

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Plaintiffs,

v.

FOX NEWS NETWORK, LLC,

Defendant.

Case No. N21C-03-257 EMD

CONSOLIDATED

PUBLIC VERSION FILED ON
FEBRUARY 16, 2023

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

Plaintiffs,

v.

FOX CORPORATION and FOX
BROADCASTING COMPANY, LLC,

Defendants.

Case No. N21C-11-082-EMD

**DOMINION'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT ON LIABILITY OF FOX NEWS NETWORK, LLC AND FOX
CORPORATION**

Dated: January 17, 2022

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

mfarnan@farnanlaw.com

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

Of Counsel:

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

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

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

mhatch-miller@susmangodfrey.com
zsavage@susmangodfrey.com
cdieckmann@susmangodfrey.com

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

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

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
INTRODUCTION	1
FACTUAL BACKGROUND.....	14
A. Dominion Voting Systems	15
B. Prior to Election Day: Setting Up the False Narrative of Fraud.....	16
C. Fox’s Election Day Coverage and Backlash.....	18
D. Election Fraud Conspiracy Theories Abound—and Soon Target Dominion.	20
E. Fox Calls the Election for Biden—and Mainstreams the False Narrative that Dominion Rigged the Election.....	23
F. Fox Continues to Woo Back Viewers and Goes on “War Footing” with Newsmax.....	26
G. “This Dominion shit is going to give me a fucking aneurysm.”	29
H. The Pressure on Fox Grows—Even As Dominion Puts Fox on Notice.	32
I. Fox Participated in the Narrative.	39
LEGAL STANDARD.....	44
ARGUMENT	46
I. The Defamatory Statements Fox Published About Dominion Are False.....	46
A. Undisputed Evidence Proves the Falsity of Fox’s Statements.	49

1.	Dominion Did Not Commit Election Fraud by Rigging the 2020 Presidential Election.	50
2.	Dominion’s Software and Algorithms Did Not Manipulate Vote Counts in the 2020 Presidential Election.	63
3.	Dominion Is Not Owned by a Company Founded in Venezuela to Rig Elections for the Dictator Hugo Chavez.....	73
4.	Dominion Did Not Pay Kickbacks to Government Officials Who Used Its Machines in the 2020 Presidential Election.	76
B.	Fox’s Accused Statements Are Actionable Allegations of Fact.	78
II.	The Accused Fox Statements Are “Of and Concerning” Dominion.....	82
III.	Fox Published the Defamatory Statements.....	82
IV.	The Statements Are Defamatory <i>Per Se</i>	85
V.	Fox Acted with Actual Malice.....	87
A.	The Public Record and Dominion’s Communications Demonstrate Fox’s Knowledge of or Reckless Disregard for the Truth.	92
B.	It Was Widely Known within Fox that the Allegations were False.....	96
C.	Executives Responsible for Fox Programming and Content Acted with Actual Malice.	101
1.	Fox Has Admitted that Its Executives Participated in the Editorial Process for the Accused Broadcasts During the Relevant Timeframe.	101

2.	Fox Has Admitted Editorial Discussion of the Accused Programs Occur at Fox’s Twice-Daily Meetings Among Senior Editorial Leadership.	102
3.	Specific Evidence Confirms These Fox Executives Acted With Actual Malice.	104
D.	Hosts, Producers, and Executives with Specific Responsibility for Each Broadcast Knew the Statements were False or Recklessly Disregarded the Truth.	117
1.	<i>Sunday Morning Futures</i> with Maria Bartiromo.	117
2.	<i>Lou Dobbs Tonight</i>	123
3.	<i>Justice with Judge Jeanine</i>	135
4.	<i>Fox & Friends</i>	139
5.	<i>Hannity</i> ’s November 30 Broadcast.	141
6.	<i>Tucker Carlson Tonight</i> ’s January 26 Broadcast.	144
E.	Additional Evidence Indicates that Fox’s Executives Acted with Actual Malice.	148
1.	Inherent Improbability/Reliance on Obviously Unreliable Sources.	148
2.	Financial Motive to Lie.	153
3.	Departure from Journalistic Standards.	158
4.	Preconceived Narrative.	159
5.	Rebroadcast and Refusal to Retract.	161
VI.	Affirmative Defenses: Dominion Is Entitled to Summary Judgment on Fox’s “Neutral Reportage” or “Newsworthiness” Defense and its Fair Report Defense.	161
A.	The Neutral Reportage Privilege Does Not Apply As A Matter of Law	163

1.	The Neutral Reportage Privilege Is Foreclosed by New York Law.	163
2.	Federal Constitutional Law Does Not Recognize A “Neutral Reportage” Privilege.	165
3.	Fox’s Case for Neutral Reportage Has Only Gotten Weaker Since the Court’s Motion to Dismiss Ruling.	167
B.	Even if the <i>Edwards</i> Doctrine Did Apply, Fox Cannot Meet Its Requirements.....	169
C.	The Narrow and Well-Defined “Fair Report” Privilege Likewise Does Not Apply	172
1.	The Court Already Correctly Held That the Fair Report Privilege Applies Only to Substantially Accurate Reports of Pending Proceedings.	172
2.	None of the Defamatory Statements Is a Substantially Accurate Report of Pending Proceedings.	174
CONCLUSION.....		176

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bose Corp. v. Consumers Union</i> , 692 F.2d 189 (1st Cir. 1982).....	88
<i>Brian v. Richardson</i> , 660 N.E.2d 1126 (N.Y. 1995).....	79
<i>Celle v. Filipino Rep. Enterprises Inc.</i> , 209 F.3d 163 (2d Cir. 2000)	85, 88, 89
<i>Cholowsky v. Civiletti</i> , 69 A.D.3d 110 (N.Y. 2d Dep’t 2009)	172, 173
<i>Cholowsky v. Civiletti</i> , 69 AD3d 110 (2d Dept 2009)	11
<i>Cianci v. New Times Pub. Co.</i> , 639 F.2d 54 (2d Cir. 1980)	7, 50
<i>Corporate Training Unlimited, Inc. v. National Broadcasting Co.</i> , 868 F.Supp. 501 (E.D.N.Y. 1994)	173
<i>Crane v. New York World Telegram Corp.</i> , 308 N.Y. 470 (N.Y. 1955)	70, 71
<i>Davis v. Boenheim</i> , 22 N.E.3d 999 (N.Y. 2014).....	79
<i>DiBella v. Hopkins</i> , 403 F.3d 102 (2d Cir. 2005)	45
<i>Dickey v. CBS Inc.</i> , 583 F.2d 1221 (3d Cir. 1978)	167
<i>Edwards v. Nat’l Audubon Soc., Inc.</i> , 556 F.2d 113 (2d Cir. 1977)	<i>passim</i>
<i>Elias v. Rolling Stone LLC</i> , 872 F.3d 97 (2d Cir. 2017)	82

<i>Eramo v. Rolling Stone, LLC</i> , 209 F. Supp. 3d 862 (W.D. Va. 2016).....	89
<i>Fine v. ESPN, Inc.</i> , 11 F. Supp. 3d 209 (N.D.N.Y. 2014).....	11, 173
<i>Franklin v. Daily Holdings, Inc.</i> , 135 A.D.3d 87 (N.Y. 1st Dep’t 2015)	49
<i>Gatz v. Otis Ford, Inc.</i> , 262 AD2d 280 (1st Dept 1999)	85, 86
<i>Geraci v. Probst</i> , 15 N.Y.3d 336 (2010)	83, 86
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	<i>passim</i>
<i>Gilmore v. Jones</i> , 2021 WL 68684 (W.D. Va. Jan. 8, 2021).....	88
<i>Greenberg v. Spitzer</i> , 155 A.D.3d 27 (2d Dep’t 2017).....	162, 174
<i>Harris v. City of Seattle</i> , 152 F. App’x 565 (9th Cir. 2005) (unpublished).....	89
<i>Harte-Hanks Communications, Inc. v. Connaughton</i> , 491 U.S. 657 (1989).....	88, 89
<i>Harwood Pharmacal Co. v. Nat’l Broad. Co.</i> , 9 NY2d 460 (Ct. App. 1961)	86
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979).....	88
<i>Hogan v. Herald Co.</i> , 84 A.D.2d 470 (N.Y. 4th Dep’t 1982), <i>aff’d</i> , 444 N.E.2d 1002 (N.Y.)	164
<i>Horton v. Guillot</i> , 2016 WL 4444875 (N.D.N.Y. Aug. 23, 2016).....	82

<i>Karedes v. Ackerly Group, Inc.</i> , 423 F.3d 107 (2d Cir. 2005)	173
<i>Kasavana v. Vela</i> , 172 AD3d 1042 (2d Dept 2019)	10, 82, 85
<i>Khalil v. Fox Corp.</i> , 2022 WL 4467622 (S.D.N.Y. Sep. 26, 2022)	<i>passim</i>
<i>Merrill v. Crothall-Am., Inc.</i> , 606 A.2d 96 (Del. 1992)	44
<i>Merritt v. United Parcel Service</i> , 956 A.2d 1196 (Del. 2008)	74
<i>New York Times v. Sullivan</i> , 367 U.S. 254 (1964).....	<i>passim</i>
<i>Nolan v. State</i> , 158 AD3d 186 (1st Dept 2018)	87
<i>Norton v. Glenn</i> , 860 A.2d 48 (Pa. 2004)	167
<i>Nunes v. Lizza</i> , 12 F.4th 890 (8th Cir. 2021)	89
<i>Osorio v. Source Enterprises, Inc.</i> , 2006 WL 2548425 (S.D.N.Y. Sept. 5, 2006)	84
<i>Ostrowe v. Lee</i> , 175 N.E. 505 (N.Y. 1931).....	84
<i>Page v. Oath Inc.</i> , 270 A.3d 833 (Del. 2022)	90, 91, 168
<i>Palin v. New York Times Co.</i> , 940 F.3d 804 (2d Cir. 2019)	82, 87, 89
<i>Penn Warranty Corp. v. DiGiovanni</i> , 10 Misc.3d 998 (N.Y. Sup. Ct. 2005)	84

<i>Pisani v. Staten Island Univ. Hosp.</i> , 440 F.Supp.2d 168 (E.D.N.Y. 2006)	174, 176
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971) (Marshall, J., dissenting)	166, 167
<i>Ruder & Finn Inc. v. Seaboard Sur. Co.</i> , 52 NY2d 663 (Ct. App. 1981)	87
<i>Seymour v. New York State Elec. & Gas Corp.</i> , 627 NY2d 466 (3d Dept 1995)	82
<i>Smartmatic USA Corp. v. Fox Corp.</i> , No. 151136/2021, 2022 WL 685407 (N.Y. Sup. Ct. Mar. 08, 2022)	83, 87, 165
<i>Snowden v. Pearl River Broad. Corp.</i> , 251 So. 2d 405 (La. Ct. App. 1971)	83
<i>Solano v. Playgirl, Inc.</i> , 292 F.3d 1078 (9th Cir. 2002)	4, 88, 90, 91
<i>Speer v. Ottaway Newspapers, Inc.</i> , 828 F.2d 475 (8th Cir. 1987)	91
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968)	88, 89
<i>Stern v. Cosby</i> , 645 F. Supp. 2d 258 (S.D.N.Y. 2009)	89
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976)	166, 167
<i>Torati v. Hodak</i> , 47 N.Y.S.3d 288 (1st Dep’t 2017)	84
<i>US Dominion, Inc. v. Newsmax Media, Inc.</i> , 2022 WL 2208580 (Del. Super. Ct. June 16, 2022)	63, 71, 162, 167

<i>Watson v. NY Doe 1</i> , 439 F. Supp. 3d 152 (S.D.N.Y. 2020)	50
<i>Weiner v. Doubleday & Co., Inc.</i> , 549 N.E.2d 453 (N.Y. 1989).....	164
<i>Zerangue v. TSP Newspapers, Inc.</i> , 814 F.2d 1066 (5th Cir. 1987)	89
<i>Zuckerbrot v. Lande</i> , 167 N.Y.S.3d 313 (N.Y. Sup. Ct. 2022).....	50, 88, 89
Statutes	
Ariz. Rev. Stat. §16-449	56
Ga. Code §21-2-374(b)	56
Ga. Code §21-2-379.6(c)	56
Mich. Comp. Laws §168.37	56
Mich. Comp. Laws §168.794.....	56
Mich. Comp. Laws §168.795.....	56
N.Y. Civil Rights Law §74	172, 173
N. Y. Civil Rights Law § 75	164, 165
N.Y. Civil Rights Law §76-a.2	45
Pa. Stat. §3006	56
Pa. Stat. §3007	56
Pa. Stat. §3011	56
Pa. Stat. §3015	56
Pa. Stat. §3031.5	56
Pa. Stat. §3031.14	56

Pa. Stat. §3031.17	55
--------------------------	----

Rules

Civ. R. 36(b).....	74
--------------------	----

Civ. R. 56	45
------------------	----

Constitutional Provisions

First Amendment.....	<i>passim</i>
----------------------	---------------

Other Authorities

Restatement (Second) of Torts §580A cmt. (d).....	89
---	----

Restatement (Second) of Torts §581 cmt.	83
--	----

INTRODUCTION

“Sidney Powell is lying.” Tucker Carlson to his producer Alex Pfeiffer, November 16, 2020 (Ex.150)

CC [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

“Sidney Powell is a bit nuts. Sorry but she is.” Laura Ingraham to Tucker Carlson and Sean Hannity, November 15, 2020 (Ex.155 at FNN035_03890539)

“Really crazy stuff.” Rupert Murdoch, November 19, 2020 (Ex.156)

“Q: Do you believe as of November 6 that going on television to say that the election is being stolen would be a conspiracy theory? **A: I agree that that would not be based in fact at that point.**” Meade Cooper, Fox News Executive Vice President for Primetime Programming (Ex.108, Cooper 194:1-6)

“Q: [Y]ou believe, since at least the time that Fox News called the election on November 7th, that Joe Biden was legitimately elected the President of the United States, correct?....A: **Yes, I believe that.**” Suzanne Scott, Fox News CEO (Ex.143, Scott 365:10-19)

“71 million voters will never accept Biden. ***This process is to destroy his presidency before it even starts***; IF it even starts....***We either close on Trumps victory or del[e]gitimize Biden....THE PLAN.***” Steve Bannon to Maria Bartiromo, November 10, 2020 (Ex.157)

“It’s dangerously insane these conspiracy theories.” Fox reporter Lucas Tomlinson to Bret Baier, Fox’s Chief Political Correspondent, December 1, 2020 (Ex.367)

“[T]he whole theory is absolutely ludicrous to anyone who bothers researching elections for more than five minutes or speaking with any elections professional.” Stephen Richer, Republican, County Recorder in Maricopa County, Arizona (Ex.139, Richer 22:6-23:11)

[REDACTED]

“Incorrect” and ***“not evidence of widespread fraud.”*** Fox’s internal “fact checks” regarding the Dominion allegations, November 13 and November 20, 2020 (Ex.318; Ex.159)

[REDACTED]

“[T]hat whole narrative that Sidney was pushing. I did not believe it for one second.” Sean Hannity (Ex.122, Hannity 322:19-21)

“[N]o reasonable person would have thought that.” Fox Politics Editor Chris Stirewalt, on whether the allegation that Dominion rigged the election was true. (Ex.146, Stirewalt 154:18-19, 153:24-157:11)

Fox knew. From the top down, Fox knew “the dominion stuff” was “total bs.” Ex.162. Yet despite knowing the truth—or at minimum, recklessly disregarding that truth—Fox spread and endorsed these ***“outlandish voter fraud claims”*** about Dominion even as it internally recognized the lies as ***“crazy,” “absurd,”*** and ***“shockingly reckless.”*** Ex.163; Ex.165; Ex.166.¹ The colorful choices of words

¹ Appendix A lists abbreviations used in this brief. All bold and italics in quotes throughout this brief are added unless otherwise noted. CAPS are how they appear

used by so many Fox employees all try to capture the same basic truth about these inherently improbable allegations: These claims were false, and obviously so.

A mountain of direct evidence demonstrates actual malice without resort to motive or other circumstantial factors. But why did Fox peddle this false narrative to its viewers? Fox’s correct call of Arizona for Joe Biden triggered a backlash among its audience and the “network [was] being rejected.” Ex.555 at FNN35_03890498. Rival networks such as Newsmax took advantage of the opening by promoting “an alternative universe” of election fraud. Ex.223 at FNN071_04502926. So Fox went on “war footing,” caring more about protecting its own falling viewership than about the truth. *Id.* [REDACTED]

[REDACTED] [REDACTED]. In the words of Fox News’ SVP and Managing Editor of the Washington, D.C. Bureau Bill Sammon, “*It’s remarkable how weak ratings make[] good journalists do bad things.*” Ex.167. The consequences to Dominion—and to democracy—did not matter.

This case differs from nearly any defamation case before it. Normally plaintiffs prove defendants’ actual malice—whether they knew it was false or “in fact entertained serious doubts as to the truth of the statement”—“by inference, *as it*

in the document. “Fox” refers to Fox News Network and Fox Corporation, except as specifically noted. All exhibits cited in this Brief are attached to the Affidavit of Katherine Peaslee filed herewith.

would be rare for a defendant to admit such doubts.” Solano v. Playgirl, Inc., 292 F.3d 1078, 1085 (9th Cir. 2002) (citation omitted). Here, however, overwhelming direct evidence establishes Fox’s knowledge of falsity, not just “doubts.”

Normally defamation cases involve a single defamatory statement. Here, Fox defamed Dominion not once. Not twice. Not three times. But continually. Over a months-long timeframe. And while defamation cases often involve matters of public concern, the false statements here—in the words of Fox host Tucker Carlson—“would amount to the single greatest crime in American history. Millions of votes stolen in a day. Democracy destroyed. The end of our centuries’ old system of self-government.” Ex.170 at FNN018_02408904.

Normally defamation cases involve the state of mind of one person, or sometimes a handful, as the law only requires that *one* person with editorial responsibility have the requisite actual malice. Here, however, literally dozens of people with editorial responsibility—from the top of the organization to the producers of specific shows to the hosts themselves—acted with actual malice.

Normally multiple public sources, credible third parties, and governmental agencies at all levels do not debunk the lies in real time. Here, however, they all did so—and Fox knew about them.

Normally the plaintiff does not inform the defendant about the falsity of the allegations *during the course of the defamation itself*. Here, however, Dominion

repeatedly told Fox and urged it to stop publishing these “debunked” and “completely false” claims. *E.g.*, Ex.339; Ex.340; *see, infra*, §V.A. Fox admits Sidney Powell and her team **never** provided Fox with any evidence. Ex.128, Lowell 30(b)(6) 285:10-13, 286:3-13. Dominion, by contrast, made over **3,600** separate communications to Fox with at least a dozen separate and widely-circulated fact check emails—each pointing to verifiable third-party information debunking the claims. Ex.128, Lowell 30(b)(6) 544:6-13, 389:5-391:25. Fox’s research department itself—along with multiple Fox employees—debunked these claims in real time. *See, e.g.*, Ex.168; Ex.160; Ex.318. No credible evidence ever existed for these “absurd” allegations against Dominion. Ex.169 at FNN035_03890644. Fox witness after Fox witness has admitted as much, consistent with every single reputable third party and stacks of public record documents. *See, infra*, nn.12-13.

Normally a defendant does not continue to broadcast lies even after the plaintiff sends verifiable information demonstrating their falsity. Here, however, Fox continued to broadcast these debunked claims even after Dominion sent notification after notification to Fox. Indeed, nineteen of the twenty accused statements occurred **after** Dominion alerted Fox that these wild allegations were lies and pointed Fox to the correct information. *See, infra*, §§V.A, V.D.

And normally plaintiffs in defamation cases do not move for summary judgment of liability, let alone file a 40,000-word opening brief. Here, however,

Dominion details some of the extensive record evidence demonstrating Fox's liability on every point—covering this months-long period involving four categories of lies in twenty accused statements across six different shows with the active involvement of numerous Fox Executives.

Dominion understands and embraces the heavy burden of plaintiffs moving for summary judgment on liability in defamation cases. Here, however, the facts demonstrate why no reasonable juror could find in Fox's favor on each element of Dominion's defamation claim.

First, falsity. Fox broadcast false information. These lies fall into four categories, each provably false at the time. Fox falsely claimed: (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 Chavez. (4) Dominion paid kickbacks to government officials who used its machines in the 2020 Presidential Election.

Numerous public sources and fact checks debunked the lies contemporaneously with Fox's multiple broadcasts. Recount after recount confirmed the accuracy of the counts. Dominion did not pay kickbacks. Smartmatic does not own Dominion, nor was Dominion formed in Venezuela to rig elections for Hugo Chavez. All these sources—and more—have established that Dominion did

not participate in some massive criminal conspiracy. Joe Biden legitimately won the 2020 Presidential Election. And as this Court already correctly concluded, these factual assertions constitute actionable non-opinion statements. *If nothing else, this Court should rule that the statements are false and grant partial summary judgment on falsity.* No reasonable juror could find otherwise. *See, infra*, pp.46-82.

Second, publication about Dominion. It is legally irrelevant that many—but not all—of the accused statements relate to false charges made by a guest and not a host. Fox is deemed the “publisher” of every statement those guests aired against 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.*” *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980) (citation omitted). Moreover, liability attaches to all those who share responsibility for the decision to publish the statements. The broadcasts on their face also refer to Dominion and connect Dominion to the lies and the far-fetched conspiracy theories regarding the “massive” but non-existent fraud that supposedly flipped millions of votes from Trump to Biden. *See, infra*, pp.82-85.

Third, actual malice. Actual malice requires a showing that those responsible for the publication either knew or “recklessly disregarded” the truth. Here, literally dozens of Fox employees had responsibility for at least one of the defamatory

statements. Prevailing on summary judgment requires finding that just *one person* met the required actual malice standard for each. The evidence demonstrates much more. Each person with responsibility either knew the truth or recklessly disregarded the truth. Normally, a plaintiff proves actual malice through circumstantial evidence and a variety of factors—such as inherent improbability, reliance on unreliable sources, departure from journalistic standards, financial motive to lie, deliberately turning a blind eye to contradictory evidence, adherence to a preconceived narrative, republication of false statements, or refusal to retract—because direct evidence of actual knowledge of falsity rarely exists.

Each circumstantial factor cuts strongly in Dominion’s favor. But here, the words of multiple Fox employees provide overwhelming *direct evidence* of actual malice. In addition to the evidence cited above, the excerpts below feature just some of the additional examples showing Fox employees *knew at the time* that these claims—and the guests promoting them—were:

- “*ludicrous*” –Tucker Carlson, 11/20/20 (Ex.171)²
- “*totally off the rails*” –Tucker Carlson, 12/24/20 (Ex.172)
- “*F’ing lunatics*” –Sean Hannity, 12/22/20 (Ex.122, Hannity 321:3-14)

² Fox produced many text messages with a date stamp in “UTC” time. Because UTC time is 5 hours ahead of Eastern time, any time before 5 AM UTC occurred on the night before.

- “*nuts*” –Dana Perino, 11/16/20 (Ex.173)
- “*complete bs*” –Producer John Fawcett to Lou Dobbs, 11/27/20 (Ex.174)
- “*kooky*” –Maria Bartiromo, regarding email received from Powell 11/07/20 (Ex.98, Bartiromo 141:18-24)
- “*MIND BLOWINGLY NUTS*” –Raj Shah, Fox Corporation SVP, 11/21/20 (Ex.175)

The body of the brief provides even more evidence along the same lines.

By the time Fox called the election on November 7, numerous Fox employees knew that Joe Biden had legitimately prevailed over Donald Trump and the charges against Dominion could not be true. As Fox Chief Political Correspondent Bret Baier stated on November 5, “*There is NO evidence of fraud. None.*” Ex.176.

As for those who claimed that they did not know at the time whether the charges were true, any reasonable juror would find that they acted at least with reckless disregard of the truth. And any cursory investigation would have quickly revealed that the charges were false. The unreliability of the sources; the preconceived narrative of fraud; the inherent implausibility of the allegations; the public evidence refuting fraud prior to November 8 and only growing stronger thereafter; the *thousands* of communications from Dominion starting on November 12 pointing to numerous public statements and investigations refuting the charges;

_____ ; and the multiple Fox employees (and others) who

actually investigated the charges and quickly concluded they were absurd all require the conclusion that Fox acted, at minimum, with reckless disregard for the truth.

Indeed, multiple Fox witnesses called the allegations—and the people making and repeating them such as Sidney Powell and Jeanine Pirro—“reckless” *at the time*. As Tucker Carlson told Sidney Powell on November 17: “You keep telling our viewers that millions of votes were changed by the software. I hope you will prove that very soon. You’ve convinced them that Trump will win. If you don’t have conclusive evidence of fraud at that scale, it’s a *cruel and reckless thing to keep saying*.” Ex.177. And on November 21, Carlson texted [REDACTED] [REDACTED] that it was “*shockingly reckless*” to claim that Dominion rigged the election “[i]f there’s no one inside the company willing to talk, or internal Dominion documents or copies of the software showing that they did it” and “as you know there isn’t.” Ex.166. *See, infra*, pp.87-161.

Fourth, defamation per se. A statement is *per se* defamatory “if it (1) charges the plaintiff with a serious crime; [or] (2) tends to injure the plaintiff in her or his trade, business or profession.” *Kasavana v. Vela*, 172 AD3d 1042, 1044 (2d Dept 2019). Where a defendant’s statements are *per se* defamatory, the plaintiff need not prove damages to establish liability. Whether particular statements are considered defamatory *per se* is a question of law. Here, every statement is *per se* defamatory.

They allege massive frauds, criminal conspiracies, and/or illegal kickbacks. They go to the very core of Dominion’s business. *See, infra*, pp.85-87.

Finally, no affirmative defense protects Fox. Fox’s defenses fail on the merits as a matter of law even assuming it has properly preserved them. This Court addressed both the neutral and fair report privileges in its Order on Fox’s Motion to Dismiss. Since this Court’s decisions in both these cases, another court applying New York law has allowed claims based on the accused December 10 broadcast here and rejected application of the neutral and fair report privileges. *Khalil v. Fox Corp.*, 2022 WL 4467622 at *4-*10 (S.D.N.Y. Sep. 26, 2022). *See, infra*, pp.161-176.

With respect to the fair report privilege, this Court previously held that it “is not triggered unless the report comments on a proceeding.” FNN MTD Order, p.45 (quoting *Cholowsky v. Civiletti*, 69 AD3d 110, 114 (2d Dept 2009)) (cleaned up). “If context indicates that a challenged portion of a publication focuses exclusively on underlying events, rather than an official proceeding relating to those events, that portion is insufficiently connected to the proceeding to constitute a report of that proceeding.” *Fine v. ESPN, Inc.*, 11 F. Supp. 3d 209, 217 (N.D.N.Y. 2014). Here the broadcasts refer to underlying events—*i.e.*, fraud; vote-flipping; ownership; kickbacks—and not any official proceeding. This Court previously recognized that the privilege does not apply to those statements made before Sidney Powell filed her first lawsuit on November 25. FNN MTD Order, p.46. And of the five statements

that occurred during the pendency of Powell's suits, no reasonable juror could find that they were true and fair reports of an official proceeding.

With respect to the neutral report privilege (or "newsworthiness," as Fox also has termed it), no such privilege exists under New York law or the First Amendment. This Court "question[ed] whether Fox can raise neutral reportage doctrine or analogous newsworthiness privilege as an absolute defense" under New York law. FNN MTD Order, pp.41-42. It cannot. And even if the privilege applied, Fox cannot meet its requirements. The neutral report privilege cannot apply if the publisher endorses or distorts the charges or otherwise fails to provide "accurate and disinterested reporting." *Edwards v. Nat'l Audubon Soc., Inc.*, 556 F.2d 113, 120 (2d Cir. 1977). Here, an examination of the transcripts shows the exact opposite of a neutral report, and no reasonable juror could find otherwise. Fox admits "shows like Dobbs, Hannity, etc." did not "challenge the narrative" that Dominion was "responsible for switching votes and/or producing inaccurate results." Ex.178. Moreover, as SVP for Primetime Programming Meade Cooper recognized, "there are ways to cover the allegations without giving a platform to the people spewing lies." Ex.108, Cooper 284:22-25. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Exactly.

Broadcasters make choices about what to air. While that platform comes with tremendous power, it also carries an obligation to tell the truth. Fox, “one of the most influential news properties in history,” Ex.128, Lowell 30(b)(6) 624:20-25, decided to use its megaphone to spread falsehoods. It deceived millions of people. The First Amendment not only allows defamation claims in these instances, *New York Times v. Sullivan* and its progeny make clear that a broadcaster does not have an unfettered license to lie. When Rupert Murdoch asked Suzanne Scott whether it was “*unarguable that high-profile Fox voices fed the story that the election was stolen and that January 6 an important chance to have the results overturned,*” Fox executives responded with **50 examples**—including broadcasts accused here. Ex.179 at FNN019_03736521.

