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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Grant, et al.,

Plaintiffs

vs.

Ivchenko, et al.,

Defendants.

No. 2:21-CV-00108-JJT

**PLAINTIFFS' MOTION FOR MORE
DEFINITE STATEMENT PURSUANT
TO FED. R. CIV. P. 12(e)**

(Assigned To Hon. John J Tuchi)

Defendants Andrew Ivchenko and Renee Ivchenko ("Defendants") hereby move, pursuant to Fed. R. Civ. P. 12(e), for a more definite statement with respect to the Verified Complaint ("Complaint") against them. This Motion is based on the Memorandum of Points and Authorities filed and served herewith, and upon the papers, records and pleadings on file herein, and specifically without waiving other defenses under Fed. R. Civ. P. 12, motions for which are filed concurrently with this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs' Complaint asserts a veritable blizzard of confusing, illogical and overlapping claims against Defendants, including abuse of process and malicious prosecution claims. This Court should be under no illusions concerning Plaintiffs' real motives here, as this case was filed just **three days** (emphasis added) after Defendant Andrew Ivchenko, a licensed Arizona attorney, served Plaintiffs in a State court action filed on behalf of a client who was a party in a previously dismissed case in this Court. [See Doc 1-4, Exhibit H].

1 Although Defendants intend to file a motion to dismiss pursuant to Fed. R. Civ. P. 12(b), we
2 require preliminary relief through this motion in order to properly respond to the Complaint.

3 This motion is necessary because the Complaint fails to set forth a “short and plain
4 statement of the claim showing that the pleader is entitled to relief,” as required by Fed. R.
5 Civ. P. 8(a)(2). Indeed, Plaintiffs’ Complaint is a textbook example of what not (emphasis
6 added) to do in a Complaint. Under the Federal Rules, “[e]ach allegation must be simple,
7 concise, and direct.” Fed. R. Civ. P. 8(d)(1). Instead of “short and plain,” the Complaint’s
8 allegations, as against both Defendants, are convoluted, self-contradictory and insufficient to
9 put Defendants on notice of the nature of the claims against them. The Complaint uses
10 impermissible “shotgun pleading” to mask the fact that its claims are circular, vague, and
11 cannot, by logic, apply to one or both Defendants, as pled. Without a more definite statement,
12 Defendants do not have notice of the claims against them and literally cannot frame a
13 responsive pleading to the Complaint. Therefore, this Motion should be granted.

14 **II. SUMMARY OF RELEVANT FACTS**

15 **A. Previous State Court Litigation**

16 Generally, this litigation arises out of two state court actions litigated against Plaintiffs
17 from December 17, 2019 to November 13, 2021 in the Superior Court of Maricopa County.
18 [Docs 1-3, Exhibit G; 1-4, Exhibit H]. Both cases were subsequently removed to the Arizona
19 District Court and then voluntarily dismissed by the plaintiffs. The first case involved
20 Defendants Andrew Ivchenko and Renee Ivchenko, who were represented by the Dickinson
21 Wright law firm. [Doc 1-3, Exhibit E]. Although Defendant Andrew Ivchenko was originally
22 a Plaintiff in that case, he was dropped from the case in an amended Complaint filed on
23 February 27, 2020, which also added 20 additional plaintiffs. [Doc 1-3, Exhibit G]. The
24 Plaintiffs herein removed that case on April 3, 2020 (Case No. 20-cv-00674-MTL).

25 Defendant Andrew Ivchenko, a licensed Arizona attorney, subsequently filed the
26 second state court action on behalf of 20 other plaintiffs on May 1, 2020, alleging violations
27 of A.R.S. § 44-7902 (the “Arizona Mugshot Act”). [See Doc. 1-4, Exhibit H]. After
28 consultation with the Dickinson Wright law firm, the parties concluded that it made little

1 economic sense to maintain two almost identical actions in two separate courts, so the
2 Dickinson Wright law firm filed a motion to dismiss their case on May 19, 2020. In their
3 response, Plaintiffs herein attempted to obtain attorney's fees from Renee Ivchenko only (not
4 from any of the other plaintiffs), but were unsuccessful. The case was dismissed without
5 prejudice on June 26, 2020, excepting Defendant Renee Ivchenko, as she had dismissed an
6 individual action against Plaintiffs herein earlier in 2019 after they removed her arrest
7 information from their mugshot websites.

