

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

US DOMINION, INC., DOMINION)
VOTING SYSTEMS, INC., and)
DOMINION VOTING SYSTEMS)
CORPORATION,) C.A. No. N21C-03-257 EMD
)
Plaintiffs,) CONSOLIDATED
v.)
) **REDACTED PUBLIC VERSION**
FOX NEWS NETWORK, LLC,)
)
Defendant.)

US DOMINION, INC., DOMINION)
VOTING SYSTEMS, INC., and)
DOMINION VOTING SYSTEMS)
CORPORATION,) C.A. No. N21C-11-082 EMD
)
Plaintiffs,)
v.)
)
FOX CORPORATION,)
)
Defendant.)

**DEFENDANT FOX NEWS NETWORK, LLC'S BRIEF IN SUPPORT OF
ITS RULE 56 MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

In the wake of the 2020 presidential election, one thing was undeniably newsworthy: whether then-President Trump's unconventional efforts to challenge the election results in an effort to stay in office would succeed. After Fox News called Arizona and the media declared the election for President Biden, then-President Trump called foul and promised that he and his legal team would back his claims of widespread voting fraud with litigation around the country, which they promptly did. Among other things, the President and his legal team alleged that voting-technology companies, including Dominion, were implicated in vote manipulation, and that this manipulation was so pervasive that the election results could not stand. While many people doubted those claims, no one doubted their newsworthiness. An attempt by a sitting President to challenge election results and reverse the outcome of his re-election bid is as newsworthy as it gets. Media outlets around the country and the world thus provided extensive coverage of and commentary on the President's allegations and lawsuits.

In its coverage, Fox News fulfilled its commitment to inform fully and comment fairly. Some hosts viewed the President's claims skeptically; others viewed them hopefully; all recognized them as profoundly newsworthy. As part of that coverage, several hosts offered members of the President's legal team the opportunity to explain their allegations and whether they would be able to muster enough evidence

quickly enough to prove them in court before the mid-December deadline for certifying electoral votes. Sometimes the President’s advocates accepted those invitations; sometimes they declined. As the story unfolded, and Dominion denied many of the allegations, Fox News covered those denials too, including by reporting Dominion’s position, giving Dominion the opportunity to tell its side, and soliciting the views of disinterested third parties on the allegations and their likelihood of making a difference in election outcomes, sometimes in a debate-like format. Fox News also aired the first post-election interview with the President himself, an event so self-evidently newsworthy that countless media reported it and Dominion dares not challenge it, even though that interview let the American people hear first-hand the President’s pointed election-fraud claims directed at Dominion by name. In short, Fox News did exactly what the First Amendment protects: It ensured that the public had access to newsmakers and newsworthy information that would help foster “uninhibited, robust, and wide-open” debate on rapidly developing events of unparalleled importance. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Dominion filed this lawsuit to make Fox News pay for participating in that vital debate at a price that would stifle similar debates going forward. Making an unsupportable but publicity-generating and speech-chilling claim for \$1.6 billion in damages, Dominion accused Fox News of defamation. But allegations and facts are two different things, and the costly (and chilling) discovery that Fox News has been

forced to endure for more than a year confirms what it has said from the beginning: Dominion's lawsuit is an assault on the First Amendment and the free press. The record shows that Dominion's central allegations are factually unfounded, legally unsound, or both.

First, now that the case has reached summary judgment, the Court must conduct a statement-by-statement examination to determine whether each statement was defamatory in the context in which it was made. That examination confirms that the statements Dominion challenges are not actionable defamation because Fox News' coverage and commentary are not only not defamatory, but also protected by the First Amendment and New York doctrines emanating from it. The First Amendment protects the right of the press to cover and comment on allegations that are inherently newsworthy because of who made them or the context in which they were made. As long as the press makes clear that the allegations are just allegations and not demonstrable facts, both constitutional and common-law principles protect the right of the press to allow the President's lawyers to explain their factual allegations and legal theories, as well as the right of the press to express opinions about those claims. The allegations at issue here were unquestionably newsworthy because of who leveled them, where, when, and how they were leveled, and what they concerned. And Fox News hosts made clear at every turn that they were just allegations, and that they would need to be proven in court in very short order to have any impact on

the election. Seeking to impose \$1.6 billion dollars in liability for that coverage goes beyond a chilling effect; it poses a direct threat to the freedom of the press on which our democracy depends.

Second, Dominion has come nowhere close to producing the “clear and convincing” evidence that the relevant individuals at Fox News made or published any challenged statement with actual malice. Indeed, discovery confirms the opposite. When the President and his lawyers made unprecedented claims of electoral fraud and insisted that they could produce enough evidence to overturn the election before the mid-December deadline for certifying electoral votes, Fox News hosts covered the story. They did not take the President’s claims at face value, but asked pointed questions about whether they would be able to produce sufficient and timely evidence to back the allegations in court. They were assured that the claims would be backed by evidence and tested in court in short order, which gave them reasons to believe the claims were not fabrications. They did not take Dominion’s denials or the statements of government officials and other members of the media at face value either. Instead, they reported them for what they were: newsworthy denials of newsworthy allegations, with the underlying truth being sorted out in court. And once it became clear that the President and his lawyers would not be able to prove their claims in time to impact the certified outcome of the election, Fox News stopped inviting them on the air. In short, Fox News did what the press is free

to do in a nation that values the First Amendment: provide a forum for testing newsworthy claims and denials in the crucible of robust debate. None of that is consistent with actual malice, and more than a year of discovery has failed to produce the clear and convincing evidence needed to prove that the relevant individuals knew that the President's claims were false or entertained serious doubts about them at the time.

Third, even assuming that the Court can find a triable issue of fact as to one or more of the challenged statements, summary judgment is warranted on Dominion's claim for economic damages. Setting aside the problem that Dominion's measure of damages double counts purported lost enterprise value and purported lost profits, the record confirms that Dominion has not suffered any economic harm at all. Its customers never believed the President's claims, it lost no contracts due to those claims, and its financials are better than ever. Even if it suffered economic losses, moreover, Dominion has no coherent theory of causation. It cannot explain why Fox News should be on the hook for hundreds of millions of dollars in purported economic damages given the virtual tsunami of coverage of the allegations—including President Trump's own much more widely viewed tweets explicitly and repeatedly making accusations against Dominion.

Fourth, at a minimum, the Court should dismiss Dominion's claim for punitive damages. To receive punitive damages, Dominion must prove that the individuals

at Fox News responsible for the publications harbored ill-will or hatred towards Dominion, and that top executives at Fox News participated in the publication decisions. Discovery confirms that there is no evidence of that sort here. Indeed, Dominion’s own expert agrees that there is no evidence that anyone at Fox News was motivated by an intent to harm Dominion.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs filed their complaint on March 26, 2021. D.I.1 (“Compl.”). The Court denied Fox News’ motion to dismiss on December 16, 2021. D.I.142. Fox News filed its answer on January 24, 2022, D.I.181 (“Answer”), and now moves for summary judgment under Rule 56.

STATEMENT OF QUESTION INVOLVED

Whether Fox News is entitled to summary judgment on Dominion’s defamation claim.

STATEMENT OF UNDISPUTED FACTS

A. Dominion’s History of Controversy

Since their arrival two decades ago, electronic voting machines have been the subject of significant controversy and public scrutiny. To some, the “appeal of such machines seemed plain: Voting was crisp, instantaneous, logged digitally.” Ex.D1, *Politico*, *How to Hack an Election in 7 Minutes* (Aug. 5, 2016). To others, any deviation from old-fashioned paper ballots and the introduction of a “black box”

voting machine raised concerns about manipulation and fraud. *Id.* “To computer scientists, it seemed like a disaster waiting to happen.” *Id.*

“Almost from the day they were taken out of the box,” electronic voting machines have been dogged by problems and concerns. *Id.* For example, in 2004, the New York Times editorial page proclaimed that “electronic voting machines cannot be trusted until more safeguards are in place” after a study conducted by Maryland demonstrated “vulnerabilities” in machines made by Diebold Election Systems that “seem[ed] almost too bad to be true.” Ex.D2, *N.Y. Times*, How to Hack an Election (Jan. 31, 2004). A few years later, a Times columnist noted that machines made by Election Systems & Software (ES&S) allegedly failed to count thousands of votes, potentially costing Democrats a congressional seat. Ex.D3, *N.Y. Times*, When Votes Disappear (Nov. 24, 2006). And in 2007, high-profile studies by California and Ohio found “‘viral’ vulnerabilities” with machines made by Diebold, Hart InterCivic, and Sequoia Voting Systems—three of the dominant players in the market at the time. Ex.F1, Wallach Report ¶¶18-19 (Nov. 28, 2022); *see also* Ex.E1 Piper Dep. Tr. 157:20-158:14, 161:2-21. As to Sequoia specifically, the California Secretary of State “found significant security weaknesses throughout the Sequoia system” that raised “serious questions as to whether the Sequoia software can be relied upon to protect the integrity of elections.” Ex.G1, California

Secretary of State, Source Code Review of the Sequoia Voting System (July 20, 2007), at i.

Dominion, a voting machine company founded in Canada in 2002, has been at the center of that controversy since acquiring Diebold (which by then had rebranded itself as “Premier Election Solutions”) and Sequoia in 2010. Sequoia had previously been owned by Smartmatic, a voting machine company founded in Venezuela that is itself no stranger to controversy. Smartmatic was forced to sell Sequoia after Congresswoman Carolyn Maloney (D-N.Y.) asked the Committee on Foreign Investment in the United States (CFIUS) to investigate Smartmatic “because of concerns that the government run by Venezuelan President Hugo Chávez ... owns a stake in the company.” Ex.D4, *Wall Street Journal*, Smartmatic to Shed U.S. Unit, End Probe Into Venezuelan Links (Dec. 22, 2006). In 2004, Smartmatic machines were used in an election won by Chávez that many people suspected to be fraudulent. And in 2006, officials blamed Smartmatic/Sequoia machines—and in particular “software ... developed in Venezuela”—for a series of “irregularities” during an election in Chicago. Ex.D5, *N.Y. Times*, U.S. Investigates Voting Machines’ Venezuela Ties (Oct. 29, 2006). Those controversies attracted significant media attention, including from then-CNN anchor Lou Dobbs. As one computer scientist expressed on Dobbs’ show in a 2006 segment about Smartmatic, “we’re using equipment to elect our president and our Congress, and our local officials, that

cannot be audited, that are potentially under the control of foreign entities, and that are almost an ideal platform for rigging an election.” Ex.D6, *CNN*, Democracy at Risk (Nov. 3, 2006).¹

To this day, Dominion continues to service legacy Diebold and Sequoia systems in multiple jurisdictions, despite longstanding criticism of their vulnerabilities. Ex.F1, Wallach Report ¶¶27-36; *see also* Ex.E1, Piper Dep. Tr. 162:18-163:4. And Dominion’s newer machines have been subject to criticism as well. In 2018, for example, Princeton University Professor Andrew Appel published a popular article illustrating “a serious design flaw” in Dominion’s new machines: “after you mark your ballot, after you review your ballot, the voting machine can print more votes on it.” Ex.H1, Andrew Appel, Design Flaw in Dominion ImageCast Evolution Voting Machine, *Freedom to Tinker* (Oct. 16, 2018). Appel elaborated that “it’s impossible to absolutely prevent a hacker from replacing the computer’s software with a vote-stealing program that deliberately miscounts the vote.” *Id.* Dominion has acknowledged that its customers saw this article and raised a “myriad of

¹ That is not Dominion’s only tie to Smartmatic. Smartmatic and Dominion had a licensing agreement in the past that was the subject of a lawsuit between the two companies in Delaware court. *See Smartmatic Int’l Corp. v. Dominion Voting Sys. Int’l Corp.*, 2013 WL 1821608 (Del. Ch. May 1, 2013).

questions” about it that were “[b]ad for business.” Ex.E2, Ikonomakis Dep. Tr. 66:15-67:1, 69:23-69:2.

Likewise, a report in 2019 noted that hackers were able to access multiple Dominion machines, that “ballots could easily be stolen” from the machines “using common items such as a standard trash picker,” that hackers were able to “boot an operating system of their choice and play video games” on Dominion’s machines, and that Dominion’s “filesystem was unencrypted and unprotected.” Ex.G13, DefCon Report 20-21 (August 2019). Those findings were widely reported in the media. *See, e.g.*, Ex.D26, *Washington Post*, Hackers Were Told to Break Into U.S. Voting Machines. They Didn’t Have Much Trouble (Aug. 12, 2019). The media also reported that, although “the US government [wa]s happy to let hackers try to break into its equipment, the private companies that make the machines America votes on, not so much,” and that the voting machine industry “doesn’t face much public accountability, even in the wake of Russia’s foreign interference in the 2016 election.” Ex.D27, *CNN*, At Hacking Conference, Pentagon’s Transparency Highlights Voting Companies’ Secrecy (Aug. 12, 2019).

Meanwhile, Dominion’s reputation took additional blows. In January 2019, Dominion submitted its brand-new Democracy 5.5 System for certification in Texas. But Texas refused to certify the system due to multiple hardware and software problems. Ex.G2, Texas Secretary of State Report (June 20, 2019). When Dominion

tried again a few months later, Texas refused to certify the system yet again, questioning whether it “is safe from fraudulent or unauthorized manipulation.” Ex.G3, Texas Secretary of State Report (Jan. 24, 2020).

After its unsuccessful attempted foray into Texas, Dominion turned to other markets—and attracted criticism and controversy there too. When Georgia decided to buy new voting machines from Dominion in 2019, “cybersecurity experts, election integrity advocates and Georgia Democrats” led by former gubernatorial-candidate Stacey Abrams opposed the purchase on the ground that Dominion’s machines “are widely considered vulnerable to hacking.” Ex.D7, *Politico*, Georgia Likely to Plow Ahead with Buying Insecure Voting Machines (Mar. 28, 2019). The June 2020 primary elections in Georgia were subsequently “overwhelmed by a full-scale meltdown of new voting systems,” as “[s]cores of new state-ordered voting machines were reported to be missing or malfunctioning.” Ex.D8, *N.Y. Times*, Georgia in Uproar Over Voting Meltdown (June 9, 2020).

Later that year, voters and advocacy groups sought a preliminary injunction in a suit against the state in federal court, claiming that its implementation of the Dominion system and its use of Dominion software violated their “First and Fourteenth Amendment rights to cast ballot votes that will be reliably counted.” *Curling v. Raffensperger*, 493 F.Supp.3d 1264, 1268-69 (N.D. Ga. 2020). The district court held that the plaintiffs established a likelihood of success on the merits

of some of their claims, crediting expert testimony that raised security concerns with Dominion’s systems. The court noted that an “array of experts and subject matter specialists provided a huge volume of significant evidence regarding the security risks and deficits in the [Dominion] system.” *Id.* at 1278. One cybersecurity expert testified that Dominion’s system remained vulnerable to a “cyber attack ... causing the swapping or deletion of specific votes cast.” *Id.* at 1279. Another testified that “Dominion has not permitted, independent research, academic or otherwise,” into its system, expressing “serious doubt that the system was operating correctly.” *Id.* at 1288-89. While the court refused to order any major changes to Dominion’s system so close to election day, it warned that the system posed “substantial risks and long-run threats” that “are neither hypothetical nor remote”—including vulnerability to “stealth vote alteration ... by malware that can be effectively invisible to detection.” *Id.* at 1312, 1341. The court concluded that “national cybersecurity experts convincingly present evidence that this is not a question of ‘might this actually ever happen?’—but ‘when it will happen.’” *Id.* at 1342.

Dominion’s troubles also attracted the attention of Congress, in part due to heightened concerns about potential foreign interference in the upcoming 2020 presidential election. *See, e.g.,* Ex.D9, *N.Y. Times Magazine*, *The Crisis of Election Security* (Sept. 26, 2018). In December 2019, Democratic Senators Elizabeth Warren, Amy Klobuchar, Ron Wyden, and Democratic Congressman Mark Pocan

sent a public letter to Staple Street Capital, the private equity firm that owns Dominion. The letter noted their concerns that “secretive and trouble-plagued companies, owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, ‘have long skimmed on security in favor of convenience,’ leaving voting systems across the country ‘prone to security problems.’” Ex.G4, Warren Ltr. (Dec. 6, 2019) (quoting Ex.D25, *AP News*, US Election Integrity Depends on Security-Challenged Firms (Oct. 28, 2019)). And in January 2020, Congress held a widely publicized hearing in which lawmakers “expressed concern about foreign components in the nation’s election equipment” to executives from the nation’s three major voting manufacturers, including Dominion CEO John Poulos. Ex.D10, *Washington Post*, Voting Machine Vendors Get Scrutiny at Congressional Hearing (Jan. 9, 2020). During the hearing, Poulos admitted that several components in its machines were manufactured overseas. *Id.* (“Several of those components, to our knowledge, there is no option for manufacturing those in the United States.”).

The media widely covered Dominion’s troubles. The USA Today reported that Dominion’s system “had been rejected by Texas and is the subject of a court battle over accuracy.” Ex.D11, *USA Today*, Will Your Vote Be Counted? Experts Warn of Unreliable Voting Machines (Nov. 2, 2020). The Washington Post stated that “election integrity activists say the new [Dominion] voting machines are

unaccountable and unverifiable and have many of the same security vulnerabilities as the old ones.” Ex.D12, *Washington Post*, Another Showdown Set This Week Over Georgia Voting Machines (Sept. 9, 2020). The New York Times reported that Dominion’s system was a “Rube Goldbergian assemblage of interrelated components” and that an “expert witness for the plaintiffs in the [Curling] lawsuit” saw “the multitude of components as more vulnerable to attack. Ex.D13, *N.Y. Times*, Anatomy of an Election ‘Meltdown’ in Georgia (July 25, 2020). The Atlanta Journal-Constitution stated that Dominion’s system “is vulnerable to cyberattacks that could undermine public confidence, create chaos at the polls or even manipulate the results on Election Day.” Ex.D14, *Atlanta Journal-Constitution*, In High-Stakes Election, Georgia’s Voting System Vulnerable to Cyberattack (Oct. 3, 2020). The Guardian noted that voting machine companies “are privately-owned and closely held, making information about ownership and financial stability difficult to obtain.” Ex.D15, *Guardian*, “They Think They Are Above the Law”: The Firms That Own America’s Voting System (Apr. 23, 2019). “The software source code and hardware design of their systems are kept as trade secrets and therefore difficult to study or investigate.” *Id.* After Democrat Jamie Raskin introduced a bill that would have prohibited states from contracting with firms “owned or influenced by non-US citizens,” the *Guardian* reported that the bill could affect “Dominion Voting

Systems” and “Scytl, which provides election night reporting and other online election management tools” and is “based in Spain.” *Id.*

Discovery in this case has revealed that Dominion’s own employees expressed serious concerns about the security of its machines. Mark Beckstrand, a Dominion Sales Manager, confirmed that other parties “have gotten ahold of [Dominion’s] equipment illicitly” in the past. Ex.E3, Beckstrand Dep. Tr. 127:8-127:22. Beckstrand identified specific instances in Georgia and North Carolina and testified that a Dominion machine was “hacked” in Michigan. *Id.* Beckstrand confirmed that these security failures were “reported about in the news.” *Id.* And just weeks before the 2020 presidential election, Dominion’s Director of Product Strategy and Security, Eric Coomer, acknowledged in private that “our shit is just riddled with bugs.” Ex.H2, Coomer Email (Oct. 30, 2020). Indeed, Coomer had been castigating Dominion’s failures for years. In 2019, Coomer noted that “our products suck.” Ex.H3, Coomer Message (Nov. 5, 2019). He lamented that “[a]lmost all” of Dominion’s technological failings were “due to our complete f--- up in installation.” *Id.* And in another instance, he identified a “*critical* bug leading to INCORRECT results.” Ex.H4, Coomer Email (Jan. 5, 2018). He went on to note: “It does not get much worse than that.” *Id.* And while many companies might have resolved their errors, Coomer lamented that “we don’t address our weaknesses effectively!” Ex.H5, Coomer Email (Sept. 25, 2019).

Internal Dominion documents likewise confirm that Dominion machines suffered several potential glitches in the November 2020 election. After a security expert told the media that Dominion “software should be designed to detect and prevent th[e] kind of glitch” experienced in Antrim County, Michigan during the 2020 presidential election, Coomer told Dominion Vice President Kay Stimson: “He’s not entirely wrong.” Ex.H23, Coomer Email (Nov. 10, 2020). Likewise, in the immediate aftermath of the election, Dominion received complaints from jurisdictions in Georgia noting “irregularities with machine counts” that required Dominion’s employees “to reprogram the machines.” Ex.H24, Daulby Email (Nov. 8, 2020).

B. The 2020 Presidential Election And President Trump’s Allegations

As the November 3, 2020 election approached and several states altered their voting procedures in light of the COVID-19 pandemic, talk of potential election interference reached a fever pitch, with President Trump indicating that he would challenge the results if he suspected fraud. After Fox News called Arizona on election night and the media called the presidency for Joe Biden on November 7, President Trump claimed that the election was “far from over” and announced plans to bring litigation. Ex.A2, Sunday Morning Futures Tr. 2 (Nov. 8, 2020).

A legal team led by Rudy Giuliani, a former Mayor of New York City and U.S. Attorney for the Southern District of New York, and Sidney Powell, a former

Assistant U.S. Attorney for the Western District of Texas, Northern District of Texas, and Eastern District of Virginia, filed lawsuits in multiple states alleging irregularities. Several of those lawsuits implicated Dominion, in part because several media outlets reported problems in jurisdictions that used Dominion machines in the immediate aftermath of the election. The day after the election, for example, several outlets reported “irregularities with the ... vote totals” in Antrim County, Michigan, which “use[d] Dominion voting equipment.” Ex.D16, *Detroit Free Press*, Antrim County Election Results Investigated After Red Michigan County Turns Blue (Nov. 4, 2020). Likewise, multiple media outlets reported problems with Dominion machines in Georgia. On November 4, for example, Politico reported that “a technological glitch” that local election officials attributed to an 11th-hour software update by Dominion “prevented voters from casting ballots on voting machines on Election Day.” Ex.D17, *Politico*, Cause of Election Day Glitch in Georgia Counties Still Unexplained (Nov. 4, 2020). Politico also reported that day that a separate Dominion “software issue” delayed the absentee ballot count in two counties in Georgia. Ex.D18, *Politico*, More Georgia Equipment Problems Delayed Absentee Ballot Count (Nov. 4, 2020). CNN picked up that story too, reporting two days later that “Georgia’s Gwinnett County blames Dominion Voting Systems for day-long delay reporting results.” Ex.D19, *CNN*, Georgia’s Gwinnett County Blames Dominion Voting Systems For Day-Long Delay Reporting Results

(Nov. 6, 2020). In Arizona, officials received hundreds of complaints that electronic voting machines, including Dominion machines, failed to count votes because of improper ballot markings. Ex.D20, *Reuters*, Fact Check: Tabulation Machines in Arizona Can Read Ballots Marked With Sharpie Pens (Nov. 5, 2020).

On November 7, the Trump Campaign and the Republican National Committee filed suit in Arizona, alleging that election officials “disenfranchised” “potentially thousands” of voters after vote tabulation machines improperly rejected their ballots and officials failed to cure them. Ex.C1, Compl. ¶¶2, 26-41, *Donald J. Trump for President, Inc. v. Hobbs*, No. CV2020-14248 (Ariz. Sup. Ct. Nov. 7, 2020). On November 11, the Trump Campaign filed suit in Michigan, alleging (among other things) that Dominion tabulation machines were defective. The complaint alleged that “Dominion Voting Systems software and vote tabulators produced ... a massive miscount” in Antrim County, and that the same Dominion systems were used in other counties as well. Ex.C2, Compl. ¶¶45, 60-66, *Donald J. Trump for President, Inc. v. Benson*, No. 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020). On November 13, Lin Wood, an ally of President Trump, filed suit in Georgia seeking to overturn the result of the election. Ex.C4, Compl. at 28, *Wood v. Raffensperger*, 1:20-cv-4651 (N.D. Ga. Nov. 17, 2020). As part of that lawsuit, a person claiming to be a former security guard for former Venezuelan president Hugo Chávez filed a sworn affidavit stating that he helped Chávez rig elections using Smartmatic machines, and that “the

software and fundamental design of the electronic electoral system and software of Dominion ... relies upon software that is a descendent of the Smartmatic Electoral Management System.” Ex.C5, Affidavit ¶¶6, 12-13, 21, *Wood v. Raffensperger*, 1:20-cv-4651 (N.D. Ga. Nov. 17, 2020).

As courts grappled with those lawsuits, more were filed. On November 25, Powell (joined by Wood) sued in Georgia and Michigan. The Georgia complaint alleged that “the Dominion system carr[ie]d out massive voter manipulation” by switching votes from President Trump to Joe Biden. Ex.C8, Compl. ¶¶15, 18, *Pearson v. Kemp*, No. 1:20-cv-4809 (N.D. Ga. Nov. 25, 2020). It cited a sworn affidavit from a witness who claimed that “Smartmatic and Dominion were founded by foreign oligarchs and dictators” to manipulate votes and ensure that “Venezuelan dictator Hugo Chavez never lost another election.” *Id.* ¶5. Dominion’s software “is designed to facilitate vulnerability,” allowing users “to arbitrarily add, modify or remove” votes without detection. *Id.* ¶¶8, 103. And according to the sworn declaration of a former military intelligence officer, foreign agents exploited Dominion’s vulnerabilities by hacking the software “in order to monitor and manipulate elections, including the most recent US general election in 2020.” *Id.* ¶14; *see id.* ¶¶111, 130, 185. “[H]undreds of thousands of votes that were cast for President Trump in the 2020 general election were transferred to former Vice-President Biden.” *Id.* ¶15. The Michigan complaint contains similar allegations.

Ex.C9, Complaint ¶¶4-12, 17-18, 92, 95, 107, 113-17, 122-53, *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Nov. 25, 2020). And on December 1 and 2, Powell filed suit in Wisconsin and Arizona, where she made similar allegations about Dominion and added some new ones. See Ex.C11, Compl. ¶¶5-12, 51-100, 133-37, *Feehan v. Wisconsin Elections Commission*, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020); Ex.C12, Compl. ¶¶5-13, 19, 21, 44, 49-57, 60-101, 133, *Bowyer v. Ducey*, No. 2:20-cv-2321 (D. Ariz. Dec. 2, 2020). For example, the Arizona and Wisconsin complaints alleged that Dominion sent ballots “offshore” to a company called “SCYTL” for “algorithmic vote manipulation.” Ex.C12, *Bowyer* Compl. ¶¶2, 80, 83.

Meanwhile, President Trump relentlessly accused Dominion of rigging the election in a barrage of public statements and tweets. For example, on November 7, President Trump retweeted a report that “Georgia Counties Using Same Software as Michigan Counties Also Encounter ‘Glitch.’” Ex.G6 Donald J. Trump (@realDonaldTrump), Twitter (Nov. 7, 2020, 10:23am). Two days later, he retweeted a report that “The #DominionVotingSystems that ‘glitched’ in favor of Joe Biden (and was used in 29 states), partnered up with the Clinton Global Initiative.” *Id.* (Nov. 9, 2020, 4:31pm). And on November 12, President Trump tweeted that “DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE.” *Id.* (Nov. 12, 2020, 11:34am). The next day, he tweeted: “This

Election was Rigged, from Dominion all the way up & down!” *Id.* (Nov. 13, 2020, 1:35pm). A few days later, he retweeted Powell’s allegations: “RT @1776Stonewall: Sidney Powell: ‘Dominion machines engineered by China, Venezuela, Cuba.’” *Id.* (Nov. 16, 2020, 1:22pm). And he accused Dominion of fraud again, tweeting “Dominion is running our Election. Rigged!” *Id.* (Nov. 16, 2020, 8:26am).

