COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 03-CI-00181

GREGG S. HARVEY, et al. PLAINTIFFS

vs. HON. JOS. F. BAMBERGER

ROMAN CATHOLIC DIOCESE OF COVINGTON, DEFENDANT

PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION - REDACTED

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I. INTRODUCTION

This case is not only an appropriate candidate for class certification, it cries out for class certification and injunctive relief. Approximately 5,000 pages of documentary evidence produced by Defendant clearly demonstrate that from 1953 through the present, it has engaged in the following policies, patterns and practices: 1) tacitly approving known instances of sexual child abuse by its priests by enabling them to continue to abuse children by reassigning known pedophiles and sexual predators to contact with minor children; 2) failing to report its priests who were known pedophiles and sexual predators to a governmental agency as it was obligated to do by law; 3) failing to properly screen, supervise and discipline its priests to protect children in the Diocese, after becoming aware that pedophilia and sexual abuse by priests were serious problems within the Diocese; 4) granting pedophiles and sexual predators unsupervised access to minor children in its schools and Parishes; 5) actively concealing from the public, including parents of actual and potential victims, the fact that children in the Diocese were being exposed as a captive audience to pedophiles and sexual predators, thus depriving parents of the opportunity to take steps to protect their children from additional incidents of abuse; 6) convincing those child sexual abuse victims who did complain that they have no legal recourse and that they must accept small monetary settlements that have no relation to the abuse suffered, pastoral counseling and psychological counseling; and 7) swearing victims to secrecy.

The records produced in response to Plaintiffs' request for all documents relating in any way to complaints of sexual abuse and misconduct reflect a lack of concern for past, current, and future victims of sexual abuse. While known pedophiles were

assigned over and over again to different positions of trust within and without the Diocese, no warning was given to potential victims or their families that they were in danger and no warning was given to governmental authorities (*see* pp. 12-21).

The true attitude of the Diocese toward its pedophile priests is reflected in a letter

BEGIN REDACTION[1]

END REDACTION Contrast Defendant's charitable attitude toward this priest, a pedophile who has sexually abused many children in the Diocese for decades, to Defendant's resistance to any recovery by Mark Fischer[2] and Richard Roe, who were each seriously sexually abused by Holtz for periods of four years beginning at age 13

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1 References to information in documents produced to Plaintiffs pursuant to the protective order in this case has been redacted from the public version of this brief. An unredacted sealed version is being supplied to the Judge and to Defendant's counsel. All copies of records referred to in this brief have been filed under seal with permission of the Court and opposing counsel.

2 *Fischer v. Roman Catholic Diocese of Covington*, Boone Circuit Court, Case No. 02-CI-1797.

and whose lives have been dramatically altered a result. It is this intransigence by the Diocese to all the victims of abuse that must be addressed in this class action.

Investigation by Plaintiff's counsel has revealed that pedophiles and sexual predators who were priests of the Diocese are still actively employed within and without the Diocese in positions where they have daily contact with children. (*see* examples, pp. 7-10). This class action is devoted to remedying, by injunctive relief, the negligent and outrageous conduct of the Diocese, obtaining some certainty that its sexual predators are removed from future contact with children, and making certain that all victims of the Diocese's conduct are cared for with the same empathetic concern the Diocese lavished on their sexual abusers. Such relief is practicable only in the class action setting, where the entire group of victims is before the Court and the vast parameters of Defendant's outrageous conduct can be brought from the darkness of secrecy into the light of justice.

Contrary to its recent public relations release expressing concern for victims (*see* pages 12-15 and Ex. 52), the Diocese's Memorandum in Opposition relies on every possible technicality to avoid class-wide relief for victims. While its public relations release and the prior testimony of its officials contain admissions that the complaints of victims are credible and that a substantial of its priests are sexual predators, the Diocese argues in its Memorandum that the complaints of victims are not credible and that it will contest them in "hundreds of mini trials." It denigrates the victims' honest and legitimate prayer for significant injunctive relief by sarcastically referring to it as "sleight of hand." In its effort to avoid much needed injunctive relief, the Diocese argues that, because most of the class members are now adults, they are not at risk of child abuse,

thus injunctive relief will not benefit them. This callous approach to the children presently in the Diocese who are in danger of being molested should not be allowed to stand. Finally, the Diocese makes the incredible claim that it has already implemented most of the proposed reforms sought in this case. Plaintiffs vehemently challenge this claim, because they are aware of sexual predators who are still today employed in positions where they have contact with children (*see* pages 7-10). As more victims come forward, Plaintiffs' counsel learn about additional perpetrators. If the Diocese truly has implemented the relief sought, it should have no objection to agreeing to this relief in the form of an enforceable Court order.

The Diocese's approach to this class action is simply a continuation of its policy, pattern, and practice of arranging secret individual settlements with individual complainants that require silence by the victims.

