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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOHN DOE, Plaintiff, vs. TRAVIS PAUL GRANT, et al., Defendants.	Case No. CV2021-090059 **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** (Assigned to Hon. Tracey Westerhausen)

Plaintiff John Doe ("Plaintiff") respectfully submits the following Response to Defendants Travis Paul Grant and Mariel Lizette Grant's ("Defendants") Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Arizona Rules of Civil Procedure ("Ariz. R. Civ. P.") 12(b)(2). This Motion is supported by the following Memorandum of Points and Authorities; the Complaint filed in this case; Declaration of Andrew Ivchenko, attached hereto as Exhibit 1; and Plaintiff's Request for Judicial Notice, attached hereto as Exhibit 2; all of which are incorporated herein. For the reasons fully set forth below, Plaintiff respectfully requests that this Court deny Defendants' motion.

I. INTRODUCTION

Defendants are First Amendment opportunists that exploit arrest information and misappropriate images in booking photos to create misleading advertisements designed to generate substantial advertising revenue from the victims whose images have been misappropriated. [Compl. ¶ 1]. Defendants are notorious mugshot website operators,

and operate several websites that post mugshots and criminal records, including that of the Plaintiff. These include www.publicpolicerecord.com and www.bailbondshq.com (the "Websites"), on which millions of arrestees appear [Compl. ¶ 5]. In enacting A.R.S. §§ 44-7901, 7902 (the "Arizona Mugshot Act"), the Arizona Legislature recognized that the commercial exploitation of one's arrest information and booking photo causes daily, ongoing and continuing damage. The Arizona Mugshot Act, and the growing list of newly enacted state statutes like it, signifies a sea-change in how governments and law enforcement agencies treat arrest information, due mostly to the unscrupulous and harmful practices of mugshot website operators, such as Defendants.

II. DEFENDANTS' MOTION SHOULD BE DENIED

A. Defendants are Mugshot Website Operators and as such are Subject to Personal Jurisdiction Under the Provisions of the Arizona Mugshot Act.

Plaintiff agrees with Defendants' contention that the facts of this case are simple. [Def. Mot. at 1 n. 20]. However, a simple approach will not allow Defendants to avoid substantial pecuniary liability under the Arizona Mugshot Act, so they are forced to rely on "Hail Mary" arguments involving constitutionality. [Def. Mot. at 10 n. 17]. The underlying facts of this case began because Defendants do not like the Arizona Mugshot Act, and are rightfully concerned about the ramifications of an adverse ruling in Arizona on their extensive business operations nationwide. Their strategy at this point is to deflect personal liability and responsibility, while simultaneously trying to invalidate the Mugshot Act's "nexus" provision, A.R.S. § 44–7902(A), which provides as follows: "A mugshot website operator that publishes a subject individual's criminal justice record for a commercial purpose on a publicly accessible website is deemed to be transacting business in this state."

Defendants' constitutional arguments involving A.R.S. § 44–7902(A) are unavailing. *Ibid*. "An act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be

upheld unless it is clearly unconstitutional." *State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (Ariz. 1982); *see Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); *cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247–51 (2012) (the "constitutional-doubt" canon rests "upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature").

A party raising a facial challenge to a statute "must establish that no set of circumstances exists under which the Act would be valid." *State v. Arevalo*, No. CR-19-0156-PR (Ariz. 2020) (citations omitted). The Complaint specifically alleges personal jurisdiction is proper under A.R.S. 44-7902(A), as well as under Arizona's long-arm rule and applicable decisional law, which allows for assertion of personal jurisdiction over a non-resident consistent with federal constitutional due process. Ariz. R. Civ. P. 4.2(a); [Compl. ¶¶ 15-16].

As discussed in the next section, this Court need not even address Defendants' spurious constitutional arguments, as there are reasonable alternative interpretations of A.R.S. 44-7902(A) that pose no constitutional question. *See Calder v. Jones*, 465 U.S. 783 (1984) ("We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry.") (citations omitted).