8 On June 9, 2020, Plaintiffs herein removed the second case, which included Florida
9 plaintiffs (Case No. 20-cv-01142-SMB). Defendant Andrew Ivchenko filed a Motion to
10 Remand on July 9, 2020. There was no further activity in this case for over four months
11 (emphasis added). On November 12, 2020, the Court set a date of December 12, 2020 for oral
12 argument on a pending Motion to Dismiss originally filed in State court, but did not rule on
13 the Motion to Remand. By then the plaintiffs in the case had lost patience, and decided to
14 pursue individual actions in State court with another law firm, as well as with Defendant
15 Andrew Ivchenko. As a result, the plaintiffs filed a motion of voluntary dismissal pursuant to
16 F.R.C.P. 41(a)(1)(A)(i), which was granted on December 8, 2020. Since then, four of these
17 plaintiffs have filed cases in State court, two through Defendant Andrew Ivchenko and two
18 through the Rosenstein Law Group in Scottsdale. The Court should note that one of the
19 Rosenstein Law Group's cases also was removed to this Court, but then quickly remanded.

20 Although the procedural history of these two cases overlapped due to Plaintiffs'
21 endless removal attempts, there was minimal activity and **no** (emphasis added) substantive
22 rulings. There was about four months of activity in the first case, and only two months of
23 activity in the second case. No discovery had commenced. Where Plaintiffs see malice intent
24 was simply a matter of economics and one party preferring a Federal forum whereas the other
25 party desired a State forum. Plaintiffs' bizarre inclusion of a count for "declaratory judgment"
26 belies their desperation to avoid substantive rulings in state court involving the Arizona
27 Mugshot Act that subjects them to significant financial liability of up to \$500 per day per
28 affected party. [See Compl. ¶¶ 31, 149, 250].

B. The Complaint

Plaintiffs commenced this action on January 21, 2021, by filing the Complaint. [Doc. 1]. The exact nature of the Complaint's causes of action are unclear. The Complaint nominally includes claims for (1) "Malicious Prosecution," [Compl. ¶¶ 177-212, 227-236], (2) "Abuse of Process," [Compl. ¶¶ 213-226, 237-247], (3) "Declaratory Relief," [Compl. ¶¶ 248-257], and (4) "Vexatious Litigant Designation," [Compl. ¶¶ 258-261].

The Complaint is an incomprehensible "shotgun" pleading containing vague and general group allegations to "Defendants." Motions for a more definite statement are appropriate to pare down "shotgun" pleadings. *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 233 (D.N.J. 2003). District courts have a "supervisory obligation to sua sponte order repleading pursuant to [Fed. R. Civ. P. 12(e)] when a shotgun complaint fails to link adequately a cause of action to its factual predicates." See *Wagner v. First Horizon Pharmaceutical Corp.*, 464 F.3d 1273, 1275 (11th Cir. 2006).

It is through "shotgun" pleading in the First and Second Causes of Action that Plaintiffs try to draw Defendant Andrew Ivchenko into the first of the two cases that are the subject of this action. In the First and Second Causes of Action, the Complaint fails to incorporate only those paragraphs that apply to each claim and each defendant. The general references to "Defendants" are especially problematic where essential elements such as malice and lack of probable cause are pled only in legal conclusions. [Compl. ¶¶ 177-226].

The "shotgun"-style pleading of the First and Second Causes of Action are insufficient to put Defendants on notice of the nature of the claims against them. The Complaint seemingly attempts to link two cases with multiple parties represented by two separate law firms to the unrelated actions of both Defendants, and avoids committing to express facts and causes of action to which either Defendant can reasonably respond. Accordingly, Defendants move under Rule 12(e) for an order striking the Complaint and ordering Plaintiffs to replead sufficiently to put Defendants on notice of the exact claims against them. Accordingly, the Complaint should be stricken and Defendants should be ordered to replead so that Defendants can frame a response.

1 **III. LEGAL ARGUMENT**

2 **A. Motions Under Rule 12(e).**

3 Rule 12(e) provides in part:

4 A party may move for a more definite statement of a pleading to which a responsive
5 pleading is allowed but which is so vague or ambiguous that the party cannot
6 reasonably prepare a response. The motion must be made before filing a responsive
7 pleading and must point out the defects complained of and the details desired.

7 Fed R. Civ. P. 12(e).

8 Whether to grant a Rule 12(e) Motion is within the sound discretion of the Court. *See* 5
9 Wright & Miller, Federal Practice & Procedure § 1217 (1990), cited in *Babb v.*
10 *Bridgestone/Firestone*, 861 F. Supp. 50, 52 (M.D. Tenn. 1993); *Fleming v. Michigan*, No.
11 2:09-cv-11795, 2010 U.S. Dist. LEXIS 22790, at *27 (E.D. Mich. Feb. 23, 2010).

12 The proper test in evaluating a motion under Rule 12(e) is whether the complaint
13 provides the defendant with a sufficient basis to frame his responsive pleadings. *See Thomas*
14 *v. Independence Twp.*, 463 F.3d 285, 301 (3d Cir. 2006); *Federal Sav. and Loan Ins. Corp. v.*
15 *Musacchio*, 695 F. Supp. 1053, 1060 (N.D. Cal. 1988). Under the notice pleading standard,
16 sufficient factual allegations are required to provide “fair notice” of the nature of the claim
17 and the grounds on which the claim rests. *See Bell Atlantic Corporation v. Twombly*, 550 U.S.
18 544, 555-56; 127 S. Ct. 1955, 1965; 167 L. Ed. 2d 929, 940 (2007). Rule 12(e) motions are
19 designed to strike at unintelligibility, rather than at lack of detail in the complaint. *See Cox v.*
20 *Maine Maritime Academy*, 122 F.R.D. 115, 116 (D. Me. 1988).