II. EVIDENCE OF DEFENDANT'S COMMON POLICIES, PATTERNS, AND PRACTICES

On June 23, 2003, Defendant first produced discovery documents regarding complaints it received about the sexual child abuse committed by its agents. There was not sufficient time to review these records before filing Plaintiff's Class Certification Motion on July 3, 2001. Defendant recently made a second production of records on September 5, 2003. Plaintiff's counsel have been able to complete a general review of the approximately 5,000 documents produced in time to refer to that information in this Reply brief. The documents produced, information received from victims, and the privilege log furnished demonstrate that substantial documentation is missing or has

been withheld. This will be the subject of continuing discovery requests and negotiations with opposing counsel.

A. AS PART OF DEFENDANT'S POLICY, PATTERN AND PRACTICE AT ISSUE IN THIS CASE, DEFENDANT CONTINUES TO PLACE PEDOPHILES AND SEXUAL PREDATORS IN POSITIONS THAT ALLOW THEM CONTACT WITH CHILDREN

Emotional distress suffered as a result of child sexual abuse makes it very difficult for victims to voluntarily come forward. (*See* Ex. 57, Affidavit of Dr. James Hawkins) Nevertheless, some victims have overcome their reluctance and have contacted Plaintiff's counsel because they are extremely distressed that their abusers currently hold positions of trust within the Catholic Church where they are afforded contact with children.

In its August 29, 2003 public relations release, issued at a time that coincides with the class certification briefing, the Diocese admits that, over the past 50 years, 30 of its priests abused "one or more" minors. It admits to 158 credible allegations of abuse. (Ex. 53, A Report to the People of the Diocese of Covington, August 29, 2003). The Bishop states, "I can assure you now that, to the best of my knowledge, there is no priest in public ministry in the Diocese of Covington who has abused a minor." (Id.). This statement is incorrect and misleading. The Diocese has consistently over the years sent abusive priests to other Diocese where they have the opportunity to abuse children. Abusive priests are still assigned to work with children within and without the Diocese.

Based on their investigation, Plaintiffs' counsel believe there are more pedophile priests and more victims of Defendant's negligent and outrageous conduct than even the shocking number revealed in Defendant's public relations release. Nor have they all

been removed from the active ministry and from current contact with children. Investigation during the discovery stage of this case, following class certification, will undoubtedly reveal additional abusers and victims. This is especially so if victims can overcome psychological barriers to coming forward and if they understand that their names can be kept confidential. Below, Plaintiffs provide the Court two examples of sexual predators currently assigned to positions of trust, based on the investigation conducted to date.

Victim 23018.17[3] was sexually and psychologically abused by Priest Number 31[4] for a period of four years, beginning when she was 13 years of age. (Exhibit. 50, Sealed Affidavit of Victim 23018.17). She and her mother complained to Diocese officials. Letters in the handwriting of the priest referring to his sexual contact with the victim, are in the possession of Plaintiff's counsel. (*See* Ex. 53). At one point, Priest 31 was to be named as the principal of her school. Instead of refusing to make Priest 31 principal and removing him from contact with children, the Diocese instructed the child to transfer to another school. She was forced to leave the school that she had attended since first grade, and her sexual abuser was made Principal of the School. On September 11, 1980, Victim 23018.17's mother made another complaint in the form of a detailed letter to Bishop William Hughes. Bishop Hughes responded by letter. (Ex. 50, Ex. 53, letters to and from Bishop Hughes). Despite receiving complaints by the victim and her mother, the Diocese invited Priest 31 to be school commencement speaker in 1981. Priest 31 was eventually transferred to other active ministry positions, where he

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[3] A pseudonym has been used to protect the identity of the victim, pursuant to the protective order.

[4] A pseudonym has been used for the identity of this priest in order to protect the identity of the victim, pursuant to the protective order. The identity of the priest is revealed in the sealed affidavit of the victim. The original affidavit, containing the victim's true name, is in the possession of Plaintiff's counsel.

was afforded contact with children. He stalked Victim 23018.17 for the next ten years. Priest 31 remains an active priest today. The Diocese has done nothing to prevent him from being transferred to the following locations during the following years, where he is believed to have had contact with children:[5]

1982:	Ravenna, Ky., St. Elizabeth Church
1986:	Pikeville, Ky., St. Francis Church
1987:	Middlesboro Ky., St. Julian Church
1997:	Morehead, Ky., Church of Jesus Our Savior
1998:	Pikeville, Ky., St. Francis Church
2001:	Salyoroville, Ky., St. Luke Church
2002:	Pikeville, Ky., St. Francis Church and Salyoroville, Ky., St. Luke Church.
2003:	Frankfort, Ky., Good Shepard Parish

Victim 23018.10 was abused for a period of several years by Earl Bierman, who was eventually convicted and incarcerated for sexually abusing children in the early 1990's. The abuse by Bierman began before Victim 23018.10 entered Covington Latin School and continued when he was 11 years old at Covington Latin School. (Ex. 51, Sealed Affidavit of Victim 23018.10). Bierman passed this child on to other pedophile priests, who engaged in improper sexual contact with him and who stalked him. (Id.). These priests included Priest Number 32, Priest Number 33 (who later committed suicide), and Priest Number 34.[6] Victim 23018.10 was routinely fondled, hugged,

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[5] The source of this information is the Official Catholic Directory, Kenedy & Sons, New York, Printers to the Holy Apostolic See.

