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. 001

RESPONDENTS' OPPOSITION TO PETITIONER'S PETITION TO COMPEL RESPONSES TO OUT-OF-STATE SUBPOENAS

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Respondents the American Civil Liberties Union Foundation ("ACLU"), Benjamin Wizner, and Anthony Romero (together, the "ACLU Non-Parties") submit this memorandum of law in opposition to Petitioner John C. Depp, II's Petition to compel compliance with three foreign subpoenas *duces tecum* and three foreign subpoenas *ad testificandum* (together, the "Subpoenas").

PRELIMINARY STATEMENT

This Petition to compel compliance with out-of-state subpoenas arises from an acrimonious defamation lawsuit between Mr. Depp and his ex-wife Amber Heard in Virginia state court (the "Virginia Action"). The only issue presented in the Virginia Action is the truth of Ms. Heard's statements in a 2018 *Washington Post* opinion piece on women's rights (the "Op-Ed"). Nearly two years after filing suit in Virginia, Mr. Depp served six subpoenas on the ACLU; Mr. Romero, its Executive Director; and Mr. Wizner, an attorney in the ACLU's Speech, Privacy, and Technology Project. In response to the Subpoenas, the ACLU Non-Parties agreed to produce documents and to provide a corporate representative witness to testify about the drafting, editing, and publication of the Op-Ed. But they refused to engage in a burdensome search for documents and to prepare multiple witnesses on a host of irrelevant topics, including the now-concluded divorce action between Mr. Depp and Ms. Heard, and Ms. Heard's charitable donations to the ACLU.

Mr. Depp's Petition reveals that he has no basis to seek discovery broader than what the ACLU Non-Parties have already agreed to provide. Rather than litigating the issue at hand—that is, whether the Op-Ed can be reasonably understood to accuse Mr. Depp of physical abuse, and if so whether that accusation is true—Mr. Depp seeks to use foreign subpoenas to harass non-parties, embarrass his litigation adversary in the press, and engage in a fishing expedition for

documents for which he might find other uses for. Tellingly, the Petition barely discusses the Op-Ed or the claims in the Virginia Action at all. Instead, Mr. Depp focuses on Ms. Heard's charitable donations to the ACLU, even though the Op-Ed does not reference donations and Mr. Depp has no claims in the Virginia Action based on Ms. Heard's donations. Even if those issues are relevant, Mr. Depp has already obtained evidence from Ms. Heard about her donations to the ACLU. And to avoid any doubt, the ACLU has now offered to stipulate to the dates and amounts of all payments made to the ACLU by Ms. Heard or on her behalf. Mr. Depp turned down that compromise offer.

Mr. Depp also fails to justify his request for three non-party depositions. The ACLU offered to produce a corporate representative to testify about the Op-Ed, but Mr. Depp insists that the corporate representative be prepared to testify on other, irrelevant topics *and* that he also be permitted to depose two ACLU additional employees, including the ACLU's highest-ranking executive.

Most troublingly, Mr. Depp refused to agree to standard confidentiality protections for a non-party. The ACLU Non-Parties proposed protective order language, modeled on forms used by Justices of this Court, that would allow them to mark as confidential documents that are internal and proprietary and that, if publicly released, would cause harm to the ACLU's competitive interests or business operations. Given Mr. Depp's proclivity to litigate his cases in the press and his past practice of using produced documents for purposes unrelated to his claims against Ms. Heard, the ACLU Non-Parties asked Mr. Depp to agree that their information would be used in the Virginia Action and not for any other purpose. Mr. Depp refused because, as his counsel confirmed, Mr. Depp seeks the information for use in other pending or potential proceedings. Indeed, much of Mr. Depp's Petition discusses his separate defamation suit against

a British newspaper, a now-concluded case that has nothing to do with the ACLU and in which the ACLU was never subpoenaed. While Mr. Depp is entitled to request relevant and non-burdensome discovery, he cannot abuse his subpoena right for a fishing expedition or to prop up his media strategy of attempting to embarrass the ACLU or his ex-wife in the press. The Court should order that any production made by the ACLU Non-Parties be subject to standard confidentiality protections to ensure that the ACLU Non-Parties' documents and testimony are used for their only permissible purpose—as evidence in the Virginia Action—and nowhere else.

BACKGROUND

I. Mr. Depp Files the Virginia Action Concerning Ms. Heard's Op-Ed

In March 2019, Mr. Depp filed the underlying Virginia Action against Ms. Heard in Virginia Circuit Court of Fairfax County. NYSCEF Dkt. 4. The Virginia Action concerns an Op-Ed that Ms. Heard published in the *Washington Post* in December 2018, which discusses the reluctance of survivors of domestic abuse to report their experiences, the #MeToo movement, and legislative efforts related to women's rights. *Id.* Ex. A. Although Mr. Depp is not named in the Op-Ed, he alleges that the piece implicitly suggests that he abused Ms. Heard during their marriage, and that such claims of abuse are false. *Id.* ¶¶ 2-3. His complaint in the Virginia Action pleads defamation claims arising from publication of the Op-Ed in print and online, and from Ms. Heard's Twitter post that included a link to the Op-Ed. *Id.* ¶¶ 74-106. The ACLU is not a party in the Virginia Action, nor are any of its employees.

