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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
ARMADO HERNANDEZ,  
  
Defendant.

No. 2:11-cr-00026-GEB

**TENTATIVE RULING RE: RESTITUTION**

Two groups of victims seek restitution under 18 U.S.C. § 2259 in connection with Defendant Armado Hernandez's guilty plea to one count of Receipt and Distribution of Child Pornography proscribed in 18 U.S.C. § 2252(a)(2): a victim identified as "Vicky" and John Does I-V, who are collectively referred to as members of the "Erik" and/or "8 Kids" series.<sup>1</sup> Defendant was sentenced on December 20, 2013, but decision on the restitution requests was continued until June 6, 2014.

For the reasons stated below, "Vicky" is awarded \$2,282.86 in restitution, and each John Doe's restitution request is denied.

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<sup>1</sup> John Does I-V comprise five of eight individuals who were sexually abused and made the subject of child pornography while living together in a foster home. See generally The Law Office of Erik Bauer's Restitution Request, Apr. 1, 2013, ECF No. 60-6.

**I. FACTUAL BACKGROUND**

The Factual Basis for Defendant's Plea Agreement states, in relevant part:

In the summer of 2010, FBI Chico received information from an officer of the Glenn County Sheriff's Department regarding a computer he had received from a concerned citizen. . . .

. . . .

The law enforcement forensic review of this computer . . . revealed that there were approximately 450 still image files of child pornography and approximately 250 videos files or child pornography on the abandoned computer. Many were downloaded by Hernandez using a peer-to-peer file-sharing network. Forensic analysis of the computer shows no evidence of any users of the computer other than Hernandez (and the concerned citizen).

There is evidence that the registered owner of the software for this abandoned computer, Amado Hernandez, . . . downloaded these files. Evidence of this comes from the photo "picture\_5.jpg," which was located in a Quick Cam folder. This is a photo of an apparently naked Amado Hernandez holding a pad of paper displaying his peer-to-peer username and the date "08 MAR 2009." At the bottom of the image . . . is imprinted a Quick Cam generated date 03/08/2009 11:26 AM. This date correlates with the "create" date for the image file found on Hernandez's computer, as revealed by the forensic software. Computer files containing visual depictions of minors engaged in sexually explicit conduct were downloaded very close in proximity to the time of the photo of the apparently naked Amado Hernandez in "picture\_5.jpg" was created.

The video and image files were forward to . . . NCMEC, which compared those files with images of known child pornography victims. NCMEC subsequently reported that 43 of those submitted video files were of known child victims from 15 different identifiable series of child pornography. Moreover, NCMEC also reported that there were 72 child pornography still images from 35 different

1 identifiable series of child  
2 pornography . . . .

3 . . . .

4 When interviewed, Hernandez said . . . .  
5 he lived in Chico during at least March 2009  
6 through October 2009. He said through July  
7 2009 he used a custom built desktop computer  
8 that he later discarded because it was not  
9 working well. Hernandez admitted that he  
10 downloaded and possessed child pornography  
11 during this time in Chico . . . .

12 Because he downloaded and viewed the  
13 images of child pornography, the defendant  
14 knew that the images that he downloaded  
15 through the file-sharing network showed  
16 minors engaged in sexually explicit conduct.

17 (Plea Agreement 15:6-17:10, ECF No. 44.)

18 The Presentence Report provides additional information  
19 concerning Defendant's admitted use of the peer-to-peer network  
20 to download child pornography as follows:

21 A forensic review of the [referenced]  
22 computer . . . revealed that . . . [m]any [of  
23 the still images and videos of child  
24 pornography] were downloaded by [Defendant]  
25 using a peer-to-peer file-sharing network,  
26 Gigatribe.

27 . . . .

28 On January 2, 2011, [Defendant] was  
29 contacted in San Diego, California, on a  
30 cruise ship. [Defendant] admitted he had used  
31 the peer-to-peer network user names  
32 "pnplatinoboi," "pnpcaliperv,"  
33 "pnpcaliperv2," and "pnpervlatino" to  
34 download child pornography. The first three  
35 user names were used while he lived in Chico.  
36 The latter account was created just weeks  
37 prior to the interview, while he lived and  
38 worked on the cruise ship.

