

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

US DOMINION, INC., DOMINION )  
VOTING SYSTEMS, INC., and )  
DOMINION VOTING SYSTEMS )  
CORPORATION, ) C.A. No.: N21C-08-063 EMD  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
NEWSMAX MEDIA, INC., )  
 )  
Defendant. )

Submitted: March 8, 2022

Decided: June 16, 2022

*Upon Defendant's Motion to Dismiss*

***DENIED***

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**DAVIS, J.**

## I. INTRODUCTION

This is a civil action involving a defamation claim. Plaintiffs US Dominion, Inc., Dominion Voting Systems, Inc. and Dominion Voting Systems Corporation (collectively “Dominion”) allege that Defendant Newsmax Media Inc. (“Newsmax”) published false and defamatory statements of fact about Dominion. Dominion claims that Newsmax’s hosts intentionally provided a platform for guests that Newsmax knew would make such statements on the air. In addition, Dominion contends that Newsmax affirmed, endorsed, repeated, agreed with, and repeated those guests false and defamatory statements on the air, on Newsmax’s websites, on Newsmax’s social media accounts, and on Newsmax’s other digital platforms and subscription services. Through its complaint (the “Complaint”), Dominion seeks punitive and economic damages for defamation *per se*.<sup>1</sup>

On October 11, 2021, Newsmax moved to dismiss (the “Motion”) the Complaint for failure to state a claim.<sup>2</sup> Dominion opposed the Motion on November 15, 2021.<sup>3</sup> On December 10, 2021, Newsmax filed a reply brief in support of the Motion.<sup>4</sup> The Court held a hearing on the Motion on March 8, 2022.<sup>5</sup> At the conclusion of the hearing, the Court took the Motion under advisement. This is the Court’s decision on the Motion. For the reasons set forth below, the Motion is **DENIED**.

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<sup>1</sup> D.I. No. 1.

<sup>2</sup> D.I. No. 21, Defendant’s Opening Brief in Support of its Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim (hereinafter, Mot.).

<sup>3</sup> D.I. No. 34, Plaintiffs’ Brief in Opposition to Defendant’s Rule 12(b)(6) Motion to Dismiss (hereinafter, Opp.).

<sup>4</sup> D.I. No. 39, Defendant’s Reply Brief in Support of its Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim (hereinafter, Reply).

<sup>5</sup> D.I. No. 45.

## II. BACKGROUND

Unless otherwise indicated, the following facts are stated as alleged in the Complaint. For purposes of the Motion, the Court must view all well-pled facts alleged in the Complaint as true and in a light most favorable to Dominion.<sup>6</sup> As such, the Court will not necessarily use terms like “alleged facts” or “purported facts” throughout. Unless otherwise indicated, all facts used herein come from the Complaint. This section tracks the facts in the order alleged in the Complaint.

### A. THE PARTIES

US Dominion, Inc. is a Delaware corporation with its principal place of business in Colorado.<sup>7</sup> Dominion Voting Systems, Inc. is a Delaware corporation with its principal place of business in Colorado and has maintained an office in New York since July 2009.<sup>8</sup> Dominion Voting Systems Corporation is an Ontario corporation with its principal place of business in Toronto, Ontario.<sup>9</sup> Dominion Voting Systems, Inc. and Dominion Voting Systems Corporation are wholly owned subsidiaries of US Dominion, Inc.<sup>10</sup>

Newsmax is a Delaware corporation with its principal place of business in West Palm Beach, Florida.<sup>11</sup> Newsmax operates the Newsmax news channel, the website Newsmax.com, mobile apps for Apple and Android devices, and various social media accounts.<sup>12</sup>

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<sup>6</sup> See, e.g., *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at \*3 (Del. Super. Oct. 27, 2010).

<sup>7</sup> Compl. ¶ 11. “It is majority-owned by a private equity firm whose principal place of business is in New York.” *Id.*

<sup>8</sup> *Id.* ¶ 12.

<sup>9</sup> *Id.* ¶ 13.

<sup>10</sup> *Id.* ¶¶ 12, 13.

<sup>11</sup> *Id.* ¶ 14.

<sup>12</sup> *Id.*

## B. RELEVANT NONPARTIES

Christopher Ruddy is the Chief Executive Officer of Newsmax.<sup>13</sup> Mr. Ruddy is Newsmax’s agent.<sup>14</sup> Mr. Ruddy “founded Newsmax in 1998 as a conservative news website” and launched the Newsmax cable television channel in 2014.<sup>15</sup>

Greg Kelly is the host of *Greg Kelly Reports*, which is broadcast from New York and airs weeknights on Newsmax TV.<sup>16</sup> Mr. Kelly is Newsmax’s agent.<sup>17</sup> Mr. Kelly also hosts “The Greg Kelly Podcast” for Newsmax and “the Greg Kelly Show” on WABC radio.<sup>18</sup> Newsmax operates and exercises control over Mr. Kelly’s Twitter account (@gregkellyusa).<sup>19</sup>

Grant Stinchfield is the host of *Stinchfield* which airs weeknights on Newsmax TV.<sup>20</sup> Mr. Stinchfield is Newsmax’s agent.<sup>21</sup> Mr. Stinchfield also hosts the radio show “The Stinchfield Report” on KLIF/570 AM and runs the website GrantsRant.com.<sup>22</sup> Newsmax operates and exercises control over Mr. Stinchfield’s Twitter account (@stinchfield1776).<sup>23</sup>

Emerald Robinson appears regularly on Newsmax TV and serves as Newsmax’s White House correspondent.<sup>24</sup> Ms. Robinson is Newsmax’s agent.<sup>25</sup> Newsmax operates and exercises control over Ms. Robinson’s Twitter account (@EmeraldRobinson).<sup>26</sup>

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<sup>13</sup> *Id.* ¶ 15.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* ¶ 16.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ¶ 17.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* ¶ 18.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Sidney Powell is an attorney that briefly pursued litigation challenging the 2020 Presidential Election.<sup>27</sup> All of that litigation was summarily dismissed by December 9, 2020.<sup>28</sup> Ms. Powell was also the attorney for Michael Flynn, who she sought to have former President Trump pardon.<sup>29</sup> Newsmax repeatedly hosted and replayed Ms. Powell after the 2020 Presidential Election.<sup>30</sup>

Rudolph Giuliani, the former mayor of New York City, is a YouTube podcast host, radio show host and attorney to President Donald Trump and the Trump Campaign.<sup>31</sup> Newsmax broadcast false statements by Mr. Giuliani in the weeks following the 2020 Presidential Election.<sup>32</sup> On June 24, 2021, New York suspended Mr. Guiliani’s law license.<sup>33</sup> On July 7, 2021, Washington, D.C. suspended Mr. Guiliani’s law license as well.<sup>34</sup>

Michael Lindell is the founder and CEO of My Pillow, Inc. (“MyPillow”), one of Newsmax’s biggest sponsors.<sup>35</sup> Newsmax invited Mr. Lindell to appear on air, where he repeated conspiracy theories about the 2020 Presidential Election and lies about Dominion.<sup>36</sup> Dominion filed a defamation lawsuit against Mr. Lindell on February 22, 2021 related to a series of “docu-movies” about Dominion.<sup>37</sup>

Dick Morris is a political commentator and was a regular Newsmax contributor, until February 2021 when he began appearing on his own show on Newsmax called *Dick Morris*

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<sup>27</sup> *Id.* ¶ 19.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Former President Trump did pardon Mr. Flynn on November 25, 2020. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* ¶ 20.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ¶ 21.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

*Democracy*.<sup>38</sup> Mr. Morris was fired from his role on President Bill Clinton’s campaign in 1996 and has been previously criticized for “crossing journalistic ethical lines by ‘accepting paid advertisements’ on his personal website ‘from candidates that he discussed on the air at Fox.’”<sup>39</sup> Newsmax manages Mr. Morris’s email list.<sup>40</sup>

Patrick Byrne is the former CEO of the internet discount retailer Overstock.com.<sup>41</sup> Mr. Byrne appeared as an “expert” on Newsmax to discuss Dominion and the 2020 Presidential Election.<sup>42</sup> Mr. Byrne was previously ordered to pay approximately \$1 million in a defamation judgment for falsely accusing a Canadian businessman of being connected to “Osama bin Laden’s favorite financier,” the Colombian drug cartel, the Russian mafia, and al Qaeda’s Golden Chain.<sup>43</sup>

In August 2020, Mr. Byrne publicly admitted that he believed the 2020 Presidential Election was going to be rigged, referring to this narrative as the “last act”.<sup>44</sup> Mr. Byrne claims that a series of alleged experiences with the FBI tipped him off that the 2020 Presidential election would be rigged back in August 2020.<sup>45</sup> In August 2020, Mr. Byrne set out to hire a group he calls the “Bad News Bears” to “reverse-engineer” the supposed election-rigging.<sup>46</sup> As

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<sup>38</sup> *Id.* ¶ 22.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶ 23.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* ¶ 24.

<sup>45</sup> *Id.* ¶ 27. Mr. Byrne resigned his board seat and position as CEO of Overstock in August 2019 after his affair with now-notorious Russian agent, Maria Butina was revealed, and Overstock was unable to renew its insurance policy if Mr. Byrne remained in charge. *Id.* ¶¶ 23, 24. Butina was sentenced to 18 months in prison after being indicted by federal prosecutors for trying to infiltrate powerful political circles in the United States at the direction of the Russian government. *Id.* Mr. Byrne claimed that he was directed by the FBI to engage in a romantic relationship with Butina, a claim that the FBI has denied and called “absolutely ludicrous.” *Id.* ¶ 25. As early as October 6, 2020, Mr. Byrne made public claims on his personal blog and in media appearance that he was instructed by the FBI to quit his affair with Butina and instructed to facilitate an \$18 million bribe of Hillary Clinton, which Mr. Byrne claims to have done on January 14, 2016. *Id.* ¶ 26.

<sup>46</sup> *Id.* ¶ 27.

part of his “Bad News Bears” efforts, Mr. Byrne funded and worked with Russell Ramsland, accusing Dominion of rigging the 2018 Dallas election.<sup>47</sup>

Mr. Byrne also worked with Mr. Ramsland’s team to create a so-called “forensic report” about the 2020 vote in Antrim County, Michigan.<sup>48</sup> Mr. Byrne worked with Mr. Lindell by sending him documents after he lost access to former President Trump and served as CEO of Defending the Republic, an organization launched by Ms. Powell to help fund her efforts to accuse Dominion of rigging the 2020 Presidential Election.<sup>49</sup> Mr. Byrne has also partnered with OAN, Sidney Powell, and others to fund the sham election audit in Arizona.<sup>50</sup> Mr. Byrne published a book and a feature film, both titled *The Deep Rig*, in which he also claims that Dominion rigs elections.<sup>51</sup> “[I]n anticipation of the U.S. Supreme Court declining to hear a case seeking to throw out the 2020 election results, [Mr.] Byrne [] claimed in early December 2020 that Chief Justice John Roberts ‘may be compromised,’ because his name according to [Mr.] Byrne appears on the flight manifest of the notorious Jeffrey Epstein’s private jet.”<sup>52</sup>

Russell Ramsland is a failed Republican congressional candidate and author of the purportedly independent “report” on the election results in Antrim County, Michigan.<sup>53</sup> Mr. Ramsland has publicly touted numerous conspiracy theories involving George Soros and election rigging.<sup>54</sup> Newsmax broadcast Mr. Ramsland and promoted his Antrim County report.<sup>55</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* The report falsely accused Dominion of switching votes in Antrim County to Joe Biden from Donald Trump.  
*Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* ¶ 29.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* ¶ 30.

<sup>53</sup> *Id.* ¶¶ 31, 34.

<sup>54</sup> *Id.* ¶ 31. Mr. Ramsland claims “that George Soros—who was born in 1930—helped form the ‘Deep State’ in Nazi Germany in the 1930s along with President George H.W. Bush’s father, the Muslim Brotherhood, and ‘leftists.’” *Id.*

<sup>55</sup> *Id.*

Fox News Network and Fox Corporation (collectively “Fox”) is the self-described “most watched television news channel” controlled by Lachlan and Rupert Murdoch.<sup>56</sup> Fox is a competitor of Newsmax.<sup>57</sup>

One America News Network (“OAN”) is a television news channel controlled by the Herring family.<sup>58</sup> OAN is a competitor of Newsmax.<sup>59</sup>

The Cybersecurity and Infrastructure Security Agency (“CISA”) was the agency in charge of overseeing online security for the 2020 election.<sup>60</sup> Christopher Krebs was director of the CISA until former President Trump fired him.<sup>61</sup>

### **C. DOMINION VOTING SYSTEMS**

Dominion’s voting systems are certified under U.S. Election Assistance Commission (“EAC”) standards.<sup>62</sup> Independent testing laboratories accredited by the EAC review and test Dominion’s voting systems and the systems are designed to be auditable.<sup>63</sup> Dominion’s systems include paper ballot backup to verify results.<sup>64</sup>

Dominion contracts with state and local governments to provide voting systems and services.<sup>65</sup> These contracts typically have multi-year terms and range in value from tens of thousands of dollars to over a hundred million dollars.<sup>66</sup> Dominion’s contracts are historically

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<sup>56</sup> *Id.* ¶ 35.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ¶ 36.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* ¶ 52.

<sup>61</sup> *Id.* ¶¶ 52, 108.

<sup>62</sup> *Id.* ¶ 39.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 43.

<sup>66</sup> *Id.*

long-term with high renewal rates.<sup>67</sup> As of the 2020 election, Dominion provided voting machine technology in over 28 states including, the more than 50 New York counties.<sup>68</sup>

#### **D. NEWSMAX COURTS FOX VIEWERS.**

Newsmax was an early supporter of former President Trump before he ran for office.<sup>69</sup> Newsmax founder and CEO, Mr. Ruddy, is a long-time friend of former President Trump and credits former President Trump with giving Newsmax “legitimacy” back in 2011.<sup>70</sup> Prior to the 2020 election, former President Trump would criticize Fox for what he perceived as insufficient support.<sup>71</sup>

Leading up to the 2020 election, Newsmax reported that election officials expected record mail-in voting because of coronavirus pandemic concerns.<sup>72</sup> Newsmax also reported that mail-in voting was widely expected to favor Democrats because prominent Republicans, including former President Trump, consistently encouraged supporters to avoid voting by mail.<sup>73</sup> Newsmax’s pre-election stories adopted former President Trump’s narrative that he could only lose the election if voting fraud occurred.<sup>74</sup> On October 14, 2020, Newsmax hosted former President Trump on the *Greg Kelly Reports*.<sup>75</sup> Host, Greg Kelly, asked former President Trump his plans to combat election fraud to which former President Trump claimed that the election was already “a rigged deal.”<sup>76</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* ¶ 48.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* ¶ 49.

