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## INTRODUCTION

This lawsuit strikes at the heart of the news media's First Amendment mission to inform on matters of public concern. Following the 2020 presidential election, one thing was undeniably newsworthy: whether then-President Trump's unconventional efforts to challenge the results of the election would succeed. After Fox News called Arizona, and the media declared the election for President Biden, then-President Trump called foul and promised that his legal teams would support his claims of widespread voting fraud with litigation around the country. Among other things, those lawsuits alleged that voting-technology companies, including plaintiff Smartmatic USA Corp., were implicated in vote manipulation. While many doubted those claims, no one doubted their newsworthiness. An attempt by a sitting President to challenge the result of an election is objectively newsworthy. Media outlets around the country and the world thus provided extensive coverage of, and commentary on, the President's allegations and the associated lawsuits.

In its coverage, Fox fulfilled its commitment to inform fully and comment fairly. As part of that coverage, several Fox hosts offered members of the President's legal teams the opportunity to explain their allegations and the evidence they had to support them. Sometimes the President's advocates accepted those invitations; sometimes they declined. As the story unfolded, and as Smartmatic denied many of those allegations, Fox covered the denials too, including by reporting Smartmatic's position, offering Smartmatic the opportunity to tell its side, and soliciting the views of disinterested third parties on the veracity of the allegations against Smartmatic, sometimes in a debate-like format.

In short, Fox did exactly what the First Amendment protects: It ensured the public had access to newsmakers and unquestionably 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].)

Smartmatic now seeks to stifle that debate and chill vital First Amendment activities by seeking billions in damages. For two reasons, Smartmatic's complaint must be dismissed, and its efforts to upend our deeply rooted free-press protections must be rejected.

*First*, Smartmatic has not identified any statement by Fox itself that is actionable as defamation. There may well be contexts in which the press may be liable for publishing the statements of third parties. But this is not one of them. The First Amendment provides its highest protection to coverage of and commentary on matters of public concern. When a statement or allegation is newsworthy just by virtue of being made, the press may cover it with full First Amendment protection, for it is the "fact" that the allegation is being leveled that is newsworthy. The press can interview a newsworthy individual making controversial statements without endorsing everything the interviewee conveys. And the press may cover both sides of a heated controversy without fearing it will be sued by the party who eventually prevails because it also gave the losing party a forum.

When a sitting President and his surrogates claim an election was rigged, the public has a right to know what they are claiming, full stop. When a sitting President and his surrogates bring lawsuits challenging election results, the public has a right to know the substance of their claims and what evidence backs them up, full stop. In that context, interviewing lawyers advocating for the President is fully protected First Amendment activity, whether those lawyers can eventually substantiate their claims or not. Here, Fox provided precisely that kind of newsworthy information, allowing the President's surrogates themselves to explain their allegations and evidence. If those surrogates fabricated evidence or told lies with actual malice, then a defamation action may lie against them, but not against the media that covered their allegations and allowed them to try to substantiate them. Providing a forum for newsworthy individuals to make claims



that can be tested in the crucible of robust debate is too important to allow suits against the media, rather than against those making the claims.

*Second*, the complaint fails to allege that Fox published the challenged statements with actual malice—knowing or reckless disregard of the truth. Smartmatic is clearly a public figure here, and in any event its claims implicate “the constitutional right of free speech in connection with an issue of public interest,” thus triggering the New York anti-SLAPP statute. (CPLR 3211 [g] [1].) Accordingly, Smartmatic cannot proceed past the pleading stage unless it alleges facts proving that Fox knowingly or recklessly falsified its coverage about Smartmatic. Smartmatic’s complaint alleges nothing of the kind. At most, Smartmatic alleges that Fox negligently failed to investigate its guests’ statements in advance, a theory foreclosed by Supreme Court precedent. Smartmatic’s effort to saddle Fox with billions of dollars of liability for covering all sides of a vigorous debate of profound national importance must be dismissed.

## BACKGROUND<sup>1</sup>

### A. Overview of Smartmatic

Smartmatic is an electronic voting-technology company founded by Venezuelan entrepreneurs in Venezuela two decades ago. (Fox.Ex.2.) According to Smartmatic’s 2004 website, “[s]even years ago”—*i.e.*, in 1997—“we were the Research and Development Unit of Panagroup in Venezuela.” (Fox.Ex.3.) According to corporate records, Smartmatic was incorporated in Caracas under the name “Tecnología Smartmatic de Venezuela C.A.” in 1997. (Fox.Ex.4.)

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<sup>1</sup> Ordinarily, a court accepts the facts alleged in a complaint as true. (*Maddicks v. Big City Properties, LLC*, 34 NY3d 116, 123 [2019].) But where, as here, a case implicates “public petition and participation,” a court “shall consider” not just “the pleadings,” but also “supporting and opposing affidavits stating the facts upon which the action or defense is based.” (CPLR 3211 [g].)

Smartmatic quickly moved from being a small startup to a major player in the election-related technology market—and just as quickly found itself embroiled in the kind of public controversy that comes with the territory. Although “Smartmatic was a little-known firm with no experience in voting technology,” “it was chosen by the Venezuelan authorities to replace the country’s elections machinery ahead of a contentious referendum that confirmed [Hugo] Chávez as president in August 2004.” (Fox.Ex.5.) Opposition parties immediately “question[ed] the results.” (Fox.Ex.6.) Claiming “they could not trust the automated voting system run by Smartmatic,” (Fox.Ex.7), opposition parties boycotted the 2005 National Assembly elections, enabling Chávez’s supporters to obtain “overwhelming control,” (Fox.Ex.8). Smartmatic continued to operate in Venezuela for more than a decade. (NYSCEF.Doc.No.1, Compl.¶351.) But in 2017, Smartmatic ceased operating there after it discovered that vote manipulation had marred the Constituent Assembly elections. (Fox.Ex.9.)

Smartmatic established a corporate presence in the United States in 2000. (NYSCEF.Doc.No.1, Compl.¶39.) In 2005, Smartmatic acquired Sequoia Voting Systems, a U.S.-based company with operations in numerous states. (Fox.Ex.10.at.1.) Responding to concerns that the Chávez-led Venezuelan government may have had control or influence over Smartmatic, the Committee on Foreign Investment in the United States (CFIUS) initiated a national-security-based review of Smartmatic’s acquisition of Sequoia. (*Id.*) Before CFIUS completed its inquiry, Smartmatic sold Sequoia, describing the CFIUS probe, along with a Department of Justice investigation into alleged bribery in Venezuela, as a “distraction.” (*Id.*) Several years later, another voting-technology company—Dominion Voting Systems—acquired Sequoia. (Fox.Ex.11.) Smartmatic and Dominion would later cross paths again, when Smartmatic sued Dominion in a dispute over a licensing agreement. (Fox.Ex.12.)

Although Smartmatic continued to operate in several U.S. jurisdictions, (NYSCEF.Doc.No.1, Compl.¶¶47, 65), it has primarily focused on expanding into other international markets, (NYSCEF.Doc.No.1, Compl.¶¶48-60). Reflecting that focus, Smartmatic's ultimate parent corporations are based in the Netherlands and the United Kingdom. (NYSCEF.Doc.No.1, Compl.¶¶15-16.)

### **B. Fox's Coverage of the 2020 U.S. Presidential Election**

In the months before the 2020 election, President Trump and many others expressed concern about potential voting fraud, due partly to unusual measures implemented in response to COVID-19. (Fox.Ex.13.) The President indicated he would challenge the election results if he suspected fraud. True to his word, after the election, President Trump and his allies began alleging fraud and challenging the election results in court. Legal teams led by Rudy Giuliani and Sidney Powell filed lawsuits in multiple states.<sup>2</sup> Some alleged widespread vote manipulation potentially implicating Smartmatic software.<sup>3</sup> Fox and virtually every media outlet nationwide covered the President's accusations and the lawsuits, and numerous federal and state officials examined the claims, including the Attorney General, who "specifically addressed ... claims about Smartmatic." (NYSCEF.Doc.No.1, Compl.¶328[d]; *see id.*¶¶83, 291, 298, 302, 303, 365.)

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<sup>2</sup> *E.g.*, *Bowyer v. Ducey*, 2020 WL 7238261, (D Ariz Dec. 9, 2020, No. 20-cv-02321); *Pearson v. Kemp*, 831 Fed Appx 467 (11th Cir 2020); *King v. Whitmer*, 2020 WL 7134198, (ED Mich Dec. 7, 2020, No. 20-13134); *Law v. Whitmer*, 2020 WL 7240299, (Nev Dec. 8, 2020, No. 82178); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5997680, (WD Pa Oct. 10, 2020, No. 2:20-cv-966); *Feehan v. Wisconsin Elections Commn*, 2020 WL 7250219, (ED Wis Dec. 9, 2020, No. 20-cv-1771-pp).

