

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 Civil Action No. 22-cv-01129

4 ERIC COOMER,

5 Plaintiff,

6 vs.

7 MICHAEL J. LINDELL, et al.,

8 Defendants.

9 -----

10 REPORTER'S TRANSCRIPT

11 Jury Trial, Vol. VIII

12 -----

13 Proceedings before the HONORABLE NINA Y. WANG, District
14 Judge, United States District Court for the District of
15 Colorado, commencing on the 11th day of June, 2025, in
Courtroom A902, United States Courthouse, Denver, Colorado.

16 APPEARANCES

17 For the Plaintiff:

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22 For the Defendants:

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1 P R O C E E D I N G S

2 (Proceedings commenced at 8:53 a.m.)

3 THE COURT: We are on the record in 22-cv-01129,
4 Coomer v. Lindell, et al.

5 Can I have appearances of counsel and introduce anyone
6 who is at the table.

7 MR. CAIN: Good morning. Plaintiff is represented by
8 myself, Charlie Cain, Brad Kloewer, Dr. Coomer is here, David
9 Beller is here and Ashley Morgan is here.

10 THE COURT: Good morning.

11 MR. KACHOUROFF: Good morning. Chris Kachouroff, Mike
12 Lindell is here, I have with me James Duane and Jennifer
13 DeMaster.

14 THE COURT: I understand from Ms. DeMaster's email
15 from last evening that there are some issues that need to be
16 discussed; is that right?

17 MS. DEMASTER: Yes, your Honor.

18 THE COURT: The first one seems to be the video clips.
19 And so let me understand what the situation is with respect to
20 the compliance with the Court's minute order of last evening
21 with respect to the video clips?

22 MS. DEMASTER: Yes. So when we provided -- when we
23 said to the Court it would take maybe a few hours, that was in
24 consideration of the clips that we had already clipped to
25 provide those. But to comply with the Court's order, we have

1 to re-clip and we want to make sure full compliance, so we
2 don't want to rush it. Our team, we have one tech that is out
3 of state and is remote and is working on those, maybe one or
4 two are done. But we still need a little more time. Our
5 estimate is maybe after lunch, early afternoon. All we were
6 asking, to make sure everything is right and complies with the
7 Court's order, including limiting down certain clips, that we
8 be allowed to conduct our redirect within the scope of recross
9 of Mr. Lindell a little later. This time we did confer --

10 THE COURT: Does someone have their phone on near a
11 microphone because it's creating feedback?

12 Just make sure, if you have your phones on, not to
13 have it near a microphone. It will create feedback, and it
14 makes it more difficult for the court reporter to hear.

15 I apologize for interrupting you, Ms. DeMaster.

16 MS. DEMASTER: That was it. We just are requesting to
17 conduct our redirect that will be no more than 15, 20 minutes
18 either in our case-in-chief or when Plaintiff is done with
19 theirs. There's not many witnesses left for the Plaintiff's
20 side. If we could move along with that, we'll be done by early
21 afternoon, so if we're able to get through with the Plaintiff's
22 remaining witnesses today, we can either do this in the
23 afternoon, we'll be ready by then, or by tomorrow morning.

24 We just want the chance to make sure we comply with
25 the Court's order by clipping down some of the other clips and

1 to provide them to counsel and the Court to make sure this is
2 fully compliant.

3 THE COURT: Don't you just have to clip from clips you
4 clipped? Doesn't your tech person just have to clip from those
5 clips?

6 MS. DEMASTER: Yes. But some of them are extracted
7 from that to make new clips. They can't be shown in certain
8 testimony. So those were the other two. I don't know how it
9 goes, I just saw that lunchtime was about the --

10 MR. KACHOUROFF: We'll push him.

11 THE COURT: Let me hear from Plaintiff's counsel.

12 MR. CAIN: Your Honor, we object. For the sake of
13 comity, we accommodated this situation yesterday. My concern
14 is we have a right to put on our case as we see fit.
15 Mr. Lindell has shown a habit on the stand of commenting on
16 matters that aren't within the scope of questions. He's now
17 seeing testimony of Mr. Ruddy. And my concern is that he's
18 going to come up and comment on testimony that otherwise would
19 have been presented as we saw fit in our case, and that's
20 concerning. So I think it's prejudicial to us.

21 THE COURT: So Mr. Cain, can't I just remedy that by
22 giving you an opportunity to cross-examine Mr. Lindell after --
23 I wouldn't ordinarily give you an opportunity to recross
24 Mr. Lindell, but given the technical difficulties -- the only
25 other thing I can think of is if your technical person can play

1 the clips, then we could do it that way.

2 MR. CAIN: I haven't asked.

3 THE COURT: Hank.

4 MR. CAIN: May I.

5 THE COURT: Yes. Mr. Kachouroff.

6 MR. KACHOUROFF: Just pointing out that we actually do
7 have a case-in-chief at some point. We could present it,
8 having him as a last witness is not a big deal. I think they
9 can also cross him, like you said.

