



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY BOARD OF EDUCATION RETIREMENT SYSTEM, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY POLICE PENSION FUND, NEW YORK CITY TEACHERS' RETIREMENT SYSTEM, and THE STATE OF OREGON, BY AND THROUGH THE OREGON ATTORNEY GENERAL AND OREGON STATE TREASURER ON BEHALF OF THE OREGON PUBLIC EMPLOYEES RETIREMENT FUND,

Plaintiffs,

v.

K. RUPERT MURDOCH, LACHLAN K. MURDOCH, CHARLES D. CAREY, JACQUES A. NASSER, PAUL D. RYAN, ANNE DIAS, ROLAND A. HERNANDEZ, VIET DINH, and SUZANNE SCOTT,

Defendants,

FOX CORPORATION,

Nominal Defendant.

C.A. No. 2023-0931-JTL

**PUBLIC VERSION
FILED ON: SEPTEMBER 15, 2023**

VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

Plaintiffs the New York City Employees' Retirement System, New York City Board of Education Retirement System, New York City Fire Department Pension Fund, New York City Police Pension Fund, and New York City Teachers' Retirement System (collectively, the "NYC Funds") and the State of Oregon, by and through the Oregon Attorney General and Oregon State Treasurer on behalf of the Oregon Public Employees Retirement Fund ("Oregon" and together with the NYC Funds, "Plaintiffs"), stockholders of Fox Corporation ("Fox", "Fox Corp." or the "Company"), bring this action on Fox's behalf against the current officers and directors identified below ("Defendants"). The allegations in this Verified Complaint are based on the knowledge of Plaintiffs as to themselves, and on information and belief, including the review of publicly available information and documents obtained under 8 *Del. C.* § 220, as to all other matters.

NATURE OF THE ACTION

1. For a media company, a jury verdict for defamation or a related intentional tort can pose an existential threat. That has been clear since at least 2016, when Gawker Media went into bankruptcy and later was forced to liquidate after the former professional wrestler known as Hulk Hogan obtained a \$140 million jury

verdict against the company for invasion of privacy.¹ In 2018, Alex Jones and his company faced multiple defamation lawsuits over Jones's repeated claims, via his *InfoWars* website, that the mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut, was a hoax. In one of those lawsuits, eight families and a first responder were awarded \$965 million in compensatory damages, \$150 million in punitive damages, and attorneys' fees of \$323 million. A separate case led to an award of nearly \$50 million in compensatory and punitive damages.² The defamation lawsuits forced Jones and his company to file for bankruptcy protection.

2. These precedents teach that the board of directors of a Delaware-incorporated media company cannot be indifferent to the existential threat of

¹ Maane Khatchatourian, *Hulk Hogan Awarded \$115 Million in Gawker Sex Tape Lawsuit*, Variety (Mar. 18, 2016, 4:04 PM), <https://variety.com/2016/biz/news/hulk-hogan-sex-tape-gawker-lawsuit-1201734113/>; *Hulk Hogan Reaches Settlement with Gawker Worth Over \$31 Million*, NPR (Nov. 2, 2016, 5:23 PM), <https://www.npr.org/sections/thetwo-way/2016/11/02/500389355/hulk-hogan-reaches-settlement-with-gawker-worth-over-31-million>; First Amended Complaint and Demand for Jury Trial, *Bollea v. Gawker et al.*, (6th Cir. M.D. Fla. 2013) (No. 12012447-CI-011), <https://s3.documentcloud.org/documents/2111332/hogans-amended-complaint.pdf>.

² *Alex Jones, Infowars, and the Sandy Hook Defamation Suits*, First Amendment Watch at New York University (Dec. 2, 2022), <https://firstamendmentwatch.org/deep-dive/alex-jones-infowars-and-the-sandy-hook-defamation-suits/>; *Jones v. Lafferty*, No. CPL-UWY-CV-18-60464360-S (CT. Super. Ct. Nov. 10, 2022) (awarding punitive damages); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *Free Speech Systems LLC*, No. 22-60043 (Bankr. S.D. Tex. July 29, 2022).

broadcasting or publishing falsehoods that constitute actionable defamation. A claim for defamation can expose a media defendant to reputationally damaging discovery and a potentially ruinous judgment.

3. Major media companies generally take precautions to minimize potential defamation claims. They follow established practices and standards about what they will publish, engage in fact-checking, undertake editorial review, and make timely corrections to inaccuracies. When accused of publishing a false story, they investigate and, if warranted, retract the story if it falls short of editorial standards. They apologize to reduce the reputational harm.

4. Fox News Network, LLC, a wholly-owned subsidiary of Fox that operates Fox News Channel, Fox Business Channel, Fox News Radio, and Fox News Digital (collectively, “Fox News”), operates under a different business model. At all relevant times, Rupert Murdoch (“Rupert”) and his son, Lachlan Murdoch (“Lachlan”), caused Fox News to promote political narratives without regard for whether the underlying factual assertions were true or based on sources worthy of credit. Fox News lacks written standards or practices for what it broadcasts. It is loath to correct factual errors. It chooses to profit from defamation and it treats potential tort claims and settlements as unlikely or as a cost of doing business.

5. A 2018 book co-authored by Harvard Law School professor Yochai Benkler and two other academics affiliated with the Berkman Klein Center for Internet & Society at Harvard University, entitled *Network Propaganda*, uses large-scale data analysis of digital media to understand the place of Fox News within the media ecosystem.³ The data analysis demonstrates new business pressures in 2016 from pro-Trump digital media outlets such as *Breitbart*, and how Fox News successfully responded to those pressures by amplifying Donald Trump's favored political narratives, even if they were factually unfounded. Pressures from within its own media ecosystem meant that Fox News was at risk of losing its audience if it adhered to journalistic standards for fact-checking. Fox News's business model thus created increased risk of defamation claims.

6. In March 2019, Fox was spun-off as an independent company from Twenty-First Century Fox, Inc., with Rupert serving as Chair of Fox and Lachlan serving as Executive Chair and CEO of Fox. It was incumbent on Fox's fiduciaries to be attuned to the legal risk and business risk associated with operating a publicly traded mass media company that promotes factually unfounded political narratives. Critically, unlike internet platforms, Fox News did not enjoy legal immunity from

³ Yochai Benkler, Robert Faris, and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (2018) [hereinafter *Network Propaganda*], <https://academic.oup.com/book/26406>.

defamation risk under 47 U.S.C. § 230. And unlike similarly situated fringe media outlets, Fox News was an inviting litigation target because of its deep pockets. At all relevant times, the board of directors of Fox (the “Board”) knew that Fox News was promoting narratives that created defamation risk. Yet, Fox’s leadership consciously disregarded defamation risk.

7. In May 2017, Fox News manufactured a false story that Democratic National Committee (“DNC”) staffer Seth Rich had been murdered because he hacked DNC emails and provided them to WikiLeaks. This journalistic scandal led Seth Rich’s parents to sue Fox News. Their claim for intentional infliction of emotional distress was upheld in 2019 by the United States Court of Appeals for the Second Circuit in an opinion that characterized Fox News’s manufacturing of the false story as “a campaign of emotional torture.” The case was settled for millions of dollars in October 2020, shortly before the scheduled depositions of major Fox News hosts Lou Dobbs and Sean Hannity. Fox’s Audit Committee and Board were informed of the settlement. The Seth Rich scandal and settlement did not prompt the Board to take any steps to monitor or mitigate defamation risk.

8. In the immediate aftermath of Election Day 2020, Fox News incurred the wrath of Trump and his supporters for being the first network to call the State of Arizona for Joseph Biden and for failing to back Trump’s claim that he had won the

election. In response to massive viewer backlash, Rupert, Lachlan, and Suzanne Scott, the CEO of Fox News, decided to indulge and amplify Trump's election-denial conspiracy theories, including false claims that election technology companies Dominion Voting Systems ("Dominion") and Smartmatic USA ("Smartmatic") were Venezuelan companies that illegally switched votes from Trump to Biden. Dominion and Smartmatic engaged in extensive public relations campaigns and lobbying of Fox News to set the record straight, sent cease-and-desist letters, demanded retractions, and threatened litigation. Fox News did not respond to the letters from counsel for Dominion and Smartmatic and did not elevate them to the Audit Committee or the Board. Fox News hosts continued to promote defamatory accusations against Dominion and Smartmatic.

9. Fox has now entered the pantheon of companies that have incurred massive cost from tort litigation. On April 18, 2023, Fox settled Dominion's defamation claim for \$787.5 million on the first day of a jury trial. Cross-motions for summary judgment made public shortly before the case settled revealed internal Fox documents and testimony evidencing that Fox News executives and hosts chose to broadcast unsupported and disbelieved conspiracy theories about Dominion. The summary judgment opinion eviscerated Fox's legal defenses. Delaware Superior Court Judge Eric Davis took the issue of falsity away from the jury, ruling (with

emphasis in the original) that the “*evidence developed in this civil proceeding demonstrates that [it] is **CRYSTAL** clear that none of the Statements relating to Dominion about the 2020 election are true.*” Dominion’s damages theories, including punitive damages, were for the jury to decide, along with the question of whether Fox News had acted with “actual malice” in making the false statements.

10. Shortly before the Dominion settlement, Fox settled for an undisclosed sum a related defamation lawsuit by Venezuelan businessman Majed Khalil, who was accused by Fox News host Lou Dobbs of being a “liaison of Hezbollah” who had committed “a cyber Pearl Harbor” in the 2020 election via Dominion and Smartmatic.

11. Smartmatic’s case against Fox News remains pending. Experts have speculated that the settlement value of the case exceeds \$1 billion.

12. Defendants are fiduciaries of Fox and/or Fox News who are responsible for the losses in the above-referenced cases because they consciously disregarded defamation risk. Three related liability theories apply: (i) Defendants adopted an illegal business model by which Fox News pursues profits by committing actionable defamation (known as a *Massey Claim*); (ii) Defendants undertook no good-faith efforts to establish systems or practices for minimizing, mitigating, or monitoring defamation risk (known as an *Information Systems Claim*); and (iii) Defendants took

no action in the face of red flags of defamation risk (known as a *Red Flags Claim*), which included the defamatory broadcasts themselves, the public relations campaigns of Dominion and Smartmatic, and their public threats of litigation.

13. A *Massey Claim* takes its name from a case involving a coal mining company that violated safety regulations, which led to a massive mine explosion and a “myriad of direct legal proceedings brought by tort plaintiffs and regulators.”⁴ In the words of then-Vice Chancellor Strine:

Delaware law does not charter law breakers. Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue “lawful business” by “lawful acts.” As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.⁵

14. Fox News adopted a tortious business model, which dates back at least to the Seth Rich scandal in 2017. Unlike other major media companies, Fox News gives its executives and hosts free rein to promote factually unfounded political narratives. On November 8, 2020, Rupert, Lachlan, and Scott decided to stem viewer backlash by embracing Trump’s claims of a “stolen election.” In the words

⁴ *In re Massey Energy Co.*, 2011 WL 2176479, at *29 (Del. Ch. May 31, 2011).

⁵ *Id.* at *20 (quoting 8 *Del. C.* §§ 101(b), 102).

of a November 16 email from Rupert to Scott: “We don’t want to antagonize Trump further Everything at stake here.”⁶

15. Fox News lacked a viable legal defense to the defamation claims of Dominion and Smartmatic. Fox News had broadcast factual assertions of criminal election fraud that were indisputably false. There was ample reason to believe that Fox News acted with actual malice (*i.e.*, knowledge of falsity or reckless disregard as to falsity). Fox News’s failure to operate within the boundaries of tort law necessitated a litigation strategy of arguing for expanded First Amendment protection for broadcasting about a newsworthy subject, including a planned appeal to the United States Supreme Court.⁷ This litigation strategy reflected the weakness of Fox News’s position under existing precedent and it ran counter to the trend of restricting First Amendment defenses to defamation claims. It was also untenable. Facing a foreseeably disastrous trial after having lost its First Amendment defense in motion practice, Fox settled Dominion’s claims for \$787.5 million.

⁶ NYC_220_8987 (PX5328) (emphasis added). For purposes of this complaint, “NYC_220_####” refers to documents produced through Plaintiffs’ § 220 requests to Fox News. “PX#####” refers to the Dominion litigation’s plaintiffs’ Exhibits prepared for trial.

⁷ Jim Rutenberg, Michael S. Schmidt and Jeremy W. Peters, *Missteps and Miscalculations: Inside Fox’s Legal and Business Debacle*, N.Y. Times (May 27, 2023), <https://www.nytimes.com/2023/05/27/business/media/fox-news-dominion-voting.html>; Gabriella Ferrigine, *Ex-prosecutor: Fox plot to appeal defamation case to Supreme Court could badly backfire*, Salon (April 17, 2023, 11:16 AM).

16. After the Dominion settlement, Lachlan reaffirmed Fox’s business model: “There’s no change in programming strategy at Fox News.... It’s obviously a successful strategy.” This unchanged programming strategy included other false narratives that led to the assertion of defamation claims against Fox News: (i) Fox News host Tucker Carlson repeatedly accused Trump supporter Ray Epps of being a government provocateur who orchestrated the attack on the Capitol on January 6, 2021; and (ii) Fox News repeatedly used a manipulated video to accuse Nina Jankowicz, a 2022 appointee to a minor governmental board without operational authority, of seeking to edit the tweets of private citizens on behalf of the government.

17. The *Information-Systems Claim* is based on the complete absence of any Board-level reporting mechanisms respecting defamation risk, despite the lack of any written editorial standards at Fox News and despite the Board being on clear notice of Fox’s defamation problem after the Seth Rich scandal. Defamatory broadcasts respecting Dominion and Smartmatic continued for many weeks, during which time Dominion and Smartmatic sent a cavalcade of missives to Fox News providing factual information and seeking corrections. The Audit Committee and the Board lacked any mechanism for monitoring the situation. Fox’s legal function was complicit in allowing Fox executives and hosts to pursue ratings through the

dissemination of baseless claims without established policies and practices to minimize, mitigate, and monitor defamation risk.

18. The *Red Flags Claim* is based on the red flags of the Seth Rich settlement and the public character of Fox News's wrongdoing respecting Dominion and Smartmatic. The Board cannot claim ignorance of what Fox News was broadcasting over a span of weeks, or of the public refutations and litigation demands made by Dominion and Smartmatic. Outside director Paul Ryan was in personal contact with a communications advisor to Dominion and he delivered public remarks in November 2020 denouncing Trump's attacks on the integrity of the election.

19. The simple reality is that the Board abdicated its responsibility of compliance risk oversight respecting the editorial and programming policies of Rupert, Lachlan, and the executive team. Rupert is deferred to as a founder, controller, and impresario who built a global media empire. The Murdoch Family Trust owns 42.9% of the voting power at Fox.

20. The Murdochs surround themselves with loyalists who share their politics and facilitate their rule. For example:

- a. Outside director Charles D. ("Chase") Carey started at Fox Broadcasting in 1988 and earned a large fortune as a longtime

deputy to Rupert, who has described Carey as his “most trusted adviser” and identified him as a potential successor to lead his media empire.

- b. Outside director Paul Ryan is a former Speaker of the House who became the Republican Party nominee for Vice President in 2012 in large part due to support from Rupert Murdoch and his media outlets. Ryan is a friend of Rupert and Lachlan.
- c. Outside director Jacques Nasser is a longtime friend of Rupert’s who for many years served as an outside director on boards of Murdoch-affiliated companies.
- d. Chief Legal and Policy Officer Viet Dinh was so close to the Murdochs that he and Lachlan are the godfathers to each other’s children. Dinh served as an outside director of corporate predecessors of Fox for fourteen years before taking a position at Fox that paid him total compensation of more than \$24 million in 2019.⁸

⁸ Ben Smith, *The Lawyer Behind the Throne at Fox*, N.Y. Times (Apr. 4, 2021), <https://www.nytimes.com/2021/04/04/business/media/fox-news-viet-dinh.html>; David Lat, *Is Viet Dinh The Most Powerful Lawyer in America?*, Original Jurisdiction (Mar. 17, 2021), <https://davidlat.substack.com/p/is-viet-dinh-the-most-powerful-lawyer>; Fox Corp., Proxy Statement (Form 14A) (Sept. 23, 2019).

Rupert, Lachlan, Carey, and Ryan all serve together on the Board of Trustees of the Ronald Reagan Presidential Foundation and Institute. Outside director Anne Dias is a longtime friend of Ryan's who donated large sums to his political campaigns.

21. The directors never acted as a board respecting defamation risk. They did not convene to raise questions about potential legal liability. Ryan testified in the Dominion litigation that programming content and personnel are not within the ambit of the Board. They are subjects about which Ryan, as a non-confrontational courtier, was only willing to raise informally with the Murdochs. Ryan and Dias each gave friendly advice to the Murdochs to move on from Trump and not to spread conspiracy theories.⁹ Their advice following the attack on the Capitol on January 6, 2021, betrays their knowledge that they and the Board had allowed Fox News to spread baseless political narratives. Ryan forwarded an article entitled "The Alternate Reality Machine" and expressed his hope that Fox News hosts Tucker Carlson, Laura Ingraham, and Sean Hannity would soon "put down the echoes of falsehoods from our side[.]"¹⁰ Dias forwarded an editorial from *The Financial Times*

⁹ Dominion Combined Opp. to Fox Mot. for Summ. J. ("D SJ Opp."), *Dominion v. Fox News Network*, No. N21C-03-257 (Del. Super. Ct. Feb. 9, 2013), at 23-24; PX5365; PX5375.

¹⁰ NYC_220_9036-49.

that described Fox News as having “enabled Mr. Trump for too long” and “been more influential in spreading false beliefs than social media.”¹¹

22. Plaintiffs bring this derivative action because the Murdochs, Scott, Dinh, and the outside directors consciously disregarded the risk of massive tort liability inherent in Fox’s business model and throughout Fox News’s post-election broadcasting. Defendants chose to invite robust defamation claims, with potentially huge financial liability and potentially larger business repercussions, rather than disappoint viewers of Fox News.

THE PARTIES

Plaintiffs

23. Plaintiffs NYC Funds consist of the following five funds: New York City Employees’ Retirement System; the Board of Education Retirement System of the City of New York; the New York City Fire Department Pension Fund; the New York City Police Pension Fund; and the Teachers’ Retirement System of the City of New York. The NYC Funds are retirement plans established by law to provide benefits to New York City employees. The NYC Funds’ assets under management as of June 30, 2023, total \$253.2 billion. The NYC Funds have been continuous holders of Fox Corp. A and B class stock at all relevant times. As of August 31,

¹¹ NYC_220_8993-95.

2023, the NYC Funds held 572,946 shares of Fox Class A stock and 285,338 shares of Fox Class B stock worth approximately \$27.7 million.

24. Plaintiff the State of Oregon, by and through the Oregon Attorney General and the Oregon State Treasurer on behalf of the Oregon Public Employees Retirement Fund (“Oregon”), protects and oversees more than \$93 billion in Oregon public assets, including retirement funds held in trust for hundreds of thousands of teachers, police, firefighters, nurses, social workers, and other public employees. Oregon has been a continuous holder of Fox Corp. A and B class stock at all relevant times. As of August 31, 2023, Oregon held 150,146 shares of Fox Class A stock and 76,169 shares of Fox Class B stock worth approximately \$5.2 million.

Nominal Defendant Fox

25. Nominal Defendant Fox is a Delaware corporation that became a standalone publicly traded company on March 19, 2019, upon its spin-off from Twenty-First Century Fox, Inc. Fox is a controlled company with a dual-class voting structure. Class B stockholders are entitled to vote in all matters on which shareholders have the right to vote,¹² such as director elections, while Class A stockholders vote only on major decisions, such as dissolution or the sale of all assets of the Company. Rupert controls Fox through the Murdoch Family Trust, which

¹² Fox Corp., Amended and Restated Cert. of Inc. at Article IV (Ex. 3.1 to Form 10Q) (Feb. 8, 2023).

owns 42.9% of Fox’s Class B voting shares. The Murdoch family owned 18% of the total Fox shares outstanding in October 2020.¹³

26. Fox is a news, sports, and entertainment company. Its wholly-owned subsidiaries include Fox News. Other business units of Fox include Fox Entertainment, Fox Television Stations, and Fox Sports. Fox’s Cable Network Programming segment, which includes Fox News, Fox Business, and Fox Sports Networks, accounted for 44% of Fox’s revenues in 2022, and 99% of Adjusted Earnings Before Interest, Taxes, Depreciation, and Amortization (“EBITDA”).¹⁴

27. In 2022, Cable Network Programming generated \$4.2 billion in affiliate fees from cable providers, representing over two-thirds of the total revenue for the segment, including advertising revenue.¹⁵

28. “Fox News is Fox Corporation’s largest moneymaker.”¹⁶ Fox News reaches an estimated seventy-seven million Americans, with the most subscribers of any cable network in the Fox portfolio.¹⁷ For over twenty consecutive years, Fox News has been the top-rated national cable news channel in weekday primetime and

¹³ NYC_220_7641, 7689.

