UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LEANDER FEREBEE, SR.,

Plaintiff,

v. ACTION NO. 2:19cv73

OLLIE'S BARGAIN OUTLET, INC.,

Defendant.

DISMISSAL ORDER

This matter is before the Court in this *pro se* action on the following motions:

(i) Defendant Ollie's Bargain Outlet, Inc's ("Defendant") "Motion to Amend Answer to Second Amended Complaint" ("Motion to Amend Answer"), ECF No. 64;

(ii) Plaintiff Leander Ferebee, Sr.'s ("Plaintiff") "Motion to Compel Fourth Request for Production/Insurance Policies" ("First Motion to Compel"), ECF No. 57;

(iii) Plaintiff's "Motion to Compel Production of Video" ("Second Motion to Compel"), ECF No. 58;

(iv) Plaintiff's "Motion to Compel Third Request for Production of Documents, Things-Onsite Camera Inspection/Video Test" ("Third Motion to Compel"), ECF No. 59;

(v) Plaintiff's "Motion to Compel Interrogatories w/ Supporting Documents" ("Fourth Motion to Compel"), ECF No. 60;

(vi) Plaintiff's Motion for Summary Judgment, ECF No. 73;

(vii) Defendant's Motion for Summary Judgment, ECF No. 78;

(viii) Plaintiff's "Motion to Amend Second Amended Complaint to Include Libel" ("Motion to Amend"), ECF No. 86; and

(ix) Plaintiff's "Motion for Leave to Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Amend Second Amended Complaint to Include Libel" ("Motion for Leave to Reply"), ECF No. 88.

The Court concludes that oral argument is unnecessary because the facts and legal arguments are adequately presented in the parties' briefs. For the reasons set forth below, Defendant's Motion to Amend Answer, ECF No. 64, is **GRANTED**. The Clerk is **DIRECTED** to file Defendant's Amended Answer, currently docketed at ECF No. 64–1, as a separate entry on the docket of this matter. Plaintiff's First Motion to Compel, ECF No. 57, is **DENIED**; Plaintiff's Second Motion to Compel, ECF No. 58, is **DENIED**; Plaintiff's Third Motion to Compel, ECF No. 59, is **DENIED**; Plaintiff's Fourth Motion to Compel, ECF No. 60, is **DENIED**; Plaintiff's Motion for Summary Judgment, ECF No. 73, is **DENIED**; Defendant's Motion for Summary Judgment, ECF No. 78, is **GRANTED**; Plaintiff's Motion for Leave to Reply, ECF No. 88, is **DISMISSED** as moot and unnecessary; and Plaintiff's Motion to Amend, ECF No. 86, is **DENIED**.

I. Relevant Procedural Background

Plaintiff filed a Second Amended Complaint alleging that he visited Defendant's store on February 4, 2019, and was "immediately targeted," "followed continuously," and "closely watched" because of his race. Second Am. Compl. at 2–3, ECF No. 16. Plaintiff further alleged that as he exited the store, one of Defendant's

employees, who has since been identified as Caroline Hooks ("Ms. Hooks"), falsely stated that she and others "saw the Plaintiff steal/remove something from the store." *Id*. at 3. Based on these factual allegations, Plaintiff asserted two claims against Defendant: (i) a state law defamation claim; and (ii) a claim brought pursuant to 42 U.S.C. § 1985(3). *Id*. at 2–4.

Defendant moved to dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On April 28, 2020, the Court issued an Order that: (i) granted Defendant's motion as to Plaintiff's § 1985(3) claim; and (ii) denied Defendant's motion as to Plaintiff's defamation claim. Order at 1–9, ECF No. 22. Following the Court's April 28, 2020 Order, Defendant filed an Answer as to Plaintiff's defamation claim, and the parties proceeded with discovery.

On December 29, 2020, Plaintiff filed a First, Second, and Third Motion to Compel. First Mot. Compel, ECF No. 57; Second Mot. Compel, ECF No. 58; Third Mot. Compel, ECF No. 59. On December 30, 2020, Plaintiff filed a Fourth Motion to Compel. Fourth Mot. Compel, ECF No. 60. Defendant filed a consolidated Opposition to Plaintiff's motions, and Plaintiff filed a Reply, along with additional supporting documents. Opp'n, ECF No. 66; Reply, ECF No. 68; Submissions, ECF Nos. 69–71. On Defendant 31, 2020, Defendant filed a Motion to Amend Answer. Mot. Amend Answer, ECF No. 64. Plaintiff filed an Opposition to Defendant's motion, and Defendant filed a Reply.

Thereafter, Plaintiff and Defendant each filed a Motion for Summary Judgment on January 29, 2021, and February 3, 2021, respectively. Pl.'s Mot. Summ.

J., ECF No. 73; Def.'s Mot. Summ. J., ECF No. 78.[1] Both parties timely filed Oppositions and Replies to oppose and support the respective summary judgment motions.

Plaintiff relies on the following documents to support his Motion for Summary Judgment: (i) the declaration of Ms. Hooks, who formerly worked as a Customer Service Supervisor for Defendant ("Hooks Declaration"), ECF No. 73–1, at 1–3; (ii) an email sent from Ms. Hooks to Defendant's District Team Leader on February 4, 2019 ("February 4, 2019 Email"), ECF No. 73–1, at 4; (iii) an Associate Statement Form completed by Ms. Hooks on February 5, 2019 ("Associate Statement Form"), ECF No. 73–1, at 5–6;[2] (iv) an Associate Performance Counseling Form for Ms. Hooks ("Associate Performance Counseling Form"), ECF No. 73–1, at 7; (v) photographs from Defendant's security camera, ECF No. 73–1, at 8–12; and (vi) a Performance Discussion Form, which summarized a performance-related discussion held on March 24, 2018, between Ms. Hooks and her manager ("Performance Discussion Form"), ECF No. 84–1, at 2.

Defendant relies on the following documents to support its Motion for Summary Judgment: (i) a transcript of Plaintiff's deposition ("Plaintiff Deposition"), ECF No. 79–1; (ii) the Hooks Declaration, ECF No. 79–2; (iii) the February 4, 2019

[1] Defendant's Motion for Summary Judgment included a proper *Roseboro* Notice, as required by Rule 7(K) of the Local Civil Rules of the United States District Court for the Eastern District of Virginia. Def.'s Mot. Summ. J. at 1–2, ECF No. 78; *see* E.D. Va. Loc. Civ. R. 7(K).

[2] The February 4, 2019 Email and the Associate Statement Form were attached as exhibits to the Hooks Declaration.

Email, ECF No. 79–2, at 5; (iv) the Associate Statement Form, ECF No. 79–2, at 6–7; (v) a transcript of Ms. Hooks's deposition ("Hooks Deposition"), ECF No. 79–3; (vi) a photograph from Defendant's security camera, ECF No. 85–4; and (vii) an email sent from Plaintiff to one of Defendant's attorneys on February 18, 2021 ("February 18, 2021 Email"), ECF No. 85–5.

