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

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

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

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## INTRODUCTION

Judge Jeanine Pirro is a former judge, Westchester County District Attorney, and well-known television commentator whose weekly Fox News program *Justice With Judge Jeanine* provides "legal insights on the news of the week." (NYSCEF.Doc.No.1, Compl.¶23.) The show is often characterized by Pirro's hard-hitting opinions, (*McKesson v. Pirro*, 2019 WL 1330910 *12 [Sup Ct, New York County Mar. 25, 2019, No. 160992/2017].) In the wake of the 2020 presidential election, then-President Trump deployed his legal team to pursue wide-ranging allegations of fraud in courts throughout the country, including allegations about Smartmatic. Naturally, Pirro's legal and current-events show devoted some coverage to these undeniably newsworthy allegations. Smartmatic's billion-dollar lawsuit nonetheless seeks to hold her liable for doing what she does best and what the First Amendment protects—offering commentary on newsworthy legal issues and other matters of public concern.

Although Smartmatic's 285-page complaint has a lot to say about a lot of things, it has very, very little to say about Judge Pirro. The paltry allegations about her are largely limited to the following: *First*, on November 14, 2020, in the immediate wake of the presidential election, Pirro interviewed the President's attorney and former federal prosecutor Sidney Powell to discuss the President's efforts to mount legal challenges to the 2020 election results. Pirro noted for her audience that Smartmatic had denied those claims, and she pressured Powell on how she was going to prove her allegations in court. *Second*, on her next show on November 21—which aired two days after the President's legal team gave a highly publicized press conference outlining its legal strategy—Pirro opened *Justice With Judge Jeanine* by discussing the claims and evidence the President's legal team had put forward.

Pirro's coverage of these matters of public concern and widespread importance lies at the heart of the First Amendment and the protections New York affords through its recently amended

anti-SLAPP law. Indeed, journalists, commentators, and television hosts from across the country, and representing a wide variety of news outlets, exercised those same First Amendment freedoms and reported on President Trump's claims and the efforts made by his legal team to challenge the election results both in court and in the public realm. The constitutional protection for the free press and related concepts like the fair-report and neutral-report doctrines exist precisely to shield commentary like Pirro's from the threat of lawsuits seeking massive damages. Her legal commentary, fleeting as it was, centered on newsworthy events of the highest order—namely, the fact that the sitting President had refused to accept the outcome of a presidential election, and the grounds on which the President and his allies were planning to challenge that election in court. That reporting and commentary lie at the absolute core of the First Amendment, and this lawsuit strikes at the Amendment's heart. It should be dismissed for all the reasons detailed in the Fox Companies' motion to dismiss, which Pirro joins in full, and for its abject failure to make sufficient allegations concerning Pirro herself.

## BACKGROUND[1]

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

Smartmatic's complaint cites just two segments of *Justice With Judge Jeanine* that it alleges to have been defamatory, and a third segment in which a voting-technology expert provided his own views about the Trump legal team's allegations about Smartmatic. (NYSCEF.Doc.No.1,

[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].)

Compl.¶¶101-103, 121, 235.) None of the language contained in any of these segments is actionable.

First, on November 14, 2020, Pirro conducted a short interview of Sidney Powell. Pirro opened the segment by noting the newsworthiness of the topic, stating: "The election results in several battleground states continue to be under intense focus as allegations of voter fraud are being investigated." (NYSCEF.Doc.No.5, Pls.Ex.3.at.2.) She then welcomed "Trump campaign attorney and former federal prosecutor, Sidney Powell" to give "some idea of what *you're working on* now and what exactly *you* are doing on the Trump [Campaign], in his effort to identify problems with the election." (*Id.* (emphases added).) As Powell explained her allegations of fraud against Smartmatic and others, Pirro pushed back. She countered that the companies, including Smartmatic, "denied that they have done anything improper[,] and they denied that this claim that there's six thousand votes that went from President Trump to Biden had anything to do with their software," and she asked Powell "what evidence" Powell had to "prove" her case. (*Id.* at 2-3; *see also id.* ("[H]ow do you … prove that on election night, or immediately after, that at the time that the votes were being either tabulated or put in, that we can prove that they were flipped?").)

