THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JOHN DOE XX	§	
	§	
VS.	§	CIVIL ACTION NO. 11-651-JJB-DD
	§	
HOLY SEE (State of the Vatican City), et al	§	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS OR IN THE ALTERNATIVE, IN CAMERA INSPECTION OF DOCUMENTS

NOW INTO COURT comes Plaintiff JOHN DOE XX in the above entitled and numbered cause, and respectfully submits this Memorandum in support of Plaintiff's motion to compel the Roman Catholic Church of the Diocese of Baton Rouge (the "Diocese") to produce those documents in its possession that respond to Plaintiff's requests for discovery. See **Diocese's Responses to Plaintiff's Requests for Production of Documents** ("Diocese's Responses") attached hereto as Exhibit A.

INTRODUCTION

This case seeks damages for the torture and violent conduct of a serial mass child rapist/pedophile, the former Catholic priest Christopher Joseph Springer. This case stems from centuries old practices and procedures — the modern day version was released in 1962— that Plaintiff alleges are at the root of the conspiracy coordinated by named Defendants Holy See, the Redemptorists Fathers and the Roman Catholic Church of the Diocese of Baton Rouge to conceal the widespread "problem" of sex crimes committed by Catholic priests and clerics against children. See ***Plaintiff's Original Complaint,*** ¶¶ 52 - 61.

To prove these allegations, Plaintiff is entitled to discover and therefore requested:

1) the Diocese's personnel file of named defendant and former priest, Christopher Joseph Springer (See REQUEST NO. 10);

2) the Diocese's personnel files of all priests, employees, and/or clerics accused of sexual misconduct of minors (See REQUEST NO. 101);

3) the Diocese's investigative files on all priests, employees, and/or clerics accused of sexual misconduct of minors (See REQUEST NO. 101);

4) all documents and reports that discuss or relate to allegations that a minor was sexually exploited or abused by any priest, employee and/or cleric under the control of the Diocese (See REQUEST NOS. 83 AND 85); and

5) depositions given by Bishop Robert W. Muench and/or his predecessors in any case involving clergy sexual misconduct against minors (See REQUEST NO. 82(c)).

The Diocese generally objects to producing all of the above by asserting various privileges, namely the First Amendment, medical, clergyman, anticipation of litigation and right of privacy. See Diocese's Responses at p.2. See also **Diocese Privilege Logs 1 - 16** ("Privilege Logs") attached hereto as Exhibit B. According to the majority of the authority that has considered these exact objections to discovery asserted by dioceses all across the country, none of these privileges apply in this case. In fact, the majority rule holds that Plaintiff is entitled to discover all of the above documents, reports and files from the Diocese. This Court should follow the majority rule and order the Diocese to produce all of the requested documents, reports and files.

ARGUMENT AND AUTHORITY

Make no mistake — the following authority is clear: the Diocese of Baton Rouge is misguided about how privileges are properly asserted, as well as the application of certain "protections and privileges" crafted by the United States government and the State of Louisiana for religious institutions and individuals. These certain "privileges" do not apply in this discovery dispute. Furthermore, the Fifth Circuit Court explains that "[a] lawsuit is *not a contest in*

concealment, and the discovery process was established so that either party may compel the other to disgorge whatever facts he has in his possession." ***Southern Railway Co. v. Lanham***, 403 F.2d 119 (5th Cir. 1968) (emphasis added). Accord ***Ogea v. Jacobs***, 344 So.2d 953, 959 (La. 1977). Moreover, it is well-established in Louisiana jurisprudence that the parties may be compelled to give evidence that may tend to embarrass them or produce documents of a confidential nature. See ***Capital City Press v. East Baton Rouge Parish Metro, Council 96-1979***, 696 So.2d 562, 566 (La. 1997) *citing* ***Parish Nat'l Bank v. Lane***, 397 So.2d 1282 (La. 1981).

A. Diocese's Privilege Logs are blanket assertions of privileges and are inadequate to carry its burden to assert any privilege specifically.

