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INTRODUCTION

With rulings on liability and punitive damages imminent, Fox seeks an indefinite stay to reopen discovery that has been closed for nearly a year. Fox has no good faith basis for such a request. Fox has already sought—and the Court has *three times* rejected—discovery on identical DOJ allegations. Fox’s motion is not actually for discovery, but for delay. Fox will do anything to avoid a decision on the merits, as illustrated by its settlement of *Dominion* for \$787.5 million on the courtroom steps. Fox hopes Smartmatic will capitulate if summary judgment and trial are delayed long enough.

For Smartmatic, delay is not an inconvenience—it is a perpetuation of Fox’s defamation. Every day this case remains open is another day Smartmatic’s reputation remains tarnished, and another day Fox’s lies remain uncorrected in the public mind. In all cases, “justice delayed is justice denied.” *Ferber v. Fairfield Greenwich Group*, 28 Misc3d 1214(A) at *4 [Sup Ct, NY Cty 2010]. But, in defamation, justice delayed is also truth denied. Fox should not be allowed to exploit procedure to perpetuate the injury it caused. Smartmatic filed this case in February 2021. If Fox’s stay is granted, this case would not resume for trial until nearly a decade after filing—based on Fox’s speculation about a conviction that may never materialize. If the Court grants Fox’s stay, it will have essentially decided the case for Fox—not on the merits, but through a procedural gambit that allows Fox to escape accountability for an egregious campaign of defamation.

OVERVIEW OF ARGUMENT

Fox argues the case should be stayed pending the criminal trial so it can obtain DOJ discovery and evidence of any hypothetical conviction. Fox’s arguments fail for five reasons.

First, the Court has already denied Fox’s identical DOJ discovery requests three times. Each time, the Court rejected Fox’s identical arguments about alleged relevance to reputation, enterprise value, special damages, and its SLAPP counterclaim. The superseding indictment adds

no new factual allegations against Smartmatic—it merely includes Smartmatic in the caption as a defendant. The formal change does not alter the factual predicate: the indictment still focuses solely on a single 2016 Philippines contract long predating Fox’s defamatory statements about the 2020 election. The Court’s rulings are the law of the case and cannot be relitigated, especially when the scope of discovery has been defined not just by this Court but by the Appellate Division.

Second, Fox is estopped from seeking DOJ discovery. Fox expressly told the First Department that it wanted only “evidence of the business impact of indictment, not evidence about Smartmatic’s bribery scheme.” The First Department relied on this representation in crafting a limited discovery order. Smartmatic has complied with that order by producing documents on the impact of the criminal allegations. Fox obtained relief based on its concession and cannot now reverse its position.

Third, Fox cites no authority for staying a defamation trial to see if the plaintiff’s reputation worsens in the future. Courts stay civil cases to protect Fifth Amendment rights at the request of the criminal defendant or because the issues are identical. Neither applies here. Smartmatic does not want a stay, and the criminal case is about an alleged payment to get paid for work in the 2016 Philippines election, not alleged vote rigging during the 2020 U.S. election.

Fourth, Fox has no basis to vacate the note of issue. No unanticipated circumstances have developed: Fox has known about the DOJ investigation for years and already received discovery on its business impact (there has been none). The superseding indictment does not constitute an unanticipated circumstance—Fox anticipated prosecution and obtained a discovery order predicated on exactly this scenario. Smartmatic has produced documents on the impact of the indictment as ordered by the First Department and will comply with its duty to supplement, so Fox cannot be prejudiced, and discovery does not need to be reopened.

Fifth, the equities overwhelmingly favor Smartmatic. Fox cannot establish prejudice because it seeks evidence on criminal allegations to which it is not entitled. By contrast, Smartmatic faces real, compounding harm. As the victim of Fox’s defamation campaign, Smartmatic has waited nearly five years to vindicate its reputation. Every month and year of delay perpetuates Fox’s false accusations. Granting a stay would reward Fox’s serial delay tactics and allow the wrongdoer to dictate the pace of litigation while denying Smartmatic justice.

BACKGROUND

A. The Court Repeatedly Denies Fox’s Identical DOJ Discovery Requests.

Fox first sought DOJ discovery almost three years ago. Fox argued that “[t]hese [DOJ] allegations bear directly on the legitimacy (and legality) of the revenue Smartmatic is using to calculate its purported damages,” and “[e]vidence that Smartmatic won key contracts through bribery directly undermines both its allegations of trustworthiness and its contention that its sterling reputation is why decision-makers chose Smartmatic over its competitors.” (NYSCEF 1157 at 4, 14.) The Court rejected Fox’s argument. The Court reasoned “defendants have provided no authority to support their argument that an investigation, by itself, is relevant, or may lead to evidence relevant, to a company’s reputation or damages related to its value.” (NYSCEF 1385 at 2.) Fox did not appeal.