¹⁴ Fox Corp., Annual Report at 42 (Form 10-K) (Aug. 12, 2022).

¹⁵ *Id.*

¹⁶ Dominion Mot. Summ. J. (“D MSJ”) Ex. 130 (L. Murdoch Dep. Tr.), *Dominion v. Fox News Network*, No. N21C-03-257, (Del. Super. Ct. Jan. 17, 2023) at 21:14-15.

¹⁷ *Id.* at 5.

total day viewing.¹⁸ Fox News has the largest digital reach of any news company, surpassing CNN.¹⁹

29. During the period from March 2019 through May 2021, the Board of Directors of Fox had seven members, who are each identified below.

K. Rupert Murdoch

30. Defendant Rupert Murdoch sits atop a media empire he built and by which he has become one of the richest men in the world. *Forbes* estimates that his family's net worth is \$17 billion.²⁰

31. In the decades after he inherited a newspaper in Adelaide, Australia in 1952, Rupert acquired major newspapers in Australia, New Zealand, Great Britain, and the United States. After founding News Corporation ("News Corp.") in 1980, he acquired the holding company of 20th Century Fox, the broadcasting conglomerate Metromedia, and book publisher HarperCollins, among other assets. He launched Fox Broadcasting Company in 1986 and Fox News Channel in 1996.²¹

¹⁸ *Id.* at 2.

¹⁹ Joseph A. Wulfsohn, *Fox News Digital Ends 2022 as Top News Brand in Multiplatform Minutes, Views*, Fox News (Jan. 18, 2023, 12:23 PM), <https://www.foxnews.com/media/fox-news-digital-ended-2022-top-news-brand-multiplatform-minutes-views>.

²⁰ *Rupert Murdoch & family*, Forbes, <https://www.forbes.com/profile/rupert-murdoch/?sh=3691ae12b1af>.

²¹ *Encyclopedia Britannica*, "News Corp." (last updated Aug. 23, 2023) (last visited Sept. 6, 2023), <https://www.britannica.com/topic/News-Corporation>.

32. Rupert was Chairman and CEO of News Corp. until 2013, when he became Executive Chairman of the spun-off entities News Corp and Twenty-First Century Fox, Inc. On July 21, 2016, Rupert became Chairman and acting CEO of Fox News Channel and Fox Business Network, following the resignation of Roger Ailes amidst a sexual harassment scandal.²²

33. In 2019, upon the creation of Fox, Rupert became Chair of Fox and Executive Chair of Fox News,²³ an officer position that is part of its listed Executive Leadership.²⁴ Rupert's hands-on role at Fox News is reflected in his compensation from Fox, which totaled \$125,696,313 between 2019 and 2022.²⁵ Rupert remains Executive Chair of News Corp, which owns, among other publications and assets, *The Wall Street Journal* and the *New York Post*. In the aftermath of the 2020 election, Rupert was closely involved in day-to-day programming decisions at Fox News.

²² Camila Domonoske, *Roger Ailes, Accused of Sexual Harassment, Out as Chairman of Fox News*, NPR (July 21, 2016, 4:31 PM), <https://www.npr.org/sections/thetwo-way/2016/07/21/486938004/roger-ailes-accused-of-sexual-harrassment-out-as-chairman-of-fox-news>.

²³ Randall Chase, *New Disclosure of Rupert Murdoch's Role at Fox News Frustrates Judge in Dominion Case*, PBS (Apr. 12, 2023, 12:30 PM), <https://www.pbs.org/newshour/nation/new-disclosure-of-rupert-murdochs-role-at-fox-news-frustrates-judge-in-dominion-case>.

²⁴ Fox News, (last visited Sept. 6, 2023), <https://press.foxnews.com/>.

²⁵ Fox Corp., 2021 Proxy Statement (Schedule 14A) (Sept. 17, 2021); Fox Corp., 2022 Proxy Statement (Schedule 14A) (Sept. 19, 2022).

Lachlan K. Murdoch

34. Ever since 1994, Defendant Lachlan Murdoch has held a number of executive roles at Murdoch-controlled media companies. Upon Fox’s formation in 2019, Lachlan became CEO, Executive Chair, and a director of Fox. His total compensation from Fox between 2019 and 2022 was \$120,689,643.²⁶ He is also Co-Chair of News Corp. In the aftermath of the 2020 election, Lachlan was closely involved in day-to-day programming decisions at Fox News.

Charles D. Carey

35. Defendant Charles (“Chase”) Carey held a variety of senior executive roles at Murdoch-affiliated companies over span of decades, including a long tenure as Rupert’s deputy. After beginning his career at Fox Broadcasting in 1988, he served as Chairman and CEO of Fox Television from 1994 to 2000 (during the launch of Fox News),²⁷ and rose to President/Chief Operating Officer and Deputy Chairman of News Corp. (later 21st Century Fox), from 2009 to 2015.²⁸ In 2011, Rupert proclaimed: “make no mistake, Chase Carey and I run [News Corp.] as a

²⁶ *Id.*

²⁷ Keach Hagey, *How Chase Carey Helped Build Fox Into a Major Player*, Wall Street Journal (June 16, 2015, 10:43 PM), <https://www.wsj.com/articles/how-chase-carey-helped-build-fox-into-a-major-player-1434509031>.

²⁸ *Chase Carey*, Fox, <https://www.foxcorporation.com/management/board-of-directors/chase-carey/>.

team.”²⁹ In 2013, Rupert stated: “Chase [Carey] is my partner, and if anything happens to me, I’m sure he will get [the top job] immediately if I went under a bus.”³⁰

36. Rupert has called Carey his most “trusted advisor”³¹ and his “partner” of “nearly 30 years.”³² In addition to Fox, Carey has served as a director of various other Murdoch-controlled or Murdoch-affiliated companies: News Corp. (1996 to 2007, 2009 to 2013); 21st Century Fox (2013 to 2019); British Sky Broadcasting Group plc (“BSkyB”) (2003 to 2009); Sky Deutschland (2010-2018).^{33,34}

37. Carey has earned upwards of \$230 million from his career as a deputy to Rupert.³⁵ Between 2019 and 2022, Carey received more than \$1 million in total

²⁹ Georg Szalai, *Rupert Murdoch Says He and News Corp. Board Believe He Should Continue as Chairman and CEO*, The Hollywood Reporter (Aug. 10, 2011, 1:48 PM), <https://www.hollywoodreporter.com/news/general-news/rupert-murdoch-says-he-news-221519/>.

³⁰ David Folkenflik, *Murdoch’s World: The Last of the Old Media Empires* at 237 (2013).

³¹ Matthew Garrahan, *Chase Carey takes the driver’s seat at Formula One*, Financial Times (Sept. 9, 2016), <https://www.ft.com/content/f5066048-75d5-11e6-b60a-de4532d5ea35>.

³² Variety Staff, *Read the Memos: Rupert Murdoch, Chase Carey on 21st Century Fox Leadership Changes*, Variety (June 16, 2015, 2:18 PM), <https://variety.com/2015/biz/news/rupert-murdoch-chase-carey-memos-21st-century-1201521163/>.

³³ *Id.*

³⁴ Jim Waterson, *As Comcast Takes Control of Sky, Murdoch Could Yet Bounce Back*, The Guardian (Sep. 23, 2018, 13:46), <https://www.theguardian.com/media/2018/sep/23/comcast-sky-rupert-murdoch-worldwide-news>.

³⁵ News Corp., Proxy Statement (Schedule 14A) (FY 2007-2013); Twenty-First Century Fox, Inc., Proxy Statement (Schedule 14A) (FY 2014-2018); Fox Corp.,

compensation for his service as a director of Fox, and more than \$10 million in pension payments and imputed income arising out of post-employment contractual obligations.³⁶ In 2019 and 2020, when Carey was CEO and Executive Chairman of Formula One, the Board determined that Carey was not an independent director of Fox under NASDAQ listing rules.³⁷ Although Carey was identified as an independent director for 2021 and 2022, he was the only non-Murdoch director not appointed to a special committee created in December 2022 to explore a potential re-combination with News Corp.³⁸

Jacques A. Nasser

38. Defendant Jacques A. Nasser, the Lead Independent Director of Fox since 2019, is a former CEO of Ford Motor Company. Like Rupert, he hails from Melbourne, Australia. Nasser and Rupert are reportedly “close both commercially

Proxy Statement (Schedule 14A) (FY 2019-2022).

³⁶ Fox Corp., 2019 Proxy Statement (Schedule 14A) (Sept. 23, 2019); Fox Corp., 2020 Proxy Statement (Schedule 14A) (Sept. 23, 2020); Fox Corp., 2021 Proxy Statement (Schedule 14A) (Sept. 17, 2021); Fox Corp., 2022 Proxy Statement (Schedule 14A) (Sept. 19, 2022).

³⁷ Fox Corp., 2019 Proxy Statement (Schedule 14A) (Sept. 23, 2019); Fox Corp., 2020 Proxy Statement (Schedule 14A) (Sept. 23, 2020).

³⁸ *FOX’s Special Committee of the Board of Directors Provides Update*, PR Newswire (Dec. 6, 2022, 8:30 PM), <https://www.prnewswire.com/news-releases/foxs-special-committee-of-the-board-of-directors-provides-update-301695535.html>.

and personally.”³⁹ Previously, Nasser was a director of BSkyB (from 2002 to 2012) and 21st Century Fox (from 2013 to 2019). Nasser serves on Fox’s Audit Committee.

Paul D. Ryan

39. Defendant Paul Ryan, the Chair of the Nominating and Corporate Governance Committee since 2019, was the Republican Party nominee for Vice President in 2012, and the Speaker of the House of Representatives when he retired from Congress in January 2019.⁴⁰ Upon his retirement, the Murdochs immediately recruited Ryan to join the Fox Board. Ryan’s Board questionnaires acknowledge his friendship with the Murdochs.⁴¹

40. Rupert was instrumental in Mitt Romney’s selection of Ryan as a running mate in 2012. “The media mogul used a combination of private persuasion, newspaper crusading, and Twitter talk to urge Mitt Romney’s campaign to shake things up.”⁴²

³⁹ Matthew Stevens, *BHP chairman Jac Nasser reflects on 30 years in management*, Australian Financial Review (May 25, 2017, 11:00 PM), <https://www.afr.com/life-and-luxury/bhp-chairman-jac-nasser-reflects-on-30-years-in-management-20170418-gvmsyz>.

⁴⁰ See Lisa Mascaro, *Speaker Ryan to retire, leaving big election-year GOP vacuum*, Associated Press (April 11, 2018), <https://apnews.com/article/819e75f7fb634531936c8416bf860344>.

⁴¹ See NYC_220_1256, NYC_220_8175, NYC_220_8774.

⁴² Howard Kurtz, *Rupert Murdoch Gets His Man As Mitt Romney Picks Paul Ryan*,

41. Ryan’s role as a director is colored by his political and ideological commitments. In a March 2023 podcast, Ryan stated that he is on the Fox Board because he thinks it important to have “strong cultural private institutions that can stand up to what I would call woke conformity.” Ryan also discussed his dislike of the direction of the conservative movement under Trump and the “long process” of redirecting the “big institution” of Fox to “get the conservative movement in a good place in America again.” According to Ryan, Fox “is a big part of the constellation of the conservative movement” and Fox is “going to have to be part of the solution if we are going to solve the problem of the conservative movement because there isn’t a bigger platform than this in America.”⁴³ Ryan tried to gently nudge the Murdochs to tilt Fox News toward his favored political perspective.

Anne Dias

42. Defendant Anne Dias is a “personal friend” of Ryan’s; their friendship predates their time on the Fox Board.⁴⁴ As she acknowledges in her director questionnaires, Dias is a longtime “financial supporter of . . . Paul Ryan’s political

Daily Beast (Aug. 12, 2012, 4:45 AM), <https://www.thedailybeast.com/rupert-murdoch-gets-his-man-as-mitt-romney-picks-paul-ryan>.

⁴³ *My Conversation With Paul Ryan*, The Bulwark Podcast, <https://www.youtube.com/watch?v=AFeyZ-gcgeo> (39:00 to 44:00).

⁴⁴ D MSJ Ex. 620 (Ryan Dep. Tr.) at 171:11-22.

activities.”⁴⁵ From 2003 to 2015, Dias was married to billionaire Kenneth Griffin, who donated over \$500,000 to federal campaign committees aligned with or controlled by Ryan.⁴⁶ Her publicly disclosed political contributions between 2010 and 2016—the last election cycle before Ryan announced that he would retire from Congress—include donations of approximately \$55,600 to “Team Ryan,” “Ryan Prosperity Action, Inc.,” and “Ryan for Congress.”⁴⁷ Dias serves on Fox’s Audit Committee and its Nominating and Corporate Governance Committee.

Roland A. Hernandez

43. Defendant Roland A. Hernandez, the Chair of the Audit Committee since 2019, is a former CEO and Chair of Telemundo Group, Inc. Hernandez serves on the Nominating and Corporate Governance Committee.⁴⁸

Viet Dinh

44. Defendant Viet Dinh has served as Chief Legal and Policy Officer of Fox and a member of the Office of the Chairman since March 2019.⁴⁹ Dinh was not

⁴⁵ NYC_220_1018.

⁴⁶ Fed. Election Comm’n, Donor Lookup: Kenneth Griffin, <https://www.opensecrets.org/donorlookup/results?name=kenneth+griffin&order=asc&sort=D>.

⁴⁷ *Id.*

⁴⁸ *Roland A. Hernandez*, Fox, <https://www.foxcorporation.com/management/board-of-directors/roland-a-hernandez/>.

⁴⁹ Jeremy W. Peters, *Fox’s Chief Legal Officer Will Depart*, N.Y. Times (Aug. 11, 2023), <https://www.nytimes.com/2023/08/11/business/media/viet-dinh-fox-departing.html>; *Viet D. Dinh*, Fox, <https://www.foxcorporation.com/management>

only Fox’s top lawyer, he “manage[d] the political operation” of Fox.⁵⁰ Dinh was not a director of Fox.

45. As the top legal officer at Fox, Dinh was responsible for having failed to oversee the implementation, management, and board-level oversight of risk controls respecting defamation, including the real-time management of the response to complaints from Dominion and Smartmatic. In the wake of the Dominion settlement, Fox announced that Dinh will be leaving his officer post at the end of 2023.⁵¹

46. Dinh was described in 2021 as “the most powerful lawyer in America[.]”⁵² Before joining Fox as an employee, Dinh served as U.S. Assistant Attorney General for Legal Policy from 2001 to 2003, and was later an elite appellate litigator with close connections to senior lawyers in the Republican legal establishment. In 2017, when Dinh worked with former Solicitor General Paul Clement and former Deputy White House Counsel William A. Burck on a high-

/executive-team/viet-d-dinh/.

⁵⁰ Smith, *The Lawyer Behind the Throne at Fox*, *supra* note 8.

⁵¹ *Viet Dinh To Depart Fox Corporation*, PR Newswire (Aug. 11, 2023, 16:11 ET), <https://www.prnewswire.com/news-releases/viet-dinh-to-depart-fox-corporation-301899062.html>.

⁵² David Lat, *Is Viet Dinh The Most Powerful Lawyer in America?*, Above the Law (Mar. 23, 2021, 10:47 AM), <https://abovethelaw.com/2021/03/is-viet-dinh-the-most-powerful-lawyer-in-america/>.

profile criminal matter, they were described by *The New York Times* as a “Dream Team of Defense Lawyers.”⁵³ Dinh re-assembled the “Dream Team” in 2021 by retaining Clement as outside counsel for Fox in the Dominion and Smartmatic litigations and by bringing in Burck as a new outside director of Fox.

47. Dinh served as an outside director of News Corp. (from 2004 to 2013) and 21st Century Fox (from 2013 until 2018).⁵⁴ Dinh became “unusually” close friends with Lachlan; they are godfathers to each other’s sons.⁵⁵ Dinh’s closeness to the Murdochs created controversy when Dinh agreed, as a purported independent director of News Corp., to oversee an internal probe into the company’s responsibility for the *News of the World* phone hacking scandal, at which time Dinh gave the following quote: “We are united in support of the senior management team to address these issues.”⁵⁶

⁵³ Benjamin Weiser, *Turkish Gold Trader Builds a Dream Team of Defense Lawyers*, N.Y. Times (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/nyregion/turkish-gold-trader-builds-a-dream-team-of-defense-lawyers.html>.

⁵⁴ Variety Staff, *Viet Dinh Named Chief Legal and Policy Officer for 21st Century Fox Post-Disney Sale*, Variety (Sept. 17, 2018), <https://variety.com/2018/biz/news/viet-dinh-chief-legal-and-policy-officer-for-21st-century-fox-1202944228/>.

⁵⁵ NYC_220_1194; Smith, *The Lawyer Behind the Throne at Fox*, *supra* note 8.

⁵⁶ Ronald Grover and Tom Schoenberg, *News Corp. Director Leading Hacking Inquiry Has Ties to Murdochs*, Bloomberg (Aug. 6, 2011, 9:54 AM), <https://www.bloomberg.com/news/articles/2011-08-06/dinh-s-ties-to-murdoch-under-fire-as-point-man-in-hacking-probe#xj4y7vzkg>; David Gelles, *Friend of the Murdochs to lead internal probe into Now*, Financial Times (July 27, 2011), <https://www.ft.com/content/ad514780-b844-11e0-8d23-00144feabdc0>.

Suzanne Scott

48. Defendant Suzanne Scott has worked at Fox News since its inception in 1996. In 2018, she was named CEO of Fox News and Fox Business Network, reporting jointly to Rupert and Lachlan. Together with Rupert and Lachlan, Scott forged the business strategy of amplifying Trump’s “stolen election” claims in the aftermath of Election Day 2020. Scott is not a director or officer of Fox. She is subject to personal jurisdiction in Delaware under 6 *Del. C.* § 18-109(a) as a person who “participates materially in the management of” Fox News Network, LLC, a Delaware limited liability company. Scott testified that Rupert and Lachlan are her bosses and that she is in regular, often daily, communication with them.⁵⁷

⁵⁷ D MSJ Ex. 143 (Scott Dep. Tr.) at 12:5-20 (since becoming CEO in 2018, Scott “run[s]” Fox News, by “oversee[ing] the day-to-day operations of [its] businesses,” and “maintain[ing] a happy and healthy and satisfied workforce”).

SUBSTANTIVE ALLEGATIONS

A. Fox News’s Distinctive Lack of Editorial Controls

49. Many media organizations establish guidelines and internal procedures that mitigate defamation risk. These guidelines and procedures emphasize accurate reporting in the first instance and the prompt retraction of errors.

50. National Public Radio (“NPR”), for example, publishes an Ethics Handbook that instructs “immediate correction” and immediate consultation with the legal department about mistakes that could have “legal consequences”:

Corrections

We have a simple standard: Errors of fact do not stand uncorrected. If we get it wrong, we’ll admit it.

Guideline: Mistakes are fixed in a timely manner.

Egregious mistakes—for example, reporting someone’s death when they are in fact still alive or a mistake that could have legal consequences (defamation)—demand immediate correction on the air and/or online (if the information was also posted on NPR.org).

NPR’s legal department should be consulted immediately about mistakes that might have legal consequences—and especially if a purported mistake is brought to our attention by a lawyer or the subject of our reporting and they are claiming or implying that NPR is liable for any damages.⁵⁸

51. The Public Broadcasting Service (“PBS”) publishes Editorial Standards & Practices that say the following about fact-checking:

⁵⁸ *Accountability*, NPR, <https://www.npr.org/about-npr/688414106/accountability> (last visited Aug. 11, 2023) (emphasis in original).

Producers must implement rigorous fact-checking procedures to verify the accuracy of all factual assertions The accuracy of assertions by expert and non-expert interviewees should never be assumed, particularly if such assertions are contentious or otherwise questionable.⁵⁹

52. Reuters publishes “The 10 Hallmarks of Reuters Journalism,” which include “Hold accuracy sacrosanct” and “Correct errors transparently.”⁶⁰ Reuters says the following about reporting rumors: “Reuters aims to report the facts, not rumours. Clients rely on us to differentiate between fact and rumour and our reputation rests partly on that.”

