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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

RENEE IVCHENKO and ANDREW IVCHENKO, wife and husband, Plaintiffs, v. KYLE DAVID GRANT and JANE DOE GRANT, husband and wife, TRAVIS PAUL GRANT and MARIEL LIZETTE GRANT, husband and wife, Defendants.	Case No. CV2019-015355 **MOTION FOR AWARD OF COSTS ON PREVIOUSLY DISMISSED ACTION** (Assigned To Hon. Teresa Sanders)

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Pursuant to Ariz. R. Civ. P. 41(d) Defendants KYLE DAVID GRANT, TRAVIS PAUL GRANT and MARIEL LIZETTE GRANT ("Defendants") respectfully move this Court for an order awarding them costs in the amount of $418.11 against Plaintiff RENEE IVCHENKO ("Plaintiff" or "Mrs. Ivchenko") and ordering this matter stayed until such time as that amount has been paid.

As explained herein, an award of costs is appropriate because Mrs. Ivchenko previously filed and then dismissed an earlier lawsuit which was substantially identical to the instant matter; the prior case included the same claims against the same defendants arising from the same conduct. For that reason, Defendants are entitled to recover, and should be awarded, their costs incurred in the prior action pursuant to Rule 41(d).

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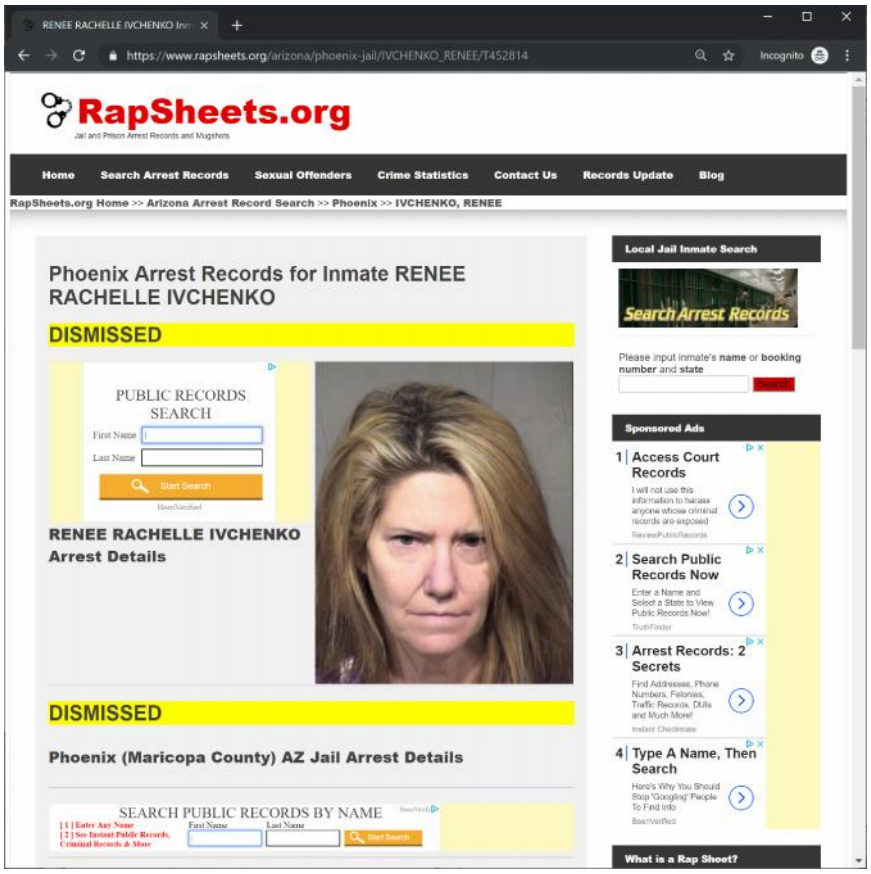
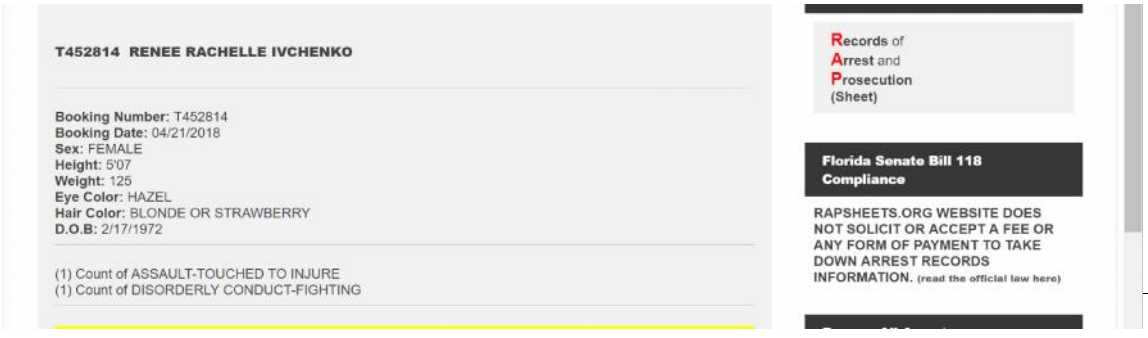
I. INTRODUCTION