<sup>72</sup> *Id.* ¶ 53.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* ¶ 55.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

Newsmax capitalized on the perception that Fox was not supportive of former President Trump in the lead up to the 2020 election.<sup>77</sup> In September 2020, Newsmax criticized Fox host Chris Wallace’s moderating of the first presidential debate, reporting that he “let Biden get off easy.”<sup>78</sup> Further, in late October 2020, Newsmax through its online platform, criticized a Fox poll indicating that former President Trump was trailing Biden in the polls.<sup>79</sup>

On election day, Mr. Ruddy positioned “Newsmax to become the landing spot for former Trump supporters who were dissatisfied with the election results and with Fox.”<sup>80</sup> Mr. Ruddy asserted that Fox might bear responsibility if former President Trump lost.<sup>81</sup> When interviewed by Newsmax host Michael Berry, Mr. Ruddy stated: “I am shocked about what Fox News has done . . . I think if Trump loses and it’s a close election, blame Chris Wallace and Fox News.”<sup>82</sup>

Newsmax called Florida for former President Trump early in the evening before other news networks, including Fox.<sup>83</sup> The White House noticed that Newsmax called Florida first and in response, Andrew Giuliani—special assistant to former President Trump and Rudolph Giuliani’s son—appeared on Newsmax from the White House lawn and stated: “We have Newsmax on every single TV at the White House.”<sup>84</sup> Newsmax published this story on its website and across its social media platforms.<sup>85</sup>

Fox was the first major news network to project that former President Trump had lost the battleground state of Arizona.<sup>86</sup> Former President Trump was reportedly “fuming” when he

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<sup>77</sup> *Id.* ¶ 56.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* ¶ 57.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* ¶ 58.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* ¶ 59.

learned that Fox had called Arizona for President Biden.<sup>87</sup> Shortly after, Jared Kushner, former President Trump’s son-in-law, called Fox founder and Chairman Rupert Murdoch to complain.<sup>88</sup> Numerous former President Trump supporters including his political advisor, Jason Miller, and Republican National Committee spokesperson Liz Harrington, took to social media to disparage Fox.<sup>89</sup> In response to this criticism against Fox, Newsmax refused to call Arizona.<sup>90</sup> This resulted in a spike in Newsmax’s ratings on Election night and social media support encouraging Fox viewers to tune into Newsmax instead.<sup>91</sup>

**E. NEWSMAX REFUSES TO CALL THE ELECTION AND CONTINUES TO COURT FOX VIEWERS.**

In the days after the election, Newsmax refused to admit that former President Trump would likely lose the election and vague claims of election fraud began to emerge.<sup>92</sup> Numerous news outlets, federal,<sup>93</sup> state, and local officials released statements confirming that vote tallies were accurate and that the election was not rigged.<sup>94</sup> Despite initial reports of vote reporting errors in Antrim County, Michigan—a jurisdiction that used Dominion voting machines for the election—election officials quickly confirmed that the reporting error was caused by human error and not by Dominion voting machines.<sup>95</sup> On November 7, 2020, the Associated Press reported that Dominion was not responsible for the human error in Antrim County, Michigan.<sup>96</sup>

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<sup>87</sup> *Id.* ¶ 60.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* ¶¶ 60-61.

<sup>90</sup> *Id.* ¶ 62.

<sup>91</sup> *Id.* ¶¶ 63-68.

<sup>92</sup> *Id.* ¶ 69.

<sup>93</sup> On November 7, 2020, Chris Krebs, the head of the CISA tweeted “Seeing #disinfo that some isolated voting day issues are tied to some nefarious election hacking and vote manipulation operations. Don’t fall for it and think twice before sharing!” *Id.* ¶ 75.

<sup>94</sup> *Id.* ¶¶ 70-74.

<sup>95</sup> *Id.* ¶¶ 73-74.

<sup>96</sup> *Id.* ¶ 74.

On November 7, 2020, most news networks—including Fox—projected that former President Trump lost the election.<sup>97</sup> Newsmax refused to call the election and boasted that it remained “the only major news network to not call the election.”<sup>98</sup> Newsmax reported that the race was “too close to call” and that “Fox News faces backlash from viewers after call for Biden.”<sup>99</sup> The next day Mr. Ruddy declared that former President Trump is “very disappointed in Fox News” and “that Newsmax is now ‘a major player in cable news.’”<sup>100</sup> Newsmax’s ratings received a surge in the three days following the election.<sup>101</sup>

#### **F. FOX CONNECTS DOMINION TO THE FALSE ELECTION FRAUD NARRATIVE.**

Shortly after Fox called the election for President Biden, to stem the tide and try to recover lost viewers and former President Trump, Fox changed its narrative and began reporting that former President Trump lost because of massive election fraud.<sup>102</sup> On November 8, Fox invited Ms. Powell on the *Sunday Morning Futures* show and began connecting Dominion with the narrative of election fraud.<sup>103</sup> Ms. Powell declared that there was “a massive and coordinated effort to steal this election from We the People of the United States of America, to delegitimize and destroy votes for Donald Trump, to manufacture votes for Joe Biden,” and that “the Dominion software” was to blame.<sup>104</sup> According to Ms. Powell: “That is where the fraud took place, where they were flipping votes in the computer system or adding votes that did not exist.”<sup>105</sup>

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<sup>97</sup> *Id.* ¶ 77.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* ¶ 78.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* ¶ 79.

<sup>102</sup> *Id.* ¶ 80.

<sup>103</sup> *Id.* ¶ 81.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

**G. NEWSMAX JOINS FOX IN CONNECTING DOMINION TO THE FALSE ELECTION FRAUD NARRATIVE.**

On November 9, 2020, Maricopa County, Arizona, completed a hand audit of paper ballots which showed a 100% match with the counts from the Dominion machines used in Maricopa County.<sup>106</sup> Newsmax reported these results and included a statement by the Republican Arizona Attorney General that “his office conducted random audits and found no problems.”<sup>107</sup>

On the same day, Newsmax’s White House correspondent, Ms. Robinson tweeted that “[o]nce the Trump campaign investigates Dominion Voting Systems, the whole thing is going to fall apart.”<sup>108</sup> In response to this tweet, a Twitter user sent Ms. Robinson a New York Times Fact Check which debunked the false claims about Dominion machines in Michigan.<sup>109</sup> In the days following the election, the public record, including voting officials and news outlets, confirmed that the election was a success, that there was no fraud, and that Dominion did not rig the election.<sup>110</sup>

Newsmax promoted a false origin story that Dominion was created in Venezuela by Hugo Chavez for the purpose of rigging elections.<sup>111</sup> This connection was based on the verifiably false claim that Dominion is owned by Smartmatic.<sup>112</sup> Smartmatic is actually a Dominion’s competitor and the two entities are not otherwise affiliated.<sup>113</sup> On November 10, 2020, Ms. Robinson retweeted the false claim that Smartmatic was synonymous with fraud for

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<sup>106</sup> *Id.* ¶ 83.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ¶ 87.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* ¶ 89.

<sup>111</sup> *Id.* ¶ 93.

<sup>112</sup> *Id.* “Newsmax later admitted that it had no evidence that Dominion and Smartmatic were the same company but refused to retract the lies and tell the truth. *Id.* ¶ 94.

<sup>113</sup> *Id.*

most Venezuelans and that Smartmatic is a subsidiary of Dominion.<sup>114</sup> Ms. Robinson’s tweet claimed that “All crooked roads lead to Dominion Voting Systems.”<sup>115</sup> Newsmax and its on-air talent sold to the American public the story “that Dominion rigged the 2020 election and stole it from Trump just like it stole elections in Venezuela for Chavez.”<sup>116</sup>

**H. NEWSMAX CONTINUES TO CONNECT DOMINION TO THE FALSE ELECTION FRAUD NARRATIVE DESPITE MOUNTING EVIDENCE TO THE CONTRARY.**

Newsmax viewership increased over four times in the week following the election.<sup>117</sup> On November 10, 2020, after showing viewers that former President Trump had tweeted Newsmax clips, a Newsmax anchor declared, “The president seems to be changing his tune on which network to go to.”<sup>118</sup>

On November 11 and 12, 2020, news outlets, including the New York Times and the Associated Press published stories debunking lies about Dominion.<sup>119</sup> Also on November 12, OAN joined Newsmax and Fox in falsely reporting that Dominion deleted votes for former President Trump.<sup>120</sup>

That same day a joint statement from federal, state, and local authorities was published by CISA confirming that there was “no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.”<sup>121</sup> Newsmax knew about the announcement and “Newsmax’s White House Correspondent, Emerald Robinson, had been responding to and

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<sup>114</sup> *Id.* ¶ 93.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* ¶ 95.

<sup>117</sup> *Id.* ¶ 96.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* ¶¶ 97-98.

<sup>120</sup> *Id.* ¶ 99.

<sup>121</sup> *Id.* ¶ 100.

reposting then-CISA Director Christopher Krebs’ ‘Rumor Control Update’ posts debunking election fraud claims on Twitter since November 6.”<sup>122</sup>

On November 12, 2020, the New York Times published a story about Newsmax courting Fox viewers with election denialism.<sup>123</sup> The story quoted Mr. Ruddy and noted that Newsmax “has promoted a parade of conspiracy theories and false allegations of voter fraud.”<sup>124</sup>

On November 13, 2020, Chief Judge Kenny of the Third Circuit Court in Wayne County, Michigan rejected an attempt to block the certification of the vote in Wayne County.<sup>125</sup> Chief Judge Kenny rejected claims of election fraud and concluded “Plaintiffs’ interpretation of events is incorrect and not credible.”<sup>126</sup> The same day, multiple Newsmax hosts tweeted about Dominion.<sup>127</sup> Newsmax host Benny Johnson tweeted “Ban mail-voting and Dominion voting machines and pass mandatory voter ID, NOW.”<sup>128</sup> Newsmax host Michelle Malkin posted a tweet suggesting that Dominion was associated with Antifa: “Joe Oltmann (now banned on Twitter) exposes pro-Antifa, cop hatred-inciting rants of #EricCoomer, VP of strategy/security of Dominion Voting Systems. ‘What if I told you he is a major shareholder’ in Dominion & ‘owns patents associated with other voting systems?’ #MalkinLive.”<sup>129</sup>

By mid-November, more evidence was published exposing the lies about Dominion.<sup>130</sup> Fifty-nine specialists in election security publicly rebutted Newsmax’s claims about Dominion.<sup>131</sup> Newsmax knew about the statements debunking claims about Dominion rigging

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<sup>122</sup> *Id.* ¶ 101.

<sup>123</sup> *Id.* ¶ 102.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ¶ 103.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* ¶¶ 105-106.

<sup>128</sup> *Id.* ¶ 105.

<sup>129</sup> *Id.* ¶ 106.

<sup>130</sup> *Id.* ¶¶ 107-108.

<sup>131</sup> *Id.* ¶ 108.

the election because they were widely reported on and publicized.<sup>132</sup> Indeed, Newsmax reported these findings on its website, and Ms. Robinson continued to regularly respond to then-CISA director Krebs' tweets debunking false election fraud claims.<sup>133</sup>

#### **I. NEWSMAX CREATES A CAMPAIGN THAT DOMINION RIGGED THE ELECTION.**

Newsmax created a brand and campaign selling its audience on the idea that Dominion rigged the election and stole it from former President Trump.<sup>134</sup> Newsmax began this campaign with a segment on the primetime show *Greg Kelly Reports* titled, "*Democracy or Dominion*."<sup>135</sup>

On November 16, 2020, in its "*Democracy or Dominion*" segment, Newsmax and Mr. Kelly rebroadcast and endorsed an interview that aired on Fox featuring Ms. Powell claiming that Dominion's voting software was designed to shift millions of votes from former President Trump to President Biden.<sup>136</sup> Mr. Kelly commented in the segment that "the truth is finally told" and "the evidence is slowly emerging."<sup>137</sup> Mr. Kelly cut into Ms. Powell's interview and endorsed the claims about Dominion stating: "I believe her, and I don't believe the critics and the naysayers."<sup>138</sup>

Later that day, Newsmax aired Ms. Powell's comments about Dominion again alongside additional remarks from Mr. Giuliani amplifying the claims about Dominion rigging the election.<sup>139</sup> In that segment, Newsmax anchor Emma Rechenberg, host of *National Report*, aired Ms. Powell's statements again and asked Joe DiGenova to weigh in.<sup>140</sup> Mr. DiGenova stated:

Well the bottom line about Dominion is that it is a suspect company. It's used in twenty-seven states in the United States and there's a reason it isn't used in the other

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<sup>132</sup> *Id.* ¶ 109.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* ¶ 110.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* ¶ 111.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* ¶ 112.

<sup>139</sup> *Id.* ¶ 113.

<sup>140</sup> *Id.* ¶ 114.

twenty th[ree]. They're smarter. It has an origin in Venezuela with friends of Hugo Chavez. The company that runs it now has the counting done overseas in Germany and Barcelona.<sup>141</sup>

The next day, Newsmax anchor Heather Childers interviewed Dick Morris.<sup>142</sup> Ms. Childers minimized CISA's November 12, 2020 statement that the election was secure by falsely stating that Dominion was a member of CISA's board of directors.<sup>143</sup> During the interview, Mr. Morris also said that Dominion was a shell company and the real motivation behind Dominion rigging the election was the Chinese communist party and Hugo Chavez supporters in Venezuela.<sup>144</sup> Newsmax refused to retract these statements.<sup>145</sup> Since this segment, Mr. Morris has a regular show on Newsmax, *Dick Morris Democracy*.<sup>146</sup>

On November 17, 2020, Newsmax was the first of the television networks to broadcast Patrick Byrne.<sup>147</sup> On the *National Report*, Mr. Byrne claimed that he was funding "cyber security experts" who had proven that Dominion machines were hacked in the 2018 election in Dallas, Texas, and that same team had "data" proving that Dominion hacked "five counties" that "flipped" the electoral college from former President Trump to President Biden.<sup>148</sup> Mr. Byrne elsewhere described these claims as being the "last act" in the same purported long-running "deep state" conspiracy that he said had earlier involved him facilitating an \$18 million bribe to Hillary Clinton.<sup>149</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* ¶ 115.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ¶ 116.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* ¶ 117. On Byrne's post promoting his Newsmax interview he captions the video "The Cone of Silence was smashed today by NewsmaxTV. That itself will be a source of discuss [sic] sometime in the future. In the meantime, enjoy. . . . Let the record show that numerous other journalists have had this story. . . None would run with the story." *Id.*

<sup>148</sup> *Id.* ¶ 118.

<sup>149</sup> *Id.*

**J. DOMINION SENDS FACTS TO NEWSMAX TO REBUT NEWSMAX’S CLAIMS.**

Dominion began circulating an email titled “SETTING THE RECORD STRAIGHT: FACTS & RUMORS” with links to independent sources disproving claims made about Dominion.<sup>150</sup> Dominion maintained a page on its public website with this information from November 11, 2020, onwards.<sup>151</sup>

On November 17, 2020, at 3:10 PM EST, Dominion sent its first “SETTING THE RECORD STRAIGHT” email to Newsmax’s booking producer, Alicia Hesse.<sup>152</sup> Ms. Hesse is involved with soliciting guests to speak on Newsmax TV, including Mr. Kelly’s show.<sup>153</sup> Newsmax believes that Ms. Hesse shared the contents of the emails she received from Dominion with the hosts and other producers for the shows she books.<sup>154</sup> Dominion did not receive a reply from Newsmax to this email.<sup>155</sup>

**K. NEWSMAX CONTINUES TO AIR ACCUSATIONS OF FRAUD AGAINST DOMINION AND RECEIVES VIEWERSHIP BUMP.**

On November 17, after Dominion sent the first “SETTING THE RECORD STRAIGHT” email, Mr. Kelly hosted Ms. Powell on *Greg Kelly Reports*.<sup>156</sup> Ms. Powell claimed to have “evidence” of “the guy who founded” Dominion admitting “he can change a million votes, no problem at all” and continued to falsely link Dominion with election rigging.<sup>157</sup> Ms. Powell did not have any such evidence.<sup>158</sup>

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<sup>150</sup> *Id.* ¶ 119.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ¶ 120.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* ¶ 121.

