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'S MOTION TO COMPEL PLAINTIFF TO PRODUCE DOCUMENTS

Plaintiff John C. Depp ("Mr. Depp"), by counsel, hereby opposes Defendant Amber Heard's ("Ms. Heard") Expanded Motion to Compel Mr. Depp to Produce Documents and Release Medical Records.

PRELIMINARY STATEMENT

The Court should deny Ms. Heard's Motion. The sole issue in this dispute is whether Ms. Heard lied about being the victim of domestic abuse at the hands of Mr. Depp in the op-ed she published in the *Washington Post* in December 2018. Instead of focusing on this issue, however, Ms. Heard seeks to conduct a vastly overbroad foray into irrelevant areas, with the apparent improper objectives to harass Mr. Depp and distract the Court from what is actually at issue in this case. While the scope of discovery is broad, it is not unlimited. A party is not obligated to produce documents that are (a) wholly irrelevant to the claims or defenses, (b) invasive and harassing, or (c) seek privileged materials. Mr. Depp's objections are not about "privacy," but are instead premised on the fundamental principle that discovery requests unlikely to lead to the discovery of admissible evidence are not permitted.

ARGUMENT

The Virginia standard does not allow a party to seek materials that are not "reasonably calculated to lead to the discovery of admissible evidence." Rule 4:1(b)(1). Further, discovery requests are prohibited if for the purpose of harassment, to needlessly increase in the cost of litigation, and unduly burdensome. *Id. See also* Va. Prac. Civil Discovery §2:24 (Courts can limit discovery if it is "unreasonably cumulative" or "burdensome").

I. The Physician-Patient Privilege Protects Information Acquired During the Course of Mr. Depp's Medical Treatment (RFP Nos. 5, 38, 43-44).

Virginia law has adopted the physician-patient privilege, which protects "any information that [a duly licensed practitioner of any branch of the healing arts] may have acquired in

attending, examining or treating the patient in a professional capacity." Va. Code § 8.01-399(a). Virginia recognizes a narrow exception to this privilege only when "the physical or mental condition of the patient is at issue." Va. Code § 8.01-399(b). Here, the sole issue is whether the 2018 op-ed, authored by Ms. Heard, was true or false. That inquiry has nothing to do with Mr. Depp's medical treatment, and Mr. Depp never put his physical and mental condition at issue. Only Ms. Heard is attempting to put Mr. Depp's physical or mental condition at issue. Her attempt will not waive any privilege because ***"the privilege is not overcome when the plaintiff's mental state is put in issue only by the defendant."*** *In re Sims*, 534 F.3d 117, 134, 141 (2d Cir. 2008) (addressing the psychotherapist-patient privilege); *see also Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007) ("A plaintiff who makes no claim for recovery based upon injury to his mental or emotional state" only waives the psychotherapist-patient privilege when "he does the sort of thing that would waive the attorney-client privilege, such as basing his claim upon the psychotherapist's communications with him or, as with the marital privilege, selectively disclosing part of a privileged communication in order to gain an advantage in litigation"). Because it was Ms. Heard who raised Mr. Depp's physical and mental condition, information related to the treatment for alcohol or drug abuse (**Request No. 5**) or an injury to his finger (**Request Nos. 43 and 44**), or communications with his personal physician (**Request No. 38**), if such information was "acquired in attending, examining or treating the patient in a professional capacity," is privileged under Va. Code § 8.01-399(a).

Further, **Request No. 38**, to the extent it seeks documents related to "other romantic partners" of Mr. Depp for the past nine years, should also be denied because such information is wholly irrelevant to whether Ms. Heard was the victim of domestic abuse by Mr. Depp. Likewise, **Request Nos. 43 and 44**, which seek documents relating to Mr. Depp's treatment for

an injury to his finger, should be denied because the medical records are unlikely to shed light on the "cause" of Mr. Depp's finger injury. Instead, the most relevant evidence will be the contemporaneous communications Mr. Depp engaged in at the time of the injury, which Mr. Depp has already agreed to produce. As Ms. Heard *caused* Mr. Depp's injury, Mr. Depp will produce the communications that relate to this incident as they are responsive to other RFPs. The full inquiry into his medical records, combined with the HIPAA release, is simply a cumulative and unduly burdensome request.

