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 SUPPLEMENTAL PLEA IN BAR

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Plaintiff John C. Depp, II, by and through his undersigned counsel, hereby opposes Defendant Amber Laura Heard's plea in bar ("Plea").[1]

PRELIMINARY STATEMENT

Ms. Heard's Plea is her *third* baseless attempt to dismiss Mr. Depp's defamation claims and avoid a trial on the merits. 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") bars Mr. Depp's defamation claims against her, which remain pending before this Court, under the doctrines of res judicata, issue preclusion, and comity. Ms. Heard, however, ***cannot cite a single authority*** that supports her Plea that this Court dismiss Mr. Depp's defamation claims based on a judgment rendered in a *different country*, with *different disclosure and evidentiary rules*, between *different parties*, where Ms. Heard was *not* a party and was *not* subject to discovery on that court's authority.

Moreover, the timing and procedural history of the UK Action disproves Ms. Heard's contention that the UK Judgment was rendered after "full discovery" into the veracity of Ms. Heard's claim that Mr. Depp abused her during their marriage and Mr. Depp, thus, already "had his 'day in court'" to disprove this claim. *See* Pl. at 1. Critically, discovery in *this action* was (and still is) ongoing when the UK Judgment was rendered and, after the UK Judgment was rendered, this ongoing discovery revealed that Ms. Heard *lied in one of her witness statements submitted in the UK Action* on behalf of the UK Defendants, in which she had signed a Statement of Truth under risk of contempt of court. Ms. Heard's Plea, unsupported by any apposite

[1] Defendant Amber Laura Heard's Memorandum in Support of Supplemental Plea in Bar shall be cited herein as "Pl. at __."

authority, is nothing more than a last-ditch effort to avert further discovery that could reveal Ms. Heard's claims of abuse to be a false and avoid a trial of Mr. Depp's defamation claims against her on a truly full and complete record.

Ms. Heard's protests of "predatory libel tourism" and a parade of horribles that would result if the preclusive effect of UK Judgment is not recognized are merely strawman arguments propounded to distract from the fact that her argument that the doctrines of comity, res judicata and collateral estoppel bar Mr. Depp's defamation claims against her is legally and factually meritless. Indeed, *it is Ms. Heard*, not Mr. Depp, who stands to benefit from the timing and legal framework in the UK Action. Ms. Heard was a third-party witness to the UK Action and, thus, not subject to compelled disclosure on the UK Court's authority. She was, therefore, able to cherry pick evidence to feed to the UK Defendants to use in their defense, and remain immune from discovery that could test the veracity and completeness of this evidence. Ms. Heard got to hand pick the evidence the UK Court considered in evaluating whether her claims of domestic violence were true and, now, seeks to use the UK Judgment to bar the adjudication of Mr. Depp's defamation claims against her on a complete and fully-vetted record. This flies in the face of U.S. public policy favoring a determination of cases on the merits.

Ms. Heard would have this Court believe that, if Mr. Depp could not prevail on his defamation claims in the UK Action, Mr. Depp cannot possibly prevail on his defamation claims against Ms. Heard before this Court, where he bears the burden of proving her claims of abuse are false. Ms. Heard even goes as far as to misstate Virginia defamation law, erroneously claiming that it is Mr. Depp's burden to prove by "clear and convincing evidence" (as opposed to a preponderance of the evidence) that her claims of domestic violence are false, to bolster this contention. *See* Pl. at 1, 12. When the procedural posture of the UK Action and this action are

accounted for, however, Ms. Heard's argument crumbles. Notwithstanding the UK Judgment, Mr. Depp absolutely can prevail on his defamation claim against Ms. Heard with the benefit of discovery devices and expert analysis unavailable to Mr. Depp in the UK Action. Mr. Depp is entitled to a full and fair opportunity to try his claims against Ms. Heard on a complete, fully-vetted record. Accordingly, Mr. Depp respectfully requests that this Court deny Ms. Heard's Plea and impose sanctions on Ms. Heard for, once again, wasting the Court's time and resources with frivolous defenses propounded only to avoid a reckoning on the merits of Mr. Depp's defamation claims against her.

BACKGROUND

On April 27, 2018, *The Sun*, a UK-based newspaper, published an article that called Mr. Depp a "wife beater" based on Ms. Heard's 2016 claim that Mr. Depp had abused her during their marriage. The article was authored by Dan Wootton, the (then) Executive Editor for *The Sun*. Accordingly, on June 13, 2018, Mr. Depp initiated a libel suit against Mr. Wootton and the owner and publisher of *The Sun*, News Group Newspapers Ltd, both of whom are based the United Kingdom, in the United Kingdom.

Six months later, in December 2018, Ms. Heard published the defamatory Op-Ed which is the subject of this action. Mr. Depp commenced this action on March 1, 2019. Discovery commenced in this action shortly thereafter. On April 11, 2019, Ms. Heard filed her first motion to dismiss and plea in bar seeking dismissal of Mr. Depp's claims based on *forum non conveniens*. In his Letter Opinion, dated August 8, 2019, the Honorable Bruce D. White, Chief Judge, denied Ms. Heard's motion. Less than a month 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.

Meanwhile, in the UK Action, Ms. Heard submitted multiple witness statements on behalf of the UK Defendants, including a witness statement on February 26, 2020, which addressed Mr. Depp's theory advanced in both the UK and this action, that Ms. Heard had married him and falsely accused him of domestic abuse for financial gain. In this witness statement, Ms. Heard testified that she "remained financially independent from him the whole time [they] were together and the entire amount of [her] divorce settlement [from Mr. Depp] was donated to charity." *See* **Exhibit 1** (Third Witnesses Statement of Amber Heard at ¶ 4). Ms. Heard was also selectively funneling evidence to the UK Defendants to use in their defense.[2] Despite the fact that Ms. Heard was, voluntarily, the primary source of evidence for the UK Defendants' defense, the UK Court held that Ms. Heard was not a party to the UK Action and, thus, could not be compelled to provide any disclosures. *See* **Exhibit 3** (Judgment, dated March 6, 2020 (Nicol, J.) at ¶ 25(iii)). On the other hand, Mr. Depp, as a party, was obligated to produce all materials relevant to the UK Action in his possession, custody, or control, including materials collected or disclosed in connection with the ongoing discovery in this action.

Because Ms. Heard was not a party to the UK Action she was not only able to decide what materials to provide or withhold, but she was also able to control the timing of her selective disclosures. Indeed, Ms. Heard waited to disclose critical, and seemingly incomplete or modified, audio recordings, photographs, and text messages until the eve of the trial in the UK Action (the "UK Trial") and, in some instances, after the UK Trial was underway. Mr. Depp

[2] In a hearing before the UK Court, counsel for the UK Defendants' admitted: "Ms. Heard has given us some documents, she has given us some documents. But she does not claim to have given us all of them." *See* **Exhibit 2** (UK Hearing Tr. at 109:6-19).

was thus left in a position of making a third-party disclosure application against Ms. Heard two weeks before the UK Trial was scheduled to commence in order to test the authenticity and completeness of the materials she had chosen to provide to the UK Defendants at the eleventh hour, just days before the UK Trial was scheduled to commence. The UK Court denied Mr. Depp's request, finding that the heightened standard for seeking disclosure from non-parties had not been satisfied. *See* **Exhibit 4** (Judgment, dated July 2, 2020 (Nicol, J.) at ¶¶ 31-61). Ms. Heard also submitted two additional witnesses statements on behalf of the UK Defendants *just days* before the UK Trial commenced, wherein she commented upon the evidence in the "trial bundles" for the UK Trial.

The sixteen-day UK Trial commenced on July 7, 2020. In connection with a dispute over whether Ms. Heard could sit in the courtroom for the presentation of all evidence, ***the UK Court again acknowledged that Ms. Heard's position was not equivalent to Mr. Depp's "[b]ecause he is a party to the litigation, and she is not."*** *See* **Exhibit 5** (Decision, dated July 6, 2020 (Nicol, J.) at ¶ 3)) (emphasis added). Aside from the witness statements and live testimony presented at the UK Trial, including live testimony from Mr. Depp and Ms. Heard, most of the documentary evidence adduced at the UK Trial was either selectively disclosed by Ms. Heard or from the incomplete discovery record in this action. In fact, at the time of the UK Trial, *approximately nine months remained before the then-current deadline for the close of discovery in this action*, with dozens of party and non-party depositions outstanding, including Mr. Depp's and Ms. Heard's, and expert discovery had not (and still has not) yet commenced.

Back on the other side of the pond, Mr. Depp was aggressively pursuing party and non-party discovery in connection with this action, including, *inter alia*: (i) seeking discovery concerning Ms. Heard's purported donation of her entire divorce settlement to charity that she

testified to in her witness statement in the UK Action; (ii) requesting the production of Ms. Heard's electronic devices for a forensic analysis of the metadata associated with the texts, photographs, and videos Ms. Heard relied upon in the UK Action; and (iii) proceeding with the depositions of dozens of percipient witnesses, including many who saw Ms. Heard shortly after incidents of alleged abuse and observed no injuries. Tellingly, Ms. Heard fought tooth and nail to thwart disclosure of the donation-related discovery, filing a petition to quash Mr. Depp's subpoena to the Children's Hospital of Los Angeles ("CHLA"), one of the charities to whom Ms. Heard claimed to have donated half of her divorce settlement, filing a motion *in limine* eight months before the trial scheduled in this action seeking to exclude evidence concerning the amounts of her purported donations (which was promptly denied), and objecting to and aggressively opposing Mr. Depp's efforts to compel discovery from her concerning the donations. Amidst these efforts, Ms. Heard yet again replaced her (second) legal team and filed her Answer and Counterclaims against Mr. Depp, seeking $100 million in damages for defamation, violation of Virginia's computer crimes act, and declaratory judgment.

Unfortunately for Mr. Depp, the UK Judgment was rendered, on November 2, 2020, before any of the foregoing discovery disputes were resolved. In the UK Judgment, Justice Nicol, the fact finder in the UK Action, dismissed Mr. Depp's libel claim against the UK Defendants. In rejecting Mr. Depp's theory that Ms. Heard's claims of abuse were a "hoax" and "insurance policy" to protect her financially in the even that their marriage broke down, Justice Nicol cited Ms. Heard's testimony that she had donated her entire divorce settlement to charity, finding that "is hardly the act one would expect of a gold-digger." UK Judgment at ¶ 577. This finding is based on, what has now been revealed to be, false testimony from Ms. Heard.

Only after the UK Judgment was rendered did the outstanding discovery Mr. Depp had

been actively pursuing start rolling in. By an order dated December 18, 2020, the California court presiding over Ms. Heard's petition to quash discovery sought from the CHLA denied her petition and awarded sanctions in connection therewith. That same day a hearing was held before this Court on Mr. Depp's motion to compel Ms. Heard's production of discovery related to her purported donations of the divorce settlement and the Court granted Mr. Depp's motion to compel this discovery. This Court entered an order directing Ms. Heard to produce documents related to her purported donations of her divorce settlement by January 4, 2021 shortly thereafter, on December 30, 2020.

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 (not by Mr. Depp) within the one-year statute of limitations. That same day, Ms. Heard made her court-ordered document production, which included documents reflecting the donations she made to two charities, the CHLA and ACLU, after receiving her $7 million divorce settlement from Mr. Depp. Contrary to Ms. Heard's prior public statements *and the testimony in her February 26, 2020 witness statement submitted in the UK Action*, the production revealed Ms. Heard *had not* donated "the entire amount of [her] divorce settlement" to charity: the production showed that, of the $7 million divorce settlement, Ms. Heard only donated $100,000 to the CHLA and $450,000 to the ACLU.

The revelation that Ms. Heard had lied about donating her entire divorce settlement to charity prompted Mr. Depp to renew his efforts to seek discovery from the ACLU in this action and make an application, in connection with his request to appeal the UK Judgment, for permission to adduce this new evidence in support of his appeal. Although Mr. Depp was denied leave to appeal the UK Judgment and adduce the newly discovered evidence in support of that

appeal, the UK Court of Appeal recognized that Ms. Heard had mislead the UK Court by testifying in her witness statement that her entire $7 million divorce settlement "was donated." *See* **Exhibit 6** (Judgment, dated March 25, 2021 (Underhill, J.) at ¶ 40). Mr. Depp continues to pursue discovery from the ACLU: in March 2021, Mr. Depp served subpoenas upon the ACLU Foundation and two of its employees who are believed to be knowledgeable concerning Ms. Heard's donations and the preparation and placement of the Op-Ed; and, because, the ACLU witnesses have resisted the discovery sought by these subpoenas, Mr. Depp filed a petition in New York State court to compel compliance, which remains pending.

In February 2021, this Court continued the jury trial in this case from May 2021 to April 11, 2022, thus extending the discovery cut-off from April 2021 to March 2022. As of the filing of this opposition, in addition to the discovery Mr. Depp is pursuing from the ACLU witnesses, the following discovery remains outstanding: (i) over twenty depositions, including Ms. Heard's deposition which has, by agreement, been scheduled to take place over three days; (ii) responses to Mr. Depp's Fourth Set of Interrogatories, which Ms. Heard has objected to in their entirety and has, to date, refused to meet and confer; (iii) the production of documents and materials requested by Mr. Depp's Seventh Set of Requests for Production, which seeks, among other things, access to Ms. Heard's devices for a forensic analysis of ESI produced by Ms. Heard to date; and (iv) all expert discovery.

