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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

RENEE IVCHENKO and ANDREW IVCHENKO, wife and husband, JANE DOES 1–8 and JOHN DOES 1–12, Plaintiffs, v. KYLE DAVID GRANT, *et al.*, Defendants.	Case No. CV2019-015355 **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO PROCEED ANONYMOUSLY** (Assigned To Hon. Teresa Sanders)

Defendants KYLE DAVID GRANT, TRAVIS PAUL GRANT and MARIEL LIZETTE GRANT ("Defendants") respectfully submit the following response in opposition to Plaintiffs' Motion to Proceed Under Pseudonym. The motion is without merit and should be denied.

I. INTRODUCTION

Prior to addressing the merits, it is extremely important for the Court to understand what is really going on here. After reading Plaintiffs' motion, a reasonable person might believe, *incorrectly*, that this case is about a group of innocent victims who have been maliciously exploited on the Internet as part of an "extortion" ring operated by Defendants. In Plaintiffs' version of the story, their mugshots were illegally published online by Defendants, in violation of Arizona law, for the purpose of pressuring Plaintiffs into paying a fee to have this embarrassing information removed.

To be clear—this story is a lie. It is completely and entirely false. The truth is that this case involves a group of several currently-anonymous Plaintiffs as well as a non-anonymous Plaintiff, Renee Ivchenko. These Plaintiffs all have one thing in common – each of them was arrested at some time, and each of them had a mugshot taken by law enforcement which was later published on the Internet by the arresting agency.

Additional details about the Doe Plaintiffs are not yet known, but it appears the majority of them were arrested in Maricopa County, and their mugshots were published by the Maricopa County Sheriff's Office at: https://www.mcso.org/Mugshot/. After these mugshots were first published by the arresting agency/agencies, Defendants simply republished them on their website, rapsheets.org, which contains a database of millions of booking photos and arrest records from across the country.

Plaintiffs have brought this lawsuit with a single purpose in mind – they want to hide their mugshots and criminal arrest information from the public. But there is a problem – posting mugshots in this manner is *not* unlawful.

To overcome that problem, Plaintiffs have developed a simple plan – they decided to lie to this Court about the facts. Specifically, Plaintiffs falsely claim that Defendants are not merely publishing mugshots and other privileged public records. Rather, Plaintiffs allege, falsely and without any factual basis whatsoever, that Defendants "*extort payment of fees* for the removal of the arrest information from victims who [sic] identities and likenesses have been misappropriated." First Amended Complaint ("FAC") ¶ 7 (emphasis added).

Again, this allegation is 100% false. It is a malicious, self-serving lie fabricated by Plaintiffs in an attempt to obtain relief they are not entitled to. The truth is Defendants are not engaged in an extortion scheme; they simply publish mugshots and other newsworthy public records on their website exactly like many others do. They DO NOT charge fees to remove mugshots. They DO NOT accept money or anything else of value to remove mugshots. To the extent Plaintiffs offer a different story, that story is an outright, deliberate fabrication which has no basis in fact.

