

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

US DOMINION, INC., DOMINION)
VOTING SYSTEMS, INC., and)
DOMINION VOTING SYSTEMS)
CORPORATION,)

Plaintiffs,)

v.)

FOX NEWS NETWORK, LLC,)

Defendant.)

Case No. N21C-03-257 EMD
(Consolidated)

JURY TRIAL DEMANDED

REDACTED PUBLIC VERSION

Filed on February 27, 2023

US DOMINION, INC., DOMINION)
VOTING SYSTEMS, INC., and)
DOMINION VOTING SYSTEMS)
CORPORATION,)

Plaintiffs,)

v.)

FOX CORPORATION,)

Defendant.)

Case No. N21C-11-082 EMD JURY

TRIAL DEMANDED

**DOMINION’S COMBINED OPPOSITION TO FOX NEWS NETWORK,
LLC’S AND FOX CORPORATION’S RULE 56 MOTIONS FOR
SUMMARY JUDGMENT**

Dated: February 8, 2022

Brian E. Farnan (Bar No. 4089)
Michael J. Farnan (Bar No. 5165)
FARNAN LLP
919 N. Market St., 12th Floor
Wilmington, Delaware 19801
(302) 777-0300
bfarnan@farnanlaw.com

mfarnan@farnanlaw.com

Rodney Smolla (Bar No. 6327)
164 Chelsea Street
South Royalton, Vermont 05068
(864) 373-3882
rodsmolla@gmail.com

Of Counsel:

Thomas A. Clare, P.C.
Megan L. Meier
Dustin A. Pusch
Daniel P. Watkins
CLARE LOCKE LLP
10 Prince Street
Alexandria, Virginia 22314
(202) 628-7400
tom@clarelocke.com
megan@clarelocke.com
dustin@clarelocke.com
daniel@clarelocke.com

Justin A. Nelson
Jonathan J. Ross
Katie Sammons
Laranda Walker
Elizabeth Hadaway
Florence Chen
Kate Farley
SUSMAN GODFREY LLP
1000 Louisiana Street, #5100
Houston, Texas 77002
(713) 651-9366
jnelson@susmangodfrey.com
jross@susmangodfrey.com
ksammons@susmangodfrey.com
lwalker@susmangodfrey.com
ehadaway@susmangodfrey.com
fchen@susmangodfrey.com
kfarley@susmangodfrey.com

Stephen Shackelford, Jr.
Mark-Hatch-Miller
Zach Savage
Christina M. Dieckmann
Eve Levin
SUSMAN GODFREY LLP
1301 6th Avenue
New York, New York 10019
(212) 336-8330
sshackelford@susmangodfrey.com
mhatch-miller@susmangodfrey.com
zsavage@susmangodfrey.com
cdieckmann@susmangodfrey.com

Davida Brook
Jordan Rux
SUSMAN GODFREY LLP
1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
(310) 789-3100
dbrook@susmangodfrey.com
jrux@susmangodfrey.com

Edgar Sargent
Katherine Peaslee
SUSMAN GODFREY LLP
401 Union Street, Suite 3000
Seattle, Washington 98101
(206) 516-3880
esargent@susmangodfrey.com
kpeaslee@susmangodfrey.com

Attorneys for Plaintiffs

Table of Contents

	Page
INTRODUCTION	1
STATEMENT OF ADDITIONAL FACTS	8
A. The Chain of Command for Fox Editorial Decisions Goes to the Top—Including Rupert and Lachlan Murdoch.....	8
B. November 3 Through 7: The Election And Its Immediate Aftermath.....	12
C. After the Call: Fox Executives Comprehend the Magnitude of Viewer Backlash—and Change Strategies.....	17
D. November 10-12: Concern About Fox’s Election Coverage and Fallout Rises to the Board Level.....	22
E. November 11-18: Fox Executives Continue To Be Preoccupied With Viewer Backlash And Competition.	24
F. November 19-December 1: Fox Gets Powell Disavowed After Her Fight With Carlson—But Keeps Bringing Her On Air.	28
G. December 6-January 6: Fox Executives Continue To Debate How To Cover The Conspiracy Allegations—Right Up To January 6.....	31
H. January 6 and After: Fox Executives Try to Move Past Trump—But Find It Difficult.....	33
RESPONSE TO FNN’s “UNDISPUTED” FACTS	37
A. Fox’s Pre-Election Background “Facts” Are Irrelevant.	38
B. Fox’s “Blame Trump” Approach Is Legally Irrelevant and Factually Inaccurate.	41
C. Fox’s Post-Litigation Argument Ignores Contemporaneous Documents And Mischaracterizes Its Coverage.	47
D. Fox Ignores Dominion’s Massive Effort to Convince Fox to Stop Airing the Lies.....	51
ARGUMENT	52
I. The Accused Statements Are Actionable.....	52
A. Fox’s Repackaged “Neutral Reportage” Argument Fails.....	52

1.	The Neutral Reportage Privilege Does Not Apply As A Matter of Law.....	52
2.	Fox Could Not Invoke the Neutral Reportage Defense On These Facts Regardless.	53
3.	The Court Should Reject Fox’s Attempt to Create a New Privilege Far Broader Than Neutral Reportage.	57
B.	Fox’s Fair Report Defense Is Meritless.	71
1.	Fox Has Largely Waived the Defense By Asserting It Solely In Its Appendix.	71
2.	Fox’s Statements Were Not “Of” a Qualified Proceeding.	72
3.	Fox’s Statements Were Not Fair and True Reports of Those Proceedings.	76
4.	Fox’s Waived Arguments Suffer From the Same Common Defects.	77
C.	Fox’s “Opinion” Argument Misses the Point.	78
D.	The Challenged Statements Are Actionable Defamation.	80
1.	November 8, 2020 – Maria Bartiromo, <i>Sunday Morning Futures</i> , ¶179(a).....	86
2.	November 12, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(b).	90
3.	November 13, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(c).	94
4.	November 14, 2020 – Lou Dobbs, twitter, ¶179(d).....	98
5.	November 14, 2020 – Jeanine Pirro, <i>Justice with Judge Jeanine</i> , ¶179(e).	99
6.	November 15, 2020 – Maria Bartiromo, <i>Fox and Friends</i> , ¶179(f).	103
7.	November 15, 2020 – Maria Bartiromo, <i>Sunday Morning Futures</i> , ¶179(g).....	104
8.	November 16, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(h).	107
9.	November 18, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(i).	112

10.	November 19, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(j).	113
11.	November 21, 2020 – Jeanine Pirro, <i>Justice with Judge Jeanine</i> , ¶179(k).	114
12.	November 24, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(l).	116
13.	November 30, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(m).	119
14.	November 30, 2020 – Sean Hannity, <i>Hannity</i> , ¶179(n).	121
15.	December 4, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(o).	123
16.	December 10, 2020 – Lou Dobbs, twitter, ¶179(p).	125
17.	December 10, 2020 – Lou Dobbs, <i>Lou Dobbs Tonight</i> , ¶179(q).	125
18.	December 10, 2020 – Lou Dobbs, twitter, ¶179(r).	128
19.	December 12, 2020 – Fox and Friends, ¶179(s).	129
20.	January 26, 2021 – Tucker Carlson, <i>Tucker Carlson Tonight</i> , ¶179(t).	130
II.	Executives at Both Fox News and Fox Corporation Participated in the Publication of the Defamatory Broadcasts.	131
A.	Responsibility Extends to Any Person In the Chain of Command Who Participates in the Publication of the Defamatory Statements, Including By Knowingly Allowing Them to Occur.	131
B.	Individuals at Both Fox News and Fox Corporation Throughout the Chain of Command Knew What Was Happening And Let The Defamatory Broadcasts Proceed.	137
1.	Fox News Hosts and Producers Allowed the Defamatory Broadcasts.	141
2.	Fox News Executives Allowed the Defamatory Broadcasts.	142
3.	Fox Corporation Executives Allowed the Defamatory Broadcasts.	143
III.	Fox News and Fox Corporation Acted with Actual Malice.	157
A.	Fox Corporation Acted with Actual Malice.	159

1.	Fox Corporation Individuals in the Chain of Command Knew or Recklessly Disregarded the Truth.	159
2.	Circumstantial Evidence Confirms Fox Corporation’s Actual Malice.	164
B.	Fox News Acted with Actual Malice.	168
C.	Fox News Fails to Raise a Question of Fact Disputing that Its Hosts Acted with Actual Malice.	168
D.	Fox Cannot Escape its Actual Malice by Denying Credible Evidence Regarding the 2020 Presidential Election.	172
E.	Additional Circumstantial Evidence Demonstrates FNN’s Actual Malice.	178
IV.	Dominion is Entitled to Substantial Economic Damages For Its Out-of-Pocket Expenses and the Destruction of its Brand and Business.	181
V.	Fox News and Fox Corporation Are Subject to Punitive Damages.	189
	Conclusion	194

Table of Authorities

Cases	Page(s)
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	158
<i>Bandido’s, Inc. v. Journal Gazette Co., Inc.</i> , 575 N.E.2d 324 (Ind. Ct. App. 1991)	135
<i>Baumann v. Newspaper Enterprises, Inc.</i> , 270 A.D. 825 (N.Y. App. Div. 1946)	74
<i>Blankenship v. Fox News Network, LLC</i> , No. 2:19-CV-00236, 2022 WL 321023 (S.D. W.Va. Feb. 2, 2022)	79, 133, 134
<i>Boulos v. Newman</i> , 302 A.D.2d 932 (N.Y. App. Div. 4th Dep’t 2003).....	67
<i>Brian v. Richardson</i> , 660 N.E.2d 1126 (N.Y. 1995).....	<i>passim</i>
<i>Brown v. New York</i> , 31 N.Y.3d 514 (2018).....	188
<i>Bufalino v. Associated Press</i> , 692 F.2d 266 (2d Cir. 1982)	62
<i>Butler v. Gazette Co.</i> , 119 A.D. 767 (N.Y. App. Div. 3d Dep’t 1907).....	187
<i>Cabello-Rodón v. Dow Jones & Co.</i> , No. 16-CV-3346 (KBF), 2017 WL 3531551 (S.D.N.Y. Aug. 16, 2017)	178
<i>Campo Lindo for Dogs, Inc. v. New York Post Corp.</i> , 65 A.D.2d 650 (N.Y. App. Div. 3d Dep’t 1978).....	53
<i>Cerberus Int’l., Ltd. v. Apollo Mgmt., L.P.</i> , 794 A.2d 1141 (Del. 2002).....	187

<i>Celle v. Filipino Reporter Enterprises Inc.</i> , 209 F.3d 163 (2d Cir. 2000)	181, 182, 190
<i>Cholowsky v. Civiletti</i> , 69 A.D.3d 110 (N.Y. App. Div. 2009)	73
<i>Cianci v. New Times Pub. Co.</i> , 639 F.2d 54 (2d Cir. 1980) (Friendly, J.)	<i>passim</i>
<i>Clifford v. Trump</i> , 339 F. Supp. 3d 915 (C.D. Cal. 2018)	80
<i>Croce v. N.Y. Times Co.</i> , 930 F.3d 787 (6th Cir. 2019)	57, 63, 64, 81
<i>Curtis Pub. Co. v. Butts</i> , 388 U.S. 130 (1967).....	191
<i>Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publ'g Ass'n</i> , 226 N.Y. 1 (1919).....	184
<i>Dershowitz v. Cable News Network, Inc.</i> , 541 F. Supp. 3d 1354 (S.D. Fla. 2021).....	103, 132
<i>Dickey v. CBS Inc.</i> , 583 F.2d 1221 (3d Cir. 1978)	53
<i>Dolcefino v. Randolph</i> , 19 S.W.3d 906 (Tex. Ct. App. 2000).....	70
<i>Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania</i> , 830 Fed.Appx. 377 (3d Cir. 2020).....	44
<i>Duci v. Daily Gazette Co.</i> , 102 A.D.2d 940 (N.Y. App. Div. 3d Dep't 1984)	69
<i>Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985).....	183
<i>Easton v. Pub. Citizens, Inc.</i> , No. 91 CIV. 1639 (JSM), 1991 WL 280688 (S.D.N.Y. Dec. 26, 1991)	73

<i>Edwards v. Nat’l Audubon Soc., Inc.</i> , 556 F.2d 113 (2d Cir. 1977)	<i>passim</i>
<i>Emerald Partners v. Berlin</i> , 2003 WL 21003437 (Del. Ch. Apr. 28, 2003).....	72, 85
<i>Fine v. ESPN, Inc.</i> , 11 F. Supp. 3d 209 (N.D.N.Y. 2014).....	73, 76
<i>Garcia v. O’Keefe</i> , 5 Misc. 3d 1006, 2004 WL 2375284 (N.Y. Sup. Ct. Sept. 9, 2004)	191
<i>Geary v. Goldstein</i> , No. 91 CIV. 6222 (KMW), 1996 WL 447776 (S.D.N.Y. Aug. 8, 1996)	85
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	58, 185
<i>Goldwater v. Ginzburg</i> , 414 F.2d 324 (2d Cir. 1969)	69
<i>Grace v. eBay Inc.</i> , 16 Cal. Rptr. 3d 192 (Ct. App.), review granted and opinion superseded on other grounds, 99 P.3d 2 (Cal. 2004).....	136
<i>Green v. CBS Inc.</i> , 286 F.3d 281 (5th Cir. 2002)	69, 70
<i>Greenlee v. Imperial Homes Corp.</i> , 1994 WL 465556 (Del. Super. Ct. July 19, 1994).....	190
<i>Gross v. N.Y. Times Co.</i> , 623 N.E.2d 1163 (N.Y. 1993).....	86, 112
<i>GS Plasticos Limitada v. Bureau Veritas</i> , 84 A.D.3d 518 (N.Y. App. Div. 2011)	67
<i>Harte-Hanks Commc’ns v. Connaughton</i> , 491 U.S. 657 (1989).....	166, 180
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979).....	158

<i>Herring Networks, Inc. v. Maddow</i> , 8 F.4th 1148 (9th Cir. 2021)	80
<i>Hinerman v. Daily Gazette Co., Inc.</i> , 423 S.E.2d 560 (W. Va. 1992).....	191
<i>Hogan v. Herald Co.</i> , 84 A.D.2d 470 (N.Y. App. Div. 4th Dep’t 1982).....	52, 53, 62, 69
<i>Holy Spirit Ass’n for Unification of World Christianity v. N.Y. Times Co.</i> , 49 N.Y.2d 63 (N.Y. 1979)	76
<i>Hunt v. Liberty Lobby</i> , 720 F.2d 631 (11th Cir. 1983)	135
<i>Immuno AG v. Moor-Jankowski</i> , 77 N.Y.2d 235 (1991).....	68
<i>Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.</i> , 61 F.3d 1250 (7th Cir. 1995)	184
<i>Janklow v. Newsweek, Inc.</i> , 759 F.2d 644 (8th Cir. 1985)	70
<i>Karedes v. Ackerly Group, Inc.</i> , 423 F.3d 107 (2d Cir. 2005)	76
<i>Karp v. Hill & Knowlton, Inc.</i> , 631 F. Supp. 360 (S.D.N.Y. 1986)	77
<i>Keogh v. N.Y. Herald Trib., Inc.</i> , 274 N.Y.S.2d 302 (Sup. Ct. 1966).....	72
<i>Kerwick v. Orange Cnty. Publications Div. of Ottaway Newspapers, Inc.</i> , 420 N.E.2d 970 (N.Y.1981)	82
<i>Khalil v. Fox Corp.</i> , 2022 WL 4467622 (S.D.N.Y. Sep. 26, 2022)	54, 57
<i>King v. Whitmer</i> , 556 F.Supp.3d 680 (E.D. Mich. 2021)	45, 180

<i>Konikoff v. Prudential Ins. Co. of Am.</i> , 234 F.3d 92 (2d Cir. 2000)	53
<i>Kostolecki v. Buffalo Courier Exp. Co. Inc.</i> , 163 A.D.2d 856 (App. Div. 1990)	190, 193
<i>KTRK Television v. Felder</i> , 950 S.W.2d 100 (Tex. Ct. App. 1997)	70
<i>Loughry v. Lincoln First Bank, N.A.</i> , 494 N.E.2d 70 (N.Y. 1986)	191, 192
<i>Matter of Giuliani</i> , 146 N.Y.S.3d 266 (N.Y. App. Div. 2021)	179
<i>McDougal v. Fox News Network, LLC</i> 489 F. Supp. 3d 174 (S.D.N.Y. 2020)	80
<i>McFarlane v. Esquire Magazine</i> , 74 F.3d 1296 (D.C. Cir. 1996)	177
<i>Metro. Opera Ass’n. v. Local 100</i> , 2005 WL 1712241 (S.D.N.Y. July 19, 2005)	183, 184
<i>Michel v. NYP Holdings, Inc.</i> , 816 F.3d 686 (11th Cir. 2016)	177, 178
<i>Milkovich v. Lorain J. Co.</i> , 497 U.S. 1 (1990)	<i>passim</i>
<i>Morris v. Flaig</i> , 511 F.Supp.2d 282 (E.D.N.Y. 2007)	191
<i>Morsette v. “The Final Call”</i> , 764 N.Y.S.2d 416 (App. Div. 2003)	190
<i>Mr. Chow of New York v. Ste. Jour Azur S.A.</i> , 759 F.2d 219 (2d Cir. 1985)	80
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	134

<i>Norton v. Glenn</i> , 860 A.2d 48 (Pa. 2004).....	53
<i>Nunes v. Lizza</i> , 12 F.4th 890 (8th Cir. 2021)	167
<i>Orr v. Lynch</i> , 60 A.D.2d 949 (N.Y. App. Div. 3d Dep’t 1978).....	53, 69, 126
<i>Page v. Oath</i> , 270 A.3d 833 (Del. 2022)	<i>passim</i>
<i>Palmer v. Matthews</i> , 162 N.Y. 100 (1900)	187
<i>Palmer v. New York News Publishing Co.</i> , 31 A.D. 210 (N.Y. App. Div. 1st Dep’t 1898)	187, 188
<i>Phoenix Newspapers, Inc. v. Church</i> , 537 P.2d 1345 (Ariz. App. 1975)	135
<i>Present v. Avon Prod., Inc.</i> , 253 A.D.2d 183 (N.Y. App. Div. 1999)	190
<i>Prozeralik v. Capital Cities Commc’ns, Inc.</i> , 626 N.E.2d 34 (N.Y. 1993).....	190
<i>Robertson v. Doe</i> , No. 05-cv-7046, 2010 WL 11527317 (S.D.N.Y. May 11, 2010).....	185
<i>Rose v. Imperial Engine Co.</i> , 127 App.Div. 885.....	193
<i>Rupert v. Sellers</i> , 65 A.D.2d 473 (N.Y. App. 1978)	185
<i>Sandals Resorts Int’l Ltd. v. Google, Inc.</i> , 86 A.D.3d 32 (N.Y. App. Div. 1st Dep’t 2011)	67
<i>Sharon v. Time, Inc.</i> , 599 F. Supp. 538 (S.D.N.Y. 1984)	173, 175

<i>Solano v. Playgirl, Inc.</i> , 292 F.3d 1078 (9th Cir. 2002)	132, 158, 162
<i>Southern Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc.</i> , 307 S.E.2d 83 (Ga. 1983)	136
<i>Stern v. Cosby</i> , 645 F. Supp. 2d 258 (S.D.N.Y. 2009)	181
<i>Stokes v. Morning J. Ass’n</i> , 72 A.D. 184 (App. Div. 1902)	191
<i>Stone v. Essex Cnty. Newspapers, Inc.</i> , 330 N.E.2d 161 (Mass. 1975)	135
<i>Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.</i> , 2007 WL 4820968 (S.D.N.Y. Sept. 18, 2007)	76
<i>US Dominion, Inc. v. Newsmax Media, Inc.</i> , No. CV N21C-08-063 EMD, 2022 WL 2208580 (Del. Super. Ct. 2022)	123
<i>US Dominion, Inc. v. Powell</i> , 554 F.Supp.3d 42 (D.D.C. 2021)	37
<i>Vengroff v. Coyle</i> , 231 A.D.2d 624 (N.Y. App. Div. 2d Dep’t 1996)	67
<i>Waste Distillation Tech. v. Blasland & Bouck Eng’rs, P.C.</i> , 136 A.D.2d 633 (N.Y. App. Div. 2d Dep’t 1988)	184
<i>Weiner v. Doubleday & Co.</i> , 549 N.E.2d 453 (N.Y. 1989)	52, 53, 62
<i>Wenz v. Becker</i> , 948 F. Supp. 319 (S.D.N.Y. 1996)	74, 75
<i>Wood v. Raffensperger</i> , 501 F. Supp. 3d 1310 (N.D. Ga. 2020)	102
<i>Yesner v. Spinner</i> , 765 F. Supp. 48 (E.D.N.Y. 1991)	182

<i>Zerangue v. TSP Newspapers, Inc.</i> , 814 F.2d 1066 (5th Cir. 1987)	181
--	-----

Statutes

N.Y. Civ. Rights L. § 74	<i>passim</i>
N.Y. Civ. Rights L. § 75	60, 61
N.Y. Civ. Rights L. §76	60

Rules

Pattern Jury Instructions §3:30	190
---------------------------------------	-----

Constitutional Provisions

First Amendment.....	2, 3, 37
----------------------	----------

Other Authorities

Prosser & Keeton on Torts § 112.....	182
<i>The Law of Libel and Slander in the State of New York</i> ¶ 228 (1941)	72
<i>The Publicly Held Corporation As Defamation Plaintiff</i> , 39 St. Louis U. L.J. 1167 (1995).....	183

INTRODUCTION

Q. What should the consequences be when Fox News executives knowingly allow lies to be broadcast? A. They should be reprimanded – They should be reprimanded, maybe got rid of. Rupert Murdoch, Chairman, Fox Corporation (Ex.600, R.Murdoch 341:5-11)¹

Q. Mr. Dinh, should Fox broadcast election fraud allegations that it knows to be false? A. No. Viet Dinh, Chief Legal & Policy Officer (CLPO), Fox Corporation (Ex.601, Dinh 160:6-9)

Q. Do you think that Fox has an obligation not to broadcast false claims to its audience? A. Yes, ma'am. Jay Wallace, President, Fox News Network (Ex.147, Wallace 24:13-16)

Rupert Murdoch, Viet Dinh, and Jay Wallace are right: news networks should not knowingly broadcast lies. Other executives at Fox Corporation (FC) and Fox News Network (FNN) admitted much the same thing in their own depositions, including FC CEO Lachlan Murdoch, FNN CEO Suzanne Scott, FNN Executive Vice President of Primetime Programming Meade Cooper, and FNN Senior Vice President for Weekend News and Programming David Clark.²

It is such a simple point. Yet it is a point that Fox refuses to acknowledge in its summary judgment papers. To the contrary, Fox asks the Court to hold that it has no legal responsibility whatsoever for broadcasting even the most horrible

¹ Dominion omits counsel's form objections from any deposition quotations in this brief.

² See Ex.130, L.Murdoch 315:25-316:11; Ex.143, Scott 373:24-374:7; *id.* 373:2-6 (“Q. Should Fox News spread conspiracy theories? A. I mean, no, of course not.”); Ex.108, Cooper 176:15-19; Ex.106, Clark 272:17-23.

allegations that it knows to be false, as long as they are “newsworthy.” Unable to contest the falsity of the statements or Fox’s knowledge of falsity at the time, Fox asks the Court to make new law that would vastly expand a broadcaster’s immunity and would upend settled defamation law.

At least the “neutral reportage” defense from *Edwards v. National Audubon Soc., Inc.*, 556 F.2d 113 (2d Cir. 1977), has some safeguards in place, requiring that the source whose charges are published be “responsible” and “prominent,” *id.* at 120, and that the party publishing the allegations report “accurately and dispassionately,” without “‘espous[ing]” or “concur[ring]” in the charges, FNN MTD Order pp.42, 44 (quoting *Edwards*, 556 F.2d at 120). Fox appears to be asking for a one-factor test, where a publisher has complete immunity to publish false allegations, knowing or recklessly disregarding the truth, as long as they are “newsworthy.” Under Fox’s test, the source of the false charges need not be “responsible” or “prominent,” and the publisher is free to espouse or concur in the charges all it wants, with impunity. *See* FNN MSJ p.3 (“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.”).³

The Court should reject that test, which has no support in New York or First Amendment law. *Infra* §I.A.3. New York’s highest court was unwilling even to

³ All emphasis in quoted materials was added by Dominion unless otherwise noted.

approve the *Edwards* “neutral reportage” immunity; it would never approve the vastly more expansive immunity Fox asks for here. And not for nothing, but the immunity Fox asks for in its papers is flatly inconsistent with the simple truths its top executives acknowledged under oath at their depositions.

Under actual First Amendment and New York law doctrines, Fox’s motion fails. The Court should confirm at summary judgment what it suggested at the pleading stage: the “neutral reportage” defense is unavailable to Fox, both because the doctrine is not good law, and because Fox as a matter of law could never satisfy its requirements for the twenty accused statements. *Infra* §§I.A, I.D.

While Fox does argue at times that its hosts were reporting “neutrally”—without “endorsing” any of the lies about Dominion—the record demonstrates the opposite. *Infra* §I.D. The hosts of the accused shows repeatedly endorsed the “stolen election” lies. Even Rupert Murdoch had to concede the point:

Q. You are aware now that Fox did more than simply host these guests and give them a platform; correct?

A. I think you’ve shown me some material in support of that.

Q. In fact, you are now aware that Fox endorsed at times this false notion of a stolen election?

A. Not Fox, No. Not Fox. But maybe Lou Dobbs, maybe Maria, as commentators.

Q. We went through Fox hosts Maria Bartiromo, yes?

A. Yes. C’mon

Q. Fox host Jeanine Pirro?

A. I think so.

Q. Fox Business host Lou Dobbs?

A. Oh, a lot.

Q. Fox host Sean Hannity?

A. A bit.

Q. All were in that document; correct?

A. Yes, they were.

Q. About Fox endorsing the narrative of a stolen election; correct?

A. No. Some of our commentators were endorsing it.

Q. About their endorsement of a stolen election?

A. Yes. They endorsed.

Ex.600, Rupert Murdoch, 361:8-362:21.⁴

There you have it. FC Chairman Rupert Murdoch admitted under oath, as he had to once he finally faced the evidence, that the hosts of the accused Fox shows

⁴ Exhibits numbered 600 or higher are attached to the Affidavit of Elizabeth Hadaway filed with this brief. Exhibits numbered 1-556 are attached to the Affidavit of Katherine Peaslee filed in support of Dominion's Motion for Summary Judgment. Exhibits in the form Ex.A#-Ex.I# are attached to the Declaration of Kate Mowery filed in support of FNN's MSJ. This brief cites to accused broadcasts as ¶179(#), referring to sub-sections of ¶179 of Dominion's Complaint against FNN ("Complaint").

did far more than just “host these guests and give them a platform”—though that would be enough for Fox to be liable, *infra* pp.59-60 (publisher liable for republishing false and defamatory statement while knowing or recklessly disregarding the truth). He admitted that each of the Fox hosts (other than Tucker Carlson) “endorsed” the stolen election lies. As for Carlson, Rupert admitted that it was “wrong” to host Mike Lindell on January 26, 2021 “to repeat those allegations against Dominion” if Carlson “didn’t contest it.” Ex.600, R.Murdoch 345:4-8. And Carlson *admitted* he did not contest it. Ex.105, Carlson 198:5-201:13. For those and numerous other reasons, Fox has no viable “neutral reportage” defense, even if the doctrine were good law.

While New York does provide a defense for “fair reports” of official proceedings, that defense is also unavailable to Fox as a matter of law on the facts of this case. The proceedings Fox purports to have been “reporting” on in the accused broadcasts were either not yet pending, or not identified in the broadcast, or did not include any of the allegations Fox claimed to have been “reporting”—or sometimes all of the above. *Infra* §§I.B, I.D. Any one of those failures of proof is sufficient to preclude Fox as a matter of law from asserting the defense.

Fox’s “opinion” defense also goes nowhere. Even if some of Fox’s hosts’ statements could qualify as “opinions,” they are still actionable if—as here—they are based on false or undisclosed facts. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18-

19 (1990). And in many instances, the statements Fox claims are “opinions” are enthusiastic endorsements of the false allegations against Dominion, making those statements (whether “opinion” or not) fatal to any defense.

Fox also moves for summary judgment on actual malice, and to avoid the many bad facts that have come out during discovery, Fox tries to limit the number of people whose actual malice is relevant to its corporate liability. The test under New York law is straightforward, imposing liability on the company if any of the persons who “participated in the creation or the publication of the statements at issue” did so with actual malice, *i.e.*, knowing or recklessly disregarding the truth. FC MTD Order p.15 (quoting *Treppel v. Biovail Corp.*, 2005 WL 2086339, at *3 (S.D.N.Y. Aug. 30, 2005)). Fox, however, seems to think that the *only* people relevant to this analysis in this case are the hosts of the accused shows. FNN MSJ pp.127-132 (only analyzing state-of-mind of the hosts). That is not so. The record in these cases proves people from show-level producers, to mid-tier executives, to the top executives at FNN and FC, all “participated in the creation or the publication” of the accused statements. *Infra* §§II, III; Dom. MSJ pp.101-161.

This is not about “collective knowledge.” The evidence confirms that executives in the “chain of command,” from both FC and FNN, knew Fox was broadcasting these known lies, had the power to stop it, but chose to let it continue. That was wrong, and for that, FC and FNN are both liable.

FC Chief Legal and Policy Officer (“CLPO”) Viet Dinh, the highest-ranking lawyer in the entire corporate structure, said it best:

Q. If any of the people in that chain of command who had the power to exercise control over Lou Dobbs’ show knew that what Sidney Powell was alleging was false, *didn’t they have an obligation to prevent her from coming on the show to tell those lies?*

A. *Yes.*

....

Q. But when the executives at Fox News know that hosts of shows are broadcasting allegations that the executives know or believe to be false, in that situation, the executives have an obligation to act, right?

A. If they are within the chain of command and if they -- and if they come to that knowledge, yes.

Q. And by “act,” that means to put a stop to it, right?

Q. They have an obligation under those circumstances, the executives do, in the chain of command, to put a stop to those broadcasts, right, sir?

A. Yes, to prevent and correct known falsehoods.

Ex.601, Dinh 287:12-19, 316:5-25. Exactly. When those executives fail that obligation, the company is liable.

The evidence of both defendants’ participation in the defamation and the actual malice of those who participated is overwhelming. As FC Executive Raj Shah told Lachlan Murdoch, Suzanne Scott, and Viet Dinh on November 23 when they successfully lobbied the White House to disavow Sidney Powell, these claims were “outlandish.” Ex.163. That statement is one of many along similar lines made by

both FC and FNN personnel. Fox, “the most trusted news source,” knowingly spread these lies. Ex.654 p.4. The Court should deny Fox’s motions for summary judgment, and grant Dominion’s.

The other two areas Fox addresses in its motions both concern damages. Fox argues that the Court should grant summary judgment holding Dominion is entitled as a matter of law to no economic damages. That request ignores not only the evidence, but the simple fact that in a defamation *per se* case like this, damages are presumed. Fox also argues that the Court should grant summary judgment holding Dominion cannot recover punitive damages as a matter of law, but there, Fox badly misstates the governing standard, which Dominion easily meets on the record here. The Court should deny both of these requests, as well. *Infra* §§IV, V.

STATEMENT OF ADDITIONAL FACTS⁵

A. The Chain of Command for Fox Editorial Decisions Goes to the Top—Including Rupert and Lachlan Murdoch.

Executives at all levels of Fox⁶—both FNN and FC—knowingly opened Fox’s airwaves to false conspiracy theories about Dominion. They did so to protect FNN, which “contributes a very outsized portion of the profits of Fox Corporation” and is “an incredibly important part” of the company. Ex.620, Ryan 54:18-55:4.

⁵ Dominion incorporates by reference its Factual Background from its Motion for Summary Judgment (“Dom. MSJ”).

⁶ Unless specifically noted, references to “Fox” refer to both Defendants.

Dominion’s Motion for Summary Judgment tells some of this story, including of FC’s involvement, and that evidence is still developing. It is already clear, though, that how to cover the false election fraud allegations in 2020 formed a central part of Fox’s internal discussions, from producers to hosts to line executives to senior FNN leadership to FC Executives—including Rupert and Lachlan Murdoch—to the FC Board.

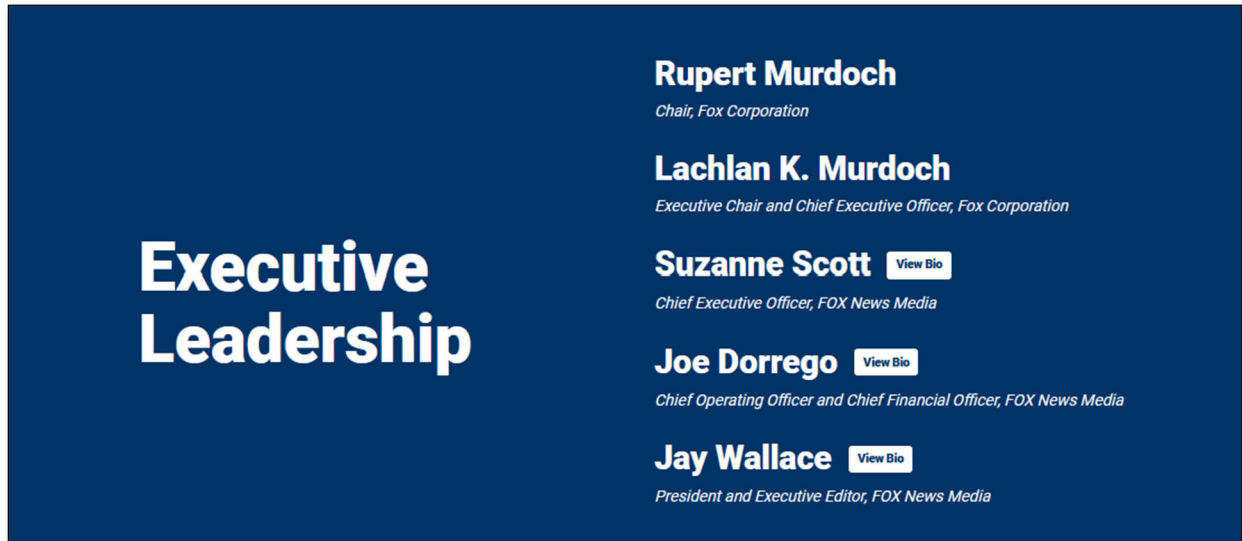
Rupert and Lachlan were part of the chain of command. Fox has not disputed what appears on its own website—or at least appeared at the time Dominion filed its complaint—that they are both part of the FNN hierarchy and FNN Executives report to them.

Time of Filing:

Fox News Executive Staff
<ul style="list-style-type: none">• Rupert Murdoch Chairman, Fox Corporation• Lachlan K. Murdoch Executive Chairman and Chief Executive Officer, Fox Corporation• Suzanne Scott Chief Executive Officer, FOX News Media <p><u>View Bio</u></p> <ul style="list-style-type: none">• Joe Dorrego Executive Vice President, Chief Operating Officer and Chief Financial Officer, FOX News Media

Ex.675, Fox News Executive Staff, <http://press.foxnews.com/> (visited 3/19/21).

Now:



Ex.751, Executive Leadership, <https://press.foxnews.com/> (visited 2/7/2023).

