

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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

Plaintiff,

v.

FOX NEWS NETWORK, LLC,

Defendant.

C.A. No. N21C-03-257 EMD

CONSOLIDATED

**REDACTED PUBLIC VERSION**

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

Plaintiff,

v.

FOX CORPORATION,

Defendant.

C.A. No. N21C-11-082 EMD

**DEFENDANT FOX CORPORATION'S OPENING BRIEF  
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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Dated: January 17, 2023

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## **PRELIMINARY STATEMENT**

In its motion-to-dismiss opinion, this Court permitted Dominion’s claims to proceed against Fox Corporation (the ultimate parent of initial defendant Fox News Network, LLC) on the theory “that Fox Corporation played a *direct role* in the creation and publication of the statements at issue.” *US Dominion, Inc. v. Fox Corp.*, 2022 WL 2229781, at \*9 (Del. Super. Ct. June 21, 2022) (emphasis added). The Court expressed serious “misgivings” about Dominion’s other theories of liability, including theories of corporate control, veil-piercing, and agency liability. *Id.*

After more than a year of discovery, the record in this consolidated case confirms that Fox Corporation had no role in the creation and publication of the challenged statements—all of which aired on either Fox Business Network or Fox News Channel, networks owned and operated by Fox News Network, LLC (“Fox News”). Dominion has deposed dozens and dozens of witnesses from Fox News and the CEO of Fox Corporation. Every single one denied that anyone at Fox Corporation participated in creating *any* of Fox News’s coverage of Dominion, let alone any of the challenged statements, which are the only ones relevant here. The reams of written discovery produced by both Fox News and Fox Corporation confirm the same: Fox Corporation did not direct, participate in, or play any role in the creation or publication of the statements Dominion challenges. Accordingly, while Fox Corporation is entitled to summary judgment for all the reasons explained

in Fox News's motion for summary judgment, which it joins and incorporates into this motion by reference, Fox Corporation is entitled to summary judgment for the independent reason that Dominion simply has not produced the evidence necessary to hold Fox Corporation liable for the challenged statements.

### **NATURE AND STAGE OF THE PROCEEDINGS**

Plaintiffs filed their complaint against Fox Corporation on November 8, 2021. Fox Corporation filed a motion to dismiss on December 30, 2021. The Court heard argument on the motion in March 2022. The Court granted in part and denied in part Fox Corporation's motion to dismiss on June 21, 2022, and Fox Corporation filed its answer on July 6, 2022. In the months that followed, Dominion, Fox News, and Fox Corporation produced millions of documents and hundreds of pages of written discovery responses, and dozens of witnesses from Dominion and Fox News sat for deposition, as did the CEO of Fox Corporation. The Court consolidated the Fox News and Fox Corporation cases on December 22, 2022. The Court subsequently ordered dispositive motions for all parties to be filed by January 17, 2023, and noted that the parties may supplement their opposition briefs with any additional discovery obtained during January 2023.

### **STATEMENT OF QUESTIONS INVOLVED**

Whether Fox Corporation is entitled to summary judgment on all of Dominion's defamation claims.



## **STATEMENT OF UNDISPUTED FACTS**

### **A. Fox Corporation's Broad Media Business**

Fox Corporation is a publicly traded news, sports, and entertainment company that owns numerous subsidiary businesses. Fox Corporation produces and delivers news, sports, and entertainment content through its primary brands, including FOX News Media (the trade name for Fox News Network, which includes Fox News Channel, Fox Business Network, Fox Digital, Fox News Audio, and Fox Weather); Fox Sports; Fox Entertainment; Fox Television Stations; and the ad-supported video on demand service TUBI. Ex. G14, Fox Corporation 2022 Form 10-K, at 2.<sup>1</sup> These subsidiaries all maintain their own employees, management structures, and corporate executives. The programming on Fox Corporation's outlets is diverse and substantial. It includes shows such as *Lego Masters*, *Hell's Kitchen*, *Bob's Burgers*, and *The Masked Singer*, sporting events such as NFL and NCAA football, MLB, and FIFA, television episodes and movies that users can stream online, and the news, opinion, and information content available from Fox News Channel, Fox Weather, Fox Business Network, and Fox News Audio.

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<sup>1</sup> This exhibit, along with all exhibits, shall be attached to the Mowery Declaration or the Helpern Declaration filed contemporaneously herewith.

## **B. Dominion's Lawsuit Against Fox Corporation**

In March 2021, US Dominion, Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation (collectively, "Dominion," or "Plaintiffs"), sued Fox News Network, LLC for defamation based on coverage of the 2020 election on Fox Business Network and Fox News Channel. *US Dominion, Inc. v. Fox News Network, LLC*, Complaint, D.I. 1 (Del. Super.) ("Fox News Compl."). The Court is by now familiar with the facts alleged in that lawsuit. Detailed descriptions of the coverage Dominion challenges can be found in Fox News's Motion for Summary Judgment ("FNN MSJ") and accompanying appendix, which Fox Corporation incorporates by reference.

