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SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

RENEE IVCHENKO and ANDREW
IVCHENKO, wife and husband,

Plaintiffs,

v.

KYLE DAVID GRANT, *et al.*,

Defendants.

Case No. CV2019-015355

MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

(Assigned To Hon. Teresa Sanders)

Pursuant to Ariz. R. Civ. P. 56(a) Defendants KYLE DAVID GRANT, TRAVIS PAUL GRANT and MARIEL LIZETTE GRANT (“Defendants”) respectfully move for an order granting summary judgment as to all claims asserted in this matter by Plaintiffs RENEE and ANDREW IVCHENKO (“Plaintiffs”).

I. INTRODUCTION

The facts of this case are extremely simple. Defendants operate a website called RapSheets.org which publishes mugshot photos and arrest records obtained from pre-existing online public records sources. Plaintiff Renee Ivchenko was arrested in Scottsdale in April 2018 and charged with several crimes. Mrs. Ivchenko’s mugshot and arrest details were published online by the Maricopa County Sheriff’s Office (MCSO), and shortly thereafter, Defendants republished Mrs. Ivchenko’s mugshot and arrest information on RapSheets.org.

1 Against this backdrop, this case involves two entirely distinct parts. Part One is
2 based on the fact that Defendants published Mrs. Ivchenko’s mugshot and arrest details
3 on their website. Mrs. Ivchenko claims this defamed her by *implying* she was guilty of a
4 crime. She also asserts related claims including false light, intentional infliction of
5 emotional distress, and misappropriation of her name/likeness, among other things.

6 Part Two of the case is wholly separate and distinct from Part One. Part Two
7 arises from statements posted on Twitter under the name “Jennifer Becker”. Although the
8 Complaint is not a model of clarity, it appears Mr. Ivchenko (who is an attorney) alleges
9 the statements published on Twitter defamed him by suggesting he “engaged in fraud”. It
10 is not entirely clear whether Mrs. Ivchenko’s claims are also based on the Twitter posts.

11 As explained below, Part One of the case is groundless for multiple reasons.
12 Taking the easiest issue first, all of Mrs. Ivchenko’s claims (again, limited only to those
13 arising from Part One) are completely barred by federal law, specifically the
14 Communications Decency Act, 47 U.S.C. § 230(c)(1) (the “CDA”). As a matter of law,
15 the CDA expressly forbids defamation, false light, and any other related state-law claims
16 which treat website operators or users (like Defendants) as the “*speaker or publisher*” of
17 any information (such as a mugshot) provided by a third party (like MCSO).

18 Here, it is undisputed the allegedly actionable information—Mrs. Ivchenko’s
19 mugshot and arrest details—was first published online by a third party—MCSO. Just like
20 many other websites, Defendants merely copied and displayed this information *verbatim*
21 without any material change or editing. This type of republication falls squarely within
22 the core protection of the CDA. As such, the CDA bars all claims arising from the
23 republication of Mrs. Ivchenko’s mugshot/arrest information on RapSheets.org. Standing
24 alone, that single point is dispositive as to all claims arising from the publication of Mrs.
25 Ivchenko’s mugshot and arrest details on Defendants’ website.

26 Next, aside from the CDA, Mrs. Ivchenko’s claims (again, limited to Part One) are
27 untimely as a matter of law. This is so because it is undisputed that Mrs. Ivchenko was
28 arrested in April 2018, and Defendants published her mugshot and arrest details within

1 days of her arrest; i.e., in April 2018. Any defamation or related claim arising from this
2 publication accrued in April 2018 and expired one year later in April 2019, eight months
3 before the commencement of this action in December 2019.

4 Finally, Mrs. Ivchenko argues that the publication of her mugshot defamed her
5 because it *implied* she was guilty of criminal conduct. This theory fails on its face
6 because RapSheets.org does not imply the guilt of any arrestees appearing on the site.
7 However, even if it did, this theory also fails because in her criminal case, Mrs. Ivchenko
8 represented to the court, in writing, that she was guilty of the crime she was charged with.
9 Because the implication that Mrs. Ivchenko committed a crime is true, it cannot support
10 liability here.

