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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

John C. Depp, II,)
)
 Plaintiff,)
)
 v.)
)
 Amber Laura Heard,)
)
 Defendant.)
 _____)

Civil Action No.: CL-2019-0002911

**MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY
AUGUST 17, 2021 ORDER FOR INTERLOCUTORY APPEAL**

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Defendant Amber Laura Heard, pursuant to Va. Code § 8.01-670.1, respectfully requests certification of the August 17, 2021 Order denying her Supplemental Plea in Bar and striking certain defenses. The Supplemental Plea in Bar presents questions of law respecting application of the nonmutual defensive collateral exception carved out in *Bates v. Devers* and recognition of a UK judgment Mr. Depp has conceded was his clear preference over this proceeding in deciding the same issues presented here. There are substantial grounds for difference of opinion on these issues and no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia. In addition, determination of these issues will be dispositive of a material aspect of the proceeding currently pending before the Court, and it is in the best interest of the parties to seek an interlocutory appeal at this time.

STATEMENT OF RELEVANT FACTS AND QUESTION OF LAW PRESENTED

After extensive briefing and a three-hour hearing on July 22, 2021 this Court took under advisement the Supplemental Plea in Bar seeking the application of the UK Judgment to this proceeding and dismissal of Mr. Depp's Complaint. On August 17, 2021, this Court overruled the Supplemental Plea in Bar. In relevant part, the Court held there was not complete mutuality of the parties between the UK action and this action to apply defensive collateral estoppel. The Court did not find privity between Ms. Heard and the UK defendants, and found substantive and procedural differences between the US and the UK precluding comity to the UK Judgment.¹

Ms. Heard believes the issues of the application of nonmutual defensive collateral estoppel and recognition of the UK judgment under principles of comity should be submitted to the Virginia Supreme Court for review on an interlocutory basis. There is no prejudice to the parties in

¹ While the Court ruled on several issues, and Ms. Heard preserves the right to raise these later, this request is focused on the application of nonmutual defensive collateral estoppel and recognition of the UK judgment on principles of comity.

submitting this now and the requirements of Va. Code § 8.01-670.1 are met, as set forth below.

It would be far better for the parties and this Court (especially with the backlogs because of COVID) for the Virginia Supreme Court to address these issues now, rather than proceed for the next nine months through expensive and duplicative litigation that would be mooted if the Court were to (1) follow the modern and majority rule of nonmutual defensive collateral estoppel and recognize the UK Judgment on principles of comity and/or (2) recognize that “it is compellingly clear from the prior record that the party in the subsequent civil action against whom collateral estoppel is asserted has fully and fairly litigated and lost an issue of fact which was essential to the prior judgment.” *Bates v. Devers*, 214 Va. 667, 671 n.7 (1974); *see also Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 266-67 (1987) (Poff, J., Russell, J., and Thomas, J. dissenting).

ARGUMENT

I. Legal Standard

Under Va. Code § 8.01-670.1, parties may seek an immediate interlocutory appeal with the trial court’s approval of an Order or Decree that is not otherwise appealable prior to trial when “that order or decree involves a question of law to which (i) there is substantial ground for difference of opinion, (ii) there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, (iii) determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) it is in the parties’ best interest to seek an interlocutory appeal.” Va. Code § 8.01-670.1.

II. There Are Substantial Grounds for Differences of Opinion and No Clear Controlling Precedent Governs Issues of Law Presented in the Supplemental Plea in Bar

A. Defensive Nonmutual Collateral Estoppel

There is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia prohibiting the application of nonmutual defensive

collateral estoppel in this case. As the Virginia Supreme Court directed in *Bates v. Devers*, 214 Va. 667, 671-72 n.2 (1974), the “mutuality doctrine should not be mechanistically applied when it is compellingly clear from the prior record that the party in the subsequent civil action against whom collateral estoppel is asserted has fully and fairly litigated and lost an issue of fact which was essential to the prior judgment.” The Virginia Supreme Court has not overruled this clear exception to the mutuality requirement of collateral estoppel.