21 A Rule 12(e) motion is an acceptable way to detect potentially meritless claims early.
22 *See Educadores Puertorriquenos En Accion v. Hernandez*, 367 F.3d 61, 67 (1st Cir. 2004).
23 “Rule 12(e) exists to rectify complaints that are unintelligible or vague.” *See Cobb v. Regions*
24 *Bank*, 2010 U.S. Dist. LEXIS 49544 at *8 (W.D. Tenn. May 19, 2010); *Cox v. Maine*
25 *Maritime Acad.*, 122 F.R.D. 115, 116 (D. Me. 1988).

B. A more definite statement is necessary so that defendants can ascertain the facts supporting each claim and which, if any, of the allegations in the complaint apply to one of them as opposed to the other.

A complaint does not provide adequate notice to a defendant where it fails to isolate the allegedly actionable acts of each defendant, and thereby does not provide adequate notice as to the nature of the claims against each. *See Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1250 (10th Cir. 2008); *see also Atuahene v. City of Hartford*, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (“By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [the] complaint failed to satisfy this minimum standard”).

Motions for more definite statement are appropriate to refine generalized group allegations to “defendants” that do not distinguish among specific conduct of each. *See Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F. Supp. 277, 284 (E.D. Wis. 1975). Plaintiffs cannot file complaints naming countless defendants as a fishing expedition; plaintiffs must have a good faith basis for drawing each defendant into civil litigation. *See Ames v. Dep't of Marine Res. Comm'r*, 256 F.R.D. 22, 24 (D. Me. 2009). The *Twombly* court was particularly critical of complaints alleging conspiracies that “mentioned no specific time, place, or person involved.” *See* 550 U.S. at 565, 127 S. Ct. at 1971, 167 L. Ed. 2d at 946 n.10. Given such a complaint, “a defendant seeking to respond to plaintiffs’ conclusory allegations . . . would have little idea where to begin.” *Id.*

The Complaint alternates between specifically named defendants and “Defendants” generally so as to render these claims unintelligible. [Compl. ¶¶ 106-108, 122-123, 136-138]. Only the Complaint’s Third and Fourth Causes of Action are asserted against an individual Defendant. Yet virtually all theories of liability in the First and Second Causes of Action are alleged against “Defendants” as a group. In short, Plaintiffs have left it up to the Defendants and the Court to try to figure out exactly what the wrongful conduct is, and to match the factual allegations up with the reasons they are wrongful or actionable. Defendants are entitled to know which of these references refer to their own, versus joint conduct.

1 **i. First Cause of Action**

2 Plaintiffs’ First Cause of Action gyrates between parties and causes of action in a
3 tortuous effort to divine liability where none exists. Although styled as a count for “malicious
4 prosecution,” Plaintiffs cause confusion by also referring to this action as one for “wrongful
5 use of civil proceedings.” [See, e.g., Compl. ¶¶ 177, 223]. Plaintiffs engage in conjecture and
6 factually unsupported theories, and simply do not plead specific facts consistent with any
7 cause of action. This makes it impossible for either Defendant to respond in an intelligible
8 manner.

9 Arizona first recognized a claim for civil malicious prosecution in 1932. *See Ackerman*
10 *v. Kaufman*, 41 Ariz. 110, 112-114, 15 P.2d 966, 967 (1932). While often called malicious
11 prosecution, that term actually applies to the criminal context, and the proper term in the civil
12 context is the wrongful institution (or use) of civil proceedings (“WICP”). *See Bradshaw v.*
13 *State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 414 n.1, 758 P.2d 1313, 1316 n.1(1988); *Smith*
14 *v. Lucia*, 173 Ariz. 290, 291 n.1, 842 P.2d 1303, 1304 n.1 (Ct. App. 1992). WICP “is a cause
15 of action not favored by the law.” *Nataros v. Superior Court*, 113 Ariz. 498, 500, 557 P.2d
16 1055, 1057 (1976).

17 To prove a claim for WICP, the plaintiff must prove the defendant: (1) instituted a civil
18 action (2) without probable cause (3) that was motivated by malice, (4) terminated in the
19 plaintiff’s favor, and (5) damaged the plaintiff. *See Bradshaw*, 157 Ariz. at 416-17, 758 P.2d
20 at 1318-19 (*citing Carroll v. Kalar*, 112 Ariz. 595, 596, 525 P.2d 411, 412 (1976)). *See also*
21 *RAJI (Civil)*, 5th *Intentional Torts* 19 (Malicious Prosecution) (citations omitted). Plaintiffs
22 make no effort to plead specific facts supporting crucial elements of a WICP cause of action.

