

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

PETER GABIOLA, ANTONIO HAMMOND, and
JIMMY THOMPSON on behalf of themselves and
all other similarly situated individuals,

Plaintiffs,

v.

SAHAR SARID, individually and a/k/a “Michael
Robertson”; THOMAS KEESEE, an individual;
MARC GARY EPSTEIN, an individual;
MUGSHOTS.COM, LLC, a Delaware Limited
Liability Company; UNPUBLISH, LLC, a Florida
Limited Liability Company; UNPUBLISH, LLC, a
Wyoming Limited Liability Company;
HAMMERMILL & MASTERSON LLC d/b/a
“Unpublisharrest.com,” “Mugshots.com,” and
“Unpublishingpartners.com,” a Wyoming Limited
Liability Company; and HAMMERMILL &
MASTERSON LLC d/b/a “Unpublisharrest.com,”
“Mugshots.com,” and “Unpublishingpartners.com,”
a Florida Limited Liability Company,

Defendants.

No. 16-cv-02076

Honorable Judge
Sharon Johnson Coleman

**MOTION TO DISMISS FIRST AMENDED COMPLAINT BY
DEFENDANT SAHAR SARID**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant SAHAR SARID (“Sarid”) respectfully moves this Court for an order dismissing the First Amended Complaint (“FAC”) (Doc. 60) as to Sarid for failure to state any claims upon which relief can be granted against Sarid. Sarid is entitled to dismissal for the reasons stated in (a) the Motion to Dismiss First Amended Complaint Filed by Defendants Thomas Keese, Marc Gary Epstein and Hammermill & Masterson LLC (Doc. 67), (b) the Memorandum in Support of the Motion to Dismiss First Amended Complaint Filed by Defendants Thomas Keese, Marc Gary Epstein and Hammermill & Masterson LLC (Doc. 68), and (c) the Reply in support thereof, all of which Sarid joins and incorporates herein by reference. In addition, Sarid is entitled to dismissal for the following additional reasons stated below and in his Memorandum that (a) the Fair Credit Reporting Act claim should be dismissed because no Defendant is a “Consumer Reporting

Agency” and the FAC does not allege facts showing that Defendants provide “Consumer Reports,” and (b) the Florida Deceptive and Unfair Trade Practices Act and the Florida Right of Publicity Act claims are barred by the statute of limitations.

In support of this motion, Sarid states as follows:

1. The FAC asks this Court to penalize and enjoin the republication of public arrest records for violations of a litany of statutes: the Illinois Right of Publicity Act (“IRPA”) (Count I), the Illinois Consumer Fraud Act (“ICFA”) (Count II), the Illinois Mugshots Act (Count III), the federal Influence and Corrupt Organizations Act (“RICO”) (Count V), the federal Fair Credit Reporting Act (“FCRA”) (Counts VI.1, VI.2, and VII), the Florida Right of Publicity Act (“FRPA”) (Count VIII), and the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) (Count IX).¹ The relief sought in the FAC for each count is the same—that the republication of arrest records in the mugshots.com database be penalized and enjoined. The First Amendment bars any such recover because there is a constitutional privilege to speak on matters of public concern and to republish matters contained in a public record.

2. In addition, and for independent statutory reasons, Plaintiffs can also prove no set of facts to support their claims under any of the substantive state statutes relied upon, and therefore those claims also fail as a matter of law.

3. Plaintiffs’ Illinois and Florida right of publicity claims fail as a matter of law, because citizens do not need permission or authorization from anyone to speak on matters of public concern or to republish matters contained in a public record.

4. Plaintiffs’ Illinois and Florida right of publicity claims fail as a matter of law because use of the arrest photos in the mugshots.com database is expressly exempt from liability under the respective state right of publicity statutes’ “public affairs” exemptions, which both Illinois and Florida courts have construed broadly to avoid First Amendment infirmity.

¹ The First Amended Complaint contains no “Count IV” and contains two claims designated “Count VI,” which are referenced herein as Count VI.1 and Count VI.2.

5. Plaintiffs' Illinois Right of Publicity claim also fails, because the arrest photos are not being used to endorse any product or service. There is no "appearance" of endorsement and therefore no reasonable viewer would assume that the persons in the arrest photos are endorsing mugshots.com's services.

