



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SMARTMATIC USA CORP.,
SMARTMATIC INTERNATIONAL
HOLDING B.V., and SGO
CORPORATION LIMITED

Plaintiffs,

v.

NEWSMAX MEDIA, INC.,

Defendant.

C.A. No. N21C-11-028-EMD

PUBLIC VERSION -
Filed: August 7, 2024

DEFENDANT'S MOTION FOR CONTEMPT

1. Defendant Newsmax Media, Inc. (“Newsmax”) hereby moves for an order holding Plaintiffs in civil contempt for misrepresenting Plaintiffs’ possession of a U.S. Department of Justice (“DOJ”) target letter (“Target Letter”) directed at [REDACTED], and deliberately withholding it in violation of the Special Master’s March 25, 2024 order requiring production of “Target letters” (Ex. A, Dkt. 693, the “March Order”).

2. Newsmax respectfully requests that the Special Master sanction Plaintiffs in the form of (i) an order giving Plaintiffs 24 hours to turn over the Target Letter and any other documents subject to the March Order; (ii) a *per diem* fine paid to the Court for each day Plaintiffs remain noncompliant; (iii) awarding Newsmax fees and costs for having to bring six motions (including this one) since March 2023 relating to DOJ information; (iv) awarding Newsmax fees and costs associated with Newsmax’s experts reviewing and incorporating withheld information into their analyses; (v) re-opening depositions of [REDACTED] and representative depositions of Plaintiffs under Rule 30(b)(6) concerning the Target Letter (and awarding Newsmax fees and costs associated with those depositions); and (vi) an instruction to the jury that it may infer from Plaintiffs’ withholding of the Target Letter that Plaintiffs or their personnel were likely to be indicted, thereby causing harm to Plaintiffs’ business not attributable to Newsmax.”

FACTS

3. [REDACTED] [REDACTED] in the Government's affidavit submitted in support of the criminal case *United States v. Bautista*, No. 1:23-mj-03829-LFL (S.D. Fla.), [REDACTED] [REDACTED] Ex. B, Oct. 23, 2023 Dep. Tr., at 504:15-23. The allegations have been widely reported. Ex. C, Def. Ex. 1716.

4. This is relevant because Plaintiffs allege that Newsmax caused Plaintiffs more than \$1 billion in damages by harming its reputation and ability to obtain future contracts. A critical defense to these allegations is that harm to Plaintiffs' future prospects has and will be caused by acts and events independent of Newsmax, including reports of the DOJ investigation into and the likelihood that Plaintiffs or their personnel will face public criminal charges.

5. Newsmax has been seeking information about the DOJ investigation for a long time. On [REDACTED], Newsmax asked [REDACTED] at his deposition:

[REDACTED]

Ex. B, at 431:5-9. Crucially, a target letter's existence means the DOJ determined that "substantial evidence" exists to indict [REDACTED] and he is a "putative defendant."¹

¹ DOJ, Justice Manual § 9-11.151 (defining "target"), available at <https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.151>.

6. In the nine months since that deposition, Plaintiffs have attempted to avoid providing information concerning the DOJ investigation by misleading both the Court and Newsmax, including by falsely representing to the Court that the DOJ was blocking this discovery. But the DOJ told Plaintiffs *in writing in August 2022* that Plaintiffs could disclose information about the DOJ investigation in civil litigation. Plaintiffs' misrepresentations are now subject to Newsmax's May 13, 2024 Motion for Sanctions currently pending before the Court. Dkt. No. 738.²

7. Plaintiffs' attempts to evade discovery led to the March 25, 2024 Order, which required production by "April 8, 2024" of "plea," "cooperation," and "deferred prosecution agreements, "including draft[s]," and "[a]ny communications relating to the investigation." The March Order expressly required production of "Target letters." The Special Master also ordered the reopening of depositions, including that of [REDACTED]. Despite the March Order, Plaintiffs did not produce the Target Letter, of which Newsmax and the Court were still unaware.