Second, the complaint refers to Pirro's next show, on November 21, 2020, which aired two days after President Trump's legal team—including Rudy Giuliani and Sidney Powell—gave a highly publicized press conference where they said they were "representing President Trump" and were "present[ing] in brief the evidence that we've collected over the last … two weeks" concerning voter-fraud allegations and their plans for challenging the presidential election in court. (Pirro.Ex.2.at.2.) Pirro opened her show with a monologue describing the claims outlined by the legal team at the press conference, where Powell and Giuliani had alleged that Dominion and Smartmatic had developed software that could change votes as part of a conspiracy to steal votes

by the Democratic Party. (Pirro.Ex.2.at.44-45; NYSCEF.Doc.No.30, Pls.Ex.28.at.3.) Pirro noted that "the President's lawyers [have] come forward alleging an organized criminal enterprise, a conspiracy by Democrats, especially in cities controlled and corrupted by Democrats." (NYSCEF.Doc.No.30, Pls.Ex.28.at.2.) She continued, "The President's lawyers [are] alleging a company called Dominion, which they say started in Venezuela with Cuban money and with the assistance of Smartmatic software, [has] a backdoor [that] is capable of flipping votes," and that "the President's lawyers [are] alleging that American votes in a presidential election are actually counted in a foreign country." (*Id*. at 3.) She went on to note that Giuliani, one of the President's lawyers, had "described election night numbers going in the favor of Donald Trump, but by the next morning, absurd increases in Biden votes." (*Id.* at 4.)

True to the description of her program, Pirro also gave her viewers legal insights into the claims. She explained that lawsuits are supported by affidavits, which are "sworn statements of individuals signed under penalty of perjury. Meaning they know they face the penalty of prosecution and five years if they lie." (*Id.* at 3-4.) She also noted that the President's lawyers claimed to have 250 supporting affidavits. (*Id.* at 4.)

Third, on the December 20, 2020 broadcast of *Justice With Judge Jeanine*, Fox News aired a pre-recorded interview with Eddie Perez, a voting-technology expert at a nonpartisan election-technology nonprofit.[2] That segment solicited Perez's views about the accuracy of the allegations Powell and Giuliani had made about Smartmatic. The complaint does not allege that anything contained in the Perez interview was defamatory. (NYSCEF.Doc.No.1, Compl.¶235.)

[2] About Our Mission & Organization, OSET Institute, https://www.osetfoundation.org/ (last accessed Feb. 11, 2021).

**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." (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]

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[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," (*Yangtze River Port and Logistics Ltd. v. Research*, 2020 WL 905770 *5 [Sup Ct, New York County Jan. 25, 2020, No. 150721/2019]), and "judicial records" and other documents, the contents of which are "essentially undeniable," (*Fontanetta v. Doe*, 73 AD3d 78, 84-85 [2d Dept 2010]).

[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 Pirro made the challenged statements) governs. Because the Court can resolve this case solely by reference to First

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 Pirro must be dismissed.[6]

## I. The Complaint Fails To State A Claim Against Pirro 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 Pirro. Pirro fully joins in those arguments and incorporates them by reference. Smartmatic's meager claims against Pirro personally must stand or fall based on her own conduct and her own state of mind, and judged in that light, they cannot proceed.

## II. The Claims Against Pirro Challenge Speech That Is Fully Protected by the First Amendment.

### A. First Amendment Principles

The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." (*N.Y. Times Co. v. Sullivan*,

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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].) In all events, New York journalists are entitled to the application of privileges afforded under New York law, including the fair report privilege. (Order, *Gubarev v. Buzzfeed*, No. 0:17-cv-60426-UU [S.D. Fla. Jun. 5, 2018], Dkt. No 171, at 10.)

[6] New York constitutional protections are even broader for speech and press activities. (*Immuno AG. v. Moor-Jankowski*, 77 NY2d 235, 249 [1991] ("[T]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution").)

376 US 254, 270 [1964].) It accordingly offers the highest protection to speech on matters of public concern. (*Snyder v. Phelps*, 562 US 443, 452 [2011].) Such speech is "at the heart of the First Amendment's protection," (*First Natl. Bank of Boston v. Bellotti*, 435 US 765, 776 [1978]), and "occupies the highest rung of the hierarchy of First Amendment values," (*Connick v. Myers*, 461 US 138, 145 [1983]). Indeed, the Supreme Court has stated that "speech concerning public affairs is … the essence of self government." (*Garrison v. Louisiana*, 379 US 64, 74-75 [1964].) This principle applies with even greater force to news coverage and commentary on matters of public concern, as the First Amendment by its terms protects not only freedom of speech, but freedom of the press, and is "intended to give to liberty of the press" the "broadest scope that could be countenanced in an orderly society." (*Bridges v. California*, 314 US 252, 265 [1941].)

