

Fox News Slams Smartmatic's Defamation Claims As 'Fanciful'

By **Hailey Konnath**

Law360 (March 17, 2022, 10:21 PM EDT) -- Fox News on Thursday accused Smartmatic of attacking its First Amendment right to inform the public, arguing that the voting technology company's \$2.7 billion defamation suit against the network and two of its hosts asserts "fanciful" claims that look to chill its vital and constitutionally protected freedoms.

Fox Corp., Fox News Network, host Maria Bartiromo and former host Lou Dobbs all filed counterclaims in New York state court, arguing both that their coverage was lawful and that Smartmatic had exaggerated its own worth. They lodged the counterclaims under the Empire State's Anti-SLAPP statute, which allows defendants to challenge the basis of a suit and recover attorney fees and litigation costs.

Smartmatic's suit "strikes at the heart of the news media's First Amendment mission and right to inform on matters of public interest," Fox News said in its filing.

"Not only is Smartmatic advancing novel defamation theories that lack any grounding in law, but Smartmatic's staggering damages claim is divorced from reality and serves no apparent purpose other than to generate speech-chilling headlines," Fox News said.

Florida-based Smartmatic **is alleging** that Fox and its hosts defamed it by airing unfounded accusations from former President Donald Trump and his supporters that the company helped rig the 2020 election in favor of President Joe Biden.

The counterclaims come a little more than a week after the New York Supreme Court judge overseeing the case **denied motions to dismiss** from Fox News, Dobbs and Bartiromo, ruling that there's a "substantial basis" for Smartmatic's claim that Fox News "turned a blind eye to a litany of outrageous claims."

Fox News and the hosts have appealed that decision.

In Thursday's filings, Fox News and the hosts specifically took issue with Smartmatic's contention that the company was on the precipice of being worth \$2.7 billion over the next five years, a value that was allegedly stymied by their coverage. Smartmatic hasn't turned a profit since 2016 and lost nearly \$100 million in the four years leading up to the 2020 presidential election, Fox News said.

It's that "fanciful claim" that underscores that this is "precisely the type of action that New York's Anti-SLAPP statute is designed to guard against," Fox News said.

The network and hosts said they were merely following the nation's "strong traditions of press freedom" by covering the president's election fraud claims. And they covered the allegations from multiple perspectives, they said.

Some hosts interviewed the president's attorneys and surrogates and inquired about the basis of their claims, according to the filings. Other Fox News hosts "engaged in protected opinion commentary" about them, they said, adding that some hosts were optimistic that the president could prove his allegations while others were more pessimistic.

"When the voting-technology companies denied the allegations being made by the president and his

surrogates, Fox News aired those denials as well," the network said.

Smartmatic's attorney, J. Erik Connolly of Benesch Friedlander Coplan & Aronoff LLP said in a statement Thursday, "It is ironic that Fox claims that Smartmatic's lawsuit is without basis after the court found that the lawsuit had a substantial basis in law and fact."

"The decisions of courts across the country regarding these defamatory statements speak for themselves," Connolly said, adding that "the courts are saying something very different than Fox."

A Fox News spokesperson declined to comment, pointing to the court filings.

According to Smartmatic's suit, the defendants "decided to make Smartmatic the villain in their story" by pushing unfounded election fraud conspiracy theories against the company. Frequent Fox News guest Rudy Giuliani is also a defendant in the case.

"With this action, Smartmatic says: Enough," the company wrote. "Facts matter. Truth matters. Defendants engaged in a conspiracy to spread disinformation about Smartmatic. They lied. And they did so knowingly and intentionally."

Fox News, Bartiromo and Dobbs **have argued** that they were **merely reporting** on and discussing newsworthy accusations made by others.

In his March 8 order, Judge David B. Cohen found that Smartmatic's claims are sturdy enough to survive Fox News' motion to dismiss. Smartmatic "meticulously set forth the allegedly defamatory language used by the defendants" in its complaint, he noted.

At this stage in the litigation, plaintiffs aren't required to demonstrate actual malice by clear and convincing evidence, Judge Cohen said at the time. Because the statements broadcast, if false, defamed Smartmatic in its profession and/or trade and accused it of committing a serious crime, they are defamatory per se, Judge Cohen said.

Meanwhile, he cut loose network host Jeanine Pirro, finding that Smartmatic hadn't pointed to statements of hers that could be defamatory. He also held that his court didn't have jurisdiction over lawyer Sidney Powell.

Smartmatic is represented by J. Erik Connolly and Nicole E. Wrigley of Benesch Friedlander Coplan & Aronoff LLP.

Fox News, Dobbs and Bartiromo are represented by Paul D. Clement, Erin E. Murphy, K. Winn Allen and Mark R. Filip of Kirkland & Ellis LLP and by Steven G. Mintz of Mintz & Gold LLP.

Giuliani is represented by Adam S. Katz and Louis Arnold Russo of Russo Law LLC and Joseph D. Sibley IV of Camara & Sibley LLP.

The case is Smartmatic USA Corp. et al. v. Fox Corp. et al., case number 151136/2021, in the Supreme Court of the State of New York, County of New York.

--Editing by Rich Mills.