Fox knew the truth. It knew the allegations against Dominion were “outlandish” and “crazy” and “ludicrous” and “nuts.” Yet it used the power and influence of its platform to promote that false story. Fox knew better. As Rupert Murdoch told Suzanne Scott in the aftermath of January 6, “All very well for Sean to tell you he was in despair about Trump but what did he tell his viewers?” Ex.180. When Rupert Murdoch watched Rudy Giuliani and Sidney Powell spew their lies on November 19, he told Suzanne Scott: “Terrible stuff damaging everybody, I fear.” Scott concurred: “*yes Sean and even Pirro agrees.*” Ex.181. Instead of calling out

the truth, however, Fox continued to “damage everybody”—not only continuing to invite these guests onto its shows but endorsing these lies. Fox duped its audience. And Dominion paid the price.

FACTUAL BACKGROUND

Bartiromo: Sidney, we talked about the Dominion software. I know that there were voting irregularities. Tell me about that.

Powell: That’s putting it mildly. The computer glitches could not and should not have happened at all. That is where the fraud took place, where they were flipping votes in the computer system or adding votes that did not exist.

¶179(a).³

When Maria Bartiromo interviewed Sidney Powell on November 8, 2020, Fox placed Dominion at the center of a wide-ranging and inherently implausible conspiracy theory designed to perpetuate the “myth” that Donald Trump—and not Joe Biden—legitimately won the 2020 Presidential Election. *See* Ex.182. As Rupert Murdoch and Suzanne Scott recognized on November 6, 2020, it was “very hard to credibly cry foul everywhere” with Trump losing multiple swing states. Ex.151. Conveniently for conspiracy theorists, however, Dominion operated in many (but

³ This Brief cites to accused broadcasts as ¶179(#), referring to sub-sections of Paragraph 179 of Dominion’s Complaint against Fox News Network, LLC (the “Complaint”). Appendix B to this Brief identifies exhibits corresponding to each accused broadcast’s transcript and video. Dominion relies on its certified transcriptions, though Appendix B identifies exhibit references for both parties’ transcripts.

not all) of these jurisdictions. Dominion became the connective thread in a prefabricated election fraud story that needed a villain. Fox, the highest-rated cable news channel in America, chose to legitimize, endorse, and broadcast these false claims into millions of American homes.⁴

A. Dominion Voting Systems

Dominion CEO John Poulos founded a voting technology business in Toronto and incorporated it in 2003 in Ontario as Dominion Voting Systems Corporation. Ex.183, Poulos Aff., ¶2; Ex.184. Dominion developed voting technology designed to generate an auditable, paper record backup. Ex.183, Poulos Aff., ¶3; Ex.138, Poulos 30(b)(6) 638:3-10. Dominion's voting technology has been certified under standards promulgated by the U.S. Election Assistance Commission ("EAC"), and reviewed and tested by independent testing laboratories accredited by the EAC ("VSTLs"). Ex.185 at p.2; Ex.186, Hovland Decl., ¶¶18-32 & Exs.A-P.

By the end of 2009, Dominion had entered into its first contract to provide voting technology in the U.S. market and had incorporated a subsidiary, Dominion Voting Systems, Inc., in Delaware. Ex.183, Poulos Aff., ¶4; Ex.187. Today, Dominion's headquarters is in Denver, Colorado. Ex.188; Ex.183, Poulos Aff., ¶6. Dominion's majority owner is a U.S.-based private equity firm Staple Street Capital,

⁴ Appendix C identifies by name and title each individual mentioned in this brief.

and Mr. Poulos retains approximately a 12% stake in the company. Ex.439. Dominion's business is organized as U.S. Dominion, Inc., a Delaware corporation, and its two wholly owned subsidiaries, Dominion Voting Systems, Inc. and Dominion Voting Systems Corporation (collectively "Dominion"). Ex.188 (Georgia proposal, Section 1), p.1; Ex.183, Poulos Aff., ¶5.

In the 2020 Presidential Election, Dominion served customers (typically counties) within 28 states and Puerto Rico. Ex.183, Poulos Aff., ¶7; Ex.189 at FNN008_00026258. The 2020 Presidential Election received praise as "the most secure in American history." Ex.190. But the election's success turned into a nightmare as Fox gave wide prominence to the lies and false claims of fraud against Dominion in twenty defamatory broadcasts spanning from November 8, 2020 until January 26, 2021.

B. Prior to Election Day: Setting Up the False Narrative of Fraud.

Before the 2020 Presidential Election, Donald Trump made clear he would claim fraud if he lost. In the words of Chris Stirewalt, Fox's Politics Editor during the relevant timeframe: "Long before" the election, Trump "started making the claim that the only way that he could lose the election was by fraud, or that the only way that he would not prevail would be if it was stolen. He had laid that predicate down throughout the spring and into the summer. And it was very well-known and understood by everybody in the business that this was the gambit that he was

making.” Ex.146, Stirewalt 16:2-15 (cleaned up); *see also id.* 28:23-29:4. Others testified likewise. *See* Ex.106, Clark 141:21-142:1; Ex.108, Cooper 116:10-20. In short, Trump was “very explicit in terms of laying down this preconceived narrative that there would be fraud in the election.” Ex.146, Stirewalt 123:3-18.

Also prior to the 2020 Presidential Election, it was well known that because of COVID concerns, the election would feature an unusually large number of mail-in ballots. And because of partisan differences in *who* cast mail-in ballots and *when* states counted those votes, the early leader after polls closed would not necessarily reflect the eventual winner. Again, Chris Stirewalt: “[E]lection day votes are going to skew heavily Republican. Early and absentee votes are going to skew heavily Democratic. If you stretch out the period of time over which that’s going to be counted, it’s going to create a false—it could tend to create a false impression about the direction that the election was going to go overall.” *Id.* 20:17-25. “[P]olitical professionals and political journalists”—including those at Fox—“universally understood” this phenomenon, also termed the “red mirage” and the “blue shift.” *Id.* 21:6-12. Fox Executive David Clark confirmed it was “widely understood” that mail-in balloting “would lead to a shift in the final vote tally.” Ex.106, Clark 142:11-143:1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Fox’s Election Day Coverage and Backlash.

On election day, Fox was the first outlet to call Arizona for Biden—a call that infuriated viewers, conservative activists, and the White House. Within minutes of the 11:20 pm Arizona call, Fox News’ SVP and Managing Editor of the Washington Bureau Bill Sammon received an angry text from a member of Trump’s team claiming it was “WAY too soon to be calling Arizona.” Ex.192; Ex.140, Sammon 107:8-108:11. Minutes later Sammon received a similarly angry phone call from White House Chief of Staff Mark Meadows. Ex.140, Sammon 108:12-110:4.

And it was not just the White House. Other viewers were livid. Within an hour of Fox calling Arizona, in early morning on November 4, Suzanne Scott forwarded Jay Wallace an email from Fox Corporation Executive Raj Shah noting “Lots of conservative criticism of the AZ call,” Ex.193; *see also* Ex.194. Fox’s senior executives discussed the heavy backlash from the Arizona call at their daily editorial meeting that morning. Ex.126, Komissaroff 121:25-123:16. On November 5, Fox’s Chief White House Correspondent told Sammon and FNC President Jay Wallace, “we are taking major heat over the AZ call...Our viewers are also chanting ‘Fox News sucks’, something I have never heard before.” Ex.195; *see also* Ex.196;

Ex.197; Ex.198 (internal Fox emails stating “Holy cow, our audience is mad at the network,” and “They’re FURIOUS”); Ex.126, Komissaroff 121:25-122:9; Ex.147, Wallace 113:3-13.

The backlash was so strong that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fox Hosts Tucker Carlson, Laura Ingraham, and Sean Hannity immediately understood the threat to them personally. Carlson wrote his producer Alex Pfeiffer on November 5: “We worked really hard to build what we have. Those fuckers are destroying our credibility. It enrages me.” Ex.199 at FNN035_03890623. He added that he had spoken with “Laura and [S]ean a minute ago” and they are “highly upset.” *Id.* at FNN035_03890624. Carlson noted: “At this point we’re getting hurt no matter what.” *Id.* at FNN035_03890625. Pfeiffer responded: “It’s a hard needle to thread, but I really think many on ‘our side’ are being *reckless demagogues* right now.” *Id.* Tucker replied: “Of course they are. We’re not going to follow them.” *Id.* And he added: “What [Trump]’s good at is destroying things. He’s the undisputed world champion of that. He could easily destroy us if we play it wrong.” *Id.* at FNN035_03890626.

Hannity faced a similar dilemma. On November 5, Hannity told his audience that “it will be impossible to ever know the true, fair, accurate election results, that’s a fact.” Ex.200. Producer Robert Samuel told the team: “My two cents—gotta be super careful on any allegations” since people can say “you’re pushing that American democratic system can’t be trusted. Just have to be 1000 percent sure and very careful.” Ex.201 at FNN055_04461236.

D. Election Fraud Conspiracy Theories Abound—and Soon Target Dominion.

As election conspiracies and false claims of fraud began to emerge in the days following the election, Fox knew the truth. Fox Chief Political Correspondent Bret Baier stated privately on November 5: “*There is NO evidence of fraud. None.*” Ex.176; Ex.97, Baier 39:3-41:1.

On November 5, Maria Bartiromo posted unfounded allegations of vote “dump[s]” on social media. Ex.204. Baier alerted Sammon: “We have to prevent this stuff...We need to fact check,” Ex.205; and separately told Fox President Jay Wallace, [REDACTED] [REDACTED] [REDACTED] Ex.158 at FNN051_04432225-26.

By November 6, Rupert Murdoch told Suzanne Scott “very hard to credibly claim foul everywhere.” *Supra*, p.14 He also wrote: “if Trump becomes a sore loser we should watch Sean especially and others don’t sound the same.” Ex.151. Scott

then forwarded that email to Meade Cooper, the EVP of Primetime Programming in charge of Hannity, Carlson, and Pirro (among others). Cooper agreed. Ex.108, Cooper 186:4-187:5. Indeed, Cooper testified that as of November 6, “going on television to say that the election is being stolen” “*would not be based in fact at that point.*” *Id.* 194:1-6.

On November 6, Sidney Powell appeared on *Lou Dobbs Tonight* and told viewers about an implausible conspiracy theory—not yet tied to Dominion--involving a secret CIA program called “Hammer and Scorecard”—Hammer being a government supercomputer and Scorecard a software program run on that computer to change votes—that “explains a lot of what we’re seeing” with vote tallies. Ex.206 at FNN018_02260592-93; Ex.462 (describing allegations and their implausibility); *see also* Ex.281 (debunking theory). Immediately after the appearance, Baier received an email about Hammer and Scorecard from a viewer: “Sydney Powell just broke the story on Dobbs.” Ex.279. Baier immediately asked Fox President Jay Wallace: “What is this? Oh man.” *Id.*

Nearly just as immediate as election fraud claims were the public statements from credible sources debunking those claims. On November 6 alone, Michigan Secretary of State Jocelyn Benson publicly stated that an issue that occurred in Antrim County was the result of human error by the County Clerk and not fraud, Ex.282; and Georgia Secretary of State Brad Raffensperger publicly stated “that

every legal vote was cast and accurately counted.” Ex.284, p.2. *See also* Ex.286; Ex.287; Ex.288.

On November 7, Fox Business News President Lauren Petterson and others within Fox received an alert that the website 4chan was “call[ing] on users to spread” conspiracy theories about Dominion’s supposed involvement in the fraud. Ex.285.

Also on November 7, the *New York Post*—controlled by the Murdoch family—wrote an editorial asking Trump to “stop the ‘stolen election’ rhetoric” and “[g]et Rudy Giuliani off TV.” Ex.289, pp.1, 4. [REDACTED]

[REDACTED]. Scott made sure that the editorial received wide distribution. Ex.290-291. Murdoch thanked her for doing so. Ex.290 at FoxCorp00056537.

During this November 4 to November 7 timeframe, Fox made at least some effort to prevent false charges from spreading. On November 6—after Cooper received the forwarded email from Rupert Murdoch stating it was “very hard to credibly cry foul” and warning of Trump becoming a “sore loser,” Ex.151—Cooper and Fox Executive Ron Mitchell discussed whether their primetime hosts Hannity, Carlson, and Ingraham would push false claims of election fraud: “I feel really good about Tucker and Laura. I think Sean will see the wisdom of this track eventually, but even this morning he was still looking for examples of fraud.” Ex.191; Ex.108, Cooper 188:6-189:4.

That same day, Cooper and Executive David Clark cancelled Jeanine Pirro's November 7 show [REDACTED] Ex.293. As Clark told Cooper, "Her guests are all going to say the election is being stolen and if she pushes back at all it will just be token.... [REDACTED] [REDACTED]" *Id.*; Ex.106, Clark 151:22-157:19, 160:7-163:11. As Fox producer Justin Wells described, "They took her off cuz she was being crazy. Optics are bad. *But she is crazy.*" Ex.294 at FNN079_04550507.

E. Fox Calls the Election for Biden—and Mainstreams the False Narrative that Dominion Rigged the Election.

On November 7, Fox called the 2020 Presidential Election for Biden—this time carefully waiting until other networks went first. The viewer backlash that Fox Executives had hoped would fade, however, only became worse. Ex.295 (11/8/20, Rupert Murdoch to Suzanne Scott, "Getting creamed by CNN! Guess our viewers don't want to watch it."). And reality began to set in. Fox Senior Vice President for Corporate Communications Irena Briganti wrote on the evening of November 7, "our viewers left this week after AZ." Ex.296. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Carlson also texted his producer: "Do the executives

understand how much credibility and trust we've lost with our audience? We're playing with fire, for real....an alternative like newsmax could be devastating to us.”

Ex.298. Carlson agreed. *Id.*

Enter Maria Bartiromo. On Sunday November 8, Bartiromo hosted Sidney Powell on *Sunday Morning Futures* where Powell claimed that Dominion's software had an “algorithm” used as part of a “massive and coordinated effort to steal this election” from Trump. ¶179(a). Bartiromo told Powell, “I know that there were voting irregularities. Tell me about that.” *Id.*

Bartiromo knew Powell would respond with conspiracy theories about Dominion. On November 7, Bartiromo had interviewed Powell, [REDACTED]

[REDACTED] Everyone [i]s excluding me from meetings.” Ex.207. [REDACTED]

[REDACTED]

What was the evidence for these far-fetched claims that Powell sent to Bartiromo the day before the broadcast? An email entitled “Election Fraud Info” Powell had received from a “source” which the author herself describes as “pretty wackadoodle.” Ex.154 at FNN001_0000009-11. This email—also received by Dobbs—alleged Dominion was the “one common thread” in the “voting

irregularities in a number of states.” Ex.154 at FNN001_00000009; Ex.98, Bartiromo 123:19-134:13. In addition to promoting lies about Dominion, the sender claimed that Justice Scalia “was purposefully killed at the annual Bohemian Grove camp...during a weeklong human hunting expedition,” and that former Fox News CEO Roger Ailes (who died in 2017) and Rupert Murdoch “secretly huddle most days to determine how best to portray Mr. Trump as badly as possible.” Ex.154 at FNN001_00000010. The author continued: “Who am I? And how do I know all of this?...I’ve had the strangest dreams since I was a little girl....I was internally decapitated, and yet, I live....The Wind tells me I’m a ghost, but I don’t believe it.” *Id.* at FNN001_00000011; Ex.98, Bartiromo 133:25-134:13. The full force of the email’s lunacy comes across by reading it in its entirety. Ex.154.

Bartiromo agreed at her deposition that this email was “nonsense,” *id.* 134:11-13, and inherently unreliable, *id.* 141:18-24. Yet Bartiromo (and Dobbs) never reported on the existence of this email. Nor did Bartiromo tell her viewers about the source of Powell’s claims or that Trump’s own Senior Advisor and son-in-law rejected the allegations as conspiracy theories. While the claims were laughable on their face, Bartiromo gave them credibility. As Tucker Carlson texted that night, “[t]he software shit is absurd....Half our viewers have seen the Maria clip.” Ex.169 at FNN035_03890644.

Meanwhile, on Monday, November 9, Maricopa County, Arizona completed its hand count audit of paper ballots. It showed a “100 percent match” with the counts from Dominion machines. Ex.210; *see* Ex.209 at 2.

F. Fox Continues to Woo Back Viewers and Goes on “War Footing” with Newsmax

Also on November 9, the impact of Fox’s Arizona call became more evident to Fox executives. Carlson told Scott directly: “I’ve never seen a reaction like this, to any media company. Kills me to watch it.” Ex.211. Scott immediately relayed the email to Lachlan Murdoch. Ex.212. She told Briganti that Sammon did not understand “the impact to the brand and the arrogance in calling AZ,” which she found “astonishing” given that as a “top executive” it was Sammon’s job “to *protect the brand.*” Ex.213. And on that day—“day one,” as Scott termed it—Fox executives made an explicit decision to push narratives to entice their audience back. Ex.214 at FoxCorp00056542. Scott and Lachlan Murdoch exchanged texts about the plan going forward: Scott: “Viewers going through the 5 stages of grief. It’s a question of trust—the AZ [call] was damaging but *we will highlight our stars and plant flags letting the viewers know we hear them and respect them.*” *Id.* at FoxCorp00056541. Murdoch: “Yes. But needs constant rebuilding without any missteps.” *Id.* Scott: “Yes today is day one and it’s a process.” *Id.* at FoxCorp00056542.

Wallace likewise knew viewers were upset by the Arizona call and discussed it with Scott. Ex.147, Wallace 163:8-12, 113:10-13; Ex.193. Scott told Wallace on November 11 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fox executives also began to criticize Fox hosts for truthful reporting. On November 9, Fox anchor Neil Cavuto cut away from a White House Press Conference when Press Secretary Kayleigh McEnany began making unsubstantiated allegations about election fraud. As Cavuto told viewers, “Whoa, whoa, whoa....She’s charging the other side as welcoming fraud and illegal voting, unless she has more details to back that up, I can’t in good countenance continue to show you this,” and “that’s an explosive charge to make.” Ex.217 at 1:05; *see* Ex.98, Bartiromo 170:24-171:25. The brand team led by Raj Shah at Fox Corporation notified senior Fox News and Fox Corporation leadership of the “Brand Threat” posed by Cavuto’s action. Ex.218. Scott wrote Wallace and Briganti: [REDACTED]

[REDACTED]

[REDACTED]

Fox Executives also observed with concern the rise of Newsmax, a far-right network attempting to capitalize on viewer dissatisfaction with Fox. Prior to November 8, Fox Executive David Clark testified that Newsmax was not a credible media outlet because “their hosts were extremely one sided, ignored the facts, they did not seem to care about telling the truth, they seemed to invest truly in conspiracy theories versus fact.” Ex.106, Clark 178:3-18. On November 10, Scott pointed senior Fox executives to a note from analyst Kyle Goodwin on Newsmax’s rise. Ex.220. Fox Executive Porter Berry responded: “Just pulled up [Newsmax’s] show- and they’re hitting Cavuto....They are just whacking us. Smart on their part.” *Id.* Lauren Petterson added: “***They definitely have a strategy across all shows to try to target and steal our viewers.***” *Id.* Scott told Goodwin: “Keep an eye and continue to report on Newsmax.” Ex.221.

Also on November 10, Scott and Wallace texted about the numbers they had just received. Wallace: “The Newsmax surge is a bit troubling—***truly is an alternative universe when you watch, but it can’t be ignored.***” Scott: “***Yes.***” Ex.223 at FNN071_04502926. Wallace: “***Trying to get everyone to comprehend we are on war footing.***” *Id.*

While the Executives were waking up to the “war footing” by November 10, key Fox hosts had understood the crisis immediately after Election Night. On November 5, Tucker Carlson texted regarding election coverage, “We’ve got to be

incredibly careful right now. We could get hurt.” Ex.224. On November 7, David Clark told Lauren Petterson that Jeanine Pirro was “[a]ngling for a job somewhere else. 100%.” Ex.225; Ex.106, Clark 176:16-22. By November 11, Sean Hannity recognized the critical role the Dominion fraud narrative would play in winning back viewers, [REDACTED]

[REDACTED] Ex.226 at FNN022_03852183.

Hannity told Carlson and Ingraham on November 12: “In one week and one debate they destroyed a brand that took 25 years to build and the damage is incalculable.” Ex.230 at FNN035_03890510. Tucker responded: “It’s vandalism.” *Id.* The hosts also discussed the possibility of competition to Fox emerging. Hannity told them: “[S]erious \$\$ with serious distribution could be a real problem. Imho they need to address but wtf do I know.” *Id.* Tucker: “That could happen.” *Id.* at FNN035_03890511.

As Irena Briganti said on November 12, “glad the panic button was hit 2 days ago.” Ex.227.

G. “This Dominion shit is going to give me a fucking aneurysm.”

By November 12, Dominion became a focal point of discussion within multiple shows at Fox. Spurred by the November 8 Bartiromo broadcast, the wild Dominion allegations entered the mainstream. That day, Ingraham’s producer

Tommy Firth texted Ron Mitchell, one of the Fox executives responsible for overseeing Ingraham’s show. Firth bluntly captured the dilemma: “*This dominion shit is going to give me a fucking aneurysm*—as many times as I’ve told Laura it’s bs, she sees shit posters and trump tweeting about it—

Mitchell responds: “This is the Bill Gates/microchip angle to voter fraud.”

Id. Firth replies: *Id.* Later in the day, Ron checks in:

“How’s it going [with] the kooks?” *Id.*

Id.

Lou Dobbs chose a different strategy. That night—November 12—he invited Rudolph Giuliani on his show. When Giuliani spewed lies about Dominion, Dobbs responded: “It’s stunning...they have no ability to audit meaningfully the votes that are cast because the servers are somewhere else....This looks to me like it is the end of what has been a four-and-a-half—the endgame to a four-and-a-half year-long effort to overthrow the president of the United States.” ¶179(b). Dobbs continued

to broadcast these false charges throughout the week and for nearly a month—until December 10. *See, infra*, §V.D.2.

Meanwhile, later that night of November 12, Ingraham was still texting with Hannity and Carlson. In their group text thread, Carlson pointed Hannity to a tweet by Fox reporter Jacqui Heinrich. Ex.230 at FNN035_03890511. Heinrich was “fact checking” a tweet by Trump that mentioned Dominion—and specifically mentioned Hannity’s and Dobbs’ broadcasts that evening discussing Dominion. Ex.232; Ex.231. Heinrich correctly fact-checked the tweet, pointing out that “top election infrastructure officials” said that ““There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.”” *Id.*; Ex.232.

Carlson told Hannity: “Please get her fired. Seriously....What the fuck? I’m actually shocked...*It needs to stop immediately, like tonight. It’s measurably hurting the company. The stock price is down. Not a joke.*” Ex.230 at FNN035_03890511. Tucker added: “I just went crazy on Meade over it.” *Id.* at FNN035_03890512. Hannity said he had “already sent to Suzanne with a really?” He then added: “I’m 3 strikes. Wallace shit debate[.] Election night a disaster[.] Now this BS? Nope. Not gonna fly. Did I mention Cavuto?” *Id.*

Hannity indeed had discussed with Scott. Hannity texted his team: “I just dropped a bomb.” Ex.292 at FNN055_04455643. Suzanne Scott received the message. She told Jay Wallace and Fox News’ SVP for Corporate Communications

Irena Briganti: “Sean texted me—he’s standing down on responding but not happy about this and doesn’t understand how this is allowed to happen from anyone in news. She [Heinrich] has serious nerve doing this and if this gets picked up, viewers are going to be further disgusted.” Ex.233. By the next morning, Heinrich had deleted her fact-checking tweet. Ex.283.

H. The Pressure on Fox Grows—Even As Dominion Puts Fox on Notice.

Also beginning on November 12, 2020, Dominion sent Fox “Setting the Record Straight” emails providing facts about Dominion and links to public information debunking the lies about Dominion. *See, infra*, §V.A. Fox’s Corporate Representative, EVP and Managing Editor of News Tom Lowell testified that in the few months following the election various Fox addressees received over 3,600 such communications from Dominion correcting false allegations and also were circulated widely within Fox, even to those who did not directly receive notice. Ex.128, Lowell 30(b)(6) 420:10-13; 431:11-15; 544:6-21. Indeed, executive David Clark received Dominion’s fact check so many times that on November 14 he wrote a colleague: “I have it tattooed on my body at this point.” Ex.106, Clark 285:7-10; Ex.234.

In addition to its correspondence highlighting the truth, Dominion’s communications consultant Tony Fratto, former Deputy White House Press

Secretary under President George W. Bush, personally reached out to his contacts among the hosts and executives at Fox starting on November 12. On November 16, he wrote Suzanne Scott and Jay Wallace directly: Dominion, “as you know, has received a great deal of attention on FoxNews [sic] and from the President. An enormous amount of misinformation—actually, completely and verifiable wrong information—is finding its way on-air.” Ex.235. Fratto offered to provide the two of them a briefing about Dominion and concluded: “I think this situation is crossing dangerous lines.” *Id.* Wallace and Fratto then spoke over the phone. Ex.147, Wallace 209:21-211:3; 217:12-218:6; Ex.119, Fratto 229:24-235:22.

After another Lou Dobbs broadcast that same night, Fratto reached out again to Wallace. Fratto forwarded part of the transcript to Wallace and told him: “More fucking [] lies. Honestly. He is a disgrace.” Ex.236.

Fox also has its own internal fact-checking department, the Brainroom, that could and did investigate the truth about Dominion. Ex.106, Clark 127:4-9, 270:7-20, 271:19-21; Ex.168. The Brainroom is “the centralized research department for Fox News.” Ex.101, Bruster 30(b)(6) 147:3-7. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Meanwhile, Fox continued to broadcast its lies about Dominion as it nervously eyed Newsmax. In a November 16 email, Rupert Murdoch told Scott to read a *Wall Street Journal* piece about Newsmax, telling her: “These people should be watched, if skeptically. Trump will concede eventually and we should concentrate on Georgia, helping any way we can. *We don’t want to antagonize Trump further, but Giuliani taken with a large grain of salt. Everything at stake here.*” Ex.239.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Carlson told his producer Alex Pfeiffer that night: “*Sidney Powell is lying. Fucking bitch.*” Ex.150.

By November 18, Carlson told Ingraham “Sidney Powell is lying by the way. I caught her. *It’s insane.*” Ex.241. Ingraham responded: “*Sidney is a complete nut.* No one will work with her. Ditto with Rudy.” *Id.* Carlson replied: “It’s unbelievably offensive to me. *Our viewers are good people and they believe it.*” *Id.* at FNN035_03891092. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Also on November 18, SVP of Primetime Programming and Analytics Ron Mitchell sent a memo to Scott and Wallace stating, with respect to Newsmax:

[T]he lack of any meaningful editorial guidance may be a positive for them at least in the short term. For example, last night on Stitchfield (who?) at 8pm, the show sourced websites like Gateway Pundit while talking about voter fraud. *This type of conspiratorial reporting might be exactly what the disgruntled FNC viewer is looking for.*

Ex.243 at FNN011_00096238. Mitchell concluded that “viewers are watching less” Fox News, and suggested “fix[es]”: “Do not ever give viewers a reason to turn us off. Every topic and guest must perform,” and “‘No unforced errors’ in content—example: Abruptly turning away from a Trump campaign press conference.” *Id.*

On November 19, Fox broadcast the entirety of a “crazy” press conference where Giuliani and Powell spewed lies about Dominion. Ex.156 (Rupert Murdoch email, Subject: “Watching Giuliani!” Text: “Really crazy stuff. And damaging.”).

But while Fox did not cut away this time, then-White House correspondent Kristen Fisher did fact-check the claims made by Powell and Giuliani. Fox's executives were not pleased. *See* Ex.118, Fisher 68:20-69:8; Ex.244. Fisher received a call from her boss, Bryan Boughton, immediately after in which he "emphasized that higher-ups at Fox News were also unhappy with it," and that Fisher "needed to do a better job of...—this is a quote—'respecting our audience.'" Ex.118, Fisher 35:21-36:24; *see* Ex.245 & Ex.246 (Fisher texts about being "punished for doing my job" after fact-checking Giuliani).

Fox anchor Dana Perino noted that the claims at the press conference could be enough to prompt Dominion to sue. Ex.247 at FNN001383083-84. This comment resulted in Scott "screaming about Dana's show and their reaction to the Rudy presser." Ex.248 at FNN032_03869379. Scott explained in an email regarding both Perino and Fisher's coverage, "[Y]ou can't give the crazies an inch right now...they are looking for and blowing up all appearances of disrespect to the audience." Ex.249. Scott separately noted, "The audience feels like we crapped on [them] and we have damaged their trust and belief in us....We can fix this but *we cannot smirk at our viewers any longer.*" Ex.250.