[6] Pseudonyms have been used for the identity of these priests in order to protect the identity of the victim, pursuant to the protective order. The identity of these priests is revealed in the sealed affidavit of

kissed, whispered to in the most vulgar terms, and his body parts were rubbed. He was taken to parties consisting of priests, where he was the "date" of one of the priests. Other priests and young boys who were their dates were there. Priest 32 engaged in sexual misconduct with Victim 23018.10 and several other boys when he was eleven years old. Thereafter, the victim attempted to resist and Priest 32 stalked him at the school for approximately four years. Because Priest 32 was a highly placed official at the School, he had the power to inflict punishments on the victim, such as preventing him from attending team functions and threatening to expel him. Each time he was rejected by the victim, Priest 32 would intensify his stalking and punishment activities. Upon information and belief, Priest 32 was sent away for treatment on or about 1976. It is unknown whether Priest 32 has remained a priest. He does not appear to be listed in the current Official Catholic Directory. Last fall, Victim 23018.10 saw Priest 32's picture in a school publication where Priest 32 was announced as returning to teach at the Diocese school where Victim 23018.10 was abused. To our knowledge, he is teaching there currently. The Diocese has once again given him access to a captive group of children.

B. DEFENDANT HAS REMOVED SIGNIFICANT DOCUMENTATION OF ITS KNOWLEDGE OF CHILD SEXUAL ABUSE FROM ITS FILES; THUS ITS FILES ARE NOT COMPLETE

Defendant's records produced in discovery do not constitute complete records of child abuse by their agents. Nor has Defendant produced any records of abuse kept by its subsidiaries, such as the Diocesan Children's Home and individual parish churches

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the victim. The original affidavit, containing the victim's true name, is in the possession of Plaintiff's counsel.

and schools. Important records of child sexual abuse have been removed from the Diocese's files.

Fr. Gerald Reinersman, in an affidavit filed in the *Fischer* case, stated that he reviewed the Diocese's files and "the first report of sexual misconduct by Louis Holtz occurred in October 1974, when the mother of Mark Fischer . . . reported to Bishop Ackerman that Louis Holtz engaged in sexual misconduct toward her son.[7] This affidavit was filed in an effort by the Diocese to avoid liability to Mr. Fischer on the ground that the Diocese was not aware of Holtz's sexually abusive conduct prior to 1974. **BEGIN REDACTION**

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Victim 23018.17, referred to on pages 8-9, was sexually and psychologically abused by Priest 31 for a period of four years, beginning when she was 13 years of age. Her mother learned of the abuse by reading letters written to the victim by the priest. The victim complained to a school official and her mother complained to three Diocese officials, including Bishop Hughes. **BEGIN REDACTION**

END REDACTION There can be no question the Diocese received the mother's complaint letter, because Bishop Hughes responded to it. This is a second example of removing critical evidence.

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[7] Defendant's Memorandum in Support of Motion for Protective Order, Ex. A, filed in Fischer v. Roman Catholic Diocese of Covington, Case No. 02-CI-1797, Boone Circuit Court, on March 6, 2003.

The removal of significant evidence of child abuse from the Diocese's files means that its records cannot be relied upon to place a limit on the nature, the time period and the perpetrators of abuse. Furthermore, the records cannot contain information about the numerous victims who have been afraid to come forward and complain. This means that the number of 158 victims and 30 priests set forth in the Diocese's public relations release is an unreasonably low number. Investigation by Plaintiffs' counsel has revealed additional abusers. Further investigation may result in identifying yet more abusers. This important investigation can only occur within this class action, where the total number of potential class members is highly relevant.

B. OVERWHELMING EVIDENCE OF THE COMMON POLICY, PATTERN, AND PRACTICE ALLEGED BY PLAINTIFFS ALREADY EXISTS EVEN THOUGH DISCOVERY JUST BEGUN

Defendant's admissions, in its public statements, in its documents, and in its agents' deposition testimony constitute overwhelming evidence of the alleged common policy, pattern and practice by Defendant as defined on pages 1-2 of this brief.

1. DEFENDANT'S ADMISSIONS

This class action lawsuit has already had a significant salutary effect on the conduct of the Diocese. Within five months of the filing of this lawsuit, the Diocese has finally conducted and published a study, albeit incomplete, if its 50-year history of sexually abusing children. These admissions were long awaited by the many victims of the Diocese. In its August 18, 2003 Report on the History of Sexual Abuse of Minors in the Diocese of Covington, attached to Defendant's August 29, 2003 public relations release, the Diocese makes the following admissions:

- *"Over the past 50 years, there is reasonable cause to believe that 30 out of 372 diocesan priests have sexually abused one or more minors."* (Ex. 52, p. 4).
- *"The Diocese has received 158 allegations against these 30 priests."* (Id.).
- *Twelve sexual abuse incidents reportedly occurred during the decade 1950-1959. Sixty-Eight sexual abuse incidents reportedly occurred during the decade 1960-1969. Sixty-two sexual abuse incidents reportedly occurred during the decade 1970-1979.* (Id.).
- *Prior to 2001, the Diocese failed to report incidents of sexual abuse of minors to the Commonwealth Attorney.* (Id.).
- *From 1950 to 1985, sexual misconduct was treated as a spiritual matter, priests were sent to confession with a penance performed, and the goal was forgiveness and redemption. Priests were returned to the ministry.* (Id.).
- *Since 1989, the Diocese and its insurer have spent only just under one $1,000,000 for legal fees (to avoid compensation to victims) and approximately $2,700,000 in secret settlements with victims.* (Id.). [8]
- *"It is never defensible for . . . institutions to condone, ignore, or abet sexual misbehavior, nor should we blame the victim or withhold our support and assistance."* (Id., p. 5).

