

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
COURT SERVICES

2021 JAN 26 12:38

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

JOHN C. DEPP, II

Plaintiff,

v.

Civil Action No.: CL-2019-0002911

AMBER LAURA HEARD,

Defendant.

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO
DENY THE REMAINDER OF DEFENDANT'S PLEA IN BAR**

Ms. Heard's opposition to Mr. Depp's motion to deny the remainder of her plea in bar for anti-SLAPP immunity (the "Motion") is devoid of *any* analysis or applicable authority demonstrating that Mr. Depp is not entitled to relief sought. Accordingly, the Court should deny the remainder of her plea in bar.

ARGUMENT

I. The Allegedly Defamatory Statements in Ms. Heard's Op-Ed Are Not Protected Statements of Public Concern

Critically, while asserting an absolute right to an evidentiary hearing before a jury on her plea in bar for anti-SLAPP immunity, Ms. Heard then concedes that the scant case law addressing Virginia's anti-SLAPP statute has recognized that a critical element for anti-SLAPP immunity *can* be resolved as a matter of law. *See* Opp. at 5-6. This critical element – whether Ms. Heard's defamatory statements concern a matter of public concern – can and should be resolved by this Court as a matter of law; and, because Ms. Heard's defamatory statements *do not* concern matters of public concern, the Court may, accordingly, dispense of Ms. Heard's remaining plea in bar for anti-SLAPP immunity without the need for an evidentiary hearing. This is *precisely* what the Court did in its most recent Letter Opinion denying Mr. Depp's plea in bar for anti-SLAPP immunity without the need for an evidentiary hearing and ruling that he is not entitled to anti-SLAPP immunity as a matter of law.

In her Opposition, Ms. Heard rehashes arguments previously raised in her Demurrer and Plea in Bar, and rejected by this Court, in a transparent attempt to obfuscate the true nature of the defamatory statements which are the subject of Mr. Depp's defamation claims. Ms. Heard argues that that the "dominant message" of the Op-Ed is about the #MeToo movement and the related political and legislative initiatives and, thus, pertains to a matter of public concern. *See* Opp. at 3-4. But, Ms. Heard's statements advocating for the Violence Against Woman Act or

the changes to Title IX rules are the subject of this action. Rather, it is her false statements about purportedly experiencing abuse at the hands of Mr. Depp – statements this Court has already found plausibly convey the defamatory meaning that Mr. Depp abused Ms. Heard – that must regard a matter of public concern for anti-SLAPP immunity to attach. *See* Va. Code § 8.01-223.2 (providing immunity for “a claim of defamation *based solely on statements (i) regarding matters of public concern . . .*” (emphasis added)). The *defamatory statements* Ms. Heard made about Mr. Depp in the Op-Ed are decidedly *not* “regarding matters of public concern,” as they pertain to what allegedly occurred in her private, domestic relationship with Mr. Depp.

None of the authorities cited by Ms. Heard support a contrary conclusion. Defendant Heard, quoting this Court’s March 27, 2020 Order, contends that this Court already found that Ms. Heard’s statements are of public concern. *See* Opp. at 7-8. Not so. The defamatory meaning of Ms. Heard’s statements recognized by this Court is that “Mr. Depp abused Ms. Heard.” *See Exhibit A* (Letter Opinion of March 27, 2020 at 5-6). The Court’s finding that the “op-ed concerns the matter of what happened after Defendant attained the status of a public figure representing domestic abuse,” is merely a reference to the non-defamatory “aspect of the article [that] relied on the factual underpinning that Ms. Heard was abused by Mr. Depp.” *Compare* Opp. at 7-8 *with Exhibit A* at 6.

Beyond the March 27, 2020 Order, Ms. Heard has not identified *a single* Virginia case to support her contention that the defamatory statements in the Op-Ed implying that she was domestically abused by Mr. Depp are of public concern. *See* Opp. at 7-9. All except one of the cases cited in Ms. Heard’s Opposition are from other jurisdictions, with markedly different anti-

SLAPP statutory schemes. *See id.*¹ These authorities are, quite simply, irrelevant to whether Ms. Heard's statements are entitled to immunity under Virginia's anti-SLAPP statute. Nonetheless, in most of the cases Ms. Heard cites, including the case from the Eastern District of Virginia, the statements found to be of public concern pertained to specific conduct with *public or systemic implications*, rather than merely personal ones. *See Opp.* at 7-9.² Here, by contrast, Ms. Heard's defamatory claim that Mr. Depp domestically abused her has no implications beyond their marriage and personal relationship.

