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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

John C. Depp, II,)
)
 Plaintiff,)
)
 v.)
)
 Amber Laura Heard,)
)
 Defendant.)

Civil Action No.: CL-2019-0002911

PLAINTIFF'S OPPOSITION TO DEFENDANT AMBER LAURA HEARD'S MOTION TO COMPEL DEPOSITION OF ADAM WALDMAN

In her most recent motion to compel, Defendant continues her trend of misrepresenting facts and law to the Court, and her inappropriate efforts to depose Mr. Depp's attorney, Adam R. Waldman, Esq., should be summarily rejected. Ms. Heard cannot, and indeed has not even made any effort to, satisfy the criteria necessary to compel the deposition of Mr. Waldman. Not only are depositions of opposing counsel strongly disfavored, but also Ms. Heard cannot show that the information is not available from another source or is non-privileged. As a threshold matter, Ms. Heard failed to properly serve (or even issue) a subpoena to Mr. Waldman -- a non-party in this action who resides outside of the Commonwealth -- as required by the Rules of the Supreme Court of Virginia. This fact in itself dooms Ms. Heard's deficient motion to compel. And, despite Ms. Heard's representations to the Court, counsel for Mr. Depp informed Ms. Heard's counsel of this requirement months ago, making Ms. Heard's request for additional sanctions even more outlandish. Thus, even if the Court were to find that Mr. Waldman's deposition should proceed, and it should not, it should reject Defendant's request for sanctions. Indeed, the Court should sanction Ms. Heard for filing her motion despite never having served Mr. Waldman.

ARGUMENT

1. Ms. Heard Never Served Mr. Waldman With the Requisite Subpoena.

It is undisputed that Ms. Heard failed to validly serve (or even issue) a third-party deposition subpoena on non-party Mr. Waldman, despite her requirement to do so under the Rules of the Supreme Court of Virginia. *See, e.g.*, Va. Sup. Ct. R. 4:5(a) (“The attendance of witnesses may be compelled by *subpoena*.”) (emphasis added); Va. Sup. Ct. R. 4:5(g) (titled “Failure...to Serve Subpoena” and noting the possible consequences stemming from a party giving *notice* of a deposition but failing to serve a *subpoena* on the witness); *see also McFarland v. McFarland*, No. 116434., 1992 WL 884465, at *1 (Va. Cir. Ct. Jan. 29, 1992) (Fairfax County Circuit Court deciding a matter relating to a deposition *subpoena* to opposing counsel, *not* merely a notice).

Conveniently absent from Ms. Heard’s memo in support of her motion, and the email correspondence attached thereto, is that counsel for Mr. Depp *informed her of this fact*. *See Exhibit A* (counsel for Mr. Depp stating, approximately two full months prior to Mr. Waldman’s purported deposition date, on August 18, 2020, in response to Ms. Heard’s improper August 14, 2020 deposition notice: “As a threshold matter, we are not authorized to accept service for Mr. Waldman. To the extent Ms. Heard seeks to pursue this, which, for the reasons set forth below, would be improper, *she would have to serve him with a valid subpoena on which we should be contemporaneously copied.*”) (emphasis added). Thus, Ms. Heard’s representation to the Court that “Counsel for Mr. Depp did not object to the service by a Notice rather than subpoena” is transparently false. This matter also was discussed on meet-and-confer calls. So while Ms. Heard would have the Court believe that Mr. Depp was simply silent on this issue, the reality is that this issue has been discussed at length between the parties and Ms. Heard was well-aware of the

subpoena requirements under the Virginia Rules for non-party witness depositions. Despite this knowledge, Ms. Heard has eschewed her obligations, seeking instead to place the blame for her own failure on Mr. Depp and burdening the Court with yet another procedurally improper motion to compel. Ms. Heard's failure to follow the rules coupled with her propensity to immediately burden the Court if she does not get exactly what she wants, exactly when she wants it, should not be tolerated. Ms. Heard's motion to compel should be denied and, as discussed below, Ms. Heard should be sanctioned.

2. The Court Should Sanction Ms. Heard, Not Mr. Depp.

Mr. Depp should not be sanctioned because, unlike Ms. Heard, he has complied with the Rules of the Supreme Court of Virginia. However, even if the Court finds that a notice is sufficient to compel Mr. Waldman's deposition and grants Ms. Heard's motion, there are no grounds to impose the severe sanctions on Mr. Depp sought by Ms. Heard under Rule 4:12(d). Rule 4:12(d) permits the imposition of certain sanctions against a "*party*" or an "officer, director, or managing agent" of a party/a corporate designee under Rules 4:5(b)(6) or 4:6(a) who fails to appear for their deposition. Mr. Waldman, of course, is neither a party to this action, nor an "officer, director, or managing agent" of Mr. Depp's, nor a designee testifying on Mr. Depp's behalf, making the imposition of such sanctions inappropriate.

