

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

SMARTMATIC USA CORP., SMARTMATIC )  
 INTERNATIONAL HOLDING B.V., and SGO ) Index No. 151136/2021  
 CORPORATION LIMITED, )  
 ) I.A.S. Part 58  
 )  
 ) Motion Seq. No. \_\_\_\_  
*Plaintiffs,* )  
 )  
 -against- )  
 )  
 )  
 FOX CORPORATION, FOX NEWS NETWORK, )  
 LLC, LOU DOBBS, MARIA BARTIROMO, )  
 JEANINE PIRRO, RUDOLPH GIULIANI, and )  
 SIDNEY POWELL, )  
 )  
 )  
 )  
*Defendants.* )  
 )

**MEMORANDUM OF LAW IN SUPPORT OF MARIA BARTIROMO’S MOTION TO  
 DISMISS PURSUANT TO THE FIRST AMENDMENT  
 AND CPLR §§3211(a)(1), (a)(7), and (g)**

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## INTRODUCTION

When the President of the United States and his legal team leveled allegations that the 2020 Presidential election was tainted by fraud, veteran news anchor Maria Bartiromo did her job: She covered that unquestionably newsworthy story. She did so by going straight to the source of those claims: the President and his attorneys Rudy Giuliani and Sidney Powell. In addition to securing the first post-election interview of President Trump—an interview so self-evidently newsworthy and protected by the First Amendment that Smartmatic largely ignores it—she also interviewed his lawyers, asking them what evidence they had to substantiate their claims, and reminding her audience of the need for (and later, the absence of) hard facts to back them up. She invited her other guests to comment on and criticize the President’s claims—an invitation that Smartmatic was extended but ignored.

That is what journalists do, and it is what the First Amendment protects. Indeed, while some cases raise subtle and difficult First Amendment issues, this case seeking some \$2.7 billion for reporting on one of the most newsworthy stories in recent memory is not one of them: “[T]his wolf comes as a wolf.” (*Morrison v. Olson*, 487 US 654, 699 [1988] [Scalia, J., dissenting].) The First Amendment entitles journalists like Bartiromo to interview people on both sides of a heated and actively litigated controversy (one or the other of which is shading the truth—if not both), so that objectively newsworthy claims can be tested in the crucible of robust debate. And, in this case, it allows her to inform the public on one of the most fundamental underpinnings of our democracy—a presidential election. Smartmatic’s headline-seeking, multi-billion-dollar lawsuit thus should be seen—and rejected—for what it is: an unconstitutional attempt by a money-losing company (Smartmatic reported \$17 million in losses on just \$144 million in revenue in 2019) to try to fill its coffers at the expense of our constitutional traditions.

The basic constitutional problems at the heart of this lawsuit are laid bare in the motion to dismiss filed by Fox News Network, LLC and Fox Corporation (Fox Companies), which Bartiromo joins in full. But the claims as to Bartiromo have to be assessed based on her conduct alone, and they do not come close. Not only has Smartmatic failed to identify anything that could form the basis of a defamation (or disparagement) claim against Bartiromo; it has failed even to adequately plead actual malice. Under both the First Amendment and New York's newly amended anti-SLAPP law, Smartmatic must allege facts showing that Bartiromo herself subjectively knew that the allegedly defamatory statements were false, or that she acted with reckless disregard for their truth or falsity. Allegations that the individuals she interviewed made defamatory statements do not advance the ball, and mere allegations of negligence or failure to investigate do not suffice. Nor can the knowledge of others be imputed to Bartiromo. Yet the complaint alleges virtually nothing about what Bartiromo herself subjectively knew, and in all events certainly does not allege any facts that could support an inference that she acted with subjective knowledge of or reckless disregard for falsity. To the contrary, the complaint acknowledges that Bartiromo pressed the President's lawyers for evidence, repeatedly reminded viewers that the President's lawyers needed to back up their claims with proof, and interviewed guests who were skeptical or dismissive of the claims the President and his legal team were pressing. And it is just one part of the broader uninhibited, robust, and wide-open debate that our Constitution protects to get to the bottom of competing claims concerning newsworthy events.

In sum, Smartmatic's 285-page, \$2.7 billion complaint is not just meritless; it is a legal shakedown designed to chill speech and punish reporting on issues that cut to the heart of our democracy. It is, in short, exactly the kind of lawsuit that both the First Amendment and New York's anti-SLAPP law are designed to eliminate at the threshold.

For these reasons and those that follow—as well as the arguments raised in the brief filed by the Fox Companies—the Court should promptly dismiss the claims against Bartiromo.

### BACKGROUND<sup>1</sup>

The Fox Companies' brief sets forth the relevant background regarding Smartmatic and this lawsuit, and Bartiromo does not repeat that here. (NYSCEF.Doc.No.206.3-9.) Instead, she states only the facts most relevant to the claims against her specifically.

Maria Bartiromo hosts *Sunday Morning Futures with Maria Bartiromo* on Fox News and *Mornings with Maria* on Fox Business. Bartiromo has been described as a “pioneer in her industry” with more than 30 years' experience in broadcast journalism. (Bartiromo.Ex.2.) After beginning her career at CNN, Bartiromo spent 20 years with CNBC, which she helped build into a major news network. (*Id.*) She was the first journalist to report live on a daily basis from the floor of the New York Stock Exchange, (*id.*), and in doing so leveled the playing field for millions of investors and would-be investors. Bartiromo was among the pioneers of covering breaking news while it was happening live, beginning with CNN and its live coverage of the first Persian Gulf War, to the individual investor revolution, to the hotly debated and extraordinary events around the presidential elections in 2016 and 2020.