These core First Amendment principles are borne out in several doctrines that protect the press from liability for covering allegations that are newsworthy just by virtue of being made. The neutral-reporting doctrine protects "disinterested communications" by the press on "matters of public concern," even if that involves communicating defamatory claims. (*Rendón v. Bloomberg, L.P.*, 403 F Supp 3d 1269, 1276 [SD Fla 2019].) "If the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement." (*DeLuca v. N.Y. News Inc.*, 109 Misc 2d 341, 345-346 [Sup Ct, New York County Apr. 14, 1981].) While that doctrine is sometimes described as a common-law one, it is firmly rooted in the First Amendment, as "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." (*Edwards v. Natl. Audubon Socy., Inc.*, 556 F2d 113, 120 [2d Cir 1977].) Indeed, while the neutral-report doctrine is often described as a

"privilege," properly speaking, such coverage is not merely "privileged"; it is not defamatory at all, because a reasonable viewer would understand that the publication is not presenting information that it has determined to be true, but rather is fulfilling its journalistic duty to "present[] newsworthy allegations made by others." (*Croce v. N.Y. Times Co.*, 930 F3d 787, 793 [6th Cir 2019].)

Core First Amendment protections are also reflected in doctrines that protect the press when reporting on judicial proceedings, as "the public has the right to be informed as to what occurs in its courts," (*Estes v. Texas*, 381 US 532, 541-542 [1965]), regardless of the accuracy of the underlying allegations, (*Freeze Right Refrig. & Air Conditioning Servs., Inc. v. City of New York*, 101 AD2d 175, 181-182 [1st Dept 1984]). The fair-report doctrine is "broad." (*Cholowsky v. Civiletti*, 69 AD3d 110, 114 [2d Dept 2009]; *Larreal v. Telemundo of Fla.*, 2020 WL 5750099, *8 [SD Fla Sept. 25, 2020, No. 19-22613].) It does not confine the press to reporting the precise contents of legal documents; it covers reports on attorney remarks too. (*Larreal*, 2020 WL 5750099, *7; *Lacher v. Engel*, 33 AD3d 10, 17 [1st Dept 2006]; *Jamason v. Palm Beach Newspapers, Inc.*, 450 So 2d 1130, 1132 [Fla Dist Ct App 1984].) A report need not be "technically precise," (*Rasmussen v. Collier County Publ. Co.*, 946 So 2d 567, 570 [Fla Dist Ct App 2006]), and the "language used" should "not be dissected and analyzed with a lexicographer's precision," (*Patriarch Partners, LLC v. Mergermarket (U.S.) Ltd.*, 2018 WL 1587674, *5-6 [Sup Ct, New York County Apr. 2, 2018, No. 160379/2016] (citing *Holy Spirit Assn. for the Unification of World Christianity v. N.Y. Times Co.*, 49 NY2d 63, 68 [1979])).

These constitutional principles are reflected in New York statutes. For example, Section 74 of the New York Civil Rights Law protects reports of judicial and other "official" proceedings, regardless of whether they are open to the public and regardless of the accuracy of the underlying

allegations. (*Freeze Right*, 101 AD2d at 181-82; *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").) "The test is whether the report concerns actions taken by a person officially empowered to do so." (*Freeze Right*, 101 AD2d at 181-82). Under this rule, the privilege for reports of "official proceedings" includes reports of investigations even if they did not culminate in formal action as well as "the announcement of an investigation by a public agency, made before the formal investigation has begun." (*Id*. at 179, 181-182) It likewise encompasses affidavits collected in investigations as well as briefings to public officials such as the President. (*Fridman v. BuzzFeed, Inc.*, 172 A.D.3d 441 [1st Dep't 2019]; *Holy Spirit Ass'n*, 49 NY2d 67 [1979]; *Russian Am. Found., Inc. v. Daily News, L.P.,* 109 A.D.3d 410, 412-413 [1st Dep't 2013].)[7]

