VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff and Counterclaim-Defendant,

v.

AMBER LAURA HEARD,

Defendant and Counterclaim-Plaintiff.

Civil Action No.: CL-2019-0002911

DEFENDANT AND COUNTERCLAIM PLAINTIFF AMBER HEARD'S POST-TRIAL MOTIONS

Defendant and Counterclaim-Plaintiff Amber Laura Heard hereby moves this Court to set aside the jury's verdict on all three Counts of Plaintiff and Counterclaim-Defendant John C. Depp II's ("Mr. Depp") Complaint, to dismiss the Complaint, and to investigate potential improper juror service.

The grounds for this Motion are set forth in the accompanying Memorandum.

July 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 1st day of July 2022, by email, by agreement of the parties, addressed as follows:

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MEMORANDUM IN SUPPORT OF DEFENDANT AND COUNTERCLAIM PLAINTIFF AMBER HEARD'S POST-TRIAL MOTIONS

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Defendant and Counterclaim-Plaintiff Amber Laura Heard ("Ms. Heard") respectfully moves this Court to set aside the jury's verdict on all three Counts of Plaintiff and Counterclaim-Defendant John C. Depp II's ("Mr. Depp") Complaint, dismiss the Complaint, alternatively to order a new trial, and to investigate potential improper juror service. In support, Ms. Heard relies upon the prior record, including objections and arguments during hearings and at trial, Motions *in Limine,* Motions to Strike, and the arguments following.

SUMMARY OF ARGUMENT

From the beginning, Mr. Depp set out to try this case as a domestic relations dispute he wished he had tried, rather than settled, in 2016. Mr. Depp's counsel argued throughout the trial that the issues before the jury began 6 years ago – when Ms. Heard obtained a Domestic Violence Temporary Restraining Order ("DVTRO") against Mr. Depp on May 27, 2016. Mr. Depp and his legal team told the jury they were seeking to restore Mr. Depp's reputation and his legacy for his children – that this was the first time Mr. Depp has been able to tell his story since Ms. Heard obtained the DVTRO in 2016.

The claims in this case were far different than the case Mr. Depp tried to the jury. Mr. Depp's claims arose from an Op-Ed published in the Washington Post on December 18, 2018 – two and one-half years later. Mr. Depp alleged that three statements, one the title authored by the Washington Post, formed the basis of his defamation claims. To avoid explaining to the jury the UK Final Judgment finding Mr. Depp to have committed 12 acts of domestic violence, including sexual violence, Def. Ex. 133, Mr. Depp represented to the Court he would limit his damages claims to the period December 18, 2018 through November 2, 2020 – the date of the UK Judgment. Yet Mr. Depp made no such effort at any point in the trial to so limit his claimed damages. Instead, throughout even the Closings, Mr. Depp continued to urge the jury to restore

his reputation and legacy to his children as a result of Ms. Heard accusing Mr. Depp in May 2016 of domestic violence and obtaining a DVTRO.

The jury's verdict was obviously influenced by Mr. Depp's pleas in the face of the Court's preclusion of Ms. Heard from introducing evidence that Mr. Depp had already, in fact, been adjudicated in the Court of his choosing to have committed not just one act of domestic abuse – all that was needed in this case for a defense verdict – but 12 acts of domestic violence, including sexual violence. The exclusion of the UK Judgment, coupled with Mr. Depp's continuous urging to the jury to go back six years and exonerate him and restore his reputation, resulted in an indefensible $10 million compensatory damage verdict and $5 million punitive damage verdict. The verdict is excessive as a matter of law in light of the evidence and law, and should be set aside.

Further evidencing the confusion resulting from Mr. Depp's efforts to relitigate the 2016 domestic relations matter without the truth of the UK judgment, the jury's dueling verdicts are inconsistent and irreconcilable. The finding of defamation against Ms. Heard with a $2 million award is inconsistent with the finding of defamation against Mr. Depp with a $15 million award. In the face of these inconsistent verdicts, the Judgment should be set aside, and a new trial ordered.

At trial, Mr. Depp proceeded solely on a defamation by implication theory, abandoning any claims that Ms. Heard's statements were actually false. But where, as here, (a) the statements are true on their face – which Mr. Depp never challenged, (b) the plaintiff is a public figure – which Mr. Depp has conceded he is, and (c) the subject matter of the Op-Ed is on matters of public concern - which this Court earlier determined as a matter of law, the First Amendment prohibits claims by implication. While this appears to be a case of first impression in Virginia,

dicta in our Courts and holdings in other courts in similar circumstances warrant applying this doctrine to this case, setting aside the Judgment, and dismissing the Complaint.

Mr. Depp never challenged the fact that Ms. Heard did not write the title of the Op-Ed, one of three of the defamatory statements comprising Mr. Depp's defamation claims. Instead, Mr. Depp contended Ms. Heard's tweet of a link to the article the following day constituted actionable republication. In addition to establishing dangerous precedent suggesting anyone tweeting or retweeting an article or link can be independently liable for the content, this interpretation is beyond the reach of Virginia law on republication. Because nothing in Ms. Heard's tweet constituted a legally enforceable republication, this Count should be dismissed. Since the damages award does not separate out the three separate statements, in the event the Court does not dismiss all three Counts, the Judgment should be set aside, and a new trial ordered on the remaining claims.

For the jury to find Ms. Heard demonstrated actual malice, Mr. Depp was required to establish at the time the Op-Ed was published, Ms. Heard did not believe she had been abused or that she had doubts about whether she was abused. But Mr. Depp presented no evidence that Ms. Heard did not believe she was abused. Instead, the evidence overwhelmingly supported Ms. Heard believed she was the victim of abuse at the hands of Mr. Depp. Therefore, Mr. Depp did not meet the legal requirements for actual malice, and the verdict should be set aside.

Next, Mr. Depp improperly relied on time-barred and judicially privileged statements as the basis for his defamation by innuendo claims. Although actionable innuendo must be drawn from the four corners of the document, in this case, it could only be drawn from the reference in the article to Ms. Heard obtaining a DVTRO against Mr. Depp in 2016. This warrants setting aside the verdict on all three of the Defamation Counts.

Finally, the information on the jury panel list appears to be inconsistent with the identity and demographics of one of the Jurors. Juror No. 15 was apparently born in 1970, not 1945, as reported to and relied upon by the parties - including Ms. Heard - in selecting a jury panel. Given the requirements for verification of each juror, it appears the identity of the juror was not verified. It is unclear if Juror No. 15 was in fact ever summoned for jury duty or qualified to serve on the panel. This warrants an investigation by this Court to determine if the Juror was in fact summoned, and whether the due process rights of the parties were bypassed. Depending upon the results of the investigation, this may justify setting aside the verdict in its entirety and setting this matter for a new trial.

ARGUMENT

I. THE DAMAGES AWARDED BY THE JURY ARE UNSUPPORTED BY THE EVIDENCE AND THE LAW

The jury returned a verdict in the amount of $10 million in compensatory damages and $5 million in punitive damages. The punitive damages amount was reduced to the statutory cap of $350,000 pursuant to Va. Code § 8.01-38.1. These damage awards were unsupported by the evidence presented at trial and cannot be upheld as a matter of law. Under Va. Code § 8.01-383, where damages awarded are too small or too excessive, courts have the authority to order a new trial, on all issues or solely on the issue of damages, or remittitur. While, as a general rule, a trial court should not disturb a jury award that has been fairly rendered and based upon competent evidence, "Courts have a duty to correct a verdict that plainly appears to be unfair or would result in a miscarriage of justice." *Poulston v. Rock*, 251 Va. 254, 258 (1996); *see also Smithey v. Sinclair Refining Co.*, 203 Va. 142, 148 (1961).

"Circumstances which compel setting aside a jury verdict include a damage award that is so excessive that it shocks the conscience of the court, creating the impression that the jury was

influenced by passion, corruption, or prejudice; that the jury has misconceived or misunderstood the facts or the law; or, the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision." *Poulston*, 251 Va. at 258. "Setting aside a verdict as excessive under these conditions is an exercise of the inherent discretion of the trial court." *Id.* at 258-59.

Here, the jury's determination of $10 million in compensatory damages is excessive as a matter of law, as there is no evidence to support the verdict. Mr. Depp was limited to damages from December 18, 2018 (the date of Ms. Heard's Op-Ed) through November 2, 2020 (the date the Court ruled in the United Kingdom that Mr. Depp had committed at least 12 acts of domestic violence, including sexual violence, at times causing Ms. Heard to fear for her life). The Court, during Opening Statements in response to Mr. Depp's objection, prohibited Ms. Heard from telling the jury about the Sun Article- which was published in April 2018, Def. Ex. 99, - nearly 8 months before the Op-Ed, the trial in July 2020 during the limited period Mr. Depp was able to claim damages,, the Complaint filed by Mr. Depp in June 2018 alleging irreparable damage to his reputation, Def. Ex. 1599, the three week trial on Mr. Depp's libel claims, the ensuing publicity surrounding the trial, or the UK Judgment – a 129-page, 585 paragraph document issued on November 2, 2020, Def. Ex. 133. Tr. 413:6-415:7. After many of Mr. Depp's witnesses had testified, the Court then allowed Ms. Heard to raise, but not admit into evidence, the Sun article, the fact of the trial, and the publicity surrounding the trial, but still not the UK Judgment. 4/29/22 Hearing Tr. 203:14-204:12. In an effort to prevent the UK Judgment from

coming into evidence, Mr. Depp represented he would not attempt to claim any damages after November 2, 2020. 4/29/22 Hearing Tr. 27:17-22.[1]

Notwithstanding Mr. Depp's representation he would not attempt to claim any damages other than during the period December 18, 2018 through November 2, 2020, Mr. Depp made no attempt to limit his damages and his counsel in Closings made clear they were seeking damages from May 27, 2016 – the date Ms. Heard sought and obtained the DVTRO - through the present. This was highly prejudicial to Ms. Heard, necessarily created confusion for the jury, and the resulting $10 million compensatory and $5 million punitive awards reflect the jury's belief that it was "restoring" Mr. Depp's reputation based on Ms. Heard's initial filing of the May 2016 DVTRO – as Mr. Depp's counsel requested in Openings and Closings. This alone justifies setting aside the verdict and ordering a new trial.

