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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JANE DOE I; JANE DOE II; JANE DOE III; JANE DOE IV; JANE DOE V; JOHN DOE I; JOHN DOE II; JOHN DOE III; JOHN DOE IV; JOHN DOE V; JOHN DOE VI; JOHN DOE VII; JOHN DOE VIII; JOHN DOE IX; JOHN DOE X; JOHN DOE XI; JANE DOE VI; JANE DOE VII; JOHN DOE XII; JANE DOE VIII; and RENEE IVCHENKO, a married woman,

Plaintiffs

vs.

KYLE DAVID GRANT and JANE DOE GRANT, husband and wife; TRAVIS PAUL GRANT and MARIEL LIZETTE GRANT, husband and wife; JOHN and JANE DOES I-X; BLACK CORPORATIONS I-X; and WHITE COMPANIES I-X,

Defendants.

Case No.: CV2019-015355

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

(Oral Argument Requested)

Plaintiffs Jane Does I-VIII, John Does I-XII, and Renee Ivchenko hereby respond in opposition to the motion for summary judgment filed by Defendants (the "Motion") and respectfully requests, for the reasons stated below, the Court to deny the same.

This Response Motion and Memorandum is supported by Defendants' Statements of Fact ("DSOF"), Plaintiffs' Controverting and Additional Statements of Fact ("CSOF"), and the entire record in this case, which are incorporated herein by reference.

I. Background Facts

Defendants admit they are "mugshot website operator[s]." A.R.S. §§ 44-7902, 44-7901(4) ("'Mugshot website operator' means a person that publishes a criminal justice record on a publicly available internet website for a commercial purpose."). DSOF, ¶¶ 5-8. Contrary to Defendants' representation, Motion at 5, Defendants' entire business model—"scraping" arrest information and booking photos from law enforcement websites, and then using this information for their own commercial gain—***is*** illegal under Arizona law. *See e.g.*, A.R.S. §§ 44-7902, *et. seq.* (the "Arizona Mugshots Act").[1]

The Arizona Mugshots Act, and the growing list of newly enacted state statutes like it, signify a sea-change in how governments, law enforcement agencies, and courts treat arrest information, due mostly to the unscrupulous and harmful practices of mugshot website operators, such as Defendants. For example, in *Detroit Free Press Inc. v. United States Dep't of Justice*, 829 F.3d 478, 482 (6th Cir. 2016), the Sixth Circuit overruled a two-decades old opinion and held that "[i]ndividuals enjoy a non-trivial privacy interest in their booking photos." 829 F.3d at 480. The Sixth Circuit explained:

[1] The Act prohibits "mugshot website operators" from posting arrest information photos for commercial purposes, broadly defined to include "any purpose in which the [mugshot website operator] can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record." A.R.S. § 39-121.03(D); A.R.S. § 44-7901(2).

> In 1996, when we decided *Free Press I*, booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection. In fact, mug-shot websites collect and display booking photos from decades-old arrests[.]

829 F.3d at 482. As a result of online access to booking photos, "[a] disclosed booking photo casts a long, damaging shadow over the depicted individual." *Id.* at 482.

The booking photos and arrest information that Defendants exploit for monetary gain are not provided, or tendered, to Defendants by law enforcement. To the contrary, law enforcement agencies, such as the Maricopa County Sherriff's Office ("MCSO"), post the information on their website for a limited period of time, only three days. CSOF, ¶ 42. As Defendants concede, Defendants obtain the information by using software that copies or "scrapes" the arrest information from the MCSO's website. DSOF, ¶ 6

Defendants then monetize and use the information for their own commercial benefit. Prior to the passage of the Florida mugshot statute on or about July 18, 2018, FL Stat § 901.43, which outlawed the practice of accepting take-down fees to remove the information, Defendants openly solicited and accepted fees to remove the arrest information. CSOF, ¶ 37. Since passage of the Florida Mugshot statute, Defendants publically represent they no longer accept removal fees, but there is evidence to the contrary, CSOF, ¶¶ 38-41, which creates a disputed issue of material fact.

