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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

US DOMINION, INC., et al.,)	
)	
Plaintiffs,)	
)	
vs.)	1:21-cv-00040-CJN
)	1:21-cv-02130-CJN
SIDNEY POWELL, et al.,)	1:21-cv-02131-CJN
)	1:21-cv-00445-CJN
Defendants.)	1:21-cv-00213-CJN
)	

TRANSCRIPT OF REMOTE PROCEEDINGS VIA VIDEOCONFERENCE
DISCOVERY CONFERENCE
BEFORE THE HONORABLE MOXILA A. UPADHYAYA, U.S. MAGISTRATE JUDGE
October 8, 2024
2:11 p.m. - 4:41 p.m.
Washington, DC

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1 (Call to Order of the Court at 2:11 p.m.)

2 DEPUTY CLERK: Good afternoon, Your Honor. This is
3 Civil Case 21-2130, *US Dominion, Inc., et al. versus Herring*
4 *Networks, Inc., et al.*; Civil Case 21-40, *US Dominion, Inc., et*
5 *al. versus Powell, et al.*; Civil Case 21-445, *US Dominion,*
6 *Inc., et al. versus My Pillow, Inc., et al.*; Civil Case
7 21-2131, *US Dominion, Inc., et al. versus Byrne*; and Civil Case
8 21-213, *US Dominion, Inc., et al. versus Giuliani.*

9 All matters are set for a discovery hearing. Parties,
10 please introduce yourself for the record, starting with
11 plaintiffs' counsel.

12 MS. BROOK: Good afternoon, Your Honor. This is
13 Davida Brook from Susman Godfrey on behalf of the plaintiffs.
14 With me today are my colleagues Stephen Shackelford, Jonathan
15 Ross and Edgar Sargent.

16 THE COURT: Good afternoon, Counsel.

17 For Herring Networks?

18 MR. BABCOCK: Good afternoon, Your Honor. This is
19 Charles Babcock, along with Carl Butzer, Jonathan Neerman, John
20 Edwards and Mino Blaesche, for Herring Networks, Robert
21 Herring, Sr., Charles Herring and Chanel Rion.

22 THE COURT: Good afternoon, Counsel.

23 MR. HAGGERTY: Good afternoon, Your Honor. It's
24 William Haggerty on behalf of defendant Christina Bobb.

25 THE COURT: Good afternoon, Mr. Haggerty.

1 MS. CINNAMOND: Good afternoon, Judge. Teresa
2 Cinnamond with Kennedys for the defendants Ms. Sidney Powell
3 and Sidney Powell, PC. And I believe my partners, Josh Mooney,
4 Marc Casarino and Daniel Marvin are joining us as well.

5 THE COURT: Good afternoon.

6 MR. TOBIN: Good afternoon, Your Honor. David Tobin
7 and Marc Eisenstein.

8 THE COURT: Good afternoon. Is that everyone?

9 Okay. I would just like to remind everyone that
10 pursuant to former chief Judge Howell's standing order 20-20,
11 recording or rebroadcasting of this hearing is strictly
12 prohibited. That includes if anyone is a party to this
13 videoconference and has their phone on in order to allow
14 someone else who is not a party to this videoconference to
15 listen, that is strictly prohibited.

16 And so by virtue of the fact that all counsel have
17 heard this and are not objecting -- I'll give you a chance to
18 object -- then I'm going to assume that you are complying with
19 my order, and if I hear that my order has not been complied
20 with, believe me, all sanctions will be on the table. Okay.

21 So I have a number of discovery disputes that have
22 been pending in the consolidated cases, and my understanding is
23 that some of the issues that were previously submitted to me
24 the parties have been able to resolve. My law clerk emailed to
25 all of you the list of disputes that the Court believes are

1 still at issue, and I'm going to take them each one by one.

2 There is one issue relating to a deposition, which I
3 will handle last, because it will be under seal, and I'm going
4 to seal the courtroom when we discuss that dispute. And I
5 believe all counsel know what dispute I'm referring to.

6 Okay. So the first issue is whether to extend
7 pretrial deadlines. And my understanding is that -- actually,
8 before we move on to that, I just want to note that I don't
9 believe that anyone is here on behalf of Mr. Lindell or My
10 Pillow or Mr. Giuliani or Mr. Byrne. I will just note that
11 there was proper notice of this hearing that was entered on
12 each and every one of the dockets, and so those parties have
13 received notice of this hearing and the Court is not going to
14 hold up the hearing due to any of those parties not being here
15 as they were all duly notified of this hearing.

16 In any event, I think most or all of the disputes
17 actually deal with the parties who are here, so I'm going to go
18 ahead and proceed to handle those issues.

19 Okay. The first issue deals with the pretrial
20 deadlines. I would like to just hear very briefly from
21 Dominion and from the defendants, any of the defendants who are
22 opposing the extension of pretrial deadlines on this issue
23 simply just to tell me what the status is of discovery. My
24 understanding, and this is what I expect to be the case, is
25 that the only depositions that have not been taken or discovery

1 that's not been taken are ones about which I should have been
2 notified prior to September 30th.

3 And so fact discovery should otherwise be completed,
4 but Ms. Brook, let me hear from you or one of your colleagues
5 on this issue.

6 MS. BROOK: Good afternoon, Your Honor. Davida Brook
7 from Susman Godfrey on behalf of the plaintiffs. Before I do
8 that I will say for the record that Dominion also separately
9 emailed Mr. Byrne the correspondence setting this conference
10 and provided him notice that way as well.

11 Regarding the schedule, Dominion thinks it should be
12 relatively straightforward. At the top, let me summarize our
13 argument with three points.

14 One, this is not a request to push off the fact
15 discovery cutoff. Fact discovery, as the Court noted, is
16 largely done I would say in two out of the five cases. For the
17 others, the parties have all agreed, or at least recognized the
18 need for some additional time, not to receive new discovery,
19 but simply to wrap up previously requested discovery.

20 So for example, Mr. Lindell has not been set for a
21 deposition, nor has Mr. Giuliani or Mr. Byrne, but that's all
22 been by agreement of the parties with the understanding that
23 would happen in the coming months.

24 Number two, this is not a request to push out the
25 trial date; rather, Dominion and several of the defendants are

1 seeking an approximately two-month extension to take previously
2 requested depositions and to comply with expert and summary
3 judgment deadlines. While no trial date has been set, Dominion
4 would be surprised if that length of an extension impacted any
5 setting.

6 And number three, Dominion believes there is good
7 cause for granting this request for the record shows that the
8 parties have been diligently litigating these cases. Indeed, I
9 believe there have been 86 depositions in the last four months
10 alone.

11 And Dominion also believes that denying this request
12 will prejudice its ability to litigate these very important
13 lawsuits. I'll start very briefly with the agreement and then
14 I'll get to the disagreement.

15 Dominion, Giuliani, Lindell, My Pillow, and, to some
16 extent, Mr. Byrne have all agreed to push out deadlines by
17 approximately two months.

18 As to Mr. Giuliani, Mr. Lindell, My Pillow, they have
19 agreed to the precise schedule that Dominion emailed to Your
20 Honor on September 10th of this year. We put that same
21 schedule to Mr. Byrne. He has not responded, but his actions
22 seem to indicate that he agrees that some additional time is
23 warranted.

24 That additional time makes sense because again, Your
25 Honor, while everyone has been diligently pursuing discovery,

1 there were some delays, not of Dominion's making, that require
2 the need for some additional time. As just one example,
3 Lindell and My Pillow had a lot of trouble with producing their
4 documents. Rather than coming to the Court with that dispute
5 and raising heck, we worked it out with My Pillow and Lindell,
6 and they did eventually give us their documents, but in a
7 rather untraditional format that has taken some time to process
8 and review.

9 And we haven't taken all of the My Pillow and Lindell
10 depositions yet, but we have agreed with them to work
11 cooperatively to do them on the schedule that we put before
12 Your Honor. Same thing with Giuliani; his case was recently
13 unstayed. And of course, the Court is familiar with the issue
14 with Mr. Byrne, all of which we think warrant this just
15 approximately two-month extension in complying with discovery,
16 and then just getting the expert reports and summary judgment
17 briefs out.

18 That brings us to disagreement, which is OAN defendant
19 Christina Bobb in particular. Here, Your Honor, I have to say
20 I'm disappointed to be making this part of my argument today,
21 as the main reason we need this additional time in the OAN
22 case, besides Judge Nichols' clear preference that all of these
23 cases stay on the same schedule pretrial, is because one of the
24 main OAN defendants, Christina Bobb, was criminally indicted
25 for actions she took relating to the 2020 presidential

1 election. That fact is obviously not of Dominion's making or
2 Dominion's fault, but as this Court knows, again, rather than
3 argue about it and force this Court to rule on everything, we
4 have worked cooperatively and collaboratively with counsel for
5 Ms. Bobb and we agreed to push out, not just her deposition,
6 but her document production until December 13, 2024.

7 When the parties reached that agreement, Your Honor,
8 and this is critical, it was no secret that the other deadlines
9 would need to be adjusted accordingly. Indeed, the stipulation
10 that was put before this Court reads, and I quote, "The parties
11 will work together in good faith to adjust the rest of the
12 schedule accordingly."