Fox Executive Ron Mitchell commented: "I'm not mad at either of them. I'm mad at those clowns at the conference who put us in a terrible place." Ex.251. That afternoon, Mitchell asked Firth: "Will you be mentioning the international crime

conspiracy to steal the election featuring Soros, Maduro, Chavez, Antifa, Cuba, and China?” Ex.252. Firth responded: “Haha nope—basically want to wrangle the argument away from the crazy that was today—it’s easy to dismiss legitimate complaints when you can lump them in with the circus.” *Id.* Mitchell responded: “Yes. But those clowns put us [in] an awkward place where we’re going to need to thread the needle.” *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

“I mean if they cant take the time to do the press this will die faster.” *Id.* Dobbs continued airing these defamatory statements, hosting Powell and Giuliani throughout this timeframe.

Dominion sent Fox’s General Counsel a letter on November 20 directly addressing Fox’s defamation and asking Fox to stop spreading lies. Ex.237. On November 24, Tony Fratto wrote to Jay Wallace personally after another Lou Dobbs show where Fox lied about Dominion: “You guys know this is all bullshit. Everyone knows it. I honestly thought, whatever...at least Powell won’t be on credible TV anymore. This is reckless.” Ex.238 (alteration in original).

Yet the appearances continued. [REDACTED]

[REDACTED]

Ex.164. That day, both Dobbs and Hannity hosted Sidney Powell. Powell told Hannity: “The machine ran an algorithm that shaved votes from Trump and awarded them to Biden. They used the machines to trash large batches of votes that should have been awarded to President Trump. And they used a machine to inject and add massive quantities of votes for Mr. Biden.” ¶179(n). Even into December, Dobbs continued hosting Powell and endorsing those lies himself, describing these debunked falsehoods as “a broadly coordinated effort to—to actually bring down this President by ending his second term before it could begin.” ¶179(q).

Suzanne Scott’s December 2 email to Meade Cooper after Fox host Eric Shawn fact-checked Sean Hannity’s claims of election fraud says it all:

[REDACTED]

Ex.254. That very same day, Bill Sammon commented on Fox’s coverage of “supposed election fraud” to Chris Stirewalt, stating “*It’s remarkable how weak ratings make[] good journalists do bad things.*” Ex.167.

Fox lied about Dominion—over and over again. As Briganti said in mid-December: “Gave Powell & Giuliani platform with reach—*all true they said crazy things.*” Ex.256.

I. Fox Participated in the Narrative.

Fox did not merely report on the claims made about the 2020 Presidential Election; it actively participated in shaping them.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dobbs and his team understood their role in promoting the narrative. [REDACTED]

[REDACTED]

Also on November 7, Bartiromo and Dobbs received the “wackadoodle” email authored by the person who received messages from “the wind.” Ex.154. Although Bartiromo now calls it “nonsense,” at the time she told Powell: “I just spoke to Eric [Trump] & told him you gave very imp[ortant] info.” Ex.259. Bartiromo also provided information directly to Powell. *See* Exs.260-262; Ex.98, Bartiromo 291:17-292:14, 293:1-295:2.

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Some of Fox’s involvement in shaping the narrative around Dominion demonstrates that Fox knew the claims were false. [REDACTED]

[REDACTED]

[REDACTED] As Suzanne Scott said, “*Privately, I had a number of conversations with Sean where he wanted the President to accept the results,*” and Hannity had understood that Joe Biden legitimately won the election “for some time.” Ex.143, Scott 362:5-363:19.

On November 19, after the Giuliani/Powell press conference, Carlson very carefully tried to thread his own needle. On one hand, he said publicly on his show that what “Powell was describing would amount to the single greatest crime in American history” but “she never sent us any evidence, despite a lot of requests.” Ex.170 at FNN018_02408904-05. On the other, however, he did *not* say what he believed privately—that she was “lying.” Ex.150. Instead, he closed by saying, “Maybe Sidney Powell will come forward soon with details on exactly how this

happened, and precisely who did it....We are certainly hopeful that she will.”
Ex.170 at FNN018_02408905.

Carlson’s broadcast still caused viewer backlash. So he and Fox—including Fox Corporation employee Raj Shah—mobilized. As Shah told Lachlan Murdoch, Viet Dinh, and Suzanne Scott afterwards: “After criticism from social media for Tucker’s segment questioning Attorney Sidney Powell’s *outlandish voter fraud claims*, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Shah also texted with Pfeiffer. On November 22, Shah wrote: “shit is so crazy right now. *so many people openly denying the obvious that Powell is clearly full of it.*” Ex.271. Pfeiffer: “*She is a fucking nutcase.*” *Id.*

That day, Trump disavowed Powell and stated that she did not represent Trump or the campaign. Ex.273. Carlson told Ingraham: Powell’s “a nut, as you said at the outset. It totally wrecked my weekend. Wow... *I had to try to make the WH disavow her, which they obviously should have done long before.*” Ex.274.

In graham responds: “No serious lawyer could believe what they were saying.” *Id.*
Carlson replies: “But they said nothing in public. Pretty disgusting.” *Id.*

That same weekend, Tucker texted his Executive Producer Justin Wells: “We won the battle with Powell. Thank god. [REDACTED]

[REDACTED] Carlson, of course, said nothing in public about his own role in this affair or that he [REDACTED] believed the claims were “reckless and unsubstantiated.” But the blowback continued and the pressure increased. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

After January 6, trying to thread the needle between the truth and pressure from his viewers and sponsors became even more difficult. Late on January 6, Carlson texted with Pfeiffer that Trump is “a demonic force, a destroyer. But he’s not going to destroy us.” Ex.276 at FNN035_03890858. On January 26, Carlson invited his leading sponsor Mike Lindell on his show, where Lindell spouted these same conspiracies on air after previewing them for Carlson’s staff during a pre-interview. *See, infra*, §V.D.6.

Privately, Fox's hosts and executives knew that Donald Trump lost the election and that he needed to concede. But Fox viewers heard a different story—repeatedly. On January 5, Rupert Murdoch told Suzanne Scott, “It’s been suggested our prime time three should independently or together say something like ‘the election is over and Joe Biden won,’” and that such a statement “*would go a long way to stop the Trump myth that the election stolen.*” Ex.277. Scott forwarded the email to Cooper, stating “I told Rupert that privately they are all there—we need to be careful about using the shows and pissing off the viewers but they know how to navigate.” *Id.* Despite the internal recognition that the election was over, Fox did not retract its claims about Dominion. Instead, it kept defaming Dominion. To this day, Fox has never retracted the false statements it broadcast about Dominion.

LEGAL STANDARD

The Court should grant summary judgment where, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist. *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992). The movant bears the initial burden of showing that undisputed material facts support its motion, but once that burden is met, the burden shifts to the non-movant, who must show material issues of fact exist and who “may not rest upon the mere allegations or

denials of the adverse party's pleading," but instead "must set forth specific facts showing that there is a genuine issue for trial." Del. Super. Ct. Civ. R. 56.

Dominion's *per se* defamation claims contain the following elements: "(i) a false statement; (ii) publication; (iii) fault; and (iv) one of four *per se* injuries, including, as relevant here, (a) an accusation of a serious crime or (b) business harm." FNN MTD Order, p.38. "In addition, the alleged defamation must be 'of or concerning [Dominion].'" *Id.* (citation omitted). A broadcast is defamatory if it contains even one actionable statement within it. As explained below, each broadcast includes multiple defamatory statements.

Dominion must ultimately prove fault—*i.e.*, actual malice—by clear and convincing evidence. N.Y. Civil Rights Law §76-a.2. Dominion further assumes, for purposes of this motion, that it must also prove the falsity of the statements by clear and convincing evidence.⁵ But those heightened burdens make no difference on this motion because to prevail here, Dominion must demonstrate that no genuine issue of material fact exists—a higher burden than clear and convincing evidence. As explained below, Dominion has done so.

⁵ Though the New York Court of Appeals has not ruled on the question, the Second Circuit has held that that court would likely hold that falsity must be proved by clear and convincing evidence for public figures. *See DiBella v. Hopkins*, 403 F.3d 102, 110-115 (2d Cir. 2005). Dominion assumes for purposes of this motion that it must ultimately prove falsity by clear and convincing evidence.

ARGUMENT

I. The Defamatory Statements Fox Published About Dominion Are False.

As Fox's Political Editor Chris Stirewalt acknowledged, in November and December 2020, "no reasonable person would have thought" the allegations against Dominion were true. Ex.146, Stirewalt 154:10-19. Denying summary judgment on falsity requires this Court to find that a reasonable juror today could think that Dominion actually committed election fraud by rigging the 2020 Presidential Election, through software and algorithms, nefarious ties to Venezuela, kickbacks to government officials, or otherwise. Denying summary judgment on falsity would effectively result in a trial regarding the legitimacy of the 2020 Presidential Election.

No reasonable juror could dispute falsity here. Fox published four categories of inherently improbable and proven falsehoods about Dominion (FNN Compl. ¶2):

- (1) Dominion committed election fraud by rigging the 2020 Presidential Election (the "fraud" lie).
- (2) Dominion's software and algorithms manipulated vote counts in the 2020 Presidential Election (the "algorithm" lie).
- (3) Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez (the "Venezuela" lie).
- (4) Dominion paid kickbacks to government officials who used its machines in the 2020 Presidential Election (the "kickbacks" lie).

This false narrative portrayed Dominion as a villain in a grand scheme to steal the 2020 Presidential Election. That larger narrative also contained separately

actionable individual claims, which themselves are also false. Appendix D of this Brief reprints the pertinent statements in each accused broadcast and tweet (herein “broadcasts”) and identifies the categories of falsehoods included in each.

A summary of the accused broadcasts identified in Paragraph 179 of the Complaint,⁶ follows:

Complaint Statements	“Fraud” Lie	“Algorithm” Lie	“Venezuela” Lie	“Kickbacks” Lie
¶179(a)	X	X		
¶179(b)	X		X	
¶179(c)	X	X	X	X
¶179(d)	X	X	X	
¶179(e)	X	X	X	
¶179(f)	X	X	X	X
¶179(g)	X	X	X	X
¶179(h)	X	X	X	
¶179(i)	X	X	X	
¶179(j)	X	X	X	
¶179(k)	X	X	X	
¶179(l)	X	X	X	
¶179(m)	X	X		X
¶179(n)	X	X		
¶179(o)	X	X		
¶179(p)	X	X		
¶179(q)	X	X	X	
¶179(r)	X			
¶179(s)	X			
¶179(t)	X			

Figure 1: Summary of Falsehoods in the Fox Accused Broadcasts

⁶ Paragraph 224 of the *US Dominion Inc. et al. v. Fox Corporation* Complaint (“Fox Corp. Compl.”) contains the same accused statements. Appendix D identifies the cross-references to that complaint.

Recounts and audits conducted by election officials across the U.S. repeatedly confirmed the election's outcome, including specifically that Dominion's machines accurately counted votes. That evidence alone more than suffices for summary judgment on the falsity of the claims that Dominion rigged the election and its software manipulated vote counts. Fox's admissions and Dominion's corporate documents and testimony show Dominion is not owned by Smartmatic or formed to rig elections. Not a shred of evidence suggests Dominion paid kickbacks to any government officials, which Dominion's and government officials' sworn statements confirm. This proof ends the inquiry.

Section A addresses the four categories of falsehoods in the accused broadcasts, establishing with undisputed evidence that each is false. Hand recounts and audits confirmed the election results time and again. Certification, testing, the existence of paper ballots, and Dominion's source code, among other evidence, only further confirm this point. Corroborating this evidence, Dominion's corporate representative, other Dominion employees, and elections officials who lived through the 2020 Presidential Election have testified under oath that the statements are false—testimony that Fox has not rebutted. Every credible source—at the time and since—has rejected all four categories of falsehoods that Fox espoused.

Fox has zero evidence to raise a genuine issue of material fact on falsity. In discovery responses and binding corporate representative testimony, Fox has

conceded falsity on Smartmatic ownership and Venezuela connections. On all other statements, Fox says it does not plan to contest falsity, except to say it plans “to introduce evidence at trial that some votes were flipped,” without further explanation. Ex.127, Lowell, 53:5-13; *see generally id.* 52:4-192:12. Fox’s witnesses consistently confirmed under oath the statements’ falsity or lack of evidence. *See, e.g., infra*, §V.B., nn.12-13. No evidence exists to suggest otherwise.

Section B explains that the accused broadcasts contain actionable defamatory statements because they are not mere opinion. On this question of law, in denying Fox’s motion to dismiss, the Court already rejected Fox’s contention that the statements were mere opinion and correctly determined that the statements themselves, as well as context of the broadcasts, signaled to viewers that what was heard was likely to be fact. FNN MTD Order, pp.47-50. At this stage, a review of each statement confirms that each reasonably appears to state or imply assertions of objective fact, which discovery has only confirmed.

A. Undisputed Evidence Proves the Falsity of Fox’s Statements.

To prove falsity, Dominion must establish that Fox’s statements are “substantially false.” *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 94 (N.Y. 1st Dep’t 2015). To determine whether a statement is substantially false, “[c]ourts typically compare the complained of language with the [] truth to determine whether the truth would have a different effect on the mind of the average reader.” *Id.*

Significantly, substantial truth (or substantial falsity) “refers to the content of an allegedly defamatory statement, not the act of republishing it.” *Zuckerbrot v. Lande*, 167 N.Y.S.3d 313, 334 (N.Y. Sup. Ct. 2022). In other words, Fox cannot establish the “substantial truth” of its statements by claiming that it accurately repeated statements that others made. *Id.* “[U]nder New York law, a speaker who repeats another’s defamatory statements is not made immune from liability for defamation merely because another person previously made the same demeaning claim.” *Watson v. NY Doe I*, 439 F. Supp. 3d 152, 161 (S.D.N.Y. 2020) (internal quotation marks omitted). Rather, it is a “black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement.” *Cianci*, 639 F.2d at 60-61.

The following addresses the falsity of each lie category in turn.

- 1. Dominion Did Not Commit Election Fraud by Rigging the 2020 Presidential Election.**

The fabricated storyline that Dominion committed fraud by rigging the 2020 Presidential Election—a lie that runs through each of the accused broadcasts—was verifiably false when Fox first published it and repeatedly disproven as source after source confirmed the election’s outcome. *See* Appendix D (Category #1).

a. State audits and recounts

State audits and recounts of auditable paper ballots confirmed the 2020 Presidential Election's results and the fact that Dominion did not rig the election. This undisputed evidence standing alone warrants summary judgment.

In the 2020 Presidential Election, Dominion's voting systems generated an auditable paper ballots or a paper trail for each vote cast in contested swing-state jurisdictions that Fox's broadcasts claimed Dominion rigged. Ex.183, Poulos Aff., ¶9; Ex.138, Poulos 30(b)(6) 699:23-700:25 (Georgia), 766:7-19 (Antrim County, Michigan), 626:15-20 (Pennsylvania); *see, e.g.*, Ex.139, Richer 59:22-60:7 (Maricopa County, Arizona); Ex.100, Boockvar 30:10-21, 41:25-42:4 (Pennsylvania).⁷ Paper ballots protect against election rigging because “[y]ou can’t flip a paper ballot.” Ex.138, Poulos 30(b)(6) 568:6-10. Importantly, they also ensure a back-up to check the results of an electronic machine. *Id.* 640:14-17; Ex.183, ¶3.

⁷ Dominion machines are designed to generate an auditable paper trail. Ex.138, Poulos 30(b)(6) 639:7-640:3. In the 2020 Presidential Election, the non-swing state of Louisiana still required the use of direct recording electronic (“DRE”) machines, and thus continued to use legacy machines built and sold by Sequoia, a company from which Dominion acquired certain assets in 2010. For early voting, Louisiana also used a limited number of newer Dominion machines, which are designed to generate a paper record, but Louisiana used the machines without a printer, to comply with the state’s existing requirements. In addition, most voters in New Jersey used mail-in paper ballots in the 2020 Presidential Election, though some legacy Sequoia DRE machines were available for accessibility purposes. *See* Ex.109, Cramer 278:9-279:8; Ex.137, Poulos 30(b)(6) 437:7-13.

As designed, paper ballots in the contested swing-state jurisdictions that used Dominion's voting machines validated the 2020 Presidential Election's outcome through hand counts, audits, and recounts. *See* Ex.299 (listing state audit requirements). Examples from jurisdictions to which the accused Fox broadcasts referred prove the point:

Arizona: In the 2020 Presidential Election, only one jurisdiction in Arizona used Dominion voting systems: Maricopa County. Ex.183, Poulos Aff., ¶10. In sworn testimony, Maricopa Board of Supervisors Chairman Bill Gates and County Recorder Stephen Richer confirmed they did not believe Dominion had manipulated vote counts in the county or anywhere and had seen no evidence of that. Ex.120, Gates 35:5-36:12, 97:3-13; Ex.139, Richer 22:14-23:11.

Copious evidence buttresses that conclusion. On November 9, 2020, Maricopa completed a hand count audit that confirmed the election's results. Ex.209. In a November 17, 2020 letter to Maricopa voters, then-Maricopa Board of Supervisors Chairman Clint Hickman advised that the hand recount “***yielded a 100 percent match to the results produced by the tabulation equipment.***” Ex.210. By November 18, Maricopa held its post-election logic and accuracy test, which again “showed that the machines, the tabulation machines, had operated properly.” Ex.120, Gates 32:2-8; *see* Ex.139, Richer 85:8-22.

To assuage voters, Maricopa then had Pro V&V and SLI, two accredited independent testing laboratories, each complete an additional audit, which confirmed again that “there was no evidence of manipulation of the software or the hardware as certified by the EAC and the Secretary of State, that the systems performed as they should have...[and that] no files, electronic files, were inappropriately deleted or in any way manipulated, and that the machines were still reading ballots as was proper and accurately.” Ex.139, Richer 53:14-56:23; *see* Ex.300 (Pro V&V Report); Ex.301 (SLI Report).

Georgia: Every county in Georgia used Dominion voting systems in the 2020 Presidential Election. Ex.183, Poulos Aff., ¶10. As with Arizona, here, too, undisputed evidence shows that Dominion’s voting machines did not rig Georgia’s election. Even before Georgia finished its hand recount, Georgia’s Republican Secretary of State Brad Raffensperger commissioned a forensic audit of a sampling of Dominion voting machines by Pro V&V, and by November 17, 2020, that audit concluded with Raffensperger’s Office reporting “Pro V&V found no evidence of the machines being tampered.” Ex.303-A; Ex.222, ¶4.

On November 19, 2020, Secretary Raffensperger announced that Georgia’s statewide 100% hand recount, ordered as part of a risk-limiting audit (“RLA”), “upheld and reaffirmed the original outcome produced by the machine tally of votes cast.” Ex.303-D; *see* Ex.303-B (RLA Report).

Georgia then conducted an additional recount at the request of the Trump campaign, and on December 7, 2020, Secretary Raffensperger recertified the accurate results of the 2020 Presidential Election. Ex.303-E.

Michigan: Michigan conducted extensive post-election audits, and these audits verified the election results across the state. Ex.306-B (Michigan audits report). The Republican-led Michigan Senate Oversight Committee then conducted its own comprehensive investigation and again “found no evidence of widespread or systematic fraud in Michigan’s prosecution of the 2020 election.” Ex.306-C at p.3 (Michigan State Senate Oversight report). Michigan officials also repeatedly debunked rumors arising from the human error by the county clerk that led to inaccurate unofficial reporting in Antrim County, which was quickly caught and fixed, was an isolated incident, and was not part of any fraud on the part of Dominion to steal the election—a point Fox does not contest. *See, infra*, §I.A.2.c.

Pennsylvania: Former Secretary of the Commonwealth Kathy Boockvar explained under oath that she did not believe Dominion stole the election and had seen no evidence to suggest it did. Ex.100, Boockvar 45:21-46:14, 50:7-16, 178:13-17. Her conclusion accords with the facts. Contrary to Fox’s reporting, Philadelphia and Allegheny County did not use Dominion in the 2020 Presidential Election; however, 14 of 67 counties in the State did. *Id.* 35:25-36:3, 79:5-11, 150:17-21. After the election, counties completed a statutorily mandated statistical sampling

audit as part of canvassing, and then 63 of 67 counties in the state completed a risk-limiting audit—both of which confirmed the accuracy of the state’s vote counts. *See id.* 46:19-49:5; 25 Pa. Stat. §3031.17 (requiring counties to conduct a “statistical recount of a random sample of ballots”); Ex.354 (election results certification announcement).

b. Certification and testing

In the words of Maricopa County Recorder Stephen Richer, Fox’s “whole theory is absolutely ludicrous to anyone who bothers researching elections for more than five minutes or speaking with any elections professional.” Ex.139, Richer 22:6-23:11. Indeed, as the Cybersecurity and Infrastructure Security Agency (“CISA”) made clear in its November 4, 2020 public advisory, “every state has voting system safeguards to ensure each ballot cast in the election can be correctly counted.” Ex.556-A; Ex.556-B. Such safeguards include certification and testing, which together formed a bulwark of protection that made Fox’s election rigging statements implausible from the outset.

State certification laws require voting systems to go through testing and meet standards of accuracy before use, with many states requiring federal testing and/or certification by the Election Assistance Commission (“EAC”). *See* Ex.308 at pp.3-4 (EAC state certification requirements report); Ex.186, Hovland Decl., Ex.A, §§1.5, 4.5-4.8 & Appx.C (EAC manual outlining source code and tabulation accuracy

testing). As part of Pennsylvania’s 2019 certification process, for example, Secretary Boockvar explained that the Dominion system went through “penetration testing, access-control testing, and testing to ensure that every access point, software and firmware are protected from tampering.” Ex.100, Boockvar 38:23-41:24; *see* Ex.350 at p.2 (state senate testimony); Ex.309 & Ex.405 (certification documents and announcement).

Every state that used Dominion voting machines in the 2020 Presidential Election certified them prior to the election. *See* Ex.183, Poulos Aff., ¶8; Ex.185 at p.2. Dominion also completed federal testing and had federal certification for its systems prior to the 2020 Presidential Election. *See* Ex.186, Hovland Decl., ¶¶18-32 & Exs.A-P.

Other measures, such as pre-election logic and accuracy testing of voting equipment, afforded additional assurances. Such testing is often required by law. *See, e.g.*, Ariz. Rev. Stat. §16-449; Ga. Code §§21-2-374(b), 21-2-379.6(c); Mich. Comp. Laws §§168.37, 168.794, 168.795; 25 Pa. Stat. §§3006, 3007, 3011, 3015, 3031.5, 3031.14. These requirements meant that in Maricopa County, Arizona, for example, the Dominion voting machines used in the 2020 Presidential Election “met mandatory requirements during logic and accuracy testing before the Presidential Preference Election, the Primary Election and the General Election.” Ex.210; *see* Ex.310 (Maricopa Pre-Logic and Accuracy Testing Certificate).

For government officials who administered the 2020 Presidential Election, measures like certification and testing provided additional confirmation that Dominion's voting machines had not manipulated votes in the 2020 Presidential Election. *See* Ex.139, Richer 22:6-27:22 & Ex.120, Gates 23:5-30:4 (Maricopa County, Arizona); Ex.100, Boockvar, 23:3-25:11, 36:4-37:3 (Pennsylvania).

c. Other public record evidence

Extensive evidence from other credible public sources made the falsity of claims about Dominion rigging the election widely known immediately after the election and confirmed their falsity in the weeks and months that followed.

On November 4, 2020, a coalition of nonpartisan elections officials from the National Association of State Election Directors ("NASED") and the National Association of Secretaries of State ("NASS") issued a statement that "more than 100 million ballots were safely and securely cast." Ex.311. The same day, CISA updated its public advisory to reject the notion that bad actors could change millions of votes without detection due to state "voting system safeguards." Ex.556-A; Ex.556-B.

In the weeks after the election, reputable source after reputable source confirmed what was plain from the outset:

- 11/12/2020: In a joint statement issued by CISA, Trump appointees, election security experts, and state and local elections officials stated: "All of the states with close results in the 2020 presidential race have paper records of each vote, allowing the ability to go back and count each ballot if necessary. This is an added benefit for security and resilience. This process allows for the

identification and correction of any mistakes or errors. **There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.**” Ex.190 (emphasis in original).

- 11/14/2020: U.S. EAC Commissioner Benjamin Hovland stated there was “no widespread fraud or malfunction that would change the result of the election.” Ex.186, Hovland Decl., ¶5.
- 11/16/2020: 59 election security and computer science experts, including Fox’s expert in this case Dan Wallach, jointly announced: “We are aware of alarming assertions being made that the 2020 election was ‘rigged’ by exploiting technical vulnerabilities. However, in every case of which we are aware, these claims either have been unsubstantiated or are technically incoherent. To our collective knowledge, *no credible evidence has been put forth that supports a conclusion that the 2020 election outcome in any state has been altered through technical compromise.*” Ex.315.
- 11/17/2020: Then-Maricopa Board of Supervisors Chairman Clint Hickman wrote in a public letter to Maricopa voters: “The evidence overwhelmingly shows the system used in Maricopa County is accurate and provided voters with a reliable election....*More than 2 million ballots were cast in Maricopa County and there is no evidence of fraud or misconduct or malfunction.*” Ex.210.
- 12/1/2020: U.S. Attorney General William Barr announced that U.S. attorneys and FBI agents had investigated claims of election fraud, and “*to date, we have not seen fraud on a scale that could have effected a different outcome in the election.*” Barr continued: “There’s been one assertion that would be systemic fraud and that would be the claim that machines were programmed essentially to skew the election results. And the DHS and DOJ have looked into that, and so far, we haven’t seen anything to substantiate that.” Ex.316 at pp.1, 4.

Most recently, a bipartisan committee concluded an 18-month expansive government investigation into the circumstances surrounding the January 6, 2021 attack on the United States Capitol: conducting nine public hearings, presenting testimony from over 70 witnesses, and reviewing voluminous stacks of documentary

evidence and media. *See* Ex.317 at pp.3-8. In their December 22, 2022 final report, the Select Committee to Investigate the January 6th Attack on the United States Capitol confirmed that Dominion did not rig the 2020 Presidential Election and the election was not stolen:

Not a single witness—nor any combination of witnesses—provided the Select Committee with evidence demonstrating that fraud occurred on a scale even remotely close to changing the outcome in any State.

Ex.317 at p.20; *see id.* at pp.216-224 (debunking claims about Dominion).

Federal and local government officials, cybersecurity experts, and Trump appointees agreed: Dominion did not rig the 2020 Presidential Election.

d. EAC Commissioner Benjamin Hovland’s sworn declaration

In a sworn declaration dated November 28, 2022, EAC Commissioner Benjamin Hovland attested to the fact that there is no evidence Dominion voting systems deleted, lost, changed, or compromised votes in the 2020 Presidential Election:

As of November 14, 2020, the EAC had not received credible or substantiated reports which indicated a Dominion voting system error related to the deletion, loss, change, or compromise of a vote during the 2020 presidential election. In the months that followed the 2020 presidential election and to date, the EAC has not received any credible or substantiated reports of this nature.

Ex.186, Hovland Decl., ¶36.

This evidence, provided by the Commissioner of the federal agency tasked with ensuring election integrity, overseeing federal certification, and monitoring for instances of irregularities in accredited voting systems, further confirms what was known from the start.

e. Dominion's source code

The evidence identified above more than suffices to disprove that Dominion rigged the election. Seeing the source code from Dominion's machines is not necessary to disprove that sensational lie. But Dominion left no room for even unfounded doubt.

Beyond opening up its books, answering dozens of interrogatories, and producing millions of pages of its business records, Dominion provided its source code to Fox's expert Dr. Seth Nielson, as well as its own expert Dr. Aviel Rubin. Following review of that source code, Dr. Rubin concluded:

We were unable to detect any mechanism or functionality for switching votes, deleting votes, or manufacturing additional fraudulent votes. Vote manipulation algorithms or interfaces for users to manually change votes were not found in any of Dominion's tabulation software (ICC, ICP and ICX) which count votes and generate election results.

Ex.548, Rubin Aff., ¶4; Ex.548-A, ¶146.

In response, no Fox expert has identified any vote-manipulating algorithm in the source code or any other Dominion document—because none exists. Though unsurprising, Dominion's source code corroborates the falsity of Fox's claims.

f. Dominion's contemporaneous and sworn statements

On top of this, since the beginning, Dominion not only has denied the ludicrous claim that it rigged the election, it pointed out how the allegation was absurd and verifiably false. As shown in Section V.A., *infra*, in real-time Dominion sent thousands of communications to Fox denying those accusations and providing links to third-party sources verifying its statements.

