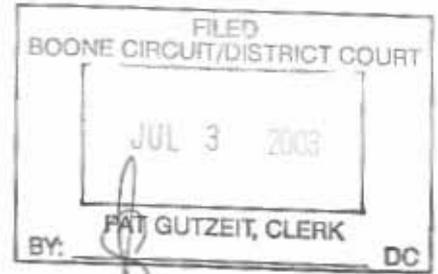


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COMMONWEALTH OF KENTUCKY  
BOONE CIRCUIT COURT  
CASE NO: 03-CI-181



GREG S. HARVEY, et al.,

Plaintiffs

JUDGE JOSEPH BAMBERGER

vs.

ROMAN CATHOLIC DIOCESE  
OF COVINGTON et. al.,

Defendants

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiffs bring this action on behalf of themselves and all other similarly situated males and females against Defendant Roman Catholic Diocese of Covington (Diocese) and Bishop Roger Joseph Foy to recover for injuries they received as a result of sexual assaults and other sexual misconduct they suffered while minors, as a direct result of the negligent and intentional conduct of Defendant Diocese of Covington. Plaintiffs seek to represent the following class of victims:

All persons who, while still minors at anytime during the period January 1, 1956 through the present, were subjected to acts of sexual abuse and sexual misconduct by priests or members of religious orders who, at the time of such abuse or misconduct, were assigned to or employed by the Diocese of Covington, as the Diocese existed prior to the creation of the Diocese of Lexington.

## II. FACTS COMMON TO CLASS

The named Plaintiffs who seek to represent the class are Greg Harvey, Rebecca Caddell, John Doe, Jane Doe and Richard Roe. Each has been the victim of sexual abuse by priests who were assigned to the Diocese of Covington and acting under the supervision and control of the Diocese. Each were abused by priests whose sexually abusive propensities were or should have been known to Defendant Diocese. (Second Amended Complaint, ¶¶20-24). Each of the named Plaintiffs has been actively involved in the pending litigation and has been instrumental in assisting class counsel in pursuing claims on behalf of absent class members. Each of the named Plaintiffs has been the victim of the same Diocesan policies and practices that have caused similar injuries to class members. Each of the named Plaintiffs understands his or her roles and responsibilities with respect to protecting the rights of absent class members. The Plaintiffs are fully committed to fulfilling those responsibilities.

As Plaintiffs set forth in their Second Amended Complaint, beginning in or about 1956 and continuing through the present, Defendant Diocese has engaged in a pattern and practice of concealing known acts of sexual abuse and misconduct by priests and others belonging to religious orders and assigned to work within the Diocese of Covington. This uniform conduct and deception had the effect of encouraging continued sexual abuse against minors within the Diocese. During this period, Defendant Diocese became fully aware of many incidents of sexual abuse and sexual misconduct committed by numerous Diocesan priests and other religious against students and parishioners who were minors at the time such abuse occurred. (Second Amended Complaint ¶ ¶ 11-12).

As of 1995, the Diocese was aware of more than 120 victims who were abused as

minors by more than 20 Diocesan priests or employees. Including victims who were afraid to report such abuse to the Diocese, it is believed that there are more than 150 victims. (*Id.* at ¶ 29)

Consistent with its policy and practice of concealing such abuse, all information regarding such sexual abuse and misconduct was conveyed to the Bishop of Defendant Diocese and then was concealed in the secret archive files and other files of Defendant Diocese. No one outside Defendant Diocese was given access to these files or information contained therein. In fact, no one other than the Bishop and the Chancellor of Defendant Diocese was given access to information contained in these files. The Diocese would keep all information regarding these numerous incidents of sexual abuse concealed from public authorities, its schools and parishes, and parents of children to whom these abusive priests were given access. (Second Amended Complaint ¶ 12 and 16). In furtherance of the policy of Defendant Diocese, after becoming aware of information regarding such sexual abuse and misconduct, Defendant Diocese failed and refused to report the incidents to any agency of government as it was obligated to do by law. (*Id.* at ¶ 13). *Roman Catholic Diocese of Covington v. Secter*, Ky. App., 966 S.W.2d 286 (1998).

