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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

JOHN DOES 1–8 and JANE DOES 1–12, Plaintiffs, v. KYLE DAVID GRANT, *et al.*, Defendants.	Case No. CV2020-093006 **MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND, ALTERNATIVELY, MOTION FOR MORE DEFINITE STATEMENT** (ORAL ARGUMENT REQUESTED)

Pursuant to Ariz. R. Civ. P. 12(b)(6), Defendants Kyle David Grant, Travis Paul Grant and Mariel Lizette Grant ("Defendants") respectfully move for an order dismissing Plaintiffs' Complaint on the basis that it fails to contain sufficient facts to state a *plausible* claim for relief. In addition and in the alternative, pursuant to Ariz. R. Civ. P. 12(e), Defendants move for an order requiring Plaintiffs to provide a more definite statement of their claims. Each point is discussed more fully below.

I. INTRODUCTION

Defendants operate several websites which archive, index, and display criminal records including booking photos, commonly referred to as "mugshots". The plaintiffs in this case are 20 anonymous individuals who were allegedly arrested at some time, and whose mugshots appear on Defendants' websites. Not surprisingly, Plaintiffs are embarrassed and want to hide their mugshots from public view. They seek to accomplish this by asking this Court to order Defendants to remove their mugshots and other records.

To that end, this case involves claims arising from a brand-new law, A.R.S. § 44–7902, which became effective in August 2019. This law (referred to herein as the "Arizona Mugshot Act") limits the use of criminal records including mugshots for the purposes such as advertising a commercial product or service. Specifically, A.R.S. § 44–7902(B) provides:

> **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. (emphasis added).

Beyond this narrow restriction, in an attempt to avoid violating the First Amendment,[1] the Mugshot Act also contains extremely broad exceptions, the bulk of which are set forth in A.R.S. § 44–7902(E):

> **E.** This article does not apply to any act performed for the purpose of disseminating news to the public, including the gathering, publishing or broadcasting information to the public for a news-related purpose … . (emphasis added)

When read together, it is clear § 7902(B) narrowly prohibits *some* conduct—like using a mugshot for the purpose of soliciting business for pecuniary gain, including requiring the payment of a fee to remove the mugshot. At the same time, § 7902(E) provides § 7902(B) *does not apply at all* "to any act performed for the purpose of disseminating news to the public, including the gathering, publishing or broadcasting information to the public for a news-related purpose … ." (emphasis added).

[1] A complete discussion of the First Amendment issues is beyond the scope of this motion, and is ultimately not an issue for this Court to resolve at this time. However, as a general rule, the publication of court records (including criminal records) is protected speech; "there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record … ." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494 (1975).

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Against this backdrop, the Complaint in this matter begins with an *ad hominem* attack on Defendants and a grossly false and misleading rhetorical argument suggesting, incorrectly, that the publication of mugshots is always *per se* unlawful. After the initial political screed, the factual allegations of all 20 Plaintiffs are essentially identical. As repeated in ¶¶ 14–33 of the Complaint, each Plaintiff alleges exactly the same thing:

> During the relevant time period, defendants have disseminated [each plaintiff's] arrest information and booking photo on the Websites for purely commercial purposes. As a result, [each plaintiff's] image has been commercial misappropriated by Defendants … and [each plaintiff] has incurred damages under the Arizona Mugshot Statute ….

Compl. ¶ 14.

As explained further herein, these bare allegations are insufficient to state a claim as a matter of law for multiple reasons. First and foremost, as noted above, on its face the Arizona Mugshot Act *does not apply* "to any act performed for the purpose of disseminating news to the public, including the gathering, publishing or broadcasting information to the public for a news-related purpose … ." Beyond the bare and conclusory allegation that Defendants have "disseminated" Plaintiffs' mugshots and/or arrest information for a "purely *commercial* purpose", the Complaint alleges no facts to plausibly show that Defendants' have used mugshots in any way that violates § 7902(B) (again, *commercial* use of a mugshot is NOT prohibited by § 7902(B)).

Put differently, if a mugshot is published for the purpose of disseminating news to the public, or for *any other* "news-related purpose", that use is, by definition, not within the scope of the Mugshot Act, even if done for commercial gain. In other words, the Act only applies to the use of criminal records for the purpose of soliciting business for pecuniary gain and only when that use is not *news-related* in any way.

Here, other than a bare, conclusory allegation that Defendants "disseminated" Plaintiffs' mugshots and/or arrest information for a "purely commercial purpose" (which is irrelevant to the question of whether the mugshot was also used *to solicit business for pecuniary gain*), the Complaint contains no facts which plausibly establish that

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Defendants' use was *not* for any "news-related purpose". Absent any well-pleaded facts which clearly show the use was *not* news-related, the Complaint fails to show Defendants' conduct falls within the scope of the Mugshot Act.

Plaintiffs also appear to misconstrue, or misunderstand, the Mugshot Act as creating a strict prohibition against the use of mugshots for *any* commercial purpose. This is wrong as a matter of law. The Mugshot Act says no such thing (nor could it).

