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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

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JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

JOHN C. DEPP, II

Plaintiff,

v.

Civil Action No.: CL-2019-0002911

AMBER LAURA HEARD

Defendant.

REPLY IN SUPPORT OF MOTION TO DISMISS/TRANSFER

4100 Monument Corner Drive, Suite 420, Fairfax, Virginia 22030  
TEL 703.273.8898 FAX 703.273.8897

Eric M. George, Esq. (admitted *pro hac vice*)  
Richard A. Schwartz, Esq. (admitted *pro hac vice*)  
BROWNE GEORGE ROSS LLP  
2121 Avenue of the Stars, Suite 2800  
Los Angeles, California 90067  
Telephone: (310) 274-7100  
Facsimile: (310) 275-5697  
[egeorge@bgrfirm.com](mailto:egeorge@bgrfirm.com)  
[rschwartz@bgrfirm.com](mailto:rschwartz@bgrfirm.com)

Timothy J. McEvoy, Esq. (VSB No. 33277)  
Sean Patrick Roche, Esq. (VSB No. 71412)  
CAMERON/McEVOY, PLLC  
4100 Monument Corner Drive, Suite 420  
Fairfax, Virginia 22030  
Telephone: (703) 273-8898  
Facsimile: (703) 273-8897  
[tmcevoy@cameronmcevoy.com](mailto:tmcevoy@cameronmcevoy.com)  
[sroche@cameronmcevoy.com](mailto:sroche@cameronmcevoy.com)

*Counsel for Defendant Amber Laura Heard*

Cameron / McEvoy  
P.L.L.C.

The Op-Ed at the center of this lawsuit was written in California by a Californian. According to Mr. Depp, also a Californian, the events that the Op-Ed supposedly implies are true also took place in California. Mr. Depp further admits that the witnesses, premises, and physical evidence that would prove the truth or falsity of his claims are located in California. By any sensible measure, this case belongs in California.

With respect to where Mr. Depp's tort claims "arose," while conceding that Ms. Heard did not herself publish the Op-Ed in Virginia, Mr. Depp asserts that his claims "arose" in Virginia because some printing presses republished the Op-Ed in Virginia. This argument misstates Virginia law, as held by a case cited in Mr. Depp's papers; where a statement was published outside of Virginia, and then republished in Virginia, a defamation claim arises in the state of the original publication and *not* Virginia. (*See* Opp'n at 5 (citing *Fryfogle v. First Nat. Bank of Greencastle*, 2009 WL 700161, \*4 (W.D. Va. Mar. 17, 2009)).) While Mr. Depp presumably did not choose the legal authorities in his brief, he must be held responsible for submitting provably false and misleading—and in any event, irrelevant—statements in his declaration in "support" of his Opposition.<sup>1</sup> These statements signal an intention by Mr. Depp to litigate in the court of public

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<sup>1</sup> Although each of Mr. Depp's false statements will be disproven when this case is litigated on the merits, Mr. Depp has clearly perjured himself by claiming that there was only one 911 call reporting his abuse on the evening of May 21, 2016. (*See* Depp Decl. ¶ 19.) Readily obtainable public records of LAPD call logs from that evening show that iO Tillett Wright called 911 at 8:30 p.m. to report Mr. Depp's violent and destructive behavior that evening, confirming the eyewitness accounts of how iO heard that Mr. Depp was becoming violent toward Ms. Heard over the phone and then called 911. (*See* Exhibit 1, attached hereto; Heard Decl. Ex. 37.) In addition to demonstrably false and selectively misleading statements, the Declarations submitted by Plaintiff are generally objectionable in that: (1) they are riddled with inadmissible hearsay, opinion, speculation, purported third-party evidence, and argumentative statements that are not matters of "personal knowledge"; (2) they are wholly irrelevant, as they do not support a single argument made in the Opposition; (3) they actually clarify the need for transfer in that they repeatedly reference events occurring in California and do not cite a single fact linking any issue in dispute to Virginia; and (4) they concede that Mr. Depp has filed this lawsuit in bad faith (*see* Depp. Decl. ¶ 3 (acknowledging that the true "impetus" of this lawsuit is not the alleged defamation but that three years after the fact, Mr. Depp found "new evidence" he wanted to present to a court some 3,000 miles from where any evidence or witnesses are found)).

opinion rather than this Court. This Court should deny Mr. Depp's transparent attempt at forum shopping, and dismiss this case.

