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 **PUBLIC VERSION**
US DOMINION, INC., DOMINION VOTING SYSTEMS, INC., and DOMINION VOTING SYSTEMS CORPORATION, Plaintiff, v. FOX CORPORATION, Defendant.	C.A. No. N21C-11-082 EMD

DEFENDANT FOX NEWS NETWORK, LLC'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Much like it did in its opening summary judgment motion, Dominion litters its opposition brief with cherry-picked statements from people who have nothing to do with the specific statements it challenges as defamatory. While that might make for interesting headlines, it does not create a triable issue of fact. In reality, Dominion has not even identified any defamatory statement of fact—as opposed to newsworthy allegations or opinions—attributable to Fox News, let alone identified any such statement published with actual malice. At the very least, its kitchen-sink complaint is wildly overbroad, and it has not even identified sufficient evidence of economic damages, let alone met the very high bar for punitive damages.

First, when it comes to allegations that are newsworthy regardless of whether they are true or false, the New York Court of Appeals has squarely held—in the context of allegations of election interference, no less—that so long as a reasonable viewer, when considering a statement in the "over-all context in which the assertions were made," would understand the statement "as mere *allegations* to be investigated rather than *as facts*," reporting the allegation is not defamation. *Brian v. Richardson*, 660 N.E.2d 1126, 1130-31 (N.Y. 1995). And so long as the press makes clear that the allegations are just allegations, it is free to offer its opinion that the allegations are "credible" and merit investigation (as some Fox News hosts and other networks

did), just as it is free to offer its opinion that the allegations are implausible (as other Fox News hosts and other networks did). *Id.*

Dominion does not even try to argue that a reasonable viewer would fail to understand that the vast majority of the statements it challenges were "mere allegations" made by the President and his lawyers, not proven facts about Dominion. Nor could it. After all, the reasonable-viewer test assumes a *reasonable* viewer, and when a host says, "Coming up, Rudy Giuliani and Sidney Powell make the President's case right here," as Maria Bartiromo did on November 8, or "the President's lawyers come forward alleging…," as Jeanine Pirro did on November 21, any sensible person understands that what they are hearing are allegations that need to proven in court, not facts reported for their truth.

Dominion instead advances the radical position that it does not matter if the allegations were accurately presented as allegations, or even if they were presented as *false* allegations. According to Dominion, the mere act of repeating them, or allowing the President's lawyers to articulate them, makes the press as liable as those leveling the allegations. Thus, in Dominion's view, the press was duty-bound to suppress the true fact that the sitting President of the United States was accusing Dominion and others of massive election fraud. If that were the law, then not only did virtually every news outlet in the nation defame Dominion repeatedly in the wake

of the 2020 election; so did all of the millions of people who "republished" the allegations in the course of tweeting, posting, texting, or emailing about them.

Unsurprisingly, there is not a shred of authority for that speech-squelching rule, which no state could adopt consistent with the First Amendment. Indeed, even Dominion seems to know that cannot really be the law, as it did *not* sue every media outlet in the country, or even sue Fox News for airing a post-election interview with President Trump in which he personally made the same allegations Dominion challenges here. In reality, New York defamation law respects, not tramples, First Amendment rights: When it comes to statements that are newsworthy without regard to whether they are true or false—which Dominion cannot seriously deny is the case here—the press is free to cover and comment on them so long as a reasonable viewer would understand that they are "mere *allegations*," not "*facts*." *Brian*, 660 N.E.2d at 1130-31. And no reasonable viewer thinks that a host has vouched for the veracity of everything a guest says just because she interviews the guest too enthusiastically, or occasionally nods after he speaks, or thanks him too profusely—especially when the host informs viewers that the allegations have been flatly denied and must be proved in court, while pressing the guest on whether they will be able to produce evidence in court in time to make a difference.

For that reason alone, this Court can grant Fox News summary judgment without even applying the press-protective actual-malice standard. But even if that

notoriously high bar comes into play, Dominion's theory on that score is every bit as radical and divorced from the law. According to Dominion, a media organization acts with the requisite actual malice so long as anyone in the "chain of command"—from line-level producers to the CEO to the highest executives at the publication's parent company—did not believe something someone on one of the organization's shows said, even if that person played no role in drafting, editing, or publishing that statement or even knew that it existed. Thus, in Dominion's view, Fox News acted with actual malice if Lachlan Murdoch did not believe something he never knew Sidney Powell said on Lou Dobbs' show.

That theory fails as a matter of law, and the law could not be clearer: Actual malice must be brought home to someone who *actually* played a role in crafting, editing, or publishing the particular statement at hand, not just to someone on the corporate organizational chart. There is no such thing as defamation by omission, and the Supreme Court of the United States squarely rejected a "collective knowledge" theory of actual malice more than half a century ago in *New York Times v. Sullivan*. The law could not be otherwise, as Dominion's theory would lead to invasive and speech-chilling discovery of virtually everyone in a news organization in virtually every defamation case. Dominion thus cannot make up for the complete absence of evidence of actual malice on the part of those actually involved in the

challenged statements by probing the mind frames of distant corporate officers who had nothing to do with them.

In the final analysis, then, the voluminous summary judgment briefing has lain bare what Fox News has said from the start: This unprecedented effort to punish the press for covering and commenting on the most newsworthy story of the day has no basis in law or fact. Indeed, Dominion has even been forced to quietly slash its damages demand by more than *half a billion dollars* after its own experts debunked its implausible claims. As that backtrack underscores, Dominion's case has always been more about what will generate headlines than about what can withstand legal and factual scrutiny. Dominion has gotten its headlines, and journalists everywhere will now think twice about covering the most important news of the day for fear of punitive defamation suits. But this effort to publicly smear a media organization just for having the temerity to cover and comment on allegations being pressed by the sitting President of the United States should be now recognized for what it is: a blatant violation of the First Amendment.

ARGUMENT

I. The Challenged Statements Are Not Actionable.

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

1. Dominion's principal response to Fox News' argument that the challenged statements were not defamatory is to insist that neither the First Amendment nor

New York law provides *any* protection (save a very narrow privilege to repeat near-verbatim statements in official proceedings) for the press to cover allegations that are newsworthy without regard to their truth or falsity—even if they are made by someone as obviously newsworthy as the President of the United States. In Dominion's view, the press is liable for reporting such allegations so long as someone in the "chain of command"—from line-level producers to the highest executives at a publication's parent company—suspects that the allegations are specious and fails to stop the publication from covering on them. On top of that, the press is not only liable for reporting such allegations, but on the hook for *punitive damages* too so long as someone within the news organization knew that the allegations would harm the accused.

Dominion never seriously grapples with the astounding implications of that theory. By Dominion's telling, if the President falsely accused the Vice President of plotting to assassinate him, the press would be duty-bound to suppress that unquestionably newsworthy allegation so long as someone in the newsroom thought it was ludicrous. The New York Times would be liable for reporting allegations in the Steele Dossier that "the Kremlin had recordings" documenting extraordinary accusations against President Trump so long as even one editor at the Times doubted that claim. *See N.Y. Times*, Lordy, Is There a Tape? (Apr. 16, 2018) (discussing "[e]vidence that the tape might be real" and encouraging readers to "open your mind

to the truly obscene"). The Washington Post would be liable for reporting President Trump's allegation that President Obama was born in Kenya since several of its editors believed the claim to be bogus. CNN could be liable for reporting former Governor Andrew Cuomo's denials and counter-allegations that his accusers were liars since some CNN executives undoubtedly believed the Governor's accusers. And all of those publications would be on the hook for punitive damages so long as someone within the organization viewed the allegations as "extremely damaging" to the accused. Dom.Opp.191.

Indeed, if it were truly "irrelevant" that the "accused statements relate to false charges made by" the President's lawyers, and if the press were really "deemed the 'publisher' of every statement [the President's lawyers] aired against Dominion … just as if [the press] had published it originally," Dom.MSJ.7, then Dominion could assert its multi-billion-dollar defamation claim against virtually every outlet in the country for reporting the President's allegations. Dominion could sue CSPAN tomorrow, as recordings of Rudy Giuliani's and Sidney Powell's November 19 news conference and their allegations about Dominion, as well as President Trump's December 2 press conference featuring the same allegations about Dominion, remain on its website to this day. And it would not stop there; Dominion could sue anyone who tweeted, posted, texted, emailed, or even just spoke about the allegations too.

Ultimately not even Dominion seriously believes its radical theory, as it has not sued other outlets for reporting the President's allegations, or even sued Fox News for airing Bartiromo's post-election interview of President Trump. Even Dominion seems to recognize that reporting allegations that are newsworthy without regard to their truth or falsity must merit *some* protection. And the New York Court of Appeals has made clear that reporting such allegations receives substantial protection, in the context of allegations of election interference no less: So long as a reasonable viewer, when viewing a statement in the "over-all context in which the assertions were made," would understand the statements "as mere *allegations* to be investigated rather than *as facts*," reporting the allegation is not defamatory, but is instead affirmatively protected by the First Amendment. *Brian v. Richardson*, 660 N.E.2d 1126, 1130-31 (N.Y. 1995); *see also Page v. Oath Inc.*, 270 A.3d 833 (Del. 2022). And so long as the press makes clear that the allegations are just allegations, it is free to "offer[] [its] own view that these [allegations] [a]re credible" and merit investigation, just as it is free to offer its own opinion that the allegations are implausible. *Brian*, 660 N.E.2d at 1131.

Dominion does not deny that a reasonable viewer would have understood that most of the statements it challenges were unproven allegations made by the President and his legal team in the context of legal challenges to the 2020 election—not true, demonstrable facts about Dominion reported for their truth. Dominion just insists

that there is no exception to defamation law for "newsworthy allegations." But no matter how many times Dominion derides a "one-factor 'newsworthy allegation'" test, Dom.Opp.81, that is not and has not ever been Fox News' position. The point is not that the press may repeat with impunity anything it deems "newsworthy." It is that the press has a First Amendment (and New York law) right to cover allegations that everyone understands are newsworthy *without regard to whether they are true or false* because of the circumstances in which the allegations arise.

When the press reports allegations that are newsworthy only if they are true (for example, a claim that a burger chain used tainted meat, or a claim that members of a college fraternity committed sexual misconduct), a reasonable viewer is likely to perceive that as reported facts even if they are couched as allegations; after all, why report such allegations if they are not true? But when it comes to allegations made by or on behalf of elected officials, a reasonable viewer readily understands that the press is covering the allegation because the people have a right to know what their elected officials are saying and doing, even if—indeed, perhaps especially if—they are making allegations that the press doubts are true.

In all events, whatever Dominion may think of the rule *Brian* articulates, there is no denying that New York courts have squarely held that, when "it is apparent to the reasonable reader" that a publication's "specific charges were allegations and not demonstrable fact, a libel cause of action does not lie." *Vengroff v. Coyle*, 231

A.D.2d 624, 626 (N.Y. App. Div. 1996) (quoting *Brian*, 660 N.E.2d at 1131). That is a binding statement of New York law—and is compelled by the First Amendment to boot. And Dominion's efforts to distinguish *Brian*, *Page*, and the wealth of authority applying the same rule fall flat.

Dominion first notes that *Brian* and *Page* did not turn on the newsworthiness of the underlying allegations. That is doubtful, but it is not clear why Dominion thinks that helps. After all, if the press may report allegations regardless of their newsworthiness, then *a fortiori* it may report allegations when what is newsworthy about them is that they were made. Indeed, this case is arguably even easier than *Page* and *Brian* because it involves allegations made *by*, not just *about*, objectively newsworthy individuals. *Page*, by contrast, involved allegations that Carter Page, a member of the 2016 Trump Campaign, colluded with Russian officials to influence the 2016 presidential election. 270 A.3d at 837, 840. And *Brian* involved allegations by former U.S. Attorney General Elliot Richardson that the plaintiff, an ally of then-candidate Ronald Reagan, colluded with Iranian leaders to influence the 1980 presidential election. 660 N.E.2d at 1128.

As one of the cases *Brian* invoked made clear, the rule that the press may cover such allegations is rooted in the "'marketplace of ideas' and oversight and informational values that compelled recognition of the privileges of fair comment, fair report and the immunity accorded expressions of opinion." *Immuno AG. v.*

Moor-Jankowski, 567 N.E.2d 1270, 1281 (N.Y. 1991). Those "values are best effectuated by according defendant some latitude" to "provide[] a forum for … statements on controversial matters," particularly where the statement's "author, affiliation, bias and premises [are] fully disclosed" and "rebuttal openly invited." *Id.* Indeed, providing such a forum is critical for "democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Id.* at 1281-82. After all, the "public may learn something, for better or worse, about the person or group" who made the statements. *Id.* at 1280.

Dominion next contends that *Brian* is distinguishable because it involved a lawsuit against the author of the op-ed, not the New York Times. Again, it is not clear why Dominion thinks that helps. If a defamation plaintiff cannot sue the *author* of an op-ed for publicizing allegations that the plaintiff rigged the election, then the plaintiff certainly cannot sue the *press* for running the op-ed. If anything, the fact that the plaintiff in *Brian* did not even think to sue the New York Times proves the point: If Dominion has a defamation case, it is against the people who leveled the allegations, not against the press for reporting and commenting on them.[1]

[1] Dominion tries to distinguish the other New York cases on the same grounds. Dom.Opp.67. But for the same reasons Dominion's distinctions hurt its position more than they help.

