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IN THE COURT OF APPEALS
DIVISION ONE
IN AND FOR THE STATE OF ARIZONA

JOHN DOE, Plaintiff/Appellant, vs. TRAVIS PAUL GRANT, et al., Appellees/Appellees	Court of Appeals Division One No. 1 CA-CV 21-0302 Maricopa County Superior Court No. CV2021-090059 **APPELLANT'S RESPONSE TO APPELLEES' MOTION TO SUSPEND OR DISMISS APPEAL**

Plaintiff/Appellant John Doe ("Appellant") respectfully submits the following Response to Defendants/Appellees' Travis Paul Grant *et al*., ("Appellees") Motion To Suspend Appeal And Revest Jurisdiction In Trial Court; Alternative Motion To Dismiss Appeal To Permit Parties To Develop Record. This Motion is supported by the following Memorandum

of Points and Authorities; and upon the papers, records and pleadings on file herein; all of which are incorporated herein. For the reasons fully set forth below, Appellant respectfully requests that this Court deny Appellees' Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Appellees 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. (IR 1, ¶¶ 1-2).[1] Appellees are notorious mugshot website operators, and operate several websites that post mugshots and criminal records, including that of the Appellant. These include www.publicpolicerecord.com and www.usbondsmen.com (the "Websites"), on which millions of arrestees appear. (*Id.*, ¶ 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

[1] "IR" refers to the Clerk of the Superior Court's Index of Record on Appeal.

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 Appellees.

The Arizona legislature's objective in passing the Arizona Mugshot Act was to put an end to the reprehensible activities of mugshot website operators like Appellees. (IR 1, ¶ 4). The Arizona Mugshot Act encompasses Appellees' exact conduct. In fact, the legislature and various stakeholders actually discussed the exact types of websites at issue here during the committee hearings on the proposed legislation.[2] Websites such as those operated by Appellees were repeatedly mentioned as prime examples of the types of activity the Legislature sought to enjoin when it drafted this legislation. The House Public Safety Committee unanimously passed this legislation. *Id*. During the hearing, the state representatives minced no words when describing mugshot website operators such as Appellees. State Representative Campbell emphasized that the legislation

[2] See AZ HB2191 - criminal justice records; prohibited uses: Hearing Before the House Public Safety Comm., Fifty-fourth Legislature 1st Regular. (2019, February 13). Available at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=22019.

was directed against such "sleaze ball operators" (*Id*. at 19:00), and Committee Chairman Payne declared that "[nobody] should be hampered by something like this." (*Id*. at 19:34). Chairman Payne further described these activities as "cruel, pure cruel." (*Id*.).

Indeed, this is a case of first impression in Arizona, as well as in the United States, as no other appellate court has had an opportunity to scrutinize the controversial CDA in relation to the growing number of state statutes similar to the Arizona Mugshot Act. The focus of this controversy is whether states can protect their citizenry from the harmful cyberstalking activities of mugshot website operators by enacting laws prohibiting the commercial exploitation of one's booking photo and arrest information, and whether the Arizona Mugshot Act is preempted by federal law, specifically the CDA. At stake in this matter is Arizona's ability to enforce its mugshot act, specifically to protect Arizonans from unfair or deceptive acts that interfere with the rights to privacy and anonymity of Arizona's citizenry, and protect them from long-term reputational harm.

In terms of Appellees' Motion, Appellant agrees on one point only – the trial court made a mistake in its March 31, 2021 ruling (filed April 1,

2021), when it granted Appellees' Motion to dismiss on the grounds that the Arizona Mugshot Act is preempted by the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"). (IR 46). However, the parties' view of the reasons for the mistake differ, in that Appellees urge that the trial court made a procedural mistake that warrants derailing this appeal. Appellant, on the other hand, contends that the trial court committed reversible error in its ruling based on the substance of the decision (emphasis added). As a result, Appellant appealed the trial court's decision. (IR 52).

