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' MEMORANDUM IN RESPONSE TO MOTION TO INTERVENE BY JOHN DOES II THROUGH VIII

Attorney Barbara Bonar (Movants' attorney) has filed a motion to permit her seven clients to intervene and to opt out from this class action after the exclusion deadline passed. Neither a valid reason nor legal authority is cited to support the motion. Granting the motion will prejudice the Class Members, the Class Counsel, and even the movants themselves, while giving an unfair advantage to Defendants. As the federal court in Kentucky has held, ***"it is beyond cavil that it is in defendants' interest for class members to elect to remove themselves from the class action."*** *Impervious Paint Industries, Inc. v. Ashland Oil*, 508 F.Supp. 720, 723 (W.D. Ky. 1981).

Plaintiffs' response to the motion to intervene is lengthy. As the Court will observe, this is necessary to detail the incorrect factual statements made by movants' attorney, who continues to represent class members despite her admitted conflict of interest.

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I. INTRODUCTION

Movants' attorney's highly emotional personal attack on Class Counsel,[1] who represent the vast majority of victims of sexual abuse by the Diocese, is based on incorrect factual statements and an inaccurate representation of Class Counsel's position regarding late opt outs. Class Counsel have always stated that we do not object to a class member opting out after the deadline if good cause exists. The motion simply fails to articulate a good cause for any of the movants to extend the exclusion deadline.

The motion to intervene is unsupported by any legal authority. It does not set forth the legal standard for establishing good cause to opt out after the deadline. The only case movants' attorney cited dealing with opting out of a class action, *Impervious Paint*, does not support movants' position; instead it supports the position of Plaintiffs. In that case, the Court invalidated opt out forms that were filed ***within the deadline*** because, due to inaccurate information given to class members by a defendant, ***class members were determined not to have made a free and unfettered decision to opt out.*** *Impervious Paint*, 508 F.Supp. at 723-24. Those opting out ***were restored to the class*** and given a reasonable time to make a knowledgeable opt out decision. (Id.). The same

[1] Class Counsel, who are approved by the Court, consist of the firms Waite, Schneider, Bayless & Chesley Co., L.P.A. of Cincinnati, Ohio, O'Hara, Ruberg, Taylor, Sloan & Sergent of Covington, Kentucky, and Oldfather & Morris of Louisville, Kentucky. Each of these firms has extensive experience in complex and class action cases. The primary legal work on this case has been performed by Stanley Chesley, Robert Steinberg, Michael O'Hara, and Ann Oldfather. Movants' attorney, Barbara Bonar, has performed no legal work on this case.

circumstances apply with respect to the movants in this case, except that the movants were given inaccurate information by their own attorney.[2]

The motion attempts to mask its failure to cite supporting legal authority by making a vicious personal attack on Class Counsel. As demonstrated below, movants have simply failed to show that good cause exists for any of them to opt out after the deadline.

II. THERE IS NO BASIS FOR PERMITTING INTERVENTION

Movants seek to intervene pursuant to CR 24.01, Intervention as of Right. Movants should not be permitted to intervene in this action because they have not established a statutory right to intervene and they have not demonstrated legal authority for being permitted to extend the time period for exclusion from this case.

III. THE CLASS ACTION PROVIDES IMPORTANT SAFEGUARDS FOR INDIVIDUALS INJURED BY A COMMON COURSE OF CONDUCT

Where a large group of people is injured by a common pattern of conduct, the class action is a procedural device that permits all victims to engage experienced attorneys who are well equipped to thoroughly investigate and prosecute their claims. It requires that all class members be treated fairly and equally with regard to compensation. Individuals who may be located in various jurisdictions and who cannot afford the cost of litigation can participate as a group and share the expenses pro rata. In this case, Class Counsel's records reflect that, in addition to the numerous Class Members located in Kentucky,

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[2] For the reasons set forth in this Memorandum, the Court may have to visit the issue of the validity of opt outs made within the deadline, but it is not the subject of the motion currently at issue.

additional Class Members reside in Arizona, California, Colorado, Connecticut, Illinois, Michigan, Indiana, Maryland, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas.

The class action device also avoids the inefficiencies of many separate trials or settlements of cases involving similar facts. The Court, in certifying this case as a class action, found that:

> the costs of juries for individual trials alone is prohibitive, not to mention the duplication of evidence. . . . because the Diocese of Covington was spread throughout many counties in Kentucky prior to 1988, it is very desirable to concentrate the litigation in this forum where the Diocese headquarters is located and where certain acts of abuse have occurred. . .

Order Certifying Class and Approving Class Notice, p. 13. The class action device also prevents an unseemly race to capture the resources of the defendant. It provides the benefit of having a Court publicly determine the fairness of any settlement and the fairness of the attorney's fees. Class actions also impose special duties on the Court, the Class Representatives, and the Class Counsel.

A. THE TRIAL COURT IS A FIDUCIARY TO ALL CLASS MEMBERS AND MUST PROTECT THEIR INTERESTS

One of the many benefits of a class action is that the trial court assumes a very important duty to protect the interests of all class members, including class members who, through their absence, are unable to protect themselves. *See* MANUAL FOR COMPLEX LITIGATION, (Third) § 30 (1995). The trial court "acts as a fiduciary who must serve as a guardian of the rights of the absent class members." *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975).

In order to carry out this role, the court has the duty and the power to ensure that the Class Representatives and the Class Counsel do nothing to compromise or otherwise prejudice the interests of those whom they have undertaken to represent. *Shelton*, 582 F.2d at 1306; *Grunin*, 513 F.2d at 123; *Runion v. U.S. Shelter*, 98 F.R.D. 313, 318 (D.S.C. 1983). As part of this duty to the class, the trial court should refuse to permit class members to opt out of the class after the deadline if the exclusion will prejudice the rights the class. *Sala v. National Railroad Passenger Corporation*, 1989 WL 21309, *2 (E.D. Pa. 1989).

B. THE CLASS REPRESENTATIVES ARE ALSO FIDUCIARIES TO ALL CLASS MEMBERS

As the Court knows, in a class action, a limited number of class members are selected to be class representatives. These class representatives must take an oath of loyalty to the class, affirming their understanding that they owe a fiduciary duty to the class. They must not put their personal gain above the interests of the class. The United States Supreme Court described the responsibilities of the class representative:

> [h]e sues, not for himself alone, but as a representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent on his diligence, wisdom and integrity... He is a self-chosen representative and a volunteer champion. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549-50 (1949).

The class representative, by assuming a representative role on behalf of the absent class members, voluntarily accepts a fiduciary obligation toward the class that may not be abandoned at will or by agreement with the defendant if prejudice to the class members would inhere or if the class representative has exploited the class action procedure for his own personal gain. *Shelton v.Pargo,*

Inc., 582 F.2d 1298, 1305 (4th Cir. 1978). *see also* MANUAL FOR COMPLEX LITIGATION, (Third) § 30 (1995).

C. CLASS COUNSEL ARE ALSO FIDUCIARIES TO ALL CLASS MEMBERS

Class Counsel are also fiduciaries to the Class Members and must do nothing to compromise or otherwise prejudice the interests of those whom they have undertaken to represent. *Shelton*, 582 F.2d at 1306; *Grunin*, 513 F.2d at 123; *Runion v. U.S. Shelter*, 98 F.R.D. 313, 318 (D.S.C. 1983).

D. THERE ARE ELABORATE PROTECTIONS FOR CLASS MEMBERS' PRIVACY IN THIS CASE

Class Members' privacy is best protected in the class action, where there are extensive and elaborate measures in place to protect the privacy rights of Class Members. The Class Certification Order itself specifically provides:

> **IT IS FURTHER ORDERED AND ADJUDGED** that the parties are to maintain the confidentiality of the identity of class members to the extent reasonably possible absent a Court finding of demonstrable need. *See Doe v. United States*, 44 Fed. Appx. 499 (Federal Circuit 2002). The parties have indicated in professional representations to the Court that they intend to maintain confidentiality of the identity of alleged victims of abuse.

The opt out notice provides:

> **C. CONFIDENTIALITY OF CLASS MEMBERS' IDENTITIES**
> THE COURT HAS ORDERED THE PARTIES TO MAINTAIN THE CONFIDENTIALITY OF THE IDENTITY OF CLASS MEMBERS TO THE EXTENT REASONABLY POSSIBLE. NAMES OF CLASS MEMBERS ARE NOT CURRENTLY A MATTER OF PUBLIC RECORD.

(Ex. B).

