

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

In the Matter of:

JOHN C. DEPP, II,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, BENJAMIN WIZNER, and
ANTHONY ROMERO,

Respondents,

Index No. 154545/2021

Part 37

Hon. Arthur F. Engoron

Motion Sequence No. 004

**MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS'
MOTION FOR PRODUCTION EXPENSES PURSUANT TO CPLR 3111 & 3122(d)**

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Petitioner John C. Depp, II (“Mr. Depp”) submits this memorandum of law in opposition to Respondents’ motion for production expenses pursuant to CPLR 3111 & 3122(d) (the “Motion”).

PRELIMINARY STATEMENT

Respondents’ request for in excess of \$86,000 in “expenses” associated with their Court-ordered document production is not only exorbitant and unreasonable, but unsupported by New York law. Mr. Depp acknowledges that New York law provides for the reimbursement of *reasonable* production expenses to a non-party and does not oppose reimbursing the Respondents for such *reasonable* expenses; but, Respondents seek reimbursement for expenses that go far beyond what was reasonably required to comply with the subpoenas *duces tecum* Mr. Depp served upon the Respondents. Quite simply, New York is clear that Mr. Depp is not required to reimburse Respondents for the attorneys’ fees associated with the time spent determining what documents to withhold from the production based on privilege or relevancy. Indeed, even if Mr. Depp were responsible for these expenses under New York law (which he is not) the fees incurred for these tasks are unreasonable and should be substantially reduced. For these reasons, and the reasons set forth herein, the Court should deny the Respondents’ Motion.

BACKGROUND

Mr. Depp commenced an action entitled *John C. Depp, II v. Amber Laura Heard*, No. CL2019-0002911 (the “Virginia Action”) in the Circuit Court of Fairfax County in the Commonwealth of Virginia (the “Virginia Court”) against Amber Laura Heard (“Ms. Heard”) on March 1, 2019, alleging that Ms. Heard made defamatory statements implying that Mr. Depp domestically abused her in an opinion piece published in the *Washington Post* on December 18,

2018 (the “Op-Ed”). Meyers Aff. ¶ 1.¹ Mr. Depp alleges that, in the Op-Ed, Ms. Heard republished a false claim she first made in May 2016, when she sought a temporary restraining order and divorce from Mr. Depp, that Mr. Depp had perpetrated domestic violence against her during their marriage. *Id.* at ¶ 2. In August 2016, it was publicly reported that Mr. Depp and Ms. Heard reached a \$7 million divorce settlement and Ms. Heard issued a public statement in which she claimed that she was donating the \$7 million to charity, with the donation to be split equally between the American Civil Liberties Union (“ACLU”) and the Children’s Hospital of Los Angeles (“CHLA”). *Id.* at ¶ 3. In a declaration submitted in the Virginia Action, Ms. Heard disclosed the ACLU’s involvement in drafting the Op-Ed. *Id.* at ¶ 6. On January 22, 2021, Ms. Heard submitted a declaration of Ben Wizner (the “Wizner Declaration”), who identified himself as an employee of the American Civil Liberties Union Foundation (the “ACLU Foundation”), in the Virginia Action. *Id.* at ¶ 21.

A. Mr. Depp’s Subpoenas to Respondents

Based upon the foregoing information, Mr. Depp sought the issuance of subpoenas *duces tecum* and *ad testificandum* to the ACLU Foundation, and two of its employees, Ben Wizner (“Mr. Wizner”) and Anthony Romero (“Mr. Romero,” and, together with the ACLU Foundation and Mr. Wizner, the “ACLU Witnesses” or “Respondents”). *Id.* at ¶ 22. On February 4, 2021, the Virginia Court issued the subpoenas *duces tecum* and *ad testificandum* to the ACLU Foundation, Mr. Wizner, and Mr. Romero (the “Subpoenas”). *Id.* at ¶ 22. After the Subpoenas were served upon the Respondents, they objected to the Subpoenas and Mr. Depp moved to compel compliance. *See id.* at ¶¶ 23-25, 28, 31; [NYSCEF No. 1](#). In July 2021, the Court granted Mr. Depp’s motion, in

¹ Citations to “Meyers Aff.” refer to the Affirmation of Jessica Meyers, dated May 10, 2021 [[NYSCEF No. 3](#)].

part, and ordered nearly full compliance with the six Subpoenas (the “July 2021 Order”). See [NYSCEF No. 70](#).

B. Respondents’ Request for Production Expenses is Exorbitant, Unreasonable, and Not Provided for Under Law

Ultimately, the Respondents produced approximately 1,900 documents in response to the Subpoenas (the “Document Production”). Meyers 2022 Aff.² at ¶ 3. In October 2021, Respondents provided a log of documents that had been withheld or redacted on the basis of privilege (the “Privilege Log”). *Id.* at ¶ 4. The Privilege Log included over 400 documents, approximately 160 of which asserted a common interest privilege over communications between Respondents’ counsel and Ms. Heard’s counsel. *Id.* On November 8, 2021, Mr. Depp’s counsel e-mailed Respondents’ counsel challenging the assertion of the common interest privilege over communications between Respondents’ counsel and Ms. Heard’s counsel. *Id.* at ¶ 5.