Further, the bounds of the *Bates* exception have not been fully explored by the Virginia Supreme Court or the Court of Appeals of Virginia, and there are substantial grounds for differences of opinion as to whether Ms. Heard has met the requirements of the *Bates* exception and whether the mutuality doctrine should apply to Ms. Heard’s nonmutual defensive collateral estoppel plea. Perhaps most illustrative of these differences of opinion are the strong dissents in the hotly contested, 4-3 Virginia Supreme Court decision in *Selected Risks Ins. Co. v. Dean*, 233 Va. 260 (1987), a case involving nonmutual *offensive* collateral estoppel. These two dissents highlight best the substantial grounds for differences of opinion as to the scope and application of the *Bates* exception and whether mutuality should be required for defensive collateral estoppel in this case. See *Selected Risks*, 233 Va. 266-76 (Poff, J., joined by Russell, J., and Thomas, J.; and Thomas, J., dissenting).²

² See 233 Va. at 266, Poff, J., dissenting: “[I]f courts are to honor the ancient maxim that a valid final judgment is a verity and immune from collateral attack, then the doctrine of collateral estoppel, once invoked, must be applied, *even if the party who invokes it was a stranger to the prior action.*” (emphasis added) see also 233 Va. at 274, 276 (Thomas, J., dissenting) (“The reason most often cited in support of the mutuality requirement is the maxim, ‘*res inter alios acta alteri nocere non debet*—a transaction between two parties ought not to operate to the disadvantage of a third....*Stare decisis* does not stand in our way in this case. That doctrine was never meant to supplant logic and reason. It was never meant to prevent a careful evolution of the law.”) (internal citation omitted, emphasis in original).

In *Selected Risks*, Justice Poff, joined by Justices Russell and Thomas, concluded that the mutuality requirement “should be *applied selectively* and never ritualistically.” *Id.* at 266 (Poff, J. dissenting) (emphasis added). He then distinguished between two procedural situations: “(1) where a plea of collateral estoppel is raised by a party who was a litigant in a prior action against a party who was a stranger to the prior action, and (2) where the plea is raised by a party [(plaintiff or defendant)] who was a stranger to a prior action against a party who was a litigant in that action.” *Id.* Justice Poff recognized that “[i]n the first situation, the mutuality requirement should always be applied for the reason that the stranger should not be deprived of his property without due process of law.” *Id.* He concluded, however, that “[t]he latter situation poses no such constitutional concern; although a person is entitled to his day in court on a particular issue, he is not entitled to a day in court against a particular adversary.” *Id.*

For obvious reasons, it is far more important that mutuality apply to offensive collateral estoppel to prevent defendants who never had a day in court in one case from being adjudged liable in a latter case. But it makes little sense to afford a plaintiff multiple opportunities to try the same factual issues, regardless of whether against the same defendants, which is what Mr. Depp is trying to accomplish here and may continue to bring suits if someone else reports or comments on his abuse of Ms. Heard.³

In his dissent, Justice Poff did not distinguish between nonmutual *offensive* collateral estoppel and nonmutual *defensive* collateral estoppel, and both types plainly fall under the second

³ The Court also cited *TransDulles Center, Inc. v. Sharma*, 252 Va. 20 (1996), a case in which the parties were identical, and the plaintiff asserted offensive collateral estoppel. In applying collateral estoppel to prevent an attack on a prior default judgment, the Court held that collateral estoppel applied even though the defendant had not even appeared in the prior case. *Id.* at 24.

procedural situation framed by Justice Poff.⁴ *See id.* Thus, with respect to both offensive and defensive collateral estoppel under his second procedural scenario, Justice Poff reasoned:

I would hold that when a party has fully and fairly litigated an issue of fact essential to a valid judgment and a judgment against him has become final, he is estopped to relitigate that issue in a subsequent action. Such a rule, I believe, has *special validity when*, as here, the *successful party in the prior action was required to bear a heavier burden of proof* than that required in the later action. And, *if courts are to honor the ancient maxim that a valid final judgment is a verity and immune from collateral attack, then the doctrine of collateral estoppel, once invoked, must be applied, even if the party who invokes it was a stranger to the prior action.*

Id. (emphasis added). Justice Poff further concluded that his opinion was not precluded by *stare decisis*, and the Court was free, under its precedents, to permit nonmutual collateral estoppel (offensive or defensive) against a party to a prior action in the circumstance outlined above.⁵ *Id.*

