

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. 154545/2021

Part 37

Hon. Arthur F. Engoron

Motion Sequence No. 003

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

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Petitioner John C. Depp, II (“Mr. Depp”) submits this memorandum of law in opposition to Respondent Anthony Romero’s (“Mr. Romero”) motion for leave to reargue (the “Motion”) the portion of this Court’s July 29, 2021 Decision and Order (the “Decision”) directing Mr. Romero’s compliance with Mr. Depp’s subpoena ad testificandum (the “Subpoena”).

### **PRELIMINARY STATEMENT**

Now that the Court has rejected the ACLU Witnesses’<sup>1</sup> baseless relevancy objections, Mr. Romero protests that he should nonetheless be excused from his Court-ordered obligation to provide deposition testimony on topics the Court has deemed relevant to the Virginia Action simply because he is too important within the ACLU. In order to succeed on his motion to reargue, Mr. Romero must demonstrate that the Court, in deciding Mr. Depp’s petition to compel compliance with the Subpoena, overlooked or misapprehended a matter of fact or law in ordering his deposition. Mr. Romero contends that the Court overlooked Mr. Romero’s status as an “apex” witness and the purportedly heightened standard under New York law for compelling the depositions of such witnesses. To the contrary, it is Mr. Romero who misapprehends and outright distorts New York law in service of his Motion.

The legal principle Mr. Romero contends this Court overlooked – that senior executives should not be compelled to sit for a deposition absent a showing they uniquely possess relevant information – is a principle of *federal* law, which has not been adopted by New York State Courts, and is *not* the absolute principle Mr. Romero makes it out to be. In short, the legal principle supposedly overlooked is not actually a principle recognized under New York law. This Court, accordingly, has *not* overlooked or misapprehended anything, but rather soundly rejected a

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Mr. Depp’s Memorandum of Law in Support of His Petition to Compel Response Out-of-State Subpoenas [[NYSCEF No. 37](#)].

baseless argument intended to thwart Mr. Depp's request for deposition testimony from a witness with relevant knowledge. For these reasons and the reasons set forth herein, the Court should deny Mr. Romero's requested leave to reargue the portion of the Decision compelling his deposition.

### **BACKGROUND**

As set forth in support of Mr. Depp's Petition, Mr. Romero emerged as a material percipient witness in the Virginia Action when Ms. Heard submitted a declaration (the "Heard Declaration") stating that, after she made a donation to the ACLU, Mr. Romero, the executive director of the ACLU, introduced her to the individuals at the ACLU who assisted her in drafting and placing the Op-Ed which is the subject of Mr. Depp's defamation claims. [NYSCEF No. 3 at ¶ 6](#); [NYSCEF No. 6](#). Ms. Heard later produced, among other things, four documents related to her donation of a portion of her divorce settlement to the ACLU. [NYSCEF No. 3 at ¶ 19](#). Included among these documents was: a September 9, 2016 letter from Mr. Romero to Ms. Heard thanking her for her donation of \$350,000 ([NYSCEF No. 17 at ALH\\_00010358](#)) (the "Letter"); and e-mail correspondence between Ms. Heard and Mr. Romero from June 2017 discussing donations made to the ACLU by Ms. Heard and on her behalf ([NYSCEF No. 17 at ALH\\_00010361-62](#)) (the "E-mail").

In the E-mail chain, which bears the subject line "Saw Elon yesterday,"<sup>2</sup> Mr. Romero tells Ms. Heard that he "[h]ad a lovely time. Missed you." *Id.* Mr. Romero goes on to inform Ms. Heard that the ACLU had received an anonymous \$500,000 check that he understood to be a gift to apply to Ms. Heard's overall pledge to the ACLU, in addition to the \$350,000 Ms. Heard had donated and a \$100,000 payment received from Mr. Depp. *Id.* In response, Ms. Heard confirmed

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<sup>2</sup> As set forth in support of Mr. Depp's Petition, "Elon" and "E" is believed to refer to Tesla and Space-X founder, Elon Musk, with whom Ms. Heard is alleged to have been in a romantic relationship during and following her marriage to Mr. Depp. [NYSCEF No. 37 at 8](#).