In brief, Dominion's claim against Fox News stems from coverage of and commentary on allegations leveled by then-President Donald Trump and his surrogates in the wake of the hotly-contested 2020 presidential election that Dominion voting machines were used to fraudulently influence the outcome of the election. Fox News Compl. ¶179. The federal government and numerous state governments investigated those allegations, which were pressed in numerous lawsuits brought by the President's lawyers and allies across the country in an effort to overturn the election before the mid-December deadline for finalizing the electoral vote. *Id.* Virtually every outlet in the country, if not the world, covered that unprecedented effort to alter the results of a presidential election. *Id.* ¶¶17, 50,

69, n.79; *see also, e.g.*, Exs. D18, Cause of Election Day Glitch in Georgia Counties Still Unexplained, Politico (Nov. 4, 2020); D19, Georgia’s Gwinnett County blames Dominion Voting Systems for day-long delay reporting results, CNN (Nov. 6, 2020). Yet Dominion sued only three: the companies owning conservative-leaning cable networks Fox News, Newsmax Media, and OANN.

In its complaint against Fox News, Dominion did not allege that any Fox Corporation employee, officer, or director made or published any of the challenged statements. *See* Fox News Compl. ¶179. Almost eight months later, however, and before obtaining any document production or serving any non-party subpoena on Fox Corporation in the Fox News matter, Dominion filed a separate lawsuit against Fox Corporation and Fox Broadcasting, LLC, alleging essentially the same defamation claims, based on the same statements challenged in its suit against Fox News. Indeed, the bulk of Dominion’s new complaint was copied verbatim from its complaint against Fox News. *US Dominion, Inc. v. Fox Corp.*, Complaint, D.I. 1 (Del. Super.) (“Complaint”). As summarized by this Court, the Complaint accused “Fox Corporation, acting through Rupert and Lachlan Murdoch and others,” of being “directly involved in the ‘defamatory scheme’” against Dominion. *Fox Corp.*, 2022 WL 2229781, at \*2. In particular, Dominion alleged that “Fox Corporation participated in the creation and publication of Fox News’s defamatory statements,” claiming that “executives at Fox Corporation believed Fox News would benefit if it

endorsed former President Trump’s election fraud narrative [so they] ‘pressur[ed]’ Fox News to ‘lure the Fox audience back home’ and ‘encouraged’ on-air personalities to perpetuate false claims about Dominion; and Fox Corporation ‘rewarded’ those at Fox News who complied with the alleged instructions and ‘punished’ those who did not.” *Id.* at \*8.

Fox Corporation and Fox Broadcasting moved to dismiss the Complaint. The Court granted the motion as to Fox Broadcasting but permitted the case to proceed against Fox Corporation, but only on a narrow basis. Recognizing that corporate veil-piercing is available only in the Court of the Chancery, not the Superior Court, the Court rejected veil-piercing as a theory of liability against Fox Corporation as a matter of law. *See, e.g.*, Exs. J1, Motion to Dismiss Oral Argument Hearing Tr., at 20:15-21:4 (Mar. 15, 2022); J2, Motion for Consolidation Oral Argument Hearing Tr., at 96:9-20 (Dec. 21, 2022). The Court also cast considerable doubt on Dominion’s corporate-control theory, emphasizing that the agency theory of vicarious liability cannot be used as an end-run around the limitations on veil-piercing. As the Court explained: “Dominion’s agency theory rests primarily on its assertion that Fox Corporation exercises a high degree of control over the operations of Fox News... [which] come[s] close to contravening the ‘fundamental [rule] that a parent is considered a legally separate entity from its subsidiary and cannot be held liable for the subsidiary’s action based solely on its ownership of a controlling

interest in the subsidiary.” *Fox Corp.*, 2022 WL 2229781, at \*9 (internal citation omitted).

The Court ultimately allowed Dominion’s claims against Fox Corporation to move forward only to the extent Dominion could prove that someone at Fox Corporation played a *direct role* in creating and publishing the challenged statements. *Fox Corp.*, 2022 WL 2229781, at \*9. The Court reiterated that ruling just this past month, explaining that mere allegations of corporate control over Fox News are not enough to hold Fox Corporation vicariously liable for all statements published by its subsidiary.

. . . I am having an issue with your corporate control argument because I think I have already ruled on that. I am not going to let people pierce the corporate veil, so you might as well throw those experts out right now. If you want to pierce the corporate veil, you are in the wrong place. And, so, corporate control is going to be a touchy subject with this Judge. I have already gone through this.

Ex. J2, Motion for Consolidation Oral Argument Hearing Tr., at 96:10-20 (Dec. 21, 2022); *see also* Ex. J1, Motion to Dismiss Oral Argument Hearing Tr., at 20:15-21:4 (Mar. 15, 2022).<sup>2</sup>

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<sup>2</sup> *See also, e.g.*, Ex. J1, Motion to Dismiss Oral Argument Hearing Tr., at 6:17-8:8 (Mar. 15, 2022).

I’m having a lot of problem[s] with the notion of agency versus piercing the corporate veil here. . . If a parent - - I mean, as we all know that corporations act through agents. . . [W]ouldn’t you always able to pierce back to the corporation in Superior Court by just arguing that the parent corporation is exercising control over the subsidiary and causing

Accordingly, to prove its claims against Fox Corporation, Dominion must prove that Fox Corporation played a direct role in creating and publishing the statements that Dominion challenges. *Fox Corp.*, 2022 WL 2229781, at \*9. And Dominion must also prove that Fox Corporation did so with the actual malice necessary to sustain a defamation claim. *See* Ex. J2, Motion for Consolidation Oral Argument Hearing Tr., at 101:13-102:5.

