IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JANE DOE I, JANE DOE II AND JANE DOE III,	)	
Plaintiffs,	)	**Case No.: 04-CV-10108 (SHS)**
v.	)	
EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,	)	
Defendant.	)	

PLAINTIFFS JANE DOE I AND II'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL CLOSED COURT TESTIMONY AND THE CONTINUED USE OF PSEUDONYMS

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Plaintiffs Jane Does I and II respectfully submit this Memorandum of Law in support of their (1) motion to permit Jane Does I and II to continue maintaining their use of pseudonyms throughout the remaining proceedings, and (2) letter brief requesting partial closure of the courtroom by permitting Jane Does I and II to testify in the Court's chambers rather than in open court.[1]

FACTS

In 1991, democratically elected president Jean Bertrand Aristide was overthrown by the Haitian Armed Forces in a violent coup d'etat. *See* Compl. ¶¶ 20, 26. Members of the Haitian paramilitary organization known as the *Front Revolutionnaire pour l'Avancement et le Progres d'Haiti* ("FRAPH"), working in concert with the Haitian Armed Forces, engaged in a campaign of terror and repression against the Haitian population in order to break local resistance to military rule. *Id.* ¶¶ 11-13. FRAPH killed, arbitrarily detained, raped and otherwise tortured civilians in the poorest neighborhoods of Haiti in persecuting pro-Aristide supporters. *Id.* ¶¶ 13-14.

Both Jane Doe I and II became outspoken critics of the military regime, and as a result, both women were targeted and attacked. *See id.* ¶¶ 18, 26. In 1992, after Jane Doe I's husband was abducted, tortured and killed by members of the Haitian Armed Forces, she was arrested for several days and, while there, repeatedly beaten while blindfolded. *Id.* ¶ 19. After her release, she continued her political activities and became outspoken about the disappearance of her

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[1] Although Jane Doe III has requested not to testify before the Court, and has moved to submit Written Declarations in Lieu of Deposition Testimony to Determine Damages, Jane Doe I and II would prefer to give live testimony. As stated by Jane Does I and II's counsel at the court conference on December 21, 2005 (I. Samson) (Tr. at 7:15-8:5), Jane Does I and II have suffered grievously, and "the purpose of this lawsuit, in addition to bringing just individual justice on behalf of these two women, is to shine the public light, if you will, on these political crimes that have occurred. And that can best happen if the victims have a chance to tell their story in court."

husband. *Id.* As a result, on April 29, 1994, approximately seven FRAPH members entered her home and gang raped her in front of her three young children. *Id.* ¶ 20. On June 6, 1994, armed FRAPH members again entered Jane Doe I's home and gang raped her in front of her children. *Id.* ¶ 22. After the repeated sexual assaults, one of the men stabbed a long, sharp object into Jane Doe I's neck and left her for dead. *Id.*

Jane Doe II, an active member of a grassroots pro-Aristide organization, was likewise brutalized for her political activities. *Id.* ¶ 26. In 1991, she was raped by members of the Haitian Armed Forces in front of her family and was then imprisoned for six months, where she was continually beaten and denied food. *Id.* ¶ 27. After her release from prison, she went into hiding. *Id.* ¶ 27. In or about July 1994, several FRAPH members discovered Jane Doe II at her brother's home. *Id.* ¶¶s 28-29. They gang raped Jane Doe II and her sister-in-law, and both women were repeatedly kicked in the abdomen. *Id.* As a result of this attack, Jane Doe II continues to suffer intense physical pain. *Id.* ¶ 29. Her sister-in-law died three years later from complications associated with internal bleeding that she suffered as a result of the beating and rape. *Id.*

Jane Does I and II have now relocated to the United States but, as a result of the violations against them, they continue to suffer multiple and severe psychological traumas, including Post-traumatic Stress Disorder, anxiety and depression. *See* Report by M. Fabri, Psy.D. at 12 (submitted on July 11, 2006).

On December 24, 1994, Defendant Emmanuel "Toto" Constant, the principal leader and founder of FRAPH, fled Haiti and moved to Queens, New York. *See* Compl. ¶¶s 5-6. Although political order has ostensibly been returned to Haiti, a climate of violence and unrest still pervades the country, and members of FRAPH and Haiti's demobilized army remain able to

terrorize its citizens. *Id.* ¶¶ 44-45. Former members of FRAPH who were under Constant's command continue to manipulate the Haitian political and judicial systems. Jane Does I and II would be in grave danger if they returned to Haiti. *Id.* ¶¶ 45-46. Moreover, several members of Jane Does I and II's family currently reside in Haiti, including Jane Doe I's five children.[2] They would be at risk if it became known that it was their mother who filed the lawsuit. *See* Declaration of Moira Feeney in Support of Memorandum of Law Regarding Partial Closed Court Testimony for Jane Doe I and II and Continued Use of Pseudonyms ("Feeney Decl.") ¶¶ 3-6.