Drawing on her long and distinguished career in democratizing information and reporting on challenging, rapidly emerging stories, Bartiromo covered the developing story surrounding the efforts of President Trump and his surrogates—including attorneys Rudy Giuliani and Sidney

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<sup>1</sup> Ordinarily, a court accepts the facts alleged in a complaint as true. (*Maddicks v. Big City Props., LLC*, 34 NY3d 116, 123 [2019].) But where, as here, a case implicates “public petition and participation,” a court “shall consider” not just “the pleadings,” but also “supporting and opposing affidavits stating the facts upon which the action or defense is based.” (CPLR 3211 [g].)

Powell—to challenge the election results in courts around the country.<sup>2</sup> Some of those lawsuits alleged widespread vote manipulation and potentially implicated Smartmatic software.<sup>3</sup> Virtually every media outlet in the nation reported on the President’s accusations and the lawsuits. Bartiromo did the same.

**A. November 15 *Sunday Morning Futures***

On November 15, there was no more newsworthy story than President Trump’s refusal to concede and the allegations by the President and his lawyers that the national presidential election was distorted by widespread illegality. That morning, Bartiromo previewed that “President Trump’s legal team” would appear on *Sunday Morning Futures* to discuss their claims that they had “evidence ... of backdoors on voting machines, ballot tampering and election interference.” (NYSCEF.Doc.No.7, Pls.Ex.5.at.2.) She observed that proving these allegations would be “a tall task.” (*Id.* at 3.) Bartiromo began by introducing “President Trump’s personal attorney,” Rudy Giuliani, who spoke about the election-fraud allegations he was making on the President’s behalf, including as to Smartmatic. Bartiromo’s first response was, “will you be able to prove this Rudy?” (*Id.* at 4-9.) Bartiromo then displayed a graphic that she initially described as showing “the swing states ... that were using Dominion and this, this software, this Smartmatic software.” (*Id.* at 9.) But she quickly clarified that the graphic showed only where “Dominion voting machines were

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<sup>2</sup> *E.g.*, *Bowyer v. Ducey*, 2020 WL 7238261, (D Ariz Dec. 9, 2020, No. 20-cv-02321); *Pearson v. Kemp*, 831 Fed Appx 467 (11th Cir 2020); *King v. Whitmer*, 2020 WL 7134198, (ED Mich Dec. 7, 2020, No. 20-13134); *Law v. Whitmer*, 2020 WL 7240299, (Nev Dec. 8, 2020, No. 82178); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5997680, (WD Pa Oct. 10, 2020, No. 2:20-cv-966); *Feehan v. Wisconsin Elections Commn*, 2020 WL 7250219, (ED Wis Dec. 9, 2020, No. 20-cv-1771).

<sup>3</sup> *E.g.*, *Bowyer v. Ducey*, No. 20-cv-02321 [D Ariz], Dkt.1.¶¶5-9 (alleging voting fraud enabled by Smartmatic, which allegedly was “founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation”); *Pearson v. Kemp*, No. 20-cv-04809 [ND Ga], Dkt.1.¶4 (alleging “massive fraud” enabled by Smartmatic).

used”—not where Smartmatic technology was used. (*Id.*) Bartiromo then (accurately) described Smartmatic as “a Delaware entity registered in Boca Raton, Florida, [with] activities in Caracas, Venezuela.” (*Id.*; *see also* NYSCEF.Doc.No.183, Fox.Ex.4.)

Bartiromo next relayed that “[o]ne source says that the key point to understand is that the Smartmatic system has a back door that allows ... the votes to be mirrored and monitored, allowing an intervening party a real-time understanding of how many votes will be needed to gain an electoral advantage.” (NYSCEF.Doc.No.7, Pls.Ex.5.at.10.) She asked Giuliani whether the President was claiming that “the states that used that software did that,” prompting Giuliani to insist that he could “prove it with witnesses” and that he had people who were “there at the creation of Smartmatic,” who could “describe it,” “draw it,” and “show it.” (*Id.* at 10-12.)

After interviewing Giuliani, Bartiromo turned to Sidney Powell, whom she had previously introduced as a member of the President’s legal team. (*Id.* at 2.) Bartiromo asked Powell for her “take on ... a gentleman named Peter Neffenger” and “how he fits into all of this.” (*Id.* at 15.) Powell (accurately) stated that Neffenger was “on the board of directors of Smartmatic” as well as “on Mr. Biden’s presidential transition team.” (*Id.* at 16.)<sup>4</sup> Powell then made various allegations of election fraud. As with Giuliani, Bartiromo’s immediate response was to repeatedly question whether Powell could actually prove her allegations: “So Sidney, you feel that you will be able to prove this? Do you have the software in your possession? Do you have the hardware in your possession? How will you prove this Sidney?” (*Id.*) Bartiromo stressed that “you have a very ... small time frame here. The elections are supposed to be certified in early December.” (*Id.*

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<sup>4</sup> Neffenger was indeed on both Smartmatic’s board and President Biden’s transition team. (Bartiromo.Ex.3; Bartiromo.Ex.4.)

at 17.) Powell replied that she “never say[s] anything [she] can’t prove” and that “the evidence is coming in so fast.” (*Id.*)