On April 13, 2021, Ms. Heard filed her motion for leave to file an amended answer and grounds for defense and a supplemental plea in bar, and to stay discovery. A hearing on Ms. Heard's motion was held on May 28, 2021. At this hearing, although the Court granted Ms. Heard leave to file an amended answer and plea, the Court denied Ms. Heard's request to stay discovery and cautioned Ms. Heard that her proposed arguments on the supplemental plea in bar,

which are now reflected in the Plea, appeared futile and could be sanctionable. *See* **Exhibit 7** (Hearing Tr. at 36-37). Ms. Heard, nonetheless, proceeded to file her supplemental Plea.

ARGUMENT

I. Ms. Heard Misstates Mr. Depp's Burden to Demonstrate Falsity

As a threshold matter, Ms. Heard materially overstates the extent to which the standards in the UK Action were more "favorable" to Mr. Depp than those in this action. While in the UK Action the UK Defendants did have the burden of proving their statements about Mr. Depp were true by a preponderance of the evidence, Ms. Heard she erroneously claims that Mr. Depp's burden in this action is to demonstrate falsity by *clear and convincing evidence*. Pl. at 1, 12 (citing *Jackson v. Hartig*, 274 Va. 219, 227 (2007)). In making this claim, however, Ms. Heard conflates the burden for proving the falsity with the burden for proving actual malice.

Under Virginia law, the elements of a defamation claim are (1) the publication of (2) an actionable statement with (3) the requisite intent. *Tharpe v. Saunders*, 285 Va. 476 (2013). A statement must be both false and defamatory in order to be actionable under Virginia law. *Id.* The requisite intent a plaintiff must demonstrate depends on whether the plaintiff is a private or public figure. *Jordan v. Kollman*, 269 Va. 569, 576 (2005). The "requisite intent" a public-figure plaintiff must prove is that the defendant acted with "actual malice," meaning the defendant made the actionable statement with knowledge it was false or with reckless disregard of whether it was true of false. *See Jackson*, 274 Va. at 227 (citing *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991)). Falsity and actual malice are, thus, distinct elements of a public-figure plaintiff's defamation claim, and only the latter must be proven by clear and convincing evidence. *Id.* (holding that a public figure defamation plaintiff must prove actual malice by clear and convincing evidence). A plaintiff need only prove falsity by a preponderance of the evidence. Thomas E. Spahn, *The Law of Defamation*, p. 73, ¶ 6.2 (2018

Ed.) ("In 1985, Virginia joined most other states in holding that a plaintiff must prove falsity . . . by a preponderance of the evidence."); *Pendleton v. Newsome*, 290 Va. 162, 174 (2015) ("The plaintiff's burden is proof by a preponderance of the evidence.").[3] Proving a fact by a preponderance of the evidence requires only a showing the occurrence of the fact was more likely than not. *See* Pl. at 4 (citing UK Judgment at ¶ 41); *Wells v. Commonwealth*, 15 Va. App. 561, 565 (Va. App. 1993).

Accordingly, the true difference in burdens of proof in the UK Action and this action is that, in the UK Action, the UK Defendants had to prove that it was more likely than not that Mr. Depp abused Ms. Heard and, in this action, Mr. Depp bears the burden of proving that it is more likely than not that Ms. Heard lied about the abuse. That the UK Court found that the UK Defendants met their burden is, thus, far less telling of Mr. Depp's ability to meet his burden in this action than Ms. Heard contends, especially when the Mr. Depp's ability to conduct more fulsome discovery and vet Ms. Heard's evidence is accounted for. In this action, Mr. Depp can actually compel discovery from Ms. Heard, depose Ms. Heard in advance of trial, conduct far more expansive third-party discovery, and present expert testimony concerning the authenticity of Ms. Heard's evidence. Any and all of these avenues could yield evidence that: had it been adduced in the UK Action, could have tipped the scales against the UK Defendants on their

[3] Here, the falsity element and actual malice element of Mr. Depp's defamation claims against Ms. Heard are more entwined than in the typical defamation suit, because proving that Ms. Heard's claims of abuse are false necessarily proves that Ms. Heard, the supposed victim of this alleged abuse, knew her claims of abuse were false. That the falsity and actual malice elements of a defamation claim are, indeed, distinct is perhaps best exemplified by cases where the allegedly defamatory statement is demonstrated to be false, but the plaintiff nonetheless fails to demonstrate that the defendant *knew* the statement was false when it was published, *i.e.*, the plaintiff fails to show actual malice. *See, e.g.*, *Kipper v. NYP Holdings Co., Inc.*, 12 N.Y.3d 348, 359 (2009) (dismissing defamation claim based on a statement that was demonstrably false, because "a reasonable jury confronted with the[] facts and circumstances could not find with convincing clarity that defendant's erroneous statements were published with actual malice").

burden of proving truth; and, if adduced by Mr. Depp in this action, tip the scales in his favor on his burden of proving falsity.

II. The UK Judgment Does Not Bar Mr. Depp's Defamation Claims Against Ms. Heard Under Principles of Res Judicata or Collateral Estoppel

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. Accordingly, to prevail on a res judicata defense, the party invoking the doctrine bears the burden of showing that the parties to the two actions are identical or in privity with each other and that the two actions arise from the same conduct, transaction or occurrence. *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 that the parties to the two proceedings are "the same or in privity." *See Columbia Gas*, 833 F. Supp. 2d at 560.

A. The Doctrines of Res Judicata and Collateral Estoppel Do Not Apply Because There Is No Mutuality Among the Parties to this Action and the UK Action

The UK Judgment does not bar Mr. Depp's defamation claims against Ms. Heard pursuant to the doctrines of res judicata or collateral estoppel because the parties to this action and the UK Action are not "the same or in privity" with one another. *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). Here, there is no dispute that the parties to this action and the UK Action are not the same.

Because Ms. Heard has no valid basis to claim privity with the UK Defendants, she is left to argue that mutuality among parties is no requirement at all. *See* Pl. at 16-21. The authorities Ms. Heard relies upon to argue that this Court should ignore the mutuality requirement and recognize the preclusive effect of the UK Judgment, however, are completely inapposite to the present circumstances. As an initial matter, in most of authorities cited by Ms. Heard in support of her argument that mutuality is not required for the application of res judicata or collateral estoppel, the parties to the two actions *actually were in privity with each other*, or had a privity-like relationship, such as insurer and insured. *See Lober v. Moore*, 417 F.2d 714 (D.C. Cir. 1968) (finding prior law suit barred plaintiff's subsequent lawsuit where defendants in both suits shared an employer-employee relationship); *Graves v. Associated Transp. Inc.*, 344 F.2d 894 (4th Cir. 1965) (finding defendant could invoke prior action, to which its employee was a party and concerned the same accident, as res judicata); *Kinsley v. Markovic*, 333 F.2d 684 (4th Cir. 1964) (affirming dismissal of action against taxicab driver, finding that plaintiff's prior action against the taxicab company the taxicab driver worked for operated as res judicata); *State Farm Mutual Ins. Co. v. Wright*, 173 Va. 261, 261 (1939) (finding that lawsuit against insured barred subsequent lawsuit against insurer who had assumed complete control over the first lawsuit); *Lohr v. McCurdy*, 52 Va. Cir. 352 (Rockingham Cir. Ct. 2000) (finding plaintiff's prior suit against defendant barred second suit against a different defendant who was in privity with the defendant to the first suit); *Bernhard v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 19 Cal. 2d 807, 812 (1942) (finding the plea of res judicata was available against an administratrix who appeared in the earlier suit, litigating the same right, merely in a different capacity).[4] Indeed, most of the

[4] In *Leach*, cited by Ms. Heard in support of her argument for collateral estoppel (Pl. at 22), the defendants to the action that was collaterally estopped *were parties to the initial proceeding* which was found to have collateral estoppel effect. *See Leach v. Virginia Bar*, 73 Va. Cir. 362

cases Ms. Heard cites to involve parties that were in an employer-employee relationship, which the Supreme Court of Virginia has recognized *is a relationship of privity. See Nero v. Ferris*, 222 Va. 807, 813 (1981) ("Under the circumstances, we hold Ferris was in privity with Noah Ferris, his employer."). Ms. Heard does not contend and presents no evidence to suggest that she had any type of legally-recognized relationship with the UK Defendants, such as employer-employee or insurer-insured. Ms. Heard contends only that she "actively participated in" the UK Action and, without basis, would have been "inextricably bound to it." *See* Pl. at 23.

The other cases cited by Ms. Heard involve entirely distinguishable circumstances. *Eagle Star*, for instance, involved the preclusive effect of a prior determination in a *criminal* proceeding, where the fact at issue was proven beyond a reasonable doubt, on a civil action, where the burden of proof on that same issue was only a preponderance of the evidence. *See Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 88-89 (1927). Here, the burden of proof on the veracity of Ms. Heard's claims of abuse in the UK Action was not so elevated as compared to Mr. Depp's burden in this action. *See* Section I, *supra.* In *Blonder-Tongue Laboratories*, the Supreme Court considered the application of the doctrine of res judicata in the patent context, where the preclusive effect of a determination of patent invalidity had implications for the efficient operation and policies underlying the patent system at large. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313, 331 (1971).[5]

(Richmond 2007). Leach brought a defamation claim against the Virginia State Bar and certain of its employees over the notice posted by the Virginia State Bar concerning Leach's disbarment. Beyond dismissing the defamation claim for failure to state a claim (Leach had, in fact, been disbarred), the court found that the defamation claim was barred by the earlier determination by Disciplinary Board, "*of which the Defendants were members*," to disbar Leach. *See id.* at *1 (emphasis added).

[5] *Omega Importing Corp.*, similarly, involved the prior adjudication of trademark rights in West Germany, a determination to which, the Second Circuit stated in dicta, "collateral estoppel would

Although the Supreme Court held that a patentee could be estopped from asserting the validity of a patent that has been declared invalid in a prior suit against a different defendant, the Supreme Court cautioned that estoppel should not apply where the patentee did not have a full and fair opportunity, procedurally, substantively, and evidentially to litigate the validity of the patent in the prior suit. *Id.* at 333. Consistent with this exception announced by the Supreme Court, Mr. Depp is not estopped from litigating his defamation claim against Ms. Heard because Ms. Heard's status as a non-party in the UK Action hindered Mr. Depp's ability to have a "full and fair opportunity . . . evidentially" to litigate the validity of Ms. Heard's claims of abuse. *See id.*[6] At most, the authorities cited by Ms. Heard show that res judicata and collateral estoppel can apply where the parties to two actions are not in strict privity, but a privity-like relationship; or in very special circumstances, where other burden or statutory-policy considerations warrant a departure from the mutuality requirement. Ms. Heard has not even alleged, much less demonstrated, any such privity-like relationship or special circumstances here that would warrant the application of res judicata or collateral estoppel to the UK Judgment in the absence of mutuality.

In apparent recognition of this flaw in her argument, Ms. Heard argues that, even if the application of res judicata and collateral estoppel requires that the parties to the same action be

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very *likely apply if it were a domestic judgment*." *Omega Importing Corp. v. Petri-Kine Camera Co.*, 451 F.2d 1190, 1196 (2d Cir. 1971) (emphasis added).

[6] *Hozie*, cited by Ms. Heard (Pl. at 18), is also distinguishable in this regard. *See Hozie v. Preston*, 493 F. Supp. 42 (W.D. Va. 1980). In *Hozie*, the Hozies sued their former attorney alleging he failed to adequately represent the couple including by, *inter alia*, exceeded his authority in negotiations over a disputed settlement agreement between the Hozies and Hart. The court held that the claim that the attorney had exceeded his authority in connection with the settlement agreement was barred by an earlier suit, by Hart against the Hozies to enforce the settlement agreement, which the Hozies vigorously defended. The Hozies, however, unlike Mr. Depp, had vigorously litigated the first action in the same U.S. jurisdiction as the second action and, thus, presumably had the same procedural tools available to marshal evidence in both actions, but most critically, the first action.

the same or in privity, she is somehow, in some way, in privity with the UK Defendants. *See* Pl. at 22-24. This argument is baseless. Indeed, in half of the cases Ms. Heard cites in support of her position, the court declined to apply res judicata or collateral estoppel because the parties to the two suits were found *not to be in privity*. *See Spiker v. Capitol Milk Producers Co-op., Inc. v. Loyd*, 577 F. Supp. 416, 419 (W.D. Va. 1983) (holding that collateral estoppel did not apply because the estates of two individuals who died in a car accident were not in privity); *Lane v. Bayview Loan Servicing*, LLC, 297 Va. 645, 657-59 (2019) (reversing circuit court's decision applying the doctrine of res judicata to bar a suit because the attorney-client relationship between the defendants to the two suits was insufficient to establish privity). Indeed, Ms. Heard's reliance on *Spiker* for the proposition that, because she "actively participated in" the UK Action and "was inextricably bound to it," Pl. at 23, is most unusual, given that, in *Spiker*, the court held that suits brought by the estates of two individuals who died in the same car crash were *not in privity with one another* and thus, *could not be bound* by an adverse outcome in one of the lawsuits. *See Spiker*, 577 F. Supp. at 418-20. Neither the holding in *Spiker*, nor any other authorities cited by Ms. Heard, stand for the proposition that Ms. Heard's mere participation in the UK Action grants her privity with the UK Defendants and renders her bound by the decision therein. *See id.*; *Lane*, 297 Va. at 657-59 (finding the attorney-client relationship between the defendants to two suits insufficient to establish privity); *Lee v. Spoden*, 290 Va. 235 (2015) (finding the sole shareholder of a corporation was in privity with the corporation because their interest were identical in the context of the suit); *Nero*, 222 Va. at 813 (finding privity between an employer and employee); *Bates v. Devers*, 214 Va. 667 (1974) (finding no issue preclusion because the issue before the court had not been decided in prior litigation).

