAN J. ROSS
DIRECT DIAL (713) 653-7813

E-MAIL JROSS@SUSMANGODFREY.COM

September 20, 2024

Dear Judge Upadhyaya,

The Court should deny OAN's request for a protective order prohibiting Dominion from taking the deposition of named defendant and OAN CEO Robert Herring, Sr. OAN has failed to meet its burden under Federal Rule of Civil Procedure 26(c) to show good cause that the protective order they seek is necessary or appropriate under the circumstances.

OAN asserts that Mr. Herring should not be required to sit for a deposition because he suffers from dementia. OAN is wrong on the facts and the law. Factually, even the doctors OAN has retained disagree as to the severity of Mr. Herring's condition. *Compare* [redacted] These opinions are given despite Dr. Dietz' factual finding that Mr. Herring [redacted]

Despite these differences, all these paid-for opinions assert that Mr. Herring [redacted] Crucially, none of the doctors OAN has retained to evaluate Mr. Herring have suggested that he will be placed at risk of harm by testifying at his deposition, the exact issue that the governing law requires to prohibit a properly noticed deposition, as explained below. Indeed, Mr. Herring [redacted]

Mr. Herring is a witness with unique and important information relevant to the cases against himself and his company; OAN does not contest this. Discovery to date has confirmed Mr. Herring's close involvement with the conduct for which Dominion sued him and his network. Dominion is "entitled to depose [him] to see if [he] recalls any relevant information, which . . . is the essential purpose of a deposition." *Smith v. Yeager*, 322 F.R.D. 96, 102 (D.D.C. 2017).

A complete prohibition of a deposition is "an extraordinary measure which should be resorted to only in rare occasions." *Jennings v. Family Mgmt.*, 201 F.R.D. 272, 275 (D.D.C. 2001) (internal quotation omitted). A party seeking this remedy bears "a heavy burden" to show that such extreme relief should be granted. *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998) (internal citation omitted). *See also Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1988) ("Absent a

strong showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition.").

Courts do not generally find a diagnosis of dementia, Alzheimer's, or other condition affecting the deponent's memory to be a basis to bar a deposition. For example, in *Jennings v. Family Management*, the Court denied a protective order sought on the basis that plaintiff suffers from dementia and depression. 201 F.R.D. 272, 276 (D.D.C. 2001). This Court denied a similar request in *Smith v. Yeager*, in which the plaintiff assertedly suffered from Alzheimer's disease. 322 F.R.D. 96, 99 (D.D.C. 2017). *See also Hardy v. UPS Ground Freight, Inc.*, No. CV 3:17-30162-MGM, 2019 WL 13144825, at *4 (D. Mass. Oct. 7, 2019) ("Except in extreme cases, courts generally have rejected the contention that a deponent's unreliable memory resulting from an impairment is a basis on which to prohibit a deposition."); *Bellin v. LA Pensee Condo. Ass'n, Inc.*, No. 05-80071-CIV, 2006 WL 8433609, at *3 (S.D. Fla. Feb. 22, 2006) (denying motion for protective order based on deponent's diagnosis of dementia, when there was no suggestion that a deposition would cause harm); *Rekor Sys. Inc. v. Loughlin*, No. 19-cv-7767, 2022 WL 488941, at *2 (S.D.N.Y. Feb. 17, 2022) (denying protective order where neurologist stated deponent suffers from Alzheimer's disease and "would likely become agitated and in emotional distress" at a deposition); *Qube Films Ltd. v. Padell*, No. 13-cv-8405, 2015 WL 109628, at *3 (S.D.N.Y. Jan. 5, 2015) (denying protective order where defendant submitted two doctors reports diagnosing Parkinson's disease and dementia, but where "neither report indicates whether [defendant] will suffer harm from the taking of his deposition, much less what that harm would be.").

Instead, the primary basis upon which courts grant protective orders is when the taking of a deposition creates a serious threat of harm to the deponent's life or health. *See, e.g.*, *In Re McCorhill Publishing, Inc.*, 91 Bankr. 223 (Bankr. S.D.N.Y. 1988) ("Dr. Athos testified that during such a deposition Mr. Kraus' borderline compensation may be catapulted into heart failure as a result of the pain and aggravated state which Mr. Kraus achieves when he cannot remember incidents in his life."); *Doolittle v. Bloomberg L.P.*, No. 22-cv-09136 2024, 2024 WL 1994668, at *2 (S.D.N.Y. May 6, 2024) (granting a temporary protective order where doctor asserted that "the stress of a deposition . . . would likely result in severe health complications" for the deponent).