In spring 2024, Fox moved to renew. Fox argued that the criminal complaint against Philippine election official Andres Bautista justified revisiting the Court’s ruling because it suggested “Smartmatic’s historical performance was inflated by bribed revenue.” (NYSCEF 2107 at 1.) The Court denied Fox’s motion, holding that [REDACTED]
[REDACTED]
[REDACTED].” (Ex. 1, June 26, 2024 Hearing Transcript of Proceedings before Justice Cohen.)

In fall 2024, Fox moved *again* to renew after the DOJ indicted two Smartmatic employees. Fox argued this showed that “a key source of Smartmatic’s pre-November 2020 revenue was its contracts in the Philippines, which now appear to be illicitly obtained.” (NYSCEF 2185 at 3.) The Court denied this motion as well, holding “an indictment is a mere accusation that raises no presumption of guilt. It’s purely hearsay....[T]he new facts do not change the outcome, based upon the fact that an indictment doesn’t change the posture of where we are with respect to discovery.” (Ex. 2, December 5, 2024 Hearing Transcript of Proceedings before Justice Cohen.) This was Fox’s third request for DOJ discovery, and the Court’s third denial.

B. Fox Expressly Abandons Discovery of the Underlying DOJ Allegations.

In January 2025, Fox appealed the Court’s denial of DOJ discovery to the First Department. (Ex. 3, Fox’s Opening Brief to the First Department.) Critically, Fox conceded on appeal that its discovery requests were too broad. Instead, Fox now sought “only documents reflecting the *impact of the indictment* on Smartmatic’s business.” (Ex. 4 at 1, Fox’s Reply Brief on Appeal.)¹ Fox added that it “want[ed] evidence of the business impact of indictment, *not evidence about Smartmatic’s bribery scheme.*” (Ex. 4 at 7.) At oral argument, the First Department confirmed:

THE COURT: [Y]ou’re...only seeking documents concerning the indictments to the extent that they connect to lost profits or future business, right?

FOX’S COUNSEL: That’s correct, Your Honor.

THE COURT: Not just any document about the indictment, but only to the extent that they connect to the damages claim in this case.

FOX’S COUNSEL: That’s absolutely right Your Honor....²

¹ Unless otherwise indicated, all emphasis is supplied and all internal quotations are omitted.

² See Appellate Division, First Department Live Stream, YouTube (Apr. 22, 2025), <https://www.youtube.com/live/iMMwXVEMWck?si=EKJ5w6xV5P3ZupCi> at 24:00–24:20.

In reliance on those representations, the First Department ordered Smartmatic to produce documents relating to “*the effect on Smartmatic’s business of the DOJ’s allegations*,” but not on the underlying allegations themselves. *Smartmatic USA Corp. v. Fox Corp.*, 238 AD3d 526, 527 [1st Dept 2025]. Smartmatic has complied with this directive and will supplement its production as required by CPLR 3101[h].

C. The DOJ Adds Smartmatic As a Defendant 14 Months After Indicting Its Employees—And Just Weeks Before the Summary Judgment Argument.

In October 2025, the DOJ filed a superseding indictment adding Smartmatic as a defendant. This was suspect for many reasons. *First, the superseding indictment contains no new allegations of wrongdoing by anyone*: no new alleged bribes, contracts, countries, or counts. The superseding indictment still focuses exclusively on a single contract in the Philippines in 2016. It simply adds Smartmatic as a defendant alongside the two employees who were indicted in August 2024. FCPA experts have commented on how atypical this is—not just that a company would be indicted *at all*, but that it would be indicted at a different time than its employees. (Ex. 5 at 11:4-16, “Compliance into the Weeds,” Podcast Tr. (Oct. 21, 2025).)

Second, the timing of the superseding indictment was ideal for Fox to try to use for delay. *The DOJ inexplicably indicted Smartmatic more than a year after indicting its employees—and just weeks before the summary judgment argument*. This makes little sense, especially when the superseding indictment contained no new allegations. (Ex. 5 at 11:15-16) The DOJ filed the superseding indictment two weeks after this Court denied Fox’s request to delay the summary judgment argument. Fox moved to stay two weeks later.

Third, Fox has admitted that it has been communicating with the DOJ about Smartmatic’s criminal case. At the hearing on June 26, 2024, Fox stated: [REDACTED]

[REDACTED].” (Ex. 1 at

9:24-26.) Fox has no legitimate reason to communicate with the DOJ about an FCPA investigation of Smartmatic. Yet that is what Fox has been doing. Moreover, the convenient timing of the DOJ's indictment of Smartmatic suggests not just communication, but coordination.