10 THE COURT: Typically, what we would do is have the
11 witnesses appear once. I mean, that's what I'm trying to get
12 to so we don't have people up and down. It would be
13 extraordinary if I had you all recall a witness that has
14 already been through so much testimony.

15 MR. KACHOUROFF: The prejudice the Plaintiff complains
16 about, we have been prejudiced from the get go because we don't
17 get to present a case as we see fit. So we're often behind the
18 8 ball because we don't know who the witnesses are, we start to
19 see their case unfold, I don't have the opportunity, so I see
20 the objection as a bit hollow.

21 THE COURT: Thank you, Mr. Kachouroff.

22 MR. CAIN: Did he say he doesn't know who our
23 witnesses are? We provided a list.

24 THE COURT: He is gently complaining that my
25 procedures require you all to put on witnesses in one fell

1 swoop, and so what he is suggesting is that he has also not
2 been able to present his case in the order in which he might
3 otherwise prefer if I allowed the parties to put people on
4 multiple times and call them back multiple times.

5 Am I capturing your gentle complaint?

6 MR. KACHOUROFF: You are, your Honor.

7 THE COURT: Mr. Cain.

8 MR. CAIN: With all of that considered and in speaking
9 with Hank, I want them to present their evidence as they see
10 fit, in terms of cutting their clips. I don't want to be
11 responsible for that.

12 THE COURT: So can we have some -- go ahead, Mr. Cain.

13 MR. CAIN: And so, yes, to move it along, with the
14 understanding that I might get some latitude with Mr. Lindell,
15 if necessary.

16 THE COURT: You will get a little bit of latitude with
17 Mr. Lindell with his additional testimony from today. But let
18 me be very clear, I do not want any of the parties to retread
19 repeatedly what we have already tread before.

20 So does that resolve it? We should just anticipate
21 that we will present that evidence and be ready to present it
22 after lunch; correct?

23 MR. CAIN: Yes, your Honor.

24 MR. KACHOUROFF: Yes.

25 MR. DUANE: No more gentle complaints.

1 THE COURT: I think that's fairly unlikely, Mr. Duane.

2 So the next thing on the email were objections to
3 the -- what I assume are demonstrative exhibits that Plaintiff
4 proposes using with the expert, their expert; is that right?

5 MR. KACHOUROFF: I'm going to link up with them before
6 lunch or at lunch or Ms. Morgan specifically to show them what
7 I'm concerned about.

8 THE COURT: All right.

9 MR. KACHOUROFF: But ultimately, the Court has stated
10 over and over that it wants evidence in that's relevant to show
11 both the general election and against -- I took it as a
12 conjunctive, in the context of Mr. Coomer and the defamation
13 alleged by him, so that's the link. And so a lot of this stuff
14 that we're seeing now is divorced from that concept of being
15 relevant to the defamation allegations themselves.

16 THE COURT: So let me give your all some clarity,
17 because I think that it might be helpful for me to give you the
18 parameters of what I have been thinking with respect to the
19 admissibility of evidence, and that might help you all guide
20 your discussions.

21 The Plaintiff in this case bears the burden of proving
22 falsity of the statements in order to prove defamation and that
23 the statements were published by one or more of the people that
24 are defendants and those statements include, but are not
25 limited to, the one that we have talked about over and over,

1 Don't worry about the election, Trump is not going to win, I
2 made F'ing sure of it, on the purported Antifa call.

3 The next allegation is of a defamatory statement and
4 includes, It's over for Dominion, it's not too late to close
5 the gate, cows are out of the barn, Dominion did their best and
6 Smartmatic to take over through China, you did your best, you
7 try to corrupt people, you tried to suppress and you did it but
8 you failed. And I'm telling you, you Coomers of the world --
9 what's his name -- yeah, Eric Coomer, if I'm you right now,
10 instead of going over and making deals at Newsmax, if I'm you,
11 I'm turning myself in and turning in the whole operation to
12 maybe, just maybe that you get immunity, and so that you -- and
13 you are disgusting, you are treasonous, you are a traitor to
14 the eyes of America.

15 There are additional statements that were purportedly
16 published by Defendants where people repeat the statement
17 attributed to Dr. Coomer. And then there are also statements,
18 for instance, All right, you've got a couple hitmen who are
19 pulling triggers, the first general, if you know, is John
20 Poulos, who is the CEO of Dominion, and he gave those remarks
21 under oath. And then, Eric Coomer who holds the patent for the
22 future known as adjudication, which is one of their tools in
23 their tool chest to murder the American people's vote. And
24 then there is a repeat of the allegation with respect to the
25 Antifa call.

