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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 FOR MORE DEFINITE STATEMENT

Plaintiffs Travis Grant, Mariel Grant, and Kyle Grant respectfully submit the following Response to Defendants' Motion for More Definite Statement (Doc. #20).

I. INTRODUCTION

Fairly summarized, Defendants' Motion for More Definite Statement is *not* actually a Motion for More Definite Statement. Rather, in substance, the pleading is hybrid of two other types of motions: 1.) a Rule 12(b)(6) Motion to Dismiss; and 2.) a Rule 56 Motion for Summary Judgment.

Defendants' factual and legal objections notwithstanding, a Rule 12(e) motion is not a proper tool to raise these types of arguments. This is so because Rule 12(e) does not authorize a defendant to challenge the factual or legal merits of a claim. For that reason, as the Ninth Circuit has explained, "We encourage district courts to avoid resolving merits issues, especially fact-sensitive questions, on Rule 12(e) motions." *One Indus., LLC v. Jim O'Neal Distrib., Inc.*, 578 F.3d 1154, 1160 (9th Cir. 2009).

But challenging the merits of Plaintiffs' claims is exactly what Defendants' Rule 12(e) motion does. For that reason, and as explained further below, the motion is without merit and should be denied.

II. SUMMARY OF DISPUTE

Many (but certainly not all) of the background facts of this matter are set forth in the First Amended Complaint, and also in Plaintiffs' Response to Defendants' Motion to Strike (Doc. #22; filed 04/02/2021). In short, this action arises from a series of lawsuits filed by Defendants Andrew Ivchenko (an attorney) and his wife, Renee, against Plaintiff Travis Grant, his wife Mariel, and Travis's brother, Kyle Grant.

Specifically, Mr. Ivchenko filed and/or instigated[1] seven (7) prior cases against the Grants in the Maricopa County Superior Court as reflected in the chart below. Here, the Grants allege three of these prior actions were brought and pursued without probable cause, with malice, and for improper purposes.

Before discussing other points, something important must be noted—not all of these prior cases are directly relevant here. Specifically, only three of these cases (Cases 1, 2 & 3) are part of the malicious prosecution/abuse of process claims in this matter. Cases 4 and 5 are not implicated at all here. Case 6 was dismissed by the Superior Court on April 1, 2021, and Case 7 has not yet been served. Thus, only the first three cases are part of the malicious prosecution/abuse of process claims here.

	Case Number	Party / Business Name
1	CV2019-015355	Grant, Travis - DOB: N/A
2	CV2019 090493	Grant, Travis DOB: N/A
3	CV2020-055202	Grant, Travis - DOB: N/A
4	CV2020-055722	Grant, Travis - DOB: N/A
5	CV2020-093006	Grant, Travis - DOB: N/A
6	CV2021-090059	Grant, Travis - DOB: N/A
7	CV2021-090710	Grant, Travis - DOB: N/A

[1] Mr. Ivchenko was neither a party nor counsel of record in Cases 4 & 5. Those cases were filed by a different lawyer/firm. Despite this, Mr. Ivchenko claims the plaintiffs in Cases 4 & 5 were "his clients" and that he was working closely with the firm that filed those matters. However, Cases 4 & 5 were resolved separately, so they are not relevant to any of the claims or issues in this matter.

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Also, just to be clear—the above chart (from the MCSC website) lists each case according to their Superior Court case numbers, but the first two matters are not in chronological order. For reasons unknown, the Superior Court Clerk assigned non-sequential case numbers to the first two matters, so the first chronologically filed case (CV2019–090493; filed May 9, 2019) appears as Case 2 on the chart while the second chronological case (CV2019–015355; filed December 17, 2019) appears as Case 1. Despite this, each case is referenced in the Complaint in proper chronological order.

Viewed in proper context, although this case does have some factually complicated aspects, the story is relatively straightforward. At its core, this case is about a lawyer (Mr. Ivchenko) who made a fateful decision to do *anything* necessary (legal or illegal) to remove his wife's mugshot from the Internet. As explained in the Complaint and as part of that effort, Plaintiffs allege Mr. and Mrs. Ivchenko engaged in two different but related courses of illegal conduct trying to hide Mrs. Ivchenko's mugshot from public view and to harass anyone who dared to publish it.

The first course of conduct involved filing groundless litigation against Travis, his wife, and his brother, simply because Travis owns a website that archives criminal records. In two separate cases, Mr. and Mrs. Ivchenko sued the Grant family for defamation and related claims, even though they knew the underlying statements about Mrs. Ivchenko's arrest were completely and entirely true. In this way, Mr. and Mrs. Ivchenko unlawfully abused the legal system seeking to accomplish an improper goal—suppressing and punishing the publication of truthful, lawful speech simply because Mr. and Mrs. Ivchenko were embarrassed by it.

The second course of conduct is related, but separate. Specifically, as alleged in paragraphs 68–90 of the First Amended Complaint, after Mrs. Ivchenko was arrested in April 2018 and her mugshot was taken (and then published online) by the Maricopa County Sheriff's Office, Mr. Ivchenko applied to register the image with the United States Copyright Office. In that application, Mrs. Ivchenko falsely claimed Mrs. Ivchenko was the "author" of her mugshot and thus owned exclusive rights to it.

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Unfortunately, the Copyright Office operates on the honor system, so Mr. Ivchenko's application was accepted at face value and a certificate of registration was issued in Mrs. Ivchenko's name. Once he obtained this registration certificate, Mr. Ivchenko sent numerous DMCA-based takedown demands to websites hosting Mrs. Ivchenko's mugshot. In these demands, Mr. Ivchenko falsely stated that Mrs. Ivchenko owned the copyright to her mugshot, and he falsely claimed that each website infringed Mrs. Ivchenko's exclusive rights in her mugshot.