Under Justice Poff's reasoning, Mr. Depp should be estopped by the UK's finding that Mr. Depp committed acts of domestic violence against Ms. Heard on at least 12 occasions. Mr. Depp fully and fairly litigated that issue in the UK and lost, and *The Sun* defendants in the UK possessed a heavier burden than Ms. Heard does here because, unlike Ms. Heard, *The Sun* defendants were required to affirmatively prove that it was true that Mr. Depp, in fact, committed acts of domestic

⁴ As this Court recognized in its August 17, 2021 Letter Opinion, "nonmutual defensive collateral estoppel occurs when 'the defendant, a stranger to the prior proceeding, attempts to preclude the plaintiff, a party to the former proceeding, from relitigating an issue plaintiff lost in the earlier case,'" whereas "nonmutual offensive collateral estoppel occurs when 'a plaintiff, who was a stranger to the former litigation, seeks to preclude the defendant, a party to the prior action, from relitigating an issue defendant lost in the prior case.'" Ltr. Op. 4 (internal citations omitted).

⁵ Even with the slim majority decision in *Selected Risks*, *stare decisis* is no bar to nonmutual defensive collateral estoppel. The majority decision in *Selected Risks* was limited in its scope and application to only nonmutual *offensive* collateral estoppel because *Selected Risks* involved only nonmutual *offensive* collateral estoppel. *Selected Risks*, 233 Va. at 262 (recognizing that Selected Risks Insurance Company was the plaintiff seeking to offensively estop defendant from seeking coverage under an insurance policy based on a criminal conviction finding defendant engaged in intentional conduct). Thus, the majority decision in *Selected Risks* in no way precludes application of Ms. Heard's nonmutual *defensive* collateral estoppel plea.

violence against Ms. Heard. Precluding a rigid application of the mutuality doctrine here, therefore, “honor[s] the ancient maxim that a valid final judgment is a verity and immune from collateral attack” even through Ms. Heard may be considered a stranger to the prior action.

Like Justice Poff, Justice Thomas determined that *stare decisis* was no bar to precluding nonmutual collateral estoppel (offensive or defensive) against a party to a prior action. *Id.* at 270-73 (Thomas, J., dissenting) (distinguishing the authorities relied on by the majority). Justice Thomas, for example, rejected the Court’s conclusion that *Norfolk and Western Ry. Co. v. Bailey*, 221 Va. 638, 640 (1980) was really a “unanimous decision to resist the so-called ‘modern trend’ and not to abrogate the mutuality requirement”—a pronouncement relied on by this Court in its August 17 Letter Opinion. *See id.* at 263, 272-73. Rather, Justice Thomas recognized that the court in *Bailey* presented a very narrow issue: “Res judicata is the focus of this appeal. Specifically, we consider whether, *under the circumstances of this case*, the doctrine of mutuality should be renounced as applied to a plea of collateral estoppel.” *Id.* at 273 (citing *Bailey*, 221 Va. at 639) (emphasis in original). Further, the court in *Bailey* only “concluded not to abandon the mutuality requirement when, as here, *offensive use of collateral estoppel is sought* to be invoked in one of a series of damage suits arising from a common disaster.” *Id.* (quoting *Bailey* at 642) (emphasis altered). Thus, Justice Thomas reasoned that *Bailey* did not preclude even *offensive* collateral estoppel under the different circumstances presented in *Selected Risks*. *Id.* *Bailey* also did not address the mutuality requirement with respect to *defensive* collateral estoppel.

With respect to this Court’s August 17 Letter Opinion, Justice Thomas’s view of the limits of the *Bailey* decision demonstrates unmistakable differences of opinion as to whether *Bailey*, was in fact, a “unanimous decision to resist the so-called ‘modern trend’ and not to abrogate the mutuality requirement,” as stated in this Court’s August 17 Letter Opinion. This difference of

opinion is particularly stark with respect to nonmutual *defensive* collateral estoppel—an issue that was not presented in *Bailey* or considered by the majority in *Selected Risks*. *See id.* (recognizing that *Bailey* only “concluded not to abandon the mutuality requirement when, as here, *offensive use of collateral estoppel is sought* to be invoked in one of a series of damage suits arising from a common disaster.”) (quoting *Bailey* at 642) (emphasis altered).