B. Defendants Purposefully Availed Themselves of the Privilege of Conducting Activities in Arizona and as such are Subject to Specific Personal Jurisdiction under the *Cybersell* Case.

The Arizona Supreme Court has stated that under Rule 4.2(a), "Arizona will exert personal jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution." *Uberti v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995); *See Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 367, 542 P.2d 24, 26

(1975) ("Arizona's long arm statute ... is intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States."); *See Planning Group of Scottsdale, LLC v. Lake Mathews Mineral Props., Ltd*., 226 Ariz. 262, 267-68, ¶¶ 22 & 25, 246 P.3d 343, 348-49 (2011) ("Considering all of the contacts between the defendants and the forum state, did those defendants engage in purposeful conduct for which they would reasonably expect to be haled into that state's courts with respect to that conduct?").

In order for specific jurisdiction to exist over a nonresident defendant in Arizona, a three-part test must be met: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[;] (2)[t]he claim must be one which arises out of or results from the defendant's forum-related activities[; and] (3)[e]xercise of jurisdiction must be reasonable. *Cybersell, Inc. v. Cybersell, Inc*., 130 F.3d 414, 416 (9th Cir. 1997) (citations omitted).

i. Defendants' Websites Are Purposefully Directed at Arizona.

The Ninth Circuit in *Cybersell*, applying Arizona law, held that an Arizona court could not exercise personal jurisdiction over a Florida corporation, which advertised over the Internet, when it used Plaintiff's trademark on an Internet site. *Id*., at 420. The court determined that even though Internet users could access the company's web page in Arizona, a company may not be sued unless it purposefully availed itself (emphasis added) of the privilege of conducting activities in Arizona, thereby invoking the benefits and protections of Arizona law. *Id*., at 419. The Court held that Internet advertisement alone is not sufficient to subject the advertiser to jurisdiction in the plaintiff's home state, and that "'something more' was required to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Id*., at 418.

The "purposeful availment" requirement is satisfied if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents. *Id*. at 417. "It is not required that a defendant be physically present within, or have physical contacts with, the forum, provided that his efforts 'are purposefully directed' toward forum residents." *Ibid*. When personal jurisdiction is claimed based on a defendant's activities on the Internet, the courts, including the Ninth Circuit in *Cybersell,* have followed the lead of the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc*., 952 F. Supp. 1119 (W.D. Pa. 1997), in holding that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Cybersell, Inc*., 130 F.3d at 419.

Unlike the "passive" website in *Cybersell*, Defendants have in fact purposefully availed themselves of the privilege of conducting commercial activities directed at residents of Arizona as an integral part of their business operations. *Id*., at 420; *See Compuserve, Incorporated v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (Holding that the defendant's contacts with Ohio were sufficient to support the exercise of jurisdiction where defendant consciously reached out from Texas to Ohio to subscribe to CompuServe and sold his software over CompuServe's Ohio-based system.). Defendants' Websites are far from "passive" websites and target agencies (such as MCSO), individuals and states. Defendants also avail themselves by financially benefiting from the state's public records laws and other political subdivisions of the state's agencies. [Def. Mot., Affidavit of Travis Grant, ¶¶ 6-9]. Now that Defendants have decided to contest personal jurisdiction (something that none of them did in at least two earlier cases in this Court), they are not only distancing themselves from one another to avoid personal liability, but they also are trying to distance themselves from their involvement with the state of Arizona.

Defendant admit they are actively "scraping" and then posting the booking photos and arrest information from Arizona residents that were posted by law enforcement

agencies in this state. [Def. Mot., Affidavit of Travis Grant, ¶¶ 8-9]. The Arizona legislature was not operating in a vacuum when they drafted the Arizona Mugshot Act. They understood how these websites operate and use technology to obtain the booking photos and arrest records from law enforcement agencies in the state.[1] They also understood the significant, inherent damage mugshot website operator's cause Arizona residents. *See Calder*, 465 U.S. 783 ("Jurisdiction over petitioners in California is proper because of their intentional conduct in Florida allegedly calculated to cause injury to respondent in California."). Defendants' actions in Arizona cause its citizens, including Plaintiff, emotional and financial harm, including, but not limited to, unwanted publicity and ramifications for their employment. [Compl. ¶ 30].

