IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SHARON TELL, Plaintiff, v. ROMAN CATHOLIC BISHOPS OF DIOCESE OF ALLENTOWN a/k/a DIOCESE OF ALLENTOWN, Defendant.	C.A. No. 09C-05-171 JAP
ANDREW S. FORD, Plaintiff, v. ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, a Corporation Sole; ST. CLARE'S ROMAN CATHOLIC CONGREGATION, INC.; MICHAEL L. BARNES, a/k/a REV. MICHAEL L. BARNES Defendants.	C.A. No. 09C-06-196 JAP

On Defendant Diocese of Allentown's Motion to Dismiss
for Lack of Personal Jurisdiction.
GRANTED.

On Defendants Roman Catholic Archbishop of Baltimore and St. Clare's
Roman Catholic Congregation, Inc.'s Motion to Dismiss
for Lack of Personal Jurisdiction
GRANTED.

On Plaintiff Ford's Motion for Leave to Take Discovery.
DENIED.

MEMORANDUM OPINION

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PARKINS, J.

The issue presented in these two cases is whether this Court can assert personal jurisdiction over two out-of-state Roman Catholic dioceses and a Roman Catholic parish in Maryland. Both cases arise from alleged sexual abuse occurring in Delaware by priests employed by one of the out-of-state entities. Because of the similarity of the issues raised in these two cases, the Court has consolidated them solely for the purpose of considering the pending motions to dismiss. The Court conducted a consolidated oral argument in which all the parties participated. For the reasons which follow, the Court finds that it lacks personal jurisdiction over the moving defendants and therefore grants their respective motions to dismiss. The Court denies Plaintiff Ford's motion for leave to take discovery because the discovery sought by Plaintiff relates to facts which are undisputed for purposes of the motion to dismiss and therefore the proposed discovery is unnecessary.

I. *Background*

Plaintiff Sharon Tell alleges that she was abused by Fr. James McHale, who was an associate pastor at her Roman Catholic parish when her family resided in the Bethlehem, Pennsylvania area. The Tell family moved to the Smyrna, Delaware area in 1966, and Fr. McHale thereafter visited them in Delaware. The abuse of Ms. Tell by Fr. McHale allegedly continued during these visits. Ms. Tell has brought suit against the Diocese

of Allentown, Fr. McHale's alleged employer, but she has not sued Fr. McHale, who died several years ago. The diocese has responded with the instant motion to dismiss.

As a youngster Plaintiff Andrew Ford was a member of St. Clare's parish and attended St. Clare School in Essex, Maryland, both of which are part of the Archdiocese of Baltimore. Plaintiff alleges that he was repeatedly sexually abused by Fr. Michael Barnes who served at St. Clare's. Mr. Ford has sued the Archdiocese, St. Clare parish, St. Clare School and Fr. Barnes, who is believed to be incarcerated. The archdiocese, parish and school have filed a joint motion to dismiss on the ground this Court lacks personal jurisdiction over them.

The Court conducted oral argument on the motion to dismiss in *Tell*. About the time of that argument the Court learned of the pendency of *Ford* and the issues it presented. Because those issues were nearly identical to the issues presented in *Tell* the Court ordered a joint oral argument so that counsel could respond to arguments made in either case. With the consent of the parties the Court has consolidated these cases solely for determination of the pending motions to dismiss.

II. *Facts*

For purposes of the pending motions the Court assumes all of the facts (as opposed to legal conclusions) alleged in the respective complaints to be true.[1] Plaintiffs have each submitted affidavits and the Court assumes for present purposes that the facts set out in those affidavits are also true.

A. *Tell*

Sharon Tell, her parents and siblings attended Notre Dame of Bethlehem Roman Catholic church in Bethlehem, Pennsylvania where James McHale served as an associate pastor from 1961 to 1965.[2] As a child and adolescent Ms. Tell regularly attended Mass, attended Catholic schools and was active in church functions. In 1964, when she was twelve years old, Fr. McHale began to sexually assault her. Two years later Mr. Tell was transferred and the family moved to Smyrna, Delaware. The move did not deter Fr. McHale, who often visited the Tell family in Smyrna. The family was understandably proud to have a priest lavish so much attention on them, but little did they know the real reason for Fr. McHale's visits. During his visits to the Tell family home in Smyrna, Fr. McHale usually celebrated Mass with the Tell family in their kitchen. Fr. McHale allegedly asked for a

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[1] On a motion to dismiss "[p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences." *Brehm v. Eisher*, 746 A.2d 244, 253 (Del. 2000).
[2] Notre Dame of Bethlehem, http://www.churchofndbeth.org/NotreDameChurch/Topic_history.html.

contribution to the diocese, and as is customary, the family made such an offering. Inevitably during these visits Fr. McHale capitalized on the trust placed on him by the family and maneuvered so that Ms. Tell would be alone with him, at which time he would sexually abuse her.

The Complaint is confusing about how long the pattern of abuse in Delaware lasted. At one point in the Complaint Plaintiff alleges that Fr. McHale's "numerous" visits to the Tells' home in Delaware took place over a year's time,[3] suggesting that it stopped around 1967. Elsewhere, however, she alleges that Fr. McHale abused her for approximately 20 years,[4] indicating that it did not stop until roughly 1984. In any event it is unnecessary to resolve this in order to decide the motion to dismiss.

B. *Ford*

Plaintiff Ford, his parents and two brothers were at one time devout Catholics who regularly attended Mass on Sunday. As a youngster Mr. Ford served as an altar boy, participated in the Catholic Youth Organization and attended St. Clare's school. It is not precisely clear when Fr. Barnes began to abuse Plaintiff. According to the Amended Complaint, the abuse occurred while Plaintiff was a student at St. Clare Catholic School in Essex, Maryland:

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[3] Tell Compl., at ¶¶40, 41. In her affidavit Ms. Tell asserts that the visits took place on a weekly basis.
[4] *Id.* at ¶36.

> Plaintiff Andrew Ford was born in 1965. In or around 1977 through 1982, Plaintiff was a parishioner at St. Clare and a student at St. Clare School … where Father Barnes was assigned. During that time period, when Plaintiff was a minor, of approximately twelve to seventeen years of age, Father Barnes committed sexual assault.[5]

On the other hand Plaintiff suggests in his affidavit he was not a student at St. Clare but rather was attending Calvert Hall College -- a private college preparatory school for boys located in Towson, Maryland -- when the abuse began:

> *Before* my experience with Barnes I was enrolled in Calvert Hall College in Towson, Maryland . . . . As the abuse by Barnes progressed I was no longer able to attend this school . . . . I transferred to Eastern Vocational Technical High in Essex, Maryland.[6]

The Court believes that the word "Before" in the affidavit was an inadvertent error and that Mr. Ford meant to say "After," which would reconcile the affidavit and the Amended Complaint. In any event, like the ambiguity in *Tell*, this confusion is of no consequence to the issues presented here.

The Amended Complaint recites that while a parishioner at St. Clare (and most likely a student at St. Clare School), Plaintiff became the object of Fr. Barnes' attention. When Plaintiff was approximately 12 years old, Fr. Barnes began to entertain Plaintiff with movies and pizza which soon progressed to alcohol and pornography. Fr. Barnes' reprehensible conduct

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[5] Ford Amended Compl., at ¶27(b).
[6] Ford Aff., at ¶17 (emphasis added).

escalated from there, and his sexual abuse of Plaintiff lasted until Plaintiff was 17 years old.

