

1 Lawrence E. Drivon, Esq. (State Bar No. 46660)
David E. Drivon, Esq. (State Bar No. 158369)
2 Robert T. Waters, Esq. (State Bar No. 196833)
The Drivon Law Firm
3 215 North San Joaquin Street
Stockton, CA 95202
4 Telephone: (209) 644-1234

5 Michael G. Finnegan, Esq. (State Bar No. 241091)
Jeff Anderson & Associates
6 E-1000 First National Bank Building
332 Minnesota Street
7 St. Paul, Minnesota 55101
Telephone: (651) 227-9990
8

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**
10 **CARCIONE, CATTERMOLLE, DOLINSKI, OKIMOTO,**
STUCKY, UKSHINI, MARKOWITZ & CARCIONE, L.L.P.
11 601 Brewster Avenue
P.O. Box 3389
12 Redwood City, CA 94064
Telephone: (650) 367-6811

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.

19

20 Dated: September 17, 2007

21

22

23

24

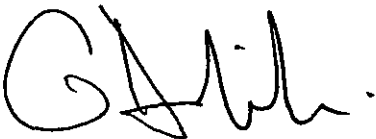
25

26

27

28

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:*

29 Laurence E. Drivon, Esq.

30 David E. Drivon, Esq.

31 Robert T. Waters, Esq.

32 The Drivon Firm

33 215 North San Joaquin Street

34 Stockton, CA 95202

35 Telephone: (209) 644-1234

Facsimile: (209) 463-7668

36 *Co-Counsel for Plaintiff*

37 Jeff Anderson, Esq.

38 Jeff Anderson & Associates, P.A.

39 E-1000 First National Bank Building

40 332 Minnesota Street

41 St. Paul, MN 55101

42 Telephone: (651) 227-9990

Facsimile: (651) 297-6543

43 *Co-Counsel for Plaintiff*

44 Martin D. Gross, Esq.

45 The Law Offices of Martin D. Gross

1 2001 Wilshire Boulevard, Suite 205
Santa Monica, CA 90403
2 Telephone: (310) 453-8320

Facsimile: (310) 861-1359

3 **Attorneys for Defendant: Cardinal Norberto Rivera and the Diocese of Tehuacan**

4 Michael L. Cypers, Esq.
Evan M. Wooten, Esq.
Mayer Brown LLP
5 350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
6 Telephone: (213) 229-9500

Facsimile: (213) 625-0248

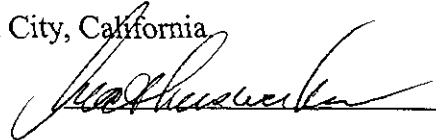
7 **Co-Counsel for Defendant: Cardinal Norberto Rivera and the Diocese of Tehuacan**

8 Steven R. Selsberg (*pro hac vice*)
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



13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Lawrence E. Drivon, Esq. (State Bar No. 46660)
David E. Drivon, Esq. (State Bar No. 158369)
2 Robert T. Waters, Esq. (State Bar No. 196833)
The Drivon Law Firm
3 215 North San Joaquin Street
Stockton, CA 95202
4 Telephone: (209) 644-1234

5 Michael G. Finnegan, Esq. (State Bar No. 241091)
Jeff Anderson & Associates
6 E-1000 First National Bank Building
332 Minnesota Street
7 St. Paul, Minnesota 55101
Telephone: (651) 227-9990

8 Joseph W. Carcione, Jr., Esq. (State Bar No. 56693)
9 Gary W. Dolinski, Esq. (State Bar No. 107725)
Mara W. Feiger, Esq. (State Bar No. 143247)
10 CARCIONE, CATTERMOLE, DOLINSKI, OKIMOTO,
STUCKY, UKSHINI, MARKOWITZ & CARCIONE, L.L.P.
11 601 Brewster Avenue
P.O. Box 3389
12 Redwood City, CA 94064
Telephone: (650) 367-6811

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,

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
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

25 Defendants.
26
27
28

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
party or attorney in a reasonable and good faith attempt to resolve informally any
22 dispute concerning discovery**, if the section governing a particular discovery motion
23 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
who fails to confer as required pay the reasonable expenses, including
28 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

1 Lawrence E. Drivon, Esq. (State Bar No. 46660)
David E. Drivon, Esq. (State Bar No. 158369)
2 Robert T. Waters, Esq. (State Bar No. 196833)
The Drivon Law Firm
3 215 North San Joaquin Street
Stockton, CA 95202
4 Telephone: (209) 644-1234

5 Michael G. Finnegan, Esq. (State Bar No. 241091)
Jeff Anderson & Associates
6 E-1000 First National Bank Building
332 Minnesota Street
7 St. Paul, Minnesota 55101
Telephone: (651) 227-9990

8 Joseph W. Carcione, Jr., Esq. (State Bar No. 56693)
9 Gary W. Dolinski, Esq. (State Bar No. 107725)
Mara W. Feiger, Esq. (State Bar No. 143247)
10 CARCIONE, CATTERMOLE, DOLINSKI, OKIMOTO,
STUCKY, UKSHINI, MARKOWITZ & CARCIONE, L.L.P.
11 601 Brewster Avenue
P.O. Box 3389
12 Redwood City, CA 94064
Telephone: (650) 367-6811

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
22 ROMAN CATHOLIC ARCHBISHOP OF
LOS ANGELES, A CORPORATION
SOLE, CARDINAL NORBERTO
23 RIVERA, THE DIOCESE OF
TEHUACAN, FATHER NICHOLAS
24 AGUILAR DOES 1-100,
25 Defendants.
26
27
28

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

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 9th 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 9th 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 The 9th Circuit Court of Appeals further held that the paucity of documents actually
3 produced supports an inference that documents are being withheld.

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

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

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

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

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

1 Plaintiff requests a court order requiring a further response by Defendant that is not
2 “conditioned” in any manner, and an unequivocal statement that *all* documents have been
3 produced. Absent such a court order, the concealment of relevant information and documents
4 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

5
6
7 **DOCUMENT DEMAND NO. 16 :**

8 All DOCUMENTS containing the name “Father Nicolas Aguilar (aka Nicolas Aguilar
9 Rivera)” in any formulation of those words.

10 **RESPONSE:**

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

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

18 **LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:**

19 A. **Good Cause For Discovery**

20 Code of Civil Procedure Section 2017.010 provides that:

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

27 While discovery is currently limited to the “jurisdictional” issue pending before the
28 Court, good cause exists for full compliance with this document demand because Father

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

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

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

18

19 B. Objections

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

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

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

27 The dual failures of the Defendant to either defend those "General Objections" and
28 withdraw them during the "meet and confer" process, means the Defendant both conceded they

1 are improper, and it was a bad faith to waste of everyone's time on such "objections".

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

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

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

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

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

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

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

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

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

28 Additionally, the objections were frivolous, warranting sanctions.

1 Accordingly, the Court is requested to overrule all objections, and make a finding that
2 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
3 in good faith constitute discovery misuse, and award sanctions.

4
5 C. Substantive Response

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

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

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

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

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

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

23 The Response further indicates that only "non-privileged documents" will be produced.
24 That is an improper response unless a privilege log was served as part of the response.

25 Otherwise, there is no identification of the particular documents that are being withheld from
26 production, and there is no identification of the particular privilege that is being invoked.

27 Those failures are violations of the Code. The objections have been waived by this non-
28 compliance with C.C.P. § 2031.240(b).

1 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
2 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

3 All such documents must be listed and described in what is
4 commonly referred to as a **privilege log**. This description **must be**
5 **sufficiently specific to enable the judge to evaluate the claim**. CCP
6 §2031.240(b) (formerly CCP §2031(g)(3)).

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

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

16 The law attempts to find a balance between these competing interests in
17 discovery and the assertion of privilege by requiring a party objecting to
18 document production to "identify with particularity" any document as to
19 which it makes an objection, and "set forth clearly the extent of, and the
20 specific ground for, the objection," in accordance with Code of Civil
21 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
22 a privilege log specifying the documents as to which it has withheld
23 production on a claim of attorney-client privilege or work product doctrine
24 protection. **The trial court must review Kaiser's privilege log to determine**
25 **whether the specified documents as to which Kaiser claims the**
26 **protection of either the privilege or the work product doctrine are in fact**
27 **so protected. For this purpose, the information in Kaiser's log must be**
28 **sufficiently specific to permit the trial court to determine whether each**
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

1 specific privilege claimed.

2 [Cal. Practice Guide; Civ. Proc. Before Trial (TRG 2004), § 8:1474.5
3 (emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d
4 1068, 1071 (9th Cir.1992).]

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

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

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

20 **OXY's privilege log is less revealing than EOG's. Although the document
21 description in OXY's privilege log identifies the document's senders and
22 recipients as well as the type of communication (e.g., letter, e-mail, or
23 facsimile cover sheet), the description gives no indication of the purpose
24 or content of the communication. The privilege claimed as to the withheld
25 documents exchanged between OXY and EOG is either just "JDA," referring
26 to the Joint Defense Agreement, or the Joint Defense Agreement combined
27 with the attorney-client privilege and/or the work product doctrine. Roughly
28 70 of the documents on OXY's privilege log were withheld solely on the
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.]

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

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

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

26 Even OXY acknowledges the interests of EOG and OXY in the transaction
27 were "adversarial, common, and at times, a blend of the two." Yet, **OXY
28 apparently expects the court to rely entirely on the conclusory Peterson
and Stevens declarations, which simply state in general terms that EOG
and OXY had a common interest in finalizing their transaction and in**

1 responding to Calpine's inquiries about the Elkhorn Slough. Neither the
2 privilege log nor the declarations reveal the content of any of the
3 communications, so it would be impossible for Calpine to offer evidence
4 refuting OXY's claims that all of the withheld communication involve
5 matters of common interest. Indeed, without more information about the
6 disputed documents, Calpine cannot demonstrate that each
7 communication between OXY and EOG was not reasonably necessary to
8 accomplish **640 the purpose for which a lawyer was consulted.

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

25 [Emphasis added.]

26 Finally, in this instance, there is no connection between the "privilege log" and the
27 Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance
28 that documents are not being withheld. There is no assurance that if documents are being
withheld, that they would only be included in the purported "privilege log". Hence, both the
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."

1 **Did the respondent comply with the statutes? No.** The response
2 “specifically” excludes attorney-client documents, but does not state whether
any in fact exist. If there are privileged documents, they must be identified
with particularity.

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

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

6 **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?

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

9 [Italics in original; bold added.]

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

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

17 The insurers also challenge the district court's order suppressing
18 certain evidence placed in the claim file after litigation commenced. The
district court granted this motion upon finding that the insurers withheld
19 evidence that they were ordered to produce regarding their post-litigation
treatment of Merrick's claim. The insurers argue that the court erred in finding
20 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
21 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
22 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
23 upon the record, we cannot conclude that the district court's finding that the
insurers withheld evidence is clearly erroneous. The insurers' pretrial
24 behavior gives rise to such an inference. **The insurers invoked the privilege
in response to a specific document production request, and continued to
do so even after the magistrate judge instructed them not to invoke the
privilege unless the privilege was actually shielding documents. Their
25 responses expressly objected on the basis of privilege and attested that
26 “subject to these objections,” their production was complete. FN3 Only
after the magistrate ordered the privileges waived (in response to
27 Merrick's assertion that defendants were withholding evidence), and
Merrick brought his motion in limine, did the insurers state
28 unequivocally that no documents were withheld on the basis of privilege.**

1 FN4 Even then, counsel's statement at the hearing could be understood as
2 admitting the existence of withheld documents.

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

4 The 9th Circuit Court of Appeals further held that the paucity of documents actually
5 produced supports an inference that documents are being withheld.

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

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

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

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

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

1 "compliance statements".

2 Plaintiff requests a court order requiring a further response by Defendant that is not
3 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
4 produced. Absent such a court order, the concealment of relevant information and documents
5 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

6
7
8 **DOCUMENT DEMAND NO. 17 :**

9 All DOCUMENTS containing the personnel file of Father Nicolas Aguilar (aka
10 Nicolas Aguilar Rivera).

11 **RESPONSE:**

12 The Diocese incorporates by reference its General Objections set forth above. Subject
13 to 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
as of the existence, description, nature, custody, condition, and location
of any document, tangible thing, or land or other property.**

26 While discovery is currently limited to the "jurisdictional" issue pending before the
27 Court, good cause exists for full compliance with this document demand because Father
28 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 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 All of the objections are patently meritless, and should be overruled.

2 Additionally, the objections were frivolous, warranting sanctions.

3 Accordingly, the Court is requested to overrule all objections, and make a finding that
4 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
5 in good faith constitute discovery misuse, and award sanctions.

6
7 C. Substantive Response

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

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

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

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

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

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

25 The Response further indicates that only "non-privileged documents" will be produced.
26 That is an improper response unless a privilege log was served as part of the response.
27 Otherwise, there is no identification of the particular documents that are being withheld from
28 production, and there is no identification of the particular privilege that is being invoked.

1 Those failures are violations of the Code. The objections have been waived by this non-
2 compliance with C.C.P. § 2031.240(b).

3 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
4 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

5 All such documents must be listed and described in what is
6 commonly referred to as a **privilege log**. This description **must be**
7 **sufficiently specific to enable the judge to evaluate the claim.** CCP
8 §2031.240(b) (formerly CCP §2031(g)(3)).

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

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

18 The law attempts to find a balance between these competing interests in
19 discovery and the assertion of privilege by requiring a party objecting to
20 document production to "identify with particularity" any document as to
21 which it makes an objection, and "set forth clearly the extent of, and the
22 specific ground for, the objection," in accordance with Code of Civil
23 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
24 a privilege log specifying the documents as to which it has withheld
25 production on a claim of attorney-client privilege or work product doctrine
26 protection. **The trial court must review Kaiser's privilege log to determine**
27 **whether the specified documents as to which Kaiser claims the**
28 **protection of either the privilege or the work product doctrine are in fact**
so protected. For this purpose, the information in Kaiser's log must be
sufficiently specific to permit the trial court to determine whether each
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.

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

5 [Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2004), § 8:1474.5
6 (emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d
7 1068, 1071 (9th Cir.1992).]

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

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

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

23 **OXY's privilege log is less revealing than EOG's. Although the document
24 description in OXY's privilege log identifies the document's senders and
25 recipients as well as the type of communication (e.g., letter, e-mail, or
26 facsimile cover sheet), the description gives no indication of the purpose
27 or content of the communication. The privilege claimed as to the withheld
28 documents exchanged between OXY and EOG is either just "JDA," referring
to the Joint Defense Agreement, or the Joint Defense Agreement combined
with the attorney-client privilege and/or the work product doctrine. Roughly
70 of the documents on OXY's privilege log were withheld solely on the
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.]

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

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

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

Even OXY acknowledges the interests of EOG and OXY in the transaction
were "adversarial, common, and at times, a blend of the two." Yet, **OXY
apparently expects the court to rely entirely on the conclusory Peterson**

1 and Stevens declarations, which simply state in general terms that EOG
2 and OXY had a common interest in finalizing their transaction and in
3 responding to Calpine's inquiries about the Elkhorn Slough. Neither the
4 privilege log nor the declarations reveal the content of any of the
5 communications, so it would be impossible for Calpine to offer evidence
6 refuting OXY's claims that all of the withheld communication involve
7 matters of common interest. Indeed, without more information about the
8 disputed documents, Calpine cannot demonstrate that each
9 communication between OXY and EOG was not reasonably necessary to
10 accomplish **640 the purpose for which a lawyer was consulted.

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

27 [Emphasis added.]

28 Finally, in this instance, there is no connection between the "privilege log" and the
Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance
that documents are not being withheld. There is no assurance that if documents are being
withheld, that they would only be included in the purported "privilege log". Hence, both the
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

1 attorney and client, defendant responses as follows: Defendant will produce
2 all responsive documents.”

3 **Did the respondent comply with the statutes? No.** The response
4 “specifically” excludes attorney-client documents, but does not state whether
5 any in fact exist. If there are privileged documents, they must be identified
6 with particularity.

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

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

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

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

19 [Italics in original; bold added.]

20 Also very recently, the 9th Circuit Court of Appeals ruled that a responding party must
21 state unequivocally that no documents are being withheld.

22 In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ---, 2007 WL 2458503 (August 31,
23 2007), a case venued in Nevada Federal Court, the 9th Circuit Court upheld a trial court judge
24 order *in limine* which barred the defendant from introducing evidence at trial where the
25 documents were withheld during discovery.

26 The insurers also challenge the district court's order suppressing
27 certain evidence placed in the claim file after litigation commenced. The
28 district court granted this motion upon finding that the insurers withheld
evidence that they were ordered to produce regarding their post-litigation
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
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
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
upon the record, we cannot conclude that the district court's finding that the
insurers withheld evidence is clearly erroneous. The insurers' pretrial
behavior gives rise to such an inference. **The insurers invoked the privilege
in response to a specific document production request, and continued to
do so even after the magistrate judge instructed them not to invoke the
privilege unless the privilege was actually shielding documents. Their
responses expressly objected on the basis of privilege and attested that
“subject to these objections,” their production was complete. FN3 Only
after the magistrate ordered the privileges waived (in response to
Merrick's assertion that defendants were withholding evidence), and**

1 **Merrick brought his motion in limine, did the insurers state**
2 **unequivocally that no documents were withheld on the basis of privilege.**
3 FN4 Even then, counsel's statement at the hearing could be understood as
4 admitting the existence of withheld documents.

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

6 The 9th Circuit Court of Appeals further held that the paucity of documents actually
7 produced supports an inference that documents are being withheld.

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

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

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

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

31 As to the pre-1988 time period, the Mexican Catholic Church Defendants have
32 produced **93 pages of documents for a priest who was ordained in Mexico in 1970**, and
33 worked as a priest in Mexico except for the time period of March 1987 to January 1988 when
34 he was in California, until perhaps the present day. The "paltry" production of documents
35 about Father Aguilar is unbelievable. The lack of credibility to the documents produced thus

1 far supports an inference that documents are being withheld by these highly evasive
2 "compliance statements".

3 Plaintiff requests a court order requiring a further response by Defendant that is not
4 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
5 produced. Absent such a court order, the concealment of relevant information and documents
6 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

7

8

9 **DOCUMENT DEMAND NO. 18 :**

10 All DOCUMENTS CONCERNING the ordination of Father Nicolas Aguilar (aka
11 Nicolas Aguilar Rivera).

12 **RESPONSE:**

13 The Diocese incorporates by reference its General Objections set forth above. The
14 Diocese further objects to this Request because the term "ordination" is vague and ambiguous
15 and, as such, the Request does not designate the requested documents with reasonable
16 particularity as required by California Code of Civil Procedure § 2025.220(a)(4). Subject to
17 and without waiving its objections, the Diocese responds as follows:

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

21 **LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:**

22 A. **Good Cause For Discovery**

23 Code of Civil Procedure Section 2017.010 provides that:

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

1 as of the existence, description, nature, custody, condition, and location
2 of any document, tangible thing, or land or other property.

3 While discovery is currently limited to the "jurisdictional" issue pending before the
4 Court, good cause exists for full compliance with this document demand because Father
5 Aguilar sexually molested the Plaintiff, and every piece of paper regarding Father Aguilar must
6 be considered *prima facie* relevant for discovery purposes, as every bit of information about
7 Father Aguilar will assist the Plaintiff in obtaining either admissible evidence, or is reasonably
8 calculated to lead to the discovery of admissible evidence.

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

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

22 B. Objections

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

25 The Defendant's use of "General Objections" are improper.

26 C.C.P. § 2031.210(a)(3) and § 2031.240(b), require *separate* objections to document
27 demands, including identification "with particularity" of each document "to which an objection
28

1 is being made”, and further, a clear statement of the “specific grounds” for the objection,
2 including but not limited to any privilege.

3 The dual failures of the Defendant to either defend those “General Objections” and
4 withdraw them during the “meet and confer” process, means the Defendant both conceded they
5 are improper, and it was a bad faith to waste of everyone’s time on such “objections”.

6 “Vague and ambiguous” is not a valid objection to an inspection demand unless “the
7 ambiguity precludes an intelligent reply.” *California Judges Benchbook: Civil Proceedings--*
8 *Discovery* (Cal CJER 1994), §15.25, p. 241, citing *Cembrook v. Superior Court* (1961) 56
9 Cal.2d 423, 430 (requests for admissions), and *Standon Co. v. Superior Court* (1990) 225
10 Cal.App.3d 898, 901 (an objection to a request for “any and all bills ... evidencing expenses ...
11 incurred” based on the ground that the request was “vague, ambiguous, and unintelligible”
12 would be untenable and subject to sanction). Also see *Deyo v. Kilbourne* (1978) 84
13 Cal.App.3d 771, 783 (an interrogatory must be answered “if the nature of the information
14 sought is apparent.”).

15 In this instance, ordination comes from the term, “ordain”. The Defendant knows what
16 the word means. The Defendant’s contemporaneous answer (8/17/07) to Plaintiff’s Special
17 Interrogatory No. 55 states that Father Aguilar “was ordained a presbyter on July 12, 1970.”

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

19 Additionally, the objections were frivolous, warranting sanctions.

20 Accordingly, the Court is requested to overrule all objections, and make a finding that
21 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
22 in good faith constitute discovery misuse, and award sanctions.

23

24 C. Substantive Response

25 As to the Defendant’s “substantive” response, it is *evasive*.

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

1 The Plaintiff is entitled to an unequivocal statement that all documents responsive to
2 the demand are being produced. C.C.P. Section 2031.220 sets forth the requirements for a
3 “statement of compliance” to a document demand.

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

10 The Defendant’s conditional response is completely non-compliant with the Code.
11 Instead of stating that “all” documents will be produced, the Response unilaterally sets
12 conditions or limits on what is being produced.

13 The Defendant’s Response first indicates that the Defendant has unilaterally decided
14 what is a “relevant” document. The Response means that documents are being withheld that
15 the Defendant has decided are “not relevant”. That is unacceptable under the Code.

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

22 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
23 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

24 All such documents must be listed and described in what is
25 commonly referred to as a **privilege log**. This description **must be**
26 **sufficiently specific to enable the judge to evaluate the claim.** CCP
27 §2031.240(b) (formerly CCP §2031(g)(3)).

28 In his “meet and confer” letter reply of September 6, 2007, defense counsel berates
29 Plaintiffs’ counsel about the existence of a “privilege log”. See Motion Exhibit “E”, hereto.
30 However, the August 21 privilege log is not compliant with the Code because it is not a
31 sufficiently specific description of *any document*. Instead, it provides 3 descriptions of

1 categories. No documents are described, e.g., with dates, authors, recipients, etc. And, the
2 "descriptions" are designed to obtain the applications of privileges. That is not a real privilege
3 log at all, and defense counsel surely is aware it is not Code-compliant.

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

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

24 [Emphasis added.]