### **C. The Voluminous Discovery Record**

Since the Court issued its motion-to-dismiss opinion in the Fox Corporation case, Fox News and Fox Corporation have produced more than a million documents, including emails, texts, and instant messages from scores of custodians. And Dominion has deposed dozens of Fox News witnesses, including Fox News hosts, producers, and senior executives (including even the Fox News CEO), numerous

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the subsidiary to do what it did? And that may not be as big a deal in other jurisdictions where the courts are not separate, but here we have Chancery and we have Superior Court and I can't pierce the corporate veil. . . . [T]he theory here is that Fox Corporation directed Fox News to do certain things for the benefit of Fox Corporation. But that could be said with a lot of parent subsidiaries and that's not enough necessarily to pierce back to the corporate veil.

*Id.* at 45:4-10 (“[C]ouldn't you use agency arguments to circumvent piercing the corporate veil and then end up in Superior Court by just alleging that the parent directed the subsidiary to take on obligations because the ultimate beneficiary - - let's say the parent owns 100 percent of the stock - - and the subsidiary is just the operating entity?”); Ex. J2, Motion for Consolidation Oral Argument Hearing Tr., at 101:13-102:5 (Dec. 21, 2022) (“And what I did rule in the Fox Corporation is we are not going there, in this Court, corporate control.”).

third parties, and the CEO of Fox Corporation. Yet despite this mountain of discovery, Dominion has failed to produce a shred of evidence that anyone at Fox Corporation was directly involved in creating or publishing any of the statements Dominion challenges. That is not for lack of trying. Dominion repeatedly asked Fox News executives, hosts, and staff whether Fox Corporation employees played a role in, or affected, the challenged statements about Dominion. The answer—every single time, for every single witness—was: No. Written discovery produced confirms the same. Simply put, there is nothing in the record to support Dominion’s lone remaining theory of liability and no basis to think that Dominion will be able to identify any such evidence through the very limited discovery that remains.

**1. Hosts of Shows on Which the Challenged Fox News Coverage Aired Uniformly Testified that Fox Corporation Did Not Play Any Role—Direct or Otherwise—In Creating or Publishing Any of the Challenged Coverage.**

To begin, hosts of the challenged Fox News coverage uniformly testified that Fox Corporation did not play any role in creating or publishing any of their coverage or commentary on about Dominion.

For example, Jeanine Pirro was asked the following:

Q. Did you ever speak with anyone at Fox Corporation about the content of your shows related to the 2020 presidential election?

A. Fox Corporation, no.

Q. Did you ever speak with anyone at Fox Corporation about the contents of your shows that contained allegations of potential fraud in the 2020 presidential election?

A. No.

Q. Did you ever speak with anyone at Fox Corporation about the plaintiffs in this case, U.S. Dominion, Incorporated, Dominion Voting Systems, Incorporated, and Dominion Voting Systems Corporation?

A. No, I did not.

Ex. E25, J. Pirro Dep. Tr., at 421:21-422:13.

Maria Bartiromo testified to the same:

Q. [D]id you ever at any time ever talk to anybody at the parent corporation of Fox News called Fox Corporation? Did you ever talk to anyone at Fox Corporation at all about Dominion or the allegations being made about Dominion?

A. No, never.

Ex. E26, M. Bartiromo Dep. Tr., at 406:7-10.

So too Tucker Carlson:

Q. Did you ever communicate with Mr. Lachlan Murdoch in any way about claims or election fraud in the 2020 election?

A. Not that I recall.

Q. Did you ever speak with Mr. – or communicate with Mr. Murdoch in any mode or method about Dominion?

A. Not that I'm aware of.

Q. Or Sidney Powell?

A. Not that I'm aware of.

Q. Or Mike Lindell?

A. Not that I'm aware of.

\* \* \*

I can say with complete certainty, allowing for somehow maybe I forget it, but as I sit here now I can say with what I believe is complete certainty I did not discuss [whether Mike Lindell would come on his show] with the Murdochs. I can't imagine that I would have.



Ex. E27, T. Carlson Dep. Tr., at 165:15-166:1; 227:1-6; *see also* Ex. E28, J. Wells, Dep. Tr., at 13:16-14:18; 87:18-20 (Executive Producer for *Tucker Carlson Tonight* testifying that Rupert Murdoch never communicated “anything specific relating to a story, such as the 2020 election,” and never communicated about Sidney Powell with Rupert Murdoch, and that Lachlan Murdoch “doesn’t get involved in direct editorial decisions.”)

And when Lou Dobbs was asked if “any of the Murdochs” ever directed him to have or not have any of the people who were leveling allegations against Dominion in the wake of the election on his show, Dobbs testified “No, that would not have happened.” Ex. E29, L. Dobbs Dep. Tr., at 96:22-23; *see also id.* at 98:24-99:11.

In sum, the hosts on whose shows challenged statements were made uniformly testified that they never received instruction from anyone at Fox Corporation, including Rupert Murdoch or Lachlan Murdoch, regarding any of that coverage. Indeed, the testimony of the hosts to whom such questions were put was so starkly and uniformly damaging to Dominion’s case that Dominion apparently decided not to bother asking similar questions of any of the other hosts whose coverage it has tried to put at issue. The record is thus devoid of *any* testimony from *any* host supporting Dominion’s dubious allegations that Fox Corporation played a direct or indirect role in creating or publishing any of the challenged statements.

**2. Fox News Executives and Employees Uniformly Testified that Fox Corporation Played No Role In Creating or Publishing Any of the Challenged Coverage.**

Like the hosts on whose shows the statements were made, other Fox News witnesses likewise confirmed that Fox Corporation played no role in creating or publishing the challenged coverage. None testified to the contrary, leaving Dominion with no evidence of any such involvement by Fox Corporation.