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[8] It is unclear whether the payment of almost $1,000,000 in the John Sector case is included in this figure. If the Sector verdict is included in the Diocese payments to victims, then the Diocese has spent more than half of the funds it has spent on victims to pay attorneys to oppose victims' claims. The Diocese did not make public the extraordinary expenditures it has made on behalf of the pedophile priests it continued to employ or transferred to other Dioceses over the 50-year period

- ***"Delayed reporting (of sexual abuse) will not preclude the Diocese from taking remedial action."*** (Id.).
- ***"The damage caused by sexual abuse of minors is devastating and long-lasting."*** (Id.).

Highly placed Diocese officials have admitted that the victims' allegations of sexual abuse are credible and that pedophiles cannot be cured. Reverend Roger Kriege, testified on August 30, 1995 in a deposition in the case of *Molloy v. Roman Catholic Diocese of Covington*, Kenton County, Ky. Circuit Court, Case Nos. 93-CI-1729, 1737 and 1885. Fr. Kriege stated that he was appointed to investigate allegations of sexual abuse. He said, "I've never come across a false allegation yet." (Kriege Deposition, Vol. II, p. 87). "As I said before, I don't think I've disbelieved any victim." (Id., at p. 88). In the case of *Armijo v. Roman Catholic Diocese of Covington*, Second District Court of Bernalillo County, New Mexico, Case. No. CV-94-09086, Bishop William Hughes admitted that "a child molester is not morally fit to be a priest." (Hughes Deposition, p. 81).

Fr. Kriege testified in the *Molloy* deposition that pedophiles cannot be cured. (Kriege Deposition, Vol. II, pp. 81-82). During the trial of *Secter v. Roman Catholic Diocese of Covington*, Kenton Circuit Court, Third Division, Case No. 93-CI-01737, Dr. William Weitzel, a practicing psychiatrist in Lexington, Ky., testified on behalf of the Diocese. On cross examination, Dr. Weitzel admitted the following:

- The term "pedophile" means using a child for sexual gratification. "Pedophile" and "pedophilia" are listed in the 1968 Diagnostic and Statistical Manual of

Mental Disorders, DSM-II, as a Sexual Deviation. Since at least 1960, the field of psychiatry has been aware that there is no recognized cure for pedophilia.

- If the Diocese had asked any reputable psychiatrist, that doctor would have advised them that pedophilia was not curable and that "any psychiatrist would be loathe to predict the future dangerousness of a pedophile." This is the view of the American Psychiatric Association.
- Sexual assault of a minor was recognized as a crime during the 1960's and 1970's, and individuals were sent to prison for that crime.
- The Diocese knew that the sexually abusive conduct of Earl Bierman could result in criminal incarceration. After numerous documented instances of Bierman sexually abusing children, the Diocese went to "great financial expense" to continue providing him assignments within and without the Diocese.

(Ex. 55, DVD of video recording of trial testimony of Dr. Weitzel).

2. THE VATICAN POLICY OF SECRECY REGARDING SEXUAL ABUSE

The hierarchy of the Catholic Church has been instructed by the Vatican at least since 1962 to keep cases of clergy sexual abuse secret. (Ex. 58, Vatican 1962 policy). Upon information and belief, the authenticity of Exhibit 58 has been confirmed by the U.S. Conference of Catholic Bishops. The document initially refers to "the crime of solicitation," which is described as a priest tempting a penitent in relation to a confession, where the priest's object is to solicit or provoke the penitent toward impure and obscene matters, whether by words or gestures, by touch or writing. However, the document later defines "THE WORST CRIME," which is defined as sexual abuse of youths.

The Vatican policy refers to this conduct as an "unspeakable crime." It indicates that one possible response to this unspeakable crime is "to transfer him to another [assignment]." The policy dictates that these matters "be pursued in a most secretive way, and, after they have been defined and given over to execution, they are to be restrained by perpetual silence (Instruction of the Holy Office, February 20, 1867, n. 14), each and everyone pertaining to the tribunal in any way or admitted to knowledge of the matters because of their office, is to observe the strictest . . . secret, which is commonly regarded as a secret of the Holy Office, in all matters and with all persons, under the penalty of excommunication . . ."

Under TITLE V, the policy identifies "THE WORST CRIME": "By the name of worst crime is understood at this point a signification of ***any obscene external deed, gravely sinful, in any way perpetrated*** by a cleric or attempt with a person of his own sex." (Emphasis added). THE WORST CRIME is also defined as: "To have the worst crime, for the penal effects, one must do the equivalent of the following: ***any obscene, external act, gravely sinful, perpetrated in any way by a cleric or attempted by him with youths of either sex*** or with brute animals (bestiality)." The policy incorporates all requirements for the crime of solicitation for the worst crime, including secrecy.