On March 8, 2021, Plaintiff filed a Motion to Amend seeking authorization to add a libel claim to his Second Amended Complaint. Mot. Amend, ECF No. 86. Defendant filed an Opposition, and Plaintiff filed a Motion for Leave to Reply, which appears to contain Plaintiff's intended Reply. Mot. Leave Reply, ECF No. 88. Because Plaintiff need not request leave of Court to file a Reply, Plaintiff's Motion for Leave to Reply, ECF No. 88, is **DISMISSED** as moot and unnecessary. The Court construes Plaintiff's Motion for Leave to Reply as Plaintiff's Reply, and has considered its contents fully in evaluating Plaintiff's Motion to Amend. All pending motions are ripe for adjudication.

II. Defendant's Motion to Amend Answer

Defendant filed a Motion to Amend Answer asserting: "Following discovery in this action, the Defendant now moves to amend its Answer to Plaintiff's Second Amended Complaint to include the defense of Virginia's Shopkeeper's Privilege, Virginia Code § 8.01–226.9." Mot. Amend Answer at 1, ECF No. 64. Defendant attached a proposed Amended Answer as an exhibit to its Motion to Amend Answer. Proposed Am. Answer, ECF No. 64–1.

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[t]he court should freely give leave [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2). The United States Court of Appeals for the Fourth Circuit has explained that "[t]his liberal rule gives effect to the federal policy of resolving cases on their merits." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). The Fourth Circuit has further explained:

> The law is well settled "that leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." Delay alone is an insufficient reason to deny leave to amend. Rather, the delay must be accompanied by prejudice, bad faith, or futility.

Edwards v. City of Goldsboro, 178 F.3d 231, 242 (4th Cir. 1999) (emphasis in original) (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)).

Defendant argues that its Motion to Amend Answer should be granted because it is made in good faith, it is not futile, and it will not unduly prejudice Plaintiff. Mot. Amend Answer at 1; Reply at 2–3, ECF No. 67. Defendant contends that this defense "is specifically related to the facts" alleged in Plaintiff's Second Amended Complaint, and that Defendant's amendment request "was made prior to Plaintiff's deposition, and the deposition of Ms. Hooks." Reply at 2–3. As such, Defendant argues, Plaintiff has had "ample opportunity to ask questions during Ms. Hooks'[s] deposition and seek discovery of facts relevant to this defense." *Id.* at 3.

Plaintiff argues that Defendant's motion should be denied because (i) "no new discovery . . . change[d] the facts that have already been established;" and (ii) Virginia Code § 8.01–226.9 "does not apply in this case."[3] Opp'n at 2, ECF No. 65.

After considering the parties' arguments and the applicable law, the Court finds that Defendant has adequately established that its requested amendment is justified and proper. Specifically, the Court finds that Defendant's requested amendment is made in good faith, is not futile, and will not result in undue prejudice. Accordingly, Defendant's Motion to Amend Answer, ECF No. 64, is **GRANTED**. The Clerk is **DIRECTED** to file Defendant's Amended Answer, currently docketed at ECF No. 64–1, as a separate entry on the docket of this matter.

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[3] Plaintiff argues that Virginia Code § 8.01–226.9 applies only to situations in which a shopkeeper stops an alleged shoplifter after an "electronic device" is activated. Opp'n at 2–4, ECF No. 65. Plaintiff's interpretation of the statute is misplaced. Virginia Code § 8.01–226.9 states, in pertinent part:

> A merchant . . . who causes the . . . detention of any person pursuant to the provisions of §§ 18.2–95, 18.2–96 or § 18.2–103, shall not be held civilly liable for . . . slander . . . of the person so . . . detained, whether such . . . detention takes place on the premises of the merchant, or after close pursuit from such premises by such merchant, his agent or employee, provided that, in causing the . . . detention of such person, the merchant, agent or employee of the merchant, had at the time of such . . . detention probable cause to believe that the person had shoplifted or committed willful concealment of goods or merchandise.

Va. Code Ann. § 8.01–226.9. Although the statute states that "[t]he activation of an electronic article surveillance device as a result of a person exiting the premises or an area within the premises of a merchant where an electronic article surveillance device is located shall constitute probable cause for the detention of such person by such merchant," the activation of an electronic article surveillance device is not established as the only manner by which probable cause may be established. *Id.*

III. Plaintiff's Motions to Compel

Next, the Court resolves Plaintiff's four motions in which he seeks to compel certain discovery from Defendant. The Court addresses each motion in turn.

A. First Motion to Compel

In his First Motion to Compel, Plaintiff states that (i) he asked Defendant to produce "all insurance policies that cover business liabilities for [Defendant] such as for this case," and (ii) Defendant objected to Plaintiff's request and did not produce the documents. First Mot. Compel at 1, ECF No. 57. Plaintiff claims that the requested documents "are reasonably calculated to lead to the discovery of admissible evidence" and must "be produced forthwith." *Id*.

In its Opposition to Plaintiff's First Motion to Compel, Defendant states that on December 11, 2020, shortly after the Court issued a Protective Order in this case, Defendant "produced the confidential insurance policy that is applicable to the claims in this case." Opp'n at 1, ECF No. 66. Defendant attached a copy of its December 11, 2020 correspondence with Plaintiff as an exhibit to its Opposition. *See* Dec. 11, 2020 Correspondence, ECF No. 66–1.

Plaintiff opted not to file a Reply in support of his First Motion to Compel, and has not otherwise refuted Defendant's Opposition regarding the production of its insurance policy. Therefore, Plaintiff has inadequately established that he is entitled to the relief requested in his First Motion to Compel, and Plaintiff's First Motion to Compel, ECF No. 57, is **DENIED**.

B. Second Motion to Compel

In his Second Motion to Compel, Plaintiff avers that (i) he asked Defendant to produce the store's surveillance video from February 4, 2019, and (ii) one of the three video clips produced by Defendant was "damaged/corrupted." Second Mot. Compel at 1, ECF No. 58. Plaintiff further states that he "contacted Defendant about this matter with no positive response." *Id*.

In its Opposition, Defendant responds that "[s]ince October 7, 2020, Defendant has produced to Plaintiff on three occasions and four different formats all security footage videos that show Plaintiff at the Portsmouth Store on February 4, 2019." Opp'n at 2. Regarding Plaintiff's claims that one of the video clips is "damaged/corrupted," Defendant asserts that it "has attempted on numerous occasions to work with Plaintiff to solve this issue," and "Plaintiff refuses to engage in good faith efforts with counsel" to resolve the issue. *Id*. at 2–4 (detailing Defendant's attempts to resolve the video issue with Plaintiff). Notably, Defendant shares that it notified Plaintiff that in advance of Plaintiff's deposition "he would be provided the opportunity to review the video footage at his deposition." *Id*. at 4. "Prior to the start of Plaintiff's deposition, he was given the opportunity to review the videos alone. However, Plaintiff repeatedly refused to review the video prior to or during his deposition." *Id*.

Plaintiff did not file a Reply in support of his Second Motion to Compel, and has not otherwise challenged the statements made by Defendant in its Opposition regarding the videos. Therefore, Plaintiff has inadequately established that he is

entitled to the relief requested in his Second Motion to Compel and Plaintiff's Second Motion to Compel, ECF No. 58, is **DENIED**.