Some of the sexual abuse occurred in Fr. Barnes' room in the rectory at St. Clare, and it also took place on trips arranged by Fr. Barnes, including at least ten occasions when Fr. Barnes took Plaintiff to Rehoboth Beach or Fenwick Island. While in Delaware they would stay in hotels or in the vacation homes of St. Clare parishioners. On one of those trips Father Barnes said Mass in a Delaware parish. Fr. Barnes took Plaintiff on other trips as well. They made "numerous" trips to Ocean City, Maryland, as well as one trip to the Bahamas and another to Colorado. A trip to Hawaii was aborted when Fr. Barnes became intoxicated in the San Francisco airport and they missed their connecting flight. Each of these trips was apparently fueled by alcohol and marked by the sexual abuse of Plaintiff.

III. *Procedural Matters*

The Court must resolve some procedural questions before reaching the substantive issues presented here. The Court will first briefly refer to the familiar standard for consideration of motions to dismiss. Next it will discuss whether, on a motion to dismiss, it may consider the affidavits submitted by the parties. This is followed by a discussion of the ecclesiastical abstention doctrine and its application to two affidavits

submitted on behalf of each Plaintiff by Fr. Thomas Doyle. Finally the Court will discuss Plaintiff Ford's application for leave to take jurisdictional discovery.

A. *The standard of review*

When faced with a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating the basis for the Court's exercise of jurisdiction over a nonresident defendant.[7] The Court must accept all factual allegations in the complaint as true and view all factual inferences in a light most favorable to the plaintiff.[8]

B. *Consideration of affidavits on a motion to dismiss for lack of jurisdiction*

Here the parties have submitted affidavits in support of their respective positions. As a general rule courts do not consider matters outside the pleadings on a motion to dismiss. However in the case of motions to dismiss for lack of personal jurisdiction, courts routinely examine such materials. As a leading treatise put it, the validity of a motion to dismiss on jurisdictional grounds "rarely is apparent on the face of the pleading and . . . generally require[s] reference to matters outside the pleadings."[9]

[7] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005).
[8] *Daily Underwriters of America v. Maryland Auto. Ins. Fund*, 2008 WL 3485807, at *2 (Del. Super.); *Wright v. American Home Products Corp.*, 768 A.2d 518, 526 (Del. Super. 2000).
[9] 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, §1364 (3d ed. 2004).

Consideration of affidavits on a motion to dismiss for lack of personal jurisdiction is now an accepted part of this state's jurisprudence. In *Greenly v. Davis*[10] the Delaware Supreme Court implicitly approved consideration of affidavits on a motion to dismiss for lack of personal jurisdiction. The issue before the *Greenly* court was not whether the trial court could consider affidavits, but whether it did so in a proper fashion.

> Plaintiff contends that the trial judge in considering the motion to dismiss actually picked and chose facts from among conflicting affidavits on the factual issues surrounding the application of the long-arm statute, and that he thereby ignored the well-established rule that the record be viewed in the light most favorable to the non-moving party and that all reasonable inferences be considered most strongly in favor of plaintiff. We have examined the record on which the trial judge relied and the conclusions he reached. We find no error in what the trial court did. It is true that the trial judge did rely on William K. Davis' specific factual assertions as to where most of the negotiations between the parties took place in Pennsylvania. In so doing, he gave little weight to vague, general assertions contained in plaintiff's counter-affidavit where plaintiff asserted that he had met on "numerous occasions" with defendant William K. Davis at Greenwood, Delaware but failed to state when the meetings occurred or that they were related to the contract in question. This was appropriate in view of the wording of the affidavits.[11]

In the years since *Greenly*, numerous lower court opinions have endorsed consideration of affidavits when considering such motions.[12] None of the instant parties argue that the Court should not consider affidavits on a motion to dismiss for lack of personal jurisdiction. The moving defendants,

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[10] 486 A.2d 669 (Del. 1984).
[11] *Id*. at 670.
[12] *E.g. Aveta, Inc. v. Olivieri*, 2008 WL 4147565, at *1 (Del. Super.); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000) ("[E]xtra-pleading material may be used to supplement the complaint and establish jurisdiction."); *Lester v. Katzen*, 1994 WL 750324, at *1 (Del. Super.) (The "law seems reasonably clear" that a court may consider affidavits when deciding a motion to dismiss for lack of personal jurisdiction).

however, object on the basis of the First Amendment to affidavits focusing on canon law submitted by each of the plaintiffs.

C. *The Doyle affidavits and ecclesiastical abstention*

Two of the affidavits—each executed by the same expert—are problematic. Both Plaintiffs have offered an affidavit from Father Thomas P. Doyle, an expert on the canon law of the Roman Catholic Church. Because they touch upon ecclesiastical matters, these affidavits raise special problems and, indeed, Defendants urge that the Establishment Clause of the First Amendment precludes this Court from considering them. The Court agrees.

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Although elegant in its simplicity, the religion clause has given rise to a vast array of judicial opinions, often difficult to decipher and at times seemingly inconsistent with one another. Justice Scalia has described the uncertainty of Establishment Clause jurisprudence in amusing, but pointed, terms. Referring to a tri-partite test previously espoused by the Court in *Lemon v. Kurtzman*[13] (the "*Lemon* test"), Justice Scalia had this to say:

[13] 403 U.S. 602 (1971).

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. In its most recent burial, only last Term, was, to be sure, not fully six feet under.
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> * * *
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> The secret of the *Lemon* test's survival, I think is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.[14]

Although the *Lemon* test itself is not pertinent to the issues at bar, Justice Scalia's thoughts underscore the twists and turns which one can encounter while exploring the case law interpreting and applying the Establishment Clause.

Fortunately the relevant principles applicable here are comparatively straightforward—the First Amendment prohibits civil courts from enmeshing themselves in doctrines of religious faith and the internal governance of religious institutions. Even though the text of the First Amendment refers to laws enacted by Congress, the amendment applies with equal force to the judiciary.[15] Among other things, the First Amendment

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[14] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 397-8 (1993) (Scalia, J., concurring).
[15] *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960).

limits the ability of secular courts to determine "questions of discipline, or of faith, or ecclesiastical rule, custom or law."[16] The purpose of this prohibition is to give religious organizations "an independence from secular control or manipulation, in short, power to decide for themselves, free from State interference, matters of church government as well as those of faith and doctrine."[17] This limitation is variously referred to as the "church autonomy doctrine" or "ecclesiastical abstention."[18]

Many, if not most, ecclesiastical abstention cases arise in the context of disputes over ownership of church property.[19] Quite clearly that is not the case here. Still these cases guide the Court's present inquiry.[20] Notably, the doctrine may not be invoked merely because one of the litigants is a religious organization, and there is no doubt that the doctrine does not bar the instant lawsuits. A court is free to resolve a dispute involving a religious organization if it can do so without reference to religious doctrine.[21] As the Supreme Court observed, the First Amendment does not require "the States

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[16] *Watson v. Jones*, 80 U.S. 679, 727 (1871).
[17] *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952).
[18] *Ogle v. Hocker*, 2008 WL 2224863 (6th Cir.).
[19] *E.g., East Lake Methodist Espiscopal Church v. Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church*, 731 A.2d 798 (Del. 1999); *African Methodist Episcopal Church, Inc. v. John Wesley United Church, Inc.*, 1994 WL 643178 (Del. Ch.); *Mother AUFCMP Church v. Conference of AUFCMP*, 1991 WL 85846 (Del. Ch.).
[20] Judge Scott of this Court referred to the property dispute cases in his thorough discussion of the ecclesiastical abstention doctrine in some detail in *Collins v. African Methodist Episcopal Zion Church*, 2006 WL 1579828 (Del. Super.).
[21] *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (court could hear sexual harassment and hostile work environment claims brought by church employee).

to adopt a rule of compulsory deference to religious authority . . . when no issue of doctrinal controversy is involved.[22]

Still the doctrine is of considerable significance here, for it forbids this Court from considering the bulk of the Doyle affidavits. To be sure, not all of the assertions contained in the Doyle affidavits are ecclesiastical in nature. For example, his statement in the *Ford* affidavit that both the Diocese of Wilmington and the Archdiocese of Baltimore are members of the Maryland Catholic Conference or the statement that the Archbishop of Baltimore attended the Wilmington funeral of retired Bishop Saltarelli can hardly be considered as touching upon matters of faith or church policy.

