IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

US DOMINION, INC., DOMINION VOTING SYSTEMS, INC., and DOMINION VOTING SYSTEMS CORPORATION, Plaintiff, v. FOX NEWS NETWORK, LLC, Defendant.	C.A. No. N21C-03-257 EMD CONSOLIDATED **REDACTED PUBLIC VERSION**
US DOMINION, INC., DOMINION VOTING SYSTEMS, INC., and DOMINION VOTING SYSTEMS CORPORATION, Plaintiff, v. FOX CORPORATION, Defendant.	C.A. No. N21C-11-082 EMD

DEFENDANT FOX NEWS NETWORK, LLC'S ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

OF COUNSEL:

Dan K. Webb
Matthew R. Carter
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600

Paul D. Clement
Erin E. Murphy
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

Scott A. Keller
LEHOTSKY KELLER LLP
200 Massachusetts Avenue NW
Washington, D.C. 20001
(512) 693-8350

Eric M. George
Katherine A. Petti
ELLIS GEORGE CIPOLLONE
O'BRIEN ANNAGUEY LLP
2121 Avenue of the Stars, 30th Floor
Los Angeles, CA 90067
(310) 274-7100

Dated: February 8, 2023

Blake Rohrbacher (#4750)
Katharine L. Mowery (#5629)
Angela Lam (#6431)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Defendant Fox News Network, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Dominion's summary judgment motion is flawed from top to bottom and should be rejected in its entirety. Dominion challenges 115 distinct statements. To obtain summary judgment on any one of those statements, Dominion must prove, as a matter of law, that the specific statement, when examined in its proper context, is a false and defamatory statement of fact about Dominion that caused it injury. *See Greenberg v. Spitzer*, 155 A.D.3d 27, 47 (N.Y. App. Div. 2017). Dominion must then produce clear and convincing evidence that the person(s) at Fox News responsible for that specific statement knew that it was false or harbored serious doubts about its truth when it was published. *See Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987) (en banc). Those questions are impossible to answer without analyzing each statement on its own terms. Yet despite filing a 40,000-word brief, Dominion does not conduct that required statement-by-statement analysis for *any* of the 115 statements it actually challenges. Instead, Dominion attempts to lower the bar for itself. It lumps the statements into four "categories" without any analysis as to whether any or all of them actually fall in those categories, deems all four categories to be false and defamatory, and calls it a day.

That is not how the law works. *See Greenberg*, 155 A.D.3d at 47. Once each statement is carefully examined on its own terms and in proper context, as the law requires, none is defamatory. Indeed, many of the statements are not remotely

defamatory. Some report the President's allegations as allegations, others repeat allegations made in court (some repeat court filings verbatim), still others are plainly protected opinion. The only way to sort all of that out and to make this case manageable for trial is to conduct the statement-by-statement analysis that is required at this stage of the proceedings. Fox News did that work in its own motion for summary judgment. Dominion has not even tried, even though Dominion bears the burden of proving its claims.

Worse still, Dominion barely tries to demonstrate that the specific person(s) at Fox News responsible for any of the statements it challenges subjectively knew or harbored serious doubts about the truth of that statement when it was published. *See Tavoulareas*, 817 F.2d at 794. Instead, it lards up its brief with any cherry-picked statement it can muster from any corner of Fox News to try to demonstrate that "Fox" writ large—not the specific persons at Fox News responsible for any given statement—"knew" that the allegations against Dominion were false. But the U.S. Supreme Court has squarely rejected the proposition that knowledge may be imputed in the actual-malice context. And much of that evidence comes from text messages and emails of individuals who had zero responsibility for any of the statements Dominion challenges—a point that becomes clear once Dominion finally conducts something that resembles a proper actual malice analysis and identifies the specific individuals it thinks are actually responsible.

Dominion is thus left taking an extreme view of defamation law that no court could or should sanction. According to Dominion, it is "legally irrelevant" that most of "the accused statements relate to false charges made by" the President's lawyers and allies. Dom.MSJ.7. According to Dominion, 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." Dom.MSJ.7. And according to Dominion, that rule is subject to virtually no exceptions (save a very narrow privilege to repeat near-verbatim after the fact things said in official proceedings), no matter how newsworthy the underlying allegations. And on top of all that, Dominion apparently thinks that a news organization acts with actual malice so long as someone in the organization (or even the organization's parent company) with supervisory authority over the publication harbors doubt about the allegations and fails to stop the publication from going to press, regardless of whether that person *actually* played any role in creating or publishing the statements.

The combined effect of those novel positions is a vision of defamation liability of impossible breadth. Under Dominion's approach, if the President falsely accused the Vice President of plotting to assassinate him, the press would be liable for reporting the newsworthy allegation so long as someone in the newsroom thought it was ludicrous. Such a rule would stop the media in its tracks. The Washington Post

would be on the hook for reporting President Trump's allegation that President Obama was born in Kenya, since several of its editors understood that the claim was bogus. The New York Times would be liable for reporting allegations in the Steele Dossier so long as some editors at the Times doubted the claims. CNN would be liable for reporting former Governor Andrew Cuomo's denials and counter-allegations that his accusers were liars since some CNN executives undoubtedly believed the Governor's accusers.

Indeed, if it were truly "irrelevant" that the "accused statements relate to false charges made by" the President's lawyers, and if the press were really "deemed the 'publisher' of every statement [the President's lawyers] aired against Dominion … just as if [the press] had published it originally," Dom.MSJ.7, then Dominion could assert its multi-billion-dollar defamation claim against virtually every outlet in the country for reporting the President's allegations about it. Dominion could sue CSPAN tomorrow, as a recording of Rudy Giuliani's and Sidney Powell's November 19 news conference and their allegations about Dominion remains on its website to this day. And MSNBC re-aired some of the very same Fox News coverage that Dominion challenges as recently as this past month.

Ultimately even Dominion does not really appear to believe its radical theory, as it has not sued any of those entities for reporting the President's allegations, or sued Fox News for airing Maria Bartiromo's post-election interview of President

Trump. Even Dominion seems to believe that reporting newsworthy allegations made by others merits *some* protection. It just disagrees with Fox News about where to draw the line. Thankfully, the New York Court of Appeals has made clear what that line is, in the context of allegations of election interference no less: So long as a reasonable viewer, when viewing a statement in the "over-all context in which the assertions were made," "would understand the statement[] … as mere *allegations* to be investigated rather than *as facts*," reporting the allegation is not defamatory, but is instead affirmatively protected by the First Amendment. *Brian v. Richardson*, 660 N.E.2d 1126, 1130-31 (N.Y. 1995). And so long as the press makes clear that the allegations are just allegations, it is free to "offer[] [its] own view that these [allegations] [a]re credible" and merit investigation (as some Fox News hosts did), just as it is free to offer its own opinion that the allegations are implausible (as other Fox News hosts and other networks did). *Id.*

That is all part of the truth-seeking function protected by the First Amendment, which values public debate about newsworthy allegations and remedies speech with more speech, not billion-dollar defamation suits against the press. The First Amendment "presupposes that the right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Dominion might think that principle is "folly," "but we have staked upon it our all." *Id.*

COUNTERSTATEMENT OF FACTS

Dominion's summary judgment motion rests on an accounting of the facts that has no basis in the record, no bearing on this case, or both. Dominion spends much of its introduction and facts section mischaracterizing the record and cherry-picking quotes that it strips of key context. And it spills considerable ink on facts that are utterly irrelevant under black-letter principles of defamation law. For example, much of Dominion's evidence consists of communications between Fox News employees that came either before any of the allegations that Dominion challenges even surfaced or long after Fox News hosts stopped inviting Giuliani or Powell onto their shows. And Dominion litters its brief with statements from individuals in the Fox News organization and parent company Fox Corporation that have no connection whatsoever to any of the statements that Dominion challenges, a point that becomes obvious when Dominion finally identifies—117 pages into its brief—a list of persons that it thinks are responsible for the statements it challenges. While even that list is vastly overbroad, it confirms that most of Dominion's so-called "overwhelming" evidence is irrelevant, as most of it relates to people who are not even on Dominion's *own list* of responsible individuals.

Dominion not only fixates on evidence that does not matter, but ignores the evidence that does. For instance, Dominion does not mention a single time in its lengthy brief that Fox News hosts repeatedly testified that they did not know in the

immediate aftermath of the election whether the President's unprecedented allegations about Dominion were false. Dominion ignores evidence demonstrating that the hosts had good reasons to keep an open mind about the President's claims that Dominion machines were hacked or facilitated fraud. After all, the media (including the New York Times, the Washington Post, and Politico), politicians from both political parties (including Senator Elizabeth Warren, Senator Amy Klobuchar, and Stacey Abrams), computer scientists, and election security experts all expressed concerns about voting machines generally and Dominion specifically in the lead up to the election. And Dominion goes so far as to say that it is *irrelevant* that the allegations were made by the sitting President and his lawyers in a contested Presidential election and in litigation, even though one of Dominion's own lawyers presciently observed: "It is unthinkable that any competent plaintiff's lawyer would advise a client to sue the likes of CBS, FOX, or CNN for live transmission of the defamatory remarks uttered by, let us say, President Trump." 1 Rodney A. Smolla, Law of Defamation §4:97 (2d ed. 2022). Dominion does not explain why a different rule applies when the press reports allegations made by the President's lawyers.

When one examines the uncontested evidence that actually matters in this case, it is plain that Dominion's claims cannot proceed. At the very least, the record thoroughly refutes Dominion's claim that it has met its concededly "heavy burden"

to prove that no reasonable juror could find in Fox News' favor on *any* of the elements of *any* of its defamation claims. Dom.MSJ.6.[1]

A. Dominion's History of Controversy

Since their arrival two decades ago, electronic voting machines have been the subject of significant controversy and public scrutiny. To some, the "appeal of such machines seemed plain: Voting was crisp, instantaneous, logged digitally." Ex.D1, *Politico*, How to Hack an Election in 7 Minutes (Aug. 5, 2016). To others, any deviation from old-fashioned paper ballots and the introduction of a "black box" voting machine raised concerns about manipulation and fraud. *Id*. "To computer scientists, it seemed like a disaster waiting to happen." *Id.*

"Almost from the day they were taken out of the box," electronic voting machines have been dogged by problems and concerns. *Id.* For example, in 2004, the New York Times editorial page proclaimed that "electronic voting machines cannot be trusted until more safeguards are in place" after a study conducted by Maryland demonstrated "vulnerabilities" in machines made by Diebold Election Systems that "seem[ed] almost too bad to be true." Ex.D2, *N.Y. Times*, How to Hack an Election (Jan. 31, 2004). A few years later, a Times columnist noted that

[1] The statement of facts that follows is substantively identical to the statement of facts in Fox News' Brief in Support of its Rule 56 Motion for Summary Judgment. Fox News reproduces that statement here for the Court's convenience.

machines made by Election Systems & Software (ES&S) allegedly failed to count thousands of votes, potentially costing Democrats a congressional seat. Ex.D3, *N.Y. Times*, When Votes Disappear (Nov. 24, 2006). And in 2007, high-profile studies by California and Ohio found "'viral' vulnerabilities" with machines made by Diebold, Hart InterCivic, and Sequoia Voting Systems—three of the dominant players in the market at the time. Ex.F1, Wallach Report ¶¶18-19 (Nov. 28, 2022); *see also* Ex.E1 Piper Dep. Tr. 157:20-158:14, 161:2-21. As to Sequoia specifically, the California Secretary of State "found significant security weaknesses throughout the Sequoia system" that raised "serious questions as to whether the Sequoia software can be relied upon to protect the integrity of elections." Ex.G1, California Secretary of State, Source Code Review of the Sequoia Voting System (July 20, 2007), at i.

Dominion, a voting machine company founded in Canada in 2002, has been at the center of that controversy since acquiring Diebold (which by then had rebranded itself as "Premier Election Solutions") and Sequoia in 2010. Sequoia had previously been owned by Smartmatic, a voting machine company founded in Venezuela that is itself no stranger to controversy. Smartmatic was forced to sell Sequoia after Congresswoman Carolyn Maloney (D-N.Y.) asked the Committee on Foreign Investment in the United States (CFIUS) to investigate Smartmatic "because of concerns that the government run by Venezuelan President Hugo Chávez ... owns a

stake in the company." Ex.D4, *Wall Street Journal*, Smartmatic to Shed U.S. Unit, End Probe Into Venezuelan Links (Dec. 22, 2006). In 2004, Smartmatic machines were used in an election won by Chávez that many people suspected to be fraudulent. And in 2006, officials blamed Smartmatic/Sequoia machines—and in particular "software ... developed in Venezuela"—for a series of "irregularities" during an election in Chicago. Ex.D5, *N.Y. Times*, U.S. Investigates Voting Machines' Venezuela Ties (Oct. 29, 2006). Those controversies attracted significant media attention, including from then-CNN anchor Lou Dobbs. As one computer scientist expressed on Dobbs' show in a 2006 segment about Smartmatic, "we're using equipment to elect our president and our Congress, and our local officials, that cannot be audited, that are potentially under the control of foreign entities, and that are almost an ideal platform for rigging an election." Ex.D6, *CNN*, Democracy at Risk (Nov. 3, 2006).[2]

To this day, Dominion continues to service legacy Diebold and Sequoia systems in multiple jurisdictions, despite longstanding criticism of their vulnerabilities. Ex.F1, Wallach Report ¶¶27-36; *see also* Ex.E1, Piper Dep. Tr. 162:18-163:4. And

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

Dominion's newer machines have been subject to criticism as well. In 2018, for example, Princeton University Professor Andrew Appel published a popular article illustrating "a serious design flaw" in Dominion's new machines: "after you mark your ballot, after you review your ballot, the voting machine can print more votes on it." Ex.H1, Andrew Appel, Design Flaw in Dominion ImageCast Evolution Voting Machine, Freedom to Tinker (Oct. 16, 2018). Appel elaborated that "it's impossible to absolutely prevent a hacker from replacing the computer's software with a vote-stealing program that deliberately miscounts the vote." *Id*. Dominion has acknowledged that its customers saw this article and raised a "myriad of questions" about it that were "[b]ad for business." Ex.E2, Ikonomakis Dep. Tr. 66:15-67:1, 69:23-69:2.

Likewise, a report in 2019 noted that hackers were able to access multiple Dominion machines, that "ballots could easily be stolen" from the machines "using common items such as a standard trash picker," that hackers were able to "boot an operating system of their choice and play video games" on Dominion's machines, and that Dominion's "filesystem was unencrypted and unprotected." Ex.G13, DefCon Report 20-21 (Aug. 2019). Those findings were widely reported in the media. *See, e.g.*, Ex.D26, *Washington Post*, Hackers Were Told to Break Into U.S. Voting Machines. They Didn't Have Much Trouble (Aug. 12, 2019). The media also reported that, although "the US government [wa]s happy to let hackers try to

break into its equipment, the private companies that make the machines America votes on, not so much," and that the voting machine industry "doesn't face much public accountability, even in the wake of Russia's foreign interference in the 2016 election." Ex.D27, *CNN*, At Hacking Conference, Pentagon's Transparency Highlights Voting Companies' Secrecy (Aug. 12, 2019).

Meanwhile, Dominion's reputation took additional blows. In January 2019, Dominion submitted its brand-new Democracy 5.5 System for certification in Texas. But Texas refused to certify the system due to multiple hardware and software problems. Ex.G2, Texas Secretary of State Report (June 20, 2019). When Dominion tried again a few months later, Texas refused to certify the system yet again, questioning whether it "is safe from fraudulent or unauthorized manipulation." Ex.G3, Texas Secretary of State Report (Jan. 24, 2020).

After its unsuccessful attempted foray into Texas, Dominion turned to other markets—and attracted criticism and controversy there too. When Georgia decided to buy new voting machines from Dominion in 2019, "cybersecurity experts, election integrity advocates and Georgia Democrats" led by former gubernatorial-candidate Stacey Abrams opposed the purchase on the ground that Dominion's machines "are widely considered vulnerable to hacking." Ex.D7, *Politico*, Georgia Likely to Plow Ahead with Buying Insecure Voting Machines (Mar. 28, 2019). The June 2020 primary elections in Georgia were subsequently "overwhelmed by a full-

scale meltdown of new voting systems," as "[s]cores of new state-ordered voting machines were reported to be missing or malfunctioning." Ex.D8, *N.Y. Times*, Georgia in Uproar Over Voting Meltdown (June 9, 2020).

Later that year, voters and advocacy groups sought a preliminary injunction in a suit against the state in federal court, claiming that its implementation of the Dominion system and its use of Dominion software violated their "First and Fourteenth Amendment rights to cast ballot votes that will be reliably counted." *Curling v. Raffensperger*, 493 F.Supp.3d 1264, 1268-69 (N.D. Ga. 2020). The district court held that the plaintiffs established a likelihood of success on the merits of some of their claims, crediting expert testimony that raised security concerns with Dominion's systems. The court noted that an "array of experts and subject matter specialists provided a huge volume of significant evidence regarding the security risks and deficits in the [Dominion] system." *Id*. at 1278. One cybersecurity expert testified that Dominion's system remained vulnerable to a "cyber attack ... causing the swapping or deletion of specific votes cast." *Id*. at 1279. Another testified that "Dominion has not permitted, independent research, academic or otherwise," into its system, expressing "serious doubt that the system was operating correctly." *Id*. at 1288-89. While the court refused to order any major changes to Dominion's system so close to election day, it warned that the system posed "substantial risks and long-run threats" that "are neither hypothetical nor remote"—including vulnerability to

"stealth vote alteration ... by malware that can be effectively invisible to detection." *Id*. at 1312, 1341. The court concluded that "national cybersecurity experts convincingly present evidence that this is not a question of 'might this actually ever happen?'—but 'when it will happen.'" *Id*. at 1342.

Dominion's troubles also attracted the attention of Congress, in part due to heightened concerns about potential foreign interference in the upcoming 2020 presidential election. *See, e.g.*, Ex.D9, *N.Y. Times Magazine*, The Crisis of Election Security (Sept. 26, 2018). In December 2019, Democratic Senators Elizabeth Warren, Amy Klobuchar, Ron Wyden, and Democratic Congressman Mark Pocan sent a public letter to Staple Street Capital, the private equity firm that owns Dominion. The letter noted their concerns that "secretive and trouble-plagued companies, owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, 'have long skimped on security in favor of convenience,' leaving voting systems across the country 'prone to security problems.'" Ex.G4, Warren Ltr. (Dec. 6, 2019) (quoting Ex.D25, *AP News*, US Election Integrity Depends on Security-Challenged Firms (Oct. 28, 2019)). And in January 2020, Congress held a widely publicized hearing in which lawmakers "expressed concern about foreign components in the nation's election equipment" to executives from the nation's three major voting manufacturers, including Dominion CEO John Poulos. Ex.D10, *Washington Post*,

Voting Machine Vendors Get Scrutiny at Congressional Hearing (Jan. 9, 2020). During the hearing, Poulos admitted that several components in its machines were manufactured overseas. *Id.* ("Several of those components, to our knowledge, there is no option for manufacturing those in the United States.").

The media widely covered Dominion's troubles. The USA Today reported that Dominion's system "had been rejected by Texas and is the subject of a court battle over accuracy." Ex.D11, *USA Today*, Will Your Vote Be Counted? Experts Warn of Unreliable Voting Machines (Nov. 2, 2020). The Washington Post stated that "election integrity activists say the new [Dominion] voting machines are unaccountable and unverifiable and have many of the same security vulnerabilities as the old ones." Ex.D12, *Washington Post*, Another Showdown Set This Week Over Georgia Voting Machines (Sept. 9, 2020). The New York Times reported that Dominion's system was a "Rube Goldbergian assemblage of interrelated components" and that an "expert witness for the plaintiffs in the [Curling] lawsuit" saw "the multitude of components as more vulnerable to attack." Ex.D13, *N.Y. Times*, Anatomy of an Election 'Meltdown' in Georgia (July 25, 2020). The Atlanta Journal-Constitution stated that Dominion's system "is vulnerable to cyberattacks that could undermine public confidence, create chaos at the polls or even manipulate the results on Election Day." Ex.D14, *Atlanta Journal-Constitution*, In High-Stakes Election, Georgia's Voting System Vulnerable to Cyberattack (Oct. 3, 2020). The

Guardian noted that voting machine companies "are privately-owned and closely held, making information about ownership and financial stability difficult to obtain." Ex.D15, *Guardian*, "They Think They Are Above the Law": The Firms That Own America's Voting System (Apr. 23, 2019). "The software source code and hardware design of their systems are kept as trade secrets and therefore difficult to study or investigate." *Id.* After Democrat Jamie Raskin introduced a bill that would have prohibited states from contracting with firms "owned or influenced by non-US citizens," the *Guardian* reported that the bill could affect "Dominion Voting Systems" and "Scytl, which provides election night reporting and other online election management tools" and is "based in Spain." *Id.*

Discovery in this case has revealed that Dominion's own employees expressed serious concerns about the security of its machines. Mark Beckstrand, a Dominion Sales Manager, confirmed that other parties "have gotten ahold of [Dominion's] equipment illicitly" in the past. Ex.E3, Beckstrand Dep. Tr. 127:8-127:22. Beckstrand identified specific instances in Georgia and North Carolina and testified that a Dominion machine was "hacked" in Michigan. *Id.* Beckstrand confirmed that these security failures were "reported about in the news." *Id.* And just weeks before the 2020 presidential election, Dominion's Director of Product Strategy and Security, Eric Coomer, acknowledged in private that "our shit is just riddled with bugs." Ex.H2, Coomer Email (Oct. 30, 2020). Indeed, Coomer had been castigating

Dominion's failures for years. In 2019, Coomer noted that "our products suck." Ex.H3, Coomer Message (Nov. 5, 2019). He lamented that "[a]lmost all" of Dominion's technological failings were "due to our complete f--- up in installation." *Id*. And in another instance, he identified a "*critical* bug leading to INCORRECT results." Ex.H4, Coomer Email (Jan. 5, 2018). He went on to note: "It does not get much worse than that." *Id*. And while many companies might have resolved their errors, Coomer lamented that "we don't address our weaknesses effectively!" Ex.H5, Coomer Email (Sept. 25, 2019).

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

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

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

A legal team led by Rudy Giuliani, a former Mayor of New York City and U.S. Attorney for the Southern District of New York, and Sidney Powell, a former Assistant U.S. Attorney for the Western District of Texas, Northern District of Texas, and Eastern District of Virginia, filed lawsuits in multiple states alleging irregularities. Several of those lawsuits implicated Dominion, in part because several media outlets reported problems in jurisdictions that used Dominion machines in the immediate aftermath of the election. The day after the election, for example, several outlets reported "irregularities with the ... vote totals" in Antrim County, Michigan, which "use[d] Dominion voting equipment." Ex.D16, *Detroit Free Press*, Antrim County Election Results Investigated After Red Michigan County Turns Blue (Nov. 4, 2020). Likewise, multiple media outlets reported problems with Dominion machines in Georgia. On November 4, for example,

Politico reported that "a technological glitch" that local election officials attributed to an 11th-hour software update by Dominion "prevented voters from casting ballots on voting machines on Election Day." Ex.D17, *Politico*, Cause of Election Day Glitch in Georgia Counties Still Unexplained (Nov. 4, 2020). Politico also reported that day that a separate Dominion "software issue" delayed the absentee ballot count in two counties in Georgia. Ex.D18, *Politico*, More Georgia Equipment Problems Delayed Absentee Ballot Count (Nov. 4, 2020). CNN picked up that story too, reporting two days later that "Georgia's Gwinnett County blames Dominion Voting Systems for day-long delay reporting results." Ex.D19, *CNN*, Georgia's Gwinnett County Blames Dominion Voting Systems For Day-Long Delay Reporting Results (Nov. 6, 2020). In Arizona, officials received hundreds of complaints that electronic voting machines, including Dominion machines, failed to count votes because of improper ballot markings. Ex.D20, *Reuters*, Fact Check: Tabulation Machines in Arizona Can Read Ballots Marked With Sharpie Pens (Nov. 5, 2020).

On November 7, the Trump Campaign and the Republican National Committee filed suit in Arizona, alleging that election officials "disenfranchised" "potentially thousands" of voters after vote tabulation machines improperly rejected their ballots and officials failed to cure them. Ex.C1, Compl. ¶¶2, 26-41, *Donald J. Trump for President, Inc. v. Hobbs*, No. CV2020-14248 (Ariz. Sup. Ct. Nov. 7, 2020). On November 11, the Trump Campaign filed suit in Michigan, alleging (among other

things) that Dominion tabulation machines were defective. The complaint alleged that "Dominion Voting Systems software and vote tabulators produced ... a massive miscount" in Antrim County, and that the same Dominion systems were used in other counties as well. Ex.C2, Compl. ¶¶45, 60-66, *Donald J. Trump for President, Inc. v. Benson*, No. 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020). On November 13, Lin Wood, an ally of President Trump, filed suit in Georgia seeking to overturn the result of the election. Ex.C4, Compl. at 28, *Wood v. Raffensperger*, 1:20-cv-4651 (N.D. Ga. Nov. 17, 2020). As part of that lawsuit, a person claiming to be a former security guard for former Venezuelan president Hugo Chávez filed a sworn affidavit stating that he helped Chávez rig elections using Smartmatic machines, and that "the software and fundamental design of the electronic electoral system and software of Dominion ... relies upon software that is a descendent of the Smartmatic Electoral Management System." Ex.C5, Affidavit ¶¶6, 12-13, 21, *Wood v. Raffensperger*, 1:20-cv-4651 (N.D. Ga. Nov. 17, 2020).

