



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: May 17, 2024

**DEFENDANT'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR
SANCTIONS AGAINST PLAINTIFFS**

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INTRODUCTION

For five months, Smartmatic misled the Court, the Special Master and Newsmax to believe that the United States Department of Justice (“DOJ”) was blocking critical discovery concerning the likelihood that Smartmatic and its executives may soon face serious, public, criminal bribery charges, an event Smartmatic admits would be devastating to the very future business prospects it claims as damages in this case.¹ As it turns out, Smartmatic—not the DOJ—was blocking this critical discovery. Smartmatic’s deceit included intentionally omitting a key part of a February 26, 2024 DOJ communication in a March 7, 2024 letter to the Court and during oral argument the next day. Four weeks later, Smartmatic was finally forced to admit to the Court that [REDACTED]

[REDACTED]

¹ A. Mugica Deposition Tr. (Jan. 12, 2024), (**Ex. 1**) at 90:3-19; 94:16-25; 111:19-112:15; 141:9-142:7; 179:20-180:17; R. A. Piñate Deposition Tr. (Oct. 23, 2023) (**Ex. 2**), at 433:8-479:18 (discussion regarding criminal investigation); 476:20-25 (“ [REDACTED] ”); R. A. Piñate Deposition Tr. (Sept. 15, 2023) (**Ex. 3**), at 297:2-298:6; 302:2-9; P. Neffenger Deposition Tr. (Oct. 18, 2023), (**Ex. 4**) at 57:3-7 (“Q: ... [REDACTED] ”).

[REDACTED]

[REDACTED]

On August 1, 2022, Smartmatic’s criminal counsel, Holland & Knight (“H&K”), asked the DOJ whether it could disclose to third parties, including litigants in pending civil actions, information related to an active investigation by the DOJ into Smartmatic. [REDACTED]

[REDACTED] (Emails between W. Ferrer and R. Emery et al. (August 2, 2022) at HK_SMT000001579 (emphasis added), **Ex. 5.**)

In January 2023, [REDACTED]

[REDACTED] Smartmatic embarked on a sixteen-month mission to suppress disclosure, first by disputing relevance, then by contending that the DOJ would not allow it.

- [REDACTED]
- [REDACTED] (Plaintiffs’ Responses and Objections to Newsmax’s Second Set of Requests for Production (Jan. 18, 2023) at Response to Request for Production No. 134, **Ex. 6.**)

- On March 16, 2023, Smartmatic claimed that “even if Smartmatic had been charged with an offense related to its procurement of a contract in the Philippines, Newsmax’s discovery requests would be improper.” (Plaintiffs’ Opp. to Defendant’s Mot. to Compel at ¶ 14 (D.I. 162).)
- On November 3, 2023, in briefing to the Special Master on Newsmax’s Sixth Motion to Compel, Smartmatic wrote: “[T]he Department of Justice has requested that Smartmatic maintain the confidentiality of those communications given the ongoing investigation.” (Plaintiffs’ Opp. to 6th Mot. to Compel at 7 n.2.)
- On November 13, 2023, in an email to the Special Master, Smartmatic wrote: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Emails between counsel (Nov. 10-14, 2023) at 2 (email from K. Harmon to Special Master), Ex. 7.)
- On November 14, 2023, in an email to the Special Master, Smartmatic wrote: [REDACTED]
[REDACTED]

[REDACTED] (Emails between counsel and Special Master (Nov. 10-15, 2023) at 5 (email from K. Harmon to Special Master), **Ex. 8.**)

- Also on November 14, 2023, in an email to the Special Master, Smartmatic wrote: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 5.)

- On November 15, 2023, during a hearing before the Special Master, Smartmatic argued: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Nov. 15, 2023

Discovery Hearing at 62:1-9 (J. Ward), **Ex. 9.**)

- Also on November 15, 2023, Smartmatic argued: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 65:7-10 (J. Ward).)

- Again, on November 15, 2023, Smartmatic argued: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 82:17-23

(J. Ward).)

- On February 1, 2024, in a hearing before the Court, Smartmatic argued:

[REDACTED]

[REDACTED]

[REDACTED] (February 1, 2024 Hearing on Notice of

Exceptions 38:15-19 (J. Ward), **Ex. 10.**)

- On March 7, 2024, in a letter to the Court, Smartmatic intentionally omitted the key portion of the February 26, 2024 DOJ Letter and wrote:

[REDACTED]

[REDACTED]

[REDACTED]

(Mar. 7, 2024 Smartmatic Letter to Court, **Ex. 31.**)

- On March 8, 2024, during a status hearing before the Court, Smartmatic explained (again intentionally omitting reference to the key portion of the February 26, 2024 DOJ Letter): “As I understand it, the requests for confidentiality has not been altered at all.” (Mar. 8, 2024 Status Conference at 31:9-11 (K. Harmon), **Ex. 11.**)
- Also on March 8, 2024, Smartmatic explained: “It does not change what we were told at the beginning of the investigation with respect to the confidentiality of anything that can be considered a criminal investigation by the DOJ. So from the Holland & Knight perspective, the letter didn’t change the original information.” (*Id.* at 50:17-51:1 (E. Connolly).) What Smartmatic concealed was that the letter expressly stated that: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (February 26, 2024 DOJ Letter, **Ex. 12.**)

Smartmatic suppressed the information because it knew that it would undermine Smartmatic’s already implausible damages claim against Newsmax. Smartmatic has conceded that the public reports of the DOJ Investigation (regardless of outcome) and the Philippines COMELEC resolution (regardless of outcome)

already caused it to lose out on business opportunities and caused reputational harm. Since it has lost those prospects for reasons wholly unrelated to Newsmax, Smartmatic cannot include them as damages against Newsmax and has accordingly removed at least the opportunities in the Philippines from its damages calculation. In suppressing information concerning the DOJ Investigation, Smartmatic withheld information about the probable future course of that investigation, and therefore its probable effect on Smartmatic's claimed damages in this action.