The real meat of the affidavits, however, relates to ecclesiastical matters. In his *Ford* affidavit, for example, Fr. Doyle invokes canon law in order to affix responsibility for Defendant Barnes' alleged conduct on the Archbishop:

> Fr. Michael Barnes' superior was the archbishop of Baltimore. He was subject to the archbishop's authority at all times and in all places whether inside the geographic boundaries of the archdiocese or not. This authority was not limited by time or location. Based on the very nature of the priesthood as a unique way of life and not merely an occupation or an employment, the archbishop's authority and responsibility for Fr. Barnes' actions included the time when he was actually performing the traditional duties of a priest such as conducting services. It also included all aspects of Fr. Barnes professional and personal life. Fr. Barnes' role and responsibilities as a priest were not confined to the geographic territory of the archdiocese of Washington. They followed him wherever he was and were active when he was on vacation or on days off. The archbishop's

[22] *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

> authority over and responsibility for Fr. Barnes' actions and deportment was not limited to the geographic boundaries of the Archdiocese of Baltimore. His authority extended to Fr. Barnes wherever he was, including when he was in the Diocese of Wilmington.
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> The archbishop of Baltimore's fundamental responsibility to the Catholics entrusted to him as their archbishop was and is the safeguarding and nurture of their spiritual and moral welfare. He is responsible for seeing that all Catholics but especially the priests fulfill their religious duties and responsibilities. He is responsible for seeing that nothing threatens to harm the spiritual and moral welfare of the members of his diocese and if something or someone does so harm a person, he is responsible for seeing that there is a just and pastoral response to this violation. This obligation extends to the archbishop's subjects wherever they may be, even if outside the archdiocese. In this case, the archbishop of Baltimore was responsible for the harm done to Andrew Ford no matter where it took place.

He draws similar conclusions in the affidavit submitted in *Tell*.

Such conclusions, in the Court's view, fall well within the ecclesiastical abstention doctrine. In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*[23] the Illinois Supreme Court held that the church's decision to defrock a bishop was arbitrary because the church did not follow its own laws and procedures. The United States Supreme Court reversed, holding that the First Amendment forbids secular courts from making the sort of inquiry made by the Illinois Supreme Court:

> For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits.[24]

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[23] 426 U.S. 696 (1976).
[24] *Id*. at 713.

Fr. Doyle's invitation to examine canon law to determine the liability of church superiors is fraught with the possibility of an unconstitutional interference with the church. The Court has no assurance that the conclusions urged in the Doyle affidavits are correct. Indeed the Diocese of Allentown advised the Court that it disagrees with Fr. Doyle's interpretation of canon law. Inevitably this would require the Court to resolve differences between Fr. Doyle's interpretations and those of the yet-to-be-named canon law experts proffered by the defendants. Such judicial intrusion into church matters is precisely what is forbidden by the Establishment Clause:

> To permit civil courts to probe deeply enough into the allocation of power within [a hierarchical] church so as to decide…religious law [governing church policy]…would violate the First Amendment in much the same manner as civil determination of religious doctrine.[25]

There is another, independent, reason why the Court will not consider the Doyle affidavits. Plaintiffs' reliance upon the canon law of the Roman Catholic Church necessarily suggests that a similar case involving a different religious organization (with different canon law) could yield a different result merely because of differences in canon law. Surely neither the Establishment Clause nor the Equal Protection Clause would tolerate different legal analyses depending upon whether the alleged miscreant cleric

[25] *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* 396 U.S. 367, 369 (1970) (Brennan, J., concurring).

was a priest, minister, pastor, rabbi or imam. Those constitutional protections "speak with one voice one this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."[26] In sum, "[w]hile Canon law may regulate the relationship between the [diocese] and [the priest], Canon law does not supply the test for personal jurisdiction under [Delaware] law."[27]

D. *Plaintiff Ford's application for leave to take discovery*

Before considering the motions to dismiss, the Court must also consider Plaintiff Ford's motion to take discovery prior to resolution of the motion to dismiss.[28] Plaintiff tells the Court that he wishes to take discovery into the following matters:

> (a) The Archdiocese's knowledge and/or approval of Barnes driving a motor vehicle out of state with minor parishioners;
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> (b) The Archdiocese's ownership and/or interest in any motor vehicle driven by or possessed by Barnes, and any other property in Delaware;
>
> (c) The Archdiocese's policies and procedures regarding priests traveling out of State with and without minor parishioners;
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> (d) The Archdiocese's knowledge of Barnes sexually abusing minors;

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[26] *Board of Education v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring); *see United States v. Mary Elizabeth Blue Hull Memorial Episcopal Church*, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when church property litigation is made to turn the resolution in civil courts of controversies over religious doctrine and practice.").

[27] *Archdiocese of Detroit v. Green*, 899 So.2d 322, 325 (Fla. Dist. Ct. App. 2004).

[28] Plaintiff Ford filed a motion seeking leave to take discovery as part of his response to the moving defendants' motion to dismiss. After the first oral argument plaintiff Tell contended for the first time that she too needed discovery. She never filed a motion seeking leave to take discovery nor has she advised the Court what discovery she needs. The Court finds, therefore, that she has waived this point.

(e) The Archdiocese's knowledge of Barnes receiving any medical treatment for psychiatric conditions and/or addictions;

(f) The Archdiocese's knowledge and approval of Plaintiff's overnight stays at the St. Clare's Rectory;

(g) The knowledge of other priests in the Archdiocese of the abuse by Barnes, Father Albert "Pete" Stallings said, "I know what is going on and I will stop it;"

(h) The Archdiocese's knowledge and approval of the funding for the trips that Barnes took Plaintiff on (i.e. – to the Bahamas.)[29]

It is true that in an appropriate case, perhaps even in most cases, a court may allow limited discovery before resolving a motion to dismiss for lack of personal jurisdiction.[30] On the other hand, "[w]hen a plaintiff offers only speculation or conclusory assertions about contacts within a forum state, a court is within its discretion in denying jurisdictional discovery."[31] A court may also deny jurisdictional discovery when it is apparent that the requested discovery will add nothing to the jurisdictional analysis. This is such a case.

Plaintiff's proposed topics of discovery are not relevant to the instant analysis. It makes no difference to this analysis that the Archbishop may have approved Fr. Barnes' driving a car out of state accompanied by minors, or that Fr. Barnes drove a car owned by the Archdiocese.[32] Likewise the

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[29] Pl. Mot., at ¶9 ("Proposed Topics").
[30] *Hart Holding, Inc. v. Drexel Burnham Lambert, Inc.*, 593 A.2d 535, 539 (Del. Ch.1991).
[31] *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Cntrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003).
[32] Proposed Topics at (a),(b).

Court will assume for present purposes that the Archdiocese had inadequate policies regarding priests driving out of state with minors and that the Archdiocese disregarded any policies it had in place.[33] The Court further assumes for purposes of this opinion that the Archdiocese knew Fr. Barnes was sexually abusing minors, that he had either received or was in need of psychiatric treatment,[34] and that the Archdiocese was aware of and approved Mr. Ford's overnight stays in the rectory.[35] In short, the proposed discovery relating to these assumed facts is not necessary to resolve the legal issues raised by the pending motions to dismiss because the Court will assume that the evidence unearthed by the discovery would have been favorable to Plaintiff.