53. *The Washington Post* publishes Policies and Standards, which include a corrections policy that states: “The Washington Post strives for a nimble, accurate and complete news report *It is necessary* to use a correction, clarification or editor’s note to inform readers whenever we correct a significant mistake.”⁶¹ This policy was instrumental in mitigating defamation risk when *The Washington Post* and other outlets were sued after publishing erroneous information about a teenager’s January 2019 encounter with a Native American activist on the steps of

⁵⁹ *PBS Editorial Standards & Practices*, PBS, <https://www.pbs.org/about/producing-pbs/editorial-standards.pdf>.

⁶⁰ *Reuters Standards & Values*, Reuters, <https://reutersagency.com/en/about/standards-values>.

⁶¹ *The Washington Post Policies and Standards*, Washington Post, <https://www.washingtonpost.com/policies-and-standards/> (emphasis in original).

the Lincoln Memorial. The attorney for the family issued a statement about how they had “agreed to settle with the Post because the Post was quick to publish the whole truth—through its follow-up coverage and editor’s notes.”

54. NBC News has a Standards and Practices team, headed by a Senior Vice President, that is “responsible for making the most critical decisions that shape the fundamentals of this network: our reputation, credibility and integrity.”⁶² CNN, similarly, has an Executive Vice President in charge of its Standards and Practices department.⁶³

55. *The Wall Street Journal* commits to The Dow Jones Code of Conduct: “Our facts are accurate and fairly presented; our analyses represent our best independent judgments rather than our preferences, or those of our sources, advertisers, or information providers[.]”⁶⁴

⁶² A.J. Katz, *NBC News Standards and Practices Chief Marian Porges is Stepping Down in March*, TV Newser (Feb. 18, 2021, 12:29 PM), <https://www.adweek.com/tvnewser/nbc-news-standards-and-practices-chief-marian-porges-is-stepping-down-in-march/471617/>.

⁶³ *CNN Names Calvin Sims Executive Vice President of Standards and Practices*, CNN Press Room (Sep. 22, 2020), <https://cnnpressroom.blogs.cnn.com/2020/09/22/cnn-names-calvin-sims-executive-vice-president-of-standards-and-practices/>.

⁶⁴ *Dow Jones Code of Conduct*, Wall Street Journal, <https://www.dowjones.com/code-conduct/>.

56. Fox News is different. A 2017 article discussed Fox News’s curious silence and inaction after retracting a story respecting the murder of Seth Rich:

When a story of this scale crumbles, most news organizations feel obligated to explain what happened and why.

Not so far at Fox, which stands apart journalistically from its competitors in many ways. Unlike the other networks or major newspapers, for example, Fox has no office or executive dedicated to standards and practices. That falls within the larger portfolio of the network’s general counsel, Dianne Brandi.

. . . .

The late Fox News Chairman Roger Ailes used to boast (incorrectly) that the network had never had to retract a story. Ailes told colleagues he saw corrections as a sign of weakness rather than a duty

Fox News’ behavior this year, in the months after the Rich story, has little recent parallel among major news organizations—especially for a story with these stakes. No apology. No explanation. And no known consequences.⁶⁵

57. Fox News’s aberrant approach remained as of November 20, 2020, when the General Counsel of Fox News received a detailed letter from outside counsel for Dominion (attached hereto as Exhibit A) describing how “Fox hosts and guests have repeatedly aired false allegations that Dominion was actively involved

⁶⁵ David Folkenflik, *No Apology, No Explanation: Fox News and The Seth Rich Story*, NPR (Sep. 15, 2017, 5:06 AM), <https://www.npr.org/2017/09/15/551163406/fox-news-has-yet-to-explain-what-what-wrong-in-seth-rich-story>.

in fraud and corruption with respect to its voting systems.” Fox distinguished itself from other major media outlets by doing nothing in response to Dominion’s letter:

Such letters often set off internal reviews at news organizations. Fox’s lawyers did not conduct one. Had they done so, they may have learned of an email that Ms. Bartiromo received in November about one of Ms. Powell’s original sources on Dominion.

The source intimated that her information had come from a combination of dreams and time travel. (“The wind tells me I’m a ghost but I don’t believe it,” she had written Ms. Powell.)

Dan Novack, a First Amendment lawyer, said that if he ever stumbled upon such an email in a client’s files, he would “physically wrest my client’s checkbook from them and settle before the police arrive.”

Fox, however, did not respond to the Dominion letter or comply with its requests[.]⁶⁶

58. Lachlan testified in the Dominion litigation that Fox News has no policy against reporting lies, no policy against presenting guests who are unreliable sources, and that Fox News hosts have editorial independence.⁶⁷

59. Scott and Jay Wallace, the President and Executive Editor of Fox News, both testified that Fox News has no written policies on journalistic standards or ethics.⁶⁸

⁶⁶ Rutenberg et al., *Missteps and Miscalculations*, *supra* note 7.

⁶⁷ D MSJ Ex. 130 (L. Murdoch Dep. Tr.) at 315:25-316:22.

⁶⁸ D MSJ Ex. 143 (Scott Dep. Tr.) at 207:20-25; D MSJ Ex. 147 (Wallace Dep. Tr.) at 38:24-39:7.

60. Fox News host Lou Dobbs testified that he received no guidance from Fox News leadership about posting allegations of election fraud on social media or about his episodes featuring Sidney Powell and Rudy Giuliani.⁶⁹

61. Fox News's distinctive lack of editorial standards remains today. On July 25, 2023, Fox News published a false story claiming that the Marine Corps forced a Gold Star family to pay \$60,000 to ship to Arlington Cemetery the remains of Marine Sgt. Nicole Gee, who was killed in a suicide attack during the pullout from Afghanistan in August 2021. The next day, a journalistic enterprise devoted to military subjects published a refutation of the Fox News story, citing the family and the Pentagon.⁷⁰

62. A Freedom of Information Act request and investigative article by *Military.com*, published on August 23, 2023, revealed how, behind the scenes, over a period of several days, the Marine Corps sent a series of emails to Fox News demanding a full retraction of the story, an apology to the family, and a public explanation for any corrections. *Military.com* reported that Fox News made various

⁶⁹ D MSJ Ex. 111 (Dobbs Dep. Tr) at 93:25-95:24.

⁷⁰ Jeff Schogol, *The Pentagon didn't refuse to pay \$60,000 to fly fallen Marine Nicole Gee to Arlington [Updated]*, Task & Purpose (Jul. 26, 2023, 4:18 PM), <https://taskandpurpose.com/news/us-military-marine-nicole-gee-arlington-national-cemetery/>.

edits to the story, before eventually deleting it without a correction or apology to the Gee family:

None of the changes were marked with an update or correction, a common media practice that offers transparency when outlets make a mistake or change a story.

By the following Friday, the article was removed completely without explanation by Fox News, even as outrage over the alleged injustice continued to spread online.⁷¹

63. The *Military.com* article ignited wider national coverage of the story and backlash against Fox News, which prompted Fox News to issue the following apology and statement on August 26: “The now unpublished story has been addressed internally and we sincerely apologize to the Gee family.”⁷² Oliver Darcy, a senior media for reporter for CNN, wrote about how Fox News operated outside of industry norms:

Deleting an entire story is exceedingly rare in news media and is seen as a last-ditch measure if the entire premise of the article is incorrect. Deleting a story without offering readers an explanation or correction is widely considered to be unethical.

⁷¹ Drew F. Lawrence, *Inside the Marine Corps’ Fight with Fox News over a False Gold Star Family Story*, *Military* (Aug, 23, 2023), <https://www.military.com/daily-news/2023/08/23/inside-marine-corps-fight-fox-news-over-false-gold-star-family-story.html#:~:text=The%20Marine%20Corps%20worked%20behind%20the%20scenes%20last,in%20Afghanistan%2C%20according%20to%20emails%20obtained%20by%20Military.com>.

⁷² Caleb Howe, *Fox News Apologizes for Since Deleted Story About Fallen Soldier*, *Mediaite* (Aug. 26, 2023, 7:15 PM), <https://www.mediaite.com/news/fox-news-apologizes-for-since-deleted-story-about-fallen-soldier/>.

In this case, Fox News did not publicly address the incident until the Military.com story ignited backlash against the outlet.

While unethical, the behavior is typical for Fox News. The outlet often breaks traditional news ethics and traffics in dishonest reporting and commentary.⁷³

B. Fox News in the Pre-Trump Era

64. Rupert Murdoch and Roger Ailes founded the Fox News Channel in 1996 to cater to conservative audiences.⁷⁴

65. Author David Frum, a former speechwriter for George W. Bush, has been a perceptive observer of Fox News. Three of his observations from a decade ago put into context the business model and scandals of Fox News in recent years.

66. *First*, in his 2014 review of a biography of Ailes, Frum wrote about how Fox News cultivated a viewer base by appealing to the attitudes and anxieties of a particular demographic—aging, right-leaning baby boomers: “Here, on this

⁷³ Oliver Darcy, *Fox News Apologizes to Go Star Family After Facing Backlash Over False Story*, CNN Business (Aug. 26, 2023, 8:29 PM), <https://www.cnn.com/2023/08/26/business/fox-news-gold-star-family-apology/index.html>.

⁷⁴ Jonathan Mahler and Jim Rutenberg, *How Rupert Murdoch’s Empire of Influence Remade the World*, N.Y. Times (Apr. 3, 2019), <https://www.nytimes.com/interactive/2019/04/03/magazine/rupert-murdoch-fox-news-trump.html?action=click&module=Top%20Stories&pgtype=Homepage>.

station, the chosen market segment could enjoy security and validation. Out there was depicted a hostile world of threats, danger, crime, and decaying values.”⁷⁵

67. *Second*, in a 2012 article, Frum described how Fox News communicated with its audience in a manner informed by their common understanding of false conspiracy theories circulating through media other than television:

It’s very important to understand that for Fox viewers, Fox is *only the most visible part* of a vast alternative reality. Fox’s coverage of the news cannot be properly understood in isolation, but only in conjunction with the rest of that system—and especially the chain emails that do so much to shape the worldview of Fox viewers.⁷⁶

Frum observed that Fox News hinted at, but did not articulate, these conspiracy theories:

You’ll not hear something quite so bizarre as that on television. But Fox News is edited and reported for an audience much of which believes such stories to be true, and edited and reported by producers and on-screen talent highly attuned to those beliefs.⁷⁷

68. *Third*, Frum observed during the Obama presidency how Fox News exercised leverage over Republican politicians due to the strong bond between Fox

⁷⁵ David Frum, *Fox News and the Anxious Elderly*, David Frum (Jan. 26, 2014), <https://davidfrum.com/article/fox-news-and-the-anxious-elderly>.

⁷⁶ David Frum, *The Fox News Wink: Is Obama “Gay”? or “Gay Gay”?*, Daily Beast (Aug. 8, 2012, 1:00 PM), <https://www.thedailybeast.com/the-fox-news-wink-is-obama-gay-or-gay-gay?ref=scroll> (emphasis in original).

⁷⁷ *Id.* (emphasis in original).

News and its viewers: “Republicans originally thought that Fox worked for us, and now we are discovering we work for Fox.”⁷⁸ In other words, Fox News could operate profitably by appealing to its viewers without promoting the political agenda of the Republican Party, and without a Republican winning the presidency.

69. The dominant influence of Rupert Murdoch and Fox News remained intact through 2015. For example, in 2012, Murdoch-controlled media outlets successfully pushed Mitt Romney to select Paul Ryan as his nominee for Vice President. A 2014 Pew survey found that respondents who scored as “consistently conservative” reported that their most trusted news sources were Fox News, Sean Hannity, and Rush Limbaugh.⁷⁹ In 2015, Rupert Murdoch refused to support Trump’s candidacy. Rupert’s publicly reported donation of \$200,000 to the super PAC of candidate John Kasich was emblematic of his search for a Republican alternative to Trump.⁸⁰ Fox News host Megyn Kelly aggressively questioned Trump at the first televised Republican primary debate in August 2015, igniting a public feud with Trump that lasted for eight months.⁸¹

⁷⁸ Andrew Edgecliffe-Johnson, *Which way now for Fox News and Trump?*, Financial Times (Sept. 15, 2020), <https://www.ft.com/content/eef2bf60-e3e8-46a4-83f2-d8d4103dd01b>.

⁷⁹ *Network Propaganda* at 73.

⁸⁰ Mahler and Rutenberg, *How Rupert Murdoch’s Empire of Influence Remade the World*, *supra* note 74.

⁸¹ Paola Chavez and Veronica Stracqualursi, *The History of the Donald Trump* –

70. As discussed below, during the 2016 presidential primaries, the Murdochs and Ailes discovered that Trump had a greater hold on the Fox News audience than they did. Ailes resigned soon thereafter, in July 2016. These two events marked the end of an era at Fox News.

C. Fox News Accedes to Trump Setting the Political Narratives

71. *Network Propaganda* is grounded in data analysis of the interaction among digital media of just under four million political stories from over 40,000 online news sources between 2015 and 2017.⁸² The book discusses the influence of Fox News within a larger partisan media ecosystem that also consists of talk radio and online media outlets such as *Breitbart* and the *Drudge Report*. The book describes how, during the 2016 presidential primaries, Fox News came under attack from pro-Trump media rivals:

The 2016 elections showed an unusual pattern of support for Trump as a candidate. Some right-leaning outlets, most notably Breitbart, launched attacks not only at Democrats and Trump's Republican rivals but also at media outlets that did not fully support Trump's candidacy. A review of the stories most widely shared during the primary season shows that Jeb Bush, Marco Rubio, and Fox News were major targets of attack from Breitbart and related sites.⁸³

72. The attacks on Fox News hurt its reach among viewers:

Megyn Kelly Feud, ABC News (May 17, 2016, 9:26 AM), <https://abcnews.go.com/Politics/history-donald-trump-megyn-kelly-feud/story?id=39151987>.

⁸² *Network Propaganda* at 46.

⁸³ *Id.* at 57.

By February 2016, Breitbart had grown more prominent while Fox had declined This shift reflects the fact that Fox News then received less Twitter attention than it did earlier or later in the campaign, and less attention in particular from users who also paid attention to the core Breitbart-centered sites.⁸⁴

73. Fox News successfully responded to the attacks from its pro-Trump media rivals by adopting a pro-Trump editorial position midway through the primaries.⁸⁵ “[A]s the primaries ended, attention to Fox recovered and Fox became more tightly integrated with Breitbart and the remainder of the right-wing media sphere.”⁸⁶ By supporting Trump through Election Day 2016 and into 2017, Fox News reasserted its centrality.⁸⁷ “As a proportion of all links that went to the top 50 media outlets on the left and right, the big positive mover was Fox News[.]”⁸⁸ “Fox News surpassed Breitbart in both inlinks and Twitter shares.”⁸⁹

74. The cost to the Murdochs was that they lost their kingmaker status. The Murdochs could no longer choose to advance the narratives of their favored politicians and political issues. To maintain Fox News’s audience, Fox News needed to advance the narratives favored by Trump.⁹⁰

⁸⁴ *Id.*

⁸⁵ *Id.* at 59, 93.

⁸⁶ *Id.* at 59.

⁸⁷ *Id.* at 60-61.

⁸⁸ *Id.* at 65.

⁸⁹ *Id.* at 66.

⁹⁰ *Id.* at 20.

75. In order for it to maintain its centrality within its media ecosystem, Fox News was under business pressure to promote factually unfounded partisan narratives that were being circulated by Trump and otherwise circulating online.⁹¹ Fox News thus operated at a higher risk of defamation liability than did major media outlets who adhered to journalistic standards and operated in a different political-media ecosystem.⁹²

76. *Network Propaganda* analyzes three case studies from 2017 in which Fox News was instrumental in pushing false narratives that served Trump's objectives: (1) the "deep state" framing of the Robert Mueller investigation;⁹³ (2) the Uranium One story "recounted by Hannity, Gingrich, Lou Dobbs, and Judge Jeannine—and more than anyone, Donald Trump—that Hillary Clinton as secretary of state gave Russia 20 percent of our uranium," which was "simply false" and had been "fact-checked extensively" by major media outlets;⁹⁴ and (3) a lurid tale involving the July 10, 2016, murder of DNC staffer Seth Rich that predictably led to actionable tort claims.⁹⁵

⁹¹ *Id.* at 73-75 (emphasis added).

⁹² *Id.* at 81.

⁹³ *Id.* at 146-58.

⁹⁴ *Id.* at 168; 166-87.

⁹⁵ *Id.* at 159-66.

77. The latter two case studies—Uranium One and Seth Rich—were “specifically fact-based cases [in which] Fox News actively promoted these stories despite the fact that they were repeatedly fact checked and debunked by a wide variety of professional journalists.”⁹⁶ The authors conclude, “Fox shares little but a few visual trappings with the world of professional journalism at the core of the rest of the U.S. media system.”⁹⁷

D. Fox’s Seth Rich Scandal

78. On May 16, 2017, when Trump was under pressure for having fired Federal Bureau of Investigation (“FBI”) Director James Comey, Fox revived a conspiracy theory from a year earlier: that DNC employee Seth Rich was murdered in July 2016 because he, rather than Russian intelligence, was the source of leaked DNC emails to WikiLeaks.

79. Fox promoted the conspiracy theory through a story distributed on multiple platforms:

At 4:30 a.m. on May 16, 2017, the Washington, D.C., local Fox 5 reported that a private investigator hired by Seth Rich’s family, Rod Wheeler, had communicated to Fox 5 that Seth Rich had been in touch with WikiLeaks before his death and that a source inside the D.C. police told him that the police were told to stand down the investigation. At 5:40 a.m., Fox and Friends interviewed the Fox D.C. reporter and developed its own story, which ran at 6:17 a.m., that repeated the story

⁹⁶ *Id.* at 146.

⁹⁷ *Id.* at 147.

and vouched for Wheeler’s credibility. That story ran again an hour later. Online, Fox News published Malia Zimmerman’s version of the story That evening Sean Hannity made the connection to the Russia investigation explicit. After telling the basic story, Hannity ran an interview he did with Julian Assange in January 2017, in which Assange said that the email dumps were not from a state actor Hannity then . . . delivered the core point:

If this is true, and Seth Rich gave Wikileaks these DNC emails . . . this blows the whole Russia collusion narrative completely out of the water.⁹⁸

80. It soon became apparent that Fox News had manufactured the story. Rod Wheeler, the Rich family investigator, told CNN that the information he had referenced in his Fox 5 interview came from a Fox News reporter. CNN also reported that Wheeler’s services had been paid for by Ed Butkowsky, a Fox News guest commentator.⁹⁹ Fox 5 published a clarification stating that Wheeler had “backtracked” on his statement.¹⁰⁰

81. Nonetheless, on May 18, 2017, Sean Hannity hosted Jay Sekulow, who said that Rich was responsible for the DNC leaks.¹⁰¹ Fox News personalities Lou Dobbs and Eric Bolling continued to suggest that Rich was murdered because he had

⁹⁸ *Id.* at 162-63.

⁹⁹ *Id.* at 163.

¹⁰⁰ *Id.*

¹⁰¹ David Folkenflik, *Fox News Retracts DNC Staffer Conspiracy Story, But Hannity Keeps it Alive*, NPR (May 24, 2017, 10:49 AM), <https://www.npr.org/2017/05/24/529809256/fox-news-retracts-dnc-staffer-conspiracy-story-but-hannity-keeps-it-alive>.

leaked DNC emails to WikiLeaks.¹⁰² On May 21, Newt Gingrich appeared on *Fox & Friends* and said that Rich was “apparently assassinated.”¹⁰³ Hannity, in particular, aggressively pushed the Rich story on Fox News, his radio show, and on Twitter.¹⁰⁴

82. Data analysis attests to the central role of Fox News and the Fox DC affiliate in spreading the Seth Rich story. Other media stories cited Fox, and video clips of Hannity and other Fox News programming about Seth Rich proliferated on YouTube.¹⁰⁵

83. On May 22, *The Daily Beast* reported that Fox News staffers were “increasingly dismayed” and “embarrass[ed]” about the network’s continued promotion of the conspiracy theory. One Fox News political reporter replied to a query as follows: “ARE WE STILL AIRING THAT SHIT?!”¹⁰⁶

¹⁰² David Folkenflik, *Seth Rich’s Killing was Exploited on Fox News and Online. His Parents are Fed Up*, NPR (June 15, 2022, 5:01 AM), <https://www.npr.org/2022/06/15/1104511732/fox-news-seth-rich-murder>.

