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

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

MEMORANDUM OF LAW IN SUPPORT OF LOU DOBBS' MOTION TO DISMISS PURSUANT TO THE FIRST AMENDMENT AND CPLR §§3211(a)(1), (a)(7), and (g)

Paul D. Clement (*pro hac vice* forthcoming)
Erin E. Murphy (*pro hac vice* forthcoming)
K. Winn Allen, P.C. (*pro hac vice* forthcoming)
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202.289.5000
Email: paul.clement@kirkland.com
Email: erin.murphy@kirkland.com
Email: winn.allen@kirkland.com

Mark R. Filip, P.C. (*pro hac vice* forthcoming)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: 312.862.2000
Email: mark.filip@kirkland.com

Steven G. Mintz
Mintz & Gold LLP
600 Third Avenue
25th Floor
New York, NY 10016
Telephone: 212.696.4848
Email: mintz@mintzandgold.com

Attorneys for Defendant Lou Dobbs

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 6

I. The Complaint Fails To State A Claim Against Dobbs For The Reasons Discussed In The Fox Companies' Motion To Dismiss 7

II. The Claims Against Dobbs Challenge Speech That Is Fully Protected By The First Amendment 8

III. The Complaint Fails To Allege That Dobbs Acted With Actual Malice Under The First Amendment And CPLR 3211 [g] 13

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Adams v. Frontier Broadcasting Co.,
555 P2d 556 [Wyo. 1976] 17

Adams v. Frontier Broadcasting Co.,
555 P2d 556 [Wyo. 1976] 15

Bianco v. Law Offices of Yuri Prakhin,
189 AD3d 1326 [2d Dept 2020] 6

Biro v. Conde Nast,
807 F3d 541 [2d Cir 2015] 16

Chiaramonte v. Coyne,
2020 WL 434342 [Sup Ct, NY County, Jan. 28, 2020, No. 156644/2017] 15

Croce v. N.Y. Times Co.,
930 F3d 787 [6th Cir 2019] 8

Fontanetta v. Doe,
73 AD3d 78 [2d Dept 2010] 6

Freeze Right Refrig. & Air Conditioning Servs., Inc. v. City of New York,
101 AD2d 175 [1st Dept 1984] 8

Garrison v. Louisiana,
379 US 64 [1964] 15

Greenbelt Coop. Publ. Assn., Inc. v. Bresler,
398 US 6 [1970] 10

Greenberg v. Spitzer,
155 AD3d 27 [2d Dept 2017] 6

Hariri v. Amper,
51 AD3d 146 [1st Dept 2008] 7

Harte-Hanks Communications, Inc. v. Connaughton,
491 US 657 [1989] 15, 17

Hobbs v. Imus,
266 AD2d 36 [1st Dept 1999] 11

Holy Spirit Assn. for the Unification of World Christianity v. N.Y. Times Co.,
49 NY2d 63 [1979] 8

Horsley v. Rivera,
292 F3d 695 [11th Cir 2002] ... 11

Howard v. Antilla,
294 F3d 244 [1st Cir 2002] ... 15

Jimenez v. United Fed'n of Teachers,
239 AD2d 265 [1st Dep't 1997] ... 13

Karaduman v. Newsday, Inc.,
51 NY2d 531 [1980] ... 7

Larreal v. Telemundo of Fla,
2020 WL 5750099 [SD Fla Sept 25, 2020, No. 19-22613] ... 8

Liberman v. Gelstein,
80 NY2d 429 [1992] ... 15

Maddicks v. Big City Properties, LLC,
34 NY3d 116 [2019] ... 2

McDougal v. Fox News Network, LLC,
2020 WL 5731954 [SD NY Sept. 24, 2020, No. 1:19-cv-11161] ... 11, 13

Milkovich v. Lorain Journal Co.,
497 US 1 [1990] ... 10

N.Y. Times Co. v. Sullivan,
376 US 254 [1964] ... 13, 14, 15

Nonnon v. City of New York,
9 NY3d 825 [2007] ... 6

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,
575 US 175 [2015] ... 10

Pacella v. Milford Radio Corp.,
462 NE2d 355 [Mass App Ct 1984], *affd* 476 NE2d 595 [Mass 1985] ... 17

Pacella v. Milford Radio Corp., 462 NE2d 355 [Mass App Ct 1984],
aff'd 476 NE2d 595 [Mass 1985] ... 15

Palin v. N.Y. Times Co.,
2020 WL 7711593 [SD NY Dec. 29, 2020, No. 17-CV-4853 (JSR)] ... 14

