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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SPENCER ELDEN,

Plaintiff,

v.

NIRVANA, L.L.C.,
UNIVERSAL MUSIC GROUP, INC.,
UMG RECORDINGS, INC.,
THE DAVID GEFEN COMPANY,
GEFFEN RECORDS,
MCA RECORDS,
KIRK WEDDLE,
COURTNEY LOVE, AS EXECUTOR OF
THE ESTATE OF KURT COBAIN,
KRIST NOVOSELIC,
DAVID GROHL,

Defendants.

Case No:2:21-cv-06836-fFMO-AGR

**PLAINTIFF SPENCER
ELDEN'S OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

Hon. Fernando M. Olguin

Date: February 24, 2022

Time: 10:00 a.m.

Courtroom: 6D

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1 **INTRODUCTION**

2 Spencer Elden, through his attorney Robert Y. Lewis of Marsh Law Firm
3 PLLC, hereby submits this memorandum of law in opposition to Defendants’
4 motion to dismiss the Second Amended Complaint (“SAC”). (Dkt. 30).

5 As set forth in detail below, the SAC (Dkt. 25) states a claim for relief for
6 Defendants’ violations of 18 U.S.C. 2255 occurring within ten years of the filing of
7 the SAC on January 12, 2022, and for those occurring since. These violations
8 include the ongoing possession, transportation, reproduction, advertisement,
9 promotion, presentation, distribution, provision, and receipt of “child
10 pornography,” to wit, the sexually exploitive images of the Plaintiff (“Spencer”) as
11 a four-month-old baby submerged underwater with his genitalia as a focal point.
12 This so-called “iconic” album cover image was and is being used to this day by the
13 Defendants to sell songs rhapsodizing about the sexual abuse of children.

14 Moreover, the SAC sets forth more than sufficient facts against each
15 Defendant to show it is plausible (that is, beyond speculation) that each Defendant
16 committed one or more of the predicate acts required by 18 U.S.C. 2255 during the
17 10-year look-back period and since.

18 **STATEMENT OF ISSUES TO BE DECIDED**

- 19 I. Whether Plaintiff’s Claims are Time Barred
20 II. Whether Plaintiff’s Claims are Plausible against Each Defendant

1 **STATEMENT OF FACTS**

2 The facts alleged in the SAC, which must be accepted as true with
3 reasonable inferences drawn in favor of Plaintiff, are as follows.

4 **I. Defendants’ Creation of a Sexualized Image of Spencer to Sell a Record**

5 In or about 1987, near or around Aberdeen, Olympia, and Seattle,
6 Washington, Kurt Cobain (deceased) and Defendant Krist Novoselic formed an
7 alternative punk-rock or “grunge” band called Nirvana, which has operated since
8 that time as Nirvana, L.L.C. (“Nirvana”). (Dkt. 25 ¶ 54). In 1990, Defendant David
9 Grohl joined Nirvana as drummer and Nirvana began working with the music label
10 DGC Records. (Dkt. 25 ¶¶ 56–57). At that time, Nirvana was practically unknown
11 to the general public. (Dkt. 25 ¶ 58).

12 Sometime in 1990, Defendant DCG Records hired Robert Fisher to serve as
13 art director. Fisher was assigned to the Nirvana account and facilitated the creation,
14 promotion, advertisement, trade, sale, distribution, and commercial success of
15 Nirvana’s music. (Dkt. 25 ¶ 62).

16 According to Fisher, Nirvana wanted images of nude babies for the cover of
17 their 1991 *Nevermind* album. (Dkt. 25 ¶ 63). Cobain, Fisher, and Defendants
18 Novoselic and Grohl determined that they had to “make [the photo] more than just
19 a baby underwater.” (Dkt. 25 ¶ 64). They engaged in an extensive debate about
20 what to pair with the naked baby on the *Nevermind* album cover considering a

1 dollar bill, raw meat, a dog, and other objects commonly associated with prurient
2 interests. Nirvana ultimately decided to use a dollar bill on a fishhook as a prop
3 with the naked baby. (Dkt. 25 ¶ 67).

4 In his journals, Cobain sketched the *Nevermind* album cover and, in at least
5 one instance, drew sperm or semen all over the image. (Dkt. 25 ¶ 60). In several
6 journal entries, found in the same book as Cobain's sketches of the *Nevermind*
7 album cover, Cobain describes his twisted vision for the cover as a manifestation
8 of his emotional and sexual disturbances:

9 I like to make incisions into the belly of infants then fuck the incision
10 until the child dies." * * *

11 I haven't masturbated in months because I've lost my imagination. I
12 close my eyes and I see my father, little girls, German Shepherds &
13 TV news commentators, but no voluptuous, pouty lipped, naked-
14 female sex kittens, wincing in ecstasy from the illusory positions I've
15 conjured up in my mind. No, when I close my eyes I see lizards &
16 flipper babies, the ones who were born deformed because their
17 mothers took bad birth control pills. I'm seriously afraid to touch
18 myself. * * *

19 [T]hey land as splash on the smooth thighs of infants lying limp on
20 beds of mohair. Dirty books made him solidify into a pedophile.

