VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff,

v.

AMBER LAURA HEARD,

Defendant.

Civil Action No.: CL-2019-0002911

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO DENY THE REMAINDER OF DEFENDANT'S PLEA IN BAR

Plaintiff John C. Depp, II ("Mr. Depp") has moved this Honorable Court to deny the remainder of Defendant's plea in bar as to anti-SLAPP immunity. In further support thereof, Plaintiff states as follows:

BACKGROUND

On March 1, 2019, Mr. Depp filed his Complaint for defamation against Ms. Heard to clear his name after she revived false and malicious claims that Mr. Depp had committed acts of domestic violence in an op-ed punished in *The Washington Post* (the "Op-Ed"). In response to the Complaint, Ms. Heard twice unsuccessfully sought dismissal of Mr. Depp's defamation claims. Ms. Heard's second attempt was in the form of a demurrer and plead in bar seeking dismissal of Mr. Depp's defamation claims, *inter alia*, on the grounds that Ms. Heard was entitled to immunity from Mr. Depp's defamation claims under Virginia's anti-SLAPP statute. At the hearing on her demurrer and plea in bar, Ms. Heard reserved her argument that she was entitled to immunity under Virginia's anti-SLAPP statute and so, the issue was never ruled upon by the Court. *See* **Exhibit A** (Letter Opinion of March 27, 2020 at 3 n.1).

After the Court overruled Ms. Heard's demurrer as to all but one of the statements Mr. Depp alleged to be defamatory and denied Ms. Heard's plea in bar regarding the statute of limitations, Ms. Heard filed counterclaims against Mr. Depp, the vast majority of which the Court subsequently dismissed. *See* **Exhibit B** (Letter Opinion of January 4, 2021). In that Letter Opinion, the Court, in denying part of Mr. Depp's plea in bar, found that Mr. Depp is not entitled to anti-SLAPP immunity. *Id.* at 10. For the same reasons, and those set forth below, the Court should deny the remainder of Defendant's plea in bar (the rest of which the Court denied, per **Exhibit A**) and find that Ms. Heard is similarly *not* entitled to anti-SLAPP immunity from Mr. Depp's defamation claims.

ARGUMENT

The Virginia anti-SLAPP statutes provides, in relevant part, that "[a] person shall be immune from civil liability for a . . . claim of defamation based solely on statements (i) regarding matters of public concern that would be protected under the First Amendment to the United

States Constitution made by that person that are communicated to a third party." Va. Code § 8.01-223.2. However, the immunity provided by Section 8.01-223.2 "shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false." *Id.*

1. **The Court Should Rule That, As A Matter of Law, Defendant's Statements Are Neither Opinions, Nor Do They Concern Important Public Issues And Are Therefore Unprotected**

As a threshold matter, Ms. Heard's statements in the Op-Ed are *not* "regarding matters of public concern that would be protected by the First Amendment." The First Amendment protects a citizen's interest in having access to "informed opinions on important public issues." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004). Ms. Heard's statements defaming Mr. Depp are neither "opinions" nor do they concern "important public issues." As this Court already recognized in overruling Ms. Heard's demurrer on Mr. Depp's defamation claims, Ms. Heard's defamatory statement in the Op-Ed, although couched as opinions, are actionable because they imply an assertion of objective fact with defamatory implication. *See* **Exhibit A**. Indeed, the Supreme Court has recognized that such statements are *not* protected by the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) ("We are not persuaded that . . . an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment."). Moreover, the Supreme Court of Virginia, in *Pendleton*, considered and rejected the precise argument that Ms. Heard makes in a very similar context: "Because 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." *Pendleton v. Newsome*, 290 Va. 162, 174 (2015). In any

event, the statements in Ms. Heard's Op-Ed that defame Mr. Depp by accusing him of domestic violence are fundamentally matters of a *private* concern: Ms. Heard's defamatory statements concern what she falsely contends occurred in her *private*, domestic relationship with Mr. Depp. *See* Letter Opinion, dated January 4, 2021 at 10 (finding that Mr. Depp's statements in response to Ms. Heard's allegations of abuse were not statements "regarding matters of public concern that would be protected by the First Amendment"). Ms. Heard, accordingly, is not shielded from liability for her statements by Virginia's anti-SLAPP statute.

2. Defendant Made Her Statements with Actual Knowledge of Their Falsity

Ms. Heard's defamatory statements are also not protected by Virginia's anti-SLAPP statute because such statements were made "with actual . . . knowledge that they are false." Va. Code § 8.01-223.2. Mr. Depp's Complaint "is replete with assertions that [Ms. Heard] made the multitude of statements with actual knowledge of their falsity." *See Steele v. Goodman*, 382 F. Supp. 3d 403, 427 (E.D. Va. 2019); Compl. ¶¶ 6, 23, 62-68. Indeed, and quite obviously, Ms. Heard knows whether the defamatory statements in her Op-Ed, portraying herself as a victim of domestic abuse at the hands of Mr. Depp, are false. Accordingly, Ms. Heard is *not* entitled to immunity under Virginia's anti-SLAPP statute because Mr. Depp's allegations raise a plausible inference that Ms. Heard made her defamatory statements with actual knowledge of their falsity. *See Steele*, 382 F. Supp. 3d at 427 (holding that defendant could not avail himself of the protections of Virginia's anti-SLAPP statute where plaintiff's allegations "plausibly support a conclusion that [defendant] made the statements with knowledge of their falsity"); *see also* Letter Opinion, dated January 4, 2021, at 10 (denying plea in bar for anti-SLAPP immunity because counterclaim-plaintiff alleged sufficient facts to demonstrate allegedly defamatory

statements made "with actual or constructive knowledge or with reckless disregard for whether they are false").

The Court may resolve the remainder of Ms. Heard's plea in bar for anti-SLAPP immunity as a matter of law. This follows from the Court's January 4th Letter Opinion, which both granted Mr. Depp's plea in bar on statute of limitations grounds as to five of the statements Ms. Heard alleged to be defamatory and denied Mr. Depp's plea in bar as to anti-SLAPP immunity. Here too, denial of Ms. Heard's plea in bar for anti-SLAPP immunity is warranted as a matter of law.

WHEREFORE, in consideration of the foregoing, Mr. Depp respectfully moves this Court to deny Ms. Heard plea in bar for anti-SLAPP immunity to Mr. Depp's defamation claims.

