IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIAN ELLIOTT,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A.No. 09-611-SLR**
	:	
THE MARIST BROTHERS OF THE SCHOOLS, INC., et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF HIS RULE 37 MOTION TO COMPEL DEFENDANT THE MARIST BROTHERS OF THE SCHOOLS, INC. TO RESPOND TO PLAINTIFF'S WRITTEN DISCOVERY REQUESTS

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NATURE AND STAGE OF THE PROCEEDING

On June 23, 2009, plaintiff Brian Elliott filed this childhood sexual abuse action in the Superior Court of the State of Delaware against the Marist Brothers of the Schools, Inc. ("Marists"), Brother Damian Galligan and other defendants, arising out of the sexual abuse inflicted on plaintiff by Galligan beginning when plaintiff was an eight year old child and continuing until age 13. The case was removed to this Court in August 2009.

As discussed in greater detail below, in December 2009, plaintiff issued written discovery to the defendants. Defendants responded to this discovery in January 2009. This is plaintiff's opening brief in support of his Fed.R.Civ.P. 37 motion to compel defendant Marists to respond to plaintiff's written discovery.

SUMMARY OF THE ARGUMENT

1. All of plaintiff's discovery requests are reasonably calculated to lead to the discovery of admissible evidence and are otherwise proper both under the federal rules and the case law.

2. As opinions from both the Delaware Superior Court and this Court attest, because the State of Delaware explicitly abrogated by statute the medical privilege in childhood sexual abuse cases, the Marist defendants must produce the medical records of defendant Galligan.

3. Both federal and state case law are clear that neither the attorney-client privilege nor the work product doctrine can be used to hide facts contained in documents, even when the documents themselves are not discoverable. Accordingly, even if the Court finds that some of the overbroad defense privilege assertions are proper, defendant must still disclose the factual information contained within these documents.

4. No privilege exists which allows defendant to withhold the names of vital fact witnesses, without which it is impossible for plaintiff to prove his case. Accordingly, this

information must be produced.

STATEMENT OF FACTS

A. Interrogatories. On December 18, 2009, plaintiff served his First Set of Interrogatories on defendant Marists. (D.I. 33). On January 18, 2010, the Marists filed their responses. (D.I. 44).[1] Supplemental responses were served on February 15, 2010. (Tab A).[2]

1. Reports of Abuse. Interrogatories # 3, 8, 9 all seek responsive information related to reports of abuse and other inappropriate contact the individual defendant had with children. The interrogatories state:

> 3. Identify any allegations or complaints (official or unofficial) made against [defendant Galligan] for any type of misconduct, including, but not limited to, inappropriate contact with and/or sexual abuse or molestation of children, the witnesses thereto, the facts of the complaints or incident and any documents and their custodian.
>
> 8. Identify and describe any and all reports of sexual misconduct received by you regarding [defendant Galligan], whether oral or written, and identify the witnesses and documents which refer or relate thereto.
>
> 9. Identify and describe any and all reports of inappropriate conduct and/or misconduct received by any defendant or any employee or agent of any defendant regarding [defendant Galligan], whether oral or written, the witnesses and documents which refer or relate thereto.

The Marists' supplemental response to each of these interrogatories was identical, stating:

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[1] In violation of Fed.R.Civ.P. 33(b)(5), the Marists failed to swear to the veracity of the answers given. Despite an e-mail to defense counsel requesting the required sworn verification, no response was ever received.

[2] Again in violation of Fed.R.Civ.P. 33(b)(5), the Marists yet again failed to swear to the veracity of the answers given. As of the date of this filing, no signature attesting to the veracity of the answers has been received.

> Answer: The Answering Defendant objects to this interrogatory on the grounds that it is vague, over broad, burdensome, oppressive and not reasonably calculated to lead to the discovery of admissible evidence. Answering Defendant further objects on the grounds that this Request seeks irrelevant information and documents post-1984, and it is not limited in scope to the relevant time period. By way of further answer, and subject to and without waiving any objection, Answering Defendant responds that any document responsive to this Interrogatory is privileged as attorney work product. It further objects on the grounds that the identity of any accuser who is not a party to this case is confidential and private.

2. Counseling or Other Treatment. Interrogatory #1 seeks responsive information related to counseling or other treatment the individual defendant received. The interrogatory states:

> 1. Identify any counseling or other medical, psychiatric or other treatment for [defendant Galligan], either before or after the incidents alleged by plaintiff in the complaint, and describe the content of any oral or written reports of the treatment, the authors and recipients of the reports.

The Marists' response to this interrogatory states:

> Answer: The Answering Defendant objects to this interrogatory that it is vague, over broad, burdensome, oppressive and not reasonably calculated to lead to the discovery of admissible evidence. Answering Defendant further objects on the grounds that this Request seeks irrelevant information and documents post-1984, and it is not limited in scope to the relevant time period. Answering defendant further objects that the information sought in this Interrogatory is privileged pursuant to the medical privilege, and must be sought from Defendant Galligan himself.

B. Requests for Production. On December 18, 2009, plaintiff also served his First and Second sets of Requests for Production on defendant Marists. (D.I. 29, 33). On January 18, 2010, the Marists filed their responses and a privilege log (D.I. 44), which were themselves followed by supplemental responses (Tab B) and a supplemental privilege log (Tab C) on

February 15, 2010.