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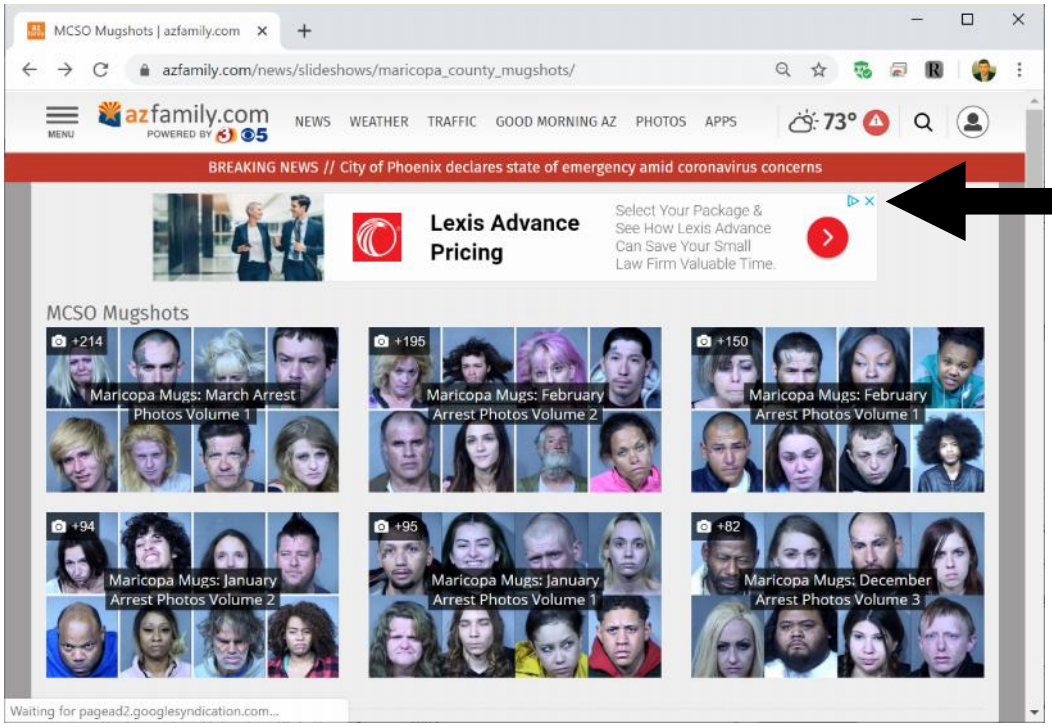
Rather than unlawfully making money by extorting payments to remove mugshots, Defendants earn revenue only through lawful means. They do so by displaying public arrest records on web pages that happen to contain banner advertisements, exactly like many other websites and mainstream news outlets have done for years.

This practice is not only lawful, it is common. How common? As just one example, the local CBS affiliate in Phoenix, KPHO TV, has a dedicated mugshot section on its website: https://www.azfamily.com/news/slideshows/maricopa_county_mugshots/. Exactly like Defendants' website, the KPHO page displays mugshots alongside paid banner advertisements, thus earning advertising revenue for KPHO.



PAID AD

Indeed, KPHO's website (azfamily.com, shown above) not only contains commercial ads, it contains *exactly the same* advertisements (known as Google "AdSense" ads) that Defendants' website displays. In the example shown above, the top of the page contains a large rectangular Google AdSense ad for the legal research service Lexis-Nexis. The source of this advertisement (Google) is evident on the face of the ad—it is indicated by the small blue triangle and "X" in the upper-right corner which are industry-standard icons used by Google on all its AdSense advertisements.

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Without question—the publication of mugshots in this manner is entirely lawful and is protected by the First Amendment and other long-standing common-law privileges such as the fair report doctrine. *See Green Acres Trust v. London*, 141 Ariz. 609, 619, 688 P.2d 617, 627 (Ariz. 1984) (in banc). Furthermore, even if the publication of these mugshots was somehow illegal, the only party who would face liability is the original source who first published the information online (MCSO). This is so because federal law expressly forbids imposing liability on a website owner or user for merely republishing information provided by another online source. *See*, *e.g.*, *Doe v. Oesterblad*, 2015 WL 12940181 (D.Ariz. 2015) (granting 12(b)(6) dismissal of claims against defendant who republished plaintiff's criminal records on the Internet because those records were simply republished from existing online sources).

Obviously aware of this problem, Plaintiffs (who are embarrassed because their mugshots appear on Defendants' website) have made a fateful and ultimately unlawful gamble not to let the truth or the law stand in their way. To be specific: Plaintiffs have chosen to lie about the material facts of this case by falsely accusing Defendants of charging money to remove mugshots. Without injecting that false allegation into this case, Plaintiffs know[1] this action would be subject to immediate dismissal.

Plaintiffs have made a calculated decision to lie to this Court for an obvious purpose: to create a viable cause of action where none would otherwise exist. Their game plan is equally obvious: Plaintiffs hope to use this fabricated and groundless litigation to unlawfully pressure Defendants into removing embarrassing but lawful information from their website. This Court must not be fooled by this charade.