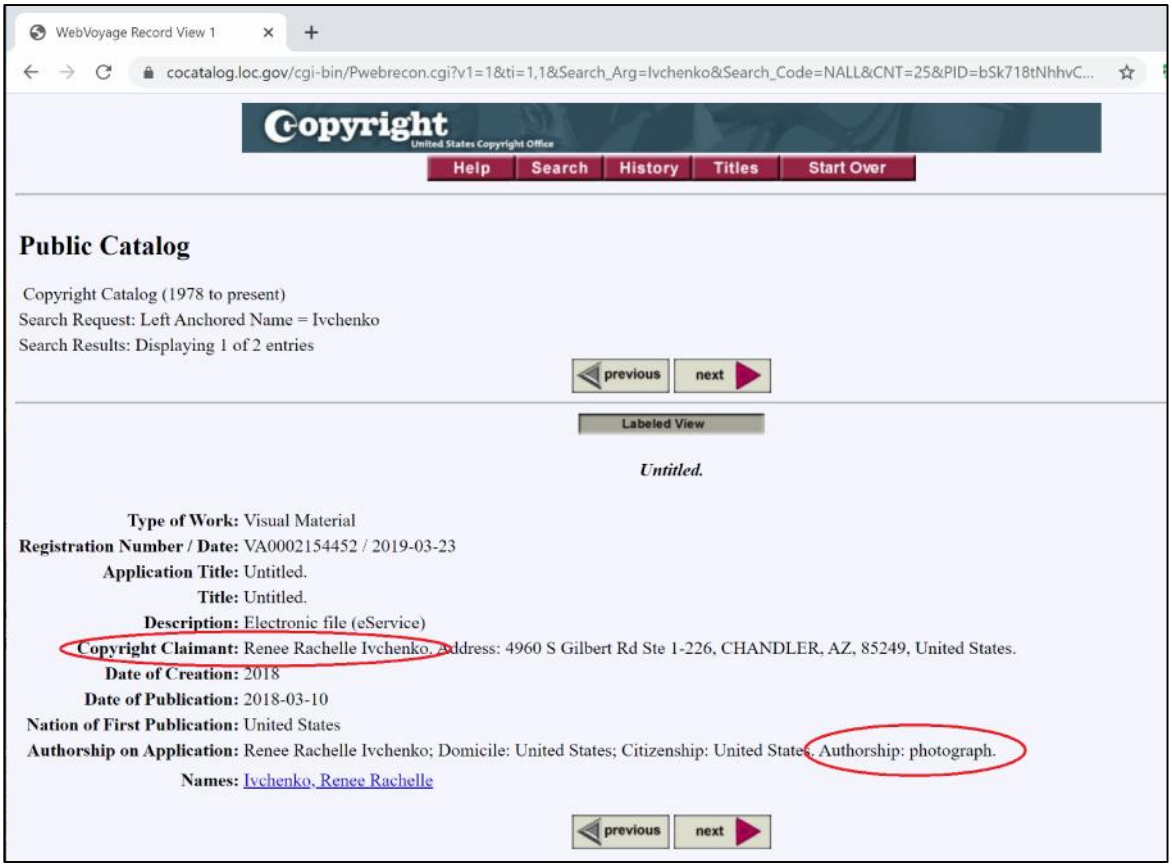
Defendants operate a website – RapSheets.org – which publishes mugshots and related information regarding arrests and criminal proceedings. In April 2018, Mrs. Ivchenko was arrested in Scottsdale and charged with felony aggravated assault on a police officer and disorderly conduct. Following her arrest and in keeping with MCSO's usual practice, Mrs. Ivchenko's booking photo or "mugshot" was taken by the Maricopa County Sheriff's Office and published on its website: https://www.mcso.org/Mugshot/.

