IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE **Plaintiff,** **vs.** **MARK A. GIPSON** **DEFENDANT.**	Civil Action No. 1:23-cv-00463-RP

PLAINTIFF'S MOTION TO DISMISS AND MOTION TO STRIKE DEFENDANT MARK A. GIPSON'S ANSWER AND COUNTERCLAIM

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PLAINTIFF JANE DOE ("Plaintiff"), by and through her attorneys, respectfully submits this Motion to Dismiss and Motion to Strike **DEFENDANT MARK A. GIPSON'S ("Defendant"** or **"Mr. Gipson"**) Answer and Counterclaim for Defamation (Dkts. 50, 56).

I. INTRODUCTION

The Court should strike Mr. Gipson's Answer and Counterclaim for Defamation in full because it is untimely and precluded, as Mr. Gipson has no right to respond to the Complaint while he is in default.[1] Moreover, even if Mr. Gipson was not already in default, the Court should dismiss Mr. Gipson's Counterclaim for Defamation pursuant to Rule 12(b)(6) for failure to state a claim, and strike the immaterial, impertinent, and scandalous allegations in Mr. Gipson's Answer pursuant to Rule 12(f).

First, because Mr. Gipson is already in default, and that default was willful, he is precluded from now submitting an answer and counterclaim to the Complaint under Fifth Circuit law. *See Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir. 2000) ("[a] finding of willful default ends the inquiry, for 'when the court finds an intentional failure of responsive pleadings there need be no other finding.'").

Second, even if Mr. Gipson were not already in default, Mr. Gipson's Counterclaim for Defamation should be dismissed pursuant to Rule 12(b)(6) because the alleged defamatory statements were made in civil pleadings filed in this case and are thus protected by the absolute judicial-proceedings privilege under Texas law. Moreover, even if the statements were not protected by the absolute judicial-proceedings privilege, Mr. Gipson's Counterclaim fails to allege

[1] As discussed below, Mr. Gipson filed his Answer and Counterclaim twice, as Dkts. 50 and 56. Plaintiff seeks to have both pleadings stricken and dismissed.

any specific statements he contends are defamatory, and fails to provide any facts or supporting affidavits supporting his claim that said statements are untrue.

Finally, Mr. Gipson's Answer is rife with immaterial, irrelevant, impertinent, and scandalous accusations designed to further denigrate and humiliate Plaintiff. Because these accusations serve no purpose but to abuse the judicial process to further harm Plaintiff, these portions of Mr. Gipson's Answer should be stricken pursuant to Rule 12(f).

Plaintiff thus respectfully requests that the Court strike Mr. Gipson's Answer and Counterclaim for Defamation in full because it is untimely and precluded. In the event that Mr. Gipson's Answer and Counterclaim is not stricken in full, Plaintiff respectfully requests that the Court dismiss Mr. Gipson's Counterclaim pursuant to Rule 12(b)(6) and strike the immaterial, irrelevant, impertinent, and scandalous accusations in Mr. Gipson's Answer pursuant to Rule 12(f).

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Mr. Gipson Was Served The Complaint And Court's Initial TRO

On April 24, 2023, Plaintiff filed her Complaint and request for a Temporary Restraining Order ("TRO"). Dkt. 3, 3-3. Subsequently, on April 26, 2023, the Court granted-in-part Plaintiff's request for a Temporary Restraining Order ("TRO") against Mr. Gipson, and set a hearing on the TRO request for May 4, 2023. Dkt. 16. That same day, Mr. Gipson was duly served with the Complaint, accompanying pleadings and exhibits, and the Court's TRO order. To confirm Mr. Gipson had been served, Plaintiff filed a sworn affidavit of service. *See* Dkt. 17. As discussed in the sworn affidavit of service, Mr. Gipson identified himself when the service agent stated she had two boxes for him. *See id* at 2. Mr. Gipson asked her to leave the boxes at his door, and the service agent observed Mr. Gipson open the door and collect the boxes with the pleadings and orders inside. *See id*. In her sworn affidavit, the service agent included photographs of Mr. Gipson's door after he took the two boxes. *See id*.

