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

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S POST-TRIAL MOTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Following a six-week jury trial, a jury of Ms. Heard's peers rendered a verdict against her in virtually all respects. Though understandably displeased with the outcome of trial, Ms. Heard has identified no legitimate basis to set aside in any respect the jury's decision. Virginia law is clear that a verdict is not to be set aside unless it is "plainly wrong or without evidence to support it." Va. Code § 8.01-680. Here, the verdict was well supported by the overwhelming evidence, consistent with the law, and should not be set aside. Mr. Depp respectfully submits that the Court should deny Ms. Heard's Post-Trial Motions, which verge into the frivolous.

II. THE DAMAGES AWARDED BY THE JURY WERE SUPPORTED BY THE EVIDENCE AND LAW

The Court should reject Ms. Heard's baseless contention that the damages award was excessive and unsupported by the evidence. Under Virginia law, the Court may only correct a verdict when it is "so excessive as to shock the conscience of the court or to compel the conclusion that the verdict was the product of passion or prejudice or some misunderstanding of the facts or the law." *See Hogan v. Carter*, 226 Va. 361, 372 (1983). The Court may not arbitrarily substitute its judgment for that of the jury. *See id.* In assessing the jury's verdict, the Court "is required to consider the evidence in the light most favorable to the party that received the jury verdict." *See Shepard v. Capitol Foundry of Virginia, Inc.*, 262 Va. 715, 721 (2001). "If there is evidence, when viewed in that light, to sustain the jury verdict, then remitting the verdict is error." *Id.* Moreover, the Court must "give the recipient of the jury verdict the benefit of all substantial conflicts in the evidence, as well as the reasonable inferences that may be drawn from the evidence." *See McGuire v. Hodges*, 273 Va. 199, 205 (2007).

While Ms. Heard slings an exceptional amount of mud at the wall in the hope that something might stick, the jury's verdict on damages was perfectly reasonable and supported by

the evidence and testimony in this case. For instance, Mr. Depp's manager, Jack Whigham, testified to the following:

- In 2017, the year **after** Ms. Heard's public allegations of domestic abuse but **before** the Op-Ed was published, Mr. Depp filmed multiple pictures, including three studio films for which he was compensated between $8 million and $13.5 million. *See* Tr. 3491-3493.
- 2017 was a "typical year" for Mr. Depp. *See* Tr. 3494:22-3495:6.
- Because 2017 was busy with three large studio films, Mr. Depp had a specific plan in 2018 – to rest the first half of the year and then do a tour with his band (the Hollywood Vampires), which explains his absence from filming any studio movies in 2018. *See* Tr. 3495:16-3496:11. (Then, of course, the Op-Ed was published in December 2018).
- Mr. Depp did not appear in any studio films between December 18, 2018 (the date the Op-Ed was published) and October 2020 (the date before the UK judgment).[1] *See* Tr. 3509:22-3510:4.
- In response to a question asking if Mr. Depp lost roles between December 2018 and October 2020, Mr. Whigham answered "Yes. After the op-ed, it was impossible to get him

---

[1] Ms. Heard's assertion that Mr. Depp "made no attempt to limit his damages" to the time period preceding the UK judgment is simply false. *See* Mot. at 6. The testimony elicited from Mr. Whigham and Mr. Depp's damages experts were all limited to the period between publication of the Op-Ed and the date of the UK judgment. Moreover, ***the jury instructions expressly limited the time period for which Mr. Depp could recover damages***, stating both that "Mr. Depp cannot recover damages for any harm that occurred after November 2, 2020" and that any damages must have been "caused by the defamatory statements at issue." Tr. at 7738:7-11; 7738:12-16. "Juries are presumed to follow their instructions," *Davison v. Commonwealth*, 69 Va. App. 321, 331 (2018), and there is no reason to believe the jury did not follow the instructions in this case.

a studio film, which is what we normally would have been focused on in that time period."[2] *See* Tr. 3520:6-9.

This testimony on its own fully supports the jury's $10 million verdict as a reasonable jury could infer from this testimony that in the 22-month period after the Op-Ed Mr. Depp lost one or more studio films as a result of the Op-Ed (and the newly alleged sexual violence allegations). *See, e.g.*, *Stump v. Commonwealth*, No. 1112-03-3, 2004 WL 2214058, at *3 (Va. Ct. App. Oct. 5, 2004) (noting that the credibility and weight of witnesses' testimony "belongs solely to the factfinder. When weighing conflicting testimony, the 'touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity.' With rare exceptions, jurors are 'free in the exercise of their honest judgment to prefer the testimony of a single witness to that of many.'") (internal citations omitted); *Cardwell v. Norfolk & W. Ry. Co.*, 114 Va. 500, 511 (1913) ("The jury may discard the preponderance of evidence as unworthy of credence and accept the evidence of a single witness upon which to base their verdict, and upon well–settled principles the verdict cannot be disturbed if the evidence of that witness is sufficient, standing alone, to sustain it.").

Mr. Whigham also testified that he had negotiated an agreed-upon deal for Mr. Depp to star in the sixth installment of the Pirates of the Caribbean franchise for $22.5 million; that as of the fall of 2018 (before the Op-Ed) the producer of the film Jerry Bruckheimer "really wanted" Mr. Depp in that film; and that in the immediate aftermath of the Op-Ed being published, "It

---

[2] Mr. Whigham testified that the Op-Ed was the first time he had heard any allegations of sexual abuse against Mr. Depp. *See* Tr. 3507:4-14. In addition to Mr. Whigham's testimony, Richard Marks, an expert in the entertainment industry, testified about the devastating impact of sexual and domestic abuse allegations in Hollywood. *See* Tr. 3583:15-3584:3; 3585:20-3587:7; 3592:21-3593:8.

became clear [Disney] was going in a different direction" in terms of its plans to use Mr. Depp in the sixth installment.[3] *See* Tr. 3500:21-3501:4; 3516:8-21; 3530:8-17.

Michael Spindler, an expert in forensic accounting, testified that Mr. Depp suffered lost earnings of approximately **$40.3 million** between December 18, 2018 and November 2, 2020 as a result of the Op-Ed – $20 million in lost income from Pirates 6 and $20 million in lost income from other potential projects. *See* Tr. 3786:5-13. In reaching this conclusion with respect to lost income from other potential projects (*i.e.* not Pirates 6), Mr. Spindler utilized 2017 as a base year and extrapolated Mr. Depp's earnings over the period December 18, 2018 through October 2020 (and as stated above, 2017 was a year after Ms. Heard's physical abuse allegations and a "typical" year for Mr. Depp in terms of his workload and earnings). Mr. Depp also testified to the damage Ms. Heard's allegations in the Op-Ed inflicted on his career (including learning within days of the Op-Ed that Disney was dropping him from Pirates 6), as well as the emotional distress the statements in the Op-Ed caused him. *See* Tr. 2282:9-2287:17. The fact that Pirates 6 has not been