After Mrs. Ivchenko's mugshot and arrest details were published online by MCSO, that information was copied and republished on numerous websites, including Defendants' site. A portion of the relevant page is shown below.





Since her arrest, Mrs. Ivchenko has gone to *extreme* lengths trying to hide this information from public view. Among other things, in March 2019, Mrs. Ivchenko (or someone using her name) submitted a registration to the United States Copyright Office which appeared[1] to claim—falsely[2]—that Mrs. Ivchenko owned the copyright to her mugshot.



[1] Information regarding copyright registrations is available online at the U.S. Copyright Office website: www.copyright.gov. Unfortunately, the Copyright Office website only shows limited information such as the purported owner's name, address, and the title of the work that was registered, among other things. It is not possible to view the actual "work" that was registered (copies of registered works can only be requested by mail). Due to the lack of information available online, it is not currently possible to verify that the copyright registration obtained by Mrs. Ivchenko actually relates to her *mugshot* as opposed to something else; i.e., a different photo. However, this point is largely irrelevant because Mr. and Mrs. Ivchenko have claimed that the registration does relate to Mrs. Ivchenko's mugshot.

[2] As a general rule and absent either a written work-for-hire agreement or an employee/employer relationship, copyrights are owned by the "author" who initially creates the work (in this case, the MCSO employee who took Mrs. Ivchenko's mugshot); a person does not own a copyright in a photo simply by virtue of appearing *in* the photo or other work. *See Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (evaluating and rejecting similar claim).

