VIRGINIA:

[redacted]

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II

Plaintiff/Counterclaim Defendant,

v.

AMBER LAURA HEARD,

Defendant/Counterclaim Plaintiff.

Civil Action No.: CL-2019-0002911

PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT RE: COUNTERCLAIM OF AMBER HEARD

Ms. Heard's Opposition sidesteps the real issues and seeks to distract the Court with irrelevant mudslinging, including a laundry list of alleged misdeeds by ***nonparty*** Adam Waldman (which are not material or supported by competent evidence). But the law is clear, and the facts needed to resolve this Motion in Mr. Depp's favor are few, simple, and undisputed.

Most fundamentally, the Counterclaim Statements are non-actionable opinions. Ms. Heard argues that whether she committed an abuse "hoax" can be proven true or false and therefore cannot be protected opinion. Ms. Heard misunderstands the law. The First Amendment affords considerable leeway for opinions and conclusions about ambiguous subject matter. When reasonable readers would understand that statements are subjective opinions, no liability arises, and even a clear factual assertion is not actionable when based on disclosed facts that enable readers to draw their own conclusions. Here, the evidence is undisputed that Mr. Waldman was stating his inferences from developments in high-profile litigation that were described in articles in which readers were explicitly informed that the underlying facts were contested. Thus, his statements are presented as ***the analysis of a partisan attorney with a disclosed bias, drawing conclusions from developments*** described in the articles. ***Mr. Waldman nowhere claims to be a fact witness*** or to have direct personal knowledge. And ***Mr. Waldman's statements are flatly contradicted in each article by the opposing side.*** In context, any reasonable reader would interpret his statements as subjective opinion and partisan advocacy.

Moreover, even if Ms. Heard could overcome that fatal defect, her Counterclaim would still be doomed. Ms. Heard cannot and has not established that Mr. Waldman made the Counterclaim Statements with actual malice. Indeed, she presents ***zero evidence*** from which the trier of fact could find (by clear and convincing evidence) that Mr. Waldman acted with *subjective knowledge* of actual or probable falsity.

Finally, Ms. Heard fails to present any evidence in support of her allegation that Mr. Depp "conspired" and directed Mr. Waldman to make the Counterclaim Statements, instead asking the Court to infer a conspiracy from Mr. Depp's appropriate assertion of the attorney-client privilege. That argument is completely unsupportable.

I. Ms. Heard Has Raised No Dispute Of Material Fact, And In Context Mr. Waldman's Statements Can Only Be Interpreted As Non-Actionable Opinions

Ms. Heard argues that whether she committed a "hoax" in accusing Mr. Depp of abuse is susceptible to being proven true or false. On that basis, she contends that the Counterclaim Statements are not protected opinion and can be a basis for defamation liability. Not so. In assessing whether a statement is defamatory, context is everything. Here, the Counterclaim Statements ultimately do nothing more than state Mr. Waldman's view that Ms. Heard's allegations were not credible and would ultimately be proven false at trial. Each of the articles provides two different interpretations of events by the Depp and Heard camps. As such, the statements merely reflect Mr. Waldman's interpretation of an inherently ambiguous subject, which involves conflicting testimony and about which there will never be universal agreement.

Tellingly, Ms. Heard's Opposition simply ignores the authorities explaining that ***"even a provably false statement is not actionable if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts."*** *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002) (emphasis added). The United States Supreme Court has recognized that statements of opinion are entitled to Constitutional protection, and that a statement that reflects one possible interpretation of ambiguous or disputable subject matter will not suffice to state a claim for defamation. Thus, there is a distinction between "alleged libel [that] purports to be an eyewitness or other direct account of events that speak for themselves," on the one hand, and a

mere *interpretation* of ambiguous events about which the speaker does not claim direct knowledge, on the other hand. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984). When a speaker offers ***"one of a number of possible rational interpretations of an event that bristled with ambiguities,"*** the United States Supreme Court has indicated that such speech is entitled to First Amendment protection as opinion. *Id.* at 513 (emphasis added); *see also, Moldea v. New York Times Company*, 22 F.3d 310, 313 (D.C. Cir. 1994) ("the Supreme Court has recognized, writers must be given some leeway to offer rational interpretation of ambiguous sources" and concluding that a statement in a book review was not actionable when it was a "supportable interpretation," and "the allegedly libelous statements were evaluations quintessentially of a type readers expect to find in that genre," since statements "must be judged with an eye toward readers' expectations").

