

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF)
RHODE ISLAND)

VS.)

C.A. NO. PC-2017-3856

ST. JOSEPH SERVICES OF RHODE)
ISLAND RETIREMENT PLAN)

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON DECEMBER 5, 2017

APPEARANCES:

STEPHEN DeLSESTO, ESQUIRE.....RECEIVER
MAX WISTOW, ESQUIRE.....SPECIAL COUNSEL
HOWARD MERTEN, ESQUIRE.....FOR THE BISHOP
PAUL KESSIMIAN, ESQUIRE.....FOR THE BISHOP
BENJAMIN LEDSHAM, ESQUIRE.....FOR THE PLAN

GINA GIANFRANCESCO GOMES
COURT REPORTER

EXHIBITS

SPECIAL COUNSEL

I.D.

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C E R T I F I C A T I O N

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 35, inclusive, are a true and accurate transcript of my stenographic notes.


GINA GIANFRANCESCO GOMES
COURT REPORTER

1 TUESDAY, DECEMBER 5, 2017

2 MORNING SESSION

3 THE CLERK: Your Honor, the matter before the Court
4 is PC-2017-3856, St. Joseph Health Services of Rhode
5 Island vs. St. Joseph Health Services of Rhode Island
6 Retirement Plan. This is on for a Motion to Compel
7 Compliance with Subpoena and to Overrule Objections.
8 Would counsel please identify themselves for the record.

9 MR. WISTOW: Max Wistow for the respondent estate.

10 MR. DELSESTO: Good morning, your Honor. Stephen
11 DelSesto, the court appointed Receiver.

12 MR. MERTEN: Your Honor, Howard Herten for the
13 Roman Catholic Bishop of Providence.

14 MR. KESSIMIAN: Paul Kessimian for the Roman
15 Catholic Bishop of Providence.

16 MR. LEDSHAM: Benjamin Ledsham also for the
17 retirement plan.

18 THE COURT: Okay. As the clerk had called we are
19 here this morning for a Motion to Compel and to Overrule
20 Certain Objections by the Respondent in this case, the
21 Diocese and the Bishop of Providence. I have received
22 and reviewed the motion itself, the objection that was
23 filed with the memorandum of law, and we are prepared to
24 move forward today. Counsel, you may proceed with your
25 motion.

1 MR. WISTOW: Thank you, your Honor. Before
2 beginning with my presentation, your Honor, I want to
3 inform the Court that my cell phone is in my car.

4 THE COURT: I appreciate that, counsel.

5 MR. WISTOW: I also want to apologize to the Court
6 for not having a written reply to the objection filed by
7 the Bishop. As I explain the timing of what has happened
8 in the last several days, I hope your Honor will
9 understand why I have been unable in the time period
10 provided by the Bishop to file a reply. Yesterday, by
11 the way, I spent a good deal of time with the Attorney
12 General's Office trying to finalize the orders that your
13 Honor has asked us to prepare, and we're very very close.
14 In fact, at the conclusion of this hearing we are going
15 over to the Attorney General's Office hopefully to
16 finalize something and get it back to you today.

17 As to the motion today, your Honor, this is not
18 exactly my first rodeo, and it's pretty clear to me that
19 what we are confronted with has been the history, however
20 brief at this point, of really slow walking the discovery
21 process by the Bishop. What is especially painful about
22 this, your Honor, is in their reply they're suggesting
23 that the fault is really with the Special Counsel, that
24 we're wasting time, we're wasting money, and that we
25 could have "met and conferred and worked all of these

1 issues out ahead of time." That's not the case and I
2 would like to make the Court aware of particular facts
3 and introduce to the Court some e-mails and
4 correspondence that I've had with counsel that shows that
5 we've done what we could to move this thing along, and
6 when I say we, I mean the Special Counsel.

7 To put this in context, your Honor, on August 17th
8 St. Joseph's Hospital petitioned for the receivership.
9 At that time they expressly asked for a reduction for all
10 of the retirees and potential retirees of 40 percent, and
11 they asked this Court to make that decision of reducing
12 everybody by 40 percent by October 11th. Fortunately,
13 the Court and the Receiver felt that this was entirely
14 precipitous and there was just insufficient information
15 to take such a drastic step.

