VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff and Counter-defendant,

v.

AMBER LAURA HEARD,

Defendant and Counter-plaintiff.

Civil Action No.: CL-2019-0002911

AMBER HEARD'S OPPOSITION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S ANTI-SLAPP IMMUNITY

March 21, 2022

Elaine Charlson Bredehoft (VSB No. 23766)
Adam S. Nadelhaft (VSB No. 91717)
Clarissa K. Pintado (VSB No. 86882)
David E. Murphy (VSB No. 90938)
Charlson Bredehoft Cohen & Brown, P.C.
11260 Roger Bacon Drive, Suite 201
Reston, Virginia 20190
Telephone: (703) 318-6800
ebredehoft@cbcblaw.com
anadelhaft@cbcblaw.com
dmurphy@cbcblaw.com
cpintado@cbcblaw.com

J. 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 to Defendant and Counter-Plaintiff Amber Laura Heard

On January 29, 2021 the Hon. Bruce D. White held a hearing on Plaintiff's Plea in Bar to Ms. Heard's Anti-SLAPP defense, requesting the Court rule, as a matter of law, on whether the statements subject to Mr. Depp's defamation claim were regarding matters of public concern. The Court, after granting a long briefing schedule and lengthier hearing, and considering all the evidence and arguments, including declarations and other authorities, took the matter under advisement. On March 24, 2021, the Court ruled that as a matter of law, the statements were of matters of public concern and therefore satisfied the first prong of the Anti-SLAPP statute. Specifically, the Court held:

> the statements made by Defendant/Counterclaim Plaintiff Amber Heard in the Op Ed published in *The Washington Post* are, ***as a matter of law***, "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;"" therefore satisfying the first prong ("of public concern") of the Anti-SLAPP statue, Va. Code § 8.01-223.2

3/24/21 Order at 1. **Att. 1.**

Mr. Depp raised the same arguments at the Plea in Bar he now raises here. *Compare* 1/13/21 Br. at 3 ("The Court Should Rule that, ***As a Matter of Law***, Defendant's Statements... Do [Not] Concern Important Public Issues.") *to* Br. at 1, 2 (seeking summary judgment "***as a matter of law,***" because he claims the statements at issue do not regard matters of public concern). Mr. Depp also previously argued that the Virginia Supreme Court's decision in *Pendleton v. Newsome*, 290 Va. 162, 174 (2015) prevented Ms. Heard from obtaining Anti-SLAPP protection. *Compare* 1/13/21 Br. at 3-4 *to* Br. at 3. Mr. Depp also previously argued that the use of the word "solely" in the Anti-SLAPP statute meant that Ms. Heard could not receive Anti-SLAPP immunity. *Compare* 1/26/21 Rep. Br. at 2 *to* Br. at 2. Mr. Depp's current Motion offers no new facts and asserts no new law. The Court's March 24, 2021 ruling is consistent with the caselaw, which has held that this issue is a question of law in Virginia. *Alexis v. Kamras*, 2020 U.S. Dist. LEXIS 227962, at *55 (E.D. Va.

Dec. 3, 2020) (Payne, J). Mr. Depp offers no basis for the Court to reverse or reconsider its prior ruling, which was more extensively briefed, evidentiary support was presented, and the Court examined the issues in lengthier and considerable detail. Mr. Depp's Motion for Summary Judgment should be denied.[1]

MATERIAL FACTS

In late 2017, the nation witnessed a series of accusations of famous, powerful men abusing women. This triggered an intense, ongoing debate about the prevalence of abuse and the nature of the societal forces that have long caused victims – mainly women – to remain silent.[2] On December 18, 2018, Ms. Heard joined that conversation by publishing an Op-Ed online in *The Washington Post*, that described her as "an actress and ambassador on women's rights at the American Civil Liberties Union." **Att. 2**. The ACLU suggested and assisted Ms. Heard in writing the Op-Ed piece, and the ACLU submitted the piece to the Washington Post. The Op-Ed addressed how victims are often intimidated by institutions and social dynamics that protect abusers, and that these dynamics cause people to question victims. **Att. 3** (Declaration of ACLU) ¶ 5. The editors at *The Post* (not Ms. Heard) created the title, "Amber Heard: I spoke up against sexual violence – and faced our culture's wrath. That has to change." When the same Op-Ed appeared in *The Post's* print edition one day later, the editors changed the title to "A Transformative Moment for Women." **Att. 4**.

