

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SMARTMATIC USA CORP., *et al.*,

Plaintiffs,

v.

HERRING NETWORKS, INC.,

Defendant.

No. 1:21-cv-02900-CJN

Judge Carl J. Nichols

Magistrate Judge Moxila A. Upadhyaya

**REPLY IN SUPPORT OF SMARTMATIC’S MOTION FOR EXTENSION OF TIME TO
SERVE DOCUMENT REQUESTS**

OANN’s opposition to Smartmatic’s motion for an extension of the time to serve document requests is in bad faith.¹ The opposition represents a renegeing on OANN’s prior assurances that it would not oppose an extension. The opposition conceals that the cause of Smartmatic’s motion was OANN’s failure to produce documents as ordered by the Court. And the opposition misrepresents the nature of OANN’s so-called “compliance” with the May 31 deadline for serving supplemental document requests. OANN may have retained new counsel, but that does not change the promises that OANN previously made or whitewash OANN’s past dilatory tactics. Smartmatic’s request should be granted.

First, OANN omits from its opposition that it previously agreed not to object to an extension of the May 31 deadline for serving supplemental document requests. On April 28, 2023, OANN stated, “Herring remains committed to producing documents by May 24, and if Plaintiffs believe that necessitates an extension of the May 31 deadline to propound additional requests for production, Herring has no objection to that.” (Exhibit A.) On May 22, 2023, OANN again

¹ Defendant Herring Networks, Inc. does business as One America News Network (“OANN”).

confirmed that it had no objection to the extension, stating: “As to the May 31 deadline to serve document requests, we have no objection to Plaintiffs’ moving to extend that deadline.” (Exhibit B.) Attorneys from Vedder Price, OANN’s counsel, provided those assurances. Attorneys from Vedder Price remain OANN’s counsel. The attorneys have not filed any notice of withdrawal.

The fact that OANN has retained additional counsel (perhaps new counsel) does not erase the assurances provided by OANN over the last several months. Smartmatic relied on these assurances from OANN’s counsel when deciding: (1) whether to serve additional requests for production prior to May 31; and (2) when to file the motion to extend the deadline. It will be difficult to litigate this case going forward, and certainly a nightmare for the Court, if Smartmatic cannot rely on representations made by OANN’s counsel on routine issues, such as whether OANN objects to a motion. Smartmatic will adapt if necessary. But regardless, for present purposes, OANN’s apparent change of heart and reversal of its prior assurances constitutes “good cause” for granting Smartmatic’s request for an extension of the deadline. *See Kaplan v. Mayo Clinic*, No. CV 07-3630 (JRT/JJK), 2008 WL 11327400, at *4 (D. Minn. Sept. 17, 2008) (defendant established “good cause” to extend expert deadline, in part, because plaintiff reneged on discovery agreement); *In re Domestic Airline Travel Antitrust Litig.*, 2018 WL 4441507, at *7 (D.D.C. Sept. 13, 2018) (finding “good cause” to extend the fact discovery deadline where defendants produced a large number of documents that plaintiffs could not review before the discovery deadline); 6A Wright, Miller & Kane, *Federal Practice and Procedure* § 1522.1, at 231 (2d ed. 1990) (“Good cause” “require[s] the party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.”); 3 Moore’s *Federal Practice* § 16.14[b] (2003) (“[G]ood cause’ is likely to be found when the moving party has been generally diligent,

the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party.”).

Second, OANN omits from its opposition that its own dilatory conduct necessitated Smartmatic’s motion to extend the May 31 deadline. Prior to May 23, OANN produced a total of **97 documents**, and it missed agreed-upon production deadlines of April 7, April 28, May 5, and May 19. OANN then produced nearly 187,000 documents on May 24. That meant Smartmatic would have needed to: (1) review 31,166 documents per day for six days in a row, including over a federal holiday; (2) simultaneously identify production deficiencies to determine subject matters not covered in the production; and (3) simultaneously draft supplemental requests to meet the May 31 deadline. Smartmatic’s counsel is diligent, but OANN’s position is facially absurd and unproductive.

Moreover, Smartmatic would not have been able to serve additional document requests by May 31 even if it had done the facially absurd and unproductive—which would have included reviewing 1,300 documents an hour, 24 hours a day, for six straight days. OANN still has not come close to completing its production of the documents requested by Smartmatic nearly eight months ago in response to Smartmatic’s initial document requests. OANN refuses to agree on search terms or a list of OANN custodians against whose files and emails those search terms will be run. (Exhibit C.) Smartmatic requested an extension of the May 31 deadline simply to provide it time to determine what OANN would and would not produce based on the original document requests and review what OANN did and did not produce in response to the original document requests. Smartmatic did not want to serve duplicative or unnecessary additional requests if the information OANN produced in response to the original requests was sufficient. Professionalism, not lack of diligence, motivated Smartmatic to file the extension request.