1. Abuse, Reports of Abuse, Disciplinary Action and Similar Documents.

Plaintiff's First Request for Production # 1-3, 8-11, 14-15, 17, 39-40, 61-62 all seek responsive documents related to sexual abuse, reports of sexual abuse, disciplinary action and other similar documents related to defendant Galligan.

In response and in its privilege log, the Marists asserted:

> Attorney-Client Privilege; Attorney Work Product; Confidentiality of a Non-Party, DRE 502, DRE 505.

a. The Records Withheld. The 125 records identified in defendant's privilege log that are being challenged in this motion are identified by the bates stamp identifiers: Mar-0037-0162.

2. Medical, Psychological, Counseling Records and Testing. Plaintiff's First Request for Production # 6-7, 74-79, 88 all seek responsive documents related to defendant Galligan's medical, psychological, counseling treatment and testing.

In response and in its privilege log, the Marists asserted:

> Medical Privilege, DRE 503 and objection of counsel for DG. These records should be sought from Galligan.

a. The Records Withheld. The 29 records identified in defendants' privilege log that are being challenged in this motion are identified by the bates stamp identifiers: Mar-0024-0036, 0163-0180.

ARGUMENT

I. THESE DISCOVERY REQUESTS ARE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE AND ARE OTHERWISE PROPER.

A. Introduction. As a preliminary matter, this Argument responds to the defense claim

that the discovery requests are vague, over broad, burdensome, oppressive and not reasonably calculated to lead to the discovery of admissible evidence.

The broad scope of discovery is governed by Fed.R.Civ.P. 26(b), which states -

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense - including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

B. Reasonably Calculated to Lead to the Discovery of Admissible Evidence. All of the requested discovery is reasonably calculated to lead to the discovery of admissible evidence as follows.

1. Propensity Evidence. As the Third Circuit has held, the plain text of Federal Rule of Evidence 415 allows plaintiff to use evidence of Galligan's sexual abuse of numerous third persons as propensity evidence to prove that he also sexually assaulted plaintiff. Fed.R.Evid. 415, states -

> In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

Fed.R.Evid. 415(a). As the Third Circuit has explained, "Rules 413-15 establish exceptions to the general prohibition on character evidence in cases involving sexual assault and child molestation." Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 151 (3d Cir. 2002).

The Third Circuit has determined that the admissibility standard under Rule 415 is -

> whether a reasonable jury *could find* by a preponderance of the evidence that the past act was an 'offense of sexual assault' under Rule 413(d)'s definition and that it was committed by the defendant.

Id. at 154-55 (emphasis added).[3] Continuing, the "offense of sexual assault" or "child molestation" under Rule 415(a) is not limited to convictions for such sexual offenses. Id. at 151. Instead, it includes "uncharged conduct." Id.; accord Morris v. Eversley, 2004 WL 856301, *1 (S.D.N.Y. April 20, 2004). Accordingly, all of the discovery seeking to identify other abuse victims of Galligan's is relevant to establishing liability and that plaintiff was in fact abused.[4]

2. Establishing Gross Negligence. This evidence also is necessary for establishing notice to the defendants - which is a basis for a finding of gross negligence under the Child Victim's Act - specifically, what they knew and when regarding the individual defendant's tendencies to sexually abuse children. Similarly, this evidence also is relevant to determining the adequacy of defendant's response to the threat posed to children by the individual defendant in light of their existing knowledge.[5]

3. Punitive Damages. Continuing, this evidence also is relevant to determining whether punitive damages should be awarded against defendants. The U.S. Supreme Court has explained that in deciding to award punitive damages, a jury should consider: (1) whether "the conduct involved repeated actions or was an isolated incident;" (2) whether the defendant's actions were "intentional ... or mere accident," and (3) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others." State Farm Mut. Auto.

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[3] This standard "does not require that a trial judge make a finding by a preponderance of the evidence." Id. at 152. Instead, it "simply requires the judge to ask whether 'a jury could reasonably' make such a finding." Id.

[4] As revealed by much of the sister litigation in state and federal court, evidence regarding additional victims is often found in the medical records of an individual perpetrator.

[5] This same evidence also is relevant to establishing plaintiff's other merits theories, such as fraud, conspiracy and aiding and abetting.

Ins. Co. v. Campbell, 538 U.S. 409, 419 (2003). Whether the individual defendant sexually abused numerous individuals is highly relevant to this analysis. Similarly, the institutional defendant's knowledge of such abuse and reckless indifference to protecting children from the same also is key to the punitive damages analysis.

4. Finding Fact Witnesses. Continuing, all of this discovery also will aid plaintiff in discovery of fact witnesses as well as the locations of other documents with which to prove plaintiff's case.

5. Non-Propensity Purposes. This discovery also will be relevant to establishing numerous non-propensity purposes under Fed.R.Evid. 404(b), such as plan, method, absence of mistake or accident.

C. Other Objections. Defendant also claims that these discovery requests are vague, over broad, burdensome and oppressive. Plaintiff contacted defense counsel requesting elaboration on this objection (Tab D), but no response was ever received. Regardless, plaintiff believes that all of his requests are proper.