¹⁰³ Lois Beckett, *Newt Gingrich Repeats Seth Rich Conspiracy Theory in Fox Appearance*, Guardian (May 21, 2017, 16:48), <https://www.theguardian.com/us-news/2017/may/21/newt-gingrich-seth-rich-wikileaks-conspiracy-theory-fox-friends>.

¹⁰⁴ THR Staff, *Sean Hannity Backs Off Seth Rich Story “For Now” Out of Respect for His Family*, The Hollywood Reporter (May 23, 2017, 11:05 PM), <https://www.hollywoodreporter.com/news/general-news/sean-hannity-backs-seth-rich-story-respect-family-999155/>.

¹⁰⁵ *Network Propaganda* at 164-65.

¹⁰⁶ Andrew Kirell and Asawin Suebsaeng, *Fox News Staffers ‘Embarrassed’ by*

84. On May 23, Fox News issued the following statement:

On May 16, a story was posted on the Fox News website on the investigation into the 2016 murder of DNC Staffer Seth Rich. The article was not initially subjected to the high degree of editorial scrutiny we require for all our reporting. Upon appropriate review, the article was found not to meet those standards and has since been removed.

We will continue to investigate this story and will provide updates as warranted.¹⁰⁷

This statement did not acknowledge that the article in question was false, and it did not say anything about the Fox 5 broadcast or any of the Fox News broadcasts devoted to Seth Rich's murder.

85. That night, Hannity stated on his primetime show, "out of respect for the family's wishes, for now, I am not discussing this matter at this time," but added: "Please do not interpret what I'm saying tonight to mean anything. Don't read into this. I promise you, I am not going to stop doing my job. To the extent to my ability, I am not going to stop trying to find the truth."¹⁰⁸ On his radio show Hannity stated:

Hannity's Conspiracy Theory Crusade, Daily Beast (May 22, 2017, 5:30 PM), <https://www.thedailybeast.com/fox-news-staffers-embarrassed-by-hannitys-conspiracy-theory-crusade>.

¹⁰⁷ *Statement on Coverage of Seth Rich Murder Investigation*, Fox News (May 23, 2017, 2:03 PM), <https://www.foxnews.com/politics/statement-on-coverage-of-seth-rich-murder-investigation>.

¹⁰⁸ THR Staff, *Sean Hannity Backs Off Seth Rich Story "For Now" Out of Respect for His Family*, The Hollywood Reporter (May 23, 2017, 11:05 PM), <https://www.hollywoodreporter.com/news/general-news/sean-hannity-backs-seth-rich-story-respect-family-999155/>.

“I am not Fox.com or FoxNews.com. I retracted nothing.”¹⁰⁹ Hannity also tweeted: “Ok TO BE CLEAR, I am closer to the TRUTH than ever. Not only am I not stopping. I am working harder. Updates when available. Stay tuned!”¹¹⁰

86. Seven companies stopped advertising on Hannity’s Fox News show due to the Seth Rich scandal.¹¹¹ Controversy over Fox News’s promotion of the Seth Rich conspiracy theory also threatened regulatory approval in the United Kingdom of 21st Century Fox’s then-pending offer to buy out the remaining 61% ownership of Sky Broadcasting Company.¹¹²

87. There is no question that the Seth Rich conspiracy theory was factually unfounded. In April 2019, special counsel Robert Mueller’s official report on the investigation into Russian interference in the 2016 presidential election documented that WikiLeaks was communicating with Russian military intelligence officers before and after Seth Rich’s death.¹¹³

¹⁰⁹ Hadas Gold, *Fox Didn’t Pressure Hannity on Rich Story*, Politico (May 24, 2017, 5:35 PM), <https://www.politico.com/story/2017/05/24/hannity-fox-news-seth-rich-238788>.

¹¹⁰ *Id.*

¹¹¹ Adam Gabbatt, *Sean Hannity Hit by Advertisers Exodus in Wake of Bogus Seth Rich Story*, Guardian (May 26, 2017, 15:07), <https://www.theguardian.com/media/2017/may/26/sean-hannity-advertiser-boycott-fox-news-seth-rich>.

¹¹² Stewart Clarke, *U.K. Government Seeks Advice on ‘New Evidence’ Concerning Fox’s Bid for Sky*, Variety (Aug. 8, 2017, 11:58 AM), <https://variety.com/2017/tv/news/fox-bid-for-sky-1202519403/>.

¹¹³ Oliver Darcy, *After Mueller Report, brother of Seth Rich calls on those who*

88. Seth Rich’s parents sued Fox News. Senior Judge Guido Calabresi, a legendary torts scholar, authored the opinion in the United States Court of Appeals for the Second Circuit sustaining their claims. Respecting the claim for intentional infliction of emotional distress, he wrote:

We have no trouble concluding that—taking their allegations as true—the Riches plausibly alleged what amounted to a campaign of emotional torture. In order to publish a knowingly false article accusing Seth of leaking the DNC emails, Butowsky and Zimmerman needed a reliable source. They settled on a purportedly independent investigator, hired by the Riches. But they had to fabricate that source. So Butowsky—through lies, religious appeals, and financial support—convinced the Riches to hire Wheeler, a Fox News contributor, as their private investigator. Eventually, Butowsky and Zimmerman told Wheeler that an anonymous FBI investigator had seen emails between Seth and WikiLeaks. Wheeler then regurgitated that unsubstantiated information back to Zimmerman, giving her a named source (himself) for her Fox News article. The article emphasized Wheeler’s connection to the Riches, thus lending credibility to his statements. And it suggested that Seth may have leaked the emails because—as his father said—he “wanted to make a difference in the world.” These allegations, taken together, plausibly rise to the level of extreme and outrageous conduct.¹¹⁴

pushed conspiracy theory to ‘take responsibility’, CNN BUSINESS (April 19, 2019, 5:58 PM), <https://www.cnn.com/2019/04/19/media/seth-rich-mueller-report/index.html>. See also Scott J. Shapiro, *Fancy Bear Goes Phishing: The Dark History of the Information Age, in Five Extraordinary Hacks* at 186-88, 207-37 (2023) (discussing methodology of DNC hack).

¹¹⁴ *Rich v. Fox News Network, LLC*, 939 F.3d 112, 123 (2d Cir. 2019) (emphasis added).

89. In upholding the claim that Fox News tortiously interfered with the Rich family’s confidentiality agreement with Wheeler, the Second Circuit rejected the defense that Fox News possessed a legal justification of news gathering:

The allegations—which we have to take as true—are that Zimmerman and Butowsky (i) intentionally planted a biased investigator to gain the trust of a grieving family; (ii) fed false information to the investigator with the sole purpose of exploiting that investigator’s relationship with the family to give credence to a politically motivated story; and (iii) knew, from the very start, that this story was nothing more than a false conspiracy theory. All that is more than enough to counter any possible justification.¹¹⁵

90. A trove of documents entered the public record from court cases among various persons connected to the Seth Rich story. In an exposé about Fox’s Seth Rich scandal, based on those court records, Kelly McBride, a senior vice president and journalism ethics expert at the Poynter Institute, stated: “The most generous way to look at it is Fox News didn’t do their job. The less generous way to look at it would be they didn’t even try to do their job. And if they didn’t even try, the obvious question is ‘Why?’”¹¹⁶ The answer to that rhetorical question is that the business model of Fox News was to maintain its centrality in its ecosystem.

¹¹⁵ *Id.* at 129.

¹¹⁶ Andy Kroll, *A Murder, a Conspiracy Theory, and the Lies of Fox News*, Rolling Stone (Aug. 16, 2020, 11:40 AM), <https://www.rollingstone.com/politics/politics-features/seth-rich-fox-news-sean-hannity-wikileaks-donald-trump-1040830/>.

91. Seth Rich’s parents settled with Fox News in October 2020, on the eve of the depositions of Dobbs and Hannity. Fox News negotiated to keep the settlement confidential for one month, until after Election Day 2020.¹¹⁷ Dinh reported the settlement to Fox’s Audit Committee on November 2 and November 10, 2020, and to the full Board on November 11, 2020. The content of any substantive report or director discussion is either redacted or not recorded.¹¹⁸

92. There is no Section 220 record or public record evidence of the Board, the Audit Committee, or the Company taking any remedial action respecting defamation risk in light of the Seth Rich scandal and resulting litigation, which should have served as a red flag of ongoing defamation risk at Fox News.

E. Fox’s Defamation of Dominion and Smartmatic

(a) Trump Fights the Election Results, Against the Public Advice of the Murdochs

93. Late in the evening on November 3, 2020, Election Day, Fox News’s Decision Desk determined that Biden had won the State of Arizona. The Decision Desk obtained authorization from Rupert and Lachlan to announce that Biden had

¹¹⁷ Ben Smith, *Fox Settled a Lawsuit Over Its Lies. But It Insisted on One Unusual Condition.*, N.Y. Times (Jan. 17, 2021), <https://www.nytimes.com/2021/01/17/business/media/fox-news-seth-rich-settlement.html>.

¹¹⁸ NYC_220_712 at 713; NYC_220_7487 at 7488; NYC_220_764 at 7697; NYC_220_1481 at 1484.

won Arizona,¹¹⁹ which seemingly would be sufficient for Biden to prevail nationally. Fox News made the call at 11:20 p.m. According to Michael Wolff’s forthcoming book, *Landslide*, Rupert approved the call with a “signature grunt” and a terse “fuck him.”¹²⁰

94. Trump’s team badgered Fox unsuccessfully to reverse the call. At Trump’s direction, Jared Kushner spoke to Rupert, and Fox News’s Senior Vice President and Managing Editor of the Washington Bureau Bill Sammon spoke to White House Chief of Staff Mark Meadows.¹²¹ Trump political adviser Jason Miller tweeted:

¹¹⁹ Martin Pengelly, ‘*This power is reaching a natural end*’: Michael Wolff’s new book predicts the fall of Fox News, The Guardian (Aug. 22, 2023, 14:00 EDT), <https://amp.theguardian.com/books/2023/aug/22/fall-michael-wolff-new-book-fox-news-murdoch>; Martin Pengelly, *Rupert Murdoch approved Fox News Arizona call that signaled Trump defeat, book says*, The Guardian (Jul. 9, 2021, 15:31 EDT), <https://www.theguardian.com/media/2021/jul/09/rupert-murdoch-donald-trump-fox-news-arizona>.

¹²⁰ Martin Pengelly, ‘*This power is reaching a natural end*’: Michael Wolff’s new book predicts the fall of Fox News, The Guardian (Aug. 22, 2023, 14:00 EDT), <https://amp.theguardian.com/books/2023/aug/22/fall-michael-wolff-new-book-fox-news-murdoch>.

¹²¹ D MSJ at 18.



Jason Miller ✓
@JasonMillerinDC

...

WAY too soon to be calling Arizona...way too soon. We believe over 2/3 of those outstanding Election Day voters are going to be for Trump. Can't believe Fox was so anxious to pull the trigger here after taking so long to call Florida. Wow.

11:27 PM · Nov 3, 2020

5,419 Retweets 1,116 Quotes 29.7K Likes 77 Bookmarks

95. Trump declared himself the winner of the national election in the early morning hours of November 4 and alleged widespread election fraud. Fox News's most reputable news host, Chris Wallace, rejected Trump's declaration, stating: "This is an extremely flammable situation and the president just threw a match into it. He has not won these states. Nobody is saying he won these states. The states haven't said he's won."¹²²

96. Initially, Rupert tried to influence Trump to concede the presidential election. On the evening of November 5, the Murdoch-controlled *New York Post*

¹²² Harriet Alexander, *Fox News' Chris Wallace says Trump 'threw a match at a flammable situation'*, The Independent (Nov. 4, 2020, 14:20 EDT), <https://www.independent.co.uk/news/world/americas/us-election-2020/chris-wallace-trump-fox-news-election-b1588603.html>. Chris Wallace left Fox News in December 2021. Michael M. Grynbaum, *Chris Wallace Says Life at Fox News Became 'Unsustainable'*, N.Y. Times (Mar. 27, 2022), <https://www.nytimes.com/2022/03/27/business/media/chris-wallace-cnn-fox-news.html>.

ran an article entitled, “Downcast Trump makes baseless election fraud claims in White House address.”¹²³

97. Rupert told Scott on November 6 that it was “very hard to credibly claim foul everywhere.”¹²⁴ Rupert testified in the Dominion litigation that the 2020 election “was not stolen” from Trump and that he always thought that the vote-counting process was on the “up-and-up.”¹²⁵

98. On November 7, Fox News and several other media outlets called the national election for Biden. Rupert emailed Lachlan: “We should and could have gone first [to call the election] but at least being second saves us a Trump explosion!”¹²⁶

99. Rupert and Lachlan helped edit a November 7 *New York Post* editorial calling for Trump to stop pushing baseless conspiracy theories of a stolen election:

[T]he president’s aides have shown no evidence that the election was “stolen.” . . . It undermines faith in democracy, and faith in the nation, to push baseless conspiracies. Get Rudy Giuliani off TV....

If Trump persists in wild talk to the contrary, he’ll lead his people into irrelevance and marginalize his own voice.¹²⁷

¹²³ Ebony Bowden, *Downcast Trump makes baseless election fraud claims in White House address*, N.Y. Post (Nov. 5, 2020, 6:19 PM), <https://nypost.com/2020/11/05/trump-to-speak-from-white-house-as-vote-count-leans-toward-biden/>.

¹²⁴ NYC_220_8972.

¹²⁵ D MSJ Ex. 600 (L. Murdoch Dep. Tr.) at 57:13, 64:19-23.

¹²⁶ NYC_220_8999.

¹²⁷ Post Editorial Board, *President Trump, your legacy is secure – stop the ‘stolen*

After the editorial was published, Scott disseminated it widely within Fox. Rupert thanked her for doing so.¹²⁸

100. That same day, the Trump campaign filed suit in Arizona claiming that Maricopa County “incorrectly rejected votes.”¹²⁹ More lawsuits would follow, along with more accusations of election fraud that Trump’s lawyers were not willing to put in signed pleadings, such as the accusations that Dominion and Smartmatic engaged in criminal election fraud.

(b) Fox News Faces a Viewer Exodus and Trump Pressure

101. By defying Trump’s claim that he had won the election, Fox News triggered a massive, immediate, negative viewer reaction.

102. Trump supporters appeared outside of the election department in Maricopa County, Arizona, chanting “Fox News sucks.”¹³⁰

election’ rhetoric, N.Y. Post (Nov. 7, 2020, 3:07 PM), <https://nypost.com/2020/11/07/president-trump-your-legacy-is-secure-stop-the-stolen-election-rhetoric/>; D SJ Opp. at 16-17.

¹²⁸ D SJ Opp. Ex. 600 (R. Murdoch Dep. Tr.) at 328:5-330:23.

¹²⁹ Irene Snyder, Jennifer Martinez, FOX 10 Staff and Stephanie Bennett, *Trump campaign, RNC file lawsuit in Maricopa County for ‘incorrectly rejected votes’*, FOX 10 Phoenix (Nov. 7, 2020), <https://www.fox10phoenix.com/news/trump-campaign-rnc-file-lawsuit-in-maricopa-county-for-incorrectly-rejected-votes>.

¹³⁰ Mayank Aggarwal, *Trump fans chant ‘Fox News sucks’ outside Arizona count as anchor replies to angry tweets*, Independent (Nov. 5, 2020, 8:32), <https://www.independent.co.uk/news/world/americas/us-election-2020/trump-fox-news-supporters-angry-tweets-bret-baier-b1610673.html>; D MSJ at 18; Ex. 195

103. In the week between November 4 and November 11, 2020, Fox News’s ratings cratered. Fox’s own internal tracking of viewer favorability showed that viewers of primetime Fox News shows (hosted by Tucker Carlson, Sean Hannity, and Laura Ingraham), who had a net favorability impression of Fox News of over 70% shortly before Election Day, had just a 25% net favorability impression as of November 11.¹³¹

104. Fox’s top hosts and executives watched the backlash with alarm. Carlson emailed Scott, “I’ve never seen a reaction like this, to any media company. Kills me to watch it.” Scott relayed the email to Lachlan.¹³² Lachlan testified in the Dominion litigation that crashing ratings were “absolutely” a concern that would “keep [him] awake.”¹³³

105. A weekly “Brand Protection” report sent to Rupert, Lachlan, and Dinh included the tracking of viewer favorability along with a “summary of the strong conservative and viewer backlash to Fox that we are working to track and mitigate.” The report warned:

This week we continued to see *extremely high levels of conservative discontent towards Fox News*, both on social media and in the pro-

(Fox’s Chief White House Correspondent telling Fox News President “Our viewers are . . . chanting ‘Fox News sucks’, something I never heard before.”).

¹³¹ NYC_220_9075 at 9076.

¹³² D MSJ at 211, 212.

¹³³ D MSJ Ex. 130 (L. Murdoch Dep. Tr.) at 145:20-147:24.

Trump commentariat. Roughly half of the top 100 tweets and a third of the top 100 Facebook posts mentioning Fox News were from angry conservatives criticizing Fox or threatening to boycott the network. ***Both Donald Trump and Newsmax have taken active roles in promoting attacks on Fox News***, including by pushing leaked footage and false reports about Fox News talent.¹³⁴

106. Noteworthy attacks on Fox News included a November 9 story by Rush Limbaugh entitled, “Fox News Turned Its Back on Its Base”¹³⁵ and a November 12 article in *Axios* entitled “Scoop: Trump eyes digital media empire to take on Fox News.”¹³⁶

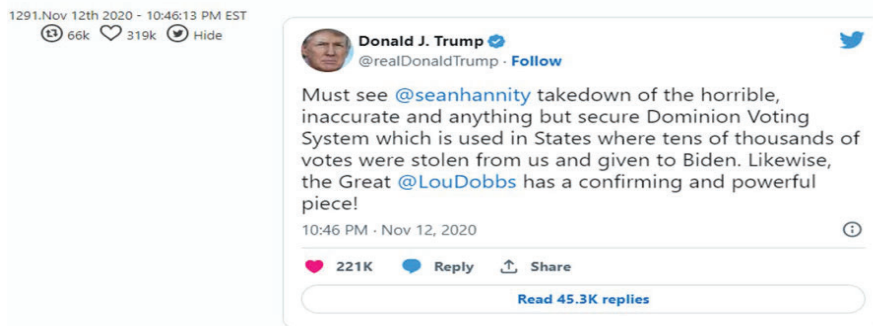
107. Trump was pressuring Fox News to support his fight against the election results. On the evening of November 12, Hannity and Dobbs unleashed attacks on Dominion, garnering Trump’s approval:¹³⁷

¹³⁴ NYC_220_9075 (November 13, 2020) (emphasis added).

¹³⁵ NYC_220_9075 at 9076; Rush Limbaugh, *Fox News Turned Its Back on Its Base*, The Rush Limbaugh Show (Nov. 9, 2020), <https://www.rushlimbaugh.com/daily/2020/11/09/fox-news-turned-its-back-on-its-base/>.

¹³⁶ NYC_220_9075 at 9076; Mike Allen, *Scoop: Trump eyes digital media empire to take on Fox News*, *Axios* (Nov. 12, 2020), <https://www.axios.com/2020/11/12/trump-fox-news-digital-media-competitor>.

¹³⁷ Donald J. Trump (@realDonaldTrump), Twitter (Nov. 12, 2020, 10:46 PM), <https://twitter.com/realDonaldTrump/status/1327095398712946695>.



108. On November 15, Trump tweeted praise of competitor networks One America News and Newsmax, which both claimed that Trump had won the 2020 election. He wrote: “Many great alternatives are forming & exist. Try @OANN & @newsmax, among others!”¹³⁸

109. Fox News’s daytime and primetime audience declined by 34% and 37% respectively, while Newsmax’s daytime audience increased nearly six-fold and its primetime audience tripled.¹³⁹

(c) The Murdochs Decide to Amplify Trump’s Claims of Election Fraud

110. Rupert fretted that Fox News had mishandled the call of Arizona, and he became more actively engaged in Fox News programming going forward.¹⁴⁰ He

¹³⁸ Donald J. Trump (@realDonaldTrump), Twitter (Nov. 15, 2020, 7:25 AM), <https://twitter.com/realDonaldTrump/status/1327950785959915520?s=20>.

