VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

REPLY MEMORANDUM IN SUPPORT OF AMBER LAURA HEARD'S SUPPLEMENTAL PLEA IN BAR

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Depp cannot escape the fact that the issue decided by the UK Court is identical to the issue before this Court—whether he abused Heard. The UK High Court ruled against Depp—where defendants had the burden of proof — finding that Depp beat Heard at least 12 times.[1]

Depp does not dispute due process in the UK and US Courts are compatible; instead, he asserts he was denied the proper "procedural tools" during his chosen forum in the UK, even though he was also litigating this case for 16 months prior to the UK trial, with full access and ability to use this discovery in the UK. It was Depp who repeatedly resisted producing damaging evidence in the UK, **Att. 1.** In one of Depp's many requests for relief from sanctions in the UK - this time facing dismissal of his UK lawsuit - Depp contended that to obtain the "vindication" Depp then sought, and now purportedly seeks in this case (Opp'n 22), he preferred the UK Court to the US jury and believed the UK decision would achieve greater vindication for all parties:

> [T]he US proceedings will not produce a clear and reasoned judgment, which is exactly what Eady J [a Judge in a case Depp's counsel was citing] said is so important. Trial in the proceedings in Virginia will be a jury trial with just a verdict. Here, your Lordship will deliver a clear and reasoned judgment taking into account a mass of evidence, hearing from the parties and giving your judgment in relation to the 14 different incidents. As I say, Eady J made clear that it is a reasoned judgment that provides the vindication, not just for the claimant but also for the defendant.

Att. 2, at 15. The UK High Court, in granting Depp's request for relief, specifically found:

> I also see force in Mr. Sherborne's [Depp's counsel] points that a reasoned decision (which I shall have to give after the trial) will be a vindication for whatever party is successful of a different order than a bald verdict of a jury. Of course, I mean no disrespect to the procedure adopted in Virginia.

Att. 3, ¶30(v). Heard asks this Court to grant her Supplemental Plea in Bar and apply comity to the UK High Court's well-reasoned decision reflected in the UK Judgment and dismiss the

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[1]The UK Court also found that at least one of the attacks involved sexual violence where Depp "inserted a bottle into Ms Heard's vagina without her consent and thrust it repeatedly and hard while screaming that he was going to kill her and taunting her." **Second JN Att. A, ¶ 9.**

Complaint. Independently, since Depp made no effort to articulate, much less meet his clear burden to prove, any exception to Va. Code § 8.01-465.13:3(A)–(C), Heard asks this Court to apply the UK Judgment under the Uniform Foreign-Country Judgment Recognition Act and dismiss the Complaint. Finally, Heard asks this Court to follow the line of Virginia cases applying the principles of collateral estoppel to bar the same plaintiff from bringing the same claims after having lost the first time, even where the defendant is different. The Virginia Supreme Court has long provided guidance that, in certain circumstances, collateral estoppel should bar subsequent claims brought by the same plaintiff against a different defendant. This is the case justifying application of the bar while remaining faithful to that guidance and the key principles of collateral estoppel. This is especially appropriate where Depp expressed his preference for the UK Court's "well reasoned decision" over "just a verdict," until he lost.

I. The UK Judgment should be recognized by this Court and given preclusive effect under principles of comity and the UFCMJRA.

US courts routinely grant comity to UK Judgments, finding that their procedures comport with this country's notions of due process. *See, e.g.*, *Apostolou v. Merrill Lynch*, 2007 WL 2908074, at *4 (E.D.N.Y. 2007) (analyzing UK tribunal decision and considering it a "sister common law jurisdiction with procedures akin to our own"); *Pony Express Records v. Springsteen*, 163 F. Supp. 2d 465, 472–73 (D.N.J. 2001) ("Indeed, this court generally considers the courts of the United Kingdom fair and just tribunals."). The Virginia Supreme Court has also held that "the prevailing English rules of procedure comport favorably with the concept of procedural due process as that concept has evolved in this State and nation." *Oehl v. Oehl*, 221 Va. 618, 624 (1980). A determination to grant comity is made "*before* a court can evaluate the preclusive effect of a foreign judgment," not the other way around, as Depp would suggest. *Apostolou*, 2007 WL 2908074, at *4 (emphasis added).

CL 2019-2911

ATTACHMENT 1

Witness statement
Louis Charalambous
Third
Defendants
Exhibit LC 3

Dated: 19 February 2020

IN THE HIGH COURT OF JUSTICE **CLAIM NO. QB-2018-006323**

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 LOUIS CHARALAMBOUS

I, **Louis Charalambous** of Simons Muirhead & Burton LLP, 87-91 Newman Street, London W1T 3EY **WILL SAY**:

1. I am a partner at Simons Muirhead & Burton LLP ('SM&B'), which acts for both Defendants in this action, and I am authorised to make this statement on their behalf. I make this statement in support of the Defendants' Application Notice dated 19 February 2020.

2. The facts and matters set out in this statement are within my own knowledge unless otherwise stated, and I believe them to be true. Where I refer to information supplied by others, a source of the information is identified. Facts and matters derived from these other sources are true to the best of my knowledge and belief.

Background

3. This is a libel claim brought by the Claimant, Mr Depp, who is a world-famous actor more commonly known as Johnny Depp. The First Defendant, News Group Newspapers Ltd, is the publisher of *The Sun* newspaper and its associated website. The Second Defendant, Mr Wootton, is a journalist employed by the First Defendant who wrote the articles complained of. The claim is for damages and an injunction in respect of an article published online on the First Defendant's website on 27 April 2018 and an article published in *The Sun* on 28 April 2018.

4. The claim form was issued on 1 June 2018 and the particulars of claim ("PoC") were served on 13 June 2018. The Claimant alleges that the words complained of meant that:

   "the Claimant was guilty, on overwhelming evidence, of serious domestic violence against his then wife, causing significant injury and leading to her fearing for her life, for which the Claimant was constrained to pay no less than £5 million to compensate her, and which resulted in him being subjected to a continuing court restraining order; and for that reason is not fit to work in the film industry." (PoC [10])

5. The Claimant has separately issued a libel claim in the United States against his former wife Ms Amber Heard in respect of a publication in the Washington Post entitled, *"I spoke up against sexual violence — and faced our culture's wrath. That has to change."* ("the US libel proceedings"). The US libel proceedings are on-going. There have also been divorce proceedings in the US between the Claimant and Ms Heard.

The Re- Amended Defence and Amended Reply

6. The Defendants served an Amended Defence on 21 June 2019. This has recently been reamended by consent. I refer in this statement to the Re-Amended Defence (Re-AmDef). The Defendants rely on a substantive defence of truth pursuant to section 2 of the Defamation Act 2013, in the meaning that *"the Claimant beat his wife Amber Heard causing her to suffer significant injury and on occasion leading to her fearing for her life"* (ReAmDef [8]).

7. The Particulars of Truth are set out at ReAmDef [8(a)] to [8(q)]. The Defendants rely on a number of alleged incidents of abuse from 2012 to 2016 (some of which took place over multiple days), and allege more generally that *"throughout their relationship the Claimant was verbally and physically abusive towards Ms Heard, particularly when he was under the influence of alcohol and/or drugs"* (ReAmDef [8(a)]).

8. The Claimant served an Amended Reply ("AmRep") on 26 July 2019 setting out a detailed response to the Defendants' factual case. He is due to file a Re Amended Reply but at the time of drafting this statement has not done so. The Claimant denies that the words complained of in the meaning relied on by the Defendants is true. The Claimant's overarching case is that *"he has never hit or committed any acts of physical violence against Ms Heard"* and *"has never done more than grab her arms to prevent her punching him in the face"* (AmRep [2.1]), and he denies each of the specific allegations of violence as alleged in the AmDef.

9. The Claimant also claims that the only substance to which he was addicted during the period in question was Roxicodone (witness statement paragraph 21). An important issue at trial will be what substances (prohibited drugs, prescription drugs and alcohol) the Claimant was using during the relationship with Ms Heard and what effect these had on him; and what his mental state was generally during that relationship. It is the Defendants' case that the Claimant frequently lost control of himself during the relationship, partly because of his heavy drug and alcohol use, and also that his memory has been impaired by his heavy use of drugs, including prescription drugs, and alcohol, throughout that relationship.

The Trial

10. The trial is due to be heard by a Category A Judge over 10 days (plus 1 day reading) from 23 March to 3 April 2020. A pre-trial review is listed for 26 February 2020. The parties have agreed that there will be an exchange of reply evidence, which the Defendants propose takes place before the pre-trial review.

Reason for this application

11. On 5 February 2020 I received an email from the Claimant's US lawyer Mr Waldman, which I exhibit at page 1 of LC 3. The email said:

Dear Mr. Charalambous:

It's Adam Waldman writing.

When we met last, you said "amber heard would have to be gone girl" for her abuse allegations to be false. One audio tape alone (plus frankly a mountain of other evidence) has shown her to be so. There are more tapes to come. I assume you were blindsided by these tapes, which Ms Heard has admitted she possesses, because she didn't provide them to you.

If you would like to discuss a way out of the morass for your client, please call me. I'm in Los Angeles on +12025504507.

Kind regards
Adam

12. The reference to 'one audio tape alone' was to an audio tape recording of a conversation between the Claimant and Amber Heard which had been provided to the US publisher of Mail Online and which appeared on the Mail Online website on 31 January 2020. I exhibit a copy of the article at pages 2-22 of LC 3.

13. On 5 February (the same day as Mr Waldman's email) a further article appeared on Mail Online concerning another recording of Ms Heard which had been provided to the publisher. I exhibit a copy of the article at pages 23-52 of LC 3.

14. I was unaware of either recording until these reports appeared on Mail Online. They had not been disclosed by the Claimant in these proceedings, and still have not been. I have now listened to the parts of the recordings that have been placed on YouTube. As is apparent from the Mail Online articles, the recordings obviously contain matters which potentially shed light on the issues in this case and therefore fall within the scope of CPR 31.6.

15. I believe that it is apparent from Mr Waldman's email to me that the Claimant has long been in possession of at least one of these audio recordings- which is unsurprising given they feature the Claimant – and has further recordings which he is threatening to put into the public domain unless my clients settle this case on terms advantageous to the Claimant. I also believe it is clear that the Claimant is responsible for leaking these recordings to Mail Online in order to put pressure on my clients or on their principal witness, Ms Heard. On 10 February I wrote to the Claimant's solicitors Schillings to ask whether their client leaked the recordings to Mail Online and to explain whether he has any further recordings, but at the date of this statement have had no response.

16. This is obviously very concerning. It is also consistent with the Claimant's persistent failure to comply with his duties of disclosure in these proceedings, as described in detail below.

17. However the failures in disclosure were not just the responsibility of the Claimant. I believe that his previous solicitors Brown Rudnick, who were replaced during the week of 3 February 2020, failed to comply with their duties regarding disclosure, for example by redacting materials which plainly should not have been redacted, as explained below, and by failing to disclose documents which obviously fall within the ambit of CPR 31.6. Brown Rudnick have also engaged in correspondence on the topic of disclosure which is, I consider, misleading, as I set out below.

18. As a result of Mr Waldman's email I now believe that the Claimant has been deliberately withholding disclosable documents from the Defendants in order to place the Defendants under a disadvantage. I also have no faith at all that the Claimant's former solicitors Brown Rudnick carried out their duties properly. This is why the Defendants seek an ordering requiring the Claimant's new solicitors to carry out a proper disclosure exercise in respect of as yet undisclosed documents, verified with a statement of truth, to ensure the Claimant's disclosure duties have been properly complied with. I also ask that the court make an order that unless the orders be complied with the claim be struck out. This is because of the imminence of trial and the risk of unfairness if the Claimant does not comply with his disclosure obligations as a matter of urgency.

Issues with the Claimant's disclosure

19. Master McCloud's CCMC directions included the usual order for standard disclosure by exchange of lists, to take place by 6 September 2019 (extended by agreement to 13 September 2019).

20. The numerous letters from SM&B to the Claimant's solicitors, which I exhibit at LC 3 pages 114-203, attest to this. It has been an excessively lengthy process that has put my clients to unnecessary costs, and even now, months later, many points remain unresolved.

Form N265 / Disclosure statement

21. In a good example of the approach the Claimant has taken to his disclosure obligations, and in particular as to his lack of personal engagement with the process, we did not receive a Form N265 signed by him personally until 9 January 2020, almost four months after the date for exchange of lists. A copy is exhibited at pages 53-58 of LC 3.

22. The form provided on 13 September 2019 had instead been signed by a representative of Brown Rudnick, the Claimant's then solicitors. Further, the wording of the disclosure statement in the standard form had been altered to say: "I certify that I understand the duty of disclosure and to the best of my knowledge ~~I have~~ the Claimant has carried out that duty. I further certify that the list of documents set out in or attached to this form, is a complete list of all documents which are or have been in ~~my~~ the Claimant's control and which ~~I am~~ he is obliged under the order to disclose".

23. We wrote on 4 October 2019 to say that this was not acceptable, noting that CPR 31.10(7) (which makes provision in for a lawyer to sign off on behalf of a company) did not apply given that the Claimant is an individual, and that as per Arrow Trading and Investments and another v Edwardian Group Ltd and others [2004] EWHC 1319 (Ch): *'The purpose of the rule [CPR 31.10] is to bring home to each party his or her individual responsibility for giving standard disclosure. Except to the extent permitted by the rules, it requires the party himself to make the disclosure statement'.*

24. We had to chase this up various times, Brown Rudnick having said on 10 October 2019 that *'we will ask our client to sign form N265 and will then provide the signed form to you'.* They then promised an amended version of the form to take account of further searches being carried out (as to that, see further below); and following yet another chaser from my firm on 20 December, they advised on 23 December that the

Claimant was travelling and unable to provide a signed copy. As I said above, the signed copy was only finally received this year, on 9 January 2020.

Text Message Spreadsheet: the accidentally disclosed documents

25. The Claimant's original form N265 exhibited hereto at pages 59-63 of LC 3 states that 'data from the iCloud backup of the Claimant's phone was extracted in 2017'. The summary page of the excel spreadsheet confirms that it was prepared in 2017, and that it contained material from the "Dembrowski iCloud backup". Christi Dembrowski is the Claimant's sister. The form says that the messages were then manually reviewed, search terms were applied, reports were made, and the reports were reviewed manually.

26. The Claimant disclosed an Excel spreadsheet of text messages which he indicated was a combination of a list of messages between (1) him and Amber Heard; and (2) him and various third parties, all from the Claimant's mobile telephone ("the Spreadsheet"). Separately, the Claimant also disclosed a schedule of text messages from Stephen Deuter's phone ("Deuters Schedule"). Mr Deuters was the Claimant's assistant.

27. On the face of it, the Spreadsheet disclosed by the Claimant's solicitors contained approximately 400 text messages. The paralegal at this firm who did this task has explained to me that she was trying to determine how many text messages were in the document, but this was not possible because it started at around row 8,000 and the row numbering was not sequential. She therefore double clicked a line between two rows of text messages which then revealed swathes of further text messages. Due to what Brown Rudnick later called a "technical error", the Spreadsheet also contained circa 70,000 text messages. It became apparent that these 70,000 messages had been disclosed inadvertently. These included a large amount of irrelevant material as well as some privileged messages which I examined in accordance with the Court of Appeal guidelines in *Mohammed Al Fayed and Ors v Commissioner of Police of the Metropolis [2002] EWCA Civ 780* to ascertain whether these messages were included as an "obvious mistake". As set out in the correspondence I found that they were. Thereafter I deleted all of the privileged material in accordance with the guidelines. The Spreadsheet also contained a great deal of other relevant messages, which were not included in the list the Claimant had intended my clients to receive. As referred to in the Schedule below, key text messages were also missing from the Deuters Schedule.

28. We notified Brown Rudnick of this and agreed to delete the Spreadsheet, so the 400/70,000 figures I have given above are my firm's best approximation (because we have not been able to access the Spreadsheet as originally disclosed in order to confirm the exact figures). Meanwhile, SM&B had compiled our own Schedule of messages taken from the full Spreadsheet that we considered relevant to the matters at issue (irrespective of the Claimant's intention to disclose them), which we sent to Brown Rudnick inviting them to agree it. As a result of our analysis of the messages we concluded that there were some 800 messages which the Claimant had not intended to disclose but which were disclosable.

29. I set out below some of the messages which the Claimant had not intended to disclose but which were contained in the 70,000 messages.

From	To	Message	Date
The Claimant	Amber Heard	You know what I want, who I am and where I want to go with us... You know very well what type of fucking man I am. And, yet... You lay a gauntlet before me that you know is the very species of danger that will always attract me into a very tempting test... What's behind that door??? Almost impossible to nit take you on... You want me to roll the dice??? This sounds more like an aggravated ultimatum than the soft words that could help to make us both feel better!!! Don't test me, please...	9/9/2013 11:03:50 PM(UTC+0)
Paul Bettany	The Claimant	I just thought of a way for us to make a lot of money! I know you already have a lot of money but I mean A LOT of money and with very little effort. First of all we buy Amber a pet beaver and then we take pictures of you shaving said beaver. All that's left is to do is to create a website with the domain name "Johnny Depp shaves Amber Hurd's beaver" and then we sell advertising space like fucking crazy!!! Clearly there are many spin offs- you could poke, stroke, punch etc.	6/4/2013 2:45:12 PM(UTC+0)
The Claimant	Paul Bettany	Lets burn Amber!!!	6/11/2013 5:04:53 PM(UTC+0)

The Claimant	Paul Bettany	Let's drown her before we burn her!!! I will fuck her her burnt corpse afterwards to make sure she is dead...	6/11/2013 6:23:46 PM(UTC+0)
The Claimant	Paul Bettany	I'm gonna properly stop the booze thing, darling... Drank all night before I picked Amber up to fly to LA, this past Sunday... Ugly, mate... No food for days... Powders... Half a bottle of Whiskey, a thousand red bull and vodkas, pills, 2 bottles of Champers on plane and what do you get...??? An angry, aggro Injun in a fuckin' blackout, screaming obscenities and insulting any fuck who got near... I'm done. I am admittedly too fucked in the head to spray my rage at the one I love... For little reason, as well I'm too old to be that guy But, pills are fine!!!	5/30/2014 5:45:08 PM(UTC+0)
The Claimant	Chrsti Dembrowski	I'm so happy that I never, ever have to deal with that conniving, thieving whore again!!!! Hope Mom's doing Snoopy dances!!! Love your guts... Me	8/18/2016 4:51:44 PM(UTC+0)

30. Eventually, Brown Rudnick did not take issue with any of the messages contained in our Schedule. On 11 October 2019 Brown Rudnick provided a new Spreadsheet which contains all of those messages. The Claimant can therefore be taken to have accepted that these messages are relevant under CPR 31.6. However, the Court should note that these text messages only came into the Defendants' possession as a result of a "technical error", and no explanation has been given about why they were not included in the messages that were intended to be disclosed – as they obviously should have been.

31. This serves as an illustration of the general stance that appears to have been taken by the Claimant, whereby until pressed he only discloses material that he considers helps his case, or at least is not unhelpful to it.

Undisclosed text messages

32. Separately, and concerningly, the spreadsheets of text messages provided by the Claimant (either in the intentional or unintentional part, and old and new versions) omit various text messages which are referred to in the pleadings in this claim. All of these messages are referred to either in the Claimant's pleadings or in the Defendants' pleadings, which were based on declarations made in the US libel proceedings. As is apparent from the relevant parts of the Amended Reply (set out below) there has never been any issue that the text messages in question were sent.

33. I have set out to the best of my knowledge when these text messages were subsequently disclosed (to the extent that they have been) in the below table. As is apparent he has only very recently disclosed the majority of these messages. Moreover, he omitted them all from the spreadsheet of messages which he provided to us. In respect of some pleaded texts the Defendant has still given no disclosure.

34. I caveat that by saying that it is difficult to comprehensibly check what has been disclosed by the Claimant and when CPR 31.10 (3) requires a party to serve a list of documents, which "must identify the documents in a convenient order and manner." The additional guidance provided in PD 31A paragraphs 3.1 to 3.3 sets out that it would be usual to list of the documents in date order, number them consecutively and give a concise description for each document. We have received the majority of the Claimant's disclosure in batches sporadically/piecemeal over the course of four months, mainly after we have chased up specific items. In accordance with PD 31A.3 and PD 31B.30, when additional documents are disclosed an additional schedule of documents should be provided. The absence of this makes it more difficult to conduct a proper review of what the Clamant has disclosed.