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

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

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

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

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

****630 As reflected in EOG's privilege log, the privilege claimed as to the
withheld documents exchanged between OXY and EOG is either a
combination of joint defense and attorney work product, or a**

1 combination of joint defense, attorney work product, and attorney-client
2 privilege. EOG's description of each withheld document on its privilege
3 log gives some indication of the content of the communication. For
4 example, EOG described one document as "1- page e-mail, re: Attached
5 draft consent request letter for EOG properties."

6 OXY's privilege log is less revealing than EOG's. Although the document
7 description in OXY's privilege log identifies the document's senders and
8 recipients as well as the type of communication (e.g., letter, e-mail, or
9 facsimile cover sheet), the description gives no indication of the purpose
10 or content of the communication. The privilege claimed as to the withheld
11 documents exchanged between OXY and EOG is either just "JDA," referring
12 to the Joint Defense Agreement, or the Joint Defense Agreement combined
13 with the attorney-client privilege and/or the work product doctrine. Roughly
14 70 of the documents on OXY's privilege log were withheld solely on the
15 ground of the Joint Defense Agreement, without reference to any underlying
16 privilege, privacy claim, or claim of work product protection.
17 Calpine ultimately filed a motion to compel the production of the 204
18 withheld documents that had been exchanged between EOG and OXY.

19 [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
communications, so it would be impossible for Calpine to offer evidence
refuting OXY's claims that all of the withheld communication involve
matters of common interest. Indeed, without more information about the
disputed documents, Calpine cannot demonstrate that each
communication between OXY and EOG was not reasonably necessary to
accomplish **640 the purpose for which a lawyer was consulted.**

As a practical matter, it is impossible to know whether any of the disclosures
of purportedly privileged information between OXY and EOG were
reasonably necessary to accomplish the purpose for which a lawyer was
consulted without knowing in at least a general sense the communication's
content. OXY correctly notes that a privilege claimant is not obliged to reveal
the subject matter of a communication to establish a claim of privilege. (See
Evid.Code, § 917, Comment of Assembly Committee on Judiciary.) The
issue here, however, is not whether the documents contain privileged
information. Rather, it is whether any privileges were waived because of
disclosure to a third party. Moreover, we do not suggest that OXY must
amend its privilege log to describe the content of each document. Instead, **an**

1 in camera review of the documents would permit the court to determine
2 whether the disclosures were reasonably necessary to accomplish the
3 lawyer's role in the consultation. OXY argues that the inviolability of the
communications at issue here. We disagree.

4 [Emphasis added.]

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

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

16
17 1. After stating objections in general terms, the respondent
18 concluded with the following language: "Without waiving these objections
19 and subject to them, and specifically excluding any communications between
20 attorney and client, defendant responses as follows: Defendant will produce
all responsive documents."

21 **Did the respondent comply with the statutes? No.** The response
22 "specifically" excludes attorney-client documents, but does not state whether
any in fact exist. If there are privileged documents, they must be identified
with particularity.

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

24 The response is also ambiguous: "**Without waiving these objections
and subject to them.**"

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

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

[Italics in original; bold added.]

1 Also very recently, the 9th Circuit Court of Appeals ruled that a responding party must
2 state unequivocally that no documents are being withheld.

3 In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ---, 2007 WL 2458503 (August 31,
4 2007), a case venued in Nevada Federal Court, the 9th Circuit Court upheld a trial court judge
5 order *in limine* which barred the defendant from introducing evidence at trial where the
6 documents were withheld during discovery.

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

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

21 The 9th Circuit Court of Appeals further held that the paucity of documents actually
22 produced supports an inference that documents are being withheld.

23 In addition, **the existence of withheld documents may be inferred from the
24 paucity of material actually produced.** Although the insurers received over
25 3000 pages of documents pertaining to Merrick's claim after litigation began,
26 it produced only three short memos analyzing this material, none of which
was generated by the attorneys who were actively managing the case file after
Merrick filed his complaint. FN5

27 Against these facts, the defendants offer only their sworn statement that
28 documents were not withheld. While proving a negative is difficult, **the
defendants' pre-trial conduct and the dearth of documents actually**

1 **produced support an inference that the defendants withheld documents**
2 in violation of the magistrate's order. Given the district court's superior
3 position to adjudge the insurers' culpability, we conclude that the district
4 court did not clearly err in so finding, and did not abuse its discretion in
5 granting Merrick's motion in limine.

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

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

13 Plaintiff requests a court order requiring a further response by Defendant that is not
14 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
15 produced. Absent such a court order, the concealment of relevant information and documents
16 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

17 **DOCUMENT DEMAND NO. 19 :**

18 All DOCUMENTS CONCERNING the incardination of Father Nicolas Aguilar (aka
19 Nicolas Aguilar Rivera) from Mexico to the Archdiocese of Los Angeles.

20 **RESPONSE:**

21 The Diocese incorporates by reference its General Objections set forth above. The
22 Diocese further objects to this Request because the term "incardination" is vague and
23 ambiguous and, as such, the Request does not designate the requested documents with
24 reasonable particularity as required by California Code of Civil Procedure § 2025.220(a)(4).

25 Subject to and without waiving its objections, the Diocese responds as follows:

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

1 LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:

2 A. Good Cause For Discovery

3 Code of Civil Procedure Section 2017.010 provides that:

4 Unless otherwise limited by order of the court in accordance with this
5 title, **any party may obtain discovery regarding any matter, not**
6 **privileged, that is relevant to the subject matter involved in the pending**
7 **action or to the determination of any motion made in that action, if the**
8 **matter either is itself admissible in evidence or appears reasonably**
9 **calculated to lead to the discovery of admissible evidence. Discovery may**
10 **relate to the claim or defense of the party seeking discovery or of any**
11 **other party to the action. Discovery may be obtained of the identity and**
12 **location of persons having knowledge of any discoverable matter, as well**
13 **as of the existence, description, nature, custody, condition, and location**
14 **of any document, tangible thing, or land or other property.**

15 Here, all documents regarding the transfer of Father Aguilar from Mexico to the United
16 States is clearly within the scope of the “jurisdictional” issue pending before the Court.

17 Certainly, documents regarding Father Aguilar cannot be considered “privileged”
18 unless they are restricted to communications between the Defendants and their attorneys.

19 B. Objections

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

22 The Defendant’s use of “General Objections” are improper.

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

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

30 “Vague and ambiguous” is not a valid objection to an inspection demand unless “the
31 ambiguity precludes an intelligent reply.” *California Judges Benchbook: Civil Proceedings--*
32 *Discovery* (Cal CJER 1994), §15.25, p. 241, citing *Cembrook v. Superior Court* (1961) 56

1 Cal.2d 423, 430 (requests for admissions), and *Standon Co. v. Superior Court* (1990) 225
2 Cal.App.3d 898, 901 (an objection to a request for “any and all bills ... evidencing expenses ...
3 incurred” based on the ground that the request was “vague, ambiguous, and unintelligible”
4 would be untenable and subject to sanction). Also see *Deyo v. Kilbourne* (1978) 84
5 Cal.App.3d 771, 783 (an interrogatory must be answered “if the nature of the information
6 sought is apparent.”).

7 In this instance, incardination comes from , “to incardinate”. The Defendant knows
8 what the word means. Plaintiff’s Special Interrogatory No. 89 to the Defendant stated: “The
9 term ‘incardinate’ means to transfer a Roman Catholic priest to a new district under the
10 authority of a different bishop.”

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

12 Additionally, the objections were frivolous, warranting sanctions.

13 Accordingly, the Court is requested to overrule all objections, and make a finding that
14 Defendant’s refusal to produce the documents, dilatory tactics, and failure to “meet and confer”
15 in good faith constitute discovery misuse, and award sanctions.

16
17 C. Substantive Response

18 As to the Defendant’s “substantive” response, it is *evasive*.

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

22 The Plaintiff is entitled to an unequivocal statement that all documents responsive to
23 the demand are being produced. C.C.P. Section 2031.220 sets forth the requirements for a
24 “statement of compliance” to a document demand.

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

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

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

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

13 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
14 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

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

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

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

27 The law attempts to find a balance between these competing interests in
28 discovery and the assertion of privilege by requiring a party objecting to
document production to "identify with particularity" any document as to

1 which it makes an objection, and "set forth clearly the extent of, and the
2 specific ground for, the objection," in accordance with Code of Civil
3 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
4 a privilege log specifying the documents as to which it has withheld
5 production on a claim of attorney-client privilege or work product doctrine
6 protection. **The trial court must review Kaiser's privilege log to determine
7 whether the specified documents as to which Kaiser claims the
8 protection of either the privilege or the work product doctrine are in fact
9 so protected. For this purpose, the information in Kaiser's log must be
10 sufficiently specific to permit the trial court to determine whether each
11 withheld document is or is not privileged. Should the trial court find the
12 information in the privilege log insufficiently specific to allow such a
13 determination, it may order Kaiser to prepare a new privilege log
14 containing more particularized information about the nature of each
15 document as to which the attorney-client privilege is claimed.**

16 [Emphasis added.]

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

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

22 [Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2004), § 8:1474.5
23 (emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d
24 1068, 1071 (9th Cir.1992).]

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

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

32 ****630 As reflected in EOG's privilege log, the privilege claimed as to the
33 withheld documents exchanged between OXY and EOG is either a
34 combination of joint defense and attorney work product, or a
35 combination of joint defense, attorney work product, and attorney-client
36 privilege. EOG's description of each withheld document on its privilege
37 log gives some indication of the content of the communication. For
38 example, EOG described one document as "1- page e-mail, re: Attached
39 draft consent request letter for EOG properties."**

40 **OXY's privilege log is less revealing than EOG's. Although the document
41 description in OXY's privilege log identifies the document's senders and
42 recipients as well as the type of communication (e.g., letter, e-mail, or
43 facsimile cover sheet), the description gives no indication of the purpose
44 or content of the communication. The privilege claimed as to the withheld
45 documents exchanged between OXY and EOG is either just "JDA," referring
46 to the Joint Defense Agreement, or the Joint Defense Agreement combined
47 with the attorney-client privilege and/or the work product doctrine. Roughly**

1 70 of the documents on OXY's privilege log were withheld solely on the
2 ground of the Joint Defense Agreement, without reference to any underlying
3 privilege, privacy claim, or claim of work product protection.
4 Calpine ultimately filed a motion to compel the production of the 204
5 withheld documents that had been exchanged between EOG and OXY.

6 [Emphasis added.]

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

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

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

12 Even OXY acknowledges the interests of EOG and OXY in the transaction
13 were "adversarial, common, and at times, a blend of the two." Yet, **OXY**
14 **apparently expects the court to rely entirely on the conclusory Peterson**
15 **and Stevens declarations, which simply state in general terms that EOG**
16 **and OXY had a common interest in finalizing their transaction and in**
17 **responding to Calpine's inquiries about the Elkhorn Slough. Neither the**
18 **privilege log nor the declarations reveal the content of any of the**
19 **communications, so it would be impossible for Calpine to offer evidence**
20 **refuting OXY's claims that all of the withheld communication involve**
21 **matters of common interest. Indeed, without more information about the**
22 **disputed documents, Calpine cannot demonstrate that each**
23 **communication between OXY and EOG was not reasonably necessary to**
24 **accomplish **640 the purpose for which a lawyer was consulted.**

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

29 [Emphasis added.]

30 Finally, in this instance, there is no connection between the "privilege log" and the
31 Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance
32

1 that documents are not being withheld. There is no assurance that if documents are being
2 withheld, that they would only be included in the purported "privilege log". Hence, both the
3 Response and the "privilege log" are patently inadequate, and further response is warranted.
4 The need for a further, straightforward response is demonstrated by the conditional, ambiguous
5 nature of the Response itself.

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

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

15 **Did the respondent comply with the statutes? No.** The response
16 "specifically" excludes attorney-client documents, but does not state whether
17 any in fact exist. If there are privileged documents, they must be identified
18 with particularity.

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

22 The response is also ambiguous: "**Without waiving these objections
23 and subject to them.**"

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

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

[Italics in original; bold added.]

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

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

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

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

27 The 9th Circuit Court of Appeals further held that the paucity of documents actually
28 produced supports an inference that documents are being withheld.

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

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

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

The Mexican Catholic Church Defendants have produced **93 pages of documents for a
priest who was ordained in Mexico in 1970**, and worked as a priest in Mexico except for the

1 time period of March 1987 to January 1988 when he was in California, until perhaps the
2 present day. The "paltry" production of documents about Father Aguilar is unbelievable. The
3 lack of credibility to the documents produced thus far supports an inference that documents are
4 being withheld by these highly evasive "compliance statements". The Plaintiff and the Court
5 must be assured that every single piece of paper involving Father Aguilar's transfer from
6 Mexico to California has been produced in order for a ruling on the merits can be made about
7 the jurisdictional issue.

8 Plaintiff requests a court order requiring a further response by Defendant that is not
9 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
10 produced. Absent such a court order, the concealment of relevant information and documents
11 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

12
13
14 **DOCUMENT DEMAND NO. 20 :**

15 All DOCUMENTS CONCERNING the incardination of Father Nicolas Aguilar (aka
16 Nicolas Aguilar Rivera) from the Archdiocese of Los Angeles to Mexico.

17 **RESPONSE:**

18 The Diocese incorporates by reference its General Objections set forth above. The
19 Diocese further objects to this Request because the term "ordination" is vague and ambiguous
20 as is the phrase "incardination ... from the Archdiocese of Los Angeles to Mexico;" and, as
21 such, the Request does not designate the requested documents with reasonable particularity as
22 required by California Code of Civil Procedure § 2025.220(a)(4). Subject to and without
23 waiving its objections, the Diocese responds as follows:

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

27 **LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:**

28 A. Good Cause For Discovery

1 Code of Civil Procedure Section 2017.010 provides that:

2 Unless otherwise limited by order of the court in accordance with this
3 title, **any party may obtain discovery regarding any matter, not**
4 **privileged, that is relevant to the subject matter involved in the pending**
5 **action or to the determination of any motion made in that action, if the**
6 **matter either is itself admissible in evidence or appears reasonably**
7 **calculated to lead to the discovery of admissible evidence. Discovery may**
8 **relate to the claim or defense of the party seeking discovery or of any**
9 **other party to the action. Discovery may be obtained of the identity and**
10 **location of persons having knowledge of any discoverable matter, as well**
11 **as of the existence, description, nature, custody, condition, and location**
12 **of any document, tangible thing, or land or other property.**

13 Here, all documents regarding the transfer of Father Aguilar from California back to
14 Mexico is clearly within the scope of the “jurisdictional” issue pending before the Court.

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

17 B. Objections

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

20 The Defendant’s use of “General Objections” are improper.

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

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

28 “Vague and ambiguous” is not a valid objection to an inspection demand unless “the
ambiguity precludes an intelligent reply.” *California Judges Benchbook: Civil Proceedings--*
Discovery (Cal CJER 1994), §15.25, p. 241, citing *Cembrook v. Superior Court* (1961) 56
Cal.2d 423, 430 (requests for admissions), and *Standon Co. v. Superior Court* (1990) 225
Cal.App.3d 898, 901 (an objection to a request for “any and all bills ... evidencing expenses ...

1 incurred” based on the ground that the request was “vague, ambiguous, and unintelligible”
2 would be untenable and subject to sanction). Also see *Deyo v. Kilbourne* (1978) 84
3 Cal.App.3d 771, 783 (an interrogatory must be answered “if the nature of the information
4 sought is apparent.”).

5 In this instance, incardination comes from , “to incardinate”. The Defendant knows
6 what the word means. Plaintiff’s Special Interrogatory No. 89 to the Defendant stated: “The
7 term ‘incardinate’ means to transfer a Roman Catholic priest to a new district under the
8 authority of a different bishop.”

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

10 Additionally, the objections were frivolous, warranting sanctions.

11 Accordingly, the Court is requested to overrule all objections, and make a finding that
12 Defendant’s refusal to produce the documents, dilatory tactics, and failure to “meet and confer”
13 in good faith constitute discovery misuse, and award sanctions.

14
15 C. Substantive Response

16 As to the Defendant’s “substantive” response, it is *evasive*.

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

20 The Plaintiff is entitled to an unequivocal statement that all documents responsive to
21 the demand are being produced. C.C.P. Section 2031.220 sets forth the requirements for a
22 “statement of compliance” to a document demand.

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

27 The Defendant’s conditional response is completely non-compliant with the Code.
28 Instead of stating that “all” documents will be produced, the Response unilaterally sets

1 conditions or limits on what is being produced.

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

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

11 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
12 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

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

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

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

25 The law attempts to find a balance between these competing interests in
26 discovery and the assertion of privilege by requiring a party objecting to
27 document production to "identify with particularity" any document as to
28 which it makes an objection, and "set forth clearly the extent of, and the
specific ground for, the objection," in accordance with Code of Civil
Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
a privilege log specifying the documents as to which it has withheld

1 production on a claim of attorney-client privilege or work product doctrine
2 protection. **The trial court must review Kaiser's privilege log to determine**
3 **whether the specified documents as to which Kaiser claims the**
4 **protection of either the privilege or the work product doctrine are in fact**
5 **so protected. For this purpose, the information in Kaiser's log must be**
6 **sufficiently specific to permit the trial court to determine whether each**
7 **withheld document is or is not privileged. Should the trial court find the**
8 **information in the privilege log insufficiently specific to allow such a**
9 **determination, it may order Kaiser to prepare a new privilege log**
10 **containing more particularized information about the nature of each**
11 **document as to which the attorney-client privilege is claimed.**

12 [Emphasis added.]

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

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

18 [Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2004), § 8:1474.5
19 (emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d
20 1068, 1071 (9th Cir.1992).]

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

23 In response to document requests served by Calpine, OXY and EOG withheld
24 certain documents and provided Calpine with privilege logs identifying the
25 withheld documents. Among the documents withheld were 204 documents
26 exchanged between OXY and EOG at various times before and after the close
27 of the transaction on December 31, 1999.

28 ****630 As reflected in EOG's privilege log, the privilege claimed as to the**
withheld documents exchanged between OXY and EOG is either a
combination of joint defense and attorney work product, or a
combination of joint defense, attorney work product, and attorney-client
privilege. EOG's description of each withheld document on its privilege
log gives some indication of the content of the communication. For
example, EOG described one document as "1- page e-mail, re: Attached
draft consent request letter for EOG properties."

OXY's privilege log is less revealing than EOG's. Although the document
description in OXY's privilege log identifies the document's senders and
recipients as well as the type of communication (e.g., letter, e-mail, or
facsimile cover sheet), the description gives no indication of the purpose
or content of the communication. The privilege claimed as to the withheld
documents exchanged between OXY and EOG is either just "JDA," referring
to the Joint Defense Agreement, or the Joint Defense Agreement combined
with the attorney-client privilege and/or the work product doctrine. Roughly
70 of the documents on OXY's privilege log were withheld solely on the
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

1 withheld documents that had been exchanged between EOG and OXY.

2 [Emphasis added.]

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

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

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

8 Even OXY acknowledges the interests of EOG and OXY in the transaction
9 were "adversarial, common, and at times, a blend of the two." Yet, **OXY**
10 **apparently expects the court to rely entirely on the conclusory Peterson**
11 **and Stevens declarations, which simply state in general terms that EOG**
12 **and OXY had a common interest in finalizing their transaction and in**
13 **responding to Calpine's inquiries about the Elkhorn Slough. Neither the**
14 **privilege log nor the declarations reveal the content of any of the**
15 **communications, so it would be impossible for Calpine to offer evidence**
16 **refuting OXY's claims that all of the withheld communication involve**
17 **matters of common interest. Indeed, without more information about the**
18 **disputed documents, Calpine cannot demonstrate that each**
19 **communication between OXY and EOG was not reasonably necessary to**
20 **accomplish **640 the purpose for which a lawyer was consulted.**

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

1 Response and the "privilege log" are patently inadequate, and further response is warranted.
2 The need for a further, straightforward response is demonstrated by the conditional, ambiguous
3 nature of the Response itself.

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

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

13 **Did the respondent comply with the statutes? No.** The response
14 "specifically" excludes attorney-client documents, but does not state whether
15 any in fact exist. If there are privileged documents, they must be identified
16 with particularity.

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

20 The response is also ambiguous: "**Without waiving these objections
21 and subject to them.**"

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

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

[Italics in original; bold added.]

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

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

The insurers also challenge the district court's order suppressing
certain evidence placed in the claim file after litigation commenced. The
district court granted this motion upon finding that the insurers withheld
evidence that they were ordered to produce regarding their post-litigation

1 treatment of Merrick's claim. The insurers argue that the court erred in finding
2 that they had withheld any evidence. "Courts need not tolerate flagrant abuses
3 of the discovery process" and have "inherent power" to exclude evidence as a
4 sanction for such abuses. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27
5 (9th Cir.1980). We review the imposition of discovery sanctions for abuse of
6 discretion and the underlying factual determinations for clear error. *Valley*
7 *Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir.1998). Based
8 upon the record, we cannot conclude that the district court's finding that the
9 insurers withheld evidence is clearly erroneous. The insurers' pretrial
10 behavior gives rise to such an inference. **The insurers invoked the privilege**
11 **in response to a specific document production request, and continued to**
12 **do so even after the magistrate judge instructed them not to invoke the**
13 **privilege unless the privilege was actually shielding documents. Their**
14 **responses expressly objected on the basis of privilege and attested that**
15 **"subject to these objections," their production was complete. FN3 Only**
16 **after the magistrate ordered the privileges waived (in response to**
17 **Merrick's assertion that defendants were withholding evidence), and**
18 **Merrick brought his motion in limine, did the insurers state**
19 **unequivocally that no documents were withheld on the basis of privilege.**
20 FN4 Even then, counsel's statement at the hearing could be understood as
21 admitting the existence of withheld documents.

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

23 The 9th Circuit Court of Appeals further held that the paucity of documents actually
24 produced supports an inference that documents are being withheld.

25 In addition, **the existence of withheld documents may be inferred from the**
26 **paucity of material actually produced.** Although the insurers received over
27 3000 pages of documents pertaining to Merrick's claim after litigation began,
28 it produced only three short memos analyzing this material, none of which
was generated by the attorneys who were actively managing the case file after
Merrick filed his complaint. FN5

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

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

The Mexican Catholic Church Defendants have produced **93 pages of documents for a**
priest who was ordained in Mexico in 1970, and worked as a priest in Mexico except for the
time period of March 1987 to January 1988 when he was in California, until perhaps the
present day. The "paltry" production of documents about Father Aguilar is unbelievable. The

1 lack of credibility to the documents produced thus far supports an inference that documents are
2 being withheld by these highly evasive "compliance statements". The Plaintiff and the Court
3 must be assured that every single piece of paper involving Father Aguilar's transfer back from
4 California to Mexico has been produced in order for a ruling on the merits can be made about
5 the jurisdictional issue.

6 Plaintiff requests a court order requiring a further response by Defendant that is not
7 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
8 produced. Absent such a court order, the concealment of relevant information and documents
9 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

10

11 **DOCUMENT DEMAND NO. 24 :**

12 For each priest who worked in YOUR diocese and thereafter worked in a diocese in the
13 United States, the DOCUMENTS CONCERNING the change in location of their place of
14 work.