If Plaintiffs' view of A.R.S. § 44–7902(B) was correct, the law would be unconstitutional on its face. Of course, it is not necessary for this Court to reach that constitutional question at this time because Plaintiffs' view of § 7902(B) is *not* correct—the law does not limit all "commercial" uses of a mugshot; it simply prohibits the use of a mugshot (or other criminal record) either to directly *advertise the defendant's product or service*, or where the website operator charges a fee to remove the mugshot.

Here, the Complaint contains no facts that plausibly show liability under either of these scenarios. As such, all claims arising under the Mugshot Act fail to state a viable claim and should be dismissed pursuant to Rule 12(b)(6).

Similarly, Plaintiffs' duplicative common-law claims—the second cause of action (for "Invasion of Privacy Based on Appropriation") and fourth cause of action (for "Unlawful Appropriation/Right of Publicity)—each fail to contain sufficient facts to state a claim as a matter of law. As such, both claims must be dismissed.

Finally, Plaintiffs' third cause of action (emotional distress) must be dismissed because the claim is directly contrary to controlling U.S. Supreme Court precedent. *See Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (IIED claims cannot be based on speech involving matters of public concern).

II. DISCUSSION

Arizona's Mugshot Act is a new law, but the subject matter of the law is not new. Indeed, the legal, factual, and moral issues surrounding the publication of mugshots have been written about extensively. One of the most helpful discussions is found in a 2013 law review article devoted entirely to this topic. *See* Allen Rostron, *The Mugshot*

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Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business, 90 WASH. U. L. REV. 1321 (2013) (available at: https://openscholarship.wustl.edu/law_lawreview/vol90/iss4/6).

In this article, Mr. Rostron carefully explains the historical origins of the mugshot publishing industry, as well as recent changes in the law intended to prevent the use of mugshots for "blackmail" or "extortion" (i.e., in situations where a defendant publishes a mugshot, and then offers to remove it for a fee; facts which are NOT present here). Mr. Rostron notes that while some have condemned the practice, established U.S. Supreme Court precedent does not permit states to outright ban the use of mugshots by for-profit publications. As Mr. Rostron explains:

> The First Amendment further complicates the situation. Mugshot businesses claim to be exercising their constitutional rights to freedom of speech and press, and they have a solid argument to the extent that they merely republish photos and information available in public records. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court struck down a Georgia law that prohibited publishing or broadcasting the name of a rape victim … . The Court concluded that crimes, arrests, and prosecutions are "without question events of legitimate concern to the public" and the interest in allowing the press to report freely on such matters outweighs the rape victim's privacy interests "when the information involved already appears on the public record." … . If the First Amendment protects republication of information about crime victims obtained from publicly-accessible sources, *it surely gives companies a right to print tabloids or create websites featuring mugshots and arrest information made available to the public by police or sheriff's departments*.

Rostron, *supra*, 90 WASH. U. L. REV. at 1326–27 (emphasis added) (internal footnotes omitted) (citing *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989)).

Beyond noting the for-profit use of mugshots by the media (and others) is constitutionally protected speech, Mr. Rostron further explains the application of other tort-based theories like intentional infliction of emotional distress is equally unavailing:

> To the extent that people who are unhappy about displays of their mugshots might look for relief under tort law, the situation is equally complicated.

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> Many would consider the mugshot industry's activities to be extreme, outrageous, and intended to inflict severe emotional distress. But in cases like *Snyder v. Phelps*, the Supreme Court has held that the First Amendment protects even the most vile and hurtful personal attacks when they relate to matters of public concern. Just as the protests at soldiers' funerals at issue in *Snyder* purported to be expressions about important issues like homosexuality, religion, and America's future, the mugshot industry can plausibly contend that crimes and arrests are matters of great public concern. While mugshot businesses obviously seek to profit financially from what they do, the same can be said for mainstream news sources, such as the *New York Times* or *CNN*. The mugshot companies cannot lose their constitutional right to report on criminal arrests simply by virtue of being for-profit purveyors of information.

Rostron, *supra*, 90 WASH. U. L. REV. at 1327 (emphasis added) (internal footnotes omitted) (citing *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (claim for intentional infliction of emotional distress cannot be based on speech involving matters of public concern).

After reviewing the issues, Mr. Rostron recommends that to remain consistent with existing U.S. Supreme Court precedent, courts must distinguish between: 1.) websites that charge money to *remove* mugshots, and 2.) those that do not:

> Torn between conflicting interests, courts can strike a fair balance by drawing a line between mugshot businesses that profit merely by assembling and displaying arrest photos and information and those that profit by their willingness to remove content for a fee. For example, a tabloid newspaper full of mugshot photos would be protected, as would a website that never accepts compensation for taking down mugshots. These companies can credibly contend that they are in the business of transmitting information to the public … .
>
> Mugshot businesses that get paid to delete content are a different story. Whether they collect compensation directly from arrestees or through affiliated or even completely independent mugshot removal services, they are not really in the business of conveying information. They get paid to suppress information; they profit by agreeing to curtail their speech ….

