

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	CASE NO. 1:06-CR-00394
)	
Plaintiff,)	JUDGE ANN ALDRICH
)	
v.)	
)	
JOSEPH H. SMITH, and)	<u>DEFENDANT JOSEPH H. SMITH'S</u>
ANTON ZGOZNIK,)	<u>MOTION TO ORDER PRODUCTION</u>
)	<u>OF DOCUMENTS</u>
Defendants.)	
)	
)	

Pursuant to Federal Rules of Criminal Procedure 16(d) and 17, and *Brady v. Maryland*, 373 U.S. 83 (1963), Defendant Joseph H. Smith, through undersigned counsel, hereby moves the Court to order the production of the documents and information described below. We request these materials because they are evidence that Mr. Smith intends to use in his defense at trial to establish his innocence. We do not care if they are produced by the government or the Catholic Diocese of Cleveland ("CDC"), which have been working together in responding to our discovery requests, so long as we receive the materials sufficiently in advance of trial.

I. Factual Summary

Mr. Smith was employed by the CDC for more than 20 years. He served as Treasurer, Chief Financial Officer and Chief Legal Officer. He is familiar with the operations of the Diocese and its records. He worked closely with Bishop Anthony Pilla, Father John Wright and many of the other witnesses in this case. He has personal knowledge of specific transactions, meetings, communications and documents which will be at issue in this case. He has personal knowledge of specific documents and information which he intends to use as evidence at trial to establish his innocence.

Since the indictment issued on August 16, 2006, Mr. Smith has diligently sought to obtain this evidence from the government. He has been unsuccessful. Evidence has been withheld by the CDC, which conducted the investigation upon which this prosecution is based and which has selectively provided information and materials to the government. Mr. Smith is entitled to this evidence – whether from the government or the CDC – pursuant to Rules 16 and 17 of the Federal Rules of Criminal Procedure and the *Brady Doctrine*.

II. Fraud Charges

The indictment alleges that, between 1997 and 2004, Mr. Smith engaged in a kickback scheme with entities controlled by his co-defendant, Anton Zgoznic, by which he: (1) caused the CDC to hire the Zgoznic Entities¹ to perform accounting, computer, and financial services at inflated prices; (2) caused the CDC to unnecessarily outsource certain of its functions to the Zgoznic Entities at inflated prices; (3) received kickbacks from the Zgoznic Entities in the amount of \$784,627.25; (4) which were not disclosed on the records of the CDC or disclosed to Diocesan Officials. (ECF 1, ¶¶ 17-24). Based on these allegations, Mr. Smith has been charged with mail fraud (18 U.S.C. §§ 1341 and 1346), money laundering (18 U.S.C. § 1956(a)(1)(B)(i)), and conspiracy to commit mail fraud (18 U.S.C. §§ 371 and 1349). (ECF 1, Counts 1 - 17).

These allegations are false. Mr. Smith is not guilty of these charges. Mr. Smith is entitled to obtain materials to use as evidence at trial to establish his innocence.

A. Father Wright Authorized the Additional Compensation.

The compensation that Mr. Smith received from the Zgoznic Entities was authorized and directed by Father John Wright, who was Chief Financial and Legal Officer of the CDC for more than 20 years and Mr. Smith's and Mr. Zgoznic's boss². If the compensation was authorized, Mr.

¹ See ECF 1, ¶ 16 for definition. Unless otherwise noted, ECF 1 citations are to paragraphs in the General Allegations, pp. 1-14.

² Mr. Zgoznic was Assistant Treasurer of the CDC. (ECF 1, ¶ 15).

Smith is not guilty, since the government must establish, among other things that the payments were not authorized, and that Mr. Smith knew they were not authorized. *See, e.g., U.S. v. Frost*, 125 F. 3d 346, 368 (6th Cir. 1997) (government must establish that employee intended to breach fiduciary duty and foresaw harm to employer to convict for honest services fraud); 18 U.S.C. § 1956(a)(1) (requiring government to establish that defendant knew transaction involved proceeds of illegal activity under money laundering law). Indeed, if Mr. Smith believed that the payments were authorized by Father Wright, he is not guilty, since good faith is a complete defense to a specific intent crime. *See, e.g., U.S. v. Wulger*, 981 F.2d 1497, 1502 (6th Cir. 1992) (good faith belief negates criminal intent); *U.S. v. D'Amato*, 39 F. 3d 1249, 1257 (2nd Cir. 1994) ("Mail fraud cannot be charged against a corporate agent who in good faith believes that his or her *** conduct is in the corporation's best interests.").