As courts grappled with those lawsuits, more were filed. On November 25, Powell (joined by Wood) sued in Georgia and Michigan. The Georgia complaint alleged that "the Dominion system carr[ied] out massive voter manipulation" by switching votes from President Trump to Joe Biden. Ex.C8, Compl. ¶¶15, 18, *Pearson v. Kemp*, No. 1:20-cv-4809 (N.D. Ga. Nov. 25, 2020). It cited a sworn affidavit from a witness who claimed that "Smartmatic and Dominion were founded

by foreign oligarchs and dictators" to manipulate votes and ensure that "Venezuelan dictator Hugo Chavez never lost another election." *Id*. ¶5. Dominion's software "is designed to facilitate vulnerability," allowing users "to arbitrarily add, modify or remove" votes without detection. *Id*. ¶¶8, 103. And according to the sworn declaration of a former military intelligence officer, foreign agents exploited Dominion's vulnerabilities by hacking the software "in order to monitor and manipulate elections, including the most recent US general election in 2020." *Id*. ¶14; *see id*. ¶¶111, 130, 185. "[H]undreds of thousands of votes that were cast for President Trump in the 2020 general election were transferred to former Vice-President Biden." *Id.* ¶15. The Michigan complaint contains similar allegations. Ex.C9, Complaint ¶¶4-12, 17-18, 92, 95, 107, 113-17, 122-53, *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Nov. 25, 2020). And on December 1 and 2, Powell filed suit in Wisconsin and Arizona, where she made similar allegations about Dominion and added some new ones. *See* Ex.C11, Compl. ¶¶5-12, 51-100, 133-37, *Feehan v. Wisconsin Elections Commission*, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020); Ex.C12, Compl. ¶¶5-13, 19, 21, 44, 49-57, 60-101, 133, *Bowyer v. Ducey*, No. 2:20-cv-2321 (D. Ariz. Dec. 2, 2020). For example, the Arizona and Wisconsin complaints alleged that Dominion sent ballots "offshore" to a company called "SCYTL" for "algorithmic vote manipulation." Ex.C12, *Bowyer* Compl. ¶¶2, 80, 83.

Meanwhile, President Trump relentlessly accused Dominion of rigging the election in a barrage of public statements and tweets. For example, on November 7, President Trump retweeted a report that "Georgia Counties Using Same Software as Michigan Counties Also Encounter 'Glitch.'" Ex.G6 Donald J. Trump (@realDonaldTrump), Twitter (Nov. 7, 2020, 10:23am). Two days later, he retweeted a report that "The #DominionVotingSystems that 'glitched' in favor of Joe Biden (and was used in 29 states), partnered up with the Clinton Global Initiative." *Id.* (Nov. 9, 2020, 4:31pm). And on November 12, President Trump tweeted that "DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE." *Id.* (Nov. 12, 2020, 11:34am). The next day, he tweeted: "This Election was Rigged, from Dominion all the way up & down!" *Id.* (Nov. 13, 2020, 1:35pm). A few days later, he retweeted Powell's allegations: "RT @1776Stonewall: Sidney Powell: 'Dominion machines engineered by China, Venezuela, Cuba." *Id.* (Nov. 16, 2020, 1:22pm). And he accused Dominion of fraud again, tweeting "Dominion is running our Election. Rigged!" *Id.* (Nov. 16, 2020, 8:26am).

Over the next five days, President Trump retweeted multiple reports about Dominion with the caption: "Dominion-izing the Vote." *See, e.g.*, *id.* (Nov. 19, 2020, 12:41am); (Nov. 21, 2020, 11:30pm); (Nov. 22, 2020, 4:30am). On November 30, he tweeted: "Our 2020 Election, from poorly rated Dominion to a Country

FLOODED with unaccounted for Mail-In ballots, was probably our least secure EVER!" *Id.* (Nov. 30, 2020, 1:05am). On December 2, he retweeted a video from the Republican Party of Arizona titled "DOMINION EXPOSED: THIS VIDEO SHOULD TERRIFY EVERY SINGLE AMERICAN." *Id.* (Dec. 2, 2020, 11:21pm). The next day, President Trump tweeted: "Dominion contractor at Detroit counting center says thousands of ballots were scanned multiple times." *Id.* (Dec. 3, 2020, 9:11pm). He continued to tweet about Dominion throughout December and well past the date for certifying the electoral vote. *See, e.g.*, *id.* (Dec. 15, 2020, 5:21am) ("Dominion Voting Machines are a disaster all over the Country. Changed the results of a landslide election."); (Dec. 16, 2020, 6:09am) ("Study: Dominion Machines shifted 2-3% of Trump Votes to Biden."); (Dec. 17, 2020, 6:14am) ("Michigan fraud witness totally debunks Dominion CEO."); (Jan 5, 2021, 6:18pm) ("Reports are coming out of the 12th Congressional District of Georgia that Dominion Machines are not working in certain Republican Strongholds for over an hour.").

Given the gravity of the President's allegations and their potential to impact the results of the Presidential election, every media outlet in the country (if not the world) covered the controversy, and numerous federal and state officials examined the claims. On November 9, Attorney General William Barr authorized U.S. Attorneys and the FBI "to pursue substantial allegations of voting and vote

tabulation irregularities prior to the certification of elections in your jurisdictions." Ex.G5, Barr Memo (Nov. 9, 2020). State officials also investigated possible fraud—including Dominion systems specifically. The Michigan Secretary of State, for example, investigated potential irregularities in the vote in Antrim County, Michigan, which had "initially reported incorrect unofficial results." Ex.G8, Mich. Sec'y of State Fact Check (Nov. 7, 2020). On November 7, the Michigan Secretary of State announced that the State's Bureau of Elections had conducted a "preliminary review of the issue." Ex.G7, Mich. Sec'y of State Ltr. (Nov. 7, 2020). She further explained that any similar errors "occur[ring] elsewhere in the state" would be "caught and identified during the county canvass" process, which was "ongoing" and lasting two weeks. *Id*. Moreover, responding to allegations that this error "was part of a larger conspiracy," the Secretary ordered a hand audit of all Antrim County ballots to confirm "that the Dominion machines had counted correctly." Ex.G8, Mich. Sec'y of State Fact Check (Nov. 7, 2020). On November 13, the U.S. Election Assistance Commission requested information from Dominion after receiving multiple reports of problems related to Dominion machines in Michigan and Georgia. Ex.H11, U.S. Election Assistance Comm'n Ltr. (Nov. 13, 2020).

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

Given the unquestionable newsworthiness of a sitting President's effort to challenge the result of a presidential election, several Fox News Channel and Fox

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

While some were skeptical of those claims, others at Fox News kept an open mind—in part because of longstanding (and bipartisan) concerns about the security of electronic voting machines, in part because of unusual (and unprecedented) voting measures adopted by many states in light of the COVID-19 pandemic, and in part because the claims were being made by the President of the United States and his well-credentialed legal team in lawsuits and backed by sworn affidavits. Bartiromo testified, for example, that the President's lawyers "were people that the country respected," and that they were making the same charges about voting machines that Senator Klobuchar, Congresswoman Maloney, and Stacey Abrams had made in the past. Ex.E4, Bartiromo Dep. Tr. 196:16-197-2, 379:14-380:21. Dobbs testified that

he "took [Powell's] claims seriously because she was representing the President of the United States and a highly respected attorney." Ex.E5, Dobbs Dep. Tr. 21:4-8. Pirro testified that she took the allegations seriously because they were backed by "affidavits that were legal sworn statements under penalty of perjury supporting the allegations." Ex.E6, Pirro Dep. Tr. 352:17-23. Tucker Carlson testified that he "took Sidney Powell seriously," and that "it's entirely plausible that [her] claim is true, because we're dealing with voting machines here." Ex.E7 Carlson Dep. Tr. 32:18-19, 44:16-19. Hannity testified that he had found Powell to be a "very bright attorney" in past interactions and thought it highly relevant that "so many people from so many varying diverse backgrounds," including the State of Texas, Congressman Wyden, Senator Warren, the New York Times, and the Associated Press, "had come to a conclusion that was very negative towards Dominion." Ex.E8, Hannity Dep. Tr. 44:1-18, 189:7-190:3, 317:12-16.

Given the extraordinary nature of the claims, however, Fox News hosts did not take the President and his lawyers at their word. Instead, they pressed the President's lawyers (and the President himself) for evidence. Hosts also reminded them that they would eventually have to prove their claims in court—and prove them promptly given the mid-December deadline for casting electoral votes imposed by federal law. *See, e.g.*, 3 U.S.C. §§5, 7, 8. For example:

- On November 8, Bartiromo pressed Giuliani: "The first question everybody wants to know is, what is the evidence the president has alluded to in terms of ballot fraud? What can you tell us?" Ex.A2, Sunday Morning Futures Tr. 2 (Nov. 8, 2020). "If this was systemic, and you have got all this evidence, where is the DOJ?" *Id.* at 5. "So, how long will this take, Rudy?" *Id.* at 6. Bartiromo also asked Powell: "If this is so obvious, then why aren't we seeing massive government investigation?" *Id.* at 15.

- On November 11, Bartiromo asked Powell: "Are you going to have enough time Sidney ... to prosecute these cases? And get heard during this limited period before year end? Ex.A4, Mornings with Maria Tr. 11 (Nov. 11, 2020). "Look, you've got experience as a federal prosecutor, do you think the DOJ is going to find instances of fraud will it be enough in your view to overturn what the media says is the result of this election?" *Id.*

- On November 12, Bartiromo asked Giuliani: "Rudy, do you have enough time to actually prosecute and be heard here?" Ex.A6, Mornings with Maria Tr. 4 (Nov. 12, 2020). "So, bottom line here, you believe you will be able to prove voter fraud that affected enough ballots that you believe you can change or overturn the results of what voters believe to be the result of this election?" *Id.* at 5.

- On November 13, Dobbs told Powell: "[Y]ou're going to have to be quick to go through and to produce that investigation and the results of it. The December deadlines are approaching for electors and just as we saw in 2000 with Bush v. Gore, how critical are those deadlines? And how urgent does that make your investigation and discovery?" Ex.A7, Lou Dobbs Tonight 5 (Nov. 13, 2020).

- On November 14, Pirro asked Powell: "[W]hat evidence do you have to prove this?" Ex.A9, Justice with Judge Jeanine Tr. 8 (Nov. 14, 2020).

- On November 15, Bartiromo pressed both Giuliani and Powell for proof: "Will you be able to prove this, Rudy?" Ex.A15, Sunday Morning Futures Tr. 4 (Nov. 15, 2020). "Do you need to have that hardware in your possession to prove it? Can you prove the case without the hardware or the software?" *Id.* at 5. "So, you only have a few weeks, Rudy, because

they want to certify the state elections early December. Do you believe you will be able to prosecute and be heard within this time frame?" *Id.* at 6. "Sidney, you feel that you will be able to prove this?" *Id.* at 7. "How will you prove this, Sidney?" *Id.* "Do you believe that you can present this to the courts and be successful within this just couple weeks?" *Id.* "So you can't say who you believe took kickbacks." *Id.* at 8. "Sidney, you say you have an affidavit from someone who knows how this system works and was there with the planning of it. You believe you can prove this in court?" *Id.* at 9.

- On November 17, Bartiromo again pressed the President's lawyers for evidence: "[W]hat are you finding so far? What do you think went on here?" Ex.A13, Mornings with Maria Tr. 5 (Nov. 17, 2020). "You have to prove it. Can you prove this?" *Id.* at 6. "If this is happening shouldn't the FBI or the DOJ be looking at this?" *Id.* at 7. "[D]o you feel you have enough evidence to overturn the results of this election?" *Id.*

- On November 19, Hannity asked Giuliani: "Now, do you believe the proof is in the affidavit signed by the people, that so far that you've gotten? Will that be—will that reach the high bar that a court would need?" Ex.A17, Hannity Tr. 8 (Nov. 19, 2020).

- On November 19, Dobbs asked Powell: "[W]hat is the next steps for the legal team and when do you believe you will be prepared to come forward with hard evidence establishing the basis for a court to overturn elections or at least results of those elections in a number of battleground states?" Ex.A18, Lou Dobbs Tonight Tr. 5 (Nov. 19, 2020).

- On November 21, Pirro pressed Lin Wood for evidence: "Okay, but Lin, a federal judge in Atlanta rejected the lawsuit that this last lawsuit is associated with and this affidavit, District Judge Steven Grimberg, a Trump appointee said he found no evidence of irregularities that affected more than a nominal number of votes." Ex.A22, Justice with Judge Jeanine 6 (Nov. 21, 2020). "Lin, when you say that they were destroying or tried to destroy the ballots, do you have evidence of that?" *Id.*

- On November 24, Dobbs reminded Powell of her promise to provide evidence to overturn the election in court: "Well, you have promised a Kraken will be unleashed. We ... were expecting perhaps your suit would

be filed yesterday or today. When shall we expect your lawsuit?" Ex.A24, Lou Dobbs Tonight Tr. 6 (Nov. 24, 2020). Powell promised that she would file her first suit in Georgia no later than the next day (which she did). Dobbs then asked: "Your thoughts now about what will be the impact and it be adjudicated in such a way as to meet all of the deadlines that are forced upon you? That is, December 8th and December 14th." *Id.*

- On November 29, Bartiromo asked President Trump: "Mr. President, these are obviously very serious charges. And I want to walk through them and ask you how you will prove this in the courts." Ex.A27, Sunday Morning Futures Tr. 7 (Nov. 29, 2020). "Let's start with Pennsylvania. I know you said that you have a pile of affidavits. That's part of the evidence. What other evidence can you talk about that will enable you to prove this in court in the coming weeks, sir?" *Id.* "Mr. President, will you be able to prove that the computers can circumvent the controls that are in place?" *Id.* at 10. "Where is the DOJ and the FBI in all of this, Mr. President? You have laid out some serious charges here. Shouldn't this be something that the FBI is investigating?" *Id.* at 13. "And you believe you will be able to prove this in the coming weeks?" *Id.* at 19.

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

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

- On November 6, Bret Baier reported: "We are not seeing any evidence of widespread fraud. We are not seeing things that can change, right now at least, the split in these different states." Ex.A1, Special Report with Bret Baier 3 (Nov. 6, 2020).

- On November 10, Laura Ingraham challenged Powell's claims on *The Ingraham Angle*: "But the [Associated Press] fact checked those family connection claims [with respect to Dominion] and said basically that's just more Republican smoke and mirrors. It doesn't add up." Ex.A3, The Ingraham Angle 4-5 (Nov. 10, 2020).

- On November 13, Dobbs reported that "the U.S. Cybersecurity Agency says the November 3rd election was the most secure in American history." Ex.A7, Lou Dobbs Tonight Tr. 2 (Nov. 13, 2020). He displayed CISA's statement to his viewers on screen. Later in the show, he stated: "Dominion Voting Systems say they categorically deny any and all of President Trump's claims that their voting machines caused any voter fraud in key swing states or electoral fraud, but reports contradict that claim." *Id.* at 4. "Let's start with Dominion, a straight-out disavowal of any claim of fraud against the company, its software or machines." *Id.* at 5. He displayed Dominion's denials on screen.

- On November 14, 2020, Eric Shawn said on *America's News HQ* that, according to "election officials and the government," "the President's claims … that fraud may have played a role in the election … is just not true." Ex.A8, America's News HQ Tr. 1 (Nov. 14, 2020). Shawn also interviewed J. Alex Halderman, one of the "most prominent election computer experts of the nation," who stated that "[t]here is absolutely no evidence, none, that Dominion Voting Machines changed any votes in this election," and that "it would be essentially impossible to change votes on this scale that's been claimed here." *Id.* at 1-3.

- On November 14, Pirro told her audience on *Justice with Judge Jeanine*: Smartmatic and Dominion have "denied that they have done anything improper." Ex.A9, Justice with Judge Jeanine Tr. 8 (Nov. 14, 2020). Pirro also interrupted Powell to read and display Dominion's denial statement on screen.

- On November 16, Dobbs stated: "Smartmatic … told us today they only provided technology and software in Los Angeles County during this

year's presidential election." Ex.A11, Lou Dobbs Tonight Tr. at 3 (Nov. 16, 2020).

- On November 17, Dobbs stated: "[W]e've asked both Dominion and Smartmatic about their role on the CISA [Cybersecurity and Infrastructure Security Agency] November 12th statement disputing election fraud or intervention by foreign governments. Smartmatic said they didn't have any input. Dominion, they didn't get back to us for some reason." Ex.A12, Lou Dobbs Tonight Tr. 5 (Nov. 17, 2020).

- On November 17, after interviewing Giuliani, Bartiromo asked a Wall Street Journal reporter for "your reaction to what you just heard" about Dominion. Ex.13, Mornings with Maria Tr. 8 (Nov. 17, 2020). The reporter stated: "Well, yes, and Dominion has denied that." *Id.* The reporter noted that Giuliani was making "very, very serious allegations" that, if true, would "undermin[e] our democracy." *Id.* He also noted that, "if those allegations are false, that's also inexcusable. That also undermines our democracy and we need to get to the bottom of that." *Id.* Bartiromo responded: "That's exactly right, Jon. Agree with you 100 percent. We will continue following this until we have answers and we want answers. We deserve it." *Id.*

- On November 18, Baier noted: "Dominion has repeatedly denied any impropriety in a statement saying, Dominion Voting Systems categorically denies false assertions about vote switching and software issues with our voting systems." Ex.A15, Special Report with Bret Baier Tr. 3 (Nov. 18, 2020). "Both Smartmatic and Dominion have denied any connection to the other." *Id.* Baier also noted that "the former head of DHS's Cybersecurity and Infrastructure Agency" "dismissed those accusation as unfounded conspiracy theories." *Id.*

- On November 19, Dobbs noted: "Smartmatic and Dominion deny those charges." Ex.A18, Lou Dobbs Tonight Tr. 2 (Nov. 19, 2020). "Dominion Voting Systems today once again distanced itself from Smartmatic, saying 'Dominion is an entirely separate company and fierce competitor to Smartmatic,' end quote. 'Dominion and Smartmatic do not collaborate in any way and have no affiliate relationship or financial ties.'" *Id.* at 4.

- On November 19, Karl Rove, a guest on Dana Perino's *America's Newsroom*, explained that Giuliani and Powell's allegations "are serious, I think, somewhat strange accusations." Ex.A46, America's Newsroom

Tr. 1 (Nov. 19, 2020). He explained that "both Mr. Giuliani and Ms. Powell have an obligation to go to court and prove them because we're ... questioning the fundamental fairness ... of our presidential election and alleging that there are conspirators who worked in major cities in an organized effort to engage in widespread voter fraud and then foreign agents and powerful Americans, namely Soros and the Clinton Foundation, were involved. So they've got on obligation to go to court and prove these, or the American people will have every reason to question their credibility." *Id.* "I'm not going to say that they don't have proof, but they better come up with proof and go to court because these are serious allegations that basically say our election was manipulated by a combination of foreign and domestic actors and stolen. And that cannot be left just simply out there; it needs to be either proved or withdrawn. And the only way to do that is to take these accusations and go to court." *Id*. Perino noted that Dominion "just put out a statement completely denying all of it." *Id.* at 2. Rove continued: "If they're accurate, then the American people deserve to know it, and our courts need to take appropriate action to deal with the outcome of the election. If they're false, we need to know that as the American people and thereby judge the credibility of Mayor Giuliani and Ms. Powell." *Id.* at 3.

- On November 19, 2020, Carlson explained on *Tucker Carlson Tonight*: "[W]e invited Sidney Powell on the show. … But she never sent us any evidence, despite a lot of requests, polite requests, not a page. When we kept pressing, she got angry and told us to stop contacting her. When we checked with others around the Trump Campaign, people in positions of authority they told us, Powell has never given them any evidence either nor did she provide any today at the press conference." Ex.A21, Tucker Carlson Tonight Tr. 6 (Nov. 19, 2020).

- On November 20, Bartiromo stated: "Dominion responded to Fox Business in a statement. They say this: The latest flood of absurdities is deeply concerning. Dominion is plainly a nonpartisan American company with no ties to Venezuela or Cuba. Vote counts are conducted by County and State election officials, not by Dominion, or any other election technology company. That is from Dominion." Ex.A20, Mornings With Maria Tr. 1 (Nov. 20, 2020). Bartiromo also told Powell: "Sidney, I want you to respond to what Tucker Carlson said last night[.] … Did you get angry with the show because they texted you and asked you to please provide evidence of what you're alleging? … [W]ill you be

able to prove this evidence that you say you have of this technology flipping votes from Trump to Biden?" *Id.* at 2-3.

- On November 20, 2020, Carlson explained on *Tucker Carlson Tonight*: "[T]hey have not seen a single piece of evidence showing that software change[d] votes. … And by they, we are including other members of Donald Trump's own legal team. They have not seen Powell's evidence either, no testimony from employees inside the software companies, no damning internal documents, no copies of the software itself." Ex.A21, Tucker Carlson Tonight Tr. 5 (Nov. 20, 2020).

- On November 21, Jesse Watters explained on *Watters' World*: Powell "made some very explosive claims this week," but the "researchers on our team spent a very long time going through her claims," could only verify some, and would "continue to look into further developments." Ex.A23, Watters' World Tr. 7 (Nov. 21, 2020).

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

- On November 22, Eric Shawn hosted Michael Steel, a spokesperson for Dominion. Shawn ticked through the allegations against Dominion. Steel denied the allegations and presented Dominion's side of the story. America's News HQ 1-6 (Nov. 22, 2020).

- On November 29, after interviewing President Trump, Bartiromo interviewed Ken Starr about the President's allegations. Starr stated that "the difficulty now is translating those allegations and intuitions and the reports into actual admissible evidence in court." Ex.A27, Sunday Morning Futures Tr. 20 (Nov. 29, 2020). "[A]t this stage, we need to

have the evidence ... we have not seen in court ... the kind of proof that will lead to victory." *Id.*

- On December 13, Bartiromo asked Michael Flynn: "General, what do you want to say in terms of proof of that? Because Dominion has pushed back on Fox News, on others, who say that that's just not true. They gave us a statement, the same with Smartmatic." Ex.A33, Sunday Morning Futures Tr. 11 (Dec. 13, 2020).

- On December 18, Dobbs hosted Eddie Perez, a voting-technology expert at a non-partisan election-technology nonprofit, to comment on the allegations made by the President and his lawyers. Perez explained that he had seen no evidence that Smartmatic software was used to manipulate votes in the 2020 election. Ex.A34, Lou Dobbs Tonight Tr. 9-10 (Dec. 18, 2020). He also stated, among other things, that Smartmatic's technology was used only in Los Angeles County in the 2020 election and that Smartmatic and Dominion are separate companies. *Id.* at 10. Perez's segment also aired on Justice with Judge Jeanine and Sunday Morning Futures. Ex.A35, Justice with Judge Jeanine Tr. 1-2 (Dec. 19, 2020); Ex.A36, Sunday Morning Futures Tr. 15-16 (Dec. 20, 2020).

Just as Fox News hosts did not take the President's claims at face value, they did not take Dominion's denials at face value either. After all, Dominion's denials were "every bit as unsubstantiated as Sidney Powell's claim," Ex.E7, Carlson Dep. 73:6-74:8, and "not in any way a conclusive response to the charges." Ex.E5, Dobbs Dep Tr. 130:22-131:5; *see also, e.g.*, Ex.E8, Hannity Dep. Tr. 123:1-14, 291:15-21. Likewise, Fox News hosts did not automatically believe statements by government officials and other media outlets denying the President's allegations, in part because of the difficult nature of proving or disproving all of those claims within a few weeks of the election. *See, e.g.*, Ex.E4, Bartiromo Dep. Tr. 183:12-184:6 ("We've seen

many instances where government misled the American people, such as the Russia collusion story, such as Hunter Biden's laptop, such as the origins of COVID-19."); Ex.E7, Carlson Dep. 75:17-23 (noting that "as a logical matter that [the President's claims about Dominion] couldn't have been debunked because the only way to debunk it and the only way to prove it would be to have possession of the Dominion software"). Indeed, hosts recognized that "the resolution of [the President's] court cases would be the best indicator" of whether Dominion would be "exonerat[ed]." Ex.E5, Dobbs Dep Tr. 117:2-12; *see also* Ex.E6, Pirro Dep. Tr. 333:15-19 ("[T]hat's not the end of it. You've got to have a trial to find out if it's ... true or not true.").