15 **RESPONSE:**

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

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

23 **LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:**

24 A. **Good Cause For Discovery**

25 Code of Civil Procedure Section 2017.010 provides that:

26 Unless otherwise limited by order of the court in accordance with this
27 title, **any party may obtain discovery regarding any matter, not
28 privileged, that is relevant to the subject matter involved in the pending
action or to the determination of any motion made in that action, if the
matter either is itself admissible in evidence or appears reasonably**

1 calculated to lead to the discovery of admissible evidence. Discovery may
2 relate to the claim or defense of the party seeking discovery or of any
3 other party to the action. Discovery may be obtained of the identity and
4 location of persons having knowledge of any discoverable matter, as well
5 as of the existence, description, nature, custody, condition, and location
6 of any document, tangible thing, or land or other property.

7 While discovery is currently limited to the "jurisdictional" issue pending before the
8 Court, good cause exists for full compliance with this document demand because the Mexican
9 Catholic Church authorities want the Court to believe that Father Aguilar went to California
10 for a vacation, and as part of that nonsense, they have disclosed virtually nothing about the
11 process by which Father Aguilar was transferred *to work as a priest* in Los Angeles. Hence, it
12 has become necessary to compare the process by which other priests have been transferred
13 from Mexico to work in California. How priests are transferred must be considered *prima*
14 *facie* relevant for discovery purposes, as such information will assist the Plaintiff in obtaining
15 either admissible evidence, or is reasonably calculated to lead to the discovery of admissible
16 evidence.

17 Obtaining information about the process other priests followed to get transferred (and
18 Defendant has only disclosed 2 other priests), will assist in proving how the Mexican Catholic
19 Church authorities used California as a location to transfer Father Aguilar, and what
20 documentation was generated in order to accomplish the transfer. It will also assist in proving
21 the extent of cooperation between the Mexican and American Catholic Churches in this regard.
22 Specifically, it will assist in proving how priests are then re-transferred to Mexico.

23 Certainly, documents regarding priest transfers cannot be considered "privileged"
24 unless they are restricted to communications between the Defendants and their attorneys.

25 B. Objections

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

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

C.C.P. § 2031.210(a)(3) and § 2031.240(b), require *separate* objections to document

1 demands, including identification "with particularity" of each document "to which an objection
2 is being made", and further, a clear statement of the "specific grounds" for the objection,
3 including but not limited to any privilege.

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

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

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

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

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

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

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

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

25
26 The California Supreme Court has held that before a trial court may restrict a discovery method
27 for being unduly burdensome, there must be evidence in the record to sustain that conclusion.
28 Indeed, there must be evidence specifically quantifying the burden imposed on the responding

1 party. *West Pico Furniture Co. v. Superior Court*, supra, 56 Cal.2d at 417-419
2 (interrogatories); and *Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 428 (requests for
3 admission). Here, the Response did not identify any undue burden. Indeed, the Defendant's
4 Interrogatory Response identified only 2 *priests*. There is no "undue burden" here.

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

6 Additionally, the objections were frivolous, warranting sanctions.

7 Accordingly, the Court is requested to overrule all objections, and make a finding that
8 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
9 in good faith constitute discovery misuse, and award sanctions.

10

11 C. Substantive Response

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

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

16 The Plaintiff does not know whether *any* documents have been produced regarding the
17 topic of this demand.

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

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

24

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

28 The Defendant's Response first indicates that the Defendant has unilaterally decided

1 what is a "relevant" document. The Response means that documents are being withheld that
2 the Defendant has decided are "not relevant". That is unacceptable under the Code.

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

9 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
10 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

11 **All such documents must be listed and described in** what is
12 **commonly referred to as a privilege log. This description must be**
13 **sufficiently specific to enable the judge to evaluate the claim.** CCP
14 §2031.240(b) (formerly CCP §2031(g)(3)).

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

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

23 The law attempts to find a balance between these competing interests in
24 discovery and the assertion of privilege by requiring a party objecting to
25 document production to "identify with particularity" any document as to
26 which it makes an objection, and "set forth clearly the extent of, and the
27 specific ground for, the objection," in accordance with Code of Civil
28 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
a privilege log specifying the documents as to which it has withheld
production on a claim of attorney-client privilege or work product doctrine
protection. **The trial court must review Kaiser's privilege log to determine
whether the specified documents as to which Kaiser claims the
protection of either the privilege or the work product doctrine are in fact**

1 so protected. For this purpose, the information in Kaiser's log must be
2 sufficiently specific to permit the trial court to determine whether each
3 withheld document is or is not privileged. Should the trial court find the
4 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.

5 [Emphasis added.]

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

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

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

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

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

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

21 **OXY's privilege log is less revealing than EOG's. Although the document
22 description in OXY's privilege log identifies the document's senders and
23 recipients as well as the type of communication (e.g., letter, e-mail, or
24 facsimile cover sheet), the description gives no indication of the purpose
or content of the communication. The privilege claimed as to the withheld
documents exchanged between OXY and EOG is either just "JDA," referring
to the Joint Defense Agreement, or the Joint Defense Agreement combined
with the attorney-client privilege and/or the work product doctrine. Roughly
25 70 of the documents on OXY's privilege log were withheld solely on the
26 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.**

27 [Emphasis added.]

28

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

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

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

6 Even OXY acknowledges the interests of EOG and OXY in the transaction
7 were "adversarial, common, and at times, a blend of the two." Yet, **OXY**
8 **apparently expects the court to rely entirely on the conclusory Peterson**
9 **and Stevens declarations, which simply state in general terms that EOG**
10 **and OXY had a common interest in finalizing their transaction and in**
11 **responding to Calpine's inquiries about the Elkhorn Slough. Neither the**
12 **privilege log nor the declarations reveal the content of any of the**
13 **communications, so it would be impossible for Calpine to offer evidence**
14 **refuting OXY's claims that all of the withheld communication involve**
15 **matters of common interest. Indeed, without more information about the**
16 **disputed documents, Calpine cannot demonstrate that each**
17 **communication between OXY and EOG was not reasonably necessary to**
18 **accomplish **640 the purpose for which a lawyer was consulted.**

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

[Emphasis added.]

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

1 nature of the Response itself.

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

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

11 **Did the respondent comply with the statutes? No.** The response
12 “specifically” excludes attorney-client documents, but does not state whether
13 any in fact exist. If there are privileged documents, they must be identified
14 with particularity.

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

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

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

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

27 [Italics in original; bold added.]

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

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

The insurers also challenge the district court's order suppressing
certain evidence placed in the claim file after litigation commenced. The
district court granted this motion upon finding that the insurers withheld
evidence that they were ordered to produce regarding their post-litigation
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
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

1 discretion and the underlying factual determinations for clear error. *Valley*
2 *Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir.1998). Based
3 upon the record, we cannot conclude that the district court's finding that the
4 insurers withheld evidence is clearly erroneous. The insurers' pretrial
5 behavior gives rise to such an inference. **The insurers invoked the privilege**
6 **in response to a specific document production request, and continued to**
7 **do so even after the magistrate judge instructed them not to invoke the**
8 **privilege unless the privilege was actually shielding documents. Their**
9 **responses expressly objected on the basis of privilege and attested that**
10 **"subject to these objections," their production was complete. FN3 Only**
11 **after the magistrate ordered the privileges waived (in response to**
12 **Merrick's assertion that defendants were withholding evidence), and**
13 **Merrick brought his motion in limine, did the insurers state**
14 **unequivocally that no documents were withheld on the basis of privilege.**
15 FN4 Even then, counsel's statement at the hearing could be understood as
16 admitting the existence of withheld documents.

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

18 The 9th Circuit Court of Appeals further held that the paucity of documents actually
19 produced supports an inference that documents are being withheld.

20 In addition, **the existence of withheld documents may be inferred from the**
21 **paucity of material actually produced.** Although the insurers received over
22 3000 pages of documents pertaining to Merrick's claim after litigation began,
23 it produced only three short memos analyzing this material, none of which
24 was generated by the attorneys who were actively managing the case file after
25 Merrick filed his complaint. FN5

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

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

35 Here, the Mexican Catholic Church authorities assert they have no idea what happened
36 to Father Aguilar after he returned from molesting children in California in January 1988, and
37 they have produced virtually no discovery for the post-1988 time period. As a result, they have
38 managed to fail to disclose the whereabouts of Father Aguilar in Mexico through today's date.
39 This means that the primary witness in the case has been kept from criminal justice, and justice
40 in a civil forum, in the form of a deposition under oath and a jury trial in California. The
41 failure to disclose much of anything about Father Aguilar after 1988 only inurs to the benefit of

1 the current Defendants in this lawsuit, as they can say anything without fear of contradiction.

2 As to the pre-1988 time period, the Mexican Catholic Church Defendants have
3 produced *93 pages of documents for a priest who was ordained in Mexico in 1970*, and
4 worked as a priest in Mexico except for the time period of March 1987 to January 1988 when
5 he was in California, until perhaps the present day. The “paltry” production of documents
6 about Father Aguilar is unbelievable. The lack of credibility to the documents produced thus
7 far supports an inference that documents are being withheld by these highly evasive
8 “compliance statements”. Plaintiff and the Court need to inspect the documents that normally
9 accompany the transfer of Mexican priests to California, and back, in order to evaluate the
10 reliability of the documents productions concerning Father Aguilar, and to evaluate the
11 credibility of the Defendant’s statements about that process, including their feigned limited
12 knowledge about anything the priests do, and their feigned lack of communication between the
13 different “jurisdictions” within the Catholic Church.

14 Plaintiff requests a court order requiring a further response by Defendant that is not
15 “conditioned” in any manner, and an unequivocal statement that *all* documents have been
16 produced. Absent such a court order, the concealment of relevant information and documents
17 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

18
19
20 **DOCUMENT DEMAND NO. 25 :**

21 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
22 change in location of a priest from YOUR diocese to another diocese.

23 **RESPONSE:**

24 The Diocese incorporates by reference its General Objections set forth above. The
25 Diocese further objects to this Request because it is overly broad, unduly burdensome and
26 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. The
27 Diocese further objects to this Request because the term “policy” is vague and ambiguous.
28 Subject to and without waiving its objections, the Diocese responds as follows:

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

4 LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:

5 A. Good Cause For Discovery

6 Code of Civil Procedure Section 2017.010 provides that:

7 Unless otherwise limited by order of the court in accordance with this
8 title, **any party may obtain discovery regarding any matter, not**
9 **privileged, that is relevant to the subject matter involved in the pending**
10 **action or to the determination of any motion made in that action, if the**
11 **matter either is itself admissible in evidence or appears reasonably**
12 **calculated to lead to the discovery of admissible evidence. Discovery may**
13 **relate to the claim or defense of the party seeking discovery or of any**
14 **other party to the action. Discovery may be obtained of the identity and**
15 **location of persons having knowledge of any discoverable matter, as well**
16 **as of the existence, description, nature, custody, condition, and location**
17 **of any document, tangible thing, or land or other property.**

18 While discovery is currently limited to the “jurisdictional” issue pending before the
19 Court, good cause exists for full compliance with this document demand because the Mexican
20 Catholic Church authorities want the Court to believe that Father Aguilar went to California
21 for a vacation, and as part of that nonsense, they have disclosed virtually nothing about the
22 process by which Father Aguilar was transferred *to work as a priest* in Los Angeles. Hence, it
23 has become necessary to compare the process by which other priests are transferred to work in
24 another diocese. How priests are transferred must be considered *prima facie* relevant for
25 discovery purposes, as such information will assist the Plaintiff in obtaining either admissible
26 evidence, or is reasonably calculated to lead to the discovery of admissible evidence.

27 Obtaining information about the process all priests are supposed to follow to get
28 transferred will assist in proving how the Mexican Catholic Church authorities used California
as a location to transfer Father Aguilar, and what documentation was generated in order to
accomplish the transfer. It will also assist in proving the extent of cooperation between the
Mexican and American Catholic Churches in this regard. Specifically, it will assist in proving
how priests are supposed to be re-transferred to Mexico. It will also assist in identifying what
the documentation is supposed to be for transfers and re-transfers.

1 Certainly, documents regarding priest transfers cannot be considered "privileged"
2 unless they are restricted to communications between the Defendants and their attorneys.

3
4 B. Objections

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

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

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

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

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

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

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

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

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

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

3 (c) The court shall limit the scope of discovery if it determines that the
4 burden, expense, or intrusiveness of that discovery clearly outweighs the
5 likelihood that the information sought will lead to the discovery of admissible
6 evidence. [Emphasis added.]

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

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

13 Additionally, the objections were frivolous, warranting sanctions.

14 Accordingly, the Court is requested to overrule all objections, and make a finding that
15 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
16 in good faith constitute discovery misuse, and award sanctions.

17
18 C. Substantive Response

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

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

23 The Plaintiff does not know whether *any* documents have been produced regarding the
24 topic of this demand.

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

28 A statement that the party to whom an inspection demand has been

1 directed will comply with the particular demand **shall state** that the
2 production, inspection, and related activity demanded will be allowed either
3 in whole or in part, and that **all documents** or things in the demanded
4 category that are in the possession, custody, or control of that party and to
5 which no objection is being made will be included in the production.

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

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

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

18 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
19 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

20 **All such documents must be listed and described in what is**
21 **commonly referred to as a privilege log. This description must be**
22 **sufficiently specific to enable the judge to evaluate the claim.** CCP
23 §2031.240(b) (formerly CCP §2031(g)(3)).

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

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

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

21 [Emphasis added.]

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

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

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

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

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

36 ****630 As reflected in EOG's privilege log, the privilege claimed as to the
37 withheld documents exchanged between OXY and EOG is either a
38 combination of joint defense and attorney work product, or a
39 combination of joint defense, attorney work product, and attorney-client
40 privilege. EOG's description of each withheld document on its privilege
41 log gives some indication of the content of the communication. For
42 example, EOG described one document as "1- page e-mail, re: Attached
43 draft consent request letter for EOG properties."**

44 **OXY's privilege log is less revealing than EOG's. Although the document**

1 description in OXY's privilege log identifies the document's senders and
2 recipients as well as the type of communication (e.g., letter, e-mail, or
3 facsimile cover sheet), the description gives no indication of the purpose
4 or content of the communication. The privilege claimed as to the withheld
5 documents exchanged between OXY and EOG is either just "JDA," referring
6 to the Joint Defense Agreement, or the Joint Defense Agreement combined
7 with the attorney-client privilege and/or the work product doctrine. Roughly
8 70 of the documents on OXY's privilege log were withheld solely on the
9 ground of the Joint Defense Agreement, without reference to any underlying
10 privilege, privacy claim, or claim of work product protection.
11 Calpine ultimately filed a motion to compel the production of the 204
12 withheld documents that had been exchanged between EOG and OXY.

13 [Emphasis added.]

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

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

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

19 Even OXY acknowledges the interests of EOG and OXY in the transaction
20 were "adversarial, common, and at times, a blend of the two." Yet, OXY
21 apparently expects the court to rely entirely on the conclusory Peterson
22 and Stevens declarations, which simply state in general terms that EOG
23 and OXY had a common interest in finalizing their transaction and in
24 responding to Calpine's inquiries about the Elkhorn Slough. Neither the
25 privilege log nor the declarations reveal the content of any of the
26 communications, so it would be impossible for Calpine to offer evidence
27 refuting OXY's claims that all of the withheld communication involve
28 matters of common interest. Indeed, without more information about the
disputed documents, Calpine cannot demonstrate that each
communication between OXY and EOG was not reasonably necessary to
accomplish **640 the purpose for which a lawyer was consulted.

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

1 [Emphasis added.]

2 Finally, in this instance, there is no connection between the “privilege log” and the
3 Defendant’s written Response to the Plaintiffs’ Document Demands. There is no assurance
4 that documents are not being withheld. There is no assurance that if documents are being
5 withheld, that they would only be included in the purported “privilege log”. Hence, both the
6 Response and the “privilege log” are patently inadequate, and further response is warranted.
7 The need for a further, straightforward response is demonstrated by the conditional, ambiguous
8 nature of the Response itself.

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

13
14 1. After stating objections in general terms, the respondent
15 concluded with the following language: “Without waiving these objections
16 and subject to them, and specifically excluding any communications between
17 attorney and client, defendant responses as follows: Defendant will produce
18 all responsive documents.”

19 **Did the respondent comply with the statutes? No.** The response
20 “specifically” excludes attorney-client documents, but does not state whether
21 any in fact exist. If there are privileged documents, they must be identified
22 with particularity.

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

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

28 **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?

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

[Italics in original; bold added.]

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

In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ----, 2007 WL 2458503 (August 31,

1 2007), a case venued in Nevada Federal Court, the 9th Circuit Court upheld a trial court judge
2 order *in limine* which barred the defendant from introducing evidence at trial where the
3 documents were withheld during discovery.

4 The insurers also challenge the district court's order suppressing
5 certain evidence placed in the claim file after litigation commenced. The
6 district court granted this motion upon finding that the insurers withheld
7 evidence that they were ordered to produce regarding their post-litigation
8 treatment of Merrick's claim. The insurers argue that the court erred in finding
9 that they had withheld any evidence. "Courts need not tolerate flagrant abuses
10 of the discovery process" and have "inherent power" to exclude evidence as a
11 sanction for such abuses. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27
12 (9th Cir.1980). We review the imposition of discovery sanctions for abuse of
13 discretion and the underlying factual determinations for clear error. *Valley*
14 *Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir.1998). Based
15 upon the record, we cannot conclude that the district court's finding that the
16 insurers withheld evidence is clearly erroneous. The insurers' pretrial
17 behavior gives rise to such an inference. **The insurers invoked the privilege
18 in response to a specific document production request, and continued to
19 do so even after the magistrate judge instructed them not to invoke the
20 privilege unless the privilege was actually shielding documents. Their
21 responses expressly objected on the basis of privilege and attested that
22 "subject to these objections," their production was complete. FN3 Only
23 after the magistrate ordered the privileges waived (in response to
24 Merrick's assertion that defendants were withholding evidence), and
25 Merrick brought his motion in limine, did the insurers state
26 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
28 admitting the existence of withheld documents.

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

18 The 9th Circuit Court of Appeals further held that the paucity of documents actually
19 produced supports an inference that documents are being withheld.

20 In addition, **the existence of withheld documents may be inferred from the
21 paucity of material actually produced.** Although the insurers received over
22 3000 pages of documents pertaining to Merrick's claim after litigation began,
23 it produced only three short memos analyzing this material, none of which
24 was generated by the attorneys who were actively managing the case file after
25 Merrick filed his complaint. FN5

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

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

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

10 As to the pre-1988 time period, the Mexican Catholic Church Defendants have
11 produced **93 pages of documents for a priest who was ordained in Mexico in 1970**, and
12 worked as a priest in Mexico except for the time period of March 1987 to January 1988 when
13 he was in California, until perhaps the present day. The "paltry" production of documents
14 about Father Aguilar is unbelievable. The lack of credibility to the documents produced thus
15 far supports an inference that documents are being withheld by these highly evasive
16 "compliance statements". Plaintiff and the Court need to inspect the documents that normally
17 accompany the transfer of Mexican priests to California, and back, in order to evaluate the
18 reliability of the documents productions concerning Father Aguilar, and to evaluate the
19 credibility of the Defendant's statements about that process, including their feigned limited
20 knowledge about anything the priests do, and their feigned lack of communication between the
21 different "jurisdictions" within the Catholic Church.

22 Plaintiff requests a court order requiring a further response by Defendant that is not
23 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
24 produced. Absent such a court order, the concealment of relevant information and documents
25 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

26
27
28

1 DOCUMENT DEMAND NO. 26 :

2 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
3 change in location of a priest from another diocese to YOUR diocese.

4 RESPONSE:

5 The Diocese incorporates by reference its General Objections set forth above. The
6 Diocese further objects to this Request because it is overly broad, unduly burdensome and
7 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. The
8 Diocese further objects to this Request because the term "policy" is vague and ambiguous.
9 Subject to and without waiving its objections, the Diocese responds as follows:

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

13 LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:

14 A. Good Cause For Discovery

15 Code of Civil Procedure Section 2017.010 provides that:

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

27 While discovery is currently limited to the "jurisdictional" issue pending before the
28 Court, good cause exists for full compliance with this document demand because the Mexican
29 Catholic Church authorities want the Court to believe that Father Aguilar went to California
30 for a vacation, and as part of that nonsense, they have disclosed virtually nothing about the
31 process by which Father Aguilar was transferred *to work as a priest* in Los Angeles. Hence, it
32 has become necessary to compare the process by which other priests are transferred to work in
33 another diocese. How priests are transferred must be considered *prima facie* relevant for

1 discovery purposes, as such information will assist the Plaintiff in obtaining either admissible
2 evidence, or is reasonably calculated to lead to the discovery of admissible evidence.

3 Obtaining information about the process all priests are supposed to follow to get
4 transferred will assist in proving how the Mexican Catholic Church authorities used California
5 as a location to transfer Father Aguilar, and what documentation was generated in order to
6 accomplish the transfer. It will also assist in proving the extent of cooperation between the
7 Mexican and American Catholic Churches in this regard. Specifically, it will assist in proving
8 how priests are supposed to be re-transferred to Mexico. It will also assist in identifying what
9 the documentation is supposed to be for transfers and re-transfers.

10 Certainly, documents regarding priest transfers cannot be considered "privileged"
11 unless they are restricted to communications between the Defendants and their attorneys.

12
13 B. Objections

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Additionally, the objections were frivolous, warranting sanctions.

26 Accordingly, the Court is requested to overrule all objections, and make a finding that
27 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
28 in good faith constitute discovery misuse, and award sanctions.

29 C. Substantive Response

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

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

4 The Plaintiff does not know whether *any* documents have been produced regarding the
5 topic of this demand.

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

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

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

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

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

27 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
28 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

All such documents must be listed and described in what is commonly referred to as a privilege log. This description must be sufficiently specific to enable the judge to evaluate the claim. CCP

1 §2031.240(b) (formerly CCP §2031(g)(3)).

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

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

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

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

In *OXY Resources California v. Superior Court* (2004) 115 Cal.App.4th 874, 883, the

1 need to give some indication of the content of the communication was demonstrated.

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

7 ****630 As reflected in EOG's privilege log, the privilege claimed as to the
8 withheld documents exchanged between OXY and EOG is either a
9 combination of joint defense and attorney work product, or a
10 combination of joint defense, attorney work product, and attorney-client
11 privilege. EOG's description of each withheld document on its privilege
12 log gives some indication of the content of the communication. For
13 example, EOG described one document as "1- page e-mail, re: Attached
14 draft consent request letter for EOG properties."**

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

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

28 [Emphasis added.]