Since then, Appellees have done everything in their power to derail the appellate process, including filing motions in the trail court contesting Ariz. R. Civ. P. ("Rule")[3] 54(C) certification, as well as a motion under Rule 60(b). (IR 59-60). The trial court rejected Appellees' arguments and categorically denied their motions. (IR 66). Appellant also argued that Appellees have ulterior motives for trying to stop this appeal (to be discussed in Section II.D., *infra*). Unwilling to accept defeat, Appellees are now making the same, stale arguments in this Court. For the reasons fully

[3] "Ariz. R. Civ. P." refers to the Rules of Civil Procedure for the Superior Courts of Arizona.

set forth below, Appellant respectfully requests that this Court deny Appellees' motion and allow the appellate process to finally proceed.

II. APPELLEES' MOTION SHOULD BE DENIED

A. The trial court did not dismiss Appellant's claims sua sponte.

Appellees argue that the trial court "went off the rails" in dismissing the entire complaint because it found that Appellant's claims were barred by federal law, specifically the CDA. (Mot., at p. 3).[4] Appellees further argue that the trial court in effect "brought and then granted its own Rule 12(b)(6) motion sua sponte, and it did so without giving notice to the parties that it was considering such action." (*Id.*). In support of their argument, Appellees cite *Acker v. CSO Chevira*, 188 Ariz. 252, 255–56, 934 P.2d 816 (App. 1997) (adopting federal standards prohibiting sua sponte dismissals without notice, because the "practice 'often leads to a shuttling of the lawsuit between the trial and appellate courts.'"). (Mot., at p. 4).

To support their position, Appellees argue that the trial court's decision to grant Appellant's motion to proceed on an anonymous basis somehow should have precluded it from making any ruling in relation to

[4] "Mot." refers to Appellees' pending Motion to Dismiss or Suspend Appeal.

the CDA. (Mot., at p. 4, fn. 1). This bizarre and nonsensical argument is little more than a red herring. To argue that "the record contains no information or evidence showing the actual manner in which Appellant's identity was used on Appellee's website" is somehow important is disingenuous at best. (Mot., at p. 4, fn. 1). Appellees know that Appellant was arrested in Maricopa County in March 2018, and have never demonstrated that any one record on their website is in any material way different from others posted that month, or at any other time for that matter. (IR 1, ¶ 25; IR 1, ¶¶ 2-3; IR 19, Affidavit of Travis Grant, ¶ 8).

Furthermore, the trial court's decision to grant Appellant anonymity was based on the sensitive nature of the issues involved and to ensure that Appellees, notorious mugshot website operators, did not engage in additional online predation designed to further harm Appellant's reputation and emotional well-being. (IR 8, 33, 42). Appellant's successful argument to the trial court included detailed descriptions of the horrific experiences of all identified plaintiffs and their attorneys over the course of the previous year at the hands of Appellees and their attorney,

including abuse of process and incessant cyber harassment.[5] (IR 8, Exhibits 2, 3).

Indeed, the CDA was not part of the trial court's analysis in granting Appellant's motion for anonymity. (IR 42). As Appellees correctly state, the parties made arguments in relation to the CDA in the context of a Rule 12(b)(2) challenge to personal jurisdiction. (Mot., at p. 3). However, Appellees then make the incredible leap that the normal appellate process must be stopped, simply because they are not satisfied with the record! *Id*. In making statements such as the need to address "other underlying substantive issues," or that the case is "not ripe for appeal," and "nor is the record sufficiently developed," Appellees are essentially asking this Court to make new law. (Mot., at p. 5). In essence, Appellees want a trial court to be burdened with the duty to leave no stone unturned in

[5] This Court should be aware of the extremely contentious nature of this litigation (emphasis added). Appellees filed suit against Appellant's attorney and his wife in the U.S. District Court for the District of Arizona, styled *Travis Grant, et al. v. Andrew Ivchenko, et at.*, Case No. 21-CV-108, filed January 21, 2021. (IR 14-15). Appellant's attorney and his wife subsequently filed suit against Appellees and their attorney in Maricopa County Superior Court, styled *Andrew Ivchenko, et al. v. David S. Gingras, et at.*, Case No. 21-CV-093562, filed August 3, 2021, alleging abuse of process, violation of the Arizona Mugshot Act, invasion of privacy, false light, misappropriation, civil conspiracy, and aiding and abetting. Both cases are pending.

discerning every conceivable issue before an appeal would even be allowed. However, Appellees cite no case law to support their "simple solution," which in effect would entail sweeping, fundamental changes to Arizona appellate procedure. *Id*.