Plaintiffs also allege that, during this time period, the Diocese has engaged in a pattern or practice of failing to properly screen, supervise and discipline its priests and religious order members, especially individuals it had reason to believe were engaging in acts of sexual abuse and misconduct. In spite of its knowledge about abusive conduct of its priests, throughout this period the Diocese continued to give abusive priests unsupervised access to minors in its schools and parishes, including the individual Plaintiffs and class members in this action. (*Id.* at ¶ 15).

This ongoing pattern and practice of concealing all information regarding sexual abuse and sexual misconduct by its priests created an atmosphere conducive to continued sexually abusive conduct. The Defendant Diocese tolerated this conduct and, thereby, tacitly encouraged priests to engage in additional sexual abuse and misconduct, without fear of exposure. (*Id.* at ¶ 18).

The Diocese' wrongful conduct as described above resulted in Plaintiffs and each of the class members being sexually abused by its priests or other religious members, and suffering the resulting shame, humiliation and trauma. The Diocese' pattern and practices of concealing its knowledge of abuse of minors by its priests and religious and of failing to adequately screen, supervise and discipline its abusive priests and religious, caused all class members to suffer injuries in a similar fashion. Because Plaintiffs demonstrate that they meet the requirements of Rule 23.01 and 23.02 of the Kentucky Rules of Civil Procedure, they now move for class certification.

### III. ARGUMENT

CR 23 provides that certain actions may be certified to proceed as representative actions on behalf of similarly situated individuals where the prerequisites of CR 23.01 are met and the action fits one of the definitions contained in CR 23.02.

The United States Supreme Court has held that "[c]lass actions serve an important function in our system of civil justice..." *Gulf Oil v. Bernard*, 452 U.S. 89, 99 (1981); accord, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550-551 (1974). The Sixth Circuit favors class actions is a favored procedural tool:

The procedural device of a Rule 23(b)(3) class action was designed not

solely as a means for assuring legal assistance in the vindication of small claims, but, rather, to achieve the economies of time, effort and expense.

At the class certification stage, the Court is required to assume that the substantive allegations of the Complaint are true. *Davis v. Avco Corp.*, 371 F. Supp. 782, 790 (N.D. Ohio 1974).<sup>1</sup> "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); accord, *Weathers v. Peters Realty Corp.*, 499 F. 2d 1197, 1201 (6th Cir. 1974). Furthermore, in an uncertain case, "any error, if there is to be one, should be committed in favor of allowing the class action." *Davis, supra.*, 371 F. Supp. at 791; 7B *Wright, Miller & Kane, Federal Practice and Procedure* (1986), §1785, p. 199. Plaintiff's class action allegations and detailed factual contentions are sufficient, by themselves, to meet the requirements of Rule 23.

**A. PLAINTIFFS HAVE MET EACH OF THE REQUIREMENTS SET OUT IN CIVIL RULE 23.01**

In order to justify certification of this action, Plaintiffs must show that they meet each of the following four prerequisites:

Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of

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<sup>1</sup> See also *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019 (N.D. Miss. 1993) ("the invitation to pre-try the case through the vehicle of this (class certification) motion must be respectfully declined...rather, the court's focus on a class certification motion is strictly on the requirements articulated in Rule 23").

all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

CR 23.01. Plaintiffs demonstrate below that they have met each of these requirements.

**1. The Class Is So Numerous That Joinder of All Members Is Impracticable**

It is Plaintiffs' burden to show "some evidence of a reasonable estimate of the number of class members" in order to meet the numerosity requirement of CR 23.01(a). *Sowers v. Atkins*, Ky., 646 S.W.2d 344, 346 (1984). In *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996), the Sixth Circuit found that when class size reaches substantial proportions the impracticability requirement is usually satisfied by the numbers alone." *Id.* at 1079. Moreover, the number of class members who actually come forward is not determinative of the numerosity issue. *BreMiller v. Cleveland Psychiatric Inst.*, 195 F.R.D. 1, 20 (N.D. Ohio 2000). "Satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required." *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 63 (S.D. Ohio 1991) (citations omitted). In *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 F.R.D. 506 (S.D. Ohio 1985), the trial court held that as few as 23 class members satisfied the requisite numerosity. *Id.* at 505.

Plaintiffs have asserted in their complaint that there are in excess 150 individuals who were victims as minors of sexual abuse by priests. (Second Amended Complaint ¶ 29). Plaintiffs' can demonstrate that, as of 1995, the Diocese was aware of at least 130

victims who were abused by more than 20 perpetrators. (Plaintiffs Exhibit A, attached under seal pursuant to protective order). Plaintiffs are aware of additional victims so that the total number of victims exceeds approximately 150.