Powell next claimed she had “evidence of some kickbacks,” and referenced “\$100 million packages for new voting machines suddenly in multiple states,” but did not mention Smartmatic. (*Id.* at 18-19). Bartiromo again pressed Powell, asking “[w]hich governor or which government official accepted hundreds of millions of dollars in benefits for their family as they took on this software?” (*Id.* at 19.) Powell backed off: “[i]f I said hundreds of millions of dollars there, I misspoke. I don’t know the exact amount of money yet. We’re still collecting the evidence on that, but it’s more than one.” (*Id.*) Bartiromo clarified, “Okay. So you can’t say who you believe took kickbacks.” (*Id.*)

Later in the interview, Bartiromo again pressed Powell for evidence, saying, “Sidney[,] you say you have an affidavit from someone who knows how this system works and was there with the planning of it,” and asking, “[y]ou believe you can prove this in court?” (*Id.* at 22.) Powell insisted that she could prove it and that she had “a sworn statement from a witness who knew exactly how it worked from the beginning, [and] it was designed to work that way.” (*Id.*)<sup>5</sup>

#### **B. November 17 Mornings with Maria**

As part of her continuing coverage of the developing story, Bartiromo interviewed Giuliani two days later on her Fox Business program *Mornings with Maria*, introducing him again as a

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<sup>5</sup> Smartmatic points to five Twitter posts and one Facebook post from Bartiromo. (NYSCEF.Doc.No.1, Compl.¶¶133(h), 133(i), 133(j), 133(k), 133(m), 133(s).) All but one of the challenged social-media posts contained a clip from the November 15 airing of *Sunday Morning Futures*. (NYSCEF.Doc.No.10, Pls.Ex.8; NYSCEF.Doc.No.11, Pls.Ex.9; NYSCEF.Doc.No.12, Pls.Ex.10; NYSCEF.Doc.No.13, Pls.Ex.11; NYSCEF.Doc.No.21, Pls.Ex.19) Only one of the challenged social-media posts referenced Smartmatic: a November 15 tweet stating that “the show will repeat @FoxBusiness 6pm et today” and quoting an earlier tweet by a third party (accurately) stating that “Peter Neffenger is on the Board of Smartmatic and is on Biden’s transition team.” (NYSCEF.Doc.No.13, Pls.Ex.11.)

“personal attorney for President Trump.” (NYSCEF.Doc.No.22, Pls.Ex.20.at.2.) Bartiromo asked Giuliani to “tell me about” his election-fraud claims, referring to the claims Giuliani had made on her show two days earlier. (*Id.* at 2-3.) Giuliani then described his election-fraud allegations generally, without mentioning Smartmatic. (*Id.* at 2-6.) Bartiromo reminded Giuliani, “You were a prosecutor for years ... You have to prove it.” (*Id.* at 7.) Giuliani replied, “[y]eah yeah sure.” (*Id.*) Bartiromo pressed him again: “Can you prove this?” (*Id.*) Giuliani said, “I can prove what I just told you.” (*Id.*) Bartiromo asked “where is the Department of Justice? If this is happening, shouldn’t the FBI or the DOJ be looking at this? Where is that? ... [D]o you feel you have enough evidence to overturn the results of this election?” (*Id.* at 8-9.) Giuliani insisted that the President’s lawyers had “amassed more than enough evidence in Pennsylvania, Michigan and Wisconsin, and Georgia.” (*Id.*)

Later in the broadcast, Bartiromo interviewed Jon Hilsenrath, a senior writer for the *Wall Street Journal*, and asked him for his “reaction to what [he] just heard” from Giuliani. (Bartiromo.Ex.5.at.8.) Hilsenrath underscored that “these are very, very serious allegations. And if it’s true, if there was corruption, if there was fraud, that’s undermining our democracy and we need to get to the bottom of it.” (*Id.*) By contrast, Hilsenrath continued, “[i]f those allegations are false, that’s also inexcusable. That also undermines our democracy and we need to get to the bottom of that.” (*Id.*) He concluded, “we’re going to know, one way or the other, someone really is stepping out of line here.” (*Id.*) Bartiromo agreed: “That’s exactly right, Jon. Agree with you 100 percent.” (*Id.*)

### **C. November 20 Mornings with Maria**

On November 20, Bartiromo interviewed Powell on *Mornings with Maria*. Smartmatic was not mentioned. (NYSCEF.Doc.No.198, Fox.Ex.19.) The previous evening, Fox host Tucker Carlson had expressed skepticism about Powell’s claims on his program, *Tucker Carlson Tonight*.

(*Id.* at 2; *see* NYSCEF.Doc.No.197, Fox.Ex.18.) Bartiromo relayed Carlson’s statements—“that he had invited you on his show to share evidence of the software flipping votes, and he said you got angry and refused to provide evidence for your claims of voting software flipping votes”—and asked Powell: “How did you respond to Tucker Carlson? Did you get angry with the show because they texted you and asked you to please provide evidence of what you’re alleging?” (NYSCEF.Doc.No.198, Fox.Ex.19.at.2-3.) Powell claimed she had sent Carlson evidence—“an affidavit”—and had “offered him another witness who could explain the mathematic and statistical evidence.” (*Id.* at 3.) Bartiromo then pressed Powell on the evidentiary basis for her claims, asking, “Sidney, will you be able to prove this evidence that you say you have of this technology flipping votes from Trump to Biden? How will you prove that, Sidney?” (*Id.*) Powell claimed that she had “firsthand evidence”—“witnesses that know how it’s done and [have] seen it done,” and that she would have “a whole lot more evidence as the days progress.” (*Id.*) Later, Bartiromo again asked Powell “[d]o you believe that you will be able to prove this in court in the next two weeks?” “Will you be able to present?” “Are you planning to present actual evidence of all that you’ve said...?” (*Id.* at 4-5.) Powell assured Bartiromo that she would “within the next two weeks.” (*Id.* at 5.) The complaint does not allege that Powell or Giuliani made defamatory statements on Bartiromo’s programs again.