**B. Pirro's Statements Are Protected**

These core constitutional principles clearly apply to Pirro's statements, and they just as clearly require dismissal of Smartmatic's claims against her.[8] It was indisputably newsworthy that the President's lawyers and advocates were arguing that the presidential election was tainted by fraud—indeed, that is precisely why dozens of news outlets across the globe and across the political spectrum covered those very same allegations. The public had a right to know, and

[7] To come under the protection of section 74, moreover, "there is 'no requirement that a publication report the plaintiff's side of the controversy.'" (*Tenney v. Press-Republican*, 75 AD3d 868, 869 [3d Dept 2010] (quoting *Cholowsky*, 69 AD3d at 115.)

[8] 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 Pirro liable based on the statements made by guests. At any rate, even assuming that Pirro were responsible for the speech of her guests, and even assuming that her guests made false and defamatory statements, Smartmatic cannot overcome the actual-malice hurdle vis-à-vis Pirro. *See infra* pp. 14-19.

Pirro—particularly as the host of an opinion program that often discusses legal issues—had a right to cover, the undeniably newsworthy fact that the President and his allies were tying Smartmatic's software to potential vote manipulation, regardless of the ultimate truth or accuracy of those allegations. Of the two *Justice with Judge Jeanine* segments that Smartmatic challenges, one was an interview in which Pirro provided a forum for one of the President's lawyers to inform the public of the allegations she intended to press, and the other was a monologue in which Pirro described the allegations made in a news conference given by the President's legal team that had taken place two days earlier. A reasonable viewer of either program would have understood that the information Pirro was imparting was *the fact* that the President, Giuliani, and Powell were making certain allegations—not that those allegations were necessarily true.

To start, the complaint fails to identify anything in the November 14th episode of *Justice with Judge Jeanine* that could support a defamation (or disparagement) claim against Pirro. Pirro began by asking Powell—who at the time was widely known to be part of the President's legal team and whom Pirro identified as a "Trump campaign attorney"—questions about what *she* was working on: "Can you give me some idea of what *you're working on now* and what exactly *you are doing* on the Trump [sic] in his effort to identify problems with the election?" (NYSCEF.Doc.No.5, Pls.Ex.3.at.2 (emphases added)). After Powell stated that there were "[a]ll kinds of different means of manipulating the Dominion and Smartmatic software," Pirro quickly jumped in to push back: "Well, and now that you mention it, [] they've denied that they have done anything improper and they denied that this claim that there's six thousand votes that went from—from President Trump to Biden had anything to do with their software. … [W]hat evidence do you have to prove this?" (*Id*. at 2-3.) Throughout the interview, Pirro continued to push Powell on what her strategy and evidence was, asking, "what is your intent here?," and "how do you … prove

that on election night, or immediately thereafter, that at the time that the votes were being either tabulated or put in, that we can prove that they were flipped?" (*Id*. at 3.) Finally, Pirro closed by reiterating that it was *Powell's* "mission" to uncover voter fraud in connection with the 2020 election. (*Id*. at 6.) In short, the interview discussed the investigation results and legal positions of the President, which were newsworthy by virtue of being made, regardless of whether they could ultimately be proven, and which Pirro had an absolute right to cover. And throughout the entire interview, Pirro pushed Powell to validate her claims, emphasized the need for evidence to substantiate Powell's claims, and explained that Smartmatic had denied the allegations. None of that could begin to support a defamation claim against Pirro, who was merely exercising her right as a journalist to keep the public informed on matters of obvious public concern.

Pirro's November 21 monologue provides no better basis for Smartmatic's claims. In that monologue, Pirro merely summarized what President Trump's legal team (including Powell and Giuliani) had asserted two days earlier in a widely publicized and heavily reported news conference concerning their voter-fraud evidence and legal strategies. Pirro stated that "the President's lawyers [have] come forward alleging an organized criminal enterprise, a conspiracy by Democrats, especially in cities controlled and corrupted by Democrats." (NYSCEF.Doc.No.30, Pls.Ex.28.at.3.) This is indeed what happened at the press conference: Giuliani contended that his fraud investigation found that fraud was "focused on big cities and specifically focused on, as you would imagine, big cities controlled by Democrats." (Pirro.Ex.2.at 3.) Pirro also stated that the "President's lawyers [are] alleging a company called Dominion, which they say started in Venezuela with Cuban money and with the assistance of Smartmatic software, [has] a backdoor [that] is capable of flipping votes." (NYSCEF.Doc.No.30, Pls.Ex.28.at.3.) Again, it is indisputably true that this is indeed what happened at the press conference: While discussing