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

D. Dominion's Lawsuit

As the President and his lawyers, surrogates, and allies were airing their allegations about Dominion, numerous media outlets, including Fox News, offered

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

Instead of actively participating in the public dialogue about the President's allegations at the time, Dominion opted to hold its fire and pursue litigation. By its own account, Dominion started preparing for affirmative litigation as early as November 10. Ex.H22, Fratto Decl. ¶2 (Sept. 21, 2022). And Dominion did not content itself with suing the people who leveled the allegations; it instead decided to blame the media for covering and commenting on them too. Dominion took an exceedingly selective approach, however, as to which media it chose to blame. While the allegations were covered by virtually every news outlet in the country, Dominion opted to bring defamation suits against only three: conservative-leaning outlets Fox News, Newsmax Media, and OANN.

Dominion's own public relations firm expressed skepticism as to whether Fox News' coverage was defamatory. *See* Ex.H7, Beckman Email (Dec. 18, 2020). But Dominion pressed forward nevertheless, filing this lawsuit in which it seeks to blame Fox News for statements made not just by its own hosts, but by the newsmakers they

interviewed. Relying principally on statements made by Giuliani and Powell during interviews on various Fox News programs, Dominion alleges that Fox News itself falsely stated that: "(1) Dominion committed election fraud by rigging the 2020 Presidential Election; (2) Dominion's software and algorithms manipulated vote counts in the 2020 Presidential Election; (3) Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chávez; and (4) Dominion paid kickbacks to government officials who used its machines in the 2020 Presidential Election." Compl. ¶2. Ensuring that its lawsuit would generate maximum publicity, Dominion claimed in its complaint to have suffered $1.6 billion in damages because of this alleged defamation.

Dominion's $1.6 billion claim was dubious from the start given that its current owner (Staple Street Capital) paid just $38.3 million for a roughly 75% stake in the company in 2018. Ex.F2, Hosfield Report at 124 (Nov. 29, 2022). Discovery has since confirmed that Dominion's damages calculation is wishful thinking. Dominion's own expert calculated Dominion's alleged lost business opportunities at a mere $88 million. *Id.* at 5. Discovery has also revealed that Dominion's calculations are riddled with mathematical overstatements (*i.e.*, double counting lost profits and total enterprise value). Dominion also included numerous projects in its calculations that discovery has confirmed it lost for reasons that have nothing to do with coverage of the 2020 election, such as the poor performance of Dominion's

machines or competition from other companies. And contrary to Dominion's claims, its business is doing just fine: Dominion is on pace to exceed its 2022 revenue projections—which it set *before* the 2020 election—and the record confirms that Dominion's own customers never believed the President's allegations—which is why Dominion felt little need to defend itself on air. Ex.H8, Serratti Email (Nov. 20, 2020) (noting that Tennessee Secretary of State stated that "they have full confidence in our company"); Ex.H9, Condos Email (Nov. 7, 2020) (email from Vermont Secretary of State telling Dominion "[w]e stand with you"); Ex.H10, Poulos Email (Dec. 4, 2020) (Dominion CEO John Poulos stating: "What you are missing, is that no customer cares about the media. It's just more words from their perspective.").

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

including Twitter, where he had more than 85 million followers at the time. *See* Ex.G6.

ARGUMENT

Dominion acknowledges that it bears a "heavy burden" to prove that no reasonable juror could find in Fox News' favor on *any* of the elements of *any* of its defamation claims. Dom.MSJ.6. While cases granting summary judgment to defamation defendants are legion, *see Khan v. New York Times Co.*, 269 A.D.2d 74, 77-78 (N.Y. App. Div. 2000), ones granting summary judgment to defamation plaintiffs are rare, *see Bee Publications v. Cheektowaga Times*, 107 A.D.2d 382, 388 (N.Y. App. Div. 1985). Dominion has not come close to carrying its heavy burden. To the contrary, as explained in Fox News' own motion for summary judgment, far from proving Dominion's case, the costly and speech-chilling discovery that Fox News has been forced to endure has confirmed that Dominion's case is meritless and should be rejected in its entirety. But at the very least, Dominion is not entitled to summary judgment on any of the 115 statements it challenges.

To obtain summary judgment in its favor, Dominion must demonstrate that each challenged statement, when examined in its surrounding context, is (as a matter of law) a false and defamatory statement of fact about Dominion. *See, e.g.*, *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d. Cir. 2013) (explaining that "each statement is a separate cause of action and requires proof of each of the elements for

defamation"); *Greenberg v. Spitzer*, 155 A.D.3d 27, 47 (N.Y. App. Div. 2017) (criticizing parties and trial court for classifying challenged statements "into eight broad categories," noting that doing so "carries the risk of sacrificing contextual analysis for the sake of expediency," and explaining that the proper approach is to analyze the statements "within the context in which *each statement was made*" (emphasis added)). On top of that, Dominion must produce clear and convincing evidence—evidence so overwhelming that no reasonable juror could conclude otherwise—that the person(s) at Fox News responsible for that *specific statement* knew that it was false or harbored serious doubts about its truth at the time of the publication. *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987) (en banc) ("[D]efamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement."). Those questions require analyzing each statement on its own terms. Yet instead of conducting that analysis, Dominion lumps all 115 statements together into four buckets and categorically claims that it is entitled to summary judgment on *all* of them without analyzing *any* specific statement in its context or doing *any* sort of statement-specific actual malice assessment. That is not how the law works, and the Court can deny Dominion's motion on this ground alone. Dominion has failed to meet its "heavy burden" of proving that it is entitled to summary judgment on liability on *any* of the challenged statements.

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

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

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

Moreover, Dominion has come nowhere close to producing the "clear and convincing" evidence that the relevant individuals at Fox News made or published any challenged statement with actual malice. Indeed, discovery confirms the opposite. Fox News hosts did not take the claims of the President and his lawyers at face value. Instead, they asked whether the lawyers would be able to marshal evidence to prove their allegations in court in time to make a difference in the certification process. *See supra* 27-34. When they received assurances that reams of evidence were incoming and allegations would be proven in court promptly, those assurances suggested that the allegations were not fabrications. *Id.* At the same time, they did not take Dominion's denials or the statements of government officials and other members of the media at face value either, but they instead reported them as newsworthy denials of newsworthy allegations. *Id.* And once it became clear that the President and his lawyers would not be able to prove their allegations in time to impact the certifications of the election results, Fox News hosts stopped interviewing them and stopped seeking updates on their progress. *Id.* None of that is consistent with actual malice, and more than a year of discovery has failed to produce anything that would satisfy the very high bar necessary to prove otherwise.

Dominion barely even tries to explain how the specific person(s) at Fox News responsible for any of the specific statements it challenges subjectively knew or harbored serious doubts about the truth of the specific statement at the time it was published. Instead, it cherry-picks any evidence that it can find from any corner of the Fox News organization that shows that anyone at "Fox" knew or believed the allegations to be false. But the vast majority of Dominion's evidence comes from individuals who had zero responsibility for the statements Dominion challenges. And no amount of irrelevant evidence can change the reality that Dominion has virtually no evidence (let alone clear and convincing evidence) that any person actually responsible for the allegedly defamatory statements (the hosts themselves and, in certain cases, the producers on their shows) knew that any of the challenged statements were false or harbored serious doubts about their truth at the time the statements were published. For that reason too, Dominion's claims fail in their entirety. At the very least, Dominion has failed to prove that it is entitled to summary judgment on anything.

I. The Challenged Statements Are Not Actionable.

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

1. Dominion spills considerable ink explaining why the allegations that President Trump and his lawyers leveled against Dominion in the wake of the 2020 election were false and defamatory. But while that perhaps may give Dominion

defamation claims against those who leveled the allegations, both the Delaware Supreme Court and the New York Court of Appeals have made clear—in the context of allegations of election interference, no less—that the press cannot be held liable for accurately reporting newsworthy allegations made by newsworthy figures, even if those allegations ultimately turn out to be false. *See Page v. Oath Inc.*, 270 A.3d 833 (Del. 2022), *cert. denied*, 142 S.Ct. 2717 (2022); *Brian v. Richardson*, 660 N.E.2d 1126 (N.Y. 1995).

Dominion resists that proposition, insisting that it is "legally irrelevant" that all of the coverage it challenges related to allegations being leveled by the sitting President and his legal team. Dom.MSJ.7. Indeed, by Dominion's telling, it is not even relevant that "many" of the statements it challenges (in fact, nearly half of the 115 statements it challenges, *see* FNN.MSJ.Appendix) were made not by a Fox News host, but by Giuliani or Powell themselves. Dom.MSJ.7. According to Dominion, it is instead a "black-letter rule," apparently subject to no exceptions other than an exceedingly narrow state-law "fair report privilege" for recounting statements set forth in pending lawsuits, 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." Dom.MSJ.7. In Dominion's view, then, the First Amendment affords literally *no* protection to the press to cover and comment on

newsworthy allegations leveled by newsworthy figures like elected officials made outside the context of "official proceedings."

The consequences of that proposition are astounding. If that were really the law, then:

- The New York Times should have faced liability for running an op-ed by former Attorney General Elliot Richardson that accused a rival of helping delay the release of Iranian hostages to swing the 1980 presidential election in then-candidate Reagan's favor, so long as some New York Times editors harbored serious doubts about the claims. *But see Brian*, 660 N.E.2d at 1131.

- The Huffington Post and Yahoo! News (and numerous other outlets) should have faced crippling liability for reporting allegations that Carter Page met with Russian officials and helped Russia interfere in the 2016 presidential election so long as some editors doubted the claims. *But see Page*, 270 A.3d at 846-47.

- Numerous news outlets should have faced defamation liability for reporting then-candidate Trump's claim that President Obama "was born in Kenya," since many outlets knew the claims were false because they had "the president's Hawaiian birth certificate in [their] hand." Robert D. Sack, Sack on Defamation, §7:3.5, 7-59 (5th ed. 2021).

- The New York Times should have faced liability for reporting allegations in the Steele Dossier that Donald Trump asked Russian prostitutes to defile the bed where former-President Barack Obama had previously slept and that the Kremlin had recordings of the entire thing so long as some editors thought the claim was far-fetched. *N.Y. Times*, Lordy, Is There a Tape? (Apr. 16, 2018), https://nyti.ms/2HkFmFi.

- CNN could face liability for reporting Governor Andrew Cuomo's allegations that the women who accused him of sexual assault were liars, since some CNN editors undoubtedly believed the Governor's accusers. *See CNN*, Cuomo Denies Former Aide's Sexual Harassment Allegations (Feb. 25, 2021), https://cnn.it/3RpA6VS.

- Newsweek could face liability for reporting then-candidate Herschel Walker's allegation that minors were sexually abused at a summer camp run by Senator Raphael Warnock so long as some editors were skeptical of the claims. *Newsweek*, Herschel Walker Sparks Fury Over Warnock Camp Abuse Claims (Nov. 22, 2022), https://bit.ly/3HmfWqT.

- Numerous outlets should have faced liability for reporting rumors that President and First Lady Clinton were involved in the death of White House Counsel Vince Foster so long as some editors doubted the allegations. *See N.Y. Times*, Why Foster Lives (Oct. 11, 1995), https://nyti.ms/3DCT9Gu.

- The New York Times should have faced defamation liability for reporting President Harry Truman's allegation that then-candidate Thomas Dewey had connections to fascists and Nazis if some editors thought the allegations were bogus. *N.Y. Times*, President Likens Dewey to Hitler as Fascists' Tool (Oct. 26, 1948), https://nyti.ms/3RgZflp.

Moreover, if Dominion's view of the law were correct, then it would have a defamation claim against virtually every news outlet in the country, as *everyone* covered what the President and his lawyers and allies were alleging in the wake of the 2020 election, even though many made no secret of the fact that they doubted their claims. After all, by Dominion's telling, the press cannot repeat such obviously newsworthy allegations even if it "expressly disavows the[ir] truth." Dom.MSJ.7. Indeed, if it is really "legally irrelevant" that the press was republishing the President's allegations for the obvious reason that they were profoundly newsworthy regardless of their truth or falsity, then Dominion could put CSPAN out of business tomorrow with a multi-billion defamation suit, as the November 19 press conference featuring Giuliani and Powell and their explosive claims about Dominion (which

certainly would not qualify as an "official proceeding" under Dominion's crabbed view, *see infra* Part I.B) remains on CSPAN's website *to this day*.[3] As does the December 2 press conference featuring President Trump and his claim that "you could press a button for Trump" on Dominion machines "and the vote goes to Biden" with a "turn of the dial or the change of a chip."[4] Dominion could even sue MSNBC, which rebroadcast as recently as this past month the very same allegedly defamatory interviews with Giuliani and Powell that aired on Fox News in November and December 2020.[5]

And the startling consequences of Dominion's theory would not end with defamation claims. If Dominion were really right that the First Amendment affords *no* protection for republishing the defamatory statements of newsworthy individuals outside the narrow confines of official procedures, then nothing in the Constitution would stop elected officials concerned that they and their cohorts have an occasional tendency to tell less than the whole truth from passing laws penalizing the press for sharing with the American public the fact that one of their elected officials leveled a false accusation. A First Amendment that is supposed to *protect* "the paramount

---

[3] *Available at:* https://tinyurl.com/2aksmx73.

[4] *Available at:* https://tinyurl.com/2p974xvy. The relevant statements were made at 10:33-12:01.

[5] *Available at:* https://tinyurl.com/bdh4utzy.

public interest in a free flow of information" regarding "anything which might touch on an official's fitness for office," *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), would be powerless against such blatant and self-serving censorship, even though "[f]ew personal attributes are more germane to fitness for office than dishonesty," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974). Indeed, many might argue that both Trump himself and the candidates he supported would have been better served had his election-fraud allegations been widely suppressed rather than widely disseminated. Yet by Dominion's telling, the press was *legally bound* to conceal that information from the American people—indeed, remains legally bound to continue to do so to this day—on pain of $1.6 billion damages claims.

Thankfully, none of that is the law. Cases like *Page* and *Brian* instead make clear that no defamation claim lies *against the press* when a reasonable viewer would understand that a publication is not presenting information that it has determined to be true, but is instead fulfilling its journalistic duty to "present[] newsworthy allegations made by others." *Croce v. N.Y. Times Co.*, 930 F.3d 787, 793 (6th Cir. 2019). Indeed, the very case from which Dominion draws its "black-letter rule" that purportedly admits of virtually no exceptions explicitly recognizes the principle that "the First Amendment" affords the press "freedom to report … charges without assuming responsibility for them" when "what is newsworthy about these accusations is that they were made." *Cianci v. New Times Pub. Co.*, 639 F.2d 54,

68 (2d. Cir. 1980) (quoting *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977)). The key question, then, is whether a reasonable viewer, when viewing a statement in the "over-all context in which the assertions were made," "would understand the statements … as mere *allegations* to be investigated rather than *as facts*." *Brian*, 660 N.E.2d at 1130-31. When "it is apparent to the reasonable reader" that a publication's "specific charges were allegations and not demonstrable fact, a libel cause of action does not lie." *Vengroff v. Coyle*, 231 A.D.2d, 624, 626 (N.Y. App. Div. 1996).[6]

Page illustrates the point. Carter Page, an advisor to President Trump's 2016 campaign, sued a media company after it published a series of articles on Yahoo! News and Huffington Post that "repeated allegations" from the "Steele Dossier" that Page "had met with high-ranking Russian individuals" in an "effort[] to undermine the 2016 election." 270 A.3d at 837, 840. The Delaware Supreme Court held that the articles were not defamatory. *Id.* at 846-47. The court explained that the articles did not report that the allegations in the Steele Dossier were true, but instead made "clear that these allegations were unsubstantiated and under investigation—using

[6] In that respect, this principle parallels the treatment of hearsay. Just as an out-of-court statement may be admissible if offered for something other than its truth—such as to show its effect on the listener—so too allegations by public figures may be reported if they are reported not for their truth, but to inform the public that they were made. Sack on Defamation, §7:3.5[D][3], at 7-62.

phrases such as 'seeking to determine,' 'that meeting, if confirmed,' and 'at their alleged meeting.'" *Id.* Because the article accurately reported the newsworthy and "true" fact that "U.S. intelligence agencies were investigating the allegations in the Steele Dossier," Page failed to allege falsity—even if the underlying allegations were false. *Id.* at 848; *see also id* at 846 (explaining that it was not the court's "role to determine whether the information in the Steele Dossier is true or false").

Page is no novelty of Delaware law. In *Brian*, the New York high court addressed allegations in a New York Times article related to the 1980 presidential election. The court held that the article written by former Attorney General Elliot Richardson was not defamatory even though it repeated allegedly false "claims" made by admittedly questionable "informants" that the plaintiff had (among other things) received "a payoff" for "helping to get some Iranian leaders to collude in the so-called October surprise, the alleged plot by the Reagan campaign in 1980 to conspire with Iranian agents to hold up release of the American Embassy hostages until after election" in order to tip the election in then-candidate Reagan's favor. 660 N.E.2d at 1128. The court explained that the "specific accusations of which plaintiff complains could not have been understood by a reasonable reader as assertions of fact that were proffered for their accuracy." *Id.* at 1131. Rather, because "most of the accusations … were identified in the article as mere 'claims' that had been made by identified and unidentified sources," "a reasonable reader would understand the

statements … as mere *allegations* to be investigated rather than as *facts*." *Id.* And "although defendant unquestionably offered his own view that these sources were credible" and called for an investigation into their allegations, that was protected opinion—a conclusion reinforced by the fact that the article was published in the op-ed section of the New York Times and "rife with rumor, speculation and seemingly tenuous inferences." *Id.*

Similar cases abound. In *Croce*, the Sixth Circuit held that a New York Times article was not defamatory even though it reported allegedly false "allegations," "charges," and "complaints" against the plaintiff because a reasonable reader would understand that the article was "present[ing] newsworthy allegations made by others," not presenting them as true. 930 F.3d at 793-95. In *Green v. CBS Inc.*, 286 F.3d 281 (5th Cir. 2002), the Fifth Circuit held that the broadcasts at issue "are non-actionable because they merely report allegations" made by others, and that, in "cases involving media defendants … the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported." *Id.* at 284. And in *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), the Eighth Circuit held that Newsweek was not liable for reporting allegations of rape against a former state Attorney General because the publication of the allegation "is the result of a materially accurate report of historical fact, not of an assertion by Newsweek that Janklow committed the alleged crime." *Id.* at 649.

All those cases stand for the commonsense principle that, when "it is apparent to the reasonable reader" that a publication's "specific charges were allegations and not demonstrable fact, a libel cause of action does not lie." *Vengroff*, 231 A.D.2d at 626. That is why "[i]f the President of the United States baselessly accused the Vice President of plotting to assassinate him, ... the media could safely report the President's accusation" without risking a billion-dollar defamation suit by the Vice President "even if they seriously doubted its truth." Sack on Defamation, §7:3.5[D][3], at 7-62. It is also presumably why not even Dominion has tried to hold Fox News liable for airing Bartiromo's November 29 interview of President Trump, even though the President accused "Dominion machines" on air of "mov[ing] thousands of votes from my account to Biden's account," characterized Dominion's machines as "garbage machinery," and alleged that "votes in Dominion" are "counted in foreign countries." Ex.A27, Sunday Morning Futures Tr. 4, 5, 9, 14 (Nov. 29, 2020). As one of Dominion's own lawyers presciently observed: "It is unthinkable that any competent plaintiff's lawyers would advise a client to sue the likes of CBS, FOX, or CNN for live transmission of the defamatory remarks uttered by, let us say, President Trump." Smolla, Law of Defamation §4:97.

Those principles stem not just from long-standing defamation law, but from the First Amendment, which affirmatively protects covering and commenting on allegations made by others when what is newsworthy about the allegations is the fact

that they were made. The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270. And it offers the highest protection to speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Accordingly, the First Amendment squarely protects the press from liability for covering allegations that are newsworthy simply because "they were made." *Edwards*, 556 F.2d at 120. Because the "public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them," the "First Amendment" protects coverage and commentary on allegations by public officials so long as the press "accurately conveys the charges." *Id.*; *see also Orr v. Lynch*, 60 A.D.2d 949, 950 (N.Y. App. Div. 1978), *aff'd* 383 N.E.2d 562 (N.Y. 1978). That is true even if the target of the allegations denies them, *Edwards*, 556 F.2d at 120-21, even if the news outlet's decision to report on them is colored by "partisan outlooks," *Goldwater v. Ginzburg*, 414 F.2d 324, 335, 342 (2d Cir. 1969), and even if the press "has serious doubts regarding their truth," *Edwards*, 556 F.2d at 120.[7]

[7] Dominion tries to dismiss *Edwards*' entire discussion of neutral-report principles as "dicta." Dom.MSJ.163. That is plainly wrong. In *Edwards*, a jury held the New

After all, the Supreme Court has made clear that "the paramount public interest in a free flow of information" includes "anything which might touch on an official's fitness for office." *Garrison*, 379 U.S. at 77. And there are "few personal attributes more germane to fitness for office than dishonesty." *Id.* Leveling serious (but ultimately unfounded) accusations against others "reflect[s] on the speaker as a candidate and on his fitness for office and are especially newsworthy precisely because the statements seem to be irresponsible." Sack on Defamation §7:3.5[D][2], at 7-62. In other words, the people have a right to know what their elected officials are saying even if—perhaps especially if—their government officials are lying. As Judge Boasberg observed long before the present controversy, not only is it constitutionally protected, but "it is … very important" for the media to cover and comment on what some may consider to be "outrageous statements by public

---

York Times liable for reporting the National Audubon Society's attacks on several scientists. 556 F.2d at 115. The Second Circuit reversed, holding the verdict "constitutionally impermissible." *Id*. at 120. The court explained that, "when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity." *Id.* Because the Times "reported Audubon's charges fairly and accurately," its coverage was protected "under the First Amendment." *Id.* To be sure, *Edwards* went on to hold that "[e]ven absent the special protection afforded to neutral reportage, the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the Times." *Id.* But "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

officials" regardless of whether it believes them, as that is the only way to give "the public" "a realistic picture of such officials." James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 Hastings Comms. & Ent. L.J. 455, 467 (1991). It is thus Dominion's crabbed view of the free speech protections afforded by our founding document that would "upend[] the 'balance between First Amendment freedoms and viable claims for defamation' that the Supreme Court has struck.'" Dom.MSJ.162 (quoting D.I.142 at 41-42).

2. Rather than grapple with that wall of authority foreclosing its novel legal theory, Dominion insists that New York courts have rejected any protection for coverage of or commentary on the newsworthy allegation of newsworthy individuals as a matter of "New York law." Dom.MSJ.163-65. That claim is both oxymoronic and wrong. New York, of course, is free to fashion its defamation law to be more protective of the press than the First Amendment. But New York cannot reject protections afforded by the First Amendment as a matter of "New York law." Nor is there any reason to think it would do so when the New York high court has long gone out of its way to make clear that, due to New York's "exceptional history and rich tradition" of "liberty of the press," the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution." *Immuno AG. v. Moor-Jankowski,*

567 N.E.2d 1270, 1278 (N.Y. 1991). To read New York law as somehow foreclosing protection for Fox News' coverage and commentary thus would get matters backwards.[8]

In reality, nothing in *Hogan v. Herald*, 84 A.D.2d 470, 479 (N.Y. App. Div. 1982), *aff'd* 444 N.E.2d 1002 (N.Y. 1982), or any other New York case Dominion invokes comes anywhere close to rejecting the proposition that the press has a right to cover and comment on the newsworthy allegations of newsworthy figures. At most, *Hogan* rejected only the more sweeping proposition that the press has an "absolute privilege for attributed quotations," no matter who said them or about whom, so long as their subject-matter is "newsworthy." *Id.* at 478. That is not and has never been Fox News' position. There is an obvious difference between repeating allegations that have no news value *unless they are true*, and repeating allegations that the people have a right to know even—indeed, perhaps especially—if they may be false. Repeating gossip that is worth repeating only for its shock value has long been actionable under doctrines like rumor and scandal. *See, e.g.*,

[8] To the extent Dominion means to suggest (at 164) that New York courts have rejected protection for reporting the newsworthy allegations of newsworthy figures as a matter of *federal* law, that argument is misguided too, as this Court is "not ... bound by the expressions of New York courts concerning this issue of federal constitutional law." *Law Firm of Daniel P. Foster, P.C. v. Turner Broad. Sys., Inc.*, 844 F.2d 955, 961 n.12 (2d Cir. 1988).

Kelley v. Dillon, 5 Ind. 426, 427 (1854). Covering and commenting on the allegations of elected officials, by contrast, has long been recognized to be essential to advancing "the paramount public interest in a free flow of information" about "anything which might touch on an official's fitness for office." *Garrison*, 379 U.S. at 77.