<sup>156</sup> *Id.* ¶ 122.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* ¶ 123.

Also on November 17, 2020, the Chairman of the Maricopa County Board of Supervisors reported that there was no evidence of voter fraud and that the hand count audit showed the machines generated an accurate count.<sup>159</sup> The Associated Press then released a report debunking the claim that Smartmatic owns Dominion.<sup>160</sup> The *Wall Street Journal* also reported that Dominion “was a linchpin in the 2020 election that federal and state officials praise as being free from tampering.”<sup>161</sup> The Editorial Board for *The Wall Street Journal* published a piece that same day that refuted false claims about Dominion and stated, “there’s no good evidence of voting problems that would come close to” calling into question Biden’s leads in the swing states.<sup>162</sup> Dominion sent that article to Newsmax.<sup>163</sup>

On November 18, 2020, former President Trump called Mr. Ruddy.<sup>164</sup> Mr. Ruddy reported that former President Trump “said that its just incredible, the ratings you’re getting, and everyone’s talking about it” and told Ruddy to “keep up the good work.”<sup>165</sup> Mr. Ruddy tweeted several times that day.<sup>166</sup> First, Mr. Ruddy tweeted: “Fox News ‘stabbed us in the back.’ Is Newsmax out new alternative?”<sup>167</sup> Later that day, Mr. Ruddy tweeted: “Another call today from @realDonaldTrump, he’s wowed by Newsmax TV’s ratings and big buzz. Says he’s gaining in Michigan, more Coming! Keep watching @newsmax: nws.mx/tv.”<sup>168</sup>

Newsmax published on its website that it was telling “the stone-cold truth, and once you get a taste of it, you will never tolerate being lied to again.”<sup>169</sup> At the same time, Fox continued

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<sup>159</sup> *Id.* ¶ 124.

<sup>160</sup> *Id.* ¶ 125.

<sup>161</sup> *Id.* ¶ 126.

<sup>162</sup> *Id.* ¶ 127.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* ¶ 128.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* ¶ 129.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* ¶ 130.

<sup>169</sup> *Id.* ¶ 131.

to air accusations about Dominion.<sup>170</sup> On November 19, 2020, in an interview between Lou Dobbs and Ms. Powell on Fox, Mr. Dobbs endorsed Ms. Powell’s statement that “Smartmatic owns Dominion.”<sup>171</sup>

On November 19, 2020, Newsmax continued to broadcast false claims about Dominion.<sup>172</sup> Over the course of three segments, Mr. Stinchfield combined Ms. Powell’s and Mr. Giuliani’s statements about Dominion with his own story that he and his team had independently uncovered the evidence that Dominion rigged the 2020 election.<sup>173</sup> Mr. Stinchfield described the allegations against Dominion as “what we here on *Stinchfield* have been warning about for the past few weeks.”<sup>174</sup> Mr. Stinchfield assured viewers that Ms. Powell and Mr. Giuliani had “tons of evidence,” including “sworn witness affidavits” to back up their claims about Dominion.<sup>175</sup> Mr. Stinchfield also told his viewers that the evidence that Dominion committed election fraud and “has ties to communist Venezuela” was “damning.”<sup>176</sup> In the same segment, Mr. Stinchfield replayed Ms. Powell’s press conference and added commentary that his “investigative unit” had been “uncovering” the same claims about Dominion for weeks.<sup>177</sup>

Also on November 19, 2020, Fox’s Tucker Carlson publicly called out Ms. Powell for failing to produce evidence to support the claims she had been making about Dominion.<sup>178</sup> Mr. Carlson’s staff checked the accuracy of Ms. Powell’s statements about Dominion with the Trump campaign who said that Ms. Powell had “never given them any evidence either” and Mr. Carlson

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<sup>170</sup> *Id.* ¶ 132.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* ¶ 133.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* ¶ 134.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* ¶ 136.

<sup>178</sup> *Id.* ¶ 138.

concluded that Ms. Powell “never demonstrated that a single actual vote was moved illegitimately by software from one candidate to another. Not one.”<sup>179</sup>

Despite the reporting by Fox, Newsmax continued to broadcast stories about Dominion and election rigging.<sup>180</sup> Newsmax’s Chris Salcedo aired clips of Mr. Giuliani making allegations against Dominion.<sup>181</sup> Mr. Salcedo said that Stinchfield has been good about exploring Dominion voting machines and endorsed the false claims that Dominion was owned by affiliates of Chavez and Maduro and that votes were counted overseas.<sup>182</sup>

On November 19, 2020, Georgia also completed its 100% hand audit recount.<sup>183</sup> Georgia’s Secretary of State, Brad Raffensperger reported that the audit “upheld and reaffirmed the original outcome produced by the machine tally of votes cast.”<sup>184</sup> Newsmax knew about the accuracy of Dominion’s voting systems and reported the results of the Georgia hand count on its website the same day.<sup>185</sup>

The next day, November 20, 2020, Newsmax brought Ms. Powell back on air to the *Howie Carr Show*.<sup>186</sup> Ms. Powell claimed that Dominion’s voting system used an “algorithm” to switch ten million votes from former President Trump to President Biden.<sup>187</sup> Ms. Powell also claimed that executives at Dominion went to Detroit on the night of the election when votes were being counted and challenged.<sup>188</sup> In the same segment, Ms. Powell claimed to have evidence that Eric Coomer, who at the time worked for Dominion, was on “a conference call or

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* ¶ 139.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* ¶¶ 137, 140.

<sup>184</sup> *Id.* ¶ 140.

<sup>185</sup> *Id.* ¶ 137.

<sup>186</sup> *Id.* ¶ 142.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

something, a Zoom supposedly with the antifa and he said don't worry about Trump, I've already made sure he's going to lose the election.”<sup>189</sup> When Ms. Powell made these claims on air, the Michigan Secretary of State's website had already publicly debunked allegations of Dominion impacting the vote count in Detroit.<sup>190</sup>

On November 21, 2020, Newsmax invited Ms. Powell back on air.<sup>191</sup> Ms. Powell opined that the Georgia certification was a “total farce,” and that Georgia's Republican Governor, Brian Kemp, and Republican Secretary of State, Brad Raffensperger, had received bribes from Dominion and were in on the scam.<sup>192</sup> Governor Kemp and Secretary of State Raffensperger received death threats after these claims.<sup>193</sup>

Newsmax's revenues tripled in the fourth quarter compared to the prior year and ad revenues were expected to double again by the end of the first quarter of 2021.<sup>194</sup> On November 23, 2020, Mr. Ruddy stated that Newsmax was on a “hiring splurge” following the election.<sup>195</sup>

**L. DOMINION SENDS NEWSMAX MULTIPLE EMAILS REBUTTING FALSE CLAIMS AND NEWSMAX CONTINUES TO AIR ACCUSATIONS OF FRAUD AGAINST DOMINION.**

On November 22, 2020, the Trump Campaign disavowed Ms. Powell by issuing the following statement: “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.”<sup>196</sup> Other prominent Republicans acknowledged that statements by Ms. Powell and Mr. Giuliani about election fraud were unsupported.<sup>197</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* ¶ 143.

<sup>191</sup> *Id.* ¶ 144.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* ¶ 145.

<sup>194</sup> *Id.* ¶ 146.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* ¶ 147.

<sup>197</sup> *Id.* ¶¶ 148-149.

Even after prominent Republicans and the Trump Campaign itself publicly disavowed Ms. Powell, Newsmax continued to air stories about Dominion and election rigging.<sup>198</sup> On November 23, 2020, Newsmax host Benny Johnson stated on *The Benny Report* that Dominion employs “Trump-hating Antifa members as security engineers,” its voting systems are used in Venezuela, and the votes were counted off American soil.<sup>199</sup>

On November 24, 2020, Dominion sent another email to Ms. Hesse.<sup>200</sup> The email outlined the many statements, with links, made by conservative leaders over the prior 24 hours debunking false claims about Dominion.<sup>201</sup>

On November 25, 2020, CNN ran an article entitled “Fox News staffers thought Newsmax was a joke. But they’re not laughing anymore.”<sup>202</sup> The article discussed the concern at Fox about Newsmax’s growing viewership in the conservative media space because of Newsmax’s election reporting and radical ideas.<sup>203</sup> Mr. Ruddy retweeted the article.<sup>204</sup>

On November 26, 2020, Dominion sent another “SETTING THE RECORD STRAIGHT” email to Ms. Hesse, stating specific facts debunking claims that Dominion rigged the election in Pennsylvania.<sup>205</sup> For example, Dominion did not operate in many highly contested districts and former President Trump won twelve out of the fourteen counties in which Dominion operated.<sup>206</sup>

On December 1, 2020, then-U.S. Attorney General Bill Barr stated that the DHS and DOJ found nothing substantiating the claim that voting machines were programmed to skew election

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<sup>198</sup> *Id.* ¶ 150.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* ¶ 151.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* ¶ 152.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* ¶ 153.

<sup>206</sup> *Id.*

results.<sup>207</sup> Newsmax knew about Barr’s statement and the findings and reported the facts on Newsmax.com the same day.<sup>208</sup> On December 3, 2020, Dominion sent another fact sheet to Ms. Hesse, this time focusing on debunking claims about Dominion rigging the election in Georgia.<sup>209</sup> On December 7, 2020, a second Georgia hand recount again confirmed the results and accuracy of Dominion machines.<sup>210</sup> Newsmax reported this development on its website.<sup>211</sup> Nonetheless, Newsmax continued to host Ms. Powell and Newsmax personalities endorsed her fraud claims.<sup>212</sup>

Newsmax’s strategy paid off with increased viewership.<sup>213</sup> On December 8, 2020, Newsmax TV “notched a ratings win over Fox News Channel for the very first time.”<sup>214</sup> The next day, Mr. Ruddy boasted about the ratings win on Twitter.<sup>215</sup> Meanwhile, Fox continued to report on election fraud.<sup>216</sup>

#### **M. NEWSMAX PROVIDES A PLATFORM FOR MR. MORRIS AND MR. LINDELL.**

On December 14, 2020, Newsmax host John Bachman interviewed Mr. Morris.<sup>217</sup> Mr. Morris reported false claims that Dominion was invented by people working for Hugo Chavez and was designed so votes can be altered and not traced.<sup>218</sup> Two months later Mr. Morris received his own show on Newsmax, *Dick Morris Democracy*.<sup>219</sup>

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<sup>207</sup> *Id.* ¶ 157.

<sup>208</sup> *Id.* ¶ 158.

<sup>209</sup> *Id.* ¶ 159.

<sup>210</sup> *Id.* ¶ 160.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* ¶ 161.

<sup>213</sup> *Id.* ¶ 162.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* ¶ 163.

<sup>216</sup> *Id.* ¶ 164. On December 10, 2020, Fox tweeted a promotion for *Lou Dobbs Tonight* stating, “The 2020 Election is a cyber Pearl Harbor: The leftwing establishment have aligned their forces to overthrow the United States government #MAGA #AmericaFirst #Dobbs.” *Id.*

<sup>217</sup> *Id.* ¶ 166.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

On December 17, 2020, Mr. Stinchfield had Mr. Lindell appear on his show.<sup>220</sup> Mr. Lindell spread false claims about Dominion, including that Dominion’s algorithms intentionally changed votes in the middle of the night, which cost former President Trump the election.<sup>221</sup> Mr. Stinchfield reminded viewers that Mr. Lindell was “a big time advertiser here on Newsmax,” for which Newsmax was “grateful.”<sup>222</sup>

On December 18, 2020, Newsmax co-anchors Bob Sellers and Heather Childers invited Mr. Morris back on air.<sup>223</sup> Mr. Morris made false claims about Dominion including that the Antrim County, Michigan audit proved that the Michigan election results were altered by Dominion and Smartmatic.<sup>224</sup> These claims were false, and the Michigan audit had already concluded the opposite, a story Newsmax had posted to Newsmax.com the day before.<sup>225</sup>

**N. DOMINION DEMANDS THAT NEWSMAX RETRACT ITS FALSE STATEMENTS, BUT NEWSMAX REFUSES.**

On December 18, 2020, Dominion sent a formal retraction demand letter to Newsmax.<sup>226</sup> The letter demanded that Newsmax stop publishing false claims about Dominion.<sup>227</sup> The letter reiterated the truth about Dominion which was also included in the multiple emails Dominion previously sent to Newsmax, and in the public domain from election officials and other news agencies.<sup>228</sup> The letter attached a 15-page retraction demand letter that Dominion had sent to Ms. Powell two days earlier concerning the nearly identical lies about Dominion she had been spreading since election day.<sup>229</sup>

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<sup>220</sup> *Id.* ¶ 167.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* ¶ 168.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* ¶ 169.

<sup>226</sup> *Id.* ¶ 177.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* ¶ 178.

Newsmax refused to retract.<sup>230</sup> Instead, a few hours after Dominion sent the letter to Newsmax, Newsmax and Mr. Kelly invited Mr. Ramsland on air to promote Ramsland’s Antrim County Report.<sup>231</sup> Before the 2020 election, Mr. Ramsland claimed that the 2018 U.S. congressional election in Dallas, Texas and the 2019 gubernatorial election in Kentucky were “rigged by voting machines with links to Smartmatic and using Venezuelan election-stealing software controlled by a George Soros operative, and that votes had been sent to CIA-funded databases in Spain where they were changed and sent back to the United States.”<sup>232</sup> These claims were rejected as unverifiable and have been debunked.<sup>233</sup>

Mr. Ramsland filed numerous affidavits recycling arguments from his 2018 election fraud allegations in support of lawsuits brought by Ms. Powell and others seeking to throw out the 2020 Presidential Election results in several states.<sup>234</sup> No court found any of Mr. Ramsland’s affidavits to have merit.<sup>235</sup> Mr. Ramsland “was brought in by [Mr.] Byrne, [Mr.] Giuliani and others to write up a purportedly independent ‘report’ on the election results in Antrim County, Michigan,” which claimed that Dominion machines were designed to and did switch votes from former President Trump to President Biden.<sup>236</sup> The report was released on December 13, 2020.<sup>237</sup> Antrim County officials and other election experts, including Michigan’s Attorney General and Secretary of State, explained that the report was false, unsupported, and used incorrect technical terms.<sup>238</sup> The details of how deeply flawed the report was had been publicly

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<sup>230</sup> *Id.* ¶ 179.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* ¶ 31.

<sup>233</sup> *Id.* Mr. Byrne, Ms. Powell, Mr. Giuliani and others promoted Mr. Ramsland’s debunked claims about the 2018 and 2019 elections and promoted them to a global audience by working with Newsmax, OAN, Fox, and other media outlets. *Id.* ¶ 32.

<sup>234</sup> *Id.* ¶ 33.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* ¶ 34.

<sup>237</sup> *Id.* ¶ 171.