Dominion notes that *Brian* was "careful to emphasize the limits of its holding," explaining that the mere "fact that a particular accusation originated with a different source does not automatically furnish a license for others to repeat or publish it without regard to its accuracy or defamatory character." Dom.Opp.66. Fox News has never claimed otherwise. The press can of course be liable in some instances for repeating allegations made by others. *Brian* makes clear when they can: when a reasonable viewer, viewing the challenged statement in its overall context, would understand the statement to be "demonstrable fact" about the plaintiff rather than "mere allegations to be investigated." 660 N.E.2d at 1131. That is the test Fox News has repeatedly asked the Court to apply. And it is the test Dominion strenuously seeks to avoid.

Dominion tries to distinguish *Brian* on its facts, pointing out that "the repeated charges were included in the article not necessarily to convince the reader of plaintiff's dishonesty but rather to demonstrate the need for an investigation that would establish the truth or falsity of the charges." Dom.Opp.66-67. But the same is true here. Fox News covered the allegations not to convince viewers that Dominion rigged the election, but to keep the public informed on what the President and his lawyers were alleging and doing vis-à-vis court proceedings designed to get to the bottom of the allegations. To the extent Dominion tries to draw a distinction between informing the public about allegations and "an advocacy piece[] … to try

to get government officials to open an investigation into the allegations," Dom.Opp.66, that does not help. As *Brian* makes clear, it is impossible to "call for a full-scale investigation" "without a recitation of the existing unresolved charges." 660 N.E.2d at 1131. Fox News hosts who, like Pirro, wanted to express their opinion that the allegations should be investigated thus had to explain what the allegations were. And hosts trying to cover allegations made in the context of litigation likewise had to relay them.

Dominion claims that Fox News' coverage of the President's allegations "bear no comparison to the Richardson op-ed" because Giuliani and Powell were "***unequivocal*** in their claims," and that "Fox's hosts repeatedly endorsed, concurred in, and cheered on the false allegations." Dom.Opp.66. But Richardson's sources were also unequivocal, *Brian*, 660 N.E.2d at 1128, and Richardson himself "unquestionably offered his own view that these sources were credible," *id.* at 1131. That makes this case even easier than *Brian*, as most of the Fox News hosts offered no opinion as to whether the allegations were credible. Bartiromo merely reported the allegations; she did not say they were credible. Pirro called for an investigation, but she too expressed no opinion on whether they were true. Dominion does not even try to argue that Hannity, Carlson, or any of the *Fox & Friends* hosts expressed an opinion that the President's allegations were credible. Dobbs is the only host that arguably did. But *Brian* says that is permissible.

Dominion points out that *Brian* involved an op-ed. But that makes *Brian* more on point, not less. Just as the "Op Ed page is a forum traditionally reserved for the airing of ideas on matters of public concern," *Brian*, 660 N.E.2d at 1130, so too are shows that Dominion challenges here. And just as a reader would expect "the columns and articles published on a newspaper's Op Ed sections will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion," *Brian*, 660 N.E.2d at 1130, a viewer would expect an opinion show to contain "exaggeration," "non-literal commentary," "overheated rhetoric," and "opinion" commentary, *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 183-84 (S.D.N.Y. 2020). To the extent Dominion suggests that a reasonable viewer would expect only sober factual reporting on all of Fox News' shows simply because Fox News is a "news organizatio[n]," Dom.MSJ.80-81, that is wrong. As the Ninth Circuit explained in a defamation suit against Rachel Maddow: "Although MSNBC produces news, Maddow's show in particular is more than just stating the news—Maddow is invited and encouraged to share her opinions with her viewers." *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157 (9th Cir. 2021). So too here. Although Fox News produces news, most of the shows at issue here "more than just stat[e] the news"; hosts are "invited and encouraged to share [their] opinions with [their] viewers." *Id.*

Dominion's efforts to distinguish *Page* fare no better. Dominion claims that *Page* is different because the articles "reported on ***a confirmed federal investigation***, and did so accurately, including reporting on the specific allegations the investigators were assessing, and some of the evidence they were considering." Dom.Opp.63-64 (emphasis original). To the extent Dominion suggests that *Page* turned on the fair-report privilege, that is wrong. The Delaware Supreme Court held that the plaintiff failed to allege *falsity* because the defendants accurately reported the true fact that the allegations were made. 270 A.3d at 846-47. To the extent Dominion suggests that this case is different because the allegations were "*false*," Dom.Opp.64, *Page* specifically held that *it did not matter whether the allegations in the Steele Dossier were false*. 270 A.3d at 846. What mattered was whether the press accurately reported the allegations and the government's investigation of them. *Id.* Similarly, Dominion tries to distinguish *Page* on the theory that Giuliani and Powell were "patently unreliable." Dom.Opp.64. But even setting aside whether Giuliani and Powell were "patently unreliable" at the time the allegations were made (they were not, *see* FNN.Opp.149), nothing in *Page* turned on the Delaware Supreme Court's assessment of whether Christopher Steele was reliable.

Dominion's efforts to distinguish other cases are similarly unpersuasive. Dominion does not deny that the Fifth Circuit squarely held that a media defendant "need not show the allegations are true, but must only demonstrate that the

allegations were made and accurately reported." *Green v. CBS Inc.*, 286 F.3d 281, 284 (5th Cir. 2002). Dominion argues that the court got it wrong because it cited Texas cases that articulated a test "much closer to a traditional 'fair report' privilege." Dom.Opp.69-70.n.13. But the fact that the Fifth Circuit did not read those cases so narrowly proves the point: The principle that the press can report allegations that are newsworthy regardless of their truth or falsity is not confined to statements made in official proceedings.

Dominion tries to distinguish *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), as a fair-report case as well, Dom.Opp.70-71.n.13, but the Eighth Circuit did not say anything about fair report. It held that accurately reporting allegations of rape against a former state Attorney General is not defamatory, regardless whether the allegations are true. *Janklow*, 759 F.2d at 649. Dominion notes that *Croce v. N.Y. Times Co.*, 930 F.3d 787 (6th Cir. 2019), stated that, "even with qualifying language, a defendant could not be liable for publishing statements with actual malice." *Id.* at 795-96. But Dominion neglects to mention that the Sixth Circuit went on to explain that actual malice was irrelevant because the defendant did not "deny that he made the statements that appear in the article." *Id.* at 796. Here, too, actual malice matters only if Dominion can identify some defamatory statements attributable to Fox News, rather than the President's lawyers. It cannot.

2. With no credible argument that the press cannot discuss allegations that are newsworthy without regard to their truth or falsity, Dominion shifts to advancing an exceedingly crabbed conception of when the press may do so. Dominion claims that if the Court is inclined to apply neutral-report principles at all, it should ignore *Brian*'s focus on how a reasonable viewer would understand the statement in favor of a narrow multi-factor test that it purports to divine from the Second Circuit's decisions in *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir. 1977), and *Cianci v. New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980).[2] At the outset, to the extent *Brian* articulates a test *more* protective of speech than the one articulated by other courts under the First Amendment, this Court must follow *Brian*—a New York Court of Appeals decision that New York courts have repeatedly applied. FNN.MSJ.45. It would be reversible error not to.[3]

[2] Dominion maintains that New York courts rejected *Edwards* in *Hogan v. Herald Co.*, 84 A.D.2d 470, 479 (N.Y. App. Div. 1982), *aff'd* 444 N.E.2d 1002 (N.Y. 1982), and *Weiner v. Doubleday & Co.*, 549 N.E.2d 453, 456-67 (N.Y. 1989). That is wrong for all the reasons Fox News has stated. FNN.MSJ.48-51; FNN.Opp.56-57. But in all events, nothing in *Hogan* or *Weiner* undermines *Brian*, which came 13 years after *Hogan* and six years after *Weiner*. Thus, even if the Court concludes that *Hogan* rejected *Edwards* full stop, it is still bound to apply *Brian*.

[3] The New York intermediate court in the Smartmatic case affirmed the district court's denial of Fox News' motion to dismiss (while dismissing the complaint against Fox Corporation). But its decision did not say anything about *Brian* or *Edwards* or any of the other cases that Fox News cites, so it has little to say about what legal principles govern here.

In all events, Dominion distorts *Edwards* beyond recognition. Dominion tries to limit *Edwards* to its facts, claiming that neutral-report principles apply only when (1) the allegations are made by "responsible" or "prominent" individuals; (2) the press "accurately" and "dispassionately" reports the allegations; and (3) the press does not "espouse" or "concur" in the charges made by others. Dom.Opp.53-57. But as the Second Circuit later made clear, "the *Edwards* opinion did not attempt precise definition of its contours," *Cianci*, 639 F.2d at 68, other than to note that a publisher who "espouses or concurs in the charges" or "deliberately distorts" them "cannot rely on a privilege of neutral reportage," *Edwards*, 556 F.2d at 120. What matters, then, is not whether the facts mirror *Edwards* precisely, but whether the allegations are newsworthy by virtue of being made and whether the press accurately conveys the allegations without embracing or concurring in them. *Id.* The factors *Edwards* discussed may be relevant to that inquiry. But not in the ways that Dominion thinks.

Take, for instance, the prominence of the accuser. That certainly informs the answer to the first question—*i.e.*, whether allegations are newsworthy without regard to their truth or falsity. *Id.*; *see also Coliniatis v. Dimas*, 965 F.Supp. 511, 520 (S.D.N.Y. 1997) (noting that the responsible, prominent organization concept "acts as a proxy for determining when the very fact that allegations are made is itself newsworthy"). But nothing in *Edwards* even hints at the notion that the press cannot

cover the statements of someone as prominent as the sitting President if it does not consider him sufficiently "responsible." Nor would such a rule make any sense given the "primary rationale of *Edwards*—the public interest in being fully informed about public controversies." *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1126 (N.D. Cal. 1984); *see also In re United Press Int'l*, 106 B.R. 323, 329 (D.D.C. 1989). Indeed, the notion that the people have *less* interest in knowing what an "irresponsible" President is saying gets things backwards. Dominion thus understandably wants to shift the discussion away from the President, and focus it on whether Giuliani and Powell were "responsible, prominent" individuals. But what made their statements newsworthy without regard to truth or falsity is that they were making them *on behalf of President Trump*—as Fox News hosts told their viewers repeatedly.[4] That is why countless news outlets around the globe covered the press conference featuring Giuliani and Powell; what mattered to the press was not their own assessment of Giuliani and Powell, but that they spoke for the President both in court and in that press conference. By Dominion's telling, the press would have to ignore

[4] To be sure, at a certain point some on the Trump legal team disavowed Powell. But there is no question that she was on the President's legal team when most of the relevant coverage occurred. And even when she no longer appeared to be on the team, she remained an obviously natural source to explain what evidence had been uncovered—especially when Giuliani and the President himself were still making all the same claims about Dominion. *See* Dom.MSJ.Ex.111, Dobbs 153:10-155:13; Ex.A27 at 9; Ex.A32 at 4; FNN.MSJ.20-21.

that press conference and anything the President's press secretary says outside the context of an "official proceeding" if it does not consider that secretary sufficiently "responsible."

Dominion accuses Fox News of failing to report accurately. Dom.Opp.56. But the question is not whether the press accurately reported whether the allegations were true or false, or what evidence existed to support or discredit them. It is whether the press "accurately conveys *the charges made*." *Edwards*, 556 F.2d at 120 (emphasis added). Thus, Fox News was not required to "use the information Dominion provided to correct its guests or to reorient its viewers." Dom.Opp.56; *contra Smartmatic USA Corp. v. Newsmax Media, Inc.*, 2023 WL 1525024, at *17 (Del. Sup. Ct. Feb. 3, 2023). *Edwards* itself could not be clearer: The press need not even tell both sides of the story, let alone "take up cudgels against dubious charges in order to publish them without fear of liability for defamation." 556 F.2d at 120. All it must do is convey the charges accurately. And even on that, the press gets significant leeway, for "if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist ***believes***, ***reasonably and in good faith***, that his report accurately conveys the charges made." 556 F.2d at 120 (emphasis added). There was no more accurate way to convey the allegations than by interviewing those making them.

Finally, Dominion contends that neutral-report principles do not apply because Fox News hosts "espoused" and "concurred" in the allegations. But that contention rests on an extreme view of what it means to "espouse" or "concur." By Dominion's telling, a host espouses everything a guest says if the host introduces the guest as a "great American," or a "leading appellate attorney," or "thanks" guests too profusely or interviews them too "enthusiastically." Dom.Opp.95, 105-06, 113, 118, 126. Dominion even goes so far as to a claim that a host espouses or concurs in an allegation simply by acknowledging that she understands what a guest is saying with a polite "yes" or "right." Dom.Opp.106. Under that approach, it is hard to imagine how the press could avoid espousing or concurring in newsworthy allegations unless the press "take[s] up cudgels against dubious charges." *Edwards*, 556 F.2d at 120. As other cases have confirmed, neutrality does not depend on whether the press gives equal airtime to both sides of a public controversy. *See Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1434 (8th Cir. 1989). It depends on whether the press makes clear that it is covering and commenting on the newsworthy allegations of others, not embracing them as their own. *Id.*

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

Fair-report principles embodied in both the First Amendment and Civil Rights Law §74 fully protect coverage of and commentary on official proceedings, and that

protection itself is broad enough to foreclose many of Dominion's claims. Dominion again insists that fair-report principles do not cover reporting on things that have not yet happened in an official proceeding. But the fair-report privilege protects reporting on both pending *and* anticipated proceedings, including preliminary investigations, FNN.MSJ.52-54, and anticipated filings in a pending lawsuit even though the litigant has "not yet performed the ministerial act of filing ... at the time the statement was made." *Wenz v. Becker*, 948 F.Supp.319, 323 (S.D.N.Y. 1996).

