

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

SMARTMATIC USA CORP., SMARTMATIC)	
INTERNATIONAL HOLDING B.V., and SGO)	
CORPORATION LIMITED,)	
)	Index No. 151136/2021
<i>Plaintiffs,</i>)	
)	I.A.S. Part 58
-against-)	
)	David B. Cohen, J.S.C.
FOX CORPORATION, FOX NEWS NETWORK,)	
LLC, LOU DOBBS, MARIA BARTIROMO,)	Motion Seq. No. ____
JEANINE PIRRO, RUDOLPH GIULIANI, and)	
SIDNEY POWELL,)	
)	
)	
<i>Defendants.</i>)	

**FOX’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO COMPEL
GEORGE SOROS, ALEXANDER SOROS, AND OPEN SOCIETY**

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TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

LEGAL STANDARDS 7

ARGUMENT..... 8

 I. Fox’s Requests Seek Documents that Are Material and Necessary to Fox’s
 Defense to Smartmatic’s Defamation Claims..... 8

 A. The Requested Documents Relate To Substantial Truth 8

 B. The Requested Documents Relate To Smartmatic’s Astronomical
 Damages Claims 17

 II. The Soros Group’s Arguments for Refusing to Produce Documents are
 Meritless..... 19

 A. New York Disclosure Requirements Apply to Both Parties and
 Nonparties Alike 19

 B. The Soros Group Cannot Satisfy Their Burden to Demonstrate
 That the Requested Discovery is “Utterly Irrelevant” 20

 C. The Soros Group Fails to Identify Any Credible Burden That
 Would Outweigh Fox’s Need for the Discovery 22

CONCLUSION..... 23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cheatum v. Wehle</i> , 172 NYS2d 62 [3d Dept 1958]	21
<i>Matter of Estate of Mabie</i> , 71 Misc 3d 1210(A) [Sur Ct, Albany County 2021]	7
<i>Fashion Boutique of Short Hills, Inc. v Fendi USA, Inc.</i> , 75 F Supp 2d 235 [SD NY 1999], <i>aff'd</i> , 314 F3d 48 [2d Cir 2002]	17
<i>Gottwald v Geragos</i> , 110 NYS3d 893 (Table), 2018 WL 5624349 [Sup Ct, New York County 2018, No. 162075/14]	17
<i>Gottwald v Sebert</i> , 172 AD3d 445 [1st Dept 2019]	17
<i>Gross v Hazan-Gross</i> , 201 AD3d 587 [1st Dept 2022]	20
<i>Impact Car Park, LLC v Mut. Redevelopment Houses, Inc.</i> , 2021 NY Slip Op 30950[U], 2021 WL 1156598, [Sup Ct, New York County Mar. 26, 2021, No. 653591/2019]	7, 19
<i>Matter of Kapon v Koch</i> , 23 NY3d 32 [2014]	7, 20
<i>State ex rel. Murray v Baumslag</i> , 134 AD3d 451 [1st Dept 2015]	20
<i>Nolan v State</i> , 111 NYS3d 802 (Table), 2018 WL 6497131 [Ct Cl 2018, No. 123283]	17
<i>Rent Stabilization Assn. of N.Y.C., Inc. v McKee</i> , 2020 NY Slip Op 32416(U), 2020 WL 4258739, [Sup Ct, New York County July 24, 2020, No. 155789/2018]	8
<i>Rivera v NYP Holdings Inc.</i> , 63 AD3d 469 [1st Dept 2009]	7, 17, 21
<i>Shanahan v Bambino</i> , 271 AD2d 519 [2d Dept 2000]	7

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120 AD3d 28 [1st Dept 2014].....8

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29 AD3d 104 [1st Dept 2006].....20

Rules

N.Y. C.P.L.R. § 3101[a]7

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N.Y. C.P.L.R. § 3124.....7

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<https://www.wsj.com/articles/SB117867011219196576>.....9

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Fox News Network, LLC, Lou Dobbs, Maria Bartiromo, and Jeanine Pirro (collectively, “Fox”) bring this motion under N.Y. C.P.L.R. §§ 2308, 3124 to compel production of documents from non-parties George Soros, Alex Soros, and Open Society Institute (also known as Open Society Foundations). The requested documents are material and necessary to Fox’s defenses against defamation claims brought by Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited (collectively, “Smartmatic”).

