IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

US DOMINION, INC., DOMINION VOTING SYSTEMS, INC., and DOMINION VOTING SYSTEMS CORPORATION,	)	Case No. N21C-11-082 EMD
Plaintiffs,	)	JURY TRIAL DEMANDED
v.	)	
FOX CORPORATION and FOX BROADCASTING COMPANY, LLC,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Dated: January 28, 2022

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PRELIMINARY STATEMENT

Fox News Network, LLC is Fox Corporation's crown jewel. Fox News generates the lion's share of Fox Corporation's profits, and a financial hit to Fox News results in an equal financial hit to Fox Corporation. As Dominion's Complaint details, at the time of the defamatory statements, the Fox News website listed Rupert Murdoch (Fox Corporation's Chairman) and Lachlan Murdoch (Fox Corporation's CEO and Executive Chairman) as part of the "Fox News Executive Staff." Yet after Dominion sued Fox News for defamation, Fox News ran away from Rupert and Lachlan Murdoch's actions—despite Fox Corporation's clear editorial input and control over Fox News. (Compl. ¶¶ 2-3; 143-180.)

Fox Corporation does not sit by when Fox News's profits begin to fall. Instead, Fox Corporation's top executives forcefully insert themselves into their wholly-owned subsidiary's affairs and try to right the ship. That is exactly what happened after the 2020 Presidential election. When Fox Corporation saw that Fox News was beginning to lose President Trump's support and Fox News viewers to its competitors OAN and Newsmax, Rupert and Lachlan Murdoch did what they had always done in the past—stepped in to "call the shots directly" at Fox News. (Compl. ¶ 171.) Fox Corporation, through the Murdochs, directed and controlled Fox News to win back Fox News viewers. Fox Corporation exercised editorial control over what would air on Fox News, including the defamatory statements at

issue. One Fox News anchor said that "These were all Murdoch's calls." (Compl. ¶ 175.) Fox Corporation also used its other subsidiary, Fox Broadcasting Company, LLC, to spread these broadcasts to an even wider audience, by publishing the broadcasts on fox.com. The result: Fox News regained its prominence as the leading conservative news network. Meanwhile, Dominion suffered devastating harm.

This Opposition refers to Fox Corporation as Fox-C, Fox Broadcasting as Fox-B, and Fox News as Fox-N. Fox-C and Fox-B (collectively, "Fox") now move to dismiss Dominion's defamation complaint. But Fox's motion to dismiss targets a hollow caricature of Dominion's complaint. Fox repeatedly targets red-herring theories Dominion did not plead. For example, Fox-C argues that Dominion did not properly pierce the corporate veil. But Dominion does not argue that Fox-C is liable due to veil piercing. Dominion alleges two different theories—direct responsibility and agency—each of which is sufficient by itself to hold Fox-C responsible and each of which Fox misconstrues. *First*, Fox-C exerted editorial direction and control over the defamatory statements and is liable for them. Dominion pleaded this editorial responsibility specifically and in detail. (*See, e.g.*, Compl. ¶¶ 2-3, 143-175, 177-178, 224, 238.) This direct responsibility over the broadcasts—responsibility that Fox-N has disowned with respect to Fox-C—provides the basis for Fox-C's liability here. Under New York law, "all who take part in the procurement, composition and

publication of a libel are responsible in law and equally so." *Brown v. Mack*, 185 Misc. 368, 373 (N.Y. Sup. Ct. 1945) (citation omitted).

Second, apart from Fox-C's editorial responsibility, Fox-N and Fox-B operated as Fox-C's agent, a separate standard from veil-piercing. (*See* Compl. ¶¶ 166-180; *see also* Compl. ¶¶ 2-3, 143-165, 224, 238.) Fox-C exercised corporate control over the relevant conduct at issue—namely the decision to publish these defamatory broadcasts and to do so knowing they were false or in reckless disregard of the truth. Fox-C caused Fox-N and Fox-B to air these defamatory broadcasts to protect Fox-C's business interests.

When Fox is not targeting red-herring theories that Dominion did not plead, Fox targets straw-man versions of Dominion's allegations. For example, Fox argues that Dominion did not allege that anyone from Fox-C played an "affirmative role" in producing the defamatory statements broadcast on Fox-N. Fox willfully overlooks the numerous allegations, backed by independent third-party reports, that Rupert and Lachlan Murdoch specifically directed Fox-N hosts to feature guests, like MyPillow's spokesman and CEO Michael Lindell, Sidney Powell, and Rudy Giuliani, who would push baseless lies about Dominion, and that after the election, "Rupert Murdoch stepped in 'to call the shots directly.'" (Compl. ¶ 171.) Fox also argues that Dominion did not allege that "any person at Fox Corporation acted with actual malice." Again, Fox overlooks Dominion's allegations that Rupert and

Lachlan Murdoch intentionally pushed baseless conspiracy theories about Dominion to win back Fox-N viewers, even while their other publications, including the *Wall Street Journal* and *New York Post*, told the truth, and even while they themselves did not believe the claims. (Compl. ¶ 172; *see also* Compl. ¶¶ 164-65, 168, 170.)

In arguing that Dominion's claims are barred by New York's statute of limitations, Fox misconstrues the stipulation between the parties. Fox glosses over the fact that the parties stipulated only to New York *substantive* law, not New York procedural law (*i.e.*, its statute of limitations). Fox's statute-of-limitations argument depends on a mishmash of Delaware and New York procedural rules, including Delaware's praecipe requirement and New York's statute of limitations, but excluding Delaware's borrowing statute.

Fox also misquotes Delaware's borrowing statute, slicing off the second sentence, which makes clear that Delaware's longer statute of limitations applies to claims brought by Delaware residents. Fox also misconstrues the import of the one defamatory statement it acknowledges was served timely, which by itself is a sufficient basis for Fox's liability here.

Fox's refuse-to-acknowledge strategy extends to this Court's prior decision in *US Dominion, Inc. v. Fox News Network, LLC*, 2021 WL 5984265 (Del. Super. Ct. Dec. 16, 2021) ("*Dominion I*"). Fox spends ten pages of its brief rehashing issues this Court already decided in *Dominion I*, including that Dominion sufficiently

alleged a defamation claim against Fox-N based on the same 20 defamatory statements Dominion alleges here. Fox also omits any discussion of the court's decision in *US Dominion, Inc. v. Powell*, 2021 WL 3550974 (D.D.C. Aug. 11, 2021) ("*Powell*"), which held that Dominion sufficiently alleged defamation claims against Giuliani, Lindell, and Powell based on nearly identical lies about Dominion. The same result is appropriate here.

Fox makes a mixed bag of arguments asserting that Dominion did not adequately plead its defamation claims. None are persuasive.

- **Statute of Limitations**: Fox argues that New York's one-year statute of limitations for defamation claims applies to this action based on the parties' stipulation that this dispute is governed by New York substantive law. It is hornbook law that the forum state's procedural law applies even when another state's substantive law applies. Statutes of limitations are procedural. And Delaware's borrowing statute makes clear that Delaware's two-year statute of limitations for defamation applies to suits by Delaware residents in Delaware courts. Moreover, Fox concedes that at least one of the statements fell within even the non-applicable, one-year statute of limitations. *See infra* Section I.

- **Direct Liability**: Fox-C argues that it cannot be held directly liable because it did not participate in procuring the defamatory statements. Fox-C ignores Dominion's numerous allegations that Fox-C, through Rupert and Lachlan Murdoch, played a critical role in procuring and directing Fox-N to broadcast the defamatory statements. *See infra* Section II.A.1.

- **Agency Liability**: Fox-C argues that it cannot be held liable for broadcasts on Fox-N. Dominion alleges that Fox-N was Fox-C's agent, and Fox-C directed Fox-N to broadcast the defamatory statements. Principals are liable for the torts of their agents. *See infra* Section II.A.2.

- **Actual Malice**: Fox-C and Fox-B argue that Dominion did not plead that they acted with actual malice. Dominion alleges that Fox-C and Fox-B published inherently improbable claims from facially unreliable sources and ignored

widely available evidence that contradicted the defamatory statements, all to boost Fox-N's viewership and increase Fox-C's stock price. *See infra* Sections II.B, III.B.

- **Republication Liability**: Fox-B argues that it cannot be held liable for reposting Fox-N's broadcasts on fox.com. Clear case law holds that relocating content to a new website is an actionable republication. *See infra* Section III.A.

- **Communications Decency Act**: Fox-B argues that it qualifies for immunity under § 230 of the CDA. CDA immunity does not apply when, as here, an agent posts content that its principal developed. *See infra* Section III.C.

- **Fox News's Liability**: Fox argues that Dominion did not sufficiently plead that Fox-N is liable for defamation. In making this argument, Fox does not once cite *Dominion I*, in which this Court held that Dominion adequately alleged a defamation claim against Fox-N. Fox does not raise new facts or law to undermine the Court's conclusions. *See infra* Section IV.

LEGAL STANDARD

This Court has already recognized that New York's Anti-SLAPP law's pleading standard does not apply. *See Dominion I*, 2021 WL 5984265, at *17 (applying Delaware's pleading standard to Dominion's defamation claims against Fox-N). For purposes of deciding Fox's motion to dismiss, the Court should apply Delaware's familiar pleading rule, which requires a court to "accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, [and] draw all reasonable inferences in favor of the plaintiff," while only permitting dismissal if "the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap.*

Holdings LLC, 27 A.3d 531, 536-37 (Del. 2011) (rejecting application of higher federal *Twombly-Iqbal* "plausibility" rule). Dominion's complaint meets any standard, and certainly the "minimal" one applicable here. *Id.* at 536.

ARGUMENT

I. The Statute of Limitations Does Not Bar Dominion's Lawsuit.

Delaware has a two-year statute of limitations, which U.S. Dominion, Inc. and Dominion Voting Systems, Inc. (the "Delaware Plaintiffs") indisputably meet. *See* 10 Del. C. § 8119; *Triestman v. Slate Grp., LLC*, 2020 WL 1450562, at *2 (D. Del. Mar. 25, 2020) ("Delaware's statute of limitations for defamation and invasion of privacy is two years."). Dominion sued Fox-C and Fox-B for defamation based on statements made between November 8, 2020 and January 26, 2021. (Compl. ¶¶ 224(a)-(t).) Dominion filed this lawsuit on November 8, 2021. (D.I. No. 1.) Dominion filed a praecipe requesting a summons on December 20, 2021, (D.I. Nos. 2, 3), and served Fox-C and Fox-B by counsel on December 21, 2021 and by registered agent on December 29, 2021.

Fox incorrectly argues that New York's one-year statute of limitations applies. (Mot. at 12 (citing N.Y. C.P.L.R. § 215).) Fox's argument is based on a mischaracterization of the parties' choice-of-law stipulation, which applies only to New York *substantive* law, not to *procedural* law like the statute of limitations. (*See* D.I. No. 8.) Most fundamentally, Delaware's borrowing statute explicitly directs

courts to apply Delaware's statute of limitations to claims by Delaware residents, like the claims by the Delaware Plaintiffs: "Where the cause of action originally accrued in favor of a person who at the time of such accrual was ***a resident of this State***, the time limited by the law of this State shall apply." 10 Del. C. § 8121. Fox's brief inexplicably omits this part of the statute. (*See* Mot. at 12 n.5.)

In any event, Fox admits that this action is not time-barred as to any of the plaintiffs even if New York's one-year statute of limitations applies, because one of the allegedly defamatory statements "occurred *after* the relevant December 20, 2021 statute of limitations cutoff." (Mot. at 14 n.6 (emphasis in original)).