Tellingly, Ms. Heard attempts to distinguish the one Virginia decision that is most factually and legally analogous to the factual circumstances and procedural and legal posture here – this Court's January 4, 2021 Letter Opinion denying Mr. Depp's plea in bar on Ms. Heard's counterclaim for defamation. *See Opp.* at 9-10. This is because the Court's January 4, 2021 Letter Opinion, directly applicable here, leads to the very conclusion Ms. Heard seeks to avoid: *i.e.*, statements concerning what went on in the personal, domestic relationship of Ms. Heard and Mr. Depp are not matters of public concern entitled to immunity under Virginia's

¹ Ms. Heard, for example, cites multiple cases applying California's anti-SLAPP statute, which, unlike Virginia's anti-SLAPP statute, "provides a mechanism for striking" lawsuits upon a showing that the challenged action is a protected activity, and if so, the plaintiff can still overcome the immunity by demonstrating a probability of prevailing on the claim. *See Guzman v. Finch*, No. 19-cv-412, 2019 WL 1877184, at *4 (S.D. Cal. Apr. 26, 2019).

² *Citing, e.g., Alexis v. Kamras*, No. 3:19-cv-000543, 2020 WL 7090120, at *21 (E.D. Va. Dec. 3, 2020) (finding statements that plaintiffs had "orchestrated systemic cheating" at an elementary school was "on a matter of public concern" because it implicated the reliability of the city's educational system); *Campone v. Kline*, No. 03-16-00854-CV, 2018 WL 3652231, at *7 (Tex. App. Aug. 2, 2018) (finding statements that plaintiff, a religious leader, had made multiple women feel uncomfortable, was taking financial advantage of members of the community, and falsely holding himself out as a healer pertained to "matters of public concern" because it touched on "public health" and "public safety"); *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1161 (2004) (finding that statements that domestic abuse by one partner that had achieved prominence due to an adoption litigation was an issue of public interest because the charges implicated the wellbeing of "a larger number of children and adoptive parents beyond the direct participants").

anti-SLAPP statute. *See Exhibit B* (Letter Opinion of January 4, 2021, at 10). Whether, as Ms. Heard falsely stated, Mr. Depp abused Ms. Heard during their marriage, or whether Ms. Heard publicly lied when she claimed such abuse had occurred, may be of curious *interest* to the public, but they are not of matters public *concern* affecting a broader community beyond Mr. Depp and Ms. Heard.

As Ms. Heard concedes, the issue of whether Ms. Heard's defamatory statements in the Op-Ed are a matter of public concern "is a question of law" that can be resolved by this Court without the need for a jury trial. *See Opp.* at 6. If her defamatory statements are found *not* to be of matter of public concern, the Court may thus deny Ms. Heard's plea in bar for anti-SLAPP immunity as a matter of law. *See id.*; *Alexis*, 2020 WL 7090120, at *20-21. Because Ms. Heard's defamatory statements accusing Mr. Depp of domestic abuse are *not* matters of public concern, the Court can and should deny Ms. Heard's plea in bar for anti-SLAPP immunity as a matter of law.

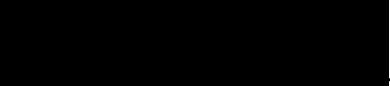
II. The Court Can Resolve Ms. Heard's Plea in Bar Without an Evidentiary Hearing Before a Jury

In arguing that the issue of anti-SLAPP immunity must go to a jury, Ms. Heard concedes (and cites to cases) confirming that there is scant Virginia caselaw on how Virginia's anti-SLAPP statute operates in practice. *See Opp.* at 6 (citing *Alexis*, 2020 WL 7090120, at *20 (observing that "courts have not extensively analyzed the new language" of Virginia's anti-SLAPP statute)). In this case, however, there is Virginia caselaw directly applicable to the issue before this Court: this Court's January 4, 2021 Letter Order, which held that Mr. Depp was not entitled to anti-SLAPP immunity based on Ms. Heard having "alleged sufficient facts in her Counterclaim to demonstrate that Mr. Depp may have made these statements with actual or constructive knowledge or with reckless disregard for whether they are false." *Exhibit B* at 10.

The same is true here and is consistent with how the Virginia federal courts have applied Virginia's anti-SLAPP statute. See *Steele v. Goodman*, 382 F. Supp. 3d 403, 427 (E.D. Va. 2019) (holding that defendant could not avail himself of the immunity provided by Virginia's anti-SLAPP statute because plaintiff's complaint was "replete with assertions that [defendant] made the multitude of statements with actual knowledge of their falsity"). Ms. Heard, like Mr. Depp, is *not* entitled to immunity under Virginia's anti-SLAPP statute because Mr. Depp's allegations raise a plausible inference that Ms. Heard made her defamatory statements with actual knowledge of their falsity. See Compl. ¶¶ 6, 23, 62-68.

For the foregoing reasons, the Court should grant Mr. Depp's Motion and enter an Order denying Ms. Heard's plea in bar for immunity under Virginia's anti-SLAPP statute.