The copyright application and registration certificate are directly relevant here for two reasons. First, in his prior defamation lawsuit against the Grants, Mr. Ivchenko claimed the Grants defamed him by publishing statements on Twitter which accused Mr. Ivchenko of committing "fraud" on the Copyright Office in the course of obtaining the registration certificate for Mrs. Ivchenko's mugshot. *See* FAC ¶ 110. As part of his defamation claim against Travis and his family, Mr. Ivchenko specifically alleged the "fraud" allegation was "completely false" and thus actionable.

As it happens, the statements regarding fraud were *not* written nor posted by the Grants; they were posted by an unknown third party. The Grants had nothing whatsoever to do with posting these comments on Twitter (which is a separate reason why Mr. Ivchenko's claims in the underlying action lacked probable cause).

However, putting that fact aside, the Grants claim Mr. Ivchenko knew the statements accusing him of "fraud" were entirely *true*—i.e., he made materially false statements to the U.S. Copyright Office claiming that Mrs. Ivchenko was the author of her own mugshot when, in fact, he knew she was not. Assuming the evidence proves these allegations are true, this supports a finding that Mr. Ivchenko lacked probable cause to sue the Grants for defamation based on the alleged statements accusing Mr. Ivchenko of committing fraud on the Copyright Office. This is so because, by definition, a completely true statement cannot support a defamation claim.

The copyright application is also relevant in a second way. As alleged in FAC ¶¶ 264–282, after this matter was filed, on March 12, 2021, Mr. Ivchenko sent a

DMCA-based takedown demand to GoDaddy, which hosted a website owned and operated by Travis. In this demand, Mr. Ivchenko informed GoDaddy that Travis's website contained content (Mrs. Ivchenko's mugshot) which "infringed" Mrs. Ivchenko's rights. Travis alleges this takedown demand violated 17 U.S.C. § 512(f).

Plaintiffs recognize that due to the lengthy background history, the original and First Amended Complaints in this matter are long and detailed. Thus, the story might, at least initially, be a little hard to follow.

Nevertheless, the FAC is sufficiently clear to meet the low requirements of Rule 8. To the extent Mr. Ivchenko feigns confusion about the precise nature of the claims against him, the remedy is not relief under Rule 12(e). Instead, Mr. Ivchenko can simply serve discovery requests seeking additional information and clarification.

III. DISCUSSION

The rules for responsive pleadings are simple. If a Complaint does not contain sufficient facts to state a plausible claim, the defendant may move to dismiss under Rule 12(b)(6). If the Complaint *does* contain enough facts to state a claim, but those facts are untrue or have no evidentiary basis, the defendant can move for summary judgment under Rule 56.

In rare instances, a Complaint may be so vague and lacking in detail that it is not possible for the defendant to understand the nature of the case. In that uncommon scenario, a defendant can move for a more definite statement under Rule 12(e). But a Rule 12(e) motion may *not* be used to raise factual challenges to the Complaint, nor may it be used to test the legal sufficiency of a cause of action:

> Rule 12(e) is designed to strike at unintelligibility rather than want of detail. Such motions are not favored by the courts "since pleadings in the federal courts are only required to fairly notify the opposing party of the nature of the claim." A motion under Rule 12(e) <u>should not be used to test an opponent's case by requiring them to allege certain facts or retreat from their allegations</u>.

Resolution Tr. Corp. v. Dean, 854 F. Supp. 626, 648–49 (D. Ariz. 1994) (cleaned up) (emphasis added) (citing authorities).

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Here, Defendants' motion does *exactly* what Rule 12(e) prohibits—it seeks to challenge the factual and legal sufficiency of Plaintiffs' claims, not the Complaint's "intelligibility". For that reason, the motion should be denied.

a. Attempts to Dispute The Facts Are Improper

Rule 12(e) gives the Court discretion to order a more definite statement, but only when the Complaint is so vague or confusing that it fails to meet the low notice pleading requirements of Rule 8; "Rule 12(e) motions are ordinarily restricted to situations where a pleading suffers from unintelligibility rather than want of detail, and <u>if the requirements of the general rule as to pleadings are satisfied and the opposing party is fairly notified of the nature of the claim, such motion is inappropriate</u>." *Xcentric Ventures LLC v. Borodkin*, 2012 WL 2919539, *3 (D.Ariz. 2012) (cleaned up) (denying defendant's Motion for More Definite Statement in a malicious prosecution action) (emphasis added).

Here, Mr. Ivchenko's motion does not attack the Complaint's "intelligibility". Instead, most, if not all, of his argument is focused on disputing the factual allegations against him. This is simply improper in a Rule 12(e) motion.

For example, after six introductory pages explaining his version of the events giving rise to this matter, Mr. Ivchenko begins by walking through each cause of action separately, explaining why each one fails to state a claim for various factual or legal reasons. Beginning on page 7 of his motion, Mr. Ivchenko claims to be confused about the exact *nature* of the case because: "Although styled as a count for 'malicious prosecution', Plaintiffs cause confusion by also referring to this action as one for 'wrongful use of civil proceedings.'" Mot. at 7:3–5.

