



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SMARTMATIC USA CORP.,
SMARTMATIC INTERNATIONAL
HOLDING B.V., and SGO
CORPORATION LIMITED

Plaintiffs,

v.

NEWSMAX MEDIA INC.,

Defendant.

C.A. No. N21C-11-028-EMD

PUBLIC VERSION

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**DEFENDANT'S OPENING BRIEF IN SUPPORT OF ITS RULE 56
MOTION FOR SUMMARY JUDGMENT**

Dated: June 7, 2024

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PRELIMINARY STATEMENT

Following the 2020 U.S. Presidential Election, numerous news organizations reported on serious allegations made by then-President Trump and his prominent affiliates regarding Smartmatic and other companies concerning the election. Newsmax, an independent, relatively small media company, also reported on these newsworthy allegations. Starting December 19, 2020, and notwithstanding that its reporting concerning Smartmatic was neutral and quite limited, Newsmax repeatedly and prominently displayed and read on its television broadcasts and published on its website the following statement: “No evidence has been offered that Dominion or Smartmatic used software or reprogrammed software that manipulated votes in the 2020 election.” Newsmax invited Smartmatic to come on the air; Smartmatic declined.

Smartmatic is a struggling election technology company with a checkered history, whose reputation has been particularly challenged due to its having allegedly engaged in a criminal bribery scheme in the Philippines to procure elections contracts. Now, Smartmatic seeks a massive windfall of *over \$1 billion* against Newsmax based upon a legally baseless—indeed, unconstitutional—liability theory and without establishing a nexus between Newsmax’s limited reporting about Smartmatic and Smartmatic’s speculative claimed damages.

The undisputed evidence shows that Smartmatic's theories of liability and damages each fail such that this Court and a jury should not be burdened with a trial.

As to liability, both Florida law and the First Amendment provide that media organizations like Newsmax are not liable for neutrally reporting newsworthy statements of others, regardless of whether the statements prove true. This protection applies with particularly strong force here. When the President of the United States and his surrogates make allegations on a matter of public concern such as the integrity of a national election, news organizations must be able to report the allegations without facing liability. If it were otherwise, even C-SPAN, which did in fact broadcast coverage of the Trump Surrogates' allegations, would be subject to defamation suits every time it airs a politician's speech making such allegations. Even putting these free press protections aside, some of the alleged defamatory allegations were true, including Newsmax's reporting on Smartmatic executive Peter Neffenger's connections to the Biden transition team, Smartmatic's ties to Venezuela, and the corrupt "election" of dictator Hugo Chávez.

As to damages, under Florida law, Smartmatic must show evidence of actual damages caused by Newsmax's reporting—Smartmatic's allegations alone are insufficient. Although it has had years to do so through broad-based discovery,

Smartmatic has produced no evidence that Newsmax's reporting caused Smartmatic any actual damages.

As a threshold and dispositive matter, Smartmatic has no evidence supporting any causal link between Newsmax's election coverage and Smartmatic's alleged harm. Much larger media outlets and then-President Trump were contemporaneously airing the same allegations at issue here. **Smartmatic has presented no facts suggesting that even a single potential elections technology customer (i.e., a government official who is charged with purchasing voting technology and equipment) even saw Newsmax's disputed coverage, let alone would have purchased Smartmatic technology but for Newsmax's coverage.** Under Smartmatic's theory, it could sue tomorrow any rural TV station or start-up podcast for over \$1 billion for reporting then-President Trump's allegations, without ever proving the reporting caused Smartmatic actual harm. That is obviously not what Florida law provides, or what the U.S. Constitution tolerates.

Moreover, and independently fatal to Smartmatic's damages claim, even if the Court were to indulge Smartmatic's theory that it can hold Newsmax liable for damages potentially caused by other news organizations and individuals, Smartmatic's damages claim would still fail. It is undisputed that it would be contrary to the governing rules of public procurement for any government official to

deny Smartmatic a contract based upon the news reports at issue here. It is also undisputed that Smartmatic's own troubling performance history—especially its recent implication in the ongoing Department of Justice bribery-and-money-laundering *Bautista* investigation related to an election contract procurement and Smartmatic's disqualification by the Philippines election authority—will be considered by Smartmatic's current and potential customers and is likely to decrease the chances that they choose to contract with Smartmatic.

Smartmatic's ill fate has nothing to do with the controversy that then-President Trump stirred up, let alone with Newsmax's coverage of the controversy. This Court should grant Newsmax's motion for summary judgment.

NATURE AND STAGE OF THE PROCEEDINGS

Smartmatic filed its Complaint on November 3, 2021 (Trans. ID 67065646). Newsmax filed an Answer to Plaintiffs' Complaint on February 4, 2022. (Trans. ID 67288350). The Court denied Newsmax's Rule 12(c) Motion For Judgment On The Pleadings on February 3, 2023. (Trans. ID 69068510). Smartmatic filed its First Amended Complaint on March 28, 2023. (Trans. ID 69670951) ("Am. Compl."). The Court denied Newsmax's Rule 12(b)(6) Motion To Dismiss In Part Smartmatic's Amended Complaint on August 23, 2023. (Trans. ID 70699672). On September 7, 2023, Newsmax filed its Answer to Smartmatic's Amended Complaint

and Counterclaim (Trans. ID 70815154) (“Ans. to Am. Compl.”). Smartmatic never filed a pleading in response to the operative Answer and Counterclaim.

After the parties’ March 8, 2024, status conference, the Court requested separate briefing on the issue of choice of law prior to dispositive motions. On May 21, 2024, the Court issued a preliminary order “hold[ing] that Florida substantive law will apply in this civil action.” (Trans. ID 73131000). Newsmax now moves for summary judgment under Rule 56 and files its opening brief in support of that motion.

STATEMENT OF UNDISPUTED FACTS

A. Factual Background

1. Smartmatic And Its Long History Of Controversies Threaten Its Existence As A Viable Company Entirely Apart From The Allegations In This Lawsuit

Smartmatic is a private election technology and software company that does business by entering into contracts with governmental entities both in the United States and abroad. *See* Ex. 1 at 19:10–23 (“Neffenger Dep.”);¹ Am. Compl. ¶ 11. The company was founded in 2000 in Boca Raton, Florida by two Venezuelan nationals, Antonio Mugica and Roger Piñate, who continue to serve as Smartmatic’s CEO and President, respectively. *See* Ex. 2 at 10:16–17 (“A. Mugica Nov. 20

¹ All exhibits cited herein are attached to the Affidavit of L. Fortunato contemporaneously filed herewith.

Dep.”); Neffenger Dep. at 96:4–10. Smartmatic operates in the United States as Smartmatic USA Corp. (“SUSA”), which is a subsidiary of Smartmatic International Holding B.V. (“SIH”), a Netherlands-based holding company, which in turn is owned by United Kingdom-based parent company SGO Corporation Limited (“SGO”).² (Trans. ID 68655868 at No.41); Neffenger Dep. at 90:23–92:19; Am. Compl. ¶¶ 11–12.

Los Angeles County, California, is the only jurisdiction in the United States that used Smartmatic’s election technology and software during the 2020 U.S. Presidential election. Am. Compl. ¶¶ 51–54. California’s experts found security problems with Smartmatic technology used in LA County’s Voting Solutions for All People (“VSAP”) program for the 2020 U.S. Presidential Election (“2020 Election”) that could allow someone to compromise the system. *See* Ex. 3 at 17–18 (“Burton Rebuttal”). In March 2020, Politico reported on L.A. County’s use of Smartmatic’s technology, calling it a “risky voting experiment.” *See* Kim Zetter, *Los Angeles County’s risky voting experiment* (March 3, 2020).³ Politico reported that Smartmatic’s machines’ “security gaps, if left unfixed, could provide a gateway for

² Unless noted otherwise, the three Plaintiff entities are collectively referred to herein as “Smartmatic.”

³ Available at <https://www.politico.com/news/2020/03/03/los-angeles-county-voting-experiment-119157> (all webpages last accessed June 6, 2024).

a rogue election staffer or someone else with physical access to alter software on the voting machines or their back-end computer systems, possibly changing votes or otherwise disrupting the presidential race.” *Id.* The report also discussed the company’s questionable and controversial record, noting “critics have expressed concerns about the company that built the system, U.K. based Smartmatic.” *Id.*

Smartmatic admits it has [REDACTED] for decades, independent of the current controversy. Ex. 4 at 23:4–24:25; 75:13–81:20; 199:5–215:17; 303:5–24 (“Saba Dep.”). From its beginning, Smartmatic has faced challenges in upholding a positive reputation due to various allegations of questionable business practices both within and outside the United States. These allegations include concerns about Smartmatic’s ownership and its connections to Venezuela, claims of Smartmatic’s voting equipment being unreliable, and accusations of criminal and/or fraudulent behavior by Smartmatic executives and employees, including a bribery and money laundering scandal in the Philippines. *See id.*; Ex. 5 at 37–50 (“Clifton Rebuttal”).

In 2004, just two years after its inception, Smartmatic became the subject of public controversy the very first time its machines were used in an election: a suspect recall referendum election won by Hugo Chávez in Venezuela. Saba Dep. at 89:2–90:8, 105:6–106:2. As was widely reported at the time, many believed the election

was fraudulent because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See id.*

at 80:16–24; Ex. 78. Smartmatic did, in fact, [REDACTED]

[REDACTED]

[REDACTED] for the 2004 presidential recall

referendum and Smartmatic’s [REDACTED]

[REDACTED]

Ex. 6 at 27–28 (“James Report”). The New York Times reported that “[t]he concerns

about possible ties between the owners of Smartmatic and the Chávez government

have been well known to United States foreign policy officials since before the 2004

recall election in which Mr. Chávez, a strong ally of President Fidel Castro of Cuba,

won by an official margin of nearly 20 percent.” *See Saba. Dep.* at 80:16–24; Ex.

78. Opposition leaders alleged that the election was compromised, and those

allegations were confirmed by two scholarly studies conducted at Harvard

University’s John F. Kennedy School of Government and the Massachusetts

Institute of Technology’s Sloan School of Management. *See Exs. 76–78.*

Smartmatic [REDACTED]

[REDACTED] and its Venezuelan ties again drew international scrutiny when the company [REDACTED]

[REDACTED] James Report at 29.

In 2006, Congresswoman Carolyn Maloney (D-NY) raised “national security concerns” and asked the Committee on Foreign Investment in the United States (“CFIUS”) to investigate Smartmatic because of concerns that Smartmatic “has been associated by the press with the Venezuelan government led by Hugo Chávez, which is openly hostile to the United States.” *See* Ex. 7; *see also* Ex. 78. In response to that investigation, in late December 2006, Smartmatic announced that it had [REDACTED] from the CFIUS investigation, and that it planned to sell its U.S. subsidiary Sequoia Voting Systems, Inc. (“Sequoia”). *See* Clifton Rebuttal at 40–41; Saba Dep. at 157:5–159:2.

In 2006, a Chicago alderman raised questions about potential ties between Sequoia and the Venezuelan government when the company’s machines were used in the March 2006 Chicago primaries and did not produce results for days. *See* Clifton Rebuttal at 42–43; *see also* Saba Dep. at 161:6–17, 165:9–16, 176:12–178:2.

In the 2008 U.S. Presidential election, there were reports of miscounted votes at an Illinois Cook County precinct using the same Sequoia equipment that Smartmatic had delivered there when it owned Sequoia. *See* Saba Dep. at 166:8–167:11. Smartmatic had been compelled to sell Sequoia in late 2007. *See* Ex. 8 at 62–63 (“Resnick Rebuttal”); Saba Dep. at 157:5–159:2. Congresswoman Maloney noted that Smartmatic decided to sell Sequoia, rather than “complete an investigation by CFIUS.” *Ans. to Am. Compl.* at 201–02; *see* Ex. 9 at 153:19–154:4 (“Resnick Dep.”). In 2010, Dominion Voting Systems Corporation (“Dominion”), a competitor of Smartmatic, acquired Sequoia’s assets. *See* Saba Dep. at 167:22–168:11; Clifton Rebuttal at 74–75.

There have been numerous other reports of Smartmatic’s concerning security and performance related issues over the years, separate and apart from the current controversy. For instance, in 2010, a Filipino publication highlighted Smartmatic’s failure to disclose ██████████ in its precinct count optical scanner (PCOS), which potentially allowed unauthorized control over the system and vote manipulation. *See* Clifton Rebuttal at 43–44. Similarly, in March 2016, a columnist at the *Philippine Daily Inquirer* claimed that Smartmatic’s machines could be manipulated, and elections conducted by the company could not be trusted. Clifton Rebuttal at 44, *see* Ex. 80 at SMARTMATIC-NM00063893. Also in 2016,

Smartmatic’s Technical Support Team Leader reportedly acknowledged the existence of multiple unsanctioned servers in the Automated Election System (AES), with votes being first routed through an undisclosed [REDACTED] before reaching the officially recognized servers. Clifton Rebuttal at 44–45. In 2017, *The Manila Times* reported that three Smartmatic employees and employees of the Republic of the Philippines Commission on Elections (“COMELEC”) had been charged with [REDACTED] [REDACTED] (See Trans. ID 69266899); see also Ex. 79. In 2019, former Filipino President Rodrigo Duterte recommended that COMELEC replace Smartmatic with a new technology provider free of fraud allegations, expressing his concern that the current system was not accurately counting Filipinos’ votes. Clifton Rebuttal at 45.

Smartmatic, its executives, and employees have also recently come under criminal scrutiny. In August 2017, the Philippines’ National Bureau of Investigation’s Anti-Fraud Division (“NBI”) began investigating an alleged bribery-and-money-laundering scheme involving former COMELEC Chairman Andres Donato Bautista, Smartmatic, and its executives. See Dkt.1 at ¶¶ 35–36, *United States v. Bautista*, No.1:23-mj-03829 (S.D. Fla. Sept. 19, 2023) (“*Bautista Affidavit*”). The U.S. Department of Homeland Security’s Homeland Security

Investigations (“HSI”) initiated its own investigation into the same shortly thereafter. *Id.* Based on HSI’s investigation, on September 19, 2023, the DOJ filed a criminal complaint against Bautista in the Southern District of Florida, charging him with receiving a \$4 million bribe as part of a money laundering conspiracy to conceal a scheme involving four unnamed “Co-Conspirators” and four unnamed companies in exchange for three lucrative contracts, worth approximately \$199 million, for voting machines and related election services in the Philippines in 2015 and 2016. *See generally id.* The *Bautista* Affidavit alleges that the scheme violated the Foreign Corrupt Practices Act (“FCPA”), as well as anti-bribery laws in the Philippines. *See id.* [REDACTED]

[REDACTED] *See* A. Mugica Nov. 20 Dep. at 229:5–230:8, 230:10–231:9, Ex. 10 at 493:1–6, 494:1–5, 504:15–507:6, 507:10–508:11, 509:3–510:5 (“R.A. Piñate Oct. 23 Dep.”); *see also* *Bautista* Affidavit ¶ 22. According to the *Bautista* Affidavit, the Philippines contract was so important to Smartmatic’s financial viability that it was “seriously considering [] closing the company (Worldwide!!!)” if it could not “win the Philippines bid!” *Id.* ¶ 45 (emphasis omitted).

In addition to Smartmatic confirming that the unnamed co-conspirators are its key executives and employees and that the unnamed companies are Smartmatic entities, several news articles also publicly implicated Smartmatic and its executives as the company and individuals who allegedly bribed Bautista. *See* Ex. 11 at 6 (“Burton Report”). On December 29, 2023, following an initial motion from Herring Network Inc. (a/k/a One America News Network (“OANN”)) and subsequent DOJ request, U.S. Magistrate Judge Lauren Louis ordered the *Bautista* “case and all pleadings” to be unsealed, Dkt.10, *Bautista*, No.1:23-mj-3829, as the investigation progresses. Newsmax has learned [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See Ex. 12.

On November 29, 2023, citing the ongoing *Bautista* investigation, COMELEC disqualified Smartmatic from participating in the AES procurement process for the upcoming 2025 elections and referred the matter to a special bids committee for possible permanent disqualification and blacklisting of Smartmatic from all future government procurements in the Philippines. *See* Ex. 13 (“Resolution” or “Decision”). Smartmatic appealed to the Philippines Supreme Court, claiming the Decision “would naturally be given great weight not only by the

public but also by other government bodies with whom Smartmatic may have dealings with, whether presently or in the future” and thereby “causes grave injury to Smartmatic’s goodwill and reputation.” Ex. 14 at 61 (“Pet.”). While Smartmatic’s appeal was pending, [REDACTED]

[REDACTED] Ex. 15 at 21:1–22:22, 207:3–217:16 (“A. Mugica Jan. 12 Dep.”); *see* Ex. 16. Also during this period, COMELEC unanimously awarded its 2025 election contract to a different election technology firm, Miru, officially replacing Smartmatic but continuing to use automated vote counting machines. *See* Dwight de Leon, *Korean Firm Miru Wins Top 2025 Election Contract, Replacing Smartmatic*, Rappler (Feb. 22, 2024).⁴ On April 16, 2024, the Philippines Supreme Court reversed COMELEC’s Decision on procedural grounds and only on a prospective basis. *See* Supreme Court of the Philippines, *SC Reverses COMELEC Resolution Disqualifying Smartmatic From Participating In Public Bidding For Elections* (Apr. 17, 2024).⁵ The reversal did not impact COMELEC’s 2025 contract award to Miru nor prevent future bid-by-bid disqualifications of Smartmatic. *See id.*

⁴ Available at <https://www.rappler.com/philippines/korean-firm-miru-wins-2025-election-contract/>.

⁵ Available at <https://sc.judiciary.gov.ph/sc-reverses-comelec-resolution-disqualifying-smartmatic-from-participating-in-public-bidding-for-elections/>.

COMELEC immediately signaled its intent to challenge the court’s decision and is currently seeking reconsideration, primarily relying on the *Bautista* case due to the public emergence of more information and documents detailing Smartmatic’s involvement, which is also influencing the review of COMELEC’s 2016 procurement proceedings currently under examination by a special investigations panel. *See* Ferdinand Patinio, *Comelec To Appeal SC Ruling On Smartmatic Disqualification*, Philippines News Agency (Apr. 18, 2024);⁶ *see also* Ferdinand Patinio, *Comelec To Include Case vs. Ex-Chief In Smartmatic Ruling Plea*, Philippines News Agency (Apr. 24, 2024).⁷

2. Large News Organizations Report On Then-President Trump’s And His Surrogates’ Allegations Against Smartmatic Relating To The 2020 Election

After Joe Biden won the November 6, 2020 Election, then-President Trump claimed that the election was “far from over” and filed multiple lawsuits challenging the Election results. *See, e.g., Donald J. Trump for President, Inc. v. Hobbs*, No.CV2020-14248 (Ariz. Sup. Ct. Nov. 7, 2020); *Donald J. Trump for President, Inc. v. Benson*, No.1:20-cv-1083 (W.D. Mich. Nov. 11, 2020); *Wood v. Raffensperger*, No.1:20-cv-4651 (N.D. Ga. Nov. 17, 2020); *Pearson v. Kemp*,

⁶ Available at <https://beta.pna.gov.ph/articles/1222895>.

⁷ Available at <https://beta.pna.gov.ph/articles/1223328>.

No.1:20-cv-4809 (N.D. Ga. Nov 25, 2020); *Feehan v. Wisconsin Elections Commission*, No.2:20-cv-1771 (E.D. Wis. Dec. 1, 2020). These lawsuits concerned both Dominion and Smartmatic’s voting equipment and election technology, claiming to have evidence that the companies facilitated voter fraud and electronic vote manipulation in the election. Dominion is one of the three largest providers of voting systems in the U.S. and has had connections with Smartmatic over the years, including by entering into “intellectual property licensing agreements” with Smartmatic in 2009 and acquiring Sequoia’s assets in 2010 “all of which were formerly owned by Smartmatic.” *See Smartmatic Corp. v. SVS Holdings, Inc.*, 2008 WL 1700195, at *5 & n.27 (Del. Ch. Apr. 4, 2008); *Smartmatic Int’l Corp. v. Dominion Voting Sys. Int’l Corp.*, 2013 WL 1821608, at *1 (Del. Ch. May 1, 2013).