It is readily apparent that joining 130 or more victims would be "impracticable" within the meaning of the Rule. *Cf., Keeton v. City of Ashland, Ky. App.*, 883 S.W.2d 894, 895 (1994) (74 was sufficient for class treatment). Thus, Plaintiffs have established compliance with Rule 23.01(a).

**2. Plaintiffs Have Established That There Are Questions of Both Law and Fact Common to the Class**

It is also Plaintiffs burden to demonstrate that there are "questions of law or fact common to the class, but it does not require that all questions of law or fact be common." *Wiley v. Adkins, Ky.*, 48 S.W.3d 20, 23 (2001). "It is not necessary that there be a complete identity of facts relating to all members as long as there is a common nucleus of operative facts." *Id.* The existence of factual differences among members of the class will not defeat certification. In *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6<sup>th</sup> Cir. 1988) the Sixth Circuit held that "the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Id.* at 1197.

It is to be expected that there will be some factual differences between individual plaintiffs; moreover, the commonality requirement may be met if the common questions go to liability despite individual differences in damages.

*BreMiller v. Cleveland Psychiatric Inst.*, 195 F.R.D. at 20. In *BreMiller* the court reaffirmed the certification of a class of victims of sexual harassment in an employment setting. The

Court did this in spite of factual distinctions among class members and class representatives because of the common proof required to show liability. *Id.* at 19-20. Additionally, the Court ruled that "the commonality requirement may be met if the common questions go to liability despite individual differences in damages." *Id.* at 20.

In this case the Plaintiffs have identified the following significant questions of fact or law which are common to class representatives and class members alike:

- a. whether or not Defendant Diocese engaged in a continuing pattern or practice of concealment of sexual abuse and sexual misconduct of its priests in violation of Kentucky common law;
- b. whether or not Defendant Diocese engaged in a continuing pattern or practice of failing to report incidents of sexual abuse and sexual misconduct of its priests in violation of Kentucky common law;
- c. whether or not Defendant Diocese engaged in a continuing pattern or practice of tacitly tolerating sexual abuse and sexual misconduct of its priests in violation of Kentucky common law;
- d. whether or not Defendant Diocese engaged in a continuing pattern or practice of exposing children, parishioners, and employees to priests who were known sexual predators in violation of Kentucky common law;
- e. whether or not Defendant Diocese engaged in a continuing pattern or practice of failing to properly screen, supervise and discipline priests, especially those priests whom it had reason to believe were engaging in acts of sexual abuse and misconduct in violation of Kentucky common law;
- f. whether or not it has been the official policy of Defendant Diocese to keep all information regarding sexual abuse and sexual misconduct by Diocesan priests against children, parishioners, and employees of Defendant Diocese concealed from the priests, nuns, teachers and employees with whom the perpetrators worked and from law enforcement authorities so that these individuals would be unable to take action to protect other victims from further abuse in violation of Kentucky common law.

(Second Amended Complaint ¶ 31).

Plaintiffs will establish on behalf of themselves and each of the class members that the Diocese' pattern and practice of concealing its knowledge of abusive priests is sufficient on a class basis to refute the Diocese' defense of the statute of limitations. This is a substantial common issue that does not vary from class member to class member.

This common proof also directly relates to issues of liability. Evidence concerning the concealment will prove that Defendant allowed abusive priests to continue to victimize members of the class. Indeed, proof regarding each of the issues set out above will dictate the outcome of the liability claims of the named Plaintiffs and class members alike. Any individual differences in factual background cannot defeat commonality. As the *BreMiller* Court found,

Significantly, in several cases in which plaintiffs have sought class-wide relief for sexual harassment by employers, courts have found Rule 23(a)'s commonality provision to be satisfied even in the face of challenges by defendants that such claims require highly individualized treatment. See, e.g., *Warnell v. Ford Motor Co.*, 189 F.R.D. 383 (N.D.Ill. 1999) (finding that sexual harassment claims could be addressed on a class-wide basis and that the common question of law in such cases is whether a reasonable woman would find the work environment hostile); *Markham*, 171 F.R.D. [217]at 222 [(N.D. Ill. 1997)] (finding that individual differences in each class member's subjective perception and response to harassment did not detract from the satisfaction of the commonality standard).

