**COMMONWEALTH OF KENTUCKY**
**BOONE CIRCUIT COURT**
**CASE NO: 03-CI-181**
**JUDGE: JOHN POTTER**

JOHN DOE, et al., PLAINTIFFS

vs.

ROMAN CATHOLIC DIOCESE OF COVINGTON, et al., DEFENDANTS

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS LISTED ON DEFENDANTS' PRIVILEGE LOG REDACTED VERSION**

Now come Plaintiffs, pursuant to CR 37, and respectfully move the Court for an order compelling Defendants to produce certain relevant documents that are improperly claimed to be privileged. These documents consist of settlement agreements with victims of child sexual abuse caused by the Diocese and documents related thereto as well as documents Defendants described as "psychotherapist reports" of priests and victims and documents related thereto. The documents at issue were created during the period 1956 to the present.

Defendants have listed in their privilege log certain records described as confidential settlement agreements and documents regarding settlement agreements, relating to 22 victims of child sexual abuse caused by the Diocese. Defendants have also listed in their privilege log 84 documents described as "psychotherapist reports" relating to 19 priests who sexually abused children as well as documents relating to the alleged psychotherapist reports, and 61 documents described as "psychotherapist reports" relating to 43 child sexual abuse victims as well as documents relating to the alleged psychotherapist

reports. Plaintiffs believe that additional settlement agreements and mental evaluations of sexual predators exist, which have not been produced and have not been described in Defendants' privilege log.

Defendants have refused to produce these documents despite the existence of a Protective Order that completely protects the confidentiality of the documents by requiring that they are seen by attorneys only and that identifying information about victims, including names, are redacted. Defendants have failed to provide the necessary information in their privilege log to establish that the documents at issue are protected by any recognized privilege. Furthermore, Defendants' refusal to produce the documents at issue is inconsistent with Defendants' production of documents, pursuant to the Protective Order, that contain information equally or more private than those identified on Defendants' privilege log. Defendant has produced approximately 10,000 pages of personnel files and Canon 489 files. Canon 489 files are the most secret files of the Diocese. These files contain the names of numerous priests who sexually abused children in the Diocese. They also contain complaints by victims and their families. The identities of the victims have been redacted, pursuant to the Protective Order. There is no reason that the records identified on Defendants' privilege log are deserving of more protection than the confidential records already produced.

The documents at issue contain highly relevant information, which would tend to establish the knowledge the Diocese possessed regarding the extent of the predatory and sexually abusive activities of its priests and about the very

serious harm being done to children within the Diocese; information relating to Plaintiffs' Complaint allegations regarding settlement agreements induced by misrepresentation;[1] and crucial evidence that would aid in establishing the length, breadth, and nature of the Diocese's long-term pattern of illegal conduct that caused severe harm to Class Members.

Defendant seeks to create a legal privilege for documents demonstrating its participation in child sexual abuse by its most trusted religious officials. There is no policy in this state that protects a conspiracy of silence in the aftermath of child sexual abuse. To the contrary, the recognition of such a privilege would contravene Kentucky's long standing policy against childhood sexual abuse, which is reflected in numerous statutes and in State agencies created to support this policy.[2] Furthermore, no legal privilege applies to the discovery of settlement documents.[3] The documents relating to mental evaluations of sexual predators and victims do not qualify for the psychotherapist-patient privilege.[4] Plaintiffs respectfully request the Court to rule that the records sought in this motion are not protected by privilege and that they must be produced promptly pursuant to the existing Protective Order.

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1 *See* Fourth Amended Complaint, ¶ 38, p. 20.
2 See detailed discussion *infra*, pages 19-20.
3 See detailed discussion *infra*, pages 22-29.
4 See detailed discussion *infra*, pages 30-40.

## MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

### I. PROCEDURAL BACKGROUND

Plaintiffs issued their First Set of Document Requests on February 20, 2003. (Exhibit A). Included were document requests for the following:

> All documents that refer in any way to any priest who was the subject of a complaint regarding engaging in sexual talk or sexual conduct of any kind with any minor, any parishioner, or any employee during the time period. (Request 1);
>
> All documents that refer in any way to any priest who was the subject of a complaint regarding engaging in consuming alcoholic beverages with a minor during the time period. (Request 2);
>
> All documents that refer or relate in any way to Greg S. Harvey or any member of his family. (Request 3). (Newspaper reports indicate that Mr. Harvey settled his claim with the Diocese).
>
> All documents that refer or relate in any way to Maria Rebecca Trout Caddell or any member of her family. (Request 4). (Newspaper reports indicate that Ms. Caddell settled her claim with the Diocese).
>
> All documents that refer or relate to any complaint of any kind of sexual misconduct on the part of anyone employed by, or assigned to the Diocese, where the complaint was asserted on or after January 1, 1958. (Request 7);
>
> All records of any disciplinary action of any kind or degree taken against any employee of the Diocese, or other person assigned to work in the Diocese, where the disciplinary action relates in any way to sexual misconduct or other mistreatment of minors, parishioners, or employees, during the time period. (Request 10);
>
> All records relating in any way to arranging or providing treatment therapy or counseling to or for any priest, teacher or laity employed by or assigned to the Diocese during the time period where the treatment, therapy or counseling related in any way to any claim or assertion of sexual misconduct with an adult or minor. (Request 14);
>
> All records referring or relating to any investigation conducted during the time period by or on behalf of the Diocese relating in any way to sexual misconduct of priests, religious or laity who are or were employed by or assigned to the Diocese. (Request 16);

All records contained in the Canon 489 Files or other secret archive files relating in any way to sexual misconduct by priests or individuals employed by or assigned to the Diocese. (Request 19);

(Exhibit A).

Plaintiffs issued their Second Set of Document Requests on October 24, 2003. (Exhibit B). Included were document requests for the following:

All records, including personnel records, seminary records, church records, Boy Scout records, public relations releases, and records of each assignment, including assignment for treatment or sick leave or sabbatical leave, relating to the following individuals: (specific priests identified thereafter). (Request 1).

Plaintiffs provided the following instruction in the event Defendants withheld records on a claim or privilege:

6. If you claim any privilege for any communication or document, please provide a detailed privilege log that contains at least the following information for each communication or document that you have withheld:

a. the date of the communication or document and any different date when it was prepared;

b. each author of the communication or document;

c. each person who prepared or participated in the preparation of the communication or document;

d. each person who received the communication or document;

e. each person to whom the communication or document or a copy thereof was sent, and each actual recipient of the communication or document or a copy thereof;

f. the present location of the communication or document and all copies thereof;

g. each person having custody or control of the communication or document and all copies thereof;

h. the subject matter of the communication or document;

i. the medium of the communication or document (e.g., oral, paper or electronic), the type of communication or document (e.g., telephone conversation, letter, memorandum, presentation, etc.), the length of the communication or document, as well as the existence of any attachments, if they are also being withheld under a claim of privilege;

j the specific privilege asserted or other particular reason you rely upon for not producing the communication or document or information; and

k. sufficient further information concerning the communication or document and the circumstances thereof to explain the claim of privilege and to permit the Court to adjudicate the validity of your claim.

