

TABLE OF CONTENTS

I. ARGUMENT 1

 A. The Neutral Reporting and Fair Report Privileges Are Affirmative
 Defenses..... 1

 B. Fox’s Neutral Reporting Privilege Is Meritless and Must Be
 Dismissed..... 2

 1. New York Has Rejected the Neutral -Reporting Privilege..... 2

 2. Fox Constructs an Alternate Reality to Avoid *Hogan*..... 4

 3. Fox’s Statements Would Not Be Protected By The Neutral-
 Reporting Privilege. 5

 a. Smartmatic Is Not a Public Figure..... 6

 b. Giuliani And Powell Are Not Responsible,
 Prominent Organizations. 6

 c. Fox Solicited the Defamatory Statements..... 7

 d. Fox Was Not Disinterested and Neutral. 7

 C. The Fair Report Privilege Is Meritless in This Case and Must Be
 Dismissed..... 8

 1. Fox Cannot Satisfy the “Official Proceeding” Requirement
 for 22 Accused Publications. 9

 2. Fox Cannot Satisfy the Attribution Requirement. 10

 3. Fox Cannot Satisfy the “Substantially Accurate Report”
 Requirement. 13

II. CONCLUSION..... 14

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abakporo v. Sahara</i> , 2011 WL 4460547 [E.D.N.Y Sept. 26, 2011]	10
<i>Brian v. Richardson</i> , 87 N.Y.2d 46 [1995]	4, 5
<i>Cholowsky v. Civiletti</i> , 69 A.D.3d 110 [2d Dept 2009]	10
<i>Cianci v. New Times Publ'g Co.</i> , 639 F.2d 54 (2d Cir. 1980).....	5, 7
<i>Condit v. Dunne</i> , 317 F.Supp.2d 344 [S.D.N.Y. 2004].....	7
<i>Corporate Training Unltd. v. Nat'l Broad. Co.</i> , 868 F.Supp. 501 [E.D.N.Y. 1994]	12
<i>Croce v. New York Times</i> , 930 F.3d 787 (6th Cir. 2019)	5
<i>Dimond v. Time Warner, Inc.</i> , 119 A.D.3d 1331 [4th Dept 2014]	10
<i>Duci v. Daily Gazette Co.</i> , 102 A.D. 2d 940 [3d Dept 1984]	4, 5
<i>Easton v. Pub. Citizens, Inc.</i> , 1991 WL 280688 [S.D.N.Y. Dec. 26, 1991]	9
<i>Edwards v. National Audubon Society, Inc.</i> , 556 F.2d 113 [2d Cir. 1977].....	4, 6, 7
<i>Estes v. Texas</i> , 381 U.S. 532 [1965].....	8
<i>Fine v. ESPN, Inc.</i> , 11 F.Supp.3d 209 [N.D.N.Y. 2014].....	12
<i>Fridman v. BuzzFeed, Inc.</i> , 2018 WL 2100452 [N.Y. Sup. May 7, 2018]	3

<i>Greenberg v. Spitzer</i> , 155 A.D.3d 27 [2d Dept 2017]	1
<i>Gross v. N.Y. Times Co.</i> , 180 A.D.2d 308 [1st Dept 1992].....	3
<i>GS Plasticos Limitada v. Bureau Veritas</i> , 84 A.D.3d 518 [1st Dept 2011].....	4, 5
<i>In re Guardian of S.A.B.G.</i> , 47 Misc. 3d 812 [N.Y. Fam. Ct. 2015]	13
<i>Gubarev v. BuzzFeed, Inc.</i> , 2018 U.S. Dist. LEXIS 97246 [S.D. Fla. June 5, 2018]	3
<i>Gubarev v. BuzzFeed, Inc.</i> , 340 F.Supp.3d 1304 [S.D. Fla. 2019]	1
<i>Hogan v. Herald Co.</i> , 84 A.D.2d 470 [4th Dept 1982]	2, 3, 4
<i>Hogan v. Herald Co.</i> , 58 N.Y. 2d 630 [1982]	2, 3, 4
<i>Karedes v. Ackerly Grp., Inc.</i> , 423 F.3d 107 [2d Cir. 2005].....	13
<i>Kenny v. Cleary</i> , 47 A.D. 2d 531 [2d Dept 1975]	10
<i>Khalil v. Fox Corp.</i> , 630 F.Supp.3d 568 [S.D.N.Y. 2022].....	1, 6, 7, 12
<i>Kraus v. Globe Int’l, Inc.</i> , 251 A.D.2d 191 [1st Dept 1998].....	6
<i>Lasky v. Am. Broad. Cos.</i> , 631 F.Supp. 962 [S.D.N.Y. 1986].....	7
<i>Lawrence v. Riffle</i> , 62 A.D.2d 1093 [3d Dept 1978]	10
<i>Levin v. McPhee</i> , 917 F.Supp. 230 [S.D.N.Y. 1996].....	6
<i>Martin v. Daily News L.P.</i> , 121 A.D.3d 90 [1st Dept 2014].....	13

May v. Syracuse,
250 A.D. 155 [3d Dept 1937]10

McManus v. Doubleday & Co.,
513 F.Supp. 1383 [S.D.N.Y. 1981].....7

McNally v. Yarnall,
764 F.Supp. 853 [S.D.N.Y. 1991].....10

Page v. Oath Inc.,
270 A.3d 833 [Del. 2022]5

Russo v. Padovano,
84 A.D.2d 925 [4th Dept 1981]7

Sandals Resorts Int’l v. Google,
86 A.D.3d 32 [1st Dept 2011].....5

Smartmatic USA Corp. v. Fox Corp.,
2022 N.Y. Misc. LEXIS 1140 [N.Y. Sup. Ct. Mar. 8, 2022]2, 6

Sunshine Sportswear & Elecs. v. WSOC Television,
738 F.Supp. 1499 [D.S.C. 1989].....7