There are several Protective Orders entered by the Court providing that sexual abuse victims' names are to be redacted from any records exchanged by

the parties in discovery and that even those redacted records may only be seen by the attorneys. If any records referring to victims are filed with the Court, even though the identities of the victims are redacted, the records must be filed under seal. The Court established a special privacy provision for those opting out of the class action. Normally, opt out forms are filed in the clerk's office as a public record. However, in this case, by agreement of the parties, the Court ruled that Class Counsel should maintain the opt out forms in a confidential file not submitted to the Court and should furnish Defendants copies of all opt out forms. This process has been followed by the parties.

None of these privacy protections is available to Class Members who have opted out of this case. Class members who opted out in the Lexington, Kentucky area have had their names, residences, and the details of their abuse publicly set forth in legal documents filed by their attorney. In the Northern Kentucky area, movants' attorney has conducted media conferences, providing names of her clients, information about abuse they suffered, and terms and amounts of their settlements. *See infra*, pp. 41-43.

E. THE CLASS IN THIS CASE HAS BENEFITED SUBSTANTIALLY

One of the benefits to the great majority of child sexual abuse victims of the Diocese, who are the Class Members in this case, is the exhaustive work performed by Class Counsel. As of February 29, 2004, the three firms who are Class Counsel have expended over 4,282 hours of legal and staff work on this case. They have compiled a computerized database reflecting the chronology of every priest and religious identified as a sexual predator. They have examined

and imaged thousands of pages of documents relating to the Diocese's pattern of misconduct. They have retained professional investigators, statistical experts, psychiatrists who specialize in child sexual abuse, a priest who is a recognized canon law expert, and experts in translating documents written in Latin. Class Counsel have briefed and argued at least thirteen motions, including pending motions to compel the Diocese to produce relevant documents it is withholding.

The purpose of a class action is to avoid a multiplicity of lawsuits while protecting the substantive rights of the parties, providing due process protections, achieving finality for all parties in class litigation. *See In re Four Seasons Securities Laws Litig.*, 59 F.R.D. 667, 677 (W.D. Okl. 1973), *rev'd*, 502 F.2d 834 (10th Cir.), *cert. denied, Ohio v. Arthur Anderson & Co.*, 419 U.S. 1034 (1974). These interests require that at some point a cutoff date be set for filing requests for exclusion. This date is the opt out deadline established by the Court. *See In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1127-28 (9th Cir. 1977); *Grace v. City of Detroit*, 145 F.R.D. 413, 416 (E.D. Mich. 1992).

IV. THE COURT-ORDERED NOTICE PROCEDURE IN THIS CASE WAS MORE THAN ADEQUATE TO PUT MOVANTS ON NOTICE OF THE OPT-OUT DEADLINE

A. THE NOTICE AND OPT OUT PROCEDURE MEETS ALL LEGAL REQUIREMENTS

Movants' brief fails to even address the law regarding adequacy of notice for opting out of a class action. They rest their claim on the proposition that they were not personally aware of the deadline. This is not the legal standard. If an individual could defeat the opt out deadline simply by declaring that he was unaware of it, the deadline would be meaningless and a class would never be

determined. The law provides that reasonable notice must be given to class members so that they may opt out if they wish. In Kentucky, CR 23.03(2) states:

> (2) In any class action maintained under Rule 23.02(c), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

The notice in this case exceeded these requirements. (*See* Ex.s B, C). It is adequate, comprehensive, and timely. *See In re Prudential Ins. Co. of America Sales Practice Liti.*, 962 F.Supp. 450, 526 (D.N.J. 1997). It far exceeds the requirements of due process. *See In re Prudential Ins. Co. of America Sales Practice Liti.*, 148F.3d 283, 327 (3d Cir. 1998).

While the Court has the power to permit class members an extension of time to opt out, ***the "[a]dequacy of notice to the class as a whole determines the binding effect on a class member.***" *In re VMS Secs. Litig.*, 1992 WL 203832, *5 (N.D. Ill. 1992) (Emphasis added). Notice procedures ordered by the Court are "presumptively valid." *In re PaineWebber Limited Partnership Liti*, 1996 WL 51189, *1 (S.D.N.Y. 1996), quoting *Langford v. Devitt*, 127 F.R.D. 41, 44 (S.D.N.Y. 1989). Because movants have not even challenged the notice procedure in this case and because their attorney did not oppose it at the time the Court approved it, that should end the inquiry.

The courts have held that the notice "must contain information that a reasonable person would consider to be material in making an informed,

intelligent decision of whether to opt out or remain a member of a class." *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1105 (5th Cir. 1977). The content of the notice is left to the sound discretion of the trial judge. *In re PaineWebber*, 1996 WL 51189, *1.

The notice in this case, quoted directly below, meets that standard:

E. YOUR RIGHT TO OPT OUT OF THIS LITIGATION AND THE DEADLINE FOR DOING SO

ALL PERSONS WHO MEET THE DEFINITION OF THE CLASS WILL BE DEEMED MEMBERS OF THE CLASS UNLESS SUCH PERSONS REQUEST TO OPT OUT OF THIS CASE (IN OTHER WORDS, TO BE EXCLUDED FROM THE CLASS). MEMBERSHIP IN THE CLASS MEANS THAT A PERSON WILL BE REPRESENTED BY CLASS COUNSEL AND THE PLAINTIFFS, WHO ARE CLASS REPRESENTATIVES. MEMBERSHIP IN THE CLASS MEANS ALSO THAT A PERSON WILL BE BOUND BY THE JUDGMENT OF THE COURT.

IF YOU DO NOT WISH TO REMAIN IN THE CLASS, YOU MUST RESPOND TO THIS NOTICE NO LATER THAN JANUARY 31, 2004.

IF YOU WISH TO OPT OUT OF THIS CASE, YOU MUST RETURN THE OPT OUT FORM ATTACHED TO THIS NOTICE BY FIRST CLASS UNITED STATES MAIL POSTMARKED ON OR BEFORE JANUARY 31, 2004. SEND REQUESTS TO OPT OUT TO THE FOLLOWING ADDRESS:

STANLEY M. CHESLEY
ROBERT A. STEINBERG
WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.
1513 FOURTH AND VINE TOWER
FOURTH & VINE STREETS
CINCINNATI, OHIO 45202
(513) 621-0267

REQUESTS FOR EXCLUSION SENT TO ANY OTHER ADDRESS OR SENT AFTER JANUARY 31, 2004 WILL BE DEEMED INVALID AND WILL NOT RESULT IN YOUR EXCLUSION FROM THE CLASS.

(Order Certifying Class and Approving Class Notice, attachments; Ex.s B, C). Thus, Class Members were clearly advised that opt out forms received after January 31, 2004 are invalid.

In this case, the publication of this notice was as exhaustive as will ever be seen in a class action. Publication of a detailed description of this case, the process of a class action, the right to opt out, and a form that an individual could sign to opt out (Ex. C) was made on the following dates, on the pages listed, in the following newspapers:

National Newspapers

Publication City	Publication Name	Issue Date	Page #
National	*USA Today*	10/31/2003	7B
National	*USA Today*	11/05/2003	8B
National	*USA Today*	11/11/2003	23A

Daily/Sunday News

Publication City	Publication Name	Issue Date	PAGE #
Ashland	*Ashland Daily Independent*	10/30/2003	A4
Ashland	*Ashland Daily Independent*	11/09/2003	A3
Bowling green	*Bowling Green Daily News*	10/30/2003	A7
Bowling green	*Bowling Green Daily News*	11/09/2003	A8
Cincinnati	*Covington Kentucky Post/Enquirer*	10/30/2003	C6
Cincinnati	*Covington Kentucky Post/Enquirer*	11/09/2003	B7
Cincinnati	*Covington Kentucky Post/Enquirer*	11/14/2003	3K
Cincinnati	*Covington Kentucky Post/Enquirer*	11/16/2003	F5
Cincinnati	*Covington Kentucky Post/Enquirer*	11/21/2003	3K
Cincinnati	*Covington Kentucky Post/Enquirer*	12/19/2003	5K
Danville	*Danville Advocate-Messenger*	10/30/2003	B9
Danville	*Danville Advocate-Messenger*	11/09/2003	C3
Elizabethtown	*Elizabethtown News Enterprise*	10/30/2003	A7
Elizabethtown	*Elizabethtown News Enterprise*	11/09/2003	A8
Frankfort	*Frankfort State Journal*	10/30/2003	A7
Frankfort	*Frankfort State Journal*	11/09/2003	C6
Glasgow	*Glasgow Daily Times*	10/30/2003	A8
Glasgow	*Glasgow Daily Times*	11/09/2003	A12
Harlan	*Harlan Enterprise*	10/30/2003	A3
Harlan	*Harlan Enterprise*	11/08/2003	A9
Henderson	*Henderson Gleaner*	10/30/2003	A9
Henderson	*Henderson Gleaner*	11/09/2003	D4
Hopkinsville	*Hopkinsville Kentucky New Enterprise*	10/30/2003	A3

