VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

[UNDER SEAL]

PLAINTIFF JOHN C. DEPP, II'S OPPOSITION TO DEFENDANT AMBER LAURA HEARD'S MOTION TO COMPEL PRODUCTION OF PLAINTIFF'S ORIGINAL DEVICES AND OPERATING SYSTEM DRIVES AND CLOUD BACKUPS OF THESE ORIGINAL DEVICES AS REQUESTED IN DEFENDANT AND COUNTERCLAIM-PLAINTIFF'S 14TH, 15TH, AND 16TH REQUESTS FOR PRODUCTION OF DOCUMENTS

This Motion represents nothing more than an improper attempt by Ms. Heard and her counsel to retaliate against Mr. Depp for obtaining a limited forensic imaging of Ms. Heard's devices. Ms. Heard has now filed two motions for a forensic imaging of Mr. Depp's devices, and has twice failed to articulate any nexus between her demand for an imaging and the issues in this case. That is because there is none. The Motion was filed for an improper purpose and lacks any valid basis. The Court should deny the Motion and award fees.

I. The Motion Is a Continuation of Ms. Heard's Improper "Tit for Tat" Tactics

Proving this is more about tit for tat than trial preparation, Ms. Heard's motion marks her second attempt to obtain discovery that she has previously argued she does not even need. ***"Ms. Heard is not requesting devices be ordered for forensic and then third party review unless the Court holds that Mr. Depp is permitted that access to Ms. Heard's devices."*** (Exhibit 1, p. 5). So argued Ms. Heard this past October, when Mr. Depp sought a forensic imaging of Ms. Heard's devices to explore one of the essential theories of his case (that Ms. Heard had manufactured false photographic and other evidence of abuse). In other words, Ms. Heard openly argued that she did not need a forensic imaging in this case – but that she wanted Mr. Depp to have to do whatever she had to do.

The Court granted (in part) Mr. Depp's motion in October, requiring a forensic imaging of certain categories of photographs relevant to Ms. Heard's alleged injuries, and finding that there was a legitimate nexus between that limited forensic review and the issues, since Mr. Depp contends that Ms. Heard's photographic evidence of abuse is staged or otherwise manufactured. At the same hearing, the Court ***denied*** Ms. Heard's Cross-Motion to make that order mutual, because Ms. Heard had not established a nexus between Mr. Depp's devices and the issues:

> THE COURT: **In this matter as far as mutuality goes, because it's ordered in one case for one side, I'm -- I'm going to deny that request at this time. There**

> **still has to be a nexus shown when -- when you're asking for those types of items in discovery.** (Exhibit 2, p. 68, emphasis added).

Shortly after arguing to the Court that it was unnecessary for either party to have their devices imaged, Ms. Heard served her 14th-16th RFPs on Mr. Depp, all of which, as framed in this *de facto* motion for reconsideration, boil down to a demand for a forensic imaging of virtually the entirety of Mr. Depp's devices, as well as the devices of certain nonparties that happen to be in possession of Mr. Depp's attorneys. Ms. Heard offers only flimsy pretexts for seeking discovery that she very recently described as "unnecessary," "scorched-earth," "extraordinary," and "far beyond what the Virginia Rules allow." (Exhibit 1). The Court should put an end to these brazen "tit for tat" tactics.[1] Enough is enough.

II. Ms. Heard Has Not Even Attempted To Establish a Nexus Between the Imaging She Seeks and The Issues in This Case

The law is clear that forensic imaging ought not be ordered absent a nexus between the issues in the litigation and the devices to be imaged. Ms. Heard fails to establish any such nexus. *Genworth Financial Wealth Management, Inc. v. McMullan*, 267 F.R.D. 443, (D. Conn. 2010):

> "Courts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature. For example, a party may not inspect the physical hard drives of a computer merely because the party wants to search for additional documents responsive to the party's document requests."

Conversely, "in cases where a defendant allegedly used the computer itself to commit the wrong that is the subject of the lawsuit," a forensic imaging may be appropriate. *Id.* In this case,

[1] This is far from the first time that Ms. Heard has sought openly retaliatory discovery. After Mr. Depp sought discovery into her alleged charitable donations from the parties' divorce settlement, Ms. Heard sought discovery into all of Mr. Depp's charitable donations. When Mr. Depp sought an IME of Ms. Heard, Ms. Heard turned around and filed a cross motion for an IME of Mr. Depp. When Mr. Depp previously sought a forensic imaging, Ms. Heard filed a cross motion in which, she argued that the relief sought was unnecessary, but should be ordered mutually. At the recent hearing on Mr. Depp's Eleventh and Twelfth RFPs, Ms. Heard spent considerable time arguing that the Court should make the order on Mr. Depp's RFPs mutual.

there was a very simple, straightforward reason that Mr. Depp sought a partial forensic imaging of Ms. Heard's devices, and the Court granted Mr. Depp's Motion – Mr. Depp contends that Ms. Heard did, in fact, use her devices to perpetrate her lies. The authenticity and veracity of Ms. Heard's photographic evidence of alleged "abuse" is at the core of her case, and Mr. Depp is contending that Ms. Heard literally manufactured her evidence, either through staging photos, digitally manipulating them, or both.[2] A forensic inspection of the devices and photographs to test that theory was therefore appropriate.

But the same logic does not apply in reverse. Ms. Heard is ***not*** contending that Mr. Depp manufactured evidence of the injuries he suffered at her hands. Indeed, ***Ms. Heard does not deny*** that Mr. Depp suffered a serious injury when she partially severed his finger in Australia; she merely claims (falsely) that he actually did it to himself. Similarly, ***Ms. Heard does not deny*** that Mr. Depp suffered an injury from an incident when she put out a cigarette on Mr. Depp's face; she merely claims (again, falsely) that he actually did it to himself.[3] Given the nature of Ms. Heard's allegations, there is no reason why she should ask for a forensic imaging of photographs depicting those injuries. There is no nexus between this Motion and the issues.

III. Ms. Heard's Manufactured Complaints about Mr. Depp's Document Productions Are Utterly Bogus

Unable to point to a nexus between this Motion and the issues, Ms. Heard resorts to a shockingly misleading argument that there are supposed problems with Mr. Depp's document production, which Ms. Heard attempts to characterize as evidence of manipulation. *See* Heard Motion at 1-3. Not so. As to the six audio recordings cited in her Motion, Ms. Heard's only "evidence" of purported manipulation is that she thinks the recordings must be "partial" because

[2] Indeed, a number of Ms. Heard's photographs were run through a photo editing program.
[3] Ms. Heard testified to that effect with respect to both Mr. Depp's finger injury and the cigarette burn on his face in her recent deposition.

they "begin and end in the middle of a sentence." *See Id.* at 2. First, Ms. Heard's assertion that they all "begin and end in the middle of a sentence" is wrong as to three of the recordings she cites. Second, and more importantly, starting or ending mid-sentence does not suggest manipulation – ***it simply suggests that that is when Mr. Depp or Ms. Heard hit the record button***. Ms. Heard also argues that data for two of the recordings (DEPP9046 and 9047) indicate the recordings were created in September 2015 and then "modified" twice: in June 2016 and one day before production in this case (August 13, 2020), and claims that this is evidence of manipulation by Mr. Depp.[4] Again, these are outrageously disingenuous arguments. As experienced litigators such as Ms. Heard's attorneys well know, when a file is copied or transferred from one digital location to another, that establishes a new "Creation Date" and/or "Modified Date." *See* Ex. 3 (Neumeister Declaration). ***Even Ms. Heard's counsel previously acknowledged this uncontroversial fact***, acknowledging at oral argument before this Court: "But if you, you know, make a copy of a photo on your phone and send it, then that can show up in the metadata as it's been somehow manipulated when it hasn't been." *See* Ex. 2 at 24:4-7.

As Ms. Heard well knows, the existence of these creation dates or modification dates is not evidence of manipulation, but merely evidence of the fact that the recordings were transferred from client to counsel and produced in litigation. Mr. Depp has confirmed again that the recordings produced were not edited, but have been reproduced in this action in the same form that they were previously produced in the UK.[5] *See,* Ex. 4 (Rich Declaration). Establishment of new Creation Dates caused by transferring or copying of files is incredibly common in discovery – and many of Ms. Heard's documents have the same issue.

---

[4] ***One of the clips appears to be a portion of another recording that is believed to have been used in Ms. Heard's deposition in the divorce action. Ms. Heard already has both.***

[5] Mr. Depp is also working to confirm that there are no other relevant recordings that have not been produced.

Ms. Heard's attempt to manufacture a complaint about photographs produced by Mr. Depp fares no better. She cites to two photos (DEPP7303 and DEPP9916) showing Mr. Depp lying on a hospital bed following his finger injury in Australia and argues they have "Creation Dates" in 2019 and 2020 when the incident occurred in 2015. *See* Heard Brief at 2-3. Once again, all that means is that the photos were transferred between different locations on those dates – reflecting a transfer to counsel, and production in litigation. There is no evidence whatsoever that Mr. Depp manipulated any photos (***unlike Ms. Heard's photos where there was evidence that they had actually passed through a photo editing program***). And as noted above, the existence of Mr. Depp's injuries and the date they occurred are **not** in dispute. Ms. Heard and her counsel should have known better than to raise these arguments, which cannot withstand even brief scrutiny, and are merely a thin pretext to bring a retaliatory motion.

IV. Ms. Heard's Requests Are Grossly Overbroad

Ms. Heard is seeking full-scale forensic imaging of numerous devices (***including devices that do not even belong to Mr. Depp, but third parties to this litigation***). Her requests are grossly overbroad, have no nexus to the issues, and far exceed what the Court ordered against her. For instance, Ms. Heard has not even attempted to justify her demand for every single piece of multimedia featuring Mr. Depp or multiple identified properties for a nearly four-year period. Nor has she shown why these requests warrant the full forensic imaging she claims is necessary, arguing only "Ms. Heard is entitled to all multimedia of Mr. Depp, just as Mr. Depp compelled from Ms. Heard." *See* Heard Motion at 3-4. But Ms. Heard is asking for far more than Mr. Depp received (Mr. Depp received only photos of Ms. Heard during the specified time periods when she was supposed to have suffered serious injuries), and, unlike Mr. Depp, has not articulated a reason that a forensic imaging is necessary. The parties are not similarly situated.

