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**FILED**  
LOS ANGELES SUPERIOR COURT

SEP 25 2007

9 Joseph W. Carcione, Jr., Esq. (State Bar No. 56693) **JOHN A. CLARKE, CLERK**  
Gary W. Dolinski, Esq. (State Bar No. 107725)  
Mara W. Feiger, Esq. (State Bar No. 143247) **BY RUGENA LOPEZ, DEPUTY**  
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13 Attorneys for Plaintiff  
14

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT  
17

18 JOAQUIN AGUILAR MENDEZ,  
19 Plaintiff,  
20 vs.  
21 CARDINAL ROGER MAHONY, THE  
ROMAN CATHOLIC ARCHBISHOP OF  
22 LOS ANGELES, A CORPORATION  
SOLE, CARDINAL NORBERTO  
23 RIVERA, THE DIOCESE OF  
TEHUACAN, FATHER NICHOLAS  
24 AGUILAR DOES 1-100,  
25 Defendants.

Case No. BC358718

**NOTICE OF MOTION AND MOTION TO  
COMPEL FURTHER RESPONSES BY  
DEFENDANT DIOCESE OF TEHUACAN TO  
PLAINTIFF'S SECOND SET OF REQUESTS  
FOR PRODUCTION OF DOCUMENTS; and  
MONETARY SANCTION REQUEST  
AGAINST DEFENDANT AND/OR ITS  
ATTORNEYS OF RECORD**

Date: October 12, 2007  
Time: 8:30 a.m.  
Dept: 42

017/CASE: BC358718 LEA/DEF#:  
RECEIPT # 09/25/07  
DATE PAID: 09/25/07 09:36:51 AM  
PAYMENT: \$40.00  
RECEIVED: 0310  
CHECK: 40.00  
CASH:  
CHANGE:  
CARD:

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on the date specified above, Plaintiff will move the  
3 Court for an order compelling defendant Diocese of Tehuacan to serve further verified  
4 responses, without objection, and produce all documents responsive to Plaintiff's Second Set  
5 of Document Demands, served July 13, 2007, specifically Document Demand Nos. 15 - 20,  
6 and 24 - 28.

7 This Motion is made on the grounds that the objections to these discovery items are too  
8 general and/or meritless, the Defendant's substantive compliance statement is inadequate, the  
9 Defendant failed to produce all of the requested documents, and/or there is no justification for  
10 the Defendant continuing to avoid production of all of the requested documents.

11 FURTHER NOTICE is given that Plaintiff will also request that the Court issue an  
12 order imposing a monetary sanction against Defendant and/or its attorneys of record, pursuant  
13 to the authority of Code of Civil Procedure sections 2031.310, 2031.320, and 2023.

14 This Motion will be based upon this Notice, the accompanying Memorandum of Points  
15 and Authorities, Separate Statement, and supporting Declaration (with exhibits), upon the  
16 materials contained in the file of the Court, upon any matter of which the Court takes judicial  
17 notice, and upon any further evidence submitted at the time of the hearing, as the Court  
18 permits.

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20 Dated: September 17, 2007

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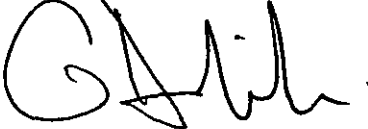
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CARCIONE, CATTERMOLE, DOLINSKI,  
OKIMOTO, STUCKY, UKSHINI,  
MARKOWITZ & CARCIONE, LLP

By:   
Attorney for Plaintiff

2  
3 PROOF OF SERVICE

4 I, the undersigned, declare:

5 I am employed in the County of San Mateo, State of California. I am over the age of  
6 eighteen and not a party to this action. My business address is 601 Brewster Avenue,  
7 Redwood City, California 94063.

8 On September 17, 2007, I served the attached document(s):

9 NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES BY  
10 DEFENDANT DIOCESE OF TEHUACAN TO PLAINTIFF'S SECOND SET OF  
11 REQUESTS FOR PRODUCTION OF DOCUMENTS; and MONETARY SANCTION  
12 REQUEST AGAINST DEFENDANT AND/OR ITS ATTORNEYS OF RECORD

13 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO  
14 COMPEL FURTHER RESPONSES BY DEFENDANT DIOCESE OF TEHUACAN TO  
15 PLAINTIFF'S SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS; and  
16 MONETARY SANCTION REQUEST AGAINST DEFENDANT AND/OR ITS  
17 ATTORNEYS OF RECORD

18 PLAINTIFF'S SEPARATE STATEMENT IN SUPPORT OF MOTION TO COMPEL  
19 FURTHER RESPONSES BY DEFENDANT DIOCESE OF TEHUACAN TO PLAINTIFF'S  
20 SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

21 DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO COMPEL FURTHER  
22 RESPONSES BY DEFENDANT DIOCESE OF TEHUACAN TO PLAINTIFF'S SECOND  
23 SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS; and MONETARY  
24 SANCTION REQUEST AGAINST DEFENDANT AND/OR ITS ATTORNEYS OF  
25 RECORD

26 x By **FEDERAL EXPRESS**, for delivery the following business day by placing same for  
27 collection in a Federal Express Deposit Box to the business addresses set forth below.

