

1-1-2022

The Real Cost of Fake News: Smartmatic's \$2.7 Billion Defamation Lawsuit against Fox News

Michael Conklin
Angelo State University

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

Conklin, Michael (2022) "The Real Cost of Fake News: Smartmatic's \$2.7 Billion Defamation Lawsuit against Fox News," *University of Dayton Law Review*. Vol. 47: No. 1, Article 3.
Available at: <https://ecommons.udayton.edu/udlr/vol47/iss1/3>

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

THE REAL COST OF FAKE NEWS: SMARTMATIC’S \$2.7 BILLION DEFAMATION LAWSUIT AGAINST FOX NEWS

*Michael Conklin**

I.	INTRODUCTION.....	18
II.	THE COMPLAINT	18
III.	COLLUSION.....	20
IV.	RUDY GIULIANI AND SIDNEY POWELL	20
	<i>A. False Statements</i>	20
	<i>B. Intent</i>	22
	<i>C. Election Fraud Lawsuits</i>	23
	<i>D. Actual Malice</i>	24
	<i>E. Potential Immunity Based on Legal Representation of Donald Trump</i>	25
V.	FOX NEWS	26
	<i>A. Intent</i>	28
	<i>B. Actual Malice</i>	30
	<i>C. Ambiguous Evidence</i>	33
VI.	DAMAGES	34
VII.	DOMINION LAWSUIT COMPARISON.....	38
VIII.	“PINK SLIME” DEFAMATION CASE COMPARISON.....	40
IX.	CONCLUSION	41

The Earth is round. Two plus two equals four. Joe Biden and Kamala Harris won the 2020 election for President and Vice President of the United States. The election was not stolen, rigged, or fixed. These are facts. They are demonstrable and irrefutable. . . . Defendants have always known these facts.

Smartmatic complaint opening paragraph¹

* Powell Endowed Professor of Business Law, Angelo State University.

¹ Complaint at 1, Smartmatic USA Corp. et al. v. Fox Corp. et al., No. 151136/2021 (N.Y. Sup. Ct. Feb. 4, 2021) [hereinafter Smartmatic Complaint].

I. INTRODUCTION²

On February 4, 2021, voting machine company Smartmatic filed a defamation lawsuit against Rudolph Giuliani, Sidney Powell, Fox News, and Fox News personalities Lou Dobbs, Maria Bartiromo, and Jeanine Pirro.³ The complaint seeks \$2.7 billion in compensatory damages, punitive damages, and attorney's fees.⁴ The 285-page complaint alleges the damages were incurred from the defendants' false claims that Smartmatic was actively involved in rigging the 2020 U.S. presidential election in favor of Joe Biden.⁵ This is similar to the defamation lawsuit filed by Dominion Voting Systems, Inc. ("Dominion") against Sidney Powell on January 8, 2021.⁶ Such lawsuits could have a significant effect on defamation law, media liability, and political speech.

Part II of this Article addresses the Smartmatic complaint generally. Part III considers the allegation that the defendants actively colluded together. Part IV analyzes the case against Giuliani and Powell, including false statements, intent, their failed election fraud lawsuits, actual malice, and potential immunity as attorneys for Donald Trump. Part V considers the case against Fox News, including issues of potential motivations, what was known when, ambiguities in coverage, and the accessibility of accurate information. Part VI considers Smartmatic's various damages claims, including the ability to sue on behalf of employees and receive compensation for future reputational harm. Part VII compares the present lawsuit to the earlier Dominion lawsuit against Sidney Powell. Part VIII uses the plaintiffs' attorney's former "pink slime" defamation lawsuit as a comparison. Part IX concludes by predicting the trial outcome and ramifications this case may have on the political process and defamation precedent.

II. THE COMPLAINT

In places, the complaint reads more like a Hollywood screenplay than a legal document. Smartmatic frames the issue as "[a] story of good versus evil . . ."⁷ The defendants are portrayed as secretly colluding together to create the maximum damage to the hero of the story, the virtuosic voting machine company with an impeccable record, Smartmatic.⁸

² Note that this Article begins with the assumption that the reader understands Joe Biden rightfully won the 2020 presidential election. For a detailed chronicling of the evidence for this conclusion, *see id.* at 27–30.

³ Smartmatic Complaint, *supra* note 1.

⁴ *Id.* at 275.

⁵ *Id.* at 3.

⁶ *See generally* Complaint, *US Dominion, Inc. v. Powell*, No. 1:21-cv-00040 (D.D.C. Jan. 8, 2021) [hereinafter *Dominion Complaint*].

⁷ Smartmatic Complaint, *supra* note 1, at 1–2.

⁸ *See id.* at 3.

Smartmatic is further depicted as heroically standing up for what is right with quotes such as, “With this action, Smartmatic says: Enough. Facts matter. Truth matters.”⁹ The consequences of the defendants’ behavior are depicted with stark language, such as how they allegedly “contributed to an erosion of trust and civility in the country” and “turn[ing] neighbor against neighbor.”¹⁰

One of the villains of the story, Fox News, is described as “one of the most powerful and far-reaching news organizations in the world,” with a “desire for fame and fortune.”¹¹ A narrative of deception and intrigue is constructed by accusing Fox News of intentionally spreading the false information in an attempt to “curry favors with the outgoing administration”¹² It is even insinuated that its willful promotion of lies was used to obtain a pardon from President Trump for the ex-husband of a news anchor.¹³ The complaint further alleges that Fox News was desperate to stay on top, fearful of newly emerging ultra-right-wing competitors, such as Newsmax.¹⁴

The complaint thoroughly chronicles the various falsehoods by the defendants. They are divided into the following eight categories:

[1.] Smartmatic’s election technology and software were widely used in the 2020 U.S. election, including in six states with close outcomes;

[2.] Smartmatic’s election technology and software were used by Dominion during the 2020 U.S. election;

[3.] Smartmatic’s election technology and software were used to steal the 2020 U.S. election by rigging and fixing the vote;

[4.] Smartmatic’s election technology and software sent votes to foreign countries for tabulation and manipulation during the 2020 U.S. election;

[5.] Smartmatic’s election technology and software were compromised and hacked during the 2020 U.S. election;

[6.] Smartmatic was previously banned from being used in U.S. elections;

⁹ *See id.* at 4.

¹⁰ *Id.* at 3–4, 13.

¹¹ *See id.* at 6, 12.

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.* at 208–09.

[7.] Smartmatic is a Venezuelan company that was founded and funded by corrupt dictators from socialist and communist countries; and,

[8.] Smartmatic's election technology and software were designed to rig and fix elections.¹⁵

III. COLLUSION

The complaint attempts to describe the defendants as actively coordinating efforts to more effectively spread false information about Smartmatic.¹⁶ The plaintiffs refer to a “well-orchestrated dance” between Fox News correspondent Bartiromo and Giuliani.¹⁷ Additionally, Fox News defendants are accused of being “voluntary and knowing members of the conspiracy with Ms. Powell and Mr. Giuliani.”¹⁸ The level of collusion amounted to waging a “disinformation campaign.”¹⁹ Smartmatic accuses specific Fox News personalities of organizing their interviews with Powell for the maximum effect of spreading false information.²⁰ Furthermore, Dobbs and Powell are accused of agreeing on what specific themes to promote.²¹ This symbiotic relationship between Powell and Fox News is alleged to be so strong that the complaint accuses the two of being co-conspirators.²²

IV. RUDY GIULIANI AND SIDNEY POWELL

This part will consider the case against the non-Fox News defendants, Giuliani and Powell. Relevant topics analyzed include the publication of false statements, intent, these defendants' attempted election fraud lawsuits, actual malice, and a potential defense.

A. *False Statements*

Giuliani and Powell made similar false statements about Smartmatic.²³ They also made numerous references to how they possessed evidence regarding these claims.²⁴ The evidence never materialized.²⁵

¹⁵ *Id.* at 57. For how these statements are shown to be false, see *id.* at 91–141. For Smartmatic's refutation of these eight accusations, see *id.* at 79.

¹⁶ *See, e.g., id.* at 2 (“Having invented their story, and created their villain, Defendants set about spreading the word.”).

