

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SMARTMATIC USA CORP.,
SMARTMATIC HOLDING B.V., AND
SGO CORPORATION LIMITED,

Plaintiffs,

v.

HERRING NETWORKS, INC., D/B/A
ONE AMERICA NEWS NETWORK,

Defendant.

Civil Action No. 1:21-cv-02900-CJN

**OAN'S MOTION FOR RELIEF FROM PLAINTIFFS'
VIOLATIONS OF JUDGE NICHOLS'S PROTECTIVE ORDER
AND USE OF OAN'S CLAWBACKED MATERIAL IN SUPPORT
OF THEIR SUMMARY JUDGMENT RESPONSE**

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Herring Networks, Inc. d/b/a One America News Network (“OAN”) files this Motion for Relief from Plaintiffs’ Violations of Judge Nichols’s Protective Order and Use of OAN’s Clawbacked Material in Support of Their Summary Judgment Response (“Motion”) as follows.

I. SUMMARY

On November 20, 2023, OAN sent a clawback letter advising Plaintiffs of an inadvertently-produced series of privileged emails bearing the Bates numbers OAN_SMMT_00996295-97. OAN further advised that pursuant to Judge Nichols’s Protective Order [Dkt. 48], Plaintiffs should immediately refrain from further examination or disclosure of the document and destroy it. Plaintiffs have not only refused to do so – they proceeded to *actually use it* to support their recent response to OAN’s motion for partial summary judgment. *See* Dkt. 155, ECF p. 32; Dkt. 155-1, ECF p. 12. These improper actions constitute violations of Judge Nichols’s Protective Order, Fed. R. Civ. P. 26(b)(5)(B), and the D.C. Rules of Professional Conduct, from which OAN now seeks relief pursuant to the Court’s inherent powers.

II. BACKGROUND

Judge Nichols entered the Amended Confidentiality Agreement and Protective Order in this case on December 16, 2022. (“Protective Order” or “Order,” Dkt. 48). Paragraph 19(b) of the Order provides that “if information protected from disclosure pursuant to Federal Rules of Civil Procedure 5.2 or 26(c) (‘Protected Information’) is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.” Paragraph 19(c) of the Order further instructs that “upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof.”

Plaintiffs invoked these provisions of the Protective Order twice. On September 15, 2023, Plaintiffs advised OAN that they had inadvertently produced six privileged documents and requested OAN to “promptly destroy the original production copy and any additional copies of the documents..., and that [OAN] not use or disclose the information contained therein in this litigation or otherwise.” (Exhibit 1-F to the Declaration of Carl C. Butzer [“Butzer Declaration”], Exhibit 1). Plaintiffs added:

Under the operative *Amended Confidentiality Agreement and Protective Order*, upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. (Dkt. 48, at 10–11).

(*Id.*) (emphasis in original). In conclusion, Plaintiffs’ counsel wrote, “Please confirm to me in writing that the documents listed above, and any copies thereof, have been destroyed.” (*Id.*). The next day, OAN’s counsel replied that the documents would be destroyed, and Plaintiffs’ counsel thanked him. (Exhibit 1-G to the Butzer Declaration).

On November 22, 2023, Plaintiffs again asked OAN to “promptly destroy” an inadvertently-produced privileged document and that OAN “not use or disclose the information contained therein in this litigation or otherwise.” (Exhibit 1-H to the Butzer Declaration). Plaintiffs’ counsel further requested written confirmation that the document “and any copies thereof, has been destroyed.” (*Id.*). OAN complied. (Exhibit 1-I to the Butzer Declaration).

As most relevant here, OAN also sent Plaintiffs’ counsel a clawback letter, on November 20, 2023. (Exhibit 1-B to the Butzer Declaration). OAN informed them that OAN documents Bates-numbered OAN_SMMT_00996295-97 (a series of emails, the “Inadvertent Production Material”) were inadvertently produced privileged documents. OAN’s counsel further wrote:

Pursuant to the December 16, 2022 Amended Protective Order [ECF No. 48], all parties should immediately refrain from further examination or disclosure of the Inadvertent Production Material. Herring formally requests that Plaintiffs

Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited (the “Smartmatic Parties”) promptly make a good faith effort to destroy the Inadvertent Production Material and any copies thereof. After destruction, Herring respectfully requests that the Smartmatic Parties certify in writing that they have carried out this destruction pursuant to the Protective Order. The Inadvertent Production Material may not be used for any purpose in this case.

(*Id.*).

For two months now, Plaintiffs’ counsel has steadfastly refused to honor OAN’s November 20, 2023, clawback request. On December 1, 2023, the parties held a meet-and-confer regarding, among other things, the Inadvertent Production Material. (Exhibit 1-C to the Butzer Declaration). During that conference, Plaintiffs questioned OAN regarding the claimed joint defense privilege, disputed application of the privilege (although Plaintiffs admitted that they had not yet determined whether the privilege applied), and represented that they had not destroyed the Inadvertent Production Material. (*Id.*). Plaintiffs further stated they would respond to the clawback letter after seeing OAN’s privilege log. (*Id.*).

On December 22, 2023, two weeks after OAN had provided its privilege log, Plaintiffs notified OAN that after reviewing the privilege log they did “not see any valid basis” for the Inadvertent Production Material to be designated Protected Information under the Protective Order. (Exhibit 1-D to the Butzer Declaration). Plaintiffs then stated that, in their view, the Inadvertent Production Material is not “Protected Information,” as defined by the Protective Order, and that they had no duty to destroy the material. (*Id.*).

