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INTRODUCTION

This case has fundamentally changed. At the time that Smartmatic filed this action and in the years since, it has told this Court and the world that it was a highly reputable company in the election-systems industry, where Smartmatic proclaims integrity is paramount. Smartmatic said that its reputation was destroyed by Fox News’s 2020 publication of allegations about the company made by lawyers for the President of the United States. All the while, Smartmatic knew that its most senior executives, and likely the Company itself, were under investigation by the United States Department of Justice for bribery and money laundering in obtaining one of its key customers. Far from being the “reliable, trustworthy company” it claimed to be, NYSCEF.Doc.No.1199 ¶525, federal prosecutors (and a grand jury) now say Smartmatic’s business was built on bribery, corruption, and money laundering. Consequently, the indictment, its impact on Smartmatic, and the ultimate resolution of the criminal case are critical to a multitude of central issues in this case; issues that cannot properly proceed to summary judgment—much less trial—without being addressed.

First, the criminal allegations constitute vital rebuttal evidence to Smartmatic’s core summary judgment and trial narrative (“Reputation Narrative Relevance”). Smartmatic’s entire case is built on the premise that Fox News’s coverage of the 2020 election somehow destroyed Smartmatic’s “perfect record” as the “most successful voting company in the world” and forever harmed its “stellar reputation” as a company that has operated “without a single incident.” NYSCEF.Doc.No.2556 at 3, 7, 66. DOJ’s allegations, if proven, *directly* refute that fable. Was Smartmatic actually a profitable and honorable company destroyed by allegedly false allegations, or was it a sham, bribing and illegally influence-peddling to win business in an industry predicated on trust? Smartmatic cannot be allowed to seek billions of dollars in damages from Fox by

claiming that it conducted business with honesty and integrity in 2020, when a federal jury might well find that Smartmatic’s business model was founded on bribery and corruption long before that. The indictment and its outcome thus plainly have Reputation Narrative Relevance into which Fox cannot fairly be denied discovery.

Second, the criminal allegations, if proven, will undermine Smartmatic’s enterprise value allegations (“Enterprise Value Relevance”). Smartmatic claims that Fox caused it to lose over \$2.7 billion in enterprise value.¹ NYSCEF.Doc.No.1199 at 282. That valuation argument rests unavoidably on the integrity of Smartmatic’s past revenues and profits and future projections. If DOJ proves its case and it turns out that significant portions of Smartmatic’s historical revenues—including *all* revenues from its then-largest customer and more than half of its historical average annual revenues—were obtained through bribery, and its future business is devastated by a criminal conviction or plea, then Smartmatic’s enterprise valuation falls apart and cannot be relied upon by this Court or a jury. Bribery is not a legitimate business model, and historical revenue obtained illegally cannot be used to value the company. The indictment and its outcome thus plainly have Enterprise Value Relevance into which Fox cannot fairly be denied discovery.

Third, the criminal allegations, whether ultimately proven or not, are relevant to Fox’s defense of Smartmatic’s special-damages arguments—as the First Department has already recognized (“Special Damages Relevance”). Smartmatic claims that Fox News’s coverage of the 2020 election—and nothing else—caused special damages of more than \$1.4 billion from lost election contracts around the world from 2021 to 2035. NYSCEF.Doc.No.2556 at 96-128. To

¹ As Fox argued at summary judgment, Smartmatic waived its enterprise-value claim by failing to produce evidence relating to it and by failing to support it through expert testimony. Smartmatic argues that its CEO, Antonio Mugica, who is not a financial expert can support a multi-billion-dollar enterprise-value claim. As stated in Fox’s summary judgment reply brief, this argument fails. Nevertheless, it appears that Smartmatic intends to present its theory to the jury.

establish those special damages, Smartmatic must prove that Fox, to the exclusion of other actors or events, caused Smartmatic to lose each specific contract. *Smartmatic USA Corp. v Fox Corp.*, 238 AD3d 526, 527 [1st Dept 2025] (citing *Aronson v Wiersma*, 65 NY2d 592, 595 [1985]); see also *Steitz v Gifford*, 280 NY 15,20 [1939]. The First Department has expressly recognized that an “*integral part of defendants’ defense* is that there are reasons for the decline of plaintiffs’ business that are unrelated to defendants’ statements, which reasons include the widely publicized criminal charges against plaintiffs’ executives.” *Smartmatic*, 238 AD3d at 527 (emphasis added). Over \$800 million of Smartmatic’s alleged lost profits are from contracts Smartmatic claims it has yet to lose but will lose in the future *solely* because of Fox’s coverage. Affirmation of Scott Klein (“Klein Aff.”), Ex. 1 (2/15/2024 Expert Report of C. James) at 4. Yet a far more likely cause of future losses will be that a federal grand jury has now indicted Smartmatic with engaging in bribery and money laundering to secure lucrative elections contracts—charges prosecutors will seek to prove in a very public trial. At the very least, Fox is entitled to fully understand the impact that the indictment, a criminal trial, and ultimate resolution of the charges will have on Smartmatic’s business before this case proceeds to either summary judgment or trial, as the First Department has held. The indictment thus has Special Damages Relevance into which Fox cannot fairly be denied discovery.