Respectfully submitted,

Benjamin G. Chew (VSB #29113)
Andrew C. Crawford (VSB # 89093)
BROWN RUDNICK LLP
601 Thirteenth Street NW, Suite 600
Washington, DC 20005
Tel.: (202) 536-1785
Fax: (617) 289-0717
bchew@brownrudnick.com
acrawford@brownrudnick.com

Leo J. Presiado (*pro hac vice*)
Camille M. Vasquez (*pro hac vice*)
Samuel A. Moniz (*pro hac vice*)
BROWN RUDNICK LLP
2211 Michelson Drive
Irvine, CA 92612
Tel.: (949) 752-7100
Fax: (949) 252-1514
cvasquez@brownrudnick.com

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

Dated: January 19, 2022

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II, Plaintiff and Counterclaim-Defendant, v. AMBER LAURA HEARD, Defendant and Counterclaim-Plaintiff.	Civil Action No.: CL-2019-0002911

DEFENDANT AND COUNTERCLAIM-PLAINTIFF AMBER LAURA HEARD'S MEMORANDUM SUPPORTING CROSS MOTION TO COMPEL MR. DEPP'S PRODUCTION OF FORENSIC EVIDENCE AND FOR SANCTIONS

Elaine Charlson Bredehoft (VSB #23766)
Adam S. Nadelhaft (VSB #91717)
Clarissa K. Pintado (VSB 86882)
David E. Murphy (VSB #90938)
CHARLSON BREDEHOFT COHEN & BROWN, P.C.
11260 Roger Bacon Drive, Suite 201
Reston, VA 20190
(703) 318-6800
ebredehoft@cbcblaw.com
anadelhaft@cbcblaw.com
cpintado@cbcblaw.com
dmurphy@cbcblaw.com

J. Benjamin Rottenborn (VSB #84796)
Joshua R. Treece (VSB #79149)
WOODS ROGERS PLC
10 S. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
(540) 983-7540
brottenborn@woodsrogers.com
jtreece@woodsrogers.com

SUMMARY OF ARGUMENT & BACKGROUND

I. Discovery Requests Served by Ms. Heard

On July 24, 2020, Ms. Heard requested Mr. Depp produce all "videos, photographs, audio recordings, and transcripts relating in any manner to the claims or defenses in this litigation, including all metadata and original source information." **Att. 1**, Request No. 8. On September 14, 2020, the Court entered a Consent Order - agreed to by Mr. Depp to resolve before Court hearing - requiring Mr. Depp to produce these documents. **Att. 2**. Yet Mr. Depp has inexplicably refused to comply.

Then on August 3, 2021, Ms. Heard served a Request for Mr. Depp to produce the devices and ESI specifically identified by Mr. Depp in an interrogatory response as all relevant devices and ESI in his possession, custody, and control for inspection and copying, including an iPhone, iPad, MacBook Pro, iCloud account, and devices and data belonging to Stephen Deuters and Nathan Holmes. **Att. 5**, Request 7. Yet despite Mr. Depp being unable to plausibly contend these devices are irrelevant based on his own sworn interrogatory response, Mr. Depp still asserted his usual gamut of boilerplate objections, and refused to produce any of the devices or ESI for inspection and copying, id., yet is demanding all of this from Ms. Heard in his Motion.

II. Relief and Alternative Relief Sought by Ms. Heard

Unlike Mr. Depp, Ms. Heard only initially seeks the production of computer forensic evidence for specifically identified documents and for specifically identified, evidentiary-supported reasons. Ms. Heard does not seek to burden the parties with the extensive, expensive, and unlimited full-scale forensic review proposed by Mr. Depp, followed by paying a third-party to review every single email, text message, and photograph that exists on any of the parties' devices over a seven-year period, regardless of whether any such documents were requested,

objected to, ruled on previously by the Court, subject to the attorney client and work product privileges, containing private, sensitive and confidential information, or even whether relevant to this proceeding. In this Cross-Motion, Ms. Heard initially seeks the following relief:

- The full and complete audio recordings previously produced as DEPP8271 and DEPP17814, which are conversations Mr. Depp recorded between Mr. Depp and Ms. Heard. The transcripts of the two partial recordings are attached as **Att. 3**. The produced recordings were only portions of the conversations, although the Court Order required production of all recordings, including the full recordings. Mr. Depp should produce these full audio recordings in native form with all associated metadata, along with an excerpt of the forensic image of both the full and previously produced partial recordings. Because these were required to be produced under Court Order, **Att. 2,** and were not, Ms. Heard seeks sanctions for the willful contempt of the Court Order as well.

- Ms. Heard seeks the native versions, all metadata, and portions of the forensic images of all devices containing any evidence Mr. Depp contends support his allegations that he was abused or suffered any injuries as a result of any such abuse, so she may forensically test this multimedia. Throughout this case, Mr. Depp has falsely alleged Ms. Heard committed domestic violence against Mr. Depp, as opposed to the reality of Mr. Depp repeatedly abusing Ms. Heard, and contends that this falsely alleged abuse "is documented" by photographs and other evidence. *See, e.g.*, **Att. 4**.

These requests are sufficiently specific and narrowly tailored, and should have been produced long ago, in response to discovery requests and Court Order. In spite of multiple requests by Ms. Heard's counsel to Mr. Depp's counsel, Mr. Depp has simply refused to respond or explain why the full recordings have not been produced.

Mr. Depp simultaneously seeks to have Ms. Heard produce all her original electronic devices over a seven-year period. As will be addressed fully in Ms. Heard's Opposition to Mr. Depp's Motion, there is no basis in Virginia law for such an unduly burdensome and unlimited request, and is nothing but an unbridled, harassing wild goose chase, designed to supplant our discovery process, the Rules of the Virginia Supreme Court, and the Court's myriad of prior Orders denying Mr. Depp's pursuit of many of these documents.

Should the Court grant all or part of Mr. Depp's Motion, however, Ms. Heard

respectfully requests that any Court Order be applied mutually. There would be no reason to provide Mr. Depp unfettered access into Ms. Heard's electronic devices, while not providing Ms. Heard the same. Indeed, Mr. Depp admitted that these issues are "mutual," and Mr. Depp would agree to produce images of his devices and ESI if the parties reach an agreement on timeframe and subject matter (of if this Court so rules). While Ms. Heard does not believe either side should be allowed such access, fundamental fairness would require the parties be treated equally.

ARGUMENT

I. Mr. Depp Should Be Re-Ordered to Produce Complete Recordings in Native Form, All Metadata, and Portions of the Forensic Images of all Previously Produced Partial Recordings, and Should be Sanctioned for his Contempt of the Court's Prior Orders

DEPP8271 and DEPP17814 are selected excerpts of recorded communications between Mr. Depp and Ms. Heard recorded by Mr. Depp, and the full recordings should have been produced long ago. As reflected in the transcripts of both these recordings, the conversations begin in the middle of a sentence, and abruptly cut off. **Att. 3**. Mr. Depp cannot cherry-pick his production, or selectively produce portions of a recording, especially where he is under Court Order to produce the full recordings. Ms. Heard is entitled, as Ordered by the Court, **Att. 2**, to receive the full recordings in native form with all associated metadata,[1] along with an excerpt of the forensic image of both the full and previously produced partial recordings.

These recordings should have been produced over a year ago, under the Court's September 14, 2020 Order. **Att. 2**. And, in spite of multiple follow up requests, Mr. Depp has simply ignored and refused to respond to all requests to produce the full recordings. The "degree

[1] Mr. Depp has already produced the metadata fields of Date Sent, Time Sent, Date Last Modified, File Name, File Extension, SHA1 Hash, and File Path for the partially produced recordings, and should produce the same for the full recordings, along with producing any additional associated metadata for both the partial and full recordings.

of punishment for contempt is within the sound discretion of the trial court." *Mihnovets v. Mihnovets*, 2004 Va. App. LEXIS 410, at *15 (Va. Ct. App. Aug. 31, 2004); *Arvin, Inc. v. Sony Corp. of America*, 215 Va. 704, 705 (1975) (*per curiam*) (The punishment is "adapted to what is necessary to afford the injured party remedial relief for the injury or damage done by the violation."). Ms. Heard should not have had to bring this Motion to obtain these full audio recordings, especially where Mr. Depp has been under Court Order for a year to produce them, it is obvious these are partial recordings, and counsel for Ms. Heard has made multiple follow up requests, only to be completely ignored. Under the circumstances, Ms. Heard should be awarded her attorney's fees and costs. *Arvin*, 215 Va. at 705 ("The punishment may include "attorney's fees incurred in the investigation and prosecution of the contempt proceedings."); *Mayfield v. Southern Ry.*, 31 Va. Cir. 229, 236 (Richmond 1993) ("Where, as here, a litigant deliberately withholds relevant information in the face of a clear, direct, and unambiguous request for such information, sanctions not only should, but must, be awarded.").

II. Ms. Heard Further Seeks All Native Versions, Metadata, and Portions of Forensic Images of all Documents and Multimedia Mr. Depp Contends Show Any Abuse by Ms. Heard

Attempting to change reality, Mr. Depp falsely alleges Ms. Heard committed domestic violence against him, and has produced "photographs" to demonstrate this alleged abuse. *See, e.g.*, **Att. 4**; *see also Compl*, ¶¶ 24-31. But these photographs, produced by Mr. Depp as DEPP11757-59 and DEPP11814, are in PDF format, contain no original metadata, and do not allow Ms. Heard to review their authenticity. Id. Therefore, Ms. Heard seeks the native versions, all metadata, and portions of the forensic images of all devices containing any evidence that Mr. Depp contends support his allegations that he was abused or suffered any injuries, including but not limited to DEPP11757-59 and DEPP11814, so that she may forensically test this specifically identified multimedia for authenticity and manipulation.

III. In the Alternative, if the Court Grants Mr. Depp's Motion to Compel, Any Ruling Should Apply Equally to Ms. Heard's Cross Motion to Compel

For the reasons stated in Ms. Heard's Opposition to Mr. Depp's Motion, Ms. Heard maintains that the relief sought by Mr. Depp is wildly overbroad, unduly burdensome, and would require significant unnecessary and unwarranted expense for Ms. Heard. Contrary to Mr. Depp, Ms. Heard only initially seeks the very specific forensic evidence for the specific reasons identified in this Motion. *Albertson v. Albertson*, 73 Va. Cir. 94, 100-02 (Fairfax 2007) (MacKay, J.) ("unfettered access to Plaintiff's computer files would be improper" and unduly burdensome, and instead identifying three specific categories for forensic review).

But in the alternative, if the Court grants all or part of Mr. Depp's Motion, Ms. Heard respectfully requests that any Order entered by the Court be applied mutually to both parties, as Ms. Heard also requested that Mr. Depp produce his identified devices. **Atts. 5-6.** Yet Mr. Depp refused to produce the devices or ESI for inspection and copying, even though he simultaneously seeks these very same from Ms. Heard, but without any specificity whatsoever. Id.

Ms. Heard is not requesting devices be ordered for forensic and then third party review unless the Court holds that Mr. Depp is permitted that access to Ms. Heard's devices. Mr. Depp agreed during the meet and confer call that the issues are mutual, and confirmed this position in his own Motion. *Memo*, at 3 ("Mr. Depp's counsel proposed a procedure...whereby *the parties each* proffer the Requested Material for forensic imaging; negotiate parameters for the extraction of relevant data; and jointly select a neutral attorney to oversee the process") (emphasis added). Surely Mr. Depp cannot reasonably object to such an Order applying mutually to both parties.

CONCLUSION

For the reasons stated above, Defendant and Counterclaim-Plaintiff Amber Laura Heard respectfully requests that the Court grant the Motion and the relief requested herein.