First, hosts of shows whose Dominion-related coverage Dominion has *not* challenged similarly testified that Fox Corporation had no role in the creation or publication of their coverage on Dominion. For example, Bret Baier, host of Special Report with Bret Baier, testified:

Q. Did anybody on your staff, or Jay Wallace or Suzanne Scott or the Murdochs, ever say anything about the claim that Dominion had rigged the election against President Trump?

A. [N]o. I didn't have any conversations editorially about that story with Jay Wallace, Suzanne Scott, or the Murdochs.

Ex. E30, B. Baier Dep. Tr., at 61:27-62:13.

Similarly, Dana Perino, host of America's Newsroom, testified: "Q. Ms. Perino, have you ever had any conversations with any members of the Murdoch family about Dominion? A. No." Ex. E31, D. Perino Dep. Tr., at 185:4-7.

Fox News executives likewise testified that that Fox Corporation played no role in the creation or publication of the allegations against Dominion. Suzanne Scott, the CEO of Fox News, testified as follows:

Q. Did you talk about Sidney Powell with Mr. Murdoch?

A. No, not that I recall.

Q. Did you talk about Dominion at all with Mr. Murdoch?

A. I don't remember ever talking to Rupert about Dominion, no.

Ex. E32, S. Scott Dep. Tr., at 328:8-11.

As did Alan Komissarroff, Senior Vice President of News and Politics  
at Fox News:

Q. Do you ever recall Rupert Murdoch telling you to cover the allegations of Sidney Powell?

A. No.

Q. Do you ever recall Rupert Murdoch telling you to cover the allegations of Rudy Giuliani?

A. No.

Q. Do you ever recall Rupert Murdoch telling you to cover the allegations about -- made by Donald Trump with respect to Dominion voting machines?

A. No.

Q. Same with Lachlan Murdoch, do you ever recall Lachlan Murdoch telling you to cover the allegations of Sidney Powell?

A. No.

Q. Do you ever recall Lachlan Murdoch telling you to cover the allegations of Rudy Giuliani?

A. No.

Q. Do you ever recall Lachlan Murdoch telling you to cover the allegations about Dominion voting machines made by Donald Trump?

A. No.

Ex. E33, A. Komissarroff Dep. Tr., at 208:10-209:5.

David Clark, Senior Vice President for Weekend News and Programming for  
Fox News, testified that he could not recall discussing Sidney Powell or Rudy

Giuliani's appearance on November 15<sup>th</sup> with either Rupert or Lachlan Murdoch. Ex. E34, D. Clark Dep. Tr., at 298:9-300:23.

Meade Cooper, Executive Vice President of Primetime Programming for Fox News, testified that no one at Fox Corporation instructed her to cover specific topics during the relevant period, and for good measure that she never even conversed about what topics should be covered with either Rupert or Lachlan Murdoch. Ex. E35, M. Cooper Dep. Tr., at 282:4-23.

Gary Schreier, who at the relevant time was the Senior Vice President of Programming for the Fox Business Network, testified that neither Rupert nor Lachlan Murdoch ever spoke to him about Sidney Powell or Rudy Giuliani. Ex. E36, G. Schreier Dep. Tr., at 252:20-253:1.

There is thus no testimony *at all* to support Dominion's direct-participation theory.

**3. The Written Discovery Record Contains No Evidence that Fox Corporation Played Any Role—Direct or Otherwise—In Creating or Publishing Any of the Challenged Coverage.**

The written discovery responses likewise contain no evidence to support—and, to the contrary, affirmatively refute—Dominion's claim that Fox Corporation directed the creation or publication of the challenged coverage. Indeed, Fox Corporation's sworn interrogatory responses state that it is unaware of any Fox Corporation personnel or employees during the relevant period who played a role in

drafting, editing, reviewing, investigating, producing, approving, contributing to, or making decisions related to any of the content Dominion challenges. (Defendant Fox Corporation's Supplemental Responses and Objections to Plaintiffs' Second Set of Interrogatories, Interrogatory Nos. 1–3, 7, 9, 15, 29, 31, 33, 35, 37, 39, 45, 47.) Likewise, Fox News's sworn interrogatory responses state that no one from Fox Corporation drafted, edited, reviewed, investigated, or approved any segment or interview on any of the broadcasts or social media posts Dominion challenges. (Defendant Fox News Network, LLC's Responses and Objections to Plaintiffs' First Set of Interrogatories, Interrogatory No. 3.)

Discovery to date has neither revealed any evidence to the contrary nor provided any basis to believe that any such evidence exists. The written discovery record thus contains no evidence whatsoever to substantiate Dominion's direct-control theory.

### **ARGUMENT**

Dominion has spent the past year gathering millions of pages of document discovery and taking dozens of depositions from Fox News and Fox Corporation. And all of that has succeeded only in confirming that there is no evidence that anyone in Fox Corporation had a direct role in creating or publishing any of challenged statements in this consolidated case. To the contrary, Fox News hosts testified repeatedly that they covered the President's allegations about Dominion because

they were the most newsworthy story of the day, not because anyone at Fox Corporation directed them to do so. Because there is no evidence of any direct control or even participation by Fox Corporation as to the creation of these challenged statements, and indeed much evidence to the contrary, there is no genuine issue of material fact on that issue. That suffices to warrant summary judgment to Fox Corporation on all of Dominion's claims.

