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Plaintiffs Smartmatic USA Corp., Smartmatic International Holding B.V., and SGO Corporation Limited (collectively, “Smartmatic”) respectfully submit this memorandum of law in support of their motion, brought by an Order to Show Cause, seeking an order:

1. compelling Rudolph Giuliani (“Giuliani”) to produce immediately all non-privileged documents responsive to the agreed upon search terms in his vendor’s possession within seven days of the date of the Order granting this motion;
2. compelling Giuliani to provide an affidavit in accordance with *Jackson v. City of New York*, 185 A.D.2d 768, 770 (1st Dep’t 1992), addressing all of Giuliani’s efforts taken to preserve, collect, and search potentially relevant data specific to this litigation;
3. compelling Giuliani to provide financial information and declaration, under penalty of perjury, regarding his claims that he cannot produce and/or search documents in his vendor’s possession because of his financial hardship;
4. awarding sanctions, attorneys’ fees, and costs against Giuliani pursuant to CPLR 3126, 22 N.Y.C.R.R. § 202.20-e, and/or the Court’s inherent authority for his willful noncompliance with discovery obligations, including but not limited to reimbursement of Smartmatic’s costs and attorneys’ fees in connection with this motion; and
5. awarding all other and further relief that the Court deems just and proper.

### **OVERVIEW OF THE ARGUMENT**

“The dog ate my homework.” “I have to wash my hair.” “I can’t go out, I’m sick.” Since the dawn of time, people have made up excuses to avoid doing things they do not want to do. This is exactly what Giuliani has done here. For months, Giuliani has made up excuses to get out of his discovery obligations to Smartmatic and to violate orders from this Court. To date, Giuliani has not produced a single non-public document responsive to the discovery requests Smartmatic issued fourteen months ago. Giuliani and his counsel must be held accountable for their repeated and blatant delay tactics and misrepresentations. Smartmatic’s patience should not be punished with further delay and excuses. Enough is enough.

*First*, the Court must compel Giuliani to immediately produce the documents he has already agreed to produce. Over the past fourteen months, Giuliani and his counsel have made excuse after excuse to avoid deadlines (both court-ordered and those agreed-to by the parties) and the production of documents. Giuliani produced no documents responsive to Smartmatic's document demands by the document production deadline in the Preliminary Conference Order. He half-heartedly undertook a manual review of two devices after a court order, in which he only located two publicly available Tweets. Now, with the parties about to embark on depositions, Giuliani has refused to commit to a date certain for his document production. The Court should order Giuliani to produce the documents responsive to Smartmatic's requests within seven days of the date of the Order granting this motion.

*Second*, the Court must order Giuliani to prepare a *Jackson* affidavit regarding his document preservation and collection efforts. From the start of discovery through today, Giuliani and his counsel regularly flipped position on whether or not Giuliani could afford to search for and produce documents stored by his e-discovery vendor. And, even when Giuliani agreed to provide information or documents to Smartmatic, he ultimately failed to uphold his side of the agreement without any believable explanation. Given his ongoing refusal to participate in discovery, Giuliani must be required to provide an affidavit regarding his alleged efforts. Giuliani has already provided a similar declaration in another litigation and agreed (before he then again flipped his position) to provide a similar declaration to Smartmatic.

*Third*, the Court must order Giuliani to produce information about his financial situation. Smartmatic does not believe Giuliani when he claims that he lacks the money necessary to produce documents responsive to Smartmatic's discovery requests. Smartmatic believes that is just another lie. Smartmatic also suspects, based on recent public disclosures, that others will pay for Giuliani's

discovery expenses if necessary, including former President Trump's campaign, which recently disclosed making such payments for Giuliani. Accordingly, since Giuliani has claimed, not claimed, and then claimed again the lack of resources to produce documents to Smartmatic, he must produce complete and verified (under the penalty of perjury) information. Smartmatic and this Court cannot simply rely on Giuliani's empty assertions.

*Fourth*, the Court must sanction Giuliani pursuant to CPLR 3126, Uniform Civil Rule Section 202.2-e, and/or the Court's inherent authority. All permit sanctions where a party repeatedly avoids its discovery obligations. Giuliani has engaged in a pattern of delay and obstruction perhaps unprecedented before this Court. Indeed, Smartmatic challenges Giuliani to identify any instance where a party has failed to produce a single, non-public responsive document over the course of fourteen months of discovery. Smartmatic has produced over 10.7 million pages of responsive documents. Giuliani sits at zero. And Smartmatic is the victim here. Smartmatic is the one that Giuliani publicly and repeatedly defamed. The wrongdoer is again engaged in wrongdoing. Giuliani and his counsel should not be allowed to get away with this behavior.<sup>1</sup>

### **PROCEDURAL BACKGROUND**

In November 2020, Giuliani was one of the primary proponents spreading the false story that Smartmatic stole the 2020 election from former President Trump. Giuliani spread this false story through multiple appearances on Fox News. Fox News then repeated Giuliani's story, relying only on Giuliani and Sidney Powell as sources. To get people to believe his story, Giuliani presented himself as a lawyer who only makes statements based on facts and evidence, and he had evidence to back up his story. Of course, as multiple courts and disciplinary panels have found,

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<sup>1</sup> Giuliani has not even answered Smartmatic's First Amended Complaint, filed in March 2023. (NYSCEF No. 1199.) Combined with his failure to comply with discovery obligations, Giuliani's failure to answer indicates that he does not intend to present a defense and judgment should be entered against him.

everything that Giuliani said about the 2020 election, including his claims about Smartmatic, were 100 percent false. Lies. Smartmatic brought this suit against Giuliani to hold him accountable for the harm his false story inflicted on Smartmatic, its reputation, and its businesses.