II. THERE IS NO MEDICAL PRIVILEGE IN DELAWARE FOR CHILD ABUSERS.

A. State of Delaware Medical Privilege Law Applies. Under Fed.R.Evid. 501, because this is a diversity case, State of Delaware law of medical privilege applies.[6]

B. The Delaware General Assembly Specifically Abrogated the Medical Privilege in Childhood Sexual Abuse Cases. Under Delaware law, it cannot be disputed that there is no

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[6] See Pagano v. Hadley, 100 F.R.D. 758, 760 (D.Del. 1984); Finley Assos. Inc. v. Sea & Pines Consol. Corp., 714 F.Supp. 110, 116 (D.Del. 1989); Burnett v. Ghassem Vakili, M.D., P.A., 685 F.Supp. 430, 431 (D.Del. 1988); Samuelson v. Susen, 576 F.2d 546, 549 (3d Cir. 1978); Valente v. Pepsico, Inc., 68 F.R.D. 361, 366 n.10 (D.Del. 1975); cf. U.S. v. Fed'n of Physicians & Dentists, Inc., 63 F.Supp.2d 475 (D.Del. 1999) (specifically applying State of Delaware medical privilege in a federal question case).

such privilege in child abuse cases. 16 Del.C. § 909 states:

> No legally recognized privilege, except that between attorney and client and that between priest and penitent in a sacramental confession, shall apply to situations involving known or suspected child abuse, neglect, exploitation or abandonment and shall not constitute grounds for failure to report as required by § 903 of this title or to give or accept evidence in any judicial proceeding relating to child abuse or neglect.

Since the enactment of the Delaware Child Victim's Act, 10 Del.C. § 8145, the Delaware Courts have twice specifically addressed the self-evident issue of whether the Delaware General Assembly meant what it very clearly said by enacting 16 Del.C. § 909. And as both Judge Young and Judge Scott of the Delaware Superior Court have repeatedly held, by enacting 16 Del.C. § 909, the Delaware General Assembly specifically abrogated the physician/psychotherapist privilege in child abuse cases. See Whitwell v. Archmere Academy, Inc., C.A.No. 07C-08-006-RBY (Del.Super. May 29, 2008) (Tab E); John Coe #1 v. Catholic Diocese of Wilmington, Inc., C.A.No. 08C-10-172-CLS (Del.Super. March 20, 2009) (Tab F). Similarly, defense reliance on Del.R.Evid. 503 has already been rejected by both Judge Scott and Judge Young. Whitwell, supra; John Coe #1, supra. Accordingly, there is no medical privilege of any type protecting these records and they must be produced.

1. This Federal Court Should Defer to the Delaware State Court's Interpretation of Delaware Law. Because the Delaware Superior Court has twice held that there is no medical privilege in child sexual abuse cases, this Court should defer to this interpretation of this state law issue and follow the lead of that Court. "[I]t is a well-settled maxim of federalism that Federal tribunals should defer to a state's interpretation of its own laws." State of Pa. v. Riley, 84 F.3d 125, 131 (3d Cir. 1996). As the Third Circuit has explained, "[w]hen interpreting a State [law], we generally defer to the interpretations of state trial or intermediate appellate courts." 181 South Inc. v. Fischer, 454 F.3d 228, 230 n.1 (3d Cir.

2006); see Intel Corp. v. Silicon Storage Tech., Inc., 20 F.Supp.2d 690, 694 (D.Del. 1998) ("In applying [ ] Delaware ... statute[s], th[is court] will defer to the interpretations of the Delaware state courts."); Fogg v. Phelps, 579 F.Supp.2d 590, 615 (D.Del. 2008) (noting that the Court must defer to a Delaware court's interpretation of Delaware law).

2. This Court Also Has Previously Held that Medical Records Must Be Produced in a Childhood Sexual Abuse Case. Presciently, in a childhood sexual abuse decision which predated both Judge Young and Judge Young's rulings on the precise issue, in the case of Quill v. Catholic Diocese of Wilmington, Inc., C.A.No. 07-435-SLR (D.Del. Feb. 12, 2008) (Tab G), this Court ordered the Diocese of Wilmington to produce the medical records of its priest Father DeLuca over the Diocese's claims of medical privilege.

C. Defendant Galligan Lacks a Veto Power Over the Discovery Rules. Defendant Marists also assert "objection of counsel for DG" as a reason not to turn over these medical records. However, no such privilege to prevent disclosure exists under either state or federal law and the Marist defendant has failed to cite any such legal authority.

More fundamentally, the records are in defendant's possession. Plaintiff served a proper discovery request. No privilege stands in the way of their production. Accordingly, defendant must produce the records, regardless of what defendant Galligan wants.[7]

III. NEITHER THE ATTORNEY-CLIENT PRIVILEGE NOR THE WORK PRODUCT DOCTRINE CAN BE USED TO HIDE FACTS CONTAINED IN DOCUMENTS, EVEN WHEN THE DOCUMENTS THEMSELVES ARE NOT DISCOVERABLE.