<sup>3</sup> *E.g.*, *Bowyer v. Ducey*, No. 20-cv-02321 (D Ariz), Dkt.1.¶¶5-9 (alleging voting fraud enabled by Smartmatic, which allegedly was "founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation"); *Pearson v. Kemp*, No. 20-cv-04809 (ND Ga), Dkt.1.¶4 (alleging "massive fraud" enabled by Smartmatic).

Unsurprisingly, given the unquestionable newsworthiness of a sitting President's effort to challenge the result of a presidential election, various Fox hosts—including Maria Bartiromo, Lou Dobbs, and Jeanine Pirro—interviewed Giuliani and Powell so viewers could hear about the allegations straight from the source. During those interviews, Giuliani and Powell made several allegations about Smartmatic, including that Smartmatic had a corrupt relationship with the Venezuelan government and had helped facilitate manipulation and a fraudulent outcome in the 2020 U.S. presidential election. (NYSCEF.Doc.No.1, Compl.¶¶146-216.)

Giuliani and Powell made those statements primarily between November 12 and 19, less than two weeks after the election. During that time, and as the story continued to unfold, multiple Fox hosts—including Bartiromo, Dobbs, Pirro, and others—and guests on Fox shows repeatedly informed viewers that Smartmatic had denied its technology was involved in election manipulation and/or asked Giuliani, Powell, and others close to President Trump if they could substantiate their claims. *See* Appendix (collecting coverage). For instance:

- On November 14, Pirro told Powell on *Justice with Judge Jeanine*: Smartmatic and Dominion have “denied that they have done anything improper[.] ... [W]hat evidence do you have to prove this?” (NYSCEF.Doc.No.5, Pls.Ex.3.at.2-3.)
- On November 14, Eric Shawn, another Fox host, explained on *America's News HQ*: “[E]lection officials and the government say that [the fraud] is just not true” and that the allegations are “baseless.” (Fox.Ex.14.at.1.)
- On November 15, Bartiromo asked Powell on *Sunday Morning Futures with Maria Bartiromo*: “Sidney, you feel that you will be able to prove this[?] ... How will you prove this, Sidney? You believe you can prove this in court?” (NYSCEF.Doc.No.7, Pls.Ex.5.at.16-17, 22.)
- On November 16, Dobbs stated on *Lou Dobbs Tonight*: “Smartmatic ... told us today that they only provided technology and software in Los Angeles County during this year's presidential election.” (NYSCEF.Doc.No.16, Pls.Ex.14.at.3.)
- On November 17, Dobbs stated on *Lou Dobbs Tonight*: “[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." (Fox.Ex.15.at.5.)

- On November 19, Karl Rove explained on *The Daily Briefing with Dana Perino*: “[B]oth Mr. Giuliani and Ms. Powell have an obligation ... to go to court and prove these [allegations]. ... [I]t needs to be either proved or withdrawn.” (Fox.Ex.17.at.1-2.)
- On November 19, Dobbs noted on *Lou Dobbs Tonight* that “Smartmatic and Dominion deny those charges” and asked Powell: “[W]hen do you believe you will be prepared to come forward with hard evidence?” (NYSCEF.Doc.No.27, Pls.Ex.25.at.4, 13.)
- On November 19, Tucker Carlson, another Fox host, 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 was never giving them any evidence either. Nor did she provide any today at the press conference.” (NYSCEF.Doc.No.138, Pls.Ex.136.at.5; Fox.Ex.18.at.6.)
- On November 20, Bartiromo told Powell on *Mornings with Maria*: “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?” (Fox.Ex.19.at.2-3.)
- On November 20, Carlson explained on *Tucker Carlson Tonight*: “[T]hey have not seen a single piece of evidence showing that software chang[ed] 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.” (Fox.Ex.20.at.5.)
- On November 21, Jesse Watters, another Fox host, 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.” (NYSCEF.Doc.No.32, Pls.Ex.30.at.17-18.)
- On November 22, Bartiromo and legal commentator Alan Dershowitz debated the allegations on *Sunday Morning Futures with Maria Bartiromo*: “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? ... We have to see the evidence.” (NYSCEF.Doc.No.35, Pls.Ex.33.at.5-6.)
- On December 13, Bartiromo explained to Michael Flynn on *Sunday Morning Futures with Maria Bartiromo*: Smartmatic “gave us a statement” denying foreign interference. “Can ... you prove that there was foreign interference, sir?” (Fox.Ex.23.at.11.)

### C. Smartmatic's Retraction Demand and Fox's Response

On December 10, 2020, Smartmatic sent Fox a letter demanding that Fox retract allegedly defamatory statements about Smartmatic made (primarily by Giuliani and Powell) on shows hosted by Bartiromo, Dobbs, and Pirro. (NYSCEF.Doc.No.79, Pls.Ex.77.) In response, Fox invited Smartmatic to appear on Fox to address the allegations made by the President's surrogates. Smartmatic declined.

Nevertheless, as part of its commitment to continuing to fully and fairly air both sides of the controversy surrounding the election, Fox invited Eddie Perez, a voting-technology expert at a nonpartisan election-technology nonprofit, to comment on the allegations.<sup>4</sup> Perez addressed, point-by-point, the allegations Smartmatic challenged. Like several Fox hosts before him, he explained that he had seen no evidence that Smartmatic software was used to alter or manipulate votes in the 2020 election. (NYSCEF.Doc.No.47, Pls.Ex.45; NYSCEF.Doc.No.48, Pls.Ex.46; NYSCEF Doc.No.49, Pls.Ex.47.) He also stated, among other things, that Smartmatic technology was used only in Los Angeles County in the 2020 election; that Smartmatic and Dominion are separate companies; that Smartmatic did not send U.S. votes overseas for tabulation; and that no U.S. jurisdiction had banned Smartmatic technology in 2020. (NYSCEF.Doc.No.47, Pls.Ex.45; NYSCEF.Doc.No.48, Pls.Ex.46; NYSCEF Doc.No.49, Pls.Ex.47.) Perez's segment aired prominently—as Smartmatic had requested—on *Lou Dobbs Tonight*, *Justice with Jeanine Pirro*, and *Sunday Morning Futures with Maria Bartiromo*, covering multiple timeslots and days and reaching a broad national audience.

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<sup>4</sup> About Our Mission & Organization, OSET Institute, <https://www.asetfoundation.org/about-us> (last accessed Feb. 8, 2021).

#### D. This Lawsuit

On February 4, 2021, Smartmatic and its parent companies filed this lawsuit against Fox News, Fox Corporation, Bartiromo, Pirro, Dobbs, Giuliani, and Powell. (NYSCEF.Doc.No.1, Compl.¶¶521-753.) In its 276-page, 16-count complaint, Smartmatic alleges that Fox and its hosts published defamatory and disparaging statements while reporting on allegations about Smartmatic’s role in the election.<sup>5</sup> In particular, Smartmatic challenges statements made on Fox programs claiming that: Smartmatic had a corrupt relationship with the Venezuelan government; Smartmatic technology facilitated vote manipulation; certain jurisdictions banned Smartmatic; Smartmatic technology had security weaknesses; Smartmatic had a relationship with Dominion; Smartmatic technology was widely used in the 2020 election; Smartmatic sent U.S. votes overseas for tabulation during the 2020 election; and Smartmatic technology helped produce a fraudulent 2020 election outcome. (*Id.*¶¶146-216.) Smartmatic alleges these statements were made with “actual malice.” (*Id.*¶¶11, 217-465.) Smartmatic seeks, among other things, “no less than \$2.7 billion” in damages. (*Id.*¶¶13, 754.)

