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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

COUNTERCLAIM PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO COUNTERCLAIM DEFENDANT'S DEMURRER AND PLEA IN BAR TO COUNTERCLAIMS

September 28, 2020

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SUMMARY OF ARGUMENT

In Virginia, the law of defamation protects a basic right: an individual's entitlement to uninterrupted enjoyment of his reputation. *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 713 (2006). Ever since a California court entered a domestic violence restraining order ("DVRO") against Mr. Depp in 2016, he has sought to destroy Ms. Heard's reputation, career, and life. In Mr. Depp's own words, "She's begging for total global humiliation" and "I will stop at nothing!!!" (Counterclaim "CC" ¶ 19.). The Counterclaim sets out in great detail the course of conduct Mr. Depp has embarked upon to achieve these goals. Mr. Depp's conduct began before he filed this lawsuit and persists to this day, in violation of Virginia's Defamation laws and the Computer Crimes Act. Although Mr. Depp tries to shield his conduct under various claims of "privilege," in doing so he is asking this Court to expand exceptions to Virginia defamation law far beyond their boundaries to permit him to file a lawsuit, and then maliciously tweet false statements about Ms. Heard and orchestrate a social media campaign of fake and inauthentic social media accounts designed to carry out his objective of destroying Ms. Heard's reputation and career. Mr. Depp apparently has a unique concept of what is not obscene, vulgar, profane, lewd, lascivious or indecent in suggesting that his characterizations of Ms. Heard as a "whore," "cunt," and that he should burn her and then "f**k her burnt corpse" to ensure she is dead, do not meet the standards for the Computer Crimes Act, when they are absolutely in line with the elements of this claim.

The statute of limitations for the Defamation Counterclaim is tolled by the filing of this lawsuit under Va. Code § 8.01-233(B) as the subject matter arises out the same transactions and occurrences upon which Mr. Depp's claims are based. Finally, the Anti-SLAPP statute requires a finding that the defamatory statements were "regarding matters of public concern that would be protected under the First Amendment." The statements by and on behalf of Mr. Depp cannot credibly be claimed to be anything other than personally motivated.

STANDARD OF REVIEW

"A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof," and therefore "does not allow the court to evaluate and decide the merits of a claim." *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013). It admits "as true all the material facts alleged in the complaint, all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts." *Hale v. Town of Warrenton*, 293 Va. 366, 368 (2017). In addition, "[n]o grounds other than those stated specifically in the demurrer shall be considered by the court." Va. Code § 8.01-273. "[T]he standards of review for a defensive plea in bar and a demurrer are substantially similar." *Station #2, LLC v. Lynch*, 280 Va. 166, 175 (2010). "A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. The moving party has the burden of proof on that issue." *Id.*

ARGUMENT

I. Ms. Heard Properly Seeks Declaratory Judgment that She is Immune from Civil Liability under Virginia's Anti-SLAPP Statute

A strategic lawsuit against public participation ("SLAPP") is a meritless civil action designed to burden the defendant with the high costs of litigation. *ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, 2015 WL 12517012 at *2 (E.D. Va. 2015); *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 8 (D.D.C. 2013) (noting "litigation itself is the plaintiff's weapon of choice" in a SLAPP suit). In response to the growth of SLAPPs, many states have enacted Anti-SLAPP legislation to weed out meritless claims and minimize the chilling effect of these lawsuits on free speech. *ABLV Bank*, 2015 WL 12517012, at *2. Like other Anti-SLAPP laws, Va. Code § 8.01-223.2 grants immunity from civil liability for defamation claims that arise out of the exercise of First Amendment rights. However, § 8.01-223.2 provides no procedural mechanism for its enforcement. *See, e.g., Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir.

2009) ("[S]ome states have provided a procedural method—often called a 'special motion to strike' but also known as an 'anti-SLAPP motion' or 'SLAPPback'—to weed out and dismiss meritless claims early in litigation."); D.C. Code § 16-5502(a) ("A party may file a special motion to dismiss....").

As a result, in Virginia, victims of SLAPP suits are free to choose a procedural vehicle for asserting their rights under § 8.01-223.2. Declaratory judgment is an appropriate mechanism for enforcing anti-SLAPP rights because the statutorily-defined purpose of declaratory judgment "is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights." Va. Code § 8.01-191. The statutes relating to declaratory judgments are "remedial," and must "be liberally interpreted and administered with a view to making the courts more serviceable to the people." *Id.* In accordance with these principles, § 8.01-184 therefore empowers circuit courts "to make binding adjudications of right" in cases of actual controversy, including cases involving the interpretation of statutes. The relief Ms. Heard seeks here, an interpretation of her rights under Va. Code § 8.01-223.2, is expressly within the class of cases subject to declaratory judgment jurisdiction.

