

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,

For an Order to compel response to out-of-
state subpoenas served in the action entitled
John C. Depp, II v. Amber Laura Heard, No.
CL2019-0002911 in the Circuit Court of
Fairfax County in the Commonwealth of
Virginia.

Index No. _____

**MEMORANDUM OF LAW IN SUPPORT OF PETITION TO
COMPEL RESPONSE TO OUT-OF-STATE SUBPOENAS**

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Petitioner John C. Depp, II (“Mr. Depp”), by and through his attorneys, hereby submits this memorandum of law in support of his Petition, pursuant to § 3119, to compel the American Civil Liberties Union Foundation (“ACLU Foundation”) and two of its employees, Benjamin Wizner (“Mr. Wizner”) and Anthony Romero (“Mr. Romero,” and, together with the ACLU Foundation and Mr. Wizner, the “ACLU Witnesses”), to comply with out-of-state subpoenas *duces tecum* and *ad testificandum* (the “Subpoenas”).¹

PRELIMINARY STATEMENT

This matter comes before the Court as a result of pending litigation in the Commonwealth of Virginia, where, on March 1, 2019, Mr. Depp commenced an action against Amber Laura Heard (“Ms. Heard”) for defamation (the “Virginia Action”) based on statements Ms. Heard made in an opinion piece published in the *Washington Post* on December 18, 2018 (the “Op-Ed”), which falsely implied that Mr. Depp had committed domestic abuse against Ms. Heard during their marriage. As alleged in Mr. Depp’s complaint against Ms. Heard (the “Complaint”),² Ms. Heard first publicly accused Mr. Depp of domestic abuse in May 2016, when she sought an *ex parte* temporary restraining order and divorce from Mr. Depp. After reaching a divorce settlement in August 2016, pursuant to which Ms. Heard received \$7 million from Mr. Depp, Ms. Heard republished false allegations of abuse in the Op-Ed, resulting in the commencement of the Virginia Action. Accordingly, the contentious factual dispute that will ultimately be dispositive of the

¹ The Subpoenas are identified and described in further detail in paragraph 20 of the accompanying Affirmation of Jessica N. Meyers in Support of Petition to Compel Response to Out-of-State Subpoenas, dated May 10, 2021 (the “Meyers Affirmation” or “Aff.”) and attached to the Affirmation as Exhibits 18, 19, 20, 21, 22, and 23.

² The Complaint is annexed to the Meyers Affirmation as Exhibit 1 and will be cited herein as “Compl. ¶ __.”

Virginia Action is whether Ms. Heard publicly lied about what transpired in her relationship with Mr. Depp.

The ACLU Witnesses not only possess evidence relevant to Ms. Heard's publication of the Op-Ed and her motivation to falsely claim that Mr. Depp abused her during their marriage, but they have also taken affirmative steps to participate in the Virginia Action on Ms. Heard's behalf. The ACLU Witnesses now refuse, in response to the Subpoenas, to produce documents and testimony that *three other courts have found relevant to the factual dispute at the center of the Virginia Action* and seek special confidential treatment, beyond the protections afforded by the Protective Order entered in the Virginia Action, for the selective evidence they have agreed to produce. Even more egregious, the ACLU Witnesses' reticence appears to be part of a collusive effort with Ms. Heard to prevent evidence showing that Ms. Heard perjured herself from becoming public. As stated herein, the Honorable Bruce D. White, Chief Judge of the Circuit Court of Fairfax County, rejected a similar gambit by Ms. Heard in the context of her perjury with respect to failing to honor her charitable pledge to the Children's Hospital of Los Angeles ("CHLA"). Applying New York law, the Court should reject the ACLU Witnesses' outrageous stonewalling. Mr. Depp, accordingly, respectfully requests that this Court enter an order directing the ACLU Witnesses to fully comply with the Subpoenas.

BACKGROUND

I. Mr. Depp and Ms. Heard's Marriage and Divorce

As alleged in his Complaint in the Virginia Action, Mr. Depp and Ms. Heard were married February 1, 2015 and, just fifteen months later, their marriage came to an end when, in May 2016, after Mr. Depp advised Ms. Heard no longer desired to be married to her, Ms. Heard filed for divorce and sought an *ex parte* temporary restraining order against Mr. Depp, claiming domestic

abuse. Compl. ¶¶ 13-16. In August 2016, it was publicly reported that Mr. Depp and Ms. Heard reached a \$7 million divorce settlement. Aff. ¶ 3, Ex. 2. At that time, Ms. Heard released a public statement, which stated in relevant part:

As described in the restraining order and divorce settlement, money played no role for me personally and never has, except to the extent that I could donate it to charity and, in doing so, hopefully help those less able to defend themselves. As reported in the media, the amount received in the divorce was \$7 million and \$7 million is being donated. . . . The donation will be divided equally between the ACLU, with a particular focus to stop violence against women, and the Children’s Hospital of Los Angeles

See id. Mr. Depp’s and Ms. Heard’s divorce was finalized in January 2017, Compl. ¶ 18, and Mr. Depp paid the final installment of the \$7 million divorce settlement to Ms. Heard in January 2018. Aff. ¶ 4.

