COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
CIVIL ACTION NO. 05-602

THE ROMAN CATHOLIC BISHOP OF SPRINGFIELD, a Corporation Sole,
Plaintiff

VS.

TRAVELERS PROPERTY CASUALTY COMPANY, MASSACHUSETTS INSURERS INSOLVENCY FUND, NORTH STAR REINSURANCE CORPORATION, UNDERWRITERS AT LLOYD'S, LONDON, INTERSTATE FIRE & CASUALTY COMPANY, and COLONIAL PENN INSURANCE COMPANY,
Defendants

HAMPDEN COUNTY
SUPERIOR COURT
FILED
AUG 11 2006
CLERK-MAGISTRATE

DEFENDANTS' STATEMENT OF ANTICIPATED DISCOVERY ISSUES IN COMPLIANCE WITH THE COURT'S SCHEDULING ORDER FOR DISCOVERY

In accordance with the Court's July 20, 2006 scheduling order for discovery, the Defendants in the captioned declaratory judgment action respectfully submit this preliminary statement of anticipated discovery issues for the Court's consideration. As contemplated by the July 20, 2006 Scheduling Order for Discovery, the Defendants reserve all rights to amend and/or to raise any other discovery issues that may come to light in the course of this litigation.

STATEMENT OF THE CASE

This declaratory judgment action commenced on or about June 14, 2005. In October of 2005, the Defendants jointly served a set of requests for production of documents and interrogatories to the plaintiff, The Roman Catholic Bishop of Springfield, a Corporation Sole,

(the "Diocese"). On June 15, 2006 this Court issued a scheduling order stating that "[t]he plaintiff shall file its responses to the defendants' written discovery on or before June 30, 2006."

On June 30, 2006, more than eight months after the service of the discovery requests, the Defendants received a document entitled "Plaintiff's Preliminary Responses to Defendants' (Joint) First Set of Requests for Production of Documents" (the "Preliminary Responses").[1] In the Preliminary Responses, the Diocese asserts a set of General Objections (A through F) in response to each and every one of the discovery requests to avoid discovery of the requested documents without specification. These objections include the attorney-client privilege, the work-product doctrine, the First Amendment or other ecclesiastical privilege, the religious autonomy doctrine, the "confession" privilege, the psychotherapist and social worker privileges, and relevancy and materiality. These objections have no merit in law or in fact and are discussed in the sections below.

ARGUMENT

A. OBJECTIONS TO PRODUCTION OF MATERIALS WHICH CONSTITUTE CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND WORK PRODUCT.

According to the Diocese's General Objections, the Diocese refuses to produce documents to the extent that the requests seek the "production of confidential attorney/client communications" (General Objection A) and/or the "production of material which was prepared or obtained in anticipation of litigation or for trial by the Diocese or the Diocese's attorneys or representatives" (General Objection C).[2] The Defendants assume for purposes of this motion

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[1] In some of its responses, the Diocese stated that it will produce documents subject to the objections. However, the Preliminary Responses did not include any of the actual documents.

[2] As with the Diocese's other General Objections, General Objections A and C are incorporated into each of the Diocese's Preliminary Responses to Defendants' Requests.

that the Diocese is intending to refuse to produce documents related to the underlying claims for which the Diocese seeks defense and indemnification from the Defendants.[3]

By way of example, the Diocese has asserted the General Objections in response to requests relating to the creation and administration of the Diocese Loss Fund[4]; any Abuse Claim[5]; personnel records and secret archives with respect to any Priest of the Diocese as to whom an Abuse Claim has been made[6]; documents authored by, sent to, or copied to Diocesan individuals referencing or relating to, among other things, any Abuse Claimant and any Priest of the Diocese as to whom an Abuse Claim was made[7]; and the terms under which any Priest of the Diocese who is or was the subject of an Abuse Claim was allowed to engage in ministry in the Diocese[8].

The information contained in these documents is patently relevant to a host of coverage issues and defenses, such as the number and timing of "occurrences"; the Diocese's notice of the Abuse Claims; whether the Diocese attempted to mitigate its damages; or whether the Diocese promised to voluntarily make payments, assume obligations or incur expenses in connection with the Abuse Claims. Absent a valid privilege, these materials are discoverable. The only issue, therefore, is whether the Diocese's contractual duty to cooperate overrides the attorney/client and work product privileges.

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[3] Indeed, the Defendants do not seek access to appropriately protected attorney/client communications (or work product) relating to the litigation of this coverage action, but rather only relating to the underlying claims.

[4] *See* Diocese's Response Nos. 5-7, 23-24.

[5] *See* Diocese's Response Nos. 27-29.

[6] *See* Diocese's Response Nos. 32-33.

[7] *See* Diocese's Response Nos. 64-72.

[8] *See* Diocese's Response No. 75.

1. The duty to cooperate.

As a general matter, each of the Defendants' insurance policies contractually requires the Diocese to cooperate with its insurer in connection with the insurer's investigation of claims.[9] While "[t]he main purpose of the cooperation clause is to prevent collusion [between the policyholder and the injured party]," it also "enable[s] the insurer to obtain relevant information concerning the loss while the information is fresh, to enable it to decide upon its obligations, and to protect itself from fraudulent and false claims." *Lee R. Russ, Thomas F. Segalla, Couch on Insurance 3d*, § 199:4 (2000). The duty to cooperate includes the policyholder's obligation "to provide accurate information bearing on coverage." *MetLife Auto & Home v. Cunningham*, 59 Mass. App. Ct. 583, 589 (2003). The only limitation on the cooperation clause is that "the insurer's requests for information must be material to the circumstances giving rise to liability on its part..." *Couch on Insurance 3d* at § 199:15.

Generally, cooperation clauses require a policyholder:[10]

- To submit proof of loss.

* * *

- To be examined under oath.
- To produce documents.

* * *

- To avoid voluntary assumption of obligations, except at his or her own cost.
- To mitigate damages.

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[9] Courts may also imply a duty to cooperate as a matter of law where such a duty is not contractually required. *See Couch on Insurance 3d* at § 199:3.

[10] Given the number of Defendants in this matter, this preliminary statement does not set forth each individual Defendant's cooperation clause.

Couch on Insurance 3d, § 199:14.

Under Massachusetts law, an insurer may disclaim liability if (1) a policyholder's breach of its duty to cooperate is "substantial and material," and (2) the insurer can demonstrate that it has been prejudiced by the policyholder's failure to cooperate. *Darcy v. Hartford Ins. Co.*, 407 Mass. 481, 488-91 (1990) (citations omitted).

As a general rule, a plaintiff's refusal to provide documents constitutes a substantial and material breach of its duty to cooperate. The Federal District of Massachusetts recently noted that Massachusetts appellate case law "dictate[s] that the failure to provide documents as required by an applicable insurance policy constitutes a failure to cooperate." *See Romano v. Arbella Mut. Ins. Co.*, 429 F. Supp. 2d 202, 2006 U.S. Dist. LEXIS 23532, at *14 (D. Mass. 2006) (relying on *Mello v. Hingham Mut. Fire Ins. Co.*, 421 Mass. 333 (1995) and *Rymsha v. Trust Ins. Co.*, 51 Mass. App. Ct. 414 (2001)).