Fourth, other recent filings by the DOJ have also been fortuitously timed for Fox to use. For example, *four days after the parties completed summary judgment briefing, the DOJ filed the 404[b] notice* asserting (without evidence) that Smartmatic engaged in misconduct in other jurisdictions that are not alleged in the indictment, including LA County. Fox, of course, tried to use this as a reason to reopen summary judgment briefing right after it closed (this Court said no). In addition, less than a week after the 404[b] notice, Fox filed a 1,000+ page amended petition in a public records case against LA County, suggesting corruption and bribery by Smartmatic based on the unsupported assertions from the 404[b] notice. (Ex. 6, (*Fox News Network LLC v. County of Los Angeles, et al.*, Case No. 25-STCP-234, First Am. Verified Pet.)) Fox then leaked its pleading to the *LA Times*, which used it for a hit piece on Smartmatic and its customer. (Ex. 7, (“Money for L.A. County voting machines ended up in bribery ‘slush fund,’ feds allege,” *The Los Angeles Times*, Aug. 20, 2025).)

Fifth, the superseding indictment contradicts President Trump's executive order pausing FCPA enforcement and the DOJ's revised guidelines limiting such enforcement. The February 2025 executive order commanded DOJ to “cease initiation of any new FCPA investigations or enforcement actions, unless the Attorney General determines that an individual exception should be made.” (Ex. 8, Executive Order, “Pausing Foreign Corruption Practices Act Enforcement to Further American Economic and National Security,” Feb. 10, 2025, at § 2[a][i].) Any continued investigations or enforcement actions also “must be specifically authorized by the Attorney General.” (Ex. 8 at § 2[c][ii].) The revised FCPA guidelines state that prosecutors “shall focus on

cases in which *individuals* have engaged in criminal misconduct and *not attribute nonspecific malfeasance to corporate structures.*” (Ex. 9, Deputy Attorney General Memo re: Guidelines for Investigations and Enforcement of FCPA, June 9, 2025 at p. 1.) Charging Smartmatic contradicts this guidance. (Ex. 9 at 2.)

Sixth, the connections between Fox and the DOJ are stronger than ever. One of the defendants, Fox host *Jeanine Pirro, is now one the leading voices within the DOJ*, taking on the position of U.S. Attorney for the District of Columbia. (Ex. 10, (“Senate confirms former Fox News host Jeanine Pirro as US attorney for the District of Columbia,” NBC News, Aug. 3, 2025).) And *Fox recently hired the brother of Attorney General Pam Bondi*—the person responsible for approving the indictment of Smartmatic (per DOJ’s Guidelines above)—to represent Fox in an antitrust case. (Ex. 11, *Newsmax Broadcasting LLC v. Fox Corp. et al.*, No. 25-cv-770, W.D. Wisco., ECF No. 17.)

Seventh, Fox executives, including *Rupert and Lachlan Murdoch, held secret meetings with Vice President J.D. Vance* at the Murdochs’ estate in Montana over the summer. (Ex. 12, (“Vance made a brief trip to Montana to speak to Rupert and Lachlan Murdoch, AP sources say,” AP News, June 11, 2025).) The meetings took place on or around June 10, 2025, about two weeks after Fox host and defendant Jeanine Pirro was sworn in as interim U.S. Attorney. (*Id.*)

* * *

Under these circumstances—and with the DOJ now openly prosecuting enemies of President Trump—Smartmatic’s indictment and its timing suggest cooperation and coordination, not coincidence.

D. The Superseding Indictment Contains Nothing New—And Nothing From the 404[b] Notice.

The superseding indictment contains no new substantive allegations. The indictment adds no new bribes, no new contracts, no new countries, and no new counts. (Ex. 14, *US v. Bautista et al.*, Case No. 24-cv-20343-CR-WILLIAMS, Dkt. No. 264.) All it does is add Smartmatic as a defendant. The DOJ alleges no institutional conduct by the company itself or policies endorsing or allowing bribery. Smartmatic’s alleged criminal liability is based entirely on agency: two employees allegedly paid a Philippine official to release a payment to which Smartmatic was entitled for work fairly won and done. The superseding indictment does *not* allege—as Fox has told the Court it does—that “Smartmatic’s business was built on bribery, corruption, and money laundering.” (Mot. at 1.)

Perhaps most notably, *the superseding indictment does not contain any of the unsupported assertions in the 404[b] notice about other jurisdictions*. In particular, Smartmatic is not charged with bribing anyone in LA County. Presumably, if the DOJ had actual evidence of that—as opposed to mere unsupported assertions—it would have included allegations about LA County in the superseding indictment. But the DOJ did not do that. In fact, the DOJ may *never* have to show this purported evidence to *anyone*. The criminal court has already indicated, as the DOJ must have known it would, that other bad acts are unlikely to come into evidence when the case is about a single contract in the Philippines in 2016. But Fox will continue to echo the DOJ’s unproven claims as fact.