For some time now, the Fifth Circuit Court has refused to tolerate blanket assertions of privileges before a district court. Blanket assertions of privilege are inadequate and unacceptable — such assertions disable the court and the adversary party from testing the merits of the claim of privilege. ***United States v. El Paso Co.***, 682 F.2d 530, 541 (5th Cir. 1982), *reh'g denied*, 688 F.2d 840 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). Litigants in the Fifth Circuit must demonstrate in some specific way that documents fall within the ambit of the privilege. ***United States v. Davis***, 636 F.2d 1028, 1044 at n.20 (5th Cir. 1981); ***United States v. El Paso Co.***, 682 F.2d at 541.

A litigant has an obligation to make a privilege claim precise in accordance with Fed. R. Civ. P. 26(b)(5). A privilege log must contain sufficient information that would allow a court or a party to assess the applicability of the privilege or protection. ***Fed. R. Civ. P. 26(b)(5)***; ***Coes v. World Wide Revival, Inc.***, 2006 U.S. Dist. LEXIS 57683, (M.D. Fla. 2007). Where descriptions in the privilege log fail to meet this standard, "then disclosure is an appropriate sanction." ***Chemtech***

Royalty Assocs, L.P. v. United States, 2009 U.S. Dist. LEXIS 27696 (M.D. La. 2009) (*quoting* ***Smithkline Beecham Corp. v. Apotex Corp.***, 193 F.R.D. 530, 534 (N.D. Ill. 2000)).

The standard for testing the adequacy of the privilege log is whether, as to each document, the entry sets forth facts that "would suffice to establish each element of the privilege or immunity that is claimed." ***Chemtech Royalty Assocs, L.P. v. United States***, 2009 U.S. Dist. LEXIS 27696 (M.D. La. 2009). The focus is on the specific descriptive portion of the log, and "not on conclusory invocations of the privilege or work-product rule, since the burden of the party withholding documents cannot be discharged by mere conclusory" assertions. ***Golden Trade S.r.L. v. Lee Apparel Co.***, 1992 U.S. Dist. LEXIS 17739, (S.D.N.Y. 1992) (*quoting* ***von Bulow v. von Bulow***, 811 F.2d 136, 144 (2d Cir. 1987)). A proper assertion that certain requested documents are privileged means that a litigant must describe those documents to the best of its ability without revealing the privileged information, even if doing so is difficult to do without revealing the confidential nature of the documents. ***Estate of Manship v. U.S.***, 232 F.R.D. 552, 561 (M.D. La. 2005). Other courts have similarly held that a privilege log should provide "a specific explanation of why the document is privileged." ***Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.***, 145 F.R.D. 84, 88 (N. D. Ill.1992).

The Diocese's Privilege Logs 1-16 merely conclude that the documents listed by Bates numbers fall within the privileges listed. The Privilege Logs are replete with blanket assertions, but void of any description of specific facts or details that establish any element of the privileges that are listed. For instance, the Privilege Log labeled Conference of Bishop Documents asserts the "clergyman privilege"/"First Amendment"/"Right to Privacy". In jurisdictions around the country and in Louisiana, **the clergyman privilege protects spiritual matters to/from a clergyman, but**

not communications between clergymen concerning other matters, such as employment. Therefore, to properly assert the clergyman privilege, each log entry, at a minimum, should: 1) identify the clergyman involved in the communication; 2) state the purpose of the communication; 3) state whether the communication is from the clergyman to the penitent or vice versa; 4) state who has possession of the document and where the document is kept; 5) explain why the clergyman privilege applies to the specific document. See e.g., ***State v. Gray***, 891 So.2d 1260, 1267 (La. 2005) (La. C.E. art. 511 privilege did not apply, either privilege was waived by consent to the minister's disclosure to a third party or there was no expectation of privacy when the minister was approached); State v. Tart, 672 So.2d 116, 143 (La. 1996) (confession not protected when minister visited defendant as the local N.A.A.C.P. president and not as a clergyman); ***State v. Berry***, 324 So.2d 822 (La. 1975) (communication to a clergyman not protected because the purpose was to seek financial gain, not spiritual advise or consolation); ***Commonwealth of Pennsylvania v. Stewart***, 690 A.2d 195 (Pa. 1996) (communications concerning a how a religious institution conducts its affairs do not fit within the privilege); **Pagano v. Hadley**, 100 F.R.D. 758, 760 (D. Del 1984)("special relationship" between a bishop and his priest do not qualify all documents in priests personnel files for privilege). In the case of all of the Diocese's Privilege Logs, it is impossible to test the merits of the clergyman privilege.