Just a few hours later, and without any advance warning, Plaintiffs filed their Rule 56(d) Response In Opposition To Defendant’s Motion For Partial Summary Judgment On Actual Malice (“Summary Judgment Response,” Dkt. 155), in which they *used the Inadvertent Production Material, citing it as an exhibit. See* Dkt. 155, ECF p. 32 (discussing the Inadvertent Production Material as referenced in paragraph 43 of the Affidavit of Eric Connolly [“Connolly Affidavit,”

Dkt. 155-1]); *see also* Dkt 155-1, ECF p. 12) (discussing and citing the Inadvertent Production Material at Exhibit BB). In that briefing, and in the Connolly Affidavit, Plaintiffs described the contents of the material and represented that it was “produced by OANN in this litigation,” but Plaintiffs did not disclose to the Court that this material had been inadvertently produced, nor that OAN had requested its return and/or destruction under the Protective Order and that Plaintiffs had refused to do so. *See id.* And when Plaintiffs submitted the Inadvertent Production Material for *in camera* review to Judge Nichols, their transmittal email likewise made no mention of OAN’s privilege assertion. (Exhibit 1-E to the Butzer Declaration).

Finally, on January 17, 2023, before this Motion was filed, the Parties engaged in a meet-and-confer during which Plaintiffs’ counsel not only refused again to destroy the Inadvertent Production Material, but also insisted that OAN could not even file a motion asking Judge Nichols to impose sanctions for Plaintiffs’ past breach of the Protective Order; asserted OAN had “waived” its claim of privilege; and claimed the issue was a mere discovery dispute that OAN must request permission to brief and which *could not be heard* by Judge Nichols. (Butzer Declaration, ¶ 11).

Plaintiffs’ position that OAN cannot ask the Court directly to impose sanctions is contradicted by Plaintiffs’ own repeated motions for sanctions against OAN, all of which were filed directly on the docket without obtaining prior leave of Court. *See* Dkt. 113, ECF p. 16; Dkt. 155, ECF p. 42.

To be clear, this Motion is not seeking resolution of a “discovery dispute.” It is *not* asking the Court to resolve the underlying issue of whether the Inadvertent Production Material is privileged (in fact, such a motion must be made by *Plaintiffs* in the first instance). Rather, this Motion *is* about Plaintiffs’ acknowledged refusal to honor OAN’s clawback request and use of the material in their summary judgment briefing to Judge Nichols, all of which violated the Protective

Order. Here, “the imposition of sanctions is an issue collateral to and independent from the underlying case.” *Schlaifer Nance & Co. v. Est. of Warhol*, 194 F.3d 323, 333 (2d Cir. 1999); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (holding that sanctions do “not signify a district court’s assessment of the legal merits” of a claim or underlying dispute, but rather “require[] the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate”).

Plaintiffs should be sanctioned for their disregard of Judge Nichols’s Protective Order, including most notably *the unlawful and willful use of Inadvertent Production Material in Plaintiffs’ summary judgment filings*, and the misleading-by-omission explanations they gave to Judge Nichols about that material.

“[A] protective order, like any ongoing injunction, *is always subject to the inherent power of the district court.*” *United States v. Pollard*, 416 F.3d 48, 59 (D.C. Cir. 2005) (Rogers, J., concurring) (emphasis added). OAN does not lightly seek this relief, especially given Plaintiffs’ demands for sanctions at every turn, *see, e.g.*, Dkt. 155, but Plaintiffs’ conduct here warrants it.

III. ARGUMENT

A. The Protective Order and Rule 26 Prohibit a Party from Independently Reviewing and Using Documents Claimed to be Privileged that Were Inadvertently Produced.

Rule 26(b)(5)(B) explains a party’s obligations when the other side has inadvertently produced information subject to a claim of privilege. It provides that when a producing party notifies a receiving party that “information produced in discovery is subject to a claim of privilege” and explains the basis for its claim, the receiving party “*must* promptly return, sequester, or destroy

the specified information and any copies [the party] has.” Fed. R. Civ. P. 26(b)(5)(B) (emphasis added).

This Court has explained at length that, upon being informed of the claimed privilege, the receiving party is flatly prohibited from conducting any further review of or using the material in question. *See United States Equal Emp. Opportunity Comm'n v. George Washington Univ.*, 502 F. Supp. 3d 62, 72–74 (D.D.C. 2020). In *George Washington University*, this Court cited case after case stating unequivocally that the Rule “does not contemplate that the party in possession of the allegedly privileged material will or should make that determination [of privilege] on its own.” *Id.* at 73. If the receiving party “disputes the assertion of the privilege . . . , it can invoke the decision making authority of the court, but cannot divine justice on its own.” *Id.*

Thus, “when a party makes a claim of privilege pursuant to Rule 26(b)(5)(B), the opposing party has two choices: it may accept the claim or it may challenge the claim by providing the material under seal to the Court for determination of the issue of privilege; *it may not, however, review the material to determine for itself whether the claimed privilege applies.*” *Id.* (emphasis added).

Consistent with Rule 26(b)(5)(B), the Protective Order in this case issued by Judge Nichols similarly provides that if the producing party takes “reasonable steps to correct [the inadvertent production], including a request to the Receiving Party for its return,” the receiving party “shall promptly return the Protected Information and destroy all copies thereof.” Dkt. 48, ECF p. 11 (emphasis added). The Protective Order nowhere authorizes the receiving party to retain the inadvertently produced documents for several weeks or review the inadvertently-produced material, let alone make an independent determination of privilege, which would directly contradict Rule 26. *See In re Disposable Contact Lens Antitrust Litig.*, No. 3:15-MD-2626-J-

20JRK, 2016 WL 7115998, at *4 (M.D. Fla. Oct. 24, 2016) (holding that if parties intended to permit the receiving party to review inadvertently-produced material—a “procedure wholly different than the one contemplated by the [Federal] Rules”—then the confidentiality order “should have expressly provided that the receiving party is able to review the inadvertently-produced material”). And Judge Nichols’s Protective Order certainly does not authorize the receiving party to then use inadvertently-produced material in a substantive filing submitted to Judge Nichols.

B. Plaintiffs Refused to Return or Destroy the Inadvertent Production Material—and Then Used It in a Summary Judgment Filing.