B. Mr. Gipson Was Served The Court's Order To Show Cause And Still Refused To Participate In This Litigation, Resulting In Default

Despite having received the Complaint and associated pleadings, as well as the Court's orders, Mr. Gipson failed to show for the May 4, 2023 TRO hearing. Thus, on May 4, 2023, this Court entered an Order to Show Cause against Mr. Gipson, requiring him to explain his non-compliance and failure to appear and further requiring Mr. Gipson to appear for a hearing set for May 5, 2023. Dkt. 19. The same day, Mr. Gipson was duly served with this order. *See* Dkt. 20 (proof of service with sworn affidavit). In the affidavit of service, the service agent noted that Mr. Gipson identified himself, and was "aggressive." *Id*. at 1. The affidavit of service also included photographs of Mr. Gipson being served with the order:

Id. at 3. Despite being photographed as receiving the Court's order, Mr. Gipson failed to attend the May 5, 2023 hearing. Thus, the Court issued an arrest warrant against Mr. Gipson. Dkt. 24. For more than a month however, Mr. Gipson evaded arrest by simply refusing to answer the door when U.S. Marshals would knock. *See* Dkt. 32. On May 26, 2023 in view of Mr. Gipson's refusal to participate in the civil process, the clerk entered a default against him. *See* Dkt. 26.

C. While Hiding From The U.S. Marshalls, Mr. Gipson Created At Least Fifteen New Websites To Publish And Sell Plaintiff's Nude Photos

During his time evading the U.S. Marshals, Mr. Gipson did not simply ignore the civil process, instead using this time to dramatically ramp up his attacks on Plaintiff and further violate the Court's TROs, creating at least ***fifteen*** websites dedicated to distributing and selling over ***four hundred*** of Plaintiff's sexually explicit photographs. *See* Dkt. 29-1 (Plaintiff's 2nd Emergency TRO Application). Thus, on June 1, 2023, Plaintiff filed a second emergency request for a TRO. Dkt. 29-1. That same day the Court granted Plaintiff's second emergency TRO application, and on June 5, 2023 the Court issued an order "that the United States Marshals is authorized to use any lawful and reasonable means to effectuate the warrant for Gipson's arrest." *See* Dkt. 32.

Mr. Gipson was subsequently arrested and the Court set a contempt hearing for June 7, 2023. *See* Dkt. 33. At the contempt hearing, Mr. Gipson asserted that he had not been served with the Complaint, associated pleadings, or any of the Court's orders. As indicated by the two sworn affidavits documenting his service with photographic evidence, Mr. Gipson's representations to the Court were false. Regardless, Mr. Gipson was subsequently released from custody and another TRO hearing was set for June 14, 2023. *See* Dkt. 35.

D. Mr. Gipson Has Abused The Civil Process Since Release From Custody

Since being release from custody, Mr. Gipson has serially filed ***nearly two dozen*** pleadings and motions, sometimes filing the same motion or pleading multiple times, including two separate

Answers and Counterclaims for Defamation (*see* Dkts. 50, 56). This further includes "Formal Complaints" alleging wild and unsubstantiated misconduct against Plaintiff's pro bono counsel, including alleging that Plaintiff's pro bono counsel falsified evidence and engaged in a conspiracy to frame Mr. Gipson. *See* Dkts. 65-67, 74.[2] The present motion addresses Mr. Gipson's two Answers and Counterclaims for Defamation.

III. LEGAL STANDARD

A. Pleadings From Pro Se Litigants Must Still Follow The Federal Rules Of Civil Procedure

Though their pleadings are to be liberally construed and held to a less stringent standard than formal pleadings, *pro se* plaintiffs are still expected to follow the Federal Rules of Civil Procedure. *See Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016) ("We hold pro se plaintiffs to a more lenient standard than lawyers when analyzing complaints, but *pro se* plaintiffs must still plead factual allegations that raise the right to relief above the speculative level.").