The Mugshot Act's "nexus" provision, A.R.S. § 44–7902(A), simply recognizes the reality that mugshot website operators must be "deemed to be transacting business in this state" in order to accomplish their objectives from a technical standpoint (i.e., they must actively target a law enforcement agency in this state and "scrape" the arrest records from their site), and that their activities cause Arizona residents substantial, ongoing harm. This inherent harm associated with Defendants' activities in Arizona provides further support for A.R.S. § 44–7902(A), in that it triggers the "effects test" established by the *Calder* court (to be further discussed in the next section), which focused on the location of the brunt of the harm, in terms both of a victim's emotional distress and the injury to her professional reputation. *Calder*, 465 U.S. at 787. Defendants conveniently ignore these realities by focusing only on the passive advertisements on the Websites. [Def. Mot. at 7 n. 23]. However, without engaging in this targeted activity in Arizona, mugshot website operators simply would have no other way of methodically obtaining booking photos and arrest records of

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[1] The legislative history of the Arizona Mugshot Act was outlined in Plaintiff's Motion To Proceed Under Pseudonym, p. 11.

Arizona residents on a daily basis, to an extent where the Websites now contain 20 million records scraped from 45 different U.S. states. [Def. Mot. at 1 n. 28].

Defendants also are being disingenuous in trying to invalidate the nexus provision of the Arizona Mugshot Act, in that by arguing that they operate entirely passive websites [e.g., Def. Mot. at 7 n. 27], they are setting up a false narrative that the Arizona Mugshot Act is preempted by federal law, specifically the Communications Decency Act, 47 U.S.C. § 230(c)(1). [Def. Mot. at 4 n. 19]. Plaintiff will address this issue in Section II.C., *infra*.

Stated another way, Defendants admit that the arrest information and booking photos they use for their own commercial exploitation are not provided and/or tendered to them by law enforcement and that they only obtain the information by "scraping" or copying it from law enforcement agencies and internet sites located in this state. [Def. Mot., Affidavit of Travis Grant, ¶ 8]. Unlike the defendant in *Cybersell*, who "conducted no commercial activity over the Internet in Arizona," Defendants are conducting *extensive* (emphasis added) commercial activity in the state by scraping this information and capitalizing on the publication of Arizona resident's booking photos and arrest information through Google Ads. *Cybersell*, 130 F.3d at 419. This is sufficient "'purposeful availment" to justify personal jurisdiction over Defendants in Arizona. *Id*., at 420.

Defendants then use the arrest information from those whose identities and likenesses have been misappropriated to create original content in the form of advertisements that serve two purposes: 1) to attract third party advertisers to the website; and 2) generate pay-per-click advertising revenue. This adds further support for establishing specific jurisdiction over Defendants in Arizona, as it likely that considering the sheer volume of arrest records on the Websites, Defendants have paying customers in Arizona. [Def. Mot., Affidavit of Travis Grant, ¶¶ 9-18].

ii. Defendants' Websites Have Significant Impact in Arizona.

In *Panavision Int'l, L.P. v. Toeppen*, the Ninth Circuit found personal jurisdiction in California over a defendant in Illinois because the defendant had engaged in a scheme to extort money from a company that the defendant knew had its principal place of business in California and was likely to be injured there. 141 F.3d 1316, 1321 (9th Cir. 1998) (noting that the brunt of the defendants' tortious activities were felt in California). Indeed, Defendants directly and actively targeted Arizona residents, including Plaintiff. [Def. Mot., Affidavit of Travis Grant, ¶¶ 3-9]. The daily, ongoing reputational harm suffered by Plaintiff is a direct result of the activities of Defendants in this forum. [Compl. ¶¶ 28-30].