Respectfully submitted,

[redacted]

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Dated: January 13, 2021

EXHIBIT A

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Re: *John C. Depp, II v. Amber Laura Heard*, Case No. CL-2019-2911

Dear Counsel:

This matter came before the Court on December 20, 2019, for argument on Defendant's Demurrer and non-evidentiary Plea in Bar. At the conclusion of the hearing, the Court took the matter under advisement. The questions presented are (1) whether Plaintiff has pleaded an actionable claim for defamation by implication, and (2) whether Plaintiff is barred from recovering on his defamation claim under the applicable statute of limitations.

OPINION LETTER

BACKGROUND

Plaintiff's claim for defamation stems from four statements made in Defendant's op-ed, which was published in the *Washington Post* online and in print on December 18, 2018, and December 19, 2018, respectively. The article, entitled "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change" (online) and "A transformative moment for women" (print), does not name Plaintiff explicitly. It discusses how—two years before the op-ed was published—Defendant became a public figure "representing domestic abuse," what Defendant experienced in the aftermath of attaining this status, and what Defendant believed could be done to "build institutions protective of women." *See* Compl. Ex. A. at 1-4. Plaintiff brought this action on March 1, 2019, alleging that the op-ed was really about "Ms. Heard's purported victimization after she publicly accused her former husband, Johnny Depp ("Mr. Depp") of domestic abuse in 2016 . . . ." Compl. at ¶ 2. Plaintiff asserts that "the op-ed's clear implication that Mr. Depp is a domestic abuser is categorically and demonstrably false," Compl. at ¶ 3, and he specifically takes issue with the following four statements from the op-ed:

1. Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change.

2. 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.

3. I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.

4. I write this as a woman who had to change my phone number weekly because I was getting death threats. For months, I rarely left my apartment, and when I did, I was pursued by camera drones and photographers on foot, on motorcycles and in cars. Tabloid outlets that posted pictures of me spun them in a negative light. I felt as though I was on trial in the court of public opinion—and my life and livelihood depended on myriad judgments far beyond my control.

Compl. at ¶ 22. Plaintiff details a number of facts and circumstances to contextualize the 2018 op-ed, including certain events surrounding the couple's highly publicized divorce in 2016, to support his allegation that Defendant falsely implied that she was a victim of domestic abuse at his hands. *See* Compl. at ¶¶ 13-19, 24-30.

Presently before the Court is Defendant's Demurrer, wherein Defendant asserts that the four statements are not actionable under a theory of defamation, and one of Defendant's Plea in Bar arguments as to the statute of limitations.[1] This Letter Opinion addresses these issues in turn.

[1] At the plea in bar portion of the hearing, Ms. Heard reserved her arguments that (1) she is entitled to immunity under Virginia's Anti-SLAPP statute and (2) that she cannot be liable for the online article's title for a later evidentiary hearing.

ANALYSIS

I. Defendant's Demurrer

On demurrer, the trial court must determine whether the complaint states a cause of action upon which the relief requested may be granted. *Welding, Inc. v. Bland County Service Auth.*, 261 Va. 218, 226 (2001). "A demurrer admits the truth of all properly pleaded material facts and all facts which are impliedly alleged, as well as facts that may be fairly and justly inferred." *Pendleton v. Newsome*, 290 Va. 162, 171 (2015) (citing *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397 (1991). "In deciding whether to sustain a demurrer, the sole question before the trial court is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant." *Id.*

The elements of a defamation claim include: (1) publication of (2) an actionable statement with (3) the requisite intent. *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). On demurrer, "the trial judge is responsible for determining whether, as a matter of law, the allegedly defamatory statements are actionable." *Taylor v. Southside Voice, Inc.*, 83 Va. Cir. 190 (2011). To be "actionable," a statement must be both "false and defamatory." *Schaecher*, 290 Va. at 91. Because statements of opinion cannot be "false," they are never actionable. *See Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132 (2003). A statement qualifies as "defamatory" only if it "tends to injure one's reputation in the common estimation of mankind . . . ." *Schaecher*, 290 Va. at 92 (noting the speech complained of must have "the requisite defamatory 'sting' to one's reputation.").

Typically, "an editorial or op-ed column" is "ordinarily not actionable" because it appears "in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints." *Id.* However, Virginia recognizes that "a defamatory charge may be made by inference, implication, or insinuation," *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 8 (1954), and that a statement expressing a defamatory meaning may not be "apparent on its face." *Pendleton*, 290 Va. at 172 (citing *Webb v. Virginian-Pilot Media Cos., LLC*, 287 Va. 84, 89 n.7 (2014)). Accordingly, "[i]n order to render words defamatory and actionable, it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." *Carwile*, 196 Va. at 7.

Under this theory of implied defamation, "in determining whether the words and statements complained of are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor." *Carwile*, 196 Va. at 8. "However, the meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation." *Id.* The innuendo functions to show "how the words used are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." *Id.*

The Supreme Court of Virginia has summarized the role of a trial court on demurrer where the plaintiff has proceeded on a theory of defamation by implication as follows:

> Because Virginia law makes room for a defamation action based on a statement expressing a defamatory meaning "not apparent on its face," **evidence is admissible to show the circumstances** surrounding the making and publication of the statement **which would reasonably cause the statement to convey a defamatory meaning** to its recipients. **Allegations that *such circumstances* attended the making of the statement, with an explanation of the circumstances and the defamatory meaning allegedly conveyed, will suffice to survive demurrer if the court, in the exercise of its gatekeeping function, deems the *alleged meaning* to be defamatory**. Whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial.

Pendleton, 290 Va. at 172 (bold emphasis added).

In the present case, Plaintiff pleaded (1) that Defendant published the statements at issue. Compl. at ¶ 75, and (2) that Defendant had the requisite intent when making the statements that allegedly imply that Plaintiff abused Defendant. Compl. at ¶ 81 ("At the time of publication, Ms. Heard knew these statements were false."). Accordingly, the Court must determine whether the statements complained of are actionable. *See Schaecher*, 290 Va. at 91. Because a statement must be both false and defamatory to be actionable, *Fuste*, 265 Va. at 132, and because the statements at issue were made in an op-ed that does not name Plaintiff, the Court must determine whether Plaintiff has adequately pleaded that the statements otherwise possess a prohibited defamatory implication. *See Carwile*, 196 Va. at 8. To make this determination, the Supreme Court of Virginia has articulated that when "[a]llegations that . . . circumstances [that would reasonably cause the statement to convey a defamatory meaning to its recipients] attended the making of the statement, with an explanation of the circumstances and the defamatory meaning allegedly conveyed," they will "suffice to survive demurrer if the court, in the exercise of its gatekeeping function, deems the *alleged meaning* to be defamatory." *Pendleton*, 290 Va. at 172 (emphasis added).[2] Here, Plaintiff has pleaded circumstances that would reasonably cause three of the four statements at issue to convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard, and this alleged meaning is in fact defamatory.

