VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff,

v.

AMBER LAURA HEARD,

Defendant.

Civil Action No.: CL-2019-0002911

PLAINTIFF JOHN C. DEPP, II'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

Plaintiff John C. Depp, II hereby moves to strike Defendant Heard's counterclaims because Ms. Heard has not proved by clear and convincing evidence that Mr. Waldman made the three allegedly defamatory statements with actual malice. Moreover, the Court should strike Defendant's claim for immunity and attorneys' fees based on Virginia's Anti-SLAPP statute as she is not entitled to immunity under the statute.

RELEVANT LAW

"In considering a motion to strike, the trial court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the plaintiff." *Izadpanah v. Boeing Joint Venture*, 243 Va. 81, 81 (1992). The Court may grant a motion to strike if there is not sufficient evidence to create an issue of fact on the claims. *See Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 496 (2014).

The elements of defamation are as follows: (1) publication of (2) an actionable statement with (3) the requisite intent. *See Tharpe v. Saunders*, 285 Va. 476 (2013). The requisite intent for defamation against a public figure is "actual malice" – that is the statement must be made "with

the knowledge that it was false or with reckless disregard of whether it was false or not." *See Sanders v. Harris*, 213 Va. 369, 372 (1972); *see also Jackson v. Hartig*, 274 Va. 219 (2007) ("In order to establish actual malice, a plaintiff 'must demonstrate by clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.'"). Reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing . . . there must be sufficient evidence to permit the conclusion that the defendant ***in fact*** entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added).

ARGUMENT

The evidence shows that Ms. Heard cannot prevail on her claim because she cannot establish that Mr. Waldman made the statements with actual malice. Mr. Waldman conducted extensive investigation and reasonably believed that the statements he made were true.

1. **Ms. Heard has no evidence of direct liability and cannot prove actual malice by Mr. Waldman when making the three statements at issue.**

Mr. Depp did not make the three statements at issue in Ms. Heard's counterclaim. Moreover, in order for Mr. Depp to be liable for the conduct of his attorney, there must be some showing that he directed, participated, or otherwise authorized Mr. Waldman to make the statements at issue. There is no such evidence in the record that Mr. Depp directed or otherwise authorized Mr. Waldman to make the three allegedly defamatory statements at issue in Ms. Heard's Counterclaim. Indeed, there is no evidence of ***any*** communication or coordination between Mr. Depp and Mr. Waldman, regarding the Counterclaim statements or anything else.[1]

[1] For this reason as well, Ms. Heard cannot meet her burden of proving that Mr. Waldman was acting within the scope of his employment/agency.

In the absence of direct liability, Ms. Heard must rely on a theory of vicarious liability to hold Mr. Depp liable for the actions of his purported agent, Mr. Waldman. Vicarious liability is by definition "liability for the tort of another person," so to hold Mr. Depp liable for Mr. Waldman's statements, Ms. Heard must establish that Mr. Waldman himself committed all the elements of defamation. *See, e.g.*, *Parker v. Carilion Clinic*, 296 Va. 319, 332 (2018) ("[v]icarious liability is liability for the tort of another person...It necessarily follows that a claimant cannot make out a vicarious liability claim against an employer without first proving 'that the employee committed a tort' within the scope of his employment"); Dobbs, et al., *Dobbs' Law of Torts* § 425 (2d ed.); *Roughton Pontiac Corp. v. Alston*, 236 Va. 152, 156 (1988); *see also Wildasin v. Mathes*, No. 3:14-CV-2036, 2016 WL 1436458, at *1 (M.D. Tenn. Apr. 12, 2016) (applying Tennessee law and holding "if a plaintiff cannot show that an agent has committed a tort, the plaintiff cannot show that the principal is vicariously liable for the agent's tortious conduct"); *Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1333 (N.D. Ga. 2009) (applying Georgia law and holding "Where the liability of a party is premised solely upon his vicarious liability for the tortious actions of an agent and judgment is entered for the agent, the party alleged to be vicariously liable is also entitled to judgment"); *Flaherty v. Royal Caribbean Cruises, Ltd.*, 172 F. Supp. 3d 1348, 1353 (S.D. Fla. 2016) (applying Florida law and recognizing "A principal cannot be held vicariously liable if a claim for negligence cannot be stated against its purported agent"); *Mobil Oil Corp. v. Bransford*, 648 So.2d 119, 121 (Fla.1995)) ("[D]ismissal of any claim against an apparent agent also requires dismissal ... against the apparent principal.... [A]pparent agency is a theory of vicarious liability imputing the acts of the agent to the principal[.] [I]f the agent cannot be held liable, neither can the principal, because there is nothing to impute); *Brightspot Sols., LLC v. A+ Prod., Inc.*, No. 20-CV-03335-MEH, 2021 WL 2935942, at *9 (D. Colo. July 13, 2021) ("vicarious