As the evidence demonstrates, their participation was more than theoretical. It was direct. From November 2020 through January 2021, both Murdochs were in close contact with FNN CEO Suzanne Scott about FNN’s coverage of the 2020 Presidential Election. Lachlan testified that he works with FNN through Scott, Ex.130, L.Murdoch 261:22-23, and he weighed in on the “specific direction on both the tone and narrative of Fox’s news coverage” during the November 2020 to January 2021 period, *id.* 115:17-22. Likewise, Rupert spoke with Scott multiple times a week, via phone calls and emails with “suggestions” on hosts, narratives, topics, and guests—including on issues related to the 2020 election; how to cover the conspiracy claims; how to treat Trump; the hosts of the accused broadcasts; and

guests like Rudy Giuliani.⁷ As Rupert testified, “I’m a journalist at heart. I like to be involved in these things.” Ex.600, R.Murdoch 78:22-23.

Scott would discuss “all aspects of the business” with Rupert and Lachlan. Ex.143, Scott 156:5-17. Scott testified that Rupert and Lachlan each call “about once a day,” Ex.143, Scott 165:23-166:5, whereas Rupert testified he speaks to her “once, twice a week,” Ex.600 R.Murdoch 163:24-14, but the effect is the same. Rupert “will generally ask what’s going on in the news and, you know, share any stories because he is not at the morning editorial, and I usually read off what was on the agenda item from the 8:30 editorial....Rupert loves the news....So it’s usually around the news editorial agenda that I received that morning.” Ex.143, Scott 166:6-167:4. And although Rupert denied it, Scott admitted that Rupert and Lachlan will attend the 3:00pm editorial meeting. Ex.143, Scott 167:5-17. As discussed in more detail below, on November 8, 2020, Scott, Rupert, and Lachlan had a “long talk”

⁷ E.g., Ex.600, R.Murdoch 75:9-76:25, 78:5-9, 78:17-81:2, 104:2-19, 118:15-120:6, 144:1-14, 144:22-145:7, 145:8-18, 163:24-25, 180:16-182:4, 183:4-22, 186:7-187:4, 188:23-189:18, 189:23-191:20, 192:16-21, 194:20-195:22, 195:24-197:10, 199:12-200:20, 203:18-205:24, 207:8-20, 207:21-208:8, 210:13-211:25, 216:25-219:18, 228:8-233-17, 238:7-239:17, 241:15-242:23, 243:23-246:19, 246:20-247:24, 249:7-251:20, 253:7-254:7, 254:20-255:15, 255:17-256:9, 257:19-259:14, 260:21-25, 264:9-21, 265:4-267:8, 269:10-271:2, 274:19-275:15, 277:7-21, 277:22-278:7, 278:24-280:19, 280:21-283:2, 292:16-298:1, 317:2-6; Ex.143, Scott 35:17-43:20, 86:24-87:6, 93:6-94:12, 102:5-105:13, 127:5-13, 130:22-131:21, 133:8-19, 155:18-157:6, 162:9-164:18, 169:21-171:3, 171:23-173:7, 177:11-21, 184:5-17, 273:4-276:23, 325:4-327:5, 358:8-360:17, 364:9-23, 366:9-367:23.

about “the direction Fox should take” in response to FNN’s falling ratings and viewer backlash. Ex.600, R.Murdoch 232:2-233:17, *infra* p.19.

B. November 3 Through 7: The Election And Its Immediate Aftermath.

On the night of the election and the days following, both Rupert and Lachlan played an active role in FNN’s coverage. Lachlan monitored how FNN handled reporting on the election, including how FNN would report the final call for Biden. Ex.130, L.Murdoch 97:11-98:6. He likewise discussed with Scott whether to pull Fox’s controversial call for Arizona after it was made. Ex.602.

During Trump’s campaign, Rupert provided Trump’s son-in-law and senior advisor, Jared Kushner, with Fox confidential information about Biden’s ads, along with debate strategy. Ex.600, R.Murdoch 210:6-9; 213:17-20; Ex.603 (providing Kushner a preview of Biden’s ads before they were public). But, on election night, Rupert would not help with the Arizona call. As Rupert described it: “My friend Jared Kushner called me saying, ‘This is terrible,’ and I could hear Trump's voice in the background shouting.” Ex.600, R.Murdoch 65:6-8. But Rupert refused to budge: “And I said, ‘Well, the numbers are the numbers.’” *Id.* 65:9. By this point, Rupert knew no fraud had occurred:

Q. It is fair to say you seriously doubted any claim of massive election fraud?

A. Oh, yes.

Q. And you seriously doubted it from the very beginning? ...

A. Yes. I mean, we thought everything was on the up-and-up. I think that was shown when we announced Arizona.

Ex.600, R.Murdoch 64:16-25.

Rupert testified that he was “very much aware,” that Trump was not happy with Fox’s Arizona call, *id.* 88:22-25. Rupert also called Mitch McConnell immediately after the election, and thought it was “probably true” that during that call Rupert “urged him to ask other senior Republicans to refuse to endorse Mr. Trump’s conspiracy theories and baseless claims of fraud.” *Id.* 89:22-90:13.

Fox’s call of Arizona for Biden also set off a flurry of negative conservative commentary and viewer backlash. Dom. MSJ pp.23, 26-38. FC executives were well aware. Lachlan discussed viewer backlash with Scott after the call was made. Ex.130, L.Murdoch 104:6-16. Indeed, FC had an entire “Brand Protection Unit” led by FC Senior Vice President Raj Shah that was tasked with monitoring—and mitigating—criticisms of Fox. Ex.605, Shah 63:17-65:9. On November 4, Shah told Lachlan and CLPO Viet Dinh, “Lots of conservative criticism of the AZ call.” Ex.193. The next day, Shah emailed Dinh a Tweet by a *New York Times* reporter that claimed Fox “*will* call the presidency for Biden if PA tips his way tonight” and warned Dinh that if they made this call, “we’re going to get hit very hard by the right.” Ex.606; *see also* Ex.612 (November 6 Shah email to Scott, Lachlan, and Dinh discussing backlash).

On November 5, former Trump adviser and election conspiracist Steve Bannon appeared on Maria Bartiromo's show claiming that "President Trump won an overwhelming victory on Tuesday night." Ex.610 at 2:7-8. Col Allan—the editor of the *New York Post*, another media entity controlled by the Murdochs—alerted Rupert to the clip and added: "Wow." Ex.608. Murdoch then called Scott and asked to see the clip. Ex.600, R.Murdoch 221:10-17. Scott dutifully complied. Ex.609. At this point, Rupert was concerned about making false claims of election fraud—as Meade Cooper, Fox's EVP of Primetime Programming, admitted FNN executives were too. Ex.108, Cooper 176:6-14.

That same evening, Hannity told his audience that "it will be impossible to ever know the true, fair, accurate election results, that's a fact." Ex.200. That comment generated backlash and calls for boycotts. FC's Viet Dinh commented to Lachlan, Scott, and FNN Senior Executive Vice President of Corporate Communications Irena Briganti: "Let's continue to buckle up for the ride for next 24 hours. Hannity is getting awfully close to the line with his commentary and guests tonight." Ex.745. Also that day, the *New York Post* ran an article entitled, "Downcast Trump makes baseless election fraud claims in White House address." Ex.746. Tucker Carlson and his team noticed this change in coverage at the Murdochs' newspaper. Ex.199 at FNN035_03890623.

The next morning, November 6, Rupert emailed Scott. That email—which also included Rupert’s “very hard to credibly cry foul everywhere” statement (Ex.151)—discussed what Fox hosts should say about the false narrative that Trump had won: “Everything seems to be moving to Biden and if Trump becomes a sore loser we should watch Sean especially and others don’t sound the same. Not there yet but a danger.” Ex.151. Scott responded: “Agree on all.” Ex.752. Scott then forwarded that email to Meade Cooper. Ex.747. Cooper agreed that Scott forwarded Rupert’s instruction “because as the executive in charge of prime time programming and Sean Hannity’s show,” Scott “wants to make sure that you see this email.” Ex.108, Cooper 186:15-19. Cooper understood the import of Rupert’s words: “I would interpret that to mean that if former President Trump clearly lost and isn’t accepting the results of the election, that we should make sure that Sean does not go down that same path.” *Id.* 186:9-14. Cooper then testified: “I would imagine there would have been a follow-up conversation if this is something that came from Mr. Murdoch.” *Id.* 187:7-18. Cooper confirmed she followed up with the shows to ensure they would not discuss fraud allegations after receiving Rupert’s email to Scott. *Id.* 188:16-189:4. This was the same time when Cooper and David Clark, the Fox line executive for weekend programming, canceled Jeanine Pirro’s show because they were “very doubtful that [she’ll] behave responsibly,” *id.* 190:10-15, and “[h]er guests are all going to say the election is being stolen and if she pushes

back at all it will be just a token,” Ex.106, Clark 155:8-11; *see id.* 157:9-19; 160:7-14; *see also* Dom. MSJ pp.23, 106-107.

Meanwhile, Rupert told the *New York Post*’s Col Allan that “[w]ith several states now disappointingly favoring Biden hard to claim foul everywhere”—and that half of what Trump was saying was “bullshit and damaging.” Ex.613. Allan responded that they would prepare “an editorial admiring trumps achievements in office but urging him to consider the nation and his own legacy as it becomes increasingly clear he has lost office. It is time for acceptance and dignity.” Rupert: “That’s great. Thanks.” Ex.753.

The next day, November 7, [REDACTED]
[REDACTED] Rupert told Allan, “Just saw a bit of Rudy ranting. A terrible influence on Donald.” Ex.615; *see also* Ex.614. Allan agreed, responding that Giuliani was “unhinged. Has been for a while. I think booze has got him.” Ex.615. [REDACTED]

[REDACTED] Trump should “quit[] the conspiracy-addled talk of a ‘stolen’ election.” It continued, “the president’s aides have shown no evidence the election has ‘stolen.’...It undermines faith in Democracy, faith in the nation, to push baseless conspiracies. *Get Rudy Giuliani off TV.*” [REDACTED]

[REDACTED] The *New York Post* published it [REDACTED]
[REDACTED]

Also on November 7, Fox called the election for Biden. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Rupert lamented to Lachlan immediately after: “We should and could have gone first but at least being second saves us a Trump explosion!” Ex.617. Lachlan responded, “I think good to be careful. Especially as we are still somewhat exposed on Arizona.” *Id.*

C. After the Call: Fox Executives Comprehend the Magnitude of Viewer Backlash—and Change Strategies.

The hope that calling the election would ease the backlash quickly gave way to the reality that viewer anger at Fox was only growing worse. The night of November 7, after Fox called the election, Fox Business Network (“FBN”) President Lauren Petterson wrote FBN executive Gary Schreier that she had turned off Fox’s coverage: “I don’t know how we work here. Honestly. We are going to look back

at this week and know this was when we lost a significant part of our audience who won't come back. As soon as Facebook starts telling people to go to [N]ewsmax." Ex.604. But Schreier and Petterson saw an opening: "You know though between us. This is a problem for the channel yes. But if we keep doing what we do, fbn will get a bunch of the disenfranchised folks too." *Id.* at FNN059_04466159. Petterson responded: "100 percent. I was talking about exactly that with my husband last night. It's actually an opening for us." Schreier: "Yes. We just can't play for it openly like newsmax and oan." *Id.*

The next morning, November 8, Maria Bartiromo aired her pre-taped interview with Sidney Powell. David Clark was the line executive directly responsible. Ex.106, Clark 11:12-15. And like the Murdochs and Scott, Clark also knew by November 7 that Joe Biden had been legitimately elected and agreed "that there was no credible evidence of massive cheating or fraud that would flip the election. *Id.* 230:22-231:21. But unlike the cancellation of Pirro's show that Clark had just participated in, Fox executives did not cancel Bartiromo.

Bartiromo's show elevated Dominion and Powell from "conspiracy tangent," to use Clark's words, to the mainstream. Ex.293. As Tucker Carlson stated later that night: "The software shit is absurd....Half our viewers have seen the Maria clip." Ex.169 at FNN035_03890644. As Schreier told Petterson that day: "The problem

is that she [Maria] has gop conspiracy theorists in her ear and they use her for their message sometimes. I wish she had that awareness.” Ex.604 at FNN059_04466161.

Meanwhile, Rupert emailed Scott early that afternoon of November 8 that Fox was “[g]etting creamed” by CNN. Ex.295. What was CNN covering that day? How “Fox is enabling Trump’s election denialism.” Ex.607. Irena Briganti sent a summary of the CNN broadcast to Scott before Murdoch’s email. According to the summary received by Scott, the segment discussed: “Right-wing media promoting voter fraud”; “FNC is enabling and encouraging Trump’s impulses”; “Aiming to destabilize the American system by telling viewers the election was stolen by deep state Democrats”; “Hannity is dishonest to his core; he is not going to change overnight - but where are the adults in the room? Where is Suzanne Scott? Is she ok with hosts going on air to undermine the election?”; “If Suzanne Scott is not going to do it, maybe Lachlan/Rupert need to make sure the hosts aren’t pushing this information.” *Id.*

Soon after Rupert’s email, Scott had a “long talk” with both Rupert and Lachlan. They discussed the mounting viewer backlash to Fox, how to win back viewers (including by not booking Democratic guests), and “the direction that Fox should take.” Ex.600, R.Murdoch 233:13-15; Ex.611. Rupert conceded that in that conversation, they also spoke about “the future of Fox going forward.” Ex.600,

R.Murdoch 229:11-14. Rupert confirmed that they discussed how Fox should react to the fact that Trump was not conceding. *Id.* 230:1-13.

And Rupert confirmed that the decision was to allow these “wild claims” on air, although he phrased it as his lawyers now do that it was only a matter of “reporting the news”:

Q. And you were aware that Fox News was having these people appear on the television under Fox’s banner to spread these charges?

A. We report the news, and we have dozens of people a day on the channels that are talking about the news. *And this was big news. The President of the United States was making wild claims, but that is news.*

Ex.600, R.Murdoch 130:10-20.

In short, Suzanne Scott, Rupert, and Lachlan made a decision. No more alienating Fox viewers. Instead of tamping down talk of conspiracy and Trump being a “sore loser,” they would allow Fox to air these “wild claims.” Instead of completely rejecting the false notions of election fraud, Scott, Rupert, and Lachlan doubled down. They were indeed “ok with hosts going on air to undermine the election,” as Briganti summarized the query from CNN. Ex.607. That evening, Fox rebroadcast Bartiromo’s interview with Powell. Dom. MSJ pp.117.

The next day, November 9, 2020, Rupert’s friend General Jack Keane wrote: “Dear Rupert, Maria B’s Sunday show provided excellent coverage of serious election fraud allegations. Given that 4 contested states almost simultaneously

stopped counting votes around midnite followed later by Alaska appears to be a coordinated and possibly a pre-planned event if Trump was leading.” Ex.618. Keane continued: “Moreover the Trump lawyers are alleging that the Democrats developed a software computer program to switch and also add votes which would help explain the reason for the vote stoppage.” *Id.* Rupert responded: “Thanks Jack, You may be right but Donald needs better lawyers than Rudy, who is past his prime.” *Id.*

That same day, Rupert and Scott continued to examine the direction of Fox. Scott discussed with Rupert the importance of “keep[ing] the audience who loves and trusts us...we need to make sure they know we aren[’]t abandoning them and still champions for them.” Ex.619. Rupert responded: “Thanks. All very true. Lots of sane Fox viewers still believe in Trump. Jack Keane for instance.” *Id.*

Also that same day—November 9—Scott told Lachlan: “[W]e will highlight our stars and plant flags letting the viewers know we hear them and respect them....today is day one and it’s a process....” Ex.214 at FoxCorp00056541-FoxCorp00056542. Later that day, Scott wrote Irena Briganti: “Irena—just spoke to Lachlan. Can you call Raj [Shah] and walk him through everything we are doing...I’m told he made a comment that maybe we [are] changing based on our coverage this weekend.” Ex.647.

D. November 10-12: Concern About Fox’s Election Coverage and Fallout Rises to the Board Level.

On November 10-12, FC held an in-person Board meeting in Los Angeles. Scott flew out for it. Former Speaker of the House and FC Board Member Paul Ryan confirmed that all Board members and business unit leaders attended. Ex.650; Ex.620, Ryan 147:13-154:16. Ryan testified that it “wouldn’t surprise me” if they discussed the topic of FNN coverage of the election. Ex.620, Ryan 156:7-10. When asked whether “the topic of Donald Trump spreading baseless election conspiracy theories” came up, Ryan responded: “This is November 11th, so it would surprise me if we were not talking about the news today.” *Id.* 156:16-24. And when asked whether the topic of FNN covering these conspiracies arose, Ryan testified: “Not that I can recall, but it’s not implausible at all.” *Id.* 156:25-157:6.

The Board also discussed the future of cable and streaming services. Ex.620, Ryan 154:21-155:9. It heard presentations about “Fox Nation,” a streaming service that would “Super-Serve & Expand Our Loyal Audience” and “Keep [the] audience within the Fox News ecosystem.” Ex.621 at FNN019_03551613, FNN019_03551618; Ex.620, Ryan 157:19-164:8. It was also “a topic du jour” that Trump was trying to build his own TV network. Ex.620, Ryan 174:14-175:2. Indeed, the day the Board meeting ended, Board Member Anne Dias forwarded Ryan an Axios article with the tagline, “Scoop: Trump eyes digital empire to ‘wreck

Fox,” noting that it was “exactly as you described it: Trump needs a scapegoat, and it’s now Fox.” Ex.622.

As a Board Member, Ryan believed that the period immediately following the 2020 Presidential Election “was a pretty important inflection point, not just for the company Fox, but for the country and for the conservative movement itself,” and shared this “view as a fiduciary” with Rupert and Lachlan. Ex.620, Ryan 266:25-267:24, 269:6-23; *see id.* 261:24-262:4 (“Q. And you thought it was in Fox News’ interest to separate out these fringe claims of voter fraud, correct? A. Yeah, that’s my fiduciary duty.”). He confirmed that the “inflection point” was not just one day; “it was the whole time” in the post-election November/December timeframe. *Id.* 277:17-25. Ryan knew that “these conspiracy theories were baseless” and that Fox “should labor to dispel conspiracy theories if and when they pop up.” *Id.* 263:2-264:10. Ryan also understood that when events occur, Fox “can clearly amplify that news being made by covering it.” *Id.* 36:23-37:13. Ryan believed “there ought to be a listing of all the allegations and then all the evidence or the validation or invalidation of those [election fraud] allegations just for the viewers’ sake,” and suggested as much to Fox’s senior management. *Id.* 267:25-269:9. ***Ryan told Rupert and Lachlan “that Fox News should not be spreading conspiracy theories.”*** *Id.* 317:11-25; *see also id.* 342:19-343:19.

Ryan was aware, through coverage by other media outlets, that FNN was having Powell and Giuliani on air to spread conspiracy theories about Dominion. *Id.* 146:9-16; *see also id.* 370:17-24. Ryan gave Lachlan and Rupert “plenty of suggestions” with respect to programming, as well as suggestions regarding content and show hosts. *Id.* 410:8-22. Specifically, he told the Murdochs that Fox “should be pivoting at this key inflection point during November 2020 through January 2021,” consistently advising them “to move on from Donald Trump and stop spouting election lies.” *Id.* 410:23-411:9; Ex.638.

E. November 11-18: Fox Executives Continue To Be Preoccupied With Viewer Backlash And Competition.

In the days after the election, FC’s Raj Shah reached out to public opinion and data company YouGov about acquiring polling data from FNN viewers, explaining that “our brand is under heavy fire from our customer base,” and “[o]ur concern is Newsmax and One America News Network.” Ex.623 at FoxCorp00032842, FoxCorp00032843. On November 11, Shah shared YouGov data showing “more clear declines in favorability, especially with primetime viewers” with Irena Briganti, following up later that day to tell her that “on our current course, if not already then by the weekend, opinions of Fox from our core viewers will be underwater.” Ex.624 at FoxCorp00053724, FoxCorp00053725. He told Briganti, “I’ve shared my thoughts with Lachlan and Viet, that bold, clear and decisive action

is needed for us to begin to regain the trust that we're losing with our core audience.”

Id. at FoxCorp00053724.

Shah's November 13 Brand Protection Unit Roundup to Lachlan, Dinh, and Scott continued to show “strong conservative and viewer backlash to Fox that we are working to track and mitigate,” noting that “[b]oth Donald Trump and Newsmax have taken active roles in promoting attacks on Fox News” and that “[p]ositive impressions of Fox News among our viewers dropped precipitously after Election Day to the lowest levels we've ever seen.” Ex.625. A few days later Shah sent an update to Lachlan and Dinh, providing polling data and social media analytics and warning, “We are now underwater with our viewers in 3-day tracking, and continue to show declines in 1 and 2-week averages.” Ex.626. Lachlan testified that he paid “close attention” to Shah's Brand Protection reports. Ex.130, L.Murdoch 139:21-24. Indeed, Lachlan testified that the drop in Fox's ratings would “keep me awake” at night. *Id.* 147:19-24. And naturally so: As FC Board Member Ryan testified, “If ratings go down, revenue goes down.” Ex.620, Ryan 157:23-158:4.

Meanwhile, Lachlan continued to advise on how Fox should cover the news related to the 2020 Presidential Election. For instance, he told Scott on November 14 during Fox's coverage of a rally in support of Donald Trump that “News guys have to be careful how they cover this rally. So far some of the side comments are slightly anti, and they shouldn't be. The narrative should be this is a huge celebration of the

president.” Ex.627; *see* Ex.130, L.Murdoch 116:4-119:11. Scott responded: “Yes thanks”; and when Lachlan then criticized Leland Vittert’s coverage as “[s]mug and obnoxious,” Scott said she was “calling now” to direct Vittert’s producer to fix the issue. Ex.627; Ex.130, L.Murdoch, 122:1-15. And indeed she did. Executive David Clark reported: “Also got called by Jay who heard from SS that Leland was being smug and condescending. I texted him and told him to cut it out and DC EP spoke to him.” Ex.628. Lachlan even gave his input on the chyron that appeared at the bottom of broadcasts, telling Scott that “the ticker at bottom of screen is all wrong. Way too wordy and long. And anti trump whenever possible.” Ex.629.

Rupert testified, “I admit I am a bit of a political junkie and a news junkie,” Ex.600, R.Murdoch 187:12-14, and that he follows his newspapers, *The Wall Street Journal* (“*WSJ*”), *The London Times*, and the *New York Post*, *id.* 16:17-19. He further testified that he specifically reads the *WSJ* editorial page “every day.” *Id.* 123:17-18. On November 14, Rupert responded to an article about election fraud sent by News Corporation CEO Robert Thomson, saying “But where’s the evidence?” Ex.630.

Three days later, the Editorial Board of the *WSJ* ran an editorial entitled “Rage Against the Voting Machine” about allegations of fraud against Dominion, asking the very same question: “Where’s the evidence?” Ex.631. Murdoch testified at his deposition that he agrees with the article, which is “a very thoughtful examination

of the whole situation” and “absolutely” rejects the allegations against Dominion. Ex.600, R.Murdoch 124:8-23. The *WSJ* news section also carried an in-depth story about Dominion that day that addressed the false accusations in detail—including not only Dominion’s denials but also the mountain of third-party evidence and official statements that rebutted them. Ex.651.

The day before the *WSJ* editorial and article appeared—November 16—Dominion’s Communications Consultant Tony Fratto, former Deputy White House Press Secretary under President George W. Bush, personally brought the false allegations to the attention of the two top executives at FNN—Scott and Wallace—telling them that Dominion, “as you know, has received a great deal of attention on FoxNews [sic] and from the President. An enormous amount of misinformation -- actually, completely and verifiable wrong information—is finding its way on-air.” Ex.235. Fratto offered to provide the two of them a briefing about Dominion and concluded: “I think this situation is crossing dangerous lines.” *Id.* Scott responded asking Wallace to provide his thoughts, *id.*, and Wallace and Fratto then spoke over the phone, Ex.147, Wallace 209:21-211:3, 217:12-218:6; Ex.119, Fratto 229:24-235:22. When Lou Dobbs again broadcast lies about Dominion that very night, Fratto reached out again to Wallace. He forwarded part of the transcript to Wallace and told him: “More fucking out [and out] lies. Honestly. He is a disgrace.” Ex.236.

On the same day Fratto reached out to Scott and Wallace, Rupert emailed Scott and later followed up by phone about the subjects discussed. Ex.239; Ex.600, R.Murdoch 246:12-19. Rupert wrote: “See today’s piece in Journal about Newsmax. These people should be watched, if skeptically. Trump will concede eventually and we should concentrate on Georgia, helping any way we can. *We don’t want to antagonize Trump further, but Giuliani taken with a large grain of salt. Everything at stake here.*” Ex.239.

As Rupert explained at his deposition, he did not want to antagonize Trump because “He had a very large following, and they were probably mostly viewers of Fox, so it would have been stupid.” Ex.600, R.Murdoch 245:20-25.

F. November 19-December 1: Fox Gets Powell Disavowed After Her Fight With Carlson—But Keeps Bringing Her On Air.

On November 19, when Rupert watched Giuliani and Powell spread their stolen election lies at that now infamous press conference, he told Scott: “Terrible stuff damaging everybody, I fear. Probably hurting us too.” Ex.181. Murdoch clarified at his deposition, “‘Us’ being Fox News,” Ex.600, R.Murdoch 118:21-24. And he sent News Corporation CEO Robert Thomson an email with subject “Watching Giuliani!” stating “Really crazy stuff. And damaging.” Ex.156. Of course, at the same time Rupert believed that Giuliani was spewing “Really crazy stuff,” Rupert testified he also “assumed” Giuliani was “pushing” those same lies on FNN. Ex.600, R.Murdoch 129:22-130:9.

On November 20, Raj Shah learned that Powell—purportedly Trump’s lawyer at the time—did not have an engagement agreement with Trump. Ex.605, Shah 273:14-20. As explained in Dominion’s Motion for Summary Judgment, following Powell’s public fight with Carlson, Shah took it upon himself to generate Trump administration pushback against Powell’s “*outlandish voter fraud claims*” and get Powell disavowed by the campaign. Dom. MSJ pp.40-43 & Ex.163.

On November 23, former Murdoch lieutenant and ABC News President Preston Padden sent Rupert an article from the website Mediaite entitled “Fox News Identity Crisis: Indulge Trump’s Election Conspiracy or Reject It...and Watch Its Audience Flee?” Ex.634; Ex.600, R.Murdoch 134:19-135:6; Ex.636. The article explained that FNN’s “top-rated opinion hosts have continued to entertain the increasingly loony conspiracy theory that the election was stolen from Trump through widespread voter fraud.” Ex.636. The article further explained that Maria Bartiromo,

[H]ad just given the platform of her Sunday morning show to Trump lawyers Rudy Giuliani and Sidney Powell. Both laid out wild and unproven conspiracy theories and claimed Trump was the rightful winner of the election. Bartiromo seemed pleased to hear the news and never once challenged her guests on their claims, simply accepting their claim that they had evidence as evidence enough.

Id. Rupert reviewed the article and agreed that it had “[s]ome truth,” but noted that he had “been listening sometime to Tucker Carlson” who had “called out that crazy would be lawyer,” Powell. Ex.634; Ex.600, R.Murdoch 138:18-21. Rupert told

Padden that “generally, we are navigating it pretty well.” Ex.600, R.Murdoch 139:2-4. Rupert testified that by this he meant “we are reporting it well,” and he confirmed that Fox was “trying to straddle the line between spewing conspiracy theories on one hand, yet calling out the fact that they are actually false on the other.” *Id.* 139:14-19.

Rupert then explained why he believed it was acceptable to air these conspiracy theories: “We were treating it as news that the president and his lawyers were saying this. We were commenting on it to say it was nonsense, or Tucker was.” *Id.* 139:19-22. Rupert admitted, however, that other hosts did not call the claims nonsense and in fact endorsed “this false notion of a stolen election.” *Id.* 361:15-362:21. Indeed, Rupert said of Dobbs: “he’s mad”; *i.e.*, crazy. *Id.* 140:13-14. And Carlson himself later hosted Mike Lindell to spout lies about Dominion without any pushback. *Infra* §I.D.20.

Rupert confirmed that he “could have” told Scott, “Stop hosting Sidney Powell.” Ex.600, R.Murdoch 145:8-13. He said the same of Giuliani:

Q. And you could have said to Suzanne Scott or to the hosts, “Stop putting Rudy Giuliani on the air”?

A. *I could have. But I didn't.*

Id. 317:2-6.

On December 1, a reporter with *The Washington Post* emailed FNN stating that Powell had appeared on both Dobbs and Hannity's programs the day before making claims of voting machine fraud. Ex.637. The reporter asked,

[D]oes Fox News Media management have any concerns about the veracity of the claims that Powell has been making on network shows? Is Sidney Powell welcome to appear on any Fox News Media show? Has Fox News Media encouraged show hosts to fact-check claims about voter fraud?

Irena Briganti forwarded the inquiry to Scott and Wallace, stating "FYI—we spoke with Lauren [Peterson] and Meade [Cooper] and there's nothing to combat this, so we are not responding." *Id.*

G. December 6-January 6: Fox Executives Continue To Debate How To Cover The Conspiracy Allegations—Right Up To January 6.

On December 6, 2020, Paul Ryan texted Rupert and Lachlan, telling them, "we are entering a truly bizarre phase of this where [Trump] has actually convinced himself of this farce and will do more bizarre things to delegitimize the election. *I see this as a key inflection point for Fox, where the right thing and the smart business thing to do line up nicely.*" Ex.638. He called for Fox to put forth "*solid pushback (including editorial)* of [Trump's] baseless calls for overturning electors." *Id.* ("Editorial" was "a reference to the opinion hosts." Ex.620, Ryan 273:19-22.) On December 7, after receiving Ryan's text, Rupert wrote to Lachlan: "Call me later re Trump and Paul. Trump on Saturday sounded really crazy." Ex.660.

Also on December 7, Rupert told Scott that Trump’s “horrible” inauguration plan, the possibility of Attorney General Bill Barr’s early retirement, and Trump’s “crazy” performance the prior Saturday in Georgia (when he called for the Georgia governor to help overturn the election) were “*all making it harder to straddle the issue!*” We should talk through this. Very difficult and we should include Lachlan later.” Ex.639; Ex.652. What was the issue that Fox was trying to straddle? As Ryan agreed, “Fox was trying to navigate this dynamic between a core group of Trump loyalists who were ignoring the truth and the truth itself.” Ex.620, Ryan 336:15-20.

Within a week, Fox had finally stopped hosting Powell and Giuliani.

On December 28, Robert Thomson sent Rupert a *New York Post* editorial, “Mr. President...Stop the Insanity. You lost the election—here’s how to save your legacy,” and said he had spoken to editor Col Allan who “agreed that we should take a stronger line.” Ex.640. The editorial stated ballots in Wisconsin and Georgia “were counted *by hand*, which alone debunks the claims of a Venezuelan vote-manipulating Kraken conspiracy. Sidney Powell is a crazy person.” Ex.653 (emphasis in original).⁸ Rupert emailed Allan, “Just read the whole editorial. Just Great.” Ex.641.

⁸ The headline on the *New York Post*’s website has since been changed to “Give it up, Mr. President—for your sake and the nation’s.”

Rupert understood that Fox *could* do something about the false claims. Indeed, he believed Fox was “uniquely positioned to state the message that the election was not stolen.” Ex.600, R.Murdoch 257:19-258:3. On January 5, Rupert and Scott discussed whether Hannity, Carlson, and Ingraham should say some version of “The election is over and Joe Biden won.” Ex.277. He hoped those words “would go a long way to stop the Trump myth that the election stolen.” *Id*; Ex.600, R.Murdoch 258:5-14. Scott told Rupert that “privately they are all there” but “we need to be careful about using the shows and pissing off the viewers.” Ex.277. So nobody made a statement.

The next day was January 6.

**H. January 6 and After: Fox Executives Try to Move Past Trump—
But Find It Difficult.**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On January 8, Preston Padden sent Rupert an article from *The Washington Post* stating that “The pro-Trump media world peddled the lies that fueled the

Capitol mob. Fox News led the way.” Ex.643 at FoxCorp00061029. Padden followed up with an email stating “I do think Fox News needs a course correction.” *Id.* at FoxCorp00061028. Rupert responded, “***Fox News very busy pivoting.... We want to make Trump a non person.***” *Id.*

On January 11, 2021, FC Board Member Anne Dias told Rupert and Lachlan that “***considering how important Fox News has been as a megaphone for Donald Trump***, directly or indirectly, I believe the time has come for Fox News or for you, Lachlan, to take a stance. It is an existential moment for the nation and for Fox News as a brand.” Ex.645; Ex.620, Ryan 171:11-12, 323:20-325:25. Lachlan emailed Rupert to discuss, and Rupert responded, “Just tell her we have been talking internally and [] intensely along these lines, and Fox News, which called the election correctly, ***is pivoting as fast as possible. We have to lead our viewers which is [] not as easy as it might seem.***” Ex.646.

Paul Ryan also continued to discuss strategic direction with the Murdochs during this timeframe. Ex.620, Ryan 329:9-15, 410:23-411:9. Ryan told Dias about his own conversation with Rupert and Lachlan, reporting he told them that “this is a huge inflection point to keep Trump down and move on for the future of the conservative movement.” *Id.* 321:10-14. Ryan added: “Both Rupert and Lachlan agree fully. The key is to execute our collective will.” *Id.* 321:17-18. Ryan agreed it was his job as a Board member to weigh in because “it was a strategic decision

about what to do.” *Id.* 322:4-8. Ryan was “hopeful that the events of January 6 were so shocking that it would help the conservative movement and Fox News move on from Donald Trump.” *Id.* 327:11-19.

On January 12, Ryan discussed with Rupert and Lachlan an article called “The Alternate Reality Machine” about how “the right-wing media ecosystem created an alternative reality for those who had come to rely on its outlets for news” and were the “enablers” of January 6. Ex.620, Ryan 331:18-334:4; Ex.666. Ryan believed that “some high percentage of Americans” thought the election was stolen “*because they got a diet of information telling them the election was stolen from what they believe were credible sources.*” Ex.620, Ryan 334:6-15. Rupert responded to Ryan’s email: “Thanks Paul. Wake-up call for Hannity, who has been privately disgusted by Trump for weeks, but was scared to lose viewers.” Ex.666. Ryan replied: “[T]he sooner we can put down the echoes of falsehoods from our side, the faster we can get onto principled loyal opposition. I truly hope our contributors, along with Tucker, Laura, and Sean get that and execute.” *Id.* Rupert replied back: “Just talked at length with Suzanne Scott. Everything changed last Wednesday [January 6]. She thinks everyone is now disgusted and previous supporters broken hearted.” *Id.* He then asked Ryan for suggestions for contributors to Fox. *Id.*

Fox Executives did make one exception, however, [REDACTED]. In mid-December, Mike Lindell criticized Fox for supposedly being “‘in on’ stealing

the election from Trump.” Ex.667. Scott sent a personal note and a gift to Lindell. *Id.* She also suggested that shows book Lindell because he would “get ratings.” Ex.668. On January 26, 2021, Tucker Carlson had Lindell on air to spread lies about Dominion. Carlson and his team gave advance notice of the appearance not only to Scott, but to FC executive Raj Shah. Ex.719. [REDACTED]

[REDACTED] As Rupert testified, “The man is on every night. Pays us a lot of money...At first you think it’s comic, and then you get bored and irritated. [REDACTED]

[REDACTED] Ex.600, R.Murdoch 298:3-14. Rupert confirmed that he could tell FNN to stop running Lindell’s advertisements, “But I’m not about to.” *Id.* 300:24-301:5. And when asked why Fox continues to give a platform to Lindell—who continues to this day to spout lies about Dominion—Murdoch agreed that “*It is not red or blue, it is green.*” *Id.* 299:14-16. Lindell brought—and brings—Fox a lot of green. He also predictably brought the same lies about Dominion to Fox’s viewers that had been peddled on Fox’s “alternate reality machine” for months.