23 A “civil action” is one commenced in court. *See Goodman v. Samaritan Health Sys.*,
24 195 Ariz. 502, 508 n.8, 990 P.2d 1061, 1067 n.8 (Ct. App. 1999). However, Defendant
25 Andrew Ivchenko was neither a party nor the attorney of record in what Plaintiffs call “Case
26 2,” as the parties in that case were represented by the Dickinson Wright law firm. [See Doc 1-
27 3, Exhibit G]. Moreover, that case included 20 Doe plaintiffs and Renee Ivchenko. [*Id.*]. This
28 is where Plaintiffs engage in a clever sleight of hand. Not only do they ignore that the original

1 Complaint (which included both Defendants) [See Doc 1-3, Exhibit E], was amended, they
2 falsely accuse Defendants of unspecified actions involving the original Complaint. [Compl.
3 ¶¶ 114-116].

4 Generally, “[o]nce an amended complaint is filed, as it was here, it supersedes the
5 original complaint, which becomes *functus officio*, that is, of no further effect or authority.”
6 *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 586, 937 P.2d 1382, 1392 (App. 1996).
7 Furthermore, a change in the evidence that results in the voluntary dismissal of an untenable
8 claim should not automatically give rise to a malicious prosecution suit. “[I]f the pleading
9 originally advanced a tenable theory but subsequent research or discovery proves it to be
10 untenable, the pleading should be amended to change or delete it.” *Bertero v. National*
11 *General Corp.*, 13 Cal.3d 43 (1974).

12 The Complaint states that “As it relates to the claims initially brought by Mr. Ivchenko
13 in Case 2, the action was terminated in favor of Plaintiffs on June 26, 2020 when the case was
14 dismissed with prejudice.” [Compl. ¶ 181]. This is simply impossible, as Defendant Andrew
15 Ivchenko was not a party when the case was subsequently dismissed. The Complaint does not
16 contain allegations as to why correcting or amending claims (which were nevertheless based
17 on probable cause) in the Amended Complaint made the remainder of the claims factually
18 groundless.

19 The second element of a WICP claim is lack of probable cause, which is the heart of
20 the WICP claim. *See Bradshaw*, 157 Ariz. at 416-17, 422, 758 P.2d at 1318-19, 1324. “The
21 failure to establish a lack of probable cause is a complete defense to an action for [WICP].”
22 *Carroll*, 112 Ariz. at 412, 545 P.2d at 412 (citing *Slade v. City of Phoenix*, 112 Ariz. 298, 541
23 P.2d 550 (1975); *McClinton v. Rice*, 76 Ariz. 358, 265 P.2d 425 (1953)). Plaintiffs argue that
24 the applicable statute of limitations had expired, yet provide no detail regarding which claims
25 in the Amended Complaint involved an expired limitations period. [Compl. ¶ 183a.].

26 Plaintiffs make general arguments that appear to be defenses to the claims in the
27 Amended Complaint, without pleading *any* (emphasis added) allegations as to why Counts I-
28 V were factually groundless and lacked probable cause. [Compl. ¶ 183b-f; Doc 1-4, Exhibit

1 G, ¶¶ 62-94]. Identifying what “claims” are referred to are essential, as an element of WICP is
 2 that litigation was begun or continued without probable cause. *See Bradshaw*, 157 Ariz. at
 3 416-17, 758 P.2d at 1318-19. Defendants simply cannot formulate a response to such a vague
 4 pleading.

5 Plaintiffs continue on, making conclusory statements that Defendants made factual
 6 allegations in the Amended Complaint that were “false,” without providing any details that
 7 would justify those conclusions. [Compl. ¶ 183g-h]. To establish objective probable cause,
 8 the defendant need only make a reasonable pre-filing inquiry and “is entitled to fully develop
 9 the facts through discovery.” *Smith*, 173 Ariz. at 298, 842 P.2d at 1311. Plaintiffs make no
 10 effort to provide specific facts to support a conclusion that probable cause did not exist for
 11 any claim in the Amended Complaint. Moreover, the Amended Complaint does not state that
 12 “Plaintiffs extorted, or attempted to extort, the payment of money or anything else of value
 13 from Mrs. Ivchenko for the purpose of removing her mugshot and/or arrest information from
 14 Travis’s websites[.]” [Compl. ¶ 183g; Doc 1-4, Exhibit G, ¶¶ 10-11]. Plaintiffs completely
 15 misrepresent allegations concerning “defamatory statements on Twitter about Mr. and/or Mrs.
 16 Ivchenko.” [Compl. ¶ 183h]. Those allegations appeared in the Complaint Doc 1-3, Exhibit E,
 17 ¶¶ 12-13], but were dropped in the Amended Complaint.