On October 24, 2023, OAN discovered the Inadvertent Production Material. On November 5, 2023, OAN sent written notice alerting Plaintiffs to this inadvertent production and explaining that OAN would send a separate clawback letter regarding the Inadvertent Production Material. (Ex. 1-A to Butzer Declaration). The clawback letter was sent on November 20, 2023, in which OAN demanded that Plaintiffs destroy and refrain from examining the Inadvertent Production Material. (Exhibit 1-B to the Butzer Declaration).

In a December 1, 2023 meet-and-confer, OAN’s counsel reminded Plaintiffs’ counsel about paragraph 19 of Judge Nichols’s Protective Order. (Exhibit 1-C to the Butzer Declaration). Plaintiffs’ counsel stated that the Inadvertent Production Material had not been destroyed, that they did not agree to destroy them, and that they would respond to the November 20 clawback letter after seeing OAN’s privilege log (*id.*), which was provided to Plaintiffs on December 8.

Two weeks later, in the afternoon of December 22, 2023, Plaintiffs’ counsel wrote that Plaintiffs would not comply with OAN’s clawback request or destroy the Inadvertent Production Material because Plaintiffs’ counsel did “not see any valid basis on which

OAN_SMMT_00996295-97 can be described as Protected Information” under the Protective Order. (Exhibit 1-D to the Butzer Declaration).

Five hours later, Plaintiffs filed a brief and an affidavit with this Court in response to OAN’s motion for partial summary judgment, and Plaintiffs actually relied on the Inadvertent Production Material. *See* Dkt. 155, ECF p. 32; Dkt. 155-1, ECF p. 12.

Then on December 28, 2023, Plaintiffs sent the Inadvertent Production Material to Judge Nichols *in camera* with a cover email that failed to advise the Court that OAN had clawed back the material. (Exhibit 1-E to the Butzer Declaration).

C. Plaintiffs’ Conduct Violates Judge Nichols’s Protective Order.

OAN complied with its obligations under Rule 26(b)(5)(B) and the Protective Order by promptly asserting privilege as to the Inadvertent Production Material and demanding its return or destruction. Upon receipt of that notice, Plaintiffs were “prohibited from reviewing the documents at issue” regardless of “whether or not those documents were, in fact, privileged.” *George Washington Univ.*, 502 F. Supp. 3d at 74. Furthermore, the Protective Order and Rule 26(b)(5)(B) likewise required the prompt return or destruction of the Inadvertent Production Material, and thereafter left Plaintiffs with two choices: (1) “accept the claim [of privilege],” or (2) “challenge the claim by providing the material under seal to the Court for determination of the issue of privilege.” *Id.* at 74. Plaintiffs did neither.

Instead, Plaintiffs examined the Inadvertent Production Material, concluded (self-servingly) that they did not believe that the material is privileged, and then actually used the material in their response to OAN’s partial motion for summary judgment submitted to Judge Nichols. These actions were entirely improper. As explained, Plaintiffs could not “review the [inadvertently produced] material to determine for [themselves] whether the claimed privilege

applies.” *See id.* at 78 (concluding that the EEOC’s choice to review clawed back materials “after the University informed the agency that it claimed privilege over those communications—violated Rule 26(b)(5)(B)”). Nor could Plaintiffs don the Court’s authority, and purport to resolve the privilege dispute themselves. *See id.* at 73; *Radiance Aluminum Fence, Inc. v. Marquis Metal Material, Inc.*, 335 F.R.D. 371, 377 (E.D. Mich. 2020) (once a disputed claim of privilege is made pursuant to Rule 26(b)(5)(B), the question of the applicability of the privilege “is for the Court’s determination”).

And, especially, Plaintiffs were prohibited from actually using the Inadvertent Production Material in a substantive filing before Judge Nichols. *See, e.g., Bank of Camden v. State Bank & Tr. Co.*, No. 5:13-CV-21 MTT, 2014 WL 991782, at *2 (M.D. Ga. Mar. 13, 2014) (receiving party’s use of inadvertently-produced material prior to court’s resolution of privilege claim “blatantly violated” Rule 26(b)(5)(B)); *Walker v. GEICO Indem. Co.*, No. 6:15-CV-1002-ORL-41KRS, 2016 WL 11234453, at *7 (M.D. Fla. Sept. 13, 2016) (same), *adopted by*, 2017 WL 1174234 (M.D. Fla. Mar. 30, 2017); *see also Doe v. Lahey Health Sys., Inc.*, No. 19-CV-11014-PBS, 2020 WL 13561721, at *2 (D. Mass. Aug. 12, 2020) (receiving party violated Rule 26(b)(5)(B) by filing a memorandum that “characterized the contents of the protected documents”).

Each of Plaintiffs’ actions—(1) independently reviewing the Inadvertent Production Material for privilege, (2) refusing to delete/destroy it, and (3) using it in a Court filing—undoubtedly violated Judge Nichols’s Protective Order and Rule 26(b)(5)(B).

D. The Court Should Order Relief, Including Requiring Plaintiffs to Pay for OAN’s Time Spent Preparing This Motion.

Plaintiffs’ actions warrant relief from the Court in the form of sanctions. Plaintiffs should first be ordered to return/destroy all copies of the Inadvertent Production Material, certify that they have done so, and cease any further review of those materials.

The Court should also impose the sanction of requiring Plaintiffs to pay for OAN’s time spent preparing this Motion. This was no mistake or misunderstanding by Plaintiffs. Over the course of two months, they have refused to destroy or return the Inadvertent Production Material, then asserted the right to determine for themselves whether it is privileged, despite uniform caselaw making clear that such a step is flatly prohibited. That alone could warrant the sanction of requiring Plaintiffs to pay for OAN’s time spent on this Motion. *See Shepherd v. Am. Broad. Cos., Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (“[I]nherent power sanctions available to courts include fines, awards of attorneys’ fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence.”); *see also Stone v. U.S. Embassy Tokyo*, No. CV 19-3273 (RC), 2021 WL 1110735, at *3 (D.D.C. Mar. 23, 2021) (“Courts have inherent power to impose sanctions to protect the integrity of the judicial process,” holding plaintiff’s willful violations of protective order warranted dismissal as a sanction) (citing *Shepherd*, 62 F.3d at 1474–75).