Fourth, the criminal allegations are relevant to Fox’s anti-SLAPP counterclaim (“Anti-SLAPP Relevance”). Fox’s counterclaim argues that Smartmatic violated New York’s Anti-SLAPP law by grossly inflating its claimed damages without a substantial basis in fact. NYSCEF.Doc.No.1438 at 141. If Smartmatic knowingly inflated its claimed \$2.7 billion in enterprise-value-damages by relying on opportunities it knew were secured or aided by bribery or other corruption, and if it included those allegations while knowing that it was under federal

investigation for that conduct, that evidence speaks directly to the merits of Fox's counterclaim. The indictment thus has Anti-SLAPP Relevance into which Fox cannot fairly be denied discovery.

Smartmatic has for five years known the truth of these matters, but it has refused to share it. Smartmatic has witnesses, including its corporate representative, who have refused to disclose answers in depositions by invoking the Fifth Amendment 249 times. It has important documents that it has refused to turn over, and in some cases appears to have intentionally destroyed, that are directly relevant to whether its claimed damages are premised on illegal conduct. And most importantly, it has (or will soon have) all the evidence in the Government's case against it. Defendants have none of this and are at a fundamental disadvantage to defend themselves.

Smartmatic's indictment two weeks ago presents an avenue to address that imbalance. Trial in the criminal matter is currently scheduled for April 2026, approximately five months from now. At the end of that trial, the jury will return a verdict of guilt or an acquittal. Smartmatic will no longer have grounds to invoke Fifth Amendment protections or otherwise seek to shield documents and other evidence from discovery that is directly relevant to their claims in this case. Defendants, the Court, and the jury will have a full picture of whether Smartmatic was an honest broker or whether any reputation it enjoyed was a mirage.

Under these circumstances, the Court is faced with a choice: Does it proceed to a trial where Smartmatic is permitted to tell a jury its potentially false version of events while hiding any countervailing evidence, and potentially win on that story only to later find its narrative completely undone by a guilty verdict in the criminal trial? Or, recognizing the relatively short period between now and the scheduled criminal trial, combined with the imbalance of information between the parties in this case and the significant effect that any verdict in the criminal case would have on this litigation, does the Court stay this case pending the outcome of the criminal trial and after that

allow the completion of material and necessary discovery that is integral to Fox's defense? Fox believes it is clear that the latter choice is the far better option and the one compelled by fundamental fairness and due process.

The Court has heard argument on related issues before, but the game has changed, and Fox is now seeking fundamentally different relief. For years, Smartmatic sidestepped the relevance of the criminal proceedings—first by emphasizing (perhaps falsely) that the investigation had not matured into an active proceeding, then (once the complaint against Bautista was released) because no Smartmatic employees had been targeted, and then (once several Smartmatic employees, including the company's co-founder and president, were indicted) because the company itself had not been charged. But since then, the First Department has made clear that the information flowing out of the criminal proceedings is relevant and the effect of those proceedings on Smartmatic is an "integral part of defendants' defense." *Smartmatic*, 238 AD3d at 527. Now that a federal grand jury has taken the step of formally charging Smartmatic based on its involvement in a bribery and money laundering scheme, those proceedings are all the more relevant.

The indictment, the conduct of the criminal trial, and its outcome will all but certainly impact Smartmatic's current and future business and have Reputation Narrative Relevance, Enterprise Value Relevance, Special Damages Relevance, and Anti-SLAPP Relevance. Accordingly, the Court should grant a stay until the criminal proceedings against Smartmatic and its executives have concluded.

This case should not advance to an adjudication on the merits, whether at summary judgment or trial, before an ongoing criminal proceeding resolves issues that are fundamentally intertwined with Smartmatic's claims. As noted above, to do otherwise would allow Smartmatic to tell potentially false and misleading narratives to the Court and a jury, and it would deeply

prejudice Fox's ability to defend itself. Moreover, the duration of the stay should not be long: Smartmatic has Speedy Trial Act rights and is scheduled to go to trial in April 2026.

A stay is further warranted to allow the Court to vacate the note of issue and allow Fox to take essential discovery—after the criminal proceedings conclude—into the effect on Smartmatic's current and future business from the indictment, the criminal trial, and the ultimate resolution of the criminal proceeding, whether a conviction, acquittal, or plea. The First Department has already recognized that evidence related to the impact on Smartmatic's business from the indictment of its *executives* is “plainly relevant” because an “integral part of defendants’ defense is that there are reasons for the decline of plaintiffs’ business that are unrelated to defendants’ statements, which reasons include the widely publicized criminal charges against plaintiffs’ executives.” *Smartmatic USA Corp. v Fox Corp.*, 238 AD3d 526, 528 [1st Dept 2025]. *A fortiori* the impact on Smartmatic's business from the indictment of *the company itself* and its criminal trial are also integral to Fox's defenses. Even Smartmatic concedes that more discovery is warranted in light of the indictment, though it seeks to block any meaningful discovery by charging ahead to adjudication of summary judgment and a trial. Klein Aff., Ex. 2 (10/16/2025 Smartmatic Letter to Justice Cohen). However, this discovery cannot be completed now: The indictment's effects on Smartmatic's business will only become apparent in the coming weeks and months, and the effects of the criminal trial obviously cannot be known until that trial concludes. Accordingly, the Court should both enter a stay and find good cause under 22 NYCRR 202.21(e) to vacate the note of issue for the limited purpose of allowing Fox discovery into these effects after the criminal proceedings conclude and the stay lifts.