39 (Presentence Report ("PSR") ¶¶ 3, 7.)

40 A May 29, 2014 Forensic Investigation Report prepared  
41 by Jos Van Hout, the Forensic Examiner/Investigator who conducted

1 the original forensic examination of the referenced computer,  
2 further states:

3           On May 20, 2014 at approximately 12:37PM  
4 I received a call from FBI Agent Mark  
5 Roberts. He indicated there was a question  
6 related to some Child Pornography image and  
7 video files in this case. Agent Roberts  
8 inquired if there was a way for me to access  
9 my original forensic files and reports to  
10 determine if the[] files in question were  
11 viewed and/or manipulated by the [Defendant].

12 . . . .

13           On May 23, 2014 at approximately 1100  
14 hours I arrived at the Butte County District  
15 Attorney's Office to review my files and  
16 evidence.

17 . . . .

18           Agent Roberts had submitted [certain]  
19 file names in question for me to analyze. The  
20 question in [these] files was whether the  
21 suspect viewed the images or video.

22           1) A video from NCMEC report request  
23 number 49933 from the "Vicky" series  
24 identified as Vicky\_newest\_(PTHC).wmv

25           I located the video file in the  
26 following path on the computer. C/Documents  
27 and Settings/Amado/My Documents/My  
28 Downloads/Gigatribe/pnpcaliperv/vids/Vicky\_ne  
west\_(PTHC).wmv

29 . . . .

30           2) An image file from NCMEC report  
31 number 49933\_1 from the "Erik" series  
32 identified as P080.jpg

33           I located the video [sic] file in the  
34 following folder path on the computer.  
35 C/Documents and Settings/Amado/My  
36 Documents/My Downloads/Gigatribe/  
37 pnpcaliperv/pics/P080.jpg

38 . . . .

39           The examination of the[ referenced]  
40 files determined that [they] were manipulated  
41 by the computer or the user after being  
42 downloaded and placed on the computer. Both

1 of these files around the same time on  
2 05/30/09 were accessed by the computer or a  
resident computer program.

3 The[] timestamp markers are not exact as  
4 to what specifically happened as to a user or  
5 program access. It can be stated that these  
6 files were opened and manipulated after being  
7 downloaded or copied to this computer. . . .

8 (Forensic Investigation Report 1-3, May 29, 2014, ECF No. 75-1.)

9 Defendant submitted a declaration from Marcus Lawson in  
10 opposition to the restitution request, in which Mr. Lawson  
11 responds to the government's Forensic Investigation Report.  
12 (Lawson Decl., ECF No. 78-1.) Mr. Lawson avers, in relevant part:

13 The file Vicky\_newest\_(PTHC).wmv does not  
14 appear to have been accessed since it was  
15 moved to where it currently resides. It  
16 appears the file was likely moved to the  
17 current folder . . . on 5/30/09 without being  
18 opened. The "Vids" folder is a user created  
19 folder created on 5/28/09 at 12:05:25 am PST.  
20 The movie was likely moved to this new folder  
21 on 5/30/09 but without being opened. . . .

22 The image P080.jpg also does not appear to  
23 have been accessed since created, it appears  
24 it was moved to its current folder . . . on  
25 5/30/09. The "Pics" folder is a user created  
26 folder created on 5/27/09 at 11:09:56Ppm  
27 [sic] PST.

28 . . . .  
[B]ased only on a review of [Jos Van  
Hout's] report . . . , it is my opinion that  
there is no evidence to support that any of  
the three files in question were opened and  
viewed.

(Id. at 3-4.)

## II. LEGAL STANDARD

"Enacted as a component of the Violence Against Women  
Act of 1994, [18 U.S.C.] § 2259 requires district courts to award  
restitution for certain federal criminal offenses, including [the

1 receipt of] child-pornography . . . .” Paroline v. United States,  
2 134 S. Ct. 1710, 1716 (2014).