That form of sanction is especially appropriate because refusing to return such materials violates the applicable rules of professional conduct in the District of Columbia. *See George Washington Univ.*, 502 F. Supp. 2d at 76–78; *see also* LCvR 83.15(a) (adopting the D.C. Rules of Professional Conduct); *see* D.C. Bar Ethics Op. No. 256 (May 1995).

But what truly warrants sanctions here is Plaintiffs’ use of the Inadvertent Production Material in a Court filing directed to Judge Nichols. Plaintiffs were first notified of those materials

(and OAN’s claim of privilege) on November 5, 2023. Despite their unambiguous obligation to return or destroy the material, Plaintiffs refused to do so from the start and then delayed for 47 days before finally confirming that the material would not be returned or destroyed.

Mere hours later, Plaintiffs filed a response to OAN’s motion for partial summary judgment, and in that response Plaintiffs used the Inadvertent Production Material to support their effort. Further, when they submitted the Inadvertent Production Material *in camera* to Judge Nichols, they omitted that it was subject to a dispute over privilege. That conduct warrants imposing inherent-power sanctions.¹ *See Shepherd*, 62 F.3d at 1475. By waiting well over a month to respond to OAN and then promptly filing that briefing shortly after informing OAN that the Inadvertent Production Material would not be returned or destroyed, Plaintiffs ensured that OAN would not have time to seek Court intervention to prevent the disclosure of the material.

Courts have imposed sanctions for far less egregious conduct in the context of inadvertently produced privileged materials.² Again, Plaintiffs’ actions here were no mistake or

¹ *See, e.g., Peterson v. PNC Bank, N.A.*, No. 6:18-CV-84-ORL-31DCI, 2019 WL 2233268, at *9 (M.D. Fla. Jan. 24, 2019) (differentiating cases in which there is “a possibility of an unfair informational advantage” from cases in which “that advantage was acted upon” and finding that plaintiffs’ use of sequestered materials in pleadings “to obtain an advantage” warranted imposing sanctions), *adopted in part by*, 2019 WL 2022446 (M.D. Fla. May 8, 2019); *Marshall v. McGill*, No. 10-01436-PHX-ECV, 2011 WL 13118589, at *3 (D. Ariz. June 8, 2011) (imposing sanctions for violating Rule 26(b)(5)(B) where, after being notified of inadvertently-produced material, the receiving party attached the material to court filings); *cf. George Washington Univ.*, 502 F. Supp. 3d at 90 (courts are “loathe to impose sanctions” when “the party who has violated [Rule 26(b)(5)(B)] has not disseminated or made use of the privileged information”) (emphasis added).

² *See, e.g., McDonald v. Cooper Tire & Rubber Co.*, No. 8:01-CV-1306-T-27TGW, 2005 WL 2810707, at *3 (M.D. Fla. Oct. 27, 2005) (counsel’s “unilateral determination” that he could disclose confidential material “contrary to the express” language of the court’s protective order “plainly establish[ed]” the bad faith necessary for the court to employ its inherent authority to impose sanctions); *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, No. CV 08-1885-GHK AGRX, 2013 WL 2278122, at *3 (C.D. Cal. May 20, 2013) (counsel’s use of documents claimed to be privileged in court filing was “tantamount to bad faith” and warranted imposition of sanctions pursuant to court’s inherent authority); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001) (counsel’s use of privileged material “in an effort to gain advantage” in the lawsuit did “not pass

misunderstanding, but a steadfast refusal to comply with the Protective Order and Rule 26, they then used that refusal to maximum advantage by actually filing the Inadvertent Production Material in support of a Rule 56(d) response.

The Court should award OAN its reasonable attorneys' fees incurred prosecuting this Motion. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) ("A court may assess attorney's fees as a sanction for the willful disobedience of a court order.") (quotation omitted); *see also Peterson*, 2019 WL 2233268, at *9 (awarding attorneys' fees for a violation of Rule 26(b)(5)(B)).

IV. CONCLUSION

Again, to be clear, OAN is not asking this Court to resolve a discovery dispute about whether the Inadvertent Production Material is actually privileged. Plaintiffs themselves are the ones obligated to file that motion. Rather, OAN asks the Court to use its inherent authority to impose sanctions because Plaintiffs have clearly and intentionally violated Judge Nichols's Protective Order and Rule 26. The Court should thus order that Plaintiffs (1) immediately return or destroy the Inadvertent Production Material, and certify in writing that they have done so; (2) cease any further review or use of the Inadvertent Production Material; and (3) pay all fees that OAN has incurred or will incur in connection with briefing and arguing this dispute.

even the most lenient ethical 'smell test'" and warranted imposing sanctions pursuant to the court's inherent authority); *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998) (affirming imposition of sanctions pursuant to court's inherent authority where party referred to and described document subject to protective order in court filing).

Dated: January 19, 2024

By: /s/ Charles L Babcock

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Counsel for Herring Networks, Inc.

CERTIFICATE OF CONFERENCE

I hereby certify that on the 17th day of January 2024, counsel for the parties held a meet-and-confer to discuss the Motion. No agreement could be reached during the conference.

/s/ R. Trent McCotter
R. Trent McCotter

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2024, the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will electronically mail notification of the filing to all counsel of record who are registered ECF users.

/s/ R. Trent McCotter
Trent McCotter

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SMARTMATIC USA CORP.,
SMARTMATIC HOLDING B.V., AND
SGO CORPORATION LIMITED,

Plaintiffs,

v.

HERRING NETWORKS, INC., D/B/A
ONE AMERICA NEWS NETWORK,

Defendant.