Then-President Trump took to social media—primarily Twitter where he had over 88 million followers at the time—claiming that illegal votes were cast in the Election and suggesting that the companies that provided the election technology and hardware used during the Election were to blame. For example, on November 12, then-President Trump tweeted “DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE.” (@realDonaldTrump, Twitter (Nov. 12, 2020, 11:34am)). Then-President Trump continued his refusal to accept the outcome of the election, tweeting on November 15, “I WON THE ELECTION!” *Id.* (Nov. 15,

2020). A few days later then-President Trump again tweeted “Dominion is running our Election. Rigged!” *Id.* (Nov. 16, 2020, 8:26 am). On the same day, then-President Trump retweeted Sidney Powell’s allegation that “Dominion Machines [are] engineered by China, Venezuela, Cuba.” *Id.* (Nov. 16, 2020, 1:22 pm). Throughout the next few weeks, then-President Trump continued to tweet/retweet statements that the election was “stolen” and that he would not accept the outcome, even confirming that “I will not be going to the Inauguration on January 20th.” *Id.* (Jan. 8, 2021).

Trump’s online reach was at its zenith with his Twitter account hitting [REDACTED] [REDACTED] on November 17, 2020. Ex. 17 at 9 (“Lipizzi Rebuttal”). Between January 2020 and January 2021, then-President Trump published *over 1,000* tweets that [REDACTED] [REDACTED] with most of these tweets appearing in the immediate aftermath of the election. *Id.* On November 16, 2020—less than two weeks after the November 3, 2020, election—The New York Times reported that Trump had already [REDACTED] [REDACTED] *Id.* at 9 & n.43.

The 2020 Election and its aftermath emerged as one of the year’s most important and hotly debated news stories. *See* Ex. 18 at 57–58 (“Kelley Rebuttal”). Many prominent individuals, including RNC employees, the former Mayor of New

York City and U.S. Attorney for the Southern District of New York, a former General and National Security Advisor, a former federal prosecutor, the former Governor of Arkansas, current and former members of Congress, then-President Trump, his legal team, representatives, and other affiliates (collectively, “Trump Surrogates”)⁸ publicly claimed that the 2020 Election was manipulated through the exploitation of election technology supplied by several government contractors; Smartmatic being one of them. *See* Resnick Rebuttal at 14; Lipizzi Rebuttal at 5; Clifton Rebuttal at 26–27; Ex. 19 at 28 (“Chiagouris Rebuttal”).

On November 13, in Georgia, Lin Wood, a prominent attorney and Trump associate, initiated a lawsuit aiming to overturn the election results. *See Wood*, No.1:20-cv-4651. During the proceedings, an individual purporting to be a former security guard for the ex-president of Venezuela, Hugo Chávez, submitted a sworn affidavit, claiming to have assisted Chávez in manipulating elections using Smartmatic machines and stated that: “the software and fundamental design of the Dominion electronic electoral system and its software are based on software that is a derivative of the Smartmatic Electoral Management System.” *Id.*

⁸ Although certain of these individuals’ reputations changed dramatically after the 2020 election, such after-the-fact understandings have no bearing on Newsmax’s decision to cover these persons’ statements at the time.

In another Georgia lawsuit, filed by Sidney Powell and joined again by Wood, the complaint cited a sworn affidavit from a witness who claimed that “Smartmatic and Dominion were founded by foreign oligarchs and dictators” to manipulate votes and ensure that “Venezuelan dictator Hugo Chávez never lost another election.” *Pearson*, No 1:20-cv-4809.

The serious nature of these allegations drew the attention of the nation’s major media organizations. *See* Ex. 20 at 232:7–14 (“Kelley Dep.”); Ex. 21 at 89:18–23 (“Schmitt Dep.”).

Fox News—the nation’s “most watched cable news channel in that period”—widely reported these allegations, including by inviting Trump Surrogates on its programs, having its anchors discuss the allegations, and by covering the Surrogates’ allegations on Fox News’s various wide-reaching media platforms, including in online articles and on its social media accounts. *See* Am. Compl. ¶¶ 80–82; Lipizzi Rebuttal at 9–10; Kelley Rebuttal at 69. Specifically, Fox News [REDACTED] [REDACTED] averaged receiving [REDACTED] to its website, and [REDACTED] [REDACTED] Lipizzi Rebuttal at 9. Smartmatic claims that Trump Surrogates such as “Rudolph Giuliani and Sidney Powell decided they would spread a story, *mainly through Fox News*” about “manipulation of election technology in select

States,” “casting Smartmatic and Dominion as the villains” and they “began to appear on Fox News *regularly* around November 12, 2020.” Am. Compl. ¶¶ 80–82 (emphases added). Fox News continued to report on the Trump Surrogates’ allegations on some of its most watched prime time programming over the following weeks. *See* Ex. 22 at 20–23 (“Kivijarv Rebuttal”). Thus, the allegedly defamatory statements at-issue in this litigation had already been widely published on Fox News, the nation’s most popular news channel, when much-smaller media companies like Newsmax reported the same or similar information (sometimes days later). *See* Ex. 23 at 155:17–23 (“Kivijarv Dep.”); Kelley Rebuttal at 69; Chiagouris Rebuttal at 26; Lipizzi Rebuttal at 9–10. By comparison, Newsmax [REDACTED] [REDACTED]—*one fifteenth* of Fox’s viewership—has [REDACTED] [REDACTED] and Newsmax’s website is [REDACTED] [REDACTED] Lipizzi Rebuttal at 9 (emphasis added).

A wide variety of other news organizations also covered the story of the Trump Surrogates’ allegations after Giuliani and Powell’s appearances on Fox News. This included news operations significantly larger than Newsmax, like CNN, organizations of a similar size, such as OANN, and even smaller local television stations. *See* Kivijarv Dep. at 155:17–23; Kelley Rebuttal at 57–58; *see, e.g.*,

Veronica Stacqualursi, *Trump Puts Giuliani In Charge Of Post-Election Legal Fight After Series Of Losses*, CNN (Nov. 15, 2020).⁹ [REDACTED]

[REDACTED] Kelley Rebuttal at 58, including general newspapers like The New York Times and the Associated Press, and even C-SPAN, which broadcasted coverage of the Trump Surrogates' allegations, *see* Lipizzi Rebuttal at 9; *see, e.g.*, C-SPAN, *Trump Campaign News Conference On Legal Challenges* (Nov. 19, 2020);¹⁰ Maryclaire Dale & Alanna Durkin Richer, *Few Legal Wins So Far As Trump Team Hunts For Proof Of Fraud*, Associated Press (Nov. 12, 2020);¹¹ Ali Swenson, *AP FACT CHECK: Trump Legal Team's Batch Of False Vote Claims*, Associated Press (Nov. 19, 2020);¹² Nick Corasaniti et. al, *Threats And Tensions Rise As Trump And Allies Attack Election Process*, N.Y. Times (Nov. 18, 2020);¹³ Mark Leibovich, *Trump's*

⁹ Available at <https://www.cnn.com/2020/11/14/politics/rudy-giuliani-trump-lawsuits-2020-election/index.html>.

¹⁰ Available at <https://www.c-span.org/video/?478246-1/trump-campaign-news-conference-legal-challenges>.

¹¹ Available at <https://apnews.com/article/joe-biden-donald-trump-campaigns-pennsylvania-lawsuits-b56e0555a2bea650b12f53b979ea7493>.

¹² Available at <https://apnews.com/article/fact-check-trump-legal-team-false-claims-5abd64917ef8be9e9e2078180973e8b3>.

¹³ Available at <https://www.nytimes.com/2020/11/18/us/politics/trump-election.html>.

Legal Team Sets A Precedent For Lowering The Bar, N.Y. Times (Nov. 20, 2020);¹⁴ Olivia Rubin et. al, *Fired Attorney Sidney Powell Is Back, Advising Trump To Chart Scorched-Earth Course After Failed Election Lawsuits*, ABC News (Dec. 20, 2020).¹⁵ C-SPAN broadcasted many of the same statements made by the same speakers concerning the same 2020 Election controversy that Smartmatic challenges in this case, both on its television channel and its website. *See, e.g.*, Sidney Powell: Recent Appearances, C-SPAN.¹⁶

3. Newsmax Thereafter Reports On These Same Allegations, Promptly Issues A Clarification After Smartmatic Complains, And Invites Smartmatic To Appear On Air

Smartmatic alleges that Newsmax defamed it by publishing and/or republishing false statements and implications during its news broadcasts, in online reports, and on social media that Smartmatic was a corrupt company that participated in or facilitated a conspiracy to fix, rig, and steal the 2020 U.S. election from then-President Trump. Am. Compl. ¶¶ 432, 439–40. As the Trump Surrogates persisted in making statements and filing numerous lawsuits concerning the integrity of the 2020 Election, Newsmax consistently covered these newsworthy developments as

¹⁴ Available at <https://www.nytimes.com/2020/11/20/us/politics/trump-lawsuits-election.html>.

¹⁵ Available at <https://6abc.com/donald-trump-sidney-powell-special-counsel-election-results-2020/8922766/>.

¹⁶ Available at <https://www.c-span.org/person/?76206/SidneyPowell>.

they unfolded. Newsmax first aired Trump Surrogates' statements discussing Smartmatic on November 10, 2020. *Id.* ¶ 84. A summary of the statements that Smartmatic complains about is provided below, and a more detailed list is provided in Exhibits A and B.

Throughout November and December of 2020, Newsmax also published a series of articles on its website concerning the ongoing controversy surrounding the 2020 Election that arguably undermined the Trump Surrogates' narrative. For example, Newsmax published multiple articles discussing the skepticism expressed by federal judges regarding the Trump Surrogates' lawsuits filed in various battleground states. *See* Jason Devaney, *Federal Judge Skeptical of GOP Lawsuit Over Mailed Ballots*, Newsmax (Nov. 4, 2020);¹⁷ *Georgia Judge Dismisses Trump Campaign Lawsuit*, Newsmax (Nov. 5, 2020).¹⁸ Newsmax highlighted the views of the secretaries of state, attorneys general, and senators, among others, in key battleground states who stated that there was no evidence of widespread voter fraud. *See, e.g.*, Solange Reyner, *Pennsylvania AG on Supreme Court Threat by President: Trump 'Doesn't Count These Votes'*, Newsmax (Nov. 4, 2020);¹⁹ *Election Observer*

¹⁷ Available at <https://www.newsmax.com/politics/pennsylvania-gop-lawsuit-mail/2020/11/04/id/995367/>.

¹⁸ Available at <https://www.newsmax.com/politics/georgia-election-trump-lawsuit/2020/11/05/id/995554/>.

¹⁹ Available at <https://www.newsmax.com/newsfront/pennsylvania-attorneygeneral-supremecourt/2020/11/04/id/995392/>.

Says No Evidence for Trump's Fraud Claims, Newsmax (Nov. 5, 2020);²⁰ Sandy Fitzgerald, *GOP Sen. Toomey: 'No Evidence' of Voter Fraud in Pennsylvania* (Nov. 6, 2020);²¹ *Republican Georgia Sec. of State: No sign of Widespread Vote Fraud*, Newsmax (Nov. 11, 2020);²² Brian Trusdell, *Arizona AG Confident Few, If Any, Election Anomalies*, Newsmax (Nov. 11, 2020).²³ Newsmax regularly emphasized the challenges then-President Trump would face in addressing the allegations of voter fraud in the 2020 Election, publishing numerous articles detailing the difficulties he would encounter in overturning the results. *See, e.g., Trump Faces Long Odds in Challenging State Vote Counts*, Newsmax (Nov. 9, 2020).²⁴ And Newsmax reported multiple times that different individuals were urging then-President Trump to acknowledge the results of the 2020 Election and were vocal about opposing his challenge to the election outcome. *See Trump Should Quit and 'Not Be Embarrassing,' Czech President Says*, Newsmax (Nov. 19, 2020);²⁵ Brian Freeman, *Obama Advises Trump to Concede, Put Country First*, Newsmax (Nov. 16,

²⁰ Available at <https://www.newsmax.com/World/europe/US-Election-2020-Election-Monitors/2020/11/05/id/995499/>.

²¹ Available at <https://www.newsmax.com/politics/toomey-pennsylvania-trump-biden/2020/11/06/id/995756/>.

²² Available at <https://www.newsmax.com/us/georgia-vote/2020/11/11/id/996623/>.

²³ Available at <https://www.newsmax.com/politics/brnovich-arizona-election-anomalies/2020/11/11/id/996643/>.

²⁴ Available at <https://www.newsmax.com/politics/Trump-Legal-Challenges/2020/11/09/id/996187/>.

²⁵ Available at <https://www.newsmax.com/World/globaltalk/milos-zeman-czech-republic/2020/11/19/id/997780/>.

2020);²⁶ *GOP Former National Security Officials Urge Party to Demand Trump Concession*, Newsmax (Nov. 23, 2020);²⁷ Eric Mack, *Chris Christie: Trump's Election Challenge 'an Absurdity'*, Newsmax (Dec. 13, 2020).²⁸

On December 11, 2020, Newsmax received a letter from SUSA's counsel demanding a retraction of allegedly defamatory reporting contained in Newsmax's coverage of the 2020 Election. *See* Am. Compl. ¶ 238. In response, Newsmax issued a public clarification headlined as "Facts About Dominion, Smartmatic You Should Know" and stating: "No evidence has been offered that Dominion or Smartmatic used software or reprogrammed software that manipulated votes in the 2020 election." *See* Ans. to Am. Compl. at 226–27; Kelley Dep. at 221:12–17; Kelley Rebuttal at 72–74. Newsmax's statement also made clear that it had "not reported as true certain claims made about these companies," clarifying that Newsmax found no evidence that: (1) either Dominion or Smartmatic owns the other, or has any business association with each other; (2) Dominion uses Smartmatic software or vice versa; (3) Dominion or Smartmatic used software that manipulated votes in the 2020 Election; or (4) George Soros or Hugo Chávez owned

²⁶ Available at <https://www.newsmax.com/politics/obama-trump-election/2020/11/16/id/997218/>.

²⁷ Available at <https://www.newsmax.com/politics/concession-never-trumpers-gop-national-security/2020/11/23/id/998352/>.

²⁸ Available at <https://www.newsmax.com/politics/chrischristie-legal-constitution-electionlaw/2020/12/13/id/1001278/>.

Smartmatic. *See* Newsmax, Facts About Dominion, Smartmatic You Should Know (Dec. 19, 2020).²⁹ That clarification was prominently published on the homepage of Newsmax.com (and continues to be available on the site) and then broadcasted and read in full on almost every Newsmax program, including *The Count*, *American Agenda*, *The Chris Salcedo Show*, *Greg Kelly Reports*, *National Report*, and *Wake Up America*. *See* Ans. to Am. Compl. at 226–27; Kelley Rebuttal at 72–74.

Further, Newsmax directly addressed Smartmatic by dispatching a letter on December 21, 2020, extending an invitation for a representative to appear on a Newsmax broadcast and address on air anything Smartmatic considered to be inaccurate. *See* Ex. 24. Smartmatic never responded to this written invitation or follow-up calls from Newsmax’s counsel. *See id.*

Smartmatic sent Newsmax a second retraction demand letter on October 27, 2021, purporting to provide “a list of defamatory statements about Smartmatic that were broadcast and published by Newsmax” and demanding Newsmax “fully and completely retract these defamatory statements.” Am. Compl. at Ex. 55. Despite Newsmax’s public clarifications regarding its reporting and its offer for Smartmatic personnel to appear on its programs, Smartmatic filed this defamation lawsuit

²⁹ Available at <https://www.newsmax.com/us/smartmatic-dominion-voting-systems-software-election/2020/12/19/id/1002355/>.

against Newsmax just a week later, on November 3, 2021, and served its Amended Complaint on March 28, 2023.

The statements that Smartmatic complains about can be categorized as follows:

Allegedly Defamatory Statements Made By Third Parties Unaffiliated With Newsmax. Many of the allegations in Smartmatic’s complaint are comprised of Newsmax’s reporting on statements made by various unaffiliated third parties—*i.e.*, the Trump Surrogates. These individuals made various statements concerning issues related to voting machines and technology during their appearances on Newsmax and other media platforms. Broadly speaking these statements fall into one of four categories.³⁰

First, a number of third-party Trump Surrogates suggested or alleged that Smartmatic was either influenced by foreign entities or had foreign origins. *See* Ex. B at pp.1, 4, 7–8, 11–13, 17–19, 21, 23–26 (Column 1). For example, Sidney Powell appeared on multiple platforms, including Newsmax, claiming that Smartmatic technology software was created in Venezuela at the direction of Hugo Chávez. *See*,

³⁰ Exhibits A and B set forth each allegedly defamatory statement, organized according to (1) whether they were made by Newsmax personnel (Exhibit A) or by unaffiliated third parties (Exhibit B); and (2) to which of the four broad categories discussed herein the nature of the allegation pertains, respectively.

e.g., Am. Compl. ¶¶ 159, 200(e), 212(m), 212(t), 212(u). In one appearance on Fox News, which Newsmax republished on one of its platforms, Powell stated that “[t]he Dominion Voting Systems, the Smartmatic technology software, and the software that goes in other computerized voting systems here as well, not just Dominion, were created in—in Venezuela, at the direction of Hugo Chávez to make sure he never lost an election We have one very strong witness who has explained how it all works.” *Id.* ¶ 122. Powell was not the only third-party guest to make allegations that Smartmatic was founded in Venezuela and was created to “fix elections,” as several other third-party guests made similar claims on various Newsmax programs. *See, e.g., id.* ¶¶ 93, 98, 103, 111, 185(v), 192(b), 200(b), 212(a–c), 212(k–l), 212(q), 212(y), 220(a), 220(e), 220(j), 220(m), 220(z). Guest Brian Kennedy, for example, pointed out to viewers that the current CEO of Smartmatic is a “Venezuelan national.” *See id.* ¶¶ 84, 200(f).

Second, certain unaffiliated third-party guests made claims that Smartmatic’s software itself was problematic. *See* Ex. B at pp.1–2, 4–21, 24–25 (Column 2, listing statements that suggest Smartmatic’s software was problematic or had performance issues). For instance, guest Kenneth Timmerman claimed that Smartmatic systems could have been hacked and that all voting machines in the United States were developed from Smartmatic software. *See* Am. Compl. ¶¶ 154, 185(k), 200(a),

200(d). Other third-party guests voiced similar concerns during their appearances on Newsmax programs. *See, e.g., id.* ¶¶ 170, 185(a), 185(d), 192(a), 192(d), 200(h), 212(g), 220(q). Powell declared on Newsmax shows that there was evidence and “sworn witness testimony” of why Smartmatic software was designed, how it worked, and how Smartmatic machines could “reject” votes. *See id.* ¶¶ 192(k), 192(w), 212(j), 220(i), 220(x–y). Powell made similar statements on Fox News, which were later republished on Newsmax, alleging that the software was used by other voting machines and flipped “millions of votes.” *See id.* ¶¶ 123, 185(a), 185(p) 220(q). In another clip Newsmax republished from Fox News’ *Sunday Morning Futures* with Maria Bartiromo, Bartiromo asked Giuliani: “[T]he Smartmatic system has a back door . . . that allows the votes to be mirrored and monitored, allowing an intervening party a real-time understanding of how many votes will be needed to gain an electoral advantage. Are you saying the states that used that software did that?” *See id.* ¶ 86. Giuliani claimed he could prove that “they did it in Michigan.” *Id.*

Third, Newsmax reported on unaffiliated Trump Surrogates’ statements concerning alleged connections between the chairman of the board of directors for SUSA, Peter Neffenger, and President Biden. For example, Powell made statements to Maria Bartiromo on Fox News that were later republished on Newsmax stating:

“Yes, well he’s listed as its former Admiral Peter Neffenger, retired Admiral Peter Neffenger. He is president and on the board of directors of Smartmatic. And there just so happens he’s on Mr. Biden’s presidential transition team that’s going to be non-existent . . . because we’re fixing to overturn the results of the election in multiple states.” *Id.* ¶ 86; *see* Ex. B at pp.1, 3, 7, 14 (Column 3). Powell later went on multiple Newsmax shows making the same or similar claims. *See, e.g.,* Am. Compl. ¶¶ 136, 192(i).