Consistent with that commonsense distinction, *Hogan* "rejected ... a neutral reportage privilege for private plaintiffs" only, not for newsworthy allegations by and against "public figure plaintiffs," *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 105 n.11, 106 (2d Cir. 2000), which this Court has now concluded that Dominion is. And even that aspect of *Hogan* is difficult to reconcile with either New York precedent or more recent Supreme Court precedent. *Id.* (citing *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. 1975), and *Weiner v. Doubleday & Co.*, 549 N.E.2d 453, 456-67 (N.Y. 1989)).[9]

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

That readily explains why a New York intermediate court had no problem rejecting a defamation claim on the ground that a newspaper "was simply servicing its informational function in relaying [another person's] views, which were in themselves a matter of public concern regarding a public official," *Duci v. Daily Gazette Co.*, 102 A.D.2d 940, 941 (N.Y. App. Div. 1984), two years after the New York high court summarily affirmed *Hogan*. Indeed, New York courts (including the high court) applied that rule before *Hogan*, and they have continued to do so long after. *See, e.g.*, *Orr*, 60 A.D.2d at 950 (broadcasts that contained an interview with a third party who made allegedly false statements about a public official plaintiff were not defamatory because defendants "were clearly serving their informational function in relaying [the third party's] opinions"), *aff'd,* 383 N.E.2d 562 (N.Y. 1978); *Campo Lindo for Dogs, Inc. v. N.Y. Post Corp.*, 65 A.D.2d 650, 650 (N.Y. App. Div. 1978) (no defamation where "article was an objective account of information obtained in the legitimate course of defendant's business to report newsworthy material"); *Boulos v. Newman*, 302 A.D.2d 932, 933 (N.Y. App. Div. 2003) ("Mere allegations, rather than objective statements of fact, are not actionable."); *Vengroff*, 231 A.D.2d at 625 ("[G]iven the use of the words 'apparently', 'rumored', and 'reportedly' in the letter, a reasonable reader would understand the statements made about the plaintiffs 'as mere *allegations* to be investigated rather than as *facts*.'"); *GS Plasticos Limitada v. Bureau Veritas*, 84

A.D.3d 518, 519 (N.Y. App. Div. 2011) (similar); *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43 (N.Y. App. Div. 2011) (similar); *Kesner v. Dow Jones & Co.*, 515 F.Supp.3d 149, 179 (S.D.N.Y. 2021) (similar); *Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC*, 151 F.Supp.3d 287, 294 (E.D.N.Y. 2015) (similar).[10]

Indeed, in the end, not even Dominion seems to have the courage of its own convictions. After all, Dominion did not sue CNN, MSNBC, CSPAN, or any of the myriad outlets that covered the President's allegations against it. Nor did it sue Fox News for airing Bartiromo's first post-election interview of President Trump, even though the President repeated his explosive allegations against Dominion for the world to hear. Ex.A27, Sunday Morning Futures Tr. 7 (Nov. 29, 2020). Nor did it sue Fox News for *all* of its shows that reported the President's allegations about Dominion, or even for every show on which Giuliani or Powell recounted them. *See, e.g.*, Ex.A3, The Ingraham Angle Tr. 4-5 (Nov. 10, 2020); Ex.A4, Mornings with

[10] So, too, have "the majority of lower courts to consider the issue." *Contra* Dom.MSJ.167. Dominion cites only two cases to the contrary. *Id.* (citing *Dickey v. CBS Inc.*, 583 F.2d 1221 (3d Cir. 1978); *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004)). One rejected neutral report principles "in dicta" that the same court questioned just three years later. *Medico v. Time, Inc.*, 643 F.2d 134, 145 (3d Cir. 1981); *cf.* Boasberg 467 (observing that *Dickey* "misinterpreted *Edwards*"). The other admitted that its analysis broke with the views of "several other jurisdiction[s]." *Norton*, 860 A.2d at 52.

Maria Tr. 11 (Nov. 11, 2020); Ex.A6, Mornings with Maria Tr. 4 (Nov. 12, 2020); Ex.A8, America's News HQ Tr. 1-3 (Nov. 14, 2020); Ex.A13, Mornings with Maria Tr. 5 (Nov. 17, 2020); Ex.A15, Special Report with Bret Baier Tr. 3 (Nov. 18, 2020); Ex.A17, Hannity Tr. 8 (Nov. 19, 2020); Ex.A16, America's Newsroom Tr. 1 (Nov. 19, 2020); Ex.A25, Sunday Morning Futures Tr. 6 (Nov. 22, 2020).

Thus, even Dominion seems to recognize that covering newsworthy allegations is at least *sometimes* not defamatory. It just disagrees with Fox News about where to draw the line. Thankfully, the New York Court of Appeals has already explained how to answer that question, in the context of allegations of election fraud, no less. What matters is whether a reasonable viewer, when viewing a statement in the "over-all context in which the assertions were made," "would understand the statements … about plaintiff as mere *allegations* to be investigated rather than *as facts*." *Brian*, 660 N.E.2d at 1130-31. And it makes no difference whether the press expresses doubt about the allegations or hope that they will prove true. When the press "offer[s] [its] own view" that the allegations are "credible" and merit investigation, that is a quintessential protected opinion. *Brian*, 660 N.E.2d at 1131.

3. Applying those principles, Dominion's claims against Fox News fail. Dominion's complaint challenges 115 distinct statements.[11] As Fox News explains in its own motion for summary judgment, when each statement is examined on its own terms in context, it is clear as a matter of law that none is defamatory. FNN.MSJ.56-119. The vast majority were made by guests (the President's lawyers, Giuliani and Powell) appearing on Fox News shows, or by Fox News hosts interviewing those guests. It would have been plain to any reasonable viewer that the guests were speaking for themselves. As for the small number of statements that were made by hosts rather than guests, it would have been equally plain that, far from embracing those allegations as their own, the hosts were going out of their way to make clear that the allegations Dominion were unproven allegations made by the President's lawyers and the President himself, and that to have any effect on the electoral outcome, the President's legal team would eventually need to prove the claims in court before the mid-December deadline for certifying the vote. The hosts repeatedly asked Giuliani, Powell, and the President what evidence they had to

[11] While Dominion tries to treat what it labels "neutral report" principles as an affirmative defense that Fox News must prove, Dom.MSJ.161-76, that reflects a fundamental misunderstanding of the doctrine. As cases like *Brian* and *Page* make clear, reporting on the newsworthy allegations of newsworthy individuals is not defamatory at all, because it merely conveys the true fact that those allegations were made. The doctrine is thus best understood as part of Dominion's burden of proving defamation, not as a privilege that would excuse it.

substantiate their claims. *See supra* 27-34. They informed viewers that government officials and other media outlets expressed serious skepticism about them. *Id.* And they asked legal experts, sitting members of Congress, and members of the media, to comment on the allegations. *Id.* In many cases, those commentators cast doubt on the allegations and noted the lack of evidence to support them. *Id.* Any reasonably viewer would therefore "understand the statements … about plaintiff as mere *allegations* to be investigated rather than *as facts*." *Brian*, 660 N.E.2d at 1130-31.

Dominion tries to take this case outside the protections of *Brian* and the First Amendment by positing that the allegations were not made by a "responsible, prominent organization." Dom.MSJ.169 (citing *Edwards*, 556 F.2d at 120). But the prominence of the accuser is relevant to the analysis only to the extent it informs whether allegations are newsworthy without regard to their truth or falsity. *Edwards*, 556 F.2d at 120; *see also Coliniatis v. Dimas*, 965 F.Supp. 511, 520 (S.D.N.Y. 1997) (noting that the responsible, prominent organization concept "acts as a proxy for determining when the very fact that allegations are made is itself newsworthy"). It is not a license for courts to engage in *ad hoc* (and *post hoc*) assessments of a prominent speaker's perceived trustworthiness. Indeed, the sources of the allegations in *Brian* were concededly unreliable; the author of the op-ed "acknowledged that his informants 'are not what a lawyer might consider ideal

witnesses.'" 660 N.E.2d at 1128. Yet the author's discussion of the allegations was protected nonetheless.

Reasonable minds can certainly disagree about whether allegations by the National Audubon Society are inherently newsworthy regardless of whether they are true. But reasonable minds cannot differ when it comes to allegations leveled by the sitting President of the United States and his lawyers. When it comes to allegations being pressed on behalf of someone as prominent as a sitting President, "differentiating among defamers on the basis of their trustworthiness or credibility" would be "inconsistent" with the "primary rationale of *Edwards*—the public interest in being fully informed about public controversies." *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1126 (N.D. Cal. 1984); *see also In re United Press Int'l*, 106 B.R. 323, 329 (D.D.C. 1989); *Coliniatis*, 965 F.Supp. at 520.[12]

Dominion next posits that Fox News hosts "embraced" the allegations as their own because they purportedly "took sides" and "failed to provide viewers with any

[12] Dominion's accusation (at 169) that *Powell* was not a "responsible" individual therefore misses the mark. Even setting aside her credentials as a former Assistant U.S. Attorney for three different federal districts and her recent successful defense of Michael Flynn in a high-profile prosecution by the U.S. Department of Justice, she represented and continued to maintain close ties to the sitting President on a matter of core public concern—namely, his ongoing efforts to overturn the results of the 2020 election. *That*, not some subjective inquiry into how "responsible" a person she was, is what entitled the press to cover and comment on her allegations and the extent to which they could be proven.

of the extensive evidence" that Dominion claims disproved their guests' allegations. Dom.MSJ.169-70. But the relevant question is not whether a reasonable viewer would understand that the allegations were *false*. *Page,* 270 A.3d at 846 (explaining that it was not the court's "role to determine whether the information in the Steele Dossier is true or false"). It is whether a reasonable viewer would "understand the statements … about plaintiff as mere *allegations* to be investigated rather than *as facts*." *Brian*, 660 N.E.2d at 1130-31. It could hardly be otherwise, as the entire genre of news commentary is built around providing diverse perspectives and commentary on the controversies of the day. Such shows could not survive if "neutrality" demanded that hosts not only offer no opinions of their own (which itself would be a clear First Amendment violation), but openly accuse anyone whose claims they seriously doubt of being a liar. *See Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157, 1160 (9th Cir. 2021) (opinion shows and their typical "rhetorical hyperbole" have "traditionally added much to the discourse of our Nation"). Simply put, the press need not "take up cudgels against dubious charges in order to publish them without fear of liability for defamation." *Edwards*, 556 F.2d at 120.[13]

[13] Dominion cherry picks deposition testimony from some Fox News employees agreeing with its statement that "token pushback is not really a fair reporting on either side." Dom.MSJ.170. That testimony is irrelevant to the question here, as abstract opinions about what makes for "fair" reporting have nothing to do with

Nor does it matter whether hosts expressed doubt that the President's allegations could be proven versus hope that they would, or offered their own opinions about the trustworthiness of the various individuals and organizations involved. In *Brian* itself, Attorney General Richardson "unquestionably offered his own view that these sources were credible" and called for a "full-scale investigation" into the allegations. *Brian*, 660 N.E.2d at 1131. Yet he (and the Times) still could not face defamation liability for repeating the allegations because he made clear that they were nevertheless just allegations. It is therefore irrelevant whether hosts reacted too positively or thanked their guest too profusely, Dom.MSJ.170, as "[e]vidence of the [reporter's] general disposition toward his topic does not establish whether he espoused each particular allegation." *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1434 (8th Cir. 1989).[14]

In all events, Dominion's accusations rest on selective analysis in the extreme, as Dominion simply ignores the many, many times that hosts pushed back on

---

whether a reasonable viewer would understand a specific statement on a specific broadcast to be a false and defamatory statement of fact about Dominion.

[14] Dominion relies on *Khalil v. Fox Corp.*, 2022 WL 4467622 (S.D.N.Y. 2022), which held that statements made about plaintiff Majed Khalil during the December 10 broadcast of *Lou Dobbs Tonight* and related tweets are not protected by the neutral-report principles. *Id.* at *7. But that decision has little to say about the statements made about *Dominion* on December 10, let alone about the statements Dominion challenges that were not made on that December 10 program.

Giuliani's and Powell's allegations, emphasized that their allegations would need to be proven in court, and offered competing views. *See supra* 27-34. At the very least, the list of statements Dominion challenges is radically overbroad. Even if the Court believes that a reasonable viewer would have thought that *some* of the statements stated "demonstrable facts" about Dominion, it is clear that many of the statements do not. That presumably explains why Dominion is so reluctant to analyze each of the statements it has challenged on its own terms, instead preferring to try to lump them together based on the nature of the allegation that was being discussed. But New York courts have squarely held that defamation plaintiffs like Dominion cannot prove defamation in gross or in the abstract; it must prove that each and every one of the statements it challenges was in fact a defamatory statement by the defendant about the plaintiff. *See Greenberg*, 155 A.D.3d at 47; *see also Dongguk Univ.*, 734 F.3d at 123. As Fox News details in its own summary judgment motion and appendix, Dominion cannot meet that burden as to *any* of those statements. FNN.MSJ.56-120; FNN.MSJ.Appendix. But at the very least, the Court should deny Dominion's summary judgment motion, and instead grant Fox News' summary judgment motion, as to the many, many statements that no reasonable

viewer could fail to understand involved unproven allegations rather than demonstrable fact.[15]

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

Fair-report principles embodied in both the First Amendment and Civil Rights Law §74 fully protect coverage of and commentary on official proceedings, and that protection itself is broad enough to compel dismissal of many of Dominion's claims against Fox News. *See* FNN.MSJ.Appendix (collecting statements). The fair-report doctrine protects reporting on official proceedings and investigations: "[T]he public has the right to be informed as to what occurs in its courts" and other official fora regardless of the accuracy of the underlying allegations. *Estes v. Texas*, 381 U.S. 532, 541-42 (1965). Thus, so long as it is clear that the press is covering or commenting on proceedings or investigations, not presenting the allegations

[15] The Court should also reject Dominion's passing request for "partial" summary judgment on whether the President's allegations were true. Dom.MSJ.7. The question is whether the press reported the "true" fact that the President made those allegations. Issuing a judgment on whether the allegations themselves were true thus would do nothing to advance the resolution of this litigation. *See Page*, 270 A.3d at 846-47 (explaining that it was not the court's "role to determine whether the information in the Steele Dossier is true or false"); *Green*, 286 F.3d at 284 (explaining that in "cases involving media defendants … the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported").

underlying them as true, there is no defamation at all.[16] While that rule is compelled by the First Amendment, New York has memorialized it in statutory law as well, prohibiting civil liability "for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." N.Y. Civ. Rights Law §74; *see also, e.g.*, *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114 (N.Y. App. Div. 2009); *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N. Y.*, 101 A.D.2d 175, 181-82 (N.Y. App. Div. 1984). That protection "is absolute, and is not defeated by the presence of malice or bad faith." *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620, 620 (N.Y. App. Div. 1994).

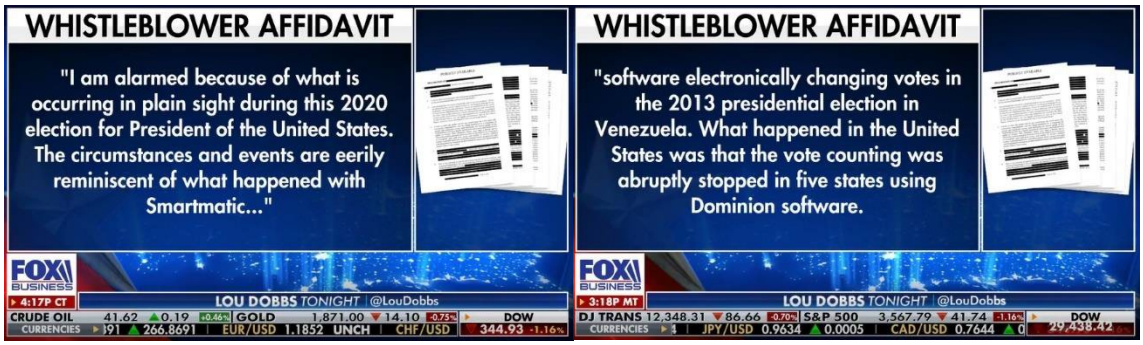
Dominion does not and cannot deny that the fair-report doctrine exists. It instead insists that this Court already "largely disposed of" all fair-report issues "at the motion to dismiss stage." Dom.MSJ.172. In fact, this Court held only that Dominion's complaint was not barred *in its entirety* by fair-report principles; it did not engage in a statement-by-statement analysis of whether the fair-report doctrine bars *any* of Dominion's claims. D.I.142 at 47-48. Indeed, the Court did not yet have the requisite facts at the time about all the various court proceedings to conduct a

[16] Dominion is thus wrong once again to label this doctrine an "affirmative defense." Dom.MSJ.172-76. Where the fair-report doctrine applies, there is no defamation at all.

complete analysis of the extent to which each statement was covering and/or commenting on an official proceeding.

Moreover, while the Court suggested in its motion-to-dismiss opinion that fair-report principles do not apply to reporting on things that have not yet happened in an official proceeding, that is incorrect. D.I.142 at 45-46. "The case law has established a liberal interpretation" of §74 "so as to provide broad protection to news accounts of judicial or other official proceedings." *Cholowsky*, 69 A.D.3d at 114. Under that broad standard, §74 (and the First Amendment) protects reporting on *both* "pending *and* anticipated" proceedings. *Dimond v. Time Warner, Inc.*, 119 A.D.3d 1331, 1333 (N.Y. App. Div. 2014) (emphasis added); *see also, e.g.*, *Law Firm of Daniel P. Foster, P.C. v. Turner Broad. Sys., Inc.*, 844 F.2d 955 (2d Cir. 1988) (statement concerning execution of a search warrant); *Wenz v. Becker*, 948 F.Supp.319, 323 (S.D.N.Y. 1996) (report on anticipated filings in pending lawsuit protected even though defendant "had not yet performed the ministerial act of filing ... at the time the statement was made"); *Freeze Right*, 101 A.D.2d at 182 (investigation by the New York City Department of Consumer Affairs); *Baumann v. Newspaper Enters., Inc.*, 270 A.D.825 (N.Y. App. Div. 1946) (district attorney investigation). It also covers attorney statements related "to a possible position" that the attorney's client may take in pending litigation. *McNally v. Yarnall*, 764 F.Supp. 853, 856 (S.D.N.Y. 1991).

Without analyzing even a single one of the statements it challenges (let alone considering any of their critical surrounding context), Dominion summarily declares that "none of the accused statements even meets the basic requirement that it report on a pending proceeding." Dom.MSJ.174. That claim strains credulity. To take just a few examples of the statements discussed in much more extensive detail in Fox News' motion for summary judgment and appendix, FNN.MSJ.56-120, FNN.MSJ.Appendix, on the November 16 broadcast of *Lou Dobbs Tonight*, Powell read verbatim from a sworn affidavit by a person claiming to be a former security guard for former Venezuelan president Hugo Chávez who attested that he helped Chávez rig elections using Smartmatic machines, and that "the software and fundamental design of the electronic electoral system and software of Dominion ... relies upon software that is a descendent of the Smartmatic Electoral Management System." Ex.C5, Affidavit, *Wood v. Raffensperger*, 1:20-cv-4651 (N.D. Ga. Nov. 17, 2020). Even assuming it mattered that the affidavit was not filed in one of Lin Wood's lawsuits until the following day, *but see Wenz*, 948 F.Supp. at 323 (explaining that it does not), Dobbs read the same affidavit verbatim on his November 18 show and displayed it on screen, in a statement that Dominion also challenges. Ex.A14, Lou Dobbs Tonight Tr. 5 (Nov. 18, 2020).



Dobbs referenced the affidavit again on his November 19 show when discussing Powell's allegations, Ex.A18, Lou Dobbs Tonight Tr. 2 (Nov. 19, 2020), in yet another statement that Dominion challenges. Pirro referenced the same affidavit as well on her November 21 show, and even held the affidavit up on screen so that viewers could see. Ex.A22, Justice with Judge Jeanine Tr. 2 (Nov. 21, 2020). It is hard to imagine a clearer application of the fair-report privilege.

Dominion's only (implicit) answer to all of that is to fixate on the fact that *Powell* herself did not file a lawsuit making allegations against Dominion until November 25. Dom.MSJ.174. But Dominion nowhere explains why the fair-report doctrine would exclude coverage of and commentary on *other* lawsuits that were filed leveling allegations against or related to Dominion before Powell's. That is

because it does not. After all, if the New York Times or NPR wanted to copy verbatim portions of filings in this lawsuit in one of their articles, that would obviously be protected by fair-report principles even though neither the Times nor NPR is a party to this suit. A fair and accurate report of an affidavit filed in a lawsuit by Lin Wood—and reading verbatim from the affidavit while holding it up and explaining to the audience that is an official legal document is plainly a fair and accurate report—is every bit as covered by fair-report principles as reading from an affidavit filed in a lawsuit filed by Powell.

In all events, the fair-report doctrine plainly covers many of the challenged statements in late November and early December even if the analysis is artificially confined to Powell's lawsuits. The Powell statements that Dominion challenges on the November 24 broadcast of *Lou Dobbs Tonight*, for example, were included nearly verbatim in the lawsuit she filed the very next day. *Compare* Ex.A26, Lou Dobbs Tonight Tr. 5 (Nov. 24, 2020) ("there'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 … they were manipulated by the software used in the Dominion machines"), *with* Ex.C8, Compl. ¶5, *Pearson v. Kemp*, No. 1:20-cv-4809 (N.D. Ga. Nov. 25, 2020) ("Smartmatic and Dominion were founded by foreign oligarchs and dictators" to manipulate votes and ensure that "Venezuelan dictator Hugo Chavez never lost another election"); ¶¶8, 103 (alleging that Dominion's software "is

designed to facilitate vulnerability," allowing users "to arbitrarily add, modify or remove" votes without detection); *see also* ¶15.

Dominion's contention (at 175) that "[a] reasonable observer would have no grounds to believe that her statements constituted a report of an official proceeding" once again strains credulity. Dobbs asked Powell: "*When shall we expect your lawsuit?*" Ex.A26, Lou Dobbs Tonight Tr. 5 (Nov. 24, 2020). And Powell promised that she would file her first suit in Georgia no later than the next day, which she did. The allegations that Powell made about Dominion on November 30, December 4, and December 10 and that Giuliani made on December 12 are likewise materially similar to the claims in Powell's lawsuits (and others), and an ordinary viewer could only have understood that coverage as relating to that litigation, as Fox News explains in greater detail in its summary judgment motion and appendix. FNN.MSJ.102-17; FNN.MSJ.Appendix. Once again, then, Dominion invites the Court to avoid actually examining the statements Dominion challenges because conducting the requisite fair-report analysis confirms that most, if not all, of them do not involve any defamatory statements that can be attributed to Fox News.

C. The Non-Factual Statements Dominion Challenges Are Protected Opinion.

Finally, many of the statements Dominion challenges are statements of opinion, which are fully protected by both New York law and the First Amendment.

FNN.MSJ.57-119; FNN.MSJ.Appendix (collecting statements). While not every statement couched as an opinion is entitled to constitutional protection, genuine statements of opinions most certainly are, for "a statement on matters of public concern must be provable as false before there can be liability." *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19-20 (1990). The key question is whether, in context, a reasonable reader would understand that "what is being read or heard is likely to be opinion, not fact." *Brian*, 660 N.E.2d at 1129. Courts should not "search a publication for specific factual assertions and then hold those assertions actionable unless they were couched in figurative or hyperbolic language." *Id*. Instead, when determining "whether [a] statement is one conveying opinion or fact," courts should consider "both the immediate context and the broader social context in which a published statement was made." *Id.* at 1127-28. "[L]oose, figurative, or hyperbolic language" tends to "negate the impression" that a person is "seriously" stating a fact. *Milkovich*, 497 U.S. at 20-21. The "general tenor" or larger context in which a purportedly defamatory statement appears may negate the impression that the statement is factual as well. *Id*. at 21. That is particularly true of suggestions that newsworthy allegations merit full investigation. *Brian*, 660 N.E.2d at 1128.

Courts have frequently recognized that spirited debate on opinion shows does not lend well to statements of actual fact. Over-the-top and emotionally charged language is commonplace in that setting, so that medium "by custom or convention

signals to [viewers] that what is being read or heard is likely to be opinion, not fact." *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 226 (2d Cir. 1985); *see, e.g.*, *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157 (9th Cir. 2021); *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 183 (S.D.N.Y. 2020). That is especially true for statements uttered in the context of competing allegations in politically charged disputes: It is well-recognized that "rhetorical hyperbole" is "normally associated with politics and public discourse in the United States." *Clifford v. Trump*, 339 F.Supp.3d 915, 925 (C.D. Cal. 2018).

Dominion claims that this "Court has effectively already concluded" that all of the statements it challenges are "factual allegations," not opinion. Dom.MSJ.78. Once again, Dominion is wrong. The Court did not conclude that every single one of the 115 statements Dominion challenges is a statement of fact; it merely came to the unremarkable conclusion that at least some of those statements are. D.I.142 at 48-49. Fox News has never claimed otherwise; it has simply argued that Dominion cannot hold Fox News liable for those statements that are *not*.

Dominion summarily declares that "[a] careful review of each statement confirms that each one 'reasonably appear[s] to state or imply assertions of objective fact.'" Dom.MSJ.79. But its 176-page brief is bereft of any such analysis, careful or otherwise. Dominion nowhere explains, for instance, how statements like the election is "the end game to a four-and-a-half-year-long effort to overthrow the

President," Ex.A5, Lou Dobbs Tonight Tr. 9 (Nov. 12, 2020), "efforts to subvert President Trump and his administration have been nothing less, in my opinion, than treason," Ex.A7, Lou Dobbs Tonight Tr. 1 (Nov. 13, 2020), "we have an Attorney General who has apparently lost both his nerve and his commitment to his oath of office, and to the country," Ex.A31, Lou Dobbs Tonight Tr. 5 (Dec. 10, 2020), are capable of being proven true or false.