[1] Normally, a statement regarding an opposing party's knowledge or intent would be based on little but sheer speculation. That is <u>not</u> the case here. Rather, in this case Plaintiffs' knowledge is easily established by one simple fact: Plaintiffs' current counsel (David Ferrucci and his firm, Dickinson Wright) previously *defended* the owner of Mugshots.com in a case involving essentially the same issues. *See Gabiola v. Sarid*, 2017 WL 4264000 (N.D.Ill. 2017). Based on that experience, and the adverse rulings against his client (who WAS charging money to remove mugshots), Mr. Ferrucci is clearly familiar with the legal issues involved, and thus knows without proof that the defendant is accepting money to remove mugshots, the claims asserted here are not tenable.

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Instead, this Court must take appropriate steps to protect *Defendants* from the illegal and unethical conduct of the Plaintiffs, not the other way around. In the course of doing so, and as it relates to the pending request for Plaintiffs to proceed anonymously, this Court can easily resolve that request by applying well-settled and long-standing rules from similar cases. Based on those standards, as explained below, it is clear the current motion has no merit and it should be denied.

II. DISCUSSION

a. Plaintiffs' Motion Misstates The Applicable Legal Standards

Page 8 of Plaintiffs' motion begins by citing *Does I thru XIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000) for the premise that "a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity." Plaintiffs also argue that permission to proceed via pseudonym is proper where "identification creates a risk of retaliatory physical or mental harm." Because Plaintiffs claim they fear retaliation from Defendants, they argue they should be entitled to proceed anonymously.

Aside from the lack of *factual* merit supporting Plaintiffs' request, these arguments misstate the law because they include only a partial discussion of the many different factors a court must consider. And to begin that analysis, Plaintiffs fail to note that disclosure of their names is required by the rules of this court.

Specifically, Ariz. R. Civ. P. 17(a)(1) requires, among other things: "An action must be prosecuted in the name of the real party in interest." (emphasis added). The same standard applies in federal court. *See* Fed. R. Civ. P. 17(a). Other rules include the same mandate. *See*, *e.g.*, Ariz. R. Civ. P. 8(g)(1)(B)(ii) (requiring plaintiff to file a civil cover sheet which includes: "the plaintiff's correct name and mailing address …"); Ariz. R. Civ. P. 10(a) ("The title of the complaint must name all the parties … .")

These rules exist because courts are public institutions and lawsuits can and do have a drastic effect on the public at large. For that reason, the public has a long-standing

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and well-recognized interest in the courts, and this includes the right to know how their taxpayer-funded legal system is functioning; "lawsuits are public events and the public has a legitimate interest in knowing the facts involved in them. Among those facts is the identity of the parties." *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D.Mont. 1974).

To keep the public informed and to ensure the highest degree of transparency possible, "The normal presumption in litigation is that parties must use their real names." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1042 (9th Cir. 2010) (emphasis added). As the Ninth Circuit has further explained:

> This presumption is loosely related to the public's right to open courts … and the right of private individuals to confront their accusers … . In this circuit, the common law rights of access to the courts and judicial records are not taken lightly. We recognize that there is a general right to inspect and copy public records and documents, including judicial records and documents. The public interest in understanding the judicial process has supported our general history of access.

Advanced Textile, 214 F.3d at 1067 (internal quotations and citations omitted) (quoting *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) (agreeing, where plaintiffs accused defendants of "serious violations" of the law, "Basic fairness dictates that … accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names."); *see also E.L. v. Scottsdale Healthcare Corp. Health Plan*, 2011 WL 1748548, *1 (D. Ariz. 2011) (emphasis added) (denying plaintiff's request to proceed anonymously when request was based solely on plaintiff's desire to avoid "'personal embarrassment and injury' and noting, "The Ninth Circuit recognizes that a plaintiff's use of a fictitious name 'runs afoul of the public's common law right of access to judicial proceedings … ."); *Doe v. Swearingen*, 2019 WL 95548, *1 (S.D. Fla. Jan. 3, 2019) ("[T]he use of fictitious names is disfavored, as 'anonymous litigation runs contrary to the rights of the public to have open judicial proceedings and to know who is using court facilities and procedures funded by public taxes'." (quoting *Doe v. Village of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016)).