Over the next five days, President Trump retweeted multiple reports about Dominion with the caption: “Dominion-izing the Vote.” *See, e.g., id.* (Nov. 19, 2020, 12:41am); (Nov. 21, 2020, 11:30pm); (Nov. 22, 2020, 4:30am). On November 30, he tweeted: “Our 2020 Election, from poorly rated Dominion to a Country FLOODED with unaccounted for Mail-In ballots, was probably our least secure EVER!” *Id.* (Nov. 30, 2020, 1:05am). On December 2, he retweeted a video from the Republican Party of Arizona titled “DOMINION EXPOSED: THIS VIDEO SHOULD TERRIFY EVERY SINGLE AMERICAN.” *Id.* (Dec. 2, 2020, 11:21pm). The next day, President Trump tweeted: “Dominion contractor at Detroit counting center says thousands of ballots were scanned multiple times.” *Id.* (Dec. 3, 2020, 9:11pm). He continued to tweet about Dominion throughout December and well past the date for certifying the electoral vote. *See, e.g., id.* (Dec. 15, 2020, 5:21am) (“Dominion Voting Machines are a disaster all over the Country. Changed the results of a landslide election.”); (Dec. 16, 2020, 6:09am) (“Study: Dominion

Machines shifted 2-3% of Trump Votes to Biden.”); (Dec. 17, 2020, 6:14am) (“Michigan fraud witness totally debunks Dominion CEO.”); (Jan 5, 2021, 6:18pm) (“Reports are coming out of the 12th Congressional District of Georgia that Dominion Machines are not working in certain Republican Strongholds for over an hour.”).

Given the gravity of the President’s allegations and their potential to impact the results of the Presidential election, every media outlet in the country (if not the world) covered the controversy, and numerous federal and state officials examined the claims. On November 9, Attorney General William Barr authorized U.S. Attorneys and the FBI “to pursue substantial allegations of voting and vote tabulation irregularities prior to the certification of elections in your jurisdictions.” Ex.G5, Barr Memo (Nov. 9, 2020). State officials also investigated possible fraud—including Dominion systems specifically. The Michigan Secretary of State, for example, investigated potential irregularities in the vote in Antrim County, Michigan, which had “initially reported incorrect unofficial results.” Ex.G8, Mich. Sec’y of State Fact Check (Nov. 7, 2020). On November 7, the Michigan Secretary of State announced that the State’s Bureau of Elections had conducted a “preliminary review of the issue.” Ex.G7, Mich. Sec’y of State Ltr. (Nov. 7, 2020). She further explained that any similar errors “occur[ring] elsewhere in the state” would be “caught and identified during the county canvass” process, which was “ongoing”

and lasting two weeks. *Id.* Moreover, responding to allegations that this error “was part of a larger conspiracy,” the Secretary ordered a hand audit of all Antrim County ballots to confirm “that the Dominion machines had counted correctly.” Ex.G8, Mich. Sec’y of State Fact Check (Nov. 7, 2020). On November 13, the U.S. Election Assistance Commission requested information from Dominion after receiving multiple reports of problems related to Dominion machines in Michigan and Georgia. Ex.H11, U.S. Election Assistance Comm’n Ltr. (Nov. 13, 2020).

C. Fox News’ Coverage of the 2020 Presidential Election.

Given the unquestionable newsworthiness of a sitting President’s effort to challenge the result of a presidential election, several Fox News Channel and Fox Business Channel hosts, including Maria Bartiromo, Lou Dobbs, Jeanine Pirro, and Sean Hannity, interviewed Giuliani and Powell in the weeks following the election so that viewers could hear about the allegations straight from the source. Bartiromo also landed the first post-election interview of President Trump—an interview so self-evidently newsworthy and protected by the First Amendment that Dominion largely ignores it. During those interviews, Giuliani, Powell, and the President made several allegations about Dominion, including that Dominion helped rig the 2020 U.S. presidential election, had ties to Smartmatic, and paid kickbacks to government officials who used its machines. The President and his lawyers promised that they would prove their allegations in court and overturn the election results.

While some were skeptical of those claims, others at Fox News kept an open mind—in part because of longstanding (and bipartisan) concerns about the security of electronic voting machines, in part because of unusual (and unprecedented) voting measures adopted by many states in light of the COVID-19 pandemic, and in part because the claims were being made by the President of the United States and his well-credentialed legal team in lawsuits and backed by sworn affidavits. Bartiromo testified, for example, that the President’s lawyers “were people that the country respected,” and that they were making the same charges about voting machines that Senator Klobuchar, Congresswoman Maloney, and Stacey Abrams had made in the past. Ex.E4, Bartiromo Dep. Tr. 196:16-197-2, 379:14-380:21. Dobbs testified that he “took [Powell’s] claims seriously because she was representing the President of the United States and a highly respected attorney.” Ex.E5, Dobbs Dep. Tr. 21:4-8. Pirro testified that she took the allegations seriously because they were backed by “affidavits that were legal sworn statements under penalty of perjury supporting the allegations.” Ex.E6, Pirro Dep. Tr. 352:17-23. Tucker Carlson testified that he “took Sidney Powell seriously,” and that “it’s entirely plausible that [her] claim is true, because we’re dealing with voting machines here.” Ex.E7 Carlson Dep. Tr. 32:18-19, 44:16-19. Hannity testified that he had found Powell to be a “very bright attorney” in past interactions and thought it highly relevant that “so many people from so many varying diverse backgrounds,” including the State of Texas,

Congressman Wyden, Senator Warren, the New York Times, and the Associated Press, “had come to a conclusion that was very negative towards Dominion.” Ex.E8, Hannity Dep. Tr. 44:1-18, 189:7-190:3, 317:12-16.

Given the extraordinary nature of the claims, however, Fox News hosts did not take the President and his lawyers at their word. Instead, they pressed the President’s lawyers (and the President himself) for evidence. Hosts also reminded them that they would eventually have to prove their claims in court—and prove them promptly given the mid-December deadline for casting electoral votes imposed by federal law.

See, e.g., 3 U.S.C. §§5, 7, 8. For example:

- On November 8, Bartiromo pressed Giuliani: “The first question everybody wants to know is, what is the evidence the president has alluded to in terms of ballot fraud? What can you tell us?” Ex.A2, Sunday Morning Futures Tr. 2 (Nov. 8, 2020). “If this was systemic, and you have got all this evidence, where is the DOJ?” *Id.* at 5. “So, how long will this take, Rudy?” *Id.* at 6. Bartiromo also asked Powell: “If this is so obvious, then why aren’t we seeing massive government investigation?” *Id.* at 15.
- On November 11, Bartiromo asked Powell: “Are you going to have enough time Sidney ... to prosecute these cases? And get heard during this limited period before year end? Ex.A4, Mornings with Maria Tr. 11 (Nov. 11, 2020). “Look, you’ve got experience as a federal prosecutor, do you think the DOJ is going to find instances of fraud will it be enough in your view to overturn what the media says is the result of this election?” *Id.*
- On November 12, Bartiromo asked Giuliani: “Rudy, do you have enough time to actually prosecute and be heard here?” Ex.A6, Mornings with Maria Tr. 4 (Nov. 12, 2020). “So, bottom line here, you believe you will be able to prove voter fraud that affected enough ballots that you believe

you can change or overturn the results of what voters believe to be the result of this election?” *Id.* at 5.

- On November 13, Dobbs told Powell: “[Y]ou’re going to have to be quick to go through and to produce that investigation and the results of it. The December deadlines are approaching for electors and just as we saw in 2000 with *Bush v. Gore*, how critical are those deadlines? And how urgent does that make your investigation and discovery?” Ex.A7, Lou Dobbs Tonight 5 (Nov. 13, 2020).
- On November 14, Pirro asked Powell: “[W]hat evidence do you have to prove this?” Ex.A9, Justice with Judge Jeanine Tr. 8 (Nov. 14, 2020).
- On November 15, Bartiromo pressed both Giuliani and Powell for proof: “Will you be able to prove this, Rudy?” Ex.A15, Sunday Morning Futures Tr. 4 (Nov. 15, 2020). “Do you need to have that hardware in your possession to prove it? Can you prove the case without the hardware or the software?” *Id.* at 5. “So, you only have a few weeks, Rudy, because they want to certify the state elections early December. Do you believe you will be able to prosecute and be heard within this time frame?” *Id.* at 6. “Sidney, you feel that you will be able to prove this?” *Id.* at 7. “How will you prove this, Sidney?” *Id.* “Do you believe that you can present this to the courts and be successful within this just couple weeks?” *Id.* “So you can’t say who you believe took kickbacks.” *Id.* at 8. “Sidney, you say you have an affidavit from someone who knows how this system works and was there with the planning of it. You believe you can prove this in court?” *Id.* at 9.
- On November 17, Bartiromo again pressed the President’s lawyers for evidence: “[W]hat are you finding so far? What do you think went on here?” Ex.A13, Mornings with Maria Tr. 5 (Nov. 17, 2020). “You have to prove it. Can you prove this?” *Id.* at 6. “If this is happening shouldn’t the FBI or the DOJ be looking at this?” *Id.* at 7. “[D]o you feel you have enough evidence to overturn the results of this election?” *Id.*
- On November 19, Hannity asked Giuliani: “Now, do you believe the proof is in the affidavit signed by the people, that so far that you’ve gotten? Will that be—will that reach the high bar that a court would need?” Ex.A17, Hannity Tr. 8 (Nov. 19, 2020).

- On November 19, Dobbs asked Powell: “[W]hat is the next steps for the legal team and when do you believe you will be prepared to come forward with hard evidence establishing the basis for a court to overturn elections or at least results of those elections in a number of battleground states?” Ex.A18, Lou Dobbs Tonight Tr. 5 (Nov. 19, 2020).
- On November 21, Pirro pressed Lin Wood for evidence: “Okay, but Lin, a federal judge in Atlanta rejected the lawsuit that this last lawsuit is associated with and this affidavit, District Judge Steven Grimberg, a Trump appointee said he found no evidence of irregularities that affected more than a nominal number of votes.” Ex.A22, Justice with Judge Jeanine 6 (Nov. 21, 2020). “Lin, when you say that they were destroying or tried to destroy the ballots, do you have evidence of that?” *Id.*
- On November 24, Dobbs reminded Powell of her promise to provide evidence to overturn the election in court: “Well, you have promised a Kraken will be unleashed. We ... were expecting perhaps your suit would be filed yesterday or today. When shall we expect your lawsuit?” Ex.A24, Lou Dobbs Tonight Tr. 6 (Nov. 24, 2020). Powell promised that she would file her first suit in Georgia no later than the next day (which she did). Dobbs then asked: “Your thoughts now about what will be the impact and it be adjudicated in such a way as to meet all of the deadlines that are forced upon you? That is, December 8th and December 14th.” *Id.*
- On November 29, Bartiromo asked President Trump: “Mr. President, these are obviously very serious charges. And I want to walk through them and ask you how you will prove this in the courts.” Ex.A27, Sunday Morning Futures Tr. 7 (Nov. 29, 2020). “Let’s start with Pennsylvania. I know you said that you have a pile of affidavits. That’s part of the evidence. What other evidence can you talk about that will enable you to prove this in court in the coming weeks, sir?” *Id.* “Mr. President, will you be able to prove that the computers can circumvent the controls that are in place?” *Id.* at 10. “Where is the DOJ and the FBI in all of this, Mr. President? You have laid out some serious charges here. Shouldn’t this be something that the FBI is investigating?” *Id.* at 13. “And you believe you will be able to prove this in the coming weeks?” *Id.* at 19.

- On December 10, Dobbs repeatedly asked Powell for evidence on Lou Dobbs Tonight: “[W]hat is the evidence that you have compiled? ... We will gladly put forward your evidence that supports your claim that this was a cyber-Pearl Harbor ... How much time do you need to get that evidence to this broadcast and we’ll put it on the air.” Ex.A31, Lou Dobbs Tonight Tr. at 4, 6-7 (Dec. 10, 2020).

As the story unfolded, Fox News hosts told their viewers that Dominion (and Smartmatic) had denied some of the allegations and informed them that other parties disbelieved the President’s claims as well. Sometimes hosts invited third parties such as reporters, politicians, and lawyers to comment on the allegations. In many instances, the hosts and third parties cast doubt on the claims or emphasized that they would need to be proven in court to impact the election. For example:

- On November 6, Bret Baier reported: “We are not seeing any evidence of widespread fraud. We are not seeing things that can change, right now at least, the split in these different states.” Ex.A1, Special Report with Bret Baier 3 (Nov. 6, 2020).
- On November 10, Laura Ingraham challenged Powell’s claims on *The Ingraham Angle*: “But the [Associated Press] fact checked those family connection claims [with respect to Dominion] and said basically that’s just more Republican smoke and mirrors. It doesn’t add up.” Ex.A3, *The Ingraham Angle* 4-5 (Nov. 10, 2020).
- On November 13, Dobbs reported that “the U.S. Cybersecurity Agency says the November 3rd election was the most secure in American history.” Ex.A7, Lou Dobbs Tonight Tr. 2 (Nov. 13, 2020). He displayed CISA’s statement to his viewers on screen. Later in the show, he stated: “Dominion Voting Systems say they categorically deny any and all of President Trump’s claims that their voting machines caused any voter fraud in key swing states or electoral fraud, but reports contradict that claim.” *Id.* at 4. “Let’s start with Dominion, a straight-out disavowal of

any claim of fraud against the company, its software or machines.” *Id.* at 5. He displayed Dominion’s denials on screen.

- On November 14, 2020, Eric Shawn said on *America’s News HQ* that, according to “election officials and the government,” “the President’s claims ... that fraud may have played a role in the election ... is just not true.” Ex.A8, *America’s News HQ Tr. 1* (Nov. 14, 2020). Shawn also interviewed J. Alex Halderman, one of the “most prominent election computer experts of the nation,” who stated that “[t]here is absolutely no evidence, none, that Dominion Voting Machines changed any votes in this election,” and that “it would be essentially impossible to change votes on this scale that’s been claimed here.” *Id.* at 1-3.
- On November 14, Pirro told her audience on *Justice with Judge Jeanine: Smartmatic and Dominion* have “denied that they have done anything improper.” Ex.A9, *Justice with Judge Jeanine Tr. 8* (Nov. 14, 2020). Pirro also interrupted Powell to read and display Dominion’s denial statement on screen.
- On November 16, Dobbs stated: “Smartmatic ... told us today they only provided technology and software in Los Angeles County during this year’s presidential election.” Ex.A11, *Lou Dobbs Tonight Tr. at 3* (Nov. 16, 2020).
- On November 17, Dobbs stated: “[W]e’ve asked both Dominion and Smartmatic about their role on the CISA [Cybersecurity and Infrastructure Security Agency] November 12th statement disputing election fraud or intervention by foreign governments. Smartmatic said they didn’t have any input. Dominion, they didn’t get back to us for some reason.” Ex.A12, *Lou Dobbs Tonight Tr. 5* (Nov. 17, 2020).
- On November 17, after interviewing Giuliani, Bartiromo asked a Wall Street Journal reporter for “your reaction to what you just heard” about Dominion. Ex.13, *Mornings with Maria Tr. 8* (Nov. 17, 2020). The reporter stated: “Well, yes, and Dominion has denied that.” *Id.* The reporter noted that Giuliani was making “very, very serious allegations” that, if true, would “undermin[e] our democracy.” *Id.* He also noted that, “if those allegations are false, that’s also inexcusable. That also undermines our democracy and we need to get to the bottom of that.” *Id.* Bartiromo responded: “That’s exactly right, Jon. Agree with you 100

percent. We will continue following this until we have answers and we want answers. We deserve it.” *Id.*

- On November 18, Baier noted: “Dominion has repeatedly denied any impropriety in a statement saying, Dominion Voting Systems categorically denies false assertions about vote switching and software issues with our voting systems.” Ex.A15, Special Report with Bret Baier Tr. 3 (Nov. 18, 2020). “Both Smartmatic and Dominion have denied any connection to the other.” *Id.* Baier also noted that “the former head of DHS’s Cybersecurity and Infrastructure Agency” “dismissed those accusation as unfounded conspiracy theories.” *Id.*
- On November 19, Dobbs noted: “Smartmatic and Dominion deny those charges.” Ex.A18, Lou Dobbs Tonight Tr. 2 (Nov. 19, 2020). “Dominion Voting Systems today once again distanced itself from Smartmatic, saying ‘Dominion is an entirely separate company and fierce competitor to Smartmatic,’ end quote. ‘Dominion and Smartmatic do not collaborate in any way and have no affiliate relationship or financial ties.’” *Id.* at 4.
- On November 19, Karl Rove, a guest on Dana Perino’s *America’s Newsroom*, explained that Giuliani and Powell’s allegations “are serious, I think, somewhat strange accusations.” Ex.A46, America’s Newsroom Tr. 1 (Nov. 19, 2020). He explained that “both Mr. Giuliani and Ms. Powell have an obligation to go to court and prove them because we’re ... questioning the fundamental fairness ... of our presidential election and alleging that there are conspirators who worked in major cities in an organized effort to engage in widespread voter fraud and then foreign agents and powerful Americans, namely Soros and the Clinton Foundation, were involved. So they’ve got on obligation to go to court and prove these, or the American people will have every reason to question their credibility.” *Id.* “I’m not going to say that they don’t have proof, but they better come up with proof and go to court because these are serious allegations that basically say our election was manipulated by a combination of foreign and domestic actors and stolen. And that cannot be left just simply out there; it needs to be either proved or withdrawn. And the only way to do that is to take these accusations and go to court.” *Id.* Perino noted that Dominion “just put out a statement completely denying all of it.” *Id.* at 2. Rove continued: “If they’re accurate, then the American people deserve to know it, and our courts need to take appropriate action to deal with the outcome of the election. If they’re

false, we need to know that as the American people and thereby judge the credibility of Mayor Giuliani and Ms. Powell.” *Id.* at 3.

- On November 19, 2020, Carlson explained on *Tucker Carlson Tonight*: “[W]e invited Sidney Powell on the show. ... But she never sent us any evidence, despite a lot of requests, polite requests, not a page. When we kept pressing, she got angry and told us to stop contacting her. When we checked with others around the Trump Campaign, people in positions of authority they told us, Powell has never given them any evidence either nor did she provide any today at the press conference.” Ex.A21, Tucker Carlson Tonight Tr. 6 (Nov. 19, 2020).
- On November 20, Bartiromo stated: “Dominion responded to Fox Business in a statement. They say this: The latest flood of absurdities is deeply concerning. Dominion is plainly a nonpartisan American company with no ties to Venezuela or Cuba. Vote counts are conducted by County and State election officials, not by Dominion, or any other election technology company. That is from Dominion.” Ex.A20, Mornings With Maria Tr. 1 (Nov. 20, 2020). Bartiromo also told Powell: “Sidney, I want you to respond to what Tucker Carlson said last night[.] ... Did you get angry with the show because they texted you and asked you to please provide evidence of what you’re alleging? ... [W]ill you be able to prove this evidence that you say you have of this technology flipping votes from Trump to Biden?” *Id.* at 2-3.
- On November 20, 2020, Carlson explained on *Tucker Carlson Tonight*: “[T]hey have not seen a single piece of evidence showing that software change[d] votes. ... And by they, we are including other members of Donald Trump’s own legal team. They have not seen Powell’s evidence either, no testimony from employees inside the software companies, no damning internal documents, no copies of the software itself.” Ex.A21, Tucker Carlson Tonight Tr. 5 (Nov. 20, 2020).
- On November 21, Jesse Watters explained on *Watters’ World*: Powell “made some very explosive claims this week,” but the “researchers on our team spent a very long time going through her claims,” could only verify some, and would “continue to look into further developments.” Ex.A23, Watters’ World Tr. 7 (Nov. 21, 2020).
- On November 22, Bartiromo and legal commentator Alan Dershowitz discussed the allegations on *Sunday Morning Futures*. Bartiromo stated:

“We haven’t seen th[e] [evidence], so we don’t know. But this is the kind of evidence that they say they have. Your reaction?” Dershowitz: “Well, evidence is very difficult to bring within two weeks or the three-week period. You need to have witnesses, experts subject to cross-examination, and findings by a court. I don’t know what Powell means when she says they have more than two weeks or three weeks to prove fraud. Once the electors are certified, and once they cast their vote, I can’t see any legal route to undoing that, even if they were to find fraud later on ... We have to see the evidence.” Ex.A25, Sunday Morning Futures Tr. 6 (Nov. 22, 2020).

- On November 22, Eric Shawn hosted Michael Steel, a spokesperson for Dominion. Shawn ticked through the allegations against Dominion. Steel denied the allegations and presented Dominion’s side of the story. America’s News HQ 1-6 (Nov. 22, 2020).
- On November 29, after interviewing President Trump, Bartiromo interviewed Ken Starr about the President’s allegations. Starr stated that “the difficulty now is translating those allegations and intuitions and the reports into actual admissible evidence in court.” Ex.A27, Sunday Morning Futures Tr. 20 (Nov. 29, 2020). “[A]t this stage, we need to have the evidence ... we have not seen in court ... the kind of proof that will lead to victory.” *Id.*
- On December 13, Bartiromo asked Michael Flynn: “General, what do you want to say in terms of proof of that? Because Dominion has pushed back on Fox News, on others, who say that that’s just not true. They gave us a statement, the same with Smartmatic.” Ex.A33, Sunday Morning Futures Tr. 11 (Dec. 13, 2020).
- On December 18, Dobbs hosted Eddie Perez, a voting-technology expert at a non-partisan election-technology nonprofit, to comment on the allegations made by the President and his lawyers. Perez explained that he had seen no evidence that Smartmatic software was used to manipulate votes in the 2020 election. Ex.A34, Lou Dobbs Tonight Tr. 9-10 (Dec. 18, 2020). He also stated, among other things, that Smartmatic’s technology was used only in Los Angeles County in the 2020 election and that Smartmatic and Dominion are separate companies. *Id.* at 10. Perez’s segment also aired on Justice with Judge Jeanine and Sunday Morning

Futures. Ex.A35, Justice with Judge Jeanine Tr. 1-2 (Dec. 19, 2020); Ex.A36, Sunday Morning Futures Tr. 15-16 (Dec. 20, 2020).

Just as Fox News hosts did not take the President's claims at face value, they did not take Dominion's denials at face value either. After all, Dominion's denials were "every bit as unsubstantiated as Sidney Powell's claim," Ex.E7, Carlson Dep. 73:6-74:8, and "not in any way a conclusive response to the charges." Ex.E5, Dobbs Dep Tr. 130:22-131:5; *see also, e.g.*, Ex.E8, Hannity Dep. Tr. 123:1-14, 291:15-21. Likewise, Fox News hosts did not automatically believe statements by government officials and other media outlets denying the President's allegations, in part because of the difficult nature of proving or disproving all of those claims within a few weeks of the election. *See, e.g.*, Ex.E4, Bartiromo Dep. Tr. 183:12-184:6 ("We've seen many instances where government misled the American people, such as the Russia collusion story, such as Hunter Biden's laptop, such as the origins of COVID-19."); Ex.E7, Carlson Dep. 75:17-23 (noting that "as a logical matter that [the President's claims about Dominion] couldn't have been debunked because the only way to debunk it and the only way to prove it would be to have possession of the Dominion software"). Indeed, hosts recognized that "the resolution of [the President's] court cases would be the best indicator" of whether Dominion would be "exonerat[ed]." Ex.E5, Dobbs Dep Tr. 117:2-12; *see also* Ex.E6, Pirro Dep. Tr. 333:15-19 ("[T]hat's not the end of it. You've got to have a trial to find out if it's ... true or not true.").

When the President’s lawyers failed to produce conclusive evidence of their claims before the mid-December deadline for casting electoral votes, however, Fox News hosts stopped having Giuliani and Powell on their shows. On January 4, Dobbs told viewers on *Lou Dobbs Tonight*: “We’re eight weeks from the election and we still don’t have verifiable tangible support” for the President’s claims of fraud. Dobbs offered his opinion that the election was fraudulent, but he noted that “we have had a devil of a time finding actual proof.” Ex.A37, Lou Dobbs Tonight Tr. 9 (Jan. 4, 2021).

D. Dominion’s Lawsuit

As the President and his lawyers, surrogates, and allies were airing their allegations about Dominion, numerous media outlets, including Fox News, offered Dominion opportunities to tell its side of the story. Dominion accepted one such opportunity from Fox News and sent executive Michael Steel to sit for an interview on *America’s News Headquarters* on November 22. But Dominion declined every other invitation from Fox News. See Ex.E10, Bischoff Dep. Tr. 188:2-21. It declined offers from other media outlets as well, including CNN. See Ex.H6, Fratto Message (Nov. 23, 2020); Ex.E11, Steel Dep. Tr. 221:12-16.

Instead of actively participating in the public dialogue about the President’s allegations at the time, Dominion opted to hold its fire and pursue litigation. By its own account, Dominion started preparing for affirmative litigation as early as

November 10. Ex.H22, Fratto Decl. ¶2 (Sept. 21, 2022). And Dominion did not content itself with suing the people who leveled the allegations; it instead decided to blame the media for covering and commenting on them too. Dominion took an exceedingly selective approach, however, as to which media it chose to blame. While the allegations were covered by virtually every news outlet in the country, Dominion opted to bring defamation suits against only three: conservative-leaning outlets Fox News, Newsmax Media, and OANN.

Dominion's own public relations firm expressed skepticism as to whether Fox News' coverage was defamatory. *See* Ex.H7, Beckman Email (Dec. 18, 2020). But Dominion pressed forward nevertheless, filing this lawsuit in which it seeks to blame Fox News for statements made not just by its own hosts, but by the newsmakers they interviewed. Relying principally on statements made by Giuliani and Powell during interviews on various Fox News programs, Dominion alleges that Fox News itself falsely stated that: "(1) Dominion committed election fraud by rigging the 2020 Presidential Election; (2) Dominion's software and algorithms manipulated vote counts in the 2020 Presidential Election; (3) Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chávez; and (4) Dominion paid kickbacks to government officials who used its machines in the 2020 Presidential Election." Compl. ¶2. Ensuring that its lawsuit would generate

maximum publicity, Dominion claimed in its complaint to have suffered \$1.6 billion in damages because of this alleged defamation.

Dominion’s \$1.6 billion claim was dubious from the start given that its current owner (Staple Street Capital) paid just \$38.3 million for a roughly 75% stake in the company in 2018. Ex.F2, Hosfield Report at 124 (Nov. 29, 2022). Discovery has since confirmed that Dominion’s damages calculation is wishful thinking. Dominion’s own expert calculated Dominion’s alleged lost business opportunities at a mere \$88 million. *Id.* at 5. Discovery has also revealed that Dominion’s calculations are riddled with mathematical overstatements (*i.e.*, double counting lost profits and total enterprise value). Dominion also included numerous projects in its calculations that discovery has confirmed it lost for reasons that have nothing to do with coverage of the 2020 election, such as the poor performance of Dominion’s machines or competition from other companies. And contrary to Dominion’s claims, its business is doing just fine: Dominion is on pace to exceed its 2022 revenue projections—which it set *before* the 2020 election—and the record confirms that Dominion’s own customers never believed the President’s allegations—which is why Dominion felt little need to defend itself on air. Ex.H8, Serratti Email (Nov. 20, 2020) (noting that Tennessee Secretary of State stated that “they have full confidence in our company”); Ex.H9, Condos Email (Nov. 7, 2020) (email from Vermont Secretary of State telling Dominion “[w]e stand with you”); Ex.H10,

Poulos Email (Dec. 4, 2020) (Dominion CEO John Poulos stating: “What you are missing, is that no customer cares about the media. It’s just more words from their perspective.”).