There is substantial evidence that Father Wright authorized the payments to Mr. Smith. The indictment acknowledges that, beginning in 1996, Father Wright decided to provide Mr. Smith with additional compensation from Diocesan funds to induce him to remain an employee with the CDC and not to accept more lucrative positions in the private sector. (ECF 1, ¶ 30). Father Wright did not want other Diocesan employees to know that Mr. Smith was receiving additional compensation, so he developed methods of providing the additional compensation to Mr. Smith which would not appear on the CDC's financial statements and would not be disclosed to the CDC's payroll department. (*Id.* ¶ 33).

Father Wright opened an account with Fidelity Investments, using the tax I.D. number of the CDC, into which he directed the deposit of additional compensation for Mr. Smith. (*Id.* ¶ 31). In this manner, Father Wright provided \$270,000 in additional compensation to Mr. Smith in

1996 and 1997. (*Id.* ¶¶ 31-32).³ Thereafter, Father Wright directed that additional compensation to Mr. Smith be paid through the Zgoznic Entities, which was done through 2003 in the total amount of \$784,624.85.

Father Wright admits that he authorized additional undisclosed compensation to Mr. Smith. However, we understand that, while he admits having authorized \$270,000 of undisclosed compensation, Father Wright denies having authorized the additional \$785,000 and claims he was "duped". In addition, he denies having approved the use of an off-book Diocesan account, or use of the Zgoznic Entities, to provide additional compensation to Smith.⁴

The indictment takes no position regarding whether Father Wright was authorized to pay Mr. Smith additional compensation, or to not disclose it on the CDC's financial records, or to conceal it from others within the Diocese. Father Wright and Mr. Smith have not been charged criminally, or sued civilly, with regard to the \$270,000 in additional compensation.⁵ Mr. Smith has been charged with regard to the \$784,624.85.

A reasonable juror could disbelieve Father Wright's claim that he only authorized a portion of the additional compensation to Mr. Smith. A reasonable juror could conclude that if Father Wright wanted to pay Mr. Smith additional compensation so he would not leave in 1996 and 1997, his desire to do so did not end in 1997 but continued thereafter. A reasonable juror could conclude that if Father Wright wanted Mr. Smith's additional compensation in 1996 and 1997 to be kept confidential, his instructions remained unchanged thereafter with regard to subsequent years. A reasonable juror could conclude that Mr. Smith believed that the additional compensation he received was authorized by Father Wright, his superior, who had authority to

³ Attached as Ex. A are documents evidencing Father Wright's authorization of the creation of the Fidelity account and additional compensation to Mr. Smith.

⁴ Plain Dealer Article 8/24/06, attached as Ex. B.

⁵ The indictment charges Mr. Smith with tax offenses relating to the \$270,000, which we will address below.

do so and to not disclose it on the CDC's financial statements. If the jury reaches any of these conclusions, Mr. Smith will be acquitted.

Father Wright is a key witness. His credibility and conduct will be at issue. A jury will have to decide how plausible it is that Father Wright authorized only a portion of the additional compensation or that he was duped. In determining whether Father Wright authorized Mr. Smith to receive the additional undisclosed compensation, and whether Mr. Smith reasonably believed Father Wright had authority to do so, there are specific documents we have requested relating to specific transactions which are material and will be evidence at trial to assist the jury in determining whether Father Wright's version of events is credible.

B. Mr. Smith is Entitled to Documents that Establish that Father Wright Authorized Additional Compensation to Himself and Others.