In the byline of the Op-Ed, Ms. Heard identifies herself as "an actress and ambassador on women's rights at the American Civil Liberties Union." *Id.* Ex. A. The ACLU assisted Ms. Heard in drafting the Op-Ed and arranging for its publication. The Op-Ed does not discuss Mr. Depp, Ms. Heard's marriage to Mr. Depp, their divorce or the subsequent legal proceeding, how

Ms. Heard spent any money she received from the resolution of the divorce proceeding, any donations Ms. Heard made or intended to make to the ACLU or any other organization, or any of Ms. Heard's work as an ACLU Ambassador besides writing the Op-Ed. *Id.*

In the Virginia Action, Ms. Heard invoked Virginia's Anti-SLAPP statute, Va. Code Ann. § 8.01-223.2(A), which provides immunity from defamation claims that relate to "matters of public concern that would be protected under the First Amendment," unless such statements are made with actual knowledge of falsity or reckless disregard for the truth. In addition, Ms. Heard brought counterclaims against Mr. Depp, alleging that he "engaged in an ongoing online smear campaign to damage her reputation and cause her financial harm," including by making defamatory statements about her in an interview with *GQ* magazine. *See Depp v. Heard*, No. CL-2019-2911, 2021 Va. Cir. LEXIS 1, at *2 (Va. Cir. Ct. Fairfax Cnty. Jan. 4, 2021).

In January 2021, Mr. Depp moved to dismiss Ms. Heard's Anti-SLAPP defense. Ms. Heard responded by arguing that the Op-Ed related to matters of public concern because it addressed violence against women, the #MeToo movement, and legislative solutions. Teplin Ex. A.[1] In support of her opposition, Ms. Heard submitted a two-page declaration from Mr. Wizner (the "Wizner Declaration") confirming that the ACLU believes gender-based violence and the other issues discussed in the Op-Ed are of great public importance. NYSCEF Dkt. 20. The Wizner Declaration further explains that the ACLU assisted Ms. Heard in placing the Op-Ed with the *Washington Post*, which, in the ACLU's experience, only publishes opinion pieces on issues of national interest. *Id.* Mr. Depp did not address the Wizner Declaration in his reply brief or at oral argument on the motion, and in March 2021, the Virginia court held that Ms.

[1] Citations to "Teplin Aff." refer to the supporting Affirmation of Stephanie Teplin. Citations to "Teplin Ex." refer to exhibits attached to that affirmation.

Heard's statements in the Op-Ed relate to matters of public concern as a matter of law. Teplin Ex. B. The Virginia Action was originally scheduled for trial in May 2021, but was rescheduled for April 2022 due to COVID-related trial backlogs. Teplin Ex. ¶ D.

Mr. Depp's Petition also describes in great detail a separate litigation he brought in the UK in May 2018 against the publisher of *The Sun* for libel, based on an article that described Mr. Depp as a "wife beater" (the "UK Action"). NYSCEF Dkt. 37 at 3-4. The ACLU Non-Parties were never subpoenaed in the UK Action and were not involved in that proceeding in any way. Teplin Aff. ¶ 10. The UK Action has concluded, with final judgment entered against Mr. Depp. Defendants there mounted a truth defense (*i.e.*, that the assertion that Mr. Depp is a "wife beater" is substantially true) and the trial court, serving as factfinder, agreed in a 129-page decision issued in November 2020. NYSCEF Dkt. 13. The court found that "the great majority of alleged assaults of Ms. Heard by Mr. Depp have been proved to the civil standard," and accordingly "what [*The Sun*] published . . . was substantially true." *Id.* ¶¶ 575, 585.

Two days after the UK trial court issued its decision, Mr. Depp asked the Virginia court to compel Ms. Heard to produce documents related to Ms. Heard's donations to the ACLU for the express purpose of supporting Mr. Depp's imminent appeal of the UK Action.[2] NYSCEF Dkt. 15 at 10:21-11:8. In March 2021, the UK appeals court denied Mr. Depp's request to appeal and his attempt to introduce evidence he had obtained from Ms. Heard in the Virginia Action, explaining that the trial judge "gave thorough reasons for his conclusions which have not been shown even arguably to be vitiated by an error of approach or mistake of law." NYSCEF Dkt. 19 ¶ 50.

[2] The UK trial court had previously denied Mr. Depp's application to compel discovery from Ms. Heard. NYSCEF Dkt. 13 ¶ 576.

II. Mr. Depp Belatedly Subpoenas the ACLU and the ACLU Agrees to Produce Documents Related to the Op-Ed

In February and March 2021, Mr. Depp served the Subpoenas on the ACLU, Mr. Wizner, and Mr. Romero pursuant to CPLR 3119(b)(4).[3] *See* NYSCEF Dkt. 21, 22, 23, 24, 25, 26.

The three document subpoenas—which duplicate each other almost in full—seek the following categories of documents:

- **The Op-Ed**: "All DOCUMENTS or COMMUNICATIONS concerning the approval, conception, preparation, drafting, and/or publication of the OP-ED" (ACLU Request 6; Wizner Request 4); and all communications with Ms. Heard about the Op-Ed (ACLU Request 8; Romero Request 5; Wizner Request 5).