Here, too, many of Dominion's arguments distort fair-report principles beyond recognition. Dominion appears to say that Fox News could not report on lawsuits unless they were filed by Powell or Giuliani. Dom.Opp.111. Dominion also seems to say that Fox News could not even report on Powell's suits because she had been disavowed by some on the Trump legal team before she filed them. Dom.Opp.93. But whatever bearing those distinctions may have on *neutral*-report principles (and the answer is very little), they have zero bearing on *fair*-report principles. A suit filed by Lin Wood is just as much an "official proceeding" as a suit filed by Powell. And a suit filed by Powell on behalf of the Trump Campaign is just as much an official proceeding as a suit filed by Powell on behalf of someone else.

It gets worse. At one point, Dom.Opp.112, Dominion insists that near-verbatim readings of affidavits on air is not protected because the host did not say the magic words "this affidavit *was filed in court*." At other points, Dominion tries to defeat

the doctrine based on the most minute differences between what a court filing said and what Fox News reported. Dominion faults Powell for describing the author of an affidavit as a "high-ranking military officer" when the affidavit says that the author has "training in special operations" and an "extensive military" background. Dom.Opp.111. Dominion supplies no authority for these reed-thin distinctions. Fair-report principles apply so long as the reporting is "substantially accurate." *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114 (N.Y. App. Div. 2009).

With little to say on the law, Dominion makes the exceedingly strained argument that Fox News "waived" its fair-report argument because it did not repeat the words "fair report" each and every time it invoked the doctrine. Nonsense. That is just a quibble with the structure of Fox News' brief. In Part I.B, Fox News explained the fair-report rule and how it protects coverage of preliminary investigations, ongoing judicial proceedings, and anticipated filings in pending proceedings. FNN.MSJ.52-54. In Part I.D, Fox News applied that rule to the challenged statements, repeatedly explaining that a reasonable viewer would understand that the allegations were not only allegations, but allegations that were the subject of official investigations and lawsuits. FNN.MSJ.57-120. And it underscored that argument by invoking the fair-report doctrine by name repeatedly in the appendix submitted alongside its brief. FNN.MSJ.Appendix. Nothing in law or logic required Fox News to intone the words

"fair report privilege" *en haec verba* 115 times to preserve its fair-report argument as to every statement it covers.[5]

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

Finally, many of the statements Dominion challenges are statements of opinion, which are fully protected by both New York law and the First Amendment. Dominion spills significant ink trying to argue that all of the statements it challenges are statements of fact under "the traditional 'fact/opinion' test applied in *Milkovich*." Dom.Opp.78. That is wrong in its own right, but Dominion also ignores that New York courts have embraced an even more protective test as a matter of state law. *Immuno*, 567 N.E.2d at 1278, 1281. Under New York law, courts should not "sift[] through a communication for the purpose of isolating and identifying assertions of fact," *Brian*, 660 N.E.2d at 1130, as Dominion seemingly asks the Court to do, Dom.Opp.78-79. Instead, courts should look first to "both the immediate context and the broader social context in which a published statement was made" to determine whether a reasonable viewer would expect to hear opinions or facts. *Id.*

[5] Dominion says that Fox News cannot raise neutral-report and fair-report arguments because "Fox did not mention fair report or neutral report" in its corporate testimony. Dom.Opp.80-81. But Dominion tellingly cites no law for its puzzling claim that a party somehow "waives" a legal argument made repeatedly in all of its briefing because a non-lawyer witness does not testify about it. Ex.E52, Lowell 30(b)(6) errata.

at 1127-28; *see also 600 W. 115th St. Corp. v. Von Gutfield*, 603 N.E.2d 930, 937-38 (N.Y. 1992) (accusations of "fraudulent" conduct, "bribery," and "corruption" not actionable when spoken in a "forum" where "controversial debate is expected and frequently encouraged"). Here, there is no doubt that reasonable viewers would expect to hear plenty of opinion commentary on shows like *Lou Dobbs Tonight*, *Justice with Judge Jeanine*, *Hannity*, and *Tucker Carlson Tonight*. Courts have frequently recognized that rhetorical hyperbole and exaggeration is common on opinion shows. *Maddow*, 8 F.4th at 1157; *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 183 (S.D.N.Y. 2020). That is especially true for statements uttered in the context of competing allegations in charged disputes: It is well-recognized that "rhetorical hyperbole" is "normally associated with politics and public discourse in the United States." *Clifford v. Trump*, 339 F.Supp.3d 915, 925 (C.D. Cal. 2018).

D. None of the Challenged Statements Is Actionable Defamation.

Applying those principles, none of Dominion's claims is viable. A reasonable viewer would plainly understand that Fox News and its hosts were reporting on allegations made by the President and his lawyers in the context of legal challenges that could determine the outcome of a presidential election. Not only would that have been obvious from the fact that the allegations were made shortly after the results of an election that the President told the entire world he planned to challenge;

it was obvious from the coverage itself. Far from reporting the allegations as true, Fox News hosts repeatedly informed their audiences that the allegations were just allegations that would need to be proven in court in short order if they were going to impact the outcome of the election. Moreover, many of the challenged statements are plainly protected by fair-report principles. And to the extent some hosts commented on the allegations, much of that commentary is protected opinion. Accordingly, Dominion has failed to state any actionable defamation. At the very least, its kitchen-sink complaint is radically overbroad.

November 8 – Sunday Morning Futures. A reasonable viewer would understand that the statements Dominion challenges were unproven allegations made by the President's legal team, not demonstrable facts about Dominion. Dominion resists that conclusion because Bartiromo did not "label Powell's statements as 'allegations.'" Dom.Opp.87. But the question is not what "label" the defendant affixes to allegations; it is whether a reasonable viewer would understand them as such. And Bartiromo told viewers that Powell's claims were allegations in a statement that Dominion conveniently ignores: "Sidney, these are incredible ***charges*** that ***you are making*** this morning." Ex.A2 at 17.

Dominion insists that Fox News is nevertheless liable for Powell's statements because Bartiromo was insufficiently "neutral" and her "tone" insufficiently "skeptical." Dom.Opp.87-88. But what matters is whether Bartiromo "espoused"

or "concurred" in the statements, and while Dominion is not shy about making that accusation in *other* contexts, it does not even try to claim that Bartiromo did so on her November 8 broadcast. Instead, Dominion just faults Bartiromo for purportedly failing to "push back" enough. But the press need not "take up cudgels against dubious charges in order to publish them without fear of liability for defamation." *Edwards*, 556 F.2d at 120. And in all events, Bartiromo did "push back" by pressing her guests for evidence and casting doubt on their claims by explaining that, if the evidence really were as extensive as they claimed, then the government would surely be investigating. FNN.MSJ.57-61.[6]

Dominion asks the Court to ignore that pushback because some of it occurred while Bartiromo was interviewing Giuliani. But Dominion concedes elsewhere that "New York courts have taken 'the entire broadcast as the context relevant to a court's defamation inquiry.'" Dom.Opp.85 (quoting *Geary v. Goldstein*, 1996 WL 447776, at *2 (S.D.N.Y. Aug. 8, 1996)). Dominion complains that Bartiromo's other questions preceded Powell's explicit references to Dominion. Dom.Opp.87. But Bartiromo's questions immediately followed several statements Dominion

[6] Dominion suggests that Bartiromo injected the story about Dominion into the public's view. Dom.MSJ.24. But Bartiromo was simply breaking the news about what the President and his legal team would be alleging, as she made clear by informing viewers that Powell was "mak[ing] the president's case" and telling viewers that Powell was "part of the president's legal team." Ex.A2 at 1, 15.

challenges, including Powell's statements about a "coordinated effort to steal this election," and "an algorithm to … flip those votes … from Trump to Biden." Ex.A2 at 15. To the extent Dominion now concedes that those statements are not about Dominion, then the Court must grant Fox News summary judgment on those statements. Conversely, to the extent Dominion means to suggest that things Bartiromo did or did not say *later* in the interview impacted how a reasonable viewer would understand Powell's earlier statements, that just underscores why the Court must look at the whole show. In context, Bartiromo's questions would have confirmed to a reasonable viewer that Powell's allegations were unproven and disputed allegations—not demonstrable facts.

Dominion next claims that the Fox News supervisor who oversaw *Sunday Morning Futures* opined that Bartiromo did not offer "any pushback." Dom.Opp.88. That is misleading—the answer came after Dominion's attorney showed Clark only part of the transcript. Dom.Ex.106, Clark 237:17-21. At any rate, Clark's testimony is irrelevant to the legal question whether any of the statements are susceptible to a defamatory meaning. To the extent the Court thinks that testimony is relevant, then so too are statements from Dominion's public relations firm, which concluded after "comb[ing] through the Flag transcripts of Maria Bartiromo's interviews" that Bartiromo "hasn't made any statements that seem to have a strong case for defamation." Ex.H7, Beckman Email (Dec. 18, 2020); Ex.H7, Walstrom Email

(Dec. 17, 2020) ("In a lot of what we read for Maria, she actually worded things pretty carefully.").

As for Bartiromo's *own* statements, they are substantially true. Dominion does not deny that "there were voting irregularities." Ex.A2 at 16. Dominion notes that Michigan attributed the irregularities to human error, not Dominion's software, Dom.Opp.89, but Bartiromo did not say otherwise. She just noted that there were irregularities, which there were. Likewise, Dominion does not seriously deny that several Georgia jurisdictions paused counting. Dominion claims that the delay was caused by "a batch scanner, not Dominion software," Dom.Opp.89, but it ignores that the press reported that "counting of absentee ballots in a crucial Atlanta suburb was held up by continued problems with" a "batch scanner made by Dominion." Ex.D18. In all events, even assuming what Bartiromo said was false, Dominion has no evidence that Bartiromo knew these *specific statements* were false at the time. Dominion has no response to that point.

November 12 – Lou Dobbs Tonight. Nothing on Dobbs' November 12 show is actionable. Dominion's arguments ignore context that makes clear that Dobbs was providing Giuliani with an opportunity to explain the President's allegations and litigation plans, not reporting those allegations as true. From the beginning of the show, Dobbs emphasized that the claims were coming from the Trump "legal team," and that lawsuits were in "the works." Ex.A5 at 1. His interview with Ellis made

clear that the allegations had yet to be proven, as Ellis told Dobbs that the Trump Campaign was still looking for evidence because it had only been eight days since the election. *Id.* at 5. His interview with Congressman Biggs removed all doubt. Dobbs explained that there were "***allegations***" about voting machines and "***whether they are or are they not*** vulnerable to hacking," and Biggs responded "we need ***to find that out*** and ***get to the bottom of this***." *Id.* No reasonable viewer could fail to understand that the allegations were unproven allegations, not proven facts.

Dominion contends that all that context is "irrelevant because Dominion has not" challenged those statements. Dom.Opp.90. But elsewhere Dominion admits that "New York courts have taken 'the entire broadcast as the context relevant to a court's defamation inquiry.'" Dom.Opp.85. Dominion contends that Dobbs "credit[ed]" Giuliani's allegations "as true" by stating "little is known about their ownership ***beyond what you're saying about Dominion.***" Dom.Opp.90. But Dominion omits that Dobbs called for an investigation into his claims, Ex.A5 at 8, which is quintessential protected opinion. *Brian*, 660 N.E.2d at 1131.

Dominion also complains that Dobbs stated, "by the way, the states, as you well know now, they have no ability to audit meaningfully the votes that are cast because the servers are somewhere else." Dom.Opp.90. But that statement is not one of the "four categories" of statements Dominion challenges, Dom.MSJ.App.D, and Dominion has made no effort to demonstrate that it is false (or defamatory). Nor

has it produced evidence that Dobbs knew that claim to be false at the time. To the extent Dominion is saying that Dobbs bolstered Giuliani's claims of voter fraud, that does not help, as a reasonable viewer would still have understood from context that Giuliani's claims were allegations.

That statement is also fair report. FNN.MSJ.56-66. Dominion does not dispute that a reasonable viewer would understand that Dobbs was referencing allegations that the President's legal team planned to include in lawsuits; nor does it deny that the allegations about servers and audits were eventually included in lawsuits. Dominion insists that fair-report principles cannot apply because Giuliani and Ellis disavowed Powell before she filed her suits. Dom.Opp.92-93. But a lawsuit is an official proceeding regardless of who files it on whose behalf.

Finally, Dominion claims that Dobbs "endorsed" Giuliani's allegations by saying things like "It's stunning" and "extraordinary" and thanking Giuliani for "pursuing what is the truth." Dom.Opp.93. But it fails to explain how those statements "espouse" or "concur" in anything other than the unremarkable opinion, shared by many, that the President's allegations were stunning, extraordinary, and should be either proven or disproven in short order. Indeed, those same words could have been uttered by someone who firmly believed that the allegations were false. Dominion claims that the sentence "four and a half year-long effort to overthrow the President of the United States" is actionable because it implies that Dominion is part

of that effort. But that requires ignoring the multiple places where Dobbs made clear that he was just expressing an opinion, and did not yet know one way or the other whether the President's claims were true. Ex.A5 at 9 ("***I think that***, … this looks to me like it maybe—and I say maybe, I'm not suggesting it is").