Hopkinsville	*Hopkinsville Kentucky New Enterprise*	11/08/2003	A8
Lexington	*Lexington Herald*	10/30/2003	A13
Lexington	*Lexington Herald*	11/09/2003	A10
Lexington	*Lexington Herald*	12/19/2003	A15
Louisville	*Louisville Courier Journal*	10/30/2003	A14
Louisville	*Louisville Courier Journal*	11/09/2003	D5
Louisville	*Louisville Courier Journal*	12/19/2003	B5
Madisonville	*Madisonville Messenger*	10/30/2003	A4
Madisonville	*Madisonville Messenger*	11/09/2003	A7
Mayfield	*Mayfield Messenger*	10/30/2003	A3
Mayfield	*Mayfield Messenger*	11/08/2003	A8
Maysville	*Maysville Ledger Independent*	10/30/2003	B5
Maysville	*Maysville Ledger Independent*	11/08/2003	A11
Middleboro	*Middleboro News*	10/30/2003	A7
Middleboro	*Middleboro News*	11/08/2003	A7
Murray	*Murray Ledger & Times*	10/30/2003	A3
Murray	*Murray Ledger & Times*	11/08/2003	A7
Owensboro	*Owensboro Messenger-Inquirer*	10/30/2003	A4
Owensboro	*Owensboro Messenger-Inquirer*	11/09/2003	A4
Paducah	*Paducah Sun*	10/31/2003	A5
Paducah	*Paducah Sun*	11/09/2003	A9
Richmond	*Richmond Register*	10/30/2003	A7
Richmond	*Richmond Register*	11/09/2003	A3
Somerset	*Somerset Commonwealth Journal*	10/30/2003	A4
Somerset	*Somerset Commonwealth Journal*	11/09/2003	B2
Winchester	*Winchester Sun*	10/30/2003	B7
Winchester	*Winchester Sun*	11/08/2003	A5
Cincinnati, Ky	*Cincinnati Enquirer/Post*	10/30/2003	A5 & B8
Cincinnati, Ky	*Cincinnati Enquirer/Post*	11/09/2003	B7
Cincinnati, Ky	*Cincinnati Enquirer/Post*	11/14/2003	A18 & A20
Cincinnati, Ky	*Cincinnati Enquirer/Post*	11/16/2003	F5
Cincinnati, Ky	*Cincinnati Enquirer/Post*	11/21/2003	A16 & 22A
Cincinnati, Ky	*Cincinnati Enquirer/Post*	12/19/03	10A & A14

Weekly Newspapers

Publication City	Publication Name	Issue Date	PAGE #
Albany	*Albany Clinton Co. News*	11/06/2003	A14
Barbourville	*Barbourville Mountain Advan*	11/13/2003	8B
Bardstown	*Bardstown Kentucky Standard*	11/05/2003	A9
Bardwell	*Bardwell Carlisle Co. News*	11/05/2003	A12
Bedford	*Bedford Trimble Banner Democrato*	11/06/2003	A3
Benton	*Benton Tribune Courier*	11/05/2003	C8
Booneville	*Booneville Sentinel*	11/06/2003	A5
Bradenburg	*Brandenburg Meade Co. Messenger*	11/05/2003	A17
Brooksville	*Brooksville Bracken Co. New*	11/06/2003	A5
Brownsville	*Brownsville Edmonson News*	11/06/2003	A6
Burkesville	*Burkesville Cumberland Co. News*	11/05/2003	A3
Cadiz	*Cadiz Record*	11/05/2003	A2
Calhoun	*Calhoun Mclean Co. News*	11/06/2003	A6

Campbellsville	*Campbellsville Central Ky N*	11/06/2003	B4
Campton	*Campton Wolfe Co. News*	11/07/2003	A4
Carlisle	*Carlisle Nicholas Countian*	11/07/2003	A7
Carrollton	*Carrollton News Democrat*	11/05/2003	A12
Central city	*Central City Leader News*	11/05/2003	C6
Clay city	*Clay City Times*	11/06/2003	A2
Clinton	*Clinton Hickman Co. Gazette*	11/06/2003	A3
Columbia	*Columbia Adair Progress*	11/06/2003	A5
Cynthiana	*Cynthiana Democrat*	11/06/2003	B5
Eddyville	Eddyville Herald Ledger	11/05/2003	C6
Edmonton	Edmonton Herald News	11/04/2003	A11
Elkton	Elkton Todd Co. Standard	11/05/2003	B1
Falmouth	Falmouth Outlook	11/04/2003	A18
Flemingsburg	Flemingsburg Gazette	11/13/2003	A11
Florence	Florence Boone Co. Recorder	11/06/2003	A3
Franklin	Franklin Favorite	11/06/2003	B6
Frenchburg	Frenchburg Menifee Co. News	11/05/2003	A2
Fulton	Fulton Leader	11/06/2003	A19
Grayson	Grayson Journal Enquirer	11/05/2003	A12
Greensburg	Greensburg Record Herald	11/05/2003	A12
Hardinsburg	Hardinsburg Herald-News	11/06/2003	A2
Harrodsburg	Harrodsburg Herald	11/06/2003	A11
Hartford	Hartford Ohio Co. Times New	11/06/2003	A9
Hawesville	Hawesville Hancock Clarion	11/06/2003	A18
Hazard	Hazard Herald	11/05/2003	A11
Hindman	Hindman Troublesome Creek T	11/05/2003	B9
Hogdenville	Hodgenville Larue Co. Herald	11/05/2003	A7
Hyden	Hyden Leslie Co. News	11/06/2003	A13
Inez	Inez Mountain Citizen	11/05/2003	A8
Irvine	Irvine Citizen Voice & Times	11/06/2003	A11
Jackson	Jackson Times	11/06/2003	A7
Lancaster	Lancaster Central Record	11/06/2003	A9
Lawrenceburg	Lawrenceburg Anderson News	11/05/2003	A3
Lebanon	Lebanon Enterprise	11/05/2003	A9
Leitchfield	Leitchfield Grayson Co. News	11/06/2003	B15
Liberty	Liberty Casey Co. News	11/05/2003	A16
London	London Sentinel Echo	11/03/2003	A14
Louisa	Louisa Big Sandy News	11/05/2003	A7
Manchester	Manchester Enterprise	11/06/2003	B3
Marion	Marion Crittenden Press	11/06/2003	B10
McKee	McKee Jackson Co. Sun	11/06/2003	A5
Monticello	Monticello Wayne County Outlook	11/05/2003	B7
Morehead	Morehead News	11/04/2003	A10
Morganfield	Morganfield Union Co. Advocate	11/05/2003	A7
Morgantown	Morgantown Butler Co. Banner	11/02/2003	A6
Mount Sterling	Mt. Sterling Advocate	11/06/2003	B4
Mount Vernon	Mt. Vernon Signal	11/06/2003	B2
Munfordville	Munfordville Hart Co. News	11/06/2003	A9
New Castle	New Castle Henry Co. Local	11/05/2003	A4

Nicholasville	Nicholasville Jessamine Journal	11/06/2003	A7
Owenton	Owenton News Herald	11/05/2003	A9
Owingsville	Owingsville Bath Co. News Outlook	11/06/2003	A4
Paintsville	Paintsville Herald	11/05/2003	A3
Pikeville	Pikeville News Express	11/02/2003	B8
Prestonburg	Prestonburg Floyd County Times	10/31/2003	C6
Princeton	Princeton Times Leader	11/05/2003	A4
Providence	Providence Journal Enterprise	11/06/2003	A13
Russell springs	Russell Springs Times Journal	11/06/2003	A3
Russellville	Russellville News Democrat	11/04/2003	B3
Salyersville	Salyersville Independent	11/06/2003	A11
Sandy Hook	Sandy Hook Elliot County News	11/07/2003	A7
Scottsville	Scottsville Citizen Times	11/06/2003	A9
Shelbyville	Ky/Shelbyville Sentinel News	11/05/2003	A10
Smithland	Smithland Livingston Ledger	11/05/2003	A9
Springfield	Springfield Sun	11/05/2003	A6
Stanford	Stanford Interior Journal	11/06/2003	A9
Taylorsville	Taylorsville Spencer Magnet	11/05/2003	A8
Three Forks	Three Forks Tradition	11/05/2003	A12
Tompkinville	Tompkinville News	11/06/2003	A6
Vanceburg	Vanceburg Lewis County Herald	11/04/2003	A9
Versailles	Versailles, Woodford Sun	11/06/2003	A8
Warsaw	Warsaw Gallatin Co. News	11/05/2003	A3
West Liberty	West Liberty Licking Valley Courier	11/06/2003	A6
Whitesburg	Whitesburg Mountain Eagle	11/05/2003	B7
Whitley city	Whitley City McCreary Co. Record	11/04/2003	B5
Williamsburg	Williamsburg News Journal	11/05/2003	A6
Williamstown	Williamstown Grant County News	11/06/2003	A2

(Ex. E; *see also* Affidavit of publication and attachment, filed by Class Counsel on December 9, 2003). There were also numerous radio and television reports of the opt out period based on the news releases. Movants' attorney and the attorney representing the Diocese also conducted a concerted media campaign, trying to convince class members to opt out of the class action. (*See infra*, pp. 41-43; Ex. D).

