VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY



| | | |
|---|---|---|
| **John C. Depp, II,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No.: CL-2019-0002911** |
| | ) | |
| **Amber Laura Heard,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE AN AMENDED ANSWER & GROUNDS OF DEFENSE AND A SUPPLEMENTAL PLEA IN BAR**

Plaintiff John C. Depp, II, by and through his undersigned counsel, hereby opposes Defendant Amber Laura Heard's motion for leave to file an amended answer & grounds of defense and a supplemental plea in bar (the "Motion"), stating as follows:

## BACKGROUND

Ms. Heard's Motion asks this Court to allow Ms. Heard's *third* baseless attempt to avoid having Mr. Depp's defamation claims against her tried on the merits. First, Ms. Heard sought to dismiss Mr. Depp's claims based on *forum non conveniens*, arguing that the case should be heard in California instead. In his Letter Opinion, dated July 25, 2019, the Honorable Chief Judge Bruce D. White denied Ms. Heard's motion. *See* **Ex. A.** Later, after replacing her first set of counsel, Ms. Heard sought and was granted leave to file a new demurrer and plea in bar. Again, this Honorable Court largely denied Ms. Heard's demurrer and plea in bar, finding that four out of five of the statements Mr. Depp alleged to be defamatory were actionable and that his defamation claims were not barred by the applicable statute of limitations. *See* **Ex. B.** Twice thwarted, Ms. Heard yet again replaced her legal team, filing her Answer and Counterclaims, seeking $100 million in damages for defamation, violation of Virginia's computer crimes act, and declaratory judgment. By a Letter Opinion dated January 4, 2021, this Court dismissed all of Ms. Heard's counterclaims, with the exception of the portion of her defamation claims based on three statements made within the one-year statute of limitations. *See* **Ex. C.**

Now, by her Motion, Ms. Heard, apparently desperate to avoid a reckoning on the merits and the consequences of lying under oath about donating to the Children's Hospital of Los Angeles and the complicit ACLU, seeks one more bite of the apple. This time, Ms. Heard seeks to amend her answer and grounds for defense and file a supplemental plea in bar which seeks dismissal of Mr. Depp's claims based on a judgment rendered in a *different country*, under

*different laws*, between *different parties*, where Ms. Heard was *not* a party and was *not* subject to discovery on that Court's authority. Specifically, Ms. Heard contends that the November 2, 2020 judgment (the "UK Judgment") rendered by the High Court of Justice Queens Bench Division (the "UK Court") in Mr. Depp's lawsuit against News Group Newspapers and Dan Wootton (the "UK Defendants"), entitled *Depp v. News Group Newspapers, Ltd., et al.* (the "UK Action") somehow bars Mr. Depp's defamation claims against Ms. Heard in this action based on the doctrines of comity, collateral estoppel, issue and claim preclusion, res judicata, and statutory law. *See* Motion at 2. Ms. Heard also seeks a stay of discovery pending the outcome of her newly-anticipated plea in bar. *See id.* at 5.

There is, however, no legal basis to bar Mr. Depp's defamation claims against Ms. Heard based on the UK Judgment. Ms. Heard's proposed amendments to her pleadings and supplemental plea in bar are futile and this Court should, accordingly, deny Ms. Heard's requested leave to, again, waste the Court's and Mr. Depp's time and resources litigating frivolous defenses which distract from the merits of Mr. Depp's claims against Ms. Heard.

## ARGUMENT

### I. Legal Standard

Rule 1:8 of the Rules of the Supreme Court of Virginia provides that a party must seek leave of court to amend any pleading after it is filed. Va. Sup. Ct. R. 1:8. Though "[l]eave to amend shall be liberally granted," *id.*, a court may, in the exercise of its discretion, deny leave to amend when the proposed amendment is futile as a matter of law. *See In re Episcopal Church Prop.*, 76 Va. Cir. 873 (2008) (citing *Booher v. Bd. of Supervisors of Botetourt Cty.*, 65 Va. Cir. 53, 60 (2004)) (denying defendant's motion for leave to amend its answer as futile); *see also SAF Funding, LLC v. Taylor*, 98 Va. Cir. 10 (2017) (citing *Brown v. Jacobs*, 289 Va. 209, 219 (2015)) ("Notwithstanding the preference for leave to amend freely given, the trial courts are

invested with the authority to deny leave to amend where the amendment in question would be irrelevant, immaterial, or futile as a matter of law.").[1]

## II. Ms. Heard's Proposed Amendments Are Futile

The Court should deny Defendant leave to file her proposed amended answer and grounds for defense and the related supplemental plea in bar because these new pleadings are futile as a matter of law. *See Episcopal Church*, 76 Va. Cir. 873. In her proposed supplemental plea in bar, Ms. Heard fails to even recite the elements necessary to establish res judicata or collateral estoppel, let alone a single Virginia case that actually supports her newest defenses based on the UK Judgment. In fact, the very authorities Ms. Heard cites in her proposed supplemental plea in bar hold that, as a matter of blackletter Virginia law, the UK Judgment *cannot* bar Mr. Depp's defamation claims against Ms. Heard in this action, nor can it bar the litigation of the issues implicated by the same.

The application of res judicata is set forth in Rule 1:6 of the Rules of the Supreme Court of Virginia, which provides in relevant part:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action *against the same opposing party or parties* on any claim or cause of action *that arises from that same conduct, transaction or occurrence* . . . .

Va. Sup. Ct. R. 1:6 (emphasis added). Accordingly, to prevail on a res judicata defense, the

[1] Ms. Heard claims that the Supreme Court of Virginia has held that it is an abuse of discretion for a court to deny leave to file an amended pleading when there is no prejudice to the opposing party. *See* Motion at 3 n.3. The Supreme Court held no such thing. In the case cited by Ms. Heard for this proposition, the Supreme Court explicitly recognized that a court may decline to grant leave to amend "when, for example, the proffered amendments are legally futile," but found that the proposed amendment stated a viable claim (*i.e.*, was not futile) and was not prejudicial. *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469, 487-88 (2017). Moreover, Virginia courts have denied leave to amend based solely on futility as opposed to a showing of prejudice. *See, e.g.*, *Episcopal Church*, 76 Va. Cir. 873 (noting that the Court need not reach the issue of whether plaintiff would be prejudiced by a post-trial amendment and denying leave to amend because the amendment would be futile).

party invoking the doctrine must show, *inter alia*, that the parties to the two actions are identical or in privity with each other. *See Columbia Gas Transmission, LLC v. David N. Martin Revocable Trust*, 833 F. Supp. 2d 552, 558 (E.D. Va. 2011); *Rawlings v. Lopez*, 267 Va. 4, 4-5 (2004). Under Virginia law, a party invoking the doctrine of collateral estoppel also bears the burden of showing, *inter alia*, that the parties to the two proceedings are "the same or in privity." *See Columbia Gas*, 833 F. Supp. 2d at 560. Here, however, it is undisputed that the parties to the UK Action and the action pending before this Court are not identical and Ms. Heard does not even contend, let alone show, that she is somehow in privity with the UK Defendants. Ms. Heard's res judicata and collateral estoppel defenses are, thus, dead on arrival. *See Columbia Gas*, 833 F. Supp. 2d at 558-60 (finding res judicata and collateral estoppel inapplicable where defendants failed to establish the privity); *Rawlings*, 267 Va. at 4-5 (holding that res judicata did not apply where the defendants in two lawsuits brought by the plaintiff were not in privity).[2]

Ms. Heard's claim that the UK Judgment bars Mr. Depp's defamation claims in this action based on principles of comity fare no better. She fails to cite any authority in her proposed supplemental plea in bar holding that principles of comity endow the UK Judgment with preclusive effect here. In the two cases Ms. Heard cites, the courts *declined* to grant a foreign judgment preclusive effect. *See Hilton v. Guyot*, 159 U.S. 113, 299 (1895) (finding that a foreign judgment was not a bar to a suit in equity between the parties in the U.S.); *Clark v. Clark*, 11 Va. App. 286, 299 (Va. Cir. 1990) ("[W]e are not confronted with a comity analysis which would require us to determine whether a Swiss judgment has been rendered under

[2] Ms. Heard's *res judicata* defense also fails as a matter of law because the UK Action does not arise from the same occurrence, conduct, or transaction as this action. *See Columbia Gas*, 833 F. Supp. 2d at 558. The Fourth Circuit has already held that two separate instances of defamation, even if regarding the same subject matter (*i.e.*, Ms. Heard's Op-Ed and the article that was the subject of the UK Action), do *not* arise from the same transaction or occurrence. *See English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 172 F.3d 862 (4th Cir. 1999).

circumstances sufficient compatible with our jurisprudent to require us to give that judgment recognition and effect."). In fact, in *Hilton*, the Supreme Court articulated the *precise* reason why the UK Judgment should not be afforded comity and preclusive effect with respect to Mr. Depp's claims: comity is not extended to judgments, like the UK Judgment, that are founded on the unique laws of a foreign jurisdiction. *See Hilton*, 159 U.S. at 186. Furthermore, U.S. courts have declined to apply the doctrine of comity in the manner Ms. Heard requests in her supplemental plea in bar – asking a U.S. court to adopt and recognize the preclusive effect of the factual findings of a foreign court – when, as here, the parties to the U.S. and foreign proceeding are not the same or in privity with one another. *See, e.g.*, *Amica Life Ins. Co. v. Barbor*, 488 F. Supp. 2d 750, 757 (N.D. Ill. 2007) ("[C]omity generally applies where both parties were involved in the foreign dispute."). There is no legal basis, under principles of comity, res judicata, or collateral estoppel, to afford the UK Judgment preclusive effect with respect to Mr. Depp's defamation claims against Ms. Heard.