During the period after the 2020 Presidential Election, Rupert was “in constant discussion with Lachlan and to a lesser extent with Scott, because we were

discussing everything,” including “the fact that this was a key inflection point for Fox about how to respond.” Ex.600, R.Murdoch 253:11-254:5. Rupert testified, with respect to the lies around the 2020 Presidential Election, that “I would have liked us to be stronger in denouncing it, in hindsight.” *Id.* 343:12-20. *See also id.* 361:15-362:17. He admitted it was “wrong for Tucker to host Mike Lindell to repeat those allegations against Dominion on January 26th, 2021,” if Carlson did not contest Lindell’s claims on air. *Id.* 345:4-8. He admitted, and Fox hosts have confirmed, he could have put a stop to Fox broadcasts featuring Sidney Powell, Rudy Giuliani, Mike Lindell, and their lies about Dominion. Ex.600, R.Murdoch 317:2-6; *see id.* 145:8-13; Ex.98, Bartiromo 259:23-260:7. But he—along with others in the chain of command at FC and FNN—allowed Fox to continue spreading the lies while they knew the entire time the charges were false.

RESPONSE TO FNN’S “UNDISPUTED” FACTS

Fox’s Statement of “Undisputed Facts” is rife with irrelevant evidence, misstatements of that evidence, and argument. It is anything but “undisputed.” Rather than face the facts of its actual malice from the top of the organization to the bottom, Fox focuses on the legally irrelevant issue of “newsworthiness,” and tries to wrap itself in the First Amendment. But the First Amendment protects broadcasters through the actual malice standard, not some separate gloss of “newsworthiness.” *US Dominion, Inc. v. Powell*, 554 F.Supp.3d 42, 57 n.8 (D.D.C. 2021).

Fox offers:

- Background information supposedly concerning Dominion from before the 2020 Presidential Election that is irrelevant, as it is either not about Dominion, not about the allegations at issue in this case, or both—and often wrong, to boot;
- An attempt to frame the accused broadcasts as merely reporting President Trump’s and his lawyers’ election fraud litigation, which (besides being legally irrelevant) ignores the lawsuits Trump and his campaign actually filed, and ignores that the campaign disavowed Powell before she ever filed a single lawsuit;
- Post-litigation testimony of certain Fox witnesses regarding the supposed credibility of the Dominion allegations that is belied by the contemporaneous documents, as well as mischaracterizations of the accused segments; and
- Argument that Dominion’s lawsuit was preordained from the start with no effort to “participate in the public dialogue,” which ignores the herculean efforts Dominion undertook to make Fox aware of both the falseness of the charges and the damage being done to Dominion.

In sum, FNN’s “undisputed” facts are disputed, irrelevant, or misleading.

They do not support summary judgment for Fox.

A. Fox’s Pre-Election Background “Facts” Are Irrelevant.

To read Fox’s recitation of facts about the voting machine industry before the 2020 Presidential Election (FNN MSJ pp.6-15), one would think this case is about whether Dominion’s machines could theoretically be hacked. But Dominion did not sue Fox for broadcasting discussions of potential “vulnerabilities.” In the words of Judge Nichols at the hearing on Sidney Powell’s Motion to Dismiss, “these are wildly different kinds of statements.” Ex.671, Powell MTD Hearing 33:15-16.

Judge Nichols stated: “Dominion is not arguing that it would have been defamatory to say that Dominion is at risk of being hacked or that there is a risk of election systems generally being hacked. They are saying what is defamatory is that your client says, we intentionally aided in election fraud. That is way different than saying, we are at risk of being hacked.” *Id.* 32:21-33:2. And he continued: “[S]tatements by various people that there are concerns about election security are not the same as saying a particular company intentionally committed voter fraud. So you can’t rely, in my view, on general concerns about election security that other people are stating to get at the question of whether someone claims that the Plaintiff was engaged in intentional voter fraud, whether that is defamatory and whether that was stated with actual malice.” *Id.* 33:5-16.

Dominion sued Fox for broadcasting the four categories of falsehoods described in the second paragraph of its complaint, and in its summary judgment argument. Compl. ¶2; Dom. MSJ p.46. The Court will not find a single pre-election citation in Fox’s brief that fits in any of these categories, and they therefore have no bearing on the claims before this Court. Regardless, the information is irrelevant on its own terms.

First, much of Fox’s evidence does not involve or even mention Dominion. Exs.D1-D3 (describing alleged vulnerabilities in voting machines generally); Exs.D4-D6 (mentioning Dominion’s competitor Smartmatic); Ex.D7 (mentioning

Dominion’s competitor ES&S). It is high time Fox stopped conflating Dominion with other voting machine companies.

Second, the articles that do mention Dominion have nothing to do with the allegations at issue. They focus on perceived vulnerabilities with voting machines or other industry-wide events/issues (Exs.D11-D15 (discussing perceived vulnerabilities); Exs.D26-27 (discussing hacker conference for voting machines); Ex.G4 (discussing Congressional inquiries into the voting industry at large)), or specific issues not relating to the 2020 Presidential Election (Ex.D8 (addressing the June, 2020, Georgia Primary Election)).

Similarly, the *Curling v. Raffensperger* litigation Fox emphasizes (FNN MSJ pp.11-12) does not concern any of the false claims at issue in this case. Rather, *Curling* involved hacking risks—risks that, even taking the allegations in that case at face value, were hypothetical and remote enough that the court refused to order any changes to Dominion’s voting system, which came through with flying colors on election day.

Third, even if these documents were somehow relevant, Fox mischaracterizes many of them. For example, Fox claims that Dominion has been at the center of voting machine controversies “since acquiring Diebold (which by then had rebranded itself as “Premier Election Solutions”) and Sequoia in 2010.” FNN MSJ p.8. Yet Fox’s own evidence shows that Dominion did not acquire Diebold, but

rather Dominion and another voting machine company (ES&S) each separately acquired some of Diebold's customer contracts. Ex.D9 p.2. Moreover, while Fox implies that Diebold and Sequoia machines were used in the states at issue in the 2020 Presidential Election, that is not true. By 2020, these machines were only used in Louisiana, and parts of Illinois, Florida, and New Jersey. Ex.672, Chavez-Casanova 187:6-189:12; Ex.673, Rosania 66:9-72:11; Ex.674, Herron 32:21-33:12, 55:20-56:5.

Finally, Fox cites to a handful of internal Dominion documents (and one Dominion employee's testimony) regarding supposed issues with Dominion's machines. FNN MSJ pp.15-16. But again, this information is legally and factually irrelevant. None of the issues raised in this evidence come anywhere near to the kind of defamatory accusations at issue in this case: namely, that Dominion purposefully used its machines to successfully steal the 2020 Presidential election, having designed its machines to do so at the behest of a Venezuelan dictator for that express purpose. That is the heart of the defamation in this case, and the existence of technological issues of the type that exist with any device does not give license to Fox to air false conspiracy theories about actual election-rigging.

B. Fox's "Blame Trump" Approach Is Legally Irrelevant and Factually Inaccurate.

Fox repeatedly insists that all it was doing was reporting allegations against Dominion by "the President and his legal team." FNN MSJ p.1. This defense is

legally invalid for all the reasons explained herein. *See infra* §I. It is also belied by the record for at least four reasons: (1) President Trump followed Fox’s lead, making the same allegations against Dominion only after Fox had made them; (2) Sidney Powell was not on the President’s legal team when she started making the Dominion allegations and was disavowed after being associated with that team for at most 8 days; (3) Powell received some of her information via Fox hosts, who then laundered the lies by hosting her on their shows; and (4) neither Trump nor his campaign ever filed a lawsuit alleging the at-issue statements.

First, Fox’s own recitation of the timeline of Trump tweets establishes that Fox went first, Trump went second. On November 7, 2020, President Trump retweeted a report of Georgia using the same machines as Antrim County. Ex.G6. Notably, Trump did not name Dominion, and certainly did not accuse Dominion of participating in an election-rigging conspiracy. The Trump campaign then filed a lawsuit on November 11 regarding the events in Antrim County MI that merely asserted there had been a “glitch” in the Dominion software. Ex.C2 ¶34. It was not until November 12 that Trump first made any allegations about Dominion intentionally switching votes, which he did via a tweet crediting OAN’s reporting. *See* Ex.G6 p.3. Though this tweet refers to OAN, it demonstrated Trump could be pulled back to Fox—provided the network broadcast what he wanted to hear. Indeed, later that same day, Trump tweeted his approval of Fox hosts attacking

Dominion, telling his followers that they “[m]ust see @seanhannity takedown of the horrible, inaccurate and anything but secure Dominion Voting System which is used in States where tens of thousands of votes were stolen from us and given to Biden. Likewise, the great @LouDobbs has a confirming and powerful piece!” Ex.683. From here on out, Trump had Dominion in his sights.

What changed between November 7 and November 12? Fox entered the fray. Specifically, on November 8 Maria Bartiromo brought Powell onto her show to air the false claim that Dominion machines “used an algorithm to calculate the votes that they would need to flip.” Ex.A2 p.15. The Fox platform gave Powell the stamp of credibility, and reach, needed to spread the lies about Dominion. And while Trump was widely known to be a voracious consumer of Fox, Bartiromo did not leave anything to chance. [REDACTED]

[REDACTED]

[REDACTED]

Second, Fox ignores what it knew better than the public at the time: Powell was never officially on the Trump campaign’s legal team, having never signed an engagement agreement. Ex.605, Shah 246:4-12; *id.* 273:11-20. When Fox was finally motivated to get to the bottom of the relationship between Powell and Trump (which only happened after Powell came after one of Fox’s own, Tucker Carlson), it took Fox but a day or so to get the truth. *See, e.g., infra* pp.163-164. And while

Trump did announce by tweet that Powell had been added to his legal team on November 14, the Campaign had publicly disavowed her by November 22, in response to pressure from Fox. *See supra* at Dom. MSJ pp.41-42.

Powell appeared on Fox only four times when she was even arguably part of the President's team, and six times when Fox was clearly aware that she was not. As important, Fox was instrumental in maneuvering Powell both into the Trump campaign and then out of it.

Third, Fox ignores its own role in developing the conspiracy theories it then aired. *See* Dom. MSJ pp.39-44.

Fourth, Fox frames its coverage as if it were merely reporting on the President's lawsuits. That is not the case, as a review of the allegations in the lawsuits it cites makes clear. As Giuliani himself told the court in one Pennsylvania lawsuit brought by the campaign, the lawsuit "is not a fraud case." *See Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 Fed.Appx. 377, 382 (3d Cir. 2020). Or to quote the headline of a November 23, 2020 *Wall Street Journal* article: "Trump Cries Voter Fraud. In Court, His Lawyers Don't." Ex.702. Only Powell's lawsuits, the earliest of which was filed on November 25 (after she had been disavowed by the Trump campaign), made allegations along the lines of the

defamatory statements accused in this case—allegations that Fox had been broadcasting for weeks before Powell’s lawsuits were filed.⁹

The facts about the cases Fox focuses on are as follows:

November 7: The Trump campaign files an Arizona election challenge alleging defects in the ballots and poll worker deviation from protocols, *not* a technological failure of vote tabulation machines. *See generally* Ex.C1. Dominion is not mentioned.

November 11: The Trump campaign files a challenge to results in Antrim County. The gravamen of the complaint is interference with Republican election observers, disputes about voter eligibility, and ballots being run through tabulating machines multiple times—not mechanical tabulation errors. *See* Ex.C2 ¶¶ 27-60. The complaint *concedes* that the Secretary of State found that the Antrim error was a result of the failure of a county clerk to properly update media drives, and does not allege any intentional misconduct by Dominion. *See id.* ¶¶ 60-62.

November 13: Lin Wood files a Georgia election contest, challenging certain changes in Georgia’s election laws. *See* Ex.C4 ¶¶ 25-50. The lawsuit was not filed on behalf of the President or his campaign, nor does it make any misconduct allegations against Dominion or even mention Dominion by name.

November 17: Lin Wood files an affidavit in his Georgia lawsuit alleging certain misconduct by Smartmatic (not Dominion). The affidavit was irrelevant to the subject matter of the underlying suit, and was never filed in any case brought by the Trump campaign. Ex.C5.

November 25: More than two weeks after Fox first gave her a platform to promote her conspiracy theories, and days after the campaign expressly disavowed her, Powell files lawsuits in Georgia and

⁹ None of these cases had any merit, and all were eventually dismissed, with Powell sanctioned in at least one. *See King v. Whitmer*, 556 F.Supp.3d 680, 688 (E.D. Mich. 2021).

Michigan. These lawsuits parrot the lies amplified by Powell and others on Fox. Exs.C8-C9.

December 1 & 2: Powell files two more lawsuits—in Wisconsin and Arizona—repeating the false allegations against Dominion. Exs.C11-C12.¹⁰

Fox’s coverage of the lies against Dominion was plainly not in response to the Trump campaign’s election litigation. In fact, the stark contrast between what Trump’s legal team was willing to say outside-of-court versus in was another giant red flag—though one Fox (unlike the *WSJ*) failed to explain to its viewers.

Fox’s oft-repeated falsehood that Smartmatic owned Dominion *was never alleged* in any of the complaints Fox cites for that proposition.¹¹ Nor does the outrageous claim that state officials were receiving kickbacks from Dominion appear in any of the complaints Fox claims it was reporting on.

Fox notes that 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.’”

¹⁰ In addition to the cases Fox cites in its brief, Fox includes cursory citations to various other lawsuits in its Appendix. These cases were not brought by Trump or his campaign, and some do not allege anything remotely implicating Dominion. Fox, cannot and does not seriously argue that they were covering these suits. *See* Exs.C3, C6, C7, C13, C14, C15, C16, C18.

¹¹ *See* FNN App’x p.46 (citing FNN Ex.C5 ¶¶ 4, 10, 16, 18, 21, 26; FNN Ex.C8 ¶¶ 5, 6, 7; FNN Ex.C9 ¶¶ 7, 146; FNN Ex.C12 ¶¶ 5, 8; FNN Ex.C11 ¶¶ 84, 90; FNN Ex.C16 ¶ 9; FNN Ex.C13 ¶ 58).

FNN MSJ p.22. But Fox leaves out Barr’s statement that “Nothing here should be taken as any indication that the Department has concluded that voting irregularities have impacted the outcome of any election.” Ex.G5 p.2. Nor does Fox note that (1) Barr on December 1 stated that the Department had found no credible evidence that any voter fraud had occurred which could impact the election, or (2) Fox hosts such as Lou Dobbs and Jeanine Pirro attacked Barr on the air for having the gall to say so. Ex.316; Ex.111, Dobbs 177:18-184:12; Ex.655.

C. Fox’s Post-Litigation Argument Ignores Contemporaneous Documents And Mischaracterizes Its Coverage.

Fox claims that its coverage of the 2020 Presidential Election was news-driven and fair, and includes other broadcasts as well. Putting aside the legal relevancy of this question, the evidence says otherwise.

First, Fox attempts to distract with testimony from Bartiromo, Dobbs, Pirro, and Carlson as to the supposed credibility of Powell and Giuliani and the seriousness of their allegations against Dominion. FNN MSJ pp.24-25. The “seriousness” of the charges do not matter. As Meade Cooper (and other witnesses) agreed, “you can cover the allegations and say they are conspiracy theories and not true.” Ex.108, Cooper 284:8-14. Moreover, Fox’s citations are meaningless in the face of the mountain of contemporaneous documents showing what these hosts and others at Fox actually thought at the time. *See* Dom. MSJ pp.149-151.

Second, Fox’s “evidence” of its primetime hosts pushing back on Powell and Giuliani is exceedingly weak, and ignores its hosts’ own repetition, amplification, and endorsement of the defamatory allegations against Dominion—endorsement that Rupert himself acknowledged. Ex.600, R.Murdoch 361:8-362:21.

Fox lists thirteen examples of alleged pushback. FNN MSJ pp.25-28. Of these examples, only seven involve an accused show. Of these seven, the supposed pushback consists almost entirely of questions focused on timing: asking when the lawsuits will be filed, or whether the guests will be able to compile their evidence in time for the electoral college vote in December—*not* questions expressing genuine skepticism regarding whether any evidence could possibly exist, and *not* questions about the ample evidence that *did* exist—that Fox knew about—debunking the wild allegations and undermining the credibility of the guests. Fox’s pushback narrative is also belied by the fact that the hosts were endorsing the defamatory claims of their guests, and failed to provide viewers with any of the extensive evidence disproving the claims and exposing Giuliani and Powell for the unreliable liars they were. Dom. MSJ pp.87-161; *see also infra* §I.D (statement-by-statement analysis and concessions by executives and hosts that no pushback occurred on many shows).

Third, Fox lists several shows, some from its daytime lineup, that it says demonstrate how it allowed Dominion’s “side of the story” on its air. FNN MSJ pp.28-33. As a matter of defamation law (discussed *infra* p.85), it is irrelevant if

Fox defames someone on one show and acts responsibly on another. Were the law otherwise, a genuine retraction after a defamatory broadcast would eliminate liability for the original broadcast.

Moreover, reporting merely a bare denial (or flashing it on a chyron) is no license to broadcast known lies. Dinh, FC's Chief Legal and Policy Officer, conceded that "reporting simply so-and-so denies this, is much less powerful than the publication reporting so-and-so denies this and here's the information they are providing to prove it's false." Ex.601, Dinh 64:18-65:3. Yet on the rare times an accused broadcast mentioned Dominion's denials, Fox invariably failed to disclose the actual information Dominion had provided to debunk the lies.

Laura Ingraham's November 10 show, cited by Fox, proves the point. In that show, Ingraham challenged one of Powell's claims against Dominion (two days after Fox first brought Powell onto its air to defame Dominion), by noting that the claim had been fact checked and found to be false. FNN MSJ p.28; *see also id.* pp.29-31. That is precisely what Fox ***failed to do*** on the challenged broadcasts.

Fox's citation to the Eddie Perez interview regarding Smartmatic (not Dominion), which ran on three shows over three days in late December 2020, does not help Fox's case. The evidence shows Fox ran the segment only in response to Smartmatic's threatened lawsuit. Ex.108, Cooper 244:19-245:9; Ex.656; Ex.133, Petterson 332:19-339:3; Ex.657; Ex.658; Ex.659. In fact, Fox was aware of Mr.

Perez as an expert who had debunked Powell's claims as far back as November 12, but did not use him until threatened by Smartmatic. Ex.322; Ex.124, Hooper 25:15-29:15. Even then, though, Fox was careful to ensure that it was only addressing the Smartmatic allegations in the fact-check; to this day, Fox has never issued a fact-check to address the false allegations it broadcast against Dominion, even though Fox acknowledges they are false. Ex.102, Briganti 304:17-305:7.

One of the other broadcasts Fox cites is the November 29 interview between Maria Bartiromo and Trump, arguing that it shows that "Dominion dares not challenge the November 29 interview." FNN MSJ p.2. To be sure, that broadcast was defamatory; discovery has revealed that Bartiromo in fact knew what Trump would say, and had even scripted comments like "the facts are on your side" the night before. Ex.644; *see also* Ex.632 (transcript of show). But Fox cannot point to a non-accused broadcast to somehow prove its accused broadcasts are not actionable.

Finally, Fox cites Tucker Carlson and Sean Hannity for testimony that Dominion's denials were every bit as unsubstantiated as Powell's claims. FNN MSJ p.33. That conclusory testimony is not remotely credible, as even a cursory review of the dozens of separate, fully annotated Dominion denials with citations and links to evidence demonstrate. *See* Dom. MSJ pp.93-96.

D. Fox Ignores Dominion’s Massive Effort to Convince Fox to Stop Airing the Lies.

Fox ends its recitation of the “undisputed” facts claiming Dominion chose not to engage with Fox and rather “opted to hold its fire” and file an eye-catching \$1.6 billion lawsuit, wanting money rather than to prove its innocence. The extensive record of Dominion’s attempts to get Fox to stop spreading lies proves otherwise. Dom. MSJ pp.92-96. Dominion sent **3,682** emails to Fox recipients, which were then “widely circulated” within Fox. Ex.128, Lowell 30(b)(6) 420:10-13, 431:8-22, 521:20-544:21; *see also* Ex.234 (Clark had Dominion’s emails “tattooed on my body”); Dom. MSJ pp.32-33 (Dominion’s communications consultant Tony Fratto personally reached out to his contacts at Fox); Ex.237; Ex.238. And in criticizing Dominion for supposedly failing to engage with Fox, Fox entirely ignores that Dominion repeatedly tried to have its representative Michael Steel appear on Fox’s programs in December 2020, specifically reaching out to producers for Dobbs, Bartiromo, and Pirro—and Fox did not accept the offers. Ex.662; Ex.750; Ex.684; Ex.128, Lowell 30(b)(6) 546:4-550:21. The idea that Dominion chose to litigate over trying to engage with Fox is wholly unsupported by the record.

Fox takes unfounded some pot-shots at Dominion’s damages claim in this section. Fox’s fixation on Dominion having suffered “merely” \$88 million in lost business opportunities, for example, ignores that the figure only covers losses to date, and also ignores the long-cycle nature of the voting machine industry. Staple

Street’s employees (current or former) have not “ridiculed” Dominion’s damages claim, and Fox’s attempt to shift the blame to President Trump is legally and factually meritless. The damages to Dominion are real and vast, and it will be up to the jury to ultimately decide. *See infra* §IV.

ARGUMENT

I. The Accused Statements Are Actionable.

A. Fox’s Repackaged “Neutral Reportage” Argument Fails.

At summary judgment, just as at the motion to dismiss stage, Fox’s lead argument is a version of the “neutral reportage” defense. In denying Fox’s motion to dismiss, the Court rightly expressed skepticism at this argument—and rightly noted that it is an affirmative defense, for which Fox bears the burden of proof. FNN MTD Order pp.38-44. The argument fails again at summary judgment.

1. The Neutral Reportage Privilege Does Not Apply As A Matter of Law.

Dominion has now twice fully briefed why the neutral reportage privilege is foreclosed by New York law and has no legitimate basis in federal Constitutional law. *See* Dom. Opp. to FNN MTD pp.8-16; Dom. MSJ pp.163-168. Dominion respectfully incorporates that briefing here by reference. The Court should follow *Hogan v. Herald Co.*, 84 A.D.2d 470, 477-79 (N.Y. App. Div. 4th Dep’t 1982), *aff’d*, 444 N.E.2d 1002 (N.Y. 1982), and *Weiner v. Doubleday & Co.*, 549 N.E.2d 453,

456 (N.Y. 1989),¹² as well as cases like *Dickey v. CBS Inc.*, 583 F.2d 1221, 1226 & n.5 (3d Cir. 1978), and *Norton v. Glenn*, 860 A.2d 48, 56-57 (Pa. 2004), and reject the proposed defense as a matter of law.

2. Fox Could Not Invoke the Neutral Reportage Defense On These Facts Regardless.

Regardless, the neutral report privilege fails as a matter of law on the facts here. As the Court properly held at the pleading stage, “[t]o assert and benefit from [the neutral reportage] defense, a defendant must show that the defendant accurately and dispassionately reported the newsworthy event.” FNN MTD Order p.42. The “defense does not apply when the press ‘espouses or concurs in the charges made by others[.]’” *Id.* at 44 (quoting *Edwards*, 556 F.2d at 120). In addition, the defense only applies when the charges being reported were made by a “responsible” and “prominent” person or entity. *Edwards*, 556 F.2d at 120; *see also Cianci v. New Times Pub. Co.*, 639 F.2d 54, 68 (2d Cir. 1980) (Friendly, J.) (reiterating the

¹² As Dominion explained in prior briefing, *Orr v. Lynch*, 60 A.D.2d 949 (N.Y. App. Div. 3d Dep’t 1978), and *Campo Lindo for Dogs, Inc. v. New York Post Corp.*, 65 A.D.2d 650 (N.Y. App. Div. 3d Dep’t 1978), both pre-dated *Hogan*, and thus were overruled to the extent they embraced a neutral reportage defense. As for *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92 (2d Cir. 2000), that court did *not* hold that New York permitted the “neutral reportage” defense for public-figure plaintiffs, and it did *not* suggest that the *Hogan* ruling had “been walked back.” *But see* FNN MSJ p.50. The “walked back” assertion makes no sense; the New York Court of Appeals in *Weiner* acknowledged the validity of *Hogan*’s ruling “reject[ing]” the “‘neutral reportage’ privilege.” 549 N.E.2d at 456.

requirements); *Khalil v. Fox Corp.*, 2022 WL 4467622, at *6 (S.D.N.Y. Sep. 26, 2022).

Here, we have none of that. As Dominion explained in its motion for summary judgment, “no reasonable juror could find that the broadcasts meet the neutral report[age] privilege’s strict standards.” Dom. MSJ pp.169-72 (incorporated here by reference). That is so for several reasons, each independently sufficient to foreclose Fox’s neutral reportage defense as a matter of law.

a. Powell, Giuliani, and Lindell Fail the *Edwards/Cianci* “Responsible, Prominent” Source Requirement.

None of the three sources Fox brought onto its airwaves to lie about Dominion—Sidney Powell, Rudy Giuliani, and Mike Lindell—come anywhere near meeting the “responsible” and “prominent” requirement of *Edwards* and *Cianci*. Fox’s own executives, hosts, and producers acknowledged over and over in private just how irresponsible and unreliable these three sources were—at the same time as Fox kept providing them a platform. *See* Dom. MSJ pp.149-152. The Southern District of New York, addressing some of the same broadcasts at issue here, held that “Sidney Powell was not a responsible source,” and “[s]everal election experts and government agencies had already debunked her theories of election fraud” when Fox brought her on. *Khalil*, 2022 WL 4467622, at *6.

Fox’s response to this argument at the motion to dismiss stage was to try to reframe the *Edwards* test as ignoring whether the source itself was “irresponsible,”

and focusing instead on “the responsibility and prominence of [the source’s] *position*.” FNN MTD Reply p.11. “[T]he President and his lawyers are public figures of the highest order,” and thus “qualify as ‘responsible’ and ‘prominent’ figures under *Edwards*,” Fox asserted. *Id.* But even that rewriting of the *Edwards* test would not much help Fox. After all, Lindell was never a lawyer for the President, and Powell was only even arguably a member of his team (whatever that means) from November 14 to 22, 2020. *See infra*, pp.163-164. Fox cannot argue that *Edwards*, even on Fox’s reading, immunizes Fox from liability for broadcasting Lindell’s Dominion lies, or for continuing to provide Powell a platform after she was expressly disavowed by the President and his campaign.

Perhaps recognizing this, Fox tries again to reframe the *Edwards* test in its summary judgment brief, arguing that “the press has a right to cover and comment on newsworthy allegations of *newsworthy* figures.” FNN MSJ pp.48-49. That, of course, is not what *Edwards* says—or *Cianci*, or any other case endorsing the neutral reportage defense. That change would massively expand one of the critical “careful limitation[s]” of the doctrine, giving publishers immunity for publishing any “newsworthy” allegations at all, since, by definition, someone who makes a “newsworthy” allegation is a “newsworthy” figure. *See Cianci*, 639 F.2d at 69. The “limitation” would lose all meaning.

b. Fox Did Not “Accurately” Report On Dominion.

At the motion to dismiss stage, “[t]he Court, reviewing the Complaint’s allegations, note[d] that it is reasonably conceivable that Fox’s reporting was inaccurate.” FNN MTD Order p.43. Specifically, the Court noted that, “[a]s alleged,” Dominion sent Fox numerous “emails, which contained analysis from election and related experts,” which “tended to disprove the election fraud claims.” *Id.* Yet “[w]hen Fox guests spread or reiterated disinformation about Dominion, Fox did not use the information Dominion provided to correct its guests or to reorient its viewers.” *Id.* “Instead, Fox and its personnel pressed their view that considerable evidence connected Dominion to an illegal election fraud conspiracy.” *Id.*

Discovery has proven these allegations to be true. Dominion *did* send Fox numerous emails containing (and linking to) “analysis from election and related experts” which “tended to disprove the election fraud claims.” *Id.*; *see* Dom. MSJ pp.93-96. The election fraud claims *were* false, just as Dominion showed Fox over and over at the time. *See* Dom. MSJ pp.46-82. Yet in accused broadcast after accused broadcast, Fox did *not* “use the information Dominion provided to correct its guests or to reorient its viewers,” but instead presented its viewers with a badly warped, wholly inaccurate picture. *Infra* §I.D; *see Cianci*, 639 F.2d at 69 & n.18 (holding defendant not entitled to neutral reportage defense where defendant failed to report numerous facts undermining the false allegations, and where “Plaintiff cites

numerous...examples which would undermine a claim of ‘fair’ and ‘neutral’ reporting, such as the failure to reveal facts undermining the credibility of [certain key witnesses].”). The *Khalil* court likewise found some of the same broadcasts were “neither accurate nor dispassionate,” which put them beyond the reach of any neutral reportage defense. 2022 WL 4467622, at *7.

c. Fox’s Hosts Espoused and Concurred In the False Dominion Charges.

The neutral reportage defense is not available to a defendant who “‘espouses or concurs in the charges made by others[.]’” FNN MTD Order p.44 (quoting *Edwards*, 556 F.2d at 120). Fox’s hosts repeatedly did just that, as described in detail below. *Infra* §I.D. For that additional reason, the neutral reportage defense is unavailable to Fox.

3. The Court Should Reject Fox’s Attempt to Create a New Privilege Far Broader Than Neutral Reportage.

Although Fox embraces neutral reportage doctrine precedents like *Edwards*, FNN MSJ at 48, Fox at times seems to advocate for a far broader blanket immunity than even the *Edwards* defense provides. Citing cases such as *Brian v. Richardson*, 660 N.E.2d 1126 (N.Y. 1995), *Page v. Oath*, 270 A.3d 833 (Del. 2022), and *Croce v. N.Y. Times Co.*, 930 F.3d 787 (6th Cir. 2019), Fox asserts 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.” FNN MSJ p.42.

In other words, Fox seems to want a rule that grants immunity for publishing allegations that the publisher *knows* to be false, as long as the allegations are “newsworthy,” and without any of the other protections of the *Edwards* rule: no requirement that the person or entity making the allegations be “responsible” or “prominent,” and no requirement that the publication be accurate or dispassionate, but rather complete freedom for the publisher to “espouse or concur” in the false allegations. Such a rule has no support in the caselaw Fox cites and would drastically alter the careful balance that both the U.S. Supreme Court and New York Court of Appeals have struck between free speech rights and “the individual’s right to the protection of his own good name.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

Judge Friendly warned against just such an attempt to expand the neutral reportage privilege in *Cianci*:

The need for the careful limitation of a constitutional privilege for fair reportage is demonstrated by the breadth of that defense, which confers immunity even for publishing statements believed to be untrue. Absent the qualifications set forth by Chief Judge Kaufman in *Edwards*, all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks, at least upon any public official or figure, based on episodes long in the past and made by persons known to be of scant reliability. And this, although without any such immunity, the media already enjoy the generous protection accorded by *New York Times Co. v. Sullivan* with respect to erroneous statements of fact or opinion.

639 F.2d at 69-70. Just as Judge Friendly did with the defendants in *Cianci*, the Court should reject Fox's efforts to claim far broader immunity than granted under the *Edwards* test.

To be fair, Fox's brief is conflicted on this issue. Fox at one point concedes that "New York courts have rejected ... 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.'" FNN MSJ p.49 (quoting *Hogan*, 84 A.D.2d at 478). Here, Fox is right. It is a "black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, *even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement.*" *Cianci*, 639 F.2d at 60-61 (citation omitted). That concession should be the end of Fox's attempt to carve out a far broader immunity than the *Edwards* rule.

Fox claims that the "sweeping proposition" quoted above "is not and has never been Fox News' position." FNN MSJ p.49. Yet that appears at times to be precisely the position Fox is taking, arguing that so long as Fox makes it clear that it is just broadcasting someone else's "allegations," Fox should be immune from liability, even if Fox knows the allegations to be false. *See, e.g., id.* p.42 ("[P]ress reports are not defamatory when they accurately report newsworthy allegations made by others, even if those allegations ultimately turn out to be false.").

Fox tries to square this circle by arguing “[t]here 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.” FNN MSJ pp.49-50 (emphasis in original). What kind of test is that, and how does a court apply it? What allegations against a public figure (even a limited-purpose public figure) “have no news value unless they are true”? One is hard-pressed to think of *any* allegations against a public figure that are not in some sense “newsworthy,” whether they prove true or false in the end. What Fox is asking for is a blank check, to publish any “newsworthy” allegations (which would include any allegations at all against any public figure), *even if Fox knows or recklessly disregards that they are false*, and without the careful protections that *Edwards* and *Cianci* insisted upon. No justification exists for issuing that blank check, particularly since anyone publishing allegations against a public figure—or, in New York, any allegations that implicate “an issue of public interest,” *see* N.Y. Civ. Rights L. §76-a—already benefits from the strong protections of the actual malice standard.

Fox cannot plausibly point to New York law as requiring this broad immunity, because if that were true, much of New York law—including statutory law—would be largely or entirely superfluous. Take, for instance, New York Civil Rights Law § 75. That statute provides that radio and television broadcasters “shall not be liable

for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by any legally qualified candidate for public office whose utterances” the broadcaster is not permitted to censor under federal regulations, but only if the broadcaster announces to viewers “that the remarks about to be made, or made, as the case may be, by the speaker are not to be construed as reflecting the opinions or beliefs of the station, its ownership or management.” N.Y. Civ. Rights L. §75. Of course, statements made by a “legally qualified candidate for public office” are inherently newsworthy, particularly when made to a radio or television audience. So under Fox’s proposed reading of New York law, Section 75 is superfluous, as any situation that could possibly meet Section 75’s narrow application would necessarily already be covered by Fox’s far broader proposed rule—without having to satisfy the express statutory requirements regarding pre- and post-broadcast announcements.

The same problem arises with New York’s statutory protection for “fair reports” of official proceedings, New York Civil Rights Law Section 74. That statute immunizes publishers from defamation liability “for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding.” N.Y. Civ. Rights L. §74. The vast majority, if not the entirety, of cases where this statute is invoked are cases where a publisher has published factual allegations made in such an official proceeding. Yet if Fox is right that New York

common law immunizes the publication of any “newsworthy” allegations, full stop, then it is hard to see what work Section 74 does. After all, allegations in official proceedings are always going to be at some level “newsworthy.” See *Bufalino v. Associated Press*, 692 F.2d 266, 271 (2d Cir. 1982) (“[T]he privilege cannot be divorced from its underlying policy of encouraging the broad dissemination of public records.”).

New York’s lawmakers have through the years made deliberate decisions about the circumstances in which, as a matter of public policy, broadcasters and other publishers should be entitled to *complete immunity* for publishing someone else’s allegations, *regardless of actual malice*. While the Second Circuit expanded those circumstances with the *Edwards* doctrine, that expansion, though wrongheaded, is at least carefully limited by the numerous requirements a defendant must meet to earn its protection. Of course, the New York Court of Appeals rejected *Edwards* anyway. The Court should not read New York law as hiding a far broader immunity for publishers of defamatory allegations than the immunity New York’s highest court expressly rejected in *Hogan* and *Weiner*.

