

THE HONORABLE MARSHA J. PECHMAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMAZON.COM, LLC,
Plaintiff,

v.

KENNETH R. LAY, in his official capacity as
Secretary of the North Carolina Department of
Revenue,
Defendant.

JANE DOE 1, JANE DOE 2, JANE DOE 3,
JANE DOE 4, JANE DOE 5, JANE DOE 6,
AND CECIL BOTHWELL,
Plaintiffs-Intervenors,

v.

KENNETH R. LAY, in his official capacity as
Secretary of the North Carolina Department of
Revenue, and AMAZON.COM, LLC,
Defendants in Intervention.

No. 2:10-cv-00664-MJP

**INTERVENORS' REPLY IN SUPPORT
OF MOTION TO FILE COMPLAINT
IN INTERVENTION USING
PSEUDONYMS**

**NOTE ON MOTION CALENDAR:
JULY 23, 2010**

Oral Argument Requested

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1 Neither party in this action objects to the motion of Jane Does 1-6 and Cecil Bothwell
2 (“Intervenors”) to proceed using pseudonyms for Jane Does 1-6. *See* Def.’s Response to
3 Pseudonymous Mot. (Dkt. No. 42) at 3 (stating that Defendant Kenneth R. Lay, the Secretary of
4 the North Carolina Department of Revenue (“DOR”), “does not oppose” the motion at this time);
5 Plaintiffs-Intervenors’ Pseudonymous Mot. (Dkt. No. 23) at 1 (noting that Amazon does not
6 object). The Court should grant this motion because Intervenors have demonstrated that using
7 pseudonyms in this case is necessary to preserve their constitutional rights to privacy and free
8 expression and to promote the public interest in protecting those rights.

9 ARGUMENT

10 Intervenors seek to proceed pseudonymously to protect their constitutional rights to
11 privacy and free expression and to ensure that their Amazon purchase records, which reveal
12 which books they have read, which films they have watched, and which other expressive
13 materials they have purchased, remain private. As explained in Intervenors’ motion, and as in
14 numerous other cases, including Supreme Court cases, where plaintiffs have been permitted to
15 proceed pseudonymously, anonymity is necessary here because: (1) the right to anonymity is the
16 basis of Intervenors’ substantive claims; (2) the First Amendment protects their right to
17 anonymity; and (3) the case involves matters of a sensitive and highly personal nature. Although
18 DOR does not oppose this motion and does not claim that DOR or the public would suffer any
19 prejudice, DOR nevertheless proffers several arguments as to why Jane Does 1-6 should not
20 necessarily be permitted to proceed pseudonymously. None of the reasons suggested by DOR
21 undermines the need for anonymity here.

22 **I. JANE DOES 1-6 SHOULD BE PERMITTED TO PROCEED** 23 **PSEUDONYMOUSLY BECAUSE THE RIGHT TO ANONYMITY IS THE BASIS** 24 **OF THEIR SUBSTANTIVE CLAIMS.**

25 DOR does not respond to Intervenors’ argument and case law that the only practicable
26 way for Intervenors to defend their constitutional rights to privacy and anonymity in this
27 proceeding is to use pseudonyms because, otherwise, the very rights that Intervenors seek to
protect will be eliminated at the outset if they are forced to proceed under their real names. *See*

1 Mot. at 2-4. Instead, DOR suggests that Jane Does 1-6 unnecessarily created a need for
2 anonymity by filing their proposed complaint. Response at 2. Jane Does 1-6 are not the ones
3 who have created their need to proceed pseudonymously. It is DOR's unconstitutional request—
4 and refusal to withdraw the request, return the information and agree not to issue such overly
5 broad requests in the future—that has forced Intervenor to seek to intervene in this lawsuit to
6 protect their constitutional rights. They must do so pseudonymously to avoid losing those very
7 rights. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (rejecting
8 judicial rule that would require an individual to identify himself in order to assert his First
9 Amendment rights because it “would result in nullification of the right at the very moment of its
10 assertion”); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091 n.2 (W.D. Wash. 2001)
11 (“[w]hen an individual wishes to protect their First Amendment right to speak anonymously, he
12 or she must be entitled to vindicate that right without disclosing their identity”).

13 Moreover, as explained in Intervenor's Motion, Jane Does 1-6 needed to reveal their
14 purchasing records—the very information that they seek to protect—to explain why they would
15 be chilled from purchasing private and expressive materials in the future from Amazon and from
16 other retailers if DOR were permitted to obtain such records. Mot. at 2. Intervenor's allegations
17 and declarations provide evidence that DOR's requests for information, which will reveal the
18 expressive activity of Amazon's customers, impermissibly chill the First Amendment rights of
19 those customers. This evidence will aid the Court in the resolution of this case. *See, e.g., In re*
20 *Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Med. L. Rptr. 1599, 1600 (D.D.C.
21 1998) (Dkt. No. 21, Ex. B) (considering evidence of chilling effect in holding that a subpoena to
22 a bookstore implicates First Amendment interests). It is in exactly this situation that proceeding
23 pseudonymously will serve the public interest. *See, e.g., Does I thru XXIII v. Advanced Textile*
24 *Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) (“[P]ermitting plaintiffs to use pseudonyms will
25 serve the public's interest in this lawsuit by enabling it to go forward.”).