A. Three Statements Are Actionable Under a Theory of Defamation by Implication

The Court finds that the following three statements are actionable:

i. Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change.

[2] "Whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial." *Id.*

ii. 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.

iii. I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.

First, Plaintiff has alleged a number of circumstances that would reasonably cause the three statements above to convey the alleged defamatory meaning—that Mr. Depp abused Ms. Heard—to its recipients. Specifically, the Complaint alleges that the events surrounding the parties' divorce—including Ms. Heard's repeated allegations of domestic violence—attended the making of her statements in the *Washington Post* op-ed. *See* Compl. at ¶ 16 (alleging that, in May 2016, Ms. Heard falsely yelled "stop hitting me Johnny," in addition to stating that Mr. Depp struck her with a cell phone, hit her, and destroyed the house, before she "presented herself to the world with a battered face as she publicly accused Mr. Depp of domestic violence and obtained a restraining order against him."); ¶ 19 ("Despite dismissing the restraining order and withdrawing the domestic abuse allegations, Ms. Heard (and her surrogates) have continuously and repeatedly referred to her in publications, public service announcements, social media postings, speeches, and interviews as a victim of domestic violence, and a "survivor," always with the clear implication that Mr. Depp was her supposed abuser."); ¶ 20 ("Most recently, in December 2018, Ms. Heard published an op-ed in the Washington Post that falsely implied Ms. Heard was a victim of domestic violence at the hands of Mr. Depp."); ¶ 21 ("The "Sexual Violence" op-ed's central thesis was that Ms. Heard was a victim of domestic violence and faced personal and professional repercussions because she "spoke up" against "sexual violence" by "a powerful man."); ¶ 22 ("Although Mr. Depp was never identified by name in the "Sexual Violence" op-ed, Ms. Heard makes clear, based on the foundations of the false accusations that she made against Mr. Depp in court filings and subsequently reiterated in the press for years, that she was talking about Mr. Depp and the domestic abuse allegations the she made against him in 2016."). Drawing every fair inference in Plaintiff's favor, the Court finds that these circumstances, as pleaded, would reasonably cause the three statements above to convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard.

Second, Plaintiff has alleged an implied meaning that is clearly defamatory. Compl. at ¶ 78 (noting that these statements imply "Ms. Heard was the victim of domestic violence at the hands of Mr. Depp."). The implication that Mr. Depp abused Ms. Heard is defamatory *per se* because it imputes to Plaintiff "the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished." *See Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 713 (2006) (citing *Fleming v. Moore*, 221 Va. 884, 889 (1981); *see also* VA. CODE § 18.2-57.2 (2020); CAL. PENAL CODE § 243(e)(1) (2016).

Because the Complaint contains allegations of circumstances that would reasonably cause the three statements above to convey an alleged defamatory meaning, and this alleged meaning—that Mr. Depp abused Ms. Heard—is defamatory *per se*, the Court is instructed under *Pendleton* to allow these statements to proceed beyond demurrer. 290 Va. at 172-73.

Additionally, the Court finds that allowing these three statements to proceed beyond demurrer under the standard articulated in *Pendleton* is consistent with the doctrine set forth in *Carwile*, which states that "[t]he province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it [cannot] introduce new matter, nor extend the meaning of the words used [beyond their ordinary and common acceptation], or make that certain which is in fact uncertain." *Carwile*, 196 Va. at 8.

By holding that Plaintiff has met the pleading standard set forth in *Pendleton*, 290 Va. at 172, the Court is not allowing Plaintiff to proceed on an allegation of an implicit defamatory meaning that introduces new matter. The implied defamatory meaning alleged was that Mr. Depp abused Ms. Heard, and Defendant's op-ed concerns the matter of what happened after Defendant attained the status of a public figure representing domestic abuse. Drawing every fair inference in Plaintiff's favor, the Court can conclude—as Plaintiff alleges—that an aspect of the article relied on the factual underpinning that Ms. Heard was abused by Mr. Depp.

This finding also does not extend the meaning of the words in each of the three actionable statements beyond their ordinary meanings.

Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change.

The first statement could reasonably convey the alleged defamatory meaning—that Mr. Depp abused Ms. Heard—to its readers without extending the words beyond their ordinary and common acceptation. *See Pendleton*, 290 Va. at 172; *Carwile*, 196 Va. at 8. Resolving every fair inference in Plaintiff's favor, this statement could reasonably imply that the "sexual violence" Ms. Heard "spoke up against" was in fact perpetrated by Mr. Depp, as he alleges. While the Court recognizes that this factual implication derives only from a part of the statement, and that the remaining portion is couched in Defendant's subjective opinion and perception, the Supreme Court of Virginia has held that "[f]actual statements made in support of an opinion . . . can form the basis for a defamation action." *See Lewis v. Kei*, 281 Va. 715, 725 (2011) (citing *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46 (2009)).

Although the Court in *Lewis* noted that, "in determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement" it made clear that this meant, "in considering whether a plaintiff has adequately pled a cause of action for defamation, *the court must evaluate all of the statements attributed to the defendant and determine whether, taken as a whole, a jury could find that defendant knew or should have known that the factual elements of the statements were false and defamatory.*" *Id.* (emphasis added). This Court holds that a jury in this case could find that Defendant knew or should have known that the implied factual elements of this statement (and the other two allowed to proceed) were false and defamatory based on the pleadings.

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.

As for the second statement, Defendant called herself "a public figure representing domestic abuse," which can be read to imply that she became a representative of domestic abuse *because* she was abused by Mr. Depp, not just because she spoke out against the alleged abuse. This inference can be drawn without extending the language beyond its "ordinary and common acceptation." *Carwile*, 196 Va. at 8. The word "represent" has over ten meanings in Merriam Webster's dictionary, including: "to serve as a specimen, example, or instance of," and "to serve as a counterpart or image of." *See Represent*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/representing (last visited Mar. 25, 2020). Notwithstanding the other meanings of the word "represent," the Court must resolve every fair inference in Mr. Depp's favor, including that Ms. Heard meant she was an "example of" a public figure who was domestically abused. This conclusion is further supported by Defendant saying she attained this status "two years ago," which would have been the same time the parties' divorce was unfolding. Again, in light of the law set forth in *Lewis*, 281 Va. at 725, this Court holds that a jury in this case could find that Defendant knew or should have known that the implied factual elements of this statement were false and defamatory based on the pleadings.