---

3 While Ms. Heard selectively cites the testimony of Disney's corporate representative stating that she did not know whether Mr. Depp would appear in a sixth installment of the Pirates movies, *see* Mot, at 7-8, as discussed above, it is the jury's job to weigh the credibility of each witness and when there is conflicting testimony, make a determination as to which testimony is more believable. Disney, of course, has great incentive not to state anything controversial or otherwise damage any potential future relationship with Mr. Depp or any other actor. Moreover, Tina Newman, the individual designated to testify on behalf of Disney, clearly acknowledged that she was not informed on the matter, and that others at the studio might have more knowledge but were never deposed. *See* Tr. at 6120:5-6121:15 ("that decision doesn't fall within my job responsibilities. It's above my head, best way to say it.... There are people that I work under. And those particular persons may or may not have more knowledge. But I can't speak on behalf of them.") Given Ms. Newman's open acknowledgement that she lacked information and could not speak on behalf of her superiors, her evidence borders on useless, and the jury was entitled to disregard it or give it little weight. The jury could reasonably believe the testimony of Mr. Whigham and others who testified regarding Mr. Depp's damages. Moreover, Ms. Heard's insinuation that Mr. Depp may have lost Pirates 6 due to the UK judgment, *see* Mot. at 8-9, is completely unsupported by any evidence.

made certainly does not preclude a finding by the jury that, but for the Op-Ed, Disney *would have* made it with Mr. Depp, consistent with the deal Mr. Whigham testified was already in place.

In addition to the evidence cited above of significant actual damages, **Mr. Depp also is entitled to presumed damages** because Ms. Heard's statements were defamatory *per se*. This Court has repeatedly confirmed that Ms. Heard's statements were defamatory per se, and jury instructions were given on that basis. *See* Tr. at 7737:3-7738:7. Accordingly, Mr. Depp was not even required to present proof of actual damages to sustain a verdict (although extensive proof of damages was in fact presented). *See, e.g.*, *Askew v. Collins*, 283 Va. 482, 486 (2012) ("[I]f the published words are determined ... to be actionable per se at common law, compensatory damages for injury to reputation, humiliation, and embarrassment are presumed" and holding "[t]hus, as a matter of law, the jury needed no proof of damages suffered by Collins on which to predicate its compensatory award based upon the per se defamation negligently published by Askew. The reputational damage to Collins resulting from Askew's statement was properly presumed, and the jury's award of compensatory damages to Collins was appropriate under established common law principles for per se defamation."); *Snead v. Harbaugh*, 241 Va. 524, 528 (1991) ("An award of general damages is based on a concept of per se injury, and resulting damage is presumed to exist if the defamation tort is established. No further proof of injury or loss is required for recovery of general damages."); *WJLA-TV v. Levin*, 264 Va. 140, 162 (2002) (refusing to set aside $2 million jury verdict for defamatory statements even though there was only evidence of $900,000 in actual damages as the plaintiff was entitled to presumed damages as well).

While Ms. Heard cites to four Virginia cases in support of her remittitur argument, *see* Mot. at 17-20, each defamation case must be assessed on the specific facts of that case, and the cases cited by Ms. Heard are clearly distinguishable. Three of the four cases are decades old, and

none involves an international A-list celebrity, false allegations of sexual abuse, or defamation in a nationally circulated newspaper. For example, in the first case cited by Ms. Heard, *Richmond Newspapers v. Lipscomb*, 234 Va. 277 (1987), the Virginia Supreme Court upheld remittitur of $900,000 from a $1,000,000 damage award to a teacher who was defamed in an article published in a local newspaper. *See* Mot. at 17. Nothing about those facts even remotely resemble the facts in this case.

Similarly, in *Gazette, Inc. v. Harris*, the Virginia Supreme Court determined a $100,000 damages award to a professor who was defamed in a local student newspaper (The Cavalier Daily) was "so out of proportion to the damage sustained as to be excessive as a matter of law." 229 Va. 1, 48 (1985). The Court noted there was effectively no damage in that case. *See id.* Mr. Depp, on the other hand, put forth substantial evidence and testimony as to how he was damaged. Again, the facts are not even remotely similar.

Next, Ms. Heard points to *Thomas v. Psimas*, noting this was a case where a compensatory damage award for defamation was reduced because the plaintiff had already been unflatteringly portrayed in the media at the time the defamatory statement was made. *See* Mot. at 18. Again, the case is easily distinguishable because in *Thomas*, "Plaintiff presented no evidence of any particular loss that he suffered as a result of Defendant's statement. He offered no witnesses to tell the jury about the effect that Defendant's statements had upon him. No one testified that they thought less of him or that his reputation had been harmed by Defendant's statement. The loss of his employment with the City of Portsmouth was not attributed to the defamation, and no prospective employer testified that Plaintiff had been denied any job opportunity because of the statement. He called no witnesses who even saw the television broadcast." *See Thomas v. Psimas*, 101 Va. Cir. 455 (Va. Cir. Ct. 2019). Conversely, there is substantial evidence in this case that Mr. Depp was

harmed by the defamatory statements in the Op-Ed. Beyond Mr. Depp's testimony about the impact the Op-Ed had on him, *see* Tr. at 1854:15-1855:1 ("I felt ill. I felt sick. I mean, sick in a sense that – that I – there was no truth in it. There was no truth in it whatsoever. And the fact that it was coming down on me so hard and so quickly and how it – it gained momentum around the world. And then you notice people looking at you differently. And then you notice calls stop coming from agents and producers and that sort of thing."), the evidence shows Mr. Depp was actually entitled to far more than the $10 million awarded. That the jury awarded only $10 million to Mr. Depp, after Mr. Depp presented evidence of damages several times that amount, renders untenable Ms. Heard's argument that the jury failed to consider other potential sources of damage to Mr. Depp's reputation or career (such as being "unflatteringly portrayed" in the media, *see* Mot. at 18).[4]

Fourth, and finally, Ms. Heard points to *Sheckler v. Virginia Broad. Corp.*, 63 Va. Cir. 368 (2003), again arguing that the court reduced a damage award from $10 million to $1 million because there were other causes of the injury sustained by the plaintiff. *See* Mot. at 19. Again, the case is easily distinguishable. First, the jury's award of $10 million in this case reflects its consideration of other potential sources of damage to Mr. Depp's reputation and career as there was evidence supporting a much larger damage award. Second, the plaintiff in *Sheckler* worked at an auto shop. The injury to the plaintiff's business/career simply is not on the same level as Mr. Depp – one of the highest paid actors in Hollywood. Third, the plaintiff in *Sheckler* was not entitled

---

[4] Ms. Heard also argues here that the $10 million in compensatory damages awarded was intended to punish her. *See* Mot. at 18. But that clearly is not the case – the $5 million in punitive damages was intended to punish Ms. Heard for her actions, not the $10 million in compensatory damages which reasonably reflects the damage attributable to the Op-Ed between December 18, 2018 and November 2, 2020. The $5 million in punitive damages was, of course, properly reduced to the statutory cap of $350,000.

to presumed damages, unlike Mr. Depp. *See Sheckler*, 63 Va. Cir. 368 (distinguishing a Virginia case where a $2 million defamation award was sustained because "unlike the case at bar, the plaintiff carried the burden of proving actual malice, and therefore, the plaintiff was entitled to receive presumed as well as actual damages.").

