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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Renee Ivchenko, *et al*. Plaintiffs, v. Kyle David Grant, *et al*., Defendants.	Case No. 20-CV-674-PHX-MTL **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO DISMISS**

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Defendants respectfully submit the following Response to Plaintiffs' Motion to Dismiss (Doc. #14). As explained herein, Defendants do not object to the motion as it relates to the twenty anonymous John Doe and Jane Doe Plaintiffs. As to those anonymous Plaintiffs, Defendants agree the Court may dismiss their claims without prejudice and without any further conditions.

However, a different result is required as to Plaintiff Renee Ivchenko ("Mrs. Ivchenko"). As explained further herein, Mrs. Ivchenko is a vexatious litigant who has brought (and dismissed) multiple duplicative lawsuits against the same Defendants based on the same claims arising from the same events. Accordingly, any dismissal as to Mrs. Ivchenko's claims should be with prejudice and should be conditioned on her paying Defendants' reasonable attorney's fees in the amount of $21,860.00.

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I. INTRODUCTION

In an "ordinary" case, most defendants would be happy to learn the plaintiff wants to abandon the litigation. But this is no ordinary case. Rather, this is a groundless lawsuit filed by a vexatious litigant—Mrs. Ivchenko—who has already sued Defendants for exactly the same claims, which she voluntarily dismissed once before, then re-filed six months later without any factual or legal basis. Defendants are entitled to protection from further harassment, and this requires Mrs. Ivchenko's claims be dismissed with prejudice.

II. PROCEDURAL HISTORY

On its face, it appears this action has only been pending for a short time—the case was removed from state court on April 3, 2020. At first, the brevity of this action would seem to weigh in favor of allowing Plaintiffs to dismiss without prejudice. However, the full history of the dispute (which Plaintiffs' motion omits) is much more complicated.

The story begins more than a year ago. On May 9, 2019, Mrs. Ivchenko sued Defendants in the Maricopa County Superior Court Case No. CV2019-090493 ("Case #1"). A copy of the Complaint from Case #1 is attached hereto as Exhibit A. At the time Case #1 was filed, Mrs. Ivchenko was represented by her husband, Andrew Ivchenko, an Arizona-licensed attorney.

The Complaint in Case #1 shows Mrs. Ivchenko's claims are substantively identical to her claims in this matter. In short, after Mrs. Ivchenko was arrested for assaulting a police office in Scottsdale in April 2018, her mugshot was published by the Maricopa County Sheriff's Office on its website at https://www.mcso.org/Mugshot/. Defendants republished Mrs. Ivchenko's mugshot on their website within a few days after it was initially published by MCSO. In Case #1, Mrs. Ivchenko claimed, *inter alia*, that by republishing her mugshot, Defendants defamed her, violated her right to publicity, and caused her emotional distress, among other things.

The Complaint in Case #1 was removed to this court on May 29, 2019 and assigned Case No. 2:19-cv-03756-JJT. A copy of the Notice of Removal from Case #1 is attached hereto as Exhibit B.

Following removal, Defendants' counsel (undersigned) explained to Mr. Ivchenko that the case was entirely groundless. Among other things, Mrs. Ivchenko's defamation claim was untimely as a matter of law pursuant to A.R.S. § 12-541 (providing a one-year limitations period for defamation claims). The claims were also barred in their entirety by the Communications Decency Act, 47 U.S.C. § 230(c) which provides immunity to website operators (like Defendants) for all state-law civil claims arising from the *republication* of existing online material including criminal records. *See Doe v. Oesterblad*, 2015 WL 12940181 (D.Ariz. 2015) (dismissing claims based on CDA immunity where defendant republished criminal records which were already published on the Internet by third party sources).

Faced with these arguments, Mrs. Ivchenko agreed to voluntarily dismiss Case #1 without prejudice on May 31, 2019. A copy of the Notice of Voluntary Dismissal is attached hereto as Exhibit C.

Notably—at the time Case #1 was dismissed, the parties did not enter into any type of settlement agreement. Despite this, after the case was dismissed, Defendants *voluntarily removed* Mrs. Ivchenko's mugshot from their website simply as a courtesy, even though they were under no legal or contractual obligation to do so.

At that point, this dispute should have ended. Unfortunately, the opposite occurred. Six months later on December 17, 2019, Mrs. Ivchenko (represented by new counsel) re-filed a virtually identical Complaint in Maricopa County Superior Court Case No. CV2019-015355 ("Case #2"). A copy of the Complaint in Case #2 was attached as Exhibit A to the Notice of Removal filed in this matter.

In Case #2, Mrs. Ivchenko continued to assert exactly the same claims that were presented and dismissed in Case #1. Because those claims were still entirely groundless, and because Mrs. Ivchenko was represented by new counsel in Case #2, on January 10, 2020, undersigned counsel sent a lengthy, detailed email to Plaintiffs' new counsel requesting a phone call to meet and confer regarding potential Rule 11 violations present in the Complaint. A copy of this email is attached as Exhibit D.

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After discussing the issues by phone, nearly two weeks passed without any substantive response from Plaintiffs' counsel. On January 30, 2020, Plaintiffs' new counsel, David Ferrucci, finally offered the following curt reply: "We have reviewed your contentions. We do not agree with your assessment." A copy of Mr. Ferrucci's email is attached hereto as Exhibit E.

Based on Mrs. Ivchenko's refusal to dismiss her claims in Case #2, undersigned informed Mr. Ferrucci that Defendants intended to bring an immediate Motion for Summary Judgment. Of course, because Defendants planned to seek summary judgment so early in the case, it was understood Plaintiffs might seek a discovery continuance under Rule 56(d) claiming they needed additional time to respond.

In an effort to be as efficient and cooperative as possible, on February 14, 2020, undersigned counsel provided Plaintiffs' counsel with a *draft* Statement of Undisputed Facts In Support of Defendants' Motion for Summary Judgment, along with an outline of the proposed arguments to be raised in the summary judgment motion. A copy of undersigned counsel's email is attached hereto as Exhibit F.

Once again, rather than responding promptly to discuss the issue, Plaintiffs counsel remained silent and non-responsive. As a result, nearly a week later on February 20, 2020, undersigned counsel emailed Plaintiffs' counsel to remind him that no response had been received regarding the draft Statement of Facts and that in the absence of any response, the summary judgment motion would be filed promptly.

Later that same day, Plaintiffs counsel responded, primarily to discuss other unrelated issues. As for the summary judgment motion, Plaintiffs' counsel offered the following comment: "We are also planning on amending the complaint within the time-period provided by the rules. As part of that amendment, we are contemplating dropping *the defamation claim* altogether." (emphasis added) A copy of the email from Plaintiffs' counsel dated February 20, 2020 is attached hereto as Exhibit G. Clearly, nothing in this message mentioned *dropping parties* or *adding new parties* or claims, and at no time did Plaintiffs' counsel mention that was likely to occur.

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Given Mrs. Ivchenko's unwavering refusal to concede a lack of merit as to any part of the case, on February 21, 2020, Defendants moved for summary judgment in Case #2 (a copy of the MSJ is attached as Exhibit G to the Notice of Removal filed in this matter). Six days later, on February 27, 2020, Mrs. Ivchenko amended the Complaint in Case #2. A copy of the Amended Complaint is attached as Exhibit H to the Notice of Removal filed in this mater.

The Amended Complaint completely changed this case; in effect, it represented an *entirely new action*. First, Mr. Ivchenko (who was previously a plaintiff asserting claims in Case #2) dropped all his claims and disappeared from the case caption. Second, the Amended Complaint added twenty new anonymous parties designated as John and Jane Does. Each of these anonymous parties asserted claims under Arizona's newly-enacted mugshot law, A.R.S. § 44–7902 (claims which were not present in Case #2). Finally, the Amended Complaint dropped Mrs. Ivchenko's defamation and civil conspiracy claims, but preserved her other tort claims unchanged.

On its face, the Amended Complaint in Case #2 was not removable because although there appeared to be complete diversity, the Complaint did not seek damages in excess of $75,000.00. Accordingly, Defendants could not remove the Amended Complaint, and the case proceeded forward in state court. Among other things, this resulted in Defendants preparing and serving the disclosure statement required by Ariz. R. Civ. P. 26.1, as well as reviewing Plaintiffs' disclosures.

As indicated in the Notice of Removal filed in this case, Defendants received Plaintiffs' initial Rule 26.1 disclosures on March 9, 2020. Plaintiffs' disclosures indicated (for the first time) that Plaintiffs were seeking *millions of dollars* in damages under A.R.S. § 44–7902. Because this document indicated Plaintiffs were seeking damages in excess of $75,000, the Amended Complaint was removed to this Court on April 3, 2020.

Both before and after removal, Defendants incurred substantial fees litigating this matter, the majority of which relates exclusively to the claims Mrs. Ivchenko now seeks to dismiss. Among other things, Defendants have incurred significant fees preparing and

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filing a Motion for Summary Judgment, preparing and serving written discovery including interrogatories, requests to admit, and requests for production of documents, and subpoenaing records from third parties and requesting public records from sources including the Scottsdale Police Department and the United States Copyright Office. Defendants have also incurred fees preparing MIDP responses, and participating in the preparation of the Joint Case Management Plan filed in this matter.

These facts and circumstances strongly support imposing two conditions on Mrs. Ivchenko's dismissal request. First, the dismissal should be with prejudice so that Mrs. Ivchenko cannot further harass Defendants by re-filing her claims for a *third* time. Second, any dismissal should be conditioned on Mrs. Ivchenko paying Defendants' reasonable attorney's fees. If Mrs. Ivchenko rejects these terms, the Court should deny her dismissal request and allow this matter to be litigated to final judgment.

III. DISCUSSION

a. Defendants Do Not Object To Anonymous Plaintiffs' Request

As noted above, Defendants do not object to the dismissal of those claims brought by the anonymous John and Jane Doe Plaintiffs. However, to avoid any confusion, Defendants wish to respond briefly to one point raised in Plaintiffs' motion.

Specifically, Plaintiffs note that on May 1, 2020, Mr. Ivchenko filed a *new* lawsuit in Maricopa County Superior Court Case No. CV2020-093006 ("Case #3"). The Complaint in Case #3 is a virtually *verbatim* copy of the Amended Complaint from Case #2, excluding only those claims previously asserted by Mr. and Mrs. Ivchenko. In other words, Case #3 involves twenty additional anonymous plaintiffs each asserting claims under Arizona's Mugshot Act, A.R.S. § 44–7902, exactly like this matter.

In their current, Motion to Dismiss, Plaintiffs briefly reference Case #3 and then suggest "many of the Plaintiffs in this [federal] case plan to join the [new] State Court Action [Case #3]. *In the interests of judicial economy*, and for other reasons detailed below and elsewhere, Plaintiffs file this Voluntary Motion to Dismiss … ." Mot. at 3:9–12 (emphasis added).

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To be clear—what Plaintiffs are attempting to do here is directly contrary to the interests of judicial economy. This is so because it is virtually certain Case #3 will be removed back to this Court in the near future. Unlike the Amended Complaint in Case #2, the Complaint in Case #3 contains non-diverse plaintiffs; i.e., plaintiffs who reside in the State of Florida. Because Defendants are also residents of Florida, the addition of these plaintiffs initially *appears* to destroy diversity.

However, Defendants believe Mr. Ivchenko (who represents the Plaintiffs in Case #3) has fraudulently joined these non-diverse Florida-resident plaintiffs for the sole purpose of attempting to avoid federal jurisdiction. A complete discussion of this point is beyond the scope of the current motion, but it is worth noting that when evaluating the existence of federal diversity jurisdiction, a district court may ignore the residence of a fraudulently joined *defendant*. *See*, *e.g.*, *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (recognizing, "It is a commonplace that fraudulently joined defendants will not defeat removal on diversity grounds.")

While far less-common, the same rule applies to fraudulently joined *plaintiffs*; "The citizenship of a party-plaintiff may also be disregarded for purposes of determining whether diversity jurisdiction exists if the removing party can show that the nondiverse plaintiff was fraudulently joined." *Foslip Pharmaceuticals, Inc. v. Metabolife Intern., Inc*., 92 F.Supp.2d 891, 903 (N.D.Iowa 2000) (emphasis added) (quoting *Oliva v. Chrysler Corp*., 978 F.Supp. 685, 689 (S.D.Tex.1997) (compiling extensive authority). Based on this rule, as soon as it can be shown the non-diverse Plaintiffs have been fraudulently joined in Case #3, that action will immediately be removed back to this Court, putting the parties back in exactly the same position they are currently in.

Far from promoting judicial efficiency, Plaintiffs' serial filing-and-dismissal of subsequent actions is the epitome of needless waste and judicial *inefficiency*. Rather than trying to litigate valid claims brought in good faith, Plaintiffs are instead attempting to misuse the judicial system solely as a tool of harassment, because they are fully aware they have no legitimate claims for relief and no possible hope of prevailing on the merits.

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For that reason, although Defendants have no specific objection to the dismissal request as it relates to the anonymous Doe Plaintiffs, the Court should understand the dismissal of that aspect of the case will *not* promote judicial efficiency in any way. On the contrary, if those anonymous Plaintiffs attempt to join Case #3 while it remains pending in state court, they will simply end up back here in federal court. That fact may warrant this Court's *sua sponte* denial of the anonymous Doe Plaintiffs' dismissal request; Defendants take no position on that point.

b. Based On The "Two Dismissal Rule" Mrs. Ivchenko's Claims Should Be Dismissed With Prejudice

Prior to addressing any other conditions the Court may impose, the first question presented is whether Mrs. Ivchenko's claims should be dismissed with prejudice or without. Not surprisingly, Mrs. Ivchenko's motion never discusses this point; she merely assumes dismissal without prejudice is the only option.

Ms. Ivchenko's assumption is incorrect; "In a nutshell, Rule 41(a)(2) requires a two-step analysis: (1) whether to dismiss; and if so, (2) whether to do so with or without prejudice and on what terms." *Plastronics Socket Partners Ltd. v. HighRel Inc*., 2020 WL 377130, at *1 (D. Ariz. 2020). Regarding the second point—whether Mrs. Ivchenko's claims should be dismissed with prejudice or without—it is important to note voluntary dismissals under Rule 41(a)(1) are always subject to a "two dismissal rule".

In short, Rule 41(a)(1) allows a plaintiff to unilaterally dismiss an action without leave of Court, as long as the notice is filed before the defendant answers or moves for summary judgment. However, this right is subject to the restriction set forth in Rule 41(a)(1)(B) which provides: "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." (emphasis added).

This is known as the "two dismissal rule" and it serves one simple function: to bar vexatious litigants from bringing a *third* successive action; "Application of the two-dismissal rule acts to bar a third action under the doctrine of *res judicata* … ." *Ferretti v.*

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Beach Club Maui, Inc., 2018 WL 3078742, at *3 (D. Haw. 2018) (citing *Lake at Las Vegas Inv'rs Grp., Inc. v. Pacific Malibu Dev. Corp*., 933 F.2d 724, 728 (9th Cir. 1991)); *see also Arizona Med. Billing Inc. v. FSIX LLC*, 2019 WL 467079, at *1 (D. Ariz. 2019) ("a voluntary dismissal of a second action operates as a dismissal on the merits if the plaintiff has previously dismissed an action involving the same claims.") (emphasis added).

As noted above, Mrs. Ivchenko previously filed a substantially identical action in state court (Case #1) which was removed to this court and then subsequently dismissed by voluntary notice under Rule 41(a)(1). Case #1 involved exactly the same claim(s) as Mrs. Ivchenko has asserted in this matter.