¹⁷ *Id.* at 37.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 185.

²⁰ *Id.* at 39–40 (“Ms. Bartiromo and Ms. Powell had evidently agreed, before Ms. Powell went on-air, that they would introduce another aspect to the false narrative”); *id.* at 48 (“Mr. Dobbs and Ms. Powell then returned to two of the themes they had decided would play a central role in the disinformation campaign”).

²¹ *Id.* at 48.

²² *Id.* at 11.

²³ *Id.* at 42, 46.

²⁴ *Id.*

The following is a sampling of claims made by Giuliani and Powell:

- Giuliani claimed that Smartmatic owned Dominion and was founded by Venezuelans.²⁶
- Powell: “We’ve identified mathematically the exact algorithm they used and plan to use from the beginning to modify the votes, in this case, to make sure Biden won.”²⁷
- Giuliani: “I know I can prove that . . . in Michigan [Smartmatic used a backdoor to switch vote totals].”²⁸
- Giuliani accused Smartmatic of fixing a number of elections in Venezuela and Argentina.²⁹
- Powell: “Well, we’ve known from early on in our independent investigation that the entire system was created for the benefit of Venezuela and Hugo Chávez to rig elections to make sure he continued winning.”³⁰
- Powell: “We’re talking about the alteration and changes in millions of votes”³¹
- Powell: “Computers [are] being overwritten to ignore signatures.”³²
- Powell: “[Smartmatic] was created for the express purpose of being able to alter votes and secure the re-election of Hugo Chávez. And then Maduro. . . . [I]t is one huge criminal conspiracy. . . .”³³
- Giuliani: Smartmatic was “founded by [] Chávez.”³⁴
- Giuliani: “[Smartmatic] was banned by the United States”³⁵
- Powell: “[T]here’s thousands of people in federal prison on far less evidence of criminal conduct than we have already against [] Smartmatic. . . .”³⁶

²⁵ See *id.* at 64–66, 78–84.

²⁶ *Id.* at 46.

²⁷ *Id.* at 70 (citation omitted).

²⁸ *Id.* at 38.

²⁹ *Id.* at 46.

³⁰ *Id.* at 74 (citation omitted) (emphasis omitted).

³¹ *Id.* at 81 (citation omitted).

³² *Id.*

³³ *Id.* at 35–36.

³⁴ *Id.* at 86 (citation omitted).

³⁵ *Id.* at 124 (citation omitted).

³⁶ *Id.* at 50.

- Powell: “Trump won by . . . millions of votes that were shifted by [Smartmatic’s] software that was designed expressly for that purpose”³⁷

B. *Intent*

Smartmatic accuses both Giuliani and Powell of “act[ing] to deliberately and malicious[ly] injure Smartmatic out of hatred, ill-will or spite, and/or for improper motives.”³⁸ Giuliani and Powell both had a “personal and financial interest in disseminating a narrative that Smartmatic stole and rigged the 2020 U.S. election for Joe Biden and Kamala Harris.”³⁹

Smartmatic alleges that Giuliani and Powell were motivated by a “desire for fame and fortune.”⁴⁰ This claim is supported but not dispositively proven by the facts. Powell’s statements gave her a sudden boost in attention.⁴¹ She also created and frequently solicited donations for her website, money that would allegedly be spent fighting election fraud.⁴² While Giuliani was already a high-profile figure, he received additional media attention, and his efforts no doubt would further ingratiate himself to Donald Trump. Giuliani allegedly sought \$20,000 a day in fees from Donald Trump.⁴³ He used his continued high-profile status “to sell various products—from coins to supplements to title fraud protection services.”⁴⁴ Some have speculated that during this time, Giuliani was motivated by a desire to obtain a presidential pardon from Donald Trump.⁴⁵

Many of the voter fraud claims appear to have originated from Giuliani and Powell, which could be interpreted to strengthen the claim that they created them and therefore knew they were false.⁴⁶ However, a wide range of culprits was identified as the cause of voter fraud misinformation. The CEO of Dominion Voting Systems—a Smartmatic competitor who filed a defamation suit against Powell—stated that it was President Trump who “launched this attack on [Dominion].”⁴⁷ Another source claimed it was J. Christian Adams, Hans von Spakovsky, and Kris Kobach—three former

³⁷ *Id.* at 92 (emphasis omitted) (citation omitted).

³⁸ *Id.* at 240.

³⁹ *Id.* at 12.

⁴⁰ *Id.*

⁴¹ *Id.* at 214.

⁴² *Id.* at 215.

⁴³ *Id.* at 31.

⁴⁴ *Id.*

⁴⁵ *Id.* at 214.

⁴⁶ Matter of Giuliani, 146 N.Y.S.3d 266, 268, 270 (N.Y. App. Div. 1st Dept’t 2021); Jim Rutenberg, et al., *Trump’s Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES, nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html (Oct. 11, 2021).

⁴⁷ *Dominion Voting Systems Sues Ex-Trump Lawyer Over False Claims*, NPR (Jan. 12, 2021, 5:06 AM), <https://www.npr.org/2021/01/12/955938741/dominion-voting-systems-sues-ex-trump-lawyer-over-false-claims>.

members of the Presidential Advisory Commission on Election Integrity—who were ultimately responsible.⁴⁸ Still, others claim that the voter fraud lies involving the 2020 presidential election resulted from a deliberate, Republican strategy implemented years ago, long before Giuliani and Powell first made their claims.⁴⁹

C. *Election Fraud Lawsuits*

Giuliani and Powell both filed lawsuits regarding the 2020 presidential election.⁵⁰ In what was an insight into the legitimacy of their accusations, these lawsuits were all dismissed before trial, often accompanied by excoriating denunciations from the judges.⁵¹ Furthermore, it is interesting to note the contrast between what Giuliani and Powell claimed in press conferences and what they alleged in these legal proceedings. Powell's lawsuits peculiarly omitted any claim regarding the eight false allegations against Smartmatic that she made elsewhere.⁵² Likewise, Giuliani explicitly admitted in court as early as November 17, 2020, that his lawsuit was “not a fraud case.”⁵³ Giuliani's and Powell's decisions to abandon their public accusations against Smartmatic when in the context of a legal proceeding is strong evidence that they knew these accusations were false. Powell's lawsuits further demonstrate how she was likely aware her accusations were false. Of her four lawsuits, three courts issued a written opinion emphasizing Powell's bad faith in filing.⁵⁴ These include:

- “Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court. They most certainly cannot be the basis for upending Arizona's 2020 General Election.”⁵⁵
- “[T]his lawsuit seems to be less about achieving the relief Plaintiffs seek . . . and more about the impact of their

⁴⁸ Sam Levine & Spenser Mestel, *Just like Propaganda: the three men enabling Trump's voter fraud lies*, GUARDIAN (Oct. 26, 2020, 9:00 AM), <https://www.theguardian.com/us-news/2020/oct/26/us-election-voter-fraud-mail-in-ballots>; *Presidential Advisory Commission on Election Integrity*, THE WHITE HOUSE (July 13, 2017), <https://trumpwhitehouse.archives.gov/articles/presidential-advisory-commission-election-integrity/>.

⁴⁹ Sam Levine, *How the Republican voter fraud lie paved the way for Trump to undermine Biden's presidency*, GUARDIAN (Jan. 18, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/jan/18/trump-republican-voter-fraud-lie-biden-presidency>.

⁵⁰ Katelyn Polantz & Dan Berman, *Giuliani and Powell pushed election fraud so they could hobnob in DC, Dominion Voting Systems argues in court*, CNN, <https://www.cnn.com/2021/06/24/politics/rudy-giuliani-sidney-powell-dominion-lawsuit/index.html> (June 24, 2021, 9:46 PM).

⁵¹ See *infra* notes 57–60 and accompanying text.

⁵² Smartmatic Complaint, *supra* note 1, at 191–97.

⁵³ *Id.* at 189 (citation omitted).

⁵⁴ *Id.* at 192.