Thomas H. v. Paul B.,
18 N.Y.3d 580 [2012]4

US Dominion, Inc. v. Fox News Network, LLC,
2021 WL 5984265, [Del. Super. Ct. Dec. 16, 2021] *passim*

Weiner v. Doubleday & Co.,
74 N.Y.2d 586 [1989]3

Wenz v. Becker,
948 F.Supp. 319 [S.D.N.Y. 1996].....10, 12

Wexler v. Allegion (UK) Ltd.,
374 F.Supp.3d 302 [S.D.N.Y. 2019].....12

White v. Tarbell,
284 A.D.2d 888 [3d Dept 2001]6

Other Authorities

CPLR 3211.....1

Smartmatic moves this Court to dismiss Fox’s affirmative defenses to the extent it is using them to raise the neutral report and fair report privileges. Smartmatic has isolated these privileges for adjudication because they are dead in the water and need not await summary judgment. The neutral reporting privilege has been invalid in New York for decades. The fair report privilege is similarly meritless in this case. A comparison between the official proceedings that Fox claims it was reporting on and the reports themselves establishes that the privilege is unavailable.

Dismissing these defenses is not only appropriate under CPLR 3211(b) but in the best interests of the case. Fox has no entitlement to advance meritless defenses. If a defense fails as a matter of law, it must go. Briefing Fox’s neutral and fair report defenses at summary judgment would also waste resources. It would add to the issues the Court will have to resolve when the parties move summary judgment. Adjudicating the defenses now will streamline proceedings.

I. ARGUMENT

A. The Neutral Reporting and Fair Report Privileges Are Affirmative Defenses.

Fox makes the fanciful argument that the neutral and fair reporting privileges are “not [] affirmative defense[s] that Fox must plead and prove.” (Fox Opp. at 1, 9, 19 n. 6). Of course they are. Every court to hear Fox make this argument has rejected it because it is nonsense. *See US Dominion, Inc. v. Fox News Network, LLC*, 2021 WL 5984265, at *22 [Del. Super. Ct. Dec. 16, 2021] (treating the neutral report privilege and fair report privilege as “defenses” Fox must establish); *Khalil v. Fox Corp.*, 630 F.Supp.3d 568, 580-82 [S.D.N.Y. 2022] (same). Other courts agree. *See Gubarev v. BuzzFeed, Inc.*, 340 F.Supp.3d 1304, 1312 [S.D. Fla. 2019] (treating neutral reportage as an affirmative defense); *Greenberg v. Spitzer*, 155 A.D.3d 27, 42 [2d Dept 2017] (“The privilege afforded by Civil Rights Law § 74 is an affirmative defense to a claim of defamation.”). The New York Pattern Jury Instructions also make clear that privileges in a

defamation case are affirmative defenses. *See* N.Y. P.J.I. Civil 3:31 (containing the instruction for the “defense of fair and true report”).

B. Fox’s Neutral Reporting Privilege Is Meritless and Must Be Dismissed.

Fox concedes that the “ordinary rule” in New York is that a “republisher of an allegedly defamatory statement”—like Fox when it broadcasted Rudy Giuliani’s and Sidney Powell’s lies with the required culpability—“is as liable as the original speaker.” (Fox Opp. at 9). Indeed, the “ordinary rule” is black-letter law that this Court has already applied. *See Smartmatic USA Corp. v. Fox Corp.*, 2022 N.Y. Misc. LEXIS 1140, a *62 [Mar. 8, 2022] (rejecting Fox’s contention that it did not make any defamatory statements because it “allowed allegedly defamatory statements about [Smartmatic] to be repeated on its network,” and “one who repeats [a] defamatory statement is responsible for the resulting damages”).

Nevertheless, Fox pretends that the First Amendment includes a “neutral-reporting” privilege that “displaces” the well-established rule and allows the press to republish “newsworthy” lies with actual malice. (Fox Opp. at 9). Fox’s position is fantasy. The U.S. Supreme Court has not recognized a neutral-reporting privilege. The New York Court of Appeals has rejected it. Most other jurisdictions have declined to adopt the privilege, and no jurisdiction has endorsed Fox’s extreme version of it.

1. New York Has Rejected the Neutral -Reporting Privilege.

New York law forecloses any attempt by Fox to raise the neutral reporting privilege. *See Hogan v. Herald Co.*, 84 A.D.2d 470 [4th Dept 1982], *aff’d* 58 N.Y. 2d 630 [1982]. Fox attempts to escape *Hogan*, but it controls here and requires dismissal of Fox’s defense.

First, Fox attempts to distinguish *Hogan* by contending that it “did not address allegations made by others,” but Fox is incorrect. (Fox. Opp. at 13). *Hogan* stemmed from a newspaper article that “repeated a false claim that” the plaintiff, a local politician’s son, “had been arrested for

criminal mischief” as the politician was seeking re-election. *Id.* at 471–72. The defendant publisher, editor, and author asserted the neutral reporting doctrine as a defense, just as Fox is doing here. They argued that their article was “absolutely privileged as an objective report of newsworthy charges with proper attribution to sources.” *Id.* at 476. The Fourth Department disagreed and rejected the neutral reporting privilege, holding that it “does not apply in this department.” *Id.* at 479. The Court of Appeals affirmed. 58 N.Y.2d 630.

Second, Fox attempts to distort *Hogan*’s holding. (Fox Opp. at 13). It is a curious tactic, considering that the Court of Appeals recognized what *Hogan* held in *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 594 [1989]. In *Weiner*, the Court of Appeals cited *Hogan* as “reject[ing] [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.” *Id.* Based on this precedent, the First Department understands that the neutral reporting privilege is invalid. *See Gross v. N.Y. Times Co.*, 180 A.D.2d 308, 312 [1st Dept 1992] (“The 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 on other grounds*, 82 N.Y.2d 146.