Respectfully submitted,


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

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

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

Dated: January 26, 2021

EXHIBIT A



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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

703-248-2221 • Fax: 703-248-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWES
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
DONTAE 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. McWEENEY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLIND
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 acceptance." *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 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 acceptance], 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 acceptance. 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 acceptance.” *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 acceptance. *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,

A large black rectangular redaction box covers the signature of the defendant.

Bruce D. White

OPINION LETTER

EXHIBIT B



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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

703-246-2221 • Fax: 703-246-5499 • TDD: 703-352-4133

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

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

January 4, 2021

JUDGES

Elaine Charlson Bredehoft, Esq.
Carla D. Brown, Esq.
Adam S. Nadelhoft, Esq.
David E. Murphy, Esq.
CHARLSON BREDEHOFT COHEN & BROWN, P.C.
11260 Roger Bacon Dr., Suite 201
Reston, VA 20190

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

Benjamin G. Chew, Esq.
Andrew C. Crawford, Esq.
BROWN RUDNICK, LLP
601 Thirteenth St. N.W., Suite 600
Washington, DC 20005

Camille M. Vasquez, Esq.
BROWN RUDNICK, LLP
2211 Michelson Drive
Irvine, CA 92612

Re: John C. Depp, II v. Amber Laura Heard, CL-2019-2911

Dear Counsel:

This matter is before the Court on Plaintiff John C. Depp II's Demurrer and Plea in Bar to All Counterclaims. At the conclusion of the hearing, the Court took the matter under advisement to consider the following five issues:

OPINION LETTER

- 1) Whether the Court should exercise jurisdiction over Defendant's Counterclaim for declaratory judgment when Defendant has asserted the same argument in her Answer and Grounds for Defense?
- 2) Whether Plaintiff's statements are actionable under Virginia defamation law?
- 3) Whether Defendant has alleged sufficient facts to state a claim for a violation of the Virginia Computer Crimes Act?
- 4) Whether Defendant's Counterclaims arise out of the same transaction or occurrence as Plaintiff's Complaint such that Plaintiff's filing of the Complaint tolled the statute of limitations for Defendant's defamation counterclaims?
- 5) Whether Plaintiff is entitled to anti-SLAPP immunity for his statements?

The Court has considered the briefs in support of and in opposition to the present motion, as well as the arguments made by counsel at the hearing on October 16, 2020. For the reasons discussed below, the Court sustains the Demurrer as to Count I and Count III, and grants the Plea in Bar as to Statements A-E.

BACKGROUND

In the underlying action for defamation, Plaintiff John C. Depp II ("Mr. Depp") is suing Defendant Amber Laura Heard ("Ms. Heard") for statements that she made in an op-ed published by *The Washington Post* in 2018. Mr. Depp, believing that Ms. Heard's statements falsely characterize him as a domestic abuser, filed his defamation claim on March 1, 2019. On August 10, 2020, Ms. Heard filed her Counterclaims as well as her Answer and Grounds for Defense.

In her Counterclaims, Ms. Heard alleges that Mr. Depp and his agents have engaged in an ongoing online smear campaign to damage her reputation and cause her financial harm. Countercl. ¶ 6. Ms. Heard alleges that Mr. Depp has defamed her on multiple occasions, beginning during an interview with *GQ* in November 2018. *Id.* at ¶ 33. The alleged harm includes attempting to remove her from her role as an actress in *Aquaman* and as spokeswoman for L'Oréal. *Id.* at ¶ 6. Ms. Heard seeks declaratory relief granting immunity from civil liability for her statements; compensatory damages of \$100,000,000; punitive damages of not less than \$350,000; attorney's fees and costs; and an injunction to prevent Mr. Depp from continuing the alleged harms. *Id.* at 19.

ANALYSIS

I. COUNT I: DECLARATORY JUDGMENT IS DISMISSED.

Where an actual controversy exists, circuit courts "shall have power to make binding adjudications of right" in the form of declaratory judgments. Va. Code § 8.01-184. However, "the power to make a declaratory judgment is a discretionary one and must be exercised with care and caution. It will not as a rule be exercised where some other mode of proceeding is provided." *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970). Because the driving

purpose behind declaratory judgments is to resolve disputes before a right is violated, “where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding . . . is not an available remedy.” *Charlottesville Area Fitness Club Operators Ass’n v. Albemarle Cty. Bd. of Supervisors*, 285 Va. 87, 99 (2013) (quoting *Bd. of Supervisors v. Hylton Enters.*, 216 Va. 582, 585 (1976)).