<sup>238</sup> *Id.* ¶¶ 34, 172-176.

known and readily available since at least November 7.<sup>239</sup> Additionally, on June 23, 2021, the Republican-led Michigan Senate Oversight Committee released a 55-page report, which found no evidence of widespread or systemic fraud in Michigan’s prosecution of the 2020 Presidential Election.<sup>240</sup> Despite these facts, Mr. Kelly had Mr. Ramsland on his show on December 18, 2020 and endorsed the claims in the Antrim County Report.<sup>241</sup>

**O. NEWSMAX ISSUES A CLARIFICATION REGARDING DOMINION.**

On December 19, 2020, Newsmax issued a “clarification” regarding its statements about Dominion rigging the election.<sup>242</sup> The clarification was titled “Facts about Dominion, Smartmatic You Should Know.”<sup>243</sup> The clarification acknowledged that: “No evidence has been offered that Dominion or Smartmatic used software or reprogrammed software that manipulated votes in the 2020 election.”<sup>244</sup> The clarification was not a wholesale retraction and was couched in terms that avoided correcting previous statements made by Newsmax.<sup>245</sup> For instance the clarification stated: “Dominion has stated its company has no ownership relationship with the House Speaker Nancy Pelosi's family, Sen. Dianne Feinstein's family, the Clinton family, Hugo Chavez, or the government of Venezuela.”<sup>246</sup>

**P. NEWSMAX INVITES MR. LINDELL ON THE AIR AGAIN.**

On December 21, 2020, two days after issuing its clarification, Newsmax invited Mr. Lindell on air.<sup>247</sup> Sebastian Gorka was guest hosting the *Greg Kelly Reports* and prefaced the Lindell segment by telling viewers that Newsmax was “not going to ignore” alleged evidence of

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<sup>239</sup> *Id.* ¶ 172.

<sup>240</sup> *Id.* ¶ 34

<sup>241</sup> *Id.* ¶ 179.

<sup>242</sup> *Id.* ¶ 180.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* ¶ 181.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* ¶ 184.

election fraud, “because we fight for the truth and we believe that this is still the greatest nation on God’s earth and nobody gets to steal it from us.”<sup>248</sup> Mr. Lindell began to discuss false claims of voter fraud and Dominion.<sup>249</sup> While Mr. Gorka cut in to tell Mr. Lindell “I don’t want to discuss,” he did not tell his audience that Mr. Lindell’s statements were false.<sup>250</sup>

**Q. DOMINION SENDS NEWSMAX A SECOND RETRACTION DEMAND LETTER AND NEWSMAX RESPONDS.**

On December 22, 2020, Dominion sent Newsmax a second retraction demand letter.<sup>251</sup> The letter explained that Dominion was “disappointed that Newsmax continues to publish lies about US Dominion Inc.,” despite Dominion’s first retraction demand letter.<sup>252</sup>

Newsmax responded to Dominion’s letters on December 28, 2020.<sup>253</sup> Newsmax’s lawyers acknowledged receipt of both retraction demand letters but ignored or denied that Newsmax made false statements about Dominion in broadcasts.<sup>254</sup> Newsmax’s response stated: “At no time did the hosts or Newsmax indicate support for or agreement with her [Powell’s] allegations. At the same time, they did not have any specific knowledge that the evidence she cited was non-existent, nor that her claims were false.”<sup>255</sup>

Newsmax removed two stories espousing false claims made by Ms. Powell from its website but then continued to publish lies about Dominion.<sup>256</sup> For example, on February 2, 2021, during an interview of Mr. Lindell about his recent Twitter ban, Mr. Lindell tried to claim he has “100% proof” of election fraud via Dominions voting systems.<sup>257</sup> Newsmax co-anchor

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* ¶ 185.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* ¶ 186.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* ¶ 187.

<sup>257</sup> *Id.* ¶ 188.

Bob Sellers interrupted Mr. Lindell, told the audience that Newsmax had not verified any of his claims, and then stormed off set.<sup>258</sup> However, the next day, facing backlash from Newsmax and its audience, Mr. Sellers apologized and called Mr. Lindell a “friend of this network” who would continue to be an important guest.<sup>259</sup> Over the next few months, Newsmax continued to push a fraud narrative that was now inextricably linked to Dominion through Newsmax’s prior false statements.<sup>260</sup>

On April 30, 2021, Newsmax issued an apology statement to Dr. Eric Coomer, Dominion’s then-Director of Product Strategy and Security.<sup>261</sup> Newsmax admitted that its hosts and guests published unproven claims that “Dr. Coomer played a role in manipulating Dominion voting machines, Dominion voting software, and the final vote counts in the 2020 presidential election” even though Newsmax had “no evidence that such allegations were true.”<sup>262</sup> However, Newsmax stated only that Dr. Coomer was not involved in the “manipulation” of voting machines during the 2020 election, and did not absolve Dominion of responsibility for alleged election fraud.<sup>263</sup> Newsmax continued to promote individuals who spread lies about Dominion including Mr. Lindell through July 2021.<sup>264</sup>

#### **R. NEWSMAX WRITES A LETTER TO DOMINION.**

Mr. Ruddy wrote a letter to Dominion Founder and CEO John Poulos on May 24, 2021.<sup>265</sup> Mr. Ruddy claimed that Newsmax never received Dominion’s December 18 retraction demand letter.<sup>266</sup> However, Newsmax’s lawyers admitted that “the email addresses used for Mr.

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* ¶ 189.

<sup>261</sup> *Id.* ¶ 190.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* ¶ 192-193.

<sup>265</sup> *Id.* ¶ 194.

<sup>266</sup> *Id.* ¶ 195.

Ruddy and Mr. Chandler” to send the letter “appear to be correct.”<sup>267</sup> Mr. Ruddy next claimed that neither he nor Newsmax generally knew that information it published about Dominion were lies and that they continue to be unaware “of any independent review and examination of the voting software.”<sup>268</sup> Mr. Ruddy also claimed that all Newsmax did was “report then President Trump’s public claims, the claims made by his lawyers, and claims they made in legal documents in several states.”<sup>269</sup>

#### **S. FURTHER EVIDENCE COMES OUT DISPROVING FALSE CLAIMS ABOUT DOMINION.**

More evidence surfaced demonstrating the falsity of claims Newsmax made about Dominion in the months following Mr. Ruddy’s letter.<sup>270</sup> In June, 2021, the Republican-led Michigan Senate Oversight Committee released a 55-page report, which found no evidence of widespread or systemic fraud in Michigan’s prosecution of the 2020 Presidential Election.<sup>271</sup> The report specifically called out individuals like Mr. Lindell and Mr. Ramsland for their false claims about systemic fraud in Michigan, stating that they “have been utilizing misleading and false information about Antrim County to raise money or publicity for their own ends.”<sup>272</sup> Additionally, on June 24, 2021, Mr. Giuliani was suspended from the practice of law in New York after it was determined he had “made knowing false and misleading factual statements to support his claim that the presidential election was stolen from his client [Donald Trump],” based on “uncontroverted evidence.”<sup>273</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* ¶ 196.

<sup>269</sup> *Id.* ¶ 197.

<sup>270</sup> *Id.* ¶ 198.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* ¶ 199.

#### **T. THE DOMINION CLAIMS GO VIRAL AND NEWSMAX PURPORTEDLY BENEFITS.**

Newsmax’s ratings jumped almost ten times in the week after the election.<sup>274</sup> Daily active users of Newsmax’s mobile app increased by a multiple of almost 14 from October 20, 2020 to November 24, 2020.<sup>275</sup> Newsmax secured 32 times more downloads of its mobile apps by February 2021 than it had in the weeks prior to the election.<sup>276</sup> The lies about Dominion went viral and millions of Americans believe the false claims that Dominion rigged the 2020 election.<sup>277</sup>

Newsmax’s website traffic spiked by 145% in December 2020 over the previous year.<sup>278</sup> In November 2020, Newsmax’s app was downloaded over 3 million times which Newsmax attributed to “attracting millions who are leaving Fox News and switching to Newsmax TV.”<sup>279</sup> Newsmax received a rise in advertising revenues as well.<sup>280</sup>

#### **U. DOMINION SUFFERS HARM FROM THE FRAUD ACCUSATIONS.**

The viral claims linked Dominion to fraud.<sup>281</sup> Dominion and its employees have received death threats and calls for jail time.<sup>282</sup> On July 4, 2021, someone threw a brick through the window of a Dominion office.<sup>283</sup> Dominion has expended over \$600,000 on private security because of these threats.<sup>284</sup> Dominion has also spent more than \$700,000 attempting to mitigate harm caused by the viral disinformation campaign.<sup>285</sup> Election officials—Dominion’s actual and

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<sup>274</sup> *Id.* ¶ 204.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* ¶¶ 205-210.

<sup>278</sup> *Id.* ¶ 212.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* ¶ 213.

<sup>281</sup> *See id.* ¶¶ 214-216.

<sup>282</sup> *Id.* ¶¶ 217-223.

<sup>283</sup> *Id.* ¶ 224.

<sup>284</sup> *Id.* ¶ 225.

<sup>285</sup> *Id.* ¶ 226.

potential customers—have received emails, letters, and calls from their constituents demanding that they cease and avoid contracting with Dominion or using Dominion machines.<sup>286</sup>

Legislators in various states where Dominion contracts—including Arizona, California, Colorado, Florida, Michigan, Ohio and Pennsylvania—stated their intent to review and reassess the Dominion contracts.<sup>287</sup> Louisiana cancelled its reassessment and bid process, prohibiting Dominion from securing a new \$100-million-plus contract.<sup>288</sup> Louisiana’s Secretary of State, Kyle Ardoin said Louisiana cancelled the bid process because of “damage to voter confidence done by those who willfully spread misinformation and disinformation.”<sup>289</sup> Given the long-term nature of Dominion’s contracts, the economic harm Dominion suffers will continue to play out over the next years.<sup>290</sup> Election officials have told Dominion that it is losing business “because of the Dominion name” and Dominion stands to lose at least \$70 million in net profits.<sup>291</sup>

The disinformation campaign caused numerous states and local governments to review and potentially cancel contracts with Dominion.<sup>292</sup> Additionally, the disinformation campaign has spurred sham audits which continue to harm Dominion.<sup>293</sup> Notably, an audit conducted in Arizona was discredited by independent election experts as a sham.<sup>294</sup> Other jurisdictions across the country—including counties in Pennsylvania and Georgia—have conducted sham audits.<sup>295</sup>

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<sup>286</sup> *Id.* ¶ 228.

<sup>287</sup> *Id.* ¶ 229.

<sup>288</sup> *Id.* ¶ 230.

<sup>289</sup> *Id.* ¶ 231.

<sup>290</sup> *Id.* ¶ 232.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* ¶¶ 233-236.

<sup>293</sup> *Id.* ¶ 236.

<sup>294</sup> *Id.* ¶ 237-240.

<sup>295</sup> *Id.* ¶ 241-246.

## V. SPECIFIC ALLEGEDLY FALSE AND DEFAMATORY STATEMENTS

On November 10, 2020, Newsmax’s White House Correspondent, Ms. Robinson, tweeted that: “All crooked roads lead to Dominion Voting Systems” in direct response to her retweet of the false statement, “Little tidbit: Smartmatic is the electronic voting systems company that has been used in Venezuela since 2004. Its name is synonymous with fraud for most Venezuelans. Since 2009, Smartmatic has been a subsidiary of Dominion.”<sup>296</sup>

On a November 16, 2020, *Greg Kelly Reports* broadcast in a segment titled “Democracy or Dominion”, which Newsmax broadcast live on television, and republished on Newsmax’s YouTube channel, Newsmax’s Facebook account, and Newsmax’s Twitter account:

Greg Kelly: . . . I think this country, this planet, could be in for the awakening of the millennium, something that we haven’t seen in thousands of years, as this election, the truth is finally told. . . . Folks, I think we will be in for the shock of our lifetime this is going to be wild; and the evidence is slowly emerging. Yes, I would like to have seen it yesterday; but the president has some very, very smart lawyers. One of my favorites, Sidney Powell. She helped Michael Flynn beat the travesty of a case that was lodged against him. She’s a former federal prosecutor. And you tell me, does she -- seem like she’s speaking the truth? She spoke to Maria Bartiromo over the weekend.

Sidney Powell: President Trump won by not just hundreds of thousands of votes, but by millions of votes, that were shifted by the software that was designed expressly for that purpose. . . . It was exported internationally for profit by the people that are behind Smartmatic and Dominion. They did this on purpose. It was calculated. They’ve done it before. We have evidence from 2016 in California. We have so much evidence, I feel like it’s coming in through a fire hose.

Kelly: I believe her. And I don’t believe the critics and the naysayers. . . .

Kelly: Talking about Dominion. This company, the software; there are a lot of concerns. And what she’s saying, I’m believing. Big problems, vulnerabilities, votes that can be switched. It happened before in South Carolina. And Sidney Powell is right . . . .<sup>297</sup>

On the November 16, 2020, *Greg Kelly Reports* broadcast:

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<sup>296</sup> *Id.* ¶ 248.

<sup>297</sup> *Id.*

Dick Morris: . . . I believe that this election was absolutely stolen.

Greg Kelly: . . . I agree with you, by the way. . . .

Morris: . . . You asked me if I was confident that it had been stolen. I certainly am, and I think we have to fight and fight and fight to get the truth out here about Dominion and about the recounts. . . .<sup>298</sup>

On the November 16, 2020, *National Report* broadcast.<sup>299</sup>

Sidney Powell: We're fixing to overturn the results of the election in multiple states. And President Trump won by, not just hundreds of thousands of votes, but by millions of votes, that were shifted by this software that was designed expressly for that purpose. We have sworn witness testimony of why the software was designed; it was designed to rig elections.

. . .

Rechenberg (Newsmax host): And Joe, I'll go back to you then, too, because it wasn't just the observers staying out of the counting area, it was also this Dominion voting service, this -- this technology here. What have you researched about that, and what's the Trump legal team doing in regards to Dominion?

DiGenova: Well, the bottom line about Dominion is -- is that it is a suspect company. . . . It has an origin in Venezuela with friends of Hugo Chavez. The company that runs it now has the counting done overseas in Germany and Barcelona.<sup>300</sup>

On the November 17, 2020, *American Agenda* broadcast:

Heather Childers: . . . you know, everyone saw the statement that came out allegedly from the DHS that said this was the safest election ever, I think, in the history of elections. But what people did not know, I didn't realize, is sitting on that board of the Department of Homeland Security, Cybersecurity and Infrastructure Security Agency, was, in fact, Dominion and Smartmatic.

Dick Morris: Right, that's true. And also remember, Dominion is a -- kind of a shell company. The real owners, the real motivators of Dominion are the Chinese Communist Party and two Chavez supporters in Venezuela, who shortly after Chavez seized power, invented the Dominion Voting System as a method of stealing elections in Venezuela. And as a result, they were kicked out of Venezuela, Argentina, and a whole host of other countries. . . .

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<sup>298</sup> *Id.*

<sup>299</sup> Newsmax broadcast live on television and republished on Newsmax's Facebook account and Instagram account.

*Id.*

<sup>300</sup> *Id.*

Bob Sellers: . . . By the way, folks, you can get Dick's up-to-the-minute news by going to DickMorris.com, subscribing free.<sup>301</sup>

On the November 17, 2020, *National Report with Emma Rechenberg* broadcast:

Emma Rechenberg: If you don't mind, kind of break down how you're connected to this Dominion machine voting system and why you have some concerns about it. . . .

Patrick Byrne: . . . This election was hacked. This election was hacked. The outcome has been rigged. I did not vote for Trump. I'm a small L libertarian, never voted Republican or Democrat for president in my life. I'm saying this election was rigged. I'm a CEO who built a \$2 billion tech company. I don't mean to sound like I'm beating my chest. I was national entrepreneur of the year, you go back a decade, for building a \$2 billion tech company, Overstock. I know what I'm talking about. Yeah, I'm also a Ph.D. from Stanford and a Marshall scholar besides. I'm putting all that credibility on the line. This election was hacked, the outcome was rigged and should be completely ignored or discounted, I mean, through the court system. The courts should throw it out. . . . How I know this is this.