**D. November 22 *Sunday Morning Futures***

When the next episode of *Sunday Morning Futures* aired, one week after viewers first heard from Giuliani and Powell, the President’s refusal to concede and his lawyers’ continuing claims of election misconduct remained front-page news. Bartiromo invited legal commentator Alan Dershowitz on the show to comment on the President’s claims. (NYSCEF.Doc.No.200, Fox.Ex.21.at.5.) Dershowitz described the President’s legal theories, including one theory “that the computers, either fraudulently or by glitches, changed hundreds of thousands of votes.” (*Id.*)

Dershowitz noted, however, “I haven’t seen the evidence to support that.” (*Id.*) Bartiromo then referred specifically to the claims by the President’s legal team about “Smartmatic election software”: “Smartmatic election software was developed, Sidney Powell says, in Venezuela, with porous security and built-in functionality allowing the administrators to override security features.” (*Id.* at 6.) Bartiromo then reported, “[w]e haven’t seen this, so we don’t know. But this is the kind of evidence that they [the President’s lawyers] say they have.” (*Id.*)

Bartiromo asked Dershowitz for his reaction; he described the required evidence—“witnesses, experts subject to cross-examination, and findings by a court”—as “very difficult to bring within two weeks or the three-week period.” (*Id.*) To “turn the election around,” Dershowitz continued, “they’re going to need overwhelming evidence, and I haven’t seen it.” (*Id.*) He concluded, “the only chance they have of winning—and it’s a perfect storm, and it’s very unlikely to happen—is if they can show retail, wholesale, constitutional arguments that affect a large number of voters, sufficient to be greater than the margin of victory. I don’t think they’re there. I don’t think they can make that case.” (*Id.* at 7.)

#### **E. December 20 *Sunday Morning Futures***

After Smartmatic expressed dissatisfaction with coverage by Bartiromo and others on Fox of the allegations that the President and his lawyers leveled at Smartmatic, but declined Fox’s invitation to come discuss those allegations on air itself, Bartiromo returned to the topic on the December 20 broadcast of *Sunday Morning Futures*. (NYSCEF.Doc.No.48, Pls.Ex.46.) On that program, Bartiromo played an interview with Eddie Perez, a nonpartisan election-technology expert, in which “[w]e asked him what he knew about Smartmatic and the claims some have made about that company.” Perez explained how he had “not seen any evidence that Smartmatic software was used to delete, change, alter, anything related to vote tabulation.” (*Id.* at 2.) Perez also said he was “not aware of any evidence that Smartmatic was sending US votes to be tabulated

in foreign countries.” (*Id.* at 3.) As for the scope of Smartmatic’s activities in the U.S., Perez explained his “understanding that outside of one customer in Los Angeles County, Smartmatic has no presence in the voting technology marketplace in the United States.” (*Id.* at 4.)

Smartmatic now sues Bartiromo, claiming billions of dollars in damages—even though it is a company that lost \$17 million on just \$144 million in revenue in 2019. (Bartiromo.Ex.6.)

### ARGUMENT

A complaint must be dismissed if the facts alleged fail to “fit within any cognizable legal theory,” (*Nonnon v. City of New York*, 9 NY3d 825, 827 [2007]), or if “documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law,” (*Bianco v. Law Offices of Yuri Prakhin*, 189 AD3d 1326, 1327-28 [2d Dept 2020]). (*See* CPLR 3211 [a] [1], [a] [7].)<sup>6</sup>

The standard is considerably higher when a complaint challenges speech in a “public forum” “in connection with an issue of public interest.” (Civ. Rights Law §76-a [1] [a].) Under New York’s anti-SLAPP law, courts *must* dismiss complaints challenging such speech at the threshold unless the plaintiff demonstrates that the challenge has a “substantial basis in law” or “is supported by a substantial argument for an extension, modification or reversal of existing law.” (CPLR 3211 [g] [1].) In other words, in a case involving speech on matters of public concern, the plaintiff must demonstrate that the case should *not* be dismissed, under a “heightened standard of proof.” (*Hariri v. Amper*, 51 AD3d 146, 150 [1st Dept 2008].)<sup>7</sup> That standard embodies the

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<sup>6</sup> In defamation cases, documentary evidence can include “a full copy, transcript, printout, or video of the relevant medium in which the allegedly defamatory statement is contained,” (*Greenberg v. Spitzer*, 155 AD3d 27, 44 [2d Dept 2017]), and “judicial records” and other documents, the contents of which are “essentially undeniable,” (*Fontanetta v. Doe*, 73 AD3d 78, 84-85 [2d Dept 2010]).

<sup>7</sup> As noted, *see* n.1 *supra*, the Court is not limited to examining the pleadings.

recognition that the “threat of being put to the defense of a lawsuit” “may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.” (*Karaduman v. Newsday, Inc.*, 51 NY2d 531, 545 [1980].)<sup>8</sup>

Here, Smartmatic’s complaint is plainly an “action involving public petition and participation” under New York’s anti-SLAPP law because it asserts defamation and disparagement claims based on “lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest.” (CPLR 3211 [g] [1]; Civ. Rights Law §76-a [1] [a].) Core First Amendment principles, together with New York’s anti-SLAPP law, compel the conclusion that Smartmatic’s claims against Bartiromo must be dismissed.