that the \$500,000 check was a gift to be applied to her pledge. *Id.* She then went on to tell Mr. Romero that she was sorry to have missed him and that she was “back in LA to see E,” who said he had a great talk with Mr. Romero, and then off to Australia in a couple days. *Id.* Mr. Romero then again sought confirmation that the \$500,000 was Ms. Heard’s and that he should count Mr. Depp’s gift towards her pledge “to make sure [he] code[s] them right in the database.” *Id.* Mr. Romero then remarked: “Had a great meeting with Elon. Love that guy. Love you too.” *Id.*

Based on Mr. Romero’s involvement in handling Ms. Heard’s donations and those made on her behalf, Mr. Depp served the Subpoena (and a subpoena *duces tecum*) on Mr. Romero’s counsel in March 2021. [NYSCEF No. 3 at ¶¶ 22, 28](#). Mr. Romero’s counsel objected to Mr. Depp’s Subpoena seeking Mr. Romero’s deposition and, after multiple meet and confers, the parties reached an impasse on the issue and Mr. Depp filed his Petition to compel, among other things, Mr. Romero’s compliance with the Subpoena [NYSCEF Nos. 1-37]. In support of his Petition, Mr. Depp submitted, in relevant part, the Heard Declaration, the Letter, and the E-mail [NYSCEF Nos. 6, 17] and cited to these materials in support of his argument that Mr. Romero possesses uniquely relevant knowledge concerning the donations made to the ACLU by Ms. Heard and on her behalf, as well as her relationship with Mr. Depp [[NYSCEF No. 37 at 3-4, 8-9, 15-17](#)]. Mr. Depp argued that the foregoing demonstrated, consistent with the standard *Kapon v. Koch*, 23 N.Y.3d 32 (2014), that the requested discovery was relevant to the Virginia Action and should, thus, be promptly produced. [NYSCEF No. 37 at 14-17](#).

In opposition to Mr. Depp’s Petition, the ACLU Witnesses raised the same arguments with respect to the request for Mr. Romero’s deposition as Mr. Romero raises in his Motion: (i) they argued that, as the Executive Director of the ACLU, Mr. Romero has substantial and expansive responsibilities; (ii) they argued, citing to *J.T. Magen & Co.* and *Daou*, that New York law

recognizes that senior executives should not be deposed absent a showing that he uniquely possesses relevant information; and (iii) they argued that Mr. Depp had not shown that Mr. Romero's unique knowledge sufficient to justify his deposition. *Compare* [NYSCEF No. 54 at 17-18](#) with [NYSCEF No. 89 at 4-6](#).

On reply, Mr. Depp responded to the ACLU Witnesses' arguments by pointing out that, based on the documentary evidence submitted to the Court, Mr. Romero appeared to be the *only* individual at the ACLU to communicate with Ms. Heard regarding her donations and that he and Ms. Heard appeared to have a relatively close personal relationship, saying that they "missed" each other and discussing Ms. Heard's plans with Elon. [NYSCEF No. 61 at 12](#). Thus, Mr. Romero's knowledge concerning Ms. Heard's donations and romantic relationships appeared unique, or at least superior, to that of anyone else at the ACLU. *Id.*

On July 22, 2021, the Court issued its Decision granting, in relevant part, Mr. Depp's Petition to compel Mr. Romero's compliance with the Subpoena. [NYSCEF No. 70](#). Citing to the requirements for enforcing a non-party subpoena set forth in *Kapon v. Koch*, the Court found that Mr. Depp had satisfied his initial burden of demonstrating the relevancy of the information sought by the Subpoena and that the ACLU Witnesses had failed to demonstrate that the information sought by the Subpoena was utterly irrelevant to the Virginia Action. *Id.* In the Decision, the Court expressly stated that the "Court considered the respondents' remaining arguments and finds them to be unavailing and/or non-dispositive." *Id.*

## **ARGUMENT**

### **A. Legal Standard**

A motion for leave to reargue pursuant to CPLR § 2221(d)(2) may only be granted upon a showing by the movant that, in deciding the original motion, "the court overlooked or misapprehended relevant facts or misapplied controlling principle of law." *Spinale v. 10 West 66<sup>th</sup>*

*St. Corp.*, 193 A.D.2d 431, 432 (1st Dep't 1993) (affirming court's denial of motion for leave to reargue where there was "no showing the court overlooked or misapprehended relevant facts or misapplied controlling law"). Reargument is not intended to provide an unsuccessful party with successive opportunities to argue issues already decided by the court. *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992). Yet, this is precisely what Mr. Romero seeks by his Motion for leave to reargue.