Aside from the legal infirmities of Ms. Heard's argument, there is a more practical flaw

in Ms. Heard's argument. The UK Court held on multiple occasions that Ms. Heard was *not* a party to the UK Action *and did not treat her as such.*[7] As a result, Mr. Depp could not compel discovery from Ms. Heard in connection with the UK Action and could not test the evidence Ms. Heard voluntarily and selectively provided. It would fly in the face of the principles underlying the doctrines of res judicata and collateral estoppel if Ms. Heard could use the UK Judgment as a shield in this action, when she was not subject to the disclosure obligations of a party in the UK Action. The irony and gamesmanship inherent in Ms. Heard's request that this Court recognize the preclusive effect of the UK Judgment to bar Mr. Depp's claims against her, yet ignore the UK Court's determination and treatment of Ms. Heard as a non-party to the UK Action, is, truly, incredible and sanctionable.

B. The Doctrine of Res Judicata Does Not Apply Because this Action and the UK Action do not Arise from the Same Conduct, Transaction or Occurrence

Even if Ms. Heard had stated a basis for this Court to ignore the mutuality requirement in the doctrines of res judicata and collateral estoppel (*which she did **not***), Ms. Heard's res judicata defense suffers from another fatal flaw: the UK Action and this action do not arise from the same conduct, transaction or occurrence. *See* Va. Sup. Ct. R. 1:6. The Fourth Circuit has held that two separate instances of defamation, even if they concern the same subject matter such as the article published by *The Sun* and Ms. Heard's Op-Ed, do *not* arise from the same transaction or occurrence. *See English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 172 F.3d 862, at *2 (4th Cir. 1999). The UK Action and this action arise from the publication of different statements, by

[7] *See* Judgment, dated March 6, 2020 (Nicol, J.) at ¶ 25(iii) ("She [Ms. Heard] is not a party to this litigation and cannot be compelled to provide [disclosures]."); Judgment, dated July 2, 2020 (Nicol, J.) at ¶¶ 31-61 (denying third-party disclosure application against Ms. Heard because the standards for non-party disclosure were not satisfied); Decision, dated July 4, 2021 (Nicol, J.) at ¶ 3 ("Because [Mr. Depp] is a party to the litigation and [Ms. Heard] is not, I do not accept that their positions are equivalent.").

different defendants, at different times. Indeed, the UK Action, based on The Sun's article, was commenced before Ms. Heard even published her defamatory Op-Ed. Mr. Depp's libel claim against the UK Defendants and Mr. Depp's defamation claim against Ms. Heard, accordingly, do not arise from the same transaction, occurrence or event, as they are unrelated "in time, space, origin, [and] motivation." *Cf. Funny Guy LLC v. Lecego*, 293 Va. 135, 155 (2017).[8]

III. Interests of Comity Do Not Warrant Granting the UK Judgment Preclusive Effect

Ms. Heard's argument that this Court should, based on principles of comity, recognize the preclusive effect of the UK Judgment with respect to Mr. Depp's defamation claims against Ms. Heard suffers from the same infirmities as her arguments for the application of res judicata and collateral estoppel. The factual circumstances and applicable law simply do not warrant granting comity to the UK Judgment.

A. Comity Should Not Be Afforded to the UK Judgment Because it Does Not Qualify for Res Judicata or Collateral Estoppel Effect

As an initial matter, "[i]t is well established that United States courts are not *obliged* to recognize judgments rendered by a foreign state, but they may *choose* to give res judicata effect to foreign judgments on the basis of comity." *Gordon & Breach Science Publishers S.A. v. Am. Institute of Physics*, 905 F. Supp. 169, 178-79 (S.D.N.Y. 1995). Because the law is unsettled as to what comity precisely entails, domestic courts should be guided primarily by "principles of

[8] *Fox v. Deese*, which Ms. Heard cites in support of her argument that Mr. Depp's claim in the UK Action arise from the same transaction, occurrence or event as Mr. Depp's claim against Ms. Heard, is distinguishable from the present circumstances. *See* Pl. at 25 (citing *Fox v. Deese*, 234 Va. 412 (1987)). *Fox*, which addressed whether there had been misjoinder of defendants and claims, involved claims brought by a concert promoter against the city and city officials for conduct that occurred in connection with plaintiff's interactions with the city to arrange a Mardi Gras concert. *See Fox*, 234 Va. at 412. The conduct at issue, thus, arose from plaintiff's continuing interactions with the defendants, in their official capacities for the same employer, in connection with ongoing efforts to get a concert up and running. *See id.* Here, there is no comparable employer-employee relationship between Ms. Heard and the UK Defendants nor any concerted activity by Ms. Heard and the UK Defendants in the context of such a relationship.

fairness and reasonableness . . . in their preclusion determinations." *Id.* at 179. Here, principles of fairness and reasonableness militate against affording comity to the UK Judgment because, among other things, Mr. Depp was hamstrung in vetting the evidence Ms. Heard selectively fed to the UK Defendants by Ms. Heard's status as a non-party to the UK Action.

Moreover, it would be highly unusual to afford preclusive effect to the UK Judgment under principles of comity when the UK Judgment does have res judicata or collateral estoppel effect because the parties to the UK Judgment and this action are not the same or in privity with one another. U.S. courts, as well as the authorities Ms. Heard relies upon (*see* Pl. at 9-13), hold that a foreign judgment should not be afforded preclusive effect under principles of comity if the foreign judgment would not operate as res judicata or collateral estoppel. *See, e.g.*, *In re Ortega T.*, 573 B.R. 284, (Bankr. S.D. Fla. 2017) ("[E]ven if the Debtor had asked me to give comity to these judgments such recognition would be meaningless since . . . under applicable law, the factual findings of those judgments have no collateral estoppel effect."); *see also* Restatement (Fourth) Foreign Relations Law of the U.S. § 481 (2019) (a party to a U.S. proceeding may rely on a foreign judgment for "claim preclusion," *i.e.*, res judicata, or "issue preclusion," *i.e.*, collateral estoppel); Ruth Bader Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAW 720, 721 (1970) ("'Recognition' in this context refers to the *res-judicata status* of a foreign judgment[.]" (emphasis added)).

Here, the UK Judgment does not operate as res judicata or collateral estoppel with respect to Mr. Depp's defamation claims against Ms. Heard because the requisite mutuality or privity among the parties to this action and the UK Action is missing. *See* Section II.A, *supra*. The UK Judgment, accordingly, should not be afforded preclusive effect in this action under principles of

comity. *See 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."). Indeed, many of the authorities Ms. Heard relies upon in support of her request that this Court grant comity to the UK Judgment are distinguishable from the circumstances here precisely because the parties to the domestic and foreign actions in those cases were the same or in privity. *See Pony Express Records v. Springsteen*, 163 F. Supp. 2d 465 (D.N.J. 2001); *Oehl v. Oehl*, 221 Va. 618 (1980). These authorities only underscore why comity is not appropriate here.

The remaining cases cited by Ms. Heard do not support her request that this Court afford comity to the UK Judgment either. In multiple cases cited by Ms. Heard, 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 circumstances sufficient compatible with our jurisprudent to require us to give that judgment recognition and effect."); *see also Apostolou v. Merrill Lynch*, No. 06 CV 4944, 2007 WL 2908074, at *5 (E.D.N.Y. Oct. 5, 2007) (reserving judgment on whether judgments plaintiff received in the Employment Tribunal of London are entitled to recognition as collateral estoppel). One case does not even involve a foreign judgment (or the doctrine of comity), but rather a decree by a state juvenile court. *See Stevens v. Redwing*, 146 F.3d 538 (8th Cir. 1998).

Finally, *Schuler* is highly distinguishable from the present circumstances. In *Schuler*, the initial judgment by the Mexican court made a determination, under Mexican law, as to the ownership of property located in Mexico, a determination that a U.S. court would have little legal or factual basis to fairly adjudicate. *See Schuler v. Rainforest Alliance, Inc.*, 684 F. App'x

77 (2d Cir. 2017). The defamation claim in the subsequent lawsuit that was barred on principles of comity arose from a statement made about the property ownership *after, and presumably based upon, the Mexican court's determination. See id.* Here, by contrast, Ms. Heard's allegedly defamatory statements were not made on the basis of, or in reliance on, a determination in the UK Judgment, which was rendered long after her Op-Ed was published. Ms. Heard and Mr. Depp are the only ones who truly know whether Ms. Heard's claims of domestic abuse are true or false and it is in this action, to which they are both parties, that this factual issue should be adjudicated. To recognize the UK Judgment as precluding this adjudication between the parties would be an unfair and unreasonable application of comity.

B. Ms. Heard Cannot Invoke Virginia's Uniform Foreign-Country Money Judgments Recognition Act

Virginia's Uniform Foreign-Country Money Judgments Recognition Act ("UFCJRA"), invoked by Ms. Heard (*see* Pl. at 13-14), provides that, under certain circumstances, a party to a foreign action may enforce the resulting judgment of that foreign action against the opposing party in Virginia. The UFCJRA does *not*, however, explicitly or implicitly, provide that a *non-party* to a foreign action can enforce a foreign judgment rendered in that action in Virginia. Notably, Ms. Heard does not cite a single case that supports her apparent position t that she, as a non-party, can enforce the UK judgment – a judgment dismissing Mr. Depp's claim against the UK Defendants – in Virginia. *See, e.g., Guinness PLC v. Ward*, 955 F.2d 875, 877–78 (4th Cir. 1992) (addressing recognition and enforcement of a foreign money judgment entered by the High Court of Justice in London, England, among the same parties to the domestic action); *Seale & Assocs., Inc. v. Vector Aerospace Corp.*, No. 1:10-CV-1093, 2010 WL 5186410, at *1 (E.D. Va. Dec. 7, 2010) (recognizing and enforcing the judgment of Ontario Superior Court of Justice

among the same parties to the domestic action). Again, Ms. Heard's status as a non-party to the UK Action is fatal to the relief she seeks.

IV. No Parade of Horribles Will Occur if the UK Judgment is Not Afforded Preclusive Effect

First, Ms. Heard's claim that allowing Mr. Depp's defamation claims against her to proceed "encourages parallel litigation and predatory libel tourism" is false. *See* Pl. at 1-2. Mr. Depp's initiation of the UK Action in the UK and this action in the U.S. is not an example of "predatory libel tourism" but rather the consequence of the unique statements from which each action arose and basic principles of civil procedure. The UK Defendants, who reside in the UK, published an article in a UK newspaper and so, Mr. Depp initiated a lawsuit against them in the UK. When Ms. Heard, who resides in the U.S., subsequently published a defamatory Op-Ed in a U.S. newspaper, Mr. Depp initiated a lawsuit against Ms. Heard in the U.S. If Mr. Depp had initiated his libel suit against the UK Defendants in the U.S. or initiated his defamation suit against Ms. Heard in the UK, he almost certainly would have faced viable arguments of improper venue, lack of subject matter jurisdiction, and lack of personal jurisdiction over the defendants. The idea that Mr. Depp's position in this action and the UK Action constitutes or encourages "predatory libel tourism" is preposterous.

Similarly, Ms. Heard's assertion that declining to recognize the UK Judgment as res judicata or collateral estoppel would "effectively overrule and invalidate the UK Judgment," create "litigation havoc" where Mr. Depp could sue anyone who comments on Ms. Heard's claims or the UK Judgment, and "chill free speech" are false and overwrought. *See* Pl. at 3, 15-16. As a threshold matter, granting comity to a foreign judgment is discretionary, a U.S. court is not obliged to so. Courts decline to grant comity to foreign judgments all the time for all sorts of reasons – these foreign judgments aren't overruled or invalidated, they just are not, in the court's

discretion, "recognized." Moreover, the prolific press coverage of Ms. Heard's initial claims of abuse by Mr. Depp in 2016, Mr. Depp and Ms. Heard's legal disputes, and the UK Action and fall out from the UK Judgment belie Ms. Heard's claim that fear of litigation will chill free speech. The press has always been free to comment on the dispute between Mr. Depp and Ms. Heard and did so just as freely before the UK Judgment as after. Those members of the press that clarify that Ms. Heard *claims or alleges* Mr. Depp abused her, as opposed to calling Mr. Depp a "wife beater" like the UK Defendants did, clearly have no reason to be concerned about a defamation suit by Mr. Depp. A determination by this Court that Ms. Heard lied about the abuse and defamed Mr. Depp would not change that. The only thing that would change is that Mr. Depp would be vindicated and *Ms. Heard* could not continue falsely accuse Mr. Depp of domestic violence.