In this lawsuit, Dominion's corporate representative and CEO John Poulos has confirmed that Dominion did not rig the 2020 Presidential Election. Ex.138, Poulos 30(b)(6) 895:5-9. Other Dominion employees confirmed likewise under oath. *See, e.g.*, Ex.131, Noell 68:18-69:5 ("Dominion doesn't flip votes. We don't steal elections."); Ex.109, Cramer 55:13-24 ("The conspiracy theory that was repeated by Fox News that somehow Dominion Voting was able to flip votes or in some fashion move votes....It was just absurd and yet that lie still echoes in the industry"). Fox has not rebutted this testimony, nor could it.

g. Fox's lack of evidence

Because Fox has zero evidence to dispute the falsity of this claim, Fox cannot raise any issue of material fact. Fox already admitted that it is "not planning to assert the truth or falsity" of the assertion that Dominion rigged the election at trial and does not "have evidence to prove" its truth. Ex.127, Lowell 30(b)(6) 41:22-42:4, 177:13-19. Fox's responses to Requests for Admission similarly do not deny the

falsity of the fraud lie. *See* Ex.319, Nos.192 &197. And Fox admits that “President Trump did not win by millions of votes that were shifted by DOMINION software that was expressly designed for that purpose.” *Id.* at No.209. Indeed, as early as November 5, Fox’s Chief Political Correspondent Bret Baier stated privately “There is NO evidence of fraud. None.” Ex.176.

Fox cannot point to witness testimony either. None of Fox’s witnesses have even asserted that Dominion rigged the election in depositions. Instead, Fox witness after witness has admitted under oath that they have not seen evidence proving Dominion stole the 2020 Presidential Election or that they do not believe Dominion did. *See, infra*, §V.B. And as Fox itself has conceded in binding corporate representative testimony, the reporting Fox has “done up until now has shown no credible evidence of massive election fraud.” Ex.127, Lowell 30(b)(6) 132:11-17. Not a single Fox witness has presented evidence that Dominion rigged the 2020 election because no evidence—documentary or otherwise—suggests it.

Dominion is therefore entitled to summary judgment on the falsity of all of the accused broadcasts, ¶¶179(a)-179(t), as they all stated the false claim that Dominion rigged the election.

2. Dominion's Software and Algorithms Did Not Manipulate Vote Counts in the 2020 Presidential Election.

It is untrue that Dominion's software or algorithms manipulated votes in the 2020 Presidential Election. *See* Appendix D (Category #2). Within the broader narrative about a rigged election, Fox cast Dominion and its software as the engine of nationwide fraud, broadcasting assertions that Dominion, through its software and algorithms, flipped, manipulated, dumped, added, or deleted votes, and that Dominion monitored votes in real time and notified officials if a preferred candidate was behind in jurisdictions across the country. A few examples illustrate:

- “[Bartirromo:] Sidney, we talked about *the Dominion software*. I know that there were voting irregularities. Tell me about that. [Powell:]...*That is where the fraud took place, where they were flipping votes in the computer system or adding votes that did not exist.*” ¶179(a); *see also* ¶¶179(l), 179(q).
- “[Powell:]...*all the machines are infected with the software code that allows Dominion to shave votes for one candidate and give them to another* and other features that do the same thing....Different states shaved different amounts of votes, or the system was set up to shave and flip different votes in different states.” ¶179(m); *see also* ¶179(n).
- “[Powell:]...We’re talking about *the alteration and changes in millions of—of votes; some being dumped* that were for President Trump, *some being flipped* that were for President Trump.... *All kinds of different means of manipulating the Dominion and Smartmatic software* that, of course, we would not expect Dominion or Smartmatic to admit.” ¶179(e).
- “[Giuliani:] Every ballot they could see just had Biden’s name on it, nobody else, not even another Democrat. Now, why does that happen? It happens because you know you’re behind. *Dominion*-- [Bartirromo:] Yeah. [Giuliani:] *notifies you, you call off the counting and then you start doing ballots like this.* [gesturing] You can’t – you can’t do the downticket.” ¶179(g).

- “[Powell:] *They can watch votes in real time. They can shift votes in real time. We’ve identified mathematically the exact algorithm they used and planned to use from the beginning to modify the votes in this case to make sure Biden won....*” ¶179(g).
- “[Dobbs:] But concomitantly, Dominion Voting Systems, which you have described it *with algorithms in which—which were designed to be inaccurate rather than to be a secure system.*” ¶179(o).

A strain of this lie was that Dominion voting machines used Smartmatic software, and that Dominion/Smartmatic software was designed to rig elections. *See, e.g.,* ¶¶179(d), 179(f), 179(g), 179(h), 179(i), 179(j), 179(q). Various Fox broadcasts asserted that the software had a “backdoor,” ¶¶179(g), 179(k), and a “controller,” ¶¶179(p), 179(q), and was “designed in a way that the system could change the vote of each voter without being detected,” ¶179(h).

Undisputed evidence shows that these statements were false.

a. State audits, recounts, certification, testing & other public record evidence

The evidence that shows Dominion did not rig the election also disproves the more specific claim that Dominion stole the election *through* its software or algorithms. As explained in Section I.A.1.a., contested jurisdictions across the U.S. that used Dominion’s software and auditable paper ballot system conducted audits and recounts that verified the results of the 2020 Presidential Election. As explained in Section I.A.1.b., safeguards from certification and testing further ensured that the voting systems counted votes accurately. Numerous public sources, including those

cited in Section I.A.1.c., also debunked the algorithm lie in real time. Commissioner Hovland has confirmed that there is no evidence Dominion voting systems deleted, lost, changed, or compromised votes, as stated in Section I.A.1.d.

b. Nature of election administration

General knowledge about how elections work further demonstrates that the asserted forms of vote manipulation and, in particular, external control by Dominion, were not feasible. Dominion does not “run elections.” Ex.138, Poulos 30(b)(6) 785:15. “Local jurisdictions have the primary responsibility of administering state and federal elections and of tabulating, reporting, and certifying results” according to applicable law. Ex.320 at p.2 (EAC 2020 election report); *see* Ex.100, Boockvar 18:25-20:12 (confirming counties administer elections). Dominion does not see votes, nor does it have a way to monitor votes during elections. *See* Ex.183, Poulos Aff., ¶11. As John Poulos explained to the Michigan State Senate Oversight Committee in December 2020 in sworn testimony, “It is technologically impossible to see votes being counted in real time or to flip them.” Ex.183-A; *see* Ex.183, Poulos Aff., ¶16; Ex.136, Poulos 128:5-23.

c. Antrim County and other counties

Numerous official sources debunked the specific instances of claimed vote-flipping or dumping by Dominion or its software, and in so doing further confirmed that Dominion’s software did not flip votes in the 2020 Presidential Election.

Antrim County: In the 2020 Presidential Election, Antrim County, Michigan used Dominion voting systems. Although human error by the county clerk led to incorrect unofficial reporting of vote tallies, by November 6, 2020, officials had identified, investigated, corrected, and explained the error, with the Michigan Department of State reporting that the Dominion “equipment and software did not malfunction and all ballots were properly tabulated.” Ex.282.

The Michigan Department of State confirmed on November 7, 2020, “***The error in reporting unofficial results in Antrim County Michigan was the result of a user error*** that was quickly identified and corrected; ***did not affect the way ballots were actually tabulated***; and would have been identified in the county canvass before official results were reported even if it had not been identified earlier.... These errors can always be identified and corrected because every tabulator prints a paper totals tape showing how the ballots for each race were counted.... ***Again, all ballots were properly tabulated.***” Ex.306-D.

Michigan Director of Elections Jonathan Brater attested in December 2020 in a declaration that the human error “***did not affect how tabulators counted ballots***....Further, there is ***no evidence*** leading me to believe that this was the result of intentional misconduct by an election official, was a result of software or equipment malfunction, or was caused by some sort of tampering.” Ex.306-A, ¶11; *see also* Ex.306, Brater Aff., ¶7 (sworn affidavit confirming above).

As described, *supra*, Michigan also conducted a complete hand recount that confirmed Antrim County's election results, Ex.306-B, and the Republican-led Michigan Senate Oversight Committee conducted its own comprehensive investigation and found with respect to Antrim County that "the official vote count was never in doubt and was validated several times, including during a complete, hand recount," Ex.306-C at p.19.

Simply put, there is no genuine dispute about what happened in Antrim.

Detroit: In addition to debunking the Antrim County fraud claim, both the Michigan Department of State and the Michigan Senate Oversight Committee debunked claims of Dominion "dumping" ballots as part of a supposed election fraud in Detroit, Michigan. *See* Ex.306-B at pp.19-23; Ex.306-C at pp.26-27. Dominion's CEO John Poulos has also denied it under oath. Ex.183, Poulos Aff., ¶12.

Georgia: Georgia debunked claims related to particular counties through its 100% hand recount and forensic audit of Dominion machines. *See, supra*, §I.A.1.a. For example, as stated in an official publication of the Office of Georgia Secretary of State concerning claims of vote-flipping in Ware County, Georgia, "No one has unearthed evidence of 'vote flipping' because it didn't happen. And no one has discovered some secret algorithm for altering the election outcome because that's nonsense." Ex.303-F.

d. Dominion's contemporaneous and sworn statements

Dominion's corporate representative and CEO John Poulos has also confirmed under oath that Dominion's software and algorithms used in the 2020 Presidential Election did not manipulate vote counts, and Dominion's voting machines did not run or use Smartmatic software or technology. Ex.137, Poulos 30(b)(6) 430:7-21; Ex.138, Poulos 30(b)(6) 895:10-14; Ex.183, Poulos Aff., ¶13.

Similarly, in sworn testimony before the Michigan Senate Oversight Committee, Poulos stated in December 2020, "Additionally, Dominion does not have any servers in Germany or Spain. No votes are sent overseas. Let me be clear. Ballots aren't sent anywhere, not overseas, not over state lines, and not even over county lines. All the votes are counted by local bipartisan US election officials in the United States." Ex.183-A; *see* Ex.183, Poulos Aff., ¶16. Former Pennsylvania Secretary of Commonwealth Kathy Boockvar likewise verified: the claim that "Dominion sends everything to Smartmatic" and "votes are sent overseas" is "[a]bsolutely 100 percent false." Ex.100, Boockvar 56:11-18.

e. Fox's lack of evidence

Fox has nothing to rebut this evidence. Its corporate representative offered no evidence of vote flipping, manipulating, dumping, adding, or deleting by Dominion or its software and has conceded that he has not seen evidence of votes for Donald Trump blowing up the algorithm or the vote-flipping evidence that Powell

referenced on air, Ex.127, Lowell 30(b)(6) 127:6-14, 179:3-180:5, 185:19-186:5, and conceded that Fox does not have evidence to support that Dominion had an algorithm used to modify the votes to make sure Biden won, *id.* 126:5-127:5.

Indeed, Fox appears not to contest numerous statements that fall under the algorithm lie. For example, in its responses to Dominion's Requests for Admissions, Fox does not contest (instead claiming it can neither admit nor deny) that "there is not an algorithm that Dominion used and planned to use from the beginning to modify the votes in this case to make sure Biden won," Ex.319, No.212 (§§179(a, g, j, n, o, q)); "Dominion does not allow votes to be mirrored and monitored," *id.* No.208 (§179(g)); "Dominion did not run an algorithm that shaved votes," *id.* No.219 (§179(m, n)); "Dominion did not use an algorithm to calculate the votes they would need to flip and use computers to flip those votes from Trump to Biden," *id.* No.202 (§179(a)); and "Dominion did not have algorithms that would stop the vote count and go in and replace votes for Biden and take away Trump votes," *id.* No.204 (§179(a)); *see also* No.225 (admitting Trump did not "blow up" the algorithm) (§179(q)).

Nor could Fox credibly argue otherwise. Multiple Fox witnesses have admitted under oath at depositions that the algorithm lie was false or lacked evidentiary support. *See, e.g.*, Ex.96, Andrews 31:22-32:2; Ex.111, Dobbs 87:13-

25, 90:15-91:15; Ex.105, Carlson 163:21-24; Ex.121, Grossberg 263:5-10; Ex.135, Pirro 89:3-13; Ex.146, Stirewalt 154:20-155:17; Ex.145, Smith 34:15-22, 35:14-22.

Nonetheless, Fox has said that it plans to offer evidence that “some votes were flipped,” though Fox couldn’t say what evidence that might be. Ex.127, Lowell 30(b)(6) 53:5-13. To the extent Fox’s focus appears to be the isolated incident in Antrim County, Michigan, that was **human error** by a local election official; it caused inaccuracies in **unofficial** election results of the Presidential Election; and government officials repeatedly confirmed Dominion’s system had correctly tabulated votes. *See, supra*, §I.A.2.c. Michigan officials also confirmed they would have caught the error during canvassing, if not caught earlier (as it was). *See id.*

But even assuming that inadvertent human error by an election official that caused erroneous unofficial reporting constitutes “vote flipping” by Dominion, that proposition would not avoid summary judgment on the lie that Dominion’s software and algorithms manipulated vote counts in the 2020 Presidential Election. Fox’s statements did not charge Dominion with merely having software susceptible to user error that could cause inaccurate unofficial reporting. The algorithm lie is far broader. And “[a] plea of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge therein made.” *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 475 (N.Y. 1955).

Beyond asserting that Dominion flipped votes, Fox falsely stated that Dominion *designed* a vote-flipping algorithm, *used* “backdoors” and “embedded controllers,” and *for the purpose of committing fraud* monitored, flipped, added, and/or deleted votes, and not just “some votes,” in an isolated county, but “millions” of votes across the country. None of that is true for all the reasons explained above. Thus, even setting aside all references to Antrim County, or even more broadly references to “vote flipping,” the statements remain absolutely false.

Fox’s other apparent critique is that Dominion voting systems have “vulnerabilities” that could allow a malicious actor to breach the system under some circumstances. But that is a red herring: Dominion has not sued for defamation about any statement asserting that Dominion voting systems had alleged vulnerabilities.

Furthermore, the existence of vulnerabilities does not cover the breadth of the false charges in two ways. *Crane*, 308 N.Y. at 475. First, this category’s statements indicated *Dominion* flipped votes, ¶179(e), *Dominion* could watch votes, ¶179(g), *Dominion* notifies government officials, ¶179(g), and *Dominion* sent votes overseas, ¶179(i)—all of which link supposed *action by Dominion* to the flipping of votes. Security vulnerabilities that theoretically could be breached by an unknown individual are far different, and not “as broad,” as Fox’s false charges about Dominion.

Second, Fox did not frame the lies as a hypothetical. Unlike the assertion that voting machines have vulnerabilities, Fox's statements alleged manipulation ***actually occurred*** through software, algorithms, and external control by Dominion. For example, Sidney Powell declared on a December 10, 2020 airing of *Lou Dobbs Tonight*, "We now have reams and reams of actual documents from Smartmatic and Dominion, including evidence that they planned and executed all of this....We have evidence of how they flipped the votes, how it was designed to flip the votes. And that all of it has been happening just as we've been saying it has been." ¶179(q). These statements do not concern "vulnerabilities." They revolve around the false charge of planned and designed vote flipping that actually occurred. As Maricopa County Recorder Stephen Richer put it when asked by Fox if "concerns" about "the use of voter tabulation" were new in 2020: "I think we went pretty quickly from saying crime could be a problem to person X, Y, Z to Mrs. White with the rope in the study committed the crime." Ex.139, Richer 108:15-22.

To be clear, as explained above, Fox has zero evidence to suggest Dominion used its software to manipulate votes. And in particular, Fox has admitted Powell never provided the "reams" of proof claimed on air. *See* Ex.128, Lowell 30(b)(6) 285:6-13; *see also* Ex.319, RFA No.222 (not denying that Powell lacked credible evidence of how Dominion flipped votes). In fact, Fox host Lou Dobbs admitted

that Powell did not reveal such evidence on his show or anywhere else. Ex.111, Dobbs 269:2-271:5.

And in fact, there is zero evidence that any security breach related to Dominion's systems actually occurred in the 2020 Presidential Election. In fact, Fox's own expert Dan Wallach confirmed in a November 16, 2020 letter, signed by himself and 58 other scientists, that there was "no credible evidence" of the claim of rigging through exploitation of technical vulnerabilities. Ex.315 ("Merely citing the existence of technical flaws does not establish that an attack occurred, much less that it altered an election outcome."). At his deposition, Professor Wallach maintained that this letter was correct. Ex.95, Wallach 7:12-9:5.

No reasonable juror could find that Dominion or its software flipped votes in the 2020 Presidential Election. Summary judgment of the falsity of all accused broadcasts containing the algorithm lie, ¶¶179(a), 179(c)-179(q), is thus also proper.

3. Dominion Is Not Owned by a Company Founded in Venezuela to Rig Elections for the Dictator Hugo Chavez.

Another outlandish component of Fox's false narrative was the fiction that Dominion was owned by a company founded in Venezuela to rig elections for Hugo Chavez. *See* Appendix D (Category #3). Fox repeatedly broadcast this lie, publishing the fable that Dominion was owned by a company founded in Venezuela, Smartmatic, ¶¶179(b), 179(c), 179(f), 179(g), 179(h), 179(k), that Dominion and/or

its supposed owner Smartmatic were formed to rig elections in Venezuela and elsewhere, ¶¶179(b), 179(c), 179(e), 179(g), 179(i), 179(j), 179(q), and that Dominion machines used Smartmatic software to count votes, ¶¶179(b), 179(d), 179(g), 179(i), 179(j), 179(l).

None of those statements is true—which Fox knows and has conceded expressly: first in its RFA responses and then in binding corporate representative testimony confirming its admissions.

In Fox News’ responses to Dominion’s Requests for Admission (Ex.319), Fox admitted:

- “FNN...admits ‘DOMINION is not owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez,’” No. 176;
- “FNN...admits ‘DOMINION is not a company that is currently owned by Smartmatic,’” No. 180; and
- “FNN...admits ‘DOMINION was not created for the express purpose of being able to alter votes and secure the reelection of Hugo Chavez and then Maduro,’” No. 194.

These RFA admissions by themselves have “conclusively established” the falsity of these statements. *See* Del. Super. Ct. Civ. R. 36(b); *Merritt v. United Parcel Service*, 956 A.2d 1196, 1201 (Del. 2008). Fox’s Corporate Representative Tom Lowell eliminated any doubt as to whether Fox would contest these statements. Ex.127, Lowell 30(b)(6) 67:2-25; *see id.* 108:14-19 (not founded in Venezuela),

134:15-17; *id.* 138:13-22 (not contending Dominion owned by Smartmatic); *id.* 181:4-18 (the Chavez connection “proved false”).

Accordingly, the Court should find no genuine issue of material fact and grant summary judgment on the falsity of each of the accused statements espousing the Venezuela lie based on this evidence alone.

Regardless, no reasonable juror would find that Dominion is owned by a company formed to rig elections in Venezuela on this record even without Fox’s admissions. Dominion’s corporate documents⁸ and statements made to governmental entities, Ex.354 at pp.225-226 (4/15/2020 letter from Dominion to the Committee on House Administration); Ex.188 (Georgia proposal, Section 1), confirm that Dominion was not formed in Venezuela and has never been owned by Smartmatic or any company designed to rig elections. Dominion’s CEO and corporate representative John Poulos confirmed under oath that Dominion is not “owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez,” Ex.138, Poulos 30(b)(6) 895:15-18, and that Dominion’s products did not

⁸ See Ex.325 (2018 Staple Street Purchase Agreement); Ex.326 (US Dominion, Inc., Certificate of Incorporation, 6/22/2018); Ex.187 (Dominion Voting Systems, Inc., Certificate of Incorporation, 7/07/2009); Ex.327 (Dominion Voting Systems Corporation (“DVSC”), Articles of Amendment, 6/04/2020); Ex.328 (DVSC, Articles of Amalgamation, 7/13/2018); Ex.329 (same, 12/31/2009); Ex.184 (DVSC, Articles of Incorporation 1/14/2003).

run or use Smartmatic software or technology in the 2020 Presidential Election, Ex.137, Poulos 30(b)(6) 430:7-21; Ex.183, Poulos Aff., ¶13.

No evidence suggests otherwise. Indeed, the testimony from Fox’s employees and former employees was that they did not believe the claims or they had seen no evidence to support them. *See, e.g.*, Ex.102, Briganti 26:23-25, 309:6-11; Ex.105, Carlson 163:17-20; Ex.108, Cooper 130:4-12, 136:7-11; Ex.147, Wallace 72:4-12. Government officials deposed in this case testified similarly. *See* Ex.100, Boockvar 55:21-56:18 (Pennsylvania); Ex.139, Richer 112:12-113:13 (Arizona).

Summary judgment on all statements in the accused broadcasts containing the Venezuela lie, ¶¶179(b)-179(l), 179(q), is proper.

4. Dominion Did Not Pay Kickbacks to Government Officials Who Used Its Machines in the 2020 Presidential Election.

The claim that Dominion paid kickbacks to government officials who used its machines in the 2020 Presidential Election is also false. *See* Appendix D (Category #4).

Dominion’s CEO and corporate representative John Poulos confirmed under oath that Dominion did not “pay kickback[s] to government officials who used its machines in the 2020 presidential election.” Ex.138, Poulos 30(b)(6) 895:19-22. Dominion’s EVP of Sales Waldeep Singh, who has worked for Dominion since 2010 and has overseen customer sales and contracts, likewise confirmed under oath that

throughout his time with the company no one at Dominion, including himself, had “ever bribed a government official.” Ex.144, Singh 57:4-7.

Elections officials from Pennsylvania and Arizona who were involved in the certification or selection of Dominion voting systems used in the 2020 Presidential Election similarly confirmed, in depositions taken pursuant to subpoenas in this matter, that they did not receive kickbacks from Dominion and had no reason to believe Dominion paid kickbacks to any government official. Ex.100, Boockvar 49:23-50:6 (Pennsylvania Secretary of State who certified Dominion voting systems); Ex.120, Gates 34:22-35:4 (Maricopa Board of Supervisors Chairman who voted to authorize contract with Dominion).

With respect to Georgia, where Fox published the false claim that Dominion engaged in “corruption” and provided “significant benefits” to Georgia officials in exchange for “rush[ing]” through a contract with Dominion, ¶179(m), Dominion has denied the claim under oath, Ex.183, Poulos Aff., ¶14, as have Georgia Secretary of State Brad Raffensperger and Chief Operating Officer of the Secretary of State’s Office Gabe Sterling. Ex.222, Raffensperger Aff., ¶3; Ex.303, Sterling Aff., ¶3.

The fabrication that Dominion provided “election insurance” to any elected official or provided a way to “make sure their election was successful,” ¶179(g), as a form of kickback is also demonstrably false, for the same reasons that the lies about Dominion stealing the election and flipping votes are false. *See, supra*, §§I.A.1, 2.

Fox has produced no evidence to rebut any of this evidence. In fact, Fox has made no effort to contest the falsity of the kickbacks lie at all (refusing to admit or deny), as reflected in its RFA responses, Ex.319, No.195, and as confirmed in its corporate representative's deposition testimony, Ex.127, Lowell 30(b)(6) 73:12-19 ("neither are we planning to assert at trial that that's true or false"); *see id.* 111:6-20, 119:5-12, 159:17-23. And numerous Fox employees and former employees have already admitted under oath that they do not believe or have not seen any evidence to support the claim that Dominion paid kickbacks to government officials. *See, e.g.,* Ex.108, Cooper 128:12-16; Ex.147, Wallace 73:11-17; Ex.97, Baier 20:13-18, 21:20-25; Ex.135, Pirro 97:7-13, 99:12-16; Ex.143, Scott 308:4-12; Ex.130, L. Murdoch 323:2-9.

Based on this undisputed evidence that the allegations were false, this Court should grant summary judgment to Dominion on the falsity of each accused statement in the accused broadcasts containing the kickbacks lie, *see* ¶¶179(c), 179(f), 179(g), 179(m).

B. Fox's Accused Statements Are Actionable Allegations of Fact.

The defamatory statements are factual allegations. The Court has effectively already concluded as much on this question of law. FNN MTD Order, pp.48-50.

This Court delineated the three-factor test that New York courts apply to distinguish between a pure opinion and a statement of fact: "(1) whether the specific

language in issue has a precise meaning that is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether the full context of the communication in which the statement appears...signals to readers or listeners that what is being read or heard [is] likely to [be] opinion, not fact.” *Id.* (quoting *Brian v. Richardson*, 660 N.E.2d 1126, 1129 (N.Y. 1995)). The Court rejected Fox’s “context” argument, instead concluding that statements themselves, as well as the context of the broadcasts, signaled to viewers that what was being heard was likely to be fact, not opinion. *Id.*⁹

A careful review of each statement confirms that each one “reasonably appear[s] to state or imply assertions of objective fact.” *Id.* (citation omitted). It is impossible to conclude that the statements that Dominion rigged the election; Dominion’s software and algorithms manipulated vote counts in the election; Dominion is owned by a company founded in Venezuela to rig elections for Hugo Chavez; and Dominion paid kickbacks to government officials are anything other than verifiable statements. *See* Appendix D (listing accused statements).

⁹ The Court also accepted Dominion’s alternative argument that even if the statements were not statements of fact, they could be considered “mixed opinions.” FNN MTD Order, pp.49-50 (citing, *inter alia*, *Davis v. Boeheim*, 22 N.E.3d 999, 1004 (N.Y. 2014)). If the Court does not conclude that the statements are factual, they are at least opinions “based on either false or incomplete facts unknown to the reasonable viewer,” which are actionable. *Id.*

Fox's witnesses agree. In the words of Fox's corporate witness, "This is not a subjective determination." Ex.127, Lowell 30(b)(6) 127:6-128:3. "It's a question of facts" on whether evidence "exists or doesn't exist." *Id.* 128:4-9; *see* Ex.130, L. Murdoch 320:14-322:6 (Powell's claims are "factual allegations" that are either "true or false"). And because the statements were factual assertions, "it was evident" that people who heard Fox's statements believed them to be true. Ex.146, Stirewalt 160:8-13. In fact, in Fox's corporate testimony, Fox never asserted that the statements were mere opinion. As EVP of Primetime Programming Meade Cooper confirmed, "whether Dominion stole the election is a factual matter that can be verified one way or the other." Ex.108, Cooper 175:11-16.

If the statements themselves were not enough, discovery has only confirmed the Court's initial conclusion concerning the "context" in which the statements were made. The two channels on which the statements were broadcast—Fox News and Fox Business—are "news organization[s]," to which "journalistic standards apply." Ex.97, Baier 12:8-13, 24:4-6. And as Cooper agreed, "even on opinion shows, factual accuracy matters." Ex.108, Cooper 175:7-10. Indeed, multiple witnesses confirmed that viewers relied on each show for accurate, factual information. Specifically:

- ***Sunday Morning Futures***: Host Maria Bartiromo confirmed that she is a "newsperson" and that she "reports on the news." Ex.98, Bartiromo 344:19-23. Her show's producer, Abby Grossberg, similarly confirmed that the show

is “a news show.” Ex.121, Grossberg 66:10-11. *See also* Ex.127, Lowell 30(b)(6) 223:8-10 (“Maria is a well-respected business reporter with deep experience reporting”). Tucker Carlson lamented false claims on Bartiromo’s show, stating, “*Our viewers are good people and they believe it.*” Ex.241, at FNN035_03891092.

- ***Lou Dobbs Tonight***: Dobbs confirmed that his show was a place for viewers to get “accurate information to inform themselves,” and that “viewers were entitled to believe the things [he] said.” Ex.111, Dobbs 19:18-20:17; *see id.* 18:6-9.
- ***Fox and Friends***: Meade Cooper testified that she expects viewers rely on Fox and Friends and Fox and Friends Weekend as a source of credible news. Ex.108, Cooper 198:25-199:14.
- ***Hannity***: Hannity agreed that his show “is a credible source of news,” and confirmed that, at least in his view, at least some people “believed Sidney Powell’s lies about Dominion.” Ex.122, Hannity 32:20-22, 376:16-20; *see also* Ex.108, Cooper 197:8-10, 198:13-17 (Hannity show “is a credible news source” and Cooper expects “viewers who hear the information presented on Sean Hannity rely on Sean Hannity to provide credible news”).
- ***Tucker Carlson Tonight***: Carlson testified that his show has “viewers and they expect us to bring as much information as we can, to be as honest as we can.” Ex.105, Carlson 33:16-19; Ex.148, Wells 72:20-23 (senior producer testifying that “we’re making the appropriate decisions for our audience, and what we believe to be true, and providing our assessment of the news events”); Ex.108, Cooper 197:5-7, 198:4-11 (Carlson’s show is “a credible news source” and she believes “viewers who hear the information presented on the Tucker Carlson show rely on Tucker Carlson to provide credible news”).
- ***Justice with Judge Jeanine***: Ex.108, Cooper 197:11-13, 198:19-23 (Justice with Judge Jeanine is “a credible news source” and Cooper believes “viewers who hear the information presented on the Justice with Judge Jeanine show rely on Jeanine Pirro to provide credible news”).

These statements constitute “false assertions of fact” that “can readily be proven true or false and...signal[] to the average reader or listener that the defendant was conveying facts about the plaintiff.” *Kasavana*, 172 AD3d at 1046.