**A. Giuliani first attempted to evade his discovery obligations by relying on documents produced in other actions.**

Giuliani's first excuse to avoid producing documents responsive to Smartmatic's demands was to direct Smartmatic to documents he produced in other litigations. In July 2022, Giuliani produced 1,269 documents he previously produced in *US Dominion, Inc. v. Giuliani*, 21-cv-213 (D.D.C.) (the "*Dominion* production"). The *Dominion* production includes copies of physical documents and does not include any electronically stored information. (*Id.*) Giuliani's written responses to Smartmatic's document demands merely referred Smartmatic to the *Dominion* production. (Pope Aff. Ex. 1.) Giuliani did not agree to produce a single additional document, despite having access to his electronically stored information. (*Id.*)

Giuliani's position—that Smartmatic should only get what he produced to Dominion—is facially absurd. Smartmatic is not the same company or plaintiff as Dominion. Smartmatic is not a party to the *Dominion* action (or any other action involving Giuliani) and Smartmatic's interests have not been represented through the *Dominion* action. While the *Dominion* production contains documents that are relevant to this litigation, it does not include documents that are uniquely responsive to Smartmatic's document demands. Giuliani backed away from his absurd stall tactic after Smartmatic pointed out its absurdity. (Pope Aff. Ex. 2 at 4.) In October 2022, Giuliani agreed to run searches across the electronically stored information derived from the devices seized by the FBI and produce responsive, non-privileged documents. (*See* Pope Aff. Ex. 3 at 6-7, Oct. 14, 2022 email from T. Frey.) Of course, that too was a lie.



**B. Giuliani next attempted to avoid his discovery obligations by claiming he cannot pay for the production.**

Just when Smartmatic thought Giuliani would fulfill his discovery obligations, Giuliani came up with his next excuse—he could not pay his document vendor. Beginning in October 2022, the parties met and conferred extensively regarding: the devices seized by the FBI; the data that Giuliani received from Special Master Jones and provided to his e-discovery vendor; the date range for the searches; and the search terms to run to locate responsive documents. (*See generally* Pope Aff. Exs. 3, 4.) During this period, Giuliani’s counsel was slow to respond to Smartmatic’s questions, failed to give straightforward answers to those questions, and even blew off Smartmatic’s counsel. (*See, e.g.*, Pope Aff. Ex. 4 at 15, Jan. 10, 2023 email from T. Frey.) Giuliani’s counsel also shut down Smartmatic’s attempts to get this information directly from Giuliani’s e-discovery vendor, TrustPoint One (“TrustPoint”). (Pope Aff. Ex. 3 at 1, Nov. 17 email from B. Costello.) In response to numerous questions about the data pulled from the seized electronic devices, Giuliani’s counsel merely told Smartmatic that “Trustpoint has all of the electronic information on its relativity platform” and the platform includes data “up until the date of seizure in late April 2021.” (*Id.*)

In early February 2023, Giuliani finally agreed to search terms to run against the data in TrustPoint’s possession and a date range for the searches. (Pope Aff. Ex. 4 at 10-11, Jan. 26, 2023 email from L. Tortorella; 3-4, Feb. 8, 2023 email from L. Tortorella.) However, this “agreement” was smoke and mirrors. When asked to provide a date for his document production, Giuliani balked. Giuliani informed Smartmatic that TrustPoint will not run any searches or produce documents because of Giuliani’s outstanding account balance. (Pope Aff. Ex. 4 at 7, Feb. 1, 2023 email from A. Katz.) Initially, Giuliani represented that the outstanding balance would not be an obstacle because “money to reduce the outstanding bill will be forthcoming.” (Pope Aff. Ex. 4 at

5, Feb. 7, 2023 email from A. Katz.) Yet days later, Giuliani backtracked, stating “there is no guarantee when the money will actually come through.” (Pope Aff. Ex. 4 at 2, Feb. 23, 2023 email from A. Katz.) Giuliani’s only solution to his inability to produce documents was to ask Smartmatic to pay TrustPoint directly to run searches. (Pope Aff. Ex. 4 at 3, Feb. 20, 2023 email from A. Katz.) Giuliani rejected Smartmatic’s offer to host Giuliani’s data through Smartmatic’s e-discovery vendor, run the parties’ agreed upon search terms, and produce non-privileged documents. (Pope Aff. Ex. 4 at 1, Feb. 24, 2023 email from L. Tortorella; 1, Feb. 27, 2023 email from A. Katz.)