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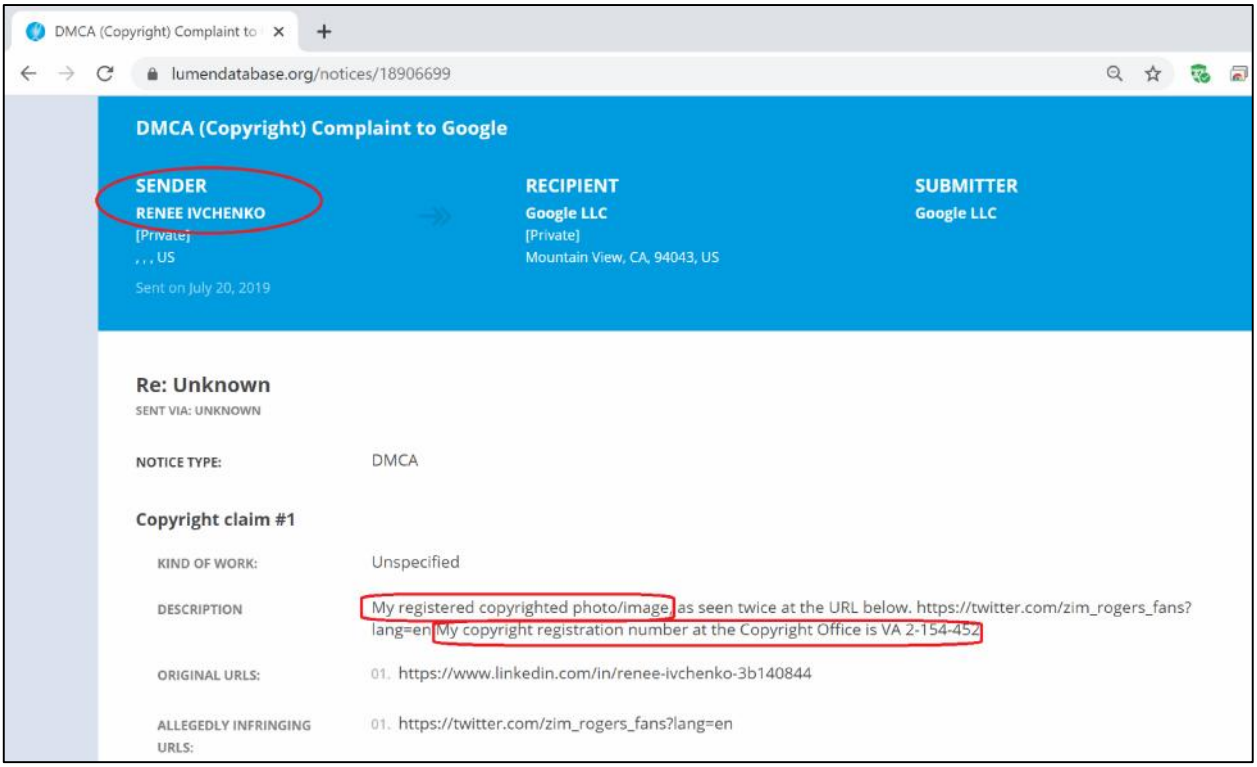
After obtaining the copyright registration shown above, Mr. Ivchenko (who is an Arizona-licensed attorney) and Mrs. Ivchenko sent various legal demands[3] to websites including Twitter and Google claiming that the publication of Mrs. Ivchenko's mugshot violated her copyright in that work. These notices (at least ones sent to Google) are logged, indexed and preserved by the Berkman Klein Center for Internet & Society at Harvard University which publishes copies on its website www.lumendatabase.org. One such notice is shown below.



In addition to these actions, the Ivchenkos have filed no fewer than four (4) separate lawsuits arising from Mrs. Ivchenko's arrest. Specifically:

1.) In May 2018, Mrs. Ivchenko (represented by Mr. Ivchenko) filed suit in *Renee Ivchenko v. The River Source Treatment Center*, Maricopa County Superior Court Case No. CV2018-092390. In this case, Mrs. Ivchenko sued the alcohol treatment/rehab center where she sought treatment as part of a deferred prosecution plea agreement to resolve her criminal case.

[3] Knowingly making a false statement on a copyright application is a federal crime under 17 U.S.C. § 506(e), and sending a DMCA takedown notice which contains any knowingly false statement that a work is infringing is actionable under 17 U.S.C. § 512(f).

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2.) In December 2019, Mrs. Ivchenko filed suit in *Renee Ivchenko v. City of Scottsdale*, U.S. District Court (Arizona) Case No. 19-CV-5834. In this case, Mrs. Ivchenko claims, *inter alia*, she was falsely arrested by Scottsdale Police in connection with the incident which resulted in her mugshot being taken.

3.) In May 2019, Mrs. Ivchenko (represented by Mr. Ivchenko) filed an action entitled *Renee Ivchenko v. Kyle David Grant, et al.*, Maricopa County Superior Court Case No. CV2019-090493. As reflected in the copy of the Complaint attached to the declaration of undersigned counsel as Exhibit A, this prior action asserted the same claims against the same defendants as the current matter before this court. Following removal of the case to federal court, Mrs. Ivchenko voluntarily dismissed the action pursuant to Fed. R. Civ. P. 41.

4.) In December 2019, Mrs. Ivchenko (joined this time by Mr. Ivchenko as co-plaintiffs) filed the instant action against Defendants Kyle Grant, Travis Grant, and their spouses (all of whom were Defendants in the action filed in May 2019). In this second case, Mrs. Ivchenko asserts the same claims against the same defendants were involved in Case No. CV2019-090493.