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Among other reasons, one of the central purposes of this rule is particularly applicable in this case—when legal proceedings are open to the public and litigants are required to use their real names, such transparency helps to "assure that proceedings are conducted fairly and discourage perjury [and] misconduct by participants … ." *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 249 (Nev. 1996) (emphasis added) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (explaining, "the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.")).

In other words, when a plaintiff accuses a defendant of serious misconduct (as in this case), and the plaintiff has identified the defendant by his/her real name (such as in this case) fairness requires the plaintiff to prosecute the case using his/her real name. In this way, if the complaint's allegations are proven *false*, the plaintiff knows he/she will face public shame and scrutiny (or worse) and thus will be less likely to perjure himself:

> [The plaintiff] has denied [the defendant] the shelter of anonymity—yet it is [the defendant], and not the plaintiff, who faces disgrace if the complaint's allegations can be substantiated. And if the complaint's allegations are false, then anonymity provides a shield behind which defamatory charges may be launched without shame or liability.

Doe v. Smith, 429 F.3d 706, 710 (7th Cir. 2005).

Against this backdrop, and contrary to Plaintiffs' arguments, the relevant question here is *not* simply whether "the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity." Rather, the analysis is much more complicated, and it begins with a strong presumption in favor of openness and transparency, and *against* permitting a party to proceed anonymously. This presumption can be overcome in extremely narrow and specific circumstances, but this case does not fall into any such category. On the contrary, this case and its unique circumstances strongly weigh *against* allowing Plaintiffs to proceed anonymously.

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b. Under the Correct Legal Standards, Plaintiffs' Motion Lacks Merit

As noted above, Plaintiffs' motion fails to fully explain the correct standards that a court must apply in this context. Those standards are as follows:

> To determine whether to allow a party to proceed anonymously when the opposing party has objected, a district court must balance five factors: "(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, ... (3) the anonymous party's vulnerability to such retaliation," (4) the prejudice to the opposing party, and (5) the public interest.

Kamehameha Schools, 596 F.3d at 1042 (quoting *Advanced Textile Corp*, 214 F.3d at 1068).

Because Plaintiffs bear the burden of showing their entitlement to the relief they are seeking, and because Plaintiffs have failed to even present, much less address, the correct legal requirements, that is an adequate reason to deny their motion. However, a full review of all five factors show that each one weighs in favor of *denying* Plaintiffs' request.

i. Plaintiffs Offer No Evidence Of Any Harm, Much Less A Reasonable Fear of *Severe* Harm

The first factor the court should consider is **"**the severity of the threatened harm" if Plaintiffs are not permitted to remain anonymous. The second factor considers whether the Plaintiffs' alleged fear is "reasonable" under the circumstances.

Here, with essentially zero evidentiary support, Plaintiffs make the following arguments of alleged harm they are likely to experience if they are not permitted to proceed anonymously:

1. A *different* plaintiff named Zim Rogers was "targeted" and "harassed" after he sued a *different* defendant (a website called JustMugshots.com) in California several years ago; Mot. at 4:7–16;
2. Plaintiff Renee Ivchenko was "embarrassed" because her mugshot was posted on Twitter by an anonymous individual several days after she filed a lawsuit against the City of Scottsdale accusing the police of falsely arresting her; Mot. at 4:16–20;

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3. "Many" mugshot websites are "based offshore" and use "sophisticated technologies" to "mask their true identities"; Mot. at 4:21–23;

4. Defendants are "known in the industry as being extremely callous and vindictive", Mot. at 6:3–4

5. Earlier in this case, on February 7, 2020, Defendants filed a motion pursuant to Ariz. R. Civ. P. 41(d) asking the Court to order Mr. and Mrs. Ivchenko to pay costs incurred by Defendants in a previous action that Mrs. Ivchenko filed and then dismissed; Mot. at 6:7–20;

6. On February 21, 2020, Defendants filed a Motion for Summary Judgment which contained "aggressive arguments" and included a screenshot of the page on their website which contained Mrs. Ivchenko's mugshot. Mot. at 7:1–15.