If the Court declines to issue a stay, given the profound impact of the four categories of relevance outlined above, at the very least the Court should allow Fox to conduct whatever

additional discovery into the effects of the indictment can be completed now and further allow discovery into the effects of the criminal trial later.

BACKGROUND

Smartmatic built its case around the story that reputation and integrity are paramount in the election-technology industry. It has repeatedly said that these were “the key value-drivers of Smartmatic’s... election business.” *E.g.*, NYSCEF.Doc.No.1199 ¶¶ 524-25. Its claims have been centered on the theory that Fox’s election coverage “cast doubt upon the quality, integrity and trustworthiness of Smartmatic’s... goods and services.” *Id.* ¶ 714. Smartmatic’s experts tell the same story:

Because its customers, election officials, are accountable to the public, Smartmatic must maintain public trust in its brand and products.

Klein Aff., Ex. 3 (2/15/2024 Expert Report of K. Keller) ¶ 21.

The world is watching.... Smartmatic was well positioned to gain traction in the U.S. market until false claims were made about its products, its integrity, and the intention and purpose of the company.

Klein Aff., Ex. 4 (2/15/2024 Expert Report of T. Patrick) at 113-14. In its summary judgment briefs, Smartmatic touted its supposedly “perfect record” and “stellar reputation” prior to the challenged Fox News shows. NYSCEF.Doc.No.2556 at 3, 7. Smartmatic made these claims even though it was likely aware of DOJ’s investigation as far back as 2019—before the conduct at issue in this case. Klein Aff., Ex. 5 (Opp’n to Mot. to Suppress, *United States v Bautista*, No. 1:24-cr-20343-KMW, Dkt. No. 143 [SD Fla]).

To maintain this narrative, Smartmatic repeatedly downplayed developments in the criminal case that have called Smartmatic’s reputation into question. In September 2022, public reporting revealed that Smartmatic was implicated in alleged bribery and corruption in connection with payments to a Philippine election official. Klein Aff., Ex. 6 (Smith, Ben “The US is

investigating Smartmatic over allegations of bribery in the Philippines”, 9/25/2022, <https://www.semafor.com/article/09/25/2022/us-investigating-smartmatic-over-allegations-of-bribery-in-the-philippines#the-scoop>). When Defendants sought discovery, Smartmatic refused to produce *any* documents and convinced the Court that merely “an investigation, by itself,” was of little concern. NYSCEF.Doc.No.1385 at 2.

Then, DOJ filed a criminal complaint against Andres Bautista, the Philippine election official alleged to have taken bribes from Smartmatic. Klein Aff., Ex. 7 (Compl., *United States v Bautista*, No. 1:24-cr-20343-KMW, Dkt. No. 1 [SD Fla]). Smartmatic told the Court that Fox was making a “critical factual misrepresentation” by suggesting Smartmatic was implicated because “the criminal complaint that Fox cites does not name any Smartmatic entity, executive, or employee.” Klein Aff., Ex. 8 (5/20/2024 Smartmatic’s Opp’n. to Fox’s Mot. to Renew Mot. Seq. 17) at 1. When DOJ indicted Smartmatic’s President and co-founder, along with two other senior executives on August 8, 2024, Klein Aff., Ex. 9 (Indictment, *United States v Bautista*, No. 1:24-cr-20343-KMW, Dkt. No. 12 [SD Fla]), Smartmatic again deflected, arguing the developments were immaterial because “[n]one of the plaintiffs in this case—Smartmatic USA Corp., Smartmatic International Holding B.V., or SGO Corporation Limited—has been indicted,” NYSCEF.Doc.No.2213 at 1, 6-8. Smartmatic continued to stall this way until discovery closed. Simply put, Smartmatic consistently stonewalled discovery into evidence that it knew existed and that undermined its whole theory of damages.

Smartmatic then filed the note of issue on January 31, 2025. Smartmatic certified that this case was ready for trial, pressed the Court for an accelerated summary judgment schedule, and demanded a trial date in 2025—despite knowing it had a tolling agreement with DOJ over its own potential criminal liability.

On October 16, 2025, this case changed dramatically. A grand jury in the Southern District of Florida issued and unsealed a superseding indictment charging “SGO Corporation Limited, a/k/a ‘Smartmatic’” with criminal violations of the FCPA and anti-money laundering statutes in connection with a \$182 million contract in the Philippines. Klein Aff., Ex. 10 (Superseding Indictment, *United States v Bautista*, No. 1:24-cr-20343-KMW, Dkt. No. 264 [SD Fla]). The indictment charges SGO—a named plaintiff—with participating in a scheme to pay and launder more than \$1 million in bribes to a Philippine government official in connection with contracts related to the 2016 Philippine national elections.