Where granting declaratory judgment is duplicative of the relief already available, circuit courts may decline to exercise jurisdiction. See *Godwin v. Bd. of Dirs. of Bay Point Ass’n*, No. CL10-5422, 2011 WL 7478302, at *3 (Va. Cir. Ct. Feb. 8, 2011) (Norfolk). In *Godwin*, the circuit court declined to issue a declaratory judgment that a document was void when there also existed a breach of contract claim that asserted the same document was void: *Id.* at *1-3. Where it “appear[ed] to be a duplicative remedy that does not add anything to the relief that may be available under [the other count],” the court would not issue a declaratory judgment. *Id.* at *3. Similarly, federal courts have recognized that declaratory judgment is unnecessary where there exists some other claim resolving the same issue. See *Jackson v. Ocwen Loan Servicing LLC*, Civil Action No. 3:15cv238, 2016 WL 1337263, at *12-13 (E.D. Va. Mar. 31, 2016) (granting a Motion to Dismiss after finding that a claim for declaratory relief was “duplicative and permitting it to proceed [would] not serve a useful purpose.”). For instance, in *Tyler v. Cashflow Technologies, Inc.*, a federal court dismissed a declaratory judgment counterclaim because the defendant’s request that the court declare that his statements were not defamatory was merely the inverse of the plaintiff’s defamation claim. Case No. 6:16-CV-00038, 2016 WL 6538006, at *1 (W.D. Va. Nov. 3, 2016). Importantly, in *Tyler*, the court stated that “[t]o consider both claims would be duplicative and force ‘the court to handle the same issues twice.’” *Id.* at *6.

Ms. Heard’s Answer and Grounds for Defense states: “The statements in the op-ed are expressions of opinion that are protected by the First Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Virginia. Defendant requests an award of her reasonable attorneys’ fees and costs pursuant to Virginia’s Anti-SLAPP Statute, including § 8.01-223.2, and/or any amendments thereto.” Answer at 29, ¶ 5. Her defense is therefore “some other mode of proceeding” to afford her the same relief that is requested in her Counterclaim. See *Liberty Mut. Ins. Co.*, 211 Va. at 421. To hear both Ms. Heard’s anti-SLAPP defense and her declaratory judgment counterclaim would equate to adjudicating the same issue twice. See *Tyler*, 2016 WL 6538006, at * 6. Additionally, since this Court would not rule on Ms. Heard’s declaratory judgment counterclaim until after all matters have been tried, the purpose of declaratory judgment – to resolve disputes before the right has been violated – is defeated. See *Charlottesville Area Fitness Club Operators Ass’n*, 285 Va. at 99. Accordingly, this Court dismisses Count I of Ms. Heard’s Counterclaim.

In her brief and at oral argument, Ms. Heard argued that declaratory judgment is an appropriate vehicle for anti-SLAPP immunity. Specifically, she pointed this Court to the case *Reisen v. Aetna Life and Cas. Co.*, where the Virginia Supreme Court held that the circuit court did not abuse its discretion by exercising jurisdiction over an action for declaratory judgment even though the same issue (regarding insurance coverage) was scheduled for adjudication in an upcoming tort action. 225 Va. 327, 334-35 (1983). In *Reisen*, the insurance company had an immediate need to determine its liability because, if coverage existed, then the company owed a duty to the defendant to negotiate a settlement. *Id.* at 335. Thus, the issue was ripe for adjudication. *Id.* Here, Ms. Heard has asserted no immediate need for declaratory relief. In fact,

by asserting anti-SLAPP immunity as a counterclaim, even if the Court held in her favor that her statements are protected, she would receive this relief at the same time as receiving the same relief under her anti-SLAPP defense. Importantly, this Court is not holding that declaratory relief could never be an appropriate vehicle for asserting anti-SLAPP immunity, but merely that, in this instance, it would be duplicative of the relief already requested.

Additionally, Ms. Heard also asserted that declaratory judgment is necessary for anti-SLAPP immunity because Mr. Depp could nonsuit at any moment and, thereby, deprive her of the opportunity to recover attorney's fees. Under Virginia's anti-SLAPP statute, however, this Court may only award reasonable attorney's fees to "[a]ny person who has a suit against him dismissed or a witness subpoena or subpoena duces tecum quashed pursuant to the immunity provided by this section . . ." Va. Code § 8.01-223.2(B). Here, even if Ms. Heard's counterclaims were to move forward, and Mr. Depp were to nonsuit, Ms. Heard still would not be able to recover reasonable attorney's fees under this statute because she would not have had Mr. Depp's suit dismissed, rather she would be proceeding under her own claim.

Overall, this Court does not find any persuasive reason to hear Ms. Heard's anti-SLAPP immunity argument twice, nor does it appear to be necessary to permit Ms. Heard's claim to move forward in case Mr. Depp should choose to nonsuit. As such, this Court declines to exercise jurisdiction over Ms. Heard's counterclaim for declaratory judgment. It is therefore dismissed.