INTRODUCTION

George Soros, Alexander Soros, and their special interest foundation, Open Society Institute (collectively, “the Soros Group”), refuse to search for or produce any documents in their possession related to George Soros’s affiliation with voting machine company Smartmatic stretching back nearly a decade.¹ Smartmatic claims Fox should pay \$2.7 *billion* in defamation damages based, in part, on allegedly defamatory statements regarding connections between Smartmatic and George Soros made on a handful of Fox broadcasts in November and early December 2020. To be clear, Smartmatic’s astronomical multi-billion-dollar damages allegations, which are untethered to the audited data in Smartmatic’s *own publicly available financial statements*, are pure fantasy. *See* NYSCEF.Doc.No.1508, Updated Expert Report of Daniel R. Fischel, ¶¶ 8–15. So, too, are Smartmatic’s claims that statements about Soros’s and Open Society’s well-documented connections to Smartmatic were somehow defamatory. But these statements are without question material to claims and defenses in this case, and Fox is

¹ The Soros Group has purportedly agreed to produce a certain narrow set of documents in their responses and objections to the Subpoena; *see* Mintz Aff., Ex. 1 (Responses & Objections of Non-Party George Soros to Defendants Subpoena Duces Tecum); Mintz Aff., Ex. 2 (Responses & Objections of Non-Party Alexander Soros to Defendants Subpoena Duces Tecum); Mintz Aff., Ex. 3 (Responses & Objections of Non-Party Open Society Institute to Defendants Subpoena Duces Tecum). Fox disagrees with the Soros Group’s interpretation of what is “relevant” and therefore discoverable, and the Soros Group has not even produced what they initially agreed to produce as of this date.

entitled to explore the veracity of the statements regarding the Soros Group that Smartmatic claims are defamatory, as well as how they relate to its damages claims.

Smartmatic’s Chairman from 2014 to December 2020 was Mark Malloch-Brown, who previously held positions in Soros’s Quantum Fund and Soros Fund Management, LLC. Malloch-Brown had a decades-long personal and business relationship with George Soros going back at least to 2005. During his time as Smartmatic’s Chairman, Malloch-Brown also served as an Open Society board member and was a close friend of George Soros—so close that within weeks of the 2020 presidential election, and amidst the coverage of Smartmatic that is at issue in this case, he resigned the chairmanship of Smartmatic to assume control over Soros’s foundation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

The confirmed connection between the entities notwithstanding, the Soros Group now insists it should not have to produce *any* documents to Fox related to Smartmatic because their connection to Smartmatic vis-à-vis Malloch-Brown is a matter of public record. According to the Soros Group, that means Fox is entitled to nothing beyond what is already publicly known about the relationship.

That assertion gets things backwards. Malloch-Brown’s simultaneous leadership of both Smartmatic and Open Society is the beginning, not the end, of Smartmatic’s connection to Soros. The Soros Group cannot refuse to disclose relevant evidence in their possession merely because one aspect of their connection to Smartmatic is already publicly known. To the contrary, Fox is entitled to all evidence that is relevant to Smartmatic’s claims and Fox’s defenses, including evidence bearing on *the full extent* of Smartmatic’s entanglement with the Soros Group. Fox

must be able to test and defend against Smartmatic’s baseless accusations. The Soros Group cannot refuse to disclose documents in their possession merely because of their self-serving and inaccurate belief that Fox already has “enough.” Accordingly, Fox seeks the Court’s assistance in compelling the Soros Group to comply with Fox’s document subpoena. The requested disclosure is material and necessary to Fox’s defenses.