Civil Action No. 1:21-cv-02900-CJN

DECLARATION OF CARL C. BUTZER

I, Carl C. Butzer, declare as follows:

1. I am over the age of 21 and competent to make this declaration. I am an attorney at the law firm of Jackson Walker LLP, and am counsel for Defendant Herring Networks, Inc., d/b/a One America News Network (“OAN” or “Defendant”). I have personal knowledge of the facts stated in this declaration and those facts are true and correct. I am making this declaration in support of OAN’s Motion for Relief from Plaintiffs’ Violations of Judge Nichols’s Protective Order and Use of OAN’s Clawbacked Material in Support of Their Summary Judgment Response (“Motion”).

2. Attached as Exhibit 1-A is a true and correct copy of a letter, dated November 5, 2023, sent via email by Carl C. Butzer, counsel for OAN, to Caitlin Kovacs, counsel for Smartmatic.

3. Attached as Exhibit 1-B is a true and correct copy of a letter, dated November 20, 2023, sent via email by Carl C. Butzer, counsel for OAN, to Olivia Sullivan, counsel for Smartmatic.

4. Attached as Exhibit 1-C is a true and correct copy of an email, dated December 1, 2023, sent by John Edwards, counsel for OAN, to Caitlin Kovacs and Olivia Sullivan, counsel for Smartmatic. Mr. Edwards's email accurately summarizes the substance of the meet-and-confer, which I participated in, held that same day between counsel for both parties.

5. Attached as Exhibit 1-D is a true and correct copy of an email, dated December 22, 2023, sent by Caitlin Kovacs, counsel for Smartmatic, to Carl C. Butzer, counsel for OAN.

6. Attached as Exhibit 1-E is a true and correct copy of an email, dated December 28, 2023, sent by Caitlin Kovacs, counsel for Smartmatic, to the Court.

7. Attached as Exhibit 1-F is a true and correct copy of a letter, dated September 15, 2023, sent via email by Amakie Amattey, counsel for Smartmatic, to John Edwards, counsel for OAN.

8. Attached as Exhibit 1-G is a true and correct copy of an email exchange, dated September 15–19, 2023, between Amakie Amattey and Caitlin Kovacs, counsel for OAN, and John Edwards, counsel for Smartmatic.

9. Attached as Exhibit 1-H is a true and correct copy of a letter, dated November 22, 2023, sent via email by Olivia Sullivan, counsel for Smartmatic, to John Edwards, counsel for OAN.

10. Attached as Exhibit 1-I is a true and correct copy of an email exchange, dated November 22–28, 2023, between Olivia Sullivan, counsel for Smartmatic, and John Edwards, counsel for OAN.

11. On January 17, 2023, I participated in a meet-and-confer with counsel for Smartmatic regarding the Motion and the inadvertently produced material ("Inadvertent Production Material") referenced therein. During the conference, Smartmatic's counsel refused to

destroy the Inadvertent Production Material; insisted that OAN could not file a motion asking Judge Nichols to impose sanctions for Plaintiffs' past breach of the Protective Order; asserted OAN had "waived" its claim of privilege; and claimed the issue was a mere discovery dispute that OAN must request permission to brief and which could not be heard by Judge Nichols.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2023.



Carl C. Butzer

EXHIBIT 1-A



Carl C. Butzer
(214) 953-5902 (Direct Dial)
(214) 661-6609 (Direct Fax)
cbutzer@jw.com

November 5, 2023

Via Email

Caitlin A. Kovacs
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
71 South Wacker Drive, Suite 1600
Chicago, Illinois 60606
ckovacs@beneschlaw.com

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 Caitlin:

Thanks for your letter dated October 24 regarding a “Spreadsheet” (OAN_SMMT_00942992). Neither OAN nor its employees took any part in creating or gathering any of the information contained in the Spreadsheet. *See OAN_SMMT_00942989.* No OAN employees used the information in the Spreadsheet and no OAN employees attempted to access any accounts listed in the Spreadsheet. OAN received the Spreadsheet from an anonymous source, identified only by an email address—theresearcher2020@protonmail.com.ch. OAN has no knowledge of the identity of the anonymous source. We will produce several non-privileged documents that relate to theresearcher2020@protonmail.com.ch within the agreed-upon timeframe which were not previously produced—a contact form email, a blank email, and two emails that were erroneously flagged as potentially privileged. OAN has produced all non-privileged documents within the agreed-upon timeframe pertaining to “internal discussion” or communications with other third parties about the Spreadsheet. We will not produce duplicate documents or documents outside the agreed-upon timeframe.

Additionally, OAN inadvertently produced an email communication protected by the joint defense privilege (OAN_SMMT_00996295). We will send a separate clawback letter regarding this document.

Sincerely,

A handwritten signature in black ink that reads "Carl C. Butzer".

Carl C. Butzer

CCB:

EXHIBIT 1-B



Carl C. Butzer
(214) 953-5902 (Direct Dial)
(214) 661-6609 (Direct Fax)
cbutzer@jw.com

November 20, 2023

Via Email

Olivia Sullivan, Esq.
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
71 South Wacker Drive, Suite 1600
Chicago, Illinois 60606
osullivan@beneschlaw.com

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 Olivia:

We have found that certain privileged documents were inadvertently included in Defendant Herring Networks, Inc., d/b/a One America News Network's ("Herring") previous productions. Specifically, the documents bates labeled OAN_SMMT_00996295, OAN_SMMT_009962956, and OAN_SMMT_00996297 (the "Inadvertent Production Material"). Pursuant to the December 16, 2022 Amended Protective Order [ECF No. 48], all parties should immediately refrain from further examination or disclosure of the Inadvertent Production Material. Herring formally requests that Plaintiffs Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited (the "Smartmatic Parties") promptly make a good faith effort to destroy the Inadvertent Production Material and any copies thereof. After destruction, Herring respectfully requests that the Smartmatic Parties certify in writing that they have carried out this destruction pursuant to the Protective Order. The Inadvertent Production Material may not be used for any purpose in this case.

If you have any questions regarding the Inadvertent Production Material, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Carl C. Butzer".