In terms of the *factual* bases for these allegations, Plaintiffs offer nothing more than a few cursory comments. The reasons for this are simple—because none of these points are actually helpful to Plaintiffs' position.

For example, regarding Zim Rogers, he is the California plaintiff who was allegedly harassed after he sued a *different* website unrelated to the defendants. Plaintiffs merely suggest Mr. Rogers was "harassed" and "targeted" on Twitter without ever explaining precisely what occurred. Insofar as Defendants are aware, Plaintiffs are referring to the fact that after Mr. Rogers sued Justmugshots.com, an anonymous individual created a Twitter account using the handle "@zim_rogers_fans". Using that account, this individual posted eleven (11) different booking photos of Mr. Rogers, along with details of his numerous arrests. *See* https://twitter.com/zim_rogers_fans/. Other than simply posting these public records, it does not appear the Twitter account made any threats towards Mr. Rogers or did anything else that could be considered harassment.

Rather than supporting Plaintiffs' position, this example shows why litigants should *not* be permitted to proceed anonymously in most cases (indeed, Mr. Rogers was not permitted to proceed anonymously in his suit). Viewed in the correct context, the Zim Rogers example reflects the story of a plaintiff who was repeatedly arrested and charged with criminal conduct on nearly a *dozen* different occasions. Rather than ceasing his criminal activities, Mr. Rogers instead pursued litigation against the operator of

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JustMugshots.com for having the audacity to publish Mr. Rogers' booking photos and arrest details.

To be sure, career/repeat criminals like Mr. Rogers may prefer to hide their backgrounds from public view, but that wish is not a legally protected interest; "A person does not have a legally protected right to a reputation based on the concealment of the truth." *Haynes v. Alfred A. Knopf, Inc*., 8 F.3d 1222, 1228 (7th Cir. 1993). Much to the contrary, Mr. Rogers' lengthy criminal history, and his efforts to hide that information from the public, is clearly deserving of public attention, scrutiny and perhaps criticism. If Mr. Rogers felt any embarrassment by having his criminal history publicly disclosed on Twitter, the solution is obvious—he should stop breaking the law.

As for Mrs. Ivchenko's assertion that she was embarrassed because someone else anonymously posted her mugshot on Twitter after she sued the City of Scottsdale for false arrest, this point is entirely irrelevant. Mere embarrassment has *never* been held sufficient to overcome the strong presumption in favor of judicial transparency. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (holding, "The mere fact that [disclosure of information] may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.")

In addition, it is worth noting Mrs. Ivchenko offers no evidence whatsoever to show that *Defendants* had anything to do with publishing her mugshot (or Mr. Roger's mugshot) on Twitter. Indeed, in support of Defendants' Motion for Summary Judgment filed in this matter on February 21, 2020, Defendant Travis Grant submitted an affidavit expressly denying any role in publishing any statements about Plaintiffs on Twitter. Not surprisingly, Plaintiffs have offered no evidence to the contrary.

As for Plaintiffs' claim that "many" mugshot websites are "based offshore" and use "sophisticated technologies" to "mask their true identities", this argument is particularly strange given that none of these circumstances apply to the Defendants in this case. Here, the Defendants are not anonymous, they are not based offshore (they are

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located in Florida), nor have Plaintiffs had any difficulty identifying Defendants or serving them with process.

Similarly, although Plaintiffs accuse Defendants of being "known in the industry as being extremely callous and vindictive", the only evidentiary support offered for this claim is Plaintiffs' own unverified Complaint. Of course, an unverified pleading is not evidence; "[t]he Second Amended Complaint is not evidence; rather it sets forth allegations." *TriQuint Semiconductor, Inc. v. Avago Techs. Ltd*., 2010 WL 3034880,*4 (D. Ariz. 2010) (quoting *BPI Energy, Inc. v. IEC*, 2007 WL 3355363, * 1 (S.D.Ill. 2007)).