- **Donations to the ACLU**: "All DOCUMENTS that refer, reflect, or relate to any donations made to YOU or for YOUR benefit by MS. HEARD or any PERSON on MS. HEARD'S behalf, from January 1, 2016 through and including the present" (ACLU Request 1; Romero Request 1).

  Also requested are all communications with Ms. Heard about any such donations (ACLU Request 2; Romero Request 2) and all documents and communications that relate to any public statements or publicity related to an such donations (ACLU Request 3; Romero Request 3).

- **The Depp/Heard "Relationship" and Divorce Action**: "All COMMUNICATIONS between YOU and MS. HEARD or any PERSON acting on MS. HEARD's behalf regarding the relationship between MR. DEPP and MS. HEARD" (ACLU Request 4; Romero Request 5; Wizner Request 5); and all communications with Ms. Heard about her divorce proceeding with Mr. Depp (ACLU Request 8; Romero Request 5; Wizner Request 5).

- **Ambassador Work**: "All DOCUMENTS or COMMUNICATIONS, concerning MS. HEARD's work as an 'ambassador' for the ACLU on women's rights" (ACLU Request 5; Romero Request 4; Wizner Request 3).

- **The Wizner Declaration**: "All DOCUMENTS or COMMUNICATIONS concerning the approval, preparation, drafting and/or execution of the DECLARATION" (ACLU Request 7; Wizner Request 1) and all communications with Ms. Heard about the Declaration (ACLU Request 8; Wizner Request 5).

[3] Mr. Depp claims he initially sought the issuance of subpoenas in May 2020. NYSCEF Dkt. 37 at 5. Those subpoenas were never served on the ACLU Non-Parties, and Mr. Depp does not suggest otherwise. The Subpoenas at issue were served on February 15, 2021 (for Mr. Wizner), March 10, 2021 (for the ACLU), and March 19, 2021 (for Mr. Romero). Teplin Aff. ¶ 3.

- **The Virginia Action**: All communications with Ms. Heard about the Virginia Action itself (ACLU Request 8; Romero Request 5; Wizner Request 5).

See NYSCEF Dkt. 22, 23, 25.

The deposition subpoenas seek testimony from Mr. Romero and Mr. Wizner without any limitation and from an ACLU corporate designee on topics corresponding to the document requests above. *See* NYSCEF Dkt. 21, 24, 26.

The ACLU Non-Parties served written responses and objections to the three document subpoenas and the three deposition subpoenas. NYSCEF Dkt. 27, 31, 33. The ACLU and Mr. Wizner agreed to produce all non-privileged documents and communications concerning the approval, conception, preparation, and publication of the Op-Ed that could be located after a reasonable search, subject to a confidentiality agreement that reasonably protected any confidential or sensitive information contained therein. NYSCEF Dkt. 31 at 10, 11, 13; Dkt. 27 at 8-10. The ACLU also agreed to produce documents concerning Ms. Heard's work as an ACLU ambassador that related to the Op-Ed. NYSCEF Dkt. 31 at 10-11. In addition, the ACLU agreed to produce a corporate representative to testify regarding the conception, preparation, drafting, and publication of the Op-Ed, including Ms. Heard's ambassador work related to the Op-Ed, and stated that it was willing to discuss a reasonable method to authenticate any documents produced in response to the Subpoenas. *Id.* at 8-9.

The ACLU Non-Parties otherwise objected to the document requests and the topics for a corporate deposition because they are overbroad, unduly burdensome, and seek irrelevant or duplicative information, among other reasons. Mr. Wizner and Mr. Romero objected to the deposition subpoenas as unduly burdensome, and, in the case of Mr. Romero, because there was no basis to require the deposition of the Executive Director of a major national organization,

particularly in light of the ACLU's willingness to produce a corporate representative to testify on relevant topics. NYSCEF Dkt. 27, 33.

III. Mr. Depp Insists on the Production of Irrelevant Documents and Refuses to Agree to a Reasonable Protective Order

The Parties held several meet-and-confer calls in March and April 2021. Teplin Aff. ¶ 12. During these discussions, the ACLU Non-Parties agreed to produce documents related to the Op-Ed by April 9, provided that the parties could agree on a confidentiality agreement. *Id.* ¶¶ 13-14. Using custodial email searches, the ACLU Non-Parties identified, reviewed, and prepared for production over 500 emails and documents related to the drafting, editing, and placement of the Op-Ed. *Id.* ¶ 15.

Despite the agreement to provide documents related to the Op-Ed, Mr. Depp continued to press for the production of documents related to Ms. Heard's donations. *Id.* ¶ 16. Although the ACLU Non-Parties disputed the relevance of donation information, they asked Mr. Depp's counsel what information was lacking from Ms. Heard's production, and offered to discuss ways to authenticate the documents provided by Ms. Heard, if necessary. *Id.* Mr. Depp's counsel did not articulate any gaps in Ms. Heard's production or explain what additional information he required. *Id.* Mr. Depp's counsel also did not explain why multiple depositions were necessary or appropriate, particularly given the ACLU's offer to produce a corporate representative. *Id.* ¶ 18. After reviewing Mr. Depp's Petition, and in a further effort to compromise, the ACLU Non-Parties also proposed entering into a stipulation confirming the dates and amounts of all payments made to the ACLU by Ms. Heard or anyone acting on her behalf. *Id.* ¶ 28. Mr. Depp refused this offer. *Id.* ¶ 29.