¹³⁹ Ruling on Cross-Mots. for Summ. J. (“MSJ Ruling”) at 15-16, *Dominion v. Fox News Network*, No. N21C-03-257, (Del. Super. Ct. Mar. 31, 2023).

¹⁴⁰ Sarah Ellison, *Top Fox News managers depart amid Murdoch’s concerns over controversial Arizona election night projection*, Washington Post (Jan. 19, 2021,

and Lachlan were in close contact with Scott from November 2020 through January 2021 about the content and direction of Fox News, including narratives, topics, and guests, and how to cover Trump’s “stolen election” claims.¹⁴¹

111. Certain Fox hosts amplified Trump’s election fraud theories. On the morning of November 8, Fox host Maria Bartiromo aired a pre-taped interview with Sidney Powell, who, together with Giuliani, was leading Trump’s legal team filing election-fraud lawsuits. Powell had forwarded Bartiromo an email that Powell said constituted evidence of voter fraud. The writer blamed election irregularities on Dominion and claimed she had learned the information in her “dreams.” The writer also proclaimed that she was “internally decapitated,” that “[t]he Wind tells me I’m a ghost, but I don’t believe it,” and that she was able to “time-travel in a semi-conscious state.”¹⁴²

6:01 PM), https://www.washingtonpost.com/lifestyle/media/fox-news-stirewalt-sammon-murdoch-arizona/2021/01/19/a54e9f72-5a8f-11eb-a976-bad6431e03e2_story.html.

¹⁴¹ D SJ Opp. at 10-11.

¹⁴² Cheryl Teh and Jacob Shamsian, *Sidney Powell cited woman who claimed to be headless, time-traveling entity in email pushing election conspiracy theories*, Business Insider (Feb. 17, 2023, 12:53 AM), <https://www.businessinsider.com/sidney-powell-voter-fraud-claims-headless-time-travel-dominion-fox-2023-2>.

112. On air with Bartiromo, Powell contended that there had been a “massive and coordinated effort to steal this election” that involved “flipping votes in the computer system, or adding votes that did not exist[.]”¹⁴³

113. Later that day, on November 8, Rupert complained to Scott about CNN coverage describing Fox News as “enabling Trump’s election denialism.”¹⁴⁴

114. Shortly thereafter on November 8, Rupert, Lachlan, and Scott had a “long talk” about mounting viewer backlash and the direction of Fox coverage in light of Trump contesting the election, and decided that Fox News would amplify Trump’s lawsuits and claims of election fraud while waiting for Trump to concede.¹⁴⁵

115. This strategy of rebuilding Fox News’s audience by indulging Trump’s claims is reflected in two subsequent emails between Rupert and Scott. On November 9, Scott wrote the following in response to Rupert’s suggestion of pivoting coverage to topics other than the presidential election:

¹⁴³ Sunday Morning Futures with Maria Bartiromo, Fox News, at 7:00AM PST (Nov. 8, 2020), https://archive.org/details/FOXNEWSW_20201108_150000_Sunday_Morning_Futures_With_Maria_Bartiromo/start/3060/end/3120.

¹⁴⁴ D SJ Opp. at 19; Cheryl Teh and Jacob Shamsian, *Sidney Powell cited woman who claimed to be headless, time-traveling entity in email pushing election conspiracy theories*, Business Insider (Feb. 17, 2023, 12:53 AM), <https://www.businessinsider.com/sidney-powell-voter-fraud-claims-headless-time-travel-dominion-fox-2023-2>.

¹⁴⁵ D SJ Opp. at 19-20.

*Pivot but keep the audience who loves and trusts us...we need to make sure they know we aren't abandoning them and [are] still champions for them.*¹⁴⁶

On November 16, Rupert emailed Scott:

Trump will concede eventually and we should concentrate on Georgia [Senate run-off], helping any way we can. *We don't want to antagonize Trump further*, but Giuliani taken with a large grain of salt. *Everything at stake here.*¹⁴⁷

110 Rupert testified in the Dominion litigation that “nobody wants Trump as an enemy,” explaining “we all know that Trump has a big following. If he says, ‘Don’t watch Fox News,’ maybe some don’t.”¹⁴⁸

111 Rupert also testified that he had “seen no evidence” that Dominion committed election fraud, and that he did not believe Dominion had done so.¹⁴⁹

(d) Fox’s Lies About Dominion and Smartmatic

116. As noted above, Judge Davis made the following observation when ruling on cross-motions for summary judgment in the Dominion litigation (with emphasis in the original): “*The evidence developed in this civil proceeding*

¹⁴⁶ NYC_220_8973 (emphasis added).

¹⁴⁷ NYC_220_8987 (emphasis added).

¹⁴⁸ Jeremy Barr, Sarah Ellison and Rachel Weiner, *Murdoch admits some Fox hosts ‘were endorsing’ election falsehoods*, Washington Post (Feb. 27, 2023, 8:08 PM), <https://www.washingtonpost.com/media/2023/02/27/rupert-murdoch-testimony-fox-dominion/>.

¹⁴⁹ D SJ Opp. Ex. 600 (Rupert Dep. Tr.) at 24.

*demonstrates that [it] is **CRYSTAL** clear that none of the Statements relating to Dominion about the 2020 election are true.”*¹⁵⁰

117. There were four categories of “Statements” at issue in the Dominion litigation:

- (i) the “election lie” (*i.e.*, that Dominion manipulated or tampered with the election results);
- (ii) the “algorithm lie” (*i.e.*, that a fraudulent Dominion algorithm design flipped votes);
- (iii) the “Venezuela lie” (*i.e.*, that Dominion is owned by a company founded in Venezuela to rig elections for Hugo Chavez); and
- (iv) the “kickback lie” (*i.e.*, that Dominion pays kickbacks to election officials).

118. The “Statements” are set forth in an appendix to the judicial opinion (attached hereto as Exhibit B) and they include the following statements:

- November 8, 2020, statements by Maria Bartiromo with Sydney Powell and Rudy Giuliani, including:

¹⁵⁰ Ruling on Def.’s Mot. to Dismiss (“MTD Ruling”) at 23, *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257, (Del. Super Ct. Dec. 16, 2021).

“Sidney, we talked about the Dominion software. I know that there were voting irregularities.”

“Can you walk us through what has taken place here as you see it.”

- November 12, 2020, statements by Lou Dobbs with Rudy Giuliani, including:

“And by the way, the states, as you well know, they have no ability to audit, meaningfully, the votes that are cast, because the servers are somewhere else and are considered proprietary and they won’t touch them.”

“Rudy, we’re glad you’re on this case and pursuing what is the truth and straightening out what is a very complicated and difficult story.”

- November 13, 2020, statements by Lou Dobbs with Sydney Powell, including, after Powell stated that Dominion “was created to produce altered voting results in Venezuela for Hugo Chavez and then shipped internationally to manipulate votes for purchase in other countries”:

“Well, that’s straightforward.”

“Sidney, we’re glad that you are on the charge to straighten out all of this.”

- November 14, 2020, tweet by Lou Dobbs (with embedded tweet by Rudy Giuliani stating that Dominion is a foreign company and a front for Smartmatic) stating:

“Read all about the Dominion and Smartmatic voting companies and you’ll soon understand how pervasive this Democrat electoral fraud is, and why there’s no way in the world the 2020 Presidential election was either free or fair.”

- November 14, 2020, statements by Fox News host Judge Jeanine Pyro with Sydney Powell, including:

“Now you’ll hear from Sidney Powell in a few minutes who will explain what she has unearthed in the creation of Dominion.”

“I assume that you are getting to the bottom of exactly what Dominion is, who started Dominion, how it can be manipulated if it is manipulated at all[.]”

- November 15, 2020, statements by Maria Bartiromo on Fox and Friends, including:

“There is much to understand about Smartmatic, which owns Dominion Voting Systems.”

“Sidney Powell is also talking about potential kickbacks that government officials who were asked to use Dominion actually also enjoyed benefits to their families.”

- November 15, 2020, statements by Maria Bartiromo with Rudy Giuliani and Sidney Powell, including:

Powell stating: “We have identified mathematically the exact algorithm they used and planned to use from the beginning to modify the votes[.]”

Giuliani stating: “this company has tried-and-true methods for fixing elections.”

Bartiromo eliciting factual assertions about electoral fraud and stating:

“Right.”

“Wow. This is explosive.”

- November 16, 2020, statements by Lou Dobbs with Sydney Powell, including:

“This is people trying to blind us to what is going on.”

“The radical Dems, the RINOS, corporate left wing national media, of course, quick to dismiss any concern about Dominion voting machines being manipulated as a, quote-unquote, conspiracy theory.”

- November 18, 2020, statements by Lou Dobbs with Rudy Giuliani, including:

“I want to share with the audience one of the affidavits that has been given to use by an unidentified whistleblower, and it pertains to Dominion.”

“It’s outrageous,” in response to Giuliani’s assertions about Dominion and Smartmatic.

- November 19, 2020, statements by Lou Dobbs with Sydney Powell, including:

“[Powell] will be providing more details on how Dominion vote machines and Smartmatic software were used to help Joe Biden.”

“We have just watched, to everyone in this audience tonight, our election is run by companies, the ownership of which we don’t know.”

Powell stating “Dominion machines run the Smartmatic software or parts of the key code of it, and that is what allows them to manipulate the votes in a way the operators choose to manipulate them[.]”

- November 21, 2020, statements by Fox News host Judge Jeanine Pirro with Trump attorney Lin Wood, including:

“[W]hy was there an overnight popping of the vote tabulation that cannot be explained for Biden?”

“[T]he President’s lawyers offered evidence by way of affidavits, which I told you last Saturday as a Judge from a legal perspective, are sworn statements of individuals signed under penalty of perjury, meaning they know they face the penalty of prosecution and five years if they lie. These sworn statements are factual allegations are part of virtually every lawsuit.”

- November 24, 2020, statements by Lou Dobbs with Sydney Powell, including:

“Let’s start with the ownership of these voting firms. I know you’re focusing on that part of the electoral fraud that’s been perpetrated this year in this election. Why don’t we know who they are?”

“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.”

Powell stating “they were manipulated by the software used in the Dominion machines—and used by other machines in the United States,

frankly, and we are just continuing to be inundated by evidence of all the frauds here[.]”

- November 30, 2020, statements by Lou Dobbs with Sydney Powell, including:

Powell stating “all the machines are infected with the software code that allows Dominion to shave votes for one candidate and give them to another[.]”

Dobbs stating “no one knows [Dominion’s] ownership, has no idea what’s going on in those servers, has no understanding of the software, because it’s proprietary.”

- November 30, 2020, statement by Sydney Powell with Sean Hannity:
“The machine ran an algorithm that shaved votes from Trump and awarded them to Biden. They used the machines to trash large batches of votes that should have been awarded to President Trump. And they used a machine to inject and add massive quantities of votes for Mr. Biden.”

- December 4, 2020, statements by Lou Dobbs, including:
“At the center of it all, Dominion Voting Systems. Are they the culprit here? Not only the culprit, but are they the principal culprit?”

“Dominion Voting Systems, with—you have described it, with algorithms in which—which were designed to be inaccurate rather than to be a secure system.”

“Give us your sense of who is driving all of this.”

- December 10, 2020, tweet by Lou Dobbs with embedded document:

“The 2020 Election is a Cyber Pearl Harbor: The leftwing establishment have aligned their forces to overthrow the United States government #MAGA #AmericaFirst #Dobbs.

“We have technical presentations that prove there is an embedded controller in every Dominion machine We have the architecture and systems, that show how the machines can be controlled from external sources, via the internet, in violation of voting standards. Federal law, state laws, and contracts.”

- December 10, 2020, statements by Lou Dobbs with Sydney Powell, including:

Powell stating “they designed and developed the Smartmatic and Dominion programs and machines, that include a controller module that allows people to log in and manipulate the vote, even as its happening. We’re finding more and more evidence of this. We now have reams

and reams of actual documents from Smartmatic and Dominion, including evidence that they planned and executed all of this.”

Dobbs stating “We have tremendous evidence already but—of fraud in this election[.]”

- December 10, 2020, tweets by Lou Dobbs:

“@SidneyPowell1 reveals groundbreaking new evidence indicating our Presidential election came under massive cyber-attack orchestrated with the help of Dominion, Smartmatic, and foreign adversaries.”

“Exposing Dominion: @SidneyPowell1 joins Lou at 5pm ET to share new information that could have massive consequences in the Battle for the White House.”

- December 12, 2020, statements by Rudy Giuliani on Fox & Friends:

“[W]e have a machine, the Dominion machine . . . was developed to steal elections and being used in the states that are involved.”

“I’ve got every piece of evidence. And I’ve got a mountainful of evidence[.]”

- January 26, 2021, statements by MyPillow CEO Mike Lindell with Tucker Carlson:

“I’ve been all in trying to find the machine fraud and I—we found it. We have all the evidence.”

“No, I have the evidence. I dare people to put it on. I dared Dominion to sue me, because then it would get out faster.”

(e) Fox’s Hostility to Fact-Checking Trump’s Claims

119. There was no shortage of timely, readily available information about the absence of any factual basis to support the “election lie,” the “algorithm lie,” the “Venezuela lie,” or the “kickback lie.” Fox News received no factual support from the Trump campaign or its pro-Trump guests. Fox News fact-checkers rejected Trump’s claims. Dominion and Smartmatic provided abundant fact-checking communications. Fox News executives and hosts knew that the claims of election fraud were false. Yet Fox News endorsed and promoted defamatory election lies over a span of many weeks. No institutional safeguards prevented Fox News from broadcasting defamatory election lies.

120. Fox News’s fact-checking department is called the Brainroom. Fox News Senior Vice President for Weekend News and Programming David Clark testified in the Dominion litigation that a claim should not be aired if the Brainroom concludes that the claim is false.¹⁵¹ By November 13, 2020, the Brainroom had

¹⁵¹ Amanda Terkel, Jane C. Timm and Dareh Gregorian, *Here’s what Fox News was*

produced two memos widely distributed within Fox rejecting claims made by the Trump campaign that Dominion voting machines had deleted or switched votes:¹⁵²

Slug	Writer	Create Date	Audio Time	Modify Date	Modified By
Background: Dominion Voting Systems & Criticism / Accusations - Fact Checks	balducci	11/13/20 13:35:06	11:17	11/13/20 13:37:41	balducci
CATEGORY				UNIT	STORY
[REDACTED]					
Len Balducci [REDACTED]					

FACT
Claims about Dominion switching or deleting votes are 100% false. Dominion systems continue to reliably and accurately count ballots, and state and local election authorities, as well fact checkers, have publicly confirmed the integrity of the process.

FACT
Dominion has no company ownership relationships with any member of the Pelosi family, the Feinstein family, or the Clinton Global Initiative. Dominion works with all political parties; our customer base and our government outreach practices reflect this nonpartisan approach.

trying to hide in its Dominion lawsuit redactions, NBC News (Mar. 29, 2023, 2:37 PM), <https://www.nbcnews.com/politics/elections/dominion-releases-previously-redacted-slides-fox-news-lawsuit-rcna77257>.

¹⁵² *Id.*; D MSJ Ex. 168, 332, 334-37.

From: Balducci, Leonard [REDACTED]
Sent: Friday, November 13, 2020 3:26 PM
To: Ilievski, Megan [REDACTED]
Cc: Ward, Kevin <[REDACTED]>
Subject: BRAINROOM: Background: Dominion Voting Systems & Criticism / Accusations - Fact Checks

TRUMP: "REPORT: DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE. DATA ANALYSIS FINDS 221,000 PENNSYLVANIA VOTES SWITCHED FROM PRESIDENT TRUMP TO BIDEN. 941,000 TRUMP VOTES DELETED. STATES USING DOMINION VOTING SYSTEMS SWITCHED 435,000 VOTES FROM TRUMP TO BIDEN."

THE FACTS: There's no evidence of widespread fraud in the 2020 election, or of major problems with Dominion's systems. Election officials from both political parties have stated publicly that the election went well, and international observers confirmed there were no serious irregularities.

121. Beginning on November 12, 2020, and continuing into 2021, Dominion sent Fox News a multitude of "Setting the Record Straight" emails, detailing all the public source evidence refuting the Trump campaign's lies being broadcast by the network. In total, Dominion sent 3,682 emails to Fox recipients seeking to correct the record.¹⁵³

122. One such "Setting the Record Straight" email, sent by Dominion's media relations specialist Tony Fratto to Maria Bartiromo on November 14 (attached as Exhibit C hereto), is a two-page document with hyperlinks and text supporting the following six propositions:

- i. Vote-deletion/switching assertions are completely false;
- ii. Dominion is a nonpartisan U.S. company;

¹⁵³ D MSJ at 92-96.

- iii. There were no Dominion software glitches and ballots were accurately tabulated. The results are also 100% auditable;
- iv. No unauthorized or last-minute software updates occurred;
- v. There were no issues with the use of Sharpie pens; and,
- vi. Assertions of voter fraud conspiracies are 100% false.

123. Smartmatic similarly embarked on its own campaign to combat misinformation. By November 16, 2020, Smartmatic had established online fact-checking sites.¹⁵⁴

124. The decision of the Murdochs and Scott to cater to Trump and Fox News's audience by airing Trump's election conspiracies overrode the available facts. Throughout Fox News, Scott and her executive team institutionalized hostility to fact-checking Trump, Fox News's hosts, and the Trump surrogates they presented.

125. As one example, Fox News reporter Jacqui Heinrich fact-checked Trump's tweet of November 12, which praised Hannity and Dobbs for attacking

¹⁵⁴ *Smartmatic's response to misinformation*, Smartmatic (last visited Sept. 7, 2023), available at <https://www.smartmatic.com/us/media/article/smartmatic-s-response-to-misinformation/>; *Smartmatic USA Corp. v. Fox Corp.*, Index No. 151136/2021, 2023 WL 2734442 (N.Y. Sup. Ct. Mar. 6, 2023) ("SMAC") Ex. 81, <https://www.courthousenews.com/wp-content/uploads/2021/02/smartmatic-fox-hooper-la.pdf>.

Dominion.¹⁵⁵ In a group text thread with Ingraham and Hannity, Carlson lambasted Heinrich's tweet:

"Please get her fired. Seriously... It's too much."

"What the fuck? I'm actually shocked."

"It needs to stop immediately, like tonight. It's measurably hurting the company. The stock price is down. Not a joke."

"I just went crazy on [Executive Vice President] Meade [Cooper] over it."

"Why would we allow some 27 year old fake reporter to wreck our network?"¹⁵⁶

126. A Fox News senior executive advised Scott about Heinrich's tweet:

Sean [Hannity] texted me—he's standing down on responding but not happy about this doesn't understand how this is allowed to happen from anyone in news. She [Heinrich] has serious nerve doing this and if this gets picked up, viewers are going to be further disgusted. Her job is to report—not to taunt the President of the United States and our biggest talent to further her career."¹⁵⁷

127. Heinrich's tweet was soon deleted and replaced with a different fact-checking tweet—one that did not reference Trump's November 12 tweet praising Hannity and Dobbs for their "takedown" of Dominion.¹⁵⁸ Fox News *reporters* were

¹⁵⁵ D MSJ Ex. 231.

¹⁵⁶ D MSJ Ex. 230 at FNN035_03890511-12.

¹⁵⁷ D MSJ Ex. 233.

¹⁵⁸ Jacqui Heinrich (@JacquiHeinrich), Twitter (Nov. 13, 2020, 4:01 PM), <https://twitter.com/JacquiHeinrich/status/1327355959849541633/photo/3>.

prohibited from fact-checking conspiracy-mongering Fox News *hosts*, directly or indirectly.¹⁵⁹

128. Giuliani and Powell held a press conference on November 19 that an article in *Vanity Fair* summarized as follows:

Hair and makeup malfunctions aside, the first thing you need to know about this press conference, in which Giuliani and company alleged they have evidence of mass, coordinated voter fraud, is that despite such claims, they told reporters they can't actually provide any evidence of them at this time.¹⁶⁰

Rupert watched the news conference and texted: "Really crazy stuff. And damaging."¹⁶¹ In an email, he wrote: "Just watched Giuliani press conference. Stupid and damaging. The only one encouraging Trump and misleading him. Both increasingly mad."¹⁶²

129. Yet, Fox News's White House correspondent, Kristen Fisher, was reprimanded for fact-checking Giuliani and Powell. She received a call from her bureau chief, who "emphasized that higher-ups at Fox News were also unhappy

¹⁵⁹ Brain Stelter (@brianstelter), Twitter (Feb. 17, 2023, 3:53 PM), <https://twitter.com/brianstelter/status/1626686377235722240>.

