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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

CONNIE MAZZEI
CLERK OF THE SUPERIOR COURT
P. Esmeralda
P. ESMERALDA DEPUTY

Hon. Thomas W. Wills, Judge Perla Z. Esmeralda, Deputy Clerk

Doe, John RJ Plaintiff/Petitioner	Case No. M110724
vs.	COURT'S PRELIMINARY DETERMINATION AFTER IN CAMERA REVIEW
The Roman Catholic Bishop of Monterey, et al. Defendant/Respondent	

This matter is before the court on the motion of Intervenor Monterey County Weekly ("Weekly"), a local paper of general circulation in Monterey County, to modify the terms of a prior pretrial order of the Court prohibiting the parties from disclosing any materials received from the opposing side during discovery. Weekly seeks to have the order modified on the grounds that, essentially, the Court's prior articulated basis for the order was to eliminate the danger of tainting the jury venire pool before the case was adjudicated to conclusion and, the case having since settled and been dismissed, such danger no longer exists.

The settlement was entered and settlement monies paid by the Bishop ("Diocese"); the settlement resulted in a dismissal of all claims by Plaintiff. Father Edward Fitz-Henry did not contribute to the settlement, was never adjudicated of any wrongdoing, and in fact recovered his costs as a prevailing party after he was dismissed pursuant to the settlement agreement.

At a prior hearing, Weekly took the position that the Court must balance any public interest in disclosure of the discovery documents against the respective privacy or other interests against disclosure and, in so doing, must review *in camera* each of the documents in question to make such assessment. Diocese took the position that it had only agreed in earlier discovery proceedings to produce the documents under protective order because Plaintiff's counsel stated on the record (at an earlier hearing) that he did not intend to disclose the documents to the media. Diocese also asserted privacy rights of individuals involved and further asserted that the Diocese has a privacy right in the

documents. Fr. Fitz-Henry asserts that he was not found liable of any wrongdoing and in fact was deemed a 'prevailing party' by virtue of the action being dismissed.

Diocese has submitted copies of (1.) the documents in question, which are identified by Bates stamp numbers; (2.) 4 deposition transcripts: one of Fr. Fitz-Henry, one of another priest employed by the Diocese, one of the former (now retired) Superintendent of Schools for the Diocese, and one of an investigator hired by the Diocese; and (3.) audio recordings of interviews conducted by the Diocese's investigator. Transcripts of those interviews are among the Bates-stamped documents produced. With the production of these documents, the Diocese also produced an objection log, itemizing its objections and, in the case of deposition transcript references, listing the objection and page and line number.

The Bates stamped documents are consecutively numbered 1 through 827, with following exceptions: no documents numbered 78, or 449 through 517, were supplied to the Court. Some of the documents supplied were duplicates, although separately numbered.

The Court has reviewed the documents and deposition transcripts submitted. The documents which are not deposition transcripts include what appear to be contents from Fr. Fitz-Henry's personnel file, letters from parishioners, letters from the Diocese to various persons (including parishioners), transcripts from interviews conducted by an investigator hired by the Diocese, and conclusions of the investigator. The Court does not feel it is necessary to listen to the audio recordings of witness interviews, since the transcripts are available, to make its determination.

The documents (including depositions) reviewed contain references to names of one or more alleged victims of child abuse and their families, as well as references to one or more adults who may have been engaged in consensual sexual relationships. No one has raised any objection to release of the name of or references to the Plaintiff in this action.

The Court does not believe that the representation by Plaintiff's counsel on the record that he did not intend to disclose the discovery materials prevents modification of the order upon request of the Weekly. Public policy and case law would seem to militate against allowing parties to bind nonparties from access to information if there is not otherwise sufficient cause to warrant a court order against disclosure.

The current issue does not involve access to documents used as a basis for adjudication by the court. There has been no such adjudication. Weekly is not seeking to force involuntary disclosure of any discovery material; the clear message conveyed is that Plaintiff's counsel wishes to release such information voluntarily. Weekly agrees it is not asserting a First Amendment right of access to the documents but rather simply requests modification of the prior order against disclosure under the Court of Appeal Decision in Mercury Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60, 106-107, which referred the parties and trial court on remand to California Code of Civil

Procedure section 2031.060 (b). That section provides that, "... for good cause shown ...", a court "... may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression"