Based on Smartmatic's numerous misrepresentations, the Special Master and the Court were led to believe that the DOJ had instructed Smartmatic that it may not produce any information related to the DOJ Investigation, when the DOJ had in fact instructed precisely the opposite.

The falsity of Smartmatic's representations was only revealed in April 2024. The Court, the Special Master and Newsmax learned that Smartmatic had been permitted to disclose the information all along: This revelation came *after* the parties briefed four motions, submitted five letters to the Court, exchanged countless substantive emails with the Special Master, participated in weekly discovery status hearings in front of the Special Master, and presented at three hearings in front of the Court – all directed at obtaining discovery that Smartmatic had always been permitted to provide. Remarkably, Smartmatic maintains that it has done nothing wrong, that

even if the truth had come out originally, nothing would have changed (despite stating to the Court on November 15, 2023 that all confidentiality concerns would be resolved if the DOJ gave permission to Smartmatic to disclose the information).² Newsmax strongly disagrees.

Newsmax requests that the Court enter an order: (a) instructing the jury that it may infer from Smartmatic’s suppression of the DOJ-related information that Smartmatic was likely to be indicted and that the indictment would cause harm to Smartmatic’s business prospects not attributable to Newsmax (such as the one provided for in the Delaware Pattern Jury Instructions: “In your deliberations, if you conclude that [there is evidence that a party intentionally / recklessly suppressed or destroyed evidence], then you may conclude that the missing evidence would have been unfavorable to [that party]’s case.”)³; (b) awarding Newsmax its attorney’s fees and costs incurred in briefing and arguing five motions since March 2023 relating to this issue (including this Motion) and its fees and costs to be incurred in carrying out the requisite additional discovery; (c) awarding Newsmax its attorney’s fees and costs associated with Newsmax’s experts reviewing and incorporating the DOJ-related

² Nov. 15, 2023 Discovery Hearing at 52:20-53:2 (J. Ward).

³ Delaware Pattern Jury Instruction for Civil Practice 23.17.

information into their analyses; and (d) re-opening fact discovery for Newsmax concerning the DOJ-related information (and an adverse inference against Smartmatic if Newsmax is unable to obtain the discovery before trial as a result of Smartmatic's delay tactics). Anything less will reward Smartmatic for its discovery misconduct and severely prejudice Newsmax.

BACKGROUND

A. Smartmatic Requests Clarification from DOJ on Confidentiality of DOJ Investigation and Grand Jury Subpoena.

On November 3, 2021, Smartmatic filed a complaint against Newsmax alleging that purported defamatory statements by Newsmax caused more than \$1 billion in damage to Smartmatic's value by harming its reputation and ability to obtain future contracts. (Complaint (D.I. 1).) Smartmatic's alleged damages are forward looking, seeking to recover hundreds of millions in lost profits based on the loss of anticipated future opportunities.

A critical defense to these allegations is that harm to Smartmatic's future business prospects has and will be caused by acts and events independent of Newsmax: Principally, public reports of the DOJ's investigation into and the likelihood that Smartmatic or its personnel will face public criminal charges relating

to bribery of election officials in the Philippines and international money laundering (the “DOJ Investigation”).

Smartmatic admits that public reports of the DOJ Investigation have already harmed its business. [REDACTED]

[REDACTED].⁴

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Email from J. Mandolfo to W. Ferrer et al. (Jun. 24, 2022), **Ex. 13.**)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*See, e.g.*, Emails between DOJ and H&K (Aug. 1, 2023-Dec. 8, 2023), **Ex. 15.**)

⁴ P. Neffenger Deposition Tr. (Oct. 18, 2023) at 57:3-7 (“ [REDACTED] [REDACTED] ; R.A. Piñate Deposition Tr. (Sept. 14, 2023) (**Ex. 14**) at 76:4-77:12 (in responding [REDACTED] to question whether public reports that the [REDACTED]).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Emails between DOJ and H&K (Aug. 1-2, 2023) at HK_SMT00001580 (email from W. Ferrer to J. Mandolfo), **Ex. 16.**)


[REDACTED] (“August 2, 2022 DOJ

Letter”, **Ex. 17**) [REDACTED]


(“June 22, 2022 DOJ Letter”, **Ex. 18**) [REDACTED]

[REDACTED]

[REDACTED]



To avoid any confusion regarding Smartmatic’s specific inquiries related to disclosure to third parties, including in pending civil litigation discovery (such as this case), the DOJ expressly addressed Smartmatic’s questions in its cover email sending the August 2, 2022 DOJ Letter (*see* Ex. 16):



Smartmatic could not possibly have forgotten this communication because it was so obviously detrimental to its interests in this litigation.

B. Smartmatic Refuses to Comply with Newsmax’s Document Requests.

Newsmax served its Second Set of Requests for Production Directed to Plaintiffs (“Second Set of RFPs”) on December 2, 2022, requesting information relevant to Smartmatic’s more than \$1 billion damages claim. Primarily, Newsmax sought information supporting the position that Smartmatic’s reputation was significantly damaged by events independent of Newsmax’s alleged defamatory statements in 2020. For example, in 2022, publicly available articles revealed the

existence of the DOJ Investigation into Smartmatic’s involvement in alleged bribery of a Philippine election official in a scheme to obtain a contract for the country’s 2016 election.

Request for Production 134 (the “DOJ-related RFP”), in particular, targeted the DOJ Investigation and its future impact on Smartmatic’s reputation and the company’s market position relevant to any damages specifically attributable to Newsmax.