Mr. Depp's Demurrer incorrectly asserts Ms. Heard seeks declaratory judgment of a disputed issue in his defamation action. (Memo. 2-3.) Instead, Ms. Heard's immunity turns on whether her statements concerned "matters of public concern that would be protected under the First Amendment," Va. Code § 8.01-223.2, an issue distinct from and with no overlap to Mr. Depp's burden at trial of proving the elements of defamation. While the Court determines whether the alleged defamatory statements are matters of public concern, the jury determines whether the statements subject to the Defamation claim were made "with actual or constructive knowledge that

they are false or with reckless disregard for whether they are false." If the first and second parts are determined in Ms. Heard's favor, the jury may award attorneys' fees and costs.[1]

Whether Ms. Heard's SLAPP immunity would foreclose further litigation of Mr. Depp's claims is not a basis for denying declaratory relief. For example, an insurer may seek declaratory judgment of an "ultimate issue of fact determining coverage," even if the same issue is "scheduled for adjudication" in a pending tort action. *Reisen v. Aetna Life & Cas. Co.*, 225 Va. 327, 335 (1983). Thus, Ms. Heard can seek a declaration that her statements were of public concern, that they were not made with actual or constructive knowledge they are false or made with reckless disregard, and that she is entitled to attorneys' fees and costs, while also asserting her immunity as a defense to Mr. Depp's claims. *Cf. Minter v. Commonwealth*, 74 Va. Cir. 336 (2007) (plaintiffs permitted "assert their constitutional challenges [to statute] by declaratory judgment action rather than as part of his or her defense against the underlying traffic charge.")

Tyler v. Cashflow Techs., Inc. is entirely inapposite and in no way undermines Ms. Heard's right to seek declaratory relief, nor is it binding on this Court. 2016 U.S. Dist. LEXIS 152936 (W.D. Va. 2016). In *Tyler*, a defamation action, the defendant asserted counterclaims seeking a declaratory judgment that its statements were not defamatory. *Id.* at *1. The court found the counterclaims were the "inverse" of the plaintiff's claims, and held they were "merely defenses characterized as counterclaims." *Id.* at **6-7. Here, the issues are not merely inverse and involve elements not present in Mr. Depp's defamation claim, including Ms. Heard's entitlement to

[1] Initially, Ms. Heard requested a process under Rule 3:25(D) for submitting attorneys' fees and costs to the Court following the trial. However, given the Court's retirement July 1, 2021 and the proximity of the trial to that date, after consultation with Mr. Depp's counsel, Ms. Heard anticipates submitting the question of attorneys' fees and costs to the jury under the traditional procedure, perhaps through bifurcation.

immunity for statements regarding matters of public concern, not made with falsity or reckless disregard, and entitlement to attorneys' fees and costs.

Moreover, Ms. Heard's rights are not fully matured, and by definition, cannot be fully matured while meritless SLAPP litigation designed to burden Ms. Heard with the high costs of litigation remains pending against her. The entire purpose underlying Anti-SLAPP statutes is to prevent the continued pursuit of the very litigation that impairs a person's rights to speak on matters of public concern. Because Mr. Depp is continuing to pursue this meritless SLAPP litigation designed to burden the Ms. Heard with the high costs of litigation, the harm to her First Amendment rights is continuing, and Ms. Heard's rights are not fully matured.

II. Mr. Heard Stated a Claim for Defamation and Defamation *Per Se*

The elements of defamation are (1) publication of (2) an actionable statement with (3) the requisite intent. *Tharpe v. Saunders*, 285 Va. 476, 480 (2013). "To be actionable, the statement must be both false and defamatory." *Id.* Mr. Depp's demurrer challenges only whether his statements are actionable, arguing they are expressions of opinion and privileged. (Memo. 4-8.) Mr. Depp's accusations of perjury, fabricating injuries, and falsifying claims of domestic violence, as well as the other allegations, have provably false factual connotations and are not privileged.

A. Mr. Depp's Accusations of Perjury, Fabricating Injuries, and Falsifying Claims of Domestic Abuse Are Not Opinions

While "pure expressions of opinion" are constitutionally protected and cannot form the basis of a defamation action, there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Raytheon Tech. Servs. Co. v. Hyland*, 273 Va. 292, 303 (2007) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). The test for distinguishing pure expressions of opinion from actionable factual assertions is whether the statement contains "a provably false factual connotation," and is thus "capable of being proven true or false." *Fuste v.*

Riverside Healthcare Ass'n, Inc., 265 Va. 127, 133 (2003) (statements that doctors "abandoned" their patients and that there were "concerns about their competence" were falsifiable); *Handberg v. Goldberg*, 297 Va. 660, 670 (2019) (statements that doctor was engaged in "excessive billing," sought reimbursement for "services that were not authorized or performed," and was "opportunistic and aggressive about pursuing money" were assertions of fact when considered in context); *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 715 (2006) ("The statement "[t]hat [plaintiff] just takes people's money" is capable of disproof by evidence, if adduced, that [plaintiff's] clients received monetary or other relief as a result of his legal services.")