When Smartmatic brought this issue to the JHO (*see* Pope Aff. Ex. 5), Giuliani refused to provide any information regarding his financial situation. He also claimed, contradicting communications from Giuliani’s counsel and TrustPoint, that the TrustPoint database “is not currently accessible or searchable [and] in cold storage.” (Pope Aff. Ex. 6 at 4.) Smartmatic knew that representation was a lie based on communications between Giuliani’s counsel and TrustPoint. When Giuliani’s counsel asked TrustPoint for estimated costs “to run searches and produce responsive documents,” TrustPoint simply responded with an estimate and gave no indication that the electronic data in its possession was “not searchable.” (Pope Aff. Ex. 7, Mar. 10, 2023 email from A. DaHarry.)

In the interest of compromise and to get Giuliani to produce some documents, at the March 20 Hearing, JHO Marin directed Giuliani to conduct a manual review of his two most used devices during September 1, 2020 to April 30, 2021. (*See* Pope Aff. Ex. 8 at 1, Mar. 27, 2023 email from A. Katz.) Given the timing of JHO Marin’s direction, Smartmatic did not expect to receive any documents prior to March 31, 2023, the Completion of Document Production deadline in the Preliminary Conference Order (“PC Order”). (*See* NYSCEF No. 1080.) Ultimately, Giuliani failed

to produce any documents responsive to Smartmatic's document demands in compliance with the PC Order. For the time being, his excuses worked.

**C. Giuliani tried these same excuses to avoid his discovery obligations in another action, but the court did not buy his excuses.**

As Giuliani was attempting to evade his discovery obligations to Smartmatic, he was also trying to avoid discovery in another litigation. Giuliani is a defendant in another lawsuit stemming from his lies about the 2020 U.S. Election, *Freeman, et al. v. Herring Networks, Inc. et al.*, 21-cv-3354 (D.D.C.) ("*Freeman*"). In *Freeman*, two Georgia election workers sued Giuliani for defamation based on Giuliani's statements related to the 2020 election. (Pope Aff. Ex. 9, *Freeman*, Dkt. 1, Compl (Dec. 23, 2021).) During fact discovery, Giuliani gave the same excuses he did here to avoid document production. When the plaintiffs sought documents from the TrustPoint database, Giuliani claimed that "the TrustPoint documents have been archived" and Giuliani would have to "pay considerable fees to have the documents unarchived and searched for additional files." (Pope Aff. Ex. 10, *Freeman*, Dkt. 42, Joint Status Report at 4, 12 (Apr. 10, 2023).) Again, Giuliani's only solution was to ask the plaintiffs to pay for his production. (*Id.*) The *Freeman* plaintiffs filed a motion to compel Giuliani to detail his preservation efforts and to complete his document production, including producing documents from the TrustPoint database, at his own expense. (Pope Aff. Ex. 11, *Freeman*, Dkt. 44, Motion to Compel (Apr. 17, 2023).) Giuliani opposed the motion by offering the same excuses. (Pope Aff. Ex. 12, *Freeman*, Dkt. 51, Response to Plaintiffs' Motion to Compel (May 1, 2023).)

The *Freeman* court declined to take Giuliani at his word. On May 19, 2023, the *Freeman* court ordered Giuliani to file a declaration, subject to penalty of perjury, detailing: 1) all efforts taken to preserve, collect, and search potentially responsive data to plaintiff's RFPs; 2) a complete list of all locations and data Giuliani used to communicate about material responsive to plaintiffs'

RFPs, including email accounts and text message platforms; 3) detailed information about the specific data in the TrustPoint database and source devices; and 4) a list of the searches, if any, Giuliani performed of his communications and in the TrustPoint database. (Pope Ex. 13, *Freeman*, Docket at 15, Minute Order (May 19, 2023).) That same day, the *Freeman* court also ordered Giuliani to provide full and complete responses to plaintiffs' requests for financial information and documentation regarding the costs for further searches of the TrustPoint database, "in order to evaluate [Giuliani's] claim of an inability to afford the cost of access to, and search of, the TrustPoint dataset." (Pope Ex. 13, *Freeman*, Docket at 15, Minute Order (May 19, 2023).) For the first time, Giuliani was ordered to back up his excuses with evidence.

The *Freeman* court called Giuliani's bluff. Faced with the prospect of having to disclose information about his financial status, Giuliani miraculously (and seemingly overnight) "obtained funding to pay the arrearage with TrustPoint to allow for full and complete searches responsive to Plaintiffs' RFPs."<sup>2</sup> (Pope Ex. 14, *Freeman*, Dkt. 61, Motion to Reconsider Court's May 19th Minute Order (May 30, 2023).) Giuliani even submitted a declaration stating he was "preparing to search the TrustPoint database for all files during the relevant time frame." (Pope Ex. 15, *Freeman*, Dkt. 60, Declaration (May 30, 2023).) Giuliani eventually produced documents responsive to the *Freeman* plaintiffs' search terms.<sup>3</sup> (Pope Aff. Ex. 24 at 1, July 25, 2023 email from J. Sibley; Pope Aff. Ex. 25 at 1-2, July 31, 2023 email from A. Katz.)

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<sup>2</sup> Recent news reports suggest that former President Trump's super PAC paid Giuliani's bill to TrustPoint. (Jonah E. Bromwich, *How Rudy Giuliani Became Co-Conspirator 1* (NY Times, Aug. 2, 2023).)