There is no California case directly on point in the precise context here presented, but Mercury Interactive presents the most apposite guidance. To the extent that Mercury Interactive involved remand for invoking a stipulated procedure for challenging confidentiality, that does not seem a critical difference from the instant case, since Mercury Interactive noted that the trial "... court was specifically empowered to [entertain the media's challenge] both under the protective order and under the Civil Discovery Act, from which the initial justification for the entry of the protective order derived." 158 Cal.App.4th @ p. 107. The fact that here there are involved deposition transcripts does not present any material distinction from the general principles of protective order applicability. The corresponding deposition discovery statute, CCP section 2025.420 (b), also authorizes orders protecting any natural person "... from unwarranted annoyance, embarrassment, or oppression"

The Court is not addressing whether there is any liability attached to the release of any information not covered by the protective order.

Weekly seems to agree that it is not seeking disclosure of the names of alleged victims of sexual abuse.

No authority has been presented to the Court in support of the contention that a Diocese has a privacy interest of its own, distinct from that of the individuals involved.

To balance the interests involved, those interests must first be identified. The public interest to be balanced here is not a prurient interest ["The claim that the subject of the litigation may be newsworthy – in effect, an argument that the public has a generalized right to be informed – cannot serve as a substitute for a showing of specific utility of public access to the information. " Mercury Interactive, *supra*, 158 Cal.App.4th @ p. 105]. To the extent that a legitimate public interest exists, it is rather a public interest in preventing or avoiding future harm and perhaps to a lesser extent in learning of the circumstances of alleged --- but not adjudicated --- abuse, and at what levels there was an awareness of the same, as well as what action, if any, was taken in response. The future or past harm legitimately subject to such balancing is that of sexual conduct toward minors, not consensual relationships between adults.

The mere existence of an *allegation* of wrongdoing ought not compel a finding of an overriding public interest, for obvious reasons --- one would need only make such an allegation, and information of a personal nature of an accused, his/her alleged victims, and persons close to them would be thrown into the public domain. The Court feels that generalized statements in cases from other jurisdictions --- to the effect that whenever clergy sexual abuse is alleged there results a complete loss of privacy rights for the accused, and alleged victims or witnesses --- are themselves not helpful and in fact

undercut the notion that the Court must *in each instance* balance the interests involved in deciding whether disclosure of discovery materials should be prohibited.

The record is not clear what the current status of the accused (Fr. Fitz-Henry) is with respect to his current employment by the Diocese. As of the date of his deposition on 5/27/11, he was 'suspended' from that position, a term which suggests he was not terminated from employment and positions of trust which would bring him into contact with youth. That status bears upon the degree of any potential risk of future misconduct toward youth.

The basis for the respective interests to be balanced here must be found in the Court's file and in the documents in question themselves. No other record has been provided the Court.

The materials reviewed disclose that there were allegations of misconduct toward one or more minors brought to the attention of one or more officials within or employees of the Diocese, and the Diocese responded to them. Whether the responses were appropriate or not is not at issue in this ruling --- only whether disclosure of any information in the documents should be prohibited by court order. The circumstances in which the allegations were brought to Diocesan personnel lead the Court to conclude that, with the possible exception of the Plaintiff in this case, none of the persons involved indicated a wish to have his/her identity disclosed to the public at large. Some documents suggest a reluctance by victims, their family members and witnesses to have come forward. If the reporting of misconduct is to be encouraged, public disclosure of those reporting or witnessing must not be ordered. If such persons wish voluntarily to make their identities publicly known, there is nothing to prevent them from doing so.

The Court concludes that the identities of witnesses and alleged minor victims and their families are to remain protected --i.e., the order remains that such information is not to be disclosed. Likewise, the identity of some church personnel and parishioners must not be disclosed; however, their titles may. Such a modification of the earlier protective order allows for disclosure of what actions were reported and what the capacity of the reporter, witness or recipient of information was, without compromising the identity of the individual.

No allegation or information regarding consensual conduct between adults is to be disclosed.

As used in this order, "3rd parties" means any person other than one of the parties to this action --- i.e., anyone other than Father Fitz-Henry, The Bishop, or the Plaintiff.

No information regarding psychotherapy or psychological counseling is to be disclosed. Such counseling is presumptively privileged, and no showing of a waiver of privilege has been made.

Any personal information regarding any of the individuals involved – home addresses, social security numbers, phone numbers, health information, names and ages of relatives and the like – is not to be disclosed.