3           Section 2259 states a broad  
4           restitutionary purpose: It requires district  
5           courts to order defendants “to pay the  
6           victim . . . the full amount of the victim’s  
7           losses as determined by the court,” §  
8           2259(b)(1), and expressly states that “[t]he  
9           issuance of a restitution order under this  
10          section is mandatory,” § 2259(b)(4)(A).

11          Id. at 1718-19. Section 2259(b)(3) defines the phrase “full  
12          amount of the victim’s losses” to include “any costs incurred by  
13          the victim for --

14                (A) medical services relating to  
15                physical, psychiatric, or psychological care;

16                (B) physical and occupational therapy  
17                or rehabilitation;

18                (C) necessary transportation, temporary  
19                housing, and child care expenses;

20                (D) lost income;

21                (E) attorneys’ fees, as well as other  
22                costs incurred; and

23                (F) any other losses suffered by the  
24                victim as a proximate result of the offense.

25          The Supreme Court recently held in Paroline that §  
26          2259(b)(3)(F)’s “proximate-cause requirement applies to all the  
27          losses described in § 2259.” Paroline, 134 S. Ct. at 1722.

28          “Restitution is therefore proper under § 2259 only to the extent  
29          the defendant’s offense proximately caused a victim’s losses.”

30          Id. However,

31                [i]n th[e] special context, where it can be  
32                shown both that a defendant possessed a  
33                victim’s images and that a victim has  
34                outstanding losses caused by the continuing  
35                traffic in those images but where it is

1 impossible to trace a particular amount of  
2 those losses to the individual defendant by  
3 recourse to a more traditional causal  
4 inquiry, a court applying § 2259 should order  
5 restitution in an amount that comports with  
6 the defendant's relative role in the causal  
7 process that underlies the victim's general  
8 losses.

9 Id. at 1727.

10 "There are a variety of factors district courts m[ay]  
11 consider in determining a proper amount of restitution . . . ."

12 Id. at 1728. "[A]s a starting point, [district courts may]  
13 determine the amount of the victim's losses caused by the  
14 continuing traffic in the victim's images . . . , then set an  
15 award of restitution in consideration of factors that bear on the  
16 relative causal significance of the defendant's conduct in  
17 producing those losses." Id.

18 These could include the number of past  
19 criminal defendants found to have contributed  
20 to the victim's general losses; reasonable  
21 predictions of the number of future offenders  
22 likely to be caught and convicted for crimes  
23 contributing to the victim's general losses;  
24 any available and reasonably reliable  
25 estimate of the broader number of offenders  
26 involved (most of whom will, of course, never  
27 be caught or convicted); whether the  
28 defendant reproduced or distributed images of  
the victim; whether the defendant had any  
connection to the initial production of the  
images; how many images of the victim the  
defendant possessed; and other facts relevant  
to the defendant's relative causal role.

29 Id. "These factors . . . should . . . serve as rough guideposts  
30 for determining an amount [of restitution] that fits the  
31 offense." Id.

32 The government bears the burden of proving the amount  
33 of a victim's losses by a preponderance of the evidence. See id.

1 at 1729 (“[T]he government . . . bears the burden of proving the  
2 amount of the victim’s losses[.]” (citing 18 U.S.C. § 3664(e));  
3 United States v. Kennedy, 643 F.3d 1251, 1263 (9th Cir. 2011)  
4 (“[T]he government must prove by a preponderance of the evidence  
5 that [the defendant’s] offenses proximately caused the losses  
6 incurred by [the victims].”). “[A] restitutionary award under §  
7 2259 will be improper if the district court must engage in  
8 arbitrary calculations to determine the amount of [a] victim’s  
9 losses.” Kennedy, 643 F.3d at 1261 (citation omitted).

