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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Grant, et al., Plaintiffs vs. Ivchenko, et al., Defendants.	No. 21-CV-00108-JJT **DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO STRIKE UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(f)** (Assigned To Hon. John J Tuchi)

Defendants Andrew Ivchenko and Renee Ivchenko ("Defendants") respectfully submit the following reply brief in further support of their motion to strike under Federal Rule of Civil Procedure 12(f). None of the arguments advanced by Plaintiffs Grant, *et. al*. ("Plaintiffs") in their response to Defendants' motion to strike ("Response" or "Resp.") warrant denying the motion. The motion should be granted and paragraphs 34-67, 68-90, 96, 98, 109-113, 160-162, 269, 270, and 272-275 of the Verified Amended Complaint ("Complaint"), including Exhibits A and B [Doc. 1-2], should be stricken on the grounds that they are scandalous, impertinent, immaterial, and prejudicial. Moreover, preliminary relief through this motion is necessary to properly respond to the Complaint. In their Response, Plaintiffs do not respond to, and thus concede, that certain impertinent, scandalous and prejudicial language sprinkled throughout the Complaint should be stricken, including "attempt to defraud" [Compl. ¶ 161], "fraudulent conduct" [Compl. ¶ 162], and conclusory statements regarding Defendants' knowledge [Compl. ¶¶ 96, 98, 109-113, 160]. 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 Federal Rule of Civil Procedure 12.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs have stated that this is primarily a civil action for malicious prosecution and abuse of process. [Compl. ¶ 1]. Plaintiffs attempt to paint themselves as the victims here, when in fact Plaintiffs victimize millions of people nationwide, including countless Arizona residents, by operating what is arguably the largest mugshot website operation in the country. [Compl. ¶ 16]. Defendants concede that this case is neither a fraud prosecution nor other criminal matter. Yet Plaintiffs' Response [Doc. 22] chronically confuses criminal law with civil law, and mistakenly equates motions directed at the pleadings with motions on the merits. Nowhere do Plaintiffs provide a reasoned basis for labeling the conduct in Paragraphs 96, 98, 109-113, 160-162, 269, 270, and 272-275 of the Complaint with the inaccurate legal terms "false," "fraud," "defraud," "fraudulent conduct," "knowingly false material representations of fact," "unlawful," "falsely represented," and "intentionally omitted."

Plaintiffs fail to show how such allegations would tend to prove the lack of probable cause or malice elements of its claims for wrongful institution (or use) of civil proceedings ("WICP"). [Resp. at pg. 7 n. 12]. Indeed, nowhere do Plaintiffs show how these loaded terms and previous arrest information make any fact at issue in this case in connection with any claim more likely than not under Federal Rule of Evidence 401. Indeed, Plaintiffs have not explained why Defendants' actions deserve these labels, or how such allegations are relevant to any issues involving the litigation between the parties. Plaintiffs are attempting to paint a false narrative through the use of conclusory statements and unsubstantiated "facts" coupled with emotional arguments in order to support a flimsy case that frankly is quite simple and should be dismissed on the pleadings.

Plaintiffs have pleaded a blizzard of derogatory and immaterial information in their Complaint, designed to disguise the fact that their case rests almost entirely on a complaint that was substantially amended to address their objections at the time. [Mot. at pg. 5 n. 9]. Generally, "[o]nce an amended complaint is filed, as it was here, it supersedes the original complaint, which becomes *functus officio*, that is, of no further effect or authority." *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 586, 937 P.2d 1382, 1392 (App. 1996). Furthermore, a change in the evidence that results in the voluntary dismissal of an untenable claim should not automatically give rise to a malicious prosecution suit. "[I]f the pleading originally advanced a tenable theory but subsequent research or discovery proves it to be untenable, the pleading should be amended to change or delete it." *Bertero v. National General Corp*., 13 Cal.3d 43 (1974).

