UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:18-CV-24145-KMW

JOHN DOES, Nos. 1-5,

Plaintiffs,

vs.

RICHARD L. SWEARINGEN, in his
Official capacity as Commissioner of
the Florida Department of Law Enforcement,

Defendant.
_____/

PLAINTIFFS' REPLY TO RESPONSE TO MOTION FOR LEAVE TO PROCEED ANONYMOUSLY

COME NOW THE PLAINTIFFS, JOHN DOES, NOS. 1-5, by and through their undersigned counsel, and herein submit their Reply to the Defendant's Response in Opposition to Plaintiffs' Motion for Leave to proceed Anonymously (DE:13). Defendant's Response minimizes—indeed it largely ignores—the real threat of physical harm that the registrants face, the fact that neither the Defendant nor the public will be prejudiced by a grant of anonymity, and the numerous cases permitting sexual offenders to proceed anonymously. The Defendant also overlooks that Plaintiffs do not oppose disclosure of their names *to the Defendant* for purposes of the Defendant's ability to litigate the case; it is the *public* dissemination of their identifies that is the focus of the Plaintiffs' motion. Because the balance of factors weighs heavily in the Plaintiffs' favor in terms of the *public* disclosure of their identifies, their motion should be granted.

I. Clarification as to Disclosure of Plaintiffs' Names to Defendant for Purpose of Litigating the Case

Plaintiffs wish to clarify one important point that was addressed in their motion but which may have not been as clear as it could have been and therefore may have been overlooked by the Defendant.

In his response, the Defendant emphasizes his need to know the Plaintiffs' identities in order to adequately defend against the lawsuit and to eliminate a "threat of unfairness" to FDLE (DE:13 at 9). The Plaintiffs agree that the Defendant "has an interest in knowing Plaintiffs' identities" and that their names are of "consequence" to the Defendant (DE:13 at 9-10).

In their motion, the Plaintiffs, while arguing forcefully for their position that their identifies be kept from *public* disclosure, did acknowledge that they were "prepared to provide defendant with their identities, so long as it agrees, or is compelled to ensure that this information is known only to those of its agents who are needed to defend the case" (DE:9 at 16). *See also id*. ("the public has no particular need to know Plaintiffs' true identities; all the relevant facts are contained in the pleadings"); *id*. at 18 (moving the Court to "order Defendant (including his agents and attorneys) should they discover Plaintiffs' true identities, not to publicly disclose them, either in a court filing or otherwise"). While the Defendant's response emphasizes his need to know the Plaintiffs' identities in order to defend the case, participate in discovery, and/or assert relevant defenses,[1] it does not appear to address the compromise proposed by the Plaintiffs: to disclose their identifies to *Defendant and its agents* in this litigation while prohibiting the public dissemination of same to be enforced by a protective order,

[1] Again, it should be clear that the Plaintiffs are not opposed to providing the Defendant with their identifying information so that the Defendant can ensure against re-litigation against him by the same parties. But *public* disclosure of the Plaintiffs' names will have no effect on the Defendant's ability to raise collateral estoppel as a defense (DE:13 at 9). Nor would it in any way raise issues of the "effects of res judicata" (*id*.), as that concern can be addressed by publishing the decision without the need to reveal the Plaintiffs' identities.

if necessary. This compromise would satisfy the Defendant's right to know who is suing him and to defend the case while at the same time account for the real threat of physical harm that the registrants face should their identifies be made *public*.

II. Defendant's Indifference To—And Marginalization Of—The Reprisals Already Suffered By Plaintiffs And Threat Of Additional Violence To Plaintiffs If Their Identities Are Revealed Publicly

The Defendant baldly asserts that Plaintiffs are "no different" than the "vast majority" of civil plaintiffs who are required to divulge "embarrassing" personal details such as physical or psychological conditions or other information "they would otherwise not prefer to make public" (DE:13 at 4). But this case is not about Plaintiffs asking to proceed anonymously out of fear of public revelation of embarrassing physical or psychological conditions, or because they "would prefer to keep their disputes private" (DE:13 at 5) (citing *Doe v. Milwaukee Cty*, 2018 WL 3458985 at *1 (E.D. Wisc. 2018)).[2] This case is about whether Plaintiffs have established that this is an "exceptional case" in which they have a "substantial privacy right which outweighs 'the customary and constitutionally-embedded presumption of openness in judicial proceedings.'" *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) (citation omitted).