LEGAL STANDARD

Motion to Stay. “Under CPLR 2201, a court may stay proceedings ‘in a proper case, upon such terms as may be just.’” *Ferber*, 28 Misc3d 1214(A) at *3, quoting CPLR § 2201. Because “[n]othing but good cause would make for a ‘proper case,’” a stay should be denied “unless the

proponent shows good cause for granting it.” *Id.* at *4. A stay “can easily be a drastic remedy, on the simple basis that justice delayed is justice denied.” *Id.* Therefore, “[s]ome excellent reason would have to be demonstrated before a judge is asked to bring to a halt a litigant’s quest for a day in court.” *Id.*, citing Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C2201:7.

Motion to Vacate Note of Issue. “Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue.” 22 NYCRR § 202.21[e]. “After such period...no such motion shall be allowed except for good cause shown.” *Id.* “To satisfy the requirement of ‘good cause,’ the party seeking vacatur must ‘demonstrate 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.’” *Nunez v. City of New York*, 236 AD3d 1049, 1051 [2d Dept 2025]. Courts are particularly reluctant to reopen discovery when it has been closed for an extended period. *See, e.g., Welch v. County of Clinton*, 203 AD2d 749, 749 [3d Dept 1994] (denying request to reopen discovery where a “year passed after the filing of the note of issue before defendant sought further discovery”). Fox cannot satisfy any of these standards.

ARGUMENT

I. The Court Has Already Held That the DOJ Allegations Are Not Discoverable.

Fox claims that the parties must wait for the criminal trial so that Fox can get discovery relating to it, but this Court has already held that the DOJ allegations are not a proper subject of discovery, so there is nothing to wait for. (NYSCEF 1385, 2140, 2225.) The Court’s repeated rulings on this issue are the law of the case, and the superseding indictment changes nothing. Moreover, even if proven at trial, the underlying facts in the criminal case would not be admissible here, so there is no reason to wait.

repeatedly. Because the DOJ allegations are not discoverable, there is no reason to await a criminal trial outcome.

B. The Superseding Indictment Changes Nothing.

The superseding indictment does not warrant departure from the Court's (or the First Department's) prior rulings because it changes nothing of substance. Fox itself has suggested that an indictment of Smartmatic's employees is no different from indictment of the company itself. For instance, Fox referred to the indictment of two Smartmatic employees as "serious accusations that the Department of Justice has leveled *against the company*." (Ex. 2 at 16:24-25.) And after the employees were indicted, Fox called Smartmatic "*a company accused of serious corruption by the United States Department of Justice*." (Ex. 2 at 9:24-10:5.) Fox also argued in its motion for summary judgment that "at a minimum, *the August 8, 2024 indictment of Smartmatic's executives cuts off its general damages*." (NYSCEF 2342 at 56.) Fox has consistently argued that the employees' indictment was (at least reputationally) an indictment of the company. Yet now Fox claims that the company's indictment changes everything. Fox's about-face is not credible—it is an obvious excuse for delay.

The indictments themselves prove nothing changed. (Ex. 13, 14.) Smartmatic has been added as a defendant. That is all. The DOJ made no new substantive allegations. Nor does it allege facts remotely suggesting that Smartmatic was "built on bribery, corruption, and money laundering." (Mot. at 1.) Like the prior indictment, it focuses on one contract in the Philippines, from ten years ago. The superseding indictment does *not* include the unsupported assertions from the 404[b] notice about LA County. The DOJ does not allege that a bribe was paid in LA County or anyplace other than the Philippines a decade ago. Nothing in the superseding indictment justifies staying this case.

C. The Underlying Facts From the Criminal Trial Would Not Be Admissible Even If Proven.

Even if the allegations in the superseding indictment were proven in the criminal trial, the underlying facts still would not be admissible in this case, so there is no reason to wait for them. “[T]he rule is clear that, while defendant[s] may offer proof of plaintiff’s bad general reputation prior to the publication” to mitigate damages, they “may not plead or prove for that purpose ‘specific acts, or instances, of plaintiff’s misconduct having no connection with the charge of libel.’” *Crane v. N.Y. World Tel. Corp.*, 308 NY 470, 478 [1955]. Fox cannot introduce evidence of alleged bribes when the defamatory statements were not about bribery. Fox published statements claiming Smartmatic rigged the 2020 election. Fox’s specific charge was election rigging. Whether Smartmatic engaged in bribery in the Philippines a decade ago is entirely collateral to whether those 2020 election-rigging statements were true. It is “entirely unrelated to the truth” of Fox’s accusations. *Id.* at 477.