St. Amant v. Thompson,
390 US 727 [1968] ... 15

Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.,
603 F Supp 2d 584 [SD NY 2009] 8

Themed Restaurants, Inc. v. Zagat Survey, LLC,
4 Misc 3d 974 [Sup. Ct., N.Y. Cnty. 2004],
aff'd, 21 AD3d 826 [1st Dep't 2005] 13

Wojciech Cieszkowski v. Baldwin,
66 Misc. 3d 1206(A), 2019 NY Slip Op 52138[U] [Sup Ct, NY County 2019] 11

Statutes

Civ. Rights Law §74 8

Civ. Rights Law §76-a 6, 14, 18

CPLR 3211 ..... 2, 6, 7, 18

Other Authorities

43A NY Jur 2d *Defamation and Privacy* (2d ed. 2021) 9

Bowyer v. Ducey, No. 20-cv-02321 (D Ariz), Dkt.1 2

Pearson v. Kemp, No. 20-cv-04809 (ND Ga), Dkt.1 2

INTRODUCTION

In the wake of the 2020 election, there was no more newsworthy story than this: The President of the United States and his surrogates raised unprecedented arguments claiming that the integrity of the electoral process was marred by fraud and filed litigation challenging the results of the election in courts throughout the nation. These allegations by the President's legal teams—which included claims about Smartmatic—drew widespread coverage in the media, and for good reason: There can be no dispute that a President's attempt to contest an election is objectively newsworthy. The very reason the First Amendment exists is to give members of the press freedom to cover and comment on fast-developing stories like this one.

Veteran political commentator Lou Dobbs engaged in political commentary on these issues just as he has engaged in spirited commentary on deeply important matters of public concern for decades. When Dobbs brought his trademark style to commenting on the breaking story about the integrity of the election—including by interviewing members of the President's legal team and offering opinions on their allegations—he was fully exercising his rights as a member of the press to address matters of public interest. Moreover, the complaint comes nowhere close to alleging the type of intent required to pierce First Amendment protections and hold a commentator liable for reporting on newsworthy matters of the highest order. For these reasons, and those explained below, this lawsuit should be dismissed as antithetical to the First Amendment and inconsistent with our nation's proud heritage of giving the media broad latitude to offer opinion and commentary on newsworthy matters.

BACKGROUND[1]

The Fox Companies' brief sets forth the relevant background regarding Smartmatic and this lawsuit, and Dobbs does not repeat that here. (NYSCEF.Doc.No.206.at.3-9.) Instead, he states only the facts relevant to the claims against him.

In the months before the 2020 election, President Trump and many others expressed concern about the integrity of the election, due partly to unusual measures implemented in response to COVID-19. (NYSCEF.Doc.No.192, Fox.Ex.13.) The President indicated that he would challenge the results if he suspected that the integrity of the election had been compromised. As predicted, after the election, President Trump and his allies, including lawyers Rudy Giuliani and Sidney Powell, began alleging fraud and challenging the election results in court. Some of those lawsuits alleged widespread vote manipulation potentially implicating Smartmatic software.[2] The President's refusal to concede and his legal claims challenging the results of a presidential election were undeniably newsworthy. Virtually every media outlet covered the President's accusations and lawsuits, and numerous federal and state officials examined the claims. (NYSCEF.Doc.No.1, Compl.¶¶83, 291, 298, 302, 303, 328, 365.)

Lou Dobbs is a commentator on Fox Business. He has won numerous major awards throughout his career, including multiple Emmys, the Emmy for Lifetime Achievement, and the George Foster Peabody Award. He is also a best-selling author, having written six books on

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

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

politics and economics. Dobbs covered the Smartmatic story on his nightly show *Lou Dobbs Tonight*—just as he covered Smartmatic more than a decade earlier in 2006, when employed by CNN. As one CNN reporter explained on Dobbs' show back in 2006, "Smartmatic is a labyrinth of international holding companies owned by Venezuelan businessmen." (Dobbs.Ex.2.at.5.) The reporter added that Smartmatic operated in some U.S. jurisdictions, like Chicago, but that officials there were "outraged" with the "problems with [its] machines." (*Id.*) CNN explained that Smartmatic also operated overseas, including in Venezuela, and one Harvard academic opined that the "preponderance of the evidence" indicated that fraud had tarnished a 2004 election, insisting that "[i]t had to be the Smartmatic system." (*Id.*) In 2005, moreover, Smartmatic acquired a U.S. voting-technology company with operations in multiple states, but as one Democratic congresswoman lamented, "[i]n the case of Smartmatic, there are a number of unanswered questions." (*Id.*) And one computer scientist opined that "[t]he problem we're in right now is that we're using equipment to elect our president and our Congress, and our local officials, that cannot be audited, that are potentially under the control of foreign entities, and that are almost an ideal platform for rigging an election." (*Id.*)