11 These points and issues, explained more fully below, completely resolve all claims
12 arising from Part One of this case. As such, Defendants are entitled to summary judgment
13 as to all claims arising from information posted on RapSheets.org.

14 As noted above, Part Two of this case has nothing to do with Defendants' website.
15 Instead, Part Two arises from statements posted on a Twitter account by someone using
16 the name "Jennifer Becker" at a Twitter "handle" @zim_rogers_fans. As explained
17 further below, Defendants are entitled to summary judgment as to all claims arising from
18 the "Jennifer Becker" Twitter account for one very simple reason—Defendants are not
19 Jennifer Becker, Defendants did not publish any of the allegedly actionable statements,
20 and aside from their own pure speculation, Plaintiffs have no evidence whatsoever that
21 would allow a reasonable juror to find in their favor on this point.

22 Because Plaintiffs have no evidence sufficient to raise a triable issue of fact as to
23 any statements published on Twitter, and because Plaintiffs bear the burden of proof on
24 that point, Defendants are entitled to summary judgment as to any and all claims arising
25 from the "Jennifer Becker" Twitter account.¹ This fully resolves the entire case.

26 ¹ Even if Defendants had published these statements, summary judgment would be proper
27 based on the fact the statements are either entirely true, or at least substantially true.
28 Nevertheless, to avoid needless factual disputes, the Court need not consider truth as it
relates to the Jennifer Becker Twitter page.

II. SUMMARY OF UNDISPUTED FACTS

Pursuant to Rule 56(c)(3)(A), the material facts relied on in support of this motion are set forth in a separate Statement of Facts (SOF). For ease of reference, the basic facts are summarized here.

Plaintiffs Renee and Andrew Ivchenko are married. Mr. Ivchenko is an attorney licensed to practice law in Arizona since 2002. Compl. ¶ 28.

On April 21, 2018, Mrs. Ivchenko was arrested in Scottsdale, Arizona. SOF ¶ 1. In connection with her arrest, Mrs. Ivchenko's mugshot was taken by the Maricopa County Sheriff's Office. SOF ¶ 2. Shortly after her arrest, MCSO published Mrs. Ivchenko's name, mugshot and certain details regarding her arrest and charges on its website at <https://www.mcso.org/Mugshot/>. SOF ¶ 3.

Defendant Travis Grant owns and operates various websites including RapSheets.org. SOF ¶ 5. RapSheets.org automatically copies, indexes and displays mugshots and arrest records from various public sources including MCSO's website. SOF ¶ 6. Within a few days after Mrs. Ivchenko's mugshot was first published by MCSO, the photograph and arrest details were copied and displayed on RapSheets.org in a standard format used by the site. SOF ¶ 7.

Several advertisements from Google's AdSense program appear on RapSheets.org. SOF ¶ 11. The contents of each Google AdSense advertisement are created and controlled solely by Google and/or its advertising customers, not by Defendants. SOF ¶ 11. Other than choosing the location where each AdSense ad appears on the page, Defendants have no involvement or control of any kind in choosing which ads to display, or what those ads contain. SOF ¶ 15. These Google ads are the sole and exclusive source of revenue earned by RapSheets.org. SOF ¶ 16.

Following her arrest, on April 24, 2018 Mrs. Ivchenko was charged by direct complaint with one felony count of aggravated assault in Maricopa County Superior Court Case No. CR2018-119949. SOF ¶ 25. In May 2018, Mrs. Ivchenko entered into a deferred prosecution agreement to resolve the felony charge. SOF ¶ 26.

1 In connection with her deferred prosecution agreement, Mrs. Ivchenko signed a
2 written statement in which she represented to the Court: “I acknowledge that I am guilty
3 of the offenses charged in the complaint.” SOF ¶ 27. On May 15, 2018, the Superior
4 Court Commissioner presiding over Mrs. Ivchenko’s criminal case relied upon her
5 written admission of guilt by issuing an order, pursuant to Ariz. R. Crim. P. 38,
6 suspending the prosecution and allowing Mrs. Ivchenko to participate in the Felony
7 Pretrial Intervention Program. SOF ¶ 28.