18 The third element of a claim for WICP requires the plaintiff to prove the defendant was
 19 motivated by malice to institute the previous civil action. *See Bradshaw*, 157 Ariz. at 416-17,
 20 758 P.2d at 1318-19. “The malice element in a civil malicious prosecution action does not
 21 require proof of intent to injure. Instead, a plaintiff must prove that the initiator of the action
 22 primarily used the action for a purpose ‘other than that of securing the proper adjudication of
 23 the claim.’” *Id.*, 157 Ariz. at 418, 758 P.2d at 1320 (citing Restatement (Second) of Torts §
 24 676 & cmt. c).

25 The Complaint attributes to Defendants (while ignoring the other 20 plaintiffs in the
 26 Amended Complaint), in a conclusory manner, malicious motive in the first case because they
 27 “did not commence or continue to prosecute [the case] for any legitimate reason or to resolve
 28 any legitimate claims.” [Compl. ¶ 186]. However, the Complaint fails to allege facts detailing

1 what this ulterior motive is, and how it was for a purpose not involving the proper
2 adjudication of the claim. *Id.* References to “malice” in the Complaint are unintelligible.
3 Plaintiffs evidently attempt to plead malice (as well as a lack of probable cause) through
4 rambling, unsupported accusations against Defendants and attorney David Ferrucci of
5 Dickinson Wright, the counsel of record in the first case, but do not distinguish exactly who
6 did what, and which facts tie into someone’s alleged malice. [Compl. ¶¶ 184-207].

7 Plaintiffs make the incredible accusation that Defendants were trying to “effectively
8 seize control of Travis’s websites” through “economic extortion” and by agreeing to give
9 Defendants “removal credits.” [Compl. ¶¶ 187-188, 203]. Continuing in their conclusory
10 manner, Plaintiffs claim such “removal credits” could be sold “for \$1,000 each,” and that the
11 value of Defendants’ “demand” was “at least \$2,400,000.00.” Plaintiffs provide *no facts*
12 (emphasis added) showing how these numbers were arrived at, or that any demand at all was
13 made in either case. Defendants simply cannot respond to such claims as made. Assuming for
14 the sake of argument that Plaintiffs’ claims are correct (which they are not), they fail to show
15 how a monetary settlement on behalf of 21 plaintiffs for violation of the Arizona Mugshot
16 Act and common law is somehow not consistent with securing the proper adjudication of the
17 claim. *See Bradshaw*, 157 Ariz. at 416-17, 758 P.2d at 1318-19.

18 Because lack of probable cause and malice are essential elements of Plaintiffs’ First
19 Cause of Action (if it is a claim for WICP), the cause of action, as alleged, is insufficient to
20 put Defendants on reasonable notice of the nature of the claim. Defendants should not be
21 burdened by discovery and trial unless Plaintiffs can allege specific, nonconclusory factual
22 allegations that establish a lack of probable cause and improper motive. *See e.g., Ames*, 256
23 F.R.D. at 30. Legal conclusions couched as factual allegations are not given a presumption of
24 truthfulness, and “conclusory allegations of law and unwarranted inferences are not sufficient
25 to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).
26 Defendants are entitled to know the general factual theory for Plaintiff’s allegations of lack of
27 probable cause, improper motive and malice so that they can frame a response.

1 **ii. Second Cause of Action**

2 An abuse of process claim requires proof that a defendant committed a willful act in
 3 using judicial process for an ulterior purpose not proper in the regular conduct of the
 4 proceeding. *Nienstedt v. Wetzel*, 133 Ariz. 348, 353 (App. 1982). Abuse of process differs
 5 from malicious prosecution in that the gist of the tort is not commencing an action or causing
 6 process to issue without justification, but misusing, or misapplying process justified in itself
 7 for an end other than that which it was designed to accomplish. *Ibid.*; *Crackel v. Allstate Ins.*
 8 *Co.*, 208 Ariz. 252, 257, ¶ 11 (App. 2004). A party can demonstrate the latter element by
 9 "showing that the process has been used primarily to accomplish a purpose for which the process was
 10 not designed." *Nienstedt*, 133 Ariz. at 353. A claimant must present evidence that the
 11 defendant committed a specific "wilful act . . . not proper in the regular conduct of the
 12 proceedings" to support a claim for abuse of process and that evidence of the defendant's
 13 mere persistence in litigation, even if based on an improper motive, does not sustain the tort.
 14 *Crackel*, 208 Ariz. 252 at ¶ 15 (*quoting Morn v. City of Phoenix*, 152 Ariz. 164, 166, 168, 730
 15 P.2d 873, 875, 877 (App. 1986); *see also Simon v. Navon*, 71 F.3d 9, 17 (1st Cir. 1995)
 16 ("[P]roof of a specific act in an abuse of process setting provides concrete assurance that a
 17 process actually has been abused.").