According to the Complaint, there was only <u>one case</u> in which one of the Defendants, Renee Ivchenko, was a plaintiff (along with 20 other plaintiffs), and <u>one case</u> in which the second Defendant, Andrew Ivchenko, represented 20 *other* (emphasis added) plaintiffs in an action against Plaintiffs (which is still ongoing in State court). [Compl. ¶¶ 107, 145]. Plaintiffs convolute the simple facts surrounding this case through a dizzying array of irrelevant and inflammatory information, essentially making a mountain out of a molehill. The first case involving the parties lasted less than a month, since Plaintiffs complied with Renee Ivchenko's demand that they remove her booking photo and arrest records from their mugshot websites. [Compl. ¶¶ 91]. This was not done because Plaintiffs are nice people, or because of the brilliance of their legal counsel's arguments. [Mot. at pg. 4 n. 11; Compl. ¶ 102]. Rather, this was done the same day Plaintiffs were served with Defendants' complaint. Regardless, that case has no factual or legal bearing on any claim in the Complaint.

Plaintiffs further conflate matters by referring to the first case in issue here as "Case 2" and "Case 2(b)," when in fact this was one case that involved an amended complaint which addressed issues Plaintiffs raised concerning Defendants' original complaint. [Compl. ¶¶ 107, 135]. The second case in issue here (called "Case 3" by Plaintiffs) proceeded for a few months before being dismissed by the plaintiffs in that case, who are *currently pursuing* (emphasis added) their claims in State court.

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 the aforementioned previously dismissed case in this Court. [*See* Doc 1-4, Exhibit H]. The Complaint is prejudicial to Defendant Andrew Ivchenko by design, and was filed in retaliation in order to impact ongoing State court proceedings, and to create a chilling effect towards others that are considering litigation against Plaintiffs. Renee Ivchenko's dispute with Plaintiffs ended last year, yet only now did Plaintiffs see fit to drag her into this lawsuit to help achieve their ulterior purposes. Even if fraud was at issue in this case (which it is not), Plaintiffs' position is problematic. Plaintiffs and their counsel have unclean hands, having greatly contributed through vexatious litigation conduct to the confusion and convoluted procedural history that led to this case.

Not striking these allegations and other irrelevant and redundant inflammatory, superfluous information would deprive Defendants of the protection of Rule 12(f). The chief requirement of motions under Rule 12(f) is that the movant needs to show prejudice. *See Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003). Prejudice is easily shown here. First, the allegations are harmful to Defendants' personal and professional reputations. Not striking the allegations would beget discovery disputes in the illogical, specious vein of Plaintiffs' Response here. Indeed, the allegations are consistent with Plaintiffs' vexatious litigation tactics, in that they are designed to justify conducting harassing, burdensome discovery on immaterial issues. The prejudice to Defendants is compounded by the Complaint's use of group pleading that does not distinguish between the Defendants' individual acts, as more fully briefed in the Motion for More Definite Statement [*See* Doc. 20 at p. 4 n. 9], and deliberate placement of irrelevant and redundant arrest and copyright records, even though they have little or nothing to do with the claims. Plaintiffs have articulated no prejudice they would suffer from striking these allegations. Everything

Plaintiffs could possibly say they have said again, in their Response, using different words. *Compare Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 183 F.R.D. 550, 556 (D. Haw. 1998). Accordingly, this motion should be granted, striking all of Paragraphs 34-67, 68-90, 96, 98, 109-113, 160-162, 269, 270, and 272-275 of the Complaint.

II. LEGAL ARGUMENT

A. Plaintiffs Do Not Explain How References to Defendant "Renee Ivchenko's Arrest" are Relevant to Any Issue in this Action.

Plaintiffs have referenced Renee Ivchenko's criminal history in their Complaint and have attached a copy of said history as exhibits. [Compl. ¶¶ 34-67; 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 v. Baum*, 2008 U.S. Dist. LEXIS 113273 at *17 (D. Ariz. June 4, 2008); [Compl. ¶¶ 179-282]. These matters include allegations that unnecessarily or irrelevantly reflect on her moral character. *See Apolinar*, at *17-18. The Plaintiffs included said scandalous and impertinent matter in an effort to cause Defendants prejudice.