The Vatican policy prescribes a detailed form of oath for secrecy.

Certainly the Vatican policy is a common policy, pattern and practice required of the Defendant.

Diocese records show that **BEGIN REDACTION**

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3. DEFENDANT'S RECORDS CLEARLY REVEAL THE POLICY, PATTERN AND PRACTICE ALLEGED BY PLAINTIFFS

Defendant's records reveal the outrageous pattern set forth on pages 1-2 of this brief. Set forth below are several examples from the approximately 5,000 pages of records produced to Plaintiff's counsel.

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Victim 23018.21 was sexually abused by Priest Number 7, referred to above, a number of times during the years 1959 through 1966, beginning when she was 10 years old. (Ex. 56, Affidavit of Victim 23018.21). Her older brother was also sexually abused by Priest 7 a number of times as a child, beginning when he was 12 years old. (Id.). Victim 23018.21 informed a former Catholic Social Services employee about this when she was 12. (Id.). That individual later informed Diocese officials of Priest 7's conduct. When Priest 7 returned from treatment in the mid 1960's, he began abusing her and her brother again. (Id.). In 1996, she reported the continuing abuse to Priest Number 4, the Chaplain at her high school, who said he would look into the matter. (Id.). Diocese records reveal that **BEGIN REDACTION**

END REDACTION Official Catholic Directory records indicate that Priest 7 remained in the Diocese as an active priest until he died in 1974. This was not the first time the Diocese appointed a sexual predator priest to investigate a sexual predator priest. **BEGIN REDACTION**

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III. LEGAL ARGUMENT

A. THERE ARE UNQUESTIONABLY COMMON ISSUES IN THIS CASE THAT MUST BE ADDRESSED BY INJUNCTIVE RELIEF

As the Court knows, at the class certification stage, Plaintiffs do not have the burden of establishing the merits of their claims. Neither the history nor language of

Rule 23 and its Kentucky counterpart gives the Court authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1033 (N. D. Miss. 1993). Rather, the only question presented is whether the class that plaintiffs propose satisfies Rule 23 requirements. In resolving this inquiry, the Court should accept the Complaint allegations as true. As Judge Friendly observed, "[t]he hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies." *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982), cert. denied, *Lewy v. Weinberger*, 464 U.S. 818 (1983).

The commonality test "is qualitative rather than quantitative, that is, ***there need be only a single issue common to all members of the class.***" *American Medical Systems*, 75 F.3d at 1080, citing Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS-ACTIONS, § 3.10 at 3-50. (Emphasis added). "***The commonality test is met when there at least one issue whose resolution will affect all or a significant number of putative class members.***" *Fallick v. Nationwide Mutual Insurance Company*, 162 F.3d 401, 424 (6th Cir. 1998), quoting *Forbush v. JCPenney Company, Inc.*, 994 F.2d 1101 (5th Cir. 1993); *Sterling Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988). (Emphasis added)

Where a common question exists, "the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 770-01 (1979). The defendant's actions need not affect each

class member in the same manner in order for those actions to form the basis of a common issue. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal. 1994) (citation omitted); *Butler v. Home Depot, Inc.*, 1996 WL 421436, Slip Opinion, p. 2 (N.D.Cal.1996).

Kentucky Rule 23.02(b) parallels Federal Rule 23(b) in that both subdivisions require that common issues exist. Kentucky Rule 23.02(c) parallel's Federal Rule 23(c) by requiring that common issues predominate over individual issues. *American Medical Systems*, 75 F.3d at 1084. The inquiry in regard to Rule 23.02(c) is mainly a pragmatic one: do the common issues justify a common adjudication? 7A Wright, Miller & Kane § 1778, p. 528. The threshold of predomination is not high. In order to predominate, common issues must constitute a significant part of the individual cases. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986). Where resolution of the common issues will significantly advance "the resolution of the underlying hundreds of cases," id., the common issues predominate.

In determining whether common questions predominate, it is clear that the Court's inquiry should be directed primarily toward issues of liability, not damages. *Mularkey v. Holsum Bakery, Inc.*, 120 F.R.D. 118, 122 (D. Ariz. 1988); *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 528, 534-35 (S.D. Fla. 1986). On this question, ***"[t]he existence of a common plan, pursuant to which a common course of conduct occurred, is a class issue."*** *Bryan v. Amrep Corp.*, 429 F. Supp. 313, 319 (S.D.N.Y. 1977). (Emphasis added).

1. THE QUESTION WHETHER THE DIOCESE ENGAGED IN THE POLICIES, PATTERNS AND PRACTICES ALLEGED PREDOMINATES IN THIS CASE

In this case, there can be no question that there are common issues and that these common issues predominate. Plaintiffs contend, and have submitted substantial evidence to support their contention, that the Diocese had a common policy, pattern and practice, as defined on pages 1-2 of this brief. Defendant's only challenge to this allegation is that its policies were implemented by different priests and Bishops over different periods of time. This statement of the obvious, however, neither negates the existence of a common policy followed by a succession of officials nor eliminates the common issue.