(Exhibit A, Plaintiffs' First Set of Document Requests, pp. 7-8; Exhibit B, Plaintiffs Second Set of Document Requests, pp. 8-9). Despite the detailed instructions, Defendants did not provide this information on their privilege log.

In response to these requests, Defendants produced several privilege logs over a period of time. On March 16, 2004, Defendants produced their consolidated privilege log (Exhibit C), which allegedly included all items on previous privilege logs. Defendant claimed that that 22 documents, described as confidential settlement agreements with victims, and 84 documents, described as psychotherapist reports, relating to 19 of its priests and letters relating to these reports, were privileged; that 61 documents, described as psychotherapist reports, relating to 43 sexual abuse victims, were privileged. Defendant failed to provide the following information, which is necessary to establish a privilege:

1. each author of the communication or document;
2. each person who prepared or participated in the preparation of the communication or document;
3. each person who received the communication or document;
4. each person to whom the communication or document or a copy thereof was sent, and each actual recipient of the communication or document or a copy thereof;
5. the present location of the communication or document and all copies thereof;
6. each person having custody or control of the communication or document and all copies thereof;
7. the medium of the communication or document (e.g., oral, paper or electronic), the type of communication or document (e.g., telephone conversation, letter, memorandum, presentation, etc.), the length of the communication or document, as well as the existence of any attachments, if they are also being withheld under a claim of privilege;

8. the specific privilege asserted or other particular reason you rely upon for not producing the communication or document or information; and

9. sufficient further information concerning the communication or document and the circumstances thereof to explain the claim of privilege and to permit the Court to adjudicate the validity of your claim.

Therefore, the privilege log is inadequate to establish a privilege and seems designed to obstruct discovery rather than assist the parties and the Court in resolving this discovery dispute. Defendants have failed to meet their burden to demonstrate that a privilege exists.

Pursuant to the Court's instruction in its February 6, 2004 Order, the parties discussed the documents at issue. Defendants' counsel informed Class Counsel that the documents described as psychotherapy records contained substantive information and were not merely invoices. They also advised that they believed each victim consented to the Diocese receiving their mental evaluations. Defense counsel would not, however, reveal to Class Counsel whether priests had consented to the Diocese obtaining their mental evaluations. On February 20, 2004, defense counsel produced 10 consent records of victims. (*See* Exhibit D). They advised that one consent form signed by a priest prohibited "re-disclosure" to additional third parties, but they did not identify the priest nor did they provide the document. (Id.). No other consent records prohibited disclosure to other third parties. No other information, including the information contained in the discovery instructions set forth on pages 4 and 5 above, was provided by defense counsel. As a result, it cannot be determined whether a qualified psychotherapist authored any of the records described as "psychotherapist reports."

## II. FACTUAL BACKGROUND

A statement issued by the Diocese on August 29, 2003, entitled, "A Report On The History of Sexual Abuse Of Minors In The Diocese of Covington" (the "First Report"), provides an overview of the manner in which the Diocese came into possession of counseling records for priests and abuse victims. (Exhibit E). Page 4A of the First Report contains a section discussing the "history" of sexual abuse by Covington's priests. In this section, the Diocese reports that, "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. The Diocese has received 158 allegations against these 30 priests. . . . 9 are deceased and 4 are laicized. The other 17 have all been permanently removed from active ministry." Although the number of abusive priests and abuse victims is actually much higher,[5] it is significant that the Diocese, which uses its access to counseling records of victims and clergy to verify allegations of abuse, admits that there is "reasonable cause to believe" that (in both the First and Second Reports) nearly 10% of its priests have sexually abused children. This establishes the great risk children within the Diocese were exposed to during the time period of this case.

The Report's "Perspective" is followed by a review of the Diocese's past "Procedures" for dealing with priests who sexually abuse children. It is reported:

> The priest was sent for treatment at a residential facility or required to attend psychological counseling. Oftentimes, the recommendation from the mental health professionals was that the problem had been

[5] On February 20, 2004, the Diocese issued an "update" (the Second Report), identifying 205 allegations against 35 priests. (Exhibit F). Class Counsel's investigation to date has obtained credible allegations of abuse against 57 priests and other religious, despite Class Counsel being hampered by their inability to obtain certain information in the possession of the Diocese.

> satisfactorily addressed and that the priest could safely be returned to ministry with appropriate monitoring and psychological and spiritual support." (Exhibit E., p. 4).

Thus, the Diocese referred to the substance of reports from mental health professionals in this public release. Plaintiffs should be permitted to view these reports to test the veracity of the Diocese's claims.

A close reading of the Report shows that there was no change in the procedures for dealing with priests accused of abuse until some point after 1993, when, reportedly, the Covington Diocese formed a "Diocesan Review Board" to "review and recommend Diocesan programs relating to sexual misconduct and serve as an independent review committee." Even then, there is no indication that the actual response to accusations of abuse (*i.e.*, reporting priests who abused minors to authorities as required by law rather than just moving them from parish to parish) was changed at any time prior to August 18, 2003, the date of the Report. (Id.). In the section headed, "The Present," it is apparent that the Diocese is ***for the first time*** directing "full cooperation with civil authorities," as well as mandating background checks and similar changes in Diocese procedures to protect children from abuse by clergy.

The devastating consequences of the Diocese's historical procedure for dealing with allegations of child sexual abuse by its priests is illustrated time and again in the thousands of confidential documents produced in discovery. The key role played by the secret settlement agreements and the mental evaluation documents at issue herein is demonstrated by the following typical example of

the conduct of the Diocese regarding the child sexual abuse allegations against one of its priests, Fr. James Kleman.[6]

**BEGIN REDACTED PORTION OF BRIEF[7]**

**END REDACTED PORTION**

Fr. Kleman's assignment history shows that in 1955 he became the Kenton County chaplain for the Boy Scouts, and then Assistant Diocesan chaplain for the Boy Scouts. By 1957, he was Diocesan chaplain for the Boy Scouts, with continued access to and control over many young boys. It is

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[6] Records regarding the Diocese's complicity in the many occurrences of child sexual abuse by Fr. Kleman have been produced under seal as Exhibit 7 attached to Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification. The references below are to Bates numbers of documents contained in Exhibit 7 to Plaintiffs' Reply Brief.

[7] References to confidential records received pursuant to the Protective Order are redacted in the public version of this brief. A complete unredacted version will be supplied to the Judge and to opposing counsel.

obvious from additional records produced by the Diocese regarding Fr. Kleman (discussed below), that it is likely that he was abusing children during his entire tenure with the Boy Scouts, although no documentation has yet been produced by the Diocese for that time period. Such information may be contained in the documents sought by this motion.