A. The Delaware two-year statute of limitations applies to the two Delaware plaintiffs

1. Delaware procedural law, including its borrowing statute and statute of limitations, applies to this dispute.

Delaware's statute of limitations and accompanying borrowing statute apply to this dispute for two independent reasons. *First*, the parties' stipulation to "Delaware choice of law principles," (D.I. No. 8), requires application of Delaware's borrowing statute because it is a codified conflicts-of-law provision. Delaware's borrowing statute reflects the "conflict rule in Delaware pertaining to the limitation of actions" that arose outside of Delaware. *Natalee v. Upjohn Co.*, 236 F. Supp. 37, 39 (D. Del. 1964).

Second, as this Court recognized in *Dominion I*, the well-established rule is that courts should apply the forum state's procedural law, even when another state's substantive law applies. *Dominion I*, 2021 WL 5984265, at *18 ("As a general rule, however, the law of the forum governs procedural matters." (citation and quotation marks omitted)); *see also Chaplake Holdings, LTD. v. Chrysler Corp.*, 766 A.2d 1, 5 (Del. 2001) ("As a general rule, the law of the forum governs procedural matters."); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1994 WL 317557, at *4 (Del. Super. Ct. Apr. 15, 1994) ("[W]hen the law of a foreign state is applied to substantive issues, the law of Delaware is usually applied to procedural issues." (citation omitted)).

It is well-established that a statute of limitations is procedural, not substantive. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 725 (1988) (holding that statutes of limitations are procedural for purposes of choice of law); *TrustCo Bank v. Mathews*, 2015 WL 295373, at *5 (Del. Ch. Jan. 22, 2015) ("Even if another state's substantive law may govern . . . , the 'general rule is that the forum state's statute of limitations applies.'" (citation omitted)); *Gavin v. Club Holdings, LLC*, 2016 WL 1298964, at *3 (D. Del. Mar. 31, 2016) ("[A] statute of limitations is procedural, not substantive."). Delaware's borrowing statute, which governs when Delaware courts should apply Delaware's statute of limitation for causes of action that arose in another state, is also procedural. *See Norman v. Elkin*, 2007 WL 2822798, at *3 (D. Del. Sept. 26, 2007) (applying Delaware's borrowing statute because the "issue of

statute of limitations is a procedural issue, not a substantive issue for conflict of law purposes"), *aff'd*, 860 F.3d 111 (3d Cir. 2017).

The *only* common-law exception to the rule that a statute of limitations is procedural—when the statute of limitations is "inseparably interwoven" with a foreign state's substantive law—does not apply here. *See Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at *3 (Del. Super. Ct. Dec. 29, 2015) (holding that New York's statute of limitations for breach of contract and fraudulent transfer was not "inseparably interwoven with the substantive rights"); *Am. Energy Techs., Inc. v. Colley & McCoy Co.*, 1999 WL 301648, at *2 (D. Del. Apr. 15, 1999) (applying Delaware's statute of limitations to a breach-of-contract claim brought under a contract with a choice-of-law provision specifying that Virginia law would apply); *TrustCo Bank*, 2015 WL 295373, at *5 ("The statute of limitations for fraudulent transfers in New York is merely New York's general statute of limitations for fraud."). The New York statute of limitations for defamation, N.Y. C.P.L.R. § 215, is not inseparably interwoven with the defamation cause of action.

New York Section 215 supplies the limitations period for 14 separate causes of action, including assault, battery, false imprisonment, and any "action to enforce a penalty of forfeiture created by statute." N.Y. C.P.L.R. § 215. Section 215 is nearly identical to another broadly applicable New York statute of limitations,

section 213, which Delaware courts have held is *not* "inseparably interwoven" with any causes of action. *See TrustCo Bank*, 2015 WL 295373, at *5 (N.Y. C.P.L.R. § 213 "is merely New York's general statute of limitations for fraud"); *Pivotal Payments*, 2015 WL 11120934, at *3 (holding that New York's statute of limitations for breach of contract and fraudulent transfer, N.Y. C.P.L.R. § 213, was not "inseparably interwoven with the substantive rights").

Fox attempts to evade the basic principles calling for the application of Delaware procedural law, including its statute of limitations, by arguing that the parties supposedly "stipulated to the application of New York law." (Mot. at 12 n.5.) False. The parties stipulated to the application of "New York *substantive* law," but never agreed that New York *procedural* law applies. (D.I. No. 8 (emphasis added).) Even Fox recognizes that Delaware procedural law applies to this action by repeatedly discussing Delaware's pleading standards and Delaware's rule on commencing an action. (Mot. at 13.) The entire basis of Fox's statute-of-limitations argument is a unique Delaware ***procedural*** device—the praecipe. Fox cannot pick and choose which Delaware procedural devices it wants (the praecipe) and reject the rest (the statute of limitations and borrowing statute).

Delaware's procedural law, including its rules on statutes of limitations, applies to this dispute.

2. Under Delaware's borrowing statute, Delaware's two-year statute of limitations applies.

Delaware's borrowing statute provides that courts must apply Delaware's statute of limitations to Delaware residents:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. **Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply**.

Del. C. § 8121 (emphasis added).

The Delaware Plaintiffs—US Dominion, Inc. and Dominion Voting Systems, Inc.—are undisputedly Delaware residents. The Delaware Plaintiffs' claims thus were timely filed pursuant to the plain terms of Delaware's borrowing statute calling for the application of Delaware's two-year statute of limitations.

Fox concedes that, if New York procedural law does not apply, then the Court must apply Delaware's borrowing statute. (Mot. at 12 n.5.) In quoting the borrowing statute, however, Fox conspicuously omitted the dispositive second sentence of the statute, which makes clear that Delaware's statute of limitations governs out-of-state claims brought in Delaware courts by Delaware residents. (*Id.*) Fox cites only one case for the proposition that "Dominion's defamation claim" is "subject to New York's one-year statute of limitations for defamation claims under

Delaware's borrowing statute." (*Id.*) That case does not implicate the second sentence of Delaware's borrowing statute because the plaintiff was a "citizen of Louisiana." *Dymond v. Nat'l Broad. Co.*, 559 F. Supp. 734, 738 (D. Del. 1983).

Courts consistently have rejected claims by defendants to overlook or disregard the second sentence of the borrowing statute. In *Brossman v. Federal Deposit Insurance Corp.*, 510 A.2d 471 (Del. 1986), the defendant, like Fox here, argued that the plaintiff's "cause of action arose outside of Delaware, and that under Delaware's borrowing statute, the time limit on the cause of action is the shorter of the limitations of either Delaware or the state in which the cause of action arose." *Id.* at 473. The court rejected the defendant's argument. Because the plaintiff was "a resident of Delaware, the Delaware statute of limitations must apply." *Id.* The court further held that it "need not decide whether the cause of action arose outside of Delaware." *Id.*[1]

[1] The only two exceptions to Delaware's borrowing statute stem from *Pack v. Beech Aircraft Corp.*, 50 Del. 413 (Del. 1957) and *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1 (Del. 2005). Fox did not cite either case, and any argument that the two exceptions apply is waived for that reason alone. *See In re Asbestos Litig.*, 2014 WL 7150472, at *1 n.5 (Del. Super. Ct. Dec. 4, 2014) (collecting cases holding that a party waives an issue by failing to raise it in an opening brief). Regardless, neither case applies here. First, the *Pack* court held that a Delaware plaintiff could not benefit from Delaware's borrowing statute where the out-of-state statute at issue included a "built-in" time limitation that, upon expiration, "extinguishe[d] the right to which it attache[d]." 50 Del. at 420. *Pack* has no relevance to a foreign jurisdiction's generally applicable statute of limitations, like N.Y. C.P.L.R. § 215, the New York statute of limitations that Fox invokes. *See*

Courts interpreting Delaware's borrowing statute have routinely reached the same conclusion: Delaware's statute of limitations applies to out-of-state claims brought by Delaware residents. *See Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 896 (Del. 2009) ("[The plaintiff] was a Delaware resident. . . . Therefore, even if the cause of action arose in Maryland, section 8121 would dictate that Delaware's statutes of limitations applies."); *Cerullo v. Harper Collins Publishers, Inc.*, 2002 WL 243387, at *3 (Del. Super. Ct. Feb. 19, 2002) ("[I]t is clear that this statute [§ 8121] was *not* intended to prevent a resident of the state from bringing an action in this state against a defendant who is subject to the jurisdiction of the Delaware Courts, even when the cause of action arose outside of the state." (emphasis in original)); *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1117 (3d Cir. 1994) ("Because

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supra at Section I.B. *See also CHC Invs., LLC v. FirstSun Cap. Bancorp*, 2020 WL 1480857, at *4 n.26 (Del. Ch. Mar. 23, 2020).

Second, the *Saudi* exception applies when out-of-state plaintiffs attempt to weaponize Delaware's borrowing statute against Delaware-resident *defendants* who are forced to bring counterclaims in Delaware. 866 A.2d at 15. In *Saudi*, the out-of-state plaintiff brought a declaratory judgment action in Delaware for the sole purpose of foisting Delaware's shorter statute of limitations on the Delaware resident's counterclaims—a situation far afield from the facts here. *Id.* at 15-16 (application of borrowing statute to Delaware defendant's counterclaims "would subvert the statute's fundamental purpose by enabling [the plaintiff] to prevail on a limitations defense that would have never been available to it had the [contract] claims been brought in the jurisdiction where the cause of action arose"). Courts have rightly limited *Saudi* to situations in which refusing to apply the borrowing statute is necessary to *protect* Delaware residents whose counterclaims were "forced into a Delaware forum." *CHC Invs.*, 2020 WL 1480857, at *7 (collecting cases).

the [plaintiff] was a Delaware resident during the relevant time period, the Delaware borrowing statute dictates that its three-year limitations period applies."); *Hill v. Equitable Tr. Co.*, 562 F. Supp. 1324, 1333 (D. Del. 1983) (the plaintiffs "are Delaware residents. By its terms, the borrowing statute is inapplicable to [these] plaintiffs . . . because of their Delaware residency."); *D'Angelo v. Petroleos Mexicanos*, 398 F. Supp. 72, 79 (D. Del. 1975) ("[The] plaintiff . . . is a resident of Delaware . . . . Accordingly, the last sentence in the borrowing statute makes Delaware limitations law controlling.").

Courts apply the clear language of the borrowing statute's second sentence even when a Delaware resident gets the benefit of Delaware's longer statute of limitations. *See, e.g.*, *Wavedivision Holdings, LLC v. Highland Cap. Mgmt. L.P.*, 2011 WL 5314507, at *8 (Del. Super. Ct. Nov. 2, 2011) (applying Delaware's three-year statute of limitations, rather than Texas's two-year statute of limitations, to claims brought by a "Delaware corporation" based on the "last sentence of the borrowing statute"), *aff'd*, 49 A.3d 1168 (Del. 2012); *Cerullo*, 2002 WL 243387, at *3 (applying Delaware's two-year statute of limitations for a defamation action brought by a Delaware resident rather than New York's one-year statute of limitations).