On July 14, 2006, counsel for Plaintiffs sent a letter to this Court requesting that Plaintiffs be allowed to testify anonymously in the default damages hearing set for August 29, 2006. On July 21, 2006, the Court requested further briefing on the issue of anonymous testimony, specifically in temporarily closing the Court during the testimony of Jane Doe I and Jane Doe II. The following discussion explains the case law governing partial courtroom closure, and how the facts and procedural posture of this case warrant limited court closure.

I. PARTIAL COURTROOM CLOSURE IS NECESSARY TO PROTECT JANE DOES I AND II

A. Partially Closed Courtroom Testimony is Permitted Where Substantial Reason Justifies Closure

Rule 77(b) of the Federal Rules of Civil Procedure provides that "(a)ll trials upon the merits shall be conducted in open court and so far as convenient in a regular court room." In addition, the Second Circuit has held that "the First Amendment . . . secure[s] to the public and to the press a right of access to civil proceedings." *Huminski v. Corsones*, 396 F.3d 53, 82 (2d

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[2] Facts supporting Jane Does I and II's application are set forth in the Declaration of Moira Feeney, Esq. (August 11, 2006), which is being concurrently served and filed. To the extent that further facts supporting partial closure are required to be developed, Jane Does I and II respectfully request a hearing be held at the beginning of the August 29, 2006 hearing.

Cir. 2005) (quoting *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 22 (2d Cir. 1984)) (quotation marks omitted). An open courtroom is necessary to "allow[] the public to see for itself that the accused is dealt with fairly and not unjustly condemned and ensures that judges, prosecutors and witnesses carry out their respective duties with a keen sense of the importance of their functions." *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2nd Cir. 1992).

The right of access, however, is not absolute, and must, in certain circumstances, "give way . . . to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984). In order to overcome the presumption of access, the party seeking total closure of the courtroom must demonstrate "a substantial probability of prejudice to a compelling interest." *Huminski*, 386 F.3d at 148 (quoting *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995)). Specifically, the party "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and [the Court] must make findings adequate to support the closure." *Waller,* 467 U.S. at 48, 104 S.Ct. at 2216.[3]

The Second Circuit, however, like several other circuits, has held that "when a trial judge orders a partial, as opposed to a total, closure of a court proceeding at the request of one party, a 'substantial reason' rather than *Waller's* 'overriding interest' will justify the closure," because a partial closure does not "implicate the same secrecy and fairness concerns that a total closure

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[3] Although this test is derived from a case involving the public's access to criminal, rather than civil, proceedings, *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995), and uses language that is specific to criminal proceedings, the Second Circuit has applied the test in *Huminski*, 396 F.3d at 82, to uphold the plaintiff's right of access to criminal as well as civil proceedings. In addition, the right of access that the court discussed in *Huminski* emanates from the First Amendment, rather than the Sixth Amendment, and so applies equally to criminal and civil cases.

does." *Woods,* 977 F.2d at 76 (see cases cited therein, emphasis added); *Farmer,* 32 F.3d 371. Accordingly, where, as here, the movant seeks only partial closure of the civil damages proceedings, "the prejudice asserted need only supply a substantial reason for closure." *Huminski,* 386 F.3d at 149.

In this case, there are three grounds that, if considered alone or in combination, support Jane Does I and II's motion to testify in chambers: (1) Jane Does I and II have a reasonable and subjective fear for their safety and their family's safety if they were required to testify in open court; (2) the subject of Jane Does I and II's testimony (the brutal sexual assault that each woman suffered) is highly sensitive in nature; and (3) Defendant Constant has defaulted and will suffer no prejudice if Jane Does I and II were permitted to testify in chambers.

1. Partial Closure is Necessary to Protect Jane Does I and II's Physical Safety and the Safety of Family Members Still Residing in Haiti

The need to protect the physical safety of a witness and "to decrease [the witness's] fear of testifying" can override the presumption against courtroom closure. *See Carson v. Fischer,* 421 F.3d 83, 89 (2d Cir. 2005); *Farmer, supra,* 32 F.3d at 371 (affirming partial closure order upon finding that sexual abuse victim legitimately feared retaliation against him and his family); *United States v. Doe, supra,* 63 F.3d at 131 (risk of physical harm to a criminal syndicate informant would justify courtroom closure during his testimony).

In addition, actual threats or other evidence of imminent danger are not needed to close the courtroom; instead, the court may look at the party's subjective fears and surrounding circumstances to determine whether such fear is genuine and should be accommodated. *Id.* at 130. For instance, the court in *United States v. Doe* noted that, in the context of criminal syndicates, retaliatory acts are particularly prevalent and the danger acute for testifying witnesses, even in the absence of an existing or direct threat. *Id.* at 131.