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

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

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

22 Even OXY acknowledges the interests of EOG and OXY in the transaction
23 were "adversarial, common, and at times, a blend of the two." Yet, **OXY
24 apparently expects the court to rely entirely on the conclusory Peterson
25 and Stevens declarations, which simply state in general terms that EOG
26 and OXY had a common interest in finalizing their transaction and in
27 responding to Calpine's inquiries about the Elkhorn Slough. Neither the
28 privilege log nor the declarations reveal the content of any of the
communications, so it would be impossible for Calpine to offer evidence
refuting OXY's claims that all of the withheld communication involve
matters of common interest. Indeed, without more information about the
disputed documents, Calpine cannot demonstrate that each
communication between OXY and EOG was not reasonably necessary to
accomplish **640 the purpose for which a lawyer was consulted.**

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

17 [Emphasis added.]

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

25 An article published in the San Francisco Daily Journal on September 6, 2007, and
26 authored by Richard M. Coleman, Esq., who is "a full-time neutral with Alternative Resolution
27 Centers, as well as a discovery referee" in the Los Angeles area, finds that these types of
28 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
any in fact exist. If there are privileged documents, they must be identified
with particularity.

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

[Emphasis added.]

The response is also ambiguous: **"Without waiving these objections**

1 and subject to them.”

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

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

9 [Italics in original; bold added.]

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

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

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

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

30 The 9th Circuit Court of Appeals further held that the paucity of documents actually
31 produced supports an inference that documents are being withheld.

1 In addition, **the existence of withheld documents may be inferred from the**
2 **paucity of material actually produced.** Although the insurers received over
3 3000 pages of documents pertaining to Merrick's claim after litigation began,
4 it produced only three short memos analyzing this material, none of which
5 was generated by the attorneys who were actively managing the case file after
6 Merrick filed his complaint. FN5

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

15 [*Id.*, at p. 6; bold added.]

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

24 As to the pre-1988 time period, the Mexican Catholic Church Defendants have
25 produced *93 pages of documents for a priest who was ordained in Mexico in 1970*, and
26 worked as a priest in Mexico except for the time period of March 1987 to January 1988 when
27 he was in California, until perhaps the present day. The "paltry" production of documents
28 about Father Aguilar is unbelievable. The lack of credibility to the documents produced thus
far supports an inference that documents are being withheld by these highly evasive
"compliance statements". Plaintiff and the Court need to inspect the documents that normally
accompany the transfer of Mexican priests to California, and back, in order to evaluate the
reliability of the documents productions concerning Father Aguilar, and to evaluate the
credibility of the Defendant's statements about that process, including their feigned limited
knowledge about anything the priests do, and their feigned lack of communication between the

1 different "jurisdictions" within the Catholic Church.

2 Plaintiff requests a court order requiring a further response by Defendant that is not
3 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
4 produced. Absent such a court order, the concealment of relevant information and documents
5 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

6
7
8 **DOCUMENT DEMAND NO. 27 :**

9 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
10 incardination of a priest from YOUR diocese to another diocese.

11 **RESPONSE:**

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

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

20 **LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:**

21 A. **Good Cause For Discovery**

22 Code of Civil Procedure Section 2017.010 provides that:

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

1 While discovery is currently limited to the “jurisdictional” issue pending before the
2 Court, good cause exists for full compliance with this document demand because the Mexican
3 Catholic Church authorities want the Court to believe that Father Aguilar went to California
4 for a vacation, and as part of that nonsense, they have disclosed virtually nothing about the
5 process by which Father Aguilar was transferred *to work as a priest* in Los Angeles. Hence, it
6 has become necessary to compare the process by which other priests are transferred to work in
7 another diocese. How priests are transferred must be considered *prima facie* relevant for
8 discovery purposes, as such information will assist the Plaintiff in obtaining either admissible
9 evidence, or is reasonably calculated to lead to the discovery of admissible evidence.

10 Obtaining information about the process all priests are supposed to follow to get
11 transferred will assist in proving how the Mexican Catholic Church authorities used California
12 as a location to transfer Father Aguilar, and what documentation was generated in order to
13 accomplish the transfer. It will also assist in proving the extent of cooperation between the
14 Mexican and American Catholic Churches in this regard. Specifically, it will assist in proving
15 how priests are supposed to be re-transferred to Mexico. It will also assist in identifying what
16 the documentation is supposed to be for transfers and re-transfers.

17 Certainly, documents regarding priest transfers cannot be considered “privileged”
18 unless they are restricted to communications between the Defendants and their attorneys.

19
20 B. Objections

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

23 First, the Defendant’s use of “General Objections” are improper.

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

28 The dual failures of the Defendant to either defend those “General Objections” and

1 withdraw them during the “meet and confer” process, means the Defendant both conceded they
2 are improper, and it was a bad faith to waste of everyone’s time on such “objections”.

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

8 Third, the objection of “undue burden” is both meritless and frivolous.

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

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

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

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

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

1 Additionally, the objections were frivolous, warranting sanctions.

2 Accordingly, the Court is requested to overrule all objections, and make a finding that
3 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
4 in good faith constitute discovery misuse, and award sanctions.

5

6 C. Substantive Response

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

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

11 The Plaintiff does not know whether *any* documents have been produced regarding the
12 topic of this demand.

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

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

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

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

26 The Response further indicates that only "non-privileged documents" will be produced.
27 That is an improper response unless a privilege log was served as part of the response.
28 Otherwise, there is no identification of the particular documents that are being withheld from

1 production, and there is no identification of the particular privilege that is being invoked.
2 Those failures are violations of the Code. The objections have been waived by this non-
3 compliance with C.C.P. § 2031.240(b).

4 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
5 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

6 **All such documents must be listed and described in what is**
7 **commonly referred to as a privilege log. This description must be**
8 **sufficiently specific to enable the judge to evaluate the claim. CCP**
9 **§2031.240(b) (formerly CCP §2031(g)(3)).**

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

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

19 The law attempts to find a balance between these competing interests in
20 discovery and the assertion of privilege by requiring a party objecting to
21 document production to "identify with particularity" any document as to
22 which it makes an objection, and "set forth clearly the extent of, and the
23 specific ground for, the objection," in accordance with Code of Civil
24 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
25 a privilege log specifying the documents as to which it has withheld
26 production on a claim of attorney-client privilege or work product doctrine
27 protection. **The trial court must review Kaiser's privilege log to determine**
28 **whether the specified documents as to which Kaiser claims the**
protection of either the privilege or the work product doctrine are in fact
so protected. For this purpose, the information in Kaiser's log must be
sufficiently specific to permit the trial court to determine whether each
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.]

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

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

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

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

11 In response to document requests served by Calpine, OXY and EOG withheld
12 certain documents and provided Calpine with privilege logs identifying the
13 withheld documents. Among the documents withheld were 204 documents
14 exchanged between OXY and EOG at various times before and after the close
15 of the transaction on December 31, 1999.

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

24 **OXY's privilege log is less revealing than EOG's. Although the document
25 description in OXY's privilege log identifies the document's senders and
26 recipients as well as the type of communication (e.g., letter, e-mail, or
27 facsimile cover sheet), the description gives no indication of the purpose
28 or content of the communication.** The privilege claimed as to the withheld
documents exchanged between OXY and EOG is either just "JDA," referring
to the Joint Defense Agreement, or the Joint Defense Agreement combined
with the attorney-client privilege and/or the work product doctrine. Roughly
70 of the documents on OXY's privilege log were withheld solely on the
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.]

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

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

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

1 Even OXY acknowledges the interests of EOG and OXY in the transaction
2 were "adversarial, common, and at times, a blend of the two." Yet, OXY
3 **apparently expects the court to rely entirely on the conclusory Peterson**
4 **and Stevens declarations, which simply state in general terms that EOG**
5 **and OXY had a common interest in finalizing their transaction and in**
6 **responding to Calpine's inquiries about the Elkhorn Slough. Neither the**
7 **privilege log nor the declarations reveal the content of any of the**
8 **communications, so it would be impossible for Calpine to offer evidence**
9 **refuting OXY's claims that all of the withheld communication involve**
10 **matters of common interest. Indeed, without more information about the**
11 **disputed documents, Calpine cannot demonstrate that each**
12 **communication between OXY and EOG was not reasonably necessary to**
13 **accomplish **640 the purpose for which a lawyer was consulted.**

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

[Emphasis added.]

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

24 An article published in the San Francisco Daily Journal on September 6, 2007, and
25 authored by Richard M. Coleman, Esq., who is "a full-time neutral with Alternative Resolution
26 Centers, as well as a discovery referee" in the Los Angeles area, finds that these types of
27 purported responses that are made with and subject to objections do not comply with the Code.
28

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

6 **Did the respondent comply with the statutes? No.** The response
7 "specifically" excludes attorney-client documents, but does not state whether
8 any in fact exist. If there are privileged documents, they must be identified
9 with particularity.

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

13 The response is also ambiguous: "**Without waiving these objections
14 and subject to them.**"

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

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

22 [Italics in original; bold added.]

23 Also very recently, the 9th Circuit Court of Appeals ruled that a responding party must
24 state unequivocally that no documents are being withheld.

25 In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ---, 2007 WL 2458503 (August 31,
26 2007), a case venued in Nevada Federal Court, the 9th Circuit Court upheld a trial court judge
27 order *in limine* which barred the defendant from introducing evidence at trial where the
28 documents were withheld during discovery.

29 The insurers also challenge the district court's order suppressing
30 certain evidence placed in the claim file after litigation commenced. The
31 district court granted this motion upon finding that the insurers withheld
32 evidence that they were ordered to produce regarding their post-litigation
33 treatment of Merrick's claim. The insurers argue that the court erred in finding
34 that they had withheld any evidence. "Courts need not tolerate flagrant abuses
35 of the discovery process" and have "inherent power" to exclude evidence as a
36 sanction for such abuses. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27
37 (9th Cir.1980). We review the imposition of discovery sanctions for abuse of
38 discretion and the underlying factual determinations for clear error. *Valley
39 Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir.1998). Based
40 upon the record, we cannot conclude that the district court's finding that the
41 insurers withheld evidence is clearly erroneous. The insurers' pretrial
42 behavior gives rise to such an inference. **The insurers invoked the privilege
43 in response to a specific document production request, and continued to
44 do so even after the magistrate judge instructed them not to invoke the
45 privilege unless the privilege was actually shielding documents. Their
46 responses expressly objected on the basis of privilege and attested that
47 "subject to these objections," their production was complete. FN3 Only**

1 after the magistrate ordered the privileges waived (in response to
2 Merrick's assertion that defendants were withholding evidence), and
3 Merrick brought his motion in limine, did the insurers state
4 unequivocally that no documents were withheld on the basis of privilege.
5 FN4 Even then, counsel's statement at the hearing could be understood as
6 admitting the existence of withheld documents.

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

8 The 9th Circuit Court of Appeals further held that the paucity of documents actually
9 produced supports an inference that documents are being withheld.

10 In addition, **the existence of withheld documents may be inferred from the
11 paucity of material actually produced.** Although the insurers received over
12 3000 pages of documents pertaining to Merrick's claim after litigation began,
13 it produced only three short memos analyzing this material, none of which
14 was generated by the attorneys who were actively managing the case file after
15 Merrick filed his complaint. FN5

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

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

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

As to the pre-1988 time period, the Mexican Catholic Church Defendants have
produced **93 pages of documents for a priest who was ordained in Mexico in 1970**, and
worked as a priest in Mexico except for the time period of March 1987 to January 1988 when
he was in California, until perhaps the present day. The "paltry" production of documents

1 about Father Aguilar is unbelievable. The lack of credibility to the documents produced thus
2 far supports an inference that documents are being withheld by these highly evasive
3 "compliance statements". Plaintiff and the Court need to inspect the documents that normally
4 accompany the transfer of Mexican priests to California, and back, in order to evaluate the
5 reliability of the documents productions concerning Father Aguilar, and to evaluate the
6 credibility of the Defendant's statements about that process, including their feigned limited
7 knowledge about anything the priests do, and their feigned lack of communication between the
8 different "jurisdictions" within the Catholic Church.

9 Plaintiff requests a court order requiring a further response by Defendant that is not
10 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
11 produced. Absent such a court order, the concealment of relevant information and documents
12 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

13
14
15 **DOCUMENT DEMAND NO. 28 :**

16 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
17 incardination of a priest from another diocese to YOUR diocese.

18 **RESPONSE:**

19 The Diocese incorporates by reference its General Objections set forth above. The
20 Diocese further objects to this Request because it is overly broad, unduly burdensome and
21 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. The
22 Diocese further objects to this Request because the term "policy" is vague and ambiguous.
23 Subject to and without waiving its objections, the Diocese responds as follows:

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

27 **LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:**

28 A. Good Cause For Discovery

1 Code of Civil Procedure Section 2017.010 provides that:

2 Unless otherwise limited by order of the court in accordance with this
3 title, **any party may obtain discovery regarding any matter, not**
4 **privileged, that is relevant to the subject matter involved in the pending**
5 **action or to the determination of any motion made in that action, if the**
6 **matter either is itself admissible in evidence or appears reasonably**
7 **calculated to lead to the discovery of admissible evidence. Discovery may**
8 **relate to the claim or defense of the party seeking discovery or of any**
9 **other party to the action. Discovery may be obtained of the identity and**
10 **location of persons having knowledge of any discoverable matter, as well**
11 **as of the existence, description, nature, custody, condition, and location**
12 **of any document, tangible thing, or land or other property.**

13 While discovery is currently limited to the “jurisdictional” issue pending before the
14 Court, good cause exists for full compliance with this document demand because the Mexican
15 Catholic Church authorities want the Court to believe that Father Aguilar went to California
16 for a vacation, and as part of that nonsense, they have disclosed virtually nothing about the
17 process by which Father Aguilar was transferred *to work as a priest* in Los Angeles. Hence, it
18 has become necessary to compare the process by which other priests are transferred to work in
19 another diocese. How priests are transferred must be considered *prima facie* relevant for
20 discovery purposes, as such information will assist the Plaintiff in obtaining either admissible
21 evidence, or is reasonably calculated to lead to the discovery of admissible evidence.

22 Obtaining information about the process all priests are supposed to follow to get
23 transferred will assist in proving how the Mexican Catholic Church authorities used California
24 as a location to transfer Father Aguilar, and what documentation was generated in order to
25 accomplish the transfer. It will also assist in proving the extent of cooperation between the
26 Mexican and American Catholic Churches in this regard. Specifically, it will assist in proving
27 how priests are supposed to be re-transferred to Mexico. It will also assist in identifying what
28 the documentation is supposed to be for transfers and re-transfers.

29 Certainly, documents regarding priest transfers cannot be considered “privileged”
30 unless they are restricted to communications between the Defendants and their attorneys.

31 B. Objections

32 The objections made to this document demand are *too general and/or meritless* and/or

1 frivolous, warranting sanctions.

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

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

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

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

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

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

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

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

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

26 (c) The court shall limit the scope of discovery if it determines that the
27 burden, expense, or intrusiveness of that discovery *clearly outweighs* the
likelihood that the information sought will lead to the discovery of admissible
evidence. [Emphasis added.]
28

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

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

8 Additionally, the objections were frivolous, warranting sanctions.

9 Accordingly, the Court is requested to overrule all objections, and make a finding that
10 Defendant's refusal to produce the documents, dilatory tactics, and failure to "meet and confer"
11 in good faith constitute discovery misuse, and award sanctions.

12

13 C. Substantive Response

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

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

18 The Plaintiff does not know whether *any* documents have been produced regarding the
19 topic of this demand.

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

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

27 The Defendant's conditional response is completely non-compliant with the Code.
28 Instead of stating that "all" documents will be produced, the Response unilaterally sets

1 conditions or limits on what is being produced.

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

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

11 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
12 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

13 **All such documents must be listed and described in** what is
14 **commonly referred to as a privilege log. This description must be**
15 **sufficiently specific to enable the judge to evaluate the claim. CCP**
16 **§2031.240(b) (formerly CCP §2031(g)(3)).**

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

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

26 The law attempts to find a balance between these competing interests in
27 discovery and the assertion of privilege by requiring a party objecting to
28 document production to "identify with particularity" any document as to
which it makes an objection, and "set forth clearly the extent of, and the
specific ground for, the objection," in accordance with Code of Civil
Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
a privilege log specifying the documents as to which it has withheld

1 production on a claim of attorney-client privilege or work product doctrine
2 protection. **The trial court must review Kaiser's privilege log to determine**
3 **whether the specified documents as to which Kaiser claims the**
4 **protection of either the privilege or the work product doctrine are in fact**
5 **so protected. For this purpose, the information in Kaiser's log must be**
6 **sufficiently specific to permit the trial court to determine whether each**
7 **withheld document is or is not privileged. Should the trial court find the**
8 **information in the privilege log insufficiently specific to allow such a**
9 **determination, it may order Kaiser to prepare a new privilege log**
10 **containing more particularized information about the nature of each**
11 **document as to which the attorney-client privilege is claimed.**

12 [Emphasis added.]

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

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

18 [Cal. Practice Guide; Civ. Proc. Before Trial (TRG 2004), § 8:1474.5
19 (emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d
20 1068, 1071 (9th Cir.1992).]

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

23 In response to document requests served by Calpine, OXY and EOG withheld
24 certain documents and provided Calpine with privilege logs identifying the
25 withheld documents. Among the documents withheld were 204 documents
26 exchanged between OXY and EOG at various times before and after the close
27 of the transaction on December 31, 1999.

28 ****630 As reflected in EOG's privilege log, the privilege claimed as to the**
29 **withheld documents exchanged between OXY and EOG is either a**
30 **combination of joint defense and attorney work product, or a**
31 **combination of joint defense, attorney work product, and attorney-client**
32 **privilege. EOG's description of each withheld document on its privilege**
33 **log gives some indication of the content of the communication. For**
34 **example, EOG described one document as "1- page e-mail, re: Attached**
35 **draft consent request letter for EOG properties."**

36 **OXY's privilege log is less revealing than EOG's. Although the document**
37 **description in OXY's privilege log identifies the document's senders and**
38 **recipients as well as the type of communication (e.g., letter, e-mail, or**
39 **facsimile cover sheet), the description gives no indication of the purpose**
40 **or content of the communication. The privilege claimed as to the withheld**
41 **documents exchanged between OXY and EOG is either just "JDA," referring**
42 **to the Joint Defense Agreement, or the Joint Defense Agreement combined**
43 **with the attorney-client privilege and/or the work product doctrine. Roughly**
44 **70 of the documents on OXY's privilege log were withheld solely on the**
45 **ground of the Joint Defense Agreement, without reference to any underlying**
46 **privilege, privacy claim, or claim of work product protection.**

47 Calpine ultimately filed a motion to compel the production of the 204

1 withheld documents that had been exchanged between EOG and OXY.

2 [Emphasis added.]

3
4 The contents are not necessarily privileged because mere transmission to an attorney
5 does not render the communication protected under the attorney-client privilege. *Green &*
6 *Shinee v. Superior Court* (2001) 88 Cal.App.4th 532, 537.

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

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

9 Even OXY acknowledges the interests of EOG and OXY in the transaction
10 were "adversarial, common, and at times, a blend of the two." Yet, **OXY**
11 **apparently expects the court to rely entirely on the conclusory Peterson**
12 **and Stevens declarations, which simply state in general terms that EOG**
13 **and OXY had a common interest in finalizing their transaction and in**
14 **responding to Calpine's inquiries about the Elkhorn Slough. Neither the**
15 **privilege log nor the declarations reveal the content of any of the**
16 **communications, so it would be impossible for Calpine to offer evidence**
17 **refuting OXY's claims that all of the withheld communication involve**
18 **matters of common interest. Indeed, without more information about the**
19 **disputed documents, Calpine cannot demonstrate that each**
20 **communication between OXY and EOG was not reasonably necessary to**
21 **accomplish **640 the purpose for which a lawyer was consulted.**

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

23 [Emphasis added.]

24
25 Finally, in this instance, there is no connection between the "privilege log" and the
26 Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance
27 that documents are not being withheld. There is no assurance that if documents are being
28 withheld, that they would only be included in the purported "privilege log". Hence, both the

1 Response and the "privilege log" are patently inadequate, and further response is warranted.
2 The need for a further, straightforward response is demonstrated by the conditional, ambiguous
3 nature of the Response itself.

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

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

11 **Did the respondent comply with the statutes? No.** The response
12 "specifically" excludes attorney-client documents, but does not state whether
13 any in fact exist. If there are privileged documents, they must be identified
14 with particularity.

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

14 The response is also ambiguous: "**Without waiving these objections
15 and subject to them.**"

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

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

19 [Italics in original; bold added.]

20 Also very recently, the 9th Circuit Court of Appeals ruled that a responding party must
21 state unequivocally that no documents are being withheld.

22 In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ----, 2007 WL 2458503 (August 31,
23 2007), a case venued in Nevada Federal Court, the 9th Circuit Court upheld a trial court judge
24 order *in limine* which barred the defendant from introducing evidence at trial where the
25 documents were withheld during discovery.

26 The insurers also challenge the district court's order suppressing
27 certain evidence placed in the claim file after litigation commenced. The
28 district court granted this motion upon finding that the insurers withheld
evidence that they were ordered to produce regarding their post-litigation
treatment of Merrick's claim. The insurers argue that the court erred in finding

1 that they had withheld any evidence. "Courts need not tolerate flagrant abuses
2 of the discovery process" and have "inherent power" to exclude evidence as a
3 sanction for such abuses. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27
4 (9th Cir.1980). We review the imposition of discovery sanctions for abuse of
5 discretion and the underlying factual determinations for clear error. *Valley*
6 *Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir.1998). Based
7 upon the record, we cannot conclude that the district court's finding that the
8 insurers withheld evidence is clearly erroneous. The insurers' pretrial
9 behavior gives rise to such an inference. **The insurers invoked the privilege**
10 **in response to a specific document production request, and continued to**
11 **do so even after the magistrate judge instructed them not to invoke the**
12 **privilege unless the privilege was actually shielding documents. Their**
13 **responses expressly objected on the basis of privilege and attested that**
14 **"subject to these objections," their production was complete. FN3 Only**
15 **after the magistrate ordered the privileges waived (in response to**
16 **Merrick's assertion that defendants were withholding evidence), and**
17 **Merrick brought his motion in limine, did the insurers state**
18 **unequivocally that no documents were withheld on the basis of privilege.**
19 FN4 Even then, counsel's statement at the hearing could be understood as
20 admitting the existence of withheld documents.

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

22 The 9th Circuit Court of Appeals further held that the paucity of documents actually
23 produced supports an inference that documents are being withheld.

24 In addition, **the existence of withheld documents may be inferred from the**
25 **paucity of material actually produced.** Although the insurers received over
26 3000 pages of documents pertaining to Merrick's claim after litigation began,
27 it produced only three short memos analyzing this material, none of which
28 was generated by the attorneys who were actively managing the case file after
Merrick filed his complaint. FN5

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

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

Here, the Mexican Catholic Church authorities assert they have no idea what happened
to Father Aguilar after he returned from molesting children in California in January 1988, and
they have produced virtually no discovery for the post-1988 time period. As a result, they have
managed to fail to disclose the whereabouts of Father Aguilar in Mexico through today's date.
This means that the primary witness in the case has been kept from criminal justice, and justice

1 in a civil forum, in the form of a deposition under oath and a jury trial in California. The
2 failure to disclose much of anything about Father Aguilar after 1988 only inurs to the benefit of
3 the current Defendants in this lawsuit, as they can say anything without fear of contradiction.