B. Fox admits that not all statements are barred.

As Fox admits in footnote 6, one of the allegedly defamatory statements—Lindell's statement in ¶ 224(t) that he had evidence that Dominion committed election fraud—"occurred *after* the relevant December 20, 2021 statute of limitations cutoff." (Mot. at 14 n.6 (emphasis added).) One statement of defamation per se, even if the statement is a repetition, is enough to impose liability. *See Doe v. U.S. Civ. Serv. Comm'n*, 483 F. Supp. 539, 570 n.26 (S.D.N.Y. 1980) ("[T]he last utterance may do no less harm than the first." (citation omitted)); *Celle v. Filipino Rep. Enterprises Inc.*, 209 F.3d 163, 179 (2d Cir. 2000) ("If a statement is defamatory per se, injury is assumed."). Under New York law, defamatory statements by other speakers do not excuse Fox from liability based on this actionable statement. N.Y. Civ. Rights Law § 76 ("In consolidated actions based on libels of similar purport or effect the jury shall assess the whole amount of the plaintiff's damages in one sum, but a separate verdict shall be taken for or against each defendant and the jury shall apportion the amount of damages among the defendants against whom it found a verdict."); *Goodrow v. N.Y. Times Co.*, 241 A.D. 190, 192 (App. Div. 1934) ("Each newspaper will be responsible for the shadow it casts on plaintiff's reputation and . . . should pay a proportionate amount of the damage caused thereby.")

Fox also argues that Lindell's statement in ¶ 224(t) is mere opinion and Fox cannot be liable because it did not direct Lindell's statement. (Mot. at 14.) This argument directly conflicts with this Court's prior opinion and mischaracterizes Lindell's statements. This Court's prior holding in *Dominion I* involved the same 20 defamatory statements as this case, including Lindell's statement in ¶ 224(t). This Court held that Dominion had adequately stated "a reasonably conceivable defamation per se claim" based on these 20 statements. *Dominion I*, 2021 WL 5984265, at *21.[2] Lindell's statement is actionable defamation per se.

[2] Regardless, Delaware's savings statute, 10 Del. C. § 8118(a), would apply here in the event this Court dismisses. The Delaware savings statute gives plaintiffs a year to refile a complaint when a case is dismissed, past the statute of limitations, for a "technical flaw in a complaint or writ." *Kaufman v. Nisky*, 2011 WL 7062500, at *2 (Del. Super. Ct. Dec. 20, 2011). The savings statute applies when "(1) the original action was filed within the [applicable] statute of limitations; and (2) the second action was filed within one year of the dismissal of the first action." *Id.* Here, Plaintiffs e-mailed Fox's counsel a courtesy copy of the Complaint on November 10, 2021, the day it was accepted by the Court. On November 23, 2021, Fox's counsel acknowledged receipt of the Complaint and another member of the law firm representing Fox asked to also be copied on future communications. *See also Empire Fin. Servs., Inc. v. Bank of New York*, 2001 WL 755936, at *2 (Del. Super. Ct. Jan. 12, 2001) (insufficient service of process but the defendant communicated with the plaintiff and "was aware of the claim against it"); *Twyman v. Rice*, 1988 WL 32002, at *2 (Del. Super. Ct. Mar. 14, 1988) (insufficient service of process but "on the date of filing the complaint a copy of the complaint and notification that it had been filed was sent to the insurer"); *Giles v. Rodolico*, 140 A.2d 263, 265 (Del. 1958) (plaintiff filed a praecipe 48 days after receiving the original writ with a *non est* return). Fox received "prompt notice" and suffered no prejudice. *See Empire*, 2001 WL 755936, at *1 (citation omitted).

Lindell's statement is not mere opinion. Lindell stated that he had evidence of Dominion "machine fraud." (Compl. ¶ 224(t).) *See Powell*, 2021 WL 3550974, at *8 (Powell expressed a verifiably false fact about Dominion because she stated that she had "evidence" showing that Dominion committed election fraud). Fox invited Lindell onto Tucker Carlson's show and asked him questions that it knew would prompt Lindell to "repeat the lies about Dominion." (Compl. ¶ 141.) *See Dominion I*, 2021 WL 5984265, at *24 ("When Fox guests spread or reiterated disinformation about Dominion, . . . Fox and its personnel pressed their view that considerable evidence connected Dominion to an illegal election fraud conspiracy.").

Regardless of which statute of limitations applies, all the Dominion entities have stated a claim for defamation based on the statement in ¶ 224(t).

II. Fox-C's Arguments Are Unavailing.

None of Fox-C's arguments provide grounds for dismissal of Dominion's complaint. *First*, Fox-C dedicates five pages of its brief to a red herring—arguing that it cannot be liable under an alter-ego theory for any defamatory statement broadcast on Fox-N, (Mot. at 19-27), even though Dominion did not plead an alter-ego theory. *Second*, Fox-C argues that it cannot be held liable under an agency theory, (Mot. at 28-30), but ignores Dominion's detailed allegations that Fox-C used its control over Fox-N to ensure Fox-N featured guests who would spread lies about

Dominion. In the words of one Fox-N anchor: "**These were all Murdoch's calls**." (Compl. ¶ 175 (emphasis added).) *Third*, Fox-C argues that it was not the proximate cause of Dominion's injuries because it did not use its control over Fox-N to broadcast the defamatory statements. (Mot. at 31-32.) Dominion has alleged the exact opposite; after the 2020 election, Fox-C, through **Rupert Murdoch, "stepped in 'to call the shots directly.'"** (Compl. ¶ 171 (emphasis added).) *Fourth*, Fox-C argues that Dominion did not plead actual malice. (Mot. at 32-38.) Dominion's allegations of actual malice are overwhelming and even more detailed and compelling than the allegations of actual malice that survived motions to dismiss in *Dominion I* and *Powell*.

A. Fox-C is directly and vicariously liable for the defamatory statements.

Fox-C dedicates much of its motion to arguing that it is not liable under an alter-ego or veil-piercing theory. (Mot. at 19.) Dominion did not allege that Fox-C is liable under an alter-ego or veil-piercing theory. Instead, Dominion has alleged that Fox-C was *directly* involved in the decisions to broadcast the defamatory statements on Fox-N. Dominion also alleged that Fox-N is Fox-C's agent, making Fox-C vicariously liable for the defamatory statements broadcast on Fox-N.

1. Fox-C was directly involved in procuring and publishing the defamatory statements.

Fox-C's argument that Dominion failed to allege that any Fox-C employees played "an 'affirmative role in the preparation or editing of' the challenged statements" (Mot. at 30), ignores Dominion's numerous, well-pleaded allegations about Rupert and Lachlan Murdoch's direct participation in the editorial process and publication of the defamatory statements. Dominion has alleged that Fox-C, through Rupert and Lachlan Murdoch, played a "direct role in participating in, approving, and controlling" the defamatory statements at issue. (*See, e.g.*, Compl. ¶ 160.)

Under New York law, "all who take part in the procurement, composition and publication of a libel are responsible in law and equally so." *Brown*, 185 Misc. at 373 (citation omitted); *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 717 (S.D.N.Y. 2014) ("[B]ecause each individual defendant allegedly participated in the drafting and/or publication of the defamatory statements, Plaintiffs' defamation claim cannot be dismissed on this basis."); *Pisani v. Staten Island Univ. Hosp.*, 440 F. Supp. 2d 168, 179 (E.D.N.Y. 2006) ("[T]he Court finds that the plaintiff has adequately pled that the [defendants] participated in the creation and/or publication of the . . . statement containing the alleged defamatory statement."); *see also* RESTATEMENT (SECOND) OF TORTS § 577 cmt. f ("One is liable for the publication of defamation by a third person whom as his servant, agent or otherwise he directs or procures to publish defamatory matter."); *Fischer v. OBG*

Cameron Banfill LLP, 2010 WL 3733882, at *2 (S.D.N.Y. Sept. 24, 2010) ("[The employee's] affidavit asserts that [the employer] directed him to compose the libelous letter, giving him a knowing participatory role in the preparation of the libelous letter, and therefore [the employer] is jointly liable on the libel claim.").

The complaint makes clear that Fox-C directly participated in and ordered publication of the defamatory statements. Fox-N is a wholly owned subsidiary of Fox-C, (Compl. ¶ 13), and by far Fox-C's biggest source of revenue. Just before this complaint was filed, Fox-C's revenue from Fox's cable network programming was $571 million, while the "rest of Fox Corporation lost $266 million." (Compl. ¶ 143; *see also* Compl. ¶ 135.)

After Fox-N projected that President Biden would win the 2020 Presidential election, Former-President Trump "directed his anger at Fox" for calling the election for his rival. (Compl. ¶¶ 51-54.) Trump encouraged his supporters to abandon Fox-N and switch to other networks, like OAN and Newsmax. (Compl. ¶ 53.) OAN and Newsmax saw their viewership soar. (Compl. ¶¶ 58, 63.) Fox-N's ratings were in freefall. (Compl. ¶ 57.) Fox-C's stock price plunged. (Compl. ¶ 56.)

Fox-C immediately reacted. Fox-C executives, "including but not limited to Rupert and Lachlan Murdoch . . . were 'not happy'" that Fox-N was losing viewers and pressured "Fox News executives 'to lure the Fox audience back home.'" (Compl. ¶ 166.) Rupert Murdoch "reengaged in the network's decisions" "during

the crisis precipitated by Fox's election coverage, its lies about Dominion, and its falling ratings." (Compl. ¶ 159.) Several reports have indicated that, "when Fox ratings dipped after the election, Rupert Murdoch stepped in 'to call the shots directly.'" (Compl. ¶ 171.)

To win back lost Fox-N viewers, Fox-C, through the Murdochs, made the executive decision to give "Giuliani and others a platform on their 'crown jewel' network to push . . . baseless claims" about Dominion. (Compl. ¶ 166.) Fox-C executives, including but not limited to Rupert Murdoch, decided "in January 2021 to change Fox News' lineup and reward Fox News employees like Maria Bartiromo who had promoted the lies about Dominion," and punish those who did not promote lies that Fox viewers wanted to hear.[3] (Compl. ¶ 175.) One Fox-N anchor said that these rewards "were all Murdoch's calls." (Compl. ¶ 175.) Murdoch was similarly involved in the punishments. (Compl. ¶ 175.)

"Fox-C executives such as Rupert and Lachlan Murdoch . . . chose to publish and broadcast the defamatory statements about Dominion across Fox." (Compl. ¶ 166.) Fox-C, acting through Rupert and Lachlan Murdoch and others, intentionally provided "a platform for guests to appear on Fox programming who

[3] Fox-C misses the point when it argues that lineup changes in January 2021 were after the bulk of the defamatory statements and could not have caused them. (Mot. at 32 n.14.) The lineup changes were proof that Fox-C instructed Fox-N hosts to produce defamatory statements about Dominion and rewarded the on-air talent who followed these instructions.

Fox and its hosts knew would make" defamatory statements "on the air." (Compl. ¶ 224.) Fox-C, through Rupert Murdoch, also "encouraged on-air personalities to perpetuate these baseless claims" about Dominion. (Compl. ¶ 171.) "Fox-C's employees and officers—including but not limited to Rupert and Lachlan Murdoch—had direct responsibility for airing these defamatory broadcasts." (Compl. ¶ 173.) Fox-C and the Murdochs "perpetuated these false claims of election fraud despite multiple reports that the Murdochs themselves did not believe the claims." (Compl. ¶ 172.)

Fox-C suggests that it cannot be held liable because it did not have a duty "to edit or to approve or even to read" Fox-N's broadcasts, (Mot. at 30), citing *Wahlheimer v. Hardenbergh*, 111 N.E. 826 (1916). At most, Fox-C's argument raises a disputed factual issue inappropriate on a motion to dismiss. In *Wahlheimer*, the defendant "did not procure" or "participate in" or "know anything about" the defamatory article at issue—as the court expressly said, "[i]f he had anything to do with the publication, the case would be different." *Id.* at 826. This case is different. Dominion's complaint includes extensive allegations that Fox-C was directly involved in encouraging, procuring, and publishing the defamatory statements, all to win back Fox-N viewers. (*See, e.g.*, Compl. ¶¶ 2, 3, 144, 158, 160, 166, 171-73, 175, 224, 238.) On a motion to dismiss, these allegations must be taken as true. *See*

Dominion I, 2021 WL 5984265, at *1 ("[T]he Court must view all well-pled facts alleged in the Complaint as true and in a light most favorable to Dominion.").