Staple Street’s own employees and former employees have ridiculed Dominion’s \$1.6 billion damages claim, observing that it “[w]ould be pretty unreal if you guys like 20x’ed your Dominion investment with these lawsuits.” Ex.E12, Franklin Dep. Tr. 77:8-10. And in all events, even if Dominion could prove that it suffered \$1.6 billion in damage, it has yet to offer any coherent theory of why Fox News should be on the hook for those losses given the virtual tsunami of coverage of the President’s claims from outlets across the country and the fact that the President himself was espousing the allegations through multiple channels, including Twitter, where he had more than 85 million followers at the time. *See* Ex.G6.

ARGUMENT

This case has now gone through more than a year of costly and speech-chilling discovery. And far from helping Dominion’s case, that discovery has confirmed what Fox News has been saying all along: Dominion’s central allegations are legally unsound, factually unfounded, or both. This case is a profound threat to the First Amendment, and it should be rejected in its entirety.

First, once each of the statements Dominion challenges is carefully examined on its own terms and in proper context (as the law requires), it is clear that none is defamatory as a matter of law. Fox News' coverage of allegations made by the President and his lawyers is not actionable defamation. As the Delaware Supreme Court recently explained (and as New York courts have long held), when the press reports newsworthy allegations made by others, that reporting is not defamatory, even if those allegations ultimately turn out to be false. Indeed, both the First Amendment and common-law principles embodied in New York law squarely protect the right of the press to cover and comment on allegations made by public figures about matters of public concern.

When the coverage that Dominion challenges is examined on the statement-by-statement basis that is required at this juncture, it is clear that it falls within the heartland of that principle: Fox News and its hosts were informing the public about a matter of the utmost public concern, *i.e.*, allegations of election fraud made by a sitting President and his legal team trying to overturn the results of a recent Presidential election. Far from reporting the allegations as true, hosts informed their audiences at every turn that the allegations were just allegations that would need to be proven in court in short order if they were going to impact the outcome of the election. And to the extent some hosts commented on the allegations, that commentary is

independently protected as opinion. Accordingly, Dominion has failed to identify any actionable defamation.

Second, Dominion has come nowhere close to producing the “clear and convincing” evidence that the relevant individuals at Fox News made or published any challenged statement with actual malice. Indeed, discovery confirms the opposite. Fox News hosts did not take the claims of the President and his lawyers at face value. Instead, they asked whether the lawyers would be able to marshal evidence to prove their allegations in court in time to make a difference in the certification process. When they received assurances that reams of evidence were incoming and allegations would be proven in court promptly, those assurances suggested that the allegations were not fabrications. At the same time, they did not take Dominion’s denials or the statements of government officials and other members of the media at face value either, but they instead reported them as newsworthy denials of newsworthy allegations. And once it became clear that the President and his lawyers would not be able to prove their allegations in time to impact the certifications of the election results, Fox News hosts stopped interviewing them and stopped seeking updates on their progress. None of that is consistent with actual malice, and more than a year of discovery has failed to produce anything that would satisfy the very high bar necessary to prove otherwise.

Third, even assuming a reasonable jury could hold Fox News liable for one or more of the challenged statements, summary judgment is warranted on Dominion's claim for economic damages. Setting aside the problem that Dominion's measure of damages double counts purported lost enterprise value and purported lost profits, the record confirms that Dominion has not suffered any economic harm at all. Its customers never believed the President's claims, and the testing of those claims in the crucible of public debate has left Dominion's financials better than ever. Even if it had suffered economic losses, moreover, Dominion has no coherent theory of causation. It cannot explain why Fox News should be on the hook for hundreds of millions of dollars in purported economic damages given the barrage of coverage of the underlying allegations—including President Trump's own Dominion-specific tweets, which are plainly the cause of any injury Dominion might have suffered.

Fourth, at a minimum, the Court should dismiss Dominion's claim for punitive damages. To receive punitive damages, Dominion must prove that those responsible for the allegedly defamatory publications at Fox News published the statements *solely* because of ill-will or hatred toward Dominion and that top executives at Fox News participated in those decisions. Discovery has confirmed that there is nothing of that sort here; instead, it has revealed that Fox News hosts (like hosts at virtually every news outlet in the country) covered the President's allegations about Dominion because they were the most newsworthy story of the day.

I. The Challenged Statements Are Not Actionable.

This Court denied Fox News' motion to dismiss Dominion's complaint for failure to identify *any* actionable statements. But in doing so, the Court did not purport to determine whether *all* of the statements Dominion challenges are actionable defamation, instead leaving that question for resolution at a later date. *See* D.I.142 at 48 (explaining that "a line-by-line assessment ... is unnecessary at the [motion to dismiss] stage"). Now that the parties are on the eve of trial, the time has come to engage in the statement-by-statement analysis that the law requires. *See, e.g., Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d. Cir. 2013) (requiring statement-by-statement analysis); *Cummins v. Suntrust Cap. Mkts., Inc.*, 649 F.Supp.2d 224, 236 (S.D.N.Y. 2009) (same); *Coles v. Wash. Free Wkly., Inc.*, 881 F.Supp.2d 26, 30 (D.D.C. 1995) (same), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996); *Shorter v. Peaches Uniforms, Inc.*, 2013 WL 268708, at *9 (E.D. Cal. Jan. 23, 2013) (same). And once each of the statements Dominion challenges is carefully examined on its own terms and in proper context, it is clear that none is defamatory as a matter of law. At the very least, the Complaint is radically overbroad, and the Court should narrow the case by eliminating statements that plainly involve no defamation by Fox News.

A. Coverage of and Commentary on Newsworthy Allegations Is Not Defamatory.

To prove a defamation claim, the plaintiff must demonstrate that the defendant published a false and defamatory statement of fact about the plaintiff that caused it harm. *Brian v. Richardson*, 660 N.E.2d 1126, 1129 (N.Y. 1995). The Delaware Supreme Court held just this past year—in an opinion issued after this Court denied Fox News’ motion to dismiss—that press reports are not defamatory when they accurately report newsworthy allegations made by others, even if those allegations ultimately turn out to be false. *Page v. Oath Inc.*, 270 A.3d 833 (Del. 2022), *cert. denied*, 142 S.Ct. 2717 (2022). Such coverage is not defamatory because a reasonable viewer would understand that the publication is not presenting information that it has determined to be true, but is instead fulfilling its journalistic duty to “present[] newsworthy allegations made by others.” *Croce v. N.Y. Times Co.*, 930 F.3d 787, 793 (6th Cir. 2019). In that respect, this principle parallels the treatment of hearsay. Just as an out-of-court statement may be admissible if offered for something other than its truth—such as to show its effect on the listener—so too allegations by public figures may be reported if they are reported not for their truth, but to inform the public that they were made. Robert D. Sack, *Sack on Defamation*, §7:3.5[D][3], at 7-62 (5th ed. 2021). The key question is whether a reasonable viewer, when viewing a statement in the “over-all context in which the assertions

were made,” would interpret the statement as stating defamatory facts about the plaintiff, or as merely reporting newsworthy allegations made by others. *Brian*, 660 N.E.2d at 1130. Whether the contested statements are “reasonably susceptible of a defamatory connotation” is a “legal question to be resolved by the court in the first instance.” *Golub v. Enquirer/Star Grp., Inc.*, 681 N.E.2d 1282, 1283 (N.Y. 1997).

Page illustrates the point. Carter Page, an advisor to President Trump’s 2016 campaign, sued a media company after it published a series of articles on Yahoo! News and Huffington Post that “repeated allegations” from the so-called “Steele Dossier” that Page “had met with high-ranking Russian individuals.” 270 A.3d at 840. The Delaware Supreme Court held that the articles were not defamatory. *Id.* at 846-47. The court explained that the articles did not report that the allegations were true, but instead made “clear that these allegations were unsubstantiated and under investigation—using phrases such as ‘seeking to determine,’ ‘that meeting, if confirmed,’ and ‘at their alleged meeting.’” *Id.* Because the article accurately reported the “true” fact that “U.S. intelligence agencies were investigating the allegations in the Steele Dossier,” Page failed to allege falsity—even if the underlying allegations themselves were false. *Id.* at 846-47 (explaining that it was not the court’s “role to determine whether the information in the Steele Dossier is true or false”).

Page does not stand alone. In *Brian*, the New York high court addressed allegations by public figures related to a presidential election and held that an article was not defamatory even though it repeated allegedly false “claims” made by admittedly questionable “informants” that the plaintiff had (among other things) received “a payoff” for “helping to get some Iranian leaders to collude in the so-called October surprise, the alleged plot by the Reagan campaign in 1980 to conspire with Iranian agents to hold up release of the American Embassy hostages until after election” in order to tip the election in then-candidate Reagan’s favor. 660 N.E.2d at 1128. The Court explained that the “specific accusations of which plaintiff complains could not have been understood by a reasonable reader as assertions of fact that were proffered for their accuracy.” *Id.* at 1131. Rather, because “most of the accusations ... were identified in the article as mere ‘claims’ that had been made by identified and unidentified sources,” “a reasonable reader would understand the statements ... as mere *allegations* to be investigated rather than as *facts*.” *Id.* And “although defendant unquestionably offered his own view that these sources were credible” and called for an investigation into their allegations, that was protected opinion—a conclusion reinforced by the fact that the article was published in the op-ed section of the New York Times and “rife with rumor, speculation and seemingly tenuous inferences.” *Id.*; *see also Boulos v. Newman*, 302 A.D.2d 932, 933 (N.Y. App. Div. 2003) (“Mere allegations, rather than objective statements of fact, are not

actionable.”); *Vengroff v. Coyle*, 231 A.D.2d 624, 625 (N.Y. App. Div. 1996) (“[G]iven the use of the words ‘apparently’, ‘rumored’, and ‘reportedly’ in the letter, a reasonable reader would understand the statements made about the plaintiffs ‘as mere *allegations* to be investigated rather than as *facts*.’”); *GS Plasticos Limitada v. Bureau Veritas*, 84 A.D.3d 518, 519 (N.Y. App. Div. 2011) (similar); *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43 (N.Y. App. Div. 2011) (similar).²

Similar cases abound. In *Croce*, the Sixth Circuit held that a New York Times article was not defamatory even though it reported allegedly false “allegations,” “charges,” and “complaints” against the plaintiff because a reasonable reader would understand that the article was “present[ing] newsworthy allegations made by others,” not presenting them as true. 930 F.3d at 793-95. In *Green v. CBS Inc.*, 286 F.3d 281 (5th Cir. 2002), the Fifth Circuit held that the broadcasts at issue “are non-actionable because they merely report allegations” made by others, and that, in “cases involving media defendants ... the defendant need not show the allegations

² In its briefing on its motion to dismiss, Fox News argued that *Brian* compels dismissal. D.I.61 at 3, 8, 29-32, 34, 35. The Court’s Order denying the motion to dismiss cited *Brian* only in a passing footnote in a section addressing whether Fox News’ coverage was, in its entirety, protected opinion. D.I.142 at 48 n.251. Fox News respectfully re-submits now at the summary judgment stage that *Brian* is on all fours with this case and squarely forecloses Dominion’s efforts to hold Fox News liable for covering and commenting on what its hosts made clear were merely allegations.

are true, but must only demonstrate that the allegations were made and accurately reported.” *Id.* at 284. And in *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), the Eighth Circuit held that Newsweek was not liable for reporting allegations of rape against a former state Attorney General because the publication of the allegation “is the result of a materially accurate report of historical fact, not of an assertion by Newsweek that Janklow committed the alleged crime.” *Id.* at 649.

All those cases stand for the commonsense principle that, when “it is apparent to the reasonable reader” that a publication’s “specific charges were allegations and not demonstrable fact, a libel cause of action does not lie.” *Vengroff*, 231 A.D.2d at 626. That is why “[i]f the President of the United States baselessly accused the Vice President of plotting to assassinate him, ... the media could safely report the President’s accusation” without risking a billion-dollar defamation suit by the Vice President “even if they seriously doubted its truth.” *Sack on Defamation*, §7:3.5[D][3], at 7-62. That is also presumably why even Dominion has not tried to hold Fox News liable for airing Bartiromo’s November 29 interview of President Trump, even though the President himself accused “Dominion machines” on air of “mov[ing] thousands of votes from my account to Biden’s account,” characterized Dominion’s machines as “garbage machinery,” and alleged that “votes in Dominion” are “counted in foreign countries.” Ex.A27, *Sunday Morning Futures Tr.* 5, 9, 14 (Nov. 29, 2020). As one of Dominion’s own lawyers presciently

observed: “It is unthinkable that any competent plaintiff’s lawyers would advise a client to sue the likes of CBS, FOX, or CNN for live transmission of the defamatory remarks uttered by, let us say, President Trump.” 1 Rodney A. Smolla, *Law of Defamation* §4:97 (2d ed. 2022). There is no reason for a different rule when the press reports allegations made by the President’s lawyers.

Indeed, a contrary rule would have alarming consequences for the press and the public alike. By Dominion’s telling, anyone who repeats a false allegation by a public official has engaged in defamatory speech, even if the person just says, “I want to see the evidence” or “I hope that proves true.” That would mean that a reporter could never repeat a statement made by a public official that the reporter suspects to be false—whether an allegation of election fraud, a denial of allegations of sexual misconduct, an allegation of collusion with the Russian government, or any of the myriad claims and counterclaims concerning raging controversies where only one side can be telling the truth.

For those reasons, reporting allegations made by others not only is not defamatory, but is affirmatively protected by the First Amendment when what is newsworthy about the allegations is the very fact that they were made. After all, the First Amendment embodies a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Sullivan*, 376 U.S., at 270. And it offers the highest protection to speech on matters of public

concern. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Accordingly, the First Amendment squarely protects the press from liability for covering allegations that are newsworthy simply because “they were made.” *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977). Because the “public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them,” the “First Amendment” protects coverage and commentary on allegations by public officials so long as the press “accurately conveys the charges.” *Id.* at 120; *see also Orr v. Lynch*, 60 A.D.2d 949, 950 (N.Y. App. Div. 1978), *aff’d* 383 N.E.2d 562 (N.Y. 1978). That is true even if the target of the allegations denies them, *Edwards*, 556 F.2d at 120-21, even if the news outlet’s decision to report on them is colored by “partisan outlooks,” *Goldwater v. Ginzburg*, 414 F.2d 324, 335, 342 (2d Cir. 1969), and even if the press “has serious doubts regarding their truth,” *Edwards*, 556 F.2d at 120.

This Court suggested (but did not squarely hold) in its motion to dismiss opinion that New York law forecloses that conclusion because New York courts have “held the neutral reportage doctrine inapplicable.” D.I.142 at 41 (citing *Hogan v. Herald*, 84 A.D.2d 470, 479 (N.Y. App. Div. 1982), *aff’d* 444 N.E.2d 1002 (N.Y. 1982)). With respect, that reasoning is mistaken. As an initial matter, the principle that the press has a right to cover and comment on the newsworthy allegations of

newsworthy figures is not a “privilege” for states to accept or discard. It is a right that stems from *the First Amendment*. New York courts have no license to furnish less protection than the Constitution demands. And regardless of how some New York courts may have interpreted the First Amendment—and *Hogan* was plainly interpreting the First Amendment, not New York law, *see* 84 A.D.2d at 478-79 (rejecting “*constitutional* privilege of neutral report” (emphasis added)), *but see* D.I.142 at 41 (stating that *Hogan* “held the neutral report doctrine inapplicable *under New York law*” (emphasis added))—this Court is “not ... bound by the expressions of New York courts concerning this issue of federal constitutional law.” *Law Firm of Daniel P. Foster, P.C. v. Turner Broad. Sys., Inc.*, 844 F.2d 955, 961 n.12 (2d Cir. 1988). This Court is thus free—in fact, obligated—to interpret the First Amendment in the first instance.

In all events, New York courts certainly have not rejected the proposition that the press has a right to cover and comment on newsworthy allegations by newsworthy figures. At most, New York courts have rejected only the more sweeping proposition that the press has an “absolute privilege for attributed quotations,” no matter who said them or about whom, so long as their subject-matter is “newsworthy.” *Hogan*, 84 A.D.2d at 478. That is not and has never been Fox News’ position. There is an obvious difference between repeating allegations that have no news value *unless they are true* and repeating allegations that the people

have a right to know even—indeed, perhaps especially—if they may be false. Moreover, *Hogan* “rejected ... a neutral reportage privilege for private plaintiffs” only, not “for public figure plaintiffs,” and even that has since been walked back. *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 105 n.11, 106 (2d Cir. 2000) (citing *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. 1975), and *Weiner v. Doubleday & Co.*, 549 N.E.2d 453, 456-67 (N.Y. 1989)).³

That readily explains why a New York intermediate court had no problem rejecting a defamation claim on the ground that a newspaper “was simply servicing its informational function in relaying [another person’s] views, which were in themselves a matter of public concern regarding a public official,” *Duci v. Daily Gazette Co.*, 102 A.D.2d 940, 941 (N.Y. App. Div. 1984), two years after the New York high court summarily affirmed *Hogan*. Other New York courts likewise have repeatedly concluded that press coverage and commentary on newsworthy

³ *Hogan* drew that distinction largely based on its reading of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as standing for the proposition that “a publisher’s immunity is based upon the status of the plaintiff, not the subject matter of the publication,” 84 A.D.2d at 478—a reading that is highly suspect under more recent Supreme Court decisions clarifying that speech on matters of public concern merits heightened First Amendment protection even when it concerns a private figure. *See, e.g., Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); Sack on Defamation, §7:3.5[D][4][a], at 7-63-65. *Hogan*’s focus on the status of a plaintiff rather than the subject matter of a publication has likewise been outpaced by New York’s Anti-SLAPP statute. *See* N.Y. Civ. Rights Law §76-a(1)(a), (2).

allegations is not actionable as defamation. *See, e.g., Orr*, 60 A.D.2d at 950 (broadcasts that contained an interview with a third party who made allegedly false statements about a public official plaintiff were not defamatory because the defendants “were clearly serving their informational function in relaying [the third party’s] opinions”), *aff’d* 383 N.E.2d 562 (N.Y. 1978); *Campo Lindo for Dogs, Inc. v. N.Y. Post Corp.*, 65 A.D.2d 650, 650 (N.Y. App. Div. 1978) (no defamation where “article was an objective account of information obtained in the legitimate course of defendant’s business to report newsworthy material”).

But even if this Court decides that the *First Amendment* does not entitle the press to cover and comment on newsworthy allegations by newsworthy figures, New York courts have squarely held that such coverage is not defamatory as a matter of *New York defamation law*, as cases like *Brian, Boulos, Vengroff, GS Plastics*, and *Sandals Resorts* confirm. New York, of course, is free to fashion its defamation law in ways that are more protective of the press than the First Amendment. *See Jones v. Mississippi*, 141 S.Ct. 1307, 1323 (2021). Indeed, the New York high court has gone out of its way to make clear that, due to New York’s “exceptional history and rich tradition” of “liberty of the press,” the “protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution.” *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1278 (N.Y. 1991). To read New York law as somehow

foreclosing protection for Fox News' coverage and commentary thus would get matters backwards. Regardless of whether one looks at this case through the lens of New York defamation law or the First Amendment, then, the Court has an obligation to examine the statements Dominion challenges and determine whether a reasonable viewer would understand them to be stating defamatory facts, or merely covering or commenting on obviously newsworthy allegations. *See Brian*, 660 N.E.2d at 1130. And once the Court conducts that analysis, it is clear that Dominion's defamation claims are not viable.

B. Fair-Report Principles Protect Reporting on Official Proceedings and Investigations.

The same basic principles underlie the fair-report doctrine, which protects reporting on official proceedings and investigations: “[T]he public has the right to be informed as to what occurs in its courts” and other official fora regardless of the accuracy of the underlying allegations. *Estes v. Texas*, 381 U.S. 532, 541-42 (1965). Thus, so long as it is clear that the press is reporting about the proceedings or investigations, not presenting any underlying allegations as true, there is no potential for defamation at all. While that rule is compelled by the First Amendment, New York has memorialized it in statutory law as well, prohibiting civil liability “for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding.” N.Y. Civ. Rights Law §74; *see also, e.g., Cholowsky*

v. Civiletti, 69 A.D.3d 110, 114 (N.Y. App. Div. 2009); *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N. Y.*, 101 A.D.2d 175, 181-82 (N.Y. App. Div. 1984). That protection “is absolute, and is not defeated by the presence of malice or bad faith.” *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620, 620 (N.Y. App. Div. 1994).

At the motion to dismiss stage, the Court suggested that Fox News cannot invoke fair-report principles because Giuliani and Powell made some (but not all) of their allegedly defamatory statements before lawsuits mentioned Dominion. D.I.142 at 45-46. But “[t]he case law has established a liberal interpretation” of §74 “so as to provide broad protection to news accounts of judicial or other official proceedings.” *Cholowsky*, 69 A.D.3d at 114. Under that broad standard, there is no requirement that an official proceeding actually exist at the time of publication. Instead, §74 (and the First Amendment) protects reporting on *both* “pending *and* anticipated judicial proceedings” and official investigations that precede judicial proceedings. *Dimond v. Time Warner, Inc.*, 119 A.D.3d 1331, 1333 (N.Y. App. Div. 2014) (emphasis added); *see also, e.g., Law Firm of Daniel P. Foster, P.C.*, 844 F.2d at 955 (statement concerning execution of a search warrant); *Freeze Right*, 101 A.D.2d at 182 (investigation by the New York City Department of Consumer Affairs); *Baumann v. Newspaper Enters., Inc.*, 270 A.D.825 (N.Y. App. Div. 1946) (district attorney investigation). It also covers attorney statements related “to a

possible position” that the attorney’s client may take in pending litigation. *McNally v. Yarnall*, 764 F.Supp.853, 856 (S.D.N.Y. 1991). But in all events, the record at summary judgment confirms that many of the statements at issue here *were* made after suits were filed, so at the very least, trial should be limited to statements that predate them.

C. Statements of Opinion Are Not Actionable.

Both the First Amendment and New York law also protect statements of opinion. While not every statement couched as an opinion is necessarily immune, genuine statements of opinions most certainly are, for “a statement on matters of public concern must be provable as false before there can be liability.” *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19-20 (1990). The key question is whether, in context, a reasonable reader would understand that “what is being read or heard is likely to be opinion, not fact.” *Brian*, 660 N.E.2d at 1129. Courts should not “search a publication for specific factual assertions and then hold those assertions actionable unless they were couched in figurative or hyperbolic language.” *Id.*; *Immuno*, 567 N.E.2d at 1281. Instead, when determining “whether [a] statement is one conveying opinion or fact,” courts should consider “both the immediate context and the broader social context in which a published statement was made.” *Brian*, 660 N.E.2d at 1127-28. “[L]oose, figurative, or hyperbolic language” tends to “negate the impression” that a person is “seriously” stating a fact. *Milkovich*, 497 U.S. at 20-21.

The “general tenor” or larger context in which a purportedly defamatory statement appears may negate the impression that the statement is factual as well. *Id.* at 21. That is particularly true of suggestions that newsworthy allegations merit full investigation. *Brian*, 660 N.E.2d at 1128.

Courts have frequently recognized that spirited debate on opinion shows does not lend well to statements of actual fact. Over-the-top and emotionally charged language is commonplace in that setting, so that medium “by custom or convention signals to [viewers] that what is being read or heard is likely to be opinion, not fact.” *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 226 (2d Cir. 1985); *see, e.g., Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157 (9th Cir. 2021) (“Although MSNBC produces news, Maddow’s show in particular is more than just stating the news—Maddow is invited and encouraged to share her opinions with her viewers.” (quotation marks omitted)); *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 183 (S.D.N.Y. 2020) (“This ‘general tenor’ of [*Tucker Carlson Tonight*] should then inform a viewer that [Carlson] is not ‘stating actual facts’ about the topics he discusses and is instead engaging in ‘exaggeration’ and ‘non-literal commentary.’”). That is especially true for statements uttered in the context of competing allegations in politically charged disputes: It is well-recognized that “rhetorical hyperbole” is “normally associated with politics and public discourse in the United States.” *Clifford v. Trump*, 339 F.Supp.3d 915, 925 (C.D. Cal. 2018).

D. None of the Challenged Statements Is Actionable Defamation.

Applying these principles, none of Dominion’s claims is viable. The statements Dominion challenges all occurred in connection with coverage of allegations made by the President and his lawyers. It is plain as day that any reasonable viewer would understand that Fox News was covering and commenting on *allegations* about Dominion, not reporting that the allegations were true.⁴ A reasonable viewer would have readily understood that hosts were not espousing the President’s allegations themselves, but were providing a forum for the principal architects of those legal challenges to explain the latest allegations and present what evidence they had to support them. Indeed, hosts made clear at every turn that the allegations were coming from Giuliani, Powell, or the President himself, and that to have any material effect on the electoral outcome, those allegations would need to be proven in court before the mid-December deadline for states to certify the electoral vote. Instead of adopting those allegations as their own, hosts repeatedly asked Giuliani, Powell, and the President what evidence they had to substantiate their claims. A reasonable viewer thus would readily have understood that Fox News hosts were “present[ing] newsworthy allegations made by others.” *Croce*, 930 F.3d at 793.

⁴ Fox News has provided transcripts as well as videos of the full broadcasts of the allegedly defamatory shows. *See* Exs.A1-39 (transcripts); Exs.B1-B17 (videos).

In addition, much of Fox News’ coverage is protected by fair-report principles. Virtually all the allegations made by Giuliani and Powell on Fox News shows were included in lawsuits that the President’s legal team filed in court and/or in affidavits filed to support them. And to the extent Dominion seeks to hold Fox News liable for hosts’ commentary on the allegations—such as expressing an opinion that the allegations were credible, or that they merited investigation, or a sincere hope that they would prove true—that is protected opinion.

November 8 – Sunday Morning Futures. Start with the November 8 broadcast of *Sunday Morning Futures*. Bartiromo began the show by stating: “***President Trump*** says the votes are wrong, and ***he is*** readying ***new lawsuits*** to drop tomorrow ... containing ***what he says*** is evidence of voter and ballot fraud, potentially a stolen election. Coming up, ***Rudy Giuliani and Sidney Powell make the president’s case right here.***” Ex.A2, Sunday Morning Futures Tr. 1 (Nov. 8, 2020). Bartiromo read a statement from President Trump claiming “the election is far from over.” *Id.* at 2. She then introduces Giuliani and asks: “The first question everybody wants to know is, ***what is the evidence the president has alluded to in terms of ballot fraud? What can you tell us?***” *Id.* The broadcast on screen highlighted to viewers that the “TRUMP LEGAL TEAM” was “PREPARING NEW

LAWSUITS,” and that Giuliani’s allegations were part of that legal strategy:



As Giuliani put forth his case, Bartiromo pushed back: “*If this was systemic, and you have got all of this evidence, where is the DOJ?*” *Id.* at 5. After Giuliani pointed out that the President needed time to marshal evidence for his lawsuits, Bartiromo asked: “So, *how long will this take, Rudy?*” *Id.* at 6. And while interviewing Senator Ted Cruz later in the show, Bartiromo made clear that Giuliani’s allegations were Giuliani’s: “We just heard from Rudy Giuliani ... there are 10 states, *he says*, that are potentially stolen, 800,000 votes in question, *according to Rudy Giuliani.*” *Id.* at 12.