**BEGIN REDACTED PORTION**

**END REDACTED PORTION**

The Diocesan procedure for responding to allegations of child sexual abuse by swearing the victim's family to silence is mandated by church policy. Attached as Exhibit G is a 1962 restatement of church policy regarding the response to what is called, "the worst crime," *i.e.* child sexual abuse by a priest. The document reveals the supreme importance the church places upon secrecy and avoidance of public scandal when allegations of sexual abuse are levied against its own. Pursuant to church policy, even the accusers are required to give an oath of secrecy, and those investigating the accusations are required to obtain from the accusers such an oath or risk excommunication. (Ex. G, ¶¶ 11, 13).

BEGIN REDACTED PORTION

**END REDACTED PORTION**

Once back in Covington, Fr. Kleman continued to sexually abuse young children in his ministry. He gained access to Victim 23018.21 and her brother and continued his past abuse of both of them.[8] To date, the Diocese has not produced documentation confirming its knowledge of additional complaints of sexual abuse against Fr. Kleman after he was permitted to return to ministry in Covington. However, such documentation is believed to exist and would most likely be found in the records sought in the instant motion.

Fr. Kleman was moved to St. Elizabeth Hospital at a time corresponding to Victim 23018.21's persistent complaints. The Diocese has in its possession records from St. Elizabeth's Hospital pertaining to Fr. Kleman, but has refused to produce them. These records (document CD 002001-2002) are listed as number 22 on page two of Defendants' July 1, 2003 Privilege Log, and appear to have been inadvertently omitted from Exhibit C. In any event, Defendants have

[8] *See* Exhibit J, Affidavit of Victim 23018.21, who is Class Representative "Frieda Foe" in the Fourth Amended Complaint. Frieda Foe's affidavit is also attached as Exhibit 56 to Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification.

refused to produce it. Based upon the evidence set forth above, it can fairly be assumed that the records withheld by the Diocese pertain to Kleman's continued use of his ministry to prey upon children.

Defendants have produced to Class Counsel some counseling records for priests and records relating to counseling of priests. These records reveal additional victims, as well as other priests who are complicit in covering up the abuse. Some records contain warnings by doctors that the abusive priest should not have access to potential victims. Counselors have also recorded their opinion that certain abusive priests tend to minimize the number of children they victimized. Such evidence is important to the proof of Plaintiffs' allegations.

In addition to the counseling records regarding its clergy, the Diocese also came into possession of counseling records of child victims of clergy abuse. As noted above, according to church policy, Bishops and priests investigating allegations of child sexual abuse, referred to as "the worst crime," are required to obtain an oath of secrecy from the accusers. (Exhibit G). The penalty for failure to fulfill this obligation is excommunication. (Id.). Accordingly, over the course of the last 50 years, the Diocese has engaged in a course of conduct that consists of inducing families and victims to remain silent about clergy sexual abuse of minors, often offering "counseling" with church personnel, church-sponsored support groups and hand-picked counselors for which it paid and whom it monitored.[9] It is apparent that counseling records from child sexual abuse

[9] According to the Second Report, from 1989 to the present, the Diocese has spent $771,005 "for counseling" of priests and victims. (Exhibit F).

victims were provided to the Diocese during settlement negotiations and litigation. (Id.).

## III. LEGAL ARGUMENT

### A. KENTUCKY FAVORS BROAD DISCOVERY

Discovery in Kentucky is broad and open. Under CR 26.02(1):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Kentucky's leading commentator has written that "[t[he discovery rules have been interpreted liberally to allow maximum discovery. ... 'Relevant' is to be interpreted very broadly to mean matter relevant to anything which is or may become an issue in the litigation. ... Discovery requests are to be interpreted liberally." Phillips' Kentucky Practice, Fifth Edition, West Publishing Co. 1995, pp. 468-469, and cases cited therein.

Kentucky Rule of Evidence 501 reflects this philosophy of liberal discovery and the restricted application of claimed privileges by its provision that no person may refuse to provide or produce evidence, objects or writings unless specifically allowed by statute, Constitution or court rules. "KRE 501 operates to reinforce the fundamental notion that there is a right to every person's evidence and to compulsory process for the production of evidence when needed." Robert G. Lawson, Kentucky Evidence Law Handbook § 5.05, at 226 (3d ed. 1993). The Kentucky Supreme Court has noted "the importance of satisfying the 'need' for discovery information if a law suit is to be decided as a search for the truth, and

the policy of the law to accommodate such need if the courts can do so . . ." *Riggs v. Schroering*, Ky., 822 S.W.2d 414 (1991).

## B. KENTUCKY DOES NOT FAVOR APPLICATION OF PRIVILEGES TO CONCEAL RELEVANT EVIDENCE

The United States Supreme Court has determined that "privileges . . . must be strictly construed and accepted only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 48, 50 (1980). Kentucky law mirrors that of the United States Supreme Court regarding the narrow application of privileges. Our Supreme Court has held that claims of privilege are strictly scrutinized and the burden of proving that a privilege applies rests on the party asserting it. *Sisters of Charity Health Sys., Inc. v. Raikes*, Ky., 984 S.W.2d 464, (1998), citing Robert G. Lawson, Kentucky Evidence Law Handbook § 5.05, at 229 (3d. ed. 1993); *see also Shobe v. EPI*, Ky., 815 S.W. 2d 395 (1991); *Futrell v. Shadoan*, Ky., 828 S.W.2d 649 (1992).

Broad claims of privilege are disfavored when balanced against the need for litigants to have access to relevant or material evidence. *Meenach v. General Motors Corp.*, Ky., 891 S.W.2d 398, 402 (1995) (citing *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)). Kentucky also strongly adheres to "the nearly universal rule that privileges should be strictly construed, because they contravene the fundamental principle that 'the public ... has a right to every man's evidence.'" *Sisters of Charity Health Sys. v. Raikes*, Ky., 984 S.W.2d 464, 468 (1998) (quoting *Trammel v. United States*, 445 U.S. 40, 45, 100

S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) (other citations omitted)); *see also Nazareth Literary and Benev. Inst. v. Stephenson*, Ky., App., 503 S.W.2d 177, 178-79 (1973) ("Claims of privilege are carefully scrutinized, and impediments to the discovery of truth are afforded validity in relatively few instances in the common law.")

### C. KENTUCKY'S POLICY AGAINST CHILD SEXUAL ABUSE OUTWEIGHS ANY POSSIBLE PRIVILEGE

Kentucky has a strong public policy of child sexual abuse prevention. There are no less than eight sexual offenses against children defined in Kentucky's penal code. *See* KRS 510.040, KRS 510.050, KRS 510.060, KRS 510.070, KRS 510.080, KRS 510.090, KRS 510.110, and KRS 510.120. All but one are felonies. Additional laws punish sexual abuse against children by family members and foster parents. *See, e.g.*, KRS 530.020 and KRS 530.064. Other laws punish sexual exploitation of children. *See, e.g.,* KRS 531.310, KRS 531.320 and KRS 531.340.

