

dispositive motions, replete with more oversized briefing. Mr. Depp opposes Ms. Heard's motion, which is set for hearing on November 8, on the grounds that it comes too late – the Notice of Scheduling Conference required that **all demurrers and pleas in bar be resolved prior to the June 27 Scheduling Conference** –, is unfairly prejudicial, and would be futile.

With respect to its instant motion non-party VPA seeks to pile on more briefing in support of Ms. Heard's proposed demurrer and plea in bar, for which leave has not yet been granted. Mr. Depp opposes VPA's Motion for the same reasons he opposes Ms. Heard's Motion for Leave. To the extent the Court were to deny Ms. Heard's motion, the VPA's Motion would become moot.

Even if the Court were to grant Ms. Heard leave to amend – which it should *not* – the Court should still deny VPA's Motion in the exercise of its discretion: the VPA seeks to address issues already addressed in Ms. Heard's proposed 17-page brief in support of her proposed amended demurrer and plea in bar.

B. The VPA Has Nothing to Assist the Trier of Fact

In response to counsel's question, the VPA effectively admitted it did no due diligence on the underlying facts prior to joining Ms. Heard's large and expanding legal team: "...[The VPA] does not take a position on the specific claims or defenses in this case." *See Exhibit A* (composite exhibit).

Mr. Depp can only infer that the VPA has no interest in the facts – *i.e.*, that it is Ms. Heard, not Mr. Depp, who has a history of domestic abuse. It is public record that Ms. Heard was arrested for domestic violence against her then-domestic partner Tasya van Ree and spent the night in jail, and that she assaulted and battered Mr. Depp several times during their brief marriage, information the VPA could easily have accessed. In one instance, for example, Mr.

Depp closed himself into the bathroom to put a door between himself and an enraged Ms. Heard. After Ms. Heard claimed to have injured herself kicking the door, ironically blaming Johnny for it, Mr. Depp cracked open the door to check on her well-being, only to have Ms. Heard kick the door into his head. By contrast, it is telling that Mr. Depp, who is often the target of frivolous strike suits, has never been even accused of domestic violence by anyone except by Ms. Heard (after their 15-month marriage was over). Clearly, the VPA did not want the actual facts to disrupt their predetermined narrative.

Indeed, when asked, the VPA refused to shed any light on Ms. Heard's brand new, partial "defense," *nowhere mentioned in her prior declarations*, that she did not author the title of her Op-Ed. Heard Declaration (September 4, 2019), ¶¶ 4-7, in which Ms. Heard appears to point her finger at *The Washington Post* and/or the ACLU as the drafter. The VPA declined to say whether it was the ACLU that brought this matter to its attention or whether the ACLU apprised the VPA that it played a role in drafting any part of the Op-Ed. *See Exhibit A.*

ARGUMENT

I. The Court Should Exercise Its Discretion to Deny the VPA's Motion

Mr. Depp agrees with the VPA that the Court may, at its discretion, accept *amicus* briefs. VPA's Motion at 2. *See Alexander v. Hall*, 64 F.R.D. 152, at 155, 156 (1974) (denying the motion of the United States to participate as *amicus curiae*). However, Virginia courts should deny motions for leave where, as here, the proposed *amicus* brief would not be useful to the Court and/or where it comes too late in the process. *See Finkle v. Howard County, Maryland*, 12 F. Supp. 3d 780, 784 (2014) (where despite *amici's* relevant experience, the Court denied leave because the proffered brief was not timely and useful); *American Humanist Ass'n v. Maryland-NCPC*, 147 F. Supp. 3d 373, 389 denying motion for leave where "proposed memoranda would

not provide helpful legal analysis beyond the thorough job done by the parties' counsel) (reversed on other grounds).

A. The VPA's Brief Would Be Redundant

Applying this authority, the Court should *deny* the VPA's Motion because Ms. Heard's current stable of multiple attorneys from four prominent law firms in California, New York and Virginia have already addressed in a proposed over-sized brief the subjects the VPA seeks to brief in ten pages: 1) whether Ms. Heard's false statements were legally actionable, VPA Motion at ¶¶ 15, 16; and 2) the Virginia anti-SLAPP, *id.* at ¶ 17. Specifically, Ms. Heard addresses issue 1) in great detail at pages 5-14 of her proposed brief; she addresses issue 2) at pages 15-17 of her proposed brief.