**I. The Complaint Fails To State A Claim Against Bartiromo For The Reasons Discussed In The Fox Companies’ Motion To Dismiss.**

The arguments made in the motion to dismiss filed on behalf of the Fox Companies, (NYSCEF.Doc.No.206), compel dismissal of all claims against Bartiromo. Bartiromo fully joins in those arguments and incorporates them by reference. Smartmatic’s claims against Bartiromo personally must stand or fall based on her own conduct and her own state of mind, and judged in that light, they are distinctively unavailing.

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<sup>8</sup> Smartmatic’s complaint does not indicate whether it thinks the substantive law of Florida (Smartmatic’s domicile) or New York (the jurisdiction where Bartiromo made the challenged statements) governs. Because the Court can resolve this case solely by reference to First Amendment principles and the applicable pleading standards, however, it need not conduct a choice-of-law analysis now. This Court does not need to conduct a choice-of-law analysis at the pleading stage and can apply its own pleading standards. (*See Pac. Controls, Inc. v. Cummins Inc.*, 2019 WL 6830790, \*5 [SD NY Dec. 13, 2019], citing *Holborn Corp. v. Sawgrass Mut. Ins. Co.*, 304 F Supp 3d 392, 403 [SD NY 2018].)

## II. The Claims Against Bartiromo Challenge Speech That Is Fully Protected By The First Amendment.

While Smartmatic's 285-page complaint is long on rhetoric, it is remarkably short on any allegedly defamatory or disparaging statements that it attempts to attribute to Bartiromo.<sup>9</sup> And the content Smartmatic identifies from Bartiromo's shows is fully protected by the First Amendment. "If the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement." (*DeLuca v. N.Y. News, Inc.*, 109 Misc 2d 341, 345-346 [Sup Ct, New York County 1981].) Likewise, when the press is reporting on the content of legal proceedings, documents, and attorney remarks, that coverage is protected so long as the report of the proceedings is substantially accurate. (*See Larreal v. Telemundo of Fla., LLC*, 2020 WL 5750099, \*8 [SD Fla Sept. 25, 2020, No. 19-22613]; *Holy Spirit Assn. for the Unification of World Christianity v. N.Y. Times Co.*, 49 NY2d 63, 68 [1979].) Indeed, while these doctrine are often described as "privileges," properly speaking, such coverage is not merely "privileged"; it is not defamatory at all, because a reasonable viewer would understand that the publication is not presenting information that it has determined to be true, but rather is fulfilling its journalistic duty to "present[] newsworthy allegations made by others." (*Croce v. N.Y. Times Co.*, 930 F3d 787, 793 [6th Cir 2019].)

When a sitting President and his surrogates claim an election was rigged, the public has a right to know what they are claiming. That is particularly true during a year that saw extraordinary

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<sup>9</sup> The *sine qua non* of a defamation claim is that the "defendant[] made a defamatory statement," not some third party. (43A NY Jur 2d *Defamation and Privacy* §6 (2d ed. 2021) [emphasis added].) Accordingly, Smartmatic cannot seek to hold Bartiromo liable based on the statements made by guests. At any rate, Smartmatic cannot overcome the actual-malice hurdle vis-à-vis Bartiromo. *See infra* pp. 17-22.

changes to voting processes in response to COVID-19, which generated enormous public interest in voting measures across the United States and substantial doubt in some quarters that those measures would yield a safe and fair election. When a sitting President and his surrogates bring lawsuits challenging election results, the public has a right to know the substance of their claims and what evidence backs them up. “The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.” (*Edwards v. Natl. Audubon Socy., Inc.*, 556 F2d 113, 120 [2d Cir 1977].) That is precisely what Bartiromo was doing in the coverage Smartmatic challenges: She was covering the unquestionably newsworthy fact that the President’s legal team was challenging the results of the 2020 election based, in part, on allegations concerning Smartmatic.

A reasonable viewer would have readily understood from the context of Bartiromo’s shows, in which she was interviewing the President’s lawyers, that she was seeking to determine what they were alleging, not purporting to have uncovered election fraud herself:

- On November 15, Bartiromo began her show with “[b]reaking news” concerning “the software that *President Trump* says was weaponized against him,” (NYSCEF.Doc.No.7, Pls.Ex.5.at.2) and previewed that viewers would hear from “*President Trump’s legal team with new evidence* this morning of backdoors on voting machines, ballot tampering and election interference ... Plus, *Sidney Powell on the Venezuela connection*,” (*Id.*; NYSCEF.Doc.No.1, Compl.¶199(c).)<sup>10</sup> Bartiromo then noted that “[o]ne source says that the key point to understand is that the Smartmatic system has a backdoor” and asked Giuliani, “[a]re you saying the states that used that software did that?” (NYSCEF.Doc.No.1, Compl.¶¶105, 183(f), 208(h).)
- On November 15, Bartiromo told Powell, “[w]e just heard about the software made by Smartmatic *from Rudy*,” who had been introduced as the President’s lawyer. (NYSCEF.Doc.No.1, Compl.¶107.)

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<sup>10</sup> All emphasis added unless otherwise noted.

- On November 17, Bartiromo asked Giuliani, “*what are you finding so far? What do you think went on here?*” (NYSCEF.Doc.No.1, Compl.¶114.)
- On November 22, Bartiromo stated, “Smartmatic election software was developed, *Sidney Powell says*, in Venezuela with porous security and built-in functionality allowing the administrators to override security features,” (NYSCEF.Doc.No.1, Compl.¶¶123, 183(1)), and noted that “[w]e haven’t seen this, so we don’t know. *But this is the kind of evidence that they [the President’s lawyers] say they have.*” (NYSCEF.Doc.No.1, Compl.¶123.)