Plaintiff contends that Defendants' continuous and ongoing violations of his rights under Arizona statutory and common law have caused and continue to cause him injury. [Compl. ¶¶ 12, 30, 45, 65]. In establishing an "effects test," the *Calder* court focused on the location of the brunt of the harm, in terms both of a victim's emotional distress and the injury to her professional reputation. *Calder,* 465 U.S. at 787 ("The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."). In *Calder*, jurisdiction over defendants was proper in California based on the "effects" of their Florida conduct in California. *Id*., at 789.

Here, Defendants attempt to distance themselves from their activities in Arizona. [Def. Mot., Affidavit of Travis Grant, ¶¶ 19-21]. As in *Calder*, Defendants are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at Arizona. *Calder,* 465 U.S. at 789. Defendants know full well the potentially devastating impact upon their victims. [Def. Mot., Affidavit of Travis Grant, ¶¶ 3-9]. To further their illegal scheme and maximize its commercial effect, Defendants then use analytics and search optimization tools to ensure that each booking photo is among the first search results found when an arrestee's name is entered into a search engine such as Google, Bing or Yahoo. [Compl.

¶ 8]. Such conduct contributes substantially to the illegality of Defendants' use of the arrest information and booking photos. *Ibid.*

Defendants knew that the brunt of the injury would be felt by Plaintiff in the State in which he lives and works. *Calder*, 465 U.S. at 790. Under the circumstances, Defendants must "reasonably anticipate being haled into court [here]" to answer for their violations of Arizona law. *Ibid*. (citations omitted) ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California."). Specific jurisdiction over Defendants exists in Arizona. This conclusion comports with case law, as well as the provisions of A.R.S. § 44–7902(A). If future discovery indicates a lack of jurisdiction for any Defendant, the trial court is free, of course, to make the appropriate order.

C. Defendants Are Not Immune From Liability Under the Communications Decency Act, 47 U.S.C. § 230.

Defendants argue that the nexus provision of the Arizona Mugshot Act, A.R.S. § 44–7902(A), is preempted by the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"). [Def. Mot. at 15 n. 5]. "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' Websites was posted there by someone else. [Def. Mot., Affidavit of Travis Grant, ¶¶ 7-9].

Defendants do not inform this Court of the myriad limitations of, or exceptions to, a CDA § 230 defense. Instead, Defendants attempt to convince the Court that application of the CDA is straightforward, 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. [Def. Mot. at 15 n. 18]. 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).

Indeed, the Ninth Circuit has held that the CDA "does not declare 'a general immunity from liability deriving from third-party content.'" *Doe*, 824 F.3d at 852 (9th Cir. 2016) (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.Com, LLC*, 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. [Def. Mot., Affidavit of Travis Grant, ¶¶ 7-9]. For this reason alone, the CDA defense does not apply.

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. [Def. Mot. at 17 n. 13]. 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 (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*, 824 F.3d at 850 (9th Cir. 2016) (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).

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 (9th Cir. 2003) (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, LLC*, 521 F.3d at 1162; *Batzel*, 333 F.3d at 1032; and *F.T.C. v. Accusearch Inc*., 570 F.3d 1187, 1201 (10th Cir. 2009)). Because the information was not "provided" to Defendants for their commercial use, they are not entitled to CDA immunity as a matter of law. *Ibid*.

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 circumstance, the recipient reasonably believes the information was tendered to them for republication. This was the holding in *Batzel*, 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 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."

Batzel, 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, LLC*, 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. [Compl. ¶ 7]. 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.").

The CDA was designed to shield an interactive computer service provider for 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").

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.

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 LLC,* 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. [Def. Mot. at 17 n. 19].

First and foremost, the principal argument Plaintiff advances 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, LLC*:

> *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, Plaintiff respectfully request this Court not to follow *Doe* as *Doe* was wrongly decided, relied upon misconstrued holdings, and never addressed the arguments Plaintiff raises here.