The dominant message of the Op-Ed is that "[w]e are in a transformative political moment"

---

[1] Moreover, as the Virginia Supreme Court has long held, "the decision to grant a motion for summary judgment is a drastic remedy." *Smith by Rosen v. Smith*, 254 Va. 99, 103 (1997).

[2] *See, e.g.*, Jeannie Suk Gersen, *Bill Cosby's Crimes and the Impact of #MeToo on the American Legal System,* NEW YORKER (Apr. 27, 2018); Amy Kaufman & Daniel Miller, *Six Women Accuse Filmmaker Brett Ratner of Sexual Harassment or Misconduct,* L.A. TIMES (Nov. 1, 2017); Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades,* N.Y. TIMES (Oct. 5, 2017).

and "have an opening now to bolster and build institutions protective of\women." Ms. Heard described the lessons of the #MeToo movement, surveyed the dramatic rise of women in electoral politics, and declared that "[w]omen's rage and determination to end sexual violence are turning into a political force." She called on Congress to "reauthorize and strengthen the Violence Against Women Act," and criticized "proposed changes to Title IX rules governing the treatment of sexual harassment and assault in schools." More broadly, she advocated the election of "representatives who know how deeply we care about these issues," as well as the adoption of cultural and political reforms to "right the imbalances that have shaped our lives."

On March 1, 2019, Mr. Depp filed a Complaint alleging defamation against Ms. Heard based on the Op-Ed. In response, Ms. Heard filed a Demurrer and Plea in Bar. Following the Demurrer, the remaining statements from Ms. Heard's Op-Ed at issue are: (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. **Att. at 5 at 4-5.** Mr. Depp then sought to dismiss Ms. Heard's Plea in Bar as to her Anti-SLAPP immunity defense. The Court ruled that as a "matter of law" Ms. Heard's statements regarded "matters of public concern," thus "satisfying the first prong ... of the Anti-SLAPP statute," and the second prong, whether the statements were made with actual malice, would be determined by a jury at trial. 3/24/21 Order, **Att. 1.**

ARGUMENT

Virginia's anti-SLAPP statute, Va. Code § 8.01-223.2, enacted in 2017, grants immunity to persons alleged to have made certain defamatory statements regarding matters of public concern:

> 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.... The immunity ... 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.

Va. Code § 8.01-223.2(A). There are two issues that must be determined. First, whether the statements at issue regard a matter of public concern. If they do, the immunity attaches. This issue has already been decided by this Court. **Att. 1.** Second, immunity can only be lost if the statements were made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false. "[T]he question of whether the statements were made with reckless disregard for their truth or constructive knowledge of their falsity will go to a jury." *Alexis*, 2020 U.S. Dist. LEXIS 227962, at *57. Mr. Depp seeks summary judgment on the first prong.

Mr. Depp, citing no Anti-SLAPP cases, advances three arguments. First, Mr. Depp argues (as he did previously) that because the alleged defamatory statements are "defamatory innuendo," somehow Virginia's Anti-SLAPP statute does not apply, citing *Pendleton v. Newsome*, 290 Va. 162, 174 (2015). But *Pendleton* did not involve the Anti-SLAPP statute at all. It merely held that at the demurrer stage, innuendo can potentially be defamatory. *Pendleton* is, thus, inapposite to the issue at hand. Moreover, it would be nonsensical for statements that potentially imply defamation to be exempted from Virginia's Anti-SLAPP statute while more direct statements would be covered. And at this stage, Mr. Depp still must prove at trial that the statements that survived demurrer are of and concerning him. His argument forgets this burden of proof.

Second, Mr. Depp argues (as he did previously), the alleged defamatory innuendo that purportedly implies Mr. Depp abused Ms. Heard is not covered by the Anti-SLAPP statute because it relates to their relationship, and those statements are not "solely" matters of public concern. First, he misplaces the word "solely" in the statute – the Defamation claim must be solely on the Op-Ed, which it is. Moreover, Courts throughout the country have held that statements regarding