¹⁶⁰ Bess Levin, *Rudy Giuliani's Hair Dye Melting Off His Face Was the Least Crazy Part of His Batshit-Crazy Press Conference*, *Vanity Fair* (Nov. 19, 2020), <https://www.vanityfair.com/news/2020/11/rudy-giuliani-hair-dye-press-conference> (emphasis added).

¹⁶¹ D MSJ at 35; D MSJ Ex. 156.

¹⁶² NYC_220_9008.

with” her live shot and told her to “do a better job of . . . ‘respecting our audience.’”¹⁶³

130. On another occasion, Fox News anchor Eric Shawn devoted a segment to debunking Trump’s claims of election fraud, including claimed vote-switching by Dominion voting machines.¹⁶⁴ Scott emailed another senior executive respecting Shawn’s on-air fact-checking of Trump:

This has to stop now.

I’m going to address this with you and Jay [Wallace] and [Tom] Lowell tomorrow.

This is bad business and there clearly is a lack of understanding what is happening in these shows.

The audience is furious and we are just feeding them material.

Bad for business.¹⁶⁵

(f) The Board Consciously Disregards Fox News’s False Accusations Against Dominion and Smartmatic

131. At no time during the post-Election Day period did the Board or any Board committee convene a formal discussion of, or take any action respecting, any

¹⁶³ D MSJ at 35-36 & D MSJ Ex. 118 at 36.

¹⁶⁴ Emily Czachor, *Fox News Host Shreds Election Fraud Claims Trump Made on Network Hours Earlier*, Newsweek (Nov. 29, 2020, 4:05 PM), <https://www.newsweek.com/fox-news-host-shreds-election-fraud-claims-trump-made-network-hours-earlier-1551029>.

¹⁶⁵ Terkel et al., *supra* note 151.

of the following: (i) Fox News's coverage of Trump's election lies; (ii) the accusations of election fraud against Dominion and Smartmatic broadcast by Fox News; (iii) the campaigns of Dominion and Smartmatic to seek retractions; (iv) editorial controls; or (v) defamation risk.

132. The Board convened for regularly scheduled committee meetings and a Board meeting on November 10-12, 2020, in Los Angeles. At the time, Fox News viewer outrage was at its peak. Trump had initiated litigation over the election results, Maria Bartiromo had interviewed Sidney Powell, and the Murdochs and Scott had decided to indulge Trump's conspiracy theories. It was also the first Board meeting after Fox had reached a temporarily confidential settlement with the parents of Seth Rich.

133. The Board was certainly aware of Trump's post-election pressure campaign against Fox. After the Board meeting, Dias emailed Ryan, forwarding him the *Axios* article about Trump potentially creating a competitor to Fox News, and stating: "It's exactly as you described it. Trump needs a scapegoat, and it's now Fox." ¹⁶⁶

134. But these events did not result in any decision-making or action by the Board. Dinh reported on the Seth Rich settlement. The substance of his report is

¹⁶⁶ NYC_220_8948.

redacted. There is no indication of any report on governance issues or business issues arising out of the Seth Rich scandal or of any formal Board discussion of business issues or legal issues arising out of Fox News’s promotion of Trump’s election-denial lies.

135. On November 24, 2020, Ryan spoke publicly about Trump’s election-denial conspiracy theories at a Bank of America conference. Ryan stated: “I think it’s really important that we’re clear about this, which is the mere fact that the president’s lawyers throw these sort of baseless conspiracy theories out at press conferences but offer no evidence of these in court tells you that there is not the kind of widespread voter fraud or systemic voter fraud that would be required to overturn the outcome of this election.” Ryan insisted: “these legal challenges to the outcome and the attacks on our voting system need to stop, in my opinion.”¹⁶⁷

136. After delivering those remarks, Ryan received a text from his former spokesperson, Michael Steel, who was then working on behalf of Dominion. Steel offered to provide Ryan any information necessary relating to the baseless attacks

¹⁶⁷ Anna Palmer, Jake Sherman, Eli Okun and Garrett Ross, *POLITICO Playbook PM : What Paul Ryan is saying about Biden and Trump*, POLITICO (Nov. 24, 2020, 12 :51 PM EST), <https://www.politico.com/newsletters/playbook-pm/2020/11/24/new-what-paul-ryan-is-saying-about-biden-and-trump-490985>.

on Dominion.¹⁶⁸ Ryan testified in the Dominion litigation that he was unaware of any credible evidence that Dominion engaged in election fraud.¹⁶⁹

137. Notwithstanding their knowledge of the Dominion/Smartmatic facts and the Seth Rich settlement, Ryan and the rest of the Board consciously disregarded the risk of defamation claims by Dominion and Smartmatic. They made no inquiries and established no protocols or reporting systems to mitigate the risk of defamation liability. There is no Section 220 record of any outside director seeking to marshal support from any other director or taking any official action concerning defamation risk at Fox.

138. Ryan has tried to excuse his passivity at Fox by claiming that, on “the board, you don’t decide content and personnel.”¹⁷⁰ But Ryan did, in fact, in his capacity as a director, provide the Murdochs with political and business advice about Fox News’s coverage of Trump. For example, on December 7, 2020, Ryan texted Lachlan:

Morning guys! Happy to chat Trump if you want. I think we are entering a truly bizarre phase of this where he has actually convinced himself of this farce and will do more bizarre things to delegitimize the election.

¹⁶⁸ D MSJ Ex. 620 (Ryan Dep. Tr.) at 255:6-256:25; *Michael Steel*, Business Roundtable, <https://www.businessroundtable.org/about-us/staff/michael-steelsenior-vice-president-communications-business-roundtable>.

¹⁶⁹ D MSJ Ex. 620 (Ryan Dep. Tr.) at 96:2-8.

¹⁷⁰ Bulwark Podcast, *supra* note 43 (38:40-38:50).

I see this as a key inflection point for Fox, where the right thing and the smart business thing to do line up nicely. A solid pushback (including editorial) of his baseless calls for overturning electors, etc. will undoubtedly accrue pushback and possibly a momentary ratings dip, but will clearly redound to our benefit in terms of credibility. Trump is going to wear thin and look crazier by the day.

Let him cleave off the fringe for his DTC venture and we can keep the largest pool of people (the center and center right). Fox is stronger than he is now and later IMO.

Just a few thoughts at this pivotal time.¹⁷¹

139. It was not until June 17, 2021, eight months after the November 2020 election and several months after Dominion and Smartmatic had sued Fox News for defamation, that the Board received a slide deck on the Fox News editorial processes for the primetime opinion shows (*i.e.*, Carlson, Hannity, and Ingraham). There is no Section 220 record of any similar presentation before June 2021. The existence of the June 2021 deck implies that the Board had not previously been educated about its subject matter. The June 2021 slide deck was generic in nature and not tailored to the facts of Dominion and Smartmatic.¹⁷² The deck does not suggest what editorial processes were in place for the opinion shows that aired in November and

¹⁷¹ NYC_220_9012.

¹⁷² NYC_220_3160, 3213-227; *see* NYC_220_1696-1706.

December 2020, such as “Lou Dobbs Tonight,” which embraced Trump’s election lies and was then canceled in February 2021.¹⁷³

(g) Dinh Neither Responds to Demand Letters Nor Elevates Them To the Audit Committee

140. There is no Section 220 record of Dinh or the legal department advising the Audit Committee or the Board about threatened litigation from Dominion or Smartmatic. Nor is there any Section 220 record of any outside director requesting information on defamation risk, even after Dominion and Smartmatic publicly threatened litigation.

141. On November 20, Dominion’s outside counsel sent a detailed letter (Exhibit A hereto) to the General Counsel of Fox News about how “several Fox News (Fox) hosts have broadcast false and defamatory allegations about Dominion that were offered by sources whose veracity was in serious doubt.” With special focus on Dobbs, Dominion wrote, “Fox hosts were all too ready to ignore countless indicia of unreliability with respect to the information they were being provided, often times adopting the false allegations as their own. Considering the totality of the circumstances, these hosts acted with reckless disregard for truth and blatant

¹⁷³ Stephen Battaglio, *Fox News cancels Lou Dobb’s show; pro-Trump host not expected to be back on air*, L.A. Times (Feb. 5, 2021, 3:10 PM), [latimes.com/entertainment-arts/business/story/2021-02-05/fox-news-cancels-lou-dobbs-tonight](https://www.latimes.com/entertainment-arts/business/story/2021-02-05/fox-news-cancels-lou-dobbs-tonight).

disregard for Dominion’s reputation.” Dominion stated that it was “prepared to do what is necessary to protect its reputation and the safety of its employees.”

142. On December 10, 2020, litigation counsel for Smartmatic sent a 20-page, single-spaced letter (Exhibit D hereto) to the General Counsel of Fox News. The letter detailed nine categories of false statements that Fox had broadcast, and made one basic point:

The most obvious transgression is your repeated claims that Smartmatic committed, perpetrated, and/or participated in a widespread voter fraud scheme for the 2020 U.S. election and switched millions of votes from President Trump to President-elect Biden. Discovery that this claim was factually inaccurate and impossible took nothing more than learning whether *Smartmatic’s technology* was widely used during the 2020 U.S. election. It was not. It *was used in one county*. From this simple truth, it was (or would have been) readily apparent that the statements being made about Smartmatic were factually inaccurate. (Emphasis added).

Smartmatic’s letter threatened litigation and demanded that Fox News take immediate action:

Fox News had no right to defame my client when covering the 2020 U.S. election. Smartmatic demands a full and complete retraction of all false and defamatory statements reports published by Fox News. This retraction must be done with the same intensity and level of coverage that you used to defame the company in the first place. Further, Smartmatic requests that you take all necessary steps to preserve communications, videos/recordings, documentation, drafts, and all other material related to the Reports. This letter serves as notice of potential legal claims against Fox News, its reporters, anchors, producers, and on-air guests by my client.

. . . Please confirm by December 15, 2020, that Fox News will publish this retraction

143. On December 14, 2020, Smartmatic publicly announced “that it is issuing legal notices and retraction demand letters to Fox News, Newsmax and One America News Network for publishing false and defamatory statements.” Smartmatic’s public announcement added that it was reserving all of its legal rights, including the right to pursue defamation and disparagement claims.¹⁷⁴

144. On December 22, 2020, outside counsel for Dominion sent a letter to the General Counsel of Fox News (Exhibit E hereto) following up on Dominion’s letter of November 20, to which Fox News had not responded. This new letter stated:

Unfortunately, *after* Dominion had provided Fox with the facts and requested a retraction and even *after* Mr. Carlson’s realization Ms. Powell was playing Fox’s viewers and had no evidence to back up her inherently improbable claims, Lou Dobbs and Sean Hannity repeatedly featured Ms. Powell—and Jeanine Pirro featured Ms. Powell’s former client, convicted felon Michael Flynn—and they, along with Maria Baritoromo [sic], repeated demonstrably false accusations against Dominion. To be clear, Mr. Dobbs did not simply give Ms. Powell a platform; he himself credited and repeated her false claims.

¹⁷⁴ *Smartmatic Demands Justice for Defamation*, Smartmatic (Dec. 14, 2020), <https://www.smartmatic.com/us/media/article/smartmatic-demands-justice-for-defamation/>.

Dominion's December 22 letter demanded a retraction and insisted that any future stories about Dominion be fact-checked and vetted. Dominion's letter also highlighted death threats received by Dominion employees.

145. Dominion publicized its letter of December 22, which gave rise to news coverage of Dominion's threat of litigation.

146. *The Daily Beast* wrote:

High-powered libel attorney Tom Clare, of the aggressive law firm Clare Locke, told *The Daily Beast* he has fired off legal letters to Newsmax, Fox, and OAN on behalf of Dominion Voting Systems, predicting the matter will end up in court.

"I think it's fair to say in January we will be pulling the trigger on multiple litigation matters. The damage that they've done has already been enormous," he said about the networks airing blatant falsehoods about voter fraud.

"The time for a retraction is not now it was weeks ago. I'm certain a retraction does not undo the damage but it's the right thing regardless of litigation," he added.

..."What this company is going through in terms of the threats to its business as a result of the reputational harm no company should have to go through" Clare added.

"You've got provable false allegations that have been rejected time and time again by the courts with no evidence ever been shown to support them and massive damage."¹⁷⁵

¹⁷⁵ Lachlan Cartwright and Justin Baragona, *Voting Company Dominion Threatens to Sue Trump-Boosting Networks Over Election Conspiracies*, *Daily Beast* (Dec. 23, 2020, 5:13 PM), <https://www.thedailybeast.com/dominion-threatens-to-sue-trump-boosting-networks-over-election-conspiracies>.

147. CNBC wrote an article entitled, “Dominion Voting warns Fox News, Sean Hannity, other conservative outlets that defamation lawsuits are imminent.”¹⁷⁶

148. On January 28, 2021, outside counsel for Smartmatic sent an updated retraction demand to outside counsel for Fox News (Exhibit F hereto).

149. Fox did not mitigate the reputational damage to Dominion and Smartmatic. Fox News did not respond to any of the above letters or retract any assertions that Dominion and Smartmatic committed election fraud.

150. In the absence of any retractions by Fox News in response to these litigation threats, Dominion and Smartmatic were empowered to seek maximum financial compensation from Fox News, including punitive damages. If Fox News could not obtain dismissal of the claims at the pleading stage, Dominion and Smartmatic would be positioned to present their damages claims at trial. As occurred in the Gawker/Hulk Hogan case, a plaintiff might be financially incentivized to litigate as long as necessary to maximize the recovery, rather than look to settle early and minimize litigation costs.

¹⁷⁶ Dan Mangan, *Dominion Voting warns Fox News, Sean Hannity, other conservative outlets that defamation lawsuits are imminent*, CNBC (Dec. 24, 2020, 2:38 PM), <https://www.cnbc.com/2020/12/24/dominion-voting-warns-fox-news-lawsuits-are-imminent.html>.

F. Fox Lacked a Viable Legal Defense

151. On February 4, 2021, Smartmatic sued Fox, Fox News, Lou Dobbs, Maria Bartiromo, Jeanine Pirro, Rudy Giuliani, and Sidney Powell in the Supreme Court of the State of New York. Smartmatic sought actual, consequential, and special damages of no less than \$2.7 billion, plus punitive damages.¹⁷⁷

152. On March 26, 2021, Dominion sued Fox News in Delaware Superior Court, seeking punitive and economic damages for defamation *per se*. Dominion sought lost profits of not less than \$600 million, lost enterprise value of not less than \$1 billion, and expenses of \$1.3 million for security and combatting disinformation.¹⁷⁸

153. Fox News lacked a viable legal defense to these lawsuits. As a matter of law and fact, Fox News engaged in actionable defamation in November and December 2020.

154. Fox News's litigators needed to defend the consequences of the Murdochs' fateful business decision on November 8, 2020, to retain viewers by pushing Trump's election lies. The Section 220 production and the sparse privilege

¹⁷⁷ Initial Complaint, *Smartmatic USA Corp. v. Fox Corp.*, Index No. 1551136/2021 (N.Y. Sup. Ct. Feb. 4, 2021), available at <https://www.documentcloud.org/documents/23702351-smartmatic-initial-complaint>.

¹⁷⁸ Initial Complaint, *U.S. Dominion, Inc. v. Fox News Network, LLC*, Case No. N21C-03-257 EMD, (Del. Super. Ct. Mar. 26, 2021), available at <https://www.documentcloud.org/documents/20527880-dominion-v-fox-news-complaint>.

log (attached hereto as Exhibit G) do not appear to reflect any real-time legal advice (*i.e.*, between November 8 and December 10, 2020) given to Fox News executives or hosts vetting planned broadcasts or tweets respecting Dominion and Smartmatic.

155. Fox News could not reasonably expect to prevail at the pleading stage on the basic elements of a defamation claim: (i) a false statement; (ii) publication; (iii) fault (*i.e.*, actual malice); (iv) injury. Fox News hosts repeatedly presented, amplified, and endorsed false assertions that Dominion and Smartmatic engaged in criminal election fraud, which is defamatory *per se*.

156. Fox News could reasonably expect that Dominion and Smartmatic would adduce evidence of actual malice. Fox News's internal documents made clear that the accusations levied against Dominion and Smartmatic were unsupported, refuted, and disbelieved by senior executives within Fox News, including Rupert. Moreover, Fox News lacked any written editorial standards, and Fox News was motivated by ratings and profits to amplify and endorse Trump's "stolen election" claims.

157. Additionally, the events of January 6, 2021, negated any notion that election fraud accusations were mere entertainment; many people believed them.

158. Nor could Fox News point to any retractions as an argument to reduce the claimed damages.

159. Fox News’s chosen litigation strategy reflects an awareness of the above problems. As explained below, that litigation strategy is itself so flawed that it further evidences Fox News’s culpability.

160. *The New York Times* reported that Dinh favored a litigation strategy of trying to win on appeal in the United States Supreme Court by creating broadened First Amendment protection for media coverage of a newsworthy subject. Fox’s retention in early 2021 of a leading appellate lawyer, former Solicitor General Paul Clement, heralded that strategy.¹⁷⁹

161. Lawyers for Fox News placed much weight on the so-called “neutral reportage privilege,” which, when it has been recognized, protects good faith reporting on defamatory statements that are newsworthy. This defense is disfavored by First Amendment lawyers, as reported in *The New York Times*:

[T]he neutral reportage privilege is not universally recognized. Longtime First Amendment lawyers who agree with the principle in theory had their doubts that it would work, given that judges have increasingly rejected it.

“Most astute media defamation defense lawyers would not, and have not for a very long time, relied on neutral reportage — certainly as a primary line of defense, because the likelihood that a court would accept it as a matter of First Amendment law has continued to diminish over time,” said Lee Levine, a veteran media lawyer.¹⁸⁰

¹⁷⁹ Rutenberg et al., *supra* note 7; Ferrigine, *supra* note 7.

¹⁸⁰ Rutenberg et al., *supra* note 7.

162. The so-called “neutral reportage privilege” was not only dubious as a matter of law, it was not a good fit factually to the conduct of Fox News’s hosts. Presenting guests who spout unsupported false assertions of criminal election fraud and then endorsing those false assertions is distinguishable from neutral news gathering. As one observer stated after the Dominion settlement, “despite hundreds of pages of pretrial filings, Fox never managed to identify a single instance of legitimate newsgathering that would have been credibly endangered in the future if Dominion prevailed[.]”¹⁸¹

163. Existing First Amendment precedent respecting opinion journalism was also not a good fit for the conduct of Fox News hosts such as Lou Dobbs or Maria Bartiromo. A timely law review article from 2020 on the intersection between tort law and First Amendment law discussed how United States Supreme Court precedent did not protect statements of opinion premised on false facts:

The *Milkovich* case has thus come to stand for the proposition that a defendant cannot deflect a claim that he or she made a false statement of fact about another merely by declaring that the statement was couched as an opinion.

...In short, *there was First Amendment protection*, subject to the standards we have identified, *against liability for defamation, except*

¹⁸¹ Ankush Khardori, *Why Fox News had to settle the Dominion suit*, Politico (April. 18, 2023, 8:17 PM EDT), <https://www.politico.com/news/2023/04/18/why-fox-news-had-to-settle-the-dominion-suit-00092708>.

when a statement constituted an opinion premised on false facts and in defamation suits between private parties regarding statements not involving matters of public concern.¹⁸²

164. Essentially, to avoid liability, Fox News needed to expand First Amendment protection for broadcasting defamatory material in the context of a political dispute. In the Dominion litigation, that would mean appealing to the United States Supreme Court an adverse judgment in the Delaware courts.

165. As a practical matter, that litigation strategy contemplates Fox bearing massive reputational injury during discovery, trial, an adverse money judgment, and for years thereafter during the pendency of appellate proceedings, which could derail future business initiatives.

166. As a legal matter, seeking to broaden First Amendment protection on appeal was problematic because the conservative majority on the United States Supreme Court was not a natural constituency for creating a new “newsworthiness” defense for broadcasting false accusations of criminal conduct with actual malice. The recent trend in conservative legal thought was to *restrict* or *eliminate* First Amendment defenses to defamation claims, which originated in the landmark 1964

¹⁸² Kenneth S. Abraham and G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 Tex. L. Rev. 813, 837 (2020) (emphasis added).

decision *New York Times Co. v. Sullivan*, which imposed the “actual malice” element for a defamation claim against a public figure.