18 Plaintiffs accuse Defendants of abusing judicial process but do not identify any specific
 19 court process that was abused. *See Fappani v. Bratton*, 243 Ariz. 306, 310, ¶ 11 (App. 2017)
 20 (requiring a showing that the defendant "engaged in [a] specific court process or procedure, or []
 21 otherwise acted with 'authority of the court'"). Specifically, Plaintiffs plead legal conclusions that
 22 the first case (Styled "Case 2" by Plaintiffs) was "groundless" and used "in a wrongful manner that
 23 was not proper in the normal course of the proceedings." [Compl. ¶¶ 217-218].

24 Plaintiffs also fixate on "removal credits" without explaining how anything associated
 25 with them would constitute an "ulterior purpose not proper in the regular conduct of the
 26 proceeding." *Nienstedt*, 133 Ariz. at 353. Even if Plaintiffs could plead specific facts showing
 27 scienter, the issue of how a Defendant pays a judgment, whether through money damages or
 28 the monetization of assets to fund a settlement, is within the ambit of the normal course of

proceedings. The only allegations attempting to plead an ulterior purpose are virtually identical to those made in the First Cause of Action for WICP. [Compl. ¶¶ 221a-i]. Just as in the First Cause of Action, Plaintiffs make no effort to identify which claims in the Amended Complaint are in issue, and which specific facts support the cause of action they plead.

Because using judicial process for an ulterior purpose not proper in the regular conduct of the proceeding is an essential element of Plaintiffs' Second Cause of Action, the cause of action, as alleged, is insufficient to put Defendants on reasonable notice of the nature of the claim. *Nienstedt*, 133 Ariz. at 353. Defendants should not be burdened by discovery and trial unless Plaintiffs can allege specific, nonconclusory factual allegations that establish that judicial process was used for an ulterior purpose not proper in the regular conduct of the proceeding. *Nienstedt*, 133 Ariz. at 353.

Legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto*, 139 F.3d at 699. Defendants are entitled to know the factual theory for Plaintiff's allegations of an "ulterior purpose not proper in the regular conduct of the proceeding" so that they can frame a response. *Nienstedt*, 133 Ariz. at 353.

iii. Third Cause of Action

The fourth element of a WICP claim (the other elements were discussed in Section III.B.i, *infra*) requires a favorable termination of the previous action in the plaintiff's favor. See *Bradshaw*, 157 Ariz. at 416-17, 758 P.2d at 1318-19. If a WICP "action is filed prior to favorable termination of the proceedings, the action is premature and subject to dismissal." *Nataros*, 113 Ariz. at 500, 557 P.2d at 1057. "Where there has been no adjudication on the merits the existence of a 'favorable termination' of the prior proceedings generally must be found in the substance rather than the form of prior events and often involves questions of fact." *Frey*, 150 Ariz. at 111, 722 P.2d at 279. Where the underlying case is terminated by way of voluntary dismissal, there must be an analysis by the court of the reasons for such dismissal. A dismissal which reflects ambiguously on the merits, or leaves some doubt as to the defendant's guilt or innocence, is not a favorable termination for purposes of malicious

prosecution. *See Pender v. Radin*, 23 Cal.App.4th 1807 (1994); *Dalaney v. American Pacific Holding Corp.* 42 Cal.App.4th 822 (1996).

Plaintiffs' Third Cause of Action fails to plead any of the elements of WICP. Indeed, the Complaint makes the startling, unsupported allegation that "at least one or more" of the Plaintiffs in the first case (represented by another law firm) were also Plaintiffs in the second case. [Compl. ¶ 229]. Plaintiffs' conclusory statement is not supported by any facts showing that this statement is true, or that there was a favorable termination in the case. Plaintiffs then continue with additional conclusory statements in an effort to show a favorable termination, stating that the dismissal of the action "was based solely on [a] desire to avoid a loss on the merits." [Compl. ¶ 230]. This statement would suggest that the claims lacked probable cause, which the Complaint simply ignores by failing to plead any specific factual allegations.

Plaintiffs also are well aware that plaintiffs in both cases have subsequently initiated suit in State court through a third-party law firm, as well as through Defendant Andrew Ivchenko, yet make no effort to craft their pleadings to address how a favorable termination could have occurred under these circumstances. In terms of the other elements of a WICP claim, Plaintiffs make no effort to provide any factual allegations that would allow a response. Instead, Plaintiffs continue to reply on conclusory statements involving probable case and malice, referencing an earlier part of the Complaint, which, as discussed *infra*, is inadequate in providing reasonable notice as to the nature of the claims. [Compl. ¶¶ 231-235].

iv. Fourth Cause of Action

As in the Second Cause of Action, Plaintiffs attempt to plead abuse of process against Defendant Andrew Ivchenko, counsel for the plaintiffs in the second case. [Compl. ¶¶ 237-247]. The elements of abuse of process are outlined in Section III.B.ii, *infra*, and will not be repeated here. These elements must be based on more than "mere conjecture" or "mere speculation." *Crackel*, 208 Ariz. at 259; *Morn*, 152 Ariz. at 167. A plaintiff must show that the defendant's improper purpose was the primary motivation for its actions, not merely an incidental motivation. *Crackel*, 208 Ariz. at 259; *Pankratz v. Willis*, 155 Ariz. 8, 22, 744 P.2d

1 1182, 1196 (Ct. App. 1987) (“Where a lawful end is pursued by appropriate process,
2 incidental motives of spite or greed are not actionable.”) (citation omitted).