8. On July 9, 2024, while re-deposing [REDACTED], Newsmax discovered that

[REDACTED] testimony that [REDACTED]
[REDACTED] testified that, [REDACTED] [REDACTED]
[REDACTED]. Ex. D, Rough

² Plaintiffs' conduct is described in greater detail in Defendant's Opening Brief in Support of its Motion for Sanctions Against Plaintiffs. Dkt. No. 738. Newsmax respectfully requests that the Special Master consider this motion while ruling on Newsmax's Motion for Sanctions.

Dep. Tr., at 26:23–27:2; 27:9–23; 31:11–17. [REDACTED] received the Target Letter at [REDACTED]. *Id.* at 29:24–30:15. He provided it to his personal counsel, who, [REDACTED] believes, provided it to Plaintiffs’ criminal counsel. *Id.* at 32:11–21.

9. [REDACTED]

[REDACTED] c [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] *Id.* at 26–33; 133–144.

ARGUMENT

10. Superior Court Rule 37(b)(2) permits sanctions should a party “fail[] to obey an order to provide or permit discovery,” including “contempt of court.” The Court “has the inherent authority to impose either civil or criminal sanctions for contempt.” *In re Hurley*, 257 A.3d 1012, 1018 (Del. 2021). When “violation of a court order is the basis for contempt, the party to be sanctioned must be bound by the order, have clear notice of it, and nevertheless violate it in a meaningful way.” *TransPerfect Glob., Inc. v. Pincus*, 278 A.3d 630, 644 (Del. 2022).

11. Plaintiffs cannot dispute that they are bound by and had notice of the March Order, which was served on Plaintiffs through the Court’s electronic filing system. Newsmax also requested production of the Target Letter during [REDACTED]. Plaintiffs refused.

██████████ his counsel nevertheless refused to comply with the March Order. Plaintiffs non-compliance is thus purposeful and an attempt to prevent Newsmax from obtaining crucial discovery in time for trial.³

16. “Discovery abuse ‘has no place in [Delaware] courts, and the protection of litigants, the public, and the bar demands nothing less than that [Delaware] trial courts be diligent in promptly and effectively taking corrective action.’” *BDO USA, LLP v. EverGlade Glob., Inc.*, 2023 WL 1371097, at *13 (Del. Super. Ct. Jan. 31, 2023) (citation omitted). The Supreme Court has held that even dismissal is an appropriate “sanction for [Plaintiffs’] failure to provide discovery” pursuant to binding court orders. *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 714 (Del. 2008). By comparison, Newsmax’s requested remedies (listed *supra*)—amounting to (i) a fine; (ii) fee shifting; and (iii) adverse inferences⁴—are lenient and reasonable given Plaintiffs’ intentional, protracted, and continued obstruction, and are well within the Court’s powers.

CONCLUSION

The Court should therefore grant Newsmax’s Motion for Contempt.

³ On July 12, 2024, ruling that the Special Master should hear this motion first, the Court stated that it “understand[s] the timeliness argument” about prejudice to Newsmax. Dkt. No. 1076.

⁴ See, e.g., *New Castle Cnty. Bd. of Educ. v. New Castle Cnty. Educ. Ass’n*, 1978 WL 8417, at *1 (Del. Ch. Nov. 29, 1978) (\$6,000 daily fine); *Gandhi-Kapoor v. Hone Cap. LLC*, 305 A.3d 707, 713 (Del. Ch. 2023) (contemnor “must bear all of the expenses that [plaintiff] incurred pursuing her motion for contempt”); *EverGlade*, 2023 WL 1371097, at *14-16 (considering “lesser sanction of adverse inferences” but entering “ultimate sanction” of default judgment).

Dated: July 16, 2024

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CERTIFICATE OF SERVICE

I, Lauren Dunkle Fortunato, Esquire, hereby certify that on August 7, 2024, a copy of the foregoing document was served on counsel of record in this case, including the following counsel, in the manner indicated below:

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