

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

----- :
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. 003

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT
ANTHONY ROMERO'S MOTION TO REARGUE**

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Respondent Anthony Romero submits this memorandum of law in support of his motion for leave to reargue, pursuant to CPLR § 2221(d), the portion of this Court's July 29, 2021 Decision and Order (the "Decision") which directed compliance with Petitioner John C. Depp, II's subpoena *ad testificandum* directed at Mr. Romero.

PRELIMINARY STATEMENT

Mr. Romero brings this motion to reargue only as to that portion of the Court's Decision requiring him to appear at deposition. The Decision did not address Mr. Romero's argument that, as the Executive Director of the American Civil Liberties Union ("ACLU"), he is an apex witness whose testimony is not necessary to provide Mr. Depp with the information he seeks in discovery.

The Decision arose out of Mr. Depp's Petition to compel compliance with three subpoenas *duces tecum* and three subpoenas *ad testificandum* (the "Subpoenas") served on the ACLU, and two of its employees, Benjamin Wizner and Mr. Romero (the "ACLU Non-Parties"). In the Decision, the Court ordered the ACLU, Mr. Wizner and Mr. Romero to produce documents in response to most of Mr. Depp's requests. The Decision did not discuss the subpoenas *ad testificandum* at all, and in particular did not discuss Mr. Romero's argument that relevant testimony can be provided by an ACLU corporate representative and by Mr. Wizner, without burdening a high-ranking executive with a deposition on matters with which he had limited personal involvement. The cases previously cited by Mr. Romero require that the subpoena for his deposition be quashed absent a showing—which Mr. Depp has failed to make—that he possesses unique knowledge that cannot be adequately obtained through depositions of other employees or a corporate representative.

Because the Court overlooked those facts and legal authorities, Mr. Romero respectfully requests that the Court grant reargument and deny the Petition to the extent it seeks to compel compliance with the subpoena *ad testificandum* directed at Mr. Romero.

BACKGROUND

This matter concerns six foreign subpoenas served by Mr. Depp on the ACLU Non-Parties. *See* Teplin Exs. 1-6.¹ In the Subpoenas, Mr. Depp seeks documents and testimony from the ACLU, Mr. Wizner (an attorney in the ACLU’s Speech, Privacy, and Technology Project), and Mr. Romero (the ACLU’s Executive Director), in connection with a defamation lawsuit pending in Virginia state court between Mr. Depp and his ex-wife Amber Heard (the “Virginia Action”).

From the outset, the ACLU agreed to produce a corporate representative to testify on relevant topics addressed by the Subpoenas, but objected to Mr. Romero’s deposition. Teplin Ex. 9 ¶ 14. After the parties were unable to agree on a compromise regarding the response to the Subpoenas—and particularly on the scope of relevant discovery and the terms of the protective order—Mr. Depp filed the Petition here seeking to compel full compliance with the Subpoenas.

In his Petition, Mr. Depp principally argued why the Court should compel compliance with the three *document* subpoenas served on the ACLU Non-Parties, and focused on the relevance of the information sought to the Virginia Action. *See* Teplin Ex. 7. Indeed, the Petition includes just a few passing references to the requested deposition testimony, and no argument at all on the need to depose Mr. Romero. *See id.* at 2, 12, 14.

¹ Citations to “Teplin Aff.” and “Teplin Ex.” refer to the Affirmation of Stephanie Teplin submitted in support of this motion and exhibits attached thereto.

The ACLU Non-Parties asserted three arguments in opposition. *First*, the ACLU Non-Parties argued that discovery on several topics was irrelevant, overbroad, duplicative, and unduly burdensome. Teplin Ex. 8 at 12-16. *Second*, and relevant to the present motion, Mr. Romero argued that his deposition was unduly burdensome and unnecessary given his status as Executive Director of a large, nationwide organization, his limited involvement with the relevant issues, and the ACLU's agreement to produce a corporate representative for deposition. *Id.* at 16-18. *Third*, the ACLU sought modifications to the protective order. *Id.* at 18-21.

In reply, Mr. Depp directly addressed the need for Mr. Romero's deposition for the first time. Teplin Ex. 10 at 4, 11-12. Mr. Depp's position was that he was entitled to depose the highest-ranking official at the ACLU *first*, and then decide whether to take a corporate representative deposition. *Id.* at 4, 11. Mr. Depp further argued that he was entitled to depose Mr. Romero simply because he had communications with Ms. Heard. *Id.* at 12. Mr. Depp did not address the cases cited by Mr. Romero holding that apex witness depositions are appropriate only in rare circumstances, and even then, only after other means of discovery have been exhausted.