C. Third Motion to Compel

In his Third Motion to Compel, Plaintiff seeks to compel Defendant to permit Plaintiff to conduct an "[o]n-site inspection" of all of Defendant's security cameras. Third Mot. Compel at 1, ECF No. 59. Plaintiff wishes to inspect the position of all cameras, to view "the cameras[']footage from the cameras['] monitor(s)," and to "take photos of monitor(s) while video coverage is taking place." *Id*. Plaintiff also seeks to compel the production of all "written, spoken, videoed or recorded" records "concerning the videos and photos taken on 2/4/2019 and since concerning this case." *Id*. Plaintiff claims that the requested discovery is "reasonably calculated to lead to the discovery of admissible evidence" and should "be produced forthwith." *Id*. at 2.

In its Opposition, Defendant responds:

> It appears that Plaintiff remains convinced that Defendant is intentionally refusing to produce all of the security footage from the day of the alleged incident.[4] . . .

[4] In its Opposition, Defendant refers to an Order of the Court that denied a Motion to Compel filed previously by Plaintiff. Opp'n at 4, ECF No. 66; *see* Order at 7–9, ECF No. 53. On October 20, 2020, Plaintiff filed a Motion to Compel, in which he claimed that the security camera footage produced by Defendant was "grossly insufficient," and that one of the video clips "can't be opened." Mot. Compel at 1, ECF No. 42. Plaintiff asked the Court to compel Defendant to produce "all/whole video clips/frames of Plaintiff while in the store." Mot. Compel at 1, ECF No. 42. In response to Plaintiff's motion, Defendant represented that it "produced all video in response to Plaintiff's request," and "attempted in good faith" to resolve the viewability issue with the one video clip. Resp. at 3, ECF No. 44. In an Order dated December 3, 2020, the Court denied Plaintiff's Motion to Compel, stating: "Plaintiff presumes that additional videos or more complete videos exist, or should exist. Such supposition provides an insufficient basis to grant a motion to compel." Order at 9 (citing *Humanscale Corp. v. CompX Int'l, Inc.*, No. 3:09cv86, 2009 U.S. Dist. LEXIS 120197,

> Defendant has produced on three separate occasions and four different formats the security footage that shows the Plaintiff at [Defendant's store] on February 4, 2019.
>
> As Defendant has already produced all security footage of the Plaintiff at the Portsmouth Store from February 4, 2019, and such inspection is not proportional to the needs of this litigation, [Plaintiff's] motion to compel the onsite inspection of the Portsmouth Store's security system should be denied.

Opp'n at 4–5.

Plaintiff did not file a Reply in support of his Third Motion to Compel, and has not otherwise refuted Defendant's Opposition. Therefore, Plaintiff has inadequately established that he is entitled to the relief requested in his Third Motion to Compel. Plaintiff's Third Motion to Compel, ECF No. 59, is **DENIED**.

D. Fourth Motion to Compel

In his Fourth Motion to Compel, Plaintiff claims that he served a First Set of Interrogatories on Defendant, and that Defendant has inadequately responded to Interrogatory Numbers 1, 6, 7, 8, and 9. Fourth Mot. Compel at 1, ECF No. 60.

Interrogatory No. 1 asked Defendant to "[i]dentify all persons having first-hand knowledge of any material fact alleged in the [p]leadings of this case and, with regard to each person, state what they know about each such fact and how they came to know it." *Id*. at 4. Defendant objected to this interrogatory on a number of grounds; however, subject to its objections, Defendant stated: "[I]n addition to the individuals provided in section (i) of Defendant's Rule 26(a)(1) Initial Disclosures, Steven LaPres (former District Loss Prevention Manager) has knowledge regarding his interactions

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at *8 (E.D. Va. Dec. 24, 2009)).

with Caroline Hooks related to Plaintiff, and the decision to terminate Ms. Hooks from her employment." *Id.* at 5.

In its Opposition, Defendant states that "by referring Plaintiff to the individuals listed in Defendant's Initial Disclosures, as well as including one additional employee," "Defendant's response to Interrogatory [No.] 1 is sufficient." Opp'n at 5.

With respect to Interrogatory Nos. 6, 7, 8, and 9, Defendant raised certain objections and provided initial responses to Plaintiff, in which Defendant stated that it would produce "confidential documents" to Plaintiff after "a Protective Order is entered in this case." Fourth Mot. Compel at 7–9. Plaintiff asserts that Defendant never answered these interrogatories even after a Protective Order was entered. *Id.* at 1.

In its Opposition, Defendant contends that (i) its initial responses to Interrogatory Nos. 6, 7, 8, and 9 properly referred Plaintiff to documents to be produced in discovery; and (ii) on December 11, 2020, shortly after the Court entered the Protective Order, "Defendant produced its confidential documents to Plaintiff, including those that are responsive to Plaintiff's interrogatory requests." Opp'n at 6. Defendant attached a copy of its December 11, 2020 correspondence that contained Defendant's supplemental interrogatory responses to Plaintiff as an exhibit to its Opposition. *See* Dec. 11, 2020 Correspondence, ECF No. 66–1.

Plaintiff did not file a Reply in support of his Fourth Motion to Compel, and has not otherwise refuted Defendant's Opposition regarding its interrogatory

responses. Plaintiff has inadequately established that he is entitled to the relief requested in his Fourth Motion to Compel. Accordingly, Plaintiff's Fourth Motion to Compel, ECF No. 60, is **DENIED**.

IV. Motions for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only when the Court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine dispute "as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* Fed. R. Civ. P. 56(a); *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party . . . [and] [a] fact is material if it might affect the outcome of the suit under the governing law." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015) (citations omitted). The moving party has the initial burden to show the absence of an essential element of the nonmoving party's case and to demonstrate that the moving party is entitled to judgment as a matter of law. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 185 (4th Cir. 2004); *McLean v. Patten Cmtys., Inc.*, 332 F.3d 714, 718 (4th Cir. 2003); *see Celotex*, 477 U.S. at 322–25.

When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party's case, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue

for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586–87 (1986); *Honor*, 383 F.3d at 185; *McLean*, 332 F.3d at 718–19. Such facts must be presented in the form of exhibits and sworn affidavits. *Celotex*, 477 U.S. at 324; *see M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc*., 981 F.2d 160, 163 (4th Cir. 1993).

To successfully defeat a motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, "mere speculation," the "building of one inference upon another," the "mere existence of a scintilla of evidence," or the appearance of "some metaphysical doubt" concerning a material fact. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986); *Thompson v. Potomac Elec. Power Co*., 312 F.3d 645, 649 (4th Cir. 2002); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc*., 330 F. Supp. 2d 668, 671 (E.D. Va. 2004). Rather, there must be sufficient evidence that would enable a reasonable fact-finder to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 252.

Although the Court is not "to weigh the evidence and determine the truth of the matter" at the summary judgment phase, the Court is required to "determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Anderson*, 477 U.S. at 249); *see Jacobs*, 780 F.3d at 568–69. In determining whether there is a genuine issue for trial, "[t]he relevant inquiry is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Stewart v.*

MTR Gaming Grp., Inc., 581 F. App'x 245, 247 (4th Cir. 2014) (quoting *Anderson*, 477 U.S. at 251–52).