13 It seems that what happened, Your Honor, is that even
14 though counsel for OAN, which is not counsel for Ms. Bobb, was
15 aware of all this, they decided they did not like this plan and
16 so now counsel for Ms. Bobb has done a complete about face and
17 is refusing to adjust any dates at all. That is not the
18 agreement that was reached between the parties and put before
19 this Court. It's not right.

20 It also makes no sense from a judicial economy
21 perspective and would unfairly prejudice Dominion. I'll take
22 both of those in turn very quickly.

23 Regarding judicial economy, what OAN and Ms. Powell
24 are proposing here makes no sense, it's that expert reports be
25 due before a named defendant and critical witness has produced

1 her documents, let alone sat for her deposition. Again, this
2 is not just some ancillary person where we can update the
3 expert report pro hoc. By way of one example, discovery has
4 shown that Christina Bobb drafted an executive order, the goal
5 of which seems to have been to prevent the certification of the
6 Electoral College, and she then enlisted her colleagues at OAN,
7 Chanel Rion and Charles Herring, to help put that executive
8 order before then President Trump and his team in the days
9 leading up to January 6th.

10 She did all of this while purporting to be an
11 independent journalist for OAN about supposed election fraud.
12 Dominion contends that that is actual malice 101, but yet OAN
13 would have Dominion put together its reports without the
14 benefit of Ms. Bobb's documents and without the benefit of her
15 testimony. And I trust, Your Honor, that OAN and Ms. Bobb are
16 not going to respond by saying, well, you got to depose Ms.
17 Rion and Mr. Charles Herring, so you have enough to go on,
18 because let me tell you, while they did not deny what I just
19 said to the Court, their memories were not so good. It was
20 clear that we needed to talk to Ms. Bobb before we were going
21 to have the full story.

22 Then there is the prejudice to Dominion. I want to be
23 clear Dominion has already been prejudiced by the agreement it
24 reached with Ms. Bobb, which, again, contemplated further
25 adjustments to the schedule, because Dominion was forced to

1 take literally every offensive deposition in this case, many of
2 which are trial depositions where Dominion cannot compel that
3 person to trial, without the benefit of Ms. Bobb's documents
4 and Ms. Bobb's testimony.

5 Now Ms. Bobb and OAN would add to that prejudice by
6 having Dominion put together and publish to them its expert
7 reports before Ms. Bobb, and possibly also Mr. Robert Herring,
8 has had to answer questions under oath. That is backwards. It
9 is not fair to Dominion.

10 Finally, in plain contrast to what I just laid out for
11 the Court, neither Ms. Bobb or OAN has articulated any known
12 prejudice to them if the Court grants this modest two-month
13 extension, not to the fact discovery cutoff, but simply to the
14 other deadlines that flow from it.

15 And so for all those reasons, Your Honor, where a
16 majority of the parties have agreed to a modest extension,
17 where the Court has indicated a strong desire to keep these
18 cases on the same schedule for pretrial purposes, and where
19 there is a good showing that the parties have been working in
20 good faith to pursue these litigations and the delays that are
21 causing this most recent request are not of Dominion's making,
22 Dominion thinks that the schedule submitted to the Court on
23 September 10, 2024 should be granted.

24 THE COURT: Thank you, Ms. Brook.

25 Very briefly, I'm going to hear from OAN and Bobb. If

1 there are still objections, I would like to hear from anyone
2 objecting to the modification of the schedule.

3 MR. BABCOCK: Your Honor, this is Charles Babcock.
4 And Ms. Brook says that the trial setting, which we don't have
5 right now, it won't be affected. And looking at her proposed
6 dates under the current schedule, the dispositive motion
7 briefing will be done by June 2nd of next year. Under the
8 proposal, it won't be done until the Friday before Labor Day of
9 next year, making a trial setting in 2025 unlikely.

10 As the Court knows from not only this case, but
11 Smartmatic, OAN has wanted to move this case along and comply
12 with what we thought, and which Dominion agreed, were
13 reasonable deadlines going forward, and we have done our utmost
14 best to do that.

15 We note that the only reason for this extension that
16 has been proffered with respect to our case, is Ms. Bobb -- and
17 Ms. Brook is perhaps overstating a little bit the prejudice to
18 Dominion. First of all, they sued on 25 broadcasts. Ms. Bobb
19 was involved with three of them. One was just an interview
20 with Rudy Giuliani, and the other Dominion wasn't mentioned,
21 although election systems were.

22 And they haven't identified their experts yet, but we
23 note from the last case, that they had nine experts, four of
24 them -- or five of them -- excuse me, five of them were related
25 to damages, three were technical, and only one was related to

1 so-called journalistic standards. If they follow that same
2 pattern here, which we have an indication they will, Ms. Bobb
3 has nothing to do with Dominion's damages. She has nothing to
4 do with their technical experts, who are expected to say that
5 the Dominion systems were just fine in the 2020 election.

6 And so it gets down to journalism expert. And if they
7 want a little more time for the journalism expert or they want
8 to supplement the journalism expert's opinions, which should be
9 formed by now as to everybody but Ms. Bobb -- and frankly, what
10 she did for those broadcasts is pretty well-known. I mean,
11 they have deposed people all around it, everybody but Ms. Bobb.

12 So if the deadlines are going to be moved, it seems to
13 me there ought to be a good reason. There is no reason to move
14 eight of Judge Nichols' nine deadlines, four of which relate to
15 experts, one was his own setting, which they now put "to be
16 determined," and the other three are dispositive motions.

17 We would like the case to move on the current
18 schedule. We don't see a reason to adjust it because of
19 Ms. Bobb. And by saying "you," but you foreshadowed this in
20 our last conference, Your Honor, by saying, "Don't come to me,
21 Dominion, asking for a bunch of extensions on the deadlines
22 because of Ms. Bobb," because she has very good reason for
23 going later, as the agreement was, and that agreement OAN was
24 not a party to, although certainly didn't object to it.

25 That's all I have, Your Honor.

1 THE COURT: Thank you, Mr. Babcock.

2 Mr. Haggerty, do you have anything in addition?

3 MR. HAGGERTY: No, Your Honor. Just very briefly that
4 I was happy to cooperate with plaintiffs' counsel with respect
5 to putting off the deposition because of the unique
6 circumstances surrounding Christine's indictment. I just did
7 not think that on behalf of Ms. Bobb I should agree to all of
8 the different dates that plaintiffs' counsel was requesting
9 here, so that was the purpose for my opposition, Your Honor,
10 but that's really all I have got. Thank you.

11 THE COURT: Okay. All right. Thank you.

12 I am going to adopt Dominion's requested modifications
13 of the trial schedule -- of the pretrial schedules. There
14 are -- Judge Nichols has expressed preference to have all of
15 the cases running on the same schedule, and there is good
16 reason to push these deadlines out, very modest extensions here
17 of about two months, two to two and a half months for some of
18 these deadlines.

19 I haven't heard any cognizable prejudice that any of
20 the defendants have articulated with respect to this modest
21 extension. And so I will adopt that extension for all of the
22 cases.

23 With respect to the status conference that Judge
24 Nichols has scheduled for February 18, 2025, as you all know,
25 he has referred any changes -- any disputes regarding changes

1 to the schedule to me. And so I will let him know that I'm
2 adopting the schedule, and he can decide whether he's going to
3 continue to have that conference on that day.

4 Okay. The first dispute I'm going to handle last, as
5 I said at the top of the hearing, the first dispute that's
6 between Dominion and OAN.

7 So let's move to Dominion's request for certain
8 financial documents, to which the Herring parties have
9 objected. So I don't need argument on this issue. I just
10 simply would like to know from Dominion, of the requests at
11 issue, which requests go to Dominion's theory of actual malice
12 and which go to Dominion's request for punitive damages?

13 MR. SHACKELFORD: Your Honor, the requests for
14 financial conditions which includes things like profits goes to
15 actual malice, because that shows a financial motive,
16 specifically how the finances were very positively impacted by
17 the continued publication of the defamatory case about
18 Dominion. That goes to actual malice. The statements --
19 that's 77 and 78.

20 79 goes towards OAN's efforts to obtain financing,
21 funding or investors. That also goes to actual malice. It
22 shows how those efforts changed or were formed by the success
23 that OAN enjoyed, the increasing success they enjoyed as a
24 result of the publication or defamatory statements.

25 That request is also relevant to a different issue,

1 which is it has become clear from one of the main arguments
2 that OAN is going to make at trial is that Dominion was never
3 worth nearly as much as we said it was worth -- (indiscernible)
4 -- and so the way that OAN chose to value itself when it was
5 out shopping for investors and so forth, even the multiples
6 they use and so forth, that is directly relevant to their
7 attempt to attack ours, so we think that RFP 79 is relevant
8 both to actual malice, but also to our own defense against
9 their arguments regarding how to value a company and the
10 reasonableness of valuing companies.

11 And then RFPs 80 and 81, which are tax returns and
12 financial statements from the individual defendants, that shows
13 the increase in fortunes of the individuals in particular as a
14 result of their support and driving the publication and
15 defamatory statements.