I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.

Drawing every fair inference in Plaintiff's favor, the Court can fairly conclude that Defendant's statement that she saw "how institutions protect men accused of abuse," could reasonably convey to its recipients that she saw how Mr. Depp was protected by institutions after he abused her and she spoke up against it. The Court finds that to reference one who was accused of abuse and protected by an institution can reasonably imply—at the demurrer stage—that the person in fact committed the abuse of which he was accused without extending the words beyond their ordinary meaning. Further, Defendant said she saw this happen to "men," "in real time," which—when read in context of the entire article, where Defendant previously stated that she became a public figure representing domestic abuse "two years ago," and in light of the circumstances pleaded about the parties' divorce—would reasonably cause readers to conclude she was referring to her experience with Mr. Depp despite her efforts to globalize the statement. *See Lewis*, 281 Va. at 725 (holding that the court must evaluate the statements taken as a whole to determine whether a jury could find that defendant knew or should have known that the factual elements of the statements were false and defamatory); *see also Carwile*, 196 Va. at 8 (noting that it does not matter "how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory.").

To summarize, all *Pendleton* requires is that the plaintiff plead allegations of an implied defamatory meaning, that is in fact defamatory, as well as circumstances that would reasonably cause the statements at issue to convey an alleged defamatory meaning. *Pendleton*, 290 Va. at 172-73. Because Plaintiff alleged that all three of these statements carry the same defamatory meaning based on the same attenuating circumstances, the Court must overrule Defendant's

Demurer because it finds that these statements could reasonably convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard when drawing every fair inference in Plaintiff's favor.

B. The Fourth Statement Is Not Actionable

Even in light of the somewhat relaxed defamation by implication pleading standard set forth by the Supreme Court of Virginia in *Pendleton*, the Court must still determine that the alleged circumstances are ones that "**would reasonably cause the statement to convey a defamatory meaning.**" *Id.* (bold emphasis added). The Court finds that the circumstances alleged regarding the statements Ms. Heard made during and after the parties' divorce would not reasonably cause the fourth statement to convey a defamatory meaning. Therefore, the Court cannot proceed to the other steps of the analysis outlined in *Pendleton*. *See id.* Plaintiff argues that the following statement implies that Mr. Depp abused Ms. Heard:

> I write this as a woman who had to change my phone number weekly because I was getting death threats. For months, I rarely left my apartment, and when I did, I was pursued by camera drones and photographers on foot, on motorcycles and in cars. Tabloid outlets that posted pictures of me spun them in a negative light. I felt as though I was on trial in the court of public opinion—and my life and livelihood depended on myriad judgments far beyond my control.

This statement lacks any factual underpinning that Mr. Depp abused Ms. Heard even when considering the circumstances alleged and resolving all fair inferences in Plaintiff's favor. The statement is too opinion-laden and representative of Defendant's own perspective for it to be actionable, and it notably lacks any implicit reference to the alleged meaning that Mr. Depp abused Ms. Heard. The Court simply cannot find that this statement has a defamatory charge without extending the meaning of the words far beyond their ordinary and common acceptation. *Carwile*, 196 Va. at 8. Accordingly, Defendant's Demurrer is sustained with prejudice as to the fourth statement discussed above.

Drawing the line at this statement is consistent with this Court's ruling regarding the other three statements, as those were held to be statements that were "artfully disguised," as articulated in *Carwile*, 196 Va. at 8, but nonetheless reasonably capable of conveying the alleged defamatory meaning in light of the circumstances pleaded, such that a jury could find that Defendant knew or should have known that the implied factual elements of the statements were false and defamatory. *See Pendleton*, 290 Va. at 172-73; *Lewis*, 281 Va. at 725. As for the first three statements, it is still the province of the fact-finder in this case to determine whether the circumstances were sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby. *Pendleton*, 290 Va. at 172-73.

II. Defendant's Plea in Bar as to the Statute of Limitations

A plea in bar condenses the litigation by narrowing it to a discrete issue of fact that bars a plaintiff's right of recovery when proven. *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). The

burden of proof on the dispositive fact rests on the moving party. *Id.* When considering the pleadings, "the facts stated in the plaintiffs' motion for judgment [are] deemed true." *Tomlin*, 245 Va. at 480 (quoting *Glascock v. Laserna*, 247 Va. 108, 109 (1994)). "Familiar illustrations of the use of a plea would be: the statute of limitations, absence of proper parties (where this does not appear from the bill itself), *res judicata*, usury, a release, an award, infancy, bankruptcy, denial of partnership, *bona fide purchaser*, denial of an essential jurisdictional fact alleged in the bill, etc." *Nelms v. Nelms*, 236 Va. 281 (1988).

Defamation claims are governed by VA. CODE § 8.01-247.1, which provides that "[e]very action for injury resulting from libel, slander, insulting words, or defamation shall be brought within one year after the cause of action accrues." Defendant argues that the gravamen of Plaintiff's case is that Defendant should be held liable for reviving statements she made in 2016, which is an attempt to end-run the statute of limitations. Def.'s Mem. Supp. Dem. & Plea in Bar 14-15. Plaintiff argues that the op-ed was published less than three months before Plaintiff filed suit, and—even if this were a case regarding revived statements—that Virginia law considers a new action to accrue each time the defamatory statement is published. Pl.'s Opp'n 10-11.

Assuming *arguendo* that Plaintiff proceeds on a theory of republication, Plaintiff is correct in asserting that the date of republication is the date on which the clock begins running for the statute of limitations in a defamation action. *See Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) ("It is well settled that the author or originator of a defamation is liable for republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication") (quoting *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 199 (1957)); *Weaver*, 199 Va. at 200 (holding the one-year statute of limitations does not bar a defamation claim involving a letter when the letter's contents were revealed before a promotion board (i.e., republished) within one year of the present action). Consequently, the original publication date of these statements does not prohibit Plaintiff from bringing this action because the statements—if republished—were reiterated within one year of Plaintiff bringing this action. The Court must therefore deny Defendant's Plea in Bar as to the statute of limitations.

CONCLUSION

For the foregoing reasons, Defendant's Demurrer is sustained as to the fourth statement listed above, but it is overruled as to the other three statements. Further, Defendant's Plea in Bar regarding the statute of limitations is denied. Counsel shall prepare an Order reflecting the Court's ruling and forward that Order to the Court for entry.