On January 18, 2023, Smartmatic objected to the DOJ-related RFP, refusing to produce any documents in response.⁵ Smartmatic’s refusal was primarily based on relevancy and did not include an objection based on confidentiality or any requests by the DOJ to keep information confidential.⁶

Faced with Smartmatic’s refusal to comply, Newsmax filed a motion to compel production of documents on March 3, 2023. (Defendant’s Motion to Compel Discovery (“March 3, 2023 Motion to Compel”) (D.I. 151).)

At argument of the March 3, 2023 Motion to Compel, Smartmatic rested its objections on lack of relevancy. Incredibly, Smartmatic wholesale denied that the

⁵ Plaintiffs’ Responses and Objections to Defendant Newsmax Media, Inc.’s Second Set of Requests for Production (Jan. 18, 2023), at Objection to RFP No. 134.

⁶ *Id.*

DOJ-related RFP sought relevant information. The requests, according to Smartmatic, were [REDACTED] and a [REDACTED] [REDACTED]

[REDACTED] (Mar. 22, 2023 Discovery Status Conference, at 169:4-8; 172:6-11 (M. Bloom), **Ex. 19.**)

The Special Master recognized that the information sought was relevant to Newsmax’s damages defense and granted, in part, the March 3, 2023 Motion to Compel, ordering production of internal Smartmatic communications and Smartmatic communications with third parties concerning reputational harm or harm to business operations related to the topics identified in the DOJ-related RFP. (Order of the Special Master (May 26, 2023) (“May 26, 2023 Order”), **Ex. 20.**) The May 26, 2023 Order constituted the first discovery order relevant to this Motion with which Smartmatic willfully refused (and refuses) to comply.

C. Smartmatic Willfully Refuses to Comply with the Special Master’s May 26, 2023 Order.

The DOJ Investigation against Smartmatic is critically relevant to this action. Smartmatic and its personnel face potential criminal liability, may be currently cooperating pursuant to a plea agreement, or have agreed to testify, all of which will become public and will be disastrous for Smartmatic’s business prospects.

Indictment and/or a judgment of guilt against Smartmatic or its personnel could lead to significant adverse consequences for Smartmatic. This includes making it either unlikely or impossible for Smartmatic to obtain the claimed opportunities on which it bases its damages and, in some circumstances, leading to mandatory debarment.⁷ Newsmax will have an argument that the damage to Smartmatic’s future business prospects was caused by an event independent to Newsmax’s 2020 alleged defamatory statements.

Between the May 26, 2023 Order and September 2023, Smartmatic did not produce any documents relating to the DOJ Investigation. In September 2023, the DOJ formally charged Juan Andres Donato Bautista, former Chairman of the Commission on Elections (“COMELEC”) in the Philippines, for violations of the Foreign Corrupt Practices Act (“FCPA”), including participation in the Philippines Bribery scheme and related money laundering. (Complaint, *United States v. Bautista*, No. 1:23-mj-03829 (S.D. Fla.), **Ex. 21**.) The DOJ submitted, with the complaint, a twenty-eight-page affidavit setting forth the grounds supporting the formal charges (the “Bautista Affidavit”, *see id.*). The complaint and Bautista Affidavit were initially filed under seal and are now public.

⁷ *See, e.g.*, R. Burton Expert Report (Nov. 30, 2023) at ¶¶ 60-77, **Ex. 22**.

The September 2023 Bautista Affidavit implicates Smartmatic personnel as co-conspirators in the violations of the FCPA. The Bautista Affidavit describes four co-conspirators who used overseas bank accounts to bribe Mr. Bautista “in exchange for using his position as Chairman of COMELEC to assist [Smartmatic and its affiliates], and others to obtain and retain business and improper advantages, including payments from COMELEC” for election contracts for the 2016 Philippines elections. (Bautista Affidavit, ¶¶ 36-37.)

At that point, Smartmatic had not disclosed the Grand Jury Subpoena to Newsmax, even though Newsmax’s discovery requests were directed precisely at that issue.⁸ However, a review of the Bautista Affidavit and public articles and information supported a reasonable belief that Smartmatic was involved and connected to the Bautista action and larger DOJ Investigation.

Within 10 days of the filing of the Bautista Affidavit, Newsmax requested that Smartmatic comply with the May 26, 2023 Order, specifically relating to these factual developments.⁹ Newsmax requested production of (a) all documents related to or

⁸ Newsmax did not learn of the Grand Jury Subpoena until Smartmatic raised it during briefing on the Sixth Motion to Compel.

⁹ Parties have a continuing obligation to update discovery. *See* Mar. 8, 2024 Status Conference at 47:15-50:1; 51:23-52:14.

constituting press or other public coverage of the charges against Mr. Bautista and (b) all communications either between Smartmatic and any customer or potential customer or internal to Smartmatic discussing the Bautista Affidavit. (Email from J. Cacace to K. Harmon et al. (Sept. 29, 2023), **Ex. 23.**)

Smartmatic failed to respond to the request to supplement. On October 2, 2023, Newsmax renewed its request, offering additional factual support for why the information was relevant: “The affidavit alleges that, motivated by . . . financial desperation, the companies (i.e. Smartmatic) bribed Bautista in order to win contracts and obtain earn-outs for the 2016 Philippines elections, and structured transactions to conceal this corrupt activity.” (Email from J. Cacace to K. Harmon et al. (Oct. 2, 2023), **Ex. 24.**)

Still, Smartmatic refused to produce the information, taking the position that it “will need to be brief.”¹⁰ Smartmatic would not even confirm whether the co-conspirators include Smartmatic personnel (a key fact). Smartmatic’s willful choice to not comply with the May 26, 2023 Order by refusing to produce DOJ-related information forced Newsmax to file *another* motion to compel.

