STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

John Doe

v.

Diocese of Manchester

and

Missionary Oblates of Mary Immaculate,
Province of the United States

226-2010-CV-00471

DIOCESE OF MANCHESTER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Roman Catholic Bishop of Manchester, a Corporation Sole ("Diocese"), respectfully moves to dismiss the plaintiff's writ in its entirety for failure to comply with the Court's rules. As grounds for this motion, the Diocese states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

This case began with a writ dated July 21, 2010. The writ identifies the plaintiff as "John Doe" only. As such, the writ plainly fails to conform to this Court's rules. *See* Super. Ct. R. 2-A ("[w]rits will not be accepted for entry unless the mail address and actual street address of each party plaintiff appear thereon"); *see also* Super. Ct. R. 10 ("The Clerk shall enter upon the docket at each return day the names of all parties to each suit entered at such return day, including plaintiffs, defendants and trustees.").

Notably, even prior to the filing of the writ, plaintiff's counsel undertook efforts to attract public attention to the case. According to a "blog" maintained by the law firm Herman,

Mermelstein & Horowitz, P.A., on July 21, 2010 at 9:37 am, Attorney Jessica Arbour – who represents the plaintiff in this case – posted a "media advisory" regarding an event scheduled to take place at 1:30 pm that day at the Diocese's headquarters in Manchester. *See* Affidavit of Gordon J. MacDonald, Esq. ("MacDonald Aff."), at ¶ 4, and Exhibit 1 thereto ("New clergy abuse & cover up suit is filed against Oblates and Manchester Diocese").[1] The advisory promised that participants in the event would "disclose and discuss a new clergy sex abuse and cover up lawsuit against a New Hampshire cleric." *Id.* Later, Attorney Arbour posted press clippings about the lawsuit on the same blog. *Id.* at ¶¶ 6-8, and Exhibit 3 thereto ("Associated Press Story on New St. Jean Lawsuit"); Exhibit 4 thereto ("WMUR story on new St. Jean Lawsuit (with video)") and Exhibit 5 thereto ("Union-Leader Story on New St. Jean Lawsuit").

The plaintiff attempted to avoid the application of the Court's rules requiring disclosure of parties' names by means of a so-called "Rule 2-A Notice" accompanied by a motion to seal. The motion to seal was cast in entirely conclusory terms. There was no accompanying affidavit, *cf.* Super. Ct. R. 57 (providing, *inter alia*, "[t]he Court will not hear any motion grounded upon facts, unless they are verified by affidavit"), or citation to supporting legal authority. The plaintiff's request for relief rested entirely on the following: "the suit involves allegations of child sexual abuse and [the plaintiff] fears further psychological harm to himself as well as to his family if his identity is publicly disclosed." This Court denied the motion to seal, finding that "the plaintiff has failed to make a sufficient showing of necessity to overcome the presumption that court records are open to the public." Order on Motion to Seal, dated September 29, 2010 (Lynn, C. J.) ("September 29 Order").

---

[1] On May 17, 2010, Attorney Arbour had circulated a similar media advisory prior to filing the writ in *Labbe v. Diocese of Manchester, at al.*, on May 18, 2010. MacDonald Aff., at ¶ 5, and Exhibit 2 thereto ("New Child Sex Abuse Lawsuit filed Against Manchester Diocese and Oblates").

The plaintiff filed a Motion for Reconsideration of the September 29 Order on October 12, 2010 ("Motion for Reconsideration"). In support of that motion, the plaintiff submitted an affidavit, in which he stated, *inter alia*, "I chose to bring this action under the pseudonym John Doe because I fear negative repercussions if my identity becomes public." Affidavit of ___, at ¶ 2. In his legal memorandum, the plaintiff argued, *inter alia*, "[a]n individual has a privacy interest in his personal information, including his name and address. Furthermore, other jurisdictions have recognized an individual's right to proceed anonymously in a case arising from sexual abuse. Nothing in New Hampshire's jurisprudence suggests the public has any recognized interest in the identity of a victim of child sexual abuse." Plaintiff's Motion for Reconsideration, at p. 3 (citations omitted).