domestic violence and sexual harassment are issues of public concern, and have found those claims to be matters of public concern even when they include accusations against individuals. For example, in *Sipple v. Found. for Nat'l Progress*, the Court held that a complaint arising from a magazine article that accused a nationally known political consultant of domestic violence fell within the scope of the anti-SLAPP statute because "domestic violence is an extremely important public issue in our society." 71 Cal. App. 4th 226, 239 (1999). In *Guzman v. Finch*, 2019 WL 1877184, at *5–6 (S.D. Cal. Apr. 26, 2019), with facts similar to circumstances here, the Court found that a Facebook post discussing the author's experience with rape and domestic violence to empower other survivors qualified as an issue of public interest because "the focus of Defendant's conduct appear[ed] to be the public interest in domestic violence and/or abusive relationships rather than an effort to gather ammunition for another round of [private] controversy." *Id.* And in *Campone v. Kline*, 2018 WL 3652231, at *7 (Tex. App. Aug. 2, 2018), the Court held that allegations that a religious leader had made multiple women feel uncomfortable were protected under Texas's anti-SLAPP statute because "[t]hose allegations can be viewed as touching on issues of . . . public safety."[3] Ms. Heard's article is, as the Court has already found, clearly about a matter of public concern even where it mentions, in broad terms, some of her life experiences.

Finally, Mr. Depp argues that Ms. Heard's conduct from 2016 to the time of the Op-Ed, somehow exempts application of the Anti-SLAPP statute. Yet Mr. Depp's Complaint is based solely on the Op-Ed, and no other activities. Thus, this differs from the case he cites, *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l*, 593 F. Supp. 2d 840, 847 (E.D. Va.

[3] *See also e.g.*, *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146 (2004) (charges of domestic abuse by one partner in a lesbian relationship that had achieved national prominence due to adoption litigation were an issue of public interest because claims "potentially affected a large number of children and adoptive parents beyond the direct participants.")

2008), which was based on a *tortious interference* claim, not a defamation claim, and related to the old version of the statute, and it was alleged Defendant's conduct included much more interference with Plaintiffs than statements made at a public hearing. *Id.* Thus, like every other case cited by Mr. Depp in this Motion for Summary Judgment, *Smithfield* is entirely inapplicable.

CONCLUSION

Mr. Depp simply rehashes the same arguments he previously asserted unsuccessfully. This Court has already ruled, as a matter of law, on these very same issues, at Mr. Depp's request and Mr. Depp has provided no new facts or law to justify reversing the Court's ruling. For all the reasons set forth in the earlier briefing and in this brief, Ms. Heard respectfully requests this Court deny Mr. Depp's Motion.

Dated this 21st day of March 2022.

Respectfully submitted,

Amber L. Heard

[redacted]

Elaine Charlson Bredehoft (VSB No. 23766)
Adam S. Nadelhaft (VSB No. 91717)
Clarissa K. Pintado (VSB No. 86882)
David E. Murphy (VSB No. 90938)
Charlson Bredehoft Cohen & Brown, P.C.
11260 Roger Bacon Drive, Suite 201
Reston, Virginia 20190
Telephone: (703) 318-6800
ebredehoft@cbcblaw.com
anadelhaft@cbcblaw.com
dmurphy@cbcblaw.com
cpintado@cbcblaw.com

J. 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 to Defendant and Counter-Plaintiff Amber Laura Heard

CERTIFICATE OF SERVICE

I certify that on this 21st day of March, 2022, a copy of the foregoing shall be served by via email, pursuant to the Agreed Order dated August 16, 2019, as follows:

Benjamin G. Chew, Esq.
Andrew C. Crawford, Esq.
BROWN RUDNICK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 536-1700
Facsimile: (202) 536-1701
bchew@brownrudnick.com
acrawford@brownrudnick.com

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

Counsel for Plaintiff and Counter-Defendant John C. Depp, II

[redacted]
Elaine Charlson Bredehoft (VSB No. 23766)

VIRGINIA:

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

ORDER

THIS MATTER CAME TO BE HEARD upon Plaintiff/Counterclaim-Defendant's Motion to Deny the Remainder of Defendant/Counterclaim Plaintiff's Plea in Bar, and Defendant/Counterclaim-Plaintiff's motion to Schedule an Evidentiary Hearing Before a Jury on the Remaining Issues (the "Motion"), and upon consideration of the briefs, exhibits and argument of counsel, it is hereby

ORDERED as follows:

1) the statements made by Defendant/Counterclaim Plaintiff Amber Heard in the Op Ed published in *The Washington Post* are, as a matter of law, "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;" therefore satisfying the first prong ("of public concern") of the Anti-SLAPP statue, Va. Code § 8.01-223.2; and it is further
2) the remaining issue on the immunity portion of the Anti-SLAPP statute, *i.e.*, whether Ms. Heard made the statements "with actual or constructive knowledge that they

[were] false or with reckless disregard for whether they [were] false," will be determined by a jury as part of the trial scheduled to commence on ~~May 17, 2021~~ April 11, 2022.

