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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 Grant, et al.,

11 Plaintiffs

12 vs.

13 Ivchenko, et al.,

14 Defendants.

No. 21-CV-00108-JJT

**DEFENDANTS' MOTION TO STRIKE
UNDER FEDERAL RULE OF CIVIL
PROCEDURE 12(f)**

(Assigned To Hon. John J Tuchi)

15 Defendants Andrew Ivchenko and Renee Ivchenko ("Defendants") hereby move,
16 pursuant to Federal Rules of Civil Procedure 1, 8(a) and 12(f) to strike paragraphs 1, 32-65,
17 66-88, 94, 96, 107-111, and 158-60, of the Verified Complaint ("Complaint"), including
18 Exhibits A and B [Doc. 1-2] on the grounds that they are scandalous, impertinent, and
19 prejudicial. This Motion is based on the Memorandum of Points and Authorities filed and
20 served herewith, and upon the papers, records and pleadings on file herein, and specifically
21 without waiving other defenses under Federal Rule of Civil Procedure 12, motions for which
22 are filed concurrently with this Motion.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Defendants bring this motion pursuant to Federal Rules of Civil Procedure 1, 8(a)¹ and 12(f) to strike paragraphs 1, 32-88, 94, 96, 107-111, and 158-160 of the Verified Complaint (“Complaint”) filed by Plaintiffs Travis Paul Grant, Mariel Lizette Grant, and Kyle David Grant (“Plaintiffs”).

Generally, this is styled as an action for malicious prosecution arising out of two state court actions litigated against Plaintiffs from December 17, 2019 to November 13, 2021 in the Superior Court of Maricopa County. [Docs 1-3, Exhibit G; 1-4, Exhibit H]. Paragraphs 1, 32-88, 94, 96, 107-111, and 158-160 contain unsubstantiated and prejudicial references to criminal conduct allegedly committed by Defendants. These specific accusations of criminal violations are based on nothing more than what Plaintiff’s attorney, David Gingras, claims in a conclusory manner from the disputed facts at issue in matters that have nothing (emphasis added) to do with the causes of action asserted by Plaintiffs in this case.

Under the circumstances, inclusion of such extreme and personal attacks on the character and reputation of Defendants, prior to adjudication of Plaintiffs’ allegations, is impertinent, scandalous and prejudicial. Defendants have been prejudiced generally by the Plaintiffs’ inclusion of scandalous and impertinent matter as described above. Accordingly, this motion should be granted.

¹ “A complaint having the factual elements of a cause of action present but scattered throughout the Complaint and not organized into a ‘short and plain statement of the claim’ may be dismissed for failure to satisfy Rule 8(a) of the Federal Rules of Civil Procedure.” See *Ortega v. Arpaio*, 2006 U.S. Dist. LEXIS 59018 at *7 (D. Ariz. Aug. 15, 2006); *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996).

II. SUMMARY OF RELEVANT FACTS

A. References to Defendant “Renee Ivchenko’s Arrest” Are Scandalous, Impertinent and Prejudicial.

Paragraphs 32 to 65 of the Complaint allege certain details surrounding the arrest of Defendant Renee Ivchenko, which put into motion the events that led to this action. [Compl. ¶¶ 32-65]. This includes derogatory and conclusory statements concerning her background as well as circumstances surrounding the arrest. [Compl. ¶¶ 32, 35, 41, 42, 43, 47, and 62). Plaintiffs also attach as exhibits a police report and documentation relating to participation in a deferred prosecution program. [Doc. 1-2, Exhibits A and B). Plaintiffs do not state that charges were eventually dropped against Defendant Renee Ivchenko. Plaintiffs also gratuitously insert Defendant Renee Ivchenko’s booking photo in two separate sections of the Complaint. [Compl. ¶¶ 53, 64].

B. References to “The Copyright Application” Are Scandalous, Impertinent and Prejudicial.

Paragraphs 66 to 88 of the Complaint allege certain details surrounding a copyright application involving Defendant Renee Ivchenko. [Compl. ¶¶ 66-88]. This includes conclusory statements concerning the application, including claims that Defendants (one of whom is an attorney) violated one or more laws. [Compl. ¶¶ 67-68, 70, 72-75, 77-80, 82-88]. None of the Defendants has ever been prosecuted for or convicted of any crimes associated with the allegations made by Plaintiffs’ counsel, David Gingras. Defendant Andrew Ivchenko, an Arizona attorney, does not have any bar record of disciplinary action, for these allegations or otherwise.