II. Mr. Depp Commences Defamation Suits in the United Kingdom and Virginia

Ms. Heard’s allegations of abuse and divorce from Mr. Depp continued to receive press coverage after their divorce was finalized and, in May 2018, Mr. Depp initiated a libel suit against News Group Newspapers Ltd. and Dan Wootton (the “UK Defendants”) in the United Kingdom (the “UK Action”), alleging that an article published by the UK Defendants falsely claimed Mr. Depp was a “wife beater.” Aff. ¶ 5.

Then, on December 18, 2018, Ms. Heard published her Op-Ed in which she, again, made statements falsely implying that Mr. Depp had abused her during their marriage. Compl. ¶¶ 20-23. On March 1, 2019, Mr. Depp commenced the Virginia Action against Ms. Heard in the Circuit Court of Fairfax County (the “Virginia Court”), alleging her Op-Ed raised the defamatory implication that Mr. Depp had domestically abused Ms. Heard. Aff. ¶ 2, Ex. 1. In September 2019, Ms. Heard submitted a declaration in the Virginia Action in which she testified that the ACLU had assisted her in drafting and placing the Op-Ed. *Id.* ¶ 6, Ex. 3. Specifically, Ms. Heard explained that, after she “made a donation to the ACLU,” “Anthony Romero, the executive director

of the ACLU, introduced [her] to Jessica Weitz, who in turn suggested the idea that [she] might write an Op-ed about how [her] own experience exemplifies the issues faced by those who speak out about abuse and violence.” *Id.*, Ex. 3 at ¶¶ 2-3. Ms. Heard goes on to describe how she worked with the ACLU to draft the Op-Ed and the ACLU handled placing the Op-Ed in a newspaper. *Id.*, Ex. 3 at ¶¶ 4-5.

On February 26, 2020, while discovery was ongoing in the Virginia Action, Ms. Heard submitted a witness statement in the UK Action on behalf of the UK Defendants (the “Witness Statement”). *Id.* ¶ 7, Ex. 4. In the UK Action, Mr. Depp advanced the theory that Ms. Heard had married him and then falsely claimed domestic abuse for financial gain. In her Witness Statement, Ms. Heard responded by citing to her donation of the divorce settlement to charity, testifying in relevant part:

As for what Johnny says about my so-called ‘agenda’ in marrying him – for financial benefit or to somehow further my career – that is preposterous. I remained financially independent from him the whole time we were together and the entire amount of my divorce settlement was donated to charity.

Id. A sixteen-day trial of the UK Action was conducted in July 2020, at which Ms. Heard provided live testimony. *Id.* ¶ 9. On November 2, 2020, Justice Nicol rendered a judgment in the UK Action (the “UK Judgment”) dismissing Mr. Depp’s claim for libel against the UK Defendants. *Id.* ¶ 16, Ex. 10. In the UK Judgment, Justice Nicol, the fact finder in the UK Action, cited to Ms. Heard’s testimony that she donated her entire divorce settlement in rejecting Mr. Depp’s theory that Ms. Heard’s claims of abuse were a “hoax” and “insurance policy,” finding in relevant part:

A recurring theme in Mr. Depp’s evidence was that Ms. Heard had constructed a hoax and that she had done this as an ‘insurance policy’ – presumably in the event that the marriage broke down. . . . She was, according to this scenario, nothing more than a gold-digger. I have in the course of this judgment given reasons why I do not accept this characterization of Ms. Heard. . . . I recognize that there were other elements to the divorce settlement as well, but [Ms. Heard’s] donation of the \$7 million to charity is hardly the act one would expect of a gold-digger. . . . [I]f Ms. Heard had been constructing a hoax there are various measures which she

might have taken, but she did not . . . I agree that those points add further force to the conclusion I would anyway have reached, which is to reject the ‘hoax’ or ‘insurance policy’ thesis.

Id. Mr. Depp timely sought permission to appeal the UK Judgment. *Id.*

III. Mr. Depp Seeks Discovery Concerning Ms. Heard’s Purported Donation of Her Divorce Proceeds

Because, in the UK Action, Ms. Heard cited her purported donation of the entire divorce settlement to claim she had no motive to falsely claim that Mr. Depp had abused her during their marriage, Mr. Depp sought discovery in the Virginia Action to confirm whether Ms. Heard had in fact donated the entire \$7 million settlement to the ACLU and Children’s Hospital of Los Angeles (“CHLA”) as Ms. Heard publicly claimed and testified in the UK Action. In May 2020, Mr. Depp sought the issuance of subpoenas *duces tecum* to the American Civil Liberties Union, Inc. and the CHLA, respectively, which both requested documents reflecting donations made to the organizations by Ms. Heard. *Id.* ¶ 8. Mr. Depp was unable to effectuate service of the subpoena to the American Civil Liberties Union, Inc. in California or New York, but the CHLA was served with the subpoena in California on or around May 29, 2020. *Id.* Mr. Depp also served requests for production on Ms. Heard, which sought documents related to Ms. Heard’s purported donation of any divorce settlement payments she received from Mr. Depp. *Id.* ¶ 11, Ex. 5.