Fox is trying to blur an important distinction between the *impact* (if any) of the criminal allegations on Smartmatic’s business and the underlying criminal allegations themselves. Fox may be allowed to introduce evidence showing that the FCPA indictment adversely affected Smartmatic’s ability to get business. Of course, Fox has no evidence of this right now, but Smartmatic has produced documents relevant to that issue, and it will continue to do so pursuant to its duty to supplement. What Fox cannot do, however, is try to prove the underlying criminal allegations in this civil case. The Court should not allow a criminal mini-trial against Smartmatic in its defamation case against Fox. *See, e.g., Maraziti v. Weber*, 185 Misc2d 624, 626 [Sup Ct, Dutchess Cty 2000] (excluding evidence of incidents “unrelated to the instant case” to avoid “a distracting series of mini-trials” that “would, more than likely, negatively impact a jury’s objectivity”).

II. Fox Conceded the DOJ Allegations Are Not Discoverable.

In its reply brief on appeal, Fox expressly conceded that it was now “request[ing] only documents reflecting the *impact of the indictment* on Smartmatic’s business” and “*not evidence about Smartmatic’s bribery scheme.*” (Ex. 4 at 7.) At oral argument, the First Department asked Fox to confirm it was “only seeking documents concerning the indictments to the extent that they connect to lost profits or future business” and “[n]ot just any document about the indictment.” Counsel for Fox told the Court “[t]hat’s correct” and “absolutely right.”⁴ In reliance on these representations, the First Department crafted an order defining the scope of discovery about the criminal matter. Consistent with Fox’s concession, the First Department allowed discovery only on “the impact of the indictment on the company.” *Smartmatic*, 238 AD3d at 527. The First Department did not allow discovery on underlying allegations in the criminal case, which Fox represented it was no longer pursuing.

Not only is the First Department’s ruling *stare decisis*, *D’Allesandro v. Carro*, 123 AD3d 1, 6 [1st Dept 2014], but Fox is judicially estopped from contradicting its own representations that were the basis for that ruling. “Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding.” *Cobenas v. Ginsburg Dev. Cos., LLC*, 133 AD3d 812, 813 [2d Dept 2015]. Here, the position Fox takes in its current motion—that the underlying allegations in the criminal case are discoverable—is “manifestly at odds with [its] representations in [its] prior appeal[.]” *Cobenas*, 133 AD3d at 813. Moreover, Fox did not just make the argument in its prior appeal; Fox prevailed on it. The First Department

⁴ See Appellate Division, First Department Live Stream, YouTube (Apr. 22, 2025), <https://www.youtube.com/live/iMMwXVEMWck?si=EKJ5w6xV5P3ZupCi> at 24:00–24:20.

ordered the discovery that Fox said it wanted. Fox is judicially estopped from seeking DOJ discovery beyond what the First Department ordered in reliance on Fox's representations. *Id.* Because the criminal allegations are, by Fox's own admission, not subject to discovery, there is no reason to wait for a trial about them.

III. Fox Is Not Entitled to a Stay to See If Its Case Might Improve in the Future.

Fox seeks a stay to see if Smartmatic is convicted, hoping to use that evidence to mitigate damages. *Such a stay would be unprecedented.* No court has ever stayed a defamation case so that the defendant could wait and see if the plaintiff's reputation got worse in the future. That would be like staying a medical malpractice case to see if the plaintiff later dies in a car accident. As usual, Fox is looking for a "Get Out Of Jail Free" card. This Court should not create one. Like any plaintiff, Smartmatic is entitled to its day in court.

A. Fox Cannot Meet Its Burden For A Stay.

Fox cannot meet the actual requirements for a stay. "[A] court entertaining an application for a stay is 'duty-bound to consider the relative hardships that would result from granting (or denying) a stay.'" *Trump v. Trump*, 81 Misc3d 1228(A), at *2 [Sup Ct, NY Cty 2024]. The burden of proof is on Fox. "[A] stay should be denied unless the proponent of the stay can demonstrate prejudice if no stay is granted." *Colt v. New Jersey Transit Corp.* 86 Misc3d 1272(A), at *1 [Sup Ct, NY Cty 2025].

1. Fox Has No Legal Basis To Stay The Trial.

As Fox's cases show, New York courts stay civil cases pending a criminal trial to protect a defendant's Fifth Amendment rights, *Britt v. Int'l Bus Servs., Inc.*, 255 AD2d 143 [1st Dept 1998], or when the issues in parallel civil and criminal cases are identical such that collateral estoppel could apply, *Mook v. Homesafe Am.*, 144 AD3d 1116 [2d Dept 2016]. Courts do not order stays to see if a defendant's damages case might improve because of a fortuitous future event. Fox

cites no authority for a “wait-and-see-if-my-damages-case-improves” stay (the “Fox rule”), and Smartmatic is not aware of any. Smartmatic has already waited five years and counting for its day in court. Fox has had more than enough time to try to come up with its defenses against damages.