II. PLAINTIFF'S DEMURRER

In Virginia, a court may sustain a demurrer upon a finding that "a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted . . ." Va. Code § 8.01-273(A). A demurrer tests only the legal sufficiency of the factual allegations; it does not permit a court to evaluate the merits of the claim. *Fun v. Va. Military Inst.*, 245 Va. 249, 252 (1993). Accordingly, the Court must "accept as true all properly pled facts and all inferences fairly drawn from those facts." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557 (2011) (quoting *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 357 (2010)). Nonetheless, "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382-83 (1997) (citing *Fun*, 245 Va. at 253).

A. The Demurrer to Count II for Defamation and Defamation *Per Se* is Overruled.

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, 192 (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). For the reasons explained below, the Court finds that Ms. Heard has pled actionable statements for a defamation claim.

The Requisite 'Sting'

To qualify as defamatory, a statement must possess the requisite 'sting' to one's reputation. *Schaefer*, 290 Va. at 92. The Supreme Court of Virginia has previously stated that defamatory language is that which "tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous." *Id.* (quoting *Moss v. Harwood*, 102 Va. 386, 392 (1904)). If language is merely "insulting, offensive, or otherwise inappropriate, but constitutes no more than 'rhetorical hyperbole,'" then it does not possess the requisite 'sting' to be considered defamatory. *Id.* Importantly, in deciding whether a statement is defamatory, a court must evaluate it in the context of the publication. *Id.* at 93.

Here, Ms. Heard has alleged defamation with respect to the following eight statements:

A. In a November 2018 interview with *GQ*, Mr. Depp stated that there was "no truth to [Ms. Heard's judicial statements of abuse] whatsoever" and said "[t]o harm someone you love? As some kind of bully? No, it didn't, it couldn't even sound like me." Further, the article quoted Mr. Depp as stating "[Ms. Heard] was at a party the next day. Her eye wasn't closed. She had her hair over her eye, but you could see the eye wasn't shut. Twenty-five feet away from her, how the fuck am I going to hit her? Which, by the way, is the last thing I would've done." Countercl. ¶ 63.

B. On April 12, 2019, Mr. Depp, through his attorney, is quoted in *Page Six*, accusing Ms. Heard of committing "defamation, perjury and filing and receiving a fraudulent temporary restraining order demand with the court . . ." *Id.* ¶ 66.

C. In June 2019, Mr. Depp, through his attorney, told *The Blast* that "Ms. Heard continues to defraud her abused hoax victim Mr. Depp, the #metoo movement she masquerades as the leader of, and other real abuse victims worldwide." *Id.*

D. On July 2, 2019, Mr. Depp, through his attorney, told *The Blast* that Ms. Heard, "went to court with painted on 'bruises' to obtain a Temporary Restraining Order on May 27." *Id.*

E. On July 3, 2019, Mr. Depp, through his attorney, stated to *People* magazine that "Ms. Heard's 'battered face' was a hoax." *Id.*

F. On April 8, 2020, Mr. Depp, through his attorney, told *The Daily Mail* that "Amber Heard and her friends in the media use fake sexual violence allegations as both a sword and shield, depending on their needs. They have selected some of her sexual violence hoax 'facts' as the sword, inflicting them on the public and Mr. Depp." *Id.*

G. On April 27, 2020, Mr. Depp, through his attorney, again told *The Daily Mail* that "[q]uite simply this was an ambush, a hoax. They set Mr. Depp up by calling

the cops but the first attempt didn't do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911." *Id.*

H. On June 24, 2020, Mr. Depp, through his attorney, accused Ms. Heard in *The Daily Mail* of committing an "abuse hoax" against Mr. Depp. *Id.*

Each of the above statements imply that Ms. Heard lied and perjured herself when she appeared before a court in 2016 to obtain a temporary restraining order against Mr. Depp. Moreover, they imply that she has lied about being a victim of domestic violence. In light of the #MeToo Movement and today's social climate, falsely claiming abuse would surely "injure [Ms. Heard's] reputation in the common estimation of mankind." *See Schaecher*, 290 Va. at 92. Therefore, this Court finds that the statements contain the requisite 'sting' for an actionable defamation claim.

Protected Opinion Statements

A statement is generally not defamatory when it is "dependent on the speaker's viewpoint . . ." *See Fuste*, 265 Va. at 133. Where the context of the statements and the positions of the people reading the statements "would allow them to reasonably conclude that [the] statement was purely her own subjective analysis," the statement is not actionable. *Schaecher*, 290 Va. at 106. However, even opinion statements are actionable if they "'imply an assertion' of objective fact." *Id.* at 103.

Although Mr. Depp's statements (and those of his attorney) can be understood as their opinion of what occurred, these statements nevertheless imply that Mr. Depp did not abuse Ms. Heard. These statements must survive demurrer because whether Mr. Depp abused Ms. Heard is a fact that is capable of being proven true or false.