Smartmatic’s indictment came on the heels of another major development. On August 1, 2025, federal prosecutors filed an Evidentiary Notice indicating that they possess evidence that Smartmatic employed “the same modus operandi” from the Philippines in LA County and Venezuela, Smartmatic’s two other largest customers. This included the creation of slush funds facilitated by Smartmatic’s voting machine supplier, Jarltech, whose president (Andy Wang) is cooperating with the Government and has admitted to aiding Smartmatic’s scheme. Klein Aff., Ex. 11 (United States’ Notice of Intent to Use Evidence Supporting the Charged Bribery and Money Laundering Conduct, *United States v Bautista*, No. 1:24-cr-20343-KMW, Dkt. No. 242 [SD Fla]) at 4. The notice also described the alleged 2019 bribery of a Venezuelan elections official to facilitate Smartmatic’s business in that country—years after the 2017 date when Smartmatic claims it “put integrity over money,” “blew the whistle” on election fraud, and withdrew from Venezuela. *Id.* at 10-11; NYSCEF.Doc.No.2556 at 70-71. DOJ’s proffer also raises questions

about whether public funds from LA County were paid through the same channels that prosecutors now describe as central to Smartmatic's scheme. Klein Aff., Ex. 11 at 4.²

LEGAL STANDARDS

A motion under CPLR § 2201 “to stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court.” *Britt v Int’l Bus Servs., Inc.*, 255 AD2d 143, 144 [1st Dept 1998]. Moreover, “[i]t is ancient and undisputed law that courts have an inherent power over the control of their calendars.” *Plachte v Bancroft Inc.*, 3 AD2d 437, 438 [1st Dept 1957]. “[T]his power exists independently of statute. Indeed, a statute which would impose a mandate upon the court in the otherwise discretionary handling of time of trial is unconstitutional.” *Id.* (citations omitted).

“A note of issue should be vacated” if “it is based upon a certificate of readiness that incorrectly states that all discovery has been completed.” *Nielsen v. N.Y. State Dormitory Auth.*, 84 AD3d 519, 520 [1st Dept 2011]. Defendants need only show “good cause” to vacate the note of issue. 22 NYCRR 202.21[e]. This requires showing that “unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness requiring additional pretrial proceedings to prevent substantial prejudice.” *Sposito v Cutting*, 165 AD3d 863, 865 [2d Dept 2018] (quotations omitted).

ARGUMENT

Smartmatic's story about its reputation and integrity is directly incompatible with its indictment, the evidence DOJ proffered, and a potential criminal conviction or plea. The gravity

² After DOJ proffered evidence concerning Venezuela and LA County, Smartmatic—who told this court it had been cooperating with DOJ—issued a press statement that those allegations were “untethered from reality.” See <https://www.latimes.com/california/story/2025-08-20/money-for-la-county-voting-machines-ended-up-in-bribery-slush-fund-feds-allege>. The Smartmatic indictment followed in short order.

of the indictment cannot be overstated: Under governing DOJ standards, to indict Smartmatic, DOJ had to conclude that indicting the company itself was necessary to achieve the goals of justice and deterrence in light of the pervasiveness of wrongdoing within the Smartmatic organization (including management's complicity) and Smartmatic's prior history of misconduct. *See* Justice Manual § 9-28.200 et seq. (Corporate Criminal Liability).

The indictment fundamentally changes the way this case should proceed. Because the way the criminal action develops and is ultimately resolved will bear on—and potentially streamline—four fundamental categories of issues in this case (Reputation Narrative, Enterprise Value, Special Damages, and Anti-SLAPP), the Court should stay these proceedings pending the resolution of the criminal action. And because the indictment, criminal trial, and a potential conviction or plea will undermine hundreds of millions, if not billions of dollars of Smartmatic's alleged damages claims, the Court should strike the note of issue for the limited purpose of permitting Fox to obtain discovery after the criminal trial regarding the impact of those developments on Smartmatic's business.

I. The Court Should Stay This Action Until the Criminal Proceedings Against Smartmatic Are Resolved to Allow Fox Use of Any Criminal Trial Disclosures And Potential Conviction on Summary Judgment and at Trial.

The indictment of Smartmatic and the developments in the criminal case bear directly upon Smartmatic's defamation case. Even if Smartmatic foreswears actual damages from the Philippines and the charged conduct, a possible conviction or plea regarding bribery there is nonetheless fundamentally relevant to Smartmatic's Reputation Narrative, Enterprise Value, Special Damages, and Defendant's Anti-SLAPP counterclaims.

A stay in the unusual circumstances where a plaintiff is indicted during civil litigation is not controversial. Indeed, there is "no question" that the "court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved." *Mook v Homesafe Am.*,

Inc., 144 AD3d 1116, 1117 [2d Dept 2016]. In deciding whether to grant a CPLR § 2201 motion, “[f]actors to consider include avoiding the risk of inconsistent adjudications, application of proof and potential waste of judicial resources.” *Britt*, 255 AD2d at 144. Here, there is significant overlap between the charges in the criminal matter and essential issues in this case such that at a minimum the application of proof and preservation of judicial resources factors weigh in favor of a stay.