There is no dispute, however, that Defendants exploit the arrest information and booking photos for their own commercial gain. Defendants use the arrest information and booking photos to serve at least two, purely commercial purposes: 1) to attract third party advertisers to Defendants' website(s); and 2) to entice any user of the website to mistakenly click the third party Google AdSense banner ads to generate pay-per-click advertising revenue for Defendants. CSOF, ¶ 44, DSOF ¶ 16.

The latter part of this scheme works by manipulating the placement on the website(s) of the third party Google AdSense ads in a misleading manner to entice the public into clicking on the Google AdSense ads, thus generating substantial pay-per-click advertising revenue for Defendants. CSOF, ¶¶ 45-46; *see* DSOF ¶ 15.

Defendants admit that their mugshot website(s) feature Google Ads. DSOF ¶ 11. Defendants also admit that they control where those Google AdSense Ads are placed on their website(s). DSOF, ¶ 15. As Google explains on its AdSense support page: "Adsense works by matching ads to your site based on your content and visitors." CSOF, ¶ 47. What this means, practically speaking, is that because Defendants' mugshots website(s), such as rapsheetz.com and bailbondsearch.com, display arrest information from court records, the Google AdSense Ads that appear on their website(s) are typically for public records databases, such as truthfinder.com or beenverified.com. CSOF, ¶ 48. As demonstrated in the Amended Complaint, ¶ 28, and the screen captured image reproduced therein, Defendants place these banner ads directly beneath, alongside, and/or embedded within the booking photo and arrest information so that the user of the website mistakenly clicks on the banner ad falsely believing that by doing so they will be directed to the "arrest details" in the rapsheetz.com database, but are instead directed to the third party database. CSOF, ¶ 49.

II. Procedural History

On December 17, 2019, Plaintiffs Renee Ivchenko and Andrew Ivchenko filed the instant lawsuit. The original complaint asserted causes of action for Defamation, False Light Invasion of Privacy, Invasion of Privacy based on Appropriation, Intentional Infliction of Emotional Distress, Unlawful Appropriation/Right of Publicity, Civil Conspiracy, and Punitive Damages. *See* Complaint. Defendants' filed an Answer on

February 7, 2020. On February 20, 2020, Plaintiffs indicated to Defendants in writing that Plaintiffs were planning on amending their complaint within the 21-day time-period provided by the rules. CSOF, ¶ 31. *See* Ariz. R. Civ. P. 15(a)(1)((B). Plaintiffs further indicated that, as part of that amendment, they were not going to include the previously asserted defamation claim. CSOF, ¶ 31. Nonetheless, Defendants filed the instant motion the following day, focused entirely on the original complaint's defamation claims.

The Amended Complaint was filed on February 27, 2020. The Amended Complaint did not include the previously asserted defamation and false light claims brought by Plaintiffs Renee Ivchenko and Andrew Ivchenko (Andrew Ivchenko is no longer a plaintiff in this action). Instead, the Amended Complaint adds twenty (20) new Plaintiffs who, along with Renee Ivchenko, assert claims for, *inter alia*, unlawful commercial misappropriation and for ongoing violations of the Arizona Mugshot Act.

Generally, "[o]nce an amended complaint is filed, as it was here, it supersedes the original complaint, which becomes *functus officio*, that is, of no further effect or authority." *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 586, 937 P.2d 1382, 1392 (App. 1996). Typically, this means that a motion for summary judgment filed before an amended complaint is rendered moot thereby. *See Williams v. Connecticut Gen. Life Ins. Co.*, 2008 WL 4183372, at *2 (D.Ariz. Sept.10, 2008). The Court "may, however, proceed with the motion if the amendment does not cure the defect." *Alexander v. Winn*, No. CV 10-724-TUC-CKJ, 2012 WL 176499, at *3 (D. Ariz. Jan. 23, 2012).

Accordingly, Plaintiffs hereby respond to the issues that arguably are not mooted by the Amended Complaint, specifically, Defendants' contention that (1) a mugshot website operator is immune from any and all liability under § 230 of the Communications Decency Act ("CDA"), (2) immune from liability under the absolute defamation privilege

promulgated in *Green Acres Trust v. London*, 141 Ariz. 609, 619, 688 P.2d 617, 627 (Ariz. 1984) ("*Green Acres*"), and that (3) Plaintiff Renee Ivchenko's misappropriation claim is time-barred under the one-year statute of limitations that applies to defamation claims. Because each of these arguments are unavailing, Defendants' Motion should be denied.