#### ARGUMENT

A complaint must be dismissed if the facts alleged fail to “fit within any cognizable legal theory,” (*Nonnon v. City of New York*, 9 NY3d 825, 827 [2007]), or if “documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of

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<sup>5</sup> While Smartmatic named Fox Corporation as a defendant, it alleged no facts showing Fox Corporation had any direct involvement in or control over speakers and statements at issue. (*See, e.g., Stern v. News Corp.*, 2010 WL 5158635, at \*4 [SD NY Oct. 10, 2010, No. 08-cv-7624].) All claims against Fox Corporation should be dismissed on that ground alone.

law,” (*Bianco v. Law Offices of Yuri Prakhin*, 189 AD3d 1326, 1328 [2d Dept 2020]). (See CPLR 3211 [a] [1], [a] [7].)<sup>6</sup>

The standard is even higher when a complaint challenges speech in a “public forum” “in connection with an issue of public interest.” (Civ. Rights Law §76-a [1] [a].) Under New York’s anti-SLAPP law, courts *must* dismiss complaints challenging such speech unless the plaintiff demonstrates that the challenge has a “substantial basis in law” or “is supported by a substantial argument for an extension, modification or reversal of existing law.” (CPLR 3211 [g] [1].) In other words, in a case involving speech on matters of public concern, the plaintiff must demonstrate that the case should *not* be dismissed, under a “heightened standard of proof.” (*Hariri v. Amper*, 51 AD3d 146, 150 [1st Dept 2008].)<sup>7</sup> That standard embodies the recognition that the “threat of being put to the defense of a lawsuit” “may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.” (*Karaduman v. Newsday, Inc.*, 51 NY2d 531, 545 [1980].)<sup>8</sup>

Here, Smartmatic’s Complaint is an “action involving public petition and participation” under New York’s anti-SLAPP law because it asserts defamation and disparagement claims based on “lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest.” (CPLR 3211 [g] [1]; Civ. Rights Law §76-a [1] [a].)

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<sup>6</sup> In defamation cases, documentary evidence can include “a full copy, transcript, printout, or video of the relevant medium in which the allegedly defamatory statement is contained,” (*Greenberg v. Spitzer*, 155 AD3d 27, 44 [2d Dept 2017]), and “judicial records” and other documents, the contents of which are “essentially undeniable,” (*Fontanetta v. Doe*, 73 AD3d 78, 84-85 [2d Dept 2010]).

<sup>7</sup> As noted, *see n.1 supra*, the Court is not limited to examining the pleadings.

<sup>8</sup> Smartmatic’s complaint does not indicate whether it thinks the substantive law of Florida (Smartmatic’s domicile) or New York (Fox’s domicile) governs. Because the Court can resolve this case solely by reference to First Amendment principles and the applicable pleading standards, however, it need not conduct a choice-of-law analysis now.



Core First Amendment principles, together with New York’s anti-SLAPP law, compel the conclusion that Smartmatic’s claims against Fox must be dismissed.<sup>9</sup>

**I. The Claims Against Fox Challenge Speech That Is Fully Protected By The First Amendment.**

1. The First Amendment embodies a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” (*N.Y. Times*, 376 US at 270.) It accordingly offers the highest protection to speech on matters of public concern. (*Snyder v. Phelps*, 562 US 443, 452 [2011].) Indeed, such speech is “at the heart of the First Amendment’s protection,” (*First Natl. Bank of Boston v. Bellotti*, 435 US 765, 776 [1978]), and “occupies the highest rung of the hierarchy of First Amendment values,” (*Connick v. Myers*, 461 US 138, 145 [1983]), as “speech concerning public affairs is more than self-expression; it is the essence of self-government,” (*Garrison v. Louisiana*, 379 US 64, 74-75 [1964]). That principle applies with even greater force to news coverage and commentary on matters of public concern, as the First Amendment by its terms protects not only freedom of speech, but freedom of the press, and is “intended to give to liberty of the press” the “broadest scope that could be countenanced in an orderly society.” (*Bridges v. California*, 314 US 252, 265 [1941].)

Those core First Amendment principles are borne out in several doctrines that protect the press from liability for covering allegations that are newsworthy just by virtue of being made. For example, the neutral-reporting doctrine protects “disinterested communications” by the press of “matters of public concern,” even if that involves communicating defamatory claims. (*Rendon v. Bloomberg, L.P.*, 403 F Supp 3d 1269, 1276 [SD Fla 2019].) “If the mere fact that a statement is

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<sup>9</sup> None of the defendants has been served as yet. This motion is made on behalf of Fox News and Fox Corporation, which have waived service, but the arguments made here compel dismissal of all claims against Bartiromo, Pirro, and Dobbs as well. The individual defendants necessarily have the right to raise additional arguments for dismissal or join this motion once served.

made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement.” (*DeLuca v. N.Y. News Inc.*, 109 Misc 2d 341, 345-346 [Sup Ct, New York County, Apr. 14, 1981].) While that doctrine is sometimes described as a common-law one, it is firmly rooted in the First Amendment, as “[t]he 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.” (*Edwards v. Natl. Audubon Socy., Inc.*, 556 F2d 113, 120 [2d Cir 1977].) Indeed, while the neutral-report doctrine is often described as a “privilege,” properly speaking, such coverage is not merely “privileged”; it is not defamatory at all, because a reasonable viewer would understand that the publication is not presenting information that it has determined to be true, but rather is fulfilling its journalistic duty to “present[] newsworthy allegations made by others.” (*Croce v. N.Y. Times Co.*, 930 F3d 787, 793 [6th Cir 2019].)

Core First Amendment protections are also reflected in doctrines that protect the press when reporting on judicial proceedings, as “the public has the right to be informed as to what occurs in its courts,” (*Estes v. Texas*, 381 US 532, 541-542 [1965]), regardless of the accuracy of the underlying allegations, (*Freeze Right Refrig. & Air Conditioning Servs., Inc. v. City of New York*, 101 AD2d 175, 181-182 [1st Dept 1984]). The fair-report doctrine is “broad.” (*Cholowsky v. Civiletti*, 69 AD3d 110, 114 [2d Dept 2009]; *Larreal v. Telemundo of Fla.*, 2020 WL 5750099, \*8 [SD Fla Sept. 25, 2020, No. 19-22613].) It does not confine the press to reporting the precise contents of legal documents; it covers reports on attorney remarks too. (*Larreal*, 2020 WL 5750099, \*7; *Lacher v. Engel*, 33 AD3d 10, 17 [1st Dept 2006]; *Jamason v. Palm Beach Newspapers, Inc.*, 450 So 2d 1130, 1132 [Fla Dist Ct App 1984].) And a report need not be

“technically precise,” (*Rasmussen v. Collier County Publ. Co.*, 946 So 2d 567, 570 [Fla Dist Ct App 2006]); the press is free to use “colorful language” or coverage phrased to grab attention, (*Folta v. N.Y. Times Co.*, 2019 WL 1486776, \*4 [ND Fla Feb. 27, 2019, No. 1:17cv246]; see *Holy Spirit Assn. for the Unification of World Christianity v. N.Y. Times Co.*, 49 NY2d 63, 68 [1979] (“language used” should “not be dissected and analyzed with a lexicographer’s precision”)).

2. Those core First Amendment principles present an insurmountable obstacle to Smartmatic’s claims. The statements challenged here—the overwhelming majority of which were made by guests appearing on Fox shows—all concerned a matter of profound public importance: the legitimacy of the 2020 election. In the election’s aftermath, the President and his allies repeatedly claimed the election had been affected by fraud. Regardless of their accuracy, those claims “directly implicate[d] matters of public concern,” (*Page v. Oath Inc.*, 2018 WL 1474620, \*2 [SD NY Mar. 26, 2018, No. 17 Civ. 6990])—as evidenced by the fact that virtually every news outlet in the nation (if not the world) consistently covered them. Those claims took on even greater importance—and the press acquired even greater First Amendment protection in covering them—once the President promised to (and, indeed, did) challenge the election results in court. Simply put, the public has an undeniable right to know, and the press has an undeniable right to cover, both the fact that the sitting President has refused to accept the outcome of a presidential election, and the grounds on which the President and his allies are planning to challenge that election, regardless of the strength of those claims.

To fulfill its commitment to keeping viewers informed of what the President was alleging, Fox went straight to the source, inviting the President’s own lawyers and surrogates on air to explain their allegations to viewers themselves. To be sure, those allegations faced skepticism in many quarters. But that made the allegations—and questions about whether they would or could

be substantiated—no less newsworthy. Smartmatic concedes that Fox itself provided skeptical reporting and reported courtroom failures and other developments that undermined the allegations’ credibility as this fast-breaking story continued to unfold. (NYSCEF.Doc.No.1, Compl.¶¶234, 237, 240, 244, 249, 251.) But the public had a right to know, and Fox had a right to cover, that the President and his allies were accusing Smartmatic (and others) of manipulating the election results, regardless of the ultimate truth or accuracy of those allegations. Indeed, to many, the fact that the President and his surrogates were making those allegations was every bit as newsworthy (if not more so) if they could *not* substantiate them. The First Amendment protects the freedom of the press when it is covering public officials and other newsmakers whether they are lying or telling the truth about such matters. And giving them a forum to make even groundless claims is part and parcel of the “uninhibited, robust, and wide-open” debate on matters of public concern that ultimately unearths the truth. (*N.Y. Times*, 376 US at 270.)