10 **III. DISCUSSION**

11 The government “asks the Court to award restitution to  
12 “Vicky” and John Does I-V from the “Erik/8 Kids” series pursuant  
13 to Paroline v. United States.” (Gov’t Supp. Br. Re Restitution  
14 (“Gov’t Supp. Br.”) 2:4-6, ECF No. 75.) The government argues  
15 under Paroline, “restitution is required where the ‘defendant  
16 possessed a victim’s images’ and (b) the ‘victim has outstanding  
17 losses caused by the continuing traffic in those images but where  
18 it is impossible to trace a particular amount of those losses to  
19 the individual defendant.’” Id. at 4:13-16. The government  
20 further argues the “two groups of victims before the Court”  
21 satisfy this standard and proposes a restitution award that  
22 equals “the pool of each victim’s proven losses [divided by] the  
23 number of defendants convicted of possessing, receiving, or  
24 distributing their images.” Id. at 4:17-21, 7:5-6, 8:14-16.

25 Defendant opposes the restitution requests, rejoining  
26 “the government has not met the required burden of proof to  
27 justify an order of restitution.” (Def.’s Opp’n 2:8-11, ECF No.  
28 78.)



1           **A.    Whether Defendant Received the Victims' Images**

2           The first step in deciding whether to award restitution  
3 under Paroline is to determine whether the Defendant received<sup>2</sup>  
4 the victims' images. Paroline, 134 S. Ct. at 1727.

5           The government contends "sufficient evidence [exists]  
6 under a preponderance standard to establish that the defendant  
7 knowingly received the[ victims'] images." (Gov't Br. Re  
8 Restitution ("Gov't Br.") 5:24-26, ECF No. 73.) Specifically, the  
9 government argues:

10                   [T]he evidence shows that the computer where  
11 the images were found belonged to defendant.  
12 There is no evidence that anyone other than  
13 defendant (and the concerned citizen who  
14 reported the crime) used the computer.  
15 Further, the defendant admitted that he  
16 downloaded and received child pornography  
17 during the timeframe alleged in the  
18 indictment, and a recent forensic analysis  
19 strongly suggests that the images at issue  
20 resided in a folder created and accessed by  
21 the defendant during that timeframe. This  
22 evidence is sufficient for the Court to find  
23 by preponderance [sic] that [among the  
24 images/videos] that the defendant knowingly  
25 received w[ere the video that NCMEC  
26 identified as part of the "Vicky" series and  
27 the image that NCMEC identified as part of  
28 the "Erik/8 Kids" series].

(Gov't Supp. Br. 6:2-12.)

21           Defendant rejoins the government has not met its burden  
22 of proving "he knowingly [received] specific images of [the]  
23 persons who claim restitution." (Def.'s Opp'n 4:23-25.) Defendant  
24 argues "a person [receives] an image of child pornography only  
25 when he knows it is present on his computer[,]" and the record  
26 "does not show that [Defendant] actually viewed" the referenced

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27           <sup>2</sup> In Paroline, the defendant plead guilty to the possession of child  
28 pornography, whereas here, the defendant plead guilty to the receipt and  
distribution of child pornography proscribed in 18 U.S.C. 2252(a)(2).

1 image and video that were found on his computer. Id. at 2:23-25,  
2 3:11-13. Defendant further argues concerning John Does I-V: "the  
3 single image from th[e "Erik/8 Kids"] series is not described in  
4 any of the government's filing[s], so the Court cannot determine  
5 which of the claimants may be depicted in that image, or whether  
6 any of the five claimants are in fact depicted. Id. at 6:4-10.

7           The Ninth Circuit has held that "a person . . .  
8 knowingly receive[s] and possess[es] child pornography images  
9 when he seeks them out over the internet and then downloads them  
10 to his computer." United States v. Kuchinski, 469 F.3d 853, 861  
11 (9th Cir. 2006); see also United States v. Romm, 455 F.3d 990,  
12 999 (9th Cir. 2006) ("[A] defendant who downloads child  
13 pornography can be prosecuted for knowing possession of child  
14 pornography.").<sup>3</sup>

15           In this case, Defendant admitted to downloading and  
16 possessing child pornography from March 2009 through October  
17 2009. (Plea Agreement 17.) Review of the computer at issue  
18 revealed hundreds of images and videos of child pornography, many  
19 of which were downloaded by Defendant using the peer-to-peer  
20 file-sharing network, Gigatribe. (Plea Agreement 15; PSR ¶ 3.)  
21 Defendant admitted to using multiple user names on the file-  
22 sharing network, including "pnpcaliperv." (PSR ¶ 5.) "Forensic  
23 analysis of the computer shows no evidence of any users of the  
24 computer other than [Defendant] (and the concerned citizen [who  
25 turned over the computer to law enforcement upon his/her  
26 discovery of child pornography])." (Plea Agreement 15-16.)