Third, Fox minimizes the significance of *Hogan*. (Fox Opp. at 13). But *Hogan* cannot be so easily ignored as it has foreclosed neutral reporting as a defense against defamation for the last forty years. *See Gross*, 180 A.D.2d at 312; *Fridman v. BuzzFeed, Inc.*, 2018 WL 2100452, at *4–*5 (N.Y. Sup. May 7, 2018), *aff’d*, 172 A.D.3d 441 [1st Dept 2019]; *Dominion*, 2023 WL 2730567, at *37; *Gubarev v. BuzzFeed, Inc.*, 2018 U.S. Dist. LEXIS 97246, at *28 [S.D. Fla. June 5, 2018]. *Hogan* prohibits Fox from raising the neutral reporting doctrine to avoid liability in this case, and the Court should make that clear now.

2. Fox Constructs an Alternate Reality to Avoid *Hogan*.

Fox's efforts to talk its way out of *Hogan* read like a verse in Lewis Carroll's *Through the Looking-Glass*. Put on Fox's lenses, and cases stand for propositions they do not discuss, courts reverse precedent they never address, and Fox miraculously always has immunity "to report[] on newsworthy allegations of newsworthy individuals" *regardless of whether Fox knows the allegations are false*. (Fox Opp. at 1). It is the world as Fox wishes it were but not as it is. Back to reality...

None of the cases that Fox cites overrule *Hogan*. Nor do they expand the neutral reporting doctrine beyond the confines of *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 [2d Cir. 1977] as Fox portrays. Start with the case that Fox features most prominently, *Brian v. Richardson*, 87 N.Y.2d 46 (1995). It does not mention the neutral-reporting privilege or *Hogan*. Rather, *Brian* turned "on the proper application of the principles" that govern whether a "statement is one conveying opinion or fact." 87 N.Y.2d at 48. New York courts therefore cite *Brian* not as an "illustration" of the neutral-reporting privilege (Fox Opp. at 10), but of opinion law, and a limited one at that. *See Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584–586 & n.2 [2012]. As important, the Court of Appeals in *Brian* emphasized that attribution of a defamatory statement to a third party does not immunize its republication. 87 N.Y.2d at 52, 54. Thus, far from "illustrat[ing]" Fox's neutral-reporting argument, *Brian* refutes it.

Fox further misleads when it claims that "New York courts have applied *Brian*" and the "principle" that Fox extracts from it. (Fox Opp. at 11). No case that Fox cites applies *Brian* within the ballpark of neutral reporting.¹ Fox only cites two cases to back up its alternative reality: *GS*

¹ The only other New York state case that Fox cites, *Duci v. Daily Gazette Co.*, 102 A.D. 2d 940 [3d Dept 1984], did not address the neutral-reporting privilege. The *Duci* court found that a remark

Plasticos Limitada v. Bureau Veritas, 84 A.D.3d 518, 519 [1st Dept 2011] and *Sandals Resorts Int'l v. Google*, 86 A.D.3d 32, 43 [1st Dept 2011]. Neither involves the press nor discusses neutral reporting. Rather, both cite *Brian* for opinion law. See *GS Plasticos*, 84 A.D.3d at 519 (statements in a private letter were “nonactionable expressions of opinion”); *Sandals Resorts*, 86 A.D. 3d at 38-39 (“assertions of opinion” are not actionable).

Nor have “courts across the country” granted the immunity that Fox pretends exists in New York. As a threshold flaw, none of the cases that Fox cites outside of New York are precedential. And Fox misrepresents them too. For example, *Page v. Oath Inc.*, 270 A.3d 833 (Del. 2022) says nothing about the neutral report privilege. Rather, the court dismissed a defamation claim after finding that the article at issue was substantially true under Delaware law. *Id.* at 844-846. Fox similarly misdescribes *Croce v. New York Times*, 930 F.3d 787 (6th Cir. 2019) as a neutral-reporting decision. There, the court found that an article was not defamatory under Ohio law because it was “a standard piece of investigative journalism” that presented both “sides of [a] controversy” and used “appropriate qualifying language.” *Id.* at 795. The court also acknowledged that the Ohio Supreme Court had rejected the neutral-reportage doctrine. *Id.* at 796.

3. Fox’s Statements Would Not Be Protected By The Neutral-Reporting Privilege.

Even if New York recognized a neutral-reporting privilege, it would not apply because Fox cannot satisfy its requirements. The Second Circuit—the court that created the privilege—has confirmed it is “limited in scope.” *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 67–68 (2d Cir. 1980). The privilege applies only if: (1) the plaintiff is a public figure; (2) the speaker making the accusations was a responsible, prominent organization; (3) the defendant did not solicit the

by a lifeguard about a town mayor was “not [susceptible] of [] defamatory meaning,” after accounting for the surrounding “circumstances.” *Id.* at 941.

defamatory statements or create the “newsworthy” event; and (4) the defendant did not espouse or concur in the statements. *Id.* at 68–69; *see also Smartmatic*, 2022 N.Y. Misc. LEXIS 1140, at *39 n. 13 (stating the privilege’s requirements); 1 Law of Defamation § 4:99 (2d Ed.) (identifying “four principal requirements” a party must satisfy “to receive the benefit of the neutral reportage privilege” where it is recognized). Here, Fox has no chance of satisfying these requirements.

a. Smartmatic Is Not a Public Figure.

