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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Travis Grant, *et al.*,

Plaintiffs,

v.

Andrew Ivchenko, *et al.*,

Defendants.

Case No. 21-CV-00108-PHX-JJT

**PLAINTIFFS' RESPONSE TO
DEFENDANTS'
MOTION TO STRIKE**

Plaintiffs Travis Grant, Mariel Grant, and Kyle Grant ("Plaintiffs") respectfully submit the following Response in opposition to the Motion to Strike (Doc. 21) filed by Defendants Andrew and Renee Ivchenko ("Defendants").

I. BACKGROUND

The facts of this matter are somewhat extensive, but the underlying story is relatively straightforward. Defendant Andrew Ivchenko is an attorney licensed to practice law in Arizona. In April 2018, Mr. Ivchenko's wife, Renee (who is a severe alcoholic), was arrested and charged with felony aggravated assault on a police officer in Scottsdale. Following her arrest, Mrs. Ivchenko's mugshot and arrest details were published on the Internet by the Maricopa County Sheriff's Office (MCSO).

To resolve the felony criminal charges against her, Mrs. Ivchenko entered into a diversion agreement. As part of that agreement, Mrs. Ivchenko made a written avowal to the Court that she was "guilty of the offenses charged in the complaint". In return, Mrs.

1 Ivchenko was allowed to participate in the Superior Court's Felony Pretrial Diversion
2 Program which included alcohol treatment. After Mrs. Ivchenko successfully completed
3 diversion, the charges against her were dismissed.

4 Plaintiff Travis Grant owns and operates several website that automatically copy,
5 index, archive and republish arrest records and mugshots. As of April 2021, Travis's
6 websites contain more than 20 million arrest records from 45 US states, including
7 Arizona.

8 After Mrs. Ivchenko's mugshot was published on the Internet by MCSO, it was
9 automatically copied and republished *verbatim* on one or more of Travis's websites. The
10 mugshot was also republished by third parties on several other unrelated websites
11 including JailBase.com and MaricopaPublicRecords.com (sites not owned by Travis)
12 which do exactly the same thing as Travis's sites. Mrs. Ivchenko's mugshot was also
13 republished by unknown third parties on social media sites, including Twitter.

14 Perhaps somewhat understandably, Mr. Ivchenko was extremely unhappy about
15 seeing his wife's mugshot splashed all over the Internet. As a result, Mr. Ivchenko began
16 a misguided campaign to remove his wife's mugshot from any/every place it appeared,
17 using any means possible, and to viciously attack and harass anyone involved in
18 republishing the image.

19 As part of this process, in March 2019 (about a year after Renee's arrest), Mr.
20 Ivchenko submitted an application to the U.S. Copyright Office in which he claimed—
21 falsely—that Renee owned the exclusive copyright in her mugshot. As it routinely does,
22 the Copyright Office did not verify this application. Instead, it simply accepted the
23 application as true and approved the registration without any investigation to determine
24 its validity. As a result, Mr. Ivchenko was issued a registration certificate which made it
25 appear—falsely—that Mrs. Ivchenko owned exclusive rights to her mugshot.

26 After receiving the copyright registration certificate, Mr. Ivchenko submitted
27 numerous DMCA-based takedown demands to Google and Twitter seeking to have
28 Renee's mugshot removed. Those DMCA takedown notices alleged, falsely, that Renee

1 owned the copyright in her mugshot and that the recipients were infringing Renee's
2 exclusive rights by displaying the image. At least one of the notices also falsely
3 represented that "*charges were never filed*" against Renee, a statement that Mr. Ivchenko
4 knew was entirely false at the time it was made.

5 Despite having no merit, most of Mr. Ivchenko's efforts to remove Renee's
6 mugshot were successful. Twitter and Google removed most, if not all, copies of the
7 mugshot. It also appears Mr. Ivchenko was successful in getting the mugshot removed
8 from JailBase.com and MaricopaPublicRecords.com. But at that point, Mrs. Ivchenko's
9 mugshot still remained on one or more of Travis's websites.