Under the traditional Delaware summary-judgment standard, once "the moving party supports its summary judgment motion with evidence that no genuine issue of material fact exists, the burden shifts to the non-moving party to establish the existence of issues of material fact in dispute," and if "the Court finds no genuine issues of material fact exist, then summary judgment is appropriate." *Turner v. Ass'n of Owners of Bethany Seaview Condo.*, 2013 WL 1861930, at \*2 (Del. Super. Ct. Apr. 26, 2013) (internal citations omitted); *see also Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979); Super. Ct. Civ. R. 56(c). "The disposition of litigation by motion for summary judgment should, when possible, be encouraged for it should result in a prompt, expeditious and economical ending of lawsuits." *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005) (quoting *Davis v. Univ. of Del.*, 240 A.2d 583, 584 (Del. 1968)).

Here, the burden Dominion must meet is higher still. For the reasons explained in Fox News's brief on New York's anti-SLAPP statute, *see Fox News*

D.I. 595 (incorporated into this motion by reference), this case is governed by New York’s anti-SLAPP statute, which requires the plaintiff in a defamation case to establish a “substantial basis in law *and fact*” to survive summary judgment. N.Y. C.P.L.R. § 3212(h) (emphasis added). Under this heightened standard, Dominion must produce “strong evidence” supporting its defamation claims to withstand summary judgment. *T.S. Haulers, Inc. v. Kaplan*, 2001 WL 1359106, at \*3 (N.Y. Sup. Ct. July 17, 2001). But Dominion has failed to adduce any evidence, much less strong evidence, to support its direct liability claim against Fox Corporation. At bottom, Dominion’s defamation claims against Fox Corporation are not just unprecedented and dangerous, but unsupported by any facts.

**I. Dominion Has Failed to Produce Any Evidence That Fox Corporation Is Liable for Any of the Statements Dominion Challenges.**

As this Court held in its motion-to-dismiss opinion, to hold Fox Corporation liable for defamation based on statements made on various Fox News programs, Dominion must prove that Fox Corporation’s employees—indeed, per Dominion’s own allegations, Rupert and Lachlan Murdoch in particular—played an “affirmative role in the preparation or editing of” each of the challenged statements, or directed Fox News to publish them. *Gaeta v. N.Y. News Inc.*, 95 A.D.2d 315, 328 (N.Y. App. Div. 1983), *rev’d on other grounds*, 465 N.E.2d 802 (1984). After all, “a defamation claim cannot survive without an allegation that defendants participated in the

creation or the publication of the statements at issue.” *Fox Corp.*, 2022 WL 2229781, at \*8 (quoting *Treppel v. Biovail Corp.*, 2005 WL 2086339, at \*3 (S.D.N.Y. Aug. 30, 2005)). Moreover, Dominion would have to prove that “the state of mind required for actual malice” was “brought home to” whomever at Fox Corporation purportedly had “responsibility for the publication” of each challenged statement, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964)—*i.e.*, again, by its own allegations, Rupert or Lachlan Murdoch.

More than a year of discovery has confirmed what Fox Corporation has been saying all along: Neither Rupert nor Lachlan Murdoch nor anyone else at Fox Corporation played any role whatsoever in creating or publishing any of the statements Dominion challenges. Indeed, Dominion’s theory that Rupert and Lachlan Murdoch encouraged Fox News hosts to air the President’s allegations about Dominion to curry favor with the President and to hold off upstart competitors was implausible from the start. Dominion itself acknowledged that some of Fox News’s most popular hosts openly questioned the President’s claims on air. And it has never explained why they would do so if Rupert or Lachlan Murdoch were instructing Fox News that the way to “lure the Fox audience back home” was to fabricate claims about Dominion.

At the motion-to-dismiss stage, the Court held that Dominion adequately *alleged* that Rupert and Lachlan Murdoch “were closely involved” with decisions



relating to Fox News's coverage of Dominion, and pressured Fox News to perpetuate false claims about Dominion to "lure the Fox audience back home" and away from upstart news outlets like OANN and Newsmax. *Fox Corp.*, 2022 WL 2229781, at \*8. But while Dominion's allegations may have sufficed to survive a motion to dismiss, Dominion must produce *evidence* supporting them to survive summary judgment. Dominion has produced nothing of the sort. To the contrary, reams of discovery over the past year confirm that *no* Fox Corporation employee played any role in the creation or publication of the allegedly defamatory statements, let alone that Rupert or Lachlan Murdoch did so—and did so with actual malice to boot. Not one witness has testified that either Rupert or Lachlan Murdoch (or, again, anyone else at Fox Corporation) played any role in approving or controlling the content of any of the challenged coverage. To the contrary, Fox News hosts uniformly testified that they covered the President's allegations because they were the most newsworthy story of the day—not because of some directive from Fox Corporation executives to "lure the Fox audience back home."