Kentucky also strongly encourages and supports local communities in prevention of child sexual abuse, and it has created two agencies to assist communities in this important goal. Kentucky's State Child Sexual Abuse and Exploitation Prevention Board was created for the purposes of developing appropriate public awareness regarding the prevention of child sexual abuse and exploitation, encouraging professional persons and groups to recognize and deal with prevention of child sexual abuse, and "encouraging and coordinating the development of local task forces." KRS 15.920. The state-created Kentucky

Multidisciplinary Commission on Child Sexual Abuse also promotes Kentucky's public policy of child sexual abuse prevention by developing and disseminating model protocols for local multidisciplinary teams regarding investigation and prosecution of child sexual abuse and recommending to Kentucky's governing officials changes in state programs, legislation, administrative regulations, policies, and standards which may facilitate effective intervention of child sexual abuse cases and the investigation and prosecution of perpetrators of child sexual abuse and which may improve the opportunity for victims of child sexual abuse to receive treatment. KRS 431.660. KRS 431.600 also furthers the state's policy of child sexual abuse prevention by requiring, whenever possible, that each Commonwealth's attorney's office and each county attorney's office shall have a child sexual abuse specialist. A myriad of other provisions built into Kentucky laws affecting children, from the juvenile code to divorce laws, reflect Kentucky's strong policy of child sexual abuse prevention.

Perhaps no law more strongly embodies Kentucky's zero-tolerance policy against child sexual abuse than KRS 620.030, which imposes a duty on every person to report child sexual abuse to the proper authorities. The stark contrast between the importance Kentucky places on preventing child sexual abuse and the Diocese's long history of indifference to child sexual abuse is seen time and again in the Diocese's repeated flagrant disregard of its legal obligation under KRS 620.030 to report acts of child sexual abuse by its clergy.

If the Court believes that any of the records the Diocese seeks to prevent Class Counsel from examining are governed by a discovery privilege, that privilege

should not take precedence over the long-standing Kentucky policy against childhood sexual abuse. "KRS 620.050 abrogates the professional-client/patient privilege, as well as the marital privilege, if it is used in the case of dependent, neglected or abused children." Mullins v. Com., Ky., 956 S.W.2d 210, 211 (1997).

> "The General Assembly may legislate in order to protect children, and it may determine that children's rights are paramount when there is a conflict with the privilege of an adult to exclude evidence regarding the abuse, dependency or neglect of a child. KRS Chapter 620 meets the legislative purpose of safeguarding the interests of children. The statute does not interfere with a judicial function, but rather it enhances it by refusing to allow a shield to a child abuser in the form of the husband-wife privilege and thereby improves the truth-finding function of the judicial process."

Id. at 212.

The Supreme Court of Washington has made the same determination with respect to the psychotherapist-patient privilege. It holds the privilege is not absolute and should be balanced against the public interest in the full disclosure of the facts relating to childhood sexual abuse. *See C.J.C. v. Corporation of the Catholic Bishop of Yakima*, WA., 985 P.2d 262, 271-72 (1999). *See also State v. Fagalde*, WA., 539 P.2d 86 (1975) (client-psychologist privilege does not apply to any judicial proceeding regarding a child's injury, neglect, or child abuse); *State v. Waleczek*, WA., 585 P.2d 797 (1978) (husband-wife privilege may be subordinated to the overriding and paramount legislative intent to protect children from physical and sexual abuse).

## D. NO DISCOVERY PRIVILEGE APPLIESTO SETTLEMENT AGREEMENTS

Defendant has listed settlement agreements with victims on its privilege log and has refused to produce them. (Exhibit C). These settlement agreements contain or will lead to evidence of similar incidents that are part of the Diocese's 50-year pattern of illegal conduct. Evidence of similar incidents has long been held to be discoverable in Kentucky. *See Volvo Car Corp. v. Hopkins*, Ky., 869 SW 2d 777 (1993). The settlement agreements also constitute evidence of constructive notice to the Diocese. "Constructive notice is knowledge imputed by law from the circumstances and is predicated upon the theory that negligent ignorance is no less a breach of duty than willful neglect, and one must be presumed to know what he should have discovered by the exercise of ordinary diligence." *Brown Hotel Co. v. Sizemore*, Ky., 197 S.W.2d 911, 912 (1946). The settlement agreements will also provide evidence of an historical record of the Diocese's treatment of allegations against its priests, which will establish that the Diocese either ignored, tolerated, disregarded, permitted, allowed or condoned the sexual abuse of children. This information may ultimately prove relevant to a number of contested issues, including the Diocese's motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. *See* KRE 404(b)(1); ROBERT G. LAWSON, KENTUCKY EVIDENCE LAW HANDBOOK § 2.40 pp. 121-26 (3d ed. 1993).

The settlement agreements contain the very information Defendants have sought from Plaintiffs in their First Set of Requests for Admission (Exhibit I) and in their Second Set of Interrogatories (Exhibit ). Plaintiffs have been hampered in

responding to these requests for admission due to Defendant's failure to produce settlement agreements and psychotherapist reports. *See* Plaintiffs' Responses to Defendants' First Set of Requests for Admissions (Exhibit L, pp. 1. 2, 10, 11, 13, 14, 17, 18, 19, 20, 21, 22, 23) and Plaintiffs' Response to Defendants' Second Set of Interrogatories to Plaintiff (Exhibit M, pp. 1, 2, 8, 16).

### 1. COURTS ROUTINELY FIND SETTLEMENT AGREEMENTS TO BE DISCOVERABLE

Virtually every court addressing the issue has held that settlement agreements, where relevant, are discoverable. Most cases recognize the distinction that discoverability is not the same as admissibility. Settlement agreements enjoy no special privilege under law and are not established to be confidential by any statute, case or controlling precedent. In a detailed discussion of the relationship between Rule 408 (relating to the admissibility of settlement agreements) and the discovery provisions of Rule 26, the Southern District of New York stated:

> This rule [Rule 408], however, only applies to the admissibility of evidence at trial and does not necessarily protect such evidence from discovery. As Judge Weinstein stated:
>
> > The policy of allowing open and free negotiations between parties by excluding conduct or statements made during the course of these discussions is not intended to conflict with the liberal rules of discovery embodied in the Federal Rules of Civil Procedure. Therefore, ***a party is not allowed to use Rule 408 as a screen for curtailing his adversary's rights of discovery.***
>
> 2 J. Weinstein & M. Berger, Evidence & 408[1] at 408-15 to 408-16 (1986). This view has been uniformly adopted by the courts in dealing with the provision. See, e.g., Center for Auto Safety v. Department of Justice, 576 F.Supp. 739, 749 n. 23 (D.D.C.1983). In that case, the court stated:

> While [Rule 408's] intent is to foster settlement negotiations, the sole means chosen to effectuate that end is a limitation on their admission ... for the purpose of proving liability at trial, not the application of a broad discovery privilege. ***Otherwise, parties would be unable to discover compromise offers which could be offered for a relevant purpose.***

*Morse/Diesel v. Fidelity Deposit*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988) (emphasis added); *see also NAACP Legal Defense Fund v. Department of Justice*, 612 F.Supp. 1143, 1146 D.D.C.1985) (Rule 408 "was never intended to be a broad discovery privilege.").