Justice Thomas recognized that *stare decisis* did not preclude application of nonmutual offensive collateral estoppel, and specifically addressed the purpose of the doctrine of mutuality applying the *Bates* exception to find that it was “compellingly clear that Dean [the defendant] fully and fairly litigated the issue of his intent in striking Berry.” *Id.* at 273-76.

Justice Thomas believed the majority failed to consider the objectives served by the mutuality doctrine and set out that “[t]he reason most often cited in support of the mutuality requirement is the maxim, “*res inter alios acta alteri nocere non debet*—a transaction between two parties ought **not to operate to the disadvantage of a third**. The thought is, of course, that everyone is entitled to his day in court.” *Id.* at 274 (quoting Note, Admissibility and Weight of a Criminal Conviction in a Subsequent Civil Action, 39 Va. L. Rev. 995, 997 (1953)) (bold emphasis added). Justice Thomas recognized that the third party would not be prejudiced by the lack of mutuality, and Dean, the defendant in *Selected Risks*, cannot complain on behalf of *Selected Risks*, the third party. *Id.* at 274. When Justice Thomas’s reasoning is applied here in view of the purpose served by the mutuality doctrine, Ms. Heard (the party the mutuality doctrine is designed to protect) is not prejudiced by application of defensive collateral estoppel and Mr. Depp does not have standing to complain of the lack of mutuality on Ms. Heard’s behalf.

Also in his dissent, Justice Thomas recognized the fundamental difference between an acquittal and a conviction and rejected any attempts to create a false equivalency between the two

because in the criminal setting “Dean is in a most favored position.” *Id.* at 275. The same is true here with respect to the UK’s finding that Mr. Depp committed acts of domestic violence against Ms. Heard. In the UK, Mr. Depp was in a “most favored position.” In the UK proceeding, Mr. Depp was not required to prove, by a preponderance of the evidence, that he committed domestic violence against Ms. Heard.⁶ Rather, the *defendants* in the UK proceeding were required to prove, by a preponderance of the evidence, that Mr. Depp did, in fact, commit acts of domestic violence against Ms. Heard—a burden they *overwhelmingly* met.

In its Letter Opinion, this Court was concerned Ms. Heard was not a defendant in the UK proceeding and the judge “refuse[d] the Claimant’s application for a third-party disclosure order against Ms. Heard.” Ltr. Opinion at 5. Yet Mr. Depp was able to conduct discovery in this Court for 16 months and use that evidence in the UK (Supp. Plea in Bar Exs. 1-7), and the reason the UK denied the application was because of its overbreadth and Depp’s failure to prove relevance of the specific documents requested. *See* Def.’s Reply Br. Att. 3, ¶¶ 31-61. Moreover, the fact that Mr. Depp did not have the burden in the UK, and that Mr. Depp, as the plaintiff in the UK, *elected to proceed* with his case based on evidence and procedures at hand—considering his favorable position—should demonstrate that Mr. Depp fully and fairly litigated the issue under the forum and procedures of his choosing, pursuant to the *Bates* exception.

In its Letter Opinion, this Court cites one Virginia Supreme Court case, *Angstadt v. Atlantic Mutual Ins. Co.*, 249 Va. 444, 447 (1995), involving the attempted application of the defensive nonmutual collateral estoppel exception. *Angstadt*, however, is not a clear or controlling precedent, because the factual issues in the prior litigation were not identical to the issues sought

⁶Mr. Depp and Ms. Heard disagree on whether the burden of proof is clear and convincing or by preponderance of the evidence, but the disagreement is not material for this motion – either way Mr. Depp has the burden of proof, and he did not in the UK.

to be litigated in the next case. 249 Va. at 447. The circumstances in *Angstadt*, therefore did not satisfy the exception articulated in *Bates v. Devers*, 214 Va. 667, 671-72 n.2 (1974), while this case does. *Bates v. Devers* left the door open for courts to apply defensive collateral estoppel in precisely this case. Whether Depp abused Heard is an issue of fact essential to this case and was essential to the UK litigation.⁷ He fully and fairly litigated that issue in the UK and lost, or at a minimum, there are substantial grounds for differences of opinion as to whether he fully and fairly litigated whether he had committed domestic violence against Ms. Heard. Therefore, this case fits within the exception carved out in *Bates v. Devers*, which exception has never been overruled. Thus, while the Court found contrary precedent to apply to a distinguishable case, the Virginia Supreme Court should be afforded the opportunity at this stage in the proceeding to decide whether to apply the *Bates v. Devers* exception to this case or to revisit Virginia law on nonmutual collateral estoppel and determine if it should mechanically apply defensive collateral estoppel solely where the parties are mutual.