A. Introduction. As explained in detail below, the case law is overwhelming and clear

[7] Indeed, counsel notes that in 6+ years of this litigation, no individual defendant has yet consented to the production of their medical records. Nevertheless, courts, including this one, have regularly ordered their production.

that a defendant cannot rely on either the attorney-client privilege or the work product doctrine to refuse to disclose - in answers to interrogatories or in deposition testimony - factual information learned from or otherwise contained in documents or discussions that are not otherwise discoverable. Accordingly, the defendants cannot refuse to answer interrogatories seeking disclosure of reports of abuse, fact witnesses and other relevant factual material on the grounds that their knowledge of this information arose through investigations conducted by their attorneys or investigators of other claims of abuse raised by other victims of defendant Galligan. So, even if the Court ultimately finds that the privilege was properly asserted to stop the complete production of a particular document, the defendant still must produce the factual information contained therein - either by redacting the portions of the document which are properly privileged, or by reciting all of the relevant factual information in the answers to interrogatories.

B. The Attorney-Client Privilege Cannot Be Used to Hide Relevant Facts. District of Delaware law is clear that the attorney-client privilege cannot be used to hide relevant facts during discovery. "The general rule is that one party may discover relevant facts known or available to the other party, even though such facts are contained in documents that are not discoverable." U.S. v. Dentsply Int'l, Inc., 187 F.R.D. 152, 155-56 (D.Del. 1999).[8] As the Third Circuit has explained, "[a] litigant cannot shield from discovery the knowledge it possessed by claiming ... that information came from a lawyer." Rhone-Poulenc Rorer Inc. v. Home Indem.

[8] Plaintiff notes that the result is the same under state law. See, e.g. Hoechst Celanese Corp. v. National Union Fire Insur. Co. of Pittsburgh, Pa., 623 A.2d 1118, 1122 (Del.Super. 1992) ("Thus a party may always be compelled to disclose relevant information even when the information was received through a communication which is itself privileged."); State v. Wright, 1994 WL 807898, *2 (Del.Super. July 20, 1994) (same).

Co., 32 F.3d 851, 864 (3d Cir. 1994).[9] As the Supreme Court has explained -

> the protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Upjohn Co. v. U.S., 449 U.S. 383, 395-96 (1981); accord State v. Wright, 1994 WL 807898, *2 (Del.Super. July 20, 1994).

Again, it is irrelevant that defendant Marists' sole knowledge of the facts came from communications with their attorney. As our District has explained, "the privilege does not protect facts which an attorney obtains from other sources and then conveys to his client." Synalloy Corp. v. Gray, 142 F.R.D. 266, 269 (D.Del. 1992).[10] "[A] party's knowledge of facts, from whatever source and at whatever time they became known, is not privileged." Allen v.

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[9] See, e.g. U.S. v. Naegele, 468 F.Supp.2d 165, 169 (D.D.C. 2007) ("[W]hen an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged"); Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 226 (D.D.C. 1995) (same); In re CFS-Related Sec. Fraud Litig., 223 F.R.D. 631, 635 (N.D.Okla. 2004) ("factual information communicated from the attorney to the client is not privileged simply because an attorney was the source of the factual information."); Intervet, Inc. v. Merial Ltd., 256 F.R.D. 229, 232 (D.D.C. 2009) ("facts do not become privileged just because they are communicated to or by a lawyer.").

[10] See, e.g. Great American Ins. Co. of N.Y. v. Vegas Constr. Co., 251 F.R.D. 534, 541 (D.Nev. 2008) ("clients cannot refuse to disclose facts which their attorneys conveyed to them and which the attorneys obtained from independent sources."); Pinnacle Pizza Co. v. Little Caesar Enters., Inc., 627 F.Supp.2d 1069, 1073 (D.S.D. 2007) (same); Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc., 236 F.R.D. 524, 529 (D.Kan. 2006) (same); Amobi v. Dept. of Corr., 262 F.R.D. 45, 51 (D.D.C. 2009) ("when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged."); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 91 (N.D.N.Y. 2003) ("the privileges do not protect the client's knowledge of the relevant facts, whether they were learned from counsel or facts learned from an attorney from independent sources."); Garvey v. Nat'l Grange Mut. Ins. Co., 167 F.R.D. 391, 395 (E.D.Pa. 1996) ("the communication will not be privileged if the attorney is merely conveying facts acquired from persons or sources other than the client.").

West Point-Pepperell Inc., 848 F.Supp. 423, 431 (S.D.N.Y. 1994).

Accordingly, defendant's assertion of attorney-client privilege in response to plaintiff's interrogatories and requests for production are improper. The factual information - names, dates, times, and other information - must still be produced.

C. The Work Product Doctrine Cannot Be Used to Hide Relevant Facts. In the same way, District of Delaware law is clear that the work product doctrine cannot be used to hide relevant facts during discovery. "The general rule is that one party may discover relevant facts known or available to the other party, even though such facts are contained in documents that are not discoverable." U.S. v. Dentsply Int'l, 187 F.R.D. at 155-56.[11] "Counsel or litigants cannot use the work product doctrine to hide facts underlying the litigation from discovery." Id. at 156.