Mr. Depp presented no evidence of any pecuniary damages suffered in the limited December 18, 2018 through November 2, 2020 timeframe as a result of the Op-Ed. There was no evidence of any projects or lost commercial opportunities because of the Op-Ed.

Moreover, Mr. Depp cannot demonstrate any reputational damages from the Op-Ed, because the evidence (including Mr. Depp's own testimony), was that Mr. Depp lost "Nothing less than everything" as of May 27, 2016, when Mr. Heard obtained the DVTRO against him, and that then there were "two years of just constant worldwide talk about [Mr. Depp] being this wife beater," before the Op-Ed was even published, including the Sun "wifebeater" article. In addition, any reputational damage after the Op-Ed (which never mentioned Mr. Depp's name)

[1]In spite of Mr. Depp's representations that it would not seek to introduce or claim any damages to Mr. Depp after November 2, 2020, Ms. Heard never agreed that limiting Mr. Depp's damages would obviate the need for the UK decision to be referenced and admitted into trial and instead repeatedly requested the Court to reconsider and admit the UK Judgment into the trial.

would have been non-existent, or at best nominal, compared to the Sun article, the lawsuit brought by Mr. Depp, the publicity over Mr. Depp's lawsuit against the Sun in the United Kingdom, the subsequent trial and the Judgment rendered against Mr. Depp.

Moreover, the exclusion of the UK Judgment necessarily prevents any reasonable or competent assessment of any damages, including reputational damages, as well as the credibility of Mr. Depp in asserting damages. There is no way a jury can determine any level of damage to Mr. Depp from the Op Ed without taking into consideration all potential alternative causes of damages, much less such an overriding one, brought on at Mr. Depp's election to file a libel suit, in a forum of his choosing, claiming irreparable damages to his reputation from the Sun article.

There can be no damages reasonably tied to the Op-Ed, much less $10 million. It is excessive as a matter of law and should be set aside.

A. There is No Evidence of Pecuniary Damages from the Op-Ed

Taking the evidence in the light most favorable to Mr. Depp, there is no evidence upon which the Jury could have reasonably relied to determine that Mr. Depp suffered any pecuniary loss because of the Op-Ed.

While Mr. Depp asserted he lost Pirates 6 because of the Op-Ed, there is no evidence upon which the jury can rely to reach such a conclusion. Mr. Depp did not have a contract for Pirates 6, Tr. 3528:6-12; 3595:19-22, there was media coverage that Mr. Depp would not be in Pirates 6 as of October 25, 2018 – two months before the Op-Ed, Tr. 1878:12-1880:16, Mr. Depp's agent testified that it was very likely Mr. Depp would not be in Pirates 6 as of the Fall 2018, Tr. 3530:8-3532:11, and Mr. Depp testified that he would not have agreed to play a role in Pirates 6 for "$300 million and a million alpacas." Tr. 1880:21-1881:4. Moreover, the Disney Corporate Representative testified that Pirates 6 is still "a project that's possibly in development

at the studio" as of the present, Tr. 6120:19-6121:1, and that Disney would not entertain paying Mr. Depp $300 million and provide him with a million alpacas, Tr. 6121:21-6122:4, and Disney's representative further testified she did not know if Pirates 6 would ever be made. Tr. 1880:17-20. While Mr. Depp's agent testified to a deal for Mr. Depp for Pirates 6 for $22.5 million (yet also admitting that there is no writing memorializing the supposed deal), he said that Mr. Depp would not be paid until the film shoots. Tr. 3500:19-3502:3. Mr. Whighan's belief there existed a contract was based on his understanding that Tracey Jacobs, Mr. Depp's earlier agent, had negotiated a deal. Tr. 3498:19-3499:1. However, Tracey Jacobs testified there was no deal negotiated and no commitment from Disney that Mr. Depp would be in Pirates 6 while she represented Mr. Depp, which was up until October 2016. Tr. 5924:21-5925:2.

Since the film has never been shot (let alone even written), and was not by November 2, 2020 – the date Mr. Depp's damages are cut-off - it would be impossible for Mr. Depp to claim damages for Pirates 6. Yet Mr. Depp continued to claim this at trial.

Most importantly, there is no evidence that the Op-Ed has had anything to do with whether Mr. Depp will be in Pirates 6. The Disney Corporate Representative testified that no decision-maker within Disney has ever said that Disney would not cast Mr. Depp in Pirates 6 or any other Disney project because of Ms. Heard's Op-Ed. Tr. 6129:19-6130:8. In fact, while Disney had internal emails commenting on negative publicity relating to Mr. Depp, including the UK trial and judgment, it had nothing in its files even referring to the Op-Ed, much less a copy of the Op-Ed. Tr. 6118:19-6119:13. Even Mr. Marks, Mr. Depp's expert, acknowledged the article published three days after the UK Judgment indicating that Mr. Depp was out of any further Pirates franchise. Tr. 3616:4-20, Def. Ex. 134. If the jury based any aspect of its award on Pirates 6, this would have been contrary to the evidence, prejudicially impacted by Ms. Heard

being prevented from introducing the November 2, 2020 UK Judgment (Def. 133), or the article three days later (Def. Ex. 134), purely speculative, and was effectively prohibited because Mr. Depp was limited to damages before November 2, 2020.

Nor is there any evidence Mr. Depp lost any other opportunities because of the Op-Ed. There is no evidence of any other films being lost because of the Op-Ed. Mr. Whigham testified that Mr. Depp did not have any studio films between December 2018 and October 2020, but he did not testify that it was the Op-Ed that caused Mr. Depp to lose any opportunities. Tr. 3509:17-3512:16. Instead, Mr. Carino – Mr. Depp's other agent - testified that the publicity surrounding litigation was harmful to Mr. Depp's career. Tr. 3028:3-3029:21. Mr. Depp filed the lawsuit against the Sun and Mr. Wooten in June 2018, Tr. 3540:15-19 – and against Ms. Heard in March 2019. Tr. 3665:20-21. Mr. Whigham testified there was a great deal of publicity surrounding the UK trial, and Mr. Depp had not been cast in any film since the UK trial. There is also no evidence of any endorsements Mr. Depp lost or did not receive because of the Op-Ed. In fact, Mr. Depp still has an endorsement deal with Dior, which he has had since 2015. Tr. 3595:8-18.

There is absolutely no evidence demonstrating the Op-Ed caused Mr. Depp to suffer any financial losses, and Mr. Depp did not testify to any lost opportunities or financial damages.

B. The Jury's Compensatory and Punitive Damage Awards Were Excessive as a Matter of Law

Given that the Jury did not, and could not, award Mr. Depp damages for any financial or pecuniary losses based on the evidence presented at trial, the only damages the Jury could possibly have awarded to Mr. Depp were reputational damages.[2] Even though reputational

[2] At no point in his testimony or through his experts did Mr. Depp ever claim damages for emotional distress.

damages are non-pecuniary, a jury still must "award damages that resulted only from the defendant's wrong, and not from other causes." *Gazette, Inc. v. Harris*, 229 Va. 1, 41 (1985). Moreover, reputational damages cannot be used to punish a defendant "for all of the negative publicity that Plaintiff had received" separate from the alleged defamation. *Thomas v. Psimas*, 101 Va. Cir. 455, 463-64 (Norfolk Cir. Jan. 17, 2019). But that is precisely what happened here, and it was compounded by the exclusion of evidence of the UK Judgment.

C. Mr. Depp is Not Entitled to Damages For Any Conduct Prior to the Op-Ed

There is no evidence of damage to Mr. Depp's reputation caused by Ms. Heard's Op-Ed. Instead, Mr. Depp testified that the damage to his reputation was when Ms. Heard obtained the DVTRO on May 27, 2016 – for which he cannot be compensated. Mr. Depp began his testimony by informing the Jury that he brought this case because "[a]bout six years ago, Ms. Heard made some quite heinous and disturbing, brought these certain criminal acts against me that -- that were not based in any species of truth." Tr. 1601:15-20. Mr. Depp then continued his testimony by describing how the accusations from the DVTRO in 2016 spread through the media: "the news of this -- her accusations had sort of permeated the industry and then made its way through media and social media, became quite global, let's say, 'fact,' if you will.... I felt it my responsibility to stand up, not only for myself, in that instance, but stand up for my children, who, at the time, were 14 and 16, and so, they were in high school. And I thought it was diabolical that my children would have to go to school and have their friends or people in the school approach them with the infamous People magazine cover with Ms. Heard with a dark bruise on her face. And then it just kept -- the – it kept multiplying. It just kept getting bigger and bigger." Tr. 1601:15-1605:1. Mr. Depp emphasized that his reputation has been damaged for six years, well before Ms. Heard's Op-Ed: "So it was my responsibility, I felt, to not only

attempt to clear my name for the sake of -- well, for many reasons, but I wanted to clear my children of this hard thing that they were having to read about their father, which was untrue.... It has really taken this full six years, and it's been six years of trying times. It's very strange when one day you're Cinderella, so to speak, and in 0.6 seconds, you're Quasimodo." *Id.* Mr. Depp's testimony clearly establishes that the damage to his reputation occurred in May 2016, and was not related to the Op-Ed.

