

**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

Motion Seq. No. ____

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF LAW IN SUPPORT OF FOX CORPORATION'S MOTION TO
DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO THE FIRST
AMENDMENT AND CPLR §§3211(a)(1), (a)(7), AND (g)**

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INTRODUCTION

Two years ago, Smartmatic filed this extraordinary defamation suit seeking to hold Fox Corporation, Fox News Network, LLC, and three hosts employed by Fox News Network, LLC liable for billions of dollars in damages because those hosts engaged in activity at the heart of the First Amendment: covering and commenting on allegations by then-President Trump and his legal team about the validity of the 2020 presidential election. While Smartmatic’s initial complaint suffered from all manner of problems, the absence of a single allegation that anyone at Fox Corporation had anything to do with the statements Smartmatic challenged was particularly glaring. Apparently Smartmatic believed that Fox Corporation should be on the hook for any liability in this case simply because Fox Corporation is the parent company of Fox News Network, LLC. The Appellate Division made quick work of that argument on appeal, dismissing Fox Corporation from this case pursuant to the “general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation ... is not liable for the acts of its subsidiaries.” (*United States v. Bestfoods*, 524 US 51, 61 [1998]). And although the Appellate Division gave Smartmatic an opportunity to replead a claim against Fox Corporation, it emphasized that any such claim could survive only if (among other things) Smartmatic adequately alleged either (1) that Fox Corporation “wholly dominated Fox News so as to [be] liable for the acts of its subsidiary” or (2) that at least one “Fox Corporation employee played an affirmative role in the publication of *the challenged defamatory statements*”—*i.e.*, that the employee “actively took part in the procurement, composition, and publication of *the challenged statements*.” (*Smartmatic USA Corp. v. Fox Corp.*, 213 AD3d 512, 514 [1st Dept 2023] (emphasis added).)

Smartmatic has now filed an amended complaint that has “added ... allegations” and “a standalone defamation cause of action against Fox Corporation.” (NYSCEF.Doc.No.1199

(“Am.Compl.”) at 1.)¹ But Smartmatic’s claim against Fox Corporation remains legally inadequate. Smartmatic has come nowhere close to pleading enough facts for this Court to take the remarkable step of piercing the corporate veil. Indeed, courts (including the Delaware court overseeing Dominion’s similar defamation suit against Fox Corporation and Fox News) have routinely rejected efforts to use the same kind of generic allegations pressed here to deem Fox Corporation and Fox News so intertwined as to be one and the same.

Nor has Smartmatic pleaded any facts suggesting that anyone at Fox Corporation affirmatively drafted, edited, or approved of any of the statements it challenges. Instead, Smartmatic essentially endeavors to impose vicarious liability *without* piercing the corporate veil: It insists that Fox Corporation is liable for *all* content on Fox News simply because two Fox Corporation executives—Rupert and Lachlan Murdoch—have “ultimate authority” over Fox News Network, LLC, and hence theoretically *could* step in and stop their subsidiary from airing defamatory content. That theory just defies the Appellate Division’s admonition that Smartmatic must allege facts showing that a Fox Corporation employee had an “active” and “affirmative” role in publishing the challenged statements. Indeed, if Smartmatic’s defamation-by-inaction theory sufficed to hold Fox Corporation liable here, then virtually every parent company in the country would face liability for the torts committed by any of its subsidiaries, because a plaintiff could always allege that the parent could and should have exercised greater control over the subsidiary.

In short, just like its first failed effort to hold Fox Corporation liable, Smartmatic’s latest effort has no basis in defamation law and would vitiate bedrock rules of corporate separateness. Accordingly, the Court should dismiss Fox Corporation from this suit once and for all.

¹ A copy of Smartmatic’s First Amended Complaint is attached as Exhibit 1 to the Affirmation of Steven Mintz, dated March 31, 2023 (“Mintz Aff.”).

BACKGROUND²

A. Fox Corporation's Broad Media Business

Fox Corporation is a publicly traded news, sports, and entertainment company that owns numerous subsidiary businesses. One of its subsidiaries is Fox News Network, LLC (“Fox News”), which operates Fox News Channel, Fox Business Network, Fox Digital, Fox News Audio, and Fox Weather. (See Fox Corporation 2022 Form 10-K, at Item 1, <https://archive.ph/PZ06h>.) Fox Corporation also owns other subsidiaries, such as Fox Sports; Fox Entertainment; Fox Television Stations; and the ad-supported video-on-demand service TUBI. (See *id.*) Each subsidiary maintains its own employees, management structures, and corporate executives. The programming on Fox Corporation’s outlets is diverse and substantial. It includes shows such as *Lego Masters*, *Hell’s Kitchen*, and *Bob’s Burgers*; sports like football, baseball, and soccer; television episodes and movies that users can stream online; and news, opinion, and information content available from Fox News Channel, Fox Weather, Fox Business Network, and Fox News Audio.