28 *Attorneys for Plaintiff, Joaquin Mendez:*

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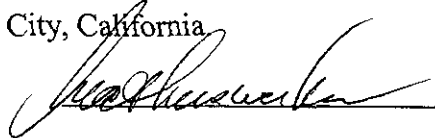
7 Co-Counsel for Defendant: Cardinal Norberto Rivera and the Diocese of Tehuacan

Steven R. Selsberg (*pro hac vice*)  
8 Mayer Brown LLP  
700 Louisiana Street, Suite 2400  
9 Houston, TX 77002-2730  
Telephone: (713) 238-3000

Facsimile: (713) 238-4664

10 I declare under penalty of perjury under the laws of the State of California that the  
11 foregoing is true and correct.

12 Executed on the above date at Redwood City, California



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16 FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT  
17

18 JOAQUIN AGUILAR MENDEZ,

Case No. BC358718

19 Plaintiff,

20 vs.

21 CARDINAL ROGER MAHONY, THE  
ROMAN CATHOLIC ARCHBISHOP OF  
22 LOS ANGELES, A CORPORATION  
SOLE, CARDINAL NORBERTO  
23 RIVERA, THE DIOCESE OF  
TEHUACAN, FATHER NICHOLAS  
24 AGUILAR DOES 1-100,

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION  
TO COMPEL FURTHER RESPONSES BY  
DEFENDANT DIOCESE OF TEHUACAN TO  
PLAINTIFF'S SECOND SET OF REQUESTS  
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MONETARY SANCTION REQUEST  
AGAINST DEFENDANT AND/OR ITS  
ATTORNEYS OF RECORD

Date: October 12, 2007

Time: 8:30 a.m.

Dept: 42

25 Defendants.  
26  
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1 **I. INTRODUCTORY SUMMARY OF ARGUMENT**

2 The facts that were available *before this lawsuit was filed* showed that Catholic Church  
3 authorities in the country of Mexico knowingly transferred a child molesting priest, Father  
4 Aguilar, to California in 1987, who then molested more children in California while working  
5 as a priest for the Los Angeles Diocese of the Catholic Church in the United States. When the  
6 American Church authorities became aware of the molests in the Los Angeles area, they  
7 delayed advising the public authorities until after Father Aguilar went back to Mexico in 1988.

8 Father Aguilar then went back to work for the Catholic Church in Mexico, and he  
9 molested children thereafter, including Plaintiff Joaquin Mendez in 1992 and 1994.

10 Concealment of information from the public authorities is what allowed sexual  
11 predation of children by Catholic priest Father Aguilar to occur in Mexico and California, and  
12 back in Mexico again.

13 *After* this lawsuit was filed, the Mexican Catholic Church Defendants have continued  
14 to cover up their involvement in its clergy's sexual abuses of children, both in Mexico and  
15 internationally, by failing to respond to civil discovery requests in a straightforward and  
16 complete manner that discloses all information and documents about Father Aguilar. As a  
17 consequence, virtually the only information and documents provided by the Defendants in this  
18 lawsuit thus far has been limited to the time period of before 1988 (and even the information  
19 and documents for the pre-1988 period have been unbelievably paltry).

20 The Plaintiff in this action continues to be victimized by the systemic and systematic  
21 concealment of information that allowed a sexual predator like Father Aguilar to molest  
22 children in Mexico and California while wearing the white collar of religious authority.

23 All civil defendants must comply with the Code of Civil Procedure, but if there were  
24 ever a civil defendant in California's courts that *should be completely forthcoming* in  
25 discovery, it would be these particular defendants. Unfortunately, these defendants only know  
26 how to conceal and cover up, and that is what is happening in the discovery in this case. A  
27 court order is required to try to get full disclosures. A court order is requested, overruling the  
28 frivolous objections to this discovery, an order of further, verified substantive responses,

1 production of the documents forthwith, and an order of monetary sanctions.

2  
3 **II. AUTHORITY FOR COMPELLING FURTHER RESPONSES**

4 Code of Civil Procedure Section 2031.310(a) provides that:

5 (a) On receipt of a response to an inspection demand, the party  
6 demanding an inspection may move for an order compelling further response  
7 to the demand if the demanding party deems that any of the following apply:

8 (1) A statement of compliance with the demand is incomplete.