167. In 2019, Justice Clarence Thomas issued a concurring opinion in which he characterized “*New York Times* and the Court’s decisions extending it” as “policy-driven decisions masquerading as constitutional law.”¹⁸³ Justice Thomas’s opinion concluded: “The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.”

168. A practitioner observed that Justice Thomas’s concurrence “provides momentum for critics of *New York Times* and room for courts to reexamine the standard,” and noted the ferment to do so: “Criticisms of defamation laws are growing increasingly popular on social media and from our current administration. The president has previously weighed in on the state of our libel laws calling it a ‘disgrace’ and suggesting that the laws as written do not provide a ‘meaningful recourse in our courts.’”¹⁸⁴ A former Reagan Administration official wrote an article

¹⁸³ *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari).

¹⁸⁴ Natasha Cooper, *Reevaluating New York Times V. Sullivan in the Wake of Modern Day Journalism*, American Bar Association (Feb. 27, 2019), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2019/reevaluating-new-york-times-v-sullivan-in-the-wake-of-modern-day-journalism/>.

in a conservative magazine endorsing Justice Thomas’s call to eliminate the requirement of proving actual malice because it creates “a perverse journalistic incentive for fake news.”¹⁸⁵

169. By July 2, 2021, Justice Gorsuch had joined Justice Thomas in seeking to revisit *New York Times v. Sullivan* in light of “momentous changes in the Nation’s media landscape since 1964,” such that “the deck seems stacked against those with traditional (and expensive) journalistic standards[.]”¹⁸⁶

170. The litigation strategy of seeking broadened First Amendment protection on appeal in the United States Supreme Court tacitly acknowledges Fox’s weak position on the facts under existing law. Eventually, the Board recognized the need to confront this reality. The litigation strategy of seeking to prevail on appeal was discarded in favor of a massive settlement with Dominion on the first day of trial.

¹⁸⁵ Bruce Fein, *End the First Amendment Sanctuary for Fake News*, The American Conservative (Feb. 27, 2019, 1:00PM), <https://www.theamericanconservative.com/end-the-first-amendment-sanctuary-for-fake-news/>.

¹⁸⁶ *Berisha v. Lawson*, 141 S. Ct. 2424, 2428, 2430 (2021) (Gorsuch, J., dissenting from the denial of certiorari).

G. The Dominion Litigation

171. On December 16, 2021, Judge Davis denied Fox’s motion to dismiss in an opinion that rejected various Fox News defenses for pleading purposes.

172. Judge Davis rejected the neutral reportage defense, observing that it “seems to run contrary to United States Supreme Court precedent” and was not clearly available under New York law.¹⁸⁷ And even if it was, Judge Davis concluded, it did not warrant dismissal because Dominion’s allegations “support the reasonable inference that Fox’s reporting was not accurate or dispassionate,” as it involved “skewing questioning and approving responses in a way that fit or promoted a narrative in which Dominion committed election fraud.”¹⁸⁸

173. Judge Davis further concluded that Dominion had sufficiently alleged actual malice: “The Complaint supports the reasonable inference that Fox either (i) knew its statements about Dominion’s role in election fraud were false or (ii) had a high degree of awareness that the statements were false. For example, Fox possessed countervailing evidence of election fraud from the Department of Justice, election experts, and Dominion at the time it had been making its statements.”¹⁸⁹ Additionally, “the Complaint alleges that several of Fox’s personnel openly

¹⁸⁷ MTD Ruling at 23.

¹⁸⁸ *Id.* at 24.

¹⁸⁹ *Id.* at 28.

disclaimed the fraud claims as false. Yet, certain Fox personnel (*e.g.*, Mr. Dobbs) continued to push the fraud claims.”¹⁹⁰

174. On March 31, 2023, Judge Davis ruled on cross-motions for summary judgment that Dominion was entitled to summary judgment on falsity and that the statements in question were defamatory *per se*. Judge Davis ruled that genuine issues of material fact existed as to actual malice.¹⁹¹

175. Judge Davis again rejected the neutral reportage privilege, holding that he was bound by a 1982 New York Appellate Division decision that had been affirmed by the Court of Appeals. Judge Davis further held that “the evidence does not support that [Fox News] conducted good-faith, disinterested reporting.”¹⁹²

176. Judge Davis’s rulings at the summary judgment stage meant that a jury trial would go forward with the jury deciding (i) the question of actual malice, and (ii) the calculation of damages, including potential lost profits and lost enterprise value, as well as punitive damages.

177. In the aftermath of the embarrassing discovery and devastating summary judgment rulings, the Board retained its own counsel.¹⁹³

¹⁹⁰ *Id.* at 28.

¹⁹¹ MSJ Ruling at 62-64.

¹⁹² *Id.* at 72.

¹⁹³ Rutenberg et al., *Misssteps and Miscalculations*, *supra* note 7.

178. On April 18, 2023, the first day of trial, Fox settled with Dominion for \$787.5 million.¹⁹⁴

179. The settlement contributed to Fox Corp.’s \$50 million net loss for the third quarter 2023, compared to a net income of \$290 million in the prior year’s third quarter.¹⁹⁵ Increased expenses for the quarter were due in large part to “higher legal costs at FOX News Media.”¹⁹⁶

H. The Smartmatic Litigation

180. On February 14, 2023, the Supreme Court of the State of New York, Appellate Division, First Judicial Department issued an Order holding that Smartmatic’s “meticulously detailed complaint” satisfied the New York statutory standard for stating a defamation claim.

181. The Appellate Division observed:

[T]he complaint alleges in detailed fashion that in their coverage and commentary, Fox News, Dobbs, and Bartiromo effectively endorsed and participated in the statements with reckless disregard for, or serious doubts about, whether the assertions or implications that plaintiffs had participated in election fraud had any basis in truth or were supported by any reliable evidence.

¹⁹⁴ Fox Corp., Report (Form 8-K) (Apr. 18, 2023), <https://investor.foxcorporation.com/static-files/cde08bd1-da85-49d8-832d-328ee0c8b356>.

¹⁹⁵ Fox Corp., Report (Form 8-K) (May 9, 2023) at 1, <https://investor.foxcorporation.com/static-files/85a1a4bf-f464-4211-b070-73d53751fcad>.

¹⁹⁶ *Id.* at 3.

In fact, according to the allegations in the complaint, Fox News, Dobbs, and Bartiromo stated that Smartmatic’s election technology and software were widely used in the 2020 election and in Dominion machines to switch votes, when they actually knew, or easily could have known had they not purposefully avoided publicly available knowledge, that in 2020, the Smartmatic technology was used only in Los Angeles County and that the vote switching claims otherwise had no support[.]¹⁹⁷

182. The Appellate Division also “decline[d] to find that plaintiffs should be deemed limited purpose public figures required to allege facts that, if true would ‘clearly and convincingly’ show defamation with actual malice[.]”

183. Smartmatic’s case against Fox remains in discovery. On April 25, 2023, the Supreme Court of New York expanded on the discovery required from the Fox defendants, observing that “recent disclosures in the *Dominion* matter demonstrate that there are many possible witnesses to the defamation and to Fox defendants’ motives.”¹⁹⁸

184. Experts have speculated that the settlement value of the Smartmatic litigation exceeds that of Dominion, and could be approximately \$1 billion.¹⁹⁹

¹⁹⁷ *Smartmatic USA Corp. v. Fox Corp.*, 183 N.Y.S.3d 402, 404 (2023).

¹⁹⁸ *Smartmatic USA Corp. v. Fox Corp.*, 2023 WL 3075267, at *4 (N.Y. Sup. Ct. Apr. 25, 2023).

¹⁹⁹ Jacob Shamsian, *Fox News paid a record-breaking sum to settle Dominion’s defamation lawsuit. Smartmatic could get even more money.*, Business Insider (Jul. 17, 2023, 11:53 AM), <https://www.businessinsider.com/fox-news-potential-smartmatic-settlement-record-dominion-2023-7>.

185. Trial is expected in 2025.²⁰⁰

H. The Khalil Litigation

186. On December 1, 2021, Venezuelan businessman Majed Khalil sued Fox, Fox News, and Lou Dobbs for defamation.

187. Khalil’s case centered on tweets and a broadcast by Dobbs on December 10, 2020, which are discussed above. *See supra* at ¶ 118.

188. Dobbs’s tweet stating that the 2020 election is a “Cyber Pearl Harbor” attached a document identifying Khalil as “right hand and business front man of Jorge Rodriguez. He has been the effective ‘COO’ of the election project, under Chavez and Maduro. Khalil is a liaison with Hezbollah.”

189. On September 26, 2022, Judge Louis L. Stanton of the U.S. District Court of the Southern District of New York upheld Khalil’s defamation claim on a motion to dismiss.²⁰¹

190. Judge Stanton rejected Fox’s neutral reportage defense because (i) “Sidney Powell was not a responsible source”; (ii) the defendants did not merely report but rather “espoused and concurred in the charges” and “adopted Powell’s

²⁰⁰ Lillian Rizzo, *Fox faces similar defamation case from Smartmatic after Dominion settlement*, CNBC (Apr. 19, 2023), <https://www.cnbc.com/2023/04/19/fox-smartmatic-defamation-case-dominion.html>.

²⁰¹ *Khalil v. Fox Corp.*, 630 F. Supp. 3d 568 (S.D.N.Y. 2022).

claims” by tweeting out the above-quoted document; (iii) “the Dobb’s [*sic*] reporting was neither accurate nor dispassionate”; and (iv) Khalil is not a public figure.

191. Judge Stanton also concluded that Khalil had sufficiently pleaded actual malice:

Defendants repeatedly maintained their claims about Khalil long after Powell’s election fraud theories were challenged. Numerous reports that declared the falsity of the claims against Dominion and Smartmatic and rejected Powell as an accurate source of information gave Defendants reasons to doubt Powell’s veracity and the accuracy of her reports.... [T]he Complaint adequately alleges that the defendants purposefully avoided the truth, given the amount of public information regarding the lack of fraud in the election.²⁰²

192. The case settled for an undisclosed amount in April 2023, days before the scheduled beginning of the Dominion trial.

I. The Defamation Claim of Ray Epps

193. Even after the initiation of the Dominion and Smartmatic litigation, the Murdochs remained committed to the Fox News business model of propagating conspiracy theories without regard for the risk of defamation liability. Following the January 6, 2021, Capitol riots, Tucker Carlson engaged in a months-long vilification campaign against Ray Epps, a private individual whom Carlson accused of being a government agent who incited the attacks.

²⁰² *Id.* at 585.

194. Epps was a Trump supporter who answered Trump’s call to come to Washington, D.C. on January 6. On the evening of January 5, 2021, Epps was present for a disturbance incited by pro-Trump protestors on Black Lives Matter Plaza where a right-wing provocateur known as Baked Alaska livestreamed Epps shouting: “Tomorrow, we need to go into the Capitol! Into the Capitol! Peacefully! Peacefully!,” and Baked Alaska shouting back: “Fed! Fed!”²⁰³ On January 6, Epps was videotaped on the Capitol grounds whispering in the ear of another protester just before that protester and others charged through a police barricade.²⁰⁴

195. Epps’s photo initially appeared on an FBI website seeking information about January 6. Epps called an FBI tip line and explained that he tried to calm a fellow protester. That protester corroborated Epps’s story. The FBI determined that

²⁰³ Bill Whitaker, *Ray Epps, a Jan. 6 Protester Now at the Center of a Far-Right Conspiracy, Says He Relives the Capitol Riot Every Day*, CBS News (Apr. 23, 2023, 7:00 PM), <https://www.cbsnews.com/news/ray-epps-jan-6-capitol-protest-60-minutes-transcript-2023-04-23/>; Keith Zubrow, *Jan. 6 Committee Staffer: “Zero Evidence That Ray Epps was a Federal Agent”*, CBS News (Apr. 23, 2023, 7:00 PM), <https://www.cbsnews.com/news/jan-6-committee-staffer-zero-evidence-that-ray-epps-was-a-federal-agent-60-minutes-2023-04-23/>; Alan Feuer, *New Evidence Undercuts Jan. 6 Instigator Conspiracy Theory*, N.Y. Times (May 5, 2022), <https://www.nytimes.com/2022/05/05/us/jan-6-ray-epps-evidence.html>; *Baked Alaska vs. Ray Epps the night before J6 exclusive video*, Meme Ranch (Jan. 26, 2023), https://www.youtube.com/watch?v=_gw3m92cyTo; Complaint, *Epps v. Fox News Network, LLC*, Case No. N23C-070-063 DJB, ¶ 30 (July 10, 2023) [hereinafter “Epps Complaint”].

²⁰⁴ Whitaker, *supra* note 203; Epps Complaint ¶ 33.

Epps did not enter the Capitol and was not a person of interest and removed his photo from the FBI website.²⁰⁵

196. Epps was the only known rank-and-file Trump supporter to admit on camera, prior to January 6, that the Trump supporters who heeded Trump’s call to come to Washington planned to storm the Capitol. In order to maintain the narrative that the storming of the Capitol by the rank-and-file was spontaneous and not planned, a conspiracy theory developed on social media that the attack on the Capitol was a “false flag” operation and that Epps was a government agent who incited and entrapped Trump supporters.²⁰⁶

197. On June 14, 2021, an online media outlet, *Revolver News*, published an article claiming that there was a “strong possibility” that unindicted January 6 co-conspirators were actually federal informants and undercover operatives.²⁰⁷ The next day, Tucker Carlson reinforced this theory, claiming on his Fox News show that “FBI operatives were organizing the attack on the Capitol.”²⁰⁸

²⁰⁵ Zubrow, *supra* note 203; Feuer, *supra* note 203.

²⁰⁶ Seth Abramson, *The Story Behind the “Ray Epps” Conspiracy Theory Now Burning Through Congress and Far-Right social media*, Proof (Jan. 12, 2022), <https://sethabramson.substack.com/p/the-story-behind-the-ray-epps-conspiracy>; Daniel Funke, *U.S. Hearings Revive Baseless Conspiracy Theory About Capitol Riot*, AFP Fact Check (June 17, 2022, 11:57), <https://factcheck.afp.com/doc.afp.com.32CF2ZM>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

198. On October 25, 2021, *Revolver News* published an article entitled, “Meet Ray Epps: The Fed-Protected Provocateur Who Appears to Have Led the Very First 1/6 Attack on the US Capitol.”²⁰⁹ That same day, Carlson presented the author of the *Revolver News* article, which Carlson described as a “very detailed—very well reported—piece, that again I would recommend to everyone watching tonight.”²¹⁰

199. In November 2021, the January 6 Committee of the U.S. House of Representatives interviewed Epps. On January 11, 2022, major media reported the January 6 Committee’s findings that Epps was not a government agent, that there was no evidence that he ever entered the Capitol or committed violent acts, and that conspiracies about him were unsupported.²¹¹ January 6 House Committee member

²⁰⁹ *Meet Ray Epps: The Fed-Protected Provocateur Who Appears to Have Led the Very First 1/6 Attack on the U.S. Capitol*, *Revolver* (Oct. 25, 2021), <https://www.revolver.news/2021/10/meet-ray-epps-the-fed-protected-provocateur-who-appears-to-have-led-the-very-first-1-6-attack-on-the-u-s-capitol/>.

²¹⁰ *From the October 25, 2021, edition of Fox News’ Tucker Carlson Tonight*, (Undated), Media Matters, <https://www.mediamatters.org/media/3983705>.

²¹¹ Luke Broadwater and Alan Feuer, *Jan. 6 Panel Seeks to Debunk Unfounded Theory About F.B.I. Role in Riot*, *N.Y. Times* (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/us/politics/ray-epps-january-6-committee.html>; Philip Bump, *Another Jan. 6 conspiracy theory suffers a reality-inflicted blow*, *Washington Post* (Jan. 11, 2022, 5:03 PM), <https://www.washingtonpost.com/politics/2022/01/11/another-jan-6-conspiracy-theory-suffers-reality-inflicted-blow/>; Feuer, *supra* note 203; Abramson, *supra* note 206.

Adam Kinzinger tweeted a thread about how the conspiracy theory about Epps was unfounded.²¹²

200. Over a period of many months, Carlson continued to accuse Epps of being a government provocateur.²¹³ On January 12, 2022, Carlson said that Epps had “stage-managed the insurrection.” Carlson also said that Kinzinger was “lying.” A week later, Carlson added, “Clearly, they’re lying about Ray Epps; there is no question about that.”²¹⁴ More recently, on March 11, 2023, Carlson appeared on the *Redacted* podcast and spoke about his ongoing work with Fox producers reviewing January 6 footage. Carlson stated: “Ray Epps clearly was working for somebody. He was not a pure civilian.”²¹⁵

201. On March 23, 2023, counsel for Epps sent Fox a formal retraction demand letter and notice of potential litigation for defamation and portraying him in a false light. Epps’s counsel demanded that Carlson and Fox News “retract the claim that Mr. Epps was working for the FBI or any governmental entity when he attended

²¹² Adam Kinzinger @AdamKinzinger, Twitter (Jan. 11, 2022, 5:07 PM), <https://twitter.com/AdamKinzinger/status/1481024966468460547>.

²¹³ Epps Complaint ¶¶ 41-55.

²¹⁴ Aaron Blake, *Fox News’s trouble with Tucker Carlson and Ray Epps*, Washington Post (July 13, 2023, 6:31 PM ET), <https://www.washingtonpost.com/politics/2023/07/13/tucker-carlson-ray-epps-fox/>.

²¹⁵ Epps Complaint ¶ 55.

the January 6th events and the claim that Mr. Epps acted as an instigator or provocateur of the insurrection.”²¹⁶

202. In April 2023, Epps spoke publicly for the first time in a CBS interview on 60 Minutes. In its broadcast, 60 Minutes played tape of Carlson saying: “Ray Epps? He is on video several times encouraging crimes, riots, breaches of the Capitol . . .” and reported that Carlson has focused on Epps more than twenty times on his top-rated show, including a half-dozen times so far in 2023.²¹⁷ Epps said that Carlson was “obsessed” with him and “going to any means possible to destroy” his life, and that Epps is facing harassment so severe that he and his wife were forced to abandon their home and business and now live in an RV in an undisclosed location.²¹⁸

203. Epps filed suit against Fox News on July 10, 2023, for defamation and false light, seeking compensatory damages and punitive damages in a jury trial.

J. The Defamation Claim of Nina Jankowicz

204. On April 27, 2022, the Department of Homeland Security (“DHS”) publicly announced that it had created a Disinformation Governance Board to

²¹⁶ *Tucker Carlson and Fox News Hit With Cease and Desist Letters for Continuing Their Lies About Ray Epps*, NBC News, <https://www.documentcloud.org/documents/23721291-pr-fox-cd>.

²¹⁷ Whitaker, *supra* note 203.

²¹⁸ *Id.*

coordinate countering misinformation related to homeland security, and that Nina Jankowicz was its Executive Director.²¹⁹ The Disinformation Governance Board lacked operational authority; its job was to gather best practices in addressing the threat of disinformation and to disseminate information.²²⁰

205. Three weeks later, on May 18, 2022, DHS employees stated that the Disinformation Governance Board was being “paused,” and Jankowicz resigned her position. The cause was a coordinated campaign by Fox News and like-minded media outlets who attacked the Disinformation Governance Board and Jankowicz.²²¹

²¹⁹ Bridget Johnson, *DHS Standing Up Disinformation Governance Board Led by Information Warfare Expert*, Homeland Security Today (April 27, 2022), <https://www.hstoday.us/federal-pages/dhs/dhs-standing-up-disinformation-governance-board-led-by-information-warfare-expert/>; Eugene Daniels, Rachael Bade and Ryan Lizza, *POLITICO Playbook: Fauci pulls out of WHCD. Is Biden next?*, Politico (April 27, 2022, 6:58 AM), <https://www.politico.com/newsletters/playbook/2022/04/27/fauci-pulls-out-of-whcd-is-biden-next-00028131>.

²²⁰ *User Clip: Mayorkas Announces Disinformation Board*, C-SPAN (April 27, 2022), <https://www.c-span.org/video/?c5013090/user-clip-mayorkas-announces-disinformation-board>; Aaron Blak, *The tempest over DHS’s Disinformation Governance Board*, Washington Post (April 29, 2022, 3:05 PM EDT), <https://www.washingtonpost.com/politics/2022/04/29/disinformation-governance-board-dhs/>.