2. Fox-C is vicariously liable for its agent, Fox-N.

These same allegations are sufficient to plead that Fox-C is vicariously liable because Fox-N was acting as Fox-C's agent. *See Am. Society of Mechanical Engineers v. Hydro Level Corp.*, 456 U.S. 556, 566 (1982) ("[I]f an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement.").

While Fox-C attempts to equate veil-piercing and agency liability, (Mot. at 28), "[s]uing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil." *Royal Indus. Ltd. v. Kraft Foods, Inc.*, 926 F. Supp. 407, 412 (S.D.N.Y. 1996). Veil-piercing requires a showing that the parent completely dominated the subsidiary, while agency liability "is premised on the view that the subsidiary had authority to act, and was in fact acting, on the parent's behalf—that is, in the *name* of the parent." *Id.*; *Khan v. Laninver USA, Inc.*, 2021 WL 1740293, at *5 (W.D.N.Y. Mar. 31, 2021) ("Whether [the defendant's] subsidiaries are alter egos of Defendant is beside the point; the relevant question is whether they were acting as Defendant's agents.").

To plead a principal-agent relationship under New York law, a plaintiff must allege three elements: (1) a "manifestation by the principal that the agent shall act

for him; (2) acceptance of the undertaking by the agent; and (3) an understanding between the parties that the principal is to be in control of the undertaking." *Otto Candies, LLC v. KPMG, LLP*, 2020 WL 4917596, at *15 (Del. Ch. Aug. 21, 2020) (citation omitted); *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 290 (S.D.N.Y. 2005) ("*Parmalat I*") ("An agency relationship exists under New York law when there is agreement between the principal and the agent that the agent will act for the principal and the principal retains a degree of control over the agent."). "The element of control often is deemed the essential characteristic of the principal-agent relationship." *Otto Candies*, 2020 WL 4917596, at *15 (quoting *Parmalat I*, 375 F. Supp. 2d at 290). The plaintiff "must plead that the principal had control over the underlying conduct at issue." *Id.* Alleging that the principal controlled the conduct at issue is generally sufficient to establish all three agency elements. *See Salomon v. Burr Manor Ests., Inc.*, 769 F. Supp. 2d 83, 89-90 (E.D.N.Y. 2011) ("This simple act could arguably satisfy all three elements of agency—a request by a principal, an agreement to act by the agent, and an understanding that the principal's direction governs the agent's acts."); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 436 (S.D.N.Y. 2010) (allegations that the principal and agent acted "as one integrated entity" that the principal "controlled" were sufficient to establish manifestation, acceptance, and control).

"Commonly, an outsider will not be privy to the details of what conversation or conduct took place between a principal and the agent." *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 327, 344 (S.D.N.Y. 2010). To allege liability based on the existence of a principal-agent relationship, "a plaintiff need only 'raise[ ] a sufficient inference that some sort of agency relationship existed between' the purported principal and agent." *Id.* "The existence of an agency relationship is a mixed question of law and fact that should generally be decided by a jury." *Veleron Holding, B.V. v. Morgan Stanley*, 117 F. Supp. 3d 404, 451 (S.D.N.Y. 2015) (citation and quotation marks omitted); *Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 51 F. Supp. 2d 457, 471 (S.D.N.Y. 1999) ("New York courts have recognized that the question of the existence and scope of an agency relationship is a factual issue that a court cannot properly adjudicate on a motion to dismiss." (collecting cases)).

Courts determine whether parties entered an agency relationship by analyzing "their manifest conduct." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2014 WL 4966072, at *29 (E.D.N.Y. Oct. 3, 2014). "Circumstantial evidence relevant to . . . establishing an agency relationship can take many forms," *Harte v. Ocwen Fin. Corp.*, 2016 WL 1275045, at *5 (E.D.N.Y. Mar. 31, 2016), including:

- The principal installing executives to manage the subsidiary, *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 274 (S.D.N.Y. 2009);

- The principal owning a controlling share of the subsidiary, *see id.*;
- The principal making personnel decisions for the subsidiary, *Parmalat I*, 375 F. Supp. 2d at 294-95; and
- The principal intervening and directing the subsidiary's actions, *STMicroelectronics v. Credit Suisse Grp.*, 775 F. Supp. 2d 525, 539 (E.D.N.Y. 2011).

Fox-C's argument that Dominion alleged an agency relationship "in only entirely conclusory fashion," (Mot. at 28), could not be farther from the truth. Dominion alleged a multitude of facts showing an agency relationship.

Fox-C's Manifestation: Dominion has alleged that Fox-C's conduct manifested that Fox-N would act as its agent. (Compl. ¶¶ 178-79.) Fox-C, through the Murdochs, instructed Fox-N to spread baseless claims about Dominion for Fox-C's benefit. (*See, e.g.*, Compl. ¶¶ 160, 171-74.) Fox-N is Fox-C's biggest source of revenue by far. (Compl. ¶ 143; *see also* Compl. ¶¶ 13, 135, 143.) Fox-C directed Fox-N to publish the defamatory statements to win back Fox-N viewers and reverse Fox-C's falling stock price. (Compl. ¶¶ 56-57, 166-71.) *See Harte*, 2016 WL 1275045, at *6 (finding an agency relationship based, in part, on the fact that "99% of [the parent's] revenues in 2012 were from loan servicing, and '[the subsidiary] was [the parent's] only licensed mortgage servicer.'"); *Ridge Clearing & Outsourcing Sols., Inc. v. Khashoggi*, 2011 WL 3586455, at *8 (S.D.N.Y. Aug. 12, 2011) (finding an agency relationship, in part, because the principal "was the beneficial owner of" the agent).

According to several reports, Rupert Murdoch "stepped in to call the shots directly" when Fox-N's ratings began to drop. (Compl. ¶ 171 (quotation marks omitted).) Lachlan and Rupert Murdoch were the ones who "decided to broadcast" the defamatory statements. (Compl. ¶ 173.) These requests and directions to act for Fox-C's benefit are sufficient to establish that Fox-C manifested that Fox-N would act as its agent. *See Salomon*, 769 F. Supp. 2d at 89-90 (finding a manifestation based on an allegation of "a request by [the] principal"); *CompuDyne Corp. v. Shane*, 453 F. Supp. 2d 807, 825 (S.D.N.Y. 2006) (finding an agency relationship when the agent acted at the "behest and for the benefit of" the principal); *Nationwide Life Ins. Co. v. Hearst/ABC Video Ent. Servs.*, 1998 WL 229445, at *4 (S.D.N.Y. May 7, 1998) (finding an agency relationship when the principal "asked" the agent to obtain a contract); *Cronin v. Hall St. Cold Storage Warehouses, Inc.*, 1997 WL 720753, at *8 (E.D.N.Y. June 11, 1997) (finding manifestation where the principal "assumed a supervisory role" over the agent).

Fox-N's Acceptance: Fox-N's conduct showed that it accepted Fox-C's request that it act as Fox-C's agent by broadcasting the defamatory statements. Both Fox-N and Fox-C "understood that Fox Corporation, through its employees and officers, was in control of that decision to broadcast—and continue to broadcast—the defamatory statements about Dominion." (Compl. ¶ 179.) Fox-N's CEO and on-air hosts have recognized the control that Fox-C, through the Murdochs, has over

Fox-N. (Compl. ¶¶ 155-58.) Fox-N has permitted the Murdochs, on behalf of Fox-C, to play a role managing the content that Fox-N broadcasts, including the defamatory statements. (Compl. ¶¶ 144-47). *See Elbit Sys., Ltd. v. Credit Suisse Grp.*, 917 F. Supp. 2d 217, 226 (S.D.N.Y. 2013) (finding an agency relationship where the subsidiary allegedly "reported to" the parent and the parent "reviewed" the subsidiary's actions); *Anwar*, 728 F. Supp. 2d at 436 (allegations that the principal and agent acted "as one integrated entity" that the principal "controlled" were sufficient to establish acceptance). For a month, Fox-N promulgated "the lie that Dominion rigged the election," (Compl. ¶ 174), to "tens of millions of viewers," (Compl. ¶ 172). (*See* Compl. ¶¶ 224(a)-(t).) Fox-N broadcasted these defamatory statements at Fox-C's behest. (*see, e.g.*, Compl. ¶¶ 166, 170-73, 178, 179.) *See CompuDyne Corp.*, 453 F. Supp. 2d at 825 (the agent acted "at the behest and for the benefit of" the principal); *Salomon*, 769 F. Supp. 2d at 89-90 (finding acceptance when the agent "agreed" to perform the principal's request).

Fox-C's Control: Dominion has also alleged the third factor—Fox-C's control over Fox-N. Even outside of Fox-N's coverage of the 2020 election, Fox-C exerts general editorial control over Fox-N by involving the Murdochs in Fox-N's daily business. (*See, e.g.*, Compl. ¶¶ 144-45, 152, 158.) *See Apartheid*, 617 F. Supp. 2d at 274-75 (the allegation that the subsidiary's "Senior management . . . included

American personnel . . . from [the parent]" supported an agency relationship).[4] Both Rupert and Lachlan Murdoch, "as Fox Corporation executives, are part of the 'Fox News Executive Staff.'" (Compl. ¶ 144.) Lachlan Murdoch participates daily in the management of Fox-N, (Compl. ¶ 145), and "Rupert Murdoch 'controls everything,'" (Compl. ¶ 152). *See Anwar*, 728 F. Supp. 2d at 436 (finding sufficient control when the principal "oversaw the day-to-day operations of the" agent). The Murdochs have exercised this editorial control by dictating the hiring, firing, and retention of Fox-N's on-air talent, (Compl. ¶¶ 153, 159), and giving final approval on Fox-N programming, (Compl. ¶ 152). Lachlan and Rupert Murdoch increase their direct editorial control during periods that are important for Fox-N's and Fox-C's revenue, (Compl. ¶¶ 158, 160-162, 168), including the period surrounding the 2020 election, (Compl. ¶¶ 166-175).

Fox-C also exerts control over Fox-N through its stock ownership. (Compl. ¶ 13.) *See Apartheid*, 617 F. Supp. 2d at 274 (finding an agency relationship, in part, because the agent was "a wholly-owned subsidiary"). Fox-C argues that having a beneficial interest in Fox-N does not establish an agency relationship. (Mot. at 19.) Fox-C's ownership of Fox-N is one factor among many that tend to show an agency

[4] The court applied federal common law, which is materially similar to New York law. *See Cromer Fin. Ltd. v. Berger*, 2002 WL 826847, at *4 n.5 (S.D.N.Y. May 2, 2002) ("[T]here does not appear to be any substantive difference between federal common law principles of agency and New York agency law.").

relationship and control. This beneficial interest is essential to alleging an agency relationship. *See In re Payment Card*, 2014 WL 4966072, at *28 ("[An] important feature of an agency relationship is that the actions taken by the purported agent are taken . . . for the benefit of the principal.").

Fox-N's CEO and on-air hosts have suggested that Fox-C, through the Murdochs, controls the decision-making at Fox-N. (Compl. ¶¶ 155-58.) Former-President Trump and other politicians also recognize that Fox-C, through the Murdochs, controls Fox-N. (Compl. ¶¶ 162-64.)