16 I think my answer is all of them in one way or another
17 go to actual malice, Your Honor. The only ones that are
18 relevant also to punitive damages would be the net worth, the
19 net worth statements, which are relevant to actual malice
20 because they show the increase in value as a result of this
21 activity, but they are also relevant -- net worth statements
22 are also relevant to punitive damages, Your Honor.

23 THE COURT: How does Dominion purport to show that
24 simply because a defendant makes more money in any given year
25 that that is somehow specifically related to the publishing of

1 allegedly defamatory statements?

2 Isn't it every -- isn't it the premise of almost all
3 businesses that they want to try to make more money? How is
4 that going to show actual malice?

5 MR. SHACKELFORD: It's specifically tying the --
6 seeing the increase in revenues and the increase in
7 profitability in the early months as a result of these
8 publications in November and December. You see the ratings did
9 as well, Your Honor, and you see in terms of discussion of how
10 they are doing better and better in November and December of
11 2020.

12 It is not just a general profit. When you see the
13 general profit motive in cases, it's merely saying you can't
14 just argue to the jury that they did this because it was more
15 sensational, you have to have very specific evidence. We don't
16 have the numbers, so we can't tell the full story. We have
17 very specific evidence that the company was doing better.
18 Certainly ratings rised as a result of publishing these
19 statements.

20 To be clear, it's the statements about Dominion and
21 the broader narrative about election fraud, of which Dominion
22 was a key part, but that was dominating their coverage in
23 November and December and continued to dominate their coverage.

24 THE COURT: So as a major presidential -- this was a
25 very, very busy time in American politics. So I mean, I just

1 don't see how Dominion is going to draw a line between the
2 increased viewership as a result of alleged defamatory
3 statements versus it being a major presidential cycle.

4 MR. SHACKELFORD: Your Honor, Fox News ratings went
5 down during the same time period. Specifically, OAN and
6 Newsmax were working overtime to attract Fox viewers who wanted
7 to see this sort of purported reporting on this alleged
8 misconduct by Dominion and others.

9 THE COURT: Didn't Dominion sue Fox News for making
10 alleged defamatory statements?

11 MR. SHACKELFORD: It did, Your Honor.

12 THE COURT: There was a major settlement from that
13 case, so that kind of undercuts your point, in my view.

14 MR. SHACKELFORD: Your Honor, it actually doesn't,
15 because what we saw with Fox is that the shows that broadcast
16 the lies managed to hang on to more viewers. I think this is
17 all public. They were fighting behind the scenes to keep
18 broadcasts on certain shows in order to keep their ratings from
19 falling any further, but the evidence that OAN -- I'm focusing
20 on OAN here -- shows that they were completely cognizant and
21 were trying really hard to get viewers from Fox by publishing
22 these statements.

23 So we do have evidence to show that was a motive, but
24 we do think this it is relevant to show just how well this
25 company did as a result of stealing some viewers from Fox.

1 Frankly, OAN went way farther than Fox did and continued it for
2 way longer than Fox did, all the way basically until we sued
3 them in August of 2021.

4 So it's a story that is different from the Fox story
5 both in length and in sort of the type of falsehoods that they
6 were willing to air on OAN, and we think that the economics
7 showing how much drastically better the company did in
8 November, December and into the first part of 2021, we think
9 that is an important part of the story.

10 And it's not just a rising tide, and we think the
11 rising tide continued because of this, so that's the order.

12 THE COURT: Thank you, Mr. Shackelford.

13 Very briefly, anyone on behalf of OAN.

14 MR. BABCOCK: That would be me, Your Honor. You said
15 no argument, but --

16 THE COURT: Isn't anyone going to give you a hand
17 today, Mr. Babcock?

18 MR. BABCOCK: Later maybe. The rest of them burdened
19 me with everything because apparently I'm the only one that can
20 resolve things with the other side.

21 But number one, I thank Mr. Shackelford for suggesting
22 an argument that I hadn't thought of and may not pursue, but
23 beyond that, I think Your Honor has hit upon the obvious, which
24 is how in the world, with the fact that we want to make money
25 and that we made perhaps more money in 2020 than we did in 2019

1 for a number of factors. They have got ratings information.
2 They can do that, but to -- and they want to go all the way
3 back to 2013, by the way, for financial statements.

4 But the fact that we made money is just not pertinent
5 to actual malice. The only case they cited, the *Connaughton*
6 case from the United States Supreme Court says exactly the
7 opposite of what they say, profit motive is not evidence of
8 actual malice. And the *Connaughton* case, the Supreme Court
9 points to the *New York Times versus Sullivan*, which is the
10 parent of the actual malice standard, and in that case the New
11 York Times was printing an advertisement for which they were
12 sued, so there was obviously a profit motive in publishing an
13 advertisement.

14 So I don't think they have demonstrated relevance.
15 And certainly in terms of proportionality, I don't think they
16 have made the case on these items.

17 THE COURT: Thank you, Mr. Babcock.

18 Here is my ruling: I do want to hold -- so any --
19 with respect to any documents that are solely going to
20 Dominion's claim for punitive damages, we're going to defer
21 production of those until and unless there comes a time that
22 Dominion has proven its entitlement to punitive damages.
23 That's a pretty standard way of proceeding.

24 With respect to, say, net worth statements that are
25 going solely to punitive damages, no one disputes that that

1 information can be relevant. The question is whether it should
2 be produced now. I don't hear OAN making any real objection to
3 production of that information, but that is going to be
4 deferred until trial or a time that the Court has determined
5 that punitive damages can be recovered.

6 With respect to documents that Dominion claims goes to
7 its theory of actual malice, there being a financial motive, I
8 will allow the production of certain documents for that issue
9 to give Dominion an opportunity to discover and make its case
10 on the actual malice issue. As attenuated as I might think it
11 is, I do think Dominion is entitled to seek that information
12 and attempt to make its case there, but I do think that the
13 requests as drafted are overly broad in order to meet that
14 objective.

15 And so we can do one of two things. I can actually go
16 through request by request and try to dissect for you all and
17 give you all a narrowed version of the request to meet that
18 objective of Dominion's, or I can take a break and let you guys
19 talk and try to figure it out.

20 Mr. Shackelford is smiling, because I'm guessing he is
21 going to say that's not possible, but now you have a ruling
22 from me, so I think you can figure it out.

23 MR. SHACKELFORD: I was going to say the opposite,
24 Your Honor. I can say that's always an easy choice for
25 counsel. Of course we'll take that offer from Your Honor. Mr.

1 Babcock and I, or his designee, if you'd like, are happy to
2 discuss, and I think I understand things like the timetable and
3 so forth. Let us try to work it out if we can.

4 THE COURT: What I would like you all to do is I would
5 like to resolve all of these issues today, and so I might take
6 a break at some point and just give you a chance to talk and
7 then come back on.

8 Let me give you some guidance that will hopefully be
9 helpful. I think going back to 2013 for financial statements
10 is overly broad for this particular issue. I also don't know
11 how the actual documents supporting tax returns are going to
12 necessarily be relevant if you can get financial statements for
13 this issue, right. For punitive damages, it's potentially a
14 different issue, but for the issue of actual malice, I think
15 Dominion can attempt to make its case on this issue without all
16 of the tax returns, underlying tax returns for the company and
17 the individuals. But I'll again let you all talk about it at a
18 break and see if you can figure it out.

19 I'll also say that with respect to RFP No. 79, that
20 will stand and I will allow those documents to be produced,
21 although I truly think 2010 to the present also seems overly
22 broad, so I would like you all to discuss that.

23 MR. SHACKELFORD: We will, Your Honor. Thank you.

24 THE COURT: Okay. Thank you.

25 Okay. The next issue I have is Dominion's amended

1 initial disclosures. My understanding is that Dominion amended
2 its initial disclosures on September 30th close to the end of
3 the day and added some additional information and that OAN is
4 seeking to strike that information.

5 This seems to be a dispute that has evolved somewhat.
6 I thought initially it was one dispute, and now my
7 understanding is that the scope of the dispute has changed.

8 So if I'm right, why don't I -- just let me turn to
9 someone from OAN to tell me if that is the issue, that OAN is
10 seeking to strike any disclosures that were amended late in the
11 day on Monday, September 30th.

12 MR. BABCOCK: Your Honor, it's not me. It's
13 Mr. Edwards.

14 THE COURT: Okay, Mr. Edwards.

15 MR. EDWARDS: Good afternoon, Your Honor. You are
16 correct. The scope of the dispute is narrowed. We had
17 additionally raised the issue of plaintiffs' disclosures
18 regarding damages as being inadequate and sought an order from
19 the Court to require them to amend those disclosures to comply
20 with the rule.

21 Now with the passage of time, with the close of
22 discovery on September 30th, we think it's too late to amend.
23 The plaintiffs should be required to stand on their disclosures
24 as they exist at the moment.

25 On Monday night, September 30th, the date discovery

1 closed, they served some amended disclosures. They didn't
2 correct the inadequacy of their damages disclosures, but what
3 they did do is they added four new jurisdictions where they are
4 claiming damages. Instead of identifying specific witnesses
5 within these jurisdictions, they just said "representatives."