Fourth, Newsmax covered allegedly defamatory statements made by unaffiliated third parties that did not name Smartmatic at all. *See* Ex. B at pp.5, 7, 23, 24 (Column 4). Rather, these claims centered around alleged issues and concerns with electronic voting machines and election integrity during the 2020 Election, generally. *See* Am. Compl. ¶ 185(q). For example, Powell stated that there was a “big fraud” in the 2020 Election and stated she had evidence to prove this. *See id.* ¶¶ 141–43, 220(w). While guests such as Lin Wood stated that he had seen sworn affidavits and video statements relating to a “complicated scheme as it related to voting machines.” *Id.* ¶ 97.

As explained in detail below, *infra* Part I.A, when Newsmax had these third-party guests on its shows, Newsmax hosts and producers clearly identified each guest’s name and affiliation to its audience through auditory and visual means. *See,*

e.g., Ex. 25 at 2:11–13 (identifying Sidney Powell as “former federal prosecutor, attorney for General Michael Flynn, and former Trump legal counsel”); Ex. 26 at 2:1–6 (identifying L. Lin Wood as a “well-known lawyer” who is “working for Donald Trump”); Ex. 27 at 2:1–6 (identifying that Michael Flynn was a “[f]ormer General” and was “President’s Trump National Security Advisor”). Multiple Newsmax witnesses noted that they indeed ██████ guests by considering their position, history, proximity and relevance to a story, and that they identified guests who were trusted primary resources and were central to the story. *See* Ex. 28 at 32:23–33:9, 35:23–36:1 (“Cassidy Dep.”); Ex. 29 at 247:2–12 (“Jacobson Dep.”). Newsmax also at times fact-checked and challenged their third-party guests with denials of their allegations, brought on other guests who voiced alternative perspectives, and covered, among other things, the dismissal of the Trump team’s legal challenges by several courts and the skepticism expressed by notable Republican figures regarding the validity of such claims. *See* Ex. 30 at 101:4–13, 119:16–120:3 (“Sellers Dep.”); Kelley Rebuttal at 23–47; *infra* Parts I.A, IV.B.

Allegedly Defamatory Statements Made By Newsmax Personnel. Newsmax hosts and reporters also engaged in the public discussion regarding the 2020 Election on several Newsmax programs, mostly in response to or in connection with the

comments made by Trump Surrogates. *See* Ex. A at pp.1, 4, 6–15, 20–24, 26 (Column 1).

Some of this commentary by Newsmax hosts and Newsmax personnel such as Grant Stinchfield, Chris Salcedo, John Bachman, Michelle Malkin, and Rob Carson suggested that Smartmatic had foreign origins and was possibly susceptible to foreign influence. *See* Ex. A at pp.1–14, 17–24 (Column 1). For example, several hosts brought viewers’ attention to the points that Smartmatic was founded in Venezuela and that the company’s software was used by Hugo Chávez during elections there. *See, e.g.*, Am. Compl. ¶¶ 130, 147, 185(e–g), 185(j), 192(w), 212(d), 212(w), 220(b), 220(i). Malkin told viewers that there could have been foreign interference in the election, Smartmatic’s troubled history, its previous ties to election security issues in Venezuelan elections, and its well-known ties in the Philippines. *See, e.g., id.* ¶¶ 148–49, 212(h), 220(d), 220(o). Stinchfield and Salcedo also raised concerns about foreign influence that could potentially occur if the votes went through overseas servers. *See id.* ¶¶ 126–27, 192(t), 200(j).

Newsmax hosts and personnel additionally discussed possible performance and security issues with Smartmatic’s software and technology. *See* Ex. A at pp.1–6, 13, 17 (Column 2). Some Newsmax hosts raised general concerns about Smartmatic’s services, *see* Am. Compl. ¶¶ 119, 185(l), 192(v), 212(g), 220(f),

220(k), while other hosts and personnel like Emerald Robinson, Chris Salcedo, Mark Kaye, and Rob Schmitt pointed out specific issues with Smartmatic software. For example, Newsmax’s White House Correspondent, Emerald Robinson, referenced a whistleblower who was providing evidence that Smartmatic software was in the DNA of every voting tabulating software, and who was claiming that there was evidence to show that there were issues in the 2020 Election regarding voting irregularities that involved Smartmatic voting software. *See, e.g., id.* ¶¶ 116, 185(b), 185(f–g). Salcedo, on *The Chris Salcedo Show*, pointed out that Smartmatic software was denied use in Texas because there were issues of “backdoor software” that could change votes, *see id.* ¶¶ 89, 192(s), 220(n), and more generally that the ability existed “to change votes commensurate to those who control the tabulator,” *id.* ¶¶ 192(v), 212(g). Newsmax hosts noted that these concerns were not new. For example, host Heather Childers mentioned in a conversation with Timmerman on *American Agenda*, that “all Dominion voting machines and the software that they use, Smartmatic and the different problems that have been documented for years[.]” *See, e.g., id.* ¶¶ 154, 185(i). Newsmax hosts further raised issues regarding the possibility of being able to “delete” votes on Smartmatic software. Host Mark Kaye, for instance, suggested there was evidence that this occurred in California. *See id.*

¶¶ 137–38, 220(t). Similarly, Salcedo raised questions concerning whether Smartmatic machines could easily be modified. *See id.* ¶¶ 185(l), 220(f), 220(s).

Newsmax personnel also made their viewers aware of the connections between Smartmatic and President Biden, noting that a former Smartmatic board member, Neffenger, was on the Biden transition team. *See* Ex. A at pp.1, 3, 12, 15, 25–26 (Column 3); *see, e.g.*, Am. Compl. ¶¶ 107, 110–11, 136, 185(r), 192(g), 192(o), 192(p), 192(q–r), 192(u), 212(s). For example, Newsmax hosts Emma Rechenberg and Greg Kelly solicited opinions from third-party guests on why they were concerned about this connection. *See id.* ¶¶ 103, 111, 192(n).

Finally, Newsmax hosts discussed newsworthy allegations and discussions involving the 2020 Election that did not involve Smartmatic. *See* Ex. A at pp.2–3, 13, 16, 17, 27–28 (Column 4). These issues broadly concerned the use of electronic voting machines and election integrity in general and at times referenced Dominion, but not Smartmatic. For example, host Rob Schmitt discussed with Powell, “you had senators Warren and Klobuchar that made a big stink about the 2018 midterms saying that they don’t trust Dominion. That they saw evidence that votes could be switched using these systems. [] What I don’t understand is how [] does this get ignored? I mean, this is . . . nationwide, this is a democracy-shocking scandal. If it is true.” *See, e.g.*, Am. Compl. ¶¶ 141–43, 185(q), 192(j), 220(w). Additionally,

Newsmax hosts pushed their third-party guests to provide evidence of the claims regarding the voting issues in the 2020 Presidential Election and acknowledging such evidence when they said they had it. *See id.* ¶ 96. For instance, Mike Huckabee stated during his show, *Huckabee*, where Powell appeared as a guest, “[t]he media keeps saying ‘there’s no evidence, there’s no evidence.’ You and others have shown hundreds of affidavits, sworn statements, under penalty of perjury, that means a person could go to prison for lying about it, of people who say they saw funny business going on.” *See id.* ¶¶ 161, 180(b). Huckabee went on to ask Powell, “[h]ow come we can’t seem to get the media and even the general public interested in the evidence you have amassed and distributed?” *See id.* Host Greg Kelly asked Michael Flynn, referring to him as an “intel expert,” what his overall take was on the election and what should happen next. *See id.* ¶ 165.

B. Procedural Background

Smartmatic filed this defamation lawsuit against Newsmax on November 3, 2021, alleging that specific statements made by Newsmax regarding the 2020 U.S. Presidential election have caused or will cause Smartmatic to suffer over \$1 billion in future-oriented damages in the form of diminished enterprise value, lost forecasted profits, and reputational harm by adversely impacting Smartmatic’s probabilities of securing future government election contracts. *See generally*

Compl.; *see* Am. Compl. ¶¶ 418–20, 423. Smartmatic alleges that it relies on its “reputation” for its “business value and prospects” and that being seen as a “corrupt company” harms those prospects. Am. Compl. ¶ 426. Smartmatic contends that Newsmax’s dissemination of allegedly defamatory content will lead to future damages in terms of diminished business value and anticipated profits from potential opportunities for government contracts. This is because the “individuals responsible for choosing voting systems, especially in the United States,” allegedly will be “less inclined to opt for electronic voting systems in their jurisdictions, and, even if they do, they are even less likely to choose Smartmatic.” *Id.* ¶¶ 427–29.

After Newsmax filed its Answer and Counterclaim, *see* Ans. to Am. Compl., which Smartmatic never responded to, the parties engaged in fact and expert discovery, with discovery disputes—including Smartmatic’s repeated failure to produce discoverable records relating to its alleged corrupt dealings in the Philippines and the *Bautista* investigation. *See generally* Def’s Br. In Support Of Its Mot. For Sanctions Against Pls. (detailing this discovery history).³¹ After the

³¹ Newsmax’s motion for sanctions against Smartmatic for withholding this critical discovery is pending; and Smartmatic is still impeding Newsmax’s ability to obtain certain information concerning the DOJ’s investigation of Smartmatic. Accordingly, while Newsmax submits that the Court should grant summary judgment in Newsmax’s favor because the current record establishes Smartmatic’s failure to carry its burden on multiple necessary elements of its defamation claim, should the Court conclude otherwise, Newsmax requests that it have the opportunity

parties' March 8, 2024, status conference, the Court requested that the parties submit separate briefing on the choice-of-law issue before filing dispositive motions, to narrow the issues for summary judgment. *See* Ex. 31 at 27:4–28:5, 56:12–57:17. On May 21, 2024, the Court issued a preliminary order ruling that Florida substantive law governs this case. (Trans. ID 73131000). Newsmax now moves for summary judgment under Rule 56 and files its opening brief in support of its motion.

ARGUMENT

Under Delaware Superior Court Rule 56, “the Court (i) construes the record in the light most favorable to the non-moving party; (ii) detects, but does not decide, genuine issues of material fact; and (iii) denies the motion if a material fact is in dispute. The movant bears the initial burden of demonstrating its motion is supported by undisputed material facts. If that burden is met, the non-movant must show there are material issues of fact to be resolved by a fact-finder.” *CVR Ref., LP v. XL Specialty Ins. Co.*, 2021 WL 5492671, at *8 (Del. Super. Nov. 23, 2021) (citations omitted). When parties file cross-motions for summary judgment, “[t]he moving party ‘concedes the absence of a factual issue and the truth of the nonmoving party’s allegations only for purposes of its own motion, and does not waive its right

to supplement the record before the Court rules on this motion, if that is possible after a favorable resolution of the discovery disputes.

to assert that there are disputed facts that preclude summary judgment in favor of the other party.”” *Brown v. City of Wilmington*, 2019 WL 141744, at *2 (Del. Super. Jan. 8, 2019) (citations omitted). Disposing of cases on summary judgment “is ‘encouraged when possible,’” *CVR Ref., LP*, 2021 WL 5492671, at *8 (citations omitted), especially under Florida law for defamation actions such as this one, *see Cronley v. Pensacola News-J., Inc.*, 561 So. 2d 402, 405 (Fla. Dist. Ct. App. 1990).

Under Florida law, the elements of a claim for defamation are: “(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to falsity on a matter concerning a public official [or public figure], or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory.” *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) (citation omitted). On summary judgment, it is the plaintiff’s duty to prove these elements by pointing to “undisputed material facts [] to reveal a basis for a jury to render a verdict in [his] favor.” *Cronley*, 561 So. 2d at 405. Additionally, “anyone who publishes defamatory matter is not liable if the remarks are published upon a conditionally privileged occasion and the privilege is not abused.” *Jews for Jesus, Inc.*, 997 So. 2d at 1112 (quoting *Demby v. English*, 667 So. 2d 350, 353 (Fla. Dist. Ct. App. 1995)).

I. Florida Law Prohibits Imposing Liability On Newsmax For Reporting On A Newsworthy Topic, But If This Court Concludes Otherwise, Then The First Amendment Protects Newsmax’s Reporting

Florida law prohibits holding Newsmax liable for neutrally reporting newsworthy allegations about which the public has the right to know. *Infra* Part I.A. Even if Florida law did not protect Newsmax’s reporting, basic First Amendment principles would mandate that result. *Infra* Part I.B.

A. Florida Law Protects Newsmax’s Reporting About The Trump Surrogates’ Allegations Against Smartmatic

Under Florida law, “disinterested and neutral reporting by members of the media” on “matters of public concern are privileged, even if defamatory.” *Corsi v. Newsmax Media, Inc.*, 519 F. Supp. 3d 1110, 1124 (S.D. Fla. 2021) (citation omitted); see *Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. Dist. Ct. App. 1985); *Smith v. Taylor Cnty. Pub. Co.*, 443 So. 2d 1042, 1044 (Fla. Dist. Ct. App. 1983); *Thomas v. Patton*, 2005 WL 3048033, at *3 (Fla. Cir. Ct. Oct. 21, 2005), *aff’d and remanded*, 939 So. 2d 139 (Fla. Dist. Ct. App. 2006) (remanded for assessment of fees).

When determining “whether a statement involves a matter of public concern” under Florida law, the Court must consider “the statement’s content, form, and context as revealed by the whole record.” 19 Fla. Jur. 2d Defamation and Privacy § 95 (citing *Rabren v. Straigis*, 498 So. 2d 1362 (Fla. Dist. Ct. App. 1986)). “[M]atters of real public or general concern are those which invoke common and

predominant public activity, participation or indulgence, and cogitation, study and debate[.]” *Firestone v. Time, Inc.*, 271 So. 2d 745, 749 (Fla. 1972). The “most obvious” “matters of real public or general concern” are “matters relating to governmental affairs, which necessarily involve public officers, public servants and employees and even candidates for public office.” *Id.* at 748.

Reporting is “disinterested and neutral,” under Florida law, so long as the reporter “identif[ies] . . . that the matters reported do not reflect” the news organization’s “opinion,” but rather a third party’s “version of the facts discussed.” *Rendón v. Bloomberg, L.P.*, 403 F. Supp. 3d 1269, 1276 (S.D. Fla. 2019). Where reporting concerns a “newsworthy event” and is “simply a reprint of statements made by a [third party],” that qualifies as neutral and disinterested. *Smith*, 443 So.2d at 1044. Further, news organizations’ “hosting and moderating a fiery debate” on a matter of public concern is also considered neutral and disinterested where “they d[o] not take sides in the [d]ebate.” *Corsi*, 519 F. Supp. 3d at 1124–25.

Neutral reporting criticizing “[p]rivate corporations that claim the confidence of the public and seek the possession of public funds . . . should be encouraged, rather than suppressed, as a means of public security.” 19 Fla. Jur. 2d Defamation and Privacy § 95 (citing *Murphy v. Daytona Beach Humane Soc’y, Inc.*, 176 So. 2d 922 (Fla. Dist. Ct. App. 1965)). Florida courts have applied the privilege to protect

allegedly defamatory reporting even though the news organization’s third-party source “was not a ‘prominent’ or particularly ‘reliable’ source.” *Rendón*, 403 F. Supp. 3d at 1278 (citing *Smith*, 443 So. 2d at 1044).

Florida law also privileges the accurate reporting of “information received from government officials.” *Rasmussen v. Collier Cnty. Pub. Co.*, 946 So. 2d 567, 570–71 (Fla. Dist. Ct. App. 2006). This fair reporting privilege, under Florida law, is “broadly” construed to protect reporting information from a “wide range of government-derived sources,” including “the contents of public records and statements from government officials.” *Larreal*, 489 F. Supp. 3d at 1318–19 (citations omitted). Because the privilege attaches so long as the report is “a **substantially correct** account of [the] information” from the official proceeding, “a plaintiff’s claim that the information derived from the government records is false is irrelevant[.]” *Id.* at 1319 (emphasis in original) (citations omitted).

Here, all of the challenged statements—including, most obviously, all of the Trump Surrogates’ statements—are privileged under Florida’s extensive protections for “disinterested and neutral reporting by members of the media” on “matters of public concern.” *Corsi*, 519 F. Supp. 3d at 1124.

First, the statements challenged in this lawsuit clearly involve “matters of public concern.” *Id.* Newsmax’s at issue reporting concerns allegations made by

the Trump Surrogates about the possibility that Smartmatic’s voting technology had been compromised in a way that could have called into question the results of a presidential election. *See supra* pp.22–35. Given the magnitude of the topic, the story received attention from news outlets across the world and across the political spectrum. *See supra* pp.19–22. These allegations of election manipulation were already the subject of significant media attention before Newsmax published the challenged statements. *See supra* pp.19–22; Am. Compl. ¶¶ 80–83 (acknowledging the same or similar allegations at issue here were previously made on Fox News). Smartmatic’s recognition of this is dispositive: “as the complaint alleges, [Smartmatic’s] [] activities were the subject of significant media attention before [Newsmax] published the [statements], which demonstrates that the information is newsworthy.” *See Rendón*, 403 F. Supp. 3d at 1277.

Second, Newsmax’s coverage of these unfolding allegations was also done in a “disinterested and neutral” manner. *See Corsi*, 519 F. Supp. 3d at 1124.

Many of the statements Smartmatic challenges in this lawsuit were statements by third parties made on non-Newsmax platforms and re-broadcast by Newsmax, or by third parties appearing as guests on Newsmax’s programs. *See Ex. B.* Newsmax consistently presented these unaffiliated third-party statements not as its own “opinion,” but as those third-party speakers’ “version[s] of the facts discussed.” *See*

Rendón, 403 F. Supp. 3d at 1276; *supra* pp.30–31. Indeed, when broadcasting these third-party statements, Newsmax carefully identified each speaker and provided information about his or her role in the unfolding events before [REDACTED]

See, e.g., Ex. 32 at 20:11–18 (“Malkin Dep.”).

For example, Newsmax host John Bachman identified Sidney Powell as a “former federal prosecutor” and “Michael Flynn’s attorney,” before rebroadcasting her views that Smartmatic’s software allegedly diverted votes away from then-President Trump. Compl. Ex. 5 at 2:6–7. On Howie Carr’s show, L. Lin Wood was identified as “working closely” with Powell and Rudolph Giuliani and as being aware of information based on personal meetings with them. Compl. Ex. 7 at 2:1–6, 3:2–20. Bachman introduced Liz Harrington as “national spokeswoman for the RNC.” Compl. Ex. 5 at 2:17–19. Greg Kelly introduced Patrick Byrne as a [REDACTED] [REDACTED] Ex. 33 at 374:9–10 (“Kelly Dep.”).

Similarly, a Newsmax.com article titled “Rudy Giuliani: ‘Dominion Shouldn’t Be Counting Votes Anywhere,’” clearly identified that it reflected Giuliani’s—*not Newsmax’s*—opinion. *See* Compl. Ex. 51. Similarly, guest Brian Kennedy allegedly defamed Smartmatic by “identif[ying] Smartmatic’s CEO as ‘a Venezuelan national,’” and declaring, “[t]his is election fraud, not voter fraud,” in

direct response to Newsmax then-host Steve Bannon’s request for Kennedy to discuss “[his] thoughts and [his] comments” on the evolving election interference news story. Am. Compl. ¶ 84; Am. Compl. Ex. 1 at 2. In framing the third-party statements in these ways, Newsmax signaled that the statements or the discussion surrounding those statements involved the third parties’ “version of the facts discussed,” *not Newsmax’s own opinion of them*. See *Rendón*, 403 F. Supp. 3d at 1276. The reporting, therefore, is the “type of disinterested and neutral reporting that Florida law and the First Amendment is designed to protect.” *Id.* at 1276.

The same holds true for the allegedly defamatory statements made by Newsmax’s own hosts and reporters. See Ex. A. When Newsmax on-air personnel discussed the developing story themselves, they endeavored to make it clear that they were discussing or analyzing allegations made by prominent public figures with personal knowledge of the unfolding controversy—not reflecting Newsmax’s own “opinion[.]” about those allegations. See *Rendón*, 403 F. Supp. 3d at 1276.