B. Motion To Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) allows dismissal if a plaintiff "fail[s] to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Moreover, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted); *see also Iqbal*, 556 U.S. at 679; *Jebaco*

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[2] On June 30, 2023, Plaintiff requested a conference hearing to address Mr. Gipson's abuse of the civil process and need for sanctions. *See* Dkt. 69.

Inc. v. Harrah's Operating Co. Inc., 587 F.3d 314, 318 (5th Cir. 2009). Further, "[a] court should not accept 'threadbare recitals of a cause of action's elements, supported by mere conclusory statements,' which 'do not permit the court to infer more than the mere possibility of misconduct.'" *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 245-46 (5th Cir. 2010) (quoting *Iqbal,* 556 U.S. at 678). Instead, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

C. Motion to Strike Standard

Under Rule 12(f), courts are empowered to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." *F.D.I.C. v. Niblo*, 821 F. Supp. 441, 448-49 (N.D. Tex. 1993) (citing Fed. R. Civ. P. 12(f)). The purpose behind a Rule 12(f) motion is to streamline the litigation process by avoiding unnecessary expenditure of time and resources on irrelevant or spurious issues. *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010); *see also United States v. Honeywell Int'l, Inc.*, 841 F. Supp. 2d 112, 116 (D.D.C. 2012) ("Removing [an] insufficient defense will avoid wasting unnecessary time and money litigating the invalid defense and will clarify the issues.") (internal quotes and citation omitted).

In assessing the sufficiency of a defense under Rule 12(f), courts consider the nature of the claim for relief and the defense in question. *E.E.O.C. v. First Nat. Bank of Jackson*, 614 F.2d 1004, 1008 (5th Cir. 1980), *cert denied*, 450 U.S. 917 (1981). Generally, a defense may be struck if it confuses the issues in the case and does not constitute a valid defense based on the alleged facts. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001). Mere conclusory statements of law, unsupported by factual allegations, carry no weight as defenses. *Schecter v. Comptroller of City of New York*, 79 F.3d 265, 270 (2d Cir.1996). To determine the materiality of

certain matter, the court must assess its essential or important relationship to the claim for relief or the defenses being pleaded. *Marceaux v. Lafayette City-Par. Consol. Gov't*, 14 F. Supp. 3d 760 (W.D. La. 2014) ("Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded."). If the challenged allegations have no possible bearing on the subject matter of the litigation, they can be deemed immaterial and are subject to striking. *Bayou Fleet P'ship, LLC v. St. Charles Parish*, No. 10-1557, 2011 WL 2680686, at *5 (E.D. La Jul. 8, 2011).

IV. ARGUMENT

A. The Clerk's Entry Of Default Prevents Mr. Gipson From Answering Or Counterclaiming

1. Mr. Gipson Has No Right to File Any Document Other Than A Motion to Vacate the Clerk's Entry of Default

First, Mr. Gipson's motion should be denied because he has no right to file any document other than a motion to vacate the Clerk's Entry of Default. *See, e.g.*, *J&J Sports Prods., Inc. v. Kuo*, No. EP-07-CA-075-FM, 2007 WL 4116209, at *3 (W.D. Tex. Nov. 15, 2007) ("The record shows that the Clerk made an entry of default as to [Defendants] on September 17, 2007. [Defendants] therefore had no right to file any document *other than motion to set aside the entry of default*. The Court will accordingly direct the Clerk to strike their Answer from the record in this cause.") (emphasis added). As the Fifth Circuit has explained, a party who has defaulted must succeed in setting aside the default before they can file pleadings or motions that go to the merits of the case. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996); *see also Strauss v. Lake City Credit*, No. 4:19-CV-00620-SDJ-CAN, 2020 WL 2174461, at *1–2 (E.D. Tex. Apr. 6, 2020) (denying motion to dismiss where pro se litigant had not vacated the Clerk's Entry of

Default).[3] Moreover, not only is Mr. Gipson "prohibited from attacking the merits of a claim after a default until that default has been set aside," but all "Rule 12(b) motions are waived after a defendant has had an entry of default entered against him." *Wilhite*, 2011 WL 13254064, at *4.