The Court takes special note of one discovery request proposed by plaintiff Ford. He wishes to obtain discovery about approval and financing of the trips to the Bahamas, Colorado, San Francisco and Ocean City, Maryland. In support of this request he points the Court to a bench ruling by another judge of this Court that "if a person was subjected to one sexual act of criminal abuse in this state, he may file suit against his abuser as to all acts of sexual abuse, both the one or ones that occurred in Delaware and

[33] *Id*. at (c).
[34] *Id.* at (d),(e).
[35] *Id.* at (f).

ones that occurred in the other jurisdiction."[36] That ruling—which did not involve application of Delaware's long arm statute—is inapplicable here. Delaware's statute provides that it confers jurisdiction only for those assaults occurring within Delaware.[37] Thus even if this Court had personal jurisdiction over the Archdiocese and St. Clare, it could not entertain claims based upon the assaults taking place in Maryland, the Bahamas, Colorado and San Francisco. Consequently the discovery sought by plaintiff Ford with respect to these trips is not reasonably calculated to lead to the discovery of admissible evidence in this case.

V. *Substantive Analysis*

Delaware courts apply a two-prong test to determine whether personal jurisdiction exists over a nonresident defendant. First, the Court must consider whether there is a statutory basis for jurisdiction under Delaware's long arm statute.[38] In doing so the Court must construe the long arm statute broadly to the maximum, extent permissible under the Due Process Clause.[39] Second, the Court must evaluate whether the exercise of jurisdiction violates

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[36] Dingle v. Catholic Diocese of Wilmington, C.A. No. 07C-09-025, at 3-4 (Del. Super. Oct. 5, 2009) (TRANSCRIPT).
[37] 10 *Del. C.* § 3104 (j).
[38] *AeroGlobal*, 871 A.2d at 437.
[39] *LaNuova D&B, S.p.A. v. Bowe, Inc.*, 513 A.2d 764, 768 (Del. 1986).

the Due Process Clause of the Fourteenth Amendment.[40] This two step analysis "must not be collapsed into a single constitutional inquiry."[41]

The first step of the analysis is to parse the terms of Delaware's long arm statute—10 *Del. C.* § 3104—and determine whether the plaintiff can satisfy one or more of its provisions.[42] Pursuant to Delaware's long arm statute, a court may exercise personal jurisdiction over a nonresident if the person:

> (1) Transacts any business or performs any character of work or service in the State;
> (2) Contracts to supply services or things in this State;
> (3) Causes tortious injury in the State by an act or omission in this State;
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
> (5) Has an interest in, uses or possesses real property in the State; or
> (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.[43]

Section 3401 is to be construed liberally, thus favoring the exercise of jurisdiction.[44]

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[40] *Id.*
[41] *Power Integerations, Inc. v. BCD Semiconductor Corp.*, 547 F. Supp. 2d 365, 370 n.3 (D. Del. 2008).
[42] Despite the liberal interpretation given to section 3104, the Court is not free to ignore the terms of the statute. *Mobile Diagnostic Group Holdings, LLC v. Diagnostic Labs Holdings, LLC*, 972 A.2d 799, 804 (Del. Ch. 2009); *Joint Stock Society v. Heublein, Inc.*, 936 F. Supp.177, 194 (D. Del.1996) (applying Delaware law).
[43] 10 *Del. C.* § 3104(c).
[44] *Daily Underwriters*, 2008 WL 3485807, at *3.

Jurisdiction arising under subsections (1)-(3) is referred to as "specific jurisdiction" whereas jurisdiction under subsection (4) is known as "general jurisdiction." The specific jurisdiction subsections require a showing that the cause of action arises from conduct occurring within the state, while general jurisdiction requires plaintiff to show that the defendant regularly and continuously conducted business within Delaware.[45]

> Subsection (c)(4), on the other hand, creates general jurisdiction in cases where the cause of action is unrelated to the relevant Delaware contacts. General jurisdiction under (c)(4) requires a greater more continuous pattern of contacts with the forum state than does the "single act" jurisdiction under subsection (1), (2) or (3). The "tradeoff" for this stricter requirement is that activities which create that general presence need not be the basis of the plaintiff's cause of action.[46]

Plaintiff Ford argues that this Court has jurisdiction under subsections (1), (3) and (4), while plaintiff Tell contends that this Court has specific jurisdiction without citing which subsection of section 3104 gives rise to that jurisdiction.

The second step in the analysis is to determine whether the exercise of personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment. Under the due process analysis, the Court must consider whether the nonresident party had sufficient "minimum contacts" with the forum state so that jurisdiction over the party "does not offend traditional

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[45] *Elliott v. The Marist Brothers of the Schools, Inc.*, 2009 WL 4927130, at *5 (D. Del.).

[46] *Computer People, Inc. v. Best International Group, Inc.* 1999 WL 288119 (Del. Ch.).

notions of fair play and substantial justice."[47] The nonresident's conduct and connection to the forum state must be such that the party "should reasonably anticipate being haled into court there."[48]

A. *The acts of the moving defendants -- not the abusive priests -- must provide the basis for personal jurisdiction over them*

Before applying the long-arm statute, it is necessary to determine whose conduct is to be used to measure whether this Court has personal jurisdiction over the moving defendants. Plaintiffs urge that the Court should determine whether it has jurisdiction on the basis of the conduct of the allegedly abusive priests, whereas the moving defendants contend that it is their own conduct, not that of the priests, which determines whether this Court has jurisdiction over them. If the moving defendants are liable under the doctrine of *respondeat superior*, the conduct of the abusing priest is attributable to his employer and will determine the jurisdictional issue.[49] If they are not vicariously liable for the priests' conduct, then it is the conduct of the moving defendants themselves which must be used to determine

[47] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
[48] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 294, 297 (1980).
[49] Section 3104(3) provides for jurisdiction to hear claims for injuries caused by acts of omissions occurring within this state. It follows that if the defendants are vicariously liable, they are liable for the assaults occurring in Delaware.

jurisdiction.[50] It is necessary, therefore, for the Court to determine whether the Archdiocese and St. Clare are vicariously liable for the conduct of Fr. Barnes and whether the Diocese of Allentown is vicariously liable for the conduct of Fr. McHale.

Although the Amended Complaint in *Ford* is not entirely clear, it appears that Plaintiff Ford alleges that St. Clare and the Archdiocese are vicariously liable for the conduct of Fr. Barnes. The Amended Complaint never recites the term "*respondeat superior*," but it appears from Counts 6-8 that Plaintiff Ford relies on that doctrine. In those counts Plaintiff alleges claims for intentional infliction of emotional distress, sexual battery and sexual harassment against all the defendants. The only theory giving rise to liability of the moving defendants for these claims must be grounded on *respondeat superior*, as none of these particular counts assert an independent theory of liability against the moving defendants. Moreover, in his opposition to the motion to dismiss, Plaintiff Ford seemingly argues that Fr. Barnes' sexual assaults were within the scope of his agency. Similarly, the Complaint in *Tell* does not contain a reference to the doctrine of *respondeat superior*, but like *Ford,* the allegations in the Complaint suggest that Ms.

[50] *Doe v. Roman Catholic Diocese of Boise, Inc*., 918 P.2d 17, 23 (N.M. Ct. App. 1996) (holding that in the absence of vicarious liability, "it is the acts of [the diocese] not the acts of [the priest] that must provide the basis for this state exercising personal jurisdiction over the [diocese]").