Carl C. Butzer
Jackson Walker LLP

CCB:

EXHIBIT 1-C

Butzer, Carl

From: Edwards, John
Sent: Friday, December 1, 2023 5:25 PM
To: Sullivan, Olivia; Kovacs, Caitlin
Cc: Amattey, Amakie; Wilkes, Christopher; Golden, Meghan; Maldonado, Jacklyn; Myers, David; Babcock, Chip; Trent McCotter; Butzer, Carl; Neerman, Jonathan; Walsh, Hannah; Blaesche, Minoo; Walsh, Hannah
Subject: RE: Smartmatic/OAN - Meet & Confer

Caitlin/Olivia, thanks for the meet and confer today. Below summarizes our discussion:

1. OAN's 11/17 email requesting certain broadcast videos referenced in the Complaint but not produced (i.e., November 16, 2020 News Room 5AM (Compl. Exhibit 2); November 16, 2020 News Room 11PM (Compl. Exhibit 5); November 19, 2020 Breaking News Live (Compl. Exhibit 9); November 20, 2020 News Room 12 AM (Compl. Exhibit 14); and December 5, 2020 News Room 9AM (Compl. Exhibit 29)).
 - You stated that Smartmatic does not have possession of the requested videos.
2. OAN's 11/6 email requesting custodial information exchange regarding cell phone collection and personal emails
 - The parties will exchange information on Monday, Dec. 4.
3. OAN's 11/14 email requesting Smartmatic to run a set of revised search queries
 - Smartmatic will respond by Tuesday, Dec. 5
4. OAN's 10/27 & 11/18 emails requesting declassification of certain AEO documents and production of missing attachments
 - Smartmatic will respond by Monday, Dec. 4

OAN's 11/30 email requesting declassification of certain AEO documents

5. OAN's 11/28 email requesting missing agreements and depositions/exhibits in bankruptcy proceeding
 - Smartmatic will respond by Thursday, Dec. 7
6. OAN's 11/9 email requesting certain Smartmatic valuation documents
 - Smartmatic will respond by Tuesday, Dec. 5
7. You indicated that Volume 20 of Smartmatic's production includes all the LA County documents that the County agreed could be produced.
8. You stated that yesterday's production by Smartmatic- and additional productions over the next 2 weeks - are documents recently produced by Smartmatic in the Newsmax and/or Fox cases.
9. OAN agreed to produce its privilege log next week.

10. Regarding OAN's letter of Nov. 20th clawing back three documents that were inadvertently produced (OAN_SMMT_00996295, OAN_SMMT_009962956, and OAN_SMMT_00996297), you asked what the basis of the privilege was, and we replied that the documents are subject to a joint defense privilege in the *Coomer* case (a case you said you were unfamiliar with). We asked if the documents had been destroyed pursuant to our request and para. 19(c) of the Court's Protective Order (Dkt 48). You stated they have not been destroyed and that you did not agree to destroy them at this time. We reminded you of the Court's Protective Order, which provides in part: "upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof." You stated that that provision does not obligate Smartmatic to destroy the documents unless Smartmatic believes the documents are in fact Protected Information, and that Smartmatic has not yet made that determination. Instead, although we had already informed you of the basis for the privilege assertion, Smartmatic will respond to the Nov. 20th clawback letter after seeing OAN's privilege log.

Thanks, and have a great weekend. - John

From: Edwards, John
Sent: Friday, November 17, 2023 3:56 PM
To: Sullivan, Olivia <OSullivan@beneschlaw.com>; Kovacs, Caitlin <CKovacs@beneschlaw.com>
Cc: Amattee, Amakie <AAamattee@beneschlaw.com>; Wilkes, Christopher <CWilkes@beneschlaw.com>; Golden, Meghan <MGolden@beneschlaw.com>; Maldonado, Jacklyn <JMaldonado@beneschlaw.com>; Myers, David <dmyers@jw.com>; Babcock, Chip <cbabcock@jw.com>; Trent McCotter <mccotter@boydengrayassociates.com>; Butzer, Carl <cbutzer@jw.com>; Neerman, Jonathan <jneerman@jw.com>; Walsh, Hannah <hwalsh@jw.com>; Blaesche, Minoo <mblaesche@jw.com>; Stowe, William <wstowe@jw.com>
Subject: Smartmatic/OAN - Meet & Confer

Caitlin/Olivia, we request a meet and confer next Tuesday, Nov. 21 when we can discuss responses to the issues raised in the attached letters/emails. Please let us know what time would work for you.

Thanks. - John

John K. Edwards | Partner
1401 McKinney Suite 1900 | Houston, TX | 77010
V: (713) 752-4319 | C: (713) 553-7951 | F: (713) 308-4117
[John Edwards - Houston Litigation Attorney - Jackson Walker \(jw.com\)](mailto:John.Edwards@jw.com) | jedwards@jw.com



EXHIBIT 1-D

From: Kovacs, Caitlin <CKovacs@beneschlaw.com>
Sent: Friday, December 22, 2023 1:46 PM
To: Butzer, Carl; Amattey, Amakie; Edwards, John
Cc: Sullivan, Olivia; Blaesche, Minoo; Walsh, Hannah; Trent McCotter; Dickson, Carter; Ceckowski, Lauren; Flynn-DuPart, Mary Lou; Betman, Ronald; Connolly, J. Erik; Wrigley, Nicole; Golden, Meghan
Subject: RE: Smartmatic v. OANN - Clawback Letter

RECEIVED FROM EXTERNAL SENDER – USE CAUTION

Carl,

Following our meet and confer regarding OANN's clawback request and our review of OANN's privilege log produced on December 8, we do not see any valid basis on which OAN_SMMT_00996295-97 can be described as Protected Information under the Amended Confidentiality Agreement and Protective Order ("Protective Order"). This conclusion is bolstered by (though not dependent on) OANN's failure to point to or produce any written agreement documenting OANN's alleged joint defense privilege. Since this document is not Protected Information, Section 19(c) of the Protective Order does not apply, and Smartmatic is under no obligation to destroy it.