On December 21, 2021, Respondents’ counsel sent Mr. Depp’s counsel a letter requesting reimbursement for the \$85,156.59 in fees and \$1096.67 in costs now requested in Respondents’ Motion. *Id.* at ¶ 6; [NYSCEF No. 99](#) at 5. The \$85,156.59 of fees requested by Respondents consist of: (a) 38.7 hours billed by a “senior associate” at \$799.50/hour (for a total of \$30,940.65); (b) 78.60 hours billed by a “junior associate” at \$500.20/hour (for a total of \$39,315.72); (c) 17.10 hours billed by a “litigation support manager” at \$336.20/hour (for a total of \$5,749.02); and (d) 31 hours billed by a “litigation support analyst” at \$295.2 (for a total of \$9,151.20). See [NYSCEF No. 95](#). As reflected in the attorney timekeeping records submitted in support of the Motion, Respondents are seeking reimbursement for attorneys’ fees associated with reviewing and determining collected documents for both privilege and relevance and preparing the Privilege Log.

² Citations to “Meyers 2022 Aff.” refer to the Affirmation of Jessica N. Meyers submitted herewith in opposition to Respondents’ Motion for production expenses.

See id. Respondents also seek reimbursement for \$1,096.67 in costs, consisting of monthly third-party data hosting and usage fees, which Mr. Depp does not oppose and agrees to pay.

ARGUMENT

A. Respondents Are Not Entitled to All Requested Expenses

Respondents are not entitled to reimbursement of attorneys' fees associated with preparation of the Document Production and Privilege Log. *See AYW Networks, Inc. v. Teleport Commc 'ns Grp., Inc.*, Index No. 004586/1999, 2005 WL 8162267, at *1 (Sup. Ct. Nassau Cty. June 13, 2005) (declining to award third party attorneys' fees incurred in responding to discovery requests under CPLR § 3122(d)). While CPLR § 3122(d) provides for the reimbursement of "reasonable production expenses of a non-party," Respondents are not entitled to reimbursement of attorneys' fees for "time spent . . . determining which documents to withhold on the basis of privilege or relevancy." *See Peters v. Peters*, Index No. 600456/2004, 2016 WL 3597629, at *2 (Sup. Ct. N.Y. Cty. July 5, 2016) (citing *Finkelman v. Klaus*, Index No. 5257/2005, 17 Misc. 3d 1138(A), at *5 (Sup. Ct. Nassau Cty. Nov. 28, 2007)) (declining to award attorney's fees to a third party under CPLR § 3122(d) for time spent determining which documents to withhold on the basis of privilege or relevancy). This is precisely the type of work for which Respondents seek reimbursement of attorneys' fees. *See Teplin Aff.* ¶¶ 10, 11³ (detailing review of a "materially higher number of documents with a higher proportion of non-responsive documents, increasing attorney review time" and that "significant attorney time was required to review responsive documents for privilege and to prepare a privilege log"). Attorneys' fees associated with the Document Production and Privilege Log should, accordingly, not be included in the calculation of reasonable production expenses recoverable under CPLR § 3122(d).

³ Citations to "Teplin Aff." refer to the Affirmation of Stephanie Teplin, dated April 18, 2022 [[NYSCEF No. 94](#)].

None of the authorities cited by Respondents in their Motion support their request for over \$85,000 in attorneys' fees. See [NYSCEF No. 99](#) at 8-9. Respondents also cite to *G. Willi-Food Int'l Ltd. v. Herzfeld & Ruben, P.C.*, Index No. 159040/2016, 2019 N.Y. Misc. LEXIS 2548 (Sup. Ct. N.Y. Cty. May 17, 2019) for the proposition that they can seek reimbursement for attorney time spent reviewing documents for responsiveness and privilege, as well as preparing a privilege log. But, that is not what the court held in *G. Willi-Food*. In *G. Willi-Food*, the court found only that "reasonable production expenses . . . *can* include the costs for locating documents, reviewing for privilege, and producing documents." *Id.* at *13 (emphasis added) (citing *Tener v. Cremer*, 89 A.D.3d 75, 82 (1st Dep't 2011)). The Court did not hold that the non-party was entitled to attorneys' fees associated with the relevance and privilege review of documents, but just "encourage[d] the parties to agree upon a reasonable scope, schedule, and cost" for the production. *Id.* at *13-14.

