

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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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS’  
MOTION FOR PRODUCTION EXPENSES  
PURSUANT TO CPLR 3111 & 3122(d)**

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The American Civil Liberties Union Foundation (“ACLU”), Benjamin Wizner, and Anthony Romero (the “ACLU Non-Parties”), respectfully submit this Memorandum of Law in 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**

The ACLU Non-Parties seek reimbursement for the considerable expense spent responding to onerous subpoenas served by Mr. Depp from an underlying action in which neither the ACLU nor any of its employees are parties. First, Mr. Depp served broad document requests that resulted in a review of over 7,500 documents and production of nearly 2,000 documents. Second, the ACLU produced three witnesses—including its Executive Director—for over sixteen hours of depositions. Along the way, Mr. Depp rejected numerous compromises to minimize the burden and expense on the ACLU and its employees.

The ACLU Non-Parties have now given Mr. Depp all the discovery he sought. While they cannot get back the significant time they spent responding to Mr. Depp’s subpoenas and the disruption to their work, they are entitled under the CPLR to be reimbursed for their reasonable production expenses. The production expenses here include the amounts billed by outside counsel’s attorneys to review documents and prepare a privilege log, the amounts billed by outside counsel’s technical staff to organize documents and prepare them for production, and modest data hosting fees. New York law recognizes each of these categories as recoverable production expenses. Mr. Depp has known from the outset that the ACLU Non-Parties intended to seek reimbursement for their production expenses, and the expenses incurred are a direct consequence of his broad document requests, which cover a lengthy time period, call for

documents maintained in disparate departments at the ACLU, and required an extensive privilege review by seeking all communications about the underlying litigation itself. For these reasons, the Court should direct Mr. Depp to reimburse the ACLU Non-Parties for \$86,253.26 in production expenses.

### **BACKGROUND**

This proceeding arose from an acrimonious defamation lawsuit between Mr. Depp and his ex-wife Amber Heard in Virginia state court (the “Virginia Action”). Teplin Aff. ¶ 3.<sup>1</sup> The Virginia Action concerns an Op-Ed that Ms. Heard published in the *Washington Post* in December 2018, discussing the reluctance of survivors of domestic abuse to report their experiences, the #MeToo movement, and legislative efforts related to women’s rights. *Id.* The ACLU assisted Ms. Heard in drafting the Op-Ed and arranging for its publication, but the ACLU is not a party in the Virginia Action, nor are any of its employees. *Id.*

#### **A. Mr. Depp’s Document and Deposition Subpoenas**

Two years after suing Ms. Heard in Virginia, Mr. Depp served six foreign subpoenas on the ACLU Non-Parties, seeking 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). *See* NYSCEF Dkt. [21-26](#). The three document subpoenas sought documents on numerous broad subjects. *See* NYSCEF Dkt. [22](#), [23](#), [25](#). For example, the subpoenas include requests for all documents concerning donations from Ms. Heard to the

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<sup>1</sup> Citations to “Teplin Aff.” refer to the supporting Affirmation of Stephanie Teplin. Citations to “Teplin Ex.” refer to exhibits attached to that affirmation.

ACLU, all documents concerning publicity and press releases about Ms. Heard's donations, all documents concerning the preparation of the Op-Ed, all communications with Ms. Heard or her representatives concerning the relationship between Ms. Heard and Mr. Depp, and all communications with Ms. Heard or her representatives about the Virginia Action, among other topics. *See* NYSCEF Dkt. [22](#) at 14-15. Moreover, Mr. Depp's requests sought documents spanning the six-year period from January 1, 2016, through the present. *Id.* The corporate representative subpoena demanded testimony on a similarly broad range of topics. *See* NYSCEF Dkt. [21](#) at 8-9.

The ACLU Non-Parties served written responses and objections, in which they indicated that they intended to seek reimbursement for their production expenses. *See, e.g.,* NYSCEF Dkt. [27](#) at 6 ¶ 7. The ACLU Non-Parties also agreed to conduct a targeted collection of documents that concerned the approval, conception, preparation and publication of the Op-Ed, which was the subject of Mr. Depp's suit against Ms. Heard. *See* Teplin Aff. ¶ 6. Mr. Depp rejected this compromise and moved to compel compliance with all of the document requests in the subpoenas, as well as to require three depositions. *See* NYSCEF Dkt. [1](#). After reviewing Mr. Depp's motion, which emphasized his questions about Ms. Heard's donations to the ACLU, the ACLU Non-Parties offered to stipulate to the pertinent facts concerning those donations, which would have eliminated the need for additional document collection and review on that topic. Teplin Aff. ¶ 7. Mr. Depp declined this compromise too. *Id.* In July 2021, the Court granted Mr. Depp's motion in part, and ordered nearly full compliance with the six subpoenas (the "July 2021 Order"). NYSCEF Dkt. [70](#).