And this was not isolated evidence. Mr. Depp also testified that after the public became aware of the DVTRO in May 2016, the bad news about him "was multiplying and multiplying and multiplying throughout media, throughout social media as well, so-called sort of strike media or whatever. And I was taken aback a bit.... they were abuse allegations, and then there was alcohol and then there was drugs and violence. And it just -- it was already right then and there, before my eyes, spinning out of control." Tr. 1850:3-1852:12. Mr. Depp testified that when Ms. Heard obtained the DVTRO, he lost "Nothing less than everything." Tr. 1867:21-1869:3. "Because when the allegations were made, when the allegations were rapidly circling the globe, telling people that I was a drunken, cocaine-fueled menace who beat women, suddenly in my 50s, it's over. You know, you're done." *Id.*

This negative publicity in 2016 included articles from TMZ and People Magazine that showed photos of the abuse alleged by Ms. Heard, which Mr. Depp introduced into evidence in this case. PL Exs. 409, 414. The negative publicity about Mr. Depp before Ms. Heard's Op-Ed also included headlines such as:

- "Apparently Drunk Johnny Depp Cut Off at Hollywood Film Awards Ceremony"
- "Johnny Depp: Friends and Family Seriously Concerned About Him. Here's Why."
- "Johnny Depp Has a Clear and Epic Sense of Entitlement, Ex-managers Say."
- "Johnny Depp: A Star in Crisis and the Insane Story of His Missing Millions."
- "Johnny Depp Reportedly Drank Heavily and Was Constantly Late on the New Pirates Movie Set."

- "Johnny Depp's Financial Woes Might Sink the next Pirates of the Caribbean."
- "Where did it all go wrong for Johnny Depp? After a string of flops and a ton of bad press, Johnny Depp's star power looks as wobbly as Jack Sparrow on a plank."
- "Pirates of the Caribbean: The Diminishing Returns of Johnny Depp."
- "Why are all of Johnny Depp's movies bombing at the box office?"
- "Johnny Depp allegedly showed up drunk to movie premiere, reports say."
- "The Real Reason Johnny Depp Used an Earpiece on a Film Set."
- "The Trouble with Johnny Depp: Multimillion-dollar lawsuits, a haze of booze and hash, a marriage gone very wrong, and a lifestyle he can't afford, inside the trials of Johnny Depp."
- "Vodka for breakfast, 72-hour Drug Binges and Spending Sprees that Beggar Belief: Allison Boshoff reveals why Hollywood's reeling over what's being called 'Johnny Depp's career suicide note.'"
- "How can JK Rowling be Genuinely Happy Casting Wife Beater Johnny Depp in the New Fantastic Beasts Film"

Tr. 2264:8-2269:13; Tr. 3535:11-3536:13. Mr. Depp admitted that these articles were not because of Ms. Heard's Op-Ed (they could not have been), but rather, "all started with Ms. Heard going to -- going directly to a court to get a TRO, which is with a bruise on her face and paparazzi. That was the sort of beginning of the ball rolling down the hill and gaining momentum." Tr. 2254:2-16.

After six weeks of trial, Mr. Depp went back up to the stand and reiterated this testimony to the Jury, stating that Ms. Heard's actions on May 27, 2016, "Changed everything." Tr. 7726:3-5. He again did not state that it was the Op-Ed that damaged him, but the accusations from May 2016, claiming that "I have spoken up for what I've been carrying on my back, reluctantly, for six years." Tr. 7230:9-7231:13.

Mr. Depp did not only rely on his own testimony to claim damages from May 2016 forward. Doug Bania, an expert hired by Mr. Depp, was "asked to analyze the impact of the -- this -- the allegations of domestic abuse made by Ms. Heard as it relates to her 2016 restraining order, and then asked, also, to analyze the publication of that alleged abuse in

her 2018 Washington Post Op-Ed." Tr. 3631:15-12. Mr. Bania testified that his "analysis shows that prior to 2016 and the allegations, the abuse allegations, Mr. Depp was not portrayed in a negative connotation.... Then after the 2016 mark, you know, the majority of those results turned into negative things about the abuse allegations. And then, even more so after the Op-Ed, there seemed to be kind of a theme or a flavor of not only the abuse allegations, but his drinking and drug use." Tr. 3636:2-21. But Mr. Bania admitted that his analysis cannot "separate out how Mr. Depp's reputation was impacted from the Op-Ed versus how it was impacted by when Ms. Heard filed for divorce." Tr. 3655:12-17. This means (as Mr. Bania admitted) that Mr. Depp's expert cannot say that Mr. Depp's reputation or public image was affected by the Op-Ed. Tr. 3658:20-3660:22. In fact, Mr. Bania testified that Mr. Depp's Q scores, both positive and negative, actually improved after Ms. Heard's Op-Ed, meaning his reputation and public image actually improved after the Op-Ed into 2020 (which again, Mr. Bania admitted). Tr. 3681:9-17

Finally, Mr. Depp's counsel improperly emphasized to the jury that it could find damages based on Ms. Heard obtaining the DVTRO. Counsel began Mr. Depp's closing argument, not by discussing the Op-Ed, but by stating, "On May 27th, 2016, Ms. Heard walked into a courthouse in Los Angeles, California to get a no notice *ex parte* restraining order against Mr. Depp, and in doing so, ruined his life by falsely telling the world that she was a survivor of domestic abuse at the hands of Mr. Depp. Today, on May 27th, 2022, exactly six years later, we ask you to give Mr. Depp his life back by telling the world that Mr. Depp is not the abuser Ms. Heard said he is, and hold Ms. Heard accountable for her lies." Tr. 7740:14-7741:3. Counsel for Mr. Depp then went on to tell the jury that Ms. Heard seeking the DVTRO was not based on truth and was instead designed to ruin Mr. Depp: "When she walked into court, six years ago today, on May

27th, 2016, to get a domestic violence restraining order against Mr. Depp, she did so in front of paparazzi with a mark on her face. The evidence presented at this trial demonstrates that Ms. Heard didn't just want a divorce, she wanted to ruin him." Tr. 7760:19-7761:4. Like Mr. Depp's testimony, and the evidence offered throughout the case, these were not isolated remarks, but permeated the entire closing - that Ms. Heard should be held responsible for seeking the DVTRO in 2016. *See* Tr. 7798:11-19 ("That's when his life ended. That was six years ago to this day, when Ms. Heard, on May 27th, 2016, walked into court with her public – with her publicist, Jody Gottlieb, having tipped off TMZ, with an alleged mark on her face to accuse Mr. Depp of abuse."); Tr. 7804:1-5 ("It is about Mr. Depp's reputation. And freeing him from the prison in which he has lived for the last six years, and it's six years to the day."); Tr. 7807:12-16 ("You heard from Mr. Depp yesterday that he has been carrying these outlandish, outrageous stories on his back pretty stoically, and living with them for six years and waiting to be able to bring the truth back."). The emphasis of this closing was clear – Mr. Depp was asking the jury to compensate him for actions that occurred on May 27, 2016 – actions to which he has no right to damages. This is improper and calls for this Court to set aside the verdict. *Thomas*, 101 Va. Cir. at 463-64 ("The Court has a substantial concern that the jury's decision was a result of an attempt by them not merely to compensate but to punish Defendant for her remarks about a personnel matter on the public airwaves. Moreover, it appears that they intended to punish her for all of the negative publicity that Plaintiff had received and not just the effects of one interview in March of 2016.").

D. Mr. Depp is Not Entitled to Damages for Alternative Causes, Including the Sun Publication, the Ensuing Litigation Brought by Mr. Depp, the UK Trial and Surrounding Publicity, and the UK Judgment

The evidence demonstrates that any damages caused to Mr. Depp after the Op-Ed were not because of the Op-Ed. There were a number of alternative causalities, the most significant was surrounding the Sun's April 2018 publication in the UK for an article by Dan Wootton, entitled "How can JK Rowling be Genuinely Happy Casting Wife Beater Johnny Depp in the New Fantastic Beasts Film," and the ensuing lawsuit, trial and Judgment. Mr. Depp brought a lawsuit against the Sun and Mr. Wooten on June 13, 2018 – six months before Ms. Heard's Op-Ed, Tr. 3540:15-19, because Mr. Depp wanted to "clear his name" Tr. 3608:19-3609:1 – the exact same quest repeated by Mr. Depp and his counsel throughout this trial. The UK litigation resulted in a three- week trial in London in the summer of 2020. Tr. 7317:3-7319:13; *see also* 7320:2-13. As Mr. Depp's agent testified, there was an enormous amount of press surrounding the trial. Tr. 3544:1-22. In fact, Mr. Bania's analysis found that the press surrounding Mr. Depp after Ms. Heard's Op-Ed did not mention the Op-Ed at all, Tr. 3664:13-3665:2, but instead were about Mr. Depp's trial in the UK, which included the following headlines:

- "Johnny Depp's disturbing alleged text messages read aloud in court as libel lawsuit begins"
- "'Let's burn Amber': Texts allegedly sent by Johnny Depp about ex read in court"
- "Hollywood nervously awaits fallout from explosive Johnny Depp trial."
- "Johnny Depp vs. Amber Heard: All the nasty bits of the U.K. trial- and it's all nasty"
- "Johnny Depp: Claims in the Sun he beat ex-wife 'complete lies,' court told."