III. Defendants Are Not Immune From Liability Under § 230 of the CDA.

A. Background of 47 U.S.C. § 230(c)(1).[2]

"Section 230(c), titled 'Protection for 'Good Samaritan' blocking and screening of offensive material,' provides two types of protection from civil liability." *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1157 (N.D. Cal. 2017). Only the first is relevant here: "Section 230(c)(1) mandates that '[n]o 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.'" *Id*. (*quoting* 47 U.S.C. § 230(c)(1)). "Accordingly, section 230(c)(1) 'precludes liability that treats a website as the publisher or speaker of information ***users provide on the website***.'" *Id*. (*quoting Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016) (emphasis added)). "'In general, this section protects websites from liability for material posted on the website ***by someone else***.'" *Id*. (emphasis added). As Defendants concede, *none* of the actionable content posted on Defendants' mugshots websites was posted there by someone else. *See* DSOF, ¶ 6.

Defendants do not inform this Court of the limitations of, or exceptions to, a CDA § 230 defense. Instead, Defendants attempt to convince the Court that application of the

[2] Arizona courts follow Ninth Circuit precedent when construing a federal statute, such as the CDA. *See Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 533, 81 P.3d 320, 324 (2003); *Sec. Alarm Fin. Enterprises, L.P. v. Fuller*, 242 Ariz. 512, 517, 398 P.3d 578, 583 (App. 2017) ("following Ninth Circuit precedent furthers federal-state court relationships and promotes predictability and stability of the law.").

CDA is "simple",[3] and that any and every time a website operator posts content originally created by a third party, the website operator is immune from any and all liability. That is not the law, as explained by the Ninth Circuit in its seminal decision on the CDA §230 defense, which Defendants neither cite to nor discuss: "[E]ven if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (*en banc*).

The Ninth Circuit has held that the CDA "does not declare 'a general immunity from liability deriving from third-party content.'" *Doe v. Internet Brands*, 824 F.3d at 852 (*quoting Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009)). Nor was the CDA "meant to create a lawless no-man's land on the Internet." *Roommates*, 521 F.3d at 1164. Rather, "section 230(c)(1) protects from liability only (a) a provider or user of an interactive computer service (b) that the plaintiff seeks to treat as a publisher or speaker (c) of information provided by another information content provider." *Fields v. Twitter, Inc.*, 200 F.Supp.3d 964, 969 (N.D. Cal. 2016) (*citing Barnes*, 570 F.3d at 1100-01).

Defendants admit facts that concede that they cannot satisfy the third element as a matter of law. Defendants' Motion should be denied.

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[3] Defendants present the "[t]he CDA [as] a very simple federal law" that immunizes from liability anyone that republishes third party content. Motion at 7. To the contrary, as one District Court recently explained, because "the immunity it bestows is not unlimited[,] Section 230 cases exist along a continuum[.] The question here is where along that continuum Defendants' [websites] lie." *Pace v. Baker-White*, No. CV 19-4827, 2020 WL 134316, at *4 (E.D. Pa. Jan. 13, 2020). A good primer on how courts have applied the CDA defense along that continuum is *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195-201 (10th Cir. 2009), which is provided here for the Court's convenience as Exhibit A.

B. The Section 230 Defense Does Not Apply Where, As Here, the Information is Not "Provided" by the Original Content Creator.

Defendants' core argument for applying the CDA defense is based entirely on a factual and legal misrepresentation, specifically, that the arrest information they copy or "scrape" and then post for commercial use on their mugshot website(s) was "provided" to them by law enforcement. Defendants state:

> As a matter of law, the CDA expressly forbids defamation, false light, and any other related state-law claims which treat website operators or users (like Defendants) as the 'speaker or publisher' of any information (such as a mugshot) ***provided by a third party*** (like MCSO).

Motion at 2 (emphasis added). Contrary to Defendants' representation, the arrest information and booking photos they commercialize are not "provided" by law enforcement (like MCSO). As such, Defendants are not entitled to CDA immunity.