Smartmatic’s claims against Fox thus fail at the threshold, for Smartmatic fails to identify any statements that could form the basis of a defamation claim against Fox. Smartmatic does not (and cannot) allege that Fox was running exposés in which it purported to have independently uncovered election manipulation or fraud by Smartmatic. Virtually all the challenged statements occurred during interviews in which Fox hosts were providing a forum for the President’s advocates to inform the public of the allegations they intended to press. The hosts did not introduce Giuliani and Powell by announcing that Fox had discovered election fraud and was bringing on independent experts to explain its discoveries. They made crystal clear they invited Giuliani and Powell onto their shows because they were the best source of information about the content of their own unquestionably newsworthy allegations of voting fraud and the evidence they had to

substantiate those allegations. And the questions Fox hosts posed elicited their claimed evidence.<sup>10</sup> A reasonable viewer would readily have understood that the information Fox was imparting was the fact that the President, Giuliani, and Powell were making certain allegations—not that those allegations were necessarily true. The bulk of Smartmatic’s allegations thus fail for the simple reason that Fox said nothing defamatory.

To be sure, not every statement Smartmatic challenges was made by Giuliani or Powell. But to the extent hosts themselves described the allegations that the President, Giuliani, and Powell were making, they did so in the context of asking guests to comment on them.<sup>11</sup> That, of course, cannot be grounds for defamation, as the press could not cover a public controversy if it could be sued just for repeating a third party’s potentially defamatory allegations when asking others to react to, comment on, or prove or disprove them. If that were enough to allow a defamation claim to go forward, Smartmatic could sue virtually every news outlet in the nation. Beyond that, Smartmatic simply points to instances in which hosts offered the kind of colorful commentary they can be expected to provide when conducting an interview.<sup>12</sup> Some (but by no means all) of those

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<sup>10</sup> *E.g.*, NYSCEF.Doc.No.1, Compl.¶105 (Giuliani stating, “I can prove that they did it in Michigan. I can prove it with witnesses. We’re investigating the rest.”); *id.*¶107 (Powell stating, “we’re fixing to overturn ... the election in multiple states” and describing “sworn witness testimony of why the software was designed”); *id.*¶111 (Powell describing “stunning evidence from a firsthand witness” who was allegedly “present when Smartmatic was designed”); *id.*¶166(d) (Giuliani describing “evidence” of a “pattern” allegedly followed by Smartmatic and “proof” of a backdoor); *id.*¶166(f) (Giuliani stating he had witnesses who could “describe the hardware in great detail” and additional “proof” he could not yet disclose); *id.*¶199(h) (Powell stating that an affidavit “explains [it’s] been used to change election results all over the world”).

<sup>11</sup> *E.g.*, NYSCEF.Doc.No.1, Compl.¶123 (Bartirromo describing Powell’s allegations to elicit guest Alan Dershowitz’s reaction); *id.*¶149(f) (Bartirromo asking Giuliani if he will “be able to prove this”); *id.*¶166(l) (Dobbs asking for “reaction to what the Trump election legal team and others are discovering” about Smartmatic and other voting companies).

<sup>12</sup> *E.g.*, NYSCEF.Doc.No.1, Compl.¶110 (Dobbs saying the nation had been “wronged mightily”); *id.*¶121 (Pirro saying “Lady Justice” must get her way, “consequences be damned”).

comments were encouraging, while others expressed considerable doubt that the allegations could be proven. But the line between protected speech and actionable defamation cannot turn on whether a commentator expresses doubt versus hope that a guest can prove her newsworthy claims. In fact, sometimes the most damning statements are elicited by an interviewer who is egging the interviewee on, either sincerely or as part of her craft. Either way, whether the interviewer is guileful or gullible, she is protected by the First Amendment; the liability for defamation (if any) lies with the interviewee.

Nor does it make any difference that Giuliani, Powell, and other guests and hosts were discussing their allegations generally or colloquially and not necessarily quoting their pleadings verbatim. Newsworthy statements or allegations need not be conveyed with technical precision. So long as the “ordinary reader” (or, here, viewer) would conclude the press was covering the content (or anticipated content) of newsworthy allegations or official proceedings, (*Fridman v. BuzzFeed, Inc.*, 172 AD3d 441, 442 [1st Dept 2019]), the press has “no duty to further investigate or verify” those allegations, (*Folta*, 2019 WL 1486776, \*4; *see Gillings v. N.Y. Post*, 166 AD3d 584, 586 [2d Dept 2018] (fair-report doctrine applies unless context makes it impossible for ordinary viewer to determine whether defendant was reporting on official proceeding)). What Fox provided viewers was a “substantially correct account” of the claims the President and his surrogates were pressing. (*Larreal*, 2020 WL 5750099, \*8.)<sup>13</sup> Just as the press could not be held

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<sup>13</sup> Compare, e.g., NYSCEF.Doc.No.1, Compl.¶111 (Powell describing evidence from military officer who “was present when Smartmatic was designed” to allegedly manipulate votes), *with* Dkt.1.¶91(2), *Bowyer v. Ducey*, No. 20-cv-02321 (D Ariz Dec. 2, 2020) (summarizing testimony from security guard that he had witnessed creation of Smartmatic for purpose of vote manipulation); NYSCEF.Doc.No.1, Compl.¶111 (Powell stating Smartmatic “agreed to create” a vote-changing system for Chávez), *with* Dkt.1.¶5, *Pearson v. Kemp*, No. 20-cv-04809 (ND Ga Nov. 25, 2020) (complaint alleging Smartmatic was “founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator [Chávez] never lost another election”); *see also*

liable for interviewing a prosecutor about a newsworthy prosecution if the charges ultimately turn out to be bogus, nor can it be held liable for interviewing the lawyers challenging a presidential election at the President's behest, even if those allegations ultimately prove unsubstantiated.

In short, Fox's coverage of this "newsworthy controversy," (*Lasky v. Am. Broadcasting Companies, Inc.*, 631 F Supp 962, 971 [SD NY 1986]), was exactly the kind of expression that the press must be "afforded the freedom to" provide without fear of liability, (*Edwards*, 556 F2d at 120). "If the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement." (*DeLuca*, 109 Misc 2d at 345-346.) That holds equally true whether the press is reporting newsworthy statements or allegations made elsewhere, or allowing a newsmaker to explain the allegations herself. Either way, the press is not required to "suppress newsworthy statements merely because it has serious doubts regarding their truth." (*Edwards*, 556 F2d at 120.) After all, when "[w]hat is newsworthy about ... accusations is that they were made," (*id.*), that is every bit as newsworthy (if not sometimes more so) if they prove unsubstantiated. Smartmatic's effort to impose billions of dollars of liability on Fox for keeping the public informed of the unquestionably newsworthy claims of unquestionably newsworthy figures strikes at the very heart of—and is squarely foreclosed by—the First Amendment.

## **II. The Complaint Fails To Allege Actual Malice Under The First Amendment And CPLR 3211 [g].**

Even if Smartmatic alleged any defamatory statements for which Fox *could* be held liable, its complaint would still have to be dismissed for failure to allege facts showing Fox acted with

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NYSCEF.Doc.No.1, Compl.¶328(d) (Attorney General indicating that DHS and DOJ were investigating claims that Smartmatic perpetrated "systemic fraud").

actual malice. To preserve the “vigor” and “variety” of “public debate,” the First Amendment provides heightened protection for statements about public figures. (*N.Y. Times*, 376 US at 279; see *Curtis Publ. Co. v. Butts*, 388 US 130, 154-155 [1967].) A public figure must demonstrate the defendant made the allegedly defamatory statements with actual malice, “a term of art denoting deliberate or reckless falsification.” (*Masson v. New Yorker Mag., Inc.*, 501 US 496, 499 [1991].) Public figures are those who “have assumed roles of especial prominence in the affairs of society.” (*Gertz v. Robert Welch, Inc.*, 418 US 323, 345 [1974].) Some achieve such “pervasive involvement in the affairs of society” that they become public figures “for all purposes.” (*Id.* at 351-352.) 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.) Holding public figures to a heightened standard makes sense because they “usually enjoy significantly greater access” to media and thus “have a more realistic opportunity to counteract false statements than private individuals normally enjoy.” (*Id.* at 344.) Whether a plaintiff is a public figure is a question of law. (*Id.*)

Smartmatic at least qualifies as a limited-purpose public figure for purposes of the 2020 election. By providing voting technology for the election, Smartmatic accepted the reality that it could be “drawn into” any public controversy about the security of its technology or the election results. (*Gertz*, 418 US at 351; see *James v. Gannett Co.*, 40 NY2d 415, 422-23 [1976].) Because of that role, moreover, Smartmatic enjoys greater access to “the channels of effective communication” to rebut allegations it disputes. (*Gertz*, 418 U.S. at 344.) Indeed, Fox offered Smartmatic time to do just that, but Smartmatic declined. Smartmatic thus qualifies as a public figure for at least the “limited range of issues” its complaint addresses. (*Id.* at 351.) And even if Smartmatic were not a public figure, it would still have to prove “knowledge” of, or “reckless



disregard” for, “falsity”—*i.e.*, actual malice—under New York’s anti-SLAPP law, which applies to lawsuits challenging speech “in connection with an issue of public interest”—a concept the law construes “broadly” to mean “any subject other than a purely private matter.” (Civ. Rights Law §76-a [1] [a].) The speech Smartmatic challenges easily passes that bar. *See supra* pp.13-17.