Third, OANN omits from the opposition that the way it “satisfied” the May 31 deadline was through abusive (and potentially sanctionable) discovery conduct. On May 30, Smartmatic sent OANN a draft of the extension motion prior to filing, as the parties had previously discussed. (Exhibit D.) OANN never indicated it objected. (*Id.*) But later that day, after Smartmatic filed the motion, OANN served three new sets of requests for production, each with over 505 requests, for ***a total of 1515 new requests for production***. Many of the requests are duplicative of existing document requests, demonstrating that OANN did not even bother cross-referencing what it had already been requested or review the documents Smartmatic had already produced.² Smartmatic will address these requests with the Court at the right time. For present purposes, though, the way OANN claims to have “satisfied” the May 31 deadline demonstrates why it should be extended.

Smartmatic and OANN approached the May 31 deadline in two distinct ways. Smartmatic obtained assurances from OANN that it did not object to extending the May 31 deadline. Smartmatic did so as the deadline was approaching to assure that it would have sufficient time to consider the documents being produced by OANN before serving additional, targeted requests. This approach would minimize the burden on OANN and allow the parties to proceed in a professional, diligent, and cost-effective manner. OANN agreed to an extension of the deadline, apparently had an undisclosed change of heart, and then served over 1,500 requests on the last day. Smartmatic believes that its approach is in keeping with how the Court expects parties to engage. *See* District of Columbia Bar Rules of Professional Conduct Rule 3.4, *Fairness to Opposing Party and Counsel*, adopted by this Court via L.R. 57.26(a) and 83.15(a). OANN engaged in duplicitous

² Smartmatic has been producing documents on a rolling basis since February 3, 2023. To date, Smartmatic has made seven productions. Smartmatic produced 5,607 documents on February 3, 2023; 17,728 documents on March 3; 5,760 documents on April 7; 10,007 documents on May 5; 215,250 documents on May 10; 219,466 documents on May 18; and 99,944 documents on June 5, 2023. Smartmatic has produced 573,762 documents to date.

and abusive conduct to “satisfy” the deadline, which hopefully is not the way the parties must litigate this case.³

Fourth, Smartmatic’s request for an extension of the May 31 deadline is not prejudicial. OANN bemoans the potential impact of the request on the December 8, 2023 deadline for fact discovery. However, the greatest threats to the December 8 deadline are: (1) OANN’s failure to produce any material volume of documents until May 24; (2) OANN’s failure to agree upon search terms and custodians to complete its production of documents responsive to Smartmatic’s original document requests; and (3) OANN’s service of more than 1,500 new document requests last week. Smartmatic requested 60 days for the extension with the assumption that the Court would want the parties to serve targeted additional requests, as opposed to a blunderbuss approach. Smartmatic can comply with a shorter schedule (less than 60 days) if that is the Court’s preference. But regardless of the length of time, it is OANN’s dilatory conduct, not Smartmatic’s request for additional time to serve supplemental requests, that may jeopardize the December 8 deadline. *In re Domestic Airline Travel Antitrust Litig.*, 2018 WL 4441507, at *6 (finding that the slight prejudice to defendants in extending the discovery deadline was outweighed by the prejudice plaintiff would suffer if it was not permitted to conduct sufficient discovery).

Finally, OANN’s assertion that Smartmatic’s motion was not timely filed is hypocritical. Judge Nichols’s Standing Order indicates that, if a party cannot comply with the four-day notice requirement, the party should provide an explanation. *Standing Order for Civil Cases*, Section 9(a), p. 3 n.2, at <https://www.dcd.uscourts.gov/sites/dcd/files/CJNSampleCivilStandingOrder.pdf>.

³ OANN’s citation to *In re Domestic Airline Travel Litig.* supports Smartmatic’s argument. Smartmatic, like the movant in that case, was forced to move to extend a court deadline due to “unforeseen or unanticipated matters.” 2018 WL 4441507, at *5 (D.D.C. Sept. 13, 2018). Smartmatic could not have foreseen that OANN would object to the extension of the May 31 deadline after twice agreeing that it would not object and wait until six days before the deadline to produce nearly 187,000 documents.