16 Since I have been involved in this, I have learned
17 that the Diocese, St. Joseph Hospital, has known about
18 this problem for years, literally for years, that there
19 was being to be a shortfall, and in spite of that waited
20 until this past August and then invited the Court to take
21 precipitous action. Fortunately, as I said, your Honor
22 has agreed with the recommendation of the Receiver to put
23 off this decision until at least February 1st, but it's
24 an important decision and it can't be put off
25 indefinitely.

1 On October 27th a permanent Receiver was appointed
2 by the Court. We were engaged the next day and we served
3 the subpoena on the Bishop on November 2nd. The Court
4 allowed -- there is no suit pending against the Diocese
5 or indeed anyone, but the Court because of the terribly
6 significant effect that the petition could have on the
7 various retirees, who under any view are completely
8 innocent, enabled the Receiver to appoint Special Counsel
9 with the Court's approval to investigate whether or not
10 there are any potential claims.

11 Now, having served the subpoena on November 2nd, the
12 next thing that happens is there is a call on November
13 8th from Mr. Merten to my associate and partner, Mr.
14 Sheehan, who signed the subpoena, and in that telephone
15 call -- Mr. Sheehan is out of state at the moment, but he
16 conferred with me immediately after that phone call.
17 After that phone call, I was told that what Mr. Merten
18 was proposing was as follows: This is on November 8th.
19 He was saying that he was not prepared to even suggest a
20 schedule of what they would do willingly or unwillingly
21 until November 17th, and he said that he would not be
22 able to talk until that date.

23 On November 9th, your Honor, we sent an e-mail to
24 Mr. Merten. That is Exhibit C to the objection.

25 THE COURT: I saw that.

1 MR. WISTOW: And what that says is: "Hi, Howard,"
2 Mr. Merten, "We appreciate it is inconvenient, but with
3 2,700 plan participants facing imminent pension cuts, we
4 cannot agree to the delays that you propose." The delays
5 were simply we're not even going to talk about this for
6 another over a week. And it goes, "Can your client at
7 least make a substantial production on schedule with
8 further production on an agreed date thereafter?" That's
9 on the 9th.

10 The next thing we hear, the next thing we hear is
11 the filing of the November 15th objection, which is
12 Exhibit B to the Bishop's memo. In that objection Mr.
13 Merten proposes to us, and I'll read directly from that
14 exhibit. "We are moving forward with efforts to identify
15 and produce documents responsive to the subpoena as best
16 we can understand them and pursuant to the objections and
17 clarifications outlined above. We expect to be in a
18 position to produce records by December 4th, which would
19 be 32 days, 32 days, from the receipt of the subpoena,
20 well short of the 40 days referenced in Rule 34 for
21 parties to respond to request for production." Indeed,
22 less than the 40 days but more than the time required by
23 the subpoena.

24 In response to that, we filed the motion to compel
25 that is pending before the Court. We did that on

1 November 21st, informed Mr. Merten that it was down for
2 hearing today on December 5th. What he did then will
3 show your Honor we are being slowed walked here. Late
4 Friday, specifically at 6:45 p.m. Friday evening, he
5 files with the clerk the objection that is now before the
6 Court, doesn't even send it to us on Friday evening until
7 7:30 in the evening guaranteed, guaranteed, we're not
8 going to see this thing until Monday, which is, in fact,
9 when I saw it.

10 In the memo he files he says to the Court and I
11 quote, it's on page five, "The Court should deny the
12 motion in full and order Special Counsel to review the
13 documents to be produced on or before December 4th and
14 then meet and confer with RCB, the Bishop before filing
15 any additional motions to compel relative to the
16 subpoena." When I see that, I call Mr. Merten to discuss
17 what he's saying. Remember, this is yesterday. There's
18 no response. I sent him an e-mail, which I would like to
19 make part of the record.

20 (Document handed to counsel and the Court.)

21 THE COURT: The clerk can mark it as Special Counsel
22 Exhibit One.

23 (Exhibit so marked.)

24 MR. WISTOW: As your Honor knows with the electronic
25 filing system, it was filed with the clerk at 6:45

1 guaranteeing that the clerk would not have time to review
2 it and send it out to other counsel, and he sent me the
3 so-called courtesy copy about an hour later.

4 Anyway, we responded, "You filed your objection at
5 6:47 Friday evening." This is me to Mr. Merten. "I did
6 not see it until this morning. You indicate that the
7 "motion will be moot before it is heard", because you
8 will be producing documents today. When will I see the
9 documents? I tried to reach you this morning and left
10 word for you to call. Please do."