Shortly after the 2020 election, Fox-C increased its control over Fox-N's broadcasting and directed Fox-N to broadcast the defamatory statements about Dominion. (Compl. ¶¶ 158-162.) The complaint makes clear that "Fox Corporation executives . . . were 'not happy'" that Fox-N was losing viewers "and pressured "Fox News executives 'to lure the Fox audience back home'" by publishing and broadcasting "the defamatory statements about Dominion across Fox." (Compl. ¶ 166.) *See Elbit*, 917 F. Supp. 2d at 226 ("[The plaintiff] alleges that [the parent] intervened in the aftermath of [the] misconduct and directed [the subsidiary's] response."); *STMicroelectronics*, 775 F. Supp. 2d at 539 ("[The parent] decid[ed] how to respond to customer complaints . . . [and] played 'a substantial role in the legal and risk management affairs' of [the subsidiary].").

To win back Fox-N viewers, Fox-C, through the Murdochs, "played a direct role in participating in, approving, and controlling the Fox News coverage of the 2020 election and its aftermath." (Compl. ¶ 160.) Rupert Murdoch "reengaged in the network's decisions" "during the crisis precipitated by Fox's election coverage, its lies about Dominion, and its falling ratings." (Compl. ¶ 159.) According to several reports, "when Fox ratings dipped after the election, Rupert Murdoch stepped in 'to call the shots directly.'" (Compl. ¶ 171.) *See Elbit*, 917 F. Supp. 2d at 226 ("[T]he allegations that [the parent] was 'directly responsible' for aspects of [the subsidiary's] compliance program, and that compliance executives overlapped, supports the inference" of an agency relationship); *Apartheid*, 617 F. Supp. 2d at 274-75 (the plaintiff alleged that the subsidiary "carried out its activities on behalf of [the parent] or that [the parent] ratified those activities in order to profit from them").

Fox-C, through the Murdochs, also ensured that Fox-N programming featured people who would spread the defamatory statements about Dominion. Fox-C gave "Giuliani and others a platform on their 'crown jewel' network to push . . . baseless claims" about Dominion. (Compl. ¶ 166.) Fox-C, through Rupert Murdoch, "encouraged on-air personalities to perpetuate these baseless claims" about Dominion. (Compl. ¶ 171.) *See Suarez v. City of New York*, 2015 WL 1539737, at *5 (E.D.N.Y. Mar. 31, 2015) ("Given that [the third party] relinquished control to

the [defendant] over an investigation involving its own security guard, a reasonable factfinder could conclude that [the third party] was not free to act independently of the [defendant], but rather, was beholden to the [defendant's] control to the extent necessary to underlie an agency relationship."); *Meese v. Miller*, 79 A.D.2d 237, 241 (1981) (one of the third-party agent's officers had "acted as administrator of the liquidation at the request of [the defendant]" (quotation marks omitted)).

The Fox-N personnel "who promoted the lies about Dominion were well rewarded." (Compl. ¶ 175.) Fox-C executives, including but not limited to Rupert Murdoch, decided "in January 2021 to change Fox News' lineup and reward Fox News employees like Maria Bartiromo who had promoted the lies about Dominion," and punish those who did not promote lies that Fox viewers wanted to hear. (Compl. ¶ 175.) One Fox-N anchor said that these rewards and punishments "were all Murdoch's calls." (Compl. ¶ 175.) *See Parmalat I*, 375 F. Supp. 2d at 294-95 (the plaintiffs "alleged further that [the parent] took actions in directing—or directing the removal of—auditors" working on the audit at issue); *id.* at 300-01("[The parent's] ability to discipline individual partners of [the agent] suggests that it had the power to direct the policies and practices of that [agent]—a defining characteristic of agency.").

Fox-C and its senior executives, namely the Murdochs, "maintained editorial control over the content of Fox News," including "the decision to broadcast and

publish the defamatory statements." (Compl. ¶ 178; *see also* Compl. ¶¶ 158-64, 179-80.) *See Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *13 n.14 (S.D.N.Y. Feb. 28, 2002) ("By involving themselves directly in [the third party's tortious] activities, and by directing these activities, defendants made [the third party] their agent with respect to the torts alleged in the complaint."); *Parmalat I*, 375 F. Supp. 2d at 294-95 (the plaintiffs alleged that a subsidiary "sought direction and help from [the parent accounting corporation], from which it could be inferred that [the parent] was in ultimate control of the audit" at issue). Fox-C's control over Fox-N is apparent from the fact "that different Fox Corporation entities made the same defamatory statements." (Compl. ¶ 180.)

3. Fox-C's arguments and cases are unavailing.

Fox-C argues that, even if Fox-N defamed Dominion, Fox-C did not proximately cause Dominion's harm because Fox-C did not use its control "to commit a wrong against" Dominion. (Mot. at 31.) As explained above, Dominion has alleged the exact opposite. Dominion alleged that Fox-C purposefully used its control over Fox-N to ensure that Fox-N's on-air talent would "push . . . baseless claims" about Dominion. (Compl. ¶ 166.) Dominion has alleged that Fox-C "encouraged on-air personalities to perpetuate these baseless claims" about Dominion. (Compl. ¶ 171.)

Fox-C also argues that Fox-N personnel exercised "journalistic autonomy," which is inconsistent with Dominion's allegations of control. (Mot. at 31 n.13.) Not so. An agent may exercise some discretion so long as the principal retains ultimate control of the underlying conduct. *See Veleron*, 117 F. Supp. 3d at 454 (finding an agency relationship even though the agent had some discretion because the principal "retained 'a degree of direction and control'").

None of Fox-C's cases support its argument. In fact, at least one of Fox-C's cases, *Autronic Plastics, Inc. v. Apogee Lighting, Inc.*, 2021 WL 5965715 (E.D.N.Y. Dec. 16, 2021) (Mot. at 19, 20), affirmatively supports Dominion's position. In *Autronic*, the court found that the plaintiff had pleaded an agency relationship between the parent and subsidiary in a patent-infringement case because the parent knew of the patents being infringed and directed the subsidiary "to continue selling and offering to sell infringing products," and did so because the parent "derive[d] substantial revenue from the sale of infringing products." *Id.* at *5. Dominion, like the *Autronic* plaintiff, has alleged that Fox-C controlled and directed Fox-N to broadcast the defamatory statements to win back Fox-N viewers, boosting Fox-N's ratings and Fox-C's stock price.

The rest of Fox-C's agency cases are factually distinguishable. In *Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A.*, 14 F. Supp. 3d 191, 215 (S.D.N.Y. 2014) (Mot. at 29), the court refused to find an intrafamilial agency relationship because

the plaintiff had alleged an agency relationship in one conclusory phrase. In *Otto Candies*, 2020 WL 4917596, at *15 (Mot. at 29), the plaintiff alleged that the parent corporation had "general control" over the subsidiary's operations, but failed to allege that the parent had control over the specific conduct at issue. In *O'Leary v. Telecom Res. Serv., LLC*, 2011 WL 379300, at *8 (Del. Super. Ct. Jan. 14, 2011) (Mot. at 21), the plaintiff alleged only that the parent "ratified and approved" the subsidiary's actions. In *Mirage Entertainment, Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp. 3d 26, 36 (S.D.N.Y. 2018) (Mot. at 22), the plaintiff failed to "plead that [the defendant's employee] posted the [allegedly defamatory] Tweet within the scope of her authority as an officer of [the defendant]." And *In re Parmalat Securities Litigation*, 501 F. Supp. 2d 560 (S.D.N.Y. 2007) ("*Parmalat II*"), the plaintiff alleged only that the parent and subsidiary had officers that overlapped and the parent provided some financing to the subsidiary. *Id.* at 588-89. The plaintiff did not allege, like Dominion here, that the parent controlled the tortious conduct at issue. *Id.* at 589.

Fox-C even cites *Williby v. Hearst Corp.*, 2017 WL 1210036, at *4 (N.D. Cal. Mar. 31, 2017) (Mot. at 22), a case in which the plaintiff alleged "no facts that suggest [the defendant] authorized or otherwise manifested the intent for [the subsidiaries] to act on its behalf." Dominion's complaint has the exact allegations missing from *Williby* and Fox-C's other cases. Dominion has alleged at length that

Fox-C, through the Murdochs, had general control over Fox-N *and* specifically directed Fox-N to broadcast the defamatory statements, including by ordering Fox-N to give airtime to those who were pushing lies about Dominion. Fox-C did so to win back Fox-N viewers. *See supra* Section II.A.1.

Feszczyszyn v. General Motors Corp., 669 N.Y.S.2d 1010 (N.Y. App. Div. 1998) (Mot. at 28), is a veil-piercing case, not an agency case. In *Feszczyszyn*, the defendant parent and subsidiary did not share directors, and the subsidiary was "responsible for its own day-to-day operations and the hiring and termination of most of its employees." *Id.* at 1012. The court found that those allegations were insufficient to show that the parent had "complete dominion" over the subsidiary. *Id.* Complete dominion (or domination) is a requirement for veil-piercing claims, not agency claims. *Compare Stern v. News Corp.*, 2010 WL 5158635, at *4 (S.D.N.Y. Oct. 14, 2010) ("New York law also holds that a parent corporation cannot be held liable for a subsidiary's torts [under a veil-piercing theory], unless it is proven that the subsidiary is wholly dominated and controlled by the parent corporation such that piercing the corporate veil is justified."), *with Royal Indus. Ltd.*, 926 F. Supp. at 413 ("If such an agency arrangement is alleged, then the plaintiff should not have to also allege domination and intent to defraud for the claim to survive."). Dominion was not required to allege that Fox-C completely dominated Fox-N, only that it controlled the specific conduct at issue. And unlike *Feszczyszyn*,

Dominion has alleged that Fox-C executives inserted themselves into Fox-N and forced Fox-N to publish the defamatory statements.

United States v. Bestfoods, 524 U.S. 51 (1998) (Mot. at 19, 29) is also a veil-piercing case. *Id.* at 62 (discussing when "the corporate veil may be pierced"). The *Bestfoods* plaintiff had alleged only that the defendant parent and subsidiary shared common directors and officers, who generally managed the subsidiary's business, but not the specific conduct for which the plaintiff was suing (management of a production facility). *Id.* at 67-68 (criticizing the district court's reasoning because it did inquire into "the parent's interaction with the subsidiary's facility"). The Court held that mere involvement of common officers and directors is not enough to establish direct or indirect liability because officers and directors "can and do change hats to represent the two corporations separately." *Id.* (citation and quotation marks omitted).

Dominion, unlike the plaintiff in *Bestfoods*, has alleged that Fox-C was directly involved in both Fox-N's day-to-day business *and* procuring and publishing the defamatory statements. Dominion has also alleged more than simple sharing of directors and officers. Dominion alleged that Rupert and Lachlan Murdoch are *not* shared directors or officers but insert themselves into the management of Fox-N anyways. The Murdochs are listed as "Executive Leadership" at Fox-N, even though they do not hold formal titles, such as CEO or CFO, at Fox-N. (Compl. ¶¶ 146-147.)

In Fox-N's recent answer to Dominion's lawsuit, Fox-N admitted that Lachlan and Rupert Murdoch are Fox-C executives, not executives at Fox-N—instead, "Lachlan Murdoch is the CEO of Fox Corporation, Rupert Murdoch is the Chairman of Fox Corporation, and both play a role with respect to Fox News appropriate to their offices." *U.S. Dominion, Inc., et al. v. Fox News Network, LLC*, Case No. N21C-03-257 (EMD), Answer at ¶ 142. The Murdochs do not—and cannot—put on Fox-N hats because they do not have formal positions at Fox-N.