Here, Smartmatic did not file the motion earlier because, as discussed above, OANN led Smartmatic to believe that there was no objection to the extension of the deadline. Indeed, OANN did not even express objection to the motion when Smartmatic shared a draft of the motion on May 30. The opposition filed on June 5 was the first time Smartmatic learned that this was a contested motion that should have been filed sooner.⁴ Smartmatic's good-faith reliance on OANN's prior assurance was the reason Smartmatic did not file the motion earlier, which should not preclude the Court's consideration of the request. *See Flanagan v. Tegna Inc.*, 1:19-CV-03604, May 1, 2020 Minute Order (D.D.C., Nichols, J.) (granting motion for extension of time filed fewer than four days in advance of deadline); *Gonzales v. Denchfield Landscaping, Inc.*, 1:19-CV-03843, May 1, 2020 Minute Order (D.D.C., Nichols, J.) (same); *Silva v. U.S. Citizenship and Immigration Services*, 1:20-CV-02646, Jan. 19, 2021 Minute Order (D.D.C., Nichols, J.) (same).

For these reasons, Smartmatic respectfully requests that the Court extend the deadline for serving requests for production by 60 days. In the alternative, Smartmatic requests that the Court extend the deadline by a shorter amount of time to allow Smartmatic to serve additional requests that it would have filed by May 31 but for OANN's prior assurances that it did not object to extending that deadline.

⁴ Ironically, OANN's opposition violates Judge Nichols's Standing Order. The Standing Order states that "[i]f a party intends to file a motion for opposition, it must file the opposition by 5:00 PM the business day after the motion is filed." *Standing Order for Civil Cases*, Section 9(c), p. 3, at <https://www.dcd.uscourts.gov/sites/dcd/files/CJNSampleCivilStandingOrder.pdf>. Smartmatic filed its motion for an extension on May 31. OANN did not file its opposition until June 5. The opposition should have been filed on June 1.

Date: June 6, 2023

/s/ Emily N. Dillingham

Emily N. Dillingham, D.C. Bar No. IL00043
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*Attorney for Plaintiffs Smartmatic USA Corp.,
Smartmatic International Holding B.V., and SGO
Corporation Limited*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which I understand to have served counsel for the parties.

/s/ Emily N. Dillingham

Emily N. Dillingham

Exhibit A



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April 28, 2023

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Shareholder
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VIA EMAIL

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**Re: *Smartmatic USA Corp., et al. v. Herring Networks, Inc., d/b/a One America News Network,*
Case No. 1:21-cv-02900-CJN (D.D.C.)**

Dear Counsel:

On behalf of Herring Networks, Inc. (“Herring”), we write in response to portions of your April 27, 2023 letter (the “April 27 Letter”) sent on behalf of Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited (together, “Plaintiffs”).¹ Herring disagrees with how Plaintiffs have characterized the issues but agrees that there are multiple areas that are now ripe for consideration by the Court. Herring is prepared to proceed with a conference with Judge Nichols to address not only the spurious issues raised by Plaintiffs in the April 27 Letter, but also the numerous significant problems with Plaintiffs’ discovery responses to date that were addressed in Herring’s April 25 letter. We understand that you intend to contact the Court by the close of business today to request a conference, and we ask that you attach this letter and Herring’s April 25 letter to any such correspondence so that the Court can be fully informed about the issues to be addressed by both sides.

Plaintiffs’ failed efforts to manufacture discovery disputes

It is apparent from the April 27 Letter that you are intent on manufacturing purported discovery deficiencies by Herring to prop up an ill-founded argument that immediate document productions should be ordered without human review, as has been ordered in other distinguishable cases related to news coverage of voting machine companies after the 2020 presidential election. But this is a different case, in a different jurisdiction, in a different procedural posture, with a different set of facts, and there is no justification for an artificially accelerated discovery timeframe or production without human review for proportionality, privilege, etc.

¹ Herring is reviewing and analyzing the search term issues addressed in Section I of the April 27 Letter and will provide a separate response next week.

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Olivia Sullivan, Esq.
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Let there be no misunderstanding here: Herring has a team of reviewers ready to commence review of search-term-responsive documents. And the review manager for that team is prepared to submit a declaration under oath to the Court to that effect, if necessary. The problem is that Plaintiffs are playing games with respect to agreeing to search terms, which is a necessary prerequisite to commencing the review and production. And it also appears Plaintiffs can conduct only one review/production at a time (which makes no sense), as confessed by you in a footnote buried in tiny font in the April 27 Letter. *See* April 27 Letter, n. 1. That perhaps explains, in part, why Plaintiffs' production in this case is a tiny fraction of Plaintiffs' production in the Related Litigation. But it doesn't explain why Plaintiffs can't produce immediately what has already been reviewed and produced in the Related Litigation, as well as third-party discovery already produced to Plaintiffs in this Litigation. Immediate production of those materials will be a topic we address with the Court. And one point we will make is that Plaintiffs are sandbagging Herring while Plaintiffs cry wolf.