11 I get a response from him at 3:02 in the afternoon,
12 a written response, which I also would like to make part
13 of the record, your Honor.

14 (Document handed to the Court and counsel.)

15 THE COURT: Madam clerk, mark that as Special
16 Counsel Exhibit Two.

17 (Exhibit so marked.)

18 MR. WISTOW: He says, your Honor -- this is 3:02
19 p.m. yesterday afternoon, "Max, in response to the below
20 and the e-mail from Benjamin Ledsham, I e-mailed the
21 following to you and Steve Sheehan directly on Friday
22 night, see attached. I indicated in our objection to
23 that motion the hearing will be moot because we will have
24 produced a significant number of documents today as we
25 said we would in our November 15th response. We have

1 been sending collections of documents to our vendor on a
2 rolling basis as we have had them ready to go. So I have
3 never really seen them all collected in one place and it
4 is difficult for me to estimate the pages or number of
5 documents," and then it goes on, and we sit and we wait
6 for the documents.

7 Last night at 9:23 p.m. he sends to us what he
8 describes as 1,292 documents and 7,006 pages. Here, your
9 Honor, is the transmittal at 9:23 p.m. enclosing his
10 letter explaining what he's doing and I also would like
11 to make this part of the record.

12 (Document handed to the Court and counsel.)

13 THE COURT: If the clerk would mark that as Special
14 Counsel's next exhibit.

15 THE CLERK: That's Special Counsel Exhibit 3, your
16 Honor.

17 (Exhibit so marked.)

18 THE COURT: Thank you.

19 MR. WISTOW: Now, I don't suppose that the best
20 speed reader in the world could have gone over 7,006
21 pages between 9:23 last night and this morning especially
22 if we expect to be coherent when we're addressing the
23 Court this morning. What I can tell you is that a good
24 deal of Mr. Merten's objections as to relevancy and his
25 desire to limit the discovery is completely negated by at

1 least one of the attachments that he puts in his letter
2 to me late last night. He claims that these election
3 forms signed by retirement participants, plan
4 participants, are irrelevant but he would produce them if
5 we insist. Your Honor, please, I will direct your Honor
6 to the attachment to Exhibit C entitled Diocese of
7 Providence Retirement Plan, St. Joseph's Hospital. This
8 is the election form of benefit employment. Do you see
9 that, your Honor?

10 THE COURT: I have.

11 MR. WISTOW: Now, a couple of things as to why this
12 is potentially relevant, I'm not asking your Honor to
13 make determinations on the merits or anything like that,
14 but I think you will see why we're saying we cannot leave
15 it to the Bishop to determine what is relevant or what is
16 not after he claims this is irrelevant. For example,
17 here is an election form that says, "Diocese of
18 Providence Retirement Plan, St. Joseph Hospital." Then
19 it says, "I, Mary Vallande, hereby applied for benefits."
20 And what has she elected? She has elected a life
21 annuity option. "A monthly benefit of \$888.94 payable to
22 me for as long as I live." Now, what Special Counsel is
23 going to make of that claim is probably going to require
24 a great deal of imagination to see that this people were
25 promised things, either honestly promised and then there

1 was a breach, or fraudulently promised at a time when it
2 was known there was no way to make these payments, and
3 that was done on a form entitled Diocese of Providence
4 Retirement Plan.

5 One of the, I believe, silly things that is being
6 argued here, in the letter he says we are going to redact
7 social security information and it's going to take us a
8 long time to do that and it's going to be expensive, and
9 so forth. The bottom line is: We're representing the
10 receivership and the estate. We have social security
11 numbers. We already have that, and if they're worried
12 about us disclosing that, I am agreeable to a protective
13 order. I don't really care about the social security
14 numbers. What I don't want is that is used as an excuse
15 to slow this down as they redact it.

16 There is all kinds of statements, generalized
17 statements, in the objection about the limited role of
18 the Bishop and the retirement plan, and what I would like
19 to do, your Honor, is happily we have gotten some
20 discovery from St. Joseph Hospital and are able to make
21 certain statements to the Court based on their partial
22 discovery which tends to negate some of the rational Mr.
23 Merten wants to make as to the relevance and
24 participation of the Bishop.