Appellees' novel argument fails as a matter of law for two reasons. First, Appellees' reliance on *Acker* is misguided. The plaintiff in *Acker* appealed a pre-service-of-process dismissal of her in forma pauperis civil action. *Acker*, 188 Ariz. at 253, 934 P.2d at 817. In discussing sua sponte Rule 12(b)(6) dismissals, the court noted that such actions by a trial court are discouraged because any appeal would be nonadversarial, since the appellant would be the only party on appeal. *Id*., 188 Ariz. at 256, 934 P.2d at 820 ("Such one-party practice 'often leads to a shuttling of the lawsuit between the [trial] and appellate courts.'").

This is where Appellees engage in a sleight of hand. By quoting only the second part of the *Acker* court's reasoning involving the "shuttling" of lawsuits, they completely ignored the other part involving "one party practice." (Mot., at p. 4). Here, the trial court's decision involved adversarial proceedings between parties that were properly before the court. (IR 46). As a result, the trial court did not make a sua sponte ruling,

and never indicated in its opinion that this inherent right of the court was even being invoked. (IR 46). Indeed, had the trial court done so, it would have provided notice to the parties, given Appellant an opportunity to submit written arguments in opposition, and provided a statement of the reasons for the dismissal. *Acker*, 188 Ariz. at 256, 934 P.2d at 820.

Appellees express concern about the parties and this Court "needlessly wast[ing] valuable time and resources" if their wishes are not granted. (Mot., at p. 5). This argument is nonsensical. First of all, if Appellees were to prevail in this appeal, the Arizona Mugshot Act would in effect become unenforceable. The Arizona legislature would then have to go back to the drawing board and find another way to protect several hundred thousand Arizonans from the ongoing reputational harm caused by predatory mugshot website operators such as Appellees. (IR 1, ¶¶ 1-12).

Similarly, if Appellant were to prevail on appeal, this case would in effect be over, too. Appellees only plausible remaining argument would involve the constitutionality of the Arizona Mugshot Act. (Mot., at p. 9). Contrary to Appellees' assertions (*Id.*), the trial court ruled that the jurisdictional portion of the Arizona Mugshot Act, A.R.S. § 44-7902(A),

"me[t] constitutional muster." (IR 46, p. 3). Curiously, Appellees filed a notice of cross-appeal on August 19, 2021, in which they did not even appeal this portion of the trial court's ruling, even though they filed a Notice of Constitutional Challenge to Statute pursuant to A.R.S. § 12–1841. (IR 22, 74). They Arizona Attorney General subsequently made an appearance in this case. (IR 50).

Appellees' decision not to appeal the trial court's ruling is a tacit admission by them that any attempt to declare the Arizona Mugshot Act unconstitutional (as well as other proposed arguments made by Appellees) would be at best an uphill battle. (IR 64, pgs. 9-12). Indeed, Appellees previously cited *Frazier v. Boomsma*, 2008 WL 3982985 (D. Ariz. 2008), in an effort to question the constitutionality of the Arizona Mugshot Act. (IR 64, p. 10). However, *Frazier* involved political speech that is fully protected by the First Amendment and subject to strict scrutiny. *Frazier*, at 16-17. Restrictions on speech are not always subject to strict scrutiny, however. The *Frazier* Court further stated that "[a] law that regulates commercial speech based on content will be constitutional so long as it "directly advances" a "substantial" governmental interest and is no more extensive than is necessary to serve that interest." *Id*. at 17. This reasoning

applies to the Arizona Mugshot Act. Appellees refuse to recognize that the courts and the legislatures in numerous states have determined that the public simply does not have an interest in Appellees' commercial exploitation of arrest photos that are only published by law enforcement for a limited period of time. (IR 1, ¶¶ 5, 9, 37).