This rule applies even when the refusal to produce documents or otherwise cooperate is based upon a privilege or constitutional right. In *Mello*, the Supreme Judicial Court held that a policyholder materially breached his duty to cooperate by asserting his constitutional privilege against self-incrimination in refusing to appear for his insurer's reasonable request for an examination under oath. *Mello*, 421 Mass. at 337. Specifically, the insurer sought to examine the policyholder under oath concerning the policyholder's claim for insurance arising out of a fire of suspicious origin. The policyholder refused to submit to the examination, invoking his constitutional privilege against self-incrimination. The *Mello* court concluded that the policyholder's refusal "significantly hampered" the insurer's ability to investigate the claim and constituted a breach of the cooperation clause:

> A person may not seek to obtain a benefit or turn the legal process to his advantage while claiming the privilege as a way of escaping

> from obligations and conditions that are normally incident to the claim he makes. This principle holds true particularly where the benefit he seeks is from another private party, who is being asked to make good on its obligation forgoing the countervailing advantages that were part of the bargain.

Mello, *supra* at 337-38 (citations omitted). In light of the policyholder's failure to cooperate, the Supreme Judicial Court affirmed a grant of summary judgment in favor of the insurer. *See also MetLife Auto & Home*, *supra* at 589 (policyholder breached duty to cooperate through assertion of Fifth Amendment privilege against self-incrimination and "the duty to cooperate does include the obligation to provide accurate information bearing on coverage").

Similarly, the Superior Court in *Modern Continental Constr. Co. v. Zurich American Ins. Co.*, Docket No. 03-3197 BLS1, 2006 Mass. Super. LEXIS 202 at *18 (Mass. Super. Ct., April 19, 2006) (Van Gestel, J.), recently held that documents related to an underlying claim otherwise protected by disclosure on the basis of a mediation privilege and the work product doctrine could be sought by insurers in a declaratory judgment action to show that the policyholder materially breached its duty to cooperate.[11] Although the court concluded that the material ordinarily would not be admissible as evidence or to support a motion for summary judgment, the court nonetheless determined that the policyholder's decision to withhold the information from its insurer violated the policy's cooperation clause and was properly discoverable in the declaratory judgment action. *Id.* at *22.

The court's analysis in *Modern Continental* applies to the instant declaratory judgment action. In *Modern Continental*, the policyholder produced all information and documents requested by the insurers except for the mediation documents. *Id.* at *24-25. Nevertheless, the *Modern Continental* court concluded that the insurers were entitled to access the privileged

[11] Although the plaintiff in that case withheld the documents, they were inadvertently produced by a non-party governmental agency in response to a public records request. *See Modern Continental*, 2006 Mass. Super. LEXIS 202 at *13.

information to demonstrate that the insurers' positions were prejudiced by the policyholder's actions at mediation. *Modern Continental*, *supra* at *26. This is precisely the same basis under which the Defendants here seek otherwise privileged information. For example, if the Diocese's counsel interviewed an underlying claimant to establish a settlement value for such claimant, the cooperation clause obligates the Diocese to produce the notes of that interview, or any memorialization thereof, notwithstanding that such notes may otherwise fall within the work product doctrine.

Accordingly, the Court should conclude that the cooperation clauses in the various policies require the Diocese to produce documents to the Defendants that otherwise fall within the attorney/client privilege or the work product doctrine. If the Diocese continues to refuse to produce these documents, the Diocese's claims should be dismissed as a result of its breach of its duty to cooperate.

B. OBJECTION TO PRODUCTION OF MATERIALS WHICH CONSTITUTE CONFESSIONAL COMMUNICATIONS TO CLERGY.

General Objection B of the Preliminary Responses states that the Diocese objects to the Defendants' requests:

> [i]nsofar as any of these requests seek the production of material which constitutes a confession, a communication seeking religious or spiritual advice or comfort, or advice given thereon by a member of the clergy which has not been waived by the person making the confession nor seeking the religious or spiritual advice, or comfort. The Plaintiff refuses to produce such materials. [sic]

By this objection, the Diocese seeks to avoid producing certain documents by invoking, *inter alias*, M.G.L. c. 233 § 20A, the so-called "confession" privilege, which protects the disclosure of confessions and communications made by a person seeking "religious or spiritual advice or comfort" from a priest, rabbi or ordained or licensed minister of any church. *See Society of Jesus*

of New England v. Commonwealth, 441 Mass. 662, 673 n. 13 (2004). The statute states, in relevant part, that:

> A priest, rabbi or ordained or licensed minister of any church... shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a priest, rabbi or ordained or licensed minister of any church... testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional character, without the consent of such person.

M.G.L. c. 233 § 20A.

Successful invocation of the "confession" privilege requires a showing that the factual basis for the privilege exists; the burden to make such a factual showing is on the putative privilege-holder. *See Leary v. Geoghan*, Suffolk Super. Ct., Civil Action No. 99-1109 (August 25, 2000). Whether a communication was made in the course of seeking religious or spiritual advice or comfort is a question of fact for the court to decide. *See Commonwealth v. Zezima*, 365 Mass. 238, 242, n. 4 (1974).

It is important to note that many documents the Diocese has refused to produce do not come within the ambit of the "confession" privilege. First, pursuant to the plain meaning of the statute, the Diocese may not refuse to disclose documents under the "confession" privilege unless such documents were exchanged between a clergy member and a person in search of "religious or spiritual advice or comfort." *See Society of Jesus of New England, supra. See also M.G.L. c. 233 § 20A.* Federal court decisions are instructive regarding the type of documents protected by the "confession" privilege. Significantly, the mere fact that a communication is made to a clergy member or documentation is transmitted to a clergy member is not sufficient to invoke a confessional privilege. *See United States v. Gordon*, 655 F.2d 478,

486 (2d. Cir. 1981) (confessional privilege not applicable to conversations between defendant and priest that related to business relationships and not spiritual matters); *United States v. Wells*, 446 F.2d 2, 4 (2d. Cir. 1981) (confessional privilege not applicable to letter from defendant to priest where letter requested that priest contact an FBI agent); *United States v. Dube*, 820 F.2d 886, 888-890 (7th Cir. 1987) (confessional privilege not applicable to communications made to a clergy member to obtain assistance in avoiding tax obligations and not spiritual relief). Therefore, communications made to a Priest of the Diocese other than for purposes of spiritual guidance are not automatically protected under the "confession" privilege.