<sup>3</sup> Giuliani continues to refuse to produce his financial information. The *Freeman* court denied Giuliani's Motion for Reconsideration of the court's order to produce "full and complete responses to plaintiffs' requests for financial information." (Pope Ex. 13, *Freeman*, Docket at 20, Minute Order (June 22, 2023).) Giuliani also continues to fight the *Freeman* court's order that Giuliani pay plaintiffs' attorneys' fees and costs related to the April 17, 2023 Motion to Compel. (*Id.* at 21, Minute Order (June 23, 2023); at 25, Minute Order (July 13, 2023).)

**D. While Giuliani defends his document production in *Freeman*, Smartmatic attempts to obtain the results of Giuliani's manual review.**

Smartmatic closely followed the developments in the *Freeman* litigation, given that the TrustPoint database was at issue in both cases. At the same time, Smartmatic attempted to work with Giuliani to obtain the results of his manual review of his two most used devices, as ordered by JHO Marin on March 20, 2023. (*See generally* Pope Aff. Ex. 8.) Week after week, Giuliani failed to produce any documents or provide an update on the review. (*See* Pope Aff. Ex. 16 at 2, May 5, 2023 email from L. Tortorella.) Smartmatic was forced to ask the JHO to impose a deadline on Giuliani's production. (Pope Aff. Ex. 17.) JHO Marin ordered Giuliani to produce documents located during the manual review by May 26, 2023, later amended to June 9, 2023. (Pope Aff. Ex. 18 at 1-2, May 25, 2023 email from Hon. Alan C. Marin.)

On June 9, 2023, Giuliani finally shared the results of his long-awaited manual review with Smartmatic. The result? Only "two publicly available tweets." (Pope Ex. 19 at 1, June 9, 2023 email from A. Katz.) According to Giuliani, he did not locate a single, non-privileged document during his manual review. (*Id.*) This result was absurd but unsurprising. Giuliani's only ran basic searches in two email accounts and conducted a manual search of text messages on his iPhone and iPad. (Pope Aff. Ex. 20, ¶¶2-4.) Hardly a thorough or complete search. But, Smartmatic believed that a manual search may be academic. At long last, Giuliani promised to produce documents responsive to Smartmatic's search terms in the TrustPoint database. (*Id.*, ¶5 ("my team plans to conduct the more complex searches that Plaintiffs demanded . . . and the actual document[s] will be forthcoming in several rolling productions over the next few weeks."))

**E. Giuliani informs Smartmatic that he will produce documents responsive to Smartmatic's search terms.**

When news of Giuliani's sudden change in financial circumstances hit the *Freeman* docket, Smartmatic demanded Giuliani "1) run the agreed-upon search terms for this case in the TrustPoint

database and 2) produce all non-privileged documents hitting on those terms.” (Pope Aff. Ex. 19 at 9, May 31, 2023 email from L. Tortorella.) A week later, counsel for Giuliani confirmed “we are running the search terms.” (*Id.* at 6, June 6, 2023 email from J. Sibley.) On June 8, 2023, counsel for Smartmatic and Giuliani met and conferred to agree on a production schedule. (*See* Pope Aff. Ex. 19 at 2, June 8, 2023 email from L. Tortorella.) Giuliani agreed to produce documents on a rolling basis, starting on June 23, 2023, and agreed to finish his production, including a privilege log, by July 7, 2023. (*Id.*) Later that day, Giuliani provide Smartmatic will a hit report for the agreed-upon search terms. (Pope Aff. Ex. 19 at 1, June 8, 2023 email from J. Sibley.)

Based on assurances from Giuliani’s counsel, Smartmatic thought Giuliani was on track to meet the deadlines he agreed to—Smartmatic was wrong. Giuliani failed to make a production on June 23. (Pope Aff. Ex. 21 at 1-2, June 25, 2023 email from L. Tortorella.) Nor did Giuliani give Smartmatic a heads up that he would not meet the agreed-upon deadline. (Pope Aff. Ex. 21 at 1, June 26, 2023 email from L. Tortorella.) Counsel for Giuliani claimed that “the process is taking longer than expected,” but refused to commit to new dates for his document production. (Pope Aff. Ex. 21 at 1, June 25, 2023 email from J. Sibley; June 26, 2023 email from L. Tortorella.) Smartmatic had no choice but to seek this Court’s intervention.

**F. Giuliani once again backtracks on his promises to Smartmatic—and this Court—by refusing to produce documents.**

On July 5, 2023, Smartmatic requested a status conference with the Court seeking “an enforceable order requiring Mr. Giuliani to complete his long-overdue production by a date certain.” (Pope Aff. Ex. 22; Ex. 23 at 5-6, July 6, 2023 email from D. Pope.) Smartmatic told the Court it was concerned that, without an order, “Mr. Giuliani will continue to forestall his production, or perhaps claim he has run out of money to pay for the production again.” (Pope Aff. Ex. 23 at 5-6, July 6, 2023 email from D. Pope.) In response, counsel for Giuliani informed the

Court, this Court's Principal Law Clerk, and Smartmatic that "we will be able to make a nearly complete *production of documents responsive to Plaintiffs' search terms* in 10 business days." (Pope Aff. Ex. 23 at 4-5, July 7, 2023 email from A. Katz.) Based on this representative, the Principal Law Clerk held Smartmatic's request for a conference until June 21 but confirmed that "if the documents are not received by the deadline, then Justice Cohen will have an in-person conference ASAP." (Pope Aff. Ex. 23 at 3, July 7, 2023 email from C. Paszkowska.)