Sincerely,

[redacted]

Bruce D. White

OPINION LETTER

EXHIBIT B

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911

Dear Counsel:

This matter is before the Court on Plaintiff John C. Depp II's Demurrer and Plea in Bar to All Counterclaims. At the conclusion of the hearing, the Court took the matter under advisement to consider the following five issues:

OPINION LETTER

1) Whether the Court should exercise jurisdiction over Defendant's Counterclaim for declaratory judgment when Defendant has asserted the same argument in her Answer and Grounds for Defense?

2) Whether Plaintiff's statements are actionable under Virginia defamation law?

3) Whether Defendant has alleged sufficient facts to state a claim for a violation of the Virginia Computer Crimes Act?

4) Whether Defendant's Counterclaims arise out of the same transaction or occurrence as Plaintiff's Complaint such that Plaintiff's filing of the Complaint tolled the statute of limitations for Defendant's defamation counterclaims?

5) Whether Plaintiff is entitled to anti-SLAPP immunity for his statements?

The Court has considered the briefs in support of and in opposition to the present motion, as well as the arguments made by counsel at the hearing on October 16, 2020. For the reasons discussed below, the Court sustains the Demurrer as to Count I and Count III, and grants the Plea in Bar as to Statements A-E.

BACKGROUND

In the underlying action for defamation, Plaintiff John C. Depp II ("Mr. Depp") is suing Defendant Amber Laura Heard ("Ms. Heard") for statements that she made in an op-ed published by *The Washington Post* in 2018. Mr. Depp, believing that Ms. Heard's statements falsely characterize him as a domestic abuser, filed his defamation claim on March 1, 2019. On August 10, 2020, Ms. Heard filed her Counterclaims as well as her Answer and Grounds for Defense.

In her Counterclaims, Ms. Heard alleges that Mr. Depp and his agents have engaged in an ongoing online smear campaign to damage her reputation and cause her financial harm. Countercl. ¶ 6. Ms. Heard alleges that Mr. Depp has defamed her on multiple occasions, beginning during an interview with *GQ* in November 2018. *Id.* at ¶ 33. The alleged harm includes attempting to remove her from her role as an actress in *Aquaman* and as spokeswoman for L'Oréal. *Id.* at ¶ 6. Ms. Heard seeks declaratory relief granting immunity from civil liability for her statements; compensatory damages of $100,000,000; punitive damages of not less than $350,000; attorney's fees and costs; and an injunction to prevent Mr. Depp from continuing the alleged harms. *Id.* at 19.

ANALYSIS

I. COUNT I: DECLARATORY JUDGMENT IS DISMISSED.

Where an actual controversy exists, circuit courts "shall have power to make binding adjudications of right" in the form of declaratory judgments. Va. Code § 8.01-184. However, "the power to make a declaratory judgment is a discretionary one and must be exercised with care and caution. It will not as a rule be exercised where some other mode of proceeding is provided." *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970). Because the driving

purpose behind declaratory judgments is to resolve disputes before a right is violated, "where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding . . . is not an available remedy." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Supervisors*, 285 Va. 87, 99 (2013) (quoting *Bd. of Supervisors v. Hylton Enters.*, 216 Va. 582, 585 (1976)).

Where granting declaratory judgment is duplicative of the relief already available, circuit courts may decline to exercise jurisdiction. *See Godwin v. Bd. of Dirs. of Bay Point Ass'n*, No. CL10-5422, 2011 WL 7478302, at *3 (Va. Cir. Ct. Feb. 8, 2011) (Norfolk). In *Godwin*, the circuit court declined to issue a declaratory judgment that a document was void when there also existed a breach of contract claim that asserted the same document was void. *Id.* at *1-3. Where it "appear[ed] to be a duplicative remedy that does not add anything to the relief that may be available under [the other count]," the court would not issue a declaratory judgment. *Id.* at *3. Similarly, federal courts have recognized that declaratory judgment is unnecessary where there exists some other claim resolving the same issue. *See Jackson v. Ocwen Loan Servicing LLC*, Civil Action No. 3:15cv238, 2016 WL 1337263, at *12-13 (E.D. Va. Mar. 31, 2016) (granting a Motion to Dismiss after finding that a claim for declaratory relief was "duplicative and permitting it to proceed [would] not serve a useful purpose."). For instance, in *Tyler v. Cashflow Technologies, Inc.*, a federal court dismissed a declaratory judgment counterclaim because the defendant's request that the court declare that his statements were not defamatory was merely the inverse of the plaintiff's defamation claim. Case No. 6:16-CV-00038, 2016 WL 6538006, at *1 (W.D. Va. Nov. 3, 2016). Importantly, in *Tyler*, the court stated that "[t]o consider both claims would be duplicative and force 'the court to handle the same issues twice.'" *Id.* at *6.

Ms. Heard's Answer and Grounds for Defense states: "The statements in the op-ed are expressions of opinion that are protected by the First Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Virginia. Defendant requests an award of her reasonable attorneys' fees and costs pursuant to Virginia's Anti-SLAPP Statute, including § 8.01-223.2, and/or any amendments thereto." Answer at 29, ¶ 5. Her defense is therefore "some other mode of proceeding" to afford her the same relief that is requested in her Counterclaim. *See Liberty Mut. Ins. Co.*, 211 Va. at 421. To hear both Ms. Heard's anti-SLAPP defense and her declaratory judgment counterclaim would equate to adjudicating the same issue twice. *See Tyler*, 2016 WL 6538006, at * 6. Additionally, since this Court would not rule on Ms. Heard's declaratory judgment counterclaim until after all matters have been tried, the purpose of declaratory judgment – to resolve disputes before the right has been violated – is defeated. *See Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 99. Accordingly, this Court dismisses Count I of Ms. Heard's Counterclaim.

In her brief and at oral argument, Ms. Heard argued that declaratory judgment is an appropriate vehicle for anti-SLAPP immunity. Specifically, she pointed this Court to the case *Reisen v. Aetna Life and Cas. Co.*, where the Virginia Supreme Court held that the circuit court did not abuse its discretion by exercising jurisdiction over an action for declaratory judgment even though the same issue (regarding insurance coverage) was scheduled for adjudication in an upcoming tort action. 225 Va. 327, 334-35 (1983). In *Reisen*, the insurance company had an immediate need to determine its liability because, if coverage existed, then the company owed a duty to the defendant to negotiate a settlement. *Id.* at 335. Thus, the issue was ripe for adjudication. *Id.* Here, Ms. Heard has asserted no immediate need for declaratory relief. In fact,

by asserting anti-SLAPP immunity as a counterclaim, even if the Court held in her favor that her statements are protected, she would receive this relief at the same time as receiving the same relief under her anti-SLAPP defense. Importantly, this Court is not holding that declaratory relief could never be an appropriate vehicle for asserting anti-SLAPP immunity, but merely that, in this instance, it would be duplicative of the relief already requested.