[redacted]

SO ORDERED.

Dated: ~~January~~ March 24, 2021

[redacted]

Chief Judge, Fairfax County Circuit Court

Compliance with Rule 1:13 requiring the endorsement of counsel of record is modified by the Court, in its discretion, to permit the submission of the following electronic signatures of counsel in lieu of an original endorsement or dispensing with endorsement.

WE ASK FOR THIS:

[redacted]

David E. Murphy (VSB No. 90938)
Charlson Bredehoft Cohen & Brown, P.C.
11260 Roger Bacon Drive, Suite 201
Reston, Virginia 20190
Telephone: (703) 318-6800
ebredehoft@cbcblaw.com
anadelhaft@cbcblaw.com
dmurphy@cbcblaw.com

J. 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 to Defendant/Counterclaim-Plaintiff, Amber Laura Heard

SEEN AND _____:

_____

Benjamin G. Chew (VSB 29113)
Andrew C. Crawford (VSB 89093)
BROWN RUDNICK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 536-1700
Facsimile: (202) 536-1701
bchew@brownrudnick.com
acrawford@brownrudnick.com

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

Counsel for Plaintiff/Counterclaim-Defendant, John C. Depp, II

Opinions

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

Amber Heard arrives at the premiere of "Aquaman" on Dec. 12 in Los Angeles. (Jordan Strauss/Jordan Strauss/Invision/AP)

By Amber Heard
December 18, 2018

Amber Heard is an actress and ambassador on women's rights at the American Civil Liberties Union.

I was exposed to abuse at a very young age. I knew certain things early on, without ever having to be told. I knew that men have the power — physically, socially and financially — and that a lot of institutions support that arrangement. I knew this long before I had the words to articulate it, and I bet you learned it young, too.

Like many women, I had been harassed and sexually assaulted by the time I was of college age. But I kept quiet — I did not expect filing complaints to bring justice. And I didn't see myself as a victim.

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.

Friends and advisers told me I would never again work as an actress — that I would be blacklisted. A movie I was attached to recast my role. I had just shot a two-year campaign as the face of a global fashion brand, and the company dropped me. Questions arose as to whether I would be able to keep my role of Mera in the movies "Justice League" and "Aquaman."

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

Listen to broadcast journalist Connie Chung read a letter to Christine Blasey Ford, acknowledging publicly for the first time that she was sexually abused. (Kate Woodsome, Danielle Kunitz/The Washington Post)

Imagine a powerful man as a ship, like the Titanic. That ship is a huge enterprise. When it strikes an iceberg, there are a lot of people on board desperate to patch up holes — not because they believe in or even care about the ship, but because their own fates depend on the enterprise.

Most Read Opinions

1 Opinion
The most revealing insight of Michael Cohen's testimony

2 Opinion
Trump's utterly unsurprising diplomatic debacle

3 Opinion
The case for getting Trump's tax returns just got stronger — and more urgent

4 Perspective
Yes, Michael Cohen's a liar and a criminal. So how come you believed him?

5 Opinion
The Republican Senate majority is imperiled

In recent years, the #MeToo movement has taught us about how power like this works, not just in Hollywood but in all kinds of institutions — workplaces, places of worship or simply in particular communities. In every walk of life, women are confronting these men who are buoyed by social, economic and cultural power. And these institutions are beginning to change.

We are in a transformative political moment. The president of our country has been accused by more than a dozen women of sexual misconduct, including assault and harassment. Outrage over his statements and behavior has energized a female-led opposition. #MeToo started a conversation about just how profoundly sexual violence affects women in every area of our lives. And last month, more women were elected to Congress than ever in our history, with a mandate to take women's issues seriously. Women's rage and determination to end sexual violence are turning into a political force.

We have an opening now to bolster and build institutions protective of women. For starters, Congress can reauthorize and strengthen the Violence Against Women Act. First passed in 1994, the act is one of the most effective pieces of legislation enacted to fight domestic violence and sexual assault. It creates support systems for people who report abuse, and provides funding for rape crisis centers, legal assistance programs and other critical services. It improves responses by law enforcement, and it prohibits discrimination against LGBTQ survivors. Funding for the act expired in September and has only been temporarily extended.

