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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Grant, et al., Plaintiffs vs. Ivchenko, et al., Defendants.	No. 2:21-CV-00108-JJT **DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO FED. R. CIV. P. 12(e)** (Assigned To Hon. John J Tuchi)

Defendants Andrew Ivchenko and Renee Ivchenko ("Defendants") respectfully submit the following reply brief in further support of their motion for a more definite statement under Fed. R. Civ. P. 12(e). None of the arguments advanced by Plaintiffs Grant, *et. al*. ("Plaintiffs") in their response to Defendants' motion for a more definite statement ("Response" or "Resp.") warrant denying the motion. Moreover, preliminary relief through this motion is necessary to properly respond to the Amended Complaint ("Complaint") and frame a motion to dismiss, particularly in relation to the issues of lack of probable cause and malice. 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.

I. PRELIMINARY STATEMENT

The underlying facts of this matter are discussed in other concurrently-filed pleadings, so they will not be repeated in full here. As noted in those other pleadings, Plaintiffs' Complaint asserts a veritable blizzard of confusing, illogical and overlapping claims against

Defendants, including abuse of process and malicious prosecution claims. Plaintiffs' Complaint was filed just three days after Defendant Andrew Ivchenko, a licensed Arizona attorney, served Plaintiffs in a State court action filed on behalf of a client who was a party in a previously dismissed case in this Court. [*See* Doc 1-4, Exhibit H]. If anything, Plaintiffs' Response confuses matters even more by introducing vagueness and revisionist history to keep Defendants in the dragnet of their spiteful, catch-all litigation style. This simply reinforces the position that Defendants' motion should be granted.

The Complaint is entirely groundless, and was filed by Plaintiffs and their attorney, David S. Gingras ("Gingras"), in retaliation for Defendant Andrew Ivchenko continuing the litigation against them in State court. Having failed to maintain Federal court jurisdiction in **three** (emphasis added) removed State court cases during the past year [*See e.g.*, Docs 1-3, Exhibit G; 1-4, Exhibit H], including one filed by Defendant Andrew Ivchenko and two more by two other law firms, Plaintiffs have now concocted yet another scheme to obtain Federal court jurisdiction though the back door. Plaintiffs attempt to shoehorn claims for declaratory relief and "False DMCA Notice Liability" into a complaint that is ostensibly about alleged malicious prosecution, while for good measure seeking a "vexatious litigant designation." [Compl. ¶¶ 250, 260, 264].

Defendants' Response correctly states that a Rule 12(b)(6) motion to dismiss should be employed here. [Resp. at pg. 1 n. 21]. However, Plaintiffs should not be allowed to convolute the facts and causes of action to such a point that without a more definite statement, Defendants do not have notice of the claims against them and literally cannot frame a responsive pleading to the Complaint. In Plaintiffs' creative writing exercise, this entire case is about Defendant Andrew Ivchenko's spouse, when in reality any issues involving her ended when her case was voluntarily dismissed on June 26, 2020. [Resp. at pg. 3 n. 10; Compl. ¶ 143]. Plaintiffs ignore forty other plaintiffs in the two cases in question and continuously beat this drum to mask the real reasons behind this lawsuit, and to cloud the fact that millions of affected individuals nationwide have potential claims against Plaintiffs, notorious mugshot website operators. [Compl. ¶ 16].

In their Response, Plaintiffs keep lurching back to the first complaint Defendants filed against them, which in the Complaint was not even considered relevant, but suddenly now has even though the one-year statute of limitations period for malicious prosecution has expired. [*See* Ariz. Rev. Stat. 12-541(1); Compl. ¶¶ 91, 105]. It begs the questions – which cases are in issue? Which facts support each cause of action in the Complaint? Which Defendant did what to whom? Ad hominem attacks and confusing, superfluous information do not set forth a "short and plain statement of the claim showing that the pleader is entitled to relief," as required by Fed. R. Civ. P. 8(a)(2).

