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 IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY OF BRYAN NEUMEISTER (CONFIDENTIAL UNDER SEAL**)**

FILED UNDER SEAL

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I. Neumeister Should be Excluded from Providing Any Testimony at Trial

First, Neumeister cannot testify in Mr. Depp's Counterclaim Defense/Rebuttal case because he was not identified as such. On the contrary, Mr. Depp disclosed Neumeister as an affirmative expert in his initial January 11 Disclosure, but elected to not call him in Case-in-Chief. **Att. 7.** Mr. Depp then *did not even include* Neumeister in his February 10 Disclosure "of Opposing Expert Witnesses." **Att. 8.** Mr. Depp's February 25 Rebuttal Disclosure then stated that Neumeister was designated to "rebut the opinions of Mr. Ackert," who has not yet testified in this matter and therefore cannot be "rebutted" as the Court just ruled last week. **Att. 9.** Mr. Depp's April 1 Supplemental Disclosure for Neumeister expands on the *substance* of Neumeister's proposed opinions, but does not change the procedural purposes and timing Neumeister was identified for. **Att. 3.** Because Neumeister was not even identified as a Defense to Counterclaim expert witness, and cannot testify in Rebuttal, he cannot testify at trial.

Second, Neumeister *admitted that* "[t]he metadata of all of the photographs of purported injuries that Ms. Heard has identified as her trial exhibits do not indicate that the photographs went through a photo editing application," and all "have an operating system EXIF data." **Att. 3,** at 8; **Att. 4,** at 4; **Att. 2,** 183:1-184:4, 216:13-217:9. Expert testimony is only relevant if it will "assist the trier of fact to understand the evidence or to determine a fact in issue" at trial, and Neumeister twice admitted his opinions regarding Photos 3 and 1.5 are not relevant to any trial evidence. Va. Sup. Ct. R. 2:702(a)(i). Mr. Depp even agrees an expert cannot testify to "materials produced by [Ms. Heard] that the jury will never see." **Att. 1,** at 122:21-123:5 ("So essentially Ms. Heard is arguing that Mr. Ackert should be permitted to testify that some materials produced by Mr. Depp that the jury will never see are missing metadata. I truly can't think of a more irrelevant and confusing set of testimony to put before the jury.").

Third, on March 22 Neumeister testified "I am not able to opine as to the authenticity of the photos." **Att. 6**, ¶ 16; **Att. 2**, 115:9-12. Fourth, the two photographs that Neumeister claimed had 1970s capture times were from test Zooms, *were not received from Mr. Young*, and are not trial exhibits- Neumeister merely "raised these as questions." **Att. 2**, 143:17-145:8.

For these reasons, Neumeister's opinions cannot "assist the trier of fact to understand the evidence or to determine a fact in issue" at trial, are irrelevant, and should be excluded.

II. Neumeister Should be Prohibited from Offering Undisclosed Expert Opinions

"Any application of [4:1(b)(4)(A)(i)] begins with determining whether the opinion at issue was disclosed in any form" in the pre-trial disclosure. *Crane*, 274 Va. at 591 ("[n]othing in Crane's disclosure reveals that Dr. Roggili might testify about asbestos in the ambient air"). Rule 4:1 requires a party to identify the specific grounds for each expert opinion. A party "is not relieved from [this] obligation...simply because ...[of] the opportunity to depose the expert." *John Crane, Inc. v. Jones*, 274 Va. 581, 592 (2007). "Such a rule would impermissibly alter a party's burden to disclose and impose an affirmative burden on the non-disclosing party to ascertain the substance of the expert's testimony" live at deposition, and "we reject this reading of the Rules." *Durand v. Richards*, 78 Va. Cir. 432, 435 (Roanoke 2009).[1]

First, Neumeister disclosed no opinions regarding any text messages, emails, or recordings, and admitted having no opinions at deposition. **Atts. 3-4**; **Att. 2**, at 62:18-63:9, 64:2-12, 65:20-66:18, 146:12-16; 176:7-8. Second, Neumeister admitted he disclosed no opinions regarding any photographs of property destruction. **Att. 2**, 147:4-10. Third, Neumeister

[1] In 2021, the Court again rejected the "opportunity to depose" argument for undisclosed opinions as the other party "should not be penalized for neglecting to provide the details required by Rule 4:1. *Galloway v. Cty. of Northampton*, 299 Va. 558, 564-65 (2021) ("[t]o hold otherwise would reduce the expert disclosure obligation to the status of a mere recommendation or, worse, a juristic bluff- obeyed faithfully by conscientious litigants but ignored by those willing to run the risk of unpredictable enforcement.").

admitted he was not offering any opinions on photographs produced by any third-party, such as Ms. Pennington. *Id.* at 131:4-18, 133:16-134:6.

Fourth, Depp's counsel claimed for *years* that Heard doctored photographs of her injuries. But Neumeister's Disclosure offers no such opinions, and Neumeister confirmed "that is correct" when asked if he was not offering "any opinion that any EXIF metadata of any photograph in this case was modified" (*Id.* 174:5-9; 256:14-257:1). Neumeister also responded that he was unable to opine whether each of the photographs on pages 21-63 of his Report (**Att. 4**) were "visually doctored," (**Att. 2**, 260:21-274:7).

Therefore, to the extent permitted to testify, Neumeister should be limited to the photographs and opinions specifically identified in his Disclosure, and only to those photographs currently admitted into evidence, which even Mr. Depp agrees with. **Att. 1**, at 122:21-123:5.