Ms. Heard made multiple attempts to thwart Mr. Depp’s discovery into her purported donation of her entire divorce settlement. First, Ms. Heard filed a petition to quash the subpoena to the CHLA (the “CHLA Petition”) in the Superior Court of California, County of Los Angeles (the “California Court”). *Id.* ¶ 10. Ms. Heard also objected to Mr. Depp’s document requests related to her purported donation of the divorce settlement in their entirety, refusing to produce any documents responsive to these requests. *Id.* ¶ 12, Ex. 6. Then, eight months before the scheduled trial of the Virginia Action and while discovery was ongoing, Ms. Heard filed motions

in limine seeking, *inter alia*, to exclude evidence concerning the amount of Ms. Heard's charitable donations. *Id.* ¶ 13. Ultimately, both the Virginia Court and California Court ordered the production of documents related to Ms. Heard's purported donations, finding the materials relevant to the claims and defenses in the Virginia Action, and the Virginia Court denied Ms. Heard's motions *in limine*. *Id.* ¶¶ 13-15, 18, Exs. 7, 8, 9, 12, 13.

The California Court *denied* Ms. Heard's CHLA Petition and awarded sanctions against Ms. Heard and her counsel for filing the CHLA Petition, finding that, because Ms. Heard publicly discussed the charitable donations while commenting on her claimed abuse by Mr. Depp and consequent divorce, Ms. Heard put the donations "at issue." *Id.* ¶ 15, Ex. 8 at 23:12-22, Ex. 9. Specifically, the California Court recognized that Ms. Heard's statements about the donations were part of the same public narrative as her public claims of domestic abuse, which are the subject of Mr. Depp's defamation claim in the Virginia Action; thus, the veracity of Ms. Heard's claim that she donated the entirety of her divorce settlement is relevant to the veracity of the other piece of the narrative – Ms. Heard's claim that Mr. Depp abused her during their marriage. *Id.*, Ex. 8 at 21:28-22:26. When the CHLA documents were produced, Ms. Heard designated the documents as confidential under the protective order in the Virginia Action (the "Protective Order"). *Id.* ¶ 17. Mr. Depp made an emergency motion to de-designate the CHLA documents, which the Virginia Court granted, finding that Ms. Heard had designated these documents confidential in bad faith. *Id.* ¶ 17, Ex. 11.

In December 2020, the Virginia Court granted Mr. Depp's motion to compel Ms. Heard to produce documents responsive to Mr. Depp's requests for documents related to Ms. Heard's donation of any divorce-settlement payments received from Mr. Depp, finding the "issue of the \$7 million donation or pledge" to be subject to discovery in the Virginia Action. *Id.* ¶18, Ex. 12 at

26:8-16, Ex. 13. As ordered by the Virginia Court, on January 4, 2021, Ms. Heard made a 35-page production which included documents related to her donation of her divorce settlement to the ACLU and CHLA (the “Production”). *Id.* ¶¶ 18-19, Exs. 13, 14, 15. Consistent with the Virginia Court’s prior order, Ms. Heard did not designate the documents related to her donations to the ACLU and CHLA as confidential under the Protective Order. *Id.* ¶¶ 17, Exs. 11, 14, 15. The Production, received after the UK Judgment was handed down, revealed that Ms. Heard had not donated the entirety of the \$7 million divorce settlement to the ACLU and CHLA as she had publicly claimed and sworn in her Witness Statement. *Id.* ¶¶ 16, 19, Exs. 14, 15.

With respect to Ms. Heard’s claimed donation to the CHLA, the Production shows that: (i) on August 24, 2016, Mr. Depp made a \$100,000 donation to the CHLA in Ms. Heard’s name “in accordance with Ms. Heard’s pledged gift of \$3,500,000” (*id.*, Ex. 15 at ALH_00010366-67, CHLA000002-3); (ii) in or around July 2017, the CHLA received a \$500,000 donation from an anonymous donor at the recommendation of Ms. Heard (*id.*, Ex. 15 at ALH_00010368, CHLA000008); (iii) on January 9, 2018, the CHLA received a donation of \$250,000 through the “recommendation of a . . . donor who wishes to remain anonymous,” that was designated as a “Donation from Amber Heard” (*id.*, Ex. 15 at CHLA000009-10); and (iv) in June 2019, the CHLA sent correspondence to Ms. Heard (and Edward White) stating that the CHLA had “not received further installments” to honor the full amount of Ms. Heard’s \$3,500,000 pledge since the installment received in August 2016 (*id.*, Ex. 15 at CHLA0000012-13). The Production does not include any pledge by Ms. Heard to donate \$3,500,000 to the CHLA and reveals that only \$100,000 of Ms. Heard’s \$7 million divorce settlement was donated to the CHLA, directly by Mr. Depp. *See id.*, Ex. 15.

The Production only included four documents related to Ms. Heard's donation to the ACLU: (i) a September 9, 2016 letter from Mr. Romero to Ms. Heard, on ACLU Foundation letterhead, thanking Ms. Heard for her donation of \$350,000 as "the first installment of your very generous pledge of \$3.5 million" (*id.*, Ex. 14 at ALH_00010358); (ii) an undated pledge form, with a logo for the "ACLU Centennial Campaign," reflecting a \$3,500,000 pledge by Ms. Heard to the ACLU Foundation to be fulfilled over ten years (*id.*, Ex. 14 at ALH_00010359) (the "ACLU Pledge"); (iii) a "recognition" form from the ACLU Foundation indicating that it would be recognizing Ms. Heard's total ACLU giving in 2016 in "select ACLU publications" (*id.*, Ex. 14 at ALH_00010360); and (iv) e-mail correspondence between Ms. Heard and Mr. Romero from June 2017, reflecting that the ACLU had received a \$350,000 donation from Ms. Heard, a \$100,000 donation from Mr. Depp towards Ms. Heard's pledge, and an "anonymous" \$500,000 which appears from the correspondence to be from "Elon" (*id.*, Ex. 14 at ALH_00010361-62). "Elon" is believed to refer to Tesla and Space-X founder, Elon Musk, with whom Ms. Heard is alleged to have had a romantic relationship during and following her marriage to Mr. Depp. *See* Compl. ¶ 15. The Production only includes evidence that Ms. Heard donated \$450,000 of her \$7 million divorce settlement to the ACLU, not the \$3,500,000 she claimed. Interestingly, the undated ACLU Pledge produced by Ms. Heard has a logo for the "ACLU Centennial Campaign" – the ACLU's centennial was in 2020,³ so it appears that Ms. Heard prepared the ACLU Pledge, not in 2016 when she publicly claimed to be donating \$3.5 million of her divorce settlement to the ACLU, but