> [A]s is the case with documents and communications protected by the attorney-client privilege, [a party] may not rely on ... claims of work product as a basis for refusing to

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[11] The cases holding the same are legion. See, e.g. Okla. v. Tyson Foods, Inc., -- F.R.D. --, 2009 WL 3682757, *9 (N.D.Okla. 2009) ("[I]t is not surprising that while the work product doctrine shields the documents and things prepared by an attorney or party representative, it does not protect the underlying facts contained in the documents from discovery."); Anchondo v. Anderson, Crenshaw & Assocs., L.L.C., 256 F.R.D. 661, 672 (D.N.M. 2009) (it "does not protect facts concerning the creation of work product or facts contained within work product."); Murphy v. Kmart Corp., 259 F.R.D. 421, 427 (D.S.D. 2009) ("even if the document itself falls under the protection of the work-product doctrine, the relevant, underlying facts contained in the documents are discoverable."); Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 230 (E.D.N.Y. 2007) (the doctrine applies only to "documents and tangible things, and not to facts within the documents."); Carlson v. Freightliner LLC, 226 F.R.D. 343, 366 (D.Neb. 2004) (the doctrine "does not protect facts concerning creation of work product or facts contained within work product."); In re ANR Advance Transp. Co., Inc., 302 B.R. 607, 615 (E.D.Wis.2003) ("facts are not protected even if contained within a document entitled to protection."); Raso v. CMC Equip. Rental, Inc., 154 F.R.D. 126, 128 (E.D.Pa. 1994) ("given that the work product privilege is limited to documents and tangible things, a party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.") (internal punctuation omitted). State of Delaware law holds the same. See, e.g. Hoechst, 623 A.2d at 1122 ("Thus a party may always be compelled to disclose relevant information even when the information was received through a communication which is itself privileged."); State v. Wright, 1994 WL 807898, *2 (same).

respond to discovery requests seeking the disclosure of non-privileged facts.

Phillips Elec. N. Am. Corp. v. Universal Elecs., 892 F.Supp. 108, 110 (D.Del. 1995).

> [I]t is settled law ... that the work product concept furnishe[s] no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

EEOC v. Jewel Food Stores, Inc., 231 F.R.D. 343, 346 (N.D.Ill. 2005).[12]

As the Tenth Circuit has explained, "[b]ecause the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product." Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir.1995); accord Lee v. State Farm Mut. Auto. Ins. Co., 249 F.R.D. 662, 685 (D.Colo. 2008).

It is irrelevant whether the information was ever actually conveyed to the party, or is known solely by the party's attorney. "[W]hether the information in the protected documents is known to the party or is known only to the party's counsel, it does not contravene the work product rule for an attorney to question an opposing party as to the information contained in protected documents." Okla. v. Tyson Foods, Inc., -- F.R.D. --, 2009 WL 3682757, *10 (N.D.Okla. 2009) (internal punctuation omitted); accord Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 121-22 (D.N.J. 2002). "[T]he rule does not protect from disclosure the underlying facts known to the party or his counsel, even if acquired in anticipation of

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[12] State of Delaware law is the same. See Atkins v. Hiram, 1993 WL 545416, *3 (Del.Ch. Dec. 23, 1993) (the work product doctrine "furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.").

litigation." Hildebrand v. Wal-Mart Stores, Inc., 194 F.R.D. 432, 434 (D.Conn. 2000).[13]

Similarly, the facts remain discoverable, even when the Marists' sole base of knowledge of them is from communications with their attorney or is from otherwise protected documents or communications.

> The attorney-client privilege does not prevent the disclosure of facts communicated to an attorney, and the work product doctrine does not prevent the disclosure of facts communicated by an attorney to a client that the attorney obtained from independent sources.

EEOC v. Caesars Entm't, Inc., 237 F.R.D. 428, 433 (D.Nev. 2006). The "privileges do not protect the client's knowledge of the relevant facts, whether they were learned from counsel or facts learned from an attorney from independent sources." Henry v. Champlain Enterprises, Inc., 212 F.R.D. 73, 91 (N.D.N.Y. 2003); see Tyler v. Suffolk County, 256 F.R.D. 34, 38 (D.Mass. 2009) ("Neither the work product doctrine nor the attorney-client privilege protects the underlying facts contained in the documents or communications.").

Accordingly, defendant's assertion of the work product doctrine in response to plaintiff's interrogatories and requests for production are improper. The factual information - names, dates, times, and other information - must still be produced.[14]

D. The Privilege Log. The privilege log (Tab C) produced by defendant also is

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[13] See, e.g. EEOC v. Jewel Food Stores, Inc., 231 F.R.D. 343, 346 (N.D.Ill. 2005) ("the work product doctrine ... does not protect factual information that a lawyer obtains when investigating a case.").

[14] The passing defense citation to the religious privilege contained within Del.R.Evid. 505 is similarly unavailing given that there is no indication that the Marists communications with their unidentified insurance counsel regarding the Texas witness were made in the context of confession. See also Pagano v. Hadley, 100 F.R.D. 758, 761 (D.Del. 1984) (rejecting the Bishop's claim that all documents related to a priest receive a religious privilege because they are found in the priest's personnel file).

improper and fails in numerous instances to establish why a document is privileged.