In the weeks after the 2020 election, Dobbs interviewed Giuliani and Powell on his show so that viewers could hear from the President's legal advisors and advocates firsthand about their allegations regarding the integrity of the election. During those interviews, Giuliani and Powell alleged, among other things, that Smartmatic had a corrupt relationship with the Venezuelan government and had helped facilitate voter manipulation and a fraudulent outcome in the 2020 U.S. presidential election. (NYSCEF.Doc.No.1, Compl.¶¶146-216.)

As the story unfolded, Dobbs informed viewers that Smartmatic had denied some of the allegations against it and often asked his guests if they could substantiate their claims. For instance:

- On November 16, Dobbs stated on *Lou Dobbs Tonight*: "Smartmatic … told us today that they only provided technology and software in Los Angeles County during this year's presidential election." (NYSCEF.Doc.No.16, Pls.Ex.14.at.3.)

- On November 17, Dobbs stated on *Lou Dobbs Tonight*: "[W]e've asked both Dominion and Smartmatic about their role on the CISA [Cybersecurity and Infrastructure Security Agency] November 12th statement disputing election fraud or intervention by foreign governments. Smartmatic said they didn't have any input." (NYSCEF.Doc.No.194, Fox.Ex.15.at.5.)

- On November 19, Dobbs noted on *Lou Dobbs Tonight*: "Smartmatic and Dominion deny those charges," and he asked Powell: "[W]hen do you believe you will be prepared to come forward with hard evidence establishing the basis for a court to overturn elections or at least results of those elections in a number of battleground states?" (NYSCEF.Doc.No.27, Pls.Ex.25.at.4, 13.).

- On November 19, Dobbs stated on *Lou Dobbs Tonight*: "Dominion Voting Systems today once again distanced itself from Smartmatic, saying Dominion is an entirely separate company and fierce competitor to Smartmatic and quote, 'Dominion and Smartmatic do not collaborate in any way and have no affiliate relationship or financial ties.'" (NYSCEF.Doc.No.27, Pls.Ex.25.at.8-9.)

- On December 10, Dobbs asked Powell on *Lou Dobbs Tonight*: "What is the evidence that you have compiled?" (NYSCEF.Doc.No.40, Pls.Ex.38.at.3.)

Dobbs also noted that, in the midst of a divisive election, "[t]here are lots of opinions about the integrity of the election, the irregularities of mail-in voting, of election voting machines and voting software." (NYSCEF.Doc.No.47, Pls.Ex.45.at.2.) And as one might expect from an opinion show devoted to addressing issues of public concern, Dobbs also provided his own opinion and commentary on the election and its legitimacy. In one segment, he explained that "[t]his looks to me like it['s] the end of what has been a … four and a half year long effort[] to overthrow the President of the United States. It looks like it's exactly that … these are all parts of a piece here." (NYSCEF.Doc.No.3, Pls.Ex.1.at.6.) In another segment, he commented that "[t]his is a nation that

has just been wronged mightily. Only an idiot would try to claim that there were no irregularities, that there were no anomalies ….” (NYSCEF.Doc.No.16, Pls.Ex.14.at.5.) In some segments, he expressed his appreciation for President Trump: "[T]hank God we've got a President who will stay in the fight all the way through until we get those answers." (NYSCEF.Doc.No.17, Pls.Ex.15.at.8.) He also expressed his distaste for other government officials: "What are we dealing with here and how can we get to this if we have an Attorney General who has apparently lost both his nerve and his commitment to his oath of office and to the country. We have an FBI director who seems to be as politically corrupt as anyone who preceded him, and a Homeland Security Department that doesn't know what the hell it's talking about and is spending more time playing politics … than securing the nation." (NYSCEF.Doc.No.41, Pls.Ex.39.at.2-3.) That is the kind of spirited opinion commentary on the nation's top law enforcement officials that could only occur in a nation committed to First Amendment principles. That is also the kind of spirited opinion commentary that viewers of *Lou Dobbs Tonight* had come to know and expect.