Tr. 3668:2-3671:22. Mr. Depp's agent testified that after the trial, and these headlines, in July 2020, Mr. Depp has made no more films. Tr. 3550:10-16.[3]

[3] This case is the opposite of *Gov't Micro Res., Inc. v. Jackson*, 271 Va. 29, 47 (2006), in which the Supreme Court acknowledged "Jackson's right to recover greater damages because he presented evidence of his untarnished reputation prior to the defamation." Mr. Depp's reputation

Mr. Depp cannot, as a matter of law, be compensated for any injuries caused by anything associated with the Sun publication, the UK lawsuit, the trial or the UK judgment. Yet Mr. Depp's expert, Mr. Bania, could not separate out how Mr. Depp's reputation was impacted from the Op-Ed versus the publicity surrounding Mr. Depp UK litigation. Tr. 3657:4-15. Nor did Mr. Depp present any other evidence that was able to separate any damages Mr. Depp purportedly incurred from the Op-Ed versus what he sustained from the UK litigation.

Finally, Mr. Depp claimed in his testimony that he has been damaged for the past 6 years, including through this jury verdict. Mr. Depp's counsel also argued this in Closing. Tr. 7807:12-16 ("You heard from Mr. Depp yesterday that he has been carrying these outlandish, outrageous stories on his back pretty stoically, and living with them for six years and waiting to be able to bring the truth back."). This completely defied Mr. Depp's representation to the Court that Mr. Depp was only going to claim damages from December 18, 2018 through November 2, 2020. It is eminently unfair and prejudicial for the Jury to be told repeatedly that that Mr. Depp was damaged for six years, up to the present, while Mr. Depp represented to the Court that it was not claiming such damages. The prejudice is exponentially increased because Ms. Heard was denied the ability to introduce the evidence that Mr. Depp's lawsuit against the Sun and Mr. Wooten resulted in an extensive, 129-page judicial finding that Mr. Depp committed 12 acts of domestic violence against Ms. Heard, including sexual violence, and had caused Ms. Heard to fear for her life. Def. The Jury's verdict as to damages should be set aside.

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was anything but untarnished before the Op-Ed was published, and was further tarnished after the Op-Ed was published by events entirely unrelated to the Op-Ed.

E. Virginia Caselaw Supports Setting Aside Damages Judgments that are Excessive

There have been several cases that have found damages to be excessive in defamation cases, which are instructive here. While "[e]ach case must be determined by its own facts…'it is nevertheless true that the verdicts of other juries which have been approved by the courts … represent the common or average judgment of mankind as to the proper recovery in such cases.'" *Sheckler v. Va. Broad. Corp.*, 63 Va. Cir. 368, 372 (Charlottesville Cir. 2003) (finding a verdict of $10 million to be excessive and multiple times the amount of any other damages award for defamation in Virginia) (quoting *Chesapeake & Ohio Ry. v. Arrington*, 126 Va. 194, 218 (1919)).

For example, in *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 300-01 (1987) the Virginia Supreme Court sustained a remittitur of $900,000 from a $1,000,000 compensatory damage award for defamation arising out of the publication of a front-page article in the Richmond Times-Dispatch, which reported on complaints about plaintiff's performance as a teacher. While the Court affirmed the judgment that the teacher was defamed, it held that "an award of $1,000,000 clearly would have been excessive," and that "the evidence does not demonstrate that the trial court abused its discretion in reducing the award to $100,000." *Id.*

In *Gazette, Inc. v. Harris*, 229 Va. 1 (1985), the jury awarded compensatory damages of $100,000 for publication of an advertisement accusing plaintiff of racism in the campus newspaper of the university where plaintiff was a professor. *Id.* at 43-48. The Virginia Supreme Court held that $100,000 in damages bore no relationship to the loss sustained by the plaintiff. "[T]he verdict of $100,000 is so out of proportion to the damage sustained as to be excessive as a matter of law. As defendant points out, Moore experienced no physical manifestation of any emotional distress. Moreover, he sought no medical attention for any condition resulting from

the publication. In addition, there was no evidence that Moore's standing with his peers was diminished as the result of the libel. … Actually, the evidence showed that Moore continues to be held in high esteem among his community of friends and colleagues." *Id.* at 48. Similarly, Mr. Depp can point to no damages sustained from the Op-Ed, as opposed to other, unrelated events. The $10 million verdict is completely out of proportion with anything even remotely related to the Op-Ed, especially in light of the Sun article, the lawsuit filed by Mr. Depp, the ensuing trial and admitted negative publicity and the adverse UK Judgment in the same timeframe.

Two Circuit Court cases are also instructive. In *Thomas v. Psimas*, 101 Va. Cir. 455, (Norfolk Cir. Jan. 17, 2019), the Court reduced a damages award of $350,000 for defamation to $75,000. The Court found that the award was excessive, because "[o]n March 8,2016, when Defendant made her defamatory statement to WAVY-TV, Plaintiff had already been unflatteringly portrayed in many articles criticizing him in The Virginian-Pilot." *Id.* at 458-460. As described above, and admitted to by Mr. Depp, he had been unflatteringly portrayed for at least two years before Ms. Heard's Op-Ed. In addition, the Court in *Thomas* had "a substantial concern that the jury's decision was a result of an attempt by them not merely to compensate but to punish Defendant for her remarks about a personnel matter on the public airwaves. Moreover, it appears that they intended to punish her for all of the negative publicity that Plaintiff had received and not just the effects of one interview in March of 2016." *Id.* at 463-64. Here, the Jury's award of $10 million is not commensurate with damages purportedly caused by Ms. Heard's Op-Ed, but rather appear to punish her for all the alleged harm caused to Mr. Depp for the past six years beginning with the May 27, 2016 DVTRO, for which Mr. Depp was not

entitled to receive damages. The same is true for the $5 million punitive damages – there was obviously a sense to punish Ms. Heard for something far beyond the Op-Ed.

Finally, in *Sheckler v. Va. Broad. Corp.*, 63 Va. Cir. 368 (Charlottesville Cir. 2003), the Court found an award of damages of $10 million in a defamation case to be excessive and reduced the award to $1 million. There a broadcast corporation, through its TV station, aired inaccurate information regarding plaintiff's arrest for conspiracy to distribute cocaine, namely that law enforcement officers found 50 grams of crack cocaine and 500 grams of powder cocaine at his residence and business. Despite the finding of defamation, the Court significantly reduced the damages award, because it found that "the Defendant could be held responsible only for those injuries inflicted by the defamatory portions of the Defendant's broadcasts, not the losses or injuries sustained from the attendant arrest, prosecution, and forfeiture proceedings, or from the newspaper accounts and the accurate portions of the television broadcasts and Internet publications reporting those events. Likewise, the Defendant could not be held liable for creating any of the emotional, mental health, or physical symptoms deemed to have predated the defamatory broadcasts." *Id.* at 377. "Notwithstanding these limitations and conditions, the jury awarded the Plaintiff $ 10,000,000.00, an amount more than sufficient to compensate him for all of his injuries from any source whatsoever. The most plausible explanation for the size of the award is that the jury misperceived the law and the instructions and, instead, set out to punish the Defendant in addition to compensating the Plaintiff." *Id.* The same is true here, where it appears that the jury was punishing Ms. Heard for everything that happened to Mr. Depp from 2016 forward. In fact, Mr. Depp's Closing asked the jury to clear his name for everything from 2016 forward, which the Court in *Sheckler* held was error, holding that the excessive award, "is supported by a review of Plaintiff's counsel's remarks in summation. Instead of asking for

compensation for proven losses, Plaintiff's counsel, without objection, asked the jury to require the Defendant television station to pay an 'enormous sum of money to clear Mr. Sheckler's good name.'" *Id.* Mr. Depp's counsel asked the jury "to give Mr. Depp his life back" by referring not to the Op-Ed, but by referring back to May 27, 2016: "On May 27th, 2016, Ms. Heard walked into a courthouse in Los Angeles, California to get a no notice *ex parte* restraining order against Mr. Depp, and in doing so, ruined his life by falsely telling the world that she was a survivor of domestic abuse at the hands of Mr. Depp." Tr. 7740:14-7741:3. Damages in this case cannot be based on actions from 2016 or any damages that Mr. Depp suffered because of the trial in the UK. But the Jury's $10 million judgment for reputational damages clearly showed that is what the Jury did. Such an award is excessive, and by law, should be set aside.

II. THE VERDICTS ON THE COMPLAINT AND COUNTERCLAIM ARE INCONSISTENT AND THEREFORE SHOULD BE SET ASIDE

The Virginia Supreme Court has held that jury verdicts that are "irreconcilably inconsistent . . . cannot stand." *Roanoke Hosp. Ass'n v. Doyle & Russell*, 215 Va. 796, 804 (1975). In that case, the Supreme Court instructed that a new trial is necessary when portions of a jury verdict are irreconcilable. *Id; see also Tyree v. Harding*, 11 Va. Cir. 446, 450 (Lynchburg Cir. 1977) (holding that "the jury verdict was inconsistent" which "in such form requires a new trial on all issues.").

Here, the Jury's verdict in favor of Mr. Depp as to his defamation claims and in favor of Ms. Heard as to her claim of defamation are inherently and irreconcilably inconsistent, and therefore cannot stand. The verdicts found that Mr. Depp did not abuse Ms. Heard at any time, while at the same time necessarily found that Ms. Heard did not lie about being a victim of domestic abuse, and in particular abuse that occurred on May 21, 2016. These findings are entirely inconsistent.

In overruling Ms. Heard's Demurrer, this Court held that the statements "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change"; "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": and "I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse" all could convey the same meaning, "***that Mr. Depp abused Ms. Heard***." 3/27/20 Letter Opinion at 4-5 (emphasis added). In reaching that conclusion, the Court held that the inference could be made based on "the events surrounding the parties' divorce," including the allegations from "May 2016." *Id.* at 5. This holding means that for the Jury to have found in Mr. Depp's favor as to his defamation claims, it necessarily had to find that Mr. Depp did not abuse Ms. Heard at any time, including May 21, 2016.