Matter is immaterial if it has no essential or important relationship to the claim for relief. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517, 114 S.Ct. 1023 (1994). Statements are impertinent if they "do not pertain, and are not necessary, to the issues in question." *Id*. "Allegations may be stricken as scandalous if the matter bears no possible relation to the controversy or may cause the objecting party prejudice." *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 664 (7th Cir. 1992). "Superfluous historical allegations are a proper subject of a motion to strike." *Fantasy*, 984 F.2d at 1527.

Ostensibly, the Complaint, stripped to its essentials, alleges that two separate (but almost identical) lawsuits involving two separate law firms constituted a WICP, as well as abuse of process. [Compl. ¶¶ 179, 215, 229, 239]. There were a total of 41 individual plaintiffs in these cases, which were both voluntarily dismissed by those plaintiffs after a short period of time for entirely legitimate (albeit different) reasons. The remainder of the "substantive" allegations in the Complaint is simply filler designed to disguise the legal and factual paucity of the WICP and abuse of process claims, and are also being used to support a fictional narrative designed to link the two cases.

Plaintiffs are also attempting to influence the attorney-client relationship Defendant Andrew Ivchenko has with his clients litigating against them in State court through an underlying falsehood behind the Complaint, which Plaintiffs are trying to disguise. The Complaint states that "As it relates to the claims initially brought by Mr. Ivchenko in Case 2, the action was terminated in favor of Plaintiffs on June 26, 2020 when the case was dismissed with prejudice." [Compl. ¶ 183]. This is an outright **lie** (emphasis added). Defendant Andrew Ivchenko was not a party to that lawsuit by virtue of the amended complaint. [Compl. ¶¶ 135-136]. What Plaintiffs are essentially saying is that Defendant Andrew Ivchenko, in his role as a licensed attorney, cannot ever represent clients who are adversely impacted by Plaintiffs' activities as mugshot website operators simply because a family member previously litigated against them. Once Defendant Andrew Ivchenko expanded his client base and initiated suit against Plaintiffs, they began a false narrative about a "grand conspiracy" against them because of what happened to his spouse, which permeates the entire Complaint. Our system of law does not restrict lawyers in this manner, and Plaintiffs are engaging in conduct that ironically mirrors the exact conduct alleged in the Complaint.

It is revealing that instead of naming all of the plaintiffs and law firms involved as defendants, Plaintiffs have targeted the lawyer that is actively litigating against them in State court, as well as that lawyer's spouse (who was not represented by Defendant Andrew Ivchenko in either case). This is targeted harassment designed for ulterior purposes, plain and simple. Indeed, Defendants by their own admission even misappropriate the names of their victims who dare threaten their activities through legal process, and subject them to further online predation by setting up separate, dedicated websites that target that individual. This is precisely what has happened to both Defendants. [Compl. ¶¶ 265-266]. The obvious purpose of such cyberstalking is to pressure people to drop their legal claims against Plaintiffs, and dissuade others from pursuing their rights under the law.

Plaintiffs' chief grievance against Defendants seems to be that they brought suit against them a second time based in part on defamatory commentary placed by an anonymous party on Twitter. [Compl. ¶ 110]. Plaintiffs have continuously beaten this drum, arguing that the statements were not actionable due to statute of limitations issues. [Compl. ¶¶ 128-130]. However, Plaintiffs do not reveal that there were two episodes of Twitter commentary, and Defendants' complaint only made claims in reference to the second set, which easily fell within the one-year statute of limitations period. *See* Ariz. Rev. Stat. 12-541(1). Regardless, even though Defendants' attorney (a member of Dickinson Wright, a major, reputable law firm) concluded that there was a reasonable factual and legal basis to make these claims, Defendants complied with Plaintiffs' request and amended their Complaint. Defendants then pursued the defamation claims in a separate action not involving any third party plaintiffs or Plaintiffs herein. In effect, there was no defamation claim in the first lawsuit. Yet, Plaintiffs' drumbeat involving defamation continues incessantly in their Response [Resp. at pg. 5 n. 22].

