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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 9<sup>th</sup> 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  
25 evidence. [Emphasis added.]

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 9<sup>th</sup> 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 9<sup>th</sup> 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  
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1 discretion and the underlying factual determinations for clear error. *Valley*  
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7 **do so even after the magistrate judge instructed them not to invoke the**  
8 **privilege unless the privilege was actually shielding documents. Their**  
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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 9<sup>th</sup> 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 9<sup>th</sup> 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 9<sup>th</sup> 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 9<sup>th</sup> 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