⁵⁵ *Id.* (citation omitted).

allegations on People’s faith in the democratic process and their trust in our government.”⁵⁶

- “Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so.”⁵⁷

Additionally, two courts explicitly speculated as to the bad faith for Powell’s filing delays.⁵⁸ One judge remarked, “Plaintiffs proffer no persuasive explanation as to why they waited so long to file this suit”⁵⁹ Another stated, “Plaintiffs offer no reasonable explanation why their claims were brought in federal court at this late date.”⁶⁰

D. *Actual Malice*

In *Curtis Publishing Co. v. Butts*, the Supreme Court expanded the holding from *New York Times Co. v. Sullivan* to require the showing of actual malice in defamation suits not just against a public official but also against public figures.⁶¹ Determining when a corporation qualifies as a public figure is highly ambiguous, with state courts and lower federal courts implementing an increasingly divergent set of standards.⁶² This nuanced determination has been described as “trying to nail a jellyfish to the wall.”⁶³

The issue of whether Smartmatic is a public figure is likely moot in the present case, however, because the behavior of Giuliani and Powell appears to satisfy the actual malice requirement. Therefore, even if Smartmatic is held to be a public figure for defamation purposes, this would not change the ultimate outcome of the case. Actual malice requires the defamatory statement to have been publicized “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”⁶⁴ There is significant evidence that Giuliani and Powell knew their accusations were false; likely, the most illuminating example is how they claimed to possess evidence that did not exist.⁶⁵ And even if a jury could somehow be convinced that Giuliani and Powell did not know their claims were false, it would be even harder to convince a jury that they did not demonstrate a “reckless disregard” for the truth.

⁵⁶ *Id.* at 192–93 (citation omitted).

⁵⁷ *Id.* at 193 (citation omitted).

⁵⁸ *Id.* at 194.

⁵⁹ *Id.*

⁶⁰ *Id.* at 195 (citation omitted).

⁶¹ 388 U.S. 130, 155 (1967). *See generally* 376 U.S. 254 (1964).

⁶² Matthew D. Bunker, *Corporate Chaos: The Muddled Jurisprudence of Corporate Public Figures*, 23 COMM’N L. & POL’Y 1, 2 (2018).

⁶³ *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

⁶⁴ *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (quoting *Sullivan*, 376 U.S. at 279–80).

⁶⁵ Smartmatic Complaint, *supra* note 1, at 44, 65, 142, 145.

E. *Potential Immunity Based on Legal Representation of Donald Trump*

Powell and Giuliani may try to assert the affirmative defense that their statements are protected by privilege based on their positions as Donald Trump's legal counsel. There is an established precedent recognizing privilege when an attorney is announcing the position of his or her client, thus rendering the attorney immune from defamation liability for such communications.⁶⁶ It is well established that Giuliani was Donald Trump's personal attorney while making statements regarding Smartmatic.⁶⁷ However, the status of Powell as Trump's attorney is less clear.

Donald Trump tweeted on November 14, 2020, that Powell was, among others, part of "a truly great team, added to our other wonderful lawyers and representatives!"⁶⁸ Five days later, Powell—with Giuliani standing next to her—stated in a press conference that they were "representing President Trump and we're representing the Trump campaign. . . ."⁶⁹ On November 16, 2020, Fox News personality Lou Dobbs introduced Powell as a member of President Trump's legal team.⁷⁰ However, Powell never filed any lawsuits on behalf of Donald Trump or the Trump campaign.⁷¹ Further, on November 22, 2020, the Trump campaign issued the following emphatic statement regarding Powell's status: "Sidney Powell is practicing law on her own. She is not a member of the Trump Legal Team. She is also not a lawyer for the President in his personal capacity."⁷² Note that this statement does not even acknowledge that Powell was ever representing Donald Trump or the Trump campaign.

The immunity for representing Donald Trump is likely not available for Powell, as she continued to make defamatory statements against Smartmatic after it was made explicitly clear that she was not representing Donald Trump or the Trump campaign.⁷³ While there are calls for Giuliani to be disbarred—in part because of these false allegations of voter fraud—he

⁶⁶ Colin Kalmbacher, *Legal Experts Explain Defamation Lawsuit Threat Made by Dominion Voting Systems Against Sidney Powell*, LAW & CRIME (Dec. 17, 2020, 4:54 PM), <https://lawandcrime.com/2020-election/legal-experts-explain-defamation-lawsuit-threat-made-by-dominion-voting-systems-against-sidney-powell/>.

⁶⁷ Alison Durkee, *Trump Cuts Ties with Giuliani: Advisor Says Attorney No Longer Representing 'In Any Legal Matters'*, FORBES (Feb. 16, 2021, 7:12 PM), <https://www.forbes.com/sites/alisondurkee/2021/02/16/trump-cuts-ties-with-giuliani-advisor-says-attorney-no-longer-representing-in-any-legal-matters/?sh=2662abfe31d3> ("Giuliani served as Trump's personal attorney throughout his presidency and most recently helmed the president's unsuccessful attempt to challenge the election results in court. . . .").

⁶⁸ Dominion Complaint, *supra* note 6, at 20 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 14, 2020, 10:11 PM), <https://twitter.com/realdonaldtrump/status/1327811527123103746>).

⁶⁹ *Id.* at 21 (citation omitted).

⁷⁰ Smartmatic Complaint, *supra* note 1, at 42 (citation omitted).

⁷¹ *Id.* at 190.

⁷² Dominion Complaint, *supra* note 6, at 25.

⁷³ Smartmatic Complaint, *supra* note 1, at 190–91.

was Donald Trump's attorney while making the statements.⁷⁴ Therefore, this immunity would be a potential defense for Giuliani. However, the problem Giuliani is likely to face when pursuing this defense is that his comments might not be construed as simply communicating his client's position. However, it could be argued that Giuliani's numerous claims regarding Smartmatic go beyond simply repeating Trump's claims. In this way, while Trump may have been appreciative of Giuliani's allegations against Smartmatic, these statements could be interpreted as being outside these attorney privilege protections. Furthermore, Giuliani's claims against Smartmatic could be interpreted as more of an effort for self-promotion than to further Trump's interest as Giuliani used his exposure to sell products such as supplements, coins, and title fraud protection services.⁷⁵

V. FOX NEWS

In addition to Giuliani and Powell, Smartmatic is suing the Fox Corporation, Fox News Network, and Fox News personalities Lou Dobbs, Maria Bartiromo, and Jeanine Pirro.⁷⁶ For the purposes of this section addressing the Fox defendants, Fox News is ultimately considered and not the individuals Dobbs, Bartiromo, or Pirro. This is consistent with the complaint, which acknowledges that “[a]t all relevant times, Mr. Dobbs, Ms. Bartiromo, and Ms. Pirro acted under the direction of Fox News, Fox News authorized and condoned the actions of Mr. Dobbs, Ms. Bartiromo, and Ms. Pirro; and, Fox News ratified the actions of Mr. Dobbs, Ms. Bartiromo, and Ms. Pirro.”⁷⁷ Fox News aired thirteen reports either explicitly stating or implying that Smartmatic played a role in stealing the 2020 presidential election.⁷⁸ These reports were then repeated in articles and social media postings.⁷⁹

The complaint alleges that the manner in which Fox News covered the election fraud issue effectively promoted the false narrative.⁸⁰ Smartmatic points out that Fox News claims to be the “Most trusted” news source.⁸¹ Also, Fox News reporters such as Dobbs, Bartiromo, and Pirro are held out by Fox News as news reporters, not “speculators or opinion mouthpieces.”⁸² Smartmatic further explains that frequent guests on

⁷⁴ *Rudy Giuliani: lawyers call for Trump's personal attorney to lose law license*, GUARDIAN (Jan. 21, 2021, 9:12 PM), <https://www.theguardian.com/us-news/2021/jan/22/rudy-giuliani-lawyers-call-for-trumps-personal-attorney-to-lose-law-license>.

⁷⁵ Drew Harwell, *Giuliani wasn't just a Trump partisan but a shrewd marketer of vitamins, gold, lawsuit says*, WASH. POST (Jan. 26, 2021, 6:21 PM), <https://www.washingtonpost.com/technology/2021/01/26/giuliani-conspiracy-influencer-lawsuit/>.

⁷⁶ Smartmatic Complaint, *supra* note 1, at 1.