liability is meant to hold a principal liable for the *tortious* actions of its agent. RESTATEMENT (THIRD) OF AGENCY § 7.03(2) (no vicarious liability of principal without agent's 'tortious' conduct); 74 Am.Jur.2d Torts § 60 (2012) ('[V]icarious liability assigns legal liability to a party who is blameless in fact based on the tortious acts of another.'); 3 Am.Jur.2d Agency § 315 (2013) ('A plaintiff may sue a principal based on its vicarious liability for the tortious conduct of its agents ...'). Because no tort claim survives the Motion, there is no basis to assert vicarious liability.").

All that is to say, it is Ms. Heard's burden to prove by clear and convincing evidence actual malice by ***Mr. Waldman, not Mr. Depp***. And while it is well-settled law in Virginia that an agent's knowledge can be imputed to a principal (*see, e.g., Allen Realty Corp. v. Holbert*, 227 Va. 441, 446 (1984)) ("As a general rule, the knowledge of an agent is imputed to his principal")), Mr. Depp has been unable to locate any case law stating that a principal's knowledge is imputed to an agent.[2] In other words, ***Mr. Waldman*** must have made the statements knowing that they are false or with reckless disregard of whether they were false, and Mr. Depp's knowledge cannot be imputed to him.

There is no evidence in the record that Mr. Waldman knew the Counterclaim Statements were false. Indeed, Mr. Waldman did not even know Mr. Depp or Ms. Heard at the time of any of the alleged incidents and thus had no personal knowledge of what transpired. *See* Trial Transcript Day 20 at 5963:3-5 ("When did you first meet Mr. Depp, as opposed to first start representing

[2] The rationale underlying imputation of knowledge from an agent to a principal is that in theory, the agent is acting on the principal's behalf and owes a duty to convey relevant knowledge to the principal within the scope of the agency. *See, e.g., People's Nat. Bank of Rocky Mount v. Morris*, 152 Va. 814 (1929) ("The general rule that a principal is bound by the knowledge of his agent is based upon the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty."). It does not follow that a principal owes any duty to convey knowledge to an agent.

him? A I first met him in October of 2016."); Tr. 5969:4 – 5970:7 ("Q And you met Mr. Depp after he and Amber Heard had reached a settlement in their divorce; is that correct? A That's my understanding. Q So you have no personal knowledge of anything that went down during their marriage; is that fair to say? A Well, it depends what you mean by 'personal knowledge.' I wasn't there, if that's what you mean, correct. Q You never witnessed any interaction between Mr. Depp and Amber Heard prior to October 2016; is that correct? A That's correct. Q And you have no personal knowledge of any conduct by either of them against the other prior to October 2016; is that correct? A Again, if you're asking me do I have any knowledge of their conduct, I think I have knowledge of their conduct. Maybe you're asking me did I witness conduct. Q I'm asking you your personal knowledge, which would mean you would have had to have witnessed it. A If you're asking whether I've witnessed it, the answer is no."). So the evidence shows that Mr. Waldman did not "know" the three alleged defamatory statements were false.

Nor is there is any evidence in the record that Mr. Waldman subjectively entertained serious doubts about the falsity of the Counterclaim Statements. Quite the opposite – the evidence shows that Mr. Waldman had very reasonable grounds to believe (and did believe) that Ms. Heard's claims of abuse were false. Mr. Waldman testified at length about 29 witnesses he believed disproved Ms. Heard's claims of abuse. *See, e.g.*, Tr. At 6008:5 – 6012:3 (Mr. Waldman's testimony that two trained police officers were called to the penthouse and saw nothing, as well as "Ms. Heard's own witnesses, who have testified in various forms, at various times, that there were no injuries to her face whatsoever between the 21st and the 27th, when suddenly there are bruises," including Laura Divenere, Melanie Inglessis, Hilda Vargas, Samantha McMillen, Isaac Baruch, Trinity Esparza, Cornelius Harrell, Alejandro Romero, Brandon Patterson); *see also* Counterclaim at ¶ 34 (describing GQ interview which included Mr. Depp's public statements that he never

abused Ms. Heard and that there was "no truth to [Ms. Heard's judicial statements of abuse] whatsoever...").