Plaintiffs' Complaint is a textbook example of what not to do in a Complaint. Under the Federal Rules, "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). Plaintiffs do not point to any allegations in the Complaint that furnish the details requested by Defendants. [*See* Doc 20, Opening Brief, at pgs. 16-17]. Even if Plaintiffs could argue a claim that might be consistent with the Complaint, it does not eliminate the Complaint's ambiguities regarding the elements of lack of probable cause, malice, "Defendants" and "claims." Plaintiffs' attempts to explain what they claim might be are as vague and unintelligible as the Complaint. [Resp. at pg. 5 n. 7].

II. <u>LEGAL ARGUMENT</u>

A. <u>Plaintiffs Concede that the Complaint and References to a Lack of Probable Cause Are Ambiguous.</u>

Plaintiffs simply do plead facts showing that the same causes of action that appeared in numerous cases filed by three separate law firms somehow lacked probable case. [Resp. at pg. 2 n. 20]. Defendants are left to guess whether the Complaint is deliberately illogical or just poorly pled. The Response also relies on facts that were never pled. [Resp. at pg. 11 n. 4]. Plaintiffs seem to suggest that Defendants should be on notice that lack of probable cause should be inferred from the bringing of "claims" that were never brought. [Resp. at pg. 4 n. 17]. For instance, Plaintiffs completely misrepresent allegations concerning "defamatory statements on Twitter about Mr. and/or Mrs. Ivchenko." [Compl. ¶ 185h]. Those allegations appeared in the Complaint [Doc 1-3, Exhibit E, ¶¶ 12-13], but were dropped in the amended complaint. Yet Plaintiffs endlessly drone on about a lack of probable cause, but fail to specify which complaint made these allegations. [Resp. at pg. 4 n. 17].

There is a reason why Plaintiffs are purposely trying to create confusion regarding the issue of probable case – they recognize that "[t]he failure to establish a lack of probable cause is a complete defense to an action for malicious prosecution." *Carroll v. Kalar*, 112 Ariz. 595, 596, 525 P.2d 411, 412 (1976). Defendants are questioning the Complaint's marked and consistent unintelligibility, rather than a lack of detail in the complaint. *See Cox v. Maine Maritime Academy*, 122 F.R.D. 115, 116 (D. Me. 1988). This motion is not designed to question the factual and legal sufficiency of Plaintiffs' claims, [Resp. at pg. 6 n. 3], but rather to lay a proper foundation to raise these issues in a subsequent Rule 12(b)(6) Motion to Dismiss or a Rule 56 Motion for Summary Judgment.

The proper test in evaluating a motion under Rule 12(e) is whether the complaint provides the defendant with a sufficient basis to frame his responsive pleadings. *Federal Sav. and Loan Ins. Corp. v. Musacchio*, 695 F. Supp. 1053, 1060 (N.D. Cal. 1988). Under the notice pleading standard, sufficient factual allegations are required to provide "fair notice" of the nature of the claim and the grounds on which the claim rests. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555-56; 127 S. Ct. 1955, 1965; 167 L. Ed. 2d 929, 940 (2007). Rule 12(e) motions are designed to strike at unintelligibility, rather than at lack of detail in the complaint. *Cox v. Maine Maritime Academy*, 122 F.R.D. 115, 116 (D. Me. 1988). The pleading standard Fed. R. Civ. P. 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Twombly*, 550 U.S. at 555.

There are two ways a plaintiff can show a defendant lacked sufficient probable cause to justify bringing an action for wrongful institution (or use) of civil proceedings ("WICP"): "A litigant will lack probable cause for his action either if he [1] relies upon facts which he has no reasonable cause to believe to be true, or [2] if he seeks recovery upon a legal theory which is untenable under the facts known to him." *Sangster v. Paetkau*, 80 Cal. Rptr. 2d 66, 75 (Cal. Ct. App. 1998). In their Response, Plaintiffs agree that meritless claims may be "weeded out" via tools such as motions under Rule 12(e). [Resp. at pg. 5 n. 19].