In addition to the newspaper, radio and television publications, Class Counsel established an Internet website for absent class members on December 19, 2003: www.covingtonkydioceseabuse.com. (Ex. E). This website was accessible to anyone in the world who had Internet access, including movants.

All pertinent pleadings and orders are posted on the website, including the Class Certification Order with the attached opt out notice and form for opting out. (Id.). Anyone visiting the website could download the opt out form and send it to Class Counsel. (Id.)

The website was accessed by a large number of people prior to the opt out deadline. During the 43 days between December 19, 2003 and January 31, 2004, there were 1,149 visitor sessions for an average of 26 visitor sessions per day.[3] (Id.) During the same period, 387 unique visitors accessed the website.[4] (Id.) Of these, 183 visited the website one time, and 204 visited the website more than once. (Id.)

Class Counsel sent a copy of the opt out notice and opt out form personally to every Class Member of whom it was aware, including John Doe III. (Exs. F, H).

The opt out period was lengthy - from October 20, 2003 until January 31, 2004. The notice given far exceeded that ordered by the Court. Movants' attorney, who was a class counsel at the time, made no objection to the notice requirements or to the notice.

The cost of the notice publication and the Internet website was $200,264. (Ex. E). Although she contributed neither funds nor legal work to support the class action case, Movants' attorney directly benefited from this expenditure by

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[3] A visitor session is counted when a visitor accesses the website, followed by 20 minutes of inactivity. (Ex. E)

[4] A unique visitor is a visitor with a computer IP address different from the other visitors. (Id.)

receiving substantial fees for settlements on behalf of individuals who submitted opt out forms.

Movants' claim that the opt out notice stage was very early in the litigation is an incorrect factual statement. The notice stage began nine months after the litigation had been filed and concluded approximately one year after the litigation had been filed. Even if the notice had been early in the litigation, there is no legal authority to establish that this would be improper. To the contrary, CR 23.03 commands that:

> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this rule may be conditional, and may be altered or amended before the decision on the merits.

Movants argue that no "census" was taken at the time of notice. No authority is cited requiring such a procedure at the notice stage of the case, because no such authority exists.

B. MOVANTS' BRIEF CONTAINS NUMEROUS INACCURATE STATEMENTS REGARDING THE LACK OF ACTUAL NOTICE

As explained *supra*, pages 1-11, the question of whether movants received actual notice is not determinative of their right to extend the time to opt out. Nevertheless, the Court should be aware of numerous inaccurate statements on this subject contained in the motion to intervene.

1. MOVANTS' ATTORNEY HAS INCORRECTLY STATED THAT JOHN DOES II AND III WERE NOT INFORMED OF THE OPT OUT DEADLINE

a. INCORRECT STATEMENTS REGARDING JOHN DOE III

To the best of our knowledge, Class Counsel have had contact with only two of the movants,[5] John Doe II and John Doe III, because these Class Members entered into retainer agreements with Class Counsel regarding their claims against Defendants ***before*** they were represented by their current attorney. John Doe III signed his retainer agreement on November 1, 2003. (Ex. F). John Doe II signed his retainer agreement on February 5, 2004. (Ex. I). Their identities are set forth in the cover letters in these sealed exhibits.

Class Counsel will not engage in a swearing contest with movants' attorney as to the truth of her assertions. Instead, contemporaneous documentary evidence establishes that movants' attorney has made the following incorrect factual statements to the Court regarding John Does II and III ("Does"):

> Does II and III were not informed of their option to opt out of the Class (Page 7); as soon as each learned of such option in the newspaper, he opted out (Page 7); no opt out form was mailed to them (Pages 7-8); they discovered such right only after the January 31, 2004 deadline (Page 9); each filled out his opt-out form at the first opportunity he knew it was even an option (Page 9); no letters were ever sent explaining their opportunities to 'opt out' of the class (Page 9); and they did not see the "legal notice," which was printed only two times last fall in the back part of the Business section of two local papers. (Page 9).

The following evidence conclusively refutes the incorrect factual statements above. Class Counsel maintain a log of every absent Class Member

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[5] Class Counsel assume that John Does IV through VIII filed opt out forms after the deadline. We are unable to verify this, because movants' attorney has not provided us a copy of their identity under seal, even thought she filed it with the Court.

who has contacted them to inquire about the class action case or their opt out rights. Doe III contacted Class Counsel on October 29, 2003. On October 30, 2003, Class Counsel wrote to John Doe III thanking him for contacting us. (Ex. F). Based on his stated desire to join the class action case as a client, the letter enclosed an Agreement of Representation. (Id.). Also enclosed was the Order Certifying Class and Approving Class Notice. (Id.). That Order discussed his opt out rights,[6] and it included the personal opt out notice (Ex. B) as well as the publication opt out notice (Ex. C), which are part of the Court Order. Doe III signed the Agreement of Representation on November 1, 2003 and returned it to Class Counsel, thus signifying that he received the opt out notices. Thus, Ex. F shows that ***Doe III received both the opt out notice and the opt out form no later than November 1, 2003.***

In support of her argument about Doe III's lack of knowledge of the right to opt out, movants' attorney states that Doe III attended a class action clients' meeting at a hotel in Florence, Kentucky and thereafter informed her of the contents of this meeting. (Motion, p. 10). Class Counsel's records reflect this meeting occurred on January 24, 2003 and that Doe III attended. (Ex. H). On January 13, 2004, Class Counsel mailed to Doe III a letter informing him of the meeting. (Ex. H, Q). The letter to Doe III advised him that Class Counsel had "established a website http://www.covingtonkydioceseabuse.com/". (Ex. Q). This website contained the opt out notice and form. The letter stated:

> Each client will be required to confidentially identify themselves to our assistant before entering the meeting ***to be certain the meeting is protected by attorney-client privilege.*** For the same reason, while

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[6] *See* Order Certifying Class and Approving Class Notice, pages 3, 4, 10, 13.

> family members and other supporters are welcome to come, they will not be able to attend the attorney-client meeting. After the meeting, we will be happy to meet with family members and other supporters.

(Ex. Q) (Emphasis added). Because the meeting is protected by the attorney-client privilege, Class Counsel cannot reveal specific conversations, including whether the opt out deadline was discussed. Doe III's statement in the affidavit his attorney drafted, asserting "nothing was explained to me at all, and I never was given any opportunity to ask questions about anything" is obviously incorrect. Aside from privileged conversations Class Counsel had with Doe III that cannot be revealed, Ex. Q establishes that answering clients' questions was the purpose of the January 24, 2004 meeting: ". . we feel it would be helpful to have a meeting of all our clients so that we can see you again ***and answer any questions you may have about this case***." (Emphasis added).

Even more disturbing than the inaccuracies in the motion and affidavit is movants' attorney's conduct in debriefing our client, Doe III, about the confidential statements made by other Class Members and by Class Counsel during this attorney-client privileged meeting, which took place after she moved to withdraw from this case due to her conflict of interest. Movants' attorney's violation of Class Members' privacy and of their attorney-client privileged conversations belies her claimed concern about victims' privacy interests.[7]

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[7] It also raises the question of whether movants' attorney is continuing to receive privileged information discussed during private Class Member client meetings, because Class Counsel have held additional confidential meetings with our clients after January 24, 2004.

b. INCORRECT STATEMENTS REGARDING JOHN DOE II

John Doe II contacted Class Counsel on February 3, 2004, according to Class Counsel's intake log. (Ex. G). Class Counsel requests the Court to rule on whether Movants' attorney has waived Doe II's attorney-client privilege on this subject by submitting his affidavit stating he was not aware of his opt out rights. If the Court rules he has waived his privilege, we will present an affidavit stating whether or not Doe II informed Class Counsel that his awareness of the opt out deadline passing prompted his call. Class Counsel sent a letter to Doe II on February 3, 2004, in response to his stated desire to join the class action case. (Ex. I). The letter enclosed an Agreement of Representation. (Id.). Because Class Counsel had reason to believe Doe II was already aware the opt out period had ended, he was not sent the notice and opt out form. However, he was told that "[y]ou may view pertinent documents relating to the case on www.covingtonkydioceseabuse.com." (Id.). Posted on that website is the Order Certifying Class and Approving Class Notice, which spells out his opt out rights and includes the personal opt out notice (Ex. B) as well as the publication opt out notice (Ex. C), which are part of the Order. Doe II signed the Agreement of Representation on February 5, 2004 and returned it to Class Counsel, establishing he received the letter and its reference to the website. (Ex. I).