For instance, as Tucker Carlson explained, "the allegation that the presidential election was rigged by a voting machine company, true or not, is in itself one of the biggest news stories of [our] lifetimes." Ex. E27, T. Carlson Dep. Tr., at 324:25-325:4. Maria Bartiromo stated: "I think when talking about a sitting President and his legal team, making the very serious charge that a voting machine was behind

fraud in an election, and he has evidence that will overturn an election, I think that it's warranted to hear that charge and what's behind it for the American people to understand what their President is saying." Ex. E26, M. Bartiromo Dep. Tr., at 113:10-17. Sean Hannity said that he reported on the Dominion story because it was "newsworthy" and "the top news of the day." Ex. E37, S. Hannity Dep. Tr., at 47:8-17. Lou Dobbs testified that "the American public has a right to know and certainly a right to know why their President is expressing his, his deeply held belief that the election had been rigged." Ex. E29, L. Dobbs Dep. Tr., at 331:8-11. "[F]or a President to be—to be making these charges is not only a serious and deserves great respect and regard and I believe a great deal of attention by the media, it's a historic moment." *Id.* at 331:15-22. And Jeanine Pirro explained that her "job was to present a balanced picture to America to let them know that here is the president's lawyer, the president of the United States, in a contested presidential election who was telling us for the first time about Dominion and Smartmatic." Ex. E25, J. Pirro Dep. Tr., at 292:11-17.

It is therefore little surprise that Fox News hosts uniformly testified that Rupert and Lachlan Murdoch had nothing to do with their choice to cover the most newsworthy topic of the day. When asked whether he "ever receive[d] instructions or guidance from executives at Fox about who you could or could not have on Lou Dobbs Tonight as a guest," Dobbs testified "no." Ex. E29, L. Dobbs Dep. Tr., at

94:20-25. When asked if “any of the Murdochs” would have given him direction or guidance on who to book, he unequivocally stated: “No, that would not have happened.” *Id.* at 96:22-23. When Dominion’s lawyer tried again to ask whether Dobbs was “given any instructions or guidance, directly or indirectly, from Fox executives about the topic of election fraud relating to the 2020 election,” Dobbs again answered: “Not at all.” *Id.* at 99:24-100:3.

Other hosts expressed similar sentiments. When asked whether she “ever sp[o]k[e] with anyone at Fox Corporation about the content of your shows related to the 2020 presidential election,” Pirro answered: “Fox Corporation, no.” Ex. E25, J. Pirro Dep. Tr., at 421:21-25. Likewise, when asked whether she “ever sp[o]k[e] with anyone at Fox Corporation about the contents of your shows that contained allegations of potential fraud in the 2020 presidential election,” Pirro answered: “No.” *Id.* at 422:2-7. And when asked whether she “ever sp[o]k[e] with anyone at Fox Corporation about the plaintiffs in this case, U.S. Dominion, Incorporated, Dominion Voting Systems, Incorporated, and Dominion Voting Systems Corporation,” Pirro again answered: “No, I did not.” *Id.* at 422:8-13.

Bartiromo testified that if her “bosses Suzanne Scott, Rupert Murdoch, Lachlan Murdoch” had given her “a directive about having a person – about having or not having a particular guest on your show,” she would have listened. But she confirmed that “they never said anything like that.” Ex. E26, M. Bartiromo Dep.

Tr., at 259:24-260:11. Dominion’s lawyer retorted: “But you understand that if they did exercise—if they did tell you to do something, you would follow their instruction?” *Id.* at 260:12-14. Bartiromo responded: “Well, it’s my boss, but they—they’ve never done that.” *Id.* at 260:15-16. Later in her deposition, when asked whether she “at any time ever talk[ed] to anybody at the parent corporation of Fox News called Fox Corporation ... about Dominion or the allegations being made about Dominion,” she answered: “No never.” *Id.* at 406:6-10. She then stated unequivocally: “I never discussed Dominion with Rupert, Lachlan or Suzanne Scott.” *Id.* at 406:16-17.

Similarly, when asked whether anyone from the “Murdoch family” or “Suzanne Scott” spoke to him about his on-air comments casting doubt on Powell’s claims, Carlson testified: “I can say unequivocally that no one at Fox tried to force me to take a specific line on Sidney Powell or any other feature of the 2020 election.” Ex. E27, T. Carlson Dep. Tr., at 114:2-21. “I made these judgments independently and I think the record will reflect that because it’s true.” *Id.* at 114:22-23. When asked: “Did you speak with anyone in Fox leadership, broadly defined, about how to address the fact that Sidney Powell was going on television and appearing on other platforms and attacking you for calling her out,” Carlson responded “no.” *Id.* at 136:13-19.

When asked: “Did you ever communicate with Mr. Lachlan Murdoch in any way about claims or election fraud in the 2020 election,” Carlson stated: “Not that I recall.” *Id.* at 165:15-18. Likewise, when asked whether he communicated with Murdoch “about Dominion,” Carlson again answered: “Not that I’m aware of.” *Id.* at 165:19-22. “Q: Or Sidney Powell? A: Not that I’m aware of.” *Id.* at 165:23-24. “Q: Or Mike Lindell? A: Not that I’m aware of.” *Id.* at 165:25-166:1. When asked whether he discussed booking Lindell on his show with either “Ms. Scott” or “any of the Murdoch family,” Carlson testified: “I can say with complete certainty, allowing for somehow maybe I forget it, but as I sit here now I can say with what I believe is complete certainty I did not discuss [whether Mike Lindell would come on his show] with the Murdochs. I can’t imagine that I would have.” *Id.* at 165:15-166:1, 227:1-6. Even Suzanne Scott, Fox News’s CEO, who herself was not directly involved in creating or publishing the challenged statements, testified: “Q. Did you talk about Dominion at all with Mr. Murdoch? A. I don’t remember ever talking to Rupert about Dominion, no.” Ex. E32, S. Scott Dep. Tr., at 328:8-11.