Smartmatic does not qualify as a “public figure,” as required under *Edwards*. 556 F.2d at 120; *Kraus v. Globe Int’l, Inc.*, 251 A.D.2d 191, 192 [1st Dept 1998]. While Fox contests whether *Edwards* requires the plaintiff to be a public figure (Fox Opp. at 16), Fox ignored whether Smartmatic qualifies as one. Fox avoids discussing this requirement because the First Department has already “decline[d] to find that [Smartmatic] should be deemed limited purpose public figures.” 213 A.D.3d 512, 514 [2023]. Nothing in Smartmatic’s or Fox’s pleading shows that, before Fox’s disinformation campaign, Smartmatic had achieved “pervasive fame or notoriety” justifying treatment as a public figure. *White v. Tarbell*, 284 A.D.2d 888, 889 [3d Dept 2001]. Even if *Edwards* was good law, it is not met here because Smartmatic is no public figure. *See Khalil*, 630 F.Supp.3d at 582.

b. Giuliani And Powell Are Not Responsible, Prominent Organizations.

The *Edwards* privilege requires that the speakers of the defamatory statements be “responsible, prominent organizations.” 556 F.2d at 120. Not every speaker meets this requirement. *See, e.g., Levin v. McPhee*, 917 F.Supp. 230, 239 [S.D.N.Y. 1996] (rejecting *Edwards* privilege where the speakers were “not all ‘responsible, prominent organization[s]’”). The responsible, prominent organization in *Edwards* was the National Audubon Society, speaking about environmental issues. *Edwards*, 556 F.2d at 120. Another example is the Better Business

Bureau, which was deemed a responsible, prominent organization when speaking about deceptive merchandising practices. *Sunshine Sportswear & Elecs. v. WSOC Television*, 738 F.Supp. 1499, 1510 n.7 [D.S.C. 1989]. Giuliani and Powell lacked those qualities of “independen[ce]” and “impartiality” because they were purporting to serve as legal advocates. *See Khalil*, 630 F.Supp.3d at 581. No precedent holds that being a lawyer transforms an individual into a “responsible, prominent organization.”

c. Fox Solicited the Defamatory Statements.

The *Edwards* privilege is inapplicable where, as here, the publisher-defendant solicits the defamatory statement or participates in creating the defamatory content. *See Lasky v. Am. Broad. Cos.*, 631 F.Supp. 962, 971 [S.D.N.Y. 1986]; *McManus v. Doubleday & Co.*, 513 F.Supp. 1383, 1391 [S.D.N.Y. 1981]. Fox cannot satisfy this requirement because it solicited Giuliani’s and Powell’s defamatory statements and participated in creating the “controversy” about Smartmatic. Fox did not merely show up at a press conference and report what Giuliani and Powell said. Rather, Fox repeatedly invited them onto its shows, asked questions to solicit new defamatory statements by Giuliani and Powell, and had its hosts make their own defamatory statements.

d. Fox Was Not Disinterested and Neutral.

The “disinterested” neutrality that was so important in *Edwards*—and which gives the “neutral” reporting privilege its name—is absent here. If a defendant “did not simply report the charges, but espoused or concurred in them,” courts have refused to apply the privilege. *Cianci*, 639 F.2d at 69; *Condit v. Dunne*, 317 F.Supp.2d 344, 371 [S.D.N.Y. 2004]; *Russo v. Padovano*, 84 A.D.2d 925, 926 [4th Dept 1981]. No one could watch the accused publications and believe that Fox gave “fair and dispassionate reporting.” *Edwards*, 556 F.2d at 120.² The transcripts alone

² Indeed, the only example Fox provides of a qualifying broadcast is not an accused publication. (See Fox Opp. at 18, Ex. L at 6). Fox cites an interview that Jeanine Pirro conducted of Lin Wood,

reveal that the Fox anchors encouraged, endorsed, and bolstered the defamatory statements by Giuliani and Powell. (Am. Compl. ¶¶97–131.) The transcripts also reveal, as the *Dominion* court found, that Fox “fail[ed] to reveal extensive contradicting evidence from the public sphere....” 293 A.3d at 1058. Fox does not deny that that evidence existed publicly or that the accused broadcasts omitted it. Fox cannot rely on the “neutral-reporting” privilege when it was in no way neutral about the claims Giuliani and Powell were making.

C. The Fair Report Privilege Is Meritless in This Case and Must Be Dismissed.

Fox’s attempt to protect its publications by invoking the fair report privilege is more fiction and historical revisionism. Fox *now* pretends that some its publications were about lawsuits filed by Lin Wood in Georgia on November 17 (*Wood v. Raffensperger*) and Sidney Powell on November 25 (*Pearson v. Kemp*). (Fox. Opp. at 22 (citing Mintz Aff. Ex. C ¶5)). Specifically, Fox pretends that its publications were about an “affidavit” filed as an exhibit in those cases. (*Id.*) But none of the publications mention or name either of these lawsuits, and none tell the viewers/readers that Fox is summarizing filings in those lawsuits. More fundamentally, Fox lied to its audience when discussing an “affidavit” *because there was no affidavit*. The document Fox claims to have been discussing in its publications is an anonymous, unsigned piece of paper. It is not an affidavit.

None of the accused publications satisfies the fair reporting privilege.³ Under N.Y. Civ. Rights Law § 74, an otherwise defamatory publication is protected if: (1) an official proceeding

in a subsequent segment after the defamatory opening segment. (*See* Am. Compl. Ex. 28, NYSCEF Doc. No. 1228).

³ Fox also sources the fair report privilege to the First Amendment, but the U.S. Supreme Court has never recognized a fair-report privilege. It derives from common law. *See* 2 Law of Defamation § 8:66. The case that Fox cites, *Estes v. Texas*, 381 U.S. 532 [1965], does not mention a fair report privilege under the First Amendment.

existed; (2) an ordinary viewer or reader would understand the publication to concern that proceeding; and (3) the publication was a “substantially accurate” report of that proceeding. *See Dominion v. Fox News*, 2021 WL 5984265, at *25-*26 [Del. Super. Ct. Dec. 16, 2021] (citing *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114-15 [2d Dept 2009]). The defense has no relevance here where Fox *now* claims that it was reporting on an “affidavit” that was not an “affidavit” in “official proceedings” that were never mentioned during the accused publications.

