

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 JOHN C. DEPP, II'S OPPOSITION TO DEFENDANT AMBER LAURA  
HEARD'S CROSS MOTION TO COMPEL PRODUCTION OF FORENSIC EVIDENCE  
AND FOR SANCTIONS

FILED  
JOHN'S DOCKET  
2021 OCT 22 PM 11:52  
JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

Ms. Heard's motion proceeds from a fundamentally false premise and contains gross mischaracterizations and flawed logic. In fact, Mr. Depp offered to consider a proposal from Ms. Heard for a reasonably particularized and targeted imaging. But Ms. Heard, who has stonewalled Mr. Depp's efforts to image the devices that contain the key evidence upon which her case relies, instead rushed to file her retaliatory motion. Ms. Heard's motion is both substantively defective – since *Ms. Heard does not even attempt to establish that a forensic imaging of Mr. Depp's devices is actually necessary in preparing her case* – and premature. As for Defendant's arguments regarding purported deficiencies in the production of two recordings and four photographs, Ms. Heard is mistaken (and, moreover, failed to properly raise the issue with Mr. Depp's counsel prior to filing her motion). The Court should deny Ms. Heard's motion.

**I. Ms. Heard Filed Her Motion for an Improper Purpose**

Effectively admitting that her objective in filing her motion was to harass and retaliate against Mr. Depp, Ms. Heard claims that the forensic imaging of her devices sought by Mr. Depp in his pending motion is “unwarranted” and “unnecessary” – but then asserts that if what she believes to be “unwarranted” and “unnecessary” discovery is ordered against her, then it should be imposed on Mr. Depp, too. That is, Ms. Heard asks the Court to order discovery she considers “unnecessary,” simply to even the score with Mr. Depp.<sup>1</sup>

Mr. Depp states compelling reasons why a forensic imaging of Ms. Heard's devices is necessary. By contrast, Ms. Heard does not even attempt to explain why the Court should order a

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<sup>1</sup> Further supporting the inference that this is a purely retaliatory motion is the fact that it did not apparently occur to Ms. Heard's counsel that she wanted to pursue a forensic imaging of Mr. Depp's devices until after Mr. Depp asked for a forensic imaging of Ms. Heard's devices – in much the same way that Ms. Heard's counsel responded to Mr. Depp's manifestly appropriate request for an IME of Ms. Heard by demanding that Mr. Depp undergo one as well. The Court correctly rejected Ms. Heard's argument for a retaliatory IME and should reject her argument for a retaliatory forensic imaging as well.

forensic imaging of Mr. Depp's devices (*and effectively admits that she needs no such thing*).

The Court should reject this transparent discovery abuse.

## II. Ms. Heard's Demand For "Mutuality" Is Inappropriate

Ms. Heard's demand for mutuality is based on the false premise that the parties are identically situated, and that whatever discovery Ms. Heard has to provide should be provided by Mr. Depp as well. Not so. As set forth in Mr. Depp's pending motion, an inspection of Ms. Heard's devices is warranted because the validity of the evidence created and maintained on those devices is directly at issue and goes to the core of this case. Mr. Depp contends that Ms. Heard made up her claims of abuse and used the specific devices Mr. Depp seeks to inspect to support her fraud with falsified and/or manufactured "evidence." There is a close connection between the issues in this case and Ms. Heard's devices.

But it does **not** follow that the order on Mr. Depp's motion must be "mutual."<sup>2</sup> While "forensic imaging is not uncommon in the course of civil discovery" it is clear that "compelled forensic imaging is not appropriate in all cases," and "courts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature[.]" *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008). The crucial question is whether the devices themselves are legitimately at issue. *There must be a clear nexus between the parties' claims and the electronic devices sought to be inspected.* See, e.g., *Genworth Financial Wealth Management, Inc. v. TJT Capital Group, LLC*, 267 F.R.D. 443 (D. Conn. 2010) ("as [the