No reasonable jury could possibly find that Mr. Waldman acted with actual malice in making the allegedly defamatory statements. He was not present for any of the alleged incidents, he has no personal knowledge of any alleged incidents, he did extensive investigation in connection with this case and spoke to 29 witnesses who he testified debunked Ms. Heard's claims of abuse, and he testified that he did not believe Ms. Heard's claims of abuse. For these reasons, Ms. Heard cannot possibly show Mr. Waldman acted with actual malice and her defamation claim must fail.

2. Mr. Waldman is an independent contractor, not an employee.

A person who hires an independent contractor is not liable for the independent contractor's actions. *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 344 (2005). An independent contractor is a person who is engaged to produce a specific result but who is not subject to the control of the employer/principal as to the way he brings about that result. *See, e.g.*, *Atkinson v. Sachno*, 261 Va. 278, 284 (2001) (defining independent contractor as "[a] person who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work according to his own ideas, or in accordance with plans furnished by the person for whom the work is done, to whom the owner looks only for results."). An outside lawyer retained by a client in connection with litigation is an independent contractor. *See King v. Dalton*, 895 F.Supp. 831, (E.D. Va. 1995) ("a law firm attorney working with a client is nonetheless an independent contractor and not an employee of the client corporation"). Indeed, clients hire lawyers to obtain specific results, but clients do not control the means by which such results are accomplished. As the Court knows, lawyers are subject to professional obligations to

exercise independent professional judgment. *See, e.g.*, Va. State Bar Professional Guidelines, Rules 1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued"); and 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice").

As a lawyer hired for the purpose of representing Mr. Depp in litigation (*see, e.g.*, Tr. 5975:2-5 ("You represented Mr. Depp through the U.K. litigation, correct? ... A "I did.")), Mr. Waldman is an independent contractor and Mr. Depp cannot be held responsible for Mr. Waldman's tort. *See, e.g.*, *Lynn v. Superior Ct.*, 180 Cal. App. 3d 346, 349 (Ct. App. 1986) ("In our view independent counsel retained to conduct litigation in the courts act in the capacity of independent contractors, responsible for the results of their conduct and not subject to the control and direction of their employer over the details and manner of their performance ... Absent compelling reasons of public policy...an employer is not liable for the negligence of an independent contractor.") (internal citations omitted); *see also id.* ("An attorney may act as an employee for his employer in carrying out nonlegal functions; he may be the agent of his employer for business transactions, or for imputed knowledge; but in his role as trial counsel, he is an independent contractor.") (internal citations omitted).

Moreover, there is no evidence that Mr. Waldman is an employee of Mr. Depp. *See, e.g.* Tr. 6020:9-12 ("And it's none of our business who your clients are, but does the Endeavor Law Firm have other clients, other than Mr. Depp? A Yes."); Tr. 6020:13-14 ("Does Johnny Depp issue you a Form W-2? A I don't think so, no."); Tr. 6020:21-6021:1 ("Have you ever listed Johnny Depp as your employer on any filings with the IRS? A No.").

Because Mr. Waldman is an independent contractor, not an employee, of Mr. Depp, Mr. Depp cannot be held liable for the alleged defamation committed by Mr. Waldman.

3. Mr. Waldman's statements were protected opinion.

Taken in their proper context, the Counterclaim Statements are non-actionable expressions of opinion, entitled to protection under the First Amendment. *See, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Indeed, "a statement cannot be defamatory if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts." *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2000). "Pure expressions of opinion . . . cannot form the basis of an action for defamation." *Chaves v. Johnson*, 230 Va. 112, 119 (1985); *see also, Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 132 (2003); *Schaecher v. Bouffault*, 290 Va. 83 (2015) (noting that where "all sides of the issue, as well as the rationale for [the speaker's] view, were exposed, the assertion of deceit reasonably could be understood only as [the speaker's] personal conclusion," and finding an accusation of deceit to be opinion) (quotation omitted).