"Dominion voting systems, [and] the Smartmatic technology software," Powell stated that "one of [the software's] most characteristic features is its ability to flip votes. It can set and run an algorithm that probably ran all over the country to take a certain percentage of votes from President Trump and flip them to President Biden." (Pirro.Ex.2.at.26-37; *see also id*. at 45 ("The gentleman who founded Smartmatic, there's video of him on the Internet, explaining that, yes, [on] at least one occasion he admits they changed a million votes with no problem.").) Powell also stated at the press conference that "the Smartmatic technology software [was] created in Venezuela at the direction of Hugo Chávez" and with assistance from Cuba. (*Id.* at 35-36.) Just as Pirro said, the President's lawyers repeatedly stated during the press conference that their claims were backed by numerous affidavits, and that votes were being counted overseas. (*Id.* at 60.)

And Powell's lawsuits indeed filed affidavits levelling these charges.[9] In short, viewed in their full context, (*Patriarch Partners*, 2018 WL 1587674, *4), Pirro's statements were doing nothing more than reporting and commenting on "newsworthy allegations made by others," (*Croce*, 930 F3d at 793). A reasonable viewer would have understood that Pirro was summarizing the allegations made by the President's lawyers at their November 19 news conference and offering spirited commentary on the same. The December 10 segment that aired on Pirro's show with Eddie Perez, a voting-technology expert at a nonpartisan election-technology nonprofit, and addressed,

[9] Declaration of (Redacted) ¶10, *Bowyer v. Ducey*, No. 2:20-cv-02321 (D. Ariz. Dec. 2, 2020), Dkt. 1-2 ("I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the leaders of conspiracy with the Venezuelan government."); *id.* ¶12 ("Chavez offered Smartmatic many inducements, including large sums of money, for Smartmatic to create or modify the voting system so that it would guarantee Chavez would win every election cycle. Smartmatic's team agreed to create such a system and did so."); *id.* ¶20 ("After Smartmatic created the voting system President Chavez wanted, he exported the software and system all over Latin America. It was sent to Bolivia, Nicaragua, Argentina, Ecuador, and Chile -- countries that were in alliance with President Chavez."); *id.* at ¶¶21-22 (alleging that "the Smartmatic software is in the DNA of every vote tabulating company's software and system," including Dominion in the United States).)

point-by-point, the allegations Smartmatic challenged, drove that home. (NYSCEF Doc.No.49, Pls.Ex.47.) Nothing about such content is actionable as defamation.

This is particularly true given the context in which the statements were made, which demonstrates that they were statements of opinion protected by the First Amendment and Article I, § 8 of the New York State Constitution. (*Jacobus v. Trump*, 55 Misc. 3d 470, 475-476 [Sup Ct, New York County Jan. 9, 2017]), *aff'd*, 156 A.D.3d 452 [1st Dept 2017].) *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292 (1986). Courts routinely hold that the context in which a statement is made can demonstrate that a "reasonable viewer" would not interpret the allegedly defamatory statement as fact. (*See, e.g.*, *Cieszkowski v. Baldwin*, 66 Misc 3d 1206(A), *3 [Sup Ct, New York County 2019]; *Behr v. Weber*, 1990 WL 270993, *3-4 [Sup Ct, New York County Jan. 5, 1990, No. 16047/89].) And where "a reasonable viewer would understand the statements … as mere *allegations* to be investigated rather than as *facts*," a challenged statement does not qualify as a statement of fact about the plaintiff, but rather qualifies as an opinion. (*Foley v. CBS Broadcasting, Inc.*, 28 Misc 3d 1227(A), *4 [Sup Ct, New York County 2006].) Here, the context confirmed that Pirro's own statements were her protected opinion. Pirro has a reputation, recognized by this Court, for engaging in "loud, caustic, and hard-hitting" commentary that signals to readers that she is offering her opinion. (*Mckesson*, 2019 WL 1330910, *12.) Indeed, the complaint recognizes that Pirro called for an investigation of Powell's allegations by the Department of Justice, (NYSCEF.Doc.No.1, Compl.¶103), which is a classic example of protected opinion. (*See Brian v. Richardson*, 87 NY2d 46, 51, 54 [1995] (op-ed writer's call for a Department of Justice investigation into purported illegal activity by plaintiff was non-actionable opinion).) Within the context of Pirro's show, and especially given that she pushed back on Powell's claims and simply