Mr. Depp's counsel did not continue to press for production of documents concerning the Depp/Heard relationship, the divorce proceeding, Ms. Heard's ambassador work, or the Virginia

Action, and did not give any reason why such documents were relevant or appropriate to seek from a non-party. *Id.* ¶ 17.

The parties also discussed entering into a confidentiality agreement, which the ACLU Non-Parties had made clear was a precondition to making any document production. *Id.* ¶ 19. The ACLU Non-Parties reviewed the confidentiality order between Mr. Depp and Ms. Heard in the Virginia Action (NYSCEF Dkt. 29), and explained that while they were generally comfortable with its terms, they requested two adjustments. NYSCEF Dkt. 32. First, because the Virginia Action protective order was negotiated between two individuals, it did not contain standard provisions necessary to protect the confidential information of an organization. *Id*. For example, the Virginia Action protective order allows confidential treatment for diary entries, but not sensitive business information. *See* NYSCEF Dkt. 29 at 2. The ACLU Non-Parties therefore requested that the definition of "Confidential" include trade secrets; sensitive personal information; proprietary or confidential research, development, or commercial information; other business-sensitive information; or other non-public information that the disclosing party believes in good faith would create a risk of harm to its operations if disclosed. NYSCEF Dkt. 32. Alternatively, the ACLU Non-Parties proposed adopting the definition of confidential information from either Justice Schecter or Justice Masley's model confidentiality orders, which has also been endorsed by the New York City Bar Association, and which all define "confidential" nearly verbatim to the ACLU Non-Parties' proposed definition.[4] *See* Teplin Aff. ¶

[4] Justice Schecter's model confidentiality order is attached at Teplin Exhibit G and available at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Confidentiality_Stip_Part_54.pdf. Justice Masley's model confidentiality order is attached at Teplin Exhibit H and available at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/JMasley-CStip.pdf. The New York City Bar Association's model confidentiality order is attached at Teplin Exhibit I and available at https://www.nycbar.org/pdf/report/ModelConfidentiality.pdf.

21. However, Mr. Depp's counsel refused to agree to a definition of "confidential" that included information that would "in the good faith judgment of the [designating party], be detrimental to the conduct of that party's business"—even after the ACLU Non-Parties pointed out that this language is widely adopted in this Court. *Id.*; NYSCEF Dkt. 32.

Second, the ACLU Non-Parties asked Mr. Depp to agree that their documents and testimony would not be "shared, or disclosed for any purposes other than preparing for or conducting [the Virginia Action]." NYSCEF Dkt. 32. In other words, the ACLU Non-Parties agreed that documents they produced could be used in depositions, motion practice, trial, and appeals in the Virginia Action, including—for the documents not marked as "Confidential"—in public proceedings and filings. However, they sought assurances that documents would not be used for other purposes, including that they not be distributed to the press for purposes of harassing the ACLU and its employees, and not be used in other litigations in which the ACLU had not been subpoenaed. This request was especially important to the ACLU because of the publicity associated with the Virginia Action and the fact that an ACLU employee and former employee had received distracting and harassing emails and press inquiries related to Mr. Depp and Ms. Heard's dispute. *See* Teplin Aff. ¶ 8. Mr. Depp's counsel refused to agree to limit use of the produced documents and testimony to the Virginia Action, explaining that they intended to use the ACLU Non-Parties' documents and testimony in unspecified current or future proceedings other than the Virginia Action. *Id.* ¶ 25.

As a consequence, the parties were unable to agree on a confidentiality agreement. *Id.* ¶ 27. Mr. Depp's counsel declined to agree to even a temporary confidentiality order that would have allowed him to see the ACLU Non-Parties' production and evaluate its completeness and

the confidentiality designations that the ACLU Non-Parties intended to apply. *Id.* Instead, Mr. Depp proceeded to file this Petition.

ARGUMENT

I. Applicable Law

"The determination of whether discovery sought is appropriate rests within the sound discretion of the trial court." *Etkin v. Sherwood 21 Assoc., LLC*, No. 652122/2017, 2021 N.Y. Misc. LEXIS 495, at *8-9 (Sup. Ct. N.Y. Cnty. Feb. 4, 2021) ("*Etkin*"). "[T]he general presumption is that non-parties are not required to disclose, and the burden is on the movant to demonstrate that they should." *Moynihan v. City of N.Y.*, No. 108817/10, 2012 N.Y. Misc. LEXIS 5892, at *3 (Sup. Ct. N.Y. Cnty. Jan. 2, 2013) (Engoron, J.); *see also Etkin*, at *8 ("[A] subpoenaing party has the initial burden of demonstrating a need for the disclosure.") (citing *Kapon v. Koch*, 23 N.Y.3d 32, 32 (2014)).