Second, the Diocese may not avoid the disclosure of documents under the "confession" privilege unless such documents were exchanged between a clergy member and another person in the strictest of confidence. While the Massachusetts "confession" privilege contains no express requirement of confidentiality, the Proposed Massachusetts Rules of Evidence requires communications under M.G.L. c. 233 § 20A to be confidential. *See Proposed Mass. R. Evid. 505(b)*. Proposed Mass. R. Evid. 505(a)(2) defines "confidential" to mean "not intended for further disclosure except to other persons present in furtherance of the purpose of the communication." *Proposed Mass. R. Evid. 505(a)(2)*. Federal law also requires the communications to be confidential, as the privilege is "rooted in the imperative need for confidence and trust.... [t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *See Trammel v. United States*, 445 U.S. 40, 51 (1980). *See also Fed. R. Evid. 501*. Further, documents later disclosed to other parties are not considered confidential. *See Trammel, supra.*

Other state law is also instructive with respect to the type of documents protected by the "confession" privilege. In *Hutchison v. Luddy,* 606 A.2d 905, 908-909 (Pa. Super. Ct. 1992), the court held that the "confessional" privilege[12] does not protect information concerning how a religious institution conducts its affairs or information acquired by a church from an independent investigation where confidential communications with a clergy member and another person are not involved. Unless the person who makes the statement to a clergy member or gives documents to a clergy member is acting on religious motivations (*i.e.* in search of the forgiveness of God), a "confessional" privilege does not apply. *Id.* at 909-910.

Based on the reasons set forth above, the Diocese cannot simply refuse to produce documents exchanged with a clergy member because of the clergy member's religious status. Instead, the Diocese must produce all relevant documents and communications that the defendant has requested except for those exchanged with a clergy member in strict confidence and in the genuine search of spiritual guidance.

C. OBJECTION TO PRODUCTION OF MATERIALS ALLEGEDLY PROTECTED BY THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OR OTHER ECCLESIASTICAL PRIVILEGE OR DOCTRINE OF RELIGIOUS AUTONOMY.

None of the Defendants' requests in their request of production of documents implicates the First Amendment. Nevertheless, the Diocese is attempting to hide behind the veil of the First Amendment to avoid production of the requested documents. Accordingly, to the extent that the

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[12] Pennsylvania's confessional statute, 42 Pa.C.S. § 5943, is similar to Massachusetts' statute, and states in pertinent part:

> No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization ... who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any governmental unit.

Diocese's objections assert the protection of the First Amendment, such objections are without merit and this Court should compel the production of the requested documents.

In General Objection D of its Preliminary Responses, the Diocese asserts the following:

> Insofar as any of these requests seek the production of information or material protected by the First Amendment or other ecclesiastical privilege or doctrine of religious autonomy, the Plaintiff objects to the request and, accept [sic] to the extent of voluntarily produced herein, the Plaintiff refuses to produce the requested material, which includes without limiting the foregoing the so-called "Laicization" and "Sacramentorum Sanctitatis Tutela (Safeguarding the Sanctity of the Sacraments)" documents.

In addition to this General Objection, the Diocese also specifically asserts in some of its responses[13] that:

> Insofar as any such documents have been sent to the Vatican, the original or copies have been retained by the Diocese. The procedure for sending such material to the Vatican was established after the occurrence of the alleged abuse in the covered claims and is done for the purpose of evaluating and disciplining its priests and other religious [sic] in accordance with Canon Law. Insofar as the requested items are privileged from production in accordance with the protections afforded by the First Amendment or other ecclesiastical privilege or doctrine of religious autonomy, the Defendant Diocese objects to the request and, accept [sic] to the extent of voluntarily produced herein, defendant refuses to produce the requested material.

By these objections, the Diocese appears to contend that production of the requested documents, including but not limited to the Laicization and *Sacramentorum Sanctitatis Tutela* (Safeguarding the Sanctity of the Sacraments) documents, would constitute an unconstitutional intrusion or entanglement upon its First Amendment rights. Along this line, the Diocese also seems to invoke the doctrine of "church autonomy", which provides that courts lacks subject matter jurisdiction over church disputes touching on matters of doctrine, canon law, polity,

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[13] *See* Diocese's Response Nos. 26, 34, 40, 64-72, and 76. In these responses, the Diocese also challenges the relevancy of the requests. The Defendants address the Diocese's objection on the ground of relevancy in section E below.

discipline, and ministerial relationships." *Williams v. Episcopal Diocese of Mass.*, 436 Mass. 574, 579 (2002).[14]

The relevant case law regarding the permissible scope of discovery with regard to religious organizations overwhelmingly provides that the First Amendment does not exempt religious organizations, such as the Diocese, from the rules of discovery. *See, e.g., The Society of Jesus of New England, supra* at 663 (court rejected claim that disclosure of priest's personnel file, in connection with criminal prosecution for sexual assault, would violate the First Amendment); *Alberts v. Devine*, 395 Mass. 59, 74 (1985) (First Amendment presents no obstacle to a plaintiff's discovery rights or to a civil court's inquiry into church proceedings resulting in minister's failure to gain reappointment because litigation "in no sense involve[d] repetitious inquiry or continuing surveillance that would amount to excessive entanglement between government and religion that the First Amendment prohibits."); *Hutchison, supra* at 908 (court held that insofar as canons of Roman Catholic Church are in conflict with law of Pennsylvania rules of discovery, canons must yield).

In other words, the mere fact that the Defendants are seeking production of documents from a religious organization does not automatically mean that the Defendants' discovery requests impermissibly implicate the First Amendment. *See Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 862 n.10 (1981) ("Examination of [ecclesiastical] documents is not, in and of itself, an impermissible intrusion into the religious realm..."); *Madsen v. Erwin*, 395 Mass. 715, 722 n.2 (1985) ("[N]ot every endeavor that is affiliated, however tenuously, with a recognized religious body may qualify as a religious activity of that body and come within the scope of the protection from governmental involvement that is afforded by the First Amendment."); *Leary v.*

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[14] In addition, the Diocese also asserts the "ecclesiastical privilege", presumably the priest-penitent privilege, which the Defendants discussed in the preceding section.

Geoghan, 2000 Mass. Super. LEXIS 312, at *6 (Mass. Super. June 28, 2000) ("[C]ivil courts are not prohibited from making appropriate civil determinations simply because the actors are clerics or the subject-matter of the dispute has heavily religious overtones."); *United States v. Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979) (IRS's requests for documents to church for purpose of gathering information does not constitute an unconstitutional entanglement).

The First Amendment states, in relevant part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..." In *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940), the United States Supreme Court found that this portion of the First Amendment "embraces two concepts – freedom to believe and freedom to act." While the freedom to believe is absolute, the freedom to act "remains subject to regulation for the protection of society." *Id.* at 304. *See Alberts*, *supra* at 72 and *Attorney General v. Bailey*, 386 Mass. 367, 376 (1982), both quoting *In re Rabbinical Seminary Netzarch Israel Ramailis*, 450 F. Supp. 1078, 1081 (E.D.N.Y. 1978) ("The free exercise clause is no talisman, however, which automatically protects religious organizations from government regulation. The religious character of an organization does not provide a shield from regulation which in no way affects religious beliefs or acts."). "Conduct, whether or not motivated by religious beliefs, is properly subject to secular examination when that 'conduct constitutes a clear and present danger to a substantial interest of the state' or a 'menace to public peace and order'." *Madsen*, *supra* at 723, quoting *Cantwell*, *supra* at 311. Therefore, the First Amendment is not an absolute bar to all inquiries that touch on issues of religious belief, governance or practice.