V. The Court Should Sanction Ms. Heard for Filing Her Frivolous Plea

At the conclusion of the hearing on May 28, 2021, on Ms. Heard's motion for leave to amend her answer and plea in bar and stay discovery, the Court, after nothing that, on first blush, "the requested motion does appear to be futile," stated as follows:

> So what I'm going to do, I'll grant the request for supplemental plea in bar for a motion to dismiss and grant the -- to allow the amended answer and grounds for defense. ***I will not, however, if it does come after everything and that I am right, that it is futile and not based on any sound legal basis, I mean, it will be sanctionable. I just want to make sure we all understand that.***

See **Exhibit 7** (Hearing Tr. at 36-37) (emphasis added). Despite the Court's admonition, and in defiance of same, Ms. Heard proceeded to file, on June 14, 2021, a brief in "support" of her new Plea and latest set of further amended pleadings that lack any sound legal basis, which the Court should sanction her.

Section 8.01-271.1 of the Code of Virginia reads in pertinent part:

The signature of an attorney or party constitutes a certificate by him that (i) he has read

> the pleading, motion or other paper, (ii) to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and (iii) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Va. Code § 8.01-271.1. Applying this statute, the Court should sanction Ms. Heard, as it was clear from the beginning that the lack of mutuality of the parties in this action and the UK Action doomed any res judicata, collateral estoppel, or comity defense. It is ***undisputed*** that the UK Defendants and Ms. Heard are not the same and, in fact, are completely distinct. On April 8, 2021, prior to the formal meet and confer on Ms. Heard's motion for leave, Plaintiff pointed out the futility of such motion and requested that Ms. Heard's counsel please provide what basis, if any, she had to support application of the doctrines of res judicata, collateral estoppel, or comity. *See* **Exhibit 8,** p. 2. In response, Ms. Heard's counsel cited the same five cases she later cited in oral argument on May 28th ***and in her opening brief on June 14th***. *See id.* at p. 1.[9]

The Court should sanction Ms. Heard for filing her motion for leave on April 13, 2021 and her supplemental Plea on June 14, 2021 because her counsel did not sign either with a well-founded belief that they were well grounded in fact or warranted by existing law. Nor does Ms. Heard even contend that her argument entails and extension of the existing law; she simply misstates the law. Finally, the fact that Ms. Heard included in her motion for leave a request for stay of discovery – albeit one the Court denied – suggests that at least part of her purpose was to improperly delay this case and to needlessly increase Mr. Depp's litigation costs.

CONCLUSION

For the foregoing reasons, Mr. Depp respectfully requests that the Court deny Ms. Heard's Plea and impose sanctions on Ms. Heard for filing her baseless Plea.

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[9] Later, during the meet and confer, Ms. Heard's counsel effectively admitted that the cases did not truly support her position, and that her argument would "be a case of first impression."

Respectfully submitted,

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Counsel for Plaintiff and
Counterclaim Defendant John C. Depp, II

Dated: June 28, 2021

Name: Amber Heard
Statement: Third
Party: Defendants
Exhibit AH 3
Dated 26 February 2020

Claim No: QB-2018-006323

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

BETWEEN:

John Christopher Depp II

Claimant

-and-

(1) News Group Newspapers Ltd

(2) Dan Wootton

Defendants

THIRD WITNESS STATEMENT OF AMBER HEARD

I, **Amber Heard**, of 2029 Century Park East, Suite 1500, LA CA 90067 WILL SAY AS FOLLOWS:

1. I am aware of the points that Johnny and some of his witnesses have raised in their statements in this claim and I will briefly respond to those here, trying not to repeat what I have already said.

2. In being asked to reply to the evidence Johnny has put forward in these proceedings, I am reminded again of how women who suffer domestic violence – and have historically tried to protect their abusive partners – have those attempts to protect their partners later weaponised against them: because we don't say something about it earlier, others assume it must not be true. It is incredibly upsetting for me to have to respond to the allegations he and his paid staff have now made against me in these proceedings, which were initiated by him, and in circumstances where our divorce

agreement required me to drop all claims of abuse but our agreed public statement made clear I had not made a false accusation. While these proceedings are not brought against me personally, they are directed at the veracity of my allegation of domestic violence. I am astounded that years after our divorce agreement was concluded, I continue to have to answer his continued harassment and bullying, and I continue to be blamed by him for a mess of his own making.

3. Johnny says that I have been diagnosed as borderline (or borderline toxic narcissistic) personality disorder, and that I have other unspecified personality disorders - that I am a sociopath, etc. This is all completely untrue.

4. As for what Johnny says about my so-called "agenda" in marrying him – for financial benefit or to somehow further my career – that is preposterous. I remained financially independent from him the whole time we were together and the entire amount of my divorce settlement was donated to charity. In fact, my desire to remain financially independent was one of the main sources of conflict during our relationship. It is not true that I told him I admired his films early in our relationship (to contradict one of his examples). I was always very clear with him that I hadn't seen his movies; it was something we joked about.

5. Johnny says I often drank more than him, and that I am a regular/heavy drug user. That's just not true, although of course I drank more than him during the brief periods when he was sober. If he was sober, then to be respectful, I would usually check with him that it was okay for me to drink wine in front of him. He would say yes and often insisted on pouring my wine.

6. I am not a habitual drug user. During our relationship I would say that I could count the number of times I attempted to smoke marijuana on two hands. I don't like it. I am not a personality that likes to be out of control. I did not take cocaine at all when I was with Johnny. I have taken MDMA or mushrooms a handful of times with friends. I was not under the influence of recreational or illegal drugs during any of the occasions set out in my last statement.

7. I was prescribed Provigil in my twenties, as I was having a hard time with sleep and that was causing problems with my work schedule: I was sometimes falling asleep in the middle of the day. I saw a sleep specialist who prescribed me the drug, which I take to this day in the prescribed dosage. I have not upped the dosage since I first started taking it. I am not addicted to it and I have never taken it outside of the way that it is prescribed.

8. I do like to drink wine, but I don't like to get drunk. I have never drunk two bottles of wine in an hour as Johnny claims; I couldn't do it and I wouldn't want to. I rarely drink to an extent that would get me past what I would characterise as "tipsy." Johnny's usage was something else entirely, as I have said. I was not drunk on any of the occasions that I talk about in my last statement. I was not drinking heavily on my birthday as Johnny says; my recollection is that I had not been drinking a great deal that evening.

9. As the principal and often sole advocate for Johnny's sobriety, it is preposterous that I could ever have encouraged Johnny to drink or take drugs. My well-being and livelihood would be severely and negatively impacted by Johnny's use. It was in my self-interest to advocate for and to support and protect his sobriety. To this end, I spent years trying to support him to get sober to help him and to save our relationship. As far as his allegation about the whiskey shot goes, it is not true – and I don't even drink spirits. It is difficult for me to even be asked to have to answer these allegations.

10. I did not lie about his drinking or drug use; frankly there was no need to lie, it was clear to everyone around him that he was doing drugs and drinking and he himself invited medical intervention to address it. It was clear throughout our relationship, throughout our divorce, and from the material in the public domain – including pictures of cocaine on his lapel on a red carpet or drunken appearances at awards shows – Johnny has issues with drug and alcohol use.

11. As I said in my previous statement, Johnny's violence often coincided with his substance abuse. I would sometimes take photographs of damage Johnny caused or take recordings on my phone to be able to show him – after he sobered up – how he would speak and behave towards me and the damage he would do. I exhibit at AH 3

a video recording that I took of Johnny in the kitchen shouting and smashing things sometime in 2016.

12. Johnny has said I was continually verbally and physically assaulting him during our relationship – he paints a picture that I was somehow the instigator and the abusive partner. That's not true. It is true that I had to use my body and limbs to protect myself from Johnny's violence and abuse. He also often referred to verbal insults, or even just perceived criticism, as "punches" or "hits". As someone who surrounded himself with people and created a life which meant he never had to face criticism or critical feedback of any kind, Johnny would often refer to even perceived criticism as "blows", "jabs" or "right hooks".

13. He says that, during the December 2015 incident, I violently attacked him and scratched his face. I have already explained the violence that occurred that night. I was in fear for my life – he was suffocating me and I was genuinely scared that he might accidentally kill me without realising he had. I have no recollection of hurting him – and it is, again, difficult for me to be asked to answer these allegations when the next thing I can remember after the bedframe splintered is my friend Rocky coming in and saying "Oh my God!" when she found me on the floor, surrounded by chunks of my own hair and blood, and later called a nurse to do a concussion check on me.

14. I have read Samantha McMillen's statement, where she says she saw me uninjured after this incident. I can't say what Samantha saw, but I remember that she came over while I was getting my hair and makeup done in PH 5 on 16 December to cover up the injuries so that I could make my scheduled TV appearance on the James Corden show. At one point, she gave me a hug and held me while I cried. I was tender, my ribs were hurt, and my movement was stiff, and Samantha had to help me get into my clothes. I think it would have been obvious to anyone that I was in pain. I cannot imagine the motives of anyone who could say otherwise when it was, to me, a very clear and palpable memory we shared of dealing with the aftermath of an incredibly traumatic experience.

15. Johnny says in his statement that on the show I appeared visibly uninjured. I exhibit at AH 3 a video clip from YouTube of my appearance on the James Corden show. As can be seen from the clip, I am wearing a large amount of makeup, which was put on

specifically to cover the marks Johnny had left on my face. I had to wear the dark red lipstick that I am wearing for the show because it was the only colour that could hide the swelling and bleeding from my lip.

16. I did not punch Johnny after my birthday party in April 2016, as he alleges. I did not throw anything at him during the March 2015 staircase incident. I recall that Johnny threw a can of Red Bull at Debbie Lloyd. I never threw a remote control at Johnny – if Johnny did really say that to Kevin Murphy, then it is not true.

17. Sean Bett has said I was abusive to Johnny. Sean and other members of Johnny's security might have heard arguments. I don't deny shouting at Johnny during some of our fights, and Sean might have overheard that. I did, at times, throw objects at Johnny or in his direction in an effort to protect myself from his violent assaults. But I don't recall Sean ever being there when I threw anything at Johnny.

18. Ben King says I spoke to him on the way back from Australia. I don't recall saying "Have you ever been so angry with someone that you just lost it." But if I said anything like that, it would have been about Johnny, not me, and in the context of me trying to make sense of him being so angry that he lost control the way that he did.

19. I don't deny that we had verbal arguments and have, at times, said insulting things in response to the verbal abuse that I had become accustomed to receiving from Johnny.

20. I would also like to use this opportunity to briefly describe some other incidents that some people have spoken about but which I did not deal with in my first statement.

21. In June 2013, in the early days of our relationship, Johnny and I were in Hicksville, staying at a themed trailer park with some friends. One night around the campfire, Johnny got upset with a female friend for what he completely misinterpreted – a platonic interaction that he (wrongly) perceived as some sort of attempt to come on to me. By this point, I was already accustomed to the reaction that followed. He grabbed her by the wrist and threatened her by talking about the pressure that would be needed to break it if she didn't admit that she was trying to flirt with me. Johnny and I went back to our trailer cabin where he continued to fight about it. By that point, the amount of

cocaine he had taken affected his ability to make rational sense and he went into a manic state. He trashed the trailer in a rage. I especially remember a lot of smashed glass. He broke light fixtures and he broke the frosted glass front of a cabinet, and I think he threw glasses at me. He accused me of being "the moral police" and "lesbian camp counsellor" and of hiding his drugs. I had a pretty dress on that I'd dyed pink – and loved and wore all the time: he ripped one of the straps and then ripped it off me at the front, claiming to be searching for the drugs. I deal with the rest of this incident in the confidential annex to this statement.

22. Sometime before my birthday in April 2016, I remember that I had to postpone an audition that I had for a film about Marilyn Monroe, called 'Blonde'. Auditions—particularly in movies with male actors—were often a major trigger for Johnny. If I was even trying to work, Johnny would use it as an excuse to blame me to justify going on a bender— to drink, take drugs, and often not come home. I can't remember exactly what Johnny's reaction was about that particular film, but we had a big argument. I remember crying about it, and I remember talking to Kristy Sexton about it. She was trying to ask me about my situation with Johnny, which was unusual because we normally talked about work and acting. Though I was still trying to protect Johnny at this time and didn't tell her that he was hitting me, I do remember – from the questions she was asking me – that she seemed to know or suspect that something had been going on.

23. Throughout the relationship, others noticed I had cuts and bruises. I made excuses. People asked me 'is he hitting you?' I would deflect it; I wasn't sharing it with people because I was trying to protect him and our relationship – and to protect myself from the humiliation that I felt about anyone knowing that I would allow this to happen to me. I became an expert in covering up the bruises and injuries. Later in the relationship, it became impossible to hide. I was reserved but increasingly open with the few people I could trust about what was happening to me. To my own detriment, and in a vain attempt to assert some agency over my own life, I represented my reality as if I was more in control of it than I really was.

24. Except for after the violence on 15 December 2015, I didn't seek medical treatment for physical injuries because I was trying to manage it on my own as best I could – I learnt

how to manage my injuries and protect them from being discovered. I didn't want to expose what Johnny had been doing to me. I was trying to protect our privacy and I was worried that, given his profile, that it could be leaked. I was – to my own detriment. – trying to protect him and our relationship. I only called for medical help in December 2015 because I was concerned that I had sustained a concussion.