October 15, 2021

Respectfully submitted,

Elaine Charlson Bredehoft (VSB #23766)
Adam S. Nadelhaft (VSB #91717)
Clarissa K. Pintado (VSB 86882)
David E. Murphy (VSB #90938)
CHARLSON BREDEHOFT COHEN & BROWN, P.C.
11260 Roger Bacon Drive, Suite 201
Reston, VA 20190
(703) 318-6800
ebredehoft@cbcblaw.com
anadelhaft@cbcblaw.com
cpintado@cbcblaw.com
dmurphy@cbcblaw.com

J. Benjamin Rottenborn (VSB #84796)
Joshua R. Treece (VSB #79149)
WOODS ROGERS PLC
10 S. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
(540) 983-7540
brottenborn@woodsrogers.com
jtreece@woodsrogers.com

Counsel to Defendant and Counterclaim-Plaintiff, Amber Laura Heard

CERTIFICATE OF SERVICE

I certify that on this 15th day of October, 2021, a copy of the foregoing was served by email, by agreement of the parties, addressed as follows:

Benjamin G. Chew, Esq.
Andrew C. Crawford, Esq.
BROWN RUDNICK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 536-1700
Facsimile: (202) 536-1701
bchew@brownrudnick.com
acrawford@brownrudnick.com

Camille M. Vasquez, Esq.
BROWN RUDNICK LLP
2211 Michelson Drive
Irvine, CA 92612
Telephone: (949) 752-7100
Facsimile: (949) 252-1514
cvasquez@brownrudnick.com

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

Elaine Charlson Bredehoft

Planet **Depos**

We Make It Happen

Transcript of Hearing

Date: October 12, 2021
Case: Depp, II -v- Heard

Planet Depos
Phone: 888.433.3767
Email: transcripts@planetdepos.com
www.planetdepos.com

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - -x

JOHN C. DEPP, II, :

Plaintiff, :

v. : Civil Action No.

AMBER LAURA HEARD, : CL-2019-0002911

Defendant. :

- - - - - - - - - - - - - - -x

HEARING Before the Honorable

JUDGE PENNEY AZCARATE

Fairfax, Virginia

Tuesday, October 12, 2021

10:00 a.m.

Job No.: 405663

Pages: 1 - 82

Transcribed By: Alicia Greenland

HEARING Before the Honorable JUDGE PENNEY AZCARATE, held at the offices of:

FAIRFAX COUNTY CIRCUIT COURT
4110 Chain Bridge Road
Fairfax, Virginia 22030
(703) 691-7320

Pursuant to agreement, before Miles Tag, Notary Public in and for the Commonwealth of Virginia.

A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF, JOHN C. DEPP, II:

BENJAMIN G. CHEW, ESQUIRE
BROWN RUDNICK LLP
601 13th Street NW
Washington, D.C. 20005
(202) 536-1700

ON BEHALF OF THE DEFENDANT, AMBER LAURA HEARD:

ELAINE CHARLSON BREDEHOFT, ESQUIRE
CLARISSA PINTADO, ESQUIRE
CHARLSON BREDEHOFT COHEN & BROWN, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190
(703) 318-6800

A P P E A R A N C E S C O N T I N U E D

ON BEHALF OF THE DEFENDANT, AMBER LAURA HEARD:

J. BENJAMIN ROTTENBORN, ESQUIRE
WOODS ROGERS PLC
10 S. Jefferson Street
Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
(540) 983-7540

ALSO PRESENT:

Socrates Matthews - Court Reporter Trainee

C O N T E N T S

E X H I B I T S

(No exhibits marked or admitted.)

P R O C E E D I N G S

THE COURT: All right. Good morning.

MS. CHARLSON BREDEHOFT: Good morning, your Honor.

MR. CHEW: Good morning, your Honor.

THE COURT: All right. This matter -- this goes on your motion. Yes, ma'am?

And I -- just for the record, I have read everything that you have sent me.

MS. CHARLSON BREDEHOFT: Thank you, your Honor.

THE COURT: And we can go from there. Go ahead.

MS. CHARLSON BREDEHOFT: And may I remove my mask?

THE COURT: Yes. Yes.

MS. CHARLSON BREDEHOFT: I am fully vaccinated.

THE COURT: Yes, ma'am.

MS. CHARLSON BREDEHOFT: Thank you, your Honor.

Good morning, your Honor. Elaine Bredehoft

together with Ben Rottenborn and Clarissa Pintado. We represent the defendant and counter-plaintiff, Amber Heard.

This is here on our motion for certification of the August 17, 2021 order denying the supplemental plea in bar pursuant to Virginia Code section 8.01-670.1, asking that the Court permit the filing of the petition for appeal to the Virginia Supreme Court on an interlocutory basis.

Now, there are several critical points that I think should be noted at the outset after going through the briefs, working through the cases, and everything, that I think are important issues here.

The first of them is, this has nothing to do with whether the Court was correct or incorrect on the ruling of the supplemental plea in bar. That is explicitly not a standard in Virginia Code section 8.01-67 -- 60 -- 670.1, and how could it be? If that were the case, then every time the Court ruled in some manner, they would say, "No. I got it right so I'm not going to give you the interlocutory appeal." That's not the standard and it's

deliberately not the standard.

Now, Mr. Depp's counsel does argue that throughout and it's a reoccurring theme throughout the opposition, but, you know, it's more, your Honor, a standard that I would say was an attempt to flatter the Court as opposed to actually argue the professional standards that we need to.

Instead, the rule is asking the Court to take a step back from the earlier rulings, review the standards carefully, keep an open mind and ensure that all parties are treated fairly and equally in applying these standards and determine if an interlocutory appeal may be appropriate under the circumstances applying the criteria from 8.01-670.1.

Now, there's no -- the second point, the overarching point here, is there is no delay. That is a primary argument as well in the opposition. But not only did Ms. Heard not request a stay, your Honor, but 8.01-271C specifically states there is no stay of the proceedings. We keep going full speed ahead.

And if the Court -- the Virginia Supreme

Court were to grant the petition, they would have granted it at the end as well and we would have saved all the time in between. So in other words -- let me rephrase that.

It makes sense to do it now because, if the Virginia Supreme Court believes there is merit, they grant it, they hear it, we get this decided before the trial, and we save ourselves an enormous amount of witnesses, expense, motions, aggressive motions practice, depositions, experts. An enormous amount. Millions of dollars. And that's not an under -- that's not an overestimate here.

But, if the Court waits and it's appealed after the trial and it's decided --

And by the way, here's the other unique situation here. We have an unusual situation here because, as of January 1, the Virginia Court of Appeals becomes the next court on the appeal of right. So after that, we have an appeal of right to the Court of Appeals. Then there's the whole issue of discretionary which is going to cost everybody a lot more and it's going to delay things much more if

it's later. So it makes sense.

Number three, which I have sort of just gone into, is there was no cost to Depp. Now, when I wrote the initial brief, your Honor, I was thinking that he had to file an opposition to our petition. He does not. I went back and re-read everything and looked at the procedures. We would, within 15 days, file a petition for appeal.

There is no opposition. The Court just looks at it, decides whether they're going to grant it or not, and that's the end of it. So there's no downside whatsoever. No cost, no delay. Those are all the things that Mr. Depp is arguing are extreme for why your Honor should deny.

The last point is -- and I've already sort of touched on that -- an interlocutory appeal in this case makes sense. It's a very unique, unusual situation. We have a full scale trial that happened in the UK on exactly the same issues; whether Mr. Depp domestically abused Amber Heard. He had his full opportunity there for examination, cross-examination, putting his witnesses on, three

weeks of trial. What he urged as, you know, the well-reasoned decision of a judge over just a jury verdict. He had his rights to appeal.

And this is important, your Honor, because I'm going to take your Honor through the cases on these and from the Virginia Supreme Court talking about how to consider these.

He had all of that in this case and it was found against him on 12 incidents of domestic abuse. Then we come to this case. All we -- and the burden of proof was on The Sun; the defendants, not the plaintiff.

Then we come here and we have exactly the same issue; whether Ms. Heard was domestically abused by Mr. Depp. She only needs to prove one time. Not 12. Not 20. Not however many there really were. And the burden of proof is on Mr. Depp. He has to prove that she's lying and that it was not. But that's already the identical issue that was issued in the other case.

So Virginia Code section 8.01-670.1 allows for the interlocutory appeal under certain

circumstances and these are the certain circumstances, your Honor.

Now, I'm going to address the specific standards set out by the legislature under Virginia Code --

THE COURT: I'm very familiar with the Code and I know the four factors. All four have to be met.

MS. CHARLSON BREDEHOFT: Okay.

THE COURT: Let's go to -- can we just go right to that? Because this is only an hour motion and you only get 30 minutes.

MS. CHARLSON BREDEHOFT: You know -- and I'm sorry, your Honor. I thought your Honor indicated on Friday that we could have more time if necessary.

THE COURT: But nobody --

MS. CHARLSON BREDEHOFT: I may have misunderstood that.

THE COURT: Well, but nobody said that they -- nothing was needed, so we're still at an hour is what I was told.

MR. CHEW: And a half hour is fine for us,

your Honor.

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: And my apologizes. I wrote my -- I re-wrote my outline all weekend long, your Honor, and went in a little more detail. I will try to move it along --

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: -- but I did -- I did anticipate that I would have more time.

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: And I apologize.

THE COURT: All right.

MS. CHARLSON BREDEHOFT: I misunderstood that.

THE COURT: Okay. That's fine.

MS. CHARLSON BREDEHOFT: Okay. I will go right away to the substantial grounds of differences of opinion and no clear controlling precedent governs issues of law presented in the supplemental plea in bar.

And here's where -- we've combined the two of those, your Honor, and I think it's very, very

important that we make certain points on what the case law is from the Virginia Supreme Court and why there is no controlling precedent here.

THE COURT: Now, are you talking about comity? Because you did -- you briefed two different ones; the comity and then the non-mutual defense of collateral estoppel. So which one are we talking about now?

MS. CHARLSON BREDEHOFT: Thank you, your Honor. We're going to start with the defensive non-mutual collateral --

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: -- estoppel.

THE COURT: All right.

MS. CHARLSON BREDEHOFT: Thank you for --

THE COURT: I just want to make sure. Okay.

MS. CHARLSON BREDEHOFT: -- asking for that clarification.

I'll take comity at the end of that, your Honor.

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: And I think that's

a much briefer argument.

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: The first point on the defensive collateral estoppel --

THE COURT: Right.

MS. CHARLSON BREDEHOFT: -- is there is no Virginia Supreme Court that's on point with this case. I think we all agree on that now.

The plaintiff tried to cite Rawlings and we distinguished that and explained to your Honor why that's not even close. It's not a defensive non-mutual collateral estoppel case. Facts aren't even close. Different parties, different issues. Not a plaintiff who lost and is trying to get on the same facts.