Similarly, in *Mayer v. Marron*, the court acknowledged that "there is authority indicating that such expenses may also cover production-related costs, "including attorneys' fees, to a non-party for costs incurred in complying with a subpoena," but did not actually award any attorneys' fees to the non-party. See *Mayer v. Marron*, Index No. 652987/2014, 2018 N.Y. Misc. LEXIS 490, at *24-25 (Sup. Ct. N.Y. Cty. Feb. 8, 2018). The court held that the "attorneys' fees and other expenses incurred must be 'reasonable'" and, "[b]ecause of the lack of detailed documentation, the reasonableness of the legal fees and e-discovery vendor expenses, cannot now be determined, and this issue will be referred to a Special Referee." *Id.* Finally, as set forth above, in *Peters* the court expressly *declined* to award attorneys' fees associated with "time spent . . . determining which documents to withhold on the basis of privilege or relevancy." *Peters*, 2016 WL 3597629, at *2.

As set forth in *AYW Networks*, reimbursement of substantial production expenses, including attorneys' fees, is simply not appropriate in the circumstances present here. *See AYW Networks, Inc.*, 2005 WL 8162267, at *1 (finding the suggestion that a court can be empowered to direct payment of attorneys' fees "unavailing" where substantial right of third-party not involved and third-party had close relationship with defendants). Like the third-party in *AYW Networks*, none of the Respondents' substantial right are implicated by the outcome of Mr. Depp's defamation suit against Ms. Heard; and Respondents share a close relationship with the defendant, Ms. Heard.⁴ *See id.* (denying a non-party's request for reimbursement in part where the non-party did not have any substantial rights involved, and given its relationship to the defendants in the action). Respondents should be limited to recovering the \$1,096.67 in *costs* associated with the Document Production only.

B. The Requested Expenses Are Unreasonable

Even if this Court were to find (which it should not) that Respondents are entitled to reimbursement of the attorneys' fees associated with the preparation of the Document Production and Privilege Log, Mr. Depp should only be required to reimburse *reasonable* production expenses. The amount of fees requested by Respondents is grossly excessive and inappropriate. Astoundingly, the Respondents seek reimbursement for roughly 120 hours of work for two associates, billing at \$500 and \$800 per hour respectively, for the review of 7,000 documents, and production of only 2,000 documents. *See Teplin Aff.* at ¶¶ 10, 13. The rates charged by this "senior" and "junior" associate are above market and Mr. Depp should not be required to pay for Respondents' choice of attorneys that charge top-of-market rates. *Id.* at ¶¶ 20-21. Furthermore,

⁴ Respondents assisted Ms. Heard in drafting the Op-Ed which is the subject of Mr. Depp's defamation suit, received substantial pledges from Ms. Heard and, as evidenced by the Privilege Log, Respondents were coordinating and assisting Ms. Heard in litigating Mr. Depp's defamation suit. *Meyers Aff.* at ¶¶ 3, 6; *Meyers 2022 Aff.* at ¶ 4, Ex. 1.

Respondents are seeking reimbursement for time spent reviewing documents for privilege, implementing privilege redactions, and preparing a Privilege Log (*see* Teplin Aff. at ¶¶ 11, 19); but, much of this time appears to have been spent improperly withholding, redacting, and/or logging communications between Respondents' counsel and Ms. Heard's counsel that are not privileged (*see* Meyers 2022 Aff. at ¶ 4).⁵ Mr. Depp should not be required to foot the bill for the time and fees associated with Respondents improperly withholding material responsive to the Subpoenas as privileged. For all these reasons, if Mr. Depp is ordered to reimburse any attorneys' fees associated with the Document Production and Privilege Log, the reimbursable fees should be reduced significantly to account for the unreasonable amount of time billed, unreasonable rates charged, and the expenses associated with Respondents' improper assertion of privilege over communications with Ms. Heard's counsel.

CONCLUSION

For the foregoing reasons, the Court should deny Respondents' Motion and order Mr. Depp to defray only the \$1096.67 in costs incurred by the Respondents and, if deemed appropriate, only those reasonable production expenses incurred by the Respondents.

Dated: New York, New York
June 1, 2022

⁵ As the parties asserting the privilege, Respondents had the burden of demonstrating their communications with Ms. Heard's counsel is protected by the common interest privilege. Under New York law, the common interest privilege only applies to communications concerning a common *legal* interest among the parties to the communications, meaning that both parties are communicating in connection with their shared legal interest in anticipated or pending litigation. *See Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 628-29 (2016). Respondents have not and cannot meet the burden of showing this common legal interest: most if not all of the withheld communications between Respondents and Ms. Heard's advisors occurred after Mr. Depp had sued Ms. Heard, *but not the ACLU*, and there is no indication that the ACLU has ever anticipated that Mr. Depp would bring the ACLU into the defamation suit against Ms. Heard as a co-defendant.

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 2,215 words, exclusive of the caption, 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.

Dated: June 1, 2022

/s/ Jessica N. Meyers
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