II. Mr. Depp's Alleged Drug Abuse Is Irrelevant to Whether Ms. Heard was the Victim of Domestic Abuse by Mr. Depp (RFP Nos. 4, 5, 17-21, 40).

The purported "connection" between Mr. Depp's alleged abuse and his alleged drug use is just as concocted as Ms. Heard's op-ed that is at the heart of this case. So issues such as Mr. Depp's supposed "shifting patterns of behavior," Def. Mot. at 2, would *not* be germane to this case or warrant Ms. Heard's blatant fishing expedition. While the probative value of any responsive documents would be minimal (and likely non-existent), there is high potential for unfair prejudice toward Mr. Depp based on the subject matter and the likelihood of confusing or misleading a jury. Thus, **Request Nos. 4, 5, 17-21, and 40** would likely produce only inadmissible evidence, *see* Rule 2:403(a), and accordingly should be denied.

Further, **Request No. 5** seeks additional information regarding *Ms. Heard's* treatment for alcohol or drug use. Documents related to Ms. Heard's drug and alcohol abuse should be in the possession, custody, and control of Ms. Heard. Requesting documents already *in her own* possession ignores that the burden of production on Ms. Heard is significantly less than that of Mr. Depp. Thus, this request, as it relates to Ms. Heard, is facially unreasonable, unduly burdensome, and overly expensive. *See* Rule 4.1(b)(1).

III. Requests Aimed At Plaintiff's Alleged Other Crimes, Wrongs, or Acts Are Not "Reasonably Calculated to Lead to the Discovery of Admissible Evidence" (RFP Nos. 17-21, 30-37, 39, 40, 41, and 42).

Ms. Heard's purported rationale for these improper requests appears to be to establish the false premise that Mr. Depp is a serial abuser. Of course, he is not an abuser. But any such character evidence, even if it existed, would be inadmissible in any event, so these requests are not "reasonably calculated" to lead to the discovery of admissible evidence. *See* Rule 2:404(a) ("Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith"); 2:404(b) ("Evidence of other crimes, wrongs, or acts is generally not admissible to provide the character traits of a person in order to show that the person acted in conformity therewith."). Indeed, "[e]vidence that someone has committed the same bad act over and over again does not show a 'plan' as that word is defined in Rule 404(b)(2)—that is propensity evidence that is prohibited by Rule 404(b)(1)." *W. All. Bank v. Jefferson*, No. 2:14-CV-0761 JWS, 2016 WL 1948803, at *5 (D. Ariz. May 3, 2016) (denying a modus operandi argument under the nearly identical Federal Rule of Evidence 404), on reconsideration in part on other grounds, No. 2:14-CV-0761 JWS, 2016 WL 4529821 (D. Ariz. Aug. 30, 2016). Evidence of separate incidents of violence or drug abuse cannot show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan" in relation to any abuse alleged by Ms. Heard as required for admissibility under Rule 2:404(b). *Cf. Gevas v. McLaughlin*, 798 F.3d 475, 487 (7th Cir. 2015) (affirming denial of motion to compel documents of defendants' disciplinary history to show likelihood of repeated wrongful act).

Further, these requests are simply irrelevant, and therefore do not qualify to prove character traits under Rule 2:405. The only character trait that is relevant here is whether Ms. Heard lied in her op-ed. Mr. Depp's character, especially as it relates to his alleged payments

made to witnesses for incidents never raised in this case (**RFP Nos. 17-21, 40**), his "other romantic partners" (**RFP Nos. 30-37, 39, 42**), and his prior arrests (**RFP No. 41**), is not on trial. While defamation claims may place the character of the victim at issue,[1] Ms. Heard's requests have nothing to do with Mr. Depp's character, and are fatally overbroad and unduly burdensome.