4 As to the pre-1988 time period, the Mexican Catholic Church Defendants have
5 produced *93 pages of documents for a priest who was ordained in Mexico in 1970*, and
6 worked as a priest in Mexico except for the time period of March 1987 to January 1988 when
7 he was in California, until perhaps the present day. The “paltry” production of documents
8 about Father Aguilar is unbelievable. The lack of credibility to the documents produced thus
9 far supports an inference that documents are being withheld by these highly evasive
10 “compliance statements”. Plaintiff and the Court need to inspect the documents that normally
11 accompany the transfer of Mexican priests to California, and back, in order to evaluate the
12 reliability of the documents productions concerning Father Aguilar, and to evaluate the
13 credibility of the Defendant’s statements about that process, including their feigned limited
14 knowledge about anything the priests do, and their feigned lack of communication between the
15 different “jurisdictions” within the Catholic Church.

16 Plaintiff requests a court order requiring a further response by Defendant that is not
17 “conditioned” in any manner, and an unequivocal statement that *all* documents have been
18 produced. Absent such a court order, the concealment of relevant information and documents
19 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

20
21
22
23
24
25
26
27
28

Dated: September 17, 2007

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

By: 
Attorney for Plaintiff

1 Lawrence E. Drivon, Esq. (State Bar No. 46660)
David E. Drivon, Esq. (State Bar No. 158369)
2 Robert T. Waters, Esq. (State Bar No. 196833)
The Drivon Law Firm
3 215 North San Joaquin Street
Stockton, CA 95202
4 Telephone: (209) 644-1234

5 Michael G. Finnegan, Esq. (State Bar No. 241091)
Jeff Anderson & Associates
6 E-1000 First National Bank Building
332 Minnesota Street
7 St. Paul, Minnesota 55101
Telephone: (651) 227-9990
8

9 Joseph W. Carcione, Jr., Esq. (State Bar No. 56693)
Gary W. Dolinski, Esq. (State Bar No. 107725)
Mara W. Feiger, Esq. (State Bar No. 143247)
10 CARCIONE, CATTERMOLLE, DOLINSKI, OKIMOTO,
STUCKY, UKSHINI, MARKOWITZ & CARCIONE, L.L.P.
11 601 Brewster Avenue
P.O. Box 3389
12 Redwood City, CA 94064
Telephone: (650) 367-6811
13

14 Attorneys for Plaintiff

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
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,

DECLARATION OF COUNSEL IN SUPPORT
OF 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

25 Defendants.
26
27
28

Date: October 12, 2007

Time: 8:30 a.m.

Dept: 42

1 I, Gary W. Dolinski, on oath state:

2 (1) I am an attorney at law duly licensed to practice law before all the courts of the
3 State of California and am a partner with the Law Offices of Carcione, Cattermole, Dolinski,
4 Okimoto, Stucky, Ukshini, Markowitz & Carcione, L.L.P., one of the attorneys of record for
5 the Plaintiff in this litigation.

6 (2) Appended as Exhibit "A" is a true and correct copy of Plaintiff's Document
7 Demands, Set No. 2, to Defendant DIOCESE OF TEHUACAN, served July 13, 2007.

8 (3) Appended as Exhibit "B" is a true and correct copy of Defendant's Responses to
9 the Document Demands, Set No. 2, mail served August 17, 2007.

10 (4) Appended as Exhibit "C" is a true and correct copy of our "meet and confer"
11 letter dated and telecopied September 5, 2007.

12 (5) Appended as Exhibit "D" is a true and correct copy of defense counsel's letter
13 reply dated September 6, 2007.

14 (6) Appended as Exhibit "E" is a true and correct copy of defense counsel's letter
15 dated August 21, 2007, with an attachment purporting to be a privilege log.

16 (7) Appended as Exhibit "F" is a true and correct copy of an article from the San
17 Francisco Daily Journal dated September 6, 2007.


18 (8) Appended as Exhibit "G" is a true and correct copy of the opinion in *Merrick v.*
19 *Paul Revere Life Ins. Co.*, --- F.3d ----, 2007 WL 2458503 (9th Cir. (Nev.), August 31, 2007).

20 (9) I have spent five (5) hours reviewing the subject discovery responses, preparing
21 "meet and confer" correspondence, and researching and preparing the present motion papers.
22 The filing fee for the instant motion is \$40.00. My reasonable hourly fee is \$350.00. I am a
23 24-year attorney in California, specializing in the representation of catastrophically injured
24 individuals in complex litigation matters. Plaintiff requests a monetary sanction against the
25 Defendant and/or their counsel of record, in the sum of \$1,750.00, representing a
26 reimbursement of legal fees and expenses, on the legal and factual grounds set forth in the
27 accompanying Memorandum of Points and Authorities, and Separate Statement, and as
28 documented in the exhibits hereto.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Executed on this 17th day of September, 2007, at Redwood City, California.



Gary W. Dolinski, Esq.

1 Lawrence E. Drivon, Esq. (State Bar No. 46660)
David E. Drivon, Esq. (State Bar No. 158369)
2 Robert T. Waters, Esq. (State Bar No. 196833)
The Drivon Law Firm
3 215 North San Joaquin Street
Stockton, CA 95202
4 Telephone: (209) 644-1234
5 Michael G. Finnegan, Esq. (State Bar No. 241091)
Jeff Anderson & Associates
6 E-1000 First National Bank Building
332 Minnesota Street
7 St. Paul, Minnesota 55101
Telephone: (651) 227-9990
8
9 Joseph W. Carcione, Jr., Esq. (State Bar No. 56693)
Gary W. Dolinski, Esq. (State Bar No. 107725)
Mara W. Feiger, Esq. (State Bar No. 143247)
10 CARCIONE, CATTERMOLE, DOLINSKI, OKIMOTO,
STUCKY, UKSHINI, MARKOWITZ & CARCIONE, L.L.P.
11 601 Brewster Avenue
P.O. Box 3389
12 Redwood City, CA 94064
Telephone: (650) 367-6811

13 Attorneys for Plaintiff
14

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

17 JOAQUIN AGUILAR MENDEZ, Case No. BC358718
18 Plaintiff,

19 vs.

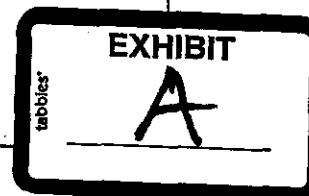
20 CARDINAL ROGER MAHONEY, THE REQUEST FOR IDENTIFICATION AND
ROMAN CATHOLIC ARCHBISHOP OF PRODUCTION OF DOCUMENTS AND
21 LOS ANGELES, A CORPORATION THINGS
22 SOLE, CARDINAL NORBERTO
RIVERA, THE DIOCESE OF
23 AGUILAR DOES 1-100,

24 Defendants.
25

26 PROPOUNDING PARTY: Plaintiff, JOAQUIN AGUILAR MENDEZ

27 RESPONDING PARTY: Defendant, THE DIOCESE OF TEHUACAN

28 SET NUMBER: TWO (2)



1 TO ALL PARTIES THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that Defendant, THE DIOCESE OF TEHUACAN
3 ("Defendant"), is requested to identify the following documents in the possession, custody
4 and/or control of the Defendant, and produce any identified documents either by making the
5 original documents available for inspection and copying at 10:00 a.m. on **August 17, 2007**, at
6 Carcione, Cattermole, Dolinski, Okimoto, Stucky, Ukshini, Markowitz & Carcione, L.L.P.,
7 601 Brewster Avenue, Redwood City, California, or by mailing copies of those documents to
8 Plaintiff counsel, pursuant to the provisions of Section 2031.050 of the Code of Civil
9 Procedure:

10 **DEFINITIONS**

11
12 Words in **BOLDFACE CAPITALS** in this Request are defined as follows:

13
14 (1) **DOCUMENT** means a writing (as defined in Evidence Code section 250), and
15 includes the original or copy of handwriting, typewriting, printing, photostating,
16 photographing, and every other means of recording upon any tangible thing, any form of
17 communication or representation, including letters, words, pictures, sounds, and symbols, or
18 combinations of them. The term "writing" also includes all information collected by, compiled
19 on and/or available through computer.

20
21 (2) The terms "**CONCERNING**" and "**CONCERN**" each mean and include not only
22 their commonly understood meaning, but the following meaning as well (where applicable):
23 relating to, embodying, comprising, analyzing, reflecting, evidencing, constituting, pertaining
24 to, dealing with, showing, referring to or having any logical or factual connections with matters
25 discussed.

26
27 (3) **PERSON** includes a natural person, firm, association, organization,
28 partnership, business, trust, corporation, or public entity.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(4) **ADDRESS** means the street address, including the city, state and zip code.

(5) The terms "**YOU**" and "**YOUR**" shall refer to **DEFENDANT** as well as its agents, employees, representatives, attorneys, officers, directors, members and any other person or entity acting under its or their control or on its or their behalf.

(6) The words "**AND**," "**OR**" and "**INCLUDING**" and similar words of guidance are intended merely as such and should not be construed as words of limitation; for example, the word "**OR**" shall include the word "**AND**" as appropriate and vice versa, and the word "**INCLUDING**" shall not be used to limit any general category description that precedes it.

(7) The singular form of a noun or pronoun includes the plural form and vice versa.

PRIVILEGES

1
2
3 If any **DOCUMENT** is withheld in response to this production request on the ground
4 of a privilege not to disclose the **DOCUMENT**, please state with respect to each such
5 **DOCUMENT**:

6
7 (1) The type of **DOCUMENT** involved and a general description of the contents of
8 the **DOCUMENT**;

9
10 (2) The name, last known address, and last known telephone numbers of each
11 person who authored or otherwise generated the **DOCUMENT**, and the job title of any such
12 person(s) at the time the **DOCUMENT** was created;

13
14 (3) The name, last known address, and last known telephone number of each person
15 to whom the **DOCUMENT** or a copy of the **DOCUMENT** was sent, including the primary
16 targeted recipient(s), any recipient(s) of copies, and any recipient(s) of blind carbon copies, and
17 the job title of any such person(s) at the time the **DOCUMENT** was sent.

18
19 (4) The date of the **DOCUMENT**;

20
21 (5) The privilege relied upon in withholding the **DOCUMENT**;

22
23 (6) The facts relied upon in support of the privilege claim; and

24
25 (7) The name, last known address, and last known telephone number for each
26 person possessing knowledge of the factual basis for the privilege claim.

27
28

1 (23) All DOCUMENTS containing the United States government documentation allowing
2 Father Nicolas Aguilar (aka Nicolas Aguilar Rivera) to work in the United States in 1987 and
3 1988.

4
5 (24) For each priest who worked in YOUR diocese and thereafter worked in a diocese in the
6 United States, the DOCUMENTS CONCERNING the change in location of their place of
7 work.

8
9 (25) All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
10 change in location of a priest from YOUR diocese to another diocese.

11
12 (26) All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
13 change in location of a priest from another diocese to YOUR diocese.

14
15 (27) All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
16 incardination of a priest from YOUR diocese to another diocese.

17
18 (28) All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
19 incardination of a priest from another diocese to YOUR diocese.

20

21

22 Dated: July 13, 2007

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

23

24

25

26

By: 

Attorney for Plaintiff

27

28

1 *Mendez v. Cardinal Roger Mahony, et al.*
[Los Angeles Superior Court Case No. BC358718]

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 July 13, 2007, I served the attached document(s):

9 **REQUEST FOR IDENTIFICATION AND PRODUCTION OF DOCUMENTS AND**
10 **THINGS (Set No. 2) [pounded to Diocese of Tehuacan]**

11 x **By MAIL**, being familiar with the practice of this office for the collection and the
12 processing of correspondence for mailing with the United States Postal Service, and
13 deposited in the United States Mail copies of same to the business addresses set forth
14 below, in a sealed envelope fully prepaid.

15 **Attorneys for Plaintiff, Joaquin Mendez:**

16 Laurence E. Drivon, Esq.

17 David E. Drivon, Esq.

18 Robert T. Waters, Esq.

19 The Drivon Firm

20 215 North San Joaquin Street

21 Stockton, CA 95202

22 Telephone: (209) 644-1234

Facsimile: (209) 463-7668

23 **Co-Counsel for Plaintiff**

24 Jeff Anderson, Esq.

25 Michael Finnegan, Esq.

26 Jeff Anderson & Associates, P.A.

27 E-1000 First National Bank Building

28 332 Minnesota Street

St. Paul, MN 55101

Telephone: (651) 227-9990

Facsimile: (651) 297-6543

Co-Counsel for Plaintiff

Martin D. Gross, Esq.

The Law Offices of Martin D. Gross

2001 Wilshire Boulevard, Suite 205

Santa Monica, CA 90403

Telephone: (310) 453-8320

Facsimile: (310) 861-1359

Attorneys for Defendant: The Roman Catholic Archbishop of Los Angeles

Lee W. Potts, Esq.

J. Michael Hennigan, Esq.

Donald F. Woods, Jr., Esq.

James Habel, Esq.

HENNIGAN, BENNETT & DORMAN LLP

865 South Figueroa Street, Suite 2900

Los Angeles, CA 90017

Telephone: (213) 694-1200

Facsimile: (213) 694-1234

1 Attorneys for Defendant: Cardinal Norberto Rivera and the Diocese of Tehuacan

Michael L. Cypers, Esq.
2 Evan M. Wooten, Esq.
Mayer, Brown, Rowe & Maw LLP
3 350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
4 Telephone: (213) 229-9500

Facsimile: (213) 625-0248

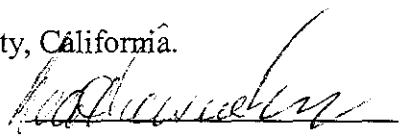
5 Co-Counsel for Defendant: Cardinal Norberto Rivera and the Diocese of Tehuacan

Steven R. Selsberg (*pro hac vice*)
6 700 Louisiana Street, Suite 2400
Houston, TX 77002-2730
7 Telephone: (713) 238-3000

Facsimile: (712) 238-4888

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

9 Executed on the above date at Redwood City, California.



10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 MAYER, BROWN, ROWE & MAW LLP
MICHAEL L. CYPERS (SBN 100641)
2 EVAN M. WOOTEN (SBN 247340)
350 South Grand Avenue, 25th Floor
3 Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
4 Facsimile: (213) 625-0248

VED

5 MAYER, BROWN, ROWE & MAW LLP
STEVEN R. SELSBERG (PRO HAC VICE)
6 700 Louisiana Street, Suite 3400
Houston, TX 77002-2730
7 Telephone: (713) 238-3000
8 Facsimile: (713) 238-4888

07
CEDOSUMC
LLP

9 Attorneys for Defendants Appearing Specially
CARDINAL NORBERTO RIVERA AND THE
DIOCESE OF TEHUACAN

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES, CENTRAL DISTRICT
12

13 JOAQUIN AGUILAR MENDEZ,
14 Plaintiff,
15 v.
16 CARDINAL ROGER MAHONY, THE
ROMAN CATHOLIC ARCHBISHOP OF LOS
17 ANGELES, A CORPORATION SOLE,
CARDINAL NORBERTO RIVERA, THE
18 DIOCESE OF TEHUACAN, FATHER
NICHOLAS AGUILAR DOES 1-100,
19 Defendants.
20

Case No. BC358718
DEFENDANT THE DIOCESE OF
TEHUACAN'S RESPONSES TO
PLAINTIFF'S SECOND SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS REGARDING
JURISDICTION

21 PROPOUNDING PARTY: Plaintiff Joaquin Aguilar Mendez

22 RESPONDING PARTY: Defendant The Diocese of Tehuacan

23 SET NUMBER: Two [Nos. 15 - 28]

24 Defendant the Diocese of Tehuacan (the "Diocese") hereby responds to Plaintiffs'
25 Second Set of Requests for Production of Documents (collectively, the "Requests," individually,
26 a "Request") as follows:
27
28



1 a confidentiality agreement and/or information that is otherwise privileged, protected or
2 confidential pursuant to any applicable doctrine, statute, rule or case law. Such responses as may
3 hereafter be given shall not include any information protected by such privileges, doctrines,
4 statutes, rules, or case law and any inadvertent disclosure of such information shall not be
5 deemed a waiver of any such privilege, protection or confidentiality.

6 2. The Diocese objects to the Requests to the extent that they seek the production of
7 documents that contain private, business confidential, proprietary or trade secret information.
8 Such documents are privileged pursuant to the California Constitution and/or the California
9 Evidence Code and may be produced to Plaintiffs only pursuant to a stipulated protective order.

10 3. The Diocese objects to each Request insofar as it assumes facts that are not in
11 evidence. By responding to these Requests, The Diocese does not admit or agree with any
12 explicit or implicit assumption made in these Requests.

13 4. The Diocese objects to the Requests to the extent they seek the production of
14 documents and information unrelated to the issue of whether California courts may lawfully
15 exercise jurisdiction over Defendants Cardinal Norberto Rivera and the Diocese (jointly, the
16 "Defendants"), for which purpose the Court granted limited discovery.

17 5. Notwithstanding the objection raised in Paragraph 4, The Diocese objects to the
18 Requests to the extent that they are not relevant to the subject matter involved in the pending
19 action, not reasonably calculated to lead to the discovery of admissible evidence or seek
20 information that is outside the scope of discovery permitted under the California Code of Civil
21 Procedure.

22 6. The Diocese objects to the definitions of "YOU" and "YOUR" included in the
23 Requests on the ground that they are overly broad, compound, unduly burdensome, oppressive,
24 vague and ambiguous. The Diocese further objects to these definitions to the extent they imply
25 an agency or employment relationship where none exists in fact or in law. The Diocese further
26 objects to these definitions to the extent they improperly seek information regarding third parties.
27 The Diocese will respond on behalf of itself only.

28

1 In addition to the above-stated objections to all of the Requests in general, the Diocese
2 also asserts objections to specific Requests, as indicated and explained below.

3 **RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

4 **REQUEST NO. 15:**

5 All DOCUMENTS CONCERNING Father Nicolas Aguilar (aka Nicolas Aguilar
6 Rivera).

7 **RESPONSE TO REQUEST NO. 15:**

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

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

15 **REQUEST NO. 16:**

16 All DOCUMENTS containing the name "Father Nicolas Aguilar (aka Nicolas Aguilar
17 Rivera)" in any formulation of those words.

18 **RESPONSE TO REQUEST NO. 16:**

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

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

26 **REQUEST NO. 17:**

27 All DOCUMENTS containing the personnel file of Father Nicolas Aguilar (aka Nicolas
28

1 Aguilar Rivera).

2 **RESPONSE TO REQUEST NO. 17:**

3 The Diocese incorporates by reference its General Objections set forth above. Subject to
4 and without waiving its objections, the Diocese responds as follows:

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

8 **REQUEST NO. 18:**

9 All DOCUMENTS CONCERNING the ordination of Father Nicolas Aguilar (aka
10 Nicolas Aguilar Rivera).

11 **RESPONSE TO REQUEST NO. 18:**

12 The Diocese incorporates by reference its General Objections set forth above. The
13 Diocese further objects to this Request because the term "ordination" is vague and ambiguous
14 and, as such, the Request does not designate the requested documents with reasonable
15 particularity as required by California Code of Civil Procedure § 2025.220(a)(4). Subject to and
16 without waiving its objections, the Diocese responds as follows:

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

20 **REQUEST NO. 19:**

21 All DOCUMENTS CONCERNING the incardination of Father Nicolas Aguilar (aka
22 Nicolas Aguilar Rivera).

23 **RESPONSE TO REQUEST NO. 19:**

24 The Diocese incorporates by reference its General Objections set forth above. The
25 Diocese further objects to this Request because the term "incardination" is vague and ambiguous
26 and, as such, the Request does not designate the requested documents with reasonable
27 particularity as required by California Code of Civil Procedure § 2025.220(a)(4). Subject to and
28

1 without waiving its objections, the Diocese responds as follows:

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

5 **REQUEST NO. 20:**

6 All DOCUMENTS CONCERNING the incardination of Father Nicolas Aguilar (aka
7 Nicolas Aguilar Rivera) from the Archdiocese of Los Angeles to Mexico.

8 **RESPONSE TO REQUEST NO. 20:**

9 The Diocese incorporates by reference its General Objections set forth above. The
10 Diocese further objects to this Request because the term "incardination" is vague and ambiguous,
11 as is the phrase "incardination ... from the Archdiocese of Los Angeles to Mexico;" as such, the
12 Request does not designate the requested documents with reasonable particularity as required by
13 California Code of Civil Procedure § 2025.220(a)(4). Subject to and without waiving its
14 objections, the Diocese responds as follows:

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

18 **REQUEST NO. 21:**

19 All DOCUMENTS containing the passport of Father Nicolas Aguilar (aka Nocolas
20 Aguilar Rivera).

21 **RESPONSE TO REQUEST NO. 21:**

22 The Diocese incorporates by reference its General Objections set forth above. Subject to
23 and without waiving its objections, the Diocese responds as follows:

24 After a reasonably diligent search, the Diocese has not located any documents within its
25 possession, custody or control that are responsive to this Request.

26 **REQUEST NO. 22:**

27 All DOCUMENTS containing the visa of Father Nocolas Aguilar (aka Nicolas Aguilar
28

1 Rivera) to travel to the United States in 1987.

2 **RESPONSE TO REQUEST NO. 22:**

3 The Diocese incorporates by reference its General Objections set forth above. Subject to
4 and without waiving its objections, the Diocese responds as follows:

5 After a reasonably diligent search, the Diocese has not located any documents within its
6 possession, custody or control that are responsive to this Request.

7 **REQUEST NO. 23:**

8 All DOCUMENTS containing the United States government documentation allowing
9 Father Nicolas Aguilar (aka Nicolas Aguilar Rivera) to work in the United States in 1987 and
10 1988.

11 **RESPONSE TO REQUEST NO. 23:**

12 The Diocese incorporates by reference its General Objections set forth above. Subject to
13 and without waiving its objections, the Diocese responds as follows:

14 After a reasonably diligent search, the Diocese has not located any documents within its
15 possession, custody or control that are responsive to this Request.

16 **REQUEST NO. 24:**

17 For each priest who worked in YOUR diocese and thereafter worked in a diocese in the
18 United States, the DOCUMENTS CONCERNING the change in location of their place of work.

19 **RESPONSE TO REQUEST NO. 24:**

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

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

27

28

1 **REQUEST NO. 25:**

2 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the change
3 in location of a priest from YOUR diocese to another diocese.

4 **RESPONSE TO REQUEST NO. 25:**

5 The Diocese incorporates by reference its General Objections set forth above. The
6 Diocese further objects to this Request because it is overly broad, unduly burdensome and
7 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. The Diocese
8 further objects to this Request because the term "policy" is vague and ambiguous. Subject to and
9 without waiving its objections, the Diocese responds as follows:

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

13 **REQUEST NO. 26:**

14 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the change
15 in location of a priest from another diocese to YOUR diocese.