In addition to the exception to the mutuality rule carved out in *Bates*, most federal court decisions interpreting the Virginia collateral estoppel doctrine conclude that defensive collateral

⁷ While this Court opined that “it would be nonsensical to find that any statement relating to whether Plaintiff abused Defendant arose from the same transaction or occurrence simply because they come from the same origin,” Ltr. Op. at 7, the essential issue in both cases is whether Mr. Depp abused Ms. Heard. If the Sun proved that Mr. Depp abused Ms. Heard, which it did, then Mr. Depp could not, and did not, prevail on his libel claim against Defendants. JN Att. A ¶¶ 75-84. Here, the three statements made by Ms. Heard, according to this Court’s Letter Opinion on the Demurrer, “imply ‘Ms. Heard was the victim of domestic violence at the hands of Mr. Depp.’” Ltr. Op., 3-27-20 at 5. The Court further found: “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 *Pendelton* to allow these statements to proceed beyond demurrer.” *Id.* Therefore, whether Mr. Depp abused Ms. Heard is the exact same issue in this case. Mr. Depp had his day in court, fully and fairly litigated the issue with a more favorable burden of proof, and lost. Under *Bates* this is the precise circumstance under which nonmutual defensive collateral estoppel applies.

estoppel satisfies the exception to the general rule of mutuality. *See e.g., Graves v. Associated Transp., Inc.*, 344 F.2d 894, 897 (4th Cir. 1965); *Lober v. Moore*, 417 F.2d 714 (D.C. Cir. 1968); *Moore v. Allied Chemical Corp.*, 480 F. Supp. 377, 382 (E.D. Va. 1979).

Therefore, there are substantial grounds for difference of opinion and no clear controlling precedent governing whether the Virginia Supreme Court will recognize and apply nonmutual defensive collateral estoppel. In light of the exception carved out by *Bates*, this Court should permit the Virginia Supreme Court to review this case and determine whether it will follow the modern and majority rule and apply nonmutual defensive collateral estoppel to the facts in this case—facts the Virginia Supreme Court suggested in *Bates* would be sufficient.

B. Comity

There are substantial grounds for difference of opinion on whether Virginia courts should apply comity to the UK judgment in this case, but the weight of authority suggests they should. Although this Court identified the four factors the Virginia Supreme Court has applied when deciding whether to grant comity to a foreign judgment, it focused only on the second factor: whether the procedural and substantive law applied by the foreign court is reasonably comparable to that of Virginia. Ltr. Op. at 7-8.⁸

With respect to that factor, the Virginia Supreme Court has held that the procedures of the UK courts are “reasonably comparable” to those of Virginia, explaining that “the prevailing

⁸ The other three are:

- (1) Did the foreign court have personal and subject matter jurisdiction?
- (2) Was the foreign court’s order falsely or fraudulently obtained?
- (3) Is the enforcement of the foreign court’s order contrary to the public policy of Virginia?

Ltr. Op. 7-8 (citing *Clark v. Clark*, 11 Va. Ct. App. 286, 296-97 (1990)).

English rules of procedure comport favorably with the concept of *procedural due process* as that concept has evolved in this State and nation.” *Oehl v. Oehl*, 221 Va. 618, 623-24 (1980) (emphasis added). The Court cited no caselaw, and Heard has found none, that holds the procedures of the two jurisdictions need to be identical.

The substantive law applied in the UK differs from the laws of the Virginia and the U.S. Constitutions in only one aspect significant to this case: the burden of proof is on the defendant to prove falsity. But this difference provided an advantage to Mr. Depp, not vice versa, and Mr. Depp still lost. Mr. Depp should not be permitted to wield the UK’s libel laws as both a sword and a shield. Even Mr. Depp must have recognized the hypocrisy such a position would entail, as he never argued that UK’s substantive defamation law was repugnant. Instead, he expressed a clear preference for the UK decision over “just a [jury] verdict” in the US. Def.’s Reply Br. Att. 2, 15.

