

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

**REPLY IN FURTHER SUPPORT OF RESPONDENT
ANTHONY ROMERO'S MOTION TO REARGUE**

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Respondent Anthony Romero submits this reply in further 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. Mr. Depp’s opposition ([NYSCEF Dkt. 90](#)) disregards binding case law limiting the deposition of senior executives and misconstrues the reasons why Mr. Romero’s deposition is unnecessary and duplicative.

ARGUMENT

I. REARGUMENT OF THE RULING ON MR. ROMERO’S DEPOSITION IS WARRANTED

Reargument is warranted when the Court overlooks a matter of fact or law. CPLR § 2221(d). Mr. Depp’s opposition confirms that Mr. Romero’s argument that his deposition is unnecessary was “indisputably presented to the Court in the parties’ briefing [on Mr. Depp’s Petition]” and was “not explicitly addressed in the Court’s two-page Decision.” [NYSCEF Dkt. 90 at 5](#). For these reasons, Mr. Romero respectfully submits that the Court may have overlooked Mr. Romero’s presentation of fact and law on the issue of Mr. Romero’s deposition, making reargument appropriate. *See Martin v. Portexit Corp.*, 98 A.D.3d 63, 65 (1st Dep’t 2012); *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).

II. MR. ROMERO’S DEPOSITION IS UNNECESSARY AND UNDULY BURDENSOME

On reargument, the Court should deny the Petition to the extent it seeks to compel Mr. Romero’s deposition. To be clear, Mr. Romero does not seek reargument of the portion of the Decision holding that certain topics, including Ms. Heard’s donations, are within the scope of discovery. [NYSCEF Dkt. 89 at 1, 3](#). And Mr. Romero does not dispute that he had communications with Ms. Heard about her donations, which Mr. Romero and the ACLU have

begun producing to Mr. Depp. [Id. at 6](#). But even accepting those facts, Mr. Depp has still failed to show that Mr. Romero’s deposition is necessary given that the ACLU will produce *two other witnesses for depositions*, including a corporate representative who will be prepared to testify as to corporate knowledge (including Mr. Romero’s knowledge) on the topics set forth in the deposition subpoenas. [Id.](#) Moreover, Mr. Depp does not dispute that the burdens on Mr. Romero to prepare for and attend a deposition would be substantial. [Id. at 5](#). In light of the fact that the ACLU is already producing multiple witnesses for depositions, such further burdens are unnecessary and inappropriate.

Justice Ramos’ decision in *Daou* presented a comparable situation: there, the court refused to compel 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 v. Huffington*, No. 651997/10, 2013 N.Y. Misc. LEXIS 705, at *17-18 (Sup. Ct. N.Y. Cnty. Feb. 14, 2013). The same conclusion is warranted here. Any communications Mr. Romero had with Ms. Heard were undertaken in his role as the ACLU’s Executive Director and, therefore, can be fully presented by a corporate representative witness, who will have access to Mr. Romero’s knowledge as well as the knowledge of the ACLU development office that manages donations. Mr. Depp’s attempt to distinguish *Daou* misses the mark. He argues that Mr. Romero “possess[es] relevant information to which others at the ACLU are not privy” ([NYSCEF Dkt. 90 at 8 n.3](#)), but even if that were true, there is no reason to expect that the ACLU’s corporate representative could not be prepared to testify as to information that Mr. Romero obtained in his role as the ACLU’s Executive Director.

At a minimum, Mr. Depp's request to depose Mr. Romero is premature: he should first depose the less senior ACLU employee and ACLU corporate representative, and then seek Mr. Romero's deposition if still necessary. As the First Department has held, it is sufficient for a subpoenaed party to "produce[] one or more of its officers or employees, who has or have knowledge of the facts." *Faber v. New York City Transit Auth.*, 177 A.D.2d 321, 322-23 (1st Dep't 1991). If, after those deposition, "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." *Id.*

III. NEW YORK COURTS PROVIDE HEIGHTENED PROTECTIONS FOR SENIOR EXECUTIVES

In opposition, Mr. Depp contends that *Daou* is the "only instance in which a New York court acknowledged . . . an additional layer of protection for senior executives subject to deposition." [NYSCEF Dkt. 90 at 6](#). That is a clear misstatement of New York law. For example, in Mr. Romero's opposition to the Petition, he cited *Rosenhaus Real Estate, LLC v. S.A.C. Capital Management, Inc.*, binding First Department authority in which the court quashed a subpoena seeking to depose Steven Cohen, the chief executive of S.A.C. Capital. 100 A.D.3d 512 (1st Dep't 2012); *see also* [NYSCEF Dkt. 54 at 17](#). The First Department so held because the subpoenaing party had not shown that several "S.A.C. officers and employees it had already deposed lacked information about the transactions at issue," and thus Mr. Cohen's deposition was not necessary. *Id.* at 512.