⁷⁷ *Id.* at 7–8.

⁷⁸ *Id.* at 2.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2–3.

⁸¹ *Id.* at 68.

⁸² *Id.* at 69.

Fox News programs who promoted the election fraud lies were introduced and treated in a way to lend undue authority to their claims.⁸³

Fox News did more than just allow Giuliani and Powell to make their false claims on air. They also boosted the credentials of Giuliani and Powell with generous introductions, praise for their coverage of election fraud, and affirmations of their claims.⁸⁴ Fox News personality Lou Dobbs appears to be the biggest perpetrator in this area. His statements include:

- “[T]hese people . . . [deciding to] overthrow our government and overthrow our way of life in this country. And it just damn well isn’t going to succeed.”⁸⁵
- “The 2020 Election is a cyber Pearl Harbor: The leftwing establishment have aligned their forces to overthrow the United States government. . . .”⁸⁶
- “Smartmatic’s CEO [] executed an electoral 9-11 against the United States. . . .”⁸⁷
- Concluding an interview in which Giuliani made false claims of election fraud, Dobbs endorsed them by stating, “[a]nd Rudy we’re glad you’re on the case and [] pursuing what is the truth and straightening out what is a very complicated and difficult story.”⁸⁸
- “Yeah, Sid[ney Powell], it is—it is more than just a willful blindness. This is people trying to blind us to what is going on. We don’t even know who the hell really owns these companies, at least most of them”⁸⁹

On February 5, 2021, the day after the Smartmatic lawsuit was filed against Fox News, *Lou Dobbs Tonight* was canceled despite being the most-watched show on the Fox Business Network.⁹⁰ Dobbs is not the only Fox News personality who went beyond just allowing Giuliani and Powell to make their false claims. For example, Bartiromo claimed that Smartmatic “has a backdoor that allows it to be [] or that allows the votes to be mirrored

⁸³ *Id.* at 75–76.

⁸⁴ *Id.* at 69–78.

⁸⁵ *Id.* at 52 (citation omitted).

⁸⁶ *Id.* at 64 (citation omitted).

⁸⁷ *Id.* (citation omitted).

⁸⁸ *Id.* at 34 (citation omitted).

⁸⁹ *Id.* at 77 (citation omitted).

⁹⁰ Jeremy Barr, *Lou Dobbs is lashing out at Fox on Twitter for dropping his show*, WASH. POST (Feb. 8, 2021, 5:32 PM), <https://www.washingtonpost.com/media/2021/02/08/lou-dobbs-twitter-fox-angry/>.

and monitored, allowing an intervening party a real-time understanding of how many votes will be needed to gain an electoral advantage.”⁹¹

Smartmatic sent a retraction demand letter to Fox News on December 10, 2020, identifying numerous false statements published by Fox News.⁹² Fox News did not grant the requested retraction.⁹³ However, shortly after receiving the retraction demand letter, Fox News did air emphatic statements confirming that there was no evidence to believe the various false statements previously published.⁹⁴ This message was delivered from some of the Fox News personalities most responsible for spreading the misinformation. This included Dobbs, Pirro, and Bartiromo.⁹⁵ However, in all three of these examples, while the truth about Smartmatic was presented, there was never any acknowledgement that the false information was originally propagated by those very Fox News personalities.⁹⁶

A. *Intent*

Smartmatic makes bold accusations of the intent of Fox News regarding its role in spreading false election fraud information. For example, it claims that Fox News did not want Joe Biden to win the election.⁹⁷ While Fox News viewers certainly favor a Trump presidency over a Biden presidency, this may not be in the best financial interest of the Fox News Corporation.⁹⁸ There is strong evidence suggesting that media outlets benefit from opposing the political party in power.⁹⁹

Another allegation by Smartmatic regarding the intent of Fox News is that it had actual knowledge that the information it published about election fraud was false.¹⁰⁰ The complaint states, “The Fox Defendants were voluntary and knowing members of the conspiracy . . .”¹⁰¹ It also alleges that Fox News “understood that Mr. Giuliani and Ms. Powell were

⁹¹ Smartmatic Complaint, *supra* note 1, at 38 (alteration in original) (citation omitted).

⁹² *Id.* at 135–36.

⁹³ *Id.* at 136.

⁹⁴ *Id.* at 136–42.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1.

⁹⁸ John Gramlich, *5 facts about Fox News*, PEW RESEARCH CENTER (Apr. 8, 2020), <https://www.pewresearch.org/fact-tank/2020/04/08/five-facts-about-fox-news/> (“On an ideological scale, the average Fox News consumer is to the right of the average U.S. adult . . .”).

⁹⁹ See Derek Thompson, *Donald Trump Is Helping the Very Media Organizations He Despises*, ATLANTIC (May 4, 2017), <https://www.theatlantic.com/business/archive/2017/05/donald-trump-media-enemies/525381>; David Bloom, *Love It or Hate It, The Trump Show Has Been Very Good For Media Business*, FORBES (Nov. 5, 2018, 12:06 PM), <https://www.forbes.com/sites/dbloom/2018/11/05/happy-election-season-media-donald-trump-has-been-very-good-for-you/?sh=5951e5fb3abd>; Michael Conklin & Renee Foshee, *Was the ‘Trump Bump’ a One-Time Phenomenon for Charities?*, THE CHRON. OF PHILANTHROPY (Nov. 5, 2019), <https://www.philanthropy.com/article/was-the-trump-bump-a-one-time-phenomenon-for-charities/>.

¹⁰⁰ Smartmatic Complaint, *supra* note 1, at 12, 34–35.

¹⁰¹ *Id.* at 12.

making it up.”¹⁰² And finally, it alleges that “Ms. Pirro and Fox News knew there was no evidence supporting a claim that Smartmatic had rigged or stolen the 2020 U.S. election”¹⁰³

Smartmatic goes further than just alleging that Fox News knew the information it was spreading about the company was false. Several pages of the complaint are dedicated to accusing Fox News of having nefarious motives, such as financial gain for spreading the misinformation.¹⁰⁴ Smartmatic does a good job of creating a narrative to explain these allegedly nefarious motives, but it is based mostly on speculation. It provides no conclusive evidence to prove exactly why Fox News publicized the false information. Smartmatic refers to the “Defendants’ desire for fame and fortune” and how Fox News “used the story to preserve its grip on viewers and readers and curry favors with the outgoing administration”¹⁰⁵ Smartmatic also paints a colorful picture of Fox News as a company desperate to make up lost ground to newly emerging ultra-right-wing competitors such as OAN (“One America News”) and Newsmax.¹⁰⁶ According to Smartmatic, this motivated Fox News to intentionally spread misinformation about the election in a desperate effort to “reclaim its favored status with President Trump and his followers.”¹⁰⁷

Yes, Fox News was facing new competition from ultra-right-wing media organizations.¹⁰⁸ Yes, President Trump had rebuked Fox News for allegedly being too critical of his administration.¹⁰⁹ Yes, when Fox News called Arizona for Joe Biden, some conservatives threatened to boycott Fox News.¹¹⁰ And yes, a Fox News anchor’s ex-husband received a pardon from President Trump.¹¹¹ While these facts are consistent with the narrative that Fox News intentionally lied about a rigged election for competitive advantage and financial gain, this is not dispositive. It could be argued that spreading knowingly false information about such a significant event would cause far more harm to Fox News than gain.¹¹² On this topic of intent, it should be noted that this is only the pleading stage of litigation. Smartmatic is not required to prove the intentions for why Fox News spread false

¹⁰² *Id.* at 133.

¹⁰³ *Id.* at 34.

¹⁰⁴ *Id.* at 208–15.

¹⁰⁵ *Id.* at 3, 12.

¹⁰⁶ *Id.* at 208–09.

¹⁰⁷ *Id.* at 32.

¹⁰⁸ *Id.* at 208–09.

¹⁰⁹ *Id.* at 208.

¹¹⁰ *Id.* at 209.

¹¹¹ *Id.* at 3 (implying that this was a reward for Fox News spreading lies about the election).