November 13 – Lou Dobbs Tonight. A reasonable viewer would plainly understand that the statements Dominion challenges in this broadcast were allegations about Dominion, not facts. Indeed, even Dominion does not contend otherwise. It instead complains that Dobbs' "presentation was one-sided." Dom.Opp.95. If that were enough to bring a defamation action, much of the modern media establishment would need to shutter. At any rate, that is not even accurate, as Dobbs reported Dominion's denials right before interviewing Powell: "***Dominion Voting Systems say they categorically deny any and all of President Trump's claims that their voting machines caused any voter fraud in key swing states or electoral fraud***." Ex.A7 at 4. Dominion asks the Court to ignore that because "Dobbs raised Dominion's disavowal only while teeing up Powell to respond," Dom.Opp.96, but that is evidence of *even*-handedness, not one-sidedness. Dobbs presented Dominion's denials and gave Powell a chance to respond, "leaving it to the readers to evaluate it for themselves." *Brian*, 660 N.E.2d at 1131.

Other context confirms that Dobbs was providing a forum for the President's lawyers to explain claims that he emphasized they would need to substantiate in

court—not reporting that those claims were true. He repeatedly characterized Powell's statements as "allegations," and "charges," and emphasized that it was all part of her "investigation." Ex.A7 at 5. And he informed viewers that CISA said the election was secure. *Id.* at 2-3. While he also displayed a graphic criticizing CISA, expressing one's opinion that allegations are more credible than denials is plainly permissible. *Brian*, 660 N.E.2d at 1131.

November 14 – @Lou Dobbs. Dominion claims that Dobbs' November 14 tweet is defamatory, but context strongly indicates that the tweet was precisely the type of "loose, figurative, or hyperbolic language" that "negate[s] the impression" that a person is stating a defamatory fact. *Milkovich*, 497 U.S. at 21. Dobbs used "colloquial and loose" language throughout. *Von Gutfeld*, 603 N.E.2d at 937-38. His tweet is also "devoid of reference to" any "specific" facts about Dominion, *id.* at 937—it instead attributes "electoral fraud" to "Democrat[s]" generally. None of that is consistent with "the language of someone inviting reasonable persons" to "find specific factual allegations in his remarks." *Id.* at 937. The same reasoning has doomed other defamation suits involving accusations of "fraud." *Id.* at 937-38. Dominion's contrary arguments require "sifting through a communication for the purpose of isolating and identifying assertions of fact," which the New York Court of Appeals has warned courts not to do. *Brian*, 660 N.E.2d at 1130. As for the

embedded Giuliani tweet, Dominion fails to explain how a reasonable reader would fail to grasp that the allegations in the tweet came from Giuliani, not Dobbs.

November 14 – Justice with Judge Jeanine. There is no way that a reasonable viewer would fail to understand that the statements Dominion challenges in this broadcast were allegations rather than facts. Dominion disagrees because Pirro told viewers that Powell would explain what "she has ***unearthed*** in the creation of Dominion," rather than telling viewers that Powell would explain what she was "alleging." Dom.Opp.100. But Dominion omits context that made clear the claims about Dominion were Powell's allegations: "The Dominion Software System ***has been tagged*** as one ***allegedly*** capable of flipping votes. Now, ***you'll hear from Sidney Powell*** in a few minutes, who will explain ***what she has unearthed*** in the creation of Dominion." Ex.A9 at 1.

Dominion next faults Pirro for purportedly "pump[ing] up the Dominion allegations by saying in her opening, 'And those voting machines created by Dominion, ***stay tuned. The best is yet to come.***'" Dom.Opp.100. But right after Dominion asks the Court to look at *that* context, it tells the Court to ignore other "statements Pirro makes in her opening and interview with other guests" as "irrelevant." *Id.* Dominion's felt-need to shamelessly cherrypick context is understandable: A few sentences later, Pirro told viewers: "The question ultimately is, will any of these ***allegations*** affect the sufficient number of votes to change the

result of the election? ***Maybe yes, maybe no***. ***If the answer is President Trump did not win***, then on January 20th, ***Joe Biden will be my President***." Ex.A9 at 3. A reasonable viewer would understand that Powell was talking about allegations, not proven facts, and that Pirro neither endorsed nor espoused those allegations.

Other context confirms that conclusion. Immediately after Powell claimed that Dominion and Smartmatic manipulated votes, Pirro reported Dominion's denials, displayed Dominion's statement on screen, and pressed Powell for evidence: "***[T]hey deny that this claim that there's 6,000 votes that went from President Trump to Biden had anything to do with their software … if it is manipulated at all … what evidence do you have to prove this***." Ex.A9 at 8. Dominion claims that "reporting bare denials is not real pushback when you omit the detailed facts debunking the false claims." Dom.Opp.100.[7] Setting aside the fact that Pirro included detailed facts on air and on screen, *see* FNN.MSJ.75, Dominion yet again ignores that the press need not include detailed facts debunking the claims to report them, *see Edwards*, 556 F.2d at 120. For the same reason, Pirro was not required to inform viewers of "the mountain of evidence" that supposedly contradicted Powell's

[7] Dominion makes this point repeatedly but cites no case to support it. Instead, it purports to derive that rule from cherry-picked deposition testimony from Fox News employees. Dom.Opp.83. But that testimony is obviously not a statement of law, and it hardly seems likely that Dominion would be willing to accept testimony from Fox News employees on other points as legally binding.

claims. Dom.Opp.101. And while Dominion claims that Pirro "amplif[ied] Powell's conspiracies" by agreeing with Powell that her claims should be investigated, that runs straight into the rule that a "call for a full-scale investigation" into allegations reflects a "personal opinion" that the allegations merit investigation, not the "demonstrable fact" that they are true. *Brian*, 660 N.E.2d at 1131.

Pirro's coverage was not only not defamatory, but squarely protected by fair-report principles. Pirro's opening monologue explicitly stated that Powell's allegations about Dominion were "very much a part of ***lawsuits, affidavits, where people are swearing that they're telling the truth***." Ex.A9 at 4. Indeed, it featured a lengthy discussion about the pending lawsuits, including the newly filed suit in Georgia in which a purported whistleblower filed a sworn affidavit days later making the same allegations. *See* Ex.C5.

Dominion does not deny that Powell's allegations were an accurate report of the contents of that affidavit. Instead, it claims that fair-report principles do not apply because the Wood lawsuit "was not filed by the President or his campaign." Dom.Opp.102. Again, the fair-report doctrine does not exclude coverage of and commentary on lawsuits not filed by the President or his campaign. Nor does it matter that the affidavit was not filed until three days later. A report on anticipated filings in pending lawsuit is protected even if the plaintiff "ha[s] not yet performed

the ministerial act of filing ... at the time the statement was made." *Wenz*, 948 F.Supp. at 323.

November 15 – Sunday Morning Futures. A reasonable viewer would have understood that Bartiromo was providing a forum for Giuliani and Powell to explain allegations that were newsworthy principally because they were central to ongoing litigation seeking to alter the outcome of the Presidential election, not reporting the allegations as fact. Indeed, Bartiromo pressed both on whether they could "prove it" at every turn. FNN.MSJ.78-82. She repeatedly attributed the allegations to Powell and Giuliani, using phrases like "Tell me what ***you mean***" and "***you say.***" *Id.* at 4, 8. And Bartiromo's interview with Congressman Jordan made clear that the allegations were part of a larger "investigatory process" that had yet to play out. Bartiromo noted that Giuliani and Powell are "***investigating***" Smartmatic and Dominion and "***they say they have evidence***" of interference. *Id.* at 14. She asked Congressman Jordan to comment on "the outcome here ***of this investigation***," to which he responded: "***Let the process play out***." *Id.* Bartiromo agreed: "Now we have to ***go through the investigatory process***." *Id.*

Dominion tries to draw a distinction between asking the President's lawyers whether they can prove their claims "in time" before the mid-December deadline for certifying the vote and whether they can prove their claims "at all." Dom.Opp.106. Bartiromo did in fact ask Giuliani and Powell multiple times whether they could

prove their claims at all, *see* Ex.A10 at 4, 5, 7, 9, but it is not clear why Dominion thinks that distinction matters. Asking someone "do you have the evidence to prove it" and "will you have the evidence to prove it before the deadline" conveys the same basic point: The allegation is unproven.

Dominion next contends that Bartiromo "endorsed" the claims by "promising her viewers" at the beginning of her show that "they were about to see 'evidence' of non-existent 'backdoors.'" Dom.Opp.105. That is not what Bartiromo said or implied. Dominion omits the rest of the sentence that makes clear that the statements about backdoors and voting machines were coming from the President's legal team: "Coming up, ***President Trump's legal team*** with new evidence this morning of backdoors on voting machines, ballot tampering, and election interference, ***Rudy Giuliani*** with new affidavits and lawsuits ***charging*** fraud." Ex.A10 at 1. A reasonable viewer would understand that they were about to hear what allegations and evidence "President Trump's legal team" claimed to have.

Other coverage removes any doubt. Bartiromo also previewed Powell's claims and expressed uncertainty about whether they were true: "Plus, ***Sidney Powell*** on the Venezuela connection ***and whether*** kickbacks were involved …" *Id.* And she made clear to viewers that the President's lawyers had not yet produced evidence of their allegations: "President Trump's legal team has exactly one month ***to produce enough evidence*** to overturn the 2020 election. With a ***slew of lawsuits pending*** in

multiple states, ***it's a tall task***." *Id.* A reasonable viewer would understand that Bartiromo was previewing what she expected the President's legal team to say.

Dominion next contends that Bartiromo endorsed Giuliani's claims by responding "'yes' or 'right'" to him "over and over" and interviewing him too "enthusiastically." Dom.Opp.106. That is absurd. The video makes clear that Bartiromo was simply acknowledging what Giuliani was saying, like any respectful listener would do. Ex.B6 at 4:54-59, 6:20-25, 10:50-52, 11:10-13. The line between protected speech and actionable defamation cannot seriously turn on whether a host says "yes" or "right" too enthusiastically. Nor did Bartiromo endorse Powell's allegations by saying "Wow. This is explosive, and we certainly will continue to follow it." Dom.Opp.107. Powell's claims were indeed explosive regardless of whether they were true.

While Bartiromo made some factual statements of her own, none is actionable. Dominion contends that Bartiromo falsely implied that Dominion used Smartmatic software. Dom.Opp.105. But in context, a reasonable viewer would understand that Bartiromo was just repeating the (unproven) allegations that Giuliani mentioned seconds earlier to ask him about them—not proclaiming that Dominion actually uses Smartmatic software. Indeed, her demand for Giuliani to "prove it" would make no sense otherwise. *See Brian*, 660 N.E.2d at 1131 ("without a recitation of the existing unresolved charges, defendant's call for a full-scale investigation would have made

no sense"). And in all events, Dominion has produced no evidence that Bartiromo knew the *specific statement* it challenges (Dominion used Smartmatic software) was false on November 15. FNN.MSJ.81.

Dominion also complains that Bartiromo cited an unnamed "source." But Attorney General Richardson also cited unnamed sources, *Brian*, 660 N.E.2d at 1128, yet the New York Court of Appeals nevertheless held that his op-ed was not defamatory because a reasonable viewer would understand that the charges were unproven allegations. The same is true here. Bartiromo did not repeat the source's allegations to tell viewers they were true. She repeated the allegations to ask Giuliani whether he was "saying the states that use that software did that?" Ex.A10 at 4-5. When Giuliani responded affirmatively, Bartiromo pushed back: "***Can you prove the case*** without the hardware or software?" *Id.*

November 15 – Fox & Friends. A few minutes before the November 15 broadcast of *Sunday Morning Futures*, Bartiromo appeared on *Fox & Friends* to preview her show. Dominion does not deny that, for the majority of the statements it challenges on this segment, a reasonable viewer would plainly understand that Bartiromo was previewing a show in which she would be providing the President's lawyers with a chance to air their allegations against Dominion, not reporting facts about the company. Indeed, there is no other way to understand statements like "***Sidney Powell is also talking*** about ***potential*** kickbacks that government officials

who were asked to use Dominion actually also enjoyed benefits to their families. We're going to talk about that coming up as well." Ex.A39 at 4.

Dominion singles out Bartiromo's statement that: "There is much to understand about Smartmatic, which owns Dominion Voting Systems." *Id*. But setting aside whether that statement alone is even defamatory, courts must not "sift[] through a communication for the purpose of isolating and identifying assertions of fact," but must consider the context, tone, and purpose of the statement first. *Brian*, 660 N.E.2d at 1130. And here, the context and the "apparent purpose," *id.*, of the preview would have made clear that Bartiromo was simply previewing a show in which she would be providing the President's lawyers with a chance to air their allegations. Bartiromo told viewers that she would be speaking "with Rudy Giuliani ***and why he does believe he will be able to overturn this election with evidence***. He will join me along with Sidney Powell, to give us ***an update on their investigation***." Ex.A39 at 4.

To the extent there were any lingering doubts, the interviews that began a few minutes later on *Sunday Morning Futures* would have dispelled them, as the statements Bartiromo made in her preview were virtually identical to the claims Giuliani and Powell made during the interviews. In all events, Dominion has failed to produce clear and convincing evidence that Bartiromo knew on November 15 that Smartmatic did not own Dominion. To the contrary, when asked in her deposition

whether she "believe[d] Dominion is owned by" Smartmatic, Bartiromo answered "I don't know." Dom.MSJ.Ex.98, Bartiromo 280:22-24.