1. The Law of Privilege Logs. A privilege assertion must "expressly make the claim" and "describe the nature of the documents, communications ... not produced or disclosed - and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed.R.Civ.P. 26(b)(5). "[A]n adequate privilege log must make a prima facie showing of each of the elements of the privilege, including providing some information on the subject matter of the materials being withheld." In re Joy Global, Inc., 2008 WL 2435552, *6 (D.Del. June 16, 2008). In addition to naming the recipient, [a party] must describe the recipient's position in the company, and where appropriate, must provide a statement of the duties of the recipient that may be relevant to the question of why the transmission and receipt of the subject document to this person is privileged." Union Pac. Res. Group, Inc. v. Pennzoil Co., 1997 WL 34655410, *2 (D.Del. Aug. 12, 1997).

> The description or narrative of subject matter must, at a minimum, establish that the document is relevant and material to the factors a court must consider when determining whether a claim of privilege should be upheld. For example, the person or entity claiming an attorney-client privilege might state that the document is a legal opinion of in-house counsel concerning the Jones and Smith transaction.

Id.

2. Specific Privilege Assertions in the Log. The following documents either fail on their face to properly assert a privilege, or fail to give the requisite information to determine whether a privilege applies and thus, the assertion of privilege fails.[15]

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[15] For the record, plaintiff notes that nearly every document identified in the defense privilege logs fails these standards - such as identifying the sender and recipient, or explaining the job duties of specific individuals when relevant to determining the applicability of the privilege. Similarly, even if any of these assertions are proper, as explained above, defendants cannot continue their shell game and instead are required to supply the factual information contained therein in answering plaintiff's interrogatories.

- Mar-56 - attorney-client privilege is claimed. The document is identified as "Correspondence from TX District Attorney's Office to General Counsel re: Texal [sic] allegations". Plaintiff is at a loss to understand how a letter from a state prosecutor to the defendant's lawyer about Galligan's sexual abuse of yet another child can be considered protected by the attorney-client privilege in any way.

- Mar-84-103 - attorney-client and work product privileges are claimed. This appears to be a document from an unidentified attorney to Cardinal Egan.[16] Even if the unidentified attorney was the Marists' attorney, the communication is not to the Marists, but to a third party. None of these privileges can possibly apply and defendant makes no attempt to explain otherwise despite its burden to do so.[17]

- Mar-107-127 - attorney-client and work product privileges are claimed. The description states that this is a "Memo of interview of accuser made in anticipation of litigation re: Texas allegations." No other descriptive information is given, such who created the memo and how this meets the anticipation of litigation requirements. Accordingly, defendant fails to meet its burden and this document must be produced because "a mere allegation that the work product doctrine is applicable is insufficient."[18]

- Mar-130--150 - attorney-client and work product privileges are here claimed. Yet defendant fails to identify who created these memos and other correspondence regarding fact witnesses or how it meets the anticipation of litigation requirement.

- Mar-104-106, 128-29, 151-162 - attorney-client and work product privileges are claimed. These appear to be factual investigation memos made by a private investigator employed by the Marists into abuse by Galligan of individuals in New York and Texas. The investigator is never identified, who tasked him to these assignments, nor how these documents otherwise satisfy the privileges asserted.

- Mar-75 - attorney-client and work product privileges are claimed, yet the document description fails to indicate whether the document was sent to or by an attorney rendering legal advice. It also fails to explain how it was prepared in

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[16] Cardinal Egan was the Cardinal of the Archdiocese of New York and is not an employee of defendant Marists.

[17] See Novartis Pharm. Corp. v. Abbott Laboratories, 203 F.R.D. 159, 163 (D.Del. 2001) ("The party asserting work product protection has the burden of demonstrating that the disputed documents were prepared by or for the party or its attorney and prepared in anticipation of litigation.").

[18] Novartis, 203 F.R.D. at 163.

anticipation of litigation.

Plaintiff also notes that nearly all of the defense medical privilege assertions fail for similar reasons, such as lack of specificity from which to identify how or if the medical privilege actually applies. However, because no medical privilege exists in the childhood sexual abuse context, these additional reasons need not be detailed here.

IV. NO PRIVILEGE EXISTS WHICH ALLOWS DEFENDANT TO WITHHOLD THE NAMES AND RELATED INFORMATION OF FACT WITNESSES.

A. Introduction. Throughout its responses to plaintiff's written discovery, defendant asserts "the identity of any accuser who is not a party to this case is confidential and private" and "confidentiality of a non-party" as a reason to refuse to disclose otherwise discoverable information related to witnesses, other victims, and reports of sexual abuse of these victims by defendant Galligan. As explained below, no such privilege exists and the only claim to the contrary arises from a misguided state court opinion which somehow interprets the First Amendment to the U.S. Constitution to give defendants an absolute right to refuse to produce vital fact discovery, an interpretation which runs directly afoul of decades of U.S. Supreme Court and Third Circuit precedent. This state court opinion may be rejected by this Court because state court interpretations of federal law are entitled to no deference. Instead, it is the place of the federal courts alone to interpret and apply federal law.