III. LEGAL ARGUMENT

A. Motions Under Rule 12(f).

Rule 12(f) of the Federal Rules of Civil Procedure provides:

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

1 (1) on its own; or

2 (2) on motion made by a party either before responding to the pleading or, if a
3 response is not allowed, within 21 days after being served with the pleading.

4 See Fed. Rule. Civ. Proc. 12(f).

5 “The function of a 12(f) motion to strike is to avoid the expenditure of time and money
6 that must arise from litigating spurious issues by dispensing with those issues prior to trial.”
7 See *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983); *Torres v.*
8 *Goddard*, 2008 U.S. Dist. LEXIS 35291 at *1 (D. Ariz. Apr. 22, 2008). A matter is
9 immaterial if it “has no essential or important relationship to the claim for relief or the
10 defenses being pleaded.” *Torres*, 2008 U.S. Dist. LEXIS 35291 at *2 (citations omitted). The
11 moving party need not show that the material is prejudicial if granting the motion would
12 streamline the ultimate resolution of the action. *Id.*

13 This Court has inherent authority to strike from any pleading any redundant,
14 immaterial, impertinent or scandalous matter. See *Apolinar v. Baum*, 2008 U.S. Dist. LEXIS
15 113273 at *17 (D. Ariz. June 4, 2008). Such matter includes any allegations “that
16 unnecessarily or irrelevantly reflect on the moral character of an individual, do not contribute
17 to the substantive claims, or state anything in repulsive language that detracts from the dignity
18 of the court.” See *id.* at *17-18; *Vesecky v. Matthews (Mill Towne Center) Real Estate, LLC*,
19 2010 U.S. Dist. LEXIS 24928 at *4 (D. Ariz. Mar. 2, 2010).

21 “A matter is impertinent if it consists of statements that do not pertain and are not
22 necessary to the issues in question.” See *Torres*, 2008 U.S. Dist. LEXIS 35291 at *3 (citations
23 omitted). The decision whether to strike material as scandalous is within the discretion of the
24 district court. See *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664-665 (7th Cir. Ill.
25 1992) (striking allegation that defendants conspired to cause fatal salmonella outbreak);
26 *Alvarado-Morales v. Digital Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. P.R. 1988).

Improper legal terms should be stricken from pleadings. *See Clark v. Goodwill Indus. of Hawaii*, 2009 U.S. Dist. LEXIS 86453, 30-31 (D. Haw. Sept. 21, 2009).

B. Paragraphs 32 to 65 Should be Stricken From the Complaint.

Plaintiffs have referenced Defendant Renee Ivchenko's criminal history in their Complaint and have attached a copy of said history as exhibits. [Compl. ¶¶ 32-65; Doc. 1-2, Exhibits A and B]. The allegations and exhibits referencing this incident are immaterial and inappropriate to the proof of the causes of action. *See Apolinar*, 2008 U.S. Dist. LEXIS 113273 at *17; [Compl. ¶¶ 177-261]. These matters include allegations that unnecessarily or irrelevantly reflect on Defendants' moral character. *See id.* at *17-18. The Plaintiffs included said scandalous and impertinent matter in an effort to cause Defendants prejudice.

Plaintiffs 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. ¶¶ 9-13]. The gratuitous insertion of Defendant Renee Ivchenko's booking photo in two separate sections of the Complaint is impertinent, scandalous and prejudicial. [Compl. ¶¶ 53, 64]. Harassing Defendants in this manner is part and parcel of what Plaintiffs do on a daily basis to "tens of millions" of people. [Compl. ¶ 14].

Plaintiffs do not inform the public; instead, Plaintiffs exploit booking photos and arrest information for purely commercial purposes. [Compl. ¶ 24]. As the Sixth Circuit recently observed, "A disclosed booking photo casts a long, damaging shadow over the depicted individual." *Detroit Free Press Inc. v. United States Dep't of Justice*, 829 F.3d 478, 482 (6th Cir. 2016). These "[b]ooking photos—snapped in the vulnerable and embarrassing moments immediately after an individual is accused, taken into custody, and deprived of most liberties—fit squarely within this realm of embarrassing and humiliating information. More than just vivid symbols of criminal accusation, booking photos convey guilt to the viewer." *Id.* (citations and quotations omitted).