21 (Dkt. 25 ¶ 60).

22 At or about the time the band created *Nevermind*, several other bands used
23 sexualized images of children to sell their albums including Scorpion with Virgin
24 Killer, Blind Faith with Blind Faith, and Van Halen with Balance. (Dkt. 25 ¶ 68).

1 According to Fisher, the first album cover mockup he created for Nirvana
2 and Geffen Records used a stock photograph. (Dkt. 25, Fisher Decl. Ex. 1 & ¶ 10).
3 However, because it was more expensive to use stock photographs than a
4 photograph taken by a photographer hired by Geffen Records, Defendants decided
5 to create their own image for the *Nevermind* album cover. (Dkt. 25 ¶ 69). At the
6 request of Cobain and Defendants Novoselic and Grohl, Fisher and Defendants
7 Nirvana and Geffen Records hired photographer Defendant Kirk Weddle because
8 Weddle specialized in photographing “submerged humans.” (Dkt. 25 ¶ 72 & Fisher
9 Dec ¶¶ 11–12).

10 In 1991, Weddle took a series of photos of Spencer, who was then a
11 4-month-old infant, in a pool at the Pasadena Aquatic Center in California. (Dkt.
12 25 & ¶ 73). To ensure the album cover would trigger a visceral sexual response,
13 Weddle directed that Spencer’s gag reflex be activated before throwing him
14 underwater, after which he took photos that highlighted and emphasized Spencer’s
15 exposed genitals. (Dkt. 25 ¶ 74). Weddle told Spencer’s parents that the pictures
16 would be edited during production. (Dkt. 25 ¶ 77). Elements of the picture were
17 ultimately edited, and the lane lines at the bottom of the pool were removed, but
18 not Spencer’s genitalia. (Dkt. 25 ¶ 78).

19 Fisher, at the direction of Cobain and Defendants Weddle, Novoselic, and
20 Grohl, superimposed the image of a dollar bill hanging from a fishhook purchased

1 from a bait and tackle shop onto Spencer's image. (Dkt. 25 ¶ 75). Cobain and
2 Defendants Novoselic and Grohl chose the image depicting Spencer grabbing for a
3 dollar bill that is positioned dangling from a fishhook in front of his naked body
4 with his penis prominently displayed. (Dkt. 25 ¶ 79). The image of Spencer with
5 his naked genitals displayed while grabbing at money resembles the actions of a
6 sex worker. (Dkt. 25 ¶ 80). Soon after creating the original image of Spencer for
7 the *Nevermind* album cover, Weddle produced photographs of Spencer, still a
8 young child, dressed up as Hugh Hefner, a worldwide icon of sexual
9 licentiousness. (Dkt. 25 ¶ 82).

10 Like creators of other controversial album covers, Defendants sought to
11 garner attention by using a sexually explicit image that intentionally focused on
12 Spencer's carefully positioned enlarged genitals. (Dkt. 25 ¶ 83). Each Defendant
13 helped select and approve the final photograph from among the many photographs
14 taken by Weddle. (Dkt. 25 ¶ 84). When the album cover was nearly complete,
15 Fisher "rout[ed]" a final mockup to Nirvana and Geffen Records, attaching the
16 note: "If anyone has a problem with his dick, we can remove it." (Dkt. 25 ¶ 86).

17 That pedophilia was on the minds of the creators is evidenced by the song on
18 the album entitled "*Polly*" which rhapsodizes about the sexual exploitation of a
19 child including the child's abduction and rape. (Dkt. 25 ¶ 90). At some point in
20 time, Cobain was confronted about the *Nevermind* album cover's appeal to

1 pedophiles. In response, Cobain sardonically declared that they should put a sticker
2 on the album cover stating: “If you’re offended by this, you must be a closet
3 pedophile.” (Dkt. 25 ¶ 87).

4 Third parties also were concerned about the pornographic nature of the
5 image. For example, Walmart—one of the stores selling the album—requested that
6 a sticker covering Spencer’s genitals be affixed to the cellophane wrapper on the
7 *Nevermind* albums sold in its stores. (Dkt. 25 ¶ 88).