In this case, Mr. Depp's statements contain provably false factual assertions respecting his abuse of Ms. Heard. In his interview with *GQ*, Mr. Depp accused Ms. Heard of perjuring herself in the DVRO proceeding, claiming there was "no truth" "whatsoever" to her statements. (*Id.* ¶ 63(a), Exhibit A at F1170.) Recognizing that Ms. Heard had bruises on her face when she appeared in the proceeding, Mr. Depp further claimed that she fabricated her injuries, stating: "[Ms. Heard] was at a party the next day. Her eye wasn't closed. She had 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?" (*Id.* ¶¶ 5, 63(b), Exhibit A at F1170.) Because Ms. Heard alleges that her injuries were real, and that Mr. Depp abused her, these statements contain provably false factual connotations.

Likewise, Mr. Waldman's overt accusations of "perjury and filing and receiving a fraudulent temporary restraining order," quoted in Page Six, are actionable factual assertions. (*Id.* ¶¶ 42, 66(a), Exhibit B at 2.). Mr. Waldman, as Mr. Depp's agent, expressly accused Ms. Heard of fabricating her injuries by telling The Blast that she "went to court with painted on 'bruises' to obtain a Temporary Restraining Order." (*Id.* ¶¶ 44, 66(c), Exhibit D.) Mr. Depp also accused Ms. Heard of fabricating other evidence of domestic violence, claiming that before calling 911, "Amber

and her friends spilled a little wine and roughed the place up." (*Id.* ¶¶ 46, 66(e), Exhibit G.) And Mr. Depp has repeatedly asserted that Ms. Heard is carrying out an "abuse hoax." (*Id.* ¶¶ 43, 47, Exhibits C, H.) All of these allegations can be proven false.

In his demurrer, Mr. Depp does not address the specific defamatory statements alleged in the Counterclaims. Instead, he broadly characterizes the statements as assertions that "Ms. Heard lied and perpetrated a hoax," and maintains that calling someone a liar is not actionable under *Schaecher v. Bouffault*, 290 Va. 83, 103 (2015). (Memo. 5-6.) But Mr. Depp's reliance on *Schaecher* is misplaced. First, Mr. Depp has not merely called her a "liar," he has accused her of committing the crime of perjury. Second, in *Schaecher*, the Virginia Supreme Court reaffirmed that an "accusation of lying" is actionable if it "'impl[ies] an assertion' of objective fact." *Id.* at 103 (internal citation omitted). The Court held that when considered in context, the statement "I firmly believe that [plaintiff] is lying and manipulating facts" was not actionable. *Id.* at 106. The Court observed that the statement was made in an email containing several factual assertions explaining the defendant's belief, and found it was "particularly noteworthy" that the plaintiff did not challenge the accuracy of the factual assertions. *Id.* at 104-05. The Court concluded that a reasonable person in the position of the email recipients "would have perceived the accusation [of lying] as a pure opinion on the part of the [defendant] based upon her subjective understanding of the underlying scenario." *Id.* at 106.

By contrast, Mr. Depp and Mr. Waldman's accusations went far beyond opinion and accused Ms. Heard of committing the crime of perjury. They were quoted in several media sources directed to and read by the general public around the entire world. Because these readers lack personal knowledge of the DVRO proceedings and the circumstances of Ms. Heard's abuse, they have no basis for perceiving the statements of criminal conduct as pure expressions of opinion.

Furthermore, all of Mr. Depp and Mr. Waldman's accusations contain factual connotations subject to being disproved. These allegations can be disproved by presenting evidence that establishes Mr. Depp abused Ms. Heard, and that she did not perjure herself in the DVRO proceedings or fabricate evidence of domestic abuse.

B. Mr. Depp and Mr. Waldman's Accusations Are Not Privileged

An absolute judicial immunity applies to "words spoken or written in a judicial proceeding that are relevant and pertinent to the matter under inquiry." *Mansfield v. Bernabei*, 284 Va. 116, 121 (2012). This immunity extends outside the courtroom only to communications that are "material, relevant or pertinent" to the "judicial process." *Id.* 122, 125 "A qualified privilege attaches to '[c]ommunications between persons on a subject in which the persons have an interest or duty.'" *Cashion v. Smith*, 286 Va. 327, 337 (2013) (quoting *Larimore v. Blaylock*, 259 Va. 568, 572 (2000). When a statement is published with common law malice, any qualified privilege attached to the statement is lost. *Id.* at 338. The Court determines as a matter of law whether a communication is qualifiedly privileged, while the question of whether a qualified privilege was lost or abused is a question of fact for the jury. *Id.* at 337, 339.