Even worse, Plaintiffs' scurrilous attacks on Defendants' character deliberately omit a key point—in May 2019, Mrs. Ivchenko filed a virtually identical lawsuit against the same Defendants in Maricopa County Superior Court Case No. CV 2019–090493. After removing the case to federal court, undersigned counsel explained the lawsuit was groundless for numerous reasons. After considering the matter, Mrs. Ivchenko agreed to voluntarily dismiss her suit. Even though the parties did not enter into any form of settlement agreement, and even though they were under no legal obligation to do so, after Mrs. Ivchenko dropped her suit, Defendants voluntarily removed her mugshot from their website, purely as a matter of courtesy. This is hardly compelling evidence of Defendants' "callous and vindictive" nature.

Finally, Plaintiffs accuse Defendants of engaging in unnecessarily "aggressive" litigation tactics such as bringing a Motion for Costs asking the Court to order Mrs. Ivchenko to pay the costs which she forced Defendants to needlessly incur during her first lawsuit against them. Plaintiffs also complain that Defendants sought to embarrass Mrs. Ivchenko by including her mugshot in various pleadings filed in this case.

Putting aside the highly deceptive and disingenuous nature of these arguments, it is not necessary for the Court to even consider these points because they are so clearly insufficient to overcome the strong presumption against anonymity. Indeed, whether taken individually or collectively, this alleged evidence of "harm" is orders of magnitude

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less substantial than the harm found to be insufficient in *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036 (9th Cir. 2010).

In that case, the plaintiffs were students seeking admission to a private school in Hawaii that allegedly excluded them solely on the basis of their race. The students filed suit and requested permission to proceed anonymously. As support, the students offered numerous examples of clear and specific threats of violence made by other students at the school. These threats included an Internet post stating: "one day they're gonna be targeted by some crazy Hawaiian or group of Hawaiians armed with baseball bats or guns." *Kamehameha Schools*, 596 F.3d at 1040. Other comments were arguably worse.

Despite this, the District Court denied the students' request to proceed anonymously, and the Ninth Circuit affirmed. In short, both Courts agreed the plaintiffs did not establish a *reasonable* fear of *severe* harm sufficient to entitle them to proceed anonymously; "To judge the reasonableness of the plaintiffs' fears, we must consider the surrounding context and other listeners' reactions to the threats." *Kamehameha Schools*, 596 F.3d at 1044. Without belaboring the issue, the Court found "many times people say things anonymously on the internet that they would never say in another context and have no intention of carrying out." *Id*. at 1045. For that simple reason, the Court determined the threats of violence against the students, even if severe, were not sufficient to overcome the "default presumption … that the plaintiffs will use their true names." *Id*.

Here, Plaintiffs have offered no evidence whatsoever to show they reasonably believe they are likely to suffer *severe* harm if they are required to comply with this Court's rules obligating them to prosecute this case using their true names. As such, this factor weighs against the requested relief.

ii. Plaintiffs Fail To Show They Are Especially "Vulnerable" To Retaliation

Although the Plaintiffs in *Kamehameha Schools* failed to show the first factor (reasonable fear of severe harm) weighed in their favor, the Court proceeded to consider the remaining factors including the "vulnerability of plaintiffs" to the alleged harm. In

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that case, the District Court agreed the "youth of these plaintiffs [is] a significant factor in the matrix of considerations arguing for anonymity," but nevertheless found this factor was not sufficient to overcome the presumption in favor of requiring them to use their real names.

Here, it is difficult to evaluate whether the "vulnerability of plaintiffs" weighs in favor of their request because Plaintiffs' motion never discusses this point. To the extent this issue is mentioned at all, Plaintiffs merely offer a broad rhetorical suggestion that websites engaged in the publication of arrest records "prey on vulnerable members of society". But again, this argument is based on the completely false and groundless assertion that Defendants remove mugshots and arrest records *in exchange for payment*.