November 16 – Lou Dobbs Tonight. Dominion appears to recognize that most of the statements it originally challenged from this show are not actionable, so the Court should grant summary judgment on any Dominion now declines to defend. The only remaining statement is Powell's claim that "Smartmatic owns Dominion." Dom.Opp.107. But a reasonable viewer would plainly understand that the accusation was an allegation made by Powell—a point that Dominion does not contest. Dominion contends Fox News is nevertheless liable because Dobbs praised Powell as a "prominent appellate attorney," while castigating "Radical Dems" for dismissing concerns about Dominion. Dom.Opp.108-09. But a reasonable viewer would understand that Dobbs was expressing his opinion that Powell's claims merited investigation, which is quintessential protected opinion. *Brian*, 660 N.E.2d at 1131. A viewer craving a different perspective could tune into Rachel Maddow, whose opinions are equally protected. *Maddow*, 8 F.4th at 1157. Dominion complains that Dobbs "endorsed" Powell's theories when he told Ronna McDaniel that the President had been "wronged mightily." Dom.Opp.109. But there too a reasonable viewer would understand that Dobbs was expressing his opinion—albeit not even an opinion specific to Dominion.

November 18 – Lou Dobbs Tonight. Dominion challenges Dobbs' verbatim reading of an affidavit filed in court the day before. That is core protected activity under the First Amendment and fair-report principles. While Dominion concedes that Dobbs "reads at length from an affidavit," it contends that coverage is actionable because "Dobbs never referenced any court case." Dom.Opp.112. But a reasonable viewer would understand that Dobbs was reading from an affidavit filed in a judicial proceeding; that is what affidavits are for. Moreover, Dobbs emphasized at the beginning of the broadcast that he would be discussing "President Trump's legal challenges" with the President's lawyers, as well as with guests who "have filed sworn affidavits charging election fraud in swing state elections." Ex.A14 at 1-2. Although Dobbs read from a different affidavit, all that context would have confirmed to a reasonable viewer that he was discussing official proceedings.

November 19 – Lou Dobbs Tonight. A reasonable viewer would obviously understand that Dobbs was reporting on allegations made by the President's legal team in a widely publicized news conference earlier that day. Dominion appears to contest that conclusion because Dobbs told viewers that Powell would be providing "more details" on her claims, instead of "more allegations." Dom.Opp.114. That argument makes no sense, as allegations have "details." At any rate, Dominion ignores that Dobbs made clear both before and after that statement that Powell's claims were allegations. He informed viewers before that statement: "We'll have

much more on today's powerful news conference and the powerful ***charges put forward by the President's legal team***." Ex.A18 at 2. After summarizing Powell's allegations, Dobbs stated: "***Smartmatic and Dominion deny those charges.***" Ex.A18 at 2. He told viewers of Dominion's denials again and displayed text straight from Dominion's "SETTING THE RECORD STRAIGHT" emails on screen. *Id.* at 4. It is thus no surprise that not even Dominion claims that Dobbs "espoused" or "concurred" in Powell's claims. It would have been obvious to any reasonable viewer that Powell's statements about Dominion were contested allegations—and that is so regardless of how "great" an "American" she is. Dom.Opp.113. A reasonable viewer would also understand that Dobbs was covering allegations made in an official proceeding. Dobbs cited the whistleblower affidavit that he read on his show the day before, which contained every single one of the allegations made about Dominion on the broadcast. Ex.C5.

November 21 – Justice with Judge Jeanine. Pirro's coverage of the President's allegations on November 21 is plainly covered by both neutral- and fair-report principles. Dominion's contrary arguments rest on distorting the statements and omitting context. Dominion begins by claiming that "Pirro repeats the false allegation that Dominion 'started in Venezuela with Cuban money, and with the assistance of Smartmatic software, a backdoor is capable of flipping votes." Dom.Opp.114. But Dominion leaves out the most important part of the sentence:

"***The President's lawyers alleging a company called Dominion, which they say*** started in Venezuela with Cuban money and with the assistance of Smartmatic software, a backdoor is capable of flipping votes." Ex.A22 at 2. Those words would make obvious to any reasonable viewer that Pirro was reporting the President's allegations, which is presumably why Dominion omits them. On-screen graphics displaying Dominion's denials (which Dominion likewise ignores) eliminates any doubts. FNN.MSJ.95-96.

Dominion claims that Pirro "bolstered the credibility of that false allegation" with "her reference to 'an overnight popping of the vote tabulation that cannot be explained for Biden.'" Dom.Opp.114. Yet again, Dominion omits key words. The full sentence is phrased as a question: "***Why was there*** an overnight popping of the vote tabulation that cannot be explained for Biden***?***" Ex.A22 at 3. Far from opining on the credibility of the President's allegations, Pirro expressed uncertainty and called for an investigation: "For the sake of our Republic, we have an obligation to ***get honest and truthful answers***, in fact, demand them." *Id.*

Moreover, a reasonable viewer would understand that Pirro was referencing allegations made in pending lawsuits, sweeping this broadcast under fair-report protections too. Pirro expressly referenced sworn declarations filed a few days earlier in Wood's lawsuit. *See* Exs.C5, C17. Dominion claims that Pirro "does not even purport to be describing a legal proceeding when she describes that affidavit."

Dom.Opp.116. That claim is inexplicable. Pirro said: "In Atlanta, a sworn affidavit under penalty of perjury," after informing viewers that affidavits are "sworn statements" that are "part of virtually every lawsuit." Ex.A22 at 2. And if that were not clear enough, Pirro interviewed Wood just a few minutes later. *Id.* at 6.

Dominion next claims that fair-report principles do not apply because Pirro "falsely attributes the affidavit as coming from "[t]he President's lawyers," which Wood was not. Dom.Opp.116. But fair-report protection does not turn on accurately describing the person who handed the court filing to the press. It turns on accurately describing the contents of the affidavit. Finally, Dominion claims that the declarations did not reference the "Venezuela/Smartmatic conspiracy," but that is exactly what they allege. Ex.C5 ¶¶21-22 (explaining that "the software and fundamental design of the electronic electoral system and software of Dominion ... relies upon software that is a descendent of the Smartmatic Electoral Management System"). Likewise, the declarations reference the "overnight popping of the vote" claim that Dominion challenges. *See* Ex.C17 ¶¶4, 6-10 (explaining that "surges of votes for Biden were observed at odd hours of the morning of November 4th").

November 24 – Lou Dobbs Tonight. Dominion challenges a single statement by Powell on the November 24 broadcast about Smartmatic and Dominion. A reasonable viewer would understand that Powell's statement was an unproven allegation. Dominion does not claim otherwise. It instead insists that Dobbs

endorsed the statement by stating that "I think many Americans have 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.A26 at 5. But far from endorsing Powell's allegations, he called them "suspicions." *Id.* Dominion points out that Dobbs asked rhetorically earlier in the show: "What? You mean this election was rigged?" *Id.* at 4. But the fact that Dobbs believed the election was rigged in general does not say anything about the veracity of Powell's specific claims about Dominion. A reasonable viewer would still understand that Powell's claims about Dominion were allegations.

Powell's statement on November 24 is clearly fair report, as her allegations were included nearly verbatim in the lawsuit she filed the next day. *See* Ex.C8, ¶5 ("Smartmatic and Dominion were founded by foreign oligarchs and dictators" to manipulate votes and ensure that "Venezuelan dictator Hugo Chavez never lost another election"); ¶¶8, 103 (alleging that Dominion's software "is designed to facilitate vulnerability," allowing users "to arbitrarily add, modify or remove" votes without detection). And a reasonable observer would plainly recognize that Powell's statements related to that lawsuit. Dobbs asked Powell: "*When shall we expect your lawsuit?*" Ex.A26 at 5.

November 30 – Lou Dobbs Tonight. There is nothing defamatory about this show. In context, a reasonable viewer would understand that Powell's claims about fraud and kickbacks were allegations. Dominion does not claim otherwise. It argues that Fox News is nevertheless liable because Dobbs endorsed Powell's allegation by saying "[t]his thing should be shut down right now." Dom.Opp.119-20. That is inaccurate. Dobbs was plainly not referencing Powell's bribery allegations. Dobbs was talking about the "ludicrous, irresponsible and rancid system" of the voting machine industry. He said: "We have across almost every state whether it is Dominion, ESS, whatever the company—voting machine company is—no one knows their ownership, has no idea what's going on in those servers, has no understanding of the software because it's proprietary. It is the most ludicrous, irresponsible and rancid system imaginable in the world's only superpower. We look like a complete nation of fools, and we're supposed to be meeting constitutional deadlines on December 8th, December 14th? Are you kidding me? This thing should be shut down right now and people understand that this will not be tolerated by the American people." Ex.A29 at 6.

November 30 – Hannity. Dominion challenges a single statement by Powell on the November 30 broadcast of *Hannity*. A reasonable viewer would plainly understand that Hannity was simply asking Powell how she would substantiate the allegations that she and others had been making in their lawsuits, not claiming that

the allegations were true. Dominion does not contest otherwise. Nor does it claim that Hannity endorsed or espoused Powell's allegations. After all, Hannity brought up the fact that Powell had "split" with the Trump campaign. Ex.A28 at 8. Dominion tries to spin that, claiming that Hannity "put a thumb on the scale for Powell's credibility." Dom.Opp.122. It is not clear how saying "you said you were never part of that, their legal team," "downplays" anything. *Id.* But in all events, telling viewers that Powell had split with the Trump legal team certainly did not bolster her credibility regardless of Dominion's spin.

Hannity's coverage is also classic fair report. A reasonable viewer would understand that Powell was articulating the claims about Dominion that she made in her lawsuits. Both before and after Powell reiterated her claims about Dominion, Hannity asked about her confidential sources and whether witnesses would be willing to sign affidavits, reinforcing that the allegations were part of ongoing litigation. Ex.A28 at 9. And immediately before stating her allegations, Powell mentioned her co-counsel's progress in one of his related suits, and recounted all the evidence that she had been collecting for it. And there is no question that the allegation she made on *Hannity*—"The machine ran an algorithm that shaved votes from Trump and awarded them to Biden"—is the same claim she was making in her lawsuits. *See, e.g.*, Ex.C8 (alleging that "multiple affidavits show[] … flipping of the race … votes being switched in Biden's favor away from Trump.").

December 4 – Lou Dobbs Tonight. Dominion does not contend that Fox News should be held liable for anything Colonel Waldron said on this show. Instead, Dominion claims that Dobbs defamed it by asking questions. Dominion claims that Dobbs "suggest[ed]" that Dominion was a "culprit" or "the principal culprit" by asking Waldron: "At the center of it all, Dominion Voting Systems. Are they the culprit here? Not the only culprit, but are they the principal culprit?" Ex.A30 at 4. But a reasonable viewer would understand that Dobbs was asking Waldron to elaborate on allegations that he had made earlier in his testimony before state legislatures, not making any assertions about Dominion. Dobbs did not claim that "Dominion Voting Systems is the culprit here," or that "Dominion Voting Systems designed their algorithms to be inaccurate." Instead, Dobbs asked Waldron to elaborate on the claims he had already made in an official proceeding, asking him *whether* Dominion was the culprit. Nothing about that is defamatory.

December 10 – @LouDobbs. Dominion isolates a single tweet issued by the @LouDobbs Twitter account at 4:56pm, just four minutes before the 5pm broadcast. But Dominion ignores the two tweets that preceded it, including one that came a mere minute earlier. FNN.MSJ.112. That tweet stated that @SidneyPowell1 would be joining Dobbs on the 5pm show "to share new information that could have massive consequences in the Battle for the White House." *Id.* In context, a reasonable viewer would have understood that the screenshotted document in the

4:56pm tweet was the "new information" from Powell promised a minute earlier in the 4:55pm tweet. Dominion does not deny that the close-in-time tweets are critical context, or that they make clear to a reasonable reader that the allegations are Powell's.

Dominion argues that Dobbs endorsed Powell's claims by including the "cyber Pearl Harbor" caption. Dom.Opp.125. But most of that language came directly from the document in which Powell laid out her allegations. *Compare* ¶179(p) (tweet stating "The 2020 Election is a cyber Pearl Harbor), *with id.* (document stating "It is a cyber Pearl Harbor."). A reasonable reader would assume that Dobbs was just reporting her claims. To the extent there were minor glosses on the precise language Powell used, the First Amendment does not demand "literal accuracy" when the press is conveying inherently newsworthy allegations. *Edwards*, 556 F.2d at 120. So long as the allegations are "accurately convey[ed]," *id.*, the press is free to employ "loose, figurative" language, *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1307 (N.Y. 1977).

December 10 – Lou Dobbs Tonight. Dominion challenges multiple statements made by Powell on Dobbs' December 10 show. A reasonable viewer would understand that Dobbs was providing Powell with an opportunity to explain her allegations, not making those allegations himself. Dominion contends that Dobbs "endorsed and gave credence" to Powell's charges by previewing that she would

bring "new information regarding electoral fraud." Dom.Opp.126. But Dominion omits the second half of the sentence, where Dobbs said that the "information" Powell would be sharing was her "***charges***" of "***what she calls*** a Pearl Harbor-style cyberattack." Ex.A31 at 3.

Dominion next contends that Dobbs endorsed Powell's claims by "characterizing her false allegation as 'apparently a broadly coordinated effort to actually bring down this President.'" Dom.Opp.126. But Dobbs was not saying that Powell's claims were *actually* part of such an effort; he was simply stating that her claims *would be* part of such an effort *if true*. Indeed, that statement would make no sense otherwise, because Dobbs also presses Powell to produce evidence of her claims. Ex.A31 at 4-5. Dominion also claims that Dobbs endorsed Powell's allegation by characterizing her "outrageous lying as 'the Lord's work.'" Dom.Opp.126. But wishing her well in her search for evidence and expressing hope that she could produce is not the same thing as endorsing her claims as *true*. Again, Dobbs' call for evidence would make no sense otherwise.