Ms. Heard asserts that damages to Mr. Depp's career must have had other causes than the Op-Ed, but as noted above, there was ample evidence introduced that the Op-Ed harmed Mr. Depp in unique and in multiple ways. Ms. Heard also attempts to argue that the fact that evidence was presented about the parties' historical relationship and Ms. Heard's initial allegations of abuse in 2016 somehow suggest that the jury awarded damages for conduct by Ms. Heard separate from the Op-Ed, dating back to 2016. Not so. It was obviously necessary to present evidence regarding the historical relationship and allegations, since that provided necessary context for the jury to evaluate the defamatory nature of the statements in Ms. Heard's Op-Ed, and her purpose, motives, and veracity in continuing to claim to have been abused in the Op-Ed. But at no point did Mr. Depp request damages for anything other than the statements in the Op-Ed, the jury instructions were explicit that damages were required to be caused by the defamatory statements at issue, and Ms. Heard's arguments are based on nothing other than pure speculation.[5]

Simply put, the jury's verdict must be assessed based on the testimony and evidence presented in this case. And collectively, the testimony and evidence presented in this case is more than enough to support the jury's verdict of $10 million in compensatory damages for the period December 18, 2018 through November 2, 2020. There is nothing about the jury's award that

---

[5] Furthermore, Ms. Heard waived any objection to the contents of Mr. Depp's opening and closing statements (as well as questions posed and testimony regarding historical events), by failing to timely object at the time. *See, e.g., Cheng v. Commonwealth*, 240 Va. 26, 39 (1990) ("[a] motion for a mistrial is untimely and properly refused when it is made after the jury has retired"); *Breard v. Commonwealth*, 248 Va. 68, 82 (1994).

"shocks the conscience" and Ms. Heard's argument that the verdict is excessive and unsupported by the evidence should be emphatically rejected by the Court.

III. THE VERDICTS ON THE COMPLAINT AND COUNTERCLAIM ARE CONSISTENT

Ms. Heard's argument that the jury's verdicts are inconsistent is clearly wrong. While jury verdicts that are "irreconcilably inconsistent ... cannot stand," the Court will "'harmonize' jury verdicts alleged to be inconsistent 'if there is any reasonable way to do so.'" *Hong Zhao v. Am. Orient Grp., Inc.*, No. 121737, 2014 WL 11398548, at *3 (Va. Jan. 10, 2014). "[I]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent." *See id.* (citing *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.")). Here, there is no inconsistency between the jury's verdict on the Complaint and Counterclaim.

The jury returned a verdict in Mr. Depp's favor on all three statements in the Complaint. Each of those statements contained a defamatory implication that Mr. Depp abused Ms. Heard:

- "Amber Heard: I spoke up against sexual violence - and faced our culture's wrath. That has to change"
- "Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out."
- "I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse."

The jury's verdict on these three statements in the Complaint reflects the jury's determination that Mr. Depp did not in fact abuse Ms. Heard and that Ms. Heard was lying about being a victim of abuse at the hands of Mr. Depp.

As to the three statements in Ms. Heard's Counterclaim, the jury determined Ms. Heard did **not** meet the elements of defamation for the two statements by Mr. Waldman stating Ms. Heard's abuse allegations were a hoax:

- "Amber Heard and her friends in the media used fake sexual violence allegations as both a sword and shield, depending on their needs. They have selected some of her sexual violence hoax, 'facts' as the sword, inflicting them on the public and Mr. Depp."
- "We've reached the beginning of the end of Ms. Heard's abuse hoax against Johnny Depp."

Again, this verdict reflects the jury's determination that Mr. Depp did not in fact abuse Ms. Heard, *i.e.*, it was not defamatory for Mr. Waldman to state Ms. Heard's abuse allegations were a hoax. That is perfectly consistent with the jury's verdict on the three Complaint statements.

The third statement in Ms. Heard's Counterclaim is the sole statement for which the jury found Mr. Depp defamed Ms. Heard:

> Quite simply, this was an ambush, a hoax. They set Mr. Depp up by calling the cops but the first attempt did not do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their story straight under the direction of a lawyer and publicist, and then placed a second call to 911.

As is clear from even a cursory review of Mr. Waldman's words, there are multiple highly specific and detailed factual elements to this statement that the jury could determine were false while still concluding that the abuse allegations by Ms. Heard about Mr. Depp were false and defamatory. For example, the jury could have determined that Ms. Heard lied about being abused but that she and her friends did not "spill[] a little wine and rough[] the place up" in an attempt to make a false police report on May 21, 2016. Of course, such a finding on this sole Counterclaim statement is not inconsistent at all, much less irreconcilable with the jury's verdict on the other five statements at issue where the jury clearly determined that Mr. Depp did not physically or sexually abuse Ms.

Heard. If anything, the jury's conclusions show the care with which the jury analyzed each of the statements and that Ms. Heard's claims were considered fairly and seriously. The verdict should stand.

IV. THE FIRST AMENDMENT DOES NOT BAR RECOVERY FOR DEFAMATION BY IMPLICATION EVEN WHEN THE STATEMENTS AT ISSUE INVOLVE PUBLIC FIGURES OR MATTERS OF PUBLIC CONCERN

This Court has repeatedly held that Ms. Heard's statements in the Op-Ed are sufficient to support a claim of defamation by implication, and Ms. Heard presents no arguments in her Motion that would justify a reversal of those rulings at this stage. Indeed, Ms. Heard egregiously and flagrantly misrepresents Virginia law in arguing that the Virginia Supreme Court has signaled defamation by implication may not be applicable when it involves a public figure or matters of public concern. *See* Mot. at 22-23. The Virginia Supreme Court has made no such suggestion and the out-of-context language relied on by Ms. Heard, *see id.*, is misleading.

In *Pendleton v. Newsome*, the Virginia Supreme Court reiterated Virginia precedent that defamation can be made by inference, implication, or insinuation. *See* 290 Va. 162, 172 (2015). In that case, the defendants argued their statements were protected by the First Amendment. *See id.* at 173. The Virginia Supreme Court rejected that argument, stating ***"a defamatory innuendo is no more protected by the First Amendment than is defamatory speech expressed by any other means."*** *See id.* (emphasis added). The *Pendleton* Court then discussed *Chapin v. Knight-Ridder*, a Fourth Circuit case that involved public figures and a subject matter that touched on matters of public concern. Critically, the Fourth Circuit recognized that even in a case involving public figures and matters of public concern, there still could be defamation by implication. *See Chapin v. Knight–Ridder, Inc.*, 993 F.2d 1087, 1092–93 (4th Cir.1993) (plaintiff was a public figure, yet the court noted that defamatory meaning may be communicated by direct reference or by

implication). But the *Chapin* court also recognized in such a case that "a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author also intends or endorses the inference." *See id.* The Virginia Supreme Court in *Pendleton* went on to distinguish this specific language from the facts in *Pendleton*, stating:

> Our decisions in defamation cases do not include a requirement that 'a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true.' The plaintiff's burden is proof by a preponderance of the evidence. Nor have we held that the defendant's words must, by themselves, suggest that the author intends or endorses the allegedly defamatory inference. Such a holding would immunize one who intentionally defames another by a careful choice of words to ensure that they state no falsehoods if read out of context...