Class Counsel do not believe they have had contact with John Does IV through VIII, thus we have no documents relating to them. If granted discovery, however, Class Counsel believe they will be able to establish that the factual representations about the other movants are equally incorrect. Therefore, unless

the Court rules that the remaining movants may not opt out of the class action, Class Counsel respectfully requests, pursuant to our fiduciary duty to the class, permission to conduct limited discovery in order to respond to their allegations.

2. MOVANTS' ATTORNEY HAS INCORRECTLY STATED THAT CLASS COUNSEL DID NOT SPEAK TO DOE II ABOUT THE DETAILS OF HIS ABUSE

Movants' attorney states, on page 21 of her motion, that Class Counsel "doesn't know anything about [Doe II's] story." In Doe II's affidavit, drafted by his attorney, he states that "no one spoke to me about the details of abuse except the date range and the name of my abuser." Contemporaneous documents demonstrate that these statements are factually incorrect. All Class Members, including Doe II, have been interviewed in detail about the abuse they suffered, unless they are prevented by emotional trauma from discussing the matter. In the case of Doe II, he revealed the details of his abuse in his initial interview by Class Counsel's paralegal. Class Counsel have two records in its possession reflecting the details of the abuse he suffered: a memorandum of the February 3, 2004 interview of Doe II and a chart on which Doe II appears along with all other victims and their abusers. The chart includes the location, the date, the nature of the abuse, and the name of the abuser. Both documents set forth the details Doe II provided to Class Counsel's paralegal about the abuse he suffered. Because these documents are protected by the work product privilege and because Doe II was promised this confidential information would not be revealed, we are not submitting the documents as Exhibits. However, if necessary, they will be made available for in camera inspection by the Court.

3. MOVANTS' ATTORNEY HAS INCORRECTLY STATED THAT THERE WAS VERY LITTLE NEWS COVERAGE OF THIS CASE DURING THE OPT OUT PERIOD

On page 8 of the motion, movants' attorney states that there was "little if any" media coverage of this case during the opt out period. She also states on page 9 of the motion that the opt out notice was printed "only two times last fall in the back part of the Business section of two local papers." The truth is that the notice was published twice in 20 daily newspapers and three times in the Lexington, Kentucky, and Louisville, Kentucky newspapers. It was published six times in the Covington, Kentucky newspaper and once in 90 weekly newspapers. The newspapers covered all 118 counties in Kentucky. It was also published six times in the major daily newspapers in Cincinnati, Ohio, as well as three times in the national publication *USA Today*. The pages on which it was published were usually in the "A" or front section of the publication. The specific publications, dates of publication and page numbers are set forth *supra*, pp. 14-17 and in Ex. E, Attachment B.

In addition to the tremendous volume of notice publication made in the media by Class Counsel for the benefit on those who wished to opt out, movants' attorney engaged in a concerted publicity campaign through the news media to encourage class members to opt out and to retain her to represent them. This media campaign is described in detail *infra*, pp. 41-43.

4. MOVANTS' ATTORNEY HAS INCORRECTLY STATED THAT CLASS COUNSEL RAISED A NEW ISSUE IN MARCH 2004 REGARDING ANONYMOUS OPT OUTS

On page 12 of her brief, movants' attorney states that Class Counsel raised a "brand new issue" regarding anonymous opt out forms on March 3, 2004. This is not a correct factual statement. On about January 29, 2004, shortly before the opt out deadline, movants' attorney submitted two anonymous or illegible opt out forms to Class Counsel. Class Counsel's secretary telephoned her immediately to advise her she needed to identify the individuals opting out so an accurate record could be maintained. Movants' attorney refused to do so. On January 30, 2004, Class Counsel sent a letter by Federal Express to movants' attorney explaining that the opt out forms are maintained confidentially. (Ex. J). The letter stated, "I want to remind you that opt out forms are not filed with the Court, but the Diocese does receive a copy of them. Otherwise, they are strictly confidential. ***I doubt that an anonymous or illegible opt out form will protect your clients' rights. I would urge you to get these forms in immediately.***" (Id.) (Emphasis added). Movants' attorney took no action to protect her clients' opt out rights by filing a proper form, despite the fact that Class Counsel raised the issue immediately to assist her in perfecting the opt out rights of these two Class Members.

5. MOVANTS' ATTORNEY HAS INCORRECTLY STATED THAT CLASS COUNSEL CONTRADICTED EACH OTHER ABOUT LATE OPT OUT RULES

On page 12 of her brief, movants' attorney states that "Mr. Steinberg's March 3, 2004 letter also **clearly contradicts** Stan Chesley's statements to the Court . . . that 'if a person can show good cause' for opting out, it would certainly

be permitted." (Emphasis in original). This is an incorrect factual statement. Class Counsel's March 3, 2004 letter to Ms. Bonar states: "You incorrectly state that my position is that I will not 'honor' certain "opt outs". . .We have always stated that we will not oppose opt outs by individuals that meet the criteria for an untimely opt out. Class Counsel does not have the power to 'honor' an untimely opt out form or to change the law regarding requirements for untimely opt outs." (Motion to Intervene, Ex. F). This statement is entirely consistent with that of Mr. Chesley as well as Class Counsel's position in this memorandum.

V. THE COURT SHOULD NOT PERMIT MOVANTS TO OPT OUT, BECAUSE THEY HAVE NOT ESTABLISHED GOOD CAUSE AND BECAUSE DOING SO PREJUDICES THE CLASS MEMBERS, CLASS COUNSEL, AND THE MOVANTS THEMSELVES

Plaintiffs have established above that the movants have demonstrated no legal basis for extending the exclusion period to allow them to opt out. We discuss below the fact that allowing such an extension is inequitable, because it will injure the Class Members, Class Counsel, and the movants.

A. CLASS MEMBERS' RIGHTS WOULD BE IMPAIRED, BECAUSE MOVANTS WOULD TAKE ADVANTAGE OF THE WORK PERFORMED ON BEHALF OF THE CLASS WHILE THE CLASS MEMBERS MUST PAY FOR THE WORK

A significant benefit of class certification is to prevent an unseemly race to capture the resources of a defendant. If the Court permits movants to opt out after the deadline, it will award their tardiness by allowing them to settle claims outside of the class action and it will jeopardize the ability of Class Members to share equitably in the proceeds. This is not only unfair, but it also violates a significant purpose of class certification:

> [P]ermitting class members to opt out after completion of a large percentage of pretrial preparation and discovery by class counsel, would result in such members reaping the benefits of this work without contributing their fair share toward the reasonable costs and fees of class counsel....Therefore, allowing late opt-outs would require the remaining class members to bear the entire cost of class counsel's fees and expenses, rather than only their fair pro rata share. (Emphasis added)

Sala v. National Railroad Passenger Corporation, 1989 WL 21309, *2 (E.D. Pa. 1989).

Additionally, the Court should deny the motion because it sends an incorrect message that the class action is weak. As the documentation submitted in support of class certification shows, the action against the Diocese is very strong. Yet, news releases that the Court is permitting late opt outs so they can obtain individual settlements will provide the false impression that the case is weak. For this reason, courts rarely permit late opt outs, especially where the beneficiary of the late opt out will use the opportunity to secure an individual settlement, to the prejudice of the class.

> In exercising such discretion, we recognize the dangers posed by piecemeal settlement of class member claims by the defendant. First, as numerous courts and commentators have stated, "[t]he danger that the offer to settle individual claims would create is the possible misleading of class members about the strength and extent of their claims and the alternatives for obtaining satisfaction of those claims." *In re General Motors Corp. Engine Interchange*, 594 F.2d 1106, 1139 (7th Cir.), *cert denied*, 444 U.S. 870, 100 S.Ct. 146 (1979). *See also Glidden v. Chromalloy American Corp.*, 800 F.2d 621, 626-27 (7th Cir.1986); *Chrapliwy v. Uniroyal*, 71 F.R.D. 461, 464 (N.D. Ind. 1976).

Sala v. National Railroad Passenger Corporation, 1989 WL 21309, *1 (E.D. Pa. 1989).