## B. The ACLU's Document Productions and Depositions

The ACLU Non-Parties conducted their document collection and review in two phases. First, in March 2021, the ACLU Non-Parties conducted a targeted collection and review consistent with their offer to produce documents concerning the approval, conception, preparation and publication of the Op-Ed. Teplin Aff. ¶ 9. This collection focused on the custodians most directly involved in preparing the Op-Ed and was limited to the three-month period in late 2018 when the Op-Ed was conceived, written, and published. *Id.* It yielded around 500 responsive documents and required the ACLU Non-Parties to incur less than \$10,000 in fees and costs. *Id.*

Second, in August through October 2021, the ACLU Non-Parties conducted a far broader collection and review consistent with the subpoenas' far-reaching requests and the Court's July 2021 Order. *Id.* ¶ 10. Specifically, the ACLU Non-Parties significantly expanded the date parameters from a tailored three-month time period in 2018 (when the Op-Ed was conceived, drafted, and published) to the six-year time period from 2016 to the present as specified in the subpoenas. *Id.* The collection also included additional document custodians because Mr. Depp's requests sought information maintained by employees from different departments, including an employee in the development department to address topics on Mr. Heard's donations and an employee in the communications department to address topics on press releases and publicity. *Id.* In order to capture documents responsive to Mr. Depp's broad requests (*e.g.*, all documents concerning the "relationship" between Ms. Heard and Mr. Depp), the ACLU Non-Parties were required to use broader search terms that returned a materially higher number of documents with false hits, increasing attorney review time. *Id.* Finally, because the subpoenas included an unusual request for documents about the pending Virginia Action itself—which naturally pulled



in communications with in-house and outside counsel—the ACLU Non-Parties were required to devote significant amounts of time to reviewing responsive documents for privilege, and then later preparing a detailed privilege log describing documents that were withheld on the basis of attorney-client privilege. *Id.* ¶ 11.

In this second phase, outside counsel reviewed over 7,000 additional documents. *Id.* ¶ 10. The ACLU Non-Parties ultimately produced 1,909 responsive documents spanning 7,130 pages, along with associated metadata. *Id.* ¶ 13.

The ACLU also produced Mr. Wizner, Mr. Romero, and a corporate representative for depositions.<sup>2</sup> Mr. Depp took over sixteen hours of testimony from the ACLU and its employees: over four hours from Mr. Wizner, the full seven hours from the ACLU’s corporate representative, and over five hours from Mr. Romero. *Id.* ¶ 14.

### **C. The ACLU’s Production Expenses**

The ACLU Non-Parties seek \$85,156.59 in fees and \$1,096.67 in costs incurred in responding to the three document subpoenas, for a total of \$86,253.26. Teplin Aff. ¶ 15. The requested fees consist of 117.3 hours for work by a senior associate and a junior associate (most of which was conducted by the junior associate), and 48.1 hours for work by two members of outside counsel’s technical litigation support team. Teplin Ex. 1. While all work was supervised by a litigation partner, the ACLU Non-Parties do not seek reimbursement for any of her time.

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<sup>2</sup> Mr. Romero initially sought reargument of the Court’s July 2021 Order as to his deposition. NYSCEF Dkt. [73](#). The Court denied reconsideration, NYSCEF Dkt. [92](#), and Mr. Romero thereafter appeared for a deposition.

For the two associates, the ACLU Non-Parties only seek reimbursement for time spent reviewing documents for responsiveness and privilege and for preparing a privilege log. They do not seek reimbursement for outside counsel's time spent discussing document collection and review activities internally and with ACLU employees, which totaled over \$15,000. Teplin Aff. ¶ 22. They also do not seek reimbursement for other tasks related to the document subpoenas, such as preparing written responses to the subpoenas, meet-and-confer discussions with Mr. Depp's counsel, and motion practice.<sup>3</sup> *Id.* And they do not seek reimbursement for any time spent preparing for and attending depositions. *Id.* For the two technical staff members, the ACLU Non-Parties likewise seek reimbursement only for time spent on tasks directly related to the document collection, review, and production, including initial data processing; preparing and implementing search parameters; imaging and Bates-stamping documents; inserting redactions for privilege; performing quality control checks; exporting documents to a data file with accompanying metadata; and preparing a file transfer link to send to Mr. Depp's counsel. *Id.* ¶ 19.

An overview of counsel's and staff's rates and hours billed is listed below, and detailed time records are provided at Exhibit 1 of the Teplin Affirmation.<sup>4</sup> *See also id.* ¶ 20.

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<sup>3</sup> In addition, the ACLU does not seek reimbursement for the considerable time its own personnel spent searching for and collecting documents in-house without using a vendor, and in assisting outside counsel in complying with the subpoenas. Teplin Aff. ¶ 22.