6. The Florida Right of Publicity claim also fails, because the arrest photos are not being used to directly promote any products or services. The use of the arrest photos in the mugshots.com database does not create the false impression that arrestees are promoting or endorsing mugshots.com services. The arrestees' photos are not being wrongly associated with a product or service on mugshots.com. Finally, Mr. Thompson's claims are barred by the statute of limitations.

7. Plaintiffs' claims under the ICFA fail as a matter of law, because Plaintiffs can prove no set of facts demonstrating that they suffered actual damages as a result of conduct deemed unlawful under the act.

8. The claims under the FDUTPA fail as a matter of law, because Plaintiff Thompson cannot prove any set of facts demonstrating that he has suffered a loss as a consequence of a violation of the statute sufficient to recover actual damages. Plaintiff Thompson cannot prove any set of facts demonstrating that he suffered a loss for diminished value of the goods received, because he did not purchase any goods or services from Defendants, and therefore he has no standing to sue under the statute. At best, Mr. Thompson can claim that the re-publication of his arrest photo and official arrest record caused him personal reputational injuries in the form of diminished employment prospects. But such personal injuries are not cognizable under the Act. The claim also fails because Mr. Thompson's injuries are caused by conduct specifically permitted the Act, the re-publication of public records. Plaintiff Thompson is not an "aggrieved" party under the FDUTPA and therefore does not have statutory standing to bring a claim for injunctive relief. Mr. Thompson also does not have Article III standing to assert a claim for injunctive relief in federal court. Finally, Mr. Thompson's claims are barred by the statute of limitations.

9. Plaintiffs' Federal RICO cause of action fails as a matter of law for myriad and independent reasons. Defendants have not committed extortion under Florida and Illinois law, because there are no allegations that Defendants threaten to post public records, and Plaintiffs' extortion theory is fatally flawed, because the threat to expose the public arrest records is wholly lacking. Even if the posting of public records did constitute an actionable threat, such conduct is fully protected speech and therefore the RICO claim should be dismissed on that basis alone. Plaintiffs' RICO claim also fails because Plaintiffs cannot allege a cognizable RICO injury, which they contend to be damage to rights of publicity arrestees have in arrest photos. Arrestees do not have property rights in their arrest photos, and, even if they did, such rights are intangible property rights that do not satisfy RICO's "concrete financial loss" requirement. In addition, Plaintiffs, at best, allege attempted extortion, which does not satisfy RICO's standing requirements. Finally, Defendants did not obtain any property from Plaintiffs as a result of the alleged extortion scheme; moreover, even if they did somehow obtain Plaintiffs' rights to publicity, the FAC's allegations are that Defendants did so *without* Plaintiffs consent, not *with* their consent — a required element of a RICO extortion claim.

10. As to the Fair Credit Reporting Act claims (Counts VI.1, VI.2 and VII), those claims can exist only with respect to a "Consumer Reporting Agency" and only in relation to a "Consumer Report." No Moving Defendant is a "Consumer Reporting Agency" within the meaning of the Act. The FAC, moreover, does not allege facts that, if true, would be sufficient to show that any defendant or the operator of the mugshots.com Website is a "Consumer Reporting Agency." Even if that were not the case, each Fair Credit Reporting Act claim fails for the additional and independent reason that the FAC does not (and could not) allege facts showing that a publication of an array of public data and arrest photos concerning thousands of individuals and procured from a host of public websites operated by hundreds of law enforcement agencies constitutes a "consumer report" within the meaning of 15 U.S.C. § 1681a(d). For each of these reasons, Counts VI.1, VI.2 and VII should be dismissed.

11. This Motion is supported by a separately filed Memorandum in Support of Motion to Dismiss, the allegations of the First Amended Complaint, and the record in this case.

WHEREFORE, Defendant SAHAR SARID respectfully requests that the Court dismiss the First Amended Complaint and this case as to Sarid for (a) failure to state a claim, because all of Plaintiffs' claims are barred by the First Amendment; and (b) failure to state claims under any of the statutes relied upon. Sarid also requests his reasonable attorneys' fees and costs defending Plaintiffs' claims, pursuant to 765 Ill. Comp. Stat. 1075/55, 815 Ill. Comp. Stat. 505/10a, Fla. Stat. § 501.211, and 15 U.S.C. § 1681.

Dated: December 19, 2016

Respectfully submitted,

/s/ Adam D. Grant

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