Ms. Heard's proposed amendments and supplemental plea in bar are futile and thus provide no basis to stay discovery that has been ongoing for over two years. The Court did not stay discovery when Ms. Heard filed her prior two sets of failed dispositive motions, or during the pendency of Mr. Depp's motion to dismiss Ms. Heard's Counterclaims, and it should not do so now at this late stage in the litigation.

## CONCLUSION

For the foregoing reasons, Mr. Depp respectfully requests that the Court deny Ms. Heard's Motion for leave to file an amended answer and grounds of defense and supplemental plea in bar.

Respectfully submitted,

[redacted]

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July 25, 2019

Re: *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911

Dear Counsel:

This matter came before the Court on the 28th of June, 2019, for argument on Amber Heard's Motion to Dismiss pursuant to Virginia Code section 8.01-265(i). At the conclusion of the hearing, the Court took the matter under advisement. There were two underlying issues presented before the Court:

[redacted]

OPINION LETTER

1) Whether the Court should adopt the "significant relationship test" multi-jurisdictional defamation cases or adhere to the long-tradition of *lex loci delicti* adopted in Virginia?
2) Do the facts support publication of the Op-Ed in Virginia or elsewhere?

## BACKGROUND

John C. Depp, II ("Mr. Depp") filed the underlying Complaint on March 1, 2019, alleging Amber Heard ("Ms. Heard") defamed him through the publication of her Op-Ed in *The Washington Post*. *See* Compl. ¶ 1. *The Washington Post* is a newspaper printed in Springfield, Virginia, in the county of Fairfax. *See* Compl. ¶ 10. Aside from the newspaper having physical offices in Virginia and a physical publication circulated within Virginia, and throughout the Washington, D.C. region, its digital platform is created and routed through servers in Virginia. *See* Compl. ¶ 10. *The Washington Post* initially uploaded Ms. Heard's Op-Ed to its website on December 18, 2018, and then published the Op-Ed in its hardcopy edition on December 19, 2018. *See* Compl. ¶¶ 20, 68, 75. The Complaint alleges that Ms. Heard's Op-Ed contained defamatory statements implying that Mr. Depp is a domestic abuser. *See* Compl. ¶¶ 1-5. Mr. Depp's Complaint states that his reputation and career sustained immense damage from Ms. Heard's allegations. *See* Compl. ¶¶ 5, 69. He brings this lawsuit seeking $50 million in compensatory damages and $350,000 in punitive damages against Ms. Heard. *See* Compl. ¶ 106.

## ARGUMENTS

***Ms. Heard's Motion to Dismiss***

*I. Mr. Depp's Defamation Claim Arises Outside Virginia*

Ms. Heard alleges that Mr. Depp's cause of action—defamation from *The Washington Post* Op-Ed—arises in California. *See* Mot. to Dismiss 4. She argues that whether Virginia law or some other state law applies is insignificant because the single, multistate mass media claim at issue here arises in California. *See id.* Ms. Heard contends that since Virginia is a *lex loci delicti* jurisdiction, then the court should "pinpoint the place of the greatest harm in this multistate libel case in the district where the plaintiff was domiciled, absent strong countervailing circumstances." *See Hatfill v. Foster*, 415 F. Supp. 2d 353, 365 (S.D.N.Y. 2006). Ms. Heard argues that Virginia is not the state where any defamation occurred because none of the relevant conduct took place in Virginia,

she has never set foot in Virginia, she never directly contacted any employee of *The Washington Post*, and she never entered *The Washington Post*'s Virginia office. *See* Mot. to Dismiss 6.

Ms. Heard asserts that federal district courts have squarely addressed where a multistate, mass media defamation claim arises as "where the plaintiff suffered the greatest injury . . . that district is usually the one in which the plaintiff is domiciled." *Hatfill*, 415 F. Supp. 2d at 364-65; *see also Gilmore v. Jones*, 370 F. Supp. 3d 630, 664 (2019). In this case, Ms. Heard argues that the alleged defamation plainly arises outside of Virginia since; (1) Mr. Depp is domiciled in California; (2) he does not own property in Virginia; (3) he does the vast majority of his work as an actor in California and; (4) the harm to his professional and personal reputation is most impacted in California. *See* Mot. to Dismiss 5-6.

*II. Virginia is a Completely Inconvenient Forum*

Ms. Heard argues that litigating this matter in Virginia would be inconvenient for the parties. She states that, in applying *forum non conveniens*, the chosen forum " . . . should be one which insures the ability of the plaintiff to prosecute his cause free from any suggestion of abuse of the venue provisions." *Norfolk & W. Ry. Co. v. Williams*, 239 Va. 390, 393 (1990). Ms. Heard articulates the factors that must be considered in a *forum non conveniens* analysis: "[1] relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 393.

Ms. Heard asserts that the witnesses and the locations of where the alleged domestic abuse occurred are all located in California; of which, none are easily accessible in Virginia. *See* Mot. to Dismiss 8. Ms. Heard further contends Virginia is an inconvenient forum because the parties and witnesses, whose credibility is in question, the layout and damage done to the physical premises, and the alleged damages to Mr. Depp, are all located in California. *See* Mot. to Dismiss 9. Therefore, Ms. Heard argues, "every factor" in the analysis "weighs in favor of finding that Virginia is an inconvenient forum." Mot. to Dismiss 9.

***Mr. Depp's Opposition to the Motion to Dismiss***

*I. Mr. Depp's Cause of Action Arose in Virginia*

Mr. Depp asserts that for Ms. Heard's dismissal motion to survive, she must satisfy her burden by establishing that the cause of action arises outside of Virginia. Mr. Depp claims that she

does not satisfy this burden. *See* Def. Mot. in Opp. 3. Mr. Depp argues that Virginia applies *lex loci delicti* to determine the place of the tort. *See* Def. Mot. in Opp. 4. He contends that as the place of the wrong in defamation cases is the place of publication, then Virginia is the place where Mr. Depp's cause of action arises. *See ABLV Bank v. Center for Advanced Defense Studies Inc.*, No.1:14-cv-1118, 2015 WL 12517012, at *1 (E.D. Va. Apr. 21, 2015) (stating that Virginia courts have held that the *lex loci* rule "looks to where the statement was published.").

Mr. Depp argues that the Supreme Court of Virginia declined to adopt the "most-significant relationship" test for resolving conflicts of laws in multistate tort actions. *See Jones v. R.S. Jones & Assocs.*, 246 Va. 3, 5 (1993). Virginia courts have also clarified that the location of the publication is determined by where the physical publication occurred. *See Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 666 (E.D. Va. 2019). Mr. Depp reiterates that Ms. Heard submitted her Op-Ed to *The Washington Post* through her contact at the ACLU, which was then published in its online edition, created on a digital platform in Virginia, routed through servers in Virginia, and also printed and published in a hard copy edition from Springfield, Virginia. *See* Def. Mot. in Opp. 5.

*II. Ms. Heard Cannot Overcome Mr. Depp's "Presumption of Correctness" Regarding the Choice of Forum*

Mr. Depp argues that the cause of action arose in Virginia and Ms. Heard cannot overcome the presumption that a plaintiff's choice of forum is correct. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1997); Def. Mot. in Opp. 11. Mr. Depp asserts that because of the limited nature of evidence, the time from the alleged incident, the fact that evidence has already been collected, and that the parties have access to witnesses in either California or Virginia, then there are no countervailing reasons why this case should not be tried in Virginia. *See id.*

Further, Mr. Depp contends that Ms. Heard's inconvenience argument simply fails because it would not be difficult for potential witnesses to appear remotely or otherwise. *See, e.g., Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 289 Va. 426, 433; *Selective Ins. Co. of Am. v. Salinas*, No. CL-2008-13275, 2009 WL 7388859, at *1 (Va. Cir. Ct. July 6, 2009) (Fairfax); Def. Mot. in Opp. 12. Mr. Depp also states that access to the physical premises is unnecessary in this case because demonstrative exhibits can be used. *See* Def. Mot. in Opp. 13. In totality, Mr. Depp states that "litigating this case in Virginia presents no prejudice to Ms. Heard or her proposed evidence." *Id.* at 14.

## ANALYSIS

The main issue to be determined on Ms. Heard's Motion to Dismiss is whether Mr. Depp's cause of action arose outside of the Commonwealth for the Court to apply the *forum non conveniens* analysis.

### *Forum Non Conveniens*

Virginia Code section 8.01-262 allows a defendant to dismiss an action upon determination that a more convenient forum exists outside Virginia. *See* VA. CODE ANN. § 8.01-262; *Dr. Gerhard Sauer Corp. v. Gold*, No. 109303, 1992 WL 884806, at *1 (Va. Cir. Ct. July 15, 1992) (Fairfax) (citing *Caldwell v. Seaboard Sys. R.R. Inc.*, 238 Va. 148, 151-55 (1989)). The party making the motion has the burden to show that good cause exists to invoke the *forum non conveniens* doctrine. *See Birdsall v. Federated Dept. Stores, Inc.*, No. CH-2005-4988, 2006 WL 727877, at *2 (Va. Cir. Ct. Mar. 14, 2006) (Fairfax). To even consider whether or not good cause is articulated by the moving party, the cause of action *must* arise outside of the Commonwealth. VA. CODE ANN. § 8.01-262 (emphasis added). The Court turns to examination of where the alleged defamation occurred.