described the President's lawyers' news conference, no "reasonable viewer" would interpret Pirro's own statements as stating objective facts rather than, at most, her opinion.

In short, Pirro was providing a forum to discuss one of the most newsworthy events of the past six months, not purporting to have uncovered facts about Smartmatic or its role in the election herself. On one occasion, she asked Sidney Powell to describe her allegations, then pressed Powell for evidence and noted that Smartmatic had denied Powell's claims. On another occasion, she describes the allegations made by the sitting President's legal team two days after a Trump legal-team news conference, on a show expressly designed to give legal insight into current news. And when Smartmatic complained, Pirro's program aired an interview with a disinterested third party to express his view that the data did not support Powell's claims. That is not defamation; that is firmly protected First Amendment activity. When a sitting President and his surrogates claim an election was rigged, the public has a right to know what they are claiming and what evidence they say they have. In that context, interviewing lawyers advocating for the President or describing what those lawyers have stated at a news conference is fully protected First Amendment activity, whether those lawyers can eventually substantiate their claims or not.

## III. The Complaint Fails to Allege That Pirro Acted With Actual Malice Under the First Amendment and CPLR 3211 [g].

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

The actual-malice standard applies here for two independent reasons. *First*, Smartmatic is at least a limited-purpose public figure, as explained in the Fox Companies' motion to dismiss. (*See* NYSCEF.Doc.No.206.at.17-18.) As a result, under well-established First Amendment law, Smartmatic must demonstrate by clear and convincing evidence that Pirro herself

made each challenged statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (*N.Y. Times*, 376 U.S. at 280; *see id.* at 287 (explaining that the "state of mind required for actual malice" must be "brought home" to the speaker); *Prozeralik v. Capital Cities Commc'ns, Inc.*, 82 NY2d 466, 474 [1993] (applying the *Times* standard of actual malice).) Even at the pleading stage, a plaintiff is required "to allege facts sufficient to show actual malice with convincing clarity." (*Jimenez v. United Fed'n of Teachers*, 239 AD2d 265, 266 [1st Dep't 1997]; *see also Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc 3d 974, 983, [Sup Ct, New York County 2004], *aff'd*, 21 AD3d 826 [1st Dept 2005].)

*Second*, this case falls squarely within New York's recently—and substantially—revised anti-SLAPP law, as also explained in the Fox Companies' motion to dismiss. (*See* NYSCEF.Doc.No.206.at.18-19.) New York's anti-SLAPP law has long contained an actual-malice requirement, but before November 2020, it "was effectively limited to cases initiated by persons or business entities that were involved in controversies over a public application or permit." (*Palin v. N.Y. Times Co.*, 2020 WL 7711593 *2 [SD NY Dec. 29, 2020, No. 17-CV-4853].) Last November, however, new amendments to the anti-SLAPP law "t[ook] effect immediately," and they "substantially broadened the reach of the actual malice rule." (*Id.* at *2-3.) Under those amendments, if a plaintiff's claim is based on "any communication in a place open to the public or a public forum in connection with an issue of public interest," or based on "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest,"[10] then—no matter whether the plaintiff is a public

[10] 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] [a], [2].)

