UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JOHN DOE 157 and JOHN DOE 158, by and through their Guardians, JOHN DOE 159 AND JANE DOE 135,

Case No. 10-cv-3754 JNE/SER

Plaintiffs,

v.

GREGG ALAN LARSEN, and Downloaders 1 – Downloaders 100,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO PROCEED USING A PSEUDONYM

Introduction

In this case, Plaintiffs bring claims against the Defendant that Defendant illegally produced, distributed and downloaded sexually explicit images of the child Plaintiffs. When balancing of First Amendment principles favoring open courts with the interest of safeguarding the physical and psychological well-being of the minor Plaintiffs, the scale clearly tips in favor of protecting the Plaintiffs. Therefore, Plaintiffs should be allowed to proceed with this action using the pseudonyms John Doe 157 and John Doe 158 and their parents should be allowed to proceed using the pseudonyms John Doe 159 and Jane Doe 135.

Background Facts

On August 26, 2010, Plaintiffs filed the Complaint in the current matter in the United States District Court for the District of Minnesota. (Complaint.) The Complaint

contained claims for damages against the Defendant Gregg Alan Larsen and other Does for production, distribution and downloading images of child pornography depicting the Plaintiffs and for sexual battery. *Id.* The Complaint also named the Plaintiffs as the pseudonyms John Doe 157 and John Doe 158 and their parents as John Doe 159 and Jane Doe 135. *Id.* On December 9, 2011, this Court ordered that Plaintiffs either file a motion to proceed using a pseudonym . (Order dated December 9, 2011.) This Motion and Memorandum follows.

Law and Argument

First Amendment Requirement of Open Courts

The United States Supreme Court has been clear that public access to criminal trials is guaranteed by the First Amendment. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 2829, 65 L.Ed.2d 973 (1980), the Court held that that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" Moreover, even though the right of the public to attend trials of civil cases was not raised in *Richmond*, the Court did note that historically both civil and criminal trials have been presumptively open. *Id.* at note 17.

Further, in *Globe Newspaper Company v. Superior Court for the County of Norfolk*, 457 U.S. 596, 610, 102 S.Ct. 2613, 2622, 73 L.Ed.2d 248 (1982), the Court ruled that a Massachusetts law mandating closure of a criminal proceeding during the testimony of a minor complainant violated the First Amendment. Specifically, the Court

held that a rule of mandatory closure respecting the testimony of minor sex victims violates the First Amendment:

> In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

Id. at note 27.

In so ruling, the Court noted:

> We agree with appellee that the first interest-safeguarding the physical and psychological well-being of a minor is a compelling one. But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. **Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.**

Id., 457 U.S. at 607-08, 102 S.Ct. at 2620-21. (Emphasis added.)

One compelling factor noted by the Court in favor of a case-by-case determination regarding whether to close the court when minors testify instead of a blanket mandatory closure rule was the fact that the names of the minor victims were already in the public record, and the record indicated that the victims may have been willing to testify despite the presence of the press. *Id.*, 457 U.S. at 608-09, 102 S.Ct. at 2621.

Moreover, in *Webster Groves School District v. Pulitzer Publishing Company*, 898 F.2d 1371, 1373 (8th Cir. 1990), the Eighth Circuit Court of Appeals considered a case involving media access to a civil proceeding in federal district court involving a child. In *Webster Groves School District*, a fourteen-year-old public school student who had been

classified as a handicapped child under the Education of the Handicapped Act was accused of bringing a loaded handgun to school and threatening classmates with it. *Id.* Under federal law, a number of administrative procedures were required before the child could be expelled, and the school district was required to allow the child to stay in school pending the results of those procedures. *Id.* The school district sought to have the child enjoined from attending school, pending exhaustion of his administrative remedies. *Id.* As the hearing on the motion for a preliminary injunction was about to begin in the district court, counsel for the child asked that the courtroom be closed to the public. *Id.* The district court Judge granted the request, whereupon a reporter for the *St. Louis Post–Dispatch,* a daily newspaper published by Pulitzer, left the courtroom without objecting. *Id.* Pulitzer sought review of the courtroom closure. *Id.* at 1374.

