**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| JOHN DOE,<br>Plaintiff | ) | CIVIL ACTION NO.: 3:16cv-30184-MAP |
| v. | ) | |
| WILLIAMS COLLEGE,<br>Defendant. | ) | |

**REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Plaintiff, John Doe[1] ("John" and "Plaintiff"), through counsel, Stacey Elin Rossi, files this Reply Memorandum of Law in Opposition to Defendant's Motion to Reconsider (Doc. 29) and Memorandum of Law in Support (Doc. 30) and in support thereof, states:

## INTRODUCTION

Plaintiff re-alleges and reasserts the allegations and arguments set forth in its Motion to Proceed Under Pseudonym and for Protective Order (Doc. 2.) and Memorandum of Law in Support Thereof (Doc. 5.).

In light of the serious nature of the allegations contained in the complaint, Plaintiff is concerned about acts of reprisal that could prevent Plaintiff from proceeding with his education, his career, or that could cause him physical or mental harm should his name be disclosed to the public.

[1] All personally identifying information has been redacted to protect the privacy of the party herein referred to as John Doe, the complainant, and of his accuser whom is referred to as Susan Smith.

In bringing this suit, John seeks to clear his name of the allegation and obtain a judicial determination that Defendant acted improperly. Inclusion of his name would result in the public association of his name with the accuser's allegations of sexual misconduct, which would be widely available through electronic means, thereby defeating the very purpose of his suit and causing the harm that the suit seeks to prevent.

## STATEMENT OF FACTS

John relies upon his Amended Verified Complaint and Jury Trial Demand (Doc. 28 [Am. Compl.]) which sets forth facts demonstrating Plaintiff's entitlement to litigate this matter pseudonymously. The facts set forth in the Amended Verified Complaint and supporting exhibits are incorporated herein by reference.

John's original Verified Complaint was filed on November 23, 2016. The Complaint and other initial filings contained Susan Smith's real name as John originally intended to proceed using the non-party employee Susan Smith's real name. Defendant correctly states in its Memorandum that this was no oversight. John was under no obligation to proceed using a pseudonym for Smith. However, Defendant outrageously and wrongly accuses Plaintiff's counsel of "extortion" in its description of a confidential settlement communication that it has produced in violation of Rule 408 of the Federal Rules of Civil Procedure. (Doc. 30 at 2, Doc. 30-1.)

On November 27, 2016, College Counsel requested that Plaintiff redact the filings and employ a pseudonym for Smith, although Counsel does not represent Smith. Counsel stated its reasoning for the request as the College's interest in ensuring the confidentiality of students and employees who are parties to the College's disciplinary proceedings. Counsel agreed to allow

Plaintiff to proceed under pseudonym and protective order unopposed so long as Plaintiff agreed with the College's request to maintain the confidentiality of Smith's identity.

On November 28, 2016, Plaintiff assented without hesitation and began the redaction process which was completed December 1, 2016. It is noteworthy that the College would oppose Plaintiff's Motion "unless the same confidentiality is extended to Smith" as if the College does not have an interest in ensuring the confidentiality of students when it comes to John.

In sum, Plaintiff had clearly originally intended to use Smith's real name and filed the original documents as such and only redacted the information upon College Counsel's subsequent request four days after filing.

Defendant misrepresents the facts of this discussion with College Counsel as a complaint "about the public naming of Smith for no proper purpose." Defendant further misrepresents Plaintiff's counsel's commentary on a blog it attached to its memorandum as Exhibit B. The comments included requests to the blog administrator to remove and redact Smith's name and nothing more than a clarification and repeating what is available from public record, as clearly shown in Exhibit B.

As stated in Plaintiff's Memorandum in Support of Motion to Proceed under Pseudonym and For Protective Order, the identity of John Doe and Susan Smith remain confined to a limited number of people within the College community. "Ephblog" is populated by Williams alumni and may be considered part of the College community. Furthermore, the administrator of "ephblog" has redacted the real name of Susan Smith.