Rostron, *supra*, 90 WASH. U. L. REV. at 1331 (emphasis added).

Having said this, before turning the merits, some brief comments are offered. First, Defendants fully agree with Mr. Rostron's comments as accurately reflecting the current

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state of the law. Second and to be clear—Defendants are *not* suggesting a law review article is controlling authority here. Surely, it is not. But at the same time, it offers helpful context and guidance, and the U.S. Supreme Court cases cited by Mr. Rostron *are* controlling authority, as is the First Amendment. Given the substantial weight of controlling authority summarized by Mr. Rostron, it is obvious when Arizona's Mugshot Act was passed last year, the legislature was concerned about placing appropriate limits on the law to ensure it would pass constitutional muster.

With this in mind, it is apparent the restrictive provisions of A.R.S. § 44–7902(B) are narrow in scope, while the exclusionary provisions of A.R.S. § 44–7902(E) are broad. Therefore, to ensure the law is applied in a manner consistent with the First Amendment, this Court must carefully evaluate the Complaint to determine whether Plaintiffs have pleaded plausible facts showing that their claims are properly *within* the narrow scope of § 44–7902(B), and that the alleged conduct does *not* fall within the broad exceptions contained in § 44–7902(E). Upon review, the Complaint fails to pass scrutiny.

a. The Complaint Fails To State A Claim

i. The Publication of Mugshots is Presumptively News-Related

As noted above, by its own terms, the Arizona Mugshot Act *never* applies to the publication of mugshots when done for the purpose of providing news to the public, or, indeed, for any news-*related* purpose. At first blush, this appears to render the Mugshot Act internally inconsistent because the news-related *exclusion of* § 44–7902(E) seems to completely swallow the prohibition of § 44–7902(B).

In other words, many courts, including the Arizona Supreme Court, have recognized crime, courts, and criminal proceedings are *per se* matters of great public interest and concern. *See Godbehere v. Phoenix Newspapers, Inc*., 162 Ariz. 335, 343, 783 P.2d 781 (1989) ("It is difficult to conceive of an area of greater public interest than law enforcement. Certainly the public has a legitimate interest in the manner in which law enforcement officers perform their duties."); *see also Rodriguez v. Fox News Network, L.L.C.*, 238 Ariz. 36, 39, 356 P.3d 322, 325 (Ariz. App. 2015) (explaining,

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"crimes themselves [are] 'events of legitimate concern to the public.' Speech on matters of public concern 'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'") (emphasis added) (quoting *Snyder*, 562 U.S. at 452).

So, if crime and criminal proceedings are *always* matters of public concern (indeed, the *highest* level of concern), and thus crimes and arrests are always newsworthy (or at least news-related), then when would the publication of mugshots ever *not* be news-related? The answer to that question is illustrated by other cases offering clear examples of the narrow types of conduct the law was intended to proscribe.

First, if a defendant publishes mugshots and then charges money to remove them, that act (charging money to *remove* a mugshot) is not news-related and it would clearly fall within the scope of A.R.S. § 44–7902(B), insofar as this subsection prohibits "the payment of a fee or other valuable consideration in exchange for removing or revising criminal justice records … ." This point is not novel nor disputed.

Other courts have agreed if a mugshot website operator publishes mugshots *and then charges a fee* to remove that mugshot, this conduct is actionable and is generally not protected by the First Amendment. *See Gabiola v. Sarid*, 2017 WL 4264000, *9 (N.D.Ill. 2017) (rejecting First Amendment challenge where defendant demanded money to remove mugshots, but also recognizing, "While potentially embarrassing, they [mugshots] are public records protected by the First Amendment and *plaintiffs do not meaningfully challenge the defendants' ability to re-publish truthful arrest records*. The allegations claim that defendants are essentially threatening not to remove them unless plaintiffs pay a fee … .") (emphasis added)

Here, the logic of cases like *Gabiola* does not apply because the Complaint does not allege, plausibly or otherwise, that Defendants solicit or accept money or anything else of value to remove mugshots or other criminal records. Accordingly, Plaintiffs cannot and have not stated a claim under that portion of A.R.S. § 44–7902(B) which prohibits charging a fee to *remove* a mugshot or criminal record.