To state a defamation (or disparagement) claim, therefore, Smartmatic must allege facts that, if true, would show that Fox published the allegedly defamatory statements with actual malice—that is, with *subjective* knowledge that they were false or with reckless disregard for their truth. (*N.Y. Times*, 376 US at 279-280.) That is a high bar. Mere allegations of negligence or “failure to investigate” before publishing do not suffice. (*See Harte-Hanks Communications, Inc. v. Connaughton*, 491 US 657, 688 [1989]; *St. Amant v. Thompson*, 390 US 727, 731 [1968].) Nor do allegations that a defendant was agnostic or unsure about the accuracy of a statement. (*See Howard v. Antilla*, 294 F3d 244, 252-254 [1st Cir 2002]; *Lieberman v. Gelstein*, 80 NY2d 429, 438-439 [1992].) Instead, a plaintiff must allege facts that “permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of [the] publication,” (*Lieberman*, 80 NY2d at 438 [emphasis added]), or acted with a “high degree of awareness” of its “probable falsity,” (*Garrison v. Louisiana*, 379 US 64, 74 [1964]). Actual malice is especially difficult to demonstrate in the context of live interviews, for hosts and media outlets have no duty (or, typically, ability) to fact-check guest statements in real time. (*See Pacella v. Milford Radio Corp.*, 462 NE2d 355, 360 [Mass App Ct 1984], *affd* 476 NE2d 595 [Mass 1985]; *Adams v. Frontier Broadcasting Co.*, 555 P2d 556 [Wyo. 1976].)

Smartmatic asserts two basic categories of actual-malice allegations. Neither comes anywhere close to supporting a claim that Fox deliberately or recklessly falsified its 2020 election coverage about Smartmatic.

*First*, Smartmatic alleges that Fox had access to, but failed to review, information that contradicted some of the allegations about Smartmatic. (NYSCEF.Doc.No.1, Compl.¶¶221, 242, 253-256, 259-357.) In other words, Smartmatic argues that Fox failed to adequately investigate the allegations the President, Giuliani, and Powell were making. But even assuming Fox was putting its imprimatur on those allegations (which it was not), that theory runs straight into the well-established rule that “failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.” (*Harte-Hanks*, 491 US at 688; *see St. Amant*, 390 US at 731 (recklessness “is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing”); *Masson*, 501 US at 510 (“[m]ere negligence does not suffice” to show actual malice).) To allege actual malice, Smartmatic must allege much more—facts showing, for example, that a story was “fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.” (*St. Amant*, 390 US at 727, 732.) Smartmatic alleges nothing of the sort. It just offers conclusory assertions, backed by no facts, that Fox “knew” the allegedly defamatory statements were false. (*See, e.g.*, NYSCEF.Doc.No.1, Compl.¶¶241, 253, 258, 363.) Moreover, Smartmatic conveniently ignores publicly available facts—such as Smartmatic’s origins in and ties to Venezuela, participation in Venezuelan elections, brush with CFIUS, and ownership of a U.S. subsidiary later acquired by Dominion (*see* Fox.Exs.2-11)—that doom its claim that all of those statements were obviously false.

Indeed, Smartmatic makes only one even arguably non-conclusory allegation that anyone at Fox “knew” information that contradicted any allegations about Smartmatic: Smartmatic alleges that, on November 16 and 17, Smartmatic informed Fox by email that its technology was used only in Los Angeles County, that its software does not tabulate votes, and that it did not

provide input to the CISA. (NYSCEF.Doc.No.1, Compl.¶¶282-283.) The two exhibits Smartmatic cites are both emails to Alex Hooper, a coordinating producer for *Lou Dobbs Tonight*. (See Pls.Exs.81, 82.) That alone is insufficient to allege actual malice. To impute knowledge of a statement’s falsity, Smartmatic must bring home the “state of mind required for actual malice” to those at Fox who were actually responsible for publishing the challenged statements. (*N.Y. Times*, 376 US at 287.) In other words, it is not enough to allege that *someone* at Fox was aware of contradictory information; Smartmatic must allege facts showing that Bartiromo, Dobbs, or Pirro *themselves*, or those responsible for producing their shows, knew about, but recklessly disregarded, that information. (See *id.* (“mere presence” of earlier articles in the *Times* contradicting later item could not establish that the *Times* “knew” later item was false).) Smartmatic has not alleged facts showing Bartiromo or Pirro knew about the emails. And Dobbs *informed* viewers of the emails, (see NYSCEF.Doc.No.16, Pls.Ex.14.at.3; Fox.Ex.15.at.5), which defeats Smartmatic’s suggestion that those who did know about that information disregarded it.

*Second*, Smartmatic attempts to spin the efforts of Fox hosts and commentators to press Giuliani and Powell for evidence, claiming that they prove there were “obvious reasons to doubt” their allegations. (NYSCEF.Doc.No.1, Compl.¶218; see *id.*¶¶234-42, 246, 249, 251.) But the fact that Fox programs pressed guests for evidence and attempted to investigate the allegations as the story unfolded just reinforces the conclusion that a reasonable viewer would readily have understood that Fox was not covering those allegations because it was confident they were true; it was covering them because it was confident they were newsworthy—as was virtually every other press outlet in the country. The logic of Smartmatic’s position is that the press must censor all discussion of even the most pressing of public controversies to escape imputation of actual malice, even in the context of statements by objectively newsworthy third parties during live television

interviews. That is not and cannot be the law, (*see Adams*, 555 P2d 556; *Pacella*, 462 NE2d at 360), as the First Amendment could not tolerate such a profound threat to our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” (*N.Y. Times*, 376 US at 270.)

### CONCLUSION

For each of the foregoing independent reasons, this Court should grant the motion to dismiss under CPLR 3211 [a] [1], [a] [7] and [g], and Civil Rights Law §76-a.

Respectfully submitted,

Dated: New York, New York  
February 8, 2021

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**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to NYCRR §202.8-b, that the foregoing Memorandum of Law was prepared on a computer using Microsoft Office 365.

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Dated: New York, New York

February 8, 2021

*/s/ Steven Mintz*

\_\_\_\_\_  
Steven Mintz

# Appendix

Fox's Evenhanded Coverage of Smartmatic

Show	Air Date	Statement(s)	Ex. No.
<i>America's News HQ</i>	11/14/2020	<p>SHAWN: They're showing their support and echo the President's claims from some that fraud may have played a role in the election. You know, <b><i>election officials and the government say that is just not true.</i></b> Some reporting new voting machines from Dominion Voting Systems and they cite baseless claims from the President himself, that millions of Trump votes were switched to Biden ... <b><i>But the company as well as election officials, election experts, and the government all say it never happened.</i></b> The Homeland Security Agency Cyber Division says: [q]uote, "<b><i>There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.</i></b>" And the head of the Federal Election Assistance Commission said this this morning.</p> <p>VIDEO CLIP (Hovland): The reality is <b><i>this was the most secure election we've ever had</i></b>, and it was one of the most well-run elections we've ever had. And this is about facts, this is about truth, this is about respecting our democracy. Respecting our elections and focusing on what has really occurred. The American people made their voice heard. And when we spread conspiracy theories and we don't back that up with facts, it has an impact.</p>	Fox.Ex.14
<i>Justice with Judge Jeanine</i>	11/14/2020	<p>POWELL: I am working on the massive aspect of system wide election fraud, definitely impacting the swing states and likely going far beyond that. We're talking about the alteration and changes in millions of votes, some being dumped that were for President Trump, some being flipped that were for President Trump. Computers being overwritten to ignore signatures. All kinds of different means of manipulating the Dominion and Smartmatic software, that of course, we would not expect Dominion or Smartmatic to admit.</p> <p>PIRRO: Well, and now that you mention it, that <b><i>they've denied that they have done anything improper and they denied that this claim that there's six thousand votes that went from -- from President Trump to Biden had anything to do with their software.</i></b> And but, 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</p>	NYSCEF Doc. No. 5, Compl.Ex.3

