NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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

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

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

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

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

Dear Counsel:

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

OPINION LETTER

1) Whether the Court should exercise jurisdiction over Defendant's Counterclaim for declaratory judgment when Defendant has asserted the same argument in her Answer and Grounds for Defense?

2) Whether Plaintiff's statements are actionable under Virginia defamation law?

3) Whether Defendant has alleged sufficient facts to state a claim for a violation of the Virginia Computer Crimes Act?

4) Whether Defendant's Counterclaims arise out of the same transaction or occurrence as Plaintiff's Complaint such that Plaintiff's filing of the Complaint tolled the statute of limitations for Defendant's defamation counterclaims?

5) Whether Plaintiff is entitled to anti-SLAPP immunity for his statements?

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

BACKGROUND

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

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

ANALYSIS

I. COUNT I: DECLARATORY JUDGMENT IS DISMISSED.

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

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

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

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

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

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

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

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

II. PLAINTIFF'S DEMURRER

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

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

The elements of a defamation claim include: "(1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). On demurrer, "the trial judge is responsible for determining whether, as a matter of law, the allegedly defamatory statements are actionable." *Taylor v. Southside Voice, Inc.*, 83 Va. Cir. 190, 192 (2011). To be "actionable," a statement must be both "false and defamatory." *Schaecher*, 290 Va. at 91. Because statements of opinion cannot be "false," they are never actionable. *See Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132 (2003). For the reasons explained below, the Court finds that Ms. Heard has pled actionable statements for a defamation claim.

The Requisite 'Sting'

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

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

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

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

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

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

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

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

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

> the cops but the first attempt didn't do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911." *Id.*
>
> H. On June 24, 2020, Mr. Depp, through his attorney, accused Ms. Heard in *The Daily Mail* of committing an "abuse hoax" against Mr. Depp. *Id.*

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

Protected Opinion Statements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A plea in bar condenses "litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). The burden of proof rests with the moving party. *Id.* When considering the pleadings, "the facts stated in the plaintiffs' motion for judgment [are] deemed true." *Id.* (quoting *Glascock v. Laserna*, 247 Va. 108, 109 (1994)). Moreover, "[f]amiliar illustrations of the use of a plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); *res judicata*; usury; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the bill, etc." *Nelms v. Nelms*, 236 Va. 281, 289 (1988).

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Sincerely,

Bruce D. White

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