II. The Accused Fox Statements Are “Of and Concerning” Dominion.

Each of the twenty broadcasts is “of and concerning” Dominion. To satisfy this element, Dominion “need not be named in the publication.” *Seymour v. New York State Elec. & Gas Corp.*, 627 NY2d 466, 468 n.1 (3d Dept 1995). Instead, Dominion need only prove that an individual “familiar with [Dominion] would identify [it] as the subject of the statements at issue.” *Palin v. New York Times Co.*, 940 F.3d 804, 816 (2d Cir. 2019) (internal quotation marks omitted). In doing so, Dominion may rely on “extrinsic facts” and the statements’ “surrounding circumstances.” *Elias v. Rolling Stone LLC*, 872 F.3d 97, 105 (2d Cir. 2017); *Horton v. Guillot*, 2016 WL 4444875, at *3 (N.D.N.Y. Aug. 23, 2016). No genuine dispute exists that the statements meet this standard. Every accused broadcasts “refers to [Dominion] specifically” by name. *Palin*, 940 F.3d at 816.

III. Fox Published the Defamatory Statements.

Fox is responsible for *all* of the statements that it broadcasts—not just the words spoken by its hosts. Indeed, a New York court applying New York law in the parallel litigation currently underway in Smartmatic’s suit against Fox News and Fox Corporation has definitively held that the statements made by the guests Fox

repeatedly booked on its broadcasts, including Powell and Giuliani, are to be treated as statements by Fox itself. *Smartmatic USA Corp. v. Fox Corp.*, No. 151136/2021, 2022 WL 685407, at *22 (N.Y. Sup. Ct. Mar. 08, 2022) (“Fox News’ contention that the claims against it must be dismissed because plaintiffs failed to plead that the network itself made any specific defamatory statements about SUSA is without merit. This is because one who ‘repeats [a] defamatory statement is responsible for the resulting damages.’”) (quoting *Geraci v. Probst*, 15 N.Y.3d 336, 342 (2010)); see also *Khalil*, 2022 WL 4467622, at *4-10 (Fox News and Fox Corporation responsible for statements by Dobbs and Powell) (S.D.N.Y. Sept. 26, 2022); *Snowden v. Pearl River Broad. Corp.*, 251 So. 2d 405, 408 (La. Ct. App. 1971) (holding broadcaster liable for defamation for statements made by a live anonymous audience caller and noting that “the publication...is done by the station”); Restatement (Second) of Torts §581 cmt. g (1977) (radio and television broadcasters responsible for material “prepared and controlled by others” because they, “[f]or their own business purposes...initiate, select and put upon the air their own programs”).

To be sure, if a guest without warning spontaneously blurts out a false and defamatory statement unanticipated by the broadcaster and is not re-aired, the broadcaster may argue it did not act with actual malice. But that broadcaster will still have published the guest’s statements.

Moreover, “all who take part in the procurement, composition and publication of a libel are responsible in law and equally so.” Fox Corp. MTD Order, p.15. A defendant is therefore responsible for the publication of a defamatory statement so long as it “participated in the creation or the publication of the statements at issue.” *Id.* Put differently, the question is whether a person at the company shared responsibility for the broadcast. *See, e.g., New York Times v. Sullivan*, 367 U.S. 254 (1964); *infra*, §V, pp.89-90. The Southern District of New York recently reaffirmed this principle and denied Fox Corporation’s Motion to Dismiss on underlying facts virtually identical to this case. *Khalil*, 2022 WL 4467622 at *4-10 (allowing defamation claim against Fox News and Fox Corporation to proceed brought by individual mentioned in Lou Dobbs’ December 10 broadcast).

Finally, publication is a “term of art” that simply means “communication of the defamatory statement to a third party.” *Osorio v. Source Enterprises, Inc.*, 2006 WL 2548425, at *6 (S.D.N.Y. Sept. 5, 2006) (citing *Ostrowe v. Lee*, 175 N.E. 505, 505 (N.Y. 1931)). “Publication to even one person other than the defamed is sufficient.” *Torati v. Hodak*, 47 N.Y.S.3d 288, 290 (1st Dep’t 2017); *see also Penn Warranty Corp. v. DiGiovanni*, 10 Misc.3d 998, 1004 (N.Y. Sup. Ct. 2005) (single posting on website sufficient to prove publication).

Fox—both Fox News and Fox Corporation—published the defamatory statements. The unrefuted evidence establishes that Fox News broadcast each of the

twenty statements over its vast media network, including on its television broadcasts and social media platforms. *See, e.g.*, Exs.21-37; Ex.55-69, Ex.4; Ex.16; Ex.18. Seventeen of the statements were first broadcast on Fox News or Fox Business, with most of those statements then reposted on Fox’s websites and social media platforms. The three remaining statements were published on Lou Dobbs’s Twitter account, which Dobbs confirmed is “the show’s handle as well as mine.” *Id.*; Ex.111, Dobbs 74:13-18. Individuals at Fox News and Fox Corporation participated in the creation and publication of the statements and shared responsibility to do so, as discussed below. *See, infra*, §V.C-D. Dominion is entitled to summary judgment on the publication element of its claims.

IV. The Statements Are Defamatory *Per Se*.

Under New York law, a statement is *per se* defamatory “if it (1) charges the plaintiff with a serious crime; [or] (2) tends to injure the plaintiff in her or his trade, business or profession.” *Kasavana*, 172 AD3d at 1044. Where a defendant’s statements are *per se* defamatory, the plaintiff need not prove damages to establish liability. Instead, in *per se* defamation cases, “injury is assumed.” *Celle v. Filipino Rep. Enterprises Inc.*, 209 F.3d 163, 179 (2d Cir. 2000); *see also Kasavana*, 172 AD3d at 1046 (**reversing** trial court’s denial of summary judgment on liability and explaining that “in cases involving defamation *per se*, the law presumes that damages will result, and special damages need not be alleged or proven”); *Gatz v.*

Otis Ford, Inc., 262 A.D.2d 280, 281 (1st Dept 1999) (affirming trial court’s grant of summary judgment on *per se* defamation claim). “Whether particular statements are considered defamatory *per se* is a question of law.” *Geraci*, 15 N.Y.3d at 344.

As discussed above, Dominion’s defamation claim is based on four categories of statements: (1) statements charging Dominion with committing election fraud by rigging the 2020 Presidential Election; (2) statements claiming that Dominion’s software and algorithms manipulated vote counts in the 2020 Presidential Election; (3) statements alleging that Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez; and (4) statements that Dominion paid kickbacks to government officials who used its machines in the 2020 Presidential Election. *See, supra*, §I, pp.46-47.

Each of the four categories of statements is defamatory *per se*. A statement charging a company with fraud, deception, or other misconduct in its business—as all four categories of statements against Dominion do—is unquestionably defamatory *per se*. *See, e.g., Harwood Pharmacal Co. v. Nat’l Broad. Co.*, 9 N.Y.2d 460, 463 (N.Y. 1961) (statement was defamatory *per se* where it charged manufacturer “with fraud and deceit in putting on the market an unwholesome and dangerous product”); *Gatz*, 262 A.D.2d at 281 (statement that business “was dishonest [and] committed fraud” was *per se* defamatory). The statements go to the “basic integrity” of Dominion’s business, namely, providing voting systems and

services to state and local governments. *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670 (N.Y. 1981). A New York court recently held that allegations virtually identical to the ones made against Dominion (plus some other, *less* serious allegations) were *per se* defamatory as made against Dominion’s competitor, Smartmatic. *See generally Smartmatic USA Corp. v. Fox Corp.*, 2022 WL 685407 (N.Y. Sup. Ct. Mar. 8, 2022). The *Smartmatic* court concluded that allegations that Smartmatic committed election fraud, manipulated vote counts, and was founded in Venezuela to fix elections were defamatory *per se*. *Id.* at *22–23, *28. That conclusion was unassailably correct, as it is here. The allegations against Dominion charge it with “committing a crime” and “tend to injure [it] in its trade, business or profession.” *Id.* at *22 (citing *Nolan v. State*, 158 A.D.3d 186, 195 (1st Dept 2018)). They are defamatory *per se*.

V. Fox Acted with Actual Malice.

Over and over again—as the Introduction and Factual Background demonstrate—Fox witnesses have admitted in their own words they knew the allegations about Dominion were “false” or “crazy” or “reckless” or “nuts” or “bs.” Yet Fox continued to broadcast them. Repeatedly. Over nearly three months.

Actual malice exists when a statement is made with “knowledge that it was false or with reckless disregard of whether it was false or not.” *Palin*, 940 F.3d at 809 (internal quotation marks omitted). Of course, a plaintiff can prove actual

malice “through the defendant’s own actions or statements.” *Celle*, 209 F.3d at 183 (internal alterations and quotation marks omitted). “The subjective determination of whether [the defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts.” *Solano*, 292 F.3d at 1085 (quoting *Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982); *see also Herbert v. Lando*, 441 U.S. 153, 170 (1979) (noting that “plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself” in the context of allowing plaintiffs to explore circumstantial evidence of knowledge of falsity). This is the rare case where such direct evidence exists.

A plaintiff also can prove actual malice through circumstantial evidence, rather than “from the mouth of the defendant,” because defendants “are prone to assert their good-faith belief in the truth of their publications.” *Lando*, 441 U.S. at 170. Circumstantial evidence of actual malice comes in many forms. Categories of such evidence include evidence that the defendant: (1) relied on inherently improbable or obviously unreliable sources, *see St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Zuckerbrot v. Lande*, 167 N.Y.S.3d 313, 335-336 (N.Y. Sup. Ct. 2022); (2) possessed a financial motive to lie about the plaintiff, *see Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989); *Gilmore v. Jones*, 2021 WL 68684, at *8 (W.D. Va. Jan. 8, 2021); (2) relied on inherently improbable

or obviously unreliable sources, *see St. Amant*, 390 U.S. at 732; *Zuckerbrot v. Lande*, 167 N.Y.S.3d 313, 335-336 (N.Y. Sup. Ct. 2022); (3) departed from journalistic standards, *see Harte-Hanks*, 491 U.S. at 667-68; *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 872 (W.D. Va. 2016); (4) conceived of the false narrative before publication, *see Palin*, 940 F.3d at 813; *Harris v. City of Seattle*, 152 F. App'x 565, 568 (9th Cir. 2005) (unpublished); and (5) refused to retract, and continued to repeat, statements that had been proven false, *see Nunes v. Lizza*, 12 F.4th 890, 900-901 (8th Cir. 2021); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071-1072 (5th Cir. 1987). *See generally* Restatement (Second) of Torts §580A cmt. (d). No one factor need be conclusive, and actual malice can be demonstrated by the “accumulation” of circumstantial evidence. *Celle*, 209 F.3d at 183; *see Stern v. Cosby*, 645 F. Supp. 2d 258, 278 (S.D.N.Y. 2009).

An organizational defendant, just like any other, is subject to liability when it acts with actual malice. Because an organization necessarily acts through individuals, in such cases, “the state of mind required for actual malice” must “be brought home to the persons in the [defendant’s] organization having responsibility for the publication.” *Sullivan*, 376 U.S. at 287. This requirement, which stems from *Sullivan* itself, prevents the imposition of liability against a corporate entity *solely* because some person, somewhere within a vast media organization, possesses knowledge that contradicts the defamatory allegations. *Id.* (concluding that the

“mere presence” of news stories in the *Times*’ files that contradicted details in the accused advertisement did not establish actual malice, as no individual responsible for the advertisement copy would have had knowledge of the prior news stories). But so long as actual malice is brought home to “at least” one individual who is responsible for the publication of the defamatory statement, the actual malice requirement is satisfied. *Page v. Oath Inc.*, 270 A.3d 833, 850 (Del. 2022); *see also Solano*, 292 F.3d at 1086 (editorial staff members’ concerns about defamatory statements satisfied actual malice even if staffers were not “the final decisionmakers as to the content”).

As discussed extensively in the Introduction and Factual Background, *supra*, this case is the rare defamation case with extensive direct evidence of actual malice. The very fact that Fox understood it had to “thread the needle” of appeasing viewers on the one hand, and not spreading election fraud conspiracy theories on the other, demonstrates that Fox *knew these claims about Dominion were false*. Ex.252.

[REDACTED]

[REDACTED]

[REDACTED] Ex.330. Fox’s many, many other documents and testimony all confirm the same.

Section A below establishes that Fox had the facts necessary to debunk the accused statements about Dominion, from extensive public record sources and direct

communications from Dominion pointing to that evidence, and Fox either knowingly or recklessly disregarded those facts.

Section B explains how individuals throughout Fox's organization knew the statements were false, illustrating at *minimum* the reckless disregard of their colleagues who nevertheless broadcast those lies. Together, parts A and B sufficiently establish Fox's actual malice; but the evidence does not stop there.

Section C discusses the executives responsible for the accused programs' knowledge or reckless disregard of the truth, and Section D walks through the team of hosts and producers, as well as the aforementioned executives, responsible for each program and highlights additional evidence—*on top of* what has already been set forth in the Factual Background above and Sections A and B below—demonstrating they likewise knew or recklessly disregarded the truth.

Though unnecessary in light of the overwhelming evidence in Sections A and B, plus the additional evidence in Sections C and D, Section E provides circumstantial evidence further underscoring Fox's actual malice.

Actual malice requires knowledge of falsity or reckless disregard by any *one* of the people sharing responsibility for a broadcast. *Page*, 270 A.3d at 850; *Solano*, 292 F.3d at 1086; *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 477 (8th Cir. 1987). Here, every person acted with actual malice.

A. The Public Record and Dominion’s Communications Demonstrate Fox’s Knowledge of or Reckless Disregard for the Truth.

Fox knew the falsity of the statements it aired about Dominion. Fox knew it because—very early on—the public record made abundantly clear that Dominion did not steal the election. Bipartisan election officials, security experts, and Democratic and Republican appointees alike repeatedly debunked provably false claims and confirmed there was no evidence of widespread electoral fraud in the 2020 Presidential Election. *See, supra*, §I.A; *e.g.* Ex.331 (forwarding CISA’s 11/12/20 statement to Fox listservs).¹⁰ Not surprisingly, numerous other news outlets readily determined the falsity of these election fraud claims. [REDACTED]

[REDACTED]

[REDACTED]

Fox had *actual knowledge* of much of this evidence because Fox personnel read, heard, and/or received notice of it, from Fox’s own internal fact-checking department. *See, infra*, §§V.B-D. They also received the facts from Dominion itself, through literally thousands of direct communications: Soon after the first time Fox broadcast the allegations—on Fox’s November 8 Maria Bartiromo show—Dominion began sending regular “Setting the Record Straight” (“STRS”) emails detailing all the public source evidence refuting these charges. In other words,

¹⁰ *See* Ex.351& Ex.352 (Fox’s listservs’ members).

Dominion did not simply deny the charges. It provided public evidence demonstrating those charges were false (and inherently improbable). These communications started on November 12, 2020, and continued through the following weeks and months.

- November 12, Ex.338: Dominion sent its first STRS email that Fox admits “is approximately three pages of fact versus rumors listing in detail why the allegations against Dominion are false.” Ex.128, Lowell 30(b)(6) 394:22-395:5. Among other things, the email pointed to DHS’s CISA Rumor Control Page. The email stated: “No credible reports or evidence of any software issues exist,” and linked to statements by the Michigan and Georgia Secretaries of State. Ex.338 at FNN007_0001899.
- November 13, Ex.339: Dominion quoted and linked to the 11/12/20 Joint Statement from CISA stating, “There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.” The email linked to and described multiple third-party fact checks (including from the Michigan Secretary of State) debunking those allegations along with the ownership issue, stating that Dominion has no ownership relationships with “Smartmatic, or any ties to Venezuela.” *Id.* at FNN011_00094719. The email concluded by stating what already was obvious: “Assertions of voter fraud conspiracies are 100% false,” again linking to multiple records from CISA and other government agencies. Ex.339 shows the email was forwarded widely within Fox, and Fox’s corporate representative confirmed that was the case for the STRS emails. Ex.128, Lowell 30(b)(6) 420:10-13.
- November 14, Ex.340: Dominion quoted and linked the same public information provided on November 13.
- November 16, Ex.433: Dominion again provided the same publicly sourced information, adding that “Dominion is not, and has never been, owned by Smartmatic” and explaining that to the contrary, Dominion and Smartmatic were previously opposing parties in a lawsuit.
- November 17, Ex.342: Dominion again provided the same information.

- November 18, Ex.343: Dominion sent an editorial in the *Wall Street Journal*—controlled by the Murdochs—“emphasizing a complete lack of evidence to support recent claims against Dominion.”
- November 19, Ex.344: Dominion again provided the same information and sources cited on November 16.
- November 20, Ex.345: Dominion responded to the crazy press conference on November 19 by Rudy Giuliani and Sidney Powell: “These conspiracy theories have no basis in truth and have been debunked by independent fact-checkers, government officials from both sides of the aisle, and publicly available documents.” The email then discussed and linked to that information.
- November 24, Ex.346: Dominion pointed to pieces by conservative leaders debunking the claims, including noting the results of the Georgia statewide hand recount that confirmed the accuracy of Dominion’s machines and noting the implausibility of the claims.
- November 25, Ex.347: Dominion pointed out that in the 14 counties where it operated in Pennsylvania, Trump exceeded his 2016 margin in 11 of them, and again linked to public sources.
- November 29, Ex.348: Dominion gave details about Arizona, noting that it only operated in one county and that the “post-election hand count audit showed a 100% match with the counts from Dominion machines,” pointing to public records along with statements from a Republican official affirming that “no evidence of fraud or misconduct” exists.
- November 30, Ex.349: Dominion gave details about Michigan, explaining among other things the “isolated human error” in Antrim County and pointing out that the Michigan Secretary of State said “the user error was quickly identified and corrected.” The email also quoted the Michigan Bureau of Elections stating, “There is no evidence voting machines in Michigan have ever been compromised or that votes have been changed,” and further pointed to public sources about the pre-election logic and accuracy testing. The email continued to provide third-party links and evidence about the false rumors regarding Dominion generally.

Dominion continued to send emails flagging public sources debunking the election fraud claims throughout December and into January, providing detailed information and public source documents that any person could easily verify.¹¹

Fox's corporate representative testified there was a "general awareness" at Fox of the CISA statement linked in Dominion's November 13 STRS email, which was "widely circulated" within Fox. Ex.128, Lowell 30(b)(6) 413:6-24, 420:5-13; Ex.331; Ex.339. In total, Dominion sent **3,682** emails to Fox recipients, which on its own makes this case truly unique in the amount of corrective correspondence provided, *see id.* 541:13-544:21; but, *on top of that*, Fox's corporate representative further agreed that Dominion's emails were then "widely circulated" within Fox. *Id.* 420:10-13, 431:8-22, 521:20-541:19, 542:17-20, 544:6-21. Fox's hosts, producers, and executives had the facts in their inboxes. Indeed, David Clark joked he had them "tattooed on [his] body." Ex.234.

Any Fox employee could readily ascertain the falsity of this information—and many did so. As Chris Stirewalt testified, "no reasonable person" would have believed the claims—the allegations were "nuts." Ex.146, Stirewalt 154:10-156:13,

¹¹ *See, e.g.*, Ex.353; Ex.355; Ex.357; Ex.358; Ex.359; Ex.360; Ex.361; Ex.362; *see* Ex.363 (table showing all recipients of Dominion's corrective communications, including over 3,600 emails to Fox); *see also* Ex.364 (providing Dominion CEO's testimony). Fox's corporate representative testified about Fox's receipt of many of these and other communications sent by or on behalf of Dominion. *See* Ex.128, Lowell 30(b)(6) 390:13-559:8.

234:25-235:11. Fox Executives understood the ease of fact checking and the importance of doing so. On November 5, Gary Schreier told Lauren Petterson that the Dobbs team made “a pretty bad mistake” by running information from a Trump tweet that had been “proved false” about votes incorrectly showing up for Biden. Ex.356 at FNN022_03852657. Petterson responded, “Jesus Christ. *Does anyone do a fucking simple google search or read emails?*” *Id.* In that instance—and unlike the Dominion claims—Fox corrected the information prior to its rebroadcast later that night. *Id.* And of course the evidence described in detail above demonstrates that many Fox employees easily concluded that the claims were transparently false—as had the Fox Brainroom. *See, supra*, pp.33-34.

B. It Was Widely Known within Fox that the Allegations were False.

Not a single Fox witness testified that they believe any of the allegations about Dominion are true. Indeed, Fox witness after Fox witness declined to assert the allegations’ truth or actually stated they do *not* believe them,¹² and Fox witnesses

¹² *See, e.g.*, Ex.99, Bila 50:21-51:21; Ex.102, Briganti 27:9-28:21; Ex.110, DiBella 45:18-47:23; Ex.111, Dobbs 22:17-22, 38:11-16; Ex.112, Doocy 18:2-25; Ex.106, Clark 215:11-231:4; Ex.108, Cooper, 127:18-140:14; Ex.116, Field 134:6-135:25; Ex.117, Firth 38:16-43:7; Ex.118, Fisher 25:24-27:2; Ex.122, Hannity 322:15-25; Ex.124, Hooper 52:14-19, 54:23-55:3, 59:17-22; Ex.125, Ingraham 95:10-99:11; Ex.126, Komissaroff 38:2-19, 38:23-40:1; Ex.130, L. Murdoch 249:4-7; 269:15-20; 321:16-323:22; Ex.129, Mitchell 256:10-259:11, 386:6-387:19, 388:8-12, 391:2-392:14; Ex.132, Perino 30:6-34:15; Ex.133, Petterson 55:20-72:17; Ex.140, Sammon 55:6-18, 56:16-18; Ex.143, Scott 306:24-310:20; Ex.146, Stirewalt 153:24-157:11; Ex.148, Wells 70:18-25.

repeatedly testified that they have not seen credible evidence to support them.¹³ Fox’s corporate representative likewise testified that Sidney Powell never provided Fox with evidence of her claims, Ex.128, Lowell 30(b)(6) 285:10-13, 294:22-295:6; could point to no evidence to support the claim that Dominion rigged the election, *id.* 298:24-299:13, 323:8-324:5, 335:15-24, 362:12-25, 375:22-376:13, 387:13-388:7; and could not explain what, if anything, Fox did to investigate claims about Dominion’s software, *see, e.g., id.* 424:14-25. Fox personnel widely knew the claims about Dominion were false.

Fox News SVP and Managing Editor Bill Sammon—one of the many witnesses who testified he does not believe the claims about Dominion, *see* n.13—conceded that one can easily fact-check Dominion’s ownership and that such “basic

¹³ *See, e.g.,* Ex.96, Andrews 30:14-31:6, 31:22-32:16; Ex.110, DiBella 64:9-24; Ex.111, Dobbs 38:11-39:16; 46:25-47:5, 86:20-24, 87:13-89:11; Ex.112, Doocy 112:4-10; Ex.147, Wallace 68:6-19, 71:21-72:12, 73:11-74:12; Ex.97, Baier 19:3-22:5, 54:2-21; Ex.98, Bartiromo 280:25-282:17; Ex.105, Carlson 163:3-16; Ex.106, Clark 231:9-21; Ex.108, Cooper 141:4-142:10, 145:17-20; Ex.116, Field 135:2-14; Ex.118, Fisher 25:24-27:2; Ex.125, Ingraham 142:25-145:5; Ex.126, Komissaroff 38:23-40:1; Ex.129, Mitchell 256:10-259:11, 389:9-392:5; Ex.132, Perino 30:6-34:15, 35:11-15; Ex.133, Petterson 56:3-74:22, 250:15-20; Ex.135, Pirro 89:3-13, 95:13-97:13, 99:12-16; Ex.142, Schreier 120:15-121:1, 224:9-225:9; Ex.143, Scott 307:10-18-308: 20, 310:21-311:5; Ex.146, Stirewalt 153:24-157:11; Ex.147, Wallace 68:6-19, 71:21-72:8, 73:11-74:5; Ex.148, Wells 59:13-16, 64:17-65:24; *see also* Ex.105, Carlson 47:13-25; Ex.122, Hannity 295:16-24, 279:1-23; Ex.99, Bila 29:12-15, 50:21-51:21; Ex.121, Grossberg 262:18-263:10, 263:15-19.

fact checking” prior to reporting on national television was important. Ex.140, Sammon 56:19-57:3.

Bret Baier, Fox News Chief Political Anchor, like Sammon, never believed Dominion shifted millions of votes from Trump to Biden. Ex.97, Baier 19:3-7. Baier texted a friend late on November 3, 2020—well before the first accused defamatory broadcast—that Giuliani’s claims of widespread election fraud had no validity. Ex.365 at FNN072_04509734; Ex.97, Baier 33:17-24; *see also* Ex.176 (11/5/20 Baier text, “there is NO evidence of fraud. None. Allegations—stories. Twitter. Bullshit.”); Ex.97, Baier 39:3-41:1, 48:2-49:21 (Dominion story was “unfounded”). By November 18, Baier knew that Chris Krebs and other election experts had debunked the claim that Dominion’s software was used to rig the election, and he found “zero proof” to the contrary. Ex.97, Baier 65:4-12. As he told his producer that day, [REDACTED]

[REDACTED]

When more outlandish allegations emerged about Dominion regarding the involvement of the military, Baier reached out to the Fox reporter on the military beat, Lucas Tomlinson: [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* Baier and Tomlinson performed the most basic task. They heard an inherently implausible story. They followed up and quickly concluded the obvious: [REDACTED]

On November 12, Laura Ingraham's producer, Tommy Firth likewise investigated the claims against Dominion and easily concluded they were false. Ex.117, Firth 36:3-43:7; Exs.368-369 [REDACTED]

[REDACTED] Ex.229 ("This dominion shit is going to give me a fucking aneurysm.").

Ingraham herself testified that she has no basis to believe Dominion committed election fraud by rigging the 2020 Presidential Election or that it is owned by a company founded in Venezuela to rig elections for Hugo Chavez (and agreed its ownership is "readily ascertainable"). Ex.125, Ingraham 95:10-96:2. She testified that, before making such serious allegations, she would want to make sure that they "had some type of fact trail that we could trace and unpack." *Id.* 101:5-15; *see id.* 95:5-9. Ingraham told Hannity and Carlson that Sidney Powell was "a bit nuts," Ex.155 at FNN035_03890539, also telling Carlson "Sidney is a complete nut," "No one will work with her," and "Ditto with Rudy." Ex.241.

Fox News host Dana Perino, who has never seen credible evidence of the claims against Dominion and has never believed those claims, *supra*, nn.12-13,

described the allegations about Dominion and election fraud in her contemporaneous texts and emails as “*total bs*,” “*insane*,” and “*nonsense*.” Ex.162, Exs.370, 371; *see also* Ex.372 (“Where the hell did they even get this Venezuela tie to dominion? I mean wtf”).

Chris Stirewalt, the Fox News Politics Editor in November 2020, believed as of November 7 that “there was no way anybody could think that Donald Trump had really won the election.” Ex.146, Stirewalt 136:2-6; *see also id.* 152:21-153:13. Stirewalt agreed that high-profile Fox anchors peddled the lie that the election was stolen. *Id.* 151:11-20. He testified that, among his colleagues at Fox, “widespread agreement” existed about the falsity of the Dominion allegations. *Id.* 198:4-25; *see id.* 153:24-157:11 (“[N]o reasonable person would have thought that.”); *id.* 202:20-203:11 (Stirewalt expected Bill Barr’s statement that no evidence of significant fraud in the 2020 Presidential election existed was well known within Fox’s Newsroom).

And as noted, by November 13, Fox’s Brainroom had debunked many of the allegations about Dominion. Ex.168.

As the broad knowledge at Fox shows, it required at *minimum* reckless disregard for Fox’s other reporters and executives to air the unsupported and verifiably false allegations about Dominion.

C. Executives Responsible for Fox Programming and Content Acted with Actual Malice.

1. Fox Has Admitted that Its Executives Participated in the Editorial Process for the Accused Broadcasts During the Relevant Timeframe.

Fox's executives exercise editorial control over Fox's broadcasting such that their knowledge of falsity, or at minimum reckless disregard for the truth, establishes Fox's actual malice in publishing the defamatory statements.