If Mr. Ivchenko is actually confused by this issue, his confusion is not fairly attributable to the Complaint's "unintelligibility". Indeed, both the original and First Amended Complaints clearly and specifically explain: "Arizona recognizes the tort of 'malicious prosecution' *which is also sometimes referred to as a 'wrongful use of civil proceedings.'*" FAC ¶ 179 (emphasis added).

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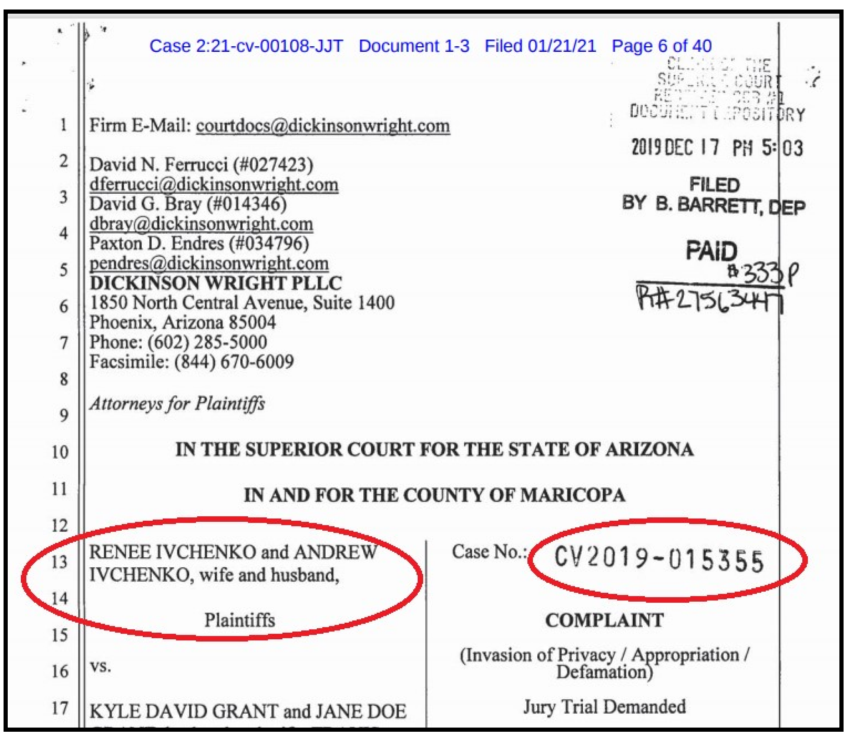
Next, Mr. Ivchenko argues the term "malicious prosecution" only applies in the *criminal* context and "the proper term in the civil context is the wrongful institution (or use) of civil proceedings ("WICP"). But this argument is both legally wrong[2] and simply irrelevant to the question of whether the Complaint is so unintelligible that Mr. Ivchenko cannot fairly respond to it. Indeed, despite nit-picking over the nominal designation of the claims, Mr. Ivchenko still correctly explains the standard typical elements of the malicious prosecution tort, clearly showing that he understands the nature of the claim.

Despite this, Mr. Ivchenko attempts to dispute the *facts* by claiming, for example, "Defendant Andrew Ivchenko was neither a party nor the attorney of record in what Plaintiffs call 'Case 2' … ." Mot. at 7:24–26 (emphasis added). That bold assertion directly contradicts both the allegations in the Amended Complaint (*see* FAC ¶ 107), as well as the actual Complaint from Case 2 itself (attached as Exhibit E to the original Complaint in this matter at ECF Doc. 1–3, page 6 of 40), shown below.


Case 2:21-cv-00108-JJT Document 1-3 Filed 01/21/21 Page 6 of 40

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

RENEE IVCHENKO and ANDREW IVCHENKO, wife and husband,

Plaintiffs

vs.

KYLE DAVID GRANT and JANE DOE

Case No.: CV2019-015355

COMPLAINT

(Invasion of Privacy / Appropriation / Defamation)

Jury Trial Demanded

[2] The FAC specifically notes that the current Revised Arizona Jury Instructions use the term "Malicious Prosecution" when describing the elements of a claim arising from *either* a wrongful criminal or civil action. *See* FAC ¶ 180.

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In all candor, putting aside the fact that it is patently improper for a defendant to use a Rule 12(e) motion to challenge the factual allegations of the Complaint, it is difficult to understand how Mr. Ivchenko can argue that he was *not a party to Case 2*, when the pleading itself clearly shows he was a party, exactly as Plaintiffs have alleged – his name is right there in the caption!

His efforts to muddy the waters notwithstanding, it appears Mr. Ivchenko is trying to confuse the issues by focusing on the fact that after Case 2 was filed, and after the Grants filed an Answer and a Motion for Summary Judgment, the Complaint in Case 2 was amended (without leave of Court). In the Amended Complaint, Mr. Ivchenko dropped all his claims and removed himself from the case caption, thus effectively dismissing his part of the action.[3] Mr. Ivchenko appears to believe that because the Amended Complaint is technically viewed as "superseding" the original Complaint, that means he cannot be liable for malicious prosecution based on his role in initially commencing and prosecuting Case 2 because after the case was commenced and before it ended, he attempted to voluntarily abandon his claims.[4]

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[3] Mr. Ivchenko's motion argues the Grants somehow "ignore" this amendment; "This is where Plaintiffs engage in a clever slight of hand. Not only do they ignore that the original Complaint … was amended, they falsely accuse Defendants of unspecified actions involving the original Complaint." Mot. at 7:28–8:3. But once again, Mr. Ivchenko's argument is not consistent with reality. Rather than "ignoring" this point, the Amended Complaint in this matter expressly discusses the amendment in Case 2, even referring to it as "Case 2(b)". See FAC ¶ 135–144.

