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Rudy Giuliani Lawyer Says Smartmatic Smears Were “Product Disparagement” Not Full-Out Defamation – Update

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Rudy Giuliani

AP Photo/John Minchillo

Rudy Giuliani’s attorney rehashed conspiracy theories and was light on evidence when pressed by a judge Tuesday in a defamation suit brought by voting software firm [Smartmatic](#).

Joe Sibley of Camara & Sibley asked New York State Supreme Court Judge David Cohen to dismiss six of the claims against his client Giuliani because they constituted “product disparagement,” or calling the software lousy, not defamation. The latter is the charge brought by the company in a lawsuit against Fox, three of its hosts, Giuliani and Sidney Powell. Defendants have asked for the case to be dismissed and their counsel, one by one, had the chance at a long hearing today to say why, followed by rebuttals by Smartmatic’s team.

Cohen asked Sibley about one of the Trump attorney’s claims — that, in Venezuela, Smartmatic “switched votes around subtly, maybe ten percent per district, so you don’t notice it.’ Is there some support in that to show that they can’t even make out a claim for actual malice?” he asked.

Here’s Sibley’s response and some of the exchange:

Sibley: “I believe in the declaration there’s some discussion of how they did it, that they kind of skimmed votes here and there to flip the votes.”

Cohen: “What about Mr. Giuliani’s statement that in 27 or 28 states Dominion sent the votes to Germany or Spain to be counted by Smartmatic. Any support for that that’s come to light?”

Sibley: “Support for that statement would be that if you use Smartmatic technology it is possible to have votes remotely changed outside of the actual voting booths or voting facilities.”

Cohen: “So you got something to show me that suggests that votes were sent to Germany or Spain has any evidentiary support whatsoever?”

Sibley: “Well, the evidentiary support would be the fact that that Smartmatic technology allows this. That would be the evidence.”

Cohen: “Wait, that Smartmatic technology allows it, or it occurred like Mr. Giuliani claimed?”

Sibley: “Well I don’t know that there is any evidence in the record that that would demonstrate that in fact occurred.”

Cohen: “Mr. Giuliani alleges a massive election fraud by Smartmatic. He alleged a crime didn’t he and that would be defamation per se, wouldn’t it?”

Sibley: “Yes your honor. Not every statement that is made I think is necessarily defamation. I think some of this is really product disparagement. And not every statement I think qualifies as a statement of fact.”

Cohen: “When you allege that someone committed a crime that is defamation per se, right?”

Sibley: “I agree.”

Sibley explained the difference between product disparagement and defamation lies in saying the product is hackable versus accusing management of using that to manipulate elections. “It just means it’s a bad product,” he told the judge.

But, said Cohen, “They are not claiming Smartmatic has lousy software, they are claiming it has really good software, that [it] can use for rigging elections. Isn’t that what you’re claiming?”

PREVIOUSLY: Attorneys on Tuesday defended Fox News and a trio of hosts for amplifying President Donald Trump’s allegations of massive election fraud following the 2020 presidential election, arguing the accusations — including against voting software concern Smartmatic — were highly newsworthy even if dubious. They said hosts Lou Dobbs and Jeanine Pirro were protected since they ran opinion shows, not news.

They didn’t make that claim for Mario Bartiromo in a hearing to dismiss a defamation lawsuit by Smartmatic against Fox and the hosts as well as Sidney Powell and Rudy Giuliani.

Powell’s lawyer argued the New York State Supreme Court had no jurisdiction over her since she’s from Texas and “never came to New York to give any of the interviews.” Giuliani’s attorney rehashed conspiracy theories but was light on evidence when pressed by the judge. He asked that six of the claims against his client be dismissed because they were “product disparagement,” or calling the software lousy, not defamation.

The Smartmatic team argued that Fox hosts repeatedly aired claims suggesting fraud by the company, which provided voting software to the county of Los Angeles for the 2020 election. Its hosts in some cases implied they’d confirmed the allegations independently.