¹¹² For example, Fox News no doubt has an experienced legal department that is knowledgeable regarding media defamation law. A multibillion-dollar defamation lawsuit from the voting machine company that was explicitly being accused of rigging an election would have been foreseeable. Furthermore, this lawsuit—along with a tarnished reputation to Fox News for repeating false accusations regarding an election outcome—could easily do more harm to Fox News than any gain.

information.¹¹³ The lack of concrete evidence in the complaint does not mean that such evidence will not surface during discovery.

Related to the issue of intent, Smartmatic further alleges that Fox News spread false information through actively colluding with others.¹¹⁴ This is referred to as a “well-orchestrated dance” between Fox News personalities and Giuliani.¹¹⁵ And Smartmatic claims that this collusion resulted in a coordinated “disinformation campaign.”¹¹⁶ Defamation does not require plaintiffs to prove that the false statements were made for personal financial gain or as part of a conspiracy with others; however, these issues would be relevant when considering the existence of actual malice.¹¹⁷

B. *Actual Malice*

As was the case with the defendants Giuliani and Powell, whether Smartmatic is considered a public figure is likely irrelevant. This is because a jury would probably find that Fox News acted “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not,” thus satisfying the actual malice requirement for public figures.¹¹⁸

There are multiple instances in the complaint in which Fox News is said to have known that the accusations against Smartmatic were false.¹¹⁹ Smartmatic sent Fox News a retraction demand letter on December 10, 2020, which explained why the allegations made on various Fox News programs about Smartmatic were emphatically false.¹²⁰ It is unclear if Smartmatic’s claim that Fox News knew the allegations were false is correct before Fox News received this letter because Giuliani and Powell could not provide the evidence they claimed to possess.¹²¹ It is now known that their inability to produce such evidence resulted from this evidence not existing—and their claims of election fraud being false.¹²² But, the inability to produce evidence only becomes a more blatant problem after the passage of time. A high-profile attorney claiming to possess

¹¹³ Fed. R. Civ. P. 9(b).

¹¹⁴ See *supra* notes 16–22 and accompanying text.

¹¹⁵ Smartmatic Complaint, *supra* note 1, at 37.

¹¹⁶ *Id.*

¹¹⁷ See *infra* note 118–141 and accompanying text. See also *Defamation*, WOLTERS KLUWERS BOUVIER LAW DICTIONARY (2012).

¹¹⁸ *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). “Smartmatic’s discussion of Defendants’ actual malice is not an admission that Smartmatic must allege and prove Defendants acted with actual malice to establish liability. Smartmatic’s position is that it does not need to prove actual malice to establish liability.” Smartmatic Complaint, *supra* note 1, at 132 n.6.

¹¹⁹ See *supra* notes 100–103 and accompanying text.

¹²⁰ Smartmatic Complaint, *supra* note 1, at 135–36.

¹²¹ *Id.* at 56.

¹²² Devan Cole & Tierney Sneed, *Deposition video shows Trump allies under oath discussing debunked election fraud claims*, CNN (Nov. 4, 2021, 10:53 PM), <https://www.cnn.com/2021/11/04/politics/rudy-giuliani-sidney-powell-deposition-tapes/index.html>.

evidence that is at the time not made public does not per se impart the knowledge that the claims are false.

Smartmatic claims that Fox News knew that Giuliani's and Powell's claims were false because Fox News did not verify their claims.¹²³ While it is true that corroborating evidence would have lent credence to Giuliani's and Powell's claims, the absence of such corroborating evidence does not necessarily prove that Fox News knew the claims were false initially. Fox News could argue that the very fact two prominent attorneys—including Donald Trump's personal attorney—were making the statements lends credence to their accuracy. Smartmatic could respond to this claim by pointing out that, while normally a well-recognized attorney working with the President would be a credible source, the track record of this particular attorney and this particular President support the belief that they should not be trusted without first verifying their claims.¹²⁴ Furthermore, Fox News had obvious reasons to doubt Giuliani's and Powell's claims, such as how their claims were contradicted by election experts.¹²⁵

At times in the complaint, Smartmatic seems to conflate what Fox News did know and what it should have known. For example, Smartmatic claims:

Defendants knew Smartmatic's election technology and software were not widely used in the 2020 U.S. election (and were not used in contested states). . . . A myriad of information was available to Defendants that showed their statements and implications about Smartmatic and the use of its technology and software for the 2020 U.S. election (and in contested states) were false.¹²⁶

Again, the existence of information to disprove a claim does not necessarily prove that one is aware the claim is false. This conflation of "Defendants knew . . . [because] [i]nformation was available" is made throughout the complaint.¹²⁷

Regardless of whether Smartmatic could prove that Fox News initially knew that the allegations were false, actual malice does not require that the defendant know the statements are false.¹²⁸ A "reckless disregard"

¹²³ *Id.* at 143 ("Fox News knew its anchors and guests lacked a basis for their statements and implications about Smartmatic."). But this only alleges that Fox News did not verify the statements from guests like Powell and Giuliani, not that it had actual knowledge that their statements were false.

¹²⁴ See Glenn Kessler et al., *President Trump has made more than 20,000 false or misleading claims*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/politics/2020/07/13/president-trump-has-made-more-than-20000-false-or-misleading-claims/>.

¹²⁵ Smartmatic Complaint, *supra* note 1, at 183–88.

¹²⁶ *Id.* at 149.

¹²⁷ *Id.* at 149, 160, 169, 171, 175, 178, 180, 182.

¹²⁸ See *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (citation omitted).

for the truth also satisfies the actual malice requirement.¹²⁹ This is likely why Smartmatic transitions from the claim that Fox News knew allegations of voter fraud were false to claims that it should have known.¹³⁰ For example, Smartmatic states that Fox News “had no basis for their statements about Smartmatic’s role in the 2020 U.S. election” and that Fox News “purposefully avoided learning the truth about Smartmatic and its election technology and software.”¹³¹ Indeed, there was very little evidence to support the accusation that the 2020 presidential election was rigged—and no evidence that Smartmatic was somehow involved.¹³² This rush to judgment by Fox News also violated numerous generally accepted journalistic standards, which further supports the claim of a “reckless disregard” for the truth.¹³³

The strongest argument for Smartmatic to show actual malice involves Fox News’s purposeful avoidance of even minimal effort to confirm the allegations of a rigged election.¹³⁴ This is because the reckless disregard standard of actual malice can be satisfied by showing Fox News had a “high degree of awareness of [the defamatory statement’s] probable falsity. . . .”¹³⁵ Their unwillingness to perform a simple Google search indicates an awareness that their statements were false. A quick Google search would have immediately informed Fox News that Smartmatic’s software was not banned from use in the United States, that Smartmatic is not a Venezuelan company, and that Smartmatic voting machines were not used in any of the contested states.¹³⁶ Fox News could have also reached out to Smartmatic for comment, but it only did this on November 16, 2020, after twenty-four false statements had already been published.¹³⁷ Furthermore, despite interviewing election conspiracy theorists like Powell multiple times, it all but refused to have election

¹²⁹ *Id.*

¹³⁰ Smartmatic Complaint, *supra* note 1, at 133. Here, Smartmatic states that Fox either knew their statements were false “or they acted with reckless disregard for whether their statements and implications were true.” *Id.* at 132.

¹³¹ *Id.* at 132, 147.

¹³² *Id.* at 2. The only evidence available was particularly weak and in no way implicated Smartmatic, whose election machines were only used in Los Angeles County. *Id.* For example, there were isolated incidents of discarded or improperly counted ballots, but these occurrences represent far too few ballots to change the election outcome and are not evidence of rigged voting machines. See McKenzie Sadeghi & Camille Caldera, *Fact check: Partly false claim about discarded ballots in Pennsylvania amplified by Eric Trump*, USA TODAY (Nov. 10, 2020, 9:23 AM), <https://www.usatoday.com/story/news/factcheck/2020/11/10/fact-check-partly-false-claim-discarded-ballots-pennsylvania/6213556002/> (referring to exaggerated claims based on only nine incorrectly discarded military ballots).

¹³³ Smartmatic Complaint, *supra* note 1, at 215–19.