II. DISCUSSION

Rule 41(d) of the Arizona Rules of Civil Procedure provides as follows:

> **(d) Costs of a Previously Dismissed Action.** If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.

Somewhat surprisingly, this particular provision of Rule 41 has never been cited in any published decisions in Arizona. However, the identically-worded federal counterpart—Fed. R. Civ. P. 41(d)—has been discussed at length in other jurisdictions. As those other courts have noted, the purpose of the rule is to "prevent the maintenance of vexatious law suits and to secure, where such suits are shown to have been brought repetitively, payment of costs for prior instances of such vexatious conduct." *Meredith v.*

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Stovall, 216 F.3d 1087 (10th Cir. 2000); *see also Andrews v. Am.'s Living Centers, LLC*, 827 F.3d 306, 309 (4th Cir. 2016) (agreeing Rule 41(d)'s purpose is clear and undisputed: "to serve as a deterrent to forum shopping and vexatious litigation").

Although one purpose of Rule 41(d) is to deter vexatious litigants, the rule does not require any showing of bad faith or other improper motive as a condition of awarding costs. *See Oteng v. Golden Star Res., Ltd*., 615 F. Supp. 2d 1228, 1240 (D. Colo. 2009) (no showing of bad faith is required before costs may be imposed on the plaintiff under Rule 41(d)); *Esquivel v. Arau*, 913 F.Supp. 1382, 1388 (C.D. Cal. 1996) ("nothing in the language of Rule 41(d) ... suggests that a defendant must show 'bad faith' before a district court can order payment of costs incurred in a voluntarily dismissed previous action.") (quoting *Simeone v. First Bank Nat'l Ass'n,* 971 F.2d 103, 108 (8th Cir. 1992)).

Here, although a finding of bad faith is not required, there is ample if not overwhelming evidence of bad faith. Among other things, both the prior case (CV2019-090493; filed May 9, 2019) and this matter (CV2019-015355; filed December 17, 2019) were untimely filed as a matter of law, at least in substantial part.[4]

This is so because Mrs. Ivchenko was arrested in April 2018, and her mugshot was posted online by MCSO shortly after her arrest. The mugshot was then republished on RapSheets.org within a mater of days. The page containing Mrs. Ivchenko's mugshot remain online and unchanged until Plaintiffs contacted Defendants in October 2018 to request removal of the page based on the dismissal of the criminal charges against Mrs. Ivchenko. As a matter of policy, Defendants do not remove pages simply because a charge has been resolved, but they do update pages to indicate the case was "dismissed", which they did here.

[4] Mrs. Ivchenko's case involves two distinct parts. The first part involves claims arising from Defendants' website, RapSheets.org, and the publication of Mrs. Ivchenko's mugshot on that site. The second part of the case involves statements published on Twitter by a user named "Jennifer Becker" in late 2019. Without any factual basis whatsoever, Mrs. Ivchenko alleges that Defendants are somehow responsible for the "Jennifer Becker" Twitter account. This allegation is completely baseless and will be the subject of a forthcoming Motion for Sanctions under Rule 11. Nevertheless, Defendants agree that claims based on the statements published on the "Jennifer Becker" Twitter account would be timely, but would fail for other reasons.

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Arizona law provides a one year statute of limitations "for injuries done to the character or reputation of another by libel or slander," A.R.S. § 12-541, and this period begins running on the first date the allegedly actionable material is published, not when the material was discovered by the plaintiff. *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. [citations] A plaintiff has one year after a defamation action accrues to commence and prosecute his claim.")

In addition, 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 …" (emphasis added) and this rule fully applies to statements published on the Internet. *See Larue*, 235 Ariz. at 444 (applying A.R.S. § 12-651(A) to statements published on the Internet, and further noting: "The single publication rule is designed to protect defendants from harassment through multiple suits and to reduce the drain of libel cases on judicial resources.") (quoting *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1130 (9th Cir. 2006)).