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<sup>2</sup> Indeed, it would make little sense to make the order "mutual" even if the Court were to conclude that a forensic imaging of Mr. Depp's devices were required, since Mr. Depp's motion is targeted toward the information and timeframes relevant to *Ms. Heard's* evidence. If Ms. Heard wishes to discuss targeted categories of Mr. Depp's evidence for which she wants a forensic review, then it is incumbent on her to come up with her own categories and timeframes.

plaintiff] has alleged and provided evidence supporting its contention that the Defendants used the computers, which are the subject of the discovery request, to secrete and distribute plaintiff's confidential information there is a sufficient nexus between [the plaintiff's] claims and its need to obtain a mirror image of the computer's hard drive, warranting the imaging requested by the Plaintiff"); *Calyon v. Mizuho Securities USA Inc.*, No. 07-CIV-02241-RODF, 2007 WL 1468889 at \*3 (S.D.N.Y. 2007) (courts "consider the relationship between the plaintiff's claims and the defendants' computers"); *Ameriwood Industries, Inc. v. Liberman*, No. 4:06CV524-DJS, 2006 WL 382591 at \*4 (E.D. Mo. 2006) ("defendants are alleged to have used the computers, which are the subject of the discovery request, to secrete and distribute plaintiff's confidential information"); *Balboa Threadworks, Inc. v. Stucky*, No. 05-1157-JTM-DWB, 2006 WL 763668 at \*4 (D. Kan. 2006) ("the alleged infringement in this case is claimed to have occurred through the use of computers to download copyrighted material, the importance and relevance of computer evidence is particularly important").

As noted above, a clear nexus exists between the issues in this action and Ms. Heard's devices. This case revolves around the falsity of Ms. Heard's allegations of abuse. Ms. Heard created photographic and other documentary evidence on these devices purporting to establish abuse in support of her defamatory campaign and litigation against Mr. Depp, "evidence" which is belied by the credible *be bene esse* testimony of Officers Melissa Saenz and Tyler Haddon (and several other witnesses). Mr. Depp contends that Ms. Heard falsified and manufactured much of her evidence, for instance by staging and/or digitally editing photographs. ***The outcome of this case could conceivably turn on the jury's assessment of the credibility and authenticity of the evidence Ms. Heard created and maintained on her devices – i.e., the photographs and***

other evidence that purport to document abuse. Mr. Depp's demand for an inspection therefore is vital to explore one of the core issues in this case.

The same *cannot* be said of Mr. Depp's devices. This case does *not* center on allegations that Mr. Depp manufactured evidence of his own injuries. In general, Ms. Heard does not even appear to contest the existence of Mr. Depp's injuries; she merely denies that she was the cause of them. Nor is there any allegation that the handful of photographs referred to in Ms. Heard's Motion were in any way doctored. Of note, the photographs cited in the Motion appear to have been obtained from a third party, Sean Bett, and were not even generated on Mr. Depp's devices. And in any event, the ultimate issue in this case turns on the falsity of Ms. Heard's claimed injuries, not Mr. Depp's. As such, the fact that a handful of photographs have been produced showing Mr. Depp's injuries is a woefully thin basis to seek any imaging of Mr. Depp's devices, much less the broad "mutuality" that Ms. Heard proposes.

Simply put, Ms. Heard has not stated a valid basis to image Mr. Depp's devices, nor has she proposed an appropriately tailored or logical protocol, and the Motion should be denied.

### **III. Ms. Heard's Complaints About Particular Documents Are Misguided**

Mystifyingly, Ms. Heard asserts that Mr. Depp produced only "selected excerpts" of two audio recordings that were produced under the Bates numbers DEPP8271 and DEPP17814 (the "Audio Recordings"), hurling false and wild accusations of "willful contempt" and demands for sanctions.

Ms. Heard is wrong. It was the *Sun*, one of the defendants in the U.K. case, not Mr. Depp, which first produced the Audio Recordings to Mr. Depp's British counsel during the U.K. action. Presumably the *Sun* obtained them from Ms. Heard. The Audio Recordings were then produced by Mr. Depp as part of the trial bundles from the U.K. action sought by Ms. Heard. We

reproduced the Audio Recordings in this case in the same version as received from Mr. Depp's U.K. counsel, which previously received them from the *Sun*. If they contain only partial conversations, then either only part of the conversations were ever recorded, or Ms. Heard, or someone on her behalf, altered them.