Dobbs regularly tweeted video clips of his shows, including segments containing his interviews with Powell and Giuliani. The tweets sometimes included a caption noting the subject of the interview, the interviewee's name, and a description of the interview's content. For example, on November 16, Dobbs tweeted a video of *Lou Dobbs Tonight* with the caption: "Electoral Fraud: @SidneyPowell1 says she has firsthand evidence that Smartmatic voting software was designed in a way to change the vote of a voter without being detected." (NYSCEF.Doc.No.20, Pls.Ex.18.) On November 18, Dobbs tweeted a video of his show with the caption: "Foreign Election Involvement: @RudyGiuliani says votes in 28 states were sent to Germany and Spain to be counted by Smartmatic." (NYSCEF.Doc.No.26, Pls.Ex.24.)

After Smartmatic expressed dissatisfaction with coverage by Dobbs and others on Fox of the allegations that the President and his lawyers leveled at Smartmatic, but declined Fox's invitation to come discuss those allegations on air themselves, Dobbs returned to the topic on a December 18 broadcast of *Lou Dobbs Tonight*. (NYSCEF.Doc.No.47, Pls.Ex.45.) On that show, Dobbs played an interview with Eddie Perez, the Global Director of Development at the Open Source Election Technology Institute, in which Perez was asked "for his assessment of Smartmatic and recent claims about the company." (*Id.* at 2.) Among other things, Perez explained that, based on his knowledge, Smartmatic had only a limited role in the 2020 election and did not participate in any alleged manipulation of the vote. (*Id.* at 2-4.)

ARGUMENT

A complaint must be dismissed if the facts alleged fail to "fit within any cognizable legal theory," (*Nonnon v. City of New York*, 9 NY3d 825, 827 [2007]), or if "documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law," (*Bianco v. Law Offices of Yuri Prakhin*, 189 AD3d 1326, 1328 [2d Dept 2020]). (*See* CPLR 3211 [a] [1], [a] [7].)[3]

The standard is considerably higher when a complaint challenges speech in a "public forum" "in connection with an issue of public interest." (Civ. Rights Law §76-a [1] [a].) Under New York's anti-SLAPP law, courts *must* dismiss complaints challenging such speech at the threshold unless the plaintiff demonstrates that the challenge has a "substantial basis in law" or "is supported by a substantial argument for an extension, modification or reversal of existing law."

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

(CPLR 3211 [g] [1].) In other words, in a case involving speech on matters of public concern, the plaintiff must demonstrate that the case should *not* be dismissed, under a "heightened standard of proof." (*Hariri v. Amper*, 51 AD3d 146, 150 [1st Dept 2008].)[4] That standard embodies the recognition that the "threat of being put to the defense of a lawsuit" "may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." (*Karaduman v. Newsday, Inc.*, 51 NY2d 531, 545 [1980].)[5]

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

I. The Complaint Fails To State A Claim Against Dobbs For The Reasons Discussed In The Fox Companies' Motion To Dismiss.

The arguments made in the motion to dismiss filed on behalf of the Fox Companies, (NYSCEF.Doc.No.206), compel dismissal of all claims against Dobbs. Dobbs fully joins in those arguments and incorporates them by reference. Smartmatic's claims against Dobbs personally

[4] As noted, *see* n.1 *supra*, the Court is not limited to examining the pleadings.

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

must stand or fall based on his own conduct and his own state of mind, and judged in that light, they are distinctively unavailing.

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

1. As explained in the Fox Companies' motion to dismiss (NYSCEF.Doc.No.206.at.11-13), the First Amendment protects the press when it covers allegations that are newsworthy just by virtue of being made. Such coverage is not defamatory because a reasonable viewer would understand that the publication is not presenting information that it has determined to be true, but rather is fulfilling its journalistic duty to "present[] newsworthy allegations made by others." (*Croce v. N.Y. Times Co.*, 930 F3d 787, 793 [6th Cir 2019].) Likewise, the First Amendment protects the press when it informs the public about judicial proceedings regardless of the accuracy of the underlying allegations. Members of the press may not be punished for covering (even in colorful language) legal proceedings, documents, and attorney remarks, as long as the coverage of the proceedings is substantially accurate. (*See Larreal v. Telemundo of Fla*, 2020 WL 5750099, *8 [SD Fla Sept 25, 2020, No. 19-22613]; *Holy Spirit Assn. for the Unification of World Christianity v. N.Y. Times Co.*, 49 NY2d 63, 68 [1979].) These constitutional principles are also reflected in New York statutes. (Civ. Rights Law §74; *Freeze Right Refrig. & Air Conditioning Servs., Inc. v. City of New York*, 101 AD2d 175, 181-182 [1st Dept 1984]; *see also Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*, 603 F Supp 2d 584, 588 [SD NY 2009] ("New York courts have broadly construed the meaning of an official proceeding as used in Section 74").)