16 **RESPONSE TO REQUEST NO. 26:**

17 The Diocese incorporates by reference its General Objections set forth above. The
18 Diocese further objects to this Request because it is overly broad, unduly burdensome and
19 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. The Diocese
20 further objects to this Request because the term "policy" is vague and ambiguous. Subject to and
21 without waiving its objections, the Diocese responds as follows:

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

25 **REQUEST NO. 27:**

26 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
27 incardination of a priest from YOUR diocese to another diocese.
28

1 **RESPONSE TO REQUEST NO. 27:**

2 The Diocese incorporates by reference its General Objections set forth above. The
3 Diocese further objects to this Request because it is overly broad, unduly burdensome and
4 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. The Diocese
5 further objects to this Request because the term "policy" is vague and ambiguous. Subject to and
6 without waiving its objections, the Diocese responds as follows:

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

10 **REQUEST NO. 28:**

11 All DOCUMENTS containing the policy of YOUR diocese CONCERNING the
12 incardination of a priest from another diocese to YOUR diocese.

13 **RESPONSE TO REQUEST NO. 28:**

14 The Diocese incorporates by reference its General Objections set forth above. The
15 Diocese further objects to this Request because it is overly broad, unduly burdensome and
16 oppressive, and it imposes an unreasonable burden and expense upon the Diocese. The Diocese
17 further objects to this Request because the term "policy" is vague and ambiguous. Subject to and
18 without waiving its objections, the Diocese responds as follows:

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

22 Dated: August 17, 2007

MAYER, BROWN, ROWE & MAW LLP
MICHAEL L. CYPERS
STEVEN R. SELSBERG
EVAN M. WOOTEN

23
24
25
26
27
28
By: 

Evan M. Wooten

Attorneys for Defendants Appearing Specially
CARDINAL NORBERTO RIVERA AND THE
DIOCESE OF TEHUACAN

DE : Fernández del Castillo y Asoc. NO.DE TEL : 5533 6700

17 AGO. 2007 01:37PM P4

FROM : ObisepadoYde Tehuacán

FAX NO. : 012383831468

Aug. 17 2007 02:23PM P2

VERIFICATION

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

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

Dated: August 17, 2007

By: Rodrigo Aguilar
Bishop Rodrigo Aguilar Martinez

CARCIONE, CATTERMOLLE, DOLINSKI,
OKIMOTO, STUCKY, UKSHINI,
MARKOWITZ & CARCIONE
LIMITED LIABILITY PARTNERSHIP

JOSEPH W. CARCIONE, JR., P.C.
GREGORY C. CATTERMOLLE
GARY W. DOLINSKI
GERALD K. OKIMOTO
ROGER W. STUCKY
JOSHUA S. MARKOWITZ
JOHN P. CARCIONE

DANIELLE UKSHINI
(1958-2005)

601 BREWSTER AVENUE
P.O. Box 3389
REDWOOD CITY, CA 94064
TELEPHONE (650) 367-6811
FACSIMILE (650) 367-0367

ROBERT U. BOKELMAN
AARON B. MARKOWITZ
NEAL A. MARKOWITZ
MARA W. FEIGER
HILLARY A. HERNING

MATTHEW J. McNAUGHTON
Of Counsel

September 5, 2007

BY TELECOPIER, ONLY [(213) 625-0248]

Michael L. Cypers, Esq.
Evan M. Wooten, Esq.
Mayer, Brown, Rowe & Maw LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503

Re: *Joaquin Mendez v. Cardinal Roger Mahony, et al.*
[Los Angeles County Superior Court No. BC358718]

Dear Counsel:

Please reference the Responses (8/17/07) of the Diocese of Tehuacan to the Plaintiff's Document Demands (Set 2). The purpose of this correspondence is to "meet and confer" in an attempt to avoid motion practice in connection with those responses.

Initially, the "General Objections" are improper, and will not be addressed.

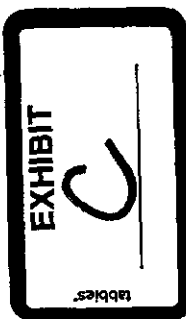
Each response to Document Demand Nos. 15 - 20, and 24 - 28, states: "The Diocese will produce such relevant, responsive and non-privileged documents as are in its possession, custody or control, which documents have not been produced previously by the Defendants."

Said response is improper because it does not state the documents will all be produced, without conditions. Hence, it appears that documents have been withheld on the basis of the Defendant's "secret" views about which documents are "relevant", "responsive", "non-privileged", and "not produced previously".

The responses must be amended to state "the documents will be produced".

If documents have been withheld, they must be identified in a privilege log.

Finally, Evan Wooten's letter dated August 17, 2007, states: "Please find enclosed documents bates labeled RIV 00089 through RIV 00093 on behalf of Defendants Cardinal Norberto Rivera and the Diocese of Tehuacan." Please clarify whether those 5 pages are the only documents that are being produced in response to the Plaintiff's Second Set of Document Demands, and to which Document Demands the documents are specifically being produced for.



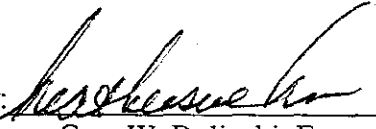
Michael L. Cypers, Esq.
Evan M. Wooten, Esq.
Joaquin Mendez v. Cardinal Roger Mahony, et al.
September 5, 2007
Page 2

By 5:00 p.m. tomorrow, we request that you advise that the Defendant will provide further document demand responses, and further estimate the date either the documents will be produced, or a privilege log served. We also request that your clarification of the produced documents be made in that time period as well.

Absent your cooperation, the Plaintiff will be forced to bring the requisite motion.

Sincerely,

CARCIONE, CATTERMOLE, DOLINSKI, ET AL.

By: 
for Gary W. Dolinski, Esq.

GWD/hs
opeiu3-afl-cio(259)

- cc: Steven R. Selsberg, Esq.
Houston Attorney for Cardinal Rivera and Diocese of Tehuacan
[by telecopier, only (712) 238-4888]
- cc: Laurence E. Drivon, Esq.
David E. Drivon, Esq.
Robert T. Waters, Esq.
Stockton Attorneys for Plaintiff
[by telecopier, only (209) 463-7668]
- cc: Michael Finnegan, Esq.
St. Paul Attorney for Plaintiff
[by telecopier, only (651) 297-6543]
- cc: Martin D. Gross, Esq.
Santa Monica Attorney for Plaintiff
[by telecopier, only (310) 861-1359]

cc: [vertical stamp]

 *** MULTI TX/RX REPORT ***

TX/RX NO	3476
PGS.	2
TX/RX INCOMPLETE	-----
TRANSACTION OK	
	(1) 12136250248
	(3) 12094637668
	(4) 16512976543
	(5) 13108611359
ERROR INFORMATION	
	(2) 17122384888

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

LIMITED LIABILITY PARTNERSHIP

JOSEPH W. CARCIONE, JR., P.C.
 GREGORY C. CATTERMOLE
 GARY W. DOLINSKI
 GERALD K. OKIMOTO
 ROGER W. STUCKY
 JOSHUA S. MARKOWITZ
 JOHN P. CARCIONE

DANIELLE UKSHINI
 (1956-2005)

601 BREWSTER AVENUE
 P.O. BOX 3389
 REDWOOD CITY, CA 94064
 TELEPHONE (650) 367-6811
 FACSIMILE (650) 367-0367

ROBERT U. BOKELMAN
 AARON B. MARKOWITZ
 NEAL A. MARKOWITZ
 MARA W. FEIGER
 HILLARY A. HERNING

MATTHEW J. McNAUGHTON
 Of Counsel

September 5, 2007

BY TELECOPIER ONLY [(213) 625-0248]

Michael L. Cypers, Esq.
 Evan M. Wooten, Esq.
 Mayer, Brown, Rowe & Maw LLP
 350 South Grand Avenue, 25th Floor
 Los Angeles, CA 90071-1503

Re: *Joaquin Mendez v. Cardinal Roger Mahony, et al.*
[Los Angeles County Superior Court No. BC358718]

Dear Counsel:

Please reference the Responses (8/17/07) of the Diocese of Tehuacan to the Plaintiff's Document Demands (Set 2). The purpose of this correspondence is to "meet and confer" in an attempt to avoid motion practice in connection with those responses.

Initially, the "General Objections" are improper, and will not be addressed.

Each response to Document Demand Nos. 15 - 20, and 24 - 28, states: "The Diocese will produce such relevant, responsive and non-privileged documents as are in its possession, custody or control, which documents have not been produced previously by the Defendants."

Said response is improper because it does not state the documents will all be produced, without conditions. Hence, it appears that documents have been withheld on the basis of the Defendant's "secret" views about which documents are "relevant", "responsive", "non-

MAYER • BROWN

September 6, 2007

BY FAX

Gary W. Dolinski, Esq.
Carcione, Cattermole, Dolinski, et al., LLP
601 Brewster Avenue
P.O. Box 3389
Redwood City, California 94064

Mayer Brown, LLP
350 South Grand Avenue, 25th Floor
Los Angeles, California 90071-1503

Main Tel (213) 229-9500
Main Fax (213) 625-0248
www.mayerbrown.com

Evan M. Wooten
Direct Tel (213) 621-9450
Direct Fax (213) 625-0248
ewooten@mayerbrown.com

Re: Joaquin Mendez v. Cardinal Roger Mahony, et al.
[Los Angeles County Sup. Ct. No. BC358718];
Various Discovery Responses

Dear Mr. Dolinski:

The purpose of this letter is to respond to your five letters, dated September 5, 2007, regarding the responses of Defendants Cardinal Norberto Rivera and the Diocese of Tehuacan (jointly, the "Defendants") to various discovery requests served by Plaintiff Joaquin Aguilar Mendez. Nothing in this letter should be construed to confirm or admit any of the alleged deficiencies in the Defendants' responses or production to date, and the Defendants hereby maintain and preserve all objections raised in response to Plaintiff's discovery requests.

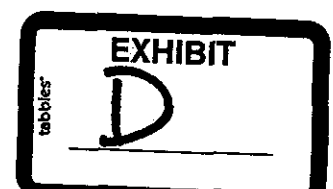
Plaintiff's Second Requests for Production to Cardinal Rivera & the Diocese of Tehuacan

To the extent that you demand that the Defendants redraft their responses to comport with your linguistic preferences, the Defendants do not acquiesce. Plaintiff's suggested response, *i.e.*, "the documents will be produced," is extremely vague and might well obligate the Defendants to produce documents that are not now, nor ever have been, in the Defendants' possession, custody or control. Moreover, to the extent that you imply that the Defendants are required to produce non-responsive, irrelevant or privileged documents, we, of course, do not agree. As the responses make clear and we are now restating in this letter, the Defendants have produced all relevant, responsive and non-privileged documents within their possession, custody or control. Documents withheld on the basis of privilege have been communicated to Plaintiff's counsel. *See* Letter to Mr. Finnegan Dated Aug. 21, 2007 and Enclosure (which documents also were transmitted via fax to Carcione, Cattermole, Dolinski, et al., LLP on August 21, 2007). We do not understand why you are now demanding a privilege log, three weeks after Mr. Finnegan made a similar request, with which we readily complied. Your obvious failure to communicate with co-counsel wastes the time and resources of all parties.

As to your request that we clarify whether the five documents Bates labeled RIV 00089 to RIV 00093 were the only documents produced in response to the second sets of requests for production, we clarify that the five documents Bates labeled RIV 00089 to RIV 00093 were *not* the only documents produced in response to those sets of requests. Numerous documents

Berlin Brussels Charlotte Chicago Cologne Frankfurt Hong Kong Houston London Los Angeles New York Palo Alto Paris Washington, D.C.

Mayer Brown, LLP operates in combination with our associated English limited liability partnership in the offices listed above.



Mayer Brown, LLP

Gary W. Dolinski, Esq.
September 6, 2007
Page 2

contained in the Defendants' initial production (*i.e.*, Documents Bates Labeled RIV 00001 to RIV 00088) are also responsive to Plaintiff's second sets of requests, several of which are quite broad (*e.g.*, Requests Nos. 13 to Cardinal Rivera and 15 to the Diocese of Tehuacan - "All DOCUMENTS CONCERNING Father Nicolas Aguilar"). As Mr. Selsberg communicated to Messrs. Drivon and Waters during the deposition of Cardinal Rivera, we did not re-produce those documents. For this reason, the Defendants responded to the second sets of requests that they would produce documents "not previously produced." Again, your failure to communicate with your co-counsel wastes time and resources.

In sum, the Defendants are not obligated to amend their discovery responses. Nonetheless, as stated, the Defendants have produced all relevant and responsive documents within their possession, custody or control, with the exception of the three documents indicated in the privilege log communicated to Plaintiff's counsel on August 21, 2007.

Plaintiff's First Special Interrogatories to the Diocese of Tehuacan

You complain that the Diocese of Tehuacan's (the "Diocese") responses to Special Interrogatories Nos. 2-9 and 11 "unilaterally limit the scope of the subject matter to 'current employees' of the Diocese" and that it was improper for Bishop Rodrigo Aguilar Martinez, the current Bishop of the Diocese, to answer the interrogatories. The limitation imposed on Plaintiff's interrogatories, as well the Diocese's responses, is imposed by law and not by the Defendants. At present, Plaintiff is entitled to conduct discovery on the limited issue of jurisdiction only. In analyzing jurisdiction, a defendant's contacts are adjudged at the time "the alleged conduct occurred and at the time of service of summons." See *DVI, Inc. v. Superior Court (Papworth)*, 104 Cal. App. 4th 1080, 1100 (2002). The Diocese's responses, therefore, are limited to the time of the alleged misconduct (*i.e.*, 1987 and 1988, during which time Plaintiff alleges that the Diocese and its Bishop, Cardinal Rivera, "transferred" Nicholas Aguilar to California and, later, aided in Aguilar's flight from California) and the present.¹ Cardinal Rivera is competent to respond to inquiries regarding the former time period (and did so in response to interrogatories directed to him) and Bishop Aguilar Martinez is competent to respond as to the latter time period (and did so). The same response applies to your comments regarding Interrogatories Nos. 16-19, 28-36, 37-41, 51-53,² 69-90 and 98-101, as do discussions below

¹ Because summons was never served in this action, the Diocese responded as to the time period commencing with filing of the Complaint and continuing to the present (*i.e.*, the dates on which the Diocese responded to the first interrogatories and later supplemented its responses to those interrogatories).

² We reject any insinuations you make with regard to the Diocese's claim that, "on information and belief," Nicholas Aguilar has been accused of sexually abusing minors. The preface "on information and belief" simply refers to the following facts: No current member of the Diocese has personal knowledge of the allegations against Nicholas Aguilar, as none were present in California at the time of the allegations, nor privy to communications between the Archdiocese of Los Angeles and then-

(cont'd)

Mayer Brown, LLP

Gary W. Dolinski, Esq.
September 6, 2007
Page 3

pertaining to the documents on which the Defendants base the information in connection with which they have no personal knowledge.

You also allege that the term "irrevocable resignation" from the parish is either inaccurate or misleading. As [you] understand Cardinal Rivera's deposition testimony, the 'irrevocable resignation' claim has been withdrawn, and the Diocese may want to change the interrogatory responses that rely upon a falsehood." Once again, your refusal to liaise with your colleagues, or digest the testimony, wastes the time and resources of all parties. As Mr. Selsberg communicated to Messrs. Waters and Drivon at the depositions of Cardinal Rivera and Bishop Aguilar Martinez, it was error to state that Nicholas Aguilar irrevocably resigned from the Diocese; rather, as the supplemental responses make plain, the Diocese meant to state that Aguilar irrevocably resigned from the Parish of San Sebastian Martir, Cuacnopalan in the Diocese. We thanked Messrs. Waters and Drivon for bringing the error to our attention and indicated that we supplement the responses to correct the error. Moreover, Cardinal Rivera's testimony comports with this understanding of the error and correction. Further, to imply that the Diocese is "rely[ing] upon a falsehood" reveals that you have not reviewed the Defendants' document production, as the term "irrevocable resignation" is a direct quote from the document Bates labeled RIV 00022.

In addition, you state that that "the claim that Father Aguilar went to California for 'family and health reasons' is another inaccuracy and should be corrected since Cardinal Rivera's Declaration made it clear those were codes for a sexual molester." This statement is so patently inaccurate and obviously incendiary as to not even warrant a response, and we are disappointed that you would so distort Cardinal Rivera's declaration in an alleged effort to "meet and confer."

Plaintiff's Second Special Interrogatories to the Diocese of Tehuacan

With regard to Interrogatory No. 55, your salacious accusation that the Defendants "are evading revealing the past and current whereabouts of Father Aguilar" by providing a last known address for Aguilar from 1987 in order to "mak[e] it impossible for the Plaintiff to find Father Aguilar and take his deposition" serves no purpose, other than to impugn the Defendants, and does not warrant a response. Nonetheless, it bears stating the obvious: the address is the last address evident in the personnel file of Nicholas Aguilar. As Cardinal Rivera testified, Nicolas Aguilar did not return to Tehuacan subsequent to fleeing California and Cardinal Rivera has had no contact with Aguilar since the latter's December 20, 1987 letter (from which letter the last known address was obtained). Nor has Nicholas Aguilar returned to Tehuacan during the tenure of the Bishop Aguilar Martinez despite the Bishop's public requests that Aguilar reveal himself

(... cont'd)

Bishop Rivera. Nonetheless, accusations against Nicolas Aguilar are widely known in Mexico due to vast media coverage ("belief") and evinced in documents contained in the personnel file of Nicholas Aguilar ("information"), which documents have been delivered to Plaintiff.

Mayer Brown, LLP

Gary W. Dolinski, Esq.
September 6, 2007
Page 4

(as the Bishop testified). Your suggestion that the Diocese is required to investigate Nicholas Aguilar's whereabouts beyond surveying its documents, records and the knowledge/memories of its employees is absurd. The Diocese is not required to act as a private investigator on Plaintiff's behalf.

With regard to Interrogatory No. 56, you ought not to find incredible the fact that the Diocese "has no knowledge of the address at which Fr. Aguilar was ordained." The Diocese is aware that Nicholas Aguilar was ordained on July 12, 1970 because of documents contained in Aguilar's personnel file (*see* RIV 00001 and RIV 00002); yet, these documents do not identify the address at which Aguilar was ordained. Moreover, no priests currently serving in the Diocese recall Aguilar's ordination; it was, after all, nearly forty years ago.³

With regard to Interrogatories Nos. 57 and 59, documents contained in Nicholas Aguilar's personnel file from the Diocese of Tehuacan demonstrate the parishes and the dioceses in which Aguilar worked prior to 1987. This statement is one which the Diocese can assert with personal knowledge; any other statements pertaining to Aguilar's history can only be based on information gleaned from documents contained in the file, which you can do as easily as we can.

With regard to Interrogatories Nos. 58 and 60, documents procured from the Archdiocese of Mexico list parishes and archdioceses in which Aguilar may have worked subsequent to 1988. Aguilar's personnel file in Tehuacan contains no documents pertaining to his service subsequent to 1988, as he never returned to Tehuacan and, as such, no member of the Diocese has knowledge of that service. You complain that the Diocese ought to conduct a "reasonable investigation" to discern Aguilar's post-1988 service; yet, this is exactly what the Defendants did. If anything, the Defendants were overly generous to the Plaintiff in their search. Plaintiff can hardly complain that the Defendants have been less than solicitous with documents pertaining to Nicholas Aguilar's service history. In short, the Defendants have produced every non-privileged document that it is in their power to produce.

The responses with regard to Interrogatories Nos. 57-60, *see supra*, also apply to Interrogatories Nos. 61-63.

The Diocese maintains its objection that the request for "every known fact" regarding Nicholas Aguilar, contained in Interrogatory No. 68, is overly broad.

With regard to Interrogatories Nos. 65 and 66, your opinion that it is "incredible" that the Diocese has no knowledge of Nicholas Aguilar's Mexican Federal Tax Registration Number or his Tributary Card number does not alter the fact that the Diocese does not possess such knowledge. Such information is not contained in the Diocese's personnel file on Nicholas

³ Plaintiff's counsel seems conveniently to forget that so many of the events in question occurred twenty or more years ago, making it difficult, if not impossible, at times to respond to interrogatories with personal knowledge.

Mayer Brown, LLP

Gary W. Dolinski, Esq.
September 6, 2007
Page 5

Aguilar and no person currently serving in the Diocese has knowledge of those numbers (if any person ever serving in the Diocese ever did).

With regard to Interrogatories Nos. 95 and 96, you state the addresses of Fathers Antonio Nunez and Candido are "known to the Catholic Church" as the two are "priest[s] in Mexico." *The Catholic Church, however, is not a party to this lawsuit.* The Diocese of Tehuacan and Cardinal Norberto Rivera in his former capacity as Bishop of that Diocese are parties to this lawsuit to whom interrogatories are directed. You may fancy that the entire Catholic Church is on trial here but, in truth, the Defendants, and their relative knowledge and authority, are far more circumscribed; and, at present, those Defendants are not even on trial, as they are not yet subject to the jurisdiction of the California courts. Your attempts to implicate the entire Catholic Church, if such a legal entity exists, in this action through jurisdictional discovery demands display delusions of grandeur.

Your description of Interrogatories Nos. 102 and 103, *i.e.*, as "request[ing] information about the knowledge of the Diocese concerning child molestations by *any* priest" (emphasis original), reveals the flaw in those requests. Knowledge of molestation apart from that of which Nicholas Aguilar is accused is irrelevant to the merits of this lawsuit, as well as to the issue of whether the California courts may exercise jurisdiction over the Defendants. As the Catholic Church is not a defendant in this lawsuit, nor are the Defendants implicated in every alleged act of molestation perpetrated by a Catholic priest.

Plaintiff's Second Special Interrogatories to Cardinal Rivera

Cardinal Rivera responds to your concerns regarding Interrogatory No. 47 as the Diocese responded to concerns regarding Interrogatories No. 55, *see supra*. Moreover, with regard to your contention that Cardinal Rivera is required to make a "reasonable investigation," Cardinal Rivera ordered an exhaustive search. Although that search did not reveal an address for Nicholas Aguilar, it did yield information as to Aguilar's possible service history subsequent to departing the Diocese, which the Defendants produced to Plaintiff. The Defendants reject any implication on the part of Plaintiff that either Cardinal Rivera or the Diocese were required to comb the records of other dioceses or archdioceses throughout the Federal Republic of Mexico (or the Defendants have the authority or means to so search).

Cardinal Rivera responds to your concerns regarding Interrogatory No. 49 as the Diocese responded to concerns regarding Interrogatory No. 56, *see supra*.