We have repeatedly made clear to Ms. Heard's counsel that all recordings of the parties have been produced (while of course always reserving the right to produce after discovered documents). Ms. Heard's counsel never identified these two recordings prior to filing this motion, although at various points her counsel made vague allusions to supposedly partial recordings. Indeed, it was only when counsel for Mr. Depp reviewed the Motion that they became aware of which particular recordings Ms. Heard was contending are mere "excerpts."<sup>3</sup>

Ms. Heard also complains that certain photographs were produced in PDF without metadata.<sup>4</sup> Those documents, however, produced as part of the trial bundles from the U.K. case, are in the same format from that action, and, moreover, appear to have as their source a third party, Sean Bett. Mr. Depp has produced files with appropriate metadata that is available to him. If Ms. Heard identifies particular documents that she wishes to further examine, Mr. Depp will cooperate with reasonable requests for native versions, to the extent he is in possession of the same, but he cannot produce what he does not have. This is an issue that should be addressed by meet and confer, not by motion.

Accordingly, the Court should deny Defendant Heard's motion in its entirety.

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<sup>3</sup> For instance, as reflected in **Exhibit A** hereto, at the end of a lengthy email from Ms. Heard's counsel there is a brief reference to unspecified audio files produced as excerpts, without any reference to the relevant Bates numbers.

<sup>4</sup> Ms. Heard and affiliated third parties have repeatedly produced pictures as PDFs without metadata.

Respectfully submitted,



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

Dated: October 22, 2021

# EXHIBIT A



**From:** [David Murphy](#)  
**To:** [Chew, Benjamin G.](#); [Vasquez, Camille M.](#); [Moniz, Samuel A.](#); [Meyers, Jessica N.](#)  
**Cc:** [Elaine Bredehoff](#); [Michael Dailey](#); [brottenborn@woodsrogers.com](mailto:brottenborn@woodsrogers.com)  
**Subject:** Depp v. Heard- Further Meet & Confer on Forensic Discovery  
**Date:** Wednesday, September 22, 2021 2:38:17 PM

**CAUTION: External E-mail. Use caution accessing links or attachments.**



Ben and Camille,

We write in furtherance of our initial meet-and-confer session on September 13, 2021 (the "Sept. 13 Call"), which concerned, among other things, Mr. Depp's Seventh Set of Requests for Production ("Seventh RFPs") and Ms. Heard's Seventh Set of Requests for Production ("Seventh RFPs") and Thirteenth Set of Requests for Production ("Thirteenth RFPs").

It should go without saying that we were surprised and disappointed by your proposed "agreed" order circulated today, which the parties did not at all contemplate during our first call and runs contrary to what we discussed. Indeed, as you recall, we agreed that the next step in the process would be for our respective forensic teams to discuss exactly what information was needed from the devices and why, and then circle back and determine if a call with our forensic experts made sense.

It was unfortunate that during the Sept. 13 Call, you were unable (or unwilling) to articulate a basis for the Seventh RFPs or specifically what you proposed to accomplish with this process. For example, when we repeatedly asked Ms. Vasquez why a full imaging of machines – containing the same data that was already reviewed and produced – was required, Ms. Vasquez indicated that she was "not the expert," but has been told that they needed "everything." However, we drew her attention to the expert witness disclosure for this purported expert wherein he indicated that based on his own analysis, the issues were not widespread and only affected a yet-to-be-identified portion of the data. We asked that more clarity be provided around exactly what he reviewed that led him to that limited conclusion. At the very least, it certainly was not "everything." As we noted during the Sept. 13 Call, most of this expert's declaration trafficked in maybes and possibilities, which is insufficient as a matter of law in Virginia to obtain imaged drives and devices (and most jurisdictions for that matter).