As currently drafted, the Complaint does not contain the barest of allegations stating why Defendants lacked probable cause to bring such claims in either case in question. *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 416-17, 758 P.2d 1318-19 (1988). Plaintiffs' own description of the Complaint highlights the ambiguities identified by Defendants' motion, conceding that the Complaint "is a little hard to follow." [Resp. at pg. 4 n. 7]. Without commenting on Plaintiffs' understatement, the Complaint is constructed in such a way that it creates many ambiguities, as outlined in Defendants' Opening Brief. [*See* Doc 20]. Plaintiffs did a sleight of hand in their Complaint by combining <u>two</u> separate cases tried by <u>two</u> different law firms involving numerous clients from several states (emphasis added). [*See* Docs 1-3, Exhibit G; 1-4, Exhibit H; Compl. ¶¶ 107, 145]. This has created tremendous confusion, which is Plaintiffs' goal considering the paucity of facts to support their claims and ulterior motives behind the Complaint.

Realizing that their story made no sense, Plaintiffs' Response hopelessly confuses matters even more by now stating a new theory altogether in arguing that Defendant Andrew Ivchenko "filed and/or instigated seven (7) prior cases against [them] in the Maricopa County Superior Court." [Resp. at pg. 2 n. 10]. Although Plaintiffs have pleaded no facts supporting this preposterous statement, they go on to say that only the "first three cases are part of the malicious prosecution/abuse of process claims here." [Resp. at pg. 2 n. 18]. However, the Complaint appears to base its claims on two lawsuits. [Compl. ¶¶ 107, 145].

Plaintiffs need to get their story straight. What are the salient facts that support each cause of action? Which Defendant wronged them, and how? The Complaint as drafted is an incomprehensible "shotgun" pleading containing vague and general group allegations to "Defendants" and coupled with endless conclusory statements and virulent personal attacks. [*See* Doc 20, Opening Brief, at pg. 4]. Plaintiffs' Response makes no effort to clarify these issues, and simply reinforces the position that Plaintiffs purposely avoided any specificity relating to their claims so that Defendants cannot effectively frame a response and move to dismiss this case. [Resp. at pg. 10 n. 23]. For instance, Plaintiffs' Response seems to suggest that their case is based on inappropriate factual allegations made by Defendants in the first complaint, which was amended three weeks after Gingras made his appearance on behalf of Plaintiffs. [Resp. at pg. 8 n. 12]. The Complaint is unclear regarding these important facts.

Plaintiffs should be required to commit to a firm position regarding the first amended complaint. [Compl. ¶ 107]. "[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." *See Bertero v. National General Corp.*, 13 Cal.3d 43, 57, 118 Cal.Rptr. 184, 529 P.2d 608 (Cal. 1974). Even though Defendants had a factual basis to make the claims in the first complaint, out of an abundance of caution and to avoid any conflict of interest with 20 new plaintiffs, Defendants amended the complaint and pursued their defamation claims in an independent action (which is still ongoing). Indeed, even in cases where a party voluntarily drops a claim because the discovery of additional facts renders it untenable (which was not the case here), liability for WICP should not attach. *See Leonardini v. Shell Oil Co.*, 264 Cal.Rptr. 883, 897-98, 216 Cal.App.3d 547, 571 (Cal. App. 1989).

Plaintiffs want to avoid being locked into any position, and for good reason. Instead of being specific, Plaintiffs make general arguments that appear to be defenses to the claims in the amended complaint, without pleading any allegations as to why Counts I-V were factually groundless and lacked probable cause. [Compl. ¶ 185b-f; Doc 1-4, Exhibit G, ¶¶ 62-94]. Identifying what "claims" are referred to are essential, as an element of WICP is that litigation was begun or continued without probable cause. Plaintiffs know this, and also know that the burden to show a lack of probable cause is high. All a WICP defendant needs is some rational basis for the claims pursued. *See Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 743 n.13 (Cal. 2003). Plaintiffs' gyrations concerning the number of cases in issue here, the precise facts supporting each claim, and the law firms involved are reason enough to require them to provide a more definite statement.