Those core First Amendment principles readily defeat Smartmatic's claims. The statements challenged by Smartmatic—the overwhelming majority of which were made by guests

appearing on Fox shows (including *Lou Dobbs Tonight*)[6]—all concerned a matter of unquestionable public importance: the legitimacy of the 2020 election. Virtually all the challenged statements occurred during interviews in which Dobbs was providing a forum for the President's advocates to inform the public of the allegations they intended to press. A reasonable viewer would readily have understood that the information Dobbs was imparting was the *fact* that the President, Giuliani, and Powell were making certain allegations—not that those allegations were necessarily true.

It does not matter that Dobbs sometimes provided commentary or encouraging observations when interviewing Giuliani and Powell. As explained in the Fox Companies' motion to dismiss, (NYSCEF.Doc.No.206.at.15-16), the line between protected speech and actionable defamation cannot turn on whether a commentator expresses doubt versus hope that a guest can prove her newsworthy claims. A reasonable viewer would understand that colorful commentary is just commentary, and that Dobbs is still covering newsworthy allegations made by others even if he expresses hope or belief that the allegations would ultimately be proven true. That is particularly so because it would have been obvious to any reasonable viewer watching Dobbs' shows that the allegations were hotly contested by many—not just by Smartmatic, but by government officials and media outlets as well. (*See supra*, p.4; *see also, e.g.*, NYSCEF.Doc.No.1, Compl.¶112 ("[W]e have seen … official investigative and Justice Department officials slow to

---

[6] The *sine qua non* of a defamation claim is that the "*defendant[]* made a defamatory statement," not some third party. (43A NY Jur 2d *Defamation and Privacy* §6 (2d ed. 2021) [emphasis added].). Accordingly, Smartmatic cannot seek to hold Dobbs liable based on the statements made by guests. At any rate, even assuming that Dobbs were responsible for the speech of his guests, and even assuming that his guests made false and defamatory statements, Smartmatic cannot overcome the actual-malice hurdle vis-à-vis Dobbs. *See infra* pp. 11-12.

move[.] … [I]t is more than willful blindness."); *id.*¶125 (detailing statement by CISA and reasons Dobbs was skeptical of it); *id.*¶128 ("[I]t's outrageous that we have an Attorney General, Sidney, who said that he sees no sign of, if any, significant fraud that would overturn the election. We had a head of the Cyber Intelligence Unit for the Department of Homeland Security who is suing some people apparently for saying that his report basically was, it was nonsense when he declared it was the most secure election in the country's history.").)

2. Even if this Court could look past the fact that all of Dobbs' coverage falls well within the protections afforded the press when covering newsworthy matters of public concern, Smartmatic's claims would run up against a separate problem: The vast majority of Dobbs' challenged statements are constitutionally protected opinions, not statements that are provably false. Indeed, the challenged opinions pale in comparison to Dobbs' unvarnished opinions about the nation's top law-enforcement officials, and are equally protected by the First Amendment. While not every statement couched as an opinion is necessarily immune under the First Amendment, opinions held in good faith enjoy greater protection because "a statement on matters of public concern must be provable as false before there can be liability." (*Milkovich v. Lorain Journal Co.*, 497 US 1, 19 [1990]; *cf. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 US 175, 197-199 [2015, Scalia, J., concurring in part and concurring in the judgment] (explaining the narrow circumstances in which a statement of opinion can be deemed "false").)

In conducting that analysis, the court must take account of the context in which the challenged statements were made, just as a reasonable viewer would. (*Greenbelt Coop. Publ. Assn., Inc. v. Bresler*, 398 US 6, 13-14 [1970].) *Lou Dobbs Tonight* is an opinion show where Dobbs frequently offers stimulating opinion and commentary on partisan politics. For instance, in