Conversely, when this Court overruled Mr. Depp's Demurrer to Ms. Heard's Counterclaim, it held that the statement made on April 27, 2020 about the May 21, 2016 incident[4] "impl[ies] 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, [it] impl[ies] that ***she lied about being a victim of domestic abuse.***" 1/4/21 Letter Opinion at 6 (emphasis added). This holding means that for the Jury to have found in Mr. Heard's favor as to her defamation claim, it necessarily had to find that Ms. Heard did not lie about being a victim of domestic abuse, and in particular the incident occurring on May 21, 2016.

Mr. Depp himself acknowledged before the trial that the parties' defamation claims are mirror-images of each other:

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[4] The full statement is here: "Quite 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."

> "this case is unique: it involves two, essentially-mirror image defamation claims asserted against the only two people who truly know whether the statements at issue are true or false. If Mr. Depp did not abuse Ms. Heard, she indisputably knows her claim that he did is false. If Mr. Depp did abuse Ms. Heard during their brief marriage, he knows that Mr. Waldman's statements calling Ms. Heard a liar are false."

3/22/22 Depp Mot. in Limine 20 at 2. As Mr. Depp's own brief makes clear, the parties' claims against each other necessarily imply that Mr. Depp either did or did not abuse Ms. Heard. By finding defamation against both parties, the jury necessarily found both that Mr. Depp did not abuse Ms. Heard and at the same time, that Mr. Depp did abuse Ms. Heard. Thus, these verdicts are "irreconcilably inconsistent" and therefore "cannot stand." *Roanoke Hosp. Ass'n*, 215 Va. at 804. At a minimum, the jury's finding in favor of Ms. Heard necessarily precludes a finding of actual malice by her with respect to Mr. Depp's claims.

III. THE FIRST AMENDMENT BARS RECOVERY FOR DEFAMATION BY IMPLICATION WHEN THE STATEMENTS AT ISSUE ARE TRUE ON THEIR FACE AND INVOLVE A PUBLIC FIGURE OR MATTERS OF PUBLIC CONCERN

The Supreme Court of Virginia has never decided whether facially true statements can support a claim of defamation by implication when they involve a public figure or matters of public concern. In *Pendleton v. Newsome*, 290 Va. 162 (2015), however, the Court signaled that this doctrine does not apply in these circumstances. *Id.* at 174 n.5. There, the Court distinguished *Chapin v. Knight-Rider, Inc.*, 993 F.2d 1087 (4th Cir. 1993), where the Fourth Circuit held that the speech at issue did not impart a defamatory implication, from the facts of *Pendleton*, reasoning:

> In *Chapin,* the court considered a libel claim in which the defendants were members of the press, **the plaintiffs were public figures, and the subject matter touched on matters of public concern** (controversy regarding involvement of American troops in the Persian Gulf War). In these circumstances, the court held, "the constitutional protection of the press reaches its apogee." *Id.* at 1092. **Here, by contrast, the plaintiff was not a public figure**, the defendants were employed

> by government agencies but were not officials generally known, **the publicity attending the subject matter lasted only a few days, and the freedom of the press is in no way impacted.**

Pendleton, 290 Va. at 174 n.5 (emphasis added) (quoting *Chapin*, 993 F.2d at 1092). This reasoning indicates that defamation by implication warrants different treatment when the speech at issue involves public figures or affairs. It also demonstrates that whether the First Amendment permits recovery in these circumstances is a question of first impression in Virginia.

Several jurisdictions have held defamation by implication is not recognized as a viable cause of action when the statements at issue concern public figures or matters of public concern. *See Johnson v. Purpera*, 320 So. 3d 374, 389 (La. 2021) (defamation by implication or innuendo "is actionable only if the statements regard a private individual *and* private affairs" (emphasis in original) (citing *Schaefer v. Lynch*, 406 So.2d 185, 188 (La. 1981)); *MacDonald v. Brodkorb*, 939 N.W.2d 468, 480-81 (Minn. Ct. App. 2020) (statement about public figure that is true on its face cannot support claim for defamation by implication); *Clements v. WHDH-TV, Inc.*, No. WC97-012, 1998 WL 596759, at *2 (R.I. Super. Aug. 27, 1998) ("Finding that plaintiff, as a police officer is a public figure, he is not entitled to recover on that portion of his claim alleging defamation by implication."); *Andrews v. Stallings*, 892 P.2d 611, 618 (N.M. Ct. App. 1995) ("[T]he factual statements are true and therefore the 'implication of misrepresentation' cannot constitutionally serve as the predicate for a defamation complaint by a public official regarding a matter of public concern."); *Pietrafeso v. D.P.I., Inc.*, 757 P.2d 1113, 1116 (Colo. App. 1988) ("[T]he trial court did not err in concluding as a matter of law that, if the allegedly libelous statements are true, there can be no libel by innuendo of a public figure."); *De Falco v. Anderson*, 506 A.2d 1280, 1284 (N.J. App. Div. 1986) ("We here adopt the view that there is 'no libel by innuendo of a public figure where the challenged communication is true.'" (quoting

Strada v. Conn. Newspapers, Inc. 477 A.2d 1005c, 1012 (1984)); *see also Garrison v. Louisiana.*, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."); *but see Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 828-29 (Iowa 2007) (describing diverging authority on this question and concluding public figure can maintain suit for defamation by implication).

Other courts permit actions for defamation by implication of a public figure only when the inference arises from the omission of material facts in the challenged communication. *See Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005, 1010-12 (Conn. 1984); *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112, 126 (1991) ("[L]ibel law may not impose damages for injuries to reputation arising from a press report of materially true facts about a public figure on a matter of public interest" and "without material factual omissions.").

Similarly, courts that permit public figures to recover for defamation by implication generally define this tort as occurring when a publication: "(1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts." *Stevens*, 728 N.W.2d at 827; *see also Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 387 (8th Cir. 1996) ("[T]he touchstone of implied defamation claims is an artificial juxtaposition of two true statements or the material omission of facts that would render the challenged statement(s) non-defamatory.").

Three rationales underlying these decisions are instructive. First, precluding liability for facially true statements about public figures or affairs is a corollary to the protection of false statements published without malice:

> [T]ruthful statements which carry a defamatory implication can be actionable. However, that is only true in the case of private citizens and private affairs. Even false statements about public officials are constitutionally protected unless known to be false or printed with a reckless disregard for the truth. *New York Times*

> *Company v. Sullivan, supra*. It surely follows that all truthful statements are also constitutionally protected. Even though a false implication may be drawn by the public, there is no redress for its servant. Where public officers and public affairs are concerned, there can be no libel by innuendo.

Schaefer v. Lynch, 406 So. 2d 185, 188 (La. 1981); *see also Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005, 1012 (1984) ("Just as the goal of a free and active press protects false statements of fact regarding public figures published without malice, so too must the law protect truthful facts that may give rise to false innuendo or inference.").

Second, as a result of their fame, public figures enjoy a platform that allows them to reach a broad audience when expressing their viewpoints. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."). With this benefit comes the "risk of closer public scrutiny than might otherwise be the case." *Pietrafeso*, 757 P.2d at 1116 (quoting *Gertz*, 418 U.S. at 344); *see also Strada*, 477 A.2d at 1011 ("[A]ny article replete with snide innuendos can be hurtful to a subject, and indeed may damage him in his business reputation. But if he is a public figure, then he must bear the risk of such publicity as the price he pays for conducting activities or business in the public arena." (quoting *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1352 (S.D.N.Y.1977)).

Third, "[w]here public affairs are concerned, the publication of true statements is encouraged, and there can be no civil or criminal liability for such, regardless of ill-will or improper motive on the part of the speaker." *Johnson*, 320 So. 3d at 389. As expressed in the Op-Ed, the public scorn inflicted upon individuals who report abuse is a matter of great public concern. True statements about this subject should be afforded protection by the First Amendment.

Speech about public figures and matters of public concern lies at the core of the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust and wide open."). Given the First Amendment interests at stake, and the reasoning described above, the Court should hold that true statements about public figures or matters of public concern cannot support a claim for defamation by implication. In the alternative, the Court should hold that when such speech is at issue, defamation by implication is permissible only if the defamatory inference arises from the juxtaposition of facts or the omission of material facts in the challenged publication.

At trial, Mr. Depp did not present evidence that the statements at issue were untrue on their face. He proceeded exclusively on a theory of defamation by implication. He also did not attempt to prove the alleged implication arose from the juxtaposition of facts or an omission of material facts in the Op-Ed. There is no dispute Mr. Depp is a public figure, he has expressing admitted he was a public figure,[5] and tacitly conceded this point by tendering jury instructions that required him to prove actual malice. *See Gertz*, 418 U.S. at 342 ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures."); *MacDonald*, 939 N.W.2d at 478 (all-purpose public figures include celebrities). Moreover, this Court has already ruled that the Op-Ed addresses matters of public concern. (3/24/21 Order); *see also Lane v. Franks*, 573 U.S. 228, 241 (2014) ("Speech involves matters of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the

[5] *See* Memorandum of Law in Support of Plaintiff's Demurrer and Plea in Bar to All Counterclaims, at 12 (referring to Mr. Depp and Ms. Heard as "public figures").

public.'" (citation omitted)). Accordingly, Mr. Depp failed to prove defamation and the jury's verdict should be set aside.

IV. THE JURY'S FINDING OF DEFAMATION BY IMPLICATION WITH RESPECT TO THE OP-ED HEADLINE STATEMENT IS CONTRARY TO THE LAW AND UNSUPPORTED BY THE FACTS

The jury's verdict with respect to the headline should be set aside because under the applicable law and facts, Ms. Heard neither (A) initially made or published, nor (B) republished through a tweet, the headline statement, "*I spoke up against sexual violence – and faced our culture's wrath. That has to change*" (the "Headline").