BACKGROUND

Smartmatic is a voting systems company that primarily has provided services for elections in foreign countries, such as Venezuela, the Philippines, Kenya, and Bulgaria. Smartmatic’s parent company—SGO Corporation Limited, a plaintiff in this case—is based in the United Kingdom, and from 2014 until December 4, 2020, its chairman was a member of the British House of Lords named Mark Malloch-Brown. Throughout Malloch-Brown’s entire tenure as Chairman of Smartmatic’s parent company, Malloch-Brown simultaneously served as a member of the Global Board of Directors of George Soros’s Open Society Foundation, alongside George and Alex Soros. In December 2020, just after the 2020 election and amidst the coverage of Smartmatic on all major U.S. news networks, Malloch-Brown resigned as Chairman of Smartmatic to become President of Open Society.

Shortly after Malloch-Brown left Smartmatic to become President of Open Society, on February 4, 2021, Smartmatic filed a lawsuit against Fox and others regarding post-election coverage. Specifically, Smartmatic alleged that certain statements made on a handful of Fox programs in the aftermath of the 2020 U.S. Presidential Election were defamatory and wiped out “everything the company had done for the last twenty years,” resulting in more than \$2.7 billion in damages. (NYSCEF.Doc.No.1199, First Amended Complaint (“Am. Compl.”), ¶ 245; *Id.* ¶ 523; *see also id.* ¶ 571). Relevant here, Smartmatic alleges that Fox is liable for defamation because Sidney Powell and Rudy Giuliani appeared on Fox programs and alleged that

Smartmatic had ties to Open Society, “the umbrella organization for Soros’ charitable work.”²

For example, Smartmatic alleges the following statements to be defamatory:

Sydney Powell: “We know that \$400 million of money came into Smartmatic from China only a few weeks before the election, that ***there are George Soros connections to this entire endeavor.*** Lord Malloch Brown [Chairman of SGO Corporation Limited] was part of it[.]” (Lou Dobbs Tonight, December 10, 2020).

Rudy Giuliani: “... Well, the guy who was running [Smartmatic] was one of the [] people who is number two or three in Soros’s Change the World organization – Open Society, right?” (Lou Dobbs Tonight, November 12, 2020).

(Am. Compl., ¶¶ 127, 204(v), 195 (b), 204(o), 533.)

Based on these allegations, Fox first attempted to obtain discovery directly from Smartmatic related to Smartmatic’s connection with the Soros Group. On September 1, 2022, Fox requested that Smartmatic produce “[a]ll documents related to George Soros and communications between [Smartmatic] and George Soros.” Klein Aff., Ex. 4 (Fox’s 1st Set of Requests for Production) at Document Request No. 44. [REDACTED]

[REDACTED]

²Thalia Beaty, *George Soros’ Open Society Foundations to lay off 40% of staff under son’s new leadership*, APNEWS (July 6, 2023), <https://apnews.com/article/george-soros-open-society-foundations-layoffs-5da856adc82b4de8dfe6a74d81b9c4e4>.

Fox issued document subpoenas to George Soros, Alex Soros, and Open Society [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Accordingly, Fox’s subpoenas were targeted in scope: they requested only those documents that are relevant to Soros’s and Open Society’s connections with Smartmatic, including:

- documents and communications relating to Smartmatic;
- communications between Soros or Open Society and Malloch-Brown about Smartmatic;
- documents relating to specific meetings between Mugica and Soros or Open Society;
- documents and communications relating to specific presentations by Mugica about Smartmatic to Open Society’s Global Board;
- documents and communications relating to involvement by Soros or Open Society in Smartmatic’s business strategy or business opportunities; and
- documents and communications relating to involvement by Soros or Open Society in funding or otherwise supporting Smartmatic, including by providing funding for Smartmatic’s litigation against Fox.³

The Soros Group served their respective responses and objections on August 14, 2023.