Herring has not concealed or withheld any documents, and this case is more than *seven months* from the close of discovery. In fact, Herring has committed to producing documents on May 24, less than a month from now — including the “Smartmatic”-search-term documents that Plaintiffs are nonsensically demanding be produced immediately.

Recognizing that the search terms would not be finalized by the parties in the anticipated timeframe, Herring approached Plaintiffs with a reasonable, good-faith suggestion that the parties extend the production timeline by just a few weeks to allow for this process to play out. Plaintiffs responded by threatening Court action and making groundless accusations that Herring is acting in bad faith, even though the primary relief Plaintiffs claim they will seek from the Court (an accelerated timetable for producing documents) likely will be moot by the time motions to compel are briefed and decided by the Court.

Plaintiffs' latest proposed calendar — including an absurd May 1 deadline for Herring to produce the “Smartmatic” search documents (just one business day from now) — is of course unreasonable and Herring will not agree to it. Herring remains committed to producing documents by May 24, and if Plaintiffs believe that necessitates an extension of the May 31 deadline to propound additional requests for production, Herring has no objection to that. But rather than simply ask Herring to agree to that document-request extension, Plaintiffs, once again, create a false issue for Court consideration.

In light of the foregoing, any relief Plaintiffs intend to seek from the Court related to the production of documents will be utterly pointless. Fulsome productions from applying search terms will have occurred before the Court rules, there is no basis for expedited relief, and Herring does not oppose an extension of the deadline to propound document requests.

The hypocrisy of Plaintiffs' letter is palpable. According to Plaintiffs, every problem that Plaintiffs face in discovery has a valid justification, while even the slightest inconsequential delay by Herring is evidence of bad faith. As noted above, buried in a footnote on page 9 of the April 27 Letter is Plaintiffs' acknowledgment that they have not produced all of the documents from the Related Litigation because

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“Smartmatic’s e-discovery vendor cannot process more than one production at a time, and Smartmatic’s focus for the last two months has been processing productions for Fox, Newsmax, and Lindell, as those cases are much further ahead and had impending discovery deadlines.” Why a vendor can’t process more than one production at a time is a mystery to Herring, particularly when the vendor is simply producing what has already been produced in the Related Litigation. Presumably, all that production would require is copying data to storage media and turning it over. Plaintiffs have *millions* of pages that they have agreed to produce and that are ready to be produced that they readily admit they have no intention of producing until late May. There is no justification for that, other than sandbagging.

The ESI Protocol says, “The parties agree to meet and confer over the use of search tools and methodologies, including the use of search terms and TAR, *before any particular tool or methodology is applied.*” (Emphasis added). Plaintiffs suggest for the first time at page 7 of the April 27 Letter that Herring could/should proceed with production on the agreed-upon-search terms while the parties continue to negotiate the others. That is inconsistent with the ESI protocol; nevertheless, that’s what Herring will now do. Herring requests that Plaintiffs do the same, starting Monday. Please confirm by 5 p.m. Central Monday that Plaintiffs are doing that. If that agreement is reciprocal (which it should be), while the agreed-to-search-term review and production occurs, we can continue to negotiate and try to agree to other search terms and seek Court intervention if complete agreement cannot be achieved.

Search term issues

Plaintiffs’ heavy focus on the character-limit problems with Plaintiffs’ proposed search terms to be run on Herring’s custodians obscures the fact that there were myriad substantive problems with the search terms, many of which remain unresolved. Even if it were true that the character-limit problem could be efficiently solved simply by splitting the terms (it’s not), Herring was under no obligation to simply accept Plaintiffs’ overly broad terms once Plaintiffs split them into shorter terms. Plaintiffs apparently hope to rely on the terms used in the Newsmax case and the orders from the Newsmax case to employ a “take-it-or-leave-it” approach based on false assertions of bad faith by Herring. But Herring is not Newsmax, and this case is not in the Delaware Superior Court. Herring is fully entitled to make its own search term objections, and if it becomes necessary for the Court to address disputes, Judge Nichols will make his own rulings.