6 The four counties are Elbert County, Colorado; Monroe
7 County, New York; Saratoga County, New York; and Schuyler
8 County, New Jersey. At the same time, Monday night, again, on
9 the day discovery closed, they amended their interrogatory
10 response to Interrogatory No. 20, which asked about the damages
11 jurisdictions, and they listed these four.

12 And we had a meet and confer about this, Your Honor,
13 and we were told that Elbert County had decided not to renew
14 their contract with Dominion at the end of the year, and they
15 learned about that on August 27th. Now, they didn't do
16 anything between August 27th and September 30th to alert us
17 that we have a new claim for damages jurisdiction so that we
18 could do discovery on it, even though we had a compressed
19 period to do it in. They waited until the night of the
20 discovery deadline.

21 Schuyler County, they told us they learned that on
22 September 4th; Saratoga County, on September 15th; and Monroe
23 County, also on September 15th. They waited until the end of
24 discovery.

25 They did tell me that Elbert County was disclosed to

1 us in a deposition. They said it was a deposition of
2 Mr. Stephen Bennett (ph), which occurred on September 25th, the
3 Wednesday before the close of discovery, and they gave me a
4 number of things. I went back and looked at his testimony.
5 And Mr. Bennett merely testified that Elbert County decided not
6 to renew their contract and they were going with a competitor,
7 a company called Clear Valley.

8 But there was actually no indication in the deposition
9 that Dominion was now claiming that Elbert County is a lost
10 jurisdiction, that they lost this contract because of any
11 alleged defamation by OAN, nothing to put us on notice that
12 this county was part of the damages.

13 So ultimately, Your Honor, when is this going to end?
14 They wait until the end of discovery to disclose these new
15 jurisdictions. We can't take discovery on them. We're not
16 asking to, because, frankly, when will this end, because they
17 previewed for me that there likely will be other jurisdictions
18 added down the road.

19 So are we going to be in a position of constantly
20 reopening discovery for depositions of new damage
21 jurisdictions? There should be a stopping point. We're four
22 years past the alleged defamation. It's very prejudicial to
23 OAN to do this on the close of discovery and put us in the
24 position we're in.

25 So we're asking the Court to strike those four newly

1 added jurisdictions as tardy and under Rule 37(c)(1), which the
2 Court makes the requirements of 26(a) in terms of timely
3 disclosing fact witnesses.

4 THE COURT: When did you receive or when were these
5 amended disclosures served, what time?

6 MR. EDWARDS: Let's see. It was Monday night. Let me
7 get the exact email in front of me.

8 All right. Let's see. It was at -- the supplemental
9 interrogatory answers were at 9:01 p.m., and the disclosures
10 themselves were at -- let me see the time -- for some reason, I
11 don't see the time. It was afterwards. 9:21 p.m.

12 THE COURT: Thank you, Mr. Edwards.

13 Dominion, who is going to be addressing this?

14 MR. SHACKELFORD: Your Honor, Stephen Shackelford. So
15 the reality of this, if past is prologue, Dominion is going to
16 keep losing business that it would not have lost in the
17 alternate universe where the 2020 election defamation never
18 happened.

19 When we go to trial we're going to hear their witness.
20 It's going to be part of the story. That is the presumption
21 behind -- likely the presumption behind damages as well.
22 That's how it was in the Fox case, is that Dominion --
23 (indiscernible) -- and they are not getting any new business.
24 (Indiscernible) -- despite the one example in deposition that
25 Mr. Edwards referenced, Dominion salesperson was baffled, you

1 can see the answer, saying they chose to go with a more
2 expensive, less good product over us, which doesn't make any
3 sense to Dominion, other than if you look at the
4 extracurricular issues that the -- (indiscernible.)

5 When OAN served interrogatories on us, instruction
6 number five says you are obligated to keep updated to and
7 through trial, so as we continue to suffer losses that are
8 substantially in part because of the defamation, we intend to
9 keep supplementing and providing information about those.

10 I'm not sure how we go to trial if we're not allowed
11 to talk about losses that continue to occur up until trial. I
12 suppose we can just say losses have continued to occur and we
13 can't tell you about them. I certainly don't want the jury to
14 think the losses stopped, because they haven't and they're not
15 stopping.

16 With these particular four, we went back to clients to
17 find out what other losses had occurred very recently --
18 (indiscernible) -- we were in the middle of quite a few
19 depositions. We did our best to update that. There will be
20 more. So in the Fox case, we updated until close to trial.

21 THE COURT: Well, how would Dominion purport to allow
22 OAN to test the assertions made in your initial disclosures? I
23 mean, typically initial disclosures -- I understand of course
24 they can be amended -- but typically those initial disclosures
25 serve to give the other party notice of witnesses and the

1 foundations of discoverable information.

2 So how do you purport to allow OAN to test any of the
3 information that Dominion added at the last -- at that late
4 time?

5 MR. SHACKELFORD: Our response is disclosures have
6 been extensive as to the specific jurisdictions, well over 100
7 jurisdictions have been in responses for months now, Your
8 Honor. And OAN chose to go out -- (indiscernible) -- they went
9 out and took depositions, and I imagine what they are going to
10 do is come to trial and play that tape and say this shows that
11 these people -- (indiscernible) -- defamation, and we're going
12 to show different parts of the tape and say, "Actually, this is
13 what these depositions show."

14 OAN didn't choose to depose every jurisdiction. And
15 us adding four more jurisdictions that we couldn't have known
16 about before they actually chose not to renew, Your Honor, we
17 couldn't have made those disclosures in June or July or August,
18 because in fact those losses had not happened.

19 So we would be open to -- I guess we would be open to
20 considering some way of late depositions of late added folks,
21 but it's going to keep happening, Your Honor, so we have to
22 come up with a way to deal with it. All I can say is these
23 losses will continue to happen. They have continued to happen
24 for years now, and we think we are entitled to let the jury
25 know the losses that continue up until the moment of trial.

1 THE COURT: Well, is it true that Dominion knew about
2 these four jurisdictions in late August and early September?

3 MR. SHACKELFORD: One of them apparently, the date on
4 which Dominion found out they had certainly lost was late
5 August, and the other ones, those dates were mid September,
6 yes, Your Honor.

7 THE COURT: So why didn't you alert OAN to this or why
8 did Dominion wait until after 9:00 p.m. on the night of the
9 close of discovery to amend its disclosures?

10 MR. SHACKELFORD: To my knowledge, Dominion's counsel,
11 Susman Godfrey, we went back to ask these questions and we
12 turned it around as quickly as we could. I'm not sure what
13 that would have changed, Your Honor, we but we are open to
14 potentially taking additional depositions, Your Honor. We
15 proceeded in good faith as quickly as we could.

16 THE COURT: Well, the time for depositions was the end
17 of September, but, you know, if Dominion is going to sit on
18 this information for whatever reason until that late time, then
19 OAN has a -- deserves a fair opportunity to test that
20 information. And what I don't want -- so I'm going to allow
21 OAN to conduct very limited discovery into these four
22 jurisdictions, but my preference would be that you all figure
23 out a way, if this is going to keep happening, to address it,
24 because at some point, the Court is going to cut this off and
25 you can't -- if there is a loss that occurs on the eve of

1 trial, you're not simply entitled to say it without giving the
2 defendants an opportunity to test that damages assertion. So I
3 mean, what would be your proposal?

4 MR. SHACKELFORD: I am happy to meet and confer with
5 OAN over this issue. I do think everyone would prefer not to
6 have to keep doing depositions up until and into trial. If
7 Your Honor is amenable to it, I think we should meet and confer
8 over how to handle this issue.

9 THE COURT: Well, you know, Mr. Edwards has a good
10 point that it has to stop at some point. And so I'm going to
11 order you all to talk when I take a break, just as you're going
12 to discuss the financial documents and come up with a plan, but
13 it's not going to be the case that Dominion is just able to
14 update this information and then OAN doesn't have a chance to
15 defend itself. So there has to be parity and some fairness
16 here.

17 And so I would like you all to talk about it and come
18 up with an idea. Otherwise, I will address it and figure out a
19 way to put an end to it at some point if there isn't an
20 agreement. So that's on your to do list. That's the second
21 item.

22 MR. SHACKELFORD: Understood, Your Honor.

23 THE COURT: Okay. All right. There is a request for
24 inspection that the Herring parties have made on Dominion for
25 certain source code. So I'll let OAN address this, but really

1 I just need one thing addressed, which is if the information is
2 not in Dominion's possession, custody or control, what does OAN
3 want the Court to do?

4 MR. EDWARDS: If the representation on record is they
5 don't have possession, custody or control of the source code,
6 which I think is what they said with respect to Louisiana and
7 Wisconsin, then that representation is what it is. They can't
8 produce what they don't have.

9 But the issue is the request for inspection of the
10 system that was used in Georgia, because they have not objected
11 to that in terms of not having the equipment or the systems.
12 They just say it's burdensome, they don't have to do it. And
13 the reason they should be required to do it, Your Honor -- and
14 just so you know, we have agreed to a source code review, which
15 has been completed. We have done that source code review under
16 your protective order that was signed earlier, so that's
17 completed.