Here, Mr. Gipson was timely served the Complaint and accompanying pleadings on April 26, 2023. *See supra* at Section II.A (citing Dkt. 17 (Summons Returned Executed)). However, Mr. Gipson chose to ignore the Complaint (along with every other pleading filed by Plaintiff and every order from this Court).[4] Due to Mr. Gipson's refusal to participate in this litigation, on May 26, 2023, the Clerk entered an Entry of Default against Mr. Gipson. *See* Dkt. 26. Thus, under Fifth Circuit law, Mr. Gipson lacks the right to seek the relief requested until he moves for and succeeds in setting aside the entry of default. *See J&J Sports Prods., Inc.*, 2007 WL 4116209, at *3.

2. The Court Should Not Vacate the Clerk's Entry of Default Against Mr. Gipson

Second, because Mr. Gipson's default was willful, the Court should not set aside the entry of default against Mr. Gipson. In determining whether to set aside an entry of default, courts must consider three factors: (i) whether the default was willful, (ii) whether setting it aside would prejudice the adversary, and (iii) whether a meritorious defense is presented. *Lacy v. Sitel Corp.*, 227 F.3d at 292. Importantly, "***[a] finding of willful default ends the inquiry***, for 'when the court

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[3] *See also Wilhite v. Reg'l Emp.'s Assurance Leagues VEBA Tr.*, No. B-11-059, 2011 WL 13254064, at *4 (S.D. Tex. Nov. 15, 2011); *Twist and Shout Music v. Longneck Xpress, N.P.*, 441 F. Supp. 2d 782, 783 (E.D. Tex. 2006).

[4] Indeed, Mr. Gipson has ***still*** failed to follow the Court's orders even after his arrest and release from custody, including the Court's second TRO. Specifically, Mr. Gipson has failed to take down defamatory statements about Plaintiff, has failed to take down Plaintiff's nude photographs, and has failed to submit a list of any additional websites where he has posted, distributed, or sold Plaintiff's nude images. *See* Dkts. 31 (order granting 2nd TRO); 44 (order granting in party Plaintiff's application for preliminary injunction).

finds an intentional failure of responsive pleadings there need be no other finding.'" *Id.* (quoting *Matter of Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992) (affirming entry of default judgment when the defendant's "failure to answer was intentional . . . [and] the plain and simple fact is that [the defendant] chose to play games with this court.")).

As discussed above, Mr. Gipson was timely served the Complaint and accompanying pleadings on April 26, 2023. *See supra* at Section II.A (citing Dkt. 17 (Summons Returned Executed)). After Mr. Gipson failed to appear for the May 4, 2023 hearing, he was again properly served via personal service with this Court's order to appear and show cause. Dkt. 20 (Affidavit of Service, including photographs of Mr. Gipson being served). But Mr. Gipson again refused to participate in this litigation and ignored the Court's order to appear, resulting in this Court issuing an order of contempt and a bench warrant for his arrest. Dkts. 23 (Order of Contempt), 24 (Bench Warrant). Thus, Mr. Gipson not only ignored his obligations to respond to the Complaint, but also ignored the Court's initial temporary restraining order (Dkt. 16) and subsequent order to appear (Dkt. 19).

Moreover, Mr. Gipson's willful disregard of the civil process only escalated from there. As discussed above and in Plaintiff's second emergency request for a temporary restraining order, on May 26, 2023, Plaintiff discovered that Mr. Gipson had created ***fifteen*** websites dedicated to distributing and selling over ***four hundred*** of her sexually explicit photographs. Dkt. 29-1 (Second TRO Application). The fact that Mr. Gipson retaliated against Plaintiff is more evidence that he knew of this lawsuit, and that his default was willful. Indeed, it was not until after Mr. Gipson was arrested and physically brought before the court in chains that he chose to file any response to the Complaint and corresponding motions.