Interrogatories 1, 2, 3, and 5

Plaintiffs also have failed to identify any actual problem with Herring’s supplemental responses to Interrogatories 1, 2, 3, and 5. Plaintiffs complain that “OANN merely repeated the names of individuals that are already agreed-upon custodians and were already referenced by Smartmatic in its complaint.” But the fact that these supplemental responses were *consistent with* separate sources of information is hardly evidence of inadequate responses. To date, Herring has identified 20 individuals in response to Plaintiffs’ discovery requests — all before applying search terms and reviewing for responsiveness and potential additional custodians. Thus, the supplemental responses were adequate, and it is unclear what Plaintiffs would ask the Court to order in a motion to compel.

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Plaintiffs' discovery deficiencies

Nothing in the April 27 Letter breaks the impasse on any of the eight discovery issues Herring identified in its April 25 letter, and Herring intends to proceed with all eight issues before the Court. That said, Plaintiffs' letter contained a number of inaccurate statements about six of the eight issues that warrant correction.

First, with respect to Plaintiffs' refusal to produce documents related to government investigations, Plaintiffs' severely-narrowed proposal to, in part, run the search term "CFIUS" is far from sufficient to satisfy Herring's requests, which is why Plaintiffs continue to maintain their objections. In response to RFP Nos. 27, 28, and 40 (which seek documents and communications relating to 2004 Venezuelan election and 2016 Philippines election), Plaintiffs wrote on February 22, "Smartmatic has not changed its position and will not produce documents responsive to these requests." In their April 19 letter, as it relates to government investigation documents, Plaintiffs only agreed to produce contracts with the Venezuelan government, BIZTA, and SBC Consortium. But Plaintiffs have not agreed to run search terms and have not agreed to produce anything related to Kenya or the Philippines. Moreover, despite claiming that they would meet and confer about "relevant investigations that Smartmatic will incorporate into its search terms," Plaintiffs flatly rejected such search terms in the April 19 letter. The fact that a New York judge may have agreed with Plaintiffs is irrelevant here — particularly now that Plaintiffs' lead counsel has publicly emphasized that Plaintiffs' case is global in scope. *See* Erik Connolly's April 21, 2023 interview with Don Lemon on CNN ("[D]amages are on a global scale, not just limited to the United States.").

Second, with respect to Plaintiffs' refusal to produce documents related to criticism and reputational issues, Herring's requests are broader than the alternative search terms that Plaintiffs proposed — and Plaintiffs provided no hit reports for those terms, so they may yield nothing at all. Additionally, in response to RFP Nos. 15 and 100, Plaintiffs wrote on February 22 that, "Smartmatic stands on its objections and will not produce documents responsive to this request."

Third, with respect to Plaintiffs' refusal to produce documents related to lack of damages, Plaintiffs continue to parse which jurisdictions it believes are relevant. Meanwhile, Plaintiffs' lead counsel is telling the entire world repeatedly, including Don Lemon on his final broadcast with CNN on April 21, that Plaintiffs' damages relate to global loss of business. Herring is entitled to discover why Plaintiffs' purportedly lost contracts in Venezuela and the Philippines and explore any issues Kenya is having with Plaintiffs. If Plaintiffs claim damages globally (which their lead counsel has clearly and repeatedly said they are), Herring is entitled to global discovery on that claim.

Fourth, with respect to Plaintiffs' refusal to produce documents related to vendors and manufacturers, Herring already offered to narrow the scope of the requests to vendors, contractors, or affiliates involved in any election with any Smartmatic entity since 2004 in which a governmental entity questioned the security or accuracy of any Smartmatic entity technology or raised concerns about vulnerability to hacking. Plaintiffs refused this modification. Moreover, the fact that Plaintiffs have "dozens" of manufacturers and vendors does not automatically mean the request is overbroad.

Michael Bloom, Esq.
Olivia Sullivan, Esq.
April 28, 2023
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Fifth, Plaintiffs, for the first time, have offered to produce “non-privileged” Board of Director meeting minutes for Smartmatic USA Corp. While this is a good start, RFP No. 86 requests all meeting minutes and documents concerning Board of Director meetings for all Smartmatic entities, not just Smartmatic USA Corp. Herring offered a reasonable compromise — production of all Smartmatic entity Board of Director minutes reflecting discussions of security breaches, corruption, criminal activity, and technical failures, but Plaintiffs refused. Herring therefore must move on this issue.

Finally, with respect to Plaintiffs’ litigation funding documents (including related communications), it is apparent that Plaintiffs continue to play more games. Plaintiffs should be required to state whether responsive documents exist so that the parties can stop wasting their time if they do not. Plaintiffs resisted this discovery in the New York case both before the judicial hearing officer and on appeal before the judge. Ordered to produce, Plaintiffs now claim they have no such documents in their possession, custody or control, but they dodge the direct questions: (1) why did Plaintiffs resist this discovery if no such documents are in their possession, custody, or control (regardless of what happens in “the future”), and (2) do such documents exist at all (even if not purportedly in Plaintiffs’ possession, custody, or control)? Plaintiffs should answer these questions directly.

