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cc: PK

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MAY 28 2003
at 10 o'clock and 27 min. P.M.
WALTER A.Y.H. CHINN, CLERK

Attorney for Defendant
THOMAS M. SCHNEPPER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	) CR. NO. 02-00062 ACK
)
Plaintiff,	) DEFENDANT'S MOTION IN LIMINE TO
	) FOR DETERMINATION THAT
vs.	) GOVERNMENT EXHIBIT 8 IS NOT
	) CHILD PORNOGRAPHY, OR TO DISMISS
THOMAS M. SCHNEPPER,	) COUNT 8; DECLARATION; EXHIBITS
	) "A" - "D"; CERTIFICATE OF
Defendant.	) SERVICE
)
	) DATE: <u>May 29, 2003</u>
	) TIME: <u>9:00 A.M.</u>
	) JUDGE: <u>ALAN C. KAY</u>

DEFENDANT'S MOTION IN LIMINE FOR DETERMINATION THAT GOVERNMENT EXHIBIT 8 IS NOT CHILD PORNOGRAPHY, OR TO DISMISS COUNT 8

Comes Now Defendant THOMAS M. SCHNEPPER, by his undersigned court-appointed counsel, and moves in limine for a determination that government exhibit 8 is not child pornography, because it was a photograph taken of porn actor David Cummings and porn actress Melissa Ashley, both of whom were over 18 years when the photograph was taken. In the alternative, defendant requests that the court dismiss count 8 on the grounds that there is no child pornography depicted.

This motion is based upon the attached declaration and memorandum in support of motion, the files and records of this

case, any evidence and testimony to be adduced in support hereof,
and upon all such further matters, demonstrating good cause to
grant this motion.

DATED: Honolulu, Hawaii, May 28, 2003.

A handwritten signature in cursive script, reading "Richard S. Kawana". The signature is written in dark ink and is positioned above the printed name.

RICHARD S. KAWANA
Attorney for Defendant
THOMAS M. SCHNEPPER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,) CR. NO. 02-00062 HG
)
Plaintiff,) DECLARATION
)
vs.)
)
THOMAS M. SCHNEPPER,)
)
Defendant.)
_____)

DECLARATION

I, RICHARD S. KAWANA, hereby declare as follows:

1. I have been appointed to represent Defendant herein pursuant to the Criminal Justice Act, and state as follows:

a. With the court's approval, I have retained the services of Marcus Lawson, a forensics expert in the field of computer and internet usage in the area of pornography;

b. Mr. Lawson has advised me that based upon his investigation and analysis concerning government exhibit 8, the computer graphic is not child pornography as alleged in count 8 because the sexual activity depicted is between two adult actors, the male being Dave Cummings and the female Melissa-Ashley, who also has stage names as B.J. Lixx and Ann Howe; on information and belief, the real name of the female actor depicted in government exhibit 8 is Melissa Lynn Bertsch

c. As a result of Mr. Lawson's request to the administrator of Melissa-Ashley's web site, Dave Cummings faxed to me a copy of the original Artist Agreement between Mr. Cummings and Ms. Bertsch, dated January 31, 1999, the first time

that Mr. Cummings and Ms. Bertsch performed together, at which time Ms. Bertsch was 20 years old.

d. Copies of screen prints provided by Mr. Lawson are attached hereto as follows:

(1) of Melissa-Ashley's web site as Exhibit "A";

(2) of Dave Cummings' web site as Exhibit "B";

e. Copies of documents sent by Dave Cummings include:

(1) the Artist Agreement and Release, dated January 31, 1999, between Dave Cummings and Melissa Bertsch, whose stage names are Melissa Ashley, B.J. Lixx, and Anne Howe, attached hereto as Exhibit "C";

(2) the Arizona Driver License of Melissa Lynn Bertsch, showing a date of birth of 8/24/78 is attached hereto as Exhibit "D";

f. When I advised the government that Exhibit 8 was not child pornography, and that the government should consider withdrawing the charge, Mr. Tong stated that because an attempt was alleged, it did not matter whether the image was pornography and thus the government would proceed with the charge;

2. Wherefore, defendant is filing this motion for determination that government exhibit no. 8 is not child pornography or to seek a dismissal of the charge.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING
IN TRUE AND CORRECT.

Dated: Honolulu, Hawaii, April 28, 2003.


RICHARD S. KAWANA