Nor does Dominion explain how statements like "now we have to find out whether they did," Ex.A5, Lou Dobbs Tonight Tr. 8 (Nov. 12, 2020), "[w]e will pursue all legal avenues where there are irregularities, anomalies, illegalities and corruption," Ex.A9, Justice with Judge Jeanine Tr. 3 (Nov. 14, 2020), "this president has to take, I believe, drastic action, dramatic action, to make certain that the integrity of this election is understood," Ex.A29, Lou Dobbs Tonight Tr. 6 (Nov. 30, 2020), and "we have to get to the bottom of this," Ex.A31, Lou Dobbs Tonight Tr. 6 (Dec. 10, 2020), can possibly be actionable, given that the New York Court of Appeals has squarely held that a "call for a full-scale investigation" into allegations made by others reflects a "personal opinion" that the allegations merit investigation, not the "demonstrable fact" that they are true. *Brian*, 660 N.E.2d at 1131. It instead simply ignores the problem that its complaint appears to challenge them.

Finally, Dominion claims that "discovery has only confirmed" that "context" suggests that the statements are fact rather than opinion because some employees

describe Fox News and Fox Business as "news organizations." Dom.MSJ.80-81. That hardly advances the ball. As cases like *Maddow* and *McDougal* reflect, nothing in case law or common sense precludes hosts of shows published by "news organizations" from exercising their First Amendment rights to express opinions. What matters "is whether the challenged expression, *however labeled by defendant*, would reasonably appear to state or imply assertions of objective fact." *Immuno AG.*, 567 N.E.2d at 1273 (emphasis added). And a reasonable viewer of *Lou Dobbs Tonight*, *Justice with Judge Jeanine*, *Hannity*, and *Tucker Carlson Tonight* would plainly understand that Dobbs, Pirro, Hannity, and Carlson often provide spirited *opinion commentary* on the pressing news of the day, which is something virtually every "news organization" includes in its repertoire. Discovery thus has only confirmed that a reasonable viewer would understand *Lou Dobbs Tonight*, *Justice with Judge Jeanine*, *Hannity*, and *Tucker Carlson Tonight* to be shows on which opinions are routinely offered, as Dominion's own expert confirms. Ex.F5, Sesno Report ¶¶170, 173 (characterizing these shows as "opinion shows"). A reasonable viewer would thus understand that many of the statements Dominion challenges are protected opinion. FNN.MSJ.Appendix (listing statements).

* * *

At bottom, Dominion's motion largely rests on the assumption that it must be entitled to summary judgment on whether the statements it challenges are

defamatory because this Court denied Fox News' motion to dismiss. But discovery and the careful statement-by-statement analysis necessary at this stage make clear that only the defendants are entitled to summary judgment. The Fox Defendants alone have parsed the 115 statements that Dominion has challenged and laid bare the flaws in Dominion's effort to treat them as unprotected. Accordingly, if anyone is entitled to summary judgment, whether partial or otherwise, it is Fox News.

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

Dominion asks the Court to hold as a matter of law that the record compels the conclusion that it has proven actual malice by clear and convincing evidence. Yet it once again fails to meet its burden. Under well-established law, Dominion must prove, by clear and convincing evidence, that *each* of the 115 statements it claims is defamatory was made or published with actual malice—*i.e.*, subjective knowledge that it was false or serious doubt that it was true. And that subjective state of mind must be "brought home" to the individual(s) responsible for the publication of each challenged statement. *See Tavoulareas*, 817 F.2d at 794. As Fox News explained in its own summary judgment motion, when one conducts the proper inquiry, it is plain as day that the individuals responsible for the publication of the challenged statements did not know that they were false or harbor serious doubts about their truth when the statements were published. Nothing in Dominion's lengthy

submission comes close to demonstrating otherwise, let alone by clear and convincing evidence.

Instead, Dominion tries to distract from its evidentiary deficiencies by cherry-picking anything it can find from any corner of the Fox News organization that shows that *anyone* at Fox News doubted or disbelieved the President's allegations. From there, it posits that "Fox" writ large—not the specific person(s) at Fox News responsible for each statement—"knew" that that specific statement was false. But binding U.S. Supreme Court precedent could not make clearer that the subjective "state of mind" necessary to prove actual malice must be brought "home to the persons in [Fox News'] organization having responsibility for the publication" of each statement. *Sullivan*, 376 U.S. at 287. "Constructive" organizational knowledge will not do. Yet most of Dominion's "Fox" evidence has absolutely nothing to do with what the individuals responsible for publishing the allegedly defamatory statements knew and when they knew it. That becomes obvious once, after starting its brief with pages of cherry-picked quotes and evidence about *other* people, Dom.MSJ.97-117, Dominion finally provides a list of individuals it considers "responsible" for the challenged statements, Dom.MSJ.117, 123, 135, 139, 141, 144. While that list is vastly overbroad, that very overbreadth confirms that most of Dominion's so-called "overwhelming" evidence is irrelevant to the actual malice

inquiry, as most of it relates to individuals at Fox News and Fox Corporation who are *not even on Dominion's own overbroad list of "responsible" individuals*.

When Dominion finally gets around to conducting something that resembles a proper actual malice analysis, Dom.MSJ.117, it has little to offer. Dominion largely points to evidence that various people at Fox News were aware of Dominion's denials and statements by CISA and the like to the effect that the 2020 election was the "most secure in American history." Dom.MSJ.125. But Dominion ignores all the testimony explaining why the individuals responsible for the statements it challenges did not take Dominion's denials at face value (just as they did not take the President's allegations at face value) and had good reasons to view statements from CISA and other media outlets as less than definitive disproof of the allegations. Dominion has cited no persuasive evidence to contradict that testimony, and that alone compels summary judgment in Fox News' favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (explaining that a plaintiff cannot defeat summary judgment by "asserting that a jury might, and legally could, disbelieve the defendant's denial … of legal malice"). At the very least, that testimony forecloses summary judgment in Dominion's favor.

A. Dominion Must Prove Actual Malice by Clear and Convincing Evidence "Brought Home" to the Individuals Responsible for Each Challenged Statement.

1. The actual malice standard is famously daunting.

To prevail at summary judgment, Dominion must prove by clear and convincing evidence that the individuals at Fox News responsible for each allegedly defamatory statement published the statement with actual malice—that is, with knowledge that it was false or with reckless disregard for the truth. *Sullivan*, 376 U.S. at 279-80. Despite Dominion's attempts to conflate the two, the concept of "reckless disregard" in defamation law is unrelated to "recklessness" in the ordinary legal sense. It is not an *objective standard* conveying gross negligence or wanton behavior. *Contra* Dom.MSJ.9-10, 87-88, 91, 100-01. Instead, the "reckless disregard" standard is "a *subjective one*, focusing upon the state of the mind of the publisher of the allegedly libelous statements at the time of the publication." *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 354-55 (2009) (emphasis added).

"The actual malice standard is famously daunting." *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 240 (D.C. Cir. 2021). "There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added), or possessed a "high degree of awareness" of its "probable falsity," *Garrison*, 379 U.S. at 74. Mere allegations of negligence or "failure to

investigate" are not enough. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). Actual malice requires "more than a departure of reasonably prudent conduct." *Id.* at 688. Indeed, not even "an extreme departure from professional standards" is enough. *Id.* at 665; *see also Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001) (Alito, J.).

2. Dominion must prove actual malice with clear and convincing evidence.

Moreover, Dominion must prove actual malice by clear and convincing evidence. That standard is "significantly more onerous than the usual preponderance of the evidence standard." *Tavoulareas*, 817 F.2d at 776. To prove actual malice under the clear-and-convincing standard, the evidence must "instantly tilt[] the evidentiary scales in the affirmative when weighed against the evidence [the defendant] offered in opposition." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). It must lead to an "abiding conviction" that the plaintiff's claim of actual malice is "highly probable." *Id*.

Dominion claims that the clear and convincing standard "make[s] no difference on this motion" because the standard at summary judgment is "a higher burden than clear and convincing evidence." Dom.MSJ.45. But the Supreme Court has squarely held that "a court ruling on a motion for summary judgment must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether

a genuine issue of actual malice exists." *Anderson*, 477 U.S. at 257. Thus, to survive a motion for summary judgment, a defamation plaintiff must produce "affirmative evidence" that would enable a reasonable jury to find actual malice *by clear and convincing evidence*. *Id.* at 255, 257. And to show that it is *entitled* to summary judgment, a defamation plaintiff must present affirmative evidence that would *require* any reasonable juror to find actual malice by clear and convincing evidence. For this reason, as noted earlier, *supra* 39, grants of summary judgment to the defamation *plaintiff*—as opposed to the defamation defendant—are virtually unheard of. *See Bee*, 107 A.D.2d at 388. Moreover, the searching standard of review on appeal underscores the importance of the clear-and-convincing evidence standard. As the Supreme Court has explained, an appellate court "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984).

3. Dominion must demonstrate that the person(s) at Fox News responsible for each specific challenged statement knew the statement was false or harbored serious doubts about the truth at the time of the statement—general organizational "knowledge" is not enough.

Critically, the requisite showing of actual malice, by clear and convincing evidence, must be made for *each specific statement* Dominion alleges to be

defamatory. "[D]efamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." *Tavoulareas*, 817 F.2d at 794 (emphasis added). Moreover, for each challenged statement, Dominion must bring the subjective "state of mind" necessary to prove actual malice "home to the persons in [Fox News'] organization having responsibility for the publication" of that specific statement. *Sullivan*, 376 U.S. at 287. In other words, Dominion cannot rely on the supposed "state of mind" of the organization itself or try to impute knowledge from one Fox News employee to another. *Page*, 270 A.3d at 844. "When there are multiple actors involved in an organizational defendant's publication of a defamatory statement, the plaintiff must identify the individual responsible for publication of a statement, and it is that individual the plaintiff must prove acted with actual malice." *Dongguk Univ.*, 734 F.3d at 123.

Courts have held time and again that the person(s) "responsible" for the allegedly defamatory statement is the author or speaker of that statement. In *Palin v. New York Times, Co.*, 940 F.3d 804 (2d Cir. 2019), for example, the Second Circuit held that, "[b]ecause the Times identified [James] Bennet as *the author* of" the specific statement in the editorial that Palin claimed defamed her, "it was his state of mind that was relevant to the actual malice determination." *Id.* at 810 (emphasis added). It did not matter that "the original author of the Editorial, several

other editors, and a fact checker read the draft after Bennet's revision and before publication." *Palin v. New York Times Co.*, 588 F.Supp.3d 375, 381 (S.D.N.Y. 2022). The court did not look at the state of mind of any of those individuals. What mattered was what the actual *author* of the defamatory statement knew at the time it was published. *Id.* at 402-07.

Similar cases abound. In *Page*, the Delaware Supreme Court stated that only the mental state of "those involved in drafting the alleged defamatory statements"—"the authors of the articles"—mattered for purposes of actual malice. 270 A.3d at 850. In *Ertel v. Patriot-News Co*., 674 A.2d 1038, 1043-44 (Pa. 1996), the Pennsylvania Supreme Court held that, to demonstrate that a specific person is "responsible" for the publication, the defamation plaintiff must show that the person "affirmatively act[ed] to direct or participate in the publication" of the allegedly defamatory statement. *Id.* at 1044. "[M]erely fail[ing] to hinder its publication" is not enough. *Id*. (affirming trial court's entry of summary judgment in favor of defendant where reporter who published challenged article testified only that the defendant "didn't say don't print it"). In *Mimms v. CVS Pharmacy, Inc*., 889 F.3d 865 (7th Cir. 2018), the Seventh Circuit held that "[i]t is the state of mind of the speaker that is relevant." *Id.* at 868. In *Flotech, Inc. v. E.I. Du Pont de Nemours & Co.*, 814 F.2d 775 (1st Cir. 1987), the First Circuit held that the actual-malice inquiry was limited to those with a "primary role[]" in the alleged defamation, which in

context meant the individual "who made the decision to issue" the challenged press release. *Id.* at 781. In *Blankenship v. Fox News Network, LLC*, 2022 WL 321023 (S.D. W.Va. Feb. 2, 2022), *appeal filed*, No. 22-1207 (4th Cir. Mar. 2, 2022), the court held that Rupert Murdoch's and Suzanne Scott's knowledge was irrelevant because "it is the state of the mind of the speaker that is relevant." *Id.* at 31.

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

All of those legal principles present an insuperable obstacle for Dominion, as most of its evidence has nothing to do with anyone who was responsible for any of the challenged statements. Indeed, Dominion itself implicitly concedes as much. Dominion devotes 30 pages to detailing statements from anyone and everyone in the entire Fox News organization and at parent company Fox Corporation who ever cast doubt on the President's claims. For instance, Dominion invokes Bret Baier's skepticism 20 different times. And it repeatedly endeavors to demonstrate that Jedidiah Bila, Irena Briganti, Richard DiBella, Steve Doocy, John Finley, Thomas Firth, Kristin Fisher, Alan Komissaroff, Lachlan Murdoch, Rupert Murdoch, Laura Ingraham, Dana Perino, Kim Rosenberg, Chris Stirewalt, Bill Sammon, and Lucas Tomlinson were all skeptical too. *See* Dom.MSJ.1-3, 8-9, 29-32, 95-102 & nn.12-13. But when Dominion finally gets around to telling the Court who it thinks is responsible for the statements it has challenged, it does not identify *any* of those

individuals as persons responsible for *any* of the statements. *See* Dom.MSJ.117,[17] 123,[18] 135,[19] 139,[20] 141,[21] 144.[22] The bulk of Dominion's evidence is thus by its own admission irrelevant.

Dominion's desire to misdirect is understandable. When one focuses on the individuals who were actually (or even arguably) responsible for the challenged statements, it is plain as day that they did not act with actual malice. No reasonable jury could conclude otherwise. Dominion's efforts to demonstrate otherwise either distort the record or depend on a vastly overbroad conception of who is "responsible" in the defamation context.

---

[17] Identifying Suzanne Scott, Jay Wallace, Lauren Petterson, Gary Scheier, David Clark, Bartiromo, and Abby Grossberg as responsible employees for broadcasts of *Sunday Morning Futures*.

[18] Identifying Scott, Wallace, Petterson, Schreier, Dobbs, Jeff Field, Alex Hooper, and John Fawcett as responsible employees for broadcasts of *Lou Dobbs Tonight* and the November 14 and December 10 tweets.

[19] Identifying Scott, Wallace, Cooper, David Clark, Pirro, Jerry Andrews, and Jen Voit as responsible employees for broadcasts of *Justice with Judge Jeanine*.

[20] Identifying Scott, Wallace, Petterson, Gavin Hadden as responsible employees for the November 15 broadcast of *Fox & Friends*, and Will Cain, Peter Hegseth, and Rachel Campos-Duffy as additional responsible employees for the December 12 broadcast of *Fox & Friends*.

[21] Identifying Scott, Wallace, Cooper, Ron Mitchell, Porter Berry, Hannity, Tiffany Fazio, and Robert Samuel as the responsible employees for the broadcast of *Hannity*.

[22] Identifying Scott, Wallace, Cooper, Mitchell, Carlson, Justin Wells, Alex Pfeiffer, Alexander McCaskill, Eldad Yaron, as the responsible employees for the broadcast of *Tucker Carlson Tonight*.

1. The record conclusively demonstrates that Fox News hosts lacked actual malice.

To start with the hosts of the shows with content that Dominion challenges, far from demonstrating actual malice by clear and convincing evidence, the record underscores its absence. Indeed, once each statement is examined in the full context that the law demands, *Immuno AG.*, 567 N.E.2d at 1278, the coverage itself confirms that no host acted with actual malice. *See* FNN.MSJ.Part I.D. When the President made unprecedented accusations of election fraud, hosts covered that newsworthy story and gave the President's attorneys (and in Bartiromo's case, the President himself) the chance to explain their allegations and their plans to contest the election in court. When they made their case, hosts pressed them for evidence and underscored that they would need to produce evidence before the mid-December deadline for certifying electoral votes for the allegations to make a difference in potentially election-altering litigation. *See supra* 27-34. When Dominion denied the President's allegations, hosts reported those denials. *See id.* Several of the relevant hosts asked other parties, including members of Congress, journalists, and legal scholars, to assess and comment on the President's allegations. *See id.* Oftentimes those guests cast doubt on the claims or emphasized that they had yet to see proof. *See id.* The relevant hosts also reported the results of the state audits, the President's legal setbacks, and the skeptical views of various government officials.

See id. All of that underscores that they 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. And when it became clear by mid-December that the President's legal team had failed to produce evidence to substantiate their allegations in court before the December 14 deadline for certifying the vote, Fox News hosts stopped booking Giuliani and Powell on their shows.

Indeed, the lone challenged statements that post-date the December 14 deadline come from the January 26 segment of *Tucker Carlson Tonight* on which Carlson interviewed Mike Lindell, not Giuliani or Powell. But as context makes clear, Carlson did not invite Lindell on to discuss election fraud; he invited him on to discuss Lindell's recent censorship on Twitter. *See id.* And Carlson has since confirmed that he had "no idea" that Lindell would bring up Dominion and "did not expect" him to do so. Ex.E7, Carlson Dep. Tr. 185:21-24, 320:14-321:9; *see also* Ex.E14, Wells Dep. Tr. 108:15-19 (Lindell "was booked because he was cancelled by woke corporations and Big Tech"). Courts have long rejected the notion that a host has published a false statement with actual malice when the statement is made by a guest in the context of a live on-air interview, particularly where the host did not know that the guest would make it. *See, e.g.*, *Jones v. Taibbi*, 508 F. Supp. 1069, 1074 n.12 (D. Mass. 1981) ("[I]t is one thing to require a newspaper to check the

accuracy of an interview. But it may be another matter to hold a TV newsperson responsible for the spontaneous live utterance of an interviewee."); *see also Pacella v. Milford Radio Corp.*, 462 N.E.2d 355, 360 (Mass. App. Ct. 1984); *Adams v. Frontier Broad. Co.*, 555 P.2d 556, 564 (Wyo. 1976). All of the coverage itself thus suffices to confirm that no challenged statement was published with actual malice.

Unsurprisingly, discovery likewise has failed to reveal any evidence that the relevant Fox News hosts knew that the President's allegations were false when they were made or harbored serious doubts about their truth. To the contrary, they repeatedly testified that they did not know that the President's claims were false at the time of the relevant shows, and/or explained why they maintained an open mind about the President's claims.

Bartiromo. Bartiromo testified under oath that she is uncertain about what happened in the election even to this day: "I cannot sit here and say I know what took place in the election 2020. I still have not seen a comprehensive investigation as to what took place, and that is why there are still questions about this election." Ex.E4, Bartiromo Dep. Tr. 283:1-5. And she still cannot say for certain that the President's allegations about Dominion are false: "I have no idea. I have not done any of this investigatory work." *Id.* at 110:2-9; *see also* Ex.I2, Bartiromo Text Message (Nov. 20, 2020) ("This was fraud. No one can tell me differently. They

hate him & they wanted him out bc he s poses their corruption. I think he could win his.").

Moreover, Bartiromo explained that she maintained an open mind about the President's claims at the time because they were being pressed by the sitting President of the United States and his lawyers in a context where the allegations would need to be proven in court in short order to have an effect on the election. She explained: "These were people that the country respected, and they were making a very serious charge." Ex.E4, Bartiromo Dep. Tr. 379:14-22. A publisher's reliance on elected officials and their attorneys, as well as official sources, shows an *absence* of actual malice, as numerous cases confirm. *See, e.g.*, *Freeze Right*, 101 A.D.2d at 184-85; *Dickey v. CBS Inc.*, 583 F.2d 1221, 1229 (3d Cir. 1978); *Suozzi v. Parente*, 202 A.D.2d 94, 102 (N.Y. App. Div. 1994); *Adler v. Conde Nast Publications, Inc.*, 643 F. Supp. 1558, 1566 (S.D.N.Y. 1986).

On top of that, Bartiromo testified that she did not think it far-fetched that Dominion's machines could potentially be hacked, particularly by foreign adversaries, especially when Senator Klobuchar, Congresswoman Maloney, and Stacey Abrams expressed similar concerns about voting machines before the 2020 presidential election. Ex.E4, Bartiromo Dep. Tr. 196:16-197-2, 379:11-18. Bartiromo was hardly alone in the view that the security of electronic voting machines is a genuine issue and that the nature of voting machines makes allegations

of unseen manipulation plausible. There was widespread concern even before the 2020 election among computer scientists, election security experts, the media, and Democratic and Republican politicians alike that electronic voting machines were vulnerable to hacking, including by foreign adversaries. *See supra* 8-17. Indeed, Dominion machines were already the subject of litigation over security concerns, and a federal judge concluded (a week before the election, no less) that "this is not a question of 'might [security problems] actually ever happen?'—but 'when it will happen.'" *Curling*, 493 F.Supp.3d at 1342. Simply put, there was nothing remotely—let alone inherently—implausible about the notion that electronic voting machines used in the 2020 election could have been hacked.

Dominion does not seriously contest that Bartiromo did not know that the President's claims were false or harbor serious doubts about their truth at the time of the November 8 and November 15 broadcasts, which aired just weeks after the election and days after the media called the election and the President accused Dominion of fraud. The best Dominion can muster is an email that Bartiromo received from Powell on November 7 forwarding a lengthy message from someone named Marlene Bourne. Dom.MSJ.118-19. Dominion emphasizes that at the very end of the three-page email, Bourne called herself "pretty wackadoodle." Dom.MSJ.Ex.154, Powell Email (Nov. 7, 2020). Dominion quotes that portion of the email repeatedly and contends that it should have put Bartiromo on notice that

the President's claims were bunk. But as Bartiromo explained at her deposition, "I did not go to press with this person." Dom.MSJ.Ex.98, Bartiromo Dep. Tr. 117:18. And although Dominion's counsel fixated on the document during Bartiromo's deposition, Bartiromo repeatedly explained that she did not know who this person was, did not know if she did anything with the email beyond "forwarding to my producer to check it out," and explained that "it's not evidence" and that she did not "know what it is." *Id.* at 126:15-16, 127:17-19, 134:7-8. Moreover, Bartiromo explained that Powell had promised "a firehose" of *other* "evidence," including "sworn testimony" from a "team of lawyers" who promised they could prove their claims in court. *Id.* at 134:19-135:7. That Powell forwarded to Bartiromo one email of questionable reliability hardly shows that Bartiromo "*in fact* entertained serious doubts" about the allegations that the President and his lawyers were pressing. *St. Amant*, 390 U.S. at 731. The undisputed testimony and contemporaneous documents show the opposite.

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

that election," *id.* at 40:1-3. Like Bartiromo, Dobbs provided reasons for maintaining an open mind about the President's claims. He testified that he "took [Powell's] claims seriously" because she "was representing the President" and "a highly respected attorney." *Id.* at 21:4-8. And he had long been skeptical of the security of electronic voting machines, a subject that he covered almost 15 years ago while he was an anchor at CNN. *See supra* 10.

Dominion says that "Dobbs admitted under oath that, at the time of Powell's appearance on his show on December 10, he doubted her credibility and her claims." Dom.MSJ.133 (citing Dom.MSJ.Ex.111, Dobbs Dep. Tr. 200:6-12). That is incorrect. Dobbs testified that he had "concerns based in some measure on doubts" about Powell's credibility as a source *on December 9*, when he received an email indicating that Powell's last lawsuit was dismissed. Dom.MSJ.Ex.111, Dobbs Dep. Tr. 219:14-200:12. But Dominion omits that Dobbs went on to explain that whatever doubts he may have had when he received that email were alleviated before his December 10 show when Powell "assured" him "that afternoon preceding the show that she … finally had the evidence to deliver." Dom.MSJ.Ex.111, Dobbs Dep. Tr. 344:5-14. Moreover, as Dobbs explained, he "was going to give her every benefit of the doubt" because "we're dealing with an attorney who had turned around General Michael Flynn's case when it was nothing but a disaster for him," who "was aligned against the entire federal justice system, the Judiciary as well as the

Department of Justice." *Id.* at 225:7-15. In all events, whatever doubts Dobbs had on December 9 say nothing about his state of mind at the time of the November 12, 13, 14, 16, 18, 19, 24, 30 and December 4 statements that Dominion challenges. The undisputed facts, including Dobbs' own testimony and contemporaneous documents, show that no reasonable jury could conclude he acted with actual malice with respect to any challenged statement.

