SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SMARTMATIC USA CORP., SMARTMATIC INTERNATIONAL HOLDING B.V., and SGO CORPORATION LIMITED, Plaintiffs, -against- FOX CORPORATION, FOX NEWS NETWORK LLC, LOU DOBBS, MARIA BARTIROMO, JEANINE PIRRO, RUDOLPH GIULIANI, and SIDNEY POWELL, Defendants.	Index No. 151136/2021 I.A.S Part 58 David B. Cohen, J.S.C. Motion Seq. Nos. 1, 2, 3, 4

SMARTMATIC'S MEMORANDUM OF LAW IN OPPOSITION TO FOX DEFENDANTS' MOTIONS TO DISMISS PURSUANT TO THE FIRST AMENDMENT AND CPLR §§ 3211(a)(1), (a)(7), and(g)

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PRELIMINARY STATEMENT[1]

This is not a game. The First Amendment does not provide the Fox Defendants a Get Out Of Jail Free card. The Fox Defendants do not get a do-over with their reporting now that they have been sued. Their decision to defame Smartmatic had real world consequences. Smartmatic's reputation will never be the same.

The Fox Defendants spend little time arguing that what they published about Smartmatic was true. They cannot. Instead, the Fox Defendants argue they cannot be held responsible under First Amendment principles because challenges to the Presidential election were "newsworthy" enough to give them a free pass. The U.S. Supreme Court disagrees.

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. ***That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected***. Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. State of La., 379 U.S. 64, 75 (1964). The Fox Defendants solicited and published calculated falsehoods about Smartmatic. They enjoy no protection or immunity pursuant to the First Amendment or New York law.

There is no do-over. The motions filed by the Fox Defendants are predicated on a version of events that they may now wish took place, but did not. The Fox Defendants did not report on a

[1] "Smartmatic" refers to Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited. "Fox News" refers to Fox Corporation and Fox News Network. "Fox anchors" refers to Lou Dobbs, Maria Bartiromo and Jeanine Pirro. "Fox Defendants" refers to Fox News and the Fox anchors.

government investigation or judicial proceeding. They were not covering fast-breaking news or a live address from the White House. They did not interview the President of the United States or another government official. The Fox Defendants interviewed two private practice lawyers–Rudy Giuliani and Sidney Powell–about their personal investigation of the 2020 election. During those interviews, Giuliani, Powell, and the Fox anchors repeatedly lied about a private company (Smartmatic) that played a minor, noncontroversial role in the election.

The Fox anchors were not innocent bystanders and the disinformation generated during their interviews was no accident. Prior to the interviews, the Fox anchors decided to join forces with Giuliani and Powell to disseminate disinformation about Smartmatic. The Fox anchors knew what Giuliani and Powell would say on their shows, asked questions to elicit lies about Smartmatic, and endorsed Giuliani's and Powell's investigation. The Fox anchors added their own defamatory comments about Smartmatic for good measure. This was a scripted performance by the Fox anchors, Giuliani, and Powell to defame and disparage Smartmatic for personal gain.

There are real world consequences. Lost in the Fox Defendants' arguments is acknowledgement of, much less regret for, the damage they caused to Smartmatic. Smartmatic played no role in the 2020 election outside of Los Angeles County. No role in any of the contested states. But the Fox Defendants decided to disseminate calculated falsehoods about the company to gain favor with the outgoing President and his followers. Smartmatic and its officers and employees have had the business they spent decades building and their own lives jeopardized as a result. The Fox Defendants must be held responsible.

OVERVIEW OF ARGUMENT

The Court's role at this early stage is limited to determining whether Smartmatic has alleged facts demonstrating a "substantial basis in law" for its claims. It has.

Defamatory Statements and Implications. The Fox Defendants concede they published defamatory statements and implications about Smartmatic. The Complaint identifies 192 defamatory statements published over the course of 41 broadcasts, online articles, and social media posts. This includes 77 defamatory statements made by the Fox anchors. The Complaint includes 37 paragraphs explaining why these statements were defamatory and factually inaccurate. The overall message conveyed by the Fox Defendants over the course of their disinformation campaign was that Smartmatic conspired to fix, rig, and steal the 2020 U.S. election for Joe Biden and Kamala Harris. That message is defamatory and false.

Actual Malice. The Fox Defendants try–but fail–to argue that Smartmatic has not adequately alleged that they acted with actual malice. The Complaint includes 248 paragraphs, including 102 exhibits, detailing allegations and evidence of actual malice. Each of the Fox Defendants (a) knew the statements being made about Smartmatic were unverified and contradicted, (b) knew that Smartmatic and government officials had denied the accuracy of the statements they were making about Smartmatic, (c) had access to dozens of reports from government officials showing their statements were not accurate, (d) had obvious reasons to doubt the veracity of Giuliani and Powell, and (e) violated their journalistic responsibilities and code of ethics. Smartmatic's allegations show the Fox Defendants knew their statements and implications were false or that they purposefully avoided learning the truth (reckless disregard).

Damages. The Fox Defendants concede that Smartmatic has adequately alleged special harm and damages. Smartmatic did not need to allege special harm and damages. The Fox Defendants reported that Smartmatic fixed, rigged, and stole the election. That is defamatory *per*

se. But Smartmatic did not rest on presumed damages. The Complaint details the damage caused by the Fox Defendants' defamation and disparagement. Smartmatic stands to lose over $500 million in net profit and over $2.7 billion in enterprise value. Its reputation has been destroyed. Its offices have been picketed. Its officers and employees have been harassed.

Excuse No. 1. Instead of challenging the adequacy of Smartmatic's allegations, the Fox Defendants attempt to cloak themselves in the First Amendment. The cloak does not fit. First, the Fox Defendants argue that the "neutral reporting" privilege allows them to publish with impunity anything that Giuliani and Powell said about Smartmatic because it would be considered newsworthy. This argument fails. New York does not recognize the neutral reporting privilege. And, even if the Court were to adopt the privilege, the Fox Defendants have failed to demonstrate that (1) Smartmatic is a public figure, (2) they did not solicit the defamatory statements about Smartmatic, (3) Giuliani and Powell are responsible and prominent organizations, and (4) they presented Giuliani's and Powell's statements in a neutral and disinterested manner. The news coverage at issue does not even come close to qualifying as neutral and disinterested.

Excuse No. 2. The Fox Defendants also attempt to invoke the "fair reporting" privilege to escape responsibility. The fair reporting privilege only applies when (1) an official proceeding exists at the time of publication, (2) a reasonable viewer or reader would understand the defendant was describing statements from that official proceeding, and (3) the defendant fairly and accurately summarized statements from that official proceeding. None of those are true here. Except for their reporting on December 10, there was no official proceeding alleging improper conduct by Smartmatic at the time the Fox Defendants published their reports. And, the reports the Fox Defendants published on December 10 did not purport to be, and were not, fair and accurate summaries of the sham lawsuits that Powell filed after she had been fired from President Trump's

legal team. The Fox Defendants' reports were littered with statements by two private lawyers, not statements from an official proceeding.

Excuse No. 3. Next, the Fox Defendants argue that they are not responsible for the statements made by Giuliani and Powell. This is contrary to black letter law. Fox News published the defamatory statements made by Giuliani and Powell. The Fox anchors participated in creating and publishing the defamatory statements. And each of the Fox Defendants republished the defamatory statements online and on social media. Each of the Fox Defendants are considered "publishers" of the defamatory statements and implications made during their respective programs. The Fox Defendants wedded themselves to Giuliani and Powell during their programs. They cannot distance themselves now.

Excuse No. 4. Finally, the Fox Defendants argue that the defamatory statements made by the Fox anchors were pure opinions. Not so under New York law. The defamatory statements were not rhetorical hyperbole. The Fox anchors accused Smartmatic of taking specific actions before and during the 2020 election. Smartmatic can demonstrate that it did not take those actions. The defamatory statements and implications were readily understandable and demonstrably false. Plus, the Complaint includes multiple paragraphs and statements explaining how the Fox Defendants created the impression that they were reporting facts about Smartmatic as opposed to pure opinions.

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This is a motion to dismiss. The only question is whether Smartmatic has adequately alleged facts to demonstrate a "substantial basis in law" for its claims. The answer is "yes" based on well-established and uncontroversial legal principles. Media organizations and individuals are held responsible for the defamatory falsehoods they publish. Finding that Smartmatic has

adequately alleged facts supporting its claims against the Fox Defendants does not require the creation of new law. It does not require extension of existing legal principles. It only requires the Court to apply black letter law to the facts alleged in Smartmatic's 276-page Complaint. This is a straightforward case of defamation and disparagement.

SUMMARY OF FACTS[2]

Antonio Mugica and Roger Piñate founded Smartmatic in 2000 in Boca Raton, Florida. (Compl. ¶39.) After observing the "hanging chad" debacle of the 2000 U.S. election, they wanted to bring secure technology to elections and build an election technology company that could ensure accuracy, transparency, and auditability. (*Id.* ¶40.) They dedicated the next 20 years of their lives to that endeavor and were successful. (*Id.* ¶¶41, 46-61.) Smartmatic has processed more than 5 billion votes in more than 25 countries on five continents. (*Id.* ¶41.) Smartmatic has never had a security breach. (*Id.* ¶61.) Each of the elections using Smartmatic's technology included an auditable paper trail that demonstrates they were not rigged, hacked, or stolen. (*Id.*) As a result of these efforts, Smartmatic became known as one of the best election technology companies in the world. (*Id.* ¶64.)

Last year, 2020, was the most important year in Smartmatic's history. Despite its many successes, Smartmatic had not played a major role in local, state, or federal elections in the United States. (*Id.* ¶¶46-60.) That was about to change. In June 2018, Los Angeles County selected Smartmatic as its partner to develop Voting Solutions for All People. (*Id.* ¶65.) Success in Los Angeles County with that initiative positioned Smartmatic to market its election technology to other counties and states in the United States (and across the world) who were inclined to follow

[2] Smartmatic's Complaint is 276 pages long, includes 754 paragraphs, 152 exhibits, and 4 appendices. *See* NYSCEF Doc. No. 1 ("Compl."). It cannot be adequately summarized in this brief. Smartmatic highlights some of the pertinent factual allegations in this section.

Los Angeles County's lead. (*Id.*) And it was a success. Smartmatic provided election technology and support to Los Angeles County during the 2020 election without incident. (*Id.* ¶76.) The results in Los Angeles County were secure, reliable, and auditable. (*Id.*)

Smartmatic's time for celebration was short-lived. On November 12, nine days after the election, the Fox Defendants began their disinformation campaign against Smartmatic. (*Id.* ¶96.) The campaign continued through December 10. (*Id.* ¶133.) During that period, the Fox Defendants broadcast 12 shows, posted 9 videos and transcripts online, and posted 20 comments and videos on social media about Smartmatic. (*Id.*) Smartmatic played no role in the 2020 election other than assisting Los Angeles County. (*Id.* ¶79.) But that is not what the Fox Defendants reported. The Fox Defendants reported that Smartmatic played a major role in rigging, fixing, and stealing the election from President Trump. (*Id.* ¶¶96-99, 101-105, 107-108, 110-116, 118-129, 149, 157, 166, 175, 183, 191, 199, 208, 522.)

The Fox Defendants used four tools to spread this message. One, the Fox Defendants repeatedly asked Giuliani and Powell to appear on their shows. Giuliani appeared on five shows. (*Id.* ¶¶133(a), 133(e), 133(t), 133(w), 133(z).) Powell appeared on five shows. (*Id.* ¶¶133(c), 133(e), 133(o), 133(y), 133(ll).) During their appearances, Giuliani and Powell stated that Smartmatic was founded to "fix elections" and "alter votes," its technology is "extremely hackable," it was "banned by the United States," its technology was "corrupt" and "switched votes," it has an "algorithm" used to "modify the votes," and Smartmatic was part of "one huge criminal conspiracy" to manipulate the 2020 Presidential election. (*See, e.g.*, *id.* ¶¶157(c), 199(b), 149(a), 208(g), 149(c), 116, 142(e), 166(j), 208(e).)

Two, the Fox Defendants republished the shows during which Giuliani and Powell made their statements about Smartmatic. Fox News posted videos and transcripts of the shows on its

website. (*Id.* ¶¶133(d), 133(g), 133(l), 133(v), 133(cc), 133(ff), 133(kk).) The Fox anchors posted videos of the shows on Twitter and Facebook. (*Id.* ¶¶133(b), 133(h), 133(i), 133(j), 133(k), 133(m), 133(p), 133(q), 133(r), 133(s), 133(u), 133(x), 133(aa), 133(ee), 133(ii), 133(mm), 133(nn), 133(oo), 133(pp), 133(qq).) In posting the videos, the Fox anchors made observations such as: "@SidneyPowell1 says she has firsthand evidence that Smartmatic voting software was designed in a way to change the vote of a voter without being detected," "@RudyGiuliani says votes in 28 states were sent to Germany and Spain to be counted by Smartmatic," and "@SidneyPowell1 reveals groundbreaking new evidence indicating our Presidential election came under massive cyber-attack orchestrated with the help of Dominion, Smartmatic and foreign adversaries." (*Id.* ¶¶133(r), 133(x), 133(nn).)

Three, the Fox anchors made their own statements about Smartmatic. For example, the Fox anchors reported that Smartmatic software was used in the states "where they stopped counting," the "Smartmatic system has a backdoor . . . allowing an intervening party a real-time understanding of how many votes will be needed to gain an electoral advantage," Smartmatic "had ties to Venezuela's Hugo Chavez," "the software made by Smartmatic [] was changing [] votes from Trump to Biden," the President's lawyers are alleging "Smartmatic software" has "a backdoor [that] is capable of flipping votes," what we have here is "a cyber-attack on our election," Smartmatic has "documented issues with their voting machine software," Smartmatic's CEO was part of a "very large foreign intrusion and interference [] in the election of 2020," and "[w]e have tremendous evidence already of fraud in this election." (*See, e.g. id.* ¶¶98, 149(f), 208(h), 199(i), 166(m), 166(s), 166(t), 183(m), 127, 142(t).)

Fourth, the Fox Defendants gave the impression that they had access to and had vetted undisclosed information, sources, or so-called "evidence" that Giuliani and Powell claimed to

possess to support the accusations they lodged against Smartmatic. For example, the Fox anchors said things like: "we have to find out whether they did [change votes]," "I want to show this graphic of the swing states that were using Dominion and this software, the Smartmatic software," "one source says that the key point to understand is that the Smartmatic system . . . ," "according to public records, Dominion voting machines are used in 2,000 jurisdictions," "I have spoken with a few whistleblowers myself this weekend," "according to public records, Dominion voting machines are used in 2,000 jurisdictions," and "[a]ccording to experts, if one site has a flaw, other sites are likely to as well . . ." (*See, e.g.*, *id.* ¶¶175(a), 175(b), 183(f), 183(e), SMT.Ex.5B[3].)

The Fox Defendants had no basis for what they published about Smartmatic. Each of them knew Giuliani and Powell had no support for what they were saying about the company. (Compl. ¶¶358-378.) Each of the Fox anchors knew they had no support for what they were saying either. (*Id.* ¶¶220-252.) Smartmatic's technology and software were not used in any of the states with close outcomes. (*Id.* ¶273.) Smartmatic's software does not have a backdoor that allows for voting manipulation. (*Id.* ¶187.) Smartmatic's technology and software were not designed to fix elections. (*Id.* ¶211.) Smartmatic has never been banned in the United States. (*Id.* ¶¶341-345.) And Smartmatic's technology and software were not used fix, rig, or steal votes in the 2020 election. (*Id.* ¶¶289-316.) These facts were known and readily available to the Fox Defendants. (*Id.* ¶¶217-357.) But the Fox Defendants published the false attacks on Smartmatic anyway.

By doing so, the Fox Defendants manufactured a controversy where none existed. After the election, challenges were raised regarding voting procedures and COVID-19 accommodations; and, perhaps there was a controversy over those procedures and accommodations. There was no

[3] Citations to Exhibits to Smartmatic's Complaint will be referenced by the Exhibit number and the NYSCEF Document Number. Citations to Exhibits to the Affidavits submitted in Opposition to the Fox Defendants' Motions to Dismiss will be labeled Smartmatic Exhibit ("SMT.Ex").

controversy regarding Smartmatic. No government official or agency issued a report finding that Smartmatic's technology and software were used to fix, rig, or steal votes in the 2020 election. (*Id.* ¶¶293-314.) Instead, government officials and election specialists universally issued reports and findings that there was no fraud by Smartmatic or anyone else. (*Id.*) The only lawsuits that even mentioned Smartmatic were the sham lawsuits that Powell filed after she had been fired from President Trump's legal team. (*Id.* ¶¶377, 379-421.) None of the Fox reports at issue covered her lawsuits.

CHOICE OF LAW

Smartmatic has brought nine causes of action against the Fox Defendants for defamation and seven causes of action for product disparagement. The Fox Defendants did not take a position on choice of law. They punted on whether Florida (domicile for Smartmatic USA Corp.) or New York (domicile for Fox News) should apply. (Fox Memorandum of Law, NYSCEF 206 ("Fox Mem.") at 10 n.8.) Fox News claimed: "Because the Court can resolve this case solely by reference to First Amendment principles and the applicable pleading standards, [] it need not conduct a choice-of-law analysis now." (*Id.*) That is not true.

"The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co.*, 81 N.Y.2d 219, 223 (1993). The defamation laws of New York and Florida conflict in several respects. For example, New York and Florida differ with respect to the two privileges the Fox Defendants attempt to invoke: the fair reporting and neutral reporting privileges. New York has codified a fair reporting privilege and the privilege is absolute. *See* N.Y. Civ. Rights Law §74. Florida follows the common law and the privilege is qualified. *See Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. Dist. Ct. App. 1993). New York does not recognize the neutral reporting privilege. *See Hogan v. Herald Co.*, 84 A.D.2d 470, 476, *aff'd*, 58 N.Y.2d 630 (1982).

At least one Florida court has recognized a neutral reporting privilege for fair and accurate reporting of official actions. *See Huszar v. Gross*, 468 So. 2d 512, 519 (Fla. Dist. Ct. App. 1985). The Court, therefore, must decide whether New York or Florida law applies to Smartmatic's claims.

"In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. The greater interest is determined by an evaluation of the facts or contacts which relate to the purpose of the particular law in conflict." *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521 (1994). "Two separate inquiries are thereby required to determine the greater interest: (1) what are the significant contacts and in which jurisdictions are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss." *Id.* New York has the greater interest under both inquiries.

New York has more significant contacts. New York is the principal place of business for Fox News. (Compl. ¶29.) New York is the place of residence or business for four of the individual defendants: Dobbs, Bartiromo, Pirro, and Giuliani. (*Id.* ¶¶30-33.) Fox News published the defamatory statements about Smartmatic from its operations in New York. (*Id.* ¶29.) All of the individual defendants, including Powell, made their defamatory statements about Smartmatic knowing and intending for them to be broadcast and published from New York. (*Id.* ¶¶30-34.) Florida is the principal place of business for Smartmatic USA Corp., but that is only one of the three plaintiffs. (*Id.* ¶¶14-16.)

"As to the second inquiry, a distinction must be made between a choice-of-law analysis involving standards of conduct and one involving the allocation of losses." *Padula*, 84 N.Y.2d at 521. "Conduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from occurring." *Id.* at 522. "If conflicting conduct-regulating laws are at issue, the law of

the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Id.* The jurisdiction where the tort occurred has an interest in "protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future. . . ." *Id.*

Courts have found that New York's defamation law should be applied in cases where the statement is published from New York and disseminated nationwide so to promote uniformity in risks and liabilities for publishers. *See, e.g., Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1093 (S.D.N.Y. 1984) (selecting New York law on republication liability because "[s]trong policy reasons exist for deciding issues whose major impact is on the behavior of potential defendants according to the rules of the jurisdiction where the conduct that gives rise to liability takes place"); *Weinstein v. Friedman*, 1996 WL 137313, at *9 (S.D.N.Y. Mar. 26, 1996) (selecting New York defamation law where the defendants were based in New York and the publishing of the defamatory material occurred in New York); *accord Grass v. News Grp. Pubs.*, 570 F. Supp. 178, 188 (S.D.N.Y. 1983) (selecting New York law for defamation action even though defendant was not a national publication due to New York's interest in "encouraging its press to investigate and report on events of great public interest").

Courts have likewise found that New York's privileges should apply when the defamatory statements are published from New York because the privileges relate to regulating conduct. *See, e.g., Kinsey v. New York Times*, 2021 WL 955125, at *4 (2d Cir. Mar. 15, 2021) (selecting New York's fair reporting privilege because "New York has strong policy interests in regulating the conduct of its citizens and its media."); *Gubarev v. BuzzFeed, Inc.*, 2018 U.S. Dist. LEXIS 97246, at *14 (S.D. Fla. June 5, 2018) (selecting New York's law on fair reporting and neutral reporting

privileges because "New York has a strong interest determining the applicability of the affirmative defenses"); *Wilkow v. Forbes, Inc.*, 2000 WL 631344, at *7 (N.D. Ill. May 15, 2000) (selecting New York's fair reporting privilege because it "is meant to protect speakers, not provide a remedy to plaintiffs"); *Block v. First Blood Assoc.*, 691 F. Supp. 685, 698 (S.D.N.Y. 1988) (selecting New York's privilege law because "the purpose of a common law or statutory privilege is the regulation of defamatory conduct that occurs within a state's borders").

The law of a plaintiff's residence often prevails when applying the interest analysis because that is the location where plaintiff experiences the injury of defamatory conduct. *Kinsey*, 2021 WL 955125 at *3. "But not always." *Id.* Here, only one plaintiff is based in Florida. (Compl. ¶14.) The other plaintiffs are based in the United Kingdom and Netherlands. (*Id.* ¶¶15-16.) Where plaintiffs are "from different jurisdictions and the alleged damage to their reputations is diffused over fifty states and several foreign nations, the state where defendant's significant acts and omissions gave rise to their liability is the most appropriate source of legal norms, particularly when it is also the forum state." *Davis*, 580 F. Supp. at 1093. That means New York defamation law, including its law on privileges, should apply here. The defamatory statements were published from New York by defendants with connections to New York.

LEGAL STANDARDS

The Fox Defendants moved to dismiss the Complaint pursuant to CPLR 3211(a)(1), (a)(7), and (g). (Fox Mem. at 10; Bartiromo Memorandum, NYSCEF 219 ("Bartiromo Mem.") at 10; Dobbs Memorandum, NYSCEF 224 ("Dobbs Mem.") at 6-7; Pirro Memorandum, NYSCEF 229 ("Pirro Mem.") at 5.) On a motion to dismiss under CPLR 3211, regardless of the subsection, the Court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). "Whether a plaintiff can ultimately establish its allegations is not part

of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

I. The Fox Defendants did not introduce any documentary evidence to support dismissal under CPLR 3211(a)(1).

CPLR 3211(a)(1) permits dismissal where "a defense is founded upon documentary evidence." To evaluate a CPLR 3211(a)(1) motion, courts conduct a "two-step" inquiry. *See* Hon. Mark C. Dillon, Suppl. Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:10 (2019). First, the proffered document must "be of the type that qualifies under the statute." *Id.* If the document qualifies, "the court then determines whether its contents provide a defense warranting the dismissal of the action as a matter of law." *Id.*; *see, e.g., Stone v. Bloomberg L.P.*, 163 A.D.3d 1028, 1031 (3d Dep't 2018) (affirming denial of CPLR 3211(a)(1) motion because "Bloomberg's submissions did not constitute documentary evidence for purposes of CPLR 3211(a)(1), and, in any event, do not conclusively establish a defense to the plaintiff's defamation cause of action").

"CPLR 3211 does not define the phrase 'documentary evidence,'" but the term "actually encompasses precious few documents, making CPLR 3211(a)(1) a decidedly narrow ground on which to seek dismissal." *See* Higgiett, Suppl. Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:10. "A paper qualifies as 'documentary evidence' if—and only if—it satisfies the following criteria: (1) it is unambiguous; (2) it is of undeniable authenticity; and (3) its contents are essentially undeniable." *Id.* In defamation actions, "documentary evidence" has consisted of: (i) copies of the medium in which the defamatory matter is contained; (ii) "a transcript of the relevant court proceeding or copy of the relevant judicial opinion," if the defendant invokes the fair report privilege; or (iii) documentation "to establish that the allegedly defamatory statement is substantially true." *Greenberg v. Spitzer*, 155 A.D.3d 27, 44-46 (2d Dep't 2017). For the last

category, the document "must be of such nature and reliability as to be 'essentially undeniable' and must 'utterly refute' the plaintiff's factual allegation that the allegedly defamatory statement is false." *Id.* at 45-46. "This is an exacting standard, which is not easily met[.]" *Id*. at 46.

None of the Fox Defendants' exhibits constitute "documentary evidence." First, Smartmatic has already supplied copies of the defamatory programming with its Complaint. Second, the Fox Defendants did not submit any transcript or opinion from a relevant court proceeding that supports the Fox Defendants' assertion of the fair report privilege. Third, the Fox Defendants fail to identify *any* document that "utterly refutes" *any* allegation in the Complaint. Instead, the Fox Defendants submitted dozens of exhibits, ignoring whether they meet the criteria of CPLR 3211(a)(1). The Court should hold the exhibits with the same regard and ignore them. A "CPLR 3211(a)(1) motion . . . may be appropriately granted only where the documentary evidence . . . conclusively establish[es] a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). The Fox Defendants did not meet this standard.

II. Smartmatic has satisfied CPLR 3211(g) even assuming it applies.

The Fox Defendants also moved to dismiss pursuant to CPLR 3211(g). CPLR 3211(g) states:

> A motion to dismiss based on [CPLR 3211(a)(7)], in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in [N.Y. Civ. Rights Law §76(a)], shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.

Civil Rights Law §76-a, New York's anti-SLAPP statute, defines "an action involving public petition and participation" as a claim based upon: "(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with

an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." The Fox Defendants cannot seek protection under New York's anti-SLAPP statute because (1) there was no public interest in Smartmatic's participation in the 2020 election until they helped to manufacture interest and (2) their reporting was neither lawful nor in furtherance of a constitutional right because they published calculated falsehoods. *Infra* at Arg.III.

Nonetheless, Smartmatic's Complaint satisfies CPLR 3211(g) even assuming it applies. A CPLR 3211(g) motion must be denied if the plaintiff's action "has a substantial basis in law." The "substantial basis requirement is met where the claimant makes specific allegations to establish the elements of its cause of action and pleads facts sufficient to support its claims." *149 Mercer Owner LLC v. 151 Mercer Retail LLC*, 2017 WL 6047562, at *4 (Sup. Ct. N.Y. Cty. Dec. 5, 2017). Motions to dismiss brought pursuant to CPLR 3211(g) are decided based on the allegations in the complaint. *See Arts4All Ltd. v. Hancock*, 5 A.D.3d 106, 110-11 (1st Dep't 2004) (denying motion to dismiss, even assuming CPLR 3211(g) applies, based on allegations in complaint and "[g]iving the complaint every favorable inference"); *149 Mercer Owner*, 2017 WL 6047562, at *4 (denying CPLR 3211(g) motion because counterclaim-plaintiff "not only set out the elements of each of those counterclaims but has also provided a detailed narrative of what occurred"). Smartmatic has alleged its claims against the Fox Defendants with greater specificity than CPLR 3211(g) requires.[4]

[4] The affidavits submitted by the Fox Defendants' counsel do not establish any undisputed issues of fact or refute the allegations in the Complaint. They do not change the Court's analysis of whether Smartmatic has adequately pled a "substantial basis in law" for its claims.