¹³⁴ Note that this does not preclude the possibility that Fox News was aware of the falsehood of the claims when it initially publicized them. Rather, this demonstrates that even if Fox News was not aware, the actual malice standard is nevertheless still met based on a reckless disregard for the truth.

¹³⁵ *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 667 (1989).

¹³⁶ Smartmatic Complaint, *supra* note 1, at 151–53, 157, 158, 169, 178, 180.

¹³⁷ *Id.* at 147. This initial inquiry was a limited one, asking only what states and counties Smartmatic’s election technology was used in during the 2020 presidential election. *Id.* at 148.

experts on to rebut Powell's claims.¹³⁸ It was not until December 18, 2020, that Fox News allowed an election expert to refute Powell's allegations about Smartmatic.¹³⁹ The unwillingness to perform such a simple fact check is more damning when one considers the significance of the claim. A vast conspiracy to rig a presidential election, if true, would be one of the most significant news stories of the 21st century.¹⁴⁰ Conversely, false accusations about a rigged presidential election could lead to unnecessary civil unrest, such as the January 6th Capitol riot.¹⁴¹

Smartmatic will likely be able to demonstrate that the behavior of Fox News constitutes actual malice. Even if a jury finds that Fox News did not possess actual knowledge of the false nature of the claims, its actions show a "reckless disregard" for the truth. Fox News is a major media outlet with experience confirming the truthfulness of allegations, the truth regarding Smartmatic was easily ascertainable, and the severity of the alleged claims was great. Therefore, Fox News is without excuse for not confirming such allegations before not only allowing a guest to make them but also to affirmatively agree with them.

C. *Ambiguous Evidence*

As early as November 15, 2020, there were Fox News segments that maintained the election was not rigged.¹⁴² On November 19, 2020, Fox News commentator Tucker Carlson condemned Sidney Powell for not providing any evidence she claimed to possess.¹⁴³ An argument could be made by both Fox News and Smartmatic that these occurrences strengthen their respective sides in the defamation case. Smartmatic uses this to claim that Fox News was always aware that the voter fraud narrative was a lie.¹⁴⁴ But, Fox News could attempt to present this same information to support its claim that there was no collusion to present knowingly false information. After all, if Fox News colluded with Giuliani and Powell to publicize information it knew was false, then one would expect this narrative to be

¹³⁸ *Id.* at 148.

¹³⁹ *Id.*

¹⁴⁰ As Fox News personality Tucker Carlson pointed out, "[w]hat Powell was describing would amount to the single greatest crime in American history. Millions of votes stolen in a day, democracy destroyed, the end of our centuries-old system of self-government. Not a small thing." *Id.* at 146 (citation omitted).

¹⁴¹ *The Capitol siege: The cases behind the biggest criminal investigation in U.S. history*, NPR, <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> (Nov. 5, 2021).

¹⁴² Smartmatic Complaint, *supra* note 1, at 145 ("On November 15, Eric Shawn, a New York-based anchor and senior correspondent for Fox News made clear the absence of support for the statements being made by the Defendants.").

¹⁴³ *Id.* at 146–47.

¹⁴⁴ *Id.* at 145–47 (claiming that statements made by Fox News personalities that the election was not rigged demonstrates that "Fox News knew that the statements being made by the other Fox Defendants . . . were divorced from fact.").

consistently promoted. The existence of Fox News segments that rebut this narrative strengthens the claim that this was not the case.

While Fox News may use this evidence to rebut Smartmatic's claims that it knew the election fraud claims were false, it is not an absolute defense to defamation. "Substantial truth" is a defense to a defamation claim, but the totality of Fox News's coverage of the issue does not support such a defense.¹⁴⁵ The numerous statements by Fox News personalities Dobbs, Bartiromo, and Pirro and the statements they published by Giuliani and Powell are more than just a "slight discrepancy of facts," nor are they only false based on a "semantic hypertechnicality."¹⁴⁶

VI. DAMAGES

As evidenced by the \$2.7 billion compensatory damages request, Smartmatic is alleging significant harm.¹⁴⁷ The false narrative that voting machines changed the outcome of the 2020 presidential election has been widely disseminated.¹⁴⁸ As a result, the related notion that fraud changed the outcome of the election is believed by a third of American adults.¹⁴⁹ However, the pervasiveness of a false belief does not per se prove damages. Furthermore, a widespread belief that the results of the election were somehow inaccurate is not equivalent to a widespread belief that Smartmatic contributed to this result.

Smartmatic chronicles how its employees have received death threats.¹⁵⁰ But, Smartmatic will likely not be able to recover compensation on behalf of its employees. It is well established that defamation is a personal claim that cannot be asserted by third parties.¹⁵¹ Even when the defamatory action "indirectly inflicts some injury upon the party seeking recovery," a plaintiff is nevertheless barred from receiving compensation for the defamation of another.¹⁵² And there is no exception available to this principle for corporations suing on behalf of their employees.¹⁵³

However, Smartmatic can likely show that the harassment its employees received also resulted in damages to the company. For example,

¹⁴⁵ 50 AM. JUR. 2D *Libel and Slander* § 253 (2020) ("[S]ubstantial truth [is] an absolute defense.").

¹⁴⁶ *Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 193 (Cal. Ct. App. 3d Dist. 2016) (providing "slight discrepancy of facts" and a "semantic hypertechnicality" as examples that would not defeat a substantial truth defense).

¹⁴⁷ Smartmatic Complaint, *supra* note 1, at 275.

¹⁴⁸ *Id.* at 220.

¹⁴⁹ *Id.* at 220–21.

¹⁵⁰ *Id.* at 221.

¹⁵¹ *Morgan v. Hustler Mag., Inc.*, 653 F. Supp 711, 719 (N.D. Ohio 1987).

¹⁵² *Johnson v. KTBS, Inc.*, 889 So. 2d 329, 333 (La. Ct. App. 2d Cir. 2004).

¹⁵³ *R. H. Bouligny, Inc. v. United Steelworkers of Am.*, 154 S.E.2d 344, 353 (N.C. 1967) ("Of course, a corporation may not maintain an action for damages for libel or slander of its stockholders, officers, employees or representatives.").

Smartmatic had to spend money to increase security for its employees.¹⁵⁴ Also, Smartmatic claims that the death threats resulted in “added stress” that “put an immeasurable strain on the company’s workforce, requiring significant investment in retention and recruitment programs.”¹⁵⁵ While Smartmatic cannot use harm incurred by its employees to satisfy the damages requirement in its defamation lawsuit, its related expenditures in retention and recruitment programs and security could serve this purpose. Smartmatic alleges at least \$75.9 million in lost productivity and increased expenses, including physical security and employee recruitment and retention, due to the threats its employees have received.¹⁵⁶ Additionally, the false accusations against Smartmatic have resulted in a “meteoric” rise in cyberattacks, which require additional personnel costs and increased third-party cybersecurity protection services.¹⁵⁷

Smartmatic is also alleging damages from reputational harm.¹⁵⁸ It makes sense that reputation would be of utmost importance in the voting machine industry. Governments and localities that contract with voting machine manufacturers will likely stray away from even the mere possibility of a corrupt company. Furthermore, the industry often relies on long-term relationships, further strengthening the importance of reputation.¹⁵⁹ Smartmatic, in particular, has an excellent record in repeat business; it has only lost one contract renewal bid in the last ten years.¹⁶⁰

The allegation of reputational damage is largely based on Smartmatic’s estimates of future harm, such as canceled contracts and lost opportunities to expand into new markets.¹⁶¹ In order to recover such damages, Smartmatic will need to show that this future injury is more than speculative or remote.¹⁶² Smartmatic certainly presents facts that are consistent with losing future business and likely also more than speculative. It alleges over \$767.4 million in lost profits over the five-year period from 2021–2025.¹⁶³

¹⁵⁴ Smartmatic Complaint, *supra* note 1, at 221.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 236.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 221–34.

¹⁵⁹ *Id.* at 232.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 221. Smartmatic’s reputational damages are largely based on the expectation of future damages. *Id.* However, it has already incurred some of this harm. *Id.* For example, it has had to reallocate salespeople to protect existing business rather than seeking out new business. *Id.* Smartmatic also refers to how “[t]wo material business partners have indefinitely suspended their relationship with Smartmatic.” *Id.* at 230.