In its analysis, the Eighth Circuit, cited to *Richmond Newspapers*, *supra*, confirming that the right to attend criminal trials is implicit in the guarantees of the First Amendment. *Id* at 1374. The court also noted that any First Amendment right of the public to access to the proceedings was a qualified right, not an absolute right, because the subject of the proceedings was a child. *Id.* at 1374-75. The court noted state and federal laws protecting children in juvenile delinquency proceedings as well as federal educational privacy laws that protect student records and identity were instructive as examples of circumstances where First Amendment rights could be limited. *Id.* at 1375. When considering courtroom closure, the court cited to *Globe Newspaper, supra*, and confirmed that "'safe-guarding the physical and psychological well-being of a minor' is a

'compelling' state interest" and that the factors to be considered by the court are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of the parents and relatives. *Webster Groves School District*, 898 F.2d at 1375. The court then held that the district court had not erred when it granted the motion for closure. *Id.* at 1376.

Using a Pseudonym in Civil Litigation in Federal Court

Generally, there is a strong presumption against allowing parties to use a pseudonym. In *Luckett v. Beaudet*, 21 F.Supp.2d 1029 (D.Minn. 1998), Judge Rosenbaum drew upon First Amendment open courtroom principles when he stated that:

> A trial is a public event. What transpires in the court room is public property. . .
>
> There is a strong presumption against allowing parties to use a pseudonym. The reasons are obvious and compelling. There is a First Amendment interest in public proceedings, and identifying the parties to an action is an important part of making it truly public. When a party invokes the judicial powers of the United States, she invites public scrutiny of the dispute and the proceeding. The people have the right to know who is using their courts.
>
> There are a small number of court-created exceptions in which parties are allowed anonymity. Case law identifies three factors which, if present, might support anonymity: (1) plaintiffs seeking anonymity were suing to challenge governmental activity; (2) **prosecution of the suit compelled plaintiffs to disclose information 'of the utmost intimacy'**; and (3) plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution.

Luckett, 21 F.Supp.2d at 1029. (Emphasis added and internal citations omitted.) *See also Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 763 (D.Minn. 2006).

In *Plaintiff B v. Francis*, 631 F.3d 1310, 1319 (11th Cir. 2011), the Eleventh Circuit Court of Appeals ruled that the District Court abused its discretion when refusing

to allow a minor to proceed in a civil case involving child pornography. Specifically, the appellate court found that the District Court had given inadequate consideration to the degree of intimacy that the plaintiff's testimony would involve given the subject matter of the lawsuit was sexually explicit images of a minor. *Id.* at 1316. According to the court:

> The issues involved in this case could not be of a more sensitive and highly personal nature – they involve descriptions of the Plaintiffs in various stages of nudity and engaged in explicit sexual conduct while they were minors who were coerced by the Defendants into those activities.

Id. at 1317. In addition, the court also ruled that the district court erred by not considering the amount of harm losing anonymity would cause the plaintiff. *Id.* at 1318. The court explained:

> The court completely disregarded one of their expert's testimony on the psychological damage of being labeled a "slut" and dismissed testimony from the other expert – a clinical psychologist who interviewed and evaluated Plaintiff B . . . as conclusory.

Id. at 1317-18. Finally, the court held "[t]he district court failed to give due consideration to the concerns of the Plaintiffs raised about being forced to maintain the suits in their own names. Justice should not carry such a high price." *Id.* at 1319.

Similarly, in *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997) the Seventh Circuit Court of Appeals noted that the use of fictitious names is disfavored, and the judge has an independent duty to determine whether exceptional circumstances justify a departure from the normal method of proceeding in federal courts. *Id.* The court then concluded that exceptional circumstances that warrant allowing the use of fictitious names include protecting the privacy of children, rape

victims, and other particularly vulnerable parties or witnesses. *Id.; See also Doe v. City of Chicago*, 360 F.3d 667, 669-70 (7th Cir. 2004) (Acknowledging use of fictitious pseudonym is appropriate where plaintiff is a minor, a rape or torture victim, or was subject to a sexual assault.)