Best,
Caitlin

 Benesch

[vCard](#)

Caitlin A. Kovacs
(she/her/hers)
Partner | Litigation
Benesch Friedlander Coplan & Aronoff LLP
t: 312.624.6392 | m: 614.804.0562
CKovacs@beneschlaw.com | www.beneschlaw.com
71 South Wacker Drive, Suite 1600, Chicago, IL 60606-4637

Confidentiality Notice to Incorrect Addressee: www.beneschlaw.com/confidentialitynotice

From: Butzer, Carl <cbutzer@jw.com>
Sent: Monday, November 20, 2023 2:11 PM
To: Amattey, Amakie <AAamattey@beneschlaw.com>; Edwards, John <jedwards@jw.com>
Cc: Kovacs, Caitlin <CKovacs@beneschlaw.com>; Sullivan, Olivia <OSullivan@beneschlaw.com>; Blaesche, Minoo <mblaesche@jw.com>; Walsh, Hannah <hwalsh@jw.com>; Trent McCotter <mccotter@boydengrayassociates.com>; Dickson, Carter <cdickson@jw.com>; Ceckowski, Lauren <lceckowski@jw.com>; Flynn-DuPart, Mary Lou <MDUPART@jw.com>
Subject: Smartmatic v. OANN - Clawback Letter

Amakie

Please see the attached correspondence regarding inadvertently produced documents.

Thanks,

Carl

Carl C. Butzer | Jackson Walker LLP
2323 Ross Avenue, Suite 600 | Dallas, TX | 75201
V: (214) 953-5902 | F: (214) 661-6609 | cbutzer@jw.com



EXHIBIT 1-E

From: Kovacs, Caitlin <CKovacs@beneschlaw.com>
Sent: Thursday, December 28, 2023 11:35 AM
To: Courtney Moore; CJNpo@dcd.uscourts.gov
Cc: Connolly, J. Erik; Wrigley, Nicole; Betman, Ronald; Sullivan, Olivia; Bedell, James; Shah, Bethany; Butzer, Carl; Babcock, Chip; Glover, Joel; Edwards, John; Neerman, Jonathan; Blaesche, Minoo; Hamilton, Nancy; tmccotter@boydengray.com
Subject: Smartmatic USA Corp. et al v. Herring Networks, Inc., Case Number 1:21-cv-02900, Docket Entry #155, Ltr re In Camera Review
Attachments: 2023.12.28 SMMT Ltr to Court re Ex BB and CC.pdf; Ex. BB to Connolly Affidavit.pdf; Ex. CC to Connolly Affidavit.pdf

****RECEIVED FROM EXTERNAL SENDER – USE CAUTION****

Dear Judge Nichols and Ms. Moore,

We write to provide the Court with two documents that Smartmatic cites in its Response to OANN's Motion for Partial Summary Judgment (Dkt. #155). Those two documents are attached to this email as Exhibits BB and CC, along with a letter describing the circumstances that lead us to provide these documents for review in camera rather than placing them on the docket. Please let us know if you need any further information.

Thank you very much for your time and attention to this matter.

Best,
Caitlin Kovacs
Counsel for Smartmatic

 Benesch

vCard

Caitlin A. Kovacs
(she/her/hers)
Partner | Litigation
Benesch Friedlander Coplan & Aronoff LLP
t: 312.624.6392 | m: 614.804.0562
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71 South Wacker Drive, Suite 1600, Chicago, IL 60606-4637

Confidentiality Notice to Incorrect Addressee: www.beneschlaw.com/confidentialitynotice

EXHIBIT 1-F



Amakie Amattey
71 South Wacker Drive, Suite 1600
Chicago, Illinois 60606-4637
Direct Dial: 312.506.3444
Fax: 312.767.9192
aamattey@beneschlaw.com

September 15, 2023

VIA EMAIL

John Edwards
Jackson Walker, LLP
1401 McKinney Suite 1900
Houston, TX 77010

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

Dear Counsel:

It has come to our attention that certain privileged documents have been inadvertently included in Smartmatic's document production, identified here by beginning Bates label:

SMMT-OAN04171334
SMMT-OAN04662278
SMMT-OAN04662282
SMMT-OAN04816880
SMMT-OAN06934126
SMMT-OAN06934129

The referenced documents are attorney-client privileged communications and/or constitute attorney work product. Accordingly, we request that you promptly destroy the original production copy and any additional copies of the documents listed above, and that you not use or disclose the information contained therein in this litigation or otherwise. Where the document at issue is in the same document family as a non-privileged document, Smartmatic will produce a redacted copy of the privileged document.

Under the operative *Amended Confidentiality Agreement and Protective Order*, upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. (Dkt. 48, at 10–11).

Please confirm to me in writing that the documents listed above, and any copies thereof, have been destroyed. Please contact me if you have any questions regarding this matter.

J. Edwards
September 15, 2023
Page 2

Very truly yours,

BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP

/s/ Amakie Amattey

Amakie Amattey

EXHIBIT 1-G

From: Kovacs, Caitlin <CKovacs@beneschlaw.com>
Sent: Tuesday, September 19, 2023 5:08 PM
To: Edwards, John; Amattey, Amakie
Cc: Sullivan, Olivia; Wilkes, Christopher; Golden, Meghan; Wertheimer, Nancy; Maldonado, Jacklyn; Butzer, Carl; Blaesche, Minoo; Pickett Shah, Bethany; Emery, Tori; Walsh, Hannah; Carlton, Emily; Trent McCotter; Dickson, Carter
Subject: RE: Smartmatic v. OANN - Clawback Letter

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Thanks John. Will do.