Mr. Depp asserts his statements are privileged, rather than subject to judicial immunity, thus he must be asserting qualified privilege. (Memo. 7-8.) A qualified privilege is not grounds for dismissing a defamation claim. Rather, when "a communication is entitled to a qualified privilege" the "onus is cast upon the person claiming to have been defamed to prove the existence of malice." *Isle of Wight Cty. v. Nogiec*, 281 Va. 140, 152, 704 S.E.2d 83, 88–89 (2011); *Goulmamine v. CVS Pharmacy, Inc.*, 138 F. Supp. 3d 652, 666 (E.D. Va. 2015) ("Defamation may be defeated by qualified privilege, and qualified privilege may be defeated by a showing of malice."); *Myers v. Tyler*, 61 Va. Cir. 512 (2003) ("[Q]ualified privilege is an affirmative

defense.") Although Ms. Heard was not required to plead facts negating an affirmative defense, she has alleged the statements at issue were published with malice. (CC ¶¶ 51, 69, 70, 72.) Accordingly, the demurrer should be overruled.

Moreover, Mr. Depp has not demonstrated the statements at issue are afforded any privilege. Relying on *Bull v. Logetronics, Inc.*, 323 F. Supp. 115 (E.D. Va. 1971), which is not binding on this Court, Mr. Depp maintains his statements are privileged because they are a "fair summary" of the allegations in the Complaint. (Memo. 7.) In *Bull*, an employer claimed it was defamed by a former employee's press release describing a lawsuit he filed against his employer.

> The [press release] set forth that Bull, a former employee of LogE and an inventor, transferred to LogE his exclusive right to acquire the Xerox Corporation's Graphic Arts Film Processor business, had filed suit against LogE and Johnson for 'royalty payments and damages in an amount over $1,000,000.00,' and 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,' the principal patent having been one obtained by Bull.

Id. at 134. Reasoning that the press release was a "fair and accurate account of the issues in [the] lawsuit," the court concluded the statements in the press release were privileged. *Id.* at 135.

Bull is inapposite for several reasons. Some of Mr. Depp's defamatory statements were made in November 2018, *before* he filed the Complaint in March 2019 and even *before* Ms. Heard's op-ed was published in December 2018. Thus, it is not possible for these statements to be a "fair summary" of the allegations in his action against Ms. Heard. (*See* CC ¶¶ 33, 63). Further, Mr. Depp did not purport to summarize any proceeding when he defamed Ms. Heard; he accused her of perjuring herself in the DVRO proceeding (*Id.* ¶ 63), and Mr. Waldman accused her of perjuring herself in the same proceeding (*Id.* ¶ 66). For example, Mr. Depp told the Daily Mail, "Amber Heard and her friends in the media use fake sexual violence allegations as both a sword and shield, depending on their needs." (*Id.* ¶ 66(d).) These statements cannot be construed as a fair summary or account of the allegations in the Complaint. As to the statements made after

Mr. Depp filed his Complaint (CC ¶¶ 41-50), there is absolutely no Virginia law that applies the "fair report" privilege to caustic, *ad hominem*, and false tweets and statements made by a defendant or his agents simply because a case is pending. *See Alexandria Gazette Corp. v. West*, 198 Va. 154, 160 (1956) ("The [fair report] privilege consists of making a fair and substantially true account of the particular proceeding or record.")

Mr. Depp also claims that under *Haycox v. Dunn*, 200 Va. 212 (1958), his statements are entitled to the privilege of "self-defense." (Memo. 7.) In *Haycox*, the Court held the trial court properly refused a jury instruction that included the following principle: "if a man is attacked in a newspaper, he may reply; and if his reply is not unnecessarily defamatory of his assailant, and is honestly made in self-defense, it will be privileged." *Id.* at 228. The Court determined that while the instruction was legally correct, it was misleading because it failed to address how the qualified privilege can be lost through abuse. *Id.* at 229. With respect to the scope of the privilege, the Court explained that it "extends only to such retorts as are fairly an answer to the attacks." *Id.* at 231.

Haycox is inapposite because Ms. Heard's op-ed was not an "attack" in the first place, and Mr. Depp was not, as a matter of law, acting in "self-defense." Mr. Depp *first* made his defamatory statements in his November 2018 *GQ* article. Ms. Heard's op-ed was published a month *later*. Under any "self-defense" analysis, Mr. Depp was the defamation aggressor, and is barred from asserting any "self-defense" privilege. *Cf., e.g., Jordan v. Commonwealth*, 219 Va. 852, 855 (1979) ("[A] person cannot rely upon...self-defense ... when he himself was the aggressor"). If any such privilege applies, it applies only to Ms. Heard, not Mr. Depp.