8 **II. The Release and Continued Promotion, Distribution, and Sale of the**
9 **Nevermind Album and other Commercial Products Featuring the Child**
10 **Pornography Image of Spencer**

11 Ignoring concerns about the use of full-frontal child nudity to sell an album,
12 Defendants released the Nirvana album cover without editing out or obscuring
13 Spencer’s genitalia. (Dkt. 25 ¶ 89). In 2015, Defendant Weddle, the photographer,
14 bragged about his exploitation of a child, telling TIME Magazine, “[i]t was a great
15 concept—a baby underwater, unable to breathe, going after money on a fishhook.”
16 (Dkt. 25 ¶ 92).

17 *Nevermind* is currently considered a climacteric of American music history
18 and is regarded and recognized specifically for the commercial child pornography
19 on its album depicting Spencer. (Dkt. 25 ¶ 96). Created in the pre-digital music era,
20 the *Nevermind* album is not only distributed in digital format but also, during the
21 ten years preceding the filing of this action and to the present day, it was and is

1 widely distributed in physical format. (Dkt. 25 ¶ 99). Defendants not only used the
2 sexualized image to sell the album, but also licensed Spencer's image for use in
3 selling branded merchandise such as Snapchat filters, t-shirts, posters, and other
4 products. (Dkt. 25 ¶ 98).

5 Defendants eventually sold well over 30 million copies of *Nevermind* and
6 they continue to sell and profit from the album featuring Spencer's image to the
7 present day. (Dkt. 25 ¶ 101). Weddle, and each of the Defendants, continues to be
8 involved in the sale, promotion, and distribution of the album and other logoed
9 products using Spencer's image as part of the recent 30th Anniversary re-release of
10 the album, as well as prior anniversaries within the past ten years. (Dkt. 25 ¶ 51–
11 52). For instance, Weddle ratified and promoted the 25th and 30th Anniversary
12 release of the *Nevermind* album. (Lewis Decl., Ex. A – Rolling Stones). Evidencing
13 Weddle's ongoing involvement in the album's sales, Weddle's website, which
14 contains the image of Spencer. Weddle's website also links to
15 modernrocksgallery.com, which is involved in selling a *Nirvana* book. The Modern
16 Rock website advertises the image or a book containing the image "signed" by
17 Weddle. The first page of that linked website states, however:

18 STATEMENT: In light of the ongoing legal case relating to the cover
19 of the *Nevermind* album, the publisher has taken the decision to
20 temporarily postpone the release of this book until further notice. We
21 apologies [sic] for any inconvenience and appreciate your patience.

1 The release date will be rescheduled as soon as the legal case is
2 resolved.

3 (Lewis Decl., Ex. B – ModernRocksGallery).

4 **III. Spencer’s Full Frontal Nude Image on the *Nevermind* Album Cover**
5 **Constitutions Child Pornography**

6 Nirvana’s *Nevermind* album cover constitutes commercial child pornography
7 within the meaning of 18 U.S.C. 2256(8). The focal point of the *Nevermind* album
8 cover image is Spencer’s genitals and pubic area. The title of the album is
9 positioned so that the final “A” in Nirvana is pointing directly at Spencer’s penis.
10 (Dkt. 25 ¶ 114). The setting of the image and superimposed photo edits make the
11 album cover sexually suggestive because Spencer is depicted in a manner
12 resembling a sex worker hustling for money. *Id.* Spencer is depicted in an
13 unnatural pose at just four months old wherein he was gagged and dunked
14 underwater while unable to swim and while not wearing a swimsuit. *Id.* Spencer is
15 fully nude. *Id.* The conduct depicted, particularly the activation of Spencer’s gag
16 reflex and the prominence, positioning, and focal point on his genitals, suggests
17 sexual coyness or a willingness to engage in sexual activity. *Id.* Finally, the
18 creators’ conduct, as recounted by Fisher and others, and the creator’s intent, as
19 evidenced in part by Cobain’s journals and other materials, together demonstrate
20 that the image was always intended and designed to elicit a sexual response. *Id.*

1 **III. Spencer Has and Continues to Suffer Damages from the Commercial**
2 **Exploitation of his Child Pornography Image**

3 Long ago, the Supreme Court recognized the significant harm caused to
4 someone who is depicted in child pornography. “It is evident beyond the need for
5 elaboration that [the] interest ‘in safeguarding the physical and psychological well-
6 being of minor’s is ‘compelling’ The legislative judgment as well as the
7 judgment found in relevant literature, is that the use of children as subjects of
8 pornographic materials is harmful to...physiological, emotional, and mental
9 health.... That judgement, we think, easily passes muster under the First
10 Amendment.” *New York v. Ferber*, 458 U.S. 747, 756–58 (1982), quoting *Globe*
11 *Newspaper Co. v. Superior Court*, 457 U. S. 596, 607 (1982); see also *Prince v.*
12 *Massachusetts*, 321 U.S. 158, 168 (1944).