### *Choice of Law*

Virginia is just one of ten states that still adheres to the *lex loci* rule. *See generally* Michael S. Green, *Law's Dark Matter*, 54 WILLIAM & MARY L. REV. 845 (2013) n. 108 ("As of 2008, states still using the traditional lex loci delicti rule for torts are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming."); Symeon Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AMER. J. COMPARATIVE L. 327 (1999) ("The commitment of Virginia's highest court to the lex loci delicti . . . appears firm."). Application of the *lex loci delicti* rule defines the "place of the wrong" for defamation cases as where the publication occurred. *See Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992); *Edwards v. Schwartz*, 378 F. Supp. 3d 468, 481 (W.D. Va. 2019) ("To determine the governing law in a defamation case, Virginia applies the *lex loci delicti commissi* rule, that is, the law of the place of the wrong.") (citation omitted); *McMillan v. McMillan*, 219 Va. 1127, 1128 (1979) (stating that *lex loci delicti* is "the settled rule in Virginia.").

However, the Supreme Court of Virginia has not addressed how this rule would apply in situations where defamatory content is published simultaneously in multiple jurisdictions. *See Cockrum*, 365 F. Supp. 3d at 688-89 ("This Court notes, as it previously has, that it remains 'far

from clear' how the Supreme Court of Virginia would apply *lex loci* in situations where defamatory content is published in multiple jurisdictions, such as on a national television broadcast or . . . a website that can be accessed worldwide."); *Gilmore*, 370 F. Supp. 3d at 664 (stating that the Supreme Court of Virginia has not addressed how the "place of the wrong" should be defined "in situations where the defamatory content is published in multiple jurisdictions.").

Many state and federal courts resolved the problem by adopting the Restatement (Second) of Conflict of Laws, commonly known as the "significant relationship" test. The Fourth Circuit voiced concerns over adherence to the *lex loci delicti* rule when an allegedly defamatory statement was broadcast on a radio station simultaneously to multiple jurisdictions. *See Wells v. Liddy*, 186 F.3d 505, 527 (1999). Applying, Maryland law, the Fourth Circuit contemplated that "[b]ecause of the widespread simultaneous publication of the allegedly defamatory statement in many different jurisdictions, application of the traditional *lex loci delicti* rule becomes cumbersome, if not completely impractical." *Id.* The *Wells* court applied the "significant relationship" test and continues to do so. *See id.* However, the Virginia Supreme Court explicitly rejects the "significant relationship test." *See R.S. Jones*, 246 Va. at 5 (1993). Multiple federal courts, while not binding upon the Court, examined the problem that a multijurisdictional defamation claim creates and hypothesized how the Supreme Court of Virginia *would* apply the *lex loci delicti* rule.

Judge Moon of the Western District of Virginia applied a new test to the place of the wrong analysis. The court held that the Supreme Court of Virginia in "multi-defendant, multi-state Internet tort cases . . . would define the 'place of the wrong' as the state where the plaintiff is primarily injured as a result of the allegedly tortious online content." *Gilmore*, 370 F. Supp. 3d at 666. The case stemmed from the plaintiff uploading footage of an individual driving into a crowd of counter-protestors, protesting the "the Unite the Right" rally in Charlottesville, Virginia in August of 2017, and killing Heather Heyer. *See id.* at 642. The plaintiff brought suit against multiple defendants who "published articles and videos falsely portraying him as a 'deep state' operative . . . ." *Id.* After those publications appeared online, the plaintiff received harassing and threatening messages online and asserted it would be difficult to for him to return to the State Department as a diplomat due to the reputational harm inflicted. *Id.* at 644-45.

While Judge Moon did not endorse the significant relationship test, his new test tracks closely to the underlying rationale behind the significant relationship test: that the extent of each interest of a potentially interested state needs to be determined to find the state with the greater

interest. *See* RESTATEMENT 2D CONFLICTS OF LAW § 150. Judge Moon suggests that applying *lex loci delicti* in a case like *Gilmore* would "require the cumbersome application of a patchwork of state law." *Id.* at 665. Instead, due to the complexity of online publication, the court reasoned that because plaintiff alleged the brunt of his injury was a result of the publications in Virginia, where he lives and works, then Virginia law should apply. *See id.* at 666.

Judge Hudson of the Eastern District of Virginia also examined application of Virginia's *lex loci delicti* rule this past March in *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 654 (E.D. Va. 2019). The plaintiffs in *Cockrum* sought damages from the unauthorized publication of their personal information on the internet, which was allegedly obtained by Russian intelligence operatives during the hack of computer servers belonging to the Democratic National Committee. *See* 365 F. Supp. 3d at 654-55. The court applied the *lexi loci delicti* rule to the common-law claim of public disclosure of private facts. *See id.* at 666. Determining that the place of the wrong is "where the last event necessary to make an act liable for an alleged tort takes place," the court looked to the elements of the tort. *See id.* at 666-67. Judge Hudson determined that the common-law claim of public disclosure's place of the wrong was wherever the act of public disclosure was published. *See id.* at 667. Ultimately, he felt that the Supreme Court of Virginia would find that the place of the wrong in these claims for public disclosure of private facts is the place where the act of publication to the internet occurred. *See id.* at 670.

The conflicting views between Judge Moon and Judge Hudson are both well-articulated and respected by this Court. One represents a view that the Supreme Court of Virginia will move towards adoption of a modern standard similar to the one set forth in the Restatement (Second) of the Conflicts of Law; while the other represents the view that the Supreme Court of Virginia will not and will continue to apply *lex loci delicti*. This Court feels that any adoption of a new standard or adoption of the standard set forth in the Restatement (Second) of the Conflicts of Law is properly made by a court not bound by the doctrine of *stare decisis*.

Although the common-law claim of public disclosure of private facts differs from defamation, both torts hinge on the *publication* of the private information or slanderous words. *See id.* at 669-70 (emphasis added). Both torts require the element of publication before any cause of action can accrue. *See id.* at 669. Application of *lex loci delicti*, the place of the wrong, requires the Court to determine "where the last event necessary to make an act liable for an alleged tort

takes place." *Id.* at 666-67. The last event necessary for an individual to become liable for defamation in online, multi-jurisdictional cases occurs when the defamatory statement is uploaded to the internet. Therefore, the place of the wrong in this case is the place where the act of publication of Ms. Heard's Op-Ed to the internet occurred. The Court will now examine whether the facts support the place of the publication to the internet as being in Virginia, California, New York, or elsewhere.

***Place of Publication***

"Publication sufficient to sustain a common-law defamation is uttering the slanderous words to some third person so as to be heard and understood by such person." *Thalhimer Bros. v. Shaw*, 156 Va. 863, 871 (1931); *see also Adams v. Lawson*, 17 Gratt. 250, 58 Va. 250, 257 (1867) ("It is enough, it is said, if [the contents of the writing] are made known to a single person."). Defamatory statements must be published to a third-party in order to be actionable. *See Dickenson v. Wal-Mart Stores, Inc.* No. 96-0240, 1997 U.S. Dist. LEXIS 19459, at *8 (W.D. Va. Nov. 3, 1997); *Hines v. Gravins*, 136 Va. 313, 112 S.E. 869, 870 (1922) (citing *Stivers v. Allen*, 115 Wash. 136, 196 Pac. 663, 15 A. L. R. 247). A publication occurs when a third person reads the slanderous words sent by the individual. *See generally Davis v. Heflin*, 130 Va. 169, 172 (1921) (contemplating that publication is not achieved until a statement is received and read by a third person). "It is undoubtedly well-recognized law that the mere act of sending of a letter through the mail is not a publication, as the sender it not responsible for what the recipient does with the letter after it is received." *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S.E. 692, 693 (1903).

1. *Ms. Heard's Op-Ed Was Uploaded to the Internet Through The Washington Post's Servers Located in Springfield, Virginia, so the Cause of Action Arises in Virginia*

Ms. Heard's Declaration on this record,[1] to which the Court cannot add or infer, states that Ms. Heard "submitted [her Op-Ed] to *The Washington Post* through [her] contact at the ACLU, who was based in New York." Heard Decl. ¶¶ 53-54. Her Op-Ed was then published on December 18, 2018, on *The Washington Post*'s website. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54. Ms. Heard's act of emailing the Op-Ed is similar to sending a letter through the mail. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54.Ms. Heard merely submitted her Op-Ed to her "contact" in New York and the Court cannot assume facts that are not in the record as to what the recipient did with the

[1] All parties stipulated to the accuracy of Ms. Heard's Declaration at the hearing on June 28, 2019.

Op-Ed, except that the Op-Ed was published on *The Washington Post*'s website at Ms. Heard's instruction. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54.

*The Washington Post*'s online edition is "created on a digital platform in Virginia and routed through servers in Virginia." Compl. ¶ 10. Like the private information that was directed to be published online by the defendant in *Cockrum*, Ms. Heard submitted her Op-Ed to *The Washington Post* to be published online. *See Cockrum*, 365 F. Supp. 3d at 670; Compl. ¶¶ 68, 75 Heard Decl. ¶¶ 53-54. The last event to make Ms. Heard liable for the alleged defamatory statements in her Op-Ed was uploading it to the internet. Using the servers located in Springfield, Virginia, *The Washington Post* posted it to the internet on December 18, 2018. *See* Compl. ¶¶ 20, 68, 75. Therefore, Mr. Depp's cause of action arises in Virginia and the prerequisite to dismiss the case based on *forum non conveniens* is not met.

2. *Even if Ms. Heard's ACLU Contact Opened and Read the Submitted Op-Ed, She Was an Interested Party and Publication Did Not Occur*

"Communications between persons on a subject in which the persons have an interest or duty are occasions of privilege." *Lairmore v. Blaylock*, 259 Va. 568, 572 (2000).