Rechenberg: Right. You sound like Trump's legal team right now, so we're all on the same page. You sound like what their claims are as well, and clearly you have the experience and the expertise in regards to maybe shedding some light on how you know that to be true, yeah.

Byrne: Okay. Here's how I know that. I'm backing -- I have the data incidentally. I have the data, the electronics, everything. I have been backing and supporting some cyber security experts, a number of different groups. This is how it came about. In 2018, the Dallas election had irregularities. The Texas state government hired an elite cyber security company to go in and study what had happened in 2018, and they reverse engineered it. And when you reverse engineer something, that's when you take the final product and you get a bunch of people to study and they break it apart and figure out how you built it so they can go copy it. These guys reverse engineered the 2018 Dallas irregularities which turned out to be a hack. Dominion ran it. It was Dominion's technology that ran it. . . .

. . . I'm putting my -- I was a Marshall scholar, a Ph.D. from Stanford. . . . I built a \$2 billion company. I'm putting it all on the line. This entire election was hacked. It's far easier to have hacked this than a PayPal or your Venmo account.

Rechenberg: Sure. I mean, we've seen hacks on major social media outlets before in this year alone. My mind goes to Twitter. Are you in touch with the Trump campaign, and would you advise when they are pursuing these lawsuits specifically about Dominion, that they would bring on board someone who would be able to

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<sup>301</sup> *Id.*

prove that they could, in fact, change votes for Donald Trump to Joe Biden? Would that be provable in court if you brought on the right person?

Byrne: Absolutely provable. We have the data. We have the data. You do not have to worry. The only question is how quickly can the process intake versus how quickly the goons are trying to shut down the process so they can seal this all in cement. Now, I'm saying this again. I did not vote for Mr. Trump. I respect him. He got elected President. He's -- so this isn't a Trump supporter coming out and saying this. I'm a tech CEO, national entrepreneur of the year for building a tech company, if you go back about -- Ernst and Young about 10 years ago. I know what I'm talking about, and this thing is child's play to have beaten. It's embarrassing. And Trump is actually correct, his campaign is correct.

Rechenberg: Have they reached out to you?

Byrne: I'm one step ahead of the sheriffs myself because of the fact that I've come out about some things, so I don't work for them, anything like that. I'm not a donor to them, but I've been using my own resources to unscramble this and I'm trying to feed it into the system. Yes, the system is taking it in. They have their other sources, but we have all the goods, they're absolutely correct.

Rechenberg: And do you believe it was millions of votes that were again flipped from Donald Trump to Joe Biden?

Byrne: Well, the main event is not the total number of millions. It was not widespread deep. It was narrow and deep. It was very strategic.

Rechenberg: In select states, you're saying?

Byrne: Select counties.

Rechenberg: Okay.

Byrne: Five counties that really matter, and they realize if you hack these five -- well, they're very -- a small number of places, if you defeated the election you could flip the states and you could flip from that flip the electoral college. And how it was done -- I mean people can see this in news they already know if you think about this. Doesn't it seem a little odd that Mr. Biden was behind in states, you know, 600,000 votes, and then he has this come from behind victory and wins by 14,000?

Rechenberg: I know. That's what so many people are asking. That is what a lot of people are asking.

Byrne: 800,000.<sup>302</sup>

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<sup>302</sup> *Id.*

On the November 17, 2020, *Greg Kelly Reports* broadcast:<sup>303</sup>

Powell: . . . we know Dominion has a long history of rigging elections. That's what it was created to do to begin with. . . . We've got increasingly mounting evidence of significant fraud across multiple states that cast in the question the validity of the elections in every swing state; including Nevada and Arizona and Michigan, Wisconsin, Georgia. And it went beyond that, too.

Kelly: You know regarding Dominion. . . .

Powell: And worse than that it had a backdoor so it could be manipulated by anyone who could access it through that backdoor. And that was a deliberate feature the affidavit of the young military officer we provided yesterday to the public explains how it was created for that very purpose, so Maduro -- I mean, so Hugo Chavez would never lose another election. And he did not after that software was created. He won every single election. And then they exported it to Argentina, and other countries in South America, and then they brought it here. And they -- it's a foreign company no matter how you look at it. So they've already violated the President's order against foreign interference in our elections. Our votes were actually eventually counted in Barcelona, Spain or Frankfurt, Germany on foreign servers. It's absolutely stunning. And what's really stunning is the effort that is being mounted against getting the truth out on this. But you have to realize that every tech company, every media company, every social media company, scads of globalist corporations have been doing business in countries with these dictators that have been installed through this rigged election system for decades. The corruption is actually worldwide in [sic] going to upset a countless number of elections across this country and -- and around the world.

Kelly: All right.

Powell: So we need to do that to get rid of the corruption.

Kelly: It does make a lot of sense now. . . .

Powell: . . . We can -- got the evidence from the word -- the own mouths of the guy who founded the company. I haven't even had a chance to get that out to the public yet, but they admit -- the founder of the company admits, he can change a million votes no problem at all.

Kelly: The founder of Dominion admitted a long time ago, recently to you, can -- tell us more, please.

Powell: Publicly. I will -- I will tweet out the video later, and I'll tag you in it.

Kelly: Please do. @GregKellyUSA if you don't mind. . . .

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<sup>303</sup> Newsmax broadcast live on television and republished on Newsmax's YouTube account. *Id.*

. . .

Powell: . . . I think we'll find he had at least 80 million votes. The only reason the glitches happened in the system was because he was so -- he had so far many more votes than they had calculated in advance, their algorithms wouldn't perform the functions they had originally performed or were set to perform. They couldn't make up the vote count he had gotten so many hundreds of thousands more than they planned. So that's when they had to stop the counting and come up with a way to back fill the votes or destroy votes for Trump while they fabricated votes for Biden.

Kelly: Sidney Powell, who is a former federal prosecutor, by the way, spent ten years working for the government. Good luck. And by the way, very quickly, you have evidence, it's coming in fast. There is a reason for not making public, correct? I mean, you're going to have a hostile media picking it apart, possibly trying to destroy your case before you can even make it; is that part of your thinking? Very briefly, if you don't mind.

. . .

Kelly: Well, millions are praying for you and with you. And find her on Twitter, the least we can do. SidneyPowell1. @SidneyPowell1, the numeral one. We appreciate it so much. Good luck, and please stay safe.<sup>304</sup>

On the November 17, 2020, *Wake Up America* broadcast:<sup>305</sup>

Emerald Robinson: . . . [I]n the last 24 hours she has released a very long detailed whistleblower statement that she says is by a high-ranking military official with firsthand knowledge of Dominion Voting Systems, and how they can be misused. In the statement the whistleblower describes the evolution of Dominion Voting machines and Smartmatic software. Smartmatic software is what was used by Hugo Chavez and his successor to fix elections in Venezuela. This whistleblower said that the software was -- was developed in conjunction with Chavez in order to appease his desires to manipulate the vote in Venezuela in a way that could not be detected. The whistleblower goes on to -- went on to describe in detail his firsthand experience watching the votes being manipulated in Venezuela in their 2013 presidential elections. He goes on to say that the Smartmatic software is -- that all the vote tabulating machines, including Dominion Voting machines, uses a derivative or a descendant of Smartmatic software saying that it's in the DNA of every software program used by every voting machine. In the statement he says quote: "The fact that the voting machine displays a voting result that the voter intends and then prints out a paper ballot which reflects that change does not matter. It is the software that counts the digitized vote and reports the results. The software itself is the one that changes the information electronically to the result that the operator of the software and vote counting system intends to produce that counts. He says that he came forward because he's concerned about what he's seeing in the

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<sup>304</sup> *Id.*

<sup>305</sup> Newsmax broadcast live on television and republished on Newsmax's Twitter account. *Id.*

2020 presidential election saying, quote: “The circumstances and events are eerily reminiscent of what happened with Smartmatic software electronically changing votes in the 2013 presidential election in Venezuela.” He describes what he saw on election night in five key, battleground states using Dominion Voting Systems, that includes Georgia, where the vote count was stopped and went offline for several hours when President Trump was ahead in the vote; when they came back online, later in the wee hours of the morning, then Joe Biden had taken the lead significantly.<sup>306</sup>

On the November 19, 2020, *Stinchfield* broadcast:

Sidney Powell: . . . votes from President Trump and flipped them to President Biden; which we might never uncovered had the votes for President Trump not been so overwhelming in so many of these states that it broke the algorithm that have been plugged into the system, and that’s what caused them to have to shut down.

Grant Stinchfield: This is unbelievable. That’s President Trump’s attorney, Sidney Powell, laying out evidence that a corrupt algorithm in the Dominion Voting System starts switching votes from President Trump to Biden on election night, and it’s such a massive scale it crashes the system. That’s when we see the (inaudible) them all stop counting. This is why multiple states stopped counting ballots in the middle of the night, she says. But she also says the states, what they did afterwards, was absolutely shocking.

Powell: That’s when they came in the back door with all the mail-in -- mail-in ballots, many of which they had actually fabricated. Some were on pristine paper with identically matching perfect circled dots for Mr. Biden; others were shoved in, in batches. They’re always put in a certain number of batches, and people would rerun the same batch. This corresponds to our statistical evidence that shows incredible spikes in the vote counts at particular times.

Stinchfield: So she says the algorithm was designed to crash allowing these states to shut down and usher in thousands of fake ballots for Biden. It all makes sense now, if this is true, right? And she says it proves all the research that our investigative unit here on Stinchfield has been uncovering. . . .

. . .

Stinchfield: . . . The bottom line is, the media is going to ignore all this anyway. Not us though. That’s Jenna Ellis, of course, ripping into the media naysayers who been hounding the president’s campaign for proof of widespread voter fraud. Today the campaign, as we said, dropped a bomb on the left detailing some of the evidence they have been able to compile so far and it is damning. . . .<sup>307</sup>

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<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

On the November 19, 2020, *Chris Salcedo Show* broadcast:

Grant Stinchfield: . . . but I think if you're going to prove fraud, the electronic pathway to that is the way you're going to have to do it, and it may be the most simple way to do it. We've been on the forefront on our show Stinchfield of going into the Dominion Voting Systems. . .

Chris Salcedo: . . . Stinchfield has been very good on the forefront of exploring the Dominion Voting Machines, Salcedo Show has been exploring and trying to sound the alarm bells for -- for months now, about how our votes are tabulated outside the country. Rudy Giuliani spoke on this today. And -- and just listen to him lay this out. I -- my jaw dropped because it was -- A, it was validation from what we've been reporting. And B, to hear Rudy Giuliani talking about it was just amazing. Listen.

Rudy Giuliani: . . . you should be more astounded by the fact that our votes are counted in Germany and in Spain by a company owned by affiliates of Chavez and Maduro. . . .

Salcedo: . . . number two -- I mean, the fact they were able to lay out that case, Grant, was just -- jaw dropping to me.

Stinchfield: . . . we saw, Chris that these votes had gone through a server in Frankfurt, Germany. I know there was a lot of talk about what happened to these servers in Frankfurt, Germany; what's confirmed and what's not. But what I can tell you is the people that I've talked to absolutely proved that votes were going from certain states through this server. And lo and behold, we put up the IP address of that Frankfurt server, the next day, after Stinchfield aired that, the server was taken offline, Chris. You can't even find it anymore.<sup>308</sup>

On the November 20, 2020, *The Howie Carr Show* broadcast:

Sidney Powell: . . . a lot of evidence of fraud is going to be coming out next week. I've got just more than I can say grace over right now coming in every day. It only gets worse and worse. This was very widespread. Very deliberate. Very well-funded. . . .

. . .

Powell: Yeah, we have a lot of extremely solid evidence. It's beyond impressive and absolutely terrifying.

. . .

Howie Carr: So how many fraudulent votes do you think that Joe Biden had on his side . . . of the slate?

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<sup>308</sup> *Id.*

Powell: Probably at least ten million.

Carr: Ten million fraudulent votes?

...

Carr: So did -- did most of these votes disappear for the President and appear for Joe Biden in the -- in those states that are still being fought over or -- or did this go on -- how many states did this go on in?

Powell: I think the -- well, there are several ways that they did this. One was an algorithm that I believe they ran nationwide, but I can't say that for sure yet, because we haven't had the time to run the data nationwide. But that would typically be the way it would be done. And certainly make it less apparent that it had been done in any one place if they ran the algorithm consistently across the country. So, for example, they can dial it -- literally dial it -- to every time there was a vote for Trump or -- that it be weighted at 0.75, and every vote for Biden be weighted at 1.25. . . . So I don't think any state was safe from it, despite the best efforts of some not to use the Dominion Voting Systems which were clearly fraudulently created and sold.

...

Powell: . . . and then the other thing they did, where they had the real problem, was Trump won so overwhelmingly in all the states that had to cut off their machines, that they had to cut off their machines for hours to go in and backfill additional votes and move things around even more to make sure that Biden won. . . . We found . . . pristine ballots with only a computer-made dot for Biden, and all of them were alike. They could just stick those in the machine in batches and run them through repeatedly and count, you know, hundreds of thousands of votes that way. There's a drag-and-drop feature to take Trump votes and put them in a trash can or assign them to a third-party candidate or move them from a third-party candidate to Biden. I mean, I think they did absolutely everything. And we also have information that one of the high people in Dominion Voting Systems went to Detroit to operate the system himself there that night at the -- the Detroit center.

...

Carr: Let me ask about this guy Eric Coomer. He's -- I think he -- he works for Dominion, he's -- he's Berkeley, California University of California grad. He's the one who was allegedly -- there's a -- he was on a conference call or something, a Zoom, with -- with Antifa and he said, supposedly: Don't worry about Trump, I've already -- I've already made sure he's going to lose the election. . . is that true, for -- for starters . . . ?

Powell: Yes.

Carr: It's true? You have that . . . ?

Powell: It's true. Yeah, we -- we have an affidavit to that effect and we have . . . I think we have a copy of the call.

. . .

Powell: And also Dominion has shuttered up both of their offices in Canada where they shared an office floor with a George Soros entity. . . . And they have moved their office in Denver. And, of course, I'm sure there was a lot of document shredding and things, quote, "lost," end quote, in that process. You know, the FBI should have moved on all of this immediately; all of the voting machines should have already been impounded. The software should have been secured and examined. . . .

. . .

Powell: . . . in the meantime we will be producing additional evidence to help the public understand the breadth and depth of this international, frankly criminal conduct; and it will also reflect substantial foreign interference in our election.

Carr: Sidney Powell . . . Including China, correct?

Powell: Yeah. China, Iran, Serbia, Lichtenstein. Multiple places.<sup>309</sup>

On a November 21, 2020, broadcast interview:<sup>310</sup>

Rob Schmitt: . . .you know, if -- if you want to -- if you want to shut the media up, and they say that you guys have nothing; when will you have some of the stuff that's -- that's this hard core evidence in paper and writing?

Sidney Powell: Well, frankly, the affidavits we've already introduced are hard core evidence. . . . They're first-hand testimony of witnesses who saw how and why the system was created and how it worked to accomplish the objective for Hugo Chavez. . . . We've got all kinds of different evidence. And then we've the statistical and mathematical evidence that's absolutely irrefutable. . . . And we've got other testimonial evidence that appears to be coming in now to indicate the Democrats literally added 35,000 votes to every Democratic candidate to begin with.