Father Wright was not duped. He is a financially sophisticated attorney. He arranged for other Diocesan employees to receive compensation through the Zgoznic Entities, so that it would not be disclosed on the CDC's books and records. He has a history of engaging in transactions where he provides compensation to people without additional authorization which are not disclosed on the CDC's books and records. There is documentation of these transactions which we have requested, which includes the following:

1. Father Wright gave his secretary, Maria Milos, \$63,000 in CDC funds in July 1996 without any additional authorization. Although initially listed as a receivable on the CDC's books, Father Wright removed it in June 2000. In preparation for this trial, Father Wright has put it back on the books of the CDC's affiliate, the Catholic Cemeteries Association ("CCA"), of which Father Wright is Chief Executive Officer. We request the documentation relating to the payment of additional compensation to Ms. Milos and the general ledger entries by which it was

placed on, removed from and recently replaced on the financial records of the CDC and CCA, and any evidence of any authorization for this transaction by anyone other than Father Wright.

2. At Father Wright's direction, since November 1998, CCA has made payments in excess of \$500,000 to Kennick Die & Mold, which is owned by a close friend of his. To conceal these payments, Father Wright arranged for the payments to be made initially to a subsidiary of CCA, Basilica Memorial Products, Inc., which in turn made the payments to Kennick.⁶ We request the documentation of these transactions between CCA, Basilica and Kennick, any evidence of authorization for these transactions by anyone other than Father Wright, and documentation of other transactions through Basilica.

3. Father Wright has authorized additional compensation to a number of CDC and CCA employees.⁷ For each, we request the invoice, check voucher, evidence of authorization of these payments by anyone other than Father Wright, and any other documentation regarding these payments. These transactions include the following:

CDC

<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
3020	12/15/1997	\$2,000.00
345	2/3/1997	\$2,500.00
3110	12/19/1997	\$2,000.00
5714	1/29/1999	\$4,500.00

CCA

<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
41550	7/8/1999	\$16,000.00
63562	7/21/2003	\$ 500.00
64077	9/2/2003	\$ 500.00
64506	10/6/2003	\$ 500.00

⁶ In response to our request, the CDC produced records relating to the transfers directly from CCA to Kennick in 1998 and 1999. However, it withheld the transfers which were concealed by being routed through Basilica Memorial Products. These include the transfers on the list attached as Ex. C, which is through June 10, 2003. However, the transfers have continued to the present.

⁷ As discussed below, none of these payments were processed by the payroll department or reported to the IRS.

4. Father Wright himself received additional compensation from the CDC and CCA that was not characterized as such on their books and records. For each, we request the check voucher, invoice, any evidence that anyone other than Father Wright authorized the payment, and any other documentation regarding the transaction. These transactions include the following:

CCA

<u>Payee</u>	<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
Race Track Chaplaincy of America	63766	8/6/2003	\$ 500.00
Race Track Chaplaincy of America	60016	11/1/2002	\$ 500.00
Race Track Chaplaincy of America	51444	4/25/2001	\$ 500.00
Ford Credit	61930	3/11/2003	\$24,470.00

CDC

<u>Payee</u>	<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
Catholic Diocese of Cleveland	12582	6/29/2000	\$15,000.00
The Provident Bank ⁸		1/12/1992	\$ 8,400.00

5. Renee Bales, wife of Deacon Jerry Balcs, was paid \$800 a month from June 15, 2000 through April 1, 2003 at Father Wright's direction. For each of the payments listed on Exhibit E, attached, we request the check voucher, evidence that anyone other than Father Wright authorized the payment, and any other documentation regarding the transaction. In addition, we request documentation showing how these payments were accounted for on the books and records of the CDC.

6. Father Wright (and others) also provided additional compensation to himself and others through payments to relatives. For each, we request the invoice, check voucher, and documentation reflecting who authorized these payments. These payments include the following:

⁸ A copy of the cashier's check purchased with that check is attached as Exhibit D.