Appellees are basically arguing here that the trial court should have granted their Rule 60(b) motion. (IR 74). Indeed, the exact same arguments that were rejected by the trial court (IR 59, 64-66) are now being made here, under the guise of Ariz. R. Civ. App. P. 3(b). (Mot., at p. 12). Since this case was dismissed by the trial court, there was substantive finality, regardless of Appellees' tortured arguments to the contrary. *Powell v. Pac. Specialty Ins. Co.*, 415 P.3d 804, 805 (Ariz. App. 2018). The trial court's final judgment also included the requisite Rule 54(c) language indicating that no further matters remained pending. (IR 72, 73). As such, there is no need for this Court to either suspend or dismiss this appeal, as Appellees request. *Madrid v. Avalon Care Center-Chandler, L.L.C.*, 236 Ariz. 221, 338 P.3d 328, 331 (Ariz. App. 2014). Furthermore, Appellees' notice of cross-appeal included "[t]he Superior Court's denial of Appellees' Motion for Relief on the Basis of Mistake" as an issue they would raise in this appeal.

(IR 74). Appellees should be required to make their arguments in their appellate brief, rather than waste everyone's time trying to resolve the issues through this motion.

B. This Court can fully evaluate the issue of CDA immunity and render a dispositive ruling based on the current record.

To the extent there even was a procedural error made by the trial court (there was not), it was Appellees who made it by trying to slip through a CDA argument in their motion to dismiss under Rule 12(b)(2), which was really a motion under Rule 12(b)(6) in disguise. The record establishes that Appellees considered their arguments under the CDA to be ripe for decision under their Rule 12(b)(2) motion. (IR 18-20). Citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007), Appellees strenuously argued that the CDA expressly preempts any state law which treats a website operator or user as a "publisher" of information originating with a third party (emphasis added). *Id*. Appellees continued on, citing *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1104 (9th Cir. 2009), in arguing that the CDA precludes courts from treating internet service providers as publishers not just for the purposes of defamation law, with its particular distinction between primary and secondary publishers, but

in general (emphasis in original). Appellant spent almost half of his response brief addressing the issue of CDA immunity. (IR 29).

Both parties understood the importance of the CDA argument, and recognized that any CDA ruling involving any cause of action, or even the portion of the Arizona Mugshot Act involving jurisdiction, would be case dispositive. It was an all or nothing argument. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (1997) (holding that the CDA barred a defamation claim premised on AOL's failure to remove an allegedly libelous advertisement, even after the plaintiff provided AOL notice of the content.). Significantly, both parties filed motions to exceed the page limits in their briefs, which were granted. (IR 17, 30).

In Appellees' previous attempt to derail this appeal through Rule 60(b), they argued that their CDA argument was limited to the portion of the Arizona Mugshot Act involving personal jurisdiction, A.R.S. § 44–7902(A). (IR 60, pg. 3 n. 26). Appellees are now trying to walk everything back by ignoring that they ever made this argument, and try to deflect attention from the real issues by drawing an irrelevant distinction between CDA *immunity* and the CDA *as a defense* to liability (emphasis added). (Mot., at p. 9). Not only is this angels-dancing-on-the-head-of-a-pin, but

the kind of legal legerdemain that fundamentally misunderstand the CDA and the relevant case law.

Appellant's response to Appellees' motion to dismiss shows that the federal immunity established by the CDA, if it applies (it does not), is broad enough to cover any cause of action, statutory or common law, pled by Appellant in his complaint. (IR 29, Pgs. 9-10). *See Zeran*, 129 F.3d at 333 (1997); (IR 1, ¶¶ 46-68). To further buttress their position here, Appellees have suggested that the CDA is really an affirmative defense, and should not have been raised by them in the first place. (IR 60, at pg. 5 n. 18). However, an affirmative defense can be raised on a motion to dismiss under Rule 12(b)(6), without having to file an answer, if the existence of the defense is revealed by the complaint itself. *Wyatt v. Terhune*, 280 F.3d 1238, 1246 (9th Cir. 2002).