Likewise, in *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190-91 (2nd Cir. 2008), the Second Circuit Court of Appeals ruled that when considering whether to allow a plaintiff to proceed anonymously, a court must balance plaintiff's interest in proceeding anonymously against the interests of defendants and the public. Failure to balance these interests constituted an abuse of discretion requiring reversal. *Id.*

Many other Federal District Courts have found that it is proper to allow victims of sexual crimes to proceed under pseudonyms. In *Doe v. Evans*, 202 F.R.D. 173, 175-76 (E.D. Pa. 2001), the District Court conducted a balancing test similar to that described above and ruled that a plaintiff's use of a pseudonym in a civil sexual assault case was justified. Similarly, in *Doe v. Kolko*, 242 F.R.D. 193, 198 (E.D.N.Y. 2006), the District Court ruled that it was proper for an adult plaintiff who was sexually abused by a rabbi when the plaintiff was a child, to proceed anonymously. *But see Doe v. Shakur*, 164 F.R.D. 359, 361 – 62 (S.D.N.Y. 1996) (Adult plaintiff who alleged that she was sexually assaulted by famous musician as an adult was not allowed to pursue claim anonymously.)

Protection of the Identities of Minors in Court Proceedings

Both the State of Minnesota and the United States have laws that protect children and victims of sexual assaults from being identified publicly. For example, in Minnesota law enforcement and other governmental entities are prohibited from disclosing the

identity of a victim of child abuse or neglect to the public. Minnesota Statutes § 13.82, Subd. 8 and 9. In addition, the identity of a victim of criminal sexual conduct is also protected from disclosure to the public. *Id.*, Subd. 17. Similarly, juvenile delinquency proceedings and the related court records are not available to the public absent a court order. Minnesota Juvenile Delinquency Procedure Rules 2.01 and 30.02, Subd. 3.

Federal law has similar provisions. Under 18 U.S.C.A. § 3509 (d), the identity of a child victim or witness is confidential. This statute also calls for all documents that disclose the identity of the child to be filed under seal and provides for closing the courtroom when a child testifies, if the judge determines that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. 18 U.S.C.A. § 3509 (d) and (e). Federal juvenile delinquency records are also protected from public disclosure under 18 U.S.C.A. § 5038.

Balancing Open Courts Against Safeguarding the Well-Being of a Child Plaintiff

In the current case, balancing of First Amendment interests with the physical and psychological well-being of the minor Plaintiffs clearly results in allowing the Plaintiffs and their parents to proceed under pseudonyms. Even though there is a strong presumption against allowing parties to use a pseudonym in prosecuting a lawsuit, the current case falls within the exception described in *Luckett* that prosecution of this suit will compel Plaintiffs to disclose information of the utmost intimacy. See *Luckett*, 21 F.Supp.2d at 1029. This lawsuit involves the production, distribution and downloading of pornographic images of the minor Plaintiffs and the sexual abuse of the Plaintiffs.

(Complaint.) Testimony at hearings and the related documents will necessarily involve testimony of a psychologist and others about the minor Plaintiffs' mental status and psychological injuries suffered as a result of being manipulated into being illegally recorded by the Defendant while Plaintiffs engaged in sexually explicit behaviors. This alone is sufficient to limit public access to this case under *Webster Groves School District v. Pulitzer Publishing Company*, 898 F.2d at 1376.

What is more, requiring the minor Plaintiffs to be publicly identified as victims of child pornography will injure the Plaintiffs. In fact, public disclosure of very personal images of the Plaintiff engaged in sexually explicit conduct is a large part of the damage that has been perpetrated upon the Plaintiff. Affidavit of Susan Phipps-Yonas, Ph.D., L.P., Aff, ¶ 9-12. It is difficult to imagine something more personal, private and mentally damaging than public images of a vulnerable child engaged in sexually explicit conduct at the direction of an adult. *See Plaintiff B,* 631 F.3d at 1317. Requiring the Plaintiffs to publicly disclose their name in this lawsuit would cause the Plaintiffs damage that is in addition to the profound damage caused by the child pornography and sexual abuse. Phipps-Yonas Aff. ¶ 12.

Further, the Plaintiffs are currently ages 10 years old and 12 years old and each of the Plaintiffs and their parents believe that public disclosure of the Plaintiffs' names would harm the Plaintiffs. Affidavit of Jane Doe 135. According to an affidavit of the Plaintiff's mother Jane Doe 135:

> 3. John Doe 157 and John Doe 158 do not want their names identified as victims of child pornography.

> 4. I believe it would further harm my children if their names had to be made public in this matter.
>
> 5. Therefore, I ask that, for the sake of our family and for the health of our sons, our names be able to remain anonymous.

Id.

Using the guidance provided in the *Globe* and *Webster Groves School District* cases (the victims' age, the desires of the victim and the victims' parents), the factors clearly weigh heavily in favor of protecting the identity of the Plaintiffs. *See Globe*, 457 U.S. at 607-08, 102 S.Ct. at 2620-21; *Webster Groves School District*, 898 F.2d at 1375.