8 After Mrs. Ivchenko completed diversion, the criminal case against her was
9 dismissed. Defendants removed Mrs. Ivchenko’s mugshot page in May 2019. SOF ¶ 21.
10 At no time did Defendants solicit or accept any payment for removing the page.

11 III. DISCUSSION

12 At first blush, it might appear the central issue in this case is: is it unlawful to
13 publish someone’s mugshot on the Internet? Although the answer to that question is
14 generally NO (assuming the person was, in fact, arrested), that is *not* the central issue in
15 this case.

16 Rather, the issue here is more subtle and can be stated as follows: if a person is
17 arrested in Arizona and their mugshot is published on the Internet by the Maricopa
18 County Sheriff’s Office, is it unlawful for *someone else* to *republish* that same
19 information on a web page that happens to earn money by displaying paid Google
20 AdSense ads on the page?

21 As explained below, the answer to that question is NO – the republication of pre-
22 existing online content (even when done for profit) is expressly *permitted* by federal law;
23 the Communications Decency Act, 47 U.S.C. § 230(c)(1) (the “CDA”). Under the CDA,
24 if unlawful or offensive content is published on the Internet, the original
25 publisher/developer may face liability, but anyone else may freely republish the same
26 information without liability as long as they do not “*materially contribute*” to the
27 unlawful nature of the *original information*. This point is not novel in the slightest. This
28 rule has been applied uniformly by courts in Arizona and across the United States.

1 To be sure, the CDA is not a “magic wand” and it does not *always* shield
2 everything a website owner does. For example, if there is evidence showing the
3 defendant has engaged in *other independently unlawful conduct* (beyond the mere
4 republication of existing online speech), the CDA will not shield the defendant for that
5 *other unlawful conduct*.

6 However, in this case, the evidence is undisputed – Plaintiffs’ claims *vis-à-vis* the
7 content published on RapSheets.org are not based on any *other unlawful conduct*. Rather,
8 as they relate to Defendants’ website, Plaintiffs’ claims are based solely on the
9 republication of speech that was initially published on the Internet by a third party
10 (MCSO). That conduct is absolutely protected by the CDA and cannot support liability
11 under any theory asserted in the Complaint.

12 In an effort to defeat this result via subterfuge, the Complaint seeks to avoid the
13 CDA by accusing Defendants of committing *other* unlawful acts; in effect, *extortion*: by
14 soliciting or demanding money to remove mugshots from their website. If true and if
15 supported by evidence, that conduct might arguably fall outside the scope of the CDA.

16 But Plaintiffs have no evidence showing that Defendants ever offered, demanded,
17 or accepted money to remove Mrs. Ivchenko’s mugshot. Indeed, it is an undisputed fact
18 that Mrs. Ivchenko’s mugshot was removed from Defendants’ website *without any*
19 *payment ever being requested or received*.

20 Accordingly, this case does not present the purely hypothetical question of whether
21 it might be lawful for a website operator to demand money to remove content from its
22 site.² Instead, the question is whether Plaintiffs may lawfully punish Defendants for the
23 simple act of republishing public records which were already published on the Internet by
24 a third party source (MCSO). The answer to that question is no.

25 ² Other courts have found extortion claims are barred by the CDA. *See Levitt v. Yelp!, Inc.*, 2011
26 WL 5079526, *6 (N.D.Cal. 2011) (holding, “allegations of extortion based on Yelp’s alleged
27 manipulation of their review pages—by removing certain reviews and publishing others...—falls
28 within the conduct immunized by § 230(c)(1).”); *see also Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008) (CDA shielded website operator who refused to remove defamatory messages despite allegation website owner sought to coerce payments).

a. All Claims Are Barred By 47 U.S.C. § 230(c)(1) To The Extent They Are Based On Information Initially Published Online By MCSO

As noted above, what happened here is entirely undisputed: Mrs. Ivchenko was arrested, her mugshot and arrest details was published by the Maricopa County Sheriff's Office on its website, and this information was copied and republished *verbatim* on Defendant's website. Other issues aside, all of Mrs. Ivchenko's claims arising from this conduct are barred by the CDA.