. . .

Powell: . . . frankly, with everything we've got, these should be criminal prosecutions at a -- at a significant level for fraud and conspiracy to defraud . . . provable beyond a reasonable doubt. There are hundreds of thousands of people in our criminal system right now in prison who were convicted on far less evidence of guilt than we have here.

. . .

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<sup>309</sup> *Id.*

<sup>310</sup> Newsmax broadcast live on television and republished on Newsmax's YouTube account. *Id.*

Powell: . . . and they can see it. Everybody saw it on election night. They saw votes being subtracted from President Trump and appearing on the Biden side of the scale. And that's exactly what this Dominion System was designed to do. And we have . . . eyewitness testimony to its entire creation for that very purpose.

. . .

Schmitt: I mean how big of a -- you know, if -- if this happened, how big of a conspiracy, how many people would have had to been in on something like this?

Powell: Oh gosh. Probably thousands, including the people running the machines at each of the polls -- polling centers. We know, for example, that one of the higher ups of Dominion went to Detroit the night of the election to -- to handle things himself. And we also have evidence that there were any number of VPN lines open to the internet for foreign actors to be meddling in it.

. . .

Powell: . . . our key -- our witness from Venezuela who saw it all created and how it worked, said that he knew as soon as the machines were turned off in those key states, it was because we the people in voting Trump -- and voting for Trump in a landslide election, had essentially broken the algorithm that had been preprogrammed into the machine. . . .

. . .

Powell: . . . Georgia's probably going to be the first state I am going to blow up and -- and Mr. Kemp and the Secretary of State need to go with it, because they're in on the Dominion scam with their lastminute purchase or award of a contract to Dominion of \$100 million. The State Bureau of Investigation for Georgia ought to be looking into financial benefits received by Mr. Kemp and -- and the Secretary of State's family about that time. And another benefit, Dominion was created to award, is what I would call, election insurance. That's why Hugo Chavez had it created in the first place. . . .

. . .

Powell: . . . And it looks like it -- thirty-five thousand votes were added to every democratic candidate.<sup>311</sup>

On the November 23, 2020, *The Benny Report* broadcast:<sup>312</sup>

Benny Johnson: Finally, we get to Dominion Voting Systems. . . . Their voting systems are used in Venezuela. And their votes are counted off of American soil; if that tells you anything. . . .<sup>313</sup>

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<sup>311</sup> *Id.*

<sup>312</sup> Newsmax broadcast live on television and republished on Newsmax's YouTube account and Twitter account. *Id.*

<sup>313</sup> *Id.*

On the December 7, 2020, *Greg Kelly Reports* broadcast:<sup>314</sup>

Greg Kelly: . . . Gosh, we're pulling for you. As you know, this is an opinion show and we're on your side. How are you holding up, first of all?

. . .

Kelly: . . . You're still focused primarily on the Dominion Voting machines and the issues on a technical basis, correct?

Sidney Powell: . . . yes, we focused also on the systematic problem with the Dominion machines. We have an expert who has identified that the votes for Biden was 5% overall greater wherever there were Dominion machines than any of the other votes. That is essentially the amount of votes that it can flip and brag about being able to flip. We know from one of our -- one of our witnesses that these machines were created in Venezuela, and the entire process was started there to make sure Mr. Chavez won every election. And then, of course, the Wall Street Journal, I think, today featured Venezuela's rigged election for Maduro. This is the same technology. The same equipment. It came out of Venezuela to be used here. I would imagine our three letter agencies have a role in it. We're essentially fighting the entire globalist elite power structure that wants to control the world for their own financial benefit. . . .

Kelly: You know, two years ago, I would have said that sounds crazy; but after all that's happened, I think you're absolutely right. I think this is the way the world works. By the way, I do want to ask you about the servers overseas. Dominion reportedly has all kinds of internet connections and -- for whatever reason they were counting the votes in places like Spain and Germany. You have seen the reports, maybe you know firsthand that -- you know, some of these servers may or may not have been seized. Overseas equipment of Dominion taken possession of by forces friendly to the United States. Do you know anything about that?

Powell: . . . The Dominion system should never have been allowed in this country. They are internationally known. Our votes were counted in Frankfurt, Germany, and altered in Barcelona, Spain, and other places. We simply cannot allow that as the United States of America. . . .<sup>315</sup>

On the December 14, 2020, news broadcast:

Dick Morris: . . . Bear in mind, Dominion was invented by people working for Hugo Chavez, the Venezuelan dictator after he, quote, "lost" an election. And he then decided to, quote, "win" the election by fixing the voting machines. And he expressly had them designed -- it's written in the specs -- that this should be so votes can be altered and not be traced. . . . secondly, they're about to do the same damn

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<sup>314</sup> Newsmax broadcast live on television and republished on Newsmax's YouTube account. *Id.*

<sup>315</sup> *Id.*

thing on January 5th with the same machines and the same result, and the Senate is at risk this time.

John Bachman: . . . but fundamentally, nothing has really changed in that state for voters who are going to the polls . . . today.<sup>316</sup>

On the December 17, 2020, *Stinchfield* broadcast:<sup>317</sup>

Grant Stinchfield: I want to bring in a guy now, who I know agrees with me. . . . Mike Lindell. . . . So look, Fox News, we all know, has problems. We know it's responsible for bringing a lot of viewers to Newsmax. . . .

. . .

Mike Lindell: . . . But I will say this, it's a blessing, because at 11:15, when they realized that the -- all of algorithms broke in all those Dominion machines, that Donald Trump was going to win the presidency anyway, in spite of all the cheating, so they had to stop everything in the middle of the night, and then backfill votes and stop . . . .<sup>318</sup>

On the December 18, 2020, *American Agenda* broadcast:

Dick Morris: . . . This is actual intervention in the vote count. This is through Dominion software and Smartmatic. And the accusation here is that the vote count itself was altered and flipped through that software. You know, it's been proven in one county in Michigan . . . .<sup>319</sup>

On the December 18, 2020, *Greg Kelly Reports* broadcast:<sup>320</sup>

Greg Kelly: That's Russell Ramsland, election technology and security expert, speaking before the election, and all of his concerns unfortunately came true. Russell Ramsland wrote the very important report on the craziness that happened in Antrim County, Michigan. Russell, welcome back to Newsmax. How are you tonight?

Russell Ramsland: Good to be here.

Kelly: Thanks so much. So sir, your report I think was shocking. I thought it was very, very important, and you lay out in great detail all of the weirdness and the issues, and you've got the technical expertise and it made perfect sense. . . .

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<sup>316</sup> *Id.*

<sup>317</sup> Newsmax broadcast live on television and republished on Newsmax's YouTube account and Twitter account. *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> Newsmax broadcast live on television and republished on Newsmax's YouTube account. *Id.*

Ramsland: . . . [T]he logs, had they been able to be published, show very clearly that the RCV algorithm was enacted, it shows very clearly that the error messages were massive, it shows very clearly that races were flipped. Now, most of the important races that were flipped were down ballot. The most important race was a marijuana, proposal. . . .

Kelly: It is amazing. Yeah. 68 percent I think was the error rate, which is obviously ludicrous. . . .  
. . .

Kelly: I want to show the initial tally from Antrim County. It has Joe Biden up with a pretty comfortable lead, and then things switched. Let's go ahead to the next one. By November 21st Donald Trump had the lead, and I guess we were lucky to catch this. And you, I think, made the point in the report that it could not have just been Antrim County. Antrim County, if this were to happen there, Dominion voting system is used in what, 48 counties, all 48 of Michigan. There's absolutely no way this was confined to one county.

Ramsland: Correct. . . .

Kelly: It's so troubling to me that people are discounting this, but I don't think you can steal something this big and get away with it. . . .<sup>321</sup>

On the December 21, 2020, *Greg Kelly Reports* broadcast:<sup>322</sup>

Sebastian Gorka: But now the election's fine because their guy "won." So, don't investigate anything. Nothing. . . . Well, we're not going to ignore it here, because we fight for the truth and we believe that this is still the greatest nation on God's earth and nobody gets to steal it from us. . . . One man who decided, he's not a politician, he doesn't work for the president, but he's still fighting for him and for the cause of truth, is a man that makes my show, for example, America First on Salem Radio possible. The great Mike Lindell. . . . He's fighting for America . . . Mike Lindell . . . what's going on?

Mike Lindell: Well, I believe in this president, but – and I'll tell you what, nobody realizes . . . what America we had on election night at 11:15. You know, you talked about all this fraud, doctoring – the biggest fraud is the Dominion machines. And at 11:15 on election night our great president –

(Talking simultaneously.)

Gorka: Mike, I don't want to discuss. Mike. Mike. We're not going to get into the minutia and the details. . . .<sup>323</sup>

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<sup>321</sup> *Id.*

<sup>322</sup> Newsmax broadcast live on television and republished on Newsmax's YouTube account. *Id.*

<sup>323</sup> *Id.*

## W. PROCEDURAL POSTURE

Dominion filed the Complaint seeking to recover for defamation *per se* on August 10, 2021.<sup>324</sup> The Court notes that the Complaint is detailed, contains two hundred and seventy-three paragraphs and is one hundred and seventy-five pages long.<sup>325</sup> Newsmax filed the Motion on October 11, 2021.<sup>326</sup> Dominion opposed the Motion on November 15, 2021.<sup>327</sup> Newsmax filed a reply brief in further support of the Motion on December 10, 2021.<sup>328</sup>

## III. PARTIES' CONTENTIONS

Newsmax argues that the constitutional doctrine of neutral reportage protects Newsmax's alleged defamatory speech. Newsmax contends that truthfully reporting newsworthy allegations made by a President and his legal team on matters of public concern is not actionable. Furthermore, Newsmax claims that none of the challenged statements identify actionable defamation because as pled the statements fail to allege facts establishing actual malice.

Dominion argues that no privilege applies. Specifically, Dominion contends that the First Amendment does not mandate application of the neutral reportage privilege. Dominion claims that, even if the Court were to consider the theory, Newsmax's broadcasts went beyond the neutral reportage privilege and therefore do not satisfy its requirements. Additionally, Dominion argues that the facts alleged in the Complaint, from which the Court must rely, adequately satisfies the *prima facie* element of actual malice in a claim for defamation *per se*.

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<sup>324</sup> D.I No. 1.

<sup>325</sup> *Id.*

<sup>326</sup> D.I. No. 21.

<sup>327</sup> D.I. No. 34.

<sup>328</sup> D.I. No. 39.

## IV. STANDARD OF REVIEW

### A. DELAWARE PROCEDURAL LAW PRESUMPTIVELY GOVERNS.

Newsmax contends that while there may ultimately “be a choice of law question for this Court, Newsmax’s motion relies on federal constitutional principles.”<sup>329</sup> “As a general rule,” however, “the law of the forum governs procedural matters.”<sup>330</sup> As a matter of black letter law, “[t]he local law of the forum governs rules of pleading.”<sup>331</sup> As a result, Delaware law presumptively governs “pre-trial practice” and “motions.”<sup>332</sup> Delaware law, therefore, presumptively governs the Court’s review of the Motion unless an exception applies.

That aside, Newsmax attempts to establish what appears to be an affirmative defense—neutral reportage—as grounds for dismissal. But both Delaware and New York<sup>333</sup> courts generally do not use affirmative defenses as a basis for dismissing claims at the pleading stage.<sup>334</sup> That is especially so when an affirmative defense has not yet been pleaded. Under New York law, Newsmax could not use the Motion to assert an affirmative defense of truth or privilege to a defamation action before it had pleaded that defense in an answer.<sup>335</sup> Given that reality, and that any affirmative defenses are preserved for and available for use in, for example, a summary

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<sup>329</sup> Mot. at 14 n.3.

<sup>330</sup> *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 5 (Del. 2001); accord *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 987 (Del. 2013).

<sup>331</sup> See Restatement (Second) of Conflict of Laws § 127 (1971).

<sup>332</sup> *Id.* cmt. a.

<sup>333</sup> The parties have not stipulated what substantive law will apply in the present case. The action was brought in Delaware so Delaware law may apply. However, Dominion argues that it suffered harms in New York and many of Newsmax’s false statements were published in New York. As such, Dominion argues that “New York substantive law most likely governs this case.” Opp. at 16, n.2 (citing Compl. ¶¶ 11-12, 16, 40-41, 43). Dominion asks this Court to “reject Newsmax’s neutral reportage doctrine defense as a matter of law[,]” as a federal court sitting in diversity recently did. *Id.* (citing *Gubarev v. BuzzFeed, Inc.*, 340 F. Supp. 3d 1304, 1312 (S.D. Fla. 2018)).

<sup>334</sup> *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2004); *Baines v. Daily News L.P.*, 26 N.Y.S. 3d 658, 664 (N.Y. Sup. Ct. 2015).

<sup>335</sup> *Baines*, 26 N.Y.S. 3d at 664.

judgment motion, Newsmax would not be deprived of a substantive right if Delaware’s pleading rules applied.<sup>336</sup>

#### **B. DELAWARE’S MOTION TO DISMISS STANDARD.**

A party may move to dismiss under this Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted.<sup>337</sup> In considering a Rule 12(b)(6) motion, the Court (i) accepts as true all well-pleaded factual allegations in the complaint; (ii) credits vague allegations if they give the opposing party notice of the claim; (iii) draws all reasonable factual inferences in favor of the non-moving party; and (iv) denies dismissal if recovery on the claim is reasonably conceivable.<sup>338</sup> The Court, however, need not “accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party.”<sup>339</sup>

Delaware’s pleading standard is “minimal.”<sup>340</sup> Dismissal is inappropriate unless “under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.”<sup>341</sup>

In general, a claim’s reasonable conceivability cannot be determined through “matters outside the pleadings.”<sup>342</sup> But, “for carefully limited purposes,”<sup>343</sup> the Court may consider (i) “matters outside the pleadings when the document is integral to . . . a claim and incorporated into the complaint” and (ii) matters subject to judicial notice, as long as all extraneous matters are not

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<sup>336</sup> *See id.* (“To allow defendants to raise truth or privilege in a pre-answer motion to dismiss a complaint for failure to state a claim [impermissibly] would necessitate that the complaint . . . anticipate and address an affirmative defense before it has been pleaded. [D]efendants must raise these affirmative defenses in an answer and move for summary judgment. . . .” (citations omitted)).

<sup>337</sup> Del. Super. Ct. Civ. R. 12(b)(6).

<sup>338</sup> *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

<sup>339</sup> *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011), *overruled on other grounds by Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1277 (Del. 2018).

<sup>340</sup> *Cent. Mortg.*, 27 A.3d at 536 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 895 (Del. 2002)).

<sup>341</sup> *Unbound Partners Ltd. P’ship v. Invoy Holdings Inc.*, 251 A.3d 1016, 1023 (Del. Super. 2021) (internal quotation marks omitted); *see Cent. Mortg.*, 27 A.3d at 537 n.13 (“Our governing ‘conceivability’ standard is more akin to ‘possibility. . . .’”).

<sup>342</sup> *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 68 (Del. 1995).

<sup>343</sup> *Id.* at 69.

considered for their truth.<sup>344</sup> “[A] claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law.”<sup>345</sup>

As discussed below, the Court finds that the Complaint is not conclusory. Dominion pleads specific facts that put Newsmax on notice as to Dominion’s claims. The Complaint, and its exhibits, are detailed and focused, and state a reasonably conceivable defamation *per se* claim.