*BreMiller*, 195 F.R.D. at 21. Sexual harassment claims certified under Rule 23 in the above referenced cases are directly analogous to the case at bar. The commonality considerations found to warrant certification on those cases is equally present here.

### 3. The Proposed Class Representatives' Claims Are Typical of the Claims of The Class.

Rule 23.01(c) requires that "claims or defenses of the representative parties [be] typical of the claims and defenses of the class." The Sixth Circuit has explained that a "necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." (Internal citation omitted). *In re American Medical Sys.*, 75 F.3d at 1082.

A plaintiff's claim is typical if it arises from the same event or **practice or course of conduct** that gives rise to the claims of other class members and his or her claims are based on the same legal theory . . . The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. (Emphasis added).

*De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7<sup>th</sup> Cir. 1983) (citations omitted); *see also, Senter v. General Motors Corp.*, 532 F.2d 511, 525 n. 31 (6<sup>th</sup> Cir. 1976) ("To be typical, a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law.")

In this case, Plaintiffs, as class representatives, will advance the case for all members of the class by proving that the Diocese engaged in a longstanding practice of concealing abuse of minors by its priests and other religious and of allowing these perpetrators to continue to have unsupervised access to minors within the Diocese. "Typicality" requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of

events, and each class member makes similar legal arguments to prove the defendant's liability." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001), quoting, *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

As demonstrated above, this standard is met by Plaintiffs in this case. Both the Plaintiffs' and the class members' claims arise from the Diocese' course of conduct involving active concealment of abuse by its priests, the Diocese' ongoing practice of failing to supervise and discipline perpetrators and of permitting abusive priests continue to have unsupervised access to minors. This conduct created an atmosphere which perpetuated an atmosphere tolerant of sexual abuse against minors which ultimately injured Plaintiffs and class members in the same manner by causing them all to be victims of sexual abuse. Thus, the typicality requirement is met.

**4. Plaintiffs Will Adequately Represent the Class Through Qualified Counsel.**

In *Senter v. General Motors Corp.*, 532 F.2d 511 (6<sup>th</sup> Cir. 1976), the Court articulated two criteria for determining adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Id.* at 525. There can be no doubt that this requirement has been met. Plaintiffs have interests which are identical to the members of the class. Moreover, Plaintiffs are represented by counsel who have substantial experience on class litigation. Plaintiffs and their counsel have already demonstrated their intent to vigorously prosecute this action in proceedings before this Court. There can be no reasonable dispute that Plaintiffs have

demonstrated that they will adequately represent the interests of unnamed class members. Additionally, the class representatives understand their responsibilities and are eager to fulfill their obligations.

**B. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23.02  
THUS, THE COURT SHOULD CERTIFY THIS CASE AS A CLASS  
ACTION.**

In order for a class action to be maintainable, the putative class also must satisfy one of the three subsections of Rule 23.02, in addition to the requirements of Rule 23.01.

Rule 23.02 states, in pertinent part, as follows:

- (a) the prosecution of separate actions by or against individual members of the class could create a risk of
  - (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
  - (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

CR 23.02. The elements of Rule 23.02 overlap, and often a class may satisfy more than one of the subsections of Rule 23.02. 1 *Newberg*, §4.01. This is true in the instant case.

**1. Certification Under 23.02(a) Is Appropriate to Avoid Inconsistent Adjudications.**

Under "Rule 23(b)(1) [Federal Rules of Civil Procedure] classes are designed to avoid prejudice to the defendant and absent class members if individual actions were prosecuted in contrast to a class suit yielding a unitary adjudication." *Newberg*, § 4.01, p. 4-4. Kentucky Civil Rule 23.02(a)(1) [substantively identical to the Federal Rule] states that class certification is proper if separate actions "would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . ." CR 23.02(a)(1). "The phrase 'incompatible standards of conduct' is thought to refer to the situation where different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct." 7A Wright & Miller, *Federal Practice & Procedure: Civil 2d*, § 1773, p. 431 (citing cases). "[S]ubdivision 23.02(a)(1) is applicable when practical necessity forces the opposing party to act in the same manner toward the individual class members and thereby makes inconsistent adjudication in separate actions unworkable or intolerable." *Id.* at 434.

