

Fox Led 'Wild Goose Chase' For Records, Smartmatic Says

By **Ivan Moreno**

Law360 (July 25, 2023, 6:53 PM EDT) -- Smartmatic has urged a New York state judge to order Fox News to produce any Zoom recordings of staff meetings following the 2020 election, saying the network led it "on a wild goose chase" for the recordings in the voting technology company's \$2.7 billion defamation suit.

The Florida-based company said in a Monday filing it has been asking for the recorded meetings since March, when a New York Times article referenced them, only to be "stonewalled" by the network.

"Fox has engaged in a pattern of conduct throughout discovery that boils down to a game of 'catch me if you can.' In addition to the meeting recording first disclosed by the New York Times, Smartmatic recently learned from a third party that additional relevant recordings exist in a custodian's files that were not produced," Smartmatic USA Corp. said.

Smartmatic alleges in its **February 2021** suit that Fox News peddled conspiracy theories of election fraud and defamed the company by airing unfounded accusations that it helped rig the 2020 election in favor of President Joe Biden. The suit names Fox Corp, Fox News Network and several on-air personalities.

Smartmatic said in its filing that the recorded meetings are "too important to ignore."

"The recordings are irreplaceable, contemporaneous evidence. If any more exist, Smartmatic would use them to question the meeting participants at their upcoming depositions. Smartmatic needs to know whether any recordings from the relevant timeframe ever existed — even if they do not exist now," Smartmatic said.

The company is also asking the court to order Fox to provide an affidavit that memorializes its efforts to search for the recordings. A judicial hearing officer previously ordered Fox to provide such an affidavit in May, but then rescinded the order the following month after the network "suddenly became 'aware'" of the location of the recording from the NYT article just before the affidavit was due, according to Smartmatic.

"Smartmatic has only the oral representations of Fox's counsel that no other recordings exist — despite having reasons to believe that others exist," the voting technology company said, adding that "Fox refuses to disclose what efforts were made as part of a purported 'investigation' to identify the existence of any others or whether any were found."

Counsel for Fox did not immediately respond to a request for comment Tuesday. A network spokesperson said in a statement that it "will be ready to defend this case surrounding extremely newsworthy events when it goes to trial, likely in 2025."

"As a report prepared by our financial expert shows, Smartmatic's damages claims are implausible, disconnected from reality and on its face intended to chill First Amendment freedoms," the statement said.

Smartmatic said meeting topics that are of relevance to its complaint include Fox's Election Day coverage, the network's early call of Arizona going for Biden, the backlash Fox faced from viewers because of that call and how it could avoid upsetting viewers in future elections.

"Throughout this litigation, Smartmatic has maintained that Fox launched and coordinated its defamatory programming to lure back viewers who had abandoned Fox for rival conservative news outlets," Smartmatic said. "If Fox's custodians recorded meetings that show they coordinated their programming across shows, Smartmatic is entitled to that evidence."

In March, New York Supreme Court Judge David B. Cohen **rejected** Fox's motion to dismiss Smartmatic's defamation claims, saying there was "substantial basis" that the network "turned a blind eye to a litany of outrageous claims."

In a separate suit against Fox in March, Delaware Superior Court Judge Eric M. Davis handed Dominion Voting Systems a summary judgment victory on its allegations the network made false statements and reports during the 2020 presidential election.

Judge Davis found that statements challenged by Dominion were defamation per se, rejecting Fox's arguments that Dominion was not entitled to punitive damages. The judge left open a number of arguments for a jury to decide, including whether the network acted with actual malice and whether Dominion incurred any damages.

But just as opening arguments were set to begin in April, Fox and Dominion reached a \$787.5 million settlement.

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

The Fox defendants are represented by K. Winn Allen and Mark Filip of Kirkland & Ellis LLP and Steven G. Mintz of Mintz & Gold 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 and Lauren Berg. Editing by Philip Shea.