B. The Wrongly Decided State Court Decision. Plaintiff will assume that the defense basis for withholding this highly relevant discovery information is the state court opinion in John Coe #1 v. Catholic Diocese of Wilmington, Inc., C.A.No. 08C-10-172-CLS (Del.Super. March 20, 2009) (Tab F). There, despite the fact that the issue received no substantive legal briefing, at oral argument a defendant raised for the first time a claim that a defendant had an absolute right

under the U.S. Constitution to withhold the names of vital third party witnesses who themselves were victims of sexual abuse by the same priest. Thereafter, the state court then issued a decision holding that the First Amendment right to privacy allowed a defendant to absolutely withhold the names and contact information of third party victims of sexual abuse who were key witnesses on issues of notice and other key issues in the underlying litigation. Id. at 2-3. The Court held that plaintiff's sole remedy to learn of these individuals was to hope that they would come forward of their own accord and offer themselves as witnesses. Thus, only the defendant was permitted access to this information, and not the plaintiff who needed this vital information to conduct discovery.[19]

1. This Court Should Not Defer to the State Court's Incorrect Interpretation of the U.S. Constitution. This state trial court opinion is not binding upon this federal court because state court interpretations of federal law are entitled to no deference whatsoever. As the Third Circuit has long held, "[i]t is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws." U.S. v. Bedford, 519 F.2d 650, 654 n.3 (3d Cir. 1975). Similarly, and more recently, the Third Circuit has explained that it is well established that state court decisions do not bind a federal court "with respect to federal law." Surrick v. Killion, 449 F.3d 520, 535 (3d Cir. 2006).[20] It is the job of a federal court to interpret and apply

[19] A decision on a properly briefed challenge to this opinion was awaiting decision when the Diocese of Wilmington filed for bankruptcy, depriving the state court of jurisdiction to correct its mistake. See Vai v. Catholic Diocese of Wilmington, Inc., C.A.No. 08C-06-044-JTV (Del.Super.) at D.I. 155 and 161.

[20] See In re Columbia Gas Systems Inc., 997 F.2d 1039, 1055 (3d Cir. 1993) ("It is axiomatic that federal law governs questions involving the interpretation of a federal statute."); Donegal Steel Foundry Co. v. Accurate Products Co., 516 F.2d 583, 587 (3d Cir. 1975) ("in some diversity cases there may be a federal matter presented, in which event federal law controls.").

federal law, not to defer to a state court's interpretation of it.

C. Full Development of the Facts is a Fundamental Precept of the Adversary System. It is a "fundamental maxim of discovery that mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court, 482 U.S. 522, 540 n.25 (1987). As the U.S. Supreme Court has repeatedly explained,

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of [ ] justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

U.S. v. Nixon, 418 U.S. 683, 709 (1974); U.S. v. Nobles, 422 U.S. 225, 230-31 (1975); Taylor v. Illinois, 484 U.S. 400, 408-09 (1988). The Third Circuit has held the same in the civil context. Reilly v. City of Atlantic City, 532 F.3d 216, 229 (3d Cir. 2008).[21]

D. The General Rule that Society Has a Right to Every Person's Evidence. Privileges are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." Nixon, 418 U.S. at 710; see Connolly, 1984 WL 14132, *1 ("Privileges are repugnant to the adversarial judicial system in the United States and are therefore narrowly construed."). The "public ... has a right to

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[21] State of Delaware courts have held the same both in the civil and criminal contexts. See State v. Wharton, 1991 WL 138417, *6 (Del.Super. June 3, 1991) ("[T]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of ... justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."); Ronald G. Connolly, M.D., P.A. v. Russell J. Labowitz, M.D., P.A., 1984 WL 14132, *1 (Del.Super. Dec. 17, 1984) ("The need to develop relevant facts is fundamental in an adversarial system. The integrity of our system relies on full disclosure of all relevant facts with the framework of the Rules of Evidence.").

every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." Nixon, 418 U.S. at 709; see Connolly, 1984 WL 14132, *1 ("The public has the right to every man's evidence except for persons protected by privilege.").

E. A Citizen Has a Duty to Give Court Testimony. As the Third Circuit has recently explained, "[t]he notion that all citizens owe an independent duty to society to testify in court proceedings is ... well-grounded in Supreme Court precedent." Reilly, 532 F.3d at 229. Indeed, nearly one hundred years of Supreme Court precedent holds the same.[22] The "act of offering truthful testimony is the responsibility of every citizen." Id. at 231.

F. There is No Privilege to Prevent the Disclosure of this Vital Discovery. As the above cited case law makes clear, there is no basis in federal law for defendant to withhold the names of vital fact witnesses. There is certainly no federal privilege permitting them to do the same.

G. The Right to Privacy is Not Absolute and the Interest Can be More Than Adequately Protected by a Protective Order. Despite the non-existence of any privilege to do so, plaintiff will squarely address on the merits the defense privacy claim.

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[22] See, e.g. Piemonte v. U.S., 367 U.S. 556, 559 n. 2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); U.S. v. Calandra, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his government."); Blackmer v. U.S., 284 U.S. 421, 438 (1932) ("It is ... beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned."); Blair v. U.S., 250 U.S. 273, 281 (1919) ("[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned...."); New York v. O'Neill, 359 U.S. 1, 11 (1959) ("A citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found."); U.S. v. Mandujano, 425 U.S. 564, 576 (1976) (recognizing that "the duty to give testimony" is an "obligation imposed upon all citizens").