The CDA precludes liability for the publication of content "provided by another information content provider." 47 U.S.C. § 230(c)(1). As the Ninth Circuit has held:

> If the [actionable] information is not "provided by another information content provider," then § 230(c) does not confer immunity on the publisher of the information.
>
> ***"[P]rovided" suggests, at least, some active role by the "provider" in supplying the material***[.]

Batzel v. Smith, 333 F.3d 1018, 1032-33 (9th Cir. 2003) (emphasis added); *see also W. Sugar Coop. v. Archer-Daniels-Midland Co*., 2015 WL 12683192, at *8 (C.D. Cal. Aug. 21, 2015) ("The Ninth Circuit has explained that the term 'provided' suggests, at least, some active role by the provider in supplying the material").

For the defense to apply, it is not enough that the information be copied or "scraped" from a third a party source; the third party must take an active role in providing or tendering the information to the website operator. Accordingly, courts, including the

Ninth Circuit, have construed the term "provided" to mean provided by a user of the website, such that the defense only "***protects websites from liability for material posted on the website by someone else***." *Doe v. Internet Brands, Inc.*, 824 F.3d at 850. (emphasis added); *see also Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (holding that the CDA §230 defense only applies to "information originating with ***a third-party user of the service.***'") (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)) (emphasis added).

Defendants admit that the arrest information and booking photos they use for their own commercial exploitation was not provided and/or tendered to them by law enforcement and that they only obtain the information by "scraping" or copying it. DSOF, ¶ 6. For this reason alone, the CDA defense does not apply.

This was the conclusion reached by a California trial court considering whether a website mugshot operator was immune from liability under the CDA. In that case, a plaintiff in California, Zim Rogers, sued a mugshot website operator for, *inter alia*, commercial misappropriation of his booking photo. As here, the defendants there argued that the CDA immunized them from liability. The Court rejected that argument because the information was not "tendered" or "provided" by law enforcement, but instead "scraped" or copied by the mugshot website operator:

> Here, the content on JustMugshots website is not posted by third parties, but obtained and posted by Defendant. Thus, the CDA immunity does not apply.

Rogers v. Justmugshots.Com, Corp., Superior Court of Los Angeles County, Super. Ct. No. BC530194 (July 30, 2014) *aff'd by Rogers v. Justmugshots.Com, Corp.*, No.

B258863, 2015 WL 5838403 (Cal. Ct. App. Oct. 7, 2015) (unpublished).[4] The exact same analysis applies here and compels a finding that Defendants are not immune from liability.

To be clear, law enforcement making the information available and/or accessible (for a limited period) does not constitute "providing" within the meaning of the CDA. *See Batzel*, 333 F.3d at 1032-33 (explaining that making information "available to anyone with access … is not 'provided'" within the meaning of the statue). Nor is "evidence that [the website operator] obtained permission to republish the [actionable information] on its website" sufficient to trigger the defense. *See W. Sugar Coop.*, 2015 WL 12683192 at *8 (citing *Roommates.Com*, 521 F.3d at 1162; *Batzel*, 333 F.3d at 1032; and *Accusearch Inc.*, 570 F.3d at 1201).

Because the information was not "provided" to Defendants for their commercial use, they are not entitled to CDA immunity as a matter of law. *Id*.

C. Even If Making the Information Available and Accessible On The Internet Constituted "Providing" Under The CDA (It Does Not), The CDA Still Does Not Apply Because Defendants Have No Reasonable Belief That The Information Was Made Available To Them For Their Copying And Commercial Use.

As the Ninth Circuit has explained, even if the information is provided to the website operator by the original content creator, the CDA defense only applies if, under the circumstances, the recipient reasonably believes the information was tendered to them for republication. This was the holding in *Batzel v. Smith*, another Ninth Circuit precedent Defendants neither cite nor discuss:

> We therefore hold that a service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created

[4] The *Rogers v. Justmugshots.Com, Corp.* decisions are not published and are offered here only as persuasive authority in light of the absence of published case law addressing whether a mugshot website operator is immune from liability under the CDA. Both decisions are attached here for the Court's convenience as Exhibit B.

> or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other "interactive computer service [*i.e.*, website]."