Policies are created by organizations to be followed by various officials over periods of time. A common course of conduct can evidence the existence of a policy that is being followed by an organization. Plaintiffs have alleged, and there is substantial evidence to support their allegation, that the course of conduct of the Diocese, as exemplified by their records, their admissions, and by the 1962 Vatican policy, demonstrates consistent policies, patterns and practices over an approximately 50-year period. The policy of secrecy with respect to records of pedophile priests abusing children continues to this day. For the purposes of class certification, however, Plaintiffs do not have the burden of proving such a course of conduct existed. It is sufficient if the existence of the course of conduct alleged is a common issue. There can really be no dispute that ***the question whether there existed consistent policies, patterns, and practices as described by Plaintiffs is a common question of fact in this case, and that question "predominates" this class action litigation.***

2. CLASS ACTION CERTIFICATION IS VERY MANAGEABLE AND WILL AVOID NUMEROUS INDIVIDUAL TRIALS

Defendant's claim that class certification would require hundreds of individual mini trials is simply wrong. This will be the result if the class is not certified. Defendant's claim is a red herring introduced in an effort to avoid its responsibility to compensate all of its victims and to avoid much needed injunctive relief. Despite its previous admissions contained in its pronouncements in the news media, in legal depositions and in court trials that the allegations of the victims are credible, Defendant now states that it has the due process right to contest the credibility of the victims' allegations.

If the Diocese intends to challenge the credibility of its own parishioners who were childhood victims of sexual abuse by its priests, so be it. However, it will first have to establish that the numerous admissions of its officials do not already prove that these victims were abused by Diocese priests. Plaintiffs believe that they will be able to produce substantial evidence of Defendant's admissions to establish that the class members were abused by their priests and that there need be no individual inquiries as to liability.

Assuming, arguendo, that the Diocese can establish its previous admissions are not trustworthy, admissible, or binding, it is still not necessary to have individual inquiries into each instance of sexual abuse in this class action. The Court has the right to bifurcate the common issues in this case, certify them, and try them separately. Rule 23.04 provides that the Court may make appropriate orders determining the course of proceedings or prescribing measures to prevent undue repetition or complication. A class action should not be found unmanageable without first exploring the available

procedural devices, such as bifurcating liability and damages issues. *Robinson v. Metro North Commuter Railroad Co.*, 267 F.3d 147, 168 (2nd Cir. 2001 (Citations omitted). Litigating the common question issues in a first phase for the class as a whole reduces the range of issues in dispute and promotes judicial economy. If the defendant succeeds at this phase and the jury finds no common policy, pattern, or practice, then the class action case ends. If the jury does find that the Diocese engaged in the alleged course of conduct, the remaining issues and evidence relating to individual damages are substantially narrowed. Id. (Citation omitted). "At those stages of the case where the interests of class members are essentially identical, the due process rights of absent class members are ensured by adequate class representation alone." *Robinson*, 267 F.3d at 167, n.10, citing *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 846 (1999) (other citation omitted). Thus, this first phase of the case is clearly appropriate for Rule 23.02(b) class treatment. *Id.* at n.12.

In discrimination cases, the United States Supreme Court has ruled that different categories of discrimination victims can be combined in the same class ***if they are affected by the same discriminatory practices***. "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159, n. 15 (1982). This class includes employees in various departments supervised by different supervisors. Id.

Trial judges have commonly bifurcated issues and tried them, even before different juries. Sometimes damages issues are tried before liability issues to encourage settlement and shortening of the trial. "This severance procedure is enshrined as a general American policy in countless statutes, rules, casebooks, hornbooks and treatises." *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 25 (E.D.N.Y. 2001) (citations omitted).[9]

Kentucky Rule 42.02 mirrors Federal Rule 42(b). Both rules encourage severing issues for trial in successive phases, with plaintiffs having to survive each step in order to progress. *See In re Bendectin Litigation*, 857 F.2d 290, 307-09 (6th Cir. 1988). Federal Rule 23(c)(4)(A), identical to Kentucky Rule 23.03(4), was added in 1966 to meet any potential difficulty with severances in class actions. Rule 23(c)(4)(A) advisory committee notes (1966). It allows certification of particular issues in a manner that ' "treat[s] common things in common and distinguish[es] the distinguishable." ' *Simon*, 200 F.R.D. at 29-33 (citations omitted). Kentucky Rule 23.03(4) and the Manual for Complex Litigation (3d ed. 1995) encourage trial judges to employ bifurcation to facilitate Rule 23's purposes. *Id.* (citations omitted).

Severing liability from damages is a simple bifurcation procedure the Sixth Circuit Court of Appeals has endorsed in mass tort class actions. ***"No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.*** Consequently, 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." *In re American*

[9] Judge Weinstein traces the history of bifurcation at 200 F.R.D. 25-27.

Medical Systems, 75 F.3d 1069, 1084 (6th Cir. 1996), quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988) (Emphasis added).