Mr. Depp's Statements are Not 'Fair and Accurate Accounts'

Mr. Depp argues that his statements are protected as "fair and accurate accounts" of his lawsuit. Tr. 8:9-14. Because a party "has a right to institute and prosecute an action without fear of being mulched in damages for reflections cast upon the defendants," no action for defamation can lie from a publication that constitutes a "fair and accurate account of the issues in suit . . ." *Bull v. Logetronics, Inc.*, 323 F. Supp. 115, 135 (E.D. Va. 1971). In *Bull*, the court considered a press release that stated (1) the plaintiff sued defendants for "conspiracy to defraud," (2) plaintiff sued for "royalty payments and damages in an amount over \$1,000,000.00," and (3) plaintiff was "seeking punitive damages, alleging a conspiracy to circumvent the provisions of a contract relating to manufacture and sale of film processors under U.S. patents . . ." *Id.* at 134. The court held that those statements were a fair and accurate summary of the allegations. *Id.*

Here, Mr. Depp's statements are notably different than those in *Bull*. *See id.* Although much of what Mr. Depp states is also contained in his Complaint, the statements do not appear to have been made in the context of attempting to recount litigation. Instead, Mr. Depp makes

factual assertions that do not fairly and accurately summarize the litigation that has taken place. Accordingly, his statements are not protected.

Although Mr. Depp's statements may have been made in self-defense, Ms. Heard has alleged sufficient malice for her defamation allegations to survive demurrer.

Under *Haycox v. Dunn*, so long as Mr. Depp's statements were "repelling the charge and not with malice," his statements would have been made in self-defense and therefore would be privileged. 200 Va. 212, 231 (1958) (internal citations omitted). There, the court recognized that, generally, the rule is "that it is the court's duty to determine as a matter of law whether the occasion is privileged, while the question of whether or not the defendant was actuated by malice, and has abused the occasion and exceeded his privilege are questions of fact for the jury." *Id.* at 229 (quoting *Bragg v. Elmore*, 152 Va. 312, 325 (1929)).

Because Ms. Heard has alleged facts in support of a showing of malice, the Court cannot properly decide this claim on demurrer. In support of her accusation of malice, Ms. Heard alleged that the *GQ* journalist, Mr. Heath, stated that Mr. Depp invited him to interview the actor because he was "angry – angry about a lot of things – and he's vengeful." Countercl. ¶ 33. Moreover, Ms. Heard has alleged that Mr. Depp has the intention of ruining her career, citing statements that he made to friends demonstrating a malicious intent. *See* Countercl. ¶¶ 17-19. Further, Mr. Depp has admitted his intent to destroy Ms. Heard's career by stating that he wanted her replaced on *Aquaman*. *See* Countercl. ¶ 7. Accordingly, Ms. Heard has sufficiently pled a malicious intent, which prevents a ruling on the self-defense privilege at this stage in the litigation.

Since Mr. Depp's statements contain the requisite 'sting', are not merely statements of opinion, and do not fairly and accurately describe litigation, the Court must overrule the Demurrer with respect to Count II. Additionally, although Mr. Depp may have made his statements in self-defense, Ms. Heard has pled malice to the extent that this Court cannot determine whether Mr. Depp's statements are privileged at the Demurrer stage.

B. The Demurrer to Count III: VCCA is Sustained.

Under the Virginia Computer Crimes Act ("VCCA"), a claimant must prove that (1) the person used a computer or computer network; (2) to "communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make a suggestion or proposal of an obscene nature, or threaten any illegal or immoral act"; (3) with the intent to "coerce, intimidate, or harass" another person. Va. Code § 18.2-152.7:1; *Barson v. Commonwealth*, 284 Va. 67, 71 (2012).

None of Ms. Heard's allegations satisfy all three prongs of the VCCA. First, Ms. Heard has alleged that Mr. Depp used a computer or computer network in four instances: when he "initiated, coordinated, overs[aw] and/or supported and amplified two change.org petitions"; when he "created, controlled, and/or manipulated social media accounts"; when he texted Mr. Bettany in 2013; and when he texted Mr. Carino in 2016. Countercl. ¶¶ 6, 8, 17, 19. This Court now examines each of these instances to determine whether they meet the other two VCCA prongs.

The allegation that “Mr. Depp has initiated, coordinated, overseen and/or supported and amplified two change.org petitions: one to remove Ms. Heard as an actress in the *Aquaman* movie franchise, and one to remove her as a spokeswoman for L’Oréal” fails under the second prong of the VCCA. See Countercl. ¶ 6. Nothing in that allegation implies facts showing that the change.org petitions included obscene language, threatened illegal or immoral acts, or suggest or propose obscene acts. See Va. Code § 18.2-152.7:1. Likewise, the allegation that Mr. Depp “created, coordinated, controlled, and/or manipulated social media accounts created specifically for the purpose of targeting Ms. Heard,” also fails under the second prong of the VCCA. See Va. Code § 18.2-152.7:1. The pleading fails to demonstrate that the social media accounts communicated obscene language, suggested obscene acts, or threatened illegal or immoral acts. Because neither of those allegations meets the second element of the VCCA, they cannot move forward in this litigation.