Defendants also cite *O'Kroley v. Fastcase, Inc*., 831 F.3d 352 (6th Cir. 2016), claiming that the case involves "online criminal records." [Def. Mot. at 17 n. 23]. However, *O'Kroley* addressed CDA liability for search snippets based on third party content, in which Google did nothing to "materially contribute to the alleged unlawfulness of the content." *O'Kroley*, 831 F.3d at 355 (citations omitted). Although Defendants concede that their CDA analysis is contradictory and "strange" [Def. Mot. at 18 n. 6], they attempt to prop up their position through a straw-person argument by concluding it actually makes sense because Google would otherwise be considered a "mugshot website operator." [Def. Mot. at 18 n. 6]. Defendants conveniently ignore that the Arizona legislature crafted a media exemption in the Arizona Mugshot Act which easily exempts the activities of Google in "disseminating news to the public, including

the gathering, publishing or broadcasting [of] information to the public for a news-related purpose…" A.R.S. § 44-7902(E).

For these foregoing reasons, Defendants' argument that the nexus provision of the Arizona Mugshot Act, A.R.S. § 44–7902(A), is preempted by the CDA should be rejected.

D. Defendant Mariel Grant is Subject to Personal Jurisdiction In Arizona.

As explained in Section II, *infra*, Defendants are mugshot website operators who are subject to personal jurisdiction in Arizona. Now that they are being held to account, Defendants are trying to distance themselves from each other and from the harm they have caused Plaintiff, as well as countless Arizonans. [Compl. ¶¶ 2-3]. Defendant Travis Grant admits that he has ownership in the Websites, [Def. Mot., Affidavit of Travis Grant, ¶¶ 8-9], but Defendant Mariel Grant denies any involvement.

"[T]he plaintiff has the burden of establishing the existence of personal jurisdiction and cannot 'simply rest on the bare allegations of the complaint, but rather [is obliged] to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction. ... Once the plaintiff makes a prima facie showing of jurisdiction, 'the burden is on the defendant to rebut that argument.'" *MacPherson v. Taglione*, 158 Ariz. 309, 311-12, 762 P.2d 596, 598-99 (Ct. App. 1988). A prima facie showing means evidence sufficient to avoid a directed verdict. *Planning Group of Scottsdale, LLC*, 224 Ariz. at 311, 230 P.3d at 371 (Ct. App. 2010). If the jurisdictional facts are in conflict, then the court must view and resolve those facts in the light most favorable to the plaintiff. *MacPherson*, 158 Ariz. at 312, 762 P.2d at 599.

Both Websites purport to be owned by the same entity, Gainesville Console Doctor LLC, which lists Mariel Grant as the Manager. [*See* Exhibit 1, ¶¶ 2-3]. Mariel Grant also is named as a Manager of T Rav Enterprises, LLC, along with Travis Grant. [*Id*., ¶ 4]. David Grant (believed to be Travis Grant's father) is listed as the registered agent. [*Id*.]. Florida public records show that the Grant family controls numerous

business entities with overlapping roles for the family members, two of which name Mariel Grant. [*Id*.].

Defendants' arguments concerning A.R.S. § 29–3304 are unavailing. [Def. Mot. at 9 n. 26]. The issue here is one of *personal jurisdiction* (emphasis added), which is premised Mariel Grant's documented role has as a manager in an entity that is the advertised owner of the Websites, as well as being linked to various overlapping companies owned by the Grant family. [*See* Exhibit 1, ¶¶ 2-4]. This analysis has nothing to do with the debt and liabilities of LLC members under A.R.S. § 29–3304. Furthermore, Plaintiff has named Mariel Grant as a Defendant not because she is the spouse of Defendant Travis Grant, as Defendants' straw-person argument suggests [Def. Mot. at 7 n. 16], but rather because Plaintiff has made a prima facie showing that she is involved in the family business that owns and operates the Websites. *Planning Group of Scottsdale, LLC*, 224 Ariz. at 311, 230 P.3d at 371.