There is no meaningful comparison between a civil plaintiff revealing an "embarrassing" or personal detail about his life, or fretting over future employment opportunities if not allowed to sue his former employer except by using a pseudonym, and plaintiffs like John Does, Nos. 1-5, who have suffered actual violence, threats of violence, and who fear harassment, retaliation, and additional threats of violence if forced to publicly reveal their identifies in this lawsuit to

[2] *Doe v. Milwaukee Cty*. involved a suit brought by a doctor who alleged reputational harm caused by defendants (a county behavior health facility and the director thereof) when the defendants entered a "wrongful report" to a national databank. 2018 WL 3458985 at *1. The plantiff sought to proceed under a pseudonym, claiming that revealing his identify would prevent him from gaining future employment. *Id*. The district court request rejected the request, explaining that reputational harm "is not the type of 'exceptional circumstance' that justifies proceeding under a pseudonym." *Id*.

anyone other than the Defendant. Indeed, the Defendant's belittling (or even ignoring) the real-life harms suffered by Plaintiffs and the potential for future harm that they have alleged[3] serves only to support their need for special protection such as proceeding anonymously in this litigation. In other words, the Defendant's marginalization of the Plaintiffs' experiences and the risk of continued future threats of violence and stigmatization that they have alleged establishes the reasonableness of their concerns. *See* DE:9 at 13-15.

FDLE's minimization of the harms to the Plaintiffs as a result of the general public learning of their identities and their status completely overlooks the allegations in their motion and in the complaint. For example, John Doe No.1 and his family have received obscene letters, his first wife was denied one job and harassed at another, they were refused rentals, he lost business, he is afraid a child bearing his name would face ostracism and harm, and his brother is afraid that John Doe No.1's nephew would be harmed by association. *See* DE:1 at ¶¶ 63-67. One does not have to be punched in the face to reasonably fear people will punch you in the face given obvious animus expressed through other acts. John Doe No. 3 had his home and car damaged and was called a "raper" by an individual on a bicycle. See DE:1 at ¶ 79. One does not have to be shot or punched or assaulted to fear that people who are willing to damage your property because they think you are a "raper" would hurt you or your wife. Like John Doe No. 3,

[3] Plaintiff's motion was not only supported by allegations and affidavits from the Plaintiffs themselves but also by Dr. Jill Levenson, a professor and an expert who has testified in numerous judicial proceedings involving sex offenders. *See* DE:9 at 64-69. In Dr. Levenson's view, requiring the Plaintiffs to publicly divulge their names subjects them and their families not only "to the possibility of viral public disclosure"; as she explains, "registrants suffer pervasive anxiety, depression, and dread that people will learn of their status and will respond by marginalizing, degrading, or harassing them" (DE:9 at 66). The Defendant ignores Dr. Levenson's affidavit but this Court must not; indeed, in *Plaintiff B v. Francis*, 631 F.3d 1310 (11th Cir. 2011), the Eleventh Circuit vacated a district court order denying an anonymity motion because, *inter alia*, the district court gave "short shrift to the evidence regarding the amount of harm losing anonymity would cause the Plaintiffs," including expert testimony proffered by the plaintiffs on the psychological damage accruing to plaintiffs if forced to reveal their identities. Id. at 1317-18.

John Doe No. 4 had his house and car damaged by neighbors, and was punched in the face by two people who were motivated solely by his name being on the registry, or through aggressive notification, see DE:1 at ¶ 82, which could easily happen to John Doe No. 3 or any of the Plaintiffs. People do not throw projectiles through the windows of convicted home invaders, let alone beat them up based on their prior criminal history. But if the police were actively notifying the home invaders' neighbors on a regular basis, posting signs, door-knocking, sending emails and setting up automated phone calls, their neighbors might take action.