In this case, causation issues need not be tried separately. The Diocese's own records and admissions will demonstrate that its common policies, patterns and practices caused children in the Diocese to be subjected to sexual abuse. This is also a common fact question that may be tried in the first phase. If the jury finds that the Diocese's common course of conduct did not cause child abuse to the victims, then the case will end.

Damages may also be tried as a common question. As the affidavit of Dr. James Hawkins (Ex. 57) demonstrates, victims of pedophiles who have experienced a childhood encounter of a sexual nature will typically have similar psychological reactions. These reactions include long-range effects on the quality of their personal adjustment, on the quality of their interpersonal relationships, and serious emotional problems, including Post Traumatic Stress Disorder. There will be no question in this case that all victims of the Diocese's policies suffer emotional distress. No one would seriously contend that children who were sexually abused by trusted priests did not suffer some form of emotional distress.

The federal courts have developed well-defined procedures for certifying and managing class actions based on the Supreme Court's model in *Teamsters*, *See* 431 U.S. at 360, and the Sixth Circuit's model in *Sterling v. Velsicol Chem. Corp.*, 855 F.2d at 1196-97. The trial typically proceeds in two phases - the liability phase and the remedial phase. Where the plaintiffs seek individual relief in addition to injunctive relief, the second phase determines the consequences to individual class members. *Id.*

In *Day v. NLO*, 851 F. Supp. 869, 883 (S.D. Ohio 1994), the court permitted a class-wide verdict on punitive damages for a (b)(2) class, because punitive damages are not measured by the individual injury suffered, but solely by the defendant's conduct common to the class. The Court established a procedure chosen to take maximum advantage of the class action format, reserving for individual determination those issues too individualized for disposition on a class wide basis. *Id.* at 876.

Plaintiffs propose that this litigation be bifurcated into stage I (class-wide liability, equitable relief, and punitive damages) and stage II (compensatory damages). Mass tort cases and employment discrimination class actions have commonly been tried in this manner under Rule 42(b). See *Teamsters*, 431 U.S. 324 (1977). See also *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-757 (1976); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d at 1196-97; MANUAL FOR COMPLEX LITIGATION (3rd Edition) § 33.54, p. 354 (1995) and cases cited therein.

Bifurcation can be done with the same jury or with different juries. Bifurcation with different juries does not violate the Seventh Amendment The Seventh Amendment was drafted to limit the ability of the courts to overturn a jury's findings of fact, not to prevent different juries from considering different issues, as the trial court held. *Simon*, 200 F.R.D. at 33-36. *See also Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931); *Bendectin*, 857 F.2d at 307-09 (6th Cir. 1988) (Seventh Amendment is not violated where consolidated actions are trifurcated into causation, liability, and damages phases); *In re "Agent Orange" Litigation*, 818 F.2d 145, 154 (2d Cir. 1987). The use of a different jury to award damages commonly occurs when an appellate court reverses a damages award and remands for a retrial of the damages issue.

Liability and compensatory damages issues are not inextricably intertwined in this case. The common policy, pattern and practice of the Diocese is not proven by evidence of individual instances of sexual abuse, but by evidence of the Defendant's awareness of the problem, tolerance of it, and failure to act. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S 867, 876 (1984). By the same token, proof of individual emotional distress damages will not involve common policy, pattern and practice evidence. A Special Master can be appointed to assess damages, thus making that phase of the case more efficient and private. To the extent that either party demands a jury trial on emotional distress damages, however, there is no Seventh Amendment prohibition to having different juries assess such damages.

3. TYPICALITY AND ADEQUACY OF REPRESENTATION EXIST IN THIS CASE

Defendant argues that the class representatives do not meet typicality requirements because they were abused in different ways by different priests. This argument misses the entire point of the class allegations in this case and is an incorrect view of the law. "[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 if his or her claims are based on the same legal theory," despite substantial factual differences between class members' claims. *In re American Medical Systems*, 75 F.3d at 1082.). "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." 75 F.3d at 1082.

The commonality and typicality requirements of the class certification rules tend to merge. Both serve as guideposts for determining whether, under the particular circumstances, maintenance of the Plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements, therefore, also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of counsel and conflicts of interests. *Falcon*, 457 U.S. at 157 n.13; *Kurczi v Eli Lilly & Company*, 160 F.R.D. 667, 671 (N.D. Ohio 1995).

The test for typicality, like the test for commonality, is not demanding. (Citation omitted). Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent. *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963, 976 (5th Cir.1996).

Plaintiffs share a common interest with class members - they were all affected by the same policies, patterns and practices and they all seek the same relief. Each class representative contends that his or her injuries were caused by the common policies, patterns and practices of the Defendant. In the event the class members in this case were to proceed individually in numerous parallel actions, they would advance legal and remedial theories identical to those advanced by the named Plaintiffs. Plaintiffs and prospective class members are not suing the pedophile priests. Each Plaintiff will have to prove essentially the same case. Because all class members will obtain a direct benefit from the success of this lawsuit, the difference in the status or in the degree of abuse suffered by each class member is irrelevant. *See Fallick v.*

Nationwide Mutual Insurance Co., 162 F.3d 410, 423-24 (6th Cir. 1998); *Bittinger v. Tecumseh Products Company*, 123 F.3d 877 (6th Cir. 1997).