¹⁰ See Email from K. Harmon to J. Cacace (Oct. 10, 2023), **Ex. 25.**

Between September 14, 2023 and November 20, 2023, Newsmax deposed several Smartmatic individuals with knowledge relevant to the DOJ Investigation and the Bautista Affidavit including: Roger A. Piñate, Peter Neffenger and Antonio Mugica. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In light of Smartmatic’s continued willful non-compliance with both the May 26, 2023 Order and its Rule 26 ongoing obligation to supplement discovery, on October 24, 2023, Newsmax filed its Sixth Motion to Compel. Through the Sixth

¹¹ R. A. Piñate Deposition Tr. (Sept. 14, 2023) at 72:21-73:10, 73:11-24, 74:21-75:14, 75:15-76:3; P. Neffenger Deposition Tr. (Oct. 18, 2023) at 50:20–51:25; 65:9–80:25; R. A. Piñate Deposition Tr. (Oct. 23, 2023) at 455:7-456:6, 442:5-443:8, 458:5-13, 460:7-13, 462:5-11; A. Mugica Deposition Tr. (Jan. 12, 2024) at 165:7-170:25.

¹² R. A. Piñate Deposition Tr. (Oct. 23, 2023) at 504:15-23.

Motion to Compel, Newsmax sought production of documents related to the DOJ Investigation and Bautista Affidavit; all discovery covered by the DOJ-related RFP and the May 26, 2023 Order.

D. Smartmatic Shifts Strategy to Rely Upon a Superseded June 22, 2022 DOJ Letter

Smartmatic’s strategy for refusing production shifted in response to the Sixth Motion to Compel. Perhaps aware that the relevancy of the discovery could no longer be disputed in light of the Bautista Affidavit and Piñate’s testimony, Smartmatic argued for the first time that it was not permitted to disclose any information about the DOJ Investigation or the Grand Jury Subpoena. In Plaintiffs’ Opposition to Defendant’s Sixth Motion to Compel (“Opp. to 6th Mot. to Compel”, D.I. 525), Smartmatic claimed that “[t]o the extent that Newsmax seeks communications between Smartmatic and the Department of Justice, the Department of Justice has requested that Smartmatic maintain the confidentiality of those communications given the ongoing investigation.” (Opp. to 6th Mot. to Compel at 7 n.2.) But, of course, that was not true.

Notwithstanding its new reliance on a previously undisclosed instruction from the DOJ, Smartmatic refused to actually produce the written instruction. (Emails between counsel and Special Master (Nov. 10-14, 2023) at 2 (email from K. Harmon

to Special Master), Ex. 7.) No document was quoted or attached to Smartmatic's Opp. to the 6th Mot. to Compel.

Smartmatic's sword-shield conduct was not lost on the Special Master, who noted on November 12, 2023: [REDACTED]

[REDACTED]

[REDACTED] (Emails between counsel and Special Master (Nov. 10-14, 2023) at 3 (email from Special Master to T. Timlin, et al.) (emphasis added), Ex. 26.) [REDACTED]

[REDACTED] *Id.* at 2 (email from K. Harmon to Special Master.) Eventually, upon insistence by the Special Master

[REDACTED] Smartmatic produced a heavily redacted version of the June 22, 2022 DOJ Letter to Newsmax for the first time on November 13, 2023. (Emails between Special Master and counsel (Nov. 14, 2023), Ex. 27.)¹³

The vital importance of the DOJ-related discovery was clear to the Special Master: [REDACTED]

¹³ Relying on the non-existent instruction from the DOJ, Smartmatic persuaded the Special Master to allow Smartmatic to designate the letter "outside counsel's eyes only," which prevented Newsmax from sharing the document with any of its client representatives or even its experts. *Id.* at 2, Ex. 27.

[REDACTED]

[REDACTED] (Nov. 15, 2023 Discovery Hearing at 31:13-19 (Special Master).)

The Special Master would have granted Newsmax’s Sixth Motion to Compel *but for* Smartmatic’s false statements that the DOJ had directed Smartmatic not to disclose the information and that doing so could jeopardize Smartmatic with respect to the DOJ Investigation. (See Nov. 15, 2023 Discovery Hearing at 62:1-6

([REDACTED]

[REDACTED]

[REDACTED]) (J. Ward);

id. at 89:17-90:2 ([REDACTED]

[REDACTED]

[REDACTED]) (Special Master).)

A comment made by Smartmatic during argument on the Sixth Motion to Compel illustrates Smartmatic’s misconduct: “[REDACTED]

[REDACTED]

[REDACTED] (Nov. 15, 2023

Discovery Hearing at 52:23-53:2 (J. Ward).) The DOJ had already made that precise representation to Smartmatic in response to Smartmatic’s direct question.

Following the Special Master’s denial (on false premises) of the Sixth Motion to Compel, events unfolded that underscored the relevance of the DOJ Investigation and shed light on the reality of the DOJ’s confidentiality position.