December 10 – @LouDobbs. Dominion also challenges a tweet reproducing Dobbs' interview with Powell. But the tweet simply identifies the interviewee (@SidneyPowell) and recites her claims. Dominion claims that the tweet is nevertheless false because it states that "@SidneyPowell reveals groundbreaking *new evidence*," which she did not. Dom.Opp.128-29. But a reasonable viewer

would understand that "evidence" just meant Powell's claims. Indeed, the reproduction of the interview would have confirmed as much. By including the interview, Dobbs "le[ft] it to the readers to evaluate it for themselves." *Brian*, 660 N.E.2d at 1131.

December 12 – Fox & Friends. Dominion challenges just a single statement made by Giuliani on the December 12 broadcast of *Fox & Friends*. But it does not deny that a reasonable viewer would understand that Giuliani's claims were his own and were made in lawsuits. Nor does Dominion even try to argue that any host "espoused" or "concurred" in Giuliani's statement. To the contrary, right after Giuliani mentioned Dominion, host Will Cain pressed him for evidence: "***Do you have the time to bring these and put forward the evidence? And what is your strongest piece of evidence***?" Ex.A32 at 3. Nor does Dominion deny that a reasonable viewer would understand that Giuliani's statement pertained to legal proceedings in which the same claims were being made. Dominion claims that fair-report principles do not apply because Powell's suits "had all been dismissed by that date." Dom.Opp.129. But Powell's suits were on appeal, *e.g.*, *Pearson v. Georgia*, No. 20-14579 (11th Cir.), and appeals are plainly "official proceedings" too.

January 26 – Tucker Carlson Tonight. Dominion barely even tries to address Fox News' arguments about the January 26 broadcast of *Tucker Carlson Tonight*. As Fox News explained in its opening brief, a reasonable viewer would plainly

understand that the two statements made by Lindell that even mention Dominion were Lindell's, and Lindell's alone. Dominion does not contend otherwise. Nor does Dominion argue that Carlson espoused Lindell's statements—nor could it, as Carlson openly denigrated them as "conspiracy theories." Ex.A38 at 20. Indeed, Dominion does not even explain how the statements were susceptible of any particular meaning given how cryptic Lindell's allusions to Dominion were. Instead, Dominion contends only that it "is not plausible" that Carlson and his team were unaware that Lindell might bring up Dominion. Dom.Opp.130. But that is an argument about actual malice, which does not matter unless Dominion has identified any defamatory statement attributable to Fox News. Regardless of whether Carlson or his team knew Lindell might bring up Dominion (they did not), the broadcast is not defamatory period because a reasonable viewer would plainly understand that, when Lindell briefly mentioned Dominion, Lindell was speaking only for himself.

II. Dominion Has Failed To Produce Clear And Convincing Evidence Of Actual Malice.

Even assuming it has identified some statement by Fox News that is susceptible of a defamatory meaning, Dominion has come nowhere close to producing "clear and convincing" evidence that the relevant individuals at Fox News made or published any challenged statement with actual malice. Instead, Dominion resorts to cherry-picking soundbites from people at Fox News and Fox Corporation who

had nothing to do with the statements it challenges. But Dominion must bring home actual malice to the people who are actually responsible for the challenged statements. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). That does not mean, as Dominion seems to think, Dom.Opp.137, anyone on the org chart with responsibility for "content," Dom.Opp.9-10. As numerous courts have held, it means the person(s) who actually drafted, spoke, or played some equivalent direct role in the publication of the statement. *Page*, 270 A.3d at 850; *see also* FNN.Opp.83-86. In this case, that means the Fox News hosts and, in some instances, producers who had an affirmative hand in drafting or publishing the specific statements Dominion challenges.

Dominion advances a much broader conception of "responsibility," insisting that a news organization is liable for defamation so long as a plaintiff can prove after the fact that someone in the "chain of command"—from line-level editors to the highest executives at a publication's parent company—who in theory *could* have stopped a publication would have expressed doubts about a statement had they been asked. Dom.Opp.131-37. That theory would mark a sea change in defamation law, ushering in exactly the kind of "collective knowledge" regime that the Supreme Court emphatically rejected in *N.Y. Times v. Sullivan*. And as this case well illustrates, it would permit invasive inquiries into the state of mind of every single editor, producer, and executive up the chain from the challenged article, editorial, or

newscast in every virtually every case, imposing a massive chill on First Amendment rights. Unsurprisingly, Dominion cannot identify a single case embracing its defamation-by-omission theory.

A. Dominion Has Failed to Produce Any Evidence that the Individuals Responsible for the Allegedly Defamatory Statements Possessed Actual Malice.

Dominion does not seriously contest that it has failed to muster clear and convincing evidence that any of the Fox News hosts whose coverage it actually challenges knew that any challenged statement for which he or she was responsible was false or harbored serious doubts about its truth when it was made.[8] Dominion simply ignores the hosts' repeated testimony that they *did not know* the President's allegations were false and/or had good reasons to keep an open mind about them at the time. FNN.MSJ.123-31. Instead of confronting what the hosts and producers actually said, Dominion just continues to doggedly insist that all of the hosts *must* have known *immediately* that the allegations were false (and hence all must have lied under oath at their depositions) because Dominion denied them and "public evidence and information" "debunked" them. Dom.Opp.172-78.

[8] Because Dominion does not address any Fox News executives or producers in its opposition brief, Fox News does not address them here. To the extent they remain relevant, Fox News incorporates its discussion of them in other summary judgment briefs. FNN.Opp.104-37

Repetition has not improved that argument. The problem Dominion continues to face is that it has never pointed to any *objectively verifiable evidence* that the relevant Fox News individuals reviewed at the time that affirmatively disproved the President's allegations. *Prozeralik v. Cap. Cities Commc'ns, Inc.*, 626 N.E.2d 34, 40-41 (N.Y. 1993); *see* FNN.MSJ.135-43; FNN.Opp.139-47. Indeed, most of the sources Dominion cites note only a *lack* of evidence *confirming* the President's allegations. But the absence of evidence proving a claim is plainly not the same thing as objectively verifiable evidence debunking it. After all, "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false. Only the latter establishes reckless disregard in a defamation action." *Liberman v. Gelstein*, 605 N.E.2d 344, 350 (N.Y. 1992).

It is little surprise, then, that the individuals at Fox News responsible for the challenged publications repeatedly testified under oath—in testimony that Dominion once again steadfastly ignores—that they did not find any of Dominion's evidence definitive. FNN.MSJ.137-38. Indeed, even Dominion does not seriously deny that none of the sources it cites supplied "objectively verifiable" evidence debunking the claims at the time. It instead tries to change the subject, claiming that Fox News is "effectively suggesting that factual evidence regarding the outcome of the 2020 Presidential Election cannot be trusted." Dom.Opp.172. Dominion even goes so far as to say that if the Court sides with Fox News, "we may as well give up all faith in

our elections." Dom.Opp.175-76. That alarmist rhetoric has no basis in reality. Acknowledging that there was no affirmative evidence disproving the President's hard-to-disprove claims in the immediate weeks after the election does not in any way threaten the legitimacy of that election or any other. It just recognizes the common-sense reality that there were extraordinary allegations and extraordinary denials being made on a very fast-paced basis, and the best way to sort out the truth of hotly contested claims is to test them in the crucible of the courts and public debate.

Of course, there may well be a point in time at which the failure to marshal evidence to support a claim is itself a powerful reason to doubt it. But wherever that point may be, it was not close to met here. As Fox News hosts repeatedly explained, the President had only a matter of weeks to prove his claims before the election results would be certified in mid-December, and he and his lawyers steadfastly insisted that they would be able to do so. FNN.MSJ.142-43. And precisely because those claims were being pressed by a sitting President, through litigation subject to Rule 11 and supported by sworn affidavits, hosts repeatedly testified that they were willing to give them the benefit of the doubt. As Lauren Petterson put it: "[W]hen they could not turn over the evidence, we gave them enough time, we gave them about 30 days to present it. It seemed like a reasonable amount of time. And when

they could not present it, at that point they were no longer invited on the air." Dom.MSJ.Ex.133, Petterson 239:23-240:4.

When Dominion finally turns to the evidence of what the relevant hosts *actually* knew and believed at the time, instead of what Dominion thinks they *should have* known and believed, it identifies nothing that comes close to clear and convincing evidence rebutting their uniform testimony that they did *not* know whether the President's claims were true or false.

Fox & Friends. At the outset, Dominion makes no actual-malice argument in its response brief specific to any host of *Fox and Friends*, and so largely rests as to those shows on its theory that no one could ever have believed the President's allegations. Dom.MSJ.140. Given that all three hosts unequivocally testified that they did not know at the time whether the President's allegations were true or false, FNN.Opp.99-101, the Court should grant summary judgment on Dominion's challenges to the December 12 *Fox & Friends* segment, as Dominion's own views about what is and is not "plausible" are patently not the kind of clear and convincing evidence necessary to create a genuine issue of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (a plaintiff cannot defeat summary judgment simply by "asserting that the jury might, and legally could, disbelieve the defendant's denial … of legal malice").

Bartiromo. Dominion notes that Bartiromo was aware before her November 8 broadcast that Jared Kushner doubted Powell's claims. Dom.Opp.169. That is hardly clear and convincing evidence that *Bartiromo* entertained serious doubts about them. As Bartiromo explained in her deposition, while she knew that, per usual, "there was some in-fighting within the Trump team," Dom.MSJ.Ex.98, Bartiromo 151:16-22, and that some in the administration doubted Powell's claims, Powell "was still the President's lawyer," *id.* 153:23-154:6, so Bartiromo took her claims seriously, *id.* 379:14-22. Dominion has produced no evidence to contradict that sworn testimony.

Instead, Dominion just argues that Bartiromo *should have* disbelieved Powell and trusted CISA instead. Dom.Opp.168-69. But what matters for the actual malice inquiry is what Bartiromo *actually* thought at the time. *See Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 354-55 (2009) (actual-malice inquiry is a "subjective one"). And Bartiromo explained under oath that she maintained an open mind about the President's claims because the claims were being pressed by the sitting President and his lawyers in a context where the allegations would need to be proven in court in short order to impact the election. Ex.E4, Bartiromo 379:14-22. Far from "purposefully ignor[ing]" Dominion's denials or the views of "government officials and agencies"—which she shared with her viewers—Bartiromo explained in her deposition why she did not find them conclusive. *Id.* 273:22-274:10; 183:19-184:6.

Dominion second-guesses that judgment, but merely saying that no one could doubt anything a government agency says does not make it so.

Indeed, even Dominion appears to admit that "hacking an election is not inherently implausible." Dom.Opp.169. It tries to dismiss the wealth of public statements expressing concerns long before the 2020 election that voting machines could be manipulated as "entirely beside the point." Dom.Opp.169. But the fact that a federal judge, cybersecurity experts, and elected officials across the political spectrum had expressed concerns about the security of voting machines in the past is obviously relevant to whether Bartiromo did in fact keep an open mind when the President claimed that Dominion's machines had been manipulated—as Bartiromo testified. Ex.E4, Bartiromo 273:22-274:10. To be sure, that may not speak directly to how likely it is that Dominion was complicit. But the first and natural question when electronic voting machines are alleged to have been manipulated is whether that is even feasible. And even Dominion now seems to concede that it is. Indeed, its own technical expert could not dispute that Dominion's machines are potentially hackable or that widespread fraud could occur. Ex.E59, Rubin 92:13-94:10; 133:8-134:14; 211:23-212:17.

Dobbs. Dominion argues that Dobbs must have known that Powell's claims were false by November 22 because Giuliani and Ellis disavowed her. Dom.Opp. 179-80; Dom.MSJ.41-42. But as Dobbs explained, "I thought that this looked to me

to be a bit of a turf battle between Sidney Powell and Rudy Giuliani in the legal team. I didn't take it to be much more than that because she was still following the lawsuits, digging for information and evidence, and certainly I saw this more as turf politics than anything else." Dom.MSJ.Ex.111, Dobbs 153:10-155:13. Dobbs explained that he continued covering her claims because "they were still of considerable interest to the President." *Id.* Indeed, the President himself continued making the same claims about Dominion, including on Fox News on November 29 and in a press conference on December 2. Giuliani also continued making the same allegations about Dominion after November 22. Dominion can second-guess that Dobbs' judgment too, but what matters is whether Dobbs subjectively disbelieved her at the time. And the unrebutted testimony is that he did not.

Pirro. Dominion neither acknowledges nor denies Pirro's unequivocal testimony that she did not know whether the President's allegations were true or not at the time of her challenged segments. Instead, Dominion fixates on one of the many reasons why Pirro kept an open mind—namely, there "were legal sworn statements under penalty of perjury supporting" them. Ex.E6, Pirro 352:17-23. Because Pirro testified that she "did not recall" whether the allegations in those affidavits were specific to Dominion, Dominion insists that she must have had no basis to believe any such allegations. Dom.Opp.170. That is a non-sequitur twice over. First, an affidavit attesting under penalty of perjury that electronic voting

machines were manipulated during the 2020 election does not have to specifically call out Dominion to lend support to a claim that Dominion's machines were among those manipulated. Second, Pirro never testified that the *sole* reason she kept an open mind about the allegations against Dominion is because they were supported by sworn affidavits. Affidavits aside, they were being made by the sitting President and his legal team, which was reason enough for many a person in this country to keep an open mind as the story unfolded. Any uncertainty Pirro may have expressed years after the fact about exactly what which affidavit said and when does not come close to constituting clear and convincing evidence that Pirro disbelieved the allegations.