Second, the Virginia Supreme Court has made it crystal clear and has never backed off that the principles of collateral estoppel are grounded in public policy and therefore, there will always be exceptions and the Court must always review the application of the principles including mutuality and privity -- and they're very specific on those

two -- on a case-by-case basis. They cannot be rigidly or mechanistically applied.

We are asking for the Virginia Supreme Court to apply the consistently reserved exception of defensive non-mutual collateral estoppel to this case where Mr. Depp chose his forum. He could have brought the action anywhere in the world because The Sun was a worldwide publication, but he chose England and he chose it because of the burdens of proof and because he perceived that it would be more friendly to him.

And he made it clear -- and we've cited it in the briefs so I'm not going to keep repeating it, your Honor. But we made it clear that, even at the last moment when he was faced with sanctions and dismissal, he said he wanted that forum, not -- over this one. He wanted that one because he believed it would be a well-reasoned decision rather than just a jury verdict and that they had mass evidence. Now, it's the exact same issue in both cases. And I've already covered that so I'll keep moving on.

Second, there have been two defensive

non-mutual collateral estoppel Virginia Supreme Court decisions. Eagle Star and Angstadt. Now, Lane v. Bayview sort of touched on it and I'll cover that in a little bit, but I don't think that that's a genuine defensive collateral estoppel non-mutual.

So I'm going to cover the first two of these. And I think it's really important to cover these because these are the most relevant. Eagle Star is tremendously supportive of our position and Angstadt simply does not apply because there are too many differences in the facts.

In Eagle Star, Heller was convicted of arson, then turned around and sought insurance coverage for the fire he was convicted of intentionally setting. The Virginia Supreme Court laid significant groundwork for applying exceptions to the general rule on res judicata and collateral estoppel and urged rational thinking when applying the exceptions.

Some significant quotes from Eagle Star which have never been overruled and are often quoted by the U.S. Supreme Court as well. Quote, "This is

a case in which a rigid adherence to the general rule and to some judicial expressions would be a reproach to the administration of justice."

In addressing mutuality, the Court explained the rationale and said, "The rule of exclusion is a shield for the protection of those who have had no opportunity to assert their defense. To apply it here would be to convert it into a sword in the hands of ones who had such an opportunity, to be used by him for the effectuation of the same fraud which had been established, condemned, and punished in the criminal case. If there be a rule which cannot stand the test of reason, it is a bad rule."

Applying that here, your Honor, Amber Heard has not had the opportunity to assert her claims, call her witnesses, examine and cross-examine, and appeal. But Mr. Depp has fully utilized all of those tools and he lost. The mutuality exclusion is to protect Amber Heard, not Mr. Depp, after he has fully accessed the system. He is using this case as a sword under the thinking process of the Virginia Supreme Court in Eagle Star.

The Court further noted, quote, "We confess our inability to perceive, however, why the accused person himself should not be held either as bound or affected as a result of the prosecution, if adverse to him. He 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. So that the chief reason for holding that the plaintiff in a civil case is not bound by the prosecution fails as to the defendant, who has once litigated the identical question and had it adversely decided under conditions most favorable to himself -- that is, in a prosecution in which he could have not have been convicted unless the decisive fact, his guilt, had been shown beyond a reasonable doubt."

The Court further explained, quote, "These views are not novel, even if contrary to the general rule of decision, because all of the precedents on the subject are not consistent with the general rule which Mr. Freeman has stated. There are, as he shows, exceptions, limitation and contrary

decisions." And it cited on Freeman on judgments for this.

Now, applying that here, your Honor, Mr. Depp chose his forum, had more favorable burden of proof, litigated the identical issues here -- his abuse of Amber Heard -- had full discovery, three weeks in court, full examination and cross-examination including of Amber Heard for four days, full opportunity to produce his witnesses, full rights of appeal which he exercised and lost.

The Virginia Supreme Court in Eagle Star concluded, "We have gone thus far into the question because we are of opinion that the cases which we have cited and the reasons we have indicated clearly bring this case within an exception to the general rule." We believe the same is true here, your Honor. Eagle Star is still good law.

Now, I'm going to address Angstadt because that's the only other non-mutual defensive collateral estoppel case from the Virginia Supreme Court which was still decided 26 years ago. But significantly, Angstadt did not overrule any of the

holdings from Eagle Star. Instead, it involved a suit brought in Utah by a man injured from a microwave installation.

The defendants, the company, and employee failed to show up for a de bene esse deposition so the Court entered a default judgment in favor of the injured person. The insurance company later brought a declaratory judgment action against the company and employee for failure to cooperate because they did not show up for the depositions.

The Virginia Supreme Court, abandoning none of the principles established in Eagle Star and subsequent collateral estoppel cases, held that quote, "None of the requirements for the application of collateral estoppel is met because the identity of the parties is lacking, the factual issues litigated are not identical to the issues sought to be litigated to the present proceeding, and there is no mutuality."

With respect to privity, the Court, however, made it clear. Quote, "A determination of who are privies requires a careful examination of the

circumstances of each case. Although the defendants and Atlantic may have been privies at the outset of the underlying tort action, a careful examination of the circumstances of the case reveals that their interest ceased to be identical, and instead became adversarial, when Atlantic denied coverage and withdrew its representation of the defendants."

So obviously Angstadt, your Honor, was unique. Did not change any of the underlying principles established by the Virginia Supreme Court precedent on collateral estoppel principles.

Now, I'm going to address the Virginia Supreme Court cases on defensive mutual collateral estoppel because I think they provide some significant dicta that's helpful here in showing the first two prongs of 8.01-670.1. There are three of them, your Honor; Bates v. Devers, Glasco v. Ballard, and Nero v. Ferris.

While Bates v. Devers involves some complex contract claims on mutual collateral estoppel grounds, the Court espoused a number of significant principles and rulings that have carried forth to

this day, never overruled, and quoted frequently by the state and federal courts.

On res judicata, the Court made clear the entire concept of res judicata and collateral estoppel, quote, "are judicially created doctrines," end of quote, resting upon, quote, "consideration of public policy which favors certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment of parties," end of quote.

The famous footnote, your Honor, from Bates v. Devers upon which we have relied very heavily as your Honor knows, and as your Honor also knows, many a time in the U.S. Supreme Court and the Virginia Supreme Court, a footnote ends up being the most significant that carries on.

It says quote, "The policy underlying mutuality is to insure a litigant that he will have a full and fair day in court on any issue essential to an action in which he is a party. But, as is the case with any other judicial doctrine grounded in public policy, the mutuality doctrine should not be

mechanistically applied when it is compellingly clear from the prior record that the party in the subsequent civil action against whom collateral estoppel is asserted has fully and fairly litigated and lost an issue of fact which was essential to the prior judgment."

Bates v. Devers also cites Graves and Eagle Star in that footnote.

Applying to this situation, your Honor, Mr. Depp has had his full day in court with his well-reasoned decision. It's difficult to conceptualize that the Virginia Supreme Court would not apply the exception here.

In Glasco v. Ballard, your Honor, a 1995 case, was a case with a patrol officer who was seeking to stop a subject. His brake did not engage. While he was engaging the brake, he accidentally shot the suspect in the neck.

The defendant filed claims of excessive force in federal court along with assault and battery and gross negligence. The excessive use of force was dismissed with the Court determining the

shooting was accidental. The Court applied collateral estoppel for all the findings except for the gross negligence in that case. In other words, the Court honored and applied the federal court's rulings.

In Nero v. Ferris, a 1981 case, this was, again, an unusual case based on the facts. There was an accident in California, the driver left the scene. The Virginia court ultimately found that neither Virginia resident was involved in the California accident, did not recognize a California default judgment.

Significantly, the Virginia Supreme Court repeated some important holdings from past cases including that mutuality and privity must be decided on a case-by-case basis and that there are exceptions. And they stated, quote, "But, to be effective, the estoppel of the judgment ordinarily must be mutual. Thus, a litigant is generally prevented from invoking the preclusive force of a judgment unless he would be bound had the prior litigation the issue reached the opposite result."

With respect to privity, the Court noted that the plaintiff quote, "misconstrued the concept of privity in the context of these facts," end of quote. And continued on, quote, "There is no fixed definition of privity that automatically can be applied to all cases involving res judicata issues. While privity generally involves a party so identical in interest with another that he represents the same legal right, a determination of just who are privies requires a careful examination into the circumstances of each case," end of quote.

The bottom line, your Honor, is that the Virginia Supreme Court cases involving defensive collateral estoppel, whether mutual or non-mutual, urge a case-by-case analysis, not the application of a general rule. And that's important here because the facts in this case do not fit any of the cases that have been decided yet. Instead, they appear to fit most closely with the dicta in the footnote of Bates v. Devers. The Virginia -- we believe the Virginia Supreme Court, your Honor, should be permitted to weigh in on this and determine whether

those exceptions apply in this instance.

Now, I'm also going to just touch on -- and I recognize your Honor would like me to move along and I'll try to do it as much as I can, but I would like to touch on the offensive non-mutual collateral estoppel cases and the offensive mutual collateral estoppels. But I'll try to make it brief and just go into what's very similar there.

We have Norfolk Railroad v. Bailey, we have Selected Risks, we have Godboh, and we have State Farm Auto versus Wright.

Now, the Virginia Supreme Court in Bailey made a significant point of distinguishing the circumstances of mass claims, but that was offensive collateral estoppel. Even then, they said quote, "the principles of mutuality, to which there are exceptions," end of quote. In other words, even there, there would be exceptions.

Selected Risks, your Honor, I think we covered pretty heavily in our briefs. And given your Honor's desire for me to keep moving, I'm not going to go into significant detail. But I think

the most important point that we were trying to make there is it was a four/three decision with two extensive -- well, I mean, extensive in terms of a few pages, but they were significant dissents that were written and they were all discussing in detail all the different aspects that we're discussing in this case, your Honor. About mutuality, about privity, about where you apply it, where you don't, and what the public policy is and what the exceptions are.

And it was a four/three which clearly suggests -- it should suggest to this Court that this is not something that has been decided fully and strongly by the Virginia Supreme Court.

And this -- remember the Selected Risks was back in 1987. There hasn't been a significant decision on collateral estoppel, much less defensive collateral estoppel, in 26 years.

Now, in Godboh v. Brawley, that was another case in a bar with an off-duty deputy serving security detail and a fight occurred. There the issue was whether the assault and battery conviction

applied, but what the Court found there was it was not the identical facts so it didn't have an applicability here.

On the State Farm v. Wright case, your Honor, the issue was whether the passenger in the vehicle was involved in an accident as a guest. And the significance of that is, if it was a guest, then the standard of proof was a higher standard. It had to be gross negligence. They ended up back and forth.

The Virginia Supreme Court ultimately said there was gross negligence, then the plaintiff tried to bring an action against the insurance company. The insurance company tried to defend against it and claimed something inconsistent. And the Court in that instance, even though it wasn't privity and not mutual, applied the rulings from the other.

And the Virginia Supreme Court said specifically, "But that in such cases, on the grounds of public policy, the principle of estoppel should be extended, so as to embrace within the estoppel of a judgment persons who are not, strictly

speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity."