333 F.3d at 1034 ("remand[ing] to the district court for further proceedings to develop the facts under this newly announced standard"); *see also Roommates.Com, LLC*, 521 F.3d at 1171 ("[I]f 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 … is thus properly deemed a developer and not entitled to CDA immunity."). As the Ninth Circuit explained in *Roommates.Com,* this limitation is necessary because "[p]roviding immunity every time a website uses data initially obtained from third parties would eviscerate the exception to 47 U.S.C.S. § 230 for 'developing' unlawful content in whole or in part." *Id*.

As the Central District of California held in construing the Ninth Circuit's CDA immunity precedent:

> If the information is not provided by another information content provider, then § 230(c) does not confer immunity on the publisher of the information. *See Batzel v. Smith*, 333 F.3d 1018, 1032 (9th Cir. 2003). ***The question is whether under the circumstances, "a reasonable person ... would conclude that the information was sent [to them] for internet publication."*** *Id*.

W. Sugar Coop., 2015 WL 12683192, at *8 (C.D. Cal. Aug. 21, 2015) (emphasis added). Under the circumstances, Defendants have no objectively "reasonable belief" that law enforcement makes the arrest information available (on a limited basis) so that Defendants can scrape it for their commercial use. The fact that the MCSO only posts the arrest information on its website for a limited period of three days, evidences its intent that the information not be available online indefinitely. Moreover, Defendants' business model is expressly prohibited by the Arizona Mugshots Act, which expresses the public policy

of the State of Arizona. Under these circumstances, no mugshot website operator could have an objectively reasonable belief that the MSCO makes the information available for their copying and commercial use. At the very least, whether any such belief was reasonable is a fact issue for the jury. *See e.g.*, *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003) ("whether their belief…was objectively reasonable… is not a legal inquiry, but rather a question of fact best resolved by a jury.").

D. The CDA Defense Also Does Not Apply Because Defendants Are Wholly Responsible for What Makes The Content Illegal.

The CDA was designed to shield an interactive computer service provider from liability for someone else's illegal content. For example, when an interactive computer service provider hosts an internet message board, the interactive computer service provider is not liable under the CDA for third party messages. The idea here is that the illegality of the third party content originated with that third party, and therefore that is the party that should be held responsible for that illegality. But if the interactive computer service provider or website host creates (or contributes to) what is illegal about the content, the defense does not apply. "In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." *Roommates.Com, LLC*, 521 F.3d at 1168.

In this case, Defendants' commercial use of the arrest information and booking photos is what makes the content illegal. Stated differently, the illegality of the content is wholly created by Defendants' unlawful use. For example, there is nothing inherently unlawful about a photograph, but when the photograph is used to commercially misappropriate an image, that use is what makes the content illegal. *See e.g., Perkins v. Linkedin Corp.*, 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (Denying application of the

CDA defense where defendant LinkedIn was alleged to be "making use of Plaintiffs' names and likenesses as personalized endorsements for LinkedIn.").

What the Arizona legislature recognized in enacting the Arizona Mugshots Act is that when law enforcement post arrest information and booking photos for a limited period of time—the short period in which the public may have an interest in the information—that original content is not illegal. But when Defendants "scrape" that information and use it for their own commercial purposes, that transformative use is illegal. *See*, *e.g.*, *Accusearch*, 570 F.3d at 1199 (defendant not protected under CDA where it "knowingly sought to transform [legally protected] information into a publicly available commodity").

Take, for example, Plaintiffs' misappropriation claims. The claim is not, as Defendants' disingenuous straw-person argument suggests, that Plaintiffs are attempting to hold Defendants liable for misleading Google Ads. Motion at 11. The claim is that Defendants use the booking photos and arrest information to (1) solicit those ads in the first instance, and (2) then embed those ads within the booking photos and arrest information to cause a user of the website to mistakenly click those ads, thus increasing Defendants' pay-per-click advertising revenue. Amended Complaint, ¶¶ 47-49.

As the Northern District of California stated in a similar case:

> Defendant ignores the nature of Plaintiffs' allegations, which accuse Defendant not of publishing tortious content, but rather of creating and developing commercial content that violates their statutory right of publicity. The SAC alleges that Facebook takes Plaintiffs' names, photographs, and likenesses without their consent and uses this information to create new content that it publishes as endorsements of third-party products or services.

Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011). This is precisely what Defendants do here. As such, Defendants are wholly responsible "for what makes

the displayed content allegedly unlawful[,]" *Gonzalez*, 282 F. Supp. 3d at 1168 (quotation omitted), and therefore the defense does not apply for this additional, independent reason.

E. Defendants' Cited Cases Are Unavailing.

Defendants do not cite to a single case, save one, that applied the CDA defense where the actionable information was copied rather than provided by the original content creator. The lone exception is *Doe v. Oesterblad*, No. CV-13-01300-PHX-SRB, 2015 WL 12940181, at *2 (D. Ariz. June 9, 2015), which was decided before Arizona's passage of the Mugshot Act, did not consider the limitations on the defense promulgated by the Ninth Circuit in *Batzel* and *Roommates*, *see* Sections III(B) and (C), *supra*, and has never been cited by another court and for good reason. There are numerous problems with the *Doe* decision, and following it, as Defendants urge, would constitute legal error.

First, the principal argument Plaintiffs advance here—that for the CDA defense to apply, the third party must both (1) provide or tender the information (2) under circumstances where the recipient reasonably believes it was tendered or provided for publication—was not raised by the parties in that case, nor addressed by the Court. *Doe*, 2015 WL 12940181, at *2. "It is axiomatic that cases are not authority for issues not considered." *Khrapunov v. Prosyankin*, 931 F.3d 922, 933 (9th Cir. 2019) (N.R. Smith, C.J., concurring); *see also Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (refusing to follow prior cases where the issue had not been "squarely addressed").

Moreover, the *Doe* case was wrongly decided because it relied upon false propositions of law. Specifically, it misconstrued the holdings of two cases and then relied upon that misconstruction in granting the defendants' motion. *See DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1034 (9th Cir. 2006) (reversing "grant of summary

judgment and remand for further proceedings" where "the district court misconstrued our holding in [Ninth Circuit case]."). The *Doe* decision cites to the Ninth Circuit's decision in *Batzel*, 333 F.3d 1018, but got the holding wrong. The *Doe* decision's citation to *Batzel* is as follows:

> *See*, *e.g.*, *Batzel*, 333 F.3d at 1031-32 (concluding that a defendant was not an information content provider of an e-mail even though he made minor alterations to the email before it was posted on a website and made the choice to publish the e-mail)

Doe, 2015 WL 12940181, at *2. Although the Ninth Circuit in *Batzel* did state that "[t]he 'development of information' therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication[,]" and did conclude the defendants there could not be held liable as information content providers on that basis, 333 F.3d at 1031, the Ninth Circuit did not end the inquiry there, as the *Doe* decision suggests. Instead, the Ninth Circuit went on to state:

> In most cases our conclusion that [the defendants] cannot be considered a content provider would end matters, but this case presents one twist on the usual § 230 analysis[.]

333 F.3d at 1032. The unusual twist in *Batzel* is the exception to the defense that applies in this case; in *Batzel* there was evidence that the email was not provided or tendered to the website operator for their publication of it. As a result, the Ninth Circuit's actual holding in *Batzel* is as follows:

> We therefore hold that a service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other "interactive computer service."

333 F.3d at 1034 ("remand[ing] to the district court for further proceedings to develop the facts under this newly announced standard").

To make matters worse, the *Doe* decision also cites to a Tenth Circuit decision and got its holding wrong as well. The *Doe* Court's citation to, and parenthetical explanation, of that decision is as follows:

> *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (concluding that a defendant was not an information content provider even though it solicited inaccurate stock information from a third party for online publication).

Doe, 2015 WL 12940181, at *2. Again, the *Doe* Court's parenthetical explanation is not accurate, as explained by the Ninth Circuit in distinguishing *Ben Ezra* in *Roommates*:

> In *Ben Ezra, Weinstein, and Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000), the Tenth Circuit held AOL immune for relaying inaccurate stock price information it received from other vendors. While AOL undoubtedly participated in the decision to make stock quotations available to members, ***it did not cause the errors in the stock data, nor did it encourage or solicit others to provide inaccurate data***. AOL was immune because "Plaintiff could not identify any evidence indicating Defendant [AOL] developed or created the stock quotation information." Id. at 985 n. 5.