Under these circumstances, if Mrs. Ivchenko attempted to voluntarily dismiss her claims for a second time under Rule 41(a)(1), that second dismissal would automatically operate as an adjudication on the merits; i.e., a dismissal *with* prejudice. That restriction exists for very good reasons; "The purpose of the two-dismissal rule is to 'prevent delays and harassment caused by plaintiffs securing numerous dismissals without prejudice.'" *Ferretti*, 2018 WL 3078742, at *4.

To be sure—Rule 41(a)(1)(B) does not control the instant motion, but only because Mrs. Ivchenko's right to dismiss by notice under Rule 41(a)(1) expired when Defendants filed an Answer and moved for summary judgment in Case #2. Still, even though Plaintiffs' motion relies on Rule 41(a)(2), not 41(a)(1), the Court should, in its broad discretion, apply the same "two dismissal" standard by ordering Mrs. Ivchenko's claims dismissed with prejudice.

This result is appropriate because dismissals via court order under Rule 41(a)(2) are intentionally *more restrictive* than dismissals via notice under Rule 41(a)(1). Put differently, Rule 41(a)(1) is more lenient *in favor of* the dismissing party making it *easier* for a plaintiff to dismiss her case if the defendant has not yet appeared. This leniency makes sense because if a case is dismissed *before* a defendant appears, any harm to the defendant is *de minimus*. Yet a plaintiff is still always limited to only two dismissals.

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By comparison, Rule 41(a)(2) is far more *restrictive* with dismissals since it does not permit the automatic dismissal of claims *after* a defendant has appeared and filed an Answer. The reasons for this restriction are obvious: once a defendant has appeared and filed an Answer or moved for summary judgment, the likely costs and harm to the defendant are much higher if the case is dismissed. This is why Rule 41(a)(2) requires a plaintiff to bring a *motion* for dismissal rather than allowing automatic dismissal by *notice*—a motion is required so the Court can review the circumstances and grant appropriate relief to ensure the defendant is not unfairly prejudiced or harassed.

Under the facts of this case, Mrs. Ivchenko is not entitled to voluntarily dismiss her claims for a second time under the more lenient provision of Rule 41(a)(1); that option is *per se* unavailable due to the two dismissal rule. As such, Mrs. Ivchenko should not be allowed to skirt the effects of the rule by obtaining a second without-prejudice dismissal under the far more restrictive provisions of Rule 41(a)(2). Rather, the only alternative should be dismissal with prejudice.

c. Dismissal of Mrs. Ivchenko's Claims Should Be Conditioned on Her Paying Defendants' Attorney's Fees

Although the parties disagree about other things, one point is not disputed—a district court has broad discretion in deciding whether to permit any party to dismiss their claims and under what terms. While evaluating those choices, the Court must keep one key point in mind: "In considering a motion for voluntary dismissal, the district court must focus primarily on protecting the interests of the defendant." *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987) (emphasis added); *see also Bridgeport Music, Inc. v. Universal-MCA Music Pub., Inc.*, 583 F.3d 948, 953 (6th Cir. 2009) ("the purpose of Rule 41(a)(2) is to protect the nonmovant, here the defendants, from unfair treatment."); *Blehm v. DC Shoes, Inc.,* 2006 WL 8455569, at *3 (S.D. Cal. May 2, 2006) ("the court should keep in mind the interests of the defendant, for it is his position which should be protected.") Thus, at each step of the analysis, this Court must ensure that Defendants are not unfairly affected by the dismissal of Mrs. Ivchenko's claims.

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As for the legal standards applicable to dismissal requests under Rule 41, Plaintiffs claim the Court need only consider one thing—the existence of "legal prejudice". Not surprisingly, Plaintiffs suggest Defendants will suffer no legal prejudice if this matter is dismissed, thus in their view the analysis is simple.

Plaintiffs' argument misstates the law. Although prejudice is certainly *one* factor the Court must consider, it is not the only one. Rather, keeping in mind the goal of Rule 41(a)(2) is to protect *defendants*, the Court must consider at least four other factors:

> The Ninth Circuit utilizes a four factors test when deciding whether to grant a voluntary dismissal: (1) the defendant's effort and expense in preparing for trial, (2) any excessive delay or lack of diligence on the part of the plaintiff in prosecuting the action, (3) insufficiencies in the plaintiff's explanation of the need for a dismissal; and (4) the fact that a summary judgment motion has been filed by the defendant.

Loud Records, LLC v. Sanchez, 2008 WL 628913, at *3 (D.Ariz. 2008).

Here, Plaintiffs' motion largely ignores these factors. This is not surprising given that all four of these factors weigh heavily *against* Mrs. Ivchenko's dismissal request.

i. Defendants Have Incurred Substantial Time And Expense

The first factor this Court must consider is "the defendant's effort and expense in preparing for trial … ." To the extent Plaintiffs address this point, they suggest "It is also worth noting that this case is still in the very early stages of litigation, discovery has just begun, and neither party has made any effort or spent any sums preparing for trial." Mot. at 6:4–6. This statement is simply false, particularly in view of the full timeline of this dispute which Plaintiffs' motion conveniently fails to mention. To restate that timeline:

Date	Event
May 9, 2019	Case #1 Filed in State Court
May 29, 2019	Case #1 Removed to Federal Court
May 31, 2019	**Case #1 Voluntarily Dismissed**
Dec. 17, 2019	Case #2 Filed in State Court
Feb. 12, 2019	Case #2 Defendants Move for Summary Judgment
Feb. 27, 2019	Case #2 Plaintiffs File Amended Complaint
Mar. 9, 2020	Case #2 Plaintiffs Disclose Damages In Excess of $75K
April 3, 2020	Case #2 Removed to Federal Court
May 1, 2020	Case #3 Filed in State Court
May 19, 2020	Plaintiffs Move to Dismiss Case #2

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Given this timeline, it is not accurate to suggest "this case is still in the very early stages of litigation, discovery has just begun, and neither party has made any effort or spent any sums preparing for trial." On the contrary, as explained in greater detail in the declaration of counsel submitted herewith, to date, Defendants have incurred more than $20,000.00 in attorney's fees and costs defending Mrs. Ivchenko's claims. This expense includes seeking discovery both from Mrs. Ivchenko and from third party witnesses and otherwise preparing this matter for trial. Importantly, virtually all of this time and effort relates *solely* to the claims brought by Mrs. Ivchenko, *not* the claims of the anonymous Doe Plaintiffs. As such, all that time and effort will be entirely wasted if Mrs. Ivchenko's claims are dismissed.

In fairness, Defendants concede that litigation expenses, standing alone, will not justify the outright denial of a request for voluntarily dismissal nor do those costs qualify as "prejudice" on their own. But this does not mean the defendants' fees and costs are irrelevant, as Plaintiffs erroneously suggest.

Rather, fees incurred by the defendant do not qualify as "prejudice" because a plaintiff should presumptively be ordered to pay those fees as a condition of dismissal; "The Ninth Circuit does not equate the paying of expenses and costs as 'plain legal prejudice' *because the court reasons that a 'defendants interests can be protected by conditioning the dismissal ... upon the payment of appropriate costs and attorney fees*.'" *Blehm*, 2006 WL 8455569, *4 (emphasis added) (quoting *Westlands Water Dist. v. U.S.*, 100 F.3d 94, 97 (9th Cir. 1996)); *see also Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987) (affirming order requiring plaintiff to pay defendant's fees and costs as a condition of dismissal, and noting, "Such conditions should be imposed as a matter of course in most cases.") (emphasis added); *McCants v. Ford Motor Co.*, 781 F.2d 855, 860 (11th Cir. 1986) ("A plaintiff ordinarily will not be permitted to dismiss an action without prejudice under Rule 41(a)(2) after the defendant has been put to considerable expense in preparing for trial, except on condition that the plaintiff reimburse the defendant for at least a portion of his expenses of litigation.") (emphasis added).

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In short, the first factor this Court must consider—Defendants' time and expense preparing for trial—weighs overwhelmingly in favor of requiring Mrs. Ivchenko to pay those expenses as a condition of dismissal. Defendants agree that payment of fees is not mandatory in every case, but the truly egregious circumstances of this case make such an award particularly appropriate.

ii. Mrs. Ivchenko's Delay In Seeking Dismissal

The second factor the Court should consider is "any excessive delay or lack of diligence on the part of the plaintiff in prosecuting the action". As it relates to Mrs. Ivchenko, this factor also weighs in favor of Defendants.

As noted above, Mrs. Ivchenko initially sued Defendants in May 2019, more than a year ago. Although that first action was quickly dismissed, six months later Mrs. Ivchenko re-filed exactly the same claims in a new suit even though her mugshot had been removed from Defendants' website and even though the statute of limitations had long since expired. After filing the second case, Mrs. Ivchenko refused to dismiss her claims despite being warned her claims were untimely and otherwise groundless.

As a result, Defendants were forced to appear in the case, prepare disclosures, serve discovery, seek discovery from third parties, and move for summary judgment, among other things. Making matters worse, rather than simply dismissing her claims outright, Mrs. Ivchenko filed an Amended Complaint which included not only most of her original claims, but also wholly unrelated claims asserted by unrelated new parties (it is unclear why the new claims by the anonymous Doe Plaintiffs were brought in conjunction with this case rather than being filed as a new, separate litigation).

To the extent Plaintiffs address this point in their motion, they focus solely on the "diligence" of the anonymous Doe Plaintiffs, not Mrs. Ivchenko. In other words, the anonymous Doe Plaintiffs seem to praise themselves for filing a *new* action (Case #3) in state court on May 1, 2020; "any additional litigation against Defendants will not result in excessive or duplicative expenses because the State Court Action is identical in almost every respect to the underlying case." Mot. at 7:8–10.

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But this argument is only true as to the anonymous Doe Plaintiffs, not Mrs. Ivchenko. Mrs. Ivchenko is not a party to Case #3, nor has she ever asserted claims under Arizona's Mugshot Act (Mrs. Ivchenko has no claims under the Act because her mugshot was removed before the Act became law in August 2019). Under these circumstances, it is clear that all the time and effort Defendants have expended responding to Mrs. Ivchenko's claims will be wasted solely due to her refusal to dismiss many months ago.

Rather than promptly seeking dismissal of her claims for legitimate reasons, Mrs. Ivchenko has done everything in her power to needlessly prolong this case until apparently realizing her claims had no merit. This factor weighs heavily in favor of Defendants and against Mrs. Ivchenko.

iii. Mrs. Ivchenko Offers No Explanation For Dismissal

The third factor the Court must consider is: "insufficiencies in the plaintiff's explanation of the need for a dismissal". This point requires little discussion because regardless of the arguments presented by the Doe Plaintiffs, Mrs. Ivchenko offers no explanation whatsoever for her dismissal request.

In short, the "forum shopping" explanation offered by the Doe Plaintiffs does not apply to Mrs. Ivchenko. Mrs. Ivchenko has not argued (nor could she) that she wants to dismiss her claims in this case so she can litigate them elsewhere. On the contrary, Mrs. Ivchenko has offered no explanation of any kind for her request to dismiss her claims after months and months of contentious and costly litigation. Presumably Mrs. Ivchenko has offered no good reason for her request because she does not have one. This point weighs heavily against Mrs. Ivchenko's request. *See Columbia Cmty. Credit Union v. Chicago Title Ins. Co.*, 2010 WL 1992225, at *2 (W.D. Wash. 2010) (denying request to dismiss where, among other things, plaintiff's "explanation of the reason for requesting dismissal without prejudice is inadequate.")

iv. Defendants' Motion For Summary Judgment

The fourth factor to consider is whether Defendants moved for summary judgment before the dismissal request. Here, it is undisputed Defendants moved for summary

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judgment as to all of Mrs. Ivchenko's claims prior to her dismissal request, so like every other factor, this one weighs heavily against Mrs. Ivchenko.

Oddly, Plaintiffs attempt to mischaracterize this factor by arguing Defendants' actions surrounding their summary judgment motion somehow show "Plaintiffs' claims have substantial merit." Mot. at 8:9. To support this strange argument, Plaintiffs suggest after Defendants moved for summary judgment, Defendants "took every procedural step possible to avoid a ruling on the motion … . Clearly, if Plaintiffs' claims lacked merit, then Defendants would not have gone through such great lengths *to avoid an adverse ruling on their Motion for Summary Judgment*." Mot. at 8 (emphasis added).

The dishonesty (or confusion) in this argument is shocking because it grossly misrepresents what actually occurred here. What occurred is this: as noted above, immediately after Defendants were served with the Complaint and Summons in Case #2, undersigned counsel met and conferred with Plaintiffs' counsel to explain that the case was entirely groundless. Confronted with (and despite) that position, Mrs. Ivchenko adamantly refused to dismiss any claims or to withdraw any allegations. Instead, Mrs. Ivchenko dug in her heels and insisted all her claims had merit.

Left with no other choice, on February 7, 2020, Defendants filed an Answer to the Complaint, and on February 27, 2020, Defendants moved for summary judgment as to all claims in the case. Notably, at that time the only Plaintiffs in the case were Renee and Andrew Ivchenko, and no claims were asserted under Arizona's Mugshot Act.

Despite previously insisting all their claims had factual support and legal merit, and despite previously refusing to withdraw any aspect of the case, six days after the summary judgment motion was filed, Plaintiffs filed an Amended Complaint. In the Amended Complaint, Mr. Ivchenko completely withdrew all his claims and attempted to dismiss himself from the case without leave of court. Further, the Amended Complaint added *twenty* new parties—the anonymous Doe Plaintiffs—each of whom asserted new legal theories under the Mugshot Act; claims which were not present in the original Complaint.

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Clearly, the Amended Complaint completely changed the posture, parties, and claims in the case. Furthermore, shortly after the Amended Complaint was filed, Plaintiffs disclosed (for the first time) they were seeking millions of dollars in damages, thus rendering the Amended Complaint removable (whereas the original Complaint was not removable). This fundamental change in the posture and substance of the case clearly rendered Defendants' first summary judgment motion procedurally moot. Furthermore, because the Amended Complaint added new parties and new legal theories not present in the original Complaint, Defendants had no opportunity to argue the merits of the new claims in their previously-filed summary judgment motion.

For those reasons, and because this Court does not permit multiple summary judgment motions, Defendants determined the only appropriate course of action was to withdraw their original (and clearly moot) summary judgment motion so that they could bring a new motion that addressed *all claims* and *all parties*. Far from attempting to *avoid* having the motion resolved on the merits, Defendants withdrew the prior summary judgment motion for the opposite reason—to ensure that a new motion could be filed which addressed *all claims* and *all parties*. The only reason that has not occurred is because the twenty new Doe Plaintiffs remain anonymous, and without knowing their identity, it is impossible for Defendants to respond to the merits of their claims.

In short, the fact that Mrs. Ivchenko amended her Complaint and then subsequently requested to dismiss all claims *after* Defendants moved for summary judgment weighs heavily against Mrs. Ivchenko and in favor of requiring her to pay all fees and costs Defendants have incurred.