B. Smartmatic’s Lawsuit Against Fox Corporation

Plaintiffs Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited (collectively, “Smartmatic”) initiated this lawsuit in February 2021. This Court is by now familiar with the relevant background. In brief, this is a defamation suit stemming from coverage of the 2020 presidential election on Fox Business Network and Fox News Channel—entities owned and operated by the Fox Corporation subsidiary Fox News. Smartmatic

² Ordinarily, a court accepts the facts alleged in a complaint as true. (See, e.g., *Maddicks v. Big City Props., LLC*, 34 NY3d 116, 123 [2019].) But as this Court has already held, New York’s Anti-SLAPP law applies in this case and “requires [the Court] to consider, in addition to the pleadings, affidavits and other evidence.” (*Smartmatic USA Corp. v. Fox Corp.*, 2022 WL 685407, at *19 [NY Sup Ct 2022], citing CPLR 3211[g][2].)

alleges that two members of then-President Trump’s legal team, Rudolph Giuliani and Sidney Powell, made defamatory statements about Smartmatic while leveling allegations of election fraud on certain Fox News programs in November and December 2020.³ Smartmatic further alleges that the hosts of these programs—Maria Bartiromo, Lou Dobbs, and Jeanine Pirro—made defamatory statements about Smartmatic while covering those same claims of election fraud.⁴

Bartiromo, Dobbs, and Pirro do not work for Fox Corporation. All three work (or worked) for Fox News. Smartmatic’s original complaint glossed over this distinction by collectively referring to Fox Corporation and Fox News Network as “Fox” or “Fox News.” (See NYSCEF.Doc.No.1 ¶¶20, 24.) Smartmatic thus pleaded all 16 of its causes of action against both corporate entities under the “Fox News” label. (See *id.* ¶¶521-753.) On February 8, 2021, Fox Corporation and Fox News Network jointly moved to dismiss the complaint, and Fox Corporation argued that Smartmatic’s claims against it could not proceed because Smartmatic failed to allege any facts regarding Fox Corporation specifically. (See, e.g., NYSCEF.Doc.No.206 at 9 n.5.) On March 8, 2022, this Court denied that motion, although it did not specifically address Fox Corporation’s argument about corporate separateness. (See NYSCEF.Doc.No.856; *Smartmatic*, 2022 WL 685407.)

On appeal, the Appellate Division held that this Court “should have granted Fox Corporation’s motion to dismiss the claims asserted against it, without prejudice to [Smartmatic’s]

³ The allegedly defamatory statements made by Giuliani and Powell are described at paragraphs 187(a)-(e), (g), (i), 195(a)-(f), (h), (k), (n)-(p), 204(a)-(h), (j), (o), (p), (r), (v), 213(c), (d), 221(a)-(c), (g), (j), 229(a), (b), (d), 237(a), (b), (d)-(h), (j)-(l), (o), (p), 246(a)-(e), (g), (i)-(l), (n)-(q), and (t)-(v) of Smartmatic’s amended complaint.

⁴ The allegedly defamatory statements made by Bartiromo, Dobbs, and Pirro are described at paragraphs 187 (f), (h), 195(g), (i), (j), (l), (q), (r), 204(i), (k), (l)-(n), (q), (s)-(u), (w), 213(a), (b), (e), 221(d)-(f), (h), (i), (k)-(m), 229(c), (e), 237(c), (i), (m), (n), 246(f), (h), (m), (r), and (s) of Smartmatic’s amended complaint.

ability to replead the claims.” (*Smartmatic*, 213 AD3d at 514.) The Appellate Division explained that, because Fox Corporation “is a corporate entity separate from Fox News,” Smartmatic cannot hold it liable for Fox News’ alleged conduct “merely by virtue of its ownership of Fox News and its profits.” (*Id.*) To state a defamation claim against Fox Corporation, the Appellate Division continued, Smartmatic must adequately allege “that Fox Corporation wholly dominated Fox News so as to [be] liable for the acts of its subsidiary,” or that a “Fox Corporation employee played an affirmative role in the publication of the challenged defamatory statements”—that is, that a Fox Corporation employee “actively took part in the procurement, composition, and publication of the challenged statements.” (*Id.*)

Seeking to address that deficiency, Smartmatic on March 6, 2023 filed an amended complaint that contains 17 causes of action. (*See Am.Compl.*) The first 16 are pleaded against Fox News and individual speakers, while the seventeenth is pleaded against Fox Corporation. (*See id.* ¶¶573-820.) Smartmatic asserts that Fox Corporation is liable for all 111 of the statements it challenges because Fox Corporation’s Chairman, Rupert Murdoch, and its Executive Chairman and CEO, Lachlan Murdoch, “ha[ve] editorial control over the content and publishing decisions of Fox News Network.” (*Id.* ¶20.) But the complaint does not contain any allegations that Rupert or Lachlan Murdoch (or any other Fox Corporation employee) affirmatively or actively directed, drafted, reviewed, or approved of any of the specific statements Smartmatic challenges. While Smartmatic alleges that Lachlan Murdoch attended editorial meetings at Fox News and texted regularly with Suzanne Scott, the CEO of Fox News, Smartmatic does not plead any facts suggesting that he had anything to do with the specific statements Smartmatic challenges as defamatory. (*See id.* ¶¶151, 157.) Likewise, while Smartmatic alleges that Rupert Murdoch occasionally provided suggestions on possible guests and what content shows might cover,

Smartmatic does not allege any facts suggesting that he played any affirmative or active role in directing the specific Fox News or Fox Business shows to host Giuliani or Powell or cover their allegations about Smartmatic. (*See id.* ¶¶156, 158.)⁵

ARGUMENT

As this Court has already held, New York’s Anti-SLAPP statute applies in this action. (*See Smartmatic*, 2022 WL 685407, at *17-*19, citing Civ. Rights Law §76-a.) Under the Anti-SLAPP statute, Smartmatic’s claims must be dismissed unless they “have ‘a substantial basis in law,’ which requires ‘such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.’” (*Smartmatic*, 213 AD3d at 512, quoting *Golby v. N & P Engrs. & Land Surveyor, PLLC*, 185 AD3d 792, 793-794 [2d Dept 2020], and citing CPLR 3211[g][1].) As the Appellate Division recognized, Smartmatic’s original complaint failed to meet that standard vis-à-vis Fox Corporation. Because Smartmatic’s amended complaint fares no better, it should be dismissed.

