

5. On 8/30/23, the Special Master orally granted Dominion’s motion to compel. Newsmax Ex. B, at 82:9-10.

6. By 9/26/2023, the parties had agreed on key language for an order directing Newsmax to collect texts regardless of whether data was stored on “personal” devices, and “regardless of whether any of the stored data consists of communications that Newsmax considers to be in furtherance of Newsmax business.” Dominion Ex. 2.

7. At a hearing on 9/28/23 about the order, the Special Master stated: [REDACTED]

[REDACTED]

Newsmax Ex. D, at 5:6-7.

8. When Newsmax objected to a proposed 10/13/23 deadline to produce texts, *id.* at 10:6-12:23, the [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 12:24-13:8.

9. The Special Master repeated later: [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 48:6-10.

10. The Special Master thus “so ordered” the production deadlines, and necessarily, the directive to collect underlying ESI; as of the 10/11/23 production deadline, only the hearing transcript reflected these directives.

11. Newsmax admits it received the 9/28/23 transcript that same day, Dominion Ex. 3; thus, Newsmax’s exception was due 10/12/23.

12. Newsmax missed the production deadline. When Newsmax tried to explain why at a 10/13/23 hearing before the Special Master, he responded: [REDACTED]

[REDACTED] Newsmax Ex. E, at 75:17-19, 78:3-4.

13. The Special Master stayed late to issue a written order on 10/13/23, Newsmax Ex. A—but by then, the time for exception had elapsed.

14. *Second*, Newsmax’s exception relies on evidence outside the record.

15. An exception may be made on “the record on which the Special Master’s decision was made.” Dominion Ex. 1.

16. The evidence Newsmax offers to show that it lacks possession/custody/control over private/personal texts, is the Haim Affidavit.

17. The Haim Affidavit is not in the record—before the Special Master, Newsmax filed no supporting evidence.

18. Newsmax omitted to file the Haim Affidavit with its exception on 10/16/23; the Affidavit was filed 10/19/23.

19. *Third*, Newsmax's exception is meritless.

20. To begin, Dominion disagrees the dispute is about possession/custody/control; instead it is about Newsmax's desire to redefine relevance based on a false "business" versus "private"/"personal" dichotomy.

21. Newsmax claims it can only produce "communications in furtherance of Newsmax business"; but when pressed about how it determined what was "in furtherance of Newsmax business," Newsmax revealed it restricted its searches and productions based upon whether the recipients of communications were affiliated with Newsmax, *not* based on whether text contents were business-related. Newsmax Ex. B at 33:12-23; Dominion Ex. 4 at 6 (hearing powerpoint).

22. What Newsmax is describing as "private" communications include conversations showing the knowledge and state of mind of Newsmax personnel when they made defamatory statements; these communications, even with individuals who do not work for Newsmax, are "in furtherance of Newsmax business," and should be produced even if Newsmax's redefinition is accepted.

23. Turning to Newsmax's framing of the debate, a party can be compelled to collect information "if [that] party has a legal right, authority, or practical ability to obtain ... [the] information"; and "even if [the information is] not in [the party's] actual physical control, then the party must produce the information." *Hammer v.*

Howard Medical, Inc., 2017 WL 1179864, at *3 (Del. Super. Feb. 14, 2017) (unpublished).

24. Newsmax says Dominion “cited no case” supporting its position below, and that the caselaw “consistently” supports Newsmax’s position.

25. Not so—the *Chevron* and *State Farm* cases cited below support Dominion’s position, Newsmax Ex. F, at 4; Newsmax’s attempts to distinguish these cases were unpersuasive.

26. Newsmax doesn’t meaningfully dispute its possession/custody/control over “business-related” communications on its custodians’ personal devices, yet insists it lacks the same over “private” communications on those devices.

27. Again, the business version personal/private distinction is flawed to begin with, and unsupported by the record here.

28. The record shows Newsmax has the practical ability to obtain all ESI data from its custodians—indeed, Newsmax already collected this data, and searched it to respond to discovery requests in Smartmatic.

29. Newsmax explained at a hearing that it [REDACTED]

[REDACTED]

[REDACTED] Newsmax

Ex. B at 54:13-17.

30. In addition, employment agreements also support a finding that Newsmax has a legal right to compel employees to provide access to the phones at issue, Dominion Ex. 5 (Aug. 25, 2013 supplement), at Ex. A; and Newsmax no longer appears to dispute it has possession/custody/control over CEO Christopher Ruddy's phone (further confirmed in the Haim Affidavit).

31. In *Fox*, the Special Master reached the same conclusion here, ordering Fox to produce texts regardless of whether Fox viewed the message as "business" or "private," *see* Newsmax Ex. F, at Ex. 1. Newsmax claims Fox "never denied that it issued and paid for Personal Devices used by its personnel," but cites no supporting evidence.

[Signature block on following page]

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CERTIFICATE OF SERVICE

I, Brian E. Farnan, hereby certify that on November 22, 2023, a copy of the redacted version of Plaintiff's Response to Defendant Newsmax Media Inc.'s Exception to October 13, 2023 Non-Stipulated Order Granting in Part Dominion's First Motion to Compel Against Newsmax was served via LexisNexis File&Serve on the following:

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