Moreover, courts in Virginia and elsewhere evidence a long history of recognizing UK judgments, given the UK’s robust and legitimate legal system, upon which much of the American legal system is based. The Virginia Supreme Court applied comity to recognize a UK judgment in *Oehl v. Oehl*, 221 Va. 618 (1980) and based its decision on the seminal U.S. Supreme Court case *Hilton v. Guyot*, 159 U.S. 113 (1895). The Virginia Supreme Court in *Oehl* considered the UK and Virginia legal systems to be “reasonably comparable.” Although this Court chose not to rely on *Oehl* because it was a domestic law case, Ltr. Op. at 9, this Court then cited *Middleton v. Middleton*, 227 Va. 82 (1984), two combined domestic relations cases, as authority that Virginia had denied a request to apply comity to a UK judgment, Ltr. Op. at 9. In fact, the decisions of the *Middleton* Court applied statutory comity under the Virginia Uniform Child Custody Jurisdiction Act (UCCJA), enacted after *Oehl*. *Id.* at 93-94. Significantly, the Court extended the UCCJA to

treat England as the equivalent of a statutory “home state” under the UCCJA. *Id.* at 94; and cited approvingly to *Oehl*:

And we are not reluctant to endorse an international deferral to the courts of England because ‘Virginia’s jurisprudence is deeply rooted in the ancient precedents, procedures, and practices of the English system of justice.’

Middleton, 227 Va. at 94. Further, the *Middleton* Court deferred to the UK courts in the first case, because England was the “home state” for the children, *Id.* at 95-96, and denied deferral to the UK courts in the second case, because Virginia was the “home state.” *Id.* at 98-99. Thus, even *Middleton* supports the respect for the UK judicial system that underlies Virginia decisions, and numerous decisions elsewhere that Heard cited that apply comity to UK decisions of all types. *See, e.g., Pony Express Records v. Springsteen*, 163 F. Supp. 2d 465, 473 (D.N.J. 2001)).

The Court expressed concern about applying comity to the UK decision because the UK has less freedom of speech than the US. (Ltr. Op. at 8). But this fact cuts in favor of applying comity in this instance, because even with the lower bar to win a libel judgment (not to mention the flipped burden of proof on the defendant in the UK), Depp still lost. And he lost on the exact same factual issue that lies at the heart of this case: whether he abused Ms. Heard. Thus, the lack of First Amendment protections in the UK support, rather than undermine, comity and would further the public policy of the First Amendment in Virginia and throughout the U.S.

Similarly, although the Court noted there is no jury trial right for libel cases in the UK, and Mr. Depp’s UK decision was issued by a judge, the Court cited no authority for the proposition that the lack of a right to a jury trial, alone, is a sufficient difference to deny application of comity. (Ltr. Op. at 8). Indeed, defamation trials are tried without a jury in the General District Courts of Virginia. In fact, Mr. Depp specifically expressed a preference for a “well-reasoned” opinion from the UK Judge over “just a [jury] verdict.” Further, Mr. Depp expressed that the “well-reasoned”

decision of the UK Court would provide vindication for both parties. Def.'s Reply Br. Att. 2, 15. Depp cannot now claim the absence of a jury trial is somehow deficient or deprived him of his ability to fully and fairly litigate his claim. And in fact, Mr. Depp did not advance such an argument in this Court. Neither side has questioned the breadth of evidence and the thoroughness of the reasoned decision issued in the UK. And in the absence of any binding or even persuasive Virginia authority suggesting a bench trial in a foreign jurisdiction vitiates comity, the Virginia Supreme Court should be asked to decide this issue. In addition, the Court noted that it was "hesitant to apply preclusive effect to the UK finding, especially considering Defendant was not a party in the UK suit," but there are also no Virginia Supreme Court cases holding mutuality is a requirement of comity.