After interviewing Senator Cruz, Bartiromo then introduced Powell: “*President Trump’s legal team* ... is preparing for all-out war, beginning with a *slew of new lawsuits* this week ... along with *what our next guest says* is evidence of voter fraud. *Sidney Powell* is ... fighting on the front lines of this battle as *part of the president’s legal team.*” *Id.* at 15. Again, the broadcast displayed a graphic highlighting that the “TRUMP TEAM” was “SET TO FILE NEW LAWSUITS OVER

BALLOTING,” making clear to readers that the allegations were part of the President’s legal challenges:



Bartiromo asked Powell to “walk us through what has taken place here ... *as you see it?*” *Id.* at 15. After Powell claimed voter fraud, Bartiromo pressed back: “*If this is so obvious, then why aren’t we seeing massive government investigation?*” *Id.* Bartiromo then asked Powell about Dominion: “Sidney, we talked about Dominion software. I know that there were voting irregularities. Tell me about that.” *Id.* at 16. Powell then alleged that Dominion machines “flipp[ed] votes” and facilitated “fraud.” *Id.* Bartiromo noted that “I have never seen voting machines stop in the middle of an election, stop down, and assess the situation.” *Id.* At the conclusion of the interview, Bartiromo made clear that the allegations that Dominion committed fraud were Powell’s: “Sidney, these are *incredible charges* that *you are making* this morning. We, of course, will be following this.” *Id.* at 17.

There is no way a reasonable viewer could fail to understand that Bartiromo was providing Giuliani and Powell with an opportunity to explain *their allegations* of

fraud that they planned to include in imminent lawsuits, and that the allegations would need to be backed by evidence and proven in court in short order to have any effect on the electoral outcome. Bartiromo made “clear that these allegations were unsubstantiated” and that they belonged to the President and his legal team, 270 A.3d at 846-47, using phrases such as “President Trump says,” “the President’s case,” “what is the evidence,” and “charges that you are making.” *See Brian*, 660 N.E.2d at 1131 (no defamation where “most of the accusations about plaintiff that defendant recounted were identified in the article as mere ‘claims’ that had been made” by others); *GS Plásticos*, 84 A.D.3d at 519 (“Based on the use of the words ‘it is likely’ and ‘may’ when describing defendant’s purported misconduct, an average reader would understand these words ‘as mere *allegations* to be investigated rather than as *facts*.”). Bartiromo also made clear that the allegations were part of the President’s broader legal strategy, and that his team would need to eventually marshal evidence to prove their claims in court before the mid-December deadline for states to certify the electoral vote. She even alerted viewers to reasons to doubt the claims, explaining that, if the evidence really were as extensive as Powell and Giuliani claimed, the government would surely be investigating.

To be sure, Bartiromo stated that “there were voting irregularities,” and that she had “never seen voting machines stop in the middle of an election, stop down, and assess the situation.” But both statements are substantially true. The day after the

election, numerous media outlets reported “irregularities with the ... vote totals” in Antrim County, Michigan, which “use[d] Dominion voting equipment.” Ex.D16, Detroit Free Press, Antrim County Election Results Investigated After Red Michigan County Turns Blue (Nov. 4, 2020). Dominion does not contest that those irregularities occurred. See Ex.E13, Poulous 30(b)(6) Dep. Tr. 846:22-848:4. Likewise, multiple news outlets reported in the immediate aftermath of the election that election officials paused counting in Georgia. See, e.g., Ex.D21, *Politico*, Burst Pipe Delays Atlanta Absentee Vote Counting (Nov. 3, 2020); Ex.D18, *Politico*, More Georgia Equipment Problems Delayed Absentee Ballot Count, *Politico* (Nov. 4, 2020). Dominion does not contest that fact either. In any event, Dominion has not produced any evidence (let alone clear and convincing evidence) demonstrating that Bartiromo knew that these specific statements were false at the time of the broadcast—which aired just five days after election day, and one day after the press called the election for President Biden. See *infra* at 123-46.

November 12 – Lou Dobbs Tonight. For similar reasons, nothing in Dobbs’ November 12 show is actionable defamation. Dobbs began the segment by updating viewers on the status of the President’s legal claims: “The battle for the White House is raging and President Trump and *his legal team* have no plans to call it quits. *Court action* is picking up ... and we’re told *more lawsuits are planned and in the works.*” Ex.A5, Lou Dobbs Tonight Tr. 1 (Nov. 12, 2020). After informing viewers of the

latest in the Arizona, Pennsylvania, and Michigan lawsuits, Dobbs asked lawyer Jenna Ellis, the “spokeswoman for the Trump Campaign’s legal team,” for an update on “where we are *in the challenges*” regarding “software irregularities,” to which Ellis responded: “[W]e are still uncovering more evidence. We’re only eight days after the election. We still have a lot of legal challenges coming.” *Id.* at 5. Later in the show, Representative Andy Biggs stated that Dominion provided machines in Arizona. Dobbs responded: “So you’ve got ... *all sorts of allegations* are being made about the trustworthiness of those systems *and whether they are or are they not* vulnerable to hacking.” *Id.* at 6. Biggs responded: “We need *to find that out and get to the bottom of this.*” *Id.*

After the break, Dobbs told his viewers that “*President Trump is zeroing in on Dominion* voting machines.” *Id.* at 7.⁵ He then stated (accurately) that Texas had rejected Dominion’s machines in 2019 and quoted the state’s findings about Dominion’s vulnerabilities extensively, *id.* at 7-8—statements that Dominion does not challenge. Dobbs asked Giuliani to elaborate on his allegations: “Rudy ... Let’s talk about just for a moment an update on Dominion and how important *do you*

⁵ Earlier that day, President Trump retweeted a report accusing Dominion of “deleting 2.7 million trump votes nationwide.” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 12, 2020, 11:34am).

believe the concerns that are being expressed in a number of states about the ability of these machines not to be hacked.” *Id.* at 8. Giuliani alleged that Dominion is a Canadian company that uses Smartmatic software, which sends votes overseas and is “extremely hackable.” *Id.* at 8. Dobbs called for an investigation into Giuliani’s claims in response: “***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.” *Id.*

Dobbs then expressed doubts that Giuliani would be able to muster the evidence to prove the President’s claims. He explained that “five of the top voting companies in this country” are “private,” making it “difficult to get a handle on just who owns what and how they are being operated.” *Id.* And he noted that states cannot “audit meaningfully the votes that are cast because the servers are somewhere else and are considered proprietary.” *Id.* Given those challenges, Dobbs asked: “***how do you proceed now?***” *Id.* at 9. As they spoke, the broadcast displayed a graphic highlighting that the claims were made “BY PRESIDENT TRUMP.”



In conclusion, Dobbs stated: “Rudy ... *this looks to me like it maybe—and I say maybe, I’m not suggesting it is*—but following the operation as when President Trump was candidate to block his presidency, to follow the special counsel, first 11 months of investigation, then the special counsel investigation which went nowhere except to exonerate him. And then the phony impeachment process—this looks to me like it is the end of what has been a four and a half ... year-long effort to overthrow the President of the United States. It looks like it is exactly that.” *Id.* He continued: “[I]t is extraordinary that this election has got more firsts than any I can think of. And Rudy, we’re glad you’re on this case and pursuing what is the truth and straightening out what is a very complicated and difficult story.” *Id.* at 10.

A reasonable viewer would have understood that Dobbs was providing Giuliani with an opportunity to explain the President’s allegations and future lawsuits, not reporting the allegations as true. From the very beginning of the show, Dobbs emphasized that the claims were coming from President Trump’s “legal team,” and that additional lawsuits were “in the works.” Ellis, a spokeswoman for the Trump campaign, noted that the President’s legal team was still gathering evidence regarding his claims against Dominion and that it had only been eight days since the election. And Dobbs’ exchange with Representative Biggs reinforced that President Trump’s legal team had yet to “get to the bottom” of one of the key questions raised by the President’s claims: whether Dominion’s machines “*are or are ... not*”

vulnerable to hacking. After Giuliani stated his allegations against Dominion, Dobbs called for an investigation. A “call for a full-scale investigation” into allegations made by others reflects a “personal opinion” that the allegations merit *investigation*, not the “demonstrable fact” that they are true. *Brian*, 660 N.E.2d at 1131.

A reasonable viewer would also understand that, by mentioning Dominion’s servers and the challenge of auditing them, Dobbs was simply repeating Giuliani’s allegations to offer his opinion on the difficulty of proving them. That conclusion is underscored by the fact that Dobbs expressed uncertainty about Giuliani’s claim just a few sentences earlier. Repeating allegations made by others for purposes of commenting on them is not defamatory; after all, “without a recitation of the existing unresolved charges, defendant’s call for a full-scale investigation would have made no sense.” *Id.*

That statement also falls squarely within the province of fair-report protection. In context, a reasonable viewer would understand that Dobbs was referencing allegations that President Trump’s legal team planned to include in imminent lawsuits, which they did a few weeks later. *See, e.g.*, Ex.C10, Decl. ¶15(j), *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Nov. 25, 2020) (claiming that “the results were forwarded to Scytl/SOE Software servers located in Frankfurt, Germany (previously, Barcelona, Spain)); Ex.C11, Compl. ¶75, *Feehan v. Wisconsin*

Elections Comm'n, No. 2:20-cv-1771 (Dec. 1, 2020) (“Dominion Voting Systems works with SCYTL, and that votes on route, before reporting, go to SCYTL in foreign countries.”); Ex.C12, Compl. ¶80, *Bowyer v. Ducey*, No. 2:20-cv-2321 (D. Ariz. Dec. 2, 2020) (same). Moreover, Dominion has not produced any evidence (let alone clear and convincing evidence) that Dobbs knew that the statement about Dominion’s servers and the challenge of auditing them were false (assuming they were even false). Indeed, computer scientists and members of the media had raised similar concerns for years. *See, e.g.*, Ex.D26, *CNN*, At Hacking Conference, Pentagon’s Transparency Highlights Voting Companies’ Secrecy (Aug. 12, 2019); Ex.D15, *The Guardian*, “They Think They Are Above the Law”: The Firms that Own America’s Voting System (Apr. 23, 2019).

To be sure, Dobbs stated that the election was “extraordinary” and that it looked like “the end game to a four-and-a-half-year-long effort to overthrow the President.” But a reasonable viewer would have readily understood that the statement was Dobbs’ opinion, and a tentative one at that. Dobbs made that clear earlier in the statement, emphasizing that “*I think that ... this looks to me like it maybe—and I say maybe, I’m not suggesting it is...*” Ex.A5, Lou Dobbs Tonight Tr. 9 (Nov. 12, 2020). The First Amendment fully protected his right to state that opinion. A statement that the 2020 election was “maybe” the “end game” to a four-year effort to overthrow the President is not the kind of statement that is provably false (and

thus actionable)—a point reinforced by the fact that Dobbs used the type of “loose, figurative, or hyperbolic language” that “negate[s] th[e] impression” that a person is stating a defamatory fact. *Milkovich*, 497 U.S. at 21. Moreover, viewers recognize that *Lou Dobbs Tonight* is an opinion show on which Dobbs offers stimulating opinion and commentary on partisan politics, typically from a conservative perspective. Dobbs’ reference to the “four-year effort to overthrow” the President is exactly the type of protected opinion commentary that viewers had come to know and expect on *Lou Dobbs Tonight*.

November 13 – Lou Dobbs Tonight. Dobbs covered the controversy again the next day. His show began with an extended monologue, during which he reiterated his view the day before that the President’s opponents, including the FBI and Democrats, had spent four years undermining him. Ex.A7, *Lou Dobbs Tonight Tr. 1* (Nov. 13, 2020). He continued: “Those efforts to subvert President Trump and his administration have been nothing less, *in my opinion*, than treason. An attack on the Constitutional Republic, an attack on the American people.” *Id.* “Their conspiracy in league with the Democratic Party, its leaders and the corporate-owned left-wing national media has reached the end game. We are at the conclusion of what has been a four-year assault on Donald Trump.” *Id.*

Dobbs began the next segment by telling viewers that Democrats, Republicans, and others contested the President’s claims: “Well, the President today also remained

defiant in the battle for the White House. The president having one hell of a fight though against the radical Dems, the RINOs of his own party, the Washington establishment, military leaders, Big Tech, the judiciary—did I mention the national left-wing media?” *Id.* at 2. He also informed viewers that the “*U.S. Cybersecurity Agency says that the November 3rd election was the most secure in American history.*” *Id.*

After a break, Dobbs told viewers that Dominion contested the allegations too: “Breaking news now. *Dominion Voting Systems say they categorically deny any and all of President Trump’s claims that their voting machines caused any voter fraud in key swing states or electoral fraud.*” *Id.* at 4.⁶ He then introduced Powell and asked her about Dominion’s denial: “[J]oining us tonight is Sidney Powell, *a member of President Trump’s legal team ... Let’s start with Dominion, a straight-out disavowal of any claim of fraud against the company, its software or machines.*” *Id.* at 5. Powell responded by claiming that she had evidence that

⁶ The President tweeted multiple times on November 13 about Dominion: “This Election was Rigged, from Dominion all the way up & down!” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 13, 2020, 1:35pm). “Now it is learned that the horrendous Dominion Voting System was used in Arizona (and big in Nevada). No wonder the result was a very close loss!” *Id.* (Nov. 13, 2020, 3:38pm). He also retweeted a tweet noting that “Democratic senators warned of potential ‘vote switching’ by Dominion voting machines prior to 2020 election.” *Id.* (Nov. 14, 2020, 1:14am)

Dominion altered votes in Venezuela, and implied that Dominion manipulated the 2020 election as well. *Id.*

Dobbs reminded her that she needed evidence to prove her claims in court, and needed to produce that evidence promptly: “[Y]ou’re going to have to be quick to go through *and to produce that investigation and the results of it*. The December deadlines are approaching for electors and just as we saw in 2000 with Bush v. Gore, how critical are those deadlines? And *how urgent does that make your investigation and discovery?*” *Id.* Powell responded that states would have to be stupid to certify the vote with such massive fraud. Dobbs then asked: “With *these allegations, these charges*, is the F.B.I. already *carrying out an investigation of these voting companies* where their servers are domiciled?” *Id.* at 6. Powell stated that she was not “privy to that information.” *Id.* She then complained about the Department of Homeland Security and the F.B.I. and called for the leadership of those agencies to be fired. *Id.* Dobbs then referenced back to his opening monologue: “Sidney, at the outset of this broadcast, I said this is the culmination of what has been over a four-year effort to overthrow this President ... This looks like the effort to carry out an end game in the effort against him. Do you concur?” *Id.*

Again, a reasonable viewer would understand that Dobbs was providing a forum for the President’s lawyers to explain claims that he emphasized still needed to be substantiated with actual evidence in court—not reporting that those claims were

true. Much like the defendants in *Page* and *Brian*, Dobbs expressly stated that Powell’s claims were mere “allegations” and “charges” that the F.B.I. may be “investigat[ing]”—not demonstrable facts about Dominion. *See Page*, 270 A.3d at 846; *Brian*, 660 N.E.2d at 1131. Dobbs expressly told viewers that Dominion denied the allegations against it. He told viewers that CISA, various Secretaries of State, and other government officials disputed the President’s claims. He also reminded Powell that she needed to produce hard evidence to overturn the election in court before the deadline for certification. There is no way a reasonable viewer would fail to understand that Powell’s allegations were nothing more than allegations that had yet to be substantiated.

Dobbs’ reference to the “four-year effort to overthrow” the President only underscores that many of his statements were fully protected opinions. In context, a reasonable viewer would plainly understand that Dobbs was (as he expressly said he was) referring to his “opinion” in his opening monologue that the irregularities in the election generally, and not the actions of Dominion specifically, marked the culmination of a four-year effort by the F.B.I., Democrats, and the media (but not Dominion specifically) to undermine the President. That is reinforced by Powell’s discussion immediately preceding Dobbs’ statement, which criticizes the F.B.I. and Department of Homeland Security. There is no way that a reasonable viewer would interpret that reference as a statement of fact about Dominion or a statement about

the truth of Powell’s allegations, particularly in light of statements earlier in the broadcast making clear that Powell’s allegations had yet to be proven, and that the allegations were part of the President’s case that he would need to prove in court in short order.

November 14 – @LouDobbs Tweet. On November 14, the @LouDobbs Twitter account posted this tweet: “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.” Compl. ¶179(d). Embedded in that tweet was another tweet from Giuliani claiming that Dominion “was counting our vote in Michigan, Arizona and Georgia and other states,” but that Dominion was a “front” for Smartmatic, “who was really doing the computing.” Giuliani’s tweet then concludes: “*It will all come out.*” *Id.*

Dominion claims that Dobbs’ tweet is defamatory, but context strongly indicates that the tweet was the type of “loose, figurative, or hyperbolic language” that “negate[s] th[e] impression” that a person is stating a defamatory fact. *Milkovich*, 497 U.S. at 21. Dobbs used “colloquial and loose” language throughout, *600 W. 115th St. Corp. v. Von Gutfield*, 603 N.E.2d 930, 937-38 (N.Y. 1992), opining that “there is no way in the world” that the election was “free or fair.” Dobbs’ tweet is also “devoid of reference to” any “specific” facts about Dominion, *id.* at 937—it instead attributes “electoral fraud” to “Democrat[s]” generally. To be sure, Dobbs

retweeted Giuliani, who made specific claims about Dominion. But Giuliani’s tweet made clear on its face (*i.e.*, “It will all come out”) that his claims about Dominion were mere “allegations to be investigated rather than ... facts.” *Brian*, 660 N.E.2d at 1131. Moreover, the general tenor of Dobbs’ remarks conveys an “expression of outrage” rather than “an accusation of fact.” *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002). None of that is consistent with “the language of someone inviting reasonable persons” to “find specific factual allegations in his remarks.” *Von Gutfeld*, 603 N.E.2d at 937. The same reasoning has doomed other defamation suits involving accusations of “fraud.” *Id.* at 937-38.

The forum of the statement—Twitter—reinforces the conclusion that Dobbs was not stating defamatory facts about Dominion. New York courts have recognized that Twitter is not a natural setting in which a reasonable viewer would conclude that she is hearing actual facts about the plaintiff. *Rapaport v. Barstool Sports, Inc.*, 2021 WL 1178240, *19 (S.D.N.Y. Mar. 29, 2021). What was true of the New York Times op-ed page is true, *a fortiori*, of Twitter: The “common expectation” is that such statements “will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion.” *Brian*, 660 N.E.2d at 1130.

November 14 – Justice with Judge Jeanine. Jeanine Pirro covered the election controversy on *Justice with Judge Jeanine*. She began her November 14 show by

stating: “The most important part of democracy is to do it correctly. Most important question tonight is, *did we in 2020?* America ... demands all *due diligence* be exercised in this highly contested presidential election.” Ex.A9, Justice with Judge Jeanine Tr. 1 (Nov. 14, 2020). She reminded viewers that, although the media had called the election, the states had yet to certify the vote, and electors would not meet until December 14. *Id.* And in the meantime, “the complaints now in the form of *affidavits and lawsuits* started coming in.” *Id.*

After listing various allegations made in lawsuits across the country, Pirro stated: “The Dominion Software System *has been tagged* as one *allegedly* capable of flipping votes. Now, *you’ll hear from Sidney Powell* in a few minutes, who will explain *what she has unearthed* in the creation of Dominion.” *Id.* at 2.⁷ Pirro pointed to “*a lawsuit by Lin Wood* in the United States District Court in Georgia.” *Id.* at 3. She concluded her opening statement by asking: “The question ultimately is, will any of these *allegations* affect the sufficient number of votes to change the result of the election? *Maybe yes, maybe no. If the answer is President Trump did not win*, then on January 20th, *Joe Biden will be my President* ... And in the

⁷ Earlier that day, President Trump tweeted: “People are not going to stand for having this Election stolen from them by a privately owned Radical Left company, Dominion, and many other reasons!” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 14, 2020, 3:07pm).

meantime, please don't tell me that ... we cannot *pursue these irregularities.*" *Id.* at

3. "We will pursue all *legal avenues* where there are irregularities, anomalies, illegalities and corruption. And until the certification and the electors vote, that is not a lot to ask." *Id.*

Later in the show, Pirro made clear again and again that the allegations referenced in the opening monologue (including the allegations about Dominion) were "very much a part of *lawsuits, affidavits, where people are swearing that they're telling the truth.*" *Id.* at 4. When interviewing Congressmen Jim Jordan, Pirro stated: "I referenced some of the *affidavits* that are part of the *lawsuits* going on and *the most recent lawsuit was filed yesterday by Lin Wood* in Georgia ... How do you think this is all going to end up, Jim?" *Id.* at 6. Congressmen Jordan responded that "we need to *investigate,*" and questioned why "Democrats spent four years investigating the Russian hoax," but did not "want to take four weeks *to investigate* the integrity of this election *when you had all these affidavits.*" *Id.* Pirro concurred in that sentiment, and wondered why "we can't even follow *a legitimate legal process* to determine *whether or not there was* some kind of irregularity or illegality." *Id.*

That discussion set the backdrop for Pirro's interview with Powell. Pirro introduced Powell as "*Trump campaign attorney* and former federal prosecutor," and asked her whether she could give "some idea of what *you're working on now*

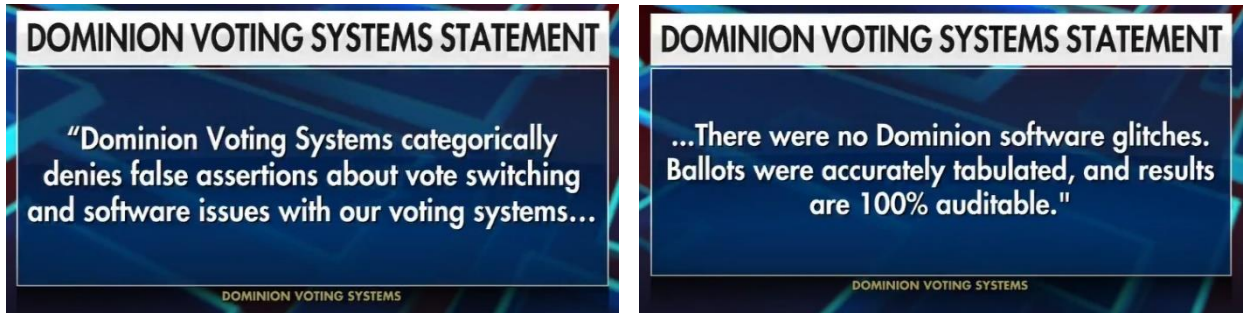
and what exactly *you are doing in the Trump Campaign*, in this effort to identify problems with the election?” *Id.* at 7-8.⁸ The broadcast displayed a graphic emphasizing that Powell was a “TRUMP CAMPAIGN ATTORNEY” and that her allegations were part of “TRUMP’S ELECTION LEGAL FIGHT.”



When Powell accused Dominion and Smartmatic software of manipulating votes, Pirro pushed back: “Well, and now that you mentioned that, *they’ve denied that they have done anything improper and they deny that this claim that there’s 6,000 votes that went from President Trump to Biden had anything to do with their software.* But at the same time, as you put together *your case*, Sidney, I assume that you are *getting to the bottom* of exactly what Dominion is, who started Dominion,

⁸ Earlier that day, President Trump identified Powell as part of his legal team: “I look forward to Mayor Giuliani spearheading the legal effort to defend OUR RIGHT to FREE and FAIR ELECTIONS! Rudy Giuliani, Joseph diGenova, Victoria Toensing, Sidney Powell, and Jenna Ellis, a truly great team, added to our other wonderful lawyers and representatives!” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 14, 2020, 10:11pm).

how it can be manipulated, *if it is manipulated at all*, and *what evidence do you have to prove this.*” *Id.* at 8. The broadcast cut to two graphics displaying Dominion’s denials:



After Powell claimed to be collecting evidence “through a firehose,” Pirro again pushed back: “*If you can establish* that there is corruption in the use of this software, this Dominion software, *as you allege*, and *you say you have evidence, how do you* put that together and *prove* that on Election Night or immediately after that at the time that the votes were being either tabulated or put in, that we can *prove* that they were flipped?” *Id.* Powell then opined that the “huge criminal conspiracy” “should be investigated.” *Id.* at 8-9. Pirro agreed: “Yes, and *hopefully the Department of Justice* but who knows anymore.” *Id.* at 9. Pirro then thanked Powell and wished her “good luck” on her “mission.” *Id.*

There is no way a reasonable viewer could fail to understand that the statements about Dominion in this segment were “mere *allegations* to be investigated rather than ... *facts.*” *Brian*, 660 N.E.2d at 1131. Again, just like the defendants in *Page* and *Brian*, Pirro used terms such as “allegedly,” “allegations,” and “as you allege”

that made clear to the viewer that the accusations about Dominion were mere “claims” made by Powell and the Trump legal team. When describing the accusations, Pirro used qualifying language, emphasizing that it was uncertain whether Dominion’s machines were “manipulated at all.” And in discussing whether the President’s legal team could produce enough evidence to contest the election, Pirro opined “maybe yes, maybe no,” and that if President Trump could not prove his claims in time before the mid-December deadline for certifying the vote, “Joe Biden will be my president.” Pirro also told viewers that Dominion denied the claims against it. And by asking Powell to provide “evidence” to “prove” her claims, Pirro highlighted for her audience that Powell had failed to produce such evidence to date. Simply put, there is no way that a reasonable viewer would fail to understand that the accusations about Dominion were simply allegations.

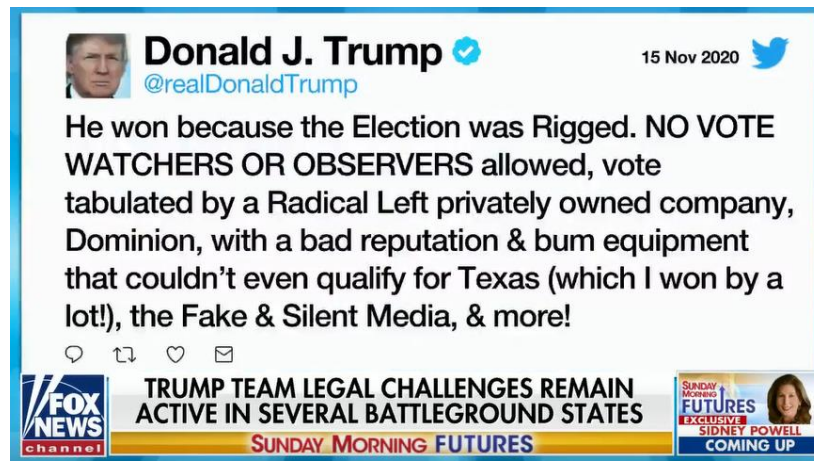
Moreover, Pirro’s coverage was thus not only not defamatory, but squarely protected by fair-report principles to boot. Pirro’s opening monologue made clear that Powell’s allegations and her investigation were part of a “legitimate legal process to determine *whether or not there was* some kind of irregularity or illegality.” That is particularly so given the lengthy discussion about the President’s pending lawsuits, including the newly filed suit in Georgia in which a purported whistleblower would later file a sworn affidavit making the same material allegations about Dominion. See Ex.C5, Affidavit ¶¶6, 12-13, 21, *Wood v.*

Raffensperger, 1:20-cv-4651 (N.D. Ga. Nov. 17, 2020); *see also Wenz v. Becker*, 948 F.Supp.319, 323 (S.D.N.Y. 1996) (report on anticipated filings in pending lawsuit protected even though defendant “had not yet performed the ministerial act of filing ... at the time the statement was made”); *Hudson v. Goldman Sachs & Co.*, 304 A.D.2d 315, 316 (N.Y. App. Div. 2003) (similar). And as explained above, Pirro’s sentiment that the Powell’s claims warranted investigation is a quintessential protected opinion. *See Brian*, 660 N.E.2d at 1131.