It is time to end Fox’s charade. This Court should dismiss Fox’s fair report privilege by comparing the accused publications (see Appendix)⁴ and the court filings that Fox *now* pretends it was reporting on.⁵ *See Easton v. Pub. Citizens, Inc.*, 1991 WL 280688, at *2 [S.D.N.Y. Dec. 26, 1991] (referring to these materials as sufficient to decide the fair report privilege as a matter of law); *Dominion*, 293 A.3d at 1060 (dismissing Fox’s fair reporting defense after comparing the proceedings that Fox claimed it was reporting on with the broadcasts); 2 Law of Defamation § 8:19 (2d ed.) (“rulings on absolute privilege are questions of law”). Fox cannot satisfy any of the requirements for the defense.

1. Fox Cannot Satisfy the “Official Proceeding” Requirement for 22 Accused Publications.

Smartmatic’s Amended Complaint is based on 43 publications and republications made by Fox between November 12 and December 10, 2020. (Appendix A; Am. Comp. ¶ 134.) The earliest “official proceeding” that Fox now claims that it was covering was an affidavit that Lin Wood filed *after* Fox aired *Mornings with Maria* on November 17, 2020. (Fox Opp. at 20 (citing Mintz Aff. Ex. B)). As a result, the fair report privilege is unavailable for Defamatory Publications

⁴ Smartmatic is providing an Appendix of Defamatory Publications for the Court’s convenience. It replicates Paragraph 134 of Smartmatic’s Amended Complaint, which includes the transcript and video of each accused program.

⁵ *See* Affirmation of Fox’s counsel, Steven Mintz

Nos. 1 to 22. It is undisputed that no official proceeding about Smartmatic existed when Fox issued those publications. *See Lawrence v. Riffle*, 62 A.D.2d 1093, 1094 [3d Dept 1978]; *Kenny v. Cleary*, 47 A.D. 2d 531, 532 [2d Dept 1975]; *May v. Syracuse*, 250 A.D. 155, 158 [3d Dept 1937]; *Abakporo v. Sahara*, 2011 WL 4460547, at *8-*9 [E.D.N.Y. Sept. 26, 2011].

Fox tries to protect publications that took place before the Lin Wood filing on November 17 by arguing that “§ 74 protects reporting on *both* ‘pending *and* anticipated proceedings.” (Fox Opp. at 19). That is not true. None of the cases Fox cites broaden the privilege to “anticipated” proceedings. The plain language of § 74 refutes the notion that the fair reporting privilege applies to false allegations that make their way into a lawsuit filed in the future, as the Delaware Superior Court found. *See Dominion*, 2021 WL 5984265, at *25 (“New York decisions teach that a report cannot be ‘of’ a proceeding unless the subject proceeding has been initiated and is pending or ongoing.”). Indeed, Fox’s own cases contradict its interpretation of § 74. *See Dimond v. Time Warner, Inc.*, 119 A.D.3d 1331, 1333 [4th Dept 2014] (applying § 74 to a broadcast because it “was a substantially accurate report” of “*pending* judicial proceedings”); *McNally v. Yarnall*, 764 F.Supp. 853, 856 [S.D.N.Y. 1991] (same to an article about “the claims and defenses of the parties” in a pending lawsuit); *Wenz v. Becker*, 948 F.Supp. 319, 323 [S.D.N.Y. 1996] (confirming that §74 “is not intended to protect statements which, at some subsequent time, may become the topic of a lawsuit”).

2. Fox Cannot Satisfy the Attribution Requirement.

The fair-report privilege requires the publisher to attribute its false statements to an official proceeding so that ordinary viewers can understand that the defendant is merely providing a summary of what happened during the official proceeding. *Cholowsky*, 69 A.D.3d at 114-15 (“ordinary” viewer must be able to determine that defendant is reporting an official proceeding); 2 Law of Defamation §8:67.50 (“To be covered by the fair report privilege, the publisher must

attribute the material to the official proceeding that is being reported upon. This requirement of attribution aligns with the function and rationale of the fair report privilege, grounded in the notion that the ‘fair reporter’ is functioning as the neutral eyes and ears for the public[.]”).

Here, the attribution requirement sinks Fox. Fox does not attempt to claim that it satisfied the attribution requirement for most of the Defamatory Publications. As noted above, the first filing that Fox identifies was filed after *Mornings with Maria* aired on November 17. (Fox Br. at 12 n.2.) Before that, viewers could not have been told—and could not have understood—that the statements about Smartmatic were from legal filings. Accordingly, Fox cannot even theoretically satisfy the attribution requirement for Defamatory Publications Nos. 1 to 22.

Additionally, Fox does not address or try to explain how most of the Defamatory Publications that took place after November 17 attributed the defamatory statements to any official proceeding. Fox discusses hardly any of the Defamatory Publications in its opposition. (*See* Fox Opp. at 19-23.) Fox *only* claims that five of the Defamatory Publications – Nos. 23, 25, 28, 33, 38 – concerned an official proceeding. But none of them attributed a defamatory statement to the official proceeding that was purportedly being reported upon. These omissions reveal that the fair reporting privilege is a lawyer’s ruse. Fox never intended its publications to be fair reports on official proceedings.