III. Neumeister's Undisclosed, Speculative, Hypothetical, and Generalized Expert Opinions

Rule 4:1(b)(4)(A)(i) requires disclosure of the *substance* of opinions, and while the expert in *Crane* "did disclose the topic of Buccigross' testimony, Crane did not disclose the substance of Buccigross' opinions in the disclosure or through Buccigross' report," so "Crane thus failed to comply with the Rule and the trial court did not err by excluding the testimony." *Crane*, 274 Va. at 593.[2] Expert opinions must also be "established with a reasonable degree of probability," and "[t]estimony that is speculative, or which opines on the credibility of another witness," is not admissible. Va. Sup Ct. R. 2:702. Here, the majority of Neumeister's purported testimony is speculative, hypothetical, and lacks specificity, with Neumeister even admitting that his Expert Disclosures contain "a generic answer towards one specific item or a number of

[2] In *Emerald Point, LLC v. Hawkins*, the Virginia Supreme Court found no error in excluding expert testimony because "[n]owhere... did the tenants indicate that Dr. Lieberman would rely on specific scholarly articles, treatises or texts... [or] would testify that the effects of carbon monoxide poisoning were subject to a "latency" period and that the tenants would potentially develop new symptoms after a period of latency."

items," without Neumeister specifically identifying those "number of items." **Att. 2**, 52:1-3.

First, at deposition Neumeister repeatedly referred to the following *undisclosed and never performed* photograph technical analysis:

> chromatic values, pixels and pixel order, pixel arrays luminous values, lux values, pedestal levels, aspect ratio, black levels, white balances, compressing reds, compressing greens, shadows, chrominance values, color tones, pedestal levels, and "scoping."

Att. 2, at 52:21-53:1, 60:2-4, 238:16-17, 254:11-12, 255:20-256:7, 258:6, 306:2-308:14, 309:7-10. But none of these terms even appear in the Disclosure, let alone meet the *Crane* standards.

Second, Neumeister generally referenced "392 duplicate files" and 91 files that "do not hash," (**Att. 4**, 64), but admitted to identifying *none* with specificity. (**Att. 2**, 349:3-16).

Neumeister should not be permitted testify to these undisclosed, hypothetical, speculative, and generalized opinions. All of this purported testimony fails the *Crane* test, and should be excluded.

IV. Neumeister's Inappropriate, Prejudicial, and Legal Opinions Should be Excluded

In his Disclosure and deposition, Neumeister made an array of inappropriate, degrading, false, and prejudicial accusations that would turn his testimony into a sideshow regarding the Forensic Discovery process. For example, Neumeister repeatedly insulted and criticized the timing of receiving photographs from Mr. Young, including that: **1)** "we were bum-rushed" and "dumped on" with photographs; **2)** "*you guys* literally delivered the stuff the day before it was due, so that's just...hilarious"; and **3)** accused *Heard's counsel* of "sandbagging," "dragging it out," intending to "sandbag a case," and "porching up" photos on him. **Att. 2**, at 40:2-21, 59:1-22, 61:14, 85:20-22, 90:20-21, 228:12. These inappropriate accusations should be excluded from trial, especially because Neumeister admitted conflating counsel and Mr. Young, and "ha[d] no idea" who was reviewing the photographs. *Id.* at 60:6-21; 377:20-379:4. Neumeister

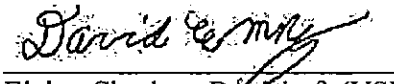
also intends to testify at trial regarding the already ruled-upon accusations of "unlicensed" and "expired" software. **Att. 4**, 68-70; **Att. 2**, 356:12-368:11.

The Court has already ruled on these issues multiple times, most recently on March 30 holding "I understand, even from my [conciliator], that this is a laborious process, and I'm not going to assign blame." **Att. 1**, at 132:19-133:4. Unlike Neumeister, Heard has no desire to "assign blame" for the timing of when Mr. Young sent the tens-of-thousands of photographs to Neumeister, but will be forced to do so if Neumeister testifies in this manner. There is also no probative value, and it is significantly outweighed by the dangers of unfair prejudice and likelihood of confusing or misleading the jury that the sideshow of the already ruled-on Forensic disputes is relevant to their deliberations regarding **the photographs *actually admitted* at trial.**

To the extent the Court permits evidence and testimony regarding the Forensic process, which it should not, Mr. Depp should be precluded from referring to the fact that it was Court Ordered or that Ms. Heard opposed the Motion as unduly prejudicial, and both parties should only refer to Mr. Young as the "neutral reviewer" to protect Mr. Young's identity.

Finally, the Rules of Evidence prohibit an expert witness from "express[ing] any opinion which constitutes a conclusion of law." But Neumeister testified about a forensic discovery company's E&O Insurance "kill[ing] you" and the "insurance company be[ing] held liable." **Att. 2**, 326:8-327:22. Neumesiter even outrageously accused iDS of a crime- stealing "pirated software"- the equivalent of "walk[ing] out of a store with a box of software and I didn't pay for it...wouldn't that be considered theft"? This inappropriate, prejudicial, irrelevant, and legal opinion testimony should be prohibited.

May 23, 2022



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CERTIFICATE OF SERVICE

I certify that on this 23rd day May, 2022, a copy of the foregoing was served by email, by agreement of the parties, addressed as follows:

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