Discovery may not be compelled unless the requested information is "material and necessary." *Kapon*, 23 N.Y.3d at 36. Moreover, "[a] subpoena that demands 'any' and 'all' documents [is] overbroad," *Etkin*, at *8, and "[i]t is hornbook law that neither parties nor a court must cull through a request for information that seeks a host of non-discoverable materials to find some that are." *Moynihan*, 2012 N.Y. Misc. LEXIS 5892, at *8. It is also "well settled that a subpoena must not be used as a tool of harassment or for a proverbial 'fishing expedition.'" *Etkin*, at *9 (quoting *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 342 (1st Dep't 1997)). Courts do not enforce subpoenas that seek information from a non-party that is "cumulative, duplicative or repetitive" of information already in the subpoenaing party's possession. *Broman v. Long Island Floor Store*, No. 09975/2015, 2016 NYLJ LEXIS 3613, at *14 (Sup. Ct. Suffolk Cnty. Oct. 18, 2016).

II. Mr. Depp Seeks Irrelevant, Overbroad, Duplicative, and Unduly Burdensome Document Discovery

As described above, the ACLU Non-Parties conducted a reasonable search and are prepared to produce over 500 documents which relate to the approval, conception, preparation, and publication of the Op-Ed (subject to an acceptable confidentiality agreement, *see infra* Section IV). Teplin Aff. ¶ 15. Because the Virginia Action concerns only the Op-Ed and the truth of Ms. Heard's statements in it, Mr. Depp is entitled to nothing more from the ACLU or its employees. The Court should deny the Petition as to all the other categories of documents that Mr. Depp seeks.

A. Discovery on Ms. Heard's Donations is Irrelevant, Duplicative, and Unduly Burdensome

Mr. Depp's submission attempts to hide the undisputed fact that his defamation claims in the Virginia Action are not premised on whether Ms. Heard donated money to the ACLU, the amount of her donations, or whether she has described her donations accurately in past public statements. Mr. Depp posits what is, at best, a strained theory of relevance: the Op-Ed is implicitly about Ms. Heard's marriage with Mr. Depp (even though the Op-Ed does not mention Mr. Depp or the marriage), their marriage ended in a divorce proceeding (which is also not mentioned in the Op-Ed), Ms. Heard has stated that she donated part of the money she received from the divorce to the ACLU (but, again, not in the Op-Ed), and so if Ms. Heard's statements about her ACLU donations are untrue, then her statements in the Op-Ed are perhaps less likely to be true too. Alternatively, Mr. Depp speculates that Ms. Heard had a motive to lie about abuse to increase her award in the divorce proceeding, that this same motive carried through to the Op-Ed (which was drafted after the divorce was finalized), and that her donations to the ACLU bear on this motive. Mr. Depp is, of course, free to question Ms. Heard about her motivations, but he cannot convert his speculation into a basis to seek discovery from a non-party. His tortured

reasoning makes plain that discovery related to Ms. Heard's donations to the ACLU "is not material and necessary to the [Virginia Action], and would result in unnecessary attention to a collateral matter." *Siegel v. Siegel*, No. 114101/10, 2012 N.Y. Misc. LEXIS 4451, at *11 (Sup. Ct. N.Y. Cnty. Sept. 13, 2012) (quashing a non-party subpoena on this basis) (citing *Greasy Spoon v. Jefferson Towers*, 181 A.D.2d 639, 640 (1st Dep't 1992)). And Mr. Depp's other requests for communications, publicity, or public statements about Ms. Heard's donations are even farther attenuated from any issue in the Virginia Action.

Relevance aside, it is clear that Mr. Depp already has the information from Ms. Heard about what she donated and when. NYSCEF Dkt. 37 at 8. As Mr. Depp describes—and attaches documents which confirm—Ms. Heard made a pledge in or around August 2016 to give $3.5 million to the ACLU.[5] *Id.* (citing NYSCEF Dkt. 17 at -358-59). Thereafter, the ACLU received payments totaling $1.3 million from Ms. Heard or others acting on her behalf or for her benefit. *Id.* Thus, Mr. Depp has all the information he needs to support his arguments based on Ms. Heard's payments to the ACLU. *Id.* at 8, 15. The request for the ACLU Non-Parties to produce the same documents and information is duplicative, serves no purpose, and would impose unnecessary burdens on the ACLU Non-Parties. The ACLU Non-Parties even offered to *stipulate* to the amounts and dates of all payments made to the ACLU by Ms. Heard or anyone acting on her behalf—an offer that Mr. Depp inexplicably rejected. Teplin Aff. ¶¶ 28-29. Nor

[5] For the first time in his brief to this Court, Mr. Depp wildly speculates that Ms. Heard's pledge to the ACLU was not made in 2016, as indicated on the pledge form, but at a later date based on an ACLU "Centennial Campaign" logo on the pledge form produced by Ms. Heard. NYSCEF Dkt. 37 at 8 (citing NYSCEF Dkt. 17 at -359). Had Mr. Depp raised this question during any of the parties' many phone conferences or email exchanges, the ACLU would have explained that its Centennial Campaign (and use of the "Centennial Campaign" logo) began in 2014, and so the logo's appearance on Ms. Heard's pledge form is entirely consistent with Ms. Heard having pledged in 2016. Teplin Aff. ¶ 31. Mr. Depp's conspiracy theories cannot justify wide-ranging discovery into a non-party that would have been resolved with a simple phone call to counsel or by taking up the ACLU's offer to provide a business records affidavit to authenticate any donation documents about which Mr. Depp had questions.

has Mr. Depp explained why he needs "all" documents and "all" communications pertaining to Ms. Heard's donations, as opposed to documents (or a stipulation) sufficient to show her donations, and such requests for "all" documents are plainly overbroad. *See Etkin*, at *8.