ARGUMENT[5]

Responsibility. The Fox Defendants do not want to be held responsible for the statements they published about Smartmatic. But, under black letter law, they are responsible and should be accountable for the damage they caused.

I. The First Amendment and New York law do not provide the Fox Defendants with immunity for defaming Smartmatic.

The First Amendment and New York law allow the Fox Defendants to publish what they want about Smartmatic. There are few prior restraints on speech. But the First Amendment and New York law also hold the Fox Defendants responsible for what they publish if done with the requisite culpability. There is no "newsworthiness" exception to defamation and disparagement claims.

A. The First Amendment does not immunize the Fox Defendants from liability for publishing factually inaccurate statements about Smartmatic.

The First Amendment embodies a balance between two sets of competing interests: "the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 153 (1967). One set does not trump the other. An individual's right to protect their good name:

> reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of a private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system[.]

[5] Unless otherwise indicated, emphases in quotes have been added. All internal citations and punctuation marks have been omitted.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). As profound as our commitment is to the freedoms of speech and press, the U.S. Supreme Court has never wavered in "its conviction—reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern." *Herbert v. Lando*, 441 U.S. 153, 169 (1979).

For that reason, the U.S. Supreme Court has never "embraced . . . the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz*, 418 U.S. at 341. "[A]bsolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation." *Id.* "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others." *Curtis Pub.*, 388 U.S. at 151. "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Id.*

A related, core First Amendment principle is the worthlessness of "calculated falsehoods." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 687 n. 34 (1989). They are worthless because they debase our society. *See Gertz*, 418 U.S. at 342 ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."). The First Amendment accordingly offers no shield to disseminating false information in a public forum. *Parkhouse v. Stringer*, 55 A.D.3d 1, 8 (1st Dep't 2008); *cf. Herbert*, 441 U.S.

at 171 ("Spreading false information in and of itself carries no First Amendment credentials."). Indeed, if those who publish defamatory falsehoods with the requisite culpability end up being liable for damages, this "in turn discourages the publication of erroneous information known to be false or probably false" and "does not abridge either freedom of speech or of the press." *Id.* at 172.

The immunity requested by the Fox Defendants runs afoul of these core principles. They claim that the "press has an undeniable right to cover [] the fact that the sitting President has refused to accept the outcome of a presidential election and the grounds on which the President and his allies are planning to challenge that election[.]" (Fox Mem. at 13.) That is only half right.

> The public looks to the press not only as a forum for divergent ideas and opinions but, equally important, as a source of accurate accounts of newsworthy events. ***Permitting the press intentionally to disseminate false and defamatory reports with impunity would be to damage its credibility and ultimately injure the press as an institution.*** And although we adhere without reservation to the principle that the First Amendment will brook no prior restraints even of reports alleged to be false, we note that those cases which so hold acknowledge the right to redress following publication.

Schermerhorn v. Rosenberg, 73 A.D.2d 276, 288 (2d Dep't 1980). While "[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty," the First Amendment does not "accord the press absolute immunity in its coverage of public figures or elections." *Harte-Hanks*, 491 U.S. at 687-88.

B. The Fox Defendants have failed to establish that their defamatory publications are protected by a neutral reporting privilege.

The Fox Defendants pretend the First Amendment compels recognition of a "neutral reporting" privilege that immunizes them for publishing reports about "newsworthy" events. (Fox Mem. at 12.) That is fantasy. A neutral reporting privilege is recognized by few courts. New York is not one of them. And no court frames or applies the "neutral reporting" privilege as articulated by the Fox Defendants. The privilege does them no good.

1. New York, like most of the country, does not recognize a neutral reporting privilege.

The Second Circuit created a "neutral reporting" privilege in *Edwards v. Nat'l Audubon Soc., Inc.*, 556 F.2d 113, 120 (2d Cir. 1977). The U.S. Supreme Court has never recognized the privilege. The Third Circuit has rejected the privilege. *See Dickey v. CBS Inc.*, 583 F.2d 1221, 1226 (3d Cir. 1978). The Seventh, Ninth, and Tenth Circuits have noted the privilege but not adopted it. *See Woods v. Evansville Press Co.*, 791 F.2d 480, 489 (7th Cir. 1986); *Weaver v. Oregonian Pub. Co.*, 878 F.2d 388 (9th Cir. 1989); *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977). The same is true with many State courts–they either reject it or consider and refuse to adopt the privilege. *See, e.g., Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511, 517-18 (Mich. Ct. App. 1982) (rejecting recognition of a neutral reporting privilege); *Young v. Morning Journal*, 669 N.E.2d 1136, 1138 (Ohio 1996) (same); *Norton v. Glenn*, 860 A.2d 48, 56-57 (Pa. 2004) (same).

New York is among the states that have rejected the privilege. *See Hogan*, 84 A.D.2d at 479. In *Hogan*, the defendant published an article about a "bitter political campaign." *Id.* at 476. "In preparing the article, [a reporter] was confronted with serious charges of criminal activity and political impropriety, involving not only one of the candidates but also a member of the candidate's family." *Id.* The reporter had a source who claimed that "he had been removed as liaison to the police for political reasons and possibly because the town police had arrested [the candidate's] son last month." *Id.* at 472. The article reported that the son "was arrested on a criminal mischief charge" (*id.*) and implied that the son and his father (the candidate) fixed the arrest. *Id.* at 474. In truth, the son had never been arrested. *Id.*

On summary judgment, the defendant publisher and reporter argued that "the article was protected under the neutral reporting privilege." *Id.* at 471. They argued that "the statements are

absolutely privileged as an objective report of newsworthy charges with proper attribution to sources." *Id.* at 477. The Fourth Department agreed that the subject matter of the article was a "legitimate public concern" (*id.* at 476) but rejected the idea of a neutral reporting privilege. The court explained:

> The Supreme Court has not adopted *Edwards* [] and in our view it is not possible to reconcile it with that court's prior decision in *Gertz* (418 U.S. 323 []). The unequivocal holding of *Gertz* is that a publisher's immunity is based upon the status of the plaintiff, not the subject matter of the publication. Presumably, all publications of the news media are newsworthy. They are not privileged, however, unless the publisher is free of culpable conduct under the standards stated in *New York Times v. Sullivan* (376 U.S. 254 []), *Gertz v. Robert Welch, Inc.*[] and, in New York, *Chapadeau v. Utica Observer-Dispatch* (38 N.Y.2d 196 []).

Id. at 478-79. The court thus rejected *Edwards* and rejected the notion that the press needed additional protection from liability–beyond that already afforded them based on plaintiff's burden to prove fault–even if the subject matter was "newsworthy." *Id.* The New York Court of Appeals affirmed the decision. *Hogan v. Herald Co.*, 58 N.Y.2d 630 (1982).

Critically, the New York Court of Appeals affirmed *Hogan* "for [the] reasons stated in the opinion by Justice Richard D. Simons at the Appellate Division." 58 N.Y.2d at 632. The Court of Appeals thus adopted the Fourth Department's holding *and* its rationale for rejecting the neutral reporting privilege. Less than a decade later, the Court of Appeals cited *its* order in *Hogan*, stating "***we rejected [the] claim*** that a 'neutral reporting' privilege should be extended to a newspaper that published an objective report of newsworthy charges with proper attribution to sources." *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 594 (1989), *cert. denied*, 495 U.S. 930 (1990); *see also Gross v. New York Times Co.*, 180 A.D.2d 308, 312 (1st Dep't 1992) (noting that "[t]he Court of Appeals has rejected the adoption of a neutral reporting privilege which would allow a newspaper to freely repeat statements made by third parties provided that the newspaper does not endorse the statements reported"), *rev'd in part*, 82 N.Y.2d 146 (1993).

The Fox Defendants mislead the Court when they try to find precedent for a neutral reporting privilege. It is inexplicable that the Fox Defendants overlooked not one, but two New York Court of Appeals rulings that rejected the neutral reporting privilege. Nor is it a coincidence that the lone New York state case they rely upon, *DeLuca v. N.Y. News, Inc.*, 109 Misc. 2d 341, 345-46 (Sup. Ct. N.Y. Cty. 1981), preceded *Hogan* and had nothing to do with the neutral reporting privilege.[6] (*See* Fox Mem. at 11-12.) The subsequent *forty years* of case law–including from this state's highest court–forecloses use of the neutral reporting doctrine as a defense. *See Fridman v. Buzzfeed, Inc.*, 2018 WL 2100452, at *4-5 (Sup. Ct. N.Y. Cty. May 7, 2018) (severing and dismissing the defendants' neutral reporting affirmative defense because the "defendants failed to cite any binding New York cases that expressly contradict *Hogan*," and acknowledging that "[t]his Court cannot ignore clear Court of Appeals precedent"), *unanimously aff'd*, 172 A.D.3d 441 (1st Dep't 2019); *Gubarev*, 2018 U.S. Dist. LEXIS 97246, at *28 ("New York law does not recognize [the neutral reporting] privilege. Indeed, *New York courts have roundly rejected Edwards* as contrary to the policy underpinning the fair report privilege and contrary to Supreme Court precedent.") (emphasis added). What the Fox Defendants portray as a "core First Amendment principle" is not even a cognizable defense in this state.[7]

[6] The court in *DeLuca* refused to grant summary judgment because "a triable issue of fact" existed "as to whether the article was a fair report of the statements contained in the judicial proceedings." 109 Misc. 2d at 345-46. It was an issue regarding the fair reporting privilege.

[7] The Fox Defendants also cite *Croce v. N.Y. Times*, 930 F.3d 787, 793 (6th Cir. 2019). (Fox Mem. at 12.) *Croce* has nothing to do with the neutral reporting privilege. The Sixth Circuit determined whether a "reasonable reader" would "interpret" the publication, "considering it as a whole, to be defamatory." *Id.* at 795-96. *Croce's* only reference to the neutral reporting privilege was a recognition that the Ohio Supreme Court had explicitly rejected it. *Id.* at 796.

2. The neutral reporting privilege–even if recognized–does not apply to the Fox Defendants' disinformation campaign.

The Fox Defendants have not established that their reporting about Smartmatic qualifies for the "neutral reporting" privilege even assuming New York recognized the privilege. The privilege created in *Edwards* is not broad. "As would be natural in a case establishing a new principle, the *Edwards* opinion did not attempt precise definition of its contours. However, it did contain important suggestions that the privilege was limited in scope and required careful examination of the facts in each case." *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 68 (2d Cir. 1980). Among other things, the *Edwards*-created privilege only applies if (1) the plaintiff is a public figure, (2) the defendant did not solicit the defamatory statements or create the "newsworthy" event, (3) the statements published were made by a responsible and prominent organization, and (4) the defendant does not espouse or concur in the statements. The Fox Defendants cannot satisfy these criteria.[8]

a. Smartmatic is not a public figure.

The plaintiff in *Edwards* was a public figure. *Edwards*, 556 F.2d at 120. That was one of the limitations that the *Edwards* court imposed upon the neutral reporting privilege. *See, e.g., Cianci*, 639 F.2d at 68 (an example of one limitation in *Edwards* was the statement "makes serious charges against a public figure"). Courts have rejected attempts to encompass non-public figures. *See, e.g.*, *Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 272-73 (Cal. 1998). Recognizing an absolute privilege for accusations against private figures:

> would be inconsistent with the United States Supreme Court's insistence on the need for balancing the First Amendment interest in promoting the broad

[8] New York has not addressed which party has the burden of proof with respect to a neutral reporting privilege because New York does not recognize the privilege. However, New York treats other privileges as affirmative defenses meaning the defendant has the burden of proof. *See, e.g.*, *Bounds v. Mut. of Omaha Ins. Co.*, 37 A.D.2d 1008, 1008 (3d Dep't 1971) ("As to the burden of proof regarding the defense of privilege, it is equally well settled that the defendant bears the burden of proof as to the allegation.").

> dissemination of information relevant to public controversies against the reputation interests of private figures.

Id. at 272. "[T]he report of such accusations can have a devastating effect on the reputation of the accused individual, who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations." *Id.* at 273.

The Fox Defendants cite *Rendon v. Bloomberg,* 403 F. Supp. 3d 1269, 1276 (S.D. Fla. 2019), to suggest that the neutral reporting privilege can apply even if the plaintiff is not a public figure. (Fox Mem. at 11.) In applying Florida's common-law privilege to a private figure, the *Rendon* court noted that it had "not found, and [the plaintiff] had not pointed to, any Florida case requiring that plaintiff be a public figure." *Id.* That was a mistake. Many Florida courts have ruled that the neutral reporting privilege only applies if the plaintiff is a public figure. *See, e.g., Miami Herald Pub. Co. v. Ane*, 458 So. 2d 239, 241 (Fla. 1984) (there is no "qualified privilege . . . to defame a private person merely because the defamatory communication is directed to a matter of public or general concern"); *Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972, 975 (Fla. Dist. Ct. App. 1987) (refusing to apply the neutral reporting privilege to a report on a private figure); *Ortega Trujillo v. Banco Cent. Del Ecuador*, 17 F. Supp. 2d 1334, 1338 n.3 (S.D. Fla 1998) (same).

Accordingly, the Fox Defendants must prove Smartmatic is a public figure for the privilege to potentially apply. *See Kraus v. Globe Int'l, Inc.*, 251 A.D.2d 191, 192 (1st Dep't 1998) ("placing the burden of proof on the defendant" for purposes of determining the fault standard). "Designation as a public figure 'may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.'" *White v. Tarbell*, 284 A.D.2d 888, 889 (3d Dep't 2001). "More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby

becomes a public figure for a limited range of issues." *Id.* "[I]nvolvement in a controversial business . . . is insufficient, without more, to confer public figure status on [a plaintiff]." *Id.* at 890. Further "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 112-13 (1979).

The Fox Defendants have not satisfied their burden. They have nothing to show that Smartmatic achieved, prior to their disinformation campaign, "pervasive fame or notoriety" justifying treatment as a public figure for all purposes. The Fox Defendants concede this point. They instead try to argue Smartmatic is a limited-purpose public figure because it provided voting technology for the election. (Fox Mem. at 18.) This argument also fails. The Fox Defendants have not introduced any evidence showing Smartmatic: "(1) successfully invited public attention to [its] views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected [itself] into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media." *Mitre Sports Int'l Ltd. v. Home Box Off., Inc.,* 22 F. Supp. 3d 240, 250-51 (S.D.N.Y. 2014) (declining to find the plaintiff a limited purpose public figure); *see also Calvin Klein Trademark Tr. v. Wachner*, 129 F. Supp. 2d 248, 252 (S.D.N.Y. 2001) (same); *O'Neil v. Peekskill Fac. Ass'n*, 120 A.D.2d 36, 45 (2d Dep't 1986) (denying summary judgment where defendants did not present evidence of plaintiff's voluntary involvement with the public and media).

The two cases the Fox Defendants cite are no help. *James v. Gannett Co*. involved a professional belly dancer who was interviewed for a profile but did not like two statements quoted to her in the profile. She was found to be a public figure, but she is not analogous to Smartmatic. The court found that the dancer cooperated with the interview and welcomed publicity concerning

her performance to attract the public to her club. 40 N.Y.2d 415, 423 (1976) ("[b]y her purposeful activity, she thrust herself into the public spotlight and sought a continuing public interest in her activities"). In stark contrast, Smartmatic never claimed to have any role in the 2020 election outside of Los Angeles County and never sought the spotlight on voting activities in other states. (Comp. ¶81.)

The other case, *Gertz v. Robert Welch*, involved a citizen who was found not to be a public figure. 418 U.S. at 352. The Fox Defendants cite *Gertz* for the proposition that Smartmatic knew it would be "drawn in" to a public controversy by accepting a job in Los Angeles County. (Fox Mem. at 18.) This is an aggressive view, especially since the reporting at issue had nothing to do with that county. And the Fox Defendants fail to note that since *Gertz*, courts have required that a plaintiff voluntarily involve themselves in the controversy, or once they are drawn in, take an active role. *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) ("while participants in some litigation may be legitimate 'public figures,' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others"); *Krauss*, 251 A.D.2d at 192 (noting that private individuals do not become limited purpose public figures by being "involved in or associated with a matter that attracts public attention").

Additionally, the U.S. Supreme Court in *Gertz* found that the plaintiff was not a public figure even though he played an active role in his community and professional affairs, and published books and articles. *Gertz*, 418 U.S. at 352 ("We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes."). Similar to *Gertz*, Smartmatic was only conducting its professional activities by

providing technology and services to Los Angeles County. Smartmatic did not voluntarily involve itself with any public discussion regarding voting outside of Los Angeles County that merits treating it like a limited purpose public figure. *See, e.g., Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 288 (S.D.N.Y. 2016) (rejecting argument that plaintiff met the "successfully invited public attention" element merely because the company has "millions of customers" and "enjoys worldwide sales of [a computer security product]").

b. The Fox Defendants solicited the defamatory statements.

The reporter in *Edwards* did not solicit the statement at issue from the National Audubon Society. The statement was the "foreword to the April, 1972, issue of American Birds." *Edwards*, 556 F. 2d at 116. Since *Edwards*, courts have rejected attempts to invoke the neutral reporting privilege if the defendant solicited the defamatory statement or participated in creating a controversy that did not exist beforehand. *See Lasky v. Am. Broad. Companies*, 631 F. Supp. 962, 971 (S.D.N.Y. 1986) (rejecting privilege where "the defendant itself elicited the statement in question and no controversy raged around the statement until the defendant brought it about"); *McManus v. Doubleday & Co.*, 513 F. Supp. 1383, 1391 (S.D.N.Y. 1981) (same, where "the charges by the Irish Embassy official were solicited at the outset by Howe"); *Schermerhorn*, 73 A.D.2d at 288 (pre-*Hogan*, neutral reporting privilege should not apply "where the substance of the accusation was concocted and disseminated by the reporter himself").

The Fox Defendants solicited the defamatory statements by Giuliani and Powell at issue in the litigation; and, thereby, participated in creating a "controversy" about Smartmatic. The Fox Defendants invited Giuliani and Powell onto their shows. They did so knowing Giuliani and Powell would defame Smartmatic. (*See, e.g.,* Compl. ¶218.) The Fox anchors proceeded to ask Giuliani and Powell questions to elicit the defamatory statements about Smartmatic; and, of course, the anchors made their own defamatory statements to further enflame a controversy. (*Id.* ¶¶149,

157, 166, 175, 183, 191, 199, 208.) The neutral reporting privilege does not protect the Fox Defendants for defamatory statements they helped to bring about.

c. Giuliani and Powell are not responsible, prominent organizations.

When the *Edwards* privilege has been applied, courts have required that the speakers of the defamatory statements be "responsible, prominent" organizations. *Edwards*, 556 F.2d at 120. The National Audubon Society qualified in *Edwards* when it was speaking about environmental issues and how its bird-count data had been allegedly misused by scientists. *Id.* The Better Business Bureau similarly qualified when it provided information about alleged deceptive merchandising practices since it had a "respective independent voice within the community" and "a reputation for impartiality." *Sunshine Sportswear & Elecs. v. WSOC Television*, 738 F. Supp. 1499, 1510 n.7 (D.S.C. 1989). Not every speaker meets this requirement. *See, e.g., Levin v. McPhee,* 917 F. Supp. 230, 239 (S.D.N.Y. 1996) (rejecting privilege where the speakers were alleged witnesses to the plaintiff's crime–an artist in Moscow and lovers of the victim).

The Fox Defendants have not established that Giuliani and Powell should be treated the same as organizations speaking on the very topics for which they are considered "responsible" and "prominent." To be sure, the Fox anchors presented Giuliani and Powell to their audience as trustworthy sources. (Compl. ¶143.) They touted Giuliani's and Powell's status as lawyers. (*Id.* ¶¶101, 111, 119, 126, 133(j), 133(m), 133(s), 133(kk).) Lawyers have ethical obligations that should make them "responsible" sources. But there is no precedent indicating that being a lawyer, even the President's lawyer, makes someone a "responsible, prominent organization" as a matter of law. And, in the case of Giuliani and Powell, any presumption of being "responsible" is a disputed issue of fact. (*Id.* ¶¶358-378, 443-449.)

d. The Fox Defendants were not disinterested and neutral.

Finally, neutrality was critical in *Edwards*. The court emphasized that the article at issue was "disinterested" and the author "did not in any way espouse the Society's accusations" but instead was the "exemplar of fair and dispassionate reporting." *Edwards*, 556 F.2d at 120. Since *Edwards*, courts have refused to apply the privilege unless the report was neutral and did not espouse or support the defamatory statements. *See, e.g., Condit v. Dunne*, 317 F. Supp. 2d 344, 371 (S.D.N.Y. 2004) (rejecting privilege where defendant's comments "were not neutral" and he "concurred in the allegations he reported"); *Cianci*, 639 F.2d at 69 (same, where defendant "did not simply report the charges, but espoused or concurred in them"); *Russo v. Padovano*, 84 A.D.2d 925, 926 (4th Dep't 1981) (same, where "articles state a number of other facts and opinions supporting the implication of fraud and professional misconduct by plaintiff").

The Fox Defendants cannot satisfy this requirement. The Complaint details how the Fox anchors encouraged, bolstered, endorsed, and confirmed the defamatory statements by Giuliani and Powell. (Compl. ¶¶100-131.) The transcripts alone reveal that the Fox anchors did not present Giuliani's and Powell's statements in a neutral and disinterested manner. The videos paint an even more compelling picture – with the tone and tenor, and visuals displayed. The Fox anchors held Giuliani and Powell out as people who were getting to a vital truth and should be believed by their audience. They were not passive, dispassionate anchors.

First, the Fox anchors showed their support for Giuliani's and Powell's statements by reacting positively to their statements, pointing to additional facts to support their statements, and endorsing what they were saying about Smartmatic and the 2020 election. For example:

- Dobbs [responding to Giuliani]: "It's ***stunning*** and they're private firms and very little is known about their ownership. Beyond what you're saying about Dominion, it's very difficult to get a handle on just who owns what and how they're being operated. And by the way, the states, as you well know now, they have no ability to audit meaningfully the votes that are cast because the servers are somewhere else

and are considered proprietary and they won't touch them." (SMT.Ex.1B at 4:5-13.)

- Dobbs [responding to Powell]: "Yes. And Smartmatic, the Chairman is Admiral Pete Neffenger, who is also on the President–the Vice President's transition team, his presidential, presumptuous presidential transition team. That's an ***extraordinary situation*** as well, isn't it?" (SMT.Ex.15B at 4:12-16.)

- Dobbs [responding to Powell]: "Well ***I share your–your fury and frustration***." (*Id.* at 6:6-7.)

- Dobbs [responding to Powell]: "It's a, it is a ***deeply, deeply troubling election***. As I said earlier, the ***worst in this country's history bar none***. And we have seen official–official investigative and Justice Department officials slow to move, and it is infuriating to everyone." (*Id*. at 7:15-20.)

- Dobbs [responding to Powell]: "Yeah, Sid it is–***it is more than just a willful blindness***. ***This is people trying to blind us to what is going on.*** We don't even know who the hell really owns these companies, at least most of them. That's got to change and ***we've got to find out exactly what's going on***." (*Id.* at 8:4-9.)

- Dobbs [introducing Giuliani]: "The American people are getting a little tired of being treated like slow witted children. It's nonsensical, it's an insult and indeed ***this whole fraud is an insult against this country***." (SMT.Ex.23B at 12:9-12.)

- Dobbs [responding to Giuliani]: "[I]t's ***outrageous***, and it's all the more outrageous because Dominion and Smartmatic were denied use in the State of Texas . . . ." (*Id.* at 14:21-23.)

- Dobbs [responding to Powell]: "We will gladly put forward your evidence that supports your claim that this was a cyber Pearl Harbor. ***We have tremendous evidence already of fraud in this election.*** But I will be glad to put forward on this broadcast whatever evidence you have, and we'll be glad to do it immediately. [. . .] We'll work overnight. We will, we will take up whatever air we're permitted beyond this broadcast. But we have to get to the bottom of this." (SMT.Ex.39B at 4:7-15.)

- Bartiromo [responding to Giuliani]: "I mean, ***you just said it all***." (SMT.Ex.5B at 9:19-20.)

- Bartiromo: "***Unbelievable***. Rudy Giuliani, ***we'll keep on it***, I promise you. Thank you so much, Sir." (*Id.* at 14:18-20.)

- Bartiromo [responding to Powell]: "***Wow, this, this is explosive*** and we certainly will continue to follow it. Sidney, ***thank you so much for your work***. We will be catching up with you soon. Thank you so much. We'll be watching." (*Id.* at 22:20-24.)

- Pirro [discussing claims by Powell]: "These are ***serious allegations***, but the media has no interest in any of this, but ***you and I do***, as we should, because 73 million Americans voted for Donald Trump." (SMT.Ex.28B at 3:12-15.)

- Pirro [discussing claims by Powell]: "I say, the ***risk of not looking at what is staring us in the face is too great*** to not stop us." (*Id.* at 3:19-21.)

The Fox anchors did not express skepticism. They did not cut to commercial after hearing Giuliani and Powell lie about Smartmatic. The Fox anchors reacted to their statements as if they were true; they conveyed to audience members that they too should believe what Giuliani and Powell said.

Second, the Fox anchors showed their support by thanking Giuliani and Powell for conducting the investigation into Smartmatic. The Fox anchors' "thanks" were not gratuitous and obligatory. Their thanks signaled appreciation for bringing these "facts" about Smartmatic to light. For example:

- Dobbs [responding to Giuliani]: "It's, it's extraordinary, that this, this election, this election has got more firsts than any I can think of. And Rudy ***we're glad you're on the case and, and pursuing what is the truth*** and straightening out what is a very complicated and difficult story." (SMT.Ex.1B at 7:4-8:5.)

- Dobbs [discussing Powell's investigation]: "***And by God, it's too important for anyone***." (SMT.Ex.39B at 5:15-16.)

- Dobbs: "Sidney Powell. ***Thank you for all you're doing. It is the Lord's work***." (*Id.* at 7:2-3.)

- Bartiromo: "***Unbelievable***. Rudy Giuliani, ***we'll keep on it, I promise you***. Thank you so much, Sir." (SMT.Ex.5B at 14:18-20.)

- Pirro [responding to Powell]: "Yes, ***and hopefully the Department of Justice.*** But who knows anymore? Sidney Powell. ***Good luck on your on your mission***. Thank you so much for being with us tonight." (SMT.Ex.3B at 5:23-6:2.)

Even the way the Fox anchors said "goodbye" to Giuliani and Powell told the audience that their findings were of vast importance and should be believed. The Fox anchors could have ended their interviews by saying: "Well, that's just wrong" or "Well, that's just nuts" or "there is strong

evidence to the contrary." But they did not. They showed appreciation for the mission targeting Smartmatic and encouraged them to keep it up so to lend credibility to their statements.

Third, the taglines and graphics that the Fox Defendants chose to display during their shows served to not only bolster and support the statements by Giuliani and Powell, but also suggested that the Fox Defendants were vetting the factual basis for the statements and that they had merit. The taglines and graphics were visual cues to their audience. For example:

- *Justice with Judge Jeanine:* "TRUMP CAMPAIGN ATTORNEY SIDNEY POWELL DISCUSSES FRAUD ALLEGATIONS WITH THE JUDGE [PIRRO]" (SMT.Ex.3C, Screenshot A.)

- *Sunday Morning Futures with Maria Bartiromo* [after linking Smartmatic to Dominion]*:* "BATTLEGROUND STATES USING DOMINION VOTING MACHINES" (SMT.Ex.5C, Screenshot A.)