On November 29, 2023, COMELEC disqualified and debarred Smartmatic from participating in election bids in the Philippines. (D.I. 569 at 9.)¹⁴ Smartmatic admits that this resolution has *already* harmed Smartmatic’s business in the Philippines by preventing it from participating in contract bids worth tens of millions of dollars, thus decreasing Smartmatic’s alleged damages amount in this case. (A. Mugica Deposition Tr. (Jan. 12, 2024) at 90:3-19; 94:16-25; 111:19-112:15; 141:9-142:7; 179:20-180:17, Ex. 1; Petition for Certiorari to Republic of Philippines Supreme Court (Dec. 7, 2023), **Ex. 28**.) Additionally, on December 28, 2023, the DOJ’s motion to unseal the Bautista matter was granted, making the Bautista

¹⁴ On April 16, 2024, the Supreme Court of the Philippines overturned COMELEC’s debarment decision prospectively (meaning Smartmatic still may not bid on a recent contract that was awarded to another company after Smartmatic’s debarment). Notably, COMELEC has publicly stated its intent to file a motion for reconsideration of the Supreme Court’s decision. <https://newsinfo.inquirer.net/1931275/comelec-says-it-will-appeal-sc-ruling-on-smartmatic-ban>. Regardless of the success of that motion, as a result of COMELEC’s November 2023 resolution, Smartmatic was prevented from participating in bidding for at least one election contract in the Philippines. And as Newsmax understands the Supreme Court’s ruling from press reports (because it is still not publicly available in full), the ruling does not prevent COMELEC from barring Smartmatic from future bids on a bid-by-bid basis.

Affidavit public, and contradicting Smartmatic’s argument that the sealing reflected the DOJ’s intent to keep the DOJ Investigation confidential.¹⁵

On December 15, 2023, Newsmax filed a Notice of Exceptions to the Special Master’s Order Denying the Sixth Motion to Compel (D.I. 569). The Court heard argument on February 1, 2024. At the February 1 argument, the Court [REDACTED]

[REDACTED]

[REDACTED]

(Feb. 1, 2024 Status Conference at 38:5-12 (Judge Davis).) Smartmatic replied:

[REDACTED]

¹⁵ The DOJ originally filed the case under seal. Smartmatic relied upon that sealing in opposing the Sixth Motion to Compel. *See* Emails between counsel and Special Master (Nov. 10-15, 2023) at 5 (email from K. Harmon to Special Master), Ex. 8.

¹⁶ Feb. 1, 2024 Status Conference at 40:20-41:14.

[REDACTED]

(Feb. 1, 2024 Status Conference at 38:15-39:1 (J. Ward) (emphasis added).)

Relying upon Smartmatic’s representations, the Court overruled the Notice of Exceptions, finding and holding that:

- “[T]he DOJ has requested that Smartmatic maintain the confidentiality of the DOJ’s active investigation”¹⁷; and
- “[T]he Court is also cognizant of the need to maintain the confidential nature of [the] ongoing DOJ investigation.”¹⁸

Illustrating the Court’s reliance upon Smartmatic’s false statements, the Court ordered Smartmatic to “submit a formal request to the DOJ . . . for the information sought by Newsmax in its Sixth Motion to Compel to allow the DOJ to decide as to what, if any, information DOJ might be willing to disclose regarding the DOJ investigations responsive to Newsmax’s Sixth Motion to Compel.”¹⁹

¹⁷ Order Denying Defendant Newsmax Media Inc.’s Exceptions to the Special Master’s Order Denying Defendant’s Sixth Motion to Compel Discovery, at 3 (Feb. 15, 2024) (D.I. No. 654), **Ex. 29**.

¹⁸ *Id.*

¹⁹ *Id.*

E. Smartmatic Seeks to Shroud All DOJ Communications About this Action in Secrecy

When Smartmatic ultimately complied with the Court’s February 1 order, Smartmatic made sure to keep its communication with the DOJ from Newsmax. Smartmatic refused to copy Newsmax on the communication to the DOJ. (Emails between counsel (Feb. 17-22, 2024) at 2 (email from K. Harmon to K. Guerke et al.), **Ex. 30.**) Smartmatic even refused Newsmax a copy. (*Id.* at 1 (email from K. Harmon to B. Flinn et al.)) Smartmatic’s refusal to provide a copy of a court-ordered communication is telling. Again, Smartmatic’s misconduct forced Newsmax to file a motion to compel production of a document that it was entitled to receive.

On March 5, 2024, Newsmax filed a Motion to Compel Updated Damages Discovery (the “Eighth Motion to Compel”) (D.I. 688) part of which sought production of the court-ordered letter to the DOJ.

The night before a March 8, 2024 status hearing with the Court, Smartmatic filed a letter revealing—for the first time—to the Court that the DOJ had responded on February 26, 2024 (“February 26, 2024 DOJ Letter”) to Smartmatic’s court-ordered communication. (Mar. 7, 2024 Smartmatic Letter to Court, Ex. 31.) Smartmatic then selectively quoted the February 26, 2024 DOJ Letter to make it

appear to the Court that the DOJ was still not permitting disclosure of the DOJ Investigation:

(Mar. 7, 2024 Smartmatic Letter to Court, Ex. 31.)



At the March 8, 2024 hearing, the Court asked Smartmatic direct questions about the DOJ's stance on confidentiality and whether the February 26, 2024 DOJ Letter reflected a change in the DOJ's position. Smartmatic chose to dig in, representing to the Court that the February 26, 2024 DOJ Letter did not reflect any change in the DOJ's confidentiality position from that expressed in the June 22, 2022 DOJ Letter. (*See* Mar. 8, 2024 Status Conference at 31:9-11 (K. Harmon), Ex. 11.)

The Court explained it had overruled Newsmax’s Notice of Exceptions, on the same flawed basis due to Smartmatic’s false representations of the DOJ’s position on confidentiality. (*See id.* at 61:14-62:9.)

F. The Truth Is Slowly Revealed.

Unbeknownst to Newsmax and the Court, Smartmatic omitted a key portion of the February 26, 2024 DOJ Letter. On March 14, 2024, one week after the March 8, 2024 hearing, Smartmatic finally provided Newsmax a copy of the letter, which states in pertinent part:



(*See* D.I. 678 at Ex. B (emphasis added).) The portion bolded and italicized was not previously revealed to the Court or Newsmax. *Id.*

Even then, with the DOJ’s position clear, Smartmatic continued to obstruct Newsmax’s discovery of communications between Smartmatic and the DOJ. It

required an additional order from the Special Master for Newsmax to receive any responsive documents.