B. Statement of Undisputed Material Facts

The remaining claim in this action is Plaintiff's defamation claim against Defendant. Order at 1–9, ECF No. 22. For purposes of the parties' Motions for Summary Judgment, the following are the undisputed material facts that are relevant to the remaining claim and are adequately supported by materials in the record:[5]

[5] When a party moves for summary judgment, the moving party is required to "include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue," and to cite "the parts of the record relied on to support the listed facts as alleged to be undisputed." E.D. Va. Loc. Civ. R. 56(B); *see* Fed. R. Civ. P. 56(c)(1). When responding to a summary judgment motion, the nonmoving party shall list "all material facts as to which it is contended that there exists a genuine issue necessary to be litigated," and "cit[e] the parts of the record relied on to support the facts alleged to be in dispute." E.D. Va. Loc. Civ. R. 56(B); *see* Fed. R. Civ. P. 56(c)(1).

Defendant filed a Motion for Summary Judgment, in which it lists the material facts that it contends are undisputed, and cites to materials in the record that support its contentions. Mem. Supp. Def.'s Mot. Summ. J. at 1–3, ECF No. 79. Plaintiff likewise filed a Motion for Summary Judgment, in which Plaintiff lists the material facts that he contends are undisputed and cites to materials in the record. Pl.'s Mot. Summ. J. at 1–4, ECF No. 73. However, certain facts that Plaintiff contends are undisputed are unsupported by the record. For example, Plaintiff contends that it is "undisputed" that he "was slandered, called a thief[,] [and] was accused of taking something from the store." *Id.* at 1. To support these contentions, Plaintiff cites to the Hooks Declaration, the February 4, 2019 Email, the Associate Statement Form, and the Associate Performance Counseling Form. These materials, which are summarized in detail herein, do not support Plaintiff's contentions. In the Statement of Undisputed Material Facts section of this Dismissal Order, the Court summarizes only the relevant material facts that are undisputed.

On February 4, 2019, Plaintiff visited Defendant's store in Portsmouth, Virginia. Pl. Dep. at 25–26, ECF No. 79–1; Hooks Decl. ¶ 3, ECF No. 79–2; Hooks Dep. at 14, 16, 29–30. During his visit to the store, Plaintiff was wearing a "black and white hoodie" and a jacket. Pl. Dep. at 26. Ms. Hooks was working at Defendant's store as a Customer Service Supervisor. Hooks Decl. ¶ 3; Hooks Dep. at 14.

At approximately 5:30 p.m., a customer approached Ms. Hooks and stated that "she saw a male customer in a black and white hoodie, sunglasses and a black hat putting items in his pockets." Hooks Decl. ¶ 4; Hooks Dep. at 35. The customer asked Ms. Hooks "to call the police to make a report." Hooks Decl. ¶ 4; Hooks Dep. at 35. Ms. Hooks advised the customer that she "would look into the issue." Hooks Decl. ¶ 5; Hooks Dep. at 35.

Shortly thereafter, Ms. Hooks observed Plaintiff, whose clothing matched the description provided by the customer, walking towards the restrooms. Hooks Decl. ¶ 5. It appeared to Ms. Hooks that Plaintiff's "inner coat pockets were stuffed." *Id.* During her deposition, Ms. Hooks, who had worked at Defendant's store since September 2013, testified that theft was common at the store, and that the individuals who stole from the store would often place items in their "[p]ockets, shirts, pants, [and] jackets." Hooks Dep. at 13, 37–38; Hooks Decl. ¶ 2.

The customer approached Ms. Hooks a second time, and advised Ms. Hooks that Plaintiff was "walking in the Housewares section of the [s]tore." Hooks Decl. ¶ 6. Ms. Hooks went to the back office of the store to watch Plaintiff on the security

camera. *Id*. Again, it appeared to Ms. Hooks that Plaintiff's pockets were "stuffed." *Id*.

Ms. Hooks "walked to the front of the store to stand at the exit to wait and see if [Plaintiff] purchased anything before he left." *Id*. ¶ 7. After a few minutes, Ms. Hooks observed Plaintiff leaving the store without purchasing any items. *Id*. Ms. Hooks followed Plaintiff out of the store, "got [Plaintiff's] attention," and stated: "Have a good night, sir. . . . I have a customer who is claiming you stole and wants the cops called. I don't know if you did, but if so take what you have and please don't come back." *Id*. In her declaration, Ms. Hooks states:

> After I made this statement, [Plaintiff] immediately started to yell at me, called me a "bitch" multiple times, and repeatedly told me to call the police. He also threatened to sue me. I attempted to deescalate the situation as [Plaintiff] continued to yell at me and cause a scene. I told [Plaintiff] that I was not going to call the police and then turned around to walk back inside the store.

Id. ¶ 8; *see* Hooks Dep. at 17–23 (confirming the accuracy of the statements in Ms. Hooks's declaration and attached exhibits).

After the incident with Plaintiff, Ms. Hooks sent an email to Defendant's District Team Leader, in which she stated:

> We have a customer [who] wants to call the police. She saw a guy stealing in our store and informed me. Customer found me and said she and her hus[ba]nd saw him stuffing things into his pockets down two of our [a]isles. They wanted to call the cops [and] I told them I would take care of it. I saw him go into the bathroom [and] his inner coat pockets were stuffed but I couldn[']t see anyt[h]ing defin[i]te. They came and found me [and] said he was [in] housewar[e]s so I looked on camera [and] yes he was there but again nothing I could see. She continued to say she was going to call the cops[.] It[']s ridiculous we don[']t have a

> policy to stop them. When he left I went outside and said[,] ["]we have several customers saying you stole items[.] If you did please don[']t come back[."] He then s[t]arted yelling obs[cene] names at me and refusing to leave if I didn[']t believe him. I said[,] ["]I[']m not saying you did but they want the police called and I[']m not calling them[,] so again if you did[,] just take what you have and go[.] If you didn't then I am sorry and I will take care of it[."] He kept yelling and walked away yelling and cussing saying he was going to contact y[']all on me.

Feb. 4, 2019 Email, ECF No. 79–2, at 5 (capitalization corrected).

On February 5, 2019, the day after the incident, Ms. Hooks was asked to complete an Associate Statement Form. Hooks Dep. at 25–26; Associate Statement Form, ECF No. 79–2, at 6–7. In the Associate Statement Form, Ms. Hooks stated:

> I, Caroline, on 2-4-19, walked outside after a guy who I suspected of stealing. I was told by a customer she saw him put items in his pocket down an [a]isle. She said to call the police. I said I would take care of it. I waited for him to leave and I walked out after him. I stated, "I have a customer who is claiming you stole and wants the cops called. I don't know if you did but if so take what you have and please don't come back, and he then sat down and started yelling[,] ["]call the police bitch.["] I said[,] "did I say I was [going] to call the cops[?] No. [A]ll I want is if you stole please leave.["] He said[,] ["]oh cuz I'm black.["] I said[,] "No it[']s not, a customer told me and I'm doing what I'm doing [and] if I'm wrong then I'm sorry[.] [A]gain I'm sorry if I'm misinformed[,] I apologize.["] [H]e then yelled[,] ["]you don't know who you['re] messing with. I'll sue you. I want your name bitch.["] I said, "I already apologized[,"] and I walked away. [H]e then said ["]I'm going to social media[,] you don't know me.["] I then call[ed] Mike to let him know and emailed our [District Team Leader] Matt.