Plaintiff needed to reveal her role as a particular employee at the College as her position has relevance to the pleadings, particularly regarding the allegations of Dean Bolton's violation of privacy and Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34

CFR Part 99). With her job title and the year during which she was employed, a search for Smith's identity is possible using Wayback Machine or another web archive; it was not even necessary for Plaintiff to have revealed Smith's identity for her identity to be discovered. In any case, none of the journalists or reporters who have written about this lawsuit have chosen to reveal Smith's identity nor has Plaintiff's attorney revealed Smith's identity to them. Defendant's claim that Smith's reputation has been harmed is severely overblown.

**No college or university in any Title IX lawsuit, of which there are hundreds, has ever opposed a student's request to proceed under pseudonym.** No court has ever ordered a student plaintiff to proceed under his or her true identity. As in those cases, this Court should allow Plaintiff to continue to employ a pseudonym because he is alleging that the College is responsible for his current and future reputation, and physical and mental well-being. Defendant's Motion effectively asks that the Court ignore or order an exception to FERPA. Defendant is bound to follow FERPA for all its students, not just those it seeks to protect, e.g. Smith. Defendant seeks this reversal of this Court's order in an effort to intimidate John into silence.

Defendant's disingenuous misrepresentation of the factual history, i.e. that Plaintiff had clearly intended to use Smith's real name and only redacted the information upon College Counsel's request four days after filing; disingenuous pretenses about protecting confidentiality of students (selectively seeking Smith's protection as opposed to John's, even further evidence of differential treatment and bias against John); and extraordinary request that this Court deviate from case precedent demonstrate the College's overwhelming aim of destroying John.

## ARGUMENT

Courts have allowed plaintiffs to proceed anonymously in cases involving social stigmatization, real danger of physical harm, or where the injury litigated against would occur as a result of the disclosure of plaintiff's identity. *Doe v. Bell Atlantic Business Systems Services, Inc.*, 162 F.R.D. at 420 (citations omitted). Cases in which parties are allowed to proceed anonymously because of privacy interests traditionally have involved abortion, mental illness, personal safety, homosexuality, transsexuality and child welfare cases. *Id*.

This case falls into that exceptional category. Cases within this Circuit have not addressed an issue similar to this one.[2] Indeed, the only case on all fours with the instant case is *Doe v. Univ.of the South*, 687 F.Supp.2d 744 (E.D. Tenn. 2009), upholding the Order of a United States Magistrate Judge granting pseudonymity to the plaintiff (Attachment 1 to Doc. 5.), who was in circumstances entirely similar to that of John. There, the employed standard is the same as that of this Circuit, with the added requirement that the moving party's need for privacy substantially outweighs the risk of unfairness to the opposing party. *See Doe v. Univ. of the South*, No. 4:09-cv-62, Memorandum and Order (E.D. Tenn. 2009 Aug. 7, 2009) (Lee, U.S.M.J.). Factors in addition considered by other courts cited by the plaintiff in that case include: (i) whether identification of the plaintiff would result in other harm, including whether the injury litigated against would be incurred as a result of the disclosure of plaintiff's identity; (ii) whether public interest in the litigation is furthered by requiring disclosure of the plaintiff's

[2] *See e.g. Doe v. Word of Life Fellowship*., Inc., 2011 WL 2968912, **1-2 (D.Mass 2011) (adult defendant accused of sexually abusing a minor denied pseudonymity on public policy grounds and where defendant arrested by police); *Doe v. Univ. of Rhode Island*, 1993 WL 667341 (D.R.I. 1993) (plaintiff in sexual assault case denied pseudonymity where case already publicized and where court found victim status to not carry stigma). *Also see Liberty Media Holdings, LLC v. Swarm Sharing Hash File*, 821 F.Supp.2d 444, 452-453 (D.Mass. 2011) (questioning whether homosexuality still carries stigma).

identity or (iii) whether there is an atypically weak public interest in knowing the litigant's identities. *See Sealed Plaintiff*, 537 F.3d at 190 (citations omitted).

In granting Plaintiff's motion, the court considered, *inter alia*, the "essentially uncontested representations" that no criminal charges were filed; there is no known public record of the accusation, and that the loss of anonymity due to electronic filing, all would compel the plaintiff to disclose information "of the utmost intimacy."[3] *See Doe v. Univ. of the South*, No.4:09-cv-62, Memorandum and Order.