In any event, Ms. Heard's op-ed was not an "attack" that can support a right to limitless, gratuitous, false, defamatory and pervasive "replies" by Mr. Depp and Mr. Waldman, beyond simply filing and pursuing the Complaint. Even if the op-ed could constitute an attack (and from

a temporal and content perspective, it cannot), Mr. Depp and Mr. Waldman cannot then publicly and falsely accuse Ms. Heard of the crime of perjury and engage in a media campaign to relentlessly accuse Ms. Heard of perjury, fabricating evidence, and falsifying claims of domestic violence. Mr. Depp's and Mr. Waldman's statements are not simply retorts that fairly answer the assertions in the op-ed. *See id.* at 231 ("One attacked by a slander or libel has a right to defend himself, but he has no right to turn his defense into a slanderous or libelous attack.").

Finally, to the extent Mr. Depp is relying on the absolute judicial immunity, it applies to Ms. Heard's statements and testimony during the DVRO, not to Mr. Depp's defamatory statements. This immunity is not limited to trials, but applies only to statements that are "material, relevant or pertinent" to the "judicial process." *Mansfield*, 284 Va. at 122, 125 (applying immunity to draft complaint circulated for settlement purposes only, where a substantially similar complaint was subsequently filed); *Donohoe Constr. Co. v. Mt. Vernon Assocs.*, 235 Va. 531, 538-39 (1988) (filing of a mechanic's lien was a judicial proceeding to which absolute immunity applied). Unlike Ms. Heard's DVRO testimony, Mr. Depp's statements to media sources are wholly unrelated to the judicial process and are therefore not privileged or subject to immunity.

III. Mr. Heard Stated a Claim for Violation of the Virginia Computer Crimes Act

The Virginia Computer Crimes Act, Va. Code § 18.2-152.1 *et seq.*, prohibits harassment through the use of a computer in Code § 18.2-152.7:1, which provides in relevant part:

> If any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, **or** make any suggestion or proposal of an obscene nature, **or** threaten any illegal or immoral act, he is guilty of a Class 1 misdemeanor.

(emphasis added). The *actus rea* portion of this statute has three disjunctive elements, which prohibit using a computer to (1) communicate obscene, vulgar, profane, lewd, lascivious, or indecent language; (2) make any suggestion or proposal of an obscene nature; or (3) threaten any

illegal or immoral act. *Id.* The third *actus rea* prong "does not require any proof of obscenity." *Moter v. Commonwealth*, 61 Va. App. 471, 479 (2013). Rather, it requires proof of a "threatened" illegal act, a violation of the criminal code, or proof of an immoral act, a violation of "society's social code reflecting its collective sense of moral propriety." *Id.* "The existence of a threat, as well as the immorality of the threatened act, must be decided by factfinders who have the opportunity to see and hear the 'living record.'" *Id.* (citation omitted).

The allegations in the Counterclaim establish that Mr. Depp used a computer to perform immoral or unlawful acts. For example, Mr. Depp's online smear campaign includes two change.org petitions: one to remove Mr. Heard as an actress in the *Aquaman* movie franchise, and one to remove her as spokeswoman for L'Oréal. (CC ¶ 6.) "[A] significant number of the accounts [that] signed the petition to remove Ms. Heard from the *Aquaman* franchise are conspicuously fake or highly suspicious." (*Id.* ¶ 9.) "In addition, the change.org petitions were modified to make it appear that far more people signed the petitions than actually did" and were "amplified" by foreign language social media accounts that target Ms. Heard. (*Id.* ¶¶ 9, 11, 12.) Using fake social media accounts to sign a petition violates "society's social code reflecting its collective sense of moral propriety." *Moter,* 61 Va. App. at 479.

Further, one stated purpose of the smear campaign was to interfere with Ms. Heard's *Aquaman* and L'Oréal contractual relationships. Wrongful interference with existing and/or prospective business or economic advantages is unlawful and illegal. *See, e.g., Glass v. Glass*, 228 Va. 39 (1984); *Duggin v. Adams*, 234 Va. 221, 225-227 (1987) ("One who intentionally interferes with another's contractual rights is subject to tort liability"). The third *actus rea* prong under Va. Code § 18.2-152.7:1 does not require a completed illegal act, only the existence of a "threatened" illegal or immoral act. Thus, threatened wrongful interference with Ms. Heard's

Aquaman and L'Oréal contractual relationships, including through the use of conspicuously fake accounts, is sufficient to bring Mr. Depp's conduct within the ambit of Va. Code § 18.2-152.7:1.