Fox has admitted in its RFA responses, among other things, that the following executives "participated in the editorial process" and/or "attend[ed] editorial meetings" for some or all of the accused programs during the relevant timeframe:

- Suzanne Scott, Fox News CEO (*e.g.*, Ex.319, Nos. 1, 5, 6, 8, 35, 51)
- Jay Wallace, Fox News and Fox Business President and Executive Editor (*id.*, Nos. 12, 16, 17, 19)
- Tom Lowell, EVP and Managing Editor of News (*id.*, Nos. 55, 59, 60, 62)
- Meade Cooper, EVP of Primetime Programming (*id.*, Nos. 66, 70, 71, 72, 73)
- Lauren Petterson, Fox Business News President (*id.*, Nos. 88, 92, 93, 94, 95)
- David Clark, SVP Weekend News and Programming (*id.*, Nos. 110, 113, 114, 115, 116, 117)
- Bill Sammon, SVP and Managing Editor (*id.*, No. 125)
- Alan Komissaroff, SVP of News and Politics (*id.*, No. 136)
- Kim Rosenberg, SVP of News Programming (*id.*, Nos. 143, 147, 148)

- Ron Mitchell, VP of Primetime Programming and Analytics (*id.*, Nos. 154, 158, 159, 160, 161)
- Gary Schreier, SVP of Programming, Fox Business (*id.*, Nos. 165, 169, 170, 171, 172)
- Rupert Murdoch, Fox Corporation Chairman (*id.*, Nos. 27, 35)
- Lachlan Murdoch, Fox Corporation CEO (*id.*, Nos. 43, 51)

These binding responses by themselves demonstrate sufficient participation in the editorial process to “bring home” actual malice to each of the above individuals.

2. Fox Has Admitted Editorial Discussion of the Accused Programs Occur at Fox’s Twice-Daily Meetings Among Senior Editorial Leadership.

Fox had twice-daily editorial meetings during the period from November 2020 through March 2021, at 8:30am and 3:00pm, attended by the “senior editorial leadership.” Ex.127, Lowell 30(b)(6) 215:20-216:16. This group included each of the individuals above: Cooper; Clark (on occasion); Komissaroff; Lowell; Mitchell; Lachlan Murdoch (at times); Rupert Murdoch (at times); Petterson; Rosenberg; Sammon; Schreier; Scott; and Wallace. Ex.374 (FNN 5th Interrogatory Responses), No. 83; Ex.106, Clark 75:14-78:16, 80:3-82:2. In addition, Porter Berry (VP & Editor-in-Chief, Fox Digital News Media), John Finley (EVP, Program Development); and a Fox News Radio representative attended. Ex.127, Lowell 30(b)(6) 196:11-201:3, 216:10-16; Ex.374, No. 83.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Discussions among the executive team at these meetings included the need to cover stories factually and responsibly. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Once again, for each of the above individuals, these editorial meetings sufficiently establish editorial participation in the accused broadcasts regardless of any other evidence.

3. Specific Evidence Confirms These Fox Executives Acted With Actual Malice.

Further evidence regarding executives with responsibility for Fox's programming includes the following (listed alphabetically):

Meade Cooper. Meade Cooper was responsible for primetime show content, which included editorial oversight of *Hannity*, *Justice with Judge Jeanine*, and *Tucker Carlson Tonight*, during the relevant period. Ex.108, Cooper 31:10-33:1; *see id.* 209:9-21. Cooper testified that for weekday primetime shows, "the executives in charge of the show or with editorial oversight would be me, Ron Mitchell, and Suzanne [Scott]." *Id.* 38:24-38:8. Cooper's editorial oversight for primetime shows meant exercising judgment over "guests that were booked, topics that were covered, things that were said." *Id.* 42:24-43:4; *see also id.* 28:9-20, 30:12-21; Ex.375 (Cooper email to Suzanne Scott, "Clearly, I reject the notion that the hosts don't have bosses exercising judgment."); Ex.376 (show request for permission to book Giuliani in November 2020); Ex.487 (Cooper and Mitchell receiving notice *Hannity* wanted Powell on his November 30 broadcast). As Cooper testified, with respect to the shows she oversaw, "ultimately I would be responsible for whatever happens in

that hour.” Ex.108, Cooper 33:18-19; *see id.* 33:10-36:10. She further testified that cancelling a show or deciding to broadcast an event live would be a discussion between her, Wallace, and Scott. *Id.* 35:21-36:3, 84:18-85:13, 108:20-109:7.

Meade Cooper knew the claims about Dominion were false. *Supra*, n.12. On November 6, she texted with executive Ron Mitchell about speaking to producer Tommy Firth and hosts Tucker Carlson and Laura Ingraham, about staying away from election fraud claims. Ex.191; *see also, supra*, p.23 (Cooper and Clark cancelled Pirro’s November 7 show when they did not trust her not to spread lies); Ex.415 (Cooper text to Scott [REDACTED] [REDACTED]). She testified that she believes Fox should vet the information it airs. Ex.108, Cooper 162:19-25, 207:18-21. Yet the primetime shows for which she had oversight repeatedly broadcast false claims about Dominion to millions of viewers.

David Clark. David Clark admits he “oversaw the bulk of programming on Saturdays and Sundays”—including *Sunday Morning Futures* and *Justice with Judge Jeanine*—including “an editorial component” such as “working with show team on the stories the show will touch and broadcast.” Ex.106, Clark 10:13-13:4. He “often consulted” with the show teams “on who would appear on their shows” and “[c]ertainly we discussed” Giuliani and Powell prior to their show appearances. *Id.* 22:7-12, 25:19-27:6. [REDACTED]

[REDACTED]

[REDACTED] It was “common practice” for Clark to know of the guests in order to give him “and other senior executives the opportunity to weigh in on those guests or to object, if necessary.” Ex.106, Clark 183:21-184:7.

[REDACTED]

[REDACTED]. Despite directly supervising the show, Clark did not believe Jeanine Pirro was actually a “credible source of news,” even as he understood that “viewers rely on” Pirro “to be a credible source.” Ex.106, Clark 118:12-119:5 (He thought viewers likewise relied on Hannity and Carlson’s show even though he thought they were not credible, *id.* 117:22-118:10, 120:10-21).

Before the election, Clark understood that Trump was pushing baseless fraud allegations and that mail-in ballots “would lead to a shift in the final vote tally.” *Id.* 141:21-143:1. By November 6, he knew “there were false conspiracy theories circulating generally,” *id.* 150:20-151:1, he “did not believe that the election was being stolen,” *id.* 155:22-156:2, and he understood “the assertion that Mr. Trump had won was a false assertion,” *id.* 182:5-9. Clark does not believe the allegations against Dominion and believes after November 7, “there was no credible evidence of massive cheating or fraud that would flip the election.” *Id.* 231:9-21; *see generally id.* 215:11-231:21. As discussed, *supra*, p.23, [REDACTED]

[REDACTED], which Clark admits he

canceled out of concern that [REDACTED]

[REDACTED] *Id.* 152:8-154:19; *see id.*

164:16-170:18 (Jesse Waters and Greg Gutfield would be permitted to have shows on November 7, but Pirro would not); Ex.380. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] Clark also received Dominion's STRS fact-check multiple times. Ex.106, Clark 283:4-14; Ex.234 ("I have it tattooed on my body at this point.").

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

to Joe Biden in the 2020 election” “[d]idn’t sound credible to me,” and he “thought [Sidney Powell] wasn’t credible.” *Id.* 256:10-259:4. In fact, in private texts with Fox colleagues, Mitchell referred to the Dominion allegations as “the Bill Gates/microchip angle to voter fraud,” agreed they were “bs,” called Powell and Rudy Giuliani “clowns,” and repeatedly mocked their Dominion allegations, including sarcastically saying they “left out Ernst Stavro Blofeld,” a fictional James Bond villain, and calling it “comic book stuff.” Ex.161; Ex.252; Ex.385-387; Ex.129, Mitchell 263:6-14, 284:2-20, 287:12-20.

Despite all this, Mitchell—who was admittedly worried about Fox losing viewers to Newsmax, and even began tracking the guests booked and topics covered on Newsmax, Ex.129, Mitchell 140:25-141:6, 156:21-157:12, 158:5-159:9, 166:2-168:21, 172:11-175:13, 178:15-24, 182:7-11, 184:6-20; Exs.390-396—did nothing to stop Hannity from bringing Powell onto his show to spout lies about Dominion, or to stop Carlson from bringing his top advertiser Mike Lindell onto his show to do the same. Hannity brought Powell on mere days after Mitchell had an analysis done that showed Fox viewers were switching the channel specifically to watch Sidney Powell as a guest. Ex.397.

Lauren Petterson. Petterson is President of FBN and, in that role, develops shows and serves as head of talent. Ex.133, Petterson 25:4-24. Petterson is part of the editorial team for the shows on FBN, *id.* 90:5-10, 139:12-21, and her role

included ensuring that “both sides [were] being presented” with respect to the allegations about Dominion, *id.* 178:11-18. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] She likewise had decision-making authority over what content could appear on air. [REDACTED]

[REDACTED]

[REDACTED]

Petterson never saw any evidence of the claims against Dominion. *Id.* 55:19-74:22. On November 7, she received an alert that there was a coordinated effort on 4chan to spread claims that Dominion voting systems were used to commit fraud. Ex.285. The next day, Gary Schreier warned Petterson that Bartiromo “has gop conspiracy theorists in her ear and they use her for their message sometimes.” Ex.398. Petterson, like her colleagues, received Dominion’s STRS emails starting on November 12, *see* Exs.399, 400; Ex.133, Petterson 125:12-14, and after Tony Fratto reached out to Jay Wallace about the lies being broadcast, Wallace told Petterson “We need to keep an eye out here on this storyline.” Ex.402; *see also* Ex.401 (11/24 Fratto email about Dobbs broadcasting lies, prompting Petterson to tell Wallace “I spoke to his booker today. Time to pivot.” Dobbs did not pivot. *See, infra*, §V.D.2); Ex.403 (11/17 email from AP reporter forwarded to Petterson stating claims about Smartmatic owning Dominion “have been debunked, but both Rudy

Giuliani and Sidney Powell have appeared on the Lou Dobbs show and Maria Bartiromo's show in the last week amplifying these false claims"). On November 22, Petterson texted Schreier the White House's announcement disavowing Powell. Ex.404. Powell nevertheless continued to appear on Dobbs' show, which is under Petterson's purview.

Gary Schreier. As SVP of Programming, Schreier was Petterson's "number 2," and was the direct report between Petterson and the shows to make sure they were "getting everything right." Ex.133, Petterson 84:15-86:10. Schreier "oversaw" *Lou Dobbs Tonight*, Ex.142, Schreier 96:3-6, and he spoke on behalf of FBN at the daily editorial meetings, going over what FBN programs would cover and notable guests appearing that day. Ex.133, Petterson 141:20-142:15; Ex.142, Schreier 16:3-13, 18:1-12. Schreier was "immediately responsible" for programming content on Dobbs' show. Ex.111, Dobbs 95:25-97:6. Schreier, as part of FBN's management, would have input on a decision that FBN was not going to rebroadcast a previously aired show (with the final decision being up to Petterson). Ex.142, Schreier 131:20-25, 135:8-17, 131:1-7, and he notified Petterson in at least one instance where an error would be corrected for rebroadcast, *see* Ex.356 at FNN022_03852657.

Like his fellow executives, Schreier knew or recklessly disregarded the truth regarding the claims about Dominion. After Maria Bartiromo's false tweet on November 5 about overnight vote dumps, Bartiromo said she was leaving Twitter

on Bartiromo's and Dobbs' shows, Ex.410; and on November 19 he also received notice of Georgia's official statewide hand recount confirming Dominion machines properly counted the votes, Ex.411. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Suzanne Scott. Fox News CEO Suzanne Scott is responsible for the content on Fox shows, including primetime show content, along with the executives with immediate supervision over the shows. Ex.143, Scott 12:6-13:11 ("Ultimately, am I the boss, yes."); Ex.108, Cooper 39:1-8; 209:9-21. Scott provided input to Cooper on potential primetime guests, and Cooper would then follow up on those suggestions for potential on-air appearances. Ex.108, Cooper 63:9-23. In some instances, Scott would ask Cooper to review and edit out portions of a pre-taped show. *Id.* 112:13-25. Scott also had "responsibility to provide Judge Jeanine Pirro with close editorial supervision and guidance." Ex.106, Clark 105:21-106:20.

[REDACTED]

[REDACTED]

Scott decides who will host programs, Ex.143, Scott 32:23-33:22, and has authority to direct a show not to host a certain guest or broadcast certain content, Ex.106, Clark 23:7-24; *see also, e.g.*, Ex.416; Ex.417 (Justin Wells to Tucker Carlson on day of Mike Lindell appearance: “I told Suzanne we were doing it and [s]he was supportive.”), and to issue a correction or retraction. Ex.147, Wallace 51:4-12. Scott also had supervisory authority over editing out false claims from rebroadcasts. Ex.106, Clark 39:20-41:20. Lachlan Murdoch provided his feedback on Fox News through Scott. Ex.130, L. Murdoch 71:1-9.

Scott knew the statements Fox broadcast about Dominion were untrue, or recklessly disregarded the truth. On November 6, as discussed above, she agreed with Rupert Murdoch that it was going to be “very hard to credibly cry foul everywhere” and “if Trump becomes a sore loser we should watch Sean especially.” Ex.151. She further agreed at her deposition that as of November 7, Joe Biden had been legitimately elected President. Ex.143, Scott 365:10-19. Beginning on November 12, she received numerous STRS emails from Dominion providing links to credible sources debunking the claims peddled by Powell, Giuliani, and Lindell. *See* Exs.399-400; Ex.128, Lowell 30(b)(6) 389:15-391:25. On November 16, Tony Fratto personally reached out to Scott and Wallace explaining that the claims about Dominion were baseless. Ex.255. *Cf.* Ex.181 (11/19 email, Rupert Murdoch: Giuliani’s claims were “Terrible stuff,” Scott: “yes Sean and even Pirro agrees”).

By November 23, Scott knew that Fox Corporation executives were working with the White House to undermine Powell's "outlandish voter fraud claims." Ex.163.

Jay Wallace. President and Executive Editor Jay Wallace testified that he had "ultimate editorial control over the content broadcast on Fox News Channel and Fox Business Network" in November 2020 and the subsequent months. Ex.147, Wallace 17:22-18:6, 19:13-22:12, 36:2-13, 171:9-13. For example, when Tucker Carlson expressed concerns about the broadcasting of one of Fox's reporters, he informed Meade Cooper, who passed that on to Wallace. Ex.108, Cooper 105:3-15. Similarly, before the election, David Clark warned Wallace and Cooper that Bartiromo was pushing QAnon conspiracy theories because "they were...two of my superiors." Ex.106, Clark 133:6-22. Clark testified that he would take instructions from Wallace on booking guests. *Id.* 57:21-58:2. Wallace confirmed that he, Rupert Murdoch, Lachlan Murdoch, Suzanne Scott, Lauren Petterson, Meade Cooper, and Gary Schreier each have the authority to cause Fox News and Fox Business to run a correction or retraction. Ex.147, Wallace 50:17-21, 51:4-54:6, 252:5-9, 254:24-255:21.

Wallace admitted that by December 17, 2020, he knew Mike Lindell was making false claims about the 2020 Presidential election, Ex.147, Wallace 310:7-19; but the undisputed record demonstrates he knew that Fox was broadcasting lies about Dominion much earlier. On November 5, 2020, Bret Baier warned Wallace that

Bartiromo had been pushing false claims about the election. Ex.418. The next day, on November 6, Wallace received notice that Rupert Murdoch said Trump had to get some “real evidence” and that Rudy Giuliani advising Trump was “really bad.” Ex.419; Ex.147, Wallace 122:2-7.

Wallace testified he has never seen evidence for the claims against Dominion. Ex.147, Wallace 68:6-19, 71:21-72:12, 73:11-74:12. Tony Fratto personally reached out to Wallace to correct lies about Dominion multiple times, and Wallace received all of Dominion’s STRS emails. Ex.235; Ex.236; Ex.147, Wallace 168:4-169:1; Ex.363. Wallace admitted that after his conversation with Fratto on November 16, he made a decision that “we need to have [Dominion’s] side of the story” but he allowed the lies to continue. Ex.147, Wallace 211:10-17. [REDACTED]

[REDACTED] Ex.119, Fratto 232:13-15; *see also id.* 231:7-235:22. Yet the shows over which he by his own account had “ultimate editorial control” repeatedly broadcast these lies.

Fox Corporation Executives: The evidence discussed extensively herein includes specific reference to knowledge of falsity for Rupert Murdoch, Lachlan Murdoch, Raj Shah, and Viet Dinh, in addition to the arguments in Section V.A and B that apply to any Fox or Fox Corporation executive with editorial responsibility. The evidence discussed above, along with Section V.C.1 & 2, demonstrates editorial

responsibility for at least Rupert and Lachlan Murdoch. Dominion will discuss additional evidence for Fox Corporation on editorial responsibility and actual malice in subsequent briefs as appropriate.

D. Hosts, Producers, and Executives with Specific Responsibility for Each Broadcast Knew the Statements were False or Recklessly Disregarded the Truth.

1. *Sunday Morning Futures* with Maria Bartiromo.

Responsible Employees: Suzanne Scott; Jay Wallace; Lauren Petterson; Gary Scheier; David Clark; Maria Bartiromo; Abby Grossberg (producer).¹⁴

SMF aired once a week in the morning on Fox News, and each episode was rebroadcast on Fox Business at 6pm Eastern, prior to which Petterson, Clark, or other senior programming executives including at least Wallace and Scott had authority to edit out false statements. Ex.106, Clark 39:9-41:19. As of November 8, each of the responsible individuals (let alone *one*, which is all that's needed to establish actual malice) knew the falsity of Powell's accusations about Dominion or recklessly disregarded the truth. *See, supra*, §§V.A-B, V.C.1-3.

¹⁴ Ex.121, Grossberg 17:3-8, 256:13-17; Exs.420, 421; Ex.98, Bartiromo 248:7-249:20; *see also* Ex.422 ([REDACTED]); *supra*, §V.C.3 (discussing executives responsible).

a. November 8 Broadcast

Bartiromo's November 8 broadcast featuring Sidney Powell published the fraud and algorithm lies about Dominion. *See* ¶179(a); Appendix D. Powell's segment was pre-recorded. Ex.424.

Even before the pre-recorded interview, Bartiromo and Grossberg knew what Powell would say on air on November 8: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *See also* Ex.98, Bartiromo 143:13-19. If any doubt existed about what Powell would say in the interview, certainly none existed by the time the pre-taped interview aired.

No such doubt ever existed, though, because Powell sent Bartiromo an email prior to the interview with the subject line "Election Fraud Info"—which Bartiromo forwarded to Grossberg—with information from a woman claiming Dominion's software flips votes from Trump to Biden and tying Dominion to a conspiracy theory involving Nancy Pelosi and Senator Dianne Feinstein. Ex.154. In the same email, Powell's singular source explained that Roger Ailes (who, as previously noted, had died years ago) "huddles" every day with Rupert Murdoch about airing anti-Trump material, and that Justice Scalia was killed in a "human hunting expedition." *Id.* at FNN001_00000010. Powell's source also explained that she gets her information

from experiencing something “like time-travel in a semi-conscious state,” allowing her to “see what others don’t see, and hear what others don’t hear,” and she received messages from “the wind.” *Id.* at FNN001_00000011. Bartiromo read this email at the time: she responded to Powell saying she had shared this “very imp[ortant] info” with Eric Trump. Ex.259. Powell provided Bartiromo with no other evidence for her claims about Dominion. Ex.98, Bartiromo 147:6-15.

At her deposition, Bartiromo admitted that this email is “not evidence” for Powell’s claims, and indeed was “nonsense” and “inherently unreliable.” *Id.* 133:25-134:13, 141:21-24. Grossberg likewise conceded that this “isn’t something that I would use right now as reportable for air, no.” Ex.121, Grossberg 148:15-17. And Clark, the executive directly responsible for the show, admitted that this is “not sufficient to make the severe allegation that Dominion Voting machines rigged the election and flipped votes,” and if he had known that this was the sole support for the “crazy” theories, he “would not have allowed that claim to be aired.” Ex.106, Clark 209:21-210:17, 213:3-11.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Cf. Ex.126, Komissaroff 79:23-80:3 (agreeing that “part of the editorial team’s job is when somebody is coming on with unsubstantiated allegations that have no evidence is to do some research, use the Brain Room, find out the information on what’s going to be alleged to determine whether it should be put on the air”). And Bartiromo did not disclose the crazy email to her viewers.

On November 5, Gary Schreier flagged a Bartiromo tweet espousing conspiracy theories for Petterson, and Petterson suggested Bartiromo should “get off social [media] all together.” Ex.406 at FNN059_04466136. Schrier echoed the sentiment that Bartiromo was “say[ing] crazy shit” online. *Id.* On November 8, he warned Petterson that Bartiromo “has gop conspiracy theorists in her ear.” Ex.398. Yet Petterson did nothing to prevent Bartiromo from broadcasting the same “crazy shit” to Fox’s viewers—and indeed allowed it to be rebroadcast. *See* Ex.142, Schreier 132:1-5 (FBN management could choose not to rebroadcast a show).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Bartiromo and Grossberg likewise ignored the public record. Ex.98, Bartiromo 29:4-30:1 (confirming “staying on top of current events is an important part of [Bartiromo’s] job,” including the *Associated Press*, *New York Post*, and others that covered public evidence confirming no evidence of fraud in the 2020 election exists); Ex.121, Grossberg 21:14-22:5 (Grossberg likewise “consume[s] a lot of news.”). Bartiromo and Grossberg, and the executives supervising their show, chose to air unsubstantiated, improbable, and damning claims about Dominion in the face of a mountain of evidence indicating those claims were false. *See, supra*, §V.A.

b. November 15 Broadcast

Bartiromo’s November 15 broadcast featuring Sidney Powell and Rudy Giuliani published the fraud, algorithm, and Venezuela lies about Dominion. *See* ¶179(g); Appendix D. The November 15, 2020 episode of *Sunday Morning Futures* was pre-recorded, such that Bartiromo, Grossberg, and Clark all knew Giuliani and Powell made these claims about Dominion before Fox aired the interviews. Ex.98, Bartiromo 200:17-201:8; Exs.428-429; Ex.147, Wallace 198:4-199:9. Indeed, Clark emailed Wallace and Cooper during the pre-tape of Giuliani’s segment to give those senior executives notice about a comment Giuliani made regarding Fox during the taping. Ex.429; *see also* Ex.106, Clark 194:12-195:2 (acknowledging Fox could

have chosen not to air pre-taped Giuliani segment). Yet he made no effort to remove the statements about Dominion he knew by then were false.

Bartiromo and Grossberg (and of course the Fox executives) all had the same knowledge and resources available regarding the total falsity of Powell and Giuliani's claims on November 15 as on November 8. They had the benefit of additional public officials publicly stating that the election was free and fair. *See, supra*, §I.A. And by November 12, Dominion had started sending its STRS emails to Fox, including to Bartiromo and Grossberg directly, as well as to the internal Fox Politics listserv of which they were both members. Ex.431; Ex.98, Bartiromo 190:1-191:14; Ex.121, Grossberg 207:5-208:12; Ex.363 (table showing recipients of STRS emails).

In addition, Bartiromo is a "well-respected business reporter with deep experience." Ex.127, Lowell 30(b)(6) 223:8-10; *see* Ex.119, Fratto 216:8-17. She knows how to determine a company's corporate ownership, for instance, and whether it was in fact founded in Venezuela to rig elections. Ex.98, Bartiromo 287:1-8. *Cf.* Ex.140, Sammon 56:19-57:3. Yet Bartiromo and Grossberg invited Powell and Giuliani on the program, aired their pre-taped interviews, and at minimum recklessly disregarded the truth about the unfounded allegations their guests made about Dominion's corporate ties and its role in the 2020 Presidential Election.

Bartiromo and Grossberg continued to receive numerous direct communications from Dominion citing to the public evidence that the claims about Dominion were false. Ex.431; Exs.433-434; Ex.121, Grossberg 207:5-208:12. Tony Fratto, who has known Bartiromo for years and has appeared on television with her multiple times, reached out to Bartiromo personally to tell her that Powell's claims about Dominion were false. Ex.119, Fratto 215:18-217:15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. But at no point did Bartiromo tell her viewers that the claims made by Powell and Giuliani on her program had been unsupported lies.

2. *Lou Dobbs Tonight.*

Q: *It was a false statement that Powell had revealed groundbreaking new evidence* on your show indicating that the 2020 presidential election came under a *massive cyberattack orchestrated with the help of Dominion*, wasn't it?

A: *It was an overstatement, yes.*

Ex.111, Dobbs 269:23-271:5 (further agreeing it was "false")

Responsible Employees: Suzanne Scott; Jay Wallace; Lauren Petterson; Gary Schreier; Lou Dobbs; Jeff Field (senior producer); Alex Hooper (senior producer); John Fawcett (associate producer).¹⁵

¹⁵ Ex.111, Dobbs 32:21-33:5, 95:25-97:6, 100:4-14; *supra*, §V.C.3.

Dobbs’ viewers “always expected [him] to speak truthfully, honestly and forthrightly” and he considers his show to be a place for his viewers to get “accurate information to inform themselves.” Ex.111, Dobbs 18:6-20:17. Yet on January 4, 2021, Dobbs admitted on air—and later confirmed in his deposition—that he had *never* seen verifiable support for the fraud claims about Dominion that his show pushed in November and December 2020. *See* Ex.111, Dobbs 36:13-37:13, 46:11-47:10, 86:20-24; Ex.436; *see also* Ex.437. And of course Gary Schreier, who had editorial responsibility for Dobbs’ show, was well aware that the statements Dobbs endorsed on air about Dominion at that time were false. *Supra*, pp.111-113.

Not only did Dobbs and his team broadcast unsubstantiated lies, the segments were each *rebroadcast* at least the very same day: airing live at 5pm EST Monday-Friday, and rebroadcast two hours later at 7pm. Ex.124, Hooper 30:18-25. The show could have been edited between those broadcasts to correct false statements, and in fact Fox has edited a rebroadcast to correct false information before. Ex.111, Dobbs 93:1-9; Ex.142, Schreier 42:1-21; *see, e.g.*, Ex.356 at FNN022_03852657. But neither Schreier nor Petterson nor anyone on Dobbs’ team edited out any of the defamatory statements about Dominion prior to the rebroadcasts.

a. November 12 Broadcast and November 14 Tweet

Dobbs' November 12 broadcast featuring Rudy Giuliani and November 14 tweet published the fraud and Venezuela lies about Dominion. *See* ¶179(b) & (d); Appendix D.

Dobbs confirmed in his deposition that in November 2020 he was aware of CISA's November 12 statement proclaiming the 2020 Presidential election "the most secure in American history," Ex.111, Dobbs 133:2-13, and Hooper confirmed that the show's producers discussed CISA's statement when it was released, Ex.124, Hooper 20:6-21:21. That same day, on November 12, Hooper emailed himself a *New York Times* article debunking claims about Dominion titled "No, Dominion Voting Machines Did Not Cause Widespread Voting Problems." Ex.322; Ex.124, Hooper 25:15-27:1. The article quotes election technology expert Edward Perez as saying that no evidence existed showing that Dominion's software flipped votes or that widespread fraud occurred, and Hooper acknowledged Perez not only as a reliable expert, but as the very expert Dobbs' show brought on air over a month later to "clear up all of our reporting afterwards, when we ultimately came to our conclusion that, in fact, the voting machines were not at fault, after all of our investigation and research and everything like that." Ex.124, Hooper 27:7-29:15.

But Dobbs' team did not need to wait weeks or months to "clear up" their reporting: they had reliable information from public sources as of November 12 that

no fraud occurred, and they had no evidence to the contrary. Dobbs himself admitted that he had never “seen any verifiable, tangible support” that Dominion was owned by Smartmatic and is aware of no evidence that Dominion rigged the election. Ex.111, Dobbs 64:11-65:15, 38:11-39:16. As for Dominion’s ownership, that is easily fact-checked (as indicated by such fact checks by other media sources and internally at Fox, and Dominion’s STRS emails, *see, supra*, §V.A & Factual Background)—and should have been, prior to airing Giuliani’s claims. Ex.140, Sammon 56:19-57:3.

b. November 13 Broadcast

Dobbs’ November 13 broadcast featuring Sidney Powell published the fraud, algorithm, Venezuela, and kickbacks lies about Dominion. *See* ¶179(c); Appendix D.

In addition to all the facts the Dobbs team had prior to the November 12 broadcast, Schreier received Dominion’s November 13 email prior to that day’s broadcast, containing links to statements by CISA, the Georgia Secretary of State, and Michigan Secretary of State disavowing claims of election fraud. Ex.142, Schreier 118:19-119:14; Ex.400. Dobbs likewise received that email, and Hooper testified that someone on the *Dobbs* show team typically would have gone through and clicked on the links in the emails Dominion provided. Ex.124, Hooper 86:22-92:20; *see* Ex.111, Dobbs 118:8-119:4. The Dobbs team ignored this additional

evidence, along with the rest of the public record and internal fact-checking resources, and broadcast Powell's lies at both 5 and 7pm. Dobbs again confirmed that he had never "seen any verifiable, tangible support" for the claims broadcast on his show on November 13. Ex.111, Dobbs 69:13-16.

c. November 16 Broadcast

On November 16, Powell returned to Dobbs' program and repeated the same falsehoods about the creation of Dominion's software, claiming that a "high-ranking military officer" was present when the software was designed to "change the vote of each voter without being detected." Ex.8 at DOM_0071654722. When Dobbs prompted her about the relationship, she cut him off and said "Smartmatic owns Dominion,"¹⁶ to which he replied "yes." *Id.* at DOM_0071654724. *See* ¶179(h); Appendix D (fraud, algorithm, and Venezuela lies).