To the extent there were any doubt about what role Bartiromo was playing (and there was not), it was dispelled by the fact that she consistently and repeatedly asked her guests whether they could substantiate these charges and informed her viewers of the need for evidence to back them up:

- On November 15, Bartiromo asked Giuliani, “will you be able to prove this Rudy?” (NYSCEF.Doc.No.7, Pls.Ex.5.at.4-9.)
- On November 15, Bartiromo asked Powell, “Sidney, you feel that you will be able to prove this. Do you have the software in your possession? Do you have the hardware in your possession? How will you prove this Sidney?” (*Id.* at 16.)
- On November 17, Bartiromo reminded Giuliani, “[y]ou were a prosecutor for years ... You have to prove it,” before asking, “[c]an you prove this?” (NYSCEF.Doc.No.22, Pls.Ex.20 at 7.)
- On November 20, Bartiromo asked Powell, “Sidney, will you be able to prove this evidence that you say you have of this technology flipping votes from Trump to Biden? How will you prove that, Sidney?” (NYSCEF.Doc.No.198, Fox.Ex.19.at.3.)
- On November 22, after reporting what evidence Powell claimed to have on this issue, Bartiromo reiterated, “[w]e haven’t seen this, so we don’t know. *But this is the kind of evidence that they [the President’s lawyers] say they have.*” (NYSCEF.Doc.No.200, Fox.Ex.21.at.6.)
- On December 20, Bartiromo aired an interview with nonpartisan election-technology expert Eddie Perez, who pointed out the lack of evidence for many of the allegations of the President’s legal team. (NYSCEF.Doc.No.48, Pls.Ex.46.)

Bartiromo also invited others to comment on these allegations. On November 17, the *Wall Street Journal’s* Hilsenrath responded to Giuliani’s interview from the same program. Hilsenrath underscored the seriousness of Giuliani’s allegations, emphasized the need for evidence, and stated

that, if the allegations were false, they were “inexcusable.” (Bartiromo.Ex.5.at.8.) The November 22 broadcast of *Sunday Morning Futures* included an interview with Alan Dershowitz, who likewise expressed deep skepticism about the ability of the President’s legal team to prove their allegations, including the claims about Smartmatic. (NYSCEF.Doc.No.200, Fox.Ex.21. at.5-7.)

Moreover, many of the statements that Smartmatic paints as defamatory were, in fact, statements that Smartmatic does and cannot claim were false. For example, Smartmatic does not dispute that it, is in fact, “a Delaware entity registered in Boca Raton, Florida,” that had “activities in Caracas, Venezuela.” (*Compare* NYSCEF.Doc.No.1, Compl.¶¶105, 149(f), 157(g), 175(b) with Compl.¶347 (conceding that Smartmatic is incorporated in Delaware and registered with its business address in Boca Raton), *and* NYSCEF.Doc.Nos.183, 188, Fox.Exs.4, 9 (confirming that Smartmatic was incorporated in Caracas in 1997 and operating in Venezuela until at least 2017). True statements, of course, cannot form the basis of a defamation action. (*Biro v. Condé Nast*, 883 F Supp 2d 441, 458 [SD NY 2012]; *see also Guccione v. Hustler Mag., Inc.*, 800 F 2d 298, 301 [2d Cir 1986].)

Smartmatic further alleges that Bartiromo tried “to create the impression that Smartmatic’s election technology and software were widely used during the 2020 U.S. election” when she initially mistakenly described a graphic titled “Battleground States Using Dominion Voting Machines” as showing states that used both Dominion and Smartmatic software. (NYSCEF.Doc.No.1, Compl.¶149.) (Bartiromo.Ex.7.) But Smartmatic neglects to mention that Bartiromo quickly realized she had misspoken and corrected herself, clarifying that “[t]he voting machines were used, *Dominion* voting machines were used in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.” (NYSCEF.Doc.No.7, Pls.Ex.5.at.9-10; *see* Bartiromo.Ex.8.) An ordinary viewer of that 20-second exchange thus would have understood that

the graphic was not “of and concerning” Smartmatic, (*Dalbec v. Gentleman’s Companion, Inc.*, 828 F2d 921, 925 [2d Cir 1987], quoting *N.Y. Times Co. v. Sullivan*, 376 US 254, 288 [1964]), and hence could not form the basis of a defamation claim at all. (See, e.g., *Smith v. Cuban Am. Natl. Found.*, 731 So 2d 702, 705-06 [Fla Dist Ct App 1999] [entire broadcast must be considered “because the average viewer would have been watching the entire broadcast, not merely a twenty second clip”]; *Amrak Prods., Inc. v. Morton*, 410 F3d 69, 72-73 [1st Cir 2005] [similar].)