³ The Court may take judicial notice that the ACLU's website reflects that the ACLU's centennial was in 2020: <https://www.aclu.org/issues/free-speech/aclu-100-history-series>; <https://centennial.aclu.org/>. *See, e.g., Cool Fashion of NY Inc. v. New Fashion 6th Ave. Corp.*, 55 Misc. 3d 271, 274 n.1, 42 N.Y.S.3d 781, 783 (N.Y. Civ. Ct. Kings Cty. 2016); *In re Tripodi*, 42 Misc. 3d 283, 285 n.1, 974 N.Y.S.2d 764, 766 (N.Y. Sup. Ct. Westchester Cty.), *aff'd*, 111 A.D.3d 586 (2d Dep't 2013).

in 2020, possibly *after* she submitted her Witness Statement in the UK Action and *after* she was ordered to produce documents evidencing any donations of her divorce settlement by the Virginia Court. *See* Aff. ¶¶ 7, 18-19, Ex. 14 at ALH_00010359.⁴

The revelation from the Production that Ms. Heard had lied about donating her entire divorce settlement to the ACLU and CHLA prompted Mr. Depp to make an application, in connection with his request to appeal the UK Judgment, for permission to adduce this new evidence in support of his appeal. *Id.* ¶ 20. Ultimately, the UK Court of Appeal dismissed Mr. Depp's applications for permission to appeal and adduce the newly-discovered from Ms. Heard's Production; but, in rendering this judgment the Court of Appeal acknowledged that Ms. Heard had mislead the UK Court in her Witness Statement:

If the statement in Ms. Heard's witness statement that the \$7m "was donated" to charity (paraphrased by the Judge as that she "had given that sum away") is to be understood to mean literally that the full \$7m had already been paid, that is clearly contradicted by the further evidence, and her statement was accordingly misleading.

Id. ¶ 20, Ex. 16.

IV. The Subpoenas to the ACLU Witnesses

Shortly after Ms. Heard made the Production, she submitted a declaration of Ben Wizner (the "Wizner Declaration"), who identified himself as an employee of the ACLU Foundation, in the Virginia Action in support of her claim of anti-SLAPP immunity to Mr. Depp's defamation claims. *Id.* ¶ 21, Ex. 17. In his declaration, Mr. Wizner testified that Ms. Heard became an "ambassador" for the ACLU on Women's Rights in November 2018 and, in connection with that

⁴ It also appears that Ms. Heard may have also attempted to obfuscate the fact that the ACLU Pledge was not executed in 2016 by producing it between a September 2016 letter from the ACLU Foundation thanking Ms. Heard for her \$350,000 donation and a form stating that Ms. Heard would be recognized for her donations in 2016 in ACLU publications. *See* Aff., Ex. 14.

role, the ACLU suggested Ms. Heard write and assisted her in submitted the Op-Ed. *Id.*, Ex. 17 at ¶¶ 4-5.

In light of the deception revealed by the Production and Ms. Heard's submission of the Wizner Declaration, Mr. Depp renewed his efforts to obtain discovery directly from the ACLU. *Id.* ¶¶ 19, 21-22. The Production and the Wizner Declaration revealed that the ACLU *Foundation* (as opposed to the American Civil Liberties Union, Inc.), Mr. Romero, and Mr. Wizner possessed information relevant to the factual issues in the Virginia Action. Accordingly, Mr. Depp sought the issuance of Subpoenas *duces tecum* and *ad testificandum* to the ACLU Witnesses, which were issued by the Virginia Court on February 4, 2021. *Id.* ¶ 22, Exs. 18, 19, 20, 21, 22, 23.

The Subpoenas seek four categories of information from the ACLU Witnesses: (i) discovery concerning any donations to the ACLU Foundation by Ms. Heard or in her name, and/or any public statements related to such donations (from the ACLU Foundation and Mr. Romero); (ii) communications with Ms. Heard or those acting on her behalf concerning her relationship with Mr. Depp and divorce from Mr. Depp (from all ACLU Witnesses); (iii) discovery concerning Ms. Heard's work as an "ambassador" for the ACLU Foundation and the conception, drafting, and placement of the Op-Ed (from all ACLU Witnesses); and (iv) communications with Ms. Heard or those acting on her behalf concerning the Virginia Action and the preparation and submission of the Wizner Declaration (from the ACLU Foundation and Mr. Wizner). *Id.*, Exs. 18-23.