The Diocese objected (Docket #19). In its objection, the Diocese noted that the Court had previously denied attempts by plaintiffs to proceed anonymously in cases involving allegations of childhood sexual abuse made against the Diocese. *See* Diocese's Objection to Motion for Reconsideration, at p. 6 (*citing Jason Doe v. Roman Catholic Bishop of Manchester, et al.*, Hillsborough County Superior Court, Northern District, No. 02-C-606 (October 17, 2002) and *John Doe IX, et al. v. Roman Catholic Bishop of Manchester*, Hillsborough County Superior Court, Northern District, No. 02-C-325 (November 27, 2002)). As explained in its objection, over the course of the last eight years, the Diocese has offered a claims-resolution process for individuals presenting claims of childhood sexual abuse. That process has resulted in the negotiated resolution of approximately two-hundred-sixty-five claims without any litigation. At the sole election of the claimants, the claims may be kept completely confidential. However, through his counsel, the plaintiff in this case has rejected that process in favor of this litigation.

In denying the Motion for Reconsideration, this Court adopted, in part, the Diocese's objection. *See* Order dated October 28, 2010 ("Denied for the reasons stated in the objection (doc #19) and in the court's original order."). In the wake of these orders, the plaintiff has declined to amend the writ to conform to the Court's rules.[2] At a case structuring conference, held on January 20, 2011, this Court declined to take up the issue and instead indicted that the Diocese should file a motion to dismiss.

II. ARGUMENT

A. Superior Court Rules Require a Plaintiff's Name to Appear on the Writ.

Super. Ct. R. 2-A provides, in relevant part: "Writs will not be accepted for entry unless the mail address and actual street address of each party plaintiff appear[s] thereon." Super. Ct. R. 10 provides that, "The Clerk shall enter upon the docket at each return day the names of all parties to each suit entered at such return day, including plaintiffs, defendants and trustees." Super. Ct. R. 2-A further provides that a party may, "for good cause shown," file a writ or appearance which does not conform to Rule 2-A.

The plaintiff sought to use the pseudonym John Doe "because the suit involves allegations of child sexual abuse and he fears further psychological harm to himself as well as to his family if his identity is publicly disclosed." Motion to Seal, at ¶ 4. This terse and conclusory statement, *cf.* Super. Ct. R. 57 (providing "[t]he Court will not hear any motion grounded upon facts, unless they are verified by affidavit"), failed to satisfy the requirements applied by this Court necessary to set aside the requirements of Rules 2-A and 10 and the Court properly denied the plaintiff's motion to seal and motion to reconsider.

---

[2] Through counsel, the Diocese has indicated that it would assent to a motion to amend the writ in order to conform to this Court's rules.

In its September 29 Order, the Court correctly stated that there is a strong and well-established presumption that proceedings in this Court are public. As the Supreme Court has stated:

> Under part I, article 8, the public has a right of access to court proceedings and to court records which cannot be "unreasonably restricted." We hold that under the constitutional and decisional law of this State, there is a presumption that court records are public and the burden of proof rests with the party seeking closure or nonclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records.

Petition of Keene Sentinel, 136 N.H. 121, 128 (1992); *see also Gannett Co., Inc. v. DePasquale*, 443 U.S. 367, 368 (1979) (noting the centuries-old precept that both civil and criminal trials "have traditionally been open to the public"). The application of this fundamental principle to this situation could not be more straightforward: "Lawsuits are public events and the public has a legitimate interest in knowing the facts involved in them. Among those facts is the identity of the parties." *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974).