Hannity. Dominion contends that Hannity always "knew Powell's claims were not true" because he testified that the "whole narrative that Sidney was pushing, I did not believe it for one second." Dom.Opp.171. But Dominion omits the rest of the testimony: "I did not believe it for one second, and I tried to listen as time went on. I gave them a fairly generous period of time, I felt, in terms of, let's see what you have; you are making accusations; you say proof is coming. I waited for the proof. I got my Sidney answer on November 30th." Dom.MSJ.Ex.122, Hannity 322:21-25. While Hannity may have been skeptical of the claims from the outset, it was only *after* Powell was unwilling to produce proof on his November 30 show—the only *Hannity* show Dominion challenges—that Hannity "got [his] Sidney

answer." *Id.*; *see also id.* at 420:9-17. Dominion fails to explain how Hannity's decision to bring Powell on his show and expose to his viewers her *lack* of evidence to support her claims shows "dishonesty in dealing with Dominion." Dom.Opp.171.

Carlson. Dominion's exceedingly brief discussion of the lone *Tucker Carlson Tonight* segment it challenges mainly just reiterates its (unsubstantiated) argument that Carlson knew what Lindell was going to say. Dom.Opp.172; *but see* Ex.E7, Carlson at 185:21-24, 320:14-321:9 (confirming that he had "no idea" that Lindell would discuss Dominion). Beyond that, Dominion argues that even if Carlson did not know that Lindell would discuss Dominion on his January 26 show, he nevertheless published Lindell's statements with actual malice because Fox News re-aired the broadcast later that night. Setting aside its conflation of responsibility and actual malice, Dominion once again ignores the record: Carlson and his producers all testified that they did not think that Lindell said anything defamatory about Dominion on the January 26 show because his statements were too vague and confusing to be understood as concretely alleging anything. *See* Dom.MSJ.Ex.105, Carlson 317:18-318:20; 321:22-323:21; 318:21-319:14; Dom.MSJ.Ex.148 Wells 107:17-108:6; Dom.MSJ.Ex.134 Pfeiffer 261:22-24. That testimony forecloses any claim that Dominion can prove by clear and convincing evidence that Carlson or his producers republished—or published in the first instance—Lindell's statements despite knowing they were false. Dominion's arguments underscore the lack of any

evidence substantiating its claims about the January 26 broadcast of *Tucker Carlson Tonight*.

B. Dominion's Defamation-By-Omission Theory Has No Basis In Law.

Unable to identify clear and convincing evidence that any host (or any relevant producer) published any defamatory statements with actual malice, Dominion tries to broaden the lens. According to Dominion, a media organization is on the hook for a defamatory statement so long as someone in the "chain of command" suspects that the statement is false and fails to stop the publication from airing it, even if that person is not actually involved in the publication. That sweeping theory has no basis in the law. As Fox News explained when Dominion pressed the same theory in its own motion for summary judgment, there is no such thing as defamation by omission. FNN.Opp.83-86, 117-20. To demonstrate that someone is "responsible" for an allegedly defamatory statement, a defamation plaintiff must show that the person "affirmatively act[ed] to direct or participate in the publication" of the statement. *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1044 (Pa. 1996). "[M]erely fail[ing] to hinder its publication" is not enough. *Id*. Nor could it be, as sweeping into the actual-malice inquiry the knowledge of everyone with any responsibility for the content of a media organization would sneak in through the back door the same "collective knowledge" test that *Sullivan* kicked out the front. 376 U.S. at 287-88.

It is little surprise, then, that courts across the country have cast doubt on similar defamation-by-omission theories. In fact, courts have made clear that defamation-by-omission is not a viable theory even if the defendant possesses the authority to stop a publication and has exercised that authority in the past. *Maynard v. Fellner*, 284 N.W.2d 121 (Wis. Ct. App. 1979), *aff'd* 297 N.W.2d 500 (Wis. 1980). In *Maynard*, the plaintiff, like Dominion, sought to defeat summary judgment by pointing to "two occasions when [the printer the plaintiff sued] refused to publish pictures" in the newspaper it printed. *Id.* at 123. Although the plaintiff argued that those lone instances sufficed to render the printer responsible for *all* content it printed, the court disagreed, explaining that "[b]y refusing to print these pictures, Port did not undertake a duty to review and verify the non-libelous character of all material it prints." *Id.* Just so here.

None of Dominion's cases is to the contrary. In *Hunt v. Liberty Lobby*, the court looked to the state of mind of the Chairman and Managing Editor of the publication *because they were the people who changed the original headline and added the misleading subheadlines*. 720 F.2d 631, 636 (11th Cir. 1983). In *Stone v. Essex County Newspapers, Inc.*, the editor personally reviewed the challenged article. 330 N.E.2d 161, 174 (Mass. 1975). Dominion has produced zero evidence that any of the myriad Fox News or Fox Corporation executives whose cherry-picked statements it repeats ad nauseum drafted, reviewed, or edited any statement

Dominion challenges. Dominion's reliance on *Phoenix Newspapers, Inc. v. Church* is yet another study in selective quotation. Dominion says that the court looked to the state of mind of the employee with "ultimate authority to approve or disapprove," but Dominion conveniently omits that the same employee was "directly involved in the activities leading to the publication of the editorial." 537 P.2d 1345, 1359 (Ct. App. Az. 1975). Beyond that, Dominion just cites a treatise, written by one of its own attorneys, refuting the proposition that only "one person" in an organization can be responsible for a publication. True—but irrelevant, as Fox News has never claimed otherwise. Of course multiple employees can play an affirmative role in drafting or publishing a defamatory statement. But that does not begin to support expanding the actual-malice inquiry to probe the mind of executives and supervisors who played *no* role in the drafting or publishing the statement.

Dominion's contrary rule not only finds no support in case law, but make no sense given the principles underlying the actual-malice standard. As the Supreme Court has made clear, actual malice requires "more than a departure from reasonably prudent conduct." *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). Yet holding a news organization responsible for a supervisor's failure to intervene and stop publication of a statement she had no role in preparing or publishing would collapse the settled distinction between actual malice and "whether a reasonably prudent [person] would have published" under the circumstances. *St.*

Amant v. Thompson, 390 U.S. 727, 731 (1968). It would also gut *Sullivan*'s bar on trying to prove actual malice via the "collective knowledge" of the organization, as it would sweep in the knowledge of everyone in the editorial chain of command in virtually every case. That would mark a sea change in defamation law, rendering intrusive and speech-chilling inquiries into the state of mind of myriad editors, producers, and executives all the way up to the editor-in-chief, the CEO, and even members of the Board of Directors routine in defamation cases. Thankfully, that is not the law.

III. Dominion Has Produced No Non-Speculative Evidence Of Lost Profits Or Lost Enterprise Value.

Fox News is entitled to summary judgment on Dominion's claims for economic damages. Dominion now admits that its headline-grabbing claim of $1.6 billion was fanciful from the start, as it now agrees (after its own damages expert contradicted it) that its original claim for *both* $1 billion in enterprise value *and* $600 million in lost profits was double counting. Dom.Opp.182 (lost profits are "alternative" to lost enterprise value); Ex.E57, Hosfield 34:16-35:8 ("it would be economically improper to recover both"). Worse, Dominion's own damages expert now admits that the figures in Dominion's complaint were wildly exaggerated. He calculates Dominion's alleged lost business opportunities at $88 million—nothing close to the $600 million Dominion originally claimed. And while he puts lost enterprise value

at a still-inflated $920 million (not $1 billion), he admits that this figure rests on the implausible assumption that Dominion, a thriving enterprise that has gained, not lost, customers since the 2020 election, will somehow lose all its customers and go out of business by 2031. *Id.* 135:25-137:4; 210:24-211:13. Dominion has also never explained how it can claim on one hand that the allegations were so implausible that no one could have believed them when made, yet claim on the other hand that it is injured to the tune of almost a billion dollars because lots of people still believe them years later. And even if Dominion could substantiate these astronomical claims, it could not recover them from Fox News because it cannot prove that they were caused by the coverage it challenges. FNN.MSJ.148-53. None of Dominion's arguments is convincing.

Dominion first argues that it does not need to prove economic damages because this is a defamation per se case. But Dominion confuses *general damages—i.e.*, non-economic damages like harm to reputation, standing in the community, and mental anguish—with *special damages—i.e.*, out-of-pocket losses like lost profits and lost enterprise value. While *general damages* may be presumed in a defamation per se case, *special damages* may not. *See Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 75 F.Supp.2d 235, 241 (S.D.N.Y. 1999), *aff'd*, 314 F.3d 48 (2d Cir. 2002); *Robertson v. McCloskey*, 680 F.Supp. 414, 415-16 (D.D.C. 1988). Fox News did not move for summary judgment on *general damages*. It moved for summary

judgment on *special damages*, including on Dominion's claim for lost profits and lost enterprise value.

On *that* question, Fox News is entitled to summary judgment, as Dominion has not presented enough evidence for a jury to find that Dominion lost *any* business or enterprise value because of the specific statements Dominion challenges. "New York imposes very strict requirements for proof of special damages in the form of lost customers," providing that "persons who ceased to be customers, or who refused to purchase, must be named." *Fashion Boutique*, 75 F.Supp.2d at 239-40. And New York law makes clear that Dominion must prove its losses "with reasonable certainty and without speculation." *Wolf Street Supermarkets v. McPartland*, 108 A.D.2d 25, 33 (N.Y. App. Div. 1985).

That strict standard is fatal. At most, Dominion points to testimony from Dominion officials suggesting that some customers "*may have*" chosen other vendors because of "stuff on Fox news," Dom.Opp.Ex.673, Rosania 249:1-5, or recounting conversations with officials attributing losses to "the media" or "misinformation" more generally, rather than any of the challenged statements on Fox News specifically, *see* Dom.MSJ.Ex.131, Noell 224:23-225-21; 230:20-231:3; Dom.MSJ.Ex.144, Singh 187:22-188:3. But even assuming that hearsay (or, in some cases, double hearsay) is admissible, speculation that customers may have abandoned ship because of Fox News' coverage of the allegations is not enough.

Moreover, much of that speculation is contradicted by the record. Dominion points to testimony suggesting that it lost a contract in Williamson County because of controversy surrounding the 2020 election, but Dominion's own records confirm that it was fired by Williamson County because of its poor performance. *See* Ex.D28 ("Williamson County will use new voting machines in its 2022 election cycle following vote tabulation discrepancies found during the October [2021] election"). And while Dominion points to testimony from two employees in Maricopa County, Dom.Opp.186, it neglects to mention that Maricopa County is still a customer. *See* Dom.Opp.Ex.738, Hosfield Rept.Ex.6. Dominion claims that "potential acquisitions" are "off the table." Dom.Opp.186. But which ones? Dominion does not say. Dom.MSJ.Ex.144, Singh Dep. Tr. 35:6-36:2.

Dominion cites its expert, Professor Steckel, but Mr. Steckel did not analyze Dominion's customers or whether or how any challenged statement affected their purchasing decisions. Dom.Opp.Ex.732 at 4-6. Dominion points to the calculations of its damages expert, Mark Hosfield, Dom.Opp.186, but Hosfield offered no opinion on whether any of the challenged statements were the cause of any losses. *See* Ex.E57, Hosfield 248:23-249:11 ("I'm not going to testify that these—that Fox was the cause of these losses."). He simply assumed causation for purposes of his

calculations. *Id.* Dominion cannot use assumptions of causation to create fact questions about causation.[9]

Dominion claims that Fox News "conflates causation of damages with the apportionment of damages among multiple defamers." Dom.Opp.187. It is Dominion that confuses things. Apportionment questions come into play only *after* a defamation plaintiff establishes that a defendant's conduct is a legal cause of the plaintiff's injuries. *See* W. Page Keeton, Prosser & Keeton on Torts §52 (1984) ("Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes.").[10] After all, if Dominion's customers chose other vendors over Dominion because of President Trump's tweets rather than anything to do with Fox News, then Fox News would plainly not be liable for that loss.

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[9] Dominion points to out-of-pocket expenses for private security, lawyers (though notably not its lead trial counsel, who is working on "pure contingency," Ex.H25), threat monitoring, and public relationships. Dom.Opp.183. But those expenses have nothing to do with Dominion's lost enterprise value and lost profit claims. And Dominion does not point to any evidence that causally links those expenses to any of the statements Dominion challenges. *Id.*

[10] Dominion argues that it does not need to prove "but for" cause, but New York courts have unequivocally held otherwise. *See SRW Assoc. v. Bellport Beach Property Owners*, 129 A.D.2D 328, 331-32 (N.Y. App. Div. 1987) (rejecting defamation claim for lack of causation where plaintiff offered nothing but speculation that statements were "a cause-in-fact" of claimed injury).

Dominion cannot assume away its causation burden and skip straight to apportionment. None of Dominion's cases say otherwise. Those cases just stand for the unremarkable proposition that, once the plaintiff has proven that the defendant's conduct is a cause of its loss, the defendant cannot point to other joint tortfeasors to mitigate damages under a joint-and-several liability regime. *See Palmer v. New York News Publ'g Co.*, 31 A.D.210 (N.Y. App. Div. 1898). Dominion thus must prove both but-for and proximate causation. Yet it has produced no evidence from which a jury could find either.