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27 <sup>3</sup> Defendant has provided no authority supporting his argument that for  
28 purposes of awarding restitution under 18 U.S.C. § 2259, a defendant must open  
and/or view downloaded child pornography to have knowingly received it.

1 A video from the "Vicky" series,  
2 "Vicky\_newest\_(PTHC).wmv," was located on the computer in the  
3 following path: C/Documents and Settings/Amado/My Documents/My  
4 Downloads/Gigatribe/pnpcaliperv/vids/Vicky\_newest\_(PTHC).wmv.

5 (Foresnic Investigation Report 2.) An image file from the "Erik/8  
6 Kids" series, "P080.jpg," was located on the computer in the  
7 following folder path: C/Documents and Settings/Amado/My  
8 Documents/My Downloads/Gigatribe/pnpcaliperv/pics/P080.jpg. Id.

9 The folders in which the referenced image and video were found  
10 are "user created folders[,]" which were created on May 27, 2009,  
11 and May 28, 2009. (Lawson Decl. 3.) After being downloaded, the  
12 image and video were "likely moved to th[e] new folder[s] on May  
13 30, 2009. Id. at 3-4.

14 The referenced evidence, and the reasonable inferences  
15 that can be drawn therefrom, establish by a preponderance of the  
16 evidence, that Defendant knowingly received "Vicky's" video,  
17 "Vicky\_newest\_(PTHC).wmv." The record also evinces by a  
18 preponderance of the evidence that Defendant knowingly received  
19 the "P080.jpg" image from the "Erik/8 Kids" series. However, the  
20 record does not indicate which unnamed victim(s) from the "Erik/8  
21 Kids" series are depicted in that image. Further, since John Does  
22 I-V comprise only five of eight individuals who are the subject  
23 of the "Erik/8 Kids" series of child pornography, it is possible  
24 that image P080.jpg does not depict John Doe I, II, III, IV, or  
25 V. Therefore, it cannot be inferred that Defendant knowingly  
26 received an image of John Doe I, II, III, IV, and/or V.  
27 Accordingly, each John Doe's restitution request is DENIED.

28

1           **B. Whether "Vicky" Has Outstanding Losses Caused by the**  
2 **Continuing Traffic in Her Images**

3           The second step in deciding whether restitution should  
4 be awarded under Paroline is to determine whether the victim  
5 seeking restitution "has outstanding losses caused by the  
6 continuing traffic in [her] images." Paroline, 134 S. Ct. at  
7 1727.

8           The government contends "[Vicky]"<sup>4</sup> has submitted  
9 sufficient evidence in support of [her] 'outstanding losses  
10 caused by the continuing traffic in the images' depicting [her]  
11 abuse." (Gov't Supp. Br. 7:5-6 (quoting Paroline, 134 S. Ct. at  
12 1727).) Specifically, the government argues: "'Vicky' has  
13 submitted a substantial amount of documentation concerning her  
14 ongoing psychological injuries, which several mental health  
15 professionals have determined are caused by her knowledge of the  
16 continued activity of individuals who download or distribute  
17 images of her childhood sexual abuse." Id. at 7:6-9.

18           Defendant does not dispute that "Vicky" has suffered  
19 losses as a result of the ongoing traffic in her images, and the  
20 record evinces she has under the preponderance of the evidence  
21 standard. For example, in the April 11, 2014 Psychological Status  
22 Report concerning "Vicky's" psychological status, Randall Green,  
23 Ph.D. opines:

24                     In my professional opinion, the initial  
25                     evaluation and four updates, covering  
26                     approximately 4-1/2 years, support the  
                          conclusion, based upon a reasonable degree of

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27           <sup>4</sup> Because the government has not shown that Defendant received an image of  
28 John Doe I, II, III, IV, and/or V, the order does not address the parties'  
respective arguments concerning John Does I-V's restitution request on the  
remaining issues.