The CDA is a very simple federal law which provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). By its own terms, this section "provides immunity from liability if a claim 'inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another.' *Sen v. Amazon.com, Inc.*, ___ Fed. App'x ___, 2020 WL 708701, at *1 (9th Cir. Feb. 12, 2020) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)); *see also Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008) (CDA applied to shield website operator from liability for publishing allegedly defamatory messages authored by a third party, even though website owner allegedly used posts as leverage to extort money); *Austin v. CrystalTech Web Hosting*, 211 Ariz. 569, 573, 125 P.3d 389, 393 (Ariz. App. 2005) (agreeing, "§ 230 precludes courts from entertaining claims that would place a [website operator] in a publisher's role.") (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

Insofar as Mrs. Ivchenko's claims arise from the publication of her mugshot, this case is essentially identical to *Doe v. Oesterblad*, 2015 WL 12940181 (D.Ariz. 2015). There, the defendant operated several websites where he republished the names, photos, and criminal history information of registered sex offenders. Further, the Complaint alleged: "Plaintiffs were required to pay Defendant a fee to remove their information from his websites; however, even after receiving payment from certain Plaintiffs, their information remains on Defendant's websites." *Oesterblad*, 2015 WL 12940181, *1.

1 Based on those facts, several plaintiffs sued, asserting a broad range of legal
2 theories including federal racketeering/RICO/extortion claims, right of publicity claims,
3 negligent and intentional infliction of emotional distress, false light invasion of privacy
4 and defamation. *See id.* Except for the RICO/extortion claims which are not present here,
5 these claims are substantially identical to the causes of action asserted by Mrs. Ivchenko
6 in this matter.

7 On a Rule 12(b)(6) Motion to Dismiss, the District Court in *Osterblad* found all
8 claims were barred by the CDA to the extent they arose from “offensive information (i.e.,
9 Plaintiffs’ names, photographs, and criminal history)” which the defendant simply copied
10 and republished from “preexisting non-profit and government websites” and then
11 reposted on his own website. *Id.* at *2. In short, the court explained this conduct was
12 shielded by the CDA because Section 230: “protects from liability (1) a provider or user
13 of an interactive computer service (2) whom a plaintiff seeks to treat ... as a publisher or
14 speaker (3) of information provided by another information content provider.” *Id.*
15 (quoting *Barnes*, 570 F.3d at 1100).

16 Applying that traditional three-part test, the court found the CDA applied because
17 the defendant was the “provider or user of an interactive computer service” (i.e., his
18 website), and the plaintiffs’ claims sought to treat him as the “publisher or speaker” of
19 information which already available elsewhere online. In other words, the allegedly
20 actionable information (plaintiff’s names, photos, and criminal history information) was
21 merely copied by the defendant “from other, preexisting websites that he did not control.”
22 2015 WL 12940181, *2. For that reason, the CDA applied.

23 This case involves essentially the same facts. Mrs. Ivchenko was arrested, and her
24 name, photograph, and summary of the charges filed against her were published on the
25 Internet by the Maricopa County Sheriff’s Office. Defendants simply copied and
26 republished this information *verbatim* on their website without any material change. Mrs.
27 Ivchenko now seeks to treat Defendants as the *publishers* or *speakers* of this same
28 information. This is precisely what the CDA prohibits. *See Barnes*, 570 F.3d at 1101–02.

1 To be clear—the defendant’s victory in *Osterblad* was not absolute. The Court
2 only held the CDA barred claims asserted by six anonymous plaintiffs (identified as John
3 Does #1–6). Despite this, the Court did not find the CDA barred the claims of *other*
4 plaintiffs identified as John Doe #8, Jane Does #9-10, John Doe #11 and David Ellis.