As discussed below, a stay is the most appropriate and least disruptive remedy because the indictment fundamentally shifts the foundation of Smartmatic’s claims and undermines its repeated attempts to minimize the import of these criminal allegations. Ever since news of the DOJ’s investigation first broke in 2022, Smartmatic has repeatedly sought to distance itself from DOJ’s allegations:

“[N]one of the allegations threw Smartmatic in to any kind of connection to any kind of behavior, improper behavior.” Klein Aff., Ex. 12 (3/9/2023 Hr’g Tr.) 67:9-68:10.

“[T]here have been no charges brought against Smartmatic. There has been no complaint issued that named Smartmatic as a defendant.... There has been no arrest. There has been no indictment.” Klein Aff., Ex. 13 (5/23/2024 Hr’g Tr.) 16:7-17:24.

“Here there is no indictment. There has been no material change with respect to the investigation against Smartmatic.... We don’t even have a complaint against Smartmatic.” Klein Aff., Ex. 14 (6/26/2024 Hr’g Tr.) 19:18-23.

Those arguments no longer apply, and there is nowhere left for Smartmatic to move the goalposts. A federal grand jury now has indicted Smartmatic itself in connection with a scheme to secure business through bribery and corruption. Smartmatic now faces the prospect of conviction and debarment. The resolution of these criminal charges is highly relevant to key aspects of this case, and pushing this case forward in ignorance of the criminal trial would be imprudent and cause Fox significant and irreparable prejudice.

Reputation Narrative Relevance. First, and most obviously, a conviction would refute the core of the narrative that Smartmatic has spun that in 2020 it was a company with integrity, legitimate international business success, and a stellar reputation as an honest, trustworthy, and high-quality elections-services provider—a reputation it would have maintained if not for a handful of Fox News and Business broadcasts about the 2020 Election. NYSCEF.Doc.No.2556 at 6-7, 71-72. That story obviously crumbles if, in fact, Smartmatic’s biggest business successes were born of illegal bribery and other improper influence rather than the alleged superiority of Smartmatic’s products and reputation, as DOJ alleges. Fox is entitled to present all factual and legal arguments in response to Smartmatic’s narrative.

But Fox will not be able to identify much less deploy that rebuttal evidence until it comes out in the criminal proceeding and the jury decides that case. This, alone, warrants a stay. Absent a stay, Smartmatic will seek billions of dollars by telling the Court (and potentially a jury) that its reputation always would have been that of a highly honest and reputable elections company, only to potentially be convicted for bribery and money laundering shortly thereafter. Absent a stay, Smartmatic will continue to argue that a handful of years-old Fox News and Business shows spoiled what would otherwise have been an extraordinary financial future, even if Smartmatic’s business was always destined to implode because its own actions set it on the path to a corruption conviction and all the associated forfeitures, penalties, reputational harms, and potential debarments. Absent a stay, Smartmatic will continue to argue that its contract with LA County was the “springboard” to future success, NYSCEF.Doc.No.2556 at 74, when it may turn out that the LA County springboard theory was never going to materialize (regardless of what Fox did) because the company was on a road to being convicted of FCPA charges in a trial where evidence is presented calling into question Smartmatic’s business in LA County, and where that conviction

may bar them from serving as the election systems provider for the largest municipality in the United States. And absent a stay, Smartmatic's experts will attempt to opine about Smartmatic's business history and business prospects without being cross-examined with the fact that the company was criminally convicted.

A conviction would be devastating rebuttal evidence, but if this litigation proceeds through summary judgment or to trial before the criminal case is resolved, Defendants and the Court will be deprived of the opportunity to use or consider it.

Enterprise Value Relevance. Second, Smartmatic has claimed it had a pre-defamation enterprise value of nearly \$3 billion based at least in part on its stellar business reputation and expected future successes. NYSCEF.Doc.No.1199 at 282. If Smartmatic secured its then biggest-ever contract (or contracts in other jurisdictions) through bribery and corruption, that directly undermines Smartmatic's purported valuation. And if it is convicted, the conviction devastates the future projections on which that valuation purportedly relies. Bribery is not a legitimate business model, and, if convicted, Smartmatic cannot be rewarded for the business model it built through illegal conduct. A conviction would be important rebuttal evidence for Defendants on this claim. Absent the requested relief, Smartmatic will be able to tell a valuation story that DOJ may prove to be a total lie.

Special Damages Relevance. Third, a conviction would be highly relevant to Smartmatic's damages claims in at least two foundational ways. For one, if Smartmatic is convicted of the charges, the news of that conviction will devastate Smartmatic's reputation and will therefore be highly relevant to Smartmatic's *future* lost profits, as recognized by the First Department. *Smartmatic*, 238 AD3d at 528. Smartmatic's special damages claims include \$1.4 ***billion*** dollars in alleged lost profits, of which \$877 million is attributed to opportunities Smartmatic alleges it

will lose from 2025 through 2035, long after potential resolution of Smartmatic's criminal case. Klein Aff., Ex. 1 at 4.