Giuliani did not produce a single document responsive to Smartmatic's search terms. Not one. Instead, Giuliani reproduced the documents he had given the *Freeman* plaintiffs. (Pope Aff. Ex. 24 at 1, July 25, 2023 email from J. Sibley.) Giuliani's counsel then compounded the shortcoming by not being honest with Smartmatic about the documents being produced. Smartmatic had to download and review the production metadata in order to discover Giuliani's deception. (Pope Aff. Ex. 24 at 1, July 25, 2023 email from L. Tortorella.) Unsurprisingly, when Smartmatic called out Giuliani for not producing any document responsive to Smartmatic's request, Giuliani merely stated "we will get back to you." (Pope Aff. Ex. 24 at 1, July 25, 2023 email from J. Sibley.) Smartmatic informed the Court of Giuliani's failure to meet the June 21 deadline and the Court scheduled a conference for August 16. (Pope Aff. Ex. 23 at 1, July 25, 2023 email from D. Pope; Ex. 25 at 2-3, July 28, 2023 email from C. Paszkowska.)

Stunningly, after the Court scheduled a conference for August 16, counsel for Giuliani said no document production was forthcoming. Once again, Giuliani claimed he had no money to pay TrustPoint. (Pope Aff. Ex. 25 at 1-2, July 31, 2023 email from A. Katz.) Giuliani further claimed "[t]here was a miscommunication where the Giuliani defense team was under the impression that TrustPoint was running the searches in both cases (*Freeman/Moss* and *Smartmatic*), but TrustPoint is claiming they were only paid to run the searches in *Freeman/Moss*." (*Id.*). There was no

miscommunication. In emails from Giuliani's counsel and in *a declaration from Giuliani himself*, Smartmatic was repeatedly assured that Giuliani "plans to conduct the more complex searches that Plaintiffs demanded [] and the actual document[s] will be forthcoming in several rolling productions over the next few weeks." (Pope Aff. 20, ¶5.)

Smartmatic could see the lie loud and clear. Giuliani and his counsel would promise to produce documents, promise it would be done by a date certain, and then fail to meet that commitment. Immediately after failing to meet the production deadline, Giuliani and his counsel would concoct a new (or repeat an old) excuse for failing to produce documents. Recognizing this now familiar patters, Smartmatic gave Giuliani one last chance to produce documents by August 7, 2023. (Pope Aff. Ex. 25 at 1, Aug. 2, 2023 email from L. Muench.) Giuliani, of course, missed this deadline too. At that point, Smartmatic brought this Order to Show Cause.

### ARGUMENT

**A. The Court should order Giuliani to produce all non-privileged, responsive documents immediately.**

Giuliani's refusal to produce a single document responsive to Smartmatic's document requests, in defiance of the PC Order, has already prejudiced Smartmatic. Any further delay in production will severely prejudice Smartmatic's ability to prosecute its case against Giuliani *and* the Fox Defendants. Smartmatic needs Giuliani's discovery *now* and the Court has ample authority to compel Giuliani to produce document.

The Court can grant Smartmatic's requested relief by exercising its inherent authority to enforce the PC Order. "Under the inherent powers doctrine, a court has all the powers reasonably required to enable it to perform its judicial functions; to protect its dignity, independence, and integrity; and to make its lawful actions effective." 20 N.Y. Jur. 2d Constitutional Law § 170. Based on this inherent power, the Court must step in when a party is blatantly refusing to comply with



the PC Order. *Ortega v. City of New York*, 809 N.Y.S.2d 884, 895 (Sup. Ct. King Cnty. 2006), *aff'd*, 35 A.D.3d 422 (2006), *aff'd*, 9 N.Y.3d 69 (2007) (“Enforcement of court orders goes to the very underpinning of our legal system and without enforcement there would be no rule of law.”). Further, the Court generally “has broad discretion in supervising disclosure and in resolving discovery disputes”. *HSBC Bank USA, N.A. v. Oscar*, 161 A.D.3d 1055, 1057 (2d Dep’t 2018) (internal quotation marks omitted).

Here, the Court must excise its inherent authority to order the immediate production of documents responsive to Smartmatic’s document requests. **First**, Smartmatic cannot take Giuliani’s deposition without documents responsive to its document demands. Courts routinely recognize the importance of substantially completing document production prior to party depositions. *See e.g. Vladeck, Waldman, Elias & Engelhard, P.C. v. Paramount Leasehold, L.P.*, 46 Misc. 3d 1225(A) at \*5 (Sup. Ct. New York Cnty. 2015) (finding certain documents were relevant to plaintiffs’ claims and therefore the defendant was required to produce them prior to depositions); *see also Red Apple Supermarkets, Inc. v. Malone & Hyde, Inc.*, 251 A.D.2d 78, 79 (1st Dep’t 1998) (granting sanctions where plaintiff did not timely produce documents to allow defendant to prepare for depositions). Smartmatic would be prejudiced were it required to take Giuliani’s deposition within the timeframe contemplated in the PC Order without Giuliani’s document production.