On March 22, 2024, the Special Master ordered Smartmatic to notify the DOJ in writing that it was ordered to produce the information related to the DOJ Investigation and Grand Jury Subpoena as identified in Smartmatic’s court-ordered February 20, 2024 letter to the DOJ (i.e. the documents requested in the Sixth Motion to Compel) (the “March 22, 2024 DOJ Order”, **Ex. 32**).

On April 8, 2024, 16 months after serving the DOJ-related RFP, Newsmax received a partial production of discovery related to the DOJ Investigation and Grand Jury Subpoena. At that time, having lost the effort to prevent disclosure by referencing the DOJ’s supposed desire for confidentiality, Smartmatic provided an “update” to the Court (“April 8, 2024 Smartmatic Letter,” **Ex. 33**), disclosing, for the first time, [REDACTED]

[REDACTED]

[REDACTED] Newsmax was stunned. This “update” proved that the previous months of vigorous litigation was based on a false premise.

The April 8 Smartmatic Letter contains no recognition of responsibility and no acknowledgement of the burden imposed on Newsmax and the Court by Smartmatic’s conduct. Instead, once again Smartmatic dug in: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 4 (emphasis added).

G. Smartmatic Continues to Block Discovery to this Day.

Smartmatic still refuses to produce DOJ Investigation-related documents from its executives and employees even though it was ordered to do so by the March 26, 2024 DOJ Order. On April 9, 2024, Newsmax wrote to Smartmatic requesting that Smartmatic produce copies of information for *all categories of documents and custodians* related to the matter as encompassed by the DOJ Order. (Email from J. Cacace to K. Harmon (Apr. 9, 2024), **Ex. 34.**)

Despite acknowledging Newsmax is entitled to these responsive documents,²⁰ Smartmatic refuses to produce them, claiming a lack of possession or control over the documents.

Smartmatic appears to be taking this position solely to prejudice Newsmax, attempting to force Newsmax to seek the documents and information by serving

²⁰ Smartmatic does not argue that Newsmax is not entitled to this discovery but refuses to produce the information itself. Emails between counsel and Special Master (April 9-16, 2024) at 1 (email from J. Ward to Special Master), **Ex. 35.**

subpoenas on eight individuals and eight of their attorneys, including those in Taiwan, Panama, the United Kingdom, the Netherlands, and Florida. (Emails between counsel (April 23, 2024-May 7, 2024) at 1-2 (emails from J. Ward to M. Lombardi et al.) **Ex. 36.**) That requires domesticating Delaware subpoenas not just in Florida, but around the globe, with summary judgment briefs due May 31, 2024 and trial on September 30, 2024. Smartmatic is trying to hide the DOJ Investigation-related documents and run out the clock to get to a jury before Smartmatic or its personnel are indicted and before Newsmax can obtain documents bearing on the likelihood of that happening in the future.

On May 7, 2024, the Special Master ordered Smartmatic to provide Newsmax addresses for its relevant executives and employees and to notify criminal counsel of those individuals of the March 26, 2024 Order. (*See* D.I. 729.) If Smartmatic does not facilitate this discovery, there is a high risk that Newsmax will be unable to obtain it in time for trial. **Smartmatic**—not Newsmax—must bear the consequences of that severe prejudice to Newsmax’s defense.

ARGUMENT

Smartmatic is pursuing over \$1 billion in damages in future lost business opportunities allegedly caused by Newsmax statements.

Desperate to keep its huge damages claim intact, Smartmatic took intentional steps over the past sixteen months to keep from Newsmax information that would weaken Smartmatic's flimsy damages claim: information about the criminal investigation involving Smartmatic and its executives in a bribery and money laundering scheme. At first, Smartmatic claimed the DOJ-related information was irrelevant to this Action. When that failed, Smartmatic argued the information was privileged. And when privilege did not plausibly cover all DOJ-related information, Smartmatic chose to concoct an argument that the DOJ had instructed Smartmatic to not disclose any DOJ-related information.

Through dozens of written and oral submissions to the Court, Smartmatic repeated the same theme – that the DOJ instructed Smartmatic to keep confidential information about the DOJ Investigation and Grand Jury Subpoena. The more Newsmax pressed for disclosure, the more Smartmatic dug in to its story causing the Court and Special Master to believe that confidentiality was vitally important to the DOJ.

But Newsmax and the Court learned on April 8, 2024 that Smartmatic had misled everyone for *months*. Smartmatic violated the most important rule dealing with the Court: candor. Smartmatic should suffer the consequences.

Smartmatic's conduct warrants (1) an adverse inference instruction to the jury that it may infer from Smartmatic's suppression of the DOJ-related information that Smartmatic was likely to be indicted and that the indictment would cause harm to Smartmatic's business prospects not attributable to Newsmax, (2) an award of attorney's fees and costs to recoup the hundreds of hours unnecessarily spent pursuing DOJ discovery overcoming Smartmatic's refusal to produce documents on false premises (which efforts include this Motion and are ongoing), (3) an award of attorney's fees and costs associated with Newsmax's experts reviewing and incorporating the DOJ-related information into their analysis, and (4) a re-opening of fact discovery for Newsmax covering the DOJ-related information and an award of attorney's fees and costs for those efforts (and an adverse inference against Smartmatic if Newsmax is unable to obtain the discovery before trial as a result of Smartmatic's delay tactics). The particular relief requested is within the Court's broad discretion under Superior Court Civil Rule 37. (Super. Ct. Civ. R. 37(b)(2)(C)-(D) (allowing sanctions in the form of adverse inference, heightened evidentiary burden or burden shifting) and *id.* at (d) (requiring fee awards for failure to comply with discovery obligations absent "substantial justifi[cation]"). Anything else will reward Smartmatic for its discovery misconduct and seriously prejudice Newsmax.