9 (2) A representation of inability to comply is inadequate, incomplete, or  
10 evasive.

11 (3) An objection in the response is without merit or too general.

12 *Fairfield v. Superior Court* (1966) 246 Cal.App.2d 113, 119-120 (Second Appellate  
13 District, Division 1), quoting *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d  
14 300, 303-304 (Second Appellate District, Division 2):

15 **One of the principal purposes of the Discovery Act (Code Civ. Proc., §§  
16 2016-2035) is to enable a party to obtain evidence in the control of his  
17 adversary in order to further the efficient, economical disposition of cases  
18 according to right and justice on the merits. ... The statute is to be liberally  
19 interpreted so that it may accomplish its purpose. [Emphasis added.]**

20 **III. FURTHER RESPONSE BY THE DEFENDANT IS WARRANTED**

21 The Court is referred to the accompanying Separate Statement for the legal and factual  
22 reasons for compelling further responses, and/or for compelling compliance with the  
23 Defendant's statement of compliance set forth in the Defendant's Response.

24 In summary, further responses are warranted because the boilerplate objections  
25 repeated in every response are meritless and/or too general, and the Defendant's statement of  
26 compliance is impermissibly conditioned on the objections. As a result, it is highly likely that  
27 not all documents have been produced.

28 Hence, the Court is urged to grant the instant motion.

1 **IV. MONETARY SANCTION REQUEST**

2  
3 **A. Authority**

4 Code of Civil Procedure Section 2031.310(c) provides that:

5 (c) The court **shall** impose a monetary sanction under Chapter 7 (commencing with  
6 Section 2023.010) against any party, person, or attorney who **unsuccessfully** makes or  
7 **opposes a motion** to compel further response to an inspection demand, unless it finds  
that the one subject to the sanction acted with substantial justification or that other  
circumstances make the imposition of the sanction unjust.

8 [Emphasis added.]

9 Code of Civil Procedure Section 2031.320(b) provides that:

10 (b) The court **shall** impose a monetary sanction under Chapter 7 (commencing with  
11 Section 2023.010) against any party, person, or attorney who **unsuccessfully** makes or  
12 **opposes a motion** to compel compliance with an inspection demand, unless it finds  
that the one subject to the sanction acted with substantial justification or that other  
circumstances make the imposition of the sanction unjust.

13 [Emphasis added.]

14 Section 2023.010 also provides (in part) that:

15 **Misuses of the discovery process include**, but are not limited to, the  
16 following:

16 ....

17 (e) **Making, without substantial justification, an unmeritorious objection to  
discovery.**

18 (f) **Making an evasive response to discovery.**

19 ....

20 (h) **Making or opposing, unsuccessfully and without substantial justification, a  
motion to compel or to limit discovery.**

21 (i) **Failing to confer in person, by telephone, or by letter with an opposing  
22 party or attorney in a reasonable and good faith attempt to resolve informally any  
23 dispute concerning discovery**, if the section governing a particular discovery motion  
requires the filing of a declaration stating facts showing that such an attempt has been  
made.

24 [Emphasis added.]

25 Section 2023.020 also provides that:

26 Notwithstanding the outcome of the particular discovery motion, the  
27 court shall impose a monetary sanction ordering that any party or attorney  
28 who fails to confer as required pay the reasonable expenses, including  
attorney's fees, incurred by anyone as a result of that conduct.



1 **B. Monetary Sanctions Are Warranted In This Circumstance**

2 Defendant cannot establish "substantial justification" for: (1) making meritless  
3 objections; (2) avoiding a substantive response by giving an evasive response which contains  
4 an illusory promise to comply; and (3) failing to participate in the mandatory "meet and  
5 confer" process in a reasonable manner.

6 First, the Defendant impermissibly makes "General Objections" to all of the document  
7 demands, and then repeats the same objections to each document demand. There is no  
8 substantial justification for the multiplying of objections, and attempting to apply them all to  
9 every discovery item through the impermissible use of "general objections". *Korea Data*  
10 *Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516, noted that our courts  
11 "recognize the use of "boiler plate" objections as were provided in this case may be  
12 sanctionable ...."

13 Second, the purported "substantive responses" are impermissible because they are  
14 conditioned on the basis of "relevance" and unspecified objections. There is no substantial  
15 justification for not producing all of the requested documents, or at least stating that documents  
16 are withheld, and identifying those documents as required by the Code.

17 Third, defense counsel's "meet and confer" reply found no fault with even a single  
18 response made by the Defendant. There was no acknowledgment of any problem at all. There  
19 was no compromise at all. There was just a false explanation given for why defense counsel  
20 believes Plaintiff counsel is "at fault" for any discovery disputes in the case.