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

had affidavits that were legal sworn statements under penalty of perjury supporting the allegations."); *see also* Ex.I3 Andrews Email (Nov. 14, 2020) ("Jeanine says she has affidavits to back up her claims provided to her by [redacted]."). Numerous courts have found no actual malice where the source "swore to his answers" and "was prepared to substantiate his charges." *St. Amant*, 390 U.S. at 733; *see also McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515-16 (D.C. Cir. 1996) (finding "most important" the fact that source "ma[de] the very same allegations" of election fraud "before the Congress under oath—and under the realistic threat of a penalty for perjury"). Even Dominion recognizes that sworn affidavits have force; indeed, it cites its own "sworn statements" as proof that that the allegations against it are false. Dom.MSJ.61. Dominion thus identifies no evidence on which a reasonable jury could conclude by clear and convincing evidence that Pirro published any statement about Dominion with actual malice.

Hannity. Hannity provided multiple reasons why he took the President's allegations seriously. He testified that he had found Powell to be a "very bright attorney" in past interactions, including her successful representation of Michael Flynn. Dom.MSJ.Ex.122, Hannity Tr. 398:12-13. Indeed, it was in part because Flynn had been pardoned on November 30 that Hannity had Powell on his program that day, as Flynn's prosecution was an issue that had been important to Hannity. *Id.* at 396:17-21; 421:24-422:4.

Moreover, Hannity kept an open mind because his own investigation revealed that "so many people from so many varying diverse backgrounds," including the State of Texas, Congressman Wyden, Senator Warren, the New York Times, and the Associated Press, "had come to a conclusion that was very negative towards Dominion." Ex.E8, Hannity Dep. Tr. 44:1-18, 189:7-19, 317:12-16. As he told viewers on his November 19 show (which Dominion does not even try to challenge), "[i]f you're keeping track, Senators Warren, Klobuchar, Biden—Wyden, tenured professor [from Princeton University], state of Texas, the A.P., the New York Times, people from all political persuasions surrounding dominion voting systems, hardly part of the vast right-wing conspiracy. Now, if in a divided country like this one, you got Democrats, Republicans, and the media, before the election, agreeing that this is not the best system, why was it used in the first place in 28 states?" Ex.A17, Hannity Tr. 4 (Nov. 19, 2020). "And now, if you bring up Dominion, you are a conspiracy theorist[] ... [H]ow is that fair and right? Whether the machines worked well in this election ***is yet to be determined***, but why were they used in the first place is my question. What about the hundreds of sworn affidavits signed under penalty of perjury? Are their stories not worthy of being heard?" *Id.* As numerous courts have explained, "a publisher's effort to investigate damaging allegations ... is evidence that the publisher neither believed the allegations to be false nor willfully blinded himself to the truth." *McFarlane*, 91 F.3d at 1509.

Notwithstanding all that evidence demonstrating the absence of malice, Dominion contends that Hannity "knew Powell's claims were false" because he testified that "with respect to 'that whole narrative that Sidney was pushing, I did not believe it for one second.'" Dom.MSJ.142 (citing Dom.MSJ.Ex.122, Hannity Dep. Tr. 322:19-21). But that is not what Hannity said. Dominion literally plucks that language from the middle of Hannity's sentence and inserts a period where the sentence continued. The actual testimony reads: "I did not believe it for one second, and I tried to listen as time went on. I gave them a fairly generous period of time, I felt, in terms of, let's see what you have; you are making accusations; you say proof is coming. I waited for the proof. I got my Sidney answer on November 30th." Dom.MSJ.Ex.122, Hannity Dep. Tr. 322:21-25. As this testimony makes clear, it was only *after* Powell was unwilling to produce proof when Hannity pressed her on why her whistleblowers would not come forward and sign affidavits on his November 30 show—the only *Hannity* show that Dominion challenges—that Hannity "got [his] Sidney answer." *Id.*; *see also id.* at 420:9-17.[23]

[23] Dominion suggests that "the nail in the coffin" for Hannity was when Powell failed to produce evidence on his *radio show* a few hours *before* the November 30 broadcast of *Hannity*. Dom.MSJ.142-43. That is wrong. That testimony was plainly referring to statements made on *Hannity*, not Hannity's radio show, as a comparison of the deposition and show transcripts confirms. *Compare* Dom.MSJ.Ex.122, Hannity Dep. Tr. 398:2-9, *with* Ex.A28, Hannity Tr. 8-9 (Nov. 30, 2020).

Dominion also points to Hannity's statement that "nobody ever convinced me that their argument was anywhere near accurate or true." Dom.MSJ.142 (citing Dom.MSJ.Ex.122, Hannity Dep. Tr. 275:9-11). But "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter establishes reckless disregard in a defamation action." *Liberman v. Gelstein*, 605 N.E.2d 344, 350 (N.Y. 1992). And the text messages referring to Powell as a "lunatic" were sent on December 22, Dom.MSJ.8, long after the November 30 show and long after it became clear that Powell could not prove her claims in court in time to overturn the election. The undisputed facts make clear that neither Dominion's mischaracterization of Hannity's testimony and November 30 show nor any other evidence in the record would support a finding of actual malice, and no reasonable jury could conclude otherwise.

Cain, Campos-Duffy, and Hegseth. Will Cain, Rachel Campos-Duffy, and Peter Hegseth hosted the December 12 *Fox & Friends* show that Dominion challenges. All three testified that they did not know at the time whether the President's allegations about Dominion were true or not. When asked whether he "believed Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez," Cain responded "I don't know." Dom.MSJ.Ex.103, Cain Dep. Tr. 136:13-17. Likewise, when asked whether he "believe[d] Dominion paid kickbacks," Cain responded "I don't know." *Id.* at 136:18-23. When asked

whether he believed "Dominion used its software and algorithms to manipulate vote counts," Cain responded "I don't know." *Id.* at 136:24-137:4. And when asked about the lone statement on the December 12 broadcast that Dominion challenges—which came from Giuliani, not any host—Cain responded again that he did not know whether the statement was true or false. *Id.* at 137:13-18 ("Q. Did you ever believe in the past that the Dominion machine was 'as filled with holes as Swiss cheese and was developed to steal elections'? A. Never maintained this affirmative belief. I have not known."); *see also* 119:23-120:16 (similar).

Both Campos-Duffy and Hegseth testified similarly. Dom.MSJ.Ex.104, Campos-Duffy Dep. Tr. 167:24-168:10 ("Q. Did you believe on December 12, 2020, that Dominion machines were 'as filled with holes as swiss cheese'? A. I had no idea. How would I know that? Q. Have you ever believed that Dominion machines are as full of holes as swiss cheese? A. I was like so many other Americans waiting to see the evidence."); *id.* at 167:16-168:4 ("Q: Did you believe on December 12, 2020 that Dominion machines were developed to steal elections? A. I had no idea."); Dom.MSJ.Ex.123, Hegseth Dep. Tr. 141:24-142:3 ("Q. Do you believe Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez? A. I don't know."); *id.* at 142:9-13 ("Q. Do you believe Dominion used its software and algorithms to manipulate vote counts in the 2020 presidential election? A. I don't know."); *id.* at 131:4-10 ("When Mr. Giuliani talked about Dominion on

your broadcast on December 12, were you aware of any evidence that the Dominion machine was as filled with holes as Swiss cheese? A. I didn't know whether that was true.").[24] No reasonable jury could find that any of these hosts acted with actual malice.

Carlson. As explained, the only *Tucker Carlson Tonight* show that Dominion challenges is his January 26 show, where Carlson was plainly not aware that Lindell would mention Dominion. And Carlson has since confirmed that he had "no idea" that Lindell would bring up Dominion and "did not expect" him to do so. Ex. E7, Carlson Dep. Tr. 185:21-24, 320:14-321:9. As explained, numerous courts have rejected the notion that a host has published a false statement with actual malice when the statement is made by a guest in the context of a live on-air interview, particularly when the host did not know that the guest would make the statement. *See supra* 89-90. What Carlson thought about the President's allegations is therefore

[24] Dominion claims that the Cain, Campos-Duffy, and Hegseth "aired [Giuliani's claims] without pushback," but that is false. After Giuliani made his claims about Dominion, Cain immediately followed up: "Do you have the time to bring these and put forward the evidence? And what is your strongest evidence?" Ex.A32, Fox & Friends Tr. 3 (Dec. 12, 2020). As Hegseth testified, "so when Will followed up with, you know, What is your evidence? What is your best evidence? That was the point of the segment, at that point we said, Hey, we hear you, but what's your evidence on the legal side?" Dom.MSJ.Ex.123, Hegseth Dep. Tr. 115:17-116:2.

irrelevant, as he is not responsible for any other coverage or commentary during which they were discussed.

Moreover, although Dominion suggests that it can infer actual malice from the fact that Carlson did not "pushback" on Lindell's "debunked claims about Dominion," none of that is correct. Dom.MSJ.147. Lindell did not even make any allegations about Dominion on Carlson's show, debunked or otherwise. All Lindell said was: "What I'd say to them with this particular thing that's going on now, I've been all in trying to find the machine fraud. And we found it. We have all the evidence … I have the evidence. I dare people to put it on. I dare Dominion to sue me, because then it would get out faster. So this is—you know, they don't want to talk about it. They don't want to say it. They just say, oh, you're wrong." Ex.A38, Tucker Carlson Tonight Tr. 19-20 (Jan. 26, 2021). Carlson responded: "*They're not making conspiracy theories go away by doing that.* You don't answer—you know, don't make people kind of calm down and get reasonable and moderate by censoring them. You make them get crazier, of course. This is … ridiculous." *Id.* at 20.

A reasonable viewer would understand that Lindell was talking about machine fraud generally, not making any specific claims about Dominion. Indeed, during his deposition, Carlson testified that Lindell did not say anything about having evidence that Dominion committed vote fraud, that Dominion rigged their machines and helped steal the election for Joe Biden, or anything else about Dominion and election

fraud. Dom.MSJ.Ex.105, Carlson Dep. Tr. 317:18-318:20; 321:22-323:21. And Carlson testified that he was "utterly confused" by Dominion counsel's suggestion during the deposition that Carlson should have apologized to his audience for Lindell's statements about Dominion or that there was anything Carlson could have said to correct Lindell—because the transcript plainly shows that there was nothing to correct. *Id.* at 318:21-319:14. In all events, Dominion's claim that Carlson failed to push back is pure fiction: to the contrary, Carlson expressly cast doubt on Lindell's statements by describing them as "conspiracy theories."

Despite the complete absence of any evidence that Carlson acted with actual malice with respect to Lindell's statements on the lone January 26 *Tucker Carlson Tonight* program that it challenges, Dominion rummages through months of Carlson's text messages and emails and emphasizes throughout its brief that Carlson sometimes referred to Powell using foul language. Dom.MSJ.1, 8, 149. Even if what Carlson thought about Powell mattered, those statements do not demonstrate with clear and convincing evidence that Carlson knew that her claims were false or harbored serious doubts about their truth. To the contrary, Carlson testified that he too initially took the President's lawyers seriously because of their connection with the President and their credentials, and because they were "willing to attach their names to a complaint" under penalty of Rule 11 sanctions. *See, e.g.*, Ex.E7, Carlson Dep. Tr. 330:19-331:5; *see also id.* at 32:18-19 ("I took Sidney Powell seriously and

I still do."). Although he was "frustrated" that Powell failed to provide evidence to him that substantiated her claims against Dominion, he considered it "entirely plausible that that claim is true, because we're dealing with electronic voting machines here." *See, e.g.*, Ex.E7, Carlson Dep. Tr. 44:16-20, 45:7-9, 110:7-9. And Carlson repeatedly emphasized that, while Powell "did not provide [evidence] to" Carlson, he had "no idea" whether she "provided that proof or not" to others. *Id.* at 45:18-22. There is thus zero evidence in the record from which a reasonable jury could find Carlson acted with actual malice. All of the evidence supports summary judgment in favor of Fox News on the lone episode of *Tucker Carlson Tonight* that Dominion challenges.

2. The record conclusively demonstrates that Fox News producers lacked actual malice.

With little to say about the hosts who bore the most direct responsibility for the challenged segments, Dominion shifts to producers of the shows it challenges. But even assuming those producers all affirmatively directed or participated in the publication of the specific statements that Dominion challenges, Dominion's evidence falls far short of proving actual malice by clear and convincing evidence.

Abby Grossberg. Grossberg, Bartiromo's producer for the November 8 and 15 broadcasts of *Sunday Morning Futures*, testified under oath that she did not know whether the President's allegations were true at the time. When asked whether she

knew whether "Dominion is owned by a company founded in Venezuela to rig elections for the dictator, Hugo Chavez," she said, "I don't know." Dom.MSJ.Ex.121, Grossberg Dep. Tr. 259:7-11. When asked whether "Dominion paid kickbacks to government officials who used its machines in the 2020 presidential election," she answered "I don't know enough about it to say either way. I don't know." *Id.* at 261:22-262:23. And when asked whether "Dominion used its software and algorithms to manipulate vote counts in the 2020 presidential election," she again responded, "I just don't know." *Id.* at 262:24-263:4. Dominion points out that Grossberg testified that she had "not seen credible evidence to support the President's claims." Dom.MSJ.97 & n.13. But "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false," and "[o]nly the latter establishes reckless disregard in a defamation action." *Liberman*, 605 N.E.2d at 350.

Without any direct evidence that Grossberg knew or harbored serious doubts about the President's claims on November 8 and 15, Dominion argues that Grossberg *should* have known the claims were false because she received the November 7 "wackadoodle" email. Dom.MSJ.118-19. Grossberg testified under oath, however, that "I don't even know if I read it at the time," since it was "just a forwarded email … an FYI." Dom.MSJ.Ex.121, Grossberg Dep. Tr. 115:11-15, 122:5-6. Moreover, Grossberg testified that "these were the President's attorneys

and these were very … serious allegations being made by the President of the United States and his team. And we were doing our best to get to the true conversation and interviews and thought the public deserved to hear what the current administration was saying." *Id.* at 158:2-9. A single email that Grossberg may not even have reviewed is hardly clear and convincing evidence that she knew the President's claims were false at the time.

Jeff Field. Field, the senior producer on *Lou Dobbs Tonight* on the challenged shows in November and December 2020, likewise testified under oath that he did not know the President's claims about Dominion were false at the time. When asked if he knew in early November "whether … Dominion was founded to fix elections for Hugo Chavez," Field answered, "I did not know," and that it "was something that was newsworthy to investigate or look into." Dom.MSJ.Ex.116, Field Dep. Tr. 154:10-155:10. Similarly, Field testified that he "did not know" whether "Dominion had in fact shifted millions of votes from Trump to Biden in the 2020 election." *Id.* at 155:23-156:4. And he did not know whether Dominion paid kickbacks to election officials. *Id.* at 156:11-157:14.

Dominion highlights testimony that Field had not seen any evidence *proving* the President's claims. Dom.MSJ.97 n.13. And it points to a text message that Field sent Gary Schreier less than two minutes before the December 10 show aired, which attached a written version of Powell's cyber Pearl Harbor claims. [redacted]

[redacted] But again, not knowing whether claims are true is not the same thing as knowing they are false. *Liberman*, 605 N.E.2d at 350. And while Field found it "odd that she claims to have this evidence but her cases are being thrown out," he thought the best course for getting to the bottom of her claims was to "make sure Lou pushes on the veracity of this" on the show, Dom.MSJ.Ex.451, Field Text Message (Dec. 10, 2020), which is exactly what Dobbs did.

Alexander Hooper. Hooper, a senior producer on *Lou Dobbs Tonight* at the time, likewise testified under oath that he did not know at the time whether the President's claims about Dominion were false. When asked whether he believed that "Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez," Hooper responded: "As we sit here today, I do not. At the time of the programming that we are talking about, I was not sure," given that the claims were being pressed by "the president" and "members of his team" and in sworn "affidavits." Dom.MSJ.Ex.124 Hooper. Dep. Tr. 52:14-5:18; *see also id.* at 57:2-4. Likewise, when asked whether he believed that "Dominion used its software and algorithms to manipulate vote counts in the 2020 presidential election," Hooper again testified that, "as I sit here today, no, I do not. But at the time we had reason to believe there was potential for that." *Id.* at 54:23-55:3. When asked whether he

believed "Dominion paid kickbacks," Hooper answered: "As we sit here today, I don't. Again, during this time I was open to investigating that claim." *Id.* at 59:17-22. As to when he "no longer believe[d]" the President's allegations against Dominion, Hooper answered "end of December," *id.* at 56:22-57:18—*i.e.*, after Powell failed to produce the evidence she had repeatedly promised in time to substantiate her claims in court before the mid-December deadline for certifying the vote. That is well after any of the Dobbs shows Dominion challenges.

John Fawcett. Fawcett, an associate producer on *Lou Dobbs Tonight* in November and December 2020, also testified that he did not know at the time whether the President's allegations about Dominion were false. When asked whether he believed "that Dominion used its software and algorithms to manipulate vote counts," Fawcett answered, "I don't know," and that he had good reason to keep an open mind about the claims. Dom.MSJ.Ex.114, Fawcett Dep. Tr. 92:4-7. After all, "[w]hen you look at 92 percent of all votes processed in this country, they were processed by three private election companies, ES&S, Hart and Dominion." *Id.* at 92:8-17. Accordingly, there was good reason to be "skeptical" that the election was entirely secure. *Id.* When asked whether he believed "Dominion paid kickbacks to government officials who used its machines," Fawcett again testified "I don't know," and "[a]nything is possible." *Id.* 93:15-20.

Dominion points to text messages between Fawcett and Dobbs on November 22 in which Fawcett stated that Powell "Could be losing her mind," that what she was saying "doesn't make sense," and "I just don't think she is verifying anything she is saying." Dom.MSJ.130 (quoting Dom.MSJ.Ex.445, Fawcett Text Message (Nov. 22, 2020)). But Dominion omits the very next text, in which Fawcett says: "Like Brian Kemp is taking bribes. ***I am sure he is***, but where is the proof." Dom.MSJ.Ex.445, Fawcett Text Message (Nov. 22, 2020). Again, Dominion mistakes Fawcett's frustration at the lack of evidence for affirmative evidence that he knew any claim for which evidence had not yet been produced must be false. *Liberman*, 605 N.E.2d at 350. In fact, later on in the same conversation, Fawcett states that he does not know whether the claims are true or false, telling Dobbs: "It's a great story ***if it is true***, otherwise it just a Fairytale!" Dom.MSJ.Ex.445, Fawcett Text Message (Nov. 22, 2020).

For the same reason, text messages that Fawcett sent Dobbs on November 28 stating that Powell's suits were "complete BS," and that Powell "had overplayed her hand," do not establish clear and convincing evidence that Fawcett knew the claims against Dominion were false or harbored serious doubts about the truth. Dom.MSJ.131. At most, the statements demonstrate Fawcett's belief that Powell had still at the time failed to present evidence to prove her claims in court. That is not the same thing as knowing that Powell was lying when she subsequently

promised Dobbs that she did indeed have evidence to share with him. *Liberman*, 605 N.E.2d at 350.

Jerry Andrews. Andrews, the executive producer of *Justice with Judge Jeanine* on November 14 and 21, also testified that he did not know whether the President's claims against Dominion were false at the time those two shows aired. When asked whether he believed "Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez," Andrews responded: "I don't know." Dom.MSJ.Ex.96, Andrews Dep. Tr. 29:18-22. Likewise, when asked whether he believed "Dominion paid kickbacks to government officials to use its machines in the 2020 presidential election," Andrews stated, "I don't know." *Id.* at 31:8-14. And when asked whether "Dominion used its software and algorithms to manipulate vote counts in the 2020 presidential election," Andrews again testified under oath: "I don't know." *Id.* at 31:15-19.

Without any direct evidence that Andrews harbored serious doubts about the President's allegations, Dominion points to a series of emails that Andrews sent on November 13 and 14. [redacted] Andrews forwarded her response to David Clark [redacted]

[redacted] *Id.* But that email exchange does not come close to clear and convincing evidence that Andrews knew the President's claims were false or harbored serious doubts about their truth. At most, the exchange shows that Andrews recognized that there were competing allegations and counter-allegations and that the best way to determine the truth was to inform viewers of both the President's allegations and Dominion's denials—which is exactly what Pirro did on the November 14 show.

If there were any doubt about that, Andrews' emails on November 14 eliminates it. [redacted] Far from constituting clear and convincing evidence that Andrews knew the President's claims were false, the email exchange confirms that Andrews did not know whether they were true or false, and that the best way to determine the truth was to press Powell for her evidence on air. Indeed, Pirro told Andrews that she did not want to change certain parts of her opening that the Brain Room flagged because [redacted] had provided her with affidavits to back up the claims. Ex.I3, Andrews Email (Nov. 14, 2020). And after the segment aired, Andrews confirmed that "I think we were fair in presenting Dominion's side of the story in graphics and

banners," *id.*, which reinforces that he did not subjectively believe the coverage was false or defamatory.

Finally, Dominion points to an email exchange before the November 21 broadcast of *Justice with Judge Jeanine*, a show on which neither Giuliani nor Powell appear. [redacted] Moreover, Dominion does not explain why Andrews' state of mind matters for statements made by Pirro in her monologue. As Dominion itself appears to admit, Pirro made the ultimate decision to include the challenged statements [redacted], and is therefore the individual at Fox News "responsible" for them. *Sullivan*, 376 U.S. at 287.[25]

[25] Dominion lists Jen Voit as a "responsible employee" for statements made on *Justice with Judge Jeanine*, but it does not present any evidence that Voit knew the statements were false or harbored serious doubts about their truth.

Tiffany Fazio and Robert Samuel. Fazio and Samuel, producers of *Hannity* on November 30, also testified that they did not know whether the President's claims against Dominion were false at the time the show aired. When asked whether she believed that "Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez," Fazio responded: "I don't know." Dom.MSJ.Ex.115, Fazio Dep. Tr. 46:20-23; *id.* at 46:24-47:18, 49:7-50:1. Likewise, when asked whether she believed that "Dominion paid kickbacks to government officials to use its machines in the 2020 presidential election," Fazio stated, "I don't know." *Id*. at 47:19-22; *see id.* at 50:2-8. And when asked whether "Dominion used its software and algorithms to manipulate vote counts in the 2020 presidential election," Fazio again testified: "I don't know." *Id.* at 48:3-6; *id*. at 48:7-49:1, 50:16-51:13. Similarly, when Dominion's lawyer asked Samuel whether he agreed "that the statement Ms. Powell made about Dominion on [the November 30] broadcast was false," Samuel testified: "I'm not aware whether it's true or not what she said." Dom.MSJ.Ex.141, Samuel Dep. Tr. 14:12-15:3.

Dominion has produced no evidence to contradict that testimony. Dominion points to text messages between Fazio and Porter Berry on November 6 in which Fazio expressed worries that the "allegations are so slim" as to election fraud. Dom.Ex.488, Fazio Text Message (Nov. 5, 2020). But that text exchange says nothing about the President's claims against *Dominion*, which is unsurprising since

the explosive allegations Dominion challenges had not yet arisen at that time. Dominion points out that Samuel thought the November 19 press conference was "a little bit outrageous" and that he "hadn't seen evidence that the allegations were true," Dom.MSJ.143, but yet again, Dominion mistakes knowing that evidence to support a claim has not yet surfaced with knowing that the claim is false or harboring doubts about the truth. *Liberman*, 605 N.E.2d at 350.

In all events, Dominion has not produced any evidence that either Fazio or Samuel is responsible for the lone statement it challenges from Hannity's November 30 show, which came from Sidney Powell. The evidence indicates that Hannity made the decision to book Powell, not Fazio or Samuel. Dom.MSJ.Ex.487; *see also* Dom.MSJ.Ex.143, Samuel Dep. Tr. 122:25-123:11 ("Sean Hannity is the ultimate decision maker on nights where he hosts."); *id.* at 8:11-14 (noting that Hannity has final say on guests and "sometimes interjects and has his own plans that is totally different from what we were planning."). And the evidence confirms that Hannity decided the content of his shows. *See id.* 126:20-25 ("Q. As you testified earlier, this confirms that Sean Hannity made the decision to have Powell talk about both the Flynn pardon and the election on the show that night, correct? A. Yes."); Dom.MSJ.Ex.115, Fazio Dep. Tr. 208:1-7 ("I don't know what particular questions

Sean was going to ask her, nor do I know what Sidney was going to say."). Fazio's and Samuel's state of mind on November 30 is therefore irrelevant.[26]

Justin Wells, Alex Pfeiffer, Alexander McCaskill, Eldad Yaron. Wells, Pfeiffer, McCaskill, and Yaron were producers on Carlson's January 26 show. They testified that they did not know whether the President's claims against Dominion were false at the time that show aired. For example, when asked whether "Dominion was founded to fix elections for Hugo Chavez," Wells responded: "I can't say one way or the other." Dom.MSJ.Ex.148, Wells Dep. Tr. 72:1-5. When asked about kickbacks, Wells testified "I don't believe anything as far as that." *Id.* at 67:17-68:4. Wells also testified that, although he was "aware that we had not gotten anything from the Trump team … that pertained to the allegations made by Sidney Powell and Rudy Giuliani[,] [w]e had no reason to believe they were untrue, but we also had no reason to believe they were true." *Id.* at 58:16-25.

Similarly, when Dominion's attorney asked Pfeiffer whether he "believe[s] that Dominion had the ability to flip votes from President Trump to President Biden," Pfeiffer responded "I don't know. It could be possible, could not be."