Associate Statement Form at 1–2.

In her deposition, Ms. Hooks testified that when she spoke to Plaintiff, there were no bystanders who were close enough to hear their conversation. Hooks Dep. at 32. Specifically, Ms. Hooks testified:

> Q: Okay. So when you exited the store and approached [Plaintiff], you were only talking to him; is that correct?
> A: Yes.
> Q: Okay. Did you have to yell to get his attention?
> A: No.
> Q: Okay. Were you speaking loudly?
> A: No. He was literally maybe a foot away from me, not even.
>
> . . .
>
> Q: Okay. And were there any bystanders that were close enough to hear what you said to him?
> A: No.
> Q: Okay.
> A: But I wasn't yelling; I was talking kind of like I am now, like I usually do.

Id. at 31–32.

Plaintiff submitted photographs from Defendant's security camera that show an individual walking into Defendant's store while Ms. Hooks spoke with Plaintiff, and suggests that this individual could have heard the conversation. Pl.'s Opp'n at 7, ECF No. 83; Photographs, ECF No. ECF No. 73–1, at 8–12. In his deposition, Plaintiff testified:

> Q: Okay. So when you exited . . . [Defendant's] store on February 4th, 2019, was anyone walking next to you?
> A: No.
>
> . . .
>
> Q: Can you recall whether [Ms. Hooks] exited the store with anyone else when she spoke with you?
> A: No, I don't know.
>
> . . .
>
> Q: Okay. Was she speaking directly to you?
> A: Yes, she was.

. . .

Q: Okay. Did any of those individuals [in the parking lot] approach you to speak with you after the interaction occurred with [Ms. Hooks]?

A: No.

. . .

Q: And so no one told you that they heard what [Ms. Hooks] said to you; is that correct?

A: I didn't ask anybody.

Pl. Dep. at 30, 33, 35, 38.[6]

C. Analysis

As noted above, Plaintiff's defamation claim is the sole remaining claim in this action. To maintain an action for defamation under Virginia law, a plaintiff must establish (i) the publication; (ii) of an actionable statement; (iii) that was made with the requisite intent. *Jafari v. Old Dominion Transit Mgmt. Co.*, 913 F. Supp. 2d 217, 223 (E.D. Va. 2012) (citing *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005)).

"Publication" requires that the alleged defamatory statement "be communicated to a third party 'so as to be heard and understood by such person.'" *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 915 (E.D. Va. 2004) (quoting *Thalhimer Bros., Inc. v. Shaw*, 159 S.E. 87, 90 (Va. 1931)). Although a plaintiff need not "present testimony from a third party regarding what that person heard or understood," and need not "identify the person to whom the defamatory words were published," a plaintiff must establish "by either direct or circumstantial

[6] Defendant terminated Ms. Hooks's employment shortly after the February 4, 2019 incident. Associate Performance Counseling Form, ECF No. 73–1, at 7. Defendant determined that by engaging with Plaintiff outside of the store, Ms. Hooks violated Defendant's policy that employees should not "chase, make physical contact with, or try to detain" an individual who is suspected of shoplifting. *Id.*

evidence that the remarks were heard by a third party who understood these remarks as referring to the plaintiff in a defamatory sense." *Food Lion v. Melton*, 458 S.E.2d 580, 585 (Va. 1995).

To be an "actionable" statement, "the plaintiff bears the burden of proving that the statement is 'both false and defamatory.'" *Liverett v. DynCorp Int'l LLC*, No. 1:17cv811, 2018 U.S. Dist. LEXIS 53607, at *11 (E.D. Va. Mar. 28, 2018) (quoting *Jordan*, 612 S.E.2d at 206). "Defamatory words are those 'tend[ing] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' A false statement must have the requisite defamatory 'sting' to one's reputation." *Schaecher v. Bouffault*, 772 S.E.2d 589, 594 (Va. 2015) (citations omitted).

To establish the "requisite intent" for a defamation claim when the plaintiff is a private figure, the plaintiff must establish that "the defendant either knew [the statement] to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based." *Liverett*, 2018 U.S. Dist. LEXIS 53607, at *11 (alteration in original) (quoting *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985)).

1. Actionable Statement

Defendant argues, among other things, that summary judgment should be granted in its favor on Plaintiff's defamation claim because Plaintiff has not established that Ms. Hooks made a statement that constituted actionable defamation. Mem. Supp. Def.'s Mot. Summ. J. at 5 n.2, ECF No. 79.

As summarized above, Defendant cites to the Hooks Declaration, the February 4, 2019 Email, the Associate Statement Form, and the Hooks Deposition to establish what Ms. Hooks said to Plaintiff outside of Defendant's store on February 4, 2019. *Id.* at 2. According to these materials in the record, Ms. Hooks told Plaintiff: "I have a customer who is claiming you stole and wants the cops called. I don't know if you did, but if so take what you have and please don't come back." Hooks Decl. ¶ 7; *see* Hooks Dep. at 19 (confirming the accuracy of the Hooks Declaration); Feb. 4, 2019 Email at 1; Associate Statement Form at 1–2.

Plaintiff appears to disagree with Ms. Hooks's version of the facts, and claims that Ms. Hooks called him a "thief" and "accused [him] of taking something from the store." Pl.'s Mot. Summ. J. at 1–2, ECF No. 73; Pl.'s Opp'n at 2, 9, ECF No. 83. In the summary judgment setting, when a party claims that an asserted fact is genuinely disputed, the party must support its claim by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c). "If the party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider that fact undisputed for purposes of the [summary judgment] motion." Fed. R. Civ. P. 56(e).

Plaintiff cites to the Hooks Declaration, the February 4, 2019 Email, the Associate Statement Form, and the Associate Performance Counseling Form to support his claim that Ms. Hooks called him a "thief" and "accused [him] of taking something from the store." Pl.'s Mot. Summ. J. at 1–2; Pl.'s Opp'n at 2, 9. These documents—the details of which are fully summarized above—do not support

Plaintiff's claim.[7] Because Plaintiff has not established, by citing to materials in the record, that Ms. Hooks's summary of her statement to Plaintiff can be genuinely disputed, Ms. Hooks's summary is properly considered as undisputed. *See* Fed. R. Civ. P. 56(c); Fed. R. Civ. P. 56(e).

As recognized above, to maintain a defamation claim a plaintiff must establish that an actionable statement was published that was both false and defamatory. *Liverett*, 2018 U.S. Dist. LEXIS 53607, at *11. To be defamatory, the statement must tend to "harm the reputation of another." *Schaecher*, 772 S.E.2d at 594. Here, the record evidence establishes that Ms. Hooks told Plaintiff that (i) a customer claimed that Plaintiff stole items from the store; (ii) Ms. Hooks did not know if Plaintiff stole items from the store; and (iii) if Plaintiff stole items, Plaintiff should keep the items and not return to the store. Hooks Decl. ¶ 7. Plaintiff has failed to offer any evidence from which a reasonable factfinder could determine that any portion of Ms. Hooks's statement was either false or defamatory. Accordingly, summary judgment is warranted in Defendant's favor on Plaintiff's defamation claim.[8]

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[7] Ms. Hooks testified in her deposition that she never called Plaintiff a "thief." Hooks Dep. at 20, 36, ECF No. 79–3.