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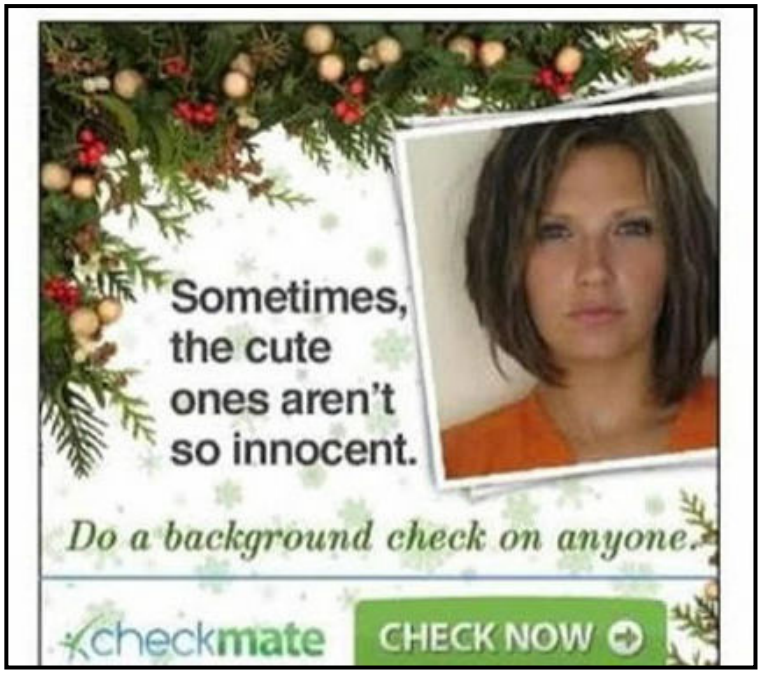
So what other conduct *would* violate the Mugshot Act? The answer is found in cases such as *Simmons v. Instant Checkmate, Inc.*, Case No. 14-cv-00756 (M.D.Fla. 2014). *Simmons* involved the mugshot of an attractive young woman who was arrested for DUI in Florida. Without her consent, the defendant, Instant Checkmate (provider of a background check service) used the plaintiff's mugshot *within a commercial advertisement* for the defendant's service. A copy of the ad is shown below.



See also CBSNews, Feb. 28, 2014, *Woman dubbed "hot convict" sues website for using mugshot* (available at: https://www.cbsnews.com/news/woman-dubbed-hot-convict-sues-website-for-using-mugshot/) (last visited May 8, 2020).

Simmons falls dead-center in the crosshairs of laws like A.R.S. § 44–7902(B). This is so because the facts of *Simmons* show the defendant used the plaintiff's mugshot "for the purpose of soliciting business for pecuniary gain …" and this use clearly had nothing to do with reporting news; the only purpose of the advertisement was to promote the defendant's business using plaintiff's attractive photo. This is a *classic* example of commercial misappropriation which has long been recognized as actionable other theories such as the common-law tort of misappropriation established by the RESTATEMENT (SECOND) OF TORTS § 652C (1977) (defining tort). *See also Lemon v.*

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Harlem Globetrotters Inter., Inc., 437 F.Supp.2d 1089 (D.Ariz. 2006) (recognizing tort); *Roth v. Naturally Vitamin Supplements, Inc*., 2006 WL 988118, *3 (D.Ariz. 2006); *Pooley v. National Hole-In-One Ass'n.*, 89 F.Supp.2d 1108 (D.Ariz. 2000).

But here, unlike in *Simmons*, the Complaint contains no facts which remotely suggest the direct use of any of the Plaintiffs' mugshots *in a commercial advertisement for a product or service offered by Defendants*. Instead, the Complaint simply claims that Defendants publish mugshots *near* "third party banner ads"; i.e., "Defendants place the arrest photo advertisements [sic] *directly above*, and/or *directly alongside* banner ads that advertise services …." Compl. ¶ 45 (emphasis added). Despite this, the Complaint does not accuse Defendants of creating the third party banner ads, nor does the Complaint allege that these third party ads used Plaintiffs' mugshots to promote any sort of product or service offered by Defendants.

These facts are fatal to Plaintiffs' claim under the Mugshot Act because Plaintiffs have not alleged any facts plausibly showing that Defendants used their mugshots *to solicit business for Defendants' pecuniary gain*. Of course, publishing a mugshot *near a third party advertisement* is not the same thing as using the mugshot as the substance of an advertisement itself. If that were the rule, then the Mugshot Act would prohibit all for-profit newspapers from publishing stories of arrests if the paper also contained any form of paid advertising, while non-commercial/free newspapers which contained no advertisements would not be subject to the Act. That is clearly *not* the law.

Again, because Arizona's Mugshot Act is new, it has not yet been interpreted by the courts, but a helpful analogy is found in the common-law misappropriation tort which has been widely analyzed and construed as extremely narrow in scope. The elements of the tort, as established by the RESTATEMENT (SECOND) OF TORTS § 652C, are as follows:

1.) The defendant's use of the plaintiff's name or likeness,
2.) The appropriation of the plaintiff's name or likeness to the defendant's advantage,
3.) Lack of consent, and
4.) Resulting injury.

Lemon, 437 F.Supp.2d at 1100.

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However, by its own terms and just like the Mugshot Act, the misappropriation tort is extremely narrow due to First Amendment limitations. The explanatory comments to the Restatement make this point crystal clear:

> The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes.

RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977) (emphasis added).

Arizona courts recognize the same exception:

> There is a recognized exception to the right to publicity doctrine where the use of a person's identity is so "incidental" as to have no commercial value. Such "incidental uses" may include the use of a person's identity in "news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."