I. The Statements That Smartmatic Challenges Are Not Actionable Defamation.

In moving to dismiss Smartmatic’s initial complaint, Fox Corporation and Fox News argued that Smartmatic has no viable defamation claims against them because the speech that Smartmatic challenges—Fox News’ coverage of one of the most newsworthy stories in modern history—is fully protected by the First Amendment. (*See, e.g.*, NYSCEF.Doc.No.206 at 2, 11-17.) That argument continues to apply with full force to Smartmatic’s claim against Fox Corporation in the amended complaint, as Smartmatic is ultimately seeking to hold Fox Corporation liable for that same coverage. While Fox Corporation recognizes that the Court did not accept this First

⁵ Despite the Appellate Division’s admonishment that Fox Corporation and Fox News Network, LLC are distinct corporate entities, Smartmatic continues to indiscriminately refer to the two organizations as “Fox News.” (*See Am.Compl.*¶21.)

Amendment argument in its previous ruling, (*see Smartmatic*, 2022 WL 685407, at *30 (“The remainder of the parties’ contentions are either without merit or need not be addressed given the findings above.”)), and that the Appellate Division subsequently allowed Smartmatic’s claims against Fox News to proceed without mentioning the First Amendment, Fox Corporation respectfully incorporates its prior briefing by reference. Indeed, Fox News intends to seek reargument before the Appellate Division and/or leave to appeal to the Court of Appeals. And if either court agrees that the First Amendment forecloses this multi-billion-dollar suit, Smartmatic’s claim against Fox Corporation could not move forward.

II. Smartmatic Cannot Establish That Fox Corporation Is Responsible For Any Of The Challenged Statements.

Even accepting the premise that Smartmatic has adequately pleaded that Fox News engaged in defamation by providing coverage of and commentary on the most newsworthy story of the day, Smartmatic still would not have a viable claim against Fox Corporation. The Appellate Division offered two—and only two—routes by which Smartmatic might state a viable claim against Fox Corporation, yet Smartmatic’s amended complaint takes neither. Smartmatic’s amended complaint falls far short of adequately alleging that Fox Corporation “wholly dominated Fox News” such that Fox Corporation could be liable under a theory of vicarious liability. (*Smartmatic*, 213 AD3d at 513-514.) And Smartmatic’s attempt to hold Fox Corporation directly responsible for the challenged statements is equally unavailing, as Smartmatic does not and cannot claim that any Fox Corporation employee played an “affirmative” or “active[]” role “in the procurement, composition, and publication of the challenged statements.” (*Id.* at 514.)

A. Smartmatic Cannot Hold Fox Corporation Vicariously Liable for Acts of Fox News or Its Employees.

“It is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation ... is not liable for the acts of its subsidiaries.” (*Bestfoods*, 524

US at 61; *see also Smartmatic*, 213 AD3d at 514.) Thus, to hold Fox Corporation liable for the acts of Fox News, Smartmatic must plead and prove that Fox News “is wholly dominated and controlled by the parent corporation such that piercing the corporate veil is justified.” (*Stern v. News Corp*, 2010 WL 5158635, at *4 [SD NY Oct. 14, 2010], *report and recommendation adopted*, 2010 WL 5158637 [SD NY Dec. 16, 2010]; *accord Smartmatic*, 213 AD3d at 513-514.) That standard is exceedingly demanding. To pierce the corporate veil, Smartmatic must show that Fox Corporation “dominate[s] the finances, policies, and business practices of [Fox News] to such an extent that [Fox News] has no separate existence of its own.” (*Kashfi v. Phibro-Salomon, Inc.*, 628 F Supp 727, 733 [SD NY 1986].) “Allegations of ‘shared common ownership’ and ‘senior management responsibility’ do not reach this requisite threshold.” (*Physicians Mut. Ins. Co. v. Greystone Servicing Corp.*, 2009 WL 855648, at *4 [SD NY Mar. 25, 2009].) Instead, Smartmatic must set forth evidence of an “abandonment of the corporate structure,” (*Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F3d 773, 778 [2d Cir 1995]), such as “lack of normal corporate formality in the subsidiary’s existence, under-capitalization, and personal use of the subsidiary’s funds by the parent or owner,” (*Am. Protein Corp. v. AB Volvo*, 844 F2d 56, 60 [2d Cir 1988]; *see also Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, 2004 WL 112948, at *7 [SD NY Jan. 22, 2004] (listing additional factors)).