This issue in relation to the CDA is unsettled and some courts have held that immunity under the CDA is valid grounds for a 12(b)(6) motion to dismiss. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc*., 564 F. Supp. 2d 544, 551 (E.D. Va. 2008) (The Court therefore holds that it is proper to evaluate Defendant's immunity defense in the context of a 12(b)(6) motion because the necessary facts are apparent on the face of the Complaint, and

that the immunity available under the CDA precludes Appellant from stating a claim of defamation or tortious interference with business expectancy in this instance."). Furthermore, when a court faces questions going to the merits of a case in a Rule 12(b)(2) motion, that motion may be converted to a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Id.*, at 550. This scenario can also play out in the context of a court converting a 12(b)(1) motion into a 12(b)(6) motion, if the underlying challenge is not to jurisdiction, but to the sufficiency of the plaintiff's claim. *See Bryce v. Episcopal Church in Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002). The crucial element is the substance of the motion, not whether it is labeled a Rule 12(b)(1) motion rather than 12(b)(6). *Id.* (*quoting* 5A Wright & Miller § 1366, at 485 ("It is not relevant how the defense is actually denominated.")).

Perhaps portions of the trial court's opinion in this case could have been stated differently, but neither Rule 60 nor Ariz. R. Civ. App. P. 3(b) were designed to allow a party (particularly a prevailing party) to essentially reverse a trial court's decision because it was somehow not to their liking. The trial court emphasized this in its ruling denying Appellees' Rule 60(b) motion. (IR 66). What's next, will we just allow

Appellees to provide a draft opinion for this Court? Appellees made their own bed here, and must live with the consequences. Appellees are clearly unhappy with the trial court's ruling once reality sunk in that their only real defense in this case, the CDA, would be put under a microscope in a state-level appeal. However, this is not grounds for relief under either Rule 60(b)(1) or Ariz. R. Civ. App. P. 3(b). *Altman v. Anderson*, 726 P.2d 625, 628, 151 Ariz. 209, 212 (Ariz. App. 1986); *Powell*, 415 P.3d at 805. Appellees likely did not think Appellant would appeal the ruling, and they most certainly did not believe the Arizona Attorney General would intervene in this case. (IR 50). Prior to that, they kept quiet and were more than happy to accept their "victory" and continue posting and monetizing booking photos and arrest records of several hundred thousand people that were once arrested in Arizona.

Appellees argue endlessly that this case needs further development, and that the only issue on appeal is whether this Court erred (procedurally or substantively) when it dismissed Appellant's complaint based on the CDA, and that the only possible result will be for this Court to reverse the decision as procedurally erroneous, thus requiring remand. (IR 60, at pg. 7 n. 20.]. This argument is a red herring. Appellant will frame the issues on

appeal based on the record and the case management statement. Ariz. R. Civ. App. P. 12(d). Finally, the trial court's CDA ruling was exceptionally broad, and did not even cite a single case cited by either party in their briefs relating to the CDA. (IR 46, at pg. 40). In so ruling, the trial court left it wide-open for both parties to present on appeal all possible arguments relating to the CDA.

C. Appellees' arguments in relation to *Roommates I* and *II* are contradictory, and support Appellant's arguments involving the CDA.

Appellees correctly point out the significance of the Ninth Circuit's seminal decision involving the CDA in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) ("*Roommates I*"). (Mot., at p. 17). However, they go one step further and argue that the Ninth Circuit's subsequent opinion in the case mandates that their motion be granted. *See Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012) ("*Roommates II*"). However, the significant case here in the context of the CDA is *Roommates I*, not what the Ninth Circuit subsequently held in *Roommates II*.

The CDA was designed to shield an interactive computer service provider from liability for someone else's illegal content. For example,

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

In this case, Appellees' 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 Appellees' 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 Mugshot 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. (IR 1, ¶ 5). But when Appellees systematically "scrape" that information and indefinitely use it for their own commercial purposes, that transformative use is illegal. (IR 1, ¶¶ 8-10); s*ee, e.g., F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (defendant not protected under CDA where it "knowingly sought to transform [legally protected] information into a publicly available commodity").

There are several other reasons why the CDA does not insulate Appellees from liability under the Arizona Mugshot Act, all of which will be extensively discussed in Appellant's opening brief. However, in citing *Roommates I* and *Roommates II*, Appellees have admitted that this Court can rule in Appellant's favor simply through the application of the holding in *Roommates I*. Indeed, the Ninth Circuit in *Roommates I* established the standard, and then instructed the district court as follows:

> In light of our determination that the CDA does not provide immunity to Roommate for all of the content of its website and email newsletters, we remand for the district court to determine in the first instance whether the alleged actions for which Roommate is not immune violate the Fair Housing Act, 42 U.S.C. § 3604(c). We vacate the dismissal of the state law claims so that the district court may reconsider whether to exercise its supplemental jurisdiction in light of our ruling on the federal claims (emphasis added).