5 As to these other plaintiffs, the Court found the CDA did not apply because the
6 Complaint accused the Defendant of *other* unlawful acts beyond merely republishing
7 information found on other websites. To wit, the Complaint “alleges that these Plaintiffs
8 have never registered as sex offenders or been convicted of a sex-related offense” but
9 these Plaintiffs were nevertheless listed on defendant’s website as if they were, in fact,
10 convicted sex offenders. Put another way, this separate group of plaintiffs claimed their
11 names and alleged criminal history information was not already published on the Internet
12 by a third party source. Instead, they accused the defendant of being the original source
13 who created and published this false information online for the first time.

14 Due to that unique fact, the Court found the CDA did not apply to some of these
15 plaintiffs because:

16 Based on these allegations, the Court could reasonably conclude that
17 Defendant created a portion of his websites’ content by adding the
18 personal information of those Plaintiffs not listed on preexisting sex
19 offender registries and misidentifying them as individuals who have been
20 convicted of a sex-related offense. Because the TAC sufficiently alleges
21 that Defendant was responsible for his websites’ content concerning
22 Plaintiffs John Doe #8, Jane Does #9-10, John Doe #11, and David Ellis,
23 Defendant is not entitled to CDA immunity for their claims.

24 2015 WL 12940181, *4 (emphasis added).

25 This exception to CDA protection—where the defendant *independently creates*
26 *new unlawful content*, rather than merely republishing existing online content—does not
27 apply here. This is so because unlike the successful plaintiffs in *Osterblad* who were
28 never listed on preexisting sex offender registries, it is undisputed that Mrs. Ivchenko was
arrested, and her mugshot and arrest details were published by MCSO on its website.
That information was simply republished by Defendants without any material change.

1 For these reasons, the CDA bars all of Mrs. Ivchenko’s claims exactly as the
2 District Court held in *Osterblad*. Other courts have reached the same conclusion. *See*
3 *Shuler v. Duke*, 2018 WL 2445685, *9 (N.D. Ala. 2018) (finding CDA barred claims
4 despite allegation plaintiff “continues to suffer economic and emotional damages from
5 his mugshot wrongfully being caused to appear at Web sites, such as mugshots.com and
6 jail.com—even though his arrest had no basis in law or fact”), *aff’d* 2019 WL
7 6048536 (11th Cir. Nov. 15, 2019); *Kruska v. Perverted Justice Found., Inc.*, 2008 WL
8 2705377, *2 (D.Ariz. 2008) (statements imputing criminal conduct by plaintiff barred by
9 CDA as to defendant which simply hosted content created by other sources, and noting
10 Section 230 “immunity has proved nearly limitless, protecting providers from
11 defamation, invasion of privacy, right of publicity, general negligence, and intentional
12 infliction of emotional distress, among other claims.”) (internal citations omitted).

13 It is possible Plaintiffs may seek to challenge this conclusion with three main
14 arguments. First, Plaintiffs may argue that Defendants are not entitled to immunity
15 because RapSheets.org contains *paid advertisements*, and thus Defendants are “profiting”
16 from the republication of Mrs. Ivchenko’s mugshot. If raised, this argument fails because
17 the CDA is not limited to non-profit websites; “[T]he fact that a website elicits online
18 content for profit is immaterial; the only relevant inquiry is whether the interactive
19 service provider ‘creates’ or ‘develops’ that content.” *M.A. ex rel. P.K. v. Vill. Voice*
20 *Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) (quoting *Goddard v.*
21 *Google*, 2008 WL 5245490, *3 (N.D.Cal. 2008)); *see also Global Royalties*, 544
22 F.Supp.2d at 933 (concurring, “it is legally ... beside the point whether defendants refuse
23 to remove the material, or how they might use it to their advantage.”); *Hill v. StubHub,*
24 *Inc.*, 219 N.C. App. 227, 242, 727 S.E.2d 550, 560 (N.C.App. 2012) (agreeing, “the fact
25 that a website operates a commercial business or makes a profit has no relevance to the
26 immunity determination.”); *Fed. Agency of News LLC v. Facebook, Inc.*, 2020 WL
27 137154, *7 (N.D. Cal. 2020) (“there is no ‘for-profit exception to § 230’s broad grant of
28 immunity.”) (quoting *M.A. ex rel. P.K., supra*).