10 At some point, in October 2018, Mr. and/or Mrs. Ivchenko (it is unknown which)
11 submitted a request to one of Travis's websites asking him to remove Renee's mugshot
12 on the grounds that the case against her had been "dismissed". In keeping with his
13 standard practice, Travis updated his website to prominently include the word
14 "DISMISSED" on Mrs. Ivchenko's mugshot page. Beyond this, Travis would not agree
15 to remove Mrs. Ivchenko's photo.¹

16 As a result, beginning in May 2019, Mr. Ivchenko unleashed an avalanche of
17 litigation against Travis and his family. This attack began with a lawsuit filed in the
18 Maricopa County Superior Court against Travis, his wife Mariel (who has no
19 involvement of any kind in Travis's website), and Travis's brother, Kyle. In the first such
20 case (the Complaint was attached as Exhibit C to the original Verified Complaint in this
21 matter), Mr. Ivchenko demanded \$1 million in damages for defamation, invasion of
22 privacy, intentional infliction of emotional distress, and violation of Mrs. Ivchenko's
23 publicity rights based on the publication of her mugshot.

24 ¹ When a publication is accurate at the time it was made, there is no ongoing obligation to
25 "update" the story in the future to add later-occurring events. *See, e.g., Martin v. Hearst*
26 *Corp.*, 777 F.3d 546, 553 (2nd Cir. 2015) (holding story that accurately reported the
27 plaintiff's arrest without subsequent update to note the charges were later expunged was
28 not actionable; "Reasonable readers understand that some people who are arrested are
guilty and that others are not. Reasonable readers also know that in some cases
individuals who are arrested will eventually have charges against them dropped.
Reporting Martin's arrest without an update may not be as complete a story as Martin
would like, but it implies nothing false about her.")

At their core, all of Mrs. Ivchenko's claims were based on a common allegation that Travis (and his family members) defamed Mrs. Ivchenko by *falsely* implying that she was "guilty of having committed a crime". That specific allegation was contained in ¶ 39 of Mrs. Ivchenko's Complaint (found at Doc. 1-2, page 37 of 40; Exhibit C to the Verified Complaint in this matter). Mr. and Mrs. Ivchenko's first lawsuit was removed to this Court and then voluntarily dismissed by Mr. Ivchenko after Travis retained counsel and threatened to seek sanctions.

Notably, after Mr. Ivchenko's first case was dismissed, the parties did not enter into any sort of settlement agreement. Despite this, Travis removed Mrs. Ivchenko's mugshot, simply as a courtesy.

That act of kindness was repaid by Mr. and Mrs. Ivchenko filing multiple additional lawsuits against Travis, Mariel, and Kyle, starting with a second suit filed in December 2019. In the second lawsuit, Mr. Ivchenko joined his wife as a party-plaintiff. Among other things, Mr. Ivchenko claimed Travis defamed him by publishing a statement on Twitter which suggested Mr. Ivchenko had committed "fraud" on the U.S. Copyright Office. That specific allegation is contained in ¶ 14 of Mr. Ivchenko's Complaint (attached as Exhibit E to the original Verified Complaint in this matter). A portion of Mr. Ivchenko's allegation is shown below:

1 been dismissed. The use of Plaintiff Renee Ivchenko's booking photo, coupled with the
2 derogatory information in the tweets, conveys to the public a perception of guilt. In
3 addition, the implication that Plaintiff Andrew Ivchenko, a licensed attorney, engaged in
4 fraud is inflammatory, false, and constitutes defamation per se.

Without needlessly belaboring the minutiae, in their prior underlying suits, Mr. and Mrs. Ivchenko alleged that Travis, Mariel and Kyle defamed Mrs. Ivchenko by *falsely* implying that she had committed a crime, and by *falsely* implying that Mr.