IV. Dominion's Punitive Damages Argument Misstates The Law.

Dominion's claim for punitive damages likewise fails as a matter of law. To recover punitive damages, Dominion must prove not only that the individuals responsible for the challenged statements published them with actual malice, but that they did so with common-law malice too. Common-law malice is an even more demanding standard, as it requires proof that the defendant made defamatory statements "out of hatred, ill will, or spite." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 184 (2d Cir. 2000). A "triable issue of 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." *Morsette v. The Final Call*, 309 A.D.2d 249, 255 (N.Y. App. Div. 2003). Dominion does not deny that it has failed to produce any evidence

that anyone at Fox News was motivated by even the slightest desire to injure Dominion; indeed, its own expert witness concedes that there is none. Ex.F5 ¶63.

Instead, Dominion accuses Fox News of misstating the standard. In Dominion's view, it can recover punitive damages so long as it shows that Fox News made the statements with "wilful, wanton or reckless disregard" of Dominion's rights. Dom.Opp.190. That is incorrect. *Morsette* illustrates the point. In *Morsette*, the plaintiff, a successful businesswoman, sued the defendant newspaper after it included her picture in an article titled "Mothers in Prison, Children in Crisis." 309 A.D.2d at 250. The photograph was taken at an event that had nothing to do with the article, and the plaintiff had never been in prison before. The editor of the newspaper nevertheless picked a photograph of the plaintiff and her son from a "photo file," altered the photo to remove her smile and to make it look like she was wearing a prison uniform, and included it in the article without attempting to obtain the plaintiff's consent. *Id.* at 251. The jury concluded that the newspaper defamed the plaintiff and awarded her $640,000 in compensatory damages and $700,000 in punitive damages. *Id.* at 252.

On appeal, the appellate court reversed the punitive damages award "despite the callous indifference with which defendant doctored random photographs to imply criminal conduct." *Id.* at 254. The court explained that to recover punitive damages, the plaintiff must prove "common-law malice," and that "***a triable issue of common-***

law malice is raised only if a reasonable jury could find that the speaker was solely motivated by a desire to injure plaintiff, and that there must be some evidence that the animus was 'the one and only cause for the publication.'" *Id.* at 255 (citing *Present v. Avon Prods.*, 253 A.D.2d 183, 189 (1999), *Stukuls v. State of New York*, 42 N.Y.2d 272, 282 (1977)) (emphasis added). "[N]otwithstanding defendant's reprehensible, irresponsible conduct, there is no evidence that defendant possessed the requisite 'mental state in relation to the plaintiff,' i.e., ***that the malice or ill will was directed specifically at plaintiff***, to support an award of punitive damages." *Id.*

The majority rejected the approach advocated by the dissent, which accused the majority of ignoring *the very same language* in the pattern jury instructions that Dominion invokes here. *Id.* at 259 (Marlow, J., dissenting) (quoting New York Pattern Jury Instructions §3:30 for the proposition that, "[i]n order to determine whether a defendant acted maliciously, the factfinder must determine whether the statement was 'made with deliberate intent to injure or made out of hatred, ill will, or spite or made with wilful, *wanton or reckless disregard of another's rights*'" (emphasis in original)). The dissent would have concluded that the plaintiff was entitled to punitive damages because the defendant published her photograph "without the slightest concern for plaintiff's right to her flawless reputation." *Id.* at 260. The majority agreed with the dissent that the defendant's conduct was "reprehensible," "irresponsible," and displayed a "callous indifference" toward the

plaintiff. *Id.* at 254-55. But that was not enough. As the majority explained, the defamation plaintiff must prove that the speaker was motivated *solely* by a desire to injure plaintiff, and that the animus was the one and only cause for the publication. *Morsette* squarely forecloses Dominion's position.

Dominion has not identified *any* New York case that awards punitive damages to a defamation plaintiff because the defendant acted with "wilful, wanton or reckless disregard of another's rights." Dominion relies primarily on the New York Pattern Jury Instructions. Dom.Opp.190. But New York courts have squarely held that the pattern jury instructions "do not take precedence over decisional law." *Acerra v. Trippardella*, 34 A.D.2d 927, 927 (N.Y. App. Div. 1970). Indeed, New York courts have repeatedly declined to apply the New York Pattern Jury Instructions when they depart from case law. *E.g.*, *id.* ("The court's charge, though based on New York Pattern Jury Instructions, was erroneous in its instruction."); *Barlow v. Liberty Maritime Corp.*, 746 F.3d 518, 527 n.14 (2d Cir. 2014) (explaining that New York Pattern Jury Instruction "misstates New York law"); *Brussels Bank Lambert v. Credit Lyonnais (Suisse) S.A.*, 2000 WL 1694308, *1 (S.D.N.Y. 2000) (declining to follow New York Pattern Jury Instruction and noting that "[t]he PJI, of course, are not binding authority"). Here, *Morsette* makes plain that the precise language Dominion cites is not the law of New York.

Dominion also cites *Prozeralik*, but that case does not help. *Prozeralik* held that the plaintiff was ***not entitled*** to punitive damages. To be sure, in discussing whether the actual-malice standard suffices to justify punitive damages, the court opined in dictum that actual malice does not "measure up to the level of outrage or malice underlying the public policy which would allow an award of punitive damages, i.e., 'to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights.'" 626 N.E.2d at 42. But when it came time to decide whether the plaintiff could recover punitive damages, the court did not mention the words "wilful," "wanton" or "reckless disregard." It instead explained that the record did not support a finding that the defendant published the statements about the plaintiff "out of hatred, ill will, spite, criminal mental state or that traditionally required variety of common-law malice." *Id.* at 42. The court did not elaborate on what it meant by "that traditionally required variety of common-law malice," but *Morsette* makes clear that a defamation plaintiff must prove that the defendant acted *solely* out of hatred, ill will, or spite. 309 A.D.2d at 255 (citing *Prozeralik*, 626 N.E.2d at 42).

Nor do any of the other cases cited in Pattern Jury Instruction §3:30 support Dominion's argument that "wilful, wanton or reckless disregard" is enough. *See Barlow*, 746 F.3d at 527 n.14 (finding that New York Pattern Jury Instruction "misstate[d] New York law" where "cases cited in the jury instruction's

commentary" did not support it). *Harris v. Hirsh* did not use the words "wilful," "wanton," or "reckless disregard." It simply held that the defamation plaintiff was *not* entitled to punitive damages because "there was no proof that defendant acted with common-law malice." 228 A.D.2d 206, 209 (N.Y. App. Div. 1996). *Marcus v. Bressler* also did not use the words "wilful," "wanton," or "reckless disregard." It stated that "common-law malice … is required to justify punitive damages," and concluded that the plaintiff could not recover punitive damages because she had already recovered sanctions. 277 A.D.2d 108, 109-10 (N.Y. App. Div. 2000). *Dobies v. Brefka* at least upheld a punitive damages award, but it did so because the plaintiff presented "proof which suggested that [the defendant] made these false accusations against him ***out of spite and anger***." 45 A.D.3d 999, 1001 (N.Y. App. Div. 2007) (emphasis added). The case does not mention anything that resembles Dominion's standard.

As for *Celle*, the court could not have been clearer:

> Punitive damages may only be assessed under New York law if the plaintiff has established common law malice in addition to the other elements of libel. *See Prozeralik v. Capital Cities Communications*, 626 N.E.2d 34, 41-42 (1993). ***To do so, plaintiffs must prove by a preponderance of the evidence that the libelous statements were made out of "hatred, ill will, [or] spite."*** *Id.* at 42.

209 F.3d at 184 (emphasis added). And in assessing whether the plaintiff was entitled to punitive damages, the Second Circuit did not mention the words "wilful,"

"wanton," or "reckless disregard." Instead, it concluded that the plaintiffs "introduced sufficient proof of ***ill will and spite*** to sustain the award of punitive damages." *Id.* at 190 (emphasis added). The only time the Second Circuit mentioned the words "wilful," "wanton" and "reckless disregard" was when it recited in the facts section of the opinion the jury instructions that the district court applied, and when it quoted the dictum in *Prozeralik* explaining that proving actual malice is not enough to obtain punitive damages. But the test that *Celle* actually applied is whether the defendant published the allegedly defamatory statements out of "hatred, ill will, [or] spite." *Id.* at 184.

Dominion's misunderstanding of the proper legal standard infects the rest of its analysis. Dominion lists several factors that it thinks a juror can consider in deciding whether to assess punitive damages. Dom.Opp.190-91. But those factors do not help Dominion, as Dominion has never even tried to claim that anyone at Fox News harbored hatred, ill will, or spite against Dominion. That is the end of Dominion's punitive damages case.

None of the cases that Dominion cites supports its contrary argument. *Kostolecki v. Buffalo Courier Express*, 163 A.D.2d 856 (N.Y. App. Div. 1990), held that the plaintiff marshaled sufficient facts of "*actual malice*" for a jury trial on punitive damages. *Id.* at 857 (emphasis added). But that decision predates cases like *Prozeralik* and *Morsette*, which squarely hold that proving actual malice is not

enough for punitive damages in defamation cases. *Stokes v. Morning Journal*, 72 A.D. 184 (N.Y. App. Div. 1902), likewise predates *Prozeralik* and *Morsette* by almost a century. *Curtis Publishing v. Butts*, 388 U.S. 130 (1967), held that a punitive damages award under Georgia defamation law (and a separate punitive damages award under Texas defamation law) did not violate the U.S. Constitution. *Id.* at 137-38, 161. It says nothing about the standard for punitive damages under New York law. *Hinerman v. Daily Gazette*, 423 S.E.2d 560 (W. Va. 1992), upheld the constitutionality of a punitive damages award under West Virginia law. *Id.* at 580-81. *Morris v. Flaig*, 511 F.Supp.2d 282 (E.D.N.Y. 2007), and *Garcia v. O'Keefe*, 2004 WL 2375284 (N.Y. Sup. Ct. Sept. 9, 2004), were not even defamation cases. They have no relevance here, as both the U.S. Supreme Court and New York courts have repeatedly explained that free speech and free press concerns embodied in the U.S. and New York Constitutions require heightened standards for punitive damages in the defamation context. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Morsette*, 309 A.D.2d at 254.

In all events, even assuming Dominion has the right standard, no reasonable jury could find that Fox News published the challenged statements with "wilful, wanton or reckless disregard of" Dominion's rights. Indeed, much of Dominion's argument boils down to its claim that Fox News "producers," "hosts," and "executives" who were not even involved in publishing the challenged statements "knew the Dominion

conspiracy theories were false." Dom.Opp.191. But even assuming that Dominion is right about that, proving actual malice is not enough for punitive damages. *See Morsette*, 309 A.D.2d at 254. A fortiori, proving actual malice in the abstract, divorced from anyone with actual responsibility for a challenged statement, does not suffice.

Dominion next claims that Fox News hosts knew that the President's allegations were "extremely damaging to Dominion as a company and to its employees." Dom.Opp.191. But Dominion refuses to acknowledge that Fox News hosts repeatedly testified that they covered the President's allegations about Dominion because the President's efforts to overturn the election results were newsworthy, and the audience deserved to hear about them even if they had not yet been proven. FNN.MSJ.156-57. Dominion also ignores that hosts repeatedly reached out to Dominion for comment and invited Dominion on air to tell its side of the story. Exs.I9, I10, I11. In fact, Dominion accepted one such opportunity, sending executive Michael Steel to sit for an interview on *America's News Headquarters* on November 22. But Dominion declined every other invitation from Fox News. Ex.E10, Bischoff 188:2-21. Dominion also ignores the many times hosts pushed back on Giuliani's and Powell's allegations, emphasized that they would need to be proven in court, and offered competing views from the press, members of Congress, and legal experts. FNN.MSJ.25-33. None of that is consistent with Dominion's

theory that Fox News acted with "wilful, wanton or reckless disregard of" Dominion's rights. Indeed, if the newspaper's "reprehensible," "irresponsible," and "callous" behavior in *Morsette* was not enough for punitive damages, 309 A.D.2d at 254-55, it is impossible to see how any reasonable jury could conclude consistent with New York law that Dominion is entitled to punitive damages in this case.

In all events, even if Dominion could demonstrate that someone at Fox News published false and defamatory statements about it with both actual and common law malice, that would still not be enough to obtain punitive damages from Fox News. Under New York law, "punitive damages can be imposed on an employer ... only when a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct." *Loughry v. Lincoln First Bank, N.A.*, 494 N.E.2d 70, 74-75 (N.Y. 1986). There is no evidence that any "superior officer" at Fox News ordered, participated in, or ratified any wrongdoing that would justify holding Fox News blameworthy. FNN.MSJ.156-57. To the contrary, Fox News executives like Suzanne Scott and Jay Wallace testified that they played no role in any of the allegedly defamatory publications, and Fox News hosts and producers confirmed that they did not. Dominion has not identified any evidence to the contrary. FNN.Opp.120-32.

At bottom, Dominion's argument for punitive damages boils down to a claim that it is enough that the defendant published with actual malice defamatory

statements that it knew would injure the plaintiff. But that, of course, will be true in every case, as a plaintiff cannot seek punitive damages unless it first succeeds in proving that the defendant made defamatory statements with actual malice. By Dominion's telling, then, *every* defamation plaintiff may ask a jury to award punitive damages—and not just against anyone who says something defamatory, but against any news organization that publishes anything defamatory, and even any parent company of such an organization. New York courts have soundly rejected that capacious claim, and rightly so, as such a regime would "exacerbate[] the danger of media self-censorship" that the Supreme Court has long warned are already inherent in defamation claims. *Gertz*, 418 U.S. at 350. At the very least, then, the Court should reject Dominion's punitive damages claim, as Dominion has produced no evidence from which it could satisfy the demanding standards of New York law.

CONCLUSION

The Court should grant Fox News' motion for summary judgment.

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