For the same reasons, there is no conflict between the Plaintiffs and the class members. They all rely on the theory that the common policy, pattern and practice of the Diocese has caused their injuries and they all seek common injunctive relief and compensatory damages. Before a trial court may deny certification, it must find that the conflict "is more than merely speculative or hypothetical." 5 *Moore's Federal Practice*, § 23.25[4][b][ii] at 23-119. *See also Rutherford v. City of Cleveland*, 137 F.3d 905, 909-10 (6th Cir. 1998) (denying certification only after finding that "there was in fact a conflict of interest."). If for any reason a Plaintiff became an inadequate class representative or an actual conflict was found to exist, that person could be removed and a new Plaintiff substituted. There is no reason to deny class certification on this basis. The fact that a hypothetical victim may chose to pursue his or her claim individually, or chose not to pursue a claim at all is no basis for denying class certification. Plaintiffs recommend that the Court issue appropriate notice and permit prospective class members to opt out of this case in order to protect anyone who may choose not to be part of this class action.

The class action device also provides a real possibility for guaranteeing privacy to the victims who are afraid to come forward. One symptom of Post Traumatic Stress Disorder is to avoid becoming involved in matters that concern the traumatic event and to avoid activities that arouse recollections of it. (Ex. 57, Affidavit of Dr. Hawkins). Names of victims can be kept confidential in the liability phase of this case, because individual instances of abuse are not at issue. At the appropriate time, Plaintiffs will

offer the Court a plan that can guarantee privacy to victims in the damages phase of this case as well. It is extremely unlikely, if not impossible, to guarantee privacy to victims who must bring individual actions.

The Diocese wants the Court to require victims to file individual actions because it knows it will be difficult for them to come forward due to Post Traumatic Stress Disorder symptoms and fear of embarrassment. If individual actions are required, the Diocese will be able to avoid compensating many victims and will be entirely able to avoid injunctive relief.

4. INJUNCTIVE RELIEF IS A NECESSARY COMPONENT OF ANY REMEDY IN THIS CASE

The well-documented failure of the Diocese to properly screen its priests and protect its child parishioners from sexual abuse over a period of about fifty years establishes why injunctive relief is absolutely necessary. The Diocese's argument that Plaintiffs have no standing to request injunctive relief because they are now adults and are in no danger of child abuse is callous approach to the very serious problem presented by its outrageous conduct. It is also incorrect as a matter of law. Courts typically apply injunctive relief even though the Plaintiff is no longer subject to the challenged conduct. *See, e.g., Amchem Products v. Windsor*, 521 U.S. 591 (1997). For example, injunctive relief is commonly granted to remedy discriminatory practices of an employer even where the Plaintiff is no longer employed by the defendant. *Nash v. City of Oakwood*, 94 F.R.D. 83 (S.D. Ohio 1982).

5. DEFENDANT'S ARGUMENT THAT NUMEROSITY DOES NOT EXIST IS FRIVOLOUS

Defendant's claim that numerosity does not exist in the face of its admission of 158 victims of 30 priest is patently ridiculous. As the Court knows, no strict numerical test exists to determine when a class is so numerous that joinder is impracticable. *In re American Medical Systems,* 75 F.3d 1069, 1079 (6th Cir. 1996). "When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." Id. As few as 23 class members satisfy the numerosity requirement. *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 F.R.D. 506 (S.D. Ohio 1985). Kentucky courts have found that 74 members is sufficient. *Keeton v. City of Ashland*, Ky. App., 833 S.W.2d 894, 895 (1994).

6. THE COURT SHOULD ISSUE A NOTICE TO THE CLASS

Although not required to do so when certifying a 23.02(b) class, Plaintiffs request that the Court issue a notice regarding class certification to all potential class members for the protection of the members of the class and for the fair conduct of the action. See Rule 23.04. Giving notice will help protect the members of the class and allow them to choose whether to opt out of this case in order to pursue individual claims or not to pursue any claim at all. Notice will also operate in Defendant's favor; because it may bring to light conflicting interests within the class or dissatisfaction with the adequacy of representation. "Notice will lessen the vulnerability of the final judgment to collateral attack by class members." Manual for Complex Litigation, Third § 30.21 (1995), citing 7A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, §§ 1789, 1793 (Supp. 1993).

Plaintiffs' counsel will submit a proposed notice to the Court at the appropriate time and a plan for service and publication nationally.

IV. CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request the Court to certify this case as a class action and to issue notice to all prospective class members, both by individual service and by publication locally and nationally.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of *Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification* was served via hand delivery to: Mark D. Guilfoyle, Esq., Deters, Benzinger & LaVelle, P.S.C., 125 East Court Street, Suite 950, Cincinnati, OH 45202; and via hand delivery to Carrie K. Huff, Mayer, Brown, Rowe & Maw, LLP, c/o Mark D. Guilfoyle, Esq., Deters, Benzinger & LaVelle, P.S.C., 125 East Court Street, Suite 950, Cincinnati, OH 45202, at the request of Mr. Guilfoyle, this 17th day of September, 2003.

Robert A. Steinberg