Under the First Department's order, a stay is warranted because a criminal conviction is an alternative cause for future losses Smartmatic blames on Fox. As the First Department has already held, "customers' responses to the bribery allegations and the indictments" might adversely impact "plaintiffs' business prospects" and thus bear on Smartmatic's special damages claims. *Smartmatic*, 238 AD3d at 528. This reasoning applies with significantly added force to a conviction of Smartmatic itself. Smartmatic has repeatedly sought to minimize the impact of the indictments by arguing that an indictment is not a conclusive determination of guilt. But a conviction would be. In an industry where Smartmatic claims that reputation and integrity are paramount, a conviction—even more than an indictment—would devastate Smartmatic's business and provide an independent, alternative, and much-more-proximate cause for the over \$800 million in opportunities Smartmatic claims it will lose after 2025. A conviction might even disqualify Smartmatic from many of the opportunities it alleges it will lose as a matter of local procurement law. Klein Aff., Ex. 15 (10/31/2025 Declaration of M. Copeland). Absent a stay, Smartmatic might seek to hold Defendants responsible for those alleged damages only to have a conviction later reveal they were illusory.

Even if Smartmatic were not seeking such massive future damages, a conviction still would be highly relevant to Smartmatic's lost-profits claims from 2021 through 2025. Smartmatic alleges that it lost hundreds of millions of dollars because of Fox in that period. Fox moved for summary judgment on those claims, arguing that "Smartmatic's international lost-profits claims are too speculative to survive summary judgment because they are completely incompatible with the company's historical performance." NYSCEF.Doc.No.2479 at 32. Smartmatic's claims require

believing that Smartmatic's post-2020 revenues would have *quadrupled* as compared to its average revenues from 2016 to 2020. The Philippines was a huge historical customer for Smartmatic, making up more than 50% of its historical average revenue from 2016 to 2020. Klein Aff., Ex. 16 (11/21/2024 Expert Suppl. Report of D. Fischel) at 4. To the extent Smartmatic obtained that significant portion of its historical business "success" via illegal means, it makes Smartmatic's lost-profits claims even more speculative and ripe for summary judgment because those funds, of course, cannot be considered as a basis for future projects. If Smartmatic is convicted, Smartmatic's damages claims would require Smartmatic to prove that its revenues would have *octupled* (increased by *8.1x*) from 2021 to 2025 compared to the five years prior. *Id.* Absent a stay, Smartmatic will be able to point to historical revenue that may well have been illegally obtained.

Anti-SLAPP Relevance. Fourth, a conviction would also bolster Fox's Anti-SLAPP counterclaim, which alleges that Smartmatic had no factual basis to claim billions in losses here. NYSCEF.Doc.No.2479 at 148-55. If Smartmatic knowingly inflated its claimed \$2.7 billion enterprise value by relying on opportunities that were or would be obtained via bribery, and if it included those allegations while knowing it was under federal investigation for that conduct, that goes directly to the merits of Fox's counterclaim. This Court has routinely granted Fox discovery to support its counterclaim, and this is no different. Absent a stay, Fox will be forced to pursue its anti-SLAPP claim without evidence that could entitle Fox to judgment on the claim as a matter of law.

* * * * *

A criminal conviction is highly relevant to these key issues, and it would play center stage at any trial in this case. *See, e.g.,* CPLR § 4513; *Vernon v. NYC Health and Hospitals Corp.*, 167

AD2d 252 [1st Dept. 1990]. Waiting for the criminal trial to resolve would estop Smartmatic from continuing to deny the allegations of its conduct in the Philippines as related to these four essential categories of relevance. *See, e.g., Lauenders v. Steinberg*, 39 AD3d 57, 64 [1st Dept 2007] (“It is well-settled law that collateral estoppel may be employed in a civil action to preclude relitigation of issues actually and necessarily determined in a prior criminal action.”) (citation omitted); *see also Buechel v Bain*, 97 NY2d 295, 303 [2001] (“The policies underlying” collateral estoppel “are avoiding relitigation of a decided issue and the possibility of an inconsistent result.”).

Nor is it just the fact of a potential conviction that warrants a stay. Evidence proffered during the trial or suddenly available after it without the specter of a looming criminal trial (such as the testimony Smartmatic’s witnesses have hidden behind hundreds of invocations of the 5th Amendment and other evidence regarding similar alleged bad acts in Venezuela and Los Angeles that Smartmatic may have refused to produce in this case) is directly relevant to and—consistent with the First Department’s direction—should be available for Defendants’ defenses and Anti-SLAPP counterclaim.

II. The Court Should Stay This Action Until the Criminal Proceedings Are Resolved and Strike the Note of Issue to Permit Discovery into the Effects of the Indictment and Criminal Proceedings on Smartmatic’s Business.

The Court should also enter the stay to allow Fox to take discovery into the effects of the indictment and criminal proceedings, which is required under the First Department’s prior ruling. In addition, to ensure the efficacy of Fox’s further discovery efforts and to prevent Smartmatic from concealing relevant information about these effects, the Court should vacate the note of issue under 22 NYCRR 202.21(e) for the specific purpose of allowing Fox to pursue this business-impact discovery after the stay lifts.

A. A Stay Is Necessary to Permit Material and Necessary Discovery into the Effects of the Indictment and Criminal Proceedings.