Notwithstanding the foregoing, the First Amendment places limitations on a court's ability to intervene in *true* ecclesiastical church matters because the resolution of those matters "cannot be made without extensive inquiry...into religious law and polity[.]" *Serbian E.*

Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976). *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[t]o have the protection of the Religion Clauses, the claims must be rooted in religious belief."). To this end, where "the court was being asked to resolve a dispute within the church itself, or to impose liability for the manner in which the church had handled or resolved that intra-church dispute", Massachusetts courts have found that they lacked subject matter jurisdiction to hear those cases pursuant to the doctrine of "church autonomy". *See, e.g., Hiles v. Episcopal Diocese of Massachusetts*, 437 Mass. 505, 512 (2002) (recognizing that "matters arising out of the church-minister relationship, including church discipline, come within the category of religious belief, and thus are entitled to absolute protection.") and *Williams*, *supra* at 578-579 (court lacked jurisdiction over employment discrimination claims between minister and church).

In contrast, where the issues before the court are of a purely secular or non-ecclesiastical nature and neutral principles of law may be applied to resolve the dispute, Massachusetts courts have found that the doctrine of "church autonomy" does not apply and that they have the proper subject matter jurisdiction to hear the matter. *See, e.g., The Society of Jesus of New England*, *supra* at 667-669 (court has subject matter jurisdiction over enforcement of subpoena to religious organization because it is not called on to resolve any dispute concerning priest's relationship with religious organization nor "to decide anything touching on 'doctrine, canon law, polity, discipline, [or] ministerial relationships.'"); *Leary*, 2000 Mass. Super. LEXIS 312 at *7-8 (court denied supervisory defendants' motion to dismiss based on First Amendment grounds because "clerics are [not] wholly immune from liability for directing, or permitting, a subordinate, pursuant to whatever power and authority, to do something or engage in some activity that they knew or should have known would expose third parties to grave and unseen danger."); *Mendez v.*

Geoghan, 1999 Mass. Super. LEXIS 358, at *4 (Mass. Super. August 2, 1999) (court held that not all consequences of the relationship between and among members of the clergy, particularly as those consequences effect third parties, are beyond judicial scrutiny). *See also Alberts*, *supra* at 75 (disputes not concerning religious faith or doctrine, or not about church discipline do not implicate the First Amendment or even place any strictures on a court from inquiring into a church's proceedings). Such inquiries by the courts do not constitute unconstitutional entanglement under the First Amendment and are permissible even if there is a mere possibility that the inquiries may have a "chilling effect" on a particular religious practice. *See Smith v. O'Connell*, 986 F. Supp. 73, 77 (D. RI 1997) ("neutral laws of general application do not violate the First Amendment simply because they have the incidental effect of burdening a particular religious practice"), citing *City of Boerne v. Flores*, 521 U.S. 507, 513-15 (1997).

In *The Society of Jesus of New England*, *supra* at 663, the Supreme Judicial Court rejected a claim by the Jesuits and its priest, James F. Talbot, that disclosure of the priest's personnel file pursuant to the Commonwealth's subpoena duces tecum in connection with a criminal prosecution for sexual assault would violate the free exercise clause of the First Amendment. The Jesuits and Talbot sought relief from an order denying their respective motions to quash the subpoena on the grounds that the court lacked subject matter jurisdiction under the doctrine of "church autonomy" to enforce the subpoena. *Id.* at 667. Although the court recognized that it did not have subject matter jurisdiction over certain church disputes under doctrine of "church autonomy", it reasoned that:

> Here, the court is not called on to resolve any dispute concerning Talbot's relationship with the Jesuits. Nothing in the doctrine of church autonomy deprives the court of subject matter jurisdiction over the underlying case, a criminal prosecution against Talbot for alleged sexual assaults. Nor does enforcement of the subpoena require the court to decide anything touching on doctrine, canon

> law, polity, discipline, [or] ministerial relationships. The mere examination of the Jesuits's documents concerning Talbot, which is all that the subpoena entails, does not infringe on the Jesuits's autonomous decision-making with respect to Talbot's fitness, discipline, assignments, or any other aspect of his relationship with the Jesuits. Applying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, [but] this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws.

The Society of Jesus of New England, *supra* at 667-668 (citations omitted). Furthermore, the court noted that "[t]he Commonwealth's subpoena here does not seek to control or influence any aspect of the Jesuits's operation – it merely seeks information in the hands of the Jesuits that is relevant to determining whether one of its priests sexually assaulted his students." *Id.* at 669 n. 6. Accordingly, the court found that the enforcement of the subpoena would not implicate the doctrine of "church autonomy" and that it had the proper subject matter jurisdiction to enforce the subpoena.

In addition to invoking the doctrine of "church autonomy", Talbot also took the position that the enforcement of the subpoena would violate the establishment clause of the First Amendment. *Id.* at 674. With regard to this assertion, the court stated as follows:

> In order to past muster under this prong of the First Amendment, the law in question must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion and it must not foster an excessive government entanglement with religion.
>
> Talbots concedes that the statutes and rules authorizing the issuance of subpoenas are secular in purpose, but contends that they have the effect of inhibiting religion and would lead to excessive governmental entanglement with religion if they were enforced in this case. We disagree. With regard to the test of "effect" on religion, we must look at the law's "principal or primary effect," not at its incidental effects. Here, the alleged inhibition on religions is not a "principal or primary" effect of the subpoena, although it may, in a subtle way, provide some

> disincentive that would arguably discourage accused priests from being totally forthcoming with their superiors...The tendency of this subpoena duces tecum to influence anyone's religious beliefs is far more attenuated than that, and cannot be said to have as its 'principal or primary' effect an impact on religious belief.
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> Nor does the enforcement of this subpoena result in any excessive governmental entanglement with religion. The court can decide issues of relevance, burdensomeness, and the applicability of the asserted privileges without having to decide matters of religion or embroil itself in the internal workings of the Jesuits...

The Society of Jesus of New England, supra at 674-675 (citations omitted). Thus, the court concluded that the enforcement of the subpoena would not violate the establishment clause of the First Amendment.