Ivchenko committed fraud on the Copyright Office in the course of obtaining a Certificate of Registration for Mrs. Ivchenko's mugshot. But as explained in both the original Complaint and First Amended Complaint, Mr. and Mrs. Ivchenko each knew these statements were *not false*; they were both literally and substantially true.

That brings us to the current suit filed in this Court. Here, Travis and his family are suing Mr. and Mrs. Ivchenko for malicious prosecution and abuse of process because they pursued litigation against Travis and his family without probable cause and with malice. In short, there is no question but that in the underlying litigation, Mr. and Mrs. Ivchenko's claims were based on their allegation that Travis defamed them by publishing statements accusing Mrs. Ivchenko of committing a crime and accusing Mr. Ivchenko of committing fraud on the U.S. Copyright Office. Obviously, Travis contends these statements were not false, and that Mr. and Mrs. Ivchenko clearly knew the statements were not false at the time they commenced their prior suits against Travis and his family.

Against this backdrop, Mr. and Mrs. Ivchenko now move to strike these allegations from the Complaint on the basis that they are "irrelevant", "impertinent" and "is not necessary to any of the issues in this action". Mot., Doc. 12, at 7:5-6. This argument is not well-taken. Indeed, the issues that Mr. Ivchenko seeks to strike represent the core, central issues in this case. Striking those points would be tantamount to granting summary judgment in Defendants' favor without any legal or factual basis for doing so.

To prove malicious prosecution, Travis must show, *inter alia*, that Mr. and Mrs. Ivchenko filed a previous lawsuit which included claims that were not supported by probable cause. By definition, under Arizona law, a defamation claim is *not* supported by probable cause when the plaintiff knows the statement is completely true.

As explained in the original Complaint and First Amended Complaints, that is precisely the situation here. Mrs. Ivchenko did commit a crime in April 2018 and Mr. Ivchenko did commit fraud by making false representations to the Copyright Office. These are hardly collateral or irrelevant issues; they are essential elements going to the very heart of this case. There is no basis to strike those points from the Complaint.

II. DISCUSSION

a. Details of Mrs. Ivchenko's Arrest Are Relevant

To be honest, given the specific allegations presented in the underlying litigation, it is difficult to understand how Mr. and Mrs. Ivchenko can claim the details of Mrs. Ivchenko's prior arrest in Scottsdale are somehow "irrelevant", "impertinent" and "not necessary to any of the issues in this action". Again, Mr. and Mrs. Ivchenko placed the facts and circumstances of Mrs. Ivchenko's arrest squarely at issue (twice) by using it as the primary basis for not one, but two, lawsuits against Travis and his family. Thus, the details of Mrs. Ivchenko's arrest are unquestionably relevant to *two* separate issues here—first, whether probable cause existed for the claims asserted in the prior action, and second, whether Mr. and Mrs. Ivchenko acted with malice in asserting those claims.

As for probable cause, assuming the evidence shows that Mrs. Ivchenko did commit a crime in April 2018, then a statement implying that fact would not be false.² In that case, if the published statements about Mrs. Ivchenko were true, then Mr. and Mrs. Ivchenko did not have probable cause to sue Travis for defamation because true statements are not defamatory; "To meet a showing of probable cause, '[t]he initiator of the action must honestly believe in its possible merits; and, in light of the facts, that belief *must be objectively reasonable.*'" *Trabucco v. Cogan*, 2020 WL 3250860, at *6 (Ariz. App. 2020) (emphasis in original) (quoting *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 416–17 (1988)); *Sign Here Petitions, LLC v. Chavez*, 243 Ariz. 99, 104 (App. 2017) (under Arizona law, a defamatory publication "must be false ..." (emphasis added) (quoting *Turner v. Devlin*, 174 Ariz. 201, 202, 204 (1993))).