> An exhaustive review of the English cases on the subject was made in 1930 by three judges of the King's Bench. *See Watt v. Longsdon*, 1 K.B. 130, 69 A.L.R. 1005, 1022. The three judges agreed that the most accurate statement of the rule was made by Lord Atkinson in *Adams v. Ward* (1917) A.C. 309, 334, Ann. Cas. 1917D, 249—H.L., as follows: 'A privileged occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'

*M. Rosenberg & Sons v. Craft*, 182 Va. 512, 526 (1944).

In this case, Ms. Heard's declaration is undisputed and she states that "while working with the American Civil Liberties Union as the ACLU Ambassador for Women's Rights, [she] learned of an opportunity to write an Op-Ed about women's rights issues." Heard Decl. ¶ 53. Ms. Heard agreed to write the Op-Ed and then, through her contact within the ACLU, submitted it to *The Washington Post*. *See* Heard. Decl. ¶¶ 53-54. Ms. Heard did not submit the Op-Ed, containing the allegedly defamatory statements, to a friend, but to an individual in the organization she was "working with." *See* Heard. Decl. ¶ 53. Ms. Heard and her contact in New York both shared a corresponding interest and reciprocity because they were working together for the ACLU. *See Craft*, 182 Va. at 526; Heard Decl. ¶¶ 53-54.

Thus, the publication did not occur until December 18, 2018, when the Op-Ed was uploaded to the internet on *The Washington Post*'s website. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54. It was only then that the allegedly defamatory statements were read by non-interested third parties.

Following Judge Hudson's opinion, and consistent with Supreme Court of Virginia precedent, the Court finds that publication occurred in Virginia.

**CONCLUSION**

For the reasons stated above, Ms. Heard's "Motion to Dismiss Based on *Forum Non Conveniens*" is Denied. Mr. Depp's counsel is directed to prepare an Order reflecting the Court's ruling and forward it to Ms. Heard's counsel for endorsement and transmitted to the Court for entry.

Sincerely,

[redacted]

Bruce D. White

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Re: *John C. Depp, II v. Amber Laura Heard*, Case No. CL-2019-2911

Dear Counsel:

This matter came before the Court on December 20, 2019, for argument on Defendant's Demurrer and non-evidentiary Plea in Bar. At the conclusion of the hearing, the Court took the matter under advisement. The questions presented are (1) whether Plaintiff has pleaded an actionable claim for defamation by implication, and (2) whether Plaintiff is barred from recovering on his defamation claim under the applicable statute of limitations.

[redacted]

**OPINION LETTER**

## BACKGROUND

Plaintiff's claim for defamation stems from four statements made in Defendant's op-ed, which was published in the *Washington Post* online and in print on December 18, 2018, and December 19, 2018, respectively. The article, entitled "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change" (online) and "A transformative moment for women" (print), does not name Plaintiff explicitly. It discusses how—two years before the op-ed was published—Defendant became a public figure "representing domestic abuse," what Defendant experienced in the aftermath of attaining this status, and what Defendant believed could be done to "build institutions protective of women." *See* Compl. Ex. A, at 1-4. Plaintiff brought this action on March 1, 2019, alleging that the op-ed was really about "Ms. Heard's purported victimization after she publicly accused her former husband, Johnny Depp ("Mr. Depp") of domestic abuse in 2016 . . . ." Compl. at ¶ 2. Plaintiff asserts that "the op-ed's clear implication that Mr. Depp is a domestic abuser is categorically and demonstrably false," Compl. at ¶ 3, and he specifically takes issue with the following four statements from the op-ed:

1. Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change.

2. Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out.

3. I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.

4. I write this as a woman who had to change my phone number weekly because I was getting death threats. For months, I rarely left my apartment, and when I did, I was pursued by camera drones and photographers on foot, on motorcycles and in cars. Tabloid outlets that posted pictures of me spun them in a negative light. I felt as though I was on trial in the court of public opinion—and my life and livelihood depended on myriad judgments far beyond my control.

Compl. at ¶ 22. Plaintiff details a number of facts and circumstances to contextualize the 2018 op-ed, including certain events surrounding the couple's highly publicized divorce in 2016, to support his allegation that Defendant falsely implied that she was a victim of domestic abuse at his hands. *See* Compl. at ¶¶ 13-19, 24-30.

Presently before the Court is Defendant's Demurrer, wherein Defendant asserts that the four statements are not actionable under a theory of defamation, and one of Defendant's Plea in Bar arguments as to the statute of limitations.[1] This Letter Opinion addresses these issues in turn.

[1] At the plea in bar portion of the hearing, Ms. Heard reserved her arguments that (1) she is entitled to immunity under Virginia's Anti-SLAPP statute and (2) that she cannot be liable for the online article's title for a later evidentiary hearing.

## ANALYSIS

### I. Defendant's Demurrer

On demurrer, the trial court must determine whether the complaint states a cause of action upon which the relief requested may be granted. *Welding, Inc. v. Bland County Service Auth.*, 261 Va. 218, 226 (2001). "A demurrer admits the truth of all properly pleaded material facts and all facts which are impliedly alleged, as well as facts that may be fairly and justly inferred." *Pendleton v. Newsome*, 290 Va. 162, 171 (2015) (citing *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397 (1991). "In deciding whether to sustain a demurrer, the sole question before the trial court is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant." *Id.*

The elements of a defamation claim include: (1) publication of (2) an actionable statement with (3) the requisite intent. *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). On demurrer, "the trial judge is responsible for determining whether, as a matter of law, the allegedly defamatory statements are actionable." *Taylor v. Southside Voice, Inc.*, 83 Va. Cir. 190 (2011). To be "actionable," a statement must be both "false and defamatory." *Schaecher*, 290 Va. at 91. Because statements of opinion cannot be "false," they are never actionable. *See Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132 (2003). A statement qualifies as "defamatory" only if it "tends to injure one's reputation in the common estimation of mankind . . . ." *Schaecher*, 290 Va. at 92 (noting the speech complained of must have "the requisite defamatory 'sting' to one's reputation.").

Typically, "an editorial or op-ed column" is "ordinarily not actionable" because it appears "in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints." *Id.* However, Virginia recognizes that "a defamatory charge may be made by inference, implication, or insinuation," *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 8 (1954), and that a statement expressing a defamatory meaning may not be "apparent on its face." *Pendleton*, 290 Va. at 172 (citing *Webb v. Virginian-Pilot Media Cos., LLC*, 287 Va. 84, 89 n.7 (2014)). Accordingly, "[i]n order to render words defamatory and actionable, it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." *Carwile*, 196 Va. at 7.

Under this theory of implied defamation, "in determining whether the words and statements complained of are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor." *Carwile*, 196 Va. at 8. "However, the meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation." *Id.* The innuendo functions to show "how the words used are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." *Id.*

The Supreme Court of Virginia has summarized the role of a trial court on demurrer where the plaintiff has proceeded on a theory of defamation by implication as follows:

> Because Virginia law makes room for a defamation action based on a statement expressing a defamatory meaning "not apparent on its face," **evidence is admissible to show the circumstances** surrounding the making and publication of the statement **which would reasonably cause the statement to convey a defamatory meaning** to its recipients. **Allegations that *such circumstances* attended the making of the statement, with an explanation of the circumstances and the defamatory meaning allegedly conveyed, will suffice to survive demurrer if the court, in the exercise of its gatekeeping function, deems the *alleged meaning* to be defamatory.** Whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial.

*Pendleton*, 290 Va. at 172 (bold emphasis added).

In the present case, Plaintiff pleaded (1) that Defendant published the statements at issue, Compl. at ¶ 75, and (2) that Defendant had the requisite intent when making the statements that allegedly imply that Plaintiff abused Defendant. Compl. at ¶ 81 ("At the time of publication, Ms. Heard knew these statements were false."). Accordingly, the Court must determine whether the statements complained of are actionable. *See Schaecher*, 290 Va. at 91. Because a statement must be both false and defamatory to be actionable, *Fuste*, 265 Va. at 132, and because the statements at issue were made in an op-ed that does not name Plaintiff, the Court must determine whether Plaintiff has adequately pleaded that the statements otherwise possess a prohibited defamatory implication. *See Carwile*, 196 Va. at 8. To make this determination, the Supreme Court of Virginia has articulated that when "[a]llegations that . . . circumstances [that would reasonably cause the statement to convey a defamatory meaning to its recipients] attended the making of the statement, with an explanation of the circumstances and the defamatory meaning allegedly conveyed," they will "suffice to survive demurrer if the court, in the exercise of its gatekeeping function, deems the *alleged meaning* to be defamatory." *Pendleton*, 290 Va. at 172 (emphasis added).[2] Here, Plaintiff has pleaded circumstances that would reasonably cause three of the four statements at issue to convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard, and this alleged meaning is in fact defamatory.

**A. Three Statements Are Actionable Under a Theory of Defamation by Implication**

The Court finds that the following three statements are actionable:

i. Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change.

[2] "Whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial." *Id.*

ii. Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out.

iii. I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.