Plaintiffs bludgeon Renee Ivchenko with irrelevant criminal history information, while conveniently ignoring that the charges against her were dismissed in the underlying case in question. [Compl. ¶ 61]. Therefore, she was not found guilty of *any* crime, regardless of any *preliminary* guilty plea required to participate in the diversion program (emphasis added). Plaintiffs also gratuitously insert Renee Ivchenko's booking photo in three separate sections of the Complaint. [Compl. ¶¶ 55, 66, 265]. This case is part and parcel of Plaintiffs' campaign to avoid liability under Arizona Revised Statute §§ 44-7901, 7902; Mugshot website operators; prohibited acts; exceptions (the "Arizona Mugshot Act"). The new law defines mugshot website companies as "mugshot website operators" and prohibits their operation for commercial purposes, which the law defines to include "any purpose in which the [mugshot website operator] can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record." A.R.S. § 39-121.03(D); A.R.S. § 44-7901(2).

Using the Complaint in this manner is designed to send a warning to anyone that dares to threaten Plaintiffs' commercial enterprise, and as such, violates the provisions of the Arizona Mugshot Act. Defendants are quintessential "mugshot website operator[s]", as defined by the Arizona Mugshot Act §§ 44-7902, 44-7901(4) ("'Mugshot website operator' means a person that publishes a criminal justice record on a publicly available internet website for a commercial purpose."). Based on their actions in previous cases involving Defendants and others, once they and their attorney have identified a party, they will see to it that this person's name, booking photo, arrest records, criminal justice files, police video, etc., will all be inserted in the pleadings as well as in the case caption, which then allows the case to get reported by various online reporting services, as well as posting the information on the home page of their mugshot websites. Even Defendants' attorney aids and abets his clients in this manner, by obtaining these records and posting copies of the pleadings in this case on his Twitter site.[1] Since there are "more than 20 million arrest records from 45 US states, including Arizona" on Plaintiffs' websites, [Resp. at pg. 2 n. 6], Defendants are under constant threat of litigation. In order to deter potential litigants, they will readily point out what they have done to others and their attorneys in Arizona. That alone will dissuade most people from pursuing their legitimate claims against Defendants.

Plaintiffs and their attorney rely heavily on using "doxing" as an intimidation strategy.[2] Doxing concerns publishing private or identifying information about a particular individual on the internet, typically with malicious intent. Plaintiffs understand that once a case is filed in Federal court, numerous online reporting services will publish it and a Google search of the party's name will produce all details of the case. Consequently, this case, along with Renee Ivchenko's booking photos and arrest records, are memorialized for eternity, short of the records being sealed by this Court. This effect is compounded by the actions of Plaintiffs' attorney on his Twitter site, as well as by Plaintiffs themselves, who misappropriated Defendants' names and published individual websites targeting them. [Compl. ¶¶ 264].

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1 See https://twitter.com/davidsgingras?lang=en.

2 See Julia M. MacAllister, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, Fordham L. Rev. (2017).

Accordingly, Renee Ivchenko's criminal history in paragraphs 34-67 should be stricken on the grounds that this information is scandalous, impertinent, and prejudicial, and not relevant to any cause of action as pled.

B. <u>Plaintiffs Do Not Explain How References to "The Copyright Application" are Relevant to Any Issue in this Action.</u>

Paragraphs 68 to 90 of the Complaint allege certain details surrounding a copyright application involving Renee Ivchenko. [Compl. ¶¶ 68-90]. This includes conclusory statements concerning the application, and claims that Defendants (one of whom is an attorney) violated one or more laws. [Compl. ¶¶ 69-70, 72, 74-77, 79-82, 84-90]. 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.

Plaintiffs know nothing about the facts and circumstances surrounding the copyright application, and engage in self-serving speculation and conjecture. Nowhere do Plaintiffs substantiate their accusation that either Defendant violated any laws in connection with the copyright application. As explained in Defendants' opening brief, Plaintiffs simply lack standing to even contest Renee Ivchenko's copyright registration. [*See* Opening Brief, p. 10]. *See also Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005).