**I. Multistate Mass Media Defamation Claims Arise Where The Plaintiff Claims To Have Been Injured**

Both parties acknowledge that transfer is proper when a cause of action arises outside of Virginia. Va. Code § 8.01-265(i). Where the parties disagree is how to determine where a defamation claim "arose." Mr. Depp contends defamation claims always arise in the place of publication, but cites no cases applying that rule in the context of a multistate mass media defamation.<sup>2</sup> In fact, the only cases involving a multistate mass media publication and applying Virginia law have concluded that the proper focus is on where the plaintiff experienced the most harm. *See Gilmore v. Jones*, No. 3:18-cv-00017, 2019 WL 1418291, \*20 (W.D. Va. Mar. 29, 2019); *Hatfill v. Foster*, 415 F. Supp. 2d 353, 364–65 (S.D.N.Y. 2006).

As *Gilmore* explained, the *lex loci* test—which has as a central purpose "uniformity, predictability, and ease of application," *McMillan v. McMillan*, 219 Va. 1127 (1979)—runs into problems identifying where a multistate mass media defamation cause of action arises because "[t]he traditional *lex loci delicti* rule 'presumes that the defamatory statement is published (i.e., communicated to third parties) in one geographic location,' but publication via the Internet results

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<sup>2</sup> None of Plaintiff's cited cases involve a mass media publication. *Cockrum v. Donald J. Trump For President, Inc.* did not involve a defamation action at all, held that there was insufficient information about where the publication from Wikileaks occurred, and specifically concluded that the *lex loci* test requires a "tort-by-tort analysis." 365 F. Supp. 3d 652 (2019), *appeal pending*. In *ABLV Bank*, it was "undisputed that ABLV's report was published from its office in Washington, D.C." 2015 WL 12517012, \*2. In *Jeffrey J. Nelson & Assocs. v. LePore*, the court found Virginia law applied because "it is completely unclear where the statement was published, or received." 2012 WL 2673242, \*7. *Katz* involved written submissions to an arbitration panel. 332 F. Supp. 2d 909, 915 (E.D. Va. 2004) (noting that "publication is complete upon dissemination to any third party"). Likewise, in *PBM Products, LLC v. Mead Johnson Nutrition Co.*, the statement at issue was a press release that was undisputedly published in Virginia. 678 F. Supp. 2d 390, 398 (E.D. Va. 2009). Finally, the Court in *Miller v. Kelly* "assume[d] without deciding, that Virginia law would be applied" to the claim because the "the events giving rise to Plaintiff's claim occurred *solely* in Virginia." 2010 WL 4684029, \*8 & n.3 (emphasis added).

in instantaneous ‘multistate (if not[ ] worldwide) publication.’” *Gilmore*, 2019 WL 1418291, \*20. As a result, courts applying Virginia law have rejected the rule that deems a tort claim to arise in “the place of publication” (often all 50 states, as here) in the mass media context, where a “cumbersome application of a patchwork of state law” would be required. *Id.* In the mass media context, then, in order to give effect to the purposes of the *lex loci* test—uniformity, predictability, and ease of application—an alleged defamation is deemed to arise in the location where the plaintiff is domiciled. *See id.*; *Hatfill*, 415 F. Supp. 2d at 364–65. Contrary to Mr. Depp’s attempts to distinguish *Gilmore* and *Hatfill*, neither case failed to apply the *lex loci* test. Both cases recognized that *lex loci* jurisdictions look to the place of the “wrong” to conclude that “the Supreme Court of Virginia, if applying *lex loci delicti* in a multi-defendant, multi-state Internet tort case, would define ‘the place of the wrong’ as the state where the plaintiff is injured as a result of the allegedly tortious content, as opposed to the state where publication occurs.” *Gilmore*, 2019 WL 1418291, \*20; *Hatfill*, 415 F. Supp. 2d at 364.