discussing the election and then-President Trump, Dobbs explained that "[t]his looks to me like it['s] the end of what has been a … four and a half year long effort[] to overthrow the President of the United States." (NYSCEF.Doc.No.3, Pls.Ex.1.at.6.) In another segment, he opined: "It's a … deeply, deeply troubling election. As I said earlier, the worst in this country's history bar none." (NYSCEF.Doc.No.17, Pls.Ex.15.at.7.) And later in that segment, he stated that "[t]his is a nation that has just been wronged mightily." (NYSCEF.Doc.No.16, Pls.Ex.14.at.5.) A reasonable viewer would understand that Dobbs frequently offers his own opinion on matters of partisan politics. As courts have recognized, political commentary on opinion shows does not lend itself well to statements of actual fact, because opinion commentary and rhetorical hyperbole is commonplace in that setting. (*McDougal v. Fox News Network, LLC*, 2020 WL 5731954, *6 [SD NY Sept. 24, 2020, No. 1:19-cv-11161]; *Horsley v. Rivera*, 292 F3d 695, 697, 702 [11th Cir 2002] (Geraldo Rivera's on-air statement was "absolutely protected as rhetorical hyperbole" in light of "context" that consisted of "loose, figurative language that no reasonable person would believe presented facts"); *see also Hobbs v. Imus*, 266 AD2d 36, 37 [1st Dept 1999] ("When considered in the context of the ribald radio 'shock talk' show in which they were made, it is clear that the complained of statements would not have been taken by reasonable listeners as factual pronouncements but simply as instances in which the defendant radio hosts had expressed their views over the air in the crude and hyperbolic manner that has, over the years, become their verbal stock in trade."); *see also Wojciech Cieszkowski v. Baldwin*, 66 Misc. 3d 1206(A), 2019 NY Slip Op 52138[U], *3 [Sup Ct, NY County 2019] ("[A] review of the videos and the transcripts of the two shows demonstrates that defendant was indeed describing his impressions, his state of mind, and his thought process during the occurrence.").)

Likewise, a reasonable viewer would understand both that Dobbs' commentary about the integrity of the election in general were not specific to Smartmatic, and that allegations about Smartmatic were heavily disputed. Dobbs made clear that the allegations came from the President and his lawyers—not from his or Fox's own independent investigation of potential election fraud by Smartmatic. Dobbs informed viewers that Smartmatic had denied some of the allegations against it. (*See supra*, p.4.) He often asked his guests whether they could substantiate their claims with evidence. (*Id.*) And Dobbs made clear to his viewers that many government officials, security officials, and media outlets were skeptical of the allegations. (*Id.*; *see also supra*, p. 9).

Viewed in light of that context, a reasonable viewer would understand that Dobbs was not stating actual facts about Smartmatic, but at most offering his opinion that the partisan and heavily disputed allegations made by Giuliani, Powell, and the President's allies *might* have merit and should be taken seriously. Dobbs himself indicated in many instances that he was offering only an opinion on the need to thoroughly investigate the allegations; for example, after listening to Powell, Dobbs opined that it "almost seems like … probable cause for a complete and thorough investigation." (NYSCEF.Doc.No.16, Pls.Ex.14.at.4; *see also, e.g.*, NYSCEF.Doc.No.1, Compl.¶99.) Similarly, in criticizing Smartmatic and CISA, Dobbs noted that "the country's largest voting machine groups have close ties to a government agency that *disputes any regularities [sic] in this year's election*." (NYSCEF.Doc.No.1, Compl.¶125 [emphasis added].)

For similar reasons, a reasonable viewer would understand that Dobbs was not stating actual facts about Smartmatic on Twitter. Often, he was simply expressly relaying the allegations of the President's lawyers and surrogates. (*See, e.g.*, NYSCEF.Doc.No.1, Compl.¶133 [nn], [oo], [pp].) At other times, he offered his opinion on the integrity of the election and the allegations

made by Giuliani, Powell, and the President's allies without specific reference to Smartmatic. This opinion commentary is clearly not actionable. (*See McDougal*, 2020 WL 5731954, *6-7.)

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

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

The actual-malice standard applies here for two independent reasons. *First*, Smartmatic is at least a limited-purpose public figure, as explained in the Fox Companies' motion to dismiss. (*See* NYSCEF.Doc.No.206.at.17-18.) As a result, under well-established First Amendment law, Smartmatic must demonstrate by clear and convincing evidence that Dobbs himself made each challenged statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (*N.Y. Times Co. v. Sullivan*, 376 US 254, 280 [1964]; *see id.* at 287 (explaining that the "state of mind required for actual malice" must be "brought home" to the speaker).) Even at the pleading stage, a plaintiff is required "to allege facts sufficient to show actual malice with convincing clarity." (*Jimenez v. United Fed'n of Teachers*, 239 AD2d 265, 266 [1st Dep't 1997]; *see also Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc 3d 974, 983, [Sup. Ct., N.Y. Cnty. 2004], *aff'd*, 21 AD3d 826 [1st Dep't 2005].)

