

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

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JOHN C. DEPP, II,	:	
	:	Index No. 154545/2021
<i>Petitioner,</i>	:	
	:	Part 37
v.	:	
	:	Hon. Arthur F. Engoron
AMERICAN CIVIL LIBERTIES UNION	:	
FOUNDATION, BENJAMIN WIZNER, and	:	Motion Sequence No. 004
ANTHONY ROMERO,	:	
	:	
<i>Respondents.</i>	:	
	:	
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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS’
MOTION FOR PRODUCTION EXPENSES
PURSUANT TO CPLR 3111 & 3122(d)**

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The ACLU Non-Parties¹ respectfully submit this Reply Memorandum of Law in further support of their motion pursuant to CPLR 3111 and 3122(d) for production expenses of \$86,253.26, which were incurred in complying with three non-party subpoenas *duces tecum* served by Petitioner John C. Depp, II.

PRELIMINARY STATEMENT

Mr. Depp does not dispute that New York law requires him, as the party that issued three document subpoenas to the ACLU Non-Parties, to reimburse reasonable production costs and expenses. *See* CPLR 3111, 3122(d). Nor does Mr. Depp dispute that the ACLU Non-Parties incurred approximately \$86,000 in fees and expenses in collecting, identifying, and producing documents responsive to his requests. The bulk of that amount was incurred after Mr. Depp rejected several compromise proposals that would have reduced the ACLU Non-Parties' compliance costs.

Now faced with the monetary consequence of serving broad discovery requests on a non-party, Mr. Depp argues that the ACLU Non-Parties are not entitled to recover costs of attorney review necessary to identify documents responsive to his subpoena. That argument makes little sense in the context of modern electronic discovery, and unsurprisingly, is not supported by New York case law. Mr. Depp is equally off the mark in arguing that the ACLU Non-Parties' assertion of privilege and work product protection over a small number of documents waives the mandatory obligation under CPLR 3122(d) to defray the costs of a non-party. New York case law does not support that proposition either, which would put non-parties to the Hobbesian choice of either waiving attorney-client privilege or being forced to bear costs that would

¹ Capitalized terms not defined here have the meanings given in the ACLU Non-Parties' moving brief. (ACLU Br., NYSCEF Dkt. [99](#).)

otherwise be defrayed by the requesting party. And Mr. Depp puts forward no support for his position that the rates or the number of hours worked by the ACLU Non-Parties' counsel were excessive.

None of Mr. Depp's arguments warrant denying or reducing the fees and expenses requested by the ACLU Non-Parties. The Court should grant the motion and order that the ACLU Non-Parties be reimbursed for \$86,253.26 in costs and expenses.

ARGUMENT

I. THE ACLU NON-PARTIES ARE ENTITLED TO RECOVER ATTORNEYS' FEES UNDER NEW YORK LAW

Mr. Depp does not dispute that “that New York law provides for the reimbursement of reasonable production expenses to a non-party.” (Opp'n Br., NSYCEF Dkt. [102](#), at 1 (emphasis removed).) But he goes on to argue that attorney review time (and associated fees) were not reasonably required to determine which documents were responsive to Mr. Depp's requests. (*Id.* at 4–6.) Mr. Depp misstates New York law. Where attorneys' fees are directly related to preparing a document production in response to a subpoena *duces tecum* they must be reimbursed by the requesting party. Multiple authorities in New York, including recent authorities that Mr. Depp ignores, support that common sense reading of the CPLR. *See, e.g., Energy Transfer Equity, L.P. v. Corvex Mgmt. LP*, 2018 N.Y. Misc. LEXIS 4628, at *8–10 (Sup. Ct. N.Y. Cty. Oct. 10, 2018) (awarding over \$650,000 in non-party attorneys' fees, including for multiple levels of document review); *see also JHAC LLC v. Advance Entm't, LLC*, 2022 N.Y. Misc. LEXIS 371, at *5–6 (Sup. Ct. N.Y. Cty. Jan. 19, 2022); *In re Khagan*, 66 Misc. 3d 335, at *342 (Sup. Ct. N.Y. Cty. Sept. 18, 2019); *Walt Disney Co. v. Peerenboom*, 2019 N.Y. Misc. LEXIS 337, at *13–14 (Sup. Ct. N.Y. Cty. Jan. 17, 2019); Appendix A, Commercial Div. Guidelines for Discovery of Electronically Stored Information (“ESI”), Section VIII.B (guidance

for Commercial Division cases providing that non-parties should be reimbursed “[r]easonable fees charged by outside counsel and e-discovery consultants”).²