Further, a request for private donor information burdens and impinges upon the First Amendment speech, association, and privacy rights of the ACLU and its donors. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Citizens Union of N.Y. v. Attorney General of N.Y.*, 408 F. Supp. 3d 478, 494 (S.D.N.Y. 2019) ("There is no question that public disclosure of donor identities burdens the First Amendment rights to free speech and free association."). To be sure, Ms. Heard has acknowledged publicly that she donated to the ACLU, but Mr. Depp's Subpoenas seek far more information than mere confirmation of Ms. Heard's donations, thereby imposing substantial burdens and intrusions on the ACLU Non-Parties that implicate First Amendment protections. Mr. Depp has not provided any justification for imposing these burdens.

Finally, the prior rulings cited by Mr. Depp do not justify his requests for duplicative discovery. Mr. Depp relies on a decision from the Virginia court directing Ms. Heard to produce documents related to her donations to the ACLU, with which the ACLU Non-Parties understand she has complied. NYSCEF Dkt. 37 at 6-7. That decision has no bearing on the present Petition because the Virginia court did not rule on the ultimate relevance of Ms. Heard's donation documents, did not consider broad requests like those Mr. Depp asserts here, and did not consider the requests in relation to a non-party that must be protected from the burden of overbroad discovery. *See* NYSCEF Dkt. 16. Also distinguishable is a decision from a California

court enforcing Mr. Depp's subpoena request for documents related to Ms. Heard's donations to the Children's Hospital of Los Angeles: the Children's Hospital did not oppose the requests in the subpoena issued to it, nor is it clear whether Ms. Heard had herself provided donation discovery when the decision was issued. *See* NYSCEF Dkt. 11, 12. In any event, decisions from Virginia and California courts in which the ACLU Non-Parties did not and could not have participated do not bear on the Petition before this Court.

B. The Remaining Document Requests are Irrelevant and Overbroad

The Depp/Heard "Relationship" and Divorce Action: Mr. Depp's requests for all documents related to his "relationship" with Ms. Heard and their divorce proceeding are vague, overbroad, and not reasonably tailored to the issues of the case, which is limited to the truth of the statements in the Op-Ed. To the extent the relationship or divorce were discussed during the conception or preparation of the Op-Ed, the ACLU Non-Parties have already agreed to produce such documents. Requiring the ACLU Non-Parties to conduct broader searches—untethered to the conception or preparation of the Op-Ed—would be an impermissible fishing expedition and impose significant, unnecessary burdens on the ACLU Non-Parties.

Ms. Heard's Ambassador Work: The ACLU Non-Parties agreed to produce documents and communications related to Ms. Heard's role as an ACLU ambassador in preparing the Op-Ed. Information concerning any ambassador work performed by Ms. Heard besides the Op-Ed is irrelevant to the Virginia Action, and Mr. Depp does not argue otherwise.

The Wizner Declaration: Ms. Heard submitted the Wizner Declaration in the Virginia Action for the narrow purpose of explaining that the Op-Ed addressed matters of public concern, in opposition to Mr. Depp's motion to deny Ms. Heard's defense of Anti-SLAPP immunity. *See* NYSCEF Dkt. 20. Mr. Depp did not argue to the Virginia court that discovery regarding the

Wizner Declaration was relevant or necessary to the resolution of the motion, and that motion has now been decided in Ms. Heard's favor as a matter of law, with no reference to the Wizner Declaration or any other evidentiary material. Teplin Ex. B. As such, discovery now into the Wizner Declaration—much of which would be protected work product in any event—is irrelevant and can serve no purpose in the Virginia Action. Mr. Depp seeks to justify this request by pointing to Mr. Wizner's statement that the ACLU was "involve[d] in preparing and placing the Op-Ed," NYSCEF Dkt. 37 at 18, but the ACLU has already agreed to produce documents that relate to the preparation and publication of the Op-Ed. Any other documents pertaining to the Wizner Declaration are irrelevant.

The Virginia Action: The Virginia Action was of course commenced after Ms. Heard published the Op-Ed. Since the only issue in the Virginia Action is whether Ms. Heard made false statements *when she wrote the Op-Ed*, discovery on events that necessarily occurred later is irrelevant and an improper fishing expedition.

* * *

For these reasons, the Court should deny the Petition to the extent it seeks to compel the ACLU Non-Parties to produce documents on topics beside the approval, conception, preparation, and publication of the Op-Ed. The Court should likewise deny the Petition to the extent it seeks to compel deposition testimony on those same topics.