Plaintiffs also agree that the decision to grant this motion is firmly in this Court's discretion. [Resp. at pg. 6 n. 5]. Ironically, Plaintiffs cite *Xcentric Ventures LLC v. Borodkin*, 2012 WL 2919539, *3 (D.Ariz. 2012), in support of their position. [Resp. at pg. 6 n. 11]. However, Plaintiffs are not telling this Court the rest of the story. *Xcentric Ventures LLC* was one of numerous instances (albeit the best known) of Gingras filing frivolous lawsuits against attorneys and parties that have brought suit against his clients, mostly online operators like Plaintiffs who cause the public immense harm. *See Xcentric Ventures, LLC v. Borodkin*, 798 F.3d 1201 (9th Cir. 2015). Not having learned his lesson after wasting years of the Courts' time and resources in unsuccessfully attacking opposing counsel and the parties in *Xcentric Ventures*, Gingras is up to his old tricks yet again, this time on behalf of Plaintiffs,[1] notorious mugshot website operators who not only victimize "tens of millions" of people, but who also are operating in violation of Arizona law. [Compl. ¶ 16; Doc 1-5, Exhibit H, ¶¶ 60-87].

B. <u>Plaintiffs Concede that References to "Malice" Are Ambiguous.</u>

Plaintiffs do not seriously dispute that many of their key allegations remain ambiguous. Indeed, Plaintiffs have gone so far as to introduce a compromise offer in violation of Fed. R. Civ. P. 408 in an attempt to buttress their claims, as well as references to two Superior Court cases (and a court order) that acknowledge that litigation involving the parties is ongoing in State court. [Resp. at pg. 2 n. 25-26; Exhibits A-B]. Both of these documents negate essential elements of any claim for WICP as well as abuse of process. [*See* Doc 20, Opening Brief, at pg. 12 n. 19; pg. 14 n. 3]. Plaintiffs were misleading in the Complaint [*See*, e.g., Compl. ¶¶ 202, 205], and when cornered, submitted an arguably inadmissible settlement document that does not even show what they claim. Now that they have come clean, Plaintiffs should be required to plead this information in their Complaint, so that Defendants can adequately address the claims through a motion to dismiss pursuant to Fed. R. Civ. P. 12(b).

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[1] Plaintiffs are referred to throughout the pleadings as "Travis." However, all three Plaintiffs are involved in the family's extensive mugshot website operation. [Compl. ¶¶ 19]. Previous pleadings between the parties showed that Mariel Grant is a manager in their mugshot websites' stated operating company. Indeed, several online sites have been established by aggrieved parties to expose the nefarious and illegal activities of Plaintiffs, including https://rapsheetsorgkyledavidgrant.wordpress.com. [*See* Doc 1-4, Exhibit H, ¶ 12].

Plaintiffs also seem to suggest that Defendants should be on notice of "malice" from allegations of acts they did not commit, or through the improper introduction of a compromise offer in violation of Fed. R. Civ. P. 408. [Resp. at pg. 12 n. 4]. Plaintiffs do not explain whether the settlement proposal in the second case is somehow linked to the abuse of process claim involving any other case. [Compl. ¶¶ 215, 239]. Plaintiffs also suggest that the settlement offer, which was for less than ten percent of the statutory penalty plaintiffs in the second case could recover as damages under A.R.S. § 44-7902 (the "Arizona Mugshot Act"), [*See* Doc. 1-5, Exhibit H, ¶ 62], was done for Defendant Andrew Ivchenko's personal benefit, rather than on behalf of his clients. Indeed, the Arizona Mugshot Act subjects Plaintiffs to significant financial liability of up to $500 per day per affected party. *Id*.