Show	Air Date	Statement(s)	Ex. No.
		Dominion, how it can be manipulated, if it is manipulated at all, and <i>what evidence do you have to prove this?</i>	
<i>Sunday Morning Futures with Maria Bartiromo</i>	11/15/2020	<p>BARTIROMO: Wow. So Sidney, <i>you feel that you will be able to prove this</i>. Do you have the software in your possession? Do you have the hardware in your possession? <i>How will you prove this, Sidney?</i></p> <p>POWELL: Well, I have got lots of ways to prove it, Maria, but I'm not going to tell on national TV what all we have. I just can't do that.</p> <p>BARTIROMO: Okay, but you have a very time -- a small time frame here. The elections are supposed to be certified in early December. <i>Do you believe that you can present this to the courts and be successful within this just couple weeks?</i></p> <p>* * *</p> <p>BARTIROMO: Which governor or which government official accepted hundreds of millions of dollars in benefits for their family as they took on this software?</p> <p>POWELL: If I said hundreds of millions of dollars there, I misspoke. I don't know the exact amount of money yet. We're still collecting the evidence on that, but it's more than one.</p> <p>BARTIROMO: Okay. So, you can't say who you believe took kickbacks.</p> <p>* * *</p> <p>BARTIROMO: And Sidney you say you have an affidavit from someone who knows how this system works and was there with the planning of it. <i>You believe you can prove this in court?</i></p>	NYSCEF Doc. No. 7, Compl.Ex.5
<i>America's News HQ</i>	11/15/2020	<p>SHAWN: Well, let's clarify the election facts as we know them right now. Rigged election? Well, <i>your own government, election officials across the country and voting experts say it's not true</i>. Baseless claims that are inflammatory, designed to undermine your faith in American democracy. Here's the Chairman of the federal agency, the U.S. Election Assistance Commission, Ben [Hovland].</p> <p>VIDEO CLIP (Hovland): The reality is <i>this was the most secure election we've ever had</i>, and it was one of the most well run elections we've ever had. And this is about facts, this is about truth. This is about respecting our democracy, respecting our</p>	NYSCEF Doc. No. 134, Compl.Ex.132



Show	Air Date	Statement(s)	Ex. No.
		<p>elections, and focusing on what has really occurred. The American people made their voice heard. And when we spread conspiracy theories, when we don't back that up with facts, it has an impact.</p> <p>* * *</p> <p>SHAWN: You know, prosecutors say that any voter or election fraud allegation will be thoroughly investigated. And if the fix were in, if there was wrongdoing, we will know about it. But election officials across the country insist as of today, <b><i>there is no evidence of any widespread fraud affecting the outcome of the presidential election.</i></b> That our precious democracy was not tampered with. And that such <b><i>baseless and false claims</i></b> are an insult to the thousands of election officials and workers across the country, who we have seen dedicating themselves 24/7 to ensure a fair and free election for all of us.</p>	
<i>Lou Dobbs Tonight</i>	11/16/2020	<p>DOBBS: Dominion has connections to UK based Smartmatic, a voting technology company established in 2000 that had ties to Venezuela's Hugo Chavez.</p> <p>* * *</p> <p>DOBBS: <b><i>Smartmatic now says that isn't true. Smartmatic also told us today they only provided technology and software in Los Angeles County during this year's presidential election.</i></b></p>	NYSCEF Doc. No. 16, Compl.Ex.14
<i>Mornings with Maria</i>	11/17/2020	<p>BARTIROMO: Okay. So you are a prosecutor. You were a prosecutor for years.... <b><i>You have to prove it.</i></b></p> <p>GUILIANI: Yeah yeah sure.</p> <p>BARTIROMO: <b><i>Can you prove this?</i></b></p> <p>* * *</p> <p>BARTIROMO: All right, real quick, before we go two questions. Number one, where is the Department of Justice? <b><i>If this is happening, shouldn't the FBI or the DOJ be looking at this?</i></b> Where is that? And secondly, do you feel you have enough evidence to overturn the results of this election?</p>	NYSCEF Doc. No. 22, Compl.Ex.20

Show	Air Date	Statement(s)	Ex. No.
<i>Lou Dobbs Tonight</i>	11/17/2020	DOBBS: Now, we've asked both Dominion and Smartmatic about their role on the CISA November 12th statement disputing election fraud or intervention by foreign governments. <b><i>Smartmatic said they didn't have any input.</i></b>	Fox.Ex.15
<i>Special Report with Bret Baier</i>	11/18/2020	ROBERTS: Supporters of the president have also raised questions about voting software called Smartmatic. A company with roots in Venezuela that has provided technology for several Venezuelan elections. Obama TSA chief Peter Neffenger, now a member of the Biden transition team is the chairman of Smartmatic's board. <b><i>Both Smartmatic and Dominion have denied any connection to the other.</i></b>	Fox.Ex.16
<i>The Daily Briefing with Dana Perino</i>	11/19/2020	ROVE: Sidney Powell said the plot was communist in origin, that it had come from Venezuela, it involved Hugo Chávez, and that George Soros and the Clinton Foundation were key participants in it -- the plot. These are serious, I think, somewhat strange, accusations but serious. And now both <b><i>Mr. Giuliani and Ms. Powell have an obligation to go to court and prove them</i></b> because ... these are questioning the fundamental fairness of our presidential election ... <b><i>[s]o they've got [a]n obligation to go to court and prove these, or the American people will have every reason to question their credibility.</i></b> So I'm not going to say that they don't have proof, but <b><i>they better come up with proof and go to court because these are serious allegations</i></b> that basically say our election was manipulated by a combination of foreign and domestic actors and stolen. And that <b><i>cannot be left just simply out there; it needs to be either proved or withdrawn.</i></b> And the only way to do that is to take these accusations and go to court. Mayor Giuliani may be right that people who signed those affidavits don't want their names exposed. But <b><i>by God, you cannot make an accusation like that without following it through by going to court and trying to prove it.</i></b>  * * *  ROVE: But look, the onus is not on the company now. The onus is on the accusations. They -- these accusations have been made, and <b><i>Mr. Giuliani and Ms. Powell, either on behalf of themselves or on behalf of the President's campaign, have an obligation to the American people now to either prove these allegations or withdraw them.</i></b> You can't leave this kinda stuff out there in the aftermath of an election and let -- and just sort of leave it there and not -- and not do what is necessary	Fox.Ex.17

Show	Air Date	Statement(s)	Ex. No.
		<p>to prove those allegations in a court of law. 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. <i>If they're false, we need to know that as the American people and thereby judge the credibility of Mayor Giuliani and Ms. Powell.</i></p> <p>* * *</p> <p>ROVE: [T]hese are serious ... [W]e need to find out one way or another</p> <p>* * *</p> <p>ROVE: Well it doesn't help. If it's -- particularly if it's not true, it just simply undermines the credibility of [ ] the President's team if this is untrue. And the only way to understand whether or not it's true or not is to go to a court of law immediately and make these claims under oath, with affidavits, with witnesses, and with evidence. Otherwise this is very harmful [ ] to our American political system and to the credibility of the individuals involved.</p>	
<i>Lou Dobbs Tonight</i>	11/19/2020	<p>DOBBS: 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. It says Smartmatic's technology was used to rig elections in Venezuela. It is now in the quote, "DNA of every vote tabulating company software and system." <i>Smartmatic and Dominion deny those charges.</i> But Sidney Powell argues that algorithms in the Smartmatic software were used to change results in the presidential election.</p> <p>* * *</p> <p>DOBBS: Breaking news now, Dominion Voting Systems today once again distanced itself from Smartmatic saying, "<i>Dominion is an entirely separate company and fierce competitor to Smartmatic,</i>" and quote. "<i>Dominion and Smartmatic do not collaborate in any way and have no affiliate relationship or financial ties.</i>" Yet, in a 2009 lawsuit in which Smartmatic sued Dominion, a very clear relationship between the two companies was laid out.</p> <p>* * *</p>	NYSCEF Doc. No. 27, Compl.Ex.25