See Pendleton, 290 Va. at 174 (internal citation omitted). The reason that the Virginia Supreme Court drew this distinction with the *Chapin* case is because in that case, unlike *Pendleton*, "defendants were members of the press, the plaintiffs were public figures, and the subject matter touched on matters of public concern." *See id.* at n.5. This merely reflects the higher standard applicable to public figures. It was **not**, as Ms. Heard suggests, the Virginia Supreme Court signaling that defamation by implication cannot be applicable to public figures or matters of public concern.

To the contrary, the *Pendleton* Court recognized explicitly that "[b]ecause defamatory speech falls outside the protection of the First Amendment, a First Amendment analysis is inapposite in a case in which a plaintiff must allege and ultimately prove that the defendant intended his words to express a defamatory innuendo, that the words actually did so, and that the plaintiff was actually defamed thereby." *See Pendleton*, 290 Va. at 174. There is no suggestion that the First Amendment might protect defamatory speech if the speech involves a public figure

or matter of public concern. Clearly public figures should be allowed to seek legal redress based on a theory of defamation by implication, just like anyone else.

Indeed, many other jurisdictions have recognized the sound policy that defamation by implication is permissible for public figure plaintiffs. *See, e.g.*, *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 829 (Iowa 2007) ("We conclude that, despite [plaintiff's] status as a public figure, he may maintain a suit based on alleged defamation by implication"); *Toney v. WCCO Tel.*, 85 F.3d 383, 393 (8th Cir. 1996) (concluding that Minnesota would recognize defamation by implication); *Chapin*, 993 F.2d at 1092–93 (plaintiff was a public figure, yet the court noted that defamatory meaning may be communicated by direct reference or by implication); *Saenz v. Playboy Enter., Inc.*, 841 F.2d 1309, 1314 (7th Cir.1988) (concluding that nothing in Supreme Court cases justifies denying a public official a cause of action premised on defamatory innuendo and holding "[t]o deny a public official the opportunity to demonstrate the defamatory innuendo of a publication, even one critical of governmental conduct, is to open Pandora's Box from which countless evils may spring. A legal fiction denying the existence of clearly discernable, though not explicit charges, exposes public officials to baseless accusations and public mistrust while promoting an undisciplined brand of journalism both unproductive to society and, as we see it, unprotected by constitutional considerations"); *Thomas v. Los Angeles Times Commc'ns, LLC*, 189 F. Supp. 2d 1005, 1012 (C.D. Cal. 2002) (recognizing that "neither the California courts nor the Ninth Circuit have ever held that a public figure cannot state a claim by defamation for implication."); *see also Stevens*, 728 N.W.2d at 829 ("denying a public figure the right of redress in the face of implied defamation is unfair. 'Precluding a plaintiff from recovering for defamation that is cleverly couched in implication is inequitable. It rewards a defendant for having the foresight or literary facility to secrete a 'classic and coolly-crafted libel' in the overtones of a

facially neutral statement. It may provide a loophole through which media defendants can escape liability for 'high-profile' defamatory stories by insinuating what they may not state.'") (*quoting* Nicole Alexandra LaBarbera, The Art of Insinuation: Defamation by Implication, 58 Fordham L.Rev. 677, 701 (1990)); *id.* ("[s]uch a draconian approach [denying cause of action for defamation by implication] would invite a publisher who deliberately seeks to harm the reputation of a public person to manipulate statements purposefully or to omit critical facts with the design of implying a false, defamatory meaning. A literal and accurate report of specific facts could be used to destroy reputation deliberately. In other words, a form of calculated falsehood would be placed beyond the reach of the law of defamation") (*quoting* C. Thomas Dienes & Lee Levine, Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan, 78 Iowa L.Rev. 237, 308 (1993)).

As the testimony and evidence of the ACLU's corporate representative in this case showed, Ms. Heard made a very calculated effort in crafting the language of the Op-Ed to try to avoid any explicit defamatory reference to Mr. Depp (while clearly referencing him implicitly). She should not be able to skirt liability stemming from the devastating impact of her Op-Ed simply by carefully choosing her words so as to convey a defamatory meaning about Mr. Depp but without actually using his name. Such a result would be manifestly unjust and has no support in Virginia law.[6]

Simply put, the Supreme Court of Virginia has never held or hinted that defamation by implication does not apply to public figures or matters of public concern. The Court has held that "a defamatory innuendo is no more protected by the First Amendment than is defamatory speech

---

6 To the extent Ms. Heard invokes the non-binding law of other jurisdictions where defamation by implication of a public figure is only permissible when the inference arises from the omission of material facts in the challenged communication, *see* Mot. at 24, such a standard would still be unavailing for Ms. Heard who failed to disclose the material fact that she was not sexually or physically abused.

expressed by any other means." *See Pendleton*, 290 Va. at 173. That the target of such defamatory innuendo is a public figure does not change the calculus. That is especially true when considering the actual malice standard applicable in defamation cases involving public figures where the plaintiff must prove the defendant made the statement with knowledge of falsity or reckless disregard for the truth. Such speech is not protected by the First Amendment and Ms. Heard's argument should be rejected.

V. THE JURY'S FINDING OF DEFAMATION REGARDING THE OP-ED HEADLINE WAS CONSISTENT WITH AND SUPPORTED BY THE LAW AND FACTS

The jury correctly found that Ms. Heard was liable for the headline of the online edition of the Op-Ed: "I spoke up against sexual violence – and faced our culture's wrath." Even conceding that Ms. Heard did not write the headline herself, the evidence shows that she clearly adopted it and republished it, thereby creating liability for defamation.

"Under the republication rule, one who repeats a defamatory statement is as liable as the original defamer." *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991); *see also* Sack on Defamation, 5th Ed., Volume 1, at § 7.1 ("The common law of libel has long held that one who republishes a defamatory statement [originally made by another] 'adopts' it as his own and is liable in equal measure to the original defamer."). The republication rule "is meant to give plaintiffs an additional remedy when a defendant edits and retransmits the defamatory material **or** redistributes the material with the goal of reaching a new audience. Stated differently, republication occurs when the speaker has **'affirmatively reiterated'** the statement." *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016) (emphasis added) (internal citations omitted). "In the context of internet articles, other courts have held that 'a statement on a website is not republished unless the statement itself is substantively altered or added to, or the

website is directed to a new audience.'" *See id.* (emphasis added); *see also Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012) ("One 'general rule' is that a statement is republished when it is 'repeat[ed] or recirculate[d] ... to a new audience'" and holding "a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience."). Typically, the single publication rule invoked by Ms. Heard is a rule designed to limit the number of actions that can be maintained for a statement by the *same* defamer. *See, e.g., Armstrong v. Bank of Am.*, 61 Va. Cir. 131 (2003); *see also* Restatement (Second) of Torts § 577A(1) ("[E]ach of several communications to a third person by the same defamer is a separate publication."). The purpose of the rule is to prevent endless retriggering of the statute of limitations. It does **not** provide a safe haven for a different defamer to republish a statement without consequence.