Other courts agree, and have required the production of settlement agreements during discovery so that, to paraphrase *Morse/Diesel*, the relevant purposes for which such agreements can be offered at trial may be discovered. *See*, e.g., *Computer Assoc. v. American Fundware*, 831 F.Supp 1516 (D. Colo. 1993) (settlement agreements are discoverable even if ultimately not admissible); *Porter Hayden Co. v. Bullinger*, 713 A.2d 962 (Ct. App. MD, 1998); *Bennett v. La Pere*, 112 F.R.D. 136 (D.R.I. 1986); *Bottaro v. Hatton Associates*, 96 F.R.D. 158 (E.D.N.Y. 1982); *Young v. State Farm Mutual Auto Ins. Co.*, 169 F.R.D. 72 (S.D.W.V.a. 1996); *Perez v. State Indus. Inc.*, 578 S.2d 1018 (La. Ct. App. 1991); *Page v. Guidry*, 506 S.2d 854 (La. Ct. App. 1987); *Computer Association v. Fundware*, 831 F Supp.1516 (D. Colo. 1993) (settlement agreements are discoverable even if not admissible at trial).

In the Bronco II litigation, *In Re Ford Motor Co Bronco II Prod. Liab. Liti.*, 1995 WL 360194 (E.D. La. 1995) the Court ordered the production of all of the Bronco II settlement agreements, ***and referred to the fact of those settlements***

***and the amounts of those settlements in its Opinion.*** *In Re Ford Motor Co Bronco II Prod. Liab. Liti.*, 1995 WL 262257 (E.D. La. 1995).

The Kentucky Supreme Court has ruled that settlement agreements are clearly discoverable. *Ford Motor Company v. Jasmin*, Ky. No. 980SC-908-MR, Opinion and Order Denying Emergency Relief (Nov. 3, 1998) (attached hereto).

## 2. PRIVATE PARTIES CANNOT CREATE EVIDENTIARY PRIVILEGES

Private parties cannot control the application of court rules:

> With respect to contracts containing explicit guarantees of confidentiality, "such contracts, of course, cannot bind parties who do not sign them and may have little effect on the capacities of a non party to discover or introduce at trial the settlement communications covered by the contract."

Kalinauskas v. Wong, 151 F.R.D. 363, 367 (D. Nev. 1993). *See also Potter v. Eli Lily & Co.*, Ky., 926 S.W.2d 449 (1996). The unanimous holding of the Kentucky Supreme Court refutes the argument that either the policy of encouraging settlements between private parties or the fact that the private parties have contracted for secrecy should somehow trump this Court's decision with respect to appropriately discoverable evidence. There, the Court held that the trial court has a duty and a right to determine that its judgments are correct and accurately reflect the truth. 926 S.W.2d at 453. It held that inquiry into a settlement that the parties agreed to keep secret was not an unwarranted invasion into privileged materials: ***"[t]he only result is that the truth will be revealed."*** 926 S.W.2d at 454. (Emphasis added).

A number of courts have specifically rejected efforts to preempt discovery rights of third parties by private agreements containing confidentiality clauses.

*See Porter Hayden Co. v. Bullinger*, Ct. App. MD, 713 A.2d 962 (1998; *Bank of America v. Hotel Rittenhouse*, 800 F.2d 339 (3rd Cir. 1986); *Scott v. Nelson*, 697 So. 2d 1300 (Fl. App. 1997).

Many authors and scholars have decried the use of secret settlements as a disservice both to the public and to the courts. In *Arkansas Best Corp. v. General Elec. Capital Corp.*, 878 S.W.2d 708 (1994), the Arkansas Supreme Court held that the public may access settlement agreements. In 2001, the South Carolina federal courts banned secret settlements, and nearly 20 states now have some type of law prohibiting secret settlements. *See* The Lawyers Weekly, April 30, 2001, "Confidential Settlements Under Fire in 13 States."

It is well established in this Commonwealth that the prerogative to determine evidentiary rules rests exclusively with our Supreme Court. Not even the legislature can by statute determine what will or will not constitute admissible evidence. *O'Bryan v. Hedgespeth*, Ky., 892 S.W.2d 571 (1995).

### 3. THE SETTLEMENT AGREEMENTS AT ISSUE ARE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE

From the settlement agreements, Plaintiffs will learn of the existence of additional victims and of priests who were abusers; more details about the nature, extent, duration of the patterns and practices alleged in the Fourth Amended Complaint; of payments through insurance coverage that now may be denied to exist; of payments made relating to the abuse of priests who were allowed to remain actively involved in public ministry; and of continuation of the practice of concealment and secrecy regarding child sexual abuse. Plaintiffs' punitive damages claim establishes an additional ground of relevance. The

discovery sought is reasonably calculated to lead to information that will render the following "material ultimate facts" more probable or less probable than they would be without the discovery:

a. That the Diocese needs to be discouraged from similar conduct in the future. KRS 411.184(1)(f);

b. That the Diocese knew that there was a high degree of "likelihood...that serious harm would arise from [The Diocese's] misconduct," in failing to curtail inappropriate sexual activities of its clergy. KRS 411.186(2)(a);

c. That the Diocese's awareness of future harm to children entrusted to the care of its employees existed to a great "degree of ... likelihood." KRS 411.186(2)(b);

d. That the Diocese's misconduct in tolerating child sexual abuse and in hiding it has been highly profitable because the amounts it has paid out to persons harmed has been less of an expense than the proceeds it would have lost in contributions had its reprehensible conduct been known. KRS 411.186(2)(c);

e "duration of the misconduct." KRS 411.186(2)(d);

f. The Diocese's concealment of its misconduct and its concealment of those settlements by the secrecy clauses that are in those documents. KRS 411.186(2)(d);

g. That the Diocese has taken no actions to remedy the horrendous effect of its misconduct, KRS 411.186(2)(e), but instead has only settled with victims who have the strength and daring to come forward; and

h. Possible misrepresentations to victims in order to induce them to secretly settle their claims. KRS 411.186(2)(d).

Proof of intentional concealment, minimization, and misrepresentation can support a punitive damages award. *Owens-Corning Fiberglass Corporation v. Golightly*, Ky., 976 S.W. 2d 409 (1998). The Diocese's conduct, for however long it has gone on, in concealing, protecting and tolerating perpetrators, goes directly to this point.