Plaintiffs do not explain the relevance of the allegations that Defendants engaged in "fraudulent and criminal activity" in connection with the copyright application, arguing only that "they go directly to the very heart of whether the underlying suit lacked probable cause." [Resp. at pg. 9 n. 10]. If anything reveals the absurdity of Plaintiffs' pleadings, it would be this statement. Plaintiffs completely misrepresent the causes of action in the first complaint, which was amended to drop any references to a defamation cause of action involving Twitter postings. [Doc 1-3, Exhibit G]. Yet it is this exact Twitter activity and related cause of action for defamation, neither of which even existed in the amended complaint, that Plaintiffs solely rely on to support their WICP claims. [Resp. at pg. 9 n. 3].

Even if the amended complaint in the first lawsuit had included these allegations (it did not), Plaintiffs would still not be in a position to conclude that either Defendant engaged in "fraudulent and criminal activity." [Resp. at pg. 9 n. 5]. Even if Plaintiffs had a theory of how Defendants violated the law, Plaintiffs do not explain how that would be probative of any element of its First and Third causes of action against Defendants for WICP. [Compl. ¶¶ 179, 229]. Plaintiffs concede that their claims for WICP require them to prove that each Defendant acted without probable cause and acted with malice. [Resp. at pg. 5 n. 7]. However, Plaintiffs do not explain how vague allegations that Defendants engaged in "fraudulent and criminal activity" would tend to prove that either Defendant continued any claim in the two lawsuits in question without probable cause or with malice. [Resp. at pg. 9 n. 5].

Plaintiffs try to link the entire history of Renee Ivchenko's copyright registration and previous DMCA takedown requests involving unrelated parties by virtue of Plaintiffs' Seventh Cause of Action for "False DMCA Notice Liability." [Compl. ¶ 264]. Plaintiffs "fair use" argument is without merit, and will be addressed in a subsequent motion to dismiss. [Compl. ¶ 272]. However, references to "knowingly false material representations" or "falsely representing" [Compl. ¶¶ 269-270, 274], "unlawful" [Compl. ¶ 272], "fraud" [Compl. ¶¶ 273], and "intentionally omitted" or "misleading" [Compl. ¶¶ 275] should be stricken from the Complaint. *See Apolinar,* at *17-18.

Plaintiffs seem to suggest that it is Defendants' burden to prove their innocence in connection with these scurrilous accusations. [Resp. at pg. 5 n. 1]. Similarly, Plaintiffs argue, in a conclusory and illogical manner, that "[s]triking those points would be tantamount to granting summary judgment in Defendants' favor without any legal or factual basis for doing so." [Resp. at pg. 5 n. 18]. These arguments misunderstand the function of a Rule 12(f) motion to strike, which is "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). It is not to shift the burden to defendants to disprove the merits of irrelevant allegations. This argument also misunderstands the role of pleadings. Allegations do not give Plaintiffs license to hound Defendants until they prove their "innocence." It is Plaintiffs' burden to articulate an intelligible claim, and show a plausible entitlement to relief before it can take any discovery. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (U.S. 2007). So far, Plaintiffs have failed to do so.

Since allegations referencing the history of the copyright are prejudicial, as well as immaterial and inappropriate to the proof of the causes of action, Paragraphs 68 to 90 should be stricken from the Complaint, as well as paragraphs 269, 270, and 272-275. *See Apolinar*, 2008 U.S. Dist. LEXIS 113273 at *17.

III. CONCLUSION

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

- Paragraphs 34-67, including Exhibits A and B [Doc. 1-2];
- Paragraphs 68-90;
- References to "attempt to defraud" [Compl. ¶ 161], "fraudulent conduct" [Compl. ¶ 162], and conclusory statements regarding Defendants' knowledge [Compl. ¶¶ 96, 98, 109-113, 160]; and
- References to "knowingly false material representations" or "falsely representing" [Compl. ¶¶ 269-270, 274], "unlawful" [Compl. ¶ 272], "fraud" [Compl. ¶¶ 273], and "intentionally omitted," and "misleading" [Compl. ¶¶ 275].

RESPECTFULLY SUBMITTED this 9th day of April, 2021.

ANDREW IVCHENKO PLLC

By: */s/ Andrew Ivchenko*

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 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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