The affidavit of Mariel Grant is revealing for what it does *not* (emphasis added) say. Incredibly, even though Mariel Grant admits being a manager in Gainesville Console Doctor LLC, and acknowledges that this entity is the stated owner of the Websites, she professes that none of this should matter. [*See* Def. Mot., Affidavit of Mariel Grant, ¶¶ 6-7]. The Court should disregard this transparent effort to avoid personal jurisdiction on the part of Mariel Grant. The Court in *MacPherson* faced a remarkably similar fact pattern with a defendant who was trying to avoid personal jurisdiction in Arizona, concluding that the defendant was subject to personal jurisdiction because he did "not deny" he was an employee of the corporation that "purposely directed his activities at residents of the forum." *Macpherson*, 158 Ariz. 309, 762 P.2d at 599.

Defendants argue that Mariel Grant "has no role whatsoever in running the websites." [Def. Mot. at 6 n. 19]. Contrary to Defendants' objections, the Complaint seeks to treat all three individual Defendants as a single unified entity because in fact the evidence shows the Websites are operated as a family business involving all three

Defendants, including unknown individuals or entities that have as yet not been named in the Complaint. [Compl. ¶¶ 6]. Indeed, the Complaint also names as Defendants "John and Jane Does I-X; Black Corporations I-X; and White Companies I-X. *See* Complaint.

Without discovery, one cannot determine exactly how the Websites are owned and operated, and the role of each Defendant. Considering the sheer number of business entities and the overlapping, stated roles in these entities, any family member who is shown to be working in the business involving the Websites would justify a prima facie showing of personal jurisdiction. *Planning Group of Scottsdale, LLC*, 224 Ariz. at 311, 230 P.3d at 371.

Plaintiff has provided evidence of personal jurisdiction sufficient to avoid a directed verdict. *Planning Group of Scottsdale, LLC*, 224 Ariz. at 311, 230 P.3d at 370. If the jurisdictional facts are in conflict, it is only because of the actions of Defendants, who obviously are playing "musical chairs" with Florida business entities designed to disguise the ownership and roles of Defendants in operating a mugshot website operation that systematically targeted Plaintiff and countless Arizona residents. Under these circumstances, the court must view and resolve those facts in the light most favorable to Plaintiff. *MacPherson*, 158 Ariz. at 312, 762 P.2d at 599. As such, both Travis Grant and Mariel Grant are subject to personal jurisdiction in Arizona.

III. CONCLUSION

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

DATED: March 8, 2021.

Respectfully submitted,

ANDREW IVCHENKO PLLC

By: */s/ Andrew Ivchenko*
Andrew Ivchenko, Esq.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, I electronically transmitted the attached document to the Clerk's Office using www.azturbocourt.com for filing and transmittal of a Notice of Electronic Filing to the following registrant:

David S. Gingras, Esq.
GINGRAS LAW OFFICE, PLLC
4802 E. Ray Road, #23-271
Phoenix, Arizona 85044
Attorney for Defendants

By: */s/ Andrew Ivchenko*

EXHIBIT 1

Andrew Ivchenko (#021145)
ANDREW IVCHENKO, PLLC
4960 South Gilbert Road, #1-226
Chandler, AZ 85249
Phone: (480) 250-4514
Aivchenkopllc@gmail.com

Attorney for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOHN DOE, Plaintiff, vs. TRAVIS PAUL GRANT, et al., Defendants.	Case No. CV2021-090059 **DECLARATION OF ANDREW IVCHENKO IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** (Assigned to Hon. Tracey Westerhausen)

1. My name is Andrew Ivchenko and I am an Arizona attorney representing the Plaintiff in the above-captioned case, and make these statements based on my own personal knowledge.

2. On or about January 25, 2021, I reviewed the websites located at www.publicpolicerecord.com and www.bailbondshq.com (the "Websites"). I reviewed the Terms of Use of both Websites, which stated as follows:

PublicPoliceRecord.com

The parties to these Terms of Use (the "Agreement") are you and the owner of this PublicPoliceRecord.com website business, Gainesville Console Doctor LLC, (the "Company"). All references to "we," "us," "our," this "Website" or this "Site," or the "App" will be construed to mean this website business and the Company.