Fox first refers to the November 18 and 19 broadcasts of *Lou Dobbs Tonight*. (*See* Defamatory Publications Nos. 23 and 25). Neither attributed the defamatory accusations that Fox reported about Smartmatic to the affidavit filed in *Wood*. (Fox Opp. at 20-21 (citing Mintz Aff. Exs. K, X)). Instead, Dobbs characterized the affidavit as “one of the affidavits that has been *given to us* by an unidentified whistleblower[.]” (Fox Ex. X at 5; Fox Ex. K at 2). Dobbs also weaved the affidavit into a broader series of defamatory statements, precluding viewers from determining

whether and to what extent he was reporting an official proceeding. These deficiencies bar the fair-report privilege. *Wexler v. Allegion (UK) Ltd.*, 374 F.Supp.3d 302, 313-14 [S.D.N.Y. 2019] (rejecting privilege where “it is equally unclear whether [defendant’s] statements about the broken promise were reporting on the allegations in his lawsuit or making an independent accusation”); *Corporate Training Unltd. v. Nat’l Broad. Co.*, 868 F.Supp. 501, 509 [E.D.N.Y. 1994]. *Wenz v. Becker*, 948 F.Supp. 319, 323–24 [S.D.N.Y. 1996].

Fox next contends that Pirro and Bartiromo “referenced the same affidavit” from *Wood* during their shows on November 21 (Defamatory Publication No. 28) and November 22 (Defamatory Publication No. 33), respectively. (Fox Opp. at 21 (citing Mintz Aff. Exs. L, S)). But the transcripts do not support Fox. Pirro never attributed the accusations she repeated about Smartmatic to the affidavit in *Wood*. To the contrary, Pirro referred to “affidavits” that “*the President’s lawyers offered.*” Ex. L at 2. Lin Wood was not “the President’s lawyer.” Pirro gave no basis to infer that she was linking her allegations to the *Wood* affidavit. As for Bartiromo, she said nothing about any lawsuit on November 22. Bartiromo simply repeated unfounded allegations. Because her statements focused on “underlying events, rather than an official proceeding relating to those events,” her November 22 broadcast is ineligible under § 74. *Fine v. ESPN, Inc.*, 11 F.Supp.3d 209, 217 [N.D.N.Y. 2014].

The final broadcast that Fox cites is *Lou Dobbs Tonight* on December 10 (Defamatory Publication No. 38). (Opp. at 22, Mintz Aff. Ex. N at 4). During that show, Dobbs interviewed Powell, who alleged that Smartmatic participated in a “massive cyber Pearl Harbor” against the 2020 election. (*Id.*) Neither Dobbs nor Powell attributed a defamatory statement from that broadcast to an official proceeding. (*Id.*) No ordinary viewer could have understood that Fox was pulling the defamatory statements from unidentified official proceedings. See *Khalil*, 630

F.Supp.3d at 580–81 (rejecting Fox’s assertion of fair reporting defense to December 10 broadcast of *Lou Dobbs Tonight* because “at no point did Dobbs or Powell attribute the statements about Khalil to an official investigation or a judicial proceeding”). The fair reporting privilege cannot protect Fox because the publications fail to satisfy the attribution requirement.

3. Fox Cannot Satisfy the “Substantially Accurate Report” Requirement.

The fair-report privilege requires the publication to “provide[] substantially accurate reporting.” *Martin v. Daily News L.P.*, 121 A.D.3d 90, 101 [1st Dept 2014]. A report is “substantially accurate” if “it does not produce a different effect on a reader than would a report containing the precise truth....” *Karedes v. Ackerly Grp., Inc.*, 423 F.3d 107, 119 [2d Cir. 2005]. “Section 74 does not afford protection if the specific statements at issue, considered in their context, ‘suggest[] more serious conduct than that actually suggested in the official proceeding.’” *Id.* Courts refuse to apply the privilege when the defamatory statements are not “substantially accurate” accounts of statements made in an official proceeding. *See Smartmatic Mot.* at 19-20.

Here, Fox has failed to explain how any of the defamatory publications were substantially accurate accounts of an official proceeding, thereby conceding they were not. If Fox truly believed the defense applied, if Fox intended the publications to be about the lawsuits, the opposition would have connected each defamatory statement in every defamatory publication to a statement made in the official proceeding. Fox did not take that necessary step in the opposition because the defense is an after-the-fact excuse. It is historical revisionism to claim that Fox was providing its audience with a substantially accurate account of the *Wood* and *Pearson* lawsuits.

Indeed, the most obvious lie peddled by Fox about the “affidavit” that it now seeks to invoke for protection was telling its audience that there was an “affidavit.” An affidavit is a sworn statement. *In re Guardian of S.A.B.G.*, 47 Misc. 3d 812, 814 [N.Y. Fam. Ct. 2015]. The document that Fox promoted as an “affidavit” was no affidavit. It is an anonymous piece of paper. There is

no name or certification. It could have been written by Lin Wood, Sidney Powell, or Mickey Mouse; and, more importantly, it was not signed by anyone. Fox telling its audience that there was an affidavit was not “substantially accurate” in and of itself. It was just another lie.

II. CONCLUSION

Fox’s neutral reporting and fair reporting privileges are without merit as a matter of law. To the extent Fox is asserting them as affirmative defenses, they must be dismissed.

Dated: January 16, 2024

Respectfully submitted,

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



By: _____

J. Erik Connolly (admitted *pro hac vice*)
Nicole E. Wrigley (admitted *pro hac vice*)
Lee B. Muench (admitted *pro hac vice*)
Benesch, Friedlander, Coplan & Aronoff LLP
71 South Wacker Drive, Suite 1600
Chicago, Illinois 60606
Telephone: 312.212.4949
Email: econnolly@beneschlaw.com
Email: nwrigley@beneschlaw.com
Email: lmuench@beneschlaw.com

Edward C. Wipper
Benesch, Friedlander, Coplan & Aronoff LLP
1155 Avenue of the Americas, 26th Floor
New York, New York 10036
Telephone: 646.593.7050
Email: ewipper@beneschlaw.com

Attorneys for the Plaintiffs

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 4,186 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.