13 Spencer has and will continue to suffer personal injury from Defendants’
14 possession, transportation, reproduction, advertisement, promotion, presentation,
15 distribution, providing, and obtaining of child pornography depicting him. (Dkt. 25
16 ¶ 115).

17 **ARGUMENT**

18 **I. The SAC is Grounded in Violations Occurring within 10 Years of the**
19 **Filing of the Complaint**

20 Defendants argue that the SAC is untimely because over ten years have
21 passed since Plaintiff became aware that he was the baby depicted on the

1 *Nevermind* album cover. While this argument might be valid if the only predicate
2 violation was the original 1991 production of the image, that is not the case.
3 Predicate violations under 18 U.S.C. 2255 encompass a wide range of activity
4 including transportation, reproduction, advertisement, promotion, presentation,
5 distribution, provision, and receipt. Although the production of the *Nevermind*
6 album cover occurred over 30 years ago, many other violations have occurred
7 since then and continue to the present day.

8 The plain reading of Section 2255’s statute of limitations makes clear that
9 Defendants’ argument that Plaintiff’s lawsuit is time-barred is meritless. 18 U.S.C.
10 2255(b) provides:

11 **Statute of Limitations.** Any action commenced under this section
12 [section 2255 (a)] shall be barred unless the complaint is filed (1) not
13 later than 10 years after the date on which the plaintiff reasonably
14 discovers the later of – (A) the violation that forms the basis for the
15 claim; or (B) the injury that forms the basis for the claim; or (2) no
16 later than 10 years after the date on which the victim reaches 18 years
17 of age.

18 Plaintiff relies on subparts (1)(A) and (B).

19 Section 2255(a) defines “violation that forms the basis for the claim” as a
20 violation of specific federal child pornography criminal statutes.¹ The criminal

¹ While predicated on violations of criminal statutes, this civil action is unlike a criminal prosecution in that the predicate criminal violations need only be proven by a preponderance of the evidence. In addition, no criminal prosecution is required to create civil liability. A criminal conviction is not necessary in order for a victim to pursue a civil remedy under 18 U.S.C. 2255.

1 violations alleged here include 18 U.S.C. 2252A(a)(5)(B), 2252A(a)(1),
2 2252A(a)(2)(A), 2252(a)(2)(B), 2252(a)3(A) and 2252(a)(3)(B), essentially,
3 possession, transportation, reproduction, advertisement, promotion, presentation,
4 distribution, provision, and receipt of child pornography.

5 The broad remedial purpose of Section 2255 “would appear to counsel
6 against limiting the scope of civil liability.” *Jane Doe No. 8 v. Royal Caribbean*
7 *Cruises, Ltd.*, 860 F. Supp. 2d 1337, 1340 (S.D. Fla. 2012). It is a metaphysical
8 impossibility for a violation to occur, much less for a plaintiff to discover the
9 violation or injury caused by the violation before a violation actually occurs. And a
10 violation does not occur until a specific predicate act occurs. In this case, multiple
11 predicate acts are ongoing, and Plaintiff is suing only for those violations occurring
12 within 10 years of the filing of the SAC and since.

13 The Supreme Court recognized the same continuing possibility of injury
14 in *Paroline v. United States*, 572 U.S. 434 (2014), a case involving the ongoing
15 distribution, receipt, and possession of child pornography well into a victim’s
16 adulthood: “[T]he victim suffers continuing and grievous harm as a result of her
17 knowledge that a large, indeterminate number of individuals have viewed and will
18 in the future view images of the sexual abuse she endured.” *Id.* at 457. “In a sense,

See Smith v. Husband, 376 F. Supp. 2d 603, 613 (E.D. Va. 2005) citing *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985) (finding that private action based on violation of a predicate offense can proceed without a criminal conviction).

1 every viewing of child pornography is a repetition of the victim’s abuse” and “[t]he
2 unlawful conduct of everyone who reproduces, distributes or possesses the images
3 of the victim’s abuse...plays a part in sustaining and aggravating” the victim’s
4 injury. *Id.* See also *United States v. Rothenberg*, 923 F.3d 1309, 1325 (11th Cir.
5 2019) (discussing *Paroline*). This same reasoning applies to the civil remedy
6 provided for by Section 2255(a). *Amy v. Curtis*, No. 19–CV–02184–PJH, 2019 WL
7 4141926, at *3 (N.D. Cal. Aug. 30, 2019).