Bailbondshq.com

THIS AGREEMENT IS A BINDING LEGAL AGREEMENT BETWEEN GAINESVILLE CONSOLE DOCTOR, LLC, (the "Company") AND YOU.

3. I reviewed the Florida business registration for Gainesville Console Doctor LLC, which lists Mariel Grant as the Manager, and ODELL NAT, LLC as the Owner. *See* Exhibit 2A, attached to Plaintiff's Request for Judicial Notice. The registered agent for Gainesville Console Doctor LLC is listed as Kyle D. Grant. The addresses listed for Gainesville Console Doctor LLC and all three of these parties are exactly the same as the "Bail Bonds HQ's" listed address on its website:

© 2017 Bail Bonds HQ All rights reserved.

7643 Gate Parkway Suite 104-559, Jacksonville, Florida 32256

4. I also reviewed the Florida business registrations naming any of Travis Paul Grant, Mariel Lizette Grant, Kyle David Grant, David R. Grant and Ann C. Grant. Mariel Grant was listed as a manager of T RAV ENTERPRISES, LLC, along with Travis Paul Grant. David Grant was listed as the registered agent, with a mailing address of 2940 Lobelia Dr., Lake Mary, FL 32746. *See* Exhibit 2B, attached to Plaintiff's Request for Judicial Notice. One or more of these individuals were named as officers, principals or agents of the following Florida entities:

- GAINESVILLE CONSOLE DOCTOR, LLC
- ODELL NAT, LLC
- GRANT & SONS, LLC

- DAVID R GRANT BUSINESS CONSULTING, LLC

- T RAV ENTERPRISES, LLC

5. I declare under penalty of perjury under that the foregoing is true and correct.

DATED this 8th day of March, 2021.

Respectfully submitted,

By: */s/ Andrew Ivchenko*
Andrew Ivchenko, Esq.
Attorney for Plaintiff

EXHIBIT 2

Andrew Ivchenko (#021145)
ANDREW IVCHENKO, PLLC
4960 South Gilbert Road, #1-226
Chandler, AZ 85249
Phone: (480) 250-4514
Aivchenkopllc@gmail.com
Attorney for Plaintiff

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOHN DOE,

Plaintiff,

vs.

TRAVIS PAUL GRANT, et al.,

Defendants.

Case No. CV2021-090059

PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE OF PUBLIC RECORDS IN SUPPORT OF HIS OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

(Assigned to Hon. Tracey Westerhausen)

Plaintiff John Doe ("Plaintiff ") respectfully requests, pursuant to Ariz. R. Evid. 201(c)(2), that the Court take judicial notice of the public records described below and attached as Exhibit 2A and Exhibit 2B. Plaintiff makes this Request in support of his Opposition to Defendants' Motion to Dismiss for, *inter alia*, lack of personal jurisdiction under Ariz. R. Civ. P. 12(b)(2). This Request is supported by the Declaration of Andrew Ivchenko, attached hereto as Exhibit 1.

Judicial notice of these documents is proper because a court may properly take judicial notice of records filed in the office of the secretary of state. *State v. Flowers*, 9 Ariz.App. 440, 453 P.2d 536, 538, (Ariz. App. 1969) (citation omitted). A court also may take judicial notice of any fact that "is generally known within the trial court's

territorial jurisdiction; or ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *State v. Rhome*, 235 Ariz. 459, 461, 333 P.3d 786, 788 (App. 2014). Courts may take judicial notice of court filings and other matters of public record. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc*., 442 F.3d 741, 746 n. 6 (9th Cir. 2006); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).[1]

Here, the requested documents are "not subject to reasonable dispute" in that they are "capable of accurate and ready determination by" referring to public records dockets, sources "whose accuracy cannot reasonably be questioned." Ariz. R. Evid. 201(b)(2). Accordingly, Plaintiff respectfully requests that the Court take judicial notice of the following Exhibits to this Request:

- Florida Limited Liability Company Annual Report for GAINESVILLE CONSOLE DOCTOR, LLC, DOCUMENT No. L12000013095, filed on March 7, 2020 in the Office of the Florida Secretary of State, attached hereto as Exhibit 2A.
- Florida Limited Liability Company Annual Report for T RAV ENTERPRISES LLC, DOCUMENT No. L19000232274, filed March 10, 2020 in the Office of the Florida Secretary of State, attached hereto as Exhibit 2B.