[26] Dominion also lists executive Porter Berry as a "responsible employee" for *Hannity* on November 30, but by that time Berry was no longer responsible for the show, and Dominion presents no evidence to the contrary. Dom.MSJ.Ex.123, Hannity Dep. Tr. 55:8-19.

Dom.MSJ.Ex.134, Pfeiffer Dep. Tr., 39:24-40-:4. After all, if Senators "Klobuchar and … Warren think that there is a problem with the machines, then we should be allowed to look into machines as well." *Id.* at 237:9-239:14. And when asked whether he though "Rudy Giuliani and Sidney Powell's allegations were implausible," Pfeiffer responded: "I don't think they were implausible." *Id.* at 251:14-252:9.

Even setting that aside, the evidence demonstrates that Carlson brought Lindell onto the show to talk about his recent censorship on Twitter, not about Dominion or election-fraud allegations. Dom.Ex.507, McNally-Emey Text Message (Jan. 26, 2021); Dom.MSJ.Ex.148, Wells Dep. Tr. 108:15-22; Dom.MSJ.Ex.134, Pfeiffer Dep. Tr. 123:19-124:5. Dominion notes that Pfeiffer texted Wells expressing concern about "wtf is he [Lindell] going to say on air." Dom.MSJ.147 (quoting Dom.MSJ.Ex.508, Wells Text Message (Jan. 26, 2021)). But that just underscores that Carlson and his team did not want Lindell discussing things that went beyond the planned topic of conversation. It does not render them responsible for everything that might come out of Lindell's mouth without regard to whether any of them prompted it.

3. The record conclusively establishes that Fox News executives lacked actual malice.

Unable to identify any testimony that would support a finding that anyone who was actually involved in any of the relevant shows published any statement with actual malice, Dominion tries to broaden the lens to include various high-level executives and supervisors. *See* Dom.MSJ.104-17 (discussing knowledge of Meade Cooper, David Clark, Ron Mitchell, Lauren Petterson, Gary Schreier, Suzanne Scott, and Jay Wallace). But Dominion fails to identify any evidence that any of these individuals exercised direct or actual control of the challenged statements in the sense that matters. And in all events, the evidence it adduces falls far short of proving actual malice.

a. Fox News executives were not "responsible" for any statement that Dominion challenges.

1. As explained, *see supra* Part II.A.3., the persons "responsible" for a statement are the speakers (or authors) of the statement and "those involved in drafting" it. *Page*, 270 A.3d at 850. Hence, it did not matter in the *Palin* case what the editors who reviewed the draft editorial knew at the time. Nor did it matter what the New York Times' editor-in-chief, executive editor, or managing editor knew, even though they surely had "responsibility" in the loose sense that they had the power to stop the op-ed from running. What mattered was the knowledge of the person who *drafted the specific statement* at issue. Here, too, it does not matter what

some executive or producer or reporter or host who did not make or exert any control over any of the challenged statements thought about the President's allegations. Dominion must bring the actual malice standard "home to the persons in [Fox News'] organization having responsibility for the publication" of each challenged statement. *Sullivan*, 376 U.S. at 287.

Dominion advances a much broader conception of "responsibility," insisting that a news organization's CEO and supervisors are "responsible" for any publication they had the power to stop. That sweeping theory has no basis in law. Indeed, Fox News is aware of *no* precedent (and Dominion cites none) allowing a defamation plaintiff to prove actual malice by pointing to the knowledge of executives or other employees who did not draft, speak, or play some equivalent and primary role in the alleged defamation, and *Palin* and other cases affirmatively refute any such theory. Instead, to demonstrate that a specific person is "responsible" for the publication, the defamation plaintiff must show that the person "affirmatively act[ed] to direct or participate in the publication" of the allegedly defamatory statement. *Ertel*, 674 A.2d at 1044. "[M]erely fail[ing] to hinder its publication" is not enough. *Id*.

The closest Dominion comes to trying to justify its radical expansion of *Sullivan* is a citation to *Solano v. Playgirl, Inc.*, which Dominion says held that "editorial staff members' concerns about defamatory statements satisfied actual malice even if

staffers were not 'the final decisionmakers as to the content.'" Dom.MSJ.90 (quoting *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1086 (9th Cir. 2002)). Dominion is wrong. In *Solano*, it was only the state of mind of the two "final decisionmakers" that mattered for purposes of actual malice. 292 F.3d at 1086. To be sure, the court relied on evidence that staffers expressed concern that a magazine cover "might falsely imply that [plaintiff] appeared nude inside the magazine." *Id.* But those concerns were relevant only because the final decisionmakers "were aware" of them. Moreover, even viewing the evidence most favorably to the plaintiff, *id.* at 1081, the court held that a fact issue existed based not only on "that awareness" of concerns raised by other staff members, but also on "evidence that [one final decisionmaker] wanted to 'sex up' the magazine to imply nudity." *Id.* at 1086. *Solano* therefore reaffirms that the subjective state of mind necessary for actual malice must be brought home to individuals with primary and direct control over the challenged statements. It provides no support for Dominion's argument that abstract "concerns" harbored by executives or supervisors who did not share them with "final decisionmakers" can "satisf[y] actual malice" on the theory that executives always have the power to intervene. Dom.MSJ.90.

Nor would such a rule make any sense in light of the principles that underlie the actual malice standard. As the Supreme Court has made clear, actual malice requires "more than a departure from reasonably prudent conduct." *Harte-Hanks*, 491 U.S.

at 688. Yet holding a news organization responsible for a supervisor's failure to intervene and stop the publication of a statement that he or she had no role in preparing or publishing would collapse the settled distinction between actual malice and "whether a reasonably prudent [person] would have published" under the circumstances. *St. Amant*, 390 U.S. at 731. Dominion's theory would mark a sea change in defamation law, and would permit an intrusive inquiry into the state of mind of every single editor, producer, and executive up the chain from the challenged article, editorial, or newscast in every case. It would require analyzing the state of mind of the editor-in-chief of every major newspaper any time a paper gets sued for an article that the editor-in-chief could have killed. That is not the law.

2. The threshold question, then, is whether Dominion can prove that any of these executives *actually* exercised direct control over any of the statements Dominion challenges. It cannot.

At the outset, Dominion tries to ascribe "responsibility" to various executives on the theory that they "participat[ed] in the editorial process" through twice-daily editorial meetings. Dom.MSJ.101-02. But what matters is whether they actually exercised direct control over the statements Dominion challenges through their participation in such meetings. And Dominion has adduced no evidence that they did. To the contrary, those who participated in those meetings uniformly testified that they did not even discuss the President's allegations against Dominion, or

booking Powell and Giuliani, in any of these meetings. *E.g.*, Dom.MSJ.Ex.143, Scott Dep. Tr. 329:3-20 ("I don't remember that – Dominion specifically ever coming up at an editorial meeting."); Dom.MSJ.Ex.127, Lowell 30(b)(6) Dep. Tr. 218:11-221:5 (does not recall any conversations about booking Powell as a guest in executive meetings or anything of substance about Giuliani); Dom.MSJ.Ex.126, Komissaroff Dep. Tr. 30:1-34:10 (similar); Dom.MSJ.Ex.106, Clark Dep. Tr. 84:5-85:5 (similar).

That is unsurprising; these are simply "brief," 15-minute meetings to discuss events that "popped up that day" and "what's ahead for the next day," and they focus primarily on the news side of the business—*i.e.*, not on the challenged programs. Dom.MSJ.Ex.127, Lowell Dep. Tr. 201:24-203:7. There "isn't extensive discussion," as there is no time to address coverage "at a granular level." *Id.* And as of late 2020, there were "hundreds of stories around the election," with Dominion making up only "one small piece" of them. Dom.MSJ.Ex.143, Scott Dep. Tr. 329:3-20. Evidence that executives attended meetings where Fox News' coverage of the President's allegations against Dominion was not even discussed—much less directed—does not come close to proving that every executive who ever attended such a meeting exercised direct control over any (let alone all) of the content Dominion challenges.

To the contrary, there is overwhelming record evidence that the seven high-level executives Dominion tries to deem "responsible" for various statements did *not* exercise any control over any of those statements.

Meade Cooper. Cooper, the Executive Vice President of Primetime Programming who oversaw *Justice with Judge Jeanine*, *Hannity*, and *Tucker Carlson Tonight*, explained generally that it "wasn't common practice for [her] to be that involved in show production." Dom.MSJ.Ex.108, Cooper Dep. Tr. 35:8-10. She left the "nuts and bolts" of coverage to others and, for instance, "wasn't in the habit of editing scripts directly" because of "[t]he volume of what [she] had oversight of." *Id.* at 27:2-7, 33:23-34:10, 111:3-112:3. So although she had the ability to exercise authority, including through editing scripts, she did not have the "ability to do that on a regular basis" and it was "very rare[]" that a script would be run by her. *Id.* at 79:2-4

Consistent with that testimony, Dominion has produced no evidence that Cooper affirmatively directed or participated in the publication of any specific statement that it challenges. Despite the voluminous discovery in this case, the best Dominion can muster is an email approving a request to host Giuliani on *Watters' World*—a show that Dominion does not even challenge. Dom.MSJ.104 (citing Dom.MSJ.Ex.376, Cooper Email (Nov. 16, 2020)). Dominion also points to an email where a producer for *Hannity* let Cooper and Ron Mitchell know as an FYI that "Sean wants to have

[Powell] on" his November 30 show "to discuss Flynn and possibly her claims of voter fraud." *Id.* (citing Dom.MSJ.Ex.487, Fazio Email (Nov. 30, 2020)). But far from showing that Cooper "affirmatively act[ed] to direct or participate" in the decision to host Powell—let alone played any role in any statement that Powell proceeded to make—the email shows that Hannity made the decision to interview Powell himself, and that Cooper "merely failed to hinder" that decision. Dom.MSJ.Ex.115, Fazio Dep. Tr. 197:6-9, 15 (Q. If Ms. Cooper had instructed you not to book Sidney Powell, you would not have booked Sidney Powell; right? A. It's not as easy as a yes or no answer."). That is not nearly enough to show that Cooper exercised control over the statements that Powell made on the November 30 broadcast. *See Ertel*, 674 A.2d at 1044. And while Cooper testified that she, like any good supervisor, considered herself ultimately "responsible for whatever happens" on the shows within her realm, Dominion omits that she stated three sentences later that she "didn't often get involved at … a granular level" and "wasn't in the habit of editing scripts," Dom.MSJ.Ex.108, Cooper Dep. Tr. 33:16-34:5, which is the only kind of responsibility that matters when it comes to the actual malice inquiry.

David Clark. Dominion has likewise failed to present clear and convincing evidence that Clark, the Senior Vice President for Weekend News and Programming at Fox News, affirmatively directed or participated in the publication of any of the

statements it challenges. Dominion lists Clark as a "responsible employee" for the statements it challenges on the November 8 and 15 broadcasts of *Sunday Morning Futures*. But when asked whether Clark would have the authority to "tell you not to have a certain individual on air," Bartiromo testified "not really. I mean, he could make the case like he tried to make the case with Rudy Giuliani on November 7th, but he wouldn't necessarily be able to say, you know, a directive, you can't do it, to us, because it was our show." Dom.MSJ.Ex.98, Bartiromo Dep. Tr. 247:16-248:6. Indeed, even though Clark asked Bartiromo on November 7 to "reconsider the Rudy Giuliani booking" on November 8, Bartiromo interviewed him on air anyway, and interviewed him on November 15 as well. *Id.* at 243:2-244:14.[27] It therefore makes no sense to say that Clark is "responsible" for statements made on those shows.

Likewise, Clark testified that even though he technically supervised *Justice with Judge Jeanine*, it was Jerry Andrews—the show's Executive Producer—who "predominantly" oversaw that show. Dom.MSJ.Ex.106, Clark Dep. Tr. 106:2-4. Clark's role was "consult[ing]" and "discuss[ing]" coverage with the shows. *Id.* at 22:7-12, 25:19-27:6. As Clark put it when Dominion's lawyer kept pressing the

[27] Dominion tries to imply that Clark did in fact have authority to tell hosts not to invite certain guests by pointing out that "Clark told Bartiromo in December 2020 that she could no longer book Powell and Giuliani." Dom.MSJ.106. But Clark did not make that call; he was merely communicating a decision that was "handed down" to him. Dom.MSJ.Ex.106, Clark Dep. Tr. 28:22-29:2.

matter: "Let me once again restate for the record, I oversaw 24 hours of programming. I was neither the executive producer nor the one in charge of the editorial research and makeup of the show. Yes, it did report to me and I did supervise it, but I also was overseeing 23 other hours of programming." *Id*. at 213:13-22. The record thus forecloses Dominion's efforts to attribute the statements made on *Sunday Morning Futures* and *Justice with Judge Jeanine* to Clark.

Ron Mitchell. Mitchell, the VP of Primetime Programming and Analytics who worked with *Hannity* and *Tucker Carlson Tonight*, testified that he also let the shows make their own decisions. He "may suggest a guest here or there, but" he does not "tell shows not to book people." Ex.129, Mitchell Dep. Tr. 26:3-9; *see also id.* at 62:19-20 ("I never told shows not to book people or discourage them."); *id.* at 244:8-9 ("I never tell shows who to book or what to talk about."). It is little surprise, then, that despite the voluminous discovery in this case, Dominion has produced no evidence whatsoever that Mitchell affirmatively directed or participated in the publication of any of the statements it challenges. Dominion instead once again falls back on the argument that Mitchell "did nothing to stop" Hannity from bringing Powell onto his show or Carlson from bringing Lindell onto his. Dom.MSJ.109. But, again, it is black-letter defamation law that "merely fail[ing] to hinder" the publication of a statement is not enough to make an editor "responsible" for it. *Ertel*, 674 A.2d at 1043-44. And while Dominion notes that Mitchell received a text

message from Carlson's booker [redacted]

Dom.MSJ.146, that text message merely confirms that Carlson made the decision to host Lindell, not Mitchell. At most, Mitchell failed to hinder Carlson from inviting Lindell on air, which is not enough to make Mitchell responsible.

Lauren Petterson. Petterson, the President of Fox Business, explained that she "empower[s] [her] people to make their own decisions around their own teams and around their own editorial content." Dom.MSJ.Ex.133, Petterson Dep. Tr. 240:18-21. She does not generally get involved in whether to book a guest, and instead leaves that decision to the individuals working directly on the show. *Id.* at 243:20-244:5; 285:25-286:6. As she recounted, getting "involved in those decisions" "get[s] into the weeds," and she tries "not to micromanage." *Id.* 239:2-8.

Consistent with that testimony, Dominion has produced no evidence that Petterson played any affirmative role in directing or publishing the statements that Dominion challenges on *Sunday Morning Futures*, *Lou Dobbs Tonight*, or *Fox & Friends*—the shows for which Dominion lists Petterson as a "responsible employee." Indeed, Dobbs confirmed that Petterson did not play any affirmative role in directing or participating in the publication of the challenged statements on any of his shows, explaining that he did not receive "any instructions or guidance, directly or indirectly, from Fox executives about the topic of election fraud relating

to the 2020 election," and that he did not recall having "any discussions with executives from Fox or communications with executives from Fox about Ms. Powell's appearances" on his show. Dom.MSJ.Ex.111, Dobbs Dep. Tr. 99:16-100:3.

Likewise, Petterson testified repeatedly that she does not oversee the content on *Sunday Morning Futures*. Dom.MSJ.Ex.133, Petterson Dep. Tr. 114:8-18 ("I don't supervise that show. I don't have editorial control over that show. I have no idea what was on that show."); *see also id.* at 162:15-20 ("I didn't even know Sidney was on [the November 15] show."); *id.* at 247:8-15 ("I don't supervise [Sunday Morning Futures] and ultimately have no say over whether that guest gets booked or not.").[28] David Clark, the Senior Vice President responsible for *Sunday Morning Futures*, confirmed as much, testifying that Petterson "would not have been involved in any editorial content of Sunday Morning Futures Maria Bartiromo." Dom.MSJ.Ex.106, Clark Dep. Tr. 38:5-16.

Dominion emphasizes that Petterson eventually decided to direct shows "to stop booking Powell on FBN" in mid-December, suggesting that she could (and, in Dominion's view, should) have made that decision earlier. But, again, "merely

[28] Petterson supervises *Mornings with Maria*, but Dominion does not challenge any coverage on *Mornings with Maria*.

fail[ing] to hinder" publication is not the same thing as "affirmatively act[ing] to direct or participate" in it. *Ertel*, 674 A.2d at 1043-44.

Gary Schreier. Schreier, the Senior Vice President of Programming for Fox Business, supervised *Lou Dobbs Tonight*. Here, too, Dominion does not point to any evidence that Schreier affirmatively directed or participated in the publication of any specific statement that it challenges. Dobbs testified that he could recall only one instance in which Schreier gave "instructions or guidance, either directly or indirectly … about topics that should or should not be discussed on [his] show," and that had nothing to do with his coverage of the 2020 election or the President's allegations about Dominion. Dom.MSJ.Ex.111, Dobbs Dep. Tr. 98:1-17. Similarly, he testified more generally that he never received any instructions from any Fox News (or Corporation) executives about what to post on social media or which guests to book, and that he did not recall receiving any direction from management about Powell or Giuliani. *Id.* at 93:25-95:21.

Dominion also lists Schreier as a "responsible individual" for *Sunday Morning Futures*, but Schrier repeatedly testified that he did not oversee the content of that show, which airs on Fox News, not Fox Business. Dom.MSJ.Ex.142, Schreier Dep. Tr. 134:25-135:7 (Q: But Ms. Bartiromo never mentions those statements from election officials or CISA during her Sunday Morning Futures episode, did she? A: "I don't know if she did. I don't oversee that show."); *see id.* 183:23-24 ("I didn't

oversee Maria's show nor did her EP report to me."); *id.* 197:7-20 (same); *id.* 254:5-6 (same). At most, Dominion points to evidence that maybe Schreier could have prevented certain episodes of *Sunday Morning Futures* from re-airing on Fox Business but failed to do so. Dom.MSJ.111. Schreier testified that management at Fox Business "ha[s] the ability to not run the show," and that "a decision to not run a Fox News show as a rebroadcast on Fox Business" would "happen from time to time because a show would be dated by the time it aired on Fox Business." Dom.MSJ.Ex.142, Schreier Dep. Tr. 130:16-131:19. But he also testified that preventing a rebroadcast was not the normal course, and that he could not recall "doing it for editorial reasons other than that information in the show was no longer relevant because circumstances had changed which would date the show." *Id*. Far from proving with clear and convincing evidence that Schreier "affirmatively act[ed] to direct or participate" in the rebroadcast of *Sunday Morning Futures* on Fox Business, Dominion's evidence shows that Schreier "merely failed to hinder" the publication of the statements it challenges, which is not enough to make Schreier "responsible" in the relevant sense for anything on *Sunday Morning Futures*. *Ertel*, 674 A.2d at 1044.

Suzanne Scott. Dominion has failed to muster any evidence that Suzanne Scott, Fox News' CEO, is responsible for any of the statements that it challenges. Scott repeatedly testified at her deposition that, "at the end of the day, the editorial

leadership of any show and any—and the talent of that show and the editorial leadership is responsible for what's in any show." Dom.MSJ.Ex.143, Scott Dep. Tr. 83:16-21. So even though she is "the boss," she entrusts others to "handle the business" and does not "decide what's in the shows or on the network." *Id.* at 13:3-11, 15:2-5; *see also id.* at 18:23-19:8 ("I am not involved in the day-to-day management or assigning guests or bookings for any show.").

Fox News hosts, executives, and producers uniformly testified that Scott was not involved in the details of the shows. Cooper testified that Scott "is not involved in the nitty gritty of the shows." Dom.MSJ.Ex.108, Cooper Dep. Tr. 41:11-13. Clark testified that it was "extremely rare[]" for him to consult with Scott or Jay Wallace about the content of the shows under his supervision. Dom.MSJ.Ex.106, Clark 22:18-24, 23:8-14. Schreier testified he could not recall any conversations with Scott about Fox News' coverage of election fraud claims. Dom.MSJ.Ex.142, Schreier Dep. Tr. 77:1-14. When asked whether Scott "would have given" him direction about programming on his show, Dobbs testified "I can't imagine that." Dom.MSJ.Ex.108, Dobbs Dep. Tr. 96:1-21; *id.* 333:16-18 ("Q. How did you communicate about your show with Suzanne Scott? A. I didn't."). And when asked to whom she would listen if she were given a directive about hosting or not hosting a guest, Bartiromo listed "Suzanne Scott," but noted that she "never said anything like that." Dom.MSJ.Ex.98, Bartiromo Dep. Tr. 259:23-260:7. When asked

whether *Tucker Carlson Tonight* would have hosted Mike Lindell on January 26 had Scott instructed him not to, Justin Wells testified that "Suzanne Scott would never issue an edict like that. She's not involved in the editorial to that degree. She trusts her shows to make their independent assessment of a story and put that on the television, put that on the air." Dom.MSJ.Ex.148, Wells Dep. Tr. 127:19-128:3.

Dominion has no evidence to the contrary. Dominion claims that Scott sometimes "provided input to Cooper on potential primetime guests," Dom.MSJ.113, but Dominion points to no evidence that Scott "provided input" on Powell, Giuliani, or Lindell. Dominion points to a text message from Wells to Carlson before the January 26 show stating "I told Suzanne we were doing it and she was supportive. She voiced how great the open was last night." Dom.MSJ.Ex.417, Wells Text Message (Jan. 26, 2021). But nothing in that message says what Scott was "supportive" of. Dominion claims that "Scott told Cooper not to censor" Pirro on her November 14 show, Dom.MSJ.113, but that is misleading in the extreme. In reality, Scott told Cooper to "review scripts," and when Cooper responded that Pirro "is very into not being 'censored,'" Scott replied, "[w]e don't want to censor her." Dom.Ex.415, Scott Text Message (Nov. 13, 2020). Cooper confirmed: "Of course not we are not telling her she should absolutely give her opinion and take on it just need to be clear what voter fraud allegations are verified and what are not." *Id.* The rest of Dominion's evidence boils down to claims that Scott could have stopped the

publication of the allegedly defamatory statements about Dominion but failed to do so. Again, that is not enough, otherwise courts would have to probe the subjective knowledge of the editors-in-chief of every newspaper in the country anytime a newspaper is sued for defamation.

Jay Wallace. Dominion likewise has no evidence that Jay Wallace, the President and Executive Editor for Fox News and Fox Business, is responsible for any of the statements that it challenges. Wallace explained that his approach was very similar to Scott's. As a general matter, he lets others "deal with stories on [a] day-to-day level." Dom.MSJ.Ex.147, Wallace Dep. Tr. 38:22-23. Because there are "21 hours of programming on Fox News Channel and many hours on Fox Business" and because "shows have bookers and producers," he is "not in the nitty gritty of each and every show." *Id.* at 36:18-24. Moreover, while he oversees all "shows in general," his main oversight responsibility is the "news divisions." *Id.* at 20:1-15. "[T]here is a separation … between the opinion shows and some of [FNN's] straight news shows," which coincides with a management structure that places "many people between [Wallace] and the opinion shows." *Id.* at 20:1-15. Dominion has pointed to no evidence to the contrary, other than a statement from Clark that he would "take instructions from Wallace on booking guests." Yet again, that boils down to an argument that Wallace could have stopped the publication of an allegedly defamatory statement, which is insufficient.

* * *

At bottom, Dominion's position with respect to the executives boils down to the proposition that anyone who has the power to *override* a decision to publish speech is in the same shoes for actual malice purposes as one who actually makes that decision. That is not how defamation law works. To be sure, the executives Dominion identified sometimes involved themselves in guest selection or other aspects of the shows that they supervised, as any executive of media company undoubtedly does. But for Dominion to demonstrate that it may prove actual malice by bringing it home to these executives, it must actually prove—not just assume—that each played some affirmative role directing or participating in the publication of each of the specific statements that Dominion wants to attribute to that individual. Dominion does not even try to meet that burden.

b. Dominion fails to identify clear and convincing evidence that any of the Fox News executives knew the challenged statements were false or harbored serious doubts about their truth.

In all events, Dominion's effort to prove that all of these executives knew that each challenged statement was false or harbored serious doubts about its truth when it was made once again come up short. Dominion ignores that many of the executives testified that they did not know whether the President's claims about Dominion were true or false in the immediate aftermath of the election. Cooper testified, for example, that "I don't want to say what I did and did not know because

I'm not sure. I knew that there were certain allegations being made by the President's legal team and I knew that there were disputes from Dominion. I'm not sure where I personally had fallen on it at that point." Dom.MSJ.Ex.108, Cooper Dep. Tr. 145:3-11; *see also id.* at 151:13-19. Clark similarly testified that "I was not aware that they were false theories at that time," Dom.MSJ.Ex.106, Clark Dep. Tr. 147:22-148:4, and that he "had no certainty in terms of factual evidence one way or the other, since this is all brand new in the wake of the election," *id.* at 203:19-204:13; *see also id.* at 264:9-10 (similar). Mitchell also testified that "I don't know—well, what was a conspiracy theory or what was a fact. Still to this day, I don't," and that he "didn't believe it one way or the other." Dom.MSJ.Ex.129, Mitchell Dep. Tr. 254:18-255:23.