[8] Because Plaintiff failed to offer evidence from which a reasonable factfinder could determine that any portion of Ms. Hooks's statement was false, it necessarily follows that Plaintiff has not established that Ms. Hooks had the requisite intent necessary to maintain a defamation claim. *See Liverett v. DynCorp Int'l LLC*, No. 1:17cv811, 2018 U.S. Dist. LEXIS 53607, at *11 (E.D. Va. Mar. 28, 2018) (explaining that to establish the "requisite intent," a plaintiff must show that "the defendant either knew [the statement] to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based" (alteration in original)).

2. Publication

Even if Plaintiff could establish that Ms. Hooks's statement was actionable, Defendant argues that summary judgment should be granted in its favor because Plaintiff has not shown that Ms. Hooks's statement was published to a third party. Mem. Supp. Def.'s Mot. Summ. J. at 4. As acknowledged above, to establish the publication element for a defamation claim a plaintiff must show that the statement at issue was "communicated to a third party 'so as to be heard and understood by such person.'" *Katz*, 332 F. Supp. 2d at 915 (quoting *Thalhimer Bros., Inc.*, 159 S.E. at 90). Although a plaintiff need not "present testimony from a third party regarding what that person heard or understood," and need not "identify the person to whom the defamatory words were published," a plaintiff must establish "by either direct or circumstantial evidence that the remarks were heard by a third party who understood these remarks as referring to the plaintiff in a defamatory sense." *Food Lion*, 458 S.E.2d at 585.

In its Motion for Summary Judgment, Defendant argues:

> As the evidence reflects, and [Plaintiff] concedes, [Ms.] Hooks'[s] statement was made directly to him only. [Pl. Dep.], pp. 30–32; [Hooks Decl.] ¶¶ 7–8; [Hooks Dep.], p. 31. [Plaintiff] exited the store alone, and [Ms.] Hooks followed only a few seconds behind him. [Pl. Dep.], p. 32; [Hooks Dep.], p. 32. The evidence is that [Ms.] Hooks did not yell or raise her voice when speaking to [Plaintiff]. [Pl. Dep.], pp. 55–56; [Hooks Dep.], pp. 31–32. Plaintiff fails to identify any person who heard or claims to have heard what was said by [Ms.] Hooks. To the contrary, the evidence reflects that no one was close enough to hear the alleged defamatory statements by [Ms.] Hooks. [Pl. Dep.], pp. 35–38; [Hooks Dep.], p. 32. [Plaintiff] admits that no one approached him or spoke with him after this

> conversation, and that he is unaware of who the individuals were who walked into the store during his conversation with Ms. Hooks. [Pl. Dep.], pp. 35–38, 55. Further, and more importantly, [Plaintiff] did not ask anyone and no one approached him after the conversation to say that they heard [Ms.] Hooks'[s] statement. *Id*. at 38. As [Plaintiff] only speculates that others heard Ms. Hooks'[s] statement, his claim for defamation must fail.

Mem. Supp. Def.'s Mot. Summ. J. at 5.

Plaintiff argues that he adequately established the publication requirement for his defamation claim. Pl.'s Mot. Summ. J. at 2. To support his argument, Plaintiff cites to the Hooks Declaration, the Associate Statement Form, the Associate Performance Counseling Form, the February 4, 2019 Email, and photographs from Defendant's security camera. *Id*.

The Court finds that the Hooks Declaration, the Associate Statement Form, and the Associate Performance Counseling Form do not contain any references to the existence of a third party to whom Ms. Hooks's statement could possibly have been published, and therefore fail to support Plaintiff's publication argument. *See* Hooks Decl.; Associate Statement Form; Associate Performance Counseling Form.

With respect to the February 4, 2019 Email, Plaintiff argues that in lines fourteen through seventeen of the email, Ms. Hooks "puts another 3rd party as a witness to the slander in her own written words." Pl.'s Mot. Summ. J. at 2. In the cited portions of the February 4, 2019 Email, Ms. Hooks states that Plaintiff was "yelling and cussing" at Ms. Hooks, and that "another gent[leman] asked [Ms. Hooks] if [she] was ok because he heard the cussing[,] name calling and everything else." Feb. 4, 2019 Email at 1.

Notably, Ms. Hooks testified at her deposition that (i) the person who "asked [her] if everything was okay" was not present when Ms. Hooks initially spoke to Plaintiff, and only approached her "as [Plaintiff] was walking away;" and (ii) there were no bystanders close enough to hear what Ms. Hooks said to Plaintiff. Hooks Dep. at 32, 34. Further, the February 4, 2019 Email establishes that a third party may have inquired as to Ms. Hooks's well-being only after the third party heard Plaintiff "yelling and cussing" at Ms. Hooks. Feb. 4, 2019 Email at 1. It does not suggest that a third party heard remarks made by Ms. Hooks regarding Plaintiff and "understood th[o]se remarks as referring to . . . [P]laintiff in a defamatory sense." *Food Lion*, 458 S.E.2d at 585. The February 4, 2019 Email fails to support Plaintiff's publication argument.

With respect to the photographs from Defendant's security camera, Plaintiff argues that the photographs show "another third party . . . very close to the incident [who] heard" Ms. Hooks's statement. Pl.'s Mot. Summ. J. at 2. These photographs portray that while Ms. Hooks and Plaintiff spoke outside of Defendant's store, an individual walked into the entrance of Defendant's store. Photographs, ECF No. 73–1, at 8–12. This individual appears several feet away from Ms. Hooks, and there is nothing other than Plaintiff's speculation to suggest that the individual heard any of Ms. Hooks's remarks and "understood these remarks as referring to . . . [P]laintiff in a defamatory sense." *Food Lion*, 458 S.E.2d at 585; *see Jafari*, 913 F. Supp. 2d at 222 (explaining that "unsupported speculation is not sufficient to defeat a summary judgment motion"); *Meyers v. Levinson*, No. 4:02cv9, 2005 U.S. Dist. LEXIS 42799, at

*73 (E.D. Va. July 26, 2005) (explaining that "[u]nsupported speculation or argument . . . is not evidence to be considered at summary judgment and does not create issues of fact").

Plaintiff has failed to offer direct or circumstantial evidence from which a reasonable factfinder could determine that Ms. Hooks's statement was "heard by a third party who understood these remarks as referring to the plaintiff in a defamatory sense." *Food Lion*, 458 S.E.2d at 585.[9] Accordingly, for these reasons, the Court also finds that summary judgment is warranted in Defendant's favor on Plaintiff's defamation claim.