- *Sunday Morning Futures with Maria Bartiromo:* "The key point to understand is that the Smartmatic system has a 'backdoor' that allows it to be 'mirrored and monitored' allowing the intervening party a real-time understanding of how many votes will be needed to gain an electoral advantage." (*Id.* at Screenshots E-F.)

- *Lou Dobbs Tonight:* "THE BATTLE FOR THE WHITE HOUSE: TRUMP LEGAL TEAM DEMANDS INVESTIGATION OF VOTE MACHINES" (SMT.Ex.14A.)

- *Lou Dobbs Tonight* [appearing below Smartmatic's name and logo]*:* "BATTLE FOR THE WHITE HOUSE" (SMT.Ex.14C, Screenshot A.)

- *Lou Dobbs Tonight* [while discussing Smartmatic]*:* "Those security gaps, if left unfixed, could provide a gateway for a rogue election staffer or someone else with physical access to alter software on the voting machines or their back-end computer systems, possibly changing votes or otherwise disrupting the presidential race." (*Id.* at Screenshots B-C.)

- *Lou Dobbs Tonight:* "BIDEN TRANSITION TEAM MEMBER IS ALSO A CHAIRMAN ON THE BOARD OF DIRECTORS AT SMARTMATIC" (SMT.Ex.15C, Screenshot B.)

- *Lou Dobbs Tonight:* "THE BATTLE FOR THE WHITEHOUSE: CONCERNS RAISED ABOUT ELECTION VOTING SYSTEMS" (SMT.Ex.15A.)

- *Lou Dobbs Tonight* [after linking Smartmatic to Dominion]*:* "THE BATTLE FOR THE WHITE HOUSE: TRUMP LEGAL TEAM TARGETS DOMINION VOTING MACHINES" (SMT.Ex.25A.)

- *Lou Dobbs Tonight* [under Smartmatic's name and logo]: "QUESTIONABLE ALGORITHMS" (SMT.Ex.25C, Screenshot A.)

- *Lou Dobbs Tonight: "*THE BATTLE FOR THE WHITE HOUSE: POWELL: DOMINION, SMARTMATIC SOFTWARE CHANGED ELECTION" (*Id.* at Screenshot B.)

- *Justice with Judge Jeanine:* "Complaints of #voterfraud on a national scale in a presidential election. Where is the @FBI Where is the #DOJ?" (SMT.Ex.28C, Screenshot A.)

- *Lou Dobbs Tonight*: "CISA IGNORES VOTER FRAUD" (SMT.Ex.36C, Screenshot A.)

- *Lou Dobbs Tonight:* "FOUR NAMES YOU NEED TO KNOW [] ACCORDING TO SIDNEY POWELL [*] JORGE RODRIGUEZ: FORMER MINISTER OF COMMUNICATIONS FOR VENEZUELA [*] KHALIL MAJID MAJZOUB: RODRIGUEZ FRONTMAN [*] GUSTAVO REYES-ZUMETA - PROGRAMMER [*] ANTONIO MUGICA - SMARTMATIC CEO" (SMT.Ex.38C, Screenshot A.)

- *Lou Dobbs Tonight*: "THE BATTLE FOR THE WHITE HOUSE: POWELL: 2020 ELECTION IS A CYBER PEARL HARBOR" (SMT.Ex.39A.)

The taglines and graphics that the Fox Defendants reinforced the messages that Giuliani and Powell conveyed.

Fourth, the Fox Defendants did not present countervailing views. The Complaint identifies 41 publications by the Fox Defendants that are at issue. (Compl. ¶133.) The Fox Defendants interviewed, quoted, or discussed Giuliani or Powell in 40 of these publications. During those same publications, the Fox anchors did not interview anyone who contradicted Giuliani and Powell. Only occasionally, in four publications, did the Fox anchors even acknowledge a Smartmatic denial. This one-sided reporting served as an endorsement of Giuliani's and Powell's statements. The Fox anchors presented their statements as incontrovertible fact.

Fifth, the Fox anchors made their own defamatory statements about Smartmatic consistent with the messages conveyed by Giuliani and Powell. Appendices 10-12 list the defamatory statements made by Dobbs, Bartiromo and Pirro. The Fox anchors made 77 defamatory statements about Smartmatic. These were consistent with what Giuliani and Powell said, which served to support and endorse what Giuliani and Powell said. Their statements also contributed to the overall defamatory messages and implications made by each and all of the publications.

C. The Fox Defendants have failed to establish that their defamatory publications are covered by the fair reporting privilege.

The Fox Defendants seek to invoke the "fair reporting" privilege, which they claim is "broad" and covers the "contents of legal documents" and "attorney remarks too." (Fox Mem. at 12.) The U.S. Supreme Court has not recognized a fair reporting privilege. And New York's privilege does not apply to the publications at issue. N.Y. Civ. Rights Law §74 provides:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.
>
> ***This section does not apply*** to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such proceeding which was not part thereof.

"The privilege afforded by Civil Rights Law §74 is an affirmative defense to a claim of defamation." *Greenberg*, 155 A.D.3d at 42. The privilege only applies if the Fox Defendants establish that: (1) an official proceeding existed at the time of their publications, (2) an ordinary viewer or reader would understand that they were reporting about what was said in that official proceeding, and (3) their publication was a "fair and true" report of statements made in that official proceeding. The Fox Defendants fail on all three counts.

1. The Fox Defendants did not provide any analysis showing their publications are protected by the fair reporting privilege.

The Fox Defendants' invocation of the fair reporting privilege is a red herring. If the Fox Defendants intended to defend their publications pursuant to the privilege, they would have: (1) identified for the Court an official proceeding that existed at the time of their publication, and (2) compared statements made in that official proceeding to the publications at issue or the defamatory statements alleged by Smartmatic. That process would have allowed the Court to determine whether the Fox Defendants had, in fact, published a "fair and true" report of an official proceeding. The fact that the Fox Defendants did not perform that analysis for the Court is telling.

The closest the Fox Defendants come is in the "Background" section of the Fox News motion. There, they claim that "[l]egal teams led by Rudy Giuliani and Sidney Powell filed lawsuits in multiple states" and "[s]ome alleged widespread voting manipulation potentially implicating Smartmatic software." (Fox Mem. at 5.) The accompanying footnotes identify six lawsuits; however, the Fox Defendants do not provide the Court with: (i) copies of the complaints filed in any of those lawsuits, (ii) dates on which those complaints were each filed, (iii) copies of the court opinions dismissing the lawsuits, or (iv) any analysis of how their defamatory publications compared to statements made in those lawsuits. *See Sokol v. Leader*, 74 A.D.3d 1180, 1182 (2d Dep't 2010) (defendants failed to submit evidence conclusively establishing that the allegedly defamatory statements constituted a "fair and true" report of judicial proceedings). The Fox Defendants' reports were not about these lawsuits. These lawsuits are irrelevant for the reasons discussed below.

2. Official proceedings did not exist at the time the Fox Defendants published their defamatory falsehoods about Smartmatic.

The Fox Defendants cannot establish a fair reporting privilege unless they published a "fair and true" report of an official proceeding that ***actually existed*** when they published their reports.

See, e.g., Lawrence v. Riffle, 62 A.D.2d 1093, 1094 (3d Dep't 1978) (denying application of the fair reporting privilege because the "statement was made before the commencement of Action No. 2 and thus an absolute privilege did not attach by reason of that proceeding"); *Kenny v. Cleary*, 47 A.D.2d 531, 532 (2d Dep't 1975) (same, because "[t]he first through fifth causes of actions relate to alleged defamatory statements made before the commencement of that judicial proceeding and do not qualify for absolute privilege"); *May v. Syracuse Newspapers, Inc.*, 250 A.D. 155, 158 (3d Dep't 1937) (same, because "the statutory privilege does not protect a newspaper when it states anticipated events to be facts"); *Abakporo v. Sahara Reporters*, 2011 WL 4460547, at *8-9 (E.D.N.Y. Sep. 26, 2011) (same, because the article quoted a petition "used to institute an official proceeding" but there was no "official proceeding" at time of publication); *Reeves v. Am. Broadcasting Cos.*, 580 F. Supp. 84, 89 (S.D.N.Y. 1983) (same, because the "counterclaims allege that [the source's] conversations with the reporters took place before the complaint was filed.").

The Fox Defendants have not established that a proceeding existed at the time of their publications, which would allow them to claim their reporting related to that proceeding. The following table summarizes the six lawsuits referenced in the footnotes by the Fox Defendants. (Fox Mem. at 5 n.2.)

Lawsuit	Jurisdiction	Filing Date	Smartmatic Reference
Donald J. Trump for President, Inc. v. Boockvar	M.D. Pennsylvania	6/29/20	None
Law v. Whitmer	Nevada	11/17/20	None
Pearson v. Kemp	N.D. Georgia	11/25/20	Yes
King v. Whitmer	E.D. Michigan	11/25/20	Yes
Feehan v. Wisconsin Elections Commn.	E.D. Wisconsin	12/1/20	Yes

Bowyer v. Ducey	D. Arizona	12/2/20	Yes

None of the challenged broadcasts by the Fox Defendants referenced any of these lawsuits. Only four of these lawsuits mentioned Smartmatic. (Compl. ¶380.) The first of those lawsuits–*Pearson v. Kemp*–was filed on November 25, 2020. (*Id.*) The first publication by the Fox Defendants at issue in this case was on November 12. The Fox Defendants published these 33 reports containing 165 defamatory statements about Smartmatic prior to November 25. (*Id.* ¶133(a)–(ii).) The Fox Defendants cannot invoke the fair reporting privilege for any of these 33 reports because no official proceeding existed at the time of publication. Accordingly, at most, the fair reporting privilege may be relevant to the seven reports published after November 25. The privilege does not apply to those reports for the reasons discussed below.

3. People did not understand the Fox Defendants to be reporting about an official proceeding involving Smartmatic.

The fair reporting privilege only applies if people watching or reading the publication understood that the defendants were reporting on an official proceeding. *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114 (2d Dep't 2009) ("it is also incumbent on the party asserting the privilege to establish that the statements at issue reported on a 'judicial proceeding'"). The privilege is not applicable if "the context in which the statements are made make 'it impossible for the ordinary viewer [listener or reader] to determine whether the defendant was reporting' on a judicial proceeding . . . ." *Id.* at 114-15. A defendant's "mere mention of an official proceeding does not automatically extend the privilege to the entire publication." *Fine v. ESPN, Inc.*, 11 F. Supp. 3d 209, 217 (N.D.N.Y. 2014).

Even where official proceedings existed at the time of publication, courts reject application of the fair reporting privilege if people watching or reading the publication would not understand that the defendants were repeating statements made in an official proceeding. *See, e.g., Wexler v.*

Allegion (UK) Ltd., 374 F. Supp. 3d 302, 314 (S.D.N.Y. 2019) (rejecting fair reporting privilege where "it is equally unclear whether [counterclaim-defendant's] statements about the broken promise were reporting on the allegations in his lawsuit or making an independent accusation against [counterclaim-plaintiff]"); *Corporate Training Unlimited v. National Broadcasting Co.*, 868 F. Supp. 501, 509 (E.D.N.Y. 1994) (same, where "the way the Broadcast is stylized–as a succession of interviews with participants in the incident–belies the notion that NBC was even attempting to provide a fair and true report of a judicial proceeding"); *Wenz v. Becker*, 948 F. Supp. 319, 323-24 (S.D.N.Y. 1996) (denying summary judgment based on fair reporting privilege where there was a "factual question as to whether [defendant] was responding to interview questions about the Tennessee Lawsuit or, on the other hand, issuing unsolicited and independent comments on the circumstances surrounding [plaintiff's] termination").

The Fox Defendants have not established that people watching or reading their publications would (i) understand that they were reporting on an official proceeding about Smartmatic, and (ii) the defamatory statements being made during their publications were originally made in an official proceeding. The Fox Defendants did not even attempt to argue this point. To start, it is impossible for anyone to believe that the Fox Defendants were reporting about an official proceeding about Smartmatic ***before*** any official proceeding existed. No official proceeding mentioning Smartmatic existed until November 25, 2020.

The same is true for the publications that took place after November 25. On November 26, Dobbs made defamatory statements about Smartmatic on *Lou Dobbs Tonight*, but he did not mention any of the lawsuits. (Compl. ¶133(jj); SMT.Ex.36B.) On December 10, Dobbs tweeted and posted videos about a "cyber Pearl Harbor" and claimed that Smartmatic participated in a

cyber-attack on the election. He did not mention any lawsuit in his tweet or posts. (Compl. ¶¶133(mm)–133(qq).)

That leaves Dobbs' interview with Powell on December 10. It was published by Fox News (*Id.* ¶133(ll)) and then republished four times by Dobbs on social media. (*Id.* ¶¶133(nn)–133(qq)). At the time of the interview, all of Powell's lawsuits had been dismissed as frivolous. (*Id.* ¶¶382-390.) Dobbs and Powell made and perpetuated numerous defamatory falsehoods about Smartmatic during the interview. (*See* SMT.Ex.38B; SMT.Ex.39B.) However, no one watching the show would understand these defamatory statements to be about something said in an official proceeding–for a simple reason. Dobbs and Powell did not mention Powell's lawsuits or any other official proceeding during the show.

4. The Fox Defendants' publications were not "fair and true" reports of an official proceeding.

The fair reporting privilege requires a determination of whether the publication "provided substantially accurate reporting." *Martin v. Daily News L.P.*, 121 A.D.3d 90, 101 (1st Dep't 2014). While this determination does not mean the language should be "dissected and analyzed with a lexicographer's precision," the privilege does not protect interpretations, expansions, or inaccurate reporting of a proceeding if they create a false and defamatory impression. *Martin*, 121 A.D.3d at 101 (finding that interpretations of a complaint and omissions created a false impression that a judge was mixed up in corruption and thus were not protected by the privilege). And the privilege does not apply to defamatory statements made by someone "concerned in the publication"–including lawyers–that are not included in the official proceeding. N.Y. Civ. Rights Law §74.

Courts universally deny application of the privilege when the defamatory statements are not "substantially accurate" accounts of statements made in an official proceeding. *See, e.g.*, *Greenberg*, 155 A.D.3d at 48, 50 (denying application of privilege where the "statements made by

[defendant] during the [] interview went beyond" what was said in the complaint and "went beyond merely summarizing or restating" the judicial proceedings); *McRedmond v. Sutton Place Res. & Bar, Inc.*, 48 A.D.3d 258, 259 (1st Dep't 2008) (same, where the defamatory statement was "entirely unrelated to this litigation and cannot be found in the complaint"); *Freeze Right Refrig. & A.C. Servs. v. City of New York*, 101 A.D.2d 175, 184 (1st Dep't 1984) (same, where the defamatory statement was "the product of [the reporter's] own research after learning of the [official proceeding]"); *Schaffran v. Press Publ. Co.*, 258 N.Y. 207, 210 (1932) (same, where the defendant's article implied that the court had found "that [plaintiff] had committed adultery" but that was not what the judge had found); *Rivera v. Greenberg*, 243 A.D.2d 697, 698 (2d Dep't 1997) (same, where defense lawyers announced at a press conference that a police officer sexually assaulted their clients because they were not "a fair and true report of judicial proceedings").

The Fox Defendants have not established that any of the defamatory statements alleged by Smartmatic are "substantially accurate" summaries of statements made in an official proceeding. This analysis requires the Fox Defendants to compare each publication and defamatory statement about Smartmatic to what was said in an official proceeding ***that existed at the time of publication***. The Fox Defendants did not perform that analysis–for an obvious reason. The defamatory statements were not included in any official proceeding that existed at the time the Fox Defendants published the defamatory statements. None of their publications were "reports" protected by the privilege.

II. Smartmatic's Complaint alleges facts establishing a substantial basis in law for its claims against the Fox Defendants.

Smartmatic brings claims against the Fox Defendants for defamation and disparagement. Defamation has long been recognized to stem from a false statement "that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace . . . ." *Davis v. Boeheim*, 24 N.Y.3d 262,

268 (2014). To state a claim for defamation, a plaintiff must allege: (1) a defamatory statement of fact; (2) regarding the plaintiff; (3) published to a third party by the defendant; (4) falsity; (5) some degree of fault; and (6) injury to the plaintiff (constituting defamation *per se* or causing special harm). *Levy v. Nissani*, 179 A.D.3d 656 (2d Dep't 2020) (setting forth elements); *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999) (same, citing the Restatement (Second) of Torts §558). Damages will be presumed for defamatory statements that charge a person with committing a serious crime or that would tend to cause injury to a person's profession or business. *Geraci v. Probst*, 15 N.Y.3d 336, 344 (2010). The gravamen of an action in defamation is an injury to reputation. *Ruder & Finn Inc. v. Seaboard Sur Co.*, 52 N.Y.2d 663, 670 (1981).

To state a claim for trade libel or product disparagement, a plaintiff must allege the following elements: (1) falsity of the statement, (2) publication to a third person, (3) malice (express or implied) and (4) proven special damages. 44 N.Y.Jur.2d Defamation and Privacy, §281 (2d Ed. 2021). There is a distinction between defamation and disparagement, even though both involve falsehoods published to third parties. *Ruder*, 52 N.Y.2d at 670. Defamation addresses a false statement that "impugns the basic integrity or creditworthiness of a business" and injury is conclusively presumed. *Id.* Disparagement addresses a false statement that denigrates the "quality of the business' goods or services," but only if malice and special damages are proven. *Id.*; *see also Squire Records, Inc. v. Vanguard Recording Soc., Inc.,* 25 A.D.2d 190, 192 (1st Dep't 1966) (plaintiff adequately alleged a product disparagement claim).

Here, the Fox Defendants published false statements and implications that not only constituted defamation, but also, in many instances, establish disparagement of Smartmatic's goods and services. The following table provides an overview of Smartmatic's claims:

Category of False and Defamatory Statements and Implications	Defamation		Disparagement		Fox Defendants
	Count	Compl. ¶	Count	Compl. ¶	
Smartmatic participated in a criminal conspiracy to fix, rig, and steal the 2020 U.S. election	1	521-535			All
Smartmatic's election technology and software were widely used during the 2020 U.S. election, including in six states with close outcomes	2	536-550	10	656-669	All
Smartmatic's election technology and software were used by Dominion during the 2020 U.S. election	6	596-610	14	712-725	All
Smartmatic's election technology and software were used to fix, rig, and steal the 2020 U.S. election	3	551-565	11	670-683	All
Smartmatic's election technology and software sent votes to foreign countries for tabulation and manipulation during the 2020 U.S. election	4	566-580	12	684-697	Fox News; Dobbs; Bartiromo
Smartmatic's election technology and software were compromised and hacked during the 2020 U.S. election	5	581-595	13	698-711	All
Smartmatic was previously banned from being used in U.S. elections	7	611-625	15	726-739	Fox News; Dobbs; Bartiromo
Smartmatic is a Venezuelan company that was founded and funded by corrupt dictators from socialist and communist countries	8	626-640			All
Smartmatic's election technology and software were designed to fix, rig, and steal elections	9	641-655	16	740-753	All

Smartmatic has alleged facts establishing a "substantial basis in law" for its claims: (1) the Fox Defendants published and republished false and defamatory statements and implications about Smartmatic and its business to third parties; (2) none of the statements or implications published

by the Fox Defendants were pure opinion; (3) the statements and implications made by the Fox Defendants were without privilege or authorization; (4) the Fox Defendants acted with the requisite fault, both gross irresponsibility and actual malice; and (5) the statements and implications made by the Fox Defendants were defamatory *per se* and Smartmatic suffered special damages as a result.

A. The Fox Defendants do not dispute that they published statements and implications about Smartmatic that were defamatory and disparaging.

Smartmatic has identified nearly 200 false and defamatory statements published and republished by the Fox Defendants. (Compl. ¶¶146-216). These are listed in Appendix 1, which identifies: (1) the date on which a statement was published or republished, (2) the publisher(s) of the statement, and (3) the original speaker(s) of the statement. Smartmatic has thus set forth the time, place, and manner of each defamatory publication and identified the particular words complained of. *Benedict P. Morelli & Assoc., P.C. v. Cabot*, 2006 WL 687858, at *2 (Sup. Ct. N.Y. Cty. Jan. 17, 2006) (counterclaim-defendant adequately alleged the particular words, the time, place, manner, and person who made the statements and the defamation claim was not dismissed); *Napoli v. Bern*, 2018 WL 3864320, at *7 (Sup. Ct. N.Y. Cty. Aug. 14, 2018) (same, even where the complaint was "not well-crafted" because it included specific language about the time, place, and manner of the statements). With limited exceptions, the Fox Defendants did not argue in their motions that these statements were not defamatory or untrue. The Fox Defendants also do not contest that the defamatory messages were implied by their publications or argue that that they were, in fact, true.

1. The Court has a limited role in determining whether Smartmatic has adequately alleged false and defamatory statements.

Defamatory meaning. The initial question for the Court is whether statements published by the Fox Defendants, considered in context of each publication, are "reasonably susceptible of

a defamatory connotation." *M.H.B. v. E.C.F.S.*, 177 A.D.3d 479 (1st Dep't 2019) (motion to dismiss properly denied where email sent to school community was "reasonably susceptible of a defamatory connotation"). If the challenged statements are reasonably susceptible to the defamatory connotation alleged by Smartmatic, "then it is for the jury to decide whether that was the sense in which the statement was likely to be understood by the ordinary and average readers." *Schermerhorn*, 73 A.D.2d at 281; *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 380 (1995) (holding the complaint must go forward if, in viewing the statements at issue most favorably to plaintiff, the statement in the context in which it appears is susceptible of a defamatory meaning). A cause of action may be based on the theory that defamation is express or implied. *Partridge v. State*, 173 A.D.3d 86, 91 (3d Dep't 2019).

In determining whether the Fox Defendants published statements that are reasonably susceptible to a defamatory connotation, the Court applies the following standards. "First, the court must consider the publication as a whole, and not pick out and isolate particular phrases." *Davis v. Ross*, 754 F.2d 80, 83 (2d Cir. 1985). "The meaning of a [publication] depends not on isolated or detached statements but on the whole apparent scope and intent." *November v. Time*, *Inc.*, 13 N.Y.2d 175, 178 (1963). "Second, the publication should be tested by its effects upon the average reader" or viewer. *Davis,* 754 F.2d at 83. "Third, the court should not strain to place a particular interpretation on the published words." *Id.* Nor should the court "interpret such [publications] in their mildest and most inoffensive sense to hold them nonlibelous." *November*, 13 N.Y.2d at 178 (internal quotation omitted). "Finally, the statement in question should be read against the background of its issuance with respect to the circumstances of its publication." *Davis*, 754 F.2d at 83.

This analysis must go even further here since many of the challenged publications were broadcast and put online. The Fox Defendants' use of these mediums adds another dimension to the analysis. *Lasky*, 631 F. Supp. at 970 ("In studying a television program for possible defamatory meanings, a court must not confine its analysis to the words alone."); *Corporate Training Unlimited*, 868 F. Supp. at 507 (*"*[C]ourts should be sensitive to the possibility that a transcript which appears relatively mild on its face may actually be, when the total mix of creative ingredients are considered, highly toxic."). "The court must also consider the impact of the video portion of the program since the television medium offers the publisher the opportunity, through visual presentation, to emphasize certain segments in ways that cannot be ascertained from a mere reading of the transcript." *Lasky*, 631 F. Supp. at 970.

Falsity. In New York, falsity is determined by whether the defamatory material is substantially true or not. "[A] statement is substantially true if the statement would not have a different effect on the mind of a reader from that which the pleaded truth would have produced." *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 94 (1st Dep't 2015). Under New York law, "accuracy of [a] report should be assessed on the publication as a whole, not isolated portions of it." *Karedes v. Ackerley Grp., Inc.,* 423 F.3d 107, 114 (2d Cir. 2005). Truth or falsity is typically a disputed issue of fact for the jury. *See, e.g., Dibble v. WROC TV Channel 8*, 142 A.D.2d 966, 967 (4th Dep't 1988) (finding defendant did not establish the news story was "substantially true" and plaintiff sustained burden of proving falsity of the publication).

2. The Fox Defendants' publications about Smartmatic were false and defamatory.

The Complaint catalogs the false and defamatory statements published by the Fox Defendants into eight categories. Each statement is actionable—as being false and defamatory. Each publication and each of those eight categories also contributed to a central defamatory

message: Smartmatic participated in a criminal conspiracy to fix, rig, and steal the 2020 election. (Compl. ¶¶521-535 (First Cause of Action)). This message is defamatory *per se*. False accusations of criminal conduct are routinely actionable. *See, e.g., Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992) (holding that accusations of a serious crime "are actionable without proof of damage"); *Geraci*, 15 N.Y.3d at 344 (finding no error in Supreme Court's charge to the jury about defamation *per se* for a statement at issue alleging plaintiff committed acts constituting a misdemeanor); *Morelli v. Wey*, 2016 WL 7386549, at *10 (Sup. Ct. N.Y. Cty. Dec. 16, 2016) (statements that plaintiffs committed bank fraud and other crimes were defamatory *per se*); *Liere v. Paini*, 93 A.D.3d 825, 826 (2d Dep't 2012) (letter stating that plaintiff's activities were "definitely illegal" was actionable).

Smartmatic briefly discusses the eight categories below. For the Court's convenience, Smartmatic has prepared a series of Appendices that collect all of the defamatory statements published and republished by the Fox Defendants that fall under each category. (Appendices 1-9.) Appendix 13 list the paragraphs in the Complaint explaining why each defamatory statement is demonstrably false. Smartmatic is also providing copies of the transcripts for each broadcast with the false and defamatory statements highlighted.[9] The highlighted transcripts also include screenshots from the broadcasts so the Court can see what the Fox Defendants were visually displaying while defamatory statements were being spoken.[10]

Widespread Use of Smartmatic's Technology and Software. Appendix 2 collects the 55 statements that the Fox Defendants published and republished to falsely convey that Smartmatic's

[9] *See* SMT.Exs.1B, 3B, 5B, 6B, 14B, 15B, 20B, 23B, 25B, 28B, 30B, 33B, 36B, 38B, 39B.

[10] *See* SMT.Exs.1C, 3C, 5C, 14C, 15C, 23C, 25C, 28C, 36C, 38C, 39C.

election technology and software were widely used during the 2020 election, including in the six states with close outcomes. (Compl. ¶¶149-150.) For example:

- Rudy Giuliani: "Lou, I don't know if people can appreciate this but I think when they do, they're going to be outraged. ***Our votes in 27 [or] 28 states that [are] counted by Dominion, and calculated and analyzed***. They're sent outside the United States. And they're not sent to Canada. They're sent to Germany and Spain. And ***the company counting, it is not Dominion, it's Smartmatic***, which is a company that was founded in 2005 in Venezuela ***for the specific purpose of fixing elections***." (SMT.Ex.23B at 13:17-14:2.)

- Maria Bartiromo: "Will you be able to prove this, Rudy? Look, I want to show this ***graphic of the swing states [] that were using Dominion and this software, this Smartmatic software***. I mean, you just said [] ***all this is Smartmatic***, a Delaware entity registered in Boca Raton, Florida, activities in Caracas, Venezuela, the voting machines were used, Dominion voting machines were ***used in Arizona, Georgia, Michigan, Nevada, Pennsylvania and Wisconsin***. And I have a graphic showing the states where they stopped counting, which I thought was also strange to stop counting in the middle of Election Night." (SMT.Ex.5B at 9:12-10:4.)

- Sidney Powell: "[D]efinitely hundreds of thousands have stepped forward with their different experiences of voter fraud, but ***this is a massive election fraud***. And I'm very concerned it involved, not only ***Dominion and its Smartmatic software, but that*** **the** ***software essentially was used by other election machines also***." (*Id.* at 17:14-18.)