B. The VPA's Brief Comes Too Late

Ms. Heard's original round of dispositive motions was resolved months ago. Now, with only two months left in discovery, Ms. Heard changes counsel and seeks a do-over demurrer and plea in bar with more oversized briefing and requests another supporting oversize brief from the VPA at the eleventh hour. The Notice of Scheduling Conference required that all demurrers and pleas in bar should have been resolved prior to June 27. As the Court held in *Finkle, supra* at p. 3, this comes too late and would unfairly prejudice Mr. Depp by forcing him to expend resources on more repetitive briefing.

II. VPA Violated the Court's Motions Docket Procedures By Scheduling a Second Motion for Hearing on November 8

By letter dated April 15, 2019, Chief Judge White stated in pertinent part:

This is to inform you that the above-reference case has been assigned to myself. Please note that even through this matter has been assigned to a specific judge for all purposes, **all motions are to be filed in accordance with the regular Motions procedures of the court.**

Letter. **Exhibit B.** (emphasis added). Paragraph 16 of the Circuit Court Motions Procedures (“Fairfax Procedures”) provides as follows:

A party is not allowed to schedule more than one Two-Week Motion in the same case for the same Friday Motions Day other than overlapping motions (e.g., motion to compel – motion for protective order) without the permission of the Calendar Control Judge...

Paragraph 16 (emphasis added):

Applying this authority, the Court should find that VPA violated the Fairfax Procedures because Ms. Heard already had noticed another two-week motion, *i.e.*, her Motion for Leave to File Amended Responsive Pleading for hearing on Friday, November 8. VPA’s Motion states that the proposed *amicus* brief would be “in support of the [proposed] Demurrer and Plea in Bar,” meaning that VPA’s Motion is, for all practical purposes, a **second** motion filed by Ms. Heard. VPA did not even seek, much less obtain, permission of the Calendar Control Judge.

Nor could the VPA credibly argue that this is an “overlapping motion” like a motion to compel/motion for protective order. Whether the Court allows Ms. Heard leave to amend (replete with an oversized 17-page brief) so late in the process – several months **after** it denied Ms. Heard’s original Motion to Dismiss – is substantively distinct from whether the Court should allow a non-party to gratuitously submit for Ms. Heard a ten-page brief on top of that. Accordingly, the Court should strike VPA’s Motion from the November 8 docket.

Conclusion

Based on the foregoing, Mr. Depp requests that the Court deny the VPA’s Motion.

Dated: November 1, 2019

Respectfully submitted,



Benjamin G. Chew (VSB #29113)
Elliot J. Weingarten (*pro hac vice*)
Camille M. Vasquez (*pro hac vice*)
Andrew C. Crawford (VSB #89093)
BROWN RUDNICK, LLP

601 Thirteenth Street NW, Suite 600
Washington, DC 20005
Phone: (202) 536-1785
Fax: (617) 289-0717
bchew@brownrudnick.com

- and -

Robert B. Gilmore (*pro hac vice*)
Kevin L. Attridge (*pro hac vice*)
STEIN MITCHELL BEATO & MISSNER LLP
901 15th Street NW, Suite 700
Washington, DC 20005
Phone: (202) 601-1589
Fax: (202) 296-8312
rgilmore@steinmitchell.com

Adam R. Waldman
THE ENDEAVOR GROUP LAW FIRM, P.C.
1775 Pennsylvania Avenue NW, Suite 350
Washington, DC 20006

Counsel for Plaintiff John C. Depp, II

EXHIBIT A

Chew, Benjamin G.

From: Jennifer Nelson <jn5g@lawschool.virginia.edu>
Sent: Monday, October 21, 2019 8:22 PM
To: Chew, Benjamin G.
Cc: Weingarten, Elliot J.; Crawford, Andrew C.; Vasquez, Camille M.; awaldman@theendevorgroup.com; rgilmore@steinmitchell.com; kattridge@steinmitchell.com; Gabriel Rottman
Subject: Re: Virginia Press Association - Response to Request for Consent for Leave to File Amicus Brief in Depp v. Heard

External E-mail. Use caution accessing links or attachments.

