

VIRGINIA:

FILED  
CIVIL PROCESSING

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

2021 MAR 29 P 3:31

JOHN C. DEPP, II,

Plaintiff and Counter-defendant,

v.

AMBER LAURA HEARD,

Defendant and Counter-plaintiff.

JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

Civil Action No.: CL-2019-0002911

**DEFENDANT AMBER LAURA HEARD'S MOTION FOR RECONSIDERATION  
OF COURT'S MARCH 26, 2021 ORDER RESPECTING ATTORNEYS' FEES**

Pursuant to Fairfax Circuit Court Practice Manual 7.0, Defendant Amber Laura Heard moves for reconsideration of this Court's March 26, 2021 Order respecting attorneys' fees (the "Order"). In the Order, the Court awarded Plaintiff the full amount of the attorneys' fees he requested for the Motion to Compel and Motion for Protective Order and to Quash the Deposition of Adam Waldman, heard on January 8, 2021.

On March 26, the Court's law clerk emailed the parties that she could not locate an Order entered with respect to this issue and asked the parties to resubmit material on the issue. Later that afternoon, the Court entered Plaintiff's proposed Order, awarding Plaintiff the full amount of fees requested, in the amount of \$21,972.50.

Motions to Reconsider may be granted to prevent "manifest injustice, or clear error." *Commonwealth ex rel. FX Analytics v. Bank of New York Mellon*, 84 Va. Cir. 473 (Fairfax Cty. 2012). As described below, Ms. Heard requests this Court to reconsider the Order for a few separate and distinct reasons to prevent manifest injustice to Ms. Heard and to correct a clear error in the Order.

First, Plaintiff's requested fees include amounts for relief the Court denied. Plaintiff filed a Motion to Quash on the basis of incorrect service on Mr. Waldman (through a Notice, rather than a subpoena), and a Motion for Protective Order on the basis that Mr. Waldman could not be deposed because he is Mr. Depp's attorney. This Court granted only the motion to quash.<sup>1</sup> This Court explicitly denied the Motion for Protective Order (which was the primary focus of Plaintiff's briefing and argument at the hearing), finding that Mr. Waldman could be deposed if he were properly served. *See* January 14, 2021 Order. Thus, Plaintiff prevailed on his technical argument that Mr. Waldman had not been properly served, but he lost his motion for protective order and his substantive argument in opposition to Ms. Heard's motion to compel that Mr. Waldman's deposition would be somehow improper. Yet Plaintiff seeks – and the Court awarded – fees for the motion he lost.

In fact, the Court's January 14 Order on this matter explicitly states that Plaintiff may be reimbursed only for "his reasonable attorney's fees expended in responding to Defendant's motion and in preparing Plaintiff's Motion to Quash." It does not award fees for the arguments made in support of a Protective Order attempting to shield Mr. Waldman altogether from deposition. Yet Plaintiff's counsel's Declaration in support of attorneys' fees does not differentiate between time seeking to respond to Defendant's Motion to Compel, time spent

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<sup>1</sup> Neither party was able to cite any on-point authority to support the unusual situation of counsel of record being noticed for deposition, or the requirement that counsel of record be served by subpoena. While counsel for Ms. Heard asked for Plaintiff's position on this, and any authority, as well as for confirmation of the address to serve Mr. Waldman if the position was that he must be served by subpoena, Mr. Depp refused to respond, did not provide confirmation of an address, and did not file a Motion to Quash prior to the deposition or prior to the filing of the Motion to Compel. Had counsel for Mr. Depp indicated they believed a subpoena was required and provided an address, Ms. Heard would have issued a subpoena, and this entire Motion and briefing could have been avoided. This Court nonetheless granted sanctions based on Ms. Heard not serving a subpoena on Mr. Waldman, rather than a Notice of Deposition because he was counsel of record. An award of nearly \$22,000 under these circumstances is manifestly unjust.

seeking an Order quashing Mr. Waldman's deposition after-the-fact (which also included argument on Plaintiff's contention Mr. Waldman could not be deposed at all), and time spent preparing the Motion for Protective Order that would shield Mr. Waldman from deposition altogether. Because no effort was made by Plaintiff to itemize the time so the Court could determine the time expended on the parts of the motion on which Plaintiff prevailed, by whom, and the hourly rate, and thus determine whether the amount sought was reasonable, the Court should deny the requested attorney's fees on this basis alone. The failure to do so would be clear error, because it would result, and has resulted, in an award of Plaintiff fees for motions and arguments he lost.