21 In this regard, in an unprofessional statement made on September 6, 2007, defense  
22 counsel stated: "[O]ur **prior experience** with Carcione, Cattermole, Dolinski, et al., LLP in  
23 this matter suggests that you have little interest in discussing the issues contained herein or  
24 otherwise attempting accommodation." [Bold added.]

25 That statement is a fabrication by defense counsel to justify the unjustifiable, i.e., not  
26 acknowledging *any* problem with the Defendant's discovery responses.

27 The fact is that defense counsel has had *one, and only one "prior experience"* with the  
28 undersigned. The Court's file will reflect that 2 prior discovery motions were filed in this case

1 on July 24, 2007, against the same Mexican Catholic Church Defendants, because they refused  
2 to answer any interrogatories beyond the statutory limit of 35. During the "meet and confer"  
3 process, defense counsel *continued to refuse* to provide substantive responses to the additional  
4 interrogatories, which *forced the Plaintiff into bringing the 2 motions. After the motions were*  
5 *filed*, defense counsel capitulated and agreed to serve further responses.

6 There is a remarkable similarity in approach between those 2 prior motions, and  
7 defense counsel's letter of September 6 pertaining to this discovery. According to defense  
8 counsel, *nothing* is wrong with the Defendant's discovery responses, at least until this motion  
9 is filed. Perhaps the Defendant will then agree to comply with the Code, or perhaps the  
10 Defendant will file an opposition and push this motion to a decision. Either way, defense  
11 counsel misrepresents his "prior experience" with the undersigned. That misrepresentation  
12 cannot be used to excuse the Defendant's discovery abuse in connection with the subject  
13 matter of *this* motion.

14 The Defendant's strategy of discovery non-compliance constitutes discovery misuse  
15 under Section 2023 of the Code of Civil Procedure, and causes unnecessary litigation expense.


16 The Court is urged to grant this Motion. In the event this motion is granted, the Code  
17 provides that monetary sanctions "shall" be granted as well. See Declaration of Counsel, for  
18 the amount of attorney time and expenses required for this motion.

19  
20 **V. CONCLUSION**

21 For all of the foregoing reasons, the Court is urged to grant the present Motion and  
22 require compliance within ten (10) days, including service of a verified, supplemental  
23 response, production of documents, and payment of a monetary sanction.

24  
25 Dated: September 17, 2007

CARCIONE, CATTERMOLE, DOLINSKI,  
OKIMOTO, STUCKY, UKSHINI,  
MARKOWITZ & CARCIONE, LLP

26  
27  
28 By:   
Attorney for Plaintiff

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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
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18 JOAQUIN AGUILAR MENDEZ,  
19 Plaintiff,  
20 vs.  
21 CARDINAL ROGER MAHONY, THE  
22 ROMAN CATHOLIC ARCHBISHOP OF  
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24 SOLE, CARDINAL NORBERTO  
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AGUILAR DOES 1-100,  
25 Defendants.

Case No. BC358718

PLAINTIFF'S SEPARATE STATEMENT IN  
SUPPORT OF MOTION TO COMPEL  
FURTHER RESPONSES BY DEFENDANT  
DIOCESE OF TEHUACAN TO PLAINTIFF'S  
SECOND SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS

Date: October 12, 2007  
Time: 8:30 a.m.  
Dept: 42

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27  
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1 SEPARATE STATEMENT (Document Demands)

2 Plaintiff submits this separate statement in support of the Motion to Compel the  
3 Defendant DIOCESE OF TEHUACAN to respond further to the Second Set of Requests for  
4 Production of Documents, in compliance with California Rules of Court, Rule 335.

5  
6 DOCUMENT DEMAND NO. 15 :

7 All DOCUMENTS CONCERNING Father Nicolas Aguilar (aka Nicolas Aguilar  
8 Rivera).

9 RESPONSE:

10 The Diocese incorporates by reference its General Objections set forth above. The  
11 Diocese further objects to this Request because it is overly broad, unduly burdensome and  
12 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. Subject to  
13 and without waiving its objections, the Diocese responds as follows:

14 The Diocese will produce such relevant, responsive and non-privileged documents as  
15 are in its possession, custody or control, which documents have not been produced previously  
16 by the Defendants.