Dear Ben,

Thank you for providing your client's position.

And, to be clear, my communications with you do not speak, in any way, to the factual issues in the case.

Regards,
Jennifer

From: Chew, Benjamin G. <BChew@brownrudnick.com>
Sent: Monday, October 21, 2019 5:06 PM
To: Jennifer Nelson <jn5g@lawschool.virginia.edu>
Cc: Weingarten, Elliot J. <EWeingarten@brownrudnick.com>; Crawford, Andrew C. <ACrawford@brownrudnick.com>; Vasquez, Camille M. <CVasquez@brownrudnick.com>; awaldman@theendevorgroup.com <awaldman@theendevorgroup.com>; rgilmore@steinmitchell.com <rgilmore@steinmitchell.com>; kattridge@steinmitchell.com <kattridge@steinmitchell.com>; Gabriel Rottman <gr4jz@lawschool.virginia.edu>
Subject: Virginia Press Association - Response to Request for Consent for Leave to File Amicus Brief in Depp v. Heard

Dear Jennifer,

The answers to our questions concerning the ACLU would have been most useful to an issue raised by Ms Heard concerning the title of her op-ed. It is disappointing that the VPA chose not to be transparent in that regard.

But we do appreciate your confirming that the VPA did no due diligence whatsoever prior to taking Ms. Heard's side, and, in particular, no investigation of whether one of the party's had previously been arrested for domestic abuse, which is a matter of public record.

And you are entitled to a timely answer, which is that Mr. Depp respectfully opposes the VPA's motion to leave on several grounds, including, without limitation:

1) it is both not ripe- Ms. Heard has not yet been granted leave to file her proposed amended demurrer, which motion is to be heard on November 8- and untimely, as Mr. Depp filed this Complaint back on March 1, and the

Court denied Ms. Heard's initial motion to dismiss, and the case is set for trial on February 2, 2020.

2. Ms. Heard is already represented in this matter by four law firms- including two of the finest firms in the Commonwealth of Virginia, and outstanding firms in California and New York. They certainly will raise any and all arguments that bear on the issues the VPA seeks to address.

Indeed, we would ask that the VPA please reconsider its position on seeking leave to file an amicus, or at least to defer any filing pending the results of the November 8 hearing. To the extent the VPA nevertheless chooses to file, we believe that you should include in the motion papers a conspicuous disclaimer making clear that the VPA did no due diligence on the merits of the claims in Mr. Depp's action including the personal histories of the parties as related to allegations of domestic abuse.

Best regards,

Ben

Sent from my iPhone

On Oct 21, 2019, at 1:14 PM, Jennifer Nelson <jn5g@lawschool.virginia.edu> wrote:

External E-mail. Use caution accessing links or attachments.

Dear Ben,

As stated below, proposed amicus seeks to present press rights considerations to the court which are not otherwise being addressed by the parties, and does not take a position on the specific claims or defenses in this case.

To the extent that your client has concerns about the Virginia Press Association participating in the Virginia courts about a First Amendment issue, he can pursue those questions through the court.

Please advise as to whether Mr. Depp will consent to VPA's motion for leave. Many thanks.

Regards,
Jennifer

From: Chew, Benjamin G. <BChew@brownrudnick.com>

Sent: Monday, October 21, 2019 2:32 PM

To: Jennifer Nelson <jn5g@lawschool.virginia.edu>

Cc: Weingarten, Elliot J. <EWeingarten@brownrudnick.com>; Crawford, Andrew C.

<ACrawford@brownrudnick.com>; Vasquez, Camille M. <CVasquez@brownrudnick.com>;

awaldman@theendeavorgroup.com <awaldman@theendeavorgroup.com>; rgilmore@steinmitchell.com

<rgilmore@steinmitchell.com>; katridge@steinmitchell.com <katridge@steinmitchell.com>; Gabriel Rottman

<gr4jz@lawschool.virginia.edu>

Subject: Virginia Press Association - Request for Consent

Dear Jennifer,

You are most welcome, and thanks for yours.