In short, Mr. Gipson was properly served the Complaint and chose to willfully ignore the lawsuit against him until Federal Marshals forcibly brought him to Court to face the consequences of his actions. But a defendant cannot ignore the civil process until they are forcibly dragged into Court to respond, and then decide that it is now an opportune time to file responsive pleadings and motions. That time has passed and Fifth Circuit law precludes setting aside defaults for individuals like Mr. Gipson. *Matter of Dierschke*, 975 F.2d at 183. Mr. Gipson's Answers and Counterclaims for Defamation should thus be stricken in full.

B. Mr. Gipson's Counterclaim Should Be Dismissed Pursuant to Rule 12(b)(6)

Second, even if Mr. Gipson was not already in default, Mr. Gipson's Counterclaims for Defamation should be dismissed pursuant to Rule 12(b)(6) because the alleged defamatory statements were made in civil pleadings filed in this case and are thus protected by the absolute judicial-proceedings privilege under Texas law. Moreover, even if the statements were not protected by the absolute judicial-proceedings privilege, Mr. Gipson's Counterclaim fails to allege any specific statements he contends are defamatory, and fails to provide any facts or supporting affidavits supporting his claim that said statements are untrue.

1. <u>The Judicial-Proceedings Privilege Is An Absolute Defense To Mr. Gipson's Counterclaim For Defamation</u>

Mr. Gipson's Counterclaim should be dismissed with prejudice because the alleged defamatory statements are protected by the absolute judicial-proceedings privilege under Texas law. Under Texas law (governing Mr. Gipson's Counterclaim), the judicial-proceedings privilege provides complete protection to litigants and their counsel from defamation claims. *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982).[5] This privilege renders any communications made

[5] While this motion relies on Texas state law, federal cases have also applied a similar standard in comparable contexts. *See, e.g.*, *O'Neal v. Alamo Cmty. College Dist.*, No. SA-08-CA-1031-XR,

during the course of a judicial proceeding immune from civil actions for libel or slander, regardless of the presence of negligence or malice. *Id.* The privilege extends to statements made by judges, jurors, counsel, parties, and witnesses, encompassing all aspects of the proceedings, including open court statements, pre-trial hearings, depositions, affidavits, and pleadings. *Id*. at 916-17. Moreover, the judicial-proceedings privilege prohibits any tort litigation based on communications made during judicial proceedings. *Collins v. Zolnier*, No. 09-17-00418-CV, 2019 WL 2292333, at *3 (Tex. App. May 30, 2019). In short, it is an absolute privilege, leaving no room for remedies. *Sharif-Munir-Davidson Dev. Corp. v. Bell*, 788 S.W.2d 427, 430 (Tex. App. 1990, *writ denied*).

The Texas Appellate Court's decision in *Strickland v. iHeartMedia, Inc.* 665 S.W.3d 739, 743 (Tex. App. 2023) is instructive here. There, a *pro se* litigant brought a claim for defamation based on statements that were made in the context of a small claims court proceeding. *Id*. at 741-742. Despite recognizing the leniency given to *pro se* litigants, the Appellate Court dismissed the claim, finding that the statements were protected by the absolute judicial-proceedings privilege. *Id*. The same applies here. While Mr. Gipson does not identify which specific statements in Plaintiff's pleadings are defamatory (*see* Dkts. 50, 56), the alleged defamatory statements nevertheless originate from Plaintiff's pleadings in this case. Thus, the absolute nature of the privilege renders the defamation claims untenable (regardless of Mr. Gipson's *pro se* status), and dismissal is required as a matter of law. Mr. Gipson's Counterclaim should thus be dismissed with prejudice.

2010 U.S. Dist. LEXIS 6637, at *46-47 (W.D. Tex. Jan. 27, 2010) (granting summary judgment and denying a claim for defamation based on Texas's "long recognized litigation privilege, which does not permit actions for defamation based on statements made during the course of litigation").