Smartmatic’s amended complaint is devoid of any allegations that Fox Corporation “completely dominated” Fox News. Smartmatic alleges that two senior Fox Corporation executives “served in the senior-most leadership position for Fox News Network during the relevant period,” (Am.Compl.¶150), and that they had significant authority to manage, oversee, and make key decisions for the network as a result (*see, e.g., id.* ¶159 (“Lachlan and Rupert Murdoch ultimately run Fox News Network.”)); *see generally id.* ¶¶147-183.) But it is well-

recognized that allegations of that sort—indeed, allegations previously made against these very individuals—are insufficient to establish that a subsidiary lacked a corporate structure or “had no existence of its own.” (*Physicians Mut. Ins. Co.*, 2009 WL 855648, at *4; see *Franklin v. Daily Holdings, Inc.*, 135 AD3d 87, 96 [1st Dept 2015] (allegations that Rupert Murdoch served as CEO of parent and subsidiary are “wholly insufficient”); *Vitamin Realty Assocs. LLC v. Time Rec. Storage, LLC*, 193 AD3d 491, 492 [1st Dept 2021] (allegations of “share[d] offices, officers, and ownership, along with conclusory allegations of ‘domination,’ are insufficient”); *Nuevo Mundo Holdings*, 2004 WL 112948, at *7 (allegations of “overs[ight]” and “close contact” are insufficient).) Furthermore, far from suggesting that Fox Corporation wholly dominates Fox News, Smartmatic ultimately alleges that Fox News *does* have a corporate structure consisting of hundreds of employees, including anchors and producers wielding “editorial control and decision-making authority” over their programs and executives “overseeing” those programs. (Am.Compl.¶¶151-154, 159.) In short, Smartmatic has failed to allege any “abuse of the corporate form,” such as “lack of corporate formalities, comingling of funds, or self-dealing,” which is the proposition that it must establish to pierce the corporate veil. (See, e.g., *Mirage Entertainment, Inc. v. FEG Entretenimientos S.A.*, 326 F Supp 3d 26, 34 [SD NY 2018].)

While plaintiffs sometimes attempt to “mak[e] an end run around the ‘piercing the corporate veil’ doctrine by styling [their] claim[s] in agency terms,” (*Royal Indus. Ltd. v. Kraft Foods, Inc.*, 926 F Supp 407, 413 [SD NY 1996]), that is not a feasible option here either. To the extent the test for determining whether a subsidiary is acting as an agent of its parent differs from the veil-piercing test, (*but see Kashfi*, 628 F Supp at 735 (stating that the two tests are “the same”)), it asks whether the subsidiary had authority “to act *on behalf of* the parent,” such that “the subsidiary’s acts were, in both form and substance, those of the parent,” (*Royal Indus.*, 926 F Supp

at 413). In other words, “agency” exists only when the parent company empowers a subsidiary to act as its fiduciary, conducting the parent’s business with an “absence of gain or risk to the [subsidiary].” (*Mouawad Natl. Co. v. Lazare Kaplan Intl. Inc.*, 476 F Supp 2d 414, 422 [SD NY 2007], quoting *Exxon Corp. v. Cent. Gulf Lines*, 717 F Supp 1029, 1031 [SD NY 1989].) Here, however, the amended complaint does not allege that Fox Corporation empowered Fox News to publish the challenged statements *on its behalf*, such that Fox News operated as a fiduciary that risked nothing and could gain nothing. To the contrary, Smartmatic alleges that Fox News published the statements to serve its own business interests. (*See, e.g., Am. Compl.* ¶¶21, 476-482.)

All of this underscores that, as in so many other cases in which a plaintiff endeavors to hold a parent liable for a subsidiary’s actions, the corporate-separateness doctrine bars any attempt to hold Fox Corporation vicariously liable for the Fox News broadcasts at issue in this case. (*See, e.g., Franklin*, 135 AD3d at 96 (News Corp. not liable for allegedly defamatory article published by subsidiary); *Stern*, 2010 WL 5158635, at *4 (same); *Martin v. Mooney*, 448 F Supp 3d 72, 79 [D NH 2020] (dismissing defamation claim against parent corporation based on allegations that the parent “ha[d] the power to control the [subsidiary]’s board of trustees, approve [its] budget, and terminate [its] CEO”); *Williby v. Hearst Corp.*, 2017 WL 1210036, at *4 [ND Cal Mar. 31, 2017] (dismissing defamation claim against parent company where “[p]laintiff allege[d] no facts that suggest the [parent] authorized or otherwise manifested the intent for [its subsidiary or the subsidiary’s journalist] to act on its behalf”).)

B. Smartmatic Cannot Establish That Any Fox Corporation Employee Played an Affirmative Role in the Publication of Any of the Challenged Statements.

Because Smartmatic cannot hold Fox Corporation vicariously liable for Fox News’ actions, Smartmatic’s only option is to proceed on a theory of direct liability. As the Appellate Division made crystal clear last month, to proceed on that theory, Smartmatic must allege facts that would

establish that at least one Fox Corporation employee “played an affirmative role” in procuring, composing, or publishing each of “the challenged statements” for which Smartmatic seeks to hold Fox Corporation liable. (*Smartmatic*, 213 AD3d at 513-514; *see also, e.g., Treppel v. Biovail Corp.*, 2005 WL 2086339, at *3 [SD NY Aug. 30, 2005] (“[T]he law requires a substantive allegation that each defendant played a role in the creation or the publication of the statement.”).) That standard is demanding. It is not enough for Smartmatic to plead that someone at Fox Corporation was involved in the publications generally or even in Fox News’ election coverage specifically. Smartmatic must plead and prove that someone at Fox Corporation participated in the publication of the *specific statements that it challenges as defamatory*. (*Smartmatic*, 213 AD3d at 513-514.)