1 Then there is the statement, So everyone, if you just
2 want to know how corrupt the corruption we are up against, Eric
3 Coomer served, had the papers served to me before I was going
4 on stage at the capitol. I have never talked about Eric
5 Coomer. Apparently, he's the president of Dominion, the
6 criminal crime family here in Denver, who knows what he did
7 there, but anyway, he served papers, everybody, he sues, get
8 this, Mike Lindell, Frankspeech and My Pillow. Eric Coomer,
9 you are a criminal. Eric Coomer, your lawyers better look out.
10 You have been part of the biggest crime this world has ever
11 seen. Eric Coomer, you have even said what you did or what you
12 are going to do. You are disgusting, you are evil, you belong
13 behind bars. We will not stop until you are behind bars. We
14 are going to melt down your little machines and you are going
15 to hang behind your prison bars. Should have thought about
16 that, Eric Coomer, before you did crimes against the United
17 States. And quite frankly, it is disgusting what you have
18 done.

19 In order for the Plaintiff to attempt to carry his
20 burden to prove falsity, this court has allowed the Plaintiff
21 to present admissible evidence about voting systems, how they
22 operate and whether they are susceptible to the actions by
23 Dr. Coomer or Dominion Voting Systems to make F'ing sure that
24 Trump is not going to win, that is to alter to make sure that
25 President Trump did not win the 2020 election.

1 In addition, the Court permitted Mr. Crane to testify
2 about the 2020 election, insofar as it gave context for the
3 core of his testimony, that is the impact of the alleged
4 defamatory statements on Dr. Coomer and for the purposes of
5 exemplary damages on others in the election space.

6 Defendants' burden to prove their defense of truth,
7 however, to prove truth, the Defendants need to prove that
8 Dr. Coomer stated on the Antifa call that he made F'ing sure
9 that Trump is not going to win and that Dominion and Dr. Coomer
10 took the country through China and they did make sure that
11 Trump wasn't going to win by manipulating the Dominion voting
12 machines. To the extent that Defendants wished or wish to
13 present evidence that Dominion voting machines were used by
14 Dr. Coomer or others to steal or interfere with the 2020
15 election, that evidence remains relevant and admissible subject
16 to other rules of evidence, including Rule 403.

17 What is not relevant or probative or is outweighed by
18 the prejudicial impact is that there was some other election
19 fraud outside of Dominion and Dr. Coomer with respect to the
20 specific alleged defamatory statements. Furthermore, the only
21 evidence that defendants acted with actual malice, i.e., stated
22 the falsity or they acted with reckless disregard of the truth,
23 pertained to the specific alleged defamatory statements, not
24 other claims of unrelated election fraud. I have given
25 Defendants some leeway to present admissible evidence about the

1 general atmosphere of the 2020 election, to test the
2 credibility of the witnesses and how they may have impacted
3 Defendant's belief.

4 Both Mr. Oltmann and Mr. Lindell repeatedly testified
5 they were not election experts, nor cyber experts, they were
6 not in the red room at the cyber symposium looking at the data
7 provided; therefore, they lacked foundation to testify to those
8 issues and rebut witnesses through their own testimony.

9 While I will permit evidence, some evidence that may
10 pertain, be probative of the Defendant's state of mind, I will
11 not permit Defendants to introduce evidence of unvetted
12 expert's testimony that purported to support or refute the
13 claims of election fraud at issue in this case.

14 The expert's qualifications are to be examined before
15 the expert's testimony is presented. I will not allow
16 Defendants to introduce backdoor testimony from purported
17 expert witnesses that they have chosen not to identify or
18 disclose pursuant to the Federal Rules of Civil Procedure or
19 call as witnesses in this case.

20 So I wanted to give you that contour that may help you
21 all discuss the objections or disputes with respect to the
22 proposed demonstrative exhibits, which I assume, Mr. Cain, if
23 you can confirm, you will not seek to admit as evidence in this
24 case.

25 MR. CAIN: I think that might be better directed to

1 Ms. Morgan, but yes.

2 THE COURT: Ms. Morgan, I assume that the slides --

3 MS. MORGAN: No, your Honor. And just for
4 clarification, I'm not sure I have whatever email you are
5 talking about, where you were discussing objections to the
6 demonstratives. If there's an email about that, I haven't seen
7 it.

8 MS. DEMASTER: It's similar to your objection about
9 the video clips. I'm not sure --

10 MS. MORGAN: Is there an email describing --

11 MS. DEMASTER: No, we had discussed it.

12 THE COURT: Anything else before we bring in the jury?

13 MR. KACHOUROFF: Yes, your Honor.

14 I do have objection to Dr. Bania's testimony, his
15 supplemental testimony. I would like to be heard for three
16 minutes on that.

17 THE COURT: All right.

18 MR. KACHOUROFF: Your Honor, Dr. Bania's testimony
19 should be excluded because it fails to satisfy the requirements
20 of Rule 702.

21 THE COURT: Before you start, I'm going to allow you
22 to argue this, but why was this not subject to a 702 motion
23 pursuant to the Court's deadlines?