For example, Newsmax host John Bachmann made clear that it was “Sidney Powell”—not Newsmax—who “sa[id] it’s not a coincidence” that “Retired Admiral Peter Neffenger is the chairman of Smartmatic [and] also part of Joe Biden’s transition team,” and Bachman commented that “we do need to get to the bottom of all these allegations regarding Dominion, and [] Smartmatic,” without endorsing

any such allegations of wrongdoing by Smartmatic or Neffenger as true. Compl. ¶¶ 185(a), 192(a), 192(o); *see* Compl. Ex. 54 at 13. Newsmax Correspondent Emerald Robinson repeatedly reminded viewers that the allegations she was reporting on regarding Smartmatic and the 2020 Election in general were Sidney Powell’s statements and that Powell was the one who had “pointed to” Smartmatic and “shared” that a Smartmatic executive was serving on the Biden transition team. Compl. ¶ 192(q). Robinson testified that when presenting the allegations, she [REDACTED]

[REDACTED] Ex. 34 at 131:7–14 (“Robinson Dep.”). Newsmax host Grant Stinchfield made clear that the allegations reported concerned “claims” made by “the Trump legal team.” Am. Compl. ¶¶ 129, 178(j), 180(c); Am. Compl. Ex. 29 at 2:7–10, 3:6–20. As Stinchfield testified: [REDACTED]

[REDACTED] Ex. 35 at 177:19–25 (“Stinchfield Dep.”); *see id.* at 214:2–13 [REDACTED]

[REDACTED]. Host Shaun Kraisman testified that [REDACTED] and that he was careful to note that guests like Liz Harrington were [REDACTED] [REDACTED] Ex. 36 at 71:7–72:9, 125:17–127:3 (“Kraisman Dep.”). Host

Robert Schmitt testified that he and other hosts were presenting the allegations of others, and that they [REDACTED] Schmitt Dep. at 71:22–25, 78:10–13, 89:18–23, 100:15–101:2, 101:8–25. In fact, they [REDACTED] [REDACTED] because they [REDACTED] about these [REDACTED] [REDACTED] *Id.* at 101:8–101:25. As host Chris Salcedo put it, he was [REDACTED] [REDACTED] [REDACTED] Ex. 37 at 214:22–215:1 (“Salcedo Dep.”).

Malkin explained the common understanding among Newsmax hosts when presenting the at-issue allegations: [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

Malkin Dep. at 76:1–13 (emphases added); *see also* Sellers Dep. at 160:5–21. This was the understanding of Newsmax’s production team as well. As senior producer Jason Rosenberg explained: [REDACTED] [REDACTED]

at 126:20–127:1 (“Rosenberg Dep.”) (emphasis added).

Based on the foregoing, it is evident that Newsmax “consistently identif[ied] the fact that the matters reported d[id] not reflect [its] opinion but [wa]s [the guests’] story, [their] version of the facts discussed,” *see Rendón*, 403 F. Supp. 3d at 1276; *see also Smith*, 443 So. 2d at 1044, 1047; *Corsi*, 519 F. Supp. 3d at 1124–25, which protects Newsmax from liability here as a matter of Florida law. Accordingly, under Florida’s neutral reporting privilege, the at-issue statements cannot be actionable against Newsmax—even if defamatory. *See Corsi*, 519 F. Supp. 3d at 1124. However, even if the Court finds some small subgroup of statements does not fall within this privilege, the Court need only proceed in analyzing *those* statements and must dismiss all others as nonactionable.

Further, a subset of the challenged statements—*see* Ex. A at pp.9–12—are additionally protected by Florida’s fair report privilege, *see Larreal*, 489 F. Supp. 3d at 1318–19. For example, Smartmatic is seeking damages because of Emerald Robinson’s reporting about a whistleblower affidavit filed on November 17, 2020 in *Wood v. Raffensperger I* (N.D. Ga.) (20-CV-04651-SDG; Doc. 6–14), to support Powell’s claim that Smartmatic had colluded with the Venezuelan government. Am. Compl. ¶¶ 116, 174(k), 174(m), 185(b), 185(e), 185(g), 212(d), 220(b).

B. If This Court Concludes That Florida Law Does Not Protect Newsmax’s Reporting, Then The First Amendment Prohibits Holding Newsmax Liable For Its Reporting

Courts “have long subscribed to a principle of judicial restraint by which [they] avoid considering a constitutional question when the case can be decided on nonconstitutional grounds.” *In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006) (citations omitted). This is such a case. The Court can—and should—grant summary judgment in favor of Newsmax as a matter of Florida defamation law, *see supra* Part I.A, without independently analyzing whether protection is warranted under general First Amendment principles. But if this Court concludes that Florida law does not foreclose the imposition of liability here, Florida law would violate the First Amendment, which independently mandates protection for Newsmax.

The First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This right is particularly important in the context of “matters relating to,”—and criticizing—“the functioning of government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980); *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) (plurality opinion) (“One of the prerogatives of American citizenship is the right to criticize public men and measures[.]”). As such, the First Amendment is designed to

guarantee the free flow of public information that “is bound to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (citation omitted).

To honor this “national commitment” to public debate, *Sullivan*, 376 U.S. at 270, the First Amendment’s Free Press Clause broadly protects the “right of the press to disseminate newsworthy information to the public,” *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981). A free press is a prerequisite for “[t]he sort of robust political debate encouraged by the First Amendment,” *Hustler Mag., Inc.*, 485 U.S. at 51, and thus the First Amendment’s Free Press Clause was meant to “preserve an untrammelled press as a vital source of public information,” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–50 (1936).

The First Amendment prohibits States from imposing liability to news organizations that neutrally “present[] newsworthy allegations made by others” to the public, for its consideration, *Croce v. N.Y. Times Co.*, 930 F.3d 787, 793 (6th Cir. 2019). The media can “report . . . charges without assuming responsibility for” allegations when “what is newsworthy about these accusations is that they were made” in the first place. *Cianci v. N.Y. Times Publ’g Co.*, 639 F.2d 54, 68 (2d Cir.

1980). Anything less than this broad protection would have a chilling effect on the media and undermine the “public interest in being fully informed about controversies that often rage around sensitive issues,” *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977), which interest the First Amendment is designed to protect, *Grosjean*, 297 U.S. at 249–50; see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346–47 (1995); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

Even before the Founding, colonial leaders recognized that individual liberty depends on the ability of the press to freely question and discuss matters of societal concern—including, specifically, matters related to governmental affairs. Back in 1768, when a radical newspaper, the Boston Gazette, “accused the royal governor of misrepresenting the position of the Massachusetts House to the British secretary of state,” the Governor asked the Massachusetts House to refer the purported “seditious libel” to a grand jury for prosecution. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 463 (1983). In rejecting that request, the Massachusetts House adopted a resolution stating that “[t]he Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People’s Rights to defend and maintain it.” *Id.* (quoting L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 69 (1960)). This significant interest in

protecting a free press proliferated in the founding era, entirely independent of protections of free speech. “Freedom of the press occupied a secure place in the framers’ catalogue of essential rights,” wholly “separate and distinct from the other first amendment rights,” even from the right to free speech, which it “was neither equated with nor viewed as a derivative of[.]” *Id.* at 487. Furthermore, “there is no evidence that the framers intended to protect freedom of the press qualifiedly”; instead “they sought to protect it fully,” without any suggestion that it was necessary to “balance the freedom of the press against other interests.” *Id.* at 488.

The republication doctrine—the common law rule pursuant to which one “who republishes a libel is subject to liability just as if he had published it originally,” *Cianci*, 639 F.2d at 60—is not at odds with this understanding of the First Amendment. The “right of the press to state public things and discuss them” is generally “complete,” subject only “to the restraints which separate right from wrongdoing.” *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419–20 (1918), *overruled on other grounds by Nye v. United States*, 313 U.S. 33 (1941). Thus, while the Supreme Court has never explicitly addressed the interaction of the republication doctrine and the press’s constitutional right to publish and discuss defamatory statements when the mere fact that such statements were made is itself a newsworthy story of exceptional importance, the general principles the Court has

established in interpreting the First Amendment’s protection of “the press,” U.S. Const. amend. I, acknowledge that republication of a defamatory statement, when not itself amounting to “wrongdoing,” *Toledo Newspaper Co.*, 247 U.S. at 419–20, necessarily falls within the protections the First Amendment affords to the press.

Lower federal courts addressing these issues have crafted various exceptions from defamation law that hew closely to the limits the First Amendment establishes. Because the republication doctrine could be read to “create[] special problems for the press,” including by exposing the press to liability whenever it “published a newsworthy account of one person’s defamation of another,” “the law has long recognized” that certain privileges and protections are necessary to “ameliorate the chilling effect [of the republication doctrine] on the reporting of newsworthy events.” *Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir. 1981).

Here, the First Amendment prohibits holding Newsmax liable for its coverage of unfolding third-party allegations concerning an issue of nation-wide public importance. *See Croce*, 930 F.3d at 793; *see also Grosjean*, 297 U.S. at 249–50; *Hustler Mag., Inc.*, 485 U.S. at 51.

As an initial matter, the statements Smartmatic challenges in this lawsuit, which concern allegations of potential technological manipulation and consequent election interference, clearly involve a “newsworthy” matter of public concern,

Edwards, 556 F.2d at 120, as explained above, *supra* Part I.A. That these statements were largely critical of Smartmatic is irrelevant to the newsworthiness of Newsmax’s reporting. Indeed, unfavorable coverage of this type is *precisely* the type of “robust political debate encouraged by the First Amendment.” *Hustler Mag., Inc.*, 485 U.S. at 51 (citation omitted); *Baumgartner*, 322 U.S. at 673–74. By reporting that certain prominent public figures believed that Smartmatic’s voting technology may have been manipulated in a manner that compromised the results of the 2020 Election, Newsmax “disseminate[d] newsworthy information to the public.” *Gilbert*, 665 F.2d at 307. Any contrary conclusion permitting the imposition of liability on Newsmax here would undermine the First Amendment’s aim to “preserv[e]” the “press as a vital source of public information” and would “prevent [the] free and general discussion of public matters” that is “absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.” *Grosjean*, 297 U.S. at 249–50 (citation omitted).

Newsmax presented the vast majority of the allegations at issue as the independent statements of unaffiliated third parties, namely the Trump Surrogates, rather than endorsing the allegations as Newsmax’s own. *See Croce*, 930 F.3d at 794; *supra* Part I.A. For example, Bob Sellers informed his viewers that it was

██████████—not Newsmax—who ██████████

[REDACTED]

[REDACTED] Kelley Rebuttal at 32. Sellers went on to caution his audience that although the whistleblower allegedly [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* (emphasis added). Likewise, after Powell appeared on air making allegations about a wide-ranging conspiracy to steal the election, Rob Schmitt offered the audience context, noting [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 34 (emphases added). Schmitt made sure to inform the audience that [REDACTED]

[REDACTED] *Id.* Similarly, when Sidney Powell unexpectedly made claims about Hillary Clinton and the 2016 primary challenge against Bernie Sanders on air, Rob Schmitt made clear that the statements were Powell's: [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 29–30 (emphasis added). As Michelle Malkin explained, the allegations at issue here were [REDACTED] and were [REDACTED]

██████████ rather they were what ██████████ and she was merely reporting ██████████ Malkin Dep. at 76:1–13 (emphases added). Other hosts repeatedly made similar statements, as discussed at length above. *See supra* Part I.A. Given this context, no reasonable viewer would have understood the Trump Surrogates’ allegations to also be Newsmax’s own. *See supra* Part I.A.

Any contrary conclusion would fly in the face of the way the press has typically reported similarly controversial, newsworthy allegations—ranging from statements Thomas Jefferson’s surrogates made about John Adams, *see* Peter Feuerherd, *The First Ugly Election: America, 1800*, JSTOR (July 4, 2016),³² to statements made by Donald Trump questioning the authenticity of then-President Obama’s birth certificate, *see Campaign 2012: Donald Trump Remarks On President Obama’s Birth Certificate*, C-SPAN (Apr. 27, 2011),³³ to C-SPAN’s coverage of Sidney Powell’s press conferences questioning the election results—which statements remain available on C-SPAN’s website today, *see* Sidney Powell: Recent Appearances, C-SPAN.³⁴ Modern media permits—and the public’s interest in the free flow of information requires—news organizations to be able to report that

³² Available at <https://daily.jstor.org/first-ugly-election-america-1800/>.

³³ Available at <https://www.c-span.org/video/?299230-1/donald-trump-remarks-president-obamas-birth-certificate>.

³⁴ Available at <https://www.c-span.org/person/?76206/SidneyPowell>.

these types of newsworthy allegations have been made. Thus, the First Amendment does not permit the imposition of liability on media outlets for merely broadcasting those statements—whether they are statements initially broadcast on other platforms, made by the initial speaker during an on-air interview, or recounted by a media organization’s own affiliates. Plaintiffs’ request in this litigation would effectively prevent *any* news outlet—including Newsmax, C-SPAN, Fox News, and CNN—from broadcasting these types of controversial statements in any context, which would clearly stifle the media and frustrate the freedoms the First Amendment is designed to protect.

II. Many Of Newsmax’s At-Issue Statements Are Not Actionable As Defamation Because They Are Not “Of And Concerning” Smartmatic

For a given statement to be capable of defamatory meaning, and therefore actionable, Florida law and the First Amendment require that the statement be “of and concerning” the plaintiff. *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 804–05 (Fla. Dist. Ct. App. 1997) (citing Restatement (Second) of Torts § 558 (Am. L. Inst. 1977)). Put differently, a statement must be “specifically directed at the plaintiff” to be actionable. *Reed v. Chamblee*, 2023 WL 6292578, at *9 (M.D. Fla. Sept. 27, 2023), *reconsideration denied*, 2024 WL 69570 (M.D. Fla. Jan. 5, 2024), *appeal dismissed*, 2024 WL 806194 (11th Cir. Feb. 27, 2024) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966)). “[A] [p]laintiff need not be named in a

publication” to satisfy this requirement. *Id.* (citing *Mac Isaac v. Twitter*, 557 F. Supp. 3d 1251, 1258–59 (S.D. Fla. 2021)). However, the communication, when viewed as a whole, must “contain[] sufficient facts or references from which the injured person may be determined by the persons receiving the communication.” *Id.* (quoting *Mac Isaac*, 557 F. Supp. 3d at 1258–59) (citations omitted). The relevant inquiry is thus whether “the average person upon reading the[] statements could reasonably have concluded that the plaintiff [] was implicated[.]” *Miami Herald Pub. Co. v. Ane*, 423 So. 2d. 376, 389 (Fla. Dist. Ct. App. 1982), *aff’d*, 458 So. 2d 239 (Fla. 1984).

Florida courts typically find that allegedly defamatory statements do not satisfy the “of and concerning” element, and summary judgment is thus appropriate, in two common circumstances. First, “[a]s a general rule no action lies for the publication of defamatory words concerning a large group or class of persons,” because “words are not reasonably understood to have any personal application to any individual unless there are circumstances that give them such an application.” *Thomas*, 699 So. 2d at 804 (citation omitted). Thus, defamation plaintiffs “face a difficult task when the statements concern groups,” because “[w]hen an entire class is defamed, it is usually difficult to show that class-wide allegations could be said to be directed to each individual.” *Id.* at 805 (citations omitted); *see Reed*, 2023 WL

6292578, at *12. Second, statements that reference specific individuals or entities generally cannot be attributed to unnamed parties for purposes of establishing the “of and concerning” requirement. *Reed*, 2023 WL 6292578, at *10–13. Thus, where a statement “solely concerns” a different person and contains a “complete dearth of identification of [plaintiff],” the plaintiff’s defamation claim necessarily fails as a matter of law. *Id.* at *10. Similarly, statements concerning a business owner or officer cannot be attributed to a business entity—regardless of how closely the individual and business are connected. *See McIver v. Tallahassee Democrat, Inc.*, 489 So. 2d 793, 793–94 (Fla. Dist. Ct. App. 1986); *Ludwin v. Proman*, 2023 WL 2401774, at *4–5 (S.D. Fla. Jan. 24, 2023).

Here, two categories of Newsmax’s at-issue statements are not capable of defamatory meaning because, even when viewed in their full context, they cannot be reasonably understood to concern Smartmatic.

First, Smartmatic points to many allegedly defamatory statements that contain the exact types of “class-wide allegations” that Florida courts routinely dismiss. *See Thomas*, 699 So. 2d at 805 (citation omitted). Smartmatic challenges several statements about electronic voting and the integrity of the 2020 Election generally—none of which mention Smartmatic. For example, Sydney Powell stated that there was a “big fraud” in the 2020 Election and stated she had evidence to prove this. *See*

Am. Compl. ¶ 141. Guests such as Lin Wood stated that they had seen sworn affidavits and video statements relating to a “complicated scheme of fraud as it relates to voting machines.” *Id.* ¶ 97. Newsmax hosts questioned their third-party guests by asking for evidence of the claims regarding the voting issues in the 2020 Election and acknowledging them when they said they had it. *See id.* ¶ 96. Mike Huckabee stated during his show *Huckabee* where Sidney Powell appeared as a guest, “[t]he media keeps saying ‘there’s no evidence, there’s no evidence.’ You and others have shown hundreds of affidavits, sworn statements, under penalty of perjury, that means a person could go to prison for lying about it, of people who say they saw funny business going on.” *See id.* ¶¶ 161, 178(i), 180(b). Huckabee further asked Sidney Powell, “[h]ow come we can’t seem to get the media and even the general public interested in the evidence you have amassed and distributed?” *Id.* And Greg Kelly asked Michael Flynn, referring to him as an “intel expert,” what his overall take was on the election and what should happen next. *See id.* ¶ 165. Importantly, Smartmatic is only one of 20 registered election technology manufacturers in the United States alone. *See United States Election Assistance Commission, Registered Manufacturers.*³⁵ Accordingly, Smartmatic must prove

³⁵ Available at https://www.eac.gov/voting-equipment/registered-manufacturers?field_manufacturer_type_target_id_1=All&field_city_value=&field_state_target_id=All&page=0.

that “the average person upon [hearing] the[] [above mentioned] statements could reasonably have concluded that [Smartmatic] [] was implicated”—despite none of those statements specifying which of the 20 registered election technology manufacturers they refer to and, in some cases, not referring to election technology at all. *See Miami Herald Publ’g Co.*, 423 So. 2d at 389.

Second, Smartmatic claims certain statements defamed it even though those statements are not only void of any mention of Smartmatic, but reference another electronic voting machine company: Dominion. For example, Smartmatic challenges the following statement Newsmax host Rob Schmitt made to Sidney Powell: “You had senators Warren and Klobuchar that made a big stink about the 2018 midterms saying that they don’t trust Dominion. That they saw evidence that votes could be switched using these systems. [] What I don’t understand is how does this get ignored? I mean, this is . . . nationwide, this is a democracy-shocking scandal. If it is true.” *See* Am. Compl. ¶¶ 143, 185(q), 192(j), 220(w). Plaintiffs ask this Court to hold that these statements, which “solely concern” Dominion, are “of and concerning” Smartmatic even though they contain a “complete dearth of identification of [Smartmatic]”—a conclusion that is plainly contrary to Florida law. *See Reed*, 2023 WL 6292578, at *9–10. Moreover, the issues with Smartmatic’s defamation theory are even more apparent here considering that Dominion is a direct

competitor of Smartmatic. *See* Saba Dep. at 374:19–375:2 (acknowledging that Smartmatic and Dominion are not the same company and statements about one are not statements about the other).

III. Smartmatic Has Failed To Present Evidence That Newsmax’s Reporting Was Substantially Inaccurate, As Necessary To Prove The Falsity Element Of Its Defamation Claim

Under Florida law, it is “required that a public figure plaintiff prove falsity,”³⁶ and “[t]he question of falsity . . . concentrates upon substantial truth.” *Smith v. Cuban Am. Nat’l Found.*, 731 So. 2d 702, 706–07 (Fla. Dist. Ct. App. 1999) (citations omitted). Pursuant to the substantial truth doctrine, the Court must “overlook[] minor inaccuracies” when determining whether allegedly defamatory statements are false, and “a statement does not have to be perfectly accurate if the ‘gist’ or the ‘sting’ of the statement is true.” *Id.* (citations omitted). Rather, a statement is false only “if the publication is substantially and materially false, not just if it is technically false.” *Id.* at 707.