Likewise here, no criminal charges were filed and there is no known public record of the accusation. Because the proceedings at issue here confined knowledge to a limited number of people within the College community, the allegation that John committed sexual misconduct has not been publicized. Such limited dissemination militates in favor of maintaining the status quo and allowing the use of pseudonyms. *See Sealed Plaintiff v. Sealed Defendant # 1*, 537 F.3d 185, 190 (2d Cir. 2008), citing *Doe v. Del Rio*, 24 F.R.D. 154, 157 (S.D.N.Y. 2006) (factors in determining appropriateness of pseudonymous filing include extent to which the identity of the litigant has been kept confidential). Also similarly here, the nature of the claims by Defendants of John's alleged sexual misconduct would require Plaintiff to disclose information "of the utmost intimacy."

**FERPA Prohibits the Production of an Unredacted Educational Record.**

Student identity is an "Education Record" under FERPA. FERPA imposes a direct obligation on colleges and universities not to disclose "education records." *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1145 (S.D. Ohio 2000) *ajf'd*, 294 F.3d 797 (6th Cir. 2002).

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[3] The court also considered that the defendant college's student disciplinary records did not reflect that the plaintiff had been accused of rape by a fellow student.

The information sought by Petitioner to disclose – the identity of Plaintiff – consists of an "education record" within the meaning of FERPA, and therefore is protected from disclosure. FERPA broadly defines education records as "[t]hose records, files, documents and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C.§ 1232g(a)(4). Regulations under FERPA issued by the Department of Education ("DOE") also make clear that any "personally identifiable information" in education records must be protected from disclosure. 34 C.F.R. § 99.2, 99.3. Such information includes "[t]he student's name," any "personal identifier," and any "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person ... who does not have knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. § 99.3.

"It is abundantly clear that disciplinary records ... satisfy both prongs of the statutory definition of education records," *Miami Univ.,* 91 F. Supp. 2d at 1149, because the legislative history of FERPA indicates that the purpose of the Act is to "to protect [ students'] rights to privacy .... ," Joint Statement, 120 Cong. Rec. 39858, 39862 (Dec. 13, 1974). The DOE also interprets the meaning of "education records" under FERPA to include student disciplinary records. *See* Rules and Regulations, Department of Education, 60 F.R. 3464, 3465 (Jan. 17, 1995) ("[A]ll disciplinary records, including those related to non-academic or criminal misconduct by students, are 'education records' subject to FERPA.").

Such information is also protected by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., pursuant to which DOE has explained that "[t]he sexual harassment of students, including sexual violence, interferes with students' right to receive an education free

from discrimination .... " (U.S. Dep't of Educ., *Dear Colleague Letter,* at 1 (Apr. 4, 2011)) and advised that failure to protect confidentiality can have a "chilling effect" on the reporting of sexual assaults (Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence,* at 19 (Apr. 29, 2014)) or on student reporting of assaults by college employees as in the instant case.

Although FERPA does authorize disclosure pursuant to a lawful judicial order – 20 U.S.C.1232g(b)(2)(B); 34 C.F.R. § 99.3 l(a)(9)(I) -- **such an order must be necessary to the particular proceeding to justify the privacy invasion.** The fact that FERPA authorizes disclosure pursuant to a court order "cannot end [the inquiry] because "the Congressional policy expressed in this provision places *a significantly heavier burden on a party seeking access to student records to justify disclosure* than exists with respect to discovery of other kinds of information." *Rios v. Read,* 73 F.R.D. 589,598 (E.D.N.Y. 1977). The privacy violations that led Congress to enact FERPA "are no less objectionable simply because release of the records is obtained pursuant to judicial approval unless, *before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the students." Id.* at 599; *see also Warner Bros. Records v. Does 1-6,* 527 F. Supp. 2d 1, 2 (D.D.C. 2007) (examining whether plaintiff had shown "good cause" for the release of student identifying information). Accordingly, this Court's power to order disclosure of the Plaintiff's name does not absolve Defendant of his burden to first justify such an order with a showing that such information is necessary, and so critical that it outweighs the students' privacy interests. Defendant has not shown that this information, i.e. John's real identity, is necessary; therefore, it has not met this burden.