The “Fox rule” would obviously lead to absurd results. Defendants would file motions to stay in every case if all they had to show was that something might happen in the future that could reduce the plaintiff’s damages. No case would ever go to trial because what if the plaintiff goes out of business someday? Why should defendant have to pay when that could theoretically happen one day? Fox’s approach makes even less sense in a defamation case where reputation is at issue, and where, as here, five years have passed since the defamatory statements were first published. Reputations can always change in the future. *See Cohen v. N.Y. Times Co.*, 153 AD 242 [2d Dept 1912] (“Reputation...is as capable of growth, and has as real an existence, as an arm or leg.”) Sometimes they grow, sometimes they recede, and sometimes they stay the same. But the dynamic nature of reputation is not a basis for staying a defamation trial to see what happens in the future.

2. Fox’s Claimed Prejudice Is Purely Speculative.

Fox cannot establish prejudice. The Court has held (and Fox has conceded) that Fox is not entitled to discovery on the allegations in the criminal case. Not having those facts thus cannot prejudice Fox. The same goes for the testimony Fox says it needs from Smartmatic witnesses who invoked the Fifth Amendment on criminal issues. Fox is not entitled to testimony on the underlying facts in the criminal case, so these witnesses’ decision not to testify about them is irrelevant. Even if they could be compelled to testify *after* the criminal trial—a questionable proposition given that Fox is not focused solely on allegations in the indictment—their testimony on the criminal allegations, which are unrelated to the defamatory statements, is not admissible. *Crane*, 308 NY at 478. Fox cannot suffer prejudice from not having evidence it is not entitled to.

Fox's conjecture about a potential conviction cannot justify a stay either. Fox argues it will be deprived of evidence of a conviction absent a stay, but that is pure speculation. A conviction may never happen. Any number of other things could happen in the criminal case. The indictment could be dismissed based on the DOJ's selective prosecution. The DOJ could drop Smartmatic as a defendant. Smartmatic may be acquitted. And, as the Court has observed, "an indictment is a mere accusation that raises no presumption of guilt." (Ex. 2 at 18:1-3.) Fox's alleged prejudice is therefore hypothetical at best.

Riding its wave of speculation, Fox argues that its "procurement experts need to conduct [an] analysis and provide their opinions" on how a conviction would affect Smartmatic's eligibility for future contracts. (Mot. at 22.) But there was nothing preventing them from doing that during discovery. Fox has known for years that an indictment of the company was possible in light of the DOJ's investigation and indictment of Smartmatic employees. It has pursued this discovery for years. Fox is not genuinely prejudiced by the pendency of the criminal case. Fox is just making excuses to avoid trial.

3. Smartmatic's Prejudice Is Real And Compounding.

Smartmatic, on the other hand, would be severely prejudiced by a stay. As the victim of Fox's defamation, Smartmatic has been waiting for its day in court for almost five years. Each additional month of delay compounds Smartmatic's reputational harm. Smartmatic remains tainted by Fox's false accusations in the eyes of potential customers, business partners, and the public. This is not like other civil disputes where delay is merely inconvenient. In a defamation case, every day of delay perpetuates the harm. Smartmatic cannot begin to repair its reputation—or collect damages for the reputational harm—until this case is resolved. Fox's requested stay would deny Smartmatic the chance to vindicate itself and would allow Fox's lies to continue circulating unchallenged.

“[J]ustice delayed is justice denied.” *Ferber*, 28 Misc3d 1214(A) at *4. Smartmatic has been saying that since Fox first sought a stay after the Court denied its motion to dismiss. (NYSCEF 999 at 7.) The Court denied Fox’s first motion to stay in 2022. Since then, the Court has pushed this case forward, most recently by entering the note of issue, rejecting Fox’s extended summary judgment schedule, and setting and refusing to move oral argument. Summary judgment and trial are all that remain. But Fox continues to resist a decision on the merits. Every few months, Fox comes up with something that supposedly requires more delay. The Court is on to it:

THE COURT: So you’re asking me to be responsible for some delay. I don’t think there’s been any inordinate delay, but you want me to be responsible for delaying it by adjourning it because in part because there is some new information that came to light, but there’s always going to be new information is going to come to light about something or another, right Mr. Allen?

(Ex. 15, 10/3/25 Tr. at 81:9-16.) The Court could not be more right. New information will always arise, but that is no reason for endless delay. Otherwise, no case would ever go to trial.