A recent decision from the U.S. Court of Appeals for the Fourth Circuit—*Blankenship v. NBCUniversal, LLC*, 60 F4th 744 [4th Cir 2023]—illustrates the point. There, Don Blankenship, a Republican political candidate, sued Fox News and other media outlets because they had described him as a convicted “felon” in their reporting when he had actually committed an “offense that is classified as a misdemeanor.” (*Id.* at 750.) As relevant here, Blankenship argued that Rupert Murdoch bore responsibility for Fox News anchors’ allegedly defamatory statements because Murdoch emailed two Fox News senior executives “request[ing] negative coverage” of Blankenship’s campaign. (*Id.* at 760.) The email stated: “Both Trump and McConnell appealing for help to beat unelectable former mine owner who served time. Anything during day helpful but Sean and Laura dumping on him hard might save the day.” (*Id.* at 760-761.) The Fourth Circuit held that the email did not make Murdoch responsible for the anchors’ statements because it “does not suggest that Murdoch *instructed anchors to falsely call Blankenship a felon or even implied that they should.*” (*Id.* at 761 (emphasis added).) Put differently, Murdoch’s *general* suggestion

that Fox News personalities “dump[] on” the candidate did not amount to procuring, composing, or publishing the anchors’ *specific* statements describing Blankenship as a convicted felon. (*See id.*)

Applying those principles, it is plain that Smartmatic’s amended complaint cannot survive against Fox Corporation. Parroting the language of the Appellate Division’s decision, the amended complaint states that “Rupert and Lachlan Murdoch played an affirmative role in the procurement, composition, and publication of the defamation published by Fox News Network LLC.” (Am.Compl.¶20.) But Smartmatic fails to allege adequate *facts* in support of that conclusory assertion. That is not terribly surprising. No Fox Corporation employee made any of the challenged statements. Giuliani and Powell—appearing as guests on Fox News shows—made the bulk of the challenged statements, and Fox News or Fox Business hosts made the rest. (*See id.* ¶¶187, 195, 204, 213, 229, 237, 246.) Smartmatic does not allege that Rupert or Lachlan Murdoch (or anyone else at Fox Corporation) discussed the allegations with Giuliani or Powell, or that they ever instructed any Fox News host or producer to bring Giuliani or Powell onto any show, let alone instructed anyone to bring them on to discuss their allegations against Smartmatic. In fact, Smartmatic does not allege that either Rupert or Lachlan Murdoch ever discussed Smartmatic with *anyone* at Fox News, let alone the host or producer of any of the relevant shows. Nor does Smartmatic allege that either Murdoch had advance knowledge that even a single one of the challenged statements would air on any show—let alone either of them *procured* or *directed* their publication.

Instead, Smartmatic just baldly asserts that Rupert and Lachlan Murdoch are “responsible” for *all III* of the challenged statements because they “ultimately run Fox News Network.” (*Id.* ¶159; *see also, e.g., id.* ¶20 (the Murdochs “ha[ve] editorial control over the content and publishing

decisions of Fox News Network”), ¶149 (the Murdochs “play a central role in managing and overseeing Fox News”), ¶152 (the Murdochs “have ultimate control and decision-making authority at Fox News Network”), ¶¶154, 156 (the Murdochs have “control and decision-making authority” over scores of Fox News employees, as well as “day-to-day oversight of executives at Fox News”).) Those kinds of allegations do not get the job done. Indeed, courts have repeatedly rejected the notion that a publisher, editor, or other superior officer even within the *same* corporate organization is responsible for an allegedly defamatory statement merely because he supervises the person who made, wrote, or published it. (*See, e.g., Treppel*, 2005 WL 2086339, at *4; *Mahoney v. Staffa*, 256 AD2d 827, 828 [3d Dept 1998].) It therefore follows *a fortiori* that Fox Corporation executives are not responsible for the broadcasts of subsidiary corporations simply because they sit atop the corporate org chart. And the rule could hardly be otherwise: To accept Smartmatic’s assertion that Lachlan Murdoch is “responsible for everything broadcast by Fox News Network” simply because he is the CEO of its parent corporation, (Am.Compl.¶157), would do violence not only to the corporate-separateness doctrine, but also to the First Amendment. As the Court of Appeals observed in a similar context, a rule that “impos[es] upon the management of newspapers the intolerable burden of rechecking every reporter’s assertions and retracing every source before proceeding with” a publication “would clearly pose an unacceptable barrier to the free flow of ideas.” (*Karaduman v. Newsday, Inc.*, 51 NY2d 531, 549 [1980].)

Smartmatic next alleges that Rupert and Lachlan Murdoch influenced Fox News’ coverage of the 2020 election generally, including coverage of claims of election fraud by then-President Trump and his surrogates. By Smartmatic’s telling, the Murdochs maintained a “general practice” of “deliver[ing] messages” to Fox News CEO Suzanne Scott “regarding the tone and narrative for Fox News Network programs, and Scott was left to execute on those messages.”