Roommates.Com, LLC, 521 F.3d at 1175.

Appellees' motion in effect concedes that the holding in *Roommates I* in and of itself dispenses with any protection they might have under the CDA, unless they can find some other way to sidestep the Arizona Mugshot Act. (Mot., at p. 19). As stated earlier, Appellees' constitutional arguments are spurious at best, and have been abandoned in their cross appeal. (*See* Section II.A, *supra*). To argue that the (purportedly) largest mugshot website operator in in the country is engaged in activities in Arizona that were not addressed by the Arizona legislature when passing the Arizona Mugshot Act is borderline laughable. (*See* Section I, *supra*). Indeed, the "duck test" is applicable here - if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.

Moreover, "a plaintiff can . . . plead himself out of a claim by including unnecessary details contrary to his claims," and courts are not required to accept conclusory allegations which are contradicted by documents referred to in the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-989 (9th Cir. 2001). Appellees' admission that *Roommates I* eviscerates any CDA defense they may have is an invitation Appellant will urge this Court to accept. Should Appellant prevail on appeal along these lines, the trial court can later decide whether Appellees' activities are covered under the Arizona Mugshot Act. Appellees may (and probably will) later appeal for any number of reasons, should they be held pecuniarily liable under the Arizona Mugshot Act. However, this important case law will then be developed in our state.

Appellant's counsel is not aware of any legal precedent in this state that requires this Court to grant Appellees' motion on the grounds that every conceivable appellate issue be first resolved by a trial court. Indeed, Arizona law contemplates appellate recourse, including special actions, under any number of circumstances. A.R.S. 12-2101; Ariz. R. P. Spe. Act. 3. For now, and applying a deferential Rule 12(b)(6) standard, Appellant has pled facts that show Appellees are in violation of the Arizona Mugshot

Act. (IR 1, ¶¶ 24-44); *Planning Group v. Lake Mathews Mineral*, 226 Ariz. 262, 264 n.1 (Ariz. 2011) ("We accordingly review the superior court's ruling de novo, viewing the facts in the light most favorable to the plaintiffs but accepting as true the uncontradicted facts put forward by the defendants."); *Coleman v. City of Mesa*, 642 Ariz. Adv. Rep. 4, 230 Ariz. 352, 284 P.3d 863, 867 (Ariz. 2012) ("In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient...").

As such, this appeal should be allowed to continue. The online mugshot industry has subjected millions of Americans to terrible, ongoing reputational harm for years. (IR 1, ¶¶ 2-3; IR 19, Affidavit of Travis Grant, ¶¶ 3, 9). These online predators have hidden behind the CDA ever since, viewing it as a "get out of jail free card" that allows them to continue their harmful activities. The morale and productivity of countless Arizona residents (and hence, the state's tax base) is adversely affected by the activities of a few internet thugs like Appellees, who operate what amounts to the internet equivalent of a weapon of mass destruction with impunity from Central Florida. (IR 1, ¶ 11). The time has come for serious

appellate review of the CDA issue in realtion to the Arizona Mugshot Act, rather than allowing Appellees to continue with their gamesmanship and "scorched-earth" tactics, as discussed in the next section.

D. The Defendants have ulterior motives for trying to derail the Arizona state court appellate process.

Appellees' Motion is both nonsensical and legally impermissible, and most certainly begs the question – what is really going on here? Why would Appellant consider a "loss" a "win," and Appellees consider a "win" a "loss"? The answer to this question requires a review of Appellees' actions in Arizona since Appellant's counsel first brought suit against them, including their conduct in ongoing litigation in Florida, the Appellees' home state. Here's the bottom line – Appellees and their counsel, David S. Gingras ("Mr. Gingras"), have done, and will do, anything in their power to derail the Arizona appellate process and get this case back to federal court, where it has now been on three separate occasions through three different law firms (emphasis added). Here is a recap of those cases[6]:

[6] Appellant's counsel first filed suit against Appellees on behalf of his wife in the Maricopa County Superior Court on May 9, 2019, Case No. CV2019-090493, which was removed to the Arizona District Court by Appellees on

- Case No. 20-CV-00674, removed to the Arizona District Court on April 3, 2020. Plaintiffs were represented by Dickinson Wright PLLC.
- Case No. 20-CV-01142, removed to the Arizona District Court on June 9, 2020. Plaintiffs were represented by Andrew Ivchenko PLLC.
- Case No. 20-CV-02045, removed to the Arizona District Court on October 23, 2020. Plaintiffs were represented by the Rosenstein Law Group.

All of the above cases were either dismissed by the plaintiffs or remanded, with one side obviously favoring a state court forum, and Appellees favoring a federal court forum. During this time, Appellant's counsel has witnessed or directly experienced at the hands of Appellees and Mr. Gingras the most egregious "scorched-earth" tactics and abuse of process he has seen in 32 years of law practice, including incessant harassment of opposing counsel, cyber harassment of any identified plaintiff (as well as the attorneys and their spouses), bar complaints, and a groundless personal lawsuit. The full extent of this appalling, unethical behavior on the part of Appellees and Mr. Gingras is beyond the scope of

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May 29, 2019, Case No. CV-19-03756. Plaintiff voluntarily dismissed the case on May 30, 2019, after Appellees removed her booking photo and arrest records from their websites.

this response, but is important to understand in order to gain insight to what these people are trying to pull here, and to refute their argument that the costs of litigation are of any concern to them. (Mot., at p. 2-3).

Appellant directs this Court to Plaintiff's Motion to Proceed Under Pseudonym, filed January 22, 2021. (IR 8). This motion includes affidavits from two attorneys, Steven Scharboneau, and Appellant's counsel. (IR 1, Exhibits 2 and 3). Both lawyers outlined in detail the harrowing experiences they endured at the hands of Appellees and Mr. Gingras. Since these affidavits were filed, a "John Doe" plaintiff initiated suit against Appellees in Florida on April 8, 2021 (Case No. 2021-CA-000960, Seminole County, Florida, Circuit Court, Eighteenth Judicial Circuit). In order to lend support to an anonymity motion by the plaintiff there, Appellant's counsel provided his legal team with an affidavit outlining in detail the actions of Appellees and Mr. Gingras throughout the Arizona litigation. One day after this motion was filed, Appellees subjected Appellant's counsel and his wife to a vicious online attack, posting her mugshot, arrest records and police video of her arrest on the homepage of their mugshot website, along with other derogatory information.

With these lurid details in mind, it should be apparent why Appellees failed to mention in their motion the elephant in the room, namely, the related class action complaint filed in Maricopa County by Appellant's counsel on behalf of all Arizona victims of Appellees (Case No. CV2021-090710, the "Class Action"). Indeed, the same arguments Appellees now want to make in this case could be made there. Appellees could have answered the complaint and brought a motion to dismiss long ago, the loser would appeal, and the two appeals likely would be consolidated. Ariz. R. Civ. App. P. 8(g). However, this would entail a state court forum for all issues, which Appellees want to avoid at all costs. This is why they have dodged service of process in the Class Action for months.[7]

The Class Action represents a dilemma for Appellees, in that they cannot answer the complaint and remove the case to federal court, until such time as the appeal in this case is derailed. Otherwise, there is a good chance the federal court would stay the proceedings pending the outcome of the appeal, or remand the case so that Arizona law can be developed.

[7] Appellant's counsel will soon be filing a motion for alternative service in the Class Action pursuant to Rule 4.1(k), for an order permitting the plaintiffs to serve Appellees by alternative means.

Nature Conservancy v. Machipongo Club, Inc., 579 F.2d 873, 875–76 (4th Cir. 1978) (Staying proceedings, holding, "[W]e read *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), and *County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959), as permitting abstention in diversity cases where (1) state law is unsettled, and (2) an incorrect federal decision might embarrass or disrupt significant state policies); *St. Paul Fire and Marine Ins. Co. v. White Const. Co., Inc*., 2005 WL 3021981 (N.D. Fla. 2005) (Staying proceedings, holding, "Abstention may also be appropriate when parallel state court proceedings are pending and exceptional circumstances exist that warrant deferral to those proceedings. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-818, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)").