The Soros Group objected to every request, asserted boilerplate objections, and refused to produce responsive documents except as to three narrow categories:

First, if Defendants can demonstrate that Smartmatic is contesting that Lord Mark Malloch Brown once served as a Board Member of

³ Outside of two requests, the subpoenas to George Soros, Alexander Soros, and Open Society request the same documents. (*Compare* Mintz Aff., Ex. 7, (“4. All Documents and Communications relating to Smartmatic located or maintained on any email account or mobile device affiliated with You that has been or is currently in use by Your current President, Lord Mark Malloch-Brown.”) *with* Mintz Aff., Ex. 5, (“11. All Documents and Communications relating to Your response, and Smartmatic’s response, to allegations in or around October 2016 that You were involved or had ownership in Smartmatic.”))

the Open Society Foundations Global Board, Mr. Soros will produce documents sufficient to prove the truth of that statement.

Second . . . Mr. Soros will produce documents, if any, sufficient to show any funding Mr. Soros has provided to Smartmatic and/or any ownership interest Mr. Soros has, or has had, in Smartmatic, identified after a reasonable search (the “Ownership Issue”).

Third and finally, Mr. Soros will produce documents, if any, sufficient to show any funding provided by him to advance Smartmatic’s litigation against Defendants (the “Litigation Funding Issue” and together with the Lord Malloch Brown Board Issue and the Ownership Issue, the “Relevant Issues”).

Klein Aff., Ex. 1 at Document Request Response No. 1; *see also* Klein Aff., Ex. 3 at Document Request Response No. 1. Alex Soros’s response was even more limited: He agreed only “to produce documents, if any, sufficient to show any funding provided by him to advance Smartmatic’s litigation against Defendants.” Klein Aff., Ex. 2 at Document Request Response No. 1.

After receiving these responses, the parties met and conferred to discuss the responses on August 28, 2023, but were unable to reach agreement. Fox explained that the Soros Group’s refusal to produce documents about their connection with Smartmatic—other than to show Malloch-Brown’s membership on the Board of Open Society (which is already known publicly)—was not consistent with their subpoena obligations to produce relevant documents. Fox explained that the allegations in the Complaint about the “connection” are not so limited, [REDACTED], and that Fox is entitled, under New York’s disclosure requirements, to documents likely to lead to the discovery of relevant evidence, including evidence about the full extent of the connection between the Soros Group and Smartmatic, which Smartmatic claims does not exist. The Soros Group’s position was that evidence of any other connections between Soros, Open Society, and Smartmatic are not relevant and refused any additional search beyond the three narrow categories.

LEGAL STANDARDS

Under New York’s disclosure rules, documents that are “material and necessary” to the claims and defenses in an action should be produced. (CPLR 3101[a].) In the defamation context, “defendants are entitled to the discovery they seek in their efforts both to establish their defense of truth to plaintiff’s defamation claims, and to defend against plaintiff’s assertion of damage to his reputation.” (*Rivera v NYP Holdings Inc.*, 63 AD3d 469, 469 [1st Dept 2009] (reversing denial of motion to compel) (internal citations omitted).) This definition of “material and necessary” in defamation cases encompasses “disclosure even as to assertions ... that are not directly challenged in plaintiff’s complaint.” (*Id.*; see also *Shanahan v Bambino*, 271 AD2d 519, 519 [2d Dept 2000].)

In New York, “[n]on-parties are subject to the same obligation as parties to provide full disclosure of all matter material and necessary in the prosecution or defense of an action.” (*Impact Car Park, LLC v Mut. Redevelopment Houses, Inc.*, 2021 NY Slip Op 30950[U], 2021 WL 1156598, at *2 [Sup Ct, New York County Mar. 26, 2021, No. 653591/2019].) In other words, if the requested information “is relevant to the prosecution or defense of an action, it must be provided by the nonparty[.]” (*Id.*; see also *Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] (citation omitted).) If a third party objects improperly to a subpoena, “the party seeking disclosure may move to compel compliance or a response.” (See CPLR 3124.) The moving party must, as Fox does herein, “demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims[.]” (*Matter of Estate of Mabie*, 71 Misc 3d 1210(A) [Sur Ct, Albany County 2021] (quotations and citation omitted).)