¹⁶² 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 289 (2020).

¹⁶³ Smartmatic Complaint, *supra* note 1, at 221, 231–32. Smartmatic estimates over \$500 million in lost profits under initial contracts and at least \$190 million from add-ons that would likely accompany those contracts. *Id.* at 221. Plus, parent holding company SGO Corporation Limited estimates an additional \$767.4 million in lost profits from other subsidiaries. *Id.* at 231. Although ultimately irrelevant at the complaint level, \$690 million in lost Smartmatic profits appears to be a highly inflated

Furthermore, Smartmatic alleges future damages by showing that it was likely on the cusp of gaining more contracts. This is based on how well it performed in the 2020 presidential election in Los Angeles, where it satisfied newly established handicap accessibility requirements and challenging COVID-19 conditions.¹⁶⁴ Smartmatic also claims that its existing clients—voting jurisdictions and governments—have expressed serious concern about continuing to do business with Smartmatic.¹⁶⁵ While it may be an exaggeration when Smartmatic claims its future business prospects have been “decimated” as a result of the false accusations against it, it does appear that the claim of future damages is well-founded and not merely speculative.¹⁶⁶

Smartmatic also presents evidence of Google searches to support its claim of reputational harm. For example, Google searches for “Smartmatic” increased hundredfold immediately after the false allegations started to spread.¹⁶⁷ However, this does not necessarily prove reputational harm. Many of these searches could have resulted in the searcher learning that Smartmatic clearly did not rig the election. Even so, Smartmatic attempts to link this increased search history to increased reputational harm by showing that many of the searches were for “smartmatic Venezuela,” “dominion smartmatic,” and “smartmatic owner.”¹⁶⁸ But again, this does not mean that the people who used these search terms believed that Smartmatic is a Venezuelan firm or that Smartmatic is associated with Dominion—or, for that matter, that the information Google provided for their searches led them to conclude these things.

Smartmatic could claim that even if most people who searched for information on Smartmatic and election fraud were ultimately directed to—and believed—the truth, just being associated with election fraud is enough to harm an election machine company. Politicians who make decisions on voting machines may decide not to use Smartmatic in the future to avoid criticism from some constituents, even if these politicians know the truth about Smartmatic. Additionally, people who know the truth about Smartmatic today may misremember in the future, only recalling an association of Smartmatic with election fraud.¹⁶⁹

estimate. See *Smartmatic USA Corp*, DUN & BRADSTREET, https://www.dnb.com/business-directory/company-profiles.smartmatic_usa_corp.41e6ca210a07baebb79ec0fbb3965cc3.html (last visited Dec. 27, 2021). According to the most recent financial data, Smartmatic USA’s annual revenue is approximately \$9.09 million. *Id.*

¹⁶⁴ Smartmatic Complaint, *supra* note 1, at 20, 22, 24, 25.

¹⁶⁵ *Id.* at 231.

¹⁶⁶ *Id.* at 221.

¹⁶⁷ *Id.* at 223.

¹⁶⁸ *Id.* at 224.

¹⁶⁹ See Ian Skymik et al., *How Warnings about False Claims Become Recommendations*, 31 J. CONSUMER RSCH. 713, 713 (2005) (finding that telling people a claim is false does not stop them from misremembering it as true).

Even less compelling than the Google search evidence is the evidence Smartmatic presents related to internet comments. Smartmatic provides seventeen hand-selected examples of internet comments made on YouTube, Facebook, and Twitter regarding publications from Fox News personalities.¹⁷⁰ The comments do demonstrate that at least seventeen people believe the lies spread about Smartmatic.¹⁷¹ However, it is unclear from these hand-selected anonymous internet comments how widespread this belief is and whether this belief has led to cognizable damages to Smartmatic.

Smartmatic is seeking “significant punitive damages” in addition to the \$2.7 billion in compensatory damages.¹⁷² Punitive damages are damages awarded in addition to compensatory damages.¹⁷³ Therefore, their purpose is not to compensate the plaintiff for harm suffered but rather to punish the defendant and deter similar behavior in the future.¹⁷⁴ Punitive damages are rare, occurring in only 6% of civil cases that result in a monetary award.¹⁷⁵ Punitive damages require the defendant’s conduct to be “outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”¹⁷⁶ This subjective standard has led some experts to refer to the practice as “voodoo economics.”¹⁷⁷

Even for an entity as large as Fox News, \$2.7 billion in compensatory damages is likely enough to punish and deter similar conduct in the future. Therefore, it is unlikely Smartmatic would be awarded additional punitive damages. However, some research into juror decision-making regarding punitive damages strengthens the notion that Smartmatic may successfully obtain them. For example, the defendant’s level of wealth is positively correlated with larger punitive damage awards.¹⁷⁸ Jurors consistently downplay or ignore juror instructions regarding punitive damage awards.¹⁷⁹ Additionally, jurors are more likely to award punitive damages when they perceive the behavior of the defendant

¹⁷⁰ Smartmatic Complaint, *supra* note 1, at 226–28.

¹⁷¹ *Id.*

¹⁷² *Id.* at 4, 222.

¹⁷³ *Punitive Damages*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/punitive_damages (last visited Dec. 27, 2021).

¹⁷⁴ Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 *BUFF. L. REV.* 103, 110 (2002).

¹⁷⁵ Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 *JUDICATURE* 233, 238 (1996).

¹⁷⁶ RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. LAW INST. 1977).

¹⁷⁷ W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 *STAN. L. REV.* 547, 577–78 (2000).

¹⁷⁸ Robbennolt, *supra* note 174, at 123.

¹⁷⁹ Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 *CHI.-KENT L. REV.* 239, 266 (2003) (reviewing CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE*, (2002) (“[Jurors] seem incapable of following instructions to take deterrence into account as a goal of their punitive awards.”). Studies showed that 85% of mock jurors either did not fill out a required punitive damages computational form or filled it out incorrectly. *Id.* at 274.

as more reprehensible.¹⁸⁰ If Smartmatic is successful in connecting the actions of Fox News to the reprehensible behavior of those who stormed the Capitol on January 6, 2021, the reprehensibility of the rioters could be imputed to Fox News by the jurors.

Smartmatic's request for punitive damages and at least \$2.7 billion in compensatory damages is highly optimistic. But it does appear that it has enough evidence to show that some compensation is in order. Money spent on added security, employee retention and recruitment, and public relations is directly attributable to the defendants' defamatory statements. Moreover, future damages from reputational harm appear to be based on more than mere speculation and, therefore, actionable.

VII. DOMINION LAWSUIT COMPARISON

Four weeks before the Smartmatic lawsuit, Dominion filed a similar defamation lawsuit.¹⁸¹ Dominion's lawsuit is only against Sidney Powell, although it is considering similar lawsuits against others, including Fox News and Donald Trump.¹⁸² The ability of Smartmatic's defendants—which include Fox News and Fox Corporation—to satisfy a large judgment compared to Dominion's defendant Powell is a highly pragmatic difference between the two cases. Dominion is requesting \$1.3 billion in compensatory damages compared to Smartmatic's \$2.7 billion request.¹⁸³ Like Smartmatic, Dominion's employees have received death threats.¹⁸⁴ Both allege reputational harm that will cause future damages.¹⁸⁵ Both provide internet search results as evidence of reputational harm.¹⁸⁶ Both complaints mention the January 6th Capitol riot as a result of the false information defendants spread.¹⁸⁷ The most significant difference between the Smartmatic lawsuit and the Dominion lawsuit from a pragmatic standpoint is the ability of Smartmatic's defendants to satisfy a large monetary judgment.

Another difference between the two cases is the comparable absurdity of the false claims. While neither Dominion nor Smartmatic were involved in any attempt to rig the 2020 presidential election, Smartmatic voting machines were not even used in the contested states, while Dominion

¹⁸⁰ See Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 17 (2004).

¹⁸¹ See generally Dominion Complaint, *supra* note 6.