Mr. Depp’s Complaint itself underscores the propriety of applying *Gilmore* and dismissing this improperly-venued case in favor of a California forum. The supposed injuries to Mr. Depp’s professional reputation that are recited in his Complaint centered squarely in his domicile state: California. Compl. ¶¶ 82–83, 93–94, 104–05. Mr. Depp admits that the Op-Ed was first published directly to the Internet—and all 50 states—simultaneously on December 18, 2018. Compl. ¶¶ 68, 75. He does not contend that Ms. Heard took any action in Virginia or even that she directly published the statement in Virginia, only that the statement was republished in Virginia (a day later) by a non-party in the exact same form (i.e., as part of the same single publication). *Id.* at ¶ 86. Mr. Depp even admits that the same Op-Ed is the basis for each of his separate “counts” of defamation, conceding that he asserts only one claim under the single publication rule. *See Armstrong v. Bank of Am.*, 61 Va. Cir. 131 (2003). Thus, the Court should conclude that Mr. Depp’s claim arose in California, if anywhere.

## II. Even If Defamation Claims Arise Where A Statement Is “Published,” This Claim Arose Outside Virginia

Mr. Depp insists the location of a defamation claim turns on where it was “published.” (Opp’n at 4–9.) Even assuming that were the true test, for defamation purposes, “[p]ublication occurs when the allegedly tortious content is ‘communicated to a third party’ so as to be ‘heard and understood by such person.’” *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 915 (E.D. Va. 2004) (citing *Thalhimer Bros. v. Shaw*, 159 S.E. 87 (Va. 1931)). Significantly, Mr. Depp does not dispute that Ms. Heard (1) never set foot in Virginia; (2) never communicated the allegedly defamatory Op-Ed to any person located in Virginia; and (3) did communicate the Op-Ed to her contact at the ACLU (who is located in New York). (Heard Decl. ¶ 54.) Thus, even if Mr. Depp were correct that a defamation claim arises where publication occurred, *his* cause of action would be deemed to arise *outside of Virginia*, as Mr. Depp does not dispute that Ms. Heard did not communicate her Op-Ed to any third party in Virginia, but rather communicated the Op-Ed from Los Angeles, California to her contact at the ACLU located in New York. *Id.* Indeed, in *Fryfogle v. First Nat. Bank of Greencastle*, a case cited by Mr. Depp, the court *declined* to apply Virginia law where the original statements were published in Pennsylvania but were republished in Virginia because “publication occurs when the defendant *first made the alleged defamatory statements, rather than when the republication occurred.*” 2009 WL 700161, \*4 (W.D. Va. Mar. 17, 2009) (emphasis added). Mr. Depp’s other cited cases would reach that same conclusion. *See, e.g., Cockrum*, 365 F. Supp. 3d at 669–70 (where a defendant published the defamatory statement directly to the Internet, “the place of the wrong . . . is the place where the act of publication to the Internet occurred”).

## III. The Convenience Factors Indisputably Favor Transfer To California

Once a court determines that a cause of action arose outside of Virginia, the court must balance the convenience factors set forth in *Norfolk & Western Railway Co. v. Williams* to determine where the case should be tried. 239 Va. 390, 393 (1990) (factors include “[1] relative

ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive”). Here, Mr. Depp has made but a perfunctory attempt to argue these factors—presumably, because an application of each such factor to this case weighs in favor of a transfer. Both parties reside in California. (Compl. ¶¶ 8, 9.) Every witness, including the 13+ “witnesses” identified in the Complaint and the 34+ “witnesses” identified in declarations—other than one who apparently has moved to Illinois recently—resides in California. (See *id.* ¶¶ 16, 17, 27, 30, 33–60; see generally Depp Decl. and Murphy Decl.) The premises where the abuse at issue occurred are in California. (*Id.* ¶ 33.) The professional representatives who might testify as to whether Mr. Depp’s career and reputation have been impacted following the publication of the Op-Ed reside in California. (*Id.* ¶¶ 5, 71, 73, 82, 83, 93, 104.)