Accusations that were denied by Smartmatic and disproved or never proved included nefarious ties with late Venezuelan strongman Hugo Chavez, that its servers were located in foreign countries so states couldn't audit votes, and that it was connected with voting machine company Dominion and ejected from Texas.

(Dominion has also sued Fox, as well as Powell and Giuliani, who actively pressed Trump's fraud case on television and in the courts, along with My Pillow founder Mike Lindell, for defamation. A federal judge in Washington, D.C. ruled last week the suit can proceed.)

Lead Fox attorney Paul Clement of Kirland Ellis insisted today that Smartmatic's lawsuit "strikes at the heart of the First Amendment." The fact "that the President's legal team is challenging the election is newsworthy and remains newsworthy whether or not they are likely to succeed."

The lengthy hearing that just wrapped addressed each defendant separately. Nicole Wrigley of Benesch Friedlander, for Smartmatic, noted that on December 10, after election fraud cases had been discredited across the country, Dobbs – whose show *Lou Dobbs Tonight* was canceled by Fox in February – "put a picture on screen of Smartmatic's CEO and said, 'We are looking at a very large foreign intrusion in the 2020 elections. We have tremendous evidence already of fraud in this election.' He is not couching these things as rumor or innuendo but as facts and that not protected opinion."

Lou Dobbs (with Bill O'Reilly)

AP Photo/Kathy Willens

In all cases the Smartmatic team charged and opposing attorneys denied malice on the part of defendants for deliberately reporting or relaying information they knew was unfounded or inaccurate.

Judge David Cohen was pointed with both sides. asking the Smartmatic legal team why the allegations wouldn't be newsworthy and noting that news shows air and discuss allegations all the time. He grilled Fox over when its hosts knew the reports they were airing had been debunked. He referred to a segment by another Fox News host, Tucker Carlson, who in late

November refused to have Powell on air after she was unable to provide documentation backing up her accusations.

Said Cohen: “Tucker Carlson said that if what Powell was saying was true, this would be one of the biggest crimes in history. And he asked her to produce evidence. And said that the Trump campaign said there was no evidence. Didn’t that give Fox pause? Isn’t that a tacit admission that what Powel and Giuliani was saying was unsubstantiated?”

“They were the President of the United States’ lawyers and even if they were subject to some doubt it does not ... take away from the newsworthiness and First Amendment protection,” repeated Clement.

But attorneys in the Fox camp also used the Carlson segment — as proof Fox’s coverage was fair and balanced.

Smartmatic filed the a \$2.7-billion defamation lawsuit against Fox, Dobbs, Pirro, Bartiromo, Giuliani and Powell in February. The company’s 285-page suit claimed that Fox News “irreparably harmed” its reputation when some of its news personalities and guests targeted the company as responsible for rigging election results.

“One of the biggest challenges in the Information Age is disinformation,” Antonio Mugica, CEO of Smartmatic, said in a statement then. “Fox is responsible for this disinformation campaign, which has damaged democracy worldwide and irreparably harmed Smartmatic and other stakeholders who contribute to modern elections.”

Smartmatic was basically characterized on Fox as a Venezuelan company under the control of corrupt dictators from socialist countries, the lawsuit said. “In their story, Smartmatic’s election technology and software were used in many of the states with close outcomes. And, in their story, Smartmatic was responsible for stealing the 2020 election by switching and altering votes to rig the election for Joe Biden and Kamala Harris.”

In fact, Smartmatic, based in Florida, provided election technology software only in Los Angeles County for the November election and “nowhere else.”

The suit identified 13 Fox News segments from November and December and over 100 “false statements” in articles and on social media in which on-air personalities and guests implied or stated the company “had stolen the 2020 U.S. election.”

In its motion to dismiss, Fox said Smartmatic may have a defamation case against Trump's surrogates if they "fabricated evidence or told lies with actual malice," but not against "the media that covered their allegations and allowed them to try to substantiate them."

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