¹⁸² *Id.* at 1 (listing defendants are Sidney Powell; Sidney Powell, P.C.; and Defending the Republic, Inc., a charity created by Powell to fundraise on the issue of voter fraud); *Dominion Voting Systems Sues Ex-Trump Lawyer Over False Claims*, *supra* note 47.

¹⁸³ Dominion Complaint, *supra* note 6, at 124; Smartmatic Complaint, *supra* note 1, at 3.

¹⁸⁴ *Id.* at 57–58; Smartmatic Complaint, *supra* note 1, at 236.

¹⁸⁵ *Id.* at 60; Smartmatic Complaint, *supra* note 1, at 222–24.

¹⁸⁶ *Id.* at 50; Smartmatic Complaint, *supra* note 1, at 3–4.

¹⁸⁷ Smartmatic Complaint, *supra* note 1, at 4; Dominion Complaint, *supra* note 6, at 66.

voting systems were.¹⁸⁸ There are also varying degrees of culpability between Powell and Fox News. It appears that Powell invented her claims out of her own imagination, while Fox News largely repeated the claims of others.¹⁸⁹ The most extreme claims regarding voter fraud came from Powell. She was so extreme that even the Trump campaign—who maintains the election was stolen from it—decided to distance itself from her.¹⁹⁰ After Fox News received Smartmatic’s retraction demand letter, it issued emphatic statements on numerous shows confirming that there was no evidence supporting election fraud allegations.¹⁹¹ Conversely, when Powell received Dominion’s retraction demand letter, she explicitly stated that she “retracts nothing” and doubled down on her false claims.¹⁹²

Based on the two complaints, Smartmatic also has the stronger case that its alleged future damages are based on more than mere speculation. Dominion points to how “elected officials, insurers, and potential investors have been deterred from dealing with Dominion, putting Dominion’s contracts in more than two dozen states and hundreds of counties and municipalities in jeopardy and significantly hampering Dominion’s ability to win new contracts.”¹⁹³ Further, Dominion references one Congressman who was actively drafting legislation to ban the use of Dominion voting machines in his home state of Arizona.¹⁹⁴ But, when asked in a media interview, the CEO of Dominion could not produce an example of a jurisdiction that decided to no longer use Dominion voting machines.¹⁹⁵ Smartmatic, however, references two “material business partners” who indefinitely canceled doing business with it.¹⁹⁶ Unlike Dominion, Smartmatic presents a compelling case that, absent the defamatory claims, it would have continued its trajectory of successful expansion.¹⁹⁷

¹⁸⁸ See Smartmatic Complaint, *supra* note 1, at 4; *Setting the Record Straight: Facts & Rumors*, DOMINION VOTING, <https://www.dominionvoting.com/election-2020-setting-the-record-straight-georgia/> (last visited Dec. 27, 2021).

¹⁸⁹ Smartmatic Complaint, *supra* note 1, at 8 (referring to how Powell and Giuliani “enlisted and used Fox News to further this conspiracy [that they created].”) .

¹⁹⁰ Dominion Complaint, *supra* note 6, at 25.

¹⁹¹ Smartmatic Complaint, *supra* note 1, at 136–42. Although, Fox News never issued a retraction as the Smartmatic letter requested. *Id.* at 136.

¹⁹² Dominion Complaint, *supra* note 6, at 105 (citation omitted).

¹⁹³ *Id.* at 60.

¹⁹⁴ *Id.* at 59.

¹⁹⁵ *Dominion Voting Systems Sues Ex-Trump Lawyer Over False Claims*, *supra* note 47. When John Poulos, CEO of Dominion, was asked if any election officials had communicated to Dominion that they are not going to use their machines in future elections, he only responded, “[w]e have been addressed by several jurisdictions that we serve who have been under pressure by legislators saying exactly those sentiments.” *Id.*

¹⁹⁶ Smartmatic Complaint, *supra* note 1, at 230.

¹⁹⁷ See *supra* note 164 and accompanying text.

VIII. “PINK SLIME” DEFAMATION CASE COMPARISON

Smartmatic’s legal team is the same group that represented beef producers in the “pink slime” defamation case of 2012.¹⁹⁸ The case involved ABC’s coverage of a beef product officially named “finely textured beef. . . .”¹⁹⁹ Plaintiffs alleged that ABC incorrectly implied that the beef product was unsafe, not nutritious, and not beef.²⁰⁰ To stop “hemorrhaging legal costs,” the defendants agreed to a \$177 million settlement.²⁰¹ This outcome is a bad omen for the defendants in the present case, as Smartmatic appears to have an even stronger basis for defamation than the beef producers. The truth was more easily accessible in the present case. Fox News aired far more election fraud coverage than ABC aired “pink slime” coverage. The “pink slime” statements were more grounded in truth than the election fraud statements (the beef product was pink and slimy in appearance).²⁰² The Fox News allegations were more explicit, while the ABC allegations were more implicit. Finally, the election fraud issue is more relevant; thus, inaccurate reporting on the matter is more harmful (claims about the color and nutrient level of beef products did not lead to insurrection).

When asked what lesson the attorneys learned from the “pink slime” defamation case, they replied, “[w]e learned how important it was to have such incredible, meticulous attention to the details when you’re putting together the complaint for these types of actions, and to really make sure you have an incredibly strong case locked down at the time you are filing your complaint.”²⁰³ This lesson was well-learned, as the Smartmatic defamation case appears to be strong against all defendants involved—and lucrative against at least one, Fox News.

¹⁹⁸ David Thomas, *Smartmatic turns to ex-Winston partners who helped win \$177M ‘pink slime’ settlement*, REUTERS LEGAL (Feb. 4, 2021, 11:43:57 PM), [https://today.westlaw.com/Document/I2c77ae10674411eba05299265d53b399/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Default\)](https://today.westlaw.com/Document/I2c77ae10674411eba05299265d53b399/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default)).

¹⁹⁹ Jonathan Berr, *Disney ‘pink slime’ lawsuit settled for whopping \$177 million*, CBS NEWS (Aug. 10, 2017, 2:02 PM), <https://www.cbsnews.com/news/disney-pink-slime-lawsuit-settled-for-177-million-abc-news/>.

²⁰⁰ James Nord, *ABC settled ‘pink slime’ defamation suit for more than \$177 million*, CHI. TRIB. (Aug. 10, 2017, 7:43 AM), <https://www.chicagotribune.com/business/ct-pink-slime-defamation-suit-20170810-story.html>.

²⁰¹ Berr, *supra* note 199.

²⁰² See Niraj Chokshi, *Trial Will Decide if ABC News Sullied a Company With ‘Pink Slime,’* N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/us/pink-slime-lawsuit.html>. “The [‘pink slime’] case went to trial despite the fact that the term was ostensibly descriptive, true, and drawn from a government scientist” Roy S. Gutterman, *Actually . . . A Renewed Stand for the First Amendment Actual Malice Defense*, 68 SYRACUSE L. REV. 579, 581 n.11 (2018).

²⁰³ Thomas, *supra* note 198.

IX. CONCLUSION

The outcome of the Smartmatic lawsuit could have significant consequences not just for the defendants but also for the political landscape. For example, the discovery process has the potential to uncover damaging communications implicating a number of players as of yet unknown in this matter. As the CEO of Dominion has stated, future litigation could even include former President Trump.²⁰⁴ The Smartmatic lawsuit could also have a long-term effect on defamation case law if it reaches the Supreme Court. The Court could use it as an opportunity to revisit *Sullivan*, as recently advocated for by Justice Thomas.²⁰⁵

A number of factors complicate predicting the outcome of this lawsuit. The incentives and willingness of both sides to settle is likely the largest unknown variable. The novel nature of quantifying the future reputational harm to a voting machine company will likely make settlement negotiations highly speculative. If the case goes to trial, a neutral assessment of the facts and applicable case law suggests that Smartmatic will win. But the amount awarded—and the amount ultimately upheld on appeal—is far from certain. The unique nature of this case, the high stakes of the issue involved, and the present political undertones all add uncertainty.

²⁰⁴ *Dominion Voting Systems Sues Ex-Trump Lawyer Over False Claims*, *supra* note 47.

²⁰⁵ *McKee v. Cosby*, 139 S. Ct. 675, 675–76, 682 (2019).