**Second**, without his document production, Smartmatic cannot test Giuliani’s defenses by subpoenaing relevant non-parties. Giuliani’s missing document production likely reveals the “sources” (real or make-believe) that Giuliani relied on for his defamatory statements. As Giuliani will rely on these “sources” to support his affirmative defense that his statements were true or substantially true, his “sources” are highly material to this case. *See Stepanov v. Dow Jones & Co.*,

120 A.D.3d 28, 34 (1st Dep’t 2014) (“Because the falsity of the statement is an element of the defamation claim, the statement’s truth or substantial truth is an absolute defense.”); *see also* CPLR 3101(a) (“There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action”). Smartmatic must be given the opportunity to seek discovery or deposition from these “sources” before trial. Without a fulsome document production from Giuliani, Smartmatic is unable to launch probes into any of these third-party “sources” Giuliani may rely on in defense.

*Third*, Giuliani’s delay impacts Smartmatic’s ability to pursue its case against the Fox Defendants because Giuliani is one of the two primary sources, if only sources, that the Fox Defendants have identified in support of what it published about Smartmatic. (*See generally* NYSCEF No. 1438, Fox News Network Answer and Counterclaim to First Amended Complaint at Twentieth Defense And First Counterclaim.) Giuliani’s lack of credibility—and the obvious reasons to doubt Giuliani’s credibility—establishes actual malice as to the Fox Defendants. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (explaining that in cases “involving the reporting of a third party’s allegations, recklessness may be found *where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*”) (internal quotations omitted). Smartmatic needs Giuliani’s documents to further one of its key theories of liability against the Fox Defendants (reliance on an obviously unreliable source) *and* to confirm that the Fox Defendants have produced everything they have related to Giuliani.

**B. The Court should order Giuliani to provide a *Jackson* Affidavit regarding his efforts to produce documents because Giuliani has failed to make a good faith effort to produce responsive electronically stored data.**

Giuliani has refused to provide Smartmatic with a detailed account of his efforts to preserve, collect, and search potentially responsive data. He has either ignored Smartmatic’s questions or provided vague answers. It is time for Giuliani to provide a *Jackson* affidavit.

A *Jackson* affidavit requires a party claiming not to have any responsive documents or failing to produce any responsive documents in response to discovery requests to explain where “the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found.” *Jackson v. City of New York*, 185 A.D.2d 768, 770 (1st Dep’t 1992). *Jackson* affidavits advance disclosure when: (a) a party fails to “evinced[] a good-faith effort to address the [opposing party’s] requests meaningfully,” *WMC Mortg. Corp. v. Vandermulen*, 32 Misc. 3d 1206(A), at \*4 (Sup. Ct. Suffolk Cnty. 2011); (b) the requested discovery is “seemingly important” *Lazzaro v. MJM Industries*, 2003 WL 25573908 (Sup. Ct. New York Cnty. 2003); or (c) the responding party produces some, but not all responsive documents. *See id.* (directing defendant to provide a *Jackson* affidavit to explain why it could produce some films plaintiff sought but not the rest); *Hassn v. Armouth Int’l Inc.*, 74 Misc. 3d 1204(A), at \*4 (Sup. Ct. New York Cnty. 2022) (finding defendant’s *Jackson* affidavit “insufficient” because it failed to explain “why defendant has some [responsive] documents...but not others”). In these situations, a *Jackson* affidavit fills a key role: it provides the Court with a “basis to find that the search had been a thorough one or that it had been conducted in a good faith effort to provide the[] necessary records[.]” *Jackson*, 185 A.D.2d at 770. All these situations are present here.

**First**, the evidence at issue—documents from the TrustPoint database responsive to Smartmatic’s search terms—is critically important for Smartmatic’s case against Giuliani and the Fox Defendants. According to filings in the *Freeman* litigation, the TrustPoint database includes “email files, pdfs, images, word files, as well as text and messenger files from messaging applications” from all of the electronic devices seized from Giuliani in April 2021. (Pope Aff. Ex. 26, *Freeman*, Dkt. 40, Report to Court re Minute Order (Mar. 24, 2023).) Giuliani’s own files are

the most important documents for Smartmatic's case against Giuliani. As explained above, these files contain evidence that is the very heart of Giuliani's affirmative defenses *and* Smartmatic's theories of liability against Giuliani and the Fox Defendants. (*Supra*, Section A.)

**Second**, Giuliani has not merely failed to make a good-faith effort to produce documents—he has acted in bad faith from the beginning. Indeed, one would be hard pressed to find a clearer example of a party acting in bad faith with respect to their discovery obligations. At times it has been difficult to keep up with Giuliani's ever-changing position—throughout discovery he has alternatively refused to produce any documents; agreed to produce some documents; or claimed he cannot afford to produce documents. Making matters worse, Giuliani has largely evaded Smartmatic's questions about what sources of information he has searched and what sources he has access to and when. Based on his ever-changing representations *in this case*, Smartmatic cannot even be sure what data is included in the TrustPoint database.

Of course, Giuliani's evasiveness goes beyond the TrustPoint database. Giuliani has failed to be up front about what data he may have access to outside the TrustPoint database. Indeed, the only time Giuliani has attempted to detail his efforts to locate responsive documents was after the manual review he conducted at the direction of JHO Marin. (Pope Aff. Ex. 20.) Even then, Giuliani did not provide information until Smartmatic demanded it. (Pope Aff. Ex. 21 at 2-3, June 16, 2023 email from L. Tortorella.) It is clear that Giuliani will not provide straight forward answers about his efforts related to document discovery unless ordered to do so.

