

## Fox Accused Of 'Insulting' Delay Tactics In 2020 Slander Suit

By **Rachel Scharf**

Law360 (September 6, 2022, 2:36 PM EDT) -- Fox News is using "insulting" discovery tactics to delay Smartmatic's \$2.7 billion defamation suit over false 2020 election fraud narratives, a lawyer for the voting technology company told a Manhattan state judge Tuesday.

The accusations came during a conference before New York State Supreme Court Justice David B. Cohen, who **refused this spring** to dismiss claims that Fox News, a pair of network hosts and Rudy Giuliani peddled Donald Trump's unfounded claims that Smartmatic helped rig the presidential election in favor of Joe Biden.

Smartmatic is now seeking discovery from Fox News, including more than four million internal records already produced by the network in Dominion Voting Systems Inc.'s related **Delaware defamation suit**.

Winn Allen of Kirkland & Ellis LLP, who represents Fox News, told Justice Cohen on Tuesday that his team needs to review those documents for privilege and relevancy and can't begin producing discovery until mid-October.

That drew ire from the voting company's counsel, Edward Wipper of Benesch Friedlander Coplan & Aronoff LLP, who said Fox News is trying to delay the case.

"That's crazy," Wipper said. "We've been waiting a year and a half, and we don't have one page. To say you're going to start producing documents in seven weeks, that's insulting."

Wipper said a drawn-out discovery process prejudices Smartmatic, especially if it means trial will have to wait until after another election cycle where the company's name might again be "besmirched."

Allen denied any delay tactics, saying Fox News deserves a chance to narrow down the Dominion case records and produce only documents that bear directly on Smartmatic. That kind of complex discovery review takes time, he argued.

"This isn't some game," Allen told Justice Cohen. "This is just the reality of how long it takes to produce documents."

The judge ultimately ordered that Fox News begin producing the Delaware case documents at the end of September, "subject to any claims of privilege or assertions that they're not relevant."

The ruling likely tees up further discovery disputes as to the scope of Smartmatic's defamation claims. The company wants documents and testimony revealing not only what Fox News executives said about it behind the scenes, but also what the network knew before it amplified Trump's "big lie" that the election had been stolen.

"What they were advancing was a larger election narrative," Wipper said Tuesday.

While Justice Cohen has not yet decided which documents and witnesses will be deemed relevant to the case, he appeared somewhat skeptical of the plaintiff's broad approach to discovery.

"This case is about Smartmatic," he pointed out.

Smartmatic initially **filed suit** in February 2021, alleging Fox News spread false claims that the company's electronic voting machines allowed foreign governments to hack the results of the 2020 election. The lawsuit also targeted Trump lawyers Giuliani and Sidney Powell, who appeared as guests on the network, and hosts Maria Bartiromo, Lou Dobbs and Jeanine Pirro.

The defendants have argued they were **merely reporting and discussing** newsworthy accusations made by others. Justice Cohen denied dismissal bids from Fox News, Giuliani, Bartiromo and Dobbs in March, but allowed Pirro and Powell to exit the case.

Both sides are appealing the dismissal order. The remaining defendants, meanwhile, have **levied counterclaims** alleging the defamation suit is an improper attempt to chill free speech.

In a comment to Law360 late Tuesday, a Fox News spokesperson called the lawsuit a "flagrant attempt to deter our journalists from doing their jobs."

"We are confident we will prevail as freedom of the press is foundational to our democracy and must be protected, in addition to the damages claims being outrageous, unsupported and not rooted in sound financial analysis," the spokesperson said.

Smartmatic is represented by Edward C. Wipper, J. Erik Connolly, Nicole E. Wrigley and David D. Pope of Benesch Friedlander Coplan & Aronoff LLP.

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

Giuliani is represented by Adam S. Katz and Louis A. 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.

--Additional reporting by Hailey Konnath. Editing by Patrick Reagan.

*Update: This story has been updated to include a comment from Fox News.*