**B. The Court Should Deny Mr. Romero's Motion Because It Did Not Overlook or Misapprehend Any Facts or Controlling Principles Law**

As a threshold matter, the Court should deny the Motion because Mr. Romero has not made any showing that the Court overlooked his argument that, as the Executive Director of the ACLU, he should not be compelled to comply with the Subpoena other than the fact that the Court did not explicitly address this argument in the two-page Decision. See [NYSCEF No. 89 at 4](#). This argument, and Mr. Depp's counter argument, was indisputably presented to the Court in the parties' briefing. See [NYSCEF No. 54 at 17-18](#); [NYSCEF No. 61 at 12](#). Much of the parties' arguments in their voluminous briefing on the Petition were not explicitly addressed in the Court's two-page Decision, but the Court expressly stated in its Decision that it had "considered respondents' remaining arguments" and found them unavailing or non-dispositive. [NYSCEF No. 70 at 2](#). Mr. Romero has presented no basis whatsoever to question the accuracy of the Court's statement that it did, in fact, consider the argument Mr. Romero raises again in his Motion.

Nor has Mr. Romero shown that, in rejecting the ACLU Witnesses' argument that Mr. Romero's position at the ACLU excuses him from sitting for a deposition, the Court misapplied a controlling principle of New York law. Relying primarily on *Daou v. Huffington*, Mr. Romero contends that "routinely quash deposition subpoenas seeking testimony from a senior executive where the subpoenaing party has not shown that the executive possesses 'unique knowledge' or



that the information ‘cannot be obtained from another source.’” [NYSCEF No. 89 at 4-5](#) (citing *Daou v. Huffington*, Index No. 651997/10, 2013 WL 6162980, at \*16-17 (Sup. Ct. N.Y. Cty. Feb. 14, 2013)). A survey of New York authorities, however, reveals that the holding in *Daou* is not routine at all. As Justice Jaffe observed in *Thomson v. Zillow*, *Daou* seems to be *the only* instance in which a New York state court acknowledged the “federal apex witness rule” as providing an additional layer of protection for senior executives subject to deposition. *See Thomson v. Zillow, Inc.*, 51 Misc. 3d 1050, 1056 (Sup. Ct. N.Y. Cty. 2016); *see also Alaverdi v. Bui*, Index No. 159549/2017, 2019 WL 5680390, at \*3 (Sup. Ct. N.Y. Cty. Nov. 1, 2019) (noting that the apex witness rule that is recognized in the New York Federal Courts has not been codified by the state courts).

Rather, in New York, third-party discovery is governed by the standard announced by the New York Court of Appeals in *Kapon*, which “does not even acknowledge such an exemption or exception for the depositions of senior executives.” *Id.* (citing *Kapon*, 23 N.Y.3d at 38-39). Indeed, New York state courts routinely *permit* depositions of senior executives to proceed. *See, e.g., Alaverdi*, 2019 WL 5680390, at \*2-3 (denying defendant’s motion to quash deposition of its senior executive, Ralph Lauren); *Thomson*, 51 Misc. 3d at 1056 (holding that competitor was entitled to depose non-party senior executive officers); *J.T. Magen & Co. v. Nissan N. Am., Inc.*, Index No. 160497/2017, 2020 WL 2510483, at \*2-3 (Sup. Ct. N.Y. Cty. May 15, 2020) (permitting deposition of defendant’s CEO). As Mr. Depp argued in support of his Petition, under *Kapon*, a third-party witness must comply with a subpoena unless the witness can demonstrate “the futility of the process to uncover anything legitimate is inevitable or obvious” or the information sought it “utterly irrelevant;” and Mr. Romero has failed to do so with respect to the Subpoena. *See [NYSCEF No. 61 at 6, 11-12](#)* (quoting *Kapon*, 23 N.Y.3d at 38-39).