**Finally**, the Court should disregard any claim of burden by Giuliani. Giuliani has already provided this exact information, under penalty of perjury, in *Freeman*. (Pope Aff. Ex. 15, *Freeman*, Dkt. 60, Declaration (May 30, 2023); *see also* Pope Aff. Ex. 13, *Freeman*, Docket at 15, Minute Order (May 19, 2023) (specifying information Giuliani must include in declaration).) What's more,

Giuliani previously agreed to provide this information to Smartmatic, but did not commit to providing a declaration be made under this case caption. (Pope Aff. Ex. 27 at 3, May 22, 2023 email from A. Katz (“I will send you whatever is submitted in [*Freeman*] and indicate, if necessary, in a supplemental declaration if there is anything additional responsive to Smartmatic’s Request”); 1, May 24, 2023 email from J. Sibley (“I can confirm we will give you a materially similar declaration to what we provide in *Freeman* by the end of next week.”).)<sup>4</sup> Clearly, Giuliani did not find this request burdensome in late May. He merely did not want to submit a declaration to this Court. It is, perhaps, obvious why.

**C. The Court should order Giuliani to provide documents and a declaration supporting his most recent claim that he cannot pay for document production.**

Every time Giuliani faces a potential order to produce documents, he claims—with no documentation—that he is unable to pay TrustPoint. He first made this excuse in February 2023, just as he agreed to Smartmatic’s search terms. (Pope Aff. Ex. 4 at 7, Feb. 1, 2023 email from A. Katz.) Giuliani gave the *Freeman* plaintiffs the same excuse. (Pope Aff. Ex. 10, *Freeman*, Dkt. 42, Joint Status Report at 4, 13-14 (Apr. 10, 2023).) Now, days after the Court scheduled a conference to discuss Giuliani’s failure to produce documents, Giuliani again claims he cannot pay, just weeks after he told Smartmatic he had the funds for document production. (Pope Aff. Ex. 25 at 1-2, July 31, 2023 email from A. Katz.)

Frustratingly, Giuliani has provided no information to back up his claimed financial woes. In his responses to Smartmatic’s document demands, Giuliani flatly refused to provide any documents “sufficient to show [his] financial condition between January 1, 2018 to the present.” (Pope Aff. Ex. 2, No. 35.) When he first claimed inability to afford document production, Giuliani

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<sup>4</sup> Unsurprising, Giuliani did not send Smartmatic the declaration filed in *Freeman*, a supplemental declaration, or a “materially similar” declaration. As usual, Smartmatic only learned about the declaration from the *Freeman* docket.

made no offer to provide any support. (*See generally* Pope Aff. Ex. 6 at 4.) The same is true now that he has renewed this claim. (Pope Aff. Ex. 25 at 1-2, July 31, 2023 email from A. Katz.) Further, the only “documentation” Giuliani ever provided regarding what it would cost to complete his documents, is a two-sentence email from TrustPoint in March 2023. (Pope Aff. Ex. 7, Mar. 10, 2023 email from A. DaHarry.) Giuliani has not shared any information on the current cost to complete his document production. (*See* Pope Aff. Ex. 25 at 1-2, July 31, 2023 email from A. Katz.)

Thus, the only “information” backing up Giuliani’s supposed financial difficulties is his unverified, self-serving word. That’s not good enough. Not even close to good enough. Smartmatic needs documentation and a verified declaration (under the penalty of perjury) to fully understand if Giuliani is accurately representing his current financial status *and* if he has accurately represented his previous financial status. Smartmatic suspects that, on this issue, like many others, Giuliani is lying. So far, Giuliani’s financial position tends to be whatever is most convenient for Giuliani. Whenever he is ordered to do something, he lacks the money to pay for it. But, when told he must submit a declaration showing he lacks funds, somehow the previously unavailable money appears. It’s a miracle.

Compelling Giuliani to produce information about his financial situation is also relevant if, as Smartmatic anticipates, Giuliani takes the position that the Court should shift the cost of his document production to Smartmatic. The presumption in New York is that “the producing party [bears] the initial cost of searching for, retrieving and producing discovery.” *U.S. Bank Nat. Ass’n v. GreenPoint Mortg. Funding, Inc.*, 94 AD3d 58, 63 (1st Dep’t 2012). Courts may consider cost-shifting when the information at issue is “relatively inaccessible” electronic data. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 323 (S.D.N.Y. 2003). To be clear, the TrustPoint database is not

inaccessible; Giuliani just, allegedly, cannot pay to access it. *Zubulake*, 217 F.R.D. at 318–20 (classifying “active, online data,” “near-line data,” and “offline storage/archives” as accessible.) However, if the data were inaccessible, Giuliani’s financial resources and the cost of production are directly relevant to three of the seven factors courts must consider when determining whether cost-shifting is warranted. *Zubulake*, 217 F.R.D. at 324 (“(3) The total cost of production, compared to the amount in controversy; (4) The total cost of production, compared to the resources available to each party; (5) The relative ability of each party to control costs and its incentive to do so”). To properly perform this analysis, Smartmatic and the Court need more than Giuliani’s word. *See Brandofino Commc’ns, Inc. v. Augme Techs. Inc.*, 2014 WL 302227, at \*5 (Sup. Ct. New York Cnty. 2014) (“defendants’ blanket assertion, without more, that the compliance cost would be \$15,000 does nothing to assist this Court in determining whether that amount constitutes an undue burden or expense, particularly in view of the fact that plaintiff’s claimed damages are at least \$1 million”). Ordering Giuliani to produce this information now will facilitate this Court’s ability, if necessary, to rule on who should pay for Giuliani’s document production.