III. Mr. Depp Does Not Justify His Request for Multiple Non-Party Depositions, Including of the ACLU's Executive Director

Mr. Depp provides no basis at all for the Court to order the depositions of three non-party ACLU witnesses, *i.e.*, an ACLU corporate representative, Mr. Wizner, and Mr. Romero. During the parties' negotiations, the ACLU agreed to produce a corporate witness for a deposition on topics related to the Op-Ed (Teplin Aff. ¶ 14), and there is no reason that witness would not be

competent to testify on any topics that the Court determines are relevant and appropriate. Requiring Mr. Wizner and Mr. Romero to also appear for depositions would be duplicative and impose significant, unnecessary burdens of time and expense. *See Sahu v. Union Carbide Corp.*, 262 F.R.D. 308, 317 (S.D.N.Y. 2009) ("[L]imited document discovery . . . is a more convenient, less costly, and less burdensome alternative to [] depositions.").

The absence of justification is particularly egregious as to Mr. Romero, the ACLU's Executive Director. *See* Teplin Ex. L. 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. *Id.*; Teplin Ex. M. The organization has 1.7 million members, over 500 staff members, thousands of volunteers, and offices throughout the country. *Id.* Under New York law, "senior corporate executives with no discernible personal involvement in a dispute . . . should not be deposed absent a showing that he or she 'uniquely possesses relevant information that renders his or her deposition necessary.'" *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 *Rosenhaus Real Estate, LLC v. S.A.C. Capital Mgt., Inc.*, 100 A.D.3d 512, 512-13 (1st Dep't 2012)). This rule "prevent[s] unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" to the senior executive, and applies with particular force here because neither Mr. Romero nor the ACLU is a party to the Virginia Action and he was not involved with preparing the Op-Ed. *Id.* (quoting CPLR 3101(a)). Courts routinely quash deposition subpoenas where the party seeking the senior executive's deposition has not shown that the deposition is necessary because the executive does not possess "unique knowledge" or because 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).

Mr. Depp has not shown that Mr. Romero "uniquely possess[es] relevant information that renders his deposition necessary," or that such information cannot be obtained from an ACLU corporate witness. *See J.T. Magen*, 2020 N.Y. Misc. LEXIS 2066, at *3. Mr. Depp relies on an email chain in which Mr. Romero and Ms. Heard discuss Ms. Heard's donations to the ACLU. NYSCEF Dkt. 37 at 17. But even if Ms. Heard's donations were relevant (as described above, there are not), Mr. Depp does not explain why testimony regarding donations to the ACLU cannot be obtained from an ACLU corporate representative, thus avoiding the substantial burden on Mr. Romero. *See Daou*, 2013 N.Y. Misc. LEXIS 705, at *17-18 (quashing deposition of senior executive absent showing that he "had any information other than that of his company" as to the transaction at issue, and rejecting argument that the executive had "unique knowledge with respect to [his] private conversations"). Accordingly, the Court should deny the Petition to the extent it seeks to compel depositions of Mr. Romero or Mr. Wizner, or of an ACLU corporate representative on topics other than the Op-Ed.

IV. The Petition Should Be Denied Based on Mr. Depp's Refusal to Agree to Standard Confidentiality and Use Terms

The Court should also deny the Petition due to Mr. Depp's refusal to agree to a reasonable confidentiality agreement. "The court may at any time on its own initiative, or on motion of any party . . ., make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." CPLR 3103(a). The purpose of a confidentiality order is "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *Id.* While a subpoenaing party "is entitled to relevant and necessary information, material confidential in nature, or information which is subject to abuse if widely

disseminated, shall be accorded judicial safeguards where possible." *McLaughlin v. G.D. Searle, Inc.*, 38 A.D.2d 810, 811 (1st Dep't 1972).

As described above, Mr. Depp refused to agree to a form confidentiality stipulation endorsed by the New York City Bar Association and adopted by Justice Schecter and Justice Masley. *Supra* at 9. Justices in this Court routinely adopt confidentiality orders with the precise definition of "confidential" that Mr. Depp opposes. *See Maxim, Inc. v. Feifer*, 161 A.D.3d 551, 554 (1st Dep't 2018); *Bullen v. Sterling Valuation Grp.*, No. 650050/2019, 2019 N.Y. Misc. LEXIS 11494, at *2 (Sup. Ct. N.Y. Cnty. July 9, 2019); *Angiolillo v. Christie's, Inc.*, 64 Misc. 3d 500, 522 (Sup. Ct. N.Y. Cnty. Apr. 26, 2019); *Rasolli Footwear Corp. v. COD Capital Corp.*, No. 655554/2017, 2019 N.Y. Misc. LEXIS 2145, at *2-3 (Sup. Ct. N.Y. Cnty. Apr. 18, 2019); *Syncora Guarantee Inc. v. Alinda Captial Partners LLC*, No. 651258/2012, 2016 N.Y. Misc. LEXIS 938, at *1-2 (Sup. Ct. N.Y. Cnty. Mar. 22, 2016). The protective order entered in the Virginia Action (without the ACLU Non-Parties' involvement or consent) does not include common terms intended to protect organizations like the ACLU, likely because both parties to that action are natural persons who do not require similar protections.