24 MR. KACHOUROFF: Well, two things. Number one, I did
25 not receive a supplemental report. It went to my spam folder.

1 I did not know there was a supplemental report,

2 THE COURT: When did it go to your spam folder?

3 MR. KACHOUROFF: May of '24. Last night, David was
4 very kind to send it to me. I went back and checked my spam
5 folder, and indeed, I had received it from Scotty. So I
6 don't -- this was when I was newer into the case, your Honor,
7 trying to do a transition from prior counsel.

8 THE COURT: Okay, all right.

9 MR. KACHOUROFF: Nevertheless, his opinions are not
10 derived from the scientific method, and they are pure
11 conjecture. For example, he overstates the exposure.
12 Mr. Bania includes the entire cyber symposium view count, all
13 three days, 1.8 million views, even though Dr. Coomer is
14 mentioned only late on day three. Most of the content has
15 nothing to do with the Plaintiff, and this is not a dispute
16 about emphasis, it's a categorical objection. He adds all
17 three days to the total reach count as if the content, all of
18 it, were defamatory.
19 He lacks the data to support his estimate. There's no
20 linking to facts whatsoever. He didn't have access to the
21 platform level analytics, and therefore, could not isolate the
22 views of Coomer-specific content or irrelevant content, and
23 that's not sufficient facts or data under Rule 702(b).
24 But his damages model is the most difficult point
25 here. He proposes a \$2.6 million reputation repair plan

1 through Google ads. This isn't a measure of harm. It's a
2 theoretical remedy that all viewers believe the statements and
3 all viewers that ad clips would fix their beliefs. No court
4 has ever endorsed that model under Daubert. It presumes that
5 every viewer was misled and must be reeducated. It presumes
6 perfect click through effectiveness and no real world data on
7 actual harm or behavioral response.

8 His method is simply not reliable. No peer review, no
9 error rate, no acceptance in the relevant field. The analysis
10 is no more than a construct of litigation, not science.

11 Your Honor, under Rule 403, a jury could be misled
12 into believing that millions of people saw the defamatory
13 statements, when only a small subset did. The probative value
14 is low and the risk of unfair prejudice is extremely high.

15 And the bottom line here is Mr. Bania's reports rely
16 on overinclusive data, speculative assumptions and
17 methodologies that don't meet any accepted evidentiary
18 standards. They're prejudicial more than probative. Under
19 Daubert and Rule 702, they must be excluded.

20 Thank you, your Honor.

21 THE COURT: Mr. Beller.

22 MR. BELLER: Good morning, your Honor. I realize the
23 jury is waiting, I will be brief.

24 Your Honor, Mr. Bania's supplemental report was in
25 fact provided to Defendants over a year ago. In addition to

1 Mr. Kachouroff, it was also sent to Mr. Lindell's two prior
2 counsels. It was sent to Mr. Kachouroff's law partner. It was
3 also sent to My Pillow's in-house counsel who withdrew, I
4 believe, approximately two to three weeks ago.

5 In addition to all of that, your Honor, I also sent
6 our Rule 107 slides to the Defendants, I believe, early Monday
7 morning. So I'm a bit surprised to be hearing this at
8 approximately 8:40 this morning that there was now going to be
9 a challenge to Mr. Bania's report, in addition to, apparently,
10 his 107 slides reloaded to all of this. I believe the
11 opportunity to address this was, candidly, quite a long time
12 ago, when there was a challenge to or could have been a
13 challenge to the 702 experts, as there was to Dr. Halderman.

14 Your Honor, in terms of the defense having some select
15 objections, apparently, to some of Mr. Bania's reports, as we
16 know through the committee's notes on the application of the
17 rule, that goes to weight, not admissibility.

18 Mr. Kachouroff, obviously, has an opportunity to make
19 objections as Mr. Bania is in fact making his testimony, giving
20 his testimony. And ultimately, Mr. Bania will be subject to
21 cross-examination.

22 As to a few limited specifics, the Defendants refused
23 to give us any analytic reports, other than Exhibits 92 and
24 118. That was the only thing that the Defendants would agree
25 to produce. Mr. Bania, as stated in his supplemental report,

1 specifically says that he is unable to determine how many
2 people saw defamatory statements out of the 1.8 million who
3 actually viewed the cyber symposium on Frankspeech, that he is
4 unable to determine how many of those individuals may have been
5 duplicates. And for that reason, he is not taking those
6 numbers into account in determining the reach of any defamatory
7 statements as to Dr. Coomer. And so all of that is already
8 included in all of his reports. And excuse me, in the
9 supplemental report, it says that verbatim. And I imagine that
10 Mr. Bania is not going to be trying to speculate such that
11 Mr. Kachouroff's concerns are ripe at this point.

12 And so for that reason, I don't think that there's
13 anything specific for the Court to rule at this point. And to
14 the extent the defense has objections, their opportunity to
15 have made those has passed. And if there is something that is
16 going to be a violation of 702 or 703, they certainly have the
17 opportunity to make the objection contemporaneously when the
18 evidence is elicited.