Here, the evidence shows that Ms. Heard tweeted a link to the online version of the Op-Ed, including the title which was prominently displayed. *See* Plaintiff's Exhibit 3. In that tweet, she proudly declared "Today, I published this op-ed in the Washington Post..." Nowhere in her tweet, or anywhere else, does she disavow the title. Instead, she adopted it. *See Reuber*, 925 F.2d at 712 ("one who repeats a defamatory statement is as liable as the original defamer."). If that is not "affirmatively reiterating" the statement, it is hard to imagine what is.[7]

Ms. Heard continued, noting in the tweet that the article was "about women who are channeling their rage about violence and inequality into political strength despite the price of coming forward. From college campuses to Congress, we're balancing the scales." This is a substantive addition to the text of the article, and it further implies that Ms. Heard was a victim of

---

[7] The jury was free to disregard Ms. Heard's testimony that she did not see the title of the Op-Ed when she tweeted it. Indeed, the title was prominently featured in the tweet.

abuse (a defamatory assertion the jury soundly rejected). Moreover, she replied to her own tweet on the same day stating, "I'm honored to announce my role as an @ACLU ambassador on women's rights." These substantive (and defamatory) additions are sufficient to constitute republication of the Op-Ed.

Further confirming Ms. Heard's republication of the Op-Ed is that she directed it to a new audience. Ms. Heard's tweet went out for the hundreds of millions of twitter users to see, including her hundreds of thousands of direct twitter followers. There is no question that readers of the Washington Post online (where the Op-Ed was posted) are a decidedly different audience than the millions of people using twitter. That distinction is important when looking at the cases cited by Ms. Heard in support of her argument, like *Lokhova v. Halper*. In that case, in determining that there was no republication, the Fourth Circuit relied on the fact that the New York Times article at issue was hyperlinked in a subsequent New York Times article and thus, "the hyperlink served as a reference for the New York Times' existing audience and did not direct the old article to a new audience." *See* 995 F.3d 134, 143 (4th Cir. 2021).[8] That is **not** the case here where Ms. Heard's twitter followers (and twitter users in general) are a different audience than readers of the Washington Post online. While Ms. Heard cites to some non-binding case law in other jurisdictions stating that a hyperlink "may call the existence of the article to the attention of a new audience, it does not present the defamatory contents of the article to the audience" and thus is not a republication (*see, e.g.*, Mot. at 30 citing to *In re Philadelphia Newspapers, LLC*, 690 F.3d 161,

---

[8] The *Lokhova* case serves as further proof that the purpose of the single publication rule is to prevent endless resetting of the statute of limitations against a single defamer. *See id.* at 142 (arguing "that hyperlinks constitute republication because pursuant to the republication doctrine, 'where the same defamer communicates a defamatory statement on several different occasions to the same or different audience, each of those statements constitutes a separate publication' that resets the statute of limitations.").

175 (3d Cir. 2012)), that too is unavailing because here, **the defamatory content is in the title prominently displayed in the article's thumbnail and Ms. Heard's tweet**. So even the case law cited by Ms. Heard supports a finding that she retweeted the defamatory content to a "new audience."

Because Ms. Heard adopted the statement as her own, affirmatively reiterated the statement, substantively added to the statement, and disseminated the statement to a new audience, Ms. Heard adopted/republished the statement in every sense of the law. The jury was fully justified in its finding Ms. Heard liable for the headline.

VI. THE JURY'S FINDING OF ACTUAL MALICE IS WELL SUPPORTED IN THE RECORD

Ms. Heard's argument that there is insufficient evidence of actual malice is specious. In the context of defamation, actual malice requires proof of knowledge or reckless disregard as to the falsity of the statements at issue. Of course, actual malice may be proven by circumstantial evidence, since rarely if ever will a defendant openly admit to knowledge of falsity. *See, e.g., Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 ("circumstantial evidence can suffice to demonstrate actual malice").

There was copious evidence presented at trial from which the jury could find (and did find) that Ms. Heard's false statements about Mr. Depp were made with actual malice. Indeed, the jury concluded that Ms. Heard lied about being abused, the falsity of which is necessarily within her own personal knowledge. Ms. Heard necessarily knows whether Mr. Depp actually engaged in the abusive conduct she alleged; and if he did not (which the jury found to be the case), then she necessarily knows that too. By way of example, Ms. Heard obviously knows firsthand whether Mr. Depp struck her on the face with a cell phone on May 21, 2016, a few days before she walked into court with a mark on her face to obtain a domestic violence restraining order and publicly

proclaim herself, for the first time, to have been abused by Mr. Depp, which claim she subsequently renewed in her Op-Ed. Such facts are inescapably within her personal knowledge. If – as the jury concluded – her allegations of abuse were false, then the test for malice is satisfied by virtue of the jury's finding that she made those allegations up. Simply put, a reasonable jury, having found that Ms. Heard's story was false, could reasonably conclude from the evidence that Ms. Heard was aware that her claims were false (indeed, a reasonable jury likely could not come to any other conclusion). *See, e.g., Welsh v. City and County of San Francisco*, No. C–93–3722 DLJ, 1995 WL 714350 at *5 (N.D. Cal. 1995):

> In a case like this one, however, where defamatory statements are published by a party with personal knowledge of their truth or falsity, the required element of "actual malice" merges into the element of "falsity." For example, if defendant Ribera actually "physically grabb[ed] and kiss[ed]" the plaintiff against her will, defendant Ribera would know that he engaged in that conduct and his denial of that accusation would therefore be a statement made "with knowledge that it was false." Similarly, if the kissing incident was fabricated by Welsh, she would know that Ribera never forcibly kissed her and, under the *New York Times v. Sullivan* definition, she would have acted with actual malice.

See also St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968) ("[t]he defendant in a defamation action brought by a public official cannot, however, automatically ensure a favorable verdict by testifying that he published with a belief that the statements were true.... ***Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination***...") (emphasis added); *Clark v. Jenkins*, 248 S.W.3d 418, 438 (2008) (finding of actual malice against a defendant was justified where "the jury could have inferred he made up or imagined the facts underlying his statement"); *Hildebrant v. Meredith Corp.*, 63 F.Supp.3d 732, 746 ("a reasonable jury could infer that [the defendant] fabricated that part of the story. Fabricating a story is evidence of actual malice"); *Carson v. Allied News Co.*, 529 F.2d 206, 213 (1976)("[t]he defendants in fabricating and imagining 'facts' necessarily entertained serious doubts as to the truth of the statements and had a high degree of awareness of

their probable falsity"); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253 (1974) (jury was "plainly justified" in concluding that falsehoods were made with knowledge or reckless disregard, where they related to facts within the defendant's personal knowledge).