If the trial court ultimately allows the admission into evidence of some of the information revealed by the settlement agreements, it would not be a groundbreaking decision. Judge Sear admitted the terms and amounts of the settlements for the issues before him. *See In Re Ford Motor Co Bronco II Prod. Liab. Liti.*, 1995 WL 360194 (E.D. La. 1995). Other courts throughout the country have allowed the admission of such evidence in any number of instances. *See*, e.g., *Goodwin v. Seven-Up Bottling Co. of Philadelphia*, Civ. A. 96-CV-2301, 1998 WL 438488 (E.D. Pa. 1998) (admission of a settlement agreement is appropriate in assessment of punitive damages); *Perri v. Daggy*, 776 F. Supp 1345 (N.D. Ind. 1991) (previous settlement agreements are admissible to show knowledge of previous misconduct); *Wiener v. Farm Credit*, 759 F.Supp 510 (E.D. Ark. 1991), *aff'd* 975 F.2d 1350 (settlement agreements are admissible to show prior knowledge); *U.S. v. Gonzalez*, 749 F.2d 74 (2nd Cir.

1984) (concessions in settlement agreements can be used as a predicate basis of mail and wire fraud); *Small v. Hunt*, 152 F.R.D. 509 (E.D.N.C. 1994) (settlement agreements can be admissible on the question of causation); *Brothers v. Public School Employees of Washington*, 945 P.2d 208 (Wash. App. 1997) (settlement agreements are admissible to establish breach or repudiation of contract and mitigation of damages), *Wiener v. Farm Credit*, 759 F.Supp. 510 (E.D.Ark.1991), *aff'd*, 975 F.2d 1350 (settlement agreements are admissible to prove knowledge of options); *Bank of America v. Hotel Rittenhouse*, 800 F2d 339 (3rd Cir. 1986) (it is an abuse of discretion not to unseal settlement agreements where the parties had utilized the courts and where therefore no longer entitled to invoke confidentiality).

No compelling argument can be made that the Court's interest in promoting the amicable resolution of cases should somehow trump otherwise relevant evidence in cases which must be submitted for a jury's decision. The policy arguments in favor of settlement are important, but nevertheless must be kept in perspective. There are situations where the fact or amount of settlement may bear on a claim or defense, as it plainly does here. The requirement that parties be allowed to discover and present relevant evidence mandates discovery, under the supervision of the court if appropriate or required.

Even if it were true that the Diocese's ability to negotiate settlements would be impaired by disclosure of settlement agreements, this Court should not countenance an argument that discovery and admissibility should be guided by the Diocese's desire to maintain a negotiating advantage by being the sole

possessor of a body of knowledge relevant to settlement of claims against it. There is no reasonable basis to assume that the Diocese and Class Members will hesitate to settle cases if they believe that the settlement may not be kept secret as they would have liked. The fact is, **the Diocese has consistently over the past year publicized the amounts of its individual settlements** in order to lure victims from the class action.

For all these reasons, there is no doubt that the settlement agreements in this case are discoverable.

### E. NO DISCOVERY PRIVILEGE APPLIES TO THE MENTAL COUNSELING RECORDS IN THIS CASE

#### 1. THE MENTAL EVALUATION RECORDS WITHHELD ARE NOT PRIVILEGED BECAUSE THEY ARE NOT CONFIDENTIAL COMMUNICATIONS

KRE 507 governs claims of privilege based upon a patient-psychotherapist relationship. Defendant's privilege log does not set forth the author of the documents alleged to be psychotherapist reports. Thus, it fails to establish that the documents listed constitute communications with a psychotherapist, a fact that would have been easy to state, especially in view of Plaintiffs' instructions to identify the author each document. Nor does the privilege log establish that the records contain a confidential communication. The term, "confidential" is defined in KRE 507(a)(3). Only communications that are "not intended to be disclosed to third persons" are confidential. KRE 507(a)(3). Defense counsel's assertion that every victim consented to the Diocese receiving their counseling report establishes that the reports are not

confidential. If the priests also consented, a factual matter on which defense counsel would not comment, their reports are not confidential.

In *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 985 P.2d 262 (Wash.1999), two Catholic priests accused of child molestation participated in counseling at the insistence of the Archdiocese and the Archdiocese received reports of their progress. In reviewing the claim of psychotherapist-patient privilege, the Supreme Court of Washington held that that, because the priests "clearly intended that a third party, the Archdiocese, would be kept informed," the psychotherapist-patient privilege did not apply. 985 P.2d at 271-272. The facts of this case cannot be distinguished from *C.J.C.* In both cases, the communications simply did not "originate in the confidence that they will not be disclosed." *Id.*

Similarly, in *Morgan v. Geran*, 2001 WL 227736, (Mass. Super. 2001), the Archdiocese sought to keep from disclosure an outpatient psychiatric assessment of one of its priests, which was conducted at the request of the Archdiocese and paid for by the Archdiocese. "The nature of the report was 'to assess him [Father Morgan] psychologically in reference to the authenticity of these accusations, his sexuality, and current functioning within priestly celibacy.'" The court likened the assessment to any other assessment required by an employer for fitness for the position, stating that the evaluation was done to allow the church "to make informed decisions on Father Morgan's future role, if any, in the Archdiocese. Any diagnosis made by Doctor Sanders were only tangential to allow the Diocese to make future employment decisions regarding Father

Morgan. Therefore, no psychotherapist-patient privilege was created and the plaintiff is entitled to the production" *Id.* at p. 2.

The example of Fr. Kleman set forth above shows that the nature of the counseling undertaken by (and required of) the Covington Diocese's priests was no different. There is strong evidence that the Diocese wanted the records to evaluate Kleman's fitness for the priesthood and that the counselor did exactly that.

Likewise, in *Ford v. Law*, 2002 WL 32139028 (Mass. Super. 2002), a priest who permitted his church "to communicate with the institution's psychiatrists and other clinicians to obtain information regarding the particular clergy member's psychological status, treatment, diagnosis, prognosis, assessment, and the like" was held to have waived any privilege attaching to his counseling records. In *Ford*, a priest with a history of molestation allegations against him was ordered by the Boston Archdiocese to seek treatment at two institutions. In a civil action against the Archdiocese for permitting the priest to remain in active ministry, the plaintiffs sought to discover the records of the two institutions. Both institutions had provided the Archdiocese with psychological assessments of the priest, a representative of the Archdiocese had participated in a "feedback session" with the priest's clinicians at one of the institutions and reported the results of the feedback session to the Archbishop, and a psychiatrist from the second institution had communicated with the Archbishop regarding the priest's ongoing assessment and treatment. *Id.* at 4. The trial court concluded, "All of the relevant documentary submissions clearly establish that the records at

issue are the results of evaluations and treatments ordered and paid for by the [Archdiocese] for the purposes of determining whether [the priest] should be reassigned or returned to another form of active ministry. In other words, the [Archdiocese] required [the priest] to undergo psychological assessment so that the [Archdiocese] could obtain psychological information it could use in reaching employment and assignment decisions. The records sought by this motion are not protected by [the privilege]." Id. at 5.

The evidence, based on the information made available by Defendant, demonstrates that the Covington Diocese's motive was the same. There is no evidence that any priest was voluntarily seeking mental treatment. In the example of Fr. Kleman, the Diocese unquestionably used the counseling records to make employment decisions.