Roth, 2006 WL 988118, *5 (emphasis added) (quoting *Pooley*, 89 F.Supp.2d at 1112).

Courts elsewhere in the Ninth Circuit have adopted the same narrow view of the misappropriation tort. In short, the tort *never* applies to grant the plaintiff a magic sword of censorship that he/she may use to prevent others from *talking about the plaintiff*.

For example, in *Chapman v. Journal Concepts, Inc.*, 528 F.Supp.2d 1081 (D.Hawai'i 2007), the plaintiff was a famous surfer who sued a magazine for misappropriation after it published a somewhat negative story about the plaintiff which

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included his name and photo. The District Court granted summary judgment in favor of the defendant as to the misappropriation claim, finding the tort simply did not apply to a defendant's conduct in publishing a negative story about the plaintiff, even where the plaintiff was famous and the defendant was a commercial entity seeking to make a profit:

> Liability under this legal theory is generally limited to unauthorized use in connection with the promotion or advertisement of a product or service and not, as is the case here, for use in a magazine story. This is true even if the article was arguably motivated by *The Surfer's Journal's* desire for profits or tangentially results in increased income … . The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.

Chapman, 528 F.Supp.2d at 1096 (emphasis added) (internal citations omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 652C cmt. d).

Again, in this case the Complaint does not allege that ANY mugshot (or other criminal record) of ANY Plaintiff was ever used *to solicit business for Defendants' pecuniary gain*. At best, the Plaintiffs simply claim that Defendants are making "commercial" use of their names because Defendants earn money from displaying third party advertisements on the same pages where mugshots are displayed.

These allegations are simply not sufficient to state a claim under the Mugshot Act because displaying a mugshot *near* a third party advertisement is not the same thing as displaying the mugshot WITHIN the advertisement itself. Absent well-pleaded facts showing that Defendants used Plaintiffs' criminal records *in an advertisement* (and that such use occurred for a non-news related purpose), Plaintiffs have failed to state a claim under the Mugshot Act and under the related common-law misappropriation theories.

ii. Defendants Are Not Liable For Third Party Google Ads

Plaintiffs are obviously aware of the significant First Amendment implications of this case. In an effort to end-run around the First Amendment, Plaintiffs present a seriously misleading (if not outright fraudulent) depiction of Defendants' websites.

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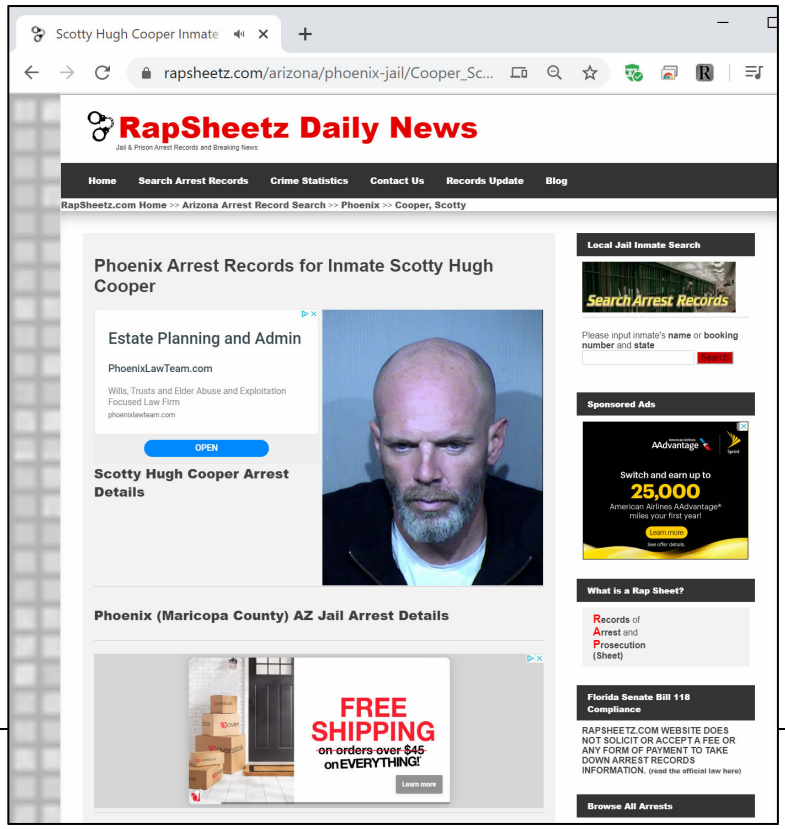
For example, in ¶ 46 of the Complaint, Plaintiffs present a partial screenshot purported taken from one of Defendants' websites. This screenshot has been highly cropped and edited to make it appear—falsely—that the individual depicted (who is *not* identified as one of the Plaintiffs) had his mugshot used *in close proximity* to a paid advertisement bearing the headline "Access Court Records", when in fact the advertisement leads to a third party service, not to Defendants' website.