1 psychological probability, that ["Vicky"] has  
2 suffered, is suffering, and will continue to  
3 suffer psychological injury that is related  
4 to the collective contribution of each  
5 individual downloader, whether she has any  
6 specific knowledge of any particular one, or  
7 not.

8 . . . .

9 It is my conclusion that her knowledge  
10 of the collective group who has or will  
11 possess such images is linked to specific  
12 psychological damages for her. This is not  
13 theoretical, but supported by the information  
14 available to me in the successive evaluations  
15 or updates conducted on ["Vicky"].

16 (Psychological Status Report Summary-IV 20, April 11, 2014.)

17 **C. Calculation of Vicky's Restitution Award**

18 Since the government has shown by a preponderance of  
19 the evidence that Defendant received "Vicky's" video,  
20 "Vicky\_newest\_(PTHC).wmv," and that "Vicky" has outstanding  
21 losses caused by the continuing traffic in her images, the Court  
22 must "order restitution in an amount that comports with  
23 [Defendant's] relative role in the causal process that underlies  
24 [her] general losses." <sup>5</sup> Paroline, 134 S. Ct. at 1727.

25 The government proposes two alternative methods to  
26 calculate the amount of Vicky's restitution award. First, "the  
27 government proposes that the Court divide the pool of ["Vicky's"]  
28 proven losses by the number of defendants convicted of  
possessing, receiving, or distributing [her] images." (Gov't  
Supp. Br. 8:14-16.) As an alternative, the government advances  
"Vicky's" counsel's proposed approach, as follows:

---

<sup>5</sup> In Paroline, the Supreme Court uses the term "general losses" to  
reference a victim's "aggregate losses, including the costs of psychiatric  
treatment and lost income, that stem from the ongoing traffic in her images as  
a whole." Paroline, 134 S. Ct. at 1722.

1 [A]ccording to the letter submitted by  
2 Vicky's lawyer on May 21, 2014, Vicky is  
3 currently seeking \$27,500 in restitution.  
4 This includes \$25,000 in general restitution  
5 and \$2,500 in attorneys' fees. This amount  
6 accords with legislation recently introduced  
7 in the Senate in response to the Court's  
8 Paroline decision. The proposed legislation  
9 provides that a defendant should be liable  
10 either for the "full amount of the victim's  
11 losses" or at least . . . \$25,000 where the  
12 offense is possession.

13 Id. at 9:12-17. The government contends "[e]ither [method] is  
14 reasonable in light of the factors outlined in Paroline and the  
15 information presently available to the Court." Id. at 9:18-20.

16 Defendant opposes the use of either proposed method and  
17 argues "the known [Paroline] factors weigh against an order of  
18 restitution." (Def.'s Opp'n 5:25-26.) Defendant rejoins  
19 concerning the first approach as follows:

20 [T]he government suggests the Court  
21 should simply divide the claimed losses by  
22 the number of criminal defendants who have  
23 been ordered to make restitution of those  
24 losses. But dividing the loss in this manner  
25 ignores the Supreme Court's direction to also  
26 consider "reasonable predictions of the  
27 number of future offenders" and "any  
28 available and reasonably reliable estimate of  
the broader number of offenders" who have yet  
to be caught. The government concedes that it  
lacks this information, but the Court is  
nevertheless required to consider it, and the  
government, because it is advocating on  
behalf of the claimants, is required to  
include it in its calculus.

29 Id. at 6:11-23 (citations omitted). Defendant counters regarding  
30 the second approach that "the Court has no authority to apply or  
31 enforce a law that does not exist." Id. 7:8-13.

32 The government has provided no authority to support  
33 using proposed legislation as the basis for a calculation of

1 restitution under 18 U.S.C. § 2259. Therefore, "Vicky's"  
2 counsel's request for \$27,500 in restitution is denied.