Ms. Heard has also sufficiently alleged use of obscene, vulgar, profane, lewd, lascivious, or indecent language. The definition of obscenity in § 18.2-372 applies to § 18.2-152.7:1. *Barson v. Commonwealth*, 284 Va. 67, 75 (2012). Therefore, language is obscene for the purposes of § 18.2-152.7:1 if it:

> has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Code § 18.2-372. Whether a particular communication appeals to the prurient interest in sex is "essentially [a] question of fact." *Moter*, 61 Va. App. at 480. Thus, the proper inquiry on demurrer is whether a particular communication "create[s] a jury issue as to obscenity," not whether the communication is in fact obscene. *Id.*

Mr. Depp has used obscene language in numerous text messages. (CC ¶¶ 17-23). Mr. Depp stated that after he "drown[s]" and then "burn[s]" Ms. Heard, he "will f**k her burnt corpse." (*Id.* ¶ 17; *see also* ¶ 19 ("I cannot wait to have this waste of a cum guzzler out of my life!!! I met a fucking sublime little Russian here . . . Which made me realize the time I blew on that 50cent stripper."); ¶ 22 (referring to Ms. Heard as "this cunt"); ¶ 23 ("She's such a predictable, see through, disposable, sick fuckin' whore!!! Truly a pig to me now!!! No better than any junkie hooker with bad intentions."). In addition to being obscene and, at a minimum, creating a jury issue as to whether they are obscene, they are also vulgar, profane, lewd, lascivious, or indecent. In addition, a phone can constitute a computer under Va. Code § 18.2-152.7:1. *See* § 18.2-152.2 ("Computer' means a device that accepts information in digital or similar form and manipulates it

for a result based on a sequence of instructions."); *Brewer v. Commonwealth*, 71 Va. App. 585, 595 (2020) (holding defendant's use of his iPhone rendered it a computer under § 18.2-152.2).

IV. Ms. Heard's Defamation Claims are Not Barred by the Statute of Limitations Because They Arise Out of the Same Transaction or Occurrence Upon Which Mr. Depp's Claims are Based.

Mr. Depp asks the Court to grant his Plea in Bar ("Plea") as to "five of the statements in Count Two" of Ms. Heard's Counterclaim that "seek to impose liability on Mr. Depp for statements she alleges were made between November 2018 and July 3, 2019"—all of which were made within five months of Mr. Depp commencing this action on March 19, 2019. *See* Depp's Demurrer and Plea at 2 (Aug. 31, 2020); Depp's Mot. to Sustain the Demurrer and Plea at 1 (Sep. 14, 2020). Mr. Depp's Plea is premised on his mistaken conclusion that these statements are barred by the one-year statute of limitations in Va. Code § 8.01-247.1. They are not because Mr. Depp's filing of his Complaint tolled the statute of limitations.

Contrary to Mr. Depp's Plea, Ms. Heard's claims were timely filed in accordance with Va. Code § 8.01-233(B), which provides:

> If the subject matter of the counterclaim or cross-claim 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.

Because all of the alleged statements supporting Count II in Ms. Heard's Counterclaim were made less than one year prior to the commencement of Mr. Depp's action and relate to the same transactions or occurrence forming the basis of Mr. Depp's claims, the Plea should be denied.

On March 19, 2019, Mr. Depp filed his Complaint in this action alleging that Ms. Heard published an op-ed that, in Mr. Depp's words, "depended on the central premise that Ms. Heard was a domestic abuse victim and that Mr. Depp perpetrated domestic violence against her" during their relationship and marriage, as Ms. Heard testified when "she publicly accused [Mr. Depp] of

domestic abuse in 2016, when she appeared in court with an apparently battered face and obtained a temporary restraining order against Mr. Depp on May 27, 2016." (Compl. ¶ 2).

Whether Mr. Depp committed domestic violence against Ms. Heard during their relationship and marriage, as Ms. Heard testified in 2016, is the primary (and, in Mr. Depp's own words "central") transaction or occurrence at issue in Mr. Depp's Complaint. Thus, Mr. Depp alleges that "[he] never abused Ms. Heard[, and] [Ms. Heard's] allegations against him were false when they were made in 2016." (*Id.* ¶ 3). Mr. Depp alleges that "[Ms. Heard] knew that Mr. Depp did not abuse her and that the domestic abuse allegations she made against him [in connection with the temporary restraining order] in 2016 were false." (*Id.* ¶ 6). He further alleges that "the testimony and photographic 'evidence' that she presented to the court [in 2016] and the supporting sworn testimony provided by her two friends were false and perjurious." (*Id.*). Mr. Depp continues with numerous, broad-sweeping allegations related to incidents of abuse during his relationship and marriage with Ms. Heard, presumably in support of his defamation claims. (*See, e.g., Id.* ¶ 16 (allegations related to the May 2016 incident six days before "Ms. Heard 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, based on ... testimony that she and her friends provided."); *id* ¶ 28 (allegations related to the March 2015 incident in Australia); *id.* ¶¶ 29-61 (broad-sweeping allegations related to instances of abuse during their marriage); *id.* ¶¶ 77-78(a) (allegations in Count I related to Ms. Heard's 2016 abuse testimony and events of abuse during their marriage); *id.* ¶¶ 88-89(a) (Count II alleging the same); *id.* ¶¶ 99-100(a) (Count III alleging the same)).