1 Second, Plaintiffs may argue the CDA does not apply because RapSheets.org
2 contains “misleading” advertisements. *See, e.g.*, Complaint ¶¶ 30–33. Again, if raised,
3 this argument fails because the “advertisements” in question are not created by
4 Defendants. The only ads present on RapSheets.org are Google AdSense ads, the
5 contents of which are solely and exclusively created by Google and/or Google’s
6 advertising customers. *See* SOF ¶ 14. For that reason, even assuming these ads were
7 misleading in some way, the CDA would still protect Defendants because the ads were
8 created by Google, not by Defendants. *See Ascentive, LLC v. Opinion Corp.*, 842 F.
9 Supp. 2d 450, 455 (E.D.N.Y. 2011) (describing Google’s AdSense program, noting “The
10 content of the advertisements change on a click-by-click basis—i.e., the advertisements
11 are different for every separate user that visits the website ...” and finding defendant
12 website fully entitled to CDA immunity despite displaying AdSense ads).

13 Third and finally, Plaintiffs may argue the CDA does not apply because
14 Defendants “extort” victims by demanding money to remove mugshots. *See, e.g.*, Compl.
15 ¶ 35. Again, this argument fails for multiple reasons. First, this is exactly the same
16 argument rejected by the Court in *Osterblad*, and second, Defendants do not engage in
17 this practice; they do NOT charge money to remove mugshots (or any other information)
18 from their website. *See* SOF ¶¶ 16, 23.

19 For each of these reasons, Defendants are entitled to summary judgment as to all
20 claims arising from the republication of Mrs. Ivchenko’s mugshot on RapSheets.org.

21
22 **b. All Claims Are Untimely To The Extent They Arise From**
23 **Information Published on Rapsheets.org**

24 Although it is not necessary for the Court to reach this point, in addition to the
25 CDA, Defendants are separately entitled to summary judgment on the basis that all
26 claims arising from material published on Defendants’ website are untimely pursuant to
27 A.R.S. § 12-541 which provides a one-year limitation period for “for injuries done to the
28 character or reputation of another by libel or slander.” This period begins to run on the

1 first date of publication, not the date the publication was discovered. *See Larue v. Brown*,
2 235 Ariz. 440, 443 (App. 2014) (“Arizona provides that the statute of limitations for a
3 defamation action begins to run upon publication of the defamatory statement. [citations]
4 A plaintiff has one year after a defamation action accrues to commence and prosecute his
5 claim.”)

6 Here, Mrs. Ivchenko’s mugshot was first published on Defendants’ website in
7 April 2018. SOF ¶ 7. The page remained visible and unchanged on the site until October
8 2018 when the word “DISMISSED” was added to indicate the criminal case against Mrs.
9 Ivchenko had been resolved. SOF ¶ 20. The page was eventually removed in May 2019.
10 SOF ¶ 23. During the time the page was present on the website, Defendants did nothing
11 to conceal it or to make it harder to find. SOF ¶ 24.

12 Based on these undisputed facts, any defamation or related claim arising from the
13 publication of Mrs. Ivchenko’s mugshot on RapSheets.org accrued in April 2018 and
14 expired in April 2019. As such, all claims³ arising from this conduct are untimely and
15 barred by A.R.S. § 12-541.

16 **c. The Publication of Mugshots & Charging Information Is Privileged**
17

18 Again, although the Court need not reach this issue, assuming Mrs. Ivchenko’s
19 claims were not barred by the CDA, and assuming the claims were timely, her claims
20 would still fail because the publication of a mugshot and other truthful information
21 obtained from court records is privileged under Arizona law. This privilege extends “to
22 reports which described the contents of pleadings which have been filed with the court”
23 as well as other information contained in public records or documents. *Green Acres Trust*
24 *v. London*, 141 Ariz. 609, 619, 688 P.2d 617, 627 (Ariz. 1984) (in banc).