Although Mr. Depp maintains that attorneys’ fees for time spent on responsiveness and privilege review are not recoverable, the authorities he cites are non-binding, unpersuasive, and have been disapproved of by courts that have considered the issues more recently. (*See* Opp’n Br. 4.) In *AYW Networks Inc. v. Teleport Communications Group Inc.* (cited at Opp’n Br. 4), the court declined to award attorneys’ fees arising out of a “motion to quash subpoena, memorandum of law, [and] telephone conferences/in person hearings related to discovery.” 2005 WL 8162267, at *1 (N.Y. Sup. Ct. Nassau Cty., June 13, 2005).³ Those are all costs that the ACLU *excluded* from its reimbursement request. (*See* Teplin Aff. ¶ 22, NYSCEF Dkt. [94](#)). Both *Peters v. Peters*, 2016 N.Y. Misc. LEXIS 2453, at *6–7 (Sup. Ct. N.Y. Cty. July 5, 2016), and *Finkleman v. Klaus*, 856 N.Y.S.2d 23, 23 (Sup. Ct. Nassau Cty. Nov. 28, 2007) (cited at Opp’n Br. 4), acknowledge that attorneys’ fees, including for review time, are recoverable. And as explained more recently in *JHAC*, to the extent *Peters* and *Finkleman* differentiate between

² Mr. Depp attempts to distinguish several cases cited by the ACLU Non-Parties because the court determined that it *could* award a non-party attorneys’ fees, but declined to do so until the non-party substantiated the fees or until the parties met-and-conferred. (*See* Opp’n Br. 5 (citing *G. Willi-Food Int’l Ltd. v. Herzfeld & Rubin, P.C.*, 2019 N.Y. Misc. LEXIS 2548 (Sup. Ct. N.Y. Cty. May 17, 2019); *Mayer v. Marron*, 2018 N.Y. Misc. LEXIS 490, at *24-25 (Sup. Ct. N.Y. Cty. Feb. 8, 2018)). But the ACLU Non-Parties *have* substantiated their costs, including attorneys’ fees, which Mr. Depp does not challenge, and the ACLU Non-Parties attempted to resolve this issue through negotiation before bringing this motion. *See* Teplin Aff. ¶¶ 6–7; Ex. 1, NYSCEF Dkt. [95](#).

³ Contrary to Mr. Depp’s suggestion (Opp’n Br. 6), *AYW Networks* does not stand for the blanket proposition that an award of attorneys’ fees to a non-party is unwarranted whenever the non-party has some association with the underlying case. In *In re Khagan*, for instance, the court awarded attorneys’ fees for attorney review notwithstanding petitioner’s allegation that the non-party was “intimately involved” with defendants in the underlying case. 66 Misc. 3d 335, at *340 (Sup. Ct. N.Y. Cty. Sept. 18, 2019). Moreover, the ACLU Non-Parties did have substantial rights at stake in ensuring that only responsive, non-privileged documents were turned over, including preserving the privacy and First Amendment-protected association rights of donors who had no relationship with the underlying litigation between Mr. Depp and Ms. Heard.

review for “production” and review for “privilege and relevancy,” they do not provide a practicable rule because “it is unclear whether time spent reviewing documents for production could be broken down into review for privilege and relevancy versus other purposes.” *JHAC*, 2022 N.Y. Misc. LEXIS 371, at *4. That is certainly the case here, where the ACLU Non-Parties, in an effort to review efficiently, had only one attorney look at each document for purposes of determining both responsiveness and privilege, and did not withhold documents based on relevance at all.⁴ Because reviewing for responsiveness was necessary to comply with the subpoenas and produce documents to Mr. Depp, it is a recoverable expense of production.

Mr. Depp is equally misguided to suggest that time reviewing for privilege/work product and preparing a privilege log is not recoverable. Indeed, the Subpoenas themselves demanded that for every claim of privilege the ACLU Non-Parties “specify in detail each and every ground on which such claim rests and identify generally what the document is” and “furnish a privilege log” that includes “a statement of the specific privilege claimed and the basis upon which such privilege is claimed *as to each separate document or portion withheld.*” (Subpoenas *Duces Tecum*, NYSCEF Dkts. [22](#), [23](#), [25](#), Instructions at ¶ 11 (emphasis added). Mr. Depp chose to “ask[] for a document-by-document privilege log instead of a categorical privilege log,” and he “cannot make a demand for such a time-intensive task and be surprised when it dramatically increases the legal fees.” *See Energy Transfer*, 2018 N.Y. Misc. LEXIS, at *8; *JHAC*, 2022 N.Y. Misc. LEXIS 371, at *7 (“It would not be reasonable to require a nonparty to produce a privilege log at its expense or waive the privilege.”) Nor should Mr. Depp be surprised by the

⁴ The ALCU Non-Parties disputed—and continue to dispute—the relevance of the documents sought by Mr. Depp. (*See* Opp’n to Mot. to Compel, NYSCEF Dkt. [54](#).) But the ACLU Non-Parties did not withhold any documents based on their irrelevance; they produced any document that hit on search terms and was responsive to Mr. Depp’s requests, unless subject to a claim of privilege.

volume of privileged communications when his Subpoenas included a request for ACLU communications *about the underlying litigation itself*. (See Request No. 5, Subpoenas *Duces Tecum*, NYSCEF Dkts. [23](#), [25](#); Request No. 8, Subpoena *Duces Tecum*, NYSCEF Dkt. [22](#).)⁵

Mr. Depp fails to establish that the ACLU cannot recover for the attorneys' fees reasonably incurred in responding to his broad and burdensome Subpoenas.