ARGUMENT

I. FOX'S REQUESTS SEEK DOCUMENTS THAT ARE MATERIAL AND NECESSARY TO FOX'S DEFENSE TO SMARTMATIC'S DEFAMATION CLAIMS**A. The Requested Documents Relate To Substantial Truth**

Substantial truth is a complete defense to a defamation claim. (*Stepanov v. Dow Jones & Co.*, 120 AD3d 28, 34, 987 NYS.2d 37 [1st Dept 2014].) Because Smartmatic alleges that statements made on Fox broadcasts about a connection between Soros and Smartmatic were defamatory, Fox is entitled to discovery about the truth or falsity of those statements. Am. Compl., ¶ 127 (“there are George Soros connections to [the] entire [Smartmatic] endeavor”); *see also id.* ¶¶ 204(v), 204(o), 195(b)). That means Fox is entitled to know the facts surrounding any connections between Smartmatic, Soros, and Open Society as this evidence would support a substantial truth defense. *See Rent Stabilization Assn. of N.Y.C., Inc. v McKee*, 2020 NY Slip Op 32416(U), 2020 WL 4258739, at *5 [Sup Ct, New York County July 24, 2020, No. 155789/2018] (granting motion to compel production of plaintiffs’ communications that were “probative of the truth of ... [the] allegedly defamatory statements”).

If there were no information available to Fox other than what has been reported publicly about the Soros Group’s connection to Smartmatic, there would still be ample cause to compel them to comply with Fox’s subpoena. Publicly available information ties Smartmatic to the Soros Group because of Lord Mark Malloch-Brown’s close association with each. As early as 2016, press outlets published articles and aired coverage directly calling attention to this association.⁴ And even prior to formally joining Open Society as President—and while he was

⁴ *See George Soros is the subject of one of the more misguided conspiracy theories of the election*, BUSINESS INSIDER (Oct. 25, 2016), <https://www.businessinsider.com/george-soros-connection-to-voting-machines-2016-10>; *see also What was fake on the Internet this election: George Soros’s voting machines*, WASHINGTON POST (Oct. 24, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/10/24/what-was-fake-on-the-internet-this-election-george-soross-voting-machines/>; *British*

working for Smartmatic—Malloch-Brown was known to be a close associate of Soros. For example, in 2005, while Malloch-Brown was serving in the United Nations, he resided at an apartment owned by Soros in New York City.⁵ And, after leaving the United Nations, Malloch-Brown was named Vice President of Soros’s Quantum Fund in 2007.⁶ When Malloch-Brown left Smartmatic to become President of Open Society, George Soros stated: “I have known and worked closely with Mark *for more than three decades*. ... Mark is deeply familiar with Open Society’s work.”⁷ Alexander Soros remarked of Malloch-Brown: “I have known Mark my whole life. ... He has been a friend and partner to my father *for more than three decades*.” The public reporting about the decades-long relationship between Smartmatic’s Chairman and the Soros Group, especially Malloch-Brown’s simultaneous leadership of both Smartmatic and Open Society, establishes a reasonable likelihood that George Soros, Alexander Soros, and Open Society possess relevant documents beyond the hyper-narrow categories they have agreed to search and produce in response to Fox’s subpoena. For this reason, even before considering the discovery already produced by Smartmatic, the publicly available evidence about the existence

lord recalls Cory Aquino campaign, INQUIRER.NET (June 29, 2015), <https://globalnation.inquirer.net/125356/british-lord-recalls-cory-aquino-campaign>; *Claim that George Soros owns U.S. voting machines is Pants on Fire!*, PolitiFact (Oct. 31, 2016), <https://www.politifact.com/factchecks/2016/oct/31/sean-duffy/wisconsin-congressman-fuels-soros-voting-machine-r/>; *Rigging and reality: How much do we need to worry?*, BLAZEMEDIA (Oct. 27, 2016), <https://www.theblaze.com/contributions/rigging-and-reality-how-much-do-we-need-to-worry>; *Soros operative buys an Election Firm: Smartmatic, SGO, Malloch-Brown (from 2015)*, LINKEDIN (July 12, 2015), <https://www.linkedin.com/pulse/smartmatic-sgo-malloch-brown-soros-operative-buys-election-cj-wilson/>.