But what of the cases Fox cites to try to support its rule that publishers are free to publish any allegations whatsoever, knowing they are false, so long as they are “newsworthy”? Those cases do not mean what Fox says they mean, and they do not support Fox’s proposed rule.

Fox leans most heavily on three cases: *Page v. Oath Inc.*, *Croce v. N.Y. Times*, and *Brian v. Richardson*. FNN MSJ pp.42-43. But it mis-describes them all.

For instance, Fox writes that “[t]he Delaware Supreme Court held just this past year...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.” FNN MSJ p.42 (citing *Page*). That is not true. The *Page* decision had nothing at all to do with “newsworthiness”; the word “newsworthy” is nowhere to be found in the opinion, and the Delaware Supreme Court’s holding did not rest on the “newsworthiness” of the allegations at issue. *See Page v. Oath Inc.*, 270 A.3d 833, 845-48 (Del. 2022). The main article at issue in *Page* (the “Isikoff Article”) reported on “a substantial federal investigation into Page and the Trump campaign’s Russian ties.” *Id.* at 848. The fact of that investigation, as well as “the existence of the Steele Dossier [describing those ties], that it was provided by an intelligence source, and how it was being investigated by U.S. intelligence agencies,” were all “true,” the court held. *Id.* In fact, the court found that “the gist of the article is that there was a serious federal investigation into Page, which is also true.” *Id.*

Whatever *Page* stands for, it does *not* stand for the proposition that publishers are free to publish any “newsworthy” allegations, even knowing they are false, without defamation liability. The Isikoff Article reported on *a confirmed federal investigation*, and did so accurately, including reporting on the specific allegations

the investigators were assessing, and some of the evidence they were considering. *See id.* at 846-48. The article is nothing like the accused broadcasts and tweets in this case, which published false allegations about Dominion made by patently unreliable sources, endorsed and concurred in by Fox’s own hosts. So even if the Court were to apply Delaware law here (*Page* was decided under Delaware law, *see id.* at 842), *Page* does not help Fox.

Nor does *Croce*. For starters, *Croce* was decided under Ohio law. *Croce v. N.Y. Times Co.*, 930 F.3d 787, 792 (6th Cir. 2019). But *Croce* proves Dominion’s point. The Sixth Circuit affirmed dismissal of the case in *Croce* after finding that the accused article “is a standard piece of investigative journalism that presents newsworthy allegations made by others, with appropriate qualifying language.” *Id.* at 790; *see also id.* at 793. So even from the beginning, *Croce* applies an additional limitation that Fox ignores: the requirement that the accused publication include “appropriate qualifying language.” *Id.* But then comes another critical passage in the opinion, that Fox omits entirely: “***Of course, even with qualifying language, a defendant could be liable for publishing statements with actual malice.***” *Id.* at 795-96. Exactly. While the court in *Croce* found the plaintiff there insufficiently pled actual malice, *id.* at 796, here Dominion has both pleaded and proved overwhelming evidence of Fox’s actual malice. Under the *Croce* rule, Fox has no “newsworthy allegations” defense.

What of *Brian v. Richardson*? That case, at least, was decided under New York law. But it does not help Fox. For starters, just as with *Page*, the word “newsworthy” appears nowhere in the opinion. See *Brian v. Richardson*, 660 N.E.2d 1126 (N.Y. 1995). So whatever *Brian* stands for, it does *not* stand for the proposition that “the press has a right to cover and comment on newsworthy allegations by newsworthy figures.” FNN MSJ pp.48-49. That is not what the case is about. Moreover, the claim in the case was not even filed against the newspaper; it was filed against the author of the op-ed, former U.S. Attorney General Elliott Richardson. See *Brian*, 660 N.E.2d at 1127-28. It is not a case about media liability for reporting on allegations (newsworthy or not).

The case turned on the court’s detailed analysis of both the content and context of the op-ed in question. The court applied a three-factor test: ““(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal *** readers or listeners that what is being read or heard is likely to be opinion, not fact.”” *Id.* at 1129 (quoting *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1167 (N.Y. 1993)) (internal quotation marks omitted). The court ultimately found that the combination of context and content—a guest opinion piece on the op-ed pages of a newspaper,

where the “purpose” of the “article was to advocate an independent governmental investigation into the purported misuse of the software” discussed in the piece—led to the finding that the op-ed was not actionable defamation. *Id.* at 1130-31. But the court was careful to emphasize the limits of its holding:

To be sure, the fact that a particular accusation originated with a different source does not automatically furnish a license for others to repeat or publish it without regard to its accuracy or defamatory character. Here, however, the repeated charges were included in the article not necessarily to convince the reader of plaintiff’s dishonesty but rather to demonstrate the need for an investigation that would establish the truth or falsity of the charges.

Id. at 1131. In other words, at bottom, the op-ed was an advocacy piece, published to try to get government officials to open an investigation into the allegations.

A single guest op-ed on the op-ed pages of a newspaper, expressly calling for a government investigation, is worlds apart from what Fox did in this case. For starters, Fox brought people onto its airwaves over and over who were *unequivocal* in their claims: Dominion had rigged the election, flipped huge numbers of votes from Trump to Biden through a secret “algorithm,” was owned by a company founded in Venezuela to rig elections for Hugo Chavez, and even bribed government officials. And Fox’s hosts repeatedly endorsed, concurred in, and cheered on the false allegations. The broadcasts—to say nothing of the tweets—bear no comparison to the Richardson op-ed.

Nor does context help Fox. Fox likes to pretend the shows at issue were all the on-air equivalent of an op-ed page, but that is not true. Fox admits, for instance, that “Maria [Bartirromo] is a well-respected business reporter with deep experience.” Ex.127, Lowell 30(b)(6) 223:8-10. Multiple Fox witnesses confirmed that viewers rely on each accused show for accurate, factual information. Dom. MSJ pp.80-82. Fox cannot stretch *Richardson*’s holding to create a blanket immunity for knowingly (and repeatedly) broadcasting false but “newsworthy” allegations.

The other New York cases Fox cites are similarly narrow in scope, and none announces a broad “newsworthy allegations” immunity for the press. In fact, most of the other New York cases have nothing to do with the press at all. *Boulos v. Newman*, 302 A.D.2d 932 (N.Y. App. Div. 4th Dep’t 2003), was about a statement by a doctor to a patient (and the statement was “I don’t think [plaintiff] knows what he is talking about”). *Id.* at 932-33. *Vengroff v. Coyle*, 231 A.D.2d 624 (N.Y. App. Div. 2d Dep’t 1996), concerned a letter that a private citizen sent to a U.S. Senator, seeking the Senator’s help in commencing an investigation into some issues plaguing the citizen’s neighborhood. *Id.* at 625-26. *See also GS Plasticos Limitada v. Bureau Veritas*, 84 A.D.3d 518, 519 (N.Y. App. Div. 2011) (private letter sent to accreditation agency; case mostly decided under New York’s fair report privilege, aside from a handful of statements held to be opinions based on disclosed, and non-actionable, facts); *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43-45

(N.Y. App. Div. 1st Dep't 2011) (attempt by Google to uncover identity of person who sent anonymous, allegedly defamatory email).

While *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 239-40 (1991), did involve a media publication—a scientific journal—the context there was also very different than here. The allegedly defamatory statements at issue in *Immuno* appeared in a “[l]etter[] to the editor,” an “important” forum that, “unlike ordinary reporting, [is] not published on the authority of the newspaper or journal.” *Id.* at 252-253. That stands in stark contrast to reporting on a cable news channel, where—as Fox witnesses admitted over and over—viewers expect to get facts, and the news channel has a clear obligation to refrain from broadcasting allegations it knows to be false. *See supra* p.1; Ex.600, R.Murdoch 323:6-9 (“Q: Is the Fox News Channel news, or is it entertainment? A: Oh, it is news.”).

Yet even after all that, the Court of Appeals did not hold that the “context” rendered the entire letter non-actionable. To the contrary, the court “conclude[d] that what plaintiff now characterizes as the ‘core premise’ of the [accused] letter both expressed and implied statements of fact that, if shown to be false (which they were not), **would be actionable.**” *Id.* at 254 (emphasis added). In other words, the court held that certain of the allegedly defamatory statements in the accused letter *were* factual statements that could be sued upon; the only reason they were *not* “actionable” was because the plaintiff failed to show they were false. The remaining

statements that the court held to be non-actionable, though, were “presumptions and predictions as to what ‘appeared to be’ or ‘might well be’ or ‘could well happen’ or ‘should be,’” which the court held in context “would not have been viewed by the average reader of the Journal as conveying actual facts about plaintiff.” *Id.* at 254-55 Those parts of the accused letter stand in stark contrast to the allegations Fox broadcast against Dominion, which were asserted unequivocally, and most often with the endorsement and concurrence of Fox’s hosts. *See infra* §I.D.

Fox’s other cases do not help its cause. *Duci v. Daily Gazette Co.*, 102 A.D.2d 940, 941 (N.Y. App. Div. 3d Dep’t 1984), relied on *Orr v. Lynch*, which by that time (after *Hogan*) was bad law. *Supra* p.53, n.9. But the *Duci* holding also rested on an analysis of the allegedly defamatory allegations themselves (allegations that the plaintiff was “talking and laughing about a tragic incident”), which the court found not to be “susceptible” of defamatory meaning on their own terms. *Duci*, 102 A.D.2d at 941. And while *Goldwater v. Ginzburg*, 414 F.2d 324, 335 (2d Cir. 1969), included the phrase “partisan outlooks” (as quoted in FNN MSJ at 48), that case did not have anything to say about the relevance of “partisan outlooks” to a defamation analysis, and in fact held that the challenged statements *were* actionable. *Id.* at 335, 337.¹³

¹³ The other cases from foreign jurisdictions Fox cites are not controlling, but also not helpful to Fox. *Green v. CBS Inc.*, 286 F.3d 281 (5th Cir. 2002), was decided

In sum, the Court should reject Fox’s attempt to frame a rule that provides complete immunity to anyone who publishes someone else’s defamatory allegations, so long as they are “newsworthy.” Even the neutral reportage defense, which New York’s highest court has repeatedly rejected, tilts the field much too far away from the valid interest in protecting hard-earned reputations—an interest that is balanced against the interest in protecting free speech by requiring the victim to prove by clear and convincing evidence that the publisher knew or recklessly disregarded the truth. The Court should not approve the neutral reportage defense that New York’s highest court, and numerous other courts, have rejected. But the Court should certainly not go even further, by adopting the blanket immunity requested by Fox.

under Texas law, but the Fifth Circuit actually misstated the relevant law. The Fifth Circuit stated that under Texas law, a media defendant “need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported.” *Id.* at 284 (citing *Dolcefino v. Randolph*, 19 S.W.3d 906, 918 (Tex. Ct. App. 2000), and *KTRK Television v. Felder*, 950 S.W.2d 100, 106 (Tex. Ct. App. 1997)). But as the cases the Fifth Circuit cited show, the actual Texas law test has an additional, and critical, requirement that narrows the immunity: “When, as here, a case involves media defendants, the defendants need only prove that third party allegations reported in a broadcast were, in fact, made **and under investigation.**” *Dolcefino*, 19 S.W.3d at 918; *see also KTRK Television*, 950 S.W.2d at 106 (same). The Texas test, then, is much closer to a traditional “fair report” defense, as it confers immunity based on the reporting of an underlying official investigation. In any event, it is different than New York law.

Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985), was decided under South Dakota law, but it likewise concerned a report of official investigations and proceedings. *See id.* at 646-48.

B. Fox’s Fair Report Defense Is Meritless.

Neutral reportage is not the only issue Fox tries to relitigate. As at the motion to dismiss stage, Fox asserted the affirmative defense that New York’s fair report privilege shields its defamatory statements as “fair and true report[s] of...judicial proceeding[s], legislative proceeding[s] or other official proceeding[s],” N.Y. Civ. Rights L. §74—an argument that Fox tellingly, and fatally, relegates in large part to its Appendix. Ignoring this Court’s prior decision applying New York’s well-established law, Fox insists again that the privilege attaches to uninitiated, unspecified future proceedings. Having fully aired this issue, Dominion respectfully incorporates its prior briefing by reference, Dom. Opp. to FNN MTD pp.20-40, and asks that the Court reject Fox’s position again.

1. Fox Has Largely Waived the Defense By Asserting It Solely In Its Appendix.

Fox in its brief asserts the fair report privilege sparingly, defending only six of its twenty defamatory statements on that basis, and identifying five purported subject “proceedings.” *See* FNN MSJ pp.65, 77, 88, 90, 98, 109. Yet in its Appendix, Fox takes an entirely different tack, invoking the privilege in defense of nineteen out of twenty statements, and citing as many as 18 subject “proceedings” for *each* challenged statement. *See, e.g.*, FNN App. pp.41 (citing “every lawsuit in exhibits C1-C18” as the subject “proceeding[s]” of the statement “[i]t’s massive election fraud. It’s going to undo the entire election”); *id.* pp.1-6 (indicating that a

November 8 statement was a “fair report” of twelve lawsuits that were not yet filed at the time). What’s more, Fox’s Appendix affirmatively conflicts with its arguments in its brief, often citing entirely different proceedings as the subject of a challenged statement than it does in its brief. *Compare, e.g.*, FNN MSJ p.77 (arguing that a statement was a report of an affidavit filed the next day in a Georgia lawsuit, and citing the affidavit), *with* FNN App. pp.17-23 (citing neither the affidavit nor the lawsuit as the subject proceeding).

“It is settled Delaware law that a party waives an argument by not including it in its brief.” *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff’d*, 840 A.2d 641 (Del. 2003). And even if the argument were not waived, Fox’s rote invocation of the defense in its Appendix—devoid as it is of any explanation whatsoever—fails to carry Fox’s summary judgment burden on its affirmative defense. *See Keogh v. N.Y. Herald Trib., Inc.*, 274 N.Y.S.2d 302, 304-07 (Sup. Ct. 1966), *aff’d*, 28 A.D.2d 1209 (N.Y. App. Div. 1967).

2. Fox’s Statements Were Not “Of” a Qualified Proceeding.

Fox’s arguments also fail on the merits. Where, as here, “the question of fair report arises solely from the publication of the contents of legal documents, . . . the question should be decided as one of law by the court.” Seelman, E. P., *The Law of Libel and Slander in the State of New York* ¶ 228 (1941) (footnotes omitted); *see*

also Easton v. Pub. Citizens, Inc., No. 91 CIV. 1639 (JSM), 1991 WL 280688, at *2 (S.D.N.Y. Dec. 26, 1991), *aff'd*, 969 F.2d 1043 (2d Cir. 1992).

a. A Fair Report Must Comment On An Actual, Specific Proceeding.

For a report to be “of” a proceeding within the meaning of Section 74, it must actually “comment on a judicial proceeding.” *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114 (N.Y. App. Div. 2009). It is not enough, as this Court previously recognized, that “a party has started judicial proceedings incorporating those statements.” FNN MTD Order p.46. Rather, the subject of the report must be the proceeding itself, and “[d]oubt regarding whether the report is ‘of’ a proceeding is resolved against the privilege.” *Id.* “If the context in which the statements are made make it impossible for the ordinary viewer [listener or reader] to determine whether defendant was reporting on a judicial proceeding, the absolute privilege does not apply.” *Cholowsky*, 69 A.D.3d at 114-15 (citation and quotation marks omitted). Moreover, “the ordinary viewer or reader must be able to determine from the publication *itself* that the publication is reporting on the proceeding.” *Fine v. ESPN, Inc.*, 11 F. Supp. 3d 209, 216 (N.D.N.Y. 2014). Finally, and critically, “a report cannot be ‘of’ a proceeding unless the subject proceeding has been initiated and is pending or ongoing.” FNN MTD Order pp.45-46.

The Court was right to reject Fox’s attempt to dramatically expand New York law at the motion to dismiss stage, and Fox has not unearthed any additional

precedent that might call the Court's prior decision into question. Dominion therefore incorporates by reference its extensive briefing on this issue. *See* Dom. Opp. to FNN MTD pp.20-26.

The only new authorities Fox adds to the precedents already considered by the Court are a federal district court decision, *Wenz v. Becker*, 948 F. Supp. 319 (S.D.N.Y. 1996), and a New York intermediate court decision, *Baumann v. Newspaper Enterprises, Inc.*, 270 A.D. 825 (N.Y. App. Div. 1946), both of which involved already ongoing proceedings and therefore are in complete accord with the Court's prior holding. The one-paragraph decision in *Baumann* addressed an official "investigation *which was being carried on* by the district attorney" already at the time of the report's publication. *Id.* at 825. And though *Wenz* involved a slightly more convoluted timeline, the upshot is the same. There, the defendant made an allegedly libelous statement describing his expected defense to an already pending lawsuit to a reporter. 948 F. Supp. at 320-21. The report was not published until *after* the answer taking the stated position had been filed in the lawsuit, but the plaintiff argued that the original statement by the defendant to the reporter had predated the filing of the answer and therefore was not "of a proceeding." *Id.* at 323. The court disagreed, and emphasized that the proceeding had been "commenced by the filing of a complaint" and whether an answer was filed at the time of the statement was irrelevant if the statement "*in fact* reported on [the] defense in the

[underlying] lawsuit.” *Id.* Far from supporting Fox’s expansive position, *Wenz* cuts against it; the court emphasized that, “[s]ignificantly, the privilege is not intended to protect statements which, at some subsequent time, may become the topic of a lawsuit.” *Id.* at 322. Thus, like the precedents already addressed at the motion to dismiss stage, *Wenz* turned on the fact that the defamatory statement reported on a (1) specific, (2) already-pending lawsuit, and a (3) defense *in fact* later asserted in the case. It is therefore in complete harmony with the Court’s prior decision.

b. Fox’s Statements Were Not Reports of Specific, Present Proceedings.

The accused broadcasts all fail the requirement that they report on specific, present proceedings. As the Court observed at the motion to dismiss stage, “most of the alleged statements were made before a lawsuit had been filed,” and “[a]s a result, most of the alleged statements, even if true, were not ‘of’ a judicial proceeding.” FNN MTD Order p.46. And even those statements that predate the litigation Fox claims they “report” on are not “tailor[ed]...to the allegations in those proceedings” clearly enough for a viewer to determine “whether Fox was reporting on those proceedings.” *Id.*

Fox’s *post hoc* attempts to recharacterize its programming as coverage of legal proceedings fail. As explained in Section I.D, in the accused segments, Fox’s hosts were not reporting on any identifiable legal proceedings, let alone the ones Fox points to now. Many of the proceedings Fox now cites had not commenced at the

time of the accused broadcasts. And even if some of the false Dominion allegations broadcast by Fox mirrored allegations made in a lawsuit, “[a]n overlap between the subject matter of the report and the subject matter of a proceeding does not suffice.” *Fine*, 11 F. Supp. 3d at 216.

3. Fox’s Statements Were Not Fair and True Reports of Those Proceedings.

The Court can dispose of Fox’s entire fair report argument, as a matter of law, on the basis that none of the six broadcasts was a report “of” a qualified proceeding. But each of those broadcasts also fails the independent requirement that the statement be “a fair and true report” of said proceeding. N.Y. Civ. Rights L. § 74. A publication is “fair and true” only if it is “substantially accurate,” *Holy Spirit Ass’n for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d 63, 67 (N.Y. 1979), meaning that the report may not “have a ‘different effect’ on the mind of the recipient than the ‘actual truth.’” *Karedes v. Ackerly Group, Inc.*, 423 F.3d 107, 119 (2d Cir. 2005) (citation omitted). Put differently, “considered in [its] context,” the report may not “suggest more serious conduct than that actually suggested in the official proceeding.” *Id.* (alteration and quotations omitted); *see also* Dom. Opp. to FNN MTD pp.22-24. “It is for the Court to determine as a matter of law if a publication is a ‘fair and true’ report under section 74, unless the Court determines that an issue of fact remains.” *Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*,

2007 WL 4820968, at *3 (S.D.N.Y. Sept. 18, 2007); *see also Karp v. Hill & Knowlton, Inc.*, 631 F. Supp. 360, 363 (S.D.N.Y. 1986).

None of Fox's statements remotely meets that standard. *Infra* §I.D.

4. Fox's Waived Arguments Suffer From the Same Common Defects.

Even if they were not waived and plainly insufficient to carry the burden on summary judgment, Fox's cursory invocations of the privilege as to the remaining statements would still be futile. Fox's kitchen-sink use of the defense in the Appendix makes it impossible to address each argument within the confines of this brief—its Appendix asserts more than 300 discrete statement-proceeding pairings. But two general observations suffice to show that these arguments are meritless.

First, over and over, Fox commits the same error the Court has already noted, citing “proceedings” that postdate the relevant statements. This is especially true of the broadcasts before Powell filed her first lawsuit on November 25, for which Fox almost exclusively cites later-filed actions. *See* FNN App’x 1-65.

Second, on the rare occasions when Fox cites proceedings that were actually pending at the relevant time, even a cursory glance at the cited allegations shows that those filings in substance (1) often did not allege the lies Fox claims they did,

and (2) *at most* shared subject matter with Fox’s lies, but were not the *subject* of Fox’s coverage.¹⁴

C. Fox’s “Opinion” Argument Misses the Point.

To some extent, Fox’s short section on “Statements of Opinion” rehashes Fox’s earlier attempts to interpret cases like *Brian v. Richardson* as granting blanket immunity to the media for reporting “newsworthy allegations” they know to be false. FNN MSJ p.55. As explained above, those cases stand for no such proposition. *See supra*, Section I.A. The “newsworthy allegation” immunity Fox proposes is far broader than that granted under the already-controversial neutral reportage doctrine. If that is what Fox means in its “Statements of Opinion” section, the Court should flatly reject the argument for the reasons stated above.

As for the traditional “fact/opinion” test applied in *Milkovich*, which Fox cites heavily in this section, the accused statements are plainly actionable under that test. In *Milkovich*, the Supreme Court rejected precisely the kind of broad “opinion” argument Fox advances here:

If a speaker says “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an

¹⁴ Obvious examples of this are legion, but by way of illustration, the Appendix attributes the statement, “You say these four individuals [Jorge Rodriguez, Khalil Majzoub, Gustavo Reyes-Zumeta, Antonio Mugica] led the effort to rig this election. How did they do it?” entirely to an allegation, repeated verbatim in four Powell complaints, that does not mention three of those four people or the election at all, and mentions the fourth only as an inventor on a Smartmatic patent. *See* FNN App’x p.73.

untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’”

Milkovich, 497 U.S. at 18-19 (quoting *Cianci*, 639 F.2d at 64).

The example the *Milkovich* Court gives of a statement of opinion that “does not contain a provably false factual connotation” is “the statement, ‘In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin.’” *Id.* at 20. That statement is not actionable because it is not provably true or false; the point the Supreme Court is making is that whether accepting the teachings of Marx and Lenin demonstrates ignorance is a consummate matter of personal opinion.

The *Milkovich* Court also cleared space to protect statements that fairly qualify as “imaginative expression” or “rhetorical hyperbole,” *id.*, but the false allegations at issue here were plainly not meant as figurative hyperbole. “Dominion rigged the 2020 election” or “Dominion bribed public officials” is not a figure of speech; these are plainspoken accusations of serious crimes, including treason, conspiracy, and bribery. For that reason, this case is nothing like *McDougal v. Fox News Network, LLC*, where the court found it “abundantly clear that Mr. Carlson

was not accusing Ms. McDougal of actually committing a crime.” 489 F. Supp. 3d 174, 183 (S.D.N.Y. 2020). Nor are the other cases cited in Fox’s opinion section anything like this one. *See Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 229 (2d Cir. 1985) (restaurant review, where reviewer used “metaphors and hyperbole”); *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1160 (9th Cir. 2021) (lawsuit over single statement that television network “really literally is paid Russian propaganda”; court (applying California law) held statement “was an obvious exaggeration, cushioned within an undisputed news story,” and so was not actionable); *Clifford v. Trump*, 339 F. Supp. 3d 915, 927 (C.D. Cal. 2018) (lawsuit over single tweet by President Trump; court (applying Texas law) held statement was non-actionable “‘rhetorical hyperbole’ against a political adversary,” emphasizing that it was “a one-off rhetorical comment, not a sustained attack on the veracity of Plaintiff’s claims”).

D. The Challenged Statements Are Actionable Defamation.

The section of Fox’s brief addressing each of the twenty accused statements individually runs more than 60 pages. FNN MSJ pp.56-120. On any fair analysis of each of the accused statements, even allowing for the possibility of a neutral reportage defense, Fox’s liability for defamation is clear and conclusive.

Fox’s corporate testimony confirms this conclusion. When asked to provide the factual basis for its affirmative defenses, Fox discussed truth/falsity almost

exclusively. Fox did not mention fair report or neutral report with respect to any of the accused statements, and only rarely even indirectly referenced facts arguably related to those defenses. On this basis alone, and for the reasons explained in Dominion’s summary judgment motion, the Court should grant summary judgment against Fox on its affirmative defenses. *See* Dom. MSJ pp.161-162 (citing Ex.127, Lowell 30(b)(6) 58:12-192:12).

Much of Fox’s analysis in this section asks the Court to rule that Fox is immune from liability because it “was covering and commenting on *allegations*, not reporting that the allegations were true.” FNN MSJ p.56. For all the reasons discussed above, the Court should reject Fox’s unsupported attempt to stretch cases like *Brian* and *Page* into a one-factor “newsworthy allegation” test. *Supra* pp.57-70. Under well-settled New York law, Fox is responsible for publishing defamatory statements of guests who appeared on its shows, if Dominion can prove Fox’s actual malice. *See, e.g., Cianci*, 639 F.2d at 60-61; *Biro*, 883 F. Supp. 2d at 461. Fox’s citation of *Croce* in the introduction to this section of its brief proves Dominion’s point, as *Croce* held that “even with qualifying language, a defendant could be liable for publishing statements with actual malice.” 930 F.3d at 795-96. Exactly.

Fox urges its one-factor “newsworthy allegation” test on the Court because it knows it cannot possibly meet the far more stringent requirements of the “neutral reportage” defense. As explained above, the guests Fox brought on were not

“responsible,” but rather were plainly unreliable. *Supra* pp.54-55. And as shown in the segment-by-segment analysis below, Fox’s broadcasts were neither “accurate” nor “dispassionate”; Fox’s hosts “espoused” and “concurred in” the lies, and hid the truth—evidence showing the guests to be unreliable and undermining the false allegations—from their viewers. FC Chairman Rupert Murdoch agreed that almost every host at issue here “endorsed” the false narrative of a stolen election. *See supra* pp.3-4; *see also* Ex.649 (internal Fox email listing broadcasts Fox deemed “Instances of Talent Support for the ‘Stolen Election’ Narrative ...” that focuses only on the *host’s* statements and *does not even count* statements made by guests such as Powell and Giuliani).

Fox’s own talent and executives understand the difference between genuine neutral reporting and “token” efforts at pushback that should not be credited. As Fox news anchor Dana Perino acknowledged, questions intended to balance reporting should “be contained within the same segment.” Ex.132, Perino 372:2-9. Pointing to coverage from other broadcasts would be even more off base, and indeed even full retractions made in subsequent broadcasts do not insulate a defendant who publishes with actual malice. *See Kerwick v. Orange Cnty. Publications Div. of Ottaway Newspapers, Inc.*, 420 N.E.2d 970 (N.Y.1981); *accord Edwards*, 556 F.2d at 120 (evaluating coverage “in the same article”).

But even questions asked in the same segment can be just token efforts, as

FNN SVP David Clark explained:

If someone states -- someone lies or they misrepresent the facts and the person who is interviewing that person just sort of says -- you know, they don't push back -- *pushing back hard would be to say, come on now, we know that's not the truth. In this case, a token push back could be, Is that what you really believe?* So I think there's degrees of push back *and what I meant by token, is that it would not really be challenging the assertions made by the guests.*

Ex.106, Clark 156:13-157:3. Clark agreed “a token push back” would “be insufficient.” *Id.* 157:4-8. FNN EVP Meade Cooper likewise conceded that “a token pushback is not really a fair reporting on either side.” Ex.108, Cooper 191:1-4.

Cooper also confirmed newsworthiness is not a license to lie, agreeing “you can cover the allegations and say they are conspiracy theories and not true” and “there are ways to cover the allegations without giving a platform to the people spewing lies.” Ex.108, Cooper 284:8-14, 284:22-25. FC executive Rah Shah similarly acknowledged, “it’s possible to cover those allegations while pointing out in the same breath that they are being made without any evidence to support them.” Ex.605, Shah 260:14-20. And while Fox’s hosts on a few occasions acknowledged Dominion’s denials, reporting a bare denial by a falsely accused party is nowhere near as powerful as reporting that denial alongside the information the accused party provides to debunk the false charges, as FC CLPO Viet Dinh conceded. Ex.601, Dinh 65:14-20.

The Court should hold the neutral reportage defense unavailable under New York and federal law, but even if the Court were to consider the defense theoretically available, no reasonable jury could find Fox carried its burden to invoke it for any of the statements at issue.

Fox's fair report defense likewise fails, for reasons explained in detail above. *Supra* pp.71-78. Fair report is a narrow doctrine (statutory in New York) that is not available in circumstances, like here, where the media defendant did not provide a substantially accurate report of the proceedings, and in fact in nearly every accused segment failed to identify any particular proceeding at all. *Id.* Dominion addresses below the six segments where Fox raised fair report in its brief; Fox's conclusory (and waived) invocations of the defense for other segments solely in its appendix are addressed above. *Id.* pp.77-78.

Fox also argues that its hosts' statements are "protected opinion." FNN MSJ p.57. This argument misses the point. Fox hosts endorsed and applauded the false Dominion allegations; however one might characterize those endorsements, they negate any "neutral reportage" defense for Fox. Yet even if some Fox host statements were opinions, those opinions are actionable because they were based on

false facts, and falsely implied that they were based upon the existence of other facts unknown to the viewer. *Milkovich*, 497 U.S. at 18.¹⁵

Fox's treatment of its hosts' endorsements is symptomatic of Fox's broader practice of analyzing particular words and sentences in isolation, then pivoting to cite "context" well outside the accused segment, and even outside the accused show. This self-serving practice of both zooming in far too tightly and zooming out far too broadly has no support in the doctrine or caselaw. Other broadcasts are legally irrelevant to whether a statement is defamatory. While the most important context is the segment itself, New York courts have taken "the entire broadcast as the context relevant to a court's defamation inquiry." *Geary v. Goldstein*, No. 91 CIV. 6222 (KMW), 1996 WL 447776, at *2 (S.D.N.Y. Aug. 8, 1996). Though other broadcasts might be relevant to the actual malice inquiry because they shed light on Fox's state

¹⁵ As with fair report, Fox sometimes raises an "opinion" argument in its appendix without mentioning the argument in its brief. Arguments that a party does not raise in its brief are waived, *Emerald Partners*, 2003 WL 21003437, at *43, and particularly given the space constraints (Fox's appendix was not included in Fox's 46,000-word count for its two opening briefs), Dominion will not address those conclusory, waived arguments in its brief. But the same response applies to each of them: opinions based on the false Dominion allegations, or implying undisclosed (and false) facts, are actionable under *Milkovich*. And opinions that also constitute endorsements eliminate any possible neutral reportage defense.

Fox also raises a handful of "actual malice" arguments in this section of its brief. Dominion addresses actual malice later in this brief. *Infra* §III.

of mind, they do not form part of the Court’s analysis for how a *viewer* would interpret the accused statements.

1. November 8, 2020 – Maria Bartiromo, *Sunday Morning Futures*, ¶179(a).

This segment espouses both an overall false narrative that Dominion aided or caused “a massive and coordinated effort to steal this election from we the people of the United States of America, to delegitimize and destroy votes for Donald Trump, to manufacture votes for Joe Biden,” and specific false assertions that Dominion rigged the election and used algorithms and software to do so. ¶179(a); Dom. MSJ App.D pp. 2-3; Ex.A2 p.15.¹⁶ The accused statements are unequivocal assertions of fact: “[t]hey also used an algorithm...,” “that’s where the fraud took place, where they were flipping votes in the computer system, or adding votes that did not exist,” and so forth. Ex.A2 pp.15-16. They have “a precise meaning which is readily understood,” “are capable of being proven true or false,” and in their full context ““signal readers or listeners that what is being read or heard is likely to be”” fact. *Gross*, 623 N.E.2d at 1167.

None of Fox’s arguments about this segment absolve it of liability.

¹⁶ Appendix D of Dominion’s motion for summary judgment identifies the accused statements, broadcast by broadcast. Appendix B identifies each broadcast’s transcript and video, by exhibit number (versions produced by Fox and Dominion). Fox’s motion identifies similar materials.

Neutral reportage. To try to prove it was merely neutrally reporting allegations, Fox first points to instances when Bartiromo asked questions as evidence of her neutrality. But three of the four questions Fox identifies are in the Giuliani segment, which is not accused, and the questions have nothing to do with allegations against Dominion anyway. See FNN MSJ p.58-59; FNN App. p.1. The fourth question, asking why “we” are not seeing a massive government investigation, likewise had nothing to do with the Dominion vote-flipping allegations. Bartiromo prefaced it by reciting Powell’s allegations about ballots having “only Joe Biden on the ticket,” and then after Powell answered the question, Bartiromo *transitioned* to the subject of Dominion: “Sidney, I want to ask you about these algorithms and the Dominion software.” Ex.A2 p.16.

There is also nothing else about the context of the show that indicates neutrality. As the video shows, Powell’s tone is unequivocal, and Bartiromo’s tone is not skeptical. Though merely labeling something an “allegation” does not immunize the broadcaster (that’s Fox’s one-factor “newsworthy allegations” test), Bartiromo does not even label Powell’s statements as “allegations.” She never says the claims are unsubstantiated. In stark contrast to the cases Fox cites, neither Powell nor Bartiromo say that Dominion “may” have committed fraud. ***Powell says Dominion did.*** In fact, Fox’s own Senior Vice President of Weekend News & Programming David Clark, who supervised this show, agreed that Bartiromo did not

offer “any pushback,” not even “token push back,” in this segment. Ex.106, Clark 238:5-14.

If Bartiromo was truly being an accurate, neutral reporter, she would have disclosed to her viewers the fact that the only “evidence” Powell had provided for her explosive Dominion allegations was the email from the woman who “listens to the wind” and believed Justice Scalia was murdered in a human hunting expedition. Dom. MSJ pp.24-25, 118-119. Bartiromo admits that she “never confronted [Powell] either before her show or on the show as to whether or not” the email was her evidence. Ex.98, Bartiromo 142:12-19. Instead, Bartiromo hid that from her viewers, [REDACTED]

[REDACTED] Bartiromo never told viewers that her statements about Powell making “the President’s case” were the opposite of what she had heard to be true from Powell herself. Bartiromo likewise admitted she “never confronted Ms. Powell with any evidence that was available to [her] contradicting [Powell’s] claims.” Ex.98, Bartiromo 179:16-21.