Abundant case authority confirms the commonsense rule that subjective interpretations are not actionable. *See, e.g., Schaecher v. Bouffault*, 290 Va. 83, 106 (2015) (no liability for defamation for accusing a plaintiff of lying, when "a reasonable person... would have perceived the accusation as a pure opinion... based on [the defendant's] ***subjective understanding*** of the underlying scenario"); *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987) (***"Even when a statement is subject to verification, however, it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it....*** we acknowledge that the defendants' statement is capable of being proved or disproved, but we nevertheless hold that when viewed in context it is clearly an opinion, and therefore protected by the First Amendment"); *Spencer v. American Intern. Group, Inc.,* Civil No. 3:08CV00591, 2009 WL 47111 (E.D. Va. 2009) (no liability in defamation for statements by an attorney that were a "subjective assessment" of evidence, which

"could not have been objectively characterized as true or false at the time, as it depended largely on his own perspective and assessment of the weight of the available evidence"); *McKee v. Cosby*, 236 F.Supp.3d 427, 439-442 (D. Mass. 2017) (statement by a lawyer that an alleged rape victim's account was not credible was protected opinion, because ***"the opinions as to Plaintiff's credibility are not capable of being objectively verified or disproven,"*** especially when the facts underlying those opinions were disclosed to readers, and ***"an objective reader, considering both sources, would have had both sides of the verbal debate"*** thus ***"leaving the reader free to draw his own conclusions"***); *Safex Foundation, Inc. v. Safeth, Ltd.*, 531 F.Supp3d 285, 311-312 (D.C. Cir. 2021) (assertions that a plaintiff was engaged in a "scam" were statements of opinion even though they had "a clear factual connotation," because they were an "interpretation" of ambiguous sources and entitled to First Amendment protection); *see also, Hunter v. Hartman*, 545 N.W.2d 699, 707 (1996) (***"[a] commentator who advocates one of several feasible interpretations of some event is not liable*** in defamation simply because other interpretations exist," and ***"remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action***"); *Haynes v. Alfred A. Knopf, Inc.* 8 F.3d 1222, 1227 (7th Cir. 1993); *Gacek v. Owens & Minor Distribution, Inc.*, 666 F.3d 1142, 1147 (8th Cir. 1993).

In context, the Counterclaim Statements obviously reflect subjective conclusions by Mr. Waldman about inherently ambiguous and disputed factual matter. Indeed, each of the articles features Mr. Waldman discussing the inferences that he draws from case developments that are specifically described in the articles – such as sworn deposition testimony by police officers contradicting Ms. Heard's testimony, or the recanting of support for Ms. Heard by one of her friends. Moreover, Mr. Waldman's bias is front and center in the articles: he is clearly described

as Mr. Depp's attorney, and even the most unsophisticated reader understands that lawyers are advocates and that litigation involves disagreement about facts. Any reasonable reader would therefore expect a statement from Mr. Waldman to aggressively challenge Ms. Heard's claims and credibility, and readers' expectations are obviously a critical part of the analysis as to whether a statement is fact or opinion. And crucially, Mr. Waldman never claims to have witnessed anything himself, but merely to be explaining his own conclusions about conflicting evidence. Furthermore, because the articles in question present competing interpretations of disputed evidence (including statements by Ms. Heard's attorneys), readers were able to draw their own conclusions. Mr. Waldman's statements are never presented as facts, but merely as statements issued by one side of a high-profile legal battle about which there is well-documented disagreement. Any readers of the articles are necessarily on notice that Mr. Waldman's statements reflect his own interpretation of murky, disputed events about which he claims no firsthand personal knowledge.[1] And as for the reporters to whom the statements were originally made, they wrote articles setting out both sides of the debate, and manifestly were not under any impression that Mr. Waldman's statements were anything more than a statement by one side of a hotly contested legal debate. A claim for defamation is simply not supportable on these facts.

II. There Is Nothing In The Record To Support A Jury Finding Of Actual Malice By Clear And Convincing Evidence

Ms. Heard does not even attempt to dispute that she is a public figure. Nor does she appear to dispute that to hold Mr. Depp vicariously liable for Mr. Waldman's conduct she must

[1] Ms. Heard also attempts to argue that the overruling of Mr. Depp's demurrer somehow precludes raising this issue on summary judgment. Ms. Heard is incorrect. Nothing precludes the Court from addressing the issue on summary judgment, which is a different procedural posture, and in assessing whether a statement can support a claim for defamation liability, a court must examine the statements in their full context, such that the issue is a mixed question of fact and law. *Schaecher v. Bouffault, supra,* at 93. It is appropriate for the Court to evaluate that issue at summary judgment.

first establish that ***Mr. Waldman*** committed all elements of the tort of defamation, including that he acted with actual malice. Ms. Heard argues that actual malice is a factual question for the jury, but the Virginia Supreme Court has specifically confirmed that a failure to present evidence from which a jury could find actual malice by clear and convincing evidence justifies summary judgment. *Jackson v. Hartig*, 274 Va. 219, 232 (2007) ("[o]ur review of the record on the motion for summary judgment does not disclose any genuinely disputed material fact that would permit a reasonable fact finder to conclude that the defendants published, either with actual knowledge of falsity or subjective serious doubts as to truth, the statements").