8 Defendants cite numerous decisions that are readily distinguishable because
9 they concern the physical sexual abuse of children who as adults file lawsuits
10 under Section 2255 (among other state causes of action) and not child pornography
11 violations. (Dkt. 30, p. 10). The predicate physical abuse in Defendants’ cited cases
12 occurred when the plaintiffs in those cases were minors. See *Shovah v. Mercure*, 44
13 F. Supp. 3d 504, 506 (D. Vt. 2014). (Dkt. 30, p. 10–12). And the lawsuits were
14 grounded *solely* in actions which occurred when the victims were minors. Under
15 Section 2255, the actions had to be commenced on or before the plaintiff’s 28th
16 birthday or rely on the statute’s discovery provision or the common law. The
17 decisions cited by Defendants were based on claims that arose after the victim
18 turned 28 in circumstances without ongoing violations of any predicate crimes.
19 (Dkt. 30, p. 10). Unlike Spencer’s claims, Defendants’ cases were grounded in
20 Section 2255(b)(2) which imposes a 10-year statute of limitations after a plaintiff

1 reaches 18 years of age, or various discovery tolling provisions which in its current
2 amended form is found at 18 U.S.C. 2255(b)(1)(B).

3 These decisions are inapplicable to this case for two reasons. First, Plaintiff
4 is relying on child pornography violations that are ongoing. Second, the SAC relies
5 on 18 U.S.C. 2255(b)(1)(A), which imposes a 10-year statute of limitations “after
6 the date the plaintiff reasonably discovers...the violation that forms the basis of the
7 claim.” Predicate violations involving child pornography— contraband which can
8 be endlessly transported, reproduced, advertised, promoted, presented, distributed,
9 provisioned, and received long after a plaintiff turns 18, even beyond a plaintiff’s
10 death—can occur anytime.

11 Activities related to child pornography create separate injuries. Each
12 transportation, reproduction, advertisement, promotion, distribution, provisioning,
13 and receipt is a distinct violation inflicting discrete injury which starts the 10-year
14 statute of limitations anew. *See* 18 U.S.C. 2255(b)(1).²

15 Another point of Defendants’ confusion is the assertion that a cause of action
16 must be grounded in a predicate act which occurred during a plaintiff’s minority.
17 The legislative history of Masha’s Law, which amended Section 2255,

² Certain acts create a legal presumption of injury. For instance, false statements imputing a lack of chastity are defamatory per se. *See In re Kennedy*, 249 F.3d 576, 582–83 (6th Cir. 2001); *see also In re Boland*, 596 B.R. 532, 548 (B.A.P. 6th Cir. 2019) (“Like a defamatory statement, pornography injures a child’s reputation and emotional well-being, and violates the individual interest in avoiding disclosure of personal matters.”).

1 demonstrates Defendants’ error. Masha’s Law was enacted in 2006 in response to a
2 “Federal district court [interpreting the prior version of § 2255(a)] to restrict
3 recovery to plaintiffs whose injuries occurred while they were minors.” 151 Cong.
4 Rec. S14187–03, S14194, 2005 WL 3478050 (daily ed. Dec. 20, 2005) (statement
5 of Sen. Kerry). Prior to Masha’s Law, courts prevented victims who had reached
6 the age of majority from “recover[ing] against their perpetrators even if
7 pornographic images of [the victims] as children are still distributed via the
8 internet.” *Id.* Masha’s Law “clarified “the statute to include victims of child
9 pornography who are injured as adults by the downloading of their pornographic
10 images,” ensuring “that victims of child pornography whose images remain in
11 circulation after they have turned 18 can still recover when those images are
12 downloaded.” *Curtis*, No. 19–CV–02184–PJH, 2019 WL 4141926, at *2 (N.D.
13 Cal. Aug. 30, 2019) *quoting Children’s Safety and Violent Crime Reduction Act of*
14 *2006*, 152 Cong. Rec. S8012–02, S8028, 2006 WL 2034118 (daily ed. July 20,
15 2006) (statement of Sen. Leahy). *See also Lily v. Feuchtener*, 2020 WL 10693186,
16 at *2 (D. Nev. Oct. 26, 2020) (allowing adult plaintiffs to later sue a Defendant for
17 the violation caused by his possession of their child pornography images).

18 Spencer has newly discovered ongoing violations of predicate statutes in the
19 years since the image of him was originally created. Contrary to Defendants’

1 suggestion (Dkt. 30, p. 13), this scenario is extraordinarily common for victims of
2 online child pornography crimes.