Second, if Mr. and Mrs. Ivchenko knew that Travis published only *true and accurate* statements about Mrs. Ivchenko's arrest, and if they misrepresented that fact in the underlying litigation (by claiming that Mrs. Ivchenko did NOT commit a crime), this

² The fact that Mrs. Ivchenko avoided a *conviction* by entering into a diversion program is irrelevant; when a person is *arrested* for a crime and a publication accurately reports that fact, it is not defamatory as a matter of law. *See, e.g., Martin v. Hearst Corp.*, 777 F.3d 546, 553 (2nd Cir. 2015).

point is relevant to prove malice; “a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim ‘can only be motivated by an improper purpose.’” *Drummond v. Desmarais*, 176 Cal.App.4th 439,452, 98 Cal.Rptr.3d 183, 193 (Cal.App. 6th Dist. 2009) (quoting *Albertson v. Raboff*, 46 Cal.2d 375, 383, 295 P.2d 405 (Cal. 1956)).

In short, probable cause cannot exist when a plaintiff sues a defendant for defamation claiming the defendant published a *false* statement which the plaintiff actually knew to be *true*. That much should be obvious. Furthermore, a plaintiff who materially misrepresents the facts in an underlying lawsuit (by claiming that a true statement is false) may properly be presumed to be acting with malice.

Here, the factual allegations relating to Mrs. Ivchenko’s arrest are clearly and directly relevant to the issues of probable cause and malice. Thus, there is simply no basis to strike them from the Complaint, even assuming they are embarrassing to Mrs. Ivchenko. *See Xcentric Ventures LLC v. Borodkin*, 2012 WL 692976, at *12 (D. Ariz. Mar. 1, 2012) (denying, in a malicious prosecution action, defendant’s request to strike Complaint’s references to “perjury” and “subornation of perjury” because those allegations were relevant to the issues of probable cause and malice).

b. Details of the “Copyright Application” Are Relevant

Mr. Ivchenko also moves to strike ¶¶ 66–90 from the First Amended Complaint. These paragraphs outline Mr. Ivchenko’s efforts to unlawfully obtain a copyright registration certificate for Mrs. Ivchenko’s mugshot. These allegations also explain how Mr. Ivchenko used the registration certificate to demand removal of Mrs. Ivchenko’s mugshot from various websites using the DMCA’s takedown procedure. *See* 17 U.S.C. § 512(c).

Once again, given the allegations made by Mr. Ivchenko in the underlying lawsuits (in which he put these specific facts at issue), his arguments about the copyright application are not well-taken. To summarize, in the *second* underlying action filed by Mr. and Mrs. Ivchenko (in which they were both plaintiffs), they each accused Travis of

publishing false and defamatory statements on Twitter regarding the copyright application in question.

Without belaboring every detail, ¶ 13 of Mr. and Mrs. Ivchenko's underlying Complaint against Travis (filed in this matter at Doc. 1–3 at page 13 of 40) alleged Travis defamed them by posting statements on Twitter about the copyright application. The Complaint asserted these statements were “unequivocally false and defamatory, and accuse Plaintiffs [Mr. and Mrs. Ivchenko] of criminal activity” arising from the copyright application.

13. On or about September 15, 2019, four tweets mentioning Plaintiffs were added to the Twitter site. These occurred one day after the owner of the site filed a DMCA counter-notice objecting to the removal of Plaintiff Renee Ivchenko's image from the Twitter site. On or about September 18, 2019, two additional tweets mentioning Plaintiffs were added to the Twitter site. The tweets are unequivocally false and defamatory, and accuse Plaintiffs of criminal activity, as follows:

- I AM ABSOLUTELY REPORTING RENEE IVCHENKO TO THE US COPYRIGHT OFFICE!!! SHE HAS COMMITTED FRAUD!!!
- if andy ivchenko has illegally claimed ownership over your work, you can report him to the us government here
<https://www.copyright.gov/help/index.html>.
- asserting a copyright claim over work that does not belong to you is a federal offence in the united states!! is andy ivchenko trying to get his wife renee ivchenko tossed back in jail? trying to get himself disbarred? what is wrong with this guy?