25
26
27 ³ Arizona’s Single Publication Act, A.R.S. § 12-651(A), limits plaintiffs to one cause of action
28 per publication regardless of how the claim is denominated. Accordingly, because multiple
claims or causes of action are not permitted, the fact that Mrs. Ivchenko asserts other claims in
addition to defamation is irrelevant.

Here, it is undisputed that Mrs. Ivchenko was arrested and the facts published about Mrs. Ivchenko on Defendants’ website accurately reflect the charges filed against her in court/police records. Accordingly, this speech is privileged and is thus not actionable under a defamation theory or any other theory. *See Barba v. Seung Heun Lee*, 2011 WL 13183112, *3 (D.Ariz. 2011) (noting (“[T]ort claims which are found to be artfully pled defamation claims are disallowed where the defamation claims themselves are invalid as a matter of law.”) (quoting *Chapman v. Journal Concepts, Inc.*, 2008 WL 5381353, at *19 (D.Haw. 2008) (citing *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (“[W]hen a claim of tortious interference with business relationships is brought as a result of constitutionally-protected speech, the claim is subject to the same First Amendment requirements that govern actions for defamation.”))).

d. Mrs. Ivchenko’s “Defamation By Implication” Claim Fails

The Complaint alleges Defendants defamed Mrs. Ivchenko by displaying her mugshot and information regarding the criminal case filed against her, thus *implying* she was guilty of criminal conduct. This claim fails for two different reasons. First, Mrs. Ivchenko has no evidence to support this claim, much less the “clear and convincing” evidence required to establish the theory. Second, entirely separate and apart from that point, although Defendants did *not* imply Mrs. Ivchenko committed any criminal acts, the undisputed evidence shows that any such implication is true.

i. Rapsheets.org Does Not Imply Guilt

To prevail on a defamation-by-implication claim, Mrs. Ivchenko is required to offer evidence showing Defendants actually “intended to convey the defamatory implication” and this showing must be made with “convincing clarity.” *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1064 (9th Cir. 1998) (emphasis added) (quoting *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 681 (9th Cir. 1990)).

Here, no evidence exists to support this conclusion. Indeed, on the contrary, it is undisputed that Defendants’ website contains a lengthy disclaimer explaining that

1 individuals depicted on the site are “PRESUMED INNOCENT UNTIL PROVEN
2 GUILTY IN A COURT OF LAW”, and that mugshots appearing on the site “ARE IN
3 NO WAY AN INDICATION OF GUILT AND THEY ARE NOT EVIDENCE THAT
4 AN ACTUAL CRIME HAS BEEN COMMITTED.” SOF ¶ 17.

5 Based on this undisputed disclaimer, and the fact that Mrs. Ivchenko was actually
6 arrested and charged with a felony, she cannot prevail on a defamation-by-implication
7 theory. *See Spilfogel v. Fox Broadcasting Co.*, 2010 WL 11504189, at *4 (S.D. Fla.
8 2010) (granting 12(b)(6) dismissal of plaintiff’s defamation-by-implication claim arising
9 from video showing plaintiff being stopped by police on TV program “COPS”; program
10 included a disclaimer advising that all suspects were presumed innocent until proven
11 guilty and was thus not impliedly defamatory), *aff’d*, 433 F. App’x 724 (11th Cir. 2011).

12 **ii. Any Implication That Mrs. Ivchenko Committed A Crime Is**
13 **True**

14 Under Arizona law, to support a defamation claim, a statement must not only be
15 literally false, it must be *false in substance*. This means the published statement (even if
16 inaccurate in some way) must be *more harmful* to the plaintiff’s reputation than the literal
17 truth would be. *See generally Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 107, 402
18 P.3d 457, 465 (App. 2017) (explaining function of substantial truth). Based on this rule,
19 even when a published statement is technically false, it is not defamatory if an accurate
20 statement would have been equally damaging to the plaintiff’s reputation. *See Fendler v.*
21 *Phoenix Newspapers Inc.*, 130 Ariz. 475, 480, 636 P.2d 1257, 1262 (App. 1981) (story
22 falsely reporting plaintiff was “in prison” serving sentence was not substantially false
23 where plaintiff had been sentenced to prison, but remained free pending appeal).