3 **II. The Section 2252(B) Violation which Triggers the SOL can Occur**
4 **Anytime During the Plaintiff's Majority**

5 Defendants' argument that the "violation" giving rise to the claim must
6 occur during a plaintiff's minority is also mistaken. (Dkt. 30, p. 10–12). As
7 explained above, a violation occurs each time a defendant undertakes a predicate
8 act of reproducing, distributing, or other activities related child pornography. And it
9 is of no consequence that the plaintiff is an adult when the violation occurs.

10 Claims of adults are specifically permitted under Section 2255(a) which
11 allows a victim to sue "regardless of whether the injury occurred while such person
12 was a minor." 18 U.S.C. 2255(a) Section 2255 provides a remedy to "any person
13 who, while a minor, was a victim of a violation" of a predicate statute. As
14 previously discussed, there is no requirement that a plaintiff seeking the remedy be
15 a minor at the time he brings the action, only that he was a child pornography
16 victim. If a defendant downloads child pornography that was originally created
17 thirty years before the download occurred, the child depicted, who is no longer a
18 minor, may bring a claim under Section 2255 against the downloader. *Doe v.*
19 *Boland*, 698 F. 3d 877, 881 (6th Cir. 2012). ("A child abused through a
20 pornographic video might have one § 2255 claim against the video's creator as

1 soon as it is produced and another against the distributor who sells a copy of the
2 video twenty years later.”).

3 Similarly, in *Doe v. Hesketh*, 828 F.3d 159, 168 (2016), the Third Circuit
4 held that the text of Section 2255 is “consistent with Congress’s remedial scheme
5 for child victims.” The *Hesketh* court noted:

6 Statements by legislators at the time of recent amendments to § 2255
7 ...suggest that the law’s general purpose is to provide both
8 compensation to victims and a measure of deterrence to those
9 responsible for the creation and distribution of child pornography. ***

10 *Id.* at 171. One of those legislators, Senator John Kerry, explained that Masha’s
11 Law was designed to stop the downloading of child pornography rather than to
12 stop downloading until the victim turned 18. He further explained that then-
13 existing statutory damages were flawed because the improper downloading of a
14 song—which violates copyright law, and which can result in civil damages of
15 \$150,000—is far less detrimental to a victim yet yielded higher statutory damages.
16 Just as each individual copyright violation creates a civil remedy long after the
17 original production of the copyrighted work, so too does a violation of the child
18 pornography statutes under Masha’s Law. *See* 151 Cong. Rec. S14194 (12–20–05).

19 Thus, multiple authorities have observed and affirmed that Masha’s Law is
20 intended to provide a civil remedy for victims over the entire period of their

1 victimization, not just during their childhood.³ Spencer’s claims remain timely so
2 long as Defendants continue to violate federal child pornography statutes 18
3 U.S.C. 2252A(a)(5)(B), 2252A(a)(1), 2252A(a)(2)(a), 2252A(a)(2)(b),
4 2252A(a)(3)(a), 2252A(a)(3)(b), and 2252A(a)(6).

5 **III. Plaintiff Properly Pleaded Claims Against Each of the Defendants**

6 Fed Rule Civ. P. 8(a) requires a complaint to contain “a short and plain
7 statement of the claim showing that the pleader is entitled to relief.” A complaint
8 need not contain “detailed factual allegations” and must only contain more than
9 mere “labels and conclusions” to survive a motion under Fed R. Civ. P. 12(b)(6).
10 *Conlin v. Mortgage Elec. Registration Systems, Inc.*, 714 F.3d 355, 358 (6th Cir.
11 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal
12 quotations removed). A complaint is sufficient if it contains factual matter,
13 accepted as true, that states a claim to relief plausible on its face. *Ctr. for Bio-*
14 *Ethical Reform v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (citing *Ashcroft v.*
15 *Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotations removed). The court
16 generally must accept that “all allegations in the complaint are true and draw all

³ “A child abused through a pornographic video might have one §2255 claim against the video’s creator as soon as it is produced and another against the distributor who sells a copy of the video twenty years later. Cast in this light, the statute’s separate references to ‘victim’ and ‘personal injury’ show only that people victimized as minors may later sue for injuries they incur or discover. The statute does not create one category of victims and another category of people who suffer personal injuries.” *N.S. v. Rockett*, No. 3:16–CV–2171–AC, 2018 WL 6920125, at *7 (D. Or. Oct. 19, 2018) (citing *Boland*, 698 F.3d at 881); See also *Singleton v. Clash*, 951 F. Supp. 2d 578, 590–91 (S.D.N.Y. 2013), aff’d sub nom. *S.M. v. Clash*, 558 F. App’x 44 (2d Cir. 2014).