Last, your Honor, on these cases, there is Transdulles Centre, but that one really doesn't apply here on facts at all so I'm going to just breeze over that one. I won't discuss it.

But in Lane v. Bayview, your Honor, that's the most recent Virginia Supreme Court and that's the 2019 one. And there was -- and I know your Honor addressed that earlier. We've addressed it extensively, but the important part of that one was that the Court specifically addressed the issues of the concept of privity and that's very important in this case, in my view.

It said, "Privity centers on the closeness of the relationship in question. Privity as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's

relationship to the subject matter of the litigation. Whether privity exists is determined on a case-by-case basis of the relationship and interests of the parties." And it cites the Raley case as well. The U.S. -- the Virginia Supreme Court on Raley.

So two years ago, your Honor, which is the most recent that the Virginia Supreme Court has addressed any of these concepts, the Virginia Supreme Court has continued to emphasize that the issues of privity and mutuality have to be on a case-by-case basis, have to take public policy into consideration, and cannot be applied rigidly.

Now, your Honor, I will move -- I think clearly we meet -- there's no substantial ground -- there is substantial ground for difference of opinion and there's no clear controlling precedent on point in the decisions of the Supreme Court of Virginia and I think -- that was my point in going through of all these in detail.

It's very important to us and I thought it was important to be able to lay that out. To be

able to show that it really does meet the first two. But I will address comity now and I'm going to do so briefly because I don't think I need to do it extensively.

The real issue here that I'm understanding from the Court and from our -- even our briefs is that the Virginia Supreme Court has extended UK decisions and judgments in Virginia. There is no case in which they have declined to extend it.

The case of Oehl v. Oehl very specifically sets out why they extended in the UK. Then there's a Middleton case which was -- which dealt with a superseding law relating to Uniform Child-Custody Jurisdiction Act and it decided -- there was two cases in Middleton. The first one, what they decided was where was the home state for the children? Where the home state was England, they applied the UK and cited Oehl v. Oehl.

THE COURT: And all these cases deal with child custody which makes sense, right? You want to have one child custody order that is universal throughout whichever country you go to. And the

Hague Convention and there's discussions about it. It makes sense in a child custody cases.

MS. CHARLSON BREDEHOFT: Absolutely, your Honor. I totally agree with your Honor.

So the question then is whether it would be reasonable to ask whether the Virginia Supreme Court would be inclined to extend their philosophy and their logic from Oehl v. Oehl and Middleton where they say, "we are not reluctant to endorse an international deferral to the courts of England because Virginia's jurisprudence is deeply rooted in the ancient precedence, procedures, and practices of the English system of justice." And that's Middleton citing Oehl v. Oehl.

So the question here is, is it a fair extension? Would the Virginia Supreme Court be inclined to extend the libel laws -- UK decision on libel to the defamation actions in Virginia? And there is no case that says they would not. And that's very significant here, your Honor. It's clearly something that they -- it is not well-established. It hasn't been addressed. There

are no cases in Virginia that refuse to apply the UK. We cited other cases from other jurisdictions that have applied UK including ones that would be more akin to the libel.

And let me just address very quickly, your Honor's -- your Honor had indicated the concern I think on the four factors. It's not discretionary and your Honor I think agreed with that and cited that in a footnote and in the opinion letter. But there are four factors. Your Honor addressed the one -- the second factor with respect to discovery. And I think the answer to this one was in our exhibits to the supplemental plea in bar.

You can see -- they had 16 months here to conduct discovery. They used all that discovery in the UK and the trial bundle which was Exhibit 1 to the supplemental plea in bar hearing showed how many of the depositions that have been taken in this case were exhibits there. It showed how many of the exhibits had -- were pictures and videos and audios and things that had been produced in this discovery that were used in the UK. Both sides. And so

obviously they had ample opportunity for discovery.

And the other issue is, the one time they sought discovery with Ms. Heard over in the UK as opposed to in all the ones here, what happened was they had a full hearing and the Court found that their request was overbroad and they hadn't proved that it would lead to the discovery of admissible evidence which is a reasonable and fair decision for them to make.

So our argument on that is that this is a perfect opportunity for the Virginia Supreme Court to weigh in on will we extend it beyond child custody matters which was Oehl v. Oehl and Middleton.

Now, the next one that I'll go to, your Honor, is determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the Court and it's in the parties' best interest.

The dispositive, I think, is an easy call. It's "a material", not "all material". And I think there was a misunderstanding on plaintiff's part

when they wrote their opposition that they said, well, wait. There's still going to be at least some aspects of the counterclaim that would go through and, therefore, it doesn't dispose of everything. But the rule says "a material" and we cited a case that relates to that. And clearly it would. If this applied, it would take out his entire complaint which is clearly a material aspect of this.

So I will jump to the second part of this, your Honor, and that is in the best interest. And I almost have to go back now to my main points at the very beginning of it. Why would it make sense to deny the request for certification at this point? There's no delay, there's no expense.

If the Virginia Supreme Court does not think that this is sufficiently meritorious to grant the petition, it won't and it's going to be appealed at some point. It makes more sense for it to be now than at the end of the case after we've gone through all of this.

THE COURT: Which there still will be appeals at the end of the case so I mean, it's

not --

MS. CHARLSON BREDEHOFT: Well, yeah.

THE COURT: On different issues.

MS. CHARLSON BREDEHOFT: Yeah.

THE COURT: You're not saving an appeal. Let's get --

MS. CHARLSON BREDEHOFT: I don't.

THE COURT: Let's --

MS. CHARLSON BREDEHOFT: I don't disagree with that at all, your Honor.

THE COURT: Let's be realistic about that. Okay.

MS. CHARLSON BREDEHOFT: Yeah.

THE COURT: I assume everybody will appeal. Yes.

MS. CHARLSON BREDEHOFT: I completely agree with you, your Honor. Just given the nature of this, there's --

THE COURT: Right.

MS. CHARLSON BREDEHOFT: -- no question this is such a unique and bizarre --

THE COURT: Right.

MS. CHARLSON BREDEHOFT: -- case for lack of a better characterization. So I agree with you, but --

So there's no downside. And that's what we said in the briefs as well. There isn't a downside to granting it here because we -- we're the only -- we write an appeal -- a petition. We have to file it within 15 days. Nobody else does anything. We've got depositions, we've got motions, we've got all kinds of things still moving forward. There's no slow down here at all. Depp doesn't have to do anything.

The Virginia Supreme Court, if they pass on it, they'll give us a pretty good sign that it's not worth us pursuing it at the end and we'll have a lot more certainty here and we can move forward with that certainty.

You know, some of the things that I thought of, your Honor, in reading all these cases again through the weekend -- I probably read them a hundred times, but one of the things that came out in one of the earlier cases was the problems with

jury instructions. And we're going to have a lot of issues with jury instructions given this other case. And it would be nice to have the certainty of where we're going on that. It would be nice for all the parties. It would just make a difference.

And we either say, okay. You know, put our heads down and just move forward and that's it, or we say, okay. There is an issue here. Let's let the Virginia Supreme Court address it. They think it has merit. Let's get it done now.

I think at the end of the day, your Honor has the opportunity -- this is a very unique case. There's no question about it. It's high profile, it's very unique, but it also, remember, has issues that are very, very unpleasant in this society. Domestic abuse. Significant domestic abuse. And if we can, in some way, get some certainty moving forward, it's worthwhile.

The last thing I want to do, your Honor, is address the sanctions motion. I think it's highly inappropriate to be filed here. It's obviously a "best defense is a good offense" and it also is

pandering, in my view, to the Court's, you know, trying to -- you know, say, oh, you were right and you know, not only did you, you know, make a touchdown -- I'll use a football analogy -- but now you should spike the football. And that has nothing -- that has no place here.

The case that they cited, your Honor -- you know, and we cited the rule 8.01-271.1 and we clearly are asking for an extension and for what we considered to be first impressions. But on top of it, the case they cited was not even remotely close. It was a non-interlocutory appealable order.

The Court told them not to do it a second time and if they did, they would sanction them, and then they did sanction them because they brought it again and it wasn't -- it has nothing to do with this case.

The most logical thing for us to do is to file this motion. And frankly, your Honor, if your Honor had decided the other way, Mr. Chew would be up here instead of me making the same arguments on his behalf.

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

MS. CHARLSON BREDEHOFT: Thank you, your Honor.

THE COURT: All right. Mr. Chew?

MR. CHEW: Good morning, your Honor. May it please the Court. Ben Chew for plaintiff, Johnny Depp.

May I please remove my mask?

THE COURT: That's all right. Yes, sir.

MR. CHEW: I am double vaccinated.

THE COURT: All right. Thank you, sir.

MR. CHEW: May I also -- to take care of a housekeeping matter --

THE COURT: Sure.

MR. CHEW: Mr. Rottenborn and I have reached agreement on a proposed --

THE COURT: Okay. Order?

MR. CHEW: -- order.

THE COURT: From Friday? Sure. Thank you. I'll enter that. Thank you.

MR. CHEW: Thank you very much.

Good morning, your Honor.

The Court should deny Ms. Heard's motion to certify the August 17th, 2021 order for interlocutory appeal. As the Court is aware, Virginia law strongly disfavors interlocutory appeals because they often result in inefficiencies and unnecessary delay and expense as an interlocutory appeal would in this case. If in fact the Supreme Court were to accept it, Mr. Depp would of course be exposed to substantial work and expense.

Denial is especially appropriate here where the Court's overruling of Ms. Heard's supplemental plea in bar did not appear to be a close call. The Court's letter opinion at page 10 states as follows: Quote, "Defendant supplemental plea in bar was misguided and only thinly supported by pre-existing law," unquote.

It also bears noting that not only did the Court grant Ms. Heard leave to amend her pleadings yet again, to take a third bite at the dismissal apple, allowing her to file her supplemental plea in bar, but the Court also granted her oversize

briefing and allowed the parties virtually unlimited time for oral argument on July 22nd, 2021, then took the matter under advisement for almost one month and thereafter issued a scholarly 10-page single-spaced letter opinion citing no fewer than 30 cases from the Virginia Supreme Court.

In this context, for Ms. Heard to seek the extraordinary remedy of an interlocutory appeal only a few months away from a trial already delayed several times smacks of frivolity if not disrespect. In applying the standard set forth in Virginia Code section 8.01-670.1, the Court should deny Ms. Heard's improvident motion.

As your Honor just stated, the Code provides that leave should only be permitted when the moving party can satisfy all four of the following criteria. Not one or two, or even three, but all four.

One, the order must involve a question of law for which there is the substantial ground for a difference of opinion, which is not the case here.

Two, there must be no clear controlling

precedent in the Supreme Court of Virginia or the Virginia Court of Appeals. Here, the Court cited abundant controlling authority from the Virginia Supreme Court on Virginia's mutuality requirement for collateral estoppel.