Second, this case falls squarely within New York's recently—and substantially—revised anti-SLAPP law, as also explained in the Fox Companies' motion to dismiss. (*See* NYSCEF.Doc.No.206.at.18-19.) New York's anti-SLAPP law has long contained an actual-malice requirement, but before November 2020, it "was effectively limited to cases initiated by persons or business entities that were involved in controversies over a public application or permit." (*Palin v. N.Y. Times Co.*, 2020 WL 7711593, *2 [SD NY Dec. 29, 2020, No. 17-CV-4853

(JSR)].) Last November, however, new amendments to the anti-SLAPP law "t[ook] effect immediately," and they "substantially broadened the reach of the actual malice rule." (*Id.* at *2-3.) Under those amendments, if a plaintiff's claim is based on "any communication in a place open to the public or a public forum in connection with an issue of public interest," or based on "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest,"[7] then—no matter whether the plaintiff is a public figure—he must prove by "clear and convincing evidence" that each challenged statement "was made with knowledge of its falsity or with reckless disregard of whether it was false." (Civ. Rights Law §76-a [1] [a], [2].) Thus, as a statutory matter, New York's revised anti-SLAPP law effectively extends the actual-malice standard that has long existed as a matter of federal constitutional law to all cases involving issues of public concern—and it imports all relevant U.S. Supreme Court precedents as well. (*See, e.g.*, *Palin*, 2020 WL 7711593, *5 ("The Court holds that N.Y. Civil Rights Law § 76-a, as amended on November 10, 2020, applies to this action and requires plaintiff, as a matter of state law, to prove by clear and convincing evidence what she had already been tasked with establishing under the federal Constitution[.]").) This case, which pertains to coverage of the integrity of the 2020 presidential election, self-evidently concerns an issue of surpassing public interest. Accordingly, Smartmatic must satisfy the actual-malice standard as a matter of both the First Amendment and New York's anti-SLAPP law.

To state a defamation claim against Dobbs, therefore, Smartmatic must allege facts that, if true, would clearly and convincingly show that Dobbs made allegedly defamatory statements with *subjective* knowledge that they were false or with reckless disregard for their truth. (*N.Y. Times*,

[7] Under the anti-SLAPP law, the term "'public interest' shall be construed broadly, and shall mean any subject other than a purely private matter." (Civ. Rights Law §76-a [1] [d].)

376 US at 279-280.) That is a high bar. Mere allegations of negligence or "failure to investigate" before publishing do not suffice (*See Harte-Hanks Communications, Inc. v. Connaughton*, 491 US 657, 688 [1989]; *St. Amant v. Thompson*, 390 US 727, 731 [1968]; *Chiaramonte v. Coyne*, 2020 WL 434342, *6 [Sup Ct, NY County, Jan. 28, 2020, No. 156644/2017].) Nor do allegations that a defendant was agnostic or unsure about the accuracy of a statement. (*See Howard v. Antilla*, 294 F3d 244, 252-254 [1st Cir 2002]; *Liberman v. Gelstein*, 80 NY2d 429, 438-439 [1992].) Instead, Smartmatic must allege facts that "permit the conclusion" that Dobbs "*in fact* entertained serious doubts as to the truth" of the challenged statements," (*Liberman*, 80 NY2d at 438 [emphasis added]), or acted with a "high degree of awareness" of its "probable falsity," (*Garrison v. Louisiana*, 379 US 64, 74 [1964]). In attempting to allege actual malice, moreover, Smartmatic must bring home the "state of mind required" to *Dobbs himself*; it may not impute to Dobbs knowledge that *someone else* at Fox may have had. (*Sullivan*, 376 US at 287.) In other words, Smartmatic must allege facts showing that *Dobbs himself* was aware of, or recklessly disregarded, information that contradicted his statements. Knowledge that *others* at Fox may have had is irrelevant to *Dobbs'* state of mind. (*See id.*) All of that makes actual malice hard enough to satisfy in the ordinary case. But it is especially difficult to demonstrate in the context of live-interview shows like *Lou Dobbs Tonight*, given that hosts have only limited ability to fact-check guests in real time. (*See Pacella v. Milford Radio Corp.*, 462 NE2d 355, 360 [Mass App Ct 1984], *affd* 476 NE2d 595 [Mass 1985]; *Adams v. Frontier Broadcasting Co.*, 555 P2d 556, 566-67 [Wyo. 1976].)