Any allegedly defamatory statement “must be considered in the [full] context of the publication,” and should not be “considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would

³⁶ As explained *infra* Part IV.A, Smartmatic is a limited purpose public figure for purposes of this litigation under Florida law.

have produced.” *Id.* at 705–06 (citations omitted). Further, Florida law recognizes a difference between statements presented as fact and statements presented as an opinion or rhetorical hyperbole. *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1234–35 (Fla. Dist. Ct. App. 2021). Where, for instance, investigative reporting is either substantially true or presented as opinion, the statements are not defamatory. *See Eduardo Quin Iglesias/Real Asset Mgmt. v. Norman*, 350 So. 3d 751, 751–52 (Fla. Dist. Ct. App. 2022).

As an initial matter, a portion of the actual statements made by then-President Trump and Trump Surrogates themselves, on which Newsmax reported, simply do not qualify as “substantially and materially false,” *Smith*, 731 So. 2d at 707.

First, statements that Smartmatic had been the subject of public controversy, investigation, and concern, including with respect to Smartmatic’s connections to Venezuela, and the role of Smartmatic technology in elections in Venezuela, the Philippines, and the United States are substantially true. *See, e.g.*, Ex. 39 at 105:7–19 (“Childers Dep.”) (explaining that a statement she read on-air was derived from an affidavit related to the 2013 Venezuelan election, which addressed claims of voting irregularities); Saba Dep. at 244:21–258:10 (acknowledging Smartmatic engaged in a [REDACTED] to improve its image prior to the 2020 Election due to its [REDACTED] including its [REDACTED]); James

Report at 27–32 (Smartmatic’s own damages expert explaining [REDACTED] and [REDACTED]). Smartmatic admits that its [REDACTED] one of its [REDACTED] and it provided election services and technology for Venezuelan elections from 2004 to 2017, including contests involving Hugo Chávez and Nicolas Maduro. Saba Dep. at 75:21–80:15; 90:5–96:18; 101:4–131:4. Indeed, Smartmatic technology was employed in the controversial 2004 referendum election won by Hugo Chávez, which was Smartmatic’s *first* contract to provide voting equipment anywhere in the world. *See id.* at 89:2–96:18. Smartmatic partnered with a Venezuelan telecommunications company, CANTV, and a software company, Bitza, which were both owned, at least in part, by Chávez’s government. *See id.* at 96:19–100:13. It is undisputed that Smartmatic was responsible for providing [REDACTED] which was used to [REDACTED] votes in that election, and that Smartmatic continued to provide [REDACTED] through July 2017. James Report at 27–29. There were also widely reported allegations at the time claiming that Smartmatic’s software was designed to and/or was used to fix election results by manipulating vote counts in Venezuela

and the Philippines, *see* Saba Dep. at 118:5–122:8, 202:19–204:24, which allegations were later repeated in a sworn affidavit, *see supra* pp.18–19.

Second, the at issue statements concerning Peter Neffenger, chairman of the board of directors of SUSA, and his connections to President Biden are substantially true. *See* Ex. A at pp.1–6, 13, 17 (Column 3); Ex. B at pp.1, 3, 7, 14–15 (Column 3). The actual statements Smartmatic claims were defamatory noted Neffenger’s affiliation with Smartmatic and that he was also part of Biden’s transition team—
[REDACTED] he was part of the transition team between late September of 2020 and early January of 2021. *See* Neffenger Dep. at 27:2–16.

Third, statements claiming “that Smartmatic’s software was used by Dominion” before are substantially true. Am. Compl. ¶ 172. Smartmatic does not contest that Sequoia, a former Smartmatic-subsiidiary that used Smartmatic software, was ultimately sold to Dominion. *Supra* pp.9–10. Nor does Smartmatic dispute that Smartmatic has [REDACTED]
[REDACTED] Saba Dep. at 60:3–63:10.

Given the evidence available at the time and Smartmatic’s own admissions since, Newsmax’s reporting on these allegations cannot be considered “substantially

and materially false,” *Smith*, 731 So. 2d at 707, and thus Smartmatic’s defamation claim as to these statements must be dismissed.

While Newsmax does not dispute that some of the other statements that then-President Trump and the Trump Surrogates made regarding Smartmatic turned out to be false, *supra* pp.25–26, Newsmax’s own reporting of those unfolding allegations as the story developed was not “substantially and materially false,” *Smith*, 731 So. 2d at 707. These allegations included claims that Smartmatic’s software was widely used during the 2020 Election, that Dominion owned Smartmatic and/or used Smartmatic software during the 2020 Election, that Smartmatic software transmitted votes overseas, and that Smartmatic software was used to rig the election in favor of President Biden and/or manipulate vote counts. *See supra* pp.25–26, 31–34. However, Newsmax largely presented these newsworthy statements from then-President Trump and Trump Surrogates as allegations made by third parties, not factual statements endorsed by or attributable to Newsmax itself. *Supra* Part I.A. Newsmax took pains to identify the source of each allegation it reported, while urging the speakers to substantiate their claims with evidence. *See supra* Part I.A. And Newsmax presented alternative perspectives, reporting on, for example, several courts’ dismissals of the Trump team’s legal challenges and notable Republican figures’ skepticism regarding the validity of such

claims. *Supra* pp.23–25. Because Newsmax’s own reporting was not “substantially and materially false,” *Smith*, 731 So. 2d at 707, Smartmatic cannot establish the falsity element of its defamation claim.

IV. Smartmatic Failed To Present Evidence That Newsmax Reported The Trump Surrogates’ Allegations With Actual Malice

Under the First Amendment, the *mens rea* required to sustain a defamation action depends upon the public/private status of the plaintiff. *See Sullivan*, 376 U.S. at 279–83. If a plaintiff is a public figure, the plaintiff must show that the defendant’s defamatory statement was made with “actual malice.” *Id.* The same is true of a limited purpose public figure—*i.e.*, a person or entity who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues”—because such person has “assume[d] special prominence in the resolution of public questions.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). In either case, the plaintiff must prove that the defendant made the defamatory statement with actual malice, a term of art meaning “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Sullivan*, 376 U.S. at 280.

Here, because Smartmatic is at least a limited purpose public figure, it must prove Newsmax had actual malice in defaming Smartmatic, meaning actual evidence that Newsmax made any false allegations that it knew were false or

recklessly disregarded knowledge of falsity. Smartmatic has not presented sufficient evidence from which a reasonable jury could conclude that Newsmax acted with actual malice and so its defamation claims fail on this independently sufficient basis.

A. Smartmatic Is At Least A Limited Public Figure

While the Supreme Court has held that the constitutional protection of requiring proof of actual malice applies to “public figures,” “[n]o precise definition of the term has been laid down by the Court,” leaving States free to assign the term “a broader meaning and thus apply the [actual malice] standard of fault [] to a greater range of plaintiffs than the Constitution requires.” Restatement (Second) of Torts § 580A, cmt.c (1977); see *Marcone v. Penthouse Int'l Mag. For Men*, 754 F.2d 1072, 1077 (3d Cir. 1985) (“Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action.”). Thus, courts routinely turn to the applicable State’s substantive law governing the action to determine whether a defamation plaintiff qualifies as a public figure. See, e.g., *Lee v. City of Rochester*, 663 N.Y.S.2d 738, 743–44 (Sup. Ct. 1997), *aff'd*, 254 A.D.2d 790 (1998) (applying federal and New York law); *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. Dist. Ct. App. 2002) (applying federal and Florida law); *Page v. Oath Inc.*, 270 A.3d 833, 842–44 (Del. 2022) (applying federal and Delaware law).

Here, as the Court previously ruled, Smartmatic is a limited purpose public figure under Florida law.

1. Smartmatic Is At Least A Limited Public Figure Under Florida Law

As the Court previously ruled, “[u]nder Florida law, Smartmatic is a limited purpose public figure.” (Trans. ID 69068510 at 25). This is the law of the case. *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 894–95 (Del. 2015), as revised (Mar. 27, 2015) (citations omitted).

Indeed, Florida law recognizes the distinction between public and private plaintiffs in defamation litigation. Under Florida caselaw interpreting “U.S. constitutional defamation law there are two classes of ‘public figures’: ‘general public figures’ of requisite fame or notoriety in a community who are always considered public figures, and ‘limited public figures’ who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Mile Marker, Inc.*, 811 So. 2d at 845 (citation omitted). In determining whether a plaintiff is a limited public figure or merely a private plaintiff, Florida courts follow “a two-step process.” *Id.* First, they must consider whether there is a public controversy. *Id.* A public controversy is “any topic upon which sizeable segments of society have different, strongly held views,” *Della-Donna v. Gore Newspapers Co.*, 489 So. 2d 72, 76 (Fla. Dist. Ct. App. 1986) (citations

omitted), and the court considers “whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution,” *Mile Marker, Inc.*, 811 So. 2d at 845. Second, Florida courts “determine whether the plaintiff played a sufficiently central role in the instant controversy to be considered a public figure for purposes of that controversy.” *Miler Marker, Inc.*, 811 So. 2d at 846 (citations omitted).

First, this case centers on a public controversy. *See id.* at 845. The 2020 Election, in general, and voting machines used in that election, in particular, were hotly contested topics of discussion across the United States. *See supra* pp.17–18. Indeed, concern about election integrity in American voting machines for the 2020 Election was arguably the biggest story in the country in the months after the November election. *See supra* pp.15–22. This controversy consumed a huge portion of the media landscape at this time, inviting heated and disparate views on the propriety of the 2020 Election, with vast swaths of society becoming engaged in the debate, with some truly believing that the election had been “stolen” through the use of faulty and even intentionally disruptive voting machines to rig a nationwide election against then-President Trump, and others finding such allegations unsupported or completely baseless, believing that the 2020 Election involved no wrongdoing whatsoever and that President Biden was validly elected. *See supra*

pp.15–22. Thus, this is exactly the sort of controversy that expanded “beyond the immediate participants in the dispute,” *Mile Marker, Inc.*, 811 So. 2d at 845, creating “different, strongly held views” among “sizeable segments of society,” *Della-Donna*, 489 So. 2d at 76 (citations omitted).

Second, Smartmatic “voluntarily inject[ed] [it]self or [wa]s drawn into [this] particular public controversy,” *Gertz*, 418 U.S. at 351, under Florida law, as it “played a sufficiently central role in the instant controversy to be considered a public figure,” *Mile Marker, Inc.*, 811 So. 2d at 846 (citation omitted). Smartmatic successfully bid upon a large elections contract for the largest municipal voting jurisdiction in the country—Los Angeles County. *See* Burton Rebuttal at 17–18; James Report at 13 & n.73, 34. Smartmatic marketed these efforts to the public, claiming that its “unparalleled experience in providing secure, advanced election technology and services to election commissions throughout the world” was a “primary reason” Los Angeles County selected it for the contract. *See id.* In this manner, Smartmatic clearly “voluntarily inject[ed]” itself into the 2020 Election and the following controversy regarding integrity of voting systems used in that election. *Gertz*, 418 U.S. at 351. Smartmatic has long known that its business of supplying voting technology—including to one of the largest jurisdictions in the country, for a highly contested presidential election—is the sort of business that invites public

controversy. Smartmatic's Communications Director testified [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Saba Dep. at 23:4–24:25; 75:13–81:20; 199:5–215:17; 303:5–24. Smartmatic's frequent mentions in national media and politicians' statements even prior to the 2020 Election provided ample notice to Smartmatic that its business was sure to invite controversy. Thus, Smartmatic had "a sufficiently central role in the instant controversy," *Mile Marker, Inc.*, 811 So. 2d at 846 (citations omitted), and "assume[d] special prominence in the resolution of [the] public questions" surrounding the 2020 Election, *Gertz*, 418 U.S. at 351, such that it is a public figure for purposes of its defamation claims.

B. Smartmatic Has Not Raised Any Genuine Issue Of Material Fact That Newsmax Knew The Challenged Statements Were False Or Acted With Reckless Disregard Of The Same

"The actual malice standard is famously 'daunting,'" *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 240 (D.C. Cir. 2021) (citation omitted), requiring proof that the defendant "made the false publication with a 'high degree of awareness of . . . probable falsity,' or must have 'entertained serious doubts as to the truth of his publication,'" *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (citations omitted), thereby preserving the "free debate" protected by the First

Amendment and avoiding the “self-censorship” that a lower standard would inevitably “lead[] to” if “critic[s] of official conduct” were required “to guarantee the truth” of their statements, *Sullivan*, 376 U.S. at 271, 279. In other words, it is “[t]he First Amendment [that] protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with . . . ‘actual malice,’ a term of art denoting deliberate or reckless falsification.” *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 499 (1991). Such proof requires more than mere allegations of negligence or even the “failure to investigate,” neither of which suffice, and even requires “more than an extreme departure from professional standards,” *Harte-Hanks*, 491 U.S. at 665, 688. “Rather there must be some showing that the defendant purposefully avoided further investigation with the intent to avoid the truth.” *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016) (citations omitted). At summary judgment, such evidence must be “clear and convincing,” meaning that the evidence presented is “such that a reasonable jury might find that actual malice had been shown with convincing clarity.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Where the defendant in a defamation case is a media organization, the “state of mind required for actual malice” must “be brought home to the persons in the

[defendant's] organization having responsibility for the publication.” *Sullivan*, 376 U.S. at 287.

Smartmatic has failed to provide any record evidence that would permit a reasonable jury to conclude that Newsmax published the at-issue statements about the 2020 Election with actual, subjective knowledge that they were false or with a high degree of awareness of their probable falsity.

Newsmax reported the unfolding allegations regarding Smartmatic made by then-President Trump and Trump Surrogates—individuals unaffiliated with Newsmax—as these allegations developed, and that accurate reporting on the newsworthy claims of third parties cannot possibly constitute actual malice in any respect. *See Masson*, 501 U.S. at 499. Again, all of the statements from Newsmax at issue here constitute Newsmax’s reporting of newsworthy statements from then-President Trump and Trump Surrogates, with Newsmax taking pains to identify the source of each allegation it reported, *supra* pp.22–35, Part I.A, urging the speakers to substantiate their claims with evidence, *supra* p.65, Part I.A, and presenting alternative perspectives, such as by reporting several courts’ dismissals of the Trump Surrogates’ legal challenges and notable Republican figures’ skepticism regarding the validity of such claims, *supra* pp.23–25, Part I.A. A news outlet that reports such newsworthy allegations made by a President and his affiliates lacks the

“deliberate or reckless” intent needed to support a defamation claim. *See Masson*, 501 U.S. at 499.

Moreover, there is no record evidence that Newsmax personnel had first-hand knowledge of Smartmatic’s company structure, its executives’ connections, or how its election technology and software functioned, *supra* pp.25–26, such that Newsmax could have subjectively known that certain allegations regarding Smartmatic’s connections to Dominion and Venezuela or its technology being manipulated were false, *see Harte-Hanks*, 491 U.S. at 665, 667, 688; *accord Michel*, 816 F.3d at 703.

Newsmax was in no position to discount out of hand these serious allegations regarding a matter of significant public concern like election integrity. *See Sullivan*, 376 U.S. at 271, 279. As Newsmax’s CEO explained: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 40 at 248:16–249:2 (“Ruddy Dep.”);

see also Salcedo Dep. at 158:5–9 (stating that, at the time, [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]); Schmitt Dep. at 89:18–23 (explaining that Sidney Powell was [REDACTED]

[REDACTED]

[REDACTED]). Similarly, a Newsmax anchor explained that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Kraisman Dep. at 78:11–17; *see also* Salcedo Dep. at 166:22–23, 201:1–7 (explaining that Newsmax hosts [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]).

Further, when evidence that the Trump Surrogates promised to produce ultimately did not materialize, Newsmax quickly acted to publicly clarify its prior reporting, endorsed Smartmatic’s denials of the allegations, and ceased all the complained-of speech. *Supra* pp.25–27. As one Newsmax host put it: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Sellers Dep. at 160:13–21. That does not qualify as actual malice. *See Harte-Hanks*, 491 U.S. at 665, 688.

V. Smartmatic Cannot Show That Newsmax’s Alleged Misconduct Caused It Any Actual Damages

Smartmatic does business by entering into contracts with foreign and domestic governmental entities at the national, state, and local level to provide election technology, software, and related services. Smartmatic claims that Newsmax’s allegedly defamatory statements concerning the 2020 U.S. Presidential Election “irreparably tarnished” Smartmatic’s reputation (i.e., its “name and brand”) “with members of the general public” and “with government officials, particularly those in the United States.” Am. Compl. ¶¶ 420–21. It also claims that it “relied upon [its reputation] for its business value and prospects,” and accordingly contends that Newsmax’s coverage painting Smartmatic as a “corrupt company” caused it to suffer “diminished business value and prospects, particularly in the United States” because the “individuals responsible for selecting voting systems, particularly in the United States” are now “less likely to select electronic voting systems for their jurisdictions, and, even if they do, they are even less likely to select Smartmatic.” *Id.* ¶¶ 425–27. In total, Smartmatic alleges that its “election-related business was valued in excess of \$3.0 billion” prior to the 2020 U.S. Election and that “[n]ow,

following Newsmax’s publication of its defamatory statements, Smartmatic’s election-related business is valued at less than \$1 billion.” *Id.* ¶ 429. Additionally, Smartmatic claimed that it has incurred “out-of-pocket expenses as a result” of Newsmax’s publications “in excess of” \$1.2 million “and will spend millions more in the coming years.” *Id.* ¶ 423.

The fact depositions and Smartmatic’s document productions in this case collectively show that Smartmatic has no proof of any damages caused by Newsmax. During his deposition, Roger V. Piñate, who has been Smartmatic’s Chief Financial Officer for around a decade and served as a 30(b)(6) witness, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 41 at 36:18–24, 131:9–160:21. During her deposition, Smartmatic’s head of Communications, Samira Saba, who was also a 30(b)(6) witness, [REDACTED]

[REDACTED]

[REDACTED] Saba Dep. at 375:3–376:4; 388:4–16.

During this litigation, Smartmatic has provided *seven* different iterations of a chart purporting to identify these alleged opportunities by jurisdiction and to provide

estimates of both Smartmatic’s probability of winning each opportunity before and after the alleged defamation and Smartmatic’s “lost forecasted profits” it would have gained from these contracts absent Newsmax’s alleged defamation. *See, e.g.*, Ex. 42. Smartmatic executives Pedro Mugica, Antonio Mugica, and Roger A. Piñate

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See* Ex. 43 at 79:3–80:2, 206:23–208:11, 270:9–18 (“P. Mugica Sept. 13 Dep.”); Ex. 44 at 621:7–622:25 (“P. Mugica Nov. 28 Dep.”); A. Mugica Nov. 20 Dep. at 183:2–184:10, 212:13–213:11, 252:3–253:24; Ex. 45 at 223:14–224:17 (“R.A. Piñate Sept. 15 Dep.”); R.A. Piñate Oct. 23 Dep. at 525:25–527:17. Smartmatic produced the last iteration of this chart on October 18, 2023, *see* Ex. 42, identifying over 400 government contract opportunities in total, of which 137 were listed as active opportunities that Smartmatic allegedly lost or which were adversely affected in the U.S. and abroad. According to Smartmatic’s estimates, [REDACTED]

[REDACTED]

[REDACTED]

See id. Smartmatic divided its lost opportunities into 17 different categories

according to the proposed reason that the opportunity was lost, and 13 of these categories claim that there was an alleged loss due to a disinformation campaign in 2020 and five of the categories assert that an alleged disinformation campaign was the only potential reason for the alleged lost opportunity. *See id.*; Ex. 46 at 20–36, 44–45 (“Marshall Report”). The lost opportunities spreadsheet provided no information regarding the out-of-pocket expenses Smartmatic allegedly incurred because of a supposed disinformation campaign or specifically because of Newsmax’s at-issue statements. Proof that the spreadsheet method is lawyer invented is brought into sharp relief by Pedro Mugica’s deposition even though Smartmatic designated him to testify about the data: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] P.

Mugica Sept. 13 Dep. at 206:23–208:11, 270:9–18; *see* R.A. Piñate Sept. 15 Dep. at 223:14–224:17; R.A. Piñate Oct. 23 Dep. at 525:25–527:17; A. Mugica Nov. 20 Dep. at 252:3–253:24.