19 THE COURT: Mr. Kachouroff.

20 MR. KACHOUROFF: Briefly, your Honor.

21 This idea about not objecting to exhibits, we gave
22 them the videos two weeks ago and yesterday we found out they
23 had objections, so this is going both ways. It's
24 understandable, we're all busy, we're waiting for trial.

25 In terms of this report, this is not purely goes to

1 weight, this is pure speculation. As your Honor knows, they
2 have admitted it, he's basing his ad clicks on what he
3 perceives to be the global viewership of this symposium.

4 THE COURT: Why does that not go to weight, not
5 admissibility?

6 MR. KACHOUROFF: Because under Daubert, this court's
7 function is to exclude evidence that is speculative and is not
8 reliable. That's an admission that it's not reliable.

9 He put in his reach estimates, what he thinks his
10 purported reach estimates are, but to a Google ad word, that
11 method of, quote, repair is suspect in and of itself and
12 unreliable. The idea of basing it on three days of a cyber
13 symposium, where he says there's 1.8 million views there and
14 100,000 views here and 100,000 views there, he doesn't know if
15 it's the defamatory content, but he seems to allude that it is,
16 in his report, that's pure speculation. That's exactly the
17 type of opinion the Courts exclude every day. It doesn't go to
18 weight is what I'm trying to say.

19 THE COURT: Why isn't this motion untimely, given the
20 Court's practice standards that is repeated in the standing
21 order with respect to trial and pretrial procedures that says,
22 unless otherwise ordered, all motions filed under Federal Rule
23 of Evidence 702 and any motion to strike an expert on the basis
24 of discovery violations shall be filed no later than 30 days
25 after the discovery deadline for disclosure of witnesses?

1 Defense counsel specifically filed a motion for me to
2 exclude the testimony of Dr. Halderman, that's Docket
3 Entry 188, that's in September of 2024. I know you received a
4 supplemental report in May of 2024, and an entire year has
5 lapsed before trial. It was also not raised in the context of
6 any motion in limine.

7 MR. KACHOUROFF: I couldn't have known about it before
8 the motion in limine side of things.

9 THE COURT: What about the other lawyers, Mr. Cynkar,
10 the in-house counsel?

11 MR. KACHOUROFF: Mr. Cynkar, I don't know that he got
12 it.

13 THE COURT: He's on the docket as counsel of record.

14 MR. KACHOUROFF: I understand that. But the email I
15 got was from counsel personally.

16 THE COURT: Right.

17 MR. KACHOUROFF: And he's referring to the two former
18 lawyers at Parker Daniels, whom I don't speak with that often.

19 THE COURT: No, I'm talking about My Pillow has two
20 in-house counsel who just withdrew from representation sometime
21 in May, I think.

22 MR. KACHOUROFF: I don't know that they received --
23 David, can you confirm? I didn't get any word from them.

24 You can just say yes.

25 THE COURT: Regardless of whether or not they received

1 them, they were sent them?

2 MR. KACHOUROFF: Correct.

3 THE COURT: And the fact that it got caught in your
4 spam folder for a year does not mean that they weren't properly
5 sent.

6 MR. KACHOUROFF: Judge, if we're going to be rule
7 based, the rules do require my consent to use email, rather
8 than hard copy, as the Court knows. I haven't -- I don't want
9 to get into the gotcha moment about rules. At the end of the
10 day, I'm not objecting to all of their evidence in Dr. Bania's
11 report.

12 I'm just saying that this idea of assigning paperclips
13 for these speculative views is improper and it's not something
14 I realized or could have realized until I started seeing the
15 evidence unfold. Because I did not realize that the alleged
16 defamation really only took place on one day, which would have
17 been the 12th of August in the afternoon.

18 So I just think it's a bit unfair -- the Court's duty
19 and role, I get it, this should have been raised earlier, but
20 at the end of the day, it's a small change to the exhibit. I
21 would ask the Court to exclude that mention of the ad clicks as
22 the, quote, repair program for Dr. Coomer's reputation.

23 THE COURT: I'll take this under advisement. I mean,
24 again, this is also the first time I'm hearing it. It's
25 incredibly inefficient, but I'll need to take some time to

1 evaluate it. I haven't even seen the supplemental report.

2 So does someone have a copy of the supplemental report
3 that I can review? I would prefer a clean one, if you have it.

4 MR. BELLER: If I may show defense counsel, briefly.

5 THE COURT: Can I hear from Plaintiff's counsel, is
6 there a way to also email this to chambers?

7 MR. BELLER: Yes, your Honor, I'm happy to.

8 THE COURT: And where does Mr. Bania fit in today with
9 respect to testimony?

10 MR. BELLER: Your Honor, our plan is that we have two
11 depositions, each one of them is going to take approximately
12 45 minutes.

13 THE COURT: Okay.

14 MR. BELLER: And then our plan is to call Mr. Bania
15 right after those two depositions are filed.

16 THE COURT: All right.

17 MR. BELLER: Your Honor, for the Court, ECF 297-1 also
18 discusses and identifies Mr. Bania, and that is on March the
19 17th, 2025 regarding the economic costs to repair Dr. Coomer's
20 reputation.