The claims asserted make this case ideal for class certification pursuant to Rule 23.02(a)(1). Both the Defendant Diocese and the class members are interested in obtaining a uniform ruling as to whether the Diocese' pattern and practice of concealing its knowledge of abuse by its priests and religious tolls the running of the statute of limitations under *Roman Catholic Diocese of Covington v. Secter*, Ky. App., 966 S.W.2d 286 (1998). Additionally, the proof regarding liability will be virtually identical for all class

members, particularly as it relates to the Diocese' pattern and practice of failing to supervise and discipline abusive priests and religious and its creating of an atmosphere which tacitly condoned and encouraged such abuse. To avoid the risk of inconsistent or varying adjudications with respect to these issues, certification under Rule 23.02(a) is appropriate. See, *Mitchell v. Peoples Bank of Northern Kentucky, Inc., et al.*, Boone Circuit Court Case No., 02-CI-00691, Amended Conditional Class Certification Order, July 23, 2002, attached.

2. **Certification Under CR 23.02(b) Is Appropriate Because Defendant has Acted or Refused to Act on Grounds Generally Applicable to the Class, Thereby Making Appropriate Final Injunctive Relief or Corresponding Declaratory Relief with Respect to the Class as a Whole.**

In addition to monetary relief, the named Plaintiffs seek substantial injunctive relief, including:

Permanently enjoin defendant from continuing the abuses described above and order that defendant:

1. Require its management and supervisory employees and agents to employ a nationally recognized firm that provides sensitivity training regarding child abuse, sexual abuse, and sexual misconduct and require all its management and supervisory employees, including priests and all their superiors, to undergo such sensitivity training;
2. Require its management and supervisory employees and all employees to make a written commitment to report all incidents of sexual abuse and sexual misconduct to appropriate law enforcement authorities;
3. Require its management and supervisory employees to institute a formal program encouraging all students, parishioners, and employees to report all incidents of sexual abuse and sexual misconduct to Defendant Diocese;
4. Require psychological screening for all priests prior to assigning them to contact with minor children, parishioners, or employees;

5. Establish an effective grievance system for minor children, students, parishoners, and employees;

6. Require full and complete disclosure of all records, wherever located, in the possession and/or control of Defendant Diocese, relating to sexual abuse and sexual misconduct by it priests.

7. Retain an outside monitor that specializes in cases of child abuse, sexual abuse, and sexual misconduct, to monitor Defendant Diocese's practices for a period of five years and to report any misconduct to Plaintiff's class counsel;

(Second Amended Complaint, Prayer for Relief, ¶ d.)

As to appropriate injunctive and other equitable relief, therefore, the class may be certified pursuant to Rule 23.02(b) of the Kentucky Rules of Civil Procedure. Certification under this provision is permitted where the "defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class." CR 23.02(b). Under this rule, "[I]njunctive relief embraces all forms of judicial orders, whether they be mandatory or prohibitory." 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1775, pp. 458-59. Moreover, the "corresponding declaratory relief" language of Rule 23.02(b) refers "to any remedy that 'as a practical matter . . . affords injunctive relief or serves as a basis for later injunctive relief.'" *Id.* at 462. "If the Rule 23.01(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision 23.02(b)." 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1775, p. 462.

Plaintiffs have described above the manner in which Defendant Diocese has acted in a way that is common to all class members. The Diocese' decades-old policy of

concealing and otherwise refusing to report abuse of minors by its priests, and its failure to take appropriate steps to protect minors to whom known abusive priests were given access, are common to the Plaintiffs and class members alike. Thus, the Diocese has acted or refused to act on grounds generally applicable to the class as a whole, making final injunctive and declaratory relief entirely appropriate. This Court should, therefore, certify under CR 23.02 that portion of this case which seeks equitable relief.

In *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 167-168 (2d Cir. 2001) the Court endorsed certification of the liability phase under 23(b)(2) and damage phase under 23(b)(3). The Court explained, "[d]istrict courts should 'take full advantage of this provision' to certify separate issues 'in order . . . 'to reduce the range of disputed issues' in complex litigation" and achieve judicial efficiencies. (Internal quotations omitted). *Id* at 167. Thus, the Court may properly certify the injunctive relief claims under 23.02(b). See *Mitchell v. Peoples Bank of Northern Kentucky*, attached.