A. There is No Support for the Conclusion that Ms. Heard Initially Made or Published the Headline; The Newspaper Added the Headline and Ms. Heard Played No Role in the Authoring or Publication of the Headline Statement

To establish defamation by implication, Depp must prove the elements *for each statement at issue*, including, first and foremost, that Ms. Heard made the Headline statement.[6] *Pendleton v. Newsome*, 290 Va. 162, 171-75 (2015); *Fairfax v. CBS Broad. Inc.*, 534 F. Supp. 3d 581, 591 (E.D. Va. 2020), *aff'd sub nom. Fairfax v. CBS Corp.*, 2 F.4th 286 (4th Cir. 2021).

There is no evidence that Ms. Heard ever "made the [Headline] statement," as required for defamation by implication; the newspaper added the headline. *See Pendleton,* 290 Va. at 175 (plaintiff must prove "the defendants made the statements alleged in the complaint"). The undisputed evidence established that Ms. Heard never wrote the Headline; the newspaper added it without any involvement from Ms. Heard. Tr. 4/28 at 3230:6-21; Tr. 5/16 at 4881:21-22-

[6] Defamation by implication requires the following elements for each statement: "(1) that the defendants made the statements alleged in the complaint, (2) that the statements, even if facially true, were designed and intended by the defendants to imply … [defamatory implications], (3) that in the light of the circumstances prevailing at the time they were made, the statements conveyed that defamatory implication to those who heard or read them, and (4) that the plaintiff suffered harm as a result." *Pendleton v. Newsome*, 290 Va. 162, 175, 772 S.E.2d 759, 765 (2015).

4882:8. Ms. Heard played no role at all with respect to the Headline. Tr. 5/16 at 4881:21-22-4882:5. In fact, Ms. Heard never even became aware of the Headline until Mr. Depp filed the lawsuit against her. Tr. 5/16 at 4882:14-18. Ms. Heard testified she did not even notice it. Tr. 5/18 at 5272:2-4. In fact, there was a completely different headline in the paper edition, which version Ms. Heard had framed. Tr. 5/16 at 4883:10-16. Mr. Depp made no attempt to challenge any of this testimony. No reasonable jury could conclude that Ms. Heard made the Headline statement, given the evidence.

Similarly, no reasonable jury could conclude that Ms. Heard published the Headline. To prove publication, it is generally "sufficient to show that, *when the defendant addressed the defamatory words to the plaintiff*, another person was present, heard the words spoken, and understood the statement as referring to the plaintiff." *Food Lion, Inc. v. Melton*, 250 Va. 144, 150, 458 S.E.2d 580, 584 (1995). Here, Ms. Heard never addressed the Headline to the plaintiff. She never wrote or conveyed the Headline message to plaintiff and therefore did not publish it in the first instance. *See, id; see also Dragulescu v. Virginia Union Univ.*, 223 F. Supp. 3d 499, 507 (E.D. Va. 2016) (noting that a sufficient showing requires that "defendant addressed the defamatory words to the plaintiff").

B. Ms. Heard's Tweet Linking the Newspaper Article Does Not Constitute Republication, Under Applicable Law and the Facts

Virginia follows the "single publication rule," under which the "mass distribution of defamatory communications, such as internet posts are not deemed to be republished each time the communication is re-posted or repeated." *Fairfax*, 534 F. Supp. 3d 581 at 597, n.11. The "public policy supporting the single publication rule and the traditional principles of

republication dictate that a mere hyperlink, without more, cannot constitute republication." *Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021).

Tweeting a link does not constitute republication, even if the tweet includes a mere reference to the article. *Lokhova*, 995 F.3d at 142-144; *Crosswhite v. Reuters News & Media, Inc.*, No. 6:21-CV-00015, 2021 WL 6125750, at *3 (W.D. Va. Dec. 28, 2021) (tweet which merely refers to the article was not republication); *see also In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012), as corrected (Oct. 25, 2012) ("though a link and reference may bring readers' attention to the existence of an article, they do not republish the article").

Rather, republication requires: (1) editing and retransmitting the defamatory material, or (2) redistributing the material with the goal of reaching a new audience. *Eramo v. Rolling Stone*, LLC, 209 F.Supp.3d 862 (W. D. Va. 2016). Stated differently, republication occurs when the speaker has "affirmatively reiterated" the statement. *Id.* Initially, Ms. Heard never edited or played any role with respect to the Headline. Tr. 4881:21-22-4882:5. Moreover, a brief reference to the linked article does not constitute "editing" the article. *Crosswhite*, No. 6:21-CV-00015, 2021 WL 6125750, at *3 (tweet which merely refers to the article was not republication); *In re Phila. Newspapers* 690 F.3d 161, 174 (3d Cir. 2012) ("mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material"). Although Ms. Heard's tweet called attention to the article and indicated she was the author, the tweet did not edit or add content to the article in a manner sufficient to overcome Virginia's single publication rule.

Ms. Heard also never redistributed the Headline statement with the goal of reaching a new audience. Tweeting a link to a prominent global newspaper article does not redistribute the material to a new audience as a matter of law. *Lokhova*, 995 F.3d at 143 (the hyperlink served as

a reference for the New York Times' existing audience and did not direct the old article to a new audience); *Crosswhite*, No. 6:21-CV-00015, 2021 WL 6125750, at *2-*3. ("the 2020 tweet about the 2019 articles served as a reference for Reuters' existing audience" – not a new audience; and third-party tweets at issue did not constitute republication); *see also Gilmore v. Jones*, 370 F. Supp. 3d 630, 660, n.32 (W.D. Va. 2019) (sharing a link on twitter "is not alone enough to make a prima facie showing that West 'manifested an intent to direct' the article at a Virginia audience"); *Perlman v. Vox Media, Inc.*, No. CVN19C07235PRWCCLD, 2020 WL 3474143, at *8 (Del. Super. Ct. June 24, 2020), *reargument denied*, No. CVN19C07235PRWCCLD, 2020 WL 4730406 (Del. Super. Ct. Aug. 14, 2020), *and aff'd*, 249 A.3d 375 (Del. 2021), and *aff'd*, 249 A.3d 375 (Del. 2021) ("directing one segment of the Verge's readership to an article on the site is by definition only reshuffling its existing audience, not directing itself to a new one"); *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 506 (6th Cir. 2015) ("Statements that are posted to a forum that is prominently accessible to the online public have a presumptively global audience;" hyperlinks demonstrate "neither the intent nor the ability to garner a wider audience than the initial iteration of the online statement could reach;" and "alerting a new audience to the existence of a preexisting statement does not republish it"); *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012), as corrected (Oct. 25, 2012) ("[w]hile [a reference] may call the existence of the article to the attention of a new audience, it does not present the defamatory contents of the article to the audience"); *Salyer v. S. Poverty L. Ctr., Inc.*, 701 F. Supp. 2d 912, 916 (W.D. Ky. 2009) (a reference "does not present the defamatory contents of the article to that audience"); *T.S. v. Plain Dealer*, 194 Ohio App.3d 30, 954 N.E.2d 213, 215 (2011) (declining to

find republication even where the defendant made a previously published print article newly available online).

In short, Ms. Heard never "affirmatively reiterated" the Headline, as required for republication, under the law or facts. *Eramo*, 209 F. Supp. 3d at 879 ("republication occurs when the speaker has 'affirmatively reiterated' the statement"). A mere link and brief reference to the online article in a global newspaper is insufficient to constitute affirmative reiteration under the law. *See, e.g.*, *Crosswhite*, No. 6:21-CV-00015, 2021 WL 6125750, at *3 (tweet which merely refers to the article was not republication); *Lokhova*, 995 F.3d at 143 (merely "linking to an article should not amount to republication;" and it does not matter that the link "added accessibility and convenience").

Moreover, there is no evidence reasonably supporting a finding that Ms. Heard republished the Headline by tweeting a link to a global newspaper article. Ms. Heard had no control over whether her link to the newspaper article included the article's Headline. Tr. 5/18 at 54884:19-22; Tr. 5/16 at 4885:1-4; Tr. 5/18 at 5270:7-11. Ms. Heard never typed the Headline in her tweet; she simply linked the article with a short reference that did not restate the Headline. Tr. 5/16 at 4885:9-11. Ms. Heard never even noticed that the Headline was contained in the link. Tr. 5/17 at 5272:2-4; Tr. 5/16 at 4885:5-8; 4882:14-18; Tr. 4885:9-11. She could not have affirmatively reiterated a Headline that she did not even notice or type.

Accordingly, under applicable law and facts, there is no support for a finding of republication with respect to the Headline, and the jury's verdict should be set aside.

V. MR. DEPP DID NOT PRESENT EVIDENCE OF ACUTAL MALICE

"A public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false statement was made with 'actual malice.'" *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) (quoting *New York Times Co. v.*

Sullivan, 376 U.S. 254 (1964)). To establish actual malice, a plaintiff must demonstrate "the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Jackson v. Hartig*, 274 Va. 219, 228 (2007) (quoting *Jordan v. Kollman*, 269 Va. 569, 577 (2005)). Courts have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 659. This "rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984).

Importantly, there "is a significant difference between proof of actual malice and mere proof of falsity." *Bose Corp.*, 466 U.S. at 511. Discredited testimony of the defendant, standing alone, does not constitute clear and convincing evidence of actual malice; rather, the plaintiff must present "affirmative evidence" that the defendant acted with the requisite state of mind. *Palin v. New York Times Co.*, No. 17-CV-4853, 2022 WL 599271, at *19 (S.D.N.Y. Mar. 1, 2022); *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 671 (9th Cir. 1990) ("[A] determination of actual malice cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial."). Conversely, a jury's finding that the plaintiff's testimony is credible does not establish actual malice. *See Harte-Hanks Commc'ns*, 491 U.S. at 681 ("The fact that an impartial jury unanimously reached th[e] conclusion [that the plaintiff was telling the truth] does not, however, demonstrate that the [defendant] acted with actual malice."). In short, evidence of falsity alone is not sufficient to prove actual malice.