To be clear on that point, in support of Defendants' Motion for Summary Judgment filed in this matter on February 22, 2020, Defendant Travis Grant supplied an affidavit testifying to the following, among other things:

> 18. Google AdSense ads are the sole and exclusive source of revenue earned by rapsheets.org.
> …
> 23. Mrs. Ivchenko's mugshot page was removed from rapsheets.org in May 2019.
> …
> 25. At no time did I solicit or accept any payment to remove Mrs. Ivchenko's mugshot.

What evidence have Plaintiffs' offered to refute Mr. Grant's denials? ABSOLUTELY NOTHING.

In this context, even assuming it is fair to say that *other* websites have "preyed on vulnerable members of society" by demanding fees to remove mugshots and arrest records, that argument simply does not apply here. This is so because Defendants are not engaged in this practice, and Plaintiffs do not have a single scintilla of evidence to the contrary. The third factor therefore weighs in favor of denying Plaintiffs' request on the basis that they have failed to show they are especially vulnerable to the alleged harm.

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c. Defendants Would Suffer Severe Prejudice If Plaintiffs Are Allowed To Remain Anonymous

The fourth factor to consider is whether the opposing party (Defendants) would be prejudiced if Plaintiffs are allowed to remain anonymous. Unlike many of the other factors which Plaintiffs have either ignored or failed to address, the current motion does discuss this issue at some length.

Specifically, the Doe Plaintiffs note they are not, "at this time, claiming individualized pecuniary loss …" and thus Defendants do not need to know their identities for the purposes of refuting their alleged claims for money damages. Mot. at 9:6–7. Instead, the Doe Plaintiffs claim they are only seeking to collect the daily statutory damages provided by Arizona's Mugshot Act. *See* A.R.S. § 44–7902(D). Because the statute provides for mandatory daily penalties, Plaintiffs argue that is it not necessary for Defendants to know Plaintiffs' real names; only the dates their photos appeared on Defendants' website; "other than specific information such as the date when Defendants scraped someone's arrest data from the law enforcement websites, *the actual identity of that individual is irrelevant* … Anonymity does not affect the ability of Defendants from challenging any of the causes of action outlined in the Complaint." Mot. at 9:9–14 (emphasis added).

This argument is fatally flawed for one simple reason—Plaintiffs appear to believe, mistakenly, that the issue of *liability* has already been established in their favor, thus leaving a computation of statutory damages as the only remaining issue. Of course, this assumption is not correct; Plaintiffs have not yet established any liability on the part of Defendants, much less that Defendants have done anything to violate the Arizona Mugshot Law.

Specifically, Plaintiffs seem to have a serious misunderstanding of the law. According to Plaintiffs, Arizona's Mugshot Law, A.R.S. § 44–7902, expressly prohibits any use of a mugshot or other arrest record for any type of *commercial purpose*. Because Defendants' website contains paid Google advertisements, Plaintiffs appear to assume

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this is sufficient to show "commercial" use of their mugshots and thus liability is either established or conceded under A.R.S. § 44–7902. In addition, as noted above, Plaintiffs have accused Defendants of engaging in the practice of soliciting or accepting money to remove mugshots. *See* FAC ¶ 7 (alleging Defendants use arrest photos to "extort payment of fees for removal of the arrest information ….")

There are two problems with Plaintiffs' arguments. First, the mere "commercial" use of a mugshot or arrest information is *not* prohibited in any way by A.R.S. § 44–7902. Rather, the law is far narrower; it only prohibits the following:

> B. A mugshot website operator may not use criminal justice records or the names, addresses, telephone numbers and other information contained in criminal justice records for the purpose of *soliciting business for pecuniary gain*, including requiring the payment of a fee or other valuable consideration *in exchange for removing* or revising criminal justice records that have been published on a website or other publication.

A.R.S. § 44–7902(B) (emphasis added).

As the plain language of the statute shows, nothing about § 44–7902(B) would prevent a website owner from using a mugshot for a commercial purpose such as displaying Google Ads (as KPHO does on its website, azfamily.com). Rather, the only conduct proscribed by this section is the use of an arrestee's name, photo, or other information *for the purpose of soliciting business for pecuniary gain*, which the statute further describes as including requiring the payment of a fee to remove the mugshot or other information.