Show	Air Date	Statement(s)	Ex. No.
		<p>POWELL: Yes, the way it works, the votes can be changed either on the ground as they come in. People can watch the votes streaming live. For example, there was a Dominion employee high up, high ranking at the Detroit Center the night of the election. He could have watched the votes come in live and manipulated them in that process. It could've run an automatic algorithm against all the votes, which we believe is what happened originally. And then the machines had to stop within the – or the counting had to stop in multiple places because President Trump's lead was so great at that point, they had to stop the vote counting and come in and backfill the votes they needed to change the result.</p> <p>DOBBS: And let me ask you, as we wrap up here, what 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?</p>	
Tucker Carlson Tonight	11/19/2020	<p>CARLSON: For more than a week Powell has been all over conservative media with the following story: This election was stolen by a collection of international leftists, who manipulated vote tabulating software in order to flip millions of votes from Donald Trump to Joe Biden.</p> <p>* * *</p> <p>CARLSON: So that's a long way of saying we took Sidney Powell seriously. We have no intention of fighting with her. We've always respected her work. We simply wanted to see the details. How could you not want to see them? So we invited Sidney Powell on the show. We would have given her the whole hour. We would have given her the entire week, actually, and listened quietly the whole time at rapt attention. That's a big story. <b><i>But she never sent us any evidence, despite a lot of requests, polite requests. Not a page.</i></b></p> <p>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, <b><i>they told us Powell [h]as never given them any evidence either. Nor did she provide any today at the press conference.</i></b></p>	Fox.Ex.18

Show	Air Date	Statement(s)	Ex. No.
		<p>Powell did say that electronic voting is dangerous and she's right. We're with her there. <b><i>But she never demonstrated that a single actual vote was moved illegitimately by software from one candidate to another, not one.</i></b></p> <p>So why are we telling you this? <b><i>We're telling you this because it's true. And in the end that's all that matters. The truth.</i></b> It's our only hope. It's our best defense. And it's how we're different from them. We care what's true, and we know you care, too. That's why we told you.</p>	
<i>Mornings with Maria</i>	11/20/2020	<p>MARIA: Sidney, I want you to respond to what Tucker Carlson said last night, Sidney. I don't know if you watched it. But Tucker Carlson said that he had invited you on his show to share evidence of the software flipping votes, and <b><i>he said you got angry and refused to provide evidence for your claims of voting software flipping votes.</i></b> How did you respond to Tucker Carlson? Did you get angry with the show because <b><i>they texted you and asked you to please provide evidence of what you're alleging?</i></b></p> <p>* * *</p> <p>MARIA: So, Sidney, <b><i>will you be able to prove this evidence that you say you have of this technology flipping votes from Trump to Biden? How will you prove that, Sidney?</i></b></p>	Fox.Ex.19
<i>Tucker Carlson Tonight</i>	11/20/2020	<p>CARLSON: Well, last night in a segment about voter fraud investigations, into it, we told you about Sidney Powell, the former Federal prosecutor, and her claim that roughly seven million votes were secretly changed on Election Night by vote rigged vote counting software. In the last 24 hours since we did that, we heard from a lot of people about that segment, including people in the White House and people close to the President. Like us, they have concluded that this election was not fair. Like us, they are willing to believe any explanation for what happened. <b><i>Like us, they have not seen a single piece of evidence showing that software change[d] votes.</i></b> It doesn't mean it didn't happen. It might have happened. It means they haven't seen any evidence that it had happened. And by they, we are including other members of Donald Trump's own legal team. <b><i>They have not seen Powell's evidence either, no testimony from employees inside the software companies, no damning internal</i></b></p>	Fox.Ex.20

Show	Air Date	Statement(s)	Ex. No.
		<p><i>documents, no copies of the software itself.</i> So that's where we are. Sidney Powell came on FOX this morning and suggest[ed] we may not have to wait much longer. I fully expect, she says, that we will be able to prove all of it in a court within the next two weeks. Well, as far as we are concerned, that is great news. If Sidney Powell can prove the technology company switched millions of votes and stole a presidential election, she will have almost single-handedly uncovered the greatest crime in the history of this country, and no one will be more grateful for that than us.</p>	
<i>Watters' World</i>	11/21/2020	<p>WATTERS: Watters' World doesn't have access to Sidney Powell's catalog, so researchers on our team spent a very long time going through her claims. We're going to report tonight on what we were able to verify, based off of what she said. ... Now Smartmatic, the vote technology company, did supply voting machines to the Venezuelan Government of Hugo Chavez. And according to the New York Times, there was a minor stake in the company that overlapped. In 2017, the CEO of Smartmatic admitted that the Venezuelan election had been tampered with and the count was falsely inflated by a million votes. Smartmatic is foreign owned, with a controlling interest by Antonio Mugica, a dual Spanish-Venezuelan national. George Soros does not have any ownership stake. <b><i>This is what our team has been able to verify from Sidney Powell's allegations</i></b> and we're going to continue to look into further developments so all Americans have confidence in our election.</p>	NYSCEF Doc. No. 32, Compl.Ex.30
<i>Sunday Morning Futures with Maria Bartiromo</i>	11/22/2020	<p>DERSHOWITZ: The other legal theory they [the Trump campaign] had, which is a potentially strong one, is that the computers, either fraudulently or by glitches, changed hundreds of thousands of votes. There, there are enough votes to make a difference, but <b><i>I haven't seen the evidence to support that.</i></b> So, in one case, they don't have the numbers. In another case, <b><i>they don't seem yet to have the evidence.</i></b> Maybe they do. I haven't seen it. But the legal theory is there to support them if they have the numbers and they have the evidence.</p> <p>* * *</p> <p>BARTIROMO: You just mentioned the computers. This is -- has to do with Smartmatic election software. ... Also, in terms of the computers and the software, Smartmatic election software was developed, Sidney Powell says, in Venezuela, with porous security and built-in functionality allowing the administrators to</p>	Fox.Ex.21

Show	Air Date	Statement(s)	Ex. No.
		<p>override security features. <i>We haven't seen this, so we don't know</i>, but this is the kind of evidence that they say they have. Your reaction?</p> <p>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. There's certainly nothing in the Constitution about that. And so I think they do have to get their evidence in. The public has the right to see it. They don't have the right to see it before the lawsuits are filed. But she said that she thinks the lawsuits will be filed by this Friday. <i>We have to see the evidence.</i></p> <p>BARTIROMO: <i>That's right.</i></p> <p>DERSHOWITZ: If the evidence is there, then there will be a trial.... So, if you're asking me what I think the outcome is going to be, notwithstanding the fact that there are legal paths to potential victory, I don't think that the election is going to be reversed, based on the numbers that I see at the moment and based on the fact that <i>I haven't seen the evidence.</i> Their strongest case, if they have the evidence....</p> <p>DERSHOWITZ: They need to make wholesale constitutional arguments. And for that, they're going to need overwhelming evidence, and <i>I haven't seen it....</i> Their only -- the only chance they have of winning -- and it's a perfect storm, and it's very unlikely to happen -- is if they can show retail, wholesale, constitutional arguments that affect a large number of voters, sufficient to be greater than the margin of victory. <i>I don't think they're there. I don't think they can make that case.</i></p>	
<i>Lou Dobbs Tonight</i>	12/10/2020	<p>DOBBS: Well, <i>what is the evidence that you have compiled?</i> How have you constructed the architecture of this relationship among these four individuals?</p> <p>* * *</p> <p>DOBBS: Well, let me make this -- let me make you an offer very straightforwardly. We will gladly put forward your evidence that supports your claim that this was a cyber-Pearl Harbor. We have tremendous evidence already of fraud in this election,</p>	Fox.Ex.22

Show	Air Date	Statement(s)	Ex. No.
		but I will be glad to put forward on this broadcast whatever evidence you have, and we'll be glad to do it immediately. We will work overnight.	
<i>Sunday Morning Futures with Maria Bartiromo</i>	12/13/2020	BARTIROMO: General, what do you want to say in terms of the proof of that? Because <b><i>Dominion has pushed back on FOX News</i></b> , on others... FLYNN: Of course they have. BARTIROMO: ... <b><i>who say that that's just not true. They gave us a statement, the same with Smartmatic. Can you prove that, and can you prove that there was foreign interference, sir?</i></b>	Fox.Ex.23
<i>Lou Dobbs Tonight</i>	12/18/2020	DOBBS: There are lots of opinions about the integrity of the election, the irregularities of mail-in voting, of election voting machines and voting software. One of the companies is Smartmatic, and we reached out to one of the leading authorities on open source software for elections, Eddie Perez for his insight and views. Eddie is the global director of tech development at the Open Source Election Technology Institute. We ask[ed] him for his assessment of Smartmatic and recent claims about the company. QUESTION: Have you seen any evidence that Smartmatic software was[ ]used to flip votes anywhere in the U.S. in this election? PEREZ: <b><i>I have not seen any evidence that Smartmatic software was used to delete, change, alter -- anything related to vote tabulation.</i></b> QUESTION: Smartmatic says its software was never used outside of LA County in 2020. Do you know whether or not that's true? PEREZ: That is my understanding. Smartmatic functioned as the contract manufacturer for the Los Angeles County voting system, and that was a customized voting system that was effectively built to the county's order. <b><i>I am not aware of them having any other direct customers relationships with election officials in the United States.</i></b> QUESTION: What about Smartmatic and Dominion? Do you know if they're related -- whether one owns the other? whether Dominion uses Smartmatic software?	NYSCEF Doc. No. 47, Compl.Ex.45