CDC

<u>Payee</u>	<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
Orion Consulting	5550	1/7/1999	\$30,500.00
Orion Consulting	10011	3/17/2000	\$12,930.00
Orion Consulting	11963	6/2/2000	\$11,831.00
Orion Consulting	12209	6/15/2000	\$21,199.00
Orion Consulting	12596	6/30/2000	\$14,400.00
Stephen T. Keefe	366	2/3/1997	\$ 734.00
Stephen T. Keefe	367	2/3/1997	\$ 54.80
Stephen T. Keefe	180	4/24/1997	\$ 73.08
Stephen T. Keefe	181	4/24/1997	\$ 2,014.00
Stephen T. Keefe	231	4/24/1997	\$ 1,084.00
Stephen T. Keefe	232	4/24/1997	\$ 117.03
Stephen T. Keefe	3806	3/31/1998	\$ 750.00

CCA

<u>Payee</u>	<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
Wright Landscaping	44491	1/14/2000	\$ 480.00
Wright Landscaping	44566	1/21/2000	\$ 480.00
Wright Landscaping	39389	12/29/1998	\$ 720.00
Wright Landscaping	39552	1/14/1999	\$ 720.00
Wright Landscaping	39803	2/4/1999	\$ 720.00
Wright Landscaping	40052	3/4/1999	\$ 720.00

7. The Diocese maintains several types of personnel files for each priest, including files entitled "Confidential" and "Secret".⁹ The Confidential and Secret files include information regarding misconduct by, and disciplinary action taken against, that priest. Diocesan officials are aware of the transactions engaged in by Father Wright described herein involving the granting of additional compensation, the use of off-book accounts, and the additional compensation of \$270,000 paid to Mr. Smith to which Father Wright admits. Father Wright's Secret and Confidential files will establish whether any disciplinary action has been taken against him for these transactions, or whether the CDC's own records establish that he was authorized to pay additional undisclosed compensation to Mr. Smith and others.

⁹ Bishop Pilla testified to the existence and content of these files in *Kodger, et al. v. Catholic Diocese of Cleveland, et al.* 03-CV-497769 (Cuyahoga C.C.P. 2003). At the Court's request, we can submit this testimony for its review.

In addition, we are aware of other conduct by Father Wright which is relevant to his credibility, which we would prefer not to disclose in a public filing, but about which we will inform the Court *in camera*, if the Court requires. We expect that evidence regarding this conduct also will be reflected in Father Wright's Secret and Confidential files, which we request be ordered produced.

8. The indictment alleges that "[N]o formal entries were made on the Diocesan records" regarding the \$270,000 in additional compensation paid to Mr. Smith. (ECF 1, ¶ 33). That is not true. Entries were made at the instruction of Father Wright, which concealed the nature of the transactions. We have the entry for the 1997 payment of \$85,000. We request the entry for the 1996 payment of \$185,000. We intend to show the jury the methods by which Father Wright used general ledger entries to conceal the payment of additional compensation to numerous employees and to conceal other transactions, which will further negate his claim that he was somehow "duped" by the defendants.

C. **Mr. Smith is Entitled to Documents that Establish that the CDC Utilized Off-Book Accounts as a Means of Providing Additional Compensation to Employees.**

Mr. Smith reasonably believed that Father Wright was authorized to grant him additional compensation that did not appear on the CDC's financial statements, in part because it was a common practice while Father Wright was Chief Financial and Legal Officer of the CDC and Chief Executive of CCA. During Father Wright's tenure, CDC employees received additional compensation that did not appear on the CDC's financial statements, and maintained accounts that used the CDC's tax I.D. number, yet did not appear on the CDC's financial statements. We have requested specific documents regarding these transactions and extensive use of off-book accounts, which include the transactions described above and the following:

1. The CDC had hundreds, if not thousands, of bank accounts which were not included on the financial records of the CDC or its affiliates. These accounts were used for a variety of purposes, including additional compensation. The CDC, its Bishop and Father Wright were aware of these accounts, which were reported to them regularly by the CDC's outside auditors, and permitted their continued use. We request the audit reports, including the audit reports of each of the parishes, for the period 1996 to the present which establish the extent of the CDC's use of off-book accounts including to provide additional compensation to employees.

2. One such off-book account was maintained by CDC's Office of Catholic Education, which is specifically referenced in the Indictment and whose Secretary during the relevant period will be a witness at trial. (ECF 1, ¶¶ 17, 20). The account, which is held at Merrill Lynch,¹⁰ is account number 64604461. The account statements were sent to Zrino Jukic, another witness in this case. We request all documentation regarding the creation of this account, authorization for its establishment, the source of funds in the account, records reflecting its use, monthly statements, and evidence regarding how it was characterized, if at all, on the books of the CDC.