Request No. 41 is an example of a patently overbroad and a blatant harassment attempt. This request seeks documents sufficient to show any times that Mr. Depp was arrested for any reason, at any time. As indicated in Ms. Heard's moving papers, she is seeking documents from the 1980s and 90s. These records are so old that Mr. Depp cannot be certain that they still exist. Ms. Heard has not come close to demonstrating why arrest records would be relevant here, or why such records would lead to the discovery of admissible evidence. Such documents certainly are both irrelevant and substantially more prejudicial than probative if sought to be admitted as evidence. Nor does this request in any way relate to the "at issue" doctrine argued by Ms. Heard. The issue here is whether the op-ed was true, not whether Mr. Depp was ever arrested, at any time, for any reason.[2] This request, along with Nos. 17-21, 30-37, 39, 40, and 42, are improper.

CONCLUSION

For the foregoing reasons, Mr. Depp respectfully requests that the Court deny Ms. Heard's motion to compel.[3]

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[1] One of the cases cited by Ms. Heard to support her argument here is wholly unrelated to defamation all together. *Hall v. Lashbrook*, No. 24 Civ. 2687, 2018 WL 6830326 (N.D. Ill Dec. 28, 2018) (*habeas corpus* action challenging murder and arson convictions).

[2] As evidenced by footnote 3 to her original moving papers, it also appears that Ms. Heard has located the information she seeks through a method that is less burdensome than having Mr. Depp obtain 30 year old documents. To the extent these documents are public records, Ms. Heard should have no difficulty obtaining them.

[3] Ms. Heard's motion to compel responses to **Request No. 15** is unwarranted. The parties have not reached impasse on this request, and Mr. Depp is still investigating the existence and extent of security footage at Sweetzer Avenue. Mr. Depp will respond to Ms. Heard's counsel in due course, but should not be compelled to produce these documents now.

Dated: October 4, 2019

Respectfully submitted,

[redacted]

Benjamin G. Chew (VSB No. 29113)
Elliot J. Weingarten (*pro hac vice*)
Andrew C. Crawford (VSB No. 89093)
BROWN RUDNICK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 536-1700
Facsimile: (202) 536-1701
bchew@brownrudnick.com
eweingarten@brownrudnick.com
acrawford@brownrudnick.com

Robert Gilmore (*pro hac vice*)
Kevin Attridge (*pro hac vice)*
STEIN MITCHELL BEATO & MISSNER LLP
901 Fifteenth Street, N.W., Suite 700
Washington, D.C. 20005
Telephone: (202) 601-1589
Facsimile: (202) 296-8312
rgilmore@steinmitchell.com
kattridge@steinmitchell.com

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

Adam R. Waldman (*pro hac vice*)
THE ENDEAVOR LAW FIRM, P.C.
5163 Tilden Street, NW
Washington, DC 20016
Telephone: (202) 715-0966
Facsimile: (202) 715-0964
awaldman@theendeavorgroup.com

Counsel for Plaintiff John C. Depp, II

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October 2019, I caused copies of the foregoing to be served via email (per written agreement between the Parties) on the following:

Roberta A. Kaplan (*pro hac vice*)
Julie E. Fink (*pro hac vice*)
John C. Quinn (*pro hac vice*)
Joshua Matz (*pro hac vice*)
KAPLAN HECKER & FINK, LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
Telephone: (212) 763-0883
rkaplan@kaplanhecker.com
jfink@kaplanhecker.com
jquinn@kaplanhecker.com
jmatz@kaplanhecker.com

Eric M. George (*pro hac vice*)
Richard A. Schwartz (*pro hac vice*)
BROWNE GEORGE ROSS LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697
egeorge@bgrfirm.com
rschwartz@bgrfirm.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

[redacted]
Benjamin G. Chew, Esq. (VSB No. 29113)