<sup>4</sup> Information about the two associates from outside counsel's website is provided at Exhibits 2 and 3 of the Teplin Affirmation.

<b>Timekeeper Position</b>	<b>Hourly Rate</b>	<b>Hours</b>	<b>Fee</b>
Senior Associate	\$799.50	38.7	\$30,940.65
Junior Associate	\$500.20	78.6	\$39,315.72
Litigation Support Program Manager	\$336.20	17.1	\$5,749.02
Litigation Support Analyst	\$295.20	31.0	\$9,151.20
<b>TOTAL</b>		<b>165.4</b>	<b>\$85,156.59</b>

In addition, the ACLU Non-Parties incurred \$1,096.67 in costs, which consists of monthly third-party data hosting and usage fees. *Id.* ¶ 23. Detailed records of the costs incurred are provided at Exhibit 4 of the Teplin Affirmation. Use of an outside vendor’s platform allowed counsel to store, review, and tag documents, and then format documents with associated metadata and stamp them for production. *Id.*

Prior to filing this motion, the ACLU Non-Parties sent a detailed description of its production expenses to Mr. Depp and sought to negotiate reimbursement without Court intervention. *Id.* ¶ 24. Those negotiations were unsuccessful, and as a result the ACLU Non-Parties bring this motion to recover their reasonable production expenses.

### **ARGUMENT**

#### **I. THE ACLU NON-PARTIES SHOULD BE REIMBURSED FOR THEIR PRODUCTION EXPENSES**

Pursuant to CPLR 3111 and 3122(d), the “reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.” *See also Tener v. Cremer*, 89 A.D.3d 75, 82 (1st Dep’t 2011) (New York law “require[s] the requesting party to defray the ‘reasonable production expenses’ of a nonparty”). “The rationale for the rule is manifestly clear; a non-party should not be burdened with shouldering the costs of litigation to which the non-party is

unrelated.” *Matter of Khagan*, 66 Misc. 3d 335, 338 (Sur. Ct. Queens Cty. Sept. 18, 2019). Thus, “[i]f a court finds that a non-party is required to produce information, including electronically-stored information (ESI), the ‘court should allocate the costs of this production to the party seeking the discovery.’” *Walt Disney Co. v. Peerenboom*, No. 151788/2018, 2019 N.Y. Misc. LEXIS 337, at \*13–14 (Sup. Ct. N.Y. Cty. Jan. 17, 2019) (quoting *Tener*, 89 A.D.3d at 82). Since the ACLU Non-Parties were required to produce electronically-stored information in response to Mr. Depp’s subpoenas, Mr. Depp is required to reimburse the ACLU Non-Parties for their reasonable production expenses. *See Riverside Ctr. Site Owner LLC v. Lexington Ins. Co.*, No. 650043/2019, 2020 N.Y. Misc. LEXIS 1911, at \*5 (Sup. Ct. N.Y. Cty. May 11, 2020) (“CPLR 3122(d) is mandatory regardless of any objections.”).

The ACLU Non-Parties seek reimbursement for several categories of expenses, each of which is a recoverable “production expense.” *First*, the ACLU Non-Parties seek reimbursement for attorney time spent reviewing documents for responsiveness and privilege and preparing a privilege log. *See G. Willi-Food Int’l Ltd. v. Herzfeld & Rubin, P.C.*, No. 159040/2016, 2019 N.Y. Misc. LEXIS 2548, at \*13–14 (Sup. Ct. N.Y. Cty. May 17, 2019) (CPLR 3122(d) authorizes reimbursement of “the costs for locating documents, reviewing for privilege, and producing documents”); *Mayer v. Marron*, No. 652987/2014, 2018 N.Y. Misc. LEXIS 490, at \*27–28 (Sup. Ct. N.Y. Cty. Feb. 8, 2018) (“reasonable production expenses” includes “attorneys’ fees”); *Peters v. Peters*, No. 600456/2004, 2016 N.Y. Misc. LEXIS 2453, at \*6 (Sup. Ct. N.Y. Cty. July 5, 2016) (awarding a non-party expenses and attorney’s fees “incurred for gathering and reviewing documents for production”). *Second*, the ACLU Non-Parties seek reimbursement for support staff time spent on the technical tasks necessary to prepare documents for attorney review and production. *See G. Willi*, 2019 N.Y. Misc. LEXIS 2548, at \*13 (non-

party is entitled to “reasonable costs in preparing documents responsive to the subpoena”); *Disney*, 2019 N.Y. Misc. LEXIS 337, at \*14 (non-party is entitled to “costs in connection with the processing and review of [] data”). *Third*, the ACLU Non-Parties seek reimbursement for data hosting fees. *Id.* at \*13 (non-party is entitled to “attorneys’ fees and/or data-vendor costs”). New York law requires Mr. Depp, the party issuing the subpoena, to bear each of these categories of expenses.