3. When we requested documents regarding the off-book transactions from the government, the government shared our requests with the CDC. The CDC then sought to eliminate these off-book accounts. Those efforts are reflected in email communications and documents, including memos issued to employees. We request that documents relating to the CDC's recent efforts to eliminate its off-book accounts, which were an established method used by the CDC to provide off-book compensation to its employees, be produced.

¹⁰ In our correspondence with the government, we mistakenly identified this account as being held at Smith Barney. Nonetheless, having described to the government and CDC the existence of the Catholic Education Office's off-book account, no records of this account were produced.

D. Mr. Smith is Entitled to Documents that Establish that he did not Cause CDC to Hire the Zgoznik Entities, whose Performance and Fees were Repeatedly Reviewed and Approved by Others.

The indictment alleges that Mr. Smith caused the CDC to retain the Zgoznik Entities to provide services at inflated prices, including functions previously performed in-house (ECF 1, ¶¶ 17-21). That is not accurate. Mr. Smith has requested specific documents which disprove this allegation, which have not been produced. These include:

1. **Finance Council Minutes**

The Diocesan Financial Advisory Council (“Finance Council”) advises the Bishop and the Financial and Legal Secretary on financial matters and expenditures. (*Id.* ¶ 2). It is composed of lay persons, including businessmen, accountants, lawyers and insurance agents, some of whom will be witnesses in this case. It has regular meetings at which minutes are kept. Exculpatory minutes have been withheld.

On February 14, 2001, the Finance Council endorsed outsourcing its accounting services to the Zgoznik Entities. This is reflected in minutes that have not been produced.

On November 7, 2001, the Finance Council discussed the outsourcing of its accounting services to the Zgoznik Entities. It received a report from a council member concerning his review of the Zgoznik Entities, in which he praised their performance and recited the benefits to the CDC. This is reflected in minutes that have not been produced.

In addition, that Council member was paid by the CDC for his analysis and report. We request the invoices, check vouchers, and any other documentation regarding the following CDC payments to Tony Lang Consultants:

<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
13508	8/15/2000	\$2,500.00
14000	9/12/2000	\$2,500.00
14614	10/10/2000	\$2,500.00
15432	11/10/2000	\$2,500.00
49629	12/22/2000	\$3,000.00
16757	1/12/2001	\$2,500.00
17877	2/15/2001	\$2,500.00
18368	3/15/2001	\$2,500.00
19230	4/12/2001	\$2,500.00
19877	5/11/2001	\$2,500.00
20822	6/19/2001	\$2,500.00
21347	7/10/2001	\$2,500.00

On November 19, 2003, the Finance Council met with the CDC's auditors, who offered unqualified opinions and praised the work of the Zgoznic Entities and the internal controls they had created. It also approved paying additional compensation to Mr. Smith for serving as a Director of a Diocesan-owned corporation, which is relevant to show authorization of additional amounts Mr. Smith received for additional services he provided to the CDC and its affiliates. (See discussion of CCA below). This is reflected in minutes that have not been produced.

The indictment alleges that Mr. Smith misled the Finance Council regarding the amounts paid to the Zgoznic Entities sometime "[d]uring 2003." The government has not produced any minutes from 2003. It has produced minutes of only three meetings for the period of the indictment: 1994-2003. We request that the above minutes and all other minutes from 1994-2003 be produced.

2. Center for Pastoral Leadership Purchase Orders

Several counts in the Indictment are based on mailings to or from the Center for Pastoral Leadership. (ECF 1, Count 1, ¶¶ 6, 8; Counts 6-9). The indictment alleges that Mr. Smith caused the Center for Pastoral Leadership to retain the Zgoznic Entities. (*Id.*, ¶¶ 4, 17). That is untrue. This is reflected in documents, including numerous purchase orders signed by Mr. Brian Houlahan, the Chief Operating Officer. We request that these documents be produced.

E. Mr. Smith is Entitled to Documents that Establish that Payments Mr. Smith Received from Cemeteries were Authorized and for Services Rendered.