We look forward to addressing these issues with the Court, and we reiterate our request that you attach both this letter and Herring’s April 25 letter to any communications with the Court.

Regards,

A handwritten signature in black ink that reads "Brian Ledebuhr". The signature is written in a cursive, slightly slanted style.

Brian W. Ledebuhr

Exhibit B

From: [Ledebuhr, Brian W.](#)
To: [Sullivan, Olivia](#); [Park, Jeanah](#); [Kimrey, Blaine C.](#); [Sawyer, Keeley A.](#); [Burleson, Nicole](#); [Dunn, Joshua](#); [Clark, Bryan](#)
Cc: [Dillingham, Emily](#); [Bloom, Michael](#)
Subject: RE: [EXT] Smartmatic USA Corp., et al. v. Herring Networks, Inc. d/b/a One America News Network; Case No. 1:21-cv-02900-CJN [VED-VP.FID4869290]
Date: Monday, May 22, 2023 5:30:39 PM
Attachments: [image002.png](#)

Olivia –

Of the dates and times you offered below, we're available **between 10 and 11 Central and 2 and 3 Central on May 25 and between 10 and 12 Central on May 30.**

As to the May 31 deadline to serve document requests, we have no objection to Plaintiffs' moving to extend that deadline. Please be mindful of Judge Nichols' four-business-day rule (which means that Plaintiffs' motion is due Wednesday). We'd like to see the draft motion before you file it to confirm Herring Networks, Inc., doesn't oppose it as written by Plaintiffs. Please share a draft by tomorrow afternoon. Thanks.

Brian

VedderPrice

Brian W. Ledebuhr, Shareholder

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Assistant: Barb Chizewski +1 312 609 7767

From: Sullivan, Olivia <OSullivan@beneschlaw.com>
Sent: Monday, May 22, 2023 9:42 AM
To: Ledebuhr, Brian W. <bledeuhr@vedderprice.com>; Park, Jeanah <jpark@vedderprice.com>; Kimrey, Blaine C. <bkimrey@vedderprice.com>; Sawyer, Keeley A. <ksawyer@vedderprice.com>; Burleson, Nicole <nburleson@vedderprice.com>; Dunn, Joshua <jdunn@vedderprice.com>; Clark, Bryan <bclark@vedderprice.com>
Cc: Dillingham, Emily <EDillingham@beneschlaw.com>; Bloom, Michael <MBloom@beneschlaw.com>
Subject: [EXT] Smartmatic USA Corp., et al. v. Herring Networks, Inc. d/b/a One America News Network; Case No. 1:21-cv-02900-CJN

Counsel,

We are going to follow up with the Court regarding the conference with Judge Nichols. Below is our availability for the next two weeks. Can your team tell us which of these times would also work for you all?

5/23: after 11 am CT

5/25: available before 11:30 CT and after 1:30 pm CT

5/26: available all day

5/30: available all day

5/31: available other than 2-3 pm CT

6/1: available all day

6/2: available before 1 pm CT

Additionally, because we have not heard from the Court, and the May 31 deadline for serving additional document

requests is approaching, we wanted to make sure we are in agreement that the deadline should be pushed back. Please let us know.

Best,

Olivia

 Benesch



Olivia Sullivan

(she/her/hers)

Associate | Litigation

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Exhibit C



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May 26, 2023

VIA EMAIL

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Re: *Smartmatic USA Corp., et al. v. Herring Networks, Inc., d/b/a One America News Network*, Case No. 1:21-cv-02900-CJN (D.D.C.)

Dear Counsel:

We write in response to Herring Networks, Inc.'s ("OANN") letter dated May 17, 2023 regarding search terms to be run across OANN's custodians. Smartmatic responds to OANN's counter proposals in Appendix C.4 and D.4 below. Also included in this letter is further follow-up on OANN's May 15 letter regarding custodians.

Appendix C.4

Search No. 71. Smartmatic agrees to OANN's proposal. Smartmatic reserves the right to expand or change this search term if it determines that OANN's document production is not sufficient.