Earlier that very same day, Field and Hooper had received an email from Fox colleague Eric Schaeffer with the subject line "AP ON WHO OWNS DOMINION," linking to an AP article debunking ownership claims about Dominion and citing in the body of the email Dominion's CEO John Poulos's Congressional testimony that an American private equity firm majority-owns Dominion, and Poulos (a Canadian)

¹⁶ The produced transcripts omit this statement in the exchange between Dobbs and Powell. However, one can hear it clearly made in the video (as noted in Appendix D). Ex.27 at 04:20-4:24.

owns 12%. Ex.439. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] Fawcett likewise had reason to doubt Powell's credibility, texting others at Fox prior to the November 16 broadcast that he believed Powell was "doing lsd and cocaine and heroin and shrooms." Ex.442. But none of Dobbs' producers prevented Powell from spouting the lies on air that evening, or corrected her claims in the rebroadcast.

d. November 18 Broadcast

Dobbs' November 18 broadcast featuring Rudy Giuliani published the fraud, algorithm, and Venezuela lies about Dominion. *See* ¶179(i); Appendix D.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is, of course, on top of all of the evidence already in the public record and of which the show team was aware. *See, supra*, §§V.A, V.C, V.D.2.a-c. Despite this, Schreier—the senior editorial leadership member with oversight for Lou Dobbs’ program—permitted Dobbs to broadcast and rebroadcast the *exact claim* the AP had debunked the very next day, on Dobbs’ November 18 show.

e. November 19 Broadcast

Dobbs’ November 19 broadcast featuring Sidney Powell published the fraud, algorithm, and Venezuela lies about Dominion. *See* ¶179(j); Appendix D.

Dobbs and his team did not tell their audience that prior to the November 19 show, associate producer Michael Biondi emailed Hooper, stating: “Even [Fox News Contributor] Victor [Davis Hanson] is waiting to see some real evidence” of the conspiracy theories Powell was pushing. Ex.443. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Hooper confirmed at his deposition that Hanson was an honest, reliable source. Ex.124, Hooper 38:3-20. Perhaps unsurprisingly given that ample evidence already existed for the falsity of Powell’s

claims and it had likewise been ignored, Dobbs had Powell on air and endorsed her baseless claims that evening anyway.

f. November 24 Broadcast

Dobbs knew that “there was an issue” with Powell on November 22, when Fawcett texted him an article about the Trump legal team disavowing Powell and noted that they were “calling bullshit” on her. Ex.444. On November 22, Dobbs told Fawcett he honestly didn’t know what Powell was “thinking or doing, Or why!”, to which Fawcett responded “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.” Ex.445 at FNN022_03852042-43. Fawcett had previously texted Dobbs to notify him of Tucker Carlson’s criticism of Powell’s stolen-election conspiracy theories. Ex.446. And on the evening the November 8, Senior Booker Anne Woolsey McCarton had texted Field warning him that staunch Republicans were “backing off” the electoral fraud narrative due to concerns about how it would “play out.” Ex.447, at FNN014_00127528. As Field testified, this response from established Republicans impacted his own view on the credibility of election fraud claims. Ex.116, Field 73:3-22.

Yet despite the Dobbs team’s clear awareness that Powell was an unreliable source making baseless claims, Dobbs had Powell on his show yet again on November 24, and Fox chose to broadcast (and rebroadcast) both the fraud and

algorithm lies about Dominion. *See* ¶179(l); Appendix D. Dobbs responded to Powell’s repeated false assertions not by challenging her, but by lamenting that most Americans had given no thought to “electoral fraud that would be perpetrated through electronic voting; that is, these machines, these electronic voting companies, including Dominion, prominently Dominion, at least in the suspicions of a lot of Americans.” Ex.448 at DOM_0071653170-71.

g. November 30 Broadcast

Dobbs had Powell on his show yet again on November 30, again publishing the fraud and algorithm lies. *See* ¶179(m); Appendix D.

Two days prior to this, on November 27, Fawcett had again texted Dobbs asking if Dobbs had read Powell’s lawsuit (Dobbs confirmed he had) and stating those suits were “*complete bs*.” Ex.174. Dobbs testified at his deposition that Fawcett is honest and trustworthy, Ex.111, Dobbs 33:9-16—but he nevertheless chose to have Powell on air to repeat her “bs” claims.

h. December 4 Broadcast

On December 4, Dobbs returned to the subject of Dominion, stating that it is at the center of the stolen election, rhetorically asking his guest Phil Waldron if it is the “principal culprit,” and repeating the claim that Dominion used algorithms designed to be inaccurate rather than to be a secure system. *See* ¶179(o); Appendix D. For all of the reasons already discussed, Dobbs and his team were well aware—

or at minimum recklessly disregarded the truth—that Dominion was not part of any election fraud scheme.

i. December 10 Broadcast and Tweets

On December 9, Dobbs and his team received notice that all of Powell’s “Kraken” lawsuits had been dismissed, the last of which for failing to provide the court with factual support for her extraordinary claims, which Dobbs admitted “affect[ed] her credibility or reliability in [his] eyes” and that he began to have “doubts” about her as a source. Ex.111, Dobbs 198:1-200:12; Ex.449.

Nonetheless, on the next day, December 10, Dobbs had Powell on again, where she repeated the false (and repeatedly debunked) story about the Smartmatic and Dominion machines being designed to flip votes to rig elections for Hugo Chavez, and allowing people to log in and manipulate votes. *See* ¶179(q); Appendix D. But rather than questioning Powell’s claims, Dobbs attacked Attorney General Barr for saying he’d seen no sign of any significant fraud that would overturn the election and told Powell “We will gladly put forward your evidence that supports your claim that this was a Cyber Pearl Harbor,” noting “we have tremendous evidence already,” *id.*—***which he now admits was not true.*** *See* Ex.111, Dobbs 46:25-47:10, 86:20-24. Dobbs had seen no evidence from Powell, nor has he since. *Id.*

Powell had sent her claims about a “Cyber Pearl Harbor” to Dobbs (who forwarded to his team) in advance of the show. Ex.450; Ex.451. Prior to the show, Dobbs published a tweet to the @loudobbs Twitter account with the claim that “The 2020 Election is a cyber Pearl Harbor,” and embedding the very document Powell had sent to him just hours before which stated that Dominion was one of four entities that had “executed an electoral 9-11 against the United States” and “a cyber Pearl Harbor,” that “there is an embedded controller in every Dominion machine,” and that they had “contracts, program details, incriminating information, and history” proving these claims. ¶179(p); Appendix D.

Later the same day, after Powell appeared on the 5pm broadcast and before the 7pm unedited rebroadcast of the show, Dobbs again tweeted “Cyber Pearl Harbor: @SidneyPowell reveals groundbreaking new evidence indicating our Presidential election came under massive cyber-attack orchestrated with the help of Dominion, Smartmatic, and foreign adversaries.” ¶179(r); Appendix D. Dobbs *conceded at his deposition that this tweet was “false”*—Powell had *not* presented any such evidence on his program that day. Ex.111, Dobbs 269:2-271:5.

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, *id.* 200:6-12—and necessarily so, given the unavoidable public and internal Fox evidence showing that Powell’s claims lacked any basis in reality. [REDACTED]

[REDACTED]

Despite this, the Dobbs team not only put it on air, but Dobbs tweeted out Powell’s “Cyber Pearl Harbor” claim multiple times, without qualification, *see* Ex.111, Dobbs 238:5-240:13, and—even though Dobbs was “disappointed” that Powell failed to deliver her promised evidence at 5pm—Fox rebroadcast the segment unedited (as it did with each of his accused broadcasts) at 7pm, *id.* 273:21-275:7.

3. *Justice with Judge Jeanine.*

Responsible Employees: Suzanne Scott; Jay Wallace; Meade Cooper; David Clark; Jeanine Pirro; Jerry Andrews (executive producer); Jen Voit (producer).¹⁷

a. **November 14 Broadcast**

Pirro's November 14 broadcast featuring Sidney Powell published the fraud, algorithm, and Venezuela lies about Dominion. *See* ¶179(e); Appendix D.

The pre-taped November 14 broadcast never should have aired. Clark and Cooper knew that Pirro's coverage of the election was irresponsible well before that date—they cancelled her November 7 show [REDACTED]

[REDACTED] Ex.293 [REDACTED]

[REDACTED]

[REDACTED]; Ex.106, Clark 151:22-157:8; *see* Exs.453-455; *see also* Ex.415 (Cooper to Scott: [REDACTED])

[REDACTED]. Yet despite having the same (and indeed a stronger) understanding that Pirro's November 14 show would focus on [REDACTED]

[REDACTED] Dominion, Clark and Pirro's producers nevertheless aired that broadcast. *See* Ex.135, Pirro 109:2-112:10.

¹⁷ Ex.135, Pirro 105:21-107:21; Ex.106, Clark 105:10-106:20 (Clark's job included providing Pirro with "close editorial supervision and guidance," along with Andrews, Cooper, and Scott); *see, e.g.*, Ex.293; Ex.456 (Cooper text messages re oversight of Pirro's show); *supra* §V.C.3.

On November 13, Andrews forwarded Pirro Dominion's November 13 STRS email providing information about Dominion's ownership and the public sources that had debunked election fraud claims. Ex.457. [REDACTED]

[REDACTED]

Id. Andrews forwarded to Clark, [REDACTED]

Id.

The next day, both Clark and Andrews reiterated to Pirro that Dominion categorically denied the claims against it, and Andrews warned that she "should be VERY careful w this" given the public information undermining Powell's allegations. Ex.458. [REDACTED]

[REDACTED]

Despite all of this evidence debunking the claims, Pirro had Powell on air on November 14 to spread her false claims about Dominion. Pirro did not push back

on Powell or confront her with the sources provided by Dominion. *See* Ex.24. Clark and Cooper did not step in to prevent her from spreading debunked lies. Pirro did not address Dominion’s specific denials of Powell’s claims. Instead, a screen showing Dominion’s general denial of wrongdoing showed for 15 seconds, and Pirro did not subsequently address it. *See id.* (pt.2) at 1:24-1:40.

b. November 21 Broadcast

In her opening statement for her November 21 broadcast, Pirro made many false claims about the election. Regarding Dominion, she noted that the President’s lawyers were “alleging a company called Dominion, which they say started in Venezuela with Cuban money and with the assistance of Smartmatic software, a backdoor capable of flipping votes,” and repeated the lies about an “overnight popping of the vote tabulation that cannot be explained for Biden.” ¶179(k); Appendix D.

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Pirro's opening was *pre-taped*, and Andrews knew that Pirro's statements about Dominion were false: [REDACTED]

[REDACTED]

4. *Fox & Friends.*

Responsible Employees: Suzanne Scott; Jay Wallace; Lauren Petterson; Gavin Hadden (VP of Morning Programming); and on 12/12, Will Cain (host); Pete Hegseth (host); and Rachel Campos-Duffy (host).¹⁸

a. **November 15 Broadcast**

On November 15, *Fox & Friends Sunday* played a pre-recorded teaser for the *Sunday Morning Futures* broadcast that would air later that day, discussed, *supra*. In that teaser, Bartiromo stated that Smartmatic owned Dominion and that Giuliani and Powell would join her to discuss their investigations, which will be “very important to understand what was going on with this software.” ¶179(f); Appendix D. She also indicated that Powell would talk about “potential kickbacks that government officials were asked to use Dominion actually enjoyed benefits to their families.” ¶179(f); Appendix D. As discussed above, Bartiromo and her team—and the Fox executives overseeing programming content—knew these statements were false or recklessly disregarded the truth. Furthermore, the *Fox & Friends* teaser confirms that there was no surprise about what Powell said on Bartiromo’s show—and indeed, in that preview Fox affirmatively chose to highlight Powell’s false claims as an advertisement for the audience.

¹⁸ Ex.103, Cain 51:18-21; *see, e.g.*, Ex.464.

b. December 12 Broadcast

Fox & Friends Weekend has several hosts, including on December 12, 2020, Will Cain, Pete Hegseth, and Rachel Campos-Duffy. Ex.103, Cain 113:17-20. That day, Giuliani appeared on air and stated without any challenge or follow-up from the hosts: “We have a machine, the Dominion machine [It] Was developed to steal elections, and [is] being used in the states that are involved.” ¶179(s); Appendix D.

As of December 12, the public record clearly demonstrated that the claims about Dominion were false. *See* §§I.A & V.A. Host Hegseth had received at least 20 STRS emails directing him to that public record prior to the broadcast. Ex.123, Hegseth 71:8-72:2 (confirming he received Dominion’s emails and “engaged with some of the content”), 72:3-91:21, 97:15-109:10; Exs.465-483. Prior to the election, Cain believed Trump’s chances of winning were “very slim.” Ex.484. Cain knew of CISA Director Chris Krebs’ conclusion that no widespread fraud occurred in the 2020 election well before the December 12 broadcast, and when a friend emailed on December 2 asking, among other things, “Do you think the election was rigged and stolen?” Cain responded “No, I didn’t say any of that.” Ex.485; Ex.103, Cain 100:5-101:6.

Campos-Duffy admitted under oath that she’s never seen any evidence to support Giuliani’s claims. Ex.104, Campos-Duffy 168:11-15, 169:5-10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But the hosts did not provide any such “challenge” to Giuliani. The day after the December 12 Broadcast, Fox banned Giuliani (along with Powell and Jenna Ellis) from appearing on its shows at all. *See* Ex.379 at FNN047_04367516. They certainly had the information and, indeed, the knowledge necessary to understand his claims were false as of December 12. They aired them without pushback anyway.

5. Hannity’s November 30 Broadcast.

“[T]hat whole narrative that Sidney was pushing. *I did not believe it for one second.*”

Ex.122, Hannity 322:19-21

Responsible Employees: Suzanne Scott; Jay Wallace; Meade Cooper; Ron Mitchell; Porter Berry; Sean Hannity; Tiffany Fazio (executive producer); Robert Samuel (senior producer).¹⁹

On November 30, Hannity provided Powell with a platform on his show to repeat the same fraud and algorithm lies about Dominion that she had told over and

¹⁹ Ex.122, Hannity 18:16-25, 19:1-15; Ex.115, Fazio 20:2-21, 22:18-21, 22:25-23:2 (Fazio would check monologues, fact check for the show, and vet guests), 25:21-25, 188:1-8; Ex.129, Mitchell 11:8-12:3.

over on Fox in the month of November. *See* ¶179(n); Appendix D. Hannity knew what Powell would say on air: she been making these same claims for weeks, including on his own nationally syndicated radio show earlier that same day on November 30, and Hannity intended to bring up her allegations about Dominion on his Fox show that night. Ex.122, Hannity 294:17-21, 295:11-15; *see* Ex.487 (Fazio notified Cooper and Mitchell that Hannity wanted Powell on to discuss the fraud claims). Hannity had told his audience on November 11 that the hand recount in Georgia would be critical regarding the questions about Dominion. Ex.122, Hannity 152:16-153:17. By November 30, the hand recount had been completed and proved Dominion’s machines worked properly and did not flip votes in Georgia. *See* Ex.303-D. Yet Hannity still invited Powell on his show and chose to broadcast her lies. He said nothing about the results of the Georgia hand recount.

Hannity knew Powell’s claims were false. He testified that, with respect to “that whole narrative that Sidney [Powell] was pushing, ***I did not believe it for one second.***” Ex.122, Hannity 322:19-21; *see id.* 275:2-14 (with respect to Powell’s arguments about Dominion, “nobody ever convinced me that their argument was anywhere near accurate or true”), 304:13–14 (“I did not believe those allegations”); *see also id.* 266:5-268:9. On the contrary, when Powell appeared on his November 30 show, he believed that it was “obvious” her allegations were false. *Id.* 420:9-22; *see id.* 398:2-9 (stating that when Powell came on his radio program prior to the

November 30 television broadcast and could not provide her claimed “eyewitnesses” that “was the nail in the coffin for me”); *id.* 320:21-321:2 (referring to Powell’s claims about “Venezuela” as “crazy stuff”); *cf. id.* 321:15-21 (Hannity texted that Powell was a “F’ing lunatic”). In the weeks prior to November 30, Hannity’s team monitored for any evidence to support Powell’s claims and saw none. *Id.* 295:16-24.

Hannity’s staff similarly knew the truth. Weeks prior, Fazio texted Porter Berry expressing concerns about “claiming all this election fraud” given the lack of support. Ex.488 at FNN032_03869371. During the November 19 press conference, Mitchell sent a text to Fazio and Samuel mocking the Dominion fraud allegations as “Comic book stuff.” Ex.387 at FNN055_04454599. As Samuel testified, he “thought the press conference was a little bit outrageous,” and he “certainly hadn’t seen evidence that the allegations were true.” Ex.141, Samuel 107:2-4, 107:25-108:1. Samuel still had not seen any evidence to support Powell’s claims when she appeared on Hannity’s November 30 broadcast. *Id.* 115:21-22. He had, however, seen the unambiguous assertion from a federal agency, CISA, refuting the claim that any voting systems manipulated the votes in the 2020 election—and no evidence that CISA was wrong. *Id.* 139:3-15.

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED] Ex.490. Fazio had received numerous corrective emails from Dominion as of November 30, including the one she forwarded to Samuel on November 16 linking to the joint statement on the security of the 2020 election (Ex.491), the November 24 email presenting three notable pieces published by three conservative leaders over the last 24 hours debunking Dominion voting machine conspiracy theories (Ex.346), and the November 26 email debunking the claims about Dominion in Powell’s lawsuit (Ex.492). *See also* Ex.345, Exs.493-498 (additional public evidence provided to Fazio).

6. *Tucker Carlson Tonight’s January 26 Broadcast.*

Responsible Employees: Suzanne Scott; Jay Wallace; Meade Cooper; Ron Mitchell; Tucker Carlson; Justin Wells (executive producer); Alex Pfeiffer (producer); Alexander McCaskill (producer); Eldad Yaron (booking producer).²⁰

[REDACTED]

[REDACTED]

[REDACTED] yet Fox nonetheless invited Lindell to appear on Tucker Carlson’s show *that same night*—to talk about those same tweets. *See* ¶179(t); Appendix D.

²⁰ Ex.148, Wells 11:2-14, 140:21-25 (Wells approved posting the January 26 Lindell segment); Ex.134, Pfeiffer 7:25-11:9; Ex.149, Yaron 8:7-24; Ex.108, Cooper 32:23-33:1.

Carlson and his team knew that Lindell’s claims were false. On November 8, Pfeiffer texted Carlson, “I dont think there is evidence of voter fraud that swung the election,” Ex.169 at FNN035_03890642, and at his deposition Pfeiffer did not recall having ever seen evidence from Lindell—or anyone—that Dominion committed election fraud. Ex.134, Pfeiffer 40:5-9, 121:8-12. On November 9, months before having Lindell on his show, Carlson acknowledged that “false claims of fraud can be every bit as destructive as the fraud itself...[T]he fraud that we can confirm does not seem to be enough to alter the election results. We should be honest and tell you that...” Ex.432 at FNN018_02303380-81. On November 13, Carlson wrote privately that Trump needed to concede and agreed that “there wasn’t enough fraud to change the outcome” of the election. Exs.500-501. On November 16, Carlson (again, privately) confirmed his belief that “Sidney Powell is lying” about having evidence for election fraud—and hers were precisely the same claims peddled by Lindell. Ex.150; *see* Ex.503 (Carlson text referring to Powell as an “unguided missile,” and “dangerous as hell”); Ex.240 [REDACTED]

[REDACTED]

[REDACTED].

On November 18, Pfeiffer texted Carlson that powerful election fraud allegations like Powell’s “need to be backed up” and could lead to undermining an elected president if Biden’s confirmed, to which Carlson responded, “Yep. It’s bad.”

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Yet Lindell made his same debunked claims about Dominion on Carlson’s show that evening, with no pushback—and his doing so was no surprise. Carlson knew Lindell was making his Dominion machine fraud claims “every single day of the year on his website and any interview that he does” and that “it is universally known by people who know anything about Mike Lindell” that he holds these bogus beliefs. Ex.105, Carlson 197:19-198:4. Before Lindell appeared on the January 26 broadcast, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Even if Lindell surprised everyone with his on-air claims about Dominion, Carlson could and should have pushed back on the lies (but did not); and once the interview happened, his team could have edited the false claims out in their rebroadcasting of the show and posted video (they did not). Ex.148, Wells 26:22-25, 27:8-28:4, 138:5-141:15.

E. Additional Evidence Indicates that Fox's Executives Acted with Actual Malice.

This is the unique defamation case where contemporaneous evidence shows that Fox's hosts, showrunners, producers, and executives knew that the statements about Dominion were false before publication (and republication). But circumstantial evidence of actual malice is also abundant.

1. Inherent Improbability/Reliance on Obviously Unreliable Sources.

Q: Was that fact, that Dominion did not commit election fraud by rigging the 2020 presidential election, widely known? ...

A: I mean, yes, of course....*no reasonable person would have thought that.*

Ex.146, Stirewalt 153:24-154:19.

The claims about Dominion—that it is owned by Smartmatic and was founded in Venezuela to rig elections for Hugo Chavez; that it rigged the 2020 Presidential election and used secret algorithms to flip votes; and that it paid kickbacks to government officials—are inherently improbable in light of the numerous

safeguards, required certifications, and official scrutiny applied to every voting equipment and software company. *See, supra*, §I.A.; *e.g.*, Ex.161 (the allegations are “the Bill Gates/microchip angle to voter fraud”); Ex.139, Richer 22:6-23:11 (“the whole theory is absolutely ludicrous”). And Fox’s sources for these claims were, by Fox’s own admission, obviously unreliable. Below is just some of what Fox’s witnesses had to say about their sources:

On Sidney Powell:

- Tucker Carlson:
 - “*lying.*” Ex.150 (11/16/20)
 - “*Crazy person.*” Ex.240 (11/16/20)
 - “*lunatic.*” Ex.526 (11/17/20)
 - She’s an “*unguided missile*” and “*dangerous as hell.*” Ex.503 (11/21/20)
 - She’s a “*Nutcase*” Ex.528 (11/21/20 text, in chain where producer Pfeiffer comments on Powell, “*Isn’t this the emperor’s new clothes idiom in real life?*”)
 - “*I’ve got a high tolerance for crazy,*” but Powell is “*too much.*” Ex.529 (11/22/20)
 - “*I hope she’s punished.*” Ex.530 at FNN035_03891200 (11/21/20 text, in response to story with headline “Trump Legal Team Shuns Sidney Powell as Insiders and National Security Officials See No Evidence Supporting Her Voting Machine Claims”)
 - She’s “*poison.*” Ex.531 at FNN022_0351889 (11/23/20)

- Laura Ingraham:
 - “*complete nut*” Ex.241 (11/18/20)
- Fox Corporation SVP Raj Shah:
 - Powell’s claims were “*outlandish*.” Ex.163 (11/23/20 email to Scott, Rubert Murdoch, and Viet Dinh)

See also, supra, Introduction & Factual Background.

In addition, Sidney Powell informed Fox employees, including Bartiromo, that she relied on clearly dubious sources that made her unreliable: before her November 8 appearance on Bartiromo’s show, the only “evidence” she provided was from a person who described herself as “internally decapitated,” capable of “time-travel in a semi-conscious state,” and who speaks to “the Wind” as “a ghost.” Ex.154; *see, supra*, §V.D.1.a.

On Rudy Giuliani:

- Rupert Murdoch:
 - Subject Line: “Watching Giuliani!” Text: “*Really crazy stuff. And damaging.*” Ex.156 (11/19/20)
 - “*Giuliani taken with a large grain of salt.*” Ex.532 (11/16/20)
 - “*Fact that Rudy advising [Trump] really bad!*” Ex.341 (11/6/20)
- David Clark:
 - “*Crazy town – glad JJP [Judge Jeanine Pirro] didn’t have her [Sidney Powell] or Rudy.*” Ex.534 (11/21/20)

- Gary Schreier:
 - “She [Jenna Ellis] *sounds downright sane next to Rudy.*” Ex.404 (11/22/20)
- Laura Ingraham:
 - “*Rudy such an idiot.*” Ex.527 (1/12/21)
- Sean Hannity:
 - “*Rudy is acting like an insane person.*” Ex.535 (11/11/20)
 - “*F’ing lunatics.*” Ex.122, Hannity 321:3-14 (12/22/20)
- John Fawcett (Lou Dobbs Tonight producer):
 - “*Giuliani is so full of shit.*” Ex.437 (1/3/21)
- Anne McCarton (Lou Dobbs Tonight producer):
 - “*keeping in mind his insanity lately ...*” Ex.255 at FNN06_04471806 (11/18/20)

On Mike Lindell:

- Gary Schreier:
 - “*He’s on the crazy train with no brakes.*” Ex.536 (2/2/21)
- Tiffany Fazio:
 - “*And Lindell is nuts!*” Ex.537 (1/26/21)
- Alex Pfeiffer:
 - “*mike lindell is crazy and about to get sued by dominion.*” Ex.508 (1/26/21)

- Jeff Collins (Fox News Media Ad Sales EVP):
 - According to Lindell’s own “family,” he was “***going off the reservation.***” Ex.538 (1/16/21)

On Fox Hosts:

Beyond Fox’s guests, Fox executives and other insiders also referred to Fox’s own hosts as inherently unreliable when discussing their reporting about the 2020 election:

- On Maria Bartiromo:
 - Fox executive Gary Schreier, on Maria Bartiromo: “***The problem is she has gop conspiracy theorists in her ear and they use her for their message sometimes.***” Ex.398 (11/8/20)
- On Lou Dobbs: Fox President Jay Wallace: “***the North Koreans do a more nuanced show***” than Lou Dobbs. Ex.539 (September 2020); Ex.147, Wallace 295:15-296:14.
 - Fox President Jay Wallace, when Bret Baier suggested Fox buy Parler: “***we can barely contain Dobbs—imagine all the crazy we’d be responsible for.***” Ex.540 (1/8/21)
 - Fox executive Porter Berry: “***he’s not crazy like Dobbs.***” Ex.541 (4/19/21)
 - Fox producer Jeff Field: Dobbs “***turned a blind eye***” because he was “so committed” to Donald Trump, and the fact that he “was ultra MAGA [] would be guiding editorial.” Ex.116, Field 138:9-139:18.
 - Tucker Carlson: “***Lou was reckless.***” Ex.542 (2/7/21)
- On Jeanine Pirro:
 - Jerry Andrews:

- *“Jeanine is just as nuts.”* Ex.534 (11/22/20)
- [REDACTED] Ex.457 (11/13/20)
- [REDACTED] Ex.152 (11/20/20)
- [REDACTED] Ex.415 (11/13/20)
- Justin Wells (executive producer for Carlson): *“[S]he is crazy.”* Ex.294 at FNN079_04550507 (11/7/20)
- On Tucker Carlson:
 - Brian Farley on Carlson and Hannity: *“crazy Tucker and crazier Hannity.”* Ex.543 (11/3/20)
- On Sean Hannity:
 - Fox Corporation Senior Vice President Raj Shah on Hannity: *“Hannity is a little out there.”* Ex.544 (11/5/20)

See also, supra, §§ Introduction, Factual Background.

In sum, Fox knew that its guests, Trump and his representatives, and even Fox’s own hosts were unreliable and could not be trusted to report accurately about the 2020 Presidential Election and Dominion.

2. Financial Motive to Lie.

The evidence—set forth in the Factual Background, pp.26-28, 35, 37-38, with additional evidence here—highlights Fox’s concerns over its ratings and its subsequent decision to placate its audience with a defamation campaign aimed at

Dominion rather than presenting fact-checks and truth. As host Dana Perino told Republican Strategist Colin Reed on November 11, 2020:

“[T]here is this RAGING issue about *fox losing tons of viewers and many watching—get this—newsmax!* Our viewers are so mad about the election calls (as if our calls would have been any different. It’s just votes!)....So this day of reckoning was going to come at some point – where the embrace of Trump became an albatross we can’t shake right away if ever.”

Ex.511. Fox personnel, including CEO Scott and President Wallace, knew that Fox needed to appease its Trump-supporting viewers to keep them tuning in. *Supra*, pp.18-19, 26-28, 38. Further illustrating executive concern, FBN President Petterson told Gary Schreier on November 12 that Newsmax’s 7pm host had “delivered over 1 million total viewers,” to which Schreier responded, “*I see it. Jesus.*” Ex.512; *see also* Ex.407 (“newsmax is getting a huge spike in ratings” related to election coverage); Ex.130, L. Murdoch 145:20-147:24 (Fox’s drop in ratings was “absolutely” a concern).