Fox points to Bartiromo’s statement that “there were voting irregularities” and that she has “never seen voting machines stop in the middle of an election, stop down, and assess the situation” and says those statements are substantially true. As support, Fox points to Antrim County, Michigan and Georgia and mischaracterizes

Dominion CEO John Poulos’ testimony. FNN MSJ pp.60-61. But by November 7, 2020, the day before the broadcast, the State of Michigan had already reported that human error, not Dominion software, caused the issue with unofficial vote reporting tallies in Antrim County, and had corrected the error. *See* Dom. MSJ p.66. And contrary to Fox’s claim, there were no “irregularities” related to Dominion voting machines’ tabulation of votes in Georgia. *See* Dom. MSJ pp.53, 67. The first article Fox points to is about a pipe bursting in Atlanta and does not mention Dominion at all. FNN MSJ p.61 (Ex.D21). The second article, from November 4, 2020 (updated November 13, 2020), is about pollbooks (manufactured by a different company) in one county, and an issue with a batch scanner, not Dominion software, that had no impact on tabulation, in one other county. *See* Ex.D18.

More to the point, the idea that Dominion voting machines were used to “stop down, and assess the situation” is patently absurd and was demonstrably false at the time asserted—Dominion cannot monitor or see votes in real time. *See* Dom. MSJ p.65. Ignoring these facts, Bartiromo nonetheless accepted as the premise of her statement that these falsehoods were true.

Fair report & Opinion. Fox does not raise fair report or “opinion” for this segment in its brief.

2. November 12, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(b).

This segment espouses both an overall false narrative that Dominion aided or caused electoral fraud and specific false assertions that Dominion was owned by a company formed in Venezuela to rig elections. Giuliani is unequivocal: “Dominion is a company that’s owned by another company called Smartmatic, ... formed really by three Venezuelans who were very close to – very close to the dictator Chavez of Venezuela and it was formed in order to fix elections. That’s the company that owns Dominion.... all of its software is Smartmatic software, so the votes actually go to Barcelona, Spain.” ¶179(b); Dom. MSJ App.D pp.3-4; Ex.A5 p.8. These are readily understandable, provably false assertions of fact. Fox’s defenses are meritless.

Neutral reportage. In support of its neutral reportage argument, Fox asserts that Dobbs expressed “doubts” about Giuliani’s ability to “prove the President’s claims,” pointing to language in which Dobbs says it is difficult to “get a handle on just who owns what.” FNN MSJ p.63. But Fox omits the passage where Dobbs *credits as true* Giuliani’s preceding false statements about Dominion being owned by a Venezuelan company formed to rig elections: “little is known about their ownership *beyond what you’re saying about Dominion.*” Ex.A5 p.8.

Dobbs also directly supports Giuliani’s false narrative by saying “by the way, the states, *as you well know now*, they have no ability to audit meaningfully the votes that are cast because the servers are somewhere else and are considered

proprietary.” *Id.* That was false on many levels, Dom. MSJ pp.51-55, and Dobbs admitted he never had any evidence to support the claims, Ex.111, Dobbs 64:11-65:15, 38:11-39:16. Fox tries to explain this statement away as Dobbs “repeating Giuliani’s allegations,” FNN MSJ p.65, but that is a nonsensical reading of Dobbs’ statement (including “as you well know”).

Fox also raises the smokescreen of “vulnerability” and “hacking” in its discussion of this segment, but (again) that is not what Dominion sued over. Even Giuliani gets the difference, saying “[t]heir machines can be hacked. ***But it’s far worse than that, Lou,***” before launching into his false Venezuelan/Smartmatic conspiracy theory. Ex.A5 p.8.

The sole question in the segment that Fox points to as evidence of neutrality, “How do you proceed now?”, does not contest the veracity of Giuliani’s claims or suggest to viewers they are false. *Id.* p.9. To the extent Fox points to other segments (interviews with Andy Biggs or Jenna Ellis) and other topics that are not about Dominion (like Pennsylvania’s ballot deadline), such matters are irrelevant because Dominion has not accused them. Non-accused statements in non-accused segments of a broadcast do not convert actionable false statements of fact into non-actionable opinion.

Dobbs also hid evidence debunking the false claims from his audience. He admitted at his deposition that he was “aware of what they [referring to Dominion]

were saying about the allegations.” Ex.111, Dobbs 115:11-16. He and his producers had received an email earlier that day from Dominion not only denying any claims of vote switching, but linking to its “Setting the Record Straight” page, which contained links to credible official sources, including the U.S. Election Assistance Commission, identifying audits as one election safeguard that did exist.¹⁷ See Ex.661; Ex.663 at FNN007_00019000; see also Ex.111, Dobbs 109:4-110:14, 112:11-114:4; Ex.351 pp.3, 6. Dobbs didn’t mention any of this on air. Nor did he tell his audience (as he admitted at his deposition years later) that he “had not seen any verifiable, tangible support that Dominion was owned by a company that was formed to fix elections.” Ex.111, Dobbs 65:7-15. The Dobbs team had reliable information from public sources as of November 12 that no fraud occurred, and they had no evidence to the contrary. Dom. MSJ at 125-126. They likewise could easily have fact-checked Dominion’s ownership, but did not. *Id.* at 126; Ex.601, Dinh 26:11-27:19.

Fair report. Fox’s fair report argument points to cases filed weeks later. As the Court already rightly held, statements made “before a lawsuit had been filed” do

¹⁷ Fox’s focus on “auditing” Dominion’s “servers” is nonsensical, as Dominion does not send votes to servers overseas. Dom. MSJ p.68. Fox says “computer scientists and members of the media” had “similar concerns” as Dobbs about “Dominion’s servers and the challenge of auditing them.” FNN MSJ p.66. But the two articles Fox cites do not say that Dominion servers stored votes cast (abroad or anywhere) nor discuss the ability to “audit” servers (whatever Fox means by that). The second article (Ex.D26) does not even mention Dominion.

not qualify for fair report immunity. MTD Order p.46. Fox also falsely says the cases it cites were filed by “President Trump’s legal team,” when they were all filed by Powell after she had been disavowed by Trump and the campaign. *Supra* pp.45-46. To the extent Fox is claiming to have been reporting on future *Trump campaign* litigation, the “report” was wholly inaccurate, since the Trump campaign never filed any cases making the false Dominion allegations Fox broadcast in this segment. For that additional reason, the fair report defense is unavailable.

Opinion. Dobbs not only repeated but endorsed Giuliani’s statements, with commentary like “It’s stunning,” “it is extraordinary that this election has got more firsts than any I can think of,” and “Rudy, we’re glad you’re on the case and pursuing what is the truth.” Ex.A5 pp.7, 10. Fox would immunize those sorts of assertions as opinion, but that misses the point that such endorsements vitiate any neutral reportage defense, and ignores the *Milkovich* rule that opinions based on false or undisclosed facts are actionable.

Fox’s highlights an instance where Dobbs says “I’m not suggesting it,” but that does not immunize Dobbs’ subsequent comments. FNN MSJ p.66. While Dobbs does say “this looks to me” and “I’m not suggesting it,” he then goes on to actually suggest something. In particular, he asserts that what Giuliani has said about Dominion is part of “a four and a half year-long effort to overthrow the

President of the United States.” Ex.A5 p.9. Dobbs does not equivocate: he says, “It looks like it is exactly that.”

Fox’s argument that “viewers recognize that *Lou Dobbs Tonight* is an opinion show” is also unpersuasive. Fox executives understand that “even on opinion shows, factual accuracy matters.” Ex.108, Cooper 175:7-10. Dobbs himself confirmed that his show was a place for viewers to get “accurate information to inform themselves,” and that “viewers were entitled to believe the things [he] said.” Ex.111, Dobbs 19:18-20:17; *see id.* 18:6-9. Fox broadcast false claims of facts on Dobbs’ show. That is actionable conduct.

3. November 13, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(c).

This segment espouses both an overall false narrative that Dominion aided or caused electoral fraud and specific false assertions that Dominion used software and algorithms to manipulate votes, was formed by a Venezuelan vote-rigging company, and paid kickbacks to government officials that used Dominion systems. The assertions are unequivocal, readily understandable, provably false assertions of fact, touting “all the evidence we have collected on Dominion, starting with the fact it was created to produce altered voting results in Venezuela for Hugo Chavez,” as well as “evidence on the financial interests of some of the governors and Secretaries of State who actually bought into the Dominion Systems, surprisingly enough – Hunter Biden type graft to line their own pockets by getting a voting machine in that

would either make sure their election was successful or they got money for their family from it,” and admonishing people to “come forward now and get on the right side of this issue and report *the fraud they know existed* in Dominion Voting Systems, *because that’s what it was created to do. It was its sole original purpose.*”

¶179(c); Dom. MSJ App.D p.5; Ex.A7 p.6.

Neutral reportage. Dobbs endorsed both Powell herself (twice calling her “a great American”) and her lies, saying, for example, “Well, good,” and “We’re glad that you are on the charge.” Ex.A7 pp.5-6. He called her lies “straightforward,” referred to the false conspiracy theory as “the culmination of what has been an over a four-year effort to overthrow this president,” told viewers “this is an extraordinary and such a dangerous moment in our history,” and concluded by characterizing the stolen election narrative featuring Dominion as “a foul mess” that was “far more sinister than any of us could have imagined.” *Id.* No reasonable person could consider this dispassionate reporting.

Dobbs’ presentation was one-sided in other ways, as well. Fox claims Dobbs “informed viewers” about the November 12, 2020 CISA statement as evidence of neutrality. FNN MSJ pp.68, 70. As an initial matter, Dobbs’ discussion of CISA was not in the accused segment. In the segment in which Dobbs referred to CISA, Dobbs lambasted CISA, claiming that “CISA IGNORES VOTER FRAUD” in

graphics highlighting a single sentence from the statement. Ex.56 at 4:51.¹⁸ Dobbs did not confront Powell with the CISA evidence in the accused broadcast, and he hid from viewers the fact that CISA had confirmed in its November 12 statement, **“There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.”** Ex.190. As on the day before, Dobbs and his team had ample evidence from credible public sources debunking the Dominion claims and knew the claims lacked evidence, yet kept this from the viewers. Dom. MSJ pp.125-127; *infra* 91-92.

Fox’s citation to Dobbs’ airing of Dominion’s denial is also misleading. Dobbs raised Dominion’s disavowal only while teeing up Powell to respond, stating the fact of the denial and then asking “Your reaction?” Ex.A7 p.5. The graphic Fox points to (buried on page 12 of its appendix but not cited in its brief) further confirms this point: the graphic notes Dominion’s denial but then says “multiple reports seem to show otherwise,” suggesting evidence exists that contradicts Dominion’s denial. (Dobbs similarly dismissed Dominion’s denial earlier in that night’s broadcast, saying (falsely) “reports contradict that claim.” Ex.A7 p.4.) If Dobbs had been reporting accurately and neutrally, he would have reported on the ***underlying proof*** that Dominion made available to him that proved the claims were false, Dom. MSJ

¹⁸ Dobbs similarly discredited the “Democrats, Republicans, and others” who “contested the President’s claims” by calling them “the radical Dems, the RINOs,” and so on. Ex.A7 p.2.

p.126, and he would have made clear that he had seen no “verifiable, tangible proof” of Powell’s claims, Ex.111, Dobbs 69:13-16. Even Fox admits token pushback is insufficient, and it is much less powerful to simply note a bare denial instead of disclosing the proof along with the denial. *Supra* pp.82-83.

Fox asserts that “Dobbs reminded [Powell] that she needed to prove her claims in court,” but Dobbs’ comment does not in any way show Dobbs’ neutrality toward Powell’s claims. Dobbs noted that Powell would be *under a time crunch* to prove the claims in court—that’s very different than saying that the underlying merits of the claims were doubtful. As for Dobbs’ question about “where their servers are domiciled,” FNN MSJ p.69, Fox omits the rest of that sentence from the transcript and replaces the ending with a question mark. What Dobbs actually says (falsely) is that “in at least two instances, three instances, we know they’re in foreign counties.” Ex.A7 p.6. Local jurisdictions administer elections locally and Dominion did not send or store votes overseas. Dom. MSJ pp.65, 68.

Fair report. Fox does not raise fair report for this segment in its brief.

Opinion. What Fox calls Dobbs’ “opinions” are evidence of non-neutrality that negate the neutral reportage defense. They are also actionable because they are based on false or incomplete facts, as none of the claims they endorse were true. Fox’s claim that Dobbs wasn’t really talking about Powell’s lies, FNN MSJ p.70-71, does not hold up, given he made the statements in direct response to her lies.

4. November 14, 2020 – Lou Dobbs, twitter, ¶179(d).

Fox claims these tweets are not defamatory:



¶179(d), Dom. MSJ App.D p.7. Giuliani’s tweet states, falsely but in no uncertain terms, that Dominion is “a foreign company” that “was counting our vote” in multiple states, and “was a front for SMARTMATIC.” These statements have a precise meaning and are capable of being proven true or false.

Fox argues that the last line of Giuliani’s tweet proves Giuliani was presenting “allegations to be investigated rather than...facts.” FNN MSJ p.72. That is an absurd reading. “It *will* all come out” is not a caution but a promise—a false one.

Dobbs, retweeting the Giuliani lies, endorses them by expressly connecting Dominion to “pervasive” “Democrat electoral fraud,” and asserting that fraud (involving Dominion) is “why there’s no way in the world the 2020 Presidential election was either free or fair.” Fox can cite all the cases it can find about “hyperbole” or “outrage” or Twitter, but Dobbs was not weaving some elaborate metaphor or letting off steam. He was telling his readers (falsely) that Dominion was part of a Democratic election fraud scheme, which (per the retweet) involved serving as a front for Smartmatic.

Neutral reportage. Fox makes no discernible neutral reportage argument about this segment in its brief. Nor could Fox: Dobbs endorsed Giuliani’s false tweet, doubling down with his own false allegations.

Fair report. Fox does not raise fair report for this segment in its brief.

Opinion defense. Even assuming *arguendo* that Dobbs’ tweet contained an expression of opinion, the opinion is actionable as based on false facts (Giuliani’s tweet) and implied undisclosed (but nonexistent) facts. *Milkovich*, 497 U.S. at 18-19.

5. November 14, 2020 – Jeanine Pirro, *Justice with Judge Jeanine*, ¶179(e).

Fox’s primary argument about this segment is a version of its “newsworthy allegation” argument, with Fox seeking immunity (despite actual malice) on the grounds that “Pirro used qualifying language” signaling Fox was not broadcasting

facts in this segment. But Powell’s language was unequivocal throughout. There is nothing tentative in statements like “It was created for the express[] purpose of being able to alter votes and secure the reelection of Hugo Chavez and then Maduro.” ¶179(e), Dom. MSJ App.D pp.8-9, Ex.A9 p.9. That is a provably false statement, published (and republished) by Fox, for which Fox is liable. *Supra* pp.84-85. In any event, Pirro introduced the segment by telling viewers Powell “will explain what she has *unearthed* in the creation of Dominion,” Ex.A9 p.2—not “what she is *alleging*,” much less “what she is alleging *with no evidence in support and all evidence to the contrary*.” That signaled to viewers they were about to hear facts.

Neutral reportage. Given the facts, no jury could find this segment to qualify for *Edwards* neutral report immunity. Not only did Pirro tell her audience they were about to hear what Powell “has unearthed” about Dominion, but she also pumped up the Dominion allegations by saying in her opening, “And those voting machines created by Dominion, *stay tuned. The best is yet to come.*” Ex.A9 p.3. That is not neutral.

Fox cites some statements Pirro makes in her opening and interviews with other guests, but those are irrelevant since those guests were not discussing Dominion. FNN MSJ pp.72-74. What about Pirro mentioning Dominion’s denial? As Fox’s own executives acknowledge, *supra* p.83, reporting bare denials is not real pushback when you omit the detailed facts debunking the false claims. The screens

and then adds, by the Department of Justice too, “but who knows anymore.” *Id.* This is not pushback; this is Pirro amplifying Powell’s conspiracies by falsely implying the Justice Department is ignoring a real scandal.

Perhaps most damning for Fox is Pirro’s laundering of her own conspiracy theories through Powell. As explained above, Pirro fed conspiracy theories to Powell, bragging to her friends that she was the source for Powell’s claims, *supra* p.44—something she never told her audience.

Fair report. As to fair report, Fox’s reference to “the President’s pending lawsuits” is no help to Fox, as none of those lawsuits included any of the Dominion allegations at issue. *Supra* pp.45-46. Fox also cites “the newly filed suit in Georgia.” FNN MSJ p.77. Contrary to Fox’s representation, that lawsuit was ***not*** filed by the President or his campaign. *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1316 (N.D. Ga. 2020) (plaintiff was “a registered voter in Fulton County, Georgia”). Moreover, at the time of the broadcast, that lawsuit likewise did not include any of the Dominion allegations. *Supra* p.40. (The bizarre affidavit, appended to a brief that did not even reference it, was not filed until November 17. Ex.C5.) *See also* Ex.743 (Carlson called it an “irrelevant redacted affidavit from Venezuela”). Fox’s fair report argument for this segment fails every element of the test.

Opinion. Fox’s only opinion argument for this segment seeks to defend Pirro’s commentary that “Powell’s claims warranted investigation.” FNN MSJ p.78.

But the comment in question, besides relying on false facts and falsely implying facts exist to justify an investigation, also serves to signal to Pirro’s viewers that actual responsible parties like the Justice Department cannot be trusted.

6. November 15, 2020 – Maria Bartiromo, *Fox and Friends*, ¶179(f).

Fox tries to dismiss this segment, Bartiromo’s “teaser” for an upcoming broadcast, as signaling to her viewers that she was merely talking about “allegations,” not facts. FNN MSJ p.85. The Court should reject this “newsworthy allegation” defense as a matter of law. But it fails on its own terms anyway. Bartiromo didn’t preview upcoming “allegations.” She told her audience that Giuliani “is breaking so much *news* on the software that was used in the voting machines on election night.” ¶179(f), Dom. MSJ App.D pp.9-10, Ex.A39 p.4. She also says, “There is *much to understand* about Smartmatic, which *owns Dominion Voting Systems*”—a plainly factual, and false, assertion by Bartiromo. *Id.* And she also said her upcoming segment was “very important to *understand what was going on with this software*”—again, not “the serious allegations being made” (though repeating allegations you know to be false is still actionable), but “what was going on with this software.” *Id.* This segment fails even Fox’s improper one-factor “newsworthy allegation” test.

It is certainly not neutral reportage, including because Bartiromo again fails to disclose to her viewers all the evidence she had discrediting the source and

debunking the false allegations. *Supra* p.88; *infra* p168-69. And Fox does not even try to claim it is fair report or opinion.

7. November 15, 2020 – Maria Bartiromo, *Sunday Morning Futures*, ¶179(g).

Bartiromo’s broadcast itself is no better for Fox. It is filled with unequivocal factual assertions: “[A] very, very dangerous foreign company that did the votes in 27 states, a company that’s not American, a company that’s foreign, a company that has close, close ties with Venezuela and therefore China, and uses a Venezuelan company software that’s been used to steal elections in other countries.” ¶179(g), Dom. MSJ App.D pp10-12., Ex.A10 p.2. “And the software that they use is done by a company called Smartmatic Dominion sends everything to Smartmatic.” *Id.* “And President Trump won ... by millions of votes, that were shifted by this software that was designed expressly for that purpose.... It was exported internationally for profit by the people that are behind Smartmatic and Dominion.... They have done it before....” *Id.* p.7. “[W]e’re collecting evidence now from various whistleblowers that are aware of substantial sums of money being given to family members of state officials who bought this software.” *Id.* p.8. Other than the fact that Dominion does do business in 27 states, every bit of that was false, and provably so. The assertions left no room for doubt.

Fox is liable for knowingly broadcasting (and rebroadcasting) those false statements, even though they were made by guests. But make no mistake, Bartiromo

told plenty of lies herself on that broadcast. She began by falsely telling her audience they would be seeing “new *evidence* this morning of backdoors on voting machines.” *Id.* p.1. Then she falsely told her audience she was showing them a “graphic of the swing states that were using Dominion *and this software, the Smartmatic software.*” *Id.* p.4. She went on to cite an unnamed “source” building on this lie by claiming the Smartmatic software supposedly used by Dominion “has a backdoor” that allows voting to be “mirrored and monitored” and then manipulated. *Id.* Citing unnamed sources to buttress false assertions is classic defamatory behavior—and runs straight into the sword/shield doctrine, given that Fox has refused to provide any information about supposed “confidential sources.” *See infra*, 174-75. And she closed her segment not by telling her viewers these were all unproven (and indeed false) allegations, but by thanking Giuliani “for *breaking all of this news.*” Ex.A10 p.6.

Neutral reportage. Bartiromo’s endorsement of the false Dominion/Smartmatic narrative is plain throughout, beginning with her promising her viewers they were about to see “evidence” of non-existent “backdoors” when she later admitted under oath she never saw any evidence of any of the false Dominion conspiracy theories. Ex.98, Bartiromo 282:7-17. Her false factual assertions described above, buttressing her guests’ lies, also take the broadcast out of any conceivable realm of neutral reportage.

Fox claims that Bartiromo “pushed back” on Giuliani’s claims and “pressed” him “at every turn.” FNN MSJ pp.79-80. The transcript and video speak for themselves. Bartiromo did not “press” him for anything; she enthusiastically invited him to tell his (outlandish) story about Dominion, responding to his lies with a simple “yes” or “right” over and over. Ex.A10 p.5. (Giuliani returned the favor when Bartiromo told her anonymously sourced lie about a “backdoor” in the software. *Id.* p.4.) Asking a few times “can you prove this” in this context is not “pushback” (and focused not on whether Giuliani or Powell could prove the allegations at all, but whether they could prove them *in time* to beat Electoral College deadlines, *supra* p.48. Presenting Giuliani with any of the public sources that had at this point debunked the Dominion lies, and which Dominion sent directly to Bartiromo and her producer Abby Grossberg (and which the executives who oversee her program also received), would have been pushback. *See* Dom. MSJ pp.93, 122-123; Ex.363. But Bartiromo did not share any of that with her viewers. *See Cianci*, 639 F.2d at 69 (failure to disclose facts undermining the allegations is inconsistent with “neutral” reporting). And even her boss, David Clark, admitted under oath Bartiromo provided no pushback in this segment. Ex.106, Clark 302:20-303:12, 304:18-305:9.

Bartiromo’s Powell interview was not remotely “neutral” for many of the same reasons, as well as the fact that just as on November 8, Bartiromo again failed

to share with her audience all the evidence she already had demonstrating how unreliable Powell and her conspiracy theories were. *Supra* p. 88. Bartiromo did not even report Dominion’s denials of the claims, despite her producer Abby Grossberg having asked her the night before whether “to pull that statements from Dominion denying wrongdoing.” Ex.703. And as with Giuliani, Bartiromo concluded this segment with an enthusiastic endorsement: “Wow. This is explosive, and we certainly will continue to follow it. Sidney, thank you so much for your work.” Ex.A10, p.9.

Fair Report & Opinion. Fox does not make a fair report or “opinion” defense to this segment in its brief.

8. November 16, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(h).

This segment focused on the demonstrably false assertion that Dominion was owned by Smartmatic, a company alleged to have been founded in Venezuela to rig elections for a dead dictator. ¶179(h), Dom. MSJ App.D pp.13-15, Ex.A11 pp.5-7. Dobbs prompted Powell to discuss Dominion, and Powell responded by reading from an affidavit accusing Smartmatic of having been designed to rig elections for Hugo Chavez. *Id.* p.5. Dobbs then prompted Powell to tie the allegations back to Dominion, and confirmed her false assertion that “Smartmatic owns Dominion”:

Dobbs: And Smartmatic, the relation –

Powell: ***Smartmatic owns Dominion.***

Dobbs: Yes.

Dom. MSJ p.127 n.16; Dom. MSJ App'x D p.18.¹⁹

Powell's assertions about Smartmatic, which she connects to Dominion with her assertion "Smartmatic owns Dominion," and which Dobbs then confirms, are assertions of fact, with precise meanings that are capable of being proven true or false. The assertions are unequivocal and defame Dominion by falsely tying it to a company alleged to have been founded in Venezuela to rig elections. The assertions are actionable under any legal theory, and Fox's defenses do not hold up.

Neutral reportage. Fox tries to paint this broadcast as Dobbs neutrally reporting on allegations, but there was nothing neutral or measured or fair about Dobbs' broadcast. While Dobbs did use phrases like "potentially rigged" and "suspected of inflating vote totals" near the beginning of the segment, Fox omits the very first words Dobbs spoke when he introduced the segment: "Well, now to the widespread irregularities, anomalies and cheating in the presidential election." Ex.A11 p.2. Not so neutral. Fox claims "Dobbs made clear that the allegations were hotly contested by many, including by Democrats, Republicans, and members of the media." FNN MSJ p.88. But Dobbs' actual words, dripping with disdain, signaled to his viewers they should not credit any of those sources: "The *Radical Dems*, the

¹⁹ As explained in Dominion's MSJ brief, the produced transcripts omit this exchange, but it is clear on the video. Ex.27 at 04:20-4:24. Fox's brief concedes Powell says this. FNN MSJ p.87.

RINOs [“Republicans In Name Only”], *corporate left-wing national media* of course, quick to dismiss any concern about Dominion voting machines being manipulated as a, *quote-unquote*, ‘conspiracy theory.’” Ex.A11, p.2.

Fox points to an exchange between Dobbs and RNC Chair Ronna McDaniel in an earlier segment, but neglects to quote other passages from that interview where Dobbs flatly endorses the truth of the false conspiracy theories: “This is a President, this is a nation that has *just been wronged mightily. Only an idiot would try to claim* that there were no irregularities, that there were no anomalies, and *that there were insufficient evidence and documents suggesting fraud and inexplicable mathematic ratios* that tell us quickly *there is something terrible afoot here....* There is no election in our presidential history, our nation’s history in which there were so many anomalies, so many irregularities, *and so much clearer evidence of fraud.*” *Id.* p.3-4.

Dobbs continues his endorsements throughout his interview of Powell, which he starts off by endorsing Powell herself as “one of the country’s most prominent appellate attorneys.” *Id.* p.5. And he ends the segment with more endorsements of Powell’s false narrative, including telling his viewers that the Justice Department is “trying to blind us *to what is going on.*” *Id.* p.7. (Dobbs’ colloquy with Tom Fitton in a later segment is irrelevant, but in no event undercuts Dobbs’ clear endorsements in his Powell interview.)

Dobbs endorsed Powell's theories, including confirming the lie that "Smartmatic owns Dominion"; he encouraged his viewers to disregard sources debunking the lies; and he explained away government agencies' failure to support the false conspiracy theories as "people trying to blind us to what is going on." There is nothing neutral or fair in that reporting.

Dobbs also kept from his viewers repeated official confirmations from government officials that the Antrim County "anomaly" was caused by human error and *not* Dominion machines; information about Dominion's ownership; and continued confirmation by Republican government officials, including in Arizona and Georgia, that hand-count audits continued to prove the Dominion machines worked properly. *See, e.g.*, Ex.439, Ex.440, Ex.441; Dom. MSJ pp.92-95, 123-128. Dominion had been sending Dobbs and his producers this information for days at this point. Ex.111, Dobbs 112:17-114:4, 118:18-119:4, 122:15-124:19; Ex.363. Dobbs also admits he did not tell his viewers that he "had not seen any verifiable, tangible support that Dominion was owned by a company that was formed to fix elections." Ex.111, Dobbs 65:7-15. In fact, as FC CLPO Dinh explained, he was "pretty easily" (his words) able at the time to "look up and find out" evidence that debunked this lie that Dominion was "owned by a company founded in Venezuela to rig elections for Hugo Chavez." Ex.601, Dinh 26:11-27:19. And John Fawcett, Dobbs' own producer, had reason to doubt Powell's credibility, texting others prior

to the show that he thought Powell was “doing lsd and cocaine and heroin and shrooms.” Ex.442.

Fair report. Fox briefly argues that “a reasonable viewer would understand that Dobbs was discussing official judicial proceedings” because Powell was reading from an affidavit “filed in federal court the very next day.” FNN MSJ p.88. But the affidavit had not yet been filed, and neither Dobbs nor Powell attributed the affidavit to the lawsuit in which it would be filed the next day—a lawsuit Powell herself did not even file.

And Powell mis-described the affidavit anyway. Powell described the anonymous affiant as a “high ranking military officer,” but that was not a “true or fair” description of the affidavit, which attests that its author had certain military experience but says nothing about his military rank. *See* Ex.C5 ¶¶5-6. That mis-description falsely lent the anonymous assertions more credibility. Also, Powell asserts that “Smartmatic owns Dominion,” Ex.27 at 4:20-4:24, but that false and defamatory remark appears nowhere in the cited affidavit. If Powell was “reporting” on the affidavit, then she falsely implied that its allegations were, in effect, allegations against Dominion.

For all these reasons, the fair report defense does not apply.

Opinion. The only opinion argument Fox makes for this segment in its brief is that Dobbs cannot be held liable for calling for an investigation. FNN MSJ p.88.

Dobbs made the referenced statement in an earlier, non-accused segment, so the statement is not even at issue.

9. November 18, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(i).

In this segment, Dobbs reads at length from an affidavit that makes numerous false allegations against Dominion. Ex.A14. Those false allegations had a “precise meaning which is readily understood” and “are capable of being proven true or false.” *Gross*, 623 N.E.2d at 1167. Fox does not even try to argue the contrary. Rather, Fox invokes the fair report defense, noting that the affidavit “was filed in federal court the day before.” FNN MSJ p.90. But Dobbs never referenced any court case. To the contrary, he told his audience he was reading from “one of the affidavits *that has been given to us by an unidentified whistleblower*,” Ex.A14 p.5, suggesting it was evidence his team had dug up, not a court document he was fairly reporting. And Dobbs’ meandering interview with Giuliani—who had nothing to do with the case where the affidavit was filed—made allegations well beyond what was in the affidavit, including that Dominion was a front for Smartmatic, *see* Ex.9 at DOM_0071654990, ln.21-24. The fair report defense is unavailable.

Dobbs also bolstered the credibility of this so-called whistleblower by telling his viewers the anonymous source “was present both in Venezuela in 2013 and in this country as we were counting votes overnight on November 3rd.” *Id.* Then, after soliciting additional lies about Dominion from Giuliani, Dobbs responded “It’s

outrageous.” *Id.* That may have been Dobbs’ opinion, but that opinion was based on the false facts Dobbs and Giuliani had just recited, and signaled to Dobbs’ viewers that he believed them, and they should, too. Finally, Dobbs in this broadcast kept referencing the “fight for a free and fair election,” *id.* p.3—a phrase further signaling to his viewers which “side” to believe. Given all of this, no reasonable jury could find Fox entitled to the fair report defense—or neutral reportage, either.

Dobbs’ failure yet again to disclose to his viewers all the evidence he and his team had debunking the Dominion lies at this point, *see* Dom. MSJ pp.128-129, only further cements that Fox cannot invoke the neutral reportage defense for this segment.

10. November 19, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(j).

In this segment, Dobbs played back some clips from the news conference earlier that day, and also hosted Powell on the show. Both in the clips and in her appearance on the show, Powell made numerous unequivocal factual assertions against Dominion, each of which were provably (and actually) false. Fox’s entire defense of this segment is to say it “was reporting on unproven allegations made by the President’s legal team.” But that is not a defense. *Supra* pp. 52-70.

In any event, Dobbs’ reporting was nowhere near neutral. He promoted Powell as “a great American” and “[o]ne of the country’s leading appellate attorneys,” and touted the news conference and the false charges made there as

“powerful.” ¶179(j), Dom. MSJ App.D pp.21-23, Ex.A18 pp.2, 4. He promised his viewers that Powell “will be providing *more details on how* Dominion vote machines and Smartmatic software were used to help Joe Biden”—not “more allegations,” but “more details.” *Id.* p.2. He referenced, and gave credence to, false reporting on an alleged overseas raid, which he falsely tied to Dominion. *Id.* And yet again, he failed to disclose to his audience the ample evidence he and his team had proving Sidney Powell unreliable and her conspiracy theories false. *Supra* p.91-92.²⁰ No neutral reportage defense can save Fox for this broadcast.

Fox makes no fair report or opinion defense of this segment in its brief.

11. November 21, 2020 – Jeanine Pirro, *Justice with Judge Jeanine*, ¶179(k).

In this segment, Pirro repeats the false allegations that Dominion “started in Venezuela with Cuban money, and with the assistance of Smartmatic software, a backdoor is capable of flipping votes.” ¶179(k), Dom. MSJ App.D p.23, Ex.A22 p.2. Pirro then bolsters the credibility of that false allegation with her reference to “an overnight popping of the vote tabulation that cannot be explained for Biden.” *Id.* p.3. Both statements are plain factual assertions, provably false, and if anyone

20



responsible for this broadcast had knowledge of their falsity or reckless disregard for the truth, Fox is liable for them. *Supra* pp.84-85.

The evidence is clear on that front. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Yet Pirro refused to back down, and her bosses tried to get by with short banners at the bottom of the screen presenting Dominion’s denials (and even then, only for a brief time). Dom. MSJ pp.138; *see* Ex.30-1, 1:57-2:17, 5:16-5:25). Those banners do not cure Fox’s willful publication of known falsehoods, and no banner appeared during the “overnight popping” comment. Ex.30-2, 2:28-2:33.

Neutral Reportage. Pirro’s segment is not neutral. She relies on patently unreliable sources, and then bolsters their lies with a lie of her own. She characterizes the allegations as “what is staring us in the face,” and says “[h]ow do we *know* this? We *knew* it through affidavits.” Ex.A22 p.2. And she fails to disclose to her viewers any of the countervailing facts— [REDACTED]

[REDACTED] In fact, even though Georgia had completed its historic statewide hand recount two days earlier,

decisively confirming Dominion machines counted votes properly, Dom. MSJ p.53, Pirro fails to tell her viewers that key information—she is “not going to talk about the recount right now,” she says. Ex.A22 p.7.²¹

Fair Report. Fox makes a brief fair report argument, citing affidavits Pirro referenced in her opening. FNN MSJ pp.97-98. Most of the affidavits had nothing to do with Dominion, though, and as for the one that did, Pirro only describes that affidavit as mentioning “technical glitches,” not the far more serious Venezuela/Smartmatic conspiracy she described earlier. Ex.A22 p.2. Moreover, Pirro does not even purport to be describing a legal proceeding when she describes that affidavit. *Id.* And she falsely attributes the affidavit as coming from “[t]he President’s lawyers,” which Lin Wood was not. There is no viable fair report defense here.

Opinion. Fox’s “opinion” defense for this segment is limited to statements by Pirro that Dominion has not accused as defamatory and is thus irrelevant.

12. November 24, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(1).

The first portion of the accused statements here was an unequivocal assertion of fact: “[T]here’s no doubt that the software was created and used in Venezuela to control the elections and make sure that Hugo Chavez was always reelected ...”

²¹ Fox’s discussion of the Lin Wood segment (FNN MSJ p.97) is irrelevant; Wood was not discussing Dominion in that segment. Ex.A22 pp.5-7.

¶179(1), Dom. MSJ App.D pp.23-24, Ex.A26 p.5. What software? “[T]he software used in the Dominion machines.” *Id.* Powell follows this up by lying about being “inundated by evidence.” *Id.* All that is actionable defamation, courtesy of Fox giving a platform to a woman Dobbs and his producer acknowledged two days before was making no sense and not “verifying anything she is saying.” Ex.445.

Fox’s main defense to this segment is that the allegations were “newsworthy.” FNN MSJ p.99-100. So what? Newsworthiness is not a license to lie. Ex.108, Cooper 284:8-14, 284:22-25; *supra* pp.52-70. Nor is it an excuse for Dobbs to repeat his already-debunked lies about Dominion sending votes “overseas.” *Supra* p.97.