Similarly, when asked whether, as of late November, "you know personally that the charges are untrue," Petterson responded that "I don't think we know that at this point. I think this case is still winding through the courts at this point in time, and I think we're trying to give it, you know, a moment to see how that plays out. . . . [I]n covering news for 25 years these things take some time to wind through the courts, sometimes months, even longer." Dom.MSJ.Ex.133, Petterson Dep. Tr. 176:11-24; *id.* at 181:4-182:11. Schreier testified that, as of November 13, "[t]here were still a lot of facts being gathered. There were, as I wrote, affidavits, sworn affidavits that were alleging fraud." Dom.MSJ.Ex.142, Schreier Dep. Tr. 117:10-118:8. Scott

noted that the fact that the President hired lawyers to go to court to present evidence "just expanded the credibility of [the] allegation." Dom.MSJ.Ex.143, Scott Dep. Tr. 388:23-389:12. And Wallace testified that "if there's still a claim out there that there's evidence coming and there's still some sort of, you know, court process underway, it is fair to keep asking and pushing while the process is underway." Dom.MSJ.Ex.148, Wallace Dep. Tr. 31:18-32:9.

With little to offer, Dominion spills considerable ink documenting text messages and emails sent in the immediate aftermath of the election that supposedly question the President's fraud claims. *See, e.g.*, Dom.MSJ.106-116 (documenting messages and emails from November 5 through November 7). And it points to Cooper and Clark's decision to cancel Pirro's November 7 show—the day the media called the election for Joe Biden. Dom.MSJ.104. But the evidence shows that decision was made to allot the Pirro show time to special election coverage. Dom.MSJ.Ex.108, Cooper Dep. Tr. 189:8-195:8. And what the executives thought about the President's claims of fraud generally in the immediate aftermath of the election says very little about what they thought of the President's specific claims about Dominion that came several days *later*—particularly when the President's lawyers were pressing those claims in lawsuits backed by sworn affidavits and promising to produce enough evidence to overturn the results of the election in court by mid-December.

Not only does Dominion focus on irrelevant evidence; it mischaracterizes even that. For example, Dominion points out that after Bartiromo's November 8 show, Schreier texted Petterson that Bartiromo "has gop conspiracy theorists in her ear." Dom.MSJ.110, 120. But it selectively omits the rest of the exchange, in which Schreier says that "*Maria did a good job with Rudy*." Dom.MSJ.Ex.398, Schreier Text Messages (Nov. 8, 2020). Petterson likewise states, "*She did well.*" *Id.* Far from demonstrating that Schreier or Petterson harbored doubts about Bartiromo's coverage, the exchange confirms that they thought it was responsible and fair. Dominion also points out that Clark told Wallace and Alan Komissaroff that he was "trying to stay away" from Giuliani on November 7. Dom.MSJ.107. But it fails to mention that, when asked about the President's allegations about Dominion in his deposition, Clark testified that he did not know whether they were true in early November. Dom.MSJ.Ex.106, Clark Dep. Tr. 264:4-12; 266:21-267:1. Dominion selectively excises a snippet of Clark's testimony and claims that he testified that, on November 6 (*i.e.*, before the allegations at issue here even surfaced), "he 'did not believe that the election was being stolen.'" Dom.MSJ.106. But Dominion omits that Clark also testified that "I didn't know whether it was or wasn't, to be honest." Dom.MSJ.Ex.106, Clark Dep. Tr. 155:12-18. Dominion highlights testimony that Clark thought "there was no credible evidence of massive cheating" as of November 7, and emphasized that Schreier noted on November 12 that Giuliani's claims about

servers in foreign countries had not yet been verified. Dom.MSJ.116. But that once again ignores the "critical difference between not knowing whether something is true and being highly aware that it is probably false." *Liberman*, 605 N.E.2d at 350.

4. The record demonstrates that Dominion's circumstantial evidence of actual malice is insufficient.

Lacking any direct evidence that the relevant individuals at Fox News—or even the broader set of individuals that Dominion wrongly tries to lump into the "responsible" category—harbored actual malice when each statement challenged statement was made, Dominion is left with circumstantial evidence. But none of that evidence is anywhere near sufficient either.

Denials. Dominion claims that, contrary to their actual testimony in this case, all the relevant individuals must have known that the President's claims were false because Dominion denied them and some government officials and other members of the media were skeptical of them. Dom.MSJ.92-94. Indeed, much of Dominion's evidence consists of its own "setting the record straight" emails, which Dominion claims it sent to virtually all of Fox News from November 12 through November 30. Dom.MSJ.92-94. Dominion also points to messages from Tony Fratto, a representative of the public relations firm that Dominion hired. Dom.MSJ.32-33, 114, 116, 123. But mere knowledge of self-serving denials does not prove that someone "*in fact* entertained serious doubts as to the truth" of a statement. *St.*

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

Unsurprisingly, the record confirms that, just as hosts and producers did not take the President at his word, they did not take Dominion at its word either. Carlson stated that Dominion's denials were "every bit as unsubstantiated as Sidney Powell's claim." Ex.E7, Carlson Dep. Tr. 73:6-74:8. Hannity "did not find" "comments in the public domain," including Dominion's denials, "credible." Ex.E8, Hannity Dep. Tr. 123:1-14, 291:15-21. Dobbs stated that the "categorical denial from Dominion" was "not in any way a conclusive response to the charges," and that "the resolution of those court cases would be the best indicator" of whether Dominion would be "exonerat[ed]." Ex.E5, Dobbs Dep Tr. 117:2-12, 130:22-131:5.

Bartiromo said that, while she "was keeping an eye on what [Dominion] w[as] saying" and "put the[ir] statement on the air," she "also recogniz[ed] that there were questions about the voting machines dating back years," including questions raised by various Democratic members of Congress and Democrat Stacey Abrams, who claimed that "voting machines caused her to lose an election." Ex.E4, Bartiromo Dep. Tr. 273:22-274:10. Pirro explained that the press could hardly serve its truth finding function if it could no longer report allegations simply because someone

"comes in and says it's not true." Ex.E6, Pirro Dep. Tr. 333:13-19, 334:16-22. As she explained, referencing her time as a sitting judge: "[T]hat's not the end of it. You've got to have a trial to find out if it's ... true or not true." *Id*. at 333:13-19. Grossberg pointed out that, just as the President's allegations were not necessarily true, Dominion's denials were not necessarily true either. Dom.MSJ.Ex.121, Grossberg Dep. Tr. 212:9-20 ("And just as you pointed out earlier, when you asked me if just because the President of the United States says it or writes it, is it true, and I said no … you are acting as though this is all facts, too, and I don't know that."). Similarly, Clark testified that Dominion's denials were "just a statement" that "did not" provide "direct proof other than their assertions … that the claims that were made are untrue." Dom.MSJ.Ex.106, Clark Dep. Tr. 255:3-10; 257:16-23; *see also* Ex.E15, Hegseth Dep. Tr. 72:2-91:21.

Evidence that cast doubt on the claims. Dominion claims that it not only denied the allegations, but also supplied information that affirmatively cast doubt on them. Dom.MSJ.92-95. But Dominion does not identify the kind of cut-and-dry information necessary to meet the high actual-malice bar. To be sure, when a publisher reviews "objectively verifiable" evidence affirmatively "contradicting" claims, that can provide the publisher with "obvious reasons to doubt" them. *Prozeralik v. Cap. Cities Commc'ns, Inc.*, 626 N.E.2d 34, 40-41 (N.Y. 1993); *see also Palin*, 588 F.Supp.3d at 402, 404 & n.28 (finding no jury issue on actual malice

because articles that allegedly debunked the allegedly defamatory statement did not "present[] any *definitive facts*" or "*conclusive evidence*" "that would have put Bennet on notice" that the statement was false (emphasis added)). But none of the things cited by Dominion in its denials provided an *objectively verifiable* reason to doubt the President's claims.

For instance, Dominion makes much of a November 12 statement from the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) declaring the 2020 election "the most secure in American history." Dom.MSJ.93. But contrary to Dominion's contentions, that statement did not debunk the President's allegations, as the agency supplied no verifiable *evidence* to support its claims. *See, e.g.*, *Tah*, 991 F.3d at 242. Indeed, it would be extremely surprising if it had, given that CISA issued the statement mere days after the President and his lawyers first pressed their claims about Dominion. That is presumably why other government agencies, including the U.S. Department of Justice, continued to investigate the President's claims long after November 12. Indeed, the U.S. Election Assistance Commission sent Dominion an email the very next day regarding its investigation into claims about Dominion. *See* Ex.H11, U.S. Election Assistance Comm'n Ltr. (Nov. 13, 2020).

It is also presumably why the individuals at Fox News responsible for the challenged publications did not take CISA's statement as conclusive. When asked

whether he considered "CISA ... to be an authoritative source of information about the November 2020 election," Dobbs responded: "Authoritative, absolutely. Conclusive, absolutely not." Ex.E5, Dobbs Dep. Tr. 133:14-19. He noted that he had "a number of reasons to be skeptical" of the CISA statement, which "turned out to be one of the silliest statements that could have been made." *Id.* at 136:1-17. Bartiromo testified that she did not know whether to believe the CISA statement, in part because "[w]e've seen many instances where government misled the American people, such as the Russia collusion story, such as Hunter Biden's laptop, such as the origins of COVID-19." Ex.E4, Bartiromo Dep. Tr. 183:19-184:6. Pirro likewise explained that the President's allegations were "clearly still up in the air" even by mid-December. Ex.E6, Pirro Dep. Tr. 388:14-19. Carlson stated that, in his view, he "knew as a logical matter that [the President's claims about Dominion] couldn't have been debunked because the only way to debunk it and the only way to prove it would be to have possession of the Dominion software." Ex.E7, Carlson Dep. Tr. 75:17-23.

Dominion also points to a November 16 statement by "specialists in election security" explaining that they "have never claimed that technical vulnerabilities have actually been exploited to alter the outcome of any U.S. election." Dom.MSJ.58; Ex.G12, Election Security Specialists Statement (Nov. 16, 2020). But the statement does not provide any affirmative evidence that debunks the allegations; at most, it

notes only a lack of evidence confirming them. Far from removing any doubt about the President's claims, moreover, the same statement notes that "there are security weaknesses in voting systems" and that there "is no realistic mechanism to fully secure vote casting and tabulation computer systems from cyber threats." *Id.* Just because technical vulnerabilities had not been exploited in the past does not mean that they could not be exploited in the future; indeed, the federal judge in the *Curling* case concluded that Dominion's machines will almost certainly be exploited at some point in the future. *See Curling*, 493 F.Supp.3d at 1342.

Dominion also invokes "fact check" articles written by other media outlets, such as the AP, BBC, and CNN. But as Schreier explained, "we are our own news organization, so the fact that AP does what they claim is a fact-check doesn't mean that Fox or anyone should or would take it lock, stock and barrel." Ex.E9, Schreier Dep. Tr. 165:23-166:11. Another producer added, "in the four years of the Trump administration, the larger media, including many of the sources [Dominion cites], had proven themselves to not be honest brokers when it comes to fully researching and investigating the information that might be affirmative to Donald Trump or his administration." Ex.E17, Lowell 30b6 Dep. Tr. 253:8-18. Consequently, "none of these reports would have had a significant impact on our view of events." *Id.*

Dominion also highlights Fox News' own internal "Brain Room" emails. *See, e.g.*, Dom.MSJ.33, 107, 136, 137, 158. [redacted]

[redacted] Dom.MSJ.107, 112, 135-37. But for the most part, those emails simply point to Dominion's own self-serving denials and to fact checks by other news organizations. *Id.* The emails are insufficient for the same reasons that those documents are insufficient. [redacted] Moreover, discovery has revealed that Fox News hosts often conducted their own research, including by reaching out to confidential sources to which the Brain Room did not have access. Pirro, for example, explained that the "brain room didn't have time, clearly, to do all of the work that needed to be done." Ex.E6, Pirro Dep. Tr. 352:17-23. She was also skeptical of their conclusions because she had evidence that, in her view, refuted them. *Id.* ("I had affidavits that were legal sworn statements under penalty of perjury supporting the allegations."); *see also* Ex.I3, Andrews Email (Nov. 14, 2020) ("Jeanine says she has affidavits to back up her claims provided to her by [redacted]").

Dominion points to state audits of the vote count, which it says "confirm[] … that Dominion did not rig the election." Dom.MSJ.51, 92-96. But even assuming that the individuals at Fox News responsible for the publications knew about the audits at the time, those self-serving audits did not debunk the

President's claims in any "objectively verifiable" way. After all, one of the key aspects of the President's theory was that Dominion's machines had been programmed to commit fraud in ways that avoid detection from state election officials. Moreover, a February 2020 paper noted that "paper ballots provide no assurance unless they accurately record the votes as expressed by the voters," and that some machines "might not record expressed votes accurately" if the "software has bugs, was misconfigured, or was hacked." Ex.G11, Andrew Appel, et al., Ballot-Marking Devices Cannot Ensure the Will of the Voters, Election L.J. 1, 10 (Feb. 2020); *see also* Ex.I5, Pfeiffer Email (Nov. 16, 2020) (explaining that the paper audit is a record of what the *machine* did, not what the *voter* did). A state audit that fails to show fraud thus tells nothing about the President's claims.

Casting the net even further, Dominion points to text messages and emails from politicians, personal friends, and other Fox News employees that supposedly cast doubt on the President's claims. *See, e.g.*, Dom.MSJ.115 (Bret Baier); 120 (Kevin McCarthy); 123 (Arthur Schwarz); 143 (Tommy Firth). But nothing in those text and emails provides any *verifiable evidence* disproving the claims. Dominion also points to the December 1 statement of the Attorney General stating that "*so far*, we haven't seen anything to substantiate" the President's claims about voting machine fraud. Dom.MSJ.58. But the absence of evidence proving a claim is plainly not the same thing as affirmative and objectively verifiable evidence debunking it. As Pirro

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

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

resolution of the court cases at that junction, which was what? Two, three weeks out from the election?" *Id.* at 69:22-70:5.

Other hosts expressed similar sentiments. *See, e.g.*, Ex.E4, Bartiromo Dep. Tr. 199:13-21 ("I understood that coming up with evidence and reporting it takes time."); Ex.E6, Pirro Dep. Tr. 92:22-93:13 ("So it was fast moving, a lot of information was coming in, people were making allegations, people were asked to come on my show to respond to my questions about what evidence they had behind their allegations, how they were going to prove their allegations."); Ex.E7, Carlson Dep. 51:4-7 ("[I]t's clear in retrospect, but at the time, you know, you're right in the middle of this, and it's hard to see the outlines of it, you know."); Ex.E8, Hannity Dep. 194:4-7 ("[Y]ou are only a few days out of what was a contentious election season, and information is flying around at a furious pace at that point."). And when it finally became clear that the President's legal team could not come up with the goods to contest the election before the mid-December certification deadline, Fox News hosts stopped hosting Giuliani and Powell on their shows. As Petterson explained: "[W]hen they could not turn over the evidence, we gave them enough time, we gave them about 30 days to present it. It seemed like a reasonable amount of time. And when they could not present it, at that point they were no longer invited on the air." Dom.MSJ.Ex.133, Petterson Dep. Tr. at 239:23-240:4.

Moreover, Dominion ignores that Fox News hosts *reported Dominion's denials and the contrary views of government officials, security experts, and members of the media to their viewers*. *Supra* 27-34. As multiple courts have held, "publication of the grounds for doubting [the claim] tends to rebut a claim of malice, not to establish one." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1304 (D.C. Cir. 1996); *see, e.g.*, *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016). That makes sense, as reporting both allegations and denials and third-party assessments of both tends to show that the press was trying to get to the truth, not trying to "avoid learning or portraying" it. *Cabello-Rodón v. Dow Jones & Co.*, 2017 WL 3531551, at *10 (S.D.N.Y. Aug. 16, 2017).

Failure to investigate. Dominion contends that the relevant hosts and producers failed to review other evidence in the public domain. For example, it faults Bartiromo and Grossberg for failing to fact "check" the initial email that Powell sent to Bartiromo on November 7 and failing to look into Dominion's ownership. Dom.MSJ.119, 121. More generally, Dominion contends that the responsible hosts, producers, and executives at Fox News failed to review "the public record" that "made abundantly clear that Dominion did not steal the election." Dom.MSJ.92. But even assuming that any such evidence affirmatively debunked the President's allegations about Dominion at the time, that runs straight into the bedrock rule that, failure to investigate, without more, is insufficient to meet the high bar of

establishing actual malice. Indeed, even the failure to review one's own files is not enough. *Sullivan*, 376 U.S. at 287-88. Failing to submit information to Fox News' Brain Room is insufficient *a fortiori*.

To be sure, "the purposeful avoidance of the truth is in a different category" from the "failure to investigate." *Harte-Hanks*, 491 U.S. at 692. But the record affirmatively refutes any suggestion that those who were responsible for the publications at Fox News did not want to know the truth. For instance, Dobbs directed his producers to conduct their own research into the claims. *See, e.g.*, Ex.I6, Field Email (Nov. 11, 2020); Ex.I7, Fawcett Email (Nov. 11, 2020); Ex.I8, Field Email (Dec. 1, 2020); Ex.I12, Hooper Email (Nov. 12, 2020). Dobbs also reached out to both Dominion and Smartmatic for comment and invited Dominion on air multiple times. *See, e.g.*, Ex.I9, Hathaway Email (Nov. 23, 2020); Ex.I10, Field Email (Nov. 11, 2020); Ex.I11, Stimson Email (Nov. 17, 2020). Pirro conducted her own research, unearthing allegations about Dominion made by Senators Warren and Klobuchar. Ex.E6, Pirro Dep. Tr. 295:21-296:10. She also talked [redacted], who provided her with affidavits filed in the pending lawsuits. *Id.* at 324:11-20. Bartiromo likewise reached out to sources and conducted research into the President's claims. *See, e.g.*, Ex.I13, Grossberg Email (Nov. 20, 2020); Ex.I14, Bartiromo Email (Nov. 14, 2020). As did Carlson and Hannity. *See, e.g.* Ex.I15, FoxNews Email (Nov. 16, 2020); Ex.E8, Hannity Dep. Tr. 35:11-16, 43:16-

20; 61:25-62:2; 93:25-94:11. Moreover, Fox News hosts called for an investigation into the allegations made by the President and his lawyers on-air and pressed them for evidence. All of that reflects an entirely permissible desire to learn the truth, not avoid it. *See, e.g.*, *McFarlane*, 91 F.3d at 1509.

Inherently implausible. Dominion is thus left contending that the allegations were so inherently implausible that those responsible for the challenged publications must have harbored serious doubts about them. Dom.MSJ.148-53. Even putting aside that this inherent-implausibility claim cannot be squared with Dominion's claim that these same allegations were sufficiently plausible to cause Dominion more than a billion dollars in damages, as the Fox News hosts repeatedly explained, that contention ignores that the claims were being pressed *by the sitting President* and his legal team. Whatever one may think of Rudy Giuliani and Sidney Powell today, there is no serious argument that they were "obviously unreliable sources" in November 2020. They were the President's lawyers, and Dobbs, Bartiromo, Pirro, Hannity, and Carlson all testified that they respected and trusted them. *See supra* 86-103. Moreover, the President's legal team backed up their allegations in federal lawsuits under penalty of Rule 11 sanctions and their state law equivalents. And they submitted affidavits from numerous individuals swearing by them. *Id*.

Moreover, the notion that voting machines could be hacked is hardly implausible; in fact, computer scientists, election security experts, members of the

media, and politicians of both political parties had been making the same claims about electronic voting machines generally and Dominion specifically for many years. *See supra* 8-17. Dominion's argument also ignores that the U.S. Department of Justice and the U.S. Department of Homeland Security took the allegations seriously enough to investigate them. As other courts have concluded, the fact that the government takes allegations seriously enough to investigate them precludes a finding that the claims are inherently implausible. In *McFarlane*, for example, the D.C. Circuit held that allegations that the Reagan campaign conspired with Iranian agents to delay the release of hostages until after the election to tip the scales for then-candidate Reagan were not inherently implausible when Congress investigated them and where the source of the allegations swore by them under penalty of perjury. 91 F.3d at 1513-14.

Other circumstantial evidence. Dominion's remaining circumstantial evidence gets it nowhere. Dominion claims that Fox News had a motive to fabricate claims of election fraud because it wanted to bolster flagging ratings and hold off upstart competitors like Newsmax. Dom.MSJ.153-57. Setting aside the problem that this theory is utterly refuted by the fact that several Fox News hosts openly questioned the President's claims on-air, it is black-letter law that mere allegations "that the defendant published the defamatory material in order to increase its profits" cannot "suffice to prove actual malice," *Harte-Hanks*, 491 U.S. at 667.

In all events, discovery has squarely undermined Dominion's theory. Fox News hosts did not invite Giuliani and Powell on their shows because they wanted to boost ratings despite knowing the allegations were false. They invited them to air their allegations because they thought the President's allegations were the most newsworthy story of the day. *See* FNN.MSJ.156-57.

The record also undermines the conclusion that Fox News had a financial motive to lie. After all, a post-election decline in ratings and viewership was hardly alarming news; such declines are commonplace after any election, and they routinely prove temporary. Dom.MSJ.Ex.113, Dorrego 30(b)(6) Dep. Tr. 258:23-259:5, 287:18-289:1, 297:8-298:11, 346:5-12; Dom.MSJ.Ex.102 Briganti Dep. Tr. 79:21-80:3, 130:6-7; Dom.MSJ.Ex.108 Cooper Dep. Tr. 171:8-13. Moreover, discovery has confirmed that ratings did not drive revenues. [redacted] Fox Corporation's Chief Legal and Policy Officer Viet Dinh likewise explained, "I don't think we were very concerned" about the drop in ratings "because viewership does not define Fox News' revenue. [redacted]

[redacted]

Accordingly, as Fox Corporation's CEO Lachlan Murdoch testified, commercial interests do not dictate what is published and broadcast on Fox News. Dom.MSJ.Ex.130, L. Murdoch Dep. Tr. 31:4-31:25. And while Dominion emphasizes that Lindell's MyPillow was Fox News' top advertising spender, Dom.MSJ.157, Fox News' Chief Financial Officer testified that MyPillow consisted of less than 5% of Fox News' revenue base, and that it would not make sense to protect that 5% if it meant putting the other 95% at risk. Fox.Corp.Opp.Ex.51, Dorrego Dep. Tr. 20:6-21:3. In fact, Gary Schreier testified that, to the extent ratings affected revenues at all, it would have been better for Bartiromo *not* to cover the President's allegations and to focus on her core business coverage rather than "divisive political things." Dom.MSJ.Ex.142, Schreier Dep. Tr. 83:18-84:7.

Dominion also contends that Fox News' coverage departs from journalistic standards. Dom.MSJ.158-59. That is wrong, *see* Ex.F6, Sanders Report at 8-23 (Nov. 28, 2022), but also irrelevant, as even "an extreme departure from professional standards" does not satisfy the demanding actual-malice standard. *Harte-Hanks*, 491 U.S. at 665. Dominion contends that Fox News' failure to retract demonstrates actual malice. Dom.MSJ.161. But actual malice cannot be inferred from a publisher's failure to retract. *See Sullivan*, 376 U.S. at 286. Nor can actual malice

be inferred from a publisher's decision to republish in the ordinary course. *Contra* Dom.MSJ.161. That makes sense. The actual malice inquiry focuses on the publisher's state of mind at the time of the publication. A publisher's decision to retract (or not) or to rebroadcast (or not) after the publication decision has little bearing on that question—especially when, as here, the publisher steadfastly maintains that it never made any defamatory statements in the first place.

CONCLUSION

For these reasons, the Court should deny Dominion's motion for summary judgment.

OF COUNSEL:

Dan K. Webb
Matthew R. Carter
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600

Paul D. Clement
Erin E. Murphy
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

/s/ Blake Rohrbacher
Blake Rohrbacher (#4750)
Katharine L. Mowery (#5629)
Angela Lam (#6431)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Defendant Fox News Network, LLC

Scott A. Keller
LEHOTSKY KELLER LLP
200 Massachusetts Avenue NW
Washington, D.C. 20001
(512) 693-8350

Eric M. George
Katherine A. Petti
ELLIS GEORGE CIPOLLONE
O'BRIEN ANNAGUEY LLP
2121 Avenue of the Stars, 30th Floor
Los Angeles, CA 90067
(310) 274-7100

Dated: February 8, 2023

CERTIFICATE OF SERVICE

I, Katherine L. Mowery, hereby certify that on February 27, 2023, I caused a copy of the ***Public Version of Defendant Fox News Network, LLC's Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment*** to be filed and served via File & Serve*Xpress* upon the following counsel of record:

Brian E. Farnan
Michael J. Farnan
Farnan LLP
919 N. Market St., 12th Floor
Wilmington, DE 19801
(302) 777-0300

/s/ Katharine L. Mowery
Katharine L. Mowery (#5629)