Appendix of Defamatory Publications

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
1	<i>Lou Dobbs Tonight</i> , November 12, 2020	Lou Dobbs and Rudolph Giuliani appear on <i>Lou Dobbs Tonight</i> discussing Smartmatic's role in election fraud	Paragraph 134(a); Exhibit 1
2	Lou Dobbs Tweet, November 14, 2020	Mr. Dobbs tweets: "Read all about Dominion and Smartmatic voting companies and you'll soon understand how pervasive this Democrat electoral fraud is, and why there's no way in the world the 2020 Presidential election was either free or fair. #MAGA @realDonaldTrump #AmericaFirst #Dobbs"	Paragraph 134(b); Exhibit 2
3	<i>Justice with Judge Jeanine</i> , November 14, 2020	Ms. Pirro and Ms. Powell appear on <i>Justice with Judge Jeanine</i> discussing Smartmatic's role in a huge criminal conspiracy.	Paragraph 134(c); Exhibit 3
4	Fox News Website, November 14, 2020	Fox News posts video and transcript of <i>Justice with Judge Jeanine</i> on its website discussing Smartmatic's role in a huge criminal conspiracy.	Paragraph 134(d); Exhibit 4
5	<i>Sunday Morning Futures with Maria Bartiromo</i> , November 15, 2020	Ms. Bartiromo, Mr. Giuliani and Ms. Powell appear on <i>Sunday Morning Futures with Maria Bartiromo</i> discussing Smartmatic's role in election fraud.	Paragraph 134(e); Exhibit 5

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
6	<i>Sunday Morning Futures with Maria Bartiromo</i> , November 15, 2020	Ms. Bartiromo and Representative Jim Jordan appear on <i>Sunday Morning Futures with Maria Bartiromo</i> discussing Smartmatic's role in manipulating votes.	Paragraph 134(f); Exhibit 6
7	Fox News Website, November 15, 2020	Fox News posts video of <i>Sunday Morning Futures with Maria Bartiromo</i> to its website with caption: "Giuliani: Trump is contesting the election 'vigorously' in the courts."	Paragraph 134(g); Exhibit 7
8	Twitter, @MariaBartiromo, November 15, 2020	Ms. Bartiromo posts video of <i>Sunday Morning Futures with Maria Bartiromo</i> using Twitter with caption: "Giuliani: Trump is contesting the election 'vigorously' in the courts."	Paragraph 134(h); Exhibit 8
9	Twitter, @MariaBartiromo, November 15, 2020	Ms. Bartiromo posts video of <i>Sunday Morning Futures with Maria Bartiromo</i> using Twitter with caption: "Why doesn't Biden camp want to know truth about voting irregularities?"	Paragraph 134(i); Exhibit 9
10	Twitter, @MariaBartiromo, November 15, 2020	Ms. Bartiromo posts video of <i>Sunday Morning Futures with Maria Bartiromo</i> using Twitter with caption: "Attorney Powell on election legal challenge that remain active in several states."	Paragraph 134(j); Exhibit 10

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
11	Twitter, @MariaBartiro, November 15, 2020	Ms. Bartiromo tweets: “#BreakingNews the show will repeat @FoxBusiness 6pm et today” and includes tweet from BlueSkyReport that states: “Outrageous: Peter Neffenger is on the Board of Smartmatic and is on Biden’s transition team. @MariaBartiro w/@SidneyPowell1 exposing massive Foreign Election Fraud.”	Paragraph 134(k); Exhibit 11
12	Fox News Website, November 15, 2020	Fox News posts video and transcript of <i>Sunday Morning Futures with Maria Bartiromo</i> to its website with caption: “Why doesn’t Biden camp want to know the truth about voting irregularities?”	Paragraph 134(l); Exhibit 12
13	Twitter, @MariaBartiro, November 16, 2020	Ms. Bartiromo posts video of <i>Sunday Morning Futures with Maria Bartiromo</i> using Twitter with caption: “Attorney for President Trump explains strategy for election lawsuits”	Paragraph 134(m); Exhibit 13
14	<i>Lou Dobbs Tonight</i> , November 16, 2020	Mr. Dobbs and Republican National Committee Chair Ronna McDaniel appear on <i>Lou Dobbs Tonight</i> discussing Smartmatic’s role in manipulating results of election.	Paragraph 134(n); Exhibit 14
15	<i>Lou Dobbs Tonight</i> , November 16, 2020	Mr. Dobbs and Ms. Powell appear on <i>Lou Dobbs Tonight</i> discussing Smartmatic’s role in massive corruption of elections.	Paragraph 134(o); Exhibit 15

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
16	Twitter, @LouDobbs, November 16, 2020	Mr. Dobbs tweets: “There’s never been a national election with this many widespread irregularities, anomalies, screw ups, disruption and plain cheating in American history! We must investigate and fix it all if we’re to remain a constitutional Republic.” and includes a tweet from Donald J. Trump.	Paragraph 134(p); Exhibit 16
17	Twitter, @IngramAngle, November 16, 2020	Fox News anchor Laura Ingram posts video of <i>Sunday Morning Futures with Maria Bartiromo</i> using Twitter with caption: “Sidney Powell says that ‘the evidence on use of ‘Dominion System’ is coming in so fast she ‘can’t even process it all.’”	Paragraph 134(q); Exhibit 17
18	Twitter, @LouDobbs, November 16, 2020	Mr. Dobbs posts video of <i>Lou Dobbs Tonight</i> 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.”	Paragraph 134(r); Exhibit 18
19	Facebook, Maria Bartiromo, November 16, 2020	Ms. Bartiromo post video of <i>Sunday Morning Futures with Maria Bartiromo</i> using Facebook with caption: “Attorney for President Trump explains the strategy for election lawsuits.”	Paragraph 134(s); Exhibit 19
20	<i>Mornings with Maria</i> , November 17, 2020	Ms. Bartiromo and Mr. Giuliani appear on <i>Mornings with Maria</i> discussing Smartmatic’s role in horrendous fraud.	Paragraph 134(t); Exhibit 20