The constantly changing data in Smartmatic’s spreadsheets resulted in a steadily decreasing damages total until Smartmatic’s executives fed the data to its damages expert, Christopher James, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Resnick Rebuttal at 25–29, 42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] which value [REDACTED]

[REDACTED]

[REDACTED]

Ex. 47 at 14 (“Marshall Rebuttal”). The James Report also contained [REDACTED]

[REDACTED] listing only [REDACTED]

[REDACTED] in the previous spreadsheet, removing

[REDACTED]

[REDACTED] while adding [REDACTED]

[REDACTED] *Id.* at 5. Whereas Smartmatic had previously [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] which [REDACTED] calculation of \$164.5 million—a \$91.3 million increase. Resnick Rebuttal at 25–26. Dr. James arrived at this number based on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 27–29. Dr. James provided no explanation [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 27.

The James Report [REDACTED]

[REDACTED] Specifically, Dr. James opined that [REDACTED]

[REDACTED] for [REDACTED]

[REDACTED] is \$525.9 million. James Report at 4. To reach this conclusion, Dr.

James [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Resnick Rebuttal at 42.

Regarding harm to Smartmatic’s business after 2025, Dr. James opined that if the Court concluded that [REDACTED]

[REDACTED] while if the Court concluded [REDACTED]

[REDACTED] James Report at 4. Dr. James [REDACTED]

[REDACTED] *Id.* at 74.

As explained in detail below, Smartmatic has failed to put forth evidence establishing a causal link between Newsmax’s reporting and the damages Smartmatic alleges in its opportunities spreadsheets and the James Report in two independently fatal respects. First, even assuming media statements could harm Smartmatic’s business opportunities in light of its independently tarnished reputation, summary judgment is still proper on Smartmatic’s damages claims here against Newsmax because Smartmatic did not put forth any evidence that Newsmax’s reporting—as opposed to that of much larger news organizations like

Fox News—caused it any damages. Second, Smartmatic’s claim that media reports—from Newsmax or otherwise—harmed its business opportunities ignores that Smartmatic’s customers are government officials who are prevented by federal, state, and local regulations from considering subjective factors like media statements or public sentiment when making contract decisions. Applying the objective factors that these officials must award contracts and suspend or debar contractors based on, reveals that Smartmatic’s own conduct is likely to be the cause of any loss in business opportunities it may experience. Accordingly, no reasonable jury could conclude that Smartmatic would have gained *any* of the allegedly lost opportunities it claims—irrespective of Newsmax’s conduct. Finally, and aside from causation, the record shows that Smartmatic’s alleged opportunities spreadsheets and the James Report are fundamentally flawed in their methods and inconsistent in their calculations, such that no reasonable jury could find that Smartmatic has proved the amount of its damages with any reasonable certainty.

A. Under Florida Law, Smartmatic Showed No Causal Link Between Newsmax’s Challenged Reporting And The Alleged Damages

1. Both Florida Law And The U.S. Constitution Require Smartmatic To Show A Causal Link Between Newsmax’s Reporting And Smartmatic’s Alleged Harms

To recover for defamation, “a plaintiff must show that the damages were proximately caused by the [allegedly] defamatory statements,” *Cape Publ’ns, Inc.*

v. Reakes, 840 So. 2d 277, 281 (Fla. Dist. Ct. App. 2003), meaning the plaintiff must prove that its damages occurred “as a result of the defamatory publications(s)” and that the publication(s) “directly and in natural and continuous sequence produce[d] or contribute[d] substantially to producing such damages,” *Johnson v. Clark*, 484 F. Supp. 2d 1242, 1254 (M.D. Fla. 2007) (citation omitted). Claims of special or actual damages, including out-of-pocket losses, “must be proven by specific evidence as to the time, cause and amount.” *Flynn v. Cable News Network, Inc.*, 2023 WL 5985193 at *5 (M.D. Fla. Feb. 22, 2023) (citation omitted). Accordingly, “a successful claim for defamation must prove actual damages,” and summary judgment is proper where defamation plaintiffs “have not shown how they were damaged by [the defendant’s] allegedly defamatory statements, or to what extent.” *Ludwin v. Proman*, 2023 WL 2401774, at *5 (S.D. Fla. Jan. 24, 2023) (citing *Johnston v. Borders*, 36 F.4th 1254, 1275 (11th Cir. 2022)). Florida law “eliminates presumed damages for defamation *per se* actions against media defendants,” *Corsi*, 519 F. Supp. 3d at 1119 (citing *Mid-Florida Television Corp. v. Boyles*, 467 So. 2d 282 (Fla. 1985)), thus “a plaintiff suing a media defendant must nevertheless plead and prove actual injury,” *Edelstein v. WFTV, Inc.*, 798 So. 2d 797, 798 (Fla. Dist. Ct. App. 2001) (per curiam). This burden likewise applies to any alleged reputational injury and “a defamation plaintiff

must prove injury to his or her reputation in the community.” *Jews For Jesus, Inc.*, 997 So. 2d at 1109.

The “trial court has discretion to decide proximate cause as a matter of law,” and should do so whenever “looking back from the harm to the actor’s [at-issue] conduct, it appears to the court highly extraordinary that [the conduct] should have brought about the harm.” *O’Donnell v. United States*, 736 F. App’x 828, 833 (11th Cir. 2018) (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992)). The issue should only “be left to the fact finder” “[w]here reasonable persons could differ as to whether the facts establish proximate causation.” *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105, 1116 (Fla. 2005) (citation omitted).

The First Amendment and Due Process Clause both prohibit forcing a defendant to pay damages for harm caused by a third party. Holding a media defendant in a defamation case liable for damages caused by *other* news organizations and unaffiliated individuals making statements on other platforms would violate the U.S. Constitution.

When “speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law.” *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775

(1986). Indeed, this barrier to recovery is at its zenith when the speech at issue “concerns the legitimacy of the political process” because such speech “is at the core of the First Amendment’s protections.” *Id.* at 778 (citation omitted); *see supra* Part IV.A. In such cases, holding a defendant liable for harm caused by third parties can raise “serious free speech concerns” where the defendant did not hold out those other speakers as representatives or a reasonable person would not have believed they were speaking on the defendant’s behalf. *See Bakst v. Cmty. Mem’l Health Sys., Inc.*, 2011 WL 13214315, at *6–7 (C.D. Cal. Mar. 7, 2011).

This principle also follows independently from “[e]lementary notions of fairness enshrined in our constitutional jurisprudence [which] dictate that a person receive fair notice [] of the conduct that will subject him to punishment.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). The “basic protection against ‘judgments without notice’ afforded by the Due Process Clause is implicated by civil penalties,” *id.* at n.22 (citation omitted), and thus the Due Process Clause prohibits the imposition of “arbitrary punishments,” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (citations omitted). A state cannot punish a defendant for the independent conduct of others; indeed, for an alleged wrong to be redressable in the first place, plaintiffs must show that their injury is “fairly traceable to the challenged action of the defendant, and not the result of the independent action

of some third party not before the court.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation and brackets omitted).

Accordingly, forcing a defamation defendant to pay damages for harms imposed by others would create a “risk that a defendant is punished arbitrarily or without fair notice of the possible consequences of his actions”—precisely what these constitutional “guideposts . . . primarily aim to eliminate.” *Peer v. Lewis*, 2008 WL 2047978, at *14 (S.D. Fla. May 13, 2008), *aff’d*, 2009 WL 323104 (11th Cir. Feb. 10, 2009) (citations omitted).

Take for example a small, start-up podcast that repeats the reporting of an international media conglomerate like ABC News concerning an alleged scandal at a large company. ABC’s reporting on the allegations reaches millions, while the podcast’s subsequent copy of the reporting is heard by a few hundred of its listeners. If the company claims the statements made on ABC regarding the allegations are defamatory and sues both ABC and the podcast, it would plainly be unconstitutional to force the small podcast to pay damages without the company first proving *the podcast’s* reporting—as opposed to ABC’s statements the podcast copied—caused the company’s harm. See *BMW of N. Am., Inc.*, 517 U.S. at 574; *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 416; *Lujan*, 504 U.S. at 560.

2. Smartmatic Failed To Present Evidence That Newsmax’s Reporting On The Trump Surrogates’ Allegations—Rather Than The Reporting By Large, Third-Party News Organizations Or Then-President Trump’s Own Public Statements—Proximately Caused Smartmatic’s Alleged Harms

Simply put, Smartmatic has presented absolutely no evidence of any at-issue statement Newsmax broadcasted leading to the type of harms Smartmatic alleges—lost contract opportunities and out-of-pocket expenses. That is sufficient to require awarding judgment to Newsmax. *Cape Publ’ns, Inc.*, 840 So. 2d at 281; *Flynn*, 2023 WL 5985193 at *5 (citation omitted); *Ludwin*, 2023 WL 2401774, at *5 (citation omitted).

Remarkably, and notwithstanding the clear obligations of Florida law, Smartmatic’s damages evidence and expert reports make no sufficient attempt to show that Smartmatic’s harms result from Newsmax’s conduct. While Smartmatic’s lost opportunities spreadsheets provided its estimated lost profits from lost, potential, or reduced scope opportunities, *they provided no computation of each category of damages allegedly caused by Newsmax’s at-issue reporting or other sources.*

Smartmatic’s salespeople were instructed to [REDACTED] [REDACTED] where applicable. Marshall Report at 10 (citing Ex. 48 at 105:22–106:12, 106:16–22, 107:23–108:11). However, in Smartmatic’s CRM database, its [REDACTED]

[REDACTED]

[REDACTED] *Id.* In

fact, [REDACTED] *Id.* [REDACTED]

[REDACTED] shows that

Smartmatic's own [REDACTED]

[REDACTED]

[REDACTED] *Id.* Accordingly, Smartmatic's opportunities spreadsheets failed even

to allege—let alone submit evidence—that any portions of Smartmatic's alleged

damages “were proximately caused by [Newsmax's allegedly] defamatory

statements,” *Cape Publ'ns, Inc.*, 840 So. 2d at 281, and do not show how those

statements “directly . . . produce[d] or contribute[d] substantially to producing” its

damages, *Johnson*, 484 F. Supp. at 1254. Thus, the spreadsheets and CRM data in

no way satisfied Smartmatic's burden to prove its damages “by specific evidence as

to the time, cause and amount.” *Flynn*, 2023 WL 5985193 at *5 (citation omitted).

The James Report similarly fails to support any causal link between

Newsmax's conduct and Smartmatic's claimed harms. In making his calculations,

Dr. James admits that he [REDACTED]

[REDACTED]

[REDACTED] James Report at 74. Significantly, Dr. James [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 2 (emphasis added). Dr. James admitted that his report did not [REDACTED]

[REDACTED] *Id.* at 3. This is fatal to Smartmatic’s damages claim because it has clearly failed to carry its burden under Florida law to prove that its damages were proximately caused by *Newsmax’s* defamatory statements, meaning they were directly produced “as a result of” *Newsmax’s* at-issue statements. *See Johnson*, 484 F. Supp. 2d at 1254; *Cape Publ’ns, Inc.*, 840 So. 2d at 281; *Flynn*, 2023 WL 5985193 at *5.

Smartmatic’s other experts likewise failed to establish a causal link to Newsmax’s conduct. *See* Ex. 49 at 11:7–16, 12:17–22, 27:2–15 (“James Dep.”); Ex. 50 at 31:12–25 (“Bania Dep.”); Ex. 51 at 70:16–71:12, 161:4–12 (“Berger Dep.”); Ex. 52 at 196:6–8 (“Patrick Dep.”). None of Smartmatic’s expert reports purporting to analyze the impact of Newsmax’s election coverage on Smartmatic³⁷ sufficiently address the issue that substantially larger media players than Newsmax

³⁷ *See generally* Ex. 53 (“Berger Report”); Ex. 54 (“Keller Report”); Ex. 55 (“Bania Report”).

(like Fox News and then-President Trump, himself) [REDACTED]

[REDACTED] Lipizzi Rebuttal at 8. Assuming any media even affected Smartmatic’s reputation, a fraught assumption, *infra* pp.94–116, these larger media players undoubtedly had an outsized impact on Smartmatic’s reputation, *see* Lipizzi Rebuttal at 8. Smartmatic’s experts [REDACTED]

[REDACTED] because they [REDACTED]

[REDACTED] including [REDACTED]

[REDACTED] in addition to a [REDACTED]

[REDACTED] Ex. 56 at 21, 25 (“Ascher Rebuttal”). Indeed, Dr.

Berger admitted that he did not examine [REDACTED]

[REDACTED] Berger Dep. at 71:7–12. Similarly, Dr. Bania testified

that he [REDACTED]

[REDACTED] and that he [REDACTED]

[REDACTED] Bania Dep. at 31:6–25. Dr. Keller likewise confirmed that he [REDACTED]

[REDACTED] and provided [REDACTED]

[REDACTED] rather [REDACTED]

[REDACTED] Ex. 57 at 147:18–148:2, 153:10–12 (“Keller Dep.”). These

[REDACTED] reports did [REDACTED] to Newsmax’s conduct because they [REDACTED]
[REDACTED]
[REDACTED] but did not [REDACTED]
[REDACTED] Ex. 58 at 96:21–97:2, 99:23–24, 129:8–130:3 (“Ascher Dep.”).

For example, then-President Trump’s account on X (formerly “Twitter”) [REDACTED] in November 2020, and he [REDACTED] in just the first two weeks following the 2020 Election. Lipizzi Rebuttal at 9. Then-President Trump’s Twitter account “@realdonaldtrump” by far had [REDACTED]
[REDACTED]
[REDACTED] Ascher Rebuttal at 25–30. Fox News, whose 2020 Election coverage is also subject to a Smartmatic defamation suit,³⁸ averaged 3.6 million primetime viewers during 2020, making it [REDACTED] in addition to an average 774.49 million monthly visitors to its website and over 20 million Twitter followers.

³⁸ See *Smartmatic USA Corp. et al. v. Fox Corp. et al.*, No.151136/2021 (Sup. Ct. N.Y. Cnty. Feb. 4, 2021).

Lipizzi Rebuttal at 9. Newsmax, by comparison, averaged [REDACTED] [REDACTED] (nearly *15 times* fewer than Fox News), and has [REDACTED] (almost *8 times* fewer than Fox News). *Id.* Internationally, the only opportunities to watch Newsmax in November to December of 2020 [REDACTED] [REDACTED] and [REDACTED] Kivijarv Rebuttal at 80.

Smartmatic has put forth no evidence whatsoever that any of its customers—government contracting officials—viewed Newsmax’s election coverage, let alone that its reporting impacted those customers’ decision making.

See Kivijarv Dep. at 222:15–25. Indeed, undisputed deposition testimony from Smartmatic’s own key executives and 30(b)(6) witnesses [REDACTED]

[REDACTED] *See* Saba Dep. at 374:11–376:4; R.A. Piñate Sept. 15 Dep. at 220:5–13, 233:17–234:13; P. Mugica Sept. 13 Dep. at 66:19–68:13, 71:12–79:2; A. Mugica Nov. 20 Dep. at 295:24–296:6; Ex. 59 at 443:25–445:13 (“A. Mugica Nov. 21 Dep.”); Ex. 60 at 243:25–244:20 (“Murphy Dep.”); Ex. 61 at 253:2–13 (“Rombola Dep.”).

Regarding Smartmatic’s alleged “out-of-pocket expenses” specifically, *see* Am. Compl. ¶¶ 423–24, neither the opportunities spreadsheet nor the James Report attempt to show that these alleged out-of-pocket expenses are attributable to Newsmax. “[A]bsent any factual enhancement to support the conclusory allegations,” *Flynn*, 2023 WL 5985193 at *5 (citing *Flynn v. Cable News Network, Inc.*, 2021 WL 5964129, at *5 (S.D.N.Y. Dec. 16, 2021), that Newsmax’s publications were “a substantial cause of these out-of-pocket expenses,” Am. Compl. ¶ 424, Smartmatic’s claim to recover these purported out-of-pocket expenses from Newsmax must be dismissed, *see Flynn*, 2023 WL 5985193 at *5.

In sum, even assuming Smartmatic’s theory that its customers *will* consider media statements and ultimately refuse to do business with Smartmatic because of news coverage concerning the 2020 Election is correct, *but see infra* pp.97–104, there is no evidence that *Newsmax’s* coverage will cause such decisions.

3. Smartmatic’s Evidence Does Not Suggest That It Lost Any Opportunity Based Upon Even The Large, Third-Party News Organizations Reporting The Trump Surrogates’ Allegations Against Smartmatic

Even if this Court were to overlook Smartmatic’s failure to offer any proof that Newsmax’s reporting harmed it and looked more broadly as to the impact of the allegations of Trump Surrogates against Smartmatic—including those made on large third-party news organizations like Fox News—Smartmatic still has failed to make

any showing of harm linked to media reports of those allegations. Smartmatic's damages theory involves suffering reputational harm from these allegations, but any such reputational harm could only result in the harm Smartmatic has alleged here—lost contract opportunities—if the Trump Surrogates' statements could have led it to lose one or more contracts. Accordingly, Smartmatic's damages claims hinge on the supposition that its current and prospective customers will not work with Smartmatic because large media organizations and prominent individuals with large microphones publicly making and/or reporting on allegations concerning Smartmatic's involvement in the 2020 Election harmed Smartmatic's reputation with those customers.

Smartmatic's customers are governmental entities whose procurement, suspension, and debarment officials are required to make decisions based on objective requirements found in their governing federal, state, and/or local regulations—not on public perception. *Infra* pp.97–104. Regulations prohibit Smartmatic's customers from considering inherently subjective criteria like public opinion, reports in the news media, or unsubstantiated allegations in their decision making. *Infra* pp.97–104. The objective factors and subfactors found in these regulations that public procurement officials do consider in their decision making—and which have nothing to do with media coverage—are likely to decrease

Smartmatic's future business opportunities in the voting equipment and services marketplace. This includes Smartmatic's failure to submit bids, its lack of necessary federal and state certifications, its small market presence and lack of incumbency, and its troubling performance record. *Infra* pp.104–14. Correspondingly, Smartmatic's long history of performance issues in performing public contracts, its implication in an ongoing criminal bribery investigation related to a procurement, and its disqualification by a foreign government are likely to increase Smartmatic's chances of being determined nonresponsible to bid on public contracts, suspended, or debarred in domestic and foreign jurisdictions where it claims to have lost business opportunities. *Infra* pp.104–14. Smartmatic's damages claims ignore this interrelated web of problems that it faces in attempting to maintain its current contracts or secure any new business opportunities. A proper understanding of the public procurement process reveals that none of the Trump Surrogates' statements could possibly have caused Smartmatic the lost opportunities on which it bases its damages claims. Thus, Smartmatic's damages claims are impermissibly speculative in nature and summary judgment is proper.

a. Under Procurement Rules Applicable To Smartmatic’s Potential Customers, Reporting On The Trump Surrogates’ Allegations Could Not Lawfully Cause Smartmatic To Lose Any Of Its Claimed Opportunities

Smartmatic’s customers are *governmental* entities and Smartmatic obtains contracts through the *public* procurement process, which is separate and unique from the commercial marketplace. As Newsmax expert and former highest ranking procurement official in the U.S. government, Robert Burton, explained, [REDACTED] [REDACTED] which are governed by an extensive [REDACTED] [REDACTED] that make [REDACTED] [REDACTED] Burton Rebuttal at 2. Unlike their commercial counterparts, public procurement officials’ decisions to award contracts [REDACTED] [REDACTED] *Id.* at 9; *see* Ex. 62 at 245:17–246:24 (“Burton Dep.”). Thus, evaluation criteria in the public procurement marketplace cannot include subjective factors such as [REDACTED] [REDACTED] Burton Rebuttal at 7–10. Indeed, [REDACTED] and [REDACTED] [REDACTED] because public sentiment, mere allegations, or negative press reports [REDACTED] in the public

procurement world. Burton Dep. at 142:15–18, 180:13–181:9, 192:11–194:13, 239:2–240:12, 272:12–275:18.