If this Court were to rule in the manner suggested by Appellees in their motion and send this case back to the trial court ostensibly "for further development of the record[,]" Appellees will most certainly not do what they profess, namely, further develop the record to their liking. (Mot., at p. 5). Rather, Appellees would likely move to consolidate this case with the Class Action, and then remove the consolidated case to

federal court, as they have done so many times before. Mission accomplished.

i. Appellees' actions in a current federal court case further demonstrate their ulterior motives behind their motion.

If there was any doubt about Appellees' ulterior motives here, the trial court was (gratuitously) given a copy of the complaint filed by them in federal court against Appellant's counsel and his wife. (IR 14-15). In their complaint, Appellees included a count for declaratory relief, in which they ask the federal court to make a declaratory judgment finding "that the manner of operation of the [Appellees] websites … is fully protected under the [CDA]. [*Id.*, at Exhibit A, pg. 33, ¶ 256]. Appellees' bizarre inclusion of a count for "declaratory judgment" belies their desperation to avoid appellate rulings in state court involving the Arizona Mugshot Act.

This is just another example of Appellees trying to gain federal court jurisdiction involving the merits of pending state court actions though the back door by shoehorning a claim for declaratory relief through the concoction of a nonexistent "dispute" between the parties in that case. However, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or

entered, would not terminate the uncertainty or controversy giving rise to the proceeding." A.R.S. § 12-1836; *accord Merritt-Chapman & Scott Corp. v. Frazier*, 92 Ariz. 136, 139, 375 P.2d 18, 20 (1962). "It was never intended that the relief to be obtained under the Declaratory Judgment Act should be exercised for the purpose of trying issues involved in cases *already pending* (emphasis added)." *Ibid*. (citation omitted).

Appellant's counsel is currently representing several hundred thousand clients in two Arizona state court cases against Appellees (this case and the Class Action) which involve the same causes of action in which Appellees are asking the federal court to make a declaratory judgment ruling (emphasis added). This is simply another naked attempt by Appellees to get a federal court to buy off on their substantive legal arguments, which they are already making in this case. This is simply not allowed under Arizona law. *Merritt-Chapman & Scott Corp.*, 92 Ariz. at 139. As a result, Appellees need this Court to rule in their favor so that they have an avenue to get out of state court, and thereby not be precluded from seeking a declaratory judgment in federal court. *Id*.

III. CONCLUSION

Time is of the essence here. Unless this Court is allowed to decide the issue of whether private parties can overcome the CDA and effectively enforce the Arizona Mugshot Act, Appellees will keep profiting from our citizen's collective misery with abandon. It is time to put to the test the legality of Appellees' ongoing cyber harassment of our citizenry. The Arizona legislature clearly stated that the activities that Appellees engage in are illegal when they passed the Arizona Mugshot Act. Now, it is up to this Court to rule on this important issue, and hopefully strip away any CDA immunity all of these mugshot website operators think they can hide behind.

Therefore, enough is enough already with Appellees and their antics. These online predators have engaged in "scorched-earth" tactics for the past eighteen months in order to continue their nationwide scam which has been going on for years and has harmed millions of Americans. Now that Appellees are in a corner they are trying to tap dance their way back into federal court, where they think they will have a friendlier audience.

Appellees fail to show any valid legal reasons for this Court to grant their motion, but instead focus on their supposed unhappiness with the result. In ruling against Appellees in their Rule 60(b) motion, the trial court determined that Appellees failed to show any extraordinary circumstances or that the judgment was manifestly unjust, as required under Rule 60(b)(6). (IR 66). Appellees simply regurgitated the same arguments here, and as such their motion should be rejected. Appellees offer no plausibly meritorious defense. Finally, in bad faith, Appellees are trying to derail the Arizona state court appellate process, and that is perhaps the greatest reason to deny their motion.

WHEREFORE, Appellant respectfully requests that Appellees' motion be denied in its entirety.

DATED: October 1, 2021 ANDREW IVCHENKO PLLC

By: */s/ Andrew Ivchenko*
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