25 I would like to hand up, your Honor, an extract of

1 the July 1, 1999, St. Joseph Health Services of Rhode
2 Island Retirement Plan.

3 THE COURT: Please mark that as the next exhibit.

4 THE CLERK: Your Honor, this is Special Counsel
5 Exhibit Four.

6 (Exhibit so marked.)

7 MR. WISTOW: And you will see on the very first page
8 that we copied, your Honor, under paragraph 1.2 it says,
9 "Effective date of planned provisions. This document
10 amends or states and continues the Diocese of Providence
11 Retirement Plan Part A, St. Joseph's Hospital, originally
12 effective of July 1, 1965." I read you that because we
13 are interested in seeing what had been promised over the
14 years to these people. There were people who had retired
15 before this amendment and this change, obviously. And we
16 wanted to see what was promised to people over the years,
17 so we would like all of those plans.

18 As to the Bishop's involvement in this, we refer you
19 to page 30, which is the next page in the exhibit, and it
20 says, "The general administration of the plan shall be
21 placed in a retirement board consisting of the most
22 Reverend Bishop of the Diocese of Providence and at least
23 three members of the board of trustees and up to six
24 others who may or may not be members of the board, each
25 of of whom is appointed from time to time by the most

1 Reverend Bishop of the Diocese of Providence, to serve at
2 the pleasure of said Bishop."

3 And, by the way, there is a definition in the
4 document I gave to your Honor, Exhibit D, on page four
5 defining employer as St. Joseph Health Services of Rhode
6 Island and such other institutions and employers within
7 the Roman Catholic Church within the Diocese of
8 Providence has adopted a plan from time to time with the
9 approval of the retirement board. Now, we are at a
10 complete loss to know what any of this means without
11 adequate production of documents. And to be honest, your
12 Honor, we are not willing to simply accept
13 representations as to relevant or non-relevant especially
14 when we see already that some of these statements are
15 inaccurate. I'm not suggesting they are fraudulently
16 inaccurate at this point but they are certainly
17 inaccurate.

18 Now, I can go through item by item of the various
19 objections, but I would like to emphasize in the
20 interest of brevity what the Bishop himself said
21 publically and I refer to his interview in the Rhode
22 Island Catholic newspaper, September 13, 2013, which we
23 have previously referred to. He stated almost precisely
24 it's about three weeks after the petition for
25 receivership, and he said at that time, "We are deeply

1 concerned for the participants in the pension fund of St.
2 Joseph's Health Services, who are very dedicated and
3 faithful employees of St. Joseph's for many years. We
4 certainly hope and I'm praying truly that this comes to a
5 very positive solution for them, as positive as would be
6 possible. We feel very badly about the situation and
7 hope and pray that it is resolved as well as possible in
8 the end." And then he goes on to say, "The important
9 thing now, the important thing now, is to figure out what
10 happened and also to see if anything can be done to
11 rescue the pension fund even to some degree."

12 I know that the Bishop is familiar with the New
13 Testament Book of James, Chapter Two, Section 14 to 18,
14 which talks about the fact that words without deeds go
15 nowhere, and that faith without acts goes nowhere. So
16 it's simple enough to say that he wants good results.
17 What we are asking is his cooperation at this point in
18 getting to the bottom of this. Now, the production we
19 got last night, I can't comment on it for obvious
20 reasons. What I can say is that the cover letter says
21 consistent with the objections here is what we're giving.
22 So if it's totally incomplete and I discover it later or
23 don't discover it later, they're going to be able to say,
24 you know, we put in objections and they were never
25 overruled.

1 Now, my proposal is this, your Honor: We need to
2 get on top of this as soon as possible. We need it to
3 help the Court. The Court has a very difficult decision
4 to make in February and we would like to be able to make
5 some kind of comments about what prospects, if any, there
6 are for recovery. So, your Honor, entered an order
7 regarding the attorney general, which seems to be working
8 and what I would ask the Court to do is to require the
9 Bishop and Special Counsel to get together soon, come up
10 with an agreement, if possible. If not, we'll have this
11 heard. I need to look at what they produced.

12 And, also, I would ask your Honor, because they're
13 talking about again rolling production, is your Honor
14 came up with a suggestion that I think was fantastic with
15 the A.G. and is that you get a status report on a regular
16 basis of what is going on with the production so that we
17 don't have this slow walking, which is what I believe we
18 have. All of us are under too much pressure to try to
19 get to the bottom of this as fast as we can, so that's
20 what I would propose, your Honor.