(Am.Compl.¶176.) In other words, Smartmatic alleges that the Murdochs provided Scott and other senior executives with high-level guidance about Fox News’ “positioning” and “messaging”—*e.g.*, “support President Trump,” (*id.* ¶163), “adopt more impartial coverage in [the network’s] general news programming,” (*id.* ¶164), and “win back [the] audience by embracing disinformation about the 2020 U.S. election,” (*id.* ¶174; *see also id.* ¶176). Even assuming that these allegations are true, they would provide no basis for holding the Murdochs responsible for the *specific statements* challenged in this lawsuit. Offering general guidance on “tone” and “messaging” is a far cry from directing “the procurement, composition, and publication” of any particular statement—much less the specific statements about Smartmatic at issue in this case. (*See Smartmatic*, 213 AD3d at 513-514.) Indeed, if Rupert Murdoch’s general suggestion in *Blankenship* that Fox News personalities “dump[]” on the candidate did not amount to procuring, composing, or publishing the anchors’ specific statements about the candidate, (*see* 60 F4th at 760-761), then his even more generic suggestions about “tone” and “narrative” of election-related coverage surely cannot suffice to hold him responsible for the specific statements about Smartmatic challenged here.

Turning to its next theory, Smartmatic alleges that Rupert and Lachlan Murdoch “were generally apprised of the day-to-day operations at Fox News Network” in late 2020 and sometimes “exercised decision-making authority on issues of interest.” (Am.Compl.¶151.) Smartmatic claims, for instance, that Lachlan Murdoch sometimes “attended daily editorial meetings at Fox News Network,” (*id.*); that both Murdochs had some involvement in certain high-profile employment decisions, (*id.* ¶158); that the Murdochs have occasionally weighed in on whether a particular anchor or guest should appear on the network (*id.*); and that, in some instances, the Murdochs “instructed Scott regarding statements that should be made during specific programs,” (*id.* ¶¶156-158, 176). These allegations once again miss the mark. Smartmatic cannot prove its

case against Fox Corporation by alleging that, in some *other* instance, Rupert or Lachlan Murdoch has composed or procured the publication of a specific statement by a Fox News anchor—even a statement “regarding the 2020 U.S. election.” (*Id.* ¶156.) Instead, Smartmatic must show that Rupert or Lachlan Murdoch (or some other Fox Corporation employee) composed or procured the publication of the *specific* statements for which Smartmatic seeks to hold Fox Corporation liable for billions of dollars in damages. (*See, e.g., N.Y. Times Co. v. Sullivan*, 376 US 254, 287 [1964] (only “persons handling the advertisement”—*i.e.*, those who reviewed it for compliance with organizational policies—had “responsibility for [its] publication”); *Palin v. N.Y. Times Co.*, 940 F3d 804, 810 [2d Cir 2019] (only “the author” of the allegedly defamatory *New York Times* article “responsible for [its] publication”); *Flotech, Inc. v. E.I. Du Pont de Nemours & Co.*, 814 F2d 775, 781 [1st Cir 1987] (only two employees “with the primary roles in issuing the press release” responsible for its contents); *Page v. Oath Inc.*, 270 A3d 833, 850 [Del 2022] (only “those involved in drafting the alleged[ly] defamatory statement” are “responsible for [it]”).)

The amended complaint contains no allegations that could support the conclusion that Rupert or Lachlan Murdoch composed or procured the publication of *any* of the 111 statements Smartmatic challenges as defamatory, whether by drafting them, reviewing them, or instructing anyone at Fox News to broadcast them. Smartmatic never even alleges that either Murdoch had advance knowledge of any of these statements’ publication. Nor does Smartmatic allege that the Murdochs had any role in deciding whether Dobbs, Bartiromo, or Pirro should invite Giuliani and Powell on their shows, what they would discuss if they did, or how those hosts should cover Giuliani and Powell’s allegations of election fraud generally or against Smartmatic specifically. (*See Am.Compl.* ¶¶147-83.) In fact, in the Dominion litigation, all three hosts have testified under oath that Fox Corporation had *no role whatsoever* in creating or publishing the content of the shows

that are the basis of this suit. (*See* Mintz Aff., Ex.2, J. Pirro Dep. Tr., at 421:17-422:14 (Aug. 23, 2022); Ex.3, M. Bartiromo Dep. Tr., at 259:23-260:11, 406:7-21 (Sept. 8, 2022); Ex.4, L. Dobbs Dep. Tr., at 96:22-23, 98:24-99:14 (Sept. 14, 2022); *see also* Ex. 5, K. [Rupert] Murdoch⁶ Dep. Tr., at 351:21-354:20 (Jan. 20, 2023).)