521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (emphasis added).

For these reasons, Plaintiffs respectfully request this Court not to follow *Doe* as *Doe* was wrongly decided, relied upon misconstrued holdings, and never addressed the arguments Plaintiffs raise here.

IV. Defendants' Posting of Information Outside the Official Proceedings For A Commercial Purpose is Not Privileged under *Green Acres*.

The defamation and false light allegations are no longer part of this case. For that reason, Defendants' *Green Acres* absolute privilege argument is moot. However, out of an abundance of caution, even if the privilege can be extended to non-defamation claims, the privilege does not apply as a matter of fact and law.

Defendants do not inform this Court that "[t]here are two classes of privileges, 'absolute' and 'qualified.'" *Green Acres*, 141 Ariz. at 612, 688 P.2d at 620. Instead,

Defendants represent that any republication of an official document outside the official proceedings, no matter what the occasion or purpose, is absolutely privileged. This argument is frivolous. In *Green Acres,* the Court explained the absolute privilege:

> In the area of absolute privileges one of the most common is that involving the participant in judicial proceedings…. The privilege protects judges, parties, lawyers, witnesses and jurors. The defense is absolute in that the speaker's motive, purpose or reasonableness in uttering a false statement do not affect the defense.

141 Ariz. at 613 (citations omitted). "In order to fall within the privilege, the defamatory publication must relate to, bear on or be connected with the proceeding." *Id.* More specifically, a "special emphasis must be laid on the requirement that [the] statement be made in furtherance of the litigation and to promote the interest of justice." *Id.* at 613-14.

Obviously, Defendants' commercial use is not "made in furtherance" of any official or court proceeding and certainly not done to "promote the interest of justice." *Green Acres,* 141 Ariz. at 613-14. Defendants do not even attempt to satisfy that standard or even truthfully inform the Court about the privilege's requirements. The absolute privilege does not apply.

Defendants are also not entitled to the qualified privilege:

> In general, Arizona law establishes a two-part analysis for determining whether a qualified privilege exists. The court must first determine whether a privileged occasion arose, and, if so, whether the occasion for the privilege was abused. Whether a privileged occasion arose is a question of law for the court, and whether the occasion for the privilege was abused is a question of fact for the jury. To establish that a privileged occasion arose, a defamation defendant must establish that the circumstances in which the communication was made created an obligation to speak.

Green Acres, 141 Ariz. at 616 (citations omitted). Defendants have not and cannot establish "circumstances in which the communication was made created an obligation

to speak." *Id*. Even if they could, "whether the occasion for the privilege was abused is a question of fact for the jury" that precludes summary judgment. *Id*.

V. Plaintiff Ivchenko's Misappropriation Claim is Not Time-barred.

Plaintiff Ivhenko's misappropriation claims arise out of Defendants' use of her booking photo to solicit advertising for, and to promote, the mugshot website(s)' banner ads. *See e.g., Gabiola v. Sarid*, No. 16-CV-02076, 2017 WL 4264000, at *6 (N.D. Ill. Sept. 26, 2017) (holding that the plaintiffs had viable commercial misappropriation claims against a mugshot website operator because the booking photos were being used to promote the mugshot website's banner ads).

Plaintiff Ivchenko's invasion of privacy based on appropriation claim and unlawful appropriation/right of publicity claim are tort claims subject to a two-year statute of limitations. *See* A.R.S. § 12-542(1); *see also Hansen v. Stoll*, 130 Ariz. 454, 460 (App. 1981) (two year statute of limitations for intentional infliction of emotional distress and invasion of privacy). Because "Mrs. Ivchenko's mugshot was first published on Defendants' website in April 2018[,] [D]SOF ¶ 7[,]" Motion at 12, and the original complaint in this case was filed on December 17, 2019, the claim is not time-barred.

Conclusion

For the foregoing reasons, Plaintiff respectfully requests that Defendants' motion be denied in its entirety.

DATED this 1st day of April, 2020.

Respectfully submitted,
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