Where pleaded	*Text referred to*	*Status of Disclosure*
2.82 of the Amended Reply	The Claimant texted Whitney Heard on 21 May 2016 at 7.30pm in response to a text he received from her at 7.15pm, suggesting his arrival may have been later than 7.15pm'	Still have not been disclosed by the Claimant
Para 8.a.2 Re-Amended Defence	'disco bloodbath' and 'hideous moment' text message	Ds disclosed this text message exchange in a screenshot within the Exhibit to Amber Heard's April 2019 US Declaration. C first disclosed these by way of a screenshot on 29 January 2020. This text exchange was not in the spreadsheet of text messages disclosed by BR.
Para 2.2B.5 Amended Reply	It is admitted that the Claimant had an exchange of texts with Ms	Ds disclosed this text message exchange in a screenshot within

(replying to Para 8.a2. Amended Defence)	Heard on 12 March containing the words quoted therein"	the Exhibit to Amber Heard's April 2019 Declaration.
Para 8.a.4 Re-Amended Defence	Stephen Deuters texted the Amber Heard saying the Claimant was apologetic and appalled at his behavior during the flight and cried when he was told he had kicked Ms Heard.	C first disclosed on 29 January 2020. They were contained within a a video of a person scrolling through text messages between Amber Heard and Stephen Deuters as Exhibit 9 to Amber Heard's Exhibits to the 2016 Divorce proceedings. This text message exchange was not in the Deuters Schedule disclosed by BR.
Para 8.a.4 Re-Amended Defence	[the Claimant] sent Ms Heard a text message, admitting "Once again, I find myself in a place of shame and regret. Of course, I am sorry... I will never do it again... My illness somehow crept up and grabbed me... I feel so bad for letting you down."	Ds disclosed this text message exchange in a screenshot within the Exhibit to Amber Heard's April 2019 US Declaration. C first disclosed these by way of a screenshot on 24 January 2020 in Exhibit 5 to Amber Heard's Divorce Exhibits. This text exchange was not in the spreadsheet of text messages disclosed by BR.
Para 2.2D Amended Reply (replying to Para 8.a.4 Amended Defence)	It is admitted that Stephen Deuters had a text exchange with Ms Heard on 25 May 2014 in which Mr Deuters said that the Claimant had cried when he had been told that he "kicked" Ms Heard. [...] As to the second sentence: it is admitted that the Claimant sent	See above.

	Ms Heard a message containing the words quoted therein, but it is denied that the said text message amounted to an admission that the Claimant had behaved in the way alleged."	
Para 8.a.6 Re-Amended Defence	The Claimant sent Ms Heard text messages apologising for his behaviour and calling himself a "fucking savage" and a "lunatic".	This was exhibited to AH's April 2019 Declaration but has not been disclosed elsewhere by C (including the spreadsheet of text messages disclosed by BR).
Para 2.2F Amended Reply (replying to Para 8.a.6 Amended Defence)	[...] it is denied that [...] the text messages sent on that date were an apology for any kind of violence on the part of the Claimant	

35. These are all, of course, relevant messages. The Claimant's approach to disclosure of them has been deficient and illustrative of the wholly unsatisfactory way in which he and his previous solicitors have approached their responsibilities as to disclosure.

36. On 10 October 2019 Brown Rudnick stated in correspondence exhibited at pages 132-135 of LC 3 that the pleaded text messages were not in the data that had been collected from the Claimant's iCloud; they advised that they were making investigations as to why that may be the case. On 17 October 2019 they said they were continuing to investigate what had happened to these messages and were looking into whether the Claimant possessed any other mobile devices that he used at the relevant times; see pages 139-140 of LC 3. On 6 November 2019 the explanation given was that the text messages 'were not in the data that has been collected' see pages 148-149 of LC 3. On 25 November my firm required confirmation about whether these text messages had been deleted, and if so by whom. We also asked what else has been deleted that should have been disclosed. A copy of this letter can be found at pages 152-153 of LC 3.

37. As per the correspondence, Brown Rudnick stated that further searches had been carried out (including keyword searches) and that the messages still did not appear. There was no explanation as to why that might be the case.

38. In their letter of 23 December 2019 at pages 164-166 of LC 3, Brown Rudnick simply stated that the Claimant's position as to the missing text messages is as set out in his second witness statement of 12 December 2019. However that statement contains no such explanation as to the manner in which the messages were (or in some cases were never) disclosed. He does not say whether they were deleted, or what efforts he has made to search for text messages.

39. I remain very concerned that the Claimant has not carried out a proper search for relevant text messages. He appears to have had very little if any involvement personally on the attempts to obtain text messages which may shed light on the issues in these proceedings. There therefore remains the very real possibility that if he made a proper effort to search for such messages further relevant messages would be found.

40. I refer at paragraph 64 below to an exhibit list to Ms Heard's statement from the US divorce proceedings dated 9 August 2016 which refers to various text messages and other documents. A copy of the exhibit list is enclosed at pages 69-73 of LC 3. This includes various documents which were obviously within the scope of CPR 31.6 including text messages. None of these documents, including text messages, were disclosed by the Claimant in his original list. As best as I can tell, some have still not been disclosed by the Claimant. This is, frankly, incomprehensible, and adds to my concerns about how the Claimant and his then solicitors carried out the disclosure exercise.

41. For this reason I ask the court for orders relating to the disclosure of text messages, as set out in the draft order.

Claimant's computer(s)

42. Initially – remarkably - the Claimant's own computer (or computers) were not searched. Brown Rudnick advised in correspondence on 10 October 2019 that they did not consider it would be reasonable or proportionate to search his computer(s). Clearly, this was not acceptable under standard disclosure criteria.

43. On 6 November 2019 Brown Rudnick confirmed that the Claimant's computer had now been imaged (nearly two months after exchange of disclosure by lists was due to take place). Brown Rudnick also advised that the documents found to be disclosable as a result of this exercise would be disclosed as soon as possible. On 25 November my firm wrote to Brown Rudnick to chase the results of this search as no documents had been received. On 26 November Brown Rudnick advised that there were no disclosable documents as a result of the search exercise carried out on the Claimant's computer. This is, to say the least, surprising.

44. Finally on 23 December 2019 the Claimant disclosed emails between himself and Michael Mann dated 8-9 June 2016, and emails between himself and Rob Marshall dated 21 June 2016. Copies of these emails are enclosed at pages 64- 68 of LC 3. These emails were disclosed despite the Claimant's solicitors having originally stated in correspondence on 17 October 2019 that the Defendant's email account returned no results relevant to the issues in dispute. Also, although it is possible that he does not use his computer for emails, I find it surprising that these emails were not found as a result of a search of the Claimant's computer.

45. Given the above, I consider it reasonable and appropriate for the Claimant's new UK solicitors to confirm that they are satisfied that the search carried out into the Claimant's computer has been properly carried out.

Medical records (Dr Kipper notes)

46. The Claimant's drug use and the resulting effect on his behaviour is a key matter at issue in these proceedings, as is apparent from the various pleaded incidents of violence. The Claimant deals with the issue in his second witness statement of 12 December 2019: for example, he makes a case that the only drug he has been addicted to is Roxicodone. He says he is not '*a general drug addict [...] nor did any drug or alcohol ever make [him] undertake violence against anyone*'. However, in his disclosure list only one item that could be considered a medical record was included, an email from Dr Kipper to the Claimant's sister. Plainly there was more material in the Claimant's control, but again we had to repeatedly press for it.

47. It is evident that there are outstanding medical records in the Claimant's control which he has not obtained from medical practitioners, or which have not been disclosed.

48. As set out at paragraph 4 (d) of my firm's letter to Brown Rudnick dated 4 October 2019, exhibited at pages 117-122 of LC 3, the Claimant has made a positive case in his Amended Reply about periods of his sobriety. We stated that there would be documents in his control which are relevant to these and his other assertions about his sobriety which needed to be disclosed.

49. In response to this, on 10 October 2019 Brown Rudnick stated in correspondence 'our reviewers did not find any documents that are relevant to the matters set out in paragraph 4(d)'. We did not find this credible.

50. On 17 October Brown Rudnick confirmed that they had requested that their client provide medical records he has within his control, admitting that they did not initially search medical records as a standalone category because – mystifyingly - they did not consider it proportionate to do so. They also stated that they continued to maintain this to be the case but had none the less asked the Claimant to provide them with medical records within his control so that they could carry out a manual review for the purpose of disclosure.

51. On 25 October Brown Rudnick advised that the Claimant was in the process of executing a HIPAA waiver in the US to enable the records to be released to him. Such a waiver allows doctors to provide information on a patient's health to third parties, they also said they were hopeful that the records would be disclosed by early the following week.

52. Despite the assurances by Brown Rudnick as to the timing of disclosure, before 23 December only one medical record had been disclosed in relation to the Claimant's positive case about his drug use/ addiction issues; a letter from the Claimant's private doctor, Dr David Kipper dated 15 March 2015.

53. On 23 December 2019 Brown Rudnick provided medical records from Dr Kipper but they said they had 'redacted information not relevant to these proceedings'. The records had been very heavily – almost entirely in some cases – redacted. We wrote to say that this was inappropriate, not least because as per CPR 31.19 (3), there must be a "right or duty" allowing a party to redact part of a document, and the grounds for doing so must be set out.

54. It is my understanding that Dr Kipper was solely treating the Claimant for his addiction issues. Therefore, I would expect all of Dr Kipper's records of his treatment of the Claimant during the period of his relationship with Ms Heard to fall within the scope of CPR 31.6.

55. It is not just the extreme reluctance of the Claimant to disclose medical records which I find concerning. It is also the manner in which Brown Rudnick redacted the medical records which they did decide to disclose. For example, the Claimant has disclosed notes relating to the Bahamas trip in August 2014, which he accepts took place to try and reduce his dependence on painkillers. Almost all of the rest of the notes contemporaneous with the Bahamas trip were redacted. Brown Rudnick wrote saying

that they considered our requests to be disproportionate, but nevertheless they would carry out the review exercise again. When Brown Rudnick re-disclosed these medical notes with redactions lifted, it was immediately obvious that they should never have made some of the original redactions. As an example, the following – obviously relevant/disclosable - notes relating to the 2014 Bahamas trip had previously been redacted:

Kjp jd 52 20/08/2014 2315 RN [nurse] received text from fiancé stating "he's manic, full on flipping out, give up, not to call you guys". Instructed to give HS meds and additional Seroquel 50mg and to call if RN needs to go assess patient.

Kjp kd 53 20/08/14 0820 RN received text from fiancé stating, "he seems calmer, not as crazed".

Kjp kd 53 20/08/14 0820 RN received text from fiancé stating "we need help ,he's at the border, refusing to take his meds." Fiancé informed RN would come right over.

Also disclosed this second time around were additional medical records highly relevant to the pleaded issues in the case. For example, on 24/06/14 1200 (Kjp 34) the entry states *'Fiancé voiced concerns of patient's behavior while using drugs and alcohol'.* The explanation given for why these medical records were not disclosed earlier was that *'a broader time frame for relevant documents which goes beyond the specific incidents alleged' –See Brown Rudnick's letter of 3 February at page [192 of LC 3.* However, the original N265 form stated that documents were searched from 2012 – this is another inconsistency which is cause for concern.

56. Again I believe that neither the Claimant nor his previous solicitors made proper efforts to comply with their disclosure obligations in relation to medical records, and that the orders the Defendants now seek are needed to ensure that the process is properly executed.

Disclosure from the other medical professionals

57. Brown Rudnick stated in their letter of 24 January 2020 that it was not proportionate under CPR 31.7 to have to undertake searches of all of the Claimant's medical records. I disagree.

58. Since we objected to this approach, Brown Rudnick advised that the Claimant has also requested medical records from some other doctors, namely Alan Blaustein M.D. and David Kulber, M.D. and provided HIPAA authorisation records to Connell Cowan,

Ph.D., Amy Banks, M.D and Laurel Anderson, PhD. CNN. (Dr Blaustein is mentioned in Dr Kipper's letter of 15 March 2015 and his medical records will likely contain evidence relevant to these proceedings). The Claimant has not said whether there are other medical practitioners or therapists who he consulted on relevant issues during the period of his relationship with Ms Heard, namely the end of 2011 to May 2016.

59. At this time of writing, none of the medical records from the medical practitioners identified above have been disclosed. The Claimant's position was originally that because these medical records have not been provided to him they are not within his control (see Brown Rudnick's letter of 13 January 2020 at pages 170-171 of LC 3). As we have had to point out, this is of course not correct - in accordance with CPR 31.8 (b)/(c) this material is in his control, because he has a right to possession/copies of it.

60. I therefore seek an order in the terms of the draft in order to ensure that the Claimant and his new solicitors carry out their duties in respect of medical disclosure properly.

US libel proceedings and Depp/Heard divorce proceedings

61. A major issue with the Claimant's disclosure has been his continuing failure to provide disclosure of relevant documents in his control arising from his divorce from Ms Heard and the US libel proceedings, including transcripts of depositions of people who are also witnesses in the current proceedings, plus exhibits to those transcripts. This has been covered extensively in the correspondence enclosed at pages 114-204 of LC 3, and I refer to the main examples below.

2016 exhibits

62. As discussed at paragraph 40 as part of their divorce proceedings, both Mr Depp and Ms Heard provided lists of witnesses and exhibits which were relevant to Ms Heard's allegations of domestic violence. The Claimant's list of exhibits was filed on 8 August 2016. Neither the list itself nor the exhibits were disclosed by the Claimant, despite them being in his control and their clear relevance to the matters at issue in the current proceedings. He also did not disclose Ms Heard's 2016 list or her exhibits. We had to specifically request this material and it was eventually disclosed on 24 January 2020. These documents should have been disclosed without my firm having to request them.

63. Of further concern is the fact that Brown Rudnick had said in earlier correspondence (e.g. their letter of 13 January 2020 exhibited at pages 170-171 of LC 3) that there had

been "no discovery or production of documents" in the divorce proceedings. I consider that this was misleading.

64. Documents were in fact exhibited by the Claimant and by Ms Heard in those proceedings which obviously fell within the scope of CPR 31.6. By way of example, the text messages exhibited at exhibit 12 of Amber Heard's exhibit list in the divorce proceedings (pages 69-73 of LC3) relate to the 2014 Bahamas trip, I enclose copies of these messages at pages 74-87 of LC 3. Of further concern is the fact that many of these messages were not even included by Brown Rudnick in the Spreadsheet of text messages the Claimant has disclosed in these proceedings.

65. On 24 January 2020 Brown Rudnick claimed that the Claimant did not have the exhibits to the depositions in the Depp/Heard 2016 divorce proceedings and were going to request these from the court file. As at 3 February 2020 Brown Rudnick were waiting to receive these. Nothing materialised. The Defendants have now obtained these from Amber Heard's US lawyers.

66. I still do not know whether the Claimant's UK lawyers have been provided with all the documents from the divorce and US libel proceedings and have conducted a review of those documents for the purpose of disclosure in the proceedings. I therefore request an order compelling both the Claimant and his UK lawyers to comply with their disclosure duties.

Depositions / Protective Order

67. We have made various requests in correspondence for copies of the deposition transcripts/exhibits from the US libel claim. The Claimant initially refused to provide any of these on 26 November and again on 23 December 2019, saying, through Brown Rudnick, that depositions taken in the US proceedings were subject to a Protective Order and were either confidential or within the period in which they could be designated confidential. See pages 154-156 and 164 to 166 of LC 3.

68. Having now obtained a copy of the Protective Order (from Ms Heard's US lawyers), a copy of which is exhibited hereto at pages 81-94 of LC 3, it is immediately apparent that the Claimant was always able to disclose documents covered by it as long as he obtained the consent of the "producing Party" or Ms Heard's agreement; see paragraph 3m of the Protective Order enclosed at page 83 of LC 3.

69. Despite this clear procedure, and before we had sight of the order, the Claimant did his best to obfuscate and delay. In their letter of 26 November Brown Rudnick had written stating that they would consider whether '*any steps can be taken to enable our client to disclose any deposition transcripts*' and would revert as a matter of urgency. On 23 December 2019 they said that *'subject to [the protective order] if [the Claimant] has in his control any non-privileged documents that fall within CPR 31.6 that have not already been disclosed in these proceedings, [he] will disclose them'.*

70. On 13 January 2020 Brown Rudnick wrote stating that they were reviewing the documents disclosed by Ms Heard in the US proceedings for the purpose of disclosure. Enclosed with their letter were certain deposition transcripts, including that of Joshua Drew, who is a witness for the Defendants in the current proceedings. However, only some of the exhibits to his deposition were disclosed, the Claimant maintaining that the rest were confidential; plus on the same grounds the Claimant also withheld disclosure of other deposition transcripts. I believe that scrutinising these claims of confidentiality is illustrative of the Claimant's approach since it demonstrates that the Claimant has chosen to withhold documents which quite obviously fall within the scope of CPR 31.6.

Joshua Drew

71. Joshua Drew and his (now) ex-wife Raquel "Rocky" Pennington lived in the neighbouring penthouse to the Claimant and Amber Heard. Mr Drew was witness to some of the pleaded incidents, including certain events which took place on 21 May 2016. One missing exhibit was Exhibit 16 – "Email from Joshua Drew to Amber Heard dated 22 May 2016, subject: Statement from JD and RP".

72. We have since obtained that exhibit (and the others) from Ms Heard's US lawyers. We enclose a copy of this exhibit hereto at pages 102-105 of LC 3. The email dated 22 May 2016 deals with the events of the previous day, a key pleaded incident in this claim. It is Mr Drew's contemporaneous account of that incident and is clearly relevant to this claim. It was an email from Mr Drew to Amber Heard, so any confidentiality (if it fell under the terms of the Protective Order) belonged to Mr Drew or Ms Heard, not to the Claimant. Likewise, the other texts which were not disclosed were texts between Ms Heard and Mr Drew. They all meet the CPR 31.6 test and should have been disclosed by the claimant. The Claimant's stance on confidentiality does not bear scrutiny.

Lisa Beane

73. Lisa Beane was the Office Manager for Dr David Kipper in Beverley Hills from 2014 until 2017, at which time the Claimant and Amber Heard were both treated by Dr Kipper. On 24 January 2020 Brown Rudnick wrote concerning the depositions in the US proceedings and associated documents, and stated that Lisa Beane's deposition had been 'designated confidential'. They gave no further explanation as to why the Claimant was not disclosing it.

74. We have since received a partially redacted version of Lisa Beane's deposition transcript and its exhibits, including medical notes, from Ms Heard's US lawyers. These relate in particular to the issue of what Ms Heard said to staff at Dr Kipper's medical practice after the alleged attack by the Claimant on her on 15 December 2015 (one of the pleaded incidents of violence); and what injuries that staff at the practice observed and noted at the time. The documents are, obviously, of real potential significance in this case, yet were not disclosed by the Claimant. I exhibit an extract from the relevant medical notes at pages 106-107 of LC 3. Again, any confidentiality in these documents belongs to Ms Heard, not to the Claimant.

75. Particularly in the light of the fact that the Claimant's former solicitors said they were actively investigating the issue of confidentiality in the US proceedings, it is completely unacceptable that he has withheld these documents from us. Maintaining confidentiality over documents in the US proceedings has long since ceased being a plausible excuse. As long ago as 26 November 2019 Brown Rudnick acknowledged in their letter the need to disclose immediately documents from the US proceedings which fell within the scope of CPR 31.6.

US Declarations

76. As part of the US libel proceedings, various people who are witnesses in the current proceedings have given declarations (which are separate to the deposition transcripts referred to above). They were within the Claimant's control and they meet the disclosure test. Despite this, copies of the declarations in the US libel proceedings were not disclosed until 24 January 2020, after we again had to specifically request copies.

77. I still do not know whether all the declarations, depositions and exhibits from the US libel proceedings have been disclosed by the Claimant. As discussed at paragraph 65] above, shortly before the Claimant changed solicitors Brown Rudnick informed us on 3 February 2020 that they were waiting to receive the missing exhibits to the divorce proceedings from the court reporter. No update has been provided on this. Hence the

Defendants apply for an order requiring Schillings to carry out a proper disclosure exercise in respect of these documents.

The Recordings featuring Amber Heard

78. The Defendants seek an order requiring the disclosure of all recordings in the Claimant's control featuring Amber Heard. As I explain above, Mr Waldman's email of 5 February demonstrates that the Claimant has had such recordings in his possession and retains further recordings which he is threatening to leak into the public domain.

79. I should add that Mr Waldman's threat is consistent with other steps Mr Waldman has taken in the US proceedings to provide documents to the media to advance his client's cause. Mr Waldman obtained a declaration from an individual called Laura Divenere dated 29 June 2019. I exhibit at page 108 of LC 3 a message he sent to Ms Divenere putting pressure on her to cooperate with him by providing a declaration supporting the Claimant's account. However I have been informed by Amber Heard's US lawyers that Ms Divenere's declaration which I exhibit at pages 109-111 of LC 3 has not ever been produced or otherwise relied on by the Claimant in the US libel proceedings. Instead it has been deployed in the media: it was attached as a link to an article published by The Blast enclosed hereto at pages 105-106 of LC 3. It is my firm belief that Mr Waldman must have supplied the declaration to Blast for publication – it is difficult to see how else they could have obtained it.