A stay is further warranted so Fox can take discovery into the effect on Smartmatic's current and future business from the indictment, the criminal trial, and the ultimate resolution of the criminal proceeding. The First Department has already recognized that evidence related to the impact on Smartmatic's business from the indictment of its executives is "plainly relevant" because an "integral part of defendants' defense is that there are reasons for the decline of plaintiffs' business that are unrelated to defendants' statements, which reasons include the widely publicized criminal charges against plaintiffs' executives." *Smartmatic USA Corp. v Fox Corp.*, 238 AD3d 526, 528 [1st Dept 2025]. *A fortiori* the impact on Smartmatic's business from the indictment of the company itself and its criminal trial are also integral to Fox's defenses.

However, this discovery cannot be completed now: The indictment's effects on Smartmatic's business will only become apparent in the coming weeks and months as customers react in real time, and the effects of the criminal trial obviously cannot be known until that trial concludes. These effects include potential initiation of suspension and debarment proceedings by governmental entities, concerns from actual or potential customers, financial effects reflected in corporate records and analyses, and loss of access to credit facilities and U.S. financial institutions. But news of the indictment *just* broke. It takes time for the impact to manifest—for the news to spread, for Smartmatic's employees and customers to react, and for impact-related documents to be created, collected, and produced. For example, Smartmatic's production related to the August 2024 indictment of its executives included documents indicating that new customer concerns were being raised six months or more *after* news of the indictment broke. Moreover, the effects of the ongoing criminal proceedings obviously cannot be known until after those proceedings conclude.

A stay is therefore necessary at least until after the criminal proceedings conclude to permit these and other potential effects to develop, so Fox can then take discovery into the effects.

B. Vacating the Note of Issue Is Warranted to Permit Effective Discovery into the Effects of the Indictment and Criminal Proceedings.

In addition to the stay, there is good cause for an order vacating the note of issue because the indictment and impending criminal trial are “unusual or unanticipated circumstances” that developed after the note of issue, and permitting additional discovery after criminal proceedings conclude is necessary to prevent substantial prejudice to Fox. *See Sposito v. Cutting*, 165 AD3d 863, 865, [2nd Dept 2018] [quotations omitted].

The indictment of Smartmatic easily satisfies the “unusual or unanticipated” circumstance requirement. The indictment post-dates the note of issue, and it represents the most significant criminal accusation against Smartmatic by law enforcement to date. *E.g., Wiebusch v. Bethany Mem’l Reform Church*, 51 AD3d 577, 578. Smartmatic cannot credibly contest this point—it did not even try after JHO Marin recently concluded even the Evidentiary Notice was an unusual or unanticipated circumstance. Klein Aff., Ex. 17 (8/7/2025 JHO Marin Report); NYSCEF.Doc.No.2625 at 19-22.

With respect to substantial prejudice, again, the First Department has already held that evidence related to the impact of the indictment and criminal proceedings on Smartmatic’s business is “plainly relevant” and an “integral part of defendants’ defense.” *Smartmatic*, 238 AD3d at 527; *see also e.g., People v Smith*, 87 NY2d 715, 720 [1996] (“A person’s reputation can be ruined forever by the mere handing up of an indictment, even though subsequently the indictment is dismissed, or the person tried and later acquitted”); *New York Times Co. v Dist. Att’y of Kings Cnty.*, 179 AD3d 115, 123 [2d Dept 2019]. On summary judgment, Smartmatic continues to maintain its astronomical special damages claims include \$1.4 *billion* dollars in alleged lost profits,

of which \$877 million is attributed to opportunities Smartmatic alleges it will lose *after this indictment*. Klein Aff., Ex. 1 at 4. Yet the indictment is a far more plausible explanation (and proximate cause) for any business losses Smartmatic suffers going forward than election coverage from 2020. Fox is entitled to take discovery into those effects for use on summary judgment and at trial.

In fact, the indictment is already affecting Smartmatic's customer relationships. Dean Logan, LA County's "top election official," has sought distance from Smartmatic, stating that the County "will 'hold Smartmatic accountable to the terms and protections' of their ongoing contract." Klein Aff., Ex. 18 (Cohen, Marshall "Smartmatic indicted in foreign bribery case, possibly endangering its lawsuits against Fox News and Giuliani," 10/17/2025, <https://www.cnn.com/2025/10/17/media/smartmatic-doj-fox-giuliani-bribery-philippines>). And the Manila Times reported that "COMELEC," the Philippines' commission on elections, will "reopen its investigation of Smartmatic deals" based on Smartmatic's indictment. Klein Aff., Ex. 19 (Depasupil, William "Comelec to reopen its investigation of Smartmatic deals," 10/21/2025, <https://www.manilatimes.net/2025/10/21/news/national/comelec-to-reopen-its-investigation-of-smartmatic-deals/2204384>). Smartmatic surely has also begun to receive—and will continue to receive—a flood of private customer inquiries. Fox is entitled to discovery into those reactions and all other business-impact evidence, and Smartmatic should not be permitted to artificially constrain its discovery obligations by insisting on pushing forward and running out the clock on its realization of the full negative effects.

Indeed, many courts have concluded that "[t]he showing of outstanding discovery" constitutes "a sufficient ground upon which to grant the original motion and vacate the note of issue." *Lopez v Kelly St. Realty, Inc.*, 106 AD3d 534, 535 [1st Dept 2013] (striking note of issue).