None of that is surprising given the way Fox News operates. As multiple executives and producers testified, it is Fox News, not Fox Corporation, that controls the content of Fox News shows. Jay Wallace, the President and Executive Editor of Fox News, explained that he is “the executive editor with ultimate editorial control over the content of Fox News.” Ex. E38, J. Wallace Dep. Tr., at 244:17-20; *see also*

*id.* at 171:9-13 (“Q. You had ultimate editorial oversight for the content broadcast on Fox News about the 2020 election, right? A. Yes, ma’am”); *id.* at 343 [REDACTED]

[REDACTED] *id.* at 39-41 (testifying that guests were mostly a “show level” responsibility). Other Fox News executives said the same thing. *See, e.g.*, Ex. E35, M. Cooper Dep. Tr., at 282:4-23 (“Q. Did anyone at Fox Corporation ever instruct you to book specific guests during the relevant time period? A. No. . . . Q. Did anyone at Fox Corporation ever instruct you to cover specific topics during the relevant time period? A. No. Q. Did you ever converse with Rupert Murdoch concerning which topics should be covered on the shows you oversaw during the relevant time period? A. No. Q. Did you ever converse with Lachlan Murdoch concerning which topics should be covered on the shows you oversaw during the relevant time period? A. No.”); Ex. E39, Fox News 30(b)(6) J. Dorrego Dep. Tr., at 62:23-63:4 (COO and CFO of Fox News) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In short, the record is completely devoid of any evidence that Rupert or Lachlan Murdoch (or anyone else at Fox Corporation) had a role in creating or publishing the challenged statements. That suffices to entitle Fox Corporation to

summary judgment. As the United States Supreme Court has emphasized, when it comes to defamation claims, it is not enough for the plaintiff to “merely assert[] that the jury might, and legally could, disbelieve the defendant’s denial.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986); *see also, e.g., id.* at 256-57 (holding that even “discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion” (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984))). Given the First Amendment interests at stake, the plaintiff must produce affirmative evidence supporting its claim that the defendant not only played a direct role in creating or publishing each challenged statement, but did so with actual malice.<sup>3</sup> Dominion alleged “direct involvement” by Rupert and Lachlan Murdoch, triggering the requirement that each challenged statement be supported by evidence that such involvement actually exists. But there is no such evidence in the record. To the contrary, all the evidence affirmatively *refutes* any such claim. Dominion’s failure to meet its evidentiary burden forecloses its claims against Fox Corporation.

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<sup>3</sup> The absence of any such evidence likewise would preclude Dominion from proving that Fox Corporation is the proximate cause of any injury it may have suffered on account of the challenged coverage, which is another essential element of its claims. *See, e.g., Wilcox v. Newark Valley Cent. Sch. Dist.*, 129 A.D.3d 1230, 1234 (N.Y. App. Div. 2015) (defamation damages must be “based upon proof of harms limited to those that can be linked by proximate cause to the [] slanderous statements”).

## **II. Dominion Cannot Hold Fox Corporation Vicariously Liable for Acts of Fox News or Its Employees.**

To the extent Dominion tries to revive the vicarious liability theories that this Court has already rejected, this Court should reiterate that they fail as a matter of law. But even if Dominion could pursue those theories, it has produced no evidence to support them, thus reinforcing the conclusion that Fox Corporation is entitled to summary judgment.

As explained, this Court has already rejected Dominion's argument that Fox Corporation can be held vicariously liable for the actions of Fox News or its employees. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation ... is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). To hold Fox Corporation liable for the acts of Fox News, Dominion would have to prove that Fox News "is wholly dominated and controlled by the parent corporation such that piercing the corporate veil is justified." *Stern v. News Corp*, 2010 WL 5158635, at \*4 (S.D.N.Y. Oct. 14, 2010), *report and recommendation adopted*, 2010 WL 5158637 (S.D.N.Y. Dec. 16, 2010). This Court has already made clear—repeatedly—that Dominion cannot pierce the corporate veil, as "[i]t is well-settled that this [Superior] Court lacks jurisdiction to pierce the corporate veil." *State ex*



*rel. Higgins v. SourceGas, LLC*, 2012 WL 1721783, at \*5 (Del. Super. May 15, 2012).

This Court has likewise made clear that Dominion cannot get around that rule by trying to hold Fox Corporation liable through a so-called “agency” theory. The “test for determining whether a corporation is acting as an agent for a related corporation is the same as the test imposed under the doctrine of piercing the corporate veil.” *Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 735 (S.D.N.Y. 1986); *see also Serrano v. N.Y. Times Co.*, 19 A.D.3d 577, 578 (N.Y. App. Div. 2005) (“A parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises complete dominion and control over the subsidiary”); *Royal Indus. Ltd. v. Kraft Foods, Inc.*, 926 F. Supp. 407, 413 (S.D.N.Y. 1996) (Plaintiffs cannot “mak[e] an end run around the ‘piercing the corporate veil’ doctrine by styling its claim in agency terms.”). Any other rule would “undermine the strong policy that exists concerning the presumption of separateness and respecting the corporate entity,” *Kashfi*, 628 F. Supp. at 735, as this Court recognized in its motion-to-dismiss decision. *Fox Corp.*, 2022 WL 2229781, at \*9. Dominion’s agency theory thus fails as a matter of law for the same reason as its veil-piercing theory: they are ultimately one and the same.