Tell is relying upon that doctrine. In particular she raises a claim of sexual abuse/battery against the diocese, which necessarily invokes the doctrine.

It is settled that the doctrine of *respondeat superior* will serve to make a principal vicariously liable for the acts of his agent only when those acts are within the scope of the agency:

> It is, of course, fundamental that an employer is liable for the torts of his employee committed while acting in the scope of his employment. The liability thus imposed upon the employer arises by reason of the imputation of the negligence of the employee to his employer through application of the doctrine of *respondeat superior*.[51]

Arguments such as that of Plaintiff Tell that "Father McHale is an agent of the defendant"[52] miss the point. It is not enough to merely prove that the priest was an agent of his diocese; the plaintiff must also prove that the priest was acting within the scope of that agency when he committed the assaults. Almost fifty years ago the Delaware Supreme Court reiterated the familiar rule that "liability for the torts of the servant is imposed upon the master only when those are committed by the servant within the scope of his employment . . . ."[53]

The term "scope of employment" is somewhat amorphous, and Delaware courts have often looked to the Restatement of Agency for

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[51] *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427, 432 (Del. 1965).
[52] Tell Ans. Br., at 5.
[53] *Draper v. Olivere Paving & Construction Co.*, 181 A.2d 565, 569 (Del. 1962).

guidance in defining and applying that term.[54] Section 228 of the Restatement provides:

> Conduct of a servant is within the scope of employment, but only if: (a) it is of the kind he is employed to perform, as stated in §229; (b) it occurs substantially within the authorized time and space limits, as stated in §§233-234; and (c) it is actuated, at least in part, by a purpose to serve the master, as stated in §§235-236.[55]

The cases which have considered the issue have uniformly rejected the contention that a priest is acting within the scope of his employment when he sexually abuses a minor because the priest was not hired to engage in such conduct and because the abuse is not motivated by a purpose to serve the church. In a closely analogous case, this Court in *Simms v. Christiana School District*,[56] considered whether a school counselor was acting within the scope of his employment when he sexually assaulted a student. The Court noted that section 229 of the Restatement set forth a number of factors to be considered in determining whether unauthorized conduct falls within the scope of employment. These include whether the act is one commonly done by such servants; the time, place and purpose of the act; whether the act is outside the enterprise of the master; whether the master has reason to expect that such an act will be done; the similarity in quality of the act done

[54] *Id.*; *Screpesi v. Draper-King Cole, Inc.*, 1996 WL 769344 (Del. Super.); *DeFerdinando v. Katzman*, 1988 WL 7621 (Del. Super); *Tyburski v. Groome*, 1980 WL 333070 (Del. Super.); *Coates v. Murphy*, 1970 WL 115815 (Del. Super.); *Johnson v. E.I. DuPont de Nemours & Co.*, 182 A.2d 904 (Del. Super. 1962).
[55] Restatement (Second) of Agency §228.
[56] 2004 WL 344015 (Del. Super.).

to the act authorized; the extent of departure from the normal method of accomplishing an authorized result; and whether or not the act is seriously criminal.[57] The *Simms* court found that no reasonable trier of fact could conclude that the counselor's abuse of the student was actuated by a purpose to serve his employer and held he was not acting within the scope of his employment when he committed the assaults.

It is difficult, if not impossible, to envision how the assaults by Fr. Barnes and Fr. McHale furthered the church's purpose. As one court aptly put it, sexual abuse by a priest "represent[s] the paradigmatic pursuit of some purpose unrelated to his master's business."[58] Neither plaintiff offers any suggestion how their abuser's conduct furthers the church's business. Indeed, both concede that their abuser's conduct was for his own purpose and not that of the church. Plaintiff Tell alleges that "[s]uch conduct was done for Father McHale's gratification,"[59] and Plaintiff Ford asserts that Fr. Barnes perpetrated the abuse "for his own personal gratification."[60]

The courts which have considered the issue have overwhelmingly, if not uniformly, have held that a priest who sexually abuses another is not

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[57] *Id*. at *5.
[58] *Tichenor v. Archdiocese of New Orleans*, 32 F.3d 953, 960 (5th Cir. 1994).
[59] Tell Compl., at ¶38.
[60] Ford Amended Compl., at ¶79.

acting within the scope of his employment.[61] Plaintiff Tell does not cite a

[61] *Mark K. v. Roman Catholic Bishop*, 67 Cal. App. 4th 603, 609 (Cal. Ct. App. 1998) (allegations of sexual abuse of a minor were outside the scope of the clergy member's employment); *Moses v. Diocese of Colorado*, 863 P.2d 310, 329 (Colo. 1993) (alleged sexual misconduct of priest not within course and scope of employment); *Destefano v. Grabrian*, 763 P.2d 275, 287 (Colo. 1988)("When a priest has sexual intercourse with a parishioner it is not part of the priest's duties"); *Dewaard v. United Methodist Church*, 793 So.2d 1038, 1041 (Fla. App. 2001) (church not held liable for pastor's sexual misconduct because "the sexual conduct alleged by plaintiffs was for the personal motives of the pastor, and not designed to further the interests of the church"); *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532, 535-36 (Ga. Ct. App. 1996) (granting judgment in favor of church in claim based upon alleged sexual misconduct by minister and holding that "it is well settled under Georgia law that an employer is not responsible for the sexual misconduct of an employee" and that "[t]his is especially true of the sexual misconduct of a minister"); *Konkle v. Henson*, 672 N.E.2d 450, 457 (Ind. Ct. App. 1996) ("The unauthorized acts committed by [the priest] are not similar to his duties as a minister. [The priest] may have had access to [plaintiff] because of his position as pastor, but he was not engaging in authorized acts or serving the interests of his employer at the time he molested [plaintiff]. Thus, we conclude that summary judgment in favor of the Church Defendants on the issue of respondeat superior liability was proper."); *Gagne v. O'Donoghue*, 1996 WL 1185145, at *5 (Mass. Super.) (holding, in sexual abuse context, that "there is little likelihood that the instant plaintiff will prevail upon a 'scope of employment' theory of vicarious liability because the torts he alleges fall well outside the scope of the perpetrators' employment"); *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 97 (Mo. Ct. App. 1995) (affirming dismissal of claims against archdiocese because the priest's sexually abusive acts "clearly were not part of defendant's duties as a priest or as a teacher, nor were they intended to further any religious or educational interests of the Catholic Church"); *Joshua S. v. Casey*, 615 N.Y.S.2d 200, 201 (N.Y. 1994) (priest's alleged sexual assault of child is neither within the scope of employment nor in furtherance of the employer's business); *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991) ("The Seventh-day Adventist organization in no way promotes or advocates nonconsensual sexual conduct between pastors and parishioners[, and t]he appellants did not hire [the priest] to rape, seduce, or otherwise physically assault members of his congregation."); *N.H. v. Presbyterian Church*, 998 P.2d 592, 599 (Okla. 1999) ("Ministers should not molest children. When they do, it is not a part of the minister's duty nor customary within the business of the congregation. . . . No reasonable person would conclude that [the priest's] sexual misconduct was within the scope of employment or in furtherance of the national organizations' business."); *R.A. ex rel. N.A. v. First Church of Christ*, 748 A.2d 692, 700 (Pa. Super. Ct. 2000) (affirming dismissal of claim against church based on alleged sexual misconduct by minister and holding that "[n]othing about [the priest's] sexual abuse of R.A. had any connection to the kind and nature of his employment as a minister"); *Howard v. Guidant Mut. Ins. Group*, 785 A.2d 561, 563 (R.I. 2001) ("Clearly, a sexual liaison with a parishioner falls outside of the scope of a minister's employment*Dausch v. Rykse*, 52 F.3d 1425, 1428 (7th Cir. 1994) (affirming dismissal of claim against church based on alleged sexual misconduct by pastor because "the church defendants could not be held vicariously liable for actions done by [the priest] solely for his own benefit and not as a part of his ministerial duties"); *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans*, 32 F.3d 953, 959-60 (5th Cir. 1994) ("It would be hard to imagine a more difficult argument than that [the priest's] illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of St. Rita's, his employer. Instead, given [the priest's] vow of celibacy and the Catholic Church's unbending stand condemning [sexual] relations [outside of marriage], [the priest's] acts represent the paradigmatic pursuit of some purpose unrelated to his master's business."); *Olinger v. Corp. of the Pres. of the Church of Jesus Christ of Latter-Day Saints*, 521 F. Supp. 2d 577, 582 (E.D. Ky. 2007) (granting judgment in favor of church in claim based upon alleged sexual misconduct by missionary and holding that "no reasonable jury could find that [missionary] was acting within the scope of his missionary work or that he was acting to advance any cause of the COP when he allegedly molested 'A'" ."); *Doe v. Catholic Soc. Of Religious and Literary Educ*., 2010 WL 345926 (S.D. Tex)(outside scope of employment and did not further employer's interests.)); *Doe v. Capuchin Franciscan Friars*, 520 F.Supp.2d 1124, 1131-32 (E.D. Mo. 2007) (holding that a priest's alleged sexual abuse of a minor "clearly reflects 'purely private and personal desires' and not Defendants' business or interests"); *Doe v. Liberatore*, 478 F.Supp.2d 742, 758