Mr. Depp's allegations leave no doubt that Ms. Heard's judicial testimony of abuse in 2016 is the primary transaction at issue: "Then two years ago [(i.e. May 2016)], I became a public figure representing domestic abuse..." (*Id.* ¶¶ 76, 87, 98). Indeed, Mr. Depp unequivocally alleges that

Ms. Heard's op-ed, "revives" her domestic abuse testimony from 2016. (*See, e.g., id.* ¶¶ 6, 66, 72). In each Count, Mr. Depp even alleges that the op-ed "statements are of and concerning Mr. Depp, as he is Ms. Heard's former husband and she publicly ... accused him of domestic abuse in [her] May 2016 [judicial testimony]." (*Id.* ¶¶ 77, 88, 99).

The challenged statements in Ms. Heard's Counterclaim (*see, e.g.,* Counterclaim at ¶¶ 63, 66) plainly "arise[] out of the same transaction or occurrence" because all of these statements falsely allege Ms. Heard committed the crime of perjury when she testified to Mr. Depp's domestic abuse during her DVRO proceeding in May 2016—the very same testimony Mr. Depp claims was "revived" by her op-ed.[2] *See* Va. Code § 8.01-233(B); *see also* (CC ¶¶ 33-34, 42-44, 63-54, 66).

Thus, the statute of limitations with respect to Ms. Heard's Counterclaim was "tolled by the commencement of the [Mr. Depp's] action." Va. Code § 8.01-233(B); *see Wilson v. Miller Auto Sales, Inc.*, 47 Va. Cir. 153, 1998 WL 34181941 at *8 (Winchester Cir. Ct. 1998) (finding an employer's defamation counterclaims against employees based on statements made in the employees' EEOC charges, "arise "out of the same transaction or occurrence upon which the plaintiff's claim is based, [so] the statute of limitations with respect to such pleading shall be tolled by the commencement of the plaintiff's action," but granting pleas in bar because plaintiffs' lawsuit was not commenced more than one year after their challenged statements); *Doe v. Carilion Med. Ctr.*, 65 Va. Cir. 104, 2004 WL 1470342 at 2 (Roanoke City Cir. Ct. 2004) (recognizing "'transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical

[2] Mr. Depp's defamatory statements in the Counterclaim were made entirely in non-privileged fora, and less than a year before he commenced his lawsuit. In contrast, Ms. Heard's testimony, which forms the basis of Mr. Depp's claims, was made during a privileged judicial proceeding, more than two years prior to his lawsuit.

relationship. Accordingly, ***all logically related events*** entitling a person to institute a legal action against another generally ***are regarded as comprising a transaction or occurrence.***") (emphasis added).

In *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 154 (2017), the Virginia Supreme Court analyzed "single transaction or occurrence" for purposes of *res judicata*—an analogous, but not identical issue. In *Funny Guy*, the court held: "what constitutes a single transaction or occurrence under Rule 1:6 should be a practical analysis." 293 Va. at 154. "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." *Id.* (emphasis added, internal citation omitted). "No 'single factor' is indispensable or determinative." *Id.* "The factors should instead be considered 'pragmatically' with a view toward uncovering the true underlying dispute between the parties." *Id.* at 154-55.

"Under this approach, it does not matter that the claimant 'is prepared in the second action (1) [t]o present evidence or grounds or theories of the case not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action." *Id.* (internal citation omitted). Instead, "[f]or purposes of res judicata, the task of categorizing the cluster of facts that define a dispute is a pragmatic exercise that focuses on how the parties, not legal dictionaries, would view the conflict." *Id.* at 141 (emphasis added).

Here, the motivations underlying the Mr. Depp's and Ms. Heard's respective claims are the same: to prove their respective allegations of abuse during their relationship are true. The parties' respective claims are the same in time, space, and origin, from a practical perspective, because they all deal with the truth of Ms. Heard abuse testimony during her DVRO hearing in

May of 2016. Further, the issues form a convenient trial unit, and the same or similar evidence will be used in support of each party's respective claims and defense.