Either denying the motion because Plaintiff refused to provide a Declaration meeting the legal requirements of a fee request (and what was set forth in the Order), or requiring Plaintiff's counsel to reissue an itemized Declaration meeting the requirements necessary for this Court to determine a reasonable amount to award for the work performed on the prevailing portion of the motion, are the only approaches that will avoid clear error and manifest injustice to the Defendant. This Court was faced with a similar situation a few months earlier, after Ms. Heard prevailed on her motion for sanctions against Mr. Waldman. On November 23, 2020, the Court awarded Ms. Heard attorney's fees related to Mr. Waldman's revocation of *pro hac vice*, but the Court reduced those fees by half (from \$5,290, to \$2,950 – a fraction of the amount the Court awarded Mr. Depp). *See* November 23, 2020 Order. In opposing the fees request in that instance, Plaintiff argued that Ms. Heard was not entitled to all the fees she sought because she had not prevailed on her request for a gag order against Mr. Waldman. *See* Pl's November 9 Opp. (arguing that fees should be reduced because "[t]he Court denied half of Defendant's motion.") The Court reduced fees apparently on that basis when Ms. Heard was awarded them,

but did not reduce fees on the same basis when Mr. Depp was awarded them – an inconsistent and unfair result. It would be manifestly unjust to Ms. Heard to reduce her fees for not obtaining all the relief she requested (even though she prevailed on the one and only motion at issue), yet turn around and award Plaintiff the full amount of fees when he did not obtain all the relief he requested (and completely lost one of his motions, and devoted significant time to the same argument in opposing the other motion).

Second, Plaintiff failed to itemize his fees in a way that would permit the Court to determine the reasonableness of those fees. Plaintiff's failure was particularly egregious because the Court denied his Motion for Protective Order. The Court is left with no way to determine which of the requested fees were incurred in pursuit of relief the Court denied, and which were incurred in pursuit of relief the Court granted. Plaintiff could have presented this information to the Court, but chose not to. The Court's award of 100% of the fees Plaintiff requested cannot, therefore, be based on an assessment that the fees sought were reasonable, because those fees, by definition, included fees to which Plaintiff was not entitled. *See Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623 (1998) (stating that the party seeking fees bears the burden of showing reasonableness). Plaintiff's failure to itemize his attorney's fees prevents him from demonstrating, or the Court from assessing, that his fees were reasonable. *Alaragy v. Dengler*, 65 Va. Cir. 112, \*4 (Fairfax Cty. 2004) (in awarding the plaintiff attorney's fees it was entitled to by contract, the court instructed the plaintiff "to produce an affidavit of reasonable attorney's fees, properly itemized, showing the number of hours and counsel's hourly rate"); *Auto. Fin. Corp. v. EEE Auto Sales, Inc.*, 2011 WL 3422648, at \*2 (E.D. Va. 2011) ("When analyzing lodestar figures, [p]roper documentation is ... key, and fee claimants must therefore submit documentation reflecting reliable contemporaneous recordation of time spent on legal tasks that

are described with reasonable particularity.”) (quotations omitted). The Court should reconsider its award on this separate, independent ground as well, because it would be clear error to award Plaintiff the full amount of requested fees when he did not itemize and when, by definition, at least a significant portion of the fees were incurred seeking relief he did not receive.<sup>2</sup>

### CONCLUSION

For these reasons, Plaintiff requests the Court reconsider its March 26, 2021 Order and either deny the requested fees, or require Plaintiff to submit additional information to permit the Court to assess the reasonableness of those fees, and provide the opportunity for Defendant to file an Opposition to such itemization.

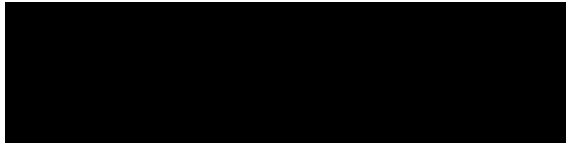
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<sup>2</sup> Ms. Heard also adopts and incorporates the related argument from her February 1, 2021 opposition to Plaintiff’s attorney’s fees Declaration that Plaintiff could have obviated the need for any of these motions had he simply stated his belief that a subpoena needed to be issued, and confirmed Mr. Waldman’s address, as Ms. Heard’s counsel originally requested.

Dated this 29<sup>th</sup> day of March 2021.

Respectfully submitted,

Amber L. Heard



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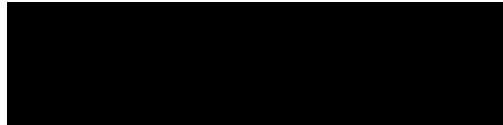
**CERTIFICATE OF SERVICE**

I certify that on this 29<sup>th</sup> day of March, 2021, a copy of the foregoing was served by email, pursuant to the Agreed Order dated August 16, 2019, as follows:

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