17 LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:

18 A. Good Cause For Discovery

19 Code of Civil Procedure Section 2017.010 provides that:

20 Unless otherwise limited by order of the court in accordance with this  
21 title, **any party may obtain discovery regarding any matter, not**  
22 **privileged, that is relevant to the subject matter involved in the pending**  
23 **action or to the determination of any motion made in that action, if the**  
24 **matter either is itself admissible in evidence or appears reasonably**  
25 **calculated to lead to the discovery of admissible evidence. Discovery may**  
26 **relate to the claim or defense of the party seeking discovery or of any**  
27 **other party to the action. Discovery may be obtained of the identity and**  
28 **location of persons having knowledge of any discoverable matter, as well**  
29 **as of the existence, description, nature, custody, condition, and location**  
30 **of any document, tangible thing, or land or other property.**

31 While discovery is currently limited to the "jurisdictional" issue pending before the  
32 Court, good cause exists for full compliance with this document demand because Father  
33 Aguilar sexually molested the Plaintiff, and every piece of paper regarding Father Aguilar must

1 be considered *prima facie* relevant for discovery purposes, as every bit of information about  
2 Father Aguilar will assist the Plaintiff in obtaining either admissible evidence, or is reasonably  
3 calculated to lead to the discovery of admissible evidence.

4       Obtaining information about Father Aguilar will assist in proving how the Mexican  
5 Catholic Church authorities used California as a location to transfer sexual predator priests. It  
6 will also assist in proving the extent of cooperation between the Mexican and American  
7 Catholic Churches in this regard. Specifically, it will assist in proving how Father Aguilar was  
8 concealed from the public authorities both in Mexico and in California as he was transferred  
9 from Mexico to California, and then California to Mexico, in advance of criminal arrest. As  
10 part of that ongoing concealment of Father Aguilar, all information about the history of his  
11 whereabouts would assist in proving the ongoing concealment through the time the Plaintiff  
12 was sexually molested, and until the present. Father Aguilar's current location (for deposition,  
13 service of process, etc.) may be identified, even if the Defendant will not do so, by having all  
14 of that information.

15       Certainly, documents regarding Father Aguilar cannot be considered "privileged"  
16 unless they are restricted to communications between the Defendants and their attorneys.

17

18 B.    Objections

19       The objections made to this document demand are *too general and/or meritless* and/or  
20 frivolous, warranting sanctions.

21       First, the Defendant's use of "General Objections" are improper.

22       C.C.P. § 2031.210(a)(3) and § 2031.240(b), require *separate* objections to document  
23 demands, including identification "with particularity" of each document "to which an objection  
24 is being made", and further, a clear statement of the "specific grounds" for the objection,  
25 including but not limited to any privilege.

26       The dual failures of the Defendant to either defend those "General Objections" and  
27 withdraw them during the "meet and confer" process, means the Defendant both conceded they  
28 are improper, and it was a bad faith to waste of everyone's time on such "objections".

1           Second, "overbroad" is not a valid objection to an inspection demand unless either  
2 undue burden or irrelevance to the subject matter is demonstrated. *California Judges*  
3 *Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994), §15.25, p. 243, citing *Perkins v.*  
4 *Superior Court* (1981) 118 Cal.App.3d 761, 764-765, and *Durst v. Superior Court* (1963) 218  
5 Cal.App.2d 460.

6           Third, the objection of "undue burden" is both meritless and frivolous.

7           There is a "burden" inherent in the discovery process in all lawsuits, and a general  
8 "objection" of burden is insufficient to deny a party's discovery rights. *West Pico Furniture*  
9 *Co. v. Superior Court* (1961) 56 Cal.2d 418, 417-418.

10           As further noted in *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG, 2007), § 8:1476, in  
11 connection with document demands, responding counsel should:

12           Avoid raising the "burdensome and oppressive" objection unless the facts are  
13 *truly unusual* (e.g., very fragile property which could be damaged by any  
14 movement, touching, etc.). If you are going to object in such a case, *state the*  
15 *reasons* for your objection and *offer* to permit whatever inspection can be  
16 allowed under the circumstances. [Italics in original.]

17           The statutory test for a protective order on the basis of "burden" is set forth in Code of Civil  
18 Procedure Section 2017(c):

19           (c)     The court shall limit the scope of discovery if it determines that the  
20 burden, expense, or intrusiveness of that discovery *clearly outweighs* the  
21 likelihood that the information sought will lead to the discovery of admissible  
22 evidence. [Emphasis added.]

23           The California Supreme Court has held that before a trial court may restrict a discovery method  
24 for being unduly burdensome, there must be evidence in the record to sustain that conclusion.  
25 Indeed, there must be evidence specifically quantifying the burden imposed on the responding  
26 party. *West Pico Furniture Co. v. Superior Court, supra*, 56 Cal.2d at 417-419  
27 (interrogatories); and *Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 428 (requests for  
28 admission). Here, the Response did not identify any undue burden.

29           All of the objections are patently meritless, and should be overruled.

30           Additionally, the objections were frivolous, warranting sanctions.

31           Accordingly, the Court is requested to overrule all objections, and make a finding that

1 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"  
2 in good faith constitute discovery misuse, and award sanctions.