Mr. Depp also unsuccessfully attempts to downplay the serious concerns raised by *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 289 Va. 426, 433 (2015), which would prevent Ms. Heard from calling unwilling witnesses to testify on her behalf in Virginia. He does so by conflating the terms “discovery” and “documentary evidence and demonstratives” with the ability to call live witnesses. (Opp’n at 12–15.) But, under controlling law, the potential unavailability of *live* testimony—and the need to resort to deposition testimony—is a factor that weighs heavily in favor of transfer. See *Williams*, 239 Va. at 395.<sup>3</sup>

#### IV. Conclusion

For the foregoing reasons, this Court should grant Ms. Heard’s motion to dismiss this case pursuant to Virginia Code section 8.01-265(i).

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<sup>3</sup> Mr. Depp cites the largely inapposite *Selective Ins. Co. of Am. v. Salinas*, 79 Va. Cir. 131 (2009), which mentions the use of deposition testimony in lieu of live testimony without further comment as to its probative value.

Respectfully submitted,

By: 

Timothy J. McEvoy, Esq. (VSB No. 33277)  
Sean Patrick Roche, Esq. (VSB No. 71412)  
CAMERON/McEVOY, PLLC  
4100 Monument Corner Drive, Suite 420  
Fairfax, Virginia 22030  
Telephone: (703) 273-8898  
Facsimile: (703) 273-8897  
[tmcevoy@cameronmcevoy.com](mailto:tmcevoy@cameronmcevoy.com)  
[sroche@cameronmcevoy.com](mailto:sroche@cameronmcevoy.com)  
*Counsel for Defendant Amber Laura Heard*

Eric M. George, Esq. (admitted *pro hac vice*)  
Richard A. Schwartz, Esq. (admitted *pro hac vice*)  
BROWNE GEORGE ROSS LLP  
2121 Avenue of the Stars, Suite 2800  
Los Angeles, California 90067  
Telephone: (310) 274-7100  
Facsimile: (310) 275-5697  
[egeorge@bgrfirm.com](mailto:egeorge@bgrfirm.com)  
[rschwartz@bgrfirm.com](mailto:rschwartz@bgrfirm.com)  
*Counsel for Defendant Amber Laura Heard*

4100 Monument Corner Drive, Suite 420, Fairfax, Virginia 22030  
TEL 703.273.8898 FAX 703.273.8897

Cameron / McEvoy  
PLLC

**CERTIFICATE OF SERVICE**

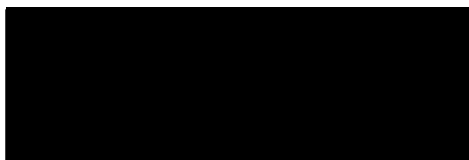
I HEREBY CERTIFY that on the 31<sup>st</sup> day of May 2019, I served the foregoing via First Class Mail (postage prepaid) and electronic mail upon the following:

Benjamin G. Chew (VSB No. 29113)  
Elliot J. Weingarten (admitted *pro hac vice*)  
Andrew C. Crawford (VSB # 89093)  
BROWN RUDNICK LLP  
601 Thirteenth Street, N.W.  
Washington, D.C. 20005  
Telephone: (202) 536-1700  
Facsimile: (202) 536-1701  
Email: [bchew@brownrudnick.com](mailto:bchew@brownrudnick.com)  
[eweingarten@brownrudnick.com](mailto:eweingarten@brownrudnick.com)  
[acrawford@brownrudnick.com](mailto:acrawford@brownrudnick.com)

Camille M. Vasquez (*pro hac vice* application pending)  
BROWN RUDNICK LLP  
2211 Michelson Drive  
Irvine, CA 92612  
Telephone: (949) 752-7100  
Facsimile: (949) 252-1514  
Email: [cvasquez@brownrudnick.com](mailto:cvasquez@brownrudnick.com)

Adam R. Waldman (*pro hac vice* application forthcoming)  
THE ENDEAVOR LAW FIRM, P.C.  
1775 Pennsylvania Avenue, N.W., Suite 350  
Washington, DC 20006  
Email: [awaldman@theendeavorgroup.com](mailto:awaldman@theendeavorgroup.com)