2. Mr. Gipson's Counterclaim Fails to Allege Any Facts Entitling Him To Relief

Moreover, even if the judicial-proceedings privilege did not apply to Mr. Gipson's claim, his Counterclaim should still be dismissed with prejudice due to his failure to allege sufficient facts to support a claim for defamation. To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must establish the grounds for their entitlement to relief. *See Jebaco Inc. v. Harrah's Operating Co. Inc.*, 587 F.3d at 318. However, Mr. Gipson's Counterclaim merely recites the four elements of defamation under Texas law and then broadly claims that Plaintiff made false statements about him resulting in him suffering damages. *See* Dkts. 50, 56 at *passim*. Notably, Mr. Gipson fails to identify any specific defamatory statements, instead concluding that all the allegations in Plaintiff's court filings are defamatory. *Id.* As such, Mr. Gipson's Counterclaim merely consists of "threadbare recitals of a cause of action's elements" and a generic assertion of entitlement to "maximum damages allowable by law." *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d at 245-46, quoting *Iqbal*, 556 U.S. at 678; *see, e.g.*, *Thomas v. Hargroder*, No. 1:22-CV-360, 2022 WL 17724149, at *8 (E.D. Tex. Dec. 14, 2022) (finding that "threadbare allegations along with the recitation of the elements of a claim for defamation under Texas law are insufficient to state a plausible claim for relief").

Furthermore, Mr. Gipson does not provide any factual declaration or evidence supporting his contention that Plaintiff's allegations are false. In contrast, Plaintiff has submitted numerous exhibits and five factual declarations (from herself and corroborating witnesses), in support of her allegations. *See, e.g.*, Dkts. 3-4 (Declaration of Jane Doe in Support of TRO Motion), 3-6 (Declaration of Rachel Steven in Support of TRO Motion), 3-7 (Declaration of Ricco Moldt in Support of TRO Motion), 45-3 (Declaration of Jane Doe), 45-4 (Declaration of Ricco Moldt). Thus, Mr. Gipson's Counterclaim lacks the necessary factual specificity to demonstrate a viable

cause of action for defamation, which is yet another independent basis for dismissing Mr. Gipson's Counterclaim.

C. Mr. Gipson's Answer Should Be Struck Pursuant To Rule 12(f)

Finally, the Court should exercise its authority under Rule 12(f) to strike each of the immaterial, irrelevant, impertinent, and scandalous accusations in Mr. Gipson's Answers. As discussed below, Mr. Gipson's purported defenses are legally irrelevant and factually erroneous. And Mr. Gipson's salacious and unsupported allegations about Plaintiff serve no purpose but to abuse the judicial process to further harm Plaintiff.

1. The Court Should Strike Mr. Gipson's Immaterial Defenses

The Court should strike Mr. Gipson's immaterial defenses pursuant to Rule 12(f). Mr. Gipson's Answer seemingly puts forth three defenses and justifications for his actions: (a) that he has a constitutional right to freedom of speech and expression; (b) that his legal rights as a copyright owner provide a defense to Plaintiff's claims; and (c) that he lacked malicious intent. *See* Dkt. 56 at 6. But each of these defenses lacks any materiality to the claims or issues at hand in this case.

First, Mr. Gipson's defense asserting his "constitutional right to freedom of speech and expression" is irrelevant in this context. The federal revenge porn statute, 15 U.S.C. § 6851, creates a private right of action for victims of revenge porn, and has not been found to violate the First Amendment. Moreover, challenges to the Texas revenge porn statute (Texas Penal Code Ann. § 21.16 and Tex. Civ. Prac. & Rem. Code § 98B) have similarly been rejected as not violating the First Amendment. *See, e.g.*, *Ex parte Mora*, 634 S.W.3d 255 (Tex. App. 2021), *petition for discretionary review refused* (Oct. 20, 2021) (finding that the Texas revenge porn statute "does not run afoul of the First Amendment") (citing *Ex parte Jones*, 625 S.W.3d 118 (Tex. Crim. App.

2021) ("the 'revenge porn' statute, properly construed, does not violate the First Amendment….")). Furthermore, the First Amendment provides no cover for any of the other causes of action in Plaintiff's Complaint, such as her claims for defamation, invasion of privacy, negligence *per se*, stalking, and online impersonation. Thus, Mr. Gipson's First Amendment defense is immaterial and should be stricken.