No such showing can be made here because there is no prejudice to Defendant in proceeding with a redacted record. The true name of the Plaintiff is not necessary for Defendant to bring or argue his case, or for the Court to conduct its review. The interests of Defendant and/or the public will not be harmed if Plaintiff's name is not revealed. The opposite is true of Plaintiff; the prejudice to Plaintiff in proceeding with an unredacted record. The records are potentially harmful and constitute an invasion of privacy if disclosed.

Furthermore, in comparison, the identity of Smith is not even protected educational information, as Defendant attempts to claim. In *Wallace v. Cranbrook Educational Community,* the plaintiff sought the identity of students who gave statements in relation to an employee's alleged misconduct (2006 WL 2796135, at *4 (E.D. Mich. Sept. 27, 2006)). As the Court in *Wallace* explained, the difference is that "records [which] ... involve[]disciplinary actions *against a student by a student"* are protected, while *"[Ellis* and *Wallace]* involve[] disciplinary action against an employee," which is not considered an "education record." 2006 WL 2796135 at *4. Indeed, FERPA affirmatively excludes from the definition of "education record" those records which concern "persons who are employed by an educational agency .... " 20 U.S.C. *§* 1232g(a)(4)(B)(iii); 34 C.F.R. *§* 99.3.

Aside from privacy considerations, a court must consider whether the very "injury litigated against would occur as a result of the disclosure of plaintiff's identity." *Doe v. Bell Atlantic Business Systems Services, Inc.*, 162 F.R.D. at 420 (citations omitted). **Simply being *accused* of sexual assault bears a strong stigma.** Publicity of such accusation would unquestionably have catastrophic effects on twenty-two-year-old John's future prospects for higher education and employment, and thus the publicity it would bring to John would entirely defeat the purpose of the suit—to clear his name. Among other remedies, John is seeking

orders: to enjoin Defendants from pursuing the ongoing disciplinary proceedings against him initiated by employee Smith; to allow John to earn his degree; to expunge John's disciplinary records from all College records; to enjoin Defendants from violating John's right to privacy under the Family Educational Rights and Privacy Act (FERPA) and Massachusetts Privacy Act (M.G.L. C. 214, § 1B) and to represent his good standing to third parties.

Thus in bringing suit, John is attempting, as best he can, to eliminate the harm resulting from Defendants' improper actions. If he were forced to prosecute the case in his own name, such disclosure would serve only to augment such harm and render useless the suit's primary aim. Under such circumstances, pseudonymous litigation is necessary and appropriate, and no less drastic measure would accomplish such purpose.

The court in *Doe v. Univ. of the South* next found that the plaintiff's need for pseudonymity substantially outweighs the presumption that identity is public information, finding that the public would know everything else about the case other than identity and that the public interest would not thereby be compromised, as defendant conceded there was nothing particular about plaintiff's status that warranted heightened public interest. *See Doe v. Univ. of the South*, No. 4:09-cv-62, Memorandum and Order. (Attachment 1 to Doc. 5.) As to prejudice to the defendant school, the court ruled that where the school fully knows the plaintiff's identity, it could not show prejudice in conducting pre-trial proceedings pseudonymously. The court continued that the only potential factor, heightened cost from the potential of more frequent court involvement, is substantially outweighed by the plaintiff's need for privacy, but if actual prejudice arose thereby, that the court could again address the issue at that point. All of these same considerations would be identical in this case, demanding the same result.

## CONCLUSION

For all of the forgoing reasons, Plaintiff respectfully requests this Court to deny Defendant's Motion for Reconsideration. Plaintiff respectfully requests further that this Court issue a protective order regarding confidentiality of any private and confidential information produced. A proposed order, copied from *John Doe v. Williams College* (Case No. 1:13-cv-11740-FDS), is attached.