The way to combat this? Broadcast an election fraud narrative featuring Dominion. On November 17, Schreier and Petterson texted about the *Sunday Morning Futures* ratings, which Schreier described as “HUGE.” They were a “tentpole” for the network “and then some.” Ex.513. Of course, the November 15 broadcast in question featured defamatory claims about Dominion. *Supra*, pp.121-123.

Fox's hosts shared these concerns over Fox's ratings and viewer retention. As Fox's corporate representative explained, Fox considers a show's ratings—which are tied to advertising revenue for the show—when assessing whether to continue or extend a host's contract, and it “informs how much we would be comfortable to pay that person going forward.” Ex.113, Dorrego 30(b)(6) 51:3-52:20; *see also id.* 55:22-59:6 (Fox's ratings provide it leverage in cable negotiations). Hosts, like Fox's executives, knew the ratings had taken a dive and the need to keep the audience happy—which meant feeding them the narrative that Dominion rigged the election.

Maria Bartiromo. “Ratings are very important” to Bartiromo, and “They impact various aspects of [her] career at Fox.” Ex.98, Bartiromo 320:4-9. She agreed that “It's easier to get good ratings when you are giving your audience something they want to hear.” *Id.* 323:6-9. Bartiromo and her producer Abby Grossberg knew that “Dominion rigged the election” was exactly what the audience wanted to hear: Grossberg texted Bartiromo that, “To be honest, *our audience doesn't want to hear about a peaceful transition.* They still have hope...” to which Bartiromo answered, “*Yes, agree.*” Ex.514.

Lou Dobbs: [REDACTED]

[REDACTED] Ex.164. Dobbs testified that having Powell and Giuliani on air was indeed good for ratings (Ex.111, Dobbs 285:2-17); that he and his producers

were contemporaneously aware of his ratings compared to those of competitors (*id.* 283:10-21); and that his show was #1 (and often his rebroadcast at 7pm was #2) for almost all of the broadcasts featuring the accused defamatory statements, and his ratings were up over 100% in most cases versus average for the month, quarter, and year (*id.* 286:8-290:21; *see* Exs.515-516).

Sean Hannity: Hannity confirmed that every day he and his team “do a very deep analysis” of ratings “to see audience reaction to certain stories or guests.” Ex.122, Hannity 48:11-20; *id.* 47:18-21; *see also* Ex.115, Fazio 283:20-25 (“[T]he ratings are important. We look at the ratings every day”). Hannity told Steve Doocy Fox had created “major backlash” with the audience after the 2020 election, stating “You don’t piss off the base.” Ex.517 at FNN023_03852766-67. He likewise texted Carlson and Ingraham, “The network is being rejected.” Carlson responded, “I’ve heard from angry viewers every hour of the day all weekend, including at dinner tonight,” to which Hannity replied “Same same same. Never before has this ever happened.” Ex.555.

In a November 24 text thread with Berry, Fazio, and Samuel, Hannity reiterated that “Respecting this audience *whether we agree or not* is critical. Fox has spent the month spitting at them,” to which Samuel responded “[*R*]ight, our best minutes from last week were on the voting irregularities.” Ex.518; *see* Ex.226 at

[REDACTED].

Tucker Carlson: On November 10, Carlson's producer Alex Pfeiffer told Carlson "Many viewers were upset tonight that we didn't cover election fraud.... [I]ts all our viewers care about right now," to which Carlson agreed the decision had been a "Mistake," further stating "I just hate this shit." Ex.519; *see also* Ex.520 at FNN079_04550759 (Wells text to Pfeiffer, "We're threading a needle that has to be thread because of the dumb fucks at Fox on Election Day. We can't make people think we've turned against Trump. Yet also call out the bullshit. You and I see through it. But we have to reassure some in the audience.").

But while Carlson did challenge Powell on air on November 20, Carlson nevertheless invited Mike Lindell on air to make the very same claims. Lindell's company MyPillow is Fox's top advertising spender [REDACTED]. Exs.521-522; Ex.107, Collins 181:23-182:17, 175:18-176:18; Ex.105, Carlson 233:20-235:5 (Carlson knew Lindell is a major Fox News sponsor). Indeed, when Lindell made negative comments about Fox on Newsmax, Fox's executives exchanged worried emails about alienating him and sent him a gift along with a handwritten note from Suzanne Scott. Exs.523-525. Fox had a strong motive to welcome him on air and avoid rebutting his baseless claims.

3. Departure from Journalistic Standards.

Q: [Y]ou broadcast on your show on November 30th the claim that, [“]We need, frankly, to stop the election that’s supposed to happen in January because all the machines are infected with the software code that allows Dominion to shave votes for one candidate and give them to another and other features that do the same thing.[”]...[H]ad you seen any evidence from Ms. Powell or anyone else to support that claim?

A: No.

Q: Did you tell your audience that?

A: No.

Ex.111, Dobbs 87:14-88:3

Witness after witness in this case has testified that they saw *no evidence* to support the false claims against Dominion. *See, supra*, n.14. Fox’s witnesses acknowledge the need to verify the claims about Dominion putting them on the air. *See, e.g.*, Ex.108, Cooper 162:19-25; Ex.105, Carlson 21:23-24 (“[E]very claim requires evidence.”); Ex.140, Sammon 56:19-57:3. Baier testified that it’s a journalist’s job to prevent bad information from getting through to the audience, and that even opinion shows have an obligation to fact check. Ex.97, Baier 22:6-20, 26:10-14; *see also* Ex.146, Stirewalt 29:19-30:16 (“Everyone” should have relied on the Brainroom “to make sure that we were, you know, not in error.”); Ex.122, Hannity 21:2-6, 32:20-22, 62:3-11 (Hannity’s viewers expect the truth, and Hannity tells viewers “I vet the program, we vet the facts”). Fox News bills itself as “one of the most influential news properties in history.” Ex.128, Lowell 30(b)(6) 624:20-

625:14. Nevertheless, it broadcast entirely unsupported and false claims about Dominion to millions of viewers.

Remarkably, Fox has no written editorial guidelines. Ex.143, Scott 207:20-25. However, when asked at her deposition “What standard of journalism do you try to live up to as Fox News’ CEO,” Scott testified, “I would rather be right than first on a story...Better to have the facts first.” *Id.* 208:8–16; *compare* Ex.373 (Schreier statement that Bartiromo was endorsing unsubstantiated claims because she wanted to be first to report, in the event the claims “somehow” turned out to be true). The record establishes that Fox did “have the facts” before broadcasting defamatory claims about Dominion, but it disregarded them in favor of what its audience wanted to hear.

4. Preconceived Narrative.

Long before the election, Fox knew the dialogue would turn to fraud if Trump lost—because Fox knew Trump would claim fraud if he lost, and that this is what Fox’s viewers would want to hear. *See, e.g.*, Ex.146, Stirewalt 28:23-29:4 (“Q: In other words, from your perspective as politics editor at Fox News, you were aware of President Trump’s history of making baseless claims of election fraud prior to the November 2020 election? A: Of course.”); *id.* at 122:20-123:18. This was so well known that months before the election Fox’s SVP for Corporate Communications,

Irena Briganti, had a statement prepared for when Fox hosts inevitably contested election results. Ex.546.

Fox was embracing an election fraud narrative well before any ballot was cast. On September 27, a Fox employee texted Jeanine Pirro saying that, in response to the question “will you accept the election results?” Trump’s response should be “Of course I will accept the results but I reserve my right to challenge the massive fraud that I am justifiably anticipating”; to which Pirro responded that Trump was “working with Rudy [Giuliani] on this.” Ex.547. At her deposition, Maria Bartiromo testified that in the lead-up to the 2020 election, she was already “on alert” that Democrats would be attempting to interfere in that election as well. Ex.98, Bartiromo 41:10-16. On October 31, 2020, she texted Schreier her worry about the election outcome, “And cheating. There will be a lot of cheating.” Ex.550. Schreier subscribed to the same narrative: the night of the election, he responded to Biden’s surge in the polls by saying Democrats were “gonna try and steal” the election. Ex.551; *see* Ex.552. [REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED],”

30(b)(6) 58:12-192:12. On this basis alone, this Court can grant summary judgement.

Moreover, no reasonable juror could find in favor of Fox's "neutral reportage" and "fair report" defenses. *See* Fox's Eighth, Ninth, Sixteenth, Seventeenth, and Nineteenth Affirmative Defenses. These are affirmative defenses. *See* FNN MTD Order, pp.38-40 (noting Fox's motion to dismiss sought to introduce affirmative defenses, including the neutral reportage and the fair report privileges); *see also US Dominion, Inc. v. Newsmax Media, Inc.*, 2022 WL 2208580, at *25 (Del. Super. Ct. June 16, 2022) (neutral reportage "appears to be an affirmative defense"); *Greenberg v. Spitzer*, 155 A.D.3d 27, 42-43 (2d Dep't 2017) (fair report privilege "is an affirmative defense" and it is therefore "[i]ncumbent on the party asserting the privilege to establish that the statements at issue reported on a judicial proceeding"). As such, the burden is on Fox to establish the applicability of these defenses.

After extensive briefing at the motion to dismiss stage, the Court "question[ed] whether Fox can raise neutral reportage doctrine or analogous newsworthiness privilege." FNN MTD Order, pp.41-42. It cannot. It is foreclosed as a matter of New York law. *Id.* And it is not grounded in the First Amendment either. To the contrary, as the Court concluded, the privilege "seems to run contrary to United States Supreme Court precedent" by upending the "balance between First Amendment freedoms and viable claims for defamation" that the Supreme Court has

struck. *Id.* Finally, even if the privilege could apply, Fox cannot meet its requirements. The Court should grant summary judgment on Fox’s neutral reportage or “newsworthiness” defense.

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

1. The Neutral Reportage Privilege Is Foreclosed by New York Law.

New York courts, as this Court already recognized, consistently reject the neutral reportage privilege. A panel of the Second Circuit created the doctrine in dicta in *Edwards v. National Audubon Society*. *Edwards* involved a New York Times article that republished defamatory accusations by the National Audubon Society that certain scientists were “paid liars.” 556 F.2d at 117. The Second Circuit ultimately held that “the evidence adduced at trial was manifestly insufficient to demonstrate ‘actual malice’ on the part of the Times.” *Id.* at 120. Yet the Court also, in dicta, suggested a new privilege giving media companies sweeping protection to republish—though not themselves endorse—“newsworthy” allegations, even if they know the allegations are false. The panel termed its new doctrine “the press’s right of neutral reportage,” and explained that the doctrine applies even if the publisher knows the charges to be false—though *not* if the publisher “espouses or concurs in” or “deliberately distorts” the charges or otherwise fails to provide “accurate and disinterested reporting.” *Id.*

New York law flatly rejects the *Edwards* doctrine. In *Hogan v. Herald Co.*, 84 A.D.2d 470, 477 (N.Y. 4th Dep’t 1982), *aff’d*, 444 N.E.2d 1002 (N.Y.), a New York intermediate appellate court stated clearly: “We now hold the rule of *Edwards v. National Audubon Society* does not apply in this department.” 84 A.D.2d at 479. The New York Court of Appeals—New York’s highest court—affirmed the Appellate Division’s order “for reasons stated in” the appellate court’s order, making that holding and reasoning the law of New York. *See Hogan*, 444 N.E.2d at 1002. Lest there be any doubt, just a few years later, the Court of Appeals confirmed *Hogan*’s holding rejecting the neutral reportage privilege. *Weiner v. Doubleday & Co., Inc.*, 549 N.E.2d 453, 456 (N.Y. 1989).

The Appellate Division in *Hogan*—affirmed by the Court of Appeals—explained why it declined to adopt the *Edwards* neutral reportage rule: “The Supreme Court has not adopted *Edwards* [] and in our view it is not possible to reconcile it with that court’s prior decision in *Gertz*,” which based immunity “upon the status of the plaintiff, not the subject matter of the publication,” and required that “the publisher [be] free of culpable conduct” under the relevant fault standard. 84 A.D.2d at 478-79. In other words, the *Edwards* rule upset the Supreme Court’s careful balancing of First Amendment and protection-of-reputation concerns.

Moreover, New York Civil Rights Law Section 75 provides very limited protections for comments by guests on television or radio. But it only applies in the

narrow situation of a “legally qualified candidate for public office whose utterances” may not be censored under applicable federal regulation, and even then requires a disclaimer. *Id.* Fox does not and cannot assert that any of these publications qualify. But Section 75 is powerful evidence that New York knows how to provide exemptions for reporting on “newsworthy” events. They just are unavailable here.

The skepticism that the Court previously expressed over the doctrine, as a matter of New York law, was therefore entirely warranted. FNN MTD Order, pp.41-42 (“Given this New York precedent, the Court questions whether Fox can raise neutral reportage doctrine or analogous newsworthiness privilege as an absolute defense to liability for defamation under New York law.”). The doctrine does not exist under New York law.

2. Federal Constitutional Law Does Not Recognize A “Neutral Reportage” Privilege.

Nor is there any federal Constitutional basis for the neutral reportage privilege. As Dominion previously explained, and as the Court previously acknowledged, in the decades since *New York Times v. Sullivan*, the U.S. Supreme Court has struck a careful balance between “First Amendment freedoms” and “the individual’s right to the protection of his own good name,” both of which the Court has acknowledged are vitally important in our constitutional system. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *see also* FNN MTD Order, p.41 (“The United

States Supreme Court has attempted to strike a balance between First Amendment freedoms and viable claims for defamation.”). “In doing so, the United States Supreme Court has declined to endorse *per se* protected categories like newsworthiness.” *Id.*

Dominion recounted, in its briefing on Fox’s motion to dismiss, how the U.S. Supreme Court expressly rejected a content-based newsworthiness test in *Gertz*. FNN MTD Opp., pp.8-11. As *Gertz* explained, a newsworthiness test would occasion the “difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of ‘general or public interest’ and which do not—to determine, in the words of Mr. Justice Marshall, ‘what information is relevant to self-government.’” 418 U.S. at 346 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)). The U.S. Supreme Court “doubt[ed] the wisdom of committing this task to the conscience of judges.” *Gertz* at 346. From *Gertz* onward, then, the Supreme Court in its First Amendment defamation jurisprudence has maintained the careful—and highly media-protective—balance it first struck in *Sullivan* and *Curtis Publishing*, requiring an inquiry based on the status of the plaintiff, not the content of the statement. “[U]se of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.” *Time, Inc. v. Firestone*, 424

U.S. 448, 456 (1976). “[T]his weakness in the *Rosenbloom* test...led us in *Gertz* to eschew a subject-matter test for focusing upon the character of the defamation plaintiff.” *Id.*

This Court was thus correct in noting that “the defense seems to run contrary to United States Supreme Court precedent.” FNN MTD Order, p.41; *see also US Dominion, Inc. v. Newsmax Media, Inc.*, 2022 WL 2208580, at *27 (Del. Super. Ct. June 16, 2022) (same). That conclusion was consistent with the conclusion reached by the majority of lower courts to consider the issue. *See, e.g., Dickey v. CBS Inc.*, 583 F.2d 1221, 1226 & n.5 (3d Cir. 1978). As the Pennsylvania Supreme Court noted after a lengthy review of the U.S. Supreme Court’s First Amendment caselaw in *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004), “the high Court would not so sharply tilt the balance against the protection of reputation, and in favor of protecting the media, so as to jettison the actual malice standard in favor of the neutral reportage doctrine.” *Id.* at 57.

3. Fox’s Case for Neutral Reportage Has Only Gotten Weaker Since the Court’s Motion to Dismiss Ruling.

Nothing has changed since the Court’s prior ruling. If anything, Fox’s case for the neutral reportage privilege has gotten weaker. At the time of the Court’s ruling on Fox’s motion to dismiss, the Court had not yet resolved whether Dominion would be required to prove actual malice, or instead whether Fox could be held liable

on a less demanding fault standard. *See* FNN MTD Order, p.42. Now, however, Dominion has consented to actual malice. Thus, to the extent that the Court had any concern that Fox might not be afforded adequate First Amendment protections, that concern no longer exists. Fox will be held liable only if Dominion proves actual malice, the greatest amount of protection available under the law.

Nor does *Page v. Oath Inc.*, change the analysis. To the extent that Fox's invocation of neutral reportage is based on state law, *Page* is obviously irrelevant, as it applies Delaware law, not New York law. In any event, *Page* does not even concern the neutral reportage privilege. The decision does not reference the privilege once, nor does it even cite *Edwards*. Instead, *Page* held that the allegedly defamatory articles were "substantially true" because they reported that U.S. intelligence agencies had received intelligence reports; were investigating the allegations in those reports; and made clear that the allegations were unsubstantiated and under investigation. 270 A.3d at 846-47. Those statements were "[f]ar from being a mere republication of libelous matter, the[y] are true statements." *Id.* at 846. *Page* does not rely on any privilege at all, let alone a privilege as expansive as neutral reportage.

B. Even if the *Edwards* Doctrine Did Apply, Fox Cannot Meet Its Requirements

Even if applicable, no reasonable juror could find that the broadcasts meet the neutral report privilege's strict standards. It does not apply if the publisher "espouses or concurs in" or "deliberately distorts" the charges or otherwise fails to provide "accurate and disinterested reporting." 556 F.2d at 120. Fox fails at every turn.

In *Khalil*, the Court found it unnecessary to reach whether the neutral reportage privilege applies. It denied Fox's motion to dismiss because unlike *Edwards*, where a "responsible, prominent organization" made the allegations, here the allegation was that "Sidney Powell was not a responsible source." 2022 WL 4467622 at *6. Moreover, "[s]everal election experts and government agencies had already debunked her theories of election fraud." *Id.* The same is true here. From at least November 7 when Maria Bartiromo received the "wackadoodle" email she described as "kooky" and "nonsense," through the multiple communications from Dominion and the mountains of public record information starting soon after the election and growing daily, to Fox's own characterization of Powell and her conspiracy theories, no reasonable juror could find the neutral report privilege applicable on this ground alone. *See, e.g., supra*, §V.E.1.

Khalil also found that the allegation regarding reporting being "neither accurate nor dispassionate" was sufficient to deny the motion to dismiss. *Id.* at *7.

Also true here, after completion of the evidence. Fox hosts took sides. A review of the transcripts shows Fox espousing and concurring in the statements. To cite just the first three: “I know that there were voting irregularities.” (Maria Bartiromo, November 8, ¶179(a)). “It’s stunning.” (Lou Dobbs, November 12, ¶179(b)). “This is the culmination of what has been an over a four-year effort to overthrow this president.” (Lou Dobbs, November 13, ¶179(c)). Fox hosts also deliberately distorted the charges by not presenting the full picture. As discussed at length above, Fox knew the charges were false yet failed to provide viewers with any of the extensive evidence disproving them. *See supra*, §V.

And these publications were the exact opposite of accurate and disinterested reporting. Meade Cooper agreed that “a token pushback is not really a fair reporting on either side.” Ex.108, Cooper 191:2-4. David Clark testified similarly, agreeing that “token push back” is still not “fair” reporting and “would be insufficient.” Ex.106, Clark 156:4-157:8; Ex.293. And he could not identify any pushback on Bartiromo’s accused shows. Ex.106, Clark 237:17-238:14, 294:12-295:11, 302:20-304:5, 304:18-305:9. This fits with the testimony of Bartiromo’s producer, Abby Grossberg: “Q: If someone says something untrue on one of your shows, do you think it’s important to correct it? A: No.” Ex.121, Grossberg 243:11-14. Other hosts likewise failed to challenge their guests. *See* Ex.554 (text from SVP of Media Relations Caley Cronin to Schrier regarding Dobbs’ 12/10/20 interview of Powell:

“wish he demanded to see the proof”); *see also* Ex.122, Hannity 300:24-301:5 (Hannity did not challenge Powell’s claims “to the extent that I would have had I had more time”).

A review of the transcripts themselves demonstrates that no reasonable juror could conclude the publications were either accurate or disinterested. *See* Appendices B & D; *see, e.g.*, Ex.178 (Fox concedes that “shows like Dobbs, Hannity, etc.” did not “challenge the narrative being put out by Giuliani, Powell et al” about Dominion).

Moreover, “newsworthiness” is not a license to lie. As Meade Cooper agreed, “you can cover the allegations and say they are conspiracy theories and not true” and “there are ways to cover the allegations without giving a platform to the people spewing lies.” Ex.108, Cooper 284:8-14, 284:22-25. Fox routinely makes decisions on what to cover or whether the material is “credible enough to put on the air.” *Id.* 285:15-20.

The afternoon of January 6, after the Capitol came under attack, then-President Trump dialed into Lou Dobbs’ show attempting to get on air. But Fox executives vetoed that decision. Why? Not because of a lack of newsworthiness. January 6 was an important event by any measure. President Trump not only was the sitting President, he was *the* key figure that day. But Fox refused to allow President Trump on air that evening because “it would be irresponsible to put him

on the air” and “could impact a lot of people in a negative way.” Ex.133, Petterson 402:18-403:21. The same is true of statements Fox chose to air about Dominion. Not only did the charges severely impact Dominion and its employees, they were based on verifiable falsehoods that any accurate and disinterested reporting would have mentioned. *See, supra*, §I.A. Fox chose to spread lies instead of telling the truth. The neutral report privilege provides no comfort to Fox on these facts.

C. The Narrow and Well-Defined “Fair Report” Privilege Likewise Does Not Apply

1. The Court Already Correctly Held That the Fair Report Privilege Applies Only to Substantially Accurate Reports of Pending Proceedings.

Like it did with the neutral reportage privilege, the Court largely disposed of Fox’s “fair report” defense at the motion to dismiss stage. At that stage, Fox argued for a vast expansion of this statutory privilege, claiming that it provided the press with absolute immunity for reports that “previewed” future litigation, even if those previews of future litigation turned out to be wrong. FNN MTD Reply, pp.18-26. The Court flatly rejected these arguments as inconsistent with the statute’s “ordinary meaning” and New York caselaw. *See* FNN MTD Order, pp.44-47.

Instead, it applied the privilege’s two well-established limitations. First, “the fair and true report must be ‘of...proceedings.’” *Id.* at 45-46 (quoting N.Y. Civil Rights Law §74). That necessarily means that the privilege “‘is not triggered unless the report comments on a proceeding.’” *Id.* at 45 (quoting *Cholowsky v. Civiletti*, 69

A.D.3d 110, 114 (N.Y. 2d Dep’t 2009)) (cleaned up). “If context indicates that a challenged portion of a publication focuses exclusively on underlying events, rather than an official proceeding relating to those events, that portion is insufficiently connected to the proceeding to constitute a report of that proceeding.” *Fine v. ESPN, Inc.*, 11 F.Supp.3d 209, 217 (N.D.N.Y. 2014); *see also Corporate Training Unlimited, Inc. v. National Broadcasting Co.*, 868 F.Supp. 501, 509 (E.D.N.Y. 1994) (privilege did not apply where report mentioned judicial proceedings only “in passing” and ordinary viewer “would not have been under the impression that he was being presented with a report of the...judicial proceedings”). “Doubt regarding whether the report is ‘of’ a proceeding is resolved against the privilege.” FNN MTD Order, pp.46 (citing *Cholowsky*, 69 A.D.3d at 114-15).

Second, the report “must be ‘substantially accurate,’” meaning that the report “does not produce a different effect on a reader than would a report containing the precise truth.” *Id.* at 45 (quoting N.Y. Civil Rights Law §74); *see also id.* (in considering whether the report is “substantially accurate,” court must “analyze the publication as a whole” and “consider the publication’s ‘effect upon the average reader’”). A report fails the “substantial accuracy” requirement if it “suggest[s] more serious conduct than that actually suggested in the official proceeding.” *Karedes v. Ackerly Group, Inc.*, 423 F.3d 107, 119 (2d Cir. 2005) (internal quotations and alterations omitted). Thus, a statement cannot qualify for the

privilege if it reasonably implies that charges against the plaintiff have “already been established,” when, in reality, the allegations are merely “pending and undecided.” *Greenberg v. Spitzer*, 155 A.D.3d 27, 34, 48 (N.Y. 2d Dep’t 2017); *see also, e.g., Pisani v. Staten Island Univ. Hosp.*, 440 F.Supp.2d 168, 178 (E.D.N.Y. 2006) (fair report privilege did not apply where report “transformed *allegations* as to plaintiff in the...complaint into *fact*”) (emphasis in original).

2. None of the Defamatory Statements Is a Substantially Accurate Report of Pending Proceedings.

When the fair report’s actual requirements are applied, there can be no genuine dispute that the defense fails. Not one of Fox’s defamatory statements is a substantially accurate report of a pending proceeding.

In fact, none of the accused statements even meets the basic requirement that it report on a pending proceeding. As the Court recognized in its prior ruling, any statement made in a broadcast that occurred before November 25, 2020 could not possibly satisfy the “of...proceedings” requirement because the lawsuits filed by Sidney Powell—the only Fox guest who actually filed a lawsuit containing the defamatory allegations about Dominion—had not been filed by that date. *See FNN MTD Order*, p.46. And even after that date, the broadcasts in question hardly mentioned the existence of legal proceedings concerning Dominion, let alone purported to be a substantially accurate report of those proceedings. “[A]t no point

did Dobbs or Powell attribute the statements...to an official investigation or a judicial proceeding. *A reasonable observer would have no grounds to believe that her statements constituted a report of an official proceeding.*” Khalil, 2022 WL 4467622 at *6.

The only broadcast in which Powell even references her lawsuits is the November 30, 2020 *Lou Dobbs Tonight* broadcast. See ¶179(m); Ex.13. But the defamatory statements in that broadcast come nowhere close to satisfying the fair report privilege’s requirements. In that broadcast, Powell mentions her “case...in Georgia that’s getting ready to go to the Eleventh Circuit,” where she was “going to ask for emergency review of that where we sought to impound all the voting machines in Georgia.” Ex.13. To be clear, Dominion does not contend that Powell’s foregoing description of her Georgia lawsuit is defamatory. Rather, Dominion’s defamation claim is based on statements about Dominion, which Powell presented as *facts*, and which she in no way attributed or connected to the Georgia lawsuit. See Appendix D, ¶179(m).

No reasonable viewer could conclude that those assertions—that Dominion’s machines “*are infected* with software code” that manipulated vote counts; that Dominion’s “system *was set up* to shave and flip different votes”; or that “*there were significant benefits*” for Governor Kemp for awarding Dominion the contract—were “reports” about her Georgia lawsuit or any other lawsuit. Powell

presented them as fact. And even if a viewer could somehow understand those assertions as being attributed to one of her lawsuits, they would be substantially inaccurate. Powell's suits contained *allegations* about Dominion and its machines, but those allegations were never substantiated; they were false. *See* Ex.128, Lowell 30(b)(6) 285:10-13, 286:3-13 (Powell provided no evidence); *see also, supra*, §I. Where a report "transform[s] *allegations*...into *fact*," it is not "substantially accurate" and does not qualify as a fair report. *Pisani*, 440 F.Supp.2d at 178 (emphasis in original). The fair report privilege therefore cannot apply. Moreover, Powell did not even accurately characterize the allegations. Though Powell stated on the show that Governor Brian Kemp received "significant benefits," *i.e.*, kickbacks, for awarding Dominion the Georgia contract, her lawsuit contains no such allegation. *Compare* ¶179(m), *with* Ex.314; *see* FNN MTD Order, p.47.

CONCLUSION

For the foregoing reasons, Dominion respectfully asks the Court to grant summary judgment in favor of Dominion on Fox News Network and Fox Corporation's liability for defamation.

Dated: January 17, 2022

Respectfully submitted,

/s/ Brian E. Farnan

Brian E. Farnan (Bar No. 4089)

Michael J. Farnan (Bar No. 5165)

FARNAN LLP

919 N. Market St., 12th Floor
Wilmington, Delaware 19801
(302) 777-0300
bfarnan@farnanlaw.com
mfarnan@farnanlaw.com

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

Of Counsel:

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

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

Stephen Shackelford, Jr.
Mark-Hatch-Miller
Zach Savage
Christina M. Dieckmann
SUSMAN GODFREY LLP
1301 6th Avenue

New York, New York 10019
(212) 336-8330
sshackelford@susmangodfrey.com
mhatch-miller@susmangodfrey.com
zsavage@susmangodfrey.com
cdieckmann@susmangodfrey.com

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

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Brian E. Farnan, hereby certify that on February 16, 2023, a copy of the redacted version of Dominion's Brief in Support of its Motion for Summary Judgment on Liability of Fox News Network, LLC and Fox Corporation was served via LexisNexis File&Serve on the following:

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

*Attorneys for Defendant Fox
Corporation*

Blake Rohrbacher
Katharine L. Mowery
Angela Lam
Richards, Layton & Finger, P.A.
920 N. King Street
Wilmington, DE 19801

*Attorneys for Defendant Fox
Corporation*

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