1 reasonable inferences in favor of the nonmoving party.” *Dahlia v. Rodriguez*, 753
2 F.3d 1060, 1066 (9th Cir. 2013). “[F]or a complaint to survive a motion to dismiss,
3 the non-conclusory factual content, and reasonable inference from that content
4 must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v.*
5 *U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009); *see also N.S. v. Rockett*, No.
6 3:16–CV–2171–AC, 2018 WL 6920125, at *2–3 (D. Or. Oct. 19, 2018), report and
7 recommendation adopted, No. 3:16–CV–2171–AC, 2018 WL 6920112 (D. Or.
8 Nov. 28, 2018).

9 Courts in this circuit have recognized that where the facts or information
10 needed to determine the precise nature of the defendants’ involvement in a joint
11 venture or activity are solely within the possession and control of the defendants, a
12 court should not dismiss the action for a complaint’s failure to specify each
13 defendant’s particular involvement, but rather should allow discovery on the issue.

14 In *Circle Click Media LLC v. Regus Management Group LLC*, 2013 WL
15 57861 (N.D. Cal. Jan. 3, 2013), the court rejected a defense argument that the
16 plaintiff had engaged in impermissible “group pleading.” In *Circle Click* the
17 plaintiff sued four defendants alleging that they worked together in the business of
18 leasing commercial office space, which leasing activity grounded the complaint.
19 The plaintiff was unable, however, without discovery, to allege the precise nature
20 of the defendants’ corporate relationship or what each of them did in connection

1 with the leasing operation. The court denied the motion to dismiss and held that
2 because the information about the precise relationship of the defendants “is in the
3 sole possession of Defendants,” the plaintiff was entitled to discovery on that issue.
4 *Id.* at 5–6.

5 Similarly, in *Ultratech Inc. v. Ensure Nanotech (Beijing), Inc.*, 108
6 F.Supp.3d 816 (N.D.C. 2015), the court denied a motion to dismiss for failure to
7 plead certain factors relevant to determining whether a defendant was an alter ego
8 of a corporation because those facts were not available to the plaintiff without
9 discovery.

10 Defendants’ reliance on *Romero v. Countrywide Bank, N.A.*, 740 F. Supp. 2d
11 1129, 1147 (N.D. Cal. 2010), is misplaced. *Romero* applied the heightened Rule 9
12 pleading standard applicable in actions for fraud. The *Circle Click* court noted that
13 “the prohibition against group pleading only applies in cases of fraud.” *Circle Click*
14 at *6. The heightened pleading standard is not applicable because this is not a fraud
15 case.

16 Plaintiff has sufficiently pleaded facts that show it beyond plausible that
17 each Defendant committed one or more violations of federal child pornography
18 statutes 18 U.S.C. 2252A(a)(5)(B), 2252A(a)(1), 2252A(a)(2)(a), 2252A(a)(2)(b),
19 2252A(a)(3)(a), 2252A(a)(3)(b), and 2252A(a)(6) within the 10 years preceding
20 the filing of this action and since.

1 Even under the fraud heightened pleading standard, which does not apply in
2 this case, the pleading must only state “who, what, when, where and how.” *Wyeth*
3 *Holdings Corp. v. Sandoz, Inc.*, No. CIV.A. 09-955-LPS, 2012 WL 600715, at *5
4 (D. Del. Feb. 3, 2012), *report and recommendation adopted*, No. CIV.A. 09-955-
5 LPS, 2012 WL 749378 (D. Del. Mar. 1, 2012) (*citing Exergen Corp. v. Wal-Mart*
6 *Stores, Inc.*, 575 F.3d 1312, 1328 (Fed.Cir.2009)). Spencer did just that.

7 **Estate of Kurt Cobain.** Kurt Cobain was the leader of the band that created
8 *Nevermind*, he was the inspiration for the album cover, and was personally
9 involved in creating the image of Spencer swimming naked underwater after being
10 gagged. After its release, Cobain wanted to use Spencer as a prop, inviting him as
11 an infant to tour with the band. Clearly in life Cobain possessed Spencer’s image
12 and was intimately involved in the album’s creation, distribution, sales, and
13 promotion. Publicly available information reveals that the Cobain estate has a net
14 worth of approximately \$450 million or more, with annual revenues from Nirvana
15 album sales at \$4 million per year. (Dkt. 25, ¶ 44). Given all the above, it is
16 reasonable and plausible to infer that Cobain’s estate, represented by his widow
17 executor Courtney Love, continues to have a keen interest in the album and the
18 image, to possess the image and to be involved in the continued distribution, sale,
19 and promotion of the *Nevermind* album. Of course, without discovery it is
20 impossible for Plaintiff to know precisely what role, if any, the estate plays in the

1 ongoing activities concerning *Nevermind*. (Dkt. 25 ¶ 4, 5, 42, 44, 51–53, 54, 59,
2 60, 61, 63, 64, 65, 67, 71, 72, 75, 79, 83, 84, 87, 89, 91, 98, 99).