Here, Jane Does I and II objectively and subjectively discern a serious risk to their safety and the safety of their families if their identities become public. Because their faces may be recognizable to Defendant Constant or other members of the Haitian community, they would be putting themselves and their families in danger if they testified in open court (even using pseudonyms). *See* Feeney Decl. ¶¶ 3, 5.

As described above, Defendant was formerly the head of a violent, politically connected organization that perpetrated similar crimes against hundreds of Haitians. *See* Compl. at ¶¶ 44, 45. Haiti remains in a state of instability and unrest, with former FRAPH members and army members still living freely and committing violence in that country. *See* Feeney Decl. ¶ 2. Former members of FRAPH and the Haitian Armed Forces still wield influence in the Haitian community in the United States. *Id.* Accordingly, given the history of Jane Does I and II's abuse and political persecution at the hands of FRAPH, they currently hold a (reasonable) well-founded belief that they or their families will be targeted if it is discovered that they have filed a lawsuit against FRAPH's leader. *See* Feeney Decl. ¶ 3-6.

2. Partial Closure Is Warranted Given The Sensitive, Private Nature of Jane Does I and II's Testimony

As courts have historically recognized, rape "is the ultimate violation of self," *Coker v. Georgia,* 433 U.S. 584, 597, 97 S.Ct. 2861, 2869 (1977), and given its "highly reprehensible" nature, the "practice of closing courtrooms to members of the public while a victim of sex crimes testifies has not been uncommon." *Bell v. Jarvis*, 236 F.3d 149, 167 (4th Cir. 2000) (citing cases); *see also United States v. Galloway,* 963 F.2d 1388, 1390 (10th Cir. 1992) (closing courtroom for sexual abuse case). Indeed, the "[p]rimary justification for this practice lies in protection of the personal dignity of the complaining witness." *United States ex rel. Latimore v.*

Sielaff, 561 F.2d 691, 694 (7th Cir. 1977). Courts are especially sensitive about accommodating a sex crime victim because:

> Shame and loss of dignity, however unjustified from a moral standpoint, are natural byproducts of an attempt to recount details of a rape before a curious and disinterested audience. The ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it aggravates the original injury.

Bell, 236 F.3d at 167 (quoting *Latimore*, 561 F.2d at 694-95) (emphasis added)). Given these concerns, "[m]itigation of the ordeal is a justifiable concern of the public and of the trial court." *Id.*

So too, in the damages hearing before the Court, Jane Does I and II will be testifying about the abuse they suffered at the hands of the FRAPH organization, an entity started and controlled by Defendant Constant. Specifically, both women will describe in detail how they were sexually assaulted and beaten by multiple men in front of their families, who were forced to watch. *See* Compl. ¶¶ 20, 22, 27-28. While Jane Does I and II are very concerned for their safety and the safety of their families, they nonetheless wish to support their case and give such important evidence. Accordingly, under Second Circuit case law, they should be protected and accommodated when giving such testimony.

3. Defendant Has Waived His Right to Confront Witness and No Other Countervailing Interest Weighs Against Limited Court Closure

The Defendant would not be prejudiced if the Court were to grant Jane Does I and II's application for partial courtroom closure. Defendant has defaulted, thereby waiving his right to confront his accusers and learn their identities. He will suffer no harm if Jane Does I and II are permitted to testify in chambers as opposed to open court. Moreover, no third-party has indicated a countervailing interest in opposition to a limited closure order. Accordingly, Jane

Does I and II's substantial concerns regarding their safety and discomfort outweighs the general presumption in favor of open court proceedings.

B. The Partial Closure Is Narrowly Tailored to Protect Jane Does I and II

In addition to a "substantial reason" for the closure, the closure must also "be no broader than necessary to protect that interest" and the trial court should "consider reasonable alternatives to closing the proceeding[.]" *Waller,* 467 U.S. at 48, 104 S.Ct. at 2216. The greater the extent of the closure, the higher the scrutiny of the interest at issue. *See Ayala v. Speckard,* 131 F.3d 62, 70 (2d Cir. 1997). Here, Jane Does I and II are requesting partial closure of the courtroom, *i.e.* that they be permitted to testify in chambers. The other testimony and evidence presented by Plaintiffs' experts and other witnesses will remain open to the public, and Jane Does I and II's in-chamber testimony may be made public so long as Jane Does I and II are permitted to testify using pseudonyms (*see, infra,* § II). In effect, Jane Does I and II are seeking to retain the anonymity they have maintained throughout the course of these proceedings, which they believe is the least intrusive means of ensuring their safety.