In accordance with the above, the Court intends to modify the protective order --- subject to the 11/21/13 hearing --- as follows:

Deposition transcripts. The Court orders that the depositions are removed from the protective order (i.e., may be disclosed without violating the order), except for the following portions, as to which good cause exists to prevent undue embarrassment and intrusion on the privacy of 3rd parties as well as in some respects to litigants. These portions therefore are to be redacted before any remaining portion of the depositions may be disclosed. Except where parenthetical reference requires that the entire cited portion of the deposition text be deleted, only the names, addresses, and phone numbers of 3rd parties --- but NOT titles -- are to be redacted from the cited testimony. References are to page and line number of the deposition transcripts:

1. Deposition of Fr. Fitz-Henry: 51:15-52:19; 69:14-71:9; 77:15-17; 77:23-80:12; 81:15-18; 82:10-89:12 (in addition to deleting 3rd party names, treatment information to be deleted); 89:21-90:1; 91:18-101:22; 105:8; 106:5; 111:24; 116:9; 117:19-118:13; 126:20-23; 129:25; 132:10-133:14; 134:24-135:16; 136:19-137:12; 138:24; 139:6-22; 140:24-25; 141:5; 146:11-21; 147:12-148:7 and 148:25-149:5 (any inquiries about treatment to be redacted, in addition to any 3rd party names); 150:6-11; 151:6-152:7; 155:10-158:24; 162:13-174:25 (redacted in entirety); 175:8-24 (redact in entirety); 178:24-179:4 and 180:2-183:1 (redact in entirety); 186:12-187:23; 188:24-190:5; 190:22-191:18; 193:6-194:5 (redact in entirety); 199:8-200:1 (redact in entirety); 201:10-19; 205:17-206:4; 207:23-209:22 and within that portion, 208:20-22 is further to be redacted in its entirety); 213:1-18; 215:2-216:21; 217:20; 220:11-224:10; 226:5-10 (redact in entirety); 230:12-231:21; 232:6-234:9 (redact in its entirety); 234:11-14; 236:25-237:8 (name of Diocese counsel does not need to be redacted, however); 238:5-16; 240:12-242:6; 242:16-20.
2. Deposition of Agnes Leonardich: 34:4; 50:18-22; 59:10; 73:22-76:14 (redact in its entirety); 87:17-19; 88:18; 89:8; 92:6-9 and 92:20-93:4 (both to be redacted in entirety).
3. Deposition of Don Cline: 17:18; 27:23-31:6; 31:11; 42:4; 54:10-23 (redact in entirety); 54:10-15 (redact in entirety); 57:1; 57:17-58:12; 59:10-24; 61:2; 62:19-63:21; 66:22; 69:22-23; 71:22 (redact the line in entirety); 72:9; 73:15-75:7; 77:1; 84:17-85:24; 86:23-89:14; 107:4-5; 112:16; 128:24-129:23; 132:9; 144:12-145:10; 145:15-16; 146:19-149:22; 152:22-25; 154:20; 155:3; 157:20; 158:24; 161:5; 162:2-4; 163:9-13; 166:9-12; 177:22-23; 182:23-183:6; 183:24-184:2; 185:5-7; 195:16-19 (redact in entirety); 196:7-15; 198:4-5; 199:17-18; 200:22-25; 201:13-202:6; 203:1; 203:7-8; 205:15; 206:1; 206:5; 206:18-19; 208:3-5; 208:10-11; 208:13; 209:14.
4. Deposition of Fr. Milich: 13:1-7; 13:18-15:5 (delete in entirety); 17:5-8 (redact in entirety); 22:11-20 (redact in entirety); 35:18-36:1; 42:8-12; 43:6-11; 46:17; 48:19-23;

50:9; 51:14; 52:22; 65:18; 66:11 (specifically, redact phone number); 69:19-25; 76:2; 77:3-14; 78:11; 79:5-22; 79:18; 87:21-88:19; 89:4; 94:5-7; 96:13; 98:7-17; 99:10; 100:24; 109:2; 113:2-7; 115:3-9; 115:10-12; 118:13-16; 119:25-120:17; 125:3; 128:10-129:7; 130:18-131:15; 132:4-20; 133:3-134:8; 135:3; 138:4; 139:16-141:5; 147:5-8; 148:20-24; 150:3-151:18; 151:23-152:6; 153:1-22; 154:11-161:1 (redact in entirety); 162:16; 163:22; 178:20-179:1; 179:7-24 (redact entirely); 180:1; 181:5-6; 185:15-25; 187:1; 199:20-21; 200:7; 211:7; 213:11; 214:8; 216:22-218:24; 219:19-220:1; 224:9.