December 23, 2016

By: _____/s/ Stacey Elin Rossi_____

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## CERTIFICATE OF SERVICE

This document was served electronically upon all counsel of record by filing through the ECF system on December 23, 2016.

_/s/ Stacey Elin Rossi_____
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**DISTRICT OF MASSACHUSETTS**

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| JOHN DOE,<br>Plaintiff | ) | CIVIL ACTION NO.: 3:16cv-30184-MAP |
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**DECLARATION OF STACEY ELIN ROSSI, ESQ.**
**IN SUPPORT OF PLAINTIFF'S OPPOSITION TO**
**DEFENDANT'S MOTION FOR RECONSIDERATION**

STACEY ELIN ROSSI, ESQ. hereby declares subject to the penalties of perjury pursuant to 28 U.S.C. § 1746:

1. I am attorney for the Plaintiff, John Doe ("Plaintiff").
2. I submit this declaration in support of Plaintiff's Opposition to Defendant's Motion for Reconsideration.
3. In the instant action, Plaintiff seeks redress for actions, inactions, omissions, and the flawed procedures employed by Defendant Williams College ("Williams," "Defendant Williams," and "College") concerning the wrongful and untruthful allegations of student misconduct made against Plaintiff by employee Susan Smith.
4. The conduct in question included fourteen allegations against John that he "abused," "coerced," and "forced" Smith with insufficient evidence to meet the criteria of the College's policy against "relationship abuse." Smith likewise employed the term "force" erroneously when describing the alleged incident in question.

5. On November 21, 2016, the College Hearing Panel found John responsible for violating the Code of Conduct by engaging in non-consensual sex. In doing so, the Panel:

    a. ignored the fact that the Code of Conduct at the time of September 2014 stated that "both parties have the obligation to communicate consent or the lack of consent";

    b. ignored the fact that the Code of Conduct did not have a policy of "affirmative consent" at the time but used it in its decision making;

    c. fabricated an allegation that the sex on the night in question was "rough";

    d. based its determination solely on an "unusual" position, equating uncomfortable sex in such a position as tantamount to rape;

    e. used a burden of proof of mere "credibility" rather than a heightened standard and not even the College's own, albeit low, standard of preponderance of the evidence (see "the Hearing Panel found this evidence [referring to Smith's inconsistent statements and her recalling of the alleged incident to "friends"] to be **credible**, and therefore find you responsible for violation of the code of conduct in regard to sexual misconduct. Doc. 33-7 at 2.)[emphasis added.]; and

    f. ignored evidence that the accuser 1) contradicted her own claims (e.g. commenting "No, he's never done that. He doesn't do that." Doc. 33-1 at 13.); 2) did not express that she did not want to be having sex, (Doc. 33-1 at 12.) 3) lied to the investigator, 4) had motivation to fabricate, exaggerate, and defame Plaintiff, 4) lacked credibility, 5) applied the terms "force" and "coerce"

inappropriately, 6) never reported any assaultive or sexually assaultive behavior of Plaintiff until she was facing a complaint investigation into her own behavior, 7) had been engaging in sex with Plaintiff for a year prior and a year following the alleged incident, 8) planted evidence in the form of groomed "witnesses" to recount her statements, and 9) had no evidence whatsoever to support her claim.

6. In Williams' finding that Plaintiff was responsible for sexual misconduct, Plaintiff was deprived of the most basic fundamental fairness rights and was discriminated against on the basis of his male sex.
7. Plaintiff's education and future career has been severely damaged. Without appropriate redress, the unfair outcome of the Hearing will continue to cause irreversible damage to John's educational career and future employment prospects, with no end in sight.
8. In light of these facts, Plaintiff should be permitted to protect his identity by proceeding under pseudonym.

**WHEREFORE**, the Court should deny Defendant's request to reconsider and vacate the Court's order allowing Plaintiff to proceed under pseudonym and enter the proposed order in its entirety and should order such further and other relief as the Court deems just and proper.

I declare under the penalty of perjury that the foregoing is true and correct, pursuant to Title 28, United States Code, Section 1746.

December 23, 2016

By: _____/s/ Stacey Elin Rossi_____

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