Caitlin A. Kovacs
(she/her/hers)
Partner | Litigation
Benesch Friedlander Coplan & Aronoff LLP
t: 312.624.6392 | m: 614.804.0562
CKovacs@beneschlaw.com | www.beneschlaw.com
71 South Wacker Drive, Suite 1600, Chicago, IL 60606-4637

Confidentiality Notice to Incorrect Addressee: www.beneschlaw.com/confidentialitynotice

From: Edwards, John <jedwards@jw.com>
Sent: Saturday, September 16, 2023 4:23 PM
To: Amattey, Amakie <AAmattey@beneschlaw.com>
Cc: Kovacs, Caitlin <CKovacs@beneschlaw.com>; Sullivan, Olivia <OSullivan@beneschlaw.com>; Wilkes, Christopher <CWilkes@beneschlaw.com>; Golden, Meghan <MGolden@beneschlaw.com>; Wertheimer, Nancy <NWertheimer@beneschlaw.com>; Maldonado, Jacklyn <JMaldonado@beneschlaw.com>; Butzer, Carl <cbutzer@jw.com>; Blaesche, Minoo <mblaesche@jw.com>; Pickett Shah, Bethany <bpickett@jw.com>; Emery, Tori <ttemery@jw.com>; Walsh, Hannah <hwalsh@jw.com>; Carlton, Emily <erhine@jw.com>; Trent McCotter <mccotter@boydengrayassociates.com>; Dickson, Carter <cdickson@jw.com>
Subject: Re: Smartmatic v. OANN - Clawback Letter

We will destroy. Please send us a privilege log for these documents.

Sent from my iPhone

On Sep 15, 2023, at 3:18 PM, Amattey, Amakie <AAmattey@beneschlaw.com> wrote:

RECEIVED FROM EXTERNAL SENDER – USE CAUTION

Counsel:

Please see the attached correspondence regarding inadvertently produced documents.

Kind Regards,
Amakie

[vCard Bio](#)

Amakie Amattey
(she/her/hers)
Associate | Litigation
Benesch Friedlander Coplan & Aronoff LLP

t: 312.506.3444 | AAmattey@beneschlaw.com

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Confidentiality Notice to Incorrect Addressee: www.beneschlaw.com/confidentialitynotice

<2023.09.15 SMMT Ltr to OANN re Inadvertently Produced Documents.pdf>

EXHIBIT 1-H



Olivia E. Sullivan
71 South Wacker Drive, Suite 1600
Chicago, Illinois 60606-4637
Direct Dial: 312.624.6415
Fax: 312.767.9192
Osullivan@beneschlaw.com

November 22, 2023

VIA EMAIL

John Edwards
Jackson Walker LLP
1401 McKinney Suite 1900
Houston, TX 77010

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 have recently discovered that a certain privileged document has been inadvertently included in Smartmatic's document production, identified here by beginning Bates label:

SMMT-OAN08139343

The referenced document is attorney-client privileged communications, subject to the trial preparation privilege, and/or constitutes attorney work product. Accordingly, we request that you promptly destroy the original production copy and any additional copies of the document listed above and that you not use or disclose the information contained therein in this litigation or otherwise. Where the document at issue is in the same document family as a non-privileged document, Smartmatic will produce a redacted copy of the privileged document.

Please confirm in writing that the document listed above, and any copies thereof, has been destroyed. Please contact me if you have any questions regarding this matter.

Sincerely,

/s/ Olivia E. Sullivan

Olivia E. Sullivan

EXHIBIT 1-I

From: Edwards, John
Sent: Tuesday, November 28, 2023 10:00 AM
To: Sullivan, Olivia; Butzer, Carl; Shah, Bethany; Trent McCotter; Blaesche, Minoo
Cc: Kovacs, Caitlin; Betman, Ronald; Bedell, James; Golden, Meghan
Subject: RE: Smartmatic v. OANN
Attachments: 2023.11.22 SMMT Ltr to OAN re Clawback.pdf

Olivia, I write to confirm that the original and any copies of the document referenced in the attached letter - SMMT-OAN08139343 -- have been destroyed. Please provide an updated privilege log to include the document. Thanks.. - John

From: Sullivan, Olivia <OSullivan@beneschlaw.com>
Sent: Wednesday, November 22, 2023 1:32 PM
To: Edwards, John <jedwards@jw.com>; Butzer, Carl <cbutzer@jw.com>; Shah, Bethany <bpickett@jw.com>; Trent McCotter <mccotter@boydengrayassociates.com>; Blaesche, Minoo <mblaesche@jw.com>
Cc: Kovacs, Caitlin <CKovacs@beneschlaw.com>; Betman, Ronald <RBetman@beneschlaw.com>; Bedell, James <JBedell@beneschlaw.com>; Golden, Meghan <MGolden@beneschlaw.com>
Subject: Smartmatic v. OANN

****RECEIVED FROM EXTERNAL SENDER – USE CAUTION****

Counsel,

Please see attached.

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SMARTMATIC USA CORP.,
SMARTMATIC HOLDING B.V., AND
SGO CORPORATION LIMITED,

Plaintiffs,
v.

HERRING NETWORKS, INC., D/B/A
ONE AMERICA NEWS NETWORK,

Defendant.

No. 1:21-cv-02900-CJN

**ORDER GRANTING OAN'S MOTION FOR RELIEF FROM PLAINTIFFS'
VIOLATIONS OF JUDGE NICHOLS'S PROTECTIVE ORDER
AND USE OF OAN'S CLAWBACKED MATERIAL IN SUPPORT
OF THEIR SUMMARY JUDGMENT RESPONSE**

On this date, the Court considered OAN's Motion for Relief from Plaintiffs' Violations of Judge Nichols' Protective Order and Use of OAN's Clawbacked Material in Support of Their Summary Judgment Response (the "Motion"). The Court, having considered the Motion, hereby orders that the Motion is GRANTED.

Smartmatic is hereby ORDERED to immediately return or destroy the Inadvertent Production Material, and certify in writing that they have done so within five (5) days of this Order.

Smartmatic is further ORDERED to cease any further review or use of the Inadvertent Production Material.

Smartmatic is further ORDERED to pay the reasonable attorneys' fees that OAN has incurred in connection with briefing and arguing the Motion. OAN may submit an application for those fees with supporting documentation within fourteen (14) days of this order.

Signed this _____ day of _____, 2024.

HON. CARL J. NICHOLS
United States District Judge