Plaintiffs' motion supports this view. This is so because an award of fees is particularly appropriate for "work which is not useful in continuing litigation between the parties." *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) (emphasis added). Here, because Mrs. Ivchenko does not seek to relitigate her claims in state court, virtually all time and expense incurred investigating, challenging and defending against her claims will be completely wasted. This makes an award of fees particularly appropriate

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PHOENIX, AZ 85044

v. Defendants Should Be Awarded $21,860.00 In Fees

Submitted herewith is a declaration from undersigned counsel explaining that since the inception of this dispute, Defendants have incurred attorney's fees in the amount of $26,850.00 and costs in the amount of $873.29. However, some of these fees relate to Case #1 and Case #3 (the new state court matter in which Mrs. Ivchenko is not a party). In addition, for reasons unrelated to the present motion, Mrs. Ivchenko previously paid the costs Defendants incurred in Case #1. For both of those reasons, Defendants do not seek an award of costs.

Excluding time spent on Case #1, and excluding work performed on Case #2 which was not directly related to Mrs. Ivchenko's claims, Defendants have incurred attorney's fees in the amount of $21,860.00. Accordingly, if Mrs. Ivchenko wishes to abandon her claims, she should be required to pay that sum to Defendants as a condition of dismissal. If Mrs. Ivchenko does not accept that condition, her claims should not be dismissed, thus allowing Defendants to litigate this matter to final judgment.

IV. CONCLUSION

For the reasons stated above, Defendants do not object to the dismissal, without prejudice, of the claims brought by the anonymous Doe Plaintiffs. As it relates to Mrs. Ivchenko's request for dismissal, the Court should order that her claims be dismissed with prejudice, and such dismissal should be conditioned upon her paying Defendants' reasonable fees in the amount of $21,860.00.

DATED: May 22, 2020.

GINGRAS LAW OFFICE, PLLC

David S. Gingras, Esq.
Attorney for Defendants

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on May 22, 2020 via the Court's ECF system, thereby causing a true copy of said document to be served electronically upon each other party registered through ECF including:

David N. Ferrucci, Esq.
David G. Bray, Esq.
Paxton D. Endres, Esq.
DICKINSON WRIGHT PLLC
1850 North Central Avenue, Suite 1400
Phoenix, AZ 85004
Attorneys for Plaintiffs

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

Exhibit A

LAW OFFICES OF ANDREW IVCHENKO
Andrew Ivchenko, Esq., SBN 021145
4960 S. Gilbert Rd., Suite 1-226
Chandler, AZ 85249
Phone: (480) 250-4514
Email: aivchenkopllc@gmail.com
Attorney for Plaintiff

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

RENEE IVCHENKO, a married woman,

Plaintiff

vs.

KYLE DAVID GRANT; TRAVIS PAUL GRANT; and MARIEL LIZETTE GRANT, d/b/a Rapsheets.org and Bailbondcity.com; JOHN DOES and JANE DOES I-X; BLACK CORPORATIONS I-X; and WHITE COMPANIES I-X,

Defendants.

Case No.: CV2019-090493

COMPLAINT for DAMAGES
(Right of Publicity, Invasion of Privacy, Defamation, Intentional Infliction of Emotional Distress, and Prayer for Legal and Equitable Relief)

(Jury Trial Demanded)

Plaintiff Renee Ivchenko (hereinafter Plaintiff or "Mrs. Ivchenko"), through her undersigned counsel, for her Complaint against the Defendants, alleges the following:

PRELIMINARY STATEMENT

This is an action for violation of Plaintiff's right of publicity, invasion of privacy, libel, and intentional infliction of emotional distress, under applicable decisional law in Arizona. Plaintiff seeks redress for injuries caused by the unlawful conduct of the Defendants, Kyle David Grant, his brother Travis Paul Grant, and Travis Paul Grant's wife, Mariel Lizette Grant, all d/b/a Rapsheets.org and Bailbondcity.com. These Defendants have acted individually and collectively

and such actions have injured Plaintiff. The Defendants' conduct that is the subject of this civil action entails their wrongful appropriation, without consent, of the name, photograph, image, and likeness of Plaintiff for a commercial purpose that benefits only the Defendants.

The Defendants, acting individually and in concert, publish on various websites (the "Websites") the names and photographs (commonly called "mugshots") of individuals who have had some involvement with the state's criminal judicial process, along with information purporting to be a statement of the allegations or charges brought against the individual. The Defendants own the websites "rapsheets.org" and "bailbondcity.com," on which they post arrest records, complete with pictures of arrestees, to www.rapsheets.org and www.bailbondcity.com. The Defendants uses software to "scrape" that information from the Maricopa County Sheriff's Office's website for all or substantially all inmates and arrestees. Although the mugshots are only kept online by the Maricopa County Sheriff's Office for three days, that is sufficient time for the Defendants to capture the images and data using spiders and bot programs. The Defendants then use analytics and search optimization to ensure that each record is among the first search results found when the arrestee's name is entered into a search engine such as Google, Bing or Yahoo.

However, rapsheets.org and bailbondcity.com are not a public safety service or media outlet. Instead, the Defendants post these mugshots online solely in order to profit by generating advertising review through Google Ads, Google's paid advertising product and its main source of revenue. Companies pay for Google Ads so that people will notice their business whenever they are searching Google. These companies only have to pay a website owner whenever someone clicks on the ad. This is known as cost-per-click advertising (CPC). The Defendants generate substantial revenue through the use of Google Ads on their websites.

The Defendants refuse to remove someone's mugshot from the Websites even if they have been found innocent of any crime, or have otherwise had their charges dropped, not filed, expunged, or dismissed, as in Plaintiff's case. Prospective employers (or anyone else) conducting a web search finds, in many cases, intentional misinformation indicating that people are still charged, incarcerated, or on parole years even after release or an adjudication of not guilty. The Defendants intentionally and maliciously set up the Websites to give the false impression people are still incarcerated or have been adjudged guilty of a crime. The end result for many arrestees is job loss, broken families, and homelessness. The end result for the Defendants is substantial profits.

The Defendants' scheme proceeds serially through websites operated by or in conjunction with one another. Individuals who attempt to apply legal pressure on the Defendants in an effort to have their mugshot removed from the Websites are retaliated against and further harmed by the Defendants by having their mugshots placed on two other websites owned and operated by them, including "www.thiswebsiterocks.com," which is devoid of advertisements. Plaintiff's mugshot (one of only two involving an Arizona resident) was placed on this website immediately after Plaintiff's attorney demanded the removal of her mugshot from the Websites. In a further effort to intimidate Plaintiff and damage her reputation, the Defendants also set up a Twitter account featuring Plaintiff's mugshot and that of the second Arizona resident, at Twitter.com/zim_rogers_fans?lang=en. Plaintiff and the second Arizona resident are the only people displayed in the Twitter account, which is set up under a fake name. These websites were established to retaliate against Plaintiff, and act as a deterrent against anyone contemplating legal action against the Defendants. These actions by the Defendants constitute libel and false light, and also have caused Plaintiff significant emotional distress.

The Defendants purport to operate "The World's Largest Arrest Record Database" on their rapsheets.org website. This includes mugshots of approximately 300,000 Arizona residents. This action seeks to put an end to the Defendants' profiteering at the expense of vulnerable people such as Plaintiff. The Defendants will continue to cause Plaintiff harm until they are enjoined from their intentional and malicious violation of her rights, both directly and indirectly through Google, Google Ads, GoDaddy, and others Internet providers that host the Websites.

JURISDICTION AND PARTIES

1. Plaintiff Renee Ivchenko is a resident of Maricopa County, Arizona.

2. The Defendants Kyle David Grant, Travis Paul Grant, and Mariel Lizette Grant, are residents of the state of Florida. They are the owners and operators of the following websites (a) Rapsheets.org, and (b) Bailbondcity.com, and based on information and belief, (c) thiswebsiterocks.com, and (d) Twitter.com/zim_rogers_fans?lang=en. The Defendants are being sued in their individual capacities. This Court has jurisdiction over the Defendants under Arizona's long-arm rule and applicable decisional law, which allows for assertion of personal jurisdiction over a non-resident consistent with federal constitutional due process. Ariz. R. Civ. P. 4.2(a).

3. At all material times, the Defendants (i) committed a tortious act within this state, and (ii) are engaged in substantial and not isolated activity within this state. Sufficient minimum contacts exist between the Defendants and the state of Arizona to satisfy the due process requirements of the United States Constitution. These include directly targeting their Websites to the state, knowingly interacting with residents of the forum state via their Websites, or through sufficient other related contacts.

4. Jurisdiction is proper in this Court because Plaintiff resides in and has suffered injury in Arizona as a result of the Defendants' tortious act of publishing defamatory statements about Plaintiff on the Internet. In addition, jurisdiction is proper because the defamatory statements were published to millions of people in the United States including persons in the state of Arizona.

5. The Defendants solicit customers in the state of Arizona. Upon information and belief, the Defendants have many paying customers who reside in the state of Arizona who each use the Defendants' respective services in the state of Arizona. Upon information and belief, the Defendants conduct continuous and systematic business in the state of Arizona.

6. Defendants JOHN and JANE DOES I-X; BLACK CORPORATIONS I-X; and WHITE COMPANIES I-X, are persons, partnerships, corporations or unincorporated associates subject to suit in a common name whose names are unknown to Plaintiff and who are wholly or partially responsible for the acts complained of, including those who have participated in managing, organizing, marketing, facilitating, and profiting from the operations of the Websites owned and controlled by the Defendants, and therefore, designated by fictitious names pursuant to Rule 10(d), Arizona Rule of Civil Procedure. Plaintiff will ask leave of the Court to substitute the true names of the said parties prior to the entry of judgment herein.

7. Maricopa County is a proper venue, pursuant to A.R.S. §12-401(1). The acts and conduct of the Defendants occurred in Maricopa County. The Defendants' Websites are available to people in Maricopa County.

GENERAL ALLEGATIONS

8. Plaintiff Renee Ivchenko had a booking photo taken in the state of Arizona.

9. With respect to Plaintiff, the Defendants, without permission, consent or knowledge of Plaintiff, reproduced, publicly displayed and distributed Plaintiff's booking photo on the Defendants' respective websites.

10. Plaintiff's image has commercial value, as is shown by the Defendants profiting from the unlawful appropriation of the image for commercial purposes.

11. The Defendants' respective websites, along with Plaintiff's image, were indexed by Yahoo.com and Google.com, and the image appears under Google Images when a web search for Plaintiff's name is conducted.

12. The Defendants' use of Plaintiff's image is for a commercial purpose, among other purposes.

13. The Defendants operate one or more websites that are used to display Plaintiff's image as part of a commercial enterprise.

14. The display by the Defendants of Plaintiff's image is intended, among other things, to subject her to hatred, contempt, or ridicule, or to damage her personal or business repute, or to impair her credit.

15. Each Defendant, acting on their own or in conjunction with one or more of the other Defendants, derives revenue from the Websites through Google Ads and other means.

16. Each Defendant, acting on their own or in conjunction with one or more of the other Defendants, utilizes the Websites to intimidate and defame Plaintiff.

17. Plaintiff's attorney emailed the Defendants a demand letter dated January 15, 2019, requesting that her mugshot be removed from the Websites based on her charges not being filed and/or dismissed. The Defendants refused this request. A more aggressive demand letter

was emailed to the Defendants on February 13, 2019. The Defendants again refused Plaintiff's request by email response dated February 19, 2019.

18. Based on information and belief, the Defendants retaliated against Plaintiff by publishing, or arranging to have published, Plaintiff's mugshot, as well as additional false, malicious, and defamatory statements, on two other websites, www.thiswebsiterocks.com and Twitter.com/zim_rogers_fans?lang=en. Plaintiff's mugshot appeared on these websites on February 19, 2019, the same day the Defendants replied to her second demand letter.

19. Unless the Defendants are enjoined from further use and publication of Plaintiff's image and name, Plaintiff will suffer further irreparable injury.

CAUSES OF ACTION

20. Mrs. Ivchenko is entitled to recover damages from the Defendants jointly and from each of them based on the theories of liability hereinafter enumerated in Counts I through V, and under such other theories of liability as may be appropriate based upon the facts as alleged herein or as revealed during discovery.

COUNT I
VIOLATION OF ARIZONA'S RIGHT OF PUBLICITY

21. Plaintiff incorporates by reference the allegations of each paragraph above into this claim as though fully set forth herein.

22. In doing the acts alleged herein, the Defendants have used for commercial purposes Plaintiff's name, likeness, identity and persona without her consent.

23. The commercial use and misappropriation of Plaintiff's name, likeness, identity and persona is a violation of the Arizona common law right of privacy, which includes the right of publicity.

24. The status of Plaintiff's booking photo and name as part of the public record does not relieve the Defendants of the obligation to obtain her consent before exploiting her persona for commercial gain.

25. The Defendants wrongfully use Plaintiffs' persona for a commercial purpose in multiple ways, including but not limited to, the generation of revenue through Google Ads.

26. As a proximate result of the Defendants' acts alleged herein, Plaintiff has suffered and will continue to suffer damages in an amount to be proven at trial.

COUNT II
INVASION OF PRIVACY

27. Plaintiff incorporates by reference the allegations of each paragraph above into this claim as though fully set forth herein.

28. Defendants intentionally intruded upon Plaintiff's solitude, seclusion or private affairs and concerns. The Defendants' intrusion would be highly offensive to a reasonable person and was unwarranted and unjustified.

29. The Defendants made statements that were untrue and intended to misrepresent Plaintiff's character, history, activities and beliefs.

30. Specifically, the Defendants have utilized Plaintiff's persona without her consent, present her image and arrest information in a manner that suggests that she is still incarcerated, or that criminal charges are outstanding when in fact they have been dismissed.

31. The Defendants also made comments or suggestions that created a false implication about Plaintiff.

32. Defendants knew or reasonably should have known that their statements regarding Plaintiff were false and/or represented her in a false light.

33. The Defendants acted with malice by posting Plaintiff's image and personal information on a bogus Twitter account in retaliation for her threats of initiating legal action against them.

34. These false and/or misleading statements were made to the public through the Internet. The Defendants had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which Plaintiff would be placed.

35. The Defendants invaded Plaintiff's privacy, with the sole purpose of making money and intimidating anyone who threatens to derail their scheme. As a result, Plaintiff has suffered mental and emotional damages as a proximate cause of such intrusion.

COUNT III
DEFAMATION - LIBEL

36. Plaintiff incorporates by reference the allegations of each paragraph above into this claim as though fully set forth herein.

37. Defendants have published Plaintiff's image on various Websites that they own and control. The language in the Websites refer to Plaintiff by name throughout, was made of and concerning Plaintiff, and was so understood by those who see the Websites.

38. Defendants knew that the statements about Plaintiff described above were false and/or recklessly disregarded the falsity of these statements when they published them, in that any criminal charges pertaining to Plaintiff have been dismissed, or were never charged in the first place.

39. The Websites and statements contained therein are libelous on their face. They clearly expose plaintiff to hatred, contempt, ridicule and obloquy because they insinuate that Plaintiff is guilty of having committed a crime.

40. The statements about Plaintiff adversely affect Plaintiff in her professional life and her reputation and Plaintiff has been damaged by their publication. As a proximate result of the above-described publication, Plaintiff has suffered loss of her reputation, shame, mortification, and injury to her feelings.

41. The above-described publication was not privileged because it was published by defendants with malice, hatred and ill will toward Plaintiff and the desire to injure her, in that the Defendants continued to defame Plaintiff after she objected to the publication of her image on the Defendants' Websites, by placing her image on two additional Websites as retribution.

42. Defendants are liable to Plaintiff as a result of these false and defamatory statements for actual, presumed and punitive damages in an amount to be determined at trial, but not less than $1,000,000.