The Subpoenas were served upon the ACLU Witnesses, either personally or through counsel for the ACLU Witnesses ("ACLU Counsel"), and counsel for Mr. Depp and ACLU Counsel met and conferred on multiple occasions to negotiate mutually-agreeable dates for the ACLU Witnesses to serve their responses and objections to their respective Subpoenas and make their document productions. *Id.* ¶¶ 23-32. In their respective responses and objections to the

Subpoenas, the ACLU Foundation and Mr. Wizner indicated that they would only produce documents and deposition testimony concerning Ms. Heard's role as an "ambassador" for the ACLU and the Op-Ed, but would not be producing any of the other categories of information sought by the Subpoenas. *Id.* ¶¶ 23, 29, Exs. 24, 28. Mr. Romero objected to the Subpoenas *duces tecum* and *ad testificandum* directed to him in their entirety, refusing to produce any of the requested discovery whatsoever. *Id.* ¶ 31, Ex. 30. Ms. Heard also served objections to the Subpoenas to the ACLU Witnesses. *Id.* ¶¶ 23, 31, Ex. 25, 31, 32. Mr. Depp's counsel met and conferred with ACLU Counsel concerning ACLU Witnesses' objections to the Subpoenas in an effort to resolve the parties' disputes, but ultimately the parties reached an impasse. *Id.* ¶¶ 25-32.

Because it was anticipated that the ACLU Witnesses would be producing documents concerning the preparation and placement of the Op-Ed in mid-April 2021 and ACLU Counsel expressed concern concerning the confidential treatment of such documents, Mr. Depp's counsel sent ACLU Counsel the Protective Order entered in the Virginia Action for their consideration. *Id.* ¶¶ 23, 27, Exs. 24, 26, 27. Thereafter, ACLU Counsel requested an addendum to the Protective Order to address the confidentiality concerns of the ACLU organization, which sought to expand the definition of "confidential" information under the Protective Order and procure an agreement from the parties to the Virginia Action that even non-confidential information produced by the ACLU Witnesses would only be disclosed for purposes of the Virginia Action. *Id.* ¶ 30, Ex. 29. Mr. Depp's counsel responded with a counterproposal expanding the definition of "confidential" information to include "information protected from disclosure by statute, trade secrets, and proprietary business information," but ACLU Counsel rejected this counterproposal and the parties ultimately reached an impasse on the confidentiality issue as well. *Id.* ¶¶ 30-32, Ex. 33. ACLU

Counsel relayed that the ACLU Witnesses would not be producing the documents and testimony concerning the Op-Ed without an agreement on confidentiality. *Id.*

Mr. Depp, accordingly, brings the accompanying Petition to compel the ACLU Witnesses' full compliance with the Subpoenas. Specifically, Mr. Depp seeks an order compelling the ACLU Witness to: (a) comply with the Subpoenas by producing documents and testimony concerning (i) Ms. Heard's donations to the ACLU Foundation or donations to the ACLU Foundation made on Ms. Heard's behalf, (ii) the ACLU Witnesses' communications with Ms. Heard concerning her relationship with and divorce from Mr. Depp, (iii) the preparation of the Wizner Declaration, and (iv) any communications the ACLU Witnesses had with Ms. Heard concerning the Virginia Action; and (b) produce the foregoing materials, and the documents and testimony the ACLU Witnesses initially agreed to produce concerning the preparation of the Op-Ed, pursuant to the Protective Order entered in the Virginia Action.

ARGUMENT

I. Legal Standard

Pursuant to CPLR § 3119, subpoenas "issued under the authority of a court of record of a state other than this state" may be served upon, and enforced against, a person within the State of New York. For convenience, CPLR § 3119(b)(4) permits an attorney licensed in New York to issue an out-of-state subpoena in New York rather than seeking issuance from a New York court. *See* CPLR § 3119(b)(4). An application to enforce a subpoena issued pursuant to CPLR 3119 "must comply with the rules or statutes of [New York] and be submitted to the court in the county in which discovery is to be conducted." *See* CPLR § 3119(e). The legislative history of CPLR § 3119 indicates, however, that the statute contemplates that the scope of examination under the subpoena would be determined by the state in which the action for which discovery is sought is

pending. See *In re Petition to Quash Subpoena Ad Testificandum ex rel. Kapon v. Koch*, Index No. 102660/2012, 2012 WL 5187328, at *2 (Sup. Ct. N.Y. Cty. Oct. 15, 2012) (citing Sponsor's Mem. in Supp., Bill Jacket, L.2009, ch. 29, Bill No. S4256), *aff'd*, 23 N.Y. 3d 32 (2014).

Pursuant to CPLR § 3101(a)(4), a party may seek “full disclosure of all matter material and necessary in the prosecution or defense and an action” from a nonparty pursuant to a valid subpoena, including an out-of-state subpoena issued pursuant to CPLR § 3119. See CPLR § 3101(a)(4); *Kapon v. Koch*, 23 N.Y.3d 32, 36-39 (2014); *Barber v. Borgwarner, Inc.*, 174 A.D.3d 1377, 1378 (4th Dep't 2019). “The words ‘material and necessary’ as used in section 3101 must ‘be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.’” *Kapon*, 23 N.Y.3d at 38. Courts have recognized that the “material and necessary” standard includes not only relevant evidence, but also discovery of matters “reasonably calculated to lead to discovery of information bearing on the claims.” See *Foster v. Herbert Slepoy Corp.*, 74 A.D.3d 1139, 1140 (2d Dep't 2010); *Cronin v. Gramercy Five Assocs.*, 233 A.D.2d 263, 263 (1st Dep't 1996). Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from another source. *Kapon*, 23 N.Y.3d at 38. “Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.” *Id.*

II. The Court Should Compel the ACLU Witnesses to Fully Respond to the Subpoenas

The discovery sought by the Subpoenas is relevant to the prosecution of Mr. Depp's defamation claims in the Virginia Action and, therefore should be promptly produced by the ACLU Witnesses. *See Kapon*, 23 N.Y.S.3d at 38-39.