The same holds true for the Diocese's First Amendment privilege claims, which amount to blanket assertions as well. Courts and other legal authorities generally now agree that the **First Amendment privilege protects religious beliefs, and not crimes against vulnerable children.** See e.g., Marci A. Hamilton, The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up, 29 Cardozo Law Review 225 (2007) attached hereto as

Exhibit C. For this court to assess the applicability of the First Amendment privilege, each log entry in the Privilege Log, at a minimum, should 1) state what religious belief/doctrine will be violated by disclosing the document; 2) describe how disclosing the document will interfere with the internal workings of the Diocese; 3) explain why the First Amendment applies to the specific document. See e.g., ***Roman Catholic Archbishop of Los Angeles v. Superior Court***, 32 Cal. Rptr. 3d 209 (Cal.App.2nd Dist., 2005) *citing* ***Lemon v. Kurtzman,*** 403 U.S. 602 (1971) *cert. denied* ***Roman Catholic Archibishop v. Superior Court***, 547 U.S. 1071 (2006) (no merit in the church's contention that disclosures were barred by the establishment clause when the core issue was whether children were molested by priests who worked for the Archdiocese and the primary effect of the disclosures will not interfere with the internal workings of the church); ***Corsie v. Campanalonga***, 721 A.2d 733 (Supr. Ct. N.J., 1998) *citing* ***Wisconsin v. Yoder***, 406 U.S. 205, 215 (1972) (no privilege under the free exercise clause as there is no religious dispute involved in the production of documents during the discovery process and the maintenance of personnel files does not involve religious doctrine, but is nothing more than a normal administrative procedure of any organization, whether it be religious or secular.); ***Malicki v. Doe***, 814 So. 2d 347, 350 (Fl. 2002) ("We conclude that the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy.") Any lesser description regarding the First Amendment privilege claim is inadequate under the requirements of Rule 26 and unacceptable for this court's assessment.

Finally, for this court to assess the applicability of the Right to Privacy privilege claim in the Privilege Logs, Louisiana's jurisprudence on privacy interest, which are protected under Article I, Section 5 of the Louisiana Constitution, will need to be reviewed and considered. ***Dunn v. State***

Farm, 927 F.2d 869 (5th Cir. 1991) (Under Rule 501 of the Federal Rules of Evidence, state law determines the applicability of a privilege in civil diversity actions where state law supplies the rule of the decision.). According to Louisiana's jurisprudence, **an individual's right to privacy is not absolute, but qualified by the rights of others and limited by society's right to be informed about legitimate subjects of public interest.** See ***Plaquemines Parish Comm'n Council***, 472 So.2d 560, 567 (La. 1985) *citing* ***Parish Nat'l Bank v. Lane***, 397 So.2d 1282, 1286 (La. 1981).