80. Further Ms Divinere's declaration has never been disclosed by the Claimant in these proceedings.

The present Application for Disclosure

81. My firm has written to the Claimant's former solicitors, Brown Rudnick and current solicitors, Schillings, on the deficiencies in disclosure on multiple occasions, repeatedly chasing them up, identifying gaps in their disclosure and insisting that they comply with their disclosure duties properly. I believe that unless the Claimant is made subject to an order in the terms sought, he will continue to fail to engage properly, or at all, with his disclosure obligations in these proceedings. Moreover, for the reasons set out above, I believe that Brown Rudnick's approach to disclosure was seriously deficient, demonstrating the need for the order in the terms sought to ensure that the Claimant's new legal representatives carry out their duties properly to ensure a fair trial is possible.

82. The Defendants also seek an order that the Claimant pay the costs that the Defendants have been forced to incur in continually chasing up disclosure by the Claimant. Had the Claimant and his former solicitors complied with their duties properly the Defendants would not have needed to incur these costs, which have been very substantial indeed. I will serve a schedule of the costs which the Defendants have incurred in connection with the Claimant's deficient disclosure before the hearing of the PTR.

Permission to call Joshua Drew as witness and application to extend time for serving notices under the Civil Evidence Act 1995

83. My second witness statement of 10 December 2019 dealt with five intended witnesses for whom the Defendants sought permission to serve witness summaries (namely, Raquel Rose Pennington, Elizabeth Marz, Melanie Inglessis, Joshua Drew, and Amanda de Cadenet). I explained at paragraph 14 of that witness statement that, while the Defendants were seeking permission to serve witness summaries because none of the witnesses were at that stage prepared to provide a signed witness statement, we were continuing to make every effort to obtain signed statements from each of the witnesses, and that if we were able to obtain and serve signed statements before trial then we would do so.

84. Following a hearing before Deputy Master Bard, permission was granted on 11 December, and we served copies of the witness summaries, along with my second statement, on Brown Rudnick on 16 December 2019, which was the date agreed between the parties for service of witness statements, summaries, and notices under the Civil Evidence Act 1995.

85. In that letter we also addressed the hearsay requirements under CPR 33 and the Civil Evidence Act 1995, saying that:

86. *We take the view that, to the extent that the witness statements, summaries or the exhibits thereto contain hearsay evidence, our clients are complying with section 2(1)(a) of the Civil Evidence Act 1995 by serving the said statements, summaries and exhibits on your client (and to the extent necessary we understand the words "witness statement" in CPR 33.2(1) to include a "witness summary"). Our intention is that all witnesses, including the five for whom we have served witness summaries, will be called at trial, and that any hearsay evidence contained in the statements, summaries or exhibits thereto will be given by them in oral evidence and relied on by our clients. We therefore do not propose to serve separate hearsay notices, not least because CPR 33.2(3)(c) (the requirement in a hearsay notice to "give the reasons why the witness will <u>not</u> be called") cannot sensibly apply to this situation. Please confirm that*

you agree with this approach, alternatively that to this extent your client waives compliance with the duty to give notice (as the parties may do under s. 2(3) of the Civil Evidence Act).

87. Brown Rudnick did not confirm whether they agreed or disagreed with this approach to the hearsay notices. No hearsay notices have been served on behalf of the Claimant.

88. To some extent, matters have since moved on in respect of these witnesses, as I set out below.

Joshua Drew

89. The position as at 10 December 2019 was set out in my second witness statement at paragraphs 34 to 38. Mr Drew has since signed a witness statement dated 12 February 2020, which we served on the Claimant's solicitors on 13 February and confirmed that he will give live evidence at trial.

90. The content of the statement is materially identical to the witness summary, save that it also refers to and exhibits the transcript of Mr Drew's deposition in the US libel claim, which took place in the US on 19 November 2019, along with the accompanying exhibits to that deposition. As set out earlier in this statement, we only obtained copies of the deposition transcript on 13 January 2020 and the full set of exhibits still more recently.

91. Mr Drew has confirmed that he wishes to attend the trial in person to give oral evidence on behalf of the Defendants, and the Defendants wish to call him to do so. I therefore seek permission pursuant to CPR 32.10 and/or relief from sanctions under CPR 3.9 to call Mr Drew to give oral evidence at trial. The Claimant has been caused no prejudice by the late service of Mr Drew's witness statement as its content is almost identical to the witness summary which was served in time on 16 December 2019. The only material difference (beyond the addition of brief introductory paragraphs 1 and 2 of the statement) is the addition of the information contained in Mr Drew's deposition transcript in the US libel proceedings, which the Claimant already had at the time that the Defendants served Mr Drew's witness summary.

Raquel Rose Pennington

92. The position as at 10 December 2019 was set out in my second statement at paragraphs 24 to 29. As I said in that statement, Ms Pennington was deposed as part of the US divorce proceedings (on 16 June and 14 July 2016), and provided a

Declaration dated 27 May 2016. I exhibited the Declaration and the deposition transcripts to Ms Pennington's witness summary.

93. Ms Pennington lives in the US. She is still represented by Anya Goldstein. Without any waiver of privilege, in January this year I made further attempts, through Ms Goldstein, to contact Ms Pennington about giving evidence in this claim. Ms Goldstein has informed me that she passed these requests on but has not (at the time of writing) had any response or update from Ms Pennington. Ms Goldstein did not say to me that Ms Pennington no longer stood by the account she provided in her Declaration and deposition, or give me any reason why she believed Ms Pennington had not responded to her.

94. Given that (on present information) it appears that it will not be possible to call Ms Pennington to give oral evidence at trial, I also give notice under CPR 33.2(3) of the Defendants' intention to rely on the content of her deposition transcripts and Declaration as hearsay evidence. Since the service of the witness summary for Ms Pennington, the Defendants have also received a copy of a 2-page statement from Ms Pennington relating to the events of 21 May 2016, which was emailed by Joshua Drew to Amber Heard on 22 May 2016 at 9:43pm. We obtained this on 7 February 2020 from Ms Heard as part of the exhibits to Mr Drew's deposition in the US libel proceedings. The Defendants also intend to rely on the content of this statement as hearsay evidence. Under CPR 33.2(4), a party proposing to rely on hearsay evidence must serve the notice no later than the latest date for serving witness statements (which in this case was 16 December 2019). I therefore ask the Court retrospectively to extend the time for giving notice and/or grant relief from sanctions..As I say above, at the time of serving Ms Pennington's witness summary on 16 December 2019, the Defendants intended that she would be called at trial and had not yet obtained her 2-page statement relating to the events of 21 May 2016.

Elizabeth Marz

95. The position as at 10 December 2019 was set out in my second statement at paragraphs 30 to 33. As I said in that statement, Ms Marz was deposed as part of the US divorce proceedings (on 15 July 2016). I exhibited the transcript of that deposition to Ms Marz's witness summary.

96. Ms Marz lives in the US and is also still represented by Anya Goldstein. Without any waiver of privilege, in January this year I made further attempts, through Ms Goldstein, to contact Ms Marz about giving evidence in this claim. Ms Goldstein has informed me that she passed these requests on, but that Ms Marz remained unwilling to give a witness statement or to meet with/speak to me. Ms Goldstein did not tell me why Ms

Marz was unwilling to give a witness statement mor meet or speak with me. Ms Goldstein did not say to me that Ms Marz no longer stood by the account she provided in her Declaration and deposition, or give me any reason why she believed Ms Marz had not responded to her.

97. Given that it seems that it will not be possible to call Ms Marz to give oral evidence at trial, I also give notice under CPR 33.2(3) of the Defendants' intention to rely on the content of her deposition transcript as hearsay evidence. Since the service of the witness summary for Ms Marz, the Defendants have also received a transcript of Ms Marz's deposition on 26 November 2019 in the US libel proceedings, and drafts of a declaration for Ms Marz dated July-August 2019 which were exhibited to that deposition transcript. We received the 2019 deposition transcript from the Claimant on 13 January 2020, and these exhibits on 24 January 2020. The Defendants also intend to rely on these documents as hearsay evidence. I therefore ask the Court retrospectively to extend the time for giving notice and/or grant relief from sanctions. As I say above, at the time of serving Ms Marz's witness summary on 16 December 2019, the Defendants intended that she would be called at trial and had not yet obtained her 2019 deposition transcript and exhibits thereto.

Additional documents

98. On 19 February 2019 the Defendants served on the Claimant a further notice under the Civil Evidence Act 1995. This notice covers both the declarations, depositions and statements of Ms Pennington and Ms Marz referred to above, and a number of other documents. As set out extensively earlier in this witness statement, the Claimant has failed to comply with his disclosure obligations, and as a result some of these documents have only come into the Defendants' possession since 16 December 2019 (the date for service of witness statements), including for example documents relating to the Claimant's medication and health, medical records of Ms Heard, telephone records of Kevin Murphy, documents from the Los Angeles Police Department relating to telephone records on 21 May 2016, and additional photographs of Ms Heard and damage to property. Others of these documents were in the Defendants' possession, such as for example some journal entries of the Claimant and Ms Heard, the Rolling Stone article, and some photographs of Ms Heard and damage to property, but no hearsay notice was previously served in respect of these documents. I ask the Court retrospectively to extend the time for giving notice and/or grant relief from sanctions. Given the Claimant's failings which has resulted in piecemeal and late disclosure of documents, and the further searches/disclosure which I have requested, I cannot say that the list as at today's date is necessarily exhaustive both in relation to the documents disclosed to-date and in the future, and the Defendants may need to serve

a further list in due course (which we will serve as soon as practicable, should that be the case).

Statement of Truth

I believe that the facts stated in this witness statement are true

Dated this 19 day of February 2020

Signed .....

Louis Charalambous

Partner, Simons Muirhead & Burton LLP

Witness statement
Louis Charalambous
Third
Defendants
Exhibit LC 3

Dated: 19 February 2020

IN THE HIGH COURT OF JUSTICE **CLAIM NO. QB-2018-006323**

QUEEN'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

BETWEEN:

JOHN CHRISTOPHER DEPP II

Claimant

and

(1) NEWS GROUP NEWSPAPERS LTD

(2) DAN WOOTTON

Defendants

Exhibit LC 3

ATTACHMENT 2

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: Monday, 29 June 2020

Page Count: 38
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Before:

MR JUSTICE NICOL
(VIA VIDEO)

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Between:

JOHN CHRISTOPHER DEPP II — **Claimant**

-and-

(1) NEWS GROUP NEWSPAPERS LIMITED
(2) DAN WOOTTON — **Defendants**

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MR DAVID SHERBORNE counsel and **MS KATE WILSON counsel** (instructed by **Schillings International LLP**) appeared for the **Claimant**
MR ADAM WOLANSKI QC and MS DAMER (instructed by **Simons Muirhead & Burton LLP**) for the **Defendants**
MR DAVID PRICE QC appeared for **Miss Amber Heard**

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PART PROCEEDINGS

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MR JUSTICE NICOL: Are we ready to proceed?

MR SHERBORNE: My Lord, we are.

MR JUSTICE NICOL: Good. There is has been a lot of correspondence since I distributed my draft judgment, which I understand has now been handed down. Mr Sherborne and Mr Wolanski, help me on what you see as the sequence of matters that we need to deal with this morning.

MR SHERBORNE: Could I begin by formally saying that obviously I appear with Ms Wilson for the claimant Mr Depp and, as I understand it, Mr Wolanski and Ms Damer appear for the defendants. I think Mr Price appears for Miss Heard.

MR JUSTICE NICOL: Just pause for a moment because I did not acknowledge whether Mr Price was present. Can I find out if he is ----

MR PRICE: Present, my Lord.

MR JUSTICE NICOL: Good. Welcome, Mr Price, thank you for appearing.

MR WOLANSKI: And Ms Damer for the defendants.

MR SHERBORNE: My Lord, shall I just outline then what is on the agenda and what is no longer on the agenda, if I can put it that way?

MR JUSTICE NICOL: That would be helpful, yes.

MR SHERBORNE: The first item is the claimant's application for relief from sanctions, following your Lordship's finding in the handed-down judgment. The second is the defendants have raised an issue over the costs of the hearing on Friday, and they do ask your Lordship to determine that today. We say it should be reserved until after the trial. That is the second item. The third is the claimant's application for permission to rely on the responsive evidence from Mr Murphy, which you will recall was on the agenda at the last hearing last week on Thursday. As I understand it, that was opposed but now the opposition to it is limited to one point, which I can deal with if that is persisted in. The fourth item is the claimant's application for third party disclosure against Miss Heard, and that is opposed by Miss Heard. Since Thursday, there has been an application for permission to rely on the further witness statement from Miss Heard received over the weekend. The claimants do not oppose that.

MR JUSTICE NICOL: Yes, thank you.

MR SHERBORNE: There is also the defendant's application to rely on the witness statement of Ms Pennington, one of Miss Heard's friends and that is not opposed by the claimant.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: Finally, there is a matter raised, I think, in the defendants' skeleton and a witness statement last night from the defendants' solicitor about some to-ing and fro-ing between American lawyers for Mr Depp and Miss Heard over documents handed by Miss Heard to the defendants which were believed to be covered by protective order. I was hoping that had been resolved, but it may be that your Lordship needs to consider that if the defendants regard it as being outstanding.

MR JUSTICE NICOL: Right. Of those, it would seem that the logical place to start is your application for relief from sanctions.

MR SHERBORNE: My Lord, yes.

MR JUSTICE NICOL: Since if I was against you on that, all the other matters would fall away.

MR SHERBORNE: My Lord, yes, exactly.

MR JUSTICE NICOL: All right, then it seems sensible for you to start with that application.

MR SHERBORNE: Can I start then with the ambit of the application? Your Lordship has found, to summarise your handed-down judgment, that the Australian texts should have been disclosed under part 31.6 of the CPR. That is the only breach which your Lordship was asked to decide. Your Lordship did not find any other breach. The reason for that is that the defendants expressly withdrew their intention to rely on any other complaints that there had been a breach. I say other complaints because your Lordship may recall that at 4 o'clock in the afternoon before the hearing, on the Wednesday before the Thursday of last week, the defendants issued an application notice for a declaration and served at the same time a lengthy witness statement making a further allegation of breach against the claimant in relation to the declaration by Mr Murphy provided to Miss Heard in relation to the criminal charges against her in Australia, and also a suggestion that the claimant's solicitor had given incorrect information to the court about the provenance of two recordings disclosed back in February before the pre-trial review.

Given how late they were raised, I suspect the defendants expressly did not ask your Lordship to take them into account as breaches, and so your Lordship did not make any finding in relation to them. Unfortunately, once again, late afternoon yesterday, the

defendants served another witness statement, a 26-page statement, with a 250-page exhibit, in which they sought to raise further allegations of breach and a number of other points. We have had yet further material the defendants have provided today. They want you to look at two further witness statements that were previously provided in this litigation by the claimant's solicitor and a transcript. We say that it is more than unfortunate that these are the defendants' tactics. I do mean tactics. If I have to deal with it, then I will, my Lord. Ms Afia was forced to put in another short statement, albeit, as I say, very short, at speed last night, in case your Lordship was persuaded to deal with these points. In my submission, this is not very satisfactory at all, especially as the defendants could have made their application for a breach, or for breaches, based on all of these, but they chose not to do so. It is not just unsatisfactory. In my submission, it is wrong in principle to try to introduce a serious complaint through the back door in the hope that they can persuade your Lordship, or try to persuade your Lordship to strike out the whole claim, or refuse the relief from sanctions application, when your Lordship has just been considering the one breach they have established.

We say this is wrong in principle and unsatisfactory, and it creates a very real sense that this last minute attempt, once again as we had on Thursday, to shoe-horn further complaints into their application that the defendants are doing everything they can to avoid the trial.

If the defendants are going to say, and it does not appear that they do any more in their skeleton, but if it is going to be said that a fair trial cannot be had, that is a question that has to be decided on the underlying breach which your Lordship found, and not other complaints they may have about the disclosure exercise. We say that the defendants' approach is not only highly opportunistic but is quite wrong in principle to ask your Lordship to consider it as a matter of your discretion. That is the starting point. I say it is very important because it covers the ambit of the application.

MR JUSTICE NICOL: Yes?

MR SHERBORNE: The second point is the test that your Lordship must apply. Your Lordship is obviously very familiar with the well-established three-stage test in the *Denton* case, and that test was set out by the Court of Appeal. The first stage is obviously to identify

whether the breach is a serious or significant one. The second is to consider why the default took place. The third is to evaluate all the circumstances of the case.

MR JUSTICE NICOL: Yes?

MR SHERBORNE: And to pay regard, as your Lordship knows, to the question of resources and a proportionate use of proceedings, and also the need to observe and comply with the rules. Although each case is fact sensitive, we have, as your Lordship will have seen from our skeleton, referred to two particulars once. I am only going to take your Lordship to one of them. The first one, the *Kazakhstan* case, is really there to show your Lordship that just because a court may find that there has been a deliberate default, and here we say it was not a deliberate default, and we will come on to that, but even where the court has found a deliberate default and no good reason, as it did in *Kazakhstan*, that does not mean that relief from sanctions will not be granted. The court still has to perform the same exercise.

The second case which I ask your Lordship to look at is the *Fox v Wiggins* case. I do not know whether your Lordship had a chance to look at that.

MR JUSTICE NICOL: I am afraid I did not. There was quite a lot for me to do and I did not have a chance. Let me just make sure that I have got the bundle of authorities which have been provided with.

MR SHERBORNE: It is the claimant's authorities.

MR JUSTICE NICOL: Just a moment. (*Pause*) Judgment of Mr Justice Julian Knowles.

MR SHERBORNE: My Lord, yes, and just so your Lordship knows the facts of this case, you will see on page 2, in the introduction, the judge explains that there the claimant was suing the defendants for libel and harassment and the claimant obtained judgment in default. You will see what the defendant was seeking in paragraphs 2(b). In particular (b) was an order setting aside the default judgment and seeking relief from sanctions. Against that backdrop, if you just turn on -- you do not need to look at anything to do with capacity.

MR JUSTICE NICOL: Which paragraph are you asking me to look at?

MR SHERBORNE: If you start at paragraph 91 probably, just to set the scene.

MR JUSTICE NICOL: Hold on.

MR SHERBORNE: If your Lordship is at paragraph 91 ----

MR JUSTICE NICOL: I have not got quite there. Just a moment. Sorry. (*Pause*) Application to set aside judgment entered in a default.

MR SHERBORNE: There the judge is explaining that he is having to apply the same test, the three-stage test in *Denton*. I apologise that it took your Lordship a long time to get to 91. Can I take you then to 111, which is where he starts to explain his reasoning. There he says that this is a defamation and harassment claim and he cites, not for the first time in the judgment, and I will show it to you again later, the *Berezovsky* case, where Eady J held that in a defamation claim involving serious allegations, it was in the interests of both sides that a proposed plea of justification should be properly addressed. "That is because the primary object of most libel actions is to achieve vindication of reputation, and if a claimant obtained relief purely on judgment obtained in default, it would be easy for those ill-disposed towards him to undermine the effectiveness of that vindication."

There he is explaining how important, and in my submission this applies with even greater force to this case, it is in a libel claim that vindication should be obtained, not just by the claimant but also for the defendant.

If you look at paragraph 112, he says, "Although, for the reasons that I have given, I cannot find on the material before me that the Sixth Defendant has a realistic prospect of defending the claim, I can ascertain that her defence will include a plea of truth ... Eady J's principle is therefore engaged. I consider that allegations of such seriousness as are involved in this case cannot be allowed to go by default." Again, that could not apply with greater force than this case here.

"Although I cannot find the Sixth Defendant lacks capacity, at the relevant time she did not have legal representation and she does certainly suffer from a number of serious medical issues. Taken together, I am satisfied that the nature of the claim and the allegations involved, and the nature of the suggested defence, are such as to satisfy the test in CPR r 13.3(b)" Then he goes on to look at the three-stage test, if you see, at 115. Then you will see he just goes through the first stage and he deals with whether or not it was serious and significant. He talks about there were a number of breaches in that case, and obviously we are dealing here with one breach. That was a number of breaches you will see in 117. Then 118, "Stage 2 requires me to consider why the defaults occurred." Paragraph 120, "Stage 3 requires me to evaluate all the circumstances of the case, so as

to enable me to deal justly with the application. Thus far, as the Claimant submits, the factors weighing in the exercise of my discretion point away from my granting relief from sanctions. However, I come back to my determination on the issue under CPR r 13.3(b). I have carefully taken into all of the points made by the Claimant about the dilatory way in which the Sixth Defendant and her mother have conducted aspects of this litigation. However, in my judgment, this special factor requires me to grant relief from sanctions by way of setting aside the judgment in default that has been entered against the Sixth Defendant. It is very important in a case such as this, where the Claimant's case is that he has been the victim of a coordinated campaign or, put another way, a conspiracy, at the hands of the Defendants, that the claim be tried on the merits against all of the alleged co-conspirators, including the Sixth Defendant. It would be a recipe for injustice to deny her the chance to defend her case on the merits, whilst allowing that chance for her alleged co-conspirators. As I pointed out earlier, such a scenario invites the risk of inconsistent verdicts. I also [and this is the important part] place great weight on the features identified by Eady J in *Berezovsky* ... about the potential need for vindication for a claimant in libel proceedings by way of a judgment on the merits and all the more so where the allegations in question are as serious as they are in this case."