- Rudy Giuliani: "I can prove that ***they did it in Michigan***. I can prove it with witnesses. We're investigating the rest. ***In every one of those states though***, we have more than enough illegal ballots already documented to overturn the results in that state. Because not only did they ***use a Venezuelan company to count our ballots***, which almost should be illegal per se. [] Now, they didn't do it everywhere. They did it in big cities where they have corrupt machines that will protect them. Meaning in ***Pennsylvania, Philadelphia, and Pittsburgh, [and] in Detroit***. They didn't have to do it in Chicago, in New York or Boston. They could have, they have corrupt machines there. ***They did it absolutely in Phoenix, Arizona***. They did it absolutely in ***Milwaukee, Wisconsin***. Republicans were shut out from enough of the count, ***so they could accomplish what Smartmatic wanted to do*** . . . . We have evidence that that's the same pattern Smartmatic used in other elections in which they were disqualified." (*Id.* at 10:14-11:11.)

These factual statements about Smartmatic and its software are disparaging and defamatory due to the context in which they were made. The Fox Defendants conveyed that Smartmatic's election technology and software were widely used during the election, while at the same time

conveying that this use is how Smartmatic was able to fix, rig and steal the election. This impugns the integrity, ethics, and honesty of the company. The statements are false because Smartmatic's technology and software were not used in any contested states or the states or cities referenced in the publications. Smartmatic's technology and software were only used in Los Angeles County. Nowhere else. (Compl. ¶¶152-155.) And no votes were fixed by Smartmatic. (*Id.* ¶¶169-173.)

Relationship with Dominion. Appendix 3 collects the 59 statements that the Fox Defendants published and republished to convey that Dominion used Smartmatic's election technology and software during the 2020 election and/or Smartmatic owns Dominion. (Compl. ¶¶157-158.) For example:

- Rudy Giuliani: "Smartmatic is a company that was formed way back in about 2004, 2003, 2004. You're going to be astonished when I tell you how it was formed. It was formed really by three Venezuelans who were very close to [] the dictator Chávez of Venezuela. And it was formed in order to fix elections. ***That's the [] company that owns Dominion***. Dominion is a Canadian company, but ***all of its software is Smartmatic software***. So the votes actually go to Barcelona, Spain. So we're using a foreign company that is owned by Venezuelans who are close to [] Chávez, are now close to Maduro, [they] have a history, they were founded as a company to fix elections." (SMT.Ex.1B at 2:11-24.)

- Maria Bartiromo: "[W]ill you be able to prove this, Rudy? Look, I want to show this ***graphic of the swing states that were using Dominion and this software, the Smartmatic software*** . . . . [Y]ou just said it all. ***This is Smartmatic***, a Delaware entity registered in Boca Raton, Florida, activities in Caracas, Venezuela. ***The voting machines were used, Dominion voting machines were used in Arizona, Georgia, Michigan, Nevada, Pennsylvania and Wisconsin and I have a graphic showing the states where they stopped counting***, which I thought was also strange to stop counting in the middle of Election Night." (SMT.Ex.5B at 9:12-10:4.)

- Sidney Powell: "[T]his is a massive election fraud. And I'm very concerned it involved not only ***Dominion and its Smartmatic software, but that the software essentially was used by other election machines also***. It's the software that was the problem. Even their own manual explains how votes can be wiped away. They can put, it's like drag-and-drop Trump votes to a separate folder and then delete that folder. It's absolutely brazen how people bought this system and why they bought this system." (*Id.* at 17:14-23.)

- Lou Dobbs: "#InextricablyIntertwined: @SidneyPowell1 has no doubt ***that Dominion voting machines run Smartmatic software which allows them to manipulate the votes***." (Compl.Ex.27, NYSCEF 29.)

These factual statements connecting Smartmatic with Dominion for the 2020 election are disparaging and defamatory due to the context in which they were made. The Fox Defendants conveyed that Smartmatic's software was used in Dominion machines to fix, rig, and steal the election. Again, this impugns the integrity, ethics, and honesty of Smartmatic. A reasonable person would interpret these statements to mean that Smartmatic acted with Dominion to manipulate votes in the 2020 election and that its software was capable of doing so. The statements are false because Smartmatic does not own Dominion, Dominion does not own Smartmatic, and Dominion machines did not use Smartmatic's software in the 2020 election. (Compl. ¶¶160-164.) And no votes were fixed using Smartmatic's software. (*Id.* ¶¶169-173.)

Stealing the 2020 election. Appendix 4 collects the 111 statements that the Fox Defendants published and republished to convey that Smartmatic fixed, rigged, and stole the 2020 election for Joe Biden and Kamala Harris. (*Id.* ¶¶166-167.) For example:

- Sidney Powell: "First of all, I never say anything I can't prove. Secondly, the evidence is coming in so fast, I can't even process it all. Millions of Americans have written, I would say by now, definitely hundreds of thousands have stepped forward with their different experiences of ***voter fraud***. But this is a ***massive election fraud***. And I'm very concerned it involved not only Dominion and its Smartmatic software but that the software essentially was used by other election machines also. ***It's the software that was the problem. Even their own manual explains how votes can be wiped away. They can put, it's like drag-and-drop Trump votes to a separate folder and then delete that folder. It's absolutely brazen how people bought this system and why they bought this system.*** In fact, every state that bought Dominion, for sure, should have a criminal investigation or at least a serious investigation of the . . . . officers in the States who bought the software. We've even got evidence from kickbacks, essentially." (SMT.Ex.5B at 17:9-18:4.)

- Sidney Powell: "Okay. That's part of it. ***They can stick a thumb drive in the machine or upload software to it, even from the Internet. They can do it from Germany or Venezuela, even. They can remote access anything. They can watch votes in real time. They can shift votes in real time. We've identified mathematically the exact algorithm they used and plan to use from the beginning***

> ***to modify the votes in this case to make sure Biden won***. That's why he said he didn't need your votes now, he would need you later. He was right. I mean, in his demented state he had no filter and he was speaking the truth more than once, including when he said he had the largest voter fraud organization ever. ***Well, its massive election fraud. It's going to undo the entire election. And they can do anything they want with the votes***. They can have the machines not read the signature. They can have the machines not read the down ballot. They can make the machines read and catalog only the Biden votes. ***It's like drag-and-drop whatever you want wherever you want, upload votes. [] In fact, we've gotten math in Michigan and Pennsylvania I think it is, that all of a sudden, hundreds of thousands of votes at a 67% ratio for Biden, 23% for Trump, [] were uploaded multiple times into the system.***" (*Id.* at 21:4-22:8.)

- Sidney Powell: "Yes, well he's listed as retired . . . admiral Peter Neffenger. He is President of the Board of Directors of Smartmatic, and it just so happens he's on Biden's presidential transition team that's going to be non-existent because we're fixing to overturn the results of the election in multiple States. [] President Trump won by not just hundreds of thousands of votes, but by ***millions of votes that were shifted by this software that was designed expressly for that purpose***." (*Id.* at 15:24-16:10.)

- Lou Dobbs: "And it's the presumption then that they had the records on those servers of all the votes that were processed by Dominion or Smartmatic?" Sidney Powell: "Yes, the way it works, ***the votes can be changed either on the ground as they come in***. People can watch the votes streaming live . . . . It could've run an automatic algorithm against all the votes, which we believe is what happened originally. ***And then the machines had to stop within the–or the counting had to stop in multiple places because President Trump's lead was so great at that point, they had to stop the vote counting and come in and backfill the votes they needed to change the result***." (SMT.Ex.25B at 12:19-13:8.)

These factual statements about fraud and vote manipulation by Smartmatic in the 2020 election are disparaging and defamatory *per se*. The Fox Defendants conveyed that Smartmatic participated in criminal and immoral behavior (defamatory) and that its technology and software were designed and used to achieve that illegal purpose (disparaging). The statements are false because Smartmatic did not participate in a conspiracy to fix, rig, or steal the election and its election technology and software were not used to fix, rig, or steal the election. (Compl. ¶¶169-173.) No votes were fixed by Smartmatic. (*Id.* ¶¶169-173.)

Sending Votes to Foreign Countries. Appendix 5 collects the 13 statements that the Fox Defendants published and republished to convey that Smartmatic sent votes to foreign countries for manipulation during the 2020 election. (*Id.* ¶¶175-176.) For example:

- Rudy Giuliani: "Lou, I don't know if people can appreciate this but I think when they do they're going to be outraged. [There are] votes in 27 [or] 28 states that [are] counted by Dominion, and calculated and analyzed. ***They're sent outside the United States. And they're not sent to Canada, they're sent to Germany and Spain. And the company counting, it is not Dominion. It's Smartmatic,*** which is a company that was founded in 2005 in Venezuela for the specific purpose of fixing elections." (SMT.Ex.23B at 13:17-14:2.)

- Rudy Giuliani: "[Smartmatic] was banned by the United States several, about a decade ago. It's come back now as a sub-contractor to other companies who sorta hides in the weeds. ***But Dominion sends everything to Smartmatic. Can you believe it? Our votes are sent overseas. They are sent to someplace else, some other country. Why do they leave our country? []*** And this company . . . has tried and true methods for fixing elections by calling the halt to the voting when you're running too far behind. They've done that in prior elections." (SMT.Ex.5B at 5:19-6:7.)

- Lou Dobbs: "And now we have to find out whether they did. And ***with those servers whether they're in Canada, whether they're in Barcelona or Spain, or Germany***. We know a number of companies. All of them are private. Five of them, five of the top voting companies in this country - at least - if they're not in this country, they're processing our votes in this country. They comprise 90% of all of the election voting market in this country. It's stunning and they're private firms and very little is known about their ownership. Beyond what you're saying about Dominion, it's very difficult to get a handle on just who owns what and how they're being operated. And by the way, the states, as you well know now, ***they have no ability to audit meaningfully the votes that are cast because the servers are somewhere else*** and are considered proprietary and they won't touch them. It won't permit them being touched. So it's really, so how do you proceed now?" (SMT.Ex.1B at 3:21-4:15.)

- Lou Dobbs: "Foreign Election Involvement: @RudyGiuliani says votes in 28 states were sent to Germany and Spain to be counted by Smartmatic." (Compl.Ex.24, NYSCEF 26).

These factual statements about Smartmatic sending votes from the 2020 election to foreign countries are disparaging and defamatory due to the context in which they were made. The Fox Defendants published these statements while at the same time conveying that Smartmatic

manipulated the voting. The implication is that Smartmatic's technology and software sent votes outside the country so they could be manipulated in a way that could not be detected by an audit. These statements are false because Smartmatic's technology and software did not send votes overseas during the 2020 election. (Compl. ¶¶178-181, 206.) And no votes were fixed by Smartmatic in the 2020 election. (*Id.* ¶¶169-173.)

Compromised Technology and Software. Appendix 6 collects the 54 statements that the Fox Defendants published and republished to convey that Smartmatic's election technology and software were compromised or hacked during the 2020 election. (Compl. ¶¶183-184.) For example:

- Rudy Giuliani: "[F]irst of all, ***the machines can be hacked***. There's no question about that. Their machines can be hacked, but it's far worse than that." (SMT.Ex.1B at 2:7-9.)

- Rudy Giuliani: "They have a terrible record and they are ***extremely hackable***. So, Texas made the right decision. What the heck was Georgia doing hiring this company?" (*Id.* at 2:24-3:2.)

- Maria Bartiromo: "One source says that the key point to understand is that the ***Smartmatic system has a back door***, that allows it to be [], or that allows the votes to be mirrored and monitored, allowing an intervening party a real-time understanding of how many votes will be needed to gain an electoral advantage." (SMT.Ex.5B at 10:4-11.)

- Maria Bartiromo: "Now, I have spoken with a few whistleblowers myself, this weekend. And one source who is an IT specialist, told me that he knows the software and specifically advised people in Texas, officials in Texas, not to use it. And yet, he was overruled. He said that ***there was an unusual patch that was put into the software while it was live, and it's highly unusual to put a patch in there.***" (SMT.Ex.5B at 20:18-21:1.)

These factual statements about Smartmatic's technology and software are disparaging and defamatory *per se*. The Fox Defendants conveyed that Smartmatic's products are not secure, which is one of the most important features of its election technology and software. Again, this impugns the integrity, ethics, and honesty of the company, and the quality of its technology and software.

These statements are false because Smartmatic's technology and software were not compromised during the 2020 election and do not have this type of secret backdoor. (Compl. ¶¶186-189.) No votes were fixed using Smartmatic's software. (*Id.* ¶¶169-173.)

Banned in the United States. Appendix 7 collects the 22 statements that the Fox Defendants published and republished to convey that Smartmatic was previously banned from providing election technology and software in the United States. (Compl. ¶¶191-192.) For example:

- Rudy Giuliani: "***[Smartmatic] was banned by the United States several times . . . about a decade ago***. It's come back now as a sub-contractor to other companies who sorta hides in the weeds. But Dominion sends everything to Smartmatic. Can you believe it?" (SMT.Ex.5B at 5:19-23.)

- Rudy Giuliani: "[T]he company counting, it is not Dominion. It's Smartmatic, which is a company that was founded in 2005 in Venezuela for the specific purpose of fixing elections. That's their expertise, how to fix elections. They did it a number of times in Venezuela. They did it in Argentina. They messed up an election . . . in Chicago and there's a whole congressional record that you can go look at about what a terrible company this is. Lou Dobbs: [I]t's all the more outrageous because Dominion and ***Smartmatic were denied use in the state of Texas, which called them out for what they are***." (SMT.Ex.23B at 13:23-14:7, 14:21-24.)

- Rudy Giuliani: "Republicans were shut out from enough of the count so they could accomplish [what] Smartmatic wanted to do. . . [***W]e have evidence that that's the same pattern Smartmatic used in other elections in which they were disqualified***. In other words, this is their pattern of activity, and, yes, there is a backdoor [] and we actually have proof of some of the connections to it." (SMT.Ex.5B at 11:6-16.)

- Maria Bartiromo: "What is the CIA's role? Why do you think Gina Haspel should be fired immediately? You're saying the CIA is behind the Dominion or Smartmatic voting software as well?" Sidney Powell: "Well, ***the CIA and the FBI and other government organizations have received multiple reports of wrongdoing and failures and vulnerabilities in this company's product.***" (*Id.* at 19:22-20:5.)

These factual statements about Smartmatic being banned and disqualified are disparaging and defamatory *per se*. The Fox Defendants conveyed that Smartmatic's election technology and software could not be trusted because they had been banned and the subject of multiple reports of

wrongdoing. Again, this impugns the integrity, ethics, and honesty of the company, and the quality of its technology and software. The statements are false because Smartmatic has never been banned or disqualified in the United States (or an individual state) and federal agencies have not received multiple reports of wrongdoing, failures, and vulnerabilities with its election technology and software. (Compl. ¶¶194-197.)

Founded and Funded by Corrupt Dictators. Appendix 8 collects the 50 statements that the Fox Defendants published and republished to convey that Smartmatic was founded and funded by corrupt dictators from socialist and communist countries. (Compl. ¶¶199-200.) For example:

- Rudy Giuliani: "This Dominion company is a radical left company. One of the people there is a big supporter of ANTIFA and has written horrible things about the President for the last three or four years. And the ***software that they use is done by a company called Smartmatic. It's a company that was founded by Chávez. And by Chávez's two - two allies who still own . . . it***. And it's been used to cheat in elections in South America." (SMT.Ex.5B at 5:11-19.)

- Rudy Giuliani: "We shouldn't be using this ***company that was founded by Chávez*** to call votes in America because their specialty in Venezuela is cheating. Well, apparently the governor signed them up and never bothered to do any due diligence of any kind." (SMT.Ex.23B at 15:12-16.)

- Sidney Powell: "Lord Malloch-Brown's name has been taken off the website for the company that he runs through the U.K. and Canada - that has a role in this. It's either Symantec or Smartmatic or the two, there - one is a subsidiary of the other. It's all inexplicably intertwined. ***The money creating it came out of Venezuela and Cuba***. ***It was created for the express purpose of being able to alter votes and secure the reelection of Hugo Chávez. And then Maduro***." (SMT.Ex.3B at 5:9-17.)

- Lou Dobbs: "Dominion has connections to UK-based ***Smartmatic***, a voting technology company established in 2000 that ***had ties to Venezuela's Hugo Chávez***." (SMT.Ex.14B at 2:17-20.)

These factual statements about Smartmatic being founded by Hugo Chávez and his allies to cheat in elections are defamatory *per se*. The statements are also defamatory based on the context in which they were made. The Fox Defendants made these statements while at the same time indicating that Smartmatic's ties to the corrupt dictators is why its technology and software

were designed to alter votes. A reasonable person would interpret the statements to mean that Smartmatic would not be a reliable or trustworthy company to use for elections. The statements are false because Smartmatic was not founded by dictators, is not funded by any dictators, and has no ties (financial or otherwise) to dictators. (Compl. ¶202-206.)

Designed to Steal Elections. Appendix 9 collects the 63 statements that the Fox Defendants published and republished to convey that Smartmatic's election technology and software were designed to fix, rig, and steal elections. (Compl. ¶¶208-209.) For example:

- Sidney Powell: "We have sworn witness testimony of why the software was designed. ***It was designed to rig elections.*** He was fully briefed on it. He saw it happen in other countries. It was exported internationally for profit by the ***people that are behind Smartmatic*** and Dominion. ***They did this on purpose***, it was calculated, they've done it before. We have evidence from 2016 in California. We have so much evidence, I feel like it's coming in through a firehose." (SMT.Ex.5B at 16:10-19.)

- Rudy Giuliani: "Smartmatic is a company that was formed way back in about 2004, 2003, 2004. You're gonna be astonished when I tell you how it was formed. It was formed really by three Venezuelans who were very close to . . . the dictator, Chávez, of Venezuela. ***And it was formed in order to fix elections***. That's the, that's the company that owns Dominion. Dominion is a Canadian company, but all of its software is Smartmatic software. So the votes actually go to Barcelona, Spain. So we're using a foreign company that is owned by Venezuelans who are close to [] Chávez, are now close to Maduro, [they] have a history, ***they were founded as a company to fix elections***." (SMT.Ex.1B at 2:11-24.)

- Sidney Powell: "The money creating it came out of Venezuela and Cuba. ***It was created for the express purpose of being able to alter votes and secure the re-election of Hugo Chávez and then Maduro***. They've used it in Argentina. There was an American citizen who has exported it to other countries. And it is one huge, ***huge criminal conspiracy*** that should be investigated by military intelligence for its national security implications." (SMT.Ex.3B at 5:14-22.)

- Rudy Giuliani: "Lou, I don't know if people can appreciate this but I think when they do, they're gonna be outraged. Our votes in 27 [or] 28 states that [are] counted by Dominion, and calculated and analyzed. They're sent outside the United States. And they're not sent to Canada, they're sent to Germany and Spain. And, the company counting, ***it is not Dominion. It's Smartmatic***, which is a company that was ***founded in 2005 in Venezuela for the specific purpose of fixing elections. That's their expertise. How to fix elections*** . . . We shouldn't be using this company that was founded by Chávez to call votes in America ***because their specialty in***

> ***Venezuela is cheating***. Well apparently the governor signed them up and never bothered to do any due diligence of any kind." (SMT.Ex.23B at 13:17-14:3, 15:12-16.)

These factual statements about Smartmatic's software being designed to alter votes are disparaging and defamatory *per se*. The Fox Defendants conveyed that Smartmatic designed its technology and software so that they could be used to manipulate election results. That is criminal and immoral. The statements are false because Smartmatic did not design its election technology and software to manipulate election results. Smartmatic designed its election technology and software to ensure election results were accurate, transparent, and auditable. (Compl. ¶¶211-216.)

B. Fox News and the Fox anchors are responsible for the defamatory statements and implications they published and republished.

The Fox Defendants do not want to be held liable for statements made by Giuliani and Powell, even though they published them and now concede their falsity. Fox News argues that "Smartmatic has not identified any statement by Fox itself that is actionable as defamation." (Fox Mem. at 2.) Each of the Fox anchors argues that they can only be held responsible for the defamatory statements they personally spoke or wrote. (Dobbs Mem. at 9 n.6; Bartiromo Mem. at 12 n.9; Pirro Mem. at 9 n.8.) They are all wrong. Black letter law holds all the Fox Defendants responsible for the defamatory falsehoods they participated in publishing and republishing, including the statements by Giuliani and Powell.

1. Fox News is responsible for all the defamatory statements and implications made in its publications.

The attempt by Fox News to avoid liability for publishing the statements made by Giuliani and Powell is frivolous. Fox News is not being sued for broadcasting a press conference by Giuliani and Powell. Smartmatic is seeking redress for the defamatory content of Fox News' own publications. Fox News invited Giuliani and Powell to participate on multiple Fox programs, Giuliani and Powell defamed Smartmatic during those programs along with the Fox anchors, and

Fox News broadcasted those programs. Then Fox News published the programs again . . . and again.

a. Fox News is liable as the original publisher of the broadcasts.

When a television station broadcasts defamatory statements, the broadcast is a publication. The broadcaster is the publisher. These propositions are not novel. They have been recognized since the advent of the motion picture. *See Brown v. Paramount Publix Corp*., 240 A.D. 520, 522 (3d Dep't 1934) (applying libel law to "a talking motion picture" and against its producer and distributor because "[i]n the hands of a wrongdoer these devices have untold possibilities toward producing an effective libel"). For decades, New York courts have classified defamatory matter on a broadcast as libel. *See Shor v. Billingsley*, 4 Misc. 2d 857, 862 (Sup. Ct. N.Y. Cty. 1956) (noting that "modern systems of broadcasting" have "completely destroyed" "[t]he reason for the distinction between libel and slander," as "[a] defamatory statement transmitted over . . . a broadcast, reaching as it may an audience of many millions, is calculated to cause as much, if not more, damage than a written report in a newspaper"), *unanimously aff'd*, 169 N.Y.S.2d 416 (1st Dep't 1957); *see also* Restatement (Second) of Torts §568A ("Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript.").

For these reasons, courts treat a broadcast as equivalent to a newspaper. Both are publications for a defamation claim. *See, e.g., Prozeralik v. Cap. Cities Commc'ns, Inc*., 82 N.Y.2d 466, 478 (1993) (affirming submission of a defamation action to the jury to "assess[]" the "actual malice and liability" of a radio and television station owner for its allegedly defamatory live news segments); *Martins v. Coelho*, 103 A.D.2d 823, 824 (2d Dep't 1984) (viable claim stated against station owner for broadcasting allegedly defamatory matter during a program); *Meadows v. Taft Broad. Co*., 98 A.D.2d 959, 960 (4th Dep't 1983) (denying summary judgment of a defamation claim brought against a television station owner for matters it aired on a news program); *Shor*, 4

Misc. 2d at 861-62 (denying dismissal of defamation claims against telecaster and show producer); *Mitre Sports*, 22 F. Supp. 3d at 256 (denying summary judgment of a defamation claim against HBO for producing and airing defamatory content on a "news magazine program").

Fox News is wrong when it suggests it cannot be liable for the defamatory statements made by Giuliani and Powell on its programs. Modern defamation law recognizes that "[o]ne who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher." Restatement (Second) of Torts §581(2).[11] Defamation law treats a broadcaster as an original publisher because, "[f]or their own business purposes," television broadcasting companies "initiate, select and put upon the air their own programs . . . ." *Id.* comment g. That is precisely what Fox News did here. For its own business purposes, Fox News: initiated programming about the 2020 election being fixed, rigged, and stolen for Joe Biden and Kamala Harris by Smartmatic (and Dominion); invited Giuliani and Powell to be appear on multiple programs; and, put them on Fox News' proprietary airspace to disseminate calculated falsehoods about Smartmatic. (Compl. ¶¶82-147.) Giuliani and Powell did not broadcast their statements; Fox News did. Fox News is accordingly liable for its publication of their statements. *Lehman v. Discovery Commc'ns, Inc.*, 332 F. Supp. 2d 534, 539 (E.D.N.Y. 2004).

b. Fox News is also liable because it rebroadcast the defamatory statements.

Fox News rebroadcast its own original publications where Giuliani and Powell defamed Smartmatic. It did so multiple times. Rebroadcasting defamatory material "over radio or television . . . [is a separate publication] that reaches a new group and the repetition justifies a new cause of

[11] *See Hogan*, 84 A.D.2d at 477 (relying on Restatement (Second) of Torts §581 as legal authority).

action." *Lehman*, 332 F. Supp. 2d at 539 (citing Restatement (Second) of Torts §577A(3), comment d); *accord* Rodney A. Smolla, 1 Law of Defamation §4:93 (Nov. 2020 update). "Like a publication of the same defamatory statement in both a morning and evening edition of a newspaper, a rebroadcast of a television show is intended to reach a new audience and is therefore an additional communication." *Lehman*, 332 F. Supp. 2d at 539. "A rebroadcast has renewed impact with each viewing and creates a new opportunity for injury, thereby justifying a new cause of action." *Id. Cf. Giuffre v. Dershowitz*, 410 F. Supp. 3d 564, 574 (S.D.N.Y. 2019) (noting that a rebroadcast of a defamatory television show is actionable, as it is "produced to garner an audience that the preexisting dissemination of the statement could not reach").

The following table summarizes when Fox News originally broadcasted and then rebroadcasted the news programs that included defamatory statements by Giuliani, Powell, and the Fox anchors.[12]

Broadcast Date	**Program**	**Compl. ¶**	**Compl. Ex.**	**Times Broadcast and Rebroadcast**
11/12/20	*Lou Dobbs Tonight*	133(a)	Ex. 1	4
11/14/20	*Justice with Judge Jeanine*	133(c)	Ex. 3	3
11/15/20	*Sunday Morning Futures with Maria Bartiromo*	133(e)	Ex. 5	4
11/16/20	*Lou Dobbs Tonight* (First Video)	133(n)	Ex. 14	4
11/16/20	*Lou Dobbs Tonight* (Second Video)	133(o)	Ex. 15	4
11/17/20	*Mornings with Maria*	133(t)	Ex. 20	N/A
11/18/20	*Lou Dobbs Tonight*	133(w)	Ex. 23	4
11/19/20	*Lou Dobbs Tonight*	133(y)	Ex. 25	4
11/21/20	*Justice with Judge Jeanine*	133(bb)	Ex. 28	3
11/21/20	*Watters' World*	133(dd)	Ex. 30	3
11/22/20	*Sunday Morning Futures with Maria Bartiromo*	133(gg)	Ex. 33	3
11/26/20	*Lou Dobbs Tonight*	133(jj)	Ex. 36	15
12/10/20	*Lou Dobbs Tonight*	133(ll)	Exs. 38 & 39	4

[12] Appendix A to the Kruskol Affidavit includes more details about the date and time of each broadcast.

If Fox News was shocked, surprised, disturbed, or bothered by something that anyone said during one of their programs, and did not want to repeat it, it had an easy option: do not publish it again. Fox News choose instead to rebroadcast the programs because it wanted to, and did, reach a different audience. Each rebroadcast provides another basis for Smartmatic's defamation claims against Fox News.

c. Fox News is liable for republishing the programs online.

Nor was Fox News content to broadcast the defamatory statements about Smartmatic made by Giuliani, Powell, and its anchors. Fox News republished the broadcasts online.

Under New York law, republication of a defamatory statement supports an independent cause of action. *See Cianci*, 639 F.2d at 60–61 (noting that it is "black-letter" law that "one who republishes a libel is subject to liability just as if he had published it originally"); *Firth v. State of New York*, 98 N.Y.2d 365, 371 (2002) (explaining that "repetition of a defamatory statement in a later edition of a book, magazine or newspaper may give rise to a new cause of action" because "the subsequent publication is intended to and actually reaches a new audience"); *Rinaldi v. Viking Penguin*, 52 N.Y.2d 422, 433 (1981) (republishing a defamatory statement previously made in paperback edition in hard-cover supported a new claim).