Indeed, there is compelling and substantial evidence that was presented at trial that Ms. Heard's story of abuse was deliberately fabricated. Merely by way of example, Mr. Depp clearly testified to never having abused Ms. Heard, either on May 21, 2016, or on any other occasion. *See, e.g.*, Tr. at 7230:14-7231:6 ("It's insane to hear heinous accusations of violence, sexual violence that she's attributed to me, that she's accused me of.... All false.... I have never, in my life, committed sexual battery, physical abuse, all these outlandish, outrageous stories of me committing these things..."). Furthermore, Mr. Depp's testimony that he did not abuse (and in fact was abused by) Ms. Heard was corroborated by multiple other witnesses. Those witnesses included, without limitation, the eyewitness testimony of Mr. Depp's bodyguard Travis McGivern, who testified to never seeing Mr. Depp strike Ms. Heard, but that he did see Ms. Heard strike Mr. Depp. *See* Tr. at 3459:16-22. Similarly, Mr. Depp's bodyguard Malcolm Connelly testified that he never saw any injuries on Ms. Heard or witnessed any violence by Mr. Depp, but that he did witness injuries on Mr. Depp, as well as witness Ms. Heard throwing items at Mr. Depp. *See* Tr. at 3333:10-3339:20. Moreover, there was evidence presented at trial that the photographs that Ms. Heard took of her purported injuries had been edited, that there were multiple versions of the same photographs, and that their authenticity could not be confirmed, *see* Tr. at 7374:11-16; 7399:1-4; 7403:14-18, from which a jury could reasonably infer that Ms. Heard had manipulated them. And, there was evidence from which the jury could infer that Ms. Heard's initial public allegations of abuse were, from the outset, part of a deliberate campaign against Mr. Depp in the context of the parties' divorce. For instance, testimony was presented from a former employee of the tabloid

TMZ that the paparazzi had been notified in advance by a reliable source that Ms. Heard would be seeking a restraining order, would have an alleged bruise on her face that could be photographed, and could be photographed at a particular time outside the courthouse. *See* Tr. at 7335:18-22; 7336:14-21.

Ms. Heard's arguments that the element of malice has somehow not been established are utterly meritless, misleading, and amount to nothing more than an improper request for the Court to substitute its judgment for that of the jury. Ms. Heard cites to out-of-context[9] snippets of exhibits which she contends supports her claims of abuse, but the fact of the matter is that the jury weighed the evidence from both sides, and concluded that Ms. Heard's claims of physical abuse, which she renewed in her Op-Ed, were a lie. That is a determination properly made by the jury. It has evidentiary support in the record, and it cannot be set aside now merely because Ms. Heard disagrees with it. *See* Va. Code 8.01-680.

VII. MR. DEPP PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF DEFAMATION BY INNUENDO

In her desperate attempt to justify the extreme remedy of setting aside the jury's carefully considered determinations, which were fully supported by overwhelming credible evidence, Ms. Heard presents a tortured recitation of Virginia defamation law, the evidence presented at trial, and the Op-Ed itself. The actual evidence, however, presented during the six-week trial before this Court, which must be considered in the light most favorable to the Plaintiff, Mr. Depp, is more than sufficient to sustain the jury's determination that Ms. Heard's Op-Ed defamed Mr. Depp by innuendo. *See Cooke v. Griggs*, 183 Va. 851, 854 (1945) ("In view of the verdict of the jury [in

---

9 For instance, Ms. Heard cites a recording of Mr. Depp discussing purportedly headbutting Ms. Heard, while omitting to disclose to the Court that Mr. Depp clearly testified that he did not deliberately "headbutt" Ms. Heard, but that their heads collided on one occasion when she physically attacked him. *See* Tr. 1804:10-1806:19.

favor of the plaintiff] and the judgment of the court, we must consider [the evidence] in the light most favorable to the plaintiff.").

Starting with the Op-Ed itself, the defamatory statements therein direct and inform the reader to a specific time period – "two years ago" – when the public became aware that Ms. Heard had accused Mr. Depp of domestic violence. *See* Trial Ex. No. 1. At trial, evidence of the extensive press coverage concerning Ms. Heard's domestic abuse allegations against Mr. Depp in 2016 – two years prior to the December 2018 Op-Ed – was presented to the jury, including articles depicting Ms. Heard walking into the LA courthouse to obtain the DVRO against Mr. Depp with a mark on her face and a People Magazine article containing pictures that purported to show injuries to Ms. Heard caused by Mr. Depp. *See* Trial Ex. 411. Circumstantial evidence of Ms. Heard's cooperation and encouragement of this media coverage back in 2016 was also presented to the jury. *See* Tr. at 7336:14-7337:21(explaining that as a field assignment manager for entertainment news website company TMZ, Mr. Tremaine sent a team of cameras to photograph the right side of Ms. Heard's face from a news producer's tip, meaning it had been from a verified source). Additionally, evidence was presented that, when the Op-Ed was pitched to the Washington Post, Ms. Heard's relationship and allegations against Mr. Depp were explicitly identified; and, immediately after the Op-Ed was published, press coverage of the Op-Ed identified Mr. Depp as the subject of Ms. Heard's statements concerning abuse within the Op-Ed. *See* Tr. at 3216:1-14; 3231:18-3232:11. Based on the foregoing evidence, the jury could have reasonably found, and did in fact correctly find, that the three challenged statements in the Op-Ed conveyed to those who read them that Mr. Depp had physically abused Ms. Heard during their brief marriage. *See Pendleton v. Newsome*, 290 Va. 162, 175 (2015) (holding that a plaintiff may prevail on a theory of defamation by implication where he demonstrates that "in light of the circumstances

prevailing at the time [the statements] were made" they conveyed a "defamatory implication to those who heard or read them").

A. There Is Sufficient Evidence, Including the Op-Ed Itself, That Would Reasonably Cause a Reader to Understand the Headline to Be About Mr. Depp

In a misplaced attempt to escape the jury's well-founded findings, Ms. Heard first attempts to dissect the Op-Ed and have the headline ("Amber Heard: I spoke up against sexual violence – and faced our culture's wrath") read in isolation. *See* Mot. at 36-37. Ms. Heard argues that, because there was no evidence that she had accused Mr. Depp of sexual violence prior to the publication of the Op-Ed, the circumstances surrounding the publication of the Op-Ed could not have reasonably caused readers to believe that the headline referred to Mr. Depp. *See id.* As is recognized by the very authority Ms. Heard relies upon, in evaluating the defamatory meaning of a statement, it is appropriately considered in the context of the surrounding circumstances *and* the publication as a whole. *See Pendleton*, 290 Va. at 172; *see also Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649, 655 (D.D.C. 1966) ("Appellant's publication must be taken as a whole, and in the sense in which it would be understood by the readers to whom it was addressed."); *Morris v. Massingill*, 61 Va. Cir. 532 (2003) (finding it inappropriate to consider each defamatory statement singularly, rather than as a whole, to assess defamatory meaning).

The headline, thus, is appropriately read in conjunction, not just with the "surrounding circumstances" described *supra*, but also with the other statements in the Op-Ed, including the other two statements the jury found to be defamatory. *See* Trial Ex. 1. Like the headline, which references experiencing "our culture's wrath," one of these statements also states that Ms. Heard experienced "our culture's wrath" "*two years ago*" when she became a "public figure representing domestic abuse." *See id.* (emphasis added). The headline, thus, could also be understood by readers as referring to "sp[eaking] up against sexual violence" "two years ago," when Ms. Heard very

publicly accused Mr. Depp of domestic abuse and, according to her Op-Ed, "faced our culture's wrath." *See id.* The fact that other news outlets understood the Op-Ed to be referring to Ms. Heard's relationship with Mr. Depp, *see, e.g.*, Tr. at 3231:18-3232:11; 3233:21-3234:1, further underscores a finding that the public understood the headline to have this defamatory meaning.