First, Plaintiff has alleged a number of circumstances that would reasonably cause the three statements above to convey the alleged defamatory meaning—that Mr. Depp abused Ms. Heard—to its recipients. Specifically, the Complaint alleges that the events surrounding the parties' divorce—including Ms. Heard's repeated allegations of domestic violence—attended the making of her statements in the *Washington Post* op-ed. *See* Compl. at ¶ 16 (alleging that, in May 2016, Ms. Heard falsely yelled "stop hitting me Johnny," in addition to stating that Mr. Depp struck her with a cell phone, hit her, and destroyed the house, before she "presented herself to the world with a battered face as she publicly accused Mr. Depp of domestic violence and obtained a restraining order against him."); ¶ 19 ("Despite dismissing the restraining order and withdrawing the domestic abuse allegations, Ms. Heard (and her surrogates) have continuously and repeatedly referred to her in publications, public service announcements, social media postings, speeches, and interviews as a victim of domestic violence, and a "survivor," always with the clear implication that Mr. Depp was her supposed abuser."); ¶ 20 ("Most recently, in December 2018, Ms. Heard published an op-ed in the Washington Post that falsely implied Ms. Heard was a victim of domestic violence at the hands of Mr. Depp."); ¶ 21 ("The "Sexual Violence" op-ed's central thesis was that Ms. Heard was a victim of domestic violence and faced personal and professional repercussions because she "spoke up" against "sexual violence" by "a powerful man."); ¶ 22 ("Although Mr. Depp was never identified by name in the "Sexual Violence" op-ed, Ms. Heard makes clear, based on the foundations of the false accusations that she made against Mr. Depp in court filings and subsequently reiterated in the press for years, that she was talking about Mr. Depp and the domestic abuse allegations the she made against him in 2016."). Drawing every fair inference in Plaintiff's favor, the Court finds that these circumstances, as pleaded, would reasonably cause the three statements above to convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard.

Second, Plaintiff has alleged an implied meaning that is clearly defamatory. Compl. at ¶ 78 (noting that these statements imply "Ms. Heard was the victim of domestic violence at the hands of Mr. Depp."). The implication that Mr. Depp abused Ms. Heard is defamatory *per se* because it imputes to Plaintiff "the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished." *See Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 713 (2006) (citing *Fleming v. Moore*, 221 Va. 884, 889 (1981); *see also* VA. CODE § 18.2-57.2 (2020); CAL. PENAL CODE § 243(e)(1) (2016).

Because the Complaint contains allegations of circumstances that would reasonably cause the three statements above to convey an alleged defamatory meaning, and this alleged meaning—that Mr. Depp abused Ms. Heard—is defamatory *per se*, the Court is instructed under *Pendleton* to allow these statements to proceed beyond demurrer. 290 Va. at 172-73.

Additionally, the Court finds that allowing these three statements to proceed beyond demurrer under the standard articulated in *Pendleton* is consistent with the doctrine set forth in *Carwile*, which states that "[t]he province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it [cannot] introduce new matter, nor extend the meaning of the words used [beyond their ordinary and common acceptation], or make that certain which is in fact uncertain." *Carwile*, 196 Va. at 8.

By holding that Plaintiff has met the pleading standard set forth in *Pendleton*, 290 Va. at 172, the Court is not allowing Plaintiff to proceed on an allegation of an implicit defamatory meaning that introduces new matter. The implied defamatory meaning alleged was that Mr. Depp abused Ms. Heard, and Defendant's op-ed concerns the matter of what happened after Defendant attained the status of a public figure representing domestic abuse. Drawing every fair inference in Plaintiff's favor, the Court can conclude—as Plaintiff alleges—that an aspect of the article relied on the factual underpinning that Ms. Heard was abused by Mr. Depp.

This finding also does not extend the meaning of the words in each of the three actionable statements beyond their ordinary meanings.

***Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change.***

The first statement could reasonably convey the alleged defamatory meaning—that Mr. Depp abused Ms. Heard—to its readers without extending the words beyond their ordinary and common acceptation. *See Pendleton*, 290 Va. at 172; *Carwile*, 196 Va. at 8. Resolving every fair inference in Plaintiff's favor, this statement could reasonably imply that the "sexual violence" Ms. Heard "spoke up against" was in fact perpetrated by Mr. Depp, as he alleges. While the Court recognizes that this factual implication derives only from a part of the statement, and that the remaining portion is couched in Defendant's subjective opinion and perception, the Supreme Court of Virginia has held that "[f]actual statements made in support of an opinion . . . can form the basis for a defamation action." *See Lewis v. Kei*, 281 Va. 715, 725 (2011) (citing *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46 (2009)).

Although the Court in *Lewis* noted that, "in determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement" it made clear that this meant, "in considering whether a plaintiff has adequately pled a cause of action for defamation, *the court must evaluate all of the statements attributed to the defendant and determine whether, taken as a whole, a jury could find that defendant knew or should have known that the factual elements of the statements were false and defamatory.*" *Id.*(emphasis added). This Court holds that a jury in this case could find that Defendant knew or should have known that the implied factual elements of this statement (and the other two allowed to proceed) were false and defamatory based on the pleadings.

***Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out.***

As for the second statement, Defendant called herself "a public figure representing domestic abuse," which can be read to imply that she became a representative of domestic abuse *because* she was abused by Mr. Depp, not just because she spoke out against the alleged abuse. This inference can be drawn without extending the language beyond its "ordinary and common acceptation." *Carwile*, 196 Va. at 8. The word "represent" has over ten meanings in Merriam Webster's dictionary, including: "to serve as a specimen, example, or instance of," and "to serve as a counterpart or image of." *See Represent*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/representing (last visited Mar. 25, 2020). Notwithstanding the other meanings of the word "represent," the Court must resolve every fair inference in Mr. Depp's favor, including that Ms. Heard meant she was an "example of" a public figure who was domestically abused. This conclusion is further supported by Defendant saying she attained this status "two years ago," which would have been the same time the parties' divorce was unfolding. Again, in light of the law set forth in *Lewis*, 281 Va. at 725, this Court holds that a jury in this case could find that Defendant knew or should have known that the implied factual elements of this statement were false and defamatory based on the pleadings.

***I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.***

Drawing every fair inference in Plaintiff's favor, the Court can fairly conclude that Defendant's statement that she saw "how institutions protect men accused of abuse," could reasonably convey to its recipients that she saw how Mr. Depp was protected by institutions after he abused her and she spoke up against it. The Court finds that to reference one who was accused of abuse and protected by an institution can reasonably imply—at the demurrer stage—that the person in fact committed the abuse of which he was accused without extending the words beyond their ordinary meaning. Further, Defendant said she saw this happen to "men," "in real time," which—when read in context of the entire article, where Defendant previously stated that she became a public figure representing domestic abuse "two years ago," and in light of the circumstances pleaded about the parties' divorce—would reasonably cause readers to conclude she was referring to her experience with Mr. Depp despite her efforts to globalize the statement. *See Lewis*, 281 Va. at 725 (holding that the court must evaluate the statements taken as a whole to determine whether a jury could find that defendant knew or should have known that the factual elements of the statements were false and defamatory); *see also Carwile*, 196 Va. at 8 (noting that it does not matter "how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory.").

To summarize, all *Pendleton* requires is that the plaintiff plead allegations of an implied defamatory meaning, that is in fact defamatory, as well as circumstances that would reasonably cause the statements at issue to convey an alleged defamatory meaning. *Pendleton*, 290 Va. at 172-73. Because Plaintiff alleged that all three of these statements carry the same defamatory meaning based on the same attenuating circumstances, the Court must overrule Defendant's

Demurer because it finds that these statements could reasonably convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard when drawing every fair inference in Plaintiff's favor.

**B. The Fourth Statement Is Not Actionable**

Even in light of the somewhat relaxed defamation by implication pleading standard set forth by the Supreme Court of Virginia in *Pendleton*, the Court must still determine that the alleged circumstances are ones that "**would reasonably cause the statement to convey a defamatory meaning.**" *Id.* (bold emphasis added). The Court finds that the circumstances alleged regarding the statements Ms. Heard made during and after the parties' divorce would not reasonably cause the fourth statement to convey a defamatory meaning. Therefore, the Court cannot proceed to the other steps of the analysis outlined in *Pendleton*. *See id.* Plaintiff argues that the following statement implies that Mr. Depp abused Ms. Heard:

> I write this as a woman who had to change my phone number weekly because I was getting death threats. For months, I rarely left my apartment, and when I did, I was pursued by camera drones and photographers on foot, on motorcycles and in cars. Tabloid outlets that posted pictures of me spun them in a negative light. I felt as though I was on trial in the court of public opinion—and my life and livelihood depended on myriad judgments far beyond my control.

This statement lacks any factual underpinning that Mr. Depp abused Ms. Heard even when considering the circumstances alleged and resolving all fair inferences in Plaintiff's favor. The statement is too opinion-laden and representative of Defendant's own perspective for it to be actionable, and it notably lacks any implicit reference to the alleged meaning that Mr. Depp abused Ms. Heard. The Court simply cannot find that this statement has a defamatory charge without extending the meaning of the words far beyond their ordinary and common acceptation. *Carwile*, 196 Va. at 8. Accordingly, Defendant's Demurrer is sustained with prejudice as to the fourth statement discussed above.

Drawing the line at this statement is consistent with this Court's ruling regarding the other three statements, as those were held to be statements that were "artfully disguised," as articulated in *Carwile*, 196 Va. at 8, but nonetheless reasonably capable of conveying the alleged defamatory meaning in light of the circumstances pleaded, such that a jury could find that Defendant knew or should have known that the implied factual elements of the statements were false and defamatory. *See Pendleton*, 290 Va. at 172-73; *Lewis*, 281 Va. at 725. As for the first three statements, it is still the province of the fact-finder in this case to determine whether the circumstances were sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby. *Pendleton*, 290 Va. at 172-73.