1 Based on these allegations, Mr. and Mrs. Ivchenko's underlying Complaint
2 asserted claims against Travis for defamation, false light, and intentional infliction of
3 emotional distress, among other things. But as the original and First Amended
4 Complaints in this matter clearly explain, all of the statements posted on Twitter about
5 Mr. and Mrs. Ivchenko were completely true—Mr. Ivchenko *did* engage in fraudulent
6 and criminal activity (repeatedly) in the course of obtaining the copyright registration for
7 Mrs. Ivchenko's mugshot and afterwards.

8 Thus, the allegations in ¶¶ 66–88 of the original Complaint (¶¶ 68–90 in the First
9 Amended Complaint) are not “unnecessary” or “irrelevant” to the claims in this case;
10 they go directly to the very heart of whether the underlying suit lacked probable cause.
11 Put simply, if Mr. Ivchenko knew the allegations in his Complaint against Travis were
12 false, then he did not have probable cause to assert defamation and related claims based
13 on those statements. And that is precisely what the Amended Complaint in this case
14 alleges with respect to the copyright application.

15 In addition, the facts and circumstances related to the copyright application are
16 also relevant for a second purpose. In ¶¶ 264–282 of the First Amended Complaint,
17 Plaintiffs added a new claim against Mr. Ivchenko for unlawfully sending a DMCA
18 takedown notice in violation of 17 U.S.C. § 512(f). This provision “provides that any
19 person who makes knowing, material misrepresentations in filing a DMCA takedown
20 notice ‘shall be liable for any damages, including costs and attorneys’ fees[] incurred by
21 the alleged infringer’” *Automattic Inc. v. Steiner*, 82 F.Supp.3d 1011, 1029 (N.D. Cal.
22 2015); *see also Weingberg v. Dirty World, LLC*, 2017 WL 5665022, *5 (C.D.Cal. 2017)
23 (explaining, “Anyone abusing the right to file DMCA takedown notification by
24 submitting meritless claims of infringement to service providers, however, may be
25 subject to liability under Section 512(f).”)

26 As explained in the Amended Complaint, on March 12, 2021, Mr. Ivchenko sent a
27 takedown demand to non-party GoDaddy in which he claimed (falsely) that a website
28 operated by Travis was infringing Mrs. Ivchenko's “registered copyright” in her

1 mugshot. Among other things, this claim alleges that Mr. Ivchenko knowingly violated
 2 17 U.S.C. § 512(f) by sending a DMCA-based takedown notice which materially
 3 misrepresented that Travis’s website infringed Mrs. Ivchenko’s copyright.

4 This claim further asks the Court to request input from the Register of Copyrights,
 5 as required by 17 U.S.C. § 411(b)(2), explaining whether the false statements in Mrs.
 6 Ivchenko’s copyright application (i.e., her untrue representation that she was the “author”
 7 of her mugshot and her failure to disclose that the image was taken by an employee of the
 8 Maricopa County Sheriff’s Office) would have caused the Register to reject the
 9 registration application. Again, this makes Mr. Ivchenko’s conduct in connection with the
 10 copyright application directly relevant. *See Unicolors, Inc. v. H&M Hennes & Mauritz,*
 11 *L.P.*, 959 F.3d 1194, 1198 (9th Cir. 2020) (discussing process for invalidating copyright
 12 registration, and noting that a copyright registration obtained by fraud is invalid).

13 For these reasons, the Amended Complaint’s allegations regarding Mr. Ivchenko’s
 14 conduct in applying for and obtaining the copyright registration are pertinent, relevant,
 15 and no basis exists to strike them.

16 **c. Mrs. Ivchenko’s Mugshot Is Relevant**

17 As one final note, Mr. and Mrs. Ivchenko object to the fact that “Plaintiffs also
 18 gratuitously inset Defendant Renee Ivchenko’s booking photo in two separate sections of
 19 the Complaint.” Mot. at 3:10–12. Defendants argue: “Allowing Plaintiffs to use
 20 Defendant Renee Ivchenko’s booking photo and arrest information in the Complaint *is*
 21 *contrary to the public policy of Arizona as reflected by the Arizona Mugshot Statute.*”
 22 Mot. at 7:2–4 (emphasis added).