Cardinal Rivera responds to your concerns regarding Interrogatories Nos. 50-56 as the Diocese responded to concerns regarding Interrogatories No. 57-61, *see supra*. Further, when complaining as to the state of Cardinal Rivera's personal knowledge with regard to Nicholas Aguilar's history in the Diocese of Tehuacan, you should bear in mind that Cardinal Rivera became Bishop of Tehuacan on December 21, 1985, approximately thirteen months prior to Aguilar's departure from the Diocese. Similarly, when complaining as to the state of Cardinal Rivera's personal knowledge with regard to Nicholas Aguilar's history subsequent to his flight

Mayer Brown, LLP

Gary W. Dolinski, Esq.
September 6, 2007
Page 6

from California, you should bear in mind that Aguilar did not return to Tehuacan during Cardinal Rivera's tenure.⁴ Also, to repeat, Plaintiff's repeated references to "the Mexican Church," "the Catholic Church," and "the Catholic Church in Mexico" make no sense in the context of this lawsuit.

Cardinal Rivera responds to your concerns regarding Interrogatories Nos. 58 and 59 as the Diocese responded to concerns regarding Interrogatories Nos. 65 and 66, *see supra*.

Cardinal Rivera maintains his objection that the request for "every known fact" regarding Nicholas Aguilar, contained in Interrogatory No. 61, is overly broad.

With regard to Interrogatories Nos. 62-68 and 69-70, Cardinal Rivera rejects the implication that because he permitted Nicholas Aguilar to depart Tehuacan for California, he must therefore have personal knowledge of, among other things, government authorization Aguilar may have obtained prior to his departure, family members of Aguilar who lived in California, or modes of transportation used by Aguilar to travel to California. It is possible that Nicholas Aguilar was already in possession of government documentation or that he traveled into the United States without such authorization; the simple fact is Cardinal Rivera does not/did not know the details of Aguilar's travel, as stated in the interrogatory responses. Nor does/did Cardinal know the details of Aguilar's return travel. As he testified, Cardinal Rivera was first made aware of Nicholas Aguilar's return to Mexico via letter from Msgr. Thomas Curry after Aguilar allegedly fled California. As discussed below, your insistence on personal knowledge where non exists makes little sense. The purpose of discovery responses is to provide known facts, not to speculate or investigate beyond what is required by the rules. Proving your allegations is your responsibility, not ours.

Cardinal Rivera responds to your concerns regarding Interrogatories Nos. 80-83 as the Diocese responded to concerns regarding Interrogatories Nos. 57-63, *see supra*. With regard to authority over Nicholas Aguilar while he was in California, Cardinal Rivera has stated and testified that he did not have authority to permit Aguilar to serve in the Los Angeles Archdiocese, only to permit Aguilar to depart Tehuacan.

Cardinal Rivera responds to your concerns regarding Interrogatory No. 88 as the Diocese responded to concerns regarding Interrogatory No. 95, *see supra*.

With regard to Interrogatory No. 89, we find it incredible that you take issue with the statement that, "[t]o Cardinal Rivera's knowledge, Father Candido no longer lives." Semantics asides, if the aim of the interrogatory was to determine Father Candido's whereabouts, then you cannot seriously find fault in Cardinal Rivera's response.

⁴ This statements is not meant to imply that Nicholas Aguilar returned to the Diocese after Cardinal Rivera's tenure as Bishop; rather, Cardinal can only speak to the period during which he was Bishop with personal knowledge.

Mayer Brown, LLP

Gary W. Dolinski, Esq.
September 6, 2007
Page 7

Cardinal Rivera responds to your concerns regarding Interrogatories Nos. 91-94 as the Diocese responded to concerns regarding Interrogatories Nos. 2-9 etc., *see supra*. Further, your demand that "both types of knowledge [*i.e.*, personal knowledge and, information and belief] need to be applied" makes no sense. Nor do the repeated complaints about the Defendants' states of knowledge in your letters make sense. Cardinal Rivera cannot alter his state of knowledge to satisfy your preferences: of some events/facts, Cardinal Rivera has personal knowledge; of others, his "knowledge" is limited to information and/or belief (of yet others, he knows nothing). To attempt to state with personal knowledge that which Cardinal Rivera "knows" only because of information and belief, or *vice versa*, would be to lie under oath.

Cardinal Rivera responds to your concerns regarding Interrogatories Nos. 95 and 96 as the Diocese responded to concerns regarding Interrogatories No. 102 and 103, *see supra*.

Concluding

Your letters seem to suggest that anything other than absolute acquiescence to your demands will result in motion practice and our prior experience with Carcione, Cattermole, Dolinski, et al., LLP in this matter suggests that you have little interest in discussing the issues contained herein or otherwise attempting accommodation. Nonetheless, we welcome attempts to resolve these issues via discourse and without burdening the Court or the parties with motion practice. You state that the purpose of your letters "is to 'meet and confer' in an attempt to avoid motion practice" We would hope that your conception of 'meet and confer' encompasses more than the issuance of demands, which, if not met, portend a motion to compel.

Please be advised the Defendants will oppose any attempt to continue the hearing date of October 16, 2007, to which all parties stipulated before the Court on Monday, August 27, 2007. This is the second time during the course of jurisdictional discovery that counsel for the Plaintiff has sought to continue the hearing on the Defendants' motion to quash service on grounds other than discovery disputes,⁵ only to later use the extended time period to pursue its previously unmentioned discovery concerns, which disputes were not considered in continuing the hearing date. Such tactics, and further attempts at continuance, will no longer be tolerated. Furthermore, the Defendants would appreciate it if Plaintiff's various counsels would attempt more robust communications with one another, so as to avoid the contradictions that appear to occur when the Defendants communicate with specific counsel individually. Frankly, we found several of the demands in your letter unprofessional because they reflect a lack of knowledge of the rules and

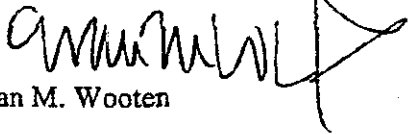
⁵ The stated motivation for the first continuance (*i.e.*, from June 19, 2007 to September 11, 2007), to which the Defendants agreed, was to permit the depositions of Cardinal Rivera and Bishop Aguilar Martinez. The stated motivation for the second continuance (*i.e.*, from September 11, 2007 to October 16, 2007), which the Defendants opposed but to which date they stipulated, was to permit the depositions of Cardinal Roger Mahony and Msgr. Thomas Curry of the Los Angeles Archdiocese.

Mayer Brown, LLP

Gary W. Dolinski, Esq.
September 6, 2007
Page 8

the record, and if you persist with them we will request sanctions.

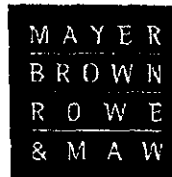
Sincerely,



Evan M. Wooten

cc: Steven R. Selsberg, Esq.
Michael Finnegan, Esq.
David E. Drivon, Esq.
Martin D. Gross, Esq.

28723735.2



August 21, 2007

BY FAX

Michael G. Finnegan
Jeff Anderson & Associates
E-1000 First National Bank Building
332 Minnesota Street
St. Paul, Minnesota 55101

Mayer, Brown, Rowe & Maw LLP
350 South Grand Avenue
25th Floor
Los Angeles, California 90071-1503

Main Tel (213) 229-9500
Main Fax (213) 625-0248
www.mayerbrownrowe.com

Evan M. Wooten
Direct Tel (213) 621-9450
Direct Fax (213) 625-0248
ewooten@mayerbrownrowe.com

Re: Mendez v. Mahony (Los Angeles Super. Ct. No.
BC 358718); Jurisdictional Discovery Privilege
Log

Dear Mike:

Please find enclosed a log of those documents withheld as privileged during jurisdictional discovery by Defendants Cardinal Norberto Rivera and the Diocese of Tehuacan.

Kind Regards,


Evan M. Wooten

Enclosure

cc: James Habel, Esq.;
David E. Drivon, Esq.; Gary W. Dolinski, Esq.; Martin D. Gross, Esq.

00000000

Berlin Brussels Charlotte Chicago Cologne Frankfurt Hong Kong Houston London Los Angeles New York Palo Alto Paris Washington, D.C.

Mayer, Brown, Rowe & Maw LLP operates in combination with our associated English limited liability partnership in the offices listed above.



Mendez v. Mahony et al. (Los Angeles Sup. Ct. No. BC358718):
 Documents Withheld as Privileged During Jurisdictional Discovery
 by Defendants Cardinal Norberto Rivera and the Diocese of Tehuacan

NO. 11111111

No.	Document Description	Privilege Asserted
1	Observations and conclusions regarding the claims against Cardinal Norberto Rivera in Los Angeles County Superior Court and suggested legal strategies, prepared at the direction of counsel for Cardinal Rivera	Work Product; Attorney-Client Privilege
2	Communications to counsel for Defendants Cardinal Rivera and the Diocese of Tehuacan regarding factual issues in case before the Los Angeles County Superior Court	Work Product; Attorney-Client Privilege
3	Communications to counsel for Defendants Cardinal Rivera and the Diocese of Tehuacan regarding factual issues in case before the Los Angeles County Superior Court	Attorney-Client Privilege

August 21, 2007

28717629.1

Mayer, Brown, Rowe & Maw LLP350 South Grand Avenue - 25th Floor
Los Angeles, California 90071-1503Main phone: (213) 229-9500
Main fax: (213) 625-0248

M	A	Y	E	R
B	R	O	W	N
R	O	W	E	
&	M	A	W	

FACSIMILE COVER SHEET

FROM:	Elena G. Griffin	Date/time:	Tuesday, August 21, 2007 12:07:20 PM
Direct Tel:	(213) 229-9584	Pages:	03
Direct Fax:	213-625-0248		ALL PAGES MUST BE NUMBERED

TO THE FOLLOWING:

Name	Company	Fax #	Telephone #
Lawrence E. Drivon	The Drivon Law Firm	1-209-463-7668	1-209-644-1234

MESSAGE:

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS BY MAIL. THANK YOU.

IF YOU HAVE ANY TRANSMISSION DIFFICULTY,
PLEASE CONTACT THE FACSIMILE DEPARTMENT AT (213) 229-9400

Berlin Brussels Charlotte Chicago Cologne Frankfurt Hong Kong Houston London Los Angeles New York Palo Alto Paris Washington, D.C.

Mayer, Brown, Rowe & Maw LLP operates in combination with our associated English limited liability partnership in the offices listed above.

SAN FRANCISCO

Daily Journal

THURSDAY,
SEPTEMBER 6, 2007
VOL. 113 NO. 172
\$ 2.00

SINCE 1893

© 2006 Daily Journal Corporation. All Rights Reserved

Musings of a Discovery Referee

Compliance with Production Requests is Harder Than it Looks

By Richard M. Coleman

Here are three instances in which respondents asserted they complied with the requested production. Did they?

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

C.C.P. Section 2031.240(b)(1) provides that the respondent: Identify with particularity any document ... to which an objection

is being made. [Emphasis added.]

The response is also ambiguous: "Without waiving these objections and subject to them."

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?

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

2. In a case where the demand requested certain records for five years prior to the incident that was the subject of the suit, the response stated: "Attached hereto are ... records ... going back to one year prior to the subject accident."

OK? No! The recommended ruling was to grant the motion to compel response to the five-year

period. The respondent may not unilaterally limit the time period for documents.

The respondent argued that it had objected to the demand because the five-year length of time was "burdensome and oppressive," and, pursuant to C.C.P. 2031.240(a), the respondent had complied with the non-objectionable part of the demand.

While correct in responding to what it believed was not objectionable, the respondent had not complied with C.C.P. 2031.240(b)(2), which calls for the party to "Set forth clearly the extent of, and the specific ground for, the objection."

An objection that a request is burdensome must be supported by detailed information demonstrating why compliance would be unduly burdensome and unreasonable. *West Pico Furniture Company v. Superior Court* 56C.2d 407, 418 (1961).

There is authority saying that the showing can be made after a motion to compel is brought. I suggest better practice is to be forthcoming in the response. It may lead to discouraging the motion or to an agreement modifying the request. It also is a showing of good faith which may be of help in opposing sanctions.

3. In a motion to compel, the respondent cited C.C.P. Section 2031.240(b)(2) in its opposition and argued: "The motion to compel must be denied because the

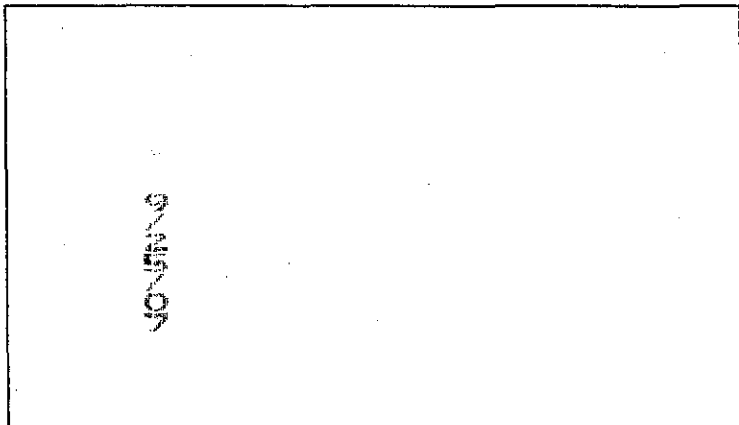
respondent has since produced all additional documents required."

Two considerations are involved here: (1) Any additional production must be accompanied by a verified response. C.C.P. 2031.250 (a) says, "The party to whom the demand for inspection response is directed shall sign the response under oath unless the response contains only objections." Compliance must meet the code requirements.

(2) While the additional production may be grounds to deny the motion, sanctions may still be awarded for forcing the party to bring the motion. California Rules of Court, Rule 3.1030 [formerly Rule 341]: "Sanctions despite no opposition — The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed."

In complying with discovery requests, there is no substitute for reading the applicable statutes.

Richard M. Coleman is a full-time neutral with Alternative Resolution Centers, as well as a discovery referee. He is the former president of the Los Angeles County Bar Association and a faculty member at Pepperdine University's Straus Institute for Dispute Resolution.



--- F.3d ---, 2007 WL 2458503 (C.A.9 (Nev.))
(Cite as: --- F.3d ---)

Merrick v. PaulRevere Life Ins. Co.
C.A.9 (Nev.),2007.

Only the Westlaw citation is currently available.

United States Court of Appeals,Ninth Circuit.
G. Clinton MERRICK, Jr., Plaintiff-Appellee,
v.

PAULREVERE LIFE INSURANCE COMPANY;
Provident Life & Accident Insurance; Unum
Provident, Defendants-Appellants.

G. Clinton Merrick, Jr., Plaintiff-Appellee,
v.

PaulRevere Life Insurance Company; Provident
Life & Accident Insurance; Unum Provident,
Defendants-Appellants.

Nos. 05-16380, 05-17059.

Argued and Submitted May 16, 2007.
Filed Aug. 31, 2007.

Background: Insured brought suit against disability insurer for breach of contract and breach of duty of good faith and fair dealing after it denied his total disability claim under an "own occupation" disability insurance policy. The United States District Court for the District of Nevada, James C. Mahan, J., entered judgment on jury verdict awarding insured \$1.65 million in compensatory and \$10 million in punitive damages and denied new trial motion. Insurer appealed.

Holdings: The Court of Appeals, Hall, Senior Circuit Judge, held that:

(1) evidence was sufficient to support verdict in favor of insured on bad faith claim;

(2) evidence was sufficient to support award of punitive damages;

(3) court did not clearly err in finding that insurer withheld discovery documents and thus in suppressing documents as sanction;

(4) court's instruction on punitive damages failed to adequately instruct jury that it could not punish insurer for conduct that harmed only nonparties; and

(5) Nevada law did not require award of fees to opposing party whenever insurer was found to have acted in bad faith.

Affirmed in part, reversed in part, vacated in part, and remanded.

[1] Federal Courts 170B ↩️

170B Federal Courts

Court of Appeals would exercise its discretion to consider issues that were not raised on motion for judgment as matter of law, and thus were not properly before appellate court, where issues were raised in motion for new trial, such that appellee was not misled and issues were fully explored below. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[2] Insurance 217 ↩️

217 Insurance

Jury verdict in favor of insured on Nevada bad faith claim was supported by evidence of insurer's improper "claim scrubbing" practices, which were employed on insured's claim for total disability based on chronic fatigue syndrome to eliminate expensive claim on "own occupation" disability insurance policy, including attempting to get insured to settle for fraction of total benefits and insisting on "objective medical evidence" of disability even when policy did not require it.

[3] Insurance 217 ↩️

217 Insurance

Evidence from which jury could have found that disability insurer undertook intentional course of conduct designed to ensure denial of insured's claim



--- F.3d ---, 2007 WL 2458503 (C.A.9 (Nev.))
(Cite as: --- F.3d ---)

under "own occupation" disability policy, and thus acted with fraud and malice, supported award of punitive damages under Nevada law. West's NRSA 42.005.

[4] Federal Civil Procedure 170A

170A Federal Civil Procedure

District courts have inherent power to exclude evidence as sanction for discovery abuses.

[5] Federal Civil Procedure 170A

170A Federal Civil Procedure

District court's finding that insurer withheld discovery documents, in support of its decision to suppress certain evidence placed in claims file after litigation commenced based on discovery abuses, was not clearly erroneous, as insurer's pre-trial conduct and the dearth of documents actually produced supported inference of withholding.

[6] Federal Courts 170B

170B Federal Courts

Insurer's objection to punitive damages instruction was sufficiently precise to preserve issue for review when it objected to giving instruction without five specific limitations.

[7] Damages 115

115 Damages

Due Process Clause forbids a State to from using a punitive damages award to punish a defendant for injury that it inflicts upon nonparties. U.S.C.A. Const.Amend. 14.

[8] Damages 115

115 Damages

Plaintiff may offer evidence on punitive damages claim regarding harm to other victims to show the reprehensibility of a defendant's conduct without violating prohibition under Due Process Clause against use of punitive damages to punish defendant for injuries inflicted on third parties. U.S.C.A. Const.Amend. 14.

[9] Federal Civil Procedure 170A

170A Federal Civil Procedure

Fact that proposed instruction is misleading does not alone permit the district judge to summarily refuse to give any instruction on the topic; where a proposed instruction is supported by law and not adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction.

[10] Damages 115

115 Damages

In bad faith insurance case, district court erred in failing to instruct the jury that, with respect to any award of punitive damages, it could not, consistent with due process, punish the defendants for conduct that harmed only nonparties. U.S.C.A. Const.Amend. 14.

[11] Costs 102

102 Costs

Under Nevada law, there is no categorical rule that finding of bad faith against insurer entitles opposing party to attorney fees award under statute permitting fees only where suit was maintained without reasonable ground or to harass prevailing party. West's NRSA 18.010(2)(b).

[12] Costs 102

102 Costs

Under Nevada law, courts are prohibited from expanding or altering legislative rules for fee-shifting.

Evan M. Tager, Mayer, Brown, Rowe & Maw, Washington, DC, for the defendants-appellants.
Thomas L. Hudson, Osborn Maledon, Phoenix, AZ, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Nevada; James C. Mahan, District Judge, Presiding. D.C. Nos. CV-00-00731-JCM, CV-00-00731-JCM.

--- F.3d ----, 2007 WL 2458503 (C.A.9 (Nev.))
(Cite as: --- F.3d ----)

Before CYNTHIA HOLCOMB HALL,
DIARMUID F. O'SCANNLAIN, and SANDRA S.
IKUTA, Circuit Judges.

HALL, Senior Circuit Judge:

*1 Defendants Paul Revere Life Insurance Company and Unum Provident Corporation (collectively "the insurers") appeal the district court's jury verdict awarding \$1.65 million in compensatory and \$10 million in punitive damages to plaintiff G. Clinton Merrick, Jr. for breach of contract and of the duty of good faith and fair dealing, stemming from the insurers' denial of Merrick's disability insurance claim. Among other issues, this appeal requires us to examine the constitutional limits upon the use of evidence of injury inflicted upon nonparties, as discussed in *Philip Morris USA v. Williams*, --- U.S. ---, ---, 127 S.Ct. 1057, 1063, 166 L.Ed.2d 940 (2007). The district court had jurisdiction pursuant to 28 U.S.C. § 1332. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for a new trial on punitive damages due to the district court's failure to give an adequate limiting jury instruction under *Williams*.

I. Background

A. History of Merrick's Claim

G. Clinton Merrick, Jr. purchased an "own occupation" disability policy from defendant Paul Revere Life Insurance Company in 1989. Under that policy, if Merrick was "unable to perform the important duties of [his] Occupation" due to "Injury or Sickness," he was entitled to a "total disability" benefit of \$12,000 per month for the duration of his disability. At the time, Merrick was one of three partners at a venture capital firm, responsible for raising capital, evaluating investment options, and participating as a director in companies in which the firm invested. Merrick had entered the venture capital arena following a successful career as a marketing executive, where his accomplishments included campaigns for Country Time Lemonade, Crystal Light drink mix, and the "Kool-Aid Man."

In the early 1990s, Merrick began suffering from fatigue, muscle pain, mental confusion, and other difficulties that affected his work performance. His attending physician, Dr. Simon Epstein, referred him to several specialists to identify the problem. In August 1993, Dr. Stuart Mushlin indicated that Merrick may be suffering from Chronic Fatigue Syndrome (CFS) and found him unable to work. This diagnosis coincided with his partners' decision to buy out Merrick's interest in the firm due to recent underperformance, which Merrick attributed to his health problems.

Merrick first alerted Paul Revere to his disability on May 31, 1994, stating that he was "suffering from a disabling condition" but was not yet filing a claim. Merrick then met with additional specialists and underwent a battery of specialized tests at the Mayo Clinic, some of which showed normal results and some of which indicated abnormalities. Dr. Michael Silber, summarizing the Mayo Clinic results, diagnosed Merrick as suffering from CFS and Lyme Disease, and advised that he "restart work at a much lower stress level than previously." By this time Merrick was under the regular care of Dr. Alan Rapaport rather than Dr. Epstein; both Epstein and Rapaport concurred with the CFS diagnosis and found Merrick unable to work.

*2 Following the Mayo Clinic's confirmation of the CFS diagnosis, Merrick filed a formal claim with Paul Revere. Paul Revere's in-house physician reviewed Merrick's documentation, questioned the diagnosis but ultimately agreed that the records supported a finding of "significant impairment." Therefore Paul Revere began paying out Merrick's claim as of December 1994, when his benefits began to accrue.

Merrick tried to start a new venture capital firm in late 1994, but his illness prevented him from getting beyond the initial stages. Merrick's other insurer, Northwestern Mutual, notified Paul Revere in June 1995 that Merrick was seeking to enter a new business venture. That August, a Paul Revere field representative offered to settle Merrick's claim for an amount equal to four months of disability benefits, citing the "return to work and recovery" provision of his claim. Merrick declined,

--- F.3d ----, 2007 WL 2458503 (C.A.9 (Nev.))
(Cite as: --- F.3d ---)

whereupon the representative left him with a check for one month of benefits. Merrick returned this check because he believed an endorsement provision on the check would have settled his claim upon cashing.