On July 29, 2021, the Court issued its Decision granting in part and denying in part Mr. Depp's Petition.² Teplin Ex. 11. The Court resolved the disputes regarding (i) the relevance and burden of responding to the topics set forth in the Subpoenas, and (ii) the appropriate confidentiality protections, and directed the ACLU Non-Parties to "comply with all subpoenas with the exception of those provisions of the subpoenas duces tecum that requests documents pertaining to Ms. Heard's role as a brand ambassador for the ACLU." *Id.* However, the Court did not address Mr. Romero's argument regarding the unjustified burdens that would be imposed

² Mr. Depp served Notice of Entry of the Decision on August 3, 2021. *See* Teplin Ex. 12.

by his deposition.³ Indeed, the Decision does not acknowledge at all that Mr. Depp sought to compel depositions in addition to document productions.

ARGUMENT

The Court should grant Mr. Romero's motion for reargument and deny Mr. Depp's motion to compel his appearance at deposition because he is an apex witness and his testimony is not necessary on the matters this Court has held are relevant. CPLR § 2221(d) permits reargument for matters of fact or law that were "overlooked or misapprehended by the court in determining the prior motion." In his opposition to Mr. Depp's Petition, Mr. Romero cited legal authorities barring the deposition of an apex witness without justification, and explained that in his role as the Executive Director of a national civil rights organization, his role in the matters relevant to the underlying Virginia Action are limited. *See* Teplin Ex. 8 at 16-18. That argument was not addressed by the Decision—indeed there is no reference to depositions at all—and Mr. Romero therefore respectfully submits that the Court overlooked this presentation of fact and law. Reargument should be granted on this basis. *See Martin v. Portexit Corp.*, 98 A.D.3d 63, 65 (1st Dep't 2012) (affirming grant of motion for reargument because trial court initially granted defendant's motion for summary judgment without addressing a legal issue raised in plaintiff's opposition); *Eden Roc, LLP v. Marriott Int'l, Inc.*, No. 651027/2012, 2014 N.Y. Misc. LEXIS 658, at *1-2 (Sup. Ct. N.Y. Cnty. Feb. 6, 2014) (granting reargument because the court overlooked an argument in defendant's motion to dismiss).

As Mr. Romero argued in his opposition to the Petition, New York courts routinely quash deposition subpoenas seeking testimony from a senior executive where the subpoenaing party

³ The Decision includes a general statement that the Court "considered [the ACLU Non-Parties'] remaining arguments," but it does not expressly address the argument regarding Mr. Romero's deposition. *Id.*

has not shown that the executive possesses “unique knowledge” or that the information “cannot be obtained from another source.” *Daou v. Huffington*, No. 651997/10, 2013 N.Y. Misc. LEXIS 705, at *16-17 (Sup. Ct. N.Y. Cnty. Feb. 14, 2013) (collecting cases); *see also* Teplin Ex. 8 at 16-18. This rule “prevent[s] unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice” to the senior executive and her organization. *J.T. Magen & Co. Inc. v. Nissan N. Am., Inc.*, No. 160497/2017, 2020 N.Y. Misc. LEXIS 2066, at *3 (Sup. Ct. N.Y. Cnty. May 15, 2020) (quoting CPLR 3103(a)). For example, Justice Ramos in *Daou* refused to compel a deposition of AOL’s Chief Executive Officer—even though he had “unique knowledge with respect to [his] private conversations” relevant to the underlying dispute—because the requested information could be obtained from another AOL witness without burdening a senior executive. *Daou*, 2013 N.Y. Misc. LEXIS 705, at *17-18; *see also Hallmark Licensing LLC v. Dickens Inc.*, No. 17-cv-2149, 2018 U.S. Dist. LEXIS 210662, at *14-15 (E.D.N.Y. Dec. 13, 2018) (denying motion to compel deposition of a senior executive—even though her testimony is “relevant”—because “her subordinates have the same knowledge” and “the information sought will be addressed during the [corporate designee] deposition”).