[4] Under Rule 41(a)(1)(A)(i), a plaintiff cannot unilaterally dismiss an action without leave of Court after the opposing party has filed an Answer or a Motion for Summary Judgment. Here, Mr. Ivchenko violated Rule 41 by filing an Amended Complaint in which he attempted to abandon all of his claims while adding claims by 20 new anonymous Plaintiffs identified only as "John Does" and "Jane Does". This effectively resulted in Mr. Ivchenko dismissing his claims in a manner prohibited by Rule 41. If this practice was allowed, an unscrupulous litigant could always escape liability for malicious prosecution by filing a groundless action, litigating it aggressively, and then just prior to losing on summary judgment, he simply "amends" the Complaint to remove himself from the caption and substitute one or more anonymous plaintiffs in his place, thus effectively dismissing his case in violation of Rule 41. Plaintiffs contend this practice is *not* lawful or proper.

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Once again, this argument simply has no place in a Rule 12(e) motion because Mr. Ivchenko is *not* claiming that he does not understand the nature of the case against him. Rather, he is attempting to dispute the merits of the case by arguing Plaintiffs cannot show a mandatory element of the malicious prosecution tort; e.g., that Case 2 was "terminated in their favor". But Mr. Ivchenko's argument on this point is simply wrong as a matter of both fact and law.

Factually, the FAC alleges Case 2 was terminated in favor of the Grants. *See* FAC ¶¶ 182–83. Legally, the fact that Mr. Ivchenko tried to abandon his claims by amending the Complaint months after the action was commenced and several weeks after the Grants filed an Answer and a Motion for Summary Judgment does not preclude his liability nor does it demonstrate a lack of favorable termination.

This is so because a plaintiff who files a groundless action and then abandons his/her claims, by voluntary dismissal or otherwise, may still be liable for malicious prosecution to exactly the same extent as a plaintiff who litigates their claims through a trial or other final resolution: "A <u>voluntary dismissal</u> of a civil action or proceeding by the plaintiff therein … though expressly made 'without prejudice,' <u>is a favorable termination which will support an action for malicious prosecution</u>." *MacDonald v. Joslyn* 275 Cal.App.2d 282, 289, 79 Cal.Rptr. 707, 711 (Cal.App. 1969) (emphasis added) (collecting cases); *see also Minasian v. Sapse*, 80 Cal.App.3d 823, 826, 145 Cal.Rptr. 829, 831] (Cal.App. 1978) ("(I)t is now the well-established rule that <u>a verdict or final determination upon the merits</u> of the malicious civil suit or criminal prosecution complained of <u>is not necessary</u> to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been legally terminated.") (emphasis added) (citing authorities).

Here, the original and Amended Complaints are clear—Mr. Ivchenko commenced a civil proceeding against the Grants which lacked probable cause and which he pursued with malice. Whether that case was resolved by summary judgment, a jury verdict, or simply a voluntarily dismissal ultimately does not matter.

If Mr. Ivchenko challenges this *legal* contention, he is free to raise that argument in a Rule 12(b)(6) motion. But there is simply no need at this point for relief under Rule 12(e) because Mr. Ivchenko's motion demonstrates that he understands the nature of the allegations against him.

b. The Complaint's Allegations Of Malice Via Extortion Are Sufficient

On page 10 of his motion, Mr. Ivchenko notes the Complaint accuses him of acting maliciously and with a goal of achieving an improper purpose because he sought to use litigation to "extort" something of value from Travis—2,400 "removal credits" which would allow Mr. Ivchenko to exercise editorial control over Travis's website by forcing Travis to remove individual mugshot pages. The FAC explains the factual basis for that claim as follows:

> Prior to the commencement of this [malicious prosecution] action, Mr. Ivchenko demanded that Plaintiffs provide him with 2,400 "removal credits" which he could use to obtain the removal of 2,400 mugshots from Travis's websites. Assuming each credit could be sold for $1,000 each, the value of this demand was at least $2,400,000.00.

FAC ¶ 207.

Mr. Ivchenko claims he cannot respond to this allegation because "Plaintiffs provide *no facts* showing how these numbers were arrived at, or that any demand at all was made in either case." Mot. at 10–12 (emphasis in original). But once again, these arguments do not support relief under Rule 12(e) because Mr. Ivchenko is not claiming that he does not *understand* the allegations. Rather, his position is that he disputes these allegations. As such, relief under Rule 12(e) is not necessary; Mr. Ivchenko can simply file a Rule 56 Motion for Summary Judgment claiming that there is no evidence to support the allegation in ¶ 207 of the FAC.

But the truth is that Mr. Ivchenko is not confused about these allegations nor does he actually believe the allegations lack evidentiary support. Instead, he is simply misrepresenting the facts to the Court in an effort to escape liability. Specifically, contrary to Mr. Ivchenko's suggestion that "Plaintiffs provide *no facts* showing how these numbers were arrived at, or that any demand at all was made in either case", Mr. Ivchenko knows exactly what occurred here.

Although it is generally improper for the Court to consider evidence outside the pleadings at this stage, attached hereto as Exhibit A is a copy of a settlement demand made by Mr. Ivchenko on November 23, 2020. In this demand, Mr. Ivchenko stated that he represented 53 different individuals with claims against the Grants. To resolve those claims, Mr. Ivchenko asked for a cash payment of $240,000 *or, alternatively*, for 2,400 "additional removals" from Travis's website that Mr. Ivchenko's firm could use in the future.[5]

> The plaintiffs would receive monetary damages of $240,000, to be paid out over 12 months, or alternatively, 2400 additional removals from the defendants' websites that my firm can use to fund the settlement pool and address the needs of the many people who have reached out to us, and will likely continue doing so. Even though I cannot ethically agree not to litigate on a client's behalf, there would be no reason to do so with the removals available.