⁵ Benny Avni, *An Annan Deputy Is A Soros Tenant*, NEW YORK SUN (June 17, 2005), <https://www.nysun.com/article/foreign-annan-deputy-is-a-soros-tenant>.

⁶ *Axios of Soros*, WALL STREET JOURNAL (May 9, 2007), <https://www.wsj.com/articles/SB117867011219196576>.

⁷ Press Release, *Patrick Gaspard to Step Down as Head of Open Society Foundations* (December 4, 2020) <https://www.opensocietyfoundations.org/newsroom/patrick-gaspard-to-step-down-as-head-of-open-society-foundations>.

of connections between Smartmatic and the Soros Group easily passes the low hurdle for disclosure under the New York rules.

[REDACTED]

[REDACTED]

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[REDACTED]

Finally, the latest—but by no means least important—indication in Smartmatic’s productions that the Soros Group possesses documents relevant to Fox’s substantial truth defense surrounds [REDACTED]

[REDACTED]

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[REDACTED] the full extent of the connection—which Smartmatic alleges was defamatory to

mention on Fox broadcasts—is still unknown and the relevant details are likely in George Soros,

Alex Soros, and Open Society’s possession, custody, and control.

B. The Requested Documents Relate To Smartmatic’s Astronomical Damages Claims

The requested documents are also material and necessary to Fox’s ability to challenge Smartmatic’s alleged damages. (See *Rivera*, 63 AD3d at 469 (defendants in defamation cases “are entitled to the discovery they seek in their efforts ... to defend against plaintiff’s assertion of damage to his reputation”); *Gottwald v Geragos*, 110 NYS3d 893 (Table), 2018 WL 5624349, at *14-15, 17 [Sup Ct, New York County 2018, No. 162075/14] (finding relevant and discoverable “evidence of any damages that plaintiff claims to have sustained either personally or to his reputation”), *aff’d sub nom.*, *Gottwald v Sebert*, 172 AD3d 445 [1st Dept 2019]; *Nolan v State*, 111 NYS3d 802 (Table), 2018 WL 6497131, at *7 [Ct Cl 2018, No. 123283] (recognizing that plaintiff in defamation *per se* case “must still show causally related harm”); *Fashion Boutique of Short Hills, Inc. v Fendi USA, Inc.*, 75 F Supp 2d 235, 241 [SD NY 1999] (ruling that plaintiff must “provide evidence of the economic losses that it contends are attributable to [the] allegedly defamatory statements with regard to its claims of slander per se”), *aff’d*, 314 F3d 48 [2d Cir 2002].) Smartmatic claims that the purported defamatory statements, including those related to Soros, caused billions of dollars in damage to “Smartmatic’s multi-billion-dollar pipeline of business.” Am. Compl. at 273. Fox is entitled to discovery regarding that “pipeline of business” to test (and disprove) those allegations.

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This is one example of how documents in George Soros, Alex Soros, and Open Society’s possession may lead to the production of relevant evidence bearing on Smartmatic’s astronomical damages claims. It is beyond dispute that the Soros Group has critical sources of discovery related to Smartmatic’s business opportunities and strategies that are central to challenging Smartmatic’s billion-dollar damages allegations relating to lost profits and enterprise value. However, Fox lacks insight as to what communications Soros or Open Society had—either internally, with Smartmatic, or with other third parties—regarding Smartmatic’s business opportunities, which are critical to Fox’s defense against Smartmatic’s allegations of lost

business. Understanding the Soros Group's involvement in Smartmatic's business prospects and strategy, in addition to receiving documents and communications regarding Smartmatic and its clients, business opportunities, expansion efforts, and valuation, would aid Fox in assessing (and disproving) Smartmatic's claims that it had a multi-billion-dollar enterprise valuation just prior to Fox's coverage of the 2020 election.