COUNT IV
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

43. Plaintiff incorporates by reference the allegations of each paragraph above into this claim as though fully set forth herein.

44. Defendants, by and through the making of such false, defamatory, and libelous statements, and the false light in which Plaintiff has been placed, behaved intentionally and/or recklessly.

45. Defendants, by and through the making of such false, defamatory, and libelous statements, intended to cause emotional distress upon Plaintiff.

46. The making of such false, defamatory, and libelous statements by Defendants was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

47. Plaintiff has suffered and continues to suffer severe emotional distress and emotional injury due to the Defendants' actions,

48. Defendants' aforementioned actions were the direct and proximate cause of such severe emotional distress and emotional injury to Plaintiff.

49. Plaintiff suffered and continues to suffer mental anguish as a result of being defamed and libeled by Defendants, and said mental anguish is of a nature that no reasonable person could be expected to endure.

50. As a result of these false and defamatory statements and false light in which Plaintiff has been placed, Defendants are liable to Plaintiff for actual, presumed and punitive damages in an amount to be determined at trial.

COUNT V
PUNITIVE DAMAGES

51. Plaintiff incorporates by reference the allegations of each paragraph above into this claim as though fully set forth herein.

52. Defendants' aforementioned conduct was conscious, deliberate, intentional, and/or reckless in nature.

53. Defendants' aforementioned conduct was undertaken in a state of mind which evidences hatred, ill will, or a spirit of revenge. Defendants' evil hand was guided by an evil mind.

54. Defendants' aforementioned conduct evidences a conscious disregard for the rights of Plaintiff and has caused, and continues to cause, her substantial harm.

55. As a result, Plaintiff is entitled to punitive damages and attorneys' fees.

WHEREFORE, Mrs. Ivchenko requests that the Court enter judgment in her favor and against the Defendants and each of them as follows:

1. For general and special damages in an amount that Plaintiff will prove;

2. For punitive damages to be consistent with proof in this action;

3. Plaintiff is requesting not less than $1,000,000 in actual and punitive damages;

4. Appropriate preliminary and/or permanent injunctive relief;

5. For Plaintiff's reasonable costs and attorney's fees incurred herein;

6. For such other and further relief as the Court deems just.

DATED this ___ day of May 2019.

LAW OFFICES OF ANDREW IVCHENKO

/s/ Andrew Ivchenko
Andrew Ivchenko
Attorney for Plaintiff

Original filed this __day of
May, 2019 with:

Clerk of Court
Maricopa County Superior Court
222 E Javelina Ave.
Mesa, AZ 85210

By: */s/ Beth Rees*
Beth Rees

Exhibit B

David S. Gingras, #021097
Gingras Law Office, PLLC
4802 E. Ray Road, #23-271
Phoenix, AZ 85044
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David@GingrasLaw.com

Attorneys for Defendants
Kyle David Grant; Travis Paul Grant and
Mariel Lizette Grant

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Renee Ivchenko, a married woman,

Plaintiff,

v.

Kyle David Grant; Travis Paul Grant; Mariel Lizette Grant; d/b/a Rapsheets.org and Bailbondcity.com; John Does and Jane Does I–X; Black Corporations I–X; and White Companies I–X,

Defendants.

Case No._____

NOTICE OF REMOVAL

Defendants Kyle David Grant, Travis Paul Grant and Mariel Lizette Grant ("Defendants") give notice that this action is hereby removed from the Maricopa County Superior Court to the United States District Court for the District of Arizona pursuant to 28 U.S.C. §§ 1441 and 1446.

Pursuant to District Court Local Rule LRCiv 3.6(a), undersigned counsel certifies that a copy of this Notice has been filed with the Clerk of the Maricopa County Superior Court in the original state court proceeding, Case No. CV2019-090493.

1. Removal Is Timely Pursuant to 28 U.S.C. § 1446(b)

The original Complaint in this matter, attached hereto as Exhibit A, was filed in the Maricopa County Superior Court on May 9, 2019. Defendants' first notice of this action

occurred when the Complaint and summons were served on the first defendant, Mariel Grant, on May 16, 2019. This matter was removed less than thirty days thereafter. Removal is therefore timely pursuant to 28 U.S.C. § 1446(b)(1).

2. The District Court Has Diversity Jurisdiction

The District Court possesses diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1). According to ¶ 1 of the state-court Complaint, the Plaintiff is a citizen of the State of Arizona residing in Maricopa County. According to ¶ 2 of the Complaint, each Defendant is a citizen of the State of Florida. There is thus complete diversity of citizenship between the Plaintiff and all Defendants.

According to ¶ 42 of the Complaint as well as its prayer for relief, Plaintiff seeks compensatory damages in excess of $1,000,000.00, plus punitive damages, plus attorney's fees. This establishes that the amount in controversy exceeds $75,000.00. Accordingly, this court possesses diversity jurisdiction. *See Home Depot U. S. A., Inc. v. Jackson*, No. 17-1471, 2019 WL 2257158, *2 (May 28, 2019); *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004).

3. All Served Defendants Consent to Removal

All three named Defendants consent to and join in removal of this action. Consent and joinder by the unknown John/Jane Doe Defendants is not required. *See Fristoe v. Reynolds Metals Co*., 615 F.2d 1209, 1213 (9th Cir. 1980) (explaing, "the unknown defendants sued as 'Does' need not be joined in a removal petition.") (citing *Ronson Art Metal Works, Inc. v. Hilton Lite Corp*., 111 F.Supp. 691 (N.D.Cal. 1953); *Grigg v. Southern Pacific Co*., 246 F.2d 613, 619–20 (9th Cir. 1957)).

4. State Court Pleadings/State Court Record

Copies of the Complaint and all pleadings filed in the state court proceedings Defendants are attached hereto as **Exhibit A**. Pursuant to Arizona District Court Local Rule LRCiv 3.6(b), undersigned counsel verifies under penalty of perjury that the records attached hereto as Exhibit A are true and complete copies of all pleadings and other documents filed in the state court proceeding.

GINGRAS LAW OFFICE, PLLC
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PHOENIX, AZ 85044

5. Pending Motions

Pursuant to Arizona District Court Local Rule LRCiv 3.6(c), undersigned counsel states there are no motions, hearings or other matters currently pending in the state court proceeding.

DATED: May 29, 2019.

GINGRAS LAW OFFICE, PLLC
/s/ David S. Gingras
David S. Gingras, Esq.
Attorney for Defendants
Kyle David Grant; Travis Paul Grant and
Mariel Lizette Grant

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I transmitted the attached document to the Clerk's Office for filing, and emailed a copy of the foregoing to:

Andrew Ivchenko, Esq.
LAW OFFICES OF ANDREW IVCHENKO
4960 S. Gilbert Road, #1-226
Chandler, AZ 85249
Email: aivchenkopllc@gmail.com
Attorney for Plaintiff

/s/David S. Gingras

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4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

Exhibit C

Andrew Ivchenko, Esq.
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4960 S. Gilbert Road, #1-226
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Email: aivchenkopllc@gmail.com
Phone: (480) 250-4514

Attorney for Plaintiff
Renee Ivchenko

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RENEE IVCHENKO, a married woman, Plaintiff, v. Kyle David Grant; Travis Paul Grant; and Mariel Lizette Grant, Defendants.	No. CV-19-03756-PHX-JJT **NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO F.R.C.P. 41(a)(1)(A)(i)**

NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO F.R.C.P. 41(a)(1)(A)(i)

Pursuant to F.R.C.P. 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, the Plaintiff, Renee Ivchenko, and her counsel, hereby give notice that the above captioned action is voluntarily dismissed, without prejudice against the defendants.

Dated this 30th day of May, 2019.

LAW OFFICES OF ANDREW IVCHENKO
/s/ Andrew Ivchenko
Andrew Ivchenko, Esq.
Attorney for Plaintiff Renee Ivchenko

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2019, I emailed the attached document to David S. Gingras, Esq., and requested that he transmit it to the Clerk's Office for filing:

David S. Gingras, Esq.
Gingras Law Office, PLLC
4802 E. Ray Road, #23-271
Phoenix, AZ 85044
E-mail: David@GingrasLaw.com
Attorney for the Defendants

/s/ Andrew Ivchenko***

*** Electronically filed by counsel for Defendants with permission from counsel for Plaintiff.

Exhibit D

David Gingras

From: David Gingras
Sent: Friday, January 10, 2020 5:41 PM
To: 'David N. Ferrucci'
Cc: David G. Bray; Paxton D. Endres
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355
Attachments: O'Kroley v. Fastcase, Inc., 831 F.3d 352 (6th Cir. 2016).doc; Ivchenko - Consent to Diversion.PDF

David,

Thanks for the quick response. I am also pretty wide-open on Monday, so I'm happy to talk any time that works for. Just tentatively, I'll try to call you about 11 am, but if that's not the best time, we can do it later in the afternoon or whatever. Also, as noted below, I understand this email is fairly long and is being sent late on a Friday afternoon, so if you need more time to digest my comments prior to talking, that's fine; just let me know.

Having said that, I think these types of calls are most productive when you have some advance notice of the subjects I want to discuss, so I wanted to give you a head's up in that regard. However, before I explain my points, I also wanted to let you know – I am currently co-counsel on a matter with another attorney in your firm (Chuck Price). That case is *Xcentric Ventures, LLC v. Zarokian*, Case No. 18-CV-3661 (D.Ariz.). Obviously this is a completely different case involving different clients and different issues, so I am not mentioning it as any sort of conflict (it is clearly not). I am just mentioning to let you know that I have a good working relationship with your firm, so please do not take my comments below too harshly.

Here's the deal – after speaking to my client and reviewing the facts, we have some concerns that the Complaint you filed is not compliant with Rule 11. At this point, I am NOT threaten to seek sanctions; I am just writing to let you know about my concerns. I am also assuming your client probably did not inform you of all the facts, so I want to take a minute to bring some points to your attention.

First, as you probably know, Mrs. Ivchenko was arrested in April 2018, and her mugshot was posted online by the Maricopa County Sheriff's Office within a day or two, as per their normal practice. My client's website (rapsheets.org) automatically "scrapes" these mugshots within a day or two, and they are republished on my client's site virtually instantly. Based on this, we know that Mrs. Ivchenko's mugshot first appeared on rapsheets.org in April 2018. I think the exact date is April 21, 2018, but the exact date isn't relevant.

As I'm sure you know, the statute of limitations for defamation is one year per A.R.S. § 12-541, and that date begins to run on the first date of publication, not when the plaintiff discovers the publication. *See Larue v. Brown*, 235 Ariz. 440, 443 (App. 2014) ("Arizona provides that the statute of limitations for a defamation action begins to run upon publication of the defamatory statement.") (emphasis added).

As the court also noted in *Larue*, Arizona has adopted the Uniform Single Publication Act, A.R.S. § 12-651(A) which further provides: "No person shall have more than one cause of action for damages for libel, slander, invasion of privacy or any other tort founded upon a single publication, exhibition or utterance …" and this rule fully applies to statements published on the Internet.

Based on this, the following points seem beyond dispute:

- If Mrs. Ivchenko had any claim against anyone arising from the publication of her mugshot, that claim initially arose in April 2018 and (at least as to rapsheets.org) it expired in April 2019 – many months before this lawsuit was filed.
- Based on the Single Publication Rule, Mrs. Ivchenko cannot assert multiple different claims based on the same Internet post; she is only allowed a single claim, and that claim is now time-barred.

Again, based on the facts as I understand them, it seems beyond question that Mrs. Ivchenko's new suit is untimely, at least as it relates to the publication of her mugshot on my client's website (I understand the information posted on Twitter is a different issue which I will address separately). Absent some other explanation, this aspect of the case appears to be inconsistent with Rule 11 because it is entirely without merit. Indeed, aside from Rule 11, it is unethical for a lawyer to pursue claims which they know are untimely. *See In re Aubuchon*, 233 Ariz. 62, 68-69, 309 P.3d 866 (2013) (affirming disbarment of deputy county attorney who, *inter alia*, pursued charges knowing they were barred by the statute of limitations).

I presume that Mr. Ivchenko did not inform you of these facts prior to retaining your firm. However, now that you are aware of the facts, I do not believe Rule 11 permits you to continue prosecuting that aspect of the case. Of course, if you are aware of any factual or legal grounds that would show Mrs. Ivchenko's claims are timely, I would like to hear what they are. Otherwise, I would expect you to withdraw that aspect of their case. If that does not happen, I don't see any option other than for me to prepare and serve a draft Rule 11 motion for the reasons stated above. I hope that won't be necessary, but I will pursue that course of action if given no other choice.

Second, entirely separate and aside from this issue, there is a separate problem with your client's claims based on the publication of her mugshot. In short, all of the information that gives rise to her claim (i.e., the mugshot itself, and a description of the charges filed) was originally published on the Internet by a third party source; i.e., the MCSO. Because this information was initially published by a third party, not by my clients, even assuming the publication of that information was unlawful (which it is not), your client's only recourse would be against the MCSO. Any claims against my clients would be barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1).

The most analogous case that supports this conclusion is *O'Kroley v. Fastcase, Inc*., 831 F.3d 352 (6th Cir. 2016) (attached). Although this case did not involve a mugshot, it did involve criminal court records scraped from one source and reposted in another location. The court explained this type of republication of criminal records is fully protected by the Communications Decency Act, and thus the republisher (in that case, Google) was not liable as to any of plaintiff's claims including: "'libel' … 'invasion of privacy' … 'failure to provide due process' … 'cruel and unusual punishment,' … 'cyber-bullying' … [and] 'psychological torture.'". Again, this result is true *even assuming* the original publication was unlawful.

For what it's worth, although it involved different facts, I personally litigated one of the leading cases in Arizona involving the Communications Decency Act. *See Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008).

Again, if you are aware of any facts that would show your clients' claims are *not* barred by the CDA (to the extent they are based on my client "republishing" information from the MCSO's website), I would like to hear your position including any legal authority that supports your position. However, based on my review of the facts, I do not see any basis to argue that the CDA doesn't apply here. To be clear -- the fact that my client's website includes commercial ads does not affect the analysis because: A.) Google does the same thing; and B.) the CDA does not contain a "for-profit exception". *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011); *see also Global Royalties*, 544 F.Supp.2d at 933 (explaining, when CDA applies, "Unless Congress amends the statute, it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, *or how they might use it to their advantage*.") (emphasis added).

Third, entirely separate and apart from the statute of limitations and the CDA, your Complaint appears to suggest – falsely – that Mrs. Ivchenko was somehow exonerated or innocent of all wrongdoing, and thus my clients defamed her

by implying her guilt. Again, I do not think a court or jury would even reach that question for many different reasons, but if they did, I do not think Rule 11 would permit you to make this argument.

The reason is very simple – although Mrs. Ivchenko did not *plead* guilty, as part of her plea, she signed a statement (attached) in which she admitted that she was, in fact, guilty of the crimes with which she was charged. Having made that admission (which is really not surprising given the circumstances), Mrs. Ivchenko cannot argue that her reputation was somehow harmed by a *false* implication that she committed a crime. Put simply, Mrs. Ivchenko DID commit a crime, and she admitted in writing that she was guilty of that criminal conduct. The fact that she avoided a criminal *conviction* is wholly beside the point because the *gist* of the statement remains entirely true.