Paul Revere then arranged for Dr. James Donaldson to perform an Independent Medical Examination in December 1995. Dr. Donaldson's report was inconclusive: based on his tests, he concluded that Merrick "does not have either an active neurological problem or active Lyme disease" but did note his chronic fatigue, attributing it to depression. He also found that Merrick "deserves aggressive treatment, both pharmacotherapy and psychotherapy, by a seasoned psychiatrist." Paul Revere's claim file shows that the company interpreted Donaldson's report as supporting "significant impairment," and as implying that Merrick could not return to work.^{FN1} Dr. Rapaport, Merrick's treating physician, disputed Dr. Donaldson's conclusions and reiterated his CFS diagnosis.

Paul Revere conducted an intensive review of Merrick's claim file, which concluded that "there does not appear to be any neuropsychologically-based disability." The field representative again offered a compromise settlement, which Merrick refused. On December 9, 1996, Paul Revere denied Merrick's claim on the ground that the internal review showed "no objective medical documentation which supports an inability to perform the duties of your occupation as a venture capitalist." After Merrick protested, Paul Revere agreed to pay two additional months of benefits while Merrick provided the company with objective medical evidence. But the company's medical consultants rejected the two follow-up reports Merrick offered to document his illness, so Paul Revere continued to deny Merrick's claim. Merrick filed suit against Paul Revere and its parent corporation, Unum Provident, in April 2000, claiming breach of contract and of the duty of good faith and fair dealing.

B. Pretrial Motion in Limine

Merrick sought production of all documents added to Paul Revere's claim file after Merrick brought suit. The insurers resisted this request, citing among other reasons attorney-client privilege. After Merrick brought a motion to compel production, the magistrate judge warned the insurers that failure to produce a privilege log would waive privilege and instructed the insurers not to invoke the privilege unless the claim file actually included privileged material. Paul Revere then reiterated its privilege objection in a supplemental response to Merrick's document request, without producing a privilege log, and attested that "[n]otwithstanding and subject to these objections," it had produced all responsive documents.

*3 In the meantime, Merrick discovered that when he filed this suit, counsel for the insurers assumed active management of the Merrick claim file. As a result, he became concerned that the insurers were using the attorney-client privilege to shield otherwise responsive documents from discovery, by claiming they were privileged communications between the insurers and counsel rather than routine documents related to claims adjustment. Merrick sought another hearing before the magistrate judge, who granted Merrick's motion to compel, held all privileges waived and ordered the insurers to produce all responsive documents. The insurers produced no additional documents in response; indeed, Unum Provident reiterated its privilege claim in a later discovery response.

Merrick then brought a motion in limine to suppress all documents in his claim file acquired after litigation commenced, on the ground that the insurers were picking and choosing which documents would be produced in discovery. In response, the insurers stated that no documents had been withheld on the basis of privilege, although at the hearing counsel for the insurers suggested in passing that such privileged documents existed. Merrick found this representation incredible, given that the insurers had collected over 3,000 pages of documents following the filing of the suit yet produced only three short memos analyzing that material. Merrick insisted before the district judge that the insurers were hiding evidence and demanded production of all "post-litigation notes"

--- F.3d ---, 2007 WL 2458503 (C.A.9 (Nev.))
 (Cite as: --- F.3d ---)

and other documents reflecting the “thought processes” underlying management of Merrick’s claim. The district court judge granted the motion in limine, and at trial suppressed much of this documentation on the ground that defendants were picking and choosing which documents to produce. After the court granted the motion in limine, the insurers submitted a declaration stating that they did not with-hold any documents on the basis of privilege.

C. Trial

At trial, Merrick argued that the denial of his claim was part of a larger scheme to “scrub” the company’s liability for expensive and noncancellable “own occupation” disability policies. Merrick relied largely upon the testimony of Stephen Prater, an insurance industry expert, who testified regarding Unum Provident’s allegedly aggressive and unethical claim-closing practices. These practices included pressuring claimants to settle for a fraction of total benefits, insisting upon “objective medical evidence” of a disability even when the policy did not require such evidence, building a stable of biased Independent Medical Examiners who would support claim denials, and holding regular “round table” meetings with lawyers, doctors, and claims handlers designed to “tri-age” the most expensive claims. Merrick introduced a substantial number of internal Unum Provident memos showing the evolution of this scheme during the early 1990s, and Prater testified regarding the tremendous financial gains Unum Provident posted by adopting these “best practices.”

*4 Unum Provident announced a merger with Paul Revere, Merrick’s insurer, in April 1996. Prater testified that in the months leading up to the merger, Unum Provident began importing its “best practices” procedures to the Paul Revere organization, including training its claims representatives in “objectification” and “round tabling” Paul Revere claims. Prater testified that Paul Revere representatives received this training shortly before the company began re-evaluating Merrick’s claim (which it had initially paid out). Prater testified that the company’s handling of Merrick’s claim was

consistent with many of Unum Provident’s improper practices, including attempting to settle for a fraction of the total amount (and threatening to sue for reimbursement if Merrick refused to settle), insisting upon “objective medical evidence” and seeking to get Merrick’s claim off the books before the end of the fiscal year. Merrick also argued that the explanations Paul Revere gave Merrick for denying his claim were inconsistent with the company’s internal documentation, which largely supported the conclusion that Merrick suffered “significant impairment.”

The jury returned a verdict for Merrick, awarding him \$1,147,355 in unpaid benefits and \$500,000 for mental and emotional distress, to be paid by the insurers jointly and severally. It also imposed \$2,000,000 in punitive damages on Paul Revere and \$8,000,000 on Unum Provident. The insurers brought a renewed motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure and a motion for a new trial under Rule 59. The judge denied these motions and awarded Merrick \$500,000 in attorney’s fees. The insurers timely appealed.

II. Discussion

The insurers appeal several decisions made by the court below. We address each argument in turn.

A. Motion for New Trial

In their opening brief, the insurers argue that they are entitled to judgment as a matter of law on the issues of bad faith and punitive damages. Merrick responds, correctly, that the insurers did not include these claims in their Rule 50 motion below, meaning the issue is not properly before us now. *Desrosiers v. Flight Int’l, Inc.*, 156 F.3d 952, 957 (9th Cir.1998). In their reply brief, the insurers concede the point and ask the court to construe their argument as an appeal of their Rule 59 request for a new trial, which did raise these arguments.

[1] Generally, issues raised for the first time in a reply brief are considered waived. *Eberle v. City of*

--- F.3d ---, 2007 WL 2458503 (C.A.9 (Nev.))
 (Cite as: --- F.3d ---)

Anaheim, 901 F.2d 814, 818 (9th Cir.1990). Here, however, we exercise our discretion to consider the insurers' claim because the appellee has not been misled and the issue has been fully explored. See *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1332 (9th Cir.1981). The insurers' Rule 59 argument is identical to their Rule 50 argument, to which Merrick has responded. We note, however, the differing standard of review. Whereas a properly presented Rule 50 question is reviewed de novo, we give "great deference" to the trial court's denial of a motion for a new trial, and will reverse "for a clear abuse of discretion only where there is an absolute absence of evidence to support the jury's verdict." *Desrosiers*, 156 F.3d at 957 (emphasis in original) (quoting *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656-57 (8th Cir.1995) (White, J.)).

*5 [2] Given this deferential standard of review, we find the evidence more than sufficient to support the jury's bad faith verdict. Under Nevada law, "[b]ad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct." *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 956 (Nev.1998) (citation omitted). Viewing the evidence in Merrick's favor, *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 774 (9th Cir.2005), the jury could have found that the insurers conducted a biased investigation of Merrick's claim as part of an improper company-wide initiative to target and terminate expensive "own occupation" policies. It also could have found that the insurers misrepresented the terms of the policy by requiring Merrick to present "objective medical evidence" of his disability. The Nevada Supreme Court recognizes biased investigations and misrepresentation of policy terms as evidence of bad faith. See *Powers v. U.S.A.A.*, 114 Nev. 690, 962 P.2d 596, 604 (Nev.1998); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 956 (Nev.1998). We have previously found that these defendants' improper claim-scrubbing supports a finding of bad faith claim denial in a case decided under California law, which like Nevada anchors bad faith liability in the reasonableness of the insurer's action. See *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1010-11 (9th Cir.2004).

[3] Similarly, there was substantial evidence before the jury that the insurers should be liable for punitive damages. Under Nevada law, a plaintiff may secure punitive damages upon showing "by clear and convincing evidence" that the defendant is "guilty of oppression, fraud, or malice, express or implied." Nev.Rev.Stat. 42.005. Here, the jury could have concluded that by subjecting Merrick's claim to improper claim-scrubbing procedures, the insurers "undertook an intentional course of conduct designed to ensure the denial" of the claim. See *Powers*, 962 P.2d at 604-05. Both the Nevada Supreme Court and the Ninth Circuit have held that such conduct could constitute "fraud and malice." *Id.* at 605; see also *Hangarter*, 373 F.3d at 1012-13 (California law).^{FN2}

Because we cannot say that there was a "complete absence of evidence" to support the jury's verdicts, we affirm the district court's denial of the insurers' Rule 59 motion.

B. Motion in Limine

[4][5] The insurers also challenge the district court's order suppressing certain evidence placed in the claim file after litigation commenced. The district court granted this motion upon finding that the insurers withheld evidence that they were ordered to produce regarding their post-litigation 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 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 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 upon the record, we cannot conclude that the district court's finding that the insurers withheld evidence is clearly erroneous. The insurers' pretrial behavior gives rise to such an inference. The insurers invoked the privilege in response to a specific document production request, and continued to do so even after the magistrate judge instructed them not to

--- F.3d ---, 2007 WL 2458503 (C.A.9 (Nev.))
(Cite as: --- F.3d ---)

invoke the privilege unless the privilege was actually shielding documents. Their responses expressly objected on the basis of privilege and attested that "subject to these objections," their production was complete.^{FN3} Only after the magistrate ordered the privileges waived (in response to Merrick's assertion that defendants were withholding evidence), and Merrick brought his motion in limine, did the insurers state unequivocally that no documents were withheld on the basis of privilege.^{FN4} Even then, counsel's statement at the hearing could be understood as admitting the existence of withheld documents.

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

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

C. Punitive Damages Jury Instruction

[6] Merrick's bad faith and punitive damages claims turned upon linking Paul Revere's handling of Merrick's claim to a decade of allegedly improper claims handling practices at Provident. Prater testified regarding Provident's practices in substantial detail. Concerned that the jury would punish them for Provident's history of improper behavior, the insurers requested the following instruction, which the district court denied:
In deciding whether or in what amount to award

punitive damages, you may consider only the specific conduct by Defendants that injured Plaintiff. You may not punish Defendants for conduct or practices that did not affect Plaintiff, even if you believe that such conduct or practices were wrongful or deserving of punishment. The law provides other means to punish wrongdoing unrelated to Plaintiff.

The insurers claim that this denial abridged their Due Process rights by exposing them to unconstitutionally excessive punitive liability.

Initially, Merrick asserts that the insurers have waived the jury instruction issue. *Voorhies-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir.2001). We disagree. Although the Ninth Circuit is "the strictest enforcer of Rule 51," the record here shows that the insurers "objected at the time of trial on grounds that were sufficiently precise to alert the district court" to the specific nature of the defect. *Id.* at 713-14 (citation omitted). The insurers explicitly objected to the court's punitive damages instructions without "some limiting ... instructions relative to the *Campbell* decision [*State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)] in terms of what the jury can look at and not look at," and set forth five specific limiting instructions on those points. This objection is sufficiently precise to "bring into focus the precise nature of the alleged error" as being inconsistent with *Campbell*. *Voorhies-Larson*, 241 F.3d at 714.

[7] The Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Philip Morris USA v. Williams*, --- U.S. ---, ---, 127 S.Ct. 1057, 1063, 166 L.Ed.2d 940 (2007). As the Supreme Court has recently explained, such punishment runs afoul of the maxim that a state must afford a defendant an opportunity to present every available defense. *Id.* (citing *Lindsey v. Normer*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972)). A defendant "threatened with punishment for injuring a nonparty victim" may be unable to present defenses applicable to the nonparty victim, if those defenses do not also coincide with those relevant to the plaintiff's claim. *Id.* In addition, punishment for

--- F.3d ----, 2007 WL 2458503 (C.A.9 (Nev.))
 (Cite as: --- F.3d ---)

nonparty injury adds “a near standardless dimension to the punitive damages equation,” as jury speculation regarding the number of nonparties injured and the extent of their injuries magnifies traditional due process concerns regarding the arbitrariness, uncertainty, and lack of notice afflicting a punitive award.

*7 [8] *Williams* clarified that a plaintiff may offer evidence of “harm to other victims” to show the reprehensibility of a defendant's conduct in this case. *Id.* at 1063-64. “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.” *Williams*, 127 S. Ct at 1064. But “a jury may not go further than this and use a punitive damages verdict to punish a defendant *directly* on account of harms it is alleged to have visited on nonparties.” *Id.* (emphasis added). Where there is a “significant” risk that the jury might do so—a risk generated, for example, by “the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury”—a court, upon request, must “provide *some* form of protection” to assure that juries “are not asking the wrong question.” *Id.* at 1064, 1065.

In this case, the evidence that was introduced at trial created a significant risk that the jury would punish the defendants for Provident's history of improper behavior and the damages this behavior caused to victims other than Merrick. Prater testified at length regarding Provident's practices based on his analysis of “over a hundred thousand” internal Provident documents written throughout the 1990s, many of which were entered into evidence. Prater and the memos describe Provident's decade-long scheme in great detail, highlighting unethical behavior by Provident that was unrelated to Paul Revere's handling of Merrick's claim.^{FN6} For example, Provident held round-table discussions to terminate expensive policies, destroyed all records of the meetings and labeled them as “legal” solely to shield them by privilege. But Merrick offered no evidence that his claim was improperly “round-tabled.” Prater also explained that Provident cultivated biased independent medical examiners to support termination decisions, although Merrick

seemingly did not allege that Dr. Donaldson's examination of him was biased. In his closing argument, Merrick's attorney repeatedly referenced Provident's pattern of allegedly unethical behavior, including practices not alleged to have occurred in Merrick's case. He also asked, in the context of punitive damages, “[h]ow do you punish a corporation that's making on the order of \$132 million a quarter in terminations? That's what you have to decide.” We conclude that the evidence offered here creates a “significant risk” that the jury would assess punitive damages to punish this pattern of unethical behavior rather than the conduct that affected Merrick specifically.^{FN7}

Merrick argues that, taken as a whole, the instructions adopted by the court adequately protected the insurers' due process rights. We disagree. The punitive damages instruction stated that “[y]ou may in your discretion award such damages, if, but only if, you find by a clear & convincing evidence that said defendant was guilty of oppression fraud or malice in the conduct upon which you base your finding of liability.” The verdict form further asked whether the insurer “act[ed] with oppression, fraud, or malice [sic], express or implied, in its dealings with plaintiff such to justify an award of punitive damages.” At most, these instructions address *liability* for punitive damages but do not prevent the jury from setting an *amount* of damages that includes direct punishment for harm to others. *Williams* states clearly that “a jury may not ... use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” *Id.* at 1064. A jury instruction, like that presented here, that allows (or does not preclude) direct punishment for nonparty harm runs afoul of this prohibition and invites precisely the improper jury speculation—as to, for example, the number of nonparty victims or the extent of their injury—that *Williams* sought to avoid. *Id.* at 1063; *see also Campbell*, 538 U.S. at 423 (“Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant.”).

*8 More important, the instructions given did not provide the jury with clear direction regarding the

--- F.3d ---, 2007 WL 2458503 (C.A.9 (Nev.))
 (Cite as: --- F.3d ---)

proper and improper uses of Merrick's "bad company" evidence. As noted above, the jury was permitted to consider this evidence when determining the reprehensibility of the insurers' actions toward Merrick, but it could not directly punish the defendants for harm to victims other than Merrick. When evidence is admissible for a limited purpose, the opponent is entitled to a limiting instruction admonishing the jury not to use the evidence for a forbidden purpose. Fed.R.Evid. 105; see *Borunda v. Richmond*, 885 F.2d 1384, 1388 (9th Cir.1988). No such instruction issued here. In light of *Williams'* statement that it is "constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one," 127 S.Ct. at 1064 (emphasis added), we conclude that the instruction issued in this case was inadequate.

[9] Merrick also argues that the court properly denied the proposed instruction because the insurers' instruction was misleading. *Mitchell v. Keith*, 752 F.2d 385, 388 (9th Cir.1985). Merrick is correct that the first sentence of the proposed instruction is misleading because it fails to indicate that the jury may consider harm to others as part of its reprehensibility analysis. *Williams*, 127 S.Ct. at 1063-64. But the fact that the proposed instruction was misleading does not alone permit the district judge to summarily refuse to give any instruction on the topic. In *Mitchell*, the primary case upon which Merrick relies, the court affirmed the district court's denial because the proposed instruction was misleading *and* the existing instruction adequately addressed the movant's concern. *Mitchell*, 752 F.2d at 389. Where a proposed instruction is supported by law and *not* adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction. See *Ragsdell v. Southern Pac. Transp. Co.*, 688 F.2d 1281, 1283 (9th Cir.1982).

[10] We therefore conclude that the district court erred in failing to instruct the jury that it could not punish the defendants for conduct that harmed only nonparties. *Williams* suggests in passing that a panel may remedy this error either by granting a new trial or reducing the amount of punitive damages. *Williams*, 127 S.Ct. at 1065. While remittitur may

remedy a jury award deemed unconstitutionally excessive, see *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 963 (9th Cir.2005), it seems less appropriate where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount. We therefore vacate the punitive damages verdict and remand the case for a new trial on punitive damages. *Larez v. Holcomb*, 16 F.3d 1513, 1520 (9th Cir.1994). In light of this holding, we decline to reach the insurers' challenge that the punitive award was unconstitutionally excessive. See *Williams*, 127 S.Ct. at 1065.

D. Attorney's Fees

*9 [11] Merrick sought attorney's fees under Nevada Revised Statute § 18.010(2)(b), which permits a fee award only where the opposing party maintained the suit "without reasonable ground or to harass the prevailing party." At the post-trial hearing, the district court explicitly found that the evidence was such that "the case could have gone either way." But it nonetheless reluctantly awarded Merrick fees based upon its reading of *Farmers Home Mutual Insurance Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (Nev.1986). In *Fiscus*, the Nevada Supreme Court affirmed the district court's award of attorney's fees in a bad faith insurance case. The district court here interpreted *Fiscus* as creating a categorical rule that "a finding of bad faith against the insurance company was at least tantamount to finding that [insurer's] defense was maintained without reasonable ground." The trial judge stated clearly that "[w]ithout the *Fiscus* case, I don't think I would award attorneys' fees in this case."

[12] The district court misread *Fiscus*, although its mistake was understandable. The trial court in *Fiscus* granted attorney's fees on the ground that where the bad faith ruling is based on an insurance company's unreasonable interpretation of a policy, then a defense based on the same unreasonable interpretation constitutes an unreasonable ground for maintaining the suit. *Fiscus*, 725 P.2d at 235-37. But the Nevada Supreme Court explicitly found

--- F.3d ---, 2007 WL 2458503 (C.A.9 (Nev.))
(Cite as: --- F.3d ---)

that, in light of the district court's factual findings regarding the extent of Farmers' bad faith, it was "unnecessary" to address this legal conclusion. *Id.* at 237 n. 3. *Fiscus* therefore declined to create a categorical rule. We note that four months after *Fiscus* was decided, the same court in another bad faith insurance case reviewed the trial court's bad faith and attorney fee findings separately; if *Fiscus* had indeed created a categorical rule there would have been no need to separate the analysis. See *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d 1352 (Nev.1986). Moreover, even if *Fiscus* purported to create a categorical rule, it could not have, as Nevada law prohibits courts from expanding or altering legislative rules for fee-shifting. See *First Interstate Bank v. Green*, 101 Nev. 113, 694 P.2d 496, 498 (Nev.1986).

The district court's award was therefore based upon a misreading of *Fiscus*. The court explained that absent the *Fiscus* decision it would not have awarded fees, and Merrick seemingly does not challenge the court's finding that this case "could have gone either way." We therefore reverse the district court's attorney fee award.

III. Conclusion

We affirm the district court's denial of the insurers' motion for a new trial and its grant of Merrick's motion in limine. We vacate the punitive damages verdict and remand for a new trial on punitive liability. We also reverse the attorney fee award. Each party shall bear its own costs on appeal.

*10 AFFIRMED in part; REVERSED in part; VACATED in part, and REMANDED.

FN1. Dr. Donaldson's report did not explicitly state whether he thought Merrick could return to work. Paul Revere's internal examiner recommended that the company ask Donaldson to clarify his findings in this regard, but apparently this follow-up never happened.

FN2. The insurers argue that Merrick

offered insufficient evidence linking Unum Provident's illicit practices to Paul Revere's handling of this claim, because Paul Revere denied the claim before the merger was completed. Merrick showed that Unum Provident engaged in claim-scrubbing prior to the merger, and that Paul Revere began importing Unum Provident's "best practices" in claim management before the merger was completed. He also showed that his claim, which Paul Revere initially granted, was re-evaluated and ultimately denied shortly after this transition period began. Prater testified that Paul Revere's behavior, such as pressuring the claimant to settle before year's end and relying upon a lack of objective medical evidence to terminate an expensive claim, was consistent with Unum Provident's tactics. Therefore we cannot say that there was an "absence of evidence" supporting Merrick's claim that Paul Revere adopted Unum Provident's illicit behavior before the merger was finalized and applied it in this case.

FN3. As noted above, Unum Provident continued to use this language even after the magistrate judge ordered all privileges waived.

FN4. Defendants claim they offered an unequivocal denial prior to the magistrate's ruling. The record does not support this assertion. The insurers' opposition to the motion to compel states that they "are not in possession of any additional documents responsive to these requests" as of May 31, 2001, but this statement is followed on the next page by a reiteration of the privilege with respect to this specific document request. We also note that subsequent events cast doubt upon the truth of that denial: following the hearing on the motion to compel, defendants produced a February 2, 2001 e-mail from Dr. Cusher to Dave Layden, the in-house counsel managing the Merrick file and a report from Dr. Cusher dated May 5, 2001. The dates on those

--- F.3d ----, 2007 WL 2458503 (C.A.9 (Nev.))
(Cite as: --- F.3d ----)

documents strongly suggest that they were in the insurers' possession, but not disclosed, on May 31, 2001.

FN5. One was an e-mail from Dr. Cusher to in-house counsel and therefore could have been considered privileged, as defendants noted in their disclosure.

FN6. As noted above, Merrick showed that Paul Revere's handling of his claim displayed *some* of Provident's allegedly unethical practices, such as pressuring claimants to settle and insisting upon objective medical evidence of a claim.

FN7. As the insurers note, the fact that the jury assessed \$2 million in punitive damages against Paul Revere and \$8 million against Unum/Provident-which did not handle Merrick's claim but was the primary focus of Prater's testimony-suggests that the jury did assess damages to punish Provident's conduct against nonparties.

C.A.9 (Nev.),2007.

Merrick v. Paul Revere Life Ins. Co.

--- F.3d ----, 2007 WL 2458503 (C.A.9 (Nev.))

END OF DOCUMENT

10/11/07