Additionally, Ms. Heard also asserted that declaratory judgment is necessary for anti-SLAPP immunity because Mr. Depp could nonsuit at any moment and, thereby, deprive her of the opportunity to recover attorney's fees. Under Virginia's anti-SLAPP statute, however, this Court may only award reasonable attorney's fees to "[a]ny person who has a suit against him dismissed or a witness subpoena or subpoena duces tecum quashed pursuant to the immunity provided by this section . . .." Va. Code § 8.01-223.2(B). Here, even if Ms. Heard's counterclaims were to move forward, and Mr. Depp were to nonsuit, Ms. Heard still would not be able to recover reasonable attorney's fees under this statute because she would not have had Mr. Depp's suit dismissed, rather she would be proceeding under her own claim.

Overall, this Court does not find any persuasive reason to hear Ms. Heard's anti-SLAPP immunity argument twice, nor does it appear to be necessary to permit Ms. Heard's claim to move forward in case Mr. Depp should choose to nonsuit. As such, this Court declines to exercise jurisdiction over Ms. Heard's counterclaim for declaratory judgment. It is therefore dismissed.

II. PLAINTIFF'S DEMURRER

In Virginia, a court may sustain a demurrer upon a finding that "a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted . . .." Va. Code § 8.01-273(A). A demurrer tests only the legal sufficiency of the factual allegations; it does not permit a court to evaluate the merits of the claim. *Fun v. Va. Military Inst.*, 245 Va. 249, 252 (1993). Accordingly, the Court must "accept as true all properly pled facts and all inferences fairly drawn from those facts." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557 (2011) (quoting *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 357 (2010)). Nonetheless, "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382-83 (1997) (citing *Fun*, 245 Va. at 253).

A. The Demurrer to Count II for Defamation and Defamation *Per Se* is Overruled.

The elements of a defamation claim include: "(1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). On demurrer, "the trial judge is responsible for determining whether, as a matter of law, the allegedly defamatory statements are actionable." *Taylor v. Southside Voice, Inc.*, 83 Va. Cir. 190, 192 (2011). To be "actionable," a statement must be both "false and defamatory." *Schaecher*, 290 Va. at 91. Because statements of opinion cannot be "false," they are never actionable. *See Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132 (2003). For the reasons explained below, the Court finds that Ms. Heard has pled actionable statements for a defamation claim.

The Requisite 'Sting'

To qualify as defamatory, a statement must possess the requisite 'sting' to one's reputation. *Schaecher*, 290 Va. at 92. The Supreme Court of Virginia has previously stated that defamatory language is that which "'tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous.'" *Id.* (quoting *Moss v. Harwood*, 102 Va. 386, 392 (1904)). If language is merely "insulting, offensive, or otherwise inappropriate, but constitutes no more than 'rhetorical hyperbole,'" then it does not possess the requisite 'sting' to be considered defamatory. *Id.* Importantly, in deciding whether a statement is defamatory, a court must evaluate it in the context of the publication. *Id.* at 93.

Here, Ms. Heard has alleged defamation with respect to the following eight statements:

A. In a November 2018 interview with *GQ*, Mr. Depp stated that there was "no truth to [Ms. Heard's judicial statements of abuse] whatsoever" and said "[t]o harm someone you love? As some kind of bully? No, it didn't, it couldn't even sound like me." Further, the article quoted Mr. Depp as stating "[Ms. Heard] was at a party the next day. Her eye wasn't closed. She had her hair over her eye, but you could see the eye wasn't shut. Twenty-five feet away from her, how the fuck am I going to hit her? Which, by the way, is the last thing I would've done.'" Countercl. ¶ 63.

B. On April 12, 2019, Mr. Depp, through his attorney, is quoted in *Page Six*, accusing Ms. Heard of committing "defamation, perjury and filing and receiving a fraudulent temporary restraining order demand with the court . . .." *Id.* ¶ 66.

C. In June 2019, Mr. Depp, through his attorney, told *The Blast* that "Ms. Heard continues to defraud her abused hoax victim Mr. Depp, the #metoo movement she masquerades as the leader of, and other real abuse victims worldwide." *Id.*

D. On July 2, 2019, Mr. Depp, through his attorney, told *The Blast* that Ms. Heard, "went to court with painted on 'bruises' to obtain a Temporary Restraining Order on May 27." *Id.*

E. On July 3, 2019, Mr. Depp, through his attorney, stated to *People* magazine that "Ms. Heard's 'battered face' was a hoax." *Id.*

F. On April 8, 2020, Mr. Depp, through his attorney, told *The Daily Mail* that "Amber Heard and her friends in the media use 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." *Id.*

G. On April 27, 2020, Mr. Depp, through his attorney, again told *The Daily Mail* that "[q]uite simply this was an ambush, a hoax. They set Mr. Depp up by calling

the cops but the first attempt didn't 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 stories straight under the direction of a lawyer and publicist, and then placed a second call to 911." *Id.*

H. On June 24, 2020, Mr. Depp, through his attorney, accused Ms. Heard in *The Daily Mail* of committing an "abuse hoax" against Mr. Depp. *Id.*

Each of the above statements imply that Ms. Heard lied and perjured herself when she appeared before a court in 2016 to obtain a temporary restraining order against Mr. Depp. Moreover, they imply that she has lied about being a victim of domestic violence. In light of the #MeToo Movement and today's social climate, falsely claiming abuse would surely "injure [Ms. Heard's] reputation in the common estimation of mankind." *See Schaecher*, 290 Va. at 92. Therefore, this Court finds that the statements contain the requisite 'sting' for an actionable defamation claim.

Protected Opinion Statements

A statement is generally not defamatory when it is "dependent on the speaker's viewpoint . . .." *See Fuste*, 265 Va. at 133. Where the context of the statements and the positions of the people reading the statements "would allow them to reasonably conclude that [the] statement was purely her own subjective analysis," the statement is not actionable. *Schaecher*, 290 Va. at 106. However, even opinion statements are actionable if they "'imply an assertion' of objective fact." *Id.* at 103.

Although Mr. Depp's statements (and those of his attorney) can be understood as their opinion of what occurred, these statements nevertheless imply that Mr. Depp did not abuse Ms. Heard. These statements must survive demurrer because whether Mr. Depp abused Ms. Heard is a fact that is capable of being proven true or false.