I understand that it is technically possible that Mrs. Ivchenko could try to argue that, in fact, she was not guilty of any crime, thus showing that she lied to the criminal court in her plea agreement. However, under the doctrine of judicial estoppel, I am confident that such an argument would not be permitted in our case. Mrs. Ivchenko made a representation to the court that she was, in fact, guilty of a crime. Having made that admission and having obtained a benefit from it, she would be estopped from taking a different position in our case. As such, Mrs. Ivchenko cannot deny that she did, in fact, commit a criminal act.

Fourth, and finally, I understand your client is not happy with various statements posted on this Twitter account: https://twitter.com/zim_rogers_fans. Putting aside the fact that it appears everything posted about your clients on that page is either true, or simply the author's opinion, the simple fact is that my clients have nothing to do with this page. They did not create the page, have never posted anything there, and have no idea who is behind it.

While I appreciate that your clients might not be willing to accept this bare denial, the fact remains that my clients are not under any burden to *disprove* a specious allegation. On the contrary, Rule 11 requires a lawyer to conduct a reasonable investigation *first*, before making accusations in a pleading, and the lawyer must obtain evidence that reasonably supports his/her contentions. To my knowledge, that did not occur here. At this point, other than sheer speculation on the part of your clients, I am not aware of any evidence to show that my clients have any involvement in running this page. I am also not aware of any evidence showing that your clients made any attempt to identify the person responsible for this page (which could easily have been done by, for instance, filing a pre-suit petition under Rule 27(a)).

Rather than conducting *any* pre-suit investigation (much less a reasonable one), your clients have now filed *two* lawsuits against my clients accusing them of running the Zim Rogers Twitter page without any factual basis for that allegation. Again, I do not believe these actions are consistent with Rule 11.

Based on the above, I would like to know if there are additional facts/legal points that I have somehow missed. I fully understand that when you filed this action, you may have been relying on false/incomplete information from your clients. However, based on the points set forth above, I do not believe that Rule 11 would permit the pursuit of any aspect of this case. If you disagree, I would like to hear the factual and legal grounds for that position.

Having said all this, I understand that I have given you a lot of information and you may need additional time to speak to your clients and conduct further research prior to talking on the phone. If you would prefer to have additional time prior to talking on Monday, just let me know.

Email Address: [redacted]

Phone Number(s): 480-625-7709

RV 5. I do not contest my guilt in this matter. I admit that I committed

the charged offenses as further explained in the attached factual basis. I acknowledge that this admission of guilt and factual basis may be used against me if I do not successfully complete the deferred prosecution program and I decide to have a trial in this matter.

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From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Friday, January 10, 2020 6:30 AM
To: David Gingras <david@gingraslaw.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

Mr. Gingras,

Let's schedule a call for Monday (if you are available). My schedule is fairly wide-open, so let me know what time works best for you.

Thank you,

David Ferrucci

David N. Ferrucci Member

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From: David Gingras <david@gingraslaw.com>
Sent: Thursday, January 9, 2020 11:17 AM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>; David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>
Subject: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

Counsel,

I have been retained to represent Kyle and Travis Grant (and their spouses) in the matter you recently filed on behalf of Mr. and Mrs. Ivchenko. My understanding is that Travis Grant was served yesterday, but Kyle Grant has not been served. In any event, I am authorized to accept/waive service on behalf of Kyle, so further attempts to serve him are not necessary.

Prior to moving forward, I wanted to discuss this case with whomever is lead counsel. Can you please let me know who is the best person to speak with, and what day/time would work for you. I'm available later this afternoon and most of tomorrow.

Thanks.

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Exhibit E

David Gingras

From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Thursday, January 30, 2020 9:04 AM
To: David Gingras
Cc: David G. Bray; Paxton D. Endres; Michael S. Rubin
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

We have reviewed your contentions. We do not agree with your assessment.

Thank you,

David

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From: David Gingras <david@gingraslaw.com>
Sent: Friday, January 10, 2020 5:41 PM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

Thanks for the quick response. I am also pretty wide-open on Monday, so I'm happy to talk any time that works for. Just tentatively, I'll try to call you about 11 am, but if that's not the best time, we can do it later in the afternoon or whatever. Also, as noted below, I understand this email is fairly long and is being sent late on a Friday afternoon, so if you need more time to digest my comments prior to talking, that's fine; just let me know.

Having said that, I think these types of calls are most productive when you have some advance notice of the subjects I want to discuss, so I wanted to give you a head's up in that regard. However, before I explain my points, I also wanted to let you know – I am currently co-counsel on a matter with another attorney in your firm (Chuck Price). That case is *Xcentric Ventures, LLC v. Zarokian*, Case No. 18-CV-3661 (D.Ariz.). Obviously this is a completely different case involving different clients and different issues, so I am not mentioning it as any sort of conflict (it is clearly not). I am just mentioning to let you know that I have a good working relationship with your firm, so please do not take my comments below too harshly.

Exhibit F

David Gingras

From: David Gingras
Sent: Friday, February 14, 2020 11:58 AM
To: David N. Ferrucci
Cc: David G. Bray; Michael S. Rubin
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355
Attachments: SOF ISO MSJ - DRAFT.pdf

David,

Following-up on our previous discussion about this, attached is a draft Statement of Facts in support of the MSJ I'm planning to file shortly. The MSJ isn't quite done, and I don't think you need to review the entire motion to fully understand the relevance of these facts and how they support my arguments, but these are the main points I'm currently planning to argue:

1.) All Claims Are Barred By 47 U.S.C. § 230(c)(1) To The Extent They Are Based on The Republication of Information Provided By MCSO
2.) All Claims Are Untimely To The Extent They Arise From Information Published on Rapsheets.org
3.) The Publication of Mugshots & Charging Information Is Privileged Under Arizona Law
4.) Mrs. Ivchenko's "Defamation By Implication" Claim Fails
    a. Rapsheets.org Does Not Imply Guilt
    b. Any Implication That Mrs. Ivchenko Committed A Crime Is True
5.) Plaintiffs Have No Evidence Defendants Posted Any Statements About Them On Twitter

As you can see, these are primarily legal arguments, not factual ones (other than points 4(b) and 5).

As discussed, if you genuinely believe you need discovery to dispute any of the facts we claim are undisputed, please let me know. I do not want you to waste time with a Rule 56(d) motion if it is clear a point could be genuinely disputed.

With regard to the Twitter stuff, I assume you're planning to subpoena Twitter. I won't oppose that effort except to note that in order to satisfy the requirements of *Mobilisa v. Doe*, you would need to establish (with supporting evidence such as affidavits from your clients) that something posted on Twitter was actually *substantially false*. Based on my knowledge of the facts, I see no way your clients could do this without perjuring themselves. If that were to occur, for instance if Mr. Ivchenko signed an affidavit that contained false statements, I would have a mandatory duty to report this to the AZ Bar per ER 8.3(a).

With regard to fact #16, I assume you may take the position that you need discovery to respond to this. Again, while I don't want this process to be more contentious than necessary, I will note that you made a Rule 11 certification to the court that you *already had evidentiary support* on this specific point at the time the Complaint was filed. As such, discovery on that issue would not be necessary *unless* Rule 11 was violated.

Having said that, if you want to take discovery regarding the narrow issue of whether my clients solicit or accept money to remove content from their site, I'm happy to let you do this, provided you understand that I will use this as support for the request for Rule 11 sanctions once you verify that fact #16 is true. Of course, if you *do* have evidence showing that fact #16 is not true, I would appreciate you disclosing that to me as soon as possible.

In closing, please understand that I want to give you a reasonable amount of time to review the Statement of Facts so you can give me an informed response. At the same time, my clients want to proceed with filing the MSJ as soon as possible. As such, time is of the essence here, so I would appreciate hearing back from you early next week.

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From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Monday, February 10, 2020 10:44 AM
To: David Gingras <david@gingraslaw.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

Thanks David.

David N. Ferrucci Member

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From: David Gingras <david@gingraslaw.com>
Sent: Friday, February 7, 2020 5:25 PM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

I assume you've received copies of the stuff I just filed through TurboCourt. If that didn't come through for any reason, please let me know.

Moving forward, as I mentioned the plan is very simple – I'm in the process of drafting a very basic MSJ. The main arguments will be:

1.) The CDA bars all claims to the extent they are based on the republication of 3rd party information;
2.) The SOL bars all claims to the extent they are based on the mugshot posted on my clients' site in April 2018;
3.) Any statement that implies Mrs. Ivchenko was guilty of a crime is literally true based on her own written admission of guilt (she is judicially estopped from denying that admission);
4.) Plaintiffs have zero evidence to show Defendants are responsible for any of the information posted on Twitter.

I will probably also argue substantial truth as it relates to the allegation that your clients "defrauded" the copyright office, but I am still waiting to get a copy of the submission material back from the copyright office so I can verify this (I requested this a few weeks ago but things move slow over there).

Anyway, as I told you on the phone, if you genuinely believe you need discovery to respond to the MSJ, then let's talk about that. I won't make you waste time with a 56(d) motion *if* you have valid grounds for needing more time. If I agree the discovery would affect any of the issues, then I am happy to hold off on filing the motion until you've had a chance to get whatever info you need. I assume you'll want to subpoena Twitter, but beyond that I'm not sure what discovery you would need to respond to any of the other issues. Either way, I am happy to provide you with a draft of the MSJ prior to filing so you can evaluate this issue without guesswork.

Have a good weekend and I'll be in touch next week.

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From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Wednesday, February 5, 2020 10:20 AM
To: David Gingras <david@gingraslaw.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

Thank you for the response. I still think we may be able to resolve the issue. I have a pretty busy day today, but can you accommodate a call around 11 am tomorrow?

Thank you,

David

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From: David Gingras <david@gingraslaw.com>
Sent: Monday, February 3, 2020 12:19 PM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

I'm happy to continue talking to you, but obviously that can't continue forever. The discussion also should be simple as we only have two choices – your clients can drop their complaint, or I have to file something with the court, and given the facts of this case, if I have to file something with the court, it will include a request for sanctions under Rule 11. I am not saying that to be an asshole or because I think threats are impressive. I am saying it because this case is so egregiously meritless that I think sanctions are warranted.

Just to address a couple of your comments –

First, regarding the Jennifer Becker Twitter stuff, I strongly disagree with your assertion that I have somehow failed to explain why "the complaint as pled fails to satisfy Rule 11 standards vis-à-vis this point."

The complaint literally contains nothing but pure speculation to suggest the Grants ***might*** have something to do with the Jennifer Becker page. As I understand it, your argument is that the Twitter page contains comments primarily attacking a *different plaintiff* (Zim Rogers) who filed a *different lawsuit* (in California) against a *different website* (JustMugshots.com) that my clients have absolutely no relationship with, and then subsequently someone used the page to post some comments about your clients.

I honestly don't see how you are connecting those dots to conclude my clients as having anything to do with the page. Isn't is just as likely (even more likely) that the person running the page is/was involved with Justmugshots.com, and they decided to criticize your clients simply because they are hostile to people who seek to suppress mugshots like your clients are doing?

I understand you also point to the fact that there was a Tweet that mentions emails from your client which threatened litigation (without ever explaining *who* was being threatened).

Bear in mind – in addition to presenting legal demands to wholly unrelated sites like Google and Twitter (which may or may not have included threats to sue), your clients have actually filed at least four separate lawsuits arising from Mrs. Ivchenko's arrest, and only two of those cases involve my clients. Why couldn't the negative comments on Twitter have come from any of the numerous other people your clients have sued?

It is also my understanding that Mrs. Ivchenko's mugshot was posted on *numerous* other unrelated sites (some of which were referenced in her initial lawsuit against my clients), and apparently the mugshot was removed from those

sites. This suggests that Mr. Ivchenko either threatened those other sites, or it is possible he paid them to remove the mugshot and is simply angry that my clients refused to do the same thing. Again, ANY of the other unrelated persons/sites that Mr. Ivchenko has threatened could just as easily be responsible for the statements posted on Twitter.

Clearly, Mr. and Mrs. Ivchenko have shown themselves to be very active litigants willing to threaten anyone who crosses their path. As such, the fact that *someone* claims to have *seen* emails from Mr. Ivchenko threatening to sue *someone* (without ever mentioning my clients) does absolutely nothing to implicate my clients as the only possible (or even likely) parties responsible for the Jennifer Becker Twitter account. THAT is why the complaint violates Rule 11 vis-à-vis the part that relates to Twitter.

As low as the pleading standards are under Rule 8, I do not believe any of these points even come close to showing a *plausible* theory that my clients have any responsibility for this page. Put simply, your clients have threatened to sue many people, and it is undisputed they have actually sued many people, including people who have nothing to do with my clients or their site. That fact illustrates why that aspect of the case is literally based on nothing more than pure (if not wholly arbitrary) speculation.

Also, beyond sheer guessing, your clients have done no investigation whatsoever to determine the identity of the person running the Twitter page. They could easily have filed a Rule 27 petition to obtain a subpoena to Twitter. Of course, this would require your clients to provide an affidavit attesting to the fact that the Twitter page contains false statements of fact. Based on my understanding of the situation, your clients could not sign such an affidavit without committing perjury because, as I previously said, it appears undisputed that your clients DID fraudulently obtain a copyright registration from the U.S. Copyright Office pertaining to Mrs. Ivchenko's mugshot. It also appears undisputed that after obtaining this registration (which your clients had absolutely no legal right to do), Mr. Ivechenko sent one or more legal demands under the DMCA to sites including Twitter and Google which falsely represented that Mrs. Ivchenko's copyright was being infringed.

Putting aside any other issues such as the fact that my clients have nothing to do with the page, as far as I can tell, everything posted on the Jennifer Becker Twitter account was and is 100% factually true. I do not believe Rule 11 allows a plaintiff to bring a defamation claim when they know the underlying speech is true, nor do I believe Rule 11 allows a plaintiff to commence such a case without performing any investigation to verify that they are suing the correct person.

Beyond the Twitter issue, there is another serious problem with your argument that my clients are using mugshots for the purpose of "advertising". I am familiar with the caselaw in this area, and I understand there is at least some authority to support the idea that the use of a name/image in advertising falls outside the scope of the CDA's protection.

The problem here is that the facts do not support this narrow argument. I understand you claim the ads on my clients' site are both misleading *and* the ads are created by my clients. If you had performed *any* pre-suit investigation, you would know that both of those assertions are 100% false.

Here are the facts -- every "ad" appearing on my clients' site is clearly designated as a Google AdSense ad. You can see this yourself simply by looking at the page. All Google AdSense ads contain a blue triangle in the corner which clearly designates that content as a Google-created advertisement. Below is a screenshot with these ads circled.

As anyone familiar with Google AdSense could tell you, the content of these ads is created by Google (or Google's advertising customers), and the choice regarding which ads to display is solely controlled by Google. Because of this, depending on various factors controlled by Google, a person visiting my clients' website might see an advertisement for pet food, or hair care products, or new cars, and others may see ads for 3rd party public records vendors like the ones shown below. In any event, the choice regarding which content to display, and whether the content is misleading or not, is entirely controlled by Google and its customers who paid for these ads, not by my clients.

For that reason, I am 100% confident that the CDA applies to both my clients' publication of your client's mugshot and, separately, the CDA also applies to the Google ads appearing on the page. Even assuming those ads are somehow

misleading (which I am not in a position to judge at this time), your clients' sole remedy is to pursue claims against Google, not against my clients. Of course, no court anywhere has ever held that CDA protection can be lost simply because a website happens to display 3rd party advertising from a source like Google. If anything, that is precisely the type of scenario where the CDA is intended to apply.

Finally, you made a comment about how my clients' "business practices" are somehow improper. Again, this position appears to be based on your misunderstanding of the facts, which, in turn, grows from your failure to perform a Rule 11-sufficient pre-suit investigation.