B. Mr. Depp Presented Evidence of Relevant Surrounding Circumstances That Would Reasonably Cause a Reader to Understand the Three Statements in the Op-Ed as Conveying a Defamatory Implication about Mr. Depp

Ms. Heard's second tactic is to rewrite the law of defamation by innuendo to require "contemporaneous facts" that connect the defamatory words to the plaintiff. *See* Mot. at 38-39. Ms. Heard cherry-picks language from *one* case where the Supreme Court of Virginia found that "statements or publications by the same defendant . . . made over a relatively short period of time . . . *may* be considered together for purposes of establishing that the plaintiff was the person" about whom the allegedly defamatory statements were made. *See id.* at 39 (quoting *WJLA-TV v. Levin*, 264 Va. 140, 152-53 (2002)). But, just because contemporaneous facts "may" connect defamatory words to a plaintiff, does not mean that *only* contemporaneous facts can do so; and, indeed, Ms. Heard does not cite any authority so limiting the context which may imbue a statement with defamatory meaning concerning a plaintiff. *See id.* at 38-39. All that is required is that "circumstances surrounding" or "prevailing at the time" a statement is made could reasonably cause the reader to understand the statements to convey a defamatory implication about the plaintiff. *See Pendleton*, 290 Va. at 172.

Here, evidence was presented at trial that the "circumstances prevailing at the time" was the earlier media coverage of Ms. Heard's allegations of abuse against Mr. Depp in 2016, which had at the time been addressed and resolved by the settlement of the divorce and the parties' joint public statement that neither had intended to harm the other, but were not so distant as to have been forgotten by the average reader of the Op-Ed. These allegations, seemingly resolved by the

divorce settlement, were resurrected by the Op-Ed. *See* Tr. Ex. 415, 427. Moreover, even if Ms. Heard's tortured reading of Virginia law were correct, there *were* "contemporaneous facts" presented at trial that confirm that readers of the Op-Ed were understanding it in the context of the media coverage from 2016, namely, articles published immediately after the Op-Ed that essentially re-wrote the Op-Ed with Mr. Depp's name. *See* Tr. at 3231:18-3232:11.

C. Mr. Depp is Not Recovering for Statements Ms. Heard Made During a Judicial Proceeding

Ms. Heard's final argument, unsurprisingly, also contorts the trial evidence and Virginia defamation law. Ms. Heard appears to argue that because Ms. Heard publicly sought a domestic violence restraining order against Mr. Depp, any further statement she makes about the abuse alleged in that DVRO is privileged even if such statement is not made in a judicial proceeding. *See* Mot. at 39-40. The judicial privilege, also referred to as absolute privilege, is not so broad: it does not apply to any statement made about facts that are the subject of a judicial proceeding. *See Donner v. Rubin*, 77 Va. Cir. 309 (2008) (holding that the absolute communication privilege of judicial proceedings does not extend to statements made prior to litigation or to statements made after the conclusion of the litigation) (citing *Lindeman v. Lesnick*, 268 Va. 532, 538, 604 S.E.2d 55, 58 (2004)). At trial, Mr. Depp did not even present any evidence of a statement Ms. Heard made in a judicial proceeding. He presented evidence of the *media coverage* surrounding Ms. Heard's allegations of abuse against Mr. Depp in 2016, including articles which included photographs of Ms. Heard with purported injuries she allegedly sustained from the abuse. *See* Plaintiff's Exhibit 409, 411, 414. Mr. Depp did not and has never claimed that this coverage was defamatory, but rather that this media coverage constituted part of the "surrounding circumstances" which imbued the defamatory statements in the Op-Ed with a defamatory meaning with respect to Mr. Depp – namely, that he abused Ms. Heard during their relationship. For the

reasons stated *supra*, this evidence of the circumstances surrounding the publication of the defamatory statements in the Op-Ed could reasonably cause a reader to understand these statements to refer to Ms. Heard's claim, found by the jury to be false, that Mr. Depp abused Ms. Heard.

VIII. THE COURT SHOULD NOT CONDUCT AN INVESTIGATION OF JUROR 15 BECAUSE DEFENDANT HAS WAIVED SUCH ARGUMENTS AND HAS FAILED TO PROVIDE ANY EVIDENCE OF UNFAIR PREJUDICE OR ANY DUE PROCESS VIOLATION

Ms. Heard's desperate, after-the-fact demand for an investigation of Juror 15 based on a purported error in his birth date, Mot. at 40, is misplaced. As a threshold matter, Ms. Heard waived her right to challenge the accuracy of the information listed in the jury panel by failing to raise this objection contemporaneously. *See, e.g.,* Supreme Court Rule 5A:18; Va. Code § 8.01-384(A) ("it shall be sufficient that a party, *at the time the ruling or order of the court is made or sought,* makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor....") (emphasis added); *Ludwig v. Commonwealth*, 52 Va. App. 1, 10, 660 S.E.2d 679, 683 (2008) ("The main purpose of the contemporaneous objection rule 'is to alert the trial judge to possible error so that the judge may consider the issue intelligently and take any corrective actions necessary to avoid unnecessary appeals, reversals and mistrials.'") (quoting *Martin v. Commonwealth,* 13 Va. App. 524, 530, 414 S.E.2d 401, 404 (1992)). Further, Va. Code § 8.01-352 outlines the procedure for objecting to irregularities in jury lists and to alleged legal disabilities of jurors and provides that:

> Unless objection to such irregularity or disability is made pursuant to subsection A herein and unless it appears that the irregularity was intentional or that the irregularity or disability be such as to *probably cause injustice* . . . in a civil case to the party making the objection, then such irregularity or disability *shall not be cause* for summoning a new panel or juror or *for setting aside a verdict or granting a new trial.*

Va. Code § 8.01-352(B) (emphasis added). As discussed further below, Ms. Heard has shown no evidence of prejudice or injunctive and, therefore, her belated argument regarding Juror 15 should be rejected by the Court. *See, e.g., Mighty v. Commonwealth*, 17 Va. App. 495, 498, 438 S.E.2d 495, 497 (1993) (refusing to reverse case where two convicted felons sat on jury, a matter which was not discovered until after trial, because defendant made no showing of injustice); *Burks v. Webb*, 199 Va. 296, 310–11, 99 S.E.2d 629, 641 (1957) (finding defendant's objection to the qualification of the juror was untimely where defendant had knowledge of the fact that a brother of a sworn juror would be a material witness in the case, but did not make an objection until after brother's "testimony was not in accord with what he hoped and thought it would be. Even if the relationship between the juror and the witness were a sufficient reason for disqualifying the juror, defendant with full knowledge of this relationship accepted him as a juror without objection. His objection to the qualification of the juror and his motion to discharge the jury came too late.").

Contrary to Ms. Heard's contention otherwise, the parties do have a statutory obligation to verify the accuracy of the information listed in the jury panel before trial and any errors are not grounds for a mistrial. Va. Code § 8.01-353(A) ("Any error in the information shown on such copy of the jury panel *shall not be grounds for a mistrial or assignable as error on appeal, and the parties in the case shall be responsible for verifying the accuracy of such information.*") (emphasis added). Disregarding this clear statutory language directly on point to Ms. Heard's issue with Juror 15, Ms. Heard shamelessly presents this argument to the Court. Further, the Clerk's Office provided the pre-panel jury list to the parties on April 6, 2022, ***five days before the jury was empaneled***, which gave Ms. Heard ample time to verify the accuracy of the information contained therein. In a rare moment of candor, Ms. Heard ***admits*** that she was aware of this purported discrepancy in Juror 15's birth year from the very start of trial because "Juror 15 . . . was ***clearly***

born later than 1945." Mot. at 40 (emphasis added). Ms. Heard chose not to raise this alleged "discrepancy" with the Court during the voir dire process or ***at any time*** during the six-week trial and thereby waived it. *See, e.g., Cheng v. Commonwealth*, 240 Va. 26, 39 (1990) ("A motion for a mistrial is untimely and properly refused when it is made after the jury has retired.").