1 Plaintiffs' business model is to exploit this embarrassing and humiliating information
2 that falsely conveys guilt for their own commercial gain. [Compl. ¶ 25]. Once these images
3 are online, they live on in perpetuity. [Compl. ¶ 20]. They serve as the digital scarlet letter of
4 our times, permanently affecting the reputation of those who have paid their debt to society.

5 In response to the proliferation of mugshot website operators, such as Plaintiffs,
6 numerous states have passed statutes relating to the exploitation of mugshots, most recently
7 Arizona. On August 27, 2019, HB2191 became effective law as Arizona Revised Statute §§
8 44-7901, 7902; Mugshot website operators; prohibited acts; exceptions (the "Arizona
9 Mugshot Statute"). The new law defines mugshot website companies as "mugshot website
10 operators" and prohibits their operation for commercial purposes, which the law defines to
11 include "any purpose in which the [mugshot website operator] can reasonably anticipate the
12 receipt of monetary gain from the direct or indirect use of the public record." A.R.S. § 39-
13 121.03(D); A.R.S. § 44-7901(2). The Arizona Mugshot Statute also prescribes hefty *minimal*
14 (emphasis added) damages that mugshot website companies will have to pay to those affected
15 if they do not comply with the law.
16

17 The Arizona Mugshot Statute makes crystal clear that the public policy of Arizona is
18 that arrest information and photos published for a limited time by Arizona law enforcement
19 agencies are not to be "scraped" and then disseminated indefinitely for Defendants' purely
20 commercial purposes. Yet, that is precisely how Plaintiffs operate. [Compl. ¶ 13]. Allowing
21 Plaintiffs to use Defendant Renee Ivchenko's booking photo and arrest information in the
22 Complaint is contrary to the public policy of Arizona as reflected by the Arizona Mugshot
23 Statute.
24

25 Defendant Andrew Ivchenko is actively litigating these issues against Plaintiffs in
26 State court on behalf of his clients. Plaintiffs included this information in the Complaint in an
27 effort to indirectly influence that litigation. If Plaintiffs believe that their rights were
28 somehow violated, they should be required to plead only factual matters that support their

1 causes of action. [Compl. ¶¶ 177-261]. Defendant Renee Ivchenko's arrest did not even need
 2 to be mentioned at all, as the litigation between the parties that is germane to this case was
 3 outlined in the Complaint in detail. [Compl. ¶¶ 89-176].

4 Defendant Renee Ivchenko's criminal history in paragraphs 32-65 should be stricken
 5 under Rule 12(f). This information is not necessary to any of the issues in this action, and was
 6 done simply to harass and intimidate Defendants, and was likely inserted in the Complaint so
 7 that they could be used by Plaintiffs as a warning against anyone in the country who threatens
 8 them with litigation. Plaintiffs are also attempting to influence the attorney-client relationship
 9 Defendant Andrew Ivchenko has with his current clients litigating against them in State court.

11 **C. Paragraphs 66 to 88 Should be Stricken From the Complaint.**

12 Not satisfied with inserting Defendant Renee Ivchenko's booking photo and arrest
 13 details in the Complaint, Plaintiffs continue their personal attacks against Defendants by
 14 drawing attention to an entirely irrelevant matter involving a copyright application. [Compl.
 15 ¶¶ 66-88]. The allegations referencing this application are immaterial and inappropriate to the
 16 proof of the causes of action. *See Apolinar*, 2008 U.S. Dist. LEXIS 113273 at *17. These
 17 matters include allegations that unnecessarily or irrelevantly reflect on Defendants' moral
 18 character. *See id.* at *17-18. The Plaintiffs included said scandalous and impertinent matter in
 19 an effort to cause Defendants prejudice.