3  
4 C. Substantive Response

5 As to the Defendant's "substantive" response, it is *evasive*.

6 Again, the Response very ambiguously and conditionally states: "The Diocese will  
7 produce such relevant, responsive and non-privileged documents as are in its possession,  
8 custody or control, which documents have not been produced previously by the Defendants."

9 The Plaintiff is entitled to an unequivocal statement that all documents responsive to  
10 the demand are being produced. C.C.P. Section 2031.220 sets forth the requirements for a  
11 "statement of compliance" to a document demand.

12 A statement that the party to whom an inspection demand has been  
13 directed will comply with the particular demand **shall state** that the  
14 production, inspection, and related activity demanded will be allowed either  
15 in whole or in part, and that **all documents** or things in the demanded  
16 category that are in the possession, custody, or control of that party and to  
17 which no objection is being made will be included in the production.

18 The Defendant's conditional response is completely non-compliant with the Code.  
19 Instead of stating that "all" documents will be produced, the Response unilaterally sets  
20 conditions or limits on what is being produced.

21 The Defendant's Response first indicates that the Defendant has unilaterally decided  
22 what is a "relevant" document. The Response means that documents are being withheld that  
23 the Defendant has decided are "not relevant". That is unacceptable under the Code.

24 The Response further indicates that only "non-privileged documents" will be produced.  
25 That is an improper response unless a privilege log was served as part of the response.  
26 Otherwise, there is no identification of the particular documents that are being withheld from  
27 production, and there is no identification of the particular privilege that is being invoked.  
28 Those failures are violations of the Code. The objections have been waived by this non-  
compliance with C.C.P. § 2031.240(b).

*California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update

1 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

2 **All such documents must be listed and described in what is**  
3 **commonly referred to as a privilege log. This description must be**  
4 **sufficiently specific to enable the judge to evaluate the claim. CCP**  
5 **§2031.240(b) (formerly CCP §2031(g)(3)).**

6 In his "meet and confer" letter reply of September 6, 2007, defense counsel berates  
7 Plaintiffs' counsel about the existence of a "privilege log". See Motion Exhibit "E", hereto.  
8 However, the August 21 privilege log is not compliant with the Code because it is not a  
9 sufficiently specific description of *any document*. Instead, it provides 3 descriptions of  
10 *categories*. No *documents* are described, e.g., with dates, authors, recipients, etc. And, the  
11 "descriptions" are designed to obtain the applications of privileges. That is not a real privilege  
12 log at all, and defense counsel surely is aware it is not Code-compliant.

13 The basic test for an adequate privilege log is set forth in *Kaiser Foundation Hospitals*  
14 *v. Superior Court* (1998) 66 Cal.App.4th 1217, 1228:

15 The law attempts to find a balance between these competing interests in  
16 discovery and the assertion of privilege by requiring a party objecting to  
17 document production to "identify with particularity" any document as to  
18 which it makes an objection, and "set forth clearly the extent of, and the  
19 specific ground for, the objection," in accordance with Code of Civil  
20 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced  
21 a privilege log specifying the documents as to which it has withheld  
22 production on a claim of attorney-client privilege or work product doctrine  
23 protection. **The trial court must review Kaiser's privilege log to determine**  
24 **whether the specified documents as to which Kaiser claims the**  
25 **protection of either the privilege or the work product doctrine are in fact**  
26 **so protected. For this purpose, the information in Kaiser's log must be**  
27 **sufficiently specific to permit the trial court to determine whether each**  
28 **withheld document is or is not privileged. Should the trial court find the**  
**information in the privilege log insufficiently specific to allow such a**  
**determination, it may order Kaiser to prepare a new privilege log**  
**containing more particularized information about the nature of each**  
**document as to which the attorney-client privilege is claimed.**

[Emphasis added.]

Specific identification of the *document* is required for a real privilege log.

A party claiming privilege in response to an inspection demand should  
provide a "privilege log" that **identifies each document for which a**  
**privilege is claimed, its author, recipients, date of preparation, and the**  
**specific privilege claimed.**



1 [Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2004), § 8:1474.5  
2 (emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d  
3 1068, 1071 (9th Cir.1992).]

4 In *OXY Resources California v. Superior Court* (2004) 115 Cal.App.4th 874, 883, the  
5 need to give some indication of the content of the communication was demonstrated.

6 In response to document requests served by Calpine, OXY and EOG withheld  
7 certain documents and provided Calpine with privilege logs identifying the  
8 withheld documents. Among the documents withheld were 204 documents  
9 exchanged between OXY and EOG at various times before and after the close  
10 of the transaction on December 31, 1999.