Upon further pressing, the only concrete issue to which Ms. Vasquez and her colleagues were able to point involved the photographs that Ms. Heard appended to the back of

her declaration in PDF format. Ms. Vasquez indicated that Mr. Depp's expert was concerned with the production of certain photographs in this format without their native metadata. We again reminded counsel that Ms. Heard had subsequently produced a variety of photographs in their native format (e.g., JPEG) along with a variety of metadata fields. During the call, we agreed that we would investigate whether those images were subsequently produced in native format—and if not, produce them. As you can imagine, this is a laborious exercise to be completed by the forensic team that is in process.

We also note that during the call, none of Mr. Depp's attorneys were able to identify what alleged metadata fields for any documents were at issue. In other words, neither Ms. Vasquez nor her colleagues were able to articulate what metadata fields were allegedly insufficient or concerning to Mr. Depp's expert. At one point, Ms. Vasquez indicated that she had an unfounded concern that all of the native images were processed through a photo processing program, but she was unable to identify what program she thought was used or why she had reached that conclusion. We drew Ms. Vasquez's attention to Mr. Depp's expert's designation again, wherein he surmised that a program called "Photo 3" could have been used to process certain photos in some yet-to-be-identified way. However, Ms. Vasquez was unable to offer any specifics or additional information—including what this program even is (we were unable to locate any details for this program after conducting research on the issue, which we told you during the call).

We again agreed that the next step in the process would be for the forensic teams to talk and explain exactly what they needed and why (with counsel present during the call). We explained that Mr. Depp's Seventh RFPs seeking broad discovery based on generic statements was improper and unfounded, especially based on his counsel's inability to explain in a cogent manner what was needed or why. Moreover, we remind counsel that Mr. Depp did not dispute the authenticity of any such photographs in the U.K. trial, which makes these newfound specious (and vaguely worded) issues rather confusing. Simply put, it makes us question whether Mr. Depp is advancing any of these issues in good faith or solely for purposes of harassment and to cause Ms. Heard to incur additional unnecessary expense.

These threshold issues must be resolved before any further forensic discovery would be appropriate, especially in light of the significant and unreasonable costs and burden associated with what would amount to entire re-review of the case file without justification or need. This is simply an unworkable proposition. On the contrary, when we

briefly discussed Ms. Heard's Seventh and Thirteenth RFPs, we explained that at this point, our concerns focused on excerpted audio recording that Mr. Depp previously produced. We understand that certain of the recordings were edited, and allegedly "non-responsive" portions were removed. We explained that we wanted an image of these complete files in their native format because there is no basis to withhold portions of these responsive documents based on a purported claim of irrelevance. Ms. Heard is entitled to these complete audio files to ensure that they were not edited based on our analysis of these specific files—something that neither Mr. Depp nor his expert has done with any specificity.

In light of the Sept. 13 Call and the parties' agreed plan moving forward, it was shocking to receive this one-sided draft order that completely ignored [1] the parties' agreement to further meet and confer with their respective forensic teams present, and [2] for Mr. Depp's counsel to provide detail as to any alleged deficiencies with Ms. Heard's production other than the small set of photographs referenced above. Please let us know if you are willing to further meet and confer regarding these forensic issues and the parties' respective requests for production. Based on the fact that we received this draft order this morning, it appears that Mr. Depp is taking the position that he does not need to provide any additional information or specificity as to these issues. This is indefensible as a matter of law in Virginia—and in most jurisdictions in the U.S. and federal courts. Indeed, Mr. Depp has claimed multiple times that Ms. Heard did not complete her meet and confer obligations based on an alleged "take it or leave it" proposal, yet that is precisely what Mr. Depp is now doing, but unlike Ms. Heard has still not even identified the specific bases for his Requests. This conduct is also consistent with Mr. Depp's unfortunate habit of taking contradictory positions whenever it suits him.

To the extent that Mr. Depp is willing to continue meeting and conferring regarding these issues, please let us know your availability next week for a call with the forensic teams, and we again request that counsel be prepared to discuss the specifics and reasons for Mr. Depp's Seventh Requests. In the meantime, please let us know if Mr. Depp will be providing Ms. Heard with the complete audio recording files that he produced in excerpted format.

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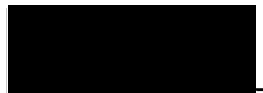
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of October 2021, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

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