Pursuant to these rules, Plaintiff requests that this Court take judicial notice of the documents attached hereto as Exhibits 2A and 2B and the contents thereof in connection

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[1] "The text of Ariz. R. Evid. 201(b) is identical to that of Fed.R.Evid. 201(b). 'Where the language of an Arizona rule parallels that of a federal rule, federal court decisions interpreting the federal rule are persuasive but not binding....'" *Shtyrkova v. Gorbunov*, No. 2 CA-CV 2013-0163, 2014 WL 3732542, at *3 n. 5 (Ariz. Ct. App. July 28, 2014) (citing Ariz. R. Evid., prefatory cmt. to 2012 amend.).

with Plaintiff's Opposition to Defendants' Motion to Dismiss, and any other matter that this Court deems appropriate.

DATED: March 8, 2021.

Respectfully submitted,

ANDREW IVCHENKO PLLC

By: */s/ Andrew Ivchenko*
Andrew Ivchenko, Esq.
Attorney for Plaintiff

EXHIBIT 2A

2020 FLORIDA LIMITED LIABILITY COMPANY ANNUAL REPORT

FILED
Mar 07, 2020
Secretary of State
8449806563CC

DOCUMENT# L12000013095

Entity Name: GAINESVILLE CONSOLE DOCTOR, LLC

Current Principal Place of Business:

7643 GATE PARKWAY
STE 104 #559
JACKSONVILLE, FL 32256

Current Mailing Address:

7643 GATE PARKWAY
STE 104 #559
JACKSONVILLE, FL 32256 US

FEI Number: 45-4377109

Certificate of Status Desired: Yes

Name and Address of Current Registered Agent:

GRANT, KYLE D
7643 GATE PARKWAY
STE 104 #559
JACKSONVILLE, FL 32256 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE: KYLE GRANT 03/07/2020

Electronic Signature of Registered Agent — Date

Authorized Person(s) Detail :

Title	MGR	Title	OWNER
Name	GRANT, MARIEL	Name	ODELL NAT LLC
Address	7643 GATE PARKWAY STE 104 #559	Address	7643 GATE PARKWAY STE 104 #559
City-State-Zip:	JACKSONVILLE FL 32256	City-State-Zip:	JACKSONVILLE FL 32256

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am a managing member or manager of the limited liability company or the receiver or trustee empowered to execute this report as required by Chapter 605, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: MARIEL GRANT MGR 03/07/2020

Electronic Signature of Signing Authorized Person(s) Detail — Date

EXHIBIT 2B

2020 FLORIDA LIMITED LIABILITY COMPANY ANNUAL REPORT

FILED
Mar 10, 2020
Secretary of State
1411114559CC

DOCUMENT# L19000232274

Entity Name: T RAV ENTERPRISES LLC

Current Principal Place of Business:

949 MOSS TREE PL
LONGWOOD, FL 32750

Current Mailing Address:

949 MOSS TREE PL
LONGWOOD, FL 32750 US

FEI Number: 84-3178482

Certificate of Status Desired: Yes

Name and Address of Current Registered Agent:

GRANT, DAVID
2940 LOBELIA DR
LAKE MARY, FL 32746 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent — Date

Authorized Person(s) Detail :

Title	MGR	Title	MGR
Name	GRANT, TRAVIS	Name	GRANT, MARIEL
Address	949 MOSS TREE PL	Address	949 MOSS TREE PL
City-State-Zip:	LONGWOOD FL 32750	City-State-Zip:	LONGWOOD FL 32750

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am a managing member or manager of the limited liability company or the receiver or trustee empowered to execute this report as required by Chapter 605, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: TRAVIS GRANT MGR 03/10/2020

Electronic Signature of Signing Authorized Person(s) Detail — Date