The remaining two allegations of computer usage fail under the third prong of the VCCA because Ms. Heard has not alleged that they were made with the intent to “coerce, intimidate, or harass.” See Va. Code § 18.2-152.7:1. Rather, it appears that Mr. Depp texted those statements, privately, to two of his friends, and Ms. Heard has not alleged that Mr. Depp intended for her to see them. Accordingly, this Court sustains the Demurrer to Count III since none of Ms. Heard’s allegations satisfy the prongs of the VCCA.

III. PLAINTIFF’S PLEA IN BAR IS GRANTED IN PART AND DENIED IN PART.

A plea in bar condenses “litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff’s right of recovery.” *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). The burden of proof rests with the moving party. *Id.* When considering the pleadings, “the facts stated in the plaintiffs’ motion for judgment [are] deemed true.” *Id.* (quoting *Glascocock v. Laserna*, 247 Va. 108, 109 (1994)). Moreover, “[f]amiliar 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, 289 (1988).

A. Statements A through E Are Barred by the Statute of Limitations.

Under Va. Code § 8.01-247.1, Virginia’s statute of limitations for a defamation action is one year. However, “if the subject matter of the counterclaim . . . arises out of the same transaction or occurrence upon which the plaintiff’s claim is based, the statute of limitations with respect to such pleading shall be tolled by the commencement of the plaintiff’s action.” Va. Code § 8.01-233(B). To determine whether an issue arises out of the same transaction or occurrence, the “proper approach asks ‘whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.’” *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 154 (2017).

In *Funny Guy*, the court found that the facts were related in origin and motivation because they both stemmed from the plaintiff’s desire to be paid for the work he had done. 293 Va. at 155. Plaintiff’s claims also satisfied the time and space factors because both claims

involved a single payment dispute. *Id.* Since all of the theories of recovery “fit within a single factual narrative,” the court held that they formed a “convenient trial unit.” *Id.* The court also held that it was unlikely that the parties would anticipate a single payment dispute developing into multiple lawsuits and, therefore, the final factor was met. *Id.* Similarly, the Fourth Circuit held that a counterclaim was compulsory when a plaintiff filed a § 1983 action against a police officer and the police officer counterclaimed for defamation because it arose out of the same transaction or occurrence. *Painter v. Harvey*, 863 F.2d 329, 331 (4th Cir. 1988). The court deemed the counterclaim compulsory because both the claim and counterclaim stemmed from what transpired during the plaintiff’s arrest, the resolution of one claim might bar the other claim via *res judicata* later, the evidence presented for both claims was virtually the same, and because there was a logical relationship between the two claims. *Id.* at 331-32; *see also Nammari v. Gryphus Enters. LLC*, 1:08cv134 (JCC/TCB), 2008 WL 11512205, at *1-3 (E.D. Va. May 12, 2008) (holding that Defendant’s counterclaim for defamation was compulsory because both it and Plaintiff’s wrongful termination claim arose from Plaintiff’s termination).

Conversely, in *Powers v. Cherin*, the Court held that the plaintiff’s claims did not “arise out of the same transaction or occurrence” because the first count for negligence stemmed from a car accident while the second count for medical malpractice stemmed from the doctor’s subsequent medical treatment of the plaintiff. 249 Va. 33, 37 (1995). Likewise, the Fourth Circuit held that a defamation allegation in an amended complaint did not arise out of the same transaction or occurrence as the allegations in the original complaint and was therefore barred by the one-year statute of limitations. *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, No. 97-2397, 1999 WL 89125, at *2 (4th Cir. Feb. 23, 1999). There, Plaintiff attempted to amend its complaint to include reference to an allegedly defamatory letter written by a different author, directed to a different recipient, and published on a different date than the other letters alleged in the complaint. *Id.* Thus, they were separate instances of defamation and the second, un-related allegation was barred by the statute of limitations. *Id.*; *see also Cojocarv v. City Univ. of N.Y.*, 19 Civ. 5428 (AKH), 2020 WL 5768723, at *3-4 (S.D.N.Y. Sept. 28, 2020) (holding that Plaintiff’s allegations in an Amended Answer do not relate back because “[w]hile the alleged text messages concerned the same general subject matter as the *New York Post* interviews, they were a separate publication, directed toward a different recipient, and included some distinct accusations.”). In both of the aforementioned cases, a party attempted to amend their own pleading. *See English Boiler & Tube, Inc.*, 172 F.3d 862, 1999 WL 89125, at *2 (describing how plaintiff attempted to amend his own complaint) and *Cojocarv*, 2020 WL 5768723, at *3-4 (describing how defendant attempted to amend his Answer). In those instances, the parties were not time-barred when they filed their initial pleadings.