Coupled together and regardless of how her claims are denominated, pursuant to A.R.S. § 12-541 and A.R.S. § 12-651(A), Mrs. Ivchenko's right to pursue any claim(s) arising from the publication of her mugshot on Defendants' website accrued in April 2018 and expired one year later in April 2019. As such, both of the lawsuits she filed against Defendants (one in May 2019 and another in December 2019) were untimely as a matter of law. This point would, standing alone, support a finding of bad faith.

But the facts are much worse. In an apparent effort to intentionally mislead the Court and to prevent the claims from being easily dismissed on a Rule 12(b)(6) motion, Mrs. Ivchenko has both withheld relevant information from her Complaint (i.e., the date her mugshot was first posted on Defendants' website which is conspicuously absent from the Complaint) and she has asserted knowingly false statements of fact in an attempt to make her claims appear timely.

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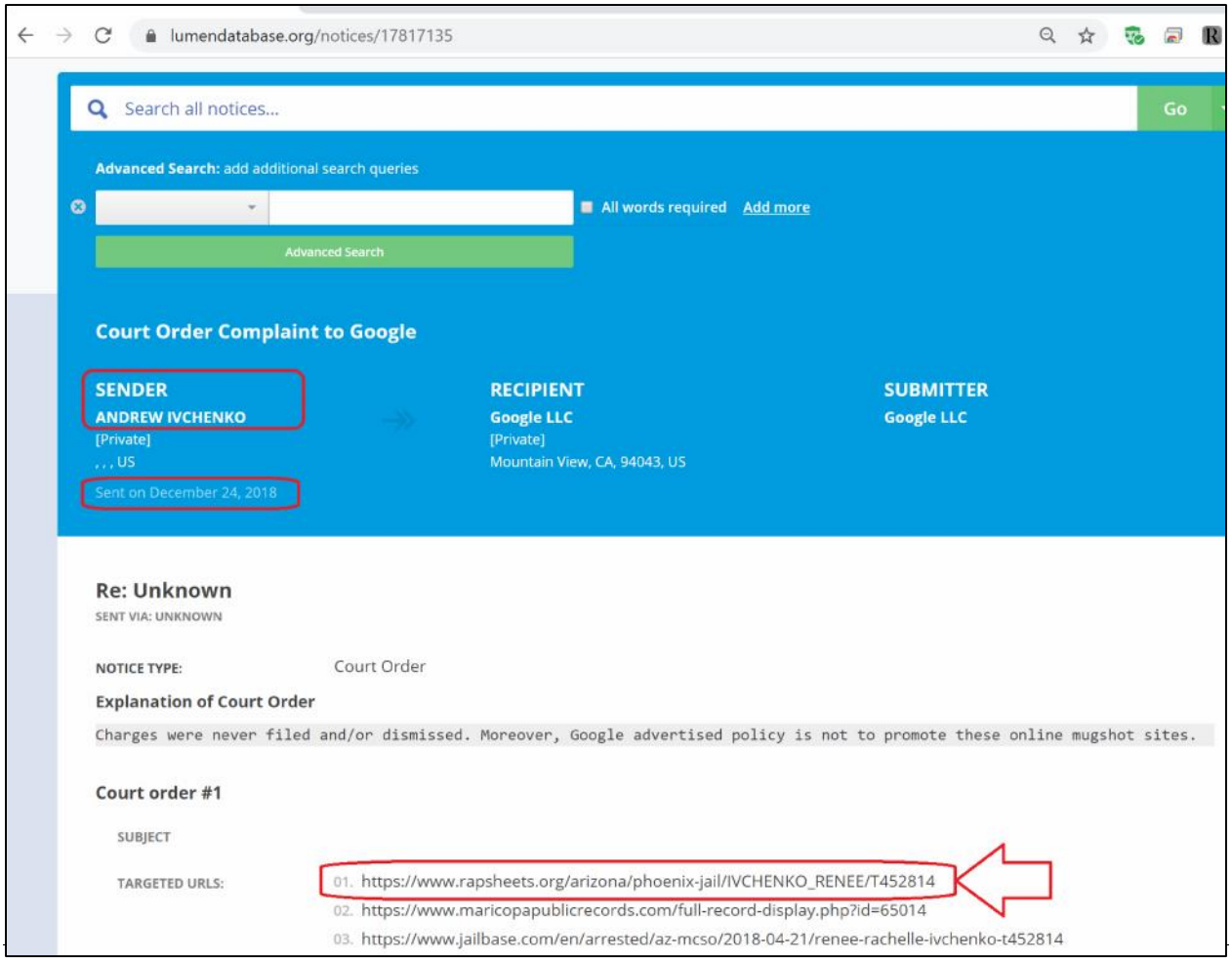
Specifically, in ¶ 10 of the Complaint filed in this matter, Mrs. Ivchenko alleges that she did not discover her mugshot on Defendants' website until January 8, 2019; some eight months after it was first published by Defendants in April 2018. Putting aside the fact that the date of discovery is irrelevant since Defendants did nothing to conceal the page in question, there is substantial evidence to show that Mrs. Ivchenko's alleged discovery date is false.