At a bare minimum, to properly assert a "Right to Privacy" privilege objection, the Diocese's Privilege Log should explain why the right to privacy privilege applies to the specific document. See e.g., ***Capital City Press v. East Baton Rouge Parish Metro, Council 96-1979***, 696 So.2d 562, 566 (La. 1997) *citing* ***Parish Nat'l Bank v. Lane***, 397 So.2d 1282 (La. 1981) ("the right to privacy, ..., may be lost in may ways -by express or implied waiver or consent, or by a course of conduct which prevents its assertion."); ***State v. Ragsdale***, 381 So.2d 492, 497 (La. 1980) (privacy interest are protected under the Constitution only if one has a "reasonable expectation" of privacy where the test for determining whether a reasonable expectation of privacy is constitutionally protected "is not only whether the person had an actual or subjective expectation of privacy, but also whether that expectation is of a type which society at large is prepared to recognize as being reasonable.") See also ***Rosado v. Bridgeport Roman Catholic Diocesan Corp.***, 970 A.2d 656, 677 (Conn. 2009) (affirmed, plaintiffs' right of access to documents related to sexual abuse by priests located in the personnel files of the defendant priests trumps the privacy of personnel files) *cert. denied* ***Bridgeport Roman Catholic Diocesan Corp. v. New York Times Co.***, 2009 U.S. LEXIS 7806 (U.S., Nov. 2, 2009); ***In Re: Roman Catholic Archbishop of Portland In Oregon***, 2009 Bankr. LEXIS 1906 (Bankr. D. Or. 2009), *affirmed by* 2010 U.S. Dist. LEXIS 9814 (D. Or. 2010) (court recognized that

a level of privacy protection for sensitive personal information in personnel records exists, but the court found no authority for a blanket protection from disclosure of information in personnel records, particularly where the information in the personnel record involves allegations of serious wrongdoing that implicates public safety). Accord ***Plaquemines Parish Comm'n Council***, 472 So.2d 560, 567 (La. 1985) (privacy interest under Louisiana constitution does not prevent the surrender of information in discovery proceedings, nor protect it from view when surrendered.)

In the same vein, Louisiana law will determine the applicability of the medical privilege where the **"physician/patient/medical privacy" privilege is waived as to the medical information a patient authorizes for release to a third party.** See e.g., ***Matherne v. Hannan***, 545 So.2d 1094 (La. App. 4th Cir. 1989) *rev'd on other grounds* 537 So.2d 1169 (La. 1989) (Father X waived the physician-patient privilege when he authorized the psychiatrist to report the results of an exam ordered by his Bishop due to allegations of sex abuse). Accord ***Doe v. Ensey***, 220 F.R.D. 422, 427 (M.D. Pa. 2004) (priests consented to psychological evaluations conducted at the request of their employer, the diocese, and knew the diocese would receive the reports, so that any patient privilege attaching to the psychological reports was waived by the disclosure or intended disclosure to third parties); ***C.J.C. v. Corp. of the Catholic Bishop of Yakima***, 138 Wash.2d 699, 717; 985 P.2d 262 (Wash. 1999) (court held mental health reports sent to the diocese were discoverable, but the actual treatment records, which had not been forwarded to the diocese were confidential and were not discoverable.) It stands to reason that the medical information that the Diocese objects to producing is apart of the Diocese's files and records only because the individual consented to the release of the information to the Diocese. Under Louisiana law, the individual's consent thereby waives the privilege. ***Matherne v. Hannan***, 545 So.2d 1094 (La. App. 4th Cir. 1989) *rev'd on other grounds*

537 So.2d 1169 (La. 1989). See also La. C.E. Art 510 (applies to communications made on or after January 1, 1993); ***Hortman v. Louisiana Steel Works***, 696 So.2d 625(La. App. 1st Cir. 1997) *writ denied*, 703 So.2d 1268 (La. 1997) (no real discussion is necessary on the issue of health care provider-patient privilege once the privilege is destroyed or taken away under the 501B(2) exceptions for communications related to committing a crime/fraud or proceedings concerning child abuse). But again, the Diocese's blanket assertions of "medical privilege" are inadequate to determine the merits of the privilege.

B. Materials prepared in Anticipation of Litigation must aid in possible future litigation and are subject to a showing of substantial need.