3 In contrast, the government's first proposed approach,  
4 i.e., that the court divide "Vicky's" proven general losses by  
5 the number of defendants convicted of possessing, receiving, or  
6 distributing her images appears to be a workable method to "set  
7 an award of restitution in consideration of [the known] factors  
8 that bear on the relative causal significance of the defendant's  
9 conduct in producing those losses." Paroline, 134 S. Ct. at 1728.  
10 Although the government states in its supplemental brief that it  
11 "does not presently have an estimate of the broader number of  
12 offenders involved in the distribution of ["Vicky's"] images,"  
13 (Gov't Supp. Br. 8 n.3), Paroline does mandate consideration of  
14 that number. The Supreme Court simply listed that value as a  
15 factor that could be considered. Paroline, 134 S. Ct. at 1728.  
16 Further, the Supreme Court stated: "it is neither necessary nor  
17 appropriate to prescribe a precise algorithm for determining the  
18 proper amount [of restitution]," and the proposed list of factors  
19 that a district court may consider in awarding restitution "need  
20 not be converted into a rigid formula, especially if doing so  
21 would result in [a] trivial restitution order[]." Id. at 1728.

22 For the stated reasons, the Court adopts the  
23 government's first proposed approach to determine the amount of  
24 "Vicky's" restitution award.

25 In "Vicky's" updated restitution request dated May 22,  
26 2014, "Vicky" lists general losses totaling \$1,082,180.51, which  
27 comprises "\$113,600.00 in [psychological] counseling expenses,  
28 \$53,330.00 in educational and vocational counseling needs and

1 lost part-time income during schooling, \$828,150.00 in lost  
2 earnings, and \$87,100.51 in expenses paid in out of pocket costs  
3 incurred relative to restitution determination." ("Vicky's"  
4 Restitution Req. ("Vicky's" Req.") 2, May 22, 2014.) "Vicky's"  
5 counsel also seeks to receive an apportioned value of her total  
6 attorney's fees expended in her representation of "Vicky." (Id.  
7 at 12.) Each requested category of losses is addressed in turn.

8 "Vicky" requests an apportioned value of \$113,600.00 in  
9 psychological counseling costs. This amount is based upon the  
10 expert opinion of clinical psychologist, Randall L. Green, Ph.D.,  
11 that "Vicky" "continues to require individual therapy for reasons  
12 that are directly and indirectly related to the knowledge of  
13 continued downloading and dissemination of her images, and the  
14 intermittent discovery of various attempts by those who have  
15 viewed her images to penetrate her privacy boundaries."  
16 (Psychological Status Report Summary-IV 17.) Dr. Green opined  
17 that "Vicky's" "[t]otal maximum est[imated] range of recommended  
18 interventions if followed and clinically indicated" totals  
19 "\$108,975 to \$113,600." Id. at 18.

20 Instead of assuming \$113,600 in psychological  
21 counseling costs, which represents the highest value of Dr.  
22 Green's estimated range, the Court will use the average amount of  
23 this range, \$111,287.50; this value will be included in the total  
24 of general losses to be apportioned to Defendant.

25 "Vicky" requests an apportioned value of \$53,330.00 in  
26 educational and vocational losses. ("Vicky's" Req. 2.) "Vicky"  
27 supports this request with the expert opinion of vocational  
28 consultant, Merrill Cohen. Ms. Cohen opines that Vicky's



1 "knowledge and understanding that [her] images . . . will persist  
2 in perpetuity has le[d] to significant psychological sequelae  
3 that impacts her education, career development, vocational  
4 situation, and earning capacity." (Vocational Assessment 1, Mar.  
5 10, 2010.) As a result of the referenced sequelae, Ms. Cohen  
6 opines "Vicky" has and will incur the following  
7 educational/vocational losses:

8 - an additional semester of college and an  
9 additional year of graduate school (\$34,580.00)

10 - lost part-time wages while attending school  
11 because of "Vicky's" inability to both attend school full-time  
12 and hold a part-time job (\$15,000)

13 - educational and career counseling (\$3,750.00)

14 (Updated Vocational Assessment 4, Apr. 23, 2014.)