Consistently in this case, Ms. Heard has skirted her obligations under the Virginia Rules, misrepresented statements or objections by Mr. Depp's counsel, and ignored the Orders of this Court. This has resulted in numerous facially and procedurally deficient motions to compel, that unnecessarily burden both the Court and Mr. Depp, because Ms. Heard has decided that immediate satisfaction of her every desire is more important than the Rules and procedures of this Commonwealth. Despite what Ms. Heard would have the Court believe, Mr. Depp

unequivocally informed Ms. Heard's counsel that any deposition of Mr. Waldman would be inappropriate to begin with, but to the extent Ms. Heard insisted on continuing her pursuit, that Mr. Waldman would have to be served with a validly issued subpoena. And despite the knowledge that she had violated the Rules, Ms. Heard not only persisted in her efforts to depose Mr. Waldman, but also filed a motion to compel relating to the same, which Mr. Depp has been forced to defend. Accordingly, the Court should sanction Ms. Heard.

3. Ms. Heard Has Not and Cannot Satisfy the *Shelton* Criteria.

Ms. Heard fails to meet the requirements set forth in *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir.1986), which establishes a test that has been adopted by Courts in the Commonwealth to determine whether it is appropriate to allow the deposition of an opposing party's counsel. *See, e.g., McFarland*, 1992 WL 884465 at *1; *Navient Sols., LLC v. Law Offices of Jeffrey Lohman, P.C.*, No. 1:19-CV-461(LMB)(TCB), 2020 WL 6379233, at *4 (E.D. Va. Sept. 4, 2020); *Moody v. City of Newport New, Virginia*, No. 4:14-CV-99, 2016 WL 9000275, at *2 (E.D. Va. Jan. 20, 2016). Specifically, Ms. Heard has not and cannot show that: "(1) no other means exist to obtain the information than to impose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case." *See Shelton*, 805 F.2d at 1327 (citations omitted).

4. No Other Reason Justifies the Deposition of Mr. Depp's Counsel.

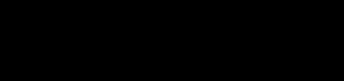
Lastly, attorney depositions are strongly disfavored in Virginia: "A deposition of opposing counsel ought to be ordered only as a last recourse." *Angelopoulos v. Volvo Penta of the Americas, L.L.C.*, 92 Va. Cir. 257 (2015). "The evidence the movant seeks must be crucial to the case and not privileged, and every reasonable alternative method of procuring that evidence must have been tried." *Id.*; *see also, Navient Sols.*, 2020 WL 6379233 at *4 ("Depositions of

opposing counsel are discouraged, as they disrupt the adversarial process and lower the standards of the profession.... Thus, a party should not be permitted to take the deposition of another party's counsel except in the most unusual of circumstances.") (citation omitted). The Court should not permit Mr. Waldman's deposition to proceed here.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Ms. Heard's motion to compel and award sanctions against Ms. Heard and in favor of Mr. Depp.

Respectfully submitted,


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

Camille M. Vasquez (pro hac vice)
BROWN RUDNICK LLP
2211 Michelson Drive
Irvine, CA 92612
Phone: (949) 752-7100
Fax: (949) 252-1514
cvasquez@brownrudnick.com

Dated: December 29, 2020

Exhibit A

From: Chew, Benjamin G.
Sent: Tuesday, August 18, 2020 1:12 PM
To: 'Elaine Bredehoff'
Subject: Mr. Depp's Response re Ms. Heard's Purported Notices of Deposition to Messrs. Bett, Deuters and Adam R. Waldman, Esq.

Dear Elaine,

Per your request, we hereby respond prior to Wednesday (tomorrow).

Sean Bett and Stephen Deuters

As always, Mr. Depp wishes to cooperate, but your Notices are improper for several reasons, and I respectfully recommend that you please confer with your co-counsel Ben Rottenborn. Ben R. will confirm that when he first raised the subject of these depositions with Camille and me during our telephone conference on June 30, we agreed that new subpoenas to Messrs. Bett and Deuters would not be required *if* the following conditions were agreed to by Ms. Heard, *i.e.*, that:

- 1) the depositions take place at ***a mutually agreed upon date, place, manner, and time***; and that
- 2) Mr. Deuters' deposition be taken by Zoom or other telephonic/video means so that he would not be required to travel from his native England.

You sent us Notices of Deposition Friday that do not meet *any* of the conditions we laid out to Ben R.

Your deposition notices to Messrs. Bett and Deuters purport to require them to appear in your offices on September 29, and September 30, 2020, and leave the duration of the depositions indefinite. (Proceeding beyond one day for either deposition would be unnecessary, and they do not agree to that.) Ms. Heard unilaterally set dates without *any* consultation as to whether those dates were convenient for either the witnesses or Mr. Depp's counsel. And they call upon the witnesses to appear at your offices in Reston in the middle of the COVID pandemic, to which they have not agreed, and, in Mr. Deuters' case, explicitly disagreed.