**D. Giuliani’s willful noncompliance with his discovery obligations warrants sanctions.**

Giuliani has repeatedly failed to meet his discovery obligations to and agreements with Smartmatic. He has repeatedly misrepresented or outright lied about his ability to participate in discovery to Smartmatic and to this Court. Giuliani must be sanctioned.

The Court has the power to sanction Giuliani pursuant to Section 202.2-e, CPLR 3126, and/or its inherent authority for evading his discovery obligations and bad faith conduct. Section 202.20-e(a) provides:

Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders. Applications for extension of a discovery deadline shall be made as soon as practicable and prior to the expiration of such deadline.

Noncompliance with such an order may result in the imposition of an appropriate sanction against that party or for other relief pursuant to CPLR 3126.

CPLR 3126 authorizes sanctions for a party's failure "to comply with [disclosure] deadlines and provide good-faith responses to discovery demands[.]" *H.R. Prince, Inc. v. Elite Env't Sys., Inc.*, 107 A.D.3d 850, 851 (2d Dep't 2013); accord *Henry v. Atlantis Rehab. & Residential Healthcare Facility, LLC*, 194 A.D.3d 1021, 1022–23 (2d Dep't 2021) ("Pursuant to CPLR 3126, a court may impose discovery sanctions, including the striking of a pleading or preclusion of evidence, where a party 'refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed.'").

Sanctions are warranted when a party's conduct "impairs the efficient functioning of the courts and the adjudication of claims." *H.R. Prince*, 107 A.D.3d at 851. Under CPLR 3126, courts award sanctions for a defendant's "repeated failures to respond to [a] plaintiff's demands and the court's compliance conference order without a reasonable excuse." *Id.* Substantial delay in providing discovery will also sustain sanctions under CPLR 3126. See *Watson v. City of New York*, 157 A.D.3d 510, 513 (1st Dep't 2018) (upholding sanctions for willful and contumacious conduct based on defendants' "substantial delay in complying with the preliminary conference order"). Additionally, "[c]ourts have inherent authority to impose remedial fines for failure to obey their orders." *Baralan Int'l, S.p.A. v. Avant Indus., Ltd.*, 242 A.D.2d 226, 227 (1st Dep't 1997).

Giuliani's conduct over the past year unquestionably calls for sanctions. Smartmatic has detailed Giuliani's behavior in this Order to Show Cause and will not repeat every infraction here. Instead, Smartmatic highlights some of Giuliani's most egregious behavior:

- Initially refusing to produce a single document outside the production made in *Dominion* without explaining why he could not make a production in this case;
- Refusing to allow Smartmatic to confirm the e-discovery issues with TrustPoint or work with TrustPoint to gain access to the documents through Smartmatic's own e-discovery platform;



- Agreeing to run searches across the documents only to refuse to produce the documents because of unsubstantiated claims of financial hardship; and
- Producing only two publicly available tweets in response to JHO Marin’s order for a manual review; and
- Lying to the Principal Law Clerk of this Court about which documents would be produced pursuant to this Court’s deadline.

Enough is enough. These actions, along with all others detailed in this Order to Show Cause, warrant sanctions against Giuliani. *See, e.g., Arpino v. F.J.F. & Sons Elec. Co.*, 102 A.D.3d 201, 211 (2d Dep’t 2012) (finding “defendants’ neglect of a court-ordered deadline and misrepresentation of their knowledge or possession of clearly discoverable material and information, without providing any excuse for doing so, must be deemed willful and contumacious” warranting sanctions under CLPR 3126). Smartmatic now understands from the *Freeman* litigation that Giuliani’s excuses for not producing documents were both unreasonable and intentionally inaccurate. Moreover, Giuliani has made a mockery of Court ordered discovery by representing there are only two responsive documents in the entire manual review. Under CPLR 3126, “costs and attorneys’ fees, as set by the court, are a fair exaction from a party *who has generated unnecessary effort by the other side in seeking court assistance with disclosure when it should not have been necessary.*” CPLR 3126:11 Practice Commentaries (2018) (emphasis added); *Maxim, Inc. v. Feifer*, 161 A.D.3d 551, 554 (1st Dep’t 2018) (“Plaintiffs’ discovery abuses warrant the imposition of a \$10,000 monetary sanction pursuant to CPLR 3126.”). This is precisely what Giuliani has caused here—unnecessary court intervention. As a result, Smartmatic requests the Court impose sanctions for Giuliani’s behavior, including but not limited to reimbursement of Smartmatic’s costs and attorneys’ fees for having to bring this Order to Show Cause.

**CONCLUSION**

For all these reasons, Smartmatic respectfully requests that the Court grant this motion in its entirety and enter Smartmatic's Proposed Order.

Dated: August 7, 2023

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 7,005 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.