November 15 – Sunday Morning Futures. Bartiromo covered the battle for the White House again on November 15. She began the segment by stating: “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* ... Plus, Sidney Powell on the Venezuela connection *and whether* kickbacks were involved for those taking on Dominion voting machines.” Ex.A10, Sunday Morning Futures Tr. 1 (Nov. 15, 2020). “President Trump’s legal team has exactly one month *to produce enough evidence to overturn the 2020 election*. With a slew of *lawsuits* pending in multiple states, *it’s a tall task*.” *Id.*

Bartiromo then introduced Giuliani and asked him about President Trump’s tweet that day accusing Dominion of fraud. The broadcast displayed the tweet,

making clear to viewers that the allegations about Dominion came from the President himself:



Giuliani then elaborated on those allegations, claiming (among other things) that “the software that [Dominion] use is done by a company called Smartmatic,” which “has tried-and-true methods for fixing elections by calling a halt to the voting when you’re running too far behind.” *Id.* at 2. Bartiromo pushed back: “***Will you be able to prove this, Rudy?***” Bartiromo then displayed a graphic titled “Battleground States Using Dominion Voting Machines” and stated: “I want to show this graphic of the swing states that were using Dominion and this software, the Smartmatic software ... 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 the election night. ***One source says*** that the key point to understand is that the Smartmatic system has a backdoor that ... allows the votes to be mirrored and monitored ... ***Are you saying the states that use that software did that?***” *Id.* at 4. Giuliani responded that he “can

prove that they did it in Michigan,” and that “we’re *investigating the rest.*” *Id.* Bartiromo pushed back again: “Do you need to have [Dominion] hardware in your possession to *prove it?*” *Id.* at 5. “*Can you prove the case* without the hardware or the software?” “[Y]ou *only have a few weeks Rudy*, because they want to certify the state elections early December. *Do you believe you will be able to prosecute and be heard* within this time frame?” *Id.* at 6.

In context, a reasonable viewer would understand that the claims about Dominion were allegations made by Giuliani, not demonstrable fact. *Brian*, 660 N.E.2d at 1131. That is obvious from the fact that Bartiromo pressed Giuliani on whether he could “prove it” at every turn. The immediate context reinforces that conclusion. Bartiromo made clear at the beginning that “President Trump” claims that “software” was “weaponized against him,” that “President Trump’s legal team” claimed to have evidence of “backdoors on voting machines,” and that all those allegations were unproven, and the President had just one month to “produce enough evidence” to win in court. To be sure, Bartiromo repeated Giuliani’s allegation that Dominion used Smartmatic software. But in context a reasonable viewer would understand that Bartiromo was repeating the (unproven) allegations that Giuliani mentioned seconds earlier in order to ask him additional questions about them—not proclaiming that Dominion actually uses Smartmatic software. Indeed, her demand for Giuliani to “prove it” would make no sense otherwise. *See Brian*, 660 N.E.2d at

1131 (“without a recitation of the existing unresolved charges, defendant’s call for a full-scale investigation would have made no sense”). And in all events, Dominion has produced no evidence that Bartiromo knew that specific statement (Dominion used Smartmatic software) was false. Indeed, it was public knowledge that Smartmatic and Dominion shared licensing agreements in the past. *See Smartmatic Int’l Corp.*, 2013 WL 1821608 at *1-*2. *See infra* at 123-46.

After interviewing Giuliani, Bartiromo hosted Powell. She began the interview: “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 or unauthorized manipulation. That’s troubling, given we already know that at least two software glitches in Georgia and Michigan occurred on election night. Attorney Sidney Powell is leading the charge against Dominion. And *she says* she has enough evidence of fraud to launch a massive *criminal investigation*.” Ex.A10, Sunday Morning Futures Tr. 7 (Nov. 15, 2020). As she introduced Powell, the broadcast displayed graphics noting that a “NEW TRUMP LAWSUIT TARGETS VOTING MACHINE FIRM,” and that “TRUMP TEAM LEGAL CHALLENGES REMAIN ACTIVE IN SEVERAL BATTLEGROUND STATES,” making clear to viewers

that the allegations they were about to hear were part of the President’s legal campaign to contest the election:



After Powell made claims about Dominion and Smartmatic, Bartiromo demanded evidence: “*Sidney, you feel that you will be able to prove this? ... How will you prove this, Sidney?*” *Id.* After Powell declined to share the evidence on air, Bartiromo pressed her again, reminding her that she had only “a small time frame” in which to try to change the outcome of the election, and asking whether she “*can present this to the courts and be successful within this just couple weeks?*” *Id.* Powell then mentioned evidence of “kickbacks,” to which Bartiromo responded: “[*Y*ou said there *may have been* kickbacks to some people who accepted the Dominion software. Tell me what *you mean.*” *Id.* at 8. After Powell made additional claims of fraud, Bartiromo asked: “*Sidney, you say you have an affidavit from someone* who knows how this system works and was there with the planning of it. *You believe you can prove this in court?*” *Id.* at 9.

Later in the show, Bartiromo asked Congressman Jim Jordan about the allegations. Bartiromo noted that “[Giuliani] 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.” *Id.* at 14. She asked Jordan to comment on “the outcome here *of this investigation* into voter fraud,” to which Jordan said: “Let the process play out ... It seems to me we can spend four weeks *on getting to the bottom of this election.*” *Id.* Bartiromo agreed: “Now we have to *go through the investigatory process.*” *Id.*

Here, too, a reasonable viewer would understand that Bartiromo was providing a forum for Powell to elaborate on allegations that were newsworthy principally because they were central to ongoing litigation seeking to alter the outcome of the Presidential election, not reporting the allegations as true fact. As with Giuliani, Bartiromo pressed Powell on whether she could “prove” it (and in time to impact the election) multiple times. And she repeatedly attributed the allegations to Powell, using phrases like “Tell me what *you mean,*” and “*you say.*” And the immediate context eliminates any doubt that a reasonable viewer would understand the charges as unproven allegations rather than fact. As Bartiromo’s interview with Congressman Jordan makes clear, the allegations made by Powell and Giuliani were theirs alone, and were part of a larger “investigatory process” that had yet to play out.

To be sure, Bartiromo made some factual statements of her own, but each of her statements is substantially true and/or not defamatory. Dominion’s own CEO told

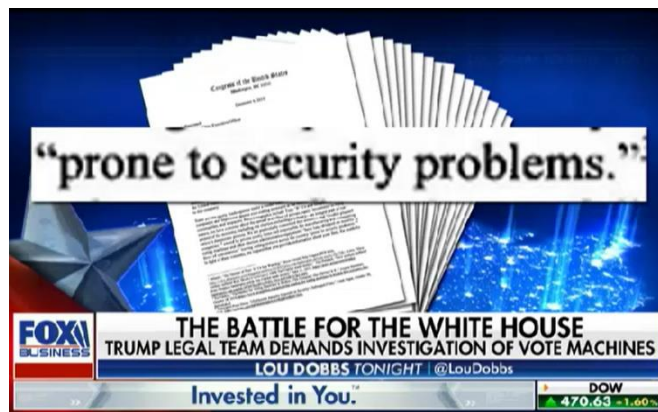
Congress that Dominion’s machines were used in 30 states in January 2020. *See* Ex.G9, Hearing Before Committee on House Administration Tr. 8 (Jan. 9, 2020). Experts have noted that Dominion’s problems affect the “entirety of the system.” *See, e.g.,* Ex.G10, Hurley Ltr. (Feb. 15, 2019). Texas has indeed rejected Dominion’s software three times. Ex.G3, Texas Secretary of State Report (Jan. 24, 2020). And there were multiple reports of software glitches on election night. *See supra* at 17-18 (CNN and Politico articles noting potential glitches and problems in Michigan and Georgia). At a minimum, Dominion has no evidence (let alone clear and convincing evidence) that Bartiromo knew that these specific factual claims, made within days of the media calling the election, were false. *See infra* at 123-46.

November 15 – Fox and Friends. A few minutes before the November 15 broadcast of *Sunday Morning Futures*, Bartiromo appeared on *Fox and Friends* to preview to viewers that she would be “*talking with Rudy Giuliani*, the President’s personal attorney” on *Sunday Morning Futures*. Ex.A39, Fox and Friends Tr. 4 (Nov. 15, 2020). Bartiromo stated: “He is my lead guest. And *he is* breaking so much news on the software that was used in the voting machines on election night. There is much to understand about Smartmatic, which owns Dominion Voting Systems.” *Id.* Bartiromo noted that “[w]e’re going to talk about it with Rudy Giuliani *and why he does believe he will be able to overturn this election with evidence.* He will join me along with Sidney Powell, to give us *an update on their*

investigation. Id. This is very important *to understand what was going on* with this software.” *Id.* She continued: “*Sidney Powell is also talking about potential* kickbacks that government officials who were asked to use Dominion actually also enjoyed benefits to their families. We’re going to talk about that coming up as well.” *Id.*

A reasonable viewer would understand that Bartiromo was previewing a show in which she would be providing the President’s lawyers with a chance to air the yet-to-be-proven allegations against Dominion, not reporting true facts about the company. Bartiromo expressly stated that Giuliani and Powell would be joining the show to “talk about” Dominion and to share “an update on their investigation,” and why *they believed* they could “overturn this election with evidence.” Bartiromo’s preview is thus non-actionable for the same reasons that the allegations Giuliani and Powell made minutes later on *Sunday Morning Futures* are not actionable: In context, it was clear that the claims were coming from Giuliani and Powell, and that such allegations had yet to be proven. To the extent there were any lingering doubts about that, the interviews that began a few minutes later would have dispelled them, as the statements Bartiromo made in her preview on *Fox and Friends* were virtually identical to the claims that Giuliani and Powell made during the interviews.

November 16 – Lou Dobbs Tonight. Dobbs continued his coverage on November 16. He began the relevant segment by introducing viewers to the President’s claims: “*President Trump’s legal team says potentially rigged* 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.” Ex.A11, Lou Dobbs Tonight Tr. 2 (Nov. 16, 2020).⁹ To make it clear that the claims were the Trump legal team’s and that they were mere allegations that needed to be investigated, the broadcast displayed a graphic noting that the “TRUMP LEGAL TEAM DEMANDS INVESTIGATION OF VOTE MACHINES.”



Dobbs then pointed out that “*radical Dems, the RINOs, corporate left-wing national media*” rejected the concerns about Dominion as a “conspiracy theory.” *Id.*

⁹ President Trump continued tweeting about Dominion on November 16. He stated: “Dominion is running our Election. Rigged!” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 16, 2020, 8:26am).

Dobbs then asked Ronna McDaniel, chair of the Republican National Committee, for her “reaction to *what the Trump legal team and others* are discovering about Dominion ... which almost seems like at least a very, very much in election terms *probable cause for a complete and thorough investigation.*” *Id.* at 3. McDaniel responded that “we need to *get to the bottom of these election issues and pursue every single one, and that’s what the Trump legal team is doing.*” *Id.* at 4.

Dobbs then introduced Powell and asked: “Dominion ... seems to be figuring larger and larger in the interest of *your legal team*, and what’s the latest?” *Id.* at 5. Powell stated she had “stunning evidence” in the form of an affidavit written by a “military officer” who witnessed Smartmatic’s rise. *Id.* She then read from an affidavit that was filed in federal court the very next day, Ex.C5, Affidavit ¶26, *Wood v. Raffensperger*, No. 1:20-cv-04651 (N.D. Ga. Nov. 17, 2020), and claimed that “Smartmatic owns Dominion.” After additional discussion, Dobbs mentioned that he had received word that an FBI “*investigative team ... is now looking into the election.*” Ex.A11, Lou Dobbs Tonight Tr. 6 (Nov. 16. 2020). Dobbs concluded the segment by stating: “It is a deeply, deeply troubling election, as I said earlier, the worst in the country’s history bar none. And we have seen official investigative and Justice Department officials slow to move, and it is infuriating to everyone.” *Id.* at 7. Later on in the show, when interviewing Tom Fitton, president of the advocacy organization Judicial Watch, Dobbs stated: “This is the time *for the F.B.I.* to get

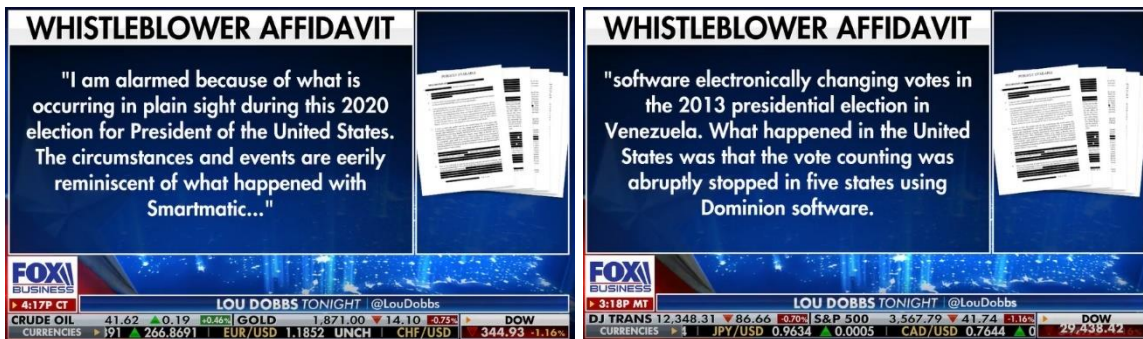
into this. This is the time *for the court system* to work. This is the time for the President *to prosecute this investigation and get to the bottom of it.*” *Id.* at 8.

A reasonable viewer would understand that the (very few) claims about Dominion in this broadcast were allegations made by the President’s legal team, not demonstrable facts. At the very beginning of the segment, Dobbs made clear that the allegations were the President’s. He also told viewers that the allegations about Dominion were not yet proven—rather, Dominion’s machines were “*potentially* rigged,” and its software only “*suspected* of inflating vote totals.” Dobbs made clear that the allegations were hotly contested by many, including by Democrats, Republicans, and members of the media. And precisely because he was uncertain about the allegations, Dobbs called for a “complete and thorough investigation” to get to the bottom of it. As explained, New York law (and the First Amendment) fully protected his right to do so. *Brian*, 660 N.E.2d at 1131. Moreover, a reasonable viewer would understand that Dobbs was discussing official judicial proceedings—indeed, Powell read from an affidavit filed in federal court the very next day—so his coverage is protected by fair-report principles as well. *See, e.g., Wenz*, 948 F.Supp. at 323.

November 18 – Lou Dobbs Tonight. Dobbs began his November 18 show by stating: “All of our guests on this evening’s broadcast will be taking up *President Trump’s fight* for a free and fair election. President Trump’s attorney, Rudy

Giuliani, among our guests.” Ex.A14, Lou Dobbs Tonight Tr. 5 (Nov. 18, 2020). “Two of our guests tonight *have filed sworn affidavits charging election fraud* in swing state elections. *Garland Favorito says* invalid ballots were counted all across Georgia, and *Patrick Colbeck alleges* Michigan Democrats were able to access a digital back door in the Dominion Voting Software that is the focus of so many *allegations and charges* across the country.” *Id.*

Later in the segment, Dobbs stated: “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.” *Id.* at 5.¹⁰ He then read from the affidavit, which had been filed in federal court in Georgia the day before, and which Powell had read on *Lou Dobbs Tonight* two days earlier. Ex.C5, Affidavit ¶26, *Wood v. Raffensperger*, No. 1:20-cv-04651 (N.D. Ga. Nov. 17, 2020). The broadcast displayed the text of the affidavit as Dobbs read it:



¹⁰ President Trump tweeted about Dominion yet again on November 17: “The only thing secure about our 2020 Election was that it was virtually impenetrable by foreign powers. On that, the Trump Administration takes great credit. Unfortunately, the Radical Left Democrats, Dominion, and others, were perhaps more successful!” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 17, 2020, 7:25pm).

After finishing, Dobbs asked Giuliani for his thoughts. Giuliani reiterated his allegations about Dominion and Smartmatic, to which Dobbs responded: “It’s outrageous.” Ex.A14, Lou Dobbs Tonight Tr. 5 (Nov. 18, 2020).

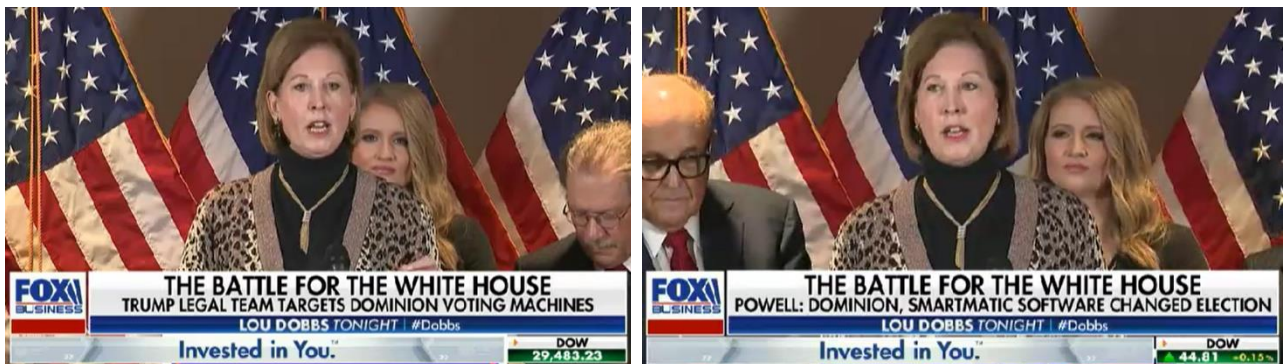
Nothing in the November 18 show is defamatory. Far from stating any defamatory facts about Dominion, Dobbs was simply reading from an affidavit that was filed in federal court the day before. That is core protected activity under the First Amendment and New York’s fair-report privilege. While Giuliani reiterated his claims against Dominion, a reasonable reader would understand that the claims were Giuliani’s unproven allegations. There is likewise nothing defamatory about the statement “It’s outrageous,” which is plainly a statement of opinion that is incapable of being proven false.

November 19 – Lou Dobbs Tonight. On the November 19 broadcast, Dobbs reported on allegations made by President Trump’s legal team (including Powell and Giuliani) in a widely publicized news conference earlier that day. That news conference was covered by innumerable media and remains available online on CSPAN’s website.¹¹ Dobbs began his segment: “*President Trump’s legal team today saying* they have the evidence to swing the election to President Trump.” Ex.A18, Lou Dobbs Tonight Tr. 1 (Nov. 19, 2020). The broadcast then cut to a

¹¹ Available at: [tinyurl.com/2aksmx73](https://www.tinyurl.com/2aksmx73).

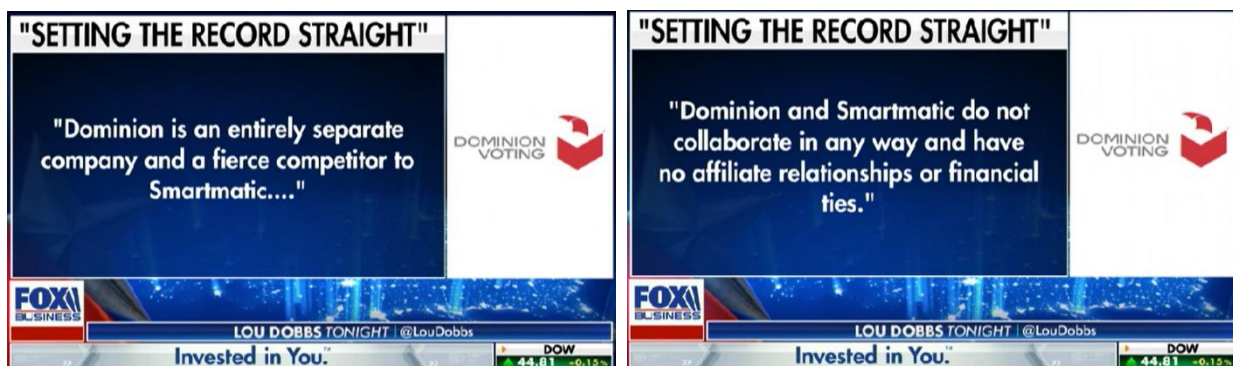
video of the news conference in which Giuliani provided an overview of the Trump Campaign’s key claims and legal strategies. A few minutes later, Dobbs stated: “Another issue at the center of today’s news conference, the use of Dominion voting machines and Smartmatic software. Defense attorney Sidney Powell cited *a whistleblower’s stunning affidavit*”—the same affidavit Dobbs read on his show the day before. *Id.* at 2. “It says Smartmatic’s technology was used to rig elections in Venezuela.” *Id.*

After summarizing the Trump legal team’s allegations from the news conference, Dobbs informed viewers that “*Smartmatic and Dominion deny those charges.* But *Sidney Powell argues* that algorithms in the Smartmatic software were used to change results in the presidential election.” *Id.* The broadcast then cut back to the news conference, where Powell made a series of allegations about backdoors and hacking and flipping votes with algorithms. *Id.* The broadcast also displayed graphics making clear that the “TRUMP LEGAL TEAM” and “POWELL” were making the claims:



Dobbs then previewed his interview with Powell later in the show: “We’ll have much more on today’s powerful news conference and the powerful *charges put forth by the President’s legal team*. One of the team members, 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.” *Id.*

Before introducing Powell, Dobbs told viewers of Dominion’s denials again: “Breaking news now, *Dominion Voting Systems today once again distanced itself from Smartmatic saying, ‘Dominion is an entirely separate company and fierce competitor to Smartmatic,’ end quote. ‘Dominion and Smartmatic do not collaborate in any way and have no affiliate relationship or financial ties.’” Id.* at 4.¹² The broadcast displayed text from Dominion’s “SETTING THE RECORD STRAIGHT” emails on screen:



¹² President Trump continued tweeting about Dominion on November 19, retweeting a segment about Dominion that aired on OANN. Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 19, 2020, 12:41am).

Dobbs noted that Smartmatic had sued Dominion in the past for breaching a licensing agreement, so there “appears to have been at least a relationship.” *Id.* But he conceded that “it is *all but impossible* to find any record of either *proving or disproving a relationship* because the two firms are privately owned.” *Id.* After introducing Powell, Dobbs asked: “Let’s turn to Smartmatic and Dominion. *Are they or are they not* linked?” *Id.* Before wrapping up, Dobbs pressed Powell for evidence: “[W]hat is the next steps for the legal team and when do you believe you will be prepared to come forward with hard evidence establishing the basis for a court to overturn elections or at least results of those elections in a number of battleground states?” The broadcast again displayed a graphic making clear that the allegations were Powell’s, and that Powell was a “MEMBER OF PRESIDENT TRUMP’S LEGAL TEAM”:



There is no world in which a reasonable viewer would fail to understand that Dobbs was reporting on unproven allegations made by the President’s legal team.

Here, again, just like the publishers in *Page* and *Brian*, Dobbs explicitly characterized the allegations as “charges” put forth “by the President’s legal team,” and he devoted much of the broadcast to reporting and dissecting the allegations made by the team during its highly publicized press conference.¹³ Dobbs noted multiple times that Dominion denied the claims against it, and the on-screen graphics displayed Dominion’s denials. He also opined that it was “all but impossible” to “prov[e] or disprov[e]” whether Smartmatic and Dominion in fact have a relationship. And he pressured Powell to produce “hard evidence” of her claims in court, underscoring that she had failed to produce such evidence to date. In short, a reasonable viewer would have understood that Dobbs was providing a forum for the President’s lawyers to explain their yet-to-be-proven claims, not reporting those claims as true.

¹³ See, e.g., Ex.D22, *Politico*, Giuliani and Fellow Trump Lawyers Crank Out Conspiracy Theories As Legal Challenges Implode, *Politico* (Nov. 19, 2020); Ex.D23, *Washington Post*, Rudy Giuliani’s Post-Election Meltdown Starts to Become Literal (Nov. 19, 2020); Ex.24, *NBC News*, Rudy Giuliani Baselessly Alleges ‘Centralized’ Voter Fraud At Free-Wheeling News Conference (Nov. 19, 2020).

November 21 – Justice with Judge Jeanine. Pirro began her November 21 segment with an opening monologue in which she described claims made by the President’s lawyers in their November 19 press conference: “[T]he *President’s lawyers* come forward *alleging an organized criminal* enterprise ... 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.” Ex.A22, Justice with Judge Jeanine Tr. 2 (Nov. 21, 2020).¹⁴ “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.*” *Id.* at 2. As she was speaking, the broadcast displayed graphics noting that Dominion had denied those claims:



¹⁴ President Trump continued to tweet about Dominion on November 21, retweeting several OANN segments about Dominion. Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 21, 2020, 11:30pm).

Pirro explained that “the President’s lawyers *offered evidence by way of affidavits.*” *Id.* “*The President’s lawyers have indicated that they have 250 such affidavits under oath, people ready to testify.*” *Id.* She then walked through some of them and their claims, including claims made by someone “in Atlanta” in “*a sworn affidavit under penalty of perjury.*” *Id.* She held the affidavit up so that viewers could see. The broadcast displayed a graphic noting Dominion denial as well.



“*Another declarant,*” Pirro continued, “*states that Georgia uses Dominion Voting Systems, which has a history of technical glitches.*” *Id.* A few moments later, Pirro wondered “what is the problem in *seeking to confirm* that this election had no irregularities?” *Id.* at 3. She then listed a series of open questions she had about the election, including “[w]hy was there an overnight popping of the vote tabulation that cannot be explained for Biden?” *Id.* She concluded her monologue by calling for an investigation: “For the sake of our Republic, we have an obligation to *get honest and truthful answers*, in fact, demand them.” *Id.*

Later on in the program, Pirro interviewed Lin Wood and pressed him about the President's claims and the pending litigation. After Wood made claims about election fraud generally (statements that Dominion does not challenge) Pirro stated: "Okay, but Lin, *a Federal Judge in Atlanta rejected the lawsuit that this last lawsuit is associated with and this affidavit, District Judge Steven Grimberg, a Trump appointee said he found no evidence of irregularities that affected more than a nominal number of votes.*" *Id.* at 6. When Wood persisted, Pirro pressed him for evidence: "Well, let me ask you this. Lin, when you say that they were destroying or tried to destroy the ballots. *Do you have evidence of that?*" *Id.* When Lin claimed to have evidence on his Twitter account, Pirro said, "well, people can certainly go to your Twitter account and check that out themselves." *Id.*

Here as well, context makes clear that Pirro was discussing allegations made by the President's lawyers and surrogates, nothing more. Just like the defendants in *Page* and *Brian*, Pirro attributed the claims to others (here, the President's lawyers and sworn affiants) multiple times. Pirro did not weigh in on whether any of the claims were true. Instead, she displayed Dominion's denials on screen and expressed uncertainty about what was true, which is precisely why she called for an investigation to seek "honest and truthful answers" and to "confirm" that the election was not fraudulent. As explained, the First Amendment and New York law protected her right to do just that. *Brian*, 660 N.E.2d at 1131. Moreover, a

reasonable viewer would understand that Pirro was referencing allegations made in pending lawsuits, sweeping this broadcast under fair-report protections too. Pirro told viewers that the President’s claims were supported by sworn affidavits. And she expressly referenced a sworn declaration filed a few days earlier in federal court accusing Dominion of “a history of technical glitches that have not been fixed” and implicating Dominion machines in election fraud *See* Ex.C17, Declaration ¶¶4, 6-10, *Wood v. Raffensberger*, No. 1:20-cv-4651 (Nov. 17, 2020).