The Fourth Circuit and other federal courts routinely analyze whether counterclaims arise out of the same "transaction or occurrence" as a plaintiff's claims to determine whether a counterclaim is compulsory under Federal Rule of Civil Procedure 13(a). In this analogous context, federal courts have repeatedly recognized that defamation counterclaim arise from the same transaction or occurrence, if they are logically related to plaintiff's claims even when "the evidence needed to prove the opposing claims may be quite different." *See, e.g., Painter v. Harvey*, 863 F.2d 329, 332 (4th Cir. 1988) (finding officer's slander and liable claim for plaintiff's false rape allegations she made in a complaint she distributed to the press, arose from the same transaction or occurrence as plaintiff's claim for excessive force claim under 42 U.S.C. § 1983 which arose from her arrest for driving under the influence because "[t]he claims both bear a logical relationship and an evidentiary similarity."); *Peter Farrell Supercars, Inc. v. Monsen*, 82 F. App'x 293, 299 (4th Cir. 2003) (finding claims for breach of contract, fraud and Virginia Consumer Practices Act were compulsory to defamation claim) (citing *Banner Indus. of N.Y., Inc. v. Sansom*, 830 F.Supp. 325, 328 (S.D.W.Va.1993) (finding a counterclaim for breach of contract and fraud to be compulsory to a claim of defamation); *Smith v. James C. Hormel Sch. of Virginia Inst. of Autism*, 2010 WL 1257656 at *20 (W.D. Va. 2010) (finding defendant's defamation counterclaim was compulsory to plaintiffs' breach of contract and federal discrimination claims because "[t]he facts underlying plaintiffs' allegations and [defendant's] counterclaim arise from the same evidentiary discussion."); *Brown v. Kelly*, 823 F.2d 546 (4th Cir. 1987) (finding defamation counterclaim was compulsory to prosecution for unfair trade practices).

In fact, the only difference between Mr. Depp's defamatory statements and Ms. Heard's statements in her op-ed are the dates on which the statements were made, and those differing dates in no way undermine the conclusion that the claims arise from the same transaction or occurrence. *Cf. Nammari v. Gryphus Enterprises LLC*, 2008 WL 11512205 at *2 (E.D. Va. 2008) (finding defamation counterclaim that accrued after an employee was terminated, still arose from the same transaction or occurrence as plaintiff's FLSA and ERISA claims that accrued during his employment because "[t]here is an obvious logical relationship between the claims and counterclaims, and similar issues of fact raised in both."); *Heartland Payment Sys., Inc. v. Mercury Payment Sys., LLC*, 2016 WL 304764 at *10 (N.D. Cal. 2016) ("[T]he general rule is that if 'the allegedly defamatory statements are *sufficiently related to subject matter of the original action" the defamation claim is a compulsory counterclaim* ***even if the alleged statements were made after the complaint was filed.***") (emphasis added, internal citation omitted).

Because all the alleged statements supporting Count II in Ms. Heard's Counterclaim relate to the same transactions or occurrence that forms the basis of Mr. Depp's claims in his Complaint, and were made less than one year prior to the commencement of Mr. Depp's action, Mr. Depp's Plea should be denied in accordance with Virginia Code § 8.01-233(B).

V. Ms. Heard's Defamation Claims Are Not Subject to Anti-SLAPP Immunity.

Unlike Ms. Heard's op-ed, which focused on the "transformative political [#MeToo] movement," called for "Congress [to] reauthorize and strengthen the Violence Against Women Act," and called for "changes to laws and rules and social norms" so that "women who come forward to talk about violence receive more support," Mr. Depp's defamatory statements are not directed to matters of public concern that would be protected by the First Amendment and subject to immunity under Virginia's Anti-SLAPP statute. Rather, they are directed primarily to whether

Ms. Heard was telling the truth about her allegations of domestic violence against Mr. Depp. These are highly personal matters and not of public concern, and were statements made by Mr. Depp solely for his own personal benefit. *See Padilla v. S. Harrison R-II Sch. Dist.*, 181 F.3d 992, 997 (8th Cir. 1999) ("The question before us is whether the compelled expression of a teacher's opinion on the propriety of a sexual relationship between a teacher and a nonstudent minor is entitled to First Amendment protection. We conclude that it is not[.]"); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1205 (10th Cir. 2007) ("In determining whether speech pertains to a matter of public concern, the court may consider the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public's interest.") (quotations omitted). Mr. Depp's repeated accusations that Ms. Heard is a "hoax artist" or perjured herself in obtaining the DVRO involve highly personal matters of abuse by a husband against his wife. These, in and of themselves, are not matters of public concern. Therefore, the Court should deny the Plea in Bar as to the Anti-SLAPP defense, because the statements by and on behalf of Mr. Depp are not statements regarding matters of public concern that would be protected under the First Amendment, the threshold issue.

In the event the Court were to find that the statements made by Mr. Depp and Mr. Waldman were matters of public concern, the issue of whether the statements were made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false remain jury issues. *See* CC ¶¶ 41-52, 63-72.

CONCLUSION

For the foregoing reasons, Ms. Heard respectfully request that this Court deny Mr. Depp's Demurrer and Plea in Bar in its entirety.

Dated this 28th day of September 2020.

Respectfully submitted,

Amber L. Heard

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I certify that on this 28th day of September 2020, a copy of the foregoing shall be served by via email, pursuant to the Agreed Order dated August 16, 2019, upon:

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