3 As outlined in Section III.B.ii, *infra*, Plaintiffs continue to rely on conclusory
4 statements, and simply do not plead facts supporting the elements of this cause of action.
5 [Compl. ¶¶ 238-246]. Plaintiffs state that the case was used in a “wrongful manner” and “not
6 proper in the course of the proceedings,” but go into no factual detail. [Compl. ¶ 238].
7 Plaintiffs continue to state that the action was “groundless” but do not explain how, and
8 engage in conjecture concerning so-called “removal credits” allegedly worth “millions of
9 dollars” [Compl. ¶¶ 239-240]. Moreover, Defendant Andrew Ivchenko filed and dismissed
10 one case against Plaintiffs on behalf of third-party clients, so it is unclear what they mean by
11 stating this constituted “serial filing-dismissal-refiling-dismissal-refiling of substantially
12 identical groundless cases.” [Compl. ¶ 240].

13 Plaintiffs contend that Court rules were violated in regard to anonymous Plaintiffs, but
14 do not explain how the procedure followed in the case (filing a complaint on behalf of Doe
15 plaintiffs accompanied by a motion for anonymity) violated any Rule of Civil Procedure.
16 [Doc 1-4, Exhibit H]. Plaintiffs contend that Defendant engaged in “willfully disregarding
17 and violating court rules” without specifying what rules were involved. [Compl. ¶ 242].
18 Plaintiffs also contend that “wrongful conduct was motivated by spite, ill will, and a desire to
19 unlawfully profit” even though this (if true) is not actionable. [Compl. ¶ 245]; *Pankratz*, 155
20 Ariz. at 22.

21 v. **Fifth Cause of Action**

22 Plaintiffs are trying to gain Federal court jurisdiction involving the merits of pending
23 State court actions through the back door by shoehorning a claim for declaratory relief through
24 the concoction of a nonexistent “dispute” between the parties in this case. Plaintiffs state that
25 “A current dispute exists between Plaintiffs and Defendants Andrew and Renee Ivchenko
26 regarding their respective legal rights and duties.” [Compl. ¶ 248]. However, “it is well settled
27 that a declaratory judgment must be based on an actual controversy which must be real and
28 not theoretical.” *Café Valley, Inc. v. Navidi*, 330 P.3d 1009, 1012 (2014) (citation omitted).

1 “The court may refuse to render or enter a declaratory judgment or decree where such
 2 judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy
 3 giving rise to the proceeding.” A.R.S. § 12-1836; *accord Merritt-Chapman & Scott Corp. v.*
 4 *Frazier*, 92 Ariz. 136, 139, 375 P.2d 18, 20 (1962). “It was never intended that the relief to be
 5 obtained under the Declaratory Judgment Act should be exercised for the purpose of trying
 6 issues involved in cases *already pending* (emphasis added).” *Ibid.* (citation omitted).

7 The Fifth Cause of Action suffers from a fatal ambiguity in failing to identify factual
 8 details concerning the nature and extent of this supposed dispute. Defendant Renee
 9 Ivchenko’s claims were dismissed with prejudice in the first case, as she had briefly filed and
 10 dismissed an action earlier in 2019 once Plaintiffs complied with her request to remove her
 11 arrest records from their websites. There is no pending case involving her, other than this
 12 case. [Compl. ¶¶ 141]. Defendant Andrew Ivchenko is currently representing clients in two
 13 State court cases against Plaintiffs which involve the same (emphasis added) causes of action
 14 as in the dismissed case.

15 Plaintiffs have pleaded no facts showing that Defendant Andrew Ivchenko in his
 16 personal capacity (emphasis added) has a “current dispute” with them. Defendants literally
 17 cannot respond to the allegations in the Fifth Cause of Action of the Complaint because it
 18 cannot be understood, on a grammatical level, how they can have a “current dispute” with
 19 Plaintiffs. [Compl. ¶ 248]. This Cause of Action is simply a naked attempt by Plaintiffs to get
 20 this Court to buy off on their substantive legal arguments, which they are already making in
 21 pending State court actions rather than intertwining them with their unrelated claims
 22 (however frivolous) against Defendants. [Compl. ¶¶ 256-257]. This is simply not allowed
 23 under Arizona law. *Merritt-Chapman & Scott Corp.*, 92 Ariz. at 139.