Aside from this demand, Plaintiffs have other evidence which they believe shows Mr. Ivchenko intended to sell these removal credits to third parties for at least $1,000 each (or more), meaning the actual value of his demand was at least $2.4 million. Of course, settlement offers are inadmissible for certain purposes under Rule 408, but in the context of a malicious prosecution action, this type of demand is admissible for other purposes including establishing malice. *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420–21 (1988) (holding settlement offer in

[5] One incredible irony in this story is the fact that Mr. Ivchenko has ruthlessly attacked Travis and his family as criminals and "scum" because Mr. Ivchenko accused them (falsely) of charging money to remove mugshots from Travis's website. Mr. Ivchenko has claimed this sort of conduct is "shameful", "despicable" and "illegal" (even though Travis does not charge money to remove content from his site).

Despite this, the evidence will show that Mr. Ivchenko hoped to use the pressure of endless litigation to force Travis to give Mr. Ivchenko the power to do exactly what he (Mr. Ivchenko) claimed was illegal and unethical – i.e., Mr. Ivchenko hoped to put himself in a position where he could charge money to people who wanted to remove their mugshots from Travis's website. The hypocrisy of that position is astonishing.

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malicious prosecution action not barred by Rule 408 when offered to show the defendant's "knowledge and state of mind").

If Mr. Ivchenko believes that his demand for 2,400 "removal credits" is not admissible, or that it is not evidence of malice or his improper purpose, he can certainly raise that argument in a Rule 12(b)(6) motion or some other pleading. But clearly, Mr. Ivchenko does not need relief under Rule 12(e) to understand the nature of these allegations.

c. Abuse Of Process

On pages 11–12 of his motion, Mr. Ivchenko attacks Plaintiffs' claim for abuse of process. But none of his arguments are based on his *inability to understand* the nature of the claims against him. Instead, the ONLY argument Mr. Ivchenko offers is that the Complaint does not contain sufficient facts to state a claim for abuse of process.

Again, this circular argument shows there is no need for relief under Rule 12(e). Instead, if Mr. Ivchenko believes the Complaint lacks sufficient factual support to state a cause of action for abuse of process, there is no reason he cannot make that argument in a motion under Rule 12(b)(6).

d. Declaratory Relief & *Rooker—Feldman* Issues

On pages 14–15 of his motion, Mr. Ivchenko argues that the FAC's fifth cause of action (for declaratory relief) is improper because there is no *current* dispute between the parties regarding their respective rights, duties, and obligations (even though the Grants claim otherwise). Once again, this is <u>not</u> a challenge to the Complaint's intelligibility; it is a challenge the Complaint's factual and legal merit. This type of argument simply has no place in a Rule 12(e) motion.

Having said that, Plaintiffs will offer some brief comments. First, Mr. Ivchenko repeatedly suggests that there is no *current* dispute between the parties, while simultaneously noting there is *other pending litigation* in state court involving the same parties and the same issues. Without ever actually saying so, Mr. Ivchenko

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appears to be arguing the claim for declaratory relief in this case is barred by the *Rooker—Feldman* doctrine; i.e., he seems to be saying the Grants are using this federal claim as a way of improperly *appealing* adverse rulings against them in the state court proceedings filed by Mr. Ivchenko; "This Cause of Action [for declaratory relief] is simply a naked attempt by Plaintiffs to get this Court to buy off on their substantive legal arguments, which they are already making in pending State court actions …" Mot. at 15:18–20 (emphasis added).

To be clear—Mr. Ivchenko's argument is based on a misrepresentation of the facts and a misunderstanding of the law. Factually, when reading the current motion, the Court may be left with the impression that there are one or more active pending matters in state court involving Mr. Ivchenko's claims against the Grants, and that this federal action has been brought as a collateral "appeal" of adverse rulings made by the state court. That is simply not true.

At the time this matter was filed on January 21, 2021, and referring to the chart of cases appearing on Page 2 above, there were then two pending matters in state court filed by Mr. Ivchenko—Case 6 (CV2021–090059) and Case 7 (CV2021–090710). Although filed separately, both matters were assigned to the same judge; Hon. Tracey Westerhausen.

Far from representing an improper federal "appeal" from adverse rulings in state court, on April 1, 2021, Judge Westerhausen issued an order *dismissing* Case 6, finding the claims were barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1). A copy of the Court's order is attached hereto as Exhibit B. Although this ruling did not technically terminate Case 7, it is fairly evident that because the Complaints in both cases were identical, Judge Westerhausen would likely also dismiss Case 7 for the same reason. This might also explain why Mr. Ivchenko has never served the Complaint and Summons in Case 7.

Legally, the mere fact that Mr. Ivchenko *might* choose to serve Case 7 at some future point and that some of the same legal arguments may overlap between the state

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and federal actions does not show the *Rooker—Feldman* doctrine applies. On the contrary, parallel litigation of similar issues in federal court is entirely proper; "The rule that permits simultaneous litigation in state and federal court of overlapping and even identical cases is deeply rooted in our system." *Noel v. Hall*, 341 F.3d 1148, 1159 (9th Cir. 2003) (citing, *inter alia*, *Green v. City of Tucson*, 255 F.3d 1086, 1097–98 (9th Cir. 2001) (en banc) (holding parallel state and federal litigation is inherent in our legal system, and "the possibility of duplicative litigation is a price of federalism").