B. The Plaintiff Does Not Meet Any Exception to the Rule that a Plaintiff Must Provide his Name on a Writ.

Consequently, against the force of this strong presumption, only truly exceptional situations will justify limits on public scrutiny sufficient to justify a party not revealing his or her identity. *See Doe v. Sheriff of Depage County*, 128 F.3d 586, 587 (7th Cir. 1997); *Doe v. Frank*, 951 F.2d 320, 330 (11th Cir. 1992); *see also Petition of Keene Sentinel*, 136 N.H. at 130 (requests to seal must be "sufficiently compelling to outweigh the public's right of access"). As courts have determined, those situations usually involve one of four situations: (i) cases in which plaintiffs are required to disclose information of the utmost intimacy; (ii) cases where plaintiffs must admit breaking or an intention to break the law; (iii) cases in which plaintiffs are

challenging government action; and (iv) cases where the privacy of minors is concerned. *See, e.g., Doe v. Hartz*, 52 F. Supp. 2d 1027, 1046 (N.D. Iowa 1999).

The Superior Court has applied these standards in a directly analogous situation and has determined that the balance of interests compels disclosure of the plaintiff's identity. Specifically, in *Jason Doe v. Roman Catholic Bishop of Manchester, et al.*, Hillsborough County Superior Court, Northern District, No. 02-C-606 (October 17, 2002) (Lynn, J.), the Court ruled that the plaintiff should not be permitted to maintain the lawsuit as a pseudonym.[3]

In so ruling, the Court applied the test set forth in *Hartz* and concluded, in relevant part, that: (i) "the allegations of sexual abuse, while undoubtedly embarrassing to the plaintiff, do not amount to such an invasion of his privacy as to outweigh the general principle that judicial proceedings should be open to the public"; (ii) "although the abuse allegedly occurred when plaintiff was a child, plaintiff is an adult at the present time"; (iii) because plaintiff had disclosed the name of the "individuals who allegedly committed the sexual assaults . . . fairness demands that he not be permitted to do so while keeping his own identity a secret from the public"; (iv) "this is not a case which involves purely legal issues and where the identity of the particular parties raising said issues is not apt to be of great importance"; and (v) "there is a strong public interest in the factual accuracy of the allegations which have been made in the complaint." *Id.* at p. 1-2 (citing *Hartz*, 52 F.Supp.2d at 1048) (emphasis in the original).

Although the plaintiff has alleged feelings of embarrassment relating to the alleged abuse, *see* Motion for Reconsideration, at p. 4, "claims of public humiliation and embarrassment . . . are not sufficient grounds for allowing a plaintiff in a civil suit to proceed [anonymously]." *Doe v.*

---

[3] A copy of this Court's order in *Jason Doe v. Roman Catholic Bishop of Manchester, et al.*, appears as Exhibit A hereto. This Court (Lynn, J.) later reaffirmed the *Jason Doe* decision in *John Doe IX, et al. v. Roman Catholic Bishop of Manchester*, Hillsborough County Superior Court, Northern District, No. 02-C-325 (November 27, 2002). A copy of the *John Doe IX* Order appears as Exhibit B hereto.

Shakur, 164 F.R.D. 359, 362 (S.D.N.Y. 1996). Indeed, many lawsuits concern matters which may be embarrassing and personal. Allowing anyone embarrassed at their situation to appear anonymously would effectively nullify the general rule that the parties be identified. *Doe v. Prudential Ins. Co. of Am.*, 744 F. Supp. 40, 42 (D.R.I. 1990). The plaintiff has rejected a confidential (at his election) claims resolution process in favor of this litigation. He is, of course, completely free to make that choice, but with that choice comes the obligation to abide by the Court's rules.

Finally, the actions of plaintiff's counsel substantially undermines any argument that adverse effects which might flow from complying with those rules. Although the plaintiff has submitted a sworn statement regarding his fears should his identity be made public, his counsel has taken steps to draw attention, including that of the media, to this case. As described above, even before the lawsuit was filed, plaintiff's counsel had posted a "media advisory" on her firm's "blog" regarding a press event to be held later that day during which the lawsuit would be discussed. *See* MacDonald Aff. at ¶¶ 4-8, and Exhibits 1-5 thereto.

C. Dismissal is the Appropriate Remedy in This Case.

In *Jason Doe*, this Court ruled that the defendant's motion to dismiss would be "granted unless the plaintiff file[d] an amended complaint within ten (10) days which specifically indentifie[d] plaintiff's name and address." *See* Exhibit A. Here, the Court has twice denied the plaintiff's efforts to avoid the application of Rule 2-A and proceed as "John Doe." Despite these orders, the plaintiff has failed to remedy the defect in his writ. As this Court held in *Jason Doe*, dismissal is the appropriate remedy for failure to submit a writ which conforms to the Court's rules.