A. The Discovery Sought from the ACLU Foundation and Mr. Romero Concerning Ms. Heard's Donations to the ACLU Foundation Is Relevant to the Claims and Defenses in the Virginia Action

Given that *three courts*, including the Virginia Court, have already found that the veracity of Ms. Heard's claim that she donated the entire \$7 million divorce settlement she received from Mr. Depp is relevant to the veracity of her claims of domestic abuse by Mr. Depp (*see* Aff. ¶¶ 15-18), the objections of the ACLU Foundation and Mr. Romero to the production of these documents on relevancy grounds border on frivolous. As Mr. Depp successfully argued to both the Virginia Court and California Court, Ms. Heard put the donation of her divorce settlement at issue by publicly asserting that she had no financial motive to falsely claim Mr. Depp abused her during their marriage when she filed for divorce. Aff. ¶¶ 15, 18. Mr. Depp is, accordingly, permitted to explore, through party and non-party discovery, Ms. Heard's potential motives to concoct a false narrative of abuse, including financial motives. *Id.* The documents and testimony Mr. Depp now seeks from the ACLU Foundation and Mr. Romero concerning Ms. Heard's donations to the ACLU are precisely the type of motive-related evidence the Virginia Court already determined Mr. Depp was entitled to explore (*id.*); and, as the court presiding over the Virginia Action, the Virginia Court's determination in this regard should be afforded "the widest possible latitude." *In re Aerco Int'l, Inc.*, 40 Misc. 3d 571, 575, 964 N.Y.S.2d 900, 904 (Sup. Ct. Westchester Cty. 2013) (adopting the determination of the foreign presiding court that materials sought by a nearly-identical subpoena were sufficiently material and necessary to the underlying action); *Kapon*, 2012

WL 5187328, at *2-5 (holding, on a petition to quash an out-of-state subpoena, that limitations on the scope of appropriate deposition testimony should be determined by the California court). The discovery sought by the Subpoenas concerning Ms. Heard's donations to the ACLU is decidedly relevant to Mr. Depp's theory, advanced in the Virginia Action (and the UK Action), that Ms. Heard had a financial motive to falsely claim he abused her during their marriage and should, accordingly, be compelled from the ACLU Foundation and Mr. Romero. *See Kapon*, 23 N.Y.3d at 38 (“[S]o long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.”); *In re Hoechst Celanese Corp.*, 184 A.D.2d 223, 223 (1st Dep’t 1992) (affirming grant of motion to compel compliance with subpoena that sought documents “material and necessary” to questions of construction raised in a pending Delaware action).

The fact that Ms. Heard has already produced documents purporting to show her donations to the ACLU Foundation is irrelevant to the ACLU Foundation's and Mr. Romero's obligations to respond to similar requests in the Subpoenas. *See Kapon*, 23 N.Y.3d at 38 (“Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source.”). To the contrary, Ms. Heard's Production, which confirms Mr. Depp's theory that Ms. Heard *did not* donate her entire \$7 million divorce settlement to the ACLU and CHLA, renders the discovery sought from the ACLU Foundation and Mr. Romero even more critical to Mr. Depp's claims in the Virginia Action. Mr. Depp's theory that Ms. Heard had a financial motive to lie about domestic abuse has borne fruit and, now, Mr. Depp is entitled to explore whether there is further evidence which confirms or rebuts this apparent motive, such as: (a) what, if any, pledges Ms. Heard made to the ACLU Foundation and when; (b) whether Ms. Heard and the ACLU Foundation ever communicated about her intention to honor (or not honor)

any pledge; and (c) whether Ms. Heard ever requested that the ACLU Foundation assist her in perpetuating or the false narrative that she had donated \$3.5 million of her divorce settlement.

Furthermore, the four documents Ms. Heard produced related to her ACLU donations are devoid of critical contextual information which Ms. Heard either does not possess or has intentionally withheld. *See* Aff., Ex. 14. For example, the ACLU Pledge is undated and, based on the “Centennial” logo on the pledge form, there is reason to believe that it was prepared *well after* Ms. Heard claimed to have made a \$3.5 million pledge to the ACLU Foundation in 2016. *See id.* ¶¶ 3, 7, 19-20, Ex. 14 at ALH_00010359; n.3, *supra*. Information in the ACLU Witnesses’ possession, such as when “Centennial” logo pledge forms were in circulation, when they received Ms. Heard’s ACLU Pledge, and any communications with Ms. Heard concerning the ACLU Pledge, is necessary to discern when Ms. Heard’s ACLU Pledge was made. Additionally, Ms. Heard’s June 2017 e-mail communications with Mr. Romero reveal that Mr. Romero had a meeting with “Elon,” apparently in connection with an “anonymous” \$500,000 donation to the ACLU Foundation in Ms. Heard’s name. *See id.*, Ex. 14 at ALH_00010361-62. Information concerning this meeting, any communications between Mr. Romero and Elon, and any documents or communications internal to the ACLU Foundation concerning this \$500,000 donation are, presumably, in the possession of the ACLU Foundation and/or Mr. Romero as opposed to Ms. Heard.