I. Smartmatic’s Conduct Requires an Adverse Inference Jury Instruction.²¹

Smartmatic’s misrepresentations deprived Newsmax of the ability to fully explore how the DOJ Investigation and Grand Jury Subpoena have and will harm Smartmatic’s business, and thus damages claim, during fact and expert discovery. It is crucial to counter the significant prejudice with an adverse inference jury instruction. The jury instruction requested may not cure all the harm but it will prevent Smartmatic from being rewarded for its misconduct.²² The Delaware Pattern Jury Instructions for Civil Practice contemplate such an order. *See* Delaware Pattern Jury Instruction for Civil Practice 23.17 (“[I]f you conclude that [there is evidence that a party intentionally / recklessly suppressed . . . evidence], then you may conclude that the missing evidence would have been unfavorable to [that party]’s case.”).

Courts utilize adverse inferences to sanction a party’s intentional delay of discovery as Smartmatic did here. *See, e.g., Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980) (noting “general rule that where a litigant intentionally suppresses or

²¹ In the event that the Special Master does not view it within his jurisdiction to grant an adverse inference jury instruction. Newsmax requests that the Special Master certify to Judge Davis the issue under Paragraph 6 of the Order of Reference.

²² Prompt, corrective sanctions can alleviate prejudice to the wronged party. *See Holt v. Holt*, 472 A.2d 820, 824 (Del. 1984).

destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case”); *Terramar Retail Centers, LLC v. Marion #2-Seaport Trust UAD*, 2018 WL 6331622, at *14-15 (Del. Ch. Dec. 4, 2018) (ordering evidence-preclusion as a discovery sanction, but noting that adverse inference would have been appropriate because the party “engag[ed] in misconduct [that] prevented Terramar from receiving [the] information in time to use it in discovery...”); *Midland Interiors, Inc. v. David Burleigh*, 2006 WL 279137, at *2 (Del. Ch. Jan. 27, 2006); *id.* at *3 (noting litigant not being candid with Court to avoid deposition “may well rise to the level that warrants” default judgment as sanction).

It strains credulity to believe that Smartmatic did not “recall” the damaging August 2022 exchange with the DOJ. While this action was pending, Smartmatic asked the DOJ whether it could disclose the investigation to litigants in civil litigation, thus including Newsmax. The DOJ’s answer that Smartmatic could do so would have been a major concern to Smartmatic because the disclosure of criminal proceedings would seriously undermine Smartmatic’s damages claim.

Only a severe sanction such as an adverse inference will address the severe prejudice Smartmatic’s dishonesty has caused to Newsmax. *See, e.g., Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718 (Del. 2008) (prejudice warrants severe discovery sanctions); *Collins*, 425 A.2d at 150; *Riley v. City of New York*, 2015 WL 541346, at

*12 (E.D.N.Y. Feb. 10, 2015) (adverse inference proper to “counteract prejudice” to party caused by misconduct); *Jacobs v. Jacobs*, 237 S.E.2d 124, 127 (Va. 1977) (adverse inference instruction available where party “has within his control” material evidence and does not produce it). The DOJ-related discovery is fundamental to Newsmax’s defense against Smartmatic’s billion-dollar damages claim. It is difficult to overstate the importance of evidence that Smartmatic and/or one of its executives or employees could be criminally charged with bribing an election official and hiding the payments. If the jury is unable to learn about the likelihood that these charges will be brought, the truth-seeking process of a trial will have been thwarted. Smartmatic’s misconduct was only discovered after fact discovery closed, meaning Newsmax cannot now pursue relevant crucial discovery from Smartmatic, its personnel or third parties about the DOJ Investigation and Grand Jury Subpoena. If Newsmax had timely received the April 8, 2024 production, Newsmax could have properly analyzed it, issued deposition notices to Smartmatic personnel and executives and, where necessary, serve third-party subpoenas. Smartmatic deprived Newsmax of that ability; the Court denied multiple requests to compel Smartmatic to produce the information based on Smartmatic’s inaccurate representations.

Even after Smartmatic’s story started to unravel, Smartmatic deliberately avoided complete disclosure by (a) initially refusing to disclose the June 22, 2022

DOJ Letter, then disclosing it only in misleadingly redacted form; (b) refusing to copy Newsmax on the February 2024 court-ordered correspondence with the DOJ, and (c) failing to produce the superseding August 2, 2022 correspondence until after Smartmatic had already fought and lost the battle to resist production of DOJ-related information.

There is no justification for Smartmatic’s discovery misconduct. This was not a mistake; Smartmatic was laser focused on hiding as much information about the DOJ investigation as possible. [REDACTED]

[REDACTED] (Emails between DOJ and H&K (Nov. 13, 2021-Feb. 18, 2022) at HK_SMT00000985 (email from W. Ferrer to J. Mandolfo et al.), **Ex. 37.**) [REDACTED] (*Id.* at HK_SMT00000984 (email from J. Mandolfo to W. Ferrer et al.).) [REDACTED]

[REDACTED] (April 8, 2024 Smartmatic Letter at 4.)

Whether or not it was in some central location, and even if somehow no one on the entire H&K team remembered it, a simple search of emails to or from Robert Emery or the other Assistant United States Attorney with whom H&K had been communicating for two years would have uncovered it.

At a minimum, Smartmatic acted recklessly in repeatedly making representations to the parties and Court about the DOJ's position without confirming that position or even requesting that its criminal counsel review its correspondence with the DOJ.²³ It was reckless to not conduct such a basic search particularly where

[REDACTED]

[REDACTED] (Compare Emails between DOJ and H&K (Feb. 20, 2024-April 1, 2024), **Ex. 38**, with Emails between DOJ and H&K (Aug. 1-2, 2022), Ex. 16.)