Robert Gilmore (*pro hac vice* application pending)  
Kevin Attridge (*pro hac vice* application pending)  
STEIN MITCHELL BEATO & MISSNER LLP  
901 Fifteenth Street, N.W.  
Suite 700  
Washington, D.C. 20005  
Telephone: (202) 601-1589  
Facsimile: (202) 296-8312  
Email: [rgilmore@steinmitchell.com](mailto:rgilmore@steinmitchell.com)  
[kattridge@steinmitchell.com](mailto:kattridge@steinmitchell.com)  
*Counsel for Plaintiff John C. Depp, II*



Sean Patrick Roche, Esq. (VSB No. 71412)



LOS ANGELES POLICE DEPARTMENT  
Date: 5/15/2019 8:29:40 AM User: N3774

LPD160521005437

**INCIDENT RECALL**

Incident	Time	Type	Pri	Dispo	Address Location BEAT TEAM/Dist	Bldg Apt Area	Caller Name Address Phone	P-Unit	Close Date/ Time	Operator
LPD160521005437	22:09	620D	2	GOASN;	849 S BROADWAY 0163	3	TELETYPE/NYPD PR/JO WRIGHT 646 [REDACTED]	PD/1A61-W3	05/22/16 03:01	PD/V8970 Contact Complainant: Y

Date	Cons	Operator
05/21/16 22:09 Incident Initiated By: PD/GUERRERO, R-970	J7	PD/V8970
05/21/16 22:09 TELETYPE FROM NYPD ICAD #D16052125292, FEMALE STATED SHE WAS ON PHONE	J7	PD/V8970
05/21/16 22:09 WITH HER FRIEND AND SHE BEGAN SCREAMING AT HER HUSBAND, SUBJ ^AMBER	J7	PD/V8970
05/21/16 22:09 HEARD^, HUSBAND ^JOHNNY HEARD^ M/W 53 YRS, 511, NFD/NFI	J7	PD/V8970
05/21/16 22:09 Units Recommended: BPD/1A85-W3 PD/1A85-W3 BPD/1A85-W3 BPD/1A85-W3 BPD/1A85-W3	J7	PD/V8970
05/21/16 22:09 LOC INFO REVIEWED: S	J7	PD/V8970
05/21/16 22:09 IN PENTHOUSE #3	J7	PD/V8970
05/21/16 22:09 Apartment Number CHANGED To: 3	J7	PD/V8970
05/21/16 22:16 Stacked Incident LPDLPD160521005437 To: PD/1A61-W3		
05/21/16 22:16 Stacked IncAck'd LPDLPD160521005437 By: PD/1A61-W3		
05/21/16 22:17 Stat: DS PD/1A61-W3 Loc: 849 S BROADWAY	00	PD/41436
05/21/16 22:17 Stat: ER PD/1A61-W3 Loc: 849 S BROADWAY	00	PD/41436
05/21/16 22:17 Primary Unit Changed PD1A61-W3	J7	PD/V8970
05/21/16 22:17 Unit CHANGED To: PD1A61-W3	J7	PD/V8970
05/21/16 22:24 Stat: AS PD/1A61-W3 Loc: 849 S BROADWAY	00	PD/41436
05/21/16 23:02 Command : UR PD/1A61-W3 Reassigned	11	PD/N4553
05/21/16 23:02 Stacked IncAck'd LPDLPD160521005437 By: PD/1A61-W3		
05/22/16 03:00 Stat: DS PD/1A61-W3 Loc: 849 S BROADWAY	00	PD/41436
05/22/16 03:01 Stat: AS PD/1A61-W3 Loc: 849 S BROADWAY	00	PD/41436
05/22/16 03:01 RELATED TO PREV INC. VERBAL ARGUMENT ONLY. CHECKED RES.	00	PD/41436
05/22/16 03:01 Stat: CL PD/1A61-W3	00	PD/41436
05/22/16 03:01 Incident Closed: 16/05/22 03:01		
05/22/16 03:01 Disposition #1 CHANGED To: GOASN:GONE ON ARRIVAL SUPV NO	J7	PD/V8970
05/22/16 03:01 GOASN:GONE ON ARRIVAL SUPV NO	J7	PD/V8970