**3. Certification Under CR 23.02(c) As to Class Claims for Compensatory Damages Is Appropriate Because Questions of Law Or Fact Common to The Class Predominate Over Questions Affecting Individual Members and a Class Action is the Superior Method for Resolving the Class Claims.**

Rule 23.02(c) has two primary requirements: (1) common issues must predominate over individual issues, and (2) class treatment must be superior to other methods of adjudications. Rule 23.02(c) parallels Rule 23.01(b) in that both subdivisions require that common issues exist, but 23.02(c)'s predominance test goes further by ensuring that the common issues predominate over individual issues. *American Medical Systems*, 75 F.3d at 1084. The inquiry is mainly a pragmatic one: do the common issues justify a common

adjudication? Wright & Miller, 7A *Federal Practice and Procedure*: Civil 2d, § 1778, p. 528. "In order to 'predominate,' common issues must constitute a significant part of the individual cases." *Jenkins v. Raymark Industries*, 782 F.2d 468, 472 (5<sup>th</sup> Cir. 1986).

As previously noted, in Plaintiffs' discussion regarding commonality pursuant to Rule 23.01(b), common issues of law and fact pervade this case and there will likely be very little factual variation in the facts and legal issues that determine the Diocese' liability. If the cases were to be tried individually, all class members would be offering essentially identical proof regarding the Diocese' pattern and practice of concealing its knowledge regarding sexual abuse of minors by its priests and religious. Class members would also be offering virtually identical evidence regarding the Diocese' longstanding practices of failing to supervise or discipline abusive priests and of permitting abusive priests to have assignments which give them unsupervised access to minors. These and the other common issues listed at page 9 above unquestionably predominate over any questions affecting only individual class members. Given the number and extent of the common issues in this case, a class action certified under CR 23.02(c) is clearly superior to any other method and will advance the efficient and fair adjudication of this controversy. Accordingly, certification of this action to proceed as a class action pursuant to CR 23.02(a) and (c) is appropriate. *Robinson*, 267 F.3d at 266-268.

Additionally, although each class member has sustained a significant injury, the costs of pursuing the matter along with the fact that each member of the class has undergone a traumatic experience that may make them fearful of public scrutiny - significantly impairs the ability of individual Plaintiffs to proceed on a case-by-case basis.

Under similar situations, courts enthusiastically certify class actions where the cost of individual adjudication personal and economic may discourage plaintiffs from pursuing their claims. *Schoels v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992) (finding plaintiffs had satisfied superiority prong in part because many class members had claims which would be uneconomical to pursue individually); *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 645 (N.D. Cal. 1987) (finding class action superior where "[i]n practical terms, plaintiffs...may be economically precluded from bringing separate lawsuits and thus be barred access to the judicial system").

The inherent ability of this Court to manage complex litigation also demonstrates that a class action is superior to individual suits. "Certainly any difficulties in handling this suit as a class action are far surpassed by the difficulties, in terms of judicial economy of administration, which would be involved in litigating these claims as individual actions." *Du Pont Glove Forgan v. A.T. & T*, 69 F.R.D. 481, 489 (S.D.N.Y. 1975). Indeed, certification will permit the Court, through the use of a class trial, to resolve the predominant common issues. Individual trials, as opposed to class trials, will require courts to hear the same evidence regarding Defendant's scheme to conceal information from Plaintiffs. Individual trials will require the parties to incur substantial expense in relitigating issues. Class certification will promote economy, expediency, and efficiency. Individual trials will promote delay, increase the costs of the litigation and inundate the courts with unnecessary individual claims. Certification of this action is, therefore consistent with both the spirit and letter of Rule 23.

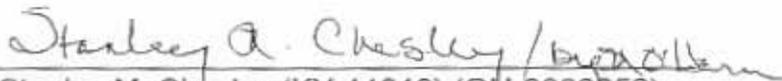
## CONCLUSION

Plaintiffs have demonstrated above that they meet each of the prerequisites set forth in CR 23.01 and that certification under CR 23.02(a) and (c) is appropriate for the class compensatory damage claims. Additionally, Plaintiffs' class claims for injunctive relief may be certified under CR 23.02(b). Accordingly, Plaintiffs urge the Court to grant their motion to certify this action to proceed as a class action on behalf of:

All persons who, while still minors at anytime during the period January 1, 1956 through the present, were subjected to acts of sexual abuse and sexual misconduct by priests or members of religious orders who, at the time of such abuse or misconduct, were assigned to or employed by the Diocese of Covington, as the Diocese existed prior to the creation of the Diocese of Lexington.