We should continue to fight sexual assault on college campuses, while simultaneously insisting on fair processes for adjudicating complaints. Last month, Education Secretary Betsy DeVos proposed changes to Title IX rules governing the treatment of sexual harassment and assault in schools. While some changes would make the process for handling complaints more fair, others would weaken protections for sexual assault survivors. For example, the new rules would require schools to investigate only the most extreme complaints, and then only when they are made to designated officials. Women on campuses already have trouble coming forward about sexual violence — why would we allow institutions to scale back supports?

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.

I want to ensure that women who come forward to talk about violence receive more support. We are electing representatives who know how deeply we care about these issues. We can work together to demand changes to laws and rules and social norms — and to right the imbalances that have shaped our lives.

Read more:

The Post's View: What Betsy DeVos's new Title IX changes get right — and wrong

Betsy DeVos: It's time we balance the scales of justice in our schools

Janet Napolitano: Don't let the Trump administration undermine Title IX

Mili Mitra: The most horrifying part of the Dartmouth sexual harassment case

710 Comments

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II, Plaintiff and Counter-defendant, v. AMBER LAURA HEARD, Defendant and Counter-plaintiff.	Civil Action No.: CL-2019-0002911

DECLARATION OF BEN WIZNER

1. My name is Ben Wizner. I am employed by the American Civil Liberties Union Foundation ("ACLU") in the position of Director of the Speech, Privacy, and Technology Project. I am familiar with the facts set forth in this Declaration based on my position with the ACLU.

2. The ACLU Women's Rights Project, a project within the Ruth Bader Ginsburg Liberty Center of the ACLU Legal Department, engages in systemic legal reform to ensure that everyone has the freedom to live, work, and learn regardless of gender. One of its priorities is holding institutions accountable for gender-based violence and requiring them to adopt systems to prevent such violence before it happens

3. Domestic violence, sexual assault, and other forms of gender-based violence deprive women and girls of their fundamental ability to live with dignity. Women and girls experience domestic violence and sexual assault at alarming rates. Governments, institutions, laws, and policies contribute to the systematic devaluation of the lives and safety of women and girls by failing to respond to gender-based violence and by discriminating against those

subjected to such violence. Domestic violence and sexual assault can affect women in all walks of life, including celebrities.

4. Amber Heard is, and was in November 2018, an "ambassador" for the ACLU on Women's Rights. Part of Ms. Heard's role as an ambassador for the ACLU is to speak and write on areas the ACLU believes are of public importance, to encourage change and reform.

5. In November 2018, the ACLU suggested Ms. Heard write and assisted her in submitting an Op-Ed piece to *The Washington Post* addressing the reluctance of survivors of domestic violence and sexual assault to report their experiences, and the institutional intimidation and social dynamics that discourage such reporting and protect abusers. Her piece further addressed how these dynamics can cause people to question survivors who report violence. The ACLU regards all of these matters as subjects of public concern and has repeatedly addressed them through litigation, advocacy, and public education. This Op-Ed piece also included discussion of the #MeToo movement, an increase in women in Congress, the Violence Against Women Act, and reduction in schools' obligations to respond to sexual harassment and assault under Title IX.

6. The ACLU assisted Ms. Heard in placing her Op-Ed piece with *The Washington Post*. In my view, *The Washington Post* is a highly regarded institution and its acceptance of the piece for publication is a further indication of the importance of the issues that it addresses. In the ACLU's experience, national news outlets like *The Washington Post* do not look to publish Op-Eds on private matters, but rather seek out timely pieces on newsworthy issues that will be of interest to their readers. The fact that *The Washington Post* selected and published Ms. Heard's Op-Ed is a testament to the importance to its readership of the topics she covered.

I declare under penalty of perjury that the foregoing is true and correct.