Moreover, Ms. Heard's argument is based on pure speculation. First, Ms. Heard cites to "publicly available information," that Juror 15 was actually born in 1970, Mot. at 40, but fails to attach such information to her Motion or otherwise identify it for the Court.[10] Second, Ms. Heard provides no support whatsoever for her conclusory assertion that her due process was somehow compromised. While Ms. Heard has a right to an impartial jury,[11] she has failed to identify ***any*** way in which the inclusion and service of Juror 15, assuming *arguendo* there had been a mistake in his birth year, somehow robbed her of that opportunity. Unsurprisingly, Ms. Heard cites to no case law to support her argument that the service of Juror 15 if he is not the same individual that the Court assigned as Juror 15 somehow comprised her due process and would warrant the drastic remedy of "setting aside the verdict and ordering a new trial." Mot. at 41, n.9. Ms. Heard makes no showing of any prejudice and, accordingly, her speculative arguments fail. "[N]either the sole

---

10 On the afternoon of July 8, 2022 – a full week after the deadline to file post-trial motions – Ms. Heard filed a Supplemental Memorandum in Support of Section VII of Defendant Amber Heard's Post-Trial Motions Based on Additional Discovered Facts. As addressed in Mr. Depp's concurrently filed Motion to Strike, Ms. Heard's Supplemental Memorandum is untimely and should not be considered by the Court. To the extent the Court does consider this additional information, Mr. Depp maintains his contention that Ms. Heard has waived her argument with respect to Juror 15, has based her argument on pure speculation, and has provided no evidence that she was prejudiced in any way or that her due process was somehow violated.

11 *See Beavers v. Commonwealth*, 245 Va. 268, 276, 427 S.E.2d 411, 418 (1993) ("The purpose of the selection procedure is to select a fair and impartial jury."); *Davis v. Sykes*, 202 Va. 952, 956, 121 S.E.2d 513, 516 (1961) (internal citations omitted) ("The purpose of the *voir dire* examination is to ascertain whether any juror has any interest in the case, or any bias or prejudice in relation to it, and that he in fact stands indifferent in the cause.").

fact of irregularity nor the mere suspicion of injustice based upon the irregularity is sufficient to warrant setting aside a verdict." *Com. Union Ins. Co. v. Moorefield*, 231 Va. 260, 265, 343 S.E.2d 329, 332–33 (1986); *see also Yellow Cab Corp. of Abingdon v. Henderson*, 178 Va. 207, 221, 16 S.E.2d 389, 396 (1941) ("Mere suspicion or possible inferences cannot be allowed to overrule the orderly administration of justice, for otherwise there would be continued delays and many proper verdicts set aside. The importance of avoiding another trial, if the first trial was fair, is of paramount importance.").

Even assuming *arguendo* Ms. Heard's latest thesis, *i.e.*, that a son served instead of his father, there would be no prejudice, as Juror 15 was qualified to serve as a juror in Fairfax County and was vetted during *voir dire* by the Court and the parties' counsel, just as all of the other jurors were. Such speculative arguments unfounded in law and without factual basis are improper at the post-trial motion stage. At this point, after a six-week trial was held, the Court should exercise its discretion and reject Ms. Heard's belated, speculative, and clearly pretextual arguments regarding Juror 15.

IX. CONCLUSION

For all the reasons set forth above, Mr. Depp respectfully requests that this Court deny Ms. Heard's frivolous Motion in its entirety and reject her outlandish requests to set aside the jury verdict, dismiss the Complaint, or, in the alternative, order a new trial, and investigate Juror 15.

Dated: July 11, 2022

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

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
smoniz@brownrudnick.com

Jessica N. Meyers (*pro hac vice*)
Yarelyn Mena (*pro hac vice*)
BROWN RUDNICK LLP
7 Times Square
New York, NY 10036
Tel.: (212) 209-4800
jmeyers@brownrudnick.com
ymena@brownrudnick.com

Wayne F. Dennison (*pro hac vice*)
Rebecca M. Lecaroz (*pro hac vice*)
Stephanie P. Calnan (*pro hac vice*)
BROWN RUDNICK LLP
One Financial Center
Boston, MA 02118
Tel.: (617) 8568149
wdennison@brownrudnick.com
rlecaroz@brownrudnick.com
scalnan@brownrudnick.com

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

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II

Plaintiff,

v.

AMBER LAURA HEARD

Defendant.

Civil Action No.: CL-2019-0002911

ORDER

Upon consideration of Defendant and Counterclaim Plaintiff Amber Laura Heard's Post-Trial Motions ("Defendant's Motion"), the memorandum in support thereof, Plaintiff and Counterclaim Defendant John C. Depp II's opposition thereto, the record, and being fully informed, it is this ____ day of _____ 2022, hereby ORDERED as follows:

1. Defendant's Motion is DENIED;

The Honorable Penney S. Azcarate
CHIEF JUDGE

Compliance with Rule 1:13 requiring the endorsement of counsel of record is modified by the Court, in its discretion, to permit the submission of the following electronic signatures of counsel in lieu of an original endorsement or dispensing with endorsement.

WE ASK FOR THIS:

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

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
smoniz@brownrudnick.com

Jessica N. Meyers *(pro hac vice)*
Yarelyn Mena *(pro hac vice)*
BROWN RUDNICK LLP
7 Times Square
New York, NY 10036
Tel.: (212) 209-4800
jmeyers@brownrudnick.com

Wayne F. Dennison *(pro hac vice)*
Rebecca M. Lecaroz *(pro hac vice)*
Stephanie P. Calnan *(pro hac vice)*
BROWN RUDNICK LLP
One Financial Center Boston, MA
02118
Tel.: (617) 8568149
Wdennison@brownrudnick.com
rlecaroz@brownrudnick.com
scalnan@brownrudnick.com

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

SEEN AND OBJECTED TO:

_____

Elaine Charlson Bredehoft (VSB No. 23766)
Adam S. Nadelhaft (VSB No. 91717)
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
dmurphy@cbcblaw.com

J. 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July 2022, I caused copies of the foregoing to be served 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 & NADELHAFT, P.C.
11260 Roger Bacon Dr., Suite 201
Reston, VA 20190
Tel.: 703-318-6800
Fax: 703-318-6808
ebredehoft@cbcblaw.com
anadelhaft@cbcblaw.com
cpintado@cbcblaw.com
dmurphy@cbcblaw.com

J. Benjamin Rottenborn (VSB No. 84796)
Joshua R. Treece (VSB No. 79149)
Elaine D. McCafferty (VSB No. 92395)
WOODS ROGERS PLC
10 S. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
Tel.: (540) 983-7540
brottenborn@woodsrogers.com
jtreece@woodsrogers.com
emccafferty@woodsrogers.com

Counsel for Defendant and Counterclaim Defendant Amber Laura Heard

Benjamin G. Chew (VSB #29113)