With no basis for alleging that the Murdochs were directly involved in creating or publishing the challenged statements, Smartmatic ultimately shifts to alleging that the Murdochs could have *prevented* Fox News from airing them. (*See, e.g.*, Am.Compl. ¶¶155, 159 (alleging that the Murdochs “each have the authority to require ... corrections and retractions” on the relevant shows); ¶158 (“Lachlan and Rupert’s instructions regarding guests appearing or not on programs are followed.”); ¶175 (“Rupert and Lachlan did not instruct Scott to ... stop Mr. Dobbs, Ms. Bartiromo and Ms. Pirro from publishing disinformation and inviting guests onto their shows to spread disinformation.”), ¶408 (the Murdochs “allowed [Giuliani and Powell] to repeatedly appear on [Fox News] programs”).) This theory of defamation-by-inaction is yet another dead-end. As the Appellate Division explained, (*see Smartmatic*, 213 AD3d at 514), and as other courts have confirmed, “[t]o find that a defendant ‘directed’ or ‘participated in’ publication requires, *at very least, evidence of some affirmative action* on the part of the defendant,” (*Ertel v. Patriot-News Co.*, 674 A2d 1038, 1043 [Pa 1996] (emphasis added)). The word “affirmative” means what it says: “[M]erely fail[ing] to hinder [the] publication” is not enough. (*Id.* at 1044; *see also Runnels v. Okamoto*, 525 P2d 1125, 1127-1128 [Haw 1974] (dismissing claim that defendants “ratifie[d]” a defamatory report through inaction, as they did not “participate in [its] publication”); *Maynard v. Fellner*, 1979 WL 30602 [Wis Ct App 1979], *aff’d*, 297 NW2d 500 [Wis 1980] (defendant had no duty to stop an allegedly libelous publication, even though he had the power to do so and had done

⁶ Rupert Murdoch’s legal name is Keith Rupert Murdoch.

so in the past.) Courts have widely adhered to that rule for good reason: If Smartmatic’s failure-to-intervene theory held any water, then high-level media executives would “participate[] in” and therefore bear “responsib[ility] for” practically any statement broadcast by their company—or even, as here, a subsidiary—because they could nearly always “instruct the anchors to change messaging or guests.” (Am.Compl.¶177.) That breathtaking theory would eviscerate the doctrine of corporate separateness, while also “pos[ing] an unacceptable barrier to the free flow of ideas.” (*Karaduman*, 51 NY2d at 549.)

* * *

In short, Smartmatic does not allege that Fox Corporation wholly dominated Fox News, and Smartmatic fails to adequately allege that Rupert Murdoch, Lachlan Murdoch, or any other Fox Corporation employee affirmatively or actively created, edited, or directed the publication of any of the specific statements at issue in this lawsuit—because none of that conduct actually occurred. Thus, even setting aside the insuperable First Amendment problems with Smartmatic’s suit, its claim against Fox Corporation fails on its own terms.

III. Smartmatic Cannot Establish That Any Fox Corporation Employee Acted With Actual Malice.

Because Rupert and Lachlan Murdoch had no involvement in the creation or publication of the allegedly defamatory statements, their states of mind are irrelevant. But even assuming that Smartmatic has adequately pleaded that Rupert or Lachlan Murdoch was directly involved in the publication of any statement at issue in this litigation, Smartmatic fails to adequately allege that either of them acted with the requisite mental state—namely, “actual malice.” (*See also Jimenez v. United Federation of Teachers*, 239 AD2d 265, 266 [1st Dept 1997] (to survive a motion to dismiss, a plaintiff subject to the actual malice standard must “allege facts sufficient to show actual malice with convincing clarity”).)

As this Court has already held, Smartmatic “must prove actual malice, *i.e.*, that one or more of the defendants ‘acted out of personal spite or ill will, with reckless disregard for [a] statement’s truth or falsity, or with a high degree [of] belief that [the] statements were probably false.’” (*Smartmatic*, 2022 WL 685407, at *18, quoting *Sagaille v Carrega*, 194 AD3d 92, 95 [1st Dept 2021]; accord *Khalil v. Fox Corp.*, 2022 WL 4467622, at *9 [SD NY Sept. 26, 2022] (holding, in related case, that the Anti-SLAPP law applies because “[t]he election of 2020 was clearly a matter of public interest”).) And to hold an organization liable for defamation, “the state of mind required for actual malice” must “be brought home to the persons in the [] organization having responsibility for the publication.” (*Sullivan*, 376 US at 287.) Thus, Smartmatic cannot attempt to impute corporate knowledge to Rupert or Lachlan Murdoch (assuming *arguendo* that one of them directed Fox News to publish one or more of the challenged statements); it must show that Rupert or Lachlan Murdoch *personally* had “knowledge of the statement’s falsity” or was “highly aware that it [was] probably false.” (*Chandok v. Klessig*, 632 F3d 803, 815 [2d Cir 2011].)

Setting aside its conclusory allegations, (*see, e.g.*, Am.Compl.¶¶256, 258-59, 283), Smartmatic mainly attempts to show “actual malice” by alleging that “information was available” to Rupert and Lachlan Murdoch that would have demonstrated the falsity of the challenged statements, (*see id.* ¶¶308, 309, 338, 367, 373, 381, 390, 396, 402, 421; *see also id.* ¶¶194, 262 (similar)). Page after page of the amended complaint is spent describing “publicly available” information about the 2020 election that allegedly reveals the falsity of the allegations made by Giuliani and Powell. (*See id.* ¶¶310-28, 335-37, 339-66, 368-72, 374-79, 382-89, 391-95, 397-401, 403-07, 412.) But the mere availability of information is not enough to show actual malice; indeed, in *Sullivan*, the plaintiff failed to prove that the New York Times acted with actual malice even though “the Times *in its own files* had articles already published which would have

demonstrated the falsity of the [allegedly defamatory] allegations.” (376 US at 263, 287.) Actual malice is a question of the relevant individual’s *subjective* mental state: What matters is whether Rupert or Lachlan Murdoch reviewed and believed the sources listed in the amended complaint, and Smartmatic offers no reason to think that they did.