So it is that part, as I pointed out earlier, "such a scenario invites the risk of inconsistent verdicts. I also place great weight on the features identified by Eady J ... about the potential need for vindication for a claimant in libel proceedings by way of a judgment on the merits and all the more so where the allegations in question are as serious as they are in this case. As I have said, the Claimant stands accused of seriously assaulting the Sixth Defendant and killing their unborn child."

Your Lordship knows, as we will come back to, how serious the allegations are here. There are 14 different incidents of alleged physical unprovoked violence against Miss Heard where she says she was in fear of her life. That is an important point, as I say, and as your Lordship will appreciate. That is really all because a lot of these cases are obviously fact sensitive.

MR JUSTICE NICOL: Indeed.

MR SHERBORNE: But the principle of the importance of vindication not just to the party who is said to be in default but to both parties is one which we say applies in this case as well and that is a matter of principle, and not fact sensitive.

With that in mind, can I turn to the three stages? Stage 1 -- it is really a question for your Lordship to decide if the regard the breach as serious and significant. Your Lordship is now ----

MR JUSTICE NICOL: Mr Sherborne, I made an unless order.

MR SHERBORNE: Yes.

MR JUSTICE NICOL: Are you really arguing that this was not a serious or significant breach?

MR SHERBORNE: My Lord, no, you will see that is why in our skeleton we say your Lordship is likely to find it is. That is what I was going on to say that you were well rehearsed.

MR JUSTICE NICOL: Stage 1 is agreed.

MR SHERBORNE: We understand your Lordship is likely to find that and that is why we have accepted that in our skeleton, and Ms Afia apologises to the court for it. Your Lordship will hopefully have had a proper chance to read Ms Afia's witness statement. I am not going to rehearse what she says there unless you wish me to do so, because there is a lot that we have to get through today, but what is clear in my submission is she gives an extensive, detailed and balanced explanation not just of the circumstances in which the order was made, and the nature of the disclosure exercise but also the approach which was taken by the claimant's solicitors in terms of reviewing the documents which gave rise to the breach. The fact that the claimant's solicitors took what your Lordship has found was an incorrect view of whether those texts fell to be disclosed would constitute in my submission a good reason to explain the default. This was not a deliberate failure to comply with a deadline. It was not the claimant deliberately withholding a document. The defendants had these documents because the claimant disclose them, as your Lordship knows, in the American proceedings, so there is no prejudice to them in the real sense, although it is accepted now they should have been disclosed in UK proceedings as well.

We say that in light of what Ms Afia says, and her explanation, your Lordship should accept it as a good explanation, and that would then bring the consideration under the Denton three-stage test to an end, effectively, because if your Lordship accepts there is a

good explanation then you do not need to get to the third stage. That, as your Lordship will have seen, was referred to in the *Fox v Wiggins* case and it is notes of the White Book. Even if your Lordship does not accept that as a good explanation or reason to explain the default, then it does place the default in context.

I say that because when your Lordship steps back and looks at the disclosure, despite all the dust that the defendants are seeking to throw up in these last-minute points in Mr Smele's witness statement the afternoon before the hearing, or Mr Charalambous' voluminous statement and exhibits late yesterday, when you step back your Lordship will see in my submission that the default of failing to provide a series of text exchanges between Mr Depp and Mr Holmes should be set against the claimant producing vast amounts of documents in terms of disclosure. In the trial bundle alone, of the nine files there are seven files-worth of documents. That is thousands of pages of disclosure, largely from the American proceedings, in circumstances where the defendants have produced only those documents handed to them by Miss Heard which she has decided help her. I will come back to that, but the claimant, and his solicitors in particular, have had to review thousands upon thousands of documents at great speed in circumstances where the defendant can and has gone through Miss Heard cross-checking everything. Can I put it this way, when your Lordship set an unless order in the circumstances your Lordship did, as you will recall, it was not intended to set a trap for the claimant, whereby if the defendant could find a text exchange or a document from this rather unique cross-checking exercise where the claimant has disclosed many, many thousands of documents in the American proceedings, and that the defendant through this cross-checking exercise finds, as I say, a text exchange or a document and produces it without any reciprocal obligation on the defendants, we say, that is not what your Lordship had in mind when you made the unless order that the claimant's claim should be struck out. We say that is the background to the third statement and it is very important background, too, when one considers that on the other side of the scale is the extremely draconian step of striking out the entire claim. Moving on to stage 3.

MR JUSTICE NICOL: I thought you were on stage 3.

MR SHERBORNE: What I was saying to your Lordship was effectively that is the backdrop to stage 3 because of the explanation that is given in detail by Ms Afia in her witness

statement. As I say, if your Lordship does not regard it as a good explanation on stage 2, it forms very much the backdrop on stage 3, and the context in which your Lordship needs to consider whether it is proportionate to the breach that has been established in all the circumstances of the case to strike out the whole claim. All of the circumstances include, as I say, the explanation that is given at stage 2, and the backdrop of the nature of the way in which disclosure has been provided in this case, in particular, how many documents the claimant has already disclosed and the fact that he has not withheld ----

MR JUSTICE NICOL: Mr Sherborne, I am sorry to interrupt you, but you have made the point already about Ms Afia's explanation. You have made the point about the volume of material that the claimant's solicitors had to consider. Let's move on to your next point.

MR SHERBORNE: Your Lordship asked me whether I was in stage 3 or not and I was trying to explain the overlap, if I can put it that way.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: As I say, your Lordship, has to consider whether the ultimate draconian step is required, and I have a number of points to make about that. Our case is, as we have said, that we accept that compliance with the rules is important. Ms Afia has apologised to the court for the default in no uncertain terms. Here we say that the court has to consider various factors when deciding whether or not the ultimate step would be a proportionate response. Those factors are as follows. Firstly, as I said, the vast number of documents already disclosed and the fact that the text exchange, which fell to be disclosed but which was not, was a very small fraction. It is very important in this context that your Lordship also notes that the defendants seem to no longer be saying in their skeleton there cannot be a fair trial as a result of the disclosure not having been provided, nor could they sensibly say so.

The next point is that although your Lordship found that the text exchange should have been disclosed, the texts are not documents which go to the heart of the allegations which the court has to decide, namely whether Mr Depp carried out this series of serious unprovoked physical assaults on Miss Heard, as I said 14 different ones, or whether, as he says, she was the one who assaulted him. The defendants cannot say that because my instructing solicitor took a certain view of the relevance of an exchange of texts about drug taking or obtaining drugs that this means there is any likelihood of documents going

to the heart of the case being disclosed. Prior to the draft judgment being circulated, your Lordship will remember our position, which is that not all texts about the use of drugs, or alcohol for that matter, could possibly be said to be relevant, not least because of admissions that I took your Lordship to on Thursday on both sides; the evidence of both Mr Depp and Miss Heard that they took drugs and consumed alcohol during their relationship. Prior to the draft judgment of your Lordship being circulated, the defendants' position was that if the action continued despite their application, they intended to apply for a specific disclosure of all documents referring to the claimant's use of narcotics between 2012 and 2016, an exercise which could never have been justified. Presumably, in the light of your Lordship's judgment, the defendants have now radically shifted their position. In their letter of 25 June, they have said that they would now apply for specific disclosure of documents referencing drugs in the period one week before just four of the 14 incidents. They have gone from a position where originally they were saying -- and this was to persuade your Lordship that, effectively, there could be no fair trial because even if you were going to grant relief, they would be seeking all the documents referring to narcotics for the entire period and that therefore that means that they could not have a fair trial unless that disclosure was given. They have now radically cut that down to just one week before four of the 14 incidents and the claimant has agreed to perform those searches. There is nothing for your Lordship.

What it does and the reason why I take your Lordship through that is that it illustrates that, in reality, the impact on these proceedings of the documents is very limited indeed. It cannot be said that somehow there can be no fair trial of the proceedings. That is very important because once one removes any real risk on the defendants' case that there can be no fair trial, then really it becomes in my submission whether the claimant should be punished, the defendants argue, to such an extent for this default, and I do stress this default, that his whole claim should be struck out. It is no good, and I will come back to it, asking your Lordship just because there are complaints made in witness statements by Mr Charalambous yesterday afternoon, that is not the same as your Lordship making a finding that those are breaches. If the defendant had wanted to rely on them, they should have sought to rely on them at the hearing last week, and they chose not to do so. If the problem was that the defendants chose not to serve their application until 4 o'clock on

the afternoon before your Lordship was due to hear it, and to serve a witness statement in support at the same time, then that is a fault that lies upon the defendants and they must bear the consequences of it. What it would not be right to do, in my submission, is to somehow introduce other complaints to try to persuade your Lordship that therefore there is an ongoing risk in relation to these proceedings. That is the backdrop.

We say that against that backdrop to punish the claimant by taking the draconian step of refusing relief from sanctions, thereby striking it out would be utterly disproportionate to what your Lordship has held. It is important then that I make a number of points in that context. Firstly, this was not a deliberate breach.

MR JUSTICE NICOL: You have said that already, Mr Sherborne, and I have understood that point.

MR SHERBORNE: Then I am grateful. What I have not covered and I need to cover is that the defendants, you will have seen, say, "Ah well, under the CPR, any default by a party's legal representatives should be attributed to the party himself or herself. That may or may not be right, but that is very different to the exercise your Lordship is performing in my submission, which is to decide whether in all the circumstances the claimant should be punished in terms of having his claim removed as a result, especially if it is going to be said as a result by the defendants that he is left with an action against his solicitors. An action for breach of contract or some other money claim might give the claimant a claim for a loss of opportunity against his solicitors, but this is no such claim. This is an entirely different type of claim and, in my submission, it would be woefully inadequate for the court to conclude, even if it took the view that it was the fault of the claimant's solicitors, in these circumstances, where one is considering all the circumstances of the case and what would be an appropriate sanction, that it should be attributed to Mr Depp, even though it is clear from Ms Afia's witness statement, and whatever points made by Mr Charalambous, which we say are utterly unrealistic and nit-picking, in circumstances where it is clear that the fault lay with the claimant's solicitors, we say it would be quite inadequate for your Lordship to conclude that somehow an action against them would provide an alternative. We say that is another point militating against imposing the ultimate sanction on the claimant, as your Lordship is being asked to do.

Another factor, and it is one your Lordship knows and I will not say much more about it, is the unfair position where disclosure is really only being given by one party. That is, as you know, something that the claimant feels very strongly about; that while he has already provided an enormous number of documents, part of which the defendants will say are helpful to them, there is no reciprocal obligation. That is important, I say, where a text exchange has not been disclosed because it was reviewed by the solicitors and not deemed to fall within 3.6. On the other hand, Miss Heard can provide a number of documents she thinks properly go to the heart of the case, as opposed to them being at best peripheral documents, and there are no sanctions on the defendants. In circumstances where your Lordship does have to consider fairness, we say that is a very material consideration indeed.

We say a further very compelling factor which weighs very heavily against strike out, and perhaps the most important factor, is how important it is to have a clear and reasoned judgment in this case. That is the only way, in my submission, vindication will be given, not just for the claimant but for the defendants as well. Your Lordship knows that it is important that vindication in libel claims is swift. Justice delayed is justice denied. Your Lordship knows that very well. It is always said to be essential in libel claims. That is why, as your lordship knows the limitation period was reduced to one year a number of years ago. An action for libel is quintessentially about vindication. The trial in this case is the determination of the most serious allegations of appalling types of violence. Your Lordship knows that.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: I apologise for repeating it, but that really is at the heart of this. It is not just physical violence, as your Lordship knows.

MR JUSTICE NICOL: Mr Sherborne, you have made the point about vindication and the importance of that to both parties, and I have understood this point. Could I ask you to move on to your next point?

MR SHERBORNE: My Lord, that is really the most important point but ----

MR JUSTICE NICOL: I understand its importance and I understand what you have said about Eady J and the *Berezovsky* case, which has made exactly that point. I have understood that point and I am inviting you now to move on to your next point.

MR SHERBORNE: That is, in effect, the last point. I need to expand on it to this extent. I understand your Lordship knows the allegations are very serious, but there are a number of points made by the defendants in response that I do really need to deal with.

MR JUSTICE NICOL: By all means deal with those points, yes.

MR SHERBORNE: I am grateful. The defendants' position, effectively, is that this is a dispute between Mr Depp and Miss Heard, but your Lordship is well aware that the defendants published these allegations to millions of readers of the *Sun*, both online and in hard copy form, and that, as a result, they reached an extremely wide audience within this jurisdiction. Not only that, the defendants persisted in these allegations through their defence under section 2 of the Defamation Act, and very publicly so, which has made these allegations even more widely reported in this country, both in the media and online. It is not right to say that they are somehow mere passive observers. Indeed, they prayed in aid on a number of occasions the fact that Miss Heard is just a witness. Not only that, they, as your Lordship will have seen, although they started with only defending two allegations they have now expanded those to justify 14 allegations.

They have deliberately conducted these proceedings -- and this is an important point your Lordship should bear in mind -- by airing the allegations in open court at interim hearings, in a way which we have said is gratuitous and deliberately intended to inflame the publicity surrounding them, to damage the claimant and to put him in the worst possible light. Whether that was by way of reading out texts, for example, at the pre-trial review or, more importantly, as your Lordship will recall, at the hearing on 20 March when the claimant, who realistically recognised the dangers posed by the Covid-19 pandemic and the risks that this would cause to the court staff and parties and therefore said the trial could not go ahead, you will recall that defendants' counsel, despite what was being said across the country about the need for lockdown, accused the claimant of being a coward very publicly. It was reported, as the defendants knew it would be, throughout all the papers and the media in this country. They called him a coward and said he wanted an adjournment because he knew he was going to lose. This very public and deliberate taunting to the effect the allegations are true, in my submission, is another factor why your Lordship needs to consider vindication as the paramount factor, and the defendants have made it so by the way in which they have deliberately conducted this. In

my submission, it is simply wrong for the defendants on the one hand to do that and now to try everything they can to avoid the trial taking place.

In my submission, therefore, vindication is of exceptional importance, but it is not just vindication per se because, and this is the other point the defendants make, they say, "Oh well, there is ample opportunity for vindication to happen in the US proceedings." In my submission, that does not provide proper vindication at all. Firstly, there is no guarantee that those proceedings will take place. For example, Miss Heard has applied at least once to strike out that claim on various grounds. Remember that her case there is she says that her opinion piece in the *Washington Post* did not name Mr Depp, so she has another substantive defence and she may well apply on other grounds. Secondly, that trial has, in any event, been adjourned to next year at some point, and there is nothing to say it will not be delayed again. Thirdly, the American proceedings have nothing do with the publication to millions of people in this country in the *Sun*. The defendants have endorsed allegations and they have chosen to repeat them time and time again in open court and persisted in them in the most public way possible.

Finally, the US proceedings will not produce a clear and reasoned judgment, which is exactly what Eady J said is so important. Trial in the proceedings in Virginia will be a jury trial with just a verdict. Here, your Lordship will deliver a clear and reasoned judgment taking into account a mass of evidence, hearing from the parties and giving your judgment in relation to 14 different incidents. As I say, Eady J made clear that it is a reasoned judgment that provides the vindication, not just for the claimant but also for the defendant.

There is also, in my submission, an important public interest given what has been said in open court by the defendants that a well-reasoned judgment is handed down. A jury in a court in Virginia maybe a year from now or more, if there is one, saying they simply find for Mr Depp or Miss Heard is nowhere near the same thing as your Lordship's reasoned judgment ,and we say it does not provide vindication at all.

For all those reasons where this is not a case where the claimant deliberately withheld documents, where the documents do not go to the heart of the allegation, where it cannot be said on the breach that there can be no fair trial, where the trial date is not imperilled and vindication in the form of a clear reasoned judgment is critical, we say it would be

wholly disproportionate in all those circumstances for your Lordship to strike out the claim for the default.

My Lord, those are my submissions based on that breach. What I have not addressed yet unless your Lordship wishes me it do so, are the different matters which the defendant has sought to introduce, we say, by the back door, as being breaches by the claimant, and we say it is quite wrong in principle to do. If your Lordship is going to consider them, then I will obviously need to deal with them.

MR JUSTICE NICOL: As I say, Mr Sherborne, the defendants have relied on certain other matters, and I will hear Mr Wolanski as to why they should be able to do so. However, it is convenient if you can give your response to those, on the assumption, which may right or may be wrong, that I do think they should be taken into account. It is convenient to have one party's submissions made comprehensively and then to hear the other party in reply.

MR SHERBORNE: My Lord, then I will do so. But can I say simply this: I will deal with the ones that I am aware have been made.

MR JUSTICE NICOL: That is all you can do.

MR SHERBORNE: With one reservation, your Lordship is right, but this is a rather unique case where all sorts of complaints have been made at the last minute. It may well be that I have not covered them all, and, if I have not done so, I am sure your Lordship will not hold them against me, because it is extremely unusual, to say the least, putting it at its lowest, and your Lordship knows how I would put it, that these are being introduced at such a late stage in a manner where, as I say, we have had little opportunity to actually deal with them, let alone for me to say what I need to say about them. I will hear what Mr Wolanski says. The first one said to be a breach relates to Mr Murphy. Just so your Lordship understands that, what is said, in effect, is that Mr Murphy gave a declaration to Miss Heard's lawyers for the purposes of her use in the criminal proceedings against her (just her) in Australia in relation to the illegal importation of dogs. That was in 2015.

MR JUSTICE NICOL: 2015 or 2016?

MR SHERBORNE: I thought it was 2015, but your Lordship may be right. If you just give me one moment, I will tell you.

MR JUSTICE NICOL: There may be a difference in our recollection about when the proceedings took place and when the alleged importation took place. Anyway, it does not matter whether it is 2015 or 2016.

MR SHERBORNE: My Lord, yes.

MR JUSTICE NICOL: So that is the context of the alleged breach regarding Mr Murphy's declaration?

MR SHERBORNE: My Lord, yes. It is on the back of the defendants being provided by Miss Heard -- although they do not disclose it to us even though we asked, this document must have come from Miss Heard, and it is on the back of that that the defendants have repeated their refrain that Mr Depp is in breach of his disclosure obligations. Can I take your Lordship to Mr Murphy's witness statement?

MR JUSTICE NICOL: Just a minute. This is in the bundle for the today's hearing, is it?

MR SHERBORNE: Yes.

MR JUSTICE NICOL: What tab?

MR SHERBORNE: If your Lordship gives me a moment, I have had to re-organise my bundle because it is obviously much bigger now than it was. It is tab 31.

MR JUSTICE NICOL: Just a moment, let me find that. Second witness statement of Kevin Murphy?

MR SHERBORNE: My Lord, yes.

MR JUSTICE NICOL: And which particular paragraph?

MR SHERBORNE: Start at paragraph 3, my Lord, on the first page.

MR JUSTICE NICOL: "I make this statement in support of the claimant's claim in these proceedings". That is the beginning of the first paragraph, paragraph 3.

MR SHERBORNE: My Lord, yes. It says, "I make this statement ... This is my second witness statement in this claim. I make it in response to the disclosure of the document by the defendants on 14 June referred to below." This is in response to the provision of that declaration I referred to. Then paragraph 4, "Paragraphs 7 to 9 of my first witness statement dated 12 December addressed Miss Heard's request to me to obtain false evidence for proceedings in Australia. I stand by that evidence and make this further statement to expand." Here Mr Murphy explains in detail over a number of paragraphs how he was involved in a process to ready the dogs for travel to Australia in April 2015.

As he says in paragraph 6, "I began to have concerns in March 2015 that timing constraints were not going to allow the dogs to be vaccinated," and he expressed those concerns to Miss Heard. He says he had investigated different options but they all involved allowing the dogs to fly in cargo and Miss Heard said she would not allow that. Then in paragraph 7, "I explained to Miss Heard on several occasions that bringing animals into Australia was like no other country. It was mandatory quarantining ..." And then paragraph 8, "Prior to Miss Heard and Mr Depp leaving for Australia, I notified a number of people that the dogs were not allowed to be taken to Australia. I further explained that the dogs should not be taken because it would be illegal and there could be severe penalties." Then this, "I made a point of discussing this matter because Miss Heard had brought the dogs into the Bahamas without paperwork and vaccinations in another incident in July 2014 and in knowledge of the risks of doing so." Then you will see because of that there was heightened awareness between the staff and Miss Heard about the need for proper paperwork. At 9, "At no time did I discuss the matter with Mr Depp because he never wanted the dogs to travel on any occasion because he felt they had better care in Los Angeles with staff". Here what he is plainly saying is it was nothing to do with Mr Depp, it was all to do with Miss Heard. Paragraph 10, this is Mr Murphy explaining that on getting to work following the departure, he learned that Miss Heard had "taken the dogs despite our discussions and my warnings of severe legal ramifications. I spoke with Mr Judge(?) shortly afterwards who explained that Miss Heard had insisted on bringing them to Australia." Despite knowing she was committing a criminal offence, she insisted on bringing them to Australia. "At exhibit KM/2 are the messages exchanged between me and Mr Brasner(?) and Mr Deuters(?) when they learned that Miss Heard had gone to Australia with the dogs."