To be clear, the VPA's answer to both of my prior questions is "no," correct?

Two final questions:

1. Was it the ACLU which brought this matter to the VPA's attention?
2. If so, did the ACLU apprise you that, according to Ms. Heard, it played a role in the drafting of some portion of the publication at issue?

Please advise.

Very truly yours,

Ben

Sent from my iPhone

On Oct 21, 2019, at 11:02 AM, Jennifer Nelson <jn5g@lawschool.virginia.edu> wrote:

External E-mail. Use caution accessing links or attachments.

Dear Ben,

Thank you for your prompt response. As I mentioned in my e-mail, the proposed amicus brief focuses on the application of Virginia's Anti-SLAPP law at the earliest stages of litigation. It will also raise the press rights considerations posed by defamation by implication claims by public figures. Proposed amicus seeks to present these considerations to the court. The VPA does not take a position on the specific claims or defenses in this case.

Regards,
Jennifer

From: Chew, Benjamin G. <BChew@brownrudnick.com>

Sent: Monday, October 21, 2019 11:13 AM

To: Jennifer Nelson <jn5g@lawschool.virginia.edu>

Cc: Weingarten, Elliot J. <EWeingarten@brownrudnick.com>; Crawford, Andrew C. <ACrawford@brownrudnick.com>; Vasquez, Camille M. <CVasquez@brownrudnick.com>; awaldman@theendevorgroup.com<mailto:awaldman@theendevorgroup.com>

<awaldman@theendevorgroup.com>; rgilmore@steinmitchell.com<mailto:rgilmore@steinmitchell.com>

<rgilmore@steinmitchell.com>; kattridge@steinmitchell.com<mailto:kattridge@steinmitchell.com>

<kattridge@steinmitchell.com>; Gabriel Rottman <gr4jz@lawschool.virginia.edu>

Subject: Re: Virginia Press Association - Request for Consent

Dear Jennifer,

As a proud graduate of the University of Virginia School of Law, Class of 1988, I ask what, if any, due diligence you or your colleagues did prior to deciding to support Ms. Heard's position in this case?

In particular, did you investigate whether either of the parties to the case had a record of domestic abuse?

If you would please do me the courtesy of responding to those two questions today, I will convey Mr. Depp's response.

Best regards,

Ben

Sent from my iPhone

On Oct 21, 2019, at 7:19 AM, Jennifer Nelson <jn5g@lawschool.virginia.edu> wrote:

External E-mail. Use caution accessing links or attachments.

Counsel:

The Virginia Press Association, represented by the First Amendment Clinic at the University of Virginia School of Law, intends to move for leave to file a short amicus brief in support of Defendant's motion for leave to file a demurrer and plea in bar in Depp v. Heard, CL2019-02911. The amicus brief will focus on the application of Virginia's Anti-SLAPP law at the earliest stages of litigation.

Will Plaintiff consent to the relief sought by our motion? Please do not hesitate to contact me with any questions. I can be reached at 202-795-9312.

Regards,
Jennifer Nelson

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.....

CERTIFICATE OF SERVICE

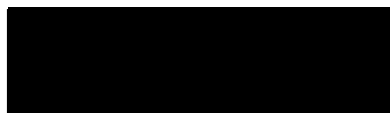
I HEREBY CERTIFY that on this 1st day of November 2019, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

Roberta A. Kaplan (*pro hac vice*)
Julie E. Fink (*pro hac vice*)
John C. Quinn (*pro hac vice*)
Joshua Matz (*pro hac vice*)
KAPLAN HECKER & FINK, LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
Telephone: (212) 763-0883
rkaplan@kaplanhecker.com
jfink@kaplanhecker.com
jqinn@kaplanhecker.com
jmatz@kaplanhecker.com

Eric M. George (*pro hac vice*)
Richard A. Schwartz (*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
rschwartz@bgrfirm.com

A. Benjamin Rottenborn (VSB No. 84796)
Joshua R. Treece (VSB No. 79149)
WOODS ROGERS PLC
10 S. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
Telephone: (540) 983-7540
brottenborn@woodsrogers.com
jtreece@woodsrogers.com

Counsel for Defendant Amber Laura Heard



Benjamin G. Chew