1 **II. JANE DOES 1-6 SHOULD BE PERMITTED TO PROCEED**
 2 **PSEUDONYMOUSLY BECAUSE THE FIRST AMENDMENT REQUIRES IT.**

3 The motion should also be granted because the First Amendment requires that Jane Does
 4 1-6 be allowed to use pseudonyms. As DOR concedes, Response at 5-6, it must show a
 5 compelling interest when requesting information protected by the First Amendment and a
 6 sufficient nexus between that interest and the information sought. *See Gibson v. Fla. Legislative*
 7 *Investigation Comm.*, 372 U.S. 539, 546 (1963) (“[I]t is an essential prerequisite to the validity of
 8 an investigation which intrudes into the area of constitutionally protected rights of speech . . .
 9 that the State convincingly show a substantial relation between the information sought and a
 10 subject of overriding and compelling state interest”); *In re Kramerbooks*, 26 Med. L. Rptr. at
 11 1600; *see also* Mot. at 4-7. Although DOR argues that it has a compelling interest in the
 12 administration of the tax system, Response at 6, this sweeping assertion does not justify
 13 obtaining information that DOR has admitted that it does not need for tax purposes, *see*
 14 Declaration of H. Alan Woodard (Dkt. No. 43-2) ¶ 9—detailed information concerning which
 15 individuals purchased which specific books, films, and other expressive materials. Because
 16 DOR has conceded that it does not need this information, it cannot have a compelling interest in
 17 obtaining it and cannot show a sufficient connection between that information and its interest in
 18 tax collection. It would thus violate the First Amendment to require disclosure of the identities
 19 of Jane Does 1-6, and, by the same measure, the records of which expressive materials they have
 20 purchased from Amazon.

21 **III. JANE DOES 1-6 SHOULD BE PERMITTED TO PROCEED**
 22 **PSEUDONYMOUSLY BECAUSE THE CASE INVOLVES MATTERS OF A**
 23 **SENSITIVE AND HIGHLY PERSONAL NATURE.**

24 The customer records at issue here reveal the Jane Does’ intimate and private family
 25 issues, political and religious beliefs, and medical and mental health conditions. Proceeding
 26 pseudonymously is also therefore necessary “to preserve privacy in a matter of sensitive and
 27 highly personal nature.” *Advanced Textile Corp.*, 214 F.3d at 1068.

1 DOR professes to be sensitive to the privacy concerns asserted by Jane Does 1-6, but
2 questions whether their concerns are sufficient to meet the Ninth Circuit's test for cases "where
3 pseudonyms are used to shield the anonymous party from retaliation." Response at 4. The
4 factors referenced by DOR are not applicable here because Jane Does 1-6 are not seeking to
5 proceed pseudonymously on the basis of a risk of retaliation. They need to proceed
6 pseudonymously "to preserve privacy in a matter of sensitive and highly personal nature," which
7 the Ninth Circuit has made clear is a different situation. *Advanced Textile*, 214 F.3d at 1068. In
8 *Advanced Textile*, the Ninth Circuit stated that there are three independent situations in which
9 plaintiffs have been permitted to proceed pseudonymously: (1) "when identification creates a
10 risk of retaliatory physical or mental harm;" (2) "when anonymity is necessary to preserve
11 privacy in a matter of sensitive and highly personal nature;" and (3) "when the anonymous party
12 is compelled to admit [his or her] intention to engage in illegal conduct, thereby risking criminal
13 prosecution." *Id.* (internal quotation marks omitted). The court then articulated a multi-factor
14 test applicable only in the first situation when "pseudonyms are used to shield the anonymous
15 party from retaliation." *Id.* (considering severity of threatened harm, reasonableness of
16 anonymous party's fears, and anonymous party's vulnerability to such retaliation). Those factors
17 do not apply in the second situation present here: when anonymity is necessary to preserve
18 privacy in a matter of sensitive and highly personal nature. *Id.*; see also *Doe 130 v. Archdiocese*
19 *of Portland*, No. CV 07-1732-PK, 2008 WL 656021, at *3 (D. Or. Mar. 6, 2008) (stating that
20 *Advanced Textile* did not suggest that the retaliation factors must be considered where the need
21 for anonymity is other than to protect a party from retaliation). Thus, DOR's discussion of the
22 cases brought under a physical or mental retaliation theory, like *Advanced Textile* and *Doe v.*
23 *Kamehameha Schools/Bernice Pauahi Bishop Estate*, Civ. No. 08-00359 JMS/BMK, 2009 WL
24 308351, at *1 (D. Haw. Feb. 6, 2009) ("Plaintiffs brought this action anonymously based on a
25 fear of retaliation."), *aff'd*, 596 F.3d 1036 (9th Cir. 2010), is inapposite.¹