New York courts also recognize that republication of a defamatory statement online is actionable. *See Firth v. State of New York*, 306 A.D.2d 666, 667 (3d Dep't 2003) (holding that "mov[ing]" a defamatory report that is already online "to a different Internet address" is "sufficient to state a cause of action for republication" because the act is "akin to the repackaging of a book from hard cover to paperback"); *cf. Geary v. Town Sports Int'l Holding, Inc.*, 21 Misc. 3d 512, 514 (Sup. Ct. N.Y. Cty. 2008) (applying republication rule to placement of a photograph online, as the website was "presumably directed at a far wider audience"). Publication of defamatory statements online causes even more harm to a plaintiff. "The internet can cause very serious harm because

unlike newspaper, radio or television, the monetary and time costs of publishing online are virtually non-existent fueling the speed with which information spreads." *Robertson v. Doe*, 2009 WL 10676484, at *7 (S.D.N.Y. Dec. 17, 2009) (internal quotation omitted).

Fox News republished the defamatory statements made by Giuliani, Powell, and its anchors by posting videos and transcripts of its news programs on its website. Fox News added commentary to their postings as well. For example:

- November 14: Fox News posted video and transcript of *Justice with Judge Jeanine* on its website with caption: "The media does not call an election: There is both an ethical and a legal obligation to all of Trump's voters to ensure them every vote is counted and not diluted in any way." (Compl. ¶133(d); Compl.Ex.4, NYSCEF 6.)

- November 15: Fox News posted video and transcript of *Sunday Morning Futures with Maria Bartiromo* to its website with caption: "Why doesn't Biden camp want to know truth about voting irregularities?" (Compl. ¶133(l); Compl.Ex.12, NYSCEF 14.)

- November 21: Fox News posted video and transcript of *Justice with Judge Jeanine* to its website with caption: "Questions linger over the Left's plot against Donald Trump." (Compl. ¶133(cc); Compl.Ex.29, NYSCEF 31.)

- November 22: Fox News posted video of *Justice with Judge Jeanine* to its website with caption: "Judge Jeanine: Preserving U.S. Election integrity . . . Judge Jeanine addresses discrepancies in the 2020 presidential election results." (Compl. ¶133(ff); Compl.Ex.32, NYSCEF 34.)

Fox News' decision to post the videos of its broadcasts and transcripts online meant the defamatory statements reached new audiences that their television broadcasts did not encompass. (Compl. ¶135.) Fox News is liable for the defamatory statements it republished online.[13]

[13] Fox Corporation argues in a footnote that it should be dismissed because Smartmatic did not allege it had "any direct involvement in or control over speakers and statements at issue." (Fox Mem. at 9 n5.) Not true. Smartmatic alleged that Fox Corporation was part of the collective "Fox News" and thus part of the collective "Fox" and "Fox Defendants." (Compl. ¶¶20, 24.) Accordingly, every action attributed to "Fox," "Fox News," and the "Fox Defendants" is attributed to Fox Corporation. Smartmatic also alleges that all actions taken by Dobbs, Bartiromo and Pirro were done "under the direction of Fox News," thus the Fox Corporation. (*Id.* ¶24.) The case cited by Fox Corporation, *Stern v. News Corp*., 2010 WL 5158635 (S.D.N.Y. Oct. 10, 2010), does not control here. In that case, a court found that the News Corporation was not a proper defendant on summary judgment, not on a motion to dismiss.

2. The Fox anchors are liable for the defamatory messages they helped to convey on their programs.

The Fox anchors each attempt to avoid liability by telling the Court to focus only on the statements they made themselves during their programs. (Bartiromo Mem. at 12 n.9; Dobbs Mem. at 9 n.6; Pirro Mem. at 9 n.8.) The only "authority" they cite is an introductory section from New York Jurisprudence that references statements "made" by the defendant. The introduction, which is at section 6 out of 279 sections, does not purport to summarize the breadth of secondary liability law in New York. Under New York law, each of the Fox anchors are responsible for the defamatory import of the statements that they made in the context of their program and the statements made by Giuliani and Powell, many of which the Fox anchors encouraged or intentionally solicited. This is black letter law.

a. The Fox anchors are liable because they participated in publishing the defamatory statements made during their programs.

"[U]nder New York law, all who take part in the procurement, composition and publication of a libel are responsible in law and equally so." *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 717 (S.D.N.Y. 2014) (denying dismissal of aiding and abetting defamation claim based upon the defendant's "integral[] involve[ment]" in a defamation campaign). "[A] defamatory statement is not uttered merely by the author, but by anyone who participates in its publication, demonstrated by the many defamation cases brought against reporters, editors and publishers of a defamatory newspaper." *Robertson*, 2009 WL 10676484, at *13; *see also Herbert*, 441 U.S. at 155-56 (authorizing discovery into editorial process in a case brought against a publisher, producer, and show narrator for defamation); *Afshari v. Barer*, 1 Misc. 3d 57, 58 (2d

Dep't 2003) (affirming judgment against a defendant who "participat[ed] in the preparation and publication" of a defamatory letter and who was "held jointly liable for the defamation"); *Storch v. Gordon*, 23 Misc. 2d 477, 479 (Sup. Ct. Kings Cty. 1960) ("Everyone who requests, procures or commands another to publish a libel is answerable as though he published it himself."); 44 N.Y. Jur. 2d *Defamation and Privacy* §§217, 218 (2d ed. 2021) (describing joint and several liability for slander and libel under New York law).

Greenberg v. CBS, Inc., 69 A.D.2d 693 (2d Dep't 1979), is illustrative. The plaintiff in *Greenberg* brought a defamation claim against CBS and Mike Wallace, the reporter, based on statements made by a woman that Wallace interviewed during a segment on "60 Minutes." *Id.* 698-99. During the segment, Wallace asked the woman a series of questions about her interactions with the plaintiff doctor. *Id.* The woman's response indicated that "there was a causal connection between the medication prescribed by the plaintiff and the birth defects of her daughter." *Id.* at 702. Wallace moved for summary judgment arguing that the responses he elicited from the women were constitutionally protected opinion. The court rejected that argument. *Id.* at 703. "In this case the decisions of the defendants [including Wallace] in their endeavor must be evaluated at trial." *Id.* at 710-11.

Like Wallace, the Fox anchors were active participants in soliciting and creating the defamatory statements on each of their programs, including those by Giuliani and Powell. (Compl. ¶¶95-138.) First, the defamatory statements at issue did not exist before Giuliani and Powell appeared on the shows hosted by the Fox anchors. The Fox anchors set up and solicited the defamatory falsehoods made by Giuliani and Powell—and did so repeatedly at different times. Second, the Fox anchors solicited the defamatory falsehoods knowing they were false and contradicted by other information. (*Id.* at ¶¶220-242.) Third, the Fox anchors did not correct or

qualify Giuliani's and Powell's statements. (*See, e.g.,* Compl. ¶¶109, 117, 464.) The Fox anchors (i) endorsed and added to the defamatory statements (including by presenting visuals and graphics prepared by Fox), (ii) indicated they had themselves reviewed certain undisclosed evidence referred to on the programs, (iii) thanked Giuliani and Powell for their investigations, and (iv) encouraged action and further investigation. *Infra* at Arg.II.C.

Through these actions, the Fox anchors controlled the overall message conveyed during the segments of their programs that discussed Smartmatic. Defamatory meaning depends not just on isolated or detached statements but on the whole scope and apparent intent of the publication. *November,* 13 N.Y.2d at 178. The anchors were uniquely situated to shape the overall messages conveyed during their programs on which Giuliani and Powell appeared. They shaped defamatory messages with the words and images they chose to use during the segments, the questions they chose to ask, their tone and tenor, and their reactions to the information provided by Giuliani and Powell. Their participation helped create the defamatory falsehoods challenged in this lawsuit.

b. The Fox anchors are liable because they conspired with Giuliani and Powell to disseminate defamatory falsehoods about Smartmatic.

The Fox anchors also conspired with Giuliani and Powell to defame Smartmatic. This is an independent basis to hold them liable for all defamatory statements made during their programs.

New York allows plaintiffs "to connect the actions of separate defendants with an otherwise actionable tort" through "allegations of civil conspiracy." *Cohen Bros. Realty Corp. v. Mapes*, 181 A.D.3d 401, 404 (1st Dep't 2020). Civil conspiracy is not an independent claim, but a means to hold liable each defendant that knowingly perpetrates a tort in concert. *See World Wrestling Fed'n Ent., Inc. v. Bozell*, 142 F. Supp. 2d 514, 532 (S.D.N.Y. 2001) (A "plaintiff may plead the existence of a conspiracy . . . to demonstrate that each defendant's conduct was part of a common scheme."). "To establish a claim of civil conspiracy, the plaintiff must demonstrate the

primary tort, plus the following four elements: [1] an agreement between two or more parties; [2] an overt act in furtherance of the agreement; [3] the parties' intentional participation in the furtherance of a plan or purpose; and [4] resulting damage or injury." *Cohen Bros.*, 181 A.D.3d at 404.

Smartmatic has alleged a conspiracy between the Fox anchors, Giuliani and Powell to defame Smartmatic.

> After the November 2020 election, Giuliani and Powell conspired to spread a false narrative regarding the outcome of the election by disparaging and defaming Smartmatic. The conspiracy served their personal and financial interest as they benefitted from creating a perception that the 2020 U.S. election had been rigged and stolen by Smartmatic. Giuliani and Powell enlisted and used Fox News to further this conspiracy. Fox News also had a financial interest in creating the perception that the 2020 U.S. election had been rigged and stolen by Smartmatic. The Fox Defendants, Giuliani, and Powell agreed to use Fox News' broadcasting base in New York, New York to disseminate the disinformation campaign, which ensured the story would reach the broadest audience possible.
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> ***
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> The Fox Defendants were voluntary and knowing members of the conspiracy with Powell and Giuliani. Like Powell and Giuliani, the Fox Defendants knew there was no factual basis for the statements being made about Smartmatic. And, like Powell and Giuliani, the Fox Defendants had a personal and financial interest in disseminating a narrative that Smartmatic stole and rigged the 2020 U.S. election for Joe Biden and Kamala Harris. With an alignment of interest, the Fox Defendants agreed they would use Fox News' broadcasting and publication power in New York to disseminate the disinformation campaign, including disseminating statements made by Powell and Giuliani regarding Smartmatic. On information and belief, Powell and Giuliani sought out and encouraged the Fox Defendants to use Fox News' New York-based operations to spread their false statements about Smartmatic, which the Fox Defendants agreed to do as part of the conspiracy.

(Compl. ¶¶27, 36.) Smartmatic then alleges facts regarding the evolution of the conspiracy, and its execution by the Fox anchors along with Giuliani and Powell. (*Id.* ¶¶95-131.) The Fox anchors had a well-orchestrated scheme with Giuliani and Powell to spread the message that Smartmatic rigged, fixed, and stole the 2020 election. They carried out this scheme over the course of multiple

publications. Following each show, the Fox anchors thanked Giuliani and Powell for their appearances and solicited return appearances, for the same purposes, multiple times. It is impossible to watch the successive programming and not discern concert between them to use the shows to broadcast disinformation.

Smartmatic checks the box on a properly alleged civil conspiracy. Smartmatic has alleged facts to establish the underlying torts of defamation and disparagement. (*Id.* ¶¶1-754.) Smartmatic has also alleged facts on each of the four elements. One, Smartmatic alleges an agreement between Fox News, Dobbs, Bartiromo, Pirro, Giuliani and Powell to defame and disparage Smartmatic. (*Id.* ¶¶27, 36.) Two, Smartmatic identifies a series of overt acts in furtherance of the conspiracy, including the publication of the defamatory reports by Fox News, Dobbs, Bartiromo, and Pirro. (*Id.* ¶¶95-138.) Three, Smartmatic alleges intentional participation in the scheme with allegations demonstrating the Fox anchors' actual malice (*id.* ¶¶217-421) as well as allegations regarding the Fox anchors' individual motivations to participate in the scheme. (*Id.* ¶¶431-442.) Four, Smartmatic alleges damages from the conspiracy. (*Id.* ¶¶466-520.)

Smartmatic's allegations are sufficient to establish a conspiracy to defame between the Fox anchors, on the one hand, and Giuliani and Powell, on the other. *See Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dep't 2012) (reversing lower court's dismissal of claim for conspiracy to commit defamation because the complaint "sufficiently alleged [its] elements"); *World Wrestling*, 142 F. Supp. 2d at 532-33 (denying motion to dismiss where complaint alleged the elements of a civil conspiracy to defame); *Pasqualini v. MortgageIT, Inc.*, 498 F. Supp. 2d 659, 671 (S.D.N.Y. 2007) (same).[14] The Fox anchors are thus liable for the defamatory statements made by Giuliani and

[14] Additional details about the conspiracy are solely in the possession of the conspirators and, thus, not grounds for dismissal. *See Cohen Bros. Realty*, 181 A.D.3d at 404-05 (holding that lower court erred in dismissing conspiracy claim because the plaintiffs' "underlying papers" raised "[n]umerous fact issues," and "the facts necessary to fully

Powell during his/her programs with his/her assistance. *See McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep't 1992) ("While there is no such tort as a conspiracy to libel, allegations of conspiracy are allowed to show that the underlying tortious acts flowed from concerted action and to connect each defendant with an actionable injury"); *Green v. Davis*, 182 N.Y. 499, 506 (1905); *Di Blasi v. Artale*, 133 A.D. 153, 154-55 (2d Dep't 1909).

c. The Fox anchors are liable because they republished the programs online.

Each of the Fox anchors republished the defamatory statements made by Giuliani, Powell and himself/herself on Twitter and Facebook. The anchors' decision to republish their respective programs renders them responsible for their contents.

New York has long recognized potential liability for the republication of an already existing work. The concept originated when everything was in print. "[R]epetition of a defamatory statement in a later edition of a book, magazine or newspapers may give rise to a new cause of action." *Firth,* 98 N.Y.2d at 371; *Cook v. Conners*, 215 N.Y. 175 (1915) (finding that liability could attach to morning and afternoon editions of newspapers owned and published by the same individual). The same is true in the age of the Internet. The New York Court of Appeals has "recognized that an online republication can be actionable where it 'is intended to and actually reaches a new audience.'" *Bacon v. Nygard*, 2019 WL 3254983, at *6 (Sup. Ct. N.Y. Cty. July 19, 2019) (citing *Firth*, 98 N.Y.2d at 371); *see also Giuffre*, 410 F. Supp. 3d at 572 (noting that republication of "prior [defamatory] statements has . . . been found actionable where additional

oppose" the defendant's motion, including "related email correspondence," "were solely in" the defendant's "possession").

material is added to the prior statements," such as "by adding 'Breaking News!' and 'Update!' sections").

The Fox anchors used their personal social media accounts (Twitter and Facebook) to republish their interviews with Giuliani and Powell to a new audience and put in additional material. (Compl. ¶136.)

- November 15: Bartiromo posted video of *Sunday Morning Futures with Maria Bartiromo* using Twitter with caption: "Giuliani: Trump is contesting the election 'vigorously' in the courts." (*Id.* ¶133(h); Compl.Ex.8, NYSCEF 10.)

- November 15: Bartiromo posted video of *Sunday Morning Futures with Maria Bartiromo* using Twitter with caption: "Why doesn't Biden camp want to know truth about voting irregularities?" (*Id.* ¶133(i); Compl.Ex.9, NYSCEF 11.)

- November 15: Bartiromo posted video of *Sunday Morning Futures with Maria Bartiromo* using Twitter with caption: "Attorney Powell on election legal challenges that remain active in several states." (*Id.* ¶133(j); Compl.Ex.10, NYSCEF 12.)

- November 16: Bartiromo posted video of *Sunday Morning Futures with Maria Bartiromo* using Twitter with caption: "Attorney for President Trump explains strategy for election lawsuits." (*Id.* ¶133(m); Compl.Ex.13, NYSCEF 15.)

- November 16: Dobbs posted video of *Lou Dobbs Tonight* using Twitter with caption: "Electoral Fraud: @SidneyPowell1 says she has firsthand evidence that Smartmatic voting software was designed in a way to change the vote of a voter without being detected." (*Id.* ¶133(r); Compl.Ex.18, NYSCEF 20.)

- November 18: Dobbs posted video of *Lou Dobbs Tonight* using Twitter with caption: "Foreign Election Involvement: @RudyGiuliani says votes in 28 states were sent to Germany and Spain to be counted by Smartmatic." (*Id.* ¶133(x); Compl.Ex.24, NYSCEF 26.)

- November 19: Dobbs posted video of *Lou Dobbs Tonight* using Twitter with caption: "Inextricably Intertwined: @SidneyPowell1 has no doubt that Dominion Voting machines run Smartmatic software which allows them to manipulate the votes" #MAGA #AmericaFirst #Dobbs (*Id.* ¶133(aa); Compl.Ex.27, NYSCEF 29.)

- November 22: Pirro posted video of *Justice with Judge Jeanine* using Twitter with caption: "PART ONE: For four years we listen to unsupported allegations of a conspiracy by a foreign government to interfere with our presidential election #OpeningStatement" (*Id.* ¶133(ee); Compl.Ex.31, NYSCEF 33.)

- November 24: Pirro posted video of *Justice with Judge Jeanine* discussing corruption in "Democrat strongholds" during election using Facebook. (*Id.* ¶133(ii); Compl.Ex.35, NYSCEF 37.)

- December 10: Dobbs posted video of *Lou Dobbs Tonight* using Twitter with caption: "Cyber Pearl Harbor: @SidneyPowell1 reveals groundbreaking new evidence indicating our Presidential election came under massive cyber-attack orchestrated with the help of Dominion, Smartmatic and foreign adversaries." #MAGA #AmericaFirst #Dobbs (*Id.* ¶133(nn); Compl.Ex.41, NYSCEF 43.)

- December 10: Dobbs posted video of *Lou Dobbs Tonight* using Twitter with caption: "Evidence of Fraud: @SidneyPowell1 says the FBI and law enforcement aren't interested in electoral fraud witnesses and offers to make public evidence of a cyber-attack on the US election system." #MAGA #AmericaFirst #Dobbs (*Id.* ¶133(oo); Compl.Ex.42, NYSCEF 44.)

- December 10: Dobbs posted video of *Lou Dobbs Tonight* using Facebook with caption: "Cyber Pearl Harbor: Sidney Powell reveals groundbreaking new evidence indicating our Presidential election came under massive cyber-attack orchestrated with the help of Dominion, Smartmatic, and foreign adversaries." #MAGA #AmericaFirst #Dobbs (*Id.* ¶133(pp); Compl.Ex.43, NYSCEF 45.)

- December 10: Dobbs posted video of *Lou Dobbs Tonight* using Facebook with caption: "Evidence of Fraud: Sidney Powell says the FBI and law enforcement aren't interested in electoral fraud witnesses and offers to make public evidence of a cyber-attack on the US election system." #MAGA #AmericaFirst #Dobbs (*Id.* ¶133(qq); Compl.Ex.44, NYSCEF 46.)

The Fox anchors may feign ignorance regarding what Giuliani and Powell were going to say about Smartmatic during their interviews with them. Discovery will uncover the truth. But the Fox anchors certainly knew what they said about Smartmatic when they posted their programs to their social media audience. They made a conscious decision to republish and add their own take on them. This republication is yet another reason to hold them liable for the defamatory statements made during their programs.

C. The Fox anchors made their own defamatory statements and implications about Smartmatic that were not pure opinion.

The Fox anchors recast themselves as passive questioners of Giuliani and Powell during their news programs. But the videos of their programs, as well as their social media postings, show

their true colors. The Fox anchors were not simply interviewers that provided "pure opinions" about Smartmatic. Each of them stated or implied facts. Each of the Fox anchors thus made their own actionable, defamatory statements about Smartmatic and contributed to the defamatory implications conveyed by their programs.

1. The Fox anchors are responsible for the actionable, defamatory statements Giuliani and Powell made on their programs.

The Fox anchors focus only on some of their own statements and re-characterize them as pure opinion. They never argue that Giuliani and Powell offered only nonactionable, pure opinions. Instead, the Fox anchors disclaim responsibility for Giuliani's and Powell's statements. (Bartiromo Mem. at 12, n.9; Dobbs Mem. at 9, n.6; Pirro Mem. at 9, n.8.) Regardless of whether the Fox anchors themselves made defamatory statements, their failure to rebut the defamatory nature of Giuliani's and Powell's statements forecloses their attempt to avoid responsibility. As explained above, the Fox anchors are responsible for the defamatory falsehoods conveyed during their programs and that they republished on their social media accounts–including the defamatory statements made by Giuliani and Powell. The Fox anchors are proper defendants for this reason alone.

2. The Fox anchors are responsible for the defamatory implications of their programs and for their own defamatory statements (neither of which were pure opinion).

New York law distinguishes between defamatory statements of fact and "pure opinion." A pure opinion may take one of two forms: (i) a "statement of opinion which is accompanied by a recitation of the facts upon which it is based," or (ii) "an opinion not accompanied by such a factual recitation ***so long as it does not imply that it is based upon undisclosed facts***." *Davis*, 24 N.Y.3d at 268 (emphasis added). "[A]n opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it . . . is a 'mixed opinion' and is actionable."

Id. at 269. This requirement that the underlying facts are disclosed ensures the viewer or reader can assess the basis upon which the "pure opinion" was based to draw their own conclusions about validity. *Id.* An analysis of fact versus pure opinion looks at "what the average person hearing or reading the communication would take it to mean." *Id.*

The Court conducts a two-part test to determine whether defamatory statements are actionable (because they convey facts or mixed opinions) or nonactionable (because they are pure opinions). First, the Court must determine whether a "reasonable" watcher or reader "could have concluded that the [publications] were conveying facts about the plaintiff." *Gross v. New York Times*, 82 N.Y.2d 146, 152 (1993). The Court considers three factors:

> (1) Whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.

Davis, 24 N.Y.3d at 270. "The third factor lends both depth and difficulty to the analysis . . . and requires that the court consider the content of the communication as a whole, its tone and apparent purpose." *Id.*

Second, if publications were conveying opinions, then the Court must determine whether the defamatory statements constitute nonactionable "pure opinions" or actionable "mixed opinions." New York "continue[s] to recognize and utilize the important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener . . . and a statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts." *Gross*, 82 N.Y. 2d at 153. "The former are actionable not because they convey 'false opinions' but rather because a reasonable listener or reader would infer that 'the speaker [or writer] knows certain facts,

unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed].'" *Id.* at 153-54. Finally, any opinions that are based on facts that are alleged to be false are actionable because "the validity of the opinions expressed [in the publication] . . . could be affected by whether the disclosed facts as stated by the defendants or those now alleged by the plaintiff were before the reader." *Silsdorf v. Levine*, 59 N.Y.2d 8, 15 (1983) (reinstating defamation claim based on a letter accusing the former mayor of corruption because the facts stated in the letter to demonstrate corruption were false).

a. The Fox anchors are liable for the actionable, defamatory implications of their programs.

One must not lose the forest for the trees. The overall message conveyed by the publications at issue was that Smartmatic participated in a criminal conspiracy to steal the 2020 election for Joe Biden and Kamala Harris. (Compl. ¶¶521-535.) The news programs hosted by the Fox anchors conveyed that message by stating that Smartmatic's technology and software: (1) were widely used during the 2020 election, (2) were used by Dominion in the contested states, (3) were used to fix, rig, and steal votes in favor of Joe Biden and Kamala Harris, (4) sent votes overseas for manipulation and tabulation, (5) were hacked during the election, (6) had previously been banned from the United States, (7) were developed with money from corrupt dictators, and (8) were intentionally designed to fix, rig, and steal elections. (*Id.* ¶¶148-357; Appendices 1-9.) Such statements are undoubtedly actionable.

First, the statements and implications made about Smartmatic have clear and readily understood meanings, which makes them. *See, e.g., Martin*, 121 A.D.3d at 100 (finding statements on the "Opinion" page were defamatory, not "protected opinion," because they "explicit[ly]" and "implicitly assert[ed]" that the plaintiff-judge was "corrupt" and "part of [a] case-rigging"); *Davis*, 24 N.Y.3d at 272 (defendant's statements that plaintiffs "lied and did so for monetary gain" and

"had done so in the past" were "reasonably susceptible of a defamatory connotation" because they were "specific, easily understood," "clear statements of the plaintiffs' actions and the driving force for their allegations"); *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 381-82 (1977) (assertions "that plaintiff is 'probably corrupt'" and engaged in "suspicious[]" activity, "with their strong undertones of conspiracy and illegality," conveyed "that plaintiff had committed illegal and unethical actions"); *Zervos v. Trump*, 74 N.Y.S.3d 442, 448-49 (Sup. Ct. N.Y. Cty. 2018) (defendant's use of "specific, easily understood language to communicate that plaintiff lied to further her interests" was actionable and could not "be characterized simply as opinion"), *aff'd*, 171 A.D.3d 110 (1st Dep't 2019); *Giffuni v. Feingold*, 299 A.D.2d 265, 266 (1st Dep't 2002) ("the complained-of assertions [were] not loose, figurative or hyperbolic statements," and were "not shielded by the opinion privilege because . . . they alleged criminal conduct").

Second, the statements and implications are demonstrably false. Smartmatic's technology and software: (1) were ***not*** widely used during the 2020 election, (2) were ***not*** used by Dominion in the contested states, (3) were ***not*** used to fix, rig, and steal votes in favor of Joe Biden and Kamala Harris, (4) did ***not*** send votes overseas for manipulation and tabulation, (5) were ***not*** hacked during the election, (6) had ***not*** previously been banned from the United States, (7) were ***not*** developed with money from corrupt dictators, and (8) were ***not*** intentionally designed to fix, rig, and steal elections. (*Id.* ¶¶148-357; Appendices 13-14.) Accordingly, they are actionable. *See Gross*, 82 N.Y.2d at 154 (reversing dismissal because the publications the complaint "cited contain[ed] many assertions of objective fact that, if proven false, could form the predicate for a maintainable libel action"); *Zervos v. Trump*, 171 A.D.3d 110, 128 (1st Dep't 2019) ("defendant's denial of plaintiff's allegations of sexual misconduct is susceptible of being proven true or false, since he either did or did not engage in the alleged behavior"); *Coliniatis v. Dimas*, 848 F. Supp.

462, 468-69 (S.D.N.Y. 1994) (statement charging a person "with criminal behavior in precise language" was "both readily understandable and verifiable"); *O'Neil*, 120 A.D.2d at 46 ("if the facts set forth in support of the opinions" of "reprehensible racial slur" and of "bigotry" are false, the statements are actionable); *Twelve Inches Around Corp. v. Cisco Sys.*, 2009 WL 928077, at *4 (S.D.N.Y. Mar. 12, 2009) (fraud accusation "carrie[d] a readily understood meaning that [was] capable of being proven true or false").

Third, the content, implications, and context of the Fox anchors' programs signaled to viewers they were hearing facts about the 2020 election and Smartmatic's role. None of the Fox anchors presented their programs as political theater untethered to reality. Fox News promotes itself as a news network. (Compl. ¶140.) Consistent with "news" programming, the programs containing the defamatory statements are replete with references to "evidence" supporting the statements based on the ongoing "investigation." (*Id.* ¶142; Appendix 15.) And the Fox anchors stated and implied that government agencies were not acting on information to which they had access. (*Id.* ¶144.) The Fox anchors stated and implied that they, too, had access to information to which the viewers were not privy (the Fox anchors' sources), which was how the Fox anchors knew the government was shirking its investigatory duties. (*Id.*) The Fox anchors depicted their programs as the place to go for facts about the legitimacy of the 2020 election. The content of each publication, as a whole, and its tone and apparent purpose demonstrate that facts were being conveyed about Smartmatic.