3. Shopkeeper's Privilege

Even if Plaintiff could establish all of the necessary elements for a defamation claim, Defendant argues that summary judgment is nevertheless warranted in its favor because Defendant is immune from liability as to Plaintiff's defamation claim under the Virginia Shopkeeper's Privilege. Mem. Supp. Def.'s Mot. Summ. J. at 5–7. As noted above, Virginia Code § 8.01–226.9 states, in pertinent part:

> A merchant . . . who causes the . . . detention of any person pursuant to the provisions of §§ 18.2–95, 18.2–96 or § 18.2–

[9] In *Food Lion v. Melton*, 458 S.E.2d 580, 585 (Va. 1995), the Virginia Supreme Court determined that a plaintiff provided sufficient evidence "to permit a reasonable inference" that a defamatory statement was "heard and understood by a third party," despite the fact that the plaintiff did not "present testimony from a third party regarding what that person heard and understood," and did not "identify the person to whom the defamatory words were published." *Id.* In *Food Lion*, the evidence established that the defamatory words were spoken in a "very loud tone," "during an encounter that lasted approximately ten minutes," and that "during this time, people were close by, and they stopped 'to listen and see what was going on.'" *Id.* No such evidence exists in the instant action.

> 103,[10] shall not be held civilly liable for . . . slander[11] . . . of the person so . . . detained, whether such . . . detention takes place on the premises of the merchant, or after close pursuit from such premises by such merchant, his agent or employee, provided that, in causing the . . . detention of such person, the merchant, agent or employee of the merchant, had at the time of such . . . detention probable cause to believe that the person had shoplifted or committed willful concealment of goods or merchandise.

Va. Code Ann. § 8.01–226.9; *see supra* note 3.

As the Virginia Supreme Court has explained, the scope of the immunity provided by this statute is "very broad." *Jury v. Giant of Md., Inc.*, 491 S.E.2d 718, 720 (Va. 1997). Additionally, this Court has explained:

> Importantly, the Fourth Circuit in applying this statute has observed that the "scope of the exemption intended by the General Assembly was very broad" and thus an "expansive rather than restrictive scope [is given] to the probable cause defense." This is so, according to the Fourth

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[10] Virginia Code § 18.2–103 provides, in relevant part:

> Whoever, without authority, with the intention of converting goods or merchandise to his own or another's use without having paid the full purchase price thereof, or of defrauding the owner of the value of the goods or merchandise, . . . willfully conceals or takes possession of the goods or merchandise of any store or other mercantile establishment, . . . when the value of the goods or merchandise involved in the offense is less than $1,000, shall be guilty of petit larceny and, when the value of the goods or merchandise involved in the offense is $1,000 or more, shall be guilty of grand larceny.

Va. Code Ann. § 18.2–103.

[11] "'In a written format, defamation is usually termed libel, while spoken defamation, not reduced to writing, is slander.' However, in Virginia, both libel and slander are encompassed in the cause of action for defamation." *Watson v. Spilman*, No. 3:13cv746, 2014 U.S. Dist. LEXIS 107512, at *20 n.10 (E.D. Va. Aug. 5, 2014) (citations omitted).

> Circuit, because the General Assembly, seeking to remedy the "multi-billion dollar epidemic of shoplifting and recognizing that police officers cannot be omnipresent," deliberately chose to "enlarge the merchant's 'property rights' while diminishing the shopper's 'personal rights.'"

Jones v. Target Corp., 341 F. Supp. 2d 583, 587 (E.D. Va. 2004) (alteration in original) (quoting *Brandau v. J.C. Penney Co.*, 646 F.2d 128, 132 (4th Cir. 1981)).

To establish the probable cause necessary to trigger the applicability of the Virginia Shopkeeper's Privilege, a defendant must show that "the circumstances disclosed by the evidence were such as to justify an ordinarily prudent person in acting as defendant[] acted." *Id.* (quoting *F.B.C. Stores v. Duncan*, 198 S.E.2d 595, 599 (Va. 1973)). "Put differently, probable cause is 'knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which she [or he] is suspected.'" *Id.* (citation omitted). "[T]he probable cause inquiry is conducted not from the customer's perspective, but rather from the facts as they appear to a reasonable merchant or its agents." *Id.* at 590 (citation omitted). "[T]he inquiry does not depend on the beliefs or good intentions of the customer. Put differently, the key inquiry is 'the *merchant's reasonable perception* of the conduct.'" *Id.* (emphasis in original) (citation omitted).

In its Motion for Summary Judgment, Defendant argues:

> As the evidence shows, [Ms.] Hooks was informed by a customer twice that she observed [Plaintiff] placing items in his pockets while walking down the Store's aisles. [Hooks Dep.], p. 35; [Hooks Decl.] ¶¶ 4, 6. After observing [Plaintiff] both in person and by video, it appeared that his pockets were indeed stuffed. [Hooks Decl.] ¶¶ 5–6. [Ms.] Hooks then decided to wait by one of the Store's two exits

> to observe whether [Plaintiff] would purchase anything before leaving. *Id*. at ¶ 7. When [Plaintiff] exited without purchasing any items, [Ms.] Hooks approached [Plaintiff] to question whether he had stolen any items. [Pl. Dep.], p. 37; [Hooks Dep.], pp. 31–32. The conversation was short and when [Plaintiff] became agitated and began to verbally assault [Ms.] Hooks, she left him and told him to go. *See* [Pl. Dep.], p. 37; [Hooks Decl.] ¶¶ 8–9. Once back in the store she promptly reported to her supervisors. [Hooks Decl.] ¶ 9; [Hooks Dep.], pp. 23–24. Ms. Hooks acted reasonably and with probable cause when she approached [Plaintiff] to detain him for long enough time to question whether or not he had taken items from the Store. Such detention was of a reasonable nature and reasonable duration. *See Hall v. Wal-Mart Stores East, Inc.*, 2003 U.S. Dist. LEXIS 21016, at *11 (W.D. Va. Nov. 21, 2003).
>
> Because all the evidence in this case fails to create a question of fact as to whether Ms. Hooks acted without probable cause, the statutory immunity from civil liability provided by Virginia Code § 8.01–226.9 is applicable as a matter of law.

Mem. Supp. Def.'s Mot. Summ. J. at 6–7.

Plaintiff argues that the Virginia Shopkeeper's Privilege "doesn't even come into play here" because Ms. Hooks "had no probable cause." Pl.'s Opp'n at 10. Plaintiff argues: "No one saw Plaintiff put anything in his pocket that didn't belong to him and even if [a] customer did, [Ms.] Hooks would have to have seen evidence with '**her eyes**.'" *Id*. at 14–15 (emphasis in original). Plaintiff claims that because Ms. Hooks "can't say she saw Plaintiff steal or have in his possession item(s) belonging to the store," she lacked the probable cause necessary to trigger the application of the Virginia Shopkeeper's Privilege. *Id*. at 5; *see* Pl.'s Mot. Summ. J. at 4 (arguing that the Virginia Shopkeeper's Privilege is inapplicable because Ms. Hooks "was unsure" if Plaintiff stole items from the store).

As summarized above, the undisputed facts of this case establish that (i) a customer approached Ms. Hooks and reported that "she saw a male customer in a black and white hoodie, sunglasses and a black hat putting items in his pockets;" (ii) after receiving this information from the customer, Ms. Hooks located the individual, now known as Plaintiff, whose clothing matched the customer's description; (iii) Ms. Hooks personally observed that, consistent with the customer's report, Plaintiff's pockets appeared to be "stuffed;" (iv) Ms. Hooks subsequently watched Plaintiff on Defendant's security camera and confirmed that Plaintiff's "pockets still appeared to be stuffed;" and (v) Ms. Hooks approached Plaintiff to discuss the situation after she observed Plaintiff leaving without purchasing any items. Hooks Decl. ¶¶ 4–7.