B. PERMITTING THE MOVANTS TO OPT OUT IS UNFAIR TO THE MOVANTS

It is apparent from the brief filed by movants' counsel that the movants have been provided incorrect factual information regarding the role and function

of class certification, especially as it relates to their privacy rights. Movants' brief asserts that they request permission to opt-out of the class in order to remain passive. (Motion, p. 7). The desire to remain passive is understandable and is legally achievable by remaining a member of the class. The rules governing class actions are clear that Class Members who are not Class Representatives are passive and are free from the duties generally associated with litigation. An individual asserting a claim is responsible for pursuing his claim; he cannot rely on representatives to pursue it for him.

Generally speaking, "an absent class-action plaintiff is not required to do anything," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 & n. 2 (1985);; see *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532 (N.D. Ga. 1972) ("the usefulness of Rule 23 would end if class members could be subjected to Rule 33 and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories"). Once they are excluded from this case, however, the victims lose the protection afforded by Rule 23 and potentially subject themselves to discovery and possibly other legal responsibilities.

Late exclusion for the purpose of entertaining settlement discussions outside of the class action may result in unfair settlements. Courts recognize that settlements of individual claims, when a class action exists, often result in settlements that are less favorable because the individual claimants lack access to the information that class counsel has acquired. "Indeed, class members who seek to enter into individual settlements are often operating without the benefit of class counsel's knowledge gained through discovery and without the negotiating

strength resulting from the unity of the class." *Sala v. National Railroad Passenger Corporation*, 1989 WL 21309, *1 (E.D. Pa. 1989).

VI. CLASS COUNSEL DID NOT HARRASS, THREATEN, OR INTIMIDATE CLASS MEMBERS

Because movants' attorney performed no legal work on this case, never attended client meetings except those held with her two original clients, and did not even attend most Court hearings on the case prior to her withdrawal, she has no idea what the relationship between Class Counsel and the Class Members is. Therefore, she has invented a derogatory picture of a poor relationship with the Class Members, primarily by giving the movants incorrect factual information about the class action. In the interest of time, we review only a few of her inaccurate statements below.

A. CLASS COUNSEL DID NOT DEMAND LEGAL FEES FROM MOVANTS

Movants' attorney has made the following incorrect factual statements on the subject of Class Counsel demanding attorney's fees from movants:

> Class Counsel "implied" that clients who opted out "owed them fees." (Motion, Page 10). "Movants expressed concerns that the firm of WSB&C was contacting them, intimidating them, and alleging they may owe fees to WSB&C." (Id., p. 11). Class Counsel intended to discourage people from opting out by claiming they would still owe fees. (Id., p. 12). Ms. Bonar even went so far as to send an email to the trial judge stating that her clients were being intimidated to "opt back in" to the class and being threatened with costs and attorney's fees. (Id., p. 11).

Class Counsel have neither demanded nor received legal fees from any Class Member. The signed retainer agreements with each member specifically discuss when Class Counsel would be entitled to legal fees. While these statements are privileged communications, the Court knows that Class Counsel

can only obtain legal fees based on work performed in this case and that the Court must carefully review records of the work performed and approve the fairness of the fees.

Movants' attorney was specifically informed in writing that no fees are sought from Class Members. Rather, it is her responsibility to disgorge fees she has collected based on work performed by other attorneys.[8] In Class Counsel's letter dated February 17, 2004, we stated, "No implication has ever been made by Class Counsel to these clients that they would owe attorney's fees and costs as a result of opting out of the class. You should know from your earlier involvement as a class counsel that clients are told there are no fees and costs unless a recovery is made on their behalf. Any implication to the contrary did not come from this office." (Ex. R). No other statements about fees are made in this letter.

On March 3, 2004, Class Counsel responded to Ms. Bonar's assertion that we were not owed fees and costs relating to class members who opted out. We first expressed concern that the individual settlements made by Ms. Bonar were below the fair value of the claims, that victims were being charged unreasonable fees by their individual attorney, and that the victims were not protected by court review of the settlements. (Ex. S). We also expressed concern that the settlements did not address important class issues of injunctive relief and the problem posed by perpetrators who are currently active. (Id.) As regards attorney's fees, we explained to Ms. Bonar that, "***If you received attorney's***

[8] Movants' attorney filed these letters with the Court as Exs. C, E, and F to her motion, and did not seal them. Therefore, Class Counsel have not sealed the documents, which are attached as Exs. R, S, and T.

fees on the settlement of claims of any of our current or former clients,[9] ***then you are responsible for compensating us. We assume that you are following the law and putting any such fees in escrow until you make a proper accounting.*** (Id.) (Emphasis added). We cited Kentucky law: *Shelley v. Texas Eastern Transmission, Inc.*, 1991 WL 86273 (6th Cir. 1991) and *LaBach v. Hampton*, Ky, 585 S.W. 2d 434 (1979). We told Ms. Bonar, "If any of our current or former clients made, or in the future, make an individual settlement through you or another attorney, we will seek a full accounting of the fees charged and the work performed on that person's case." (Id.)

These statements accurately set forth the law and the Rules of Professional Responsibility as they apply to attorneys who seek to represent clients that were previously represented by another attorney. The second attorney cannot unjustly profit from the work done by the first attorney. She must reimburse the first attorney according to the comparative value of the work done. Every practicing attorney in Kentucky knows, or should know, this professional responsibility rule.

On March 16, 2004, Class Counsel wrote Ms. Bonar and identified two of our clients with whom we have active retainer agreements, John Doe II and John Doe III. (Ex. T). We told her that we had performed a substantial amount of work on their behalf. (Id.). We asked her to verify that she was attempting to

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[9] There is no question that movants' attorney represented two of Class Counsel's clients, Does II and III, both of whom had active retainer agreements with Class Counsel. Her conduct raises the question whether she has represented other Class Members who had retainer agreements with Class Counsel and who opted out prior to the deadline. Although the vast majority of Class Members chose not to opt out, we believe there were four class member clients who did so.

represent them. (Id.). Ms. Bonar has never responded to this reasonable request. We told her we remained concerned about the value of the net settlements her clients were receiving from the Diocese through her. (Id.).

Thus, as the correspondence made clear, ***it is Ms. Bonar, not her clients, that owes a fee to Class Counsel*** for the work Class Counsel performed on the cases she has settled. Her clients have already paid their fees, at least the fees that are related to the amount of the settlements made. While they may be able to recoup fees paid to Ms. Bonar that are unreasonable, they will not have to pay additional fees to Class Counsel based on these settlements.

It now is clear that Ms. Bonar misrepresented Class Counsel's statements to her current clients and told them Class Counsel were seeking additional fees from them. There is no question that Class Counsel have not and do not seek fees from Class Members who have opted out and settled their cases. The truth is that ***Ms. Bonar is required by Kentucky law to place her fees in escrow until she makes a proper accounting to Class Counsel for the work she has done on each case, compared to the work Class Counsel performed on that person's case.*** It is to Ms. Bonar's benefit to refuse to reveal the names of certain clients who have filed illegible opt out forms. This will obstruct Class Counsel's efforts to recover from her fees she is obligated to pay.

VII. MOVANTS' ATTORNEY HAS GIVEN INCORRECT LEGAL ADVICE TO HER CLIENTS REGARDING PRIVACY IN ORDER TO INFLUENCE THEM TO OPT OUT OF THIS CASE

As explained *supra*, pp. 9-10 and 29, an important advantage of the class action device, as compared to individual claims, is that the Class Members may

remain private and are not subjected to discovery demands. This case, however, has been clouded with the dissemination of incorrect information regarding the role and function of class certification. Movants have been told that, in order to remain passive and to protect their privacy, they must opt out of the class action. Those class members who opted out apparently believed that the facts of their abuse would be in the public realm if they remain in the class. The truth is just the opposite. The two attorneys who have settled the bulk of the class members' claims individually have published their clients' names, the facts of their abuse, and the terms of their settlements.

Movants appear not to have been informed of the large body of case law holding that their settlement agreements are routinely discoverable in a court proceeding, even if the settlement agreements provide for confidentiality. *See Morse/Diesel v. Fidelity Deposit*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988); *NAACP Legal Defense Fund v. Department of Justice*, 612 F.Supp. 1143, 1146 D.D.C.1985); *Computer Assoc. v. American Fundware*, 831 F.Supp 1516 (D. Colo. 1993); *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).

Potter v. Eli Lily & Co., Ky., 926 S.W.2d 449 (1996), involves a unanimous holding of the Kentucky Supreme Court that approved the action of a trial judge

in making a confidential settlement agreement available for discovery. 926 S.W.2d at 453. The Kentucky Supreme Court 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. One of the allegations in this case is that the Diocese has engaged in a pattern of influencing victims to engage in secret settlements for less that the fair value of their claims in order to discourage other victims from coming forward and to conceal the extent of the Diocese's illegal activities. (Fourth Amended Complaint, ¶ 38). Class Counsel have already filed a motion to compel all the settlements of individual cases made by the Diocese during the class period of January 1, 1956 to the present. Thus, to the extent that movants are seeking late exclusion to entertain settlement discussions outside of the class action, this will actually prejudice their privacy rights.