Fourth, the Fox anchors presented themselves and their guests (Giuliani and Powell) as authorities that could be trusted to provide facts about Smartmatic and its role in the 2020 election. The Fox anchors brand themselves as being providers of fact, not spin. (*Id.* ¶¶21-23.) Their shows– *Lou Dobbs Tonight, Sunday Morning Futures*, *Mornings with Maria*, and *Justice with Judge*

Jeanine–are presented as being fact-based coverage of current events, not opinion programs. (*Id.* ¶141.) The perception that the Fox anchors have created about themselves and their programs makes their defamatory statements and implications actionable. *See, e.g., Davis*, 24 N.Y.3d at 273 (finding that "[t]he context further suggest[ed] to the reader that [the speaker] spoke with authority, and that his statements were based on facts," as he appeared to have access to "confidential details" and "factual details unavailable to the public" that "supported his assertions"); *Restis*, 53 F. Supp. 3d at 720-22 (statements that "communications professionals" and "former" governmental officials crafted, as part of "a sophisticated and coordinated" multi-media "campaign," were defamatory considering "the overall context in which the assertions were made"); *Coliniatis*, 848 F. Supp. at 468-69 (accusation that plaintiff "was involved in an illegal kickback scheme" was actionable because its "verbal context" and "broader social context" suggested "that the statements were intended to be understood as assertions of fact").

Fifth, Smartmatic's action does not arise from a one-time, spontaneous piece. Each of the Fox anchors made and participated in making defamatory accusations against Smartmatic multiple times on multiple platforms. The repetition of the defamatory statements, coordination necessary to produce the programming, and deliberateness of their story villainizing Smartmatic makes the false statements and implications arising from the broadcasts actionable. *See Restis*, 53 F. Supp. 3d at 721 (defendants' repeated accusations, "grounded in assertions of fact about Plaintiffs' business activities," showed "Defendants presumably meant what they said and intended their words to be understood in accordance with their plain meaning"); *Zervos*, 171 A.D.3d at 119-20 ("defendant's repeated statements" through different "means of communication" could not "be characterized simply as opinion, heated rhetoric or hyperbole"); *see also Gross*, 82 N.Y.2d at 156 ("In closing . . . the reputation of a public official with significant professional credentials was

allegedly impaired by a *series* of *widely read* newspaper articles that portrayed him a unethical and corrupt. Under the circumstances of his case, we conclude that this individual should be permitted go forward in an effort to establish a right to libel recovery.") (emphasis added).

These facts, as well as the facts discussed below, distinguish this case from *Brian v. Richardson*, cited by Pirro. 87 N.Y.2d 46 (1995). In *Brian*, the court found that an op-ed article accusing the plaintiff of being "part of a scheme to steal [] software" was nonactionable opinion. *Id.* at 54. The court reached that conclusion because the "common expectation is the columns and articles published [in a] Op-Ed section[] will represent the viewpoints of their authors and, as such contain considerable hyperbole, speculation, diversified forms of expression and opinions" and the article at issue "was rife with rumor, speculation and seemingly tenuous inferences." *Id.* at 53. Here, the Fox anchors presented the accusations being made against Smartmatic as something to be taken seriously and was supported by facts and an investigation. Smartmatic's participation in a scheme to steal the election was not speculation according to the Fox anchors. It was a fact.

b. Dobbs made actionable, defamatory statements about Smartmatic.[15]

Dobbs tries to recast himself as a talking head who only spouts political rhetoric. (Dobbs Mem. at 11.) But outside of litigation, Dobbs holds himself out as an "award-winning journalist." (Compl. ¶21.) *Lou Dobbs Tonight* was the "#1 news program on business television." (*Id.*) "Dobbs presents himself to readers and viewers as a provider of factual information–not opinion, rhetoric, or spin." (*Id.*) Dobbs was not promoted as an "opinion mouthpiece" and his show was not presented

[15] In his motion, Dobbs did not address each of the defamatory statements attributed to him in the Complaint. In this opposition, Smartmatic addresses several examples of Dobbs' defamatory statements. Appendix 10 lists all his defamatory statements.

as a "pure opinion program." (*Id.* ¶141(d).) He presented his coverage of the 2020 election as reporting facts that people needed to know.

November 12. On November 12, Dobbs hosted Giuliani on his program. (Compl. ¶133(a); SMT.Ex.1A-C.) During the program, Giuliani stated that Smartmatic owns Dominion, Dominion uses Smartmatic software, Smartmatic was formed to fix elections, Smartmatic's owners are close to Venezuelan dictators, and Smartmatic's software sends votes to Barcelona. In that context, Dobbs stated:

> And now ***we have to find out*** whether they did. And ***with those servers whether they're in Canada, whether they're in Barcelona or Spain, or Germany***. We know a number of companies. All of them are private. Five of them, five of the top voting companies in this country-at least-if they're not in this country, they're processing our votes in this country. They comprise 90% of all of the election voting market in this country. It's stunning and they're private firms and very little is known about their ownership. Beyond what you're saying about Dominion, it's very difficult to get a handle on just who owns what and how they're being operated. And by the way, the states, as you well know now, ***they have no ability to audit meaningfully the votes that are cast because the servers are somewhere else*** and are considered proprietary and they won't touch them. It won't permit them being touched. So it's really, so how do you proceed now?

(SMT.Ex.1B at 3:21-4:15.) Dobbs' statements make clear factual assertions—Smartmatic's servers are in foreign countries and cannot be audited. Both of those assertions are demonstrably false. (Compl. ¶¶181, 189.)

Dobbs also endorsed Giuliani's statements, implying that Smartmatic was involved in wrongdoing in connection with the election. After Giuliani made the statements noted above about Smartmatic, Dobbs stated:

> And Rudy we're glad you're on the case and ***pursuing what is the truth*** and straightening out what is a very complicate[d] and difficult story. And by the way, it's not only a difficult, it has the feeling of a cover up in certain places, you know, putting the servers in foreign countries, private companies, we don't have transparency with these servers. This is, this is an election nightmare, as well as a battle.

(SMT.Ex.1B at 8:2-10.) Dobbs' statements not only validated what Giuliani said about Smartmatic, but also implied that Smartmatic participated in a "cover up." The ordinary meaning of "cover up" is "an attempt to prevent people from discovering the truth about a serious mistake or crime." *Cover-up*, https://www.lexico.com/en/definition/cover-up (last visited April 11, 2021). This is demonstrably false. (Compl. ¶¶259-357.)

November 14. On November 14, Dobbs made sure Smartmatic was implicated in a fraud over the election. Dobbs posted on Twitter: "Read all about Dominion and Smartmatic voting companies and you'll soon understand how pervasive this Democrat electoral fraud is, and why there is no way in the world the 2020 Presidential election was either free or fair." (Compl.Ex.¶133(b); Compl.Ex.2, NYSCEF 4.) Dobbs' statement implied that Smartmatic was part of the "electoral fraud." The ordinary meaning of "fraud" is "wrongful or criminal deception intended to result in financial or personal gain." *Fraud*, https://www.lexico.com/en/definition/fraud (last visited April 11, 2021). This is demonstrably false. (Compl. ¶¶259-357.)

November 16 (Part 1). On November 16, Dobbs hosted Ronna McDaniel on his show. (Compl. ¶133(n); SMT.Ex.14A-C.) Dobbs began the show by discussing findings by President Trump's legal team and then added facts to validate them:

> President Trump's legal team says potentially rig[ged] voting machines demand a national security investigation. They are pointing to Dominion Voting Systems' widely used ballot scanning machines whose software is suspected of inflating vote totals for Joe Biden. Dominion's systems used in more than two dozen states.
>
> ***
>
> Dominion has connections to UK based Smartmatic, a voting technology company established in 2000 that had ties to Venezuela's Hugo Chavez.
>
> ***

> Your reaction to what the Trump legal team and others are discovering about Dominion, Smartmatic and many of the other voting companies, which almost seems like a, at least a very, very much in election terms, probable cause for a complete and thorough investigation.

(SMT.Ex.14B at 2:1-7, 2:17-20, 4:6-11.) Dobbs' statements are defamatory in three respects: (1) he stated that Smartmatic has ties to Hugo Chávez, (2) he stated that Smartmatic has connections with Dominion, and (3) he implied that Smartmatic (through its Dominion connection) is "suspected of inflating votes for Joe Biden." Each of those assertions is demonstrably false. (Compl. ¶¶259-357.) As discussed below, *infra* at Arg.II.C.3, it does Dobbs no good that he couched some of his statements in terms of what President Trump's legal team "says" and "are discovering" because he is responsible for repetition. (*See, e.g.*, SMT.Ex.14B at 2:1.)

November 16 (Part 2). Later in the same show, Dobbs hosted Powell. (Compl. ¶133(o); SMT.Ex.15A-C.) During this segment, Powell read from an "affidavit" by an undisclosed "whistleblower." Powell stated that, according to the undisclosed whistleblower, Smartmatic's election technology and software were designed in a way to change votes, Smartmatic designed its technology and software that way to help Hugo Chávez win elections, and Smartmatic had been stealing elections all over the world. (*See, e.g.*, SMT.Ex.15B at 2:9-14, 2:16-23, 5:16-21.) Powell never disclosed the identity of the "whistleblower" and the affidavit had not been filed in any judicial proceeding at the time of this publication. (Compl. ¶¶377, 380.)[16]

Nonetheless, even though Powell did not disclose her so-called whistleblower, Dobbs' responded with an endorsement and new facts:

> Well I share your–your fury and frustration, but I do have some news to break here at this moment. I have now received ***word from a highly reliable source***

[16] The "affidavit" that Powell claimed to be reading from during the November 16 broadcast had not been filed with any court at the time of the publication. (Compl. ¶¶377, 380.) Accordingly, even if it was not a sham affidavit, which it was (Compl. ¶¶401-421), the fair reporting privilege does not apply. The fair reporting privilege only applies to statements made *after* the document has been made part of a judicial proceeding. *Supra* at Arg.I.C.2.

> ***that the FBI does have an investigative team that is now looking into this election***. Now what that means beyond that, but at least it's confirmation that they are investigating and we'll see what moves because there had been no indication that indeed publicly that they were involved; ***they are now***.
>
> ***
>
> Yeah, Sid it is–it is ***more than just willful blindness***. This is people trying to blind us to what is going on. We don't even know who the hell really owns these companies, at least most of them. That's got to change and we've got to find out exactly what's going on.

(SMT.Ex.15B at 6:6-14, 8:4-9.) Dobbs' statements implied that Smartmatic had, in fact, been involved in stealing elections and was now under investigation by the FBI. Dobbs' comment about an FBI investigation—from another undisclosed source—follows Powell's statements about Smartmatic rigging elections around the world. His comment about "willful blindness" is logically connected to people not paying attention to Smartmatic's role in stealing elections. The implications stemming from Dobbs' own statements are demonstrably false. (Compl. ¶¶259-357.)

November 16 (Part 3). Later on November 16, Dobbs guaranteed that people would understand Smartmatic had interfered with the election based on his interview with Powell. He posted it to Twitter and added the caption: "Electoral Fraud: @SidneyPowell1 says she has firsthand evidence that Smartmatic voting software was designed in a way to change the votes of a voter without being detected." (Compl. ¶133(p); Compl.Ex.18, NYSCEF 20.) Dobbs' post is precise. He makes a factual assertion, which is demonstrably false. (Compl. ¶¶352-57.). Again, it does Dobbs no good that he attributed his statement to Powell. Defamation law draws no distinction between saying "Smartmatic engaged in electoral fraud" and "Sidney Powell says Smartmatic engaged in electoral fraud." *Infra* at Arg.II.C.3.

November 18 (Part 1). On November 18, Dobbs had Giuliani on his show. (Compl. ¶133(w); SMT.Ex.23A-C.) Dobbs displayed and read part of an undisclosed whistleblower affidavit:

> I want to share with the audience ***one of the affidavits that has been given to us by an unidentified whistleblower***. And it pertains to Dominion. A whistleblower who also [] saw what happened in Venezuela. And the very similar events that took place in the United States on November 3rd. If we could put this up please to share with the audience because it is indeed alarming . . . "I am alarmed because of what is occurring in plain sight during this 2020 election for President of the United States. The circumstances and events are eerily reminiscent of what happened with Smartmatic software– electronically changing votes in the 2013 presidential election in Venezuela. What happened in the United States was that the vote counting was abruptly stopped in five states using Dominion software. At the time the vote counting was stopped, Donald Trump was significantly ahead in the votes. Then during the wee hours of the morning, when there was no voting occurring and the vote count reporting was off-line, something significantly changed. When the vote reporting resumed the very next morning, there was a very pronounced change in voting in favor of the opposing candidate, Joe Biden." That whistleblower was present, both in Venezuela in 2013 and in this country as we were counting votes overnight on November 3rd, your thoughts?

(SMT.Ex.23B at 12:12-13:16.) Again, this affidavit had not been filed in any judicial proceedings at the time of the broadcast. *Supra* at Arg.I.C.2. Dobbs was reading from something that was not part of any judicial proceeding. What he read from the affidavit clearly conveyed that Smartmatic rigged an election in Venezuela and did it again in the United States. Both assertions are demonstrably false. (Compl. ¶¶169, 211.)

Later during the program, Dobbs asserted: "It's outrageous, and it's all the more outrageous because Dominion and Smartmatic were denied use in the State of Texas, which called them out for what they are. They have a clear record." (SMT.Ex.23B at 14:21-24.) He did not attribute this statement to anyone. It was presented as a fact he learned from his own investigation. His statement is readily understandable. It is also demonstrably false. Smartmatic was never denied use in Texas. (Compl. ¶195.)

November 18 (Part 2). During the November 18 broadcast, Giuliani stated that Smartmatic sent votes from 27 or 28 states out of the country for counting, Smartmatic was founded to fix elections, and "they did all their old tricks" in the 2020 election. (SMT.Ex.23B at

13:19-21; 14:9.) That evening, Dobbs posted his interview with Giuliani to Twitter: "Foreign Election Involvement: @RudyGiuliani says votes in 28 states were sent to Germany and Spain to be counted by Smartmatic." (Compl.Ex.24, NYSCEF 26.) Dobbs' statement is clear. It is also demonstrably false. Smartmatic did not count votes in Germany or Spain. (Compl. ¶178.) Dobbs' attribution of the statement to Giuliani does not prevent him from being responsible for the statement. *Infra* at Arg.II.C.3.

November 19. On November 19, Dobbs hosted Powell. (Compl. ¶133(y); SMT.Ex.25A-C.). Before she came on, Dobbs referenced a press conference that she and Giuliani attended earlier in the day. He said, in part:

> We'll have much more on today's ***powerful news conference*** and the ***powerful charges*** put forward by the President's legal team, one of the team member, Sidney Powell, among our guests here tonight. ***She will be providing more details on how Dominion vote machines and Smartmatic software were used to help Joe Biden***.

(SMT.Ex.25B at 5:7-13.) Dobbs began by focusing attention on whether Smartmatic and Dominion were linked. He told the audience that "it is all but impossible to find any record of either proving or disproving a relationship because the two firms are privately owned, it becomes a thorny matter." (*Id.* at 9:13-16.) He then asked Powell whether they are linked. (*Id.* at 10:23-24.) She responded: "Oh, they're definitely linked." (*Id.* at 11:1.)

Later on November 19, Dobbs repeated that conclusion on Twitter. He posted a video of his interview with Powell with the caption: "Inextricably Intertwined: @SidneyPowell1 has no doubt that Dominion Voting machines run Smartmatic software which allows them to manipulate the votes." (Compl.Ex.27, NYSCEF 29.) Dobbs' two assertions are clear: (1) Dominion uses Smartmatic's software–they are linked–and (2) Smartmatic software is used to manipulate votes. Both statements are demonstrably false. (Compl. ¶¶160, 186.) Once again, Dobbs cannot hide behind his attribution to Powell. *Infra* at Arg.II.C.3.

December 10 (Part 1). On December 10, Dobbs hosted Powell. (Compl. ¶133(ll); SMT.Ex.38A-C.) Dobbs started his show by displaying this image as he said: "You say these four individuals led the effort to rig this election. How did they do it?"

The final name: "Antonio Mugica–Smartmatic CEO." By displaying Mugica's name, Dobbs was clearly, unambiguously saying that he and Smartmatic "led the effort to rig this election." Dobbs cannot hide behind any attribution to Powell. *Infra* at Arg.II.C.3. This serious accusation is clear and demonstrably false. (Compl. ¶169.)

December 10 (Part 2). After a commercial break, Dobbs returned with Powell. (Compl. ¶133(ll); SMT.Ex.39A-C.) Dobbs stated:

> We're back with attorney Sidney Powell. She was describing ***a cyber Pearl Harbor*** and the 2020 election, focusing on four names. I would also like to put up this element from your investigation if we could have that full screen up so that we could all go through that with the audience. Because it's important as ***we look at these four names, we're talking about very large, a very foreign intrusion and interference in the, in the election of 2020***.
>
> ***
>
> We will gladly put forward your evidence that supports your claim that this was cyber Pearl Harbor. ***We have tremendous evidence already of fraud in this election***. But I will be glad to put forward on this broadcast whatever evidence you have, and we'll be glad to do it immediately.

(SMT.Ex.39B at 2:10; 4:5-10.) The phrase "cyber Pearl Harbor" referred to Smartmatic and Dominion using an algorithm to switch votes from President Trump to now-President Biden in multiple states. Dobbs made clear that (1) Smartmatic was part of the "foreign intrusion" that switched votes during the election and (2) there was "tremendous evidence" of the fraud perpetrated by Smartmatic and Dominion. This evidence was not put forward or disclosed, although Dobbs suggests he has access to factual details unavailable to the public. These are straight-forward claims and demonstrably false. (Compl. ¶¶169, 178, 186.)

December 10 (Part 3). Later on December 10, Dobbs posted his interview with Powell on Twitter and Facebook. Each time, Dobbs made additional defamatory statements about Smartmatic.

- "Cyber Pearl Harbor: @SidneyPowell1 reveals groundbreaking new evidence indicating our Presidential election came under massive cyber-attacked orchestrated with the help of Dominion, Smartmatic, and foreign adversaries." (Compl. ¶133(n); Compl.Ex.41, NYSCEF 43.)

- "Evidence of Fraud: @SidneyPowell1 says the FBI and law enforcement aren't interested in electoral fraud witnesses and offers to make public evidence of a cyber-attack on the US election system." (Compl. ¶133(oo); Compl.Ex.42, NYSCEF 44.)

- "Cyber Pearl Harbor: Sidney Powell reveals groundbreaking new evidence indicating our Presidential election came under massive cyber-attack orchestrated with the help of Dominion, Smartmatic, and foreign adversaries." (Compl. ¶133(pp); Compl.Ex.43, NYSCEF 45.)

- "Evidence of Fraud: Sidney Powell says the FBI and law enforcement aren't interested in electoral fraud witnesses and offers to make public evidence of a cyber-attack on the US election system." (Compl. ¶133(qq); Compl.Ex.44, NYSCEF 46.)

Powell never revealed any evidence of a cyber-attack on the 2020 election. (Compl. ¶¶186-189.) Leaving that aside, Dobbs' statements were unequivocal: Smartmatic orchestrated a cyber-attack on the election and participated in the "fraud" that stole the election. This is demonstrably false. (Compl. ¶¶186, 169.)

c. Bartiromo made actionable, defamatory statements about Smartmatic.[17]

To her credit, Bartiromo does not pretend she engages in political theater. (Bartiromo Mem. at 3.) She is a journalist who "presents herself to readers and viewers as a provider of factual information–not opinion, rhetoric, or spin." (Compl. ¶22.) Her programs–*Sunday Morning Futures* and *Mornings with Maria*–are news programs. (*Id.*) They are not "pure opinion programs." (*Id.* ¶141(d).) She presented her coverage of challenges to the 2020 election as based on facts, not speculation.

November 15 (Introduction). On November 15, Bartiromo hosted Giuliani and Powell. (Compl. ¶133(e); SMT.Ex.5A-C.) Bartiromo previewed the interview topics:

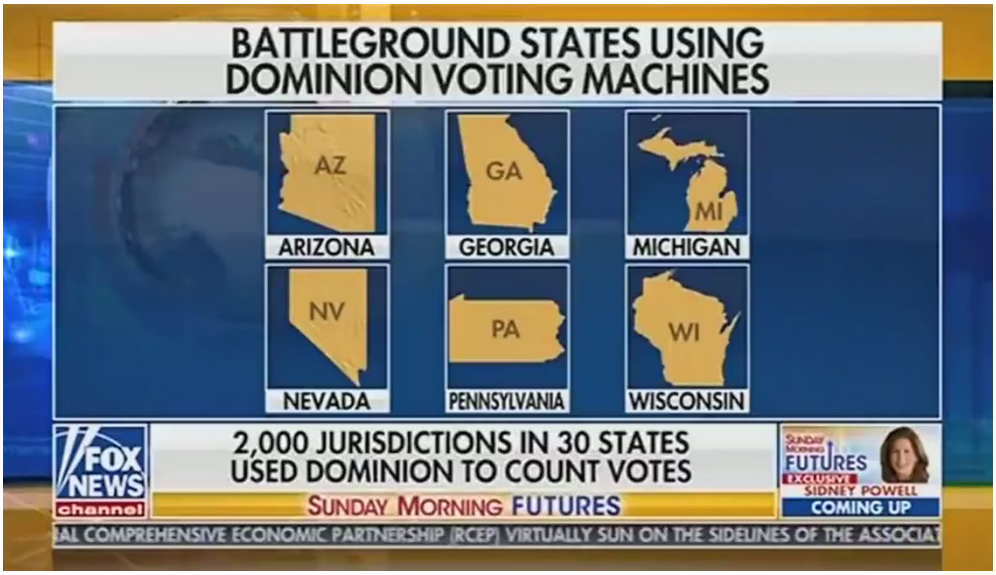
> Breaking news this morning on the software that President Trump says was weaponized against him.
>
> ***
>
> Coming up: President Trump's legal team with new evidence this morning of backdoors on voting machines, ballot tampering and election interference. Rudy Giuliani with new affidavits and lawsuits charging fraud. Why the swing states delayed or stopped counting ballots on election night. Plus, Sidney Powell on the Venezuela connection and whether kickbacks were involved for those taking on Dominion voting machines as a hand recount of nearly 5 million ballots is underway in Georgia.

(SMT.Ex.5B at 2:6-17.) This teaser shows that Smartmatic would be a target in her program as part of a presentation of evidence on election fraud. Her program would then identify the software weaponized against President Trump to be Smartmatic's software. The "backdoor on voting machines" was identified as Smartmatic's software. And the "Venezuela connection" involved

[17] In her motion, Bartiromo did not address each of the defamatory statements attributed to her in the Complaint. In this opposition, Smartmatic addresses several examples of Bartiromo's defamatory statements. Appendix 11 lists all her defamatory statements.

with kickbacks was identified on her program to be Smartmatic. All those factual assertions are demonstrably false. (Compl. ¶¶186, 202.)

November 15 (Giuliani Interview). Bartiromo began with Giuliani. He stated that a "very dangerous foreign company" handled the voting in 27 states, the company has close ties to Venezuela and China, the company was founded by Hugo Chávez, and the company's software has been used to steal elections. (SMT.Ex.5B at 5:3-19.) He identified Smartmatic as the company and explained that Dominion "sends everything to Smartmatic." (*Id.* at 5:22-23.) In response, Bartiromo put up this graphic:



Bartiromo stated: "I want to show this graphic of swing states [] that were using Dominion and this, this software, this Smartmatic software. I mean, you just said it all. This is Smartmatic, a Delaware entity registered in Boca Raton, Florida, activities in Caracas, Venezuela. The voting machines used, Dominion voting machines were used in Arizona, Georgia, Michigan, Nevada, Pennsylvania and Wisconsin. And I have a graphic showing the states where they stopped counting, which I thought also strange to stop counting in the middle of election night." (*Id.* at 9:14-10:4.) Bartiromo's statements conveyed two clear messages.

First, she conveyed that Smartmatic's software was used in each of the swing states: Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. Her references to "Dominion voting machines" must be read in the context of the broadcast in which she and Giuliani had already told people that Dominion uses Smartmatic's software and sends votes to Smartmatic. Bartiromo's assertion that Smartmatic's software was used in these swing states is demonstrably false. (Compl. ¶¶152-155.)

Second, Bartiromo implied that Smartmatic participated in rigging the 2020 election. The graphic and her statement must be understood in context. Before she put it up, Giuliani stated–in no uncertain terms–that Smartmatic's software has "been used to steal elections," and Smartmatic "has a tried and true method for fixing elections by calling a halt to the voting when you're running too far behind." (SMT.Ex.5B at 5:8-9; 6:4-6.) On the tail of these assertions, Bartiromo told people that Smartmatic was used in the swing states, and that "they stopped counting" in the middle of night in those swing states. Bartiromo implied that Smartmatic was "fixing" the election in those swing states when the voting stopped. That assertion is demonstrably false. (Compl. ¶¶152-153.)

Bartiromo then introduced the idea of a Smartmatic backdoor to change votes:

> One source says that the key point to understand is that Smartmatic system has a backdoor that allows it to be [] or that allows the votes to be mirrored and monitored, allowing an intervening party a real-time understanding of how many votes will be needed to gain an electoral advantage.

(SMT.Ex.5B at 10:4-11.) The context of Bartiromo's statement is again important. She made this statement–without ever identifying her "source"–after Giuliani had stated that Smartmatic's software has been "used to steal elections" and "has tried and true methods for fixing elections." Bartiromo then identified that "tried and true method"—the backdoor. The implication is that Smartmatic's software has a secret way to fix an election. Her statement and implication are demonstrably false. (Compl. ¶211.)

November 15 (Powell Interview). After a commercial break, Bartiromo returned to interview Powell. Bartiromo began the segment by discussing Texas' rejection of "Dominion software":

> Welcome back. According to public records, Dominion voting machines are used in 2,000 jurisdictions in 30 states. According to experts, if one site has a flaw, other sites are likely to as well, which is why ***Texas rejected using Dominion software three times, raising concerns that the system was not safe from fraudulent and unauthorized manipulation***. That is troubling given we already know that at least two software glitches, in Georgia and Michigan, occurred on election night.
>
> ***
>
> We just heard about the ***software made by Smartmatic*** from Rudy.

(SMT.Ex.5B at 15:7-14; 15:19-20.) Bartiromo's statement about "Dominion software" must be read in context. Bartiromo and Giuliani repeatedly stated that Dominion uses Smartmatic's software and that Smartmatic's software has a backdoor. Bartiromo's statement about Dominion software being rejected by Texas due to concerns that "the system was not safe from fraudulent and unauthorized manipulation" would reasonably be understood to be about Smartmatic's software. She was implying that Smartmatic's software (used in the Dominion machines) had been rejected over security concerns in Texas, and that it was part of an election night fraud. That is demonstrably false. Smartmatic's software has never been rejected by Texas. (Compl. ¶¶160, 186, 195.)