**II. Defendant's Plea in Bar as to the Statute of Limitations**

A plea in bar condenses the litigation by narrowing it to a discrete issue of fact that bars a plaintiff's right of recovery when proven. *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). The

burden of proof on the dispositive fact rests on the moving party. *Id.* When considering the pleadings, "the facts stated in the plaintiffs' motion for judgment [are] deemed true." *Tomlin*, 245 Va. at 480 (quoting *Glascock v. Laserna*, 247 Va. 108, 109 (1994)). "Familiar illustrations of the use of a plea would be: the statute of limitations, absence of proper parties (where this does not appear from the bill itself), *res judicata*, usury, a release, an award, infancy, bankruptcy, denial of partnership, *bona fide purchaser*, denial of an essential jurisdictional fact alleged in the bill, etc." *Nelms v. Nelms*, 236 Va. 281 (1988).

Defamation claims are governed by VA. CODE § 8.01-247.1, which provides that "[e]very action for injury resulting from libel, slander, insulting words, or defamation shall be brought within one year after the cause of action accrues." Defendant argues that the gravamen of Plaintiff's case is that Defendant should be held liable for reviving statements she made in 2016, which is an attempt to end-run the statute of limitations. Def.'s Mem. Supp. Dem. & Plea in Bar 14-15. Plaintiff argues that the op-ed was published less than three months before Plaintiff filed suit, and—even if this were a case regarding revived statements—that Virginia law considers a new action to accrue each time the defamatory statement is published. Pl.'s Opp'n 10-11.

Assuming *arguendo* that Plaintiff proceeds on a theory of republication, Plaintiff is correct in asserting that the date of republication is the date on which the clock begins running for the statute of limitations in a defamation action. *See Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) ("It is well settled that the author or originator of a defamation is liable for republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication") (quoting *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 199 (1957)); *Weaver*, 199 Va. at 200 (holding the one-year statute of limitations does not bar a defamation claim involving a letter when the letter's contents were revealed before a promotion board (i.e., republished) within one year of the present action). Consequently, the original publication date of these statements does not prohibit Plaintiff from bringing this action because the statements—if republished—were reiterated within one year of Plaintiff bringing this action. The Court must therefore deny Defendant's Plea in Bar as to the statute of limitations.

## CONCLUSION

For the foregoing reasons, Defendant's Demurrer is sustained as to the fourth statement listed above, but it is overruled as to the other three statements. Further, Defendant's Plea in Bar regarding the statute of limitations is denied. Counsel shall prepare an Order reflecting the Court's ruling and forward that Order to the Court for entry.

Sincerely,

[redacted]

Bruce D. White

**OPINION LETTER**

# NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911

Dear Counsel:

This matter is before the Court on Plaintiff John C. Depp II's Demurrer and Plea in Bar to All Counterclaims. At the conclusion of the hearing, the Court took the matter under advisement to consider the following five issues:

1) Whether the Court should exercise jurisdiction over Defendant's Counterclaim for declaratory judgment when Defendant has asserted the same argument in her Answer and Grounds for Defense?

2) Whether Plaintiff's statements are actionable under Virginia defamation law?

3) Whether Defendant has alleged sufficient facts to state a claim for a violation of the Virginia Computer Crimes Act?

4) Whether Defendant's Counterclaims arise out of the same transaction or occurrence as Plaintiff's Complaint such that Plaintiff's filing of the Complaint tolled the statute of limitations for Defendant's defamation counterclaims?

5) Whether Plaintiff is entitled to anti-SLAPP immunity for his statements?

The Court has considered the briefs in support of and in opposition to the present motion, as well as the arguments made by counsel at the hearing on October 16, 2020. For the reasons discussed below, the Court sustains the Demurrer as to Count I and Count III, and grants the Plea in Bar as to Statements A-E.

## BACKGROUND

In the underlying action for defamation, Plaintiff John C. Depp II ("Mr. Depp") is suing Defendant Amber Laura Heard ("Ms. Heard") for statements that she made in an op-ed published by *The Washington Post* in 2018. Mr. Depp, believing that Ms. Heard's statements falsely characterize him as a domestic abuser, filed his defamation claim on March 1, 2019. On August 10, 2020, Ms. Heard filed her Counterclaims as well as her Answer and Grounds for Defense.

In her Counterclaims, Ms. Heard alleges that Mr. Depp and his agents have engaged in an ongoing online smear campaign to damage her reputation and cause her financial harm. Countercl. ¶ 6. Ms. Heard alleges that Mr. Depp has defamed her on multiple occasions, beginning during an interview with *GQ* in November 2018. *Id.* at ¶ 33. The alleged harm includes attempting to remove her from her role as an actress in *Aquaman* and as spokeswoman for L'Oréal. *Id.* at ¶ 6. Ms. Heard seeks declaratory relief granting immunity from civil liability for her statements; compensatory damages of $100,000,000; punitive damages of not less than $350,000; attorney's fees and costs; and an injunction to prevent Mr. Depp from continuing the alleged harms. *Id.* at 19.

## ANALYSIS

### I. COUNT I: DECLARATORY JUDGMENT IS DISMISSED.

Where an actual controversy exists, circuit courts "shall have power to make binding adjudications of right" in the form of declaratory judgments. Va. Code § 8.01-184. However, "the power to make a declaratory judgment is a discretionary one and must be exercised with care and caution. It will not as a rule be exercised where some other mode of proceeding is provided." *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970). Because the driving

purpose behind declaratory judgments is to resolve disputes before a right is violated, "where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding . . . is not an available remedy." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Supervisors*, 285 Va. 87, 99 (2013) (quoting *Bd. of Supervisors v. Hylton Enters.*, 216 Va. 582, 585 (1976)).

Where granting declaratory judgment is duplicative of the relief already available, circuit courts may decline to exercise jurisdiction. *See Godwin v. Bd. of Dirs. of Bay Point Ass'n*, No. CL10-5422, 2011 WL 7478302, at *3 (Va. Cir. Ct. Feb. 8, 2011) (Norfolk). In *Godwin*, the circuit court declined to issue a declaratory judgment that a document was void when there also existed a breach of contract claim that asserted the same document was void. *Id.* at *1-3. Where it "appear[ed] to be a duplicative remedy that does not add anything to the relief that may be available under [the other count]," the court would not issue a declaratory judgment. *Id.* at *3. Similarly, federal courts have recognized that declaratory judgment is unnecessary where there exists some other claim resolving the same issue. *See Jackson v. Ocwen Loan Servicing LLC*, Civil Action No. 3:15cv238, 2016 WL 1337263, at *12-13 (E.D. Va. Mar. 31, 2016) (granting a Motion to Dismiss after finding that a claim for declaratory relief was "duplicative and permitting it to proceed [would] not serve a useful purpose."). For instance, in *Tyler v. Cashflow Technologies, Inc.*, a federal court dismissed a declaratory judgment counterclaim because the defendant's request that the court declare that his statements were not defamatory was merely the inverse of the plaintiff's defamation claim. Case No. 6:16-CV-00038, 2016 WL 6538006, at *1 (W.D. Va. Nov. 3, 2016). Importantly, in *Tyler*, the court stated that "[t]o consider both claims would be duplicative and force 'the court to handle the same issues twice.'" *Id.* at *6.

Ms. Heard's Answer and Grounds for Defense states: "The statements in the op-ed are expressions of opinion that are protected by the First Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Virginia. Defendant requests an award of her reasonable attorneys' fees and costs pursuant to Virginia's Anti-SLAPP Statute, including § 8.01-223.2, and/or any amendments thereto." Answer at 29, ¶ 5. Her defense is therefore "some other mode of proceeding" to afford her the same relief that is requested in her Counterclaim. *See Liberty Mut. Ins. Co.*, 211 Va. at 421. To hear both Ms. Heard's anti-SLAPP defense and her declaratory judgment counterclaim would equate to adjudicating the same issue twice. *See Tyler*, 2016 WL 6538006, at * 6. Additionally, since this Court would not rule on Ms. Heard's declaratory judgment counterclaim until after all matters have been tried, the purpose of declaratory judgment – to resolve disputes before the right has been violated – is defeated. *See Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 99. Accordingly, this Court dismisses Count I of Ms. Heard's Counterclaim.

In her brief and at oral argument, Ms. Heard argued that declaratory judgment is an appropriate vehicle for anti-SLAPP immunity. Specifically, she pointed this Court to the case *Reisen v. Aetna Life and Cas. Co.*, where the Virginia Supreme Court held that the circuit court did not abuse its discretion by exercising jurisdiction over an action for declaratory judgment even though the same issue (regarding insurance coverage) was scheduled for adjudication in an upcoming tort action. 225 Va. 327, 334-35 (1983). In *Reisen*, the insurance company had an immediate need to determine its liability because, if coverage existed, then the company owed a duty to the defendant to negotiate a settlement. *Id.* at 335. Thus, the issue was ripe for adjudication. *Id.* Here, Ms. Heard has asserted no immediate need for declaratory relief. In fact,

by asserting anti-SLAPP immunity as a counterclaim, even if the Court held in her favor that her statements are protected, she would receive this relief at the same time as receiving the same relief under her anti-SLAPP defense. Importantly, this Court is not holding that declaratory relief could never be an appropriate vehicle for asserting anti-SLAPP immunity, but merely that, in this instance, it would be duplicative of the relief already requested.