B. Dominion's allegations of Fox-C's actual malice are overwhelming.

Fox-C acknowledges that Dominion need only allege that Fox-C "recklessly disregarded the truth" to plead actual malice.[5] (Mot. at 34.) *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) (a statement is made with "actual malice" when the defendant made it "with knowledge that it was false or with reckless disregard of whether it was false or not"); *Palin v. N.Y. Times Co.*, 940 F.3d 804, 814-16 (2d Cir. 2019) (vacating dismissal of a complaint that plausibly alleged actual malice).

To satisfy the reckless disregard standard, a plaintiff must show the defendant "entertained serious doubts as to the truth of [the] publication or . . . had a high

[5] For purposes of opposing Fox's motion to dismiss, Dominion assumes that the "actual malice" standard applies, thus mooting any dispute over whether New York Civil Rights Law Section 76-A applies. Dominion reserves the right to argue that the proper standard is negligence or gross irresponsibility. *See Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569 (N.Y. 1975).

degree of awareness [its] falsity." *Dominion I*, 2021 WL 5984265, at *28 (quoting *Sweeney v. Prisoners' Legal Servs. of N.Y., Inc.*, 647 N.E.2d 101, 104 (N.Y. 1995)).

Because most defamation defendants never directly admit that they knew they were lying, plaintiffs typically prove actual malice using indirect evidence, through which a jury can infer the defendant knew or recklessly disregarded the truth. As one court put it, "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors' actions we try to understand their motives." *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997).

Actual malice can be inferred from many kinds of evidence. Actual malice can be inferred when a defendant publishes a defamatory statement that contradicts information known to him. *See* DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 7.12 (2016) (collecting cases); *Palin*, 940 F.3d at 813-16. In addition, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports" or when the allegations are so "inherently improbable" that only a reckless broadcaster would have put them in circulation. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Evidence that a defendant conceived a story line before investigating and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice.

See Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969) (concluding "a jury might reasonably find a predetermined and preconceived plan to malign the Senator's character" based on "the totality of appellants' conduct, as evidenced by proffered materials"). Evidence of a publisher's financial motive to defame can likewise support a finding of actual malice. *See Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1136 (9th Cir. 2003); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989) ("[I]t cannot be said that evidence concerning [profit] motive or care never bears any relation to the actual malice inquiry."). Finally, a defendant's later "refusal to retract a statement after it has been demonstrated to him to be both false and defamatory" can also be evidence of actual malice at the time of publication. *See, e.g.*, *Golden Bear Distrib. Sys. of Tex., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 580A cmt. d).

Because "proof of 'actual malice' calls a defendant's state of mind into question," this element "does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). Rather, a "finder of fact must determine whether the publication was indeed made in good faith." *St. Amant*, 390 U.S. at 732; *see also Kaelin v. Globe Commc'ns Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) ("The editors' statements of their subjective intention are matters of credibility for a jury.").

Just as with the similar allegations in *Dominion I*, Dominion's copious allegations here are more than sufficient for a reasonable jury to conclude that Fox-C recklessly disregarded the falsity of the statements it published—indeed, that Fox-C knowingly and intentionally published lies about Dominion. Construing all the actual malice facts together as a whole and drawing all inferences in Dominion's favor (as the Court must at this stage), there can be no doubt that a reasonable jury could find Fox-C acted with actual malice. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1258 (D.C. 2016) (explaining that a "constellation of facts," many of which are inferential and circumstantial, taken together, can establish actual malice). Fox-C, at best, raises factual disputes that a jury should decide. *See White v. Fraternal Ord. of Police*, 909 F.2d 512, 514 (D.C. Cir. 1990) (holding actual malice was a question for the jury).

First, Fox-C knowingly disregarded publicly available evidence that contradicted the defamatory statements. (*See, e.g.*, Compl. ¶¶ 78-80, 82-86, 88, 96, 98, 104.) Some of this contradictory information came directly from Fox-N's own on-air talent. (Compl. ¶¶ 61, 64-65, 116, 138, 226). *See Dominion I*, 2021 WL 5984265, at *28 ("The nearby presence of dissenting colleagues thus further suggests Fox, through personnel like Mr. Dobbs, was knowing or reckless in reporting the claims."). Dominion emailed over 90 Fox-N personnel, including anchors, reporters, producers, content managers, and executives who were involved

in the publication of the defamatory falsehoods at issue in this case, refuting the defamatory statements at length. (Compl. ¶¶ 67-69, 71, 75, 79, 81, 88, 92, 96, 98, 105, 115, 245.) *See Dominion I*, 2021 WL 5984265, at *28 ("Fox possessed countervailing evidence of election fraud from the Department of Justice, election experts, and Dominion at the time it had been making its statements."). Lachlan Murdoch participates daily in the management of Fox-N and knew about this contradictory information. (Compl. ¶¶ 145, 179.) Fox-C also disregarded the reporting of its own subsidiary publications, including the *New York Post* and the *Wall Street Journal*. (Compl. ¶¶ 43, 83-85, 90, 164, 165, 168-170, 226.) Fox-C's Rupert Murdoch is known to be "heavily involved in the editorial process" at the *New York Post* and would have seen this reporting. (Compl. ¶ 164.) Despite this contradictory evidence, Fox-C directed Fox-N to give airtime to people who were spreading lies about Dominion.

Second, Fox-C directed Fox-N to broadcast and republish the demonstrably false and inherently improbable claims of facially unreliable sources like Powell, Giuliani, and Lindell. (Compl. ¶¶ 21, 47, 48, 50, 61, 63-65, 72, 76, 97, 102, 106, 108, 112, 142, 167, 224.) Fox-C executives—particularly Rupert and Lachlan Murdoch—exercised editorial control over Fox-N and, despite obvious reasons to doubt the veracity of these sources, directed Fox-N to broadcast their inherently improbable claims, including that Dominion is owned by a company that was

"formed in order to fix elections" and to "produce altered voting results in Venezuela for Hugo Chavez," that "it is one huge, huge criminal conspiracy," that there was "a massive and coordinated effort to steal this election," and that they "used an algorithm to calculate the votes they would need to flip and they used computers to flip those votes . . . from Trump to Biden." (Compl. ¶¶ 224(a), (b), (c), (e).) *See Powell*, 2021 WL 3550974, at *12 ("[A] reasonable juror could conclude that the existence of a vast international conspiracy that is ignored by the government but proven by a spreadsheet on an internet blog is so inherently improbable that only a reckless man would believe it."). These claims are inherently improbable on their face, including because—among other reasons—Americans voted on paper ballots that were repeatedly recounted by hand to verify the vote counts of Dominion machines, and because Dominion machines were used in many states that Trump won. (Compl. ¶¶ 98, 113, 139, 213.)

Third, Fox-C promoted a false storyline that the election had been stolen from Trump to lure back Fox viewers who were ditching Fox in favor of media outlets promoting lies about Dominion. (Compl. ¶¶ 56-59.) Fox-N's ratings were in freefall and Fox-C's stock price had plummeted because Fox-N viewers were leaving for rival outlets promoting the lie that the election had been stolen from Trump. (Compl. ¶¶ 63, 76.) Trump had publicly taken out his rage on Fox-N, (Compl. ¶¶ 51-56.), directing viewers to head for Fox-N's largest competitors, OAN and Newsmax,

(Compl. ¶¶ 56, 58, 59, 63). Trump had long been important to Fox-N's success. (Compl. ¶¶ 149, 150.) Losing Trump's support to OAN and Newsmax had a near immediate impact on Fox-C's stock price. (Compl. ¶¶ 56, 57.) To prevent Fox-N from hemorrhaging viewers, stabilize its deteriorating stock price, and placate Former-President Trump, Fox-C, through the Murdochs, used Fox-N to promote a false, preconceived narrative to win Trump supporters back to Fox-N. (*See, e.g.*, Compl. ¶¶ 99, 100 121, 133-35, 166, 168, 171, 172.) Taken together with the Complaint's other allegations, these allegations of Fox-C's financial motivation and preconceived narrative support the conclusion that Fox-C acted with actual malice.[6] *See Palin*, 940 F.3d at 814-15.

Fourth, even after learning that the defamatory statements were false, Fox-C did not direct Fox-N to retract those statements. (Compl. ¶¶ 72, 89, 114-115, 245.) Instead, Fox-C rewarded those who had pushed the baseless lies about Dominion, like Maria Bartiromo. (Compl. ¶¶ 137, 175.) Fox-C did not order Fox-N to issue a retraction even though Rupert Murdoch, on behalf of Fox-C, had ordered Fox-N to

[6] Fox-C argues that profit motive "cannot be enough to constitute actual malice." (Mot. at 37-38.) As demonstrated above, Dominion alleged far more than just profit motive—Dominion alleged that Fox-C directly inserted itself into Fox-N and knowingly disregarded contradictory information in favor of facially unreliable sources who made implausible claims, all to support a fabricated storyline to win back Fox-N viewers. Profit motive, even if not itself dispositive, is plainly relevant to actual malice. *See Suzuki*, 330 F.3d at 1136 ("[F]inancial motive . . . is a relevant factor bearing on the actual malice inquiry.").

issue retractions before. (Compl. ¶ 152.) *See Golden Bear*, 708 F.2d at 950 ("refusal . . . to retract a statement after it has been demonstrated to him to be both false and defamatory" can be evidence of actual malice).

Fox-C argues that Dominion "does not allege any facts that any person at Fox Corporation acted with actual malice." (Mot. at 34.) This argument glosses over the numerous specific allegations that Lachlan and Rupert Murdoch, on behalf of Fox-C, directly ensured that Fox-N gave airtime to people, like Powell and Giuliani, who would spread lies about how Dominion stole the 2020 election from Trump. (*See, e.g.*, Compl. ¶¶ 159-175.)

Fox-C also suggests that it cannot be held liable for broadcasts on Fox-N because Fox-C was not the speaker, citing *Mimms v. CVS Pharmacy, Inc.*, 889 F.3d 865 (7th Cir. 2018) and *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113 (2d Cir. 2013). (Mot. at 35.) Fox-C fails to mention that their rule is foreclosed by the very Supreme Court precedent that the *Dongguk University* court cited as its basis: *New York Times v. Sullivan*, which made clear that when (as here) more than one person in an organization is involved in publishing a defamatory statement, the actual malice inquiry is not limited to a single person, but involves the state of mind of all "persons" involved in the publication. 376 U.S. at 287. New York law also makes clear that defamation liability runs to anyone who played a role in procuring,

producing, or publishing a defamatory statement. *See Restis*, 53 F. Supp. 3d at 717; *Fischer*, 2010 WL 3733882, at *2; *Brown*, 185 Misc. at 373.

The Delaware Supreme Court's recent decision in *Page v. Oath Inc.* does not require a different conclusion. 2022 WL 164008 (Del. Jan. 19, 2022). Page's allegations of mere financial motive and a failure to investigate pale in comparison to Dominion's overwhelming allegations of actual malice. *Id.* at *4. *Page*, moreover, applied Delaware law, not New York law. *Id.* at *6. And *Page* of course does not—and cannot—upset the correct interpretation of *New York Times v. Sullivan*, which contemplates that the team of persons responsible for a defamatory statement are all persons to whom the actual malice standard may be "brought home." *Id.* at *13 ("In other words, the state of mind of the individuals actually involved in ***approving the publication*** was relevant to actual malice."); *see also Sullivan*, 376 U.S. at 287 ("[T]he state of mind required for actual malice [must] be brought home to the persons in the . . . organization having responsibility for the publication . . . ."). Dominion has alleged the persons at Fox-N and Fox-C who acted with actual malice by authoring, speaking, procuring, publishing, republishing, approving, and exercising editorial control over the defamatory statements. (Compl. ¶¶ 2, 159-175, 224-225, 238-239.) Dominion brought these actual malice allegations home to Rupert and Lachlan Murdoch at Fox-C, as well as Suzanne Scott, Jay Wallace, Tom Lowell, Meade Cooper, John Fiedler, Lauren Petters, Maria

Bartiromo, Tucker Carlson, Lou Dobbs, Sean Hannity, and Jeannine Pirro at Fox-N. (Compl. ¶¶ 2, 159-175, 224-225, 238.)