21 THE COURT: I'm sorry, the proposed final pretrial
22 order?

23 MR. BELLER: That's correct, your Honor, 297-1.

24 THE COURT: Well, it does identify Mr. Bania. It
25 doesn't identify this specific opinion that Defendants seem to

1 be challenging. We'll take this one under advisement.

2 Let's take a quick break. Madam Deputy, is our jury
3 ready to go?

4 THE DEPUTY CLERK: I'm not sure yet.

5 THE COURT: If you can check on that. And then we'll
6 take a look at this as well.

7 (Recess)

8 THE COURT: Pending before the Court is this objection
9 with respect to the supplemental report and opinions stated by
10 Doug Bania in his supplemental report.

11 Counsel concedes that this report was provided to him
12 through his email in May of 2024. And the Court's practice
13 standards provide that 702 motions need to be filed within
14 30 days of the rebuttal reports. Here, the rebuttal report
15 deadline was firm, and so by operation of the rule, the 702
16 motion should have been filed within 30 days of the May 15th,
17 2024 supplemental report.

18 However, this court has its own gatekeeping function
19 under Rule 702 and Daubert and its progeny. The Tenth Circuit
20 has noted that a district court can reject as untimely Daubert
21 motions raised late in the trial process and only in rare
22 instances will such tardy motions be permitted. However, in
23 this case, I can't -- because of the timing of how the report
24 was provided and this objection was raised, I can't really
25 evaluate whether or not I need to exercise my gatekeeping

1 functions with respect to the testimony until Mr. Bania
2 actually testifies and I can evaluate what foundation and what
3 basis or expertise he is relying upon in order to state these
4 various opinions.

5 One of the drawbacks of this being raised here is that
6 this court is not working from a full record, full briefing of
7 the parties, and there is no counterevidence of a rebuttal
8 expert or some other individual who can actually address for
9 the Court defense counsel's argument.

10 So I think what is most appropriate in this case, in
11 the Court's exercise of its gatekeeping functions, is to note
12 that it is untimely, but that it has been raised before
13 Mr. Bania's testimony and the Court will consider
14 contemporaneous objections at sidebar at the time so I can
15 evaluate Mr. Bania's testimony as a whole as it's coming in to
16 evaluate the appropriateness of the particular opinions that
17 the defense is now challenging.

18 MR. KACHOUROFF: Thank you, your Honor.

19 Our expert may be coming in -- I was looking for him
20 moments ago -- Peter Kent. I wanted to get permission for him
21 to watch Mr. Bania testify.

22 THE COURT: I thought that was already agreed to.
23 Mr. Beller.

24 MR. BELLER: It was agreed to, your Honor.

25 THE COURT: And you all emailed this to chambers;

1 correct?

2 MR. BELLER: We did.

3 THE COURT: Let me hand this back to you.

4 MR. BELLER: If I may approach, your Honor.

5 THE COURT: You may.

6 MR. BELLER: Thank you.

7 THE COURT: Thank you.

8 Are you all ready for the jury?

9 MR. KACHOUROFF: Yes, your Honor.

10 (Continued on next page)

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1 (In open court; jury present)

2 THE COURT: Mr. Cain or Ms. Morgan.

3 MS. MORGAN: Plaintiff calls Dennis Montgomery, who
4 will testify by video deposition. It should be about
5 45 minutes.

6 (Dennis Montgomery video deposition played)

7 THE COURT: Counsel, are you ready to call your next
8 witness?

9 MS. MORGAN: Yes, we are. The video deposition will
10 be about 45 minutes long, just wanted to let the Court know, in
11 case you wanted to take the morning break now.

12 THE COURT: I think we can proceed.

13 MS. MORGAN: Plaintiff calls Brannon Howse by video
14 deposition.

15 (Brannon Howse video deposition played)

16 MR. KLOEWER: Your Honor, one moment. We're checking
17 on the video. I apologize. We're okay. We thought there was
18 an error with the video. We can proceed.

19 (Brannon Howse video deposition played)

20 THE COURT: Ladies and gentlemen of the jury, let's
21 take our morning break for 15 minutes. Just be back here by
22 11:20. Don't talk to anyone or between yourselves about what
23 you've seen or heard today.

24 (Continued on next page)

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1 (In open court; jury not present)

2 THE COURT: Counsel, anything before we take a break?

3 MR. BELLER: Only to put the Court on notice that
4 Mr. Bania is the next witness.

5 THE COURT: All right. Anything for defense?

6 MR. KACHOUROFF: No, your Honor.

7 THE COURT: Thank you.

8 (Recess)

9 THE COURT: Counsel, I have a few things to go over
10 with you all. I think, during the examination of Mr. Howse on
11 the deposition, there was an exhibit that was shown in
12 conjunction with his testimony. I'm not exactly sure what
13 exhibit that corresponds to, in terms of the trial exhibits.
14 And so if you can identify that. And I'm also not sure that it
15 was formally admitted.