The indictment alleges that Mr. Smith caused Diocese Funds to be paid to him by Catholic Cemeteries Association, without authorization, in January 1997, 1998, 1999 and 2000. (*Id.* ¶ 35). The indictment does not charge this as an offense, and it is untrue. These payments were authorized by Father Wright for additional services Mr. Smith provided to CCA, of which Father Wright was the Chief Executive Officer. The services Mr. Smith provided to CCA for which he was paid are reflected in documents, including regular minutes, notes, agendas and reports of the Board of Directors, Finance Council and Management Committee of the CCA. These services also are reflected in the notes and reports of the strategic planning process and documentation of Mr. Smith's travel on behalf of the CCA to Pittsburgh and Chicago. We request that all of these documents be produced for the years 1997-2000.

F. Mr. Smith is Entitled to Documents that Establish that Mr. Smith did not Receive Kickbacks from an Insurance Brokerage Firm.

The indictment alleges that Mr. Smith received kickbacks from an Insurance Brokerage Firm. (ECF 1, ¶¶ 40-44). The indictment does not charge it as an offense, and it is not true. Mr. Smith did not cause the CDC to employ the firm. The firm was paid for the substantial and valuable work product it provided, which created enormous savings to the CDC. Members of the firm served on the Finance Council. CDC's employment of the insurance firm was independent of and predated any relationship it had with Mr. Smith. To prove these points, and address these allegations, Mr. Smith requires the following documents:

1. the invoices submitted by the insurance firm to the CDC prior to March 1997 and from January 2000 to the present;
2. a complete set of the work product submitted by the insurance firm to the CDC.

III. The Tax Charges

The indictment charges Mr. Smith with tax offenses for allegedly failing to pay taxes on additional compensation he received from the CDC. (ECF 1, Counts 18- 22). The indictment alleges that the CDC did not report this income to the IRS. (*Id.* ¶¶ 33, 38). The CDC also did not accurately report the additional compensation to Mr. Smith, who accurately reported all income that the CDC reported to him.

The CDC had a recurring problem of not accurately reporting to employees – or the IRS – additional compensation that employees received. This was not unique to Mr. Smith. As set forth above, the CDC routinely gave additional compensation to employees, which was not routed through the payroll office, was not disclosed on the CDC's financial statements and, which the CDC did not report to the IRS and did not include on employee W-2 forms. These employees include many of the witnesses in this case, such as Father Wright, Bishop Pilla, and Gerald Arnold, who was responsible for issuing accurate W-2 forms to employees.

In the late 1990's, the IRS performed an audit of the Catholic Universe Bulletin, an affiliate of CDC. The IRS determined that the Catholic Universe Bulletin had consistently failed to report additional income paid to individuals and entities similar to the income described above. Gerald Arnold was responsible for tax reporting for the CDC and its affiliates, including the Catholic Universe Bulletin. We request the IRS findings which establish the pattern of the CDC failing to accurately report to the IRS and individuals the additional income they received.

The indictment alleges that Bishop Pilla determined Mr. Smith's compensation after he became Chief Financial and Legal Officer in 2000. (ECF 1, ¶¶ 6-7). His knowledge and credibility will be at issue. There is an account at McDonald & Co. entitled the Anthony M. Pilla Charitable Account with assets in excess of \$500,000. It is account number 70009101. It alternates between using the CDC's tax I.D. number and Bishop Pilla's tax I.D. It has never

appeared on the CDC's books and records. Bishop Pilla withdrew money from the account for his own use in a manner designed to conceal the transactions and his use of the funds.¹¹ After the indictment issued in this case, Bishop Pilla resigned and filed amended tax returns which account for some of the activity in this account. We request all documentation regarding the account, including the source of funds deposited into this account and all activity regarding this account recorded on the CDC's books and records.

On May 2, 2002, Bishop Pilla wrote a check from this account, which was then using the CDC tax I.D., made payable to cash in the amount of \$180,000, which was deposited at the CDC. We request the documents which show where the funds were deposited and how they were treated on the CDC's financial records.