Here, both Ms. Heard’s allegations and Mr. Depp’s allegations stem from the same set of facts: the Domestic Violence Restraining Order (“DVRO”) proceeding in May 2016 and the events leading up to it. As previously stated, to succeed on his defamation claim, Mr. Depp is going to need to show (1) publication of (2) an actionable statement with (3) the requisite intent. *See Schaecher*, 290 Va. at 91. Ms. Heard would need to meet the same standard if her Counterclaims are permitted to proceed. In presenting evidence of publication, the statements that Ms. Heard alleges in her Counterclaims were not made in the same publication as the one referenced in Mr. Depp’s Complaint. Whereas Mr. Depp’s Complaint focuses on an op-ed published in *The Washington Post*, Ms. Heard’s Counterclaim focuses on statements in *GQ*,

People Magazine, The Daily Mail, and other publications. To demonstrate actionable claims, both parties will likely need to present similar evidence regarding whether Mr. Depp actually abused Ms. Heard in May 2016. However, while Mr. Depp's Complaint focuses on Ms. Heard's intent in making the statements, Ms. Heard would instead need to present evidence on Mr. Depp's intent. Therefore, the only connection between the claims is in origin – they both stem from the 2016 incident. *See Funny Guy, LLC*, 293 Va. at 154. Because these claims arise from statements made in separate publications, on separate dates, and by different people, the Court is not persuaded that Mr. Depp could have anticipated, at the time of filing his Complaint, a need to defend against statements made to other publications. The lack of relatedness and failure to reasonably put Mr. Depp on notice of a potential counterclaim compels this Court to grant the Plea in Bar to Statements A through E.

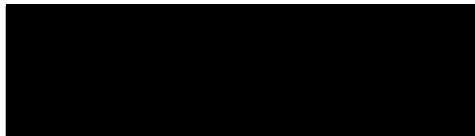
B. Mr. Depp is Not Entitled to Anti-SLAPP Immunity.

Mr. Depp asserted in his Plea in Bar that he is entitled to anti-SLAPP immunity for the statements that are the subject of Ms. Heard's Counterclaim.¹ As addressed earlier, Virginia's anti-SLAPP law provides immunity for statements "regarding matters of public concern that would be protected by the First Amendment." Va. Code § 8.01-223.2(A). Here, the Court finds no support for the notion that Mr. Depp's statements are on matters of public concern. Moreover, Mr. Depp's counsel neither argued nor addressed this point during oral argument or in their reply brief. Lastly, Ms. Heard has alleged sufficient facts in her Counterclaim to demonstrate that Mr. Depp may have made these statements with actual or constructive knowledge or with reckless disregard for whether they are false. *See supra* p. 8 (citing instances in the Counterclaim alleging that Mr. Depp made his statements with actual malice). Accordingly, the Court denies the Plea in Bar for anti-SLAPP immunity.

IV. CONCLUSION

For the foregoing reasons, Count I is dismissed, the Demurrer to Count II is overruled, the Demurrer to Count III is sustained, and the Plea in Bar is granted for Statements A through E due to the lapsed statute of limitations. Count II with respect to Statements F, G, and H survive. Counsel shall prepare an appropriate order reflecting the Court's ruling and submit it to the Court for entry.

Sincerely,



Bruce D. White

¹ Mr. Depp's counsel did not address this point in his oral argument or in his Reply Memorandum. Ms. Heard's counsel stated that she believes this point was "conceded by [Mr. Depp's counsel] because it was not addressed in their reply." Oct. 16, 2020 Tr. 33:3-6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of January 2021, I sent a true and correct copy of the foregoing by email to each of the following:

Elaine Charlson Bredehoft, Esq.
Carla D. Brown, Esq.
Adam S. Nadelhaft, Esq.
David E. Murphy, Esq.
Charlson Bredehoft Cohen & Brown, P.C.
11260 Roger Bacon Drive, Suite 201
Reston, VA 20190
(703) 318-6800
ebredehoft@cbcblaw.com
cbrown@cbcblaw.com
anadelhaft@cbcblaw.com
dmurphy@cbcblaw.com

J. Benjamin Rottenborn, Esq.
Joshua R. Treece, Esq.
Woods Rogers PLC
10 S. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
(540) 983-7540
brottenborn@woodsrogers.com
jtreece@woodsrogers.com

Counsel for Defendant/Counterclaim Plaintiff Laura Amber Heard


Benjamin G. Chew