Mr. Depp's Statements are Not 'Fair and Accurate Accounts'

Mr. Depp argues that his statements are protected as "fair and accurate accounts" of his lawsuit. Tr. 8:9-14. Because a party "has a right to institute and prosecute an action without fear of being mulched in damages for reflections cast upon the defendants," no action for defamation can lie from a publication that constitutes a "fair and accurate account of the issues in suit . . .." *Bull v. Logetronics, Inc.*, 323 F. Supp. 115, 135 (E.D. Va. 1971). In *Bull*, the court considered a press release that stated (1) the plaintiff sued defendants for "conspiracy to defraud," (2) plaintiff sued for "royalty payments and damages in an amount over $1,000,000.00," and (3) plaintiff was "seeking punitive damages, alleging a conspiracy to circumvent the provisions of a contract relating to manufacture and sale of film processors under U.S. patents . . .." *Id.* at 134. The court held that those statements were a fair and accurate summary of the allegations. *Id.*

Here, Mr. Depp's statements are notably different than those in *Bull*. *See id.* Although much of what Mr. Depp states is also contained in his Complaint, the statements do not appear to have been made in the context of attempting to recount litigation. Instead, Mr. Depp makes

factual assertions that do not fairly and accurately summarize the litigation that has taken place. Accordingly, his statements are not protected.

Although Mr. Depp's statements may have been made in self-defense, Ms. Heard has alleged sufficient malice for her defamation allegations to survive demurrer.

Under *Haycox v. Dunn*, so long as Mr. Depp's statements were "repelling the charge and not with malice," his statements would have been made in self-defense and therefore would be privileged. 200 Va. 212, 231 (1958) (internal citations omitted). There, the court recognized that, generally, the rule is "that it is the court's duty to determine as a matter of law whether the occasion is privileged, while the question of whether or not the defendant was actuated by malice, and has abused the occasion and exceeded his privilege are questions of fact for the jury." *Id.* at 229 (quoting *Bragg v. Elmore*, 152 Va. 312, 325 (1929)).

Because Ms. Heard has alleged facts in support of a showing of malice, the Court cannot properly decide this claim on demurrer. In support of her accusation of malice, Ms. Heard alleged that the *GQ* journalist, Mr. Heath, stated that Mr. Depp invited him to interview the actor because he was "angry – angry about a lot of things – and he's vengeful." Countercl. ¶ 33. Moreover, Ms. Heard has alleged that Mr. Depp has the intention of ruining her career; citing statements that he made to friends demonstrating a malicious intent. *See* Countercl. ¶¶ 17-19. Further, Mr. Depp has admitted his intent to destroy Ms. Heard's career by stating that he wanted her replaced on *Aquaman*. *See* Countercl. ¶ 7. Accordingly, Ms. Heard has sufficiently pled a malicious intent, which prevents a ruling on the self-defense privilege at this stage in the litigation.

Since Mr. Depp's statements contain the requisite 'sting', are not merely statements of opinion, and do not fairly and accurately describe litigation, the Court must overrule the Demurrer with respect to Count II. Additionally, although Mr. Depp may have made his statements in self-defense, Ms. Heard has pled malice to the extent that this Court cannot determine whether Mr. Depp's statements are privileged at the Demurrer stage.

B. The Demurrer to Count III: VCCA is Sustained.

Under the Virginia Computer Crimes Act ("VCCA"), a claimant must prove that (1) the person used a computer or computer network; (2) to "communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make a suggestion or proposal of an obscene nature, or threaten any illegal or immoral act"; (3) with the intent to "coerce, intimidate, or harass" another person. Va. Code § 18.2-152.7:1; *Barson v. Commonwealth*, 284 Va. 67, 71 (2012).

None of Ms. Heard's allegations satisfy all three prongs of the VCCA. First, Ms. Heard has alleged that Mr. Depp used a computer or computer network in four instances: when he "initiated, coordinated, overs[aw] and/or supported and amplified two change.org petitions"; when he "created, controlled, and/or manipulated social media accounts"; when he texted Mr. Bettany in 2013; and when he texted Mr. Carino in 2016. Countercl. ¶¶ 6, 8, 17, 19. This Court now examines each of these instances to determine whether they meet the other two VCCA prongs.

The allegation that "Mr. Depp has initiated, coordinated, overseen and/or supported and amplified two change.org petitions: one to remove Ms. Heard as an actress in the *Aquaman* movie franchise, and one to remove her as a spokeswoman for L'Oréal" fails under the second prong of the VCCA. *See* Countercl. ¶ 6. Nothing in that allegation implies facts showing that the change.org petitions included obscene language, threatened illegal or immoral acts, or suggest or propose obscene acts. *See* Va. Code § 18.2-152.7:1. Likewise, the allegation that Mr. Depp "created, coordinated, controlled, and/or manipulated social media accounts created specifically for the purpose of targeting Ms. Heard," also fails under the second prong of the VCCA. *See* Va. Code § 18.2-152.7:1. The pleading fails to demonstrate that the social media accounts communicated obscene language, suggested obscene acts, or threatened illegal or immoral acts. Because neither of those allegations meets the second element of the VCCA, they cannot move forward in this litigation.

The remaining two allegations of computer usage fail under the third prong of the VCCA because Ms. Heard has not alleged that they were made with the intent to "coerce, intimidate, or harass." *See* Va. Code § 18.2-152.7:1. Rather, it appears that Mr. Depp texted those statements, privately, to two of his friends, and Ms. Heard has not alleged that Mr. Depp intended for her to see them. Accordingly, this Court sustains the Demurrer to Count III since none of Ms. Heard's allegations satisfy the prongs of the VCCA.

III. PLAINTIFF'S PLEA IN BAR IS GRANTED IN PART AND DENIED IN PART.

A plea in bar condenses "litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). The burden of proof rests with the moving party. *Id.* When considering the pleadings, "the facts stated in the plaintiffs' motion for judgment [are] deemed true." *Id.* (quoting *Glascock v. Laserna*, 247 Va. 108, 109 (1994)). Moreover, "[f]amiliar illustrations of the use of a plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); *res judicata*; usury; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the bill, etc." *Nelms v. Nelms*, 236 Va. 281, 289 (1988).

A. Statements A through E Are Barred by the Statute of Limitations.

Under Va. Code § 8.01-247.1, Virginia's statute of limitations for a defamation action is one year. However, "if the subject matter of the counterclaim . . . arises out of the same transaction or occurrence upon which the plaintiff's claim is based, the statute of limitations with respect to such pleading shall be tolled by the commencement of the plaintiff's action." Va. Code § 8.01-233(B). To determine whether an issue arises out of the same transaction or occurrence, the "proper approach asks 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 154 (2017).

