

## GUEST COLUMN

## Did Dominion dominate Fox?

By Douglas E. Mirell

It is undeniable that \$787.5 million is a lot of money. That's how much Dominion Voting Systems will receive as the result of settling its \$1.6 billion defamation lawsuit against Fox News Network (FNN) and its parent entity, Fox Corporation (FC), for allowing FNN's guests and hosts to make 20 false on-air statements about how Dominion's voting machines helped "steal" the 2020 election from former President Donald J. Trump. The payout, though less than half of what Dominion sought, is apparently the largest reported defamation settlement in U.S. history, dwarfing the \$177 million paid by Disney in 2017 to settle the "pink slime" defamation lawsuit brought against ABC by a South Dakota meat producer.

The Dominion settlement certainly represents a windfall for Staple Street Capital, the private equity firm that owns Dominion. Given its 76% ownership stake in Dominion, Staple Street is poised to see a 1,442% return on its initial investment. As one of Staple Street's investors told Reuters, "We are very pleased with the outcome and think that Staple Street has handled the situation very well on behalf of their investors." Meanwhile, FC's investors are reportedly demanding to see records about how FNN handled its election-rigging coverage in what might be a precursor to litigation seeking to hold Fox's directors personally liable for the cost of this settlement and other expenses. One such shareholder has already filed suit in Delaware against 92-year-old FC chairman Rupert Murdoch, his CEO son Lachlan, and three other directors for breaching their fiduciary duties



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by permitting FNN to perpetuate these and other false claims.

Notwithstanding this threat, Fox appears to be well positioned to withstand the financial consequences of its Dominion settlement. Aside from any insurance that Fox may have to cover this liability, FC reportedly held \$4 billion in cash and cash equivalents as of February, and FNN alone reported \$2.9 billion in pro forma earnings in 2022. And let us not forget that the Murdoch empire survived the wide-ranging phone hacking/bribery/influence peddling scandal in Britain that cost it a reported \$800 million in damages.

Beyond the financial consequences of this settlement lie deeper and rather more unsettling questions about why Dominion agreed to settle and who really benefited from avoiding a trial.

Unlike the 3/4ths jury verdict vote requirement in California state court civil cases, unanimity of decision is required for civil juries under both Delaware and New York law. It is certainly possible that Dominion may have been concerned about rogue or holdout jurors undermining its case. We will likely never know whether anything about any of the jurors who were awaiting opening statements (six men and six women, seven of whom were Black, plus 12 alternates with an identical gender split) might have made a liability verdict less certain or reduced the likelihood of a huge damages judgment. Our insight into this question is exceedingly limited because these jurors were selected in total secrecy – a procedure that, in California, would be impermissible under Code of Civil Procedure Sec-

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tion 124 and *NBC Subsidiary v. Superior Court*, 20 Cal.4th 1178 (1999).

From Fox's perspective, this settlement likely means that we will never learn the contents of the roughly 82 often-lengthy excerpts redacted from Dominion's publicly filed summary judgment brief. And it is certainly true that Fox is now freed from the spectacle of a trial that was expected to last five to six weeks, and which would likely have disrupted the lives of the Murdochs and of FNN's most famous hosts. While it is likewise true that the pre-trial disclosures of these prospective witnesses' deposition testimony are both exceedingly revelatory and damaging to the reputation of a network whose now-abandoned moniker was "Fair and Balanced," the question remains: Damaging in whose eyes?

While the Apr. 18 settlement received wall-to-wall coverage on most every other television network, FNN reportedly only aired three stories about it in the first four hours following its announcement, cumulatively totaling about six minutes of coverage. At the time Dominion's attorneys were holding their self-congratulatory "money is accountability" press conference, the FNN website contained no mention of the

settlement; on the network itself, host Neil Cavuto was reportedly discussing the collapse of a Lower Manhattan parking garage and how artificial intelligence is being misused. Thus, Fox seems as determined as ever to continue insulating its viewers from the reality of its misfeasance.

This predilection was likewise evident from the press statement that Fox issued in response to the Dominion settlement: "We acknowledge the court's rulings finding certain claims about Dominion to be false. This settlement reflects FOX's continued commitment to the highest journalistic standards. We are hopeful that our decision to resolve this dispute with Dominion amicably, instead of the acrimony of a divisive trial, allows the country to move forward from these issues." By merely "acknowledging" Delaware Superior Court Judge Eric M. Davis' "*CRYSTAL clear* [emphasis in original]" finding of falsity as to each of the 20 statements it aired over a period of 11 weeks from Nov. 8, 2020, to Jan. 26, 2021, Fox does nothing more than take notice of that ruling's existence. Moreover, in light of Judge Davis' findings, Fox's professed "continued com-

mitment to the highest journalistic standards" is flatly risible. And it would seem that the only people who wish to "move forward from these issues" are Fox and its viewers. In short, this solitary statement offers no assurance whatsoever that Fox has any intention of altering its lying-to-its-audience business model.

What is even more disturbing than what Fox has said about its settlement with Dominion is what it hasn't said. According to all press reports, Dominion did not procure any form of retraction, correction, or apology from FNN or FC. This inexplicable omission flies in the face of what one typically sees in publicly disclosed out-of-court defamation settlements. A paradigmatic example of this template can be found in the U.K.-based Daily Mail tabloid's 2017 settlement with Melania Trump over an article claiming that she served as a high-end escort in the 1990s. In addition to paying a reported \$2.9 million, the Daily Mail issued a statement which read: "We accept that these allegations about Mrs. Trump are not true and we retract and withdraw them. We apologise to Mrs. Trump for any distress that our publication caused her." Inexplicably, no such confession

of remorse or contrition was ever extracted from Fox. In this case, paying \$787.5 million apparently means never having to say you're sorry.

It remains to be seen whether the still-pending \$2.7 billion defamation lawsuit filed against Fox by Smartmatic, another election technology company subjected to FNN's vote-rigging allegations, will yield a similarly significant monetary settlement or whether that case will proceed to trial. In response to the Dominion settlement, Smartmatic's lawyer issued the following statement: "Dominion's litigation exposed some of the misconduct and damage caused by Fox's disinformation campaign. Smartmatic will expose the rest. Smartmatic remains committed to clearing its name, recouping the significant damage done to the company, and holding Fox accountable for undermining democracy."

Time will also tell whether Fox's relationship with its viewers will be undermined by any disclosures that may arise from the lawsuit brought against Fox by Abby Grossberg, FNN host Maria Bartiromo's former producer, in which she claims to have been instructed to give misleading deposition testimony in the Dominion lawsuit.