First, as noted above, Mr. Ivchenko has sent numerous legal threats to various websites including Google, and at least some of these threats have been logged by sites like lumendatabase.org. One such threat – sent on December 24, 2018 – is shown below and remains available online here: https://www.lumendatabase.org/notices/17817135 This threat (in which Mr. Ivchenko falsely stated that "Charges were never filed…" against Mrs. Ivchenko) clearly contains the specific URL on Defendants' website where Mrs. Ivchenko's mugshot was published.



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Furthermore, as noted above, on October 30, 2018, Defendants received a removal request submitted via an online form asking them to remove Mrs. Ivchenko's mugshot on the basis that the criminal case against her had been dismissed. At the present time, it is not known whether the request was submitted by Mr. or Mrs. Ivchenko, but the only reasonable conclusion is that it was sent by one or the other. Given these facts, it is obvious that Mrs. Ivchenko is not acting in good faith in bringing untimely (and otherwise meritless) claims against Defendants in not one, but *two* successive lawsuits, particularly where she has actively withheld relevant information from her Complaint in an attempt to make the case harder to address via a Rule 12 motion.

However, as noted above, a finding of bad faith is not required under Rule 41(d). Instead, applying the simple and plain language of the rule, Defendants are entitled to an award of costs incurred in the previous action solely based on the fact that Mrs. Ivchenko "previously dismissed an action in any court" and then "file[d] an action based on or including the same claim against the same defendant." That is exactly what has occurred here, and nothing more is required to grant the relief Defendants seek.

In terms of the amount requested, Rule 41(d) provides this Court may order the plaintiff "to pay all or part of the *costs of that previous action* …." (emphasis added). As explained in the declaration submitted herewith, after the prior action was removed to federal court, Defendants incurred costs in the amount of $400 for the federal court filing fee paid to the clerk, $10.61 in Superior Court filing fees and $7.50 for records obtained from the Maricopa County Superior Court for use in the case.

Filing fees and other fees (such as fees for obtaining copies and records) paid to the Clerk of Court are "taxable costs" in federal cases. *See* 28 U.S.C. § 1920 (taxable costs include "Fees of the clerk" and "costs of making copies of any materials"). Accordingly, these amounts are properly recoverable here as "costs of that prior action." However, even if the Court were to interpret "costs" as meaning costs that would be taxable in *state court*, both of the requested amounts would still be proper. *See English v. Fessel*, 2018 WL 3387277, at *2 (App. 2018) (holding filing and other fees paid to the

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Clerk of Court are taxable within the meaning of A.R.S. § 12-332(A) because "[f]ees of officers" are taxable costs under § 12-332(A), and filing fees go to the clerk of the superior court, who is an officer of the court.")

III. CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court order Mrs. Ivchenko to pay them costs in the amount of $418.11, and order this proceeding stayed until such time as those costs have been paid.

DATED: February 7, 2020.

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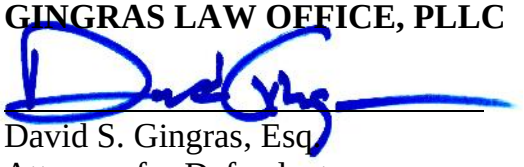

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