In short, Bartiromo did precisely what the First Amendment envisions and protects: She interviewed sources with differing views of a controversy of unquestionable public importance, probing those who were making the allegations to explain what evidence they had to substantiate their claims, and soliciting views from competing sources who expressed doubt that those allegations could be proven. There can be no serious dispute the fact that the President’s legal team was making these allegations and claiming they could support them in court with evidence was an “newsworthy controversy,” (*Lasky v. Am. Broadcasting Cos., Inc.*, 631 F Supp 962, 971 [SD NY 1986]), which the press must be “afforded the freedom to” cover it without fear of liability, (*Edwards*, 556 F2d at 120). That is all the more true given the enormous public interest in election processes and procedures that stemmed from the unusual measures implemented in response to COVID-19. The logic of Smartmatic’s position would be that the press may not even *interview* individuals on competing sides of a heated controversy without facing the risk that it will be sued by the party who eventually prevails because it also gave the losing party a forum. That is not and cannot be the law. Smartmatic’s effort to use a multi-billion-dollar lawsuit to chill reporters like Bartiromo from covering objectively newsworthy allegations should be rejected as a plain affront to the First Amendment.

### III. The Complaint Fails To Allege That Bartiromo Acted With Actual Malice Under The First Amendment And CPLR 3211 [g].

In all events, even if Smartmatic alleged any defamatory statements for which Bartiromo could be held liable, its complaint would still have to be dismissed for failure to allege facts showing that Bartiromo herself acted with actual malice.

The actual-malice standard applies here for two independent reasons. *First*, Smartmatic is at least a limited-purpose public figure, as explained in the Fox Companies' motion to dismiss. (*See* NYSCEF.Doc.No.206.at.17-18.) As a result, under well-established First Amendment law, Smartmatic must demonstrate by clear and convincing evidence that Bartiromo made each challenged statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (*N.Y. Times*, 376 US at 280; *see id.* at 287 [explaining that the "state of mind required for actual malice" must be "brought home" to the speaker].) Even at the pleading stage, a plaintiff is required "to allege facts sufficient to show actual malice with convincing clarity." (*Jimenez v. United Fed'n of Teachers*, 239 AD2d 265, 266 [1st Dep't 1997]; *see also Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc 3d 974, 983, [Sup. Ct., New York County 2004], *affd*, 21 AD3d 826 [1st Dep't 2005].)

*Second*, this case falls squarely within New York's recently—and substantially—revised anti-SLAPP law, as also explained in the Fox Companies' motion to dismiss. (*See* NYSCEF.Doc.No.206.at.18-19.) New York's anti-SLAPP law has long contained an actual-malice requirement, but before November 2020, it "was effectively limited to cases initiated by persons or business entities that were involved in controversies over a public application or permit." (*Palin v. N.Y. Times Co.*, 2020 WL 7711593, \*2 [SD NY Dec. 29, 2020, No. 17-cv-4853].) Last November, however, new amendments to the anti-SLAPP law "t[ook] effect immediately," and they "substantially broadened the reach of the actual malice rule." (*Id.* at \*2-

3.) Under those amendments, if a plaintiff’s claim is based on “any communication in a place open to the public or a public forum in connection with an issue of public interest” or based on “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest,”<sup>11</sup> then—no matter whether the plaintiff is a public figure—he must prove by “clear and convincing evidence” that each challenged statement “was made with knowledge of its falsity or with reckless disregard of whether it was false.” (Civ. Rights Law §76-a [1] [a], [2].) Thus, as a statutory matter, New York’s revised anti-SLAPP law effectively extends the actual-malice standard that has long existed as a matter of federal constitutional law to all cases involving issues of public concern—and it imports all relevant U.S. Supreme Court precedents as well. (*See, e.g., Palin*, 2020 WL 7711593, \*5.) This case, which pertains to coverage of the integrity of the 2020 presidential election, self-evidently concerns an issue of surpassing public interest. Accordingly, Smartmatic must satisfy the actual-malice standard as a matter of both the First Amendment and, independently, New York’s anti-SLAPP law.

To state a claim against Bartiromo, therefore, Smartmatic must allege facts that, if true, would clearly and convincingly show that Bartiromo made allegedly defamatory statements with *subjective* knowledge that they were false or with reckless disregard for their truth. (*N.Y. Times*, 376 US at 279-80.) That is a high bar. Mere allegations of negligence or “failure to investigate” before publishing do not suffice. (*See Harte-Hanks Communications, Inc. v. Connaughton*, 491 US 657, 688 [1989]; *St. Amant v. Thompson*, 390 US 727, 733 [1968]; *Chiaramonte v. Coyne*, 2020 WL 434342, \*8 [Sup Ct, New York County Jan. 28, 2020, No. 156644/2017].) Nor do

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<sup>11</sup> Under the anti-SLAPP law, the term “[p]ublic interest’ shall be construed broadly, and shall mean any subject other than a purely private matter.” (Civ. Rights Law §76-a [1] [a], [2].)

allegations that a defendant was agnostic or unsure about the accuracy of a statement. (*See Howard v. Antilla*, 294 F3d 244, 252-254 [1st Cir 2002]; *Lieberman v. Gelstein*, 80 NY2d 429, 438-439 [1992].) Instead, Smartmatic must allege facts that “permit the conclusion” that Bartiromo “in fact entertained serious doubts as to the truth” of the challenged statements, (*Lieberman*, 80 NY2d at 438), or acted with a “high degree of awareness” of their “probable falsity,” (*Garrison v. Louisiana*, 379 US 64, 74 [1964]). In attempting to allege actual malice, moreover, Smartmatic must bring home the “state of mind required” to *Bartiromo herself*; it may not impute to Bartiromo knowledge that *someone else* at Fox may have had. (*N.Y. Times*, 376 US at 287.) In other words, Smartmatic must allege facts showing that *Bartiromo herself* was aware of, or recklessly disregarded, information that contradicted her statements. Knowledge that *others* at Fox may have had is irrelevant to *Bartiromo’s* state of mind. (*See id.*) All of that makes actual malice hard enough to satisfy in the ordinary case. But it is especially difficult to demonstrate in the context of live-interview shows like *Sunday Morning Futures* and *Mornings with Maria*, given that hosts have only limited ability to fact-check guests in real time. (*See Pacella v. Milford Radio Corp.*, 462 NE2d 355, 360 [Mass App Ct 1984], *affd* 476 NE2d 595 [Mass 1985]; *Adams v. Frontier Broadcasting Co.*, 555 P2d 556, 566-67 [Wyo. 1976].)