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
21	Twitter, @IngrahamAngle, November 17, 2020	Fox News anchor Laura Ingraham retweets post by Sara A. Carter captioned: "Trump's attorneys battle for 'legitimate votes' as concern mounts over Dominion Voting Systems & Smartmatic."	Paragraph 134(u); Exhibit 21
22	Fox News Website, November 17, 2020	Fox News posts video of <i>Mornings with Maria</i> to its website discussing Smartmatic's role in horrendous fraud.	Paragraph 134(v); Exhibit 22
23	<i>Lou Dobbs Tonight</i> , November 18, 2020	Mr. Dobbs and Mr. Giuliani appear on <i>Lou Dobbs Tonight</i> discussing Smartmatic's role in fixing elections.	Paragraph 134(w); Exhibit 23
24	Twitter, @LouDobbs, November 18, 2020	Mr. Dobbs posts video of <i>Lou Dobbs Tonight</i> using Twitter with caption: "Foreign Election Involvement: @RudyGiuliani says votes in 28 states were sent to Germany and Spain to be counted by Smartmatic."	Paragraph 134(x); Exhibit 24
25	<i>Lou Dobbs Tonight</i> , November 19, 2020	Mr. Dobbs and Ms. Powell appear on <i>Lou Dobbs Tonight</i> discussing Smartmatic's software being used to change election results.	Paragraph 134(y); Exhibit 25
26	Fox News Website, November 19, 2020	Fox News posts video and transcript of <i>Hannity</i> discussing broken election system.	Paragraph 134(z); Exhibit 26

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
27	Twitter, @LouDobbs, November 19, 2020	Mr. Dobbs posts video of <i>Lou Dobbs Tonight</i> 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	Paragraph 134(aa); Exhibit 27
28	<i>Justice with Judge Jeanine</i> , November 21, 2020	Ms. Pirro appears on <i>Justice with Judge Jeanine</i> discussing corruption in “Democrat strongholds” during election.	Paragraph 134(bb); Exhibit 28
29	Fox News Website, November 21, 2020	Fox News posts video and transcript of <i>Justice with Judge Jeanine</i> to its website with caption: “Questions linger over the Left’s plot against Donald Trump.”	Paragraph 134(cc); Exhibit 29
30	<i>Watters’ World</i> , November 21, 2020	Mr. Dobbs appears on <i>Watters’ World</i> discussing a cyberattack by voting machines and software that were used to “steal” an election.	Paragraph 134(dd); Exhibit 30
31	Twitter, @JudgeJeanine, November 22, 2020	Ms. Pirro posts video of <i>Justice with Judge Jeanine</i> 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	Paragraph 134(ee); Exhibit 31
32	Fox News Website, November 22, 2020	Fox News posts video of <i>Justice with Judge Jeanine</i> to its website with caption: “Judge Jeanine: Preserving U.S. election integrity.”	Paragraph 134(ff); Exhibit 32

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
33	<i>Sunday Morning Futures with Maria Bartiromo</i> , November 22, 2020	Ms. Bartiromo and Alan Dershowitz appear on <i>Sunday Morning Futures with Maria Bartiromo</i> discussing porous security of Smartmatic's software.	Paragraph 134(gg); Exhibit 33
34	Fox News Website, November 22, 2020	Fox News posts video and transcript of <i>Sunday Morning Futures with Maria Bartiromo</i> to its website with caption: "Dershowitz: 'Legal theory' supports election lawsuits but evidence is crucial."	Paragraph 134(hh); Exhibit 34
35	Facebook, Jeanine Pirro, November 24, 2020	Ms. Pirro posts video of <i>Justice with Judge Jeanine</i> discussing corruption in "Democrat strongholds" during election using Facebook.	Paragraph 134(ii); Exhibit 35
36	<i>Lou Dobbs Tonight</i> , November 26, 2020	Mr. Dobbs appears on <i>Lou Dobbs Tonight</i> discussing issues with Smartmatic's software.	Paragraph 134(jj); Exhibit 36
37	Fox News Website, November 26, 2020	Fox News posts video and article titled: "Attorney Sidney Powell files lawsuit seeking Georgia election results be decertified, awarded to Trump."	Paragraph 134(kk); Exhibit 37
38	<i>Lou Dobbs Tonight</i> , December 10, 2020	Mr. Dobbs and Ms. Powell appear on <i>Lou Dobbs Tonight</i> discussing Smartmatic's role in rigging the election.	Paragraph 134(ll); Exhibits 38 & 39

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
39	Twitter, @LouDobbs, December 10, 2020	Mr. Dobbs tweets: "The 2020 Election is a cyber Pearl Harbor: The leftwing establishment have aligned their forces to overthrow t he United States government" #MAGA #AmericaFirst #Dobbs He includes a statement that reads, in part: "These four people [including Smartmatic's CEO] and their collaborators executed an electoral 9-11 against the United States with the cooperation and collusion of the media and Democrat Party and China."	Paragraph 134(mm); Exhibit 40
40	Twitter, @LouDobbs, December 10, 2020	Mr. Dobbs posts video of <i>Lou Dobbs Tonight</i> 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	Paragraph 134(nn); Exhibit 41
41	Twitter, @LouDobbs, December 10, 2020	Mr. Dobbs posts video of <i>Lou Dobbs Tonight</i> 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	Paragraph 134(oo); Exhibit 42

Publication No.	Publication	Description	Amended Complaint Citation and Exhibit
42	Facebook, Lou Dobbs, December 10, 2020	Mr. Dobbs posts video of <i>Lou Dobbs Tonight</i> 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	Paragraph 134(pp); Exhibit 43
43	Facebook, Lou Dobbs, December 10, 2020	Mr. Dobbs posts video of <i>Lou Dobbs Tonight</i> 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	Paragraph 134(qq); Exhibit 44