20 The copyright application in question did not involve Plaintiffs or their attorney in any
 21 manner whatsoever. The allegations and endless conclusory statements [See e.g., Compl. ¶¶
 22 72-74, 80, 82-84, 86] in this entire section of the Complaint should be stricken under Rule
 23 12(f). They are not necessary to any of the issues in this action as pled. They would be
 24 unnecessarily burdensome to answer, and would unduly prejudice the Defendants. *See Wailua*
 25 *Assocs. v. Aetna Cas. & Sur. Co.*, 183 F.R.D. 550, 556 (D. Haw. 1998) (striking reference to
 26 "siege warfare" as scandalous because plaintiff could communicate same idea in other
 27 words).
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1 The unfounded allegations of “perjury,” “fraud,” “false statements” and “crime” in the
 2 Complaint bear an unfortunate resemblance to those in *Nault's Auto. Sales, Inc. v. American*
 3 *Honda Motor Co., Acura Auto. Div.*, 148 F.R.D. 25, 29 (D.N.H. 1993) (“Terms such as
 4 “perjury,” “contempt,” “liar,” and “suborning of perjury” became almost routine in Nault’s
 5 pleadings.”); [Compl. ¶¶ 79, 85-88]. In Nault, as here, the defendant moved to strike, inter
 6 alia, allegations that the defendant had committed “perjury,” and that its counsel had
 7 “suborned perjury “ and “pressured” a witness into signing an affidavit which it knew to
 8 contain false information. *See id.*, 148 F.R.D. at 33. The Court struck the allegations of
 9 “perjury,” “suborning perjury” and other criminal conduct.

10
 11 In Nault, the Court specifically rejected Nault’s counsel’s claim to have acted in
 12 subjective good faith in alleging “perjury,” “subornation of perjury” and criminal conduct:

13 That Nault's counsel are convinced in their own minds that the "facts" point
 14 exclusively to one reasonable conclusion (i.e., that Honda's counsel . . . “suborned
 15 perjury,” “committed perjury,” and engaged in “criminal conduct”) hardly establishes
 16 either the truth of those charges or even that those charges were objectively reasonable
 17 when made. . . . none of that justifies the unsubstantiated and extreme attacks on the
 18 personal integrity, ethics and character of defense counsel exhibited in the challenged
 pleadings. The tone, the language used, and the accusations themselves are
 unwarranted by the facts, either as they are presently known or as they were known to
 plaintiffs' counsel when the challenged pleadings were filed.

19 *See Nault’s*, 148 F.R.D. at 34-35 (D.N.H. 1993).

20 Without factual evidence, an attorney’s subjective belief does not free him to
 21 “indiscriminately bludgeon the professional reputations” of other attorneys:

22 [P]laintiffs' counsel . . . are of course free to believe whatever they choose to believe.
 23 They are not free to indiscriminately bludgeon the professional reputations of opposing
 24 counsel out of frustration, or in angry overreaction, or on mere suspicion alone.

25 *See id.*, 148 F.R.D. at 36.

26 Exactly the same conviction exists solely in the mind of Plaintiffs’ counsel, David
 27 Gingras. However convinced Plaintiffs’ counsel may be that he will ultimately prevail on the
 28

1 merits of his claims, that conviction does not justify the unfounded accusations in the
2 Complaint of “perjury,” “fraud,” “false statements” and “crime.” Such an “inference” is
3 insufficient to justify scandalous allegations that irrelevantly reflect on the moral character of
4 the Defendants. *See Vesecky*, 2010 U.S. Dist. LEXIS 24928 at *4.

5 Plaintiffs lack evidence supporting the serious allegations of perjury and other serious
6 allegations made in this section of the Complaint. “Perjury” requires not only proof beyond a
7 reasonable doubt, but also consists of willfulness and must pertain to a material fact of the
8 case. *See Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004). As no adjudication of
9 “perjury” was ever made, the allegations of Defendants committing “perjury” and other
10 criminal conduct are not only unsubstantiated but without objective factual basis.

11
12 If the evidence is consistent with two possible interpretations, scandalous allegations
13 of “perjury,” “fraud,” “false statements” and criminal conduct against opposing counsel
14 should be stricken from a pleading unless they are demonstrated “beyond mere suspicion”:

15 When presented with evidence which is consistent with two possible and equally
16 plausible, but inconsistent, interpretations of how opposing counsel have conducted
17 themselves, professional courtesy and dignity militate in favor of adopting that which
18 is consistent with ethical and professional conduct, at least until the contrary is
19 demonstrated beyond mere suspicion. . . . In this instance, the Court finds there was
20 and is no reasonable basis well grounded in fact to have warranted Nault's allegations
21 of perjury and subornation of perjury in the first place, and certainly no basis for
22 refusing to strike those allegations now. Those allegations are stricken.