Additionally, Ms. Heard also asserted that declaratory judgment is necessary for anti-SLAPP immunity because Mr. Depp could nonsuit at any moment and, thereby, deprive her of the opportunity to recover attorney's fees. Under Virginia's anti-SLAPP statute, however, this Court may only award reasonable attorney's fees to "[a]ny person who has a suit against him dismissed or a witness subpoena or subpoena duces tecum quashed pursuant to the immunity provided by this section . . .." Va. Code § 8.01-223.2(B). Here, even if Ms. Heard's counterclaims were to move forward, and Mr. Depp were to nonsuit, Ms. Heard still would not be able to recover reasonable attorney's fees under this statute because she would not have had Mr. Depp's suit dismissed, rather she would be proceeding under her own claim.

Overall, this Court does not find any persuasive reason to hear Ms. Heard's anti-SLAPP immunity argument twice, nor does it appear to be necessary to permit Ms. Heard's claim to move forward in case Mr. Depp should choose to nonsuit. As such, this Court declines to exercise jurisdiction over Ms. Heard's counterclaim for declaratory judgment. It is therefore dismissed.

## II. PLAINTIFF'S DEMURRER

In Virginia, a court may sustain a demurrer upon a finding that "a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted . . .." Va. Code § 8.01-273(A). A demurrer tests only the legal sufficiency of the factual allegations; it does not permit a court to evaluate the merits of the claim. *Fun v. Va. Military Inst.*, 245 Va. 249, 252 (1993). Accordingly, the Court must "accept as true all properly pled facts and all inferences fairly drawn from those facts." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557 (2011) (quoting *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 357 (2010)). Nonetheless, "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382-83 (1997) (citing *Fun*, 245 Va. at 253).

### A. The Demurrer to Count II for Defamation and Defamation *Per Se* is Overruled.

The elements of a defamation claim include: "(1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). On demurrer, "the trial judge is responsible for determining whether, as a matter of law, the allegedly defamatory statements are actionable." *Taylor v. Southside Voice, Inc.*, 83 Va. Cir. 190, 192 (2011). To be "actionable," a statement must be both "false and defamatory." *Schaecher*, 290 Va. at 91. Because statements of opinion cannot be "false," they are never actionable. *See Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132 (2003). For the reasons explained below, the Court finds that Ms. Heard has pled actionable statements for a defamation claim.

***The Requisite 'Sting'***

To qualify as defamatory, a statement must possess the requisite 'sting' to one's reputation. *Schaecher*, 290 Va. at 92. The Supreme Court of Virginia has previously stated that defamatory language is that which "'tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous.'" *Id.* (quoting *Moss v. Harwood*, 102 Va. 386, 392 (1904)). If language is merely "insulting, offensive, or otherwise inappropriate, but constitutes no more than 'rhetorical hyperbole,'" then it does not possess the requisite 'sting' to be considered defamatory. *Id.* Importantly, in deciding whether a statement is defamatory, a court must evaluate it in the context of the publication. *Id.* at 93.

Here, Ms. Heard has alleged defamation with respect to the following eight statements:

A. In a November 2018 interview with *GQ*, Mr. Depp stated that there was "no truth to [Ms. Heard's judicial statements of abuse] whatsoever" and said "[t]o harm someone you love? As some kind of bully? No, it didn't, it couldn't even sound like me." Further, the article quoted Mr. Depp as stating "[Ms. Heard] was at a party the next day. Her eye wasn't closed. She had her hair over her eye, but you could see the eye wasn't shut. Twenty-five feet away from her, how the fuck am I going to hit her? Which, by the way, is the last thing I would've done.'" Countercl. ¶ 63.

B. On April 12, 2019, Mr. Depp, through his attorney, is quoted in *Page Six*, accusing Ms. Heard of committing "defamation, perjury and filing and receiving a fraudulent temporary restraining order demand with the court . . .." *Id.* ¶ 66.

C. In June 2019, Mr. Depp, through his attorney, told *The Blast* that "Ms. Heard continues to defraud her abused hoax victim Mr. Depp, the #metoo movement she masquerades as the leader of, and other real abuse victims worldwide." *Id.*

D. On July 2, 2019, Mr. Depp, through his attorney, told *The Blast* that Ms. Heard, "went to court with painted on 'bruises' to obtain a Temporary Restraining Order on May 27." *Id.*

E. On July 3, 2019, Mr. Depp, through his attorney, stated to *People* magazine that "Ms. Heard's 'battered face' was a hoax." *Id.*

F. On April 8, 2020, Mr. Depp, through his attorney, told *The Daily Mail* that "Amber Heard and her friends in the media use fake sexual violence allegations as both a sword and shield, depending on their needs. They have selected some of her sexual violence hoax 'facts' as the sword, inflicting them on the public and Mr. Depp." *Id.*

G. On April 27, 2020, Mr. Depp, through his attorney, again told *The Daily Mail* that "[q]uite simply this was an ambush, a hoax. They set Mr. Depp up by calling

the cops but the first attempt didn't do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911." *Id.*

H. On June 24, 2020, Mr. Depp, through his attorney, accused Ms. Heard in *The Daily Mail* of committing an "abuse hoax" against Mr. Depp. *Id.*

Each of the above statements imply that Ms. Heard lied and perjured herself when she appeared before a court in 2016 to obtain a temporary restraining order against Mr. Depp. Moreover, they imply that she has lied about being a victim of domestic violence. In light of the #MeToo Movement and today's social climate, falsely claiming abuse would surely "injure [Ms. Heard's] reputation in the common estimation of mankind." *See Schaecher*, 290 Va. at 92. Therefore, this Court finds that the statements contain the requisite 'sting' for an actionable defamation claim.

***Protected Opinion Statements***

A statement is generally not defamatory when it is "dependent on the speaker's viewpoint . . .." *See Fuste*, 265 Va. at 133. Where the context of the statements and the positions of the people reading the statements "would allow them to reasonably conclude that [the] statement was purely her own subjective analysis," the statement is not actionable. *Schaecher*, 290 Va. at 106. However, even opinion statements are actionable if they "'imply an assertion' of objective fact." *Id.* at 103.

Although Mr. Depp's statements (and those of his attorney) can be understood as their opinion of what occurred, these statements nevertheless imply that Mr. Depp did not abuse Ms. Heard. These statements must survive demurrer because whether Mr. Depp abused Ms. Heard is a fact that is capable of being proven true or false.

***Mr. Depp's Statements are Not 'Fair and Accurate Accounts'***

Mr. Depp argues that his statements are protected as "fair and accurate accounts" of his lawsuit. Tr. 8:9-14. Because a party "has a right to institute and prosecute an action without fear of being mulched in damages for reflections cast upon the defendants," no action for defamation can lie from a publication that constitutes a "fair and accurate account of the issues in suit . . .." *Bull v. Logetronics, Inc.*, 323 F. Supp. 115, 135 (E.D. Va. 1971). In *Bull*, the court considered a press release that stated (1) the plaintiff sued defendants for "conspiracy to defraud," (2) plaintiff sued for "royalty payments and damages in an amount over $1,000,000.00," and (3) plaintiff was "seeking punitive damages, alleging a conspiracy to circumvent the provisions of a contract relating to manufacture and sale of film processors under U.S. patents . . .." *Id.* at 134. The court held that those statements were a fair and accurate summary of the allegations. *Id.*

Here, Mr. Depp's statements are notably different than those in *Bull*. *See id.* Although much of what Mr. Depp states is also contained in his Complaint, the statements do not appear to have been made in the context of attempting to recount litigation. Instead, Mr. Depp makes

factual assertions that do not fairly and accurately summarize the litigation that has taken place. Accordingly, his statements are not protected.

***Although Mr. Depp's statements may have been made in self-defense, Ms. Heard has alleged sufficient malice for her defamation allegations to survive demurrer.***

Under *Haycox v. Dunn*, so long as Mr. Depp's statements were "repelling the charge and not with malice," his statements would have been made in self-defense and therefore would be privileged. 200 Va. 212, 231 (1958) (internal citations omitted). There, the court recognized that, generally, the rule is "that it is the court's duty to determine as a matter of law whether the occasion is privileged, while the question of whether or not the defendant was actuated by malice, and has abused the occasion and exceeded his privilege are questions of fact for the jury." *Id.* at 229 (quoting *Bragg v. Elmore*, 152 Va. 312, 325 (1929)).

Because Ms. Heard has alleged facts in support of a showing of malice, the Court cannot properly decide this claim on demurrer. In support of her accusation of malice, Ms. Heard alleged that the *GQ* journalist, Mr. Heath, stated that Mr. Depp invited him to interview the actor because he was "angry – angry about a lot of things – and he's vengeful." Countercl. ¶ 33. Moreover, Ms. Heard has alleged that Mr. Depp has the intention of ruining her career; citing statements that he made to friends demonstrating a malicious intent. *See* Countercl. ¶¶ 17-19. Further, Mr. Depp has admitted his intent to destroy Ms. Heard's career by stating that he wanted her replaced on *Aquaman*. *See* Countercl. ¶ 7. Accordingly, Ms. Heard has sufficiently pled a malicious intent, which prevents a ruling on the self-defense privilege at this stage in the litigation.

Since Mr. Depp's statements contain the requisite 'sting', are not merely statements of opinion, and do not fairly and accurately describe litigation, the Court must overrule the Demurrer with respect to Count II. Additionally, although Mr. Depp may have made his statements in self-defense, Ms. Heard has pled malice to the extent that this Court cannot determine whether Mr. Depp's statements are privileged at the Demurrer stage.

**B. The Demurrer to Count III: VCCA is Sustained.**

Under the Virginia Computer Crimes Act ("VCCA"), a claimant must prove that (1) the person used a computer or computer network; (2) to "communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make a suggestion or proposal of an obscene nature, or threaten any illegal or immoral act"; (3) with the intent to "coerce, intimidate, or harass" another person. Va. Code § 18.2-152.7:1; *Barson v. Commonwealth*, 284 Va. 67, 71 (2012).