In the context of acquisitions for voting equipment and election services, specifically, the factors procurement officials typically consider include: [REDACTED]

[REDACTED]

Burton Rebuttal at 11. Accordingly, it is not public sentiment, but a lack of necessary certifications, lack of incumbency, poor sales strategies, and deficient performance record that will contribute to any loss of a contractor’s current public contracts and decrease a contractor’s chances of obtaining future business both in the U.S. and abroad. *See id.* at 11–22; Burton Dep. at 43:18–22, 54:4–55:10, 71:4–74:19, 132:25–133:8, 198:12–200:10, 242:11–14.

Public procurement officials consider a contractor’s performance history when making contract award decisions, and any history of performance-related problems in connection with public contracts—especially recent issues related to

similar contracts—decreases a contractor’s probability of being determined a responsible bidder capable of obtaining [REDACTED]

[REDACTED] See Burton Rebuttal at 2, 4, 11, 15. A contractor with a history of serious performance issues or who has allegedly engaged in unethical or nonresponsible conduct risks being debarred, suspended, or disqualified from bidding, further decreasing the contractor’s chances of winning new contracts or maintaining its current contracts. See *id.* at 15–16; see Burton Dep. at 71:4–74:19; 242:11–14; 245:17–246:24.

Current and prospective public contractors like Smartmatic are also subject to various suspension and debarment regulations that are designed to protect governmental interests by preventing agencies [REDACTED]

[REDACTED] Burton Report at 3. U.S. and foreign jurisdictions routinely suspend, debar, or disqualify contractors [REDACTED]

[REDACTED] Burton Rebuttal at 19–20. Even if a contractor is not ultimately convicted of a criminal charge, the underlying conduct [REDACTED]

[REDACTED] *Id.* at 16. Government procurement officials are also far less likely to do business with contractors who

have been disqualified, suspended, or debarred by other jurisdictions. *See id.*; Burton Dep. at 160:15–161:19, 162:21–164:14.

Factoring in the likely application of public procurement, suspension, and debarment regulations is relevant “to minimize the odious aspects of the wrong done” by Newsmax’s statements, if any, to Smartmatic’s chances of winning future contracts “for the purpose of mitigating actual damages.” *See* 19A Fla. Jur. 2d Defamation and Privacy § 130. Yet, Smartmatic [REDACTED]

[REDACTED] *See, e.g.,* A. Mugica Nov. 20 Dep. at 208:8–210:18; Marshall Report at 46. The same is true of Smartmatic’s experts on brand value and reputation who [REDACTED]

[REDACTED] and did not [REDACTED]
[REDACTED]
[REDACTED] Ex. 63 at 198:5–18 (“Chiagouris Dep.”).

Applying the public procurement regulations discussed above, media statements and public perceptions of Smartmatic would not have contributed to its alleged lost opportunities. Unlike the objective factors discussed above, media statements and public sentiment about a government contractor are *not* likely to be considered in the public procurement process either on the front-end in awarding

contracts or on the back-end in making suspension or debarment decisions. *See* Burton Dep. at 142:15–18, 180:13–181:9, 192:11–194:13, 239:2–240:12, 272:15–275:18. This is because, unlike in the commercial marketplace, specific policies and procedures governing voting equipment acquisitions [REDACTED] [REDACTED] and require officials to [REDACTED] [REDACTED] should be determined nonresponsible (and thus ineligible for a contract award) or suspended or debarred in a given jurisdiction. Burton Rebuttal at 7–9. Accordingly, [REDACTED] [REDACTED] [REDACTED] cannot [REDACTED] [REDACTED] *Id.* at 8–9. And [REDACTED] [REDACTED] thereby adhering to these regulations. *Id.* at 5 n.13 (citations omitted); *see* Burton Dep. at 59:5–12. At bottom, [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED] Burton Dep. at 141:12–15, 142:15–18.

Testimony from Smartmatic’s own witnesses confirms that media reports cannot affect Smartmatic’s customers’ decisions. Smartmatic’s own government contracts expert and a former suspension and debarment official, Steven Shaw, testified that he [REDACTED] because [REDACTED] for suspension or debarment. Ex. 64 at 45:19–46:14 (“Shaw Dep.”). [REDACTED]

[REDACTED] *Id.* at 128:21–23, 130:8–9. Even when asked if it would be [REDACTED]

[REDACTED] Steven Shaw stated [REDACTED] and added that while a [REDACTED]

[REDACTED] *Id.* at 131:15–20; 132:5–8. [REDACTED]

[REDACTED] *See* A. Mugica Nov. 20 Dep. at 77:4–78:8, 207:17–25. [REDACTED]

[REDACTED]

[REDACTED]

See, e.g., Saba Dep. at 72:9–74:5, 375:3–376:4; Rombola Dep. at 252:11–253:13; Murphy Dep. at 238:17–248:17, 265:4–267:3. This unrefuted deposition testimony from Smartmatic’s own witnesses undermines Smartmatic’s claim that negative reporting on Smartmatic’s role in the 2020 Election adversely affected its government-contract opportunities.

Moreover, public procurements for voting equipment have a built-in [REDACTED]

[REDACTED]

[REDACTED] Burton Rebuttal at 9; *see* Burton Dep. at 257:3–20. So, even if an official improperly did

[REDACTED]

[REDACTED] Burton Rebuttal at 9. And [REDACTED]

[REDACTED] *id.*, because such a decision

[REDACTED] Burton Dep. at 141:12–15. Thus, it is highly unlikely that a public procurement official would base a decision not to

award Smartmatic a contract or to suspend or debar Smartmatic based on media reports.

- b. To The Extent Smartmatic Had Any Realistic Chance To Obtain Any Of Its Speculative Opportunities, Its Debarment In The Philippines For Bribery And Impending Indictment By the DOJ On These Same Grounds Destroyed Any Such Chances

Considering Smartmatic's own performance history, properly applying public procurement regulations to Smartmatic's allegedly lost contract opportunities makes it "highly extraordinary" to conclude that any lost profits Smartmatic may suffer will occur as a result of Newsmax's at-issue statements. *O'Donnell*, 736 F. App'x at 833 (citing *McCain*, 593 So. 2d at 504); see *Burton Dep.* at 272:15–275:18.

First, Smartmatic's failure to participate in the domestic bidding process or to obtain the certifications necessary to do so will contribute to any alleged damages it may suffer. Second, Smartmatic's small market presence and lack of incumbency will likewise contribute to any alleged damages it may suffer. These two factors make it highly unrealistic that Smartmatic was going to obtain any of the opportunities about which it speculates. And, finally, the serious nature of the COMELEC Resolution disqualifying Smartmatic and the ongoing *Bautista* criminal investigation into Smartmatic personnel and entities, see *supra* pp.11–15, significantly increase the chances that Smartmatic will be suspended or debarred—

and thus ineligible to bid on public contracts—in multiple jurisdictions in which it claimed to have prospective opportunities, *see* Burton Report at 7–17; Burton Dep. at 70:2–8, 81:9–13, 93:23–94:7, 132:25–133:8, 160:15–161:19, 162:21–164:14. These developments virtually eliminated any remaining chances Smartmatic had of obtaining its alleged contract opportunities.

To even be considered a prospective vendor for a public contract award, Smartmatic first had to submit a bid in response to a procurement official’s Request for Proposals (“RFP”) and meet the jurisdiction’s qualifications for responsible vendors, yet Smartmatic claims lost opportunities in jurisdictions where it failed to do so. *See* Burton Rebuttal at 3. Since 2020, Smartmatic has only submitted one bid for an election services contract in response to a U.S. jurisdiction’s RFP—its current contract with Los Angeles County, California. Smartmatic claims [REDACTED]

[REDACTED] Report at 4 (citing A. Mugica Nov. 21 Dep. at 355:23–356:11, 361:21–368:10). Thus, outside of Los Angeles County, all of Smartmatic’s claimed damages for contract “opportunities” in the U.S. come from jurisdictions where Smartmatic was not even a *prospective* vendor. Obviously, Smartmatic’s “probabilities” of being awarded contracts it never bids on are reduced to zero—but this does nothing to show that the

reduction was due to negative media coverage. Smartmatic says it is so, but “absent any factual enhancement to support the conclusory allegations,” they are “insufficient to support an inference that [Smartmatic] suffered actual economic harm.” *See Flynn*, 2023 WL 5985193 at *5 (citation omitted).

Moreover, in procurements for voting equipment and election services, qualifications for eligible vendors almost always require [REDACTED]

[REDACTED] Keller Report at 41, [REDACTED]
[REDACTED] Burton
Rebuttal at 6; *see* Ex. 65 at 98–99 (“Patrick Report”); Burton Dep. at 43:18–22.

[REDACTED]
[REDACTED]
[REDACTED] which are issued at the state and federal level and usually based on federal guidance published by the U.S. Election Assistance Commission (“EAC”) and the Cybersecurity and Infrastructure Security Agency (“CISA”). Burton Rebuttal at 6, 12; *see* Burton Dep. at 43:18–22. As Smartmatic’s own experts explained, [REDACTED] Patrick Report at 30, [REDACTED]

[REDACTED], Keller Report at 41. Smartmatic admits that it chose not to pursue its alleged opportunities in the U.S. partly because [REDACTED]

[REDACTED]

to obtain. Keller Report at 41. Indeed, [REDACTED]

[REDACTED] Burton Rebuttal at 13; Murphy
Dep. at 94:9–96:25 (explaining that Smartmatic [REDACTED]

[REDACTED]). Thus, outside of
California, Smartmatic has based its domestic damages claims on allegedly lost
contract opportunities in jurisdictions where it was not even *eligible* to submit a bid
and had affirmatively decided not to pursue the necessary certifications to do so.

Most of Smartmatic’s identified lost opportunities are in jurisdictions where
it lacked the necessary certifications to participate in the procurement process.
Specifically, Smartmatic [REDACTED]

[REDACTED] See James Report
at 66–67. [REDACTED]

[REDACTED], *id.* at 67 (citing Ex. 66 at 208:4–209:11, 215:7–216:10 (“Smith Dep.”)),

thus there is no support for Smartmatic’s contention that there were any “opportunities” for new contracts in these jurisdictions—let alone that Smartmatic had a good chance of winning them. Regarding the remaining jurisdictions, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Burton Rebuttal at 12–13 & n.39–41 (collecting statutes). It is undisputed that Smartmatic’s voting equipment and technology is not currently federally certified. *See id.* at 13; James Report at 67. And even those four jurisdictions have their own state-level certification and/or testing requirements that Smartmatic likewise has not satisfied. *See* Haw. Rev. Stat. §§ 16-1, 16-2, 16-12; N.H. Rev. Stat. §§ 656:41–42; N.H. Code Admin. R. 608.01; N.J. Stat. §§ 19:48-2, 19:53A-4; N.J. Admin. Code § 15:10-7.4; Tenn. Comp. R. & Regs. 1360-02-13-.06–.07. Accordingly, all of Smartmatic’s “opportunities” in the U.S. consist of contracts with jurisdictions that have not even issued RFPs and/or where Smartmatic is not qualified to serve as a contractor.

Dr. James’s suggestion that [REDACTED]

[REDACTED] James Report at 68, is unfounded. Dr. James is not a government contracts expert and his only support for that assertion is a self-serving statement Smartmatic executive Edwin

Smith made during an interview with Dr. James. *See id.* Meanwhile, Newsmax’s government contracts expert—the former top procurement official for the United States government—opined that most jurisdictions [REDACTED]

[REDACTED] citing dozens of applicable state statutes and regulations. Burton Rebuttal at 12–13 & n.39–41. Robert Burton confirmed in his deposition testimony that [REDACTED]

[REDACTED] and that the certifications are necessary for contractors to [REDACTED] [REDACTED] in those jurisdictions. Burton Dep. at 43:18–22. Smartmatic’s *own* [REDACTED] Tammy Patrick, agreed with Robert Burton: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Patrick Report at 28. And Smartmatic’s Director of Engagement, Daniel Murphy, explained that [REDACTED]

[REDACTED]

Murphy Dep. at 99:24–100:3. Thus, contrary to Smartmatic’s claims, its failure to account for its decreased chances of winning contracts it did not submit bids for

and/or was not qualified to bid on makes it impossible for a reasonable jury to determine that [REDACTED]

[REDACTED] See James Report at 73. Accordingly, summary judgment is appropriate because there is no way for a jury now, “looking back from the harm,” *O’Donnell*, 736 Fed. App’x at 833 (citation omitted), to determine that Smartmatic lost contracts “as a result of [Newsmax’s] publication(s),” see *Johnson*, 484 F. Supp. 2d at 1254.

Public procurement officials [REDACTED]

[REDACTED] especially [REDACTED]

[REDACTED] Burton

Rebuttal at 13–14. Put succinctly, [REDACTED]

[REDACTED] Burton Dep. at 198:12–200:10. In

2020, Smartmatic had a miniscule presence in the U.S. marketplace with only one active domestic contract accounting for [REDACTED]

[REDACTED] Burton Rebuttal at 14, and a [REDACTED]

[REDACTED] Resnick Rebuttal at 31–32, while just three of its competitors, Election Systems and Software (“ES&S”), Hart InterCivic (“Hart”), and Dominion, accounted for approximately 88.8% of the market, Burton Rebuttal at 6–7, 14. Smartmatic’s experts agree that [REDACTED] Keller Report at 23, and that [REDACTED]

[REDACTED] James Report at 26. Accordingly, to secure any of the opportunities it identified in the U.S. outside of California and most jurisdictions abroad³⁹ Smartmatic would have to [REDACTED] where

[REDACTED] Keller Report at 41–42. This landscape made it [REDACTED] for Smartmatic [REDACTED] to [REDACTED] [REDACTED] Burton Dep. at 200:3–10. Indeed, Smartmatic executive Edwin Smith [REDACTED]

[REDACTED] Resnick Rebuttal at 28 (citing

³⁹ Smartmatic only identified 8 foreign countries where it was the incumbent provider in 2020: [REDACTED]

[REDACTED] See James Report at 36.

Smith Dep. at 46–47); *see, e.g.*, Ex. 67 at 53:2–67:2 (“Pollock Dep.”) (describing this dynamic in Canada).

Smartmatic plainly failed to properly account for the negative effects its lack of incumbency would have on its probabilities of obtaining future contract opportunities. This flaw in Smartmatic’s damages calculations further demonstrates its failure to establish that its alleged damages occurred directly “as a result of [Newsmax’s] publications.” *See Johnson*, 484 F. Supp. 2d at 1254.

Smartmatic’s history of serious performance issues—especially in light of the *Bautista* scandal—will also contribute to any alleged damages it may suffer. *See Burton Rebuttal* at 16–20. This history includes Smartmatic’s deficient performance of election-related contracts—both recently and dating back to 2004—in Chicago and Cook County, Illinois; Los Angeles County; Venezuela; and the Philippines. *Id.* at 17–20; *see supra* pp.5–15. However, two recent developments related to the *Bautista* criminal investigation are even more damning to Smartmatic’s performance record.

First, Smartmatic and certain of its executives— [REDACTED] [REDACTED] are the subjects of an ongoing U.S. federal criminal investigation in the *Bautista* case for allegedly engaging in fraud, bribery, and money laundering in connection with procuring Smartmatic’s former contract with

COMELEC, Smartmatic's former customer in the Philippines. *See* Burton Rebuttal at 19–20; *supra* pp.9–11. Plaintiff SGO is similarly under investigation in the UK for alleged misconduct in the 2016 Philippines election. *Supra* p.13. Second, citing the allegations in the *Bautista* Affidavit, COMELEC disqualified Smartmatic from participating in the 2025 AES procurement process and referred Smartmatic to a special committee for possible permanent disqualification and blacklisting from all government procurements proceedings. Burton Rebuttal at 19; *see generally* Resolution; *supra* pp.13–15.

Smartmatic's troubling performance history, including its disqualification in the Philippines, and its implication in a federal criminal investigation for bribery and fraud in connection with an elections contract, [REDACTED] and [REDACTED] and correspondingly increase its chances of being disqualified, suspended, or debarred in jurisdictions where it is a current or prospective contractor. Burton Rebuttal at 15–20; *see* Burton Dep. at 54:4–55:10, 61:11–62:14, 63:17–64:14, 70:2–8, 81:9–13, 93:21–94:7, 132:25–133:8, 160:15–161:19, 162:21–164:14, 272:15–275:18; R.A. Piñate Oct. 23 Dep. at 433:8–479:18; Neffenger Dep. at 57:3–7. Indeed, it would only take one of these governmental entities to take action against Smartmatic to create the [REDACTED] as other jurisdictions may then be required or

permitted to [REDACTED] Burton Dep. at 160:15–161:19, 181:4–19.

[REDACTED]
[REDACTED] and has admitted that COMELEC’s Decision “would naturally be given great weight not only by the public but also by other government bodies with whom Smartmatic may have dealings with, whether presently or in the future,” thereby “caus[ing] grave injury to Smartmatic’s goodwill and reputation.” Pet.61.

[REDACTED]
[REDACTED]
[REDACTED] evinces a strong possibility that multiple jurisdictions are considering debarring Smartmatic over its misconduct related to COMELEC and the *Bautista* investigation, which formed the basis of COMELEC’s Decision. *See* A. Mugica Jan. 12 Dep. at 21:1–22:22, 207:3–217:16; Exs. 16, 68.

As noted above, *supra* pp.13–15, COMELEC’s Decision is currently subject to an ongoing legal challenge on procedural grounds, but the substantive facts remain the same. Regardless of how court proceedings in the Philippines are resolved, COMELEC’s disqualification already harmed Smartmatic’s reputation and negatively impacted its opportunities with other jurisdictions. This damage—totally independent of Newsmax’s conduct—cannot be undone. At bottom, the DOJ’s criminal allegations and charges implicating Smartmatic in the *Bautista*

investigation caused Smartmatic to lose a *\$250 million* contract opportunity in the Philippines—and the investigation is likely to continue dissuading other governmental entities from wanting to work with Smartmatic in the future.

[REDACTED]

[REDACTED]

[REDACTED] See A. Mugica Nov. 20 Dep. at 210:14–213:11. While the James Report [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Marshall Report at 46. This is despite undisputed evidence that Smartmatic’s customers in other jurisdictions have already inquired about both. See *supra* pp.113–14. Smartmatic’s failure to attribute *any* of its alleged lost profits from adversely impacted contract opportunities to the *Bautista* investigation or COMELEC Decision makes it impossible for a reasonable jury to determine what portion, if any, of Smartmatic’s alleged “damages were proximately caused by the [allegedly] defamatory statements.” *Cape Publ’ns, Inc.*, 840 So. 2d at 281. This too is fatal to Smartmatic’s actual damages claims. See *id.*; *Johnson*, 484 F. Supp. 2d at 1254.

4. Aside From Causation, No Reasonable Jury Could Find That Smartmatic Suffered Damages In the Amount It Claims.

Separately, Smartmatic has failed to “prove[] by specific evidence” the “amount” of its damages, *see Flynn*, 2023 WL 5985193, at *5, because its astronomical business valuations and claimed billions in prospective losses, as listed in its spreadsheets and the James Report, are fundamentally flawed in their calculations and unsupported by the record.

Smartmatic’s spreadsheet of so-called “lost” opportunities [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] as opposed to only listing [REDACTED]

[REDACTED] Marshall Report at 9.

[REDACTED]

[REDACTED]

[REDACTED] *Id.* Indeed, [REDACTED]

[REDACTED] within the CRM database. *Id.* at 37. Dr. James’s

report [REDACTED]

[REDACTED] *See* Ex. 69 at 223:3–

224:21 (“Marshall Dep.”). Dr. James chose to [REDACTED]

[REDACTED]

[REDACTED] Marshall Rebuttal at 7. Not only did this choice deviate from the [REDACTED] of deriving sales probabilities from [REDACTED]

[REDACTED] but those Smartmatic managers had previously [REDACTED]

[REDACTED] *Id.*; see Rombola Dep. at 55:19–56:17.

Indeed, “[REDACTED]

[REDACTED] Marshall Rebuttal at 8–9,

11, 21. [REDACTED]

[REDACTED] Marshall Dep. at 258:7–10, and in one particularly egregious example, Dr. James [REDACTED]

[REDACTED] *id.* at 195:18–196:10. Both the lost

opportunity spreadsheet and the James Report are fundamentally unreliable sources

to substantiate Smartmatic’s claimed damages.