The work product doctrine is codified in Fed. R. Civ. P 26(b)(3) and insulates a lawyer's research, analysis of legal theories, mental impressions, notes and memoranda of witnesses' statements from an opposing counsel's inquiries. ***Upjohn Co. v. United States***, 449 U.S. 383, 400 (1981); ***United States v. El Paso Co.***, 682 F.2d 530, 543 (5th Cir. 1982), *reh'g denied*, 688 F.2d 840 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). The work product doctrine, however, does not protect the disclosure of relevant underlying facts to opposing counsel. ***Upjohn Co. v. United States***, 449 U.S. 383, 395 (1981). The doctrine focuses only on materials that have been assembled and brought into being in anticipation of litigation. FRCP 26(b)(3). Materials assembled in the ordinary course of business are excluded from the work product materials. ***United States v. El Paso Co.***, 682 F.2d at 542.

In analyzing whether a document was prepared in anticipation of litigation, the Fifth Circuit applies the "primary purpose" test. Specifically, "litigation need not necessarily be imminent as long as the primary motivating purpose behind the creation of the document was to aid in possible future

litigation." ***United States v. Davis***, 636 F.2d 1028, 1040 (5th Cir. 1981). Once eligibility is established, then a court must analyze whether the adverse party has made a showing of substantial need for the information and an inability to obtain the information through other means without undue hardship. FRCP 26(b)(3).

It is alleged in Plaintiff's Original Complaint that the modern day conspiracy, which began with the 1962 procedure for handling "Cases of Solicitation" and made it possible for Springer to gain access to Plaintiff, was in full force in the 60's, 70's and 80's. Many of the key players who were the Diocese's head official representatives during this timeframe are no longer alive. Bishop Robert Tracey, who served the Diocese from 1961-1974, died in 1980; Bishop Joseph Sullivan served from 1974-1982 and died in the office in 1982; Bishop Stanley Ott served from 1983-1992 and also died in the office. The Diocese's current official representative, Bishop Robert Muench, was only installed in 2002 and his testimony will certainly be that he can not speak for his predecessors or account for their acts and omissions in cases related to sexual misconduct involving the Diocese's clergy and children.

Therefore, the accounts of the acts and/or omissions of these former Bishops, as well as their statements and impressions, will come alive in the official documents that have been requested as outlined above. The facts that will be culled from these official documents will either corroborate the statement that has been obtained from Springer or paint a different picture altogether. See ***Affidavit of Christoff Joseph Springer***, attached hereto as Exhibit D. In his affidavit, Springer refers to the discussions with Bishop Ott about the priest sexual abuse scandal in Lafayette and also the House of Affirmation, where both the Lafayette priest and Springer were eventually sent by their respective Bishops for treatment related to sexual misconduct with boys. While the priest in

Lafayette was charged and convicted for his crimes against minors, Springer apparently received a "get out of jail free" card from Bishop Ott. Without these official documents, there will be no official statement from the Diocese that explains 1) how Springer was able to thrive in the Diocese's communities without fear of prosecution and 2) how the widespread "problem" of child sex crimes by the clergy did not gain public notice in the Diocese of Baton Rouge until 2002.

If the Diocese does not produce its official documents, there is no question that Plaintiff will be unfairly prejudiced and suffer undue hardship. There are no alternative reliable sources, other than the official documents, to discover the facts and details about the Diocese's pattern and practices to conceal the alleged conspiracy to cover-up what the Diocese knew about its clergy's sexual activities with boys. Without the official documents, Plaintiff will be hard pressed to develop and present his case that the Diocese's entire objective and approach to its "problem" with "Cases of Solicitation" was to avoid a scandal by concealing the sex crimes of its clergy from prosecution and its parishioners and to escape responsibility for civil damages for failing to protect the safety of vulnerable children like Plaintiff.

CONCLUSION

The assortment of unqualified privilege claims notwithstanding, this Court should follow the majority rule and order the Diocese to produce all of the requested documents, reports and files.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic transmission and U.S. Mail on the following counsel pursuant to the Federal Rules of Civil Procedure on this the 12th day of June, 2012.

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