## II. THE REQUESTED PRODUCTION EXPENSES ARE REASONABLE

Moreover, the amount of the ACLU Non-Parties’ production expenses is reasonable. As to the requested fees, New York courts generally determine a “presumptively reasonable fee” by using the “lodestar” calculation, which is the product of a reasonable hourly rate and a reasonable number of hours worked. *See Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011); *see also Nager v. Teacher’s Retirement Sys. of the City of N.Y.*, 57 A.D.3d 389, 390 (1st Dep’t 2008) (affirming trial court’s 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

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 to those by whom the prevailing party was represented.” *Getty Petroleum Corp. v. G.M. Triple S. Corp.*, 187 A.D.2d 483, 483–484 (2d Dep’t 1992). “[I]n most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney.” *Id.* at 483. In general, “evidence that counsel customarily charged that rate in other cases will

tend to establish its reasonableness.” *In re Quill v. Cathedral Corp.*, 241 A.D.2d 593, 594 (3d Dep’t 1997).

Here, outside counsel billed the ACLU Non-Parties at rates of \$799.50/hour for a senior associate, \$500.20/hour for a junior associate, \$336.20/hour for a litigation support program manager, and \$295.20/hour for a litigation support analyst. *Teplin Aff.* ¶ 20. These billing rates are comparable or less than the rates that outside counsel charges to its clients for litigation and exempt organizations-related work. *Id.* ¶ 21. As such, these billing rates are reasonable and should be used to calculate the ACLU Non-Parties’ reimbursable fees. *See 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”); *Freidman v. Yakov*, 138 A.D.3d 554, 556 (1st Dep’t 2016) (“Here, the work performed by defendants’ attorneys was more than sufficiently detailed by the billing attorney’s credible testimony.”).

**B. The Number of Hours Worked Is Reasonable**

The collective number of hours expended on this matter by the ACLU Non-Parties’ counsel and support staff is also reasonable. “In calculating the number of ‘reasonable hours,’ the court looks to its own familiarity with the case and . . . its experience generally[,] as well as to the . . . submissions and arguments of the parties.” *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992).

The time spent by outside counsel’s attorneys and staff in responding to the documents subpoenas was reasonable. The ACLU Non-Parties conducted a reasonable search for responsive documents, which entailed reviewing over 7,500 documents identified through the use of search terms, and ultimately preparing nearly 2,000 documents for production. *Teplin*

Aff. ¶¶ 9-10, 13. To minimize the expense, outside counsel assigned the majority of the document review work to a junior associate and the majority of the technical work to a junior member of the technical support team. As a result, the amounts sought are based on time that is weighted heavily toward attorneys and staff members with lower billing rates, and includes no partner time at all. While the document review occurred in two phases, outside counsel tailored the search parameters used in second phase to avoid re-reviewing documents that had been collected in the first phase. *Id.* ¶ 12.

Further, the requested hours are reasonable because they are the direct consequence of Mr. Depp's own document requests and his insistence on full compliance. From the outset, the ACLU Non-Parties put Mr. Depp on notice that they intended to seek their production expenses. *Supra* at 3. As described above, the ACLU Non-Parties proposed a targeted response to the subpoenas that would have kept production expenses under \$10,000. Mr. Depp declined that proposal and insisted on a document collection and review that necessitated searching numerous custodial files over a six-year time period, with generalized search terms that yielded a lower responsiveness rate and a significant number of responsive documents that included privileged attorney-client communications. It is unsurprising that the significantly broader collection and review process that Mr. Depp demanded resulted in significantly higher production expenses. Mr. Depp received the broad document discovery he sought, and it is entirely reasonable to compensate the ACLU Non-Parties for the costs of producing those documents.

**C. Counsel's Costs are Reasonable**

Finally, it is reasonable to reimburse the ACLU Non-Parties for \$1,096.67 in costs incurred in monthly data-hosting fees with an outside vendor, which was necessary for counsel

to review and tag documents and prepare documents for products. *See* Teplin Aff. ¶ 23 & Ex. 4; *Disney*, 2019 N.Y. Misc. LEXIS 337, at \*13.

**CONCLUSION**

For the foregoing reasons, the Court should grant the motion and order Mr. Depp to pay the ACLU Non-Parties production expenses totaling \$86,253.26 (\$85,156.59 in fees and \$1,096.67 in costs).

Dated: New York, New York  
April 18, 2022

*/s/ Stephanie Teplin*

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this opening memorandum of law is 3,131 words exclusive of the caption, table of contents, table of authorities, and signature block, and that this document complies with the word limit for an opening memorandum of law.

Dated: April 18, 2022

*/s/ Stephanie Teplin*

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Stephanie Teplin