15 The entire \$53,330.00 in educational and vocational  
16 losses will be included in the total of general losses to be  
17 apportioned to Defendant.

18 "Vicky" requests an apportioned value of \$828,150.00 in  
19 lost earnings based upon the expert opinion of economist Stan V.  
20 Smith, Ph.D. Dr. Smith "has calculated the loss of earnings  
21 attendant to the delay in entry into the work force and the  
22 predicted recurrent interruption in her work life that the need  
23 for therapy and periodic triggering of her panic and anxiety over  
24 the presence of her images on the internet." ("Vicky's" Req. 11;  
25 see also Updated Economic Assessment 5, May 5, 2014.)

26 The entire \$828,150.00 in lost earnings will be  
27 included in the total of general losses to be apportioned to  
28 Defendant.

1           “Vicky” seeks an apportioned value of \$87,100.51 in out  
2 of pocket costs (“costs”). “Vicky” supports this request with her  
3 counsel’s itemized, chronological summary of costs expended in  
4 her representation. However, review of the cost summary evinces  
5 some of the costs predate Defendant’s offense conduct, and many  
6 of the costs are traceable to other litigation. Such costs are  
7 excluded from the total of costs that will be apportioned to  
8 Defendant. See United States v. Gambel, 709 F.3d 541, 554 (6th  
9 Cir. 2013) (“[I]t should be clear that allocation will not apply  
10 when proximately caused harms are clearly traceable to a  
11 particular defendant. An example would be litigation costs in  
12 connection with the particular defendant.”); Paroline, 134 S. Ct.  
13 at 1727 (“[W]here it is *impossible to trace a particular amount*  
14 of [a victim’s losses] to the individual defendant . . . a court  
15 . . . should order restitution in an amount that comports with  
16 the defendant’s relative role . . . .” (emphasis added)); see  
17 also Gambel, 709 F.3d at 554 (“As a logical matter, a defendant  
18 generally cannot cause harm prior to the date of his offense.”).  
19 The costs which postdate Defendant’s offense conduct and cannot  
20 be traced to a particular Defendant total \$50,501.67. This amount  
21 includes, for example, the expense of “Vicky’s” initial and  
22 updated expert evaluations, and the expense of obtaining her  
23 medical and school records. \$50,501.67 will be included in the  
24 total of general losses to be apportioned to Defendant.

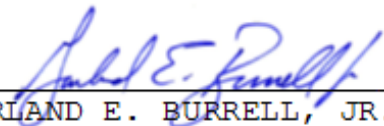
25           “Vicky” also requests \$2,500.00 in attorney’s fees.  
26 (“Vicky’s” Req. 2.) However, this request is not supported by  
27 evidence concerning “Vicky’s” counsel’s time spent in this  
28 litigation. “Vicky’s” counsel’s declaration submitted in support

1 of her restitution request only provides the number of hours she  
2 has spent representing "Vicky" generally. (Decl. of Carol  
3 Hepburn, May 10, 2014.) Therefore, no attorney's fees will be  
4 included in the total of general losses to be apportioned to  
5 Defendant.

6 Accordingly, the total amount of "Vicky's" general  
7 losses to be apportioned to Defendant totals \$1,043,269.17  
8 (\$111,287.50 in psychological counseling, \$53,330.00 in  
9 vocational/educational losses, \$828,150.00 in lost wages, and  
10 \$50,501.67 in costs). After dividing this amount by the number of  
11 standing restitution orders for "Vicky" (457)<sup>6</sup>, the amount of  
12 "Vicky's" general losses that can be attributed to Defendant is  
13 \$2,282.86.

14 For the stated reasons, "Vicky" is awarded \$2,282.86 in  
15 restitution.

16 Dated: June 26, 2014

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19 \_\_\_\_\_  
20 GARIAND E. BURRELL, JR.  
21 Senior United States District Judge  
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24  
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27

28 <sup>6</sup> See Gov't Supp. Br. 9.