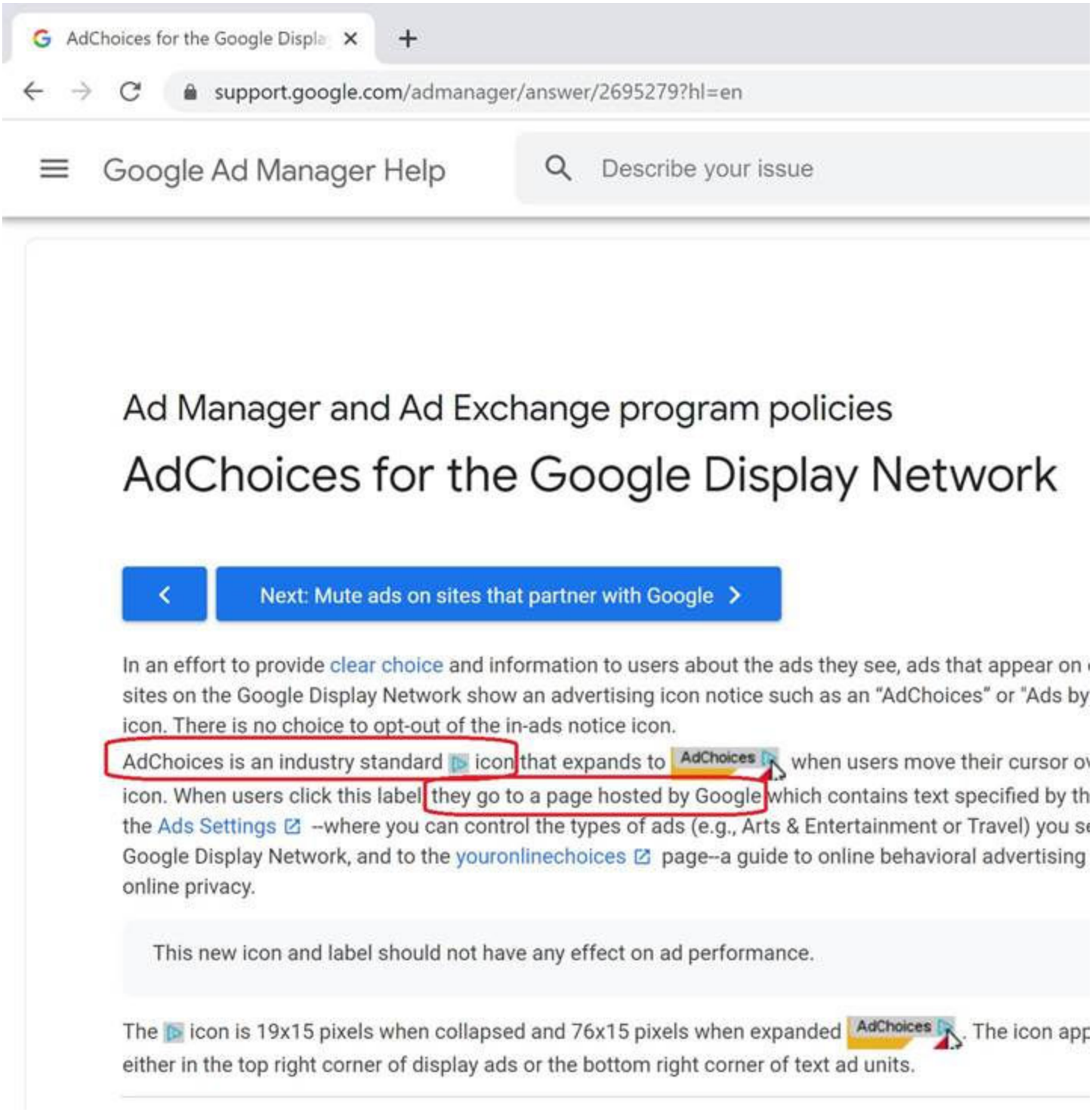
Here's the deal – my clients' sole revenue source is from Google AdSense ads. They have no other revenue source – PERIOD. They do not charge money to remove photos, they do not accept money to remove photos, and, indeed, they voluntarily removed Mrs. Ivchenko's photo even though they were under no obligation to do so.

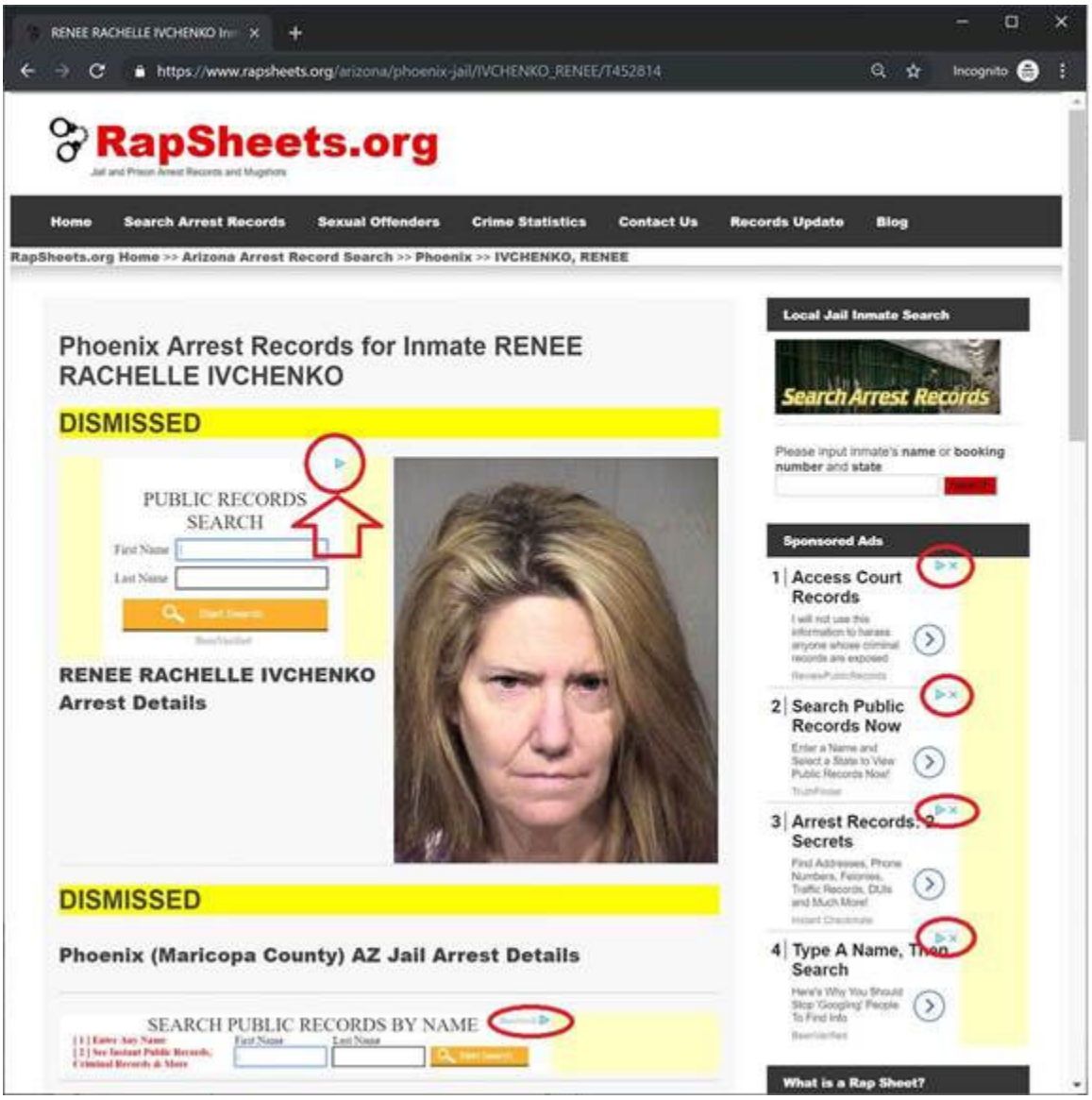
I am fully aware of the fact that some other courts have issued adverse rulings against mugshot websites (including against your client Mugshots.com). But the facts of those cases were different – in those cases, the websites were accepting paid removals. Although I would argue this is NOT actionable for other reasons, *e.g. Levitt v. Yelp*, I understand and respect the fact that some courts have ruled otherwise.

But these rulings are always factually limited to cases where the websites are charging or accept money for removals. My clients understand this, which is why they don't engage in that practice. To be sure, they make a lot less money from AdSense than they would if they accepted paid removals, but they are not willing to incur the legal risk that would result from that practice. As such, they don't offer or accept paid removals.

I understand your clients may *speculate* that this simply isn't true, and that ***maybe*** my clients are taking money for removals. All I can say in response to that is: A.) if it still has any meaning at all, Rule 11 doesn't permit plaintiffs to sue based on nothing more than sheer speculation and guesses; and B.) Rule 11 doesn't allow you to shoot first and ask questions later; i.e., you can't sue my clients based on a guess they are accepting money for removals, and then ask them to prove you're wrong. That simply isn't how this stuff works.

Having said all that, my clients are ready, willing, and able to litigate this case. They are happy *not* to litigate, but at this point I don't see that your clients are open to any other result.


AdChoices for the Google Displa
support.google.com/admanager/answer/2695279?hl=en
Google Ad Manager Help
Describe your issue
Ad Manager and Ad Exchange program policies
AdChoices for the Google Display Network
Next: Mute ads on sites that partner with Google
In an effort to provide clear choice and information to users about the ads they see, ads that appear on
sites on the Google Display Network show an advertising icon notice such as an "AdChoices" or "Ads by
icon. There is no choice to opt-out of the in-ads notice icon.
AdChoices is an industry standard icon that expands to AdChoices when users move their cursor ov
icon. When users click this label they go to a page hosted by Google which contains text specified by th
the Ads Settings --where you can control the types of ads (e.g., Arts & Entertainment or Travel) you se
Google Display Network, and to the youronlinechoices page--a guide to online behavioral advertising
online privacy.
This new icon and label should not have any effect on ad performance.
The icon is 19x15 pixels when collapsed and 76x15 pixels when expanded AdChoices. The icon app
either in the top right corner of display ads or the bottom right corner of text ad units.



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From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Monday, February 3, 2020 7:47 AM
To: David Gingras <david@gingraslaw.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David:

If you are sincere about continuing to meet and confer in good faith over your contentions, then let's continue to do so. I believe that we can work together to resolve these issues.

We appear to have made some headway. I think you now recognize that that the defamation claim targets the statements on the twitter account and therefore the claim is not time-barred (nor does it have anything to do with the true or falsity of an arrest photo). That claim is directed at the John and Jane Doe defendants and alleges coordination with the Twitter account by your clients. As I've explained, there is a sufficient basis to allege that coordination. I note that unlike the portions of your email addressing the non-issue of your claimed statute of limitations defense to defamation, you cite no case law to support for your contention that the complaint as pled fails to satisfy Rule 11 standards vis-à-vis this point. Our research indicates to the contrary. But if you have case, please let us know.

Again, I am well aware you have defenses to the claims, including the defamation claim. But I don't even have to look at *Green Acres* to know that case does not provide an absolute privilege for publishing court records outside a court proceeding. So if you are trying to convince me about the weakness of the claims, you are going to have to do better than lodge obviously false statements of the law. With all due respect, this is hardly our first rodeo.

As for your CDA defense, as we have shown, it has been rejected several times in factually analogous cases involving defendants who exploit arrest photos, such as your clients. To be blunt, the legal tide is clearly turning against your client's exploitive and damaging business model. Plaintiffs' right of publicity and other claims are thus all clearly warranted by existing law and/or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.

Again, if you are sincere about meaningfully meeting and conferring, I think we should still attempt to resolve the issue. I think we can. Like I said, we appear to have made some headway.

I am traveling the early part of this week (and will be largely out of pocket for that reason), but would like to have a phone conference with you sometime Wednesday if possible.

Thank you,

David N. Ferrucci

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From: David Gingras <david@gingraslaw.com>
Sent: Friday, January 31, 2020 2:57 PM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

I appreciate the substantive response, but it is clear we are miles apart on this stuff. That is particularly true given that you haven't responded to some extremely key points such as the fact that Mrs. Ivchenko admitted, in writing, that she was guilty of felony aggravated assault, and thus she could not have been defamed by a statement implying her guilt of that crime. Do you have any response to that point?

If time/cost wasn't an issue, I could refute every other point you make and show why it's not merely wrong, it's well across the line into Rule 11 territory. But since time/cost IS always an issue, and since your position makes it clear that you are entrenched in your views, let me just mention a couple small things that really shouldn't be debatable.

First, you claim that your clients did not discover the page in question until January 8, 2019. While I appreciate this assertion may be based on information provided to you by your clients, the fact remains this statement is demonstrably false.

We know this because, among other things, Mr. Ivchenko submitted a written removal demand to Google on December 24, 2018 which includes the URL of the page in question, thus eliminating any doubt as to whether your clients knew of the page on my client's site. A copy of this is shown below, and you can access it for yourself here: https://www.lumendatabase.org/notices/17817135.

Do you have any response to this? Can you explain why you made a representation to the Court that appears to be completely untrue?

Yes, I know – Mr. Ivchenko will deny he made this submission to Google. Of course, I'm guessing that Google logged Mr. Ivchenko's IP address when he contacted them, so I have no concerns that any such denial will easily be disproven.

But was this the EARLIEST date that I can prove your clients knew about the post on my client's website? No, it is not. In his blind (and deeply misguided and destructive) passion to scrub the Internet of his wife's mugshot, Mr. Ivchenko also submitted a request directly to my clients on October 30, 2018 advising that Mrs. Ivchenko's criminal case was "dismissed" (which is why the page contained that notice).

Again, I understand that prior to the commencement of this matter, Mr. Ivchenko may have lied to you about these points, and I agree that lawyers are generally allowed to rely on statements from their clients….at least until they become aware of evidence showing that the client has lied. Once you have reason to know the facts are not as you represented to the Court in your Complaint, you have both a Rule 11 and ethical duty to take corrective action.

Putting aside any other arguments about the discovery rule (which clearly doesn't apply here), the fact remains that your clients DID discover the page in question more than one year before this case was filed. That fact alone means the case is untimely to the extent it was based on the post on my client's site, and that means Rule 11 sanctions are

justified; "courts have not hesitated to find sanctionable conduct under Rule 11 for bringing claims clearly time-barred under the respective statutes of limitations." *Murphy v. Klein Tools, Inc.*, 123 F.R.D. 643 (D.Kan. 1988) (citing *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1091 (3rd Cir.1988) (applied two-year statute of limitations for claims under 42 U.S.C. §§ 1981 and 1983); *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1247, 1250–51 (9th Cir.1988) [applied six-year statute of limitations for contract actions under 28 U.S.C. § 2415(a) brought by the United States]; *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 751–54 (7th Cir.1988), [quoting *Dreis & Krump Mfg. v. Intern. Ass'n of Machinists*, 802 F.2d 247, 255 (7th Cir.1986)], (" 'No competent attorney who made a reasonable inquiry into the ***647** state of the law ... could have thought the [pleading] had any possible merit. He should have known it was time-barred.'"); *Baker v. Citizens State Bank of St. Louis Park*, 661 F.Supp. 1196, 1197(D.Minn.1987) (two-year statute of limitations applied as to claims of misrepresentation, conversion, intentional infliction of emotional distress and breach of fiduciary duty and six-year statute of limitations as to fraud claim); *Van Berkel v. Fox Farm and Road Machinery*, 581 F.Supp. 1248, 1249–51 (D.Minn.1984) (violated Rule 11 in not making a reasonable inquiry of fact regarding the date of the accident in a product liability action and violated 28 U.S.C. § 1927 in not dismissing the lawsuit after learning it was barred by the statute of limitations)).