Bartiromo then began her interview of Powell. Powell stated that Smartmatic's software was designed to rig elections, she was concerned about "Dominion and its Smartmatic software," and that it was "the software that was the problem." (SMT.Ex.5B at 17:16-18.) Powell then said she "even got evidence of some kickbacks" relating to the officers who "bought the software." (*Id.* at 18:2-4). Bartiromo responded:

> Kickbacks. I want to take a short break and come back on that. And I want to ask you about the kickbacks and who took kickbacks and in which states.
>
> ***
>
> Welcome back. We are back with attorney Sidney Powell who's part of President Trump's legal team. Sidney, before we went on break, we talked about, ***you said that there may have been kickbacks to some people who accepted the Dominion software***. Tell me what you mean.

(*Id.* at 18:5-8, 11-15.) Throughout the entire segment, Bartiromo, Giuliani, and Powell made clear that there was no "Dominion software." It was Smartmatic's software being used by Dominion. Bartiromo's reference to "kickbacks" to people who accepted "Dominion software" could reasonably be understood to mean kickbacks to people who accepted Smartmatic's software. Kickbacks is readily understood to mean "a payment made to someone who has facilitated a transaction or appointment, especially illicitly." *Kickback*, https://www.lexico.com/en/definition/kickback (last visited Apr. 11, 2021). That is demonstrably false. Smartmatic's software was not used outside of Los Angeles County so there were no kickbacks to get it used in the contested states. (Compl. ¶202.)

Next, Bartiromo transitioned to her own investigation into Smartmatic that uncovered security weaknesses with Smartmatic's software:

> Now, I have spoken with a few whistleblowers myself this weekend. And one source who is an IT specialist, told me that he knows the software and specifically advised people in Texas, officials in Texas, not to use it. And yet, he was overruled. He said that there was an unusual patch that was put into the software while it was live, and it's highly unusual to put a patch in there. Is that what you're referring to? Tell me how it's done and how these backdoors work.

(SMT.Ex.5B at 20:18-21:3.) Bartiromo never identified her whistleblowers. Nonetheless, Bartiromo was returning to her assertion that Smartmatic's software has a backdoor, which she originally raised with Giuliani. In this context, Bartiromo's statement would reasonably be understood to mean that Smartmatic's software has an "unusual patch" that switches votes through

a backdoor. Her statement, and this implication, are demonstrably false because there is no unusual patch, no backdoor, and no switching of votes. (Compl. ¶¶186, 211.)

November 15 (Jordan Interview). Bartiromo also interviewed Representative Jim Jordan on November 15. (Compl. ¶133(f); SMT.Ex.6A-C.) Bartiromo stated during this interview:

> Yeah, I mean, you heard what Rudy Giuliani said earlier in the program, he and Sidney Powell are investigating the ***Smartmatic software*** and the Dominion voting machines because they do believe, and they say they have evidence, that ***there were backdoors and the votes were manipulated to turn Trump votes into Biden votes***. Where are we on that, and what do you see in terms of the outcome here of this investigation into voter fraud?

(SMT.Ex.6B at 2:16-24.) Bartiromo's assertion is clear–Smartmatic's software has a backdoor that was used to manipulate votes during the election–and demonstrably false. (Compl. ¶¶186, 211.) It does her no good that she attributed the statements to Giuliani and Powell. *Infra* at Arg.III.C.3.

November 17. On November 17, Bartiromo interviewed Giuliani again. (Compl. ¶133(t); SMT.Ex.20A-C.) During the interview, Bartiromo returned to one of her earlier themes:

> Because when we spoke on Sunday, we talked about the software made by Smartmatic that was changing . . . [Giuliani: Yeah, that's part of it.] votes from Trump to Biden.

(SMT.Ex.20B at 3:24-4:4.) Bartiromo's statement is readily understandable–Smartmatic's software changed votes from President Trump to now-President Biden. Her statement is demonstrably false. (Compl. ¶¶186-87.)

November 22. On November 22, Bartiromo interviewed Alan Dershowitz. (Compl. ¶133(gg); SMT.Ex.33A-C.) She asked Dershowitz about the "charges" being made about the election:

> Let me show you a list of some of the things that the legal team of President Trump is charging and get your thoughts on this. You just mentioned the computer. This is, has to do with Smartmatic election software . . . Also in terms of the computers and the software, Smartmatic election software was developed, Sidney Powell says, in Venezuela, with porous security and built-in functionality allowing the administrators to override security features. We

> haven't seen this, so we don't know, but this is the kind of evidence that they say they have. Your reaction.

(SMT.Ex.33B at 4:21-5:1; 5:7-13.) Bartiromo chose to republish Powell's defamatory statements even though "we haven't seen this" and "we don't know." (*Id.*) In reality, as discussed below, Bartiromo knew Powell's statements were not true. *Infra* at Arg.II.D. But, Bartiromo nonetheless decided to repeat Powell's claims about Smartmatic's software being used for election fraud. Bartiromo is responsible for the words she says even when she is repeating Powell's words. *Infra* at Arg.III.C.3. Her words are clear and demonstrably false. (Compl. ¶169.)

d. Pirro made actionable, defamatory statements about Smartmatic.[18]

Pirro attempts to recast herself into a pure opinion columnist. (Pirro Mem. at 1.) But Pirro publicly describes herself as an authoritative source, a "highly respected District Attorney, author & renowned champion of the underdog." (Compl. ¶23.) Fox News highlights her "notable legal career" spanning "over 30 years." (*Id.*) The title of her program–*Justice with Judge Jeanine*–reminds viewers and readers that she was a judge. It is marketed as "legal insights on the news of the week." (*Id.*) Pirro wraps herself and her show with the credibility and expected honesty of a lawyer and judicial officer. Professionals with an ethical obligation to speak the truth.

Pirro has also cultivated an image and reputation as someone who does not tolerate lies. Her most recent book is titled: DON'T LIE TO ME. (Jeanine Pirro, DON'T LIE TO ME: AND STOP TRYING TO STEAL OUR FREEDOM (Center Street 2020).) On her program, she reminds people that she will not tolerate any lying. For example, on March 20, 2021, Pirro hosted an immigration attorney, David Leopold. At one point, Pirro ended her interview with him: "I'm stopping you

[18] In her motion, Pirro did not address each of the defamatory statements attributed to her in the Complaint. In this opposition, Smartmatic addresses several examples of Pirro's defamatory statements. Appendix 12 lists all her defamatory statements.

right there. I don't tolerate lies on my show." (SMT.Ex.B at 6:23.) Pirro "represents herself as a provider of factual information–not opinion, rhetoric, or spin." (Compl. ¶23.) Her program is not presented as a "pure opinion" program. (*Id.* ¶141(d).) Her cultivated reputation for only allowing the truth on her program magnified the impact of her participation in the disinformation campaign.

November 14. Pirro hosted Powell on November 14. (Compl. ¶133(c); SMT.Ex.3A-C.) Pirro's interview of Powell was crafted to create the clear impression that Smartmatic's software was used to manipulate votes. Pirro began by stating that "several battleground states continue to be under intense focus as allegations of voter fraud are being investigated." (SMT.Ex.3B at 2:2-4.) Powell then discusses the alteration of "millions of votes" by Dominion and Smartmatic software. (*Id.* at 2:15.) Pirro asks Powell about "getting to the bottom of exactly what Dominion is, who started Dominion, how it can be manipulated, if it is manipulated at all, and what evidence do you have to prove this?" (*Id.* at 3:5-8.) Powell responded: "we are collecting evidence through a fire hose[.]" (*Id.* at 3:9-10.) Yet, this evidence was not identified. Pirro then asked: "If you could establish that there is corruption in the use of this Dominion software as you allege and you say you have evidence, how do you put that together . . . and prove that [votes] were flipped?" (*Id.* at 3:15-21.) Powell responded by discussing so-called "statistical evidence," "mathematical evidence" and "forensic evidence" to prove the point. (*Id.* at 3:22-24.)

In this exchange, Pirro never disputed Powell's claims. Pirro did not cut her off. Pirro did not tell her audience that Powell was lying. Instead, Pirro endorsed her claims. At the end of the show, Powell stated that Smartmatic and Dominion are "inextricably intertwined," Smartmatic was "created for the express purpose of being able to alter votes," and Smartmatic's money "comes out of Venezuela and Cuba." (*Id.* at 5:14-16.) Powell said, "it is one huge, huge criminal conspiracy

that should be investigated by military intelligence for its national security implications." (*Id.* at 5:19-20.) Pirro responded: "Yes, and hopefully the Department of Justice." (*Id.* at 5:23-24.)

Pirro's endorsement of Powell's statements implied that Smartmatic had participated in voter fraud. The context here is important. Pirro is a judge who does not tolerate lying on her program and who viewers would assume could evaluate the sufficiency and validity of evidence. Pirro accepted Powell's statements without skepticism, which is apparent from the tone and tenor of the interview. A reasonable viewer would not understand Pirro to accept any lies or false accusations from Powell. That is Pirro's *modus operandi* (she does not tolerate lies). Pirro's agreement that Smartmatic should be investigated by the Department of Justice (as well as military intelligence) was a clear signal that Smartmatic participated in a criminal conspiracy. That is demonstrably false. (Compl. ¶¶259-357.)

November 21. Equally devastating for Smartmatic was Pirro's opening remarks on November 21. (Compl. ¶121; SMT.Ex.28A-C.) Pirro began:

> And now, just over two weeks, the President's lawyers come forward alleging an organized criminal enterprise, a conspiracy by Democrats, especially in cities controlled and corrupted by Democrats. The President's lawyers alleging a company called Dominion, which they say started in Venezuela with Cuban money and with the assistance of Smartmatic software, a backdoor is capable of flipping votes. And the President's lawyers alleging that American votes in a presidential election are actually counted in a foreign country. These are serious allegations, but the media has no interest in any of this, but you and I do, as we should, because 73 million Americans voted for Donald Trump.

(SMT.Ex.28B at 3:2-15.) The accusation against Smartmatic is clear and unequivocal: (1) Smartmatic's software has a backdoor capable of flipping votes, (2) Dominion uses Smartmatic's software, (3) Dominion's machines with Smartmatic's software results in votes being counted in foreign countries. Three factual assertions that are demonstrably false. (Compl. ¶¶160, 178, 211.)

The fact that Pirro couched her statements in terms of what the "President's lawyers [are] alleging" does her no good. *Infra* at Arg.II.C.3.

Pirro then provided an enthusiastic endorsement of the charges against Smartmatic by discussing the credibility of affidavits (and suggesting she had evaluated them):

> They say the risk of our giving false hope should be enough to stop us. Two weeks later, I say, the risk of not looking at what is staring us in the face is too great to not stop us. Now the President's lawyers offered evidence by way of affidavits, which I told you last Saturday as a judge, from a legal perspective, are sworn statements of individuals signed under penalty of perjury. Meaning they know they face the penalty of prosecution and five years if they lie. These sworn statements are factual allegations, are part of virtually every lawsuit.

(SMT.Ex.28B at 3:7-4:4.) At the time of this broadcast, no affidavits had been filed with allegations against Smartmatic or its software. (Compl. ¶¶377, 380.) Powell did not file any of her sham lawsuits until November 25. (Compl. ¶380.) That did not prevent Pirro from validating the charges against Smartmatic based on these "affidavits." These charges were, of course, defamatory and demonstrably false. (Compl ¶¶202, 211.)

Pirro then makes a series of statements about vote changes in several swing states and implies wrongdoing:

> On Thursday, Rudy Giuliani made clear the Democrat cities were targeted by crooked Democrats who stole votes. These were cities where they were comfortable with corruption, where political corruption ran through the blood lines of cities like ***Pittsburgh and Philadelphia and Detroit***. He described ***election night numbers going in favor of Donald Trump, but by the next morning, absurd increase in Biden votes***.
>
> ***
>
> Another declarant who holds dual doctorates in economics and engineering from Stanford states that ***Georgia*** uses Dominion Voting Systems, which has a history of technical glitches, and in Atlanta, these ***software glitches could have affected thousands of absentee mail-in ballots***.
>
> ***

> In ***Wisconsin*** the day after the election, Biden received a dump of 143,000 votes at 3:42 a.m. The upshot in the graph is stunning. It suggests there was a ***pause and then a filling-in the needed votes to win***.
>
> ***
>
> Why was there an overnight ***popping of the vote tabulation*** that cannot be explained for Biden?

(SMT.Ex.28B at 4:15-23; 5:14-18; 7:10-12.) Pennsylvania. Michigan. Georgia. Wisconsin. Four swing states. Pirro had already offered an explanation for the voting changes in these swing states: "Smartmatic software, a backdoor [] capable of flipping votes." (*Id.* at 3:8-9.) The implication from the totality of Pirro's program is that Smartmatic's software was responsible for stealing votes for Biden. That implication is demonstrably false. (Compl. ¶169.)

3. The Fox anchors' arguments to avoid liability are unavailing and ignore the many independent bases for liability Smartmatic has alleged.

The Fox anchors offer several defenses for the defamatory statements made during their programs. All of the defenses are inconsistent with black letter law.

First, the Fox anchors cannot avoid liability by claiming that they were merely repeating what Giuliani and Powell said. "[T]he law affords no protection to those who couch their libel in the form of reports or repetition. . . ." *Cianci*, 639 F.2d at 61. "Every repetition of the defamation is publication in itself, even though the reporter states the source, or resorts to the customary newspaper evasion 'it is alleged.'" *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002). Defamatory statements are actionable even when "couched in the language of hypothesis or conclusion" by the speaker or the repeater. *Gross*, 82 N.Y.2d at 154; *see, e.g., Davis*, 24 N.Y.3d 262 (statements could be defamatory even when prefaced by statements such as "I believe" or "I really don't have any facts"); *Alianza Dominicana, Inc. v. Luna*, 229 A.D.2d 328, 329 (1st Dep't 1996) (motion to dismiss should have been denied because statements were defamatory

"notwithstanding the cautionary language used by [the defendant], such as 'they say' or 'rumor in the streets say'").

Second, the Fox anchors cannot avoid liability by pointing out that they occasionally mentioned Smartmatic's denials. A defendant cannot negate the defamatory meaning of her statements by simply including a denial by the subject of the report. *See, e.g., Elhanafi v. Fox Television Stations, Inc*., 966 N.Y.S.2d 345 (Sup. Ct. Kings Cty. 2012) (finding that the "sequence of cuts in the subject news story could implant in the minds of the average viewer" a defamatory implication despite the network's airing of interviewees who denied that implication); *Dempsey v. Time, Inc*., 252 N.Y.S.2d 186, 189 (Sup. Ct. N.Y. Cty. 1964), *aff'd*, 22 A.D.2d 854 (1st Dep't 1964) (denying motion to dismiss in part because "the suggestion that a libel be excused because a denial made by the subject thereof is also published, is patently absurd"); *Karedes*, 423 F.3d at 117 (reversing motion to dismiss for defendant where "article's defamatory tendency is not wholly offset by the giving of [plaintiff's] side of the story," including plaintiff's denials and explanations); *Tomblin v. WCHS-TV8*, 434 F. App'x 205, 211 (4th Cir. 2011) (reversing summary judgment where news organization implied that plaintiff's worker abused child even though defendant reported that plaintiff denied the allegation).

Third, the Fox anchors cannot avoid liability by claiming that they were just asking questions. The questions asked by the Fox anchors and their silence (what the Fox anchors did not say) materially contributed to the overall defamatory message conveyed by their programs. What a defendant does not say is often as important as what she says when evaluating what is implied by a program. *See Rubel v. Daily News, LP*, 2010 WL 3536793 (Sup. Ct. N.Y. Cty. 2010) (denying motion to dismiss and cross motion for summary judgment when newspaper implied that plaintiff was guilty of wrongdoing and inaccurately reported what a government agency had concluded

upon investigating); *Partridge*, 173 A.D.3d at 94 (examining the context of a defendant's communication "as a whole" to determine whether the defendant "intended or endorsed the defamatory inference"); *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 37-38 (1st Dep't 2014) (defamation by implication includes statements that are substantially true but "affirmatively suggest that the author intended or endorsed that inference").

The Fox anchors' omissions during their interviews with Giuliani and Powell, as well as in their own statements, materially contributed to the defamatory implications created by their programs. The Fox anchors did not correct Giuliani and Powell when they made statements the anchors knew were not correct. The Fox anchors rarely pointed out that the statements made by Giuliani and Powell, were inconsistent with the findings of federal and state officials as well as election specialists. Indeed, when the Fox anchors mentioned that officials disagreed with Giuliani and Powell it was in the context of criticizing those officials and endorsing what Giuliani and Powell said. And, the Fox anchors–only once–pointed out that they had never seen any evidence supporting what Giuliani and Powell said about Smartmatic. These omissions, as well as what the Fox anchors said themselves, contributed to the defamatory messages conveyed by the programs.

***

There is a difference between how the Fox anchors covered Giuliani's and Powell's statements about Smartmatic and how they were covered by other news organizations. The Fox anchors did not contextualize the accusations made by Giuliani and Powell so as to ensure that viewers and readers understood that the accusations were fabricated. They did the opposite. They adopted and repeated what Giuliani and Powell said. They added their own defamatory statements to the mix. Here, the Fox anchors actively contributed to conveying defamatory falsehoods about Smartmatic.

D. Smartmatic has pled sufficient facts showing the Fox Defendants acted with actual malice.[19]

The Fox Defendants argue that Smartmatic failed to allege actual malice. (Fox Mem. at 17-22; Dobbs Mem. at 13-17; Bartiromo Mem. at 17-22; Pirro Mem. at 14-19.) Yet they ignore Smartmatic's allegations. The Complaint includes 248 paragraphs and 102 exhibits on actual malice, alleging the Fox Defendants: (1) had no support for what they published about Smartmatic, (2) knew and had access to information showing their publications about Smartmatic were factually inaccurate, (3) had obvious reasons to doubt the veracity of Giuliani and Powell, (4) violated generally accepted journalism standards when publishing their reports about Smartmatic, and (5) had improper motives for publishing their reports about Smartmatic. (Compl. ¶¶217-465.)

1. The Court should consider the totality of Smartmatic's allegations to evaluate actual malice.

The actual malice standard requires Smartmatic to plead facts showing that the Fox Defendants acted "with knowledge that [their statements and implications] were false or with reckless disregard of whether [they] were false or not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986). Reckless disregard requires pleadings sufficient to show that the Fox Defendants "made the false publication[s] with a high degree of awareness of . . . probable falsity . . . or must have entertained serious doubts as to the truth of [their] publication[s]." *Prozeralik*, 82 N.Y.2d at 474. "The proof of actual malice calls a defendant's state of mind into question" and "does not

[19] Smartmatic does not concede that it must plead or prove that the Fox Defendants acted with actual malice. Smartmatic is not a public figure, and New York's anti-SLAPP statute does not apply to the Fox Defendants' reporting. Smartmatic should only be required to plead and prove "by a preponderance of the evidence [] that the [Fox Defendants] acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, 38 N.Y.2d at 199.

readily lend itself to summary disposition."[20] *Hutchinson*, 443 U.S. at 120 n.9; *Meadows*, 98 A.D.2d at 960; *Davis v. High Soc. Magazine, Inc.*, 90 A.D.2d 374, 384 (2d Dep't 1982).

As part of the actual malice inquiry, a defendant's purposeful avoidance of the truth is treated differently than a failure to investigate. Courts have found that a failure to investigate standing alone, with no additional allegations, is insufficient to establish actual malice. *St. Amant v. Thompson,* 390 U.S. 727, 733 (1968). But "the purposeful avoidance of the truth is in a different category." *Harte-Hanks*, 491 U.S. at 692. The actual malice standard–reckless disregard–can be satisfied by allegations showing that the defendant's failure to investigate "was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of the information published. *Id.* Allegations or evidence "of an intent to avoid the truth" can be sufficient to show an "extreme departure from professional publishing standards" and meet "the more demanding *New York Times* standard." *Id.* at 693 (discussing *Curtis Publishing*, 388 U.S. 130).

Likewise, a defendant's inaction and deliberate decisions not to acquire knowledge of facts that might confirm probable falsity is relevant to the actual malice inquiry. A "defendant in a defamation action . . . cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant*, 390 U.S. at 732.

> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.

[20] The U.S. Supreme Court further explained that this observation was "an acknowledgment of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.'" *Anderson*, 477 U.S. at 256 n.7.

Id. For these reasons, recklessness "may be found where there are obvious reasons [for the defendant] to doubt the veracity of the informant or the accuracy of his reports." *Id.*

Courts recognize that "plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant." *Herbert*, 441 U.S. at 170. That means plaintiffs must often rely on "circumstantial evidence." *Harte-Hanks*, 491 U.S. at 668.

> The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of a rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard for the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration.

Herbert, 441 U.S. at 164 n.12. "Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary" to establish actual malice. *Id.* at 165.

2. The Fox Defendants lacked support for the defamatory falsehoods they published about Smartmatic.

The Complaint groups the defamatory falsehoods published by the Fox Defendants into eight categories:

- Smartmatic's election technology and software were widely used in the 2020 U.S. election, including the six states with close outcomes;
- Dominion used Smartmatic's election technology and software and/or Smartmatic owned Dominion;
- Smartmatic fixed, rigged and stole the 2020 U.S. election for Joe Biden and Kamala Harris;
- Smartmatic sent votes to foreign countries for tabulation and manipulation during the 2020 U.S. election;
- Smartmatic's election technology and software were compromised or hacked during the 2020 U.S. election;

- Smartmatic was previously banned from providing election technology and software in the United States;
- Smartmatic is a Venezuelan company founded and funded by corrupt dictators from socialist and communist countries; and
- Smartmatic's election technology and software were designed to fix, rig, and steal elections.

With two exceptions, each of the Fox Defendants made, published, participated in publishing, or republished one or more defamatory statements in each of these categories. *See* Appendix 1 (collecting statements for which Fox News is liable), Appendix 10 (collecting statements for which Dobbs is liable), Appendix 11 (collecting statements for which Bartiromo is liable), and Appendix 12 (collecting statements for which Pirro is liable).

The Fox Defendants knew they had no support for these statements and implications. (Compl. ¶¶221-230.) Each of the Fox Defendants knew there was no support for stating or implying that Smartmatic's technology and software were widely used during the 2020 election, were used by Dominion during the 2020 election, were used to rig the 2020 election, sent or processed votes in foreign countries during the 2020 election, were previously banned in the United States, or were designed to rig elections. (*Id.*) They also knew there was no support for stating or implying that Smartmatic was a Venezuelan company founded and funded by corrupt dictators. (*Id.*) The Fox Defendants do not dispute this.

Smartmatic's allegation that the Fox Defendants lacked support for these statements and implications is not conclusory or speculative. First, the Fox Defendants did not set forth any direct or indirect proof during their programs. Second, on December 18 (after 41 publications), Fox News aired an interview of Eddie Perez, an election technology specialist, acknowledging the lack of support for the accusations made about Smartmatic. (*Id.* ¶¶231-242.) Third, other anchors on Fox News acknowledged this lack of support. (*Id.* ¶¶243-252.) Fourth, in their motions, none of the

Fox Defendants identify any evidence that they possessed at the time supporting the statements and implications made about Smartmatic.

This lack of support establishes the Fox Defendants' actual malice. *See, e.g., Prozeralik*, 82 N.Y.2d at 475 (finding plaintiff satisfied burden of proving actual malice where defendant's statement that plaintiff was the victim of a crime was based only on defendant's speculation and "without any basis or source whatsoever"); *Crime Victims Ctr., Inc. v. Logue*, 181 A.D.3d 556, 557 (2d Dep't 2020) (denying motion to dismiss where plaintiff alleged that defendant had "no reliable evidence or information supporting" the challenged statements); *Collins v. Troy Pub. Co. Inc.*, 213 A.D.2d 879, 881 (3d Dep't 1995) (affirming denial of summary judgment where defendants' only sources for their defamatory statement were confidential sources and defendants did not attempt to verify their allegations through objective sources); *Scacchetti v. Gannett Co., Inc.*, 123 A.D.2d 497, 498 (4th Dep't 1986) (affirming denial of summary judgment where defendant relied only on her own recollection and did not ask another source to confirm the speaker's identity before misidentifying plaintiff as shouting obscenities at a judge); *Bruno v. New York News*, *Inc.*, 89 A.D.2d 260, 268 (3d Dep't 1982) (reversing summary judgment for defendant where reporters' affidavits identified no sources to support the challenged statements).

3. The Fox Defendants possessed and/or avoided available information that contradicted their defamatory falsehoods about Smartmatic.

Appendix 14 identifies the various paragraphs in the Complaint that identifies information available to the Fox Defendants that contradicted each of the defamatory statements. Suffice to say, the Complaint goes into significant detail regarding the various sources of accurate information available to the Fox Defendants. These sources of information were publicly available to the Fox Defendants both before their publications began and during the period when they were publishing defamatory information about Smartmatic. The Fox Defendants do not dispute this.

Nor do they dispute that the available information contradicted what was said about Smartmatic in their publications.

First, the Complaint alleges the Fox Defendants were aware of true and factual information about Smartmatic and its role in the 2020 election and its connection (or lack of one) to Dominion. For example, the Complaint identifies a communication from Fox News to Smartmatic on November 16 that references two fact check pages from Smartmatic's website. (Compl. ¶¶279-282; Compl.Ex.81, NYSCEF 83.) These fact-check pages included accurate information about Smartmatic. (Compl.Exs.83-84, NYSCEF 85-86.) Smartmatic also told Fox News in response to this email that it provided technology and software only to Los Angeles County, that it had no involvement, direct or indirect, in any other county or state in the U.S., and that it did not provide any software to tabulate, tally or count votes in any county or state. (Compl. ¶¶279-282; Compl.Ex.81, NYSCEF 83.)

Second, the Complaint identifies seven categories of information available to the Fox Defendants showing that Smartmatic's election technology and software were not widely used during the 2020 election, including in the contested states. (Compl. ¶¶260-287.) This included information showing which companies' election technology was used in each state, which election technology companies were actually widely used in the 2020 election, which states each election technology company said used its technology, and in which jurisdiction Smartmatic's election technology was used (Los Angeles County only). (*Id.*) The Complaint attaches 35 exhibits with examples of this information.

Third, the Complaint identifies five categories of information available to the Fox Defendants showing that Smartmatic's election technology and software were not used to rig the 2020 election. (*Id.* ¶¶298-316.) This information showed that Smartmatic's election technology

and software were not widely used, which would make rigging the election impossible. (*Id.*) It also included information on the steps taken to secure the election, and public statements by key federal and state officials and agencies confirming the absence of any vote manipulation. (*Id.*) The Complaint attaches 26 exhibits with examples of this information.

Fourth, the Complaint identifies five categories of information available to the Fox Defendants showing that Smartmatic's election technology and software did not send votes to foreign countries during the 2020 election. (*Id.* ¶¶318-322.) This included information showing Smartmatic was only involved with Los Angeles County *and* that the Los Angeles County voter tabulation was not even connected to the internet. (*Id.*) It also included information from government officials and election technology companies explaining that votes in a U.S. election are not, and have never been, sent to foreign countries. (*Id.*) The Complaint attaches 10 exhibits with examples of this information.

Fifth, the Complaint identifies five categories of information available to the Fox Defendants showing that Smartmatic's election technology and software were not compromised or hacked during the 2020 election. (*Id.* ¶¶324-330.) This included information showing Smartmatic was only involved in Los Angeles County *and* there were no security issues there. It also included information from state and federal officials on the security of the election and information published by Smartmatic showing its technology and software had been used to count over 5 billion votes without any security issues. (*Id.*) The Complaint attaches 10 exhibits with examples of this information.

Sixth, the Complaint identifies four categories of information available to the Fox Defendants showing that Dominion did not use Smartmatic's election technology and software during the 2020 election and that Smartmatic does not own Dominion. (*Id.* ¶¶332-339.) This

included public filings for the companies, the companies' website information, and websites that identify the voting equipment used in each state. (*Id.*) The Complaint attaches 12 exhibits with examples of this information.