25. I understand that it has been said that I had returned from the Bahamas with Johnny in 2014. I may well have been mistaken about whether I had returned on my own or together with Johnny, but what I can say is – contrary to what Johnny has said – I went to stay in a hotel with friends when we got back to LA because I did not feel safe to be around him. I know the medical notes say that this was a joint decision taken by me, him and the medical team that we spend some time apart after what happened in the Bahamas. But I will say that it was because I insisted that I couldn't be around him because I was scared.

26. I understand that Johnny refers to the temporary restraining order (TRO) being "dismissed with prejudice". It is important to understand that this was not because of any legal challenge to the TRO or the evidence on which it was based; it was the result of our divorce settlement. This is clear from Section 8.1 of the divorce judgment, which states:

> *Petitioner represents, and Respondent acknowledges and agrees, that on August 16, 2016 Petitioner dismissed her Request for Domestic Violence Restraining Orders against Respondent, with prejudice, in this dissolution action. The parties agree that neither Petitioner nor Respondent was the prevailing party for purposes of Code of Civil Procedure Section 1032J Family Code Section 6344, or any other statute.*

27. Because of the terms and conditions secured in my divorce settlement, and because by then we were no longer sharing a residence, it became unnecessary for me to engage in and pursue a separate legal action in order to obtain a permanent restraining order (PRO).

28. I just wanted Johnny to leave me alone and for it all to be over – and hoped the divorce agreement would put it to an end so that we could both move on with our lives. Our

agreed public statement at the time of the divorce made clear that I had not made a false accusation (*"Neither party has made false accusations for financial gain"*). I did not anticipate that Johnny would later sue a newspaper claiming I had lied. The Sun, in common with many news organisations, has subsequently reported on the TRO application. I was not involved in that reporting nor did I do anything to encourage it. Although I am not being sued personally in this claim, I feel that the action is very much aimed at me because Johnny is using it a platform to repeat his false allegations that I lied about my experience of domestic violence in an attempt to address his perceived loss of his reputation at my expense, which I find very upsetting. That is why I am giving evidence in these proceedings.

STATEMENT OF TRUTH

I believe that the facts set out in this statement are true.

Amber Heard

26 February 2020

Claim Number: QB-2018-006323
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Royal Courts of Justice
Strand, London
WC2A 2LL
Wednesday, 26th February 2020
Before:
MR. JUSTICE NICOL

BETWEEN:
JOHN CHRISTOPHER DEPP II
Claimant
-and-
(1) NEWS GROUP NEWSPAPERS LTD
(2) DAN WOTTON
Defendants

(Computer-aided Transcript of the Stenograph Notes by Marten Walsh Cherer Limited, 2nd Floor Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP. Telephone Number 020 7067 2900. Fax Number 020 7831 6864 e-mail: info@martenwalshcherer.com)

MR. DAVID SHERBORNE and MS. ELEANOR LAWS QC (instructed by Schillings International LLP) appeared for the Claimant.

MR. SASHA WASS QC, MR. ADAM WOLANSKI QC and MS. CLARA HAMER (instructed by Simons Muirhead & Burton LLP) appeared for the Defendants.

PROCEEDINGS

(Transcript prepared without access to documents)

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SHERBORNE

MR. JUSTICE NICOL: Yes, Mr. Sherborne.

MR. SHERBORNE: May it please your Lordship, I appear with Ms. Laws QC for the claimant, Mr. Johnny Depp, a well known actor, who sits behind me in court, in this, his libel action against the defendants, News Group Newspapers Limited and the journalist, Dan Wootton, who are represented by Mr. Wolanski QC, Ms. Wass QC and Ms. Hamer.

As your Lordship is aware, this is the pre-trial review of this libel claim, which is due to be tried on 23rd March with a time estimate of ten days. Can I just begin with a little housekeeping. Your Lordship should have four files. I hope they have been updated overnight with a number of documents —

MR. JUSTICE NICOL: I received a bunch of documents just now, and I said they were not to be inserted.

MR. SHERBORNE: I am grateful. I have them in the same form in an envelope.

MR. JUSTICE NICOL: There we go.

MR. SHERBORNE: I can take your Lordship to them, in so far as they become relevant today. You will have also received skeleton arguments from both sides which suggested a certain amount of pre-reading. I am not sure whether your Lordship had an opportunity to do that pre-reading.

MR. JUSTICE NICOL: I did some.

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MR. SHERBORNE: I am grateful. There is a time estimate obviously of one day for this hearing, but I am fairly confident we can achieve that, if not something less than that.

Can I begin by briefly explaining the history and nature of the proceedings, because it is going to be relevant across these applications and it sets them in context. I will do so relatively briefly. Your Lordship will have seen already from the material you have read that this a libel action brought by Mr. Depp over an article which was written by Mr. Wootton and first appeared online on the Sun's website on 27th April of 2018 under the headline, "Gone Potty. How can JK Rowling be 'genuinely happy' casting wife beater Johnny Depp in the new Fantastic Beasts film?"

MR. JUSTICE NICOL: This is 27th —

MR. SHERBORNE: April 2018 my Lord. I will not take my Lord to that article unless you wish me to do so, but the words "wife beater" in the headline was later removed but the article remained online in the same form. A very similar article was published in the hard copy issue of the Sun newspaper the following morning, 28th April. A copy of that is in the bundle. Just to summarise, the article was in the form of an open letter by Mr. Wootton to the author JK Rowling, criticising her for casting the well known actor in a role in

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her new film in the Harry Potter series, but the main criticism, the attack, was reserved for Mr. Depp himself, who was accused of being a wife beater who had seriously assaulted his former wife, the actress Amber Heard, as the article states pretty unequivocally, your Lordship will have seen. Furthermore, Mr. Wootton also took the opportunity to bring in the #MeToo movement as some form of support for his attack, citing quotes said to have come from the actress Katherine Kendall, one of Mr. Weinstein's victims. Your Lordship will have seen the text which a furious Ms. Kendall sent to the Sun and Mr. Wootton after the article came out, in which she stated she had been misled by the newspaper, disavowed the attempt to use her to defame Mr. Depp, and said that she did not say and had no knowledge that he had hit Ms. Heard in any way, but rather, as far as she understood, it was Ms. Heard who was abusive towards Mr. Depp. Ms. Kendall is a witness in these proceedings.

Pre-action correspondence followed, with Mr. Depp's letter of claim being sent on 2nd May 2018, attaching Ms. Kendall's text that I have just referred to. The defendants responded by letter on 15th May, denying the claim. Proceedings were therefore issued on 1st June 2018, with particulars of claim being served on 13th. I am sure your Lordship has seen them, but it is important to remind

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his divorce proceedings over which Ms. Heard has asserted rights of confidence he has to ask Ms. Heard first. That is how it works. But what Ms. Afia says is: "I do not believe it is appropriate for the claimant to make a request to Ms. Heard to waive the effect of a protective order she has put in place." Why are not? Ms. Heard is obviously going to say yes. She also says: "I do not consider the matter of what was ...(reads to the words)... one that the UK court can determine." We are not asking the UK court to determine that. All we are asking Mr. Depp to do is disclose these documents to us. If that involves him asking Ms. Heard if she has any objection under the protective order he should do so, he should ask. The answer is obviously going to be yes. So it is not a good excuse. In addition, what Ms. Afia said at 37 is, "Anyway, you can get the documents from Ms. Heard". This say theme that permeates Schillings' response. That is just not an answer. It is Mr. Depp who must be disclosing these documents, it is not good enough to expect us to try and get them off Ms. Heard. She is not under any duties of disclosure, and anyway, she is out of the jurisdiction, so even if we did want to force her to give disclosure, we could not.

MR. JUSTICE NICOL: One of the points I think that is taken against you is that orders for specific disclosure must be

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both necessary and proportionate. I think it is being said against you that if these documents are available through other means, why is it proportionate to require the claimant to disclose them?

MR. WOLANSKI: Well, in brief, yes, Ms. Heard has been -- as Mr. Charalambous sets all this out. Ms. Heard has given us some documents, she has given us some documents. But she does not claim to have given us all of them. It would be extremely unfortunate if we had to put pressure on her as a witness in this case, a key witness in this case, to provide us with all the documents that Mr. Depp has failed to provide. That causes her not only obviously inconvenience, it almost certainly causes her expense, and it puts stress on her, which she should not be under. She is a witness in these proceedings. It is Mr. Depp who has brought the libel case, not Ms. Heard. He is the one who should be doing the work of disclosure. All he has to do is give them to us, ask Ms. Heard if there is a problem and then give them to us.

Finally, medical records. There is an important issue in the case as I have already said about the claimant's medical regime during the relationship. It is not disputed by the claimant that he should be disclosing medical records. It was initially disputed. He said no he is not going to give -- he has not searched for medical records. He was taken to task

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about that by my solicitors and finally said that, yes, okay he will disclose them. But we know that there are records which exist which he has not himself been provided with by his own medical practitioners for review.

MR. JUSTICE NICOL: Just a moment. (Pause) No records exist which claimant has not?

MR. WOLANSKI: Well, it is set out in Ms. Afia's statement, but the claimant accepts that there are medical professionals that he consulted during the period of the relationship and two of them are named, not all of them, but two of them are named, from whom his solicitors have requested records -- we have to say it is taken an awfully long time to do it, but those medical professionals have not provided them. That is not good enough. He is obviously entitled to them, they are his records. Ms. Afia explains that at paragraphs 30 onwards in her statement at tab 9, B/258(g), paragraph 30. She says: "It is not proportionate to require the claimant to undertake searches of all its medical records ...(reads to the words)... reasonable." We do not know what the attempts are, they do not tell us when they were made, they just say they are reasonable. How do we know? "Attempts made to date have been more than reasonable. In relation to Dr. Kulber there has been no further update." That is just not good enough. All he has to do is ask for his own records. "I understand

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Ms. Heard has served ...(reads to the words)... that subpoena." Maybe, maybe not, but that is a far more circuitous route than Mr. Depp simply getting them from his own doctor. "It is suggested that Brown Rudnick continue to do so in order to be co-operative..."

MR. JUSTICE NICOL: I will ask Mr. Sherborne about this, but it seemed to me that there was probably a typographical error in the sentence beginning: "Again it is either necessary nor proportionate". I think that should be read as "neither necessary or proportionate".

MR. WOLANSKI: I think it must be. We want the claimant to be required to get these records, and review them and if they come within 31.6, to disclose them. We want that to happen quickly. In addition, in relation to notes that have been provided in relation to Dr. Kipper, who is the doctor whose notes from his surgery we have just been looking at, the issue there is a little different, it is that those have been redacted. We do not question that there may be scope for redaction, we do not know. We find it a little unlikely, given that Dr. Kipper appeared to be treating the claimant mainly for his addictions, but if we are told that there are medical matters completely outside the ambit of this case, so be it. But the problem here is that when those records were disclosed on 23rd December by Brown Rudnick they were subject

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Neutral Citation Number: [2020] EWHC 505 (QB)

Case No: QB 2018 006323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Media and Communications list

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2020

Before :

MR JUSTICE NICOL

Between :

John Christopher Depp II	**Claimant**
- and -	
(1) News Group Newspapers Ltd	**Defendants**
(2) Dan Wootton	

Eleanor Laws QC and David Sherborne (instructed by **Schillings International LLP**) for the **Claimant**
Sasha Wass QC, Adam Wolanski QC and Clara Hamer (instructed by **Simons Muirhead & Burton LLP**) for the **Defendants**

Hearing date: 26th February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE NICOL

possession' must be, Mr Wolanski submits, a contrast to documents which are within his control and to which the duty of disclosure extends (see CPR r.31.8), so there is a further gap in the evidence from the Claimant as to whether other tapes may be within the Claimant's control if not in his personal possession.

viii) Ms Afia's reference to Ms Heard having access to the tapes is nothing to the point. While she has provided a witness statement which the Defendants have served, she is not a party to the litigation. Accordingly, she does not, but the Claimant does, have disclosure duties.

24. Mr Sherborne, who made submissions regarding disclosure on the Claimant's behalf, argued:

i) The two tapes referred to in the *Mail Online* articles had been disclosed.

ii) Whether or not there were other tapes 'out there' was immaterial. The Defendants had to show reasonable grounds for believing that the Claimant had them in his control. The Defendants could not do so.

iii) Nowhere on the tapes that have been found does the Claimant admit to hitting Ms Heard.

iv) In addition, disclosure would only be ordered if it was necessary in the particular case (see for instance White Book 2019 paragraph 31.0.1). The overriding objective in CPR r.1.1 also requires the Court to consider the proportionate cost of any case management direction. Since the Defendants could get these tapes (if such exist) from their witness, Ms Heard, it is neither necessary nor proportionate to require the Claimant to disclose them.

v) In any case the draft order is far too wide since it seeks disclosure of all recordings which include the voice of Amber Heard (whether or not they also include the voice of the Claimant) and irrespective of the topic on which she is speaking.