18 The source code is a static picture of just the
19 program language that generates the code, is actually compiled
20 and used in the machines. What our expert really needs is the
21 ability to have a plugged-in machine, a ballot tabulator, so
22 that they can create an election project, a ballot, make their
23 selection, scan it, tabulate it, and look at the results,
24 because that's the only way they are going to be able to
25 determine how this software actually functions in an

1 operational environment.

2 That's very important to them because there were
3 issues in the 2020 election which were kicked off primarily in
4 Michigan where there was a vote miscount. There was actually
5 vote flipping from one candidate to another caused by what we
6 believe, and other experts believe, was a software defect, an
7 error. We want to be able to simulate and recreate that which
8 occurred. That's one reason the expert would like it.

9 So it's really to be able to test the functionality.
10 It's like if you had a computer and some plug, you could look
11 at the computer and it's only going to tell you a certain
12 amount of information. You plug in the computer and you're
13 able to run it, you can -- (indiscernible) -- functionality in
14 a real environment.

15 We made a very specific request of the items we needed
16 to be able to do this, and we're happy to work with Dominion to
17 protect whatever they think is necessary, whatever procedures
18 they want in place to ensure it's done in a confidential
19 manner. We're happy to have those conversations, but we think
20 we're entitled to at least be able to see an operational voting
21 system that they were using in 2020.

22 THE COURT: Now, the theory for OAN seeking this
23 information is that it goes to the truth of the statements and
24 that is the defense; is that right?

25 MR. EDWARDS: That's partially it, Your Honor. The

1 theory of defense is actually an essential part of it, but
2 there is also the reporting that was done, broadcasts that were
3 made involved glitches that occurred in three states, one being
4 in Antrim County. To be able to reproduce what happened in
5 Antrim County, you have to be able to -- (indiscernible) --
6 through the components of the system, and that's what our
7 expert would like to be able to do.

8 THE COURT: You kind of hit right on my next question,
9 which is the publishers of the statements didn't have access to
10 source code, did they? Isn't what's relevant what the
11 publishers knew or didn't know or relied on or didn't rely on
12 when they made statements?

13 MR. EDWARDS: That gets to the actual malice inquiry.
14 It goes until the time of trial. And so what actually the
15 system is capable of doing or may have done is relevant until
16 the time of trial.

17 THE COURT: All right. Dominion -- so let me just
18 make sure I understand what the request is. So the request is
19 with respect to three different jurisdictions, is it Louisiana,
20 Wisconsin and Georgia, right?

21 MR. EDWARDS: Your Honor, if the representation of
22 Dominion is that they can't produce and make available what was
23 in Wisconsin and Louisiana, then that is the representation
24 that we rely on.

25 THE COURT: So I rely -- I'm going to take that

1 representation as well, because I can't order Dominion to
2 produce something that is not in its possession, custody or
3 control, unless there is a viable argument that that statement
4 is not true, which I'm not hearing.

5 With respect to Georgia, let me hear from Dominion as
6 to what the argument is.

7 MR. SARGENT: This is Edgar Sargent, Susman Godfrey on
8 behalf of Dominion on this issue.

9 Mr. Edwards is correct, we produced all the source
10 code that they requested that is in our possession. That
11 actually does include the Wisconsin system, which although it
12 is an old system, it was not developed by Dominion itself, we
13 did have the source code for it so we were able to produce.

14 Mr. Edwards' expert spent three weeks at our office in
15 Houston examining the source code for that system and for the
16 Georgia system and for the Michigan system, and for the Arizona
17 system and for the Nevada system, and for every system of
18 Dominion that was at use in any swing state in the 2020
19 election.

20 What Mr. Edwards is asking for now is for us to set up
21 a -- it's called an EMS or election management system. It's
22 essentially a computer, a laptop, Windows, that allows the
23 jurisdiction to program the ballot working devices and
24 tabulators that are used by the voters.

25 And again, to be clear, this request for inspection

1 was served six months after the discovery document production
2 deadline in this case. We did agree to produce not only the
3 source code, but copies of the ballot devices, the tabulators
4 and machines used by the voters in the election. What we are
5 struggling with is finding a reasonable way to produce a full
6 election management system allowing the programming of the
7 complete election.

8 There is no dispute at all anywhere of what happened
9 in Antrim County. Everybody knows how the errors caused in
10 Antrim County were caused, and everyone has known that since
11 about 24 hours after the election ended. That's never been in
12 dispute. If OAN experts want to try to recreate that, they are
13 not going to be doing anything except following steps that have
14 already been set out in the documents repeatedly and it's not
15 going to prove anything.

16 Producing this election management system is an
17 extremely complex and burdensome process. It's going to
18 require negotiation of a supplemental protective order. Just
19 the installation and configuration of this system takes even
20 experts at Dominion 10 to 12 hours. Who is going to make the
21 decisions on how it's configured, us or them? Who is going to
22 decide which module is getting included? Once they start the
23 inspection and their process of installing additional software,
24 connecting it to the internet, the other things they want to
25 try to prove, how does that get monitored? Do we get a log of

1 all the activities they conduct? Does it get done in our
2 offices?

3 Your Honor is exactly correct that what OAN's experts
4 need, if they are looking for evidence about how this system
5 works, is the source code, the software that determines how it
6 counts votes. That was all made available to them. They spent
7 weeks looking at it. They asked our experts for copies of it.
8 What they don't need to do is program some election and play
9 some game that shows a bunny dancing video that sings Call Me
10 Maybe or something just to show what kind of manipulation their
11 experts are going to do with our system.

12 This case is not about whether or not our systems are
13 subject to hacking or manipulation. Their experts were given
14 unfettered access for a month. This case is about claims that
15 were made by OAN that our system was designed to cheat, was
16 designed to commit fraud and manipulated vote totals.

17 There is no need for us to go through this elaborate
18 negotiation with them about the terms under which they can
19 manipulate the computer system just so they can show something,
20 exactly as Your Honor pointed out, was not available to their
21 broadcasters and guests on their shows at the time they made
22 the inflammatory statements. This material is irrelevant. The
23 burden this late in the case on attempting to come up with a
24 procedure for doing it is simply not justified.

25 THE COURT: So this request would require Dominion to

1 actually affirmatively create a system as opposed to just
2 permit inspection of something that already exists?

3 MR. SARGENT: Absolutely, Your Honor.

4 THE COURT: I'm going to deny the request for the
5 Georgia information. This is not -- again, this is not a
6 situation where you're simply requesting permission to inspect
7 something that already exists in its current state. It's
8 actually a request that's designed, or that maybe is not
9 designed to, but would require Dominion to actually create
10 something. And I do think that it's overly -- I mean, I think
11 that it's not proportional to the needs of the case, especially
12 because I don't think that given everything that has been
13 produced already that this would be of marginal relevance. So
14 I'm going to deny that request.

15 Mr. Sargent, you have got to get a more updated pop
16 culture reference, my friend.

17 MR. EDWARDS: Your Honor, I'll say on the record we
18 are not intending to do any bunny dancing videos.

19 THE COURT: I didn't think you were, but we can come
20 up with something better than Call Me Maybe. That's fine.

21 The next issue is the Steve Owens deposition. This
22 one I'll just tell you all, you know, I have read the
23 materials. I don't need argument on this. I'll simply say
24 that based on what I've read, OAN is not required to take
25 Mr. Owens as Dominion wants to produce him.

1 OAN is entitled to take a deposition in person of
2 Mr. Owens, and you know the fact that he made himself available
3 by Zoom and another party took him up on that deposition is
4 fine, but OAN is entitled to take the deposition of the witness
5 in the manner it wishes.

6 And so I'm going to allow the deposition to go
7 forward. It seems that Mr. Owens can make himself available in
8 October. Is that still correct?

9 MR. SHACKELFORD: Yes, Your Honor. I'll check with
10 him, but I'm sure we can find a date in October.

11 THE COURT: I would -- I don't know exactly what
12 Mr. Owens knows, but I will note that Staple Street Capital is
13 a majority owner of Dominion Voting, by Dominion's own
14 concession. So given that he's one of the co-founders, I don't
15 think that he's just an ancillary witness. It may be that he
16 doesn't know much, but if OAN wishes to take that deposition in
17 person, it's entitled to do so. I would ask you all to confer
18 on scheduling that deposition in October.

19 MR. SHACKELFORD: Given that OAN has now two
20 transcripts of Mr. Owens' depositions in which he talked about
21 how much he doesn't know about, could we meet and confer with
22 OAN about some reasonable time for us, so he doesn't have to
23 sit for an all-day deposition?

24 THE COURT: You all can meet and confer if you wish,
25 but I don't need to hear this dispute again. You know,

1 Mr. Babcock, Mr. Edwards, you know, I don't know why you would
2 need seven hours with this gentleman. I don't know if you have
3 an idea of how long you would need with him, but I assume and
4 expect that OAN is not going to just be, the old phrase that I
5 used to use when I was in practice is walking the dog, right,
6 just having the witness sitting there. And I don't know if you
7 all still use that. I shouldn't be talking to Mr. Sargent
8 about outdated phrases.