Then in paragraph 11 he deals with the document that was provided by the defendants to Schillings on 14 June. It is important to bear that in mind because this document was provided on 14 June, which is said to be a breach by Mr Depp, but you will recall that it was relied on by the defendants not in their origin letter, but when the witness statement arrived on the afternoon before the actual hearing in the application notice, so they had plenty of time to consider whether they should apply for it to be a breach. They obviously chose not to and yet they still ask your Lordship to bear it in mind. I will show you why

it could not possibly be a breach as we go through this. What they are depriving the claimant of is proving that this is no breach at all, but asking your Lordship at the same time to consider that somehow he should be penalised in this context because of his previous conduct. We say this is a classic example of the defendant seeking to have its cake and eat it by not allowing the claimant to disprove this, but by trying to get your Lordship to rely on it. That is why I have to take this, unfortunately, in some detail, to demonstrate it. I am not going to take every point in this detail but show your Lordship the nature of the exercise the defendants are asking you do so.

If you look at paragraph 11, it states, "As stated in paragraph 9 of my first witness statement, Miss Heard requested I make a false statement regarding the dogs' illegal entrance into Australia. When I expressed I was extremely uncomfortable with this, Miss Heard said to me, 'well, I want your help on this. I wouldn't want you to have a problem with your job.' It became very apparent to me that Miss Heard was threatening my job stability unless I co-operated with providing a declaration that supported her false account for the Australian proceedings." It was this witness statement which obviously she used to avoid the charges that would have involved imprisonment in Australia. "Because of her statements I felt extreme ..."

MR JUSTICE NICOL: Sorry, where is that?

MR SHERBORNE: That is not the witness statement. That is what the effect of the declaration was because there are different charges. "Because of her statements I felt extreme pressure to co-operate despite knowing this would involve being untruthful." Then he explains the declaration which is the document that the defendants disclosed on 14 June. "On 13 October I signed the declaration for the Australian proceedings that discussed the circumstances in which Miss Heard brought her and Mr Depp's dogs into Australia." If you want to see the document, it is the exhibit at page 574 in my hard copy bundle. I appreciate that is not the same for your Lordship.

MR JUSTICE NICOL: Can you look on your electronic copy and tell me what the pdf page number is, please?

MR SHERBORNE: I will have to wait for somebody else to do that, I am sorry.

MR JUSTICE NICOL: Let's not be distracted by that. Let's move on to the point that you want to make.

MR SHERBORNE: If your Lordship goes back to paragraph 12, this declaration was prepared, as he says, by Miss Heard's US lawyer in this matter. You have seen reference in Mr Murphy and Ms Kate James's witness statement in relation to the Australian proceedings how pressure was put on Ms James by Miss Heard. Miss Heard asked her US lawyer whether it was appropriate to do so, and you will see he said just be careful. No, I will not paraphrase it, I will take you to because he quite clearly does not advise her to lie, which we will come back to. "That declaration contains statements that were not entirely truthful. It was not true that Ms Kate James, Miss Heard's assistant, was responsible for the paperwork and had not completed it and that this was the reason Miss Heard travelled with the dogs to Australia without the necessary paperwork. The true position is that I was responsible for the paperwork which I could not obtain in time. Miss Heard was fully aware of this in advance of travelling to Australia with the dogs." Before I move on, I have got the page, it is page 600.

MR JUSTICE NICOL: Just a minute. (*Pause*)

MR SHERBORNE: Does your Lordship have it?

MR JUSTICE NICOL: I am still trying to get to page 600.

MR SHERBORNE: I am sorry.

MR JUSTICE NICOL: Electronic bundles are extremely convenient, but they are not easy to navigate.

MR SHERBORNE: My Lord, I can understand.

MR JUSTICE NICOL: Just give a moment and I will get to page 600. It is headed "Privileged and confidential - Statement of Kevin Murphy"?

MR SHERBORNE: My Lord, yes. I am not going to take you through it, but this is a document that you can see explains the circumstances in which this was provided. I just want to show your Lordship the document so you can see what he was referring to. You will see he signs it on the second page. No point is really taken on the content of it other than to say it contradicts what he says. The important point for your Lordship now is that the defendants have said that this is a document Mr Depp must have and therefore by not disclosing it, he is in breach. If we go back to Mr Murphy's witness statement ----

MR JUSTICE NICOL: Which paragraph?

MR SHERBORNE: Paragraph 13, he says in categorical terms that the lawyers with the conduct of the matter were "Miss Heard's lawyer in the US with whom I dealt primarily. Miss Heard also had an Australian counsel at Ashurst's. I was told by both [and this is paragraph 14] US and Australian counsel that my statement in the terms that they had drafted on Miss Heard's behalf [so they drafted it for him] would be integral to the outcome of the proceedings. I was told that I was going to have to travel to Australia to testify in person on Miss Heard's behalf. Miss Heard knew that she was asking me to lie under duress and from what she said to me it was clear to me that I was essentially being told by her that my job would be at risk if I did not agree to her demands." That goes back to the conversation at paragraph 11. "I was relieved", he says in 15 "that the matter then settled and I was not going to be asked to lie in person in Australia." He did not have to travel out to give evidence on her behalf.

Then you can see how he explains in paragraph 16 and following how he was never comfortable with the fact he had given a statement that was not entirely truthful "but as long as Miss Heard was Mr Depp I did not feel able to take steps to remedy this without there being a risk to my job."

At paragraph 17, after Miss Heard files for divorce, he retained the services of an Australian law firm to seek advice on retracting his declaration in Australia. He says that once Miss Heard was no longer having control or influence over his job he felt he could take this step to attempt to right the wrong. "This effort was completely independent," he says, of Mr Depp, "and I personally incurred all the legal costs". He exhibits a letter from the Australian lawyers confirming his instructions of that firm. Then at 19 he explained through them he retained an Australian barrister for specialist advice because he was obviously worried about potential criminal liability. This is Mr Murphy taking it very seriously indeed that he was asked to and, in the end, agreed to lie on her behalf. "I sought advice in Australia arising from the false statement provided by me in a statutory declaration tendered in criminal proceedings in Queensland the prospect of avoiding prosecution by making a voluntary disclosure as to the falsity of such statement and the steps I would need to take. I very much wanted to understand the process and to explain the pressure I had been under to sign the statement." He is taking, as I say, very serious steps to deal with the situation. Then in August 2016 he resigned from his position with

Mr Depp. That was seven years ago. "Because I was no longer working and my legal bills were costly, it was no longer financially feasible for me to continue pursuing this matter. Following the proceedings, Miss Heard continued to travel with her dog and even made a joke of the Australians to do with her cat on social media." Then he goes on to talk about the lie which Miss Heard told, which you will remember from the hearing a few weeks ago to Homeland Security in relation to Savannah McMillan. That is Mr Murphy. What he is dealing there, as I say, is the circumstances which gave rise to that declaration, and all of them clearly evidence the fact that this was not Mr Depp but Miss Heard who had arranged this. In the light of this, Mr Smele in his witness statement, where this was referred to, in the afternoon before the hearing on Thursday when we received that witness statement -- Can I just take you to one part of that? It is paragraph 25 of his first witness statement.

MR JUSTICE NICOL: First witness statement?

MR SHERBORNE: Yes.

MR JUSTICE NICOL: I have got that, tab 33.

MR SHERBORNE: It is, my Lord, yes, and it is just paragraph 25. As I say, I am not going to take each of them at this level of detail, or we will be here for a long time. This is just to demonstrate the approach taken by the defendants. Here he talks about other serious concerns - you will see above paragraph 23, this is the rubric - regarding the claimant's disclosure. As well as the breach, these are the things which Mr Wolanski said he was not relying on by way of breach. He refers in 23 to the declaration of Mr Murphy and he says it contradicts the statement Mr Murphy has given. In my submission, it does not, but he says that it obviously falls within the scope of 31(b) and then says this, "The claimant has never disclosed the statement in these proceedings. Given that the claimant employs Mr Murphy [he does not but anyway] we assume [at the time but that is not point] that the claimant may well have arranged for this statement to be taken." That is the most they can say. "The claimant may well have arranged for this statement to be taken, or at least that his lawyers in US or Australia or here in the US would have retained a copy of it." There is no evidential basis for saying that Mr Depp has it. It is quite clear from the evidence that it was all arranged by Miss Heard's lawyers and she disclosed it.

In any event, this is said to be a serious breach by the claimant, we say on the flimsiest of pretexts.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: We say again this just demonstrates the way the defendants are approaching this by throwing into the mix anything they can think of to say it might be a breach by the claimant and therefore your Lordship should strike the whole action out.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: I think the next one, and I will try to take this much quicker, is the complaint that is raised in paragraphs 29 and following. This one is only called "further concerns", so it is not said to be a breach, or a serious breach, not surprisingly, but could I just say a lot of material has been provided in relation to this. Mr Charalambous yesterday afternoon, as far as I got through it in the time, in a 250-page exhibit and 26 pages of a witness statement refers back to this point. In a nutshell, what is said is that when Ms Afia said to the court in a witness statement back at the pre-trial review that this document did not come from the claimant, it appears that she may have been wrong in that. One does have to go back into the electronic data to try to establish this, but even if that is correct, in my submission, that does not take the defendant any further. It is not said to be a breach by the claimant. In any event, it lacks, as we say, any real reality because the document was disclosed by the claimant on 20 February, so before even the pre-trial review.

It is a transcript your Lordship will recall which contains a number of highly damaging allegations against the defendants' case with Miss Heard admitting to physically having assaulted Mr Depp. When he says to her that she punched him, she says, "I just hit you across the face. I wasn't punching you, babe, you're not punched." She calls him, I think, a "pussy" because he is complaining about having been hit. She goes on to admit that she did start a fight and she was the physical one. It does not make any sense the suggestion that somehow the claimant is trying to withhold documents in that case, firstly, because he disclosed them, and, secondly, they are helpful to his case anyway, so it cannot be said that does not give rise to a fair trial. This is the second concern said to be about the claimant's disclosure.

There is another point made in Mr Charalambous's witness statement, which I think is dealt with in Ms Afia's eighth witness statement. I do not know if your Lordship got to that. That was provided at speed last night in the event that your Lordship really was going to take these into account.

MR JUSTICE NICOL: I am afraid I did not get to Mrs Afia's eighth witness statement. Where is that?

MR SHERBORNE: It is right at the back of the bundle, at tab 45.

MR JUSTICE NICOL: Let me just have a look at the eighth witness statement and see what it says. (*Pause for reading*)

MR SHERBORNE: I was going to take you to paragraph 12 to deal with the text message, the other matter.

MR JUSTICE NICOL: Paragraph 12? Just a moment. (*Pause for reading*)

MR SHERBORNE: You will see Mr Charalambous at 13 has raised two further text messages. If you want to read to 15. (*Pause for reading*)

MR JUSTICE NICOL: Yes, I have read paragraphs 13 to 15.

MR SHERBORNE: We say in the context of the disclosure exercise performed, text messages, thousands upon thousands of documents, we say this kind of exercise, where the defendants have the unique ability to cross-check disclosure, is not one which should be allowed to inform your Lordship's judgment on whether or not it would be proportionate to strike the entire claim out. It was raised at the last minute by the defendants in a way whereby we cannot deal with them in the proper fashion. Ms Afia can try to give a proper explanation on a Sunday night at speed on what she has seen, but this is not satisfactory at all.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: That is the nature of exercise your Lordship is being asked to conduct, and I do object to it in the strongest possible terms, as your Lordship will appreciate. We say it would be wrong in principle to take these into account. At 16 you will see there is reference to an email -- this is a point that I made earlier right at the outset that there is a spat between the claimant's American lawyer and the defendant's American lawyer about whether some of the documents that were provided by Miss Heard to the defendants, if I can get this right, may have been the subject of a protective order. Your Lordship will

remember the whole problem with protective orders where Miss Heard has the benefit of a protective order in the Virginia proceedings and we had to get her consent before we could even disclose those documents. An entirely artificial process was created that we had to go around in order to be able to provide documents. It is said that some of those documents provided were part of the protective order. I think the American lawyer says that should not have been done and they should not do that. May I make it absolutely plain, as I need to, as Ms Afia does here, we are not seeking to stop Miss Heard providing documents for use by the defendants in this country. We do complain ----

MR JUSTICE NICOL: Just pause and repeat what you just said, please, Mr Sherborne. You are not seeking to stop Miss Heard doing what?

MR SHERBORNE: Relying on and providing to the defendants documents from the US proceedings. I understand Mr Wolanski is going to show you the letter and say that is what we were trying to do. If that is what is said, well, then I can categorically state on behalf of the claimant that he does not object to it. I do not know about the spat between the American lawyers, but I can tell you on instructions that we do not seek to do so.

MR JUSTICE NICOL: I have seen some reference to this I think perhaps in Mr Wolanski' skeleton for this hearing. On the claimant's behalf, are you prepared to offer an undertaking to that effect?

MR SHERBORNE: Yes, if your Lordship requires that, then we can give an undertaking. I want to try to dispose of this point without having to have a long debate about it, but what it cannot do, in my submission, is assist the defendants in their relief from sanctions application. I know the defendants are seeking to rely on ----

MR JUSTICE NICOL: It is not the defendants that are seeking relief from sanctions, it is the claimant, is it not?

MR SHERBORNE: Exactly, but the defendants have thrown this in as part of their attempt to say to your Lordship that it would not be disproportionate to strike this out, so it is said to be another attack on Mr Deep. What I am keen to avoid is this multiplication of issues thrown up by the defendants at the last minute as a way of slinging mud at Mr Depp to say that you should refuse relief from sanctions. In my submission, that would not be a principled approach for the court to take. If the defendants want to raise a separate point about this, then, as I say, it can be dealt with by the assurance or undertaking, or whatever

form your Lordship thinks is appropriate, but what it does not do, in my submission, is relate to the three-stage test which your Lordship is performing.

MR JUSTICE NICOL: All right. I have understood that point. Now, is there anything else you want to say in support of the claimant's application for relief from sanctions?

MR SHERBORNE: I think that deals with this. You will appreciate I have taken it at some speed.

MR JUSTICE NICOL: I understand that, but needs must and we have quite a lot to deal with, if you are successful on this application.

MR SHERBORNE: I do understand, my Lord, yes.

MR JUSTICE NICOL: Thank you very much then for your submissions.

MR SHERBORNE: Thank you, my Lord.

MR JUSTICE NICOL: Have we got Mr Wolanski on the line?

MR WOLANSKI: We do, hopefully with a clearer line than we had last Thursday.

MR JUSTICE NICOL: That is perfectly clear, thank you, Mr Wolanski.

MR WOLANSKI: Going then straight to the three stages of the *Denton* test for relief from sanctions, first of all, the seriousness of the breach is obvious and, albeit reluctantly, now accepted by the claimant. The second stage on good reason, we say that the incompetence of the defendants' legal team is not a good reason for the default; it is a bad reason. The authorities make clear that, in general, whether it is the fault of the party or his lawyer, makes no difference. We will come to the relevant case on that in due course. Further, we do not accept ----

MR JUSTICE NICOL: Just a minute. I think you referred me to a note in the White Book, yes at 3.9.5.

MR WOLANSKI: I did.

MR JUSTICE NICOL: You referred me to that for the proposition that good reasons are likely to arise from circumstances outside the control of the party in default.

MR WOLANSKI: Yes.

MR JUSTICE NICOL: But I looked on to the next paragraph still within 3.9.5, and that says, "If some good reason is shown for the failure to comply with the rule, practice direction or order the court will usually grant relief from any sanction imposed." The effect of it not being a good reason is that almost automatic relief from sanctions is not triggered.

MR WOLANSKI: Yes.

MR JUSTICE NICOL: We do have to get to the third stage and that is your point.

MR WOLANSKI: That is my point because this is not a good reason. Still on stage 2, however, before we get on to stage 3, the claimant says in evidence, or rather his solicitor says in evidence that the fault lies with Schillings for the breach, but we do not accept that. And we do not accept that the claimant is not personally culpable in relation to the breach. It is very striking that there is no evidence on this application from the claimant personally and he does not personally address the allegation that we have made that he has been seeking to withhold damaging documents from the defendants. It is in this regard that we will be addressing your Lordship on two additional matters. Mr Sherborne says it is inappropriate for us to do so, but, in my submission, it is crucial for us to do so because they are both relevant to the question of whether or not the court can accept the assurance given by the claimant's solicitors that he was in no way culpable in relation to this breach.

MR JUSTICE NICOL: Just a minute. Yes?

MR WOLANSKI: The first of those two matters is that, as we will see, the claimant has already misled your Lordship at the PTR on an important matter relating to disclosure. It is not in dispute that the evidence given on his behalf by Ms Afia at the PTR in relation to an important recording that was at the centre of an application for disclosure had never been in his possession. It is now accepted by Schillings that that assurance given to your Lordship through his solicitor, and repeated by his counsel to your Lordship in court, with the claimant sitting in court present, was false. Despite Schillings now making clear that that assurance was false, there is still no statement from Mr Depp personally explaining how he came to mislead your Lordship, let alone an apology.

The second matter which is relevant to the question as to whether or not your Lordship can accept Ms Afia's assurance today that the claimant is not culpable relates to the conduct of the claimant's American lawyers with regard to Miss Heard, because, as we will be demonstrating, as recently as last Friday immediately after the hearing of last Thursday was reported in the media, the claimant's American lawyer Mr Choo wrote ----

MR JUSTICE NICOL: Just slow down a minute ---- yes?

MR WOLANSKI: ---- wrote a message to Miss Heard's representatives in America threatening to seek sanctions in court in America against Miss Heard for providing the defendants with the Australia drugs texts and seeking an assurance that she would provide ----

MR JUSTICE NICOL: Just slow down, please. --- threatening to seek sanctions in the US for providing the defendants with the Australian drug texts?

MR WOLANSKI: Correct. And seeking an assurance from Miss Heard that she would provide no further such documents to the defendants. Set against that background, we say the court can reject Ms Afia's bald statement that the claimant was not in any way responsible for or culpable in relation to the breach which your Lordship has found he is guilty of.

Turning to the third stage, we will rely on the following seven factors, any one of which would in itself be a sufficient reason to deny the claimant his application for relief. Taken together, the case for denying that application is in my submission overwhelming. First, there is no reason for this court today to revisit the reasons why the unless order of 10 March was made, and, as the authorities show, it is only in a rare case that this is appropriate. The court has already ruled what the sanction for breach should be and nothing has happened that can change that, or should change that. As it happens, there was in fact every reason for your Lordship to make an unless order on 10 March, since that was less than two weeks before the trial was due to start and the claimant was guilty of multiple breaches of his duties of disclosure just days before the trial was due to commence. That leads me to the second point we rely on in relation to the gravity of the breach which your Lordship has found. Had the trial proceeded on 23 March, the defendants would have had that trial without the Australia drugs texts. The claimant ----

MR JUSTICE NICOL: Just slow down please. When were those drugs texts supplied by the claimant in the US proceedings? I think that was in February, was it not? I think my recollection is that the evidence was that no later than 18 February.

MR WOLANSKI: That is right, my Lord. Obviously we did not know about them; they were not disclosed to us. That is the whole point. We only found out about them because Miss Heard give them to us very recently.

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: The claimant had them before the 23 March trial, but did not disclose them to us. Had the trial gone ahead on 23 March, it would have gone ahead without the defendants having those texts. We would have been unable to challenge the claimant on his account of having not on his account had drugs in Australia, not having taken drugs in Australia and not having discussed drugs with Miss Heard in Australia. We would also not have had those documents in order to challenge the claimant's credibility more generally, because they directly demonstrate that he is not telling the truth on an important matter at the heart of the dispute over what happened in Australia.

MR JUSTICE NICOL: I have already ruled that those texts were disclosable.

MR WOLANSKI: You have. The third is a matter to which I have already alluded in relation to the second stage, namely that it is now clear that the claimant through his legal team misled the court at the PTR, and I shall be returning to that in more detail.

MR JUSTICE NICOL: Yes.

MR WOLANSKI: Fourth is the matter to which I have already referred in relation to the second stage which is his threats to Miss Heard in relation to her supply to the defendants of the Australia drugs texts and its threat to her of sanctions for doing so.

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: Again, I will be returning to that in more detail because we say that what Mr Depp has been engaged in is an attempt not just to prevent the defendants from receiving relevant evidence in these proceedings which he has chosen not to disclose to us; it also demonstrates an attempt to threaten and intimidate Miss Heard, who is of course our key witness, just days before the trial is due to start.

MR JUSTICE NICOL: At some stage, you do not have to do it now, do you want to respond to the proffered undertaking by Mr Sherborne on the claimant's behalf?

MR WOLANSKI: I will if we get to it, but, in my submission, this trial should not proceed at all. If your Lordship is against me on that, of course, yes, we will accept the undertaking.

MR JUSTICE NICOL: I understand your point that the trial should not proceed at all, but you are making the point about Mr Depp's threats against Miss Heard and, in that context, I was inviting you to respond to Mr Sherborne's offer of an undertaking.

MR WOLANSKI: I will address that when I make submissions on this topic, if I may, my Lord.