January 22, 2021
Date

[redacted]
Ben Wizner
American Civil Liberties Union

KER

no un, but s the tuff

s go, It's hard to better fit to fill John Senate seat than the rst female Air Force hat — Rep. Martha

oug Ducey (R) ap- er, too. On Tuesday, lly to fill the seat a special election the remaining two erm. Assuming she o run for reelection could conceivably art of the next four the seat she'll occu- , when she's due to

rriveling, it may be st last month that ce to Democrat- ema, when she was reting Republican old on. Sen. Jon Kyl, ated in September rat, announced last d stay only until the ing someone else a ace for 2020.

ill become her mid- Senate colleague. l rise hasn't been cluding opposition m McCain's family. against Sinema on a ump platform (de- riticizing the presi- insulted the family, mory by failing to when touting legis- actually named for S. McCain National ation Act for. Fiscal perceived as a low contrived to mimic withheld McCain's nion during com- dgned the act into

recommendation, met with Cindy gized for her over- reportedly accepted

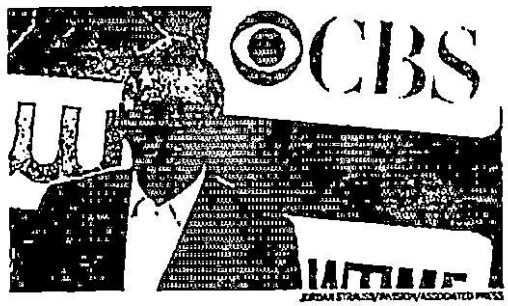
ns may not be so these would largely o just rejected her 'll hold. But nearly era preferred McSal- the governor is re- w to select someone same party as the it has been vacated. Sally's appointment litical calculation — ed the most likely to ost future challeng- y was initially hesi- eam reportedly were ally's post-election she blamed her loss n rather than inter- akes.

-blah-blah. Such nit- ant if you're a politi- talk-show host, but ple are more inter- ' human aspect — experiences — and to the table.

quite a lot, includ- qualities in this town erson, she is almost nt social event we hich included a re- person to introduce few autobiographi- y's introduction was n a pilot, and I like

oes, as many will ovember concession with McSally seated h her rescue golden r, who seemed most mbing on McSally's dn't steal all hearts, y consolidated the

ks, McSally is the tereotypical fighter ale sporting a Top



JORDAN STRAUSS/INVISION/ASSOCIATED PRESS

Leslie Moonves in July 2018. The CBS chief executive resigned in September after multiple allegations of sexual misconduct surfaced.

A transformative moment for women

BY AMBER HEARD

I was exposed to abuse at a very young age. I knew certain things early on, without ever having to be told. I knew that men have the power — physically, socially and financially — and that a lot of institutions support that arrangement. I knew this long before I had the words to articulate it, and I bet you learned it young, too.

Like many women, I had been harassed and sexually assaulted by the time I was of college age. But I kept quiet — I did not expect filing complaints to bring justice. And I didn't see myself as a victim.

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.

Friends and advisers told me I would never again work as an actress — that I would be blacklisted. A movie I was attached to recast my role. I had just shot a two-year campaign as the face of a global fashion brand, and the company dropped me. Questions arose as to whether I would be able to keep my role of Mera in the movies "Justice League" and "Aquaman."

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

Imagine a powerful man as a ship, like the Titanic. That ship is a huge enterprise. When it strikes an iceberg, there are a lot of people on board desperate to patch up holes — not because they believe in or even care about the ship, but because their own fates depend on the enterprise.

In recent years, the #MeToo movement has taught us about how power like this works, not just in Hollywood but in all kinds of institutions — workplaces, places of worship or simply in particular communities. In every walk of life, women are confronting these men who are buoyed by social, economic and cultural power. And these institutions are beginning to change.

We are in a transformative political moment. The president of our country has been accused by more than a dozen women of sexual misconduct, including assault and harassment. Outrage over his statements and behavior has energized a female-led opposition. #MeToo started a conversation about just how profoundly sexual violence affects women in every area of our lives. And last month, more women were elected to Congress than ever in our history, with a mandate to take women's issues seriously. Women's rage and determination to end sexual violence are turning into a political force.

We have an opening now to bolster and build institutions protective of women. For starters, Congress can reauthorize and strengthen the Violence Against Women Act. First passed in 1994, the act is one of the most effective pieces of legislation enacted to fight domestic violence and sexual assault. It creates support systems for people who report abuse, and provides funding for rape crisis centers, legal assistance programs and other critical services. It improves responses by law enforcement, and it prohibits discrimination against LGBTQ survivors. Funding for the act expired in September and has only been temporarily extended.