3 **Krist Novoselic and David Grohl.** Novoselic and Grohl were band
4 members and, with Cobain, personally involved in the creation of *Nevermind* and
5 the image used to sell it, as well as its promotion and sales. Although little
6 information is publicly available about whether and how much these band
7 members continue to benefit from the sale of the album and related products, it is
8 reasonable to infer that they continue to benefit from activities related to the
9 *Nevermind* franchise just as does the Cobain estate. In an article in the New York
10 Daily News dated October 5, 2022, Grohl is quoted as saying, “I have many ideas
11 of how we should alter that cover, but we’ll see what happens [...] We’ll let you
12 know. I’m sure we’ll come up with something good.” (Lewis Decl., Ex. C – New
13 York Daily News). This statement shows that Grohl continues to have a keen
14 interest in the album and image (having “ideas of how we should alter that cover”).
15 It is more than plausible that he is involved in the sale, distribution, promotion, and
16 other activities related to the album and its cover image. Again, discovery is
17 needed to determine their precise involvement. (Dkt. 25 ¶ 4, 5, 44–48, 51–53,
18 54–56, 63–65, 67, 69, 71, 72, 75, 79, 86, 89, 98, 99, 101).

19 **Nirvana, L.L.C.** The band, through its members and as a corporate entity,
20 was directly involved in the creation of the album cover image and the album

1 itself, and clearly benefited handsomely from *Nevermind's* commercial success. It
2 is reasonable to infer that like the estate, the band itself continues to receive
3 substantial benefit from the ongoing sale of the album, continues to possess
4 Spencer's image, and continues to be involved in *Nevermind's* promotion, sales,
5 and distribution. (Dkt. 25 ¶¶ 4, 5, 11–15, 42–48, 51–53, 54–57, 59–61, 63–65, 67,
6 69, 71, 72, 75, 79, 84, 86, 87, 89, 91, 98–101.)

7 **Kirk Weddle.** Weddle took the picture of Spencer which ended up on
8 *Nevermind's* cover. His involvement goes well beyond taking pictures, however.
9 After the album's release, and intending to garner more publicity and attention,
10 Weddle produced photographs of Spencer, still a young child, dressed up as Hugh
11 Hefner, a worldwide icon of sexual licentiousness. He also gave interviews to mass
12 media about Spencer's image, telling TIME Magazine that “[i] was a great concept
13 – baby underwater, unable to breathe, going after money on a fishhook.” Weddle's
14 name is listed on the 30th Anniversary release of the *Nevermind* album. To this
15 day, he is selling a book he created about Nirvana and the *Nevermind* album cover,
16 which contains his *signed* copy of the subject image. (Lewis Decl., Ex. A & B).

17 Together these allegations and facts show that it is plausible that Weddle has
18 within ten-year look back period and since sold or been involved in the sale and/or
19 distribution of the image. (Dkt. 25 ¶¶ 4, 5, 51–53, 72–77, 81–84, 89, 98–101).

1 **The Corporate Entities – Geffen Records/The David Geffen**

2 **Company/MCA Recordings and UMG Recordings.** In 1990, Nirvana retained
3 David Geffen Records (DCG) as its music label. (Dkt. 25 ¶ 57). Also in 1990,
4 DCG hired Robert Fisher to serve as art director and assigned Fisher to the Nirvana
5 account. (Dkt. 25 ¶ 62). As DGC’s employee, Fisher helped the band, Weddle, and
6 others at Geffen and DGC create the *Nevermind* album cover image. (Dkt. 25
7 ¶¶ 62–75, 84–86). Geffen initially shipped 46,251 copies of *Nevermind* to retailers,
8 but the album was so commercially successful that it ultimately sold over 30
9 million copies. (Dkt. 25 ¶¶ 100–102).

10 In 1999 DCG Records was bought by Universal Music Group (“UMG”).
11 UMG Recordings is the successor-in-interest to DGC, Geffen Records, and MCA
12 Records. (Dkt. 25 ¶ 34). It is more than plausible that UMG Recordings, as the
13 entity into which these companies who sold and distributed the album merged, has
14 continued to possess, distribute, promote, advertise, and sell *Nevermind*.

15 **CONCLUSION**

16 For these reasons, Plaintiff respectfully requests that the Court deny
17 Defendants’ Motion to Dismiss.
18

Dated: February 3, 2022
New York, New York

Respectfully submitted,

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