In September, 1991, Bishop Pilla caused two checks to be written on this account in the amounts of \$29,019.57 and \$56,806.04. The CDC then issued a check to First Federal Savings Bank to purchase a money order payable to Bishop Pilla in the same amount.¹² We request the CDC records which show: (1) where the two checks were deposited; (2) how they were accounted for on the CDC's records; and (3) how the purchase of the money order was accounted for on the CDC's records.

In addition, we request the check vouchers, invoices and all other documentation regarding the following transactions involving additional compensation to Bishop Pilla:

<u>Payee</u>	<u>Check Number</u>	<u>Date</u>	<u>Amount</u>
Ivanhoe Furniture	409	2/3/1997	\$16,369.64
Ivanhoe Furniture	901	4/18/1997	\$19,451.81
Ivanhoe Furniture	2198	7/31/1997	\$42,939.50
Cash	479	2/3/1997	\$ 1,000.00
Cash	327	2/3/1997	\$ 300.00
Cash	890	4/18/1997	\$ 160.00

¹¹ For example, checks were written from this account to a bank to purchase a money order.

¹² A copy of the money order is attached as Exhibit F.

Cash	188	4/24/1997	\$ 300.00
Cash	192	4/24/1997	\$ 1,475.00
Cash	955	5/15/1997	\$ 300.00
Cash	3615	2/27/1998	\$ 300.00
Cash	3669	3/11/1998	\$ 500.00
Cash	3787	3/31/1998	\$ 579.00
Cash	4861	9/18/1998	\$ 93.82
Cash	5171	11/1/1998	\$ 119.79
Cash	5322	12/1/1998	\$ 377.05
Cash	6078	3/15/1999	\$ 340.17
Cash	6263	4/15/1999	\$ 579.00
Cash	6672	6/30/1999	\$ 42.36
Cash	7357	10/1/1999	\$ 111.88
Cash	10701	4/12/2000	\$ 2,000.00
Cash	12324	6/23/2000	\$ 100.00
Cash	12619	6/30/2000	\$ 369.82
Cash	12630	7/3/2000	\$ 380.30
Cash	14413	9/29/2000	\$ 589.00
Cash	14586	10/6/2000	\$ 358.00
Cash	14669	10/13/2000	\$ 100.00
Cash	15599	11/16/2000	\$ 530.82
Cash	16065	12/8/2000	\$ 823.05
Cash	19692	5/4/2001	\$ 196.80
Cash	24921	11/30/2001	\$ 300.00
Cash	25326	12/14/2001	\$ 238.00
Bishop Pilla	36966	9/23/1997	\$ 200.00

IV. Internal Investigation

The indictment is based upon a selective investigation performed by the CDC. As part of its investigation, the CDC hired lawyers and accountants to interview witnesses and review documents. Based on its investigation, the CDC submitted a claim to its insurance company, which it provided to the government and to defense counsel.¹³ The indictment mirrors the claim submitted by the CDC to its insurance carrier.¹⁴

¹³ Attached as Ex. G.

¹⁴ Compare Ex. G, Insurance Claim, Attachment C, ¶ 8 (“When questioned in late 2003, Smith misrepresented to the Diocesan Finance Council the total amount of fees paid to the Zgoznik Entities.”) with ECF 1, ¶ 28 (“During 2003, SMITH misled the Diocesan Financial Advisory Council by misrepresenting the amount paid by the Diocese to the Zgoznik Entities for outsourced services.”) Also compare Ex. G, Attachment C ¶¶ 7 and 7a (Mr. Smith “either retained Zgoznik Entities, recommended that other Diocese-affiliated entities retain Zgoznik Entities or otherwise influenced the retention of Zgoznik Entities” and further “Smith urged, and in some instances forced, other Secretariats (such as the Office of Catholic Education) to use Zgoznik Entities and Smith approved the charges.”) with ECF 1, p. 7, ¶ 17 (“SMITH caused and induced certain offices and departments of the Diocese and certain of its

The CDC obtained statements from the key witnesses in this case. Father Wright initially denied authorizing payments to Mr. Smith, and then conceded that he had authorized some of the payments to induce Mr. Smith to remain with the CDC. (Exhibit G, Attachment C, ¶ 14). Gerald Arnold, the Comptroller of the CDC who authorized the payments to the Zgoznic Entities, provided an affidavit and defended the quality and cost of the services they provided. Tom Kelly, the COO of the CCA, who was paid through the Zgoznic Entities, acknowledged that Father Wright instructed him to give Mr. Smith additional compensation for services he provided to CCA. We understand the CDC obtained statements from every CDC employee with knowledge regarding any of the allegations in the indictment. It also interviewed Mr. Smith. (ECF 1, ¶ 29(b); Ex. G, Attachment C, ¶ 8).