23 *See Nault's*, 148 F.R.D. at 34.

24 Similarly, in *Clark v. Goodwill Indus of Hawaii*, the Court struck references to
25 “perjury” in the complaint in that action:

26 Each of Plaintiff's allegations of perjury are unsubstantiated . . . Perjury is a serious
27 offense, and allegations of perjury are scandalous accusations that may result in
28 prejudice against Defendants. . . . Improper use of legal terms should be stricken.
Therefore, the Court strikes all allegations of perjury from paragraphs 27, 28, 31, 32,
33, 59, 62, 66, 67, and 82.

1 *Clark*, 2009 U.S. Dist. LEXIS 86453, 30-31. Likewise, improper use of the legal terms
2 “fraud,” “false statements” and “crime” should be stricken from the Complaint. Indeed, since
3 the substance of the alleged wrongdoing is itself not even material to any cause of action pled
4 in the Complaint. [Compl. ¶¶ 177-261]. Since allegations referencing the copyright are
5 immaterial and inappropriate to the proof of the causes of action, this entire section should be
6 stricken from the Complaint. *See Apolinar*, 2008 U.S. Dist. LEXIS 113273 at *17.

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8 **D. Additional Paragraphs Should be Stricken From the Complaint.**

9 Plaintiffs include impertinent, scandalous and prejudicial language throughout the
10 Complaint, including language such as “extreme example” [Compl. ¶ 1], “attempt to defraud”
11 [Compl. ¶ 159], “fraudulent conduct” [Compl. ¶ 160], and conclusory statements regarding
12 Defendants’ knowledge [Compl. ¶¶ 94, 96, 107-111, 158]. This Court has inherent authority
13 to strike from any pleading any redundant, immaterial, impertinent or scandalous matter. *See*
14 *Apolinar*, 2008 U.S. Dist. LEXIS 113273 at *17. Such matter includes any allegations “that
15 unnecessarily or irrelevantly reflect on the moral character of an individual, do not contribute
16 to the substantive claims, or state anything in repulsive language that detracts from the dignity
17 of the court.” *See id.* at *17-18; *Vesecky v. Matthews (Mill Towne Center) Real Estate, LLC*,
18 2010 U.S. Dist. LEXIS 24928 at *4 (D. Ariz. Mar. 2, 2010); *Alvarado-Morales v. Digital*
19 *Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. P.R. 1988) (No matter the origin of these
20 repugnant words replete with tragic historical connotations, they are superfluous descriptions
21 and not substantive elements of the cause of action. As such, they have no place in pleadings
22 before the court.). Plaintiffs included said scandalous and impertinent matter in an effort to
23 cause Defendants prejudice, and as such, should be stricken from pleadings. *See Clark*, 2009
24 U.S. Dist. LEXIS 86453, 30-31.
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1 **IV. CONCLUSION**

2 For the foregoing reasons, the following paragraphs in the Complaint should be
3 stricken under Rule 12(f) as immaterial, impertinent, scandalous, and prejudicial:

- 4 • Paragraphs 32-65, including Exhibits A and B [Doc. 1-2];
5 • Paragraphs 66-88; and
6 • References to “extreme example” [Compl. ¶ 1], “attempt to defraud” [Compl. ¶
7 159], “fraudulent conduct” [Compl. ¶ 160], and conclusory statements regarding
8 Defendants’ knowledge [Compl. ¶¶ 94, 96, 107-111, 158].
9

10
11 RESPECTFULLY SUBMITTED this 12th day of March, 2021.

12 **ANDREW IVCHENKO PLLC**

13
14 By: /s/ Andrew Ivchenko
15 Andrew Ivchenko, Esq.
16 ***Attorney for Defendants***
17
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19 **CERTIFICATE OF GOOD FAITH CONFERENCE; CONFERRED BUT UNABLE TO**
20 **RESOLVE ISSUES PRESENTED IN THE MOTION**

21 Pursuant to this Court’s order, I hereby certify that counsel for the movant has
22 conferred with all parties or non-parties who may be affected by the relief sought in this
23 motion in a good faith effort to resolve the issues but has been unable to resolve the issues.
24

25 By: /s/ Andrew Ivchenko
26 Andrew Ivchenko, Esq.
27 ***Attorney for Defendants***
28

CERTIFICATE OF SERVICE

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

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