

## Fox Wields 1st Amendment in \$2.7B Election-Fraud Defamation Fight

NICK RUMMELL February 9, 2021

*The network now claims that the false claims it broadcast about Smartmatic helping Democrats steal the 2020 election are privileged as a neutral report.*



Dominion Voting Systems included this screenshot of Sidney Powell repeating baseless election-fraud claims in a Jan. 8 federal complaint filed against the ex-Trump lawyer. (Image via Courthouse News)

MANHATTAN (CN) — Faced with a \$2.7 billion defamation suit, Fox News said in a motion to dismiss that the First Amendment protects post-election reporting in which the electronic voting company Smartmatic was falsely accused of helping Democrats to steal the U.S. presidency.

“This suit strikes at the heart of the First Amendment,” Kirkland & Ellis attorney Paul Clement says in [the brief for Fox](#), filed Monday. “Smartmatic’s theory is fundamentally incompatible with the reality of the modern news network and deeply rooted principles of free speech law.”

In a separate statement, Fox News added that, “if the First Amendment means anything, it means that Fox cannot be held liable for fairly reporting and commenting on competing allegations in a hotly contested and actively litigated election.”

Clement says the [complaint Smartmatic brought last week](#) in state court in Manhattan does not show the network exhibiting “actual malice” in any statement by Fox itself.

The 22-page motion cites the landmark case *New York Times Co. v. Sullivan*, in which the Gray Lady criticized police for mistreating civil rights protestors. An Alabama police commissioner sued the paper, claiming several inaccuracies within the article were tantamount to defamation.

In the 1964 ruling, the U.S. Supreme Court was unanimous that the Times could not be held liable for defamation because there was no evidence of actual malice. The ruling has been cited several times in other defamation and invasion of privacy suits against various publishers.

“Indeed, Smartmatic makes only one even arguably non-conclusory allegation that anyone at Fox ‘knew’ information that contradicted any allegations about Smartmatic,” wrote Fox attorney Clement, citing two emails from a Fox producer at “Lou Dobbs Tonight.”

Filed on the docket as exhibits 81 and 82, the emails show a Smartmatic spokeswoman replying to Fox requests comment about where the company’s technology was used during the 2020 U.S. election. In addition to stating that its machines were used [only in Los Angeles County](#), Smartmatic said that [it had no input](#) in a [Nov. 12 statement](#) from the Cybersecurity and Infrastructure Security Agency that disputed allegations of voter fraud.

Fox claims that Dobbs informed viewers about Smartmatic’s rebuttal, and that the emails do not prove Dobbs or the network willingly tried to lie or conceal information.

“It is not enough to allege that someone at Fox was aware of contradictory information,” the motion states. “Smartmatic must allege facts showing that Bartiromo, Dobbs, or Pirro themselves, or those responsible for producing their shows, knew about, but recklessly disregarded, that information.”

As for whether the conservative news network can pull of the First Amendment defense, media experts note that the defense is only as strong as a news organization’s ability to merely report allegations by others — such as those made by Giuliani — rather than make those claims directly.

“It is a very powerful First Amendment defense, but it is very fact-driven,” said Peter Lubin, a defamation attorney at Lubin Austermuehle in Chicago. “The question is how far over the line were their own news anchors going in making news.”

As for the opinion shield, Lubin noted that sometimes it is simply not adequate. Consider the hypothetical where someone says, “this used car dealer is a thief.”

“That is probably fine,” Lubin argued. “But if I said I saw him regularly fencing stolen cars, then I’ve gone beyond opinion and made a factual statement that could be proven true or false.”

In a 14-page appendix to its motion, Fox offers evidence that Fox was not the only media group discussing Trump’s allegations, noting that The New York Times and Business Wire joined the chorus of news outlets that discussed claims about voter fraud involving Smartmatic and Dominion.

“Following the 2020 presidential election, one thing was undeniably newsworthy: whether then-President Trump’s unconventional efforts to challenge the results of the election would succeed,” Clement wrote.

Trump began alleging theories of widespread voting fraud and threatening litigation immediately after the election was called for now-President Biden.

“While many doubted those claims, no one doubted their newsworthiness. An attempt by a sitting President to challenge the result of an election is objectively newsworthy,” Clement’s motion states.

“Interviewing the President’s lawyers is fully protected First Amendment activity, whether those lawyers can substantiate their claims or not,” Clement continued, adding that the network also reported Smartmatic’s denials of Trump’s claims and held debates on the veracity of the fraud claims.

Smartmatic’s suit, which is one of the [largest defamation complaints](#) ever filed, adds to two other defamation lawsuits against Rudy Giuliani – one filed by Dominion Voting Systems for [\\$1.3 billion lawsuit](#) and one by a [Dominion employee](#) who claims he has received threats against his life. Sidney Powell faces a separate lawsuit for [\\$1 billion suit](#) by Dominion over claims the company helped rig the election. Smartmatic also named hosts Maria Bartiromo, Lou Dobbs and Jeanine Pirro as defendants in this latest suit.

“These private companies have more standing to complain about false allegations than elected officials do,” said defamation attorney Scott Talkov, noting that Smartmatic will get more leeway than a public figure. “I think they see a dollar sign on this.”

Having provided election technology and software for the 2020 U.S. election only in Los Angeles County, Smartmatic says Powell, Giuliani and others had no basis for painting the company as a nefarious, shadowy corporation that had ties to socialist dictators and had switched Trump votes to Biden.

The conspiracy theory, which originated with former federal prosecutor Powell and her cohort Lin Wood, was then picked up by pro-Trump Fox firebrands like Dobbs and Bartiromo. Smartmatic counts at least 13 reports implying that Smartmatic had helped Democrats steal the 2020 election.

Since the suit was brought last Thursday, Fox News has rejiggered several of its shows. Most notably, Fox Business Network dropped Dobbs from its prime-time lineup without any reason.

After being shuffled out the door, Dobbs lashed out at his former bosses, retweeting several posts that call on viewers to dump Fox for the right-wing competitor One America News Network, and other posts insinuating Dobbs was fired for his relationship with Trump.

According to Smartmatic, however, Dobbs allowed Giuliani and others to claim without evidence that Smartmatic was created “in order to fix elections,” and that it had a “back door” allowing third parties to view and alter votes for a desired electoral outcome.

Unlike Dobbs, who is 75 years old, Bartiromo seemingly has been rewarded. She is now one of several rotating hosts who are trying to land the network’s new opinion show hour at 7 p.m. weekdays. Bartiromo is one of Fox Business Network’s anchors and hosts Fox’s “Sunday Morning Futures” interview show.

Pirro continues to host her nightly program.

“Smartmatic is confident in its case and looks forward to briefing these issues for the court,” said attorney J. Erik Connolly of Benesch Friedlander Coplan & Aronoff, who is representing the company.

[Fox News Accused of Election Lies in \\$2.7 Billion Smartmatic Suit](#)

February 4, 2021  
In "Civil Rights"

[Fighting Voting Company’s Defamation Suit, Fox Hosts Insist They Did Their Jobs](#)

February 12, 2021  
In "Civil Rights"

[Dominion Links Fox Spread of Election Lies to Desperate Ratings Stunt](#)

March 26, 2021  
In "Business"

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