To be clear—Defendants are fully aware that in the context of a Rule 12(b)(6) motion, the Court usually cannot consider matters outside the pleadings. However, in this instance, the Court can and should consider the *entire* page in question under the "incorporation by reference" rule. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (where plaintiff only attached part of a webpage to his Complaint, the court may properly view the *entire page* when evaluating a Rule 12(b)(6) Motion to Dismiss; "The rationale of the 'incorporation by reference' doctrine applies with equal force to internet pages as it does to printed material.")

Here, the *complete* page referenced in Compl. ¶ 46 is attached as Exhibit A, and is located here: https://www.rapsheetz.com/arizona/phoenix-jail/Cooper_Scotty/T597785. A portion of the page (which is too large to fully insert here) is shown below:



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There are several reasons why it is important to view the *complete* page in context. First, the example used in the Complaint (which is heavily cropped) appears to have been edited by lightening the image so the grey background disappears, thus making it impossible to distinguish between the paid Google advertisement on the left and other content on the page. Exhibit A contains a complete, un-retouched screenshot of the page, albeit showing a different ad (for PhoenixLawTeam.com) than the one shown in the Complaint.

What is notable about this page is that it clearly contains material which Defendants *did not create*—the Google AdSense ad shown in the white box to the left of the mugshot with the title "**Estate Planning and Admin**". Any person viewing this page could simply click on the small blue triangle in the upper-right corner which will take them to a page on Google.com, a copy of which is attached hereto as Exhibit B, which contains both a copy of the ad text, and an explanation showing why Google decided to display this specific advertisement to that unique visitor.

As this page explains, the ad shown was selected **by Google**, based on the history of websites visited by the viewer (undersigned counsel) and *Google's* estimation of the viewer's interests. Of course, other visitors to the same page might see completely different ads based on their own unique browsing history. In short, the contents of these are not created by Defendants, nor do Defendants control which ads appear.

If these ads are somehow "misleading", Plaintiffs sole remedy would be to sue Google or the company who created the ad. Beyond that, due to the immunity provisions of the Communications Decency Act, 47 U.S.C. § 230(c)(1), Defendants are not liable for false, inaccurate, or misleading information contained in an advertisement created by a third party and served by Google. *See Ascentive, LLC v. Opinion Corp*., 842 F. Supp. 2d 450, 455 (E.D.N.Y. 2011) (describing Google's AdSense program, noting "The content of the advertisements change on a click-by-click basis—i.e., the advertisements are different for every separate user that visits the website …" and finding defendant website fully entitled to CDA immunity despite displaying AdSense ads).

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b. The Complaint Fails to State A Claim for Emotional Distress

Plaintiffs' third cause of action seeks recovery for intentional infliction of emotional distress. In short, the claim appears to allege that Plaintiffs suffered emotional distress because Defendants displayed Plaintiffs' arrest information and/or booking photos.

This claim is expressly barred by *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) which held that claims for intentional infliction of emotional distress cannot be based on speech involving matters of public concern. As noted above, crime, arrests, and criminal proceedings are, *per se*, matters of the highest public interest and concern. Furthermore, the Arizona Supreme Court has *repeatedly* 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 his criminal records).

As a matter of law, claims for intentional infliction of emotional distress cannot arise from the publication of mugshots and arrest information. Accordingly, Plaintiffs' third cause of action must be dismissed.

c. In The Alternative, Plaintiffs Must Provide A More Definite Statement Because It Is Not Clear That Arizona Law Applies To All Plaintiffs

For the reasons stated above, Plaintiffs have failed to state any valid claims under any theory presented, and the Complaint should be dismissed with prejudice for that reason. However, in the alternative, if the Court were to find the Complaint sufficient to state a claim as to one or more Plaintiffs, it should nevertheless require all non-Arizona resident Plaintiffs to provide a more definite statement of their claims pursuant to Rule 12(e).

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Specifically, the problem here is as follows—each plaintiff has alleged exactly the bare-bones fact: "During the relevant time period, defendants have disseminated [each plaintiff's] arrest information and booking photo on the Websites for purely commercial purposes." Compl. ¶¶ 14–33. Although this common factual allegation is shared between all Plaintiffs, one thing is *not* shared: their state of residence. According to the Complaint, some Plaintiffs reside in Arizona, while others reside in other states like Florida, Texas, Illinois, South Carolina and Missouri.

Beyond merely listing their current states of residence (and beyond alleging Defendants reside in Florida), the non-Arizona resident Plaintiffs offer no explanation showing why venue exists in Arizona as to their claims, nor do they explain why their claims are properly governed by Arizona substantive law. In other words, if a person lives *in Florida*, and they are arrested *in Florida*, and their mugshot is displayed by Defendants who live *in Florida*, what basis does that plaintiff have for seeking damages under Arizona law? It would appear the answer is: *none whatsoever*. If that is true, then it would appear all the non-resident plaintiffs have no tenable claim under Arizona law and their claims should be dismissed.