November 24 – Lou Dobbs Tonight. Dobbs interviewed Powell again on November 24.¹⁵ Continuing a line of questioning from his previous show, he asked her: “Let’s start with the ownership of these voting firms. I know you’re focusing on that part of the electoral fraud that’s been perpetrated this year in this election. *Why don’t we know who they are?*” Ex.A26, Lou Dobbs Tonight Tr. 5 (Nov. 24, 2020). Powell explained that the voting companies hide their ownership, then reiterated her other claims about Dominion and Smartmatic. Dobbs stated: “I think many Americans have given no thought to electoral fraud that would be perpetrated through electronic voting; that is, these machines, these electronic voting companies

¹⁵ Dominion continued to feature prominently in President Trump’s tweets. On November 23, he tweeted that he would “never concede to fake ballots & ‘Dominion.’” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 23, 2020, 11:07pm).

including Dominion, prominently Dominion *at least in the suspicions of* a lot of Americans.” *Id.*

A few minutes later, Dobbs reminded Powell of her promise to provide evidence to overturn the election in court: “Well, you have promised a Kraken will be unleashed. We were expecting perhaps your suit would be filed yesterday or today. *When shall we expect your lawsuit?*” *Id.* at 6. Powell promised that she would file her first suit in Georgia no later than the next day (which she did). Dobbs then asked: “Your thoughts now about *what will be the impact* and it *be adjudicated in such a way as to meet all of the deadlines* that are forced upon you?” *Id.* The broadcast displayed a graphic reiterating that Powell planned to file suit the next day.



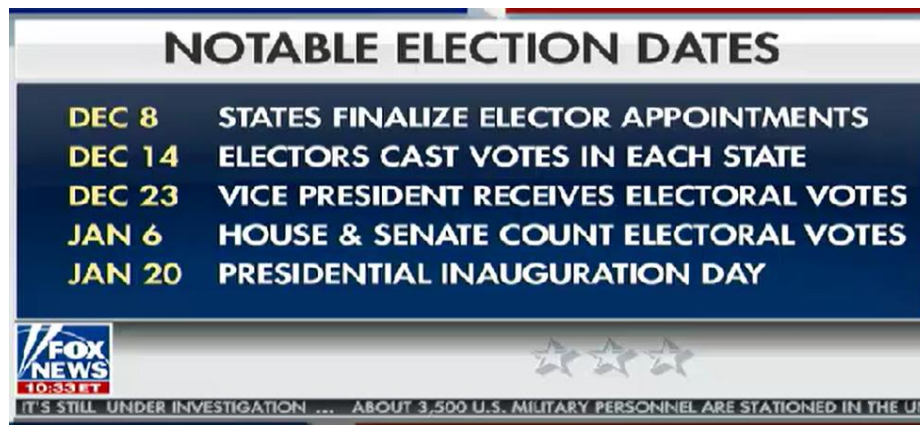
Just like the other shows, a reasonable viewer would understand that Powell’s allegations about Dominion were hers alone, and that those allegations were unproven and that they would eventually need to be substantiated in court—and by a mid-December deadline, no less. Dobbs made clear that the allegations were newsworthy because of their relationship to lawsuits challenging the results of the

election. And instead of weighing in on whether Powell’s allegations were true, Dobbs expressed ignorance on some of her claims. He asked Powell, for example, “why don’t we know who [Dominion and Smartmatic] are?” And he characterized the claims about Dominion as mere “suspicions.” A reasonable viewer would therefore understand that Dobbs was simply conveying the fact that Powell made certain allegations on his show, not that the allegations were true.

November 29 – Sunday Morning Futures. On November 29, Bartiromo scored the first post-election interview of President Trump. While Dominion omits this broadcast from the litany of statements it challenges—presumably because it is so obviously protected by the First Amendment—this interview underscores why Fox News hosts were covering and commenting on the allegations: The sitting President of the United States was leveling these allegations against Dominion by name and indicating that he still believed that litigation advancing these allegations could overturn the outcome of the election. During the interview, the President accused “Dominion machines” of “mov[ing] thousands of votes from my account to Biden’s account,” characterized Dominion’s machines as “garbage machinery,” and alleged that “votes in Dominion” are “counted in foreign countries.” Ex.A27, Sunday Morning Futures Tr. 5, 9, 14 (Nov. 29, 2020).

Bartiromo said to President Trump: “Mr. President, these are obviously very serious charges. And I want to walk through them and ask you how you will prove

this in the courts.” *Id.* at 7. “What other evidence can you talk about that will enable you to prove this in court in the coming weeks, sir?” *Id.* “Mr. President, will you be able to prove that the computers can circumvent the controls that are in place?” *Id.* at 10. “[I]s the thinking that, because of the various ballot issues, that the Supreme Court will rule that the vote is tainted?” *Id.* at 11. “[W]hat’s your timing on this, Mr. President? ... Because we have got some notable election dates here that I want to ask you what you believe you consider to be your drop-dead date in terms of proving this case ... Is it December 18?” *Id.* at 11-12. “Where is the DOJ and the FBI in all of this, Mr. President? You have laid out some serious charges here. Shouldn’t this be something that the FBI is investigating?” *Id.* at 13. “And you believe you will be able to prove this in the coming weeks?” *Id.* at 19. As she interviewed the President, the broadcast displayed a graphic reminding viewers of the key election certification dates:



Bartirromo then interviewed former D.C. Circuit judge and U.S. Solicitor General Ken Starr about the President’s allegations. Starr stated that “the difficulty

now is translating those allegations and intuitions and the reports into actual admissible evidence in court.” *Id.* at 20. “[A]t this stage, we need to have the evidence ... we have not seen in court ... the kind of proof that will lead to victory.” *Id.*

November 30 – Lou Dobbs Tonight. Dobbs’ November 30 segment the next day followed Bartiromo’s groundbreaking interview of President Trump the day before, where he accused Dominion of switching votes.¹⁶ Dobbs began his November 30 broadcast by providing an update on the President’s legal challenges. He noted that “Dominion voting machines in Georgia are at the center of a *major Republican lawsuit.*” Ex.A29, Lou Dobbs Tonight Tr. 2 (Nov. 30, 2020). “Attorney *Sidney Powell is seeking* a forensic audit of the Dominion voting machines,” and a federal judge “banned those machines from being wiped or in any way altered for the next 10 days.” *Id.* Dobbs also noted that Georgia officials attributed the voting irregularities to a “*staff member not following instructions,*” rather than Dominion, and noted “*I guess it wasn’t machine error, is the implication, or perhaps it wasn’t*

¹⁶ President Trump also kept tweeting about Dominion, noting on November 30 that “Our 2020 Election, from poorly rated Dominion to a Country FLOODED with unaccounted for Mail-In ballots, was probably our least secure EVER!” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 30, 2020, 1:05am). Dobbs’ November 30 coverage also followed Powell’s lawsuits about Dominion in Georgia and Michigan, which were filed on November 25. *See supra* at 19-20.

error at all.” *Id.* at 3. He then noted that Giuliani was in Arizona “speaking before state legislators,” and that Giuliani had called Colonel Phil Waldron, a “cybersecurity expert witness in that hearing” who “provided chilling details about Dominion Voting Systems,” including allegations that Dominion machines were “less secure than a Venmo account.” *Id.*

Minutes later, Dobbs turned to Powell: “This audience, most of America, wants to know *where we are in this fight for the White House?*” *Id.* at 5. Powell provided an update on her lawsuits, including one on appeal in the Eleventh Circuit and one she had just filed in Michigan. Powell then noted that, even though a federal judge granted her a temporary restraining order prohibiting the wiping of Dominion machines in Georgia, someone had wiped the machines under guise of a “software glitch.” *Id.* Dobbs exclaimed: “Unbelievable ... You know, people don’t go to jail for their attitude, but in the case of the Secretary of State and the Governor of Georgia right now, one would be tempted to prosecute based on their conduct so far. What is going on with those two individuals?” *Id.*

In response, Powell noted that “[w]e’ve gotten *tips* from different people *that we haven’t been able to verify completely* yet, but *it seems* that there were significant benefits for both” the Governor and the Secretary of State “for deciding at the last minute to rush in a contract for Dominion.” *Id.* Dobbs responded: “We have across almost every state whether it is Dominion, ESS, whatever the company—voting

machine company is—no one knows their ownership, has no idea what’s going on in those servers, has no understanding of the software because it’s proprietary. It is the most ludicrous, irresponsible and rancid system imaginable in the world’s only super-power. We look like a complete nation of fools, and we’re supposed to be meeting constitutional deadlines on December 8th, December 14th? Are you kidding me?” *Id.* at 6. Dobbs then concluded the segment by saying: “[T]his is no longer about just voter fraud or electoral fraud. This is something much bigger and this President has to take, *I believe*, drastic action, dramatic action to make certain that the integrity of the election is understood or lack of it, the crimes that have been committed against him and the American people, and if the Justice Department doesn’t want to do it, if the F.B.I. cannot do it, then we have to find other resources within the Federal government.” *Id.*

There is nothing defamatory about this show. In context, a reasonable viewer would understand that Powell’s claim about kickbacks was an unproven allegation, not fact. Indeed, Powell said as much herself—all she had gotten were some “tips” that she had not yet verified. That conclusion is reinforced by Dobbs’ statements earlier in the show, which made clear to a viewer that the allegations were coming from Powell. Dobbs noted that “*Sidney Powell* is seeking a forensic audit of the Dominion machines,” and that the allegations were all part of a “Republican lawsuit” targeting “Dominion machines.” Dobbs also made clear that the allegations were

unproven, even noting that Georgia officials concluded that any errors on election day were caused by a poll worker, *not* “machine error.”

Dobbs’ statement that “one would be tempted to prosecute” the Governor and Secretary of State of Georgia, and his statement that “I believe” that the President should take “drastic action,” is precisely the kind of spirited opinion commentary on public officials that could only occur in a nation committed to First Amendment principles. A reasonable viewer would likewise understand that the statement “no one knows their ownership” is hyperbole. Dobbs clearly did not mean “no one” in the literal sense; after all, someone must know Dominion’s ownership. Rather, the gist of his claim was that Dominion’s ownership is difficult for the public to figure out, which is hardly a false or defamatory claim, particularly given that numerous public officials and cybersecurity experts had expressed similar concerns in the past. *See supra* at 6-16.¹⁷ The “loose, figurative, or hyperbolic language” that surrounds Dobbs’ statements reinforces the conclusion that a reasonable viewer would not interpret them as conveying facts. Dobbs used colloquial and loose language

¹⁷ Moreover, Dominion has produced no evidence that Dobbs’ made this statement with actual malice. *See infra* at 123-46. In fact, the record confirms that at the time of the November 30 show, there was great uncertainty about Dominion’s ownership. *See* Ex.II Field Text Message (Dec. 1, 2020) (noting that Staple Street Capital and Dominion CEO John Poulos are owners, but that “there is nearly 13% outstanding but we don’t know by whom, just that their stakes isn’t greater than 5% (could be foreign)”).

throughout—calling us a “nation of fools” and our use of voting machines generally (rather than Dominion specifically) “ludicrous” and “rancid.” That is the type of spirited opinion commentary that viewers of *Lou Dobbs Tonight* had come to expect.

November 30 – Hannity. Fox News host Sean Hannity also covered the story on his November 30 show, which came hot off the heels of Bartiromo’s groundbreaking interview with President Trump the day before. Hannity began the segment by telling viewers that he would be covering the President’s allegations and his legal team’s investigation: “We start, breaking tonight, we have major new developments out of Georgia, Arizona. *The Trump campaign continues to investigate* election irregularities, allegations of voter fraud.” Ex.A28, Hannity Tr. 1 (Nov. 30, 2020). After criticizing Democrats for investigating allegations of Russian collusion, Hannity criticized them for having no interest in “*investigating what are valid affidavits and claims* by fellow American citizens under the threat of perjury” related to the President’s claims of fraud. *Id.* at 3.

Later, Hannity asked Powell about her work for “*the attorneys for Trump on the election investigation fraud issue.*” *Id.* at 8. He asked why individuals with potentially relevant evidence had been unwilling to step forward to “speak publicly” and “sign affidavits.” *Id.* at 9. Powell responded that, among other reasons, some people require confidentiality because of their jobs. *Id.* Hannity responded: “So, we really can’t hear from them—and they can’t sign an affidavit until they get these

protections. And my question is to you ... has anybody forensically examined these machines since the election?” *Id.* at 9. In her answer, Powell reiterated the claims she had been making in her lawsuits all along: that Dominion machines ran an algorithm that manipulated the votes. *Id.* Hannity did not respond to Powell’s allegations, but referred back to his question about whistleblowers and affidavits: “I thought Democrats told us they like whistle-blowers. You’re saying that these people can’t talk because they’re going to [lose] their job? I would think that they get protection.” *Id.*

Here, as in the other shows, a reasonable viewer would understand that Hannity was simply asking Powell how she would substantiate the allegations she and others had been making in their lawsuits, not claiming that the allegations were true. Hannity expressly identified Powell as part of the Trump legal team investigating election fraud. He asked her about the claims she had been litigating, nothing more. Both before and after Powell reiterated her claims about Dominion, Hannity asked about confidential sources and whistleblowers and whether witnesses would be willing to sign affidavits, reinforcing that the allegations were Powell’s and were part of ongoing litigation. The broader context confirms as much. At the very start of the program, Hannity informed viewers that guests on the show would discuss the election fraud investigation by the Trump legal team. All of that is core protected coverage of and commentary on newsworthy allegations and ongoing litigation.

December 4 – Lou Dobbs Tonight. Dobbs began his December 4 broadcast by stating: “*Attorneys for President Trump* also today *ramping up their legal challenge* against Georgia’s election results. *A new filing* claiming Georgia’s election laws were violated thousands of times, rendering the outcome invalid.” Ex.A30, Lou Dobbs Tonight 1 (Nov. 4, 2020). Dobbs then introduced Colonel Waldron, the cybersecurity expert that Giuliani had called as a witness in previous proceedings, where he told audiences about Dominion’s vulnerabilities to hacking and vote flipping. Dobbs said: “*Your testimony has been fascinating before each of these state legislatures*, and I believe that you have been absolutely, I’m going to say persuasive because you’ve been so informative. At the center of it all, Dominion Voting Systems. *Are they the culprit here?* Not the only culprit, but *are they the principal culprit?*” *Id.* at 4.¹⁸ Dobbs later asked: “Dominion Voting Systems with – *you have described* it with algorithms which were designed to be inaccurate rather

¹⁸ President Trump continued attacking Dominion in early December. On December 2, President Trump held a press conference where he claimed that, with Dominion machines, “you could press a button for Trump and the vote goes to Biden” with a “turn of the dial or the change of a chip.” <https://bit.ly/3iGW7m1>. On December 3, he tweeted a report claiming that “Dominion contractor at Detroit counting center says thousands of ballots were scanned multiple times.” Ex.G6, Donald J. Trump (@realDonaldTrump), Twitter (Dec. 3, 2020 9:11pm). Dobbs’ December 4 coverage also follows on the heels of two additional lawsuits filed by Powell on December 1 and 2 in Arizona and Wisconsin. *See supra* at 19-20.

than to be a secure system. Give us *your sense* of who is driving all of this.” *Id.* at 5.

Dominion does not contend that Fox News should be held liable for any of Waldron’s answers. Instead, it claims that Dobbs defamed Dominion merely by asking Waldron questions. But a reasonable viewer would plainly understand that Dobbs was asking Waldron to elaborate on allegations that he had made earlier in his testimony before state legislatures, not making any assertions of fact about Dominion. Dobbs did not claim that “Dominion Voting Systems is the culprit here,” or that “Dominion Voting Systems designed their algorithms to be inaccurate.” Instead, Dobbs asked Waldron to elaborate on the claims he had already made in an official proceeding, asking him *whether Dominion was the culprit or not*. Not only is that not defamatory—it falls squarely in the province of the fair-report doctrine as well.

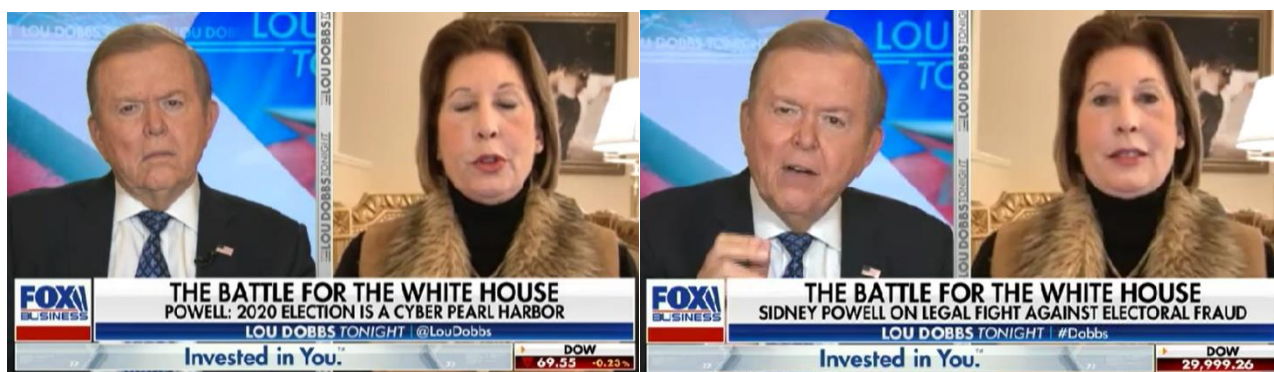
December 10 – Lou Dobbs Tonight. Dobbs began the December 10 segment by stating: “Our first guest tonight has new information regarding electoral fraud in the radical left’s efforts to steal an election, and *she charges* four individuals as authors of what *she calls* a Pearl Harbor-style cyberattack on the 2020 presidential election.” Ex.A31, Lou Dobbs Tonight Tr. 3 (Dec. 10, 2020). He continued: “There are four names that *she highlights.*” *Id.* An on-screen image likewise explicitly attributed the allegations to Powell, including the words “ACCORDING TO

SIDNEY POWELL” immediately under the headline “FOUR NAMES YOU NEED TO KNOW.”



Dobbs then welcomed Powell on the show and asked her to explain her allegations: “Sidney, great to have you with us. *You say* these four individuals led the effort to rig this election. How did they do it?” *Id.* After Powell explained her allegations (including her allegations about Dominion), Dobbs pressed her for evidence: “Well, *what is the evidence* that you have compiled? *How have you constructed the architecture* of this relationship among these four individuals?” *Id.* at 4. “*What is the evidence* that this former Communications Minister could reach into the U.S. electoral system and raise the havoc and commit the fraud that obviously we have witnessed in 2020?” *Id.* After a commercial break, Dobbs again made clear to the audience that the allegations were Powell’s: “We’re back now with Attorney Sidney Powell. *She was describing* a cyber-Pearl Harbor in the 2020 election focusing on four names.” *Id.* at 5. He then directed the broadcast team to display the four names on the screen, describing the names as an “element from *your*

investigation.” Id. As the segment wrapped up, Dobbs invited Powell to “put forward *your evidence*” and asked how much time she needed “to get *that evidence* to this broadcast.” *Id.* Throughout the interview, the on-screen graphics made clear that the allegations were Powell’s:



There is no way a reasonable viewer could fail to understand that Dobbs was providing Powell with an opportunity to explain *her* allegations, not making those allegations himself. Virtually “[e]very phrase used ... was qualified by words that” made clear that the allegations were coming from Powell, not Dobbs. *Orr*, 60 A.D.2d at 950; *see also, e.g., Brian*, 660 N.E.2d at 1131. And Dobbs reinforced that conclusion by making clear that government officials disputed Powell’s allegations. He pointed out, for example, that the Attorney General “sees no sign of any significant fraud that would overturn the election.” Ex.A31, Lou Dobbs Tonight Tr. 5 (Dec. 10, 2020). He noted that the head of the cyber intelligence unit for the Department of Homeland Security declared the 2020 election “the most secure election in the country’s history.” *Id.* And he observed that the FBI Director refused

to pursue the claims. *Id.* To be sure, Dobbs also stated that government officials should be devoting more energy to investigating the serious accusations leveled by the President, Giuliani, and Powell, and he encouraged Powell and praised her efforts at times. *Id.* But the “personal opinion” that allegations warrant further investigation is just that—an opinion, not a “demonstrable fact” or an attestation to their truth. *Brian*, 660 N.E.2d at 1131. And as explained, the overall context of *Lou Dobbs Tonight* reinforces that a reasonable viewer would understand the difference between Powell’s allegations and Dobbs’ opinion about them. *See supra* at 54-55, 66.

December 10 – @LouDobbs Tweets. Shortly before the regularly scheduled 5 p.m. broadcast, the @LouDobbs Twitter account issued a series of tweets promoting his upcoming show. The first tweet promoted the guests Dobbs would host that evening to discuss (among other things) the ongoing election-fraud litigation. Lou Dobbs (@LouDobbs), Twitter (Dec. 10, 2020, 4:47pm), <https://bit.ly/3IXF9rb>. A few minutes later, the account published a second tweet highlighting Powell in particular and noting that she would “share new information”

on the upcoming show. Lou Dobbs (@LouDobbs), Twitter (Dec. 10, 2020, 4:55pm), <https://bit.ly/3g8F3k5>.



One minute later, the account published a third tweet pulling language from a document reproduced in the tweet via screenshot that outlined that new information. The screenshotted document said (among other things) that four individuals “executed an electoral 9-11 against the United States, with the cooperation and collusion of the media and the Democratic Party and China. This is a cyber Pearl Harbor.” Lou Dobbs (@LouDobbs), Twitter (Dec. 10, 2020, 4:56pm), <https://bit.ly/3VnfA8r>. The document also stated that “[w]e have identities, roles, and background of Dominion. Smartmatic people. This will turn into a massive RICO filing. It is Smartmatic, Dominion Voting Systems, Sequoia, SGO. If you come forward now to cooperate with law enforcement, you will be better off.” It

likewise claimed to have evidence of a \$400 million “Chinese investment” into Dominion.

Context made clear to a reasonable viewer that these statements came from Powell, not Dobbs. While Dominion isolates a single tweet issued by the @LouDobbs Twitter account four minutes before the December 10 *Lou Dobbs Tonight* broadcast, Compl. ¶179(p), it conveniently omits from its complaint any mention of the two tweets that preceded it, including one that came literally one minute earlier. *See Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 187 (2d Cir. 2000) (holding that two articles in a newspaper must be read together when one appeared under the other since “a casual reader no doubt would read and consider these articles together”); *McKee v. Cosby*, 874 F.3d 54, 64 (1st Cir. 2017) (“proper context” included article hyperlinked in allegedly defamatory letter). That tweet expressly stated that Sidney Powell would be joining the show “to share new information” about the election fraud allegations. It was then immediately followed by the tweet of which Dominion complains, which began with language pulled from a screenshotted document reproduced in full following a colon. In context, a reasonable viewer would understand that the document was the promised “new information” from Powell—particularly given that much of the language in the document (*e.g.*, “If you come forward now to cooperate with law enforcement, you will be better off.”) would make little sense coming from Dobbs himself. Compl.

¶179(p). The tweet is thus non-actionable for the same reasons that the allegations Powell made shortly thereafter on the show are not actionable: In context, it was clear that the claims were coming from Powell, not Dobbs or Fox News.

To the extent there were any lingering doubts about that, the interview that began a few minutes later would have dispelled them, as the claims in the screenshotted document were virtually identical to the claims that Dobbs attributed to Powell alone—and that Dobbs asked Powell if she could substantiate—during the interview. And for any Twitter followers unable to watch the program, the @LouDobbs account reproduced the bulk of the interview less than one hour later, and explicitly identified Powell and recited her charges in the accompanying tweet. Thus, as with the statements in the interview itself, the pre-show tweet simply made the public aware of allegations made by Powell, a figure at the apex of the raging public controversy over the presidential election. It did not present those claims as fact, but rather “present[ed] newsworthy allegations made by others,” *Croce*, 930 F.3d at 793—core activity that is protected by the First Amendment and New York law.

Dominion also challenges a tweet reproducing Dobbs’ interview with Powell. Compl. ¶179(r). But the interview itself cannot provide the basis for a defamation claim for all the reasons already explained. And the tweet accompanying the interview merely identified the interviewee—@SidneyPowell1—and recited her

charges (“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.”). The tweet attributed the allegations to their source without weighing in on whether they were true. And it links to a video of the interview itself, making clear that the allegations were coming from Powell. A reasonable viewer would understand that the post-show tweet was simply conveying the fact that Powell made certain allegations on Dobbs’ show.

December 12 – Fox and Friends. On December 12, Fox News reporter Griff Jenkins covered a rally in Washington D.C. in support of President Trump in which he interviewed participants, one of which stated that he felt disenfranchised because he voted in Georgia, where votes were stolen. The interviewee mentioned Powell’s suit. Jenkins then passed the show to *Fox and Friends* hosts Pete Hegseth, Rachel Campos-Duffy, and Will Cain, who interviewed Giuliani. Hegseth asked Giuliani: “*In the legal challenge*, what’s next?” Ex.A32, Fox & Friends Tr. 3 (Dec. 12, 2020). Giuliani then provided a lengthy overview of the lawsuits still at issue and claimed that the election was fraudulent. Amidst that eight-minute segment, which touched on everything from Giuliani’s non-Dominion lawsuits, to Hunter Biden’s laptop, to Giuliani’s battle with COVID-19, Giuliani mentioned Dominion for a few fleeting seconds, alleging that the “Dominion machine is filled with holes as Swiss cheese”

and was developed to steal elections. *Id.* Cain immediately followed up: “I’d love to ask you about timing in that evidence that you bring up ... *Do you have the time to bring these and put forward the evidence? And what is your strongest evidence?*” *Id.* Yet again, a reasonable viewer would clearly understand that Giuliani’s claims were his own, that the claims were made in lawsuits (“*In the legal challenge, what’s next?*”), and that he had yet to substantiate his claims in court.

January 26 – Tucker Carlson Tonight. On January 26, Carlson interviewed MyPillow CEO Mike Lindell on his program to discuss Lindell’s recent ban from Twitter and the decision by Bed Bath & Beyond (and other outlets) to stop selling his products. The point of the segment was to discuss Lindell’s perspective on “cancel culture”—a topic of particular interest to Carlson, who had covered it many times before. Unprompted by Carlson, however, Lindell brought up election fraud: “[A]bout 17 days ago, when someone put up on the internet ... new machine election fraud, I retweeted it and they took my Twitter down” for about 14 days. Ex.A38, Tucker Carlson Tonight Tr. 17 (Jan. 26, 2021). “This cancel culture ... It’s just a shame, Tucker.” *Id.* “I’m not backing down. We cannot back down out of fear this time,” to which Tucker responded: “I totally agree.” *Id.* at 18. Tucker then asked: “I thought the rules were, if you think someone is saying something incorrect, you explain how it’s incorrect and you convince his audience that actually you’re right and he’s wrong. When did that go away? When did we decide force was the only

answer to disagreement?” *Id.* at 19. Lindell responded: “[R]ight ... What I’d say to them with this particular thing that’s going on now, I’ve been all in trying to find the machine fraud. And we found it. We have all the evidence ... I have the evidence. I dare people to put it on. I dare Dominion to sue me, because then it would get out faster. So this is—you know, they don’t want to talk about it. They don’t want to say it. They just say, oh, you’re wrong.” *Id.* at 19-20. Tucker responded: “***They’re not making conspiracy theories go away by doing that.*** You don’t answer—you know, don’t make people kind of calm down and get reasonable and moderate by censoring them. You make them get crazier, of course. This is ... ridiculous.” *Id.* at 20.