Contrary to Mr. Depp's claim, the ACLU Non-Parties do not seek "special confidential treatment," NYSCEF Dkt. 37 at 19, but rather a standard protection widely recognized to apply to all litigants in this Court. Nor do they intend to designate "any unflattering information as 'confidential.'" *Id.* Information that is merely "unflattering" is not considered confidential under the ACLU Non-Parties' proposed confidentiality language, and the ACLU Non-Parties never indicated an intent to designate material as confidential simply because it is unflattering. On the other hand, the ACLU Non-Parties *do* intend to designate as confidential documents that reflect internal ACLU processes or discussions which would not generally be shared outside the

organization, and thus would reasonably harm the ACLU's business operations if revealed publicly. Mr. Depp is also wrong in suggesting that the ACLU Non-Parties wish to "unilaterally designate any document [they choose] as confidential." *Id.* (quoting *Mann v. Copper Tire Co.*, 33 A.D.3d 24, 36 (1st Dep't 2006)). To the extent Mr. Depp disagrees with the ACLU's confidentiality designation, the proposed confidentiality order sets forth procedures for Mr. Depp to challenge those designations. In any case, Mr. Depp's speculation about future mis-designations is not a valid reason to refuse to agree to a standard confidentiality order at the outset.

Moreover, the ACLU Non-Parties should not be compelled to provide discovery absent an agreement from Mr. Depp that the ACLU Non-Parties' documents and testimony will not be used, shared, or disclosed for any purposes other than preparing for or conducting the Virginia Action. "[D]iscovery is provided for the sole purpose of assisting in the preparation and trial . . . of litigated disputes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-36 (1984). Thus, courts should not enforce a subpoena or compel discovery "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit" or "when a party's aim is to . . . embarrass or harass the person from whom he seeks discovery." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 352 n.17 (1978).

Mr. Depp has candidly admitted that the purpose of his discovery requests in the Virginia Action directed at both Ms. Heard and the ACLU Non-Parties "is to gather information for use in proceedings other than the pending suit." *See id.*; Teplin Aff. ¶ 25. That is highly improper. In addition, Mr. Depp's counsel has a history of abusing discovery devices. The Virginia court revoked the *pro hac vice* admission of Mr. Depp's counsel after counsel was caught publicly disseminating Ms. Heard's confidential documents on Twitter. Teplin Ex. C at 30. Mr. Depp's

admission that he intends to use discovery from the ACLU Non-Parties for improper purposes (and his history of doing so) is reason enough to deny the Petition.[6] *See Breest v. Haggis*, No. 161137/2017, 2020 N.Y. Misc. LEXIS 2127, at *10 (Sup. Ct. N.Y. Cnty. May 18, 2020) (denying motion to unseal because "defendant openly admits that he seeks to unseal these messages so that he can leak the messages to the media"). At a minimum, the Court should order that any documents or testimony produced by the ACLU Non-Parties may only be used, shared, or disclosed by Mr. Depp, his agents, and his counsel to prosecute the Virginia Action and for no other purposes.

Mr. Depp also raises several bizarre concerns about what it means to limit use of discovery material to the Virginia Action. NYSCEF Dkt. 37 at 20 n.7. Tellingly, Mr. Depp's counsel never raised these concerns in the parties' numerous discussions. Teplin Aff. ¶ 26. Regardless, there is nothing "unclear" about the proposed confidentiality terms: Mr. Depp may publicly file or use at trial the ACLU Non-Parties' non-confidential information in the Virginia Action if necessary to prosecute that Action, but he may not take that information and use it in a different proceeding or supply it to the press for the purposes of harassing the ACLU and its employees.

[6] Mr. Depp cites *Kapon v. Koch*, 2012 N.Y. LEXIS 4957 (Sup. Ct. N.Y. Cnty. Oct. 15, 2012), to suggest that issues related to confidentiality and use restrictions should be raised before the Virginia court rather than this Court. NYSCEF Dkt. 37 at 21. However, that decision was upheld on appeal because the subpoenaed party "failed to articulate a sufficient, nonspeculative basis" for the use restriction it sought—and not because the issue was raised in the incorrect court. *Kapon v. Koch*, 105 A.D.3d 650, 651 (1st Dep't 2013). In contrast, the ACLU Non-Parties have made a clear, concrete showing that confidentiality and use restrictions are necessary to prevent well-documented discovery abuses by Mr. Depp and his counsel. Mr. Depp has asked this Court to enforce his subpoenas and compel discovery from three non-parties to the Virginia Action; the Court should not do so, at a minimum, without adequate "judicial safeguards." *McLaughlin*, 38 A.D.2d at 811.

CONCLUSION

For the foregoing reasons, the Court should deny Mr. Depp's Petition and decline to compel compliance with the Subpoenas. The Court should also deny Mr. Depp's requests for costs and attorneys' fees because the Petition is meritless and Mr. Depp has not provided any reasons why he is entitled to his costs and fees.

Dated: New York, New York
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/s/ Stephanie Teplin

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition memorandum is 6,967 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 opposition memorandum.

/s/ Stephanie Teplin
Stephanie Teplin