Fox-C acted with actual malice.

III. Fox-B's Arguments Are Unavailing.

Fox-B argues that it is not individually liable. *First*, Fox-B argues that it cannot be liable for merely reposting the defamatory statements on fox.com, (Mot. at 38-40), even though relocating content to a new website is an actionable republication. *Second*, Fox-B argues that Dominion did not allege that Fox-B acted with actual malice, (Mot. at 40-42), ignoring Dominion's allegations that Fox-B knew of widely publicized evidence undermining the defamatory statements, which were already inherently implausible. *Third*, Fox-B argues that its posts on fox.com qualify for immunity under § 230 of the Communications Decency Act. (Mot. at 42-48.) Fox-B fails to cite § 230 cases where, like here, agents published unlawful content created by their principals.

A. Fox-B is liable for republishing the defamatory statements on fox.com because it relocated those statements to a new website.

Fox-B argues that it cannot be held liable for reposting any of the allegedly defamatory statements on fox.com because it neither "created" nor "had editorial control over any of the allegedly defamatory content." (Mot. at 38.) Established New York case law undermines Fox-B's argument.

It is a basic rule of defamation law that a republisher of a defamatory statement is just as liable as the original publisher. *See Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 152 (2d Cir. 2000) ("[T]he fact that a particular accusation originated with a different source does not automatically furnish a license for others to repeat or publish it without regard to its accuracy or defamatory character." (citation omitted)); *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980) (noting the "widely recognized" "black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement" (quotation marks and citation omitted)).

Courts applying New York law have uniformly held that relocating defamatory material to a second website is an actionable republication. *See Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 822 N.Y.S.2d 375, 377 (N.Y. Sup. Ct. 2006) ("[I]f the defamatory material is relocated to a second website, the relocation to the new website constitutes a republication of the defamatory comment."); *Firth v. New York*, 306 A.D.2d 666, 667 (N.Y. App. Div. 2003) ("[C]laimant's allegations that the report was moved to a different Internet address are sufficient to state a cause of action for republication to a new audience akin to the repackaging of a book from hard cover to paperback."); *Etheredge-Brown v. Am. Media, Inc.*, 13 F. Supp. 3d

303, 307 (S.D.N.Y. 2014) (holding that the *National Enquirer*'s online publication of a prior print article was a republication).

The defamatory statements that aired on Fox-N also appeared on foxnews.com. (Compl. ¶¶ 176, 224.) As an agent of Fox-C, Fox-B relocated those broadcasts to a separate website, fox.com. (Compl. ¶¶ 176, 177.) Under New York law, Fox-B is liable for republishing these articles and videos.

Fox-B's cases do not involve a defendant who, like Fox-B, relocates defamatory content to its own website. In *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 250 (N.Y. 1999), the defendant operated an online bulletin board that allowed third parties to post messages. While the defendant "reserve[d] the right to screen its bulletin board messages, it [was] not required to do so, [did] not normally do so and therefore [could not] be a publisher of electronic bulletin board messages posted on its system by third parties." *Id.* Similarly, in *Page v. Oath, Inc.*, 2021 WL 528472, at *5 (Del. Super. Ct. Feb. 11, 2021), the court addressed articles on the Huffington Post website that were written and posted on the Huffington Post website by third-party contributors.

Fox-B is liable for the republications on fox.com.

B. Fox-B acted with actual malice in reposting the defamatory statements on fox.com.

Fox-B argues that Dominion did not plead actual malice. (Mot. at 40-42.) This argument ignores Dominion's countless allegations.

Many of the allegations showing that Fox-C acted with actual malice apply equally to Fox-B. In choosing to republish broadcasts on fox.com, Fox-B disregarded publicly available evidence casting doubt on the truth of the defamatory statements, including "countervailing evidence of election fraud from the Department of Justice [and] election experts." *Dominion I*, 2021 WL 5984265, at *28. (Compl. ¶¶ 5, 78-80, 82-86, 88, 96, 98, 104.) Fox-B likely was aware that its sister publications, the *New York Post* and *Wall Street Journal*, were reporting facts that cast doubt on the defamatory statements. (Compl. ¶¶ 43, 83-85, 90, 164, 165, 168-170, 226, 239.) *See Powell*, 2021 WL 3550974, at *12 ("But Dominion also alleges other facts that make those claims even more obviously improbable . . . including (1) public statements by election security specialists, Attorney General Barr, numerous government agencies, and elected officials; (2) independent audits; and (3) paper ballot recounts that disproved those claims.").

Fox-B also republished the same demonstrably false and inherently improbable claims of facially unreliable sources like Powell, Giuliani, and Lindell, even though Fox had obvious reasons to doubt the veracity of those sources and their claims. (Compl. ¶¶ 21, 47, 48, 50, 61, 63-65, 72, 76, 97, 102, 106, 108, 112, 142, 167.) Despite obvious reasons to doubt the veracity of these sources, Fox-B chose to republish these sources' inherently improbable claims, including that Dominion is owned by a company that was "formed in order to fix elections" and to "produce

altered voting results in Venezuela for Hugo Chavez," that "it is one huge, huge criminal conspiracy," that there was "a massive and coordinated effort to steal this election," and that they "used an algorithm to calculate the votes they would need to flip and they used computers to flip those votes . . . from Trump to Biden." (Compl. ¶¶ 224(a), 224(b), 224(c), 224(e).) As explained above, these claims are inherently improbable on their face. (Compl. ¶¶ 98, 113, 139, 213, 243.) *See Powell*, 2021 WL 3550974, at *12 ("[A] reasonable juror could conclude that the existence of a vast international conspiracy that is ignored by the government but proven by a spreadsheet on an internet blog is so inherently improbable that only a reckless man would believe it.").

Dominion has alleged that Fox-B republished the defamatory statements even though "those within Fox Broadcasting separately responsible for publishing the defamatory statements knew they were false or acted in reckless disregard of their falsity." (Compl. ¶ 177; *see also* Compl. ¶ 239.) Fox-B worked as Fox-C's agent, and "the defamatory broadcasts stem from that agency relationship." (Compl. ¶ 178.) Fox-B followed Fox-C's instructions after Fox-C executives "chose to publish the defamatory statements through Fox Broadcasting, on fox.com." (Compl. ¶ 177). Fox-B allowed "Fox Corporation to dictate whether Fox Broadcasting would publish the defamatory statements" on fox.com. (Compl. ¶ 179.) Notably, "Fox

News has disclaimed responsibility for the accused defamatory broadcasts on fox.com." (Compl. ¶ 177; *see also* Compl. ¶ 3.)

Fox-B argues that it was entitled to rely on the accuracy of Fox-N's reporting. (Mot. at 41.) Not true. Republishers are entitled to rely on third-party reports only if (1) the third party is reputable and trustworthy and (2) no other information casts doubt on the third party's report. *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002) ("One who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted recklessly."); *Bryks v. Canadian Broad. Corp.*, 928 F. Supp. 381, 383 (S.D.N.Y. 1996) (a republisher may rely on the "research of the original publisher" only if the republisher did not have "substantial reasons to question the accuracy of the articles or the bona fides of [the] reporter." (citation and quotation marks omitted)).

Even one of Fox-B's cases, *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422 (1981), supports the position that a republisher cannot rely on the original publisher when it has reason to doubt the truth of the original publication. In *Rinaldi*, the court affirmed the district court's *denial* of the republisher's motion for summary judgment because the republisher, who republished a book in paperback form, had received notice that the original hardcover was "inaccurate." *Id.* at 437.

Dominion has alleged that Fox-N was not acting as a reputable news source. As Fox-B knew, Fox-N was scrambling to avoid losing viewers to Newsmax and

OAN, making it more likely that Fox-N would publish unreliable reports from untrustworthy sources, such as Giuliani, Powell, and Lindell. (Compl. ¶¶ 56-65.) Dominion has alleged that Fox-C instructed Fox-B to republish the defamatory statements "to protect Fox Corporation's business interests by warding off any competitive attacks from outlets such as Newsmax and OAN." (Compl. ¶ 178.)

Fox-B was not entitled to rely on Fox-N because, as discussed at length above, Fox-B had "conflicting information from another source and recklessly disregard[ed] it." *Flowers*, 310 F.3d at 1130 ("But if someone knows that the news story is false, he can't sanitize his republication by purporting to rely on the news source."); *see also Stern v. Cosby*, 645 F. Supp. 2d 258, 282 & n.15 (S.D.N.Y. 2009) (rejecting the defendant's argument that she "relied on previous reports" because there was "evidence that [the defendant] either knew the allegation was false, or was reckless as to its truth or falsity"); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 372 (S.D.N.Y. 1998) (rejecting the defendant's argument that it was entitled to rely on Associated Press reports because "[s]uch a rule would effectively eliminate the inquiry into whether there was 'substantial reason' to question the accuracy of a given report").

This Court and one other have already held that Dominion has adequately alleged reasons to doubt the truth of defamatory statements about Dominion. *See Dominion I*, 2021 WL 5984265, at *28 ("Fox possessed countervailing evidence of

election fraud."); *Powell*, 2021 WL 3550974, at *12 (outlining Dominion's allegations of contradictory evidence). In the face of the same evidence, Fox-B had reasons to doubt the accuracy of Fox-N's reports.

The rest of Fox-B's cases are distinguishable because they did not involve, like here, widely available information debunking the original publisher's statements. *See Dongguk*, 734 F.3d at 126 (no evidence that the defendant "entertained serious doubts as to the truth" of the allegedly defamatory statements); *Bryks*, 928 F. Supp. at 385 ("The indicia plaintiff identifies as 'red flags' did not give CNN reason to question the accuracy of the Report."); *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 542 (N.Y. 1980) (the defendant had no reason to "suspect the veracity of the material with which he was supplied"); *Zetes v. Richman*, 86 A.D.2d 746, 747 (N.Y. App. Div. 1982) (the defendant "had no reason to doubt the truthfulness of the article" on which he relied); *Miller v. News Syndicate Co.*, 445 F.2d 356, 357 (2d Cir. 1971) (the reporter's article was substantially true and no evidence that cast doubt on the article).

In sum, the executives at Fox-B had reason to know that Fox-N was not acting as a reputable news source, widely available information showed that the defamatory statements were inaccurate, and Fox-B acted as Fox-C's agent. Fox-B acted with actual malice and is liable for the defamatory statements. At most, Fox-B raises a question of fact. *See Flowers*, 310 F.3d at 1130 (holding that whether the defendant

justifiably relied on a news source is "inapplicable" at an "early stage in the proceedings"); *Jewell*, 23 F. Supp. 2d at 371 (whether a reporter appropriately relied on an Associated Press report was a question of fact).

C. Fox-B does not qualify for immunity under the Communications Decency Act because it did not republish content from a third party.