Neutral Reportage. Fox tries to rehabilitate the supposed “neutrality” of this segment by asserting that Dobbs “expressed ignorance on some of [Powell’s] claims.” FNN MSJ pp.99-100. That argument omits much, including the fact that, directly after Powell made false claims about Dominion, Dobbs confirmed with “Yeah,” and expounded upon “electoral fraud that would be perpetrated through electronic voting...prominently Dominion.” Ex.A26 p.5. That he noted “at least in the suspicions of a lot of Americans” does not relieve Fox of liability, particularly given his other statements, including his lies about the “overseas” servers. Fox also ignores that right as Dobbs was telling his viewers that Powell was up next on the show, he asked rhetorically (and sarcastically) “What? You mean this election was rigged? Really?” *Id.* p.4; Ex.63 11:00-11:11.

Dobbs yet again bolstered Powell's credibility in this segment, calling her "a great American," FNN Ex.A26 p.5, while failing to tell his audience that she had been *disavowed* by the Trump campaign just two days earlier. Ex.273. That was critical information he omitted, going directly to Powell's credibility. Moreover, as Meade Cooper testified Powell was newsworthy "because of the fact that she was representing the President," and she "lost some news value" once she was no longer representing him. Ex.108, Cooper 212:3-11. Dobbs' own producer texted him with the news on November 22, saying the campaign was "calling bullshit" on Powell. Ex.444. Yet Dobbs did not mention any of that to his audience.

In stark contrast, Dobbs *discredited* Dominion spokesperson Michael Steel, who had appeared on Fox two days earlier, with more of his dismissive sarcasm: "Well, Dominion Voting Systems trotting out a D.C. public relations firm to *run cover* for its *problematic conduct* during this year's election." Ex.A26 p.5. Neutral? No. Needless to say, Dobbs did not disclose almost anything Steel had said on Fox debunking the lies about Dominion. And yet again, Dobbs hid from his viewers all the other evidence discrediting Powell and her false conspiracy theories, including the fact that the statewide Georgia hand recount had confirmed nearly a week earlier that Dominion's machines did not flip votes. *Supra* pp.91-92; Ex.303-D.

Fair Report. Fox offers no fair report defense of this segment in its brief.

Opinion. Fox offers no "opinion" defense of this segment in its brief.

13. November 30, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(m).

Powell yet again made numerous unequivocal false factual assertions against Dominion in the segment, with precise meanings capable of being proven true or false, such as “all the machines *are infected* with the software code that allows Dominion to shave votes for one candidate and give them to another.” ¶179(m), Dom. MSJ App.D p.24-26, Ex.A29 p.5. And Dobbs, with his own factual statements about the “lack of [integrity]” in the election and “the *crimes that have been committed* against [Trump] and the American people,” endorsed her lies. *Id.* p.6. None of Fox’s arguments about this segment absolve it of liability for knowingly publishing these false allegations defaming Dominion.

Neutral reportage. The only accusation even arguably equivocal in this segment is Powell’s accusation of bribery; her allegations of election rigging through software code are unequivocal. But Powell’s reference to “tips” about bribery does not immunize Fox (or Powell) from liability for that false accusation. What Powell actually said was “[w]e’ve gotten tips from different people that we haven’t been able to verify *completely* yet,” *id.* p.5, plainly communicating (falsely) that Powell *had* been able to verify those “tips” at least to some extent. And rather than push back on this sensational allegation, Dobbs embraces it, further feeding the false narrative that Dominion bribed Georgia officials: “This thing should be shut down

right now and people understand that this will not be tolerated by the American people.” *Id.* p.6.

The context of the bribery allegations is also important. By this point, Georgia had completed its 100% hand recount of all ballots, confirming that Dominion’s machines accurately counted the presidential votes. Dom. MSJ pp.53-54. Dobbs yet again did not report that critical fact to his viewers, because it debunked the very conspiracy theory he brought Powell on his show to promote. Even worse, though, Dobbs not only failed to report the results—he ridiculed it as a “*so-called* recount,” signaling to his audience they should ignore it. Ex.A29 p.2. The false bribery allegations were another tool Powell and Dobbs used to discredit the Georgia officials responsible for the recount, and thus falsely discredit the recount results, too. Dobbs’ repeated attacks on Georgia officials throughout the segment were for the same purpose, and demonstrate just how non-“neutral” the segment was.

It was not just Georgia officials, either. Dobbs told his viewers “we cannot trust the Justice department, the F.B.I. or any Intelligence Agency.” *Id.* p.4. Who should his viewers trust? Dobbs was clear: “Let me be straightforward with you. I had damn sight rather have Sidney Powell and Rudy Giuliani on the case than [FBI Director] Christopher Wray and the fools, the corrupt fools that lead the F.B.I. any day.” *Id.* p.6. Now that’s an endorsement!

Fox tries to get mileage out of Dobbs saying “I guess it wasn’t machine error” at one point in the broadcast, FNN MSJ pp.102-103, but that comment had nothing to do with the allegations that Dominion rigged the election or flipped votes. It was a response to an explanation for why a server crashed, delaying the recount. Ex.A29 p.3. Fox misrepresents the exchange when it tries to credit Dobbs with “noting that Georgia officials concluded that *any errors on election day* were caused by a poll worker, *not* ‘machine error.’” FNN MSJ p.104-105. That entire passage had nothing to do with “errors on election day”; it was about delays in a recount.

Fair report. Fox makes no fair report argument regarding this segment in its brief.

Opinion. Fox tries to immunize statements about prosecuting Georgia officials, and other commentary, as protected opinion. Whether hyperbolic or not, the anger and frustration Dobbs was expressing was based on *false facts, i.e.*, all the lies Powell was telling, and he was endorsing. Opinions based on false facts are actionable. And these statements in particular signaled to Dobbs’ viewers that they should believe the lies.

14. November 30, 2020 – Sean Hannity, *Hannity*, ¶179(n).

Fox cannot seriously dispute that the statement by Sidney Powell at issue in this segment is an affirmative, unequivocal statement of fact, plainly accusing Dominion of rigging the election through “an algorithm.” So Fox doesn’t even try.

Instead, it trots out its “newsworthy allegation” defense, which the Court should reject as a matter of law. *Supra* pp.52-70.

Fox tries to defend Hannity by pointing to all the places where he talked about the “Trump campaign” investigating issues, but those passages have nothing to do with Powell, who by this time had been disavowed by the campaign. Now, Hannity at least mentions the disavowal, though he tries to downplay it for his viewers by saying “you said you were never part of that, their legal team.” ¶179(n), Dom. MSJ App.D p.26, Ex.A28 p.8. That is a head-spinning change in Powell’s story, directly contradicting what other Fox hosts had been saying for weeks—and what Fox continues to argue in this case. And it is a clear attempt to put a thumb on the scale for Powell’s credibility, by downplaying the apparent “split” between her and the campaign. *But see supra* p.118 (Fox executives admitting Powell was less “newsworthy” once she stopped being the President’s lawyer).

Hannity admitted at his deposition that he never believed Powell’s claims, yet he did not “challenge” her false claims on that broadcast “to the extent that I would have had I had more time.” Ex.122 Hannity 300:24-301:5, 322:18-21; *see also* Dom. MSJ pp.142-143. Hannity did not challenge her false claims at all. He did not tell his audience that he did not believe them, or that her excuses for not producing evidence were not credible, or disclose any of the evidence he had debunking those claims, such as the results of the statewide Georgia recount. *Id.* pp.142-144. To the

contrary, in the lead-up to his interview with Powell, Hannity repeated his own well-worn lies about Dominion, repeatedly mischaracterizing numerous press reports and other sources to soften up his audience to believe Powell's more drastic lies (a practice of Hannity's that Dominion covered in detail with him at his deposition). Ex.A28; Ex.122, Hannity 196:24-264:2. Given the unreliability of the source, and Hannity's woefully inaccurate reporting, this segment cannot possibly qualify as neutral reportage.

Fox does not mount a fair report or "opinion" defense of this segment in its brief. None applies.

15. December 4, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(o).

This broadcast starts off with Dobbs promising his viewers that Phil Waldron will "share *his knowledge* of Dominion Voting Systems" with them. ¶179(o), Dom. MSJ App.D p.26-27, Ex.A30 p.3. Dobbs then starts off the Waldron segment by framing a very leading question, suggesting to his viewers that while Dominion is certainly *a* "culprit" in the "multifaceted attack" Dobbs just finished describing, he wants to know from Waldron whether Dominion is "*the principal* culprit." *Id.* p.4. Framing questions to suggest false and defamatory answers—that Dominion is certainly *a* "culprit," and may in fact be "the principal culprit"—is actionable. *US Dominion, Inc. v. Newsmax Media, Inc.*, No. CV N21C-08-063 EMD, 2022 WL 2208580, at *31 (Del. Super. Ct. 2022) ("skewing questioning and approving

responses in a way that fit or promoted a narrative in which Dominion committed election fraud” can give rise to defamation). Remarkably, though, Waldron fails to take the bait, setting off on a meandering battlefield metaphor that does not mention Dominion. Ex.A30 pp.4-5. So Dobbs tries again, describing Dominion as “with algorithms which were designed to be inaccurate rather than to be a secure system” (though Dobbs again tries to put these words into Waldron’s mouth). *Id.* p.5. And Waldron again gets lost in a bizarre tangent, eventually getting to Dominion but saying only “it is a situation that is not easy to understand.” *Id.*

That colloquy illustrates just how much it was Dobbs driving the false Dominion narrative in this interview. He was not neutral; he presented none of the evidence contradicting that false narrative. *Supra* pp.91-92. Nor can fair report save Fox here, as Dobbs did not attribute his comments to (or even identify) any specific official proceedings—which perhaps is why Fox did not even try to prove that Dobbs’ defamatory statements were a true and fair report of anything. Moreover, Fox’s own brief admits that the interview was not a report “of” an official proceeding but rather a forum in which Dobbs prompted his interviewee to “*elaborate on*”—i.e., to go beyond—“the claims he had already made in an official proceeding.” FNN MSJ p.109. That also takes the segment beyond any possible fair report immunity.

16. December 10, 2020 – Lou Dobbs, twitter, ¶179(p).

This one is simple. Dobbs tweeted out a screenshot that even Fox must concede makes numerous false factual assertions against Dominion. ¶179(p), Dom. MSJ App.D pp.27-28. He did not attribute it to anyone else; it went out directly from his Twitter account. Even FC CLPO Dinh conceded “if you are looking at this tweet, [you] could reasonably think it came straight from Lou Dobbs since he did not attribute it to anyone else.” Ex.601, Dinh 282:16-22.

Fox tries to argue that other close-in-time tweets would signal that Dobbs was just “reporting” the “allegations” in the tweet. That is yet another attempt by Fox to invoke its unsupported “newsworthy allegation” immunity, which the Court should reject. But the argument is factually meritless anyway. Even if the Court could find as a matter of law that the embedded screenshot was plainly someone else’s allegations, not Dobbs’, Dobbs embraced and endorsed those allegations with his introductory tweet calling the election “a cyber Peral Harbor” and warning his readers “[t]he leftwing establishment have aligned their forces to overthrow the United States government #MAGA #AmericaFirst #Dobbs.” Ex.16.

17. December 10, 2020 – Lou Dobbs, *Lou Dobbs Tonight*, ¶179(q).

Yet again, in this segment Dobbs had Powell on to tell numerous lies about Dominion, each a factual assertion plainly capable of being proven true or false. ¶179(q), Dom. MSJ App.D pp.28-30, Ex.A31 (including Powell repeatedly saying

“we know” various false things). Fox argues that “[v]irtually ‘[e]very phrase used ... was qualified by words that made clear that the allegations were coming from Powell, not Dobbs” (FNN MSJ p.111, quoting the overruled *Orr* decision), but that is both legally irrelevant, *supra* pp.81-82, and factually false, as the Court can see from the transcript. Powell’s lies were unequivocal, and Fox is liable for broadcasting them with actual malice, Dom. MSJ pp.132-134—as well as for Dobbs’ endorsements and lies in support of Powell’s false narrative, described below.

Neutral reportage. Fox asserts Dobbs’ reporting was neutral because he “ma[de] clear that government officials disputed Powell’s allegations.” FNN MSJ p.111-112. But what Dobbs actually did was ***ridiculous*** these government officials as having “lost” their “nerve” and being “politically corrupt,” discrediting them for his viewers. Ex.A31 pp.5-6. As usual, Dobbs bolstered Powell’s credibility, calling her a “distinguished attorney” and “great American.” *Id.* p.3. *Edwards* does not protect defendants who endorse a source they know to be unreliable, Dom. MSJ p.12, while disparaging any sources undermining the false charges.

Dobbs also repeatedly endorsed and gave credence to Powell’s charges, previewing that she would be bringing “new information regarding electoral fraud in the radical left’s efforts to steal an election” (she didn’t), characterizing her false allegation as “apparently a broadly coordinated effort to actually bring down this President,” and characterizing her outrageous lying as “the Lord’s work.” Ex.A31

pp.5-7. Although he did ask Powell to bring her nonexistent “evidence” onto his show, he made sure to tell his viewers “[w]e have tremendous evidence already of fraud in this election,” *id.*—a statement he admitted at deposition was false. Ex.111, Dobbs 46:25-47:10; 86:20-24. And once more, Dobbs hid from his viewers the mountain of evidence debunking Powell’s false claims, as well as the fact that he personally doubted her credibility and had still never seen any evidence. Dom. MSJ p.132.

Fair report. Fox makes no fair report argument for this segment in the brief. All Powell’s lawsuits had been dismissed by this date—a fact that Dobbs knew, but kept from his viewers, further proving how non-“neutral” his “reporting” was. Dom. MSJ p.134.

Opinion. Any “opinions” Dobbs expressed in this segment were based on false or undisclosed facts, and so are actionable.

18. December 10, 2020 – Lou Dobbs, twitter, ¶179(r).



Fox’s analysis of this tweet misses the point. In this tweet, sent after the interview, Dobbs tells his audience that Powell had just “reveal[ed] groundbreaking new evidence indicating our Presidential election came under massive cyber-attack

orchestrated with the help of Dominion, Smartmatic, and foreign adversaries.” Ex.18. But as Dobbs admitted at his deposition, that statement was flat-out false: Powell had revealed *no* evidence *at all* in support of her Dominion lies on his show that evening (and never did). Ex.111, Dobbs 269:2-271:5. Dobbs lying to his viewers about there being evidence that Dominion “help[ed]” “orchestrat[e]” a “massive cyber-attack” on the election is plainly defamatory. The truth—that there was no evidence of such a thing—exonerates Dominion. Dobbs’ lie defames Dominion. Moreover, Dobbs’ “evidence” lie bolstered—falsely—the credibility of the lies Powell had just finished telling about Dominion on his show.

19. December 12, 2020 – Fox and Friends, ¶179(s).

Fox mounts two brief challenges to Giuliani’s appearance in this segment. Neither holds up. First, Fox argues the claims were Giuliani’s not Fox’s, but that’s just another variety of Fox’s “newsworthy allegations” argument, which the Court should reject. Second, Fox seems to make a fair report argument without invoking that defense by name, but that fails because the false Dominion allegations Giuliani made never appeared in any of his Trump campaign lawsuits, and Powell’s lawsuits had all been dismissed by that date. *Supra* pp.45-46. Underscoring the utter lack of any pushback by the Fox hosts, they failed even to point out to their viewers either of those highly relevant facts.

20. January 26, 2021 – Tucker Carlson, *Tucker Carlson Tonight*, ¶179(t).

Fox’s central defense to this segment appears to be that they were surprised Lindell falsely attacked Dominion that day, because they just wanted him to talk about “cancel culture.” FNN MSJ pp.117-118. That is not plausible. Dom. MSJ pp.144-147. But it is also irrelevant, given Carlson knew the Dominion attack was false, yet admitted he did not push back at all when Lindell made it (nor did his team edit the false claims out of rebroadcasts or online videos). *Id.*; Ex.105, Carlson 198:5-201:13. Even Rupert Murdoch conceded Carlson should have pushed back. Ex.600, R.Murdoch 345:4-8.

Fox cites Carlson’s November broadcasts criticizing Sidney Powell as “broader context,” Dom. MSJ p.118, but those broadcasts from months earlier do not make this segment non-actionable. To the contrary, a regular viewer of Carlson’s would likely have thought Carlson changed his mind on the subject, given how differently he treated Lindell than he had treated Powell. As for Fox’s argument that a viewer would not know Lindell was defaming Dominion, that is not plausible, given Dominion was the only voting machine company Lindell mentioned (and he mentioned Dominion multiple times, including in his statement about “machine fraud”). ¶179(t), Dom. MSJ App.D pp.31-32, Ex.A38 p.19.

II. Executives at Both Fox News and Fox Corporation Participated in the Publication of the Defamatory Broadcasts.

A. Responsibility Extends to Any Person In the Chain of Command Who Participates in the Publication of the Defamatory Statements, Including By Knowingly Allowing Them to Occur.

As this Court has held, “[i]n New York, ‘all who take part in the procurement, composition and publication of a libel are responsible in law and equally so.’ ‘Thus, a defamation claim cannot survive without an allegation that defendants participated in the creation or the publication of the statements at issue.’” FC MTD Order p.15 (footnote omitted) (quoting and collecting cases); *see also* Seelman §141 (same, and noting “where several persons join in singing one and the same libelous song, it is an *entire offence* and one joint act done by them all” and “if one repeat and another write, and a third approve what is written, they are all makers of the libel” (citation omitted)).

FNN focuses only on the state of mind of the accused programs’ hosts. FNN MSJ pp.126-134. But participation in the creation or publication of the accused statements does not stop at the hosts. Rather, it applies to *all* those individuals within the chain of command of a show. Consistent with the cases cited in this Court’s Order denying FC’s Motion to Dismiss, this Court recognized as much and allowed the claim against FC to proceed because of the allegations regarding the involvement of FC executives—particularly Rupert and Lachlan Murdoch—in the publication of the defamatory statements. FC MTD Order pp.15-18; *see also* Page, 270 A.3d at

850; *Solano*, 292 F.3d at 1086; cf. *Dershowitz v. Cable News Network, Inc.*, 541 F. Supp. 3d 1354, 1368 (S.D. Fla. 2021) (noting that plaintiff could use discovery to identify the “responsible decisionmakers” in a “large news organization” beyond just on-air commentators). Indeed, in prior briefing, FC acknowledged that liability extends to those who “approved” the accused statements. FC MTD p.32.

Section II.B.3, *infra*, addresses the specific evidence regarding FC’s participation. But this same principle also applies to those individuals at FNN who participate in the creation or publication of the accused statements—from the segment producers to the executive producers to the hosts to the executives responsible for overseeing the show.

FC CLPO Viet Dinh confirmed that responsibility for publication extends up and down the chain of command, and those “with the power to exercise control” had “an obligation to” prevent guests from telling lies:

Q. If any of the people in that chain of command who had the power to exercise control over Lou Dobbs’ show knew that what Sidney Powell was alleging was false, *didn’t they have an obligation to prevent her from coming on the show to tell those lies?*

A. *Yes....*

Q. But when the executives at Fox News know that hosts of shows are broadcasting allegations that the executives know or believe to be false, in that situation, the executives have an obligation to act, right? ...

A. If they are within the chain of command and if they—and if they come to that knowledge, yes.

Q. And by “act,” that means to put a stop to it, right?

Q. They have an obligation under those circumstances, the executives do, in the chain of command, to put a stop to those broadcasts, right, sir? ...

A. Yes, to prevent and correct known falsehoods.

Ex.601, Dinh 287:11-19, 316:5-25.

Fox’s argument that Dominion cannot rely on “general corporate knowledge” is a red herring: Dominion does not do so. Rather, Fox has artificially circumscribed the universe of responsible individuals to only five hosts, when in fact there are teams of executives and producers who—by Fox’s own admission—are responsible for each broadcast. *See, e.g.,* Dom. MSJ pp.101-117 (executives responsible), pp.117-148 (show teams). FC’s own motion acknowledges the responsibility of Fox News executives, pointing to FNN President and Executive Editor Jay Wallace’s testimony that he is “the executive editor with ultimate editorial control over the content of Fox News” as evidence of FNN’s control over the published statements. FC MSJ p.23.

Fox cites to *Blankenship v. Fox News Network, LLC*, No. 2:19-CV-00236, 2022 WL 321023 (S.D. W.Va. Feb. 2, 2022), for the proposition that “it is the state of the mind of the speaker that is relevant.” FNN MSJ p.134. FC has previously cited this case for the same proposition, *see* FC MTD Reply p.26, and the Court correctly rejected this erroneous framing of the law by permitting Dominion’s case against FC to proceed. As Dominion discussed at the hearing on the Motion to

Dismiss, *Blankenship* concerned actual malice on the part of Rupert Murdoch based on a one-day discrepancy in the length of a person’s prison sentence, not participation. Ex.744, FC MTD Hearing pp.56-57.

As the overwhelming weight of caselaw makes clear, the proposition that solely the speaker’s state of mind is relevant for the actual malice determination for a large media defendant contravenes the law. In *New York Times v. Sullivan*, the case originating the requirement that actual malice be “brought home” to the appropriate persons, the Supreme Court did *not* isolate the speaker’s mindset as the only one relevant for actual malice; on the contrary, it held that “the state of mind required for actual malice would have to be brought home to *the persons* in the Times’ organization *having responsibility for* the publication of the advertisement.” 376 U.S. 254, 287 (1964). If solely the “speaker’s” mindset was relevant, the reference to “persons” would make no sense. And the words “having responsibility for” on their face have an entirely different meaning than “who spoke” or “who authored.” *See also* Dom. MSJ pp.82-84, 89-90.

Similarly, in *Page v. Oath Inc.*, the Delaware Supreme Court emphasized that the actual malice standard must be brought home to the “persons” responsible for the defamation—repeatedly using the plural. 270 A.3d 833, 844 (Del. 2022). The Court dismissed claims where the plaintiff failed to plead or prove that *anyone* responsible for the defamation possessed actual malice.

Courts have consistently found the knowledge or reckless disregard of executives supports finding actual malice in the context of publishers or media organizations. *See, e.g., Hunt v. Liberty Lobby*, 720 F.2d 631, 646 (11th Cir. 1983) (evidence of actual malice of Chairman and Managing Editor of publication supported actual malice finding); *Stone v. Essex Cnty. Newspapers, Inc.*, 330 N.E.2d 161, 174 (Mass. 1975) (evidence supported actual malice where, despite author's lack of actual malice, his editor "allowed the story to be printed despite serious doubts as to its accuracy with respect to the plaintiff"); *Phoenix Newspapers, Inc. v. Church*, 537 P.2d 1345, 1359 (Ariz. App. 1975) (holding that actual malice on the part of *either* the author/editor *or* the president with "ultimate authority to approve or disapprove the publishing of the editorial" would satisfy actual malice requirement for organization); *Bandido's, Inc. v. Journal Gazette Co., Inc.*, 575 N.E.2d 324, 327 (Ind. Ct. App. 1991) (rejecting defendant's contention that the court "may examine only the conduct of the headline author in our analysis of 'actual malice'"); *see also* Smolla, 1 Law of Defamation §3:42.50 (2d ed.) ("It is critical to understand what this 'bringing home' to the 'persons' who 'have responsibility' does and does not mean. There are some occasional suggestions in cases implying that this means that the actual malice standard must be reduced to the subjective state of mind of *one person* within an organization. These statements may create the impression that when multiple individuals participate in the publication of an

allegedly defamatory statement, it is necessary to pick *one* of those individuals as the single human being most responsible for the publication, and focus single-mindedly on the state of mind of that person alone. This is *not* the correct legal standard,” and discussing cases (emphases in original)).

Finally, this case is not a normal defamation case, because instead of one defamatory statement, it presents a *series* of defamations over a months-long timeframe. As discussed in Dominion’s motion for summary judgment, 19 of the 20 accused statements occurred *after* Dominion gave notice to Fox. Dominion continued to provide notice throughout this timeframe, including in multiple communications to senior Fox leadership. *See, e.g.*, Dom. MSJ pp.4-5, 32-33, 37. A party who continues to distribute a defamatory publication after the party possesses knowledge of falsity may be charged with liability. *See Southern Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc.*, 307 S.E.2d 83, 88 (Ga. 1983) (“The evidence in the instant case authorizes the finding that appellant knowingly exercised its control over the publication of the libel by allowing additional distribution of the yellow pages directories.”). Indeed, the common law has always recognized that a defendant may be imposed with “distributor liability” for continuing to distribute defamatory material after the defendant becomes subjectively aware of the false and defamatory content of the material. *Grace v. eBay Inc.*, 16 Cal. Rptr. 3d 192, 198-199 (Ct. App.), review granted and opinion

superseded on other grounds, 99 P.3d 2 (Cal. 2004) (“A distributor, such as a book seller, news vendor, or library, may or may not know the content of the published matter and therefore can be held liable only if the distributor knew or had reason to know that the material was defamatory.”), citing Rest.2d Torts, §581, subd. (1), coms. b-e, pp. 232-234; Prosser & Keeton, Torts, §113, pp. 810-811; 2 Harper et al., The Law of Torts (2d ed. 1986) Defamation, §5.18, pp. 144-145; Smolla, The Law of Defamation, §4:92, pp. 4-140 to 4-140.1.

All 20 statements occurred after the November 7 *New York Post* editorial—

[REDACTED]

[REDACTED] Nineteen of the

20 accused statements occurred after multiple government agencies had debunked the charges. And 18 of the 20 accused statements occurred after Fox’s own research department—the Brainroom—had fact-checked the allegations and debunked the charges.

B. Individuals at Both Fox News and Fox Corporation Throughout the Chain of Command Knew What Was Happening And Let The Defamatory Broadcasts Proceed.

The lies about Dominion spewed by Fox were no accident. As discussed extensively in Dominion’s Motion for Summary Judgment, pp.1-44, 87-161, and in this Motion’s Background, Fox placed Dominion at the center of a far-fetched conspiracy to rig the 2020 Presidential Election. Fearing audience backlash, Fox

chose to spread those lies. Fox invited guests to its shows knowing the lies they would spread. Fox hosts endorsed those lies. And it was no surprise what guests like Sidney Powell, Rudy Giuliani, or Mike Lindell would say. The very reason Fox invited them to appear was to spread the lie that Dominion had rigged the 2020 Presidential Election.

Fox admits as much. Indeed, Fox bases its entire (legally incorrect) “newsworthiness” defense on the ground that the “allegations at issue here were unquestionably newsworthy because of who leveled them, where, when, and how they were leveled, and what they concerned.” FNN MSJ, p.3. Accordingly, as Fox candidly states, it invited guests onto its shows knowing what they would say. It is the reason why Fox claims it invited them on. Fox “interviewed Giuliani and Powell in the weeks following the election *so that viewers could hear about the allegations straight from the source.*” FNN MSJ p.23.

These guests did not make surprise allegations. Fox invited—and senior executives approved—their appearances with full transparency that they would repeat the lies about Dominion. Of course, as Fox Executive Vice President Meade Cooper admitted, “there are ways to cover the allegations without giving a platform to the people spewing lies.” Ex.108, Cooper 284:22-25. For Fox, however, inviting these guests to spew those lies was the very point of their appearances—a point well understood by the producers [REDACTED]

Ex.164); by the hosts who repeatedly endorsed these false election lies themselves (“Instances of Talent Support for the ‘Stolen Election’ Narrative,” Ex.649); and by the executives themselves (Suzanne Scott agreeing that after she learned about the allegations, Fox had the “right and the obligation to at least publish and broadcast that the President had made those serious allegations,” Ex.143, Scott 387:5-14).

Moreover, as described in Dominion’s Summary Judgment Introduction, this case is not normal. It involves serial defamations over a months-long timeframe about issues going to the core of democracy. The issues also threatened the core of Fox’s business—both FNN of course, but also FC, which relies on FNN’s profits. It is no surprise that these issues rose to the highest levels and that executives from Jay Wallace to Suzanne Scott to Rupert and Lachlan Murdoch participated in how to cover these allegations.

It is simply no excuse to say that senior executives were relying on subordinates (or superiors) when they themselves also share responsibility. Executives at Fox—both FC and FNN—have admitted responsibility over the broadcasts. They were all within the chain of command.

All reasonable jurors would find that from line executives like David Clark, Gary Schreier, and Ron Mitchell, to more senior executives like Meade Cooper and Lauren Petterson, to top FNN Executives Jay Wallace and Suzanne Scott, to FC executives including Rupert and Lachlan Murdoch, Viet Dinh, and Raj Shah, *each*

knew these defamatory broadcasts were occurring. See, e.g., Dom. MSJ pp.102-117 (evidence of knowledge of broadcasts by FNN executives); 32-33 (Dominion’s “Setting the Record Straight” emails distributed widely and to all FNN executives by November 12, and specific email to Scott and Wallace on November 16); Ex.704 (notice to senior Fox executives—including Scott, Wallace, Schreier, and Clark—the day before Powell’s November 8 appearance on Bartiromo); *supra* pp.20-24, 29-30 and *infra* pp.149-150 (Rupert’s knowledge by November 9 of Powell’s appearance; by November 23 of the article discussing Fox spreading conspiracy theories and Rupert’s comment that there was “some truth” to the article but Fox “navigating it pretty well”; and Ryan’s testimony that he was discussing Fox’s coverage of these conspiracy throughout the relevant timeframe and as early as the November 10 Board Meeting with both Rupert and Lachlan, even putting aside the circumstantial evidence of their knowledge based on the November 8 “long talk” with Suzanne and their daily calls and updates); *infra* pp.152-53 (in addition to the above, Lachlan watched the accused broadcasts at the time they aired and although he admits that he generally attended editorial meetings in this timeframe, specific evidence shows he attended the November 13 afternoon editorial meeting prior to Dobbs’ broadcast that night); *infra* p.154 (Dinh); *infra* pp.155-57 (Shah).

The requests for retractions and corrections and “Setting the Record Straight” emails from Dominion and third-party evidence debunking the allegations did not

occur *after* one defamatory broadcast. They occurred *while the defamatory broadcasts were still occurring*.

At the point an individual in the chain of command knows, *each person* has an “obligation to act,” as Dinh admits, “to prevent and correct known falsehoods.” Ex.601, Dinh 316:5-25. This obligation incurs from the junior-most producer to the Chairman of FC. And as discussed in Dominion’s Summary Judgment Motion, it is only necessary that *one person* have the requisite actual malice. Here, all reasonable jurors would find that *each* person listed had sufficient responsibility and knowledge of the broadcasts, and as discussed *infra*, *each* knew the charges were false or seriously doubted their truth.

All those in the broadcast’s chain of command understood the import of inviting these guests onto Fox’s air, and further understood that Fox hosts would endorse this false narrative. Yet Fox continued broadcasting these lies.

1. Fox News Hosts and Producers Allowed the Defamatory Broadcasts.

Fox’s on-air hosts were responsible for the defamatory broadcasts, and Fox does not argue otherwise. Indeed, they are the sole individuals Fox appears to consider relevant. *See, e.g.*, FNN MSJ pp.23-34. Fox’s hosts are certainly *among* the individuals in the chain of command with responsibility for the defamatory broadcasts.

The production teams for each program are likewise part of the chain of command responsible for each broadcast. *See* Dom. MSJ pp.117-148 & nn.14-15, 17-20. Each of these individuals had a responsibility to intervene if they knew that a broadcast featured false statements. *See supra*, §II.A; Ex.601, Dinh 314:3-315:19. None did so.

2. Fox News Executives Allowed the Defamatory Broadcasts.

Dominion's Motion for Summary Judgment sets forth the undisputed evidence of Fox News executives' responsibility for the accused broadcasts. Dom. MSJ pp.101-117; *see also id.* pp.14-44. Fox's motion does not dispute the sufficiency of the record, but instead argues that the only relevant individuals for the liability analysis are the hosts. That is not the law, *supra* §II.A, and additions to the record since the filing of Dominion's motion only confirm Fox News' executives' responsibility.

Rupert and Lachlan Murdoch both testified that they work with FNN through its CEO, Suzanne Scott. *See, e.g.*, Ex.600, R.Murdoch 210:13-16; Ex.130, L.Murdoch 261:22-23. As Rupert testified, Scott is "responsible for everything on Fox News." Ex.600, R.Murdoch 72:24. Viet Dinh, FC's CLPO, confirmed at his deposition that "executives at Fox News, they sit above the hosts and the producers," and that when executives "in the chain of command" "know that hosts of shows are broadcasting allegations that the executives know or believe to be false, in that

situation, the executives have an obligation to act.” Ex.601, Dinh 315:20-316:25; *id.* 314:3-20 (responsibility to point out false statements to viewers runs “to the speaker, that is the host, and her executive team, her production team.”). And FC’s own Motion for Summary Judgment highlights Jay Wallace’s testimony that “he is ‘the executive editor with ultimate editorial control over the content of Fox News’” and had “ultimate editorial oversight for the content broadcast on Fox News about the 2020 election.” FC MSJ pp.23-24.

The record makes clear that FC executives were additionally involved, but FNN executives were part of the chain of command responsible for the accused broadcasts. *Infra* pp.10-11, 15, 17-21, 28-29, 32-33, 35-36; *see also* Dom. MSJ pp.20, 22-23, 26-38, 44, 101-116

3. Fox Corporation Executives Allowed the Defamatory Broadcasts.

This Court correctly held in its Order on FC’s Motion to Dismiss that Dominion sufficiently alleged that FC “participated in the creation and publication of Fox News’s defamatory statements.” As the Statement of Facts here demonstrates—along with those in Dominion’s Summary Judgment Motion—discovery has borne out that any reasonable juror would conclude that FC was indeed “responsible in law” for the defamatory broadcasts.

Fox makes much of the fact that hosts of the accused broadcasts denied having ever spoken directly to Rupert or Lachlan Murdoch about Dominion or the accused

broadcasts, suggesting that demonstrates that FC cannot be liable for defamation. See FC MSJ pp.19-25. That is not the law.

FC's own motion quotes Maria Bartiromo's testimony regarding the authority of FC Executives Rupert and Lachlan Murdoch over the defamatory broadcasts: "if her 'bosses Suzanne Scott, Rupert Murdoch, Lachlan Murdoch' had given her 'a directive about having a person—about having or not having a particular guest on your show,' she would have listened. But she confirmed that 'they never said anything like that.'" FC MSJ p.21. Her "bosses" Rupert and Lachlan Murdoch never exercised their authority to stop her—or any of her colleagues—from broadcasting Sidney Powell's, Rudy Giuliani's, and Mike Lindell's lies about Dominion, despite knowing those guests were "crazy" and "unhinged" and, at minimum, harboring serious doubts about their claims. See Ex.634, Ex.615.

Rupert Murdoch. Rupert Murdoch is part of the executive leadership of Fox News Media and FNN. Ex.600, R.Murdoch 162:4-13; Ex.675. Fox News anchor Shepherd Smith confirmed that Rupert Murdoch was "the boss" and "the person in charge" of the direction of Fox News. Ex.145, Smith 47:2-48:22. Other Fox witnesses echo his testimony. See, e.g., Ex.98, Bartiromo 406:15-17; Ex.105, Carlson 113:3-7; Ex.122, Hannity 269:9-11. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Rupert testified that in November and December 2020 he was “clearly at this time in touch with Ms. [Suzanne] Scott,” Fox News’ CEO, and the “we talk about the show, what’s the news of the day, and everything.” Ex.600, R.Murdoch 144:1-13; *see id.* 163:24-14 (Rupert calls Scott once or twice a week).