24 **vi. Sixth Cause of Action**

25 Pursuant to the Arizona Revised Statutes § 12-3201, the presiding judge of a superior
 26 court or designee may designate a pro se litigant a vexatious litigant in a noncriminal case.
 27 Plaintiffs’ pleading defies law and logic. Incredibly, Plaintiffs do not plead a single fact
 28 showing that either Defendant filed suit against them in a pro se capacity. Plaintiffs are

1 simply trying to insulate themselves from any liability for future acts, while influencing the
 2 attorney-client relationship Defendant Andrew Ivchenko has with his current clients litigating
 3 against them in State court.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Complaint should be stricken and Plaintiffs should be
 6 ordered (1) to identify which defendants are referred to in “shotgun”-type allegations referring
 7 to all “Defendants” in paragraphs 184-189, 203-204, 208-211, and 216-225 of the Complaint,
 8 (2) to identify the unintelligible and “shotgun”-like references to “claims” in Paragraphs
 9 183, 188, and 221 of the Complaint, (3) to reasonably identify which factual allegations, if
 10 any, of “improper motive” are referred to by the Complaint’s paragraphs 53, 82 and 84, as
 11 against Defendants, (4) to reasonably identify which factual allegations, if any, of “wrongful
 12 conduct” are referred to in paragraphs 210, 224, 234, 239 and 245 of the Complaint, (5) to
 13 reasonably identify which factual allegations, if any, in Paragraph 181 support the conclusion
 14 that the action was terminated in favor of Plaintiffs in relation to Defendant Andrew Ivchenko
 15 when the case was dismissed with prejudice in relation to Defendant Renee Ivchenko, (6) to
 16 reasonably identify which factual allegations, if any, in Paragraph 183a, identify how any
 17 claim in the Amended Complaint involved an expired limitations period, (7) to reasonably
 18 identify which factual allegations, if any, in Paragraphs 183b-f and 217-218 show the
 19 Amended Complaint was factually groundless and lacked probable cause, (8) to reasonably
 20 identify which factual allegations, if any, in Paragraph 183g-h in the Amended Complaint
 21 were “false,” (9) to reasonably identify which factual allegations, if any, in Paragraphs 184-
 22 207 support a “lack of probable cause,” “malice,” and “improper purpose,” and their
 23 corresponding claim(s) in the Amended Complaint, (10) to reasonably identify which factual
 24 allegations, if any, in Paragraph 221a-i support a “lack of probable cause,” “malice,” and
 25 “improper purpose,” and their corresponding claim(s) in the Amended Complaint, (11) to
 26 reasonably identify which factual allegations, if any, in Paragraph 221a-i and 222 support the
 27 conclusory statements made therein and how they support the claim of an “ulterior purpose,”
 28 (12) to reasonably identify which factual allegations, if any, in Paragraph 229 support the

conclusory statement that “at least one or more” of the Plaintiffs in the first case were also Plaintiffs in the second case, (13) to reasonably identify which factual allegations, if any, in Paragraphs 230-235 support the conclusory statements that the Complaint lacked probable cause and how a dismissal “was based solely on [a] desire to avoid a loss on the merits,” (14) to reasonably identify which factual allegations, if any, in Paragraph 238 support the conclusory statements that the case was used in a “wrongful manner” and “not proper in the course of the proceedings,” (15) to reasonably identify which factual allegations, if any, in Paragraphs 239-246 support the elements of abuse of process, (16) to reasonably identify which factual allegations, if any, in Paragraphs 239-240 support the conclusory statements that the claims in the Complaint were “groundless,” specify those claims, and which factual allegations support the conclusory statement concerning so-called “removal credits” allegedly worth “millions of dollars,” (17) to reasonably identify which factual allegations, if any, in Paragraph 240 support the statement “serial filing-dismissal-refiling-dismissal-refiling of substantially identical groundless cases,” (18) to reasonably identify which factual allegations, if any, in Paragraph 242 support the claim of “willfully disregarding and violating court rules,” (19) to reasonably identify which factual allegations, if any, in Paragraph 245 support the conclusory statement that “wrongful conduct was motivated by spite, ill will, and a desire to unlawfully profit” and how this supports each and every element of abuse of process, (20) to reasonably identify which factual allegations, if any, in Paragraph 248 support the contention that a “current dispute exists” between the parties “regarding their respective legal rights and duties,” and (21) to reasonably identify which factual allegations, if any, in Paragraph 258 support the conclusory statement that each Defendant violated Arizona Revised Statutes § 12-3201. In doing so, Plaintiffs should be ordered to separate each specific theory advanced and incorporate only those allegations that apply to each claim.

DATED: March 12, 2021.

ANDREW IVCHENKO PLLC

By: /s/ Andrew Ivchenko

Andrew Ivchenko, Esq.

Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following:

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