In any case, because the Grants have *prevailed* in the state court action and are not asking this Court to *overturn* any prior rulings by the state court, the *Rooker—Feldman* doctrine is not implicated at all. *See Bitsui v. Rassas*, 2021 WL 1255549, at *2 (D.Ariz. 2021) (explaining, "If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker–Feldman* bars subject matter jurisdiction in federal district court.") (citing *Noel*, 341 F.3d at 1164 (advising, "*Feldman* is likely to apply primarily in cases in which the state court both promulgates and applies the rule at issue—that is, to the category of cases in which the local court has acted in both legislative and a judicial capacity—and *in which the loser in state court later challenges in federal court both the rule and its application*.")) (emphasis added).

Here, the Grants did not "lose" in state court, nor are they asking this Court to reverse any rulings made by the state courts. Instead, Mr. Ivchenko has repeatedly threatened to file *additional* litigation in the future against Plaintiffs (and undersigned counsel) on behalf of himself and his wife for various perceived wrongs. The claim for declaratory relief in this matter seeks to resolve that current dispute once and for all by asking this Court to review the facts and the law and to determine that Mr. and Mrs. Ivchenko have no further claims against Plaintiffs based on the conduct complained of by Mr. Ivchenko in his threats. This is an entirely appropriate use of declaratory relief.

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e. Vexatious Litigant Issues

Finally, on pages 15–16 of his motion, Mr. Ivchenko argues the Complaint's sixth cause of action (seeking an order declaring that Mr. and Mrs. Ivchenko are vexatious litigants) fails to state a viable claim for relief. As is true of literally every other argument presented by Mr. Ivchenko, this is simply *not* a request for a more definite statement under Rule 12(e) because Mr. Ivchenko is not suggesting that he cannot understand the nature of the claim. Instead, his sole argument is that the sixth cause of action is not viable as a matter of fact and/or law.

In that case, Mr. Ivchenko should present his arguments in a motion under Rule 12(b)(6) which this Court may then consider and resolve under the traditional and familiar Motion to Dismiss standards.

IV. CONCLUSION

As explained above, Defendants' motion does not seek additional information due to any lack of clarity in Plaintiffs' Complaint. Rather, Defendants are simply disputing liability for various factual and legal reasons. These arguments have no place in a motion under Rule 12(e). Indeed, given the exceptionally contentious nature of this proceeding and the unfortunately difficult history between the parties, it is clear that no amount of additional facts or information will *ever* satisfy Mr. Ivchenko.

For that reason, the Court should deny the instant motion by finding that the First Amended Complaint contains sufficient facts to meet the low notice pleading requirements of Rule 8. Of course, such a finding would not preclude Mr. Ivchenko from raising whatever arguments he may have in either a subsequent Rule 12(b)(6) Motion to Dismiss or a Rule 56 Motion for Summary Judgment.

DATED: April 13, 2021.

GINGRAS LAW OFFICE, PLLC

David S. Gingras, Esq.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 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:

Andrew Ivchenko, Esq.
LAW OFFICES OF ANDREW IVCHENKO
4960 S. Gilbert Road, #1-226
Chandler, AZ 85249
Attorney for Defendants

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

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Exhibit A

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E-mail: aivchenkopllc@gmail.com

November 23, 2020

David S. Gingras
Gingras Law Office, PLLC
4802 E. Ray Road, #23-271
Phoenix, AZ 85044

Re: Settlement proposal

Dear Mr. Gingras,

My clients have requested that I explore settlement options with your clients before proceeding with another round of litigation in state court along the lines outlined in my e-mail to you dated November 20, 2020. There is a small window of opportunity before I combine these clients and my efforts with the other law firm litigating against you in Arizona.

In the interests of bringing the case involving your clients to a speedy and just conclusion, I have been authorized by my clients to make the following settlement offer. Please consult with your clients, give this settlement offer all due consideration, and contact my office with your response by Friday, November 27, 2020. During this time, my clients from the recently dismissed Federal court action (No. 20-CV-01142-SMB) will hold off on any further litigation.

This offer applies to 53 individuals I represent, including the 20 plaintiffs in the recently dismissed Federal case. Please be aware that this offer does not indicate liability on anyone's part and as such cannot be used to prove or disprove any party's claims against the other.

Please allow me to recap some of the legal issues involving your clients. As you know, this case has gone through numerous iterations since its inception and there are several motions currently pending in two related cases through another law firm. It is our belief that your clients will not prevail in these motions, and that additional litigation will ensue in either (or both) state and federal forums. Moreover, you have asserted defenses under § 230 of the Communications Decency Act. That issue was thoroughly briefed in your previous motion for summary judgment in a related case, and I believe that you will not prevail, especially in state court. You had two separate opportunities to have a court (including a Federal court) decide that issue in a previous case involving the Dickinson Wright law firm, and you punted both times. (See e.g., Federal case No. 20CV-00674-PHX-MTL, Document 9, Notice of Pending Motion). That alone refutes your constant argument that these cases are somehow frivolous, and this conclusion was further

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reinforced when you did not object to those plaintiffs being dismissed without prejudice when they sought to join my parallel state court action (subsequently removed to Federal court).