Rupert testified that he gives Scott advice on matters regarding Fox News, explaining “Yes. *I’m a journalist at heart. I like to be involved in these things.*” Ex.600, R.Murdoch 78:17-23; *see* Ex.143, Scott 156:18-157:6; Ex.128, Lowell 30(b)(6) 355:16-356:6. He further agreed he “would routinely suggest stories to Ms. Scott about what Fox News or Fox Business should cover,” and also in some instances suggested what guests should appear. Ex.600, R.Murdoch 210:13-20. For instance, on October 14, 2020, Rupert suggested to Scott that Victor Davis Hanson would be worth putting on air; and two days later Hanson appeared on Fox News. *Id.* 211:18-212:1. When Trump presented a new tax bill, Rupert told Scott “we must tell our viewers again and again what they will get.” Ex.677. And when Shepard Smith attacked the “Trump administration’s ‘lies’” on air, Rupert emailed Scott and Jay Wallace calling it “Over the top!” and telling them, “Need to chat to him.” Ex.678; *see also* Ex.679 (Rupert email to Scott regarding “Ratings” and “The Five” providing suggestions about writers and cast); *See also* Ex.680 (Rupert: “Should we

at least stunt and promote Tucker before the Hannity/Ingraham move?” Scott: “Yes good idea.”). In December 2020, Rupert told Scott, “People are trying to steal Miranda Devine....It would be great if you signed her as a contributor.” Ex.681. Scott responded, “ok will work on this.” *Id.*

Rupert discusses whether he likes a new host with Scott, Ex.600, R.Murdoch 165:15-22, and has been involved in personnel decisions at Fox News, including the decisions to let go of Bill O’Reilly, Lou Dobbs, and Bill Sammon, *id.* 169:15-170:3; Ex.682; Ex.705; *see also* Ex.706 (Rupert discussing keeping Bartiromo, 1/26/21). As Murdoch explained with respect to Dobbs, “I suggested, or urged, and we were in recognition that we had a problem, that he would be fired” because Dobbs “was an extremist.” *Id.* 170:8-15.

Rupert “could have suggested at any point to fire Lou Dobbs.” *Id.* 172:19-22. However, he had good reason to keep him around through the 2020 election, despite believing he was an “extremist” as of September 2020, *id.* 179:6-13: Dobbs was popular with both Trump and his supporters, and “Nobody wants Trump as an enemy” “Because he had a great following, big following,” *id.* 80:14-21; *see* Ex.707; Ex.600, R.Murdoch 291:15-20 (“[W]e all know that Trump has a big following. If he says, ‘Don’t watch Fox News,’ maybe some don’t.”); *cf. id.* 263:22-24 (Newsmax was “airing baseless charges of election fraud” because it was what “would be popular with the Trump core”). As Fox fought to retain that important viewer base

against Newsmax in the wake of the 2020 Presidential election, Dobbs remained. Rupert and Lachlan likewise decided to extend Scott's contract in the midst of Fox's election coverage. Ex.708. Conversely, Sammon presided over the deeply unpopular Arizona call. Thus, despite the call's accuracy, Rupert suggested, "Maybe best to let Bill go right away," which would "be a big message with Trump people." Ex.682. Sammon was indeed "told the inevitable" that day (November 20, 2020). *Id.*; see Ex.600, R.Murdoch 241:15-242:23.

Rupert testified that he has probably told Fox News to close off certain guests from being on air completely, including "the Trump advisor, Bannon" because Rupert "see[s] him as a fringe character." Ex.600, R.Murdoch 183:4-22; see also Ex.635 ("There is no way they'll let us book Megyn Kelly....SS [Suzanne Scott] said Rupert and Lachlan are a hard no there."). He has likewise told Fox News that "we shouldn't be covering every single Trump rally." Ex.600, R.Murdoch 183:12-13. Conversely, on November 28, Murdoch suggested to Scott that perhaps Fox should have Michael Flynn on as a contributor. *Id.* 246:20-23; Ex.685. A week later, Flynn appeared as a contributor on Bartiromo's show. Ex.686.

Around the election, Murdoch had discussions with Scott about the election polling that Fox News was doing and the methodology. Ex.600, R.Murdoch 207:8-11.

Fox's selected testimony that various individuals at Fox did not speak directly to Rupert Murdoch is unsurprising: Rupert worked with FNN primarily through Scott, who would then relay his input to other executives and shows. *See, e.g.*, Ex.108, Cooper 183:9-185:20. Rupert had conversations with Scott about the "importance of giving exposure to Republicans in close Senate races." Ex.600, R.Murdoch 207:21-25. When Lindsey Graham was running for the Senate in October 2020, Rupert wrote to Scott, "You probably know about the Lou Dobbs outburst against Lindsey Graham. Could Sean [Hannity] say something supportive?" Meaning of Lindsey Graham. "We cannot lose the Senate if at all possible." *Id.* 217:2-13. Scott followed up to confirm that she indeed "addressed the Dobbs outburst" as Rupert requested. Ex.687.

In short, the record makes clear that Rupert was consistently involved in FNN programs. Further evidence of Rupert Murdoch's involvement in all aspects of Fox News, including specifically relating to FNN's election fraud coverage, is set forth in the Statement of Additional Facts, *supra*.

Fox News Channel is Fox's most watched news property: Nielsen reported that Fox News Channel ended the third quarter of 2020 as the most-watched network in all of television, with an average total audience of 3.507 million viewers, *see* Ex.688. Rupert understands the influence Fox News has. He told Scott and Wallace when Donald Trump appealed for help defeating Don Blankenship in the West

Virginia Senate race, “Anything during day helpful but *Sean and Laura dumping on him hard might save the day.*” Ex.689. When *New York Post* editor Col Allan told Rupert that Biden’s only hope for election was “to stay in his basement and not face serious questions,” Rupert responded, “Just made sure Fox banging on about these issues. *If the audience talks the theme will spread.*” Ex.690. Rupert explained at his deposition that to make sure Fox was “banging on about these issues” he “must have been talking to Ms. Scott.” Ex.600, R.Murdoch 205:19-22; *see also* Ex.691.

As set forth above, Rupert knew that FNN was inviting guests on air to spread lies pulling Dominion into the center of an unsubstantiated election fraud narrative. He knew as early as November 9 that Bartiromo’s show the previous day aired allegations about a “software computer program to switch and add votes, which would help explain the reason for the vote stoppage.” Ex.709; Ex.600, R.Murdoch 235:23-241:5. He “assumed” Giuliani was “pushing” these claims on FNN and conceded “I knew that—about Rudy.” Ex.600, R.Murdoch 316:4-8. After initially denying it, he conceded he read an article specifically discussing how “the network’s top-rated opinion hosts have continued to entertain the increasingly loony conspiracy theory that the election was stolen from Trump through widespread voter fraud” and detailing the appearances on the network by Giuliani and Powell. Ex.636; Ex.600, R.Murdoch 134:6-135:18, 138:2-21. Rupert in fact acknowledged there was “some truth” to the Mediaite article but thought “we [Fox] are navigating it pretty well.”

Ex.634. And he mentioned Tucker Carlson’s segment calling out “that crazy would-be lawyer,” *i.e.*, Powell. *Id.*; Ex.600, R.Murdoch 138:18-139:4. He could have stopped FNN’s coverage of these lies: “I could have. But I didn’t.” Ex.600, R.Murdoch 317:2-6. He didn’t because that coverage was part of a conscious strategy to “straddle the line” and allow hosts and guests to spread and endorse these conspiracy theories. *Id.* 139:14-22; *supra* p.32.

Lachlan Murdoch. Lachlan Murdoch, the CEO of FC, was and is involved in directing important programming decisions regarding FNN. A significant part of Lachlan’s job involves overseeing FNN, Ex.130, L.Murdoch 38:6-16, which is FC’s “biggest moneymaker,” *id.* 21:2-15.

Lachlan regularly communicates with Scott, including on FNN programming decisions. *Id.* 62:23-64:3. Such conversations would have included both Lachlan’s high-level thoughts and specifics about content or guests that should or should not be featured on FNN—and at his deposition, Lachlan could not recall a single instance when FNN did not follow one of his suggestions. *Id.* 79:23-80:9.

Lachlan regularly communicated with Scott about specific stories or themes he thought FNN should report on. *Id.* 71:5-9; *see also id.* 78:2-15; *see, e.g., id.* 126:9-127:2; Ex.692 at FoxCorp00056515-FoxCorp00056516 (regarding a story on Biden, Lachlan: “If this is real can we get up on website?” Scott: “Checking and yes. It’s real and we are getting it up.” Lachlan: “Should be lead story for now. Thx.” Scott:

“Copy.”). In mid-November 2020, Murdoch told Scott that FNN “should do a ton of pro-Trump legacy specials on Fox Nation.” Ex.130, L.Murdoch 124:11-14. And in the wake of FNN’s call of AZ, Murdoch was in touch with both Scott and Wallace regarding whether and when to pull that call. *See, e.g.*, Ex.602.

Lachlan admitted that he can and did share his views on what guests should or should not be on FNN. Ex.130, L.Murdoch 92:11-95:13. FNN’s 30(b)(6) witness confirmed that Lachlan would “have the ability to weigh in on content on the Fox show,” Ex.128, Lowell 30(b)(6) 355:9-15, and FNN talent and executives affirmatively reached out to Lachlan to take his temperature on whether or not to have a particular guest on their program, *see, e.g.*, Ex.693.

Lachlan even provided suggestions of specific questions to ask a particular guest. *See* Ex.694; *see also* Ex.130, L.Murdoch 47:2-51:20. Lachlan agreed that during the relevant period he would sometimes give Scott “specific direction on both the tone and narrative of Fox’s news coverage.” *Id.* 115:17-116:2. For instance, on November 14, Lachlan texted Scott while he was watching FNN’s coverage of a Trump rally providing her notes on how that coverage should be done. Ex.627; *supra*, p.26. Lachlan even communicated with Scott about what was being said in the “ticker” at the bottom of the FNN screen. Ex.629 (“Just FYI to discuss tomorrow, the ticker at bottom of screen is all wrong. Way too wordy and long. And anti trump whenever possible.”); Ex.130, L.Murdoch 128:16-21.

Lachlan was very well versed in the news surrounding the 2020 Presidential Election, and perhaps even more critically, in FNN's coverage of said news.

Regarding the former, Lachlan describes himself a "news junky." *Id.* 17:6-16; *see also* 101:10-12 ("Like I said, I'm a news junky, so reading newspapers and watching news."). During the relevant period Lachlan regularly read numerous newspapers (including, in particular, *The Wall Street Journal*, *The New York Times*, and the *New York Post*), and watched televised news (both FNN and its competitors). *Id.* 24:9-17; 25:6-12.

Regarding the latter, at his deposition Lachlan confirmed that he consults daily with Scott, the CEO of FNN. This includes a regular daily call he attends with her most mornings. *Id.* 16:25-17:5. He also confirmed that there are two daily editorial calls at FNN, including during the relevant period, and that he had both calls on his calendar and would join when able. *Id.* 67:2-69:5. He was, for instance, on the November 13, 2020 3pm Editorial call, prior to Dobbs' defamatory broadcast, Ex.748 at FNN059_04466185, and received the weekly brand protection round-ups from Raj Shah, monitoring threats to FNN's public image, Ex.601, Dinh 91:12-93:11; Ex.612.

Lachlan testified that he watches as much Fox News "as I can", including "Primetime." Ex.130, L.Murdoch 22:5-12. He watched all the accused statements at the time they aired. *Id.* 391:9-15; *see also* 24:4-8. Given its importance, he

explained that he would have been looped in on FNN's coverage of the 2020 Presidential Election, *id.* 97:11-98:6, and the record confirms this, *see supra* Statement of Additional Facts. Lachlan confirmed he was generally aware of the allegations that Sidney Powell was making on FNN. *Id.* 267:23-268:4. Lachlan was involved in all aspects of FNN and is responsible for the defamatory broadcasts.

Viet Dinh. Viet Dinh is the most senior lawyer in Fox's entire corporate structure. Ex.601, Dinh 8:25-9:7. Documents show that Dinh heavily involved himself in FNN issues, particularly in the November 2020 through January 2021 period. Dinh received nightly updates from Briganti on FNN public relations, *id.* 89:23-90:22; Ex.710; Ex.711; Ex.712; Ex.713; got weekly "brand protection unit" updates from Shah about FNN, Ex.601, Dinh 90:23-93:11, Ex.612, and even assigned his direct report Shah to handle public relations directly for Tucker Carlson, Ex.601, Dinh 69:11-71:7. Shah reported both to Dinh and, for that limited purpose, to Irina Briganti, "so as to make sure that that function was still supervised by the Chief Communications Officer of *Fox News*." *Id.* 70:22-71:7. Dinh claimed not to understand whether he had authority to order shows not to have particular guests, but said if he had that authority, it would only be "on the basis of my role as a lawyer." *Id.* 252:2-11, 256:3-9. Of course, stopping guests coming on to prevent defamation exposure is a legal issue.

To that point, Dinh and his direct report Shah were directly involved in Fox pushing to have its guest Powell disavowed by the Trump Campaign following Tucker Carlson's reporting. Shah "coordinated an effort to generate Trump campaign pushback against her claims," in Shah's own words, which he emailed to his supervisor Dinh. Ex.721. Dinh admitted this was an example of coordination by Fox Corp and FNN to protect Tucker Carlson and "Fox News' reputation," which ultimately was successful and "contributed" to Powell's disavowal. Ex.601, Dinh 234:19-238:16. Dinh plainly knew Powell was unreliable in November 2020.

Dinh, by virtue of his position, received constant updates about crises at FNN, as shown above, and had direct involvement in setting strategy for dealing with them. *See, e.g.*, Ex.714 (email between Dinh and Briganti regarding press coverage and response strategy for Hannity, who had gotten "awfully close to the line with his commentary and guests tonight"); Ex.715 (email discussion among Dinh, Shah, and Lachlan about coordination with Briganti to defend Fox News after ratings dip from Trump's comments about Fox); Ex.713 (email between Briganti and Dinh re "Smartmatic issue"). This position of control, combined with his knowledge of falsity of the claims at the time regarding the foundational Venezuela/Smartmatic

conspiracy theory about Dominion, all make him another clear avenue of liability for FC.²²

Raj Shah. Shah's Brand Protection unit is responsible for monitoring "organized activity criticizing the entire network." Ex.605, Shah 66:18-67:9; *see* Ex.695; Ex.605, Shah 299:4-300:8; Ex.696. Shah additionally assisted in general communications work for Tucker Carlson. This assignment, blessed by Viet Dinh, resulted in Shah becoming enmeshed in Carlson's team. Ex.605, Shah 298:10-299:1. Shah was regularly included in correspondence regarding Carlson's anticipated and actual programming, and thus had an opportunity to comment on it. *See, e.g., id.* 309:20-310:7.

As part of both his roles, Shah freely provided his views on programming content for FNN shows, including the at-issue programs. For example, on November 10, following the intense pushback Fox was receiving in the wake of the Arizona call, Shah raised with FNN SVP Executive Irena Briganti "the idea of some sort of public mea culpa for the AZ call," or "some programming that's focused on hearing our viewers grievances about how we've handled the election." Ex.697. Shah

²² Independently, Dominion deserves the inference of control given improper instructions not to answer questions relevant to those issues at Dinh's deposition. *See, e.g.,* Ex.601, Dinh 181:11-186:9 (whether gave instructions to FNN Communications Chief), 201:2-202:25, 226:5-21 (whether involved in Eddie Perez segment addressing Smartmatic allegations), 249:24-251:19 (whether could direct not to book guests if it would cause legal exposure). The transcript contains numerous other examples.

likewise prepared and sent Dinh a lengthy memo describing various programming and messaging changes he would make in the wake of the Arizona call. Ex.698; Ex.605, Shah 308:11-15.

Shah also prepared a lengthy memo regarding the *Tucker Carlson Tonight* program, which ends with several paragraphs providing “Some Programming Suggestions.” Ex.699 at FoxCorp00219514. He shared his thoughts with not just Viet Dinh, but also individuals at FNN. Ex.716. And in February of 2021, Shah reached out to FNN’s EVP of Primetime Programming, Meade Cooper, to request that Hannity “limit the charges of misinformation” in the lead up to a Congressional Hearing happening the next week. Ex.717.

Shah likewise provided his views on what guests should appear on FNN shows, again including some of the at-issue programs. For example, just prior to the 2020 Presidential Election, Shah suggested that, in light of questions Rudy Giuliani was facing following a compromising scene in the newly released Borat film, it “might be advisable to keep him off shows for a few days, even tho the laptop story is getting traction.” Ex.700; *see* Ex.605, Shah 287:1-10 (Shah at times “reached out to folks at Fox news and made suggestions about who they should or should not have on their airwaves”).

On November 20, Shah communicated with a producer for Carlson’s show about whether to address an affidavit Sidney Powell was offering as proof of fraud.

Shah explained: “Might wanna address this, but this stuff is so fucking insane. Vote rigging to the tune of millions? C’mon.....I don’t think it’s wise to revisit tonight beyond addressing the affidavit...her specific claim...not new info, not proof, then pivot to being deferential...we hope she is able to provide the evidence in court and we’ll bring it to viewers when they do.” Ex.701. The very next day, Shah again offered his advice to Carlson’s production team, suggesting: “We Def shouldn’t engage [re Powell interview]. This is an op to discredit her, since it’s totally insane....It’s just MIND BLOWINGLY NUTS.” Ex.718.

And yet, when Fox repeatedly aired clearly false allegations about Dominion, Shah ignored the truth and sat on his ability to intervene.

For instance, Shah knew that Tucker Carlson was going to have Mike Lindell on his January 26 broadcast. Ex.605, Shah 310:19-23. Indeed, Shah flagged this appearance for individuals at Fox in advance. Ex.719. Shah also knew that Lindell had been making allegations of election fraud, including about Dominion, in this same timeframe. Ex.605, Shah 313:1-6. Shah did nothing to stop Carlson from featuring Lindell on his program.

III. Fox News and Fox Corporation Acted with Actual Malice.

In ruling on a party’s actual malice, “the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing

evidence or that the plaintiff has not.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986). While this is the rare case in which direct evidence of actual malice exists, actual malice “may also be proved by inference, as it would be rare for a defendant to admit such doubts.” *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1085 (9th Cir. 2002) (citation omitted); *see also Herbert v. Lando*, 441 U.S. 153, 170 (1979). Dominion’s opening brief further elaborates on the actual malice standard. Dom. MSJ pp.87-90; *see also supra* §II.A.

FNN argues as a threshold point that it *ipso facto* lacks actual malice because its “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.” FNN MSJ pp.124-125. Putting aside FNN’s mischaracterization of its own broadcasts, *see supra* §I.D., the alleged newsworthiness of a statement certainly does not disprove—and is indeed entirely irrelevant to—Fox’s knowledge or reckless disregard for the truth, for which there is overwhelming undisputed evidence. Meanwhile, FC’s motion does not even address the actual malice of its officers. They, like the Fox News hosts, producers, and executives, knew the statements at issue were false or recklessly disregarded the truth.

A. Fox Corporation Acted with Actual Malice.

Dominion's Motion for Summary Judgment contains evidence of FC's actual malice. *See, e.g.*, Dom. MSJ pp.13-14, 20-23, 26, 34-35, 41, 114-116, 150. Further evidence only confirms this.

1. Fox Corporation Individuals in the Chain of Command Knew or Recklessly Disregarded the Truth.

Rupert Murdoch. Rupert knew the claims about Dominion were false or, at a minimum, recklessly disregarded the truth. He has never believed any of the allegations about Dominion. Ex.600, R.Murdoch 24:10-57:23. As Rupert explained at his deposition, "I thought the election was genuine, and it was bad advice to encourage [Trump] being a bad loser." *Id.* 77:25-78:2. He thought the fact that Giuliani was advising Trump was "really bad" because Giuliani's "judgment was bad" and he was "an extreme partisan." Ex.600, R.Murdoch 76:23-77:18. He confirmed that he "seriously doubted" claims of massive election fraud "from the very beginning," explaining "we thought everything was on the up-and-up. I think that was shown when we announced Arizona." *Id.* 64:16-25.

Rupert testified that he spoke to Mitch McConnell immediately after the election and that he had probably "urged him to ask other senior Republicans to refuse to endorse Mr. Trump's conspiracy theories and baseless claims of fraud." *Id.* 90:2-13. He further testified that, as early as November 4, he agreed with Chris

Christie’s assessment that “there’s no basis to make the argument about Mr. Trump’s claims of victory.” *Id.* 90:14-21.

Murdoch’s contemporaneous emails confirm that he knew claims by Powell and Giuliani of a stolen election were not true. *See, e.g.*, Ex.419 (11/6 email stating that Trump has “got to get some real evidence” and the “Fact that Rudy advising really bad!”); Ex.156 (“Really crazy stuff. And damaging.”); Ex.532 (“Giuliani taken with a large grain of salt.”); Ex.633 (“Just watched Giuliani press conference. Stupid and damaging.”).

Rupert is a self-professed “news junkie” who follows the *New York Post*, *The London Times*, and the *Wall Street Journal*, and who reads the *Wall Street Journal* editorial page every day. Ex.600, R.Murdoch 16:9-19, 123:17-18, 187:12-14. These sources covered the false election fraud claims during the relevant timeframe in articles that Murdoch reviewed. *See, e.g.*, Ex.631; Ex.742. And when Preston Padden sent Rupert a Mediaite article on November 23 discussing the lies spread by Sidney Powell and Rudy Giuliani on Maria Bartiromo’s program, Rupert responded that there was “Some truth,” and described Powell as “that crazy would be lawyer.” Ex.634; *supra* pp.29-30.

Lachlan Murdoch. Lachlan knew at the time—or at a minimum recklessly disregarded—that allegations about Dominion were false. The contemporaneous evidence shows that he kept up with the news during this period, and thus would

have known about the outpouring of information disproving the election fraud claims. This includes reading specific articles published by his own newspapers, such as a November 7, 2020, *NY Post* article: “President Trump, your legacy is secure—stop the ‘stolen election’ rhetoric.” Ex.742; *see also* Ex.130, L.Murdoch 328:2-331:9 (Lachlan saw, approved, and agreed with the article at the time, and had Scott circulate it). He likewise read and agreed with a *Wall Street Journal* editorial: “The Presidential Endgame: Trump has the right to fight in court, but he needs evidence to prove voter fraud.” Ex.720; *see also* Ex.130, L.Murdoch 345:11-346:9.

Also, by late November, 2020, Raj Shah had informed Lachlan that the Trump Campaign had disavowed Powell because she could not provide any evidence supporting her claims. Ex.130, L.Murdoch 302:16-304:2; *see also* Ex.721. And by early December, 2020, FC Board Member Paul Ryan sent Lachlan a text calling for “solid pushback (including editorial) of [Trump’s] baseless calls for overturning electors.” Ex.638. Lachlan nevertheless allowed FNN to continue broadcasting lies about Dominion.

Viet Dinh. Dinh conceded that he was “skeptical” of the claim that Dominion rigged the election from the time it was made up through mid-December 2020. Ex.601, Dinh 12:12-23. With respect to whether Dominion’s software and algorithms manipulated vote counts in the 2020 election, he likewise testified that “he did not believe” and “was skeptical of that allegation,” though he remained open

to contrary evidence. *Id.* 20:2-12; *see id.* 28:19-25 (Dinh was likewise “skeptical” of the kickbacks claim). At minimum, by his own admission, Dinh recklessly disregarded the truth by permitting the broadcasts to air. *Solano*, 292 F.3d at 1085 (actual malice exists where a defendant “entertained serious doubts as to the truth” of a statement—which defendants rarely admit). As of December 14 or 15, 2020, Dinh’s doubts about the allegations solidified to certain belief in their falsehood. *Id.* 20:2-22:10.

Dinh has never believed that Dominion is owned by a company founded in Venezuela to rig elections or that Dominion is owned by Smartmatic. *Id.* 26:11-18, 27:23-28:12. In fact, it was the kind of “extraordinary thing that you can look up,” *id.* 26:23-27:3—so he did, and found it was untrue. *See id.* 27:3-19; *id.* 27:14-19 (“And so that research at the time, you know, I think, in my mind, dismissed that possibility,” and “it seems to me something that I can look up and find out pretty easily.”). The ease with which Dinh debunked one of the foundational lies being pushed by Powell and Giuliani and his existing skepticism of the rest of their claims underscores that, at minimum, he acted with reckless disregard by failing to stop broadcasts that featured their false narrative about Dominion. If *one* of their outlandish claims was plainly false, all the more reason Dinh knew or recklessly disregarded the fact that the intertwined outlandish allegations of Dominion’s supposed election rigging were likewise false.

The fact that Dinh at minimum acted with reckless disregard for the truth is further confirmed by the fact that Dinh is—like Rupert Murdoch—a “news junkie” who subscribes to multiple publications including *The Wall Street Journal* and *The New York Times* that reported on the baselessness of the allegations against Dominion and election fraud generally. *Id.* 23:17-24:11; Ex.631; Ex.722; Ex.702; Ex.723. Dinh testified that he finds these publications to be credible news sources that he relies on to report truthfully. Ex.601, Dinh 24:12-24:23.

Raj Shah. Shah admitted he never believed, never saw any evidence of, and indeed was very skeptical of the allegations about Dominion from day one. Ex.605, Shah 47:12-52:1. In his own words, “[t]he only clear cut evidence for voter fraud is the failed attempts from Trump.” Ex.724. Shah believed the Decision Desk got the Arizona call right (*see, e.g.*, Ex.725); that the November 19, 2020, press conference featuring Sidney Powell and Rudy Giuliani was not credible, including the claims about Dominion (*see, e.g.*, Ex.605, Shah 214:21-215:7); *see also* Ex.726 (“crazy fucking presser”); and that Sidney Powell was generally “nuts” (Ex.727).

Yet Shah did **nothing** when on or around November 20, 2020, he learned that Sidney Powell **never** had a retention agreement with Trump or his campaign. **This was explosive news.** For several weeks Shah’s network had been airing false allegations from Powell, in part, so they say now, because she was the President’s lawyer. But upon learning that she was not the President’s lawyer what did Shah do?

Effectively nothing. *See* Ex.605, Shah 297:18-298:2. This decided inaction is in plain contrast to how, during this same period, Shah readily flagged for his colleagues when truthful reporting about the 2020 Presidential Election was likely to, or did in fact result in, viewer backlash. *See, e.g.*, Ex.606; Ex.728 (“*Merits aside*, we’re taking incoming on that one [Neil Cavuto’s cutting away from Trump Campaign press conference] as well.”). It is also in contrast to Mr. Shah’s willingness to make clear to “Lachlan and Viet, that bold, clear and decisive action is needed for us to being to regain the trust that we’re losing with our core audience.” Ex.624.

Shah knew the allegations about Dominion were false, was in a position to say something to any of the relevant executives, producers, or talent should he have so desired—and indeed as part of his role regularly did so in other instances—and yet allowed the broadcasts to air.

2. Circumstantial Evidence Confirms Fox Corporation’s Actual Malice.

The evidence set forth in Dominion’s Summary Judgment Motion regarding circumstantial evidence of actual malice applies equally here. *See* Dom. MSJ pp.148-161. And additional circumstantial evidence only confirms the evidence set forth above of FC’s actual malice.

Inherent Improbability/Reliance on Obviously Unreliable Sources. As set forth in Dominion’s summary judgment motion and exhibits, FC witnesses

specifically recognized the “outlandish” nature of the claims against Dominion. Ex.163; *see also* Ex.156; Ex.532; Ex.634.

Viet Dinh testified that the claim regarding Dominion’s ties to Venezuela was “extraordinary” (leading him to quickly research and disprove it). Ex.601, Dinh 26:19-27:19. This easy confirmation that Powell and Giuliani were lying about one major aspect of their conspiracy theory necessarily undercuts the credibility of the (already outlandish) other threads of their narrative.

Raj Shah knew as of November 20 that, despite making claims to represent Donald Trump, Sidney Powell had no retention agreement with Trump or his campaign. Ex.605, Shah 273:14-20. That further confirmed her unreliability as a source.

Paul Ryan confirmed at his deposition that with respect to the lies about Dominion rigging the election, “the whole theory is ludicrous to anybody who follows elections,” testifying “Yeah, I didn’t believe the election was stolen from the beginning.” Ex.620, Ryan 402:12-18.

Financial Motive to Lie. As set forth in the Statement of Additional Facts above, FC was well aware of the viewer backlash from its call for Arizona during the 2020 Presidential election. As viewer discontent and the specter of competition from Newsmax, OAN, and a potential Trump TV alternative became real, FC knew that they had to “straddle the issue” and continue allowing the stolen election

narrative featuring Dominion to be pushed on Fox News in order to avoid angering—and losing—their Trump supporting viewers. *See supra*, pp.29-30, 32, 35-36.

Preconceived Narrative. Rupert Murdoch knew as of the date of the election that “government officials at all levels of government were concerned about false narratives of fraud emerging.” Ex.600, R.Murdoch 61:10-15. And Paul Ryan confirmed that “prior to the 2020 Presidential Election, [Trump] was making these baseless claims of election fraud should he lose” and “was laying the predicate if did lose to blame election fraud.” Ex.620, Ryan 49:9-17. Ryan further agreed this was “well known,” stating “Yes, it was...yes, I do recall him making these noises before the election.” *Id.* 49:18-24; *see also* Dom. MSJ pp.159-161.

Departure from Journalistic Standards. While a departure from journalistic standards (such as a failure to properly investigate) does not itself establish actual malice, a purposeful departure may be probative circumstantial evidence of actual malice. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 692 (1989). Rupert Murdoch testified that it is wrong for Fox hosts to endorse lies if they knew they were lies. Ex.600, R.Murdoch 322:2-6. Rupert agreed that “Fox has a role in making sure people can agree on a basic set of facts,” testifying “Yes. We broadcast the facts. We hope people believe what we are broadcasting.” *Id.* 329:7-11. He

further agreed that even opinion should be based on a common set of facts. *Id.* 330:15-18.

Viet Dinh agreed at his deposition that show teams, “if they have any questions relating to the falsity and truth of what they are reporting, then they should fact-check and consult with their editors.” Ex.601, Dinh 314:10-20. Dinh further testified that if a news outlet reporting on Fox, for instance, gets information wrong and Fox provides evidence debunking the story, Dinh would at least expect the outlet to publish the evidence Fox provided along with Fox’s denial, if not a correction. *Id.* 62:23-63:12.

Paul Ryan confirmed that there’s “a way to cover these allegations that are admittedly newsworthy and still call them false.” Ex.620, Ryan 254:24-255:5; *see also* Dom. MSJ pp.158-59.

Rebroadcasting and Refusal to Retract. Rupert and Lachlan Murdoch each have the authority to direct FNN to make retractions. Ex.600, R.Murdoch 331:25-332:3; Ex.147, Wallace 52:10-16. They likewise could have prevented rebroadcasts or prohibited Powell, Giuliani, and Lindell from appearing on air or told Scott that Fox News could no longer broadcast false claims about Dominion. Ex.600, R.Murdoch 317:2-6; Ex.130, L.Murdoch 94:25-96:24; *see also* Ex.128, Lowell 30(b)(6) 355:16-356:6. They did none of those things. *See Nunes v. Lizza*, 12 F.4th 890, 900 (8th Cir. 2021) (“A speaker who repeats a defamatory statement or

implication after being informed of its falsity ‘does so at the peril of generating an inference of actual malice.’” (citation omitted)).

B. Fox News Acted with Actual Malice.

Dominion’s Motion for Summary Judgment sets for the undisputed evidence demonstrating that Fox News’ hosts, producers, and executives knew the statements they broadcast about Dominion were false or, at minimum, recklessly disregarded the truth. Dom. MSJ §V; *see also id.* pp.16-44. As discussed *infra*, §III.C-E, none of FNN’s arguments regarding its actual malice create an issue of fact that would preclude summary judgment for Dominion.

C. Fox News Fails to Raise a Question of Fact Disputing that Its Hosts Acted with Actual Malice.

Each host of Fox’s accused broadcasts either knew the statements about Dominion were false or recklessly disregarded the truth. Dom. MSJ pp.117-148.

As discussed above, for every accused broadcast there are multiple people—including producers and executives—with responsibility for the program who acted with actual malice. But putting that aside, none of the isolated testimony cited by Fox for five of its hosts creates a factual question regarding Fox’s actual malice in light of the undisputed record.

Bartiromo. Fox claims that Bartiromo’s reliance on “elected officials and their attorneys” demonstrates Bartiromo’s lack of actual malice. FNN MSJ p.127.

[REDACTED]

[REDACTED] The cases cited by Fox provide no support for relying on a discredited attorney falsely claiming to represent the President while ignoring a government agency's contrary statements. See FNN MSJ p.127 (citing *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N.Y.*, 101 AD2d 175, 184-85 (1st Dept 1984); *Dickey v. CBS Inc.*, 583 F.2d 1221, 1229 (3d Cir. 1978)). Those cases *do*, however, support relying on the numerous government officials and agencies that repeatedly confirmed the 2020 Presidential Election was secure, *see, e.g.*, Dom. MSJ pp.50-59—evidence that Bartiromo purposefully ignored. And as for Bartiromo's claims that hacking an election is not inherently implausible due to potential software vulnerabilities, FNN MSJ pp.127-128, this is entirely beside the point: Powell did not merely claim that some vulnerability in Dominion's system might potentially render it vulnerable to hacking. She claimed that Dominion rigged the election and committed fraud on the American public. Undisputed evidence establishes that Bartiromo (and her team) knew or recklessly disregarded the truth with respect to those outlandish claims. Dom MSJ pp.117-123.

Dobbs. As with Bartiromo, Dobbs' purported general concerns over the security of electronic voting has no bearing on whether he knew or recklessly disregarded the truth regarding whether Dominion committed fraud by rigging the

2020 Presidential Election (nor whether it was founded in Venezuela to rig elections for Hugo Chavez or paid kickbacks to public officials). And his claim that he had “no reason to doubt [Powell’s] claims” is simply false. FNN MSJ p.128; *see* Dom. MSJ pp.123-134 (discussing evidence of actual malice for Dobbs and his team).

Pirro. Fox contends that Pirro’s purported reliance on “affidavits” demonstrates her lack of actual malice. FNN MSJ pp.129-130. But at her deposition, Pirro testified that she did *not* recall having ever seen any affidavit asserting the at-issue allegations about Dominion prior to her November 14 broadcast with Sidney Powell, Ex.135, Pirro 102:15-22, nor could she recall having ever seen any such affidavit since, *id.* 102:23-103:12. Having no recollection of having ever seen any affidavit asserting Powell’s claims about Dominion, Pirro cannot possibly disclaim actual malice based on her reliance on such sworn statements. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Further evidence of Pirro and her team’s actual malice is set forth in Dominion’s Motion for Summary Judgment at pages 135-138.

Hannity. Hannity testified that the “whole narrative that Sidney was pushing. I did not believe it for one second.” Ex.122, Hannity 322:19-21; *see id.* 275:2-14 (“nobody ever convinced me that their argument was anywhere near accurate or true”), 304:13-14 (“I did not believe those allegations”); *see also id.* 266:5-268:9. When Powell appeared on Hannity’s November 30 show, he believed that it was “obvious” her allegations were false. *Id.* 420:9-22; *see id.* 398:2-9; *id.* 320:21-321:2 (Powell’s claims about “Venezuela” were “crazy stuff”); *cf. id.* 321:15-21 (“F’ing lunatic”). Hannity’s own words repeatedly confirm that he knew Powell’s claims were not true at the time of the November 30 broadcast.