The same logic applies here. Mr. Depp does not dispute that the burdens on Mr. Romero in preparing for and attending a deposition would be substantial. Nor could he: Mr. Romero heads one of the country’s largest and oldest civil rights and civil liberties law firms, handling close to 2,000 cases annually, and also one of the country’s largest and oldest public advocacy organizations managing lobbying, political advocacy, and public education efforts nationwide. Teplin Ex. 8 at 17 (citing Teplin Exs. 13, 14). The organization that Mr. Romero leads has 1.7 million members, over 500 staff members, thousands of volunteers, and offices throughout the country. *Id.*

Nor has Mr. Depp shown that Mr. Romero possesses unique knowledge than cannot be obtained through the deposition of ACLU employee Mr. Wizner and a deposition of an ACLU corporate representative on seven enumerated topics.⁴ *See* Teplin Ex. 2 at 5-6. Mr. Romero was not involved with preparing the Op-Ed and, as the Court has recognized, the Virginia Action “pertain[s] only to the statements Ms. Heard made in her Op-Ed.” Decision at 2. To be sure, part of Mr. Romero’s role as Executive Director involves communications with prominent donors, including Ms. Heard. But the ACLU and Mr. Romero will produce those communications, and the ACLU will produce the substantive communications regarding Ms. Heard’s donations, which show that donations from Ms. Heard were handled by employees in the ACLU’s development department in conjunction with Mr. Romero. Mr. Depp has given no reason why an ACLU representative would not be competent to testify concerning those communications and Mr. Heard’s donations generally. As in *Daou*, it would not warrant a deposition even if Mr. Romero has “unique knowledge with respect to [his] private conversations” with Ms. Heard because all relevant information can be obtained from an ACLU representative. 2013 N.Y. Misc. LEXIS 705, at *17-18.

Indeed, the very purpose of deposing a corporate representative—which the ACLU will prepare and produce for deposition—is to allow a single individual, who has gathered information as to corporate knowledge across different divisions and employees, to offer testimony that binds the corporation, thereby promoting efficiency and minimizing the burdens and expense of having to depose numerous company employees. *See* Uniform Civil Rules for

⁴ The ACLU initially objected to some of the topics in the corporate representative notice as irrelevant. Based on the Decision, the ACLU understands those objections to be overruled in significant part, and will produce a corporate representative to testify on the topics that the Court held to be relevant, *i.e.*, topics 1, 2, 3, 4, 6, 7, and 8. *See* Teplin Ex. 2 at 5-6.

the Supreme Court § 202.20-d(f) (allowing a commercial entity to designate an individual to “testify about information known or reasonably available to the entity”); *Faber v. New York City Transit Authority*, 177 A.D.2d 321, 322 (1st Dep’t 1991) (“It is well established law in this State that a corporation . . . can generally, in the first instance designate which of its employees will represent it for the purposes of pretrial depositions.”). The designated representative need not have “personal knowledge of the matters set out in the deposition notice,” provided that the corporation “prepare[s] the designee[] so that [she] may give knowledgeable and binding answers for the corporation.” *Travelers Prop. Cas. Co. of Am., LLC v. Daimler Trucks N. Am., LLC*, No. 14-cv-1889, 2015 U.S. Dist. LEXIS 48760, at *11-12 (S.D.N.Y. Apr. 14, 2015); *see also Bigsby v. Barclays Capital Real Estate, Inc.*, 329 F.R.D. 78, 80-81 (S.D.N.Y. 2019) (if corporate designee “lacks personal knowledge concerning the matters set out in the deposition notice, then the corporation is obligated to prepare them so that they may give knowledgeable answer.” (internal quotations omitted)).

The ACLU will produce such a witness, who will gather information as to corporate knowledge (including Mr. Romero’s knowledge) on the topics set forth in the deposition subpoenas. The ACLU is also producing Mr. Wizner to testify in his individual capacity. Requiring an additional deposition of Mr. Romero himself would thus be duplicative, unnecessary, and unduly burdensome on the ACLU Non-Parties. *See Faber*, 177 A.D.2d at 322-33 (“It should be enough if defendant produces one or more of its officers or employees, who has knowledge of the facts. If, after an examination of the person or persons produced, it shall appear that a further examination of any specific person or persons is necessary, application may be made to the court for such further examination.”).

Accordingly, the Court should grant the motion for reargument and deny the Petition to the extent it seeks to compel a deposition of Mr. Romero.⁵

CONCLUSION

For the foregoing reasons, the Court should grant the motion for reargument and deny the Petition to the extent it compels compliance with the subpoena *ad testificandum* directed at Mr. Romero.

Dated: New York, New York
September 2, 2021

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⁵ To date, Mr. Depp's counsel has not pressed to take Mr. Romero's deposition imminently, and has instead stated that the ACLU and Mr. Romero can complete their document productions before any depositions are scheduled. Teplin Aff. ¶ 10. However, Mr. Romero reserves the right to seek a stay pending on a decision on this motion should the exigencies change.

CERTIFICATE OF COMPLIANCE

I hereby certify that this memorandum is 2,261 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 memorandum of law.

/s/ Stephanie Teplin
Stephanie Teplin