In *Gelin v N.Y.C. Transit Auth.*, 189 AD3d 789, 793 [2d Dept 2020], vacatur was warranted where, after the note of issue, the plaintiff suffered a second, unrelated injury that bore on the Plaintiff's claims regarding the original injury and necessitated further discovery. *Id.*; see also *Grady v AHRC NYC New Projects, Inc.*, 51 Misc 3d 1014, 1018-19 [Sup Ct, Nassau County 2016] (finding "substantial prejudice" where plaintiff otherwise could have presented damages claims at trial "without affording the defendants the opportunity to conduct further discovery" into "unusual or unanticipated" post-note developments). So too here.

Smartmatic does not dispute that it must produce discovery into the indictment's impact. Klein Aff., Ex. 2. But Smartmatic has been attempting to dramatically and improperly limit the extent of and timeframe for the discovery it concedes it owes. Smartmatic recently told this Court that "[t]he recent indictment of Smartmatic has zero impact on how this case should continue to proceed." Klein Aff., Ex. 20 (10/27/2025 Email C. Letkewicz to C. Paszkowska). Smartmatic also misrepresented the First Department's order as requiring production of only "a narrow scope of documents." Klein Aff., Ex. 2 at 1-2 & n.2. And Smartmatic proposed that it would only update prior discovery responses if it concludes they have become "materially misleading" in light of the indictment—a position completely inconsistent with its discovery obligations. See NYSCEF.Doc.No.2625 at 19-20. Only at that point does Smartmatic say it might produce more documents.

Smartmatic's view is wrong on all fronts. The discovery concerning the effects of the indictment that is required under the First Department's order is not a matter of Smartmatic supplementing its past responses if or when it decides to do so. The First Department already held that indictment-related discovery should proceed under the "liberal discovery standard set forth in

CPLR 3101(a).” *Smartmatic*, 238 AD3d at 527-28. Satisfying that standard will require the following forms of additional discovery:

- **Documents:** Defendants need the documents that have been created and will be created in response to the indictment, trial, and possible conviction, showing the impact of each on Smartmatic’s business. Separately, Smartmatic also now has access to everything produced in the underlying criminal case and should search that new source for documents responsive to Fox’s previously served discovery requests and other material relevant to this case.
- **Fact Depositions:** Documents are not enough. Fox needs to depose Smartmatic employees responsible for Smartmatic’s sales, marketing, public relations, and business planning to understand how Smartmatic’s sales prospects and business value are being affected. Depositions are particularly critical because Smartmatic’s head of HR instructed all Smartmatic personnel to avoid creating documents related to the indictment and its impact on Smartmatic’s business: “We will have a communication plan for inquiring customers as soon as possible” and to “[p]lease do not use email, text, WhatsApp, or any other form of communication to express thoughts or ask questions about the matter.” Klein Aff., Ex. 21 (SMARTMATIC-FOX11489152) at -154.
- **Supplemental Expert Reports:** Some of Fox’s experts supplemented their expert reports when Smartmatic’s leadership team was indicted; Smartmatic’s indictment requires further supplementation. In addition, the indictment (or a potential conviction) may disqualify for Smartmatic from working in some locales—or may at least be considered by jurisdictions in evaluating any proposals from Smartmatic. Fox’s procurement experts need to conduct that analysis and provide their opinions on those issues. *E.g.*, Klein Aff., Ex. 15 (Copeland Decl.).
- **Expert Depositions:** Certain of Smartmatic’s experts offer opinions about Smartmatic’s supposedly good reputation and alleged damages; they will need to be deposed in light of the indictment.

All this discovery will be focused on the four categories of relevance discussed above: Reputation Narrative Relevance, Enterprise Value Relevance, Special Damages Relevance, and Anti-SLAPP Relevance. The First Department has made clear that this information is an “integral part of defendants’ defense,” *Smartmatic*, 238 AD3d at 527, and a federal grand jury charged Smartmatic with bribery and money laundering, Klein Aff., Ex. 10. Fundamental fairness and due process require that Fox be given the chance to take this critical discovery after the criminal proceedings conclude, and it would substantially prejudice Fox if this discovery is denied.

Finally, at the very least, if the Court declines to issue a stay, the Court still should allow Fox to conduct whatever additional discovery into the effects of the indictment can be completed now and further allow discovery into the effects of the criminal trial later. Indeed, absent relief, Fox's Due Process and First Amendment rights will be jeopardized. *Cf. In re New York City Asbestos Litig.*, 130 AD3d 489, 490 [1st Dept 2015] (due process requires discovery in response to punitive damages claims); *New York Times Co. v Sullivan*, 376 US 254, 279 [1964] ("libel judgments [of] virtually unlimited amount" yield "self censorship").

CONCLUSION

For these reasons, Fox respectfully asks the Court to stay the case pending the ongoing criminal proceedings against Smartmatic and for an order striking the note of issue for the purpose of taking certain discovery.

Dated: New York, New York
October 31, 2025

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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
October 31, 2025

s/Scott Klein
Scott Klein

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2025, I served the foregoing “FOX’S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE TO STRIKE THE NOTE OF ISSUE AND HOLD SUMMARY JUDGMENT IN ABEYANCE” by e-mail upon all counsel of record.

s/Scott Klein _____
Scott Klein