Note that § 230 has never been successfully invoked by a mugshot company in litigation, including cases in California, Illinois and Florida similar to this one. Should the court rule against your clients on that issue, you likely would not be able to immediately appeal that decision. However, regardless of the eventual outcome, it is apparent that the losing party would appeal any adverse ruling. This will require more time and expense, and even were you to ultimately prevail a few years down the road, a favorable ruling in Arizona (or even in the 9th Circuit) would be of limited utility for your clients to use as precedent in other jurisdictions.

In addition, your constitutional arguments are long shots at best. The chances of having a statute invalidated on constitutional grounds at the state trial court level are extremely low – most lawyers go through their entire career and never achieve that result. Have you ever accomplished that feat? Moreover, you are in effect trying to invalidate similar statutes that have been vetted and passed by over a dozen state legislatures. The trend is clearly against you, and you would in effect be fighting the Arizona Attorney General and several other organizations that would file amicus briefs on our behalf.

As I have stated, the law firms that have been involved in these cases intend to consolidate their efforts. Once we file the next actions we intend to motion for partial summary judgment on liability under A.R.S. § 44-7901 ("Arizona Mugshot Act") on behalf of all plaintiffs as soon as legally permissible. Based on the evidence developed to date, you simply have no colorable argument that your clients do not fall within the definition of "mugshot website operators" who face substantial penalties under the Arizona Mugshot Act. This would subject them to extensive minimum damages of over $180,000 per affected individual for the past 12 months. If we were to apply the statute to Arizona residents only (around 30 people), a judgment of $5.4 million is not out of the question. Even if each client files individually and formally disclaims any damages over $75,000, your clients would be looking at $2.25 million in damages.

Also bear in mind that a judgment against your clients is likely not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(6), "for willful and malicious injury by the debtor to another entity or to the property of another entity…", so if we go down that road and you lose, the judgment will follow them for the rest of their lives until it is paid. This could include any other parties found during the discovery process that are involved in your clients' business. Your clients can determine if this is a risk they are willing to take, but they are free to make their own decision. Under Section 523, "maliciousness" may be implied from circumstances surrounding the debtor's conduct, even without proof that the

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debtor acted with spite, hatred or ill will toward the victim. *In re Ormsby*, 591 F.3d 1207 (9th Cir. 2010).

It is clear that in enacting the Arizona Mugshot Act, the legislature intended to send a message to mugshot website operators such as your clients to stop publishing the arrest records and booking photos of Arizona residents. You have already notified the Arizona Attorney General's office in the current case in Federal court. If that case proceeds further (now that you formally questioned the constitutionality of the Arizona Mugshot Act), it is likely that your clients will be in their crosshairs. The magnitude of your clients' exposure, coupled with their unsympathetic nature, should give them pause in proceeding in this forum.

Do not underestimate what you are up against tangling with the Arizona Attorney General. The Arizona Mugshot Statute is basically consumer protection oriented, and it is only a matter of time before the AG moves against any such company or individuals operating in Arizona. Even a cursory review of the AG's website shows that multi-million dollar settlements are not uncommon (see https://www.azag.gov/press-releases). The imposition of such large, minimal penalties under the statute creates a presumption that mugshot website operators cause continuing, daily harm to the affected individuals. The Arizona Mugshot Act requires a minimal showing that the plaintiffs are "adversely affected" by your clients' activities. We will provide the court with affidavits and/or testimony from these clients that will more than meet this standard. Although we do not have to make much of a showing under the statute, many plaintiffs have lost jobs, relationships, and suffered humiliation in the eyes of their peers. I doubt the court will be very sympathetic to your clients, especially in light of the current national crisis.

Of course, there are always counter arguments and civil litigation can go on for many years, which is great for the lawyers, but not always for the litigants. In order to expedite an amicable agreement, we propose a framework for settlement, and then negotiate the details. As a minimum, all plaintiffs would have their booking photos and arrest information removed from any and all of your clients' websites, and then destroyed. Your clients would agree to never publish any of this information, either directly or indirectly, in any medium, or disclose them to third parties. An agreement would need to have a liquidated damages provision for any violation of its terms. Mutual releases and other standard terms would be included.

The plaintiffs would receive monetary damages of $240,000, to be paid out over 12 months, or alternatively, 2400 additional removals from the defendants' websites that my firm can use to fund the settlement pool and address the needs of the many people who have reached out to us, and will likely continue doing so. Even though I cannot ethically agree not to litigate on a client's behalf, there would be no reason to do so with the removals available.

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I would suggest that you consider something else. It would appear that in light of our laws, Arizona is one of the last states where your clients should be operating and making a legal stand. There is little benefit for your clients to litigate here considering the prospect of years of very public litigation (including appeals) and the risk of a substantial, life-altering money judgment just to post arrest records from Arizona residents. The Arizona legislature has made it clear that mugshot website operators need to just leave our residents alone. If your clients would in fact follow this prudent course, it would have little impact on their business and they would live to fight another day. Moreover, there would be no reason for any of the current cases to continue, and within a short time the statute of limitations would expire and there would be no liability at all. Although not part of my settlement proposal, it is something to consider.

It appears as though you have developed animosity towards me, and this may be influencing your perspective. On a professional level, I urge you to counsel your clients to also consult with another attorney and obtain an additional perspective on this proposal.

Thank you for your consideration. I urge you to take this settlement offer to your clients in the spirit in which it is offered. I will look forward to your affirmative response.

Sincerely,

Andrew Ivchenko, Esq.

Exhibit B

Clerk of the Superior Court
*** Electronically Filed ***
04/01/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-090059 03/31/2021

HONORABLE TRACEY WESTERHAUSEN

CLERK OF THE COURT
C. Avena
Deputy

JOHN DOE

v.