Based on the undisputed facts, the Court finds that Ms. Hooks had probable cause to believe that Plaintiff took items from Defendant's store, and that Ms. Hooks acted as would an "ordinarily prudent person" under similar circumstances. *See Jones*, 341 F. Supp. 2d at 587 (explaining that the Virginia Shopkeeper's Privilege requires a showing that the defendant acted as would an "ordinarily prudent person" under the circumstances). The evidence presented fails to create any genuine dispute of material fact as to the applicability of the Virginia Shopkeeper's Privilege. Therefore, Defendant is entitled to immunity on Plaintiff's defamation claim pursuant Virginia Code § 8.01–226.9 as a matter of law.

4. Summary

For all of the reasons set forth above, the Court finds that Plaintiff has not demonstrated the existence of a genuine dispute of material fact as to his defamation

claim, and that Defendant is entitled to judgment as a matter of law. Accordingly, Defendant's Motion for Summary Judgment, ECF No. 78, is **GRANTED**; and Plaintiff's Motion for Summary Judgment, ECF No. 73, is **DENIED**.

V. Plaintiff's Motion to Amend

On March 8, 2021, after the briefing closed on Defendant's Motion for Summary Judgment, Plaintiff filed a Motion to Amend seeking authorization to add a libel claim to his Second Amended Complaint. Mot. Amend at 1, ECF No. 86. To support his request, Plaintiff claims that the contents of the February 4, 2019 Email, in which Ms. Hooks summarized the events of February 4, 2019, for her District Team Leader, constituted libel. *Id.*; *see* Feb. 4, 2019 Email, ECF No. 86–1. The February 4, 2019 Email states, in relevant part:

> We have a customer [who] wants to call the police. She saw a guy stealing in our store and informed me. Customer found me and said she and her hus[ba]nd saw him stuffing things into his pockets down two of our [a]isles. They wanted to call the cops [and] I told them I would take care of it. I saw him go into the bathroom [and] his inner coat pockets were stuffed but I couldn[']t see anyt[h]ing defin[i]te. They came and found me [and] said he was [in] housewar[e]s so I looked on camera [and] yes he was there but again nothing I could see. She continued to say she was going to call the cops[.] It[']s ridiculous we don[']t have a policy to stop them. When he left I went outside and said[,] ["]we have several customers saying you stole items[.] If you did please don[']t come back[."] He then s[t]arted yelling obs[cene] names at me and refusing to leave if I didn[']t believe him. I said[,] ["]I[']m not saying you did but they want the police called and I[']m not calling them[,] so again if you did[,] just take what you have and go[.] If you didn't then I am sorry and I will take care of it[."] He kept yelling and walked away yelling and cussing saying he was going to contact y[']all on me.

Feb. 4, 2019 Email at 1.

As explained above, Federal Rule 15(a) provides that "[t]he court should freely give leave [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, leave to amend may be denied when "the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999).

In its Opposition, Defendant argues that Plaintiff's requested amendment would be futile. Opp'n at 2, ECF No. 87. Specifically, Defendant argues:

> Virginia law makes "no distinction between actions for libel and slander." *Schaecher v. Bouffault*, 290 Va. 83, 91 (2105). Where a Plaintiff alleges defamation by publication, "the elements are (1) publication of (2) an actionable statement with (3) the requisite intent." *Id*. [(]quoting *Tharpe v. Saunders*, 285 Va. 476, 480 (2013)[)]. The elements for a libel claim are the same as those for defamation – Virginia law does not separate them into distinct causes of action. Plaintiff's libel claim is based upon the same set for facts and circumstances upon which his current defamation claim is based. Therefore, amendment of Plaintiff's Second Amended Complaint would be futile.

Id.

Defendant also argues that Plaintiff's requested amendment would be prejudicial, would unnecessarily increase the costs of litigation, and would "work an injustice on Defendant." *Id*. at 3.

Plaintiff argues that Defendant has provided the Court with a "bad interpretation of Defamation/Libel/Slander," and that the claims "are different in meaning and in their application to the law." Reply at 1, ECF No. 88. Plaintiff further

argues that his request "is not prejudicial towards the Defendant," "seeks justice," and should be granted. *Id.*

The Court finds that Plaintiff's requested amendment would be futile. As explained above, "[i]n a written format, defamation is usually termed libel, while spoken defamation, not reduced to writing, is slander.' However, in Virginia, both libel and slander are encompassed in the cause of action for defamation." *See supra* note 11 (quoting *Watson v. Spilman*, No. 3:13cv746, 2014 U.S. Dist. LEXIS 107512, at *20 n.10 (E.D. Va. Aug. 5, 2014) (citations omitted)). To maintain his proposed libel claim, Plaintiff would have to establish that the contents of the February 4, 2019 Email constituted the publication of an actionable statement (*i.e.*, one that is both false and defamatory) that was made with the requisite intent. *Jafari v. Old Dominion Transit Mgmt. Co.*, 913 F. Supp. 2d 217, 223 (E.D. Va. 2012) (citing *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005)); *see Liverett v. DynCorp Int'l LLC*, No. 1:17cv811, 2018 U.S. Dist. LEXIS 53607, at *11 (E.D. Va. Mar. 28, 2018) (explaining that an actionable statement is one that is "both false and defamatory"). Upon review, the Court finds that the February 4, 2019 Email does not contain any false or defamatory statements, and was not published with the requisite intent necessary to maintain a libel or slander claim. *See Liverett*, 2018 U.S. Dist. LEXIS 53607, at *11 (explaining that a plaintiff must show that "the defendant either knew [the statement] to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the

publication was based" (alteration in original)). Accordingly, Plaintiff's Motion to Amend, ECF No. 86, is **DENIED**.

VI. Conclusion

For the reasons set forth above, Defendant's Motion to Amend Answer, ECF No. 64, is **GRANTED**. The Clerk is **DIRECTED** to file Defendant's Amended Answer, currently docketed at ECF No. 64–1, as a separate entry on the docket of this matter. Plaintiff's First Motion to Compel, ECF No. 57, is **DENIED**; Plaintiff's Second Motion to Compel, ECF No. 58, is **DENIED**; Plaintiff's Third Motion to Compel, ECF No. 59, is **DENIED**; Plaintiff's Fourth Motion to Compel, ECF No. 60, is **DENIED**; Plaintiff's Motion for Summary Judgment, ECF No. 73, is **DENIED**; Defendant's Motion for Summary Judgment, ECF No. 78, is **GRANTED**; Plaintiff's Motion for Leave to Reply, ECF No. 88, is **DISMISSED** as moot and unnecessary; and Plaintiff's Motion to Amend, ECF No. 86, is **DENIED**.

Plaintiff may appeal this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, Norfolk Division, 600 Granby Street, Norfolk, Virginia 23510. The written notice must be received by the Clerk within thirty days from the date of entry of this Dismissal Order. If Plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* shall be submitted to the Clerk of the United States District Court, Norfolk Division, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to Plaintiff and counsel for Defendant.

IT IS SO **ORDERED**.

/s/
Arenda L. Wright Allen
United States District Judge

June 7, 2021
Norfolk, Virginia