Moreover, recently obtained discovery has thrown the credibility of even Smartmatic’s underlying CRM data into serious doubt. Smartmatic’s own witnesses

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]” Rombola
Dep. at 56:15–17, 62:4–8, 66:4–19; *see* Pollock Dep. at 186:8–196:20. Now,
Newsmax has obtained deposition testimony from *Smartmatic USA v. Fox Corp.*
showing that— [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *See* Ex. 70 at 271:21–273:10 (“Long Dep.”). However, Pedro
Mugica [REDACTED]

[REDACTED] *id.* at 274:14–23,
and approved changing the entry to: [REDACTED]

[REDACTED] *id.* at 274:24–277:20. Long could not
recall [REDACTED]

[REDACTED] *Id.* at 278:5–281:8.

Mugica confirmed [REDACTED]

[REDACTED] See Ex. 71 at 414:2–425:11 (“P. Mugica Sept. 14 Dep.”); Exs. 81–82. [REDACTED]

[REDACTED] no reasonable jury could conclude that Smartmatic has presented sufficiently reliable evidence that it has suffered actual damages in the amount it claims. See *Flynn*, 2023 WL 5985193, at *5.

Additionally, Smartmatic’s own consolidated financial documents showing its financial position prior to Newsmax’s at-issue reporting further undermine Smartmatic’s projected damages. Indeed, immediately prior to the 2020 Election Smartmatic was [REDACTED] and [REDACTED] Murphy Dep. at 167:12–16. No reasonable jury could conclude that a company which experienced [REDACTED] [REDACTED] James Report at 37, would have gone on to make *hundreds of millions in profit* in 2020 and beyond.

At bottom, Smartmatic’s damages calculations are fundamentally flawed, based on incomplete—potentially falsified—data, and simply do not substantiate the enormous damages it claims here.

VI. Smartmatic’s Punitive Damages Claim Fails As A Matter Of Law

A. Smartmatic Failed To Prove That Newsmax’s Sole Or Primary Motivation In Publishing The At-Issue Statements Was To Injure Smartmatic, As Required To Recover Punitive Damages Under Florida Law

Under Florida law, “[w]here allegedly defamatory statements involve a matter of public concern, punitive damages can be recovered only where actual malice is shown.” 19A Fla. Jur 2d Defamation and Privacy § 133 (citing *Rabren v. Straigis*, 498 So. 2d 1362 (Fla. Dist. Ct. App. 1986)). Thus, “at a minimum, to proceed with [a] punitive damages claim” the plaintiff must first “proffer a reasonable evidentiary basis to establish actual malice.” *Cable News Network, Inc. v. Black*, 374 So. 3d 811, 817 (Fla. Dist. Ct. App. 2023) (citing *Carroll v. TheStreet.com, Inc.*, 2012 WL 13134547, at *4 (S.D. Fla. May 25, 2012)). A showing of actual malice is necessary but not sufficient to authorize a punitive damages award because, “to recover punitive damages a defamation plaintiff must prove ‘express malice’ or ‘common law malice[.]’” *Id.* at 816 (citing *Lawnwood Med. Ctr., Inc. v. Sadow*, 43 So. 3d 710, 727 (Fla. Dist. Ct. App. 2010)). “The elements of ‘actual malice,’ and the standard of proof, differ from those of express malice.” *Nodar v. Galbreath*, 462

So. 2d 803, 806 (Fla. 1984). Actual malice “consists of knowledge of falsity or reckless disregard of truth or falsity, and must be shown by clear and convincing evidence,” whereas express malice “is present where the primary motive for the statement is shown to have been an intention to injure the plaintiff” under a preponderance of the evidence standard. *Id.* at 806–07 (citations omitted). “Strong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that speaker used his privileged position to ‘gratify his malevolence,’” and was “motivated more by a desire to harm the person defamed.” *Id.* at 811 (citations omitted). While “[t]his malice may be inferred from the language itself, or may be proven by extrinsic circumstances,” express malice “is not inferable from the mere fact that the statements are untrue.” *Id.* at 810 (citations omitted). Thus, complained of statements may well be “clearly capable of stating defamatory meaning” but “not so extreme as to demonstrate express malice.” *Id.* at 812. Rather, to show express malice and obtain punitive damages the plaintiff must establish that “motivation to harm the plaintiff is the purpose of the communication.” *John Hancock Mut. Life Ins. Co. v. Zalay*, 581 So. 2d 178, 180 (Fla. Dist. Ct. App. 1991) (citing *Nodar*, 462 So. 2d at 811).

Florida law also applies the additional statutory limitation that “a punitive damage award may not exceed the greater of three times the amount of the

compensatory damage award, or the sum of \$500,000” unless “the jury determines that the defendant had a specific intent to harm the plaintiff, and determines that the defendant’s conduct did in fact harm the plaintiff.” *Peer*, 2008 WL 2047978, at *12 (citing Fla. Stat. §§ 768.73(1)(a), 768.73(1)(c)).

Here, Smartmatic has failed to present sufficient evidence of actual malice or express malice by Newsmax, prohibiting any claim of punitive damages under Florida law. As an initial matter, Smartmatic’s claim for punitive damages cannot proceed because Smartmatic has failed to prove actual malice for the reasons explained above in Part IV. This failure alone is fatal to its claim under Florida law. *See, e.g., Cable News Network, Inc.*, 374 So. 3d at 816. But even assuming Smartmatic could establish the actual malice element of its defamation claim, it still cannot recover punitive damages because there is no evidence that Newsmax acted with express malice. *See In re Standard Jury Instructions*, 575 So. 2d 194, 202 (Fla. 1991) (“[T]he standard of liability for punitive damages is both the First Amendment actual malice standard, and express malice as defined by Florida law.”) (citations omitted). Although Smartmatic claims that Newsmax acted with “ill-will and spite towards Smartmatic and for improper motives,” Am. Compl. ¶ 447, it has never put forward any actual evidence that Newsmax’s “primary” motivation and purpose for publishing its allegedly defamatory statements was to injure Smartmatic personally,

as is required to show express malice. *See Cable News Network, Inc.*, 374 So. 3d at 816; *Nodar*, 462 So. 2d at 811 n.8. On the contrary, Smartmatic has consistently advanced the unproven theory that Newsmax published the at-issue statements “for self-preservation, self-promotion, and financial and other gains” because it “was motivated, in part, by the desire for ratings, to cater to individuals and companies supporting President Trump, and to avoid losing viewers to competing media organizations like Fox News and OANN[.]” Am. Compl. ¶¶ 412–13. According to Smartmatic, the supposed “disinformation” about the election was “a tool in [Newsmax’s] competition against Fox News” and “how Newsmax hoped to beat its rival” while Smartmatic was just “an innocent victim” collaterally damaged in Newsmax’s “quest to usurp Fox News as a top news station.” *Id.* ¶¶ 10, 19.

Testimony from Newsmax’s hosts and executives confirms that harming Smartmatic did not motivate their reporting on the Trump Surrogates’ allegations. Rather, Newsmax covered these allegations because [REDACTED]

[REDACTED] *See* Salcedo Dep. at 68:9–72:8, 96:10–21; *supra* pp.41–42, Part IV.B. And, in part, Newsmax was [REDACTED] [REDACTED] from Fox News and other cable networks in 2020, Ruddy Dep. at 362:13–

363:2, which it could not do by ignoring the biggest news stories of the day, *see supra* pp.15–22.

Even if Newsmax was primarily motivated to publish the allegations for its own promotion and “unreasonable financial gain,” as Smartmatic suggests, this is insufficient to establish express malice under Florida law. *Crestview Hosp. Corp. v. Coastal Anesthesia, P.A.*, 203 So. 3d 978, 980 (Fla. Dist. Ct. App. 2016) (citations omitted). Newsmax, like all networks, [REDACTED]

[REDACTED] because it is [REDACTED]

[REDACTED]

[REDACTED] Kelley

Rebuttal at 61–62. But [REDACTED]

[REDACTED] *Id.* at 62. At bottom, there is

simply no evidence that Newsmax published the at-issue statements here “to gratify [] malevolence” towards Smartmatic and was purely or even primarily motivated by a desire to harm the company. *See Nodar*, 462 So. 2d at 811. Accordingly, Smartmatic’s punitive damages claim fails as a matter of law.

Alternatively, Newsmax is entitled at least to summary judgment as a matter of Florida law on Smartmatic’s punitive damages claim to the extent Smartmatic seeks an award in excess of \$500,000. *See Fla. Stat. § 768.73(1)(a)*. Given that

Smartmatic has failed to prove actual, compensatory damages, should the Court permit Smartmatic to proceed with its punitive damages claim, the jury should be instructed to limit any potential award to the statutory cap of \$500,000. *See Peer*, 2008 WL 2047978, at *12 (citing Fla. Stat. § 768.73(1)(c)).

VII. Because Smartmatic Failed To Provide The Statutorily Required Notice, Many Of The Statements Are Not Actionable Under Florida Law

This Court previously directed the parties not to “waste a lot of time” on the Florida notice statute applicable to defamation claims. Ex. 72 at pp.4–5. Newsmax, heeding the Court’s directive, only raises this point briefly here.

Florida Statute § 770.01⁴⁰ required Smartmatic to serve pre-suit notice on Newsmax specifying the allegedly defamatory statements at issue in this action. Fla. Stat. § 770.01; *Gannett Fla. Corp. v. Montesano*, 308 So. 2d 599, 600 (Fla. Dist. Ct. App. 1975). “*The statute and its supporting case law establish that written notice on the defendant is a condition precedent* to a claim for defamation.” *Rendón*, 403 F. Supp. 3d at 1273 (collecting cases) (emphasis added). “[A] plaintiff’s failure to comply with the pre-notice requirement requires dismissal of the complaint for

⁴⁰ The statute applies here given the Court’s ruling that Florida substantive law applies. *See, e.g., King v. Burris*, 588 F. Supp. 1152, 1158 (D. Colo. 1984) (applying Fla. Stat. § 770.01 where Florida law applied to the defamation claim).

failure to state a cause of action” either in part or in full. *Buckley v. Moore*, 2021 WL 3173185, at *5 (S.D. Fla. July 26, 2021).

Smartmatic failed to provide the statutorily required notice of many of the statements for which it now seeks damages. Smartmatic sent Newsmax two purported notices prior to commencing this lawsuit. *See* Am. Compl. at Exs. 54, 55. These letters failed to provide the pre-suit notice required by Section 770.01 for all the statements in the Amended Complaint. A comparative analysis of the allegedly defamatory statements that Smartmatic omitted from its retraction demand letters but later added to its Amended Complaint is provided in the charts attached hereto as Exhibits C and D.⁴¹ Regardless of the veracity of these allegations, Smartmatic never provided Newsmax with any notice regarding these statements, nor requested that Newsmax retract them. Under Florida law, the only statements that are actionable against Newsmax are those that were specified in Smartmatic’s two pre-suit letters as required by Section 770.01. *See* Ex. D. Summary judgment is required for all others.

⁴¹ Exhibit C provides a side-by-side comparison of all allegedly defamatory statements as listed in Smartmatic’s two retraction demand letters and the Amended Complaint. Exhibit D highlights the differences in the statements as they appeared in the letters and the Amended Complaint, and notes which allegedly defamatory statements did not appear at all in one or both letters.

VIII. Newsmax Is Entitled To Summary Judgment On Its Anti-SLAPP Counterclaim, Which Warrants Dismissal Of Smartmatic's Claims

For the reasons set forth above, Smartmatic's suit is without merit and lacks a substantial basis in fact and law. Moreover, it is premised entirely on Newsmax's exercising its right to report on newsworthy matters of public concern under Florida law and its First Amendment rights as a media organization. The suit, accordingly, is prohibited by Florida's anti-SLAPP statute, which mandates the award of costs and fees to Newsmax.

A. Florida's Anti-SLAPP Law Mandates an Award of Costs and Fees to Newsmax

Florida's anti-SLAPP statute, codified at Section 768.295 of the Florida Statutes, expressly prohibits any "person or governmental entity" from filing "any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue." Fla. Stat. § 768.295(3). This protection is expansive, applying to a lawsuit challenging "any written or oral statement that is protected under applicable law," including any such statements "made in or in connection with a . . . news report, or other similar work." Fla. Stat. § 768.295(2)(a). The statute specifically guards against actions suing a media defendant for "hosting and moderating a debate on matters of public concern," *Corsi*, 519 F. Supp. 3d at 1128, or exercising its "First Amendment right to decide

what to publish and what not to publish on its platform,” *Mac Isaac*, 557 F. Supp. 3d at 1261 (citations omitted). Indeed, any “action directly target[ing] the way a content provider chooses to deliver, present, or publish news content on matters of public interest . . . is based on conduct in furtherance of free speech rights,” and thus falls under Florida’s anti-SLAPP law. *See Mac Isaac*, 557 F. Supp. 3d at 1262 (citing *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424–25 (9th Cir. 2014)).

Any “person or entity sued . . . in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section” and “may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant’s or governmental entity’s lawsuit has been brought in violation of this section.” Fla. Stat. § 768.295(4). The statute further provides that a “court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section.” *Id.* Procedurally, the “statute places the initial burden on a ‘SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies’ and once that burden is met, the burden is shifted to the SLAPP plaintiff ‘to demonstrate that the claims are not primarily based on First Amendment rights in connection with a public issue and not without merit.’” *Davis v. Mishiyev*, 339 So. 3d 449, 453 (Fla.

Dist. Ct. App. 2022) (citing *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 314 (Fla. Dist. Ct. App. 2019)).

Here, the Florida anti-SLAPP statute applies to Smartmatic’s claims against Newsmax and warrants dismissal of this suit. First, Smartmatic’s claim is primarily based on Newsmax’s exercise of its common law and constitutional rights. Each of the statements that Smartmatic claims was defamatory were made “in connection with public issues” discussed in Newsmax’s press coverage and “news report[s],” Fla. Stat. § 768.295(2)(a), in the wake of the 2020 Election surrounding allegations of election fraud and vote manipulation made by then-President Trump, his surrogates, other prominent individuals, and other news organizations, *see supra* pp.15–35. Accordingly, the interviews, news reports, and broadcasts at issue in this suit are the archetypal examples of “free speech in connection with public issues” to which the Florida anti-SLAPP statute applies. *See, e.g., Parekh v. CBS Corp.*, 820 F. App’x 827, 836 (11th Cir. 2020) (statue applied where “suit . . . arose out of the defendants’ protected First Amendment activity—publishing a news report on a matter of public concern”). Indeed, Newsmax served as a public forum to “host[] and moderat[e] a debate on matters of public concern,” *Corsi*, 519 F. Supp. 3d at 1128, and made editorial decisions about “what to publish and what not to publish on its platform,” *Mac Isaac*, 557 F. Supp. 3d at 1261 (citations omitted), actions that

fall well within the expansive coverage of Florida’s anti-SLAPP protections, *see also Anderson v. Best Buy Stores L.P.*, 2020 WL 5122781, at *4 (M.D. Fla. July 28, 2020); *Vesselov v. Harrison*, 2024 WL 536061, at *5 (S.D. Fla. Jan. 4, 2024) (noting that the claims were protected by anti-SLAPP because they “arose out of protected First Amendment activity—publishing an article on a public litigation proceeding”). As a result, “because Plaintiff’s suit ‘arose out of’ Defendant’s news report[s], [this element of the Florida anti-SLAPP Statute]—free speech in connection with a public issue—is [] satisfied.” *Bongino v. Daily Beast Co., LLC*, 477 F. Supp. 3d 1310, 1322 (S.D. Fla. 2020).

Moreover, the applicable law establishes that Smartmatic’s suit is “without merit.” *See* Fla. Stat. § 768.295(3). As explained above, Newsmax’s coverage—an exercise of the press’s right to “free speech in connection with a public issue,” *id.*—was fully privileged as disinterested and neutral reporting, by the fair reporting privilege, and under the First Amendment, *supra* Part I. This bars Smartmatic’s defamation claim in its entirety. Even if the claim was not barred, Smartmatic’s inability to prove the required elements of defamation, including its failure to show actual malice, *supra* Part IV, or the existence of any damages causally linked to Newsmax’s conduct, *supra* Part V, is fatal to Smartmatic’s case. Smartmatic’s suit

is therefore “without merit under Florida Statute § 768.295(3).” *See Bongino*, 477 F. Supp. 3d at 1322; *Vesselov*, 2024 WL 536061, at *5.

Separately, Smartmatic’s filing of an Amended Complaint that included future contracts with COMELEC in the Philippines in a list of allegedly lost or negatively impacted business opportunities alone warrants summary judgment on Newsmax’s anti-SLAPP counterclaim. As stated above, *supra* pp.11–12, NBI began investigating an alleged bribery and money laundering scheme involving Bautista, Smartmatic, and its executives in August 2017, and the HSI initiated its investigation into the same shortly thereafter in 2017, *Bautista Affidavit* ¶¶ 35–36. The NBI’s investigation was publicly reported that same month. *See, e.g.*, Edu Punay, *NBI Probes Bautista For Money Laundering, Graft*, *The Philippine Star* (Aug. 9, 2017).⁴²

It is undisputed that [REDACTED]

[REDACTED]

[REDACTED] *See Ex. 73.* [REDACTED]

[REDACTED]

[REDACTED] *See, e.g.*, Exs. 74–75. COMELEC itself [REDACTED]

[REDACTED]

⁴² Available at <https://www.philstar.com/headlines/2017/08/09/1727364/nbi-probes-bautista-money-laundering-graft>.

[REDACTED] See A. Mugica Jan. 12 Dep. at 58:8–16. It is thus undisputed that [REDACTED]

[REDACTED]. Smartmatic was also fully aware prior to initiating this lawsuit, and both parties’ experts have since agreed, that the existence of the ongoing criminal investigation—especially one involving fraudulent conduct in obtaining a government contract—significantly decreased Smartmatic’s chances of being awarded future government contracts, at the very least in the Philippines and potentially in other jurisdictions. *Supra* pp.104–15. Despite this knowledge, Smartmatic filed its Amended Complaint on March 28, 2023—*nearly 6 years after the investigations began*—including “the Philippines” as one of Smartmatic’s business “opportunities” that was allegedly negatively impacted because of “distribution of Newsmax’s defamatory statements.” Am. Compl. ¶ 429 & n.27. Well aware that COMELEC knew of and was likely to consider the *Bautista* investigation as grounds to debar Smartmatic (an action that COMELEC eventually took), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ex. 42.

This undisputed evidence leaves only one reasonable inference to draw: Smartmatic included alleged business opportunities in the Philippines in its Amended Complaint to inflate its damages claims against Newsmax and thereby stifle Newsmax’s protected exercise of its constitutional right of free speech in connection with a public issue. By doing so, Smartmatic caused Newsmax “precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation.” *Davis*, 339 So. 3d at 452 (citing *Gundel*, 264 So. 3d at 310–11). Over the course of 16 months, Newsmax filed and briefed four motions, submitted five letters to the Court, exchanged countless substantive emails with the Special Master, participated in weekly discovery status hearings in front of the Special Master, and presented at three hearings in front of the Court all seeking to obtain information regarding Smartmatic’s claimed business opportunities in the Philippines (among others)—only to ultimately uncover information in Smartmatic’s possession from the COMELEC proceedings and DOJ investigation showing that no such legitimate opportunity had existed in the first place. *See generally* Def’s Br. In Support Of Its Mot. For Sanctions Against Pls. (detailing this discovery history). Smartmatic’s “very filing and continuation of” this suit despite its knowledge of the *Bautista*

investigation “had a ‘chilling effect on [Newsmax’s] constitutional rights’” and the Court should act now to remedy the harm Newsmax suffered from this “unnecessary litigation.” *Davis*, 339 So. 3d at 452 (citing *Gundel*, 264 So. 3d at 310–11).

Accordingly, the Court should enter summary judgment in Newsmax’s favor on its anti-SLAPP counterclaim and award Newsmax the reasonable attorney’s fees and costs it incurred in connection with Smartmatic’s defamation claim. *See Fla. Stat. §§ 768.295(3)–(4)*.

CONCLUSION

The Court should grant Newsmax’s motion for summary judgment.

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CERTIFICATE OF SERVICE

I, Lauren Dunkle Fortunato, Esquire, hereby certify that on June 25, 2024, a copy of the foregoing document was served on counsel of record in this case, including the following counsel, in the manner indicated below:

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