Second, Mr. Gipson's defense asserting his "legal rights as a copyright owner" is equally irrelevant and immaterial. Copyright protection serves to safeguard original works of authorship, granting the owner exclusive rights to reproduce, distribute, and publicly display their work. It does not, however, provide a blanket defense against claims arising from other legal causes of action, including defamation. *See, e.g.*, *Cullum v. White*, 399 S.W.3d 173 (Tex. App. 2011) ("there is no privilege or justification to defame another") (citing *Prudential Ins. Co. of Am. v. Fin. Review Serv., Inc*., 29 S.W.3d 74, 80 (Tex. 2000)). Mr. Gipson's attempt to rely on his purported copyright ownership is therefore without merit and should be stricken.

Lastly, Mr. Gipson's claim that he "did not, at any time, act with any malintent" (Dkt. 56 at 6) is both factually erroneous and legally irrelevant. As an initial matter, Mr. Gipson himself has already admitted that he acted with malintent, claiming that he initiated his campaign of harassing messages and behavior to "provoke" the Plaintiff into filing suit. *See* Dkt. 71 (Plaintiff's Opposition to Motion to Dismiss) at 8. This admission directly contradicts his claim of lacking malintent and undermines the credibility of his defense. Moreover, whether Mr. Gipson possessed "malintent" is legally irrelevant to the Federal Revenge Porn statute, which only asks whether a victim's intimate images were disclosed by someone "who knows that, or recklessly disregards whether, the individual has not consented to such disclosure." 15 U.S.C. § 6851(b)(2)(A). Thus, Mr. Gipson's defense of lacking "malintent" should be stricken.

2. The Court Should Strike Mr. Gipson's Redundant, Impertinent, Irrelevant, And Scandalous Allegations

In addition to striking Mr. Gipson's irrelevant and immaterial defenses, the Court should strike the redundant, impertinent, irrelevant, and scandalous allegations against Plaintiff in Mr. Gipson's Answer. As discussed above, *supra* at Section II.C, Mr. Gipson filed an Answer and Counterclaim ***twice***. *See* Dkts. 50, 56. Thus, at least one of these pleadings should be struck as redundant.

Beyond being redundant, Mr. Gipson's Answer is replete with unfounded, irrelevant, impertinent, and scandalous allegations against Plaintiff, abusing the civil process to continue his campaign of harassing Plaintiff to further tarnish her reputation. For example, Mr. Gipson's Answer alleges that Plaintiff's "financial instability" is a motivation for the present lawsuit, stating that "the plaintiff has a history of financial instability and debt, as evidenced by her eviction notices [exhibits] (75-81)." Dkt. 56 at 5. But this impertinent and scandalous allegation was made without any evidentiary support (Mr. Gipson attached no actual notices of eviction or any other affidavit or evidence to support this statement). Moreover, the allegation has no relevance to any of Plaintiff's causes of action, and thus serves no purpose but to humiliate and harass Plaintiff further. *See Momentum Mktg. Sales & Serv., Inc. v. Curves Int'l, Inc.*, No. W-07-CA-048, 2008 WL 11334568, *2 (W.D. Tex. June 25, 2008) (granting defendant corporation's motion to strike plaintiff's allegations concerning defendant's failure to disclose its CEO's prior bankruptcy because the plaintiff "fail[ed] to demonstrate any connection between the non-disclosure of [the CEO's] bankruptcy and the issues in this case" and, therefore, the allegations were "immaterial."); *see also Wakefield v. Olenicoff*, No. SACV122077AGRNBX, 2013 WL 12126116, *3 (C.D. Cal. Apr. 22, 2013) (striking allegations about a party's financial status because they were "prejudicial" and "immaterial and impertinent to [plaintiff's] copyright actions").