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 into all such cases all relevant U.S. Supreme Court precedents as well. (*See, e.g.*, *Palin*, 2020 WL 7711593, at *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 claim against Pirro, therefore, Smartmatic must allege facts that, if true, would clearly and convincingly show that Pirro made the allegedly defamatory statements with *subjective* knowledge that they were false or with reckless disregard for their truth. (*N.Y. Times*, 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]; *Sweeney v. Prisoners' Legal Servs. of New York, Inc.*, 84 N.Y.2d 786, 793 [1995] (a failure to investigate "is not enough to prove actual malice even if a prudent person would have investigated before publishing the statement"); *Kipper v. NYP Holdings Co., Inc.*, 12 NY3d 348, 354 [2009] ("reckless conduct is not measured by whether a reasonably prudent [person] would have … investigated before publishing");

*Chiaramonte v. Coyne*, 2020 WL 434342, *6 [Sup Ct, New York 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 Pirro "*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 their "probable falsity," (*Garrison v. Louisiana*, 379 US 64, 74 [1964]). In attempting to allege actual malice, moreover, Smartmatic must bring home the "state of mind required" to *Pirro herself*; it may not impute to Pirro knowledge that *someone else* at Fox News may have had. (*N.Y. Times*, 376 US at 287.) In other words, Smartmatic must allege facts showing that *Pirro herself* was aware of, or recklessly disregarded, information that contradicted her statements. Knowledge that *others* at Fox News may have had is irrelevant to *Pirro's* state of mind. (*See id.*) All of that makes actual malice hard enough to satisfy in the ordinary case. But it is especially difficult to demonstrate in the context of live-interview opinion shows like *Justice With Judge Jeanine*, 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 [Wyo. 1976].)

Smartmatic's complaint alleges no facts that come anywhere close to showing that Pirro knew (or recklessly disregarded) that Powell's and Giuliani's claims were false when she covered their allegations on November 14 and 21. To begin, the complaint alleges *nothing at all* specific to *Pirro's* subjective knowledge or state of mind—no facts whatsoever showing that she specifically became aware, or was made aware, of information that contradicted anything in the two segments that Smartmatic challenges. Indeed, the complaint alleges virtually nothing about

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

Instead, the complaint relies almost entirely on broad-brush allegations about contradictory facts Smartmatic thinks the Fox News hosts (including Pirro) should have researched and discovered. (*See* NYSCEF.Doc.No.1, Compl.¶¶221, 242, 253-256, 259-357.) As explained in the Fox Companies' brief, however, that theory of actual malice is a non-starter under settled First Amendment precedent, which squarely holds that even in the context of news reporting, the "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." (*Harte-Hanks*, 491 US at 688; *see* NYSCEF.Doc.No.206.at.20).) The protection for interviews of newsworthy individuals or summaries of press conferences is greater still, because the statements of newsworthy individuals merit coverage by the press whether they are ultimately proven true or false. The only specific, non-conclusory allegation Smartmatic makes about the knowledge of *anyone* at Fox News is its allegation that a coordinating producer for *Lou Dobbs Tonight* received two emails from Smartmatic stating that its technology was used only in Los Angeles County, its software does not tabulate votes, and it did not provide input to the CISA. (NYSCEF.Doc.No.1, Compl.¶¶282-283.) This allegation does not pertain to Pirro at all, and since Smartmatic alleges no facts bringing that

knowledge home *to Pirro*, it is irrelevant; Smartmatic is squarely foreclosed from imputing knowledge of a coordinating producer for a different show to Pirro. (*See N.Y. Times*, 376 US at 287.)

Beyond that, Smartmatic's allegations show only that Pirro went out of her way to push back against Powell's allegations and reported on Smartmatic's denials of the allegations, and her show gave air time to a voting-technology expert to tell Smartmatic's side of the story when Smartmatic declined to do so itself. (*See* NYSCEF.Doc.No.5, Pls.Ex.3.at.3; NYSCEF.Doc.No.1, Compl.¶¶235-237.) Those allegations doom any claim of actual malice—particularly given that Pirro was interacting with Powell on a live show, under circumstances in which fact-checking her guest's statements in real time was neither necessary nor practical. (*See Pacella*, 462 NE2d 355; *Adams*, 555 P.2d 556.) More fundamentally, they reinforce the conclusion that a reasonable viewer would readily have understood that Pirro was covering the allegations about Smartmatic not because she was confident they were true, but rather because the fact that these claims were being made was a matter of intense public interest. That is not defamation; it is exactly how a commentator goes about fostering "uninhibited, robust, and wide-open" debate the First Amendment is designed to protect. (*N.Y. Times*, 376 US at 270.)

Because Smartmatic's complaint fails to allege any facts showing that Pirro made any defamatory statements with actual malice, the claims against her must be dismissed.

## 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,

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**CERTIFICATE OF COMPLIANCE**

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

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