Three, determinations of the issues must be dispositive of a material aspect of the proceedings of the Court. And this is the only one that's arguably in play. But Ms. -- at least in their moving -- in their moving papers, defendant has conceded that the appeal would not affect Ms. Heard's $100 million counterclaim so there wouldn't be much efficiency.

Four, an interlocutory appeal must be in the best interest of both parties. Clearly, in this case it would not be in Mr. Depp's best interest.

Let's start, please, with the requirement that an interlocutory appeal must be -- to be certified, there must be no controlling precedent on point from Virginia's highest courts. Here, the Court's 10-page letter opinion of August 17th, 2021, upon which the August 17th order at issue is based,

is chock-full of controlling authority from the Supreme Court of Virginia supporting the Court's order.

Indeed, the Court cited and analyzed no fewer than 30 Virginia Supreme Court cases supporting the Court's overruling of Ms. Heard's latest plea in bar, several of which involve collateral estoppel and Virginia's ongoing mutuality requirement.

As the Court stated in its letter opinion, quote, "This is not a matter of first impression. It is a matter of stare decisis. Based on the abundance of binding case law, holding mutuality is still a requirement in Virginia, collateral estoppel is not appropriate here," quoting the letter opinion at page 5.

That's game over. The existence of that abundant controlling authority should have stopped Ms. Heard and her counsel in their tracks as they knew, prior to filing Ms. Heard's motion to certify, that she could not satisfy this threshold criterion. That this be a case of first impression. It's not.

Those sanctions are appropriate under 8.01-271 and necessary to discourage Ms. Heard and her counsel from filing frivolous motions just because they have a third-party insurance carrier footing the bill. That's not the case for Mr. Depp.

And neither does Ms. Heard satisfy the next criterion. As her proposed interlocutory appeal presents no question of law as to which there is a substantive grounds for difference of opinion. Again, as the Court concluded on page 10 of its letter opinion of August 17th, defendant's supplemental plea in bar was misguided and only thinly supported by existing law.

And Ms. Heard cites nothing new in her motion papers. Not a single new case. Rather, in her opening and reply briefs, and again, here today in oral argument, Ms. Heard re-plows old ground and badly misstates Virginia law.

There is, of course, no Bates exception. And as your Honor recognized at page 4 of the letter opinion, since Bates v. Devers in 1974, the Virginia Supreme Court has re-examined the issue of mutuality

multiple times and reaffirmed the mutuality requirement as it did 21 years later in Angstadt versus Atlantic Mutual Insurance Company, 219 Va. App. 444(1995), where the Supreme Court of Virginia reversed the Trial Court's application of collateral estoppel on the grounds that, as is the case here, there was no mutuality. That's 249 Va. App. 444.

And the Court dealt with Angstadt also in its letter opinion. Referring the Court to page 4. Find -- quoting at page 4. Finally the Virginia Supreme Court again confirmed the mutuality requirement in Angstadt versus Atlantic Mutual Insurance Company, citation omitted, holding mutual defensive collateral estoppel was inappropriate when the non-mutual party quote, "would not be bound by the prior litigation had the opposite result been reached," unquote.

Similarly, in Rawlings versus Lopez, 267 Va. App. 4(2004), the Virginia Supreme Court again dealt with the issue of defensive collateral estoppel. The Supreme Court reversed the Trial

Court's sustaining of the plea in bar on collateral estoppel and res judicata because, as in Angstadt and in this case, the requisite mutuality was missing.

In her reply, and again today, Ms. Heard claims that the Court somehow should have ignored Rawlings because Lopez prevailed as the defendant in the prior action. But Rawlings clearly involved defensive collateral estoppel which applies to any situation where the defendant invokes it in the second case as Ms. Heard did here. And Rawlings, like Angstadt and other Virginia Supreme Court cases cited by the Court, controls here.

Rawlings is directly on point because the Supreme Court of Virginia found defensive collateral estoppel did not apply because there was no mutuality and did so even in a case where the factual issues, i.e., whether the defendant in both cases was negligent, were the same.

Your Honor, I wanted to address -- well, the Court has already addressed Eagle Star so I will just point the Court to its opinion at page 4

spilling over to page 5. And I'm just going to read the topic sentences of each.

"However, Eagle Star is an exception to the general rule." And the Court cites additional cases, continues its analysis. Then starting on the first paragraph of the next page, page 5 of the letter opinion, "The case before this Court is markedly different from Eagle Star and Bates." And then the Court continues to explain why it's distinguishable.

From there, Ms. Heard's argument becomes even more frivolous, citing two dissenting opinions in a case, Selected Risk Insurance Company 230 -- 233 Va. App. 260(1987), that upheld Virginia's mutuality requirement. 233 Va. App. 264 and 265.

As to the dissents, I respectfully refer the Court to pages 11 and 12 of Mr. Depp's opposition brief, which I know the Court has read, rather than repeating it.

Ms. Bredehoft mentioned comity briefly in Lane v. Bayview. I would just point the Court to its letter opinion, page 3, section A, privity,

where it cites Lane v. Bayview and concludes at the end of that section, therefore, given Virginia's narrow construction of privity, defendant and The Sun are not in privity as they clearly weren't.

And I will be finishing up quickly. Hopefully ahead of time, your Honor.

Concerning comity, the Court correctly exercised its broad discretion finding that enforcing the UK judgment would be contrary to the public policy of Virginia. Again, see the opinion letter at pages 7 through 9, citing Clark, 11 Virginia Court of Appeals App. 296 and 297.

In any event, Ms. Heard can only cite one Virginia case which recognized a UK judgment under the principles of comity. See her opening motion at pages 10 through 12 citing Oehl v. Oehl, 221 Va. 618(1980).

And as the Court found in its letter opinion and mentioned briefly today, this case is distinguishable from the present circumstances because it was a domestic law case and made sense in that context. See opinion letter at 9.

This case is also distinguishable because comity was applied where there was mutuality of the parties in Oehl v. Oehl, which is not the case here. See Oehl, 221 Va. 618.

One highly distinguishable case does not create a substantial ground for differing opinions on whether the UK judgment should have been afforded preclusive effect in this action where the parties to this action and the UK action were not the same or in privity with each other.

See opinion letter at 9. Quote, "The Court is hesitant to apply preclusive effect to the UK finding, especially considering defendant was not a party in the UK suit and was not subject to the same discovery requirements in this suit."

Moving to the next criterion. Again, we'll rest on our papers on that. We do think that there is a possibility of both expense and delay. This is a case, as your Honor knows, that under ordinary circumstances would have been tried before March 1, 2020. We filed it March 1 -- and it's nobody's fault. It was just COVID. But we're now going to

be trying the case three years after the case was filed and there is a risk of delay despite what you've heard.

Finally, your Honor, Ms. Heard cannot satisfy the fourth conjunctive criterion because the proposed interlocutory appeal would not be dispositive of a material aspect in this case. Ms. Heard's $100 million counterclaim based on three statements by Mr. Waldman, who is one of Mr. Depp's attorneys, would not be affected by the appeal at all.

In a rare, but refreshing acknowledgment of Virginia law, Ms. Heard admits at page 4 of her opening brief that a successful interlocutory appeal would not allow Ms. Heard to use collateral estoppel offensively against Mr. Depp with respect to the counterclaim. So we'd have the same issues coming in at trial whether what Mr. Waldman said was true. Which -- it's kind of circular. It goes back to whether Ms. Heard was lying about her allegations of abuse as she's been found to lie about many other things.

In any event, the subject matter of Ms. Heard's counterclaim is so distinct that the appeal would not be dispositive. And so for these reasons, your Honor, we ask that the Court deny, from the bench hopefully, this motion to certify and impose a symbolic $18,000 in attorneys fees.

And in that regard, the Court did not impose sanctions last time, and we totally understand that, but defendant was warned. It was warned when she moved for leave to file the supplemental plea in bar that it might be sanctionable.

In the Court's letter opinion, the Court made clear that it was -- I want to get the words right. "Misguided and only thinly supported by pre-existing law." In both of those cases, the Court was applying a more liberal standard. We're now on a standard with these four criterion.

And Ms. Bredehoft is right. It's not whether the Court, per se, was correct. Although it was. It's whether each and all of those four criteria were met. And there was no way, in good faith, that Ms. Heard could have argued, for

example, that there was no law on point, which is a threshold criterion. They try to gloss over it with impossible and silly distinctions and I think sanctions are appropriate here.

Thank you, your Honor.

THE COURT: All right. Thank you.

Yes, ma'am.

MS. CHARLSON BREDEHOFT: Thank you, your Honor.

I listened very carefully to see if I could get answers to the questions that I thought were the most important to bring before the Court today and the first of those was, why wait until the end? I did not hear an answer to that, your Honor, and I think that's a very significant issue before this Court. We're going to know very quickly whether the Court thinks this is of substantial merit or not. With no cost to Mr. Depp, with no delay whatsoever.

Mr. Chew argues both that there will be delay and cost, but he doesn't articulate how that could be. Because we file a petition, nothing slows down, nothing is stayed. The only way that the

Virginia Supreme Court will -- the only way that it would even grant it is if it decides that it has sufficient merit and then it still doesn't stay the proceedings, your Honor. Under 8.01-671C, still doesn't stay the proceedings. So there's no delay, there's no cost.

This is solely an issue of if the Virginia Supreme Court thinks that it makes sense to address the defensive collateral estoppel for the first time in 26 years and extend the footnote from Bates v. Devers and say this is that case. This is the opportunity.

And with respect to comity, your Honor -- and I want -- I know your Honor is -- that's a very important issue to your Honor and I think that it's important for me to make one additional point on that.

With comity, there is no Virginia Supreme Court case that has neglected -- has declined to extend the UK judgment with the exception -- I know your Honor cited Middleton, but that was different because they extended it on the one. The other one,

the reason they didn't was because the home on those people was Virginia.

THE COURT: But it is also clear that comity is discretionary to the Court.

MS. CHARLSON BREDEHOFT: I actually disagree with that, your Honor. And we cited American -- we cited in our brief, American -- Online I think it is. Hold on a second, your Honor. My apologizes.

American Online v. Anonymous Publicly Traded Company on this issue in our reply brief and specifically the Court -- and we cited Oehl v. Oehl, I think, in laying out that this is not -- this is not a matter of discretion for the Court. This is something --

And in fact, your Honor, given that there is no case in Virginia that has not applied UK law -- and we've asked it several times in our briefs and we asked it again today. For Mr. Depp to cite any case that has rejected the UK decisions or judgment. They -- it doesn't exist.

We do have some. Your Honor has made it quite clear those extend to child custody and they

make sense. So at a minimum, we're asking for an extension of the existing law of Virginia Supreme Court with no contrary. None whatsoever.

So if the Virginia Supreme Court -- and that's my point, your Honor. There's no downside here. If the Virginia Supreme Court thinks this is the time for them to speak to whether they should extend the UK judgments or decisions beyond child custody, this would be the opportunity for them to do it.