MR JUSTICE NICOL: Of course.

MR WOLANSKI: The fifth point we make is that the defendants cannot now have a fair trial. I am saying that because it is now apparent from Ms Afia's seventh and eighth witness statements that the disclosure exercise which has been carried out by the claimant's representatives was conducted at the very least totally incompetently and quite possibly with a view to the deliberate withholding of damaging documents. In relation to incompetence, we know this not just because, as my learned friend explained last week his team do not understand how CPR 31.6 operates -- that in itself is of course a serious problem since it shows that the wrong test has been applied to documents in this case and therefore may well have been applied across the board -- but there is more because Ms Afia's latest evidence tells a very sorry tale of wholesale incompetence. A disclosure exercise was conducted in a desperate rush. Important documents have been overlooked. Important recordings have never been listened to by members of Schillings' team and insufficient search key words have been applied.

The result, as is clear from Ms Afia's statements, is chaos, and I will be referring your Lordship in this context to further examples of documents which the claimant has not disclosed, which we obtained very recently from Miss Heard, and which the claimant now accepts he should have disclosed. In my submission, unless the whole disclosure exercise is carried out afresh with a different legal team, the defendants cannot have a fair trial.

You might expect that in the face if your Lordship's draft judgment, the claimant would have offered to have the task done again against this sad background of ineptitude. But no such offer has been made, and now it is too late. The trial starts in a week and neither we nor the court can have any idea about which other documents exist in the claimant's control, which he has elected not to give us or which have been overlooked through the incompetence of his legal team.

The sixth point is that the claimant can have his vindication, if he is entitled to it, through his US claim for libel against Miss Heard. This claim is in respect of purported damage caused to the claimant by the defendants to his reputation not just in this jurisdiction but globally. The claimant is not confined to damage in this jurisdiction. It extends also to damage in the US, where he and Miss Heard reside and where they are both citizens. That trial is currently due to start in January. The problems with disclosure

that the claimant has complained of in these proceedings arising from the fact that Miss Heard is not a party, and I note Mr Sherborne referred to those just now as giving rise to an unfair position as far as his client is concerned, those problems do not arise. The asymmetry of which Mr Depp makes complaint in these proceedings does not exist, since Miss Heard is a party. The allegations in respect of which Mr Depp brings the claim are the same as the allegations complained of in these proceedings. In response to the point made by Mr Sherborne that Miss Heard is contesting what we in this jurisdiction would call reference or meaning, I am informed that a judge in the US proceedings has already ruled that the *Washington Post* article, which is the subject of the claim, did refer to the claimant in respect of three of the four statements complained, so that issue is resolved.

Moreover, we do not accept that vindication achieved through a jury verdict is any less effective for Mr Depp than vindication achieved through a reasoned judgment in these proceedings. If Mr Depp really considered vindication through a jury verdict to be insufficient then why did he bring the claim in the US at all? As your Lordship is aware, vindication in libel cases has until very recently been achieved almost entirely in this jurisdiction between the verdicts of jurors, and it was never suggested that that was not proper vindication.

MR JUSTICE NICOL: Just a minute.

MR SHERBORNE: Moreover, in the US proceedings, the problems with, for example, remote video links and time zones are much less challenging because almost all the witnesses are there and should be able to give evidence in person. By January we all hope the pandemic will have eased, further facilitating the giving of evidence by live witnesses in person.

The seventh and final point we make in relation to the third stage of the test is that if this case does go ahead next week it will absorb vast resources. Five court rooms have been made available. Large numbers of court staff will be required, all of this largely at public expense and to the detriment of other litigants who would otherwise have access to those resources. In my submission, Mr Depp has forfeited the right to this indulgence. He has demonstrated contempt for our courts and for your Lordship. The absence of any contrition from him personally or an apology in respect of these serious default demonstrates a breath-taking arrogance.

My Lord, I am going to address four of those seven topics in more detail, but before I do, I would like to say a little bit about the law. Can I first of all ask your Lordship to turn in the bundle of authorities, to the *Global Torch* case? Hopefully, your Lordship has it.

MR JUSTICE NICOL: Just a moment. I am going to ask my clerk again please to help me on when she received or sent to me the defendants' bundle of authorities.

CLERK OF THE COURT: I sent that to you on the 28th at 20.14.

JUDGE NICOL: Was that Sunday at 20.14? Yes, I have got it.

CLERK OF THE COURT: Great.

MR JUSTICE NICOL: Just a moment. *Global Torch* is tab 2, I think.

MR WOLANSKI: It is tab 2.

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: It is a decision of the Supreme Court 2018 relating to the breach of an unless order in respect of a statement which the party was personally ordered to make. I would like you please to look at paragraph 23. It is the judgment of Lord Neuberger at page 68 of the pdf.

MR JUSTICE NICOL: "This contention effectively involves saying that..."

MR WOLANSKI: Yes, please. I would like to start at G, about six lines down: " The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction. (24) In the present case, essentially for the reasons given by the three judges in their respective judgments, there do not appear to be any special factors (subject to what I say in the next two sections of this judgment). Further, it is difficult to have much sympathy with a litigant who has failed to comply

with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place."

Next please is the *Michael Wilson v Sinclair* case which is in tab 3. That was an application for relief from sanctions its Court of Appeal summarised the relevant post *Denton* principles at paragraph 26 at 91 of the pdf.

MR JUSTICE NICOL: I have got 91. Thank you. I have got paragraph 26, yes.

MR WOLANSKI: In relation to the third stage of the test ----

MR JUSTICE NICOL: Mr Wolanski, your voice was muted or very quiet then.

MR WOLANSKI: In relation to the third stage ----

MR JUSTICE NICOL: No, you still need to do something about the volume on your microphone.

MR WOLANSKI: I fear the gremlins from last Thursday may have returned. If I speak close to the microphone, does that help? Apparently, my solicitors say they can hear me fine, so it may be a problem at your Lordship's end.

MR JUSTICE NICOL: Amy, can you hear Mr Wolanski?

THE CLERK OF THE COURT: Yes, I can, and quite clearly as well.

MR JUSTICE NICOL: I am afraid your voice has now gone quiet as well so it sounds as if it is a problem at my end.

CLERK OF THE COURT: Do you want to leave and dial back in?

MR JUSTICE NICOL: Mr Wolanski, at the moment I can only hear you very faintly, so I am going to ask please for everybody to dial back in and for us to a take a few minutes while that occurs.

MR WOLANSKI: Very well.

MR JUSTICE NICOL: Thank you.

(Short break)

MR JUSTICE NICOL: Mr Wolankski, I can hear you perfectly clearly, thank you, Amy. That has resolved the problem. Is Mr Sherborne present on the call?

CLERK OF THE COURT: I do not think he is.

MR JUSTICE NICOL: I think Ms Wilson is. Ms Wilson, do you want to see if we can get Mr Sherborne back?

MS WILSON: Yes, my Lord, I am just trying to now.

MR PRICE: My Lord, it is Mr Price here. I am wondering where we are going on timing. I have no idea how long the other applications are going to be after that as well.

MR JUSTICE NICOL: Mr Price, thank you for your patience. I think the reality is that by the time Mr Sherborne has responded, I am not going to be able to hear you before at least lunch time. If you would like to be released until sometime from 2 o'clock onwards, that is the best I can do at the moment.

MR PRICE: I am grateful for that indication, my Lord. There were some other applications mentioned in today's proceedings. Is the disclosure application likely to follow this application assuming it succeeds?

MR JUSTICE NICOL: I cannot tell you that at the moment because I may need to hear from the other parties about the precise order in which I take the further matters before me, but I can say it will not be before 2 o'clock.

MR PRICE: I will probably stay in the meeting and work on some other things so I know what is going on, but I am grateful, my Lord.

MR JUSTICE NICOL: Very good. Have we got Mr Sherborne back?

MR SHERBORNE: My Lord, you do, yes.

MR JUSTICE NICOL: Mr Sherborne, thank you. I can now hear Mr Wolanski very clearly so I am going to ask him please to continue with his submissions. You were taking me to *Wilson v Sinclair*.

MR WOLANSKI: I was paragraph 26.

MR JUSTICE NICOL: Paragraph 26. Just a moment. Yes?

MR WOLANSKI: And it is (iii) which I invite your Lordship to look at because there is a summary of the law post *Denton* with particular reference to how the court should approach factors (a) and (b) in 3.9.

MR JUSTICE NICOL: Let me just read 26.3. (*Pause for reading*) I have read 26.3.

MR WOLANSKI: Those two factors should be given particular weight. Next please paragraph 35 where Richard LJ addresses the distinction between on the one hand orders imposing a stay if there is non-compliance and on the other unless orders imposing a strike out. I

would invite your Lordship to read paragraph 35 and paragraph 36, please. (*Pause for reading*)

MR JUSTICE NICOL: Yes, right, I have read paragraphs 35 and 36 of *Wilson v Sinclair*.

MR WOLANSKI: Thank you. Finally from the same authority on this point, where an unless order has been properly made and therefore the sanction is appropriate, unless there is some exceptional circumstances or some change of circumstances. Paragraph 38 please. (*Pause for reading*) So the court on an occasion such as the current one has to proceed on the basis that the sanction was properly imposed. Before leaving this case, please go to paragraph 56 page 103 of the electronic bundle. Does your Lordship have that?

MR JUSTICE NICOL: I do. I am just reading it now. (*Pause for reading*). Yes?

MR WOLANSKI: Here we have Lord Justice Christopher Clarke again addressing the distinction between an unless order and orders which impose a lesser sanction leading to a breach, and important for current purposes is what he says five lines from the bottom of that page with reference to unless orders as follows. The applicant -- and that is an applicant in a case where there is not an unless order -- has not been given what is expressed to be a last chance. Where an unless order has been made as in the current case, the applicant has been given a last chance and that is not a matter that the court should ordinarily revisit.

Finally on this trio of cases, please go to the next case in the bundle *Sinclair v Dorsey & Whitney*, another Sinclair but different from the one in the case we have just been looking at. It is at tab 4. This was a case involving an unless order. It is a decision of Popplewell J (as he then was) in 2016 where the claimant was ordered to make a payment for security for costs of £100,000 and an unless provision was attached to that order. Just one paragraph I would invite your Lordship to look at from this and that is paragraph 43 at page 119 (*Pause for reading*).

MR JUSTICE NICOL: I have read it, thank you.

MR WOLANSKI: You will have noted then what Popplewell J identifies there is the need to see whether or not there is anything in the case that puts it in that rare category of cases where the value judgment that was made prior to making the unless order should be revisited. In my submission, the current case is not such a case.

The final authority I would like to take your Lordship to is in tab 5 please and it is a case called *Gladwin v Bogescu*.

MR JUSTICE NICOL: Which paragraph?

MR WOLANSKI: Paragraph 30, please, page 130 of the bundle. It is another relief from sanctions case, and in this paragraph Turner J addresses the question of whether this is in some way a mitigating factor on an application for relief from sanctions that the default was the fault of the defaulting party's legal adviser, and he says it is not. (*Pause for reading*)

MR JUSTICE NICOL: Yes?

MR WOLANSKI: With that in mind, can I please turn now to the first of the four topics which I said I would address your Lordship in more detail as a third stage. That topic is the role of the claimant personally in the breach of the unless order which your Lordship has already ruled on. On this can I ask you please it look at Ms Afia's seventh witness statement, which is in tab 42 at page 763?

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: It is page 789 of the electronic pdf.

MR JUSTICE NICOL: Which paragraph?

MR WOLANSKI: Paragraphs 23 to 25, please, which is page 768 of my bundle. I am told that is page 794 of the electronic bundle. Does your Lordship have that?

MR JUSTICE NICOL: Yes, and it was paragraph?

MR WOLANSKI: 23, 24 and 25.

MR JUSTICE NICOL: Let me just read those. (*Pause for reading*) Yes?

MR WOLANSKI: The explanation, in short, in relation to the failure to disclose these messages was that they were reviewed but a decision was made that they did not meet the test under 31.6, In relation to the claimant's role all that is said is this at paragraph 25: "I wish to assure the court that there was no attempt to hide or withhold them by the claimant, contrary to what the defendants asserted in their application. Indeed, as already explained, it was the claimant who had already disclosed this exchange in the US libel proceedings only a few weeks earlier." As to that latter point, we will come back to that because, as will be apparent, the claimant has been taking rigorous steps to stop documents that were disclosed by him in the US libel proceedings from finding their way

to the defendants in this case. That is not a point which avails the claimant at all on this application.

However, it is the first point which I wish to make some observations about. All we have here from Ms Afia is a bald assurance. She does not explain the basis on which she provides that assurance. She does not say whether or not she spoke to the claimant about this issue of the Australia drugs texts. She does not say whether or not the claimant knew about the Australia drugs texts. She does not say whether the claimant had any input into the decision to withhold them or whether he was advised as to whether or not they should be disclosed. So, we know nothing about the state of knowledge of the claimant personally at the time the decision was made not to disclose them and we know nothing about his role personally in the decision not to disclose them. As I say, there is no evidence on this application from the claimant himself.

I am about to move to the second of the four topics I am going to explore in more detail. It may be your that Lordship considers this a good time to adjourn. It is a somewhat more substantial topic.

MR JUSTICE NICOL: I think it would be. How much longer do you think you will be, Mr Wolanski?

MR WOLANSKI: I think I may be an hour.

MR JUSTICE NICOL: Mr Sherborne, are you still on the line?

MR SHERBORNE: My Lord, I am.

MR JUSTICE NICOL: Mr Wolanski has not finished yet, but if he is going to be another hour do you have any idea as to how long you are likely to need in reply?

MR SHERBORNE: It is difficult.

MR JUSTICE NICOL: On the basis of what you have not heard yet but from what you have heard so far, how long do you estimate you will need in reply?

MR SHERBORNE: It depends. A number of the points Mr Wolanski is making again, so I do not know the extent to which that is going to expand. Your Lordship has my submissions on the fact that so much of this material has been brought in by a side wind, and if your Lordship takes the view you need me to deal with it, you told me to say something *de bene esse* about it about it, but if you are going to regard these as factors to be brought if despite no finding of breach, I may well take some time to deal with it. I am very

concerned at how long this is all taking, as I am sure your Lordship is, but I could be at least half an hour or so, may be much longer, depending how far Mr Wolanski is allowed to go into this material.

MR JUSTICE NICOL: All right. I do not know if anybody is on the line who can pass a message to Mr Price.

MR PRICE: I am here.

MR JUSTICE NICOL: Hello, Mr Price. Thank you. It looks as though I will be involved with the present application at least until 3 o'clock, so if you want to take an extended lunch break I will not need to hear you before at least 3 o'clock.

MR PRICE: An extended lunch break is always a good idea.

MR JUSTICE NICOL: Thank you, Mr Price. I will terminate the call now. We will resume at 2.05.

(Luncheon adjournment)

Marten Walsh Cherer hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.

ATTACHMENT 3

England and Wales High Court (Queen's Bench Division) Decisions

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
02/07/2020

B e f o r e :

MR JUSTICE NICOL

Between:

John Christopher "Depp" II	**Claimant**
- and -	
News Group Newspapers Ltd.	
Dan Wootton	
-and-	
Amber Heard	
	Defendants

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

HTML VERSION OF JUDGMENT

Mr Justice Nicol :

1. I have set out the background to this libel action in my previous judgments.

2. On Thursday 25th June I heard an application by the Defendants for a declaration that the claim was struck out because of the Claimant's alleged failure to comply with my earlier 'unless' order for disclosure. I reserved judgment.

3. A draft of my judgment was distributed to the parties on Friday 26th June 2020. In that draft I said that I agreed with the Defendants that the Claimant had not completely satisfied the obligation in paragraph 3(c) of my 'disclosure order' of 6th March 2020 which, by paragraph (10) of my order of 10th March 2020 I had made an 'unless' order. At the hearing on 25th June, Mr Sherborne, who represented the Claimant had indicated that, if I did find that there had been a breach, the Claimant would wish to apply for relief from sanctions. The trial is currently listed to start on 7th July 2020 and it was agreed by both parties that any such application would need to be made very expeditiously. Mr Sherborne proposed and Mr Wolanski QC for the Defendants agreed that it would be reasonable to require that the draft of any such application notice (together with the evidence in support) should be served within 36 hours of my draft of the judgment reserved on 25th June being distributed to the parties. The Claimant did so serve a draft application notice and the supporting evidence. My draft judgment was formally handed down on the morning of 29th June 2020 which was also the date when I heard the Claimant's application for relief from sanctions.

4. In my draft judgment from the hearing on 25th June, I indicated that it would not be appropriate to make the declaration that the claim was struck out until I had heard and determined any application for relief from sanctions.

5. This application was the first disputed matter which I considered on 29th June 2020. I reserved my decision which I am now handing down. I had made clear that I wished to resolve any other pre-trial issues on the same day. Of course, if the Claimant was refused relief from sanctions, the claim would be struck out and there would be no trial. Nonetheless, because it was desirable to resolve as far as possible any other pre-trial matters, the parties agreed to proceed on the assumed basis that the trial would proceed. It was on this basis that I heard the second disputed matter, namely whether I should make the order sought by the Claimant that Ms Heard, as a Third Party, should be required to make disclosure of certain categories of documents.

6. As I have explained in my previous judgments the articles which the Claimant alleges libelled him concerned his relationship with Ms Heard who is his former wife. In those articles, it is said, the Defendants accused the Claimant of multiple acts of physical violence against Ms Heard, some of which, it is alleged the articles said, put Ms Heard in fear of her life.

7. The Defendants substantially rely on the defence of truth in Defamation Act 2013, s.2. In doing so they have served a number of witness statements from Ms Heard (among others) and Mr Wolanski has indicated that they will rely on her evidence in support of that plea.

Should the Claimant be allowed relief from sanctions?

8. This application is under CPR r.3.9 which says,

> '(1) On an application for relief from any sanction for failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application including the need –
>
> (a) For litigation to be conducted efficiently and at proportionate cost; and
>
> (b) To enforce compliance with rules, practice directions and orders....'

9. As is well known, the Court's approach to such an application has been analysed in *Denton v T.H. White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3296. The Court has to ask itself three questions: (1) Was the breach serious or significant? (2) Why did the breach occur? (3) Is it just to allow relief from sanctions having regard to all the circumstances, particularly the matters referred to in r.3.9(1)(a) and (b)? These are commonly referred to as the three *Denton* stages.

Denton Stage 1: Was the breach serious or significant?

10. Mr Sherborne did not seriously contest that the breach was serious or significant. In my view, he was right to take that course. I had ordered disclosure of certain categories of documents on 6th March 2020. The Claimant has brought libel proceedings in the US state of Virginia arising out of an article that Ms Heard had written in the *Washington Post*. One of the categories of documents which I required the Claimant to disclose concerned documents which had been produced on discovery in those Virginia proceedings. I set a tight timetable for compliance since, at the date of my order, the trial was due to start on 23rd March 2020. Shortly thereafter the Claimant asked for a little more time since there had been a relatively recent change in his solicitors from Brown Rudnick to Schillings and the amount of work required was considerable. On 10th March 2020 I agreed to extend time (see paragraph (5) of my order of 10th March extending time for compliance with paragraph 3 of the order of 6th March 2020) but, I added that, if the Claimant failed to comply with that or various other orders his claim would be struck out.

11. Thus, the order which the Claimant breached was an 'unless' order and breach of such an order will almost invariably be serious or significant.

12. In my judgment handed down on 29th June 2020 I found that the Claimant had not completely complied with paragraph 3(c) of my order of 6th March 2020. That sub-paragraph required the Claimant to disclose any documents produced on discovery in the Virginia libel proceedings which came within CPR r.31.6 and which had not already been disclosed. In my judgment of 29th June 2020 I agreed with the Defendants that certain texts exchanged between the Claimant and his assistant, Nathan Holmes, and which were referred to as 'the Australian drug texts' did come within that description.

Denton Stage 2: why the breach occurred.

13. Ms Afia of Schillings gives her account of how the breach occurred in her 7th witness statement (dated 27th June 2020).

14. Ms Afia apologised for the breach of my order which she acknowledged (in light of my judgment) had occurred. Her apology was on behalf of her firm and the Claimant. She explained that my disclosure order had required a very large number of documents to be reviewed. Even with the extended deadline which my order of 10th March 2020 had given the Claimant, this was still a very taxing task. Schillings had been obliged to consider a very large number of documents as a result of my disclosure order. Their team had been working virtually round the clock. As a result of my disclosure order some 142 documents from the Virginia proceedings had been disclosed to the Defendants. The Australian drug texts had been considered but the view was taken that they did not fall within r.31.6 and they did not therefore have to be disclosed.