Fox nevertheless proclaims Hannity’s lack of actual malice by pointing to irrelevant statements that Dominion has not accused. FNN MSJ pp.130-131. If all Hannity had said on air about Dominion was that it was “not the best system,” Dominion (while perhaps disagreeing) would not have included Hannity’s broadcast in its suit. As for the evidence Hannity “investigate[d] damaging allegations” about Dominion, that references Hannity’s distorted and inaccurate broadcasts about Dominion in the weeks leading up to the November 30 broadcast, when Hannity misrepresented various articles and letters about the industry as a whole, or about Dominion’s competitors, as being about Dominion instead. Ex.122, Hannity 196:24-230:22, 254:15-262:3. All that proves is Hannity’s dishonesty in dealing with Dominion.

Carlson. Dominion’s Summary Judgment Motion sets forth ample evidence both that Carlson (and his team) knew what Mike Lindell would say on air on January 26, 2021, and that he knew Lindell’s claims about Dominion were false. *See* Dom. MSJ pp.144-148; *see also supra* §I.D. Furthermore, even were it true that Carlson was surprised by Lindell’s on-air comments, Fox subsequently *re-aired* that broadcast unedited at 1am. Ex.148, Wells 26:17-25. Moreover, as of this filing, the January 26 broadcast is *still posted* on the *Tucker Carlson Tonight* Facebook page—and it has 2.7 million views.²³ Fox cannot claim surprise as an excuse for providing a platform—to this day—for Lindell’s lies about Dominion.

D. Fox Cannot Escape its Actual Malice by Denying Credible Evidence Regarding the 2020 Presidential Election.

Fox argues against its actual malice by effectively suggesting that factual evidence regarding the outcome of the 2020 Presidential Election cannot be trusted. FNN MSJ pp.136-144. This Court should reject this dangerous argument.

Fox claims in defense of its endorsement of Powell and Giuliani’s “outlandish” claims about Dominion (Ex.163) that reliance on “official sources” demonstrates an absence of actual malice. FNN MSJ p.127. But Fox’s Motion *also* claims that Fox could *not* trust the November 12 statement by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA)

²³ *See* Ex.729 (<https://www.facebook.com/watch/?v=527156314919486>, last visited 2/8/2023).

declaring that the 2020 election was secure because “the agency supplied no verifiable *evidence* to support its claims.” FNN MSJ p.137 (emphasis by FNN). CISA is the official government agency tasked with ensuring and evaluating the security of our elections. Sidney Powell was a lawyer claiming to be associated with (but who was in fact shut out and then disavowed by) the losing presidential candidate. Fox rejected the claims of the former for purported lack of “evidence” and embraced the claims of the latter without any “verifiable evidence” whatsoever. Indeed, despite acknowledging that CISA is “authoritative” regarding the November 2020 election, *see* FNN MSJ p.138, Fox never challenged Powell or Giuliani with CISA’s statement contradicting their unsupported claims. This unwillingness to ask key questions only underscores Fox’s actual malice. *See, e.g., Sharon v. Time, Inc.*, 599 F. Supp. 538, 584-85 (S.D.N.Y. 1984).

Fox’s argument that the November 16 statement by 59 election security and computer science experts—including Fox’s own expert, Dan Wallach—left open the possibility that software “vulnerabilities” could be exploited once again misframes Dominion’s case: Dominion has not sued Fox for claiming Dominion’s software had “vulnerabilities” that could potentially be exploited. It has sued Fox for publishing and endorsing the claim that Dominion *actually rigged the election*, including by using “algorithms” to flip votes. The November 16 statement underscored that that had not happened, and indeed described many of the voting machine fraud claims as

“technically incoherent.” Ex.315. Numerous public officials said likewise. *See* Dom. MSJ pp.50-60, 65-67.

Fox dismisses Dominion’s “Setting the Record Straight” emails as “self-serving denials,” but ignores that those emails cited and provided links to public evidence and information, from, for instance, DHS/CISA (Exs.339-340), the Michigan Secretary of State (*id.*), the Georgia Secretary of State (*id.*), the EAC (*id.*), the Chairman of the Maricopa County Board of Supervisors (Ex.345), and others (*see, e.g.,* Ex. 346). *See also* Exs.347-349. The notion that Dominion’s denials were “every bit as unsubstantiated” as the claims Fox aired about Dominion is flat wrong. FNN MSJ p.135.

Fox similarly dismisses the factual reporting by other outlets that debunked the claims about Dominion on the basis that Fox does its own investigations and did not trust other outlets to fairly report information that might benefit the Trump administration; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fox ignores this factual evidence in favor of “affidavits” that Pirro testified she could not recall having ever actually seen, Dom. MSJ. Ex.135, Pirro 102:16-103:12, and unexplained, unnamed “confidential sources,” FNN MSJ 140. Having asserted the reporter’s privilege over testimony regarding any such “confidential sources,” Fox cannot point to these unnamed “sources” now as a defense to its actual malice. *See* D.I. 819 (Dominion’s exception to Order regarding assertion of Reporter’s Privilege over Hannity testimony); D.I. 648 (Order denying in part Dominion’s MTC Pirro testimony and precluding Dominion from asking Pirro “to disclose the details or contents of any discussion of information provided by the confidential source at issue”). Fox cannot use the privilege as both sword and shield. *Sharon*, 599 F. Supp. at 583 (a defamation defendant cannot “insulate [her] state of mind from scrutiny simply by asserting that the information [she] obtained came from confidential sources”).

Most disconcerting is Fox’s argument that states’ purportedly “self-serving” paper ballot audits could not disprove claims of electronic vote flipping. FNN MSJ p.141. By Fox’s logic, *nothing* would demonstrate that the 2020 Presidential Election was secure: paper audits are the gold standard for testing an election. *See, e.g.*, Ex.299 (statement from U.S. EAC on purpose of and requirements for audits). Fox’s response is to cite a conspiracy theory that machines were programmed specifically to evade detection by audits; but again, under Fox’s reasoning,

conspiracy theories could never be debunked, and we may as well give up all faith in our elections. This position is untethered from reality. Fox's attempt to undermine the reliability of the 2020 Presidential Election by citing to a previous article by Professor Andrew Appel regarding hypothetical concerns with ballot marking devices is a non-starter: on November 16, 2020, Professor Appel signed a letter stating that he and his colleagues in cybersecurity found assertions "that the 2020 election was 'rigged' by exploiting technical vulnerabilities...unsubstantiated or [] technically incoherent." Ex.315; *see also* Ex.548 (Expert Report of A.Rubin) at ¶¶137-141. Fox's claim that paper trail audits are not "objectively verifiable" waves away conclusive evidence supporting the legitimacy of the 2020 Presidential Election and should be swiftly rejected.

Despite the public evidence to the contrary, Fox points to the December 14 deadline for certifying the vote as purportedly the earliest date by which it could have known or recklessly disregarded the truth regarding the false claims about Dominion. FNN MSJ p.125. The testimony of Fox's *own witnesses* belies this claim. *See, e.g.*, Dom. MSJ pp.96-100 (many at Fox concluded the claims were false, demonstrating the reckless disregard of their colleagues who avoided the truth); *id.* pp.96-97 nn.12-13. Numerous reliable public sources concluded the election was secure and no widespread fraud occurred before that date. Dom. MSJ pp.50-59, 64-67. Furthermore, Fox did not merely broadcast statements about

uncertainty surrounding the election; it published affirmative claims, without any evidence, that Dominion *committed fraud* and *rigged* the election. And claims about Dominion’s ownership by Smartmatic or its purported bribes to officials are entirely unrelated to the certification of votes (in addition to being false, *see* Dom. MSJ pp.73-78).

Fox repeatedly points back to the notion that Fox was merely “reporting” on “allegations,” and that it apparently could not possibly have acted with actual malice. *See, e.g.*, FNN MSJ pp.143-144. But framing lies as “allegations” does not erase a publisher’s liability for publishing and endorsing those lies, *see supra* §I, nor does the existence of an allegation mean that contrary evidence can be willfully ignored.

Finally, Fox’s occasional cursory mention of Dominion’s general denial of the defamatory claims does not negate Fox’s actual malice. Fox cites to *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1304 (D.C. Cir. 1996), for the proposition that “publication of the grounds for doubting [a claim] tends to rebut a claim of malice,” but that is precisely what Fox *failed to do*. FNN MSJ p.143. While Fox for a handful of the accused broadcasts may have noted Dominion’s denials, Fox did not, for instance, discuss the many public officials who had stated that no fraud occurred in the election, or the many cybersecurity experts who stated that no evidence indicated Dominion’s machines altered votes, or the fact that Sidney Powell’s claims originated with a woman who communes with “the Wind.” Fox also cites *Michel*

v. NYP Holdings, Inc., 816 F.3d 686 (11th Cir. 2016), which similarly underscores Fox’s actual malice here: that case explained that “[w]here a publisher gives readers sufficient information to weigh for themselves the likelihood of an article’s veracity, it reduces the risk that readers will reach unfair (or simply incorrect) conclusions, even if the publisher itself has.” *Id.* at 703. None of the accused broadcasts provided explanations of contrary evidence alongside the defamatory claims, as described in *Michel*, that would permit viewers to objectively evaluate the defamatory claims about Dominion. And in *Cabello-Rodón v. Dow Jones & Co.*, No. 16-CV-3346 (KBF), 2017 WL 3531551 (S.D.N.Y. Aug. 16, 2017), the defendant sought to present information within the allegedly defamatory article to allow readers to reach their own conclusion, whereas Fox never presented such contrary explanatory information in the accused broadcasts. *See id.* at *10.

E. Additional Circumstantial Evidence Demonstrates FNN’s Actual Malice.

Fox asserts a number of additional excuses for ignoring the circumstantial evidence that—along with the extensive direct evidence—supports its actual malice. None succeeds.

“*Failure to investigate.*” Dominion does not assert Fox’s “failure to investigate” as alone proving Fox’s actual malice; but as Fox itself conceded, Fox cannot intentionally avoid the truth. FNN MSJ p.144. The undisputed record demonstrates that Fox did just that when, for instance,

- On November 8, Bartiromo brought Powell on air to spread claims about Dominion for which the sole support Bartiromo had seen was an email from a woman who learned her information about Dominion from “the Wind,” *see* Dom. MSJ pp.24-25 & Ex.154;
- On November 21, Pirro [REDACTED] *id.* p.137-138 & Ex.160;
- Hannity first told his viewers that the hand recount in Georgia would be critical regarding the questions about Dominion, but then did not report on it when that recount proved Dominion’s machines worked properly and did not flip votes in Georgia—and instead had Sidney Powell on air to spread lies about Dominion. Dom. MSJ pp.142.

These and many other examples demonstrate, at minimum, Fox’s purposeful avoidance of the truth. *See generally* Dom. MSJ; *supra* §I.D.

Inherent implausibility. Fox argues that the claims about Dominion were not “inherently improbable” because (1) they were made by a president and his legal team in federal lawsuits, and (2) “the government [took the] allegations seriously enough to investigate.” FNN MSJ p.146. As an initial matter, direct evidence demonstrates that the responsible individuals at Fox believed the allegations were inherently improbable (and indeed false) at the time they were made. Dom. MSJ pp.148-153; *see also id.* pp.24-25, 33-34. But putting that aside, with respect to the “federal lawsuits” Fox cites, Giuliani did not file a single lawsuit alleging the claims he made about Dominion on Fox’s broadcasts—and New York ultimately suspended his law license due to the “demonstrably false” claims he *did* make. *Matter of Giuliani*, 146 N.Y.S.3d 266, 268 (N.Y. App. Div. 2021). Meanwhile, Powell did

not file her first suit making claims about Dominion until November 25, *after* she had been expressly disavowed by the White House. *See* Ex.273. And the Michigan federal court sanctioned Powell for that suit, describing it as “a historic and profound abuse of the judicial process.” *King v. Whitmer*, 556 F.Supp.3d 680, 688 (E.D. Mich. 2021). In other words, Powell and Giuliani’s involvement with the courts—to the extent relevant at all—only confirms the inherently improbable nature of their claims.

With respect to the “investigations” Fox references, Fox entirely ignores the statements and conclusions of those investigations. *See, e.g.*, Ex.190 (November 12 DHS/CISA statement that no evidence indicates any vote was compromised); Ex.186, ¶5 (11/14/20, EAC Commissioner Benjamin Hovland stated there was “no widespread fraud or malfunction that would change the result of the election”); Ex.316 (statement by Attorney General Bill Barr that the DHS and DOJ have found no evidence of systemic fraud). None of these supports the plausibility of the wild claims about Dominion that Fox broadcast.

Finally, Fox argues that none of profit motive, departure from journalistic standards, or a failure to retract can demonstrate a defendant’s actual malice. FNN MSJ p.147. To the extent Fox argues that these factors are irrelevant, it mischaracterizes the law. *See, e.g., Harte-Hanks Commc’ns*, 491 U.S. at 667-68 (finding trial court appropriately treated a defendant newspaper’s “departure from

accepted standards and the evidence of motive” as “supportive” of actual motive); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071-72 (5th Cir. 1987) (“Refusal to retract an exposed error tends to support a finding of actual malice.”). To the extent it argues that none of these factors is independently sufficient, Dominion has not argued otherwise. But actual malice can be demonstrated by the “accumulation” of circumstantial evidence. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 183 (2d Cir. 2000); *see Stern v. Cosby*, 645 F. Supp. 2d 258, 278 (S.D.N.Y. 2009). Each of these factors confirms what the direct evidence already makes clear: the responsible individuals at Fox knew the statements about Dominion were false or recklessly disregarded the truth.

IV. Dominion is Entitled to Substantial Economic Damages For Its Out-of-Pocket Expenses and the Destruction of its Brand and Business.

After Fox—the top-rated cable news network in the nation—repeatedly endorsed, broadcast, rebroadcast, and posted the conspiracy theory that Dominion had stolen the 2020 U.S. Presidential Election with a vote-flipping algorithm designed for a Venezuelan dictator, Dominion became “*one of the most demonized brands in the United States or the world*,” Ex.139, Richer 73:9-14 (Maricopa County government official), and the people who dared to associate with Dominion—whether as Dominion employees or as elected officials responsible for choosing voting machines—were inundated with death threats, harassment, and protests. *Compare* Ex.731 p.2 (Fox 10-K); *with* Ex.732, Steckel Rep. 4-6; Ex.733,

Ex.734 & Ex.735 (threats to Dominion); Ex.120 Gates 42:17-43:17, 45:22-46:14, 49:19-25, Ex.139, Richer 27:2-59:4 & Ex.736 (strain on and threats to government officials related to Dominion); Ex.136, Poulos 312:2-10 (security threat by man scoping out a perch to shoot employees).

The fact of harm is indisputable. At trial, Dominion will establish the extent of the ongoing and substantial economic harms that flow from Fox's defamation: from out-of-pocket costs like security detail to protect its employees, to the ultimate destruction of its enterprise value and, in the alternative, lost profits. *See, e.g., id.*; Ex.737, Banks 301:6-303:3 (private investigation firm to deal with death threats); Ex.673, Rosania 183:11-184:9; Ex.109, Cramer 53:20-54:9 (diversion of resources to respond to false allegations); Ex.120; *see generally* Ex.738, Hosfield Rep.; Ex.732, Steckel Rep.

Fox's attack on Dominion's damages evidence goes to the quantum of harm, not its existence. This factual dispute is a quintessential jury question that a court cannot resolve on summary judgment. Fox's motion fails for that reason alone, but also for the following additional, independent reasons.

First, where, as here, the accusations are defamatory per se, injury is assumed and the jury may award presumed damages without special proof. *See Yesner v. Spinner*, 765 F. Supp. 48, 52 (E.D.N.Y. 1991); *Celle v. Filipino Rep. Enters., Inc.*, 209 F.3d 163, 179 (2d Cir. 2000); Prosser & Keeton on Torts § 112, at 788.

While a “corporation’s defamation damages are solely economic,” it would be a “mistake[]” to think that “the presumed damages rule is designed solely to compensate for noneconomic injuries.” Norman Redlich, *The Publicly Held Corporation As Defamation Plaintiff*, 39 St. Louis U. L.J. 1167, 1174-75 (1995). Instead, corporations are entitled to presumed economic damages for reputational harm because “rather than distinguishing between pecuniary and nonpecuniary damages, the presumed damages rule is designed to apply in all cases arising from statements” that are defamatory *per se*, because “reputational damages are rarely subject to the same ease of proof as the damages arising from a typical tort.” *Id.*; *see also Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985); *Metro. Opera Ass’n. v. Local 100*, 2005 WL 1712241, at *4-*5 (S.D.N.Y. July 19, 2005).

In *Metro Opera*, the defendant argued that a corporation could only show reputational harm through specific pecuniary loss. The Court rejected that notion, distinguished the same inapposite case Fox relies on—*Wolf St. Supermarkets*—and cited a long list of cases establishing that a corporate plaintiff can “show actual harm to reputation and recover damages based on types of loss other than specific instances of pecuniary business loss.” *Metro. Opera Ass’n*, 2005 WL 1712241, at *5 (citing *Harwood v. Pharmacal Co. v. Nat’l Broad. Co.*, 9 N.Y.2d 460, 464 (1961) (holding that plaintiff corporation did not have to offer proof of specific lost sales or

relationships)); *Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publ'g Ass'n*, 226 N.Y. 1, 10-11 (1919) (holding that an averment of specific damage is not necessary for a corporation in per se libel cases).

Fox relies on two cases that did not involve defamation claims and a case in which—unlike here—the plaintiff failed to “adduce direct evidence of damages to its reputation,” advanced only a single damages theory of lost profits, and relied on a rule that applies only in labor cases. *See* FNN MSJ p.149 (citing *SRW Assocs. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 332 (N.Y. App. Div. 2d Dep't 1987); *Waste Distillation Tech. v. Blasland & Bouck Eng'rs, P.C.*, 136 A.D.2d 633, 634 (N.Y. App. Div. 2d Dep't 1988); and *Wolf St. Supermarkets*, 108 A.D.2d 25, 33 (N.Y. App. Div. 4th Dep't 1985). Fox's cases are inapposite because defamation per se entitles a plaintiff to presumed economic damages for reputational harm.

As Judge Easterbrook observed: “[H]ow does [plaintiff] prove a counterfactual proposition about the behavior of persons who bought [its competitor's] services? [Plaintiff] was able to prove that lies had been told, but the extent of their effect was bound to be problematic. That's why general damages are available in the law of defamation.” *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1255 (7th Cir. 1995). “[T]his principle does not somehow become irrelevant for a corporate plaintiff; reputational damages are no easier to quantify for a corporate plaintiff than for an individual plaintiff.” *Metro.*

Opera Ass'n, 2005 WL 1712241, at *5. For this reason, any suggestion that Dominion must produce government official affidavits explaining their procurement decisions is mistaken.

Second, Fox's argument ignores that defamed corporations are entitled to all economic losses that "flow directly from the injury to reputation caused by the defamation." *Robertson v. Doe*, No. 05-cv-7046, 2010 WL 11527317, at *3 (S.D.N.Y. May 11, 2010) (quoting *Celle*, 209 F.3d at 179). Dominion's security costs and mitigation expenses alone dictate denying Fox's motion. *See* Ex.738, Hosfield Rep. pp.137-136 & Rep. Ex.7 (itemizing out-of-pocket expenses including security, public relations, and legal fees).

Third, in addition to out-of-pocket expenses, a defamed company can also recover the diminution in its enterprise value. *See Rupert v. Sellers*, 65 A.D.2d 473, 487 (N.Y. App. 1978) (Cardamone, J., concurring) (affirming award of damages for difference in market value of business before and after defamation). As the Supreme Court has explained, "actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by the defamatory falsehood include impairment of reputation...[T]here need be no evidence which assigns an actual dollar value to the injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

As Dominion will demonstrate at trial, Dominion has suffered monumental losses to its business. And even though some election officials retain high personal

opinions of Dominion, they are distancing themselves from the company and avoiding Dominion because of intense pressure from constituents and concerns for their safety. *See, e.g.*, Ex.139, Richer 40:23-41:11, 45:8-47:15, 51:6-11, 121:6-17, 122:24-124:10, 124:19-126:15; Ex.120, Gates 20:10-21:7, 41:24-42:12, 51:10-22, 53:11-15, 66:2-22. Whereas before the defamation Dominion was growing, now loyal customers have abandoned ship, and other long-term contracts not yet up for renewal are requiring more work to retain and show signs of likely loss. Ex.673, Rosania 246:2-15; Ex.131, Noell 222:9-223:11, 231:17-22; Ex.144, Singh 186:25-187:10, 189:6-14. Potential acquisitions are also off the table for Dominion. Ex.144, Singh 35:6-19.

All of this evidence (and more) supports the conclusion that Fox's defamation has irreparably poisoned Dominion's name and damaged Dominion's business. As such, Dominion has presented an expert report and testimony from a well-respected financial expert, Mr. Mark Hosfield, that estimates a \$920 million diminution of Dominion's enterprise value. He also calculates potential additional damages for lost growth opportunities. Ex.738, Hosfield Rep. p.5. Mr. Hosfield's estimate of \$920 million appropriately considers the financial impact of lost customers and opportunities discussed in his report. *See id.* pp.24-51.

Fox raises factual disputes with that valuation, but those are issues for cross-examination. The purpose of summary judgment is not to weigh evidence; to do

otherwise would usurp the proper role of the jury. *Cerberus Int'l., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) (“The judge who decides the summary judgment motion may not weigh qualitatively or quantitatively the evidence adduced on the summary judgment record.”).

Fourth, Fox’s argument that Dominion cannot isolate the reputational harm caused by Fox News as opposed to others is also not a summary judgment argument. FNN’s MSJ p.153. Contested damages causation is a jury question. Fox also confuses the law, conflating the **causation** of damages with the **apportionment** of damages among multiple defamers. None of Fox’s arguments have merit.

As an initial matter, Fox cannot use other tortfeasors to avoid liability for the harm it caused. “The rule is well settled that a defendant cannot show in mitigation of damages that the plaintiff has commenced actions against other papers for publishing the same libel.” *Butler v. Gazette Co.*, 119 A.D. 767, 770 (N.Y. App. Div. 3d Dep’t 1907); *see also Palmer v. Matthews*, 162 N.Y. 100, 103 (1900) (holding a defendant “may not show that other journals published the same statement simultaneously or subsequently to the publication complained of”).

The seminal New York case, which remains authoritative and controlling New York law, is *Palmer v. New York News Publishing Co.*, 31 A.D. 210 (N.Y. App. Div. 1st Dep’t 1898). The defendant newspaper argued that the plaintiff’s damages should be mitigated because the identical libel was published by many other

newspapers in the United States, and the plaintiff had also begun various libel actions against those other papers. *Id.* at 211. The court forcefully rejected the defendant’s argument and explained:

[W]here a libel has been published against the plaintiff by different persons at different times, he is entitled, not only to pursue each publisher, but to recover whatever damages the jury may think that each publication may have caused him. Each libel is a separate and distinct tort, and each person who sees fit to publish it is separately liable to the plaintiff for whatever damages may be fairly said to accrue.

If 100 persons at 100 different places make 100 separate publications of a libel in 100 different newspapers, the fact that this simultaneous action of all of them has ruined the plaintiff’s character is no reason why one of them when sued for it should shelter himself behind the acts of the other 99, and say that 99/100 of the plaintiff’s character was ruined by the others, and, therefore, he is liable for only 1/100 part of the damage.

The true rule is and must be, that whoever publishes a libel, publishes it at his peril, and he cannot mitigate his damages because some other reckless or evil-disposed person has incurred the same liability that he has for the same story.

Id. at 212 (spacing added) (citing *Smith v. Sun Printing & Publ’g Ass’n*, 55 F. 240, 245 (2d Cir. 1893); accord *Bennett v. Salisbury*, 78 F. 769 (2d Cir. 1897)).

Furthermore, Fox misstates the damages causation standard that will be at issue at trial. While Delaware law employs the rule of “but for” causation, New York law—which governs this case—applies a different standard. For proving special damages, New York requires only that the tortious conduct was “a substantial factor in the plaintiff’s injury.” See *Brown v. New York*, 31 N.Y.3d 514, 519 (2018); N.Y. Pattern Jury Instr. Civil 2:70 (“You may, however, decide that a cause is

substantial even if you assign a relatively small percentage to it.”). For general damages, the jury considers a set of factors that account for both the nature and scope of the defamation. N.Y. Pattern Jury Instr. Civil 3:29.

Under any standard, a juror can easily find that the evidence in this case suffices. Beginning on November 8, Fox chose to endorse and legitimize the conspiracy theory about Dominion, ¶179(a), then prompted that theory to go viral by broadcasting it to nearly 2.5 million Americans and republishing and rebroadcasting to millions of others, and then repeating that story over and over again for months, ¶¶179(b)-179(t). *See supra* pp.86-130; Ex.739 and Ex.740 (viewership); Ex.732, Steckel Rep. pp.36-37. Meanwhile, in real time, Dominion and their government customers around the nation suffered very real threats to their welfare and ability to do their jobs. *See supra* pp.181-182, 185-186. Dominion has already lost business, and drastically lost value. *See supra* pp.185-186. Fox cannot deprive Dominion of its right to seek damages for this per se defamation.

V. Fox News and Fox Corporation Are Subject to Punitive Damages.

Fox’s argument falls far short of its burden on summary judgment to preclude punitive damages. Fox asserts—incorrectly—that punitive damages “require[] proof that the defendant made defamatory statements ‘out of hatred, ill will, or spite.’” FNN MSJ pp.154-55 (internal citation omitted). Fox left out half the standard. Under black-letter New York law, an award of punitive damages is

warranted when the defamatory statements are made “with deliberate intent to injure or made out of hatred, ill will, or spite *or made with wilful, wanton or reckless disregard of another’s rights.*” New York Pattern Jury Instructions §3:30; *see also Prozeralik v. Capital Cities Commc’ns, Inc.*, 626 N.E.2d 34, 42 (N.Y. 1993).

Fox’s own cited cases recite that very standard. *See, e.g., Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 184 (2d Cir. 2000) (jury was properly instructed that it may award punitive damages if it found that defendant “made the statements ‘with deliberate intent to injure,’ ‘out of hatred, ill-will or spite’ *or ‘with willful, wanton or reckless disregard of another’s rights.’*”); *Morsette v. “The Final Call”*, 764 N.Y.S.2d 416 (App. Div. 2003) (same).²⁴

Fox’s failure to address its arguments to the proper standard is fatal to this part of its motion.

Under the proper standard, a juror may rely on various circumstances to support a punitive damages award:

- ***Proof of a deliberate falsehood.*** *Kostolecki v. Buffalo Courier Exp. Co. Inc.*, 163 A.D.2d 856 (App. Div. 1990).

²⁴ Fox cites to *Greenlee v. Imperial Homes Corp.*, a Delaware case, that states explicitly that punitive damages are warranted to punish conduct that was in any way “willful, wanton or reckless.” 1994 WL 465556, at *8 (Del. Super. Ct. July 19, 1994). Fox’s other cases relate to qualified privilege issues—***not punitive damages.*** *See Present v. Avon Prod., 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) (also a qualified privilege case)).

- ***Refusal to retract the statements.*** *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 173 (1967) (upholding a punitive damages award where the jury was instructed); *Stokes v. Morning J. Ass’n*, 72 A.D. 184, 192-93, (App. Div. 1902); *Hinerman v. Daily Gazette Co., Inc.*, 423 S.E.2d 560, 580-81 (W. Va. 1992).
- ***Whether the conduct involved repeated actions or an isolated incident.*** *Morris v. Flaig*, 511 F.Supp.2d 282, 309-10 (E.D.N.Y. 2007).
- ***How long the conduct went on.*** *Garcia v. O’Keefe*, 5 Misc. 3d 1006, 2004 WL 2375284, at *6 (N.Y. Sup. Ct. Sept. 9, 2004).
- ***Defendants’ awareness of what harm the conduct caused or was likely to cause.*** *Id.*; *Morris*, 511 F.Supp.2d at 309.

Here, there is strong evidence from which a jury could find that Fox—including FNN producers and hosts of the accused shows, and executives in the “chain of command” right up through Scott at FNN and Rupert and Lachlan Murdoch at FC—exhibited wanton, reckless, and willful disregard of Dominion’s rights. They knew the Dominion conspiracy theories were false. They knew Fox continued to bring on guests to promote those false conspiracy theories. They knew these broadcasts were extremely damaging to Dominion as a company and to its employees (not to mention to American democracy). *See, e.g.*, Ex.122, Hannity 161:14-167:12; *supra* pp.157-181; Dom. MSJ pp.87-161.

Such evidence more than suffices to preclude summary judgment. But even more, Fox’s own case, *Loughry v. Lincoln First Bank, N.A.*, describes word-for-word what Fox has done in terms that make clear a jury would be well justified in awarding punitive damages here:

Punitive damages can be imposed on an employer for the intentional wrongdoing of its employees only ***where management has authorized, participated in, consented to or ratified the conduct*** giving rise to such damages, or deliberately retained the unfit servant, ***or the wrong was in pursuance of a recognized business system of the entity.***

494 N.E.2d 70, 74 (N.Y. 1986) (internal citations omitted). As in *Loughry*, Fox News executives controlled what went on Fox’s airwaves at all relevant times, and each knew the falsity and consequences of what Fox was broadcasting. *Supra* pp.142-143, 144-157; Dom. MSJ pp.101-117.

Dominion told Fox the truth, over and over, including in letters sent on November 20 and December 22, 2020 to the top executives in the company, phone calls to Scott and Wallace in mid-November by Tony Fratto, and thousands of “Setting the Record Straight” emails sent to Fox throughout the period. *Supra* pp.51-52; Ex.235 (“out and out lies” were “crossing dangerous lines”); Ex.236 (Fox broadcasts “damaging” Dominion); Ex.119, Fratto 231:7-233:17; Ex.237 (Fox causing “incredible harm to Dominion’s reputation” and putting in jeopardy the “safety of others.”); Ex.741 (“death threats...unleashed on Dominion’s employees”); Ex.648 (Op-Ed by Dominion’s CEO noting “the harassment of election officials and Dominion employees across the country—including stalking and death threats,” which Dominion sent to Fox, *see* Ex.730). Yet Fox continued to broadcast, promote, and endorse damaging falsehoods about Dominion, week after week through the end of January 2021 in 17 broadcasts and 3 tweets across two Fox

networks and other platforms. ¶179. Fox has steadfastly refused to retract a single statement or apologize to Dominion. Ex.128, Lowell 30(b)(6) 619:22-620:3.

Rupert Murdoch said it best when asked if he could have stopped Fox from continuing to bring Rudy Giuliani onto its airwaves to tell the Dominion lies: “I could have. But I didn’t.” Ex.600, R.Murdoch 317:2-6.

Nor can Fox wiggle its way out of punitive damages by claiming its hosts and showrunners’ conduct is irrelevant to punitive damages. Their conduct would necessarily have been “in pursuance of [Fox’s] recognized business system.” *Rose v. Imperial Engine Co.*, 127 A.D. 885, 887 (N.Y. App. Div. 1908).²⁵

Hannity’s conduct is illustrative of the level of disregard the showrunners had for Dominion. On November 11, 2020, Hannity took a call from a listener to his radio show—the owner and operator of a company also called Dominion—who alerted Hannity to the fact that his company was receiving “threats” precisely because people were confusing it with the voting company Dominion. Ex.122, Hannity 161:14-167:12. While Hannity did something to help this business owner, he did nothing about the threats Dominion was receiving, and in fact, just a few weeks later brought Powell on his Fox show to falsely accuse Dominion of rigging

²⁵ Regardless of which of Fox’s employees acted with the necessary disregard of Dominion’s rights, “[t]he wrongdoer’s rank in the corporation, and hence the defendant’s liability for punitive damages, are questions of fact that preclude summary judgment for defendant.” *Kostolecki*, 163 A.D.2d at 857.

the 2020 election—which Hannity has now admitted he never believed “for one second.” *Id.* 294:17-295:15, 322:19-21; Ex.487.

That was not an isolated episode. The record demonstrates that such “willful, wanton, or reckless disregard of [Dominion’s] rights” permeated every Fox show that aired a challenged broadcast, and every FNN and FC executive who “authorized, participated in, consented to or ratified” the challenged broadcasts. *Rose*, 127 App.Div. at 887; *supra* pp157-181; Dom. MSJ pp.87-161.

To this day, Rupert Murdoch and Fox refuse to apologize for or retract the lies Fox News broadcast about Dominion, even though he admits that “I would have liked us to be stronger in denouncing it in hindsight” and that Fox hosts “endorsed” the “false notion of a stolen election.” Ex.600, R.Murdoch 343:12-20; 361:15-362:21. Whether Fox’s misconduct and recalcitrance merits punitive damages is a question for the jury.

CONCLUSION

This Court should deny Fox’s summary judgment motions.

Dated: February 8, 2022

Respectfully submitted,

FARNAN LLP

/s/ Brian E. Farnan

Brian E. Farnan (Bar No. 4089)
Michael J. Farnan (Bar No. 5165)
919 N. Market St., 12th Floor
Wilmington, Delaware 19801
(302) 777-0300
bfarnan@farnanlaw.com
mfarnan@farnanlaw.com

Rodney Smolla (Bar No. 6327)
164 Chelsea Street
South Royalton, Vermont 05068
(864) 373-3882
rodsmolla@gmail.com

Of Counsel:

Thomas A. Clare, P.C.
Megan L. Meier
Dustin A. Pusch
Daniel P. Watkins
CLARE LOCKE LLP
10 Prince Street
Alexandria, Virginia 22314
(202) 628-7400
tom@clarelocke.com
megan@clarelocke.com
dustin@clarelocke.com
daniel@clarelocke.com

Justin A. Nelson
Jonathan J. Ross
Katie Sammons
Laranda Walker
Elizabeth Hadaway
Florence Chen
Kate Farley
SUSMAN GODFREY LLP
1000 Louisiana Street, #5100
Houston, Texas 77002
(713) 651-9366
jnelson@susmangodfrey.com
jross@susmangodfrey.com
ksammons@susmangodfrey.com
lwalker@susmangodfrey.com
ehadaway@susmangodfrey.com
fchen@susmangodfrey.com
kfarley@susmangodfrey.com

Stephen Shackelford, Jr.
Mark-Hatch-Miller
Zach Savage
Christina M. Dieckmann
Eve Levin
SUSMAN GODFREY LLP
1301 6th Avenue
New York, New York 10019
(212) 336-8330
sshackelford@susmangodfrey.com
mhatch-miller@susmangodfrey.com
zsavage@susmangodfrey.com
cdieckmann@susmangodfrey.com

Davida Brook
Jordan Rux
SUSMAN GODFREY LLP
1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
(310) 789-3100
dbrook@susmangodfrey.com
jrux@susmangodfrey.com

Edgar Sargent
Katherine Peaslee
SUSMAN GODFREY LLP
401 Union Street, Suite 3000
Seattle, Washington 98101
(206) 516-3880
esargent@susmangodfrey.com
kpeaslee@susmangodfrey.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Brian E. Farnan, hereby certify that on February 27, 2023, a copy of the redacted version of Dominion’s Combined Opposition to Fox News Network, LLC’s and Fox Corporation’s Rule 56 Motions for Summary Judgment was served via LexisNexis File&Serve on the following:

Blake Rohrbacher
Katharine L. Mowery
Angela Lam
RICHARDS, LAYTON & FINGER, P.A.
920 N. King Street
Wilmington, DE 19801

John L. Reed
Ronald N. Brown, III
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801

/s/ Brian E. Farnan
Brian E. Farnan (Bar No. 4089)