So where is the evidence of Mr. Waldman's "knowledge of falsity" or "subjective serious doubts" about the truth of the Counterclaim Statements? There is none. Ms. Heard – who purposefully chose not to name Mr. Waldman in this action – has presented ***no evidence*** about Mr. Waldman's subjective view of the truth of the Counterclaim Statements. Ms. Heard weakly attempts to argue that Mr. Waldman's lack of firsthand knowledge of the events of the parties' marriage somehow suggests malice because he ought not to have spoken without direct personal knowledge. But that argument fundamentally misunderstands the law. As explained by the Virginia Supreme Court, the mere failure to adequately investigate truth does not suffice to show actual malice. *See, Jackson, supra,* at 230 ("in the context of the actual malice inquiry, a duty to investigate the accuracy of one's statements does not arise until the publisher of those statements has a high degree of subjective awareness of their probable falsity"). Nor does it suffice to argue that a reasonably prudent person would not have made the statements. *Id.*; *see also, St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant ***in fact*** entertained serious

doubts as to the truth of his publication"). Nor does it suffice to argue that Mr. Waldman might be hostile to Ms. Heard. *Jackson, supra,* at 231 ("ill will toward a public figure plaintiff is, without more, insufficient to establish knowledge of falsity or reckless disregard for the truth").

Simply put, it is not enough for Ms. Heard to argue that Mr. Waldman acted badly, or that a sensible person in Mr. Waldman's position would not have made the Counterclaim Statements – the burden is on Ms. Heard to present evidence that Mr. Waldman had "subjective awareness" of "probable falsity" from which the trier of fact could conclude by clear and convincing evidence that he acted with actual malice. Such evidence is utterly lacking.[2]

III. There Is Nothing In The Record To Support A Finding Of Specific Direction

Ms. Heard argues that "if a principal instructs his agent to make a public statement defaming the reputation of another person, the principal can be sued for defamation." (Opposition at p. 10). As a statement of law, that is basically correct, and that is what Ms. Heard has alleged ("Depp has authorized and conspired with his attorney, Adam Waldman (acting on Depp's behalf), to attempt to destroy and defame Ms. Heard in the press") (Counterclaim at ¶¶ 41; 66(d)-(f)). Setting aside the ***spectacularly hypocritical*** nature of this claim (Ms. Heard's attorneys are quoted giving the opposing viewpoint in the same articles) there is just no evidence that Mr. Depp "conspired" or directed Mr. Waldman to make the Counterclaim Statements.

Ms. Heard argues that Mr. Waldman was Mr. Depp's attorney. So what? That fact does not establish that Mr. Depp directed that Mr. Waldman make the Counterclaim Statements. Ms. Heard also argues that Mr. Waldman supposedly committed all sorts of horrible acts on Mr. Depp's behalf, from obtaining supposedly "false" declarations to "leaking" audio recordings of

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[2] Ms. Heard argues that Mr. Depp must know the truth or falsity of whether he abused Ms. Heard, and therefore acted with actual malice. That is a non sequitur. Vicarious liability is contingent on showing that an ***agent*** – in this case, allegedly, Mr. Waldman – committed a tort. Dobbs, et al., Dobbs' Law of Torts § 425 (2d ed.).

Mr. Depp and Ms. Heard. But even if those allegations were true, it would not follow that Mr. Depp directed Mr. Waldman to make the Counterclaim Statements. ***There is no evidence to that effect in the record***, and Mr. Depp is not required to waive privilege, merely because Ms. Heard opted to sue him based on his attorney's alleged statements. Ms. Heard has done her best to slime Mr. Depp with Mr. Waldman's supposed misdeeds, but her "conspiracy" theory has no actual evidentiary basis and can therefore be resolved on summary judgment.

IV. Ms. Heard's Opposition Is Misleading And Unsupported By Relevant Evidence

Finally, it should be noted that Ms. Heard's supporting evidence amounts to nothing more than a blatant attempt to smear Mr. Depp and distract the Court with irrelevancies. For example, Ms. Heard's Attachments 1, 2, 3, 4, 5, 6, 9, 10, 12, 13 and 26 are (unauthenticated) copies of text messages from Mr. Depp or Mr. Waldman that predate and do not involve the Counterclaim Statements. None of those documents have anything to do with the narrow issues on this Motion of opinion, knowledge of falsity, or specific direction. Attachment 7 contains excerpts of Mr. Waldman's deposition, which Ms. Heard incorrectly suggests states that Mr. Waldman (a U.S. lawyer) represented Mr. Depp in the UK Action. Mr. Waldman acknowledges making the Counterclaim Statements, but the transcript does not go to the issues of opinion, malice, or direction. Attachment 11 contains isolated snippets from a deposition of a third-party, which Ms. Heard presents as evidence of Mr. Waldman's obtaining a "false" declaration. Ms. Heard's conduct in making this accusation is troubling, particularly because ***Ms. Heard omits testimony from the same deposition wherein the witness acknowledges the truthfulness of the declaration.*** Regardless, this also does not go to the issue of opinion, nor malice, nor direction. Attachment 25 is a hearsay email from 2019 on which neither Mr. Depp nor Mr. Waldman is even copied – it does not go to opinion, nor malice, nor direction. The list goes on.

Respectfully submitted,

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Dated: March 18, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of March 2022, I sent a true and correct copy of the foregoing by email to each of the following:

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