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27 ¹ Although the Ninth Circuit in *Kamehameha Schools* stated that a plaintiff must show a reasonable fear

1 DOR attempts to distinguish the privacy cases cited by Intervenors on the basis that this
2 is allegedly a tax case. Response at 5. That is a distinction without a difference. The need for
3 anonymity to protect information of highly sensitive and personal nature is the same regardless
4 of whether the case involves taxes. In any event, this case is not about taxes, as DOR has already
5 admitted that it does not need records of which books, films, and other expressive materials
6 individuals are purchasing for the purposes of tax collection. Woodard Decl. ¶ 9.

7 DOR also attempts to undermine the need for anonymity by stating that “the strict
8 confidentiality procedures governing NC Revenue prohibit the disclosure of information
9 obtained during an audit and therefore already protect the Jane Does’ privacy interests.”
10 Response at 3. That misses the point. The issue here is whether Jane Does 1-6 should be forced
11 to reveal their identities to challenge in court DOR’s ability to obtain their private purchasing
12 records. The issue is not whether DOR will keep the information confidential. In any event,
13 DOR’s confidentiality obligations do nothing to protect the constitutionally protected privacy
14 interests of Intervenors and other citizens to read, view, and purchase expressive and private
15 materials without government scrutiny. *See Bursley v. United States*, 466 F.2d 1059, 1086 (9th
16 Cir. 1972) (holding that the secrecy of the grand jury proceeding “did little to soften the blow to
17 the First Amendment rights” because “[t]he public did not know what the grand jury learned, but
18 the proceedings were no secret to the Government”), *superseded by statute on other grounds, In*
19 *re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988).

20 Finally, DOR suggests that it might need to learn the identities of Jane Does 1-6 later in
21 this proceeding because they have not alleged that they paid sales or use taxes for their Amazon
22 purchases. *See* Response at 7. The absence of such allegations should not be read as implying
23 that Intervenors have not complied with their tax obligations. In any event, such allegations have
24

25 of severe harm in order to proceed anonymously, 596 F.3d at 1043, that statement was made in the
26 context of a case involving a retaliation claim. This case is different. *Kamehameha Schools* did not
27 overrule the other two situations in which pseudonymous litigation is permitted under *Advanced Textile*,
for which the retaliation factors are not necessary. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir.
2003) (en banc) (a three-judge panel may not ordinarily overrule a decision of another panel).

1 nothing to do with this motion, or with this case. The relevant question for this motion is
2 whether the identities of Jane Does 1-6 are necessary for the purposes of this litigation. They are
3 not, and Jane Does 1-6 should be permitted to proceed pseudonymously.

4 **CONCLUSION**

5 For the foregoing reasons, Intervenor's motion to file the Complaint using pseudonyms
6 for Jane Does 1-6 should be granted.

7 Respectfully submitted this 23rd day of July, 2010.

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10 **AMERICAN CIVIL LIBERTIES UNION OF**
11 **WASHINGTON FOUNDATION**
12 Sarah A. Dunne, WSBA # 34869
13 901 Fifth Ave, Suite 630
14 Seattle, Washington 98164
15 Tel: (206) 624-2184
16 Fax: (206) 624-2190
17 Email: dunne@aclu-wa.org

/s/ Venkat Balasubramani
Venkat Balasubramani, WSBA #28269
FOCAL PLLC
8426 40th Ave SW
Seattle, WA 98136
Tel: (206) 529-4827
Fax: (206) 260-3966
Email: venkat@focallaw.com

18 **AMERICAN CIVIL LIBERTIES UNION OF**
19 **NORTH CAROLINA FOUNDATION**
20 Katherine Lewis Parker (*pro hac vice*)
21 Post Office Box 28004
22 Raleigh, North Carolina 27611
23 Tel: (919) 834-3466
24 Fax: (866) 511-1344
25 Email: acluncklp@nc.rr.com

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Speech, Privacy and Technology Project
Aden J. Fine (*pro hac vice*)
Mariko Hirose (*pro hac vice*)
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2651
Email: afine@aclu.org
mhirose@aclu.org

CERTIFICATE OF SERVICE

The undersigned certifies that she filed the foregoing Reply in Support of Motion to File Complaint in Intervention Using Pseudonyms through the Court's CM/ECF system which will provide a notice of filing to counsel for all parties.
July 23, 2010.

/s/ Mariko Hirose
Mariko Hirose

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