There's no reason not to do that. And it would be better for us to know that now, in this next month or however long it will take, than to know it after we've gone through the --

You know, we're dealing with, you know, probably a hundred witnesses, Your Honor. And I don't think I'm exaggerating at all. Between expert witnesses and the laypersons in here. We're dealing with just an enormous amount deposition de bene esse's because most of these people are in California.

We're dealing with just an extensive amount

of pretrial in this case. Motions in limine. We're going to have a trial that's at least four weeks. If we can get some certainty on that issue earlier, it's worth it. What is the downside?

What I listened to carefully and I got and I wrote it down was the same issues that I started out with here. The first one is cost. There is no cost to Mr. Depp for us to do that.

The second is delay. There is no delay. There's no stay so there's negative there.

The third is -- and it's what I raised to Your Honor right at the very beginning. It's not about whether your Honor was right. I'm sure your Honor believes that your Honor was right and we're not -- and we absolutely respect this Court and respect the Court's, you know, absolute ability to be able to, you know, make the decisions they make on this. What we're saying is to step back and apply 8.01-670.1 which is different than whether the Court was right. It's whether there are issues here.

I thought it was significant that Mr. Chew

admitted at the end that it is not about what -- whether your Honor was right earlier down the line. I spent a lot of time, your Honor, in this argument and probably to the chagrin of your Honor for having to hear me out on all this. And I apologize for being so lengthy, but I spent a lot of time parsing through every one of those cases on collateral estoppel. And I pulled out the language on all of those to show the Court how truly these issues are still very much unsettled. There is no on point cases.

Mr. Chew then cited Angstadt again. And I think he just flat out ignored the fact that I read specifically from Angstadt in my argument and quoted specifically where they say a determination of who are privies requires a careful examination of the circumstances of each case and then went on to discuss those.

And then, in that particular case, none of the requirements were met. They didn't have the same parties, they didn't have the same facts, it wasn't the same issues, it wasn't the defensive --

none of those things applied and so they didn't overrule anybody. They just said, look. This one just doesn't do it, but we have to have a careful consideration.

At the end of the day here, your Honor, this is a very, very significant issue of whether the UK decision should apply under these circumstances. The Virginia Supreme Court has said over and over again that this is public policy. The public policy is to let a litigant have its day in court, but only once and that's why it has urged the application of collateral estoppel and the application of res judicata to be not rigidly applied, not mechanistically -- darn it. I almost made it through the day without it -- applied and on a case-by-case basis.

This is the case that Bates v. Devers has described in that footnote and there is no case that is on point with this one. This would be the time for your Honor to allow us to be able to file that petition. And if the Virginia Supreme Court says no, we know the answer to it. If the Virginia

Supreme Court says yes, then there is some merit, they do want to speak to it. This is important and there's absolutely no downside to it.

Thank you, your Honor.

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

All right. For an interlocutory appeal to be certified, Virginia Code 8.01-670.1 requires that all four of the statutory criteria in the statute must be met. So what I'm going to do is just go through all four of the requirements for both of the issues before us today.

So for defensive non-mutual collateral estoppel, first there has to be a difference in opinion. In this matter, defendant relies on dissenting opinions to demonstrate a difference in opinion regarding the application of non-mutual collateral estoppel.

While the existence of dissenting opinions indicates a difference of opinion, it's not necessarily a substantial difference of opinion. There is no difference in jurisprudence of the Commonwealth. The Virginia Supreme Court has

decidedly held time and time again that mutuality requirements is still controlling law. So there are grounds for a difference of opinion, but those grounds are not substantial, therefore, the first prong is not met.

The second requirement is no clear controlling precedent. As noted in the letter opinion, the Virginia Supreme Court has not retracted the mutuality requirement since its seminal decision in Bates. Virginia has upheld the mutuality requirement in varied factual circumstances as outlined in the letter opinion and in many cases.

Notably, the cases defendant relies upon in her motion that potentially dispose of the mutuality requirement are Bates and Selected Risks. But as noted before from the Court, the Bates decision has limited the discussion of mutuality to a single footnote, and then defendant relies upon dissenting opinions in Selected Risks.

So considering that no Virginia Supreme Court has abrogated the mutuality requirement and

defendant only cites dissenting opinions, therefore, it's clear and controlling precedence regarding defensive non-mutual collateral estoppel mutuality requirement, therefore, the second prong and second requirement has not been met in this matter.

As far as determination of issues will be dispositive, the third prong, the resolution of this issue in defendant's favor would not be dispositive. All issues in the case, however, it would be dispositive of material aspect of the proceedings and -- because plaintiff's claims would be precluded which is a material aspect of litigation and so the third prong is met.

As to the fourth requirement, parties' best interest, the litigation is not in both parties' best interest. While it is true that plaintiff would save money if this case were dismissed, it also ignores the reality that plaintiff still has an impending claim against them and would not dispose of defendant's counterclaim and thus, plaintiff would still have to spend money defending himself and the litigation would continue, therefore, the

certification is not in the best interest of both parties and the fourth prong is not met as to non-mutual collateral estoppel.

As to comity, prong one, the difference in opinion, the Court found squarely in the letter opinion that UK law and Virginia law as to libel were significant enough as to deny a request for a comity. Defendant states no new case law in her motion to certify the interlocutory appeal that was not discussed within the letter opinion and defendant has shown no compelling or significant differences in opinion that warrant an interlocutory appeal of a judgment based on comity, which is in the discretion of the Trial Court judge. So the first prong is not met.

The second prong, no clear controlling precedent. There are four factors that were discussed in the letter opinion as to whether to grant comity. Defendant claims that comity is appropriate here.

Again, the Court believes the defendant ignores settled law that the application of comity

is not obligatory and within the sound discretion of the Trial Court. Defendant has not raised any novel issues here. The law in comity is settled and I -- the Court had discussed all four comity factors in detail in letter opinion. I won't go into them here. So the second prong is not met.

As to the third prong, the same determination as with non-mutual collateral estoppel. The determination of the issues would be dispositive in this matter, so that is met.

As to the fourth prong, again, for the same reasons. It's not in both the parties' best interest, therefore, I'll deny the motion for -- to certify the interlocutory appeal on both counts.

As to sanctions, again, as noted in letter opinion, there is dissenting opinions from Virginia Supreme Court justices that have arguably called the mutuality requirement into question. It's obviously not the strongest argument, but it is an argument that is grounded in law, therefore, I don't think it's a sanctionable matter so there will not be sanctions. All right?

MR. CHEW: Thank you very much, your Honor.
THE COURT: Okay. Thank you.
If I can just get an order soon on that.
MR. CHEW: Your Honor, may we try to submit that by the end of the week after we get the transcript?
THE COURT: Sure. That'll be fine. Okay.
MR. CHEW: We can lay out the four prongs --
THE COURT: Okay.
MR. CHEW: -- for each.
THE COURT: That's fine.
MS. CHARLSON BREDEHOFT: Thank you, your Honor.
THE COURT: Okay.
MS. CHARLSON BREDEHOFT: May I address just another --
THE COURT: Sure. Housekeeping?
MS. CHARLSON BREDEHOFT: -- housekeeping matter? Yes.
THE COURT: Sure.
MS. CHARLSON BREDEHOFT: We have a situation that I don't honestly know how to deal with --

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: -- and that is that Mr. Chew filed a motion for the electronics and set it down for October 29th. He did so -- and I'm going to try not to argue here, but just explain to you --

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: -- that we believe that we have a very legitimate motion to strike on that because he didn't let us know in advance, which was required under the order your Honor entered --

THE COURT: Right.

MS. CHARLSON BREDEHOFT: -- on September 7. Didn't let the Court know in a non-ex parte manner. And we would want to have both cross-motions and briefing. We would like to have an evidentiary hearing.

It's a very serious issue. They're asking to have all of the electronics just turned over and then have some third-party that we would all pay to review all of these electronics. And it's a pretty significant issue.

We were at the stage in the meet and confers where we were suggesting having the two experts speak so they could figure out what they really needed so we could hone that down to a minimum and that's when they filed this motion without our knowledge.

So I don't know how to go about this, your Honor, but obviously the motion to strike should come before that motion. And then, if your Honor denies the motion to strike, we would like to be able to do cross-motions, we would like to be able to do longer briefing, we would like to be able to put it on as an evidentiary because we think we need to call our IT expert, at a minimum.

So I'm not sure whether your Honor wants us to do this in a calendar control call or how we get this set up. I'm -- and my apologies for not having --

THE COURT: Okay. No, that's fine. We can try to figure out now. That's fine.

MR. CHEW: Your Honor, may I be heard --

THE COURT: Yes.

MR. CHEW: -- on that briefly?

Ms. Heard has relied on photographs and a treasure-trove of evidence of very dubious validity which came into England because they allow everything in.

We have eyewitness testimony from the police officers. Officer Science and Haddon said that she didn't have any marks on her in the accident in May of 2018. We have credible eyewitnesses after the police left saying the same thing, and all of a sudden, five days later she appears with a bruise.

We have very good reason to seek the devices. If these are legitimate, actual photographs, it shouldn't be a problem. And it's not an uncommon request. We're open to reciprocal requests from defendant. Although, unlike her, Mr. Depp isn't using this kind of evidence to prove his case.

We had been trying to get Ms. Bredehoft's attention for two months on this and she kept stiff-arming. Said she wanted to do the supplemental plea in bar. She wanted to do her own

motions to compel.

Finally, in exasperation, I went to Steve Cochran, the conciliator, and he wrote me back and he said, file your motions. One was the motion that we filed recently and your Honor heard on the IME which the Court granted, and the second motion he said in writing, the answer to your question is yes and yes.

So the conciliator instructed us to proceed to file the motion to compel the devices and the original cloud mechanisms. And Ms. Bredehoft argued that somehow she was surprised by this and Mr. Cochran said this is what Mr. Chew is referring to. So I can show the Court that correspondence. I think I've actually sent it to your law clerk.

So Mr. Cochran has approved our filing of this motion which we set for the 29th. And the Court may recall that in appointing the conciliator, even though normal day-to-day communications with the conciliator as to what request he's telling different parties that they may want to give in on, the one unique power he has on the order, which I

respectfully -- I haven't insisted on because I'm not in a position to insist. But one of the provisions with which he agreed is that he, Mr. Cochran, is the one who will decide who goes next.

And he explicitly authorized us to file this motion on the devices which is absolutely crucial. We need these devices to get to our experts so our expert can say, you know what? That photograph of the bruise in London, that's a fake.

That's what we're asking. We're not -- we don't have any problem with her filing a reciprocal motion if she wants to get devices. We have asked her, please let us know what specifically you need and why you need it. We haven't said no. But it can't just come in a vacuum. Oh, we want all of Johnny's devices. There has to be some kind of request and protocol with which Mr. Cochran can deal.

And yes, we do think that Mr. Cochran may have a role to play because when you're dealing with the devices, for example, if the Court is inclined

to order some or all of what we're asking for and say she has to turn over these cameras to see when -- what the provenance of these photographs were, we don't want to look at Ms. Heard's different relationships that don't have anything to do with Mr. Depp. Unless they involve violence. In which case, we do.