Search No. 73. OANN's proposal for search term 73 in Appendix C.4 is still insufficient. OANN's proposal still does not contain key words such as "accurate/accuracy," "guest," "investigate/investigation," and "truth." These key words must be included in this search so that any policy or guidelines with regard to these topics can be identified. The issues of whether OANN has policies in place related to these topics, and whether OANN potentially violated those policies, are directly relevant to actual malice. If OANN will not agree to Smartmatic's April 27 proposal, then the parties have reached an impasse, and Smartmatic will raise the dispute with the Court.

Smartmatic requests that OANN respond as to whether it accepts Smartmatic's proposal as to Search No. 73 by May 31, 2023.

Appendix D.4

For **Search Nos. 22, 64.1, 66.2, 66.3, 69.1, 69.2, 73, 83, and 123.1**, Smartmatic agrees to OANN's counterproposals as laid out in Appendix D.4. Smartmatic reserves the right to expand or change these search terms if it determines that OANN's document production is not sufficient.

Brian Ledebuhr

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Search Nos. 18.1 and 18.2. Smartmatic will agree to OANN's proposal in Appendix D.4 for searches 18.1 and 18.2. if OANN is amenable to changing ((vot* OR elec*) w/10 fraud*) to ((vot* OR elec*) w/25 fraud*).

Search No. 23. Please clarify if OANN intended to discuss on p. 4 of its May 17 letter Search Term 23, as opposed to 33. Assuming that OANN intended to reference Search Term 23, not 33, Smartmatic agrees to OANN's counterproposals as laid out in Appendix D.4. Smartmatic reserves the right to expand or change these search terms if it determines that OANN's document production is not sufficient.

Search No. 33.1. OANN notes in Appendix D.4 that the term "not" is a noise word that is not properly captured in searches on Relativity. In light of this note, Smartmatic agrees to use the term "not true." Smartmatic does not agree to the proximity operator of "w/10." Smartmatic stands by its April 27 proposal to use the proximity operator of "w/25."

Search No. 65.1. With regard to this search term, OANN stood on its May 5 proposal and did not offer an additional counterproposal in response to Smartmatic's May 11 proposal. Smartmatic is willing to remove "*oann.com" from the search term. Smartmatic will not agree to change the proximity operator from "w/25" to "w/10." Because Smartmatic has agreed to remove "*oann.com," there will likely be less hits, and there is no reason to limit the search yet again with a smaller proximity operator.

Smartmatic requests that OANN respond as to whether it accepts Smartmatic's proposals as to Search Terms 18.1, 18.2, 23, 33.1, and 65.1 by May 31, 2023.

Temporal Scope

In OANN's May 5, 2023 letter, in response to Smartmatic's proposal that "Smartmatic" and "Dominion" searches be run without date limitations, OANN stated, "Herring agrees to run the searches consistent with Plaintiff's proposals." Now, in its May 17 letter, OANN reneges on this agreement. OANN's assertion that the scope is too broad now that they have agreed to 35 additional custodians is non-sensical, given that OANN knew on May 5, when it agreed to the temporal scope, that Smartmatic would be proposing additional OANN custodian designations. Because OANN's defamation campaign spanned over six months and involved dozens of OANN employees and guests, these searches are entirely proportionate to the needs of this case.

In Smartmatic's First Set of Requests for Production, Smartmatic did not include a time limitation for RFP Nos. 1 and 2 regarding Smartmatic and Dominion. In its responses and objections, OANN agreed to produce documents in response to these requests. In its May 17 letter, OANN alleges that it did not report on Smartmatic or Dominion before 2020, and that Smartmatic has presented no facts to the contrary. As OANN well knows, Smartmatic has no way of knowing what OANN's history of reporting on or knowledge of Smartmatic and Dominion was prior to 2020. And if OANN's assertion is correct—that OANN did not report on Smartmatic or Dominion before 2020—then the universe of documents will likely be small and easy for OANN to review.

Brian Ledebuhr
May 26, 2023
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Additionally, OANN states that the term “present” is ever-changing. As Smartmatic clarified to OANN in its letter dated January 3, 2023, “present” is the date on which Smartmatic served its First Set of Requests for Production, *i.e.*, October 21, 2022. The parties have discussed this numerous times. (*See e.g.*, Smartmatic March 28, 2023 Letter, p. 7.) OANN must stop feigning ignorance. Smartmatic further asserts that documents referencing Smartmatic or Dominion after the defamatory campaign publicly ended are still entirely relevant to this dispute.

Smartmatic is willing to limit the temporal scope of these requests to January 1, 2014 to October 21, 2022. If OANN is unwilling to agree to this temporal scope, the parties are at an impasse, and Smartmatic will raise this issue with the Court.

Smartmatic requests that OANN respond as to whether it accepts Smartmatic’s proposal as to temporal scope by May 31, 2023.