Moreover, there is no prejudice to the Defendant if Plaintiffs' names are not known to the public and there is no compelling public interest that will be served by requiring the Plaintiffs to disclose their identity. The compelling public interest actually lies in the identity of the Defendant. Parents must be able to protect their children from known sexual abusers and child pornographers. Naming the child Plaintiffs does not serve this compelling interest. In fact, requiring victims of child pornography to disclose their identity in order to file a civil lawsuit, could result in fewer victims being willing to identify child abusers and pornographers and pursue this type of litigation. A concern shared by Justices Burger and Rehnquist in their dissent in *Globe*. *Globe*, 457 U.S. at 615-619, 102 S.Ct. at 2625-2626 ("The mere possibility of public testimony may cause parents and children to decide not to report these heinous crimes. If, as psychologists report, the courtroom experience in such cases is almost as traumatic as the crime itself, a state certainly should be able to take whatever reasonable steps it believes are necessary to reduce that trauma.)

Conclusion

In conclusion, given the very personal and sensitive nature of the wrongs in this matter and the fact that it would be mentally harmful to the Plaintiffs to be required to publicly identify himself, Plaintiffs request this Court to allow them to proceed in this case using the pseudonyms John Doe 157 and John Doe 158 and allow their parents to proceed using John Doe 159 and Jane Doe 135.

Date: December 16, 2011.

s/Patrick W. Noaker

Patrick W. Noaker (Minn. # 274951)
Attorney for Plaintiffs
JEFF ANDERSON & ASSOCIATES, PA
366 Jackson Street, Suite 100
St. Paul, MN 55101
(651) 227-9990

Erin Dalluge

From: ecf-notice@mnd.uscourts.gov
Sent: Friday, December 16, 2011 4:45 PM
To: mndecfnotifications@mnd.uscourts.gov
Subject: Activity in Case 0:10-cv-03754-JNE-SER Doe 157 et al v. Larsen et al Memorandum in Support of Motion

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of Minnesota

Notice of Electronic Filing

The following transaction was entered by Noaker, Patrick on 12/16/2011 at 4:44 PM CST and filed on 12/16/2011

Case Name: Doe 157 et al v. Larsen et al
Case Number: 0:10-cv-03754-JNE-SER
Filer: Jane Doe 135
John Doe 157
John Doe 158
John Doe 159
Document Number: 24

Docket Text:
MEMORANDUM in Support re [23] MOTION to Proceed Using a Pseudonym filed by All Plaintiffs. (Attachments: # (1) Certificate of Compliance with LR 37.1 Certificate of Compliance)(Noaker, Patrick)

0:10-cv-03754-JNE-SER Notice has been electronically mailed to:

Jeffrey R Anderson jeff@andersonadvocates.com, therese@andersonadvocates.com

Patrick W Noaker patrick@andersonadvocates.com, erin@andersonadvocates.com

0:10-cv-03754-JNE-SER Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1051215216 [Date=12/16/2011] [FileNumber=3539550-0] [106deae98733d61af0b0af1f209f61a58426585575ee82d0410c179d4752320fb3e5a59812227c6e291d9293da10745a51424c747046dbf6d89c5b4622e88edb]]
Document description: Certificate of Compliance with LR 37.1 Certificate of Compliance
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1051215216 [Date=12/16/2011] [FileNumber=3539550-1] [30c1da069b8ccb70bb255d580ee42cda94f4879c324d04a0e94b620e00b522e0b61b6ac743fd7e5b3b26a5cc284819d549b2c8617f094bbc1e27ea91a71dff9d]]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JOHN DOE 157 and JOHN DOE 158, by and through their Guardians, JOHN DOE 159 AND JANE DOE 135,

Case No. 10-cv-3754 DWF/JJK

Plaintiffs,

v.

GREGG ALAN LARSEN, and Downloaders 1 – Downloaders 100,

Defendants.

CERTIFICATE OF COMPLIANCE

I certify that the Memorandum in Support of Plaintiffs' Motion to Proceed Using a Pseudonym contains 2842 words in 13 point Times New Roman font. I also certify that I relied on the word count provided by the software used to prepare the Memorandum, Microsoft Word 2007.

Dated: December 16, 2011.

s/Patrick W. Noaker
Patrick W. Noaker, #274951