But we think Mr. Cochran would be ideally suited to be the gatekeeper, as it were. To look at Ms. Heard's devices. And if she moves and the Court is inclined or we agree and they get some of Mr. Depp's devices, he's probably the best person because he knows something about the case. He knows a lot about the case by now. He can sift through that and say, no, no, no. This has nothing to do with this. And then I think we can get somewhere.

But if we don't get this tee'd up, as Mr. Cochran explicitly told us to do, we're going to run out of time with our experts because our experts need time with those devices. We tried for two months, your Honor.

THE COURT: Okay. Thank you.

Yes, ma'am?

MS. CHARLSON BREDEHOFT: I wasn't going to argue but now I will, your Honor.

THE COURT: Okay.

MS. CHARLSON BREDEHOFT: This is very important.

First of all, Mr. Chew sent me an e-mail on a Friday afternoon when I was in Wisconsin with my husband's family celebrating their 67th anniversary. Demanded an answer by Monday. He sent an e-mail to Mr. Cochran said, look, she hasn't responded to my Friday e-mail. May I file these motions? He said yes and yes. Didn't CC us.

After that, I came back and said, what? I said, I haven't had a chance to even respond to him. I was in Wisconsin over the weekend. Here -- we want to do a lot of things here. We want to have our expert talk to their expert. We think this makes sense to do a meet and confer. We're going to set it up so we can do a four by four. Mr. Cochran came back and said, I would like you guys to try to work this out. Please put your animosity behind

you. Let's try to work it out.

We scheduled a meet and confer with the attorneys. We were present. There were three lawyers from my side, three lawyers from his side. We had a meet and confer and said, the next meet and confer we'd like would be with a four-way with the IT experts so they can talk about what they really need because what's being proposed here is way more expensive and way more extensive. And I think if we get the IT people together, and we'll be on the phone, I think we can really, really cut down on this. They said, okay. Then we sent them an e-mail saying let's get this set up. The next day he files this motion. We're in the middle of meet and confers.

I am positive we can prove that to your Honor, that that's what was going on. That Mr. Cochran, while he said that back in August when I was out of town, he revoked that, came back and said work this out. He knew we were in the middle of meet and confers and we were in the middle of meet and confers.

And your Honor, the important aspect of this is, the reason we want to do the motion to strike is because he violated your Honor's current order in three different ways. And these orders have to mean something. He has filed every single motion in this case since I've been in the case without ever consulting me. Every single one of them. And that's wrong. And that's why we had that in the conciliator's order. You have to consult with us.

That would have enabled us to say, what? Why are you filing this? I thought we were doing a four-way here with the two IT people. And it would have been -- it would have enabled us to go to you and say, your Honor, we think we should be able to do a meet and confer or we'd like to do the motion to strike first because we don't think they've complied with it. They didn't tell us, they didn't tell the Court, they didn't finish the meet and confer process.

But then the other thing is, your Honor, is we do think there should be cross-motions because we're -- some things we're looking for that are the

same, but our IT person says you don't need to do this whole huge sweep and then pay hundreds of thousands of dollars to a third-party to look through for attorney-client privilege, work product, confidential information, irrelevant information. There's other ways we can achieve this. Let me talk to your IT person. We were setting that up.

Our IT person would be able to explain to your Honor, very articulately, what the issues are and what the best solution is and what the least expensive solution is. We can't do that in a half an hour on a motions day.

I am confident that we can prove to the Court that they violated the conciliator order in three ways. I'm confident when your Honor sees the documents, your Honor will know that that's the case.

Then second -- but in the meantime, frankly, we'd still love to do the meet and confer. We'd still love to get the two IT people and resolve this. But we can't because he's got that on October 29th and he is not talking to us about it.

MR. CHEW: Your Honor, I believe --

THE COURT: Yes, sir.

MR. CHEW: -- I have a proposed solution.

THE COURT: Okay.

MR. CHEW: Respectfully. Because I know the Court has other probably better things to do. But, your Honor, very briefly.

Ms. Bredehoft just admitted that the Court told us to go forward back in August. Go ahead. Go forth and file your motion to compel. And two months later, we're still trying to work things out. And finally, two months after we had authorization, we went ahead and did it.

Secondly -- so there's no basis to strike and there's no basis for the violation of the order. And she's admitted that Mr. Cochran said in writing, file your motion, sir.

So with that said, we have no problem with continuing to meet and confer. We've continued to meet and confer with Mr. Rottenborn and Ms. Bredehoft after motions have been filed. We want to work this out. We want these devices and

we're certainly willing to consider her getting some of our devices if she would ever articulate why she needs them and what she needs. So she's pushing an open door. We want to get as much resolved as we can, but if we don't have October 29th as the deadline, it's never going to get done.

So what I would respectfully request is that we continue the meet and confers, we keep the October 29th date for our motion. If she wants to file a reciprocal motion for devices and it's more efficient for the Court to hear them both on the same day, we don't have a problem with that. Or extending it for an hour instead of half an hour. But what we don't want is to get involved in some silly thing about moving to strike when the conciliator said go file your motion.

THE COURT: All right.

MR. CHEW: Thank you, your Honor.

THE COURT: All right. Thank you.

MS. CHARLSON BREDEHOFT: Your Honor, may I suggest that instead -- your Honor may recall I'm not even in the country on October 29th, but may I

suggest this so that we get out of --

I don't want to do motions to strike either, but I would like him to start adhering to the orders and talking to us. But why don't we set an evidentiary hearing for cross-motions and a briefing schedule?

And I think your Honor had -- we'd indicated that we were available on November 12 if your Honor wanted to do --

THE COURT: I'm not going to set an evidentiary hearing in this matter, okay? I'm not going to. You can file your cross-motion on the same day, for the 29th, and we can put it for an hour. That's fine.

Between now and then, I want you to set up a time with your IT people and I want there to be a meeting with the IT people from both sides and with the attorneys and to get that -- issues resolved.

MR. CHEW: Absolutely.

THE COURT: And that way -- I mean, I don't need to hear from the IT people. You need to hear from the IT people. And then we can see where we

are on the 29th. Okay?

MR. CHEW: Thank you, your Honor.

THE COURT: All right.

MS. CHARLSON BREDEHOFT: Thank you.

THE COURT: Let's do that.

MS. CHARLSON BREDEHOFT: Thank you very much.

THE COURT: All right.

MS. CHARLSON BREDEHOFT: We appreciate it, your Honor.

THE COURT: All right. The Court will be in recess.

(End of recording at 11:13 a.m.)

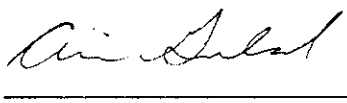
CERTIFICATE OF COURT REPORTER

I, Miles Tag, the officer before whom the foregoing was taken, do hereby certify that said proceedings were electronically recorded by me; 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.

Miles Tag, Court Reporter

CERTIFICATE OF TRANSCRIBER

I, Alicia Greenland, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supported information; 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.



Alicia Greenland

October 13, 2021

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II Plaintiff, v. AMBER LAURA HEARD Defendant.	Civil Action No.: CL-2019-0002911

DECLARATION OF BRYAN NEUMEISTER

1. My name is Bryan Neumeister.

2. I am a court certified video, audio, and digital photographic forensics and technical expert and the CEO of USAForensic LLC.

3. I have extensive experience collecting, analyzing, and producing electronically stored information ("ESI") in law enforcement and legal proceedings, including approximately 600 cases in the last four years alone. I have over 41 years of audio/video professional experience, and twenty years of experience testifying and consulting for federal and state governments, agencies, prosecutors, defense attorneys, Fortune 500 companies, and individuals in a variety of aspects concerning analysis of photographs, audio and visual recordings, phone and text messages, and other digital data. My CV is attached hereto.

This declaration is based on my personal knowledge, years of experience, training, and education.

4. There are three basic types of computer date stamps: modified date, access date, and creation date (also known collectively as "MAC").

5. A file's last modified date refers to the date and time that a file is last saved. Typically, a file is modified or written to when a user opens and then saves a file, regardless of whether any

data is changed or added to the file. For this reason, the last modified date will generally indicate the last date and time that a file was saved.

6. Creation dates do not necessarily reflect when a file was originally created. Rather, creation date stamps indicate when a file came to exist on a particular storage medium, such as a hard drive. Creation dates can thus indicate when a user or computer process created a file or can also reflect the date and time that a file was copied onto a particular storage medium. Where a file has been copied, moved, or downloaded onto a new medium, its "creation date" indicates the later act of file transference, rather than the date the file originally came into existence.

7. For these reasons, just because a certain file of data has a creation or modified date after the original creation date when the file first came into existence, it does not follow that the data has necessarily been manipulated or altered in any way.

8. In my experience, it is very common in litigation for files to have creation or modified dates after the original creation date.

I declare under penalty of perjury that the foregoing is true and correct.

Submitted on this 18th day of January 2022

Bryan Neumeister

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II Plaintiff, v. AMBER LAURA HEARD Defendant.	Civil Action No.: CL-2019-0002911

DECLARATION OF JOELLE RICH

1. My name is Joelle Rich.

2. I am a Partner based in the London office of the law firm Schillings.

3. I represented Mr. Depp in the UK action titled *Depp v. News Group Newspapers Ltd.* (the "UK Action").

4. At the request of Mr. Depp's U.S. counsel, Brown Rudnick, I have reviewed the following six audio recordings produced by Mr. Depp in the Virginia Action: DEPP9046, 9047, 8259, 8260, 8297, and 8298.

5. Based on my review, I have confirmed (a) that each of the six audio recordings were previously reviewed and produced by Schillings in the UK Action; (b) that Schillings did not alter, edit, manipulate, or otherwise change the recordings in any way prior to producing them in the UK Action; and (c) that the recordings produced in the Virginia Action i.e., DEPP9046, 9047, 8259, 8260, 8297, and 8298 are the exact same length and content as the following six recordings produced in the UK Action: Trial Bundle references L138a, L138b, F154, F155, M140, and M141, respectively. They do not therefore appear to have been altered, edited, manipulated, or otherwise differ in any way from those produced in the UK Action.

6. Each of the recordings were produced to Brown Rudnick as part of the UK Trial Bundles, which we understand were required to be produced in the Virginia Action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of January, 2022

Joelle Rich

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of January 2022, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

Elaine Charlson Bredehoft (VSB No. 23766)
Adam S. Nadelhaft (VSB No. 91717)
Clarissa K. Pintado (VSB No. 86882)
David E. Murphy (VSB No. 90938)
CHARLSON BREDEHOFT COHEN & BROWN, P.C.
11260 Roger Bacon Dr., Suite 201
Reston, VA 20190
Phone: 703-318-6800
Fax: 703-318-6808
ebredehoft@cbcblaw.com
anadelhaft@cbcblaw.com
cpintado@cbcblaw.com
dmurphy@cbcblaw.com

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

Counsel for Defendant Amber Laura Heard

Benjamin G. Chew