None of Ms. Heard's allegations satisfy all three prongs of the VCCA. First, Ms. Heard has alleged that Mr. Depp used a computer or computer network in four instances: when he "initiated, coordinated, overs[aw] and/or supported and amplified two change.org petitions"; when he "created, controlled, and/or manipulated social media accounts"; when he texted Mr. Bettany in 2013; and when he texted Mr. Carino in 2016. Countercl. ¶¶ 6, 8, 17, 19. This Court now examines each of these instances to determine whether they meet the other two VCCA prongs.

The allegation that "Mr. Depp has initiated, coordinated, overseen and/or supported and amplified two change.org petitions: one to remove Ms. Heard as an actress in the *Aquaman* movie franchise, and one to remove her as a spokeswoman for L'Oréal" fails under the second prong of the VCCA. *See* Countercl. ¶ 6. Nothing in that allegation implies facts showing that the change.org petitions included obscene language, threatened illegal or immoral acts, or suggest or propose obscene acts. *See* Va. Code § 18.2-152.7:1. Likewise, the allegation that Mr. Depp "created, coordinated, controlled, and/or manipulated social media accounts created specifically for the purpose of targeting Ms. Heard," also fails under the second prong of the VCCA. *See* Va. Code § 18.2-152.7:1. The pleading fails to demonstrate that the social media accounts communicated obscene language, suggested obscene acts, or threatened illegal or immoral acts. Because neither of those allegations meets the second element of the VCCA, they cannot move forward in this litigation.

The remaining two allegations of computer usage fail under the third prong of the VCCA because Ms. Heard has not alleged that they were made with the intent to "coerce, intimidate, or harass." *See* Va. Code § 18.2-152.7:1. Rather, it appears that Mr. Depp texted those statements, privately, to two of his friends, and Ms. Heard has not alleged that Mr. Depp intended for her to see them. Accordingly, this Court sustains the Demurrer to Count III since none of Ms. Heard's allegations satisfy the prongs of the VCCA.

## III. PLAINTIFF'S PLEA IN BAR IS GRANTED IN PART AND DENIED IN PART.

A plea in bar condenses "litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). The burden of proof rests with the moving party. *Id.* When considering the pleadings, "the facts stated in the plaintiffs' motion for judgment [are] deemed true." *Id.* (quoting *Glascock v. Laserna*, 247 Va. 108, 109 (1994)). Moreover, "[f]amiliar illustrations of the use of a plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); *res judicata*; usury; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the bill, etc." *Nelms v. Nelms*, 236 Va. 281, 289 (1988).

### A. Statements A through E Are Barred by the Statute of Limitations.

Under Va. Code § 8.01-247.1, Virginia's statute of limitations for a defamation action is one year. However, "if the subject matter of the counterclaim . . . arises out of the same transaction or occurrence upon which the plaintiff's claim is based, the statute of limitations with respect to such pleading shall be tolled by the commencement of the plaintiff's action." Va. Code § 8.01-233(B). To determine whether an issue arises out of the same transaction or occurrence, the "proper approach asks 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 154 (2017).

In *Funny Guy*, the court found that the facts were related in origin and motivation because they both stemmed from the plaintiff's desire to be paid for the work he had done. 293 Va. at 155. Plaintiff's claims also satisfied the time and space factors because both claims

involved a single payment dispute. *Id.* Since all of the theories of recovery "fit within a single factual narrative," the court held that they formed a "convenient trial unit." *Id.* The court also held that it was unlikely that the parties would anticipate a single payment dispute developing into multiple lawsuits and, therefore, the final factor was met. *Id.* Similarly, the Fourth Circuit held that a counterclaim was compulsory when a plaintiff filed a § 1983 action against a police officer and the police officer counterclaimed for defamation because it arose out of the same transaction or occurrence. *Painter v. Harvey*, 863 F.2d 329, 331 (4th Cir. 1988). The court deemed the counterclaim compulsory because both the claim and counterclaim stemmed from what transpired during the plaintiff's arrest, the resolution of one claim might bar the other claim via *res judicata* later, the evidence presented for both claims was virtually the same, and because there was a logical relationship between the two claims. *Id.* at 331-32; *see also Nammari v. Gryphus Enters. LLC*, 1:08cv134 (JCC/TCB), 2008 WL 11512205, at *1-3 (E.D. Va. May 12, 2008) (holding that Defendant's counterclaim for defamation was compulsory because both it and Plaintiff's wrongful termination claim arose from Plaintiff's termination).

Conversely, in *Powers v. Cherin*, the Court held that the plaintiff's claims did not "arise out of the same transaction or occurrence" because the first count for negligence stemmed from a car accident while the second count for medical malpractice stemmed from the doctor's subsequent medical treatment of the plaintiff. 249 Va. 33, 37 (1995). Likewise, the Fourth Circuit held that a defamation allegation in an amended complaint did not arise out of the same transaction or occurrence as the allegations in the original complaint and was therefore barred by the one-year statute of limitations. *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, No. 97-2397, 1999 WL 89125, at *2 (4th Cir. Feb. 23, 1999). There, Plaintiff attempted to amend its complaint to include reference to an allegedly defamatory letter written by a different author, directed to a different recipient, and published on a different date than the other letters alleged in the complaint. *Id.* Thus, they were separate instances of defamation and the second, un-related allegation was barred by the statute of limitations. *Id*; *see also Cojocaru v. City Univ. of N.Y.*, 19 Civ. 5428 (AKH), 2020 WL 5768723, at *3-4 (S.D.N.Y. Sept. 28, 2020) (holding that Plaintiff's allegations in an Amended Answer do not relate back because "[w]hile the alleged text messages concerned the same general subject matter as the *New York Post* interviews, they were a separate publication, directed toward a different recipient, and included some distinct accusations."). In both of the aforementioned cases, a party attempted to amend their own pleading. *See English Boiler & Tube, Inc.*, 172 F.3d 862, 1999 WL 89125, at *2 (describing how plaintiff attempted to amend his own complaint) and *Cojocaru*, 2020 WL 5768723, at *3-4 (describing how defendant attempted to amend his Answer). In those instances, the parties were not time-barred when they filed their initial pleadings.

Here, both Ms. Heard's allegations and Mr. Depp's allegations stem from the same set of facts: the Domestic Violence Restraining Order ("DVRO") proceeding in May 2016 and the events leading up to it. As previously stated, to succeed on his defamation claim, Mr. Depp is going to need to show (1) publication of (2) an actionable statement with (3) the requisite intent. *See Schaecher*, 290 Va. at 91. Ms. Heard would need to meet the same standard if her Counterclaims are permitted to proceed. In presenting evidence of publication, the statements that Ms. Heard alleges in her Counterclaims were not made in the same publication as the one referenced in Mr. Depp's Complaint. Whereas Mr. Depp's Complaint focuses on an op-ed published in *The Washington Post*, Ms. Heard's Counterclaim focuses on statements in *GQ*,

*People Magazine*, *The Daily Mail*, and other publications. To demonstrate actionable claims, both parties will likely need to present similar evidence regarding whether Mr. Depp actually abused Ms. Heard in May 2016. However, while Mr. Depp's Complaint focuses on Ms. Heard's intent in making the statements, Ms. Heard would instead need to present evidence on Mr. Depp's intent. Therefore, the only connection between the claims is in origin – they both stem from the 2016 incident. *See Funny Guy, LLC*, 293 Va. at 154. Because these claims arise from statements made in separate publications, on separate dates, and by different people, the Court is not persuaded that Mr. Depp could have anticipated, at the time of filing his Complaint, a need to defend against statements made to other publications. The lack of relatedness and failure to reasonably put Mr. Depp on notice of a potential counterclaim compels this Court to grant the Plea in Bar to Statements A through E.

### B. Mr. Depp is Not Entitled to Anti-SLAPP Immunity.

Mr. Depp asserted in his Plea in Bar that he is entitled to anti-SLAPP immunity for the statements that are the subject of Ms. Heard's Counterclaim.[1] As addressed earlier, Virginia's anti-SLAPP law provides immunity for statements "regarding matters of public concern that would be protected by the First Amendment." Va. Code § 8.01-223.2(A). Here, the Court finds no support for the notion that Mr. Depp's statements are on matters on public concern. Moreover, Mr. Depp's counsel neither argued nor addressed this point during oral argument or in their reply brief. Lastly, Ms. Heard has alleged sufficient facts in her Counterclaim to demonstrate that Mr. Depp may have made these statements with actual or constructive knowledge or with reckless disregard for whether they are false. *See supra* p. 8 (citing instances in the Counterclaim alleging that Mr. Depp made his statements with actual malice). Accordingly, the Court denies the Plea in Bar for anti-SLAPP immunity.

## IV. CONCLUSION

For the foregoing reasons, Count I is dismissed, the Demurrer to Count II is overruled, the Demurrer to Count III is sustained, and the Plea in Bar is granted for Statements A through E due to the lapsed statute of limitations. Count II with respect to Statements F, G, and H survive. Counsel shall prepare an appropriate order reflecting the Court's ruling and submit it to the Court for entry.

Sincerely,

[redacted]

Bruce D. White

[1] Mr. Depp's counsel did not address this point in his oral argument or in his Reply Memorandum. Ms. Heard's counsel stated that she believes this point was "conceded by [Mr. Depp's counsel] because it was not addressed in their reply." Oct. 16, 2020 Tr. 33:3-6.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of May 2021, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

Elaine Charlson Bredehoft (VSB No. 23766)
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