**Unit Summary**

Unit PD/1A61-W3 Dispatch 22:17:02 Enroute 22:17:05 AtScene 22:24:00 Canc Cmp 03:01:39  
Dispo GOASN; IncType 620D Int 23:02:33 Tot Int 232 Oper Fr/Dispo PD/N4553

**Attached Docs**



LOS ANGELES POLICE DEPARTMENT  
 Date: 5/15/2019 8:46:26 AM User: N3774

LPD160521004756

**INCIDENT RECALL**

Incident	Time	Type	Pri	Dispo	Address Location BEAT TEAM/Dist	Bldg Apt AREA	Caller Name Address Phone	P-Unit	Close Date/ Time	Operator
LPD160521004756	20:30	242D	2	OCCSN;	849 S BROADWAY 0163	01	FEMALE/REFUSED REFUSED	PD/1A1-W3	05/21/16 21:22	PD/N3299 Contact Complainant: N

Date	Incident	Cons	Operator
05/21/16 20:30	Incident Initiated By: PD/DELAPENA, E-299	5H	PD/N3299
05/21/16 20:30	PENTHOUSE 3 * PR RECEIVED CALL FR VICT FRIEND "AMBER", ASSAULTED BY	5H	PD/N3299
05/21/16 20:30	BOYFRIEND, PR REFUSED TO GIVE FURTHER	5H	PD/N3299
05/21/16 20:30	Units Recommended: BPD/1A85-W3 BPD/1A85-W3 BPD/1A85-W3 BPD/1A85-W3 BPD/1A85-W3	5H	PD/N3299
05/21/16 20:37	DUPCALL: LA	7G	PD/N2721
05/21/16 20:37	DUPCALL: CNAME: NYPD/PCT JOHNSON CPH: 646 610 5030 CONTACT COMP: N FAS: N PRI: 2 SRC: 0	7G	PD/N2721
05/21/16 20:37	2ND HAND FM NYPD, FEM/DECLINED CALLED AND ADVISED HER FRIEND WAS INVOLVED	7G	PD/N2721
05/21/16 20:37	IN A DOMESTIC DISPUTE, SUSP JOHNNY HEARD, W/M 53 YRS OLD BRO HAIR BRO	7G	PD/N2721
05/21/16 20:37	EYES 511 UNK IF WPNS, VICT AMBER C/B 323 541 8111	7G	PD/N2721
05/21/16 20:43	B/C ANY	K6	PD/N4558
05/21/16 20:46	Stacked Incident LPDLPD160521004756 To:PD/1A1-W3		
05/21/16 20:46	Stacked IncAck'd LPDLPD160521004756 By:PD/1A1-W3		
05/21/16 20:46	Stat: DS PD/1A1-W3 Loc: 849 S BROADWAY	00	PD/42335
05/21/16 20:46	Stat: ER PD/1A1-W3 Loc: 849 S BROADWAY	00	PD/42335
05/21/16 20:46	Primary Unit Changed PD1A1-W3	5H	PD/N3299
05/21/16 20:46	Unit CHANGED To: PD1A1-W3	5H	PD/N3299
05/21/16 20:57	Stat: AS PD/1A1-W3 Loc: 849 S BROADWAY	00	PD/42335
05/21/16 21:22	MET W/ VICT. CHCKD LOC. VERIFIED HUSBAND LEFT LOC. VICT ADVISED VERBAL	00	PD/42335
05/21/16 21:22	DISPUTE AND REFUSED TO GIVE ANY FRTHR INFO. ISSUE BUS CARD	00	PD/42335
05/21/16 21:22	Stat: CL PD/1A1-W3	00	PD/42335
05/21/16 21:22	Disposition #1 CHANGED To: OCCSN:OFCR COMPLETED CALL SUPV NO	00	PD/42335
05/21/16 21:22	OCCSN:OFCR COMPLETED CALL SUPV NO	00	PD/42335
05/21/16 21:22	Incident Closed: 16/05/21 21:22		

**Unit Summary**

Unit PD/1A1-W3 Dispatch 20:46:36 Enroute 20:46:37 AtScene 20:57:24 Canc Cmp 21:22:57  
 Dispo OCCSN; IncType 242D Int Tot Int Oper Fr/Dispo

**Attached Docs**