Short of open-court testimony, very few alternatives are available. The only other option is for Jane Does I and II to testify in a disguise or behind a curtain. *See, e.g., Carson, supra,* 421 F.3d at 86. The trial court in *Carson* rejected this alternative, finding that having the witness "testify with a paper bag over his head . . . would have a deleterious effect upon the assessment of his credibility[.]" *Id.* The more desirable option would be to permit Jane Doe I and II to testify in chambers, where the Court can fully observe the women's demeanor and assess their credibility, while lessening the women's considerable discomfort. This accommodation is particularly availing where, given that Defendant has already defaulted, he will suffer no prejudice from his inability to observe the testifying witness first-hand.

C. The Court Must Make Findings Adequate To Support Closure

As a final matter, in ordering partial closure, the Court must make "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 13-14, 106 S.Ct. 2735, 2743 (1986); *Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059, 1071 (3d Cir. 1984) (certain procedural and substantive requirements must be satisfied before civil proceedings could be closed). Jane Does I and II respectfully request that, at the August 29, 2006 hearing, the Court grant their motion to testify in chambers by making findings supporting the partial closure order on the record in open court.

II. JANE DOES I AND II ARE ENTITLED TO CONTINUE USING PSEUDONYMS IN ORDER TO PROTECT THEMSELVES AND THEIR FAMILIES

The court has the discretion to permit a litigant to pursue his or her claim anonymously where "the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity." *Does I Thru XXIII v. Advanced Textile Corp.,* 214 F.3d 1058, 1068 (9th Cir. 2000); *Doe v. City of New York*, 201 F.R.D. 100, 101-02 (S.D.N.Y. 2001). Although the Second Circuit has not directly addressed the issue of when a plaintiff can proceed by pseudonym, other circuits and numerous district courts considering the issue have held that a district court must "balance the need for anonymity against the general presumption that parties' identities are public information and the risk of unfairness to the opposing party." *Id.*; *see also Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004); *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981).

Use of a pseudonym is permitted where there is some "social stigma or the threat of physical harm to the plaintiff" if their identities were disclosed. *Doe v. Meachum,* 126 F.R.D.

452, 453 (D. Conn. 1989) (Cabranes, J.). In Alien Tort Statute and Torture Victim Protection Act cases, such safety considerations have often persuaded courts to allow the use of pseudonyms. *See, e.g.*, *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1117, 1134 (E.D.Cal 2004) (plaintiff in default case permitted to proceed through damages hearing as J. Doe "due to risks of violent reprisals against plaintiff and plaintiff's family."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 170 (D.Mass. 1995) (plaintiff in default case permitted to proceed as Juan Doe); *Doe v. Karadzic*, 176 F.R.D. 458 (S.D.N.Y. 1997); *A,B,C,D,E,F v. Zemin*, 282 F. Supp. 2d 875 (N.D. Ill. 2003).

In this case, for the reasons stated above, Jane Does I and II's need for anonymity is great. They both have a well-founded fear that they and their family members will suffer severe reprisals if their identities are revealed in this lawsuit. Further, given the highly personal nature of Jane Does I and II's testimony against Defendant Constant, exposure of their identity may cause both women to experience undue fear and physical harm. On the other hand, Defendant would suffer no prejudice because, having already defaulted, he has no need to learn their identities to develop his defense or mitigate his damages. *See, e.g., EW v. New York Blood Center*, 213 F.R.D. 108, 110 (E.D.N.Y. 2003) (rejecting defendant's argument against the use of pseudonym in part because it would not prejudice the defendant's ability to conduct discovery or try the matter).

CONCLUSION

Based on the foregoing reasons, Plaintiffs Jane Does I and II respectfully request that the Court GRANT their motion to partially close the courtroom so that they may testify in chambers rather than in open court; and GRANT their motion to continue the use of pseudonyms throughout the pendency of this action.

Dated: August 11, 2006
New York, NY

Respectfully Submitted,

/s/

Ivor Samson
Counsel for Plaintiffs Jane Doe I and II

Ivor E. Samson
Jessica L. Woelfel
SONNENSCHEIN NATH & ROSENTHAL LLP
525 Market Street, 26th Floor
San Francisco, CA 94105
Tel: (415) 882-5000
Fax: (415) 882-0300

Monica Pa
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas, 25th Floor
New York, New York 10020-1089
Tel: (212) 768-6700
Fax: (212) 768-6800

Moira Feeney (Bar Code: MF4454)
Matthew Eisenbrandt (Bar Code: ME2907)
CENTER FOR JUSTICE & ACCOUNTABILITY
870 Market Street, Suite 684
San Francisco, CA 94102
Tel: (415) 544-0444
Fax: (415) 544-0456

Jennifer Green (NY Bar No. JG-3169)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6431
Fax: (212) 614-6499

Counsel for Plaintiffs Jane Does I and II

To:
Emmanuel Constant
137-35 225th St.
Laurelton, NY 14413-2431

Emmanuel Constant a/k/a Toto Constant
Suffolk County Correctional Facility
110 Centre Drive
Riverhead, NY 11901