II. THE REQUESTED PRODUCTION EXPENSES ARE REASONABLE

The amounts requested by the ACLU Non-Parties reflect reasonable rates and reasonable hours, as supported by detailed back-up. (Teplin Aff. ¶¶ 20–21; Exs. 1–3, NYSCEF Dkts. [95](#), [96](#), [97](#).) See *Nager v. Teacher's Retirement Sys. of the City of N.Y.*, 57 A.D.3d 389, 390 (1st Dep't 2008) (affirming use of the lodestar method to determine reasonable legal fees); Weinstein, Korn & Miller, N.Y. Civ. Prac. ¶ 909.06.

A. Counsel's Hourly Rates Are Reasonable

Mr. Depp cites nothing but his own conclusory and self-serving assessments to dispute the reasonableness of counsel's rates. (See Opp'n Br. 6.) A reasonable hourly rate is "based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation." *Getty Petroleum Corp. v. G.M. Triple S. Corp.*, 187 A.D.2d 483, 483–484 (2d Dep't 1992); see also *Experience Hendrix, LLC v. Pitsicalis*, No. 17-CV-1927, 2018 WL 11222520, at *4 (S.D.N.Y. Dec. 17, 2018) (reasonable hourly rate is based on "what a reasonable, paying client would be willing to pay," given that such a party wishes "to spend the minimum necessary to litigate the case effectively" (quoting *Simmons v. N.Y.C. Trans. Auth.*,

⁵ Mr. Depp's disagreement with the ACLU's privilege and work product assertions is not relevant to the ACLU Non-Parties' entitlement to reimbursement under CPLR 3122(d). The ACLU Non-Parties responded in writing to Mr. Depp's objections to privilege assertions on November 11, 2021, providing the basis and legal citation supporting the privilege assertions. (See June 14, 2022 Affirmation of Stephanie Teplin ¶ 3.) Mr. Depp's counsel never responded. (*Id.*)

575 F.3d 170, 174 (2d Cir. 2009)); *Zacharius v. Kensington Publ'g Corp.*, 167 A.D.3d 452, 453–54 (1st Dep't 2018) (affirming determination of reasonable attorneys' fees based on “the testimony of the experienced attorneys who performed the relevant services and the invoices sent to the clients”).

Mr. Depp does not cite anything in support of his bald assertion that counsel's rates are “above market.” See *Energy Transfer Equity*, 2018 N.Y. Misc. LEXIS 4628, at *3 (awarding fees based on associate review at \$550 per hours); *Mahan v. Roc Nation, LLC*, No. 14-CV-5075, 2016 WL 4718018, at *4–5 (S.D.N.Y. Sept. 9, 2016) (finding hourly rate of \$553 for associate reasonable). Moreover, the ACLU Non-Parties reduced the total cost by using a junior associate to perform the majority of the review, supervised by a senior associate, without requesting reimbursement for any partner time at all. (See ACLU Br. 11.) See *Energy Transfer Equity*, 2018 N.Y. Misc. LEXIS 4628, at *9 (approving of a similar arrangement). Mr. Depp raises no dispute at all with the reasonable rates billed by technical staff employed by counsel to collect, process and produce documents according to the ESI specification included in the Subpoenas.

B. The Number of Hours Worked Is Reasonable

Mr. Depp contends that the number of hours spent by outside counsel's attorneys in responding to the document subpoenas was unreasonable, but again fails to provide any legal or factual support for his claim. (See Opp'n Br. 6.) As detailed in the ACLU Non-Parties' opening brief, in light of the broad scope of Mr. Depp's requests and refusal to entertain more cost-efficient compromise proposals, the hours required by outside counsel to comply was reasonable. (See ACLU Br. 10–11); see also *In re Khagan*, 66 Misc. 3d 335, at *341–42 (finding hours reasonable where they reflected “the breadth of the subpoenas' demands” and “failure to reach an agreement on reducing the scope of the subpoenas”). The hours expended are supported by

detailed billing records, which Mr. Depp does not challenge. (*See Ex. 1.*) *See Freidman v. Yakov*, 138 A.D. 3d 554, 555-56 (1st Dep't 2016).

C. Counsel's Costs are Reasonable

Mr. Depp does not dispute the reasonableness of the ACLU Non-Parties request for reimbursement of \$1,096.67 in costs incurred in monthly data-hosting fees. (*See Opp'n Br.* at 7; *Teplin Aff.* ¶ 23 & *Ex. 4*, NYSCEF Dkt. [98](#)); *Disney*, 2019 N.Y. Misc. LEXIS 337, at *13.

CONCLUSION

For the foregoing reasons and the reasons given in the ACLU Non-Parties' moving brief, the Court should grant the motion and order Mr. Depp to pay the ACLU Non-Parties production expenses totaling \$86,253.26.

Dated: New York, New York
June 14, 2022

/s/ Stephanie Teplin

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply memorandum of law is 2168 words exclusive of the caption, table of contents, table of authorities, and signature block, and that this document complies with the word limit for a reply memorandum of law.

Dated: June 14, 2022

/s/ Stephanie Teplin

Stephanie Teplin