* * * * *

Fox's narrow requests are material and necessary to its substantial truth defense as well as its ability to challenge Smartmatic's damages claims. The Soros Group should therefore be compelled to produce documents that are responsive to Fox's respective subpoena requests.

II. THE SOROS GROUP'S ARGUMENTS FOR REFUSING TO PRODUCE DOCUMENTS ARE MERITLESS

The Soros Group's justifications for their refusal to produce relevant documents—as expressed in their subpoena responses as well as during the parties' August 28 meet-and-confer—are meritless and should be rejected.

A. New York Disclosure Requirements Apply to Both Parties and Nonparties Alike

The Soros Group argues that they are not a party to this case and should not be subject to purportedly burdensome discovery requests. But New York law is clear that Fox's right to receive relevant materials does not depend on whether the source of the requested information is a party versus a nonparty. Nonparties are subject to the same disclosure obligations as parties. (*Impact Car Park, LLC*, 2021 WL 1156598, at *2 (explaining that nonparties are obligated "to provide full disclosure of all matter material and necessary in the prosecution or defense of an action" (quotations and citation omitted)).) Nor does it matter that Fox can and has obtained *some* of this material from Smartmatic, as a nonparty's obligation to produce relevant materials does not depend on whether similar materials have been requested of or produced by a party to

the lawsuit. (*Kapon*, 23 NY3d at 38 (“Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.”).)

B. The Soros Group Cannot Satisfy Their Burden to Demonstrate That the Requested Discovery is “Utterly Irrelevant”

The Soros Group also refuses to comply with the subpoena on the grounds that the requested information, by their telling, is not relevant to the allegations in the Complaint. To resist disclosure on relevance grounds, the Soros group bears the burden to show that “the discovery sought by defendant via the Subpoena is utterly irrelevant or that the futility of the process to uncover anything legitimate is inevitable or obvious.” (*Gross v Hazan-Gross*, 201 AD3d 587 [1st Dept 2022]; see also *State ex rel. Murray v Baumslag*, 134 AD3d 451, 452 [1st Dept 2015] (reversing the denial of a motion for a subpoena where the nonparty “failed to establish that the discovery sought is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious” (internal quotations and citations omitted)); *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006] (“the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed” (citation omitted)).)

The Soros Group has not—and cannot—satisfy this high burden to show that the discovery Fox has requested is “utterly irrelevant.” According to the Soros Group, the only “connection” *explicitly* mentioned in the allegedly defamatory statements is Malloch-Brown, and thus the only documents in their possession that could be relevant are documents sufficient to show that Malloch-Brown was, in fact, an Open Society board member, which they state is a matter of public record anyway. But even the Soros Group does not believe that appropriate

scope of relevance is limited to what is stated explicitly in the Complaint—they agree to produce documents, if any, reflecting funding provided by the Soros Group to advance Smartmatic’s litigation against Fox, which is not mentioned in the Complaint at all. Regardless, however, the Soros Group’s attempt to limit the scope of relevance to its improperly narrow reading of the Complaint falls far short of the *Gross* standard for several reasons.

First and foremost, the Soros Group’s blinkered interpretation limiting Smartmatic’s association only to Malloch-Brown is simply an inaccurate characterization of the allegations concerning the statements at issue in the complaint. By their own terms, the allegations are that the challenged statements imply far broader connections than just Malloch-Brown. *See* Am. Compl., ¶ 127 (“there are George Soros connections to [the] entire [Smartmatic] endeavor”). Evidence of connections between Smartmatic and the Soros Group beyond Malloch-Brown’s involvement in Open Society bear on the truth or falsity of the statements Smartmatic put at issue in this case. *Rivera*, 63 AD3d at 469 (reversing trial court’s denial of motion to compel, holding that disclosure was required “even as to assertions in those articles that are not directly challenged in plaintiff’s complaint”). Moreover, evidence of any such connections—which Smartmatic would have known about prior to filing this action— is also directly relevant to Fox’s Anti-SLAPP counterclaim, which asserts that Smartmatic knowingly brought baseless defamation claims against Fox.