D. The Plaintiff's Continued Failure to Correct His Writ Warrants an Award of Attorneys' Fees.

Super. Ct. R. 59 specifically provides that a court "may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion." New Hampshire courts have long recognized exceptions to the general rule that a party bears his own costs in litigation. *See, e.g. Guay v. Association*, 87 N.H. 216 (1935). Thus, "[w]hen overriding considerations so indicate, the award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights." *Harkeem v. Adams*, 117 N.H. 687, 690 (1977) (*citing Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975).

According to the New Hampshire Supreme Court, where a party to a litigation acts "in bad faith, vexatiously, wantonly, or for oppressive reasons," such conduct justifies a court awarding attorney's fees to the prevailing party. *Id.*. at 691 (*citing Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 n. 4 (1968)). The Court has defined "bad faith" conduct to include, among other things, "an intentional disregard of duty" to the Court and opposing counsel. *Indian Head Nat'l Bank v. Corey*, 129 N.H. 83, 86 (1986) (*citing Murphy v. Financial Development Corp.*, 126 N.H. 536, 542 (1985)). An award of attorney's fees is also justifiable when a litigant's conduct can be characterized as "unreasonably obdurate or obstinate." *Id.* (*citing Stolberg v. Members of Bd. Of Trustees for State Col. Of Conn.*, 474 F.2d 485, 490 (2d Cir. 1973)); *Bedard v. Town of Alexandria*, 159 N.H. 740, 744 (2010) (an award of fees is appropriate "where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action") (citations omitted).

The issue of whether the plaintiff can avoid the application of the Court's rules and proceed anonymously has been joined and decided. The "Rule 2-A Notice" and motion to seal were the means by which the plaintiff attempted to achieve his objective. Through its Orders, this Court rejected that effort. Those Orders are consistent with prior Superior Court decisions denying plaintiffs' efforts to proceed anonymously under a precisely analogous situation. The Diocese had indicated that it would assent to a motion to amend the writ. The plaintiff rejected that offer. The plaintiff's actions constitute precisely the type of conduct Super. Ct. R. 59 was designed to discourage. Because the plaintiff's position has necessitated the filing of this motion to compel compliance with the Court's orders, the Diocese is entitled to an award of its attorneys' fees in filing this motion.

CONCLUSION

For the foregoing reasons, the Court should grant the Diocese's motion to dismiss and award it attorneys' fees.

Respectfully submitted,

ROMAN CATHOLIC BISHOP OF
MANCHESTER, A CORPORATION SOLE

Dated: February 14, 2011

By: ______________________

Gordon J. MacDonald (NH Bar No. 11011)
NIXON PEABODY LLP
900 Elm Street, 14th Floor
Manchester, NH 03101
(603) 628-4000
gmacdonald@nixonpeabody.com

CERTIFICATE OF SERVICE

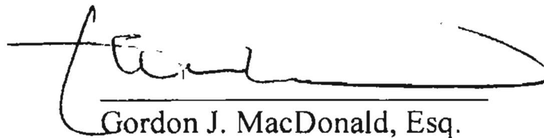
I, Gordon J. MacDonald, hereby certify that on this 4th day of ~~January,~~ February 2011, a copy of the foregoing *Diocese of Manchester's Memorandum of Law in Support of Motion to Dismiss* was served via first class mail to:

John B. Kenison, Jr., Esq.
Normand & Associates
15 High Street
Manchester, NH 03101

R. Matthew Cairns, Esq.
Gallagher, Callahan and Gartrell
214 North Main Street
Concord, NH 03302

and

Stuart S. Mermelstein, Esq.
Jessica D. Arbour, Esq.
Herman, Mermelstein & Horowitz, P.A.
18205 Biscayne Blvd., Suite 2218
Miami, FL 33160



Gordon J. MacDonald, Esq.