This is so because when resolving choice-of-law issues, Arizona follows the "most significant relationship" theory from the Restatement. *See Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, 516, 990 P.2d 1069, 1075 (App. 1999). Under this rule, "Which forum's law applies to a particular issue depends on which forum has the most significant relationship to the issue … ." *Garcia*, 195 Ariz. at 516.

Here, although the Complaint lists the state and county in which each non-Arizona resident Plaintiff currently resides, the Complaint does *not* contain any facts showing that Arizona law would apply to any of these Plaintiffs under a choice of law analysis. Put simply, if a Plaintiff lives in Florida, is arrested in Florida, and their mugshot is displayed on a Florida-based website, the case would be controlled by Florida law, not Arizona law, and that Plaintiff would have no right to bring an action in Arizona or to seek damages under Arizona's Mugshot Act.

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Unfortunately, the Complaint fails to explain the facts showing a connection between each non-resident Plaintiff and this state. Without this information, it is impossible for Defendants (or this Court) to determine whether the non-Arizona resident Plaintiffs can properly state a claim under Arizona's Mugshot Act or Arizona common law. For that reason, even assuming the Complaint is not otherwise dismissed, the non-Arizona resident Plaintiffs (John Does 8–16 and Jane Does 3–4) should be ordered to provide a more definite statement which clearly sets forth the factual basis, subject to the provisions of Ariz. R. Civ. P. 11, showing why Arizona law applies to them.[2]

III. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice or, alternatively, the non-Arizona resident Plaintiffs should be ordered to provide a more definite statement of their claims.

DATED: May 12, 2020.

GINGRAS LAW OFFICE, PLLC

David S. Gingras, Esq.
Attorney for Defendants

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[2] Defendants believe it is likely the non-resident Plaintiffs have been fraudulently joined in this matter for the sole purpose of defeating federal removal jurisdiction. *See*, *e.g.*, *Caouette v. Bristol-Myers Squibb Co.*, 2012 WL 3283858, at *5–7 (N.D. Cal. 2012) (discussing doctrine of fraudulent joinder of plaintiffs). However, it is not currently possible to make that determination without more information about the non-resident Plaintiffs' claims. This is so because although one or more Plaintiffs might *currently* reside outside Arizona, it is entirely possible all of those Plaintiffs were arrested *in Arizona*, and their claims arise from the Defendants' publication of booking photos taken by an Arizona law enforcement agency. In that case, it is possible the non-resident Plaintiffs *might* have a valid claim under the Mugshot Act. This illustrates why the current lack of detail in the Complaint is unacceptable—because it does not allow Defendants to fully frame a responsive pleading.

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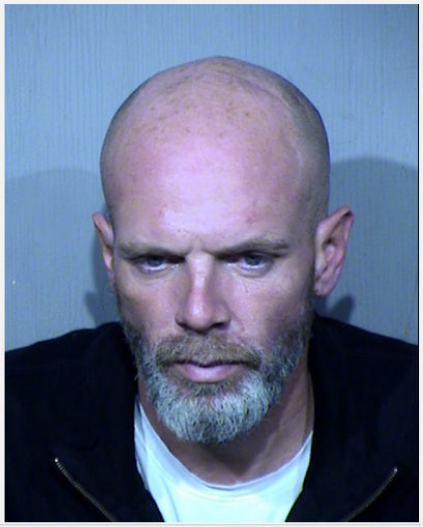
PHOENIX, AZ 85044

EXHIBIT A

RapSheetz Daily News

Jail & Prison Arrest Records and Breaking News

Phoenix Arrest Records for Inmate Scotty Hugh Cooper



Scotty Hugh Cooper Arrest Details

Phoenix (Maricopa County) AZ Jail Arrest Details

T597785 Scotty Hugh Cooper

Booking Number: T597785
Booking Date: 11/15/2019
Sex: MALE
Height: 5'09
Weight: 185
Eye Color: BLUE
Hair Color: BROWN
D.O.B: 3/15/1973

(1) Count of DANGEROUS DRUG-POSS/USE
(1) Count of DRUG PARAPHERNALIA-POSSESS/USE
(1) Count of CRIM TRESP 3RD DEG/PROPERTY

Local Jail Inmate Search

Please input inmate's **name** or **booking number** and **state**

Search

Sponsored Ads

What is a Rap Sheet?