25. I agree with Mr Wolanski that the Claimant should be required to make some further disclosure in relation to audio tapes.

i) I agree with him that it is relevant that the articles in *Mail Online* speak of 'tapes' in the plural as a 'series' of conversations, since that gives grounds to believe that what has so far been disclosed may not be the entirety of the relevant tapes which exist.

ii) Mr Sherborne is, of course, right that it is insufficient for the Defendants to show that there are grounds to believe that there are further tapes 'out there': they must show that there are grounds to believe that there are such tapes within the Claimant's control. However, in my view, Mr Wolanski has overcome that hurdle. After all, the recordings were in part apparently of conversations between the Claimant and Ms Heard. It was also Mr Waldman, the Claimant's American lawyer (or one of them), who came into possession of two of the tapes. I am also persuaded by Mr Wolanski's submissions that the evidence on the Claimant's behalf does not satisfactorily address the matter.

iii) I also agree with Mr Wolanski that it is nothing to the point that the Defendants may have (through Ms Heard) an alternative route to obtaining these tapes. She is not a party to this litigation and cannot be compelled to provide them. The Claimant is a party to the litigation and, in accordance with the order of Master McCloud, it is his duty to provide disclosure.

iv) As Mr Wolanski was inclined to agree in reply, the order as presently drafted is too wide. It cannot extend beyond tapes which are germane to the issues in the case. Mr Sherborne is right that the draft order would require the Claimant to disclose tapes whether or not that was the case, but this could be addressed by inserting into paragraph 1(a) of the draft order wording on the lines of 'so far as required by CPR r.31.6'.

v) I also do not see the justification for subparagraph b of the draft order ('stating when the recording came into existence and by what means they came into existence'), nor for subparagraph c ('stating when the Claimant first came into possession or control of the recordings').

vi) The duties on standard disclosure include the duty to disclose documents on which [the party making disclosure] relies – see CPR r.31.6(a) and so it is no complete answer that the tapes which Mr Waldman obtained assist the Claimant's case, rather than the Defendants'.

vii) Given the approaching trial, there is an urgency to this process, but the timings in the draft order for paragraph 1(a) and 2 were, presumably, based on a decision being given at the hearing. There will need to be some adjustment in view of the fact that this is a reserved judgment.

Text messages

26. This part of the draft order in summary would require the Claimant personally to make a witness statement describing the steps which he has taken to search for text messages in the period 1st January 2012 – 31st May 2016 whether to or from Ms Heard or third parties, stating whether any text messages have been deleted and whether all text messages found have been passed to Schillings. The draft order would then require Schillings to review the text messages which the Claimant provides and disclose to the Defendants those text messages which fall within r.31.6 and which have not so far been disclosed.

27. Mr Wolanski submitted that such an order was necessary and appropriate having regard to (i) what was said to be the Claimant's limited personal involvement with the disclosure process so far, (ii) that Brown Rudnick had failed to disclose relevant text messages and (iii) some text messages were referred to in the pleadings and which the Claimant had admitted existed but which had not been disclosed.

28. For the first proposition, Mr Wolanski referred me to the history of disclosure to date (see above).

29. For the second proposition, Mr Wolanski said that the Defendants had been able to compare what had been disclosed intentionally which was a spreadsheet of some 300-400 text messages with the inadvertent disclosure of some 70,000 further messages.

Neutral Citation Number: [2020] EWHC 1734 (QB)

Case No: QB-2018-006323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2020

Before :

MR JUSTICE NICOL

Between :

John Christopher Depp II	**Claimant**
- and -	
(1) News Group Newspapers Ltd.	**Defendants**
(2) Dan Wootton	
-and-	
Amber Heard	
	Third Party Respondent

David Sherborne and Kate Wilson (instructed by **Schillings**) for the **Claimant**
Adam Wolanski QC and Clara Hamer (instructed by **Simons Muirhead and Burton**) for the **Defendants**
David Price QC (solicitor) for the **Third Party Respondent**

Hearing dates: 29th June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE NICOL

vi) This trial will be unusually resource intensive. As Mr Sherborne submitted, this is a consequence of COVID-19. As it happens, the same pandemic has led the courts to favour where possible the use of technology to conduct hearings remotely. Somewhat ironically, there is not therefore quite the same competition for court resources that there would be in normal times and therefore the continuation of this trial will not necessarily be at the expense of other litigants and cases. Mr Sherborne argued that the demand on the court was independent of the Claimant's breach. Of course, the COVID-19 pandemic is not the result of the breach, though the breach has led to two quite extensive hearings and two reserved judgments.

vii) Finally, I have to decide this application in the present circumstances. The trial did not proceed on 23rd March and I am not persuaded that it is helpful for me to consider the counter-factual position if it had.

Should Ms Heard be ordered to make Third Party disclosure

31. The Claimant relies on Senior Courts Act 1981 s.34 and CPR r.31.17 which, so far as material says,

> '(3) The Court may make an order under this rule only where –
>
> (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or to save costs'

32. Thus, there are two preconditions which must be satisfied if an order is to be made, but, even if they are, the Court has a discretion as to whether to make the order. The pre-condition in r.31.17(3)(a) is satisfied if the documents in question may well support the case of the applicant (or adversely affect the case of another party). It is not necessary for the applicant to go further and establish that the documents are more probable than not to have this effect - see *Three Rivers DC v Bank of England (No.4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210.

33. In support of this application, the Claimant relies on the 6th witness statement of Ms Afia made on 23rd June 2020. Mr Sherborne observed that there is no witness statement from Ms Heard in response to the application.

34. It is convenient to consider the application category by category and do so by reference to the Claimant's draft order.

35. Category 1(a) *The raw file that is the original and complete recording made by the Third Party Respondent on 22 July 2016 when she and the Claimant met in or near San Francisco or, if that is not available, the most proximate copy thereof.*

36. On 16th June 2020 the Defendants' solicitors sent a letter to Schillings disclosing an audio file of a conversation between the Claimant and Ms Heard which was said to have

taken place in San Francisco on 22nd July 2016. The letter also included a transcript of that recording which, Ms Afia says, is not agreed.

37. Ms Afia comments that at the time the Claimant was subject to a Temporary Restraining Order which had been obtained by Ms Heard. The Claimant accepts that he met Ms Heard on or about that date. The Defendants have not answered a request from Schillings as to the provenance of the recording, but Ms Afia invites me to infer that it must have been made by Ms Heard. The only voices heard on the recording are those of Ms Heard and the Claimant. It seems that the recording has not been disclosed in the Virginia proceedings. Towards the end of the recording, the Claimant asks her 'Are you recording this?' Ms Heard responds, 'Now I am. Go.' Mr Sherborne submits that this is a lie because it is apparent that the recording had begun some time before this question.

38. Ms Afia comments that parts of the recording are of poor quality and substantial parts are inaudible. As I have said, the transcript which Simons Muirhead and Burton (the Defendants' solicitors) have supplied is not agreed. It appears from the Defendants' solicitors' letter that the Defendants propose to rely on the recording. This has led the Claimant to seek category 1(a). One example of a disagreement is given by Mr Sherborne in his skeleton argument.

> '[The Defendant's transcript includes Ms Heard saying "*You can throw a punch but yet screaming's okay.*" Mr Depp considers that Ms Heard said: "*You can't throw a punch but yet screaming's okay.*" That puts a different light on the exchange, and is more consistent with the context in which there is a contrast of two matters, namely punching and screaming. If that is what Ms Heard said, then it is consistent with the Claimant's case that Ms Heard was violent to him and he did not punch her.'

39. Mr Sherborne submits that the exchange is relevant, Ms Heard possesses the recording, its production to the Claimant is necessary to dispose fairly of the action.

40. Ms Afia comments that at one point in the recording, Ms Heard begs the Claimant to hug her. Mr Sherborne submits that this is inconsistent with Ms Heard's account (adopted by the Defendants) that he had subjected to her repeated and serious violence. Ms Afia also comments that the recording is also inconsistent with Ms Heard's allegation of one particular incident of alleged violence by the Claimant on the night of Ms Heard's birthday party on 21st April 2016. The Claimant's pleaded case is that he was the victim, not the perpetrator of domestic violence. Ms Afia says that in the recording, the Claimant alleges that it was Ms Heard who hit him. Ms Afia says that on the recording Ms Heard does not deny this version of events on 21st April 2016.

41. Mr Price QC who represented Ms Heard on this application, argues that this category does not satisfy either of the necessary pre-conditions in r.31.17(3).

42. I agree with Mr Price that the Claimant has not shown that r.31.17(3)(b) is satisfied. In my judgment, the evidence from the Claimant does not establish that Ms Heard is likely to have a better copy than the one which has been produced. It is only if she did that it could even arguably be said to be necessary for the fair disposal of the case to order her to produce it. Mr Depp can, of course, give his own evidence about what is said on the

recording and, if the quality of the recording is poor in places as Ms Afia says, its value in rebutting his version will be diminished.

43. I refuse to order Ms Heard to disclose category 1(a). Mr Price said that Ms Heard has offered to investigate whether she does have a better recording and to produce it to the parties if she does. That may be helpful, but it does not alter my view that the Claimant is not entitled to an order that she do so.

44. Category 1(b) is not pursued by the Claimant.

45. Category 1(c) *The raw file that is the original and complete recording made by the Third Party Respondent, or if that is not available, the most proximate copy thereof of the conversations between the Third Party Respondent and the Claimant which took place in or near Toronto in or around September 2015 and which are referred to on pages 4 and 5 of the transcript identified in paragraph 1(b)(i).*

46. Ms Afia explains that the Defendants have disclosed 2 other recordings: one was of a conversation on 15th June 2015, the other was on an unknown date in 2016. She says that these recordings are of only part of the conversation in question. Further, in one or both there is reference to another conversation between Ms Heard and the Claimant which occurred in Toronto. At various stages, Ms Heard offered to send the Claimant the 'Toronto tapes' but she has never done so. The Claimant originally sought the most original version of all three recordings.

47. The application in relation to first two recordings was in Category 1(b) and is not now pursued. The Claimant does persist in relation to the 'Toronto tapes'. I accept that the Claimant has shown that the 'Toronto tapes' have at least existed in the past. I agree with Mr Sherborne that he is assisted in this regard by the absence of any evidence in reply from Ms Heard.

48. However, I do not accept that he has shown that the condition in r.31.17(3)(a) is satisfied. As Mr Price submitted, it is a pre-condition of third-party disclosure that the document in question is likely to assist the case of the applicant or adversely affect the case of another party. It is not sufficient for Mr Sherborne to comment that the Toronto tape was of a conversation at a critical time in the relationship of Ms Heard and the Claimant and that the relationship between the two of them is central to this litigation. The Claimant is not assisted by drawing attention (as Mr Sherborne did) to paragraph 8.a of the Re-Amended Defence which pleads that 'Throughout their relationship the Claimant was controlling and verbally and physically abusive.' This does not assist the Claimant to show that the 'Toronto tapes' are likely to support his case or adversely affect the Defendants' case.

49. I refuse to order Ms Heard to disclose category 1(c).

50. Category 1(d) *All photographs howsoever taken or created by the Third Party Respondent purporting to show damage caused by the Claimant during or in connection with an act of domestic violence against the Third Party Respondent between 1 January 2013 and 21 May 2016.*

51. Ms Afia draws attention to passages in Ms Heard's witness statements in which she says that she took photographs of various items which had been damaged by the

Claimant in the course of his violent attacks. Ms Afia says that some photographs of damaged property have been produced, but the Claimant seeks an order that she produce all such photographs.

52. In my judgment the Claimant cannot satisfy r.31.17(3)(a) in relation to this category. He has not shown that any such photographs are likely to support his case or adversely affect the case of the Defendants. If he wishes to comment on the limited number of photographs which have been produced, he may do that on the current state of the evidence. Thus, I am also not satisfied that category 1(d) meets the pre-condition in r.31.17(3)(b).

53. I refuse to order Ms Heard to produce category 1(d).

54. Category 1(e) *All communications between the Third Party Respondent and the man who visited her at the Eastern Columbia Building at approximately 11pm on 22 May 2016 sent or received between 21 April 2016 and 31 May 2016, whether sent by text, email, or otherwise howsoever, which refer to or relate to their meeting*

55. Ms Afia notes that in her witness statement Ms Heard says that the Claimant was irrationally jealous of her supposedly having affairs with other men during the course of her relationship with the Claimant. That, too, is pleaded in effect in paragraph 1 of the Confidential Schedule to the Re-Amended Defence paragraph. In his Re-Amended Reply, the Claimant has denied that allegation – see paragraph 1 of the Confidential Schedule. Thus, Mr Sherborne argues, there is an issue on the pleadings as to whether the Claimant's concern that Ms Heard was having affairs with other men was well-founded or irrational jealousy. This underlies category 1(e) and also category 1(f).

56. I do not accept this submission. Because they are in confidential schedules, it is not appropriate for me to quote them in this public judgment. However, if it was the Claimant's case that his concern about Ms Heard's infidelity was justified, that should have been more clearly pleaded. It is not and the bare denial of the allegation in paragraph 1 of the Confidential Schedule to the Re-Amended Defence is not in my view sufficient.

57. Accordingly, I do not accept that the pre-condition in r.31.17(3)(a) is fulfilled in regard to either category 1(e) or category 1(f). Further, I am not persuaded that the pre-condition in 31.17(3)(b) is fulfilled either. The central issue for the defence of truth is whether Mr Depp assaulted Ms Heard. Even if she had been unfaithful to him, that would be irrelevant on that central issue. I am not therefore persuaded that these categories of documents are necessary for the fair disposal of the litigation.