9 MR. BABCOCK: I was going to say, Judge, you can do
10 better than walking the dog.

11 THE COURT: That's really old, isn't it?

12 MR. BABCOCK: We got a saying that is "that old dog
13 won't hunt."

14 THE COURT: Mine is a modification of that one. Yeah,
15 I assume that OAN is going to only be keeping Mr. Owens for how
16 long -- for however long it needs.

17 So certainly, Mr. Shackelford, if you wish to try to
18 meet and confer with them, but my ruling is what it is and so I
19 don't intend to revisit this dispute, at least as to the taking
20 of his deposition.

21 There is I think an undisputed issue with respect to
22 third-party witnesses, Mr. Johnson and Ms. Holler. Are the
23 parties simply asking that the Court bless the taking of their
24 depositions beyond the September 30th date?

25 MR. SHACKELFORD: Your Honor, you would have to

1 because you have extended the order that Dominion requested,
2 which includes certain Powell-related depositions being until
3 December, so I think you mooted this issue.

4 THE COURT: Okay. The next issue is Ms. Powell or the
5 Powell defendants' objections to producing certain documents,
6 so I will hear from Dominion on this. This is Dominion RFPs
7 43, 76, 77 and 84. And whoever is going to address this -- I'm
8 sorry. It's 43, 49, 76, 77, 84 and 88.

9 And what I would ask is whoever from Dominion is going
10 to address this to please just state into the record when the
11 requests were served and when the Powell defendants responded.

12 MR. SHACKELFORD: Yes, Your Honor, this one -- I'm
13 looking through my notes. These requests were served late last
14 year. I'll give you the exact date in one moment.

15 THE COURT: I'll just note that RFP 90 is in this as
16 well. I think I did not say that.

17 MR. SHACKELFORD: Okay. Requests were served --

18 THE COURT: Is it October 26, 2023?

19 MR. SHACKELFORD: I think that was when they responded
20 to them. I'm not sure why I can't find it, Your Honor. I
21 apologize. So these requests were served on, you're right,
22 October 26, 2023, and Ms. Powell responded December 16, 2023.

23 THE COURT: Were they due under the standard 30 days?

24 MR. SHACKELFORD: Yes, Your Honor.

25 THE COURT: All right.

1 MR. SHACKELFORD: As I recall, we sent several emails
2 asking Ms. Powell, "Hey, you're late, what's going on," and
3 there was no answer, and then finally they served a response in
4 mid December 2023, December 16, 2023.

5 THE COURT: Go ahead.

6 MR. SHACKELFORD: Your Honor got the parties
7 back-and-forth, our positions on these requests. The requests
8 are for some financial information, but there is information
9 such as -- (indiscernible) -- websites, Ms. Powell's websites,
10 certain book sales and other merchandise sales we believe were
11 connected to Ms. Powell's newfound notoriety in November of
12 2020, when she became a much more national figure because of
13 her promotion of false conspiracy theories.

14 There is a network piece, which I assume Your Honor
15 would handle in the same way Your Honor handled for the OAN
16 defendants. There is data analytics from Twitter, all of which
17 goes to the reach of Ms. Powell's defamatory statements, which
18 is relevant to questions of damages.

19 Our expert is doing impact analyses on some of these
20 defendants, so it's all very relevant, and the only answer that
21 Ms. Powell's counsel gave in their opposition to this was we
22 waited too long to raise this and the net worth is premature.
23 They didn't address the other substantive issues.

24 We would ask Your Honor -- we're asking --
25 (indiscernible) -- if there is a concern of overbroad, we're

1 happy to confer.

2 THE COURT: Have the Powell defendants been deposed?

3 MR. SHACKELFORD: No, Your Honor. They have not been
4 and they will not be because we've past the time to be deposed.

5 THE COURT: All right. Then I have read the Powell
6 defendants' submission on this. Is there anything that the
7 Powell defendants would like to add?

8 MS. CINNAMOND: Yes, Your Honor. This is Teresa
9 Cinnamond. I appreciate that the OAN issue with respect to
10 financial records is being dealt with with a further meet and
11 confer, but we would ask the Court to consider that the Powell
12 case is its own case and whether or not the financial records
13 of Ms. Powell are discoverable in this case depends upon
14 whether Dominion will be able to prove that they are relevant
15 to actual malice.

16 I think Your Honor had said she doesn't want argument
17 on the issue of punitive damages, whether they are relevant to
18 punitive damages is premature, so I'm not going to argue that.
19 I think Your Honor knows where she's going on that. But I do
20 think that the Powell case is a bit different than the OAN case
21 with respect to whether -- or may be a little different. I
22 might argue -- my argument is also for OAN, but I'm not arguing
23 for OAN, but for Ms. Powell, the plaintiffs' request for
24 financial records are not relevant to Dominion's claims of
25 actual malice. They are seeking a broad array --

1 THE COURT: Ms. Cinnamond, I'm sorry to interrupt.
2 Before you launch into that, can you just confirm that the
3 Powell defendants did not timely serve any objections to this?
4 Why shouldn't I deem those waived?

5 MS. CINNAMOND: Well, there is good cause not to deem
6 them waived, Judge. The amount of time of the delay was not
7 extensive, and the responses and objections to the third set
8 were served on December 11, 2023. That date was stated
9 incorrectly. I think under the federal rules if there is good
10 cause, you know, the untimeliness, the brief untimeliness
11 period should not result in disclosure of such a broader array
12 of records that are not really discoverable, because they are
13 not relevant to the issues, the elements of actual malice.

14 THE COURT: Okay. Is there anything else?

15 MS. CINNAMOND: Yes. I wanted to point out to Your
16 Honor that there is case law in this district that holds that
17 absent evidence that the publisher's motive is coupled with
18 other evidence that the publisher is willing to publish false
19 allegations, improper motive alone is not probative of actual
20 malice.

21 In my view, Dominion cannot get -- I appreciate that
22 Your Honor asked Mr. Shackelford to state which of the
23 discovery requests were relevant solely to punitive damages as
24 opposed to relevant to actual malice, but I think here Dominion
25 is without evidence that Ms. Powell had a high degree of

1 awareness of probable falsity or that she entertained serious
2 doubts as to the truth of the publications.

3 So without that connection, there is case law in DC,
4 including the *Jankovic* case that holds that that would be
5 improper to allow discovery of Ms. Powell's financial records.
6 So in addition to the requests being premature on the issue of
7 punitive damages, I don't think that connection is there to say
8 that, as Mr. Shackelford said, that it's all relevant to actual
9 malice.

10 I know it's in a nuanced argument, but I think it's
11 important, and I think Ms. Powell is in a slightly different
12 situation than perhaps the news networks. As you saw in the
13 Fox case, there apparently was evidence of knowledge of falsity
14 and evidence that they entertained doubt as to the truth of
15 publication on networks, but I don't think they have evidence
16 against Ms. Powell. And without that, I would say all of the
17 financial records discovery that's been sought, to the extent
18 it's not just overbroad, should be delayed until the issue of
19 punitive damages is properly before the Court.

20 THE COURT: Okay. Well, I do think this issue is
21 different from OAN, but not necessarily in the way that the
22 Powell defendants are seeing it. I think it's different
23 because Powell defendants did not object in a timely fashion.

24 And so I'm still going to narrow some of the requests,
25 but I'm not going to -- I am going to compel the production of

1 documents that go toward actual malice, so I'm going to
2 overrule any objections that the Powell defendants have made at
3 this time.

4 I'll just note that when the -- when the dispute was
5 submitted to me, none of these particular arguments were made,
6 rather the arguments were focused on an incorrect statement
7 that the Court ordered all remaining discovery disputes to be
8 submitted to it on or before September 18th. I don't believe
9 that's what I did. I instead had ordered that the parties just
10 simply give me a joint report telling me what disputes were
11 still pending.

12 In fact, I did consider and decide disputes up until
13 just a couple of days I think before September 30th. So that
14 said, what I will say is that any documents that are going to
15 go solely to punitive damages are going to be -- that discovery
16 is going to be deferred, along with the other defendants, but
17 with respect to any documents that go to actual malice, again,
18 the theory -- well, Dominion is entitled to discover this
19 information and to make its case. Whether it will draw that
20 connection is for another day, it's not up to me.

21 So I'm looking at the request. Certainly, I would
22 think requests 88 and 90 shall stand the way they are drafted.

23 77 shall stand.

24 76 shall stand the way it's drafted.

25 And 49 shall stand the way it's drafted.

1 43 and 84 go to -- ask for all bank records and all
2 financial statements and all assets, net worth, financial
3 condition, source of income. I do think that's overly broad.

4 So Mr. Shackelford, I would like you to talk to
5 Ms. Cinnamond. You're going to be talking to Mr. Babcock or
6 Mr. Edwards anyway. I would think the same principles that
7 you're going to apply in trying to figure out a way to narrow
8 those should apply as well to Powell, but I will allow Dominion
9 to discover the information for its attempt to make a showing
10 of actual malice, but I think that's probably more than you
11 need for that point. So when I take a break, if you could have
12 that discussion with Ms. Cinnamond as well, I'd appreciate it.