23 These arguments warrant two brief responses. First, regarding public policy,
 24 Defendants’ position is directly contrary to the express language of the statute.
 25 Specifically, the Mugshot Act, A.R.S. § 44–7902, could not be any clearer—it expressly
 26 “*does not apply* to activities by a *licensed attorney* ... relating to a current or anticipated
 27 criminal *or civil proceeding.*” A.R.S. § 44–7902(F) (emphasis added). Thus, there is
 28 nothing improper about using a mugshot as evidence, as in this case.

Second, Mrs. Ivchenko's mugshot was *not* incorporated into the Complaint for the purposes of embarrassing her. Rather, the mugshot was used to *respond* to the false allegations made by Mrs. Ivchenko in the underlying proceeding in which she accused Travis (and his family) of unlawfully using the mugshot to advertise goods/services.

Indeed, in the first underlying Complaint filed by Mrs. Ivchenko, she specifically (and repeatedly) accused Travis and his family of making an *unlawful commercial* use of her mugshot, and misusing that image "in multiple ways". Just a few of those allegations (found in ¶¶ 24, 25, & 30 of Mrs. Ivchenko's Complaint, filed at Doc. 1–2 at pages 35–36 of 40 in this matter) are reflected below:

24. The status of Plaintiff's booking photo and name as part of the public record does not relieve the Defendants of the obligation to obtain her consent before exploiting her persona for commercial gain.

25. The Defendants wrongfully use Plaintiffs' persona for a commercial purpose in multiple ways, including but not limited to, the generation of revenue through Google Ads.

30. Specifically, the Defendants have utilized Plaintiff's persona without her consent, present her image and arrest information in a manner that suggests that she is still incarcerated, or that criminal charges are outstanding when in fact they have been dismissed.

31. The Defendants also made comments or suggestions that created a false implication about Plaintiff.

32. Defendants knew or reasonably should have known that their statements regarding Plaintiff were false and/or represented her in a false light.

Because Mrs. Ivchenko alleged that Travis *unlawfully* used her mugshot in "multiple ways", the original image published by MCSO and the copied version (republished by Travis) were included in the Complaint simply for the purpose of

1 responding to those allegations by demonstrating how untrue they were. Also, the
2 mugshot is relevant to the issue of malice; insofar as the embarrassing nature of the
3 image helps to explain *why* Mr. and Mrs. Ivchenko were willing to go such extreme
4 lengths to remove it from public view.

5 For either or both of these reasons, there is no basis to strike Mrs. Ivchenko's
6 mugshot from the pleadings. This image is a central issue in the case and it bears directly
7 on multiple elements including probable cause and malice.

8 III. CONCLUSION

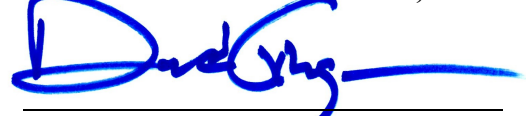
9 Mr. and Mrs. Ivchenko chose to drag Travis Grant and his family through *years* of
10 costly litigation seeking millions of dollars in damages arising from the alleged misuse of
11 Mrs. Ivchenko mugshot and statements concerning the truthfulness of Mr. Ivchenko's
12 representations to the U.S. Copyright Office. These matters were put directly at issue by
13 Mr. and Mrs. Ivchenko, not by Travis or his family.

14 As initiators of this dispute, Mr. and Mrs. Ivchenko cannot now complain that the
15 true facts are being brought to light in a manner they find embarrassing. That is precisely
16 the point of this type of action – to determine which party was lying and which was
17 telling the truth.

18 The motion to strike should be denied.

19 DATED: April 2, 2021

GINGRAS LAW OFFICE, PLLC



David S. Gingras, Esq.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2021, I transmitted the attached document to the Clerk's Office for ECF filing, and for electronic service on all counsel of record in this matter:

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