Smartmatic falls well short of alleging facts showing that Dobbs specifically knew (or recklessly disregarded) that the claims the President's surrogates were making about Smartmatic were false before he covered and commented on those allegations. (*See Sullivan*, 376 US at 279-280.) Quite the opposite: the complaint and show transcripts reflect an absence of actual malice

in several ways. First, as Dobbs dealt with the developing story around the claims being pursued by the President's lawyers, Dobbs repeatedly emphasized that the President's allies would need to prove their claims in court with actual evidence, and he clarified that Smartmatic and others disputed those claims. *See supra*, p.4. And as explained in the Fox Companies' motion to dismiss (NYSCEF.Doc.No.206.at.21), the fact that Dobbs *told* his viewers about the information that Smartmatic sent to his coordinating producer, Alex Hooper, dooms any suggestion that he disregarded the information contained therein. If anything, many of Dobbs' comments convey agnosticism or genuine lack of knowledge, which by definition cannot reflect actual malice. (*See Biro v. Conde Nast*, 807 F3d 541, 544 [2d Cir 2015] (actual malice consists of statements made "with knowledge that the statements were false or with reckless disregard as to their falsity"); *see also, e.g.*, NYSCEF.Doc.No.1, Compl.¶112 ("We don't even know who the hell really owns these companies, at least most of them."); *id.*¶120 ("[O]ur election is run by companies, the ownership of which we don't know."); *id.*¶119 ("There has been great controversy as well as you know, about *reports* of a raid on a company Scytl in Germany, which held election data, *presumably*, and a raid that was carried out by U.S. forces *or so goes the report, although the forces themselves were not clearly identified nor the event actually proven*. Can you tell us what actually did happen there *what you do know*?" [emphasis added]).) And although Smartmatic declined Dobbs' invitation to appear on his show, Dobbs ran an interview with an election expert who disagreed with many of the claims made by Giuliani and Powell.

At most, Smartmatic alleges that Dobbs failed to review information that contradicted some of the allegations about Smartmatic, a company that has been dogged by election-related controversy for decades. (*See supra*, pp. 2-3.) But that theory of actual malice is foreclosed by the settled rule that even in the context of news reporting, the "failure to investigate before

publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." (*Harte-Hanks*, 491 at 688.) That rule applies *a fortiori* to an interview of a newsworthy individual (whose claims remain newsworthy whether they are true or false) and is especially sensible in the context of a show like *Lou Dobbs Tonight*, which features live studio guests—a format that made it exceedingly difficult, if not impossible, to rebut statements point-by-point on air. (*See Pacella v. Milford Radio Corp.*, 462 NE2d 355, 360 [Mass App Ct 1984], *affd* 476 NE2d 595 [Mass 1985]; *Adams v. Frontier Broadcasting Co.*, 555 P2d 556 [Wyo. 1976].) Requiring television hosts—especially hosts of commentary shows like *Lou Dobbs Tonight*—to pre-vet anything a guest might say would neuter television's ability to respond instantly to breaking news, dampen the interplay of live discussion, and restrict the use of the TV medium in ways that are wholly inconsistent with the First Amendment. It would place hosts in a particularly untenable position when they have guests with opposing views, since one or the other (or perhaps both) must be shading the underlying truth. Fortunately, the First Amendment protects all of that as part of our national commitment to a wide-open and robust debate. That national commitment forecloses billion dollar lawsuits against commentators that interview news-making individuals making hotly contested statements. If a wide-open, robust debate ultimately reveals that one side could back up their allegations, that is a sign that the First Amendment is working. It should be a cause for celebration, not an excuse for an outsized lawsuit.

At bottom, Smartmatic's allegations demonstrate only that Dobbs was attempting to inform the public about whether the sitting President of the United States and his allies could back up their claims about Smartmatic with evidence. Smartmatic cannot, consistent with the First Amendment, impose crippling liability on Dobbs for engaging in that protected activity.

CONCLUSION

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

Respectfully submitted,

Dated: New York, New York
February 11, 2021

/s/ Steven G. Mintz
Steven G. Mintz
Mintz & Gold LLP
600 Third Avenue
25th Floor
New York, NY 10016
Telephone: 212.696.4848
Email: mintz@mintzandgold.com

Paul D. Clement (*pro hac vice* forthcoming)
Erin E. Murphy (*pro hac vice* forthcoming)
K. Winn Allen, P.C. (*pro hac vice* forthcoming)
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202.289.5000
Email: paul.clement@kirkland.com
Email: erin.murphy@kirkland.com
Email: winn.allen@kirkland.com

Mark R. Filip, P.C. (*pro hac vice* forthcoming)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: 312.862.2000
Email: mark.filip@kirkland.com

Attorneys for Defendant Lou Dobbs

CERTIFICATE OF COMPLIANCE

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

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 12
Line spacing: Double

Word Count. The total number of words in this brief, exclusive of the caption, table of contents, table of authorities, and signature block is 5,513.

Dated: New York, New York
February 11, 2021

/s/ *Steven Mintz*
Steven Mintz