58. Category 1(f) *All communications between the Third Party Respondent and Elon Musk, whether sent by text, email, or otherwise howsoever, sent or received between 1 March 2015 and 21 May 2016 which refer to or relate to them meeting at the Eastern Columbia Building when the Claimant was not present on 22 May 2016 or arrangements for it.*

59. For the same reasons as I have given in relation to Category 1(e) I refuse this part of the application.

60. In his submissions, Mr Price also argued that, even if the pre-conditions were satisfied, I should refuse disclosure in my discretion. He particularly relied on what he said was

the lateness of the application. Mr Sherborne submitted that there were good reasons why the application was only made now. For his part, Mr Sherborne argued that there were good reasons to exercise discretion in the Claimant's favour. He relied on the imbalance between the Claimant (who was obliged to make extensive disclosure) and the Defendants (who, for the most part, could only pass on what Ms Heard had chosen to give them).

61. Since I have found that the pre-conditions are not fulfilled, the issue of discretion does not arise.

Overall conclusions

62. Subject to the Claimant giving the undertaking regarding not seeking sanctions against Ms Heard for any breach of the Virginia protective order because of such assistance as she has already or may in the course of this litigation give to the Defendants, I will grant the Claimant relief against sanctions.

63. I refuse the Claimant's application for a third-party disclosure order against Ms Heard.

64. This judgment has necessarily had to be provided expeditiously for reasons which will be readily understood.

Claim No. QB-2018-006323

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

BEFORE THE HONOURABLE MR JUSTICE NICOL

DATED 4 JULY

BETWEEN

JOHN CHRISTOPHER DEPP II

Claimant

and

QB-2018-006323

(1) NEWS GROUP NEWSPAPERS LTD

(2) DAN WOOTTON

Defendants

ORDER

UPON THE CLAIMANT'S REQUEST FOR A DIRECTION that Amber Heard be not permitted to attend the trial of this claim until she is called to give evidence

'IT IS ORDERED THAT

The request is refused. No such direction will be given.

REASONS

1. The Claimant made this request. The Defendants indicated that they did not agree to it. The Defendants asked for a hearing to determine the matter. I refused to hold a hearing. I considered that the matter could be adequately addressed through written submissions and, in view of the imminence of the trial (due to start on 7th July 2020), it was right that it should be resolved in this way. I set a timetable for submissions. I received submissions on behalf of the Claimant from Eleanor Laws QC together with David Sherborne and Kate Wilson and on behalf of the Defendants from Sasha Wass QC together with Adam Wolanski QC and Clara

Hamer. Ms Laws provided submissions in response to those of the Defendants. Ms Wass chose not make any further submissions All submissions were dated 3rd July 2020. I am grateful to all parties for providing these submissions so promptly.

2. The Claimant argued that the direction should be made for the following reasons (in summary):

    a. In civil trials, witnesses were not normally excluded from the hearing until they gave their evidence, but there was power to give such a direction - see The White Book paragraph 32.1.4.3 if there was good reason to do so.

    b. It was common in criminal trials to make such a direction. Although this was a civil claim the defence of truth on which the Defendants rely amount to allegations of criminal conduct by him.

    c. For many of the incidents relied upon by the Defendants, the Claimant and Ms Heard were the only two persons present. Her testimony would be particularly important.

    d. I should follow the guidance of Holman J. in *Luckwell v Limata* [2014] EWHC 586 (Fam)who said that the focus should be on 'the quality, purity and reliability of the evidence. Ma Laws submitted that the evidence of Ms Heard would be better on all three tests if she was not present in Court when the Claimant gave his evidence.

    e. Although the focus of the Claimant's concern was Ms Heard's presence in court while the Claimant gave evidence, he would be willing to accede to a more general direction which excluded all witnesses before they were called to give evidence.

    f. Ms Laws emphasised that Ms Heard is not a party to this claim. That is a matter on which the Defendants have relied in a number of hearings to distinguish her position from that of Mr Depp.

3. I am not persuaded by these arguments. I do accept that Ms Heard is not a party to this litigation. It is unnecessary to consider the position if she was. I agree that her position is therefore, different from that of Mr Depp. I received a letter to the Court from Ms Heard dated 2nd July 2020 in which she sought to equate her position to his and argued that in fairness, she and he should be treated the same. Because he is a party to the litigation and she is not, I do not accept that their positions are equivalent.

4. But, while I go this far with Ms Laws, I consider that Ms Wass makes forceful submissions as to why the request should be refused:

    a. This is a civil trial. While the allegations may amount to criminal offences in the places where they were committed (although I have no evidence to the criminal laws of the places where these incidents took place, I am prepared to assume that it is the case), the nature of the proceedings remains civil. I do not therefore find helpful the reference to the practice which would be adopted if these were criminal proceedings. So far as criminal proceedings are concerned, the Criminal Procedure Rules provide that a witness who is waiting, but who is not a party or an expert must

not wait in the courtroom, unless the court directs otherwise – see Criminal Procedure Rules2015 SI 2015 No.1490 r.25.11(2).

b. In *Luckwell v Limata* Holman J. described the parties' positions as 'obscure' in some respects. That does not seem to be the case here. The parties have set out their positions in the pleadings and the witness statements on which they rely have been served. Mr Depp and Ms Heard have, quite properly, seen each other's witness statements.

c. Although Ms Heard is not a party, I agree with Ms Wass that her exclusion from the court while Mr Depp was giving evidence would inhibit the Defendants in the conduct of their defence. It is 'their' defence, but, as has been clear, they rely heavily on the information which Ms Heard can provide. She will not be in a position to give instructions to Ms Wass, but she can provide information on which the defendants may choose to act. There is a benefit to the Defendants in her being able to do that near instantaneously in the course of Mr Depp's cross examination and, in my view, it would be unfair to the Defendants to deprive them of that advantage.

d. As Ms Wass submits, it will be open to Ms Laws, if she thinks appropriate, to cross examine Ms Heard on the basis that her evidence has been affected by what she heard of the Claimant's cross examination.

e. I also agree with Ms Wass that, so far as can be told, the trial is likely to receive extensive publicity. Of course, every nuance in the cross examination of Mr Depp is not likely to be reported, but this is not a trial of which there is likely to be a dearth of coverage. This was a matter to which Mrs Justice Eady alluded in *BGC Brokers v Tradition UK* [2019] EWHC 3588 (QB) at [39], which was another of the cases cited to me.

f. Ms Laws submits that, if the trial had gone ahead in March 2020 (as it was originally scheduled to do) and if Ms Heard had been prevented by the COVID-19 pandemic from travelling to England from her home in USA, she would then be in the position for which the Claimant's contend. With respect to Ms Laws, I do not find it helpful to consider such counter-factual scenarios. I must decide the request on the position as it now is. Absent the direction which the Claimant seeks, Ms Heard is willing and able to attend the whole of the trial.

g. The Claimant's suggestion that a similar direction could be made for all witnesses does not persuade me to make the direction he seeks. The other factors which I have mentioned above would still count against making the direction.

Neutral Citation Number: [2021] EWCA Civ 423

Case No: A2/2020/2034

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Nicol J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
and
LORD JUSTICE DINGEMANS

Between :

JOHN CHRISTOPHER DEPP II	**Appellant**
- and -	
NEWS GROUP NEWSPAPERS LTD	
DAN WOOTTON	**Respondents**

Andrew Caldecott QC, David Sherborne and **Kate Wilson** (instructed by **Schillings International LLP**) for the **Appellant**
Sasha Wass QC, Adam Wolanski QC and **Clara Hamer** (instructed by **Simons Muirhead & Burton LLP**) for the **Respondents**

Hearing date: 18th March 2021

Approved Judgment

Lord Justice Underhill (giving the judgment of the Court):

INTRODUCTION

1. On 2 November last year Nicol J handed down judgment dismissing a claim for libel brought by Johnny Depp, the actor, against News Group Newspapers Ltd and one of its journalists ("NGN"). The claim arose out of an article in *The Sun* which accused Mr Depp of being a wife-beater. NGN's defence was that the allegation was true because Mr Depp had on numerous occasions physically assaulted his then wife, Amber Heard: fourteen separate incidents were pleaded, covering a three-year period between early 2013 and May 2016. The Judge found that Mr Depp assaulted Ms Heard on all but two of those occasions. Ms Heard was the principal witness for NGN, and the Judge largely accepted her evidence. There are before us an application for permission to appeal against that decision and an application for permission to rely in support of the appeal on evidence which was not before the Judge but which is said to cast serious doubt on Ms Heard's credibility.

2. The hearing before Nicol J lasted for over three weeks. He heard evidence from Mr Depp and Ms Heard but also from a large number of other witnesses. Both parties also put in evidence a wealth of more or less contemporaneous material which was said to support the accounts of one or other of the protagonists. This included texts, e-mails, photographs and tapes of conversations between Mr Depp and Ms Heard.

3. Nicol J's judgment, which includes a short confidential annex, runs to some 130 pages. For the purposes of these applications we need do no more than summarise its structure and its overall conclusions: it can of course be read in full (with the exception of the annex) on the BAILII website, the citation being [2020] EWHC 2911 (QB). After dealing with various introductory matters, at paras. 109-186 the Judge examines a number of points relied on by Mr Depp, apart from the fourteen incidents, as reflecting badly on Ms Heard's credibility ("the credibility issues"). His conclusion was that none of them carried substantial weight. At paras. 191-205 he found that neither Mr Depp or Ms Heard had a record of violent behaviour. He then proceeded, from paras. 206-573, to consider in turn each of the incidents relied on by the defence. In relation to each he summarised the evidence in great detail and reached a conclusion as to whether he found that Mr Depp had indeed assaulted Ms Heard (otherwise than in self-defence): as we have said, he made such a finding in all but two of the cases. At paras. 574-583 he stepped back and considered the evidence as a whole: that exercise confirmed the conclusions that he had reached about the individual incidents.

4. Although in one sense the Judge's conclusion involved him accepting that Ms Heard was a credible witness, it is important to appreciate that he did not proceed by making some overall assessment of her credibility which he then fed into his conclusions on the individual incidents; indeed, as noted above, he found that various submissions made on behalf of Mr Depp challenging her general credibility did not assist him. Rather, in relation to each of the fourteen incidents he relied essentially on the evidence relating specifically to that incident. In most of the cases he did not have to rely only on choosing between the competing testimony of the two protagonists, because there was contemporaneous evidence of the kind to which we have referred at para. 2; also, Mr Depp made various admissions which were relevant to the overall probabilities. By way of illustration:

amounts that the evidence which we have seen clearly shows that she has paid are $100,000 to the CHLA and $450,000 to the ACLU. The documents refer to some other substantial payments associated with her, though not clearly donated by her; but even if these are taken into account the total is under $2m. The evidence also contains a transcript of a hearing in the US proceedings on 18 December 2020 in which her lawyers state that she has pledged the full amounts to the CHLA and the ACLU; that "a significant proportion" of those pledges have been fulfilled; and that there is a "multi-year process" through which she can pay the balance, which she "certainly intends to do" although it may take some time. The lawyers appear to suggest that the process of making payment in full has been delayed by the costs that she has had to incur in defending Mr Depp's claim against her in the US, although Ms Rich observes that those proceedings were not commenced until at least a year after Ms Heard had received full payment of the divorce settlement.

40. If the statement in Ms Heard's witness statement that the $7m "was donated" to charity (paraphrased by the Judge as that she "had given that sum away") is to be understood to mean literally that the full $7m had already been paid, that is clearly contradicted by the further evidence, and her statement was accordingly misleading. We need not decide whether that is in fact a fair reading of what Ms Heard says.

41. There was no dispute before us that, in accordance with the well-established "*Ladd v Marshall* principles" (as glossed in *Terluk v Berezovsky* [2011] EWCA Civ 1534), further evidence should only be admitted for the purpose of an appeal (a) if it could not have been obtained with reasonable diligence for use at the trial; (b) if it would probably have had an important influence on the result of the case; and (c) if it is credible. We will take limb (b) first.

42. The starting-point must be that whether Ms Heard had given a misleading impression about her charitable donations was in itself nothing to do with the case which the Judge had to decide. It was only relevant to the extent that it shed light on the question whether Mr Depp had committed the alleged assaults. As to that, the question of the charitable donations had only come up, fairly peripherally, in the context of the hoax/insurance thesis. The Judge makes clear in the first half of the passage which we have quoted from para. 577 of his judgment that he rejected that thesis for the reasons which he had already given in the course of his detailed consideration of the individual incidents: that is, he was satisfied that the various pieces of contemporary evidence generated by Ms Heard and which supported her account were genuine. He also at para. 578 accepted Ms Wass's further reason for rejecting the thesis. That being so, the question whether Ms Heard was in any sense a gold-digger was irrelevant, which is of course entirely in accordance with the stance adopted by Mr Sherborne. That point is reinforced by the fact that Ms Heard was not cross-examined about this part of her evidence.