24 Here, Mrs. Ivchenko alleges that Defendants defamed her and placed her in a false
25 light by implying she committed a crime. Although it is certainly true that Mrs. Ivchenko
26 avoided a criminal *conviction* by participating in felony pretrial diversion, this does not
27 mean she was innocent of wrongdoing, or that a statement implying she committed a
28 crime is substantially false.

1 This is so because in addition to other evidence of her guilt, as part of her felony
2 diversion agreement, Mrs. Ivchenko made a written representation to the court admitting
3 that she was “guilty of the offenses charged in the complaint.” SOF ¶ 27. The court relied
4 on that admission when it allowed Mrs. Ivchenko to participate in diversion, thereby
5 avoiding a possible felony conviction and prison sentence.

6 Under these circumstances, the doctrine of judicial estoppel prevents Mrs.
7 Ivchenko from changing her story and claiming (as she apparently now does) that she did
8 not commit any crime at the time of her arrest in April 2018; “[a]s a general rule, a party
9 who has assumed a particular position in a judicial proceeding is estopped to assume an
10 inconsistent position in a subsequent proceeding involving the same parties and
11 questions.” *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996) (in banc)
12 (quoting *Martin v. Wood*, 71 Ariz. 457, 459, 229 P.2d 710, 711–12 (1951)).

13 Because the criminal court relied on Mrs. Ivchenko’s admission of guilt, she
14 cannot now take a contrary position by attempting to deny her guilt in this case; this is
15 precisely the type of “perversion” of judicial integrity the doctrine was intended to
16 prevent. See *Towery*, 186 Ariz. at 183 (noting among other factors, judicial estoppel will
17 apply where “the court in the prior action accepted the [party’s] first position”)

18 Mrs. Ivchenko admitted that she committed a crime, and she obtained a significant
19 advantage by doing so. As such, she is “stuck” with that admission and cannot take a
20 contrary position here. For that reason, even assuming Defendants somehow implied her
21 guilt (which they did not), that implication would have been both literally and
22 substantially true. As such, the implication is not actionable.

23
24 **e. Plaintiffs Have No Evidence Defendants Posted Any Statements**
25 **About Them On Twitter**

26 As noted above, Part Two of this case has nothing to do with Defendants’ website.
27 Instead, Part Two involves allegedly defamatory statements published on Twitter by an
28 individual using the name “Jennifer Becker”.

1 Plaintiffs bear the affirmative burden of proof as to this issue, which includes
2 proving *Defendants* published the statements attributed to Jennifer Becker. But
3 Defendants deny posting any such comments, see SOF ¶¶ 29–30, and Plaintiffs have no
4 evidence whatsoever to the contrary.

5 Because Plaintiffs bear the burden of proof on this issue, and because Plaintiffs
6 have no evidence with which to meet that burden, summary judgment in favor of
7 Defendants is appropriate:

8 [A] party moving for summary judgment need merely point out by
9 specific reference to the relevant discovery that no evidence existed to
10 support an essential element of the [non-movant's] claim. Conclusory
11 statements will not suffice, but the movant need not affirmatively establish
12 the negative of the element. If the party with the burden of proof on the
13 claim ... cannot respond to the motion by showing that there is evidence
creating a genuine issue of fact on the element in question, then the motion
for summary judgment should be granted.

14 *Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 117, 180 P.3d 977, 982 (Ariz. App.
15 2008) (emphasis added) (internal citation omitted) (quoting *Orme School v. Reeves*, 166
16 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990) (citing *Celotex Corp. v. Catrett*, 477 U.S.
17 317, 330, 106 S.Ct. 2548, 2556, 91 L.Ed.2d 265 (1986))).

18 IV. CONCLUSION

19 For the reasons stated above, Defendants are entitled to summary judgment as to all
20 claims in this matter.

21 Respectfully submitted: February 21, 2020.

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23 

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28

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