A. MOVANTS' ATTORNEY HAS EXPOSED HER INDIVIDUAL CLIENTS TO SUBSTANTIAL PUBLICITY REGARDING THEIR IDENTITY, THEIR ABUSE, AND THEIR SETTLEMENTS

As part of her plan to solicit class members to opt out of this case and become her clients, movants' attorney engaged in a media campaign during December 2003 and January 2004. During the media campaign, she exposed three of her clients to press conferences with multiple media sources, including newspapers and television. At these conferences, the clients' true first names were used, information about the abuse suffered was given, and terms and amounts of their settlements were provided. (*See* Ex. D-1). The media campaign is discussed in detail *infra*, pp. 41-43. Class Counsel have never

exposed their clients to media conferences. In fact, their names have not been made public, but have been protected through the class action device.

Thus, it appears that movants may have made their decisions to opt out of this case based on incorrect legal advice.

VIII. MOVANTS' ATTORNEY VIOLATED HER FIDUCIARY DUTY TO THE CLASS

By taking affirmative action against the interests of the class and by acting as a class counsel despite her admitted conflict of interest in representing Class Members, movants' attorney has in the past and continues to violate her fiduciary duty to the class.

It is apparent from the content of her motion that movants' attorney has not informed her current clients, who are all Class Members, of the conflict of interest she has in representing them and advising them regarding opting out of this case. This is another factor that may have influenced their decision to seek a late opt out.

A. IN SEPTEMBER 2003, CLASS COUNSEL FIRST LEARNED THAT MOVANTS' ATTORNEY HAD A CONFLICT OF INTEREST

One of the primary goals of the class action case is to be sure a process is in place in the Diocese to ensure that children are not currently exposed to sexual abuse by priests, teachers, and others. Part of Class Counsel's extensive investigation has been to identify any sexual abusers who are currently active and pose a danger to children.

At the time movants' attorney joined the class action case, Class Counsel Attorneys Stanley Chesley, Robert Steinberg, and Michael O'Hara were unaware

that she had a conflict of interest. However, by September 2003, Class Counsel's investigation had resulted in credible child sexual abuse complaints about two individuals who were still actively employed. As the result of information filed under seal in Plaintiffs' Reply To Defendant's Memorandum In Opposition To Plaintiff's Motion For Class Certification, the Dioceses of Lexington and Covington removed these individuals from their positions, due to credible allegations of sexual abuse.

On September 22, 2003, movants' attorney wrote to Class Counsel, confirming a previous telephone discussion. (Ex. M). She expressed her concern about the allegations in Class Counsel's brief and about the subsequent removal of one of the individuals from a Covington Diocesan school. (Id.). She stated this would affect her relationships in the Diocese and her law practice, which involved representation of Diocesan supervisory officials. (Id.). She acknowledged a potential conflict of interest. (*See* Ex. M).[10] Movants' attorney stated that she had previously been aware of this conflict based on discussions she had with Class Counsel about the facts developed in the case, but she had not anticipated that allegations would be made in a brief. (Id.) She said, "My overall concern is that my name was placed in a brief in which I may not fully agree, and that I have been put in an extremely uncomfortable position with many of my clients and peers because of it. . . (Id.). Most clearly, however, I can confirm to you that if any potential class member implies or makes any

[10] This exhibit is submitted under seal to preserve the confidentiality of the client relationships Ms. Bonar refers to in her September 22, 2003 letter.

accusations against a *current* Covington Diocese School administrator or program, it would create a conflict for me." (Id.) (Emphasis in original).

These statements raised serious concerns among Class Counsel, including the concern that movants' attorney had not disclosed these conflict relationships before we permitted her access to confidential work product information. After conversations about her conflict of interest produced no result, on November 20, 2003, Class Counsel directed a letter to movants' attorney formally expressing our concerns about her conflict of interest. (Ex. N). In a response letter on November 21, 2003, movants' attorney stated that "I never said I felt 'uncomfortable' because people connected to the Diocese see my name on the case." (Ex. O). This statement is directly contradicted by her September 22 letter, which states that she was "uncomfortable" for those very reasons. (Ex. M, p. 2). At this point, Class Counsel realized there was a credibility issue regarding her factual statements.

Ms. Bonar's November 21, 2003 letter also stated that "Bob," referring to Bob Steinberg, "assured me that this did not create a conflict." (Id.). This statement factually incorrect, as Mr. Steinberg's November 20, 2003 letter demonstrates. (Ex. N). Movants' attorney also denied that she withdrew her two clients (Class Representatives 1 and 2) from the class action. (Ex. O). This statement is obviously inaccurate, as demonstrated below. The letter contains a number of other factually incorrect statements, which are not relevant to the

issue before the Court. In this same letter, however, Ms. Bonar confirmed that "I have not actively worked on the case."[11] (Id.).

In November, Class Counsel notified Ms. Bonar that she continued to act against the interests of the class. (Ex. P).

B. IN OCTOBER AND DECEMBER 2003, MOVANTS' ATTORNEY NEGOTIATED WITH THE DIOCESE TWO INDIVIDUAL SETTLEMENTS FOR CLASS REPRESENTATIVES 1 AND 2

In October 2003, movants' attorney negotiated an individual settlement with the Diocese for Class Representative 2, who then withdrew from the case. In November 2003, movants' attorney negotiated an individual settlement with the Diocese for Class Representative 1, who then withdrew from the case. Based on media releases by movants' attorney and the Diocese, it is apparent that these two former Class Representatives received substantial settlements and that Ms. Bonar received substantial legal fees through these settlements. The Class Members in this case, who have gained nothing from these settlements, must now shoulder the financial burden of paying for the substantial work performed and expenses incurred by Class Counsel on behalf of these two persons from the Class Members' share of the recovery in this case. Thus, they have been prejudiced by Ms. Bonar's actions.

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[11] Class Counsel agreed at the outset that Ms. Bonar's sole contribution to the case was to permit two of her clients to serve as Class Representative 1 and Class Representative 2. These are the same individuals she withdrew from the class action and represented in individual settlements with the Diocese. We agreed, at her request, that she was not required to perform legal work. Although she was told that her time records must be submitted every month (Ex. K), she has never submitted any record of time spent on this case.

C. DURING THE OPT OUT PERIOD, MOVANTS' ATTORNEY ENGAGED IN A MEDIA CAMPAIGN TO CONVINCE CLASS MEMBERS TO OPT OUT OF THE CLASS ACTION

In addition to removing two class representatives while she was a class counsel, in the fall and winter of 2003, movants' attorney began a concerted media campaign to influence Class Members to opt out of the class action and enter into private settlements with herself as their attorney. On December 4, 2003, she conducted a press conference, during which she made her sexual abuse clients, including Class Representatives 1 and 2, available to the media. The information movants' attorney provided to the media demonstrates that the expressions of concern for the privacy interests of her clients, set forth in the motion to intervene, are not genuine.

Movants' attorney permitted her three clients to use their true first names in the media conference, and Class Representative 1 gave information about the abuse he suffered. (Ex. D-1). Class Representative 1 gratuitously criticized the class action and said "[h]e didn't find the peace he was looking for until he chose to opt out of the class action lawsuit in November and sign a settlement agreement on Wednesday with the Diocese." (Id.). Under Ms. Bonar's guidance, he revealed terms of his settlement, which included financial compensation, pastoral counseling, and psychological counseling. (Id.). The sisters revealed that they and a third person were paid $750,000 (thus implying that class members could receive $250,000 each if they opted out and retained Ms. Bonar to settle their claims). One of the sisters described the class action process as "horrible." She stated, "All I wanted was to get my case resolved, and

with the help of my attorney I could approach the diocese directly and resolve my claim." (Id.).

This non-too-subtle solicitation of Class Members was followed the next day by another prominent report of the press conference, where Class Representative 1 attacked Class Counsel, claiming they were not interested in the details of his story (Ex. D-2). (Class Counsel spent many hours with this person). He said, "For me, the class-action lawsuit became out of the question, and that's why I got out." (Id.).