In light of the relevant case law cited above, the Diocese's objections based on the First Amendment in its Preliminary Responses are without merit and should be rejected. As the Court is aware, this declaratory judgment action involves a purely secular or non-ecclesiastical dispute regarding the Defendants' contractual rights and obligations with respect to claims of sexual abuse alleged to be covered under multiple policies of liability insurance and/or indemnification contracts allegedly issued by the Defendants (or in the case of the Fund by Home) to the Diocese for policy periods extending from 1968 to 1986. In litigating the relevant coverage issues, the Defendants served their discovery requests in accordance with Mass. R. Civ. P. Rules 33 and 34 to seek information that the Diocese has in its possession that is relevant and reasonably calculated to lead to the discovery of admissible evidence relating to the Diocese's claims for coverage and/or the Defendants' coverage defenses. *See Mass.R.Civ.P. Rule 26(b)(1).*

Contrary to the Diocese's contention in its Preliminary Responses, none of the Defendants' discovery requests implicates the First Amendment because the Court may resolve the instant discovery disputes between the Diocese and the Defendants without becoming

entangled in religious controversies. As discussed above, the doctrine of "church autonomy", protected under the free exercise clause of the First Amendment, only limits the Court's ability to hear true ecclesiastical matters. *See Serbian E. Orthodox Diocese,* supra at 709 and *Wisconsin, supra* at 215. Consequently, the doctrine will not deprive this Court of subject matter jurisdiction over the discovery disputes in this case because as the Court's inquiries in doing so will not intrude upon the Diocese's religious beliefs, matters of ecclesiastical or theological doctrine, nor church discipline. *See The Society of Jesus of New England, supra* at 667-668.

While some of the Defendants' discovery requests, *i.e.* requests for materials relating to the laicization of Priests of the Diocese as to whom any Abuse Claims were made and requests for materials relating to the *Sacramentorum Sanctitatis Tutela* documents, seek production of documents that involve canon law, this Court does not need to inquire whatsoever into "matters of doctrine, canon law, polity, discipline, and ministerial relationships" to resolve the discovery disputes in this declaratory judgment action. *See Williams, supra* at 579. To put it differently, it is not necessary for the Court to delve into the nuances of canon law to decide whether the Defendants are entitled to production of the Laicization and the *Sacramentorum Sanctitatis Tutela* documents because "[i]n so far as the canons of the [c]hurch are in conflict with the law of the land [*i.e.* the rules of discovery], the canons must yield." *See Hutchison, supra* at 908 ("Merely because Canon 489 is controlling in the internal operations of the affairs of the Church does not mean that it permits evidence pertaining to sexual molestation of children by priests to be secreted and shielded from discovery which is otherwise proper..."), citing *St. Joseph's Lithuanian Roman Catholic Church's Petition,* 117 A.2d 216, 218 (Pa. 1922) and *Niemann v. Cooley,* 637 N.E.2d 943, 949-950 (Ct. App. Ohio 1994) (denying priest and Archdiocese of Cincinnati's motions for protective orders to prevent discovery of secret archive file). *See also*

The Society of Jesus of New England, *supra* at 674-675 (fact that subpoena requesting production of priest's personnel file is directed to a religious organization does not shield it from compliance with the rules of discovery nor does it render the court's enforcement of the subpoena to be an excessive government entanglement with religion). Moreover, the Court "can decide issues of relevance, burdensomeness, and the applicability of the asserted privileges without having to decide matters of religion or embroil itself in the internal workings" of the Diocese. *See id.* at 675. Therefore, none of the Defendants' discovery requests implicates the First Amendment and this Court may exercise subject matter jurisdiction over the instant discovery disputes and order the Diocese to produce the requested documents.

D. OBJECTION TO PRODUCTION OF MATERIALS WHICH CONSTITUTE COMMUNICATIONS WITH PSYCHOTHERAPISTS OR SOCIAL WORKERS, OR WHICH INTERFERE WITH THE RIGHT OF PRIVACY.

1. The Materials That Are The Subject Of Defendants' Discovery.

General Objection E asserted by the Diocese relates primarily to such materials constituting privileged communications with psychotherapists or social workers, subject to M.G.L. c. 233, §20B and c. 112, §§135, 135A and 135B, respectively, or which interfere with the right of privacy under M.G.L. c. 214, §1B.[15] Although the Diocese does not identify which of these statutes purports to apply to any particular document, the Defendants infer that the Diocese is generically objecting to the production of any documents that constitute, concern or otherwise refer to counseling received by any Priest of the Diocese who was or is accused of sexual abuse.

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[15] The Diocese also asserts the statutory privilege relating to clergy, *i.e.*, M.G.L. c. 233, §20A, as part of General Objection E. The Defendants have addressed this issue in the context of their response to the Diocese's General Objection B, discussed *supra*.

The Defendants are now aware that the Diocese has possession, custody or control of documents that relate to the evaluations of Priests of the Diocese that the Diocese determined were necessary and appropriate in light of earlier reports of abuse. Moreover, reported decisions involving other priests accused of sexual abuse in Massachusetts have identified certain institutions, *e.g.*, the Institute of Living in Connecticut or St. Luke Institute in Maryland, or other health care professionals to which the Catholic Church sent priests already accused of sexual abusing of minors for evaluation of their fitness for continued employment in the priesthood. These institutions or individual therapists to whom the priests were referred for evaluation then customarily reported the results of their evaluations back to the Catholic Church. *See The Society of Jesus of New England*, *supra* at 665-666, *appeal after remand*, 442 Mass. 1049 (2004); *Ford* v. *Law*, 2002 WL 32139028 (Mass. Super. Ct. November 25, 2002) (Sweeney, J.); *Morgan* v. *Geran*, 2001 WL 227736 (Mass. Super. Ct. January 5, 2001) (Connolly, J.). *See also John Doe 1-22* v. *Roman Catholic Bishop of Fall River*, 509 N.W.2d 598, 599-600 (Minn. Ct. App. 1993).

The Defendants seek production of documents relating to such evaluations for such purposes as continued employment, for example as opposed to documents that relates solely to therapeutic counseling sought by the Priests of the Diocese themselves. These documents are not "confidential" and/or were not created for purposes of "diagnosis and treatment". Therefore, such documents are not privileged.

2. <u>The Psychotherapist And Social Worker Privileges.</u>

The psychotherapist and social worker privileges conferred by M.G.L. c. 233, §20B and c. 112, §135B are for the benefit of the affected "patient" or "client", respectively. *See In re Adoption of Diane*, 400 Mass. 196, 201 (1987) (statute conferring psychotherapist privilege

"makes clear that the privilege may be asserted only by the patient, or, if the patient is incompetent, by a guardian appointed to act on his or her behalf"). The Diocese is not the "patient" or "client" within the meaning of either statute, nor has it proffered any proof that it is authorized to assert the privilege on behalf of any particular Priest of the Diocese whose evaluation records are the object of the Defendants' inquiry. *Com.* v. *Oliveira*, 438 Mass. 325, 330-332 (2002) (Commonwealth could not assert psychotherapist privilege on behalf of child rape victim); *Com.* v. *Pelosi*, 441 Mass. 258, 261 (2004) (Commonwealth could not assert social worker privilege on behalf of child rape victim). Therefore, the Diocese does not have standing to assert the psychotherapist and social worker privileges with respect to any of the materials that are the subject of the Defendants' discovery.