To the extent any of Smartmatic’s allegations relate to what Rupert and Lachlan Murdoch actually thought about then-President Trump’s claims regarding Smartmatic (as opposed to what Smartmatic claims they should have researched), the allegations cannot support a finding of actual malice. Smartmatic alleges that Rupert and Lachlan Murdoch did not believe that anyone “fixed, rigged, or stolen” the 2020 presidential election, that Rupert “told [Suzanne] Scott that it was ‘very hard to credibly cry foul everywhere,’” and that both Murdochs viewed Giuliani’s election-fraud claims as “[r]eally crazy stuff.” (Am.Comp.¶¶296-300, 429.) But there is a wide gulf between accepting that President Biden fairly won the 2020 election and subjectively knowing the falsity of the specific factual propositions at issue here—*e.g.*, that Smartmatic’s “election technology and software were used by Dominion during the 2020 U.S. election,” that Smartmatic’s “election technology and software were compromised and hacked during the 2020 U.S. election,” and that “Smartmatic is a Venezuelan company that was founded and funded by corrupt dictators.” (*Id.* ¶133.)

Unable to allege that Rupert and Lachlan Murdoch subjectively knew of the falsity of the challenged statements, Smartmatic resorts to allegations that Fox Corporation had a financial incentive to defame Smartmatic. (*See id.* ¶256 (alleging that “Rupert and Lachlan were motivated for Fox News Network to publish false claims about election fraud ... to regain a favorable relationship with President Trump and bring back its audience”), ¶260 (“Fox Corporation needed Fox News Network to win back the audience to maintain its profits and stock price. That was a

motivator for Rupert and Lachlan Murdoch.”), ¶261 (alleging that they “allowed” Smartmatic to be vilified because it “would sell well to the audience”).) That is not nearly enough to support a finding of actual malice. “The cases from *New York Times v. Sullivan* onward teach that evidence of a defendant printing material to increase its profits does not suffice to prove actual malice.” *Reuber v. Food Chem. News, Inc.*, 925 F2d 703, 716 [4th Cir 1991].) After all, “it is hardly unusual for publications to print matter that will please their subscribers; many publications set out to portray a particular viewpoint or even to advance a partisan cause. Defamation judgments do not exist to police their objectivity.” (*Id.*; see also *Campbell v. Citizens for an Honest Govt., Inc.*, 255 F3d 560, 569 [8th Cir 2001] (“Evidence of a... political or profit motive does not suffice” to show actual malice); *McCafferty v. Newsweek Media Grp., Ltd.*, 955 F3d 352, 355, 360 [3d Cir 2020] (“Newsweek’s desire ‘to increase its profits’ and sluggish sales does not make out actual malice.”).)

In all events, Smartmatic’s theory makes little sense. Smartmatic alleges that “Rupert and Lachlan would not allow an anchor or program to convey ‘positioning’ and ‘messaging’ that they did not support.” (Am.Compl.¶177.) Yet Smartmatic itself alleges that, while some anchors expressed support for Powell’s election-fraud claims, (*id.* ¶¶175, 177), others “prominent[ly] rebuke[d] ... Powell’s claims,” (*id.* ¶¶293-95). Smartmatic’s theory that top Fox Corporation executives implemented a “plan to rebuild the audience by embracing election fraud claims,” but limited that plan to a small subset of Fox News hosts, while simultaneously allowing other, more prominent hosts to openly cast doubt on those claims, strains credulity. The far more plausible explanation is that Fox News anchors expressed divergent views on the former President’s explosive claims of election fraud because, as Smartmatic itself acknowledges, “[a]nchors and producers have editorial control and decision-making authority over their individual programs.”

(*Id.* ¶152.) Accordingly, the Court should dismiss Smartmatic’s claims against Fox Corporation for the additional reason that Smartmatic has failed to adequately allege actual malice.

IV. Fox Corporation Is Entitled To An Award Of Costs And Attorney’s Fees Under The Anti-SLAPP Statute.

New York’s Anti-SLAPP law provides for a *mandatory* award of costs and attorney’s fees to successful defendants in cases where the action “was commenced or continued without a substantial basis in fact and law.” (*See* Civ. Rights Law §70-a.) Such an award is available upon adjudication of the instant motion in Fox Corporation’s favor pursuant to CPLR 3211(g). (*See Golan v Daily News, L.P.*, 77 Misc3d 258, 272-73 [Sup Ct NY County 2022], *aff’d*, -- NYS3d --, 2023 WL 2603164 [1st Dept Mar. 23, 2023].) Fox Corporation therefore respectfully requests that the Court enter an order dismissing the amended complaint as to Fox Corporation and directing Fox Corporation to file a fee application (including billing records and an affirmation of reasonableness) setting forth its fees in this action. (*See id.* at 273; *Gillespie v. Kling*, No. 158959/2021, 2022 WL 16699233, at *5 [Sup Ct NY County Nov. 2, 2022].)

CONCLUSION

For the foregoing reasons, this Court should grant the motion to dismiss under CPLR 3211 [a] [1], [a] [7] and [g], and Civil Rights Law §76-a, and direct Fox Corporation to file a fee application for an award of costs and attorney's fees to Fox Corporation.

Respectfully submitted,

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