The cases upon which OAN relies do not suggest otherwise. OAN relies heavily upon *Hometown Folks, LLC v. S & B Wilson, Inc.* No. 1:06-CV-81, 2007 WL 2227817 (E.D. Tenn. July 31, 2007), *objections overruled*, No. 1:06-cv-81, 2007 WL 3132609 (Oct. 18, 2007). However, in addition to suffering from dementia, the defendant in that case also suffered from "labile hypertension." *Id.* at *1. His doctor testified that defendant's high blood pressure is so unstable that even mild stress could cause loss of vision, stroke, and congestive heart failure, and opined that the stress of responding to discovery requests could trigger these symptoms. *Id.* at *5. No such facts exist in Mr. Herring's case. And in *Smith v. Yaeger*, discussed above, the Court denied a protective order on facts similar to those at issue here. 322 F.R.D at 99.[1]

Because there is no evidence that sitting for deposition could cause Mr. Herring serious harm, the issues OAN raises go to weight and credibility, to be determined after the deposition takes place. This Court should order that Mr. Herring's deposition may proceed.[2]

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[1] Other cases cited by OAN are inapposite. *See Vereen v. United States*, 587 A.2d 456, 458 (D.C. 1991) (overturning robbery conviction when defendant was not permitted to introduce expert testimony to impeach the credibility of a witness diagnosed with schizophrenia); *Hilton v. United States*, 435 A.2d 383, 387 (D.C. 1981) (affirming conviction after defense moved for competency exam of witness, claiming she appeared to be under the influence of drugs).

[2] As counsel noted during oral argument, Dominion is willing to implement reasonable accommodations for Mr. Herring's deposition.

Sincerely,

Jonathan J. Ross

Jonathan J. Ross

Ex. 3

OAN's Reply Letter Brief

Jackson Walker LLP

Charles L. Babcock
(713) 752-4210 (Direct Dial)
(713) 308-4110 (Direct Fax)
cbabcock@jw.com

September 19, 2024

Dear Judge Upadhyaya:

Mr. Herring has [redacted] is not competent to testify. Plaintiffs offer no proof, only argument, to the contrary. Plaintiffs' best cases are distinguishable on the volume and specificity of Mr. Herring's medical reports. In *Smith v. Yeager*, for instance, the movant "largely rel[ied] on [her] medical condition being well documented to the public through numerous national news agencies and her book detailing her struggles." 322 F.R.D. at 99 (cleaned up). But here we have the unrebutted reports of three experts who reviewed Mr. Herring's medical records, examined and tested him, and interviewed witnesses. Each expert independently concluded that Mr. Herring [redacted].[1]

The harm Mr. Herring will face if required to testify is real. [redacted]

A deposition would also harm Mr. Herring by [redacted]

The *Hometown* court observed that "requiring an 83 year-old man with severe dementia and labile hypertension to be subjected *to even a scintilla of stress* in order to personally respond under oath to *interrogatories* where no likely benefit exists" justifies a protective order. 2007 WL 2227817, at *8 (emphasis added). Here, the stress is greater because "depositions often can become tense and even hostile as one party is interrogated by the opposing party's attorney." *Id.* at *7. So the same health concerns that were present in *Hometown* weigh even more heavily for Mr. Herring. *See also, e.g.*, *Schiavone v. Ne. Utilities Serv. Co.*, No. 3:08-cv-429, 2010 WL 382537, at *2–3 (D. Conn. Jan. 27, 2010) (quashing deposition subpoena where 84–year–old witness suffered from dementia and memory loss, and deposition would "emotionally overwhelm and traumatize" him, endangering his health).

[1] Dominion's reference to Dr. Darby's diagnosis of [redacted]

Respectfully submitted,

/s/ Charles L. Babcock

Charles L. Babcock

CLB:wmb

cc: William Haggerty (Ford, Walker, Haggerty & Behar LLP)
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