The only argument raised by Mr. Depp was that he was not allowed to conduct discovery of Ms. Heard in the UK process. Mr. Depp did, however, issue discovery to Ms. Heard in the UK; it was denied because Mr. Depp had failed to demonstrate the requests would have been helpful to him or harmful to the Defendants and were effectively overbroad and not relevant. Further, Mr. Depp had no response to the fact that he had 16 months of discovery in this proceeding—four months more than typically afforded any litigant in this Court. At the Supp. Plea in Bar hearing, Ms. Heard introduced evidence of multiple discovery requests issued by Mr. Depp to her over that 16-month period and Mr. Depp even served an expert witness disclosure. Supp. Plea in Bar Exs. 2-7. Further, Ms. Heard introduced the entire UK trial bundle (exhibit) index reflecting multiple depositions taken in the US case, as well as extensive text messages, emails, photographs, videotapes, audiotapes, transcripts of audiotapes, and many other documents. Supp. Plea in Bar Ex. 1. As Mr. Depp's counsel admitted before the UK Court, there was "mass evidence" before the UK Court. Def.'s Reply Br. Att. 2, 15.

While Ms. Heard believes the binding and persuasive case law on comity points in her favor, Mr. Depp must agree at a minimum there are grounds for a difference of opinion and a lack of controlling precedent since (1) he has not cited any controlling precedent; and (2) he admitted in his Opposition that the law is “unsettled as to what comity precisely entails.” Pl. Opp’n. 18.

III. Determination of the Issues Will Be Dispositive of a Material Aspect of the Proceeding Currently Pending Before the Court and it is in the Parties’ Best Interests to Petition for an Interlocutory Appeal

It is undisputed that had this Court ruled in Ms. Heard’s favor on her Supplemental Plea in Bar, Mr. Depp’s claims would have been disposed of in their entirety. If this Court recognized the UK Judgment’s essential findings of fact and afforded them preclusive effect, Mr. Depp would be prohibited from maintaining his action for defamation against Ms. Heard. It is in the best interest of the parties to resolve these issues now. If the Virginia Supreme Court decides to apply the modern and majority rule of nonmutual defensive collateral estoppel (followed by the majority of Courts in the US), and apply the UK Judgment to this action, the parties would have saved nine months of fact and expert witness discovery, extensive depositions (particularly in lieu of trial because of the location of most of the witnesses), aggressive motions practice, pre-trial and trial preparation, and a four-week jury trial.

In opposing this Motion during the Calendar Control call, Mr. Depp’s counsel argued an interlocutory appeal is not in Mr. Depp’s best interest because “he is paying for this litigation.” First, Mr. Depp was and is the plaintiff in both the UK proceedings and this case – he chose to bring these actions and aggressively pursue them. Second, this argument supports certification and appealing now. If the Virginia Supreme Court rules in Ms. Heard’s favor, Mr. Depp will have saved a significant amount of money – likely millions of dollars in attorneys’ fees and costs - in not pursuing the next nine months of expensive and frequently duplicative depositions,

discovery and motions practices, as well as trial preparation and a four-week trial. If Mr. Depp prevails, there is no prejudice to him – given Mr. Depp’s litigious nature, the cost of briefing an appeal in this case will almost certainly be expended either way. *See, e.g.*, Supp. Plea in Bar Ex. 11.

There is no downside to appealing to the Virginia Supreme Court now. If the Virginia Supreme Court agrees with this Court and declines to apply the principles espoused by Defendant, then it is far preferable for certainty to both parties now. Should Ms. Heard prevail on her Appeal, it would not only significantly curtail the exorbitant, expensive, and duplicative discovery and motions practice in this case but would also protect Ms. Heard from re-litigating factual issues already determined by an admittedly competent Court, chosen by and expressly preferred by Depp, mitigate global judicial uncertainty its chilling effect on free speech, and prevent Ms. Heard from having to re-tell and re-live her abuse by Depp.

CONCLUSION

For the foregoing reasons, Defendant and Counter-Plaintiff Amber Laura Heard respectfully requests that this Court certify its August 17, 2021 Order denying Ms. Heard’s Supplemental Plea in Bar and striking certain defenses for interlocutory appeal to the Supreme Court of Virginia.

Dated this 8th day of September 2021.

Respectfully submitted,

Amber L. Heard



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CERTIFICATE OF SERVICE

I certify that on this 8th day of September 2021, a copy of the foregoing was served by email, pursuant to the Agreed Order dated August 16, 2019, as follows:

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