We should continue to fight sexual assault on college campuses, while simultaneously insisting on fair processes for adjudicating complaints. Last month, Education Secretary Betsy DeVos proposed changes to Title IX rules governing the treatment of sexual harassment and assault in schools. While some changes would make the process for handling complaints more fair, others would weaken protections for sexual assault survivors. For example, the new rules would require schools to investigate only the most extreme complaints, and then only when they are made to designated officials. Women on campuses already have trouble coming forward about sexual violence — why would we allow institutions to scale back supports?

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.

I want to ensure that women who come forward to talk about violence receive more support. We are electing representatives who know how deeply we care about these issues. We can work together to demand changes to laws and rules and social norms — and to right the imbalances that have shaped our lives.

The writer is an actress and ambassador on women's rights at the American Civil Liberties Union.

ALYSSA ROSENBERG

Excerpted from washingtonpost.com/people/alyssa-rosenberg

Pay the women instead

If there is one tiny kernel of relief in the infuriating news cyclone that has been 2018, it is the report that CBS doesn't intend to pay disgraced and disgraceful former chairman and chief executive Leslie Moonves $120 million in severance. Of course, that relief is mitigated incurring costs upfront in the form of lawyers' fees. It's a perverse incentive structure that gives companies millions of reasons not to deal aggressively with male stars who harass their co-workers.

Some companies have begun to write employment contracts specifying that employees who are axed because of sexual misconduct can't demand that

Racism is a national security issue

BY SHERRILYN IFILL

Two newly released reports from the Senate Intelligence Committee about Russian interference in the 2016 election have been nothing short of revelatory. Both studies — one produced by researchers at Oxford University, the other by the cybersecurity firm New Knowledge — describe in granular detail how the Russian government tried to sow discord and confusion among American voters. And both conclude that Russia's campaign included a massive effort to deceive and co-opt African Americans. We now have unassailable confirmation that a foreign power sought to exploit racial tensions in the United States for its own gain.

Ever since U.S. intelligence agencies reported that the Russian government worked to sway the 2016 election, foreign election meddling has been one of our nation's top national security concerns. But our discussions about Russian interference rarely touch on the other major threat to our elections: the resurgence of state-sponsored voter suppression in the United States. In light of these disturbing new reports, it is clear we can no longer think of foreign election meddling as a phenomenon separate from attempts to disenfranchise Americans of color. Racial injustice remains a real vulnerability in our democracy, one that foreign powers are only too willing to attack.

How should we respond? First, we have to make it easier, not harder, for Americans to vote. In the wake of the Supreme Court's 2013 *Shelby County* decision, which severely weakened the Voting Rights Act, we've seen a resurgence of voter-suppression efforts across the nation. Congress has the power to fix the Voting Rights Act, but so far it has declined to do so. The revelations of Russia's racial targeting should serve as a wake-up call that domestic voter suppression, in addition to being unconstitutional, effectively aids foreign attacks on our democracy. Indeed, we should take seriously the danger that domestic and foreign groups may coordinate to suppress turnout in future elections, a possibility we can begin to forestall, first and foremost, by protecting the franchise here at home. Rep. Terri A. Sewell (D-Ala.) has already introduced a comprehensive new voting rights bill, and Congress should swiftly act upon it in the new year.

Second, these revelations only deepen the urgency of demanding more accountability from technology companies. The New Knowledge report criticizes social media companies such as Facebook for misleading Congress about the nature of Russian interference, noting that one even denied that specific groups were targeted. This is just more evidence that Silicon Valley has yet to come to grips with the enormous influence it wields in our democracy, and the ways that foreign powers can use that influence to manipulate Americans. Congress should require greater transparency and responsibility from these corporations before the 2020 elections.

Finally, we have to accept that foreign powers seize upon these divisions because they are real — because racism remains the United States' Achilles' heel. Indeed, it is, and always has been, a national security vulnerability — a fundamental and easily exploitable reality of American life that belies the image and narrative of equality and justice we project and export around the world. It may be especially difficult in our era of "fake news" and "alternative facts," but we must recognize that our failure to acknowledge hard truths, especially when it comes to race, makes it easier for foreign powers to turn us against one another. Russia did not conjure out of thin air the black community's legitimate grievances about racist policing. Nor did it invent racist and hateful conspiracy theories. Rather, Russian trolls seized upon these real problems as ready-made sources of discord. Moving forward, we need to recognize that our failure to honestly address issues of civil rights and racial justice makes all of us more susceptible to foreign interference.