Plaintiffs' reliance on *Bradshaw v. State Farm Mut. Auto. Ins. Co*., 157 Ariz. 411, 420–21 (1988), to show "state of mind" is unavailing. [Resp. at pg. 12 n. 2]. The "state of mind" in question must involve the merits of the underlying action. *Id*. Moreover, using a settlement proposal in response to a motion for a more definite statement under Rule 12(e) has nothing to do with salvaging a defective pleading. Defendants will not address the merits of Plaintiffs inaccurate description of the settlement proposal, as this will be done in a subsequent motion to dismiss. This is assuming the information provided by Plaintiffs is even admissible, which it is not. *Id*. Regardless, now that Plaintiffs have come clean and admitted that the "improper purpose" surrounding their abuse of process claims involves matters discussed during settlement negotiations, a more definite statement would force Plaintiffs to commit to the settlement document as the basis for their claims in the Second and Fourth causes of action. [Compl. ¶¶ 215, 239].

Plaintiffs' incessant ad hominem attacks stretch credulity to the point where one can only conclude that they are 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 in question. Nowhere is this more apparent than Plaintiffs' statement that Defendants' settlement proposal smacked of "hypocrisy" in that it was for "$2.4 million." [Resp. at pg. 11 n. 18, 28.]. Although the merits of this argument will be addressed later, the

20 plaintiffs in the case have a statutory claim under the Arizona Mugshot Act of over $3.5 million, and the offer was for $240,000, less than ten cents on the dollar. *See* A.R.S. § 44-7902(D). The 2400 removal credits offered as an alternative would have entailed an affected party contributing $100 towards the fees and costs associated with any settlement pool, not $1000 as erroneously (and gratuitously) stated by Plaintiffs. [Resp. at pg. 11 n. 12].

C. <u>Plaintiffs Ignore the Strong Judicial Policies Served By Requiring the Repleading of Impermissible "Shotgun" Pleadings.</u>

Plaintiffs do not discuss the "shotgun" nature of the Complaint anywhere in their Response, as discussed in detail in Defendants' motion. [*See* Doc 20, Opening Brief, at pg. 4]. Plaintiffs also do not discuss the cases cited in this motion in which courts have granted motions under Rule 12(e) to decipher "shotgun" pleading. *See Clark v. McDonald's Corp*., 213 F.R.D. 198, 233 (D.N.J. 2003). District courts have a "supervisory obligation to sua sponte order repleading pursuant to [Fed. R. Civ. P. 12(e)] when a shotgun complaint fails to link adequately a cause of action to its factual predicates." *See Wagner v. First Horizon Pharmaceutical Corp*., 464 F.3d 1273, 1275 (11th Cir. 2006).

Plaintiffs' suggestion that Defendants should respond to their unintelligible Complaint through a Rule 12(b)(6) Motion to Dismiss or a Rule 56 Motion for Summary Judgment would only heap unnecessary work upon the Court, and increase the expense of litigating this action. [Resp. at pg. 5 n. 15-17]. Such a suggestion shows great disregard for the efficient administration of justice and the scarcity of court resources. In *Byrne v. Nezhat*, 261 F.3d 1075, 1129 (11th Cir. 2001), the Court of Appeals described at length how failing to promptly address "shotgun" pleadings through Rule 12(e) waters down the rights of the parties to have valid claims litigated efficiently:

> [A] shotgun complaint leads to a shotgun answer. . . . Such disjointed pleadings make it difficult, if not impossible, to set the boundaries for discovery. Hence, discovery disputes are inevitable. Resolving them can be time-consuming. If the court does not intervene and require the parties to narrow the issues, the discovery disputes continue unabated--until a motion for summary judgment or a pretrial conference brings them to a halt. At that point, the court is confronted with the time-consuming tasks it avoided earlier--rearranging the pleadings and discerning whether the plaintiff has stated a

> claim, or claims, for relief, and whether the defendant's affirmative defenses are legally sufficient.