On the same day, December 5, 2003, a prominent news article featured the statement of the Diocese's attorney that "My position is, I'm not going to settle the class-action. That's a completely negative element." (Ex. D-3). "Individual claims can receive individual attention . . that many victims have found beneficial. . . But a class-action lawsuit necessarily advances an adversarial process, with winners and losers. . . In our system, the goal is not to have losers." The news article then states that victims who settled "were represented by Covington attorney Barbara Bonar, ***who is also involved in the class action lawsuit.*** She said several of her clients specifically have told her they wanted to go alone." (D-3) (Emphasis added). Thus, Ms. Bonar used her position as Class Counsel (where she had an acknowledged conflict of interest) to put a public imprimatur on leaving the class action and pursuing individual claims with her as individual counsel.

On January 28, 2004, the Diocese and Ms. Bonar participated in a front page story in the Cincinnati Enquirer. The Diocese's attorney stated that it had

paid $8,900,000 in settlements to 39 sexual abuse victims. (D-4). She again attacked the class action as "wholly negative." The article notes that "many claims were settled through attorney Barbara Bonar of Covington." Ms. Bonar apparently provided the true name of Class Representative 2, which appears in the article. The article states that she "dropped out as a lead plaintiff in the class action . . ." (Id.). It quotes her as describing the class action as a "horrible process. All I wanted was to get my case resolved, and with the help of my attorney, I could approach the diocese directly and resolve my claim." A similar article appeared in the Cincinnati Post on January 28, 2004. It quoted the Diocese's attorney as stating that "[t]en other victims have expressed interest in settling their cases individually." (D-5). It is no coincidence these media conferences were conducted three days before the opt out deadline.

D. MOVANT'S ATTORNEY IS CURRENTLY OBSTRUCTING CLASS DISCOVERY

Defendants were previously ordered by the Court to produce, pursuant to a protective order, all documents relating to child sexual abuse complaints. In the fall of 2003, Class Counsel requested Defendants to supplement their production with complaints they had received during 2002 and 2003. These complaints of historical child sexual abuse are crucial to Class Counsel's ability to establish a continuing pattern of illegal conduct on the part of the Diocese.

Nevertheless, Defendants have refused to produce these complaints, making it necessary for Class Counsel to file a motion to compel them. This motion is pending. The only reason given for the refusal to produce evidence is the strenuous objection of the victims' attorneys: Barbara Bonar and one other

attorney in the Lexington, Kentucky area. There are no privacy concerns regarding the records sought, because all identification of victims must be redacted pursuant to the Protective Order in this case. Thus, the only information that will be protected is the identities of abusive priests, the times and locations of the abuse, and information establishing the Diocese's complicity in the abuse. The refusal to produce highly relevant evidence has caused unnecessary work on the part of Class Counsel and exhausts resources that are better spent on other facets of the case. It also taxes the resources of the Court.

E. DUE TO HER CONFLICT OF INTEREST AND HER BREACH OF FIDUCIARY DUTY TO THE CLASS, MOVANTS' ATTORNEY SHOULD NOT BE PERMITTED TO REPRESENT CLASS MEMBERS VIA THE MOTION TO INTERVENE

The conflict of interest that caused movants' attorney to withdraw as a class counsel is due, at least in part, to the pressure of her relationships with her Diocesan clients and her peers within the Diocese and the embarrassment it causes her in representing Class Members. (Ex. M). The conflict was sufficiently strong that she demanded her name be removed from briefs filed by Class Counsel. Thus, it has definitely affected her representation of the Class Members.

Nevertheless, after moving to withdraw as class counsel, movants' attorney has continued to represent approximately 19 Class Members, all of whom apparently opted out of the class action based on her advice. As the Court is aware, Kentucky's Rules of Professional Responsibility prevent a lawyer from representing a client in the face of an apparent conflict of interest. A lawyer shall not represent a client if the representation of that client may be materially

limited by the lawyers' responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

> (1) A lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

SCR 3.130(1.7). Moreover,

> A lawyer who has formally represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation.

SCR 3.130(1.9).

These conflict of interest rules are designed to protect the interests of both the former and current clients of an attorney and to assure attorney-client loyalty at all times. Where an attorney's loyalty to her client becomes an issue, the Commentary to the Rules of Professional Responsibility provides that :

> [3] loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. . . . the critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will ***materially interfere with the lawyer's independent professional judgment*** in considering alternatives or foreclosed courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interests involved.

SCR 3.130(1.7), Commentary [3].

There is no indication that movants' attorney has severed her business and personal connections with the clients and peers that created her conflict. Her clients' legal interests are necessarily adverse to administrators and programs in the Diocese and peer pressure still exists. The conflict remains. SCR 3.130(1.7) and (1.9).

Movants' attorney suffers from an additional conflict in that her interests are adverse to the Class Members and she has acted on those interests in manner antagonistic to the class. During her tenure as a class counsel, she conducted media conferences where she encouraged her clients to criticize the class action. (*See supra*, pp. 37-40).[12] Despite her fiduciary responsibilities to the class, she urged Class Members to leave the class to seek individual settlements. *Id.* The press conferences publicized her availability as counsel for this purpose. Shortly thereafter, she moved to withdraw as a class counsel and filed her Notice of Attorney's Fee Lien, seeking legal fees from any future class recovery. (Ex. A).[13]

CONCLUSION

For all the above reasons, Plaintiffs respectfully request the Court to deny the motion to intervene.

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[12] It cannot reasonably be said that these media conferences would advance the interests of Ms. Bonar's individual clients, who had already settled their claims and whose confidentiality she claims to be protecting.

[13] This conduct raises serious questions about the validity of the settlements entered into by Class Members who were Ms. Bonar's clients, especially Class Representatives 1 and 2. While the Court may have to visit that issue in the future, that is not the subject of the instant motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served by regular mail on March 30, 2004, to: Mark D. Guilfoyle, Esq., Deters, Benzinger & LaVelle, P.S.C., 2701 Turkeyfoot Road, Crestview Hills, KY 41017; Carrie K. Huff, Esq., Mayer, Brown, Rowe & Maw, LLP, 190 South LaSalle Street, Chicago, IL 60603; B. Dahlenburg Bonar, Esq., 3611 Decoursey Avenue, Covington, KY 41015; and Angela Ford, Esq., Chevy Chase Plaza, 836 Euclid Avenue, Suite 311, Lexington, KY 40502.

Robert A. Steinberg

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

- APPENDIX -

Exhibit #	Document Description
Exhibit A:	Motion of Barbara Bonar to withdraw as class counsel due to conflict of interest dated January 9, 2004
Exhibit B:	Opt Out Notice and opt out form approved by the Court
Exhibit C:	Published Opt Out Notice and Opt Out Form approved by the Court
Exhibit D:	(Containing Exhibits D-1 through D-5) Newspaper articles containing press conferences by Barbara Bonar and the Diocese's attorneys urging victims to opt out of the class action case.
Exhibit E:	Affidavit of Katherine Kinsella attesting to the publication of opt out notices and the creation and maintenance of the website.
Exhibit F:	(Under Seal). Cover letter dated October 30, 2003 from Peggy Champagne to John Doe III, enclosing the Order Certifying Class and Approving Class Notice, including the opt out notice and opt out form, and signed retainer agreement
Exhibit G:	Affidavit of Peggy Champagne
Exhibit H:	Affidavit of Matilda Hasson
Exhibit I:	(Under Seal). Cover letter dated February 3, 2004 from Peggy Champagne to John Doe II, and signed retainer agreement.
Exhibit J:	January 30, 2004 letter from Robert Steinberg to Barbara Bonar regarding anonymous opt outs.
Exhibit K:	(Under Seal). February 6, 2003 letter from Robert Steinberg to Barbara Bonar regarding time records.
Exhibit M:	(Under Seal). September 22, 2003 letter from Barbara Bonar to Robert Steinberg regarding her conflict of interest.
Exhibit N:	(Under Seal). November 20, 2003 letter from Robert Steinberg to Barbara Bonar expressing concern about her conflict of interest.
Exhibit O:	(Under Seal). November 21, 2003 letter from Barbara Bonar to Robert Steinberg denying her conflict of interest and denying she withdrew two clients from the class action.

Exhibit P: (Under Seal). November 26, 2003 letter from Robert Steinberg to Barbara Bonar regarding her actions that were against the best interests of the class.

Exhibit Q: (Under Seal) January 13, 2004 letter from Class Counsel to clients advising them of attorney-client privileged meeting on January 24, 2004

Exhibit R: February 17, 2004 letter from Robert Steinberg to Barbara Bonar in response to her e-mail to Judge Potter of Sunday, February 15, 2004.

Exhibit S: March 3, 2004 letter from Robert Steinberg to Barbara Bonar in response to her letter of February 24, 2004.

Exhibit T: March 16, 2004 letter (erroneously titled "March 3, 2004") from Robert Steinberg to Barbara Bonar in response to her letter of March 11, 2004.