B. The Discovery Sought from the ACLU Witnesses concerning Ms. Heard’s Relationship and Divorce from Mr. Depp Is Relevant to the Claims and Defenses in the Virginia Action

The ACLU Witnesses’ relevance objections to the Subpoenas’ requests for communications with Ms. Heard concerning her relationship and divorce from Mr. Depp are unsustainable. The dispositive factual issue in the Virginia Action is whether Ms. Heard lied when

she publicly claimed that Mr. Depp abused her during their relationship. *See generally* Compl. Evidence of what transpired during Mr. Depp's and Ms. Heard's relationship is, thus, highly relevant to Mr. Depp's claim that Ms. Heard's allegations of abuse are false and defamatory, and Ms. Heard's defense that her allegations are true. Ms. Heard's communications with anyone, including the ACLU Witnesses, concerning her relationship with Mr. Depp and subsequent divorce is probative evidence of what transpired between Mr. Depp and Ms. Heard and should be produced. *See Kapon*, 23 N.Y.3d at 38.

Based on evidence already produced in the Virginia Action, Mr. Depp has reason to believe the ACLU Witnesses possess these relevant communications. Ms. Heard has produced an e-mail showing that she communicated with Mr. Romero concerning a donation to the ACLU Foundation she publicly claimed to have made from her divorce settlement from Mr. Depp, which was procured after claiming domestic abuse. Aff. ¶¶ 3-4, 19, Ex. 2, Ex. 14 at ALH_00010361-62. It stands to reason that, when communicating with Mr. Romero concerning the donation and her subsequent role as an "ambassador" for the ACLU, Ms. Heard may have discussed her relationship and divorce from Mr. Depp. Indeed, in the single e-mail with Mr. Romero that Ms. Heard produced, she appears to discuss her current romantic relationship with Elon Musk. *Id.*, Ex. 14 at ALH_00010361-62. Additionally, Ms. Heard and Mr. Wizner have both submitted declarations in the Virginia Action which state that the ACLU assisted Ms. Heard with drafting an Op-Ed in which Ms. Heard implies she was the victim of domestic abuse by Mr. Depp. *See* Aff., Exs. 4, 17. Thus, Ms. Heard almost certainly communicated with the ACLU Witnesses concerning the relationship and divorce that were the subject of the Op-Ed.

Accordingly, the ACLU Witnesses should be compelled to produce the discovery requested in the Subpoenas concerning the Mr. Depp's and Ms. Heard's relationship and divorce.

C. The Discovery Sought from the ACLU Witnesses Concerning the Wizner Declaration and Virginia Action Is Relevant to the Claims and Defenses in the Virginia Action

In objecting to the production of discovery concerning the preparation of the Wizner Declaration and communications with Ms. Heard and her agents regarding the Virginia Action, the ACLU Witnesses are trying to have their cake and eat it too. The ACLU Foundation reaped the benefit of Ms. Heard's patronage, assisted in the drafting and placement of the defamatory Op-Ed, and submitted a declaration in the Virginia Action in Ms. Heard's defense confirming the ACLU Foundation's involvement in the preparation and publication of the Op-Ed; and, now, the ACLU Witnesses seek to avoid any discovery concerning their participation in Ms. Heard's defense. The ACLU Witnesses cannot submit evidence in a legal proceeding and then dodge discovery designed to probe the credibility of that evidence.

Setting aside the hypocrisy of the ACLU Witnesses' position, the requested discovery concerning the Wizner Declaration and the ACLU Witnesses' communications with Ms. Heard concerning the Virginia Action is plainly relevant to the claims and defenses in the Virginia Action or, at the very least, calculated to lead to the discovery of relevant evidence. The Wizner Declaration literally submitted factual evidence in the Virginia Action in support of Ms. Heard's defense of anti-SLAPP immunity. Aff. ¶ 21, Ex. 17. Accordingly, the circumstances surrounding the preparation of this declaration and the basis for the statements included therein are information that may be adduced by Ms. Heard in support of her defense, or by Mr. Depp to rebut her defense. Moreover, given the ACLU Foundation's admitted involvement in preparing and placing the Op-Ed and the ACLU Witnesses' apparent cooperation and assistance with Ms. Heard's defense, it likely that the ACLU Witnesses and Ms. Heard may have communicated about evidence relevant

to Ms. Heard's defense. The ACLU Witnesses should be compelled to produce this relevant information.

III. **Discovery Produced by the ACLU Witnesses Is Not Entitled to Confidential Treatment Beyond the Terms of the Protective Order in the Virginia Action**

In what can only be viewed as further stonewalling tactics to protect Ms. Heard from the consequences of her own lies, the ACLU Witnesses *refuse to produce any documents*, including documents related to the preparation and placement of the Op-Ed that ACLU Counsel initially indicated would be produced in mid-April, because Mr. Depp has not acquiesced to their demands for special confidential treatment. *Id.* ¶¶ 27-33, Exs. 26, 33. As the party with the burden of demonstrating any confidential treatment of their documents is warranted, the ACLU Witnesses' demands are patently unreasonable and should not be entertained.