This is hardly the first time our adversaries have identified race and racism as America's great vulnerability. During the Cold War, the Soviet Union frequently pointed to segregation and civil unrest as proof of American hypocrisy. This propaganda was sufficiently widespread, and contained enough truth, that leaders of both parties began arguing that segregation undermined the United States' position in the Cold War, helping to ease the passage of civil rights legislation in the 1950s and 1960s.

Today, we need a similar understanding that our failure to ensure equal justice for all has grave implications for U.S. national security. The upcoming House oversight committee hearings on Russian interference and voter suppression will be critical opportunities to educate the public on the threats to our democracy, and they deserve our close attention.

But we must be careful not to reduce the struggle for racial equality into a bloodless question of national interest. Civil rights are essential to our national security, but national security cannot be the chief rationale for pursuing civil rights. After all, racial injustice is not just another chink in our armor. It is the great flaw in our character. Our adversaries know that race makes us our own worst enemy. It is past time we learn this hard truth ourselves.

The writer is president and director-counsel of the NAACP Legal Defense and Educational Fund.

DAVID IGNATIUS

A Russian spy's dream

Imagine American politics for a moment as a laboratory experiment. A foreign adversary (let's call it "Russia") begins to play with the subjects, using carrots and sticks to condition their behavior. The adversary develops tools to dial up anger and resentment inside the lab bubble, and even recruits unwitting accomplices to perform specific tasks.

This 21st-century political dystopia isn't drawn from a "spec script" that just landed in Hollywood. It's a summary of two reports on the Kremlin-linked Internet Research Agency published this week by the Senate Intelligence Committee. The studies describe a sophisticated, multilevel Russian effort to use every available tool of our open society to create resentment, mistrust and social disorder.

For a century, Russian intelligence agents have been brilliant at creating false fronts and manipulating opposition groups. Now, thanks to the Internet, they seem to be perfecting these dark arts.

Even as it meddles abroad, the Kremlin has just introduced new legislation to block its own information space from foreign penetration. Under the new law, reported this week, Russia could control all Internet and message traffic into the country, block any anonymous websites and, during a crisis, manage the Russian Web from a central command point.

Put the two halves of Russian behavior

"Russia's IRA activities were designed to polarize the U.S. public and interfere in elections," the study says, by encouraging African American voters to boycott elections, pushing right-wing voters toward extremism, and "spreading sensationalist, conspiratorial and other forms of junk political news and misinformation."

The Russians pushed every button. They sought to tap African American anger with "Blacktivist" and "Black Matters" Facebook pages. They reached conservatives through pages called "Army of Jesus," "Heart of Texas" and "Secured Borders." The list of the IRA's top-20 Facebook pages is a catalogue of American rage.

The New Knowledge report blows the cover off these Internet operations. It shows how Hillary Clinton and vice-presidential nominee Tim Kaine were depicted as the "Satan Team," with Clinton wearing devil's horns and Kaine bearing a red mark on his forehead. The researchers found an image of Jesus wearing a red "Make America Great Again" hat.

Instagram provided a useful platform for manipulating younger Americans. The IRA's "Blackstagram" account had 303,668 followers; "American Veterans" had 215,680; "Sincerely Black" had 196,754; and "Rainbow Nation" had 156,465, to name the top four Instagram pages cited in the New Knowledge study.

Russia's Internet activity wasn't just

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWS
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAÉ L. BUGG

JUDGES

COUNTY OF FAIRFAX CITY OF FAIRFAX

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

March 27, 2020

Roberta A. Kaplan, Esq.
Julie E. Fink, Esq.
John C. Quinn, Esq.
Joshua Matz, Esq.
Kaplan Hecker & Fink, LLP
350 Fifth Ave., Suite 7110
New York, NY 10118

J. Benjamin Rottenborn, Esq.
Joshua R. Treece, Esq.
Woods Rogers, PLC
10 S. Jefferson St., Suite 400
Roanoke, VA 24011

Eric M. George, Esq.
Richard A. Schwartz, Esq.
Browne George Ross, LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, CA 90067

Benjamin G. Chew, Esq.
Elliot J. Weingarten, Esq.
Camille M. Vasquez, Esq.
Brown Rudnick, LLP
601 Thirteenth St. NW, Suite 600
Washington, DC 20005

Adam R. Waldman, Esq.
The Endeavor Law Firm, P.C.
5163 Tilden Street NW
Washington, DC 20016

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