Seventh, the Complaint identifies five categories of information available to the Fox Defendants showing that Smartmatic's election technology and software had not been banned in the United States or in any individual state. (*Id.* ¶¶341-345.) This included information showing Smartmatic's election technology and software being used in the United States prior to the 2020 election. (*Id.*) It also included information showing that Smartmatic served on a federal election advisory council, which it could not have done if it had been banned. And, it included information showing that Texas had issues with Dominion, not Smartmatic, but those issues had long been resolved prior to the election. The Complaint attaches 9 exhibits with examples of this information.

Eighth, the Complaint identifies four categories of information available to the Fox Defendants showing that Smartmatic was not a Venezuelan company founded or funded by corrupt dictators. (*Id.* ¶¶347-351.) This information included corporate filings for the company, Smartmatic's website (disclaiming such ties), and articles written about Smartmatic–including articles written by Fox News and referenced by Dobbs–explaining that Smartmatic has no ties to Venezuelan dictators. (*Id.*) The Complaint attaches 5 exhibits with examples of this information.

Ninth, the Complaint identifies four categories of information available to the Fox Defendants showing that Smartmatic's election technology and software were not designed to rig elections. (*Id.* ¶¶353-357.) This included information showing that Smartmatic's election technology and software were used in audited elections, and publicly available information about those audited elections that refutes any assertion of election rigging. (*Id.*) It also included information from Smartmatic's website showing that its election technology and software had

received recognition from various third-party validators. (*Id.*) And it included information showing Smartmatic being approved by Los Angeles County, approved by the Department of Defense, registered with the U.S. Election Assistance Commission, and participation on a federal election council. (*Id.*) The Complaint attaches 3 exhibits with examples of this information.

In response, the Fox Defendants claim only that a failure to investigate is not sufficient to prove actual malice. (*See, e.g.,* Fox Mem. at 19; Dobbs Mem. at 15; Bartiromo Mem. at 18; Pirro Mem. at 16.) But the Complaint alleges far more than a mere failure to investigate. It alleges purposeful avoidance of the truth by each of the Fox Defendants. *Supra* at Arg.II.D.1. The Fox Defendants had no support for their publications about Smartmatic. *Supra* at Arg.II.D.2. There was no support on the first day, nor on the last. That means the Fox Defendants: (i) either made absolutely no effort to confirm the veracity of their reporting at any time, or (ii) did and realized the falsity of it.

If they reviewed publicly available information like what is discussed in the Complaint, then the Fox Defendants knew the statements and implications were false based on that information and acted with actual malice in publishing and republishing them. *See, e.g., Bruno*, 89 A.D.2d at 268 (reversing summary judgment for defendant where reporters were likely aware of a report, issued four months before the article at issue, that clearly negated "any inference of intentional misconduct" by plaintiff); *Palin v. New York Times Co.*, 940 F.3d 804,815 (2d Cir. 2019) (denying motion to dismiss where defendant, in its article about plaintiff, included a hyperlink to an article that contained information that contradicted defendant's statements about plaintiff without acknowledging the contradictory information); *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 927 (2d Cir. 1987) (affirming jury verdict for plaintiff where plaintiff showed the defendant conducted its own investigation and uncovered facts showing that

the plaintiff was not a "fraud" prior to defendant's defamatory statements); *Guccione v. Flynt*, 618 F. Supp. 164, 166 (S.D.N.Y. 1985) (denying summary judgment where plaintiff showed that evidence was presented in earlier litigation between the parties that contradicted defendant's statements about the plaintiff's marital status).

If they did not review the publicly available information discussed in the Complaint, then the Fox Defendants purposefully avoided learning the truth. *See, e.g., Harte-Hanks*, 491 U.S. at 693 (affirming verdict for plaintiff where defendant's failure to interview the key witness indicated that defendant deliberately avoided acquiring knowledge of facts that might confirm the probable falsity of defendant's article); *Prozeralik*, 82 N.Y.2d at 475 (finding sufficient evidence of actual malice where a rival TV station aired the correct name of the victim of a crime the night before the defendant misidentified plaintiff as the victim in its broadcast); *Lewis v. Newsday, Inc.*, 246 A.D.2d 434, 437-38 (1st Dep't 1998) (denying summary judgment where "the story was never verified" and defendant published a second article repeating the accusations after receiving plaintiff's denial and "made no further effort to verify"); *Collins*, 213 A.D.2d at 881 (affirming denial of summary judgment where defendant's failure to obtain objective verification of plaintiff's criminal record through an inspection of court records or confirmation from plaintiff could be interpreted by a jury as a deliberate decision not to acquire facts that might confirm the probable falsity of the published statements); *Bruno*, 89 A.D.2d at 268 (reversing summary judgment for defendant where, four months prior to the article at issue, a report was issued that clearly negated the article's allegations of plaintiff's misconduct).

Either way, the Fox Defendants cannot prevail on a motion to dismiss by adopting an ostrich approach to reporting, especially given the circumstances here. It is no defense for a defendant to stick his or her head in the sand to avoid learning the truth particularly when the

support is lacking, and, as discussed below, they had obvious reasons to doubt the veracity of their sources (Giuliani and Powell). Each of the Fox Defendants had obvious reasons to doubt the two people they repeatedly featured on their programs and quoted dozens of times, *and* either knew the defamatory messages about Smartmatic were contradicted by available information or purposefully avoided learning the truth. That is actual malice.

4. Dominion's recently filed complaint confirms that the Fox Defendants possessed information contradicting their defamatory falsehoods about Smartmatic.

Obviously, no discovery has occurred; and, Smartmatic has not yet received information from the Fox Defendants showing all the information they received, reviewed, and possessed about Smartmatic. However, after Smartmatic filed its Complaint, Dominion filed a defamation complaint against Fox News in the Superior Court of the State of Delaware. (SMT.Ex.D.) Dominion's complaint includes allegations discussing information that Dominion provided to the Fox Defendants prior to and during their reporting about Smartmatic. (SMT.Ex.D ¶¶69, 82; SMT.Ex.E.) Dominion's complaint confirms the Fox Defendants, in fact, received and possessed many of the publicly available documents identified in Smartmatic's Complaint.[21]

For example, on November 12, 2020, Dominion began circulating an email titled: "SETTING THE RECORD STRAIGHT: FACTS & RUMORS." (SMT.Ex.D ¶65.) Dominion sent the emails to reporters and producers for Fox News, "including those who oversaw and managed content" for *Lou Dobbs Tonight, Sunday Morning Futures, Mornings with Maria,* and *Justice with*

[21] Smartmatic was not aware of the information Dominion provided the Fox Defendants until Dominion filed its complaint on March 26, 2021. Smartmatic will ask the Court for leave to amend to include these allegations if necessary. The Fox Defendants would have been aware of these communications and thus are not prejudiced by the court's consideration of them.

Judge Jeanine. (*Id.* ¶66.) Dominion circulated the emails to these individuals within Fox News on November 12, 13, 14, 16, 17, 19 and 20 (*Id.* ¶¶66, 77.)[22]

Dominion's emails to Fox News, including individuals who oversaw and managed content for the Fox anchors, provided the Fox Defendants even more information contradicting what they published about Smartmatic. For example, Dominion's emails provided the Fox Defendants with the following information:

Votes were not switched/election not fixed, rigged or stolen

- November 13, 14, 16, 17, 19 emails: "Dominion Voting Systems categorically denies false assertions about vote switching and software issues with our voting systems." (SMT.Ex.E.)

- November 13, 14, 16, 17, 19 emails: "According to a Joint Statement by the federal government agency that oversees U.S. election security, the Department of Homeland Security's Cybersecurity & Infrastructure Security Agency (CISA): 'There was no evidence that any voting system deleted or lost votes, or was in any way compromised.' The government & private sector councils that support this mission called the 2020 election 'the most secure in American history." (SMT.Ex.E (with link to CISA statements); Compl.Ex.130, NYSCEF 132.)

- November 14 email: Link to Associated Press article ("Fact Check") reporting that claims of votes being switched from President Trump to now-President Biden was "false" and including a statement by Eddie Perez that he was not aware of any "systematic issue related to problems with Dominion software that would affect the tabulation of results." (SMT.Ex.D ¶69; *see also* SMT.Ex.C.)

No relationship between Dominion and Smartmatic/no use of Smartmatic's software

- November 13, 14, 16, 17, 19 emails: "Dominion has no ownership relationship with . . . Smartmatic [] or any ties to Venezuela." (SMT.Ex.E.)

- November 16, 17, 19 emails: "Dominion is not, and has never been, owned by Smartmatic. Dominion is an entirely separate company and a fierce competitor to Smartmatic. [Dominion and Smartmatic do not] collaborate in any way and have no affiliate relationships or financial ties. . . . Dominion does not use Smartmatic software." (SMT.Ex.E)

[22] Dominion also emailed the November 14 "SETTING THE RECORD STRAIGHT" memo to Bartiromo. (SMT.Ex.D ¶69; SMT.Ex.F.)

- November 20 email: "Dominion and Smartmatic do not collaborate in any way and have no affiliate relationships or financial ties. Dominion is an entirely separate company and a fierce competitor to Smartmatic." (SMT.Ex.E.)

Votes not sent to foreign countries for tabulation

- November 13, 14, 16, 17, 19 emails: "Dominion equipment is used by county and state officials to tabulate ballots." (SMT.Ex.E with links to statements by Michigan Secretary of State (Compl.Ex.62, NYSCEF 64) and Georgia Secretary of State (Compl.Ex.57, NYSCEF 59).)

- November 14, 16, 17, 19 emails: "There have been no 'raids' of Dominion servers by the U.S military or otherwise, and Dominion does not have servers in Germany." (SMT.Ex.E.)

- November 20: "Votes are counted and reported by county and state election officials–not by Dominion, or any other election technology company. Assertions that votes are counted in General are completely false . . . Dominion equipment is used by county and state officials to tabulate ballots. All vote tallies are 100% auditable. Our voting systems are designed and certified by the U.S. government to be closed and do not rely on network connectivity." (SMT.Ex.E.)

Software was not compromised or hacked/designed to rig elections

- November 12, 13, 14, 15, 16, 17, 19 emails: "No credible reports or evidence of any software issues exist. While no election is without isolated issues, Dominion voting system are reliably and accurately counting ballots. State and local election authorities have publicly confirmed the integrity of the process." (SMT.Ex.E (with links to statements by Michigan Secretary of State (Compl.Ex.62, NYSCEF 64) and Georgia Secretary of State (Compl.Ex.57, NYSCEF 59)).)

- November 12, 13, 14, 16, 17, 19 emails: "All U.S. voting systems must provide assurance that they work accurately and reliably as intended under federal U.S. EAC and state certification and testing requirements. Election safeguards–from testing and certification of voting systems, to canvassing and auditing–prevent malicious actors from tampering with vote counts and ensure that final vote tallies are accurate." (SMT.Ex.E (with links to statements by the U.S. Election Assistance Commission (Compl.Ex.115, NYSCEF 117) and Cybersecurity & Infrastructure Security Agency (Compl.Ex.130, NYSCEF 132)).)

- November 13, 14, 16, 17, 19 emails: "There were no Dominion software glitches. Ballots were accurately tabulated, and results are 100% auditable. No credible reports or evidence of any software issues exists." (SMT.Ex.E (with links to statements by Michigan Secretary of State (Compl.Ex.62, NYSCEF 64) and Georgia Secretary of State (Compl.Ex.57, NYSCEF 59)).)

- November 14 email: Link to Associated Press article ("Fact Check") reporting that claims of votes being switched from President Trump to now-President Biden was "false" and including a statement by Eddie Perez that he was not aware of any "systematic issue related to problems with Dominion software that would affect the tabulation of results." (SMT.Ex.E; *see also* SMT.Ex.C (AP article).)

Dominion thus provided the Fox Defendants with information that supports Smartmatic's allegations of actual malice.

5. The Fox Defendants had obvious reasons to doubt the veracity of their sources.

The Fox Defendants chose to invite Giuliani and Powell onto their programs–five times with Dobbs, twice with Bartiromo, and once with Pirro. The anchors also chose to quote, endorse, and attribute statements to them, dozens and dozens of times. These two lawyers were the main "sources" for the defamatory falsehoods about Smartmatic. However, each of the Fox Defendants had obvious reasons to doubt their veracity. (Compl. ¶¶358-378.) This is not disputed by the Fox Defendants.

The Complaint details, with exhibits, eight reasons to doubt the veracity of Giuliani and Powell. (*Id.*)

- First, Giuliani and Powell did not present any firsthand support for the statements and implications they made about Smartmatic's role in the 2020 election. (*Id.* ¶¶359-360.)
- Second, the Fox Defendants could not corroborate their statements about Smartmatic. (*Id.* ¶¶361-362.)
- Third, the Fox Defendants knew credible sources with firsthand knowledge had refuted their statements. (*Id.* ¶¶363-365.)
- Fourth, the Fox Defendants knew election officials in the contested states contradicted their statements. (*Id.* ¶366.)
- Fifth, the Fox Defendants knew or should have known their statements were inconsistent with the testing and certification conducted by the U.S. Election Assistance Commission. (*Id.* ¶¶367-368.)

- Sixth, the Fox Defendants knew election specialists contradicted their statements. (*Id.* ¶¶369-372.)

- Seventh, the Fox Defendants knew that Giuliani's and Powell's statements regarding a "fraud" and votes being flipped by Smartmatic's software were inconsistent with the arguments presented in court to challenge the results of the 2020 election. (*Id.* ¶¶373-374.)

- Eighth, the Fox Defendants knew that Powell's claim of having a "Kraken" amount of evidence to support her statements was a sham. President Trump's campaign distanced itself from Powell, she never filed any lawsuits on behalf of President Trump, and the lawsuits she eventually filed were shams. (*Id.* ¶¶375-378.)

Any one of these would have given the Fox Defendants reason to doubt Giuliani's and Powell's veracity. But their cumulative weight reveals even more.

These obvious reasons to doubt Giuliani and Powell go to the Fox Defendants' reckless disregard for the truth. *See, e.g., Harte-Hanks*, 491 U.S. at 681-82 (affirming jury award where the source used was contradicted by numerous other witnesses and defendant did not take further steps to investigate the veracity of the source despite clear reasons to do so, like interviewing additional witnesses or listening to taped conversations); *New Testament Missionary Fellowship v. Dutton & Co.*, 112 A.D.2d 55, 56 (1st Dep't 1985) (denying summary judgment where plaintiff showed evidence of the editor's skepticism of defendant's background and bizarre theories); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 190 (2d Cir. 2000) (upholding jury verdict where plaintiff presented evidence that the source relied on lacked current knowledge of the account at issue, which "suggested a reasonable basis for defendants to question the accuracy and reliability of the information he provided"); *see also Curtis Pub.*, 388 U.S. at 157 (denying defendant's motion for new trial where there was sufficient evidence of actual malice where the source used was not reliable and the publication had no "substantial independent support" beyond the source).

6. The Fox Defendants violated generally accepted journalism standards.

Compliance with generally accepted journalism standards is a key inquiry into fault under *Chapadeau*, 38 N.Y.2d at 199 (fault established by showing defendant "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties"). While not dispositive, a failure to comply is relevant to reckless disregard for the truth. *See, e.g.*, *Prozeralik v. Capital Cities Commc'ns.*, 222 A.D.2d 1020, 1020 (4th Dep't 1995) ("[t]he Trial Judge did not abuse her discretion in permitting expert testimony on journalistic standards and practices"); *Campbell v. Citizens for an Honest Gov't, Inc.*, 255 F.3d 560, 569 (8th Cir. 2001) (actual malice "may be supported by evidence . . . of extreme departure from professional standards"); *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 189, 196-97 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) ("Some evidence of actual malice may be found if there is a complete departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.").

The Fox Defendants do not address Smartmatic's allegations that they violated generally accepted journalism standards as indicative of actual malice. (Compl. ¶¶450-465.) Among other things, the Fox Defendants reported information they knew was not accurate, failed to verify and corroborate information from Giuliani and Powell, purposefully avoided gathering information inconsistent with their preconceived narrative, failed to disclose Giuliani's and Powell's lack of credibility, failed to publish information that contradicted the statements and implications they published, failed to put Giuliani's and Powell's statements in the proper context, vilified a private company for personal gain, and failed to disclose to their audience the lack of support for their statements. (*Id.*)

7. The Fox Defendants' disinformation campaign was motivated by an improper purpose.

Improper motive, standing alone, may not be enough to establish actual malice. Nonetheless, motive is relevant to whether a defendant acted with actual malice. *See, e.g.*, *Greenberg*, 155 A.D.3d at 55 (denying motion to dismiss where plaintiff alleged that defendant published statements solely to discredit plaintiff and damage his reputation and career while attempting to bolster defendant's own reputation and career); *New Testament*, 112 A.D.2d at 56 (denying summary judgment where plaintiff showed evidence of hostility by defendant); *Palin*, 940 F.3d at 814 (reversing trial court's dismissal of defamation complaint where plaintiff's pleading of personal bias and personal connection to the subject of the defamatory statements, while not sufficient, could be evidence of actual malice); *Celle*, 209 F.3d at 186 (upholding jury verdict where plaintiff presented evidence of actual malice that included "evidence indicating ill will and personal animosity between Celle and Pelayo at the time of publication").

The Fox Defendants do not dispute that they published and republished the reports about Smartmatic for an improper purpose. The Fox Defendants understood that disseminating the message, that President Trump did not lose the election and that it was stolen by Smartmatic, would endear them to President Trump and his supporters. This was important for each of them. Fox News wanted support from President Trump and his supporters to recapture market share that it was losing to other media organizations. (Compl. ¶¶423-430.) Dobbs wanted public approval from President Trump to keep up his viewership. (*Id.* ¶¶431-435.) Bartiromo wanted to solidify her support from President Trump and his supporters because it allowed her to get exclusive interviews and larger opportunities within Fox News. (*Id.* ¶¶436-442.) Pirro used her attacks on Smartmatic as a vehicle to sell books. (SMT.Ex.28B at 8:9-11 ("And if you like my opens, you'll love my book, 'Don't Lie to Me.' Available right now everywhere.").) And, not coincidently, Pirro's ex-

husband received a pardon from President Trump after her reports about Smartmatic. (Compl. ¶10.)

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The weight of actual malice allegations in the Complaint is considerable, and the Fox Defendants did not even try in their motions to dispute most of it. Instead, the Fox Defendants try to sidestep the issue altogether by analogizing themselves to hosts of "live radio" shows where "anonymous" callers happen to defame someone. (Fox Mem. at 19; Bartiromo Mem. at 19; Dobbs Mem. at 15; Pirro Mem. at 17.)[23] The programs at issue were not call-in radio shows. The Fox Defendants invited Giuliani and Powell onto their shows multiple times. They knew what they were going to say. They allowed Giuliani and Powell to defame Smartmatic knowing what they were saying was false. And, the Fox Defendants made their own false and defamatory statements on top . . . with actual malice.

E. Smartmatic has adequately alleged special harm and damages.

Under New York law, Smartmatic must (a) allege facts showing "special harm" as a result of the Fox Defendants' defamation unless it is considered defamatory *per se*, and (b) allege facts showing "special damages" from Fox Defendants' disparagement. *Supra* at Arg.II. The Complaint includes 54 paragraphs detailing "special harm" and "special damages." (Compl. ¶¶466-519.) Among other things, the Fox Defendants' conduct created a public backlash against Smartmatic, jeopardized $500 to $766 million in profits, has and will cost Smartmatic over $75 million in expenses, and negatively impacted Smartmatic's enterprise value by at least $2.7 billion. (*Id.*) The

[23] The Fox Defendants cite two aged cases outside of New York for their "live radio/anonymous callers" argument. *See Pacella v. Milford Radio Corp.*, 462 N.E.2d 355, 360 (Mass. App. Ct. 1984); *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo. 1976). New York has not created a special actual malice test for live radio/anonymous callers.

Complaint also details the various business opportunities negatively impacted by the Fox Defendants' defamation and disparagement. (Compl. Appendix 1.A-1.D, NYSCEF 155-158.) The Fox Defendants do not take issue with the adequacy of the allegations for special harm and damages.

III. New York's anti-SLAPP statute does not protect the Fox Defendants' disinformation campaign against Smartmatic.

The Fox Defendants have failed to establish that New York's anti-SLAPP statute applies to their communications. New York revised its statute in November 2020. In signing the bill, Governor Cuomo stated: "For too long, powerful and wealthy interests have used frivolous lawsuits to harass and intimidate critics by burdening them with exorbitant legal fees and time consuming legal process." (*Governor Cuomo Signs Legislation to Stop Frivolous Lawsuits* (Nov. 10, 2020).)[24] Senator Hoylman echoed these comments: "It's unacceptable that wealthy and powerful interests like Donald Trump have been able to abuse New York's civil justice system by bringing meritless lawsuits against their critics with the intent of harassing, intimidating, and bankrupting them. That ends today." (*Id.*) This lawsuit was not the type intended to be dispatched by the revision to the statute.

There is no indication in the legislative history that the revision was done to upend defamation law in New York, or to allow news organizations to broadcast false accusations of crimes. In keeping with this, the statute is limited to claims that are based on a defendant's "lawful conduct." Civil Rights Law §76-a(2). This language expressly excludes conduct that is unlawful, such as defamatory conduct. The Fox Defendants have failed to demonstrate that their conduct was lawful. They have not established the alleged falsehoods were actually true, or that they made

[24] *Available at* https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-stop-frivolous-lawsuits-meant-intimidate-bully-or-suppress.

them without knowledge of their falsity. There is no constitutional value to calculated falsehoods. *Supra* at Arg.I.A; s*ee also Rinaldi,* 42 N.Y.2d at 382 ("No First Amendment protection enfolds false charges of criminal behavior."); *World Wrestling*, 142 F. Supp. 2d at 520 ("The First Amendment does not protect statements that are false and defamatory even if they are made in the context of a public debate about issues of general concern."); *Nat'l Coal. On Black Civic Participation v. Wohl*, 2021 WL 480818, at *12 (S.D.N.Y. Jan. 12, 2021) (rejecting application of New York's anti-SLAPP statute because the plaintiffs plausibly alleged unlawful conduct, which neither "receive[s] First Amendment Protection" nor falls within the scope of the anti-SLAPP statute).

The Fox Defendants have also failed to demonstrate their publications were made in connection with an "issue of public interest." Though New York law defines "public interest" broadly, the Fox Defendants have cited no case finding that there is an "issue of public interest" in publicly revealing false and serious criminal accusations against a private company by private lawyers. While courts have recognized a "public interest" in cases involving actual arrest and charges, Smartmatic has never been charged by the government or a grand jury with a crime. The falsity of the accusations implicating Smartmatic in rigging the 2020 election is crucial.

While New York's revision is recent, California courts have considered and rejected the applicability of an anti-SLAPP statute where the defendant fabricated criminal accusations:

> Simply stated, causes of actions arising out of false allegations of criminal conduct, made under circumstances like those alleged in this case, are not subject to [California's] anti-SLAPP statute. Otherwise, wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, automatically would be accorded the most stringent protections provided by law, without regard to the circumstances in which they were made–a result that would be inconsistent with the purpose of the anti-SLAPP statute and would undermine the protection accorded by [California law].

Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1135 (Cal. App. Ct. 2003) (rejecting application of statute where plaintiff was a private figure and defendant published accusations that he had committed crimes); *Rivero v. American Federal of State, County and Municipal Employees*, 105 Cal. App. 4th 913, 929 (Cal. App. Ct. 2003) (same, where defendant published documents alleging that plaintiff engaged in misconduct). The U.S. Supreme Court has applied similar reasoning in considering whether defamatory conduct can transform a plaintiff into a public figure. *See Gertz*, 418 U.S. at 351 (plaintiff was not a public figure where he "plainly did not thrust himself into the vortex of this public issue"); *Hutchinson*, 443 U.S. at 135 ("those charged with defamation cannot, by their conduct, create their own defense by making the claimant a public figure").

The Fox Defendants should not be allowed to invoke protection under the anti-SLAPP statute through their own defamatory conduct. *See Shepard v. Schurz Commc'ns, Inc*., 847 N.E.2d 219, 224 (Ind. Ct. App. 2006) (anti-SLAPP statute "does not supplant the Indiana common law of defamation, but provides that the movant must establish that his or her speech was 'lawful'"). The burden of application is theirs and they have not satisfied it. Nonetheless, Smartmatic's claims have a "substantial basis in law" even if there are unresolved issues of fact related to its claims.[25] *See, e.g., Related Properties, Inc. v. Town Bd. of Town/Vill. of Harrison*, 22 A.D.3d 587, 591 (2d

[25] Requiring a plaintiff to establish their defamation claims with clear and convincing evidence at the pleading stage pursuant to an anti-SLAPP statute has been held by some courts to violate a plaintiff's right to a jury trial and be unconstitutional. *See, e.g., Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-36 (Minn. 2017) (on reviewing a motion to dismiss, finding subdivision of Minnesota's anti-SLAPP law that transferred jury's fact-finding role in tort matters at law to district court violated the state constitutional right to a jury trial); *Davis v. Cox*, 183 Wash. 2d 269, 296 (2015), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wash. 2d 392 (2018) (provision of Washington anti-SLAPP law requiring the trial judge to make a factual determination of whether the plaintiff established by clear and convincing evidence a probability of prevailing on the claim, "violates the right of trial by jury under [the Washington constitution] because it requires a trial judge to invade the jury's province of resolving disputed facts and dismiss—and punish—nonfrivolous claims without a trial.") Similarly, New York provides a plaintiff a constitutional right to a jury trial. N.Y. Const. art. I, §2 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever").

Dep't 2005) (affirming denial of motion to dismiss and holding "it cannot be said that the petitioners' cause of action to recover damages [] lacks a substantial basis in law" where unresolved issues of fact existed related to the claim covered by Civ. Rights Law §76-a).

CONCLUSION

It is hard to imagine a Complaint providing more factual allegations to demonstrate a "substantial basis in law" for claims of defamation and disparagement. Smartmatic has pled facts supporting each of the essential elements. The privileges that the Fox Defendants have raised are either not recognized in New York (neutral reporting) or not applicable to the statements and implications made in their publications (fair reporting). Notwithstanding the breadth of the pleadings, in the end, denial of the Fox Defendants' motion to dismiss is a straightforward exercise based on well-established New York law and the detailed factual allegations made in Smartmatic's Complaint.

The motions filed by the Fox Defendants articulate broad, sweeping principles, but do not provide the Court any detailed application of those principles to their reporting or the allegations made in the Complaint. That raises concerns of sandbagging. Smartmatic has responded, in detail, to the arguments the Fox Defendants made in their motions. But Smartmatic is not a fortune teller and cannot predict what the Fox Defendants may do in their replies. The Court should not allow the Fox Defendants to raise new arguments, introduce new evidence, or present new analysis that was not included in their opening motions. "[C]ontention[s] raised in [a] reply brief for the first time [are] not properly before this court." *Oceanview Manor Home for Adults v. Vargas*, 2019 WL 6335233, at *2 (2d Dep't Nov. 22, 2019); *accord Matter of Erdey v. City of New York*, 129 A.D.3d 546, 546-47 (1st Dep't 2015).

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CERTIFICATION OF COMPLIANCE

In accordance with Section 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court, I certify that this foregoing Memorandum of Law contains 39,582 words, exclusive of the Table of Contents, Table of Authorities, the cover page, and the signature block, based on a Word Count check performed by our word processing system.

Dated: April 12, 2021

Stephen Chahn Lee