Records of
Arrest and
Prosecution
(Sheet)

Florida Senate Bill 118 Compliance

RAPSHEETZ.COM WEBSITE DOES NOT SOLICIT OR ACCEPT A FEE OR ANY FORM OF PAYMENT TO TAKE DOWN ARREST RECORDS INFORMATION. **(read the official law here)**

Browse All Arrests

- Alabama Arrest Records
- Arizona Arrest Records
- Arkansas Arrest Records
- California Arrest Records
- Colorado Arrest Records
- Connecticut Arrest Records
- Florida Arrest Records
- Georgia Arrest Records
- Idaho Arrest Records
- Illinois Arrest Records
- Indiana Arrest Records
- Iowa Arrest Records
- Kansas Arrest Records
- Kentucky Arrest Records
- Louisiana Arrest Records
- Maine Arrest Records
- Maryland Arrest Records
- Michigan Arrest Records
- Minnesota Arrest Records

Maricopa County Jail
2939 W Durango St
Phoenix, AZ 85009

Click here for Phoenix Jail Visitation Information

Phoenix Arizona's Best Resource for Arrest Records

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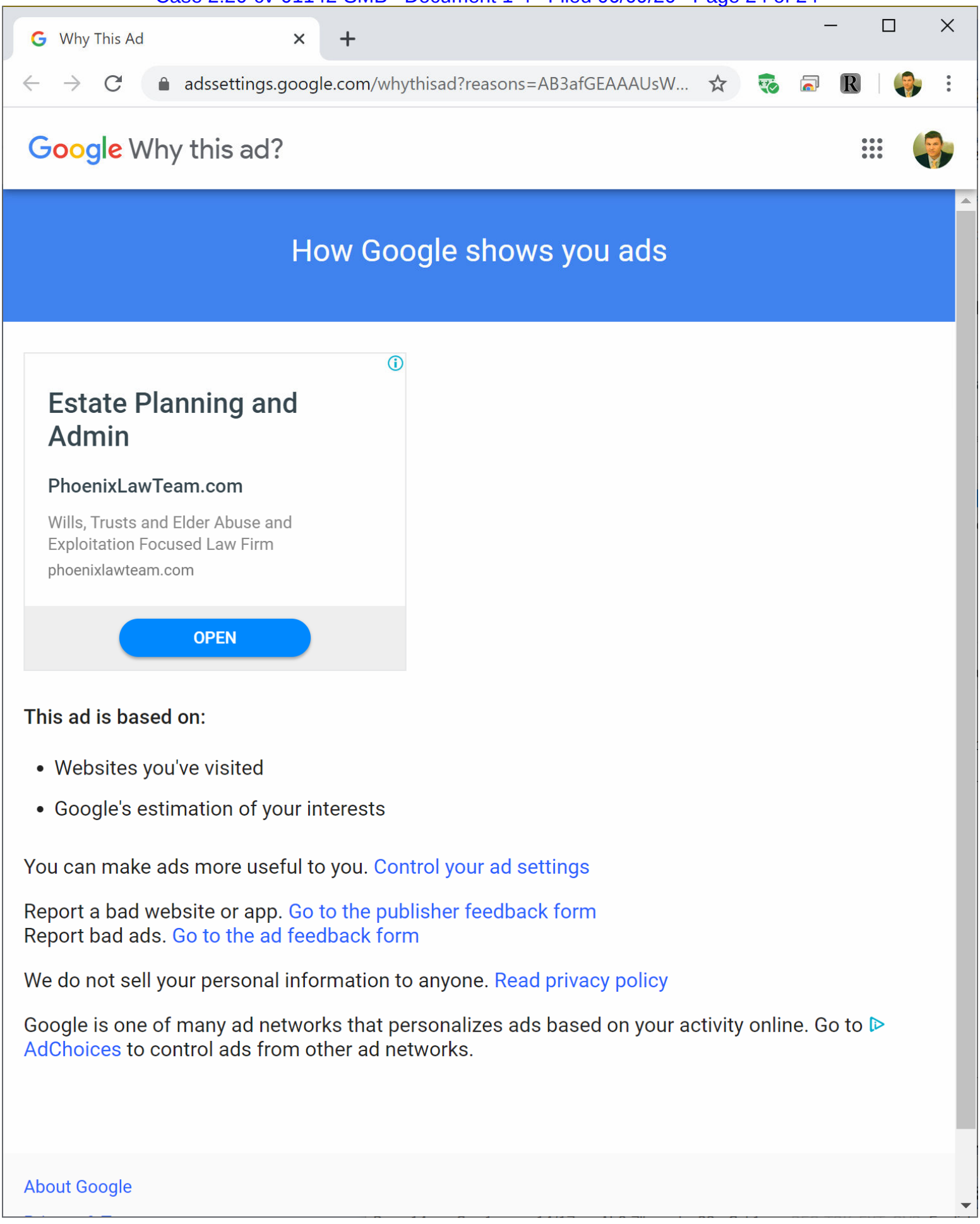
North Dakota Arrest Records
Ohio Arrest Records
Oklahoma Arrest Records
Oregon Arrest Records
Pennsylvania Arrest Records
Rhode Island Arrest Records
South Carolina Arrest Records
South Dakota Arrest Records
Tennessee Arrest Records
Texas Arrest Records
Utah Arrest Records
Virginia Arrest Records
Washington Arrest Records
West Virginia Arrest Records
Wisconsin Arrest Records
Wyoming Arrest Records

EXHIBIT B


Why This Ad
adssettings.google.com/whythisad?reasons=AB3afGEAAAUsW...
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