In *Funny Guy*, the court found that the facts were related in origin and motivation because they both stemmed from the plaintiff's desire to be paid for the work he had done. 293 Va. at 155. Plaintiff's claims also satisfied the time and space factors because both claims

involved a single payment dispute. *Id.* Since all of the theories of recovery "fit within a single factual narrative," the court held that they formed a "convenient trial unit." *Id.* The court also held that it was unlikely that the parties would anticipate a single payment dispute developing into multiple lawsuits and, therefore, the final factor was met. *Id.* Similarly, the Fourth Circuit held that a counterclaim was compulsory when a plaintiff filed a § 1983 action against a police officer and the police officer counterclaimed for defamation because it arose out of the same transaction or occurrence. *Painter v. Harvey*, 863 F.2d 329, 331 (4th Cir. 1988). The court deemed the counterclaim compulsory because both the claim and counterclaim stemmed from what transpired during the plaintiff's arrest, the resolution of one claim might bar the other claim via *res judicata* later, the evidence presented for both claims was virtually the same, and because there was a logical relationship between the two claims. *Id.* at 331-32; *see also Nammari v. Gryphus Enters. LLC*, 1:08cv134 (JCC/TCB), 2008 WL 11512205, at *1-3 (E.D. Va. May 12, 2008) (holding that Defendant's counterclaim for defamation was compulsory because both it and Plaintiff's wrongful termination claim arose from Plaintiff's termination).

Conversely, in *Powers v. Cherin*, the Court held that the plaintiff's claims did not "arise out of the same transaction or occurrence" because the first count for negligence stemmed from a car accident while the second count for medical malpractice stemmed from the doctor's subsequent medical treatment of the plaintiff. 249 Va. 33, 37 (1995). Likewise, the Fourth Circuit held that a defamation allegation in an amended complaint did not arise out of the same transaction or occurrence as the allegations in the original complaint and was therefore barred by the one-year statute of limitations. *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, No. 97-2397, 1999 WL 89125, at *2 (4th Cir. Feb. 23, 1999). There, Plaintiff attempted to amend its complaint to include reference to an allegedly defamatory letter written by a different author, directed to a different recipient, and published on a different date than the other letters alleged in the complaint. *Id.* Thus, they were separate instances of defamation and the second, un-related allegation was barred by the statute of limitations. *Id*; *see also Cojocaru v. City Univ. of N.Y.*, 19 Civ. 5428 (AKH), 2020 WL 5768723, at *3-4 (S.D.N.Y. Sept. 28, 2020) (holding that Plaintiff's allegations in an Amended Answer do not relate back because "[w]hile the alleged text messages concerned the same general subject matter as the *New York Post* interviews, they were a separate publication, directed toward a different recipient, and included some distinct accusations."). In both of the aforementioned cases, a party attempted to amend their own pleading. *See English Boiler & Tube, Inc.*, 172 F.3d 862, 1999 WL 89125, at *2 (describing how plaintiff attempted to amend his own complaint) and *Cojocaru*, 2020 WL 5768723, at *3-4 (describing how defendant attempted to amend his Answer). In those instances, the parties were not time-barred when they filed their initial pleadings.

Here, both Ms. Heard's allegations and Mr. Depp's allegations stem from the same set of facts: the Domestic Violence Restraining Order ("DVRO") proceeding in May 2016 and the events leading up to it. As previously stated, to succeed on his defamation claim, Mr. Depp is going to need to show (1) publication of (2) an actionable statement with (3) the requisite intent. *See Schaecher*, 290 Va. at 91. Ms. Heard would need to meet the same standard if her Counterclaims are permitted to proceed. In presenting evidence of publication, the statements that Ms. Heard alleges in her Counterclaims were not made in the same publication as the one referenced in Mr. Depp's Complaint. Whereas Mr. Depp's Complaint focuses on an op-ed published in *The Washington Post*, Ms. Heard's Counterclaim focuses on statements in *GQ*,

People Magazine, *The Daily Mail*, and other publications. To demonstrate actionable claims, both parties will likely need to present similar evidence regarding whether Mr. Depp actually abused Ms. Heard in May 2016. However, while Mr. Depp's Complaint focuses on Ms. Heard's intent in making the statements, Ms. Heard would instead need to present evidence on Mr. Depp's intent. Therefore, the only connection between the claims is in origin – they both stem from the 2016 incident. *See Funny Guy, LLC*, 293 Va. at 154. Because these claims arise from statements made in separate publications, on separate dates, and by different people, the Court is not persuaded that Mr. Depp could have anticipated, at the time of filing his Complaint, a need to defend against statements made to other publications. The lack of relatedness and failure to reasonably put Mr. Depp on notice of a potential counterclaim compels this Court to grant the Plea in Bar to Statements A through E.

B. Mr. Depp is Not Entitled to Anti-SLAPP Immunity.

Mr. Depp asserted in his Plea in Bar that he is entitled to anti-SLAPP immunity for the statements that are the subject of Ms. Heard's Counterclaim.[1] As addressed earlier, Virginia's anti-SLAPP law provides immunity for statements "regarding matters of public concern that would be protected by the First Amendment." Va. Code § 8.01-223.2(A). Here, the Court finds no support for the notion that Mr. Depp's statements are on matters on public concern. Moreover, Mr. Depp's counsel neither argued nor addressed this point during oral argument or in their reply brief. Lastly, Ms. Heard has alleged sufficient facts in her Counterclaim to demonstrate that Mr. Depp may have made these statements with actual or constructive knowledge or with reckless disregard for whether they are false. *See supra* p. 8 (citing instances in the Counterclaim alleging that Mr. Depp made his statements with actual malice). Accordingly, the Court denies the Plea in Bar for anti-SLAPP immunity.

IV. CONCLUSION

For the foregoing reasons, Count I is dismissed, the Demurrer to Count II is overruled, the Demurrer to Count III is sustained, and the Plea in Bar is granted for Statements A through E due to the lapsed statute of limitations. Count II with respect to Statements F, G, and H survive. Counsel shall prepare an appropriate order reflecting the Court's ruling and submit it to the Court for entry.

Sincerely,

[redacted]

Bruce D. White

[1] Mr. Depp's counsel did not address this point in his oral argument or in his Reply Memorandum. Ms. Heard's counsel stated that she believes this point was "conceded by [Mr. Depp's counsel] because it was not addressed in their reply." Oct. 16, 2020 Tr. 33:3-6.