The ACLU Witnesses demand that the definition of "confidential" information in the Protective Order be expanded to include broad, amorphous categories of information, such as "sensitive personal information," "other business-sensitive information," and "other non-public information that the disclosing ACLU Parties believes in good faith would create risk of harm to its operations if disclosed." *Id.*, Ex. 29. Such an expansion would seemingly allow the ACLU Witnesses to, in contravention of New York law and the Protective Order, unilaterally designate any unflattering information as "confidential." *See id.* ¶ 17, Exs. 11, 26, 33; *Mann v. Cooper Tire Co.*, 33 A.D.3d 24, 36 (1st Dep't 2006) (finding that the motion court "improperly adopted wholesale the 'draconian' protective order drafted by the [defendant] whereby [defendant] was effectively permitted to unilaterally designate any document it chose as confidential").⁵ Consistent

⁵ Ms. Heard already sought confidential treatment for the documents the CHLA produced concerning Ms. Heard's donations and the Virginia Court found that such documents were not properly designated as confidential and entered an order de-designating them. *Aff.* ¶ 17, Ex. 11. The expansive confidentiality protections demanded by the ACLU Witnesses may be an attempt

with New York law, Mr. Depp offered to expand the definition of “confidential” information in the Protective Order to include trade secrets and proprietary business information⁶ to address the confidentiality concerns of the ACLU organization. *See* Aff., Ex. 33; *Mann*, 33 A.D.3d 24 at 36 (“[P]rotective orders should be limited to trade or business secrets and are required to be specific.”); *Kapon*, 2012 WL 5187328, at *5 (declining to enter a protective order that offers confidential treatment to information beyond “trade or business secrets”). The ACLU Witnesses should not be permitted to delay compliance with the Subpoenas because they rejected this reasonable accommodation.

In addition to expanding the definition of “confidential” information beyond what is recognized under New York or Virginia law, the ACLU Witnesses also demand, what is essentially, confidential treatment for non-confidential material. Specifically, they requested that all documents produced by the ALCU Witnesses “whether or not marked CONFIDENTIAL by the ACLU Party . . . not be used, shared or disclosed for any purposes other than preparing for or conducting the [Virginia Action].” Aff., Ex. 29. Setting aside that there is no legal or practical basis for this unworkable demand,⁷ New York courts typically reject the confidential treatment

to obtain confidential treatment for the donation-related documents requested from ACLU Witnesses that would likely be rejected by the Virginia Court. *See id.*

⁶ The Subpoenas do not intentionally seek information from the ACLU Witnesses that would traditionally be viewed as “trade secrets” or “proprietary business information,” *see* Aff., Exs. 18-23, and it is unclear to Mr. Depp what, if any, “trade secrets” or “proprietary business information” the ACLU Foundation would even possess, given that it is a non-profit organization.

⁷ Under the ACLU Witnesses’ proposal it is unclear: (a) how Mr. Depp could use non-confidential information produced by the ALCU Witnesses, leaving Mr. Depp in an unnecessarily tenuous position when prosecuting his claims in the Virginia Action; and (b) what, if any, additional protection the ACLU Witnesses expect from the requested treatment. If Mr. Depp discloses non-confidential information produced by the ACLU Witnesses to a third-party in connection with the Virginia Action or publicly files non-confidential information produced by the ACLU Witnesses in the Virginia Action and such information is subsequently used by third parties for purposes other than the Virginia Action, has Mr. Depp violated the ACLU Witnesses proposed treatment of their documents? And, if not – if Mr. Depp can, for instance, publicly file non-confidential

demanded by the ACLU Witnesses. *See Kapon*, 2012 WL 5187328, at *4-5, *aff'd*, 23 N.Y.3d at 39-40 (denying requested limitation on the use of non-party depositions beyond use in the out-of-state action for which the discovery was sought). This demand too should not be countenanced as an excuse for the ACLU Witnesses to withhold discovery sought by the Subpoenas.

As New York courts have recognized, when discovery is sought pursuant to an out-of-state subpoena, the confidential treatment and permitted use of the requested discovery is properly within the province of the court presiding over the out-of-state action for which the discovery is sought. *See Kapon*, 2012 WL 5187328, at *4-5, *aff'd*, 23 N.Y.3d at 39-40 (“A limitation on the use of non-party depositions beyond their use in the California Action should be made to the California court, because the non-party depositions are being taken as part of discovery in the California Action.”). This is all Mr. Depp requests here: that the ACLU Witnesses produce the discovery requested by the Subpoenas pursuant to the Protective Order entered by the Virginia Court (with Mr. Depp’s proposed expansion of the definition of “confidential” information) and raise any requests for additional protections before the Virginia Court.

CONCLUSION

For all the foregoing reasons, Mr. Depp respectfully requests that the Court grant Mr. Depp’s Petition, enter an order compelling the ACLU Witnesses to produce documents and appear for the depositions sought by the Subpoenas, and grant any further relief the Court deems just and proper.

Dated: New York, New York
May 10, 2021

documents produced by the ACLU Witnesses in the Virginia Action – what protection is even afforded to the ACLU Witnesses’ non-confidential documents other than what is already provided under the Protective Order?

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 6,997 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: May 10, 2021

/s/ Jessica N. Meyers
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