Fox-B argues that it is entitled to the affirmative defense of immunity under § 230 of the Communications Decency Act. (Mot. at 42-48.) The CDA provides an affirmative defense that is not appropriate on a motion to dismiss. *See Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (Section 230 is an affirmative defense and does "not justify dismissal under Rule 12(b)(6)."). This Court recognized in *Dominion I* that "Delaware courts considering defamation claims on a motion to dismiss have been wary of granting dismissal based on affirmative defenses." 2021 WL 5984265, at *22; *see also Reid v. Spazio*, 970 A.2d 176, 183-84 (Del. 2009) ("Unless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate.").

The CDA immunizes a "provider or user of an interactive computer service" who republishes "information provided by ***another*** information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). But the CDA does ***not*** immunize statements for which the defendant is itself an "information content provider." *FTC*

v. Accusearch Inc., 570 F.3d 1187, 1197 (10th Cir. 2009) ("[A]n interactive computer service that is also an 'information content provider' of certain content is not immune from liability arising from publication of that content."); *Shiamili v. Real Est. Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 290 (2011) (CDA immunity extends only to content "posted by third-party users").

An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Courts have held that a defendant creates or develops content when he "materially contribut[es]" to an unlawful statement. *See Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021) (collecting cases). A material contribution requires being at least partially responsible for adding to the allegedly unlawful elements of the displayed content. *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (en banc) (Section 230 immunity did not apply to a roommate-matching service that "contribute[d] materially to the alleged illegality of the conduct").

Courts have applied common-law agency principles to claims involving the CDA, refusing to grant immunity to agents and principals that split up the publishing and content-creation roles. *See Gilmore v. Jones*, 370 F. Supp. 3d 630, 663 (W.D. Va. 2019) (denying immunity under the CDA because the defamatory "article

support[ed] an inference that these defendants played some role in developing [the] article or maintained some agency relationship with [the creator]."); *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 274 (S.D.N.Y. 2016) ("The Court agrees that the factual allegations, which must be credited on a motion to dismiss, are sufficient, under principles of agency, to make [the defendant] the provider of the challenged statements about [the plaintiffs]."); *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016) (reversing a motion to dismiss based on CDA immunity because the plaintiff alleged that the defendant's "employees might have anonymously authored comments" posted on the defendant's website). It is a basic rule of agency that an agent is liable for assisting its principal commit a tort. *See Cruickshank & Co. v. Sorros*, 765 F.2d 20, 25 n.6 (2d Cir. 1985) ("An agent who assists another agent or the principal to commit a tort is normally himself liable as a joint tort feasor for the entire damage.").

The complaint makes clear that Fox-B acted on "instruction" from Fox-C as Fox-C's "agent in the broadcast and publication of the specific defamatory statements alleged," (Compl. ¶¶ 177-179), and that Fox-C, through its extensive role in creating and developing the defamatory statements, is an information content provider. *See supra* Section II.A.1 (detailing how Fox-C, through Lachlan and Rupert Murdoch, used its control over Fox-N to give airtime to people who were known to spread defamatory statements about Dominion). Fox-B can take no refuge

in the CDA for its actions as the agent of a defamatory information content provider. *See Accusearch Inc.*, 570 F.3d at 1199 (the defendant website provider was "responsible for the development" of the allegedly unlawful content because it "solicited requests" for the content "and then paid researchers to obtain it").

Fox-C wholly owns Fox-B. (Compl. ¶ 13.) Just like at Fox-N, Fox-C, through Lachlan and Rupert Murdoch, determines which content Fox-B publishes on fox.com. (Compl. ¶¶ 176-79.) Fox-C, through Rupert and Lachlan Murdoch, had direct "authority and control over the decision to broadcast the defamatory statements alleged," including the decision to broadcast the statements on fox.com. (Compl. ¶ 178.) The complaint makes clear that "Fox News has disclaimed responsibility for the accused defamatory broadcasts on fox.com." (Compl. ¶ 177.) Instead, Fox-C executives, including the Murdochs, "chose to publish the defamatory statements through Fox Broadcasting, on fox.com." (*Id.*) Fox-B followed Fox-C's instructions "to publish the defamatory statements," (*id.*), "allowing Fox Corporation to dictate whether Fox Broadcasting would publish the defamatory statements," (Compl. ¶ 179). Each of the defamatory statements appeared on fox.com. (Compl. ¶ 224.) Fox-B published the defamatory statements even though "those within Fox Broadcasting separately responsible for publishing the defamatory statements knew they were false or acted in reckless disregard of their falsity." (Compl. ¶ 177.)

Under standard agency principles, Fox-B is liable for assisting Fox-C commit defamation. And under CDA case law, Fox-B cannot claim immunity for republishing content created and developed by its principal. This case is nearly identical to *Baiqiao Tang v. Wengui Guo*, 2020 WL 6414371 (S.D.N.Y. Nov. 2, 2020). In *Baiqiao*, the plaintiff alleged that one defendant, Kwok, made "false and misleading statements" that the second defendant, SMG, published on its website. *Id.* at *3. The plaintiffs alleged that Kwok owned and controlled SMG and "used it to" publish Kwok's statements. *Id.* at *4. SMG—in the same position as Fox-B—was not entitled to CDA immunity because the plaintiff had adequately alleged that the false and misleading statements on SMG's website were not created by a third-party information content provider but, instead, by SMG's principal, Kwok. *Id.*; *see also Hare v. Richie*, 2012 WL 3773116, at *17 (D. Md. Aug. 29, 2012) (The defendant website's "involvement goes beyond mere editorial functions and extends to the creation of its own content—specifically, [including the CEO's] comments at the end of each post.").

The same is true here. Fox-C owns and controls Fox-B and used it to publish defamatory statements. Given the agency relationship between Fox-B and Fox-C,

Fox-B did not publish information created by a third party. Fox-B is not entitled to CDA immunity.[7]

IV. The Court Has Already Held that Dominion Sufficiently Alleged Fox-N's Underlying Defamation Liability.

Fox argues that the defamatory statements on Fox-N were not defamatory because (1) the statements are protected opinion, (2) the statements were not made with actual malice, and (3) the fair-report and neutral-reportage privileges protect the statements. (Mot. at 49-59.)

Dominion is suing Fox for the exact same 20 statements as Fox-N. Fox-N moved to dismiss Dominion's defamation claims, asserting the exact same arguments that Fox now asserts. Just last month, this Court rejected Fox-N's motion to dismiss, holding that Dominion adequately alleged that these 20 defamatory statements were not protected opinion, were made with actual malice, and were not protected by the fair-report or neutral-reportage privileges. Nevertheless, Fox

[7] All of Fox-B's cited cases involved clear third-party contributors, not defendants with a principal-agent relationship. *See Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (content developed by a third party); *Jones*, 755 F.3d at 415 (same); *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (same); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (same); *Page*, 2021 WL 528472, *6-7 (same); *In re Zoom Video Commc'ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1030 (N.D. Cal. 2021) (same); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1128 (N.D. Cal. 2016) (same); *Blumenthal v. Drudge Rep.*, 992 F. Supp. 44, 52 (D.D.C. 1998) (same); *Roca Labs, Inc. v. Consumer Op. Corp.*, 140 F. Supp. 3d 1311, 1322 (M.D. Fla. 2015) (same); *Phan v. Pham*, 105 Cal. Rptr. 3d 791, 795 (Cal. App. 2010) (same).

inexplicably "incorporate[s] by reference the arguments raised by [Fox-N]" in its motion to dismiss and other briefs. (Mot. at 49.) In reasserting the Fox-N arguments this Court rejected, Fox-C and Fox-B do not address a single time this Court's opinion in *Dominion I*, 2021 WL 5984265.

A. This Court has already held that the opinion defense does not apply.

Fox argues that 8 of the 20 defamatory statements are opinions, not statements of fact: ¶¶ 179(b), (c), (e), (g), (h), (l), (m), (q). (Mot. at 52-53.) Fox makes no effort to argue that the remaining 12 statements in ¶¶ 179(a), (d), (f), (i), (j), (k), (n), (o), (p), (r), (s), and (t) are protected opinions.

Fox also makes no attempt to distinguish this Court's prior opinion, addressing the same 20 statements and holding that Dominion's allegations supported "the reasonable inference that Fox was reporting on a fact, *i.e.*, that Dominion aided or caused election fraud." *Dominion I*, 2021 WL 5984265, at *26; *id* at *27 ("[T]he Complaint supports the reasonable inference that Fox made unprotected statements of fact that defamed Dominion."). Dominion's complaint against Fox-N, like its complaint against Fox here, stated "a reasonably conceivable defamation claim based on what a reasonable listener could conclude are false statements of fact and defer the question to a fact finder." *Id.* ("[T]he Court does not read Fox's statements as mere statements of opinion. . . ."). The Court also held that it was "reasonably conceivable that Fox's reporting comprised opinion 'mixed' with

false facts" and "that Fox and its personnel broadcasted mixed opinions that were based on either false or incomplete facts unknown to the reasonable viewer," since "[m]any of Fox's reporters made broad election fraud statements that did not disclose their sources clearly, or clearly connect their statements to the election fraud litigations." *Id.*

The same result is appropriate here.

B. This Court has already held that Dominion sufficiently alleged Fox-N's actual malice.

Fox argues that Dominion did not adequately allege that Fox-N acted with actual malice. Again, Fox attempts to rehash what this Court has already addressed, citing no new facts or law. (Mot. at 54-55.) The Court has already held that Dominion adequately alleged that Fox-N acted with actual malice. *Dominion I*, 2021 WL 5984265, at *28 ("The Complaint supports the reasonable inference that Fox either (i) knew its statements about Dominion's role in election fraud were false or (ii) had a high degree of awareness that the statements were false.").

C. This Court has already held that the fair-report and neutral-reportage privileges do not apply.

Fox argues that, under the fair-report privilege, Fox-N is not liable for reporting on "judicial and other government proceedings." (Mot. at 55-57.) Even if Fox had identified which defamatory statements are protected by the fair-report

privilege (it didn't), this Court has already held that the defamatory statements do not qualify for the fair-report privilege:

> [T]he Complaint supports a reasonable inference that Fox repeatedly misstated election fraud allegations to defame Dominion. Because, at this stage, Fox's statements might not amount to a fair and true report of official proceedings, the Motion is denied to the extent it is based on the fair report privilege.

Dominion I, 2021 WL 5984265, at *26.

Fox also argues that, under the neutral-reportage privilege, Fox-N cannot be liable "for publishing allegations about the integrity of U.S. presidential elections." (Mot. at 58-59.) This Court rejected that argument. This Court held that the neutral-reportage privilege was likely unavailable under New York law and, even if it were, the "defense would not warrant dismissal" because "Dominion's well-pleaded allegations . . . support the reasonable inference that Fox's reporting was not accurate or dispassionate." *Dominion I*, 2021 WL 5984265, at *24.

Fox does not identify new facts or law that undermine the Court's holding.

CONCLUSION

The Court should deny Fox-C and Fox-B's motion to dismiss entirely.

Dated: January 28, 2022

Respectfully submitted,

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

US DOMINION, INC., DOMINION VOTING SYSTEMS, INC., and DOMINION VOTING SYSTEMS CORPORATION,	)	Case No. N21C-11-082 EMD
Plaintiffs,	)	JURY TRIAL DEMANDED
v.	)	
FOX CORPORATION and FOX BROADCASTING COMPANY, LLC,	)	
Defendants.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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Dated: January 28, 2022

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CERTIFICATE OF SERVICE

I, Brian E. Farnan, hereby certify that on January 28, 2022, a copy of Plaintiffs' Opposition to Defendants' Motion to Dismiss was served via LexisNexis File&Serve on the following:

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