The bottom line is that, notwithstanding the Defendant's marginalization of the Plaintiffs' histories and experiences, *see* DE:13 at 7, the Plaintiffs are not required to exhibit broken bones and fractured skulls in order to show that they reasonably fear harassment and violence from the public as a result of the public learning their status as registrants. Lawsuits make their status public in a way that the registry alone does not. The fact that the Plaintiffs' convictions and registrant status are matters of public record, see DE:13 at 3-4, does not automatically invalidate their need for anonymity. Indeed, "[i]t is one thing to leave the public guessing as to which registrants dared to challenge a popular statutory scheme by bringing this suit. It is quite another thing to point the public to intimate information they otherwise would not be able to associate with the litigants in this suit." *Doe v. Strange*, 2016 WL 1168487 at *2 (M.D. Ala. Mar. 24, 2016).

III. Defendant's Legal Arguments Are Insufficient to Overcome Plaintiffs' Entitlement To Proceed Anonymously In This Litigation

Plaintiffs rely on allegations and authorities discussed in their motion to counter most of the Defendant's anticipated legal arguments. Some matters, however, warrant a brief reply from the Plaintiffs.

The Defendant relies heavily on *Doe v. Frank*, 951 F.2d 320 (11th Cir. 1992). While it is true that the Eleventh Circuit in *Frank* discussed and applied the factors a court is to consider when evaluating whether and under what circumstances a plaintiff may proceed anonymously or under a fictitious name, the outcome in *Frank* (affirmance of a denial of plaintiff's request to proceed under pseudonym) must be considered in the context of the actual circumstances presented there.

The legal challenge brought by the plaintiff in *Frank* involved an allegation of unlawful removal from employment because of, *inter alia,* the plaintiff's alcoholism. *Id*. at 322. The plaintiff sought to proceed anonymously to avoid suffering "some personal embarrassment" at having to divulge his identity given the nature of his lawsuit. *Id.* at 324. Rejecting the plaintiff's request, the *Frank* court noted that it had permitted plaintiffs to proceed anonymously in cases involving mental illness, homosexuality, and transsexuality—all to which a level of "social stigma" attached such that they overcame "the presumption of openness in court proceedings." *Id*. While the Plaintiffs here are not requesting anonymity based on the same reasons at issue in *Frank*, it bears noting that the Eleventh Circuit and other courts have acknowledged the stigma associated with sex offender status. *See Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) ("stigmatizing consequences of being labeled a sex offender"); *Kirby v. Siegelman*, 195 F.3d 1285, 1291 (11th Cir. 1999) (citing *Shimoda* to acknowledge "the stigmatizing effect of being classified as a sex offender"); *Schepers v. Commissioner, Indiana Dept. of Correction*, 691 F.3d 909, 914 (7th Cir. 2012) ("any kind of placement on the registry is stigmatizing").

The Defendant also relies on *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska. 1994), where a district court denied a request for anonymity under the *Frank* standard in a case involving an Alaska sex offender registry statute which had a public notification provision. The

circumstances in *Rowe* are qualitatively different from those here. First, the challenged Alaska statute was enacted in 1994, a time when public notification was vastly more limited than it is today with the advent of the Internet; moreover, the Alaska statute did not contain the more aggressive notification that is at issue here. Furthermore, the Alaska statute's terms only provided for a limited amount of information to be disclosed to the public. *Id*. at 1376. Most importantly, in denying anonymity to the plaintiffs, the Alaska court noted that it "would be inclined to look more favorably upon the request for relief from Rule 10(a) *if plaintiffs had presented facts from which it could be more reasonably concluded that plaintiffs face a serious risk of bodily harm.*" *Id*. at 1387 (emphasis added). The very evidence found lacking in the Alaska challenge has, however, been set forth by the Plaintiffs here. *See* DE:9 at 3 et. seq.