OANN Custodians

On May 17, via email, Smartmatic requested that OANN provide justification as to why the 21 individuals identified in OANN’s May 15 letter are not relevant and should not be designated as OANN custodians.

Smartmatic requests that OANN provide a response regarding these 21 individuals by May 31, 2023.

Based on further review, Smartmatic has identified additional individuals that it believes should be designated as OANN custodians. That list includes:

- Jennesh Agagas, Booking Producer for Tipping Point with Kara McKinney
- Derek Blashinsky, Senior Vice President of Programmatic Advertising
- Amanda Brilhante, Anchor
- Allyssia Britton, former Producer
- Justin Brown, Executive Producer for Real America with Dan Ball
- Aaron Cornils, System Engineer
- Camryn Kinsey, Booking Producer/White House Correspondent
- Marco Rodriguez, Editor
- Ann Schick, Content Distribution of Herring Networks/Vice President of Affiliate Relations
- Jezzamine Wolk, Anchor and Producer

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Smartmatic requests that OANN respond as to whether it accepts Smartmatic's proposal designate the individuals listed above as custodians by May 31, 2023.

Very truly yours,

BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP

/s/ Olivia E. Sullivan

Olivia E. Sullivan

Exhibit D

From: [Sullivan, Olivia](#)
To: [Kimrey, Blaine C.](#); [Ledebuhr, Brian W.](#); [Clark, Bryan](#); [Park, Jeanah](#)
Cc: [Dillingham, Emily](#); [Bloom, Michael](#); [Babcock, Chip](#)
Subject: RE: [EXT] Smartmatic USA Corp., et al. v. Herring Networks, Inc.
Date: Tuesday, May 30, 2023 4:08:07 PM
Attachments: [image002.png](#)
[image305822.png](#)

Always a pleasure, Blaine. Thanks for letting us know.

Chip—please let us know your stance on the motion for an extension of time.

Thanks,

Olivia



Olivia Sullivan
(she/her/hers)
Associate | Litigation
Benesch Friedlander Coplan & Aronoff LLP
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Confidentiality Notice to Incorrect Addressee: www.beneschlaw.com/confidentialitynotice

From: Kimrey, Blaine C. <bkimrey@vedderprice.com>
Sent: Tuesday, May 30, 2023 3:58 PM
To: Sullivan, Olivia <OSullivan@beneschlaw.com>; Ledebuhr, Brian W. <bledebuhr@vedderprice.com>; Clark, Bryan <bclark@vedderprice.com>; Park, Jeanah <jpark@vedderprice.com>
Cc: Dillingham, Emily <EDillingham@beneschlaw.com>; Bloom, Michael <MBloom@beneschlaw.com>; Babcock, Chip <cbabcock@jw.com>
Subject: RE: [EXT] Smartmatic USA Corp., et al. v. Herring Networks, Inc.

Counsel –

Jackson Walker is taking over as lead counsel for Herring Networks, Inc., in this case. Please note I've copied Chip Babcock. He can share with you Herring Networks, Inc.'s, position. I imagine that, at minimum, he'll object to the misleading wording in the attached.

Kind regards,
Blaine

Blaine C. Kimrey, Shareholder
National class and direct litigation and Chair, Privacy, Cybersecurity & Media Practice Group, CIPP/US, CIPP/E, CIPM

VedderPrice

T +1 312 609 7865

Assistant: Deb Mullen +1 312 609 7583

[web](#) | [email](#) | [offices](#) | [biography](#)

From: Sullivan, Olivia <OSullivan@beneschlaw.com>
Sent: Tuesday, May 30, 2023 1:10 PM
To: Ledebuhr, Brian W. <bledebuhr@vedderprice.com>; Clark, Bryan <bclark@vedderprice.com>; Kimrey, Blaine C. <bkimrey@vedderprice.com>; Park, Jeanah <jpark@vedderprice.com>
Cc: Dillingham, Emily <EDillingham@beneschlaw.com>; Bloom, Michael <MBloom@beneschlaw.com>
Subject: [EXT] Smartmatic USA Corp., et al. v. Herring Networks, Inc.

Counsel,

Smartmatic has decided that it will seek an extension for the May 31 deadline to serve document requests. We've attached the draft motion that we intend to file by the end of today. Please let us know if you approve of the motion being filed as unopposed or if you want the motion to be filed jointly. If you oppose the motion, let us know your rationale as soon as possible so we can include it in the motion.

Thanks.

Best,

Olivia

Benesch



Olivia Sullivan
(she/her/hers)
Associate | Litigation
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