single case holding that a priest's abuse of a parishioner is within the scope of his employment. Plaintiff Ford cites to only two cases in support of his position, neither of which is persuasive. He cites a Connecticut Superior Court Case in which the court denied a motion to dismiss a count grounded on *respondeat superior*.[62] Two years later, however, the same court in the same case granted summary judgment dismissing the vicarious liability claim because the priest was not acting within the scope of his employment when he abused the plaintiff. In so doing, the court observed that "[u]nlike the situation where a servant performs the master's work poorly or misunderstands what the master wants done, the molestation of children is a total abdication of the master's work so that the pedophile priest can satisfy personal lust."[63]

Plaintiff Ford also points to *Nardella v. Dattillo*,[64] a Pennsylvania Court of Common Pleas case wherein the court wrote that "it appears to this

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(M.D. Pa. 2007) ("[I]t is clear that [the priest's] sexual molestation of Plaintiff was not within the scope or nature of his employment as a priest. Indeed, '[t]he activity of which [Plaintiff] now complains is wholly inconsistent with the role of one who is received into the Holy Orders as an ordained priest of the Roman Catholic Church.'"); *Graham v. McGrath*, 363 F. Supp. 2d 1030, 1034 (S.D. Ill. 2005) ("Taking into consideration [the priest's] vow of celibacy and the Catholic Church's stance of condemning homosexual relations, [the priest's] actions represent the paradigmatic pursuit of some purpose unrelated to his master's business."); *Wilson v. Diocese of New York of Episcopal Church*, 1998 WL 82921, at *5 (S.D.N.Y.) ("[A]cts of sexual misconduct by priests such as those alleged here are outside the scope of the priests' employment and are clearly not in furtherance of either the Diocese's or the Trinity Defendants' business."); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 70-71 (D. Conn. 1995) ("[S]exual abuse . . . cannot be said to further the defendant's business and therefore is outside the scope of employment[.]").

[62] *Nelligan v. Norwich Roman Catholic Diocese*, 2004 WL 574330 (Conn. Super. Ct.).

[63] *Nelligan v. Norwich Roman Catholic Diocese*, 2006 WL 1828532 (Conn. Super. Ct.).

[64] 1997 WL 1056878 (Pa .Com. Pl. 1997).

court that [the priest's abusive] conduct arguably falls within the scope of his employment."[65] This does not, however, seem to be the law of Pennsylvania. *Nardella* has never been cited with approval for this point by any court. Moreover, in 1999 the Pennsylvania Superior Court—which in the hierarchy of Pennsylvania courts is above the Court of Common Pleas—opined, contrary to *Nardella,* that

> such nefarious conduct [by a priest] falls outside the scope of [the priest's] employment as an ordained servant of the Roman Catholic Church is a conclusion which may be readily derived from a mere application of common sense.[66]

The Pennsylvania Superior Court more recently reiterated that "Pennsylvania case law holds that a church is not responsible for acts of sexual abuse committed by a minister or priest because such activity is outside the scope of employment,"[67] and the United States District Court, applying Pennsylvania law, recently reached the same conclusion.[68] The Court concludes, therefore, that *Nardella* is not persuasive and does not cause this Court to differ from the view held by the overwhelming number of courts in this country.[69]

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[65] *Id*. at *8.

[66] *Hutchinson v. Luddy*, 683 A.2d 1254, 1256 (Pa. Super. Ct. 1996), *vacated in part on other grounds*, 742 A.2d 1052 (Pa. 1999).

[67] *R.A. v. First Church of Christ*, 748 A.2d 692, 699 (Pa. Super. Ct. 2000). The Pennsylvania Court of Common Pleas has reached the same conclusion. *Mathews v. Roman Catholic Diocese of Pittsburgh*, 2004 WL 2526794 (Pa. Com. Pl.).

[68] *Doe v. Liberatore*, 478 F. Supp. 2d 742, 758 (M.D. Pa. 2007).

[69] Plaintiff also cites to authorities which are inapposite because they are negligent hiring or failure to supervise cases, not vicarious liability cases. *Evan F. v. Hughson United Methodist Church*, 10 Cal. Rptr.

The Court therefore concludes that Plaintiffs may not base their jurisdictional claims on the conduct of Frs. McHale and Barnes. They are therefore required to show that because of the conduct of the moving defendants themselves, those defendants are subject to the personal jurisdiction of the Delaware courts.[70]

B. *The long arm statute does not vest this Court with personal jurisdiction in this case*

Neither the conduct of the Archdiocese of Baltimore nor the conduct of the Diocese of Allentown subjects them to either the general personal jurisdiction of this court or its specific personal jurisdiction.

1. *General jurisdiction*

General jurisdiction is defined by section 3104(c)(4),[71] which provides:

> [A] court may exercise personal jurisdiction over any resident … who in person or through an agent:
>
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives

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748 (Cal. Ct. App. 1992) (negligent hiring case; no claim for vicarious liability asserted); *Hutchinson v. Luddy*, 742 A.2d 1052 (Pa. 2000) (failure to supervise only); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993) (allowing negligent hiring and negligent supervision claims; rejecting vicarious liability claim).

The remaining cases cited by Plaintiff expressly rejected the vicarious liability theory. *Gagne v. O'Donoghue*, 1996 WL 1185145 (Mass. Super.) ("there is little likelihood that the instant plaintiff will prevail upon a 'scope of employment' theory of vicarious liability because the torts he alleges fall well outside the scope of the perpetrator's employment").

[70] *Pecorara v. Sky Ranch for Boys, Inc.*, 340 F.3d 558, 562-3 (8th Cir. 2003) (holding that the conduct of the Diocese of Rapid City, as opposed to that of its agent, must be used to determine whether court had *in personem* jurisdiction over the diocese.); *Roman Catholic Diocese of Boise, Inc.*, 918 P.2d at 23 (acts of the diocese, not the abusive priest, used to determine whether court had *in personem* jurisdiction over the diocese).

[71] 10 *Del. C.* § 3104(c)(4).