16 MS. DEMASTER: It's Exhibit 117.

17 THE COURT: Okay.

18 MR. KLOEWER: Let me confirm that. Yes, my co-counsel
19 is telling me that's right, your Honor.

20 THE COURT: So it hasn't been admitted, so are you
21 proffering its admission?

22 MR. KLOEWER: Your Honor, I apologize, my internet is
23 slow. Is it the LindellTV registration document?

24 MS. MORGAN: It's from their designation.

25 MR. KLOEWER: That was an email from Todd Carter

1 indicating that he was working with the Frankspeech website,
2 some information on the website, that was disclosed by the
3 Defendants, I believe it's an opposing party statement.

4 THE COURT: So are Defendants moving to admit it?

5 MR. KACHOUROFF: Relevance.

6 THE COURT: It's part of your designation.

7 MR. KACHOUROFF: Then we definitely stipulate to it.

8 THE COURT: Any objection?

9 MR. KLOEWER: We have no objection.

10 THE COURT: It's formally admitted.

11 (Defendant's Exhibit 117 received in evidence)

12 THE COURT: The second issue I wanted to address with
13 you all is the timing with respect to the remainder of the
14 testimony. As I understand it, Mr. Kachouroff, does the
15 Defendant have one or two live witnesses? Because it seems
16 like there's one will call and one may call on the remainder of
17 your supplemental witness list.

18 MR. KACHOUROFF: Two.

19 THE COURT: So both Jerry Bremer and Peter Kent.

20 MR. KACHOUROFF: I'm sorry, your Honor, just Peter
21 Kent. And I was counting Mr. Lindell.

22 THE COURT: So you anticipate Mr. Kent's testimony
23 taking about two hours?

24 MR. KACHOUROFF: Maybe an hour, to be honest with you.

25 THE COURT: So probably another hour with Mr. Lindell

1 with both the videos and the cross-examination; is that
2 accurate?

3 MS. DEMASTER: With Mr. Lindell?

4 THE COURT: Yes.

5 MS. DEMASTER: Yes. Yes, it would, your Honor.

6 THE COURT: So I'm just letting you all know this.
7 Typically, in our pretrial orders, we expressly divide the time
8 between the parties. That doesn't really make sense in this
9 case. And under Rule 611, I'm going to make an adjustment to
10 that because of the manner by which both Mr. Oltmann and
11 Mr. Lindell testified and the fact that the Court had to remind
12 both of them to respond to the actual question being asked and
13 their tendency when unchecked to offer additional testimony not
14 directly responsive.

15 But I think I also need to balance that with the fact
16 that I need to make sure that Defendants have a full
17 opportunity to put in their testimony, and I want to make sure
18 they're not prejudiced in terms of rushing that testimony to be
19 presented by Mr. Lindell and Mr. Kent. So to that end, unless
20 I hear differently from the parties about some other agreement
21 that you all reach, the Plaintiff has to conclude its case no
22 later than lunch tomorrow. That gives the Defendants an
23 opportunity to put on their testimony. Hopefully that gets us
24 to closing arguments on Friday morning, instead of Friday
25 afternoon with this jury, who has been sitting here for two

1 weeks.

2 I don't know how long it will take them to deliberate,
3 but I want to give them at least some opportunity to deliberate
4 before the weekend. Because once the weekend comes, then we
5 have to bring them all back. And I'm certain that some of them
6 have other obligations that they need to attend to next week.

7 Anything else before the next witness?

8 MR. BELLER: Not for the Plaintiff.

9 MS. DEMASTER: Point of clarification, your Honor.
10 Does that mean that we'll be able to call Mr. Lindell for our
11 final recross in our case-in-chief after they were done?

12 THE COURT: I thought you all were going to be ready
13 to do that this afternoon.

14 MS. DEMASTER: We are. I thought we were talking
15 about our case-in-chief.

16 THE COURT: I wanted to make sure you all had enough
17 time. So I anticipate Mr. Lindell today. And then I'm giving
18 Plaintiff fair warning that you all need to manage your time.

19 MR. BELLER: Understood.

20 THE COURT: Anything else before we bring the jury in?

21 MR. CAIN: No.

22 MR. DUANE: No, your Honor.

23 THE COURT: Madam Deputy.

24 (Continued on next page)

25

1 (In open court; jury present)

2 THE COURT: Counsel, are you ready to call your next
3 witness?

4 MR. BELLER: We are, your Honor. Thank you.

5 Plaintiff calls Doug Bania.

6 DOUG BANIA,

7 called as a witness by the Plaintiff,

8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BELLER:

11 Q. Good morning, Mr. Bania.

12 A. Good morning.

13 Q. Could you tell the jury what you do for work, please.

14 A. Yeah, so I own my own company. It's called Nevium. I'm
15 located in San Diego, California. And Nevium is an
16 intellectual property consulting firm.

17 Q. Mr. Bania, in preparation for your testimony to the jury
18 this morning, did you prepare a slide deck to assist in your
19 testimony?