There is nothing in the privilege log submitted by the Diocese to establish that the counseling records are any different from the conduct considered (and rejected as nonconfidential and nonprivileged) in *C.J.C.*, *Morgan* and *Ford, supra.* The Diocese has known since at least February 5, 2004 that Plaintiffs would be moving to compel production of these records. The Diocese revised its entire privilege log and produced it on March 16, 2004 to Plaintiffs' counsel, and there is not sufficient information in the log to establish a privilege. The communications that the Diocese seeks to protect simply cannot be deemed confidential and should be produced.

## 2. THE DIOCESE IS NOT A "PERSON PARTICIPATING IN THE DIAGNOSIS OR TREATMENT" TO WHOM THE COMMUNICATIONS MAY BE DISCLOSED WITHOUT COMPROMISING CONFIDENTIALITY

Plaintiffs expect defense counsel to assert that the Diocese participated in its priests' treatment and worked with the mental health professionals in implementing treatment recommendations. The short answer to this is that Class Counsel has received no documents tending to prove this fact, and Plaintiffs' discovery requests, set forth above, certainly encompass such documents. Furthermore, nothing in the privilege log establishes this fact.

Pursuant to KRE 507(a)(3), certain persons, such as family members, may be "present during the communication at the direction of the psychotherapist" without compromising the confidential nature of the communication. Pursuant to KRE 507(b), confidential communications that are communicated "for the purpose of diagnosis or treatment" to "persons who are participating in the diagnosis or treatment under the direction of the psychotherapist" remain privileged.

The Diocese meets none of these criteria. In the first place, the Diocese is not even a person, thus it does not come within even the terms of the rule. Secondly it was not a "person present" during the communication. In most, if not all, cases, the communication took place at a distant location outside the Diocese, often in another city or state. The Diocese was not acting under the direction of a psychotherapist. Nor was the Diocese participating in treatment or diagnosis.

In *C.J.C*, the Washington Supreme Court rejected the Diocese's claim that the privilege was not waived because of the "unique relationship" between priests and their church, which the Diocese sought to compare to "a husband and wife attending joint counseling." 985 P.2d at 271. The court stated that it would have to "amalgamate various evidentiary privileges in order to create the protection" the church advocated. Id. The court refused to do this, reasoning:

> Legislative grants of testimonial privilege conflict with the inherent power of the courts to compel the production of relevant evidence and are, therefore, strictly construed. . . . Even were we inclined to recognize a unity of interest between a cleric and his or her church and protect communications made in furtherance of that interest against compulsory disclosure, this is not the case in which to do so. Where childhood sexual abuse is at issue, even long established privileges do not apply.

Id. (citations omitted)

The Kentucky Supreme Court is in accord with the Washington Supreme Court on this point. In *Stidham v. Clark*, Ky., 74 S.W.3d 719 (2002), the Kentucky Supreme Court refused to extend the psychotherapist-patient privilege:

> Our analysis begins with the almost universally accepted rule that testimonial privileges are generally disfavored and should be strictly construed. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 853 (1997). "For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." John W. Wigmore, 8 Evidence § 2192, at 70 (Little Brown & Co., McNaughton Rev.1961). *See also United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974) ("exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.").

74 S.W.3d at 722-723.

This Court would have to contort the meaning of KRE 507 to find that the Rule contemplates protecting from discovery the reports at issue. It is apparent that the Diocese insisted upon monitoring the counseling of some priests and victims, not to assist in treatment, but for the purpose of controlling public disclosure and scandal and covering up criminal activity by its priests. Certainly, there is no indication that the Diocese did anything *under the direction of a psychotherapist*. Priests like Fr. Kleman, who were revealed to be uncontrollable recidivists, were shipped elsewhere and given access to children, despite the information that undoubtedly is contained in the counseling reports.

Diocesan religious officials who knew that priests such as Fr. Kleman repeatedly sexually molested children spoke only in innuendo about their conduct, using the code phrases described above. Such language was intended to obscure and keep secret Kleman's actions. For this reason, church correspondence about the counseling records is no substitute for the records themselves. It is imperative that Class Counsel be given access to the counseling records to learn exactly what the Diocese knew, and when it knew it, regarding the crimes perpetrated by its high religious officials.

"Privileges exist as a matter of policy . . . under circumstances indicating an 'imperative need for confidence and trust.'" *Stidham*, 74 S.W.3d at 722-723 (quoting *Gaffe v. Redmond*, 518 U.S. 1, 10, 116 S.Ct. 1923, 1928, 135 L.Ed.2d 337 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980)). With complete certainty it can be concluded that

there is no "imperative need for confidence and trust" in the communications at issue in this case.

### 3. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT APPLY WHEN A CLAIMANT'S MEDICAL CONDITION IS AN ELEMENT OF THE CLAIM

Concepts of fundamental fairness counsel against preventing Class Counsel from viewing their clients' counseling records. Defendants have propounded discovery that will requires Class Members to produce them to produce all counseling records in their custody and control. (Exhibit H, p. 4, Requests 2 and 4). KRE 507 (c)(3) provides that, if a patient is asserting his or her mental condition as an element of a claim, the psychotherapist-patient privilege does not apply. The mental suffering of each Class Member is an element of damages in this action. Not only are their counseling records discoverable, but also statements by the Class Members contained in the records may be used by the Diocese at trial regardless of whether the Class Members are available to testify. *See* KRE 801A(b). To our knowledge, every victim identified in the privilege log is a Class Member in this case. They would be severely prejudiced by a Court ruling that permitted only one party to the case, their alleged abuser, to have access to their counseling records. Whether or not those records are introduced in this litigation, they contain evidentiary leads that the Defendants have had access to from the outset of this case.

As is the case with the Diocese's secret files of sexual abuse, the counseling records may reveal destruction of evidence and removal of files. This fact alone can be introduced as evidence of liability. In many cases, the

counseling records themselves may be the only documented evidence of actual notice to the Diocese of a particular Class Member's abuse, or of a particular priest's misconduct. At this moment, the Diocese continues to obtain counseling records of Class Members whose identity is unknown to Class Counsel. The Court should not participate in any effort to prevent communication between Class Counsel and Class Members.

Requiring Defendants to produce the records at issue will not prejudice the privacy rights of Class Members, who are clients of Class Counsel. Any confidentiality issues are resolved by the severely restrictive protective order in place in this case. The procedure of producing relevant records while still protecting privacy interests through a protective order limiting disclosure to a party's attorney is well settled in the United States Supreme Court and the U. S. Court of Appeals for the Sixth Circuit. In the context of employment discrimination cases, the Supreme Court has held that plaintiffs are entitled to "broad access to employee records in an effort to document their claims." *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989).