Here too, a reasonable viewer would plainly understand that the allegations were coming from Lindell. Context makes clear that the point of the segment was to discuss cancel culture, not election-fraud allegations. And it could not be clearer that Lindell’s statements about election fraud were entirely his own, not anything that Carlson embraced, endorsed, or even invited Lindell to offer. Indeed, far from stating that Lindell’s claims were true, Carlson cast doubt on them by describing them as “conspiracy theories.”

The broader context of *Tucker Carlson Tonight* reinforces that conclusion. Carlson explained in his previous shows that he had not seen any evidence to support the President’s allegations against Dominion. On November 19, he explained that

Powell had “never sent us any evidence, despite a lot of requests, polite requests, not a page. When we kept pressing, she got angry and told us to stop contacting her. When we checked with others around the Trump Campaign, people in positions of authority they told us, Powell has never giving them any evidence either. Nor did she provide any today at the press conference.” Ex.A19, Tucker Carlson Tonight Tr. 6 (Nov. 19, 2020). Likewise, on November 20, Carlson stated that “they have not seen a single piece of evidence showing that software change[d] votes. ... And by they, we are including other members of Donald Trump’s own legal team. They have not seen Powell’s evidence either, no testimony from employees inside the software companies, no damning internal documents, no copies of the software itself.” Ex.A21, Tucker Carlson Tonight Tr. 5 (Nov. 20, 2020). In context, a reasonable viewer of *Tucker Carlson Tonight* would understand that any allegations Lindell may have leveled about Dominion were entirely his own, and that the allegations were unproven. And in all events, the very little Lindell said about election fraud was not about Dominion specifically, but rather about “machine fraud” generally, so a reasonable viewer would not even understand Lindell to have been stating any facts about Dominion anyway.

* * *

As the foregoing confirms, once each of the statements Dominion challenges is carefully examined on its own terms, it is clear that none is defamatory as a matter

of law. Dominion's suit should therefore end here and now. Even if Dominion could successfully argue that a jury should decide whether some of the challenged statements are actionable, it is clear that many of the statements and shows that Dominion challenges are not defamatory. At the very least, the Court should narrow this case for trial by granting summary judgment to Fox News on claims related to shows, hosts, or statements that are not defamatory as a matter of law, and ensure that the parties need not waste the Court's or a jury's time presenting evidence and arguments about coverage that is legally irrelevant.

II. Dominion Lacks Clear and Convincing Evidence Of Actual Malice.

Even assuming, for the sake of argument, that Dominion could point to any statement that *could* be actionable defamation, this Court should grant Fox News' summary judgment motion for the independent reason that Dominion lacks clear and convincing evidence that the relevant individuals at Fox News made or published any statement with actual malice.

A. Dominion Must Produce Clear and Convincing Evidence of Actual Malice Under New York's Anti-SLAPP Law and the First Amendment.

The actual malice standard applies here for two independent reasons. *First*, under New York's anti-SLAPP statute, when a plaintiff challenges a statement made "in connection with an issue of public interest," the plaintiff must prove "by clear and convincing evidence" that the statement "was made with knowledge of its falsity or with reckless disregard of whether it was false." N.Y. Civ. Rights Law §76-

a(1)(a), (2). New York “broadly” defines “public interest” to mean “any subject other than a purely private matter.” *Id.* §76-a(1)(d). As the trial court in the Smartmatic litigation has already concluded, *Smartmatic USA Corp. v. Fox Corp.*, 2022 WL 685407, at *19 (N.Y. Sup. Ct. Mar. 8, 2022), and as more fully explained in Fox News’ brief on the issue, D.I. 595, media coverage of the integrity of the 2020 presidential election plainly qualifies.

Second, the First Amendment independently requires proof of actual malice. To preserve the “vigor” and “variety” of “public debate,” the First Amendment provides heightened protection for statements about public figures. *Sullivan*, 376 U.S. at 279. Public figures are those who “have assumed roles of especial prominence in the affairs of society.” *Gertz*, 418 U.S. at 345. Some achieve such “pervasive involvement in the affairs of society” that they become public figures “for all purposes.” *Id.* at 351-52. Others are public figures only “for a limited range of issues,” because they “voluntarily inject[ed]” themselves or were “drawn into a particular public controversy.” *Id.* at 351.

As explained more fully in Fox News’ brief on the issue, *see* D.I. 594, Dominion is at a minimum a limited-purpose public figure for purposes of the 2020 election. By providing voting technology for the election, Dominion accepted the reality that it could be “drawn into” a public controversy about the security of its technology. *Id.*; *see Daniel Goldreyer, Ltd. v. Dow Jones & Co.*, 259 A.D.2d 353, 353 (N.Y.

App. Div. 1999); *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir. 1980). While Dominion may be frustrated that it became embroiled in a heated national controversy, one cannot supply voting technology and expect to avoid the spotlight. Controversy comes with the territory, as Dominion well knows from the reams of publicly available articles from the largest newspapers in the country documenting intensive scrutiny of Dominion and the security of its technology over the past decade by Congress, state governments, courts, and other media outlets. *See supra* at 6-16. Dominion is thus a public figure for at least the “limited range of issues” in this case. *Gertz*, 418 U.S. at 351.

To prove defamation, then, Dominion must prove that Fox News published each allegedly defamatory statement with actual malice—that is, with knowledge that it was false or with reckless disregard for the truth. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). “The actual malice standard is famously daunting.” *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 240 (D.C. Cir. 2021). Mere allegations of negligence or “failure to investigate” are not enough. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). Indeed, actual malice requires even “more than an extreme departure from professional standards.” *Id.* at 665; *see also Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001) (Alito, J.). “There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication,” *St. Amant v.*

Thompson, 390 U.S. 727, 731 (1968) (emphasis added), or possessed a “high degree of awareness” of its “probable falsity,” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). “The inquiry is thus a subjective one, focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication.” *Kipper v. NYP Hldgs. Co.*, 912 N.E.2d 26, 29-30 (N.Y. 2009).

Moreover, actual malice must be proven by “clear and convincing” evidence. *Anderson*, 477 U.S. at 257. That standard is “significantly more onerous than the usual preponderance of the evidence standard.” *Tavoulareas v. Piro*, 817 F.2d 762, 776 (D.C. Cir. 1987) (en banc). To prove actual malice under the clear-and-convincing standard, the evidence must “instantly tilt[] the evidentiary scales in the affirmative when weighed against the evidence [the defendant] offered in opposition.” *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). It must lead to an “abiding conviction” that the plaintiff’s claim of actual malice is “highly probable.” *Id.*; see also *In re Martin*, 105 A.3d 967, 974-75 (Del. 2014) (same). This heightened standard applies at the summary-judgment stage: “[A] court ruling on a motion for summary judgment must be guided by the *New York Times* ‘clear and convincing’ evidentiary standard in determining whether a genuine issue of actual malice exists.” *Anderson*, 477 U.S. at 257. The plaintiff thus must present “affirmative evidence” that would enable a “reasonable jury” to find actual malice by clear and convincing proof. *Id.* at 255, 257.

Importantly, where (as here) the defendant is a media organization, it is not enough to point to evidence that *someone* in the organization knew the claims were false or harbored serious doubts about the truth. As the Supreme Court explained, “the state of mind required for actual malice” must “be brought home to the persons in the [defendant’s] organization having responsibility for the publication.” *Sullivan*, 376 U.S. at 287.

B. Dominion Lacks Clear and Convincing Evidence of Actual Malice.

1. The record conclusively demonstrates that the individuals responsible for the allegedly defamatory statements lacked actual malice.

After more than a year of discovery, Dominion has come nowhere close to mustering the clear and convincing evidence it would need to prove actual malice. The record instead underscores the absence of malice.

At the outset, once the challenged coverage is examined statement-by-statement, *see supra* Part I.D, the absence of actual malice leaps off the page. When the President made unprecedented accusations of election fraud, Fox News hosts covered that newsworthy story and gave the President’s attorneys (and in Bartiromo’s case, the President himself) the chance to explain their allegations and their plans to contest the election in court. When they made their case, the hosts pressed them for evidence and underscored that they would need to produce evidence before the mid-December deadline for certifying electoral votes for the allegations to make a difference in potentially election-altering litigation. *See supra*

at 25-32. When Dominion denied the President’s allegations, hosts reported those denials. *See id.* Several hosts asked other parties, including members of Congress, journalists, and legal scholars, to assess and comment on the President’s allegations. *See id.* Oftentimes the guests cast doubt on the claims or emphasized that they had yet to see proof. *See id.* Fox News hosts also reported the results of the state audits, the President’s legal setbacks, and the skeptical views of various government officials. *See id.* All of that underscores that the hosts covered and commented on the allegations because they were newsworthy and because they could alter the outcome of the election if they could be substantiated in the litigation where they were being pressed. When it became clear by mid-December that the President’s legal team had failed to produce evidence to substantiate their allegations in court before the December 14 deadline for certifying the vote, Fox News hosts stopped booking Giuliani and Powell on their shows.

Indeed, the lone challenged statements that post-date the December 14 deadline come from the January 26 segment of *Tucker Carlson Tonight* on which Carlson interviewed Lindell, not Giuliani or Powell. But as context makes clear, Carlson did not invite Lindell on to discuss election fraud; he invited him on to discuss Lindell’s recent censorship on Twitter. *See id.* And Carlson has since confirmed that he had “no idea” that Lindell would bring up Dominion and “did not expect” him to do so. Ex.E7, Carlson Dep. Tr. 185:21-24, 320:14-321:9; *see also* Ex.E14, Wells Dep. Tr.

108:15-19 (Lindell “was booked because he was cancelled by woke corporations and Big Tech”). Courts have long rejected the notion that a host has published a false statement with actual malice when the statement is made by a guest in the context of a live on-air interview, particularly where the host did not know that the guest would make it. *See, e.g., Jones v. Taibbi*, 508 F. Supp. 1069, 1074 n.12 (D. Mass. 1981) (“[I]t is one thing to require a newspaper to check the accuracy of an interview. But it may be another matter to hold a TV newsperson responsible for the spontaneous live utterance of an interviewee.”); *see also Pacella v. Milford Radio Corp.*, 462 N.E.2d 355, 360 (Mass. App. Ct. 1984); *Adams v. Frontier Broad. Co.*, 555 P.2d 556, 564 (Wyo. 1976). All of the coverage itself thus suffices to confirm that no challenged statement was published with actual malice.

Unsurprisingly, discovery likewise has failed to reveal any evidence that Fox News hosts knew the President’s allegations were false when they were made or harbored serious doubts about their truth. The context of the allegations—claims related to litigation that was being promoted as having the potential to change the election—affirmatively pointed the other way, especially given the need to back the allegations up in court in short order. Moreover, each of the hosts testified that they did not know that the President’s claims were false at the time of the relevant shows, and/or explained why they maintained an open mind about the President’s claims.

Bartiromo. Bartiromo has expressed uncertainty even to this day about what exactly happened in the election: “I cannot sit here and say I know what took place in the election 2020. I still have not seen a comprehensive investigation as to what took place, and that is why there are still questions about this election.” Ex.E4, Bartiromo Dep. Tr. 283:1-5. And she still cannot say for certain that the President’s allegations about Dominion are false: “I have no idea. I have not done any of this investigatory work.” *Id.* at 110:2-9; *see also* Ex.I2, Bartiromo Text Message (Nov. 20, 2020) (“This was fraud. No one can tell me differently. They hate him & they wanted him out bc he s poses their corruption. I think he could win his.”). Moreover, Bartiromo explained that she maintained an open mind about the President’s claims because the claims were being pressed by the sitting President of the United States and his lawyers in a context where the allegations would need to be proven in court in short order to have an effect on the election. She explained: “These were people that the country respected, and they were making a very serious charge.” Ex.E4, Bartiromo Dep. Tr. 379:14-22. A publisher’s reliance on elected officials and their attorneys, as well as official sources, shows an *absence* of actual malice. *See, e.g., Freeze Right*, 101 A.D.2d at 184-85; *Dickey v. CBS Inc.*, 583 F.2d 1221, 1229 (3d Cir. 1978).

On top of that, Bartiromo testified that she did not think it far-fetched that Dominion’s machines could potentially be hacked, particularly by foreign

adversaries, especially when Senator Klobuchar, Congresswoman Maloney, and Stacey Abrams expressed similar concerns about voting machines before the 2020 presidential election. Ex.E4, Bartiromo Dep. Tr. 196:16-197-2, 379:11-18. Bartiromo was hardly alone in the view that the security of electronic voting machines is a genuine issue and that the nature of voting machines makes allegations of unseen manipulation plausible. There was widespread concern even before the 2020 election among computer scientists, election security experts, the media, and Democratic and Republican politicians alike that electronic voting machines were vulnerable to hacking, including by foreign adversaries. *See supra* at 6-16. Indeed, Dominion machines were already the subject of litigation over security concerns, and a federal judge concluded (a week before the election, no less) that “this is not a question of ‘might [security problems] actually ever happen?’—but ‘when it will happen.’” *Curling*, 493 F.Supp.3d at 1342. Simply put, there was nothing remotely—let alone inherently—implausible about the notion that electronic voting machines used in the 2020 election could have been hacked.

Dobbs. Dobbs likewise testified that his interest was in “finding out what really did happen,” and that, at the time, he had “no reason to doubt [Powell’s] claims.” Ex.E5, Dobbs Dep. Tr. 22:4-16. He believed at the time (and still believes today) that “the election was stolen,” *id.* at 37:25-38:4-6, 38:7-10, and he did not (and still does not) know “what happened with the electronic voting companies in that

election,” *id.* at 40:1-3. Like Bartiromo, Dobbs provided reasons for maintaining an open mind about the President’s claims. He testified that he “took [Powell’s] claims seriously” because she “was representing the President” and “a highly respected attorney.” *Id.* at 21:4-8. And he had long been skeptical of the security of electronic voting machines, a subject that he covered almost 15 years ago while he was an anchor at CNN. *See supra* at 8-9.

Pirro. Pirro, who hosted Powell just once on her show (on November 14) and did not host Giuliani at all, also confirmed in her deposition testimony that she did not know whether the President’s allegations were true or not. She testified: “Did I know for a fact that it was true or not true? I didn’t know.” Ex.E6, Pirro Dep. Tr. 297:22-24; *see also id.* at 97:23-25 (“I don’t know if there were kickbacks. I don’t know.”); *id.* at 99:17-21 (“I don’t know” whether “Dominion used its software and algorithms to manipulate vote counts”); *id.* at 103:13-15 (“I don’t know” whether “Dominion was owned by Smartmatic”). And as of early December (well after any of the challenged episodes of *Justice with Judge Jeanine*), Pirro thought that the veracity of the President’s allegations “was clearly still up in the air.” *Id.* at 388:14-19. She testified that she took the claims particularly seriously because the President’s legal team pressed them in multiple lawsuits under penalty of Rule 11 sanctions, backed them up with sworn affidavits, and would accomplish nothing if they could not substantiate their allegations in court. *Id.* at 352:17-23 (“I had

affidavits that were legal sworn statements under penalty of perjury supporting the allegations.”); *see also* Ex.I3 Andrews Email (Nov. 14, 2020) (“Jeanine says she has affidavits to back up her claims provided to her by ██████████”). Numerous courts, including the United States Supreme Court, have found no actual malice where the source “swore to his answers” and “was prepared to substantiate his charges.” *St. Amant*, 390 U.S. at 733; *see also* *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515-16 (D.C. Cir. 1996) (finding “most important” the fact that source “ma[de] the very same allegations” of election fraud “before the Congress under oath—and under the realistic threat of a penalty for perjury”).

Hannity. Hannity provided multiple reasons why he took the President’s allegations seriously. He testified that he had found Powell to be a “very bright attorney” in past interactions. And he kept an open mind because his own investigation revealed that “so many people from so many varying diverse backgrounds,” including the State of Texas, Congressman Wyden, Senator Warren, the New York Times, and the Associated Press, “had come to a conclusion that was very negative towards Dominion.” Ex.E8, Hannity Dep. Tr. 44:1-18, 189:7-19, 317:12-16. As he told viewers on his November 19 show (which Dominion does not even try to challenge), “[i]f you’re keeping track, Senators Warren, Klobuchar, Biden—Wyden, tenured professor [from Princeton University], state of Texas, the A.P., the New York Times, people from all political persuasions surrounding

dominion voting systems, hardly part of the vast right-wing conspiracy. Now, if in a divided country like this one, you got Democrats, Republicans, and the media, before the election, agreeing that this is not the best system, why was it used in the first place in 28 states?” Ex.A17, Hannity Tr. 4 (Nov. 19, 2020). “And now, if you bring up Dominion, you are a conspiracy theorist[] ... [H]ow is that fair and right? Whether the machines worked well in this election *is yet to be determined*, but why were they used in the first place is my question. What about the hundreds of sworn affidavits signed under penalty of perjury? Are their stories not worthy of being heard?” *Id.* As numerous courts have explained, “a publisher’s effort to investigate damaging allegations ... is evidence that the publisher neither believed the allegations to be false nor willfully blinded himself to the truth.” *McFarlane*, 91 F.3d at 1509.

Carlson. As explained above, the only *Tucker Carlson Tonight* show that Dominion challenges is his January 26 show, where Carlson was plainly not aware that Lindell would mention Dominion. And Carlson has since confirmed that he had “no idea” that Lindell would bring up Dominion and “did not expect” him to do so. Ex. E7, Carlson Dep. Tr. 185:21-24, 320:14-321:9. As explained, numerous courts have rejected the notion that a host has published a false statement with actual malice when the statement is made by a guest in the context of a live on-air interview, particularly when the host did not know that the guest would make the statement.

See supra at 125. What Carlson thought about the President’s allegations is therefore irrelevant, as he is not responsible for any other coverage or commentary during which they were discussed.

Nevertheless, Carlson testified that he too took the President’s lawyers seriously because of their connection with the President and their credentials, and because they were “willing to attach their names to a complaint” under penalty of Rule 11 sanctions. *See, e.g.,* Ex.E7, Carlson Dep. Tr. 330:19-331:5; *see also* 32:18-19 (“I took Sidney Powell seriously and I still do.”). Carlson reported on his November 19 show that Powell had failed to give him any evidence substantiating her claims despite his requests, underscoring that he was trying to get to the truth. *See McFarlane*, 91 F.3d at 1509. But he testified that, although he was “frustrated” that the President’s lawyers failed to provide evidence for their claim against Dominion, “it’s entirely plausible that that claim is true, because we’re dealing with electronic voting machines here.” *See, e.g.,* Ex.E7, Carlson Dep. Tr. 44:16-20, 45:7-9, 110:7-9. And while Powell “did not provide [evidence] to” Carlson, he had “no idea” whether she “has provided that proof or not” to others. *Id.* at 45:18-22.

2. Dominion cannot establish actual malice by relying upon skepticism of persons at Fox News who were not responsible for the allegedly defamatory statements.

Unable to identify anything in the record that casts doubt on the conclusion that none of the hosts published any defamatory statements with actual malice, Dominion

has tried to muster evidence that some *other* individuals within the Fox News organization questioned the President's claims. But even assuming any doubts others may have harbored could meet the very high actual-malice bar vis-à-vis the knowledge of those individuals, actual malice is not determined by examining the collective knowledge within an organization. When the defamation defendant is (as here) a news organization, the key question is whether those in the organization *responsible for the allegedly defamatory publication* knew that the publication was false or harbored serious doubts about its truth. *See Sullivan*, 376 U.S. at 287-88; *see also Palin v. N. Y. Times Co.*, 588 F.Supp.3d 375, 381, 402-07 (S.D.N.Y. 2022); *Palin v. N. Y. Times Co.*, 940 F.3d 804, 810 (2d Cir. 2019).

That rule is particularly important in a case like this, where the subject matter of the reporting involves one of the most important political events in our Nation's history. When someone (particularly someone as polarizing as the former President) makes unprecedented claims about hot-button political or social issues—be it election fraud, sexual misconduct, the coronavirus, or anything else—those claims are bound to arouse intense passions. It is hardly unusual that some people in a newsroom (with the diverse political viewpoints one would expect) will disbelieve the allegations and hope that they ultimately prove false, while others will keep an open mind in hopes that they prove true. It would hardly be surprising, for example, if reporters and producers at CNN held a variety of views about the veracity of the

sexual assault allegations against then-Governor Andrew Cuomo (and the mix of skeptics and believers might be different at Fox News). That is one of the many reasons why the actual malice inquiry focuses on the specific individuals in the news organization that are responsible for the allegedly defamatory publication. If it were otherwise, then every news organization would be on the hook for actual malice so long as *someone* in the newsroom thought the claims were false. The collective knowledge of Fox News writ large is thus irrelevant. *See, e.g., Blankenship v. Fox News Network, LLC*, 2022 WL 321023 (S.D. W.Va. Feb. 2, 2022), *appeal filed*, No. 22-1207 (4th Cir. Filed Mar. 2, 2022) (holding that Rupert Murdoch’s and Suzanne Scott’s knowledge was irrelevant to claim that broadcast was defamatory because “it is the state of the mind of the speaker that is relevant”).

3. The record demonstrates that Dominion’s circumstantial evidence of actual malice is insufficient.

Lacking any direct evidence that the responsible individuals at Fox News harbored actual malice, Dominion is left with circumstantial evidence. But none of that evidence is anywhere near sufficient either.

Denials. Dominion claims that Fox News hosts must have known that the President’s claims were false because Dominion denied them and because some government officials and members of the media were skeptical of them. But mere knowledge of self-serving denials does not prove that someone “*in fact* entertained

serious doubts as to the truth” of a statement. *St. Amant*, 390 U.S. at 731 (emphasis added). Such “denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.” *Harte-Hanks*, 491 U.S. at 691 n.37 (quoting *Edwards*, 556 F.2d at 121).

Indeed, the record confirms that, just as Fox News hosts did not take the President at his word, they did not take Dominion at its word either. Carlson stated that Dominion’s denials were “every bit as unsubstantiated as Sidney Powell’s claim.” Ex.E7, Carlson Dep. Tr. 73:6-74:8. Hannity “did not find” “comments in the public domain,” including Dominion’s denials, “credible.” Ex.E8, Hannity Dep. Tr. 123:1-14, 291:15-21. Dobbs stated that the “categorical denial from Dominion” was “not in any way a conclusive response to the charges,” and that “the resolution of those court cases would be the best indicator” of whether Dominion would be “exonerat[ed].” Ex.E5, Dobbs Dep Tr. 117:2-12, 130:22-131:5. Bartiromo said that, while she “was keeping an eye on what [Dominion] w[as] saying” and “put the[ir] statement on the air,” she “also recogniz[ed] that there were questions about the voting machines dating back years,” including questions raised by various Democratic members of Congress and Democrat Stacey Abrams, who claimed that “voting machines caused her to lose an election.” Ex.E4, Bartiromo Dep. Tr. 273:22-274:10. Pirro explained that the press could hardly serve its truth finding

function if it could no longer report allegations simply because someone “comes in and says it’s not true.” Ex.E6, Pirro Dep. Tr. 333:13-19, 334:16-22. As she explained, referencing her time as a sitting judge: “[T]hat’s not the end of it. You’ve got to have a trial to find out if it’s ... true or not true.” *Id.* at 333:13-19; *see also* Ex.E15, Hegseth Dep. 72:2-91:21 (explaining that Dominion’s refutations are advocacy positions, not facts in and of themselves).¹⁹

Evidence that cast doubt on the claims. Dominion claims that it not only denied the allegations against it, but also supplied information that affirmatively cast doubt on them. But Dominion does not identify the kind of cut-and-dry information necessary to meet the high actual-malice bar. To be sure, when a publisher reviews

¹⁹ Moreover, discovery confirms that Fox News hosts and producers had good reason to be skeptical of Dominion’s claims. Dominion itself recognized that its “fact checks” sometimes contained errors: “Can you please pull down this Wisconsin fact sheet as soon as you get a chance? We’ve noticed a potential error so want the document off the site while we double check a few things.” Ex.H12, Walstrom Email (Dec. 16, 2020). Dominion also claimed that “[n]o foreign national directly or indirectly owns or controls the company,” Ex.H13, Stimson Email (Dec. 4, 2020), but admits that its founder and CEO (and part owner) is a Canadian citizen. Dominion also claimed that its machines are not connected to the internet. Ex.A24, America’s News HQ Tr. 4-5 (Nov. 22, 2020). But its own internal documents acknowledge that some states “require machines to be able to access the internet,” so “some of [Dominion’s] machines have the ability to plug in an external modem” which “is run through a private network and transfers unofficial results to elections officials who can then report the results.” Ex.H14, Dominion Media Cheat Sheet. And while Dominion extolled its technology to the public, Dominion’s own executives acknowledged (a week before the election, no less) that its products are “just riddled with bugs.” Ex.H2, Coomer Email (Oct. 30, 2020).

“objectively verifiable” evidence affirmatively “contradicting” claims, that can provide the publisher with “obvious reasons to doubt” them. *Prozeralik v. Cap. Cities Commc’ns, Inc.*, 626 N.E.2d 34, 40-41 (N.Y. 1993); *see also Harte-Hanks*, 491 U.S. at 688 (audiotapes that could easily have verified or disproved the allegations); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 158 (1967) (films that clearly revealed what happened); *Palin*, 588 F.Supp.3d at 402, 404 & n.28 (finding no jury issue on actual malice because articles that allegedly debunked the allegedly defamatory statement did not “present[] any *definitive facts*” or “*conclusive evidence*” “that would have put Bennet on notice” that the statement was false (emphasis added)). But none of the things cited by Dominion in its denials provide an *objectively verifiable* reason to doubt the President’s claims.

For instance, Dominion makes much of a November 12 statement from the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA) declaring the 2020 election “the most secure in American history.” Compl. ¶64. But contrary to Dominion’s contentions, that statement did not debunk the President’s allegations, as the agency supplied no verifiable *evidence* to support its claims. *See, e.g., Tah*, 991 F.3d at 242 (explaining that statements did not provide “obvious reasons to doubt” the publication because they contained no “evidence that could be readily verified”). Indeed, it would be extremely surprising if it had, given that CISA issued the statement mere days after the President and his lawyers first

pressed their claims about Dominion. That is presumably why other government agencies, including the U.S. Department of Justice, continued to investigate the President's claims long after November 12. Indeed, the U.S. Election Assistance Commission sent Dominion an email the very next day regarding its investigation into claims about Dominion. *See* Ex.H11, U.S. Election Assistance Comm'n Ltr. (Nov. 13, 2020).