Documents. The Court modifies the protective order previously entered in this case, to *remove* the following documents from the protective order. Again, the parties should note that some of the documents are released from the terms of the protective order only to the extent that, where indicated, names or other information are to be redacted before they may be released. References are to the "Bates stamped" numbers on the documents:

Documents 3, 4, 7 through 10, 11-12 (redact names of alleged victims), 25-27 (redact phone number on 27), 31, 34 through 38, 41, 44-45, 65-66 (delete names of 3rd persons), 71-72, 75-77, 81-82 (redact address information), 83-84 (delete 3rd party names and social security numbers) through 96, 99-100, 102, 104, 106, 107-108, 113 through 116, 119, 121-122, 124-126, 128, 130 through 136, 138 through 145, 147-148, 150, 160, 164, 169-174, 175-177, 183-184, 186, 190-191, 193, 197-199 (redact name of author), 200-201, 202-203 (redact 3rd paragraph), 207-210, 212, 217, 219 (delete last paragraph), 221 through 224, 227-228, 230-231, 234, 236, 239, 251 (delete reference to 3rd person), 254 through 256, 257-258 (delete 3rd person's name), 259-260, 262, 264-267, 270-272, 274-275, 278-283, 285 through 287, 289, 291 through 294, 297 through 299, 301-302, 304, 306, 308-308, 311, 313, 314-315, 316, 321, 322, 323, 324-325, 326-327, 332, 333, 335 (redact author name), 337-338, 340, 342, 344, 346, 347, 348, 349-350, 352, 353, 356, 358, -359, 361 through 363, 365, 367, 369-370, 372, 374, 375, 376, 379, 381, 383, 385-386, 388, 389, 391, 393, 395, 397, 399, 401, 403, 405-406, 408, 410, 411-413, 415, 416, 418, 420 (redact name and address of addressee), 421 (redact names except Fr. Fitz-Henry and the Bishop), 422-423 (court cautions that release of this information may, however, may be prohibited by Penal Code section 11167), 440-442, 443-447, 448, 518 (redact Social Security number), 519 and 520 (redact cell phone number), 522, 523-525, 526 (redact all names other than Fr. Fitz-Henry), 527 through 531, 532 (redact 3rd persons' names), 533-534, 535 through 629 (the Cline report with transcripts of his interviews; all 3rd party names, addresses and phone numbers are to be redacted, but NOT titles ---e.g., Mr., Mrs., Fr., Officer, Bishop, etc.), 630-640 (redact names, and any identifying information, of alleged victims, their family members, or witnesses), 667-737 (redact 3rd party names, addresses and phone numbers, but NOT titles), 738 through 753 (redact names, addresses, and phone numbers of 3rd persons, but NOT titles), 754 through 777 (redact names, addresses, and phone numbers, but NOT titles, of 3rd persons), 778 through 794 (redact names, addresses, and phone numbers, but NOT titles, of 3rd persons), 795, 804 (redact name and address of addressee), 808 through 826. The Court notes that some of the documents not

mentioned in this modification are duplicates of those which are mentioned. Others have no apparent connection to the allegations made in this case.

Recordings. The audio recordings of witness interviews remain within the protective order. In view of the redacted transcripts of those being removed from the protective order, any public interest in the recordings themselves is greatly diminished; redaction from the recordings themselves would also be unduly cumbersome.

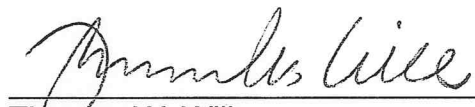
References to Plaintiff by name in any of the above. No one has specifically asked that the protective order keep plaintiff's identity protected. However, consistent with the principles set forth above, the Court believes the protective should be modified to provide that if *Plaintiff* wishes to disclose his identity, *he* (or his counsel) may do so without violating the terms of the protective order.

If the parties cannot agree as to which information and portions of documents or depositions fall within the above guidelines, they may raise such questions at the 11/21/13 hearing.

Recognizing that this appears in some respects to be a question of first impression, the Court will upon request at the November 21 hearing stay this order for 30 days from today's date so that any party may, if it wishes, seek review by a higher Court.

DATE: _____

11/6/13



Thomas W. Wills
Judge of the Superior Court