> substantial revenue from services, or things used or consumed in the State.[72]

If Plaintiff can make out a claim for general jurisdiction, this Court will have jurisdiction over the Diocese of Allentown or the Archdiocese of Baltimore (as the case may be) for claims based upon sexual assaults occurring in Delaware, even if the Diocese's or Archdiocese's negligence occurred only in Pennsylvania or Delaware. [73]

In order to establish general jurisdiction, the plaintiffs must show at least one of three things: (1) the diocese or archdiocese was regularly doing or soliciting business in Delaware; (2) the diocese or archdiocese was engaging in any other persistent course of conduct in Delaware; or (3) the diocese or archdiocese derived substantial revenues from its services used in Delaware.[74]

a. *Plaintiff Tell's contentions*

It is uncertain whether Plaintiff Tell even contends that this Court has general personal jurisdiction over the diocese. In her Complaint she alleges that the Diocese of Allentown "regularly and continuously had contacts with Delaware, had agents in Delaware and conducted official business in

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[72] *Id*.
[73] *Computer People.* 1999 WL 288119, at *5 ("General jurisdiction under subsection (c)(4) requires a greater, more continuous pattern of contacts with the forum than does single act jurisdiction under subsection (c)(1), (2) or (3). The tradeoff for this stricter requirement is that the activities which create that general presence need not be the basis for the plaintiff's cause of action").
[74] *LaNuova,* 513 A.2d at 767.

Delaware."[75] But in her papers in opposition to the diocese's motion to dismiss she never mentions general jurisdiction and asserts only that this Court has specific jurisdiction over the defendant. In the interest of completeness the Court will assume that she contends that it has both general and specific jurisdiction here.

Plaintiff's allegations that the diocese "regularly and continuously had contacts with Delaware" does not establish general jurisdiction. It is settled that a plaintiff may not establish personal jurisdiction on the basis of vague and conclusory allegations when the defendant has presented specific facts negating personal jurisdiction.[76] In contrast to Plaintiff's conclusory allegations the diocese has presented an affidavit setting forth specific facts, none of which are surprising, that demonstrate this Court lacks general jurisdiction over it. The diocese is located entirely within the Commonwealth of Pennsylvania; all of the diocese's parish, missions, schools and pastoral centers are located within the geographic confines of the diocese; the diocese has never owned any real estate in Delaware nor has it ever maintained any bank accounts, mailboxes or telephone listings in

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[75] Tell Compl., at ¶3.

[76] The diocese submitted the affidavit of Rev. Msgr. Alfred Schlert, the former Vicar General of the Diocese of Allentown. In essence Msgr. Schlert attests to the absence of any activity in Delaware by the Diocese of Allentown. Plaintiff asks this Court to give little weight to this affidavit because of the monsignor's purportedly advanced age. This Court will not assess the affiant's credibility at this stage. Moreover, as stated in the text, there is nothing remarkable or surprising about the factual assertions contained in the affidavit.

Delaware; and the diocese does not serve any parishioners in Delaware. In short, it has no contacts, let alone any regular or persistent contacts, with this state.

Subsection (c)(4) does confer general jurisdiction over any person who derives substantial income from its services used in Delaware. Plaintiff Tell points to the fact that Fr. McHale celebrated Mass when he visited the Tell home in Delaware. As is customary, the Tell family made a donation to the church during or after that ritual. The record is devoid, however, of any indication as to the size of the Tells' donation, and therefore Plaintiff has fallen far short of showing that the Diocese of Allentown derived "substantial" income from Fr. McHale's visits.[77]

b. *Plaintiff Ford's contentions*

Plaintiff Ford does not contend that the St. Clare entities are subject to the jurisdiction of this Court;[78] instead he argues that the Court has general jurisdiction over the Archdiocese of Baltimore[79] for four reasons:

(1) The Diocese of Wilmington is a suffragan diocese to the Archdiocese of Baltimore;

(2) The Archbishop of Baltimore "regularly attends religious

[77] *United States v. Consolidated Rail Corp.*, 674 F. Supp. 138 (D. Del. 1987) (Boston Globe's 1985 Delaware advertising revenue of $6,107 did not constitute "substantial revenue" for purposes of section 3104(c)(4)).

[78] He conceded during oral argument that he was making no such contention.

[79] Plaintiff Ford does not contend that this Court has general jurisdiction over St. Clare Catholic Church or St. Clare Catholic School.

services and events in Delaware;"

(3) The Diocese of Wilmington participates in the Maryland Catholic Conference;

(4) The Diocese of Wilmington has an ownership interest and plays a joint supervisory role in Mount St. Mary's Seminary St. Luke Institute.

None of the above activities, either separately or taken together establish this Court's general jurisdiction over the archdiocese.

(1) *The Diocese of Wilmington is a suffragan diocese to the Archbishop of Baltimore*

As discussed above, this Court will not consider nuances of church organization and canon law because it would violate the Establishment Clause to do so. Suffice it to say that the Archdiocese of Baltimore and the Diocese of Wilmington are distinct corporate entities and therefore this Court cannot treat them as one and the same for personal jurisdictional purposes. Although the Court has chosen not to rely upon the opinions of Fr. Doyle, it notes in passing that Fr. Doyle finds that despite the suffragan relationship of the Diocese of Wilmington to the Archdiocese of Baltimore "each entity is autonomous . . . ."[80]

[80] Doyle Aff., at ¶13.

(2) *The Archbishop of Baltimore "regularly attends religious services and events in Delaware"*

Plaintiff offers no hint as to the frequency of the Archbishop's contacts with Delaware save for the statement that the "most recent contacts were the installation of Bishop Malooly as Bishop of Wilmington and the funeral Mass of former Bishop Saltarelli."[81] If those visits are an example, the Archbishop's visits are far from "regular." The Court takes judicial notice that Bishop Malooly was installed on September 8, 2008 and the funeral Mass of Bishop Saltarelli was celebrated more than a year later, on October 14, 2009. Thus assuming, but not deciding, that an out-of-state prelate's attendance at religious services constitutes "doing business," the occasional visits by the Archbishop do not constitute regular activity within Delaware.

(3) *The Diocese of Wilmington participates in the Maryland Catholic Conference*

In considering this contention it is important to keep in mind that the Diocese of Wilmington is not limited to the geographic boundaries of Delaware, but includes the counties comprising Maryland's eastern shore as well as Cecil County. Because of this, the diocese is a member of the Maryland Catholic Conference, which according to the conference's website

[81] Ford Ans. Br., at 14.

"represents all three dioceses with territory in the state [of Maryland]."[82] The purpose of the Conference is to advocate for "the Church's public policy position before the Maryland General Assembly and other civil officials."[83] It serves other functions for Roman Catholics residing in Maryland; in this regard Plaintiff brings to the Court's attention the Conference's publication of "Marriage in Maryland: Security the Foundation of Family and Society." All of this, however, is focused on Maryland governmental officials as well as Roman Catholics residing in that state. It has little, if anything, to do with Delaware, and there is no evidence that the Conference's activities are directed toward Delaware.

(4) *The Diocese of Wilmington has an ownership interest in and plays a joint supervisory role in Mount St. Mary's Seminary and St. Luke Institute*

St. Luke Institute is located in Silver Spring, Maryland, and St. Mary's Seminary can be found in Emittsburg, Maryland. Plaintiff does not provide any information about the purported ownership interest and supervisory role beyond the conclusory allegation that they exist. More to the point, he does not explain how the Diocese of Wilmington's purported ownership of real property in Maryland subjects the Archdiocese to the

[82] Maryland Catholic Conference, http://www.mdcathcon.org/aboutus.
[83] *Id*.

jurisdiction of Delaware courts. Although not articulated in Plaintiff's papers, it may be that Plaintiff is relying upon this to show that the Archdiocese and the Diocese of Wilmington collaborate on projects of mutual interest. But collaboration, by itself, does not establish the presence of the Archdiocese in this state. What Plaintiff must show, and has failed to do so, are activities by the Archdiocese in Delaware.