It is also presumably why the individuals at Fox News responsible for the challenged publications did not take CISA's statement as conclusive. When asked whether he considered "CISA ... to be an authoritative source of information about the November 2020 election," Dobbs responded: "Authoritative, absolutely. Conclusive, absolutely not." Ex.E5, Dobbs Dep. Tr, 133:14-19. He noted that he had "a number of reasons to be skeptical" of the CISA statement, which "turned out to be one of the silliest statements that could have been made." *Id.* at 136:1-17. Bartiromo testified that she did not know whether to believe the CISA statement, in part because "[w]e've seen many instances where government misled the American people, such as the Russia collusion story, such as Hunter Biden's laptop, such as the origins of COVID-19." Ex.E4, Bartiromo Dep. Tr. 183:19-184:6. Pirro likewise explained that the President's allegations were "clearly still up in the air" even by mid-December. Ex.E6, Pirro Dep. Tr. 388:14-19. Carlson stated that, in his view, he "knew as a logical matter that [the President's claims about Dominion] couldn't

have been debunked because the only way to debunk it and the only way to prove it would be to have possession of the Dominion software.” Ex.E7, Carlson Dep. Tr. 75:17-23.

Dominion also points to a November 16 statement by “specialists in election security” explaining that they “have never claimed that technical vulnerabilities have actually been exploited to alter the outcome of any U.S. election.” Comp. ¶78; Ex.G12, Election Security Specialists Statement (Nov. 16, 2020). But the statement does not provide any affirmative evidence that debunks the allegations; at most, it notes only a lack of evidence confirming them. Far from removing any doubt about the President’s claims, moreover, the same statement notes that “there are security weaknesses in voting systems” and that there “is no realistic mechanism to fully secure vote casting and tabulation computer systems from cyber threats.” *Id.* Just because technical vulnerabilities had not been exploited in the past does not mean that they could not be exploited in the future; indeed, the federal judge in the *Curling* case concluded that Dominion’s machines will almost certainly be exploited at some point in the future. *See Curling*, 493 F.Supp.3d at 1342.

Dominion also points to “fact check” articles written by other media outlets, such as the AP, BBC, and CNN. But as one Fox News producer explained, “we are our own news organization, so the fact that AP does what they claim is a fact-check doesn’t mean that Fox or anyone should or would take it lock, stock and barrel.”

Ex.E9, Schreier Dep. Tr. 165:23-166:11. Another producer added, “in the four years of the Trump administration, the larger media, including many of the sources [Dominion cites], had proven themselves to not be honest brokers when it comes to fully researching and investigating the information that might be affirmative to Donald Trump or his administration.” Ex.E17, Lowell 30b6 Dep. Tr. 253:8-18. Consequently, “none of these reports would have had a significant impact on our view of events.” *Id.* at 253:8-18. Dominion also highlights Fox News’ own internal “Brain Room” emails. *See, e.g.*, Ex.I4, Ilievski Email (Nov. 13, 2020). But those emails simply point to Dominion’s own self-serving denials and to fact checks by other news organizations. *Id.* They are insufficient for the same reasons that those documents are insufficient. *See, e.g.*, Ex.E4, Bartiromo Dep. Tr. 188:11-15 (noting that one of the emails she received from the brain room simply regurgitated a Dominion denial). Moreover, discovery has revealed that Fox News hosts often conducted their own research, including by reaching out to confidential sources to which the Brain Room did not have access. Pirro, for example, explained that the “brain room didn’t have time, clearly, to do all of the work that needed to be done.” Ex.E6, Pirro Dep. Tr. 352:17-23. She was also skeptical of their conclusions because she had evidence that, in her view, refuted them. *Id.* (“I had affidavits that were legal sworn statements under penalty of perjury supporting the allegations.”); *see*

also Ex.I3, Andrews Email (Nov. 14, 2020) (“Jeanine says she has affidavits to back up her claims provided to her by [REDACTED].”).

Dominion also points to state audits of the vote count. But even assuming that the individuals at Fox News responsible for the publications knew about the audits, those self-serving audits did not debunk the President’s claims in any “objectively verifiable” way. After all, one of the key aspects of the President’s theory was that Dominion’s machines had been programmed to commit fraud in ways that avoid detection from state election officials. Moreover, a February 2020 paper noted that “paper ballots provide no assurance unless they accurately record the votes as expressed by the voters,” and that some machines “might not record expressed votes accurately” if the “software has bugs, was misconfigured, or was hacked.” Ex.G11, Andrew Appel, et al., Ballot-Marking Devices Cannot Ensure the Will of the Voters, *Election L.J.* 1, 10 (Feb. 2020); *see also* Ex.I5, Pfeiffer Email (Nov. 16, 2020) (explaining that the paper audit is a record of what the *machine* did, not what the *voter* did). A state audit that fails to show fraud thus tells nothing about the President’s claims. Dominion also points to the December 1 statement of the Attorney General stating that “*so far*, we haven’t seen anything to substantiate” the President’s claims about voting machine fraud. Compl. ¶102 (emphasis added). But the absence of evidence proving a claim is plainly not the same thing as affirmative and objectively verifiable evidence debunking it. *Supra* at 138. As Pirro explained:

“He did not make an affirmative finding ... In fact, he said the Department of Justice was continuing to get affidavits and information.” Ex.E6, Pirro Dep. Tr. 387:15-23.

To be sure, there may be a point in time in which the failure to marshal evidence in support of a claim provides an obvious reason to doubt it. But that did not happen in the tight timeline at issue here. As the Fox News hosts explained, the President had a relatively short amount of time to produce evidence of his claims before the election results would be certified in mid-December, and in light of that quick turnaround, hosts were inclined to give the President’s lawyers a chance “to see if they could prove the allegations in a court of law.” Ex.E5, Dobbs Dep. Tr. 342:19-25. After all, “30 days is ... an extraordinary time in which to go out and demonstrate anything in court”—let alone substantiate claims that a Presidential election had been rigged through difficult-to-detect electronic means. *Id.* at 343:1-4 It was therefore not at all unusual that the President’s legal team failed to produce hard evidence in the weeks after the election, when Fox’s core coverage took place. As Dobbs explained, “[S]hould there have been tangible, verifiable evidence at that stage of the court proceedings? I don’t know. It certainly would have been good to have had, but I don’t know how realistic the expectation would have been that we could have expected an adjudication on evidence and the resolution of the court cases at that junction, which was what? Two, three weeks out from the election?” *Id.* at 69:22-70:5.

Other hosts expressed similar sentiments. *See, e.g.*, Ex.E4, Bartiromo Dep. Tr. 199:13-21 (“I understood that coming up with evidence and reporting it takes time.”); Ex.E6, Pirro Dep. Tr. 92:22-93:13 (“So it was fast moving, a lot of information was coming in, people were making allegations, people were asked to come on my show to respond to my questions about what evidence they had behind their allegations, how they were going to prove their allegations.”); Ex.E7, Carlson Dep. 51:4-7 (“[I]t’s clear in retrospect, but at the time, you know, you’re right in the middle of this, and it’s hard to see the outlines of it, you know.”); Ex.E8, Hannity Dep. 194:4-7 (“[Y]ou are only a few days out of what was a contentious election season, and information is flying around at a furious pace at that point.”). And when it finally became clear that the President’s legal team could not come up with the goods to contest the election before the mid-December certification deadline, Fox News hosts stopped hosting Giuliani and Powell on their shows.

In all events, Dominion ignores that Fox News hosts *reported Dominion’s denials and the contrary views of government officials, security experts, and members of the media to their viewers.* *Supra* at 25-32. As multiple courts have held, “publication of the grounds for doubting [the claim] tends to rebut a claim of malice, not to establish one.” *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1304 (D.C. Cir. 1996); *see, e.g., Michel v. NYP Hldgs., Inc.*, 816 F.3d 686, 703 (11th Cir. 2016) (“[W]here the publisher includes information contrary to the general

conclusions reached in an article, that showing tends to undermine the claims of malice.”); *Cabello-Rodón v. Dow Jones & Co.*, 2017 WL 3531551, at *10 (S.D.N.Y. Aug. 16, 2017) (“By including Cabello and others’ denials of the wrongdoing that is purportedly the subject of U.S. investigation and quotes by Cabello that flatly contradict claims by a source cited in the article ... the article cannot be said to evince an intent to deliberately avoid learning or portraying the truth.”), *aff’d*, 720 F.App’x 87 (2d Cir. 2018). That makes sense, as reporting both allegations and denials and third-party assessments of both tends to show that the press was trying to get to the truth, not trying to “avoid learning or portraying” it. *Cabello-Rodón*, 2017 WL 3531551, at *10.

Failure to investigate. Dominion also contends that the relevant Fox News people failed to review other evidence in the public domain. But that runs straight into the bedrock rule that failure to investigate, without more, is insufficient to establish actual malice. Even the failure to review one’s own files is inadequate to demonstrate actual malice. *Sullivan*, 376 U.S. at 287-88. To be sure, “the purposeful avoidance of the truth is in a different category” from the “failure to investigate.” *Harte-Hanks*, 491 U.S. at 692. But the record affirmatively refutes any suggestion that those who were responsible for the publications at Fox News tried to avoid the truth.

publisher neither believed the allegations to be false nor willfully blinded himself to the truth”).

Inherently implausible. Dominion is thus left contending that the allegations were so inherently implausible that those responsible for the challenged publications at Fox News must have harbored serious doubts about them. But, as the hosts explained, that contention ignores that the claims were being pressed *by the sitting President* and his legal team in federal lawsuits under penalty of Rule 11 sanctions (and their state law equivalents), as well as longstanding criticism of electronic voting machines generally and Dominion specifically from computer scientists, election security experts, members of the media, and politicians of both political parties. *See supra* at 6-16. And it ignores that the U.S. Department of Justice and the U.S. Department of Homeland Security took the allegations seriously enough to investigate them. As other courts have concluded, the fact that the government takes allegations seriously enough to investigate them precludes a finding that the claims are inherently implausible. In *McFarlane*, for example, the D.C. Circuit held that allegations that the Reagan campaign conspired with Iranian agents to delay the release of hostages until after the election to tip the scales for then-candidate Reagan was not inherently implausible when Congress investigated them and where the source of the allegations swore by them under penalty of perjury. *See McFarlane*, 91 F.3d at 1513-14.

Other circumstantial evidence. Dominion also claims that Fox News had a motive to fabricate claims of election fraud because it wanted to bolster flagging ratings and hold off upstart competitors like Newsmax. Setting aside the problem that this theory is refuted by the fact that several Fox News hosts openly questioned the President’s claims on-air, it is black-letter law that mere allegations “that the defendant published the defamatory material in order to increase its profits” cannot “suffice to prove actual malice.” *Harte-Hanks*, 491 U.S. at 667. Dominion contends that Fox News’ coverage departs from journalistic standards. That is wrong, *see* Ex.F6, Sanders Report at 8-23 (Nov. 28, 2022), but also irrelevant, as even “an extreme departure from professional standards” does not satisfy the demanding actual-malice standard. *Harte-Hanks*, 491 U.S. at 665. Dominion also contends that Fox’s failure to retract demonstrates actual malice. But actual malice cannot be inferred from a publisher’s failure to retract. *See Sullivan*, 376 U.S. at 286. That makes sense. The actual malice inquiry focuses on the publisher’s state of mind at the time of the publication. A publisher’s decision to retract (or not) after the publication decision has little bearing on that question—especially when, as here, the publisher steadfastly maintains that it never made any defamatory statements in the first place.

III. Dominion Is Not Entitled To Recover Economic Damages.

Even assuming for the sake of argument that Dominion could establish liability, Fox News is entitled to summary judgment on Dominion’s claims for economic damages, including lost profits and lost enterprise value. *See TL of Fla., Inc. v. Terex Corp.*, 2016 WL 6436613, at *3 (D. Del. Oct. 28, 2016) (granting summary judgment “of no lost profits” where “there [was] not sufficient evidence in the record from which a reasonable jury could find for [plaintiff] on either of its theories of lost profits”). While Dominion’s defamation claims are legally and factually flawed from top to bottom, its headline-grabbing claim of \$1.6 billion is especially so. Setting everything else in this case aside, it is simply unrealistic that a company that was generating as little as \$10.6 million in annual EBITDA before the 2020 election could have skyrocketed to *\$1 billion* in enterprise value in the few short years that followed—especially when that valuation would have to carve out \$600 million in profits to avoid a double-counting problem.²⁰ That claim would have required

²⁰ At a very minimum, this Court should make clear that Dominion cannot recover *both* lost profits *and* lost enterprise value. Dominion claims to have lost \$1 billion in enterprise value and \$600 million in profits on account of the 2020 election coverage. But any viable calculation of enterprise value should include anticipated profits. After all, the old owners do not typically get to keep collecting the profits after they sell the company. Awarding Dominion both lost profits and lost enterprise value would therefore result in impermissible double recovery. Ex.F3, Dudney Report at ¶¶39-41 (Nov. 29, 2022). Courts routinely recognize that recovery for

Dominion's value to grow 20-fold since its majority owners purchased it in 2018, a prospect that even they have admitted has no basis in reality. Staple Street's own employees explained that it "[w]ould be pretty unreal if you guys like 20x'ed your Dominion investment with these lawsuits." Ex.E12, Franklin Dep. Tr. 77:8-10.

Even if Dominion could substantiate these astronomical losses, moreover, it could not recover them from Fox News because it cannot prove that they were caused by the coverage it challenges. As in any tort case, a defamation plaintiff must prove that the defamation is both the but-for and the proximate cause of its alleged economic injury. *SRW Assocs. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 332 (N.Y. App. Div. 1987). To make that showing, the plaintiff must prove that the defamatory statements played "a material and substantial part in inducing others not to deal with the plaintiff, with the result that special damages, in the form of lost dealings, are incurred." *Waste Distillation Tech., Inc. v. Blasland & Bouck Eng'rs.*,

both lost profits and lost business value would be impermissibly duplicative. *E.g.*, *Protectors Ins. Serv., Inc. v. U.S. Fid. & Guar. Co.*, 132 F.3d 612, 618 (10th Cir. 1998) (vacating award as impermissible double recovery because a valuation award "must exist clearly independently of the lost profits"); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 914 (8th Cir. 2005) ("The problem is that [plaintiff] did not make a submissible case of lost goodwill damages" separate from lost profits); *City of San Antonio v. Guidry*, 801 S.W.2d 142, 150 (Tex. App. 1990) (recovery of both lost profits and loss of business value for the same time period would be duplicative); *Trailer Ranch, Inc. v. Levine*, 523 So.2d 629, 631 (Fla. Dist. Ct. App. 1988) ("[R]ecover for loss of a business venture is to be measured either by lost profits or loss of business value, but not both.").

P.C., 136 A.D.2d 633, 634 (N.Y. App. Div. 1988). Moreover, Dominion must prove its loss “with reasonable certainty and without speculation.” *Wolf St. Supermarkets, Inc. v. McPartland*, 108 A.D.2d 25, 33 (N.Y. App. Div. 1985). Indeed, “New York imposes very strict requirements for proof of special damages in the form of lost customers,” providing that “persons who ceased to be customers, or who refused to purchase, must be named.” *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 75 F.Supp.2d 235, 239-40 (S.D.N.Y. 1999), *aff’d*, 314 F.3d 48 (2d Cir. 2002). Where there are “several possible causes of the damage,” some of which have nothing to do with the alleged defamation, the plaintiff must put forth “credible evidence proximately relat[ing] any loss to the” defamation. *Wolf St. Supermarkets*, 108 A.D.2d at 449-50.

That strict standard is fatal to Dominion’s economic-loss claim. Dominion alleges “lost profits of not less than \$600,000,000.” Compl. ¶136. For one thing, that claim is belied by its own expert witness, who calculated Dominion’s alleged lost business opportunities at a mere \$88 million. Ex.F2, Hosfield Report at 5 (Nov. 29, 2022). For another, Dominion includes in its calculations bids that are still ongoing. Dominion asserts that it lost a nearly \$127 million revenue opportunity in Louisiana, *see* Ex.H15, Plaintiffs’ Fourth Supplemental Responses and Objections to Defendants’ Fourth Set of Interrogatories, Interrogatory No. 75, despite its own CEO’s testimony that the bid is still open and Dominion continues to pay lobbyists

to track and participate in the bidding process. Ex.E13, Poulos 30b6 Dep. Tr. 327:16-329:4; *see also* Ex.E18, McGee Dep. Tr. 34:17-38:15; 66:10-67:5 (Dominion CFO admitting that Louisiana is on hold because of a competitor, not because of anything Fox News did).

But that aside, Dominion’s claim that would-be customers were making decisions based on Fox News’ coverage of the President’s allegations has proven to be conjecture. Indeed, discovery has confirmed that the President’s allegations—much less FNN’s coverage of them—was not a factor in decisions not to award Dominion a contract. *See e.g.*, Ex.E3, Beckstrand Dep. Tr. 169:13-171:11 (no one from Huron County referred to any statements “made on Fox News”); Ex.E24, Poulos Dep. Tr. 297:15-21 (no mention of Fox News as reason for losing the bid in Alberta, Canada). To the contrary, unrefuted evidence from customers themselves shows that they made decisions for exactly the kinds of reasons one would expect, *e.g.*, price, quality, and need. *See e.g.*, Ex.H16, Herron Email (Sept. 1, 2021) (DuPage County, Illinois Award Recap stating that for Dominion, “All subjective ratings were below Hart.”); Ex.H17, L’Italien Email (Mar. 24, 2022) (Brookline, Massachusetts explaining reasons for selecting ES&S); Ex.F3, Dudney Report at ¶56 (Nov. 29, 2022) (explaining that Dominion was not awarded the Morris County, New Jersey contract because “ES&S’s machine won on four of five measures and [its] pricing was comparable to Dominion”).

If anything, the record shows that Dominion’s customers were *not* influenced by the President’s allegations or media reports about the 2020 election. Immediately after the election, customers made clear that they did not believe the allegations. The Tennessee Secretary of State expressed “full confidence” in Dominion on November 20. Ex.H8, Serratti Email (Nov. 20, 2020). The Vermont Secretary of State assured Dominion that “[w]e stand with you.” Ex.H9, Condos Email (Nov. 7, 2020). And after Dominion released its “setting the record straight” statements, sales representatives covering New Jersey reported that customers did not need Dominion to “correct the record” because they believed the allegations were “nonsense.” Ex.H18 Dutton Email (Nov. 18, 2020). Internally, Dominion employees recognized that customers were not swayed. Dominion CEO John Poulos stated in a December 2020 e-mail: “What you are missing, is that no customer cares about the media. It’s just more words from their perspective.” Ex.H10, Poulos Email (Dec. 4, 2020); *see also* Ex.H19, Yaghoobzadeh Email (Nov. 11, 2020).

It is little surprise, then, that Dominion’s financial performance does not reflect that it lost any profits *at all* on account of the 2020 election coverage. To the contrary, Dominion’s 2021 revenues *exceeded* its pre-election projections. Ex.E18, McGee Dep. Tr. 72:8-18; Ex.H20, Dominion Financial Review (Dec. 2021). Between May and September of 2020, Dominion projected 2021 revenues of between \$51.5 and \$89.6 million. Ex.F3, Dudney Report ¶74 (Nov. 29, 2022).

Dominion's actual revenue in 2021 was \$94.6 million. *Id.* Measured by gross profits, that made 2021 the second most profitable year in Dominion's history, Ex.E19, Reich Dep. Tr. 39:15-40:3; Ex.H20, Dominion Board Report (Dec. 31, 2021), even though Dominion expected 2021 to be a down year due to the cyclical nature of the voting business. Ex.E18, McGee Dep. Tr. 110:23-111:19. Dominion's unexpectedly strong financial performance allowed it to pay off loans early, *id.* at 151:6-16, and to distribute \$8 million in cash to shareholders in October of 2021, Ex.20, Owens Dep. Tr. 224:7-22. And Dominion is on pace to exceed its pre-2020 election revenue projections for 2022 as well, which ranged from \$53.1 to \$99.9 million. Ex.F3, Dudney Report ¶79 (Nov. 29, 2022). As of April 2022, Dominion was expected to exceed \$110 million in revenue in 2022. *Id.* ¶79. No reasonable jury could find that that evidence somehow translates to \$600 million in lost profits (on top of a \$1 billion loss in enterprise value).

In all events, even if Dominion could somehow prove that it lost business opportunities as a result of the controversy surrounding the 2020 election, it has no evidence substantiating its claim that those lost opportunities are attributable to Fox News' coverage of the President's allegations, rather than the President himself or the virtual tsunami of coverage of the allegations by every news outlet in the country. Indeed, all evidence suggests that the President's own allegations about Dominion had a far greater reach than any Fox News coverage of them. *See* Ex.F4, Ascher

Rep. 19-24 (Nov. 28, 2022). For example, the President’s tweets about Dominion were retweeted more than 825,000 times, whereas all of the tweets challenged here were collectively retweeted a mere 99,000 times. *Id.* ¶123, Fig. 6. And network analysis of media coverage surrounding the 2020 election demonstrates that Fox News’ coverage of the President’s allegations was miniscule compared to the coverage by other outlets across the country. *Id.* ¶135. Most of the coverage that Dominion challenges occurred on Fox Business Network, which has a vastly smaller reach than the President’s Twitter account and other networks that covered the allegations. *See id.* ¶132. For example, the most watched segment of *Lou Dobbs Tonight* that Dominion challenges drew an audience of 731,000 viewers, which pales in comparison to the President’s 85 million Twitter followers. *See Ex.I16, Ex. B to ROG 10.*

IV. Dominion Is Not Entitled To Punitive Damages.

Dominion’s claim for punitive damages fails as a matter of law. *See Death v. Salem*, 143 A.D.2d 253, 255 (N.Y. App. Div. 1988) (granting summary judgment to defendant on punitive damages); *Greenlee v. Imperial Homes Corp.*, 1994 WL 465556, at *9 (Del. Super. Ct. July 19, 1994) (same). To recover punitive damages, Dominion must prove not only that the individuals responsible for the allegedly defamatory statements published the statements with actual malice, but that they did so with common-law malice too. Common-law malice is an even more demanding

standard than actual malice, as it requires proof that the defendant made defamatory statements “out of hatred, ill will, or spite.” *Celle*, 209 F.3d at 184. A “triable issue of common-law malice is raised only if a reasonable jury could find that the speaker was *solely* motivated by a desire to injure [the] plaintiff.” *Morsette v. “The Final Call”*, 309 A.D.2d 249, 255 (N.Y. App. Div. 2003). “The fact that defendants may have harbored ill will towards plaintiff is insufficient, without some evidence that this animus was ‘the *one and only* cause for the publication.’” *Present v. Avon Prods., Inc.*, 253 A.D.2d 183, 189 (N.Y. App. Div. 1999) (citing *Stukuls v. New York*, 366 N.E.2d 829, 835-36 (N.Y. 1997)) (emphasis added); *see also Glob. Auto, Inc. v. Hitrinov*, 2021 WL 7367078, at *12 (E.D.N.Y. Aug. 20, 2021) (same).

That strict standard is fatal to Dominion’s claim for punitive damages. Despite more than a year of discovery, Dominion has failed to produce any evidence that anyone at Fox News was motivated by even the slightest desire to injure Dominion. To the contrary, *even Dominion’s own expert* agrees that “[t]here is no evidence that Fox, its hosts, producers, and executives particularly wanted to harm Dominion.” Ex.F5, Sesno Report ¶63 (Nov. 28, 2022). Indeed, Dominion has never even argued that anyone at Fox News harbored some deep-seeded ill will toward *Dominion*. Its theory has instead always been that Dominion was collateral damage in an effort to boost Fox News’ ratings and help then-President Trump. *See also id.* While even

that theory has not panned out now that the evidence is in, it is patently insufficient to satisfy the exceptionally demanding common-law malice standard.

Indeed, Fox News hosts testified that they covered the President's allegations about Dominion because the President's efforts to overturn the election results were newsworthy and the audience deserved to hear about them, not because they harbored any desire to harm Dominion. As Carlson explained, "the allegation that the presidential election was rigged by a voting machine company, true or not, is in itself one of the biggest news stories" of our lifetimes. Ex.E7, Carlson Dep. Tr. 324:17-325:4. Bartiromo stated: "I think when talking about a sitting President and his legal team, making the very serious charge that a voting machine was behind fraud in an election, and he has evidence that will overturn an election, I think that it's warranted to hear that charge and what's behind it for the American people to understand what their President is saying." Ex.E4, Bartiromo Dep. Tr. 113:10-17. Hannity said that he reported on the Dominion story because it was "newsworthy" and "the top news of the day." Ex.E8, Hannity Dep. Tr. 47:8-18. Dobbs testified that "the American public has a right to know and certainly a right to know why their President is expressing his, his deeply held belief that the election had been rigged." Ex.E5, Dobbs Dep. Tr. 331:8-25. "[F]or a President to be—to be making these charges is not only a serious and deserves great respect and regard and I believe a great deal of attention by the media, it's a historic moment." *Id.* at 331:18-22. And

Pirro explained that her “job was to present a balanced picture to America to let them know that here is the president’s lawyer, the president of the United States, in a contested presidential election who was telling us for the first time about Dominion and Smartmatic.” Ex.E6, Pirro Dep. Tr. 292:11-21. No reasonable jury could find that hatred of Dominion was even *a* cause—let alone the “one and only cause”—for Fox’s coverage, especially when media outlets across the country also covered the President’s allegations.

In all events, even if Dominion could demonstrate that someone at Fox News published false and defamatory statements about it with both actual and common law malice, that would still not be enough to obtain punitive damages from Fox News. New York law does not impose strict vicarious liability for punitive damages. In other words, Dominion cannot obtain punitive damages from Fox News simply because some Fox News employees published defamatory statements with actual and common law malice. Under New York law, “an employer is not punished for malicious acts in which it was not implicated.” *Loughry v. Lincoln First Bank, N.A.*, 494 N.E.2d 70, 74 (N.Y. 1986); *see also* Restatement (Second) of Torts §909 (1979). Rather, “punitive damages can be imposed on an employer ... only when a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct.” *Id.* at 74-75. A “superior officer” is someone with “a high level of general managerial authority in relation to the nature and operation of the employer’s

business” such that his “level of responsibility within the entity [is] sufficiently high that his participation in the wrongdoing renders the employer blameworthy.” *Loughry*, 494 N.E.2d at 76.

There is no evidence in the record that any “superior officer” at Fox News ordered, participated in, or ratified any wrongdoing that would justify holding Fox News blameworthy. To the contrary, Fox News executives testified that they did not order, participate in, or ratify any of the allegedly defamatory publications. Suzanne Scott, CEO of Fox News, explained that she was “not involved in the editorial decisions the show makes. They do that on their own.” Ex.E21, Scott Dep. Tr. 51:18-21; *id.* at 86:14-23 (explaining that she is “not granularly involved in the booking of any shows”). Jay Wallace, president and executive editor at Fox News Channel and Fox Business Network, likewise testified that “I am not in the nitty gritty of each and every show,” and that “[g]uests are the responsibility mostly on a show level.” Ex.E22, Wallace Dep. Tr. 36:18-24; 39:16-22. And Lauren Petterson, president of Fox Business, testified: “I usually don’t get involved in those decisions of who is being booked. I don’t get into the weeds. I try not to micromanage.” Ex.E23, Petterson Dep. Tr. 239:2-5. No reasonable jury could find that any “superior officer” at Fox News ordered, participated in, or ratified any of the allegedly defamatory publications, so Dominion’s claim for punitive damages fails twice over.

CONCLUSION

For these reasons, the Court should grant Fox News' motion for summary judgment.

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