²²¹ Taylor Lorenz, *How the Biden administration let right-wing attacks derail its disinformation efforts*, Washington Post (May 18, 2022, 10:28 AM), <https://www.washingtonpost.com/technology/2022/05/18/disinformation-board-dhs-nina-jankowicz/>.

206. Within hours of the public announcement of the creation of the Disinformation Governance Board, far-right influencer Jack Posobiec posted tweets accusing the Biden Administration of creating a “Ministry of Truth.”²²² Fox News soon joined in. Within one week, Fox covered Jankowicz or the Disinformation Governance Board during ninety-three of its one-hour programs (*i.e.*, 70% of them).²²³ Over a span of eight months, Fox talked about Jankowicz more than 300 times.²²⁴

207. On April 29, 2022, eleven different speakers referenced Jankowicz and the Disinformation Governance Board in eleven separate segments on Fox.²²⁵ In one of many such segments, Hannity described Jankowicz as “the person that polices our thoughts.”²²⁶

208. In a recently filed defamation action in Delaware Superior Court, Jankowicz accuses Fox of lying about her repeatedly in three different ways:

First, over the course of a year, Fox built a narrative calculated to lead consumers to believe that Jankowicz intended to censor Americans’ speech. Anyone consuming Fox between April and December 2022

²²² *Id.*

²²³ Complaint, *Jankowicz v. Fox News Network, LLC and Fox Corp.*, Case No. N23C-05-098, ¶ 22 (Del. Super. Ct. May 10, 2023) [hereinafter “Jankowicz Complaint”], <https://www.documentcloud.org/documents/23809460-2023-05-10-jankowicz-complaint-as-filed>.

²²⁴ Jankowicz Complaint ¶ 1.

²²⁵ Jankowicz Complaint ¶ 36.

²²⁶ Jankowicz Complaint ¶ 36.

understood that Fox was telling them that Jankowicz and the Board were out to censor them and that they should be afraid of her. Second, former star host Tucker Carlson and current host Jesse Watters lied that Jankowicz was fired from her post at the Board. In fact, as Carlson and Watters both knew, Jankowicz resigned due to harassment arising from Fox's defamation. Third, Fox hosts, guests, and commentators falsely claimed that Jankowicz wanted to give verified Twitter users the power to edit others' tweets. They relied extensively on an obviously manipulated video—the full version of which was publicly available—to transform her description (and indeed, skepticism) of a developing beta feature on Twitter into a false declaration that she would supposedly police online speech.²²⁷

209. Jankowicz further alleges that Fox's false reporting provoked a barrage of unrelenting harassment against her. Over a period of one year, 131 tweets that referenced her Twitter handle threatened violence, hostile action, or advocated the use of Jankowicz's personal information to target her. Jankowicz was told to expect death an untold number of times, and a security consultant advised her not to remain in her family home.²²⁸ Her personal information was publicly disseminated, resulting in threats to her mother, husband, and infant son.²²⁹

²²⁷ Jankowicz Complaint ¶ 10. *See also id.* ¶ 86 (citing Sophia Tulp, *Old comments by disinformation board director misrepresented online*, AP News (May 14, 2022, 6:04 PM EDT), <https://apnews.com/article/Fact-Check-Disinformation-Board-Director-Twitter-049631150022>).

²²⁸ Jankowicz Complaint ¶ 97; Heidi Przybyla, *'A surreal experience': Former Biden 'disinfo' chief details harassment*, Politico (Mar. 8, 2023), <https://www.politico.com/news/2023/03/08/former-biden-disinfo-chief-details-harassment-00085981>.

²²⁹ Jankowicz Complaint ¶¶ 95-98.

210. Jankowicz seeks compensatory damages, including for emotional injury, and punitive damages.

K. The Pending Campaign To Strip Fox of Broadcast Licenses

211. The Murdochs' decision to embrace Trump's claims of a stolen election not only led to the \$787.5 million settlement payment to Dominion, but also endangered Fox's broadcast licenses. Fox owns and operates twenty-nine television stations in the United States, including in fourteen of the top fifteen markets.²³⁰ Licenses require renewal by the Federal Communications Commission ("FCC") every eight years.

212. On July 6, 2023, the Media and Democracy Project ("MAD"), a nonpartisan non-profit, and various individuals filed a petition to deny the license renewal of Fox affiliate WTFX-TV in Philadelphia, the only Fox license currently up for renewal, arguing that Fox "lacks the character to remain a licensee."²³¹ MAD explained: "The question before the Commission is not whether FOX had a right to

²³⁰ Fox Careers, *Our Brands*, <https://foxcareers.com/OurBrands> (last visited Sept. 5, 2023).

²³¹ In the Matter of Application of Fox Television Stations, LLC for Renewal of License of WTXF-TV, Petition to Deny, LMS File No. 0000213362, at I (July 3, 2023), available at https://www.mediaanddemocracyproject.org/_files/ugd/f9547d_d59f128ca09d4106b82930d09c12c94f.pdf.

lie, rather it is about the consequences of those lies and the impact on FOX's qualifications to remain an FCC licensee."²³²

213. MAD's effort is led by former Fox VP of Programming Preston Padden, who remained in touch with Rupert during the period after the 2020 election. MAD's petition has received bipartisan support. Former Republican FCC Chairman Alfred Sikes filed an objection to the license renewal.²³³ Former PBS President Ervin S. Duggan and former Weekly Standard Editor William Kristol filed a joint objection, stating:

As media veterans, we are acutely aware of the power afforded to those who control the information broadcast on our nation's airwaves. The evidence presented in the Dominion case, considered in the light of the Commission's Character Policy, leaves no room for doubt: Rupert and Lachlan Murdoch's role in failing to stop, and indeed in perpetuating, election falsehoods broadcast on the FNM channels in connection with the 2020 election stands as a blatant violation of the character requirements expected from public trustees controlling broadcast licensees.²³⁴

²³² In the Matter of Application of Fox Television Stations, LLC for Renewal of License of WTXF-TV, Reply to Opposition of Fox Television Stations, LLC, LMS File No. 0000213362, at 16 (Aug. 22, 2023), available at https://www.mediaanddemocracyproject.org/_files/ugd/f9547d_ae070ed7cbc7454bb9999a0e9b3c019a.pdf.

²³³ Ltr. from Alfred Sikes to FCC (Aug. 20, 2023), <https://www.fcc.gov/ecfs/document/10825951416089/1>.

²³⁴ Re: Application for Television Station License Renewal, Ltr. From Ervin S. Duggan and William Kristol to Marlene H. Dortch, available at https://drive.google.com/file/d/1T_Dr5pkDw9v3R2ZE0bXoBNojOM2Gf29c/view.

Jamie Kellner, the founding President of Fox Broadcasting Company, also filed an objection.²³⁵

214. MAD's petition seeks "an evidentiary hearing into Fox's misdeeds," and MAD filed a request for an open proceeding. Ordinarily, FCC license renewal proceedings are restricted and not open to public comment. On August 23, 2023, the FCC determined that it served the public interest to permit public participation in the proceeding.²³⁶

215. Harold Feld, an expert on telecom law and policy,²³⁷ analyzed MAD's petition and stated that it raised "some very interesting questions from an FCC law perspective" and was "not a frivolous claim."²³⁸ Feld observed that the FCC's decision to open the license renewal hearing to public comment is a "highly unusual step."²³⁹

²³⁵ Letter from Jamie Kellner, Founding President of Fox Broadcasting Co., to Marlene H. Dortch, Secretary of the FCC (Aug. 22, 2023) (on file with the FCC).

²³⁶ Federal Communications Commission Public Notice, MB Docket No. 23-293 (Aug. 23, 2023), available at <https://docs.fcc.gov/public/attachments/DA-23-752A1.pdf>.

²³⁷ Profile of Harold Feld, Senior Vice President, Public Knowledge, https://publicknowledge.org/team_member/harold-feld.

²³⁸ Harold, *My Insanely Long Field Guide to the Fox29 Philadelphia (WTFX-TV) License Renewal Challenge*, Wetmachine, (Aug. 29, 2023, 7:35AM), <https://wetmachine.com/tales-of-the-sausage-factory/my-insanely-long-field-guide-to-the-fox29-philadelphia-wtfx-tv-license-renewal-challenge/>.

²³⁹ *Id.*

DEMAND FUTILITY

216. On June 17, 2021, the Fox Board expanded from seven members to eight and elected William A. Burck as a new director. Demand is futile if four directors out of eight are disabled from impartially considering a demand.

217. There are two separate bases for demand futility: (i) the entire Board at the time of the defamation of Dominion, Smartmatic, and Khalil faces a substantial likelihood of personal liability for a *Massey Claim*, an *Information Systems Claim*, and a *Red Flags Claim*; and (ii) at least two outside directors (out of Carey and Ryan and Nasser) lack independence from Rupert, who faces a substantial likelihood of personal liability, as does Lachlan.

A. Rupert and Lachlan Face Liability

218. Rupert and Lachlan directed the strategies and operations of Fox and Fox News that gave rise to the defamation claims of Dominion, Smartmatic, and Khalil and which make them personally responsible for a *Massey Claim*, an *Information Systems Claim*, and a *Red Flags Claim*.

219. Both are deeply engaged in Fox News's daily operations. Lachlan regularly attends the twice-daily editorial leadership team meeting to discuss topics, segments, guests, and monologues, and Rupert attends those meetings when he is in

New York. Both speak to and email Scott regularly, sometimes on a daily basis.²⁴⁰ Rupert routinely suggests potential Fox News and Fox Business stories to Scott, and recommends guests.²⁴¹ Lachlan works closely with the managers of the newsrooms to get the positioning and messaging right²⁴² and regularly texts Scott his comments and feedback on Fox News's coverage.²⁴³

220. Additionally, Rupert and Lachlan are advised twice daily on viewership through (i) a preliminary rating assessment referred to as “overnights” that gets distributed early in the morning covering the previous day and (ii) an “executive scorecard” of ratings which is prepared daily for the executive team.²⁴⁴ Lachlan also receives weekly emails with Fox News Network's audience and social media favorability reports.²⁴⁵

²⁴⁰ David Folkenflik, *Rupert Murdoch says Fox stars ‘endorsed’ lies about 2020. He chose not to stop them*, NPR (Feb. 28, 2023, 5:00 AM ET), <https://www.npr.org/2023/02/28/1159819849/fox-news-dominion-voting-rupert-murdoch-2020-election-fraud>.

²⁴¹ Barr et al., *supra* note 148.

²⁴² D MSJ Ex. 130 (L. Murdoch Dep. Tr.) at 62:5-12 (discussed Tucker Carlson's on-air comments regarding immigrants making America “dirtier” and “poorer” with Scott); *id.* at 71:5-9 (Lachlan sends Scott stories that Fox News should report on); 79:8-80:9 (unable to think of a single instance where Scott and Fox News refused to air a story Lachlan believed should be aired).

²⁴³ *See, e.g., id.* at 80:15-81:7 (texting Scott that Laura Ingraham's being at the Trump 2020 watch party was not a “good look”); *see also* NYC_220_8951 (texting Scott about how to cover Trump rally); NYC_220_9172 (same).

²⁴⁴ SMAC ¶ 167.

²⁴⁵ *See, e.g.,* NYC_220_9070.

221. Rupert and Lachlan were particularly mindful of Fox’s coverage of Trump to ensure it was favorable. For example, Lachlan told Scott to change the tone of coverage of a Trump rally, saying the hosts needed to “be careful” and that “some of the side comments are slightly anti, and they shouldn’t be. The narrative should be this is a huge celebration of the president.”²⁴⁶ Lachlan was so engrossed in the details of Fox’s Trump coverage that he complained about a chyron (the text that runs at the bottom of the screen) that he felt was too negative about Trump.²⁴⁷

222. Rupert and Lachlan greenlighted and directly oversaw on a day-to-day basis the weeks-long programming strategy of cultivating an audience of Trump supporters by presenting hosts and guests who propagated Trump’s election-denial conspiracy theories, which were predicated in large part on false accusations that Dominion and Smartmatic committed election fraud.

223. Rupert admitted he “could have” stopped Fox from giving airtime to Giuliani but did not, to avoid antagonizing Trump, explaining that Trump “had a very large following, and they were probably mostly viewers of Fox, so it would

²⁴⁶ Jeremy W. Peters, *Inside the 3 Months That Could Cost Fox \$1.3 Billion*, N.Y. Times (Mar. 20, 2023), <https://www.nytimes.com/2023/03/20/technology/fox-news-dominion-texts.html>; NYC_220_8951.

²⁴⁷ Jeremy W. Peters, *Fox Leaders Wanted to Break From Trump but Struggled to Make It Happen*, N.Y. Times (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/business/media/fox-news-trump-break.html>.

have been stupid.”²⁴⁸ Rupert agreed there was “some truth” to an article concluding that the “lucrative approach” for Fox was to draw in viewers with conspiracy theories while the journalistically sound approach was to tell the truth.²⁴⁹

224. Lachlan admitted that he weighed in on the specific direction on both the “tone” and “negativ[ity]” of Fox’s news coverage of Trump between November 2020 and January 2021.²⁵⁰

225. From their respective long careers as mass media executives, Rupert and Lachlan knew that it was actionable for a broadcaster or publisher to accuse a private company of engaging in criminal activity without any factual basis. Given their personal involvement at the relevant time in the programming and operations of Fox News, Rupert and Lachlan also knew the following:

- the on-air accusations of criminal wrongdoing by Dominion and Smartmatic were factually unfounded and not fact-checked;
- Dominion and Smartmatic were communicating directly with Fox News to comprehensively rebut the false claims;
- Dominion and Smartmatic were threatening to sue; and

²⁴⁸ D SJ Opp. at 28, 30.

²⁴⁹ *Id.* at 140.

²⁵⁰ Peters, *supra* note 247.

- Fox News was not mitigating its damages exposure by retracting the false accusations leveled by its hosts and guests.

B. The Outside Directors Face Liability

226. At all relevant times, the outside directors knew that the business model of Fox News was to present political narratives favored by its viewers, even if those narratives were false. Fox’s manufacture of a false story about the murder of Seth Rich was a notable example.

227. The Seth Rich settlement was reported to the Board on November 11-12, 2020, in the midst of Trump’s pressuring Fox News to endorse his election-denial conspiracy theories, including by threatening to create a direct competitor to Fox News, which was a subject of discussion among some if not all directors. The fact that Fox News had paid to settle a defamation claim had no apparent impact on Fox News’s business model in covering the 2020 election. Fox News hosts and guests proceeded to amplify and endorse Trump’s defamatory conspiracy theories about Dominion and Smartmatic.

228. Ryan understood that defamatory conspiracy theories were part of Fox News’s business model. He meekly advised the Murdochs not to spread conspiracy theories. After January 6, 2021, Ryan acknowledged that Fox News was part of an “alternative reality machine” and he expressed his hope that prime time hosts

Carlson, Ingraham, and Hannity and Fox News contributors would “put down the echoes of falsehoods from our side.”²⁵¹

229. Dias similarly understood “how important Fox News has been as a megaphone for Donald Trump, directly or indirectly,” when she endorsed a *Financial Times* editorial of January 11, 2021, which stated that Fox News “has enabled Mr. Trump for too long, and according to one study had been more influential in spreading false beliefs than social media.”²⁵²

230. Carey was present at the creation of Fox News, and he was a long-time deputy and advisor to Rupert. He understood and condoned Fox News’s business model.

231. None of the outside directors organized with each other to protect Fox News from defamation risk. They did not confront the Murdochs or Dinh or Scott. They did not review the protocols for fact-checking and retractions. They did not obtain legal advice about defamation risk. They did not obtain an internal risk-assessment about defamation. They did not establish reporting protocols about threatened defamation litigation.

²⁵¹ NYC_220_9036; NYC_220_9040.

²⁵² NYC_220_8993.

232. Dominion and Smartmatic made significant public efforts to combat misinformation. After correcting Fox News for weeks, Dominion and Smartmatic both publicly threatened litigation. The defamation itself and the responses to it by Dominion and Smartmatic were all red flags waved to, among others, the outside directors of Fox. Yet, the outside directors did not meet and take action respecting the threat of significant defamation liability.

C. Carey, Ryan, and Nasser Lack Independence from Rupert

233. Carey was Rupert’s long-time “partner” and “trusted adviser.” Carey spent almost his entire career as a high-ranking employee of Murdoch-owned companies. He was also a longtime director of Murdoch-controlled or Murdoch-affiliated companies. As of 2020, Carey was not deemed an independent director, and in 2022 he was not appointed to a “Special Committee composed of independent members of the Board” to investigate a possible combination with News Corp.²⁵³

234. Ryan owes the height of his political prominence to the Murdochs. Rupert successfully lobbied Mitt Romney publicly and privately to name Ryan as the Republican Party’s nominee for Vice President in 2012. When Ryan retired from Congress in the midst of the Trump presidency, the Murdochs provided Ryan with

²⁵³ *FOX’s Special Committee of the Board of Directors Provides Update*, PR Newswire (Dec. 6, 2022), <https://www.prnewswire.com/news-releases/foxs-special-committee-of-the-board-of-directors-provides-update-301695535.html>.

a sinecure. Ryan’s “owingness” to the Murdochs is complemented by his political ambition for the conservative movement and the Republican Party, which he served by gently nudging the Murdochs to shift the political orientation of Fox News. Ryan acted as a courtier, not as someone who, together with the other directors, such as his political ally Dias, could impose their will on the governance of Fox News.

235. For decades, Nasser has been “close both commercially and personally” to Rupert.²⁵⁴ As of 2020, he had almost two decades of service as an outside director of Murdoch-affiliated companies.

CLAIMS FOR RELIEF
COUNT I
Breach of Fiduciary Duty
(Against the Officer Defendants)

236. Plaintiffs repeat and reallege all of the allegations above as though fully set forth herein.

237. Rupert and Lachlan owed fiduciary duties of loyalty and care as directors, officers, and controlling stockholders of Fox. Rupert and Lachlan separately owed duties as officers of Fox News to act in the best interest of Fox News and its corporate parent, Fox.

238. Dinh owed fiduciary duties of loyalty and care as an officer of Fox.

²⁵⁴ Stevens, *supra* note 39.

239. Scott owed duties as an officer of Fox News to act in the best interest of Fox News and its corporate parent, Fox.

240. Rupert, Lachlan, Dinh, and Scott all acted in bad faith by causing Fox News to pursue profits through tortious misconduct. At all relevant times, Rupert, Lachlan, Dinh, and Scott maintained a tortious business model of propagating factually unfounded, defamatory conspiracy theories, without institutionalized policies of fact-checking, retractions, or assessment of defamation risk.

241. Rupert, Lachlan, Dinh, and Scott were all closely involved in overseeing and implementing the programming strategy of regaining market share in November 2020 by airing hosts and guests who propagated unfounded conspiracy theories falsely accusing Dominion and Smartmatic of election fraud. Rupert, Lachlan, Dinh, and Scott all knew that Fox News executives, hosts, and guests were disregarding the lack of any credible evidence to support the accusations and the abundant, readily available evidence about the absence of systemic fraud in the tabulation of votes.

242. As executives with deep experience in the management of mass media companies, Rupert, Lachlan, Dinh, and Scott knew that it was tortious to pursue profits by making false, unfounded accusations of criminal misconduct. Rupert, Lachlan, Dinh, and Scott further knew that Dominion and Smartmatic had positioned

themselves to seek maximal damages by putting Fox News on notice of the false claims and by making demands for retractions that Fox News ignored.

COUNT II
Breach of Fiduciary Duty
(Against the Outside Director Defendants)

243. Plaintiffs repeat and reallege all of the allegations above as though fully set forth herein.

244. Throughout their tenure on the Board, outside directors Carey, Ryan, Nasser, Dias, and Hernandez acquiesced to a business strategy of pursuing profit through actionable defamation, and they consciously disregarded the risk of tort liability from actionable defamation. They failed to act in good faith to establish information and reporting systems that mitigate defamation risk, and they disregarded red flags respecting defamation liability to Dominion and Smartmatic.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

- A. Determining that this action is a proper derivative action maintainable under the law and that demand is excused;
- B. Awarding all damages sustained by Fox as a result of the defamation committed by Fox and Fox News, including, without limitation, any damages, amounts paid in settlement, and legal expenses incurred in

each of the Dominion litigation, the Smartmatic litigation, and the Khalil litigation;

- C. Awarding Plaintiffs the costs and expenses of the action, including reasonable attorneys' fees and expert fees; and
- D. Granting such further relief as the Court deems just and proper.

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