In context, any reporter or reasonable reader would understand and expect a lawyer associated with Mr. Depp to challenge Ms. Heard's version of the inherently murky events of the parties' marriage, just as Ms. Heard's lawyers challenged Mr. Depp. That context necessarily negates any suggestion that the statements are properly understood as objective statements of fact that could be deemed defamatory. *See, Chaves, supra,* 230 Va. at 119 ("[t]he most unsophisticated recipient of such a claim, made by one competitor against another, could only regard it as a relative statement of opinion, grounded upon the speaker's obvious bias"); *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995) (if a statement is made in a "forum in which a reader would be likely to recognize that the critiques . . . represent the highly subjective opinions of the author," and

relates to "inherently ambiguous" subject matter about which reasonable minds could draw different conclusions, then "the general context in which the statements were made negates the impression that they imply a false assertion of fact"). Ultimately, Mr. Waldman's statements reflect the existence of two competing narratives, and are merely his "subjective view, an interpretation, a theory, conjecture, or surmise" about events he never claims to have witnessed.

4. Ms. Heard is not entitled to Anti-SLAPP immunity.

Virginia Code Section 8.01-223.2 provides in part :

> A person shall be immune from civil liability for a violation of § 18.2-499, a claim of tortious interference with an existing contract or a business or contractual expectancy, or a claim of defamation based **solely** on statements (i) regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party or (ii) made at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body. **The immunity provided by this section shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false**. (emphasis added).

In other words, Ms. Heard is not entitled to Anti-SLAPP immunity if she made her defamatory statements with actual malice. The evidence is clear that Ms. Heard did in fact make her defamatory statements with actual malice. Mr. Depp testified that he never abused Ms. Heard. *See* Tr. 1601:17-1602:6 ("About six years ago, Ms. Heard made some quite heinous and disturbing, brought these certain criminal acts against me that -- that were not based in any species of truth. It was a complete shock that it would -- it just didn't need to go in that direction, as ***nothing of the kind had ever happened.*** Though, the relationship, there were arguments and things of that nature, but ***never did I, myself, reach the point of striking Ms. Heard in any way,*** nor have I ever struck any woman in my life.") (emphasis added).

In addition to Mr. Depp's testimony, many other witnesses testified that (a) they had never witnessed Mr. Depp abuse Ms. Heard; and (b) that they observed Ms. Heard without injuries/marks/bruises/swelling, etc. during periods when Ms. Heard claimed to have injuries, marks, bruises, etc. Such witnesses include but are not limited to Isaac Baruch, Kate James, Dr. David Kipper, Officer Melissa Saenz, Officer William Gatlin, and Starling Jenkins. Ms. Heard's request for Anti-SLAPP immunity should be stricken.

Moreover, the defamatory implication of Ms. Heard's statements are not "solely" relating to a matter of public concern. As generally analyzed by courts, a matter of public concern is one which relates to a "matter of political, social, or other concern to the community" as opposed to a matter of only "personal interest." *Connick v. Myers*, 461 U.S. 138, 146 (1983). Newsworthiness alone is not enough, and references to particular private grievances generally do not rise to the level of matters of public concern. *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1205 (noting the lack of public concern with respect to a statement that "merely deals with personal disputes and grievances unrelated to the public's interest" and explaining that "speech that airs grievances of a purely personal nature typically does not involve matters of public concern"). Instead, that defamatory implication relates to the personal grievances between the Mr. Depp and Ms. Heard, which does not rise to the level of a matter of public concern with broader implications for society beyond the two litigants in this action. Simply stated, Mr. Depp is not suing Ms. Heard for making statements about society in general. He is suing her for publicly naming *him* as an abuser, and forever tarnishing his good name – an act that, coming from an ex-spouse, is fundamentally *personal* in nature. For that reason as well, Virginia's anti-SLAPP statute is not applicable.

CONCLUSION

Based on the foregoing, the Court should grant Plaintiff's motion to strike the Counterclaims and also strike her claim for attorneys' fees under Virginia's Anti-SLAPP statute.

Respectfully submitted,

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Dated: May 23, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of May 2022, I caused copies of the foregoing to be served on the following:

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