Relying on *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000), the Defendant challenges Plaintiff's assertions of fear or risk of personal harm because, in his view, they have only alleged "a single incident of physical violence" (DE:13 at 7).[4] The Defendant misapprehends Plaintiffs' argument. The Plaintiffs are not contending that the mere act of registration has subjected them to acts of violence; rather, the increasingly aggressive notification requirements, through changes to the law and technological development, have rendered the Plaintiffs far more vulnerable to violence than they were for the first 10 years or so on the registry. That Plaintiffs may not have been harassed or beaten or had their property damaged for years before the enactment of the challenged statute—when the notification requirements were passive in nature—is not relevant to the situation at present under the newer and more aggressive notification aspects of the statute.

The remaining cases relied on by the Defendant where anonymity was denied are also distinguishable. In *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008), a criminal direct

[4] In *Femedeer*, the court held that the plaintiff did not establish "real, imminent personal danger" (DE:13 at 7).

appeal, the defendant moved the appellate court to proceed anonymously or to seal the final disposition of his appeal. The Ninth Circuit rejected the request to seal the disposition of the appeal, but explained that the request to proceed anonymously presented "a closer question." *Id*. at 1012. In evaluating the factors, the court noted that the defendant was arguing that anonymity was necessary because, as a convicted sex offender, he faced an "elevated risk of violent abuse in prison." *Id.* The court rejected this argument because the defendant had failed to establish that his situation was "unusual" in that his concern applied to all similarly situated sex offenders facing prison sentences. *Id*. Moreover, prison officials have a responsibility to take measures to prevent violence between incarcerated inmates. *Id*. Here, there is no one with any official duty to protect the plaintiffs from harm and violence; in fact, as alleged by John Doe No. 4, law enforcement turned a blind eye when he reported acts of violence and the police warned him that "some people get what they deserve." *See* DE:1 at ¶ 82.

Finally, the Defendant relies on *Fla. Action Committee v. Seminole County*, 2016 WL 6080988 (M.D. Fla. Oct. 18, 2016). There, non-party witnesses, not the plaintiff, sought anonymity because they claimed to have knowledge of the matters involved in the litigation. In rejecting their request, the court noted that the non-party witnesses offered only a "study examining public retaliation against sex offenders," as well as newspaper articles about violence to registrants in that district. *Id*. at *3. Because the non-party witnesses offered nothing more than "generalities and speculation," the court denied their request to proceed anonymously. But in the instant case, the Plaintiffs *have* alleged physical violence, *see* DE:1 at ¶ 82, *as well as* vandalism against their properties. *See* DE:1 at ¶¶ 79, 82. In addition, Plaintiffs have submitted sworn declarations from a number of registrants recounting relatively recent instances of violence, vigilantism, and vandalism occurring on the heels of notification. *See* DE:9 at 25-57.

Plaintiffs here have submitted more than sufficient evidence to establish their entitlement to proceed anonymously; the non-party witnesses in the Middle District case relied on by the Defendant did not.

IV. Conclusion

Plaintiffs have a real and substantial fear that disclosure of their identities will bring physical harm to them and their families. The balance of factors weighs in favor of anonymity. Accordingly, Plaintiffs request that this Court grant their Motion for Leave to Proceed Anonymously.

Respectfully submitted,

s/*Valerie Jonas*
Valerie Jonas, Esq.
Florida Bar No. 616079
valeriejonas77@gmail.com
WEITZNER AND JONAS, P.A.
1444 Biscayne Blvd. Suite 207
Miami, FL 33132-1430
Phone (786) 254-7930

s/*Todd G Scher*
Todd G. Scher
Fla. Bar No. 0899641
tscher@msn.com
Law Office of Todd G. Scher PL
1722 Sheridan Street #346
Hollywood, FL 33020
Tel: 754-263-2349
Fax: 754-263-4147

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed on December 26, 2018, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notification for this case, including all opposing counsel.

By: *Todd G. Scher*
TODD G. SCHER