11 **\*\*630 As reflected in EOG's privilege log, the privilege claimed as to the  
12 withheld documents exchanged between OXY and EOG is either a  
13 combination of joint defense and attorney work product, or a  
14 combination of joint defense, attorney work product, and attorney-client  
15 privilege. EOG's description of each withheld document on its privilege  
16 log gives some indication of the content of the communication. For  
17 example, EOG described one document as "1- page e-mail, re: Attached  
18 draft consent request letter for EOG properties."**

19 **OXY's privilege log is less revealing than EOG's. Although the document  
20 description in OXY's privilege log identifies the document's senders and  
21 recipients as well as the type of communication (e.g., letter, e-mail, or  
22 facsimile cover sheet), the description gives no indication of the purpose  
23 or content of the communication. The privilege claimed as to the withheld  
24 documents exchanged between OXY and EOG is either just "JDA," referring  
25 to the Joint Defense Agreement, or the Joint Defense Agreement combined  
26 with the attorney-client privilege and/or the work product doctrine. Roughly  
27 70 of the documents on OXY's privilege log were withheld solely on the  
28 ground of the Joint Defense Agreement, without reference to any underlying  
privilege, privacy claim, or claim of work product protection.**

Calpine ultimately filed a motion to compel the production of the 204  
withheld documents that had been exchanged between EOG and OXY.

[Emphasis added.]

20 The contents are not necessarily privileged because mere transmission to an attorney  
21 does not render the communication protected under the attorney-client privilege. *Green &*  
22 *Shinee v. Superior Court* (2001) 88 Cal.App.4th 532, 537.

23 At a minimum, there must be an *in camera* inspection for these documents.

24 *OXY Resources California v. Superior Court* (2004) 115 Cal.App.4th 874, 895:

25 Even OXY acknowledges the interests of EOG and OXY in the transaction  
26 were "adversarial, common, and at times, a blend of the two." Yet, **OXY  
27 apparently expects the court to rely entirely on the conclusory Peterson  
28 and Stevens declarations, which simply state in general terms that EOG  
and OXY had a common interest in finalizing their transaction and in  
responding to Calpine's inquiries about the Elkhorn Slough. Neither the  
privilege log nor the declarations reveal the content of any of the**

1 **communications, so it would be impossible for Calpine to offer evidence**  
2 **refuting OXY's claims that all of the withheld communication involve**  
3 **matters of common interest. Indeed, without more information about the**  
4 **disputed documents, Calpine cannot demonstrate that each**  
5 **communication between OXY and EOG was not reasonably necessary to**  
6 **accomplish \*\*640 the purpose for which a lawyer was consulted.**

7 As a practical matter, it is impossible to know whether any of the disclosures  
8 of purportedly privileged information between OXY and EOG were  
9 reasonably necessary to accomplish the purpose for which a lawyer was  
10 consulted without knowing in at least a general sense the communication's  
11 content. OXY correctly notes that a privilege claimant is not obliged to reveal  
12 the subject matter of a communication to establish a claim of privilege. (See  
13 Evid.Code, § 917, Comment of Assembly Committee on Judiciary.) The  
14 issue here, however, is not whether the documents contain privileged  
15 information. Rather, it is whether any privileges were waived because of  
16 disclosure to a third party. Moreover, we do not suggest that OXY must  
17 amend its privilege log to describe the content of each document. Instead, **an**  
18 **in camera review of the documents would permit the court to determine**  
19 **whether the disclosures were reasonably necessary to accomplish the**  
20 **lawyer's role in the consultation. OXY argues that the inviolability of the**  
21 **attorney-client privilege prohibits even an in camera review of the**  
22 **communications at issue here. We disagree.**

23 [Emphasis added.]

24 Finally, in this instance, there is no connection between the "privilege log" and the  
25 Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance  
26 that documents are not being withheld. There is no assurance that if documents are being  
27 withheld, that they would only be included in the purported "privilege log". Hence, both the  
28 Response and the "privilege log" are patently inadequate, and further response is warranted.  
The need for a further, straightforward response is demonstrated by the conditional, ambiguous  
nature of the Response itself.

An article published in the San Francisco Daily Journal on September 6, 2007, and  
authored by Richard M. Coleman, Esq., who is "a full-time neutral with Alternative Resolution  
Centers, as well as a discovery referee" in the Los Angeles area, finds that these types of  
purported responses that are made with and subject to objections do not comply with the Code.

1. After stating objections in general terms, the respondent  
concluded with the following language: "Without waiving these objections  
and subject to them, and specifically excluding any communications between  
attorney and client, defendant responses as follows: Defendant will produce  
all responsive documents."

**Did the respondent comply with the statutes? No.** The response  
"specifically" excludes attorney-client documents, but does not state whether

1 any in fact exist. If there are privileged documents, they must be identified  
with particularity.