In conclusion, there is no basis in the record for this Court to conclude that either the Diocese of Allentown or the Archdiocese of Baltimore is subject to the general jurisdiction of this court.

2. *Specific jurisdiction*

Both Plaintiffs contend that the respective dioceses are subject to specific jurisdiction in Delaware. Plaintiff Ford relies upon subsections 3104 (c)(1) and (3), while Plaintiff Tell does not specify the subsections upon which she relies.

Section 3104(c)(1) confers specific personal jurisdiction on this Court when the defendant "[t]ransacts any business or performs any character of work or service in the State." It is settled that "Delaware law requires [under

section 3104(c))(1)] that some act on the part of the defendant must have occurred in Delaware and also that plaintiff's claims arise out of that act."[84]

The allegations in the complaints in both actions show that none of the acts of the moving defendants giving rise to Plaintiffs' causes of action occurred in Delaware. Generally speaking, Plaintiff Tell alleges that the Diocese of Allentown negligently hired Fr. McHale, failed to adequately monitor and supervise his activities; failed to warn parishioners of Fr. McHale's dangerous propensities; and covered-up his transgressions once it learned of them.[85] But those alleged failures on the part of the diocese necessarily occurred in Pennsylvania. The only activity causing harm to Plaintiff which is alleged to have occurred in Delaware are Fr. McHale's sexual assaults on her at her family home in Smyrna. But as discussed previously those assaults do not, without more, give rise to liability on the part of the diocese.

Plaintiff Ford's contentions are similar. In general terms he alleges that the moving defendants negligently failed to review the criminal history of its employees; failed to adequately train priests and other employees; and

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[84] *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1156 (Del. Super. 1997); *Tri-State Energy Solutions LLP v. KVAR Energy Sav., Inc.* 2008 WL 5245712 (D. Del.) ("The Delaware Supreme Court has interpreted section 3104(c)(1) . . . [as requiring] a 'nexus' between plaintiff's cause of action and the defendant's 'transaction of business or performance of work.'"); *Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458 (D. Del. 1991).
[85] Tell Compl., at ¶¶ 53-66.

failed to adequately supervise Fr. Barnes.[86] Once again, none of these failures occurred in Delaware, rather they took place in Maryland. Consequently Plaintiff has failed to show that this Court has specific personal jurisdiction under subsection (c)(1).

Subsection (c)(3), by its very terms requires plaintiff to show that the moving defendants committed a wrongful act in Delaware. It confers personal jurisdiction when the defendant "[c]auses tortuous injury in the State by and act or omission in this State."[87] As just discussed, neither plaintiff alleges an act or omission of the moving defendants occurring in Delaware. Consequently, subsection (c)(3) does not confer jurisdiction over these defendants.

C. *The exercise of personal jurisdiction here would deprive moving defendants of due process of law*

The Court is mindful that principles of judicial restraint counsel against the unnecessary resolution of constitutional issues when the matter can be disposed of by reference to state law.[88] The Court can, and has, resolved the pending motions on the basis of section 3104, and ordinarily it

[86] Plaintiff Ford also alleges that the defendants failed to report child abuse as required by 16 *Del. C.* § 903 and 42 U.S.C. ch. 51. These statutes are inapplicable here. Putting aside the obvious question whether the General Assembly can require a Maryland entity not present within the state to report child abuse, section 903 applies to physicians and those involved in the healing arts. Undoubtedly St. Clare and the Archdiocese are involved in spiritual healing, but the Court does not read section 903 so broadly as to encompass this. Chapter 51 of title 42 of the United States Code does not contain a reporting requirement.
[87] 10 *Del. C.* § 3104(c)(3).
[88] *Hunter v. State*, 420 A.2d 119, 123 (Del. 1980).

would not address the constitutional issues presented here. However, because the Delaware Supreme Court has yet to be presented with the question whether the courts of this state can assert personal jurisdiction over an out-of-state diocese in a priest-abuse case, this Court anticipates at least the possibility of an appeal of its judgment. In light of that, and in the interest of presenting a complete record, the Court will address the constitutional issues.[89]

The Due Process Clause limits the power of this Court to exercise jurisdiction over out-of-state defendants. The constitutional touchstone here can be found in the seminal case of *International Shoe Co. v. Washington*[90] wherein the Court opined that due process requires "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."[91] Much ink has been spilled over the years as to what, in the context of a give case, amounts to sufficient "minimum contacts." Fortunately, clear guideposts abound. In particular, "it is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its

[89] *Applied Biosystems, Inc.*, 772 F. Supp. at 1469 (considering constitutional issues relating to personal jurisdiction even though court found that plaintiff did not satisfy section 3104).
[90] 326 U.S. 310 (1945).
[91] *Id.* at 316.

laws.[92] Here the record is devoid of any evidence whatsoever that either the Archdiocese of Baltimore or the Diocese of Allentown did anything which even remotely smacks of "purposefully availing [themselves] of the privilege of conducting activities" in Delaware. At most the parties have alleged that an abusive priest in the employ of the respective defendants travelled into Delaware for the purpose of gratifying his own perverse sexual desires. As offensive as this alleged conduct is, the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state."[93] The Due Process Clause insures that an out-of-state defendant "will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts or the unilateral activity of another party or a third party."[94]

Plaintiffs both strenuously urge that the conduct of their abuses was, or should have been, foreseeable to their employers. But "forseeability" alone "has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."[95] The idea that the moving defendants should have foreseen that the priests were likely to cause injury in another state does not suffice to establish the requisite minimum contacts in that state.

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[92] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).
[93] *Id.*
[94] *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985).
[95] *World-Wide Volkswagen Corp.*, 444 U.S. at 295.

> Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such [minimum] contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction.[96]

Turning briefly to the argument that this Court can exercise specific jurisdiction, the Due Process Clause, like state law, requires that the exercise in order to exercise such jurisdiction, the claim must arise from activities within this state.[97] As discussed earlier, the activities allegedly giving rise to the diocese's and archdiocese's liability indisputably occurred entirely within Pennsylvania and Maryland (as the case may be), and, therefore, this Court cannot constitutionally exercise specific jurisdiction over the moving defendants.

VI. *Conclusion*

The Court wishes to conclude with a word to the plaintiffs themselves. If the allegations of the complaints are true, you have suffered immeasurably at the hands of men who betrayed a sacred vow and a position of trust solely to satisfy their own selfish and perverted desires. The Court realizes that the foregoing analysis must seem to be a cold, sterile calculus devoid of any understanding of the injuries you have suffered, and it is fully cognizant that its decision in this matter will leave

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[96] *Burger King*, 471 U.S. at 474.
[97] *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 448 U.S. 408, 413-4 (1984).

you without a remedy because your claims are barred by the statutes of limitations in your home states. Nonetheless, the Court is bound to apply our federal constitution and the laws of this state as it finds them. The legal questions presented by these motions are not even close ones.[98] The Court must therefore dismiss these cases knowing full well the unfortunate consequences of its decision.

April 26, 2010

oc: Prothonotary

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[98] The local federal court, applying Delaware law and the federal constitution, recently reached the same conclusions in a priest abuse case as this Court. *Jane Voe #2 v. The Archdiocese of Milwaukee*, 2010 WL 1242721 (D. Del.).