In this case, proving actual malice required showing that, at the time the Op-Ed was published, Ms. Heard did not believe she was abused or that she "entertained serious doubt"

about whether she was abused. *Jackson*, 274 Va. at 228. *See, e.g.*, Compl. at 5, ¶¶ 62, 68 (alleging Op-Ed implied Mr. Depp abused Ms. Heard); Ltr. Opin. 3/32/2020 at 5 (alleged defamatory meaning is that Mr. Depp abused Ms. Heard). Further, because actual malice is a subjective standard, whether Ms. Heard believes she was abused must be judged by her definition of abuse. Ms. Heard testified unequivocally that Mr. Depp abused her physically, emotionally, and psychologically. Tr. 7625. Mr. Depp presented no evidence that Ms. Heard does not believe abuse can be physical, emotional, or psychological.[7]

Ample undisputed evidence supports Ms. Heard's belief that Mr. Depp abused her. For example:

- Mr. Depp repeatedly asked Ms. Heard to cut him with a knife and threatened to cut himself in her presence when she refused to comply. (Def. Ex 586A.) Ms. Heard implored Mr. Depp not to cut himself in this recording. *See, e.g.* timestamp: 1:55 to 2:05. ("Cut me, if you don't I will."); 1:10 to 1:30 ("Please don't cut your skin"); 3:20 to 3:30 ("Put the knife down!").

- Mr. Depp intimidated Ms. Heard by kicking cabinets and doors, screaming obscenities, and smashing glasses. (Def. Ex. 638). He also destroyed property in her presence on other occasions. *See* Tr. 1997-98 (Mr. Depp's testimony that he "punched a bathroom sconce that was right by the mirror" during an argument at Hicksville); Tr. 7294 (Mr. Depp's testimony that he ripped a phone off a wall in Australia).

- While fighting with Ms. Heard, Mr. Depp pushed over racks of clothes and shoes in her closet and threw her clothes down a staircase. (Def Ex. 400A). *See also* Tr. 3458, 3475 (Mr. McGivern's testimony that Depp "rearranged" Ms. Heard's closet).

- Mr. Depp forbid Ms. Heard from acting in movies and having meetings. (Def. Ex. 195 (text message from Mr. Depp to Ms. Heard stating "no goddamn meetings. No movies. Why do you deviate from our agreement?"); Tr. 2233-34 (discussion of text message).

- Mr. Depp texted Ms. Heard, "I have other uses for your throat, which do not include injury…" (Def. Ex. 186A); Tr. 2156-57 (discussion of text message).

[7] In addition, Mr. Depp and his expert, Dr. Curry, agreed abuse can be verbal and emotional. Tr. 1898-99; 2669.

- Mr. Depp repeatedly accused Ms. Heard of infidelity and promiscuity, and exhibited jealous and aggressive behavior, including the following:

    - Using paint and his own blood, Mr. Depp wrote Ms. Heard a "reminder" on mirror in a house where they stayed in Australia, stating, "Starring Billy Bob and Easy Amber." Tr. 2085-86 (discussing Def. Ex. 374). He left her this reminder directly after she filmed a movie with Billy Bob Thornton. (*Id.*).

    - Mr. Depp accused Ms. Heard of having affairs with her co-stars. Tr. 2004 (Mr. Depp's testimony that an argument was about his suspicion that Ms. Heard was having an affair with James Franco).

    - As Mr. Depp told Ms. Heard, "I become irrational when you're doing movies. I become jealous and fucking crazy, weird, and you know, we fight a lot more." Tr. 2114 (discussing Def. Ex. 343).

    - Mr. Depp physically intervened when he viewed someone as "very affectionate" toward Ms. Heard. Tr. 1996. He testified that in order to protect "Ms. Heard's honor," "I removed Kelly Sue's hand from Ms. Heard's body, and I told her, 'Do not do that. First of all, that is my girl. Second of all, it's rude and aggressive.'" Tr. 1996-97.

Te question is not whether the jury rejected that the above conduct constitutes abuse as an objective matter. The question is subjective; it is whether Mr. Depp proved that these events did not cause Ms. Heard to believe she was abused. Mr. Depp presented no evidence that Ms. Heard seriously doubted that she was abused, and thus failed to prove actual malice.

Moreover, while domestic abuse is not limited to physical violence, undisputed evidence also established Mr. Depp participated in physical fights with Ms. Heard and used force. For example, Mr. Depp admitted that in a recording, he said "I headbutted you in the fucking forehead. That doesn't break a nose." Tr. 2121-22; (discussing Def. Ex. 587A). While Mr. Depp testified that he did not intentionally headbutt Ms. Heard, it does not follow that Ms. Heard could not have concluded he intentionally headbutted her. She also could have believed that Mr. Depp

headbutting her was abusive, regardless of whether it was intentional. In other words, Mr. Depp presented no evidence that Ms. Heard did not believe that his headbutt was physically abusive.

In another recording, Mr. Depp stated, "I left last night, honestly, I swear to you, because I just couldn't take the idea of more physicality, more physical abuse **on each other."** (Plf. Ex. 356 timestamp 1:04:40 to 1:05:30) (emphasis added). This recording shows, at a minimum, that Mr. Depp believes the parties' conduct could be interpreted as physical abuse of each other, or that he believes Ms. Heard views their conduct as physical abuse of each other. Either conclusion supports Ms. Heard's belief that Mr. Depp physically abused her, and Mr. Depp adduced no evidence to the contrary.

Because Mr. Depp presented no evidence that Ms. Heard did not believe he abused her physically, emotionally, and psychologically, he failed to prove actual malice and the verdict must be set aside.

VI. MR. DEPP DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF DEFAMATION BY INNUENDO

When a plaintiff claims that he was defamed by statements that are literally true because of a false implication arising from them, the "implication must be reasonably drawn from the words actually used." *Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 89 (2014). In such cases, the plaintiff may prove defamation through innuendo, "an explanation of the allegedly defamatory meaning of the statement, if it is not apparent on its face." *Id.* at 88. "The province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it can not introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." *Schaecher v. Bouffault*, 290 Va. 83, 93 (2015) (quoting *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 8 (1954)). In this case,

the jury's verdict in favor of Mr. Depp should be set aside because he failed to prove through innuendo that the Op-Ed is about him and that it conveys the defamatory implication that he abused Ms. Heard.

A. No Evidence Surrounding the Op-Ed's Publication Would Reasonably Cause a Reader to Believe the Title of the Online Edition is About Mr. Depp

When a plaintiff proceeds under a defamation by implication theory, he must prove that in "light of the circumstances prevailing at the time [the statements] were made," they conveyed a "defamatory implication to those who heard or read them." *Pendleton v. Newsome*, 290 Va. 162, 175 (2015). "[E]vidence 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." *Id.* at 172. During opening statements, counsel for Mr. Depp forecasted that, with respect to the title, he would present no evidence of circumstances surrounding the publication of the Op-Ed that would suggest the title is about Mr. Depp. Counsel stated:

> [A]fter this lawsuit was filed, Ms. Heard started making up more and more alleged incidents of abuse. And if you'll recall, ladies and gentlemen, **the headline of the Op-Ed references sexual violence. But Ms. Heard had never made that accusation against Mr. Depp**. It was never part of her allegations of abuse. So what changed? What changed between 2016 and 2018? We submit to you and the evidence will show, when she realized the seriousness of what she had alleged, she panicked and she alleged sexual assault.

(Tr. 4/12/2022, Day 2 at 337) (emphasis added). In other words, Mr. Depp's theory was that allegations of sexual assault made **after** the Op-Ed's publication, and after the commencement of the instant action, caused readers to understand the title to be about Mr. Depp. This theory finds no support in any authority, and is contrary to Virginia law, which requires a plaintiff to prove

that circumstances surrounding a statement's publication caused it to impart a defamatory implication.

Consistent with counsel's opening statements, at trial Mr. Depp presented no evidence that prior to or shortly after the Op-Ed's publication, Ms. Heard accused him of sexual abuse. The only evidence of prior allegations of sexual abuse was Ms. Heard's testimony that in the United Kingdom, she was provided with "confidentiality" when testifying about incidents of sexual abuse. (Tr. 5/16/22, Day 17, at 4651, 4896; *see also* 5165 (testimony about sexual assault in the United Kingdom was in a "confidential schedule")). She also testified that at the time the Op-Ed was published, she had never publicly accused Mr. Depp of sexual violence. (Tr. 5/17/2022, Day 18 at 5268). Not only was Ms. Heard's testimony about sexual abuse in the United Kingdom confidential, no evidence established it was made around the time the Op-Ed was published. As such, Mr. Depp failed to present evidence of "circumstances surrounding" the publication of the Op-Ed that would reasonably cause readers to believe its title was about him. *Pendleton*, 290 Va. at 172.