In all events, even if Dominion’s vicarious-liability theories were not foreclosed as a matter of law, they would still be foreclosed as a matter of fact. As

explained in detail above, Dominion has failed to produce evidence that Fox Corporation exercised *any* editorial control over the challenged statements, let alone exercised the kind of “complete dominion and control” that veil-piercing demands. To the contrary, the record affirmatively refutes the exercise of any such “dominion and control.” In addition to all of the testimony detailed above, the CEO of Fox Corporation, Lachlan Murdoch, testified that “it’s very hard for someone who’s not in the editorial, not responsible for the editorial management to come in at a board level or senior executive level and endorse or not endorse any particular show or comment. It would be, frankly, inappropriate to do so.” Ex. E40, L. Murdoch Dep. Tr., at 61:5-13; *see also, e.g., id.* at 63 and 202. Suzanne Scott, the CEO of Fox News, likewise refuted any claim that Fox Corporation exercises editorial control. For example, when asked: “Q. I’m surprised you didn’t list Rupert or Lachlan Murdoch in that list. They are involved too, aren’t they?,” she responded, “A. They are not involved in making decisions about talent, no.” Ex. E32, S. Scott Dep. Tr., at 34:13-19; *see also, e.g., id.* at 33:23-34:12 and 208:2-7. Dominion could not even begin to try to prove a veil-piercing claim when it does not even have any evidence that Fox Corporation exercises any control at all over what content Fox News chooses to publish.

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In short, even setting aside the problem that vicarious liability is foreclosed as a matter of law, there is no evidence to support it. Dominion thus must produce evidence that would sustain a finding that Fox Corporation directly participated in the creation or publication of each challenged statement, which it likewise has failed to do. Dominion's Complaint should accordingly meet the same fate as so many other efforts to hold a parent company liable for the publications of subsidiaries: dismissal in its entirety. *See Franklin v. Daily Hldgs., Inc.*, 135 A.D.3d 87, 96 (N.Y. App. Div. 2015) (dismissing a defamation claim against News Corp. for an article published by its subsidiary in the *Daily*); *Stern*, 2010 WL 5158635, at \*4 (granting summary judgment dismissing a defamation claim against News Corp. for an article published by its subsidiary, the *New York Post*); *Williby v. Hearst Corp.*, 2017 WL 1210036, at \*4 (N.D. Cal. Mar. 31, 2017) (dismissing defamation claim against parent company where "[p]laintiff allege[d] no facts that suggest the [parent] authorized or otherwise manifested the intent for [its subsidiary or the subsidiary's journalist] to act on its behalf"); *Martin v. Mooney*, 448 F. Supp. 3d 72, 79 (D.N.H. 2020) (dismissing defamation claims against parent company where "complaint [did] not . . . include facts that support a reasonable inference that the corporate relationship between [parent and subsidiary] [was] being used to accomplish a wrongful purpose").

### **III. Dominion is Not Entitled to Recover Economic or Punitive Damages From Fox Corporation.**

Even if Dominion could establish liability, Fox Corporation is entitled to summary judgment on Dominion's claims for economic damages, including lost profits and lost enterprise value, for the same reasons and evidence articulated in the FNN MSJ. Fox Corporation incorporates by reference Section III of Fox News's opening brief. Indeed, Dominion's causation theories are (if possible) even more strained as to Fox Corporation, which did not even exercise any control over the creation or publication of any of the challenged statements.

Dominion likewise is not entitled to seek punitive damages against Fox Corporation. To recover punitive damages, Dominion would have to prove not only actual malice, but common-law malice, which requires proof that the defendant made defamatory statements "out of hatred, ill will, or spite." *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 184 (2d. Cir. 2000). "[A] triable issue as to common-law malice is raised only if a reasonable jury could find that the speaker was *solely* motivated by a desire to injure the plaintiff." *Present v. Avon Prods., Inc.*, 253 A.D.2d 183, 189 (N.Y. App. Div. 1999). Moreover, New York law does not permit strict vicarious liability for punitive damages. Dominion would instead have to prove that "a superior officer" at Fox Corporation—*i.e.*, someone with "sufficiently high" responsibility in the organization—"participate[d] in, or ratifie[d] [the]

outrageous conduct.” *Loughry v. Lincoln First Bank, N.A.*, 494 N.E.2d 70, 75-76 (N.Y. 1986). And given its own allegations, that someone would have to be Rupert or Lachlan Murdoch.

As explained in Parts I and II, Fox Corporation did not make, create, publish, or direct any of the challenged statements at all, let alone do so with actual malice. But even if Dominion could somehow prove its accusation that Rupert or Lachlan Murdoch (or even anyone else at Fox Corporation) was responsible for the challenged statements, there is zero evidence that any high-level executive at Fox Corporation harbored any ill will toward Dominion. To the contrary, *even Dominion’s own expert* agrees that “[t]here is no evidence that Fox, its hosts, producers, and executives particularly wanted to harm Dominion.” Ex. F5, Sesno Report, at ¶63 (Nov. 28, 2022). Indeed, Dominion has never even argued that anyone at Fox News or Fox Corporation harbored some deep-seated ill will toward *Dominion*. As to both Fox News and Fox Corporation, Dominion’s theory has instead always been that Dominion was collateral damage in an effort to boost Fox News’s ratings and help then-President Trump. *See* FNN MSJ Brief at 154; Ex. F5, Sesno Rep., at ¶63. While even that theory has not panned out now that the evidence is in, it is legally insufficient to satisfy the exceptionally demanding common-law malice standard. Accordingly, Dominion’s claim for damages, punitive or economic, fails as a matter of law.

## CONCLUSION

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

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