13 MR. SHACKELFORD: Will do. Thank you, Your Honor.

14 MS. CINNAMOND: Before you go on, I just wanted to
15 make sure the Court is aware of the particulars of our
16 submission when the Court ordered that all remaining discovery
17 disputes be brought to the Court's attention in the
18 September 18th joint submission. Dominion didn't bring up and
19 hadn't brought up on multiple meet and confers that occurred
20 over a long period of time any of these problems with
21 Ms. Powell's objections to her financial records being subject
22 to discovery. And I think we did bring that to the Court's
23 attention in our submission. This was very sudden. We didn't
24 learn about any problem they had with her responses until a few
25 days before that discovery end date.

1 THE COURT: Okay. Well, I am aware of that and my
2 ruling stands. Dominion doesn't have to -- wasn't required to
3 bring this argument up immediately upon receiving the
4 objections and responses, although that would have likely been
5 preferable. It still raised this issue well in advance of the
6 close of discovery. All right.

7 There is a request to strike Dominion's amended
8 supplementary responses to Interrogatories 7 to 10. This is
9 from the Powell defendants. Is this the same issue as the
10 amended disclosures?

11 MS. CINNAMOND: Yes, it is, Judge. We received on the
12 evening of the 30th, the last day of discovery, we received at
13 10:19 p.m. supplemental log responses and supplemental Rule 26
14 responses.

15 THE COURT: Okay. So then -- go ahead.

16 MS. CINNAMOND: We compared side by side. I did
17 receive a subsequent email from Dominion's counsel saying that
18 they had provided that information to us, but I reviewed the
19 responses side by side with the four counties that Mr. Edwards
20 cited to, were not included in the prior responses, so it's the
21 same issue, Your Honor, the four new counties.

22 THE COURT: Okay. I would like you to speak to
23 Mr. Shackelford at the break as well to deal with all of these
24 issues in a uniform way so when -- I'll ask that OAN, Dominion
25 and the Powell defendants speak together as well, or if

1 Dominion wishes to speak to Ms. Cinnamond separately, that's
2 fine.

3 I'm going to take a brief break, and I believe, unless
4 I'm wrong, that we only have one issue left, which is about the
5 deposition I referenced earlier today. Is that right?

6 MS. BROOK: Your Honor, this is Davida Brook from
7 Susman Godfrey. That is right, based on the very helpful
8 agenda that the Court provided. I did just want to state for
9 the record, though I believe this is all well-known, just
10 because the Court's email said there are no current disputes in
11 the following cases, and it lists among them Mr. Byrne's case,
12 there are disputes that have been put to the Court in that
13 case, so we understand they are not up today. We just wanted
14 to make clear for the record that there are in fact disputes
15 there.

16 THE COURT: I am aware of that, but I'm also aware of
17 the fact that Mr. Byrne has appealed my order of August 13th,
18 and so I'm going to let that appeal -- I was not inclined to
19 stay all discovery, but I will allow this dispute to be
20 deferred until we have further word on the status of the
21 appeal. So I think --

22 MS. BROOK: That was our perception, Your Honor. I
23 appreciate clarification.

24 THE COURT: I think in fairness to Mr. Byrne, once
25 that appeal is resolved, then I will take up this dispute in

1 due course.

2 All right. Thank you. Okay. So when I come back,
3 I'm going to seal the courtroom. And I have read all the
4 materials on this last remaining dispute and so I don't need
5 extensive argument, but I will allow each side to that last
6 dispute to be heard, but I ask that you keep it under three
7 minutes, because I have read everything that has come in. So
8 that portion of the hearing will be under seal.

9 And then I will also hear at that time from the
10 parties on the issues that I have asked them to confer on.

11 Mr. Shackelford, does 15 minutes give you enough time?
12 I know I'm keeping you on a tight time schedule.

13 MR. SHACKELFORD: (Indiscernible.)

14 THE COURT: So I'll ask -- so then I'll be back in
15 about 15 minutes and we will deal with the last issue and then
16 deal with any cleanup on those couple of issues I have asked
17 you all to talk about. Thank you.

18 (Recessed from 3:31 p.m. to 4:01 p.m.)

19 DEPUTY CLERK: Good afternoon, Your Honor. We are now
20 back on the record.

21 THE COURT: Mr. Shackelford, did you have an
22 opportunity to confer with opposing counsel on the issues that
23 we talked about?

24 MR. SHACKELFORD: We did, Your Honor. I think we have
25 reached an agreement.

1 THE COURT: Okay. Great. Do you want to walk me
2 through whatever you all decided?

3 MR. SHACKELFORD: Yes. So I'll start with RFP 7 and
4 78, we agreed to limit the timeframe for the financial
5 statements to January 1st, 2019 to the present. And we agreed
6 our request is that they produce at least quarterly financial
7 statements that show profits and losses for all those years,
8 except for 2020 and 2021, we're requesting monthly. Mr.
9 Babcock is going to check what they have. He thinks they might
10 only have monthly. That's generally the agreement.

11 MR. BABCOCK: Your Honor, that's correct, with the
12 caveat that I'm not sure that financial statements exist. To
13 the extent they do, then Mr. Shackelford has correctly
14 referenced our agreement on this.

15 THE COURT: Okay. Great.

16 MR. SHACKELFORD: (Indiscernible.)

17 THE COURT: Just a moment. We're having a glitch on
18 our end and the court reporter is having an issue hearing.
19 Just a moment.

20 (Pause)

21 THE COURT: I think we are good now. My computer is
22 frozen again. Just a moment, please. Usually we don't have
23 issues on this end, but it might be our issue.

24 I think we might be all right now.

25 Mr. Babcock, you were saying that you are going to

1 look into monthly statements for those two years and
2 Mr. Shackelford was hoping that those exist.

3 MR. BABCOCK: Right. And he made the point, and I
4 agree with it, even if they don't call it monthly financial
5 statements, they call it something else, if it's an equivalent,
6 then we'll get it to them.

7 THE COURT: Very good.

8 MR. SHACKELFORD: RFP 79, documents, communications to
9 obtain financing, funding or investors from 2010 to present.
10 We agreed to limit that to 2019 to present, with one caveat,
11 which is Mr. Herring has testified that they have periodically
12 talking to potential investors over the years or in the last
13 several years. And what we don't know is May 2018 was a huge
14 year. I said I would like to go up to 2018 -- (indiscernible)
15 -- to do a search.

16 So either 2018 or 2019, depending on what
17 Mr. Babcock's investigation shows, and we would ask for pitch
18 checks to potential investors or financiers, and then some sort
19 of ESI or communication with potential investors from that time
20 period. We can't agree on now, but we have to be able to see
21 what we can agree on in terms of search terms and review and so
22 forth on that discrete issue.

23 MR. BABCOCK: Yes. And how much activity there was,
24 but, yeah, generally, Judge, he's accurately stated our
25 agreement.

1 THE COURT: Okay.

2 MR. SHACKELFORD: And then RFP 80 and 81, tax returns
3 and financial statements from the individual defendants. We're
4 asking for financial statements. Counsel for the individual
5 defendants don't know whether they keep personal financial
6 statements. They may. If they do, that's what we're asking
7 for from the time period of November 1st, 2020 through the
8 present.

9 If any of those defendants don't keep any of that and
10 the only records they have are tax returns, we have offered to
11 have them copy their tax returns. If they were to prepare a
12 simplistic document that takes the relevant sort of profit and
13 loss income information off of that, if they will swear to it,
14 we will accept that as well.

15 MR. BABCOCK: Judge, that's a little bit of a loose
16 end. Chanel Rion is a young woman. I don't know if she has
17 financial statements or not. Maybe she does. But I have to
18 talk to her about whether she has created a document and would
19 swear to it. We're not swearing to financial statements, so I
20 don't know why she would have to swear to it, but in any event,
21 that's a little bit of a loose end with respect to her. If
22 she's got a financial statement, that's fine, we'll produce it
23 pursuant to the agreement.

24 THE COURT: Okay. And so that takes care of
25 everything with respect to OAN.

1 MR. SHACKELFORD: On financial statements, Your Honor.
2 You asked us to confer on the four new counties. What
3 Mr. Edwards proposed, which is fine, we know who the relevant
4 person is in each of those four counties, and we don't object
5 to OAN taking their deposition sometime within the discovery
6 period to December 14th.

7 For any other losses between now and trial, Your
8 Honor, our proposal was, I think, accepted generally, was we
9 will tell Dominion if there are other losses suffered that in
10 our view was substantially caused by the defamation, including
11 the defamation of OAN broadcasts and so forth.

12 We disagree on how to prove that, but we understand,
13 of course -- (indiscernible) -- if there is another loss after
14 today that Dominion learns of, Dominion will let OAN and the
15 Powell folks and the other defendants know in two weeks of that
16 notice in good faith.

17 We will consent to them submitting those folks for
18 documents or deposition testimony. We recognize as we're
19 getting very close to trial, we will revisit this as we're
20 getting closer to trial, but for now that is where I think we
21 have landed.

22 MR. BABCOCK: The only thing -- I think you said this,
23 Mr. Shackelford, but the notice to us about an additional
24 jurisdiction, there would have to be a good faith belief by
25 Dominion that they have caused damage from that jurisdiction.