We further request the Court to direct notice to the class pursuant to CR 23.03 at the earliest practicable time.

Respectfully submitted,



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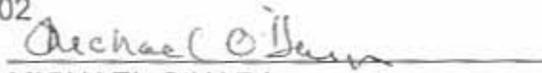
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**CERTIFICATION**

I hereby certify that I have, this 3d day of July, 2003, mailed a copy of the foregoing pleading to the following attorneys of record:

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*CHRY*

**COMMONWEALTH OF KENTUCKY  
BOONE COUNTY CIRCUIT COURT  
CASE NO. 02-CI-00691**

ENTERED BOONE CIRCUIT DISTRICT COURT	
JUL 23 2002	
BY: <i>[Signature]</i>	PAT GUTZEIT, CLERK
	DC

**CHARLES D MITHCHELL, et. al.**

**PLAINTIFFS**

v.

**Honorable Judge Joseph Bamberger**

**PEOPLES BANK OF  
NORTHERN KENTUCKY, INC., et. al.**

**DEFENDANTS**

\*\*\*\*\*

**AMENDED CONDITIONAL CLASS CERTIFICATION ORDER AND ORDER  
APPROVING CLASS NOTICE**

Upon consideration of Plaintiffs' motion of class certification and Defendants' response and the Court having considered the arguments of the parties and being otherwise sufficiently advised;

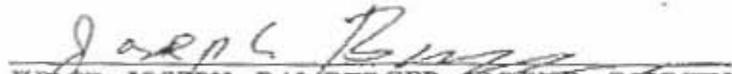
**IT IS HEREBY ORDERED AND ADJUDGED** that pursuant to C.R. 23.03(1) Plaintiffs Charles and Sherry Mitchell are conditionally certified to be representatives and that Brandon N. Voelker and Stanley M. Chesley are conditionally certified as class counsel and the following class is conditionally certified:

All purchasers of Erpenbeck property who have a lien on their property from a construction mortgage lender because the payoff check payable to that construction mortgage lender was deposited into an account of Erpenbeck or an Erpenbeck related company maintained at Peoples Bank of Northern Kentucky. The class definition expressly excludes any employee of Peoples Bank of Northern Kentucky, any person who purchased a home while an employee of Erpenbeck, any properties purchased from Erpenbeck by a company known as Jams.

**IT IS FURTHER ORDERED AND ADJUDGED** that the Plaintiffs are authorized to distribute via first class United States mail the attached class notice to all known members of the

class. The Plaintiffs further are ordered to publish the approved notice in an edition of Sunday *Cincinnati and Kentucky Enquirer* and an edition of the *Cincinnati and Kentucky Post*.

IT IS FURTHER ORDERED AND ADJUDGED that the parties may move the Court for amendment, modification, and decertification.

  
JUDGE JOSEPH BAMBERGER, BOONE COUNTY  
CIRCUIT COURT

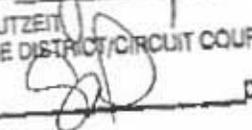
Date: 7-23-02

Prepared By:

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Fax: (513) 381-2375/621-0262  
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**CERTIFICATE**

I, PAT GUTZEIT, Clerk of the Boone District/Circuit Court, hereby certify that I have mailed a copy of the foregoing order and notice to all parties hereto at their last known addresses or their counsel of record this 23 day of July 2002.

PAT GUTZEIT  
BOONE DISTRICT/CIRCUIT COURT  
  
p.c.

**NOTICE TO CERTAIN PERSONS WHO PURCHASED A HOME OR CONDOMINIUM  
FROM ERPENBECK BUILDERS OR A RELATED COMPANY\***

**IF YOU ARE A PERSON WHO HAS PURCHASED A HOME OR CONDOMINIUM  
FROM AN ERPENBECK RELATED ENTITY, THIS NOTICE IS IMPORTANT TO  
YOU.**

Charles and Sherry Mitchell (The "Mitchells") filed a class action lawsuit against Peoples Bank of Northern Kentucky ("Peoples") and several of its directors. The Mitchells on behalf of a class of individuals seek, among other things, a determination by the Court that Peoples unlawfully diverted proceeds from checks intended to pay off construction loans into the accounts of Erpenbeck and/or its related entities. This notice explains:

- A. The Lawsuit and the Court's Rulings.
- B. The Class Members, i.e., Those Who Might Benefit From the case.
- C. How to Get More Information.