20 A. Yes.

21 Q. And do you believe that that slide deck will assist the
22 jury in their comprehension or understanding of your testimony?

23 A. Yes.

24 MR. BELLER: Your Honor, at this time, I would move to
25 publish under Rule 107 the slide deck.

1 THE COURT: Any objection?

2 MR. KACHOUROFF: Can we see the slide deck first, and
3 then publish after we have seen it. There's been so many slide
4 decks going around, your Honor, I just want to see what's going
5 up.

6 THE COURT: We can take a brief pause.

7 Was it not the same slide deck that was presented to
8 the Court this morning?

9 MR. BELLER: I believe it's been provided to defense,
10 I believe, three times over the course of the last three days.

11 THE COURT: I think it's the one that you attached.

12 MR. BELLER: I'm happy to take it slide by slide, your
13 Honor.

14 THE COURT: All right.

15 MR. KACHOUROFF: Your Honor, I thought that was
16 Halderman's slides.

17 MR. BELLER: I'm happy to take it slide by slide, your
18 Honor, pursuant to Rule 107.

19 THE COURT: Yes.

20 MR. BELLER: Thank you.

21 If we can please publish Slide 2.

22 BY MR. BELLER:

23 Q. Mr. Bania, does this accurately depict and describe a
24 little of your biography?

25 A. Yes, it does.

1 MR. BELLER: Your Honor, at this time, I would move
2 for the publication of Slide 2 to the deck.

3 MR. KACHOUROFF: Without objection.

4 THE COURT: All right. Let's publish it.

5 MR. BELLER: Thank you.

6 BY MR. BELLER:

7 Q. Mr. Bania, would you explain to the jury what Nevium
8 intellectual property does?

9 A. Yes. So we value intellectual property. When I say
10 intellectual property, I'm talking about trademarks,
11 copyrights, patents, publicity rights. For various reasons,
12 mergers, acquisitions, tax reasons, you know, simple business
13 transactions. So beyond what an accountant does valuing a
14 business, we can let the client know what the value of the
15 business is, but what percent of that value is due to, say,
16 your trademark portfolio or copyrights or other IP assets.

17 Q. And does that also include, for example, the impact of
18 something that is posted online?

19 A. Yes. So we provide brand strategy services as well. So
20 typically, the client will come to us, hey, I want to make more
21 money on our brand, you know, how do we do that. So by using
22 the internet and social media, we're able to put programs
23 together for them to basically better monetize their brands.

24 Q. And as part of your work with Nevium, do you also sometimes
25 serve as an expert witness?

1 A. Yeah. So the second bucket of what Nevium does is we
2 provide litigation support, like we are today. So in cases,
3 trademark infringement, copyright infringement, defamation
4 cases, false endorsement, right of publicity cases, when
5 somebody might use a celebrity's name and likeness without
6 permission.

7 Q. In how many cases, Mr. Bania, have you been served as an
8 expert?

9 A. I have been named approximately 150 times.

10 Q. In the same areas that you have just described to the jury?

11 A. Yeah, yes, basically.

12 Q. And does that also sometimes include reputation and the
13 cost for repairing reputation?

14 A. Yeah, absolutely. If it's an individual, there's a
15 reputation. But I also think the company has a brand, there's
16 a reputation there as well. So it goes both with companies,
17 brands and individuals.

18 Q. Mr. Bania, do you also have a formal education, in addition
19 to the work that you've done?

20 A. Yeah, so I have a creative background educational-wise. I
21 have a bachelor's degree in cinema from San Francisco State
22 University. And then I have a master's degree in television,
23 film and media from San Diego State.

24 Q. Do you have any specific training or experience in the area
25 of defamation, internet and social media analytics?

1 A. So part of my master's degree was the new media aspect of
2 it. And that's where I learned about the internet -- this is
3 the late 90s, so before YouTube and the popularity of Google.
4 So that's where I got first introduced to internet analytics
5 and building, you know, films or websites for the internet. So
6 it was rather new. But that's where I, you know, cut my teeth
7 as it relates to internet analytics.

8 Q. And how about training, in terms of sort of publicity
9 disputes, do you have experience and/or education in that area?

10 A. As it relates to publicity disputes, actually, that was
11 more of a hands on training. One of the first cases I worked
12 on was dealing with a misuse of name and likeness in a right of
13 publicity case. So more of a hands on experience with
14 publicity cases.

15 THE COURT: Our court reporter needs to step out.

16 Ladies and gentlemen of the jury, we need to take a
17 break. I apologize for the interruption.

18 (Recess)

19 (Continued on next page)

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Bania - Direct

1 DEFENDANT EXHIBITS

2 Exhibit No. Received

3 1171333

4 INDEX OF EXAMINATION

5 Examination of: Page

6 DOUG BANIA

7 Direct By Mr. Beller1336

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I hereby certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes.

Sadie L. Herbert
Official Court Reporter
U.S. District Court