Even if the apex witness rule recognized by New York Federal Courts and *Daou* were a “controlling principle of law” for this Court – and, it is *not* – this rule would not excuse Mr. Romero from complying with the Subpoena. Indeed, even the authorities cited by Mr. Romero in support of his Motion hold that senior executives are by no means immune from discovery. [NYSCEF No. 89 at 5](#); *Hallmark Licensing LLC v. Dickens Inc.*, No. 17-cv-2149, 2018 WL 6573435, at \*4 (E.D.N.Y. Dec. 13, 2018); *J.T. Magen*, 2020 WL 2510483, at \*2; *Daou*, 2013 WL 6162980, at \*7. Under the apex witness rule, deposing a senior executive is appropriate if the party seeking the discovery demonstrates he has unique knowledge concerning a relevant subject matter. [NYSCEF No. 89 at 4-5](#); *Daou*, 2013 6162980, at \*7. Moreover, when an executive claims no unique knowledge, this “claim ‘is subject to testing by the examining party.’” *Hallmark*, 2018 WL 6573435, at \*5 (quoting *Consol. Rail Corp. v. Primary Indus. Corp.*, Nos. 92 Civ. 4927, 92 Civ. 6313, 1993 WL 364471, at \*1 (S.D.N.Y. Sept. 10, 1993)). Courts applying the apex witness rule “have also explicitly held that it does not ‘matter that the proposed witness is busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge.’” *See Alaverdi*, 2019 WL 5680390, at \*3 (quoting *Naftchi v. New York Univ. Med. Ctr.*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997)).

Here, the materials submitted in support of Mr. Depp’s Petition show that Mr. Romero possesses unique knowledge concerning the donations made to the ACLU and personal conversations with Ms. Heard surrounding those donations. The Letter and E-mail show that Mr. Romero personally handled donations to the ACLU made by Ms. Heard and on her behalf and that Mr. Romero and Ms. Heard had the type of friendly relationship where they would talk about personal matters, such as romantic relationships. *See* [NYSCEF Nos. 6, 17](#); [NYSCEF No. 37 at 16](#); [NYSCEF No. 61 at 14-15](#). Accordingly, Mr. Romero almost certainly has unique knowledge

concerning these donations and, perhaps, Ms. Heard's relationship with Mr. Depp, that could not be obtained from anyone else at the ACLU. See [NYSCEF No. 61 at 14-15](#). In any event, Mr. Depp is entitled to test Mr. Romero's professed lack of unique knowledge at the deposition sought by the Subpoena. See *Alaverdi*, 2019 WL 5680390, at \*3. Mr. Romero's deposition is, thus, appropriate even if the apex witness rule is applied here.<sup>3</sup>

### **CONCLUSION**

In sum, the Court correctly rejected the ACLU Witnesses' argument that Mr. Romero's status as Executive Director of the ACLU exempts him from sitting for the deposition sought by the Subpoena. The Court explicitly considered this argument in opposition to Mr. Depp's Petition and correctly applied New York law in rejecting this argument and compelling Mr. Romero to comply with the Subpoena. For all the foregoing reasons, Mr. Depp respectfully requests that the Court deny Mr. Romero's Motion for leave to reargue the portion of the Decision compelling his compliance with the Subpoena.

Dated: New York, New York  
September 14, 2021

Respectfully submitted,

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<sup>3</sup> In *Daou*, Justice Ramos quashed the subpoena to AOL's CEO because plaintiffs failed to demonstrate that he had any relevant information other than that of his company, which other AOL personnel could testify to. *Daou*, 2013 WL 6162980, at \*7-8. Mr. Romero, on the other hand, *does* possess relevant information to which others at the ACLU are not privy.

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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 2,608 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: September 14, 2021

/s/ Jessica N. Meyers  
Jessica N. Meyers