Critically, Fox is not the victim here—Smartmatic is. Fox is the wrongdoer. New York courts are particularly skeptical of granting stays to defendants who have repeatedly delayed cases through their own tactics. *See Transasia Commod. Invest. Ltd. v. NewLead JMEG, LLC*, 169 AD3d 591, 592 [1st Dept 2019] (“the past conduct of defendants-appellants in frustrating discovery and delaying the action supported the court’s determination” denying a stay). Fox has now sought multiple stays and reopenings of discovery and summary judgment briefing. At some point, a court must say enough. Awarding Fox a stay would encourage the serial delay tactics courts seek to prevent.

Further delay would be prejudicial to Smartmatic for practical reasons as well. New York courts do not allow legal disputes to “slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Blanco v. Am. Tel. & Tel. Co.*, 90 NY2d 757, 773 [1997]

(explaining purpose of statutes of limitation); *Duffy v. Horton Mem. Hosp.*, 66 NY2d 473, 476 [1985] (same). At least two witnesses, one of them a defendant, have died during the pendency of this case. Other key players, like Rupert Murdoch who is in his mid-90s, are not in good health. Given his age, illness or death could deprive Smartmatic of critical testimony at trial. Murdoch was a central decision-maker at Fox during the defamation campaign. Smartmatic should not be forced to try its case without him or other key witnesses at trial. Nor should further delay give Fox witnesses any more opportunities to testify “I can’t recall” about critical events in 2020.

4. The Criminal Trial Timeline Proves A Stay Would Be Endless.

Fox suggests that the April 2026 criminal trial date is right around the corner. But that date assumed only the two existing defendants. (Ex. 16 at 3, n.1.) With Smartmatic added, the trial will realistically take place (assuming the case is not dismissed) in 2027 at the earliest. After that, there will likely be appellate proceedings, potentially including retrials or remands. New York courts have recognized that it is “unfair and inequitable to require a plaintiff to put [its civil] case on hold while a criminal case makes its way through the criminal justice system, which often can take years.” *J.F. v. 110 Grill*, 82 Misc3d 1144, 1146 [Sup Ct, Orange Cty 2024].

Furthermore, Fox is not asking for a trial date immediately after the criminal trial ends. That is when Fox wants to *start* discovery on the impact of any hypothetical conviction. Fox claims that its post-trial discovery will require more document productions, more fact depositions, more expert reports, and more expert depositions. (Mot. at 22.) Fox basically wants to start the case over, except this time only Fox will be taking discovery. Fox is asking for an open-ended stay with no defined end date. In other words, ***Fox is asking this Court to put a billion-dollar defamation case in suspended animation for three to four years or longer (after summary judgment has been briefed) so that Fox can conduct a second round of discovery on a hypothetical future***

event that may never occur. Granting a stay would reward Fox's delay tactics and deny Smartmatic the opportunity to clear its name of being falsely accused of rigging the 2020 election.

B. Fox Cannot Stay Summary Judgment On The Merits.

Fox's argument that the summary judgment proceedings should be stayed is even more far-fetched. Nothing that could happen in the criminal trial would impact any issue of law in this case. Fox has not identified a single element of defamation that would be negated as a matter of law by any fact established in the criminal case, or even a conviction. *At most*, Fox argues that the DOJ allegations or a conviction may be relevant to mitigating future damages.

For starters, general (reputational) damages are presumed for defamation *per se*, *Lieberman v. Gelstein*, 80 NY2d 429, 435 [1992], so that issue is going to the jury regardless of what happens in the criminal trial. Fox has made a "libel-proof plaintiff" argument, but even if that doctrine were recognized under New York law, criminal liability for a bribe in the Philippines in 2016 would not make Smartmatic libel-proof as a matter of law, any more than Goldman Sachs and Wal-Mart are now libel-proof because of their FCPA liability. The U.S. Supreme Court has explicitly held that defamation law should not be applied in a way that "would create an 'open season' for all who sought to defame persons convicted of a crime." *Wolston v. Reader's Dig. Ass'n, Inc.*, 443 US 157, 169 [1979].

As for special damages, New York courts recognize that the jury is "the supreme arbiter on the question of damages" in defamation cases. *Kruglak v. Landre*, 23 AD2d 758, 758 [2d Dept 1965]. The impact of any hypothetical conviction on Smartmatic's future business opportunities would go solely to the quantum of damages, and "[i]t is settled that the amount of damages to be awarded in a defamation action is peculiarly within the jury's province." *Calhoun v. Cooper*, 206 AD2d 497 [2d Dept 1994]. As the *Dominion* court held when it denied Fox's motion summary judgment, this issue is "intensely factual" and "[t]he calculation of damages is a question for the

jury.” *U.S. Dominion Inc. v. Fox News Network*, 293 A3d 1002, 1055 [Del Super Ct 2023]. A FCPA conviction would not allow—much less require—the Court to grant summary judgment on damages.