The *Rosenhaus* court cites *Barnwell v. Emigrant Savings Bank*, where the First Department similarly reversed a decision compelling the deposition of a chief executive because the subpoenaing party had failed to seek relevant information by deposing lower level employees in the first instance. 81 A.D.3d 518, 518 (1st Dep't 2011). Indeed, even one of the cases relied

on by Mr. Depp cites several examples of New York state appellate courts quashing subpoenas directed at senior corporate executives. See [NYSCEF Dkt. 90 at 6](#) (citing *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) (collecting cases)).

It is thus well established in state trial and appellate court decisions—as well as under federal law—that extra scrutiny is given to subpoenas seeking to depose senior executives.¹ See [NYSCEF Dkt. 89 at 5](#).

IV. MR. DEPP MISCONSTRUES MR. ROMERO’S POSITION AND RELIES ON IRRELEVANT LEGAL AUTHORITIES

Mr. Depp’s remaining point depends on mischaracterizing Mr. Romero’s argument. Mr. Romero has never claimed that he is “immune from discovery.” [NYSCEF Dkt. 90 at 7](#). To the contrary, the ACLU and Mr. Romero are producing documents consistent with the Decision, and his knowledge on these topics can be discovered by deposing the ACLU’s corporate representative. That is the very purpose of deposing a corporate representative, which allows a single employee to gather information as to corporate knowledge across different divisions and employees and offer testimony that binds the corporation. See *Faber*, 177 A.D.2d at 322. Mr. Depp’s opposition entirely ignores that the ACLU will be producing a corporate representative for deposition, and he does not offer any reason why that deposition would be insufficient to obtain information on the ACLU’s knowledge of relevant topics, including Mr. Romero’s knowledge. See, e.g., *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) (a

¹ Notably, Mr. Depp did not dispute any of the legal authority concerning deposition of senior executives when Mr. Romero first raised them in opposition to the Petition. See generally [NYSCEF Dkt. 61](#) (Depp Reply Memorandum in Further Support of Petition).

corporate 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”).

Having misconstrued Mr. Romero’s position, Mr. Depp then proceeds to cite several inapposite legal authorities where senior executive claimed that they had no knowledge of relevant facts. *See Thomson v. Zillow, Inc.*, 51 Misc. 3d 1050, 1054, 32 N.Y.S.3d 455, 458 (Sup. Ct. N.Y. Cnty. 2016) (permitting deposition of senior executives despite claim that they lack knowledge related to the underlying litigation); *Alaverdi v. Bui*, No. 159549/2019, 2019 N.Y. MISC. LEXIS 5898, at *8-9 (Sup. Ct. N.Y. Cnty. Nov. 1, 2019) (subpoenaing party can test at deposition an executive’s claim that he lacks any material and necessary information). Neither of these cases is responsive to Mr. Romero’s position because he does not dispute that he possesses some relevant information.² Mr. Depp has no response to Mr. Romero’s actual position, which is that the document and testimonial discovery Mr. Romero and his organization are providing are more than sufficient to satisfy Mr. Depp’s needs. The legal authorities relied on by Mr. Depp thus fail to justify Mr. Romero’s deposition.

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. At a minimum, the Petition should be denied without prejudice, Mr. Depp should

² The Court of Appeals’ decision in *Kapon v. Koch* is likewise off point. 23 N.Y.3d 32 (2014). The Court there merely holds that a non-party subpoena should be enforced absent a showing that the information sought is “utterly irrelevant.” *Id.* at 38. Again, Mr. Romero does not contest in this reargument motion the relevance of the information sought.

depose Mr. Wizner and the ACLU corporate representative, and then Mr. Depp should apply to the Court for leave to depose Mr. Romero if he can establish that it is still necessary.

Dated: New York, New York
September 20, 2021

/s/ Stephanie Teplin_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this memorandum is 1577 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.

/s/ Stephanie Teplin
Stephanie Teplin