Of course, I understand your response to this – *Twitter*. However, as I already explained, my clients have nothing whatsoever to do with the Twitter page referenced in your Complaint, and as I understand it, beyond sheer guesswork and speculation you have no undertaken any effort to ascertain the identity of the individual who created the page. Among other things, you or your clients easily could have brought a pre-suit petition under Rule 27 asking for leave to investigate the identity of the person responsible for this page. Had you done so, you would have discovered that my clients had nothing to do with the page.

Again, with all due respect, this reflects a clear violation of Rule 11 which requires you to *investigate first* and, upon completing your investigation, you may not make allegations in a pleading unless you certify that: "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Here, Rule 11 was violated because you did not undertake a reasonable pre-suit investigation AND it was violated because the allegation that my clients are responsible for the Twitter page has zero evidentiary support. Indeed, Rule 11 was *also* violated because nothing posted on the Twitter page was false – your clients DID defraud the U.S. Copyright Office by falsely claiming that Mrs. Ivchenko owns the copyright to her own mugshot. If you have evidence showing that Mrs. Ivchenko lawfully obtained the copyright to her photo from MCSO, please provide that information to me immediately.

Turning to a totally different issue, in an attempt to show your clients' claims are not barred by the CDA (to the extent the claims are based on the republication of information copied from the MCSO website), you cite *Jones v. Dirty World* (as you know, I was trial and appellate counsel on that case) for the idea that: "if the editor publishes material that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination."

This statement is, of course, nothing more than a correct summary of the rule discussed in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). In that case, the website operator (Cremers) published an allegedly defamatory message that the original author (Smith) claimed was *never* intended for online publication. In that unique scenario, the Ninth Circuit said the CDA might not apply to Cremers if Smith's email was really not "provided to" him with a specific intent (from Smith) for the message to be posted online. Due to the unclear facts, the court remanded because: "It is not entirely clear from the record whether Smith 'provided' the e-mail for publication on the Internet under this standard."

This argument has ZERO application here. Unlike *Batzel*, this case does not involve private information that was *never* intended to be published online. Rather, this case involves information about Mrs. Ivchenko's arrest which was actually published online by the MCSO and which my clients merely republished *verbatim*.

I appreciate that you *allege* (apparently based on a pre-suit interview with Sheriff Penzone or some other basis which I will ask your clients to explain in discovery if the case proceeds that far), that the MCSO does not intend its mugshots to be scraped by other websites. But this point is entirely irrelevant. This argument is essentially the same one which was

raised and rejected in another case I litigated -- *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008).

In that case, the plaintiff posted information on www.RipoffReport.com. Then (after receiving a threat from the plaintiff) the author changed his mind and asked the website to remove his comments. Of course Ripoff Report refused.

In response to my Motion to Dismiss, the plaintiff argued the CDA should not apply because the author of the allegedly actionable speech *changed his mind about publication and asked Ripoff Report to remove his speech*. The Court noted this argument (derived from *Batzel* like your quote from *Jones* above) was NOT sufficient to defeat CDA immunity because:

> [I]n Batzel, the court did not interpret "provided" as an ongoing process. The focus was on expectations regarding communications when they are made. The court was concerned that technology users would be discouraged from sending e-mails if website operators have no incentive to evaluate whether the content they receive is meant to be broadcast over the internet or kept private. There are no similar concerns in this action; Sullivan obviously meant his messages to appear on the website.

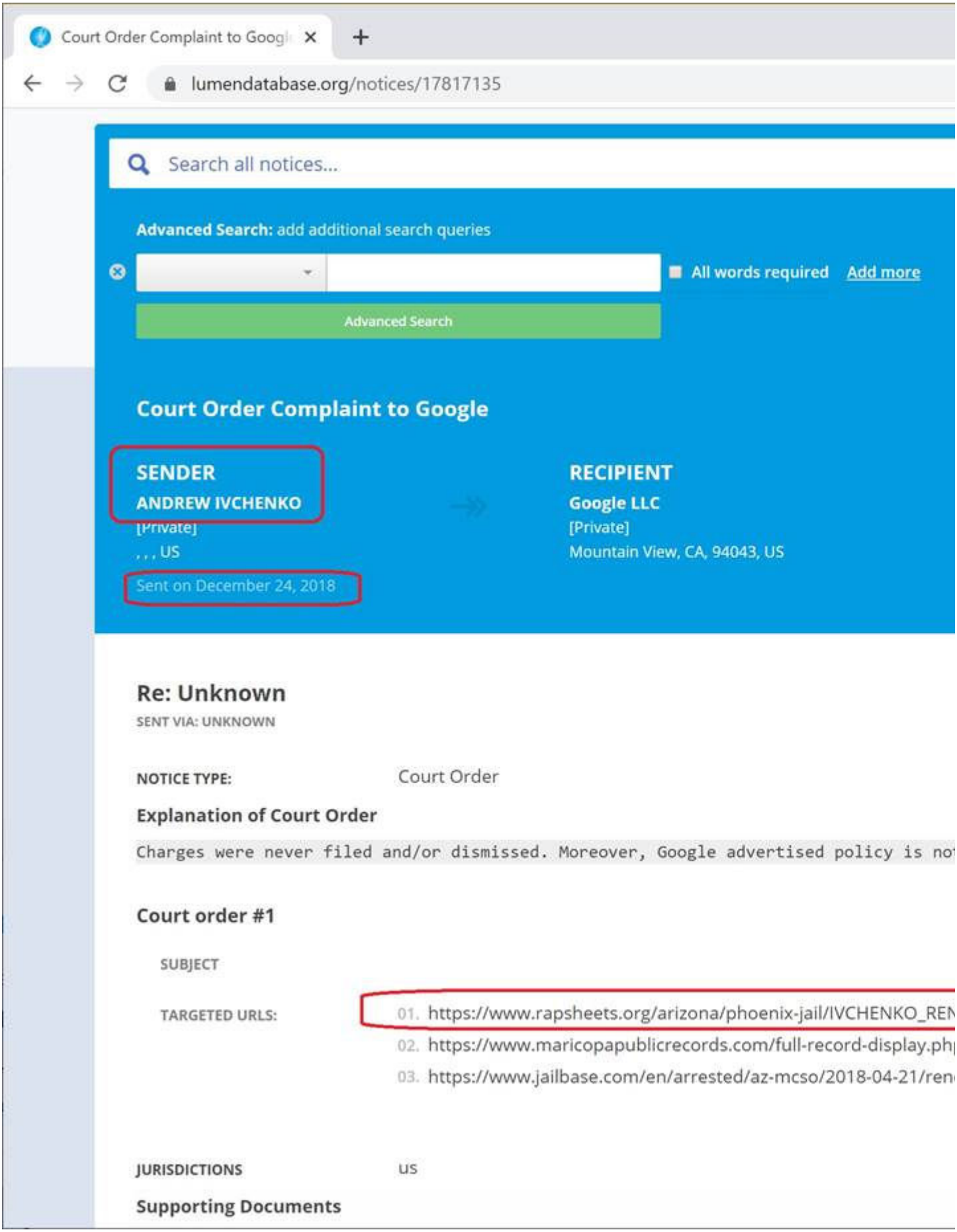
Global Royalties, 544 F.Supp.2d at 931.

Applying that standard, the Court found the argument that CDA immunity ends when the original author decides to de-publish content "is without statutory support and is contrary to well-settled precedent that the CDA is a complete bar to suit against a website operator for its 'exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content.'" *Id*. at 932.

By the same logic, it makes absolutely no difference whether MCSO chooses to publish information online for one day, one week, or one year. The undisputed fact is that the information Mrs. Ivchenko is unhappy about WAS INITIALLY PUBLISHED ONLINE BY MCSO, and your clients' claims necessarily treat my clients as the publishers/speakers of this information. This is exactly what the CDA expressly forbids.

Anyway, beyond these points and the others I have already raised, there are NUMEROUS other problems with your position; i.e., the publication of information obtained from court records is *privileged*, even if false. *See Green Acres Trust v. London*, 141 Ariz. 609 (1984). But given your arguments and position, I don't think it's worth even talking about these points. As such, unless you indicate that you are willing to withdraw your clients' Complaint, I don't think there is any value in further debates over these points.

If you feel differently, let me know. Otherwise, I'll assume our efforts to meet and confer are done and I'll make my arguments to the court.


Court Order Complaint to Goog
lumendatabase.org/notices/17817135
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Advanced Search: add additional search queries
All words required
Add more
Advanced Search
Court Order Complaint to Google
SENDER
ANDREW IVCHENKO
[Private]
, , , US
Sent on December 24, 2018
RECIPIENT
Google LLC
[Private]
Mountain View, CA, 94043, US
Re: Unknown
SENT VIA: UNKNOWN
NOTICE TYPE:
Court Order
Explanation of Court Order
Charges were never filed and/or dismissed. Moreover, Google advertised policy is no
Court order #1
SUBJECT
TARGETED URLS:
01. https://www.rapsheets.org/arizona/phoenix-jail/IVCHENKO_REN
02. https://www.maricopapublicrecords.com/full-record-display.ph
03. https://www.jailbase.com/en/arrested/az-mcso/2018-04-21/ren
JURISDICTIONS
US
Supporting Documents

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From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Friday, January 31, 2020 12:29 PM
To: David Gingras <david@gingraslaw.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

I am happy to discuss these issues with you further. We believe the Complaint's allegations have more than a good faith factual and legal basis and that you have no basis to file for Rule 11 sanctions.

A couple of points:

The defamation claim, as explained at paragraphs 10-15 and 49-51, is based on the defamatory statements posted to the Jennifer Becker Twitter account in 2019 (not the posting of the arrest photo on Rapsheets in 2018) and therefore the defamation claims are not time-barred. Again, the claim is based on the defamatory statements (*see* Complaint, ¶¶ 13, 49-51) published in 2019, not on the reposting of Ms. Ivchenko's arrest photo in 2019. But even if it were, we have more than a good faith basis to assert that the-republication of that arrest photo on a different website (Twitter) is the initial publication for purpose of the statute of limitations. *See Seldon v. Magedson*, No. CV-13-00072-PHX-SPL, 2015 WL 12942085, at *2 (D. Ariz. Feb. 27, 2015) ("republication of material in a new edition generally restarts the statute of limitations"). And even if we were contending that the original posting of the arrest photo on the rapsheets.com website was defamatory, the Complaint alleges that the Plaintiffs did not discover that posting until January 08, 2019. Complaint, ¶ 10. As you know doubt know, in Arizona "the discovery rule is available in defamation cases." *Gaona v. US Investigations Servs. Prof'l Servs. Div., Inc.*, No. CV 12-8211-PCT-JAT, 2013 WL 1748361, at *9 (D. Ariz. Apr. 23, 2013).

With regard to the CDA immunity defense, we believe that we have alleged sufficient facts demonstrating that Defendants are not immune because they have sufficiently contributed to the

development of the illegal content on Rapsheets and the other websites. Not only does that contention have a good faith factual and legal basis, but we believe we will win on the issue.

Remember, the trial court in the *Justmugshots.com* case held that because the plaintiff alleged that the arrest photos were being used "to solicit advertising" "neither [the California anti-SLAPP statute,] **nor the Communication Decency Act** of 1996, 47 U.S.C. § 230(c), **barred plaintiff's claims**." *Rogers v. Justmugshots.Com, Corp.*, No. B258863, 2015 WL 5838403, at *2 (Cal. Ct. App. Oct. 7, 2015) (emphasis added). *See* Complaint, ¶¶ 30-34. Moreover, the Northern District of Illinois in the *Mugshots.com* case held that arrest photos that were being used to promote mugshots.com's banner ads (including a banner ad for their removal service), although "not advertising use in the traditional sense[,]" were being used as promotional commercial materials and therefore were unlawful in that context for purposes of the misappropriation claim in that case. *Gabiola v. Sarid*, No. 16-CV-02076, 2017 WL 4264000, at *6 (N.D. Ill. Sept. 26, 2017). Creating advertisements out of arrest photos and thus using them for an unlawful commercial purpose, misappropriation, "contributes materially to the alleged illegality of the conduct." *Swift v. Zynga Game Network, Inc.*, No. C 09-05443 SBA, 2010 WL 4569889, at *4 (N.D. Cal. Nov. 3, 2010) (quotation omitted).

Also, as the complaint alleges, the law enforcement agencies who originally post the arrest photos do not intend for those arrest photos to be "scraped", and then posted indefinitely for use as advertisements by your clients and other mugshots websites. Complaint, ¶ 5. As the Sixth Circuit stated in the *Dirty World* case (quoting the Ninth Circuit in *Roomates.com*):

> But if the editor publishes material that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination.

Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 411 (6th Cir. 2014) (quotation omitted).

We also have a good faith basis to assert that the publication of Ms. Ivchenko's arrest photo *does* falsely convey guilt, and did so after the claims against her were dismissed. As the Sixth Circuit recently held, reversing two decades of precedent: "[B]ooking photos convey *guilt* to the viewer[.]" *Detroit Free Press Inc. v. United States Dep't of Justice*, 829 F.3d 478, 482 (6th Cir. 2016) (emphasis in original).

Finally, we have asserted sufficient factual allegations demonstrating that your clients either own, control, are affiliated with, or have acted in concert with the Jennifer Becker Twitter account in posting the alleged defamatory information. Not only is the timing of the posts regarding the Ivchenkos suspect (Complaint, ¶ 10), but the Twitter account includes information that could have only been derived from your clients. For example, the very first post regarding the Ivchenkos states:

> Just got a DM asking for a favor, to post a photo of a woman detained in Arizona, and whose photo and arrest details are part of a public police record for anyone to see. But she seems to have a husband who does not respect speech, so I think I'll help out and post this info.

It is our good faith belief that the "DM" and the information about Ms. Ivchenko's husband, came from your clients. Another Tweet states:

> The woman is Renee Ivchenko and her husband is Andrew Ivchenko. I'll call him Andy. Hope that's okay, Andy! So, Andy, doesn't want anyone to know his wife got arrested. But rather than ask nicely (**I saw the e-mails and Andy Ivchenko is quite rude**), **Andy is threatening to sue**!

It is our good faith belief that the only way this person could have seen the private emails between your clients and Mr. Ivchenko is if your clients provided them to her or him.

As set forth above, Plaintiffs' claims are all clearly warranted by existing law and/or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law. Further, the complaint's factual contentions regarding the ownership or control of the Twitter account at issue have both existing evidentiary support and will undoubtedly have even further evidentiary support after a reasonable opportunity for further investigation or discovery.

In short, our lawsuit is on very firm ground. Your clients' business practices – and your threatened Rule 11 motion – are not.

As I have expressed, it is my sincere hope that you and I can work to amicably resolve the dispute between our clients. It is still my hope—despite your unfortunate and baseless threats—that we can still do so.

Sincerely,

David Ferrucci

David N. Ferrucci Member

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From: David Gingras <david@gingraslaw.com>
Sent: Thursday, January 30, 2020 9:34 AM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>; Michael S. Rubin

<MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

Thanks for the response. After talking to the client and given the lack of any substantive response from your side to the concerns raised in my initial email, we will be proceeding with a Rule 11 motion for sanctions based on the points previously mentioned.