A. The Lawsuit and the Court's Rulings.

In their class action complaint, the Mitchells allege that Peoples unlawfully accepted checks for deposit into accounts of Erpenbeck and/or related entities. The Mitchells contend that the checks in question lacked proper endorsements. The class action complaint, therefore, alleges that Peoples' conduct in depositing the proceeds into an Erpenbeck account was unlawful. The checks at issue were intended to pay off financial institutions that had a first mortgage on the property. As a result of Peoples depositing the checks into an Erpenbeck account, the first lender with the first mortgage never received the payoff check, and the first mortgage was not released.

The Defendants generally deny the legal theories advanced by the class action complaint. The Defendants assert that other entities other than Peoples are responsible for the injuries claimed on behalf of the class.

The Class seeks to have the Court order injunctive relief that (a) Peoples immediately take the necessary steps to eliminate the first mortgage on the property; and (b) Peoples pay for the cost of defending any foreclosure action involving the first mortgage.

The Court conditionally ruled that the case could proceed as a class action on or about June 12, 2002. However, the Court has not expressed an opinion as to the merits of the Plaintiffs' allegations or the Defendants' answer. The Court has not yet expressed an opinion as to whether one party or the other will prevail.

B. The Class Members, i.e., Those Who May Benefit From the Case.

The Mitchells, as class representatives, have asked the Court to allow them to represent people who fit the following class definition:

All purchasers of Erpenbeck property who have a lien on their property from a construction mortgage lender because the payoff check payable to that construction mortgage lender was deposited into an account of Erpenbeck or an Erpenbeck related company maintained at Peoples Bank of Northern Kentucky. The class definition expressly excludes any employee of Peoples Bank of Northern Kentucky, any person who purchased a home while an employee of Erpenbeck, any properties purchased from Erpenbeck by a company known as Jams.

This class definition is conditional and is subject to change and amendment.

C. How to Get More Information.

If you would like more information about this notice or about the case, you may contact the class-action plaintiffs' attorneys in writing or by calling:

Stanley M. Chesley  
Terrence L. Goodman  
**WAITE, SCHNEIDER, BAYLESS**  
& **CHESLEY CO., L.P.A.**  
1513 Fourth and Vine Tower  
Fourth & Vine Streets  
Cincinnati, Ohio 45202  
(513) 621-0267

and

Brandon N. Voelker  
**EDMONDSON & ASSOCIATES**  
28 West Fifth Street  
Covington, Kentucky 41011  
(859) 491-5551

The Court papers filed in this case are available for inspection in the Office of the Clerk for the Commonwealth of Kentucky Boone County Circuit Court. The case is captioned as follows: *Mitchell v. Peoples of Northern Kentucky, Case No. 02-C1-00691 (Boone County, Kentucky)*

**PLEASE DO NOT CALL** Judge Bamberger or the Clerk of the Court. They will not be able to answer your questions about this case.

\* Erpenbeck related entities include: Erpenbeck Development Company LLC, Erpenbeck Development Company, Erpenbeck Company, Erpenbeck's Supernette, Inc., Belmont Park Builders, LLC, Edgewood Offices, LLC, Erpenbeck & Kennedy Builder, LLC, Ft. Mitchell

Builders, LLC, EDC, Inc., Mt. Zion Real Estate Development, LLC, Steeplechase Builders, LLC, Triple Crown Builders, LLC, Valley View Ridge, Ltd., LLC, Wellington Builders, LLC, Aston Oak Builders, Inc., Chestnut Park Builders, Inc., Laurel Glenn Builders, Inc., Legendary Run Builders, Inc., Oakmont Village Builders, Inc., Wetherington Builders, Inc., and Wetherington II Builders, Inc.

  
JUDGE JOSEPH BAMBERGER, BOONE COUNTY  
CIRCUIT COURT

Date: 7-23-02