Not only is the Soros Group’s improperly narrow concept of relevance at odds with New York standards governing disclosure generally, it makes even less sense in the context of a defamation action, where an element of Smartmatic’s claim turns on how the statements would be “reasonably understood by listeners in the sense that would make [it] defamatory.” (*Cheatum v. Wehle*, 172 NYS2d 62, 67 [3d Dept 1958] (*citing* Restatement, Torts § 613).) Because it is

unquestionably true that Malloch-Brown was in leadership positions at both Smartmatic and Open Society simultaneously, Smartmatic is alleging and will seek to prove that a reasonable listener would conclude that Sidney Powell and Rudy Giuliani's several references to Smartmatic's "connection" to Soros implied a relationship even more intertwined than the mere fact that Malloch-Brown was Chairman of Smartmatic at the same time as he was on Global Board of Open Society. Fox is entitled to evidence bearing on the extent of that connection that may be relevant to the truth or falsity of the statements and implications that Smartmatic is putting at issue.

C. The Soros Group Fails to Identify Any Credible Burden That Would Outweigh Fox's Need for the Discovery

The Soros Group fails to identify an unreasonable burden associated with responding to Fox's requests that would outweigh the importance of the information to Fox's defenses. The Soros Group has not described *any* burden beyond mere boilerplate objections and blanket assertions. (Klein Aff., Exs. 1–3.) During the meet and confer with Fox, the Soros Group could not articulate with any specificity what burden would be associated with producing the requested materials nor why such burden would be undue given the plain relevance of the requested materials. This is not surprising, as Fox's requests are narrowly tailored, targeted, and—for the large part—tied to specific key dates and events. The Soros Group's blanket assertions of burden are not sufficient to justify the failure to produce in this case. (*See* CPLR 3122[a].)

Both Fox and Smartmatic already have obtained extensive document productions from other nonparties who did not resist production on burden grounds. For example, Fox requested documents from Stripe Communications, a public relations company that Smartmatic retained to try to boost Smartmatic's public image and to assist Smartmatic in dealing with public relations crises. Unlike Soros, who is referenced by name in multiple of the allegedly defamatory

statements at issue in this case, Stripe Communications is not mentioned anywhere in the Complaint. And yet, Stripe produced 8,268 pages of documents in response to Fox's subpoena. George Soros, Alex Soros, and Open Society, collectively, have produced zero pages.

To date, Fox has worked cooperatively with numerous nonparty subpoena recipients to narrow and target its requests to minimize burden while also ensuring Fox obtains the relevant discovery to which it is entitled. This has included, for many recipients, negotiating search terms and custodians that target the scope of review toward relevant files. Fox is committed to working with the Soros Group in similar ways, but Fox cannot do so if the Soros Group remains unwilling to produce any documents in response to Fox's reasonable, targeted requests. Their refusal is contrary to law, contrary to the allegations in the Complaint, and contrary to the standard practice of other nonparty subpoena recipients in this case.

CONCLUSION

For the foregoing reasons, Fox respectfully requests that the Court compel the Soros Group to produce documents, without limitation, that are responsive to Fox's respective subpoena requests by October 16, 2023.

Dated: New York, New York

September 28, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to NYCRR §202.8-b, that the foregoing Memorandum of Law was prepared on a computer using Microsoft Office 365.

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Dated: New York, New York
September 28, 2023

 /s/ Scott Klein
Scott Klein

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2023 I served the foregoing “FOX’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO COMPEL GEORGE SOROS, ALEXANDER SOROS, AND OPEN SOCIETY” by e-mail upon all counsel of record.

/s/ Scott Klein

Scott Klein