All factors considered by Delaware courts in determining the appropriate severity of a discovery sanction support an adverse inference jury instruction here. Among these factors are (1) “the extent of the party’s personal responsibility”; (2) the “prejudice to the adversary caused by the failure”; (3) “a history of dilatoriness” by the party; and (4) “whether the conduct of the party or the attorney was willful or

²³ Reckless discovery misconduct is sanctioned the same as intentional. *See, e.g., Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 550 (Del. 2006) (adverse inference warranted for “intentional or reckless” discovery misconduct); *Culler v. Bayhealth Med. Ctr. Inc.*, 2018 WL 1935972, at *3 n.10 (Del. Super. Apr. 16, 2018).

in bad faith.” *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718 (Del. 2008) (adopting factors for evaluating severe sanctions).²⁴

All the *Hoag* factors weigh in favor of a severe sanction against Smartmatic. Smartmatic is solely responsible for the misrepresentations, refusals to produce and delays. As detailed above, Smartmatic’s obfuscation has seriously prejudiced Newsmax’s defense. Smartmatic’s misconduct involved a history of dilatoriness, delaying by months Newsmax’s discovery concerning the DOJ Investigation and the underlying alleged bribery scheme, and causing Newsmax to expend hundreds of thousands of dollars in attorney’s fees, to obtain the discovery.

At bottom, Smartmatic’s misconduct undermined the hallmarks of discovery: candor and fair dealing. *Terramar Retail Centers, LLC v. Marion #2-Seaport Trust UAD*, 2018 WL 6331622, at *9 (Del. Ch. Dec. 4, 2018). The requested jury instruction will alleviate the severe harm caused to Newsmax. Smartmatic should not be rewarded by preventing the jury from knowing the truth about the likelihood that Smartmatic and/or its personnel will be indicted on criminal charges of bribing an election official.

²⁴ The fifth and sixth *Hoag* factors relate to dismissal as a sanction and the merits of the claim being dismissed. Since Newsmax is not seeking the sanction of dismissal, these factors are not relevant to this Motion.

II. Smartmatic Should Pay the Significant Attorney’s Fees and Costs Incurred by Newsmax over the Past Year of Motion Practice (Which Remains Ongoing).

Since March 2023, Newsmax has expended countless resources pursuing the DOJ-related discovery. The vast majority of that would have been avoided but for Smartmatic’s misconduct. An award of fees is mandatory in this circumstance. *Wileman v. Signal Fin. Corp.*, 385 A.2d 689, 690 (Del. 1978) (When “a party fails to comply with orders of the Court permitting discovery, an award of expenses, including attorney’s fees, *is mandatory* unless the failure to comply was substantially justified or other circumstances make it unjust.”); Rule 37(b)(2)(E). Smartmatic has no “substantial justification” for misleading the parties and Court and harming Newsmax. It has not even offered one.

Under Rule 37, the Court should award Newsmax its ongoing expenses and fees incurred in pursuing this DOJ-related discovery. Those efforts include preparing and arguing the First Motion to Compel, the Sixth Motion to Compel, the Notice of Exceptions to the Special Master’s Denial of the Sixth Motion to Compel, the Eighth Motion to Compel, the Motion for Clarification and this Motion. Smartmatic should also be ordered to pay Newsmax’s fees to be incurred in carrying out the additional discovery and expert work required by Smartmatic’s misconduct.

In fact, Smartmatic continues to refuse to produce documents from its personnel or executives relating to the DOJ Investigation or Grand Jury Subpoena and will not make current and former personnel available for depositions without Court order. At least five of those individuals reside outside the United States, requiring Newsmax to pursue lengthy service processes and fighting objections in far-flung jurisdictions if Smartmatic refuses to assist. The Court should grant an adverse inference jury instruction if Newsmax lacks sufficient time to obtain this discovery before trial due to Smartmatic's intentional delay based on false premises.

Specifically, Newsmax seeks to re-open the depositions of Antonio Mugica and Roger Piñate and take for the first time the depositions of certain Smartmatic personnel: Colin Flannery, Alfredo Wolkoweiz, Elie Moreno, Romano Stasi, Cesar Flores Zavarace, Victor Ramirez Betancourt and Jorge Vasquez.²⁵ Newsmax also seeks documents and deposition testimony from each of these individuals' criminal counsel. Each of these individuals and their counsel has or is likely to have knowledge related to the DOJ Investigation, the Grand Jury Subpoena and the likelihood that Smartmatic or its personnel are indicted. The Court should order

²⁵ On April 30, 2024, the parties reached an agreement to reopen certain depositions while not conceding that either party was entitled to them and reserving all rights with respect to their motions for sanctions and oppositions thereto. *See* Emails between counsel (April 22, 2024-May 8, 2024) at 1-11, **Ex. 39**.

Smartmatic to produce the documents encompassed by the March 26, 2024 Order from these individuals and their counsel, and order Smartmatic to produce these individuals and their counsel for deposition. If Smartmatic fails to do so, the Court should instruct the jury that it is entitled to draw an adverse inference against Smartmatic based upon its failure to do so (i.e., Smartmatic believed the documents or witnesses would show that Smartmatic was likely to be indicted and that the indictment would cause harm to Smartmatic's business prospects not attributable to Newsmax).

CONCLUSION

For the foregoing reasons, Newsmax respectfully requests that the Court grant Newsmax's Motion for Sanctions.

Dated: May 13, 2024

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CERTIFICATE OF SERVICE

I, Lauren Dunkle Fortunato, Esquire, hereby certify that on May 17, 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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