Finally, the criminal trial is also irrelevant to Smartmatic’s motion for summary judgment on Fox’s SLAPP counterclaim. As explained in detail in Smartmatic’s briefs, no New York court has ever held that the amount of damages is a proper basis for a SLAPP counterclaim. (NYSCEF 2556 at 146-149; NYSCEF 2560 at 80-84.) At least one New York court has found that a SLAPP counterclaim failed even when the plaintiff could prove no damages whatsoever. *See Nat’l Fuel Gas Dist. Corp. v. PUSH Buffalo*, 104 AD3d 1307, 1309 [4th Dept 2013]. The outcome of the criminal trial has no bearing on whether Smartmatic’s defamation action against Fox has a “substantial basis in fact and law.” NY Civ Rights Law §70-a[1][a].

IV. The Note of Issue Should Not Be Vacated After Almost Five Years of Litigation.

Fox cannot come close to meeting the standard for vacating the note of issue. Fox must show both that “unanticipated circumstances” developed after the note of issue and that reopening discovery is necessary to prevent “substantial prejudice.” *Nunez*, 236 AD3d at 1051. Fox cannot establish either.

A. No Unanticipated Circumstances Have Developed.

Fox cannot show unanticipated circumstances that have developed since the Court entered the note of issue in January 2025. Fox has known about the DOJ investigation for three years. *See Diamond v. WWP Office, LLC*, 202 AD3d 503, 503 [1st Dept 2022] (“Defendants failed to show that ‘unusual or unanticipated circumstances’ developed...since they were aware of [the issue] for three years prior to filing the note of issue”). Smartmatic’s employees were indicted more than a year ago. The superseding indictment contains no new allegations. Fox has known every allegation at issue since the original indictment. Fox consented to the note of issue knowing the DOJ could

charge Smartmatic at any time. Fox pretends to be surprised by the new indictment, but it has been anticipating—and reportedly pushing for—this development for a long time.

B. Fox Will Not Suffer “Substantial Prejudice” If Discovery Remains Closed.

The Court held (and Fox conceded) that DOJ allegations are not a proper subject for discovery. Fox cannot be prejudiced by the denial of what it is not entitled to. Fox received all *relevant* discovery under the First Department’s order—documents reflecting the impact of the criminal case on Smartmatic’s business. Smartmatic will continue supplementing this production as required. Smartmatic has already produced numerous documents reflecting the business impact (or lack thereof) under the First Department’s order and will continue to do so. No substantial prejudice can exist when Fox is already receiving the discovery it is entitled to under the First Department’s order.

C. If Discovery on the DOJ Allegations Is Allowed, Smartmatic Will Seek Discovery Showing That Fox Procured Its Indictment.

While Smartmatic does not support further discovery, if it were allowed, Smartmatic will be seeking discovery on Fox’s behind-the-scenes push to indict Smartmatic. As set forth above (Background, Section C), the circumstances of Smartmatic’s indictment suggest collusion between Fox and the DOJ. Fox has admitted to communicating with the DOJ about Smartmatic’s criminal investigation, despite having no legitimate reason to do so. The timing of the superseding indictment—filed more than a year after the DOJ indicted Smartmatic’s employees, with no new allegations whatsoever, and just weeks before summary judgment argument—suggests coordination rather than coincidence. This timing was of course ideal for Fox’s litigation strategy (perpetual delay). Fox’s connections with the DOJ are stronger than ever, with Fox host Jeanine Pirro now serving as U.S. Attorney and Fox recently hiring the brother of Attorney General Pam Bondi—the official responsible for approving Smartmatic’s indictment in violation of the DOJ’s

own Guidelines. Fox executives, including the Murdochs, held secret meetings with J.D. Vance in June 2025, two weeks after Pirro was sworn in at DOJ.

These are not coincidences. In fact, Smartmatic has it on good authority that *discovery into Fox's communications with the DOJ and the Trump Administration will show that Fox procured the indictment of Smartmatic* and, with the DOJ's cooperation, weaponized it to gain tactical advantage in this case. There is no reason to go down the path of reopening discovery. But if it happens, Smartmatic will be dredging Fox's back channel to the DOJ and the Oval Office.

CONCLUSION

For all these reasons, Fox's Order to Show Cause to Stay Proceedings and Strike the Note of Issue should be denied.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

In accordance with Section 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court, I certify that this foregoing memorandum of law contains 6,984 words, exclusive of the Table of Contents, Table of Authorities, the cover page, and the signature block, based on a Word Count check performed by our word processing system.