1 THE COURT: Yes, he did.

2 MR. BABCOCK: We have been through a lot of counties
3 where they say they never heard of OAN, wasn't because of
4 defamation, and so we don't want to have to do that
5 particularly close to trial, but if you have good faith belief
6 that OAN caused this damage, then, yeah, everything else --

7 MR. SHACKELFORD: To be clear, Your Honor, we disagree
8 with that. We will do it in good faith only ones that we
9 believe OAN contributed to the particular loss.

10 THE COURT: Mr. Shackelford, could you repeat the last
11 thing you said because we're having a little bit of a glitch on
12 this side. Just a moment, everyone.

13 (Pause)

14 THE COURT: Am I still frozen on your end?

15 MR. BABCOCK: We can't hear the Court.

16 MR. SHACKELFORD: Your Honor --

17 THE COURT: There is something going on here on our
18 end and the court reporter has I think managed to do her best
19 to get everything down, but I don't want us going into this
20 next dispute with glitches, so I would just ask everyone to sit
21 tight for a moment, let me figure out on this end what we can
22 do.

23 (Pause.)

24 THE COURT: To the extent the parties didn't hear me,
25 we're trying to figure out what's happening here, because this

1 is unusual for the court's system, and so I assume it's the
2 court's network that's the problem, because all of you are
3 freezing to me and that means that it's on our end.

4 And so we're just calling IT, so if you guys just give
5 us a moment, please.

6 (Pause)

7 THE COURT: Okay, Counsel. Thank you for your
8 patience. We're actually going to come and have our IT restart
9 our system, which will take about five minutes. So apologies
10 for the inconvenience, but I would just ask everyone to log off
11 and log back on at 4:30 p.m.

12 What's happening on our end, just so you all know, is
13 Madam Court reporter is not -- for some reason, you all are
14 freezing on our end like every 20 seconds and she's having a
15 really hard time getting this down.

16 This next issue is important for us to get a full
17 complete record. I assume everyone wants that. And so I don't
18 think we'll be on this hearing past 4:45 or 5:00, because I'm
19 going to resolve the last issue pretty quickly, but if that
20 poses a problem for anyone, let me know, but I would just ask
21 everyone to log off and log back on at 4:30.

22 Is that timing okay for you all? I know we have been
23 going a little while, but I would like to get these things
24 resolved for you guys. Thanks. So we'll see you all at 4:30.

25 (Recessed from 4:16 p.m. to 4:29 p.m.)

1 DEPUTY CLERK: Good afternoon, Your Honor. We are
2 back on the record.

3 THE COURT: Okay. Mr. Shackelford, I think we were in
4 the middle of you putting into the record your discussions with
5 OAN and the Powell defendants. Where we left off I think
6 before the -- before things started getting really glitchy is
7 that you were going to -- you were stating what the agreement
8 was if there are additional losses beyond the four that
9 Dominion identified on September 30th.

10 Could you just repeat what that agreement is, so if
11 there is anyone beyond the four.

12 MR. SHACKELFORD: Yes, Your Honor. So Stephen
13 Shackelford for Dominion. The agreement is that Dominion will
14 inform OAN within two weeks of learning of any other losses,
15 and same for the Powell defendants, all defendants frankly, any
16 other losses that we could have a good faith basis to believe
17 that the various defendants were a substantial factor in
18 causing those losses for Dominion, and then we will consent to
19 the defendants asking for documents or deposition to any such
20 later arising losses.

21 THE COURT: Okay. And then with respect to the Powell
22 defendants, what were your discussions, Mr. Shackelford?

23 MR. SHACKELFORD: I think the Powell defendants, we're
24 on the same page on that one I just finished outlining. And
25 then for the Powell defendants we discussed the request for

1 Ms. Powell and Powell, PC's financial statements, which I think
2 Your Honor sent us back to meet on 43 and 84.

3 And we agreed that Your Honor's ruling for now
4 information about Ms. Powell's net worth is not something she
5 has to produce. But for 43, which is bank records and
6 financial statements, our request is that they simply -- we
7 don't know what form they have these in. The date range was
8 from January 1st, 2020 to the present.

9 So what I think we got is production of whatever
10 financial records that she keeps that show profits, losses,
11 income for various sources, and they want the right,
12 Ms. Powell, the right to redact information that is plainly
13 unrelated to Ms. Powell's activity in issuing lawsuits. We are
14 open to that.

15 For example, like her Social Security check, for
16 instance, if she gets one, or child support if she gets that,
17 we're not getting information on those sources of income
18 specifically. Other choices to redact I think we have to meet
19 and confer on specific decisions to redact additional sources
20 of income. We have to meet and confer about it.

21 And lastly, we do think we're entitled to and we want
22 the top line number of her income each year, because,
23 obviously, if we show the jury that she made \$5 million from
24 fundraising and so forth over a six-month time period, it is
25 relevant, that is 95 percent of her income during that time

1 period or 5 percent over that time period.

2 So while we're not asking for other things like child
3 support or specific numbers for Social Security income, we do
4 think we have to have the top line number, and I think there
5 was not an objection to that also. The only issue is the
6 redaction part.

7 MR. MOONEY: This is Josh Mooney. I think what
8 Mr. Shackelford is saying is for the most part correct. Just
9 to confirm or maybe word it in a different way, we understand
10 when the Court come down on its decision, what we're looking at
11 is the production of financial statements, bank statements,
12 sources of income is really to relate that to income or debt
13 that arises that out of the statements for which she's being
14 sued.

15 Another example is Ms. Powell represented Michael
16 Flynn in a treason case before her involvement in the election.
17 The time period in question, her income from that
18 representation would fall within the scope of the request, but
19 we do not believe that that information is either relevant or
20 responsive to the claims, the defamation claims alleged by
21 Dominion in this lawsuit. So what we're looking to do, we
22 understand that Dominion wants to see whether or not Ms. Powell
23 made money off statements that she made. We understand the
24 Court is going to compel production of documents to the extent
25 they exist that would reflect that.

1 What we're simply asking is that that production,
2 either through limitation of production or through redaction,
3 is limited just to that source of income or any financial
4 statements or bank records that relate to moneys that go back
5 to statements that she -- or statements she made for which
6 she's being sued.

7 If I may, Your Honor, I did want to raise one thing
8 about counties, but we'll table that and address this issue
9 first if that's what the Court would like to do.

10 THE COURT: That limitation is okay, but that's where
11 I think you're going to have to have discussions with Dominion
12 on the redactions. And so I would want you all to meet and
13 confer, because Dominion doesn't have to take your word that
14 whatever is redacted is unrelated. You'll have to provide some
15 information as to what it goes to.

16 So I would suggest that way of proceeding is in theory
17 generally okay, but you'll need to have discussions. So you
18 can't just redact something and then not share any information
19 as to what's been redacted so that Dominion can contest
20 whatever the redactions are.

21 MR. MOONEY: We agree with that, Your Honor. And we
22 agree with my colleague Mr. Shackelford's suggestion. This is
23 a little bit of a meet and confer and an involved issue, but
24 we're confident that we can work with Dominion's attorneys and
25 resolve anything without further Court attention.

1 THE COURT: You said there is an issue on the four
2 counties?

3 MR. MOONEY: We would also ask, to the extent as
4 production of document requests are ongoing, that to the extent
5 that Dominion does identify new counties which they allege did
6 not -- either cancel a contract or did not renew a contract
7 with Dominion because of statements made by Ms. Powell, that
8 they send internal communications or documents that are related
9 to that county's decision.

10 THE COURT: Well, was a request propounded from Powell
11 defendants before the close of discovery that goes to that
12 information?

13 MR. MOONEY: We can get that to the Court. I don't
14 have it in front of me. There is a request that's pending for
15 documents in essence supporting their damages claims.

16 THE COURT: Mr. Shackelford?

17 MR. SHACKELFORD: I'm not sure there is a request that
18 covers this, Your Honor, but we'll see what Mr. Mooney produces
19 on that.

20 THE COURT: Okay. All right. I mean, at some point
21 we need to cut this off, and, that said, if Dominion is going
22 to be relying on these documents for its damages, it has to
23 produce them. So why don't you all talk and then let me know
24 if I need to intervene on this issue.

25 MR. SHACKELFORD: We'll do our best to do what we can.

1 MR. MOONEY: Thank you, Your Honor.

2 THE COURT: Okay. Unless there is anything further,
3 I'm going to seal the courtroom. And we can address the last
4 issue. For what it's worth, no one is in the courtroom.

5 (Public proceedings concluded at 4:41 p.m.)
6

7 CERTIFICATE

8 I, Sonja L. Reeves, Federal Official Court Reporter in and
9 for the United States District Court of the District of
10 Columbia, do hereby certify that the foregoing transcript is a
11 true and accurate transcript, to the best of my ability, from
12 the original stenographic record of a videoconference, in the
13 above-entitled matter and that the transcript page format is in
14 conformance with the regulations of the Judicial Conference of
15 the United States.

16 Dated this 9th day of October, 2024.

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/s/ Sonja L. Reeves
SONJA L. REEVES, RDR-CRR
FEDERAL OFFICIAL COURT REPORTER

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