Even assuming, *arguendo*, that the Diocese has the requisite standing to assert the psychotherapist and/or social worker privileges, the requested documents are appropriately subject to discovery. To the extent that a particular Priest of the Diocese was sent for evaluation by the Diocese as a condition of his continued employment, the "communications" between a particular Priest of the Diocese and an institution or health care personnel evaluating him – and subsequently reporting the results of such an evaluation to the Diocese – are not "confidential" and/or are not for the purposes of "diagnosis and treatment". Under these circumstances, the threshold requirement for both the statutory psychotherapist and social worker privilege is absent and this Court should order discovery. *The Society of Jesus of New England, supra* at 1050 n. 3; *Ford, supra*; *Morgan, supra*. *See also Roman Catholic Archbishop of Los Angeles* v. *Superior Court*, 32 Cal.Rptr.3d 209, 237-238 (Ct. App. Cal. 2006); *C.J.C.* v. *Corporation of the Catholic Bishop of Yakima*, 985 P.2d 262, 271-272 (Wash. 1999); *Niemann, supra* at 951-952. Moreover, any "confidentiality" of these materials has been waived by any particular Priest of the Diocese

by the transmission of such materials to the Diocese, thereby making the privilege inapplicable. *See Ryan v. Ryan*, 419 Mass. 86, 95 (1994).

3. The Right Of Privacy.

The Diocese also lacks standing to assert a right of privacy with respect to the materials that the Defendants seek in discovery. The Massachusetts statute conferring the right of privacy, M.G.L. ch. 214, §1B, provides that "a *person* shall have a right against unreasonable, substantial or serious interference with *his* privacy." (emphasis supplied.) "A corporation is not an 'individual' with traits of a 'highly personal or intimate nature.' " *Warner-Lambert Company* v. *Execuquest Corp.*, 427 Mass. 46, 50-51 (1998), quoting *Bratt* v. *International Business Machs. Corp.*, 392 Mass. 508, 518 (1994) (stating that it is the individual who is protected by statute from disclosure of highly personal or intimate facts). The Diocese, which is a "corporation sole", clearly is not a "person" within the meaning of this statute. *Warner-Lambert, supra.*

Moreover, M.G.L. c. 214, §1B only affords protection from disclosure of private matters when such disclosure would be unreasonable, serious *and* substantial. *Schlesinger* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 517 (1991) (privacy statute does not prohibit serious or substantial interferences which are reasonable or justified). In assessing whether a disclosure is "reasonable", the Court must balance the legitimate interest in obtaining and publishing the information against the substantiality of the intrusion on the individual's privacy. *Bratt, supra* at 521.

In this case, the legitimate – and, ultimately, paramount – interest to be served is the unveiling of information surrounding a conspiracy of silence to cloak a widespread problem of sexual abuse of minors by Priests of the Diocese. *See Morgan, supra. See also C.J.C., supra* at 217 (holding that, in determining whether, as a matter of policy, court should recognize a unity

of interest between a cleric and church and protect communications in furtherance of that interest against compulsory disclosure, "this is not the case in which to do so. Where childhood sexual abuse is at issue, even long established privileges do not apply."). Such information goes to the very heart of the Defendants' coverage defenses, *i.e.*, that the Diocese's knowledge of sexual abuse by Priests of the Diocese was so substantial and long standing that its concealment of such knowledge from the insurers materially affected the insurers' respective decisions to insure the Diocese. *See, e.g., A.W. Chesterton Co.* v. *Massachusetts Insurers Insolvency Fund*, 445 Mass. 502, 513 (2005). Alternatively, the Defendants submit that the Diocese's knowledge of the extent of past Abuse Claims rendered subsequent injuries resulting from acts of sexual abuse by particular Priests of the Diocese "expected or intended" from the standpoint of the Diocese. *See Worcester Ins. Co. v. Fells Acre Day School, Inc.*, 408 Mass. 393, 409 (1990); *Newton* v. *Krasignor*, 404 Mass. 682, 687 (1989).

E. OBJECTION TO PRODUCTION OF MATERIALS ON GROUNDS OF RELEVANCY AND MATERIALITY.

The Diocese has objected to the production of materials that are the subject of the Defendants' Request Nos. 11, 12, 20, 30, 31, 32, 33, 35, 36, 61, 62, 63, 65 (f), 66 (f), 67 (f), 68 (f), 69 (f), 70 (f), 71 (f), 72 (f), 74 and 76, on the basis that these materials are "not relevant or material to the issues raised in this case." The Diocese's relevancy/materiality objection related to these requests falls into four categories of documents: (1) documents concerning Abuse Claims for which the Diocese does not seek coverage in this action, *i.e.*, Abuse Claims *other* than those of the Exhibit A and Exhibit B Abuse Claimants, or concerning Priests of the Diocese as to whom Abuse Claims have been made by individuals *other* than Exhibit A and Exhibit B Abuse Claimants; (2) documents relating to the laicization of Priests of the Diocese as to whom an Abuse Claim was made; (3) documents relating to the Diocese's application for, purchase of and

claims asserted under policies of insurance issued by insurers other than the Defendants; and (4) any *Sacramentorum Sanctitatis Tutela* Documents. The Diocese's relevancy/materiality objection fails with respect to each category of requests.

1. Documents Relating To Abuse Claims Other Than Those For Which The Diocese Seeks Coverage In This Action.

The present declaratory judgment action relates to 108 Abuse Claims, 57 of which are pending (the Exhibit A Abuse Claims) and 51 of which were settled in 2005 (the Exhibit B Abuse Claims). The Diocese seeks to limit the Defendants' discovery to *only* the Exhibit A and Exhibit B Abuse Claimants.[16] The Exhibit A and Exhibit B Abuse Claims, however, obviously do not constitute the "universe" of such claims against the Diocese. Moreover, the Exhibit A and Exhibit B Abuse Claims do not identify all of the Priests of the Diocese against whom Abuse Claims have been made. Indeed, it is apparent that the Exhibit A and Exhibit B Abuse Claims represent only the most recently asserted Abuse Claims.

The Defendants' coverage with the Diocese began in 1968.[17] Based upon publicly available website information, *see, e.g.*, BishopAccountability.org, it appears that certain Priests of the Diocese have been identified as sexual predators who preyed on minors *as early as the 1950's and 1960's*. The Defendants submit that there may be documents related to Abuse Claims that are not the subject of the Diocese's present demand for insurance coverage, but that pre-dated one or more of the Defendants' periods of coverage and that were never disclosed to the Defendants by the Diocese. These documents may contain information related to Abuse

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[16] *See* Diocese's Response Nos. 30-33, 35-36 and 74.

[17] The Complaint alleges that the Defendants provided the Diocese with the following coverages: Aetna (now Travelers) (January 1, 1968 to January 1, 1971); Home (now represented by the Fund) (January 1, 1971 to October 17, 1979); North Star (March 29, 1976 to October 17, 1979); and the "Gallagher Bassett plan" (self-insurance; Lloyd's; Centennial; Interstate; Colonial Penn) (October 17, 1979 to October 17, 1986). The coverages afforded by Interstate and Colonial Penn during the period October 17, 1985 to October 17, 1986 are no longer at issue, because those policies contained exclusions for sexual abuse and sexual molestation and are the subject of orders allowing motions for partial summary judgment.