## V. DISCUSSION

To state a claim for defamation *per se* under New York law, a plaintiff must establish (i) a false statement; (ii) publication; (iii) fault; and (iv) one of four *per se* injuries, including, as relevant here, (a) an accusation of a serious crime or (b) business harm.<sup>346</sup> In addition, the alleged defamation must be “of or concerning the plaintiff.”<sup>347</sup>

The Motion seeks dismissal for two reasons. First, Newsmax asserts an affirmative defense that purportedly applies regardless of whether a statement made is defamatory. In other words, Newsmax contends, even if the Court accepts Dominion’s allegations as true, they fail to state a claim because the neutral reportage privilege mandates dismissal. Second, Newsmax argues that none of the alleged defamatory statements as pled allege facts establishing actual malice.

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<sup>344</sup> *Windsor I, LLC v. CWCap. Asset Mgmt. LLC*, 238 A.3d 863, 873 (Del. 2020) (internal quotation marks omitted).

<sup>345</sup> *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

<sup>346</sup> *Kasavana v. Vela*, 100 N.Y.S.3d 82, 85–86 (N.Y. App. Div. 2019).

<sup>347</sup> *Chicherchia v. Cleary*, 616 N.Y.S.2d 647, 648 (N.Y. App. Div. 1994) (quoting *Gross v. Cantor*, 200 N.E. 592, 593 (N.Y. 1936)).

## A. NEUTRAL REPORTAGE DEFENSE

Through the Motion, Newsmax raises the “defense” of neutral reportage to Dominion’s allegations. For the reasons discussed below, this defense is either not applicable, or, if applicable, rests on factual issues inappropriate for resolution at this stage.

Newsmax invokes the neutral reportage privilege—also characterized as the neutral reportage defense.<sup>348</sup> Newsmax’s position is that the topics discussed were of “extreme public interest” and, in its reporting, “presented allegations without adopting them as true....”<sup>349</sup> The neutral reportage defense bars recovery for defamation when the challenged statements, even if defamatory, are “newsworthy.”<sup>350</sup> When the neutral reportage privilege applies, the press need not “suppress newsworthy statements merely because it has serious doubts regarding their truth.”<sup>351</sup> Instead, under the defense, the press enjoys “immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.”<sup>352</sup>

The neutral reportage privilege was developed by a federal court of appeals; however, the defense seems to run contrary to United States Supreme Court precedent.<sup>353</sup> The United States Supreme Court has attempted to strike a balance between First Amendment freedoms and viable claims for defamation. In doing so, the United States Supreme Court has declined to endorse *per se* protected categories like newsworthiness. Instead, the determination of how much protection should be afforded the media has been left to the states.<sup>354</sup>

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<sup>348</sup> Mot. at 14.

<sup>349</sup> *Id.* at 14-15.

<sup>350</sup> See *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (articulating doctrine).

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> See *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 68–69 (2d Cir. 1980) (questioning and limiting the reach of the neutral reportage doctrine).

<sup>354</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); see also *Times, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

Newsmax argues the press should be afforded immunity from defamation because its journalists were accurately conveying allegations.<sup>355</sup> In *Edwards v. National Audubon Society*, the Second Circuit found that to establish a fair press, the media should have immunity from defamation when “a journalist is accurately conveying allegations.”<sup>356</sup> Newsmax argues, due to the fact the allegations against Dominion had been uttered, they were afforded “the freedom to report” the statements bearing no responsibility “for the underlying allegations.”<sup>357</sup> Accordingly, Newsmax relies on lower state and federal courts, arguing that some courts have favored this reception of such a doctrine.<sup>358</sup> Newsmax contends that courts which have adopted the neutral reportage privilege have extended the privilege further than *Edwards*.<sup>359</sup> Newsmax depends on the Eighth Circuit case *Price v. Viking Penguin Inc.*, to support the proposition that “[e]vidence of general disposition does not establish lack of neutrality in a particular circumstance” and that “as long as the particular accusation is reported disinterestedly and dispassionately, the neutral reportage privilege would apply even if the report was one-sided.”<sup>360</sup>

Newsmax asserts that neutral reportage is a constitutional principle that “every state and federal court in the United States” must follow.<sup>361</sup> Newsmax also contends that “it is irrelevant

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<sup>355</sup> Mot. at 15 (citing *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113 (2d Cir. 1977)).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* (citing *Edwards*, 556 F.2d at 120).

<sup>358</sup> *Id.* (citing 1 Robert Sack, *Sack on Defamation* § 7:3.5[D][3], at 7-61); *Rendon v. Bloomberg, L.P.*, 403 F. Supp. 3d 1269, 1276 (S.D. Fla. 2019) (proposing the protection of reporting on alleged election rigging throughout Latin America); *Ward v. News Grp. Int’l, Ltd.*, 733 F. Supp. 83, 85 (C.D. Cal 1990); *Sunshine Sportswear & Elecs. Inc. v. WSOC Television*, 738 F. Supp 1499, 1510 (D.S.C. 1989)).

<sup>359</sup> *Id.* at 16 (citing *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1433-34 (8th Cir. 1989) (holding that if the particular accusation is reported disinterestedly and dispassionately, the neutral reporting privilege would apply even if the report was one-sided); *In re United Press Int’l*, 106 B.R. 323, 330 (D.D.C. 1989) (holding neutral reportage doctrine does not require reportage of “both sides” when the report itself is essentially factual, neutral, and accurate); *Rendon*, 403 F. Supp 3d at 1278 (holding that neutral reportage was recognized even in circumstances where the source was not reliable); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1126 (N.D. Cal. 1984) (holding that “the neutral reportage privilege does not depend solely upon the ‘trustworthiness’ of the individual or the organization making the allegedly defamatory statements)).

<sup>360</sup> *Id.* at 16-17 (citing *Price*, 881 F.2d at 1433-34). Newsmax attempts to support its position that the information it was reporting was utterances by others and the Plaintiff’s “disposition” alone does not establish a lack of neutrality.

<sup>361</sup> Reply at 5.

whether Dominion is correct that New York law will apply in this action. . . since New York law cannot displace a command of the First Amendment.”<sup>362</sup>

Dominion addresses Newsmax’s argument by distinguishing the facts of this case from *Edwards*.<sup>363</sup> Dominion acknowledges the premise in *Edwards*, but states that no Delaware court has accepted the theory.<sup>364</sup> Further, Dominion rests on the common-law rule framed as, “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”<sup>365</sup> Dominion argues that extending the neutral reporting privilege so far would be unsound because the adoption upsets the actual malice standard’s careful balance of interests.<sup>366</sup> Dominion’s argument highlights the fact that the Second Circuit alone “created the neutral reportage doctrine in dicta in [*Edwards*], and to this day, no other federal appellate circuit has joined in.”<sup>367</sup>

Dominion also claims that federal law provides no universal neutral reportage defense. Specifically, Dominion notes that the neutral reportage doctrine “must have an anchor somewhere in some controlling body of decisional law to be applied here” and as the “doctrine has not been adopted as controlling as a matter of state law in any American state that might plausibly bear some connection to this litigation” it is not applicable in the present case.<sup>368</sup>

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<sup>362</sup> *Id.* at 5, n.1.

<sup>363</sup> *Opp.* at 4 (citing *Edwards*, 556 F.2d. at 120 (illustrating the blank immunity as accepted by the Second Circuit required neutrality to be found within the same article/publication)).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 8 (citing Restatement (2d) Torts § 578 (1977); Rodney Smolla, 1 *Law of Defamation* § 4:87 (2d ed. 2021 Update) (a collection of cases and authorities)).

<sup>366</sup> *Id.* at 11.

<sup>367</sup> *Id.* at 13-16 (providing analysis of the Second Circuit’s creation of “the press’s right of neutral reportage” and how it has been rejected in numerous federal and state courts). *See id.* at 13, n.1 (distinguishing the holding in *Price* as cited by Newsmax through explaining the Eighth Circuit’s holding limited its concept of neutral reporting to public bodies, which Dominion claims to be more like the traditional fair report privilege).

<sup>368</sup> *Opp.* at 11-12.

Newsmax’s argument is unavailing at this stage of the process. Newsmax has failed to demonstrate why this Court at this phase in litigation should apply the neutral reportage defense when it has not been adopted as controlling law in Delaware and the record is undeveloped as to an answer and plead affirmative defenses.

***1. Newsmax’s Neutral Reportage Defense is Not “Well-Suited for Treatment” On a Motion to Dismiss.***

Apart from the actual malice requirement, Newsmax does not appear to argue Dominion’s allegations are conclusory. Instead, the Motion attempts to introduce an affirmative defense Newsmax intends to raise if this case proceeds beyond the pleadings stage. The defense is not pleaded, however, because Newsmax has not yet answered the Complaint. As a result, Newsmax’s arguments are based, in large part, on facts outside the Complaint.

At this stage, the Court usually does not consider facts outside the complaint. “The complaint generally defines the universe of facts that the trial court may consider in ruling on a Rule 12(b)(6) motion to dismiss.”<sup>369</sup> As such, “[m]atters extrinsic to a complaint generally may not be considered in a ruling on a motion to dismiss.”<sup>370</sup> Given these constraints on the Court’s view of the evidence, the non-movant’s “affirmative defenses . . . are not ordinarily well-suited for treatment on” a motion to dismiss.<sup>371</sup> The Court should not dismiss a complaint due to an affirmative defense “[u]nless *it is clear from the face of the complaint that an affirmative defense exists* and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense.”<sup>372</sup>

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<sup>369</sup> *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

<sup>370</sup> *AlixPartners, LLP v. Mori*, 2019 WL 6327325, at \*15 (Del. Ch. Nov. 26, 2019) (internal quotation marks omitted).

<sup>371</sup> *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2004); *accord Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.*, 2018 WL 4057012, at \*13 (Del. Ch. Aug. 27, 2018); *In re Primedia, Inc. S’holders Litig.*, 2013 WL 6797114, at \*12 (Del. Ch. Dec. 20, 2013).

<sup>372</sup> *Reid*, 970 A.2d at 183–84 (emphasis added).

Delaware courts considering defamation claims on a motion to dismiss have been wary of granting dismissal based on affirmative defenses, including on the privilege Newsmax invokes here.<sup>373</sup> As a matter of Delaware procedural law, the question of

Privilege . . . depend[s] upon the facts and circumstances surrounding the making of the publication. Since it is a matter of affirmative defense[,] it may not be raised by a motion to dismiss under Rule 12(b)(6) but should be made a matter of answer supported by proof at trial.”<sup>374</sup>

The Court, noting a “low pleading threshold,” has denied dismissal of defamation claims where “additional facts developed in discovery will reveal [whether] the alleged defamatory statements were true, mere expressions of opinion, or . . . protected by an applicable privilege.”<sup>375</sup>

Expressed differently, “even silly or trivial [defamation] claims can easily survive a motion to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be.”<sup>376</sup>

The Court, applying Delaware procedural law, will use these legal principles when addressing the Motion’s arguments. The Court will not deny the Motion solely because it raises an affirmative defense based on facts outside the pleadings. However, a finding that Dominion’s allegations state a reasonably conceivable defamation claim will defeat the Motion to the extent it is based on unpled and fact-based affirmative defenses that could be raised later in the case. As discussed in this decision, the Court finds that Dominion has plead facts that support a reasonably conceivable defamation claim.

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<sup>373</sup> See, e.g., *Kelly v. Blum*, 2010 WL 629850, at \*16–17 (Del. Ch. Feb. 24, 2010).

<sup>374</sup> *Klein v. Sunbeam Corp.*, 94 A.2d 385, 392 (Del. 1952); accord *Meades v. Wilmington Hous. Auth.*, 2005 WL 1131112, at \*2 n.15 (Del. May 12, 2005).

<sup>375</sup> *Cornell Glasgow, LLC v. La Grange Props., LLC*, 2012 WL 2106945, at \*10 (Del. Super. June 6, 2012).

<sup>376</sup> *Doe v. Cahill*, 884 A.2d 451, 459 (Del. 2005).

**2. Procedural Limitations Aside, Newsmax’s “Neutral Reportage” Defense Does Not Support Dismissal.**

Dominion argues that when the neutral reportage privilege has been applied, courts have done so “‘fitfully’” and have “‘insisted all the *Edwards* criteria be met.”<sup>377</sup> The requisites that must be found by the court for *Edwards* to apply are:

(1) the accusations being reported were made by ‘a responsible, prominent organization’; (2) ‘against a public figure’; (3) with ‘accurate and disinterested reporting’ of the charges; ‘regardless of the reporter’s private views regarding their validity’; (5) ‘[w]hat is newsworthy about [the] accusations is that they were made’; (6) ‘the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made’; (7) the publisher neither ‘espouses [n]or concurs in the charges’; (8) the publisher does not ‘deliberately distort[] these statements to launch a personal attack on his own’; (9) the publisher publishes the accused party’s response to the accusation ‘in the same article’; and (10) the statement was an ‘exemplar of fair and dispassionate reporting.’<sup>378</sup>

Dominion contends whether all the factors have been met is a “‘factual exercise for a jury.’”<sup>379</sup>

Based on the facts alleged in the Complaint, Dominion contends that “[a] jury could find that Newsmax broke almost all of the *Edwards/Cianci* rules in the challenged statements.”<sup>380</sup> Thus, Newsmax’s alleged defamatory statements went beyond the neutral reportage privilege and do not qualify for the protection as a matter of law.<sup>381</sup>

To support the notion that the neutral reportage doctrine should apply, Newsmax makes three arguments.<sup>382</sup> First, that the alleged defamatory remarks were made by public figures and

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<sup>377</sup> Opp. at 18-19.

<sup>378</sup> *Id.* at 19 (citing *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120-22 (2d Cir. 1977)); see also *Cianci v. New York Times Publ’g Co.*, 639 F.2d 54, 68 (2d Cir. 1980) (citing *Edwards* but emphasizing the “‘important suggestions’” to demonstrate the “‘privilege was limited in scope and required careful examination of the facts in each case’”).

<sup>379</sup> *Id.* at 20 (citing *Cianci*, 639 F.2d at 69 (where “‘after some discovery denied a motion to dismiss or for summary judgment invoking the neutral reportage privilege because ‘a jury could well find that the [defendant] did not simply report the charges but espoused or concurred in them’”).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> Mot. at 17, 19, 20.

officials.<sup>383</sup> The President and his lawyers are public figures, and thus qualify as “‘responsible and prominent’ figures under *Edwards*.”<sup>384</sup> Once this first factor is qualified, Newsmax argues the doctrine applies as the speaker’s statements are newsworthy by virtue based upon their responsibility and prominence.<sup>385</sup> Even if that were correct, allegations in the Complaint extend beyond just statements uttered by any prominent and responsible figures (*i.e.*, former President Trump).<sup>386</sup> Newsmax’s possession of evidence demonstrating the election fraud claims were false, supports the reasonable inference that Newsmax made or published statements knowing they were false or with a reckless disregard for the truth.<sup>387</sup> Newsmax may not have a duty to parse through every newsworthy and controversial statement uttered for validity before sharing it, but it does have a duty to report on those allegations truthfully, accurately, and without endorsement.