Further, nothing in the Op-Ed suggests the title is about Mr. Depp. The title states Ms. Heard spoke up against sexual violence, which does not suggest she spoke up about violence by a particular person as opposed to violence in general. The only sexual abuse discussed in the Op-Ed was Ms. Heard's statement that she "had been harassed and sexually assaulted by the time [she] was of college age," well before she met Mr. Depp. (Plf. Ex. 1 at 2). The title also has no temporal component suggesting Ms. Heard spoke up about sexual violence at a particular time coinciding with Ms. Heard's separation from Mr. Depp. And the Op-Ed does not include Mr. Depp's name. Because nothing in the Op-Ed suggests the title is about Mr. Depp, and he presented no evidence of extrinsic circumstances surrounding its publication that could cause the

Op-Ed to be viewed as about him, he failed to prove, through innuendo, that the title imparts a defamatory implication about him.[8]

B. No Evidence Established Contemporaneous Facts Surrounding the Publication of the Op-Ed that Would Reasonably Cause a Reader to Understand Any of the Statements as Conveying a Defamatory Implication About Mr. Depp

At trial, Mr. Depp's theory of defamation was that the Op-Ed implied Mr. Depp abused Ms. Heard. *See*, e.g., Tr. 4/12/2022, Day 2 at 324 (counsel for Mr. Depp asserting in opening statements that "the clear implication in Ms. Heard's Op-Ed . . . was that she was the victim of domestic abuse perpetrated by Mr. Depp."). Mr. Depp maintained that this implication arose from the Op-Ed because on May 27, 2016, she obtained a domestic violence restraining order against him. *See, e.g.*, Tr. 4/12/2022, Day 2, Tr. 316-17, 321, 323 (counsel for Mr. Depp noting in opening statements Ms. Heard obtained a restraining order against Mr. Depp on May 27, 2016); Tr. 5/27/2022, Day 25 at 7740 (counsel for Mr. Depp stating in closing arguments that "[o]n May 27, 2016 Ms. Heard walked into a courthouse in Los Angeles, California to get a no notice ex parte restraining order against Mr. Depp, and in doing so, ruined his life."). In sum, Mr. Depp argued that circumstances two and a half years before the Op-Ed's publication in December 2018 caused it to be defamatory.

No court in Virginia, however, has ever permitted circumstances so distant from a publication to serve as innuendo showing the publication conveys a defamatory implication. When "the publication on its face does not show that it applies to the plaintiff, the publication is not actionable, unless the allegations and supporting **contemporaneous facts** connect the

[8] For the same reasons, especially Ms. Heard's testimony that she has never spoken publicly about sexual abuse, Mr. Depp failed to prove that Ms. Heard "designed and intended" for the publication to convey a defamatory implication.

[defamatory] words to the plaintiff. *WJLA-TV v. Levin*, 264 Va. 140, 152 (2002) (emphasis added) (alteration in original) (quoting *The Gazette, Inc. v. Harris*, 229 Va. 1, 37 (1985)). "[S]tatements or publications by the same defendant regarding one specific subject or event and made over a **relatively short period of time**, some of which clearly identify the plaintiff and others which do not, may be considered together for the purpose of establishing that the plaintiff was the person 'of or concerning' whom the alleged defamatory statements were made." *Id.* at 153 (emphasis added); *see also Pendleton*, 290 Va. at 172, 175 (explaining "circumstances surrounding" or "circumstances prevailing at the time" of the statements can result in a defamatory implication). Because Mr. Depp presented no evidence that, within a relatively short period of time prior to or after the Op-Ed's publication, Ms. Heard asserted that he abused her, he failed to prove through innuendo that the Op-Ed defamed him.

C. Mr. Depp Cannot Recover for Statements Ms. Heard Made During Judicial Proceedings and He Failed to Prove that Any Statement in the Op-Ed Implies He Abused Ms. Heard

As explained above, Mr. Depp's theory of the case was that on May 27, 2016, Ms. Heard "ruined his life" by going to a courthouse and obtaining a restraining order against him. (Tr. 5/27/2022, Day 25 at 7740). "It is settled law in Virginia that words spoken or written in a judicial proceeding that are relevant and pertinent to the matter under inquiry are absolutely privileged." *Bryant-Shannon v. Hampton Roads Cmty. Action Program, Inc.*, 299 Va. 579, 590 (2021). In addition, because defamation claims are subject to a one-year statute of limitations, statements made during the restraining order proceeding are time barred. Va. Code § 8.01-247.1.

Yet Mr. Depp has attempted to bootstrap statements that are protected by judicial immunity and time-barred to the Op-Ed through a claim of defamation by implication. This attempt failed because only implications that can be "reasonably drawn from the words actually

used" are actionable. *Webb*, 287 Va. at 89. Viewed in the light most favorable to Mr. Depp, the most the evidence could have shown is that if a reader was previously aware of the restraining order, then the statement, "two years ago, I became a public figure representing domestic abuse" could remind such a reader that Ms. Heard obtained a restraining order against Mr. Depp. But a reminder of statements made in a judicial proceeding does not amount to a republication of those statements. *See generally Downs v. Schwartz*, No. CIV.A. 14-630, 2015 WL 4770711, at *15 (E.D. Pa. Aug. 12, 2015) (judicial privilege may be lost when a statement "made in the regular course of judicial proceedings is later republished to another audience outside the proceedings."). In other words, reminding readers that Ms. Heard once obtained a restraining order does demonstrate that the statements in the Op-Ed amount to an implied assertion that Mr. Depp abused her. To hold otherwise would treat defamation by implication as a republication doctrine, improperly allow the introduction of "new matter," and would permit recovery for the innuendo itself. *See Webb*, 287 Va. at 89-90 (innuendo cannot "introduce new matter, nor extend the meaning of the words used, nor make that certain which is in fact uncertain"). Mr. Depp did use innuendo to show that the Op-Ed coveys that he abused Ms. Heard. He has attempted to recover for the innuendo itself, Ms. Heard's testimony to obtain a restraining order in a judicial proceeding. Accordingly, the jury's verdict in favor of Mr. Depp should be set aside.

VII. THE COURT SHOULD CONDUCT AN INVESTIGATION OF JUROR NO. 15 AND WHETHER JURY SERVICE WAS PROPER AND DUE PROCESS WAS PROTECTED

The Court should investigate whether Juror 15 properly served on the jury. On the juror panel list sent to counsel before voir dire, the Court noted that the individual who would later be designated Juror 15 had a birth year of 1945. Juror 15, however, was clearly born later than 1945. Publicly available information demonstrates that he appears to have been born in 1970.

This discrepancy raises the question whether Juror 15 actually received a summons for jury duty and was properly vetted by the Court to serve on the jury. Virginia Code § 8.01-353.1 provides that

> At the time of assembly for the purpose of juror selection, the identity of each member of the jury venire shall be verified as provided in this section. Prior to being selected from the jury venire, a potential juror shall verify his identity by presenting to the person taking jury attendance any of the following forms of identification: his Commonwealth of Virginia voter registration card; his social security card; his valid Virginia driver's license or any other identification card issued by a government agency of the Commonwealth, one of its political subdivisions, or the United States; or any valid employee identification card containing a photograph of the juror and issued by an employer of the juror in the ordinary course of the employer's business. If the juror is unable to present one of these forms of identification, he shall sign a statement affirming, under penalty of perjury, that he is the named juror.

Thus, the Court's Clerk's office had a statutory obligation to verify the identity of Juror 15. But because Juror 15 was not born in 1945, it appears his identity could not have been verified through any of the means of identification the Code provides. And it also raises questions about whether and how Juror 15 could have signed a statement affirming, under penalty of perjury, that he was the named juror if he was 25 years younger than the person the Court recognized as Juror 15.

Although the Virginia Supreme Court has previously construed Va. Code § 8.01-353 (requiring the jury panel to be made available at least 48 hours before trial) to be directory, rather than mandatory, it has observed that "adherence to the provisions of Code § 8.01-353 is required to the extent necessary to insure due process." *Butler v. Commonwealth*, 264 Va. 614, 620 (2002). It therefore follows that adherence to § 8.01-353.1 is necessary to ensure due process even if it is viewed as a directory, rather than mandatory, statute.[9]

[9] Ms. Heard recognizes that Va. Code § 8.01-353 states that "[a]ny error in the information shown on . . . the jury panel shall not be grounds for a mistrial or assignable as error on appeal,

To the extent that the individual who served as Juror 15 was not, in fact, the same individual on the venire, or that the Court Clerk's office did not verify his identify, Ms. Heard's due process was compromised. The Virginia Code does not contemplate jury service by someone not on the venire, for good reason. *See* Va. Code § 8.01-337 *et seq*. In any case, but especially a high-profile case such as this one, it is critical to ensure no person who is not on the venire is able to serve on the jury, whether by inadvertence or intention. Here, the facts show Juror 15 was decades younger than the individual on the jury panel list, raising questions as to whether they were the same or different people. Ms. Heard therefore requests that the Court investigate whether Juror 15 was properly part of the venire and whether, prior to jury service, Juror 15 verified his information in the manner prescribed by Va. Code § 8.01-853.1. Ms. Heard further requests this Court to take appropriate action based upon the results of the investigation, including if appropriate, ordering a new trial.

CONCLUSION

For all the reasons set forth above, and for the reasons set forth on the record during the hearings and at trial, in the Motions in Limine and Motions to Strike, Ms. Heard respectfully requests this Court to set aside the jury verdict in favor of Mr. Depp and against Ms. Heard in its entirety, dismiss the Complaint, or in the alternative, order a new trial. Ms. Heard further requests this Court to investigate potential improper juror service and take appropriate action warranted by the results of the investigation.

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and the parties in the case shall be responsible for verifying the accuracy of such information." But the apparent error in the jury information form relating to Juror 15 is not the basis for Ms. Heard's concerns. It is the potential that Juror 15 was not, in fact, the same individual that the Court assigned as Juror 15 and/or was not verified by the Court Clerk's office as required by Va. Code § 8.01-353.1. This would warrant setting aside the verdict and ordering a new trial.

July 1, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 1st day of July 2022, by email, by agreement of the parties, addressed as follows:

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