Smartmatic’s complaint alleges no facts that come anywhere close to showing that Bartiromo knew (or recklessly disregarded) that Powell’s and Giuliani’s claims were false when she invited them to discuss those claims on her shows. To begin, the complaint alleges nothing at all specific to Bartiromo’s subjective knowledge or state of mind—no facts whatsoever showing that she specifically became aware, or was made aware, of information that contradicted anything in the segments that Smartmatic challenges. Indeed, the complaint alleges virtually nothing about what Bartiromo herself actually did or did not know. Courts routinely dismiss defamation claims

where, as here, a plaintiff does not sufficiently bring home alleged knowledge to the speaker herself. (See, e.g., *McDougal v. Fox News Network, LLC*, 2020 WL 5731954, \*8 [SD NY Sept. 24, 2020, No. 1:19-cv-11161] [dismissing defamation claims where plaintiff had not alleged any “sufficient basis for inferring actual malice”]; *Cabello-Rondón v. Dow Jones & Co., Inc.*, 2017 WL 3531551, at \*7 [SD NY Aug. 16, 2017, No. 16-cv-3346] [dismissing defamation claims where plaintiff failed “to plead that any purportedly false statements ... were published with ‘either knowledge of falsity or reckless disregard of the truth’”]).

At most, Smartmatic alleges that Bartiromo should not have allowed attorneys for the President of the United States to appear on her show and explain their allegations of election fraud without “see[ing] any evidence” beforehand. (NYSCEF.Doc.No.1, Compl.¶104; see also *id.*¶¶106, 109.) As explained in the Fox Companies’ brief, however, that theory of actual malice is a non-starter under settled First Amendment precedent, which squarely holds that even in the context of news reporting, the “failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.” (*Harte-Hanks*, 491 US at 688; see *NYSCEF.Doc.206.at.20.*) The protection for interviews of newsworthy individuals is greater still, because their statements merit coverage by the press whether they are ultimately proven true or false. The only specific, non-conclusory allegation Smartmatic makes about the knowledge of *anyone* at Fox is its allegation that a coordinating producer for *Lou Dobbs Tonight* received two emails from Smartmatic stating that its technology was used only in Los Angeles County, its software does not tabulate votes, and it did not provide input to the CISA. (NYSCEF.Doc.No.1, Compl.¶¶282-283.) But Smartmatic alleges no facts bringing that knowledge home to *Bartiromo*, so it is irrelevant; Smartmatic is squarely foreclosed from imputing

knowledge of a coordinating producer for a different show to Bartiromo. (*See N.Y. Times*, 376 US at 287.)

Beyond that, Smartmatic’s allegations actually *undermine* its claim to actual malice, as Smartmatic itself acknowledges that Bartiromo pushed back—repeatedly—on Powell and Giuliani’s claims, emphasizing that they would need to prove these remarkable claims in court with actual evidence. (*E.g.*, NYSCEF.Doc.No.7, Pls.Ex.5.at.4-9 [“[W]ill you be able to prove this Rudy?”]; *id.* at 16. [“How will you prove this Sidney?”]; *id.* at 22 [“You believe you can prove this in court?”]; NYSEC.Doc.No.22, Pls.Ex.20.at.7 [“Can you prove this?”]; *id.* at 9 [“[D]o you feel you have enough evidence to overturn the results of this election?”].) Her show then aired interviews with experts like Dershowitz and Perez who expressed skepticism about or directly refuted these claims. (NYSCEF.Doc.No.35, Pls.Ex.33; NYSCEF.Doc.No.48, Pls.Ex.46.) Far from supporting a claim that Smartmatic can prove that Bartiromo acted with actual malice, that even-handed commentary on a developing story confirms that she did not. More fundamentally, the very fact that Bartiromo pressed the President’s legal team on the need for hard evidence reinforces the conclusion that a reasonable viewer would readily have understood that Bartiromo was not covering those allegations for their truth or falsity; she was covering them because she was confident they were newsworthy—as was virtually every other press outlet in the country.

In short, Smartmatic wholly fails to demonstrate actual malice here. Bartiromo interviewed the President’s lawyers about the breaking news of their allegations of voter fraud on a show that focuses on news and politics. She covered the developing story by listening to the President’s lawyers, pressing them on how they would prove their allegations, and as time passed and that evidence did not materialize, expressing increasing skepticism about the ability of the President’s legal team to establish their claims. That is precisely how journalists are supposed to help foster

“uninhibited, robust, and wide-open” debate on matters of profound public importance. (*N.Y. Times Co.*, 376 U.S. at 270.).

### CONCLUSION

For each of the foregoing independent reasons, this Court should grant the motion to dismiss under CPLR 3211 [a] [1], [a] [7] and [g], and Civil Rights Law §76-a.

Respectfully submitted,

Dated: New York, New York  
February 11, 2021

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**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to NYCRR §202.8-b, that the foregoing Memorandum of Law was prepared on a computer using Microsoft Office 365.

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/s/ Steven Mintz

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