Show	Air Date	Statement(s)	Ex. No.
		<p>PEREZ: Both Dominion and Smartmatic have individually and respectively put out very clear statements from their corporate headquarters, each of them indicating <b><i>they are independent companies, they are not related to each other.</i></b> It is my understanding that neither one of them has an ownership stake in the other or anything like that. They are, again, for all intents and purposes, <b><i>two completely separate companies.</i></b></p> <p>QUESTION: Have you seen any evidence of a connection between George Soros and Smartmatic?</p> <p>PEREZ: I'm <b><i>not aware of any direct connection between George Soros and Smartmatic.</i></b> It is my understanding that an executive at Smartmatic has some sort of relationship with one of Soros' foundations. That's the extent of my knowledge.</p> <p>QUESTION: Have you seen any evidence of Smartmatic sending U.S. votes to be tabulated in foreign countries?</p> <p>PEREZ: No, <b><i>I'm not aware of any evidence that Smartmatic is sending U.S. votes to be tabulated in foreign countries.</i></b> Again, <b><i>I'm not aware -- outside of Los Angeles County, of Smartmatic tabulating any votes in the United States</i></b> because I'm not aware of them having any customer relationships in the U.S. And secondly, as others have pointed out, irrespective of which voting technology vendor we're talking about, in the United States, the <b><i>ballots that are cast in the United States are tabulated in the United States.</i></b></p> <p>QUESTION: Are you aware of any instances in which Smartmatic's technology was banned in the U.S. in 2020 due to security weaknesses or wrongdoing?</p> <p>PEREZ: I am not. <b><i>I'm not aware of any instances where Smartmatic's technology was banned in the U.S.</i></b> Again, it is my understanding that outside of one customer in Los Angeles County, Smartmatic has no presence in the voting technology marketplace in the United States.</p>	
<i>Justice with Judge Jeanine</i>	12/19/2020	<p>BOOTHE: In our week's long look into election integrity, we've heard concerns about both voting machines and voting software, specifically a company called Smartmatic. This week we reached out to Eddie Perez for his insight. He is the Global Director of tech development at the Open Source Election Technology Institute. His</p>	NYSCEF Doc. No. 49, Compl.Ex.47

Show	Air Date	Statement(s)	Ex. No.
		<p>team develops Open Source Software for elections, and we asked him what he knew about Smartmatic and the claims some have made about that company.</p> <p>QUESTION: Have you seen any evidence that Smartmatic software was used to flip votes anywhere in the U.S. in this election?</p> <p>PEREZ: <i>I have not seen any evidence that Smartmatic software was used to delete, change, alter, anything related to vote tabulation.</i></p> <p>QUESTION: Smartmatic says its software was never used outside of LA County in 2020. Do you know whether or not that's true?</p> <p>PEREZ: That is my understanding. <i>I am not aware of them having any other direct customers' relationships with election officials in the United States.</i></p> <p>QUESTION: What about Smartmatic and Dominion? Do you know if they're related? Whether one owns the other? Whether Dominion uses Smartmatic software?</p> <p>PEREZ: Both Dominion and Smartmatic have individually and respectively put out very clear statements from their corporate headquarters. Each of them indicating <i>they are independent companies, they are not related to each other.</i></p> <p>QUESTION: Have you seen any evidence of a connection between George Soros and Smartmatic?</p> <p>PEREZ: I'm <i>not aware of any direct connection between George Soros and Smartmatic.</i> It is my understanding that an executive at Smartmatic has some sort of relationship with one of Soros's foundations. That's the extent of my knowledge.</p> <p>QUESTION: Have you seen any evidence of Smartmatic sending US votes to be tabulated in foreign countries?</p> <p>PEREZ: No. <i>I'm not aware of any evidence that Smartmatic is sending US votes to be tabulated in foreign countries.</i> As others have pointed out, irrespective of which voting technology vendor we're talking about, in the United States, the <i>ballots that are cast in the United States are tabulated in the United States.</i></p> <p>QUESTION: Are you aware of any instances in which Smartmatic's technology was banned in the US in 2020 due to security weaknesses or wrongdoing?</p>	

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		PEREZ: I am not. <i>I'm not aware of any instances where Smartmatic's technology was banned in the US.</i> Again, it is my understanding that outside of one customer in Los Angeles County, Smartmatic has no presence in the voting technology marketplace in the United States.	
<i>Sunday Morning Futures with Maria Bartiromo</i>	12/20/2020	<p>BARTIROMO: In our week's long look into election integrity, we have heard concerns about both voting machines and voting software, specifically a company called Smartmatic. This week we reached out to Eddie Perez for insight. He is the Global Director of tech development at the Open Source Election Technology Institute. His team develops Open Source Software for elections. We asked him what he knew about Smartmatic and the claims some have made about that company.</p> <p>QUESTION: Have you seen any evidence that Smartmatic software was used to flip votes anywhere in the U.S. in this election?</p> <p>PEREZ: <i>I have not seen any evidence that Smartmatic software was used to delete, change, alter, anything related to vote tabulation.</i></p> <p>QUESTION: Smartmatic says its software was never used outside of LA County in 2020. Do you know whether or not that's true?</p> <p>PEREZ: That is my understanding. <i>I am not aware of them having any other direct customer's relationships with election officials in the United States.</i></p> <p>QUESTION: What about Smartmatic and Dominion? Do you know if they're related? Whether one owns the other? Whether Dominion uses Smartmatic software?</p> <p>PEREZ: Both Dominion and Smartmatic have individually and respectively put out very clear statements from their corporate headquarters. Each of them indicating <i>they are independent companies they are not related to each other.</i></p> <p>QUESTION: Have you seen any evidence of a connection between George Soros and Smartmatic?</p> <p>PEREZ: I'm <i>not aware of any direct connection between George Soros and Smartmatic.</i> It is my understanding that an executive at Smartmatic has some sort of relationship with one of Soros's foundations. That's the extent of my knowledge.</p>	NYSCEF Doc. No. 48, Compl.Ex.46

Show	Air Date	Statement(s)	Ex. No.
		<p>QUESTION: Have you seen any evidence of Smartmatic sending US votes to be tabulated in foreign countries?</p> <p>PEREZ: No, <i>I'm not aware of any evidence that Smartmatic is sending US votes to be tabulated in foreign countries.</i> As others have pointed out, irrespective of which voting technology vendor we're talking about, in the United States, the <i>ballots that are cast in the United States are tabulated in the United States.</i></p> <p>QUESTION: Are you aware of any instances in which Smartmatic's technology was banned in the US in 2020 due to security weaknesses or wrongdoing?</p> <p>PEREZ: I am not. <i>I'm not aware of any instances where Smartmatic's technology was banned in the US.</i> Again, it is my understanding that outside of one customer in Los Angeles County, Smartmatic has no presence in the voting technology marketplace in the United States.</p>	
<i>Bill Hemmer Reports</i>	12/22/2020	ROVE: Ms. Powell has pedaled theories that have <i>little basis in fact.</i> The idea that Hugo Chavez from the grave was somehow involved in stealing this year's election... So what she has done, you know, to sort of throw mud on the President through her antics is unbelievable. The President has been so ill-served by this crowd and she's chief among them.	Fox.Ex.24
<i>The Story with Martha MacCallum</i>	12/22/2020	CHRISTIE: The fact is that <i>we haven't seen any of these things.</i> We've had promises from Sidney Powell and other members of the president's legal team for blockbuster evidence, and <i>none of it has come forward.</i>	Fox.Ex.25
Fox Online/ <i>New York Post</i>	1/4/2021	"It follows weeks where the president and his legal team got almost no traction among elected officials for their claims of widespread voter fraud, largely because court after court dismissed their filings. <i>Claims by lawyer Sidney Powell alleging an international conspiracy involving voting machines drew widespread scorn.</i> "	Fox.Ex.26