Claimants who reported sexual abuse by a Priest of the Diocese but who never sought compensation. These documents may also contain information related to Abuse Claims that have already been settled by the Diocese, but for which the Diocese has determined reimbursement against the Defendants is not worth pursuing. Such Abuse Claimants and such Priests of the Diocese would not necessarily be identified among the Abuse Claims that are the subject of the present action, and would not necessarily be identified in other materials that the Diocese chooses to produce in discovery.

The significance of these materials that the Diocese contends are "irrelevant" or "immaterial" is self-evident because they go directly to the Defendants' coverage defenses. The Exhibit A and Exhibit B Claimants have alleged that the Diocese was negligent in supervising Priests of the Diocese who sexually abused minor children and/or by concealing information related to such sexual abuse from parishioners, the general public, and law enforcement officials. Information related to Abuse Claims other than the Exhibit A and Exhibit B Abuse Claims is clearly relevant to these issues. *See, e.g.*, *Ford* v. *Law*, 2002 WL 32139028 (Mass.Super., Sweeney, J.)(Nov. 25, 2002) (permitting discovery of psychotherapy records of non-party priest who sexually abused minors who were not plaintiffs); *In re Roman Catholic Archbishop of Portland in Oregon*, 335 B.R. 815, 823 (D.Ore. 2005) (permitting discovery of Archbishop's "patterns, practices and policies" in dealing with allegations of sexual abuse of minors subsequent to alleged sexual abuse at issue).

To the extent that one or more of the Defendants may be required to afford coverage to the Diocese, the Defendants are entitled to obtain such information for claims investigation-related purposes, *i.e.*, in order to satisfy themselves that the Diocese had a legitimate basis for settlement with the Exhibit B Abuse Claimants, and that there exists a legitimate basis for

defense or settlement of the Exhibit A Abuse Claims. Furthermore, such information is also highly probative with respect to the Defendants' defense that the Diocese concealed such information from the Defendants at the time the Diocese applied for coverage, and that the concealment of such information – which was material to the insurers' decisions to issue insurance policies to the Diocese – voids the coverage. Such information is also relevant to the Defendants' assertion that the Diocese's knowledge of what was an apparently rampant problem of sexually predatory conduct among the Priests of the Diocese was sufficient to preclude coverage for the Exhibit A and/or Exhibit B Abuse Claims on the basis that the damage inflicted upon the Abuse Claimants was not an "occurrence" and/or was "expected or intended" from the standpoint of the Diocese.

Conspicuously absent from the Exhibit A and Exhibit B Abuse Claims, for example, are the 17 Abuse Claims that were asserted against Lavigne and which were settled for $1.4 million in 1994. As the Court is no doubt aware, Lavigne was a Priest of the Diocese during the period between 1966 and 1992 – he was placed on administrative leave by the Diocese in 1992, following his entry of a guilty plea for sexual abuse, and laicized in 2003 – and was accused of multiple acts of sexual abuse of minors. According to an August 15, 2003 affidavit of Maurice E. DeMontigny, who served in various lay capacities as a representative of the Diocese, "diocesan officials (including my late friend Bishop Weldon) knew that Father Lavigne was molesting children *as early as the late 1960's*." *See* BishopAccountability.org, DeMontigny Affidavit, ¶13. (Emphasis supplied.) The Diocese's knowledge of Lavigne's nefarious acts and its concealment of those acts from the Defendants at the time the Diocese applied for coverage is clearly "relevant" to whether the Defendants would have chosen to insure the Diocese and to

whether the Abuse Claims at issue in this case did not result from "occurrences" or that they should be excluded from coverage because they were "expected or intended".

The Diocese appears to recognize the legitimacy of at least part of the scope of the Defendants' requests. In responding to Request Nos. 44, 47, 50, 53, 56 and 59, the Diocese stated that it "will produce the requested documents subject to its General Objections." These Requests relate specifically to *Other Abuse Claimants*. The Diocese's apparent willingness to produce documents as to the Other Abuse Claimants – who are defined as Abuse Claimants other than the Exhibit A or Exhibit B Abuse Claimants – is inconsistent with the Diocese's blanket assertion in its other responses that materials related to Abuse Claimants other than those for whose claims the Diocese now seeks coverage are "irrelevant" and "immaterial".

Apart from this inherent inconsistency in its responses, the Diocese's global assertion of its relevancy/materiality objection fails to address the critical issue before the Court with respect to "relevancy", *i.e.*, whether the discovery sought "is reasonably calculated to lead to the discovery of admissible evidence." *See Mass.R.Civ.P. 26 (b)(1)*. As the court observed in *In re Roman Catholic Archbishop of Portland in Oregon, supra*:

> ... This is discovery. The test is [not] whether the information obtained would be admissible at trial [sic]; it is whether the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Although the relevant time frame for these claims is the time of the alleged misconduct, evidence of debtor's later policies could possibly lead to evidence that would be relevant to the claims of negligence or to establishing debtor's knowledge for purposes of extending the statute of limitations under ORS 12.117(1). If, for example, evidence shows the debtor continued to reassign known pedophile priests to new parishes even after it knew that child molesters are likely to re-offend, that fact would provide some evidence that debtor's earlier reassignment was not merely a mistake or accident. Further, changes in policies after alleged abuse occurred would shed light on what the policies were at the time of the abuse.

335 B.R. at 823.

2. Documents Relating To Laicization Of Priests Of The Diocese.

The Diocese has also asserted the relevancy/materiality objection with respect to materials relating to the laicization of Priests of the Diocese as to whom any Abuse Claims were made.[18] Again, the Diocese does not articulate any specific basis for this objection, *i.e.*, it does not explain why such documents are purportedly "irrelevant" and/or "immaterial", let alone why such documents would not be either admissible or reasonably calculated to lead to the discovery of admissible evidence. *See Mass.R.Civ.P. Rule 26 (b)(1).*

The Defendants do not seek to analyze the process or challenge the Diocese's decision of laicization with respect to any particular Priest of the Diocese accused of Abuse Claims, *e.g.*, whether that process or decision was consistent with notions of judicial due process or requirements of substantive federal or state law. *Compare Callahan* v. *First Congregational Church of Haverhill*, 441 Mass. 699 (2004). Rather, the Defendants seek information that the Diocese utilized in its Laicization process because such information would indicate what knowledge regarding the Abuse Claims the Diocese had at any particular time with respect to any particular Priest of the Diocese who underwent that process.