The Sixth Circuit has held that, even where plaintiffs are seeking records of persons who are not parties to the litigation and who have a recognized privacy interest in their files, it is not appropriate to attempt to protect privacy interests by denying the plaintiff access to relevant records. Rather, the Court endorsed the procedure of permitting access to such records pursuant to the protective order limitation that the records may be viewed by counsel only. *Knoll v. AT&T,* 176 F.3d 359, 365 (6th Cir. 1999). In such cases, the individuals who

posses a privacy interest are not notified and their approval of the process is not sought. In the instant case, the protective order provides an additional privacy safeguard: identifying information regarding the victim (patient) must be redacted. While this process gives the Diocese an unfair advantage over Class Counsel, we have agreed to it in order to obtain these relevant records.[10]

The procedure of producing private records has been approved by many courts. *See Donald v. Rast*, 927 F.2d 379 (8th Cir. 1991); *Griffith v. Wal-Mart Stores, Inc.*, 163 F.R.D. 4 * 3-4 (E.D.Ky., July 3, 1995) (Wehrman, M.J.); *Willis v. Golden Rule Insurance Co.*, 56 F.E.P. 1451, 1991 WL 350038 (E.D.Tenn.1991); *Horizon of Hope Ministry v. Clark County, Ohio*, 115 F.R.D. 1 (S.D.Ohio 1986); *EEOC v. Avco New Idea Division*, 18 F.E.P. 311, 1978 WL 72 *4 (N.D.Ohio 1978) ("While there no doubt is much that is irrelevant to this action contained in such person's personnel files, those files might reasonably be expected to yield probative evidence of plaintiff's claims.").

**4. THE PRIVILEGE DOES NOT APPLY TO DECEASED PRIESTS OR VICTIMS**

A number of the priests and victims are deceased. Fr. Kleman died in 1974. Victim 23018.21's brother, who was abused by Fr. Kleman, is also deceased. (*See* Exhibit J). Pursuant to KRE 507 (c)(3), which allows any party to discover the mental condition of a patient who is deceased if the mental condition is an element of a claim or defense, the Diocese has no standing to assert any privilege with respect to deceased patients.

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[10] Class Counsel reserve the right to seek Court permission to learn the names of these victims if that becomes necessary to the prosecution of this case.

## 5. THE DOCUMENTS ARE NOT PRIVILEGED COMMUNICATIONS FOR THE PURPOSE OF RECEIVING THIRD PARTY PAYMENT

Invoices for psychological treatment are not confidential communications made for the purpose of diagnosis or therapy and are therefore not in themselves privileged communications. *See* KRE 507(b). KRE 509 provides that the privilege is waived in its entirety if "any significant part" of the privileged matter is disclosed. Arguably, the disclosure of a billing code that signifies the diagnosis of a psychiatric patient to a third party insurance company would be a "significant" disclosure, and thus would result in a waiver under this general rule. To preserve confidentiality in such cases, KRE 509 further provides that disclosures made "for the purpose of receiving third-party payment for professional services" do not waive the privilege.

KRE 509 does not cloak in confidentiality counseling records simply because they are in the custody of a party charged with paying for the counseling. Nevertheless, the Diocese has attempted to convert this Rule into a blanket protection for records in its possession by advising Class Counsel that it came into possession of the records related to abused persons because the Diocese was the source of payment for the professional services. However, there is no plausible explanation why it was necessary for victims, priests, and/or their therapists to provide actual treatment records, notes of counseling sessions, psychological assessments and so forth, if the only purpose was to facilitate payment of victims' counseling. If the Diocese used its superior bargaining position (both financially and as the arbiter of spiritual salvation for victims) to condition payment upon open access to counseling records, such questionable

behavior would not convert the Diocese's true intent for demanding the disclosure to a "[d]isclosure . . . for the purpose of receiving third party payment for professional services." KRE 509. Finding KRE 509 to be a blanket rule of confidentiality in this case would countermand the fundamental requirements of KRE 507 that the original communications be intended to be held in confidence, and that they be shared only for the purpose of treatment and diagnosis.

## 6. THE DIOCESE IS ESTOPPED FROM ASSERTING THE PRIVILEGE TO WITHHOLD CLASS MEMBERS' RECORDS

The Diocese seeks to protect itself, not Class Members, by refusing this discovery. Its concealment of the records at issue is a continuation of its long-term course or conduct of covering up its own criminal activities and those of its priests and religious. This case is analogous to *Bond v. Bond*, Ky. App., 887 S.W.2d 558 (1994), in which one parent asserted the privilege on behalf of a divorced couple's minor child to prevent the other parent from discovering records that contained information injurious to the parent asserting the privilege. In *Bond*, it was held that, "parents involved in a custody dispute should not be allowed to assert any privilege on behalf of their child simply ***because their interests are divergent from the child's interests***." *Id.* at 560 (emphasis added). The same analysis applies here. As in *Bond*, the Diocese's only reason for seeking to keep the records hidden is to protect itself and prevent important discovery material to the resolution of Class Members' claims. The Court should find that the Kentucky policy of detecting and deterring child sexual abuse prevails over any recognized psychotherapist-patient privilege that might exist. Accordingly the Diocese should be estopped from asserting the privilege.

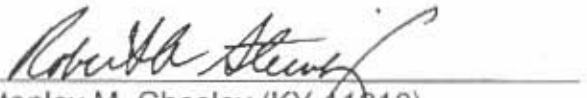
## CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request the Court to order Defendants to produce the documents described as settlement agreements and related items and the documents described as psychotherapist reports and related items in their privilege log as well as any additional settlement agreements and psychotherapist reports that are omitted from the privilege log but in the custody or control of Defendants.

## NOTICE

Notice is hereby given that the foregoing motion will be heard before the Court on June 10, 2003, in Boone Circuit Court.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that an unredacted copy of this Motion was served by email (without exhibits) and by regular mail (with exhibits) on March 19, 2004, to Mark D. Guilfoyle, Deters, Benzinger & LaVelle, P.S.C., 2701 Turkeyfoot Road, Crestview Hills, KY 41017, 2003 and Carrie Huff, Esq., Mayer, Brown, Rowe & Maw, LLP, 190 South LaSalle Street, Chicago, IL 60603.

Robert A. Steinberg

JOHN DOE, et al., vs. ROMAN CATHOLIC DIOCESE OF COVINGTON

- APPENDIX -

| Exhibit # | Document Description |
|---|---|
| A | Plaintiffs' First Set of Document Requests. |
| B | Plaintiffs' Second Set of Document Requests |
| C | Privilege Log of Diocese of Covington |
| D | Letter dated February 20, 2004 from Mark Guilfoyle to Robert Steinberg regarding consent forms. |
| E | A Report to the People of the Diocese of Covington dated August 29, 2003. |
| F | "Ministering to victims is primary work for Bishop" - February 20, 2004 issue of the Messenger |
| G | 1962 Vatican Policy of Secrecy |
| H | Defendants' First Set of Interrogatories and Request for Production of Documents to Plaintiffs |
| I | Defendants' First Set of Requests for Admissions to Plaintiffs |
| J | Affidavit of Victim No. 23018.21 |
| K | Defendants' Second Set of Interrogatories to Plaintiffs |
| L | Plaintiffs' Response to Defendants' First Set of Requests for Admissions to Plaintiffs |
| M | Plaintiffs' Responses to Defendants' Second Set of Interrogatories to Plaintiffs |