Proposed Resolution

In a good-faith attempt to resolve the issue, I will reach out to Messrs. Bett and Deuters this week in an attempt to procure potential dates on which they are available for depositions. At a minimum, Mr. Deuters' deposition will have to be done remotely, and Mr. Bett's will likely have to be done in that manner as well, in light of COVID and the expense, inconvenience (possible quarantine), and risk entailed in long-distance air travel. I will then get back to you.

Documents

No document requests were appended to Ms. Heard's Notices of Deposition. Ben R. advised that the original (now expired and inoperative) subpoenas had been *duces tecum*. As reflected in my email to him of August 4, I told Ben R. that we would consider a deadline for responding to those if he would please resend us the original subpoenas. He did not send, or resend, us, copies of the original subpoenas. Unless Ms. Heard sends us those document requests, we will assume that they are not operative, and that Ms. Heard seeks only their depositions.

Adam R. Waldman, Esq.

As a threshold matter, we are **not** authorized to accept service for Mr. Waldman. To the extent Ms. Heard seeks to pursue this, which, for the reasons set forth below, would be improper, she would have to serve him with a valid subpoena on which we should be contemporaneously copied.

Though I appreciate why you, as an experienced, talented advocate, would want to draw attention away from your client's ever-shifting stories about alleged abuse, her admission about striking Mr. Depp, and her arrest in Washington state, it is improper for Ms. Heard to seek to depose Mr. Depp's attorney. As you well know, such depositions are rarely allowed, only as a last recourse, and the applicable standard is exceptionally high, requiring that, *inter alia*, that no other means is available to obtain the information sought, that such information be both relevant *and non-privileged*, and that the information sought is crucial to the preparation of the case. You know from having attended the entirety of the London trial that Mr. Waldman was *not* a fact witness to any alleged abuse or relevant interactions between Ms. Heard and Mr. Depp. (Like you, Mr. Waldman attended the *Sun* trial as Mr. Depp's lawyer, *not* as a witness.) Ms. Heard could not satisfy *any* of these criteria, and her attempt to depose Mr. Waldman would appear to be both a practiced distraction and a transparent attempt to set up a pretextual motion to disqualify him down the line.

As politely requested several times, I request that we please set a time next week when we can roll

up our sleeves, agree upon who needs to be deposed, and devise a mutually acceptable deposition schedule. (We also likely will have to discuss a briefing schedule of dispositive motions relating to Ms. Heard's recently filed Counterclaim and other matters.) This is the approach we take in every case of substantial size, and it inures to everyone's benefit, as it obviates the time and client expense incurred in running into Court for resolution of what should be unnecessary disputes.

Best regards,

Ben

Benjamin G. Chew

Partner

Brown Rudnick LLP
601 Thirteenth Street NW Suite 600
Washington, DC 20005
T: 202-536-1785
F: 617-289-0717
bchew@brownrudnick.com
www.brownrudnick.com
American College logo

Please consider the environment before printing this e-mail

From: Elaine Bredehoft [mailto:ebredehoft@charlsonbredehoft.com]

Sent: Friday, August 14, 2020 4:52 PM

To: Chew, Benjamin G.; Vasquez, Camille M.; Crawford, Andrew C.;
awaldman@theendeavorgroup.com

Cc: brottenborn@woodsrogers.com; Joshua Treece; Adam Nadelhaft; David Murphy; Leslie Hoff;
Michelle Bredehoft; cmariam@grsm.com; John Cogger; Kristin Blocher

Subject: Notices of Deposition

External E-mail. Use caution accessing links or attachments.

All: Attached are Notices of Deposition for Sean Bett, Steven Deuters

and Adam Waldman. Please let me know if you have any issues with Mr. Bett and Mr. Deuters appearing in Virginia – we are happy to work with you on the logistics. Also, I am assuming you will accept the Notice of Deposition for Mr. Waldman, since he is counsel of record in the case. However, if for some reason you believe he requires a subpoena, please provide your authority for this, and the address for serving a subpoena. If we do not hear from you by next Wednesday on these three Notices, we will assume they will appear as noticed.

Thank you for your anticipated cooperation. Have a great weekend.
Elaine

Elaine Charlson Bredehoft
Charlson Bredehoft Cohen & Brown, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, VA 20190
(703) 318-6800
(703) 919-2735 (mobile)
(703) 318-6808 (fax)
www.cbcbllaw.com

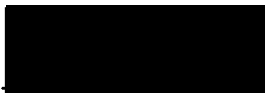
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December 2020, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

Elaine Charlson Bredehoft (VSB No. 23766)
Carla D. Brown (VSB No. 44803)
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
cbrown@cbcblaw.com
anadelhaft@cbcblaw.com
dmurphy@cbcblaw.com

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

Counsel for Defendant Amber Laura Heard



Benjamin G. Chew