2 C.C.P. Section 2031.240(b)(1) provides that the respondent: Identify  
with particularity any document ... to which an objection is being made.  
3 [Emphasis added.]

4 The response is also ambiguous: **“Without waiving these objections  
and subject to them.”**

5 **What does that mean?** The documents will be produced but  
objections made to them are preserved? Or, any documents to which  
objection has been made are being withheld?

6 **The movant is entitled to an unequivocal statement that all the  
documents responsive to the request are being produced.** If withheld  
7 based on objection, as with claims of privilege, the documents must be  
identified with particularity.

8 [Italics in original; bold added.]

9  
10 Also very recently, the 9<sup>th</sup> Circuit Court of Appeals ruled that a responding party must  
state unequivocally that no documents are being withheld.

11 In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ----, 2007 WL 2458503 (August 31,  
12 2007), a case venued in Nevada Federal Court, the 9<sup>th</sup> Circuit Court upheld a trial court judge  
13 order *in limine* which barred the defendant from introducing evidence at trial where the  
14 documents were withheld during discovery.

15  
16 The insurers also challenge the district court's order suppressing  
certain evidence placed in the claim file after litigation commenced. The  
17 district court granted this motion upon finding that the insurers withheld  
evidence that they were ordered to produce regarding their post-litigation  
18 treatment of Merrick's claim. The insurers argue that the court erred in finding  
that they had withheld any evidence. “Courts need not tolerate flagrant abuses  
of the discovery process” and have “inherent power” to exclude evidence as a  
19 sanction for such abuses. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27  
(9th Cir.1980). We review the imposition of discovery sanctions for abuse of  
20 discretion and the underlying factual determinations for clear error. *Valley  
Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir.1998). Based  
21 upon the record, we cannot conclude that the district court's finding that the  
insurers withheld evidence is clearly erroneous. The insurers' pretrial  
22 behavior gives rise to such an inference. **The insurers invoked the privilege  
in response to a specific document production request, and continued to  
23 do so even after the magistrate judge instructed them not to invoke the  
privilege unless the privilege was actually shielding documents. Their  
24 responses expressly objected on the basis of privilege and attested that  
“subject to these objections,” their production was complete. FN3 Only  
25 after the magistrate ordered the privileges waived (in response to  
Merrick's assertion that defendants were withholding evidence), and  
26 Merrick brought his motion in limine, did the insurers state  
unequivocally that no documents were withheld on the basis of privilege.  
27 FN4 Even then, counsel's statement at the hearing could be understood as  
admitting the existence of withheld documents.**

1 [Id., at p. 5; bold added.]

2  
3 The 9<sup>th</sup> Circuit Court of Appeals further held that the paucity of documents actually  
4 produced supports an inference that documents are being withheld.

5 In addition, **the existence of withheld documents may be inferred from the**  
6 **paucity of material actually produced.** Although the insurers received over  
7 3000 pages of documents pertaining to Merrick's claim after litigation began,  
8 it produced only three short memos analyzing this material, none of which  
9 was generated by the attorneys who were actively managing the case file after  
10 Merrick filed his complaint. FN5

11 Against these facts, the defendants offer only their sworn statement that  
12 documents were not withheld. While proving a negative is difficult, **the**  
13 **defendants' pre-trial conduct and the dearth of documents actually**  
14 **produced support an inference that the defendants withheld documents**  
15 in violation of the magistrate's order. Given the district court's superior  
16 position to adjudge the insurers' culpability, we conclude that the district  
17 court did not clearly err in so finding, and did not abuse its discretion in  
18 granting Merrick's motion in limine.

19 [Id., at p. 6; bold added.]

20 Here, the Mexican Catholic Church authorities assert they have no idea what happened  
21 to Father Aguilar after he returned from molesting children in California in January 1988, and  
22 they have produced virtually no discovery for the post-1988 time period. As a result, they have  
23 managed to fail to disclose the whereabouts of Father Aguilar in Mexico through today's date.  
24 This means that the primary witness in the case has been kept from criminal justice, and justice  
25 in a civil forum, in the form of a deposition under oath and a jury trial in California. The  
26 failure to disclose much of anything about Father Aguilar after 1988 only inurs to the benefit of  
27 the current Defendants in this lawsuit, as they can say anything without fear of contradiction.

28 As to the pre-1988 time period, the Mexican Catholic Church Defendants have  
29 produced **93 pages of documents for a priest who was ordained in Mexico in 1970**, and  
30 worked as a priest in Mexico except for the time period of March 1987 to January 1988 when  
31 he was in California, until perhaps the present day. The "paltry" production of documents  
32 about Father Aguilar is unbelievable. The lack of credibility to the documents produced thus  
33 far supports an inference that documents are being withheld by these highly evasive  
34 "compliance statements".