TRAVIS PAUL GRANT, et al.

ANDREW IVCHENKO

DAVID S GINGRAS

KYLE DAVID GRANT
100 MYRTLE ST # 304
LONGWOOD FL 32750
JUDGE WESTERHAUSEN

MINUTE ENTRY

Ruling denying in part and granting in part Defendants' Motion to Dismiss.

According to his Complaint, Plaintiff John Doe was arrested in March 2018 by the Maricopa County Sheriff's Office. Item 1, Para. 25 ("Item" refers to the document's number in iCIS, the in-house docketing system used by the Court and the Clerk) 1/6/2021 Filing ID 12397422. Following the arrest, the sheriff's office photographed Doe. The sheriff's office made the photograph (the "mugshot") publicly available on a government website. Item 1, Para. 26. Doe alleged that Defendants Travis Grant, Mariel Grant and Kyle Grant reside in Florida, and operate businesses in Florida. Item 1, Para. 14. Defendants own and operate websites that publish mugshots. Item 1, Para. 14. They published Doe's mugshot on the websites. Item 1, Para. 28.

Doe sued under the mugshot statutes, A.R.S. §§ 44-7901 and 44-7902. He claimed irreparable injury, damages and statutory damages from the publication of his mug shot.

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Two Defendants, Travis and Mariel Grant, have been served with the Complaint, and they filed a Motion to Dismiss for Lack of Personal Jurisdiction. Item 16 2/17/2021 Filing ID 12553509. Plaintiff responded, "Plaintiff's Response to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction," Item 25 3/8/2021 Filing ID 12630019. The defense replied, "Reply in Support of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction." Item 27 3/11/2021 Filing ID 12643274. The Court held oral argument on March 22, 2021.

Under the mug shot statutes, "A mugshot website operator that publishes a subject individual's criminal justice record for a commercial purpose on a publicly accessible website is deemed to be transacting business in this state." A.R.S. § 44-7902.A. The defense calls this the "nexus" provision. The "deemed to be transacting business" phrase is an effort to confer personal jurisdiction in the Arizona state courts over the mug-shot web-sites. And the law, in its effort to confer jurisdiction, is valid, as long as the statute comports with federal constitutional law regarding personal jurisdiction. "Arizona's long arm statute is contained in Rule 4(e)(2) of the Arizona Rules of Civil Procedure and is intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States." *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 367 (1975). "(D)ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (internal punctuation omitted).

The parties agree on the test to be applied to determine whether the minimum contacts are sufficient:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997) (internal punctuation omitted).

On the first point, the words of the U.S. Supreme Court, written before the age of the internet, are still resonant:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not ***physically*** enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the

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> reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (bold and italic in original).

The Court finds that a defendant who actively "scrapes[1]" the arrest details that the sheriff's office publishes on its website is purposely availing himself of the privilege of conducting activities in the forum (the first prong). This is true even though the defendant, as here, charges no fee to remove a mugshot. The only money that Defendants make in the instant matter is from Google, based on the number of views of each page and the number of views of each ad on the websites.[2]

John Doe claims to have suffered injury and damages in Arizona from the publication of his mug shot on Defendants' websites (the second prong of the test).

In looking at the activity – scraping the sheriff's office website – and the injury that Doe claims from that activity in Arizona, it is reasonable to exercise jurisdiction over Travis Grant (the third prong).

Travis Paul Grant is subject to the jurisdiction of this Court. Further, the Court finds that A.R.S. § 44-7902.A meets constitutional muster.

The Court finds, however, that Mariel Grant is not subject to the jurisdiction of this Court. She produced evidence that although her name appears in Florida public records as a manager of an entity, not named in the complaint, related to the web-sites, she has nothing to do with them. Thus, Mariel argues, she is not a "mugshot website operator" under the statutes.[3] Also, Florida is not a community property state. There is no basis to join her in this action.

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[1] Travis Grant's affidavit described the process this way, "After this information is published online by the arresting agency, my system uses software to automatically copy and compile the records into our database."

[2] Whether the commercial purposes (attracting third party advertisers to the website and generating pay-per-click advertising revenue) are prohibited by the mugshot act is not before the Court on this Motion.

[3] A.R.S. § 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."

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Finally, this Court does not see, as Doe does, *Macpherson v Taglione*, 158 Ariz. 309 (App. 1988) as similar. Unlike Mariel, Defendant Taglione was intimately involved in the subject business and the transaction in question.

All of the discussion above is moot, if Doe's state law claims under the mugshot statutes are pre-empted by federal law. The federal law in question is the Communications Decency Act of 1996, 47 U.S.C.A. § 230 ("CDA").

As the defense points out, Congress has largely preempted civil liability in the realm of interactive computer services, i.e., websites. "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C.A. § 230.e.4. Under the CDA, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C.A. § 230c.1.

Doe argues that the sheriff's office did not "provide" the mugshot information to Defendants under circumstances where the recipient (Defendants' websites) reasonably believed the information was tendered for publication.

That is reading into the CDA more than is there. There is no requirement that the sheriff's office made the mugshot information available for the very purpose of publishing (or republishing) on another website. This Court cannot re-write the statute. "Although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them because doing so would invade the legislature's domain." *In re Nickolas S.*, 226 Ariz. 182, 186, ¶ 18 (2011). Here, the domain isn't the state legislature, but Congress.

The Court agrees that the CDA pre-empts the mugshot act. The Court grants the Motion to Dismiss.