Byrne, 261 F.3d at 1129. In addition, "shotgun" pleadings wreak havoc on the judicial system, effectively depriving meritorious cases of court resources:

> Cases framed by shotgun pleadings consume an inordinate amount of a court's time. As a result, justice is delayed, if not denied, for litigants who are standing in the queue waiting to be heard. . . . Shotgun pleadings, if tolerated, harm the court by impeding its ability to administer justice. The time a court spends managing litigation framed by shotgun pleadings should be devoted to other cases waiting to be heard. Wasting scarce judicial and parajudicial resources … impedes the due administration of justice and, in a very real sense, amounts to obstruction of justice.

Byrne, 261 F.3d at 1130-31. Granting this motion would conserve judicial resources.

D. <u>The Equities Warrant Granting this Motion.</u>

Plaintiffs do not argue that they would be prejudiced in any way from the granting of this motion. They cannot. Plaintiffs do not claim that granting this motion would complicate or delay this case. Indeed, granting this motion would make this case less complicated, not more. Moreover, granting this motion would not delay this case. The Court is still considering Defendants' motion to strike under Fed. R. Civ. P. 12(e), *see* Doc. 21, and this relatively simple (and frivolous) case has been hopelessly convoluted through Defendants' shotgun approach of pleading confusing, illogical and overlapping claims. [*See* Doc 14].

By contrast, the Court and Defendants would be subjected to unnecessary burden if the pleadings are not clarified. Defendants would be prejudiced by being forced into discovery on Plaintiffs' unintelligible claims. Indeed, Defendants should not be burdened by discovery and trial unless Plaintiffs can allege specific, nonconclusory factual allegations that establish a lack of probable cause and improper motive. *See Ames v. Dep't of Marine Res. Comm'r*, 256 F.R.D. 22, 30 (D. Me. 2009). Plaintiffs urge that any ambiguities in the Complaint can be cleared up in discovery. [Resp. at pg. 5 n. 11]. But that would work a grave injustice. Defendants have submitted strong prima facie proof that Plaintiffs quickly pieced the Complaint together and filed it as a knee-jerk reaction, and for improper purposes. [*See* Doc 20, Opening Brief, at pg. 1 n. 26].

All Defendants can do at this time is seek the just, speedy, and inexpensive resolution of this action that Federal Rule 1 contemplates. Plaintiffs provided a copy of a recent Arizona Superior Court order finding that claims under the Arizona Mugshot Act were barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1). [Resp. at Exhibit B]. The Court also ruled against Plaintiffs on a constitutional challenge, and previously ruled against them on the issue of plaintiff anonymity. *Id*. The plaintiff in the case will appeal the ruling, as the enforceability of the Arizona Mugshot Act needs to be determined statewide. In the meantime, Plaintiffs should be required to plead facts showing that either underlying action in question is final in the traditional sense of a "final judgment", i.e., after the time to appeal has expired or at the conclusion of an appeal. *See Rich v. Siegel*, 7 Cal.App.3d 465, 86 Cal.Rptr. 665, 667 (Cal. App. 1970).

III. <u>CONCLUSION</u>

For the foregoing reasons, Defendants respectfully request that this Court grant this motion for a more definite statement under Rule 12(e). [*See* Doc 20, Opening Brief, at pgs. 16-17]. In addition, should the Court find it warranted, it is respectfully requested that the Court award Defendants the cost of preparing this Reply as a sanction under 28 U.S.C. § 1927 for Plaintiffs counsel's bad faith in misrepresenting this motion's argument regarding the "claim" that is apparently the sole factual basis of the Complaint against Defendants, as well as introducing a compromise offer in violation of Fed. R. Civ. P. 408, should the Court find that these acts vexatiously multiplied the proceedings. [*Compare* Doc. 14, ¶¶ 91, 185, with Resp. at pg. 4 n. 10]. In light of the Response, it cannot be denied that Plaintiffs' counsel is determined to put Defendants on trial for continuing a claim that was never brought.

DATED: April 20, 2021. **ANDREW IVCHENKO PLLC**

By: *<u>/s/ Andrew Ivchenko</u>*
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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on April 20, 2021, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following:

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