43. Mr Caldecott made it clear, however, that he was not seeking to adduce the further evidence on the basis that it would have directly affected the Judge's rejection of the hoax/insurance thesis. Rather, his submission was that the apparent fact that Ms Heard had donated the entirety of her divorce settlement to charity was bound, or was at least very likely, to have influenced the Judge's assessment of her overall credibility. At the most general level it suggested that she was a good person and was therefore unlikely to have made up a false story about the alleged assaults. More specifically, Mr Caldecott pointed out that in her public announcement Ms Heard had said that the

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Date: May 28, 2021
Case: Depp, II -v- Heard

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V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

----------x

JOHN C. DEPP, II, :

Plaintiff,:

v. : Case No. CL2019-0002911

AMBER LAURA HEARD, :

Defendant.:

----------x

Hearing on Motions

Before the HONORABLE PENNEY AZCARATE, Judge

Conducted Virtually

Friday, May 28, 2021

11:35 a.m. EST

Job No.: 377021

Pages: 1 - 42

Transcribed by: Bobbi J. Fisher, RPR

Hearing on Motions before the HONORABLE PENNEY AZCARATE, Judge, conducted virtually.

Pursuant to Docketing, before Sarah Loiler, Digital Court Reporter.

A P P E A R A N C E S

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I N D E X

E X H I B I T S

(None.)

P R O C E E D I N G S

THE COURT: We are here on the motions today filed by Ms. Heard as far as amending the plea in bar and the answer and also request to stay discovery. All right. So I have read the motions, but anything you want to add to that, Ms. Bredehoft, since it's your motions?

MS. BREDEHOFT: Thank you, Your Honor. And just for introduction purposes, Your Honor, Elaine Bredehoft, and with me is Ben Rottenborn. We represent Amber Heard.

THE COURT: Okay. I'm sorry. Let me just swear in your court reporter. I'm sorry.

(The court reporter was duly sworn.)

THE COURT: Okay. Thank you. I'm sorry, Ms. Bredehoft. Go ahead.

MS. BREDEHOFT: Okay. Thank you, Your Honor. And just for clarification, Your Honor, it's a motion for leave to -- we filed the amended answer and grounds of defense, supplemental plea in bar, and also to request a hearing and briefing schedule as well as stay discovery, just for --

because this is clearly futile. Thank you, Your Honor.

THE COURT: Thank you, Mr. Chew.

Anything further, Ms. Bredehoft?

MS. BREDEHOFT: Your Honor, I would -- in addition to the fact that I just cited a whole bunch of cases that absolutely support the position, this is an example of Mr. Chew making representations. And I was able to pull this up.

On April 12, in our email exchanges back and forth on filing the amended plea in bar -- the supplemental plea in bar and amended -- Mr. Chew just represented to the Court that I said there were no cases and that this would be a case of first impression. In fact, I'm going to read to Your Honor what I wrote as part of that email.

Quote: "On the demand for our authorities for the underlying issues we intend to raise in our pleadings, that is not the issue on the motion for leave, but I am happy to discuss this with you. I believe your email ignores the concept of privity altogether. Some of the

authorities upon which we rely and expect to rely in the underlying hearing on the supplemental plea in bar are Lee v. Spoden, 290 Va. 235, a 2015 Supreme Court case; Lane v. Bayview Loan Servicing, LLC, 297 Va. 645, a 2019 case; Bates v. Devers, 214 Va. 667 (1974); and Funny Guy, LLC v. Lecego, 293 Va. 135, 2017 Virginia Supreme Court case."

This is in my email that I sent to him. I didn't say I have no cases. I said I'm happy to discuss it with you and here are five Virginia Supreme Court cases that we intend to rely on, which is exactly the opposite of what he just contended to you now.

Your Honor, there's an enormous amount, an enormous body of support in Virginia -- in the Virginia Supreme Court and in the courts -- that stand for the proposition of exactly what we're asking. We believe we have a very, very strong case. We believe we will be able to convince Your Honor to apply the UK decision. But more importantly, Your Honor, at this hearing, we're just asking for leave to file the defenses and the

Honor decides on the number, but I will represent that these are not easy issues. They're complex issues. There are many cases that relate to these very ones, and I tried to give a good smattering of them in this hearing today, but there are even more. And I think it would be helpful -- this is such an important case, Your Honor, such an important decision that I think it would be good to be able to fully prepare that before the Court.

THE COURT: All right. Thank you, ma'am.

When I look at the motion, on first blush, I must say the requested motion does appear to be futile, but I may be missing something, and therefore, I think it's only right to give a full opportunity to hear the motion and to have the motion briefed and to argue the motion and allow amendments to the answer and grounds of defense. It should be liberally allowed. I'll allow that as well.

So what I'm going to do, I'll grant the request for supplemental plea in bar for a motion to dismiss and grant the -- to allow the amended

answer and grounds of defense. I will note, however, if it does come after everything and that I am right, at this point, that it is futile and not based on any sound legal basis, I mean, it will be sanctionable. I just want to make sure we all understand that.

But, again, I may be missing something, and I want the opportunity to have a full hearing and have the issue briefed.

As far as discovery, the rule does give the Court the discretion, and there's no basis to stay discovery, so discovery will be ongoing while we prepare for this motion.

All right. So I have here that the 25 pages is fine. You said you can -- Ms. Bredehoft, you can get that by June 14th; is that correct?

MS. BREDEHOFT: That's correct, Your Honor.

THE COURT: All right. And then, Mr. Chew, can you respond with your 25 pages by June 28?

MR. CHEW: Yes, Your Honor, for sure.

Chew, Benjamin G.

From: Elaine Bredehoft <ebredehoft@charlsonbredehoft.com>
Sent: Monday, April 12, 2021 11:04 AM
To: Chew, Benjamin G.
Cc: Vasquez, Camille M.
Subject: RE: Response to Ms. Heard's Latest Attempt to Further Amend Her Responsive Pleadings: Meet and Confer Requirements

Ben: Thank you for your email. The issue for the meet and confer is not whether Amber Heard or Mr. Depp will ultimately prevail on the issues relating to res judicata/collateral estoppel/comity and the related principles, but whether you agree to our request for leave to file the amended pleadings as we indicated, and request a hearing and briefing schedule for the Supplemental Plea in bar (where both parties will be entitled to fully air their positions). On the issue of staying discovery, I would request that you provide us with any prejudice Mr. Depp would suffer by the stay, given the extension of nearly a year until trial, and the current status of discovery.

I appreciate your view and characterization of some of the earlier filings and rulings by the Court, but I do not believe they have any relationship or application to the current issues.

With respect to your bringing your motion to compel, I think you may have misunderstood my email. I recognized and respected that you had filed and set for hearing the Motion to Compel, and therefore I believed that you still had the right to set that first and we earlier talked about April 30 and you asked to reserve that date. I respected that. I raised with you whether you would consider allowing our motion first in light of the request for stay, but I did not insist, nor did I suggest that I would try to file my motion before you, or take your date without your consent. I received your message loud and clear in your immediately filing your motion to compel to set if for the April 30. I had hoped we could further confer on this after we added the Bates numbers at your request, but again, it was your right to file that motion.

On the demand for our authorities for the underlying issues we intend to raise in our pleadings, that is not the issue on the Motion for Leave, but I am happy to discuss this with you. I believe your email ignores the concept of privity altogether. Some of the authorities upon which we rely, and expect to rely in the underlying hearing on the Supplemental Plea in bar, are *Lee v. Spoden, 290 Va. 235 (2015), Lane v. Bayview Loan Servicing, LLC, 297 Va. 645 (2019), Bates v. Devers, 214 Va. 667 (1974) and Funny Guy, LLC v. Lecego, LLC, 293 Va. 135 (2017).*

I look forward to speaking with you on our meet and confer. Elaine

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From: Chew, Benjamin G. <BChew@brownrudnick.com>
Sent: Thursday, April 08, 2021 6:14 PM
To: Elaine Bredehoft <ebredehoft@charlsonbredehoft.com>
Cc: Vasquez, Camille M. <CVasquez@brownrudnick.com>
Subject: Response to Ms. Heard's Latest Attempt to Further Amend Her Responsive Pleadings: Meet and Confer Requirement

Good evening, Elaine,

With respect, you are again very much putting the cart before the horse.

Though you are correct that Ms. Heard would require permission by the Court to- yet again- seek leave to amend her responsive pleadings to Mr. Depp's Complaint for defamation, the Fairfax Rules require you to meet and confer with us with respect to her latest proposed amendment. In that regard, I am available to speak with you on that issue on Monday at 11:30 a.m. as you suggest.

Prior to that meet and confer, please let us know what basis, if any, Defendant has to propose a belated collateral estoppel or *res judicata* affirmative defense. As you know, Ms. Heard was NOT a party in Mr. Depp's action against the *Sun* in London, so please be specific as to how those doctrines could apply in the absence of a full commonality of parties, which we understand to be a threshold requirement. Also, please advise how "comity" would apply here. Having defended the Governments of Dubai and Honduras in claims filed in Washington, D.C. and Miami, respectively, and having represented Standard Fruit Company (Dole) in litigation and arbitration against the Sandinista Government of Nicaragua, I am acquainted with the concept, but do not see the connection here.

A little context is in order:

1. Defendant's first lead counsel, Eric George, filed on Ms. Heard's behalf a motion to dismiss or to transfer venue, which Chief Judge White denied in a detailed Letter Opinion (recall that it was Eric George who, on behalf of Ms. Heard, months prior to Mr. Depp's filing his action for defamation against Ms. Heard in Fairfax on March 1, 2019, filed a Demand for Arbitration against Mr. Depp in California, which Judge Meisinger dismissed; thus, Ms. Heard's failure to honor her pledge to donate the $ 7 million she received in her divorce settlement with Mr. Depp to the Children's Hospital of Los Angeles and the ACLU (which she apparently misrepresented in a sworn witness statement submitted in London) after a 15-month marriage with no issue, cannot fairly be ascribed to any "litigiousness" by Mr. Depp);

2. Defendant's second lead counsel, Robbie Kaplan, moved on Ms. Heard's behalf to amend Defendant's responsive pleadings, and was allowed to assert a new Demurrer and Plea in Bar, which were, except as to one statement, denied by Chief Judge White in another detailed Letter Opinion;

3. You, as Defendant's third lead counsel, filed an Answer including affirmative defenses and Counterclaims, most of which were dismissed by Chief Judge White in a detailed Letter Opinion.

At the time we spoke with Chief Judge Azcarate on March 26, the latest ruling in the London action had already come down. Indeed, the decision in London was issued last November. Yet you said nothing about it then, and, in fact, agreed that the first motion in this case before Chief Judge Azcarate would be Plaintiff's long-pending motion to compel, originally set to be heard in March before Chief Judge White, but now to be heard before Chief Judge Azcarate on April 30, which we have properly noticed for hearing.

In this context, Plaintiff does not agree to any stay of discovery, which was not stayed pending the last two dispositive motions filed by your client, nor was it stayed during the pendency of Mr. Depp's largely successful demurrer and plea in bar to Ms. Heard's Counterclaims, very little of which survived. And we will proceed on April 30 with Mr. Depp's motion to compel. As to whether Mr. Depp will agree to Ms. Heard's latest request to again amend her responsive pleadings, that will await your please providing the information we seek here, and the results of Monday's meet and confer.

Best regards,

Ben

brownrudnick

Benjamin G. Chew
Partner

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From: Elaine Bredehoft <ebredehoft@charlsonbredehoft.com>
Sent: Thursday, April 8, 2021 1:26 PM
To: Chew, Benjamin G. <BChew@brownrudnick.com>
Cc: Vasquez, Camille M. <CVasquez@brownrudnick.com>
Subject: Scheduling Order, Motion to Compel, other Motions in the queue, and new matter in light of UK denial of further appeals

Ben: Thanks for your response. I look forward to seeing your mark up of the Scheduling Order, so we can discuss. Do you want to set up a time for a call on Monday?

On the 4th RFPs, while neither side has provided bates stamps for the responsive pleadings, we will agree to provide those in this instance to try to assist in resolving, and are working on that. I hope to get these to you asap.

On the other motions in the queue:

We have already met and conferred on the 10th, 11th, and 12th RFPs and the related RFAs. We have also met and conferred on using Tracey Jacobs' other depositions and documents that were sent during Ms. Jacobs' deposition. All of these are motions we were prepared to file, and intend to bring in turn, unless you want to reconsider your earlier positions.

In the meantime, another issue has developed that we believe takes priority. In light of the finality of the UK decision, including the exhaustion of the appeals, we are amending our Answer & Grounds of Defense and supplementing our Plea in Bar to include the defenses of comity, collateral estoppel, issue preclusion, res judicata, and the like. We need to request the consent of the Court to file these. We would also like to schedule a hearing on the Plea in Bar, a briefing schedule and we believe the Court should stay discovery pending a ruling on this.

Will you agree to a Consent Order permitting leave to file the Amended Answer & Grounds of Defense and Supplemental Plea in Bar? Will you join us in requesting a hearing date on the Supplemental Plea in Bar, a briefing schedule and agree to a stay pending decision? If so, we can prepare a Consent Order and approach Chief Judge Azcarate's law clerk for dates.

If you do not agree, we would like to set this down as soon as possible. If you will allow us the April 30 date, we would set it down on that Friday (I say allow because we have agreed that your motion to compel the 4th RFPs was already filed and scheduled for hearing, and therefore would be set first if you choose to proceed after seeing our supplemental responses). If you want to retain that date, we would ask the Court to allow us May 7 for the request for leave, to set the hearing and briefing and for a stay pending.

Let me know your thoughts on this and if you want to schedule a time on Monday to discuss. How is 11:30 a.m. Eastern?

Thanks. Elaine

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11260 Roger Bacon Drive
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of June 2021, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

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Carla D. Brown (VSB No. 44803)
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