Laicization is a drastic undertaking. *See* Canon 290 of 1983 Code of Canon Law (providing that a priest can be returned to the lay state "only for the most serious reasons"). The Court may reasonably infer that the Diocese undertook laicization *only* as a last resort and after having first unsuccessfully sought to rectify misconduct by means of a less draconian nature. *See* Canon 1341 of 1983 Canon Law (providing that imposition of such a penalty should not be

[18] *See* Diocese's Response Nos. 65 (f), 66 (f), 67 (f), 68, (f), 69 (f), 70 (f), 71 (f) and 72 (f).

undertaken until there has been a determination that the "accused cannot sufficiently be reformed by fraternal correction, rebuke or other ways of pastoral care … .").

Thus, because the Vatican would presumably require the case for laicization to be meticulously documented, materials relating to laicization proceedings of Priests of the Diocese accused of Abuse Claims would contain "evidence" relating to Abuse Claims against a Priest of the Diocese that the Diocese considered. At a minimum, it is probable that such documents would identify one or more Abuse Claimants and where and when any alleged acts of abuse purportedly took place, as well as whether the Diocese regarded the allegations as credible. The Defendants similarly presume that these documents would contain or reference whatever "evidence" a Priest of the Diocese had available and considered relevant to his "defense" to laicization proceedings, *e.g.*, denials of the accusations of Abuse Claims, records of psychiatric treatment explaining "extenuating circumstances", etc. These materials could provide information that would either be helpful to the Defendants in evaluating the underlying Exhibit A and Exhibit B Abuse Claims, or that would be relevant to the Defendants' assertions that the insurers either would not have afforded coverage to the Diocese had they been made aware of Abuse Claims or that the Exhibit A and Exhibit B Abuse Claims were not "occurrences" and/or were "expected or intended" from the standpoint of the Diocese.

3. Documents Relating To Colonial Penn Or Other Insurers' Coverages.

The Diocese has also asserted a relevancy/materiality objection to the production of materials that are the subject of the Defendants' Request Nos. 11, 12, 20, 61, 62, 63 which are Requests related to the Diocese's application for, purchase of, and demands for coverage under the Colonial Penn Policies or Other Insurers' Policies. The Diocese has asserted that because Colonial Penn was dismissed from this case because the only policy it had issued to the Diocese

contained an exclusion for sexual abuse and sexual molestation, any discovery relating to the Diocese's application for such coverage – or for any other coverage, *i.e.*, prior to January 1, 1968 or subsequent to October 17, 1987 – is "irrelevant" and "immaterial".

Once again, the Diocese confuses "admissibility" with "discoverability". *See* Part D, 1., *supra.* Although coverage questions relating to policies other than those issued by the Defendants are not before the Court for resolution, it is clear that information disclosed in applications to pre-January 1, 1968 insurers or post-October 17, 1987 insurers may contain relevant information with respect to Abuse Claims. Conversely, such applications may contain statements in which the Diocese *denied* knowledge of Abuse Claims, which would bear on the Diocese's credibility at trial. Even assuming, *arguendo*, that such evidence is not admissible – although there is no apparent reason why the evidence would be inadmissible – it reasonably could lead to the discovery of admissible evidence, which is the litmus test for discovery. *See Mass.R.Civ.P. 26 (b)(1).*

Similarly, to the extent that the Diocese actually has sought coverage to pay for Abuse Claims from Other Insurers, information relating to such requests for coverage may contain statements by the Diocese relating to the Exhibit A or Exhibit B Abuse Claims, *e.g.*, whether the Diocese considered them credible or whether the Diocese considered them subject to insurance coverage *other* than that issued by the Defendants. Such statements would clearly be relevant to the issues in this case.

4. The *Sacramentorum Sanctatis Tutela* Documents.

The last category of documents to which the Diocese raises the relevancy/materiality objection is the *Sacramentorum Sanctitatis Tutela* documents, which are documents related to any Abuse Claim that the Diocese is required to send to the Vatican. *See* Defendants' Request

No. 76.[19] The Diocese asserts that, because the procedure established by the *Sacramentorum Sanctitatis Tutela* post-dates the Exhibit A and Exhibit B Abuse Claims, discovery relating thereto is irrelevant and immaterial. The Diocese further states that the Diocese has retained the originals or copies of any documents sent to the Vatican as a result of this procedure.

The *Sacramentorum Sanctitatis Tutela* is an apostolic letter (the "Apostolic Letter"), written by then Cardinal Ratzinger and sent out with Pope John Paul II's endorsement under the date of April 30, 2001.[20] It provides, *inter alia*, for changes in procedures relating to the Catholic Church's handling of sexual abuse claims. Significantly, these changes include the following:

(1) All information about such claims is covered by "pontifical secret" – the disclosure of which may result in excommunication – and is to be sent to the Vatican. Prior to this time, there were no special secrecy provisions other than the general principle in Canon Law that records of criminal cases were to be retained in the secret archive of a diocese for ten (10) years, after which time those records were to be destroyed (although a summary was required to be kept).

(2) Except with the express permission of the Vatican, diocesan bishops are precluded from taking any action with respect to such claims beyond a preliminary investigation; thereafter, all action was to be taken by the Vatican. Prior to this time, the bishops were charged with applying the Canon Law themselves by means of the Canon Law's penal system, *i.e.*, conduct a formal investigation, initiate trial proceedings, assess innocence or guilt, and impose punishment as necessary and appropriate.

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[19] The Diocese has also objected to production of these materials on the basis of the First Amendment, which the Defendants have addressed *supra*.

[20] A copy of an English translation of the Apostolic Letter is attached hereto.

(3) Lay persons are precluded from involvement in church proceedings relating to such claims. Prior to this time, lay persons were merely forbidden from acting as the notary in such cases.

The practical effect of the Apostolic Letter is to not only sanction, but to *require* the transfer of documents and information that might be incriminating to the Vatican, which is a sovereign state effectively immune from discovery. Although the Diocese represents in its Response to Request No. 76 that it has originals or copies of any documents sent to the Vatican pursuant to the Apostolic Letter, it is unclear whether such materials – even if still retained by the Diocese – are "pontifical secrets" which the Diocese "refuses" to produce. Moreover, although the Diocese takes the position that documents subject to the Apostolic Letter are irrelevant/immaterial because the procedure was developed subsequent to the Exhibit A and Exhibit B Abuse Claims, it is unclear whether the Apostolic Letter is intended to be retroactive.

The Diocese's relevancy/materiality objection again fails to address the fact that the materials the Defendants seek are "discoverable", even if they may not ultimately be admissible. Defendants have requested the production of *all* copies of *all* documents which are the subjects of their Requests; consequently, the mere fact that the Diocese chooses to produce originals or *less than all* copies fails to constitute an adequate response. Similarly, the Diocese's objection that the requested materials are irrelevant because the Apostolic Letter created a procedure subsequent to the Exhibit A and Exhibit B Abuse Claims is simply another effort to preclude discovery relating to the Other Abuse Claims, which are clearly an appropriate subject for discovery.

CONCLUSION

Based on the foregoing, the Diocese's General Objections should fail because they have no merit in law or in fact. Accordingly, the Diocese is obligated under the applicable rules of discovery to produce the requested documents.