15. Ms Afia accepted, in the light of my judgment, that the Claimant had taken too narrow an approach to the requirements of r.31.6, but, she said, the error had been made in good faith and not with the intention of deliberately concealing documents adverse to the Claimant's case. Schillings had obtained a full download of iCloud messages, SMS messages and MMS messages for the period of 15th February 2015 – 9th March 2015 and had reviewed these to see if any others came within r.31.6. One further message from Mr Holmes sent on 3rd March 2015 had been identified and that would be disclosed. The Defendants have alleged 14 incidents where it is said that the Claimant was violent to Ms Heard. On 3 more of those occasions the Defendants have pleaded that the Claimant was affected

by alcohol and/or drugs. The Claimant has agreed that Schillings would review his messages for the immediate period before each of those three incidents to see if any further documents should be disclosed.

16. As to the *Denton* second stage, Mr Wolanski submitted:

> i) I could not accept that the breach was solely the responsibility of Schillings. He commented that there was no witness statement from the Claimant himself in regard to how the default had occurred.
>
> ii) Mr Wolanski also submitted that the Claimant had previously misled me at the pre-trial review hearing on 26th February 2020 regarding his possession of a certain recording of a conversation between him and Ms Heard.
>
> iii) He also commented that the Claimant's US lawyers had recently threatened Ms Heard with sanctions for providing documents to the Defendants in the present proceedings (including the Australian drugs texts).
>
> iv) In any event, as the White Book commented, a good reason for the default which required relief from sanctions was ordinarily something which was outside the control of the party in default. A mistake by the party's lawyers was not of that kind. Mr Wolanski submitted that, even if Ms Afia's explanation was correct, it was not a good reason.

17. While there is no witness statement from the Claimant himself, Ms Afia's witness statement gives a full account of how the breach occurred. It is plain from her witness statement that the Australian drug texts were included in the documentation which the Claimant supplied to Schillings in compliance with paragraph 3(a) of my order of 6th March 2020. Schillings were then obliged to review the documentation which the Claimant supplied to them. I have no reason to doubt that they did so.

18. I accept Ms Afia's explanation of why the Australian drug texts were not thereafter disclosed to the Defendants.

19. I shall return to Mr Wolanski's second and third points when I come to consider the *Denton* 3rd stage.

20. As for Mr Wolanski's fourth point (that a good reason would ordinarily be something outside the control of the parties), this has to be seen in conjunction with the next paragraph in the notes to the White Book at 3.9.5, namely that, 'If some good reason is shown for the failure to comply with a rule, practice direction or order, the court will usually grant relief from any sanction imposed because of it.' In other words, if a reason outside the control of the defaulting party is shown, it is not usually necessary to go on to consider the 3rd *Denton* stage. I agree with Mr Wolanski to this extent. The explanation given by Ms Afia for how the default occurred does not mean that the Claimant avoids examination of all the circumstances of the case: he does have to engage with *Denton* stage 3 as Ms Afia effectively acknowledges in her witness statement.

The 3rd Denton stage

21. Mr Wolanski submitted that there were 7 factors for me to take into account at the third *Denton* stage any one of which, he submitted, would be sufficient to deny the Claimant relief from sanctions, but which in combination provided an 'overwhelming' case against granting the Claimant relief.

> i) *There was no reason to revisit the reasons why, on 10th March an 'unless order had been made. It was only in a rare case that the sanction previously stipulated would be departed from. In this case there had been multiple breaches of the 'unless' order.*
>
> Mr Wolanski referred me to *Global Torch Ltd v Apex Global Management Ltd (No2)* [2014] UKSC 64, [2014] 1 WLR 4495 where Lord Neuberger said at [23]

'Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have.'

That is also in line with one of the particular factors to which the Court must have particular regard- see r.3.9(1)(b) and *Michael Wilson and Partners Ltd v Sinclair* [2015] EWCA Civ 774, [2015] 4 Costs LR 707 at [26(iii)]. Likewise in *Sinclair v Dorsey and Whitney (Europe) LLP* [2015] EWHC 38888, [2016] 1 Costs LR 19 at [43] Popplewell J. spoke of it being a 'rare' case where the decision to impose an 'unless' order with its consequence of striking out in default should be revisited.

ii) *Had the trial proceeded on 23rd March, the Defendants would not have had the Australian drugs texts. The Defendant had only found out about them recently when Ms Heard had alerted the Defendants to their existence. Because they were unaware of them, the Defendants would have been unable to challenge the Claimant's evidence regarding those matters.*

iii) *It was now clear, Mr Wolanski submitted, that the Claimant had misled the Court at the pre-trial review hearing on 26th February 2020* (This was Mr Wolanski's second point at the *Denton* stage 2)

One of the issues raised at the Pre-Trial review concerned recordings of conversations which included Ms Heard. In turn that led to a debate as to whether the Claimant had any such recordings. Schillings had said he did not. Recently it has transpired that he did. This recording was referred to at the present hearing as 'Argument 2'. In an earlier witness statement (dated 21st February 2020) prepared for the hearing on 26th February, Ms Afia had said,

'The Claimant does not hold and has never held any of these recordings.' Mr Wolanski commented that the point was repeated by Mr Sherborne in the course of his oral submissions, at a time when Mr **Depp** was present, as was one of his US lawyers, a Mr Adam Waldman. Since 12th June 2020 Ms Heard provided to the Defendants a document referred to as 'the extraction report'. That showed that the Claimant had had possession of the 'Argument 2 tape'. On 13th March 2020 the Claimant had disclosed as part of his response to my orders of 6th March and 10th March parts of the Extraction Report, but not the parts which showed that he had been in possession of a recording of 'Argument 2' and had had it since at least 18th February (the latest date by when it had been disclosed to Ms Heard in the Virginia proceedings).

In her witness statement of 27th June Ms Afia accepted that the recording of 'Argument 2' was disclosable, but, she said, it had just been missed. She commented that 'our instructions were that the recordings were not held by the Claimant.'

Ms Afia has made an 8th witness statement (dated 28th June 2020) in which she says, 'there was no intention to mislead the Defendants or the Court'. Mr Wolanski comments that the statement is ambiguous as to whose intention Ms Afia is referring and he repeats his observation that there is no witness statement on the matter of relief from sanctions from the Claimant himself. He submits that I should infer that the Claimant *did* intend to mislead the Court.

In her 8th witness statement, Ms Afia also explains how certain texts were overlooked. She says that the Claimant's team used an electronic key word

search, but these did not include the words 'fight', 'hit' or 'control'. Mr Wolanski submits that that is remarkable, given the nature of the disputes between the parties which leads to his comment that there can be no confidence that other relevant messages may also have been overlooked.

iv) *The Claimant had threatened Ms Heard with repercussions in the Virginia proceedings for supplying the Australian drugs texts to the Defendants in these proceedings. The intimidation of Ms Heard has continued in the days leading up to the present hearing and only days before the expected start of the trial on 7th July 2020* (This was Mr Wolanski's third point at *Denton* stage 2).

Mr Wolanski submits that the Defendants have only known about the deficiencies in the Claimant's disclosure because of the assistance they have received from Ms Heard. The discovery procedure in Virginia allowed either party to designate a document as 'confidential' in which case its use outside those proceedings was restricted. After the hearing on 25th June Ben Chew, who is one of the Claimant's US lawyers wrote to Ms Heard's US lawyers,

> 'We understand that in London today counsel for the *Sun* tabloid represented to the Court there that Ms. Heard's American lawyers provided certain texts that Mr. **Depp** produced and marked CONFIDENTIAL pursuant to the Protective Order in the Fairfax case. We believe that such disclosure is an egregious violation of the Protective Order and we plan to seek appropriate relief from the Court in Fairfax.'

Mr Wolanski submits that a letter in those terms sits uneasily with what Ms Afia said in her 8th witness statement, namely.

> 'There has been no attempt to prevent the Defendants obtaining documents by Ms Heard, even if the provision of these documents is apparently in breach of US procedural law.'

Mr Wolanski argues that the letter of Mr Chew was only the latest in a number of similar threats to Ms Heard by the Claimant's US lawyers.

v) *The Defendants cannot now have a fair trial. Ms Afia's 7th and 8th witness statement show that the Claimant's legal team have been incompetent in applying the r.31.6 test. Important documents may have similarly been overlooked. The Claimant has admitted that a further message should have been disclosed. Unless the whole disclosure exercise was re-done, the Defendants could not have a fair trial, but there is simply insufficient time to do that before 7th July.*

vi) *The Claimant will have the opportunity to vindicate his reputation through the Virginia libel proceedings.* That trial is due to start in January 2021. In that claim Mr **Depp** is the claimant and Ms Heard is the defendant. There will not therefore be in those proceedings the asymmetry of which the Claimant has complained in the English proceedings. Mr Wolanski told me that a Judge in Virginia has already ruled that Ms Heard's article in the *Washington Post* did refer to Mr **Depp.** The factual issues will be determined by a jury in Virginia, but that feature did not dissuade the Claimant from suing Ms Heard in Virginia. While jury trials were more common in defamation cases in England, it was never suggested that they provided an inadequate means of vindication.

vii) *If the present trial goes ahead it will absorb vast resources.* The Court Service has agreed to make 5 court-rooms available (because of the need to observe social distancing). The burden on the public purse and the displacement of resources which could otherwise be used for other cases is, therefore, particularly acute.

22. In response, Mr Sherborne argues that the *Global Torch* and similar cases were addressing a different type of situation, namely a litigant who has recalcitrantly refused to obey an order of the court, despite being given every opportunity to do so. He argues that the present situation was different. The disclosure order was converted into an 'unless' order on 10th March 2020, not because the Claimant had been recalcitrant, but because the trial date was fast approaching and Schillings had sought an extra few days in which to meet the challenge of reviewing a very large number of documents.

23. Striking out, Mr Sherborne submitted, was a draconian step which should be reserved for cases where it was clear what the litigant had to do and had not done it. This was not a case of a litigant refusing to do something which he clearly was required to do, but a mis-judgment of what the Rule 3.6 required. The Claimant now accepted that the Australian drugs texts were disclosable but the decision to the contrary which the Claimant had taken prior to my judgment was made in good faith, as Ms Afia had said. She had apologised on behalf of both her firm and the Claimant for that error.

24. The Defendants had chosen to allege that the disclosure order had been breached only by reference to the Australian drugs texts. It would be unfair to the Claimant to allow Mr Wolanski to widen his complaints as he had sought to do.

25. Mr Sherborne emphasised that the Australian drug texts had not in themselves shown that the Claimant had been violent to Ms Heard. That was important in my decision whether striking out the claim for failure to disclose them was a proportionate measure.

26. There was, he submitted, an air of unreality regarding the complaints of threats against Ms Heard. She had undoubtedly assisted the Defendants, notwithstanding anything said by the Claimant's US lawyers. As for the future, Mr Sherborne offered on the Claimant's behalf an undertaking that he would not seek to take any measures against her regarding alleged breaches of the protective order by passing any documents to the Defendants which had been marked confidential.

27. It was also unrealistic, Mr Sherborne submitted, to suggest that Mr **Depp** had deliberately withheld the 'Argument 2' recording. First, Mr Sherborne submitted that this recording assisted the Claimant, since Ms Heard can be heard to admit that she had sometimes started fights and that, on occasion, she had hit the Claimant. This, therefore supported his case that it was Ms Heard who was the aggressor. Second, 'Argument 2' had been disclosed in the US proceedings which was how it had reached the Defendants. Mr Sherborne reminded me that early on in these proceedings, Nicklin J. had refused to stay the present proceedings despite the Defendants' argument that they could not fairly defend the action because of restrictions placed on Ms Heard by the Virginia proceedings (see the transcript of his judgment of 27th February 2019).

28. Mr Sherborne submitted that, whatever redress could be obtained by the Claimant in the Virginia proceedings, would not compensate for the loss of the opportunity to litigate in the UK. As Mr Wolanski had observed, the Virginia proceedings would be decided by a jury which would not give a reasoned decision. By contrast, at the conclusion of the trial, I would give a reasoned judgment which would be more satisfactory for the Claimant and a more effective form of vindication for either him or Ms Heard. The opportunity to seek that vindication in the jurisdiction where the Defendants' articles had been circulated to a very large number of readers and where the Defendants had exacerbated the injury to the Claimant's reputation by the conduct of their defence was very important to the Claimant. This is not the type of situation where a claim against the party's legal representatives (assuming that there would be a claim for professional negligence) would be an adequate alternative.

29. Finally, Mr Sherborne submitted that the resources which would be needed to try the case were a result of the COVID-19 pandemic: it had nothing to do with the nature of the breach by the Claimant.

30. In my judgment, I should grant relief against sanctions. I have taken into account all that Mr Wolanski and Mr Sherborne have said, but in my view it would not be just to strike out the claim. My reasons are as follows,

    i) The claim is far advanced and the trial is imminent. Despite the breach which I have found and despite Mr Wolanski's submissions, I am not persuaded that the trial of the

claim would be unfair.

ii) Ms Heard has provided assistance to the Defendants and has done so despite whatever may have been said by the Claimant's US lawyers. I agree that it is important that she is not subjected to sanctions in another jurisdiction for having done so. In the course of the hearing, Mr Sherborne offered an undertaking to that effect and it will be a necessary part of my decision that that is formalised in an undertaking to this Court.

iii) I agree that the 'unless' order which I made on 10th March was not because the Claimant had been recalcitrant but because of the imminence of the trial which was then due to start in only a few days' time. I cannot find that the breach which I have found was deliberate. Rather it was because of an erroneous view of the nature of the disclosure obligations in r.31.6. In all of those circumstances, I agree that the position which I face is not quite the same as in *Global Torch* and the other decisions relied on by Mr Wolanski and in those circumstances, while the breach was serious, there is scope for other considerations to play a more significant role in the assessment of what justice requires.

iv) I see some force in Mr Sherborne's objection that the Defendants' resistance to the present application has expanded beyond the breach which I have found. Of course r.3.9 requires the court to take into account all the circumstances of the case, but fairness to the Claimant requires him to have a proper opportunity (a) to answer the allegation of breach and (b) to have the Court determine whether that breach has been proved (if not admitted). Thus, I agree with Mr Sherborne that I should focus for the purposes of the present application on the breach which I have found proved (together with the additional text which the Claimant has agreed ought also to have been disclosed).

v) I also see force in Mr Sherborne's points that a reasoned decision (which I shall have to give after the trial) will be a vindication for whichever party is successful of a different order than a bald verdict of a jury. Of course, I mean no disrespect to the procedure adopted in Virginia. As Mr Wolanski commented, in the past juries commonly decided factual issues in libel trials in England. However, Parliament considered that the system should change and now it is usual for defamation actions to be tried by judge alone. The Claimant's choice to sue Ms Heard in Virginia as well as the Defendants in this jurisdiction does not demonstrate his indifference to the advantage which the present English system will give him (or the Defendants if they are the successful party at trial). This is not the type of case where the Claimant should be left to such recourse as he may have against his lawyers (assuming that he would have such a remedy).

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's** 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.

ATTACHMENT 4

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Transcript of John C. Depp, II

Date: November 10, 2020
Case: Depp, II -v- Heard

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www.planetdepos.com

BY MS. CHARLSON BREDEHOFT: 12:14:07

Q So -- so I just want to make sure I understand this last -- this last answer. 12:14:07 12:14:09

MR. CHEW: You may answer this one question. 12:14:10 12:14:11

BY MS. CHARLSON BREDEHOFT: 12:14:12

Q So none of the $7 million that you paid to Amber Heard -- 12:14:12 12:14:17

A Uh-huh. 12:14:18

Q -- was because or as a result of her alleging that you'd engaged in domestic abuse or violence; is that correct? 12:14:19 12:14:22 12:14:25

MR. CHEW: And Mr. Depp, I would instruct you not to answer that question to the extent it requires you to divulge attorney-client privilege. If you can answer it without disclosing any communications with counsel, you can, but if you can't, don't answer it. 12:14:26 12:14:28 12:14:30 12:14:33 12:14:35 12:14:37

THE WITNESS: May I hear the question again? 12:14:40 12:14:42

MS. CHARLSON BREDEHOFT: Can you just read it back? 12:14:42 12:14:44

THE REPORTER: Question: "So none of the $7 million that you paid to Amber Heard was because or as a result of her alleging that you'd engaged in domestic abuse or violence; is that correct?" 12:15:00 12:15:01

MR. CHEW: And same instruction. 12:15:01

THE WITNESS: None of the $7 million that she was awarded in the divorce had anything whatsoever to do with any -- any of her claims, any of that, no. 12:15:04 12:15:07 12:15:10 12:15:18

MS. CHARLSON BREDEHOFT: You can take your break now. 12:15:20 12:15:21

MR. CHEW: Thank you. 12:15:22

THE VIDEOGRAPHER: We're going off the record. The time is 12:15. 12:15:23 12:15:25

(Recessed at 12:15 p.m.) 12:15:28

(Reconvened at 1:32 p.m.) 12:15:28

THE VIDEOGRAPHER: We are back on the record. The time is 13:32. 13:31:54 13:32:15

BY MS. CHARLSON BREDEHOFT: 13:32:17

Q Mr. Depp, while we were talking this morning, you had indicated that Ms. Heard had engaged in I believe you called it a campaign of 13:32:17 13:32:23 13:32:27

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Karen Young, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my direction, and that I am neither counsel for or related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 17th day of November, 2020.

NOTARY PUBLIC IN AND FOR
THE COMMONWEALTH OF VIRGINIA

My commission expires:
June 30, 2022
Registration No. 7046852

ATTACHMENT 5

[redacted]

From: "Samantha F. Spector" <ss@spectorlawfirm.com>
Date: August 6, 2016 at 12:41:39 AM PDT
To: AH <arrowsarc@icloud.com>
Cc: "Samantha F. Spector" <ss@spectorlawfirm.com>, "joseph@jpkoeniglaw.com" <joseph@jpkoeniglaw.com>
Subject: DEPP - Client Acknowledgment and Consent re Waiver of 1/2 Interest in Community Back-End Deals

Amber,

As a follow up to our call tonight, the attached letter which was sent to Laura tonight (dated August 8, 2016) is worded specifically so that you are not making any specific demands, but it clearly extends your willingness to be extremely generous by waiving your 1/2 interest in the back-end of Pirates 5, etc.

Joe Sweeney, your forensic accountant, has reviewed the financial documentation provided to him thus far from Ed White. From Sweeney's analysis, he determined that Pirates 1, which was released in 2003, has resulted in profit-participation payments made to Johnny from his back-end deal for the 12 months ended March 31, 2016 of approximately $700,000 or more. Johnny's profit-participation (back-end deal) for Pirates 4, to date, has earned Johnny over $33,000,000.

Based on that fact that Johnny made Pirates 5 during marriage, Pirates 5 is a community property asset and, therefore, you are entitled to 1/2 of the income from this asset. Although one cannot predict with accuracy the amount of profit-participation that will be earned by Johnny from Pirates 5, it is important for you to note and understand that from back-end deals, Johnny has made over $21,000,000 from Pirates 1, and he has made over $33,000,000 from Pirates 4. Accordingly, by waiving your ½ interest in the back-end deal of Pirates 5 (i.e., the profit-participation), not to mention any other projects such as Boswell in which Johnny made during marriage, you would potentially be foregoing tens of millions of dollars in income to you in the future.

Simply put, given Sweeney's analysis, you are potentially leaving a lot of money (to wit, tens of millions of dollars payable to you) on the table by waiving your interest in Johnny's back-end deals for projects he worked on during marriage.

Therefore, you will need to print out, and date and sign this email below, and thereafter return the executed document to me, to signify your express confirmation that you understand what you are choosing to do.

Candidly, you are being amazingly true to your word, that this is not about the money. With tremendous respect, you are walking away from a lot of money. Yet, as your attorneys we cannot be held responsible for making that decision and we cannot recommend to you that you walk away and waive your rights to this community asset/money.

We ask that you proceed with great caution and prudence as this is a decision only you can make. Please take the time to think carefully about this decision to waive your ½ interest in all of the back-end deals of Johnny for all

projects which he worked on during marriage, and should we reach a settlement today or in the near future, you will need to first sign-off on this email before doing so.

All my best,
Samantha

Samantha F. Spector, Esq. | Partner
SPECTOR LAW, A Professional Law Corporation

I, AMBER LAURA HEARD, HAVE READ, AND HEREBY ACKNOWLEDGE AND UNDERSTAND THE CONTENTS OF THIS EMAIL. I HAVE NO FURTHER QUESTIONS OF MY ATTORNEYS, I HEREBY ACKNOWELDGE I HAVE BEEN FULLY INFORMED OF MY COMMUNITY PROPERTY RIGHTS IN MY DISSOLUTION OF MARRIAGE PROCEEDING WITH JOHNNY DEPP, AND AGAINST THE EXPRESS RECOMMENDATION OF MY ATTORNEYS, I HAVE INDEPENDENTLY CHOSEN, ON MY OWN FREE WILL AND VOLITION, TO WAIVE MY ONE-HALF (½) INTEREST AND CLAIM IN THE COMMUNITY'S ESTATE/ASSET WITH REGARD TO JOHNNY'S PROFIT-PARTICIPATION (I.E., BACK-END DEALS) FOR ANY AND ALL PROJECTS JOHNNY COMPLETED DURING MARRIAGE (SUCH AS, PIRATES 5 AND BOSWELL, AS WELL AS ANY OTHER PROJECTS HE WORKED ON DURING MARRIAGE). I VOLUNTARILY MAKE THIS DECISION TO WAIVE MY RIGHTS AS NOTED HEREIN AND DO SO UNDER NO COERICION, UNDUE INFLUENCE OR DURESS.