On that note, Rule 11 has recently changed in a couple significant ways. Unlike past versions, I no longer have to serve you with a draft/proposed motion before filing; I simply need to provide you with "written notice of the specific conduct that allegedly violates Rule 11(b)". Obviously my previous email satisfied that requirement. You then have 10 days to take corrective action if you want (which has already expired). Second, unlike the old version, the new version of Rule 11(c)(2) requires a good faith effort to meet and confer before a motion is filed.

Given those requirements, do you want to have any further discussions about this stuff, or do you feel we've adequately met and conferred? If you feel additional discussions would be helpful, I am happy to have them. Otherwise, I'll move forward with filing the motion next week.

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From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Thursday, January 30, 2020 9:04 AM
To: David Gingras <david@gingraslaw.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>; Michael S. Rubin <MRubin@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

We have reviewed your contentions. We do not agree with your assessment.

Thank you,

David

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From: David Gingras <david@gingraslaw.com>
Sent: Friday, January 10, 2020 5:41 PM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

David,

Thanks for the quick response. I am also pretty wide-open on Monday, so I'm happy to talk any time that works for. Just tentatively, I'll try to call you about 11 am, but if that's not the best time, we can do it later in the afternoon or whatever. Also, as noted below, I understand this email is fairly long and is being sent late on a Friday afternoon, so if you need more time to digest my comments prior to talking, that's fine; just let me know.

Having said that, I think these types of calls are most productive when you have some advance notice of the subjects I want to discuss, so I wanted to give you a head's up in that regard. However, before I explain my points, I also wanted to let you know – I am currently co-counsel on a matter with another attorney in your firm (Chuck Price). That case is *Xcentric Ventures, LLC v. Zarokian*, Case No. 18-CV-3661 (D.Ariz.). Obviously this is a completely different case involving different clients and different issues, so I am not mentioning it as any sort of conflict (it is clearly not). I am just mentioning to let you know that I have a good working relationship with your firm, so please do not take my comments below too harshly.

Here's the deal – after speaking to my client and reviewing the facts, we have some concerns that the Complaint you filed is not compliant with Rule 11. At this point, I am NOT threaten to seek sanctions; I am just writing to let you know about my concerns. I am also assuming your client probably did not inform you of all the facts, so I want to take a minute to bring some points to your attention.

First, as you probably know, Mrs. Ivchenko was arrested in April 2018, and her mugshot was posted online by the Maricopa County Sheriff's Office within a day or two, as per their normal practice. My client's website (rapsheets.org) automatically "scrapes" these mugshots within a day or two, and they are republished on my client's site virtually instantly. Based on this, we know that Mrs. Ivchenko's mugshot first appeared on rapsheets.org in April 2018. I think the exact date is April 21, 2018, but the exact date isn't relevant.

As I'm sure you know, the statute of limitations for defamation is one year per A.R.S. § 12-541, and that date begins to run on the first date of publication, not when the plaintiff discovers the publication. *See Larue v. Brown*, 235 Ariz. 440, 443 (App. 2014) ("Arizona provides that the statute of limitations for a defamation action begins to run upon publication of the defamatory statement.") (emphasis added).

As the court also noted in *Larue*, Arizona has adopted the Uniform Single Publication Act, A.R.S. § 12-651(A) which further provides: "No person shall have more than one cause of action for damages for libel, slander, invasion of privacy

or any other tort founded upon a single publication, exhibition or utterance …" and this rule fully applies to statements published on the Internet.

Based on this, the following points seem beyond dispute:

- If Mrs. Ivchenko had any claim against anyone arising from the publication of her mugshot, that claim initially arose in April 2018 and (at least as to rapsheets.org) it expired in April 2019 – many months before this lawsuit was filed.
- Based on the Single Publication Rule, Mrs. Ivchenko cannot assert multiple different claims based on the same Internet post; she is only allowed a single claim, and that claim is now time-barred.

Again, based on the facts as I understand them, it seems beyond question that Mrs. Ivchenko's new suit is untimely, at least as it relates to the publication of her mugshot on my client's website (I understand the information posted on Twitter is a different issue which I will address separately). Absent some other explanation, this aspect of the case appears to be inconsistent with Rule 11 because it is entirely without merit. Indeed, aside from Rule 11, it is unethical for a lawyer to pursue claims which they know are untimely. *See In re Aubuchon*, 233 Ariz. 62, 68-69, 309 P.3d 866 (2013) (affirming disbarment of deputy county attorney who, *inter alia*, pursued charges knowing they were barred by the statute of limitations).

I presume that Mr. Ivchenko did not inform you of these facts prior to retaining your firm. However, now that you are aware of the facts, I do not believe Rule 11 permits you to continue prosecuting that aspect of the case. Of course, if you are aware of any factual or legal grounds that would show Mrs. Ivchenko's claims are timely, I would like to hear what they are. Otherwise, I would expect you to withdraw that aspect of their case. If that does not happen, I don't see any option other than for me to prepare and serve a draft Rule 11 motion for the reasons stated above. I hope that won't be necessary, but I will pursue that course of action if given no other choice.

Second, entirely separate and aside from this issue, there is a separate problem with your client's claims based on the publication of her mugshot. In short, all of the information that gives rise to her claim (i.e., the mugshot itself, and a description of the charges filed) was originally published on the Internet by a third party source; i.e., the MCSO. Because this information was initially published by a third party, not by my clients, even assuming the publication of that information was unlawful (which it is not), your client's only recourse would be against the MCSO. Any claims against my clients would be barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1).

The most analogous case that supports this conclusion is *O'Kroley v. Fastcase, Inc*., 831 F.3d 352 (6th Cir. 2016) (attached). Although this case did not involve a mugshot, it did involve criminal court records scraped from one source and reposted in another location. The court explained this type of republication of criminal records is fully protected by the Communications Decency Act, and thus the republisher (in that case, Google) was not liable as to any of plaintiff's claims including: "'libel' … 'invasion of privacy' … 'failure to provide due process' … 'cruel and unusual punishment,' … 'cyber-bullying' … [and] 'psychological torture.'". Again, this result is true *even assuming* the original publication was unlawful.

For what it's worth, although it involved different facts, I personally litigated one of the leading cases in Arizona involving the Communications Decency Act. *See Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008).

Again, if you are aware of any facts that would show your clients' claims are *not* barred by the CDA (to the extent they are based on my client "republishing" information from the MCSO's website), I would like to hear your position including any legal authority that supports your position. However, based on my review of the facts, I do not see any basis to argue that the CDA doesn't apply here. To be clear -- the fact that my client's website includes commercial ads does not affect the analysis because: A.) Google does the same thing; and B.) the CDA does not contain a "for-profit exception". *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011); *see also Global Royalties*, 544 F.Supp.2d at 933 (explaining, when CDA applies, "Unless Congress amends the statute, it is legally (although perhaps

not ethically) beside the point whether defendants refuse to remove the material, *or how they might use it to their advantage*.") (emphasis added).

Third, entirely separate and apart from the statute of limitations and the CDA, your Complaint appears to suggest – falsely – that Mrs. Ivchenko was somehow exonerated or innocent of all wrongdoing, and thus my clients defamed her by implying her guilt. Again, I do not think a court or jury would even reach that question for many different reasons, but if they did, I do not think Rule 11 would permit you to make this argument.

The reason is very simple – although Mrs. Ivchenko did not *plead* guilty, as part of her plea, she signed a statement (attached) in which she admitted that she was, in fact, guilty of the crimes with which she was charged. Having made that admission (which is really not surprising given the circumstances), Mrs. Ivchenko cannot argue that her reputation was somehow harmed by a *false* implication that she committed a crime. Put simply, Mrs. Ivchenko DID commit a crime, and she admitted in writing that she was guilty of that criminal conduct. The fact that she avoided a criminal *conviction* is wholly beside the point because the *gist* of the statement remains entirely true.

I understand that it is technically possible that Mrs. Ivchenko could try to argue that, in fact, she was not guilty of any crime, thus showing that she lied to the criminal court in her plea agreement. However, under the doctrine of judicial estoppel, I am confident that such an argument would not be permitted in our case. Mrs. Ivchenko made a representation to the court that she was, in fact, guilty of a crime. Having made that admission and having obtained a benefit from it, she would be estopped from taking a different position in our case. As such, Mrs. Ivchenko cannot deny that she did, in fact, commit a criminal act.

Fourth, and finally, I understand your client is not happy with various statements posted on this Twitter account: https://twitter.com/zim_rogers_fans. Putting aside the fact that it appears everything posted about your clients on that page is either true, or simply the author's opinion, the simple fact is that my clients have nothing to do with this page. They did not create the page, have never posted anything there, and have no idea who is behind it.

While I appreciate that your clients might not be willing to accept this bare denial, the fact remains that my clients are not under any burden to *disprove* a specious allegation. On the contrary, Rule 11 requires a lawyer to conduct a reasonable investigation *first*, before making accusations in a pleading, and the lawyer must obtain evidence that reasonably supports his/her contentions. To my knowledge, that did not occur here. At this point, other than sheer speculation on the part of your clients, I am not aware of any evidence to show that my clients have any involvement in running this page. I am also not aware of any evidence showing that your clients made any attempt to identify the person responsible for this page (which could easily have been done by, for instance, filing a pre-suit petition under Rule 27(a)).

Rather than conducting *any* pre-suit investigation (much less a reasonable one), your clients have now filed *two* lawsuits against my clients accusing them of running the Zim Rogers Twitter page without any factual basis for that allegation. Again, I do not believe these actions are consistent with Rule 11.

Based on the above, I would like to know if there are additional facts/legal points that I have somehow missed. I fully understand that when you filed this action, you may have been relying on false/incomplete information from your clients. However, based on the points set forth above, I do not believe that Rule 11 would permit the pursuit of any aspect of this case. If you disagree, I would like to hear the factual and legal grounds for that position.

Having said all this, I understand that I have given you a lot of information and you may need additional time to speak to your clients and conduct further research prior to talking on the phone. If you would prefer to have additional time prior to talking on Monday, just let me know.

Email Address: [redacted]

Phone Number(s): 480-625-7709

RV 5. I do not contest my guilt in this matter. I admit that I committed

2

the charged offenses as further explained in the attached factual basis. I acknowledge that this admission of guilt and factual basis may be used against me if I do not successfully complete the deferred prosecution program and I decide to have a trial in this matter.

David Gingras, Esq.
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From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Friday, January 10, 2020 6:30 AM
To: David Gingras <david@gingraslaw.com>
Cc: David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>
Subject: RE: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

Mr. Gingras,

Let's schedule a call for Monday (if you are available). My schedule is fairly wide-open, so let me know what time works best for you.

Thank you,

David Ferrucci

David N. Ferrucci Member

1850 N. Central Avenue
Suite 1400
Phoenix AZ 85004
Profile V-Card

Phone 602-889-5337
Fax 844-670-6009
Email DFerrucci@dickinsonwright.com

DICKINSON WRIGHT PLLC
ARIZONA CALIFORNIA FLORIDA KENTUCKY MICHIGAN NEVADA OHIO TENNESSEE TEXAS WASHINGTON D.C. TORONTO

From: David Gingras <david@gingraslaw.com>
Sent: Thursday, January 9, 2020 11:17 AM
To: David N. Ferrucci <DFerrucci@dickinson-wright.com>; David G. Bray <DBray@dickinson-wright.com>; Paxton D. Endres <PEndres@dickinson-wright.com>
Subject: EXTERNAL: Ivchenko v. Grant; MCSC Case No. CV2019-015355

Counsel,

I have been retained to represent Kyle and Travis Grant (and their spouses) in the matter you recently filed on behalf of Mr. and Mrs. Ivchenko. My understanding is that Travis Grant was served yesterday, but Kyle Grant has not been served. In any event, I am authorized to accept/waive service on behalf of Kyle, so further attempts to serve him are not necessary.

Prior to moving forward, I wanted to discuss this case with whomever is lead counsel. Can you please let me know who is the best person to speak with, and what day/time would work for you. I'm available later this afternoon and most of tomorrow.

Thanks.

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Exhibit G

David Gingras

From: David N. Ferrucci <DFerrucci@dickinson-wright.com>
Sent: Thursday, February 20, 2020 3:19 PM
To: David Gingras
Cc: David G. Bray; Paxton D. Endres; Andrew J. Alvarado
Subject: RE: EXTERNAL: RE: Ivchenko v. Grant, et al. - CV2019-015355

David:

Regarding your first point, we have simply provided you with our notices of intent to serve subpoenas and do not intend on serving the subpoenas until after we have provided you with our initial disclosure statement pursuant to Rule 26. So I can confirm that we will not be proceeding with the subpoena to Google at this time.

Respectfully, we disagree with your analysis regarding the subpoena to Google. Notably, the case you cited addressed when a plaintiff, who is merely seeking punitive damages, is entitled to request financial information regarding the defendant's wealth. The Court in *Arpaio* made clear that the "policy reasons for requiring a *prima facie* showing," which you suggest Plaintiffs are required to make, is to "'protect[ ] the defendant from an unwarranted invasion of privacy and harassment where the plaintiff has merely asserted a claim for punitive damages.'" *Arpaio v. Figueroa*, 229 Ariz. 444, 447, 276 P.3d 513, 516 (Ct. App. 2012); see also *Larriva v. Montiel*, 143 Ariz. 23, 24, 691 P.2d 735, 736 (Ct. App. 1984) (wealth of a defendant is relevant and subject to discovery in a proper punitive damages case.).

Here, Plaintiffs are not seeking the information from Google merely to support a claim for punitive damages, but rather to obtain evidence to support one of the claims in this case: that Defendants are using the arrest information and arrest photos to solicit advertising such that the CDA does not bar Plaintiffs' claims. *See*, *Rogers v. Justmugshots.Com, Corp.*, No. B258863, 2015 WL 5838403, at *2 (Cal. Ct. App. Oct. 7, 2015); Complaint at ¶¶ 29-34. Accordingly, the subpoena to Google fits within the broad scope of permissible discovery as "any nonprivileged matter that is relevant to any party's claim or defense[.]"

But again, we will not be sending the Google subpoena at this time and you and I can discuss the issue further when we plan to do so.

Nonetheless, the discovery into the commercial purpose and commercial use of the arrest photos and information is discovery that we would need in order to respond to any motion for summary judgment.

We have not yet formulated a comprehensive discovery plan. To be clear, Plaintiffs are not agreeing that our inability to provide you with a comprehensive discovery plan at this time somehow constitutes an agreement that there are no genuine factual disputes in this case. At a minimum, as indicated above, the subpoenas that you were provided notice of are part of Plaintiffs' discovery plan. However, as this case is still in its infancy, Plaintiffs are still in the process of determining the full scope of discovery they intend to propound. Plaintiffs will provide you with notice of their intended discovery requests pursuant to the applicable rules. To reiterate, the Plaintiffs' position is that there are genuine disputes of fact that preclude resolution of this case on summary judgment.

We are also planning on amending the complaint within the time-period provided by the rules. As part of that amendment, we are contemplating dropping the defamation claim altogether.

Lastly, regarding your motion for costs in the amount of $418.11, I do not remember you raising that issue in the course of our correspondence. Had you asked, we would have likely stipulated to pay that amount. Plaintiffs will pay you that amount rather than waste the parties' and the Court's resources on that relatively insignificant issue.

Thank you,

David