Second, Newsmax contends that the reporting at issue related to the 2020 Presidential Election and that concerned newsworthy controversies of critical public concern.<sup>388</sup> Newsmax argues that the First Amendment provides protection to discuss governmental affairs and “all such matters relating to political process.”<sup>389</sup> Third, Newsmax contends it accurately reported unprecedented allegations covering a newsworthy public controversy.<sup>390</sup> Newsmax concludes its

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<sup>383</sup> *Id.* at 17.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* (signaling to *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1126 (N.D. Cal. 1984) which was relied on by Newsmax for a separate proposition *supra* note 343 and accompanying text). Newsmax attempts to argue that “the fact that such allegations at issue here were made by the President and his representatives were unprecedented in and of themselves, and that alone justifies Newsmax for reporting on them.” *Id.* at 19.

<sup>386</sup> *See e.g.*, Compl. ¶ 248.

<sup>387</sup> *See e.g.*, Compl. ¶¶ 101, 109, 127, 137, 151, 153, 169, 177.

<sup>388</sup> Mot. at 19. Newsmax conceptualizes the subject matter of the speech being a critical public concern tips the scale of the Constitutional balance as upheld in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). Newsmax also cites *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), noting that “[w]hen the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount to a much higher barrier before recovering damages from a media defendant that raised by the common law.” (emphasis added).

<sup>389</sup> *Id.* at 20 (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)).

<sup>390</sup> *Id.*

framing of the neutral reportage privilege by suggesting, because the reports were accurate recitations of what was actually said or done, that the immunity should attach if the matters were already reported on by a reliable source.<sup>391</sup>

Newsmax contends that the statements need to be viewed in the full context of the broadcasts and not isolated phrases because a defamation case requires the question answered to be “whether the statements at issue are statements of fact . . . , informed by factual context of the statements in question.”<sup>392</sup> This would thus require the Court to rely on the reporting or comments as they were made in context—succinctly, in the totality of the circumstances.<sup>393</sup> Newsmax claims this distinction is crucial because it is necessary for the Court to discern whether Newsmax adopted and endorsed the claims, or merely reported them as received.<sup>394</sup> Moreover, some courts have provided additional deference when considering the context of statements made during a broadcast talk show.<sup>395</sup>

Even if the neutral reportage defense were available, the Court would not dismiss the Complaint on the current record and at this stage of the litigation. To benefit from the neutral reportage defense, the facts must show the defendant accurately and dispassionately reported the newsworthy event.<sup>396</sup> Per its name, Newsmax’s reporting must have been neutral, not “a

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<sup>391</sup> *Id.* at 21 (citing *Price*, 881 F.2d at 1434 (“evidence of the author’s general disposition toward the topic does not establish whether he espoused each particular allegation.”); *In re United Press Int’l*, 106 B.R. at 330 (“a report need not set forth both sides of an issue”); *Merrill v. McClatchy Newspapers, Inc.*, 1998 WL 1814475, at \*4 (W.D.N.C. Oct. 2, 1998), *aff’d*, 187 F.3d 630 (4th Cir. 1999) (“[i]mmunity attaches to accurate reports on matters already reported by reliable sources”).

<sup>392</sup> *Id.* at 21-22 (citing *McDougal v. Fox News Network, LLC*, 489 F. Supp. 3d 174, 181 (S.D.N.Y. 2020) (internal citation omitted)).

<sup>393</sup> *Id.* at 22. *See, e.g., Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042, 1049 (S.D. Cal. 2020); *Michaelis v. CBS, Inc.*, 119 F.3d 697, 700 (8th Cir. 1997); *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 138 F. Supp 3d 1191, 1198 (D. Colo. 2015) *aff’d*, 861 F.3d 1081 (10th Cir. 2017).

<sup>394</sup> *Id.* at 23 (citing *Farah v. Esquire Magazine*, 736 F.3d 528, 535 (D.C. Cir. 2013)).

<sup>395</sup> *Id.* *See, e.g., McDougal*, 489 F. Supp. 3d at 182-84 which found that some statements made during “Tucker Carlson Tonight” were construed as “rhetoric hyperbole” and not defamatory. *See also Huggins v. NBC*, 1996 WL 763337, at \*3 (N.Y. Sup. Feb. 7, 1996) (“standing for the proposition that ‘unscripted, unrehearsed’ comments delivered in a ‘conversational tone’ signal opinion”).

<sup>396</sup> *See Edwards*, 556 F.2d at 120.

personal attack” on Dominion, to succeed on this defense.<sup>397</sup> As set forth above, Dominion’s well-pleaded allegations, however, support the reasonable inference that Newsmax’s reporting was not accurate or dispassionate.

It is reasonably conceivable that Newsmax’s reporting was inaccurate. For example, once Newsmax began connecting Dominion to the election fraud claims, Dominion attempted to get out in front of the impact by sending Newsmax its “SETTING THE RECORD STRAIGHT” memoranda. Those memoranda, which contained analysis from election and related experts, tended to disprove the election fraud claims. Rather than reporting on Dominion’s memoranda, Newsmax and its news personnel continued to connect Dominion to the election fraud claims by hosting guests who took that position.<sup>398</sup> When Newsmax guests spread or reiterated disinformation about Dominion, Newsmax did not use the information Dominion provided to correct its guests or to reorient its viewers. Instead, Newsmax and its personnel pressed their view that considerable evidence supported Dominion’s involvement in an illegal election fraud conspiracy.

It is also reasonably conceivable that Newsmax was not dispassionate. Given that Newsmax apparently refused to report contrary evidence, including evidence from the Department of Justice, the allegations support the reasonable inference that Newsmax intended to keep Dominion’s side of the story out of the mainstream. Moreover, there are numerous instances in which Newsmax personnel did not merely ask questions and parrot interviewee responses, but rather, endorsed or suggested a motivated result. By skewing questioning and approving responses in a way that fit or promoted a narrative in which Dominion committed election fraud, Newsmax may have failed to report the issue truthfully.

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<sup>397</sup> *See id.*

<sup>398</sup> *See e.g.*, Compl. ¶ 248.

The neutral reportage defense does not apply when the press “espouses or concurs in the charges made by others[] or who deliberately distorts these statements to launch a personal attack” on the plaintiff.<sup>399</sup> And the Complaint supports the reasonable inference that Newsmax did both. Accordingly, Dominion’s allegations support the reasonable inference that Newsmax was not engaged in neutral reportage. The neutral reportage defense does not support dismissal.

Newsmax argues that Dominion “omit[s] key elements of the exchanges in order to distort the context” and create a misimpression.<sup>400</sup> When viewed in context, Newsmax contends “the neutrality and lack of endorsement of statements regarding Dominion are clear.”<sup>401</sup>

Newsmax also argues that the Motion “studiously ignore[s] the clear and verbal on screen identifications of guests and speakers in clips...which establish that they are independent sources of allegations and information, not the voice of Newsmax.”<sup>402</sup>

Newsmax references appearances from Ms. Powell, Mr. Morris, Mr. DiGenova, Mr. Byrne, Mr. Giuliani, and Mr. Ramsland, and argues that it “identified the source of the information for viewers who were able to draw their own conclusions about the claims made by those sources.”<sup>403</sup> Newsmax concludes its application of the facts regarding the neutral reportage doctrine by pulling paragraphs from the Complaint and adding “context” demonstrating that “Newsmax provide[d] balance as to the developing story of allegations being made.”<sup>404</sup> This argument is suitable for a later stage in the case, as it offers facts probative of a privilege or

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<sup>399</sup> *Edwards*, 556 F.2d at 120.

<sup>400</sup> Mot. at 25

<sup>401</sup> *Id.* at 29.

<sup>402</sup> *Id.*

<sup>403</sup> *See id.* at 29-31 (identifying each speaker, explaining their interpretation of the nature of the appearance, and argue “[t]he notion that anytime a host identifies a guest’s Twitter handle or website means that they are endorsing everything there or anything the guest has said, would make nearly every host on every program such an endorser”).

<sup>404</sup> *Id.* at 37.

defense. But at the pleadings stage, it raises factual issues the Court must resolve in Dominion’s favor.

**B. DOMINION HAS ADEQUATELY ALLEGED ACTUAL MALICE.**

Newsmax argues the Complaint fails to adequately plead fault (*e.g.*, actual malice).<sup>405</sup> The Court does not agree. At this stage, the Court finds that the Complaint alleges facts that Newsmax made the challenged statements with knowledge of their falsity or with reckless disregard of their truth.

“‘Actual malice’ means that defendants published the false information about plaintiff ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’”<sup>406</sup> To satisfy the reckless disregard standard, a plaintiff must show the defendant “entertained serious doubts as to the truth of [the] publication” or had “a high degree of awareness of . . . [its] probable falsity.”<sup>407</sup> The failure to investigate a statement’s truth, standing alone, is not evidence of actual malice, even if a prudent person “would have investigated before publishing” the statement.<sup>408</sup> But a speaker cannot “purposefully avoid[.]” the truth and then claim ignorance.<sup>409</sup> If the plaintiff offers “some direct evidence” that the statement “was probably false,” a fact-finder may infer that the defendant “inten[ded] to avoid the truth.”<sup>410</sup> The plaintiff must prove actual malice with clear and convincing evidence.<sup>411</sup>

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<sup>405</sup> Actual malice is the most demanding fault standard. It generally applies when a public figure plaintiff sues in defamation for statements the defendant made on matters of public concern. Although the appropriate fault standard hinges on further development of the record, the parties accept that actual malice is the relevant standard for resolving the Motion. Dominion expressly reserves its right to argue that the proper pleading standard is negligence. *See Chapadeua v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. 1975).

<sup>406</sup> *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

<sup>407</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (citing *Garrison v. State of La.*, 379 U.S. 64, 85 (1964)).

<sup>408</sup> *Id.*

<sup>409</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 693 (1989).

<sup>410</sup> *Sweeney v. Prisoners’ Legal Servs. of N.Y., Inc.*, 647 N.E.2d 101, 104 (N.Y. 1995); *see also Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1253 (9<sup>th</sup> Cir. 1997).

<sup>411</sup> *Hepps*, 475 U.S. at 773.

Newsmax suggests Dominion, a public plaintiff, must satisfy a heightened pleading standard and that they have failed to do so.<sup>412</sup> Newsmax states that Dominion meets one or both related standards in the determination of Dominion’s public status because of the role Dominion had in the election—Dominion’s contractual relationship with the government, and Dominion’s executive giving testimony as a State Defendant.<sup>413</sup>

Newsmax argues that the Complaint fails to plead actual malice with regards to Antrim County reports, then goes on to state Dominion’s “broader allegations are insufficient for the same reasons.”<sup>414</sup> Newsmax’s contention is premised on the notion that no facts pleaded by Dominion support a reasonable inference that Newsmax published the Antrim County broadcasts, or any of the other broadcasts alleged to be defamatory, with knowledge.<sup>415</sup>

Newsmax asserts that Dominion’s pleadings are insufficient to create a reasonable inference of actual malice despite the pleadings including specific facts of public reports clarifying the allegations of the election fraud, statements from government officials attesting to vote audits, denials of fraud sent directly to Newsmax from Dominion, and confrontation of several personalities who had the propensity to lie.<sup>416</sup>

Contrary to Newsmax’s claim that there could be no reasonable inference of actual malice, the Motion states: “[w]hile these facts could conceivably raise serious doubts as to the allegations against Dominion (though, as discussed below, they do not), it is difficult to see how

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<sup>412</sup> Mot. at 41.

<sup>413</sup> *Id.* at 42; *see Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (actual malice standard applies “[w]here a position in government such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it”); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (actual malice applies when an party is a limited public figure that “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues”).

<sup>414</sup> Mot. at 46, 55.

<sup>415</sup> *Id.* at 48. Newsmax argues Dominion’s allegations that Newsmax knew or should have known of the Antrim error are not supported by fact but through conclusory allegations. *Id.*

<sup>416</sup> *Id.* at 49-50.

they can be said to render those allegations inherently improbable.”<sup>417</sup> The Court disagrees and finds that there is at least a reasonable inference of actual malice based on the alleged facts when viewed in Dominion’s favor.

Dominion asserts it has adequately alleged actual malice.<sup>418</sup> Dominion argues when the Court views the Complaint in its entirety it “more than adequately pleads actual malice.”<sup>419</sup> Dominion provides examples of evidence that inferences of actual malice can be discerned and then applies them to facts alleged in the Complaint. For instance Dominion asserts that: (i) Newsmax knowingly disregarding publicly available evidence; (ii) Newsmax broadcasted and republished false and improbable claims from unreliable sources; and (iii) Newsmax promoted a false storyline to increase profits.<sup>420</sup> Essentially, Dominion contends that the abundance of facts that were well-plead are enough to adequately allege Newsmax acted *at least* recklessly when reporting on Dominion.<sup>421</sup> At the pleading stage, Dominion must allege facts from which this Court can draw a reasonable inference of actual malice when viewed in Dominion’s favor.<sup>422</sup> In its totality, the Complaint pleads facts from which this Court could draw a reasonable inference of actual malice.

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<sup>417</sup> *Id.* at 60, n.16.

<sup>418</sup> *See Opp.* at 42, n.4. (Dominion is not contesting whether it does or does not satisfy the public figure status; rather reserves its right to argue that the proper pleading standard is negligence (citing *Chapadeua*, 341 N.E.2d at 571 (N.Y. 1975))).

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 43-44; *see Palin v. New York Times*, 940 F.3d 894, 813-16 (2d Cir. 2019) (actual malice can be shown where a defendant publishes defamatory statements that contradicts known to him); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (actual malice can be shown where the story published is based “wholly on an unverified anonymous” source or “where there are obvious reasons to doubt the informant”); *see Harris v. City of Seattle*, 152 F. App’x 565, 568 (9th Cir. 2005) (where evidence “that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story”); *see Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989) (where evidence of a financial motive to defame can support a finding of actual malice); *see Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (where a defendant’s refusal to retract defamatory statements was found to support actual malice at the time of publication).

<sup>421</sup> *Id.* at 42.

<sup>422</sup> *Id.* at 64.

Contrary to Newsmax’s contentions, Dominion’s allegations are not conclusory.<sup>423</sup> The Complaint supports the reasonable inference that Newsmax either knew its statements about Dominion’s role in the election fraud were false or had a high degree of awareness that they were false. For example, Newsmax possessed countervailing evidence of election fraud from the Department of Justice, election experts, and Dominion at the time it had been making its statements. The fact that, despite this evidence, Newsmax continued to publish its allegations against Dominion, suggests Newsmax knew the allegations were probably false. Although Newsmax ordinarily would not be required to investigate further, there were enough signs indicating the statements were not true to infer Newsmax’s intent to avoid the truth. Furthermore, a Newsmax personality stated to have an “independent investigation unit” that had been exploring evidence surrounding Dominion’s role in an allegedly rigged election. Whether Dominion ultimately will prove Newsmax’s actual malice by clear and convincing evidence is irrelevant on a motion to dismiss. At this stage, it is reasonably conceivable that Dominion has a claim for defamation *per se*. Accordingly, the Motion is denied.

## VI. CONCLUSION

For the foregoing reasons, the Motion is **DENIED**.

**IT IS SO ORDERED**

June 16, 2022  
Wilmington, Delaware

/s/ Eric M. Davis  
Eric M. Davis, Judge

cc: File&ServeXpress

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<sup>423</sup> During oral argument Newsmax stated that the following paragraphs demonstrate at least an inference of knowledge: 40, 53-54, 71-73, 83-87, 89, 94-95, 97-100, 108-109, 118-120, 124-125, 127, 137, 140-141, 143, 145, 151, 153-154, 157-161, 169, 171-173, 177-179, 261-268, 270-272. The Court finds that these paragraphs demonstrate more than mere conclusory allegations by Dominion on the issue of knowledge.