_____

AMBER LAURA HEARD
Dated:_____

ATTACHMENT 6

EDWARD WHITE & CO, LLP
CERTIFIED PUBLIC ACCOUNTANTS

WARNER CENTER TOWERS
21700 OXNARD STREET, SUITE 400
WOODLAND HILLS, CALIFORNIA 91367
(818) 716-1120 FAX (818) 716-2870

August 24, 2016

Ms. Tiffanie Al-Nasser
Children's Hospital
Los Angeles Foundation
800 N. Brand Boulevard, 20th Floor
Glendale, California 91203

Dear Ms. Al-Nasser:

Enclosed is a check in the amount of $100,000, which constitutes a donation to Children's Hospital Los Angeles Foundation in the name of Amber Heard. This donation is being made in accordance with Ms. Heard's pledged gift of $3,500,000 to Children's Hospital Los Angeles Foundation. This check represents the first of multiple scheduled installments to honor the full amount of Ms. Heard's $3,500,000 pledged gift.

Very truly yours,

Edward L. White

ELW:nv

ATTACHMENT 7

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Transcript of Hearing

Date: December 18, 2020
Case: Depp, II -v- Heard

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Ms. Heard had -- had made in public that have nothing to do with this case.

The Court's repeatedly remarked it does not want this trial to be a side show, but that's exactly what Mr. Depp wants to do here. He wants to try to test the issue of whether these out-of-court statements that do not form the basis of the defamation claim are true or false, and that's just far beyond the scope of this -- of this case.

This is a prime example of wanting to try to bring in and retry this divorce on unrelated issues. It's these allegations of what Mr. Heard -- Mr. Depp says in his brief he wants to contend. He wants to rebut these. They're found nowhere in his complaint.

He's just simply trying to take discovery on irrelevant and unrelated matters because he's come up with this new theory that he wants to impeach Ms. Heard's credibility by showing that unrelated out-of-court statements were not true.

But in the exhibit that I submitted yesterday, your Honor, which is CHLA document

number 2, Mr. Depp -- his own accountant sent letters acknowledging that these gifts were to be fulfilled over a multi-year period in installments to honor the full amount Ms. Heard's pledged gift. So they've know for years, by their own admission, that this gift would be paid in installments, which is the way that large donations are typically made.

As I understand it, a significant portion of those pledges have been fulfilled, and to the extent they haven't been fully fulfilled, there's a multi-year process through which Ms. Heard can fulfill them, and she certainly intends to do that, but when you're sued for defamation based on an article that appears in the Washington Post, Ms. Heard spent a significant amount of money on this defense, and -- and what they're trying to do is criticize Ms. Heard for giving a significant amount to charity and pledging a significant amount to charity, but taking a pledge that's going to take some time to pay off, which she certainly intends to do.

But this lawsuit, which Mr. Depp has brought, should not be, you know, to the extent that that has -- that that has impacted the speed with which a pledge can be fulfilled, should not be -- when Mr. Depp is the architect of that inability to complete a pledge earlier and it's on a totally unrelated issue, it should not be compelled and certainly at all here, and which is they're trying to make this about this side show about what -- what was done with these pledges, which is so far afield from this case, your Honor.

The last category of documents is these interrogatories 7, 8, and 9, which is information about witness -- or romantic partners and agreements with romantic partners. Again, none of these are relevant. The parties are differently situated.

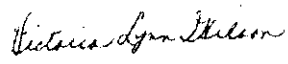
The fact that Ms. Heard has filed a counterclaim for defamation against Mr. Depp has nothing to do with Ms. Heard's conduct towards Mr. Depp. It has to do with Mr. Depp calling her a liar or saying that she was abused by him. So

CERTIFICATE OF SHORTHAND REPORTER-E-NOTARY PUBLIC

I, Victoria Lynn Wilson, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my direction; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 18th day of December 2020.

My commission expires May 31, 2023.



VICTORIA LYNN WILSON
E-NOTARY PUBLIC IN AND FOR
THE COMMONWEALTH OF VIRGINIA

Depp argues that it would be "highly unusual" to afford the preclusive effect of comity, where the parties are not identical or in privity, but that is precisely what the courts did in *Pony Express Records*[2] and *Schuler v. Rainforest Alliance*, 684 F.App'x 77 (2d Cir. 2017).[3]

There is no dispute here that the UK had jurisdiction over the prior case and the parties received adequate notice. It was Depp's claim. He filed it and took it through trial and appeal. The UK Court issued a painstakingly detailed 129-page, 585-paragraph decision in which it thoroughly considered the evidence presented by both parties. The issue in the two cases is identical, and Depp fully and fairly participated in the UK litigation and had every opportunity to challenge the evidence presented by the defendants. Heard was an active participant, providing evidence, seven witness statements, and sitting for four days of live testimony and cross-examination at trial. Depp had the added benefit of conducting simultaneous discovery in this

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[2]In *Pony Express Records*, Bruce Springsteen had previously sued Masquerade Music, Ltd., for copyright infringement of his compositions and sound recordings in the UK and prevailed. 163 F. Supp. 2d at 472. Plaintiffs were not parties to the prior litigation and filed an action against Springsteen in New Jersey federal court alleging multiple claims including copyright infringement. Plaintiffs argued they were prohibited from engaging fully in the UK litigation by Masquerade and had only directly participated in the litigation by sending the court two letters detailing their positions on the copyright issues at stake. The court found that (1) the UK Court had personal jurisdiction over the parties; (2) the parties to the UK action received adequate notice; (3) the UK Court was a fair and just tribunal that "carefully and thoroughly considered their respective allegations and proofs, provided Masquerade with ample opportunity to defend itself, and recorded the court's final decision clearly within that opinion"; (4) the issue pending litigation was identical to the issue in the previous litigation; (5) there was no privity between plaintiffs and prior parties; and (6) even though there was no privity and plaintiffs had not fully and fairly participated in the litigation, they were still estopped from asserting their claims because "they had the opportunity to participate, but forwent that opportunity." *Id.* at 474–75.

[3]In *Gordon & Breach Science Publishers S.A. v. Am. Institute of Physics*, 905 F. Supp. 169, 178–79 (S.D.N.Y. 1995), cited by Depp for his assertion that comity should not be applied in this case, the court examined six factors before declining to grant preclusive effect to German and Swiss judgments. Here, in sharp contrast to Gordon, there is reciprocity with the UK Court, which recognizes collateral estoppel (referred to as "issue estoppel in the UK), Depp was a party to the previous litigation and litigated his case on the merits; the UK is a common law jurisdiction from which our legal system is derived; the foreign law is ascertainable and undisputed; the UK applies collateral estoppel consistently; and there are no conflicting foreign judgments.

litigation, for 16 months, and used that discovery in the UK trial. Thus, he was not deprived of any procedural advantage of this Court, in his other chosen forum, the UK.[4]

Furthermore, Depp has misstates the law of UFCMJRA. Nowhere in the Act is there a restriction that it applies to only the same two parties. In fact, Depp admits that the UFCMJRA does not provide *any* limitation "explicitly or implicitly" as to who can seek enforcement. Opp'n 20. It provides that "a court of the Commonwealth shall recognize a foreign-country judgment to which this chapter applies" and lists the limited circumstances in which the court may decline recognition of a foreign judgment. Va. Code § 8.01-465.13:3(A)–(C). Depp has not provided a single reason why any of the circumstances listed in Virginia Code § 8.01-465.13:3(B) or (C) would prevent this Court from recognizing the judgment, and it is his burden to do so.

"A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection B or C exists." *Id.* § 8.01-465.13:3(D). Depp has failed to articulate any exception, much less meet this burden. The UFCMJRA therefore applies and independently justifies dismissal of the Complaint.

II. This case warrants application of the doctrines of collateral estoppel and res judicata to bar Depp's claims.

Depp asserts Heard "*cannot cite a single authority* that supports her Plea." Opp'n 1. But he ignores, for example, *Moore v. Allied Chemical Corp.*, (Plea in Bar 18), holding the plaintiff was barred from asserting a claim against defendant even though it was not a party to the prior administrative proceedings. 480 F. Supp. 377, 384–86 (E.D. Va. 1979).[5]

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[4]Depp misstates the ruling of the US High Court on Depp's last-minute third-party request of Heard – the Court found Depp failed to meet his burden that the specific evidence requested of Heard would support his claims or adversely affect the other party. **Att. 3, ¶¶ 31-61.**

[5]Likewise, Depp avoids *Hunter v. Chief Constable of the Westmidlands Police* (1982) AC 529, which applied defensive collateral estoppel on due process grounds where there was no privity. Notably, the Virginia Supreme Court has not yet spoken on which country's preclusion law should apply. Some US jurisdictions apply the preclusion law of the rendering jurisdiction. *See*

Where Depp addresses cases permitting defensive collateral estoppel, he concedes Virginia permits collateral estoppel in cases without privity. Nevertheless, he invents new obstacles purporting to require a "privity-like relationship," or other "situations where other burden or statutory-policy considerations warrant a departure from the mutuality requirement." Opp'n 12, 13. It is Depp's, not Heard's, position that is at odds with the Virginia Supreme Court's guidance on the application of collateral estoppel. The critical questions is whether the plaintiff had a fair opportunity to litigate an issue on the merits.[6] Depp clearly did.

Depp misstates the caselaw yet again when he asserts that the defendants in *Leach* v. *Virginia State Bar*, 73 Va. Cir. 362 (Richmond 2007) were parties to the initial proceeding. Opp'n 13 n.4. Three of the defendants were not. *Leach*, 73 Va. Cir. at 363. Further, Depp fails to address *Leach*'s key holding that the plaintiff's *defamation* claim was barred by findings of fact in the prior proceedings under the doctrine of collateral estoppel because the statements at issue had been adjudicated as fact. *Id.* at 363–64(emphasis added).

Oddly, Depp attempts to distinguish *Eagle Star* because the prior factual determination in *Eagle Star* was in a criminal proceeding with a higher burden of proof. Opp'n 13. But the *Eagle Star* Court held that plaintiff "had his day in court, with the opportunity to produce his witnesses, to examine and cross-examine the witnesses for the prosecution, and to appeal from the judgment," and held the plaintiff "who has once litigated the identical question and had it

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e.g., *Diorinou v. Mezitis*, 237 F.3d 133, 140, 142 (2d Cir. 2001); *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1148–49 (5th Cir.1990). Here, Heard would prevail under both UK and Virginia preclusion principles.

[6]*See e.g.*, *Graves v. Associated Transp. Inc.*, 344 F.2d 894, 897 (4th Cir. 1965); *See also Kinsley v. Markovic*, 333 F. 2d 684, 685 (4th Cir. 1964) (holding "the plaintiff has had his day in court"); *Lober v. Moore*, 417 F.2d 714, 719 (D.C. Cir. 1968) (not finding privity, but holding the "decisive" policy governing collateral estoppel under Virginia law is "one adverse litigative adventure on any one issue is enough for any one litigant.").

adversely decided, under conditions most favorable to himself" was bound to that decision. *Eagle Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 89 (1927).[7] Depp prosecuted his same libel claim in a country where the statements were *presumed* false and the defendant—not the plaintiff—has the burden to prove truth.[8] Conditions are rarely more favorable in the civil context, and Depp had a full-and-fair opportunity to litigate the issue of his abuse of Heard, even admitting he preferred the UK forum. So even under Depp's newly created obstacles of a "privity-like relationship" and special "burden or statutory-policy considerations," Opp'n 14, collateral estoppel is appropriate.[9]

In an attempt to distinguish *Schuler*—a case not involving privity or a "privity-like relationship" where the court held that a prior foreign court adjudication barred the plaintiffs' defamation claim—Depp reasons that principles of comity only served to bar a subsequent defamation claim because the defamatory statement was based on the foreign court's

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[7]Significantly, in rendering its decision, the Court looked to "English decisions" and found exceptions to mutuality requirements there too. *Eagle Star*, 149 Va. at 90.

[8]It is Depp's burden to prove by *clear and convincing evidence* that Heard "realized that [her] statement was false or that [s]he subjectively entertained serious doubt as to the truth of [her] statement" that she was a victim of domestic abuse. *Jackson v. Hartig*, 274 Va. 219, 228 (2007); *Jordan v. Kollman,* 269 Va. 569, 576-77 (2005). Depp would also have to prove he never committed any act of domestic abuse against Heard, even though the UK Court already found he did – at least 12 times. Depp would then have to prove damages against Heard for the Op-Ed stating she was a victim of abuse, when the world is aware the UK has adjudicated, permanently, that Depp is a wife beater and abused Heard at least 12 times, causing her to fear for her life.

[9]Depp likewise attempts to sidestep *Hozie v. Preston*, 493 F. Supp. 42 (W.D. Va. 1980), by arguing that that he did not have the "same procedural tools" in the first action. Yet in the UK, Depp referred to the extensive evidence, **Att. 2, at 15,** and Depp withheld evidence in the US case from the UK defendants, while Heard cooperated. **Atts. 1 ¶¶61-61, 70-75, 2 and 3.** Depp omits that he had a full 16 months of the "procedural tools" in this litigation before the UK trial - four months beyond the typical length of a fully litigated Fairfax case, which routinely (before COVID) scheduled trials within one year of filing. Moreover, Virginia does not require identical procedural tools to recognize a foreign judgment and has found that "English rules of procedure comport favorably with the concept of procedural due process as that concept has evolved in this State and nation." *Oehl*, 221 Va. at 623–624.

determination. Opp'n 20. Depp's logic falls short. First, the defendant's reliance on the order of the statements played no part in the court's reasoning or decision in *Schuler*. Second, the inescapable conclusion of Depp's reasoning would be that if Heard's statements had temporally followed the UK Judgment, then his defamation claims would be barred. By his reasoning, then, Depp would agree with Heard that the entire publishing world should be entitled to rely on the UK judgment and the truth adjudicated therein, underscoring the risks of a contradictory judgment chilling free speech, particularly on matters of public concern.

While Heard was not a formal party to the UK litigation, Depp argued that the "*effective opponent was Ms. Heard.*" JN Att. 1, ¶576. The UK Court also recognized Heard was integral to the UK proceedings by (1) conditioning the disclosure of Virginia litigation documents on her release and, in its July 2, 2020 Order. **Att. 3,** ¶62, (2) noting the importance of Heard being in the courtroom for the trial, and (3) refusing Depp's request to exclude her. Opp'n, Ex. 5, ¶ 4(c). Ultimately, this case and the UK litigation turn on precisely the same issue—whether Depp abused Heard. He did. Depp fully litigated that issue on the merits and lost.

III. This action and the UK action arise from the same conduct, transaction, or occurrence

Relying on an *unpublished* Fourth Circuit decision applying North Carolina law, *English Boiler & Tube, Inc., v. W.C. Rouse & Son, Inc.*, 172 F.3d 862 (4th Cir. 1999), Depp contends that this action and the UK action do not arise from the same conduct, transaction, or occurrence, because this action stems from statements made in the *Washington Post* while the UK action stemmed from statements made in *The Sun*. Opp'n 16–17. But the Virginia Supreme Court has rejected such a narrow view when identifying the same conduct, transaction, or occurrence.

With the adoption of Rule 1:6, the Virginia Supreme Court returned to the same-subject-matter test for res judicata. *Funny Guy, LLC v. Lecego*, 293 Va. 135, 150 (2017). The applicable

test involves a practical analysis of whether two claims arise from the same conduct, transaction, or occurrence, *Id.* at 154, and "asks 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Id.* (quoting Restatement (Second) of Judgments § 24(2)). These "factors should be considered 'pragmatically' with a view toward uncovering the underlying dispute between the parties." *Id.* at 154–55.

Applying this analysis, it is clear this action and the UK action arise from the same conduct, transaction, or occurrence. First, the facts underlying the two actions are related in origin and motivation. The origin of both actions is Heard's allegations and evidence of Depp's domestic abuse of Heard. The motivation for both actions is Depp's desire to prove Heard's claims were false.

The facts underlying the two actions are also related in time and space. The Op-Ed in the *Washington Post* both address Heard's allegations of domestic violence and abuse by Depp during their relationship, which became public with her filing for divorce and obtaining a Domestic Violence Restraining Order in May 2016. The publications serve readers worldwide, maintaining websites accessible all over the world.

Finally, the facts underlying the two actions form a convenient trial unit and their treatment as such conforms to reasonable parties' expectations. The factual narrative in the UK action was about Depp's domestic abuse of Heard and that would be the factual narrative in this action as well. Indeed, the evidence presented here will be virtually identical to the evidence presented in the UK action. Further, reasonable "parties would not expect, much less want," a dispute over the veracity of a statement "to disintegrate into multiple lawsuits." *Id.* at 155.

Instead, reasonable "parties would expect there to be one court case to resolve it," which has already taken place, by Depp's own choice, in the UK. *Id.* at 156.

While Heard is not required to establish all the factors of the same-subject-matter test to prevail on her plea of res judicata, she has clearly done so. *See id.* at 154. After a full-and-fair trial, the UK court found that Depp abused Heard on at least 12 occasions and thus statements that he had abused her were true and not defamatory. Depp is therefore barred from re-litigating that issue under Rule 1:6.

The purpose of the doctrines of res judicata and collateral estoppel is to end duplicative litigation, once an issue has been fully and fairly litigated. These doctrines prevent Depp from bringing a new defamation action every time anyone publishes statements that he abused Heard, without regard to the fact that he fully and fairly litigated this issue in the Court of his choosing and lost.[10] "Every litigant should have [an] opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity and having failed to avail himself of it, he must accept the consequences." *Id.* at 147 (quoting *Miller v. Smith*, 109 Va. 651, 655 (1909)). Depp refuses to accept the consequences of the UK action, but res judicata compels him to do so. This action is thus barred under Rule 1:6 and should be dismissed with prejudice.

[10]Depp asserts "no parade of horribles will occur if the UK Judgment is not afforded preclusive effect," Opp'n. 21, which is not the standard under any of Heard's defenses. Depp then makes clear that unless every statement about Depp's abuse is preceded by "claims" or "alleges," they remain susceptible to a defamation action by Depp, *id.* at 22. This means that unless Heard, the adjudicated victim of domestic violence, testifies to her traumatic experiences in each such action brought by Depp, the publisher risks losing the lawsuit and paying Depp damages. That is a parade of horribles. So too is the continued waste of precious Judicial resources, witness inconvenience, and significant time and expense to the parties.

IV. The UK Courts considered and rejected Depp's efforts to attack Heard on the collateral and immaterial issue of donations.

Depp is incorrect in arguing this issue was not fully and fairly aired in the UK.[11] He was simply unhappy that the Courts of Appeal found this "donation" issue to be, at best, a minor collateral attack of no significance to whether he abused Heard. Although Depp has never asserted in this litigation that Heard's allegations of abuse were motivated by money, *see generally* Complaint, Depp admitted he did not pay any money because of her allegations of abuse, **Att. 4.** Heard received much less money in the divorce settlement than she was entitled under California law, **Att. 5,** Depp's business manager admitted Heard pledged the amounts with no set payment schedule, **Att. 6,** and Heard intends to complete those pledges, once she is free of this litigation and able to pay, **Att. 7.** In the words of the UK Court of Appeals, this "peripheral" **(JN Att. C, ¶ 44)** grievance by Depp lingers as the only argument Depp has left in his quiver in his bid to prolong this litigation.

CONCLUSION

For the reasons set forth in her initial Memorandum in Support and this Reply, Defendant Laura Amber Heard respectfully requests this Court to grant the Supplemental Plea in Bar and dismiss the Complaint.

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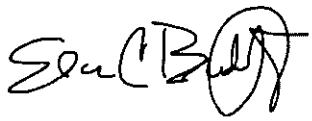
[11] Depp apparently misread ¶40, asserting the UK Courts of Appeal found Heard's statement about the donation "misleading." Opp'n 7-8. The court instead found that whether donation and pledge were understood to be interchangeable was not something the court needed to reach: "[W]e need not decide whether that is in fact a fair reading of what Ms. Heard says." **JN Att. C**, ¶ 40. The court further noted, in ¶ 42, that the issue of donations "had only come up, fairly peripherally, in the context of the hoax/insurance thesis." *Id.* ¶ 44. The court further noted the insignificance of the donations to the abuse: "[Nicol, J.] does not refer to her charitable donation at all in the context of his central findings: on the contrary, he only mentions it in a very particular context, as explained above, and after he had already reached conclusions in relation to the fourteen incidents." *Id.*¶ 49, The court also pointed out that Depp's legal team made a decision not to examine Heard on the donations, including what she meant by donated, and whether she understood this to mean pledge, which may have resolved the issue completely. *Id.* ¶ 42.

Dated this 7th day of July, 2021

Respectfully submitted,

Amber L. Heard



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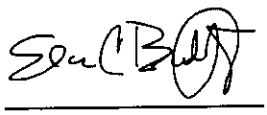

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