The constitutional privacy interest implicated by these discovery requests is that of "informational privacy."[23] As the Third Circuit has explained, this right "is not absolute." Sterling v. Borough of Minersville, 232 F.3d 190, 195 (3d Cir. 2000). Instead, the court must "balance a possible and responsible government interest in disclosure against the individual's privacy interests." Id.; see Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566, 574 (6th Cir. 2002) ("the Court must balance the individual's interest in nondisclosure against the public's interest" in disclosure). "[T]he right to privacy protects only against invasions which are not justified by some legitimate need for the information." Mullins v. Griffin, 603 N.E.2d 1133, 1136 (Ohio.App. 1991).

Importantly, as the District of Delaware recently held, the "fact that protected information must be disclosed to a party who has a particular need for it ... does not strip the information of its protection against disclosure to those who have no similar need." Neuberger v. Gordon, 567 F.Supp.2d 622, 633 (D.Del. 2008). The Third Circuit has repeatedly held the same. See F.O.P., Lodge No. 5 v. City of Phila., 812 F.2d 105, 118 (3d Cir. 1987); Paul P. v. Verniero, 170 F.3d 396, 406 (3d Cir. 1999). Here, the fact that this vital discovery must be disclosed to plaintiff in order to prosecute his court case does not strip that information of is protection from those who lack that interest. Instead, imposition of a protective order or confidentiality agreement under Rule 26 to protect that information certainly meets the rule's good cause requirement.[24] In other words, by subjecting this information to the strictures of a protective order, the privacy interests

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[23] See, e.g. Aid for Women v. Foulston, 441 F.3d 1101, 1116 (10th Cir. 2006); Pioneer Elecs. (USA), Inc. v. Superior Court, 150 P.3d 198, 204 (Cal. 2007); Alch v. Superior Court, 82 Cal.Rptr.3d 470, 479 (Cal.App. 2008).

[24] Plaintiff readily concedes that victims of childhood sexual abuse have a privacy interest worth protecting.

of third party victims can still be protected while at the same time giving the plaintiff access to the vital fact discovery necessary to prove his case.

The case law makes clear that the following seven factors should be considered in evaluating an informational privacy claim: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[25] As the Third Circuit has noted, the first five factors account for the individual's privacy expectation, while the last two factors account for the interest in disclosure. C.N., 430 F.3d at 181.

Regarding the first five factors, here, the information requested includes reports of abuse as well as the names and contact information for witnesses to and reports from all known victims of Galligan, all of whom have the potential to be key liability witnesses on the issues of notice and gross negligence. Plaintiff acknowledges the risk of injury of further disclosure, but that risk can be alleviated by subjecting this information to a protective order, a more than adequate safeguard with a long and effective history in the federal courts.

As to the last two factors, the degree of need here is vital. These very well may be key fact witnesses on the issue of actual notice to the Marists (i.e. actual reports of abuse) or constructive notice (i.e. being taken into Galligan's bedroom in plain view of the other priests, or

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[25] C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 179-80 (3d Cir. 2005); Nat'l Ass'n of Letter Carriers v. U.S. Postal Serv., 604 F.Supp.2d 665, 673 (S.D.N.Y. 2009); Lozano v. City of Hazleton, 496 F.Supp.2d 477, 545 (M.D.Pa. 2007); Idaho AIDS Found. v. Idaho Hous. & Fin. Ass'n, 422 F.Supp.2d 1193, 1199 (D.Idaho 2006).

observing the same or similar behavior, yet doing nothing to stop it). Indeed, the failure to provide this vital discovery could be the death knell to this case.

Additionally, the unanimous enactment of the Delaware Child Victim's Act, 10 Del.C. § 8145, provides a clear mandate that exposing what institutions knew or should have known and when is of the utmost importance. Depriving plaintiff who has invoked this historic law of such key information undermines the intent of the General Assembly. As Representative Valihura explained, the purpose of the Act was to "bring out in the open" and shine "daylight" onto the cover up of sexual abuse of children by institutions, such as defendant. (Tab H at 41). The Delaware legislature is entitled to deference in its policy determination that such legislature was both useful and necessary.[26] Baring plaintiff from obtaining the discovery vitally necessary to prosecute his case undermines this clear legislative determination and cannot be countenanced, all the more so when there is a well established means to protect the privacy interests of third parties while at the same time giving plaintiff access to this discovery information - the use of a protective order.

CONCLUSION

For the reasons set forth above, the Court should compel defendant Marists to: (1) fully respond to interrogatories # 1, 3, 8 and 9; (2) swear to the answers to the interrogatories as

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[26] See, e.g. Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (noting that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); Sea-Land Serv., Inc. v. Barry, 41 F.3d 903, 910 (3d Cir. 1994) ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); In re Adoption of Swanson, 623 A.2d 1095, 1099 (Del. 1993) ("our courts do not sit as a superlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Instead, each judge must take and apply the law as they find it, leaving any changes to the duly elected representatives of the people.") (internal citation omitted).

required by Fed.R.Civ.P. 33; (3) fully respond to request for production #1-3, 6-11, 14-15, 17, 39-40, 61-62, 74-79, 88; and (4) immediately produce Mar-0024-180 in a pure and unredacted form.

Respectfully Submitted,

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