We are entitled to the statements obtained by the CDC. They are material to Mr. Smith's defense. They are exculpatory. They may be used as evidence at trial.

These statements are not privileged from production. They are not attorney work product, since the investigation would have been conducted whether or not the CDC anticipated litigation. See *In re OM Group Securities Litigation*, 226 F.R.D. 579, 587 (N.D. Ohio 2005) (internal investigation regarding financial issues not work product where company "would have conducted the investigation *** regardless of the possibility of additional litigation."). However, assuming *arguendo* that they were privileged, the privilege was waived when the CDC disclosed information regarding its investigation to its insurance carrier -- whom it later sued¹⁵ -- to the government and to defense counsel. See *In re Columbia/HCA Health Care Corp. Billing Practice Litigation*, 293 F.3d 289, 306 (6th Cir. 2002) (affirming order compelling production of internal audits where information partially disclosed to government). The Sixth Circuit has made

constituent organizations, including but not limited to the CCA, the Seminaries, and the Diocesan-owned high schools, to retain the services of the Zgoznic Entities.").

¹⁵ *The Catholic Diocese of Cleveland v. National Union Fire Insurance Company of Pittsburg, PA and Axis Reinsurance Company*, 1:06-cv-01891 (N.D. Ohio).

clear that “we reject the concept of selective waiver, in any of its various forms.” *Id.* at 306. Thus, the CDC must produce the remainder of its internal investigation – including the witness statements it obtained.

The reasons for ordering production are particularly compelling in this case. Not only did the CDC conduct the investigation upon which the indictment is based, it has selectively fed information and documents from its investigation to the government. In response to our requests for discovery to the government, the government has in each instance passed on the request to CDC’s counsel, obtained the CDC’s response, and passed that along to us. The government is acting as a middle man. It served a broad subpoena upon the CDC for documents relating to this case.¹⁶ However, it has abdicated to the CDC responsibility for complying with the subpoena. As a result, it has not sought to obtain documents that are material and exculpatory evidence in this case.

V. Conclusion

We do not care who produces the requested documents to us. They may be ordered produced by the government pursuant to Rule 16. They may be ordered produced from the CDC pursuant to Rule 17(c). However, we ask the Court to compel production of these materials from either or both forthwith, so that we may prepare to use them in the trial of this case, as they will be important evidence to establish that Mr. Smith is not guilty.

V. Additional Motions

On February 12, 2007, the Court granted the government’s motion for permission to disclose grand jury transcripts to the defense, which the government acknowledges contain *Brady* material. Mr. Smith has not yet received those transcripts. As a result, Mr. Smith requests

¹⁶ Although we have seen the subpoena, the government has refused to produce it or the other subpoenas it issued. We request that it be compelled to do so.

that the Court permit the filing of additional pretrial motions that may become relevant as a result of the production of those grand jury transcripts or the records requested in this motion.

In addition, the government has produced numerous documents that would not be admissible at trial. Until the government identifies which of the thousands of documents it intends to offer as evidence, Mr. Smith cannot reasonably determine whether a motion *in limine* will be required to address the admissibility of any one of the government's proposed exhibits. Mr. Smith requests that this Court also set a date for the government to identify the exhibits it intends to offer at trial and a date for Mr. Smith to file any necessary motions *in limine* sufficiently in advance of trial to permit the Court an adequate opportunity to address these issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Defendant Joseph H. Smith's Motion to Order Production of Documents* was filed electronically this 16th day of February, 2007. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Philip S. Kushner
Attorney for Joseph H. Smith