Why is this important? Because, as noted above, the allegation that Defendants solicit or accept money to remove mugshots or other records from their site is 100% false. Of course, Plaintiffs have *alleged* Defendants are engaged in this practice, but that allegation is entirely unproven. For their part, Plaintiffs have offered no evidence of any sort to support the allegation that Defendants solicit or accept money to remove mugshots. Furthermore, Defendants contend Plaintiffs have deliberately fabricated this allegation in order to illegally pressure Defendants into removing Plaintiffs' mugshots.

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Although Defendants maintain this entire lawsuit is groundless for other reasons, it is clear that if this matter were to proceed forward, and if there was conflicting evidence on the issue of whether Defendants remove mugshots for money, a fact-finder would have to consider the credibility of *both sides*, including the anonymous Doe Plaintiffs. Put differently, Defendants have already offered evidence (in the form of Mr. Grant's affidavit) denying that Defendants solicit or accept money to remove content. In order to establish a *genuine* factual dispute on this point, Plaintiffs would be required to offer admissible evidence contradicting Mr. Grant's testimony in some way. In other words, one or more of the anonymous Plaintiffs would need to testify that Mr. Grant is lying, and that the Plaintiff is telling the truth.

In that situation, evidence of witness credibility (and evidence impeaching credibility, such as evidence of a felony conviction) would be essential to help the trier of fact reach the truth; "a witness's credibility is always relevant … ." *State v. Lopez*, 234 Ariz. 465, 470, 323 P.3d 748, 753 (App. 2014). Of course, without knowing Plaintiffs' true identities, it will be impossible for Defendants to obtain relevant impeachment evidence which may include evidence of Plaintiffs' criminal convictions, among other things. This is, of course, exactly what Plaintiffs want – to hide the truth, not reveal it.

For this reason, allowing Plaintiffs to proceed anonymously would be extremely prejudicial to Defendants insofar as it would make it impossible for Defendants to locate and present relevant evidence pertaining to the credibility of each Plaintiff.

d. Arizona Public Policy Weighs Heavily Against Plaintiffs' Request

Finally, the Court must consider whether public policy supports Plaintiffs' request. *See Kamehameha Schools*, 596 F.3d at 1042. To support their position, Plaintiffs argue "it is the public policy of Arizona that the identities of arrestees only be disclosed to the public on a limited basis, only by law enforcement agencies or *bona fide* news agencies, and only for a brief period of time." Mot. at 9:18–20. Once again, the only evidence offered to support this assertion is the unverified First Amended Complaint which makes these allegations.

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It is difficult to understand how Plaintiffs can make this argument with a straight face or without violating Rule 11. This is so because the Arizona Supreme Court's records retention policy (set forth in Ariz. Code of Jud. Admin., § 4-302) provides that criminal records in Arizona are preserved for a period of fifty (50) years for cases filed after 1959. *See* https://www.superiorcourt.maricopa.gov/docket/docs/RetentionRules.pdf. Of course, the Superior Court does not restrict access only to law enforcement agencies or *bona fide* news agencies; these records are open to any member of the public to review, copy, and publish, as are individual arrest records and police reports.

Contrary to Plaintiffs' position, Arizona has long recognized that any privacy interest in criminal records is, as a general rule, outweighed by the public interest in "the safety and welfare of the community as a whole. The individual's interest is outweighed by the public's interest in the possession of information concerning persons who may again be charged with some activity which requires the making of records." *Beasley v. Glenn*, 110 Ariz. 438, 440, 520 P.2d 310, 312 (Ariz. 1974) (in banc) (denying petitioner's request to destroy criminal records, and noting "We know of no statute or rule of court which permits the bringing of an action in a fictitious name unless prior permission of the court has been obtained.")

III. CONCLUSION

Defendants are not anonymous, and as a matter of both law and fairness, Plaintiffs should not be anonymous either. The motion to proceed via pseudonym is without merit and should be denied.

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