Mr. Gipson also includes factually erroneous and legally irrelevant allegations pertaining to the timing of the Complaint, claiming that Plaintiff chose to delay filing suit for six months "in the midst of a separate legal dispute between us." Dkt. 56 at 6. But Mr. Gipson's assertions regarding the timing of the present suit are factually wrong. Plaintiff did not fully discover the extent of Mr. Gipson's non-consensual disclosures until December 2022, and she filed this action in April 2023 after seeking out and obtaining *pro bono* counsel. Moreover, before Plaintiff filed this action, there was no "ongoing legal battle" between the parties, beyond Mr. Gipson sending Plaintiff fake "cease and desist" letters from made-up law firms as part of his campaign to harass and intimidate Plaintiff. *See* Complaint at ¶ 58 (citing Exhibit 30). Finally, as Mr. Gipson is not arguing that any of Plaintiff's causes of action have passed the statute of limitations, his allegations regarding the timing of Plaintiff's suit are legally irrelevant. Again, this is the type of material that courts strike under the authority of Rule 12(f). *See Watts v. Kroger*, 170 F.3d 505, 510-11 (5th Cir. 1999) (finding that defendant could not, as a matter of law, assert an affirmative defense to plaintiff's sexual harassment and retaliation claims on the basis that she had delayed reporting the sexual harassment for three months); *Hill Country Bakery, LLC v. Honest Kitchens Grp., LLC*, No. 5:17-CV-334-DAE, 2017 WL 9362706, *6 (W.D. Tex. Dec. 11, 2017) (granting, in relevant part, plaintiff's motion to strike defendant's affirmative defense because the defense is "irrelevant to Plaintiff's claims… immaterial… and insufficient as a matter of law").

Given the redundancy of the filings and the presence of these objectionable allegations, the Court should strike Mr. Gipson's Answers. Doing so will eliminate the unnecessary duplication of pleadings and prevent the inclusion of impertinent, irrelevant, and scandalous allegations that serve no legitimate purpose in this litigation.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court strike Mr. Gipson's Answers and Counterclaims in full. In the alternative, Plaintiff respectfully requests that the Court dismiss Mr. Gipson's Counterclaim with prejudice and strike the immaterial portions of his Answer.

Dated: July 11, 2023

Respectfully Submitted,

/s/ *S. Giri Pathmanaban*

S. Giri Pathmanaban (TSB#: 24074865)
Benjamin J. Behrendt (TSB#: 24130704)
LATHAM & WATKINS LLP
300 Colorado Street
Suite 2400
Austin, TX 78701
Telephone: (737) 910-7300
Facsimile: (737) 910-7301
giri.pathmanaban@lw.com
benjamin.behrendt@lw.com

Bradley A. Hyde (*pro hac vice*)
Kevin M. Hamilton (*pro hac vice*)
Caitlyn L. Brock (*pro hac vice*)
LATHAM & WATKINS LLP
650 Town Center Drive
Suite 2000
Costa Mesa, CA 92626-1925
Telephone: (714) 540-1235
Facsimile: (714) 755-8290
bradley.hyde@lw.com
kevin.hamilton@lw.com
caitlyn.brock@lw.com

ATTORNEYS FOR Plaintiff
JANE DOE

CERTIFICATE OF CONFERENCE STATEMENT

I hereby certify that counsel for Plaintiff emailed Mr. Gipson on Tuesday, July 11, 2023 seeking his position on the present motion. Mr. Gipson did not respond. Given Mr. Gipson's refusal to meaningfully participate in the civil process, the undersigned counsel believes no further efforts to conference in good faith with Mr. Gipson should be required prior to this Court granting Plaintiff's request.

Dated: July 11, 2023

/s/ *S. Giri Pathmanaban*
S. Giri Pathmanaban

CERTIFICATE OF SERVICE

I hereby affirm that on this 11th day of July, 2023, a true and correct copy of the foregoing document was served by electronic service pursuant to the Federal Rules of Civil Procedure with the Court's CM/ECF electronic filing system. Additionally, paper copies were sent via regular mail, and a copy of the respective pleading was served to Mr. Gipson's email address.

Dated: July 11, 2023

/s/ *S. Giri Pathmanaban*
S. Giri Pathmanaban