21 THE COURT: Thank you, counsel. Counsel. Good
22 morning. You may proceed, counsel.

23 MR. MERTEN: Thank you, your Honor. Good morning.
24 Your Honor, let me start by sort of setting the record
25 straight on some of the background that was provided,

1 because I think that is important only because it was
2 mentioned because at the end of the day I don't think I
3 disagree at all with what Mr. Wistow has suggested. But
4 because it's been put on the record, I feel compelled to
5 respond.

6 The idea that the Bishop of Providence has been slow
7 walking with production is absurd and flies in the face
8 of the facts. We got that subpoena on November 2nd.
9 It's facially invalid because it didn't give us enough
10 time to respond under the rule. We reached out to
11 Special Counsel, and in that phone call with Mr. Sheehan
12 I said, "I'm out of town." The leadership of the Bishop
13 is out of town. The right way to do this is for us --
14 we're already pulling records. We're already looking for
15 records now. We started that immediately upon the
16 receipt of the subpoena.

17 I said, "We'll get a handle on what the records are,
18 we'll look at the subpoena," because the subpoena, quite
19 frankly, your Honor, is incredibly overbroad. You've
20 read the papers and you've seen the problems with this.
21 Some of these requests aren't even close to a targeted
22 request for records. So we reached out and we said
23 let's talk and give us time to figure out what kind of
24 records we have. We were already collecting them. We
25 reached out and let's look at the subpoena and we'll

1 respond. We intend to produce records. From the start
2 we have said we intend to produce records. Since the
3 subpoena we have collected -- we've reviewed tens of
4 thousands of records because of the scope of the subpoena
5 even with our objection. We have collected them,
6 reviewed them, identified privileged documents. We'll be
7 prepared to produce a privilege log by the end of this
8 week, your Honor, maybe earlier. We've collected those
9 records, we've produced those records, and we did it in
10 the timeframe.

11 Quite frankly, your Honor, to say that we're slow
12 walking this, flies in the face of the facts of how many
13 people have been and collecting and reviewing records.
14 Literally, between the Diocese, the Bishop, and lawyers
15 dozens have been collecting records. So to say that we
16 have not been doing that is absurd. The timeline, your
17 Honor, between the receiving of the subpoena and the 32
18 days we've looked at tens of thousands of documents. We
19 pulled privileged records. We produced them yesterday,
20 which is exactly when we told counsel that we would be
21 producing these records. We produced 7,000 pages of
22 records.

23 THE COURT: You would agree that if they were sent
24 to Special Counsel at 9:23 last night, it's not
25 reasonable for him to have the opportunity to look at

1 them.

2 MR. MERTEN: Absolutely, and that's why I suggested
3 to the Court that this motion is moot.

4 THE COURT: In your papers you said the motion is
5 moot. I never saw you withdraw your objection. Under
6 Rule 45, the Special Counsel can file a motion to compel.

7 MR. MERTEN: Right.

8 THE COURT: I understand if you were to send a
9 letter saying, you know what, I withdraw my objection
10 that I filed.

11 MR. MERTEN: I can't withdraw the objection.

12 THE COURT: Why would be it moot today?

13 MR. MERTON: Special Counsel ended with a suggestion
14 that we get together. He looks at the records, we sit
15 down and agree on what should be produced. That's the
16 way this should go. That's the way these things always
17 go. To suggest that to meet and confer is of slow
18 walking, flies in the face of the way courts and parties
19 address these issues everyday in every court. I wasn't
20 available to respond to Mr. Wistow's phone call because I
21 was engaged in a meet and confer conference that took all
22 morning in Judge Licht's courtroom yesterday.

23 THE COURT: I understand you were away and the
24 people from the Diocese were away. Nobody was around
25 before the period of time when the subpoena was actually

1 due to sit down. Do you agree with that?

2 MR. MERTEN: No. The exact opposite, your Honor.
3 The exact opposite, your Honor. In that initial phone
4 call I said, "Let's sit down and talk." In the objection
5 letter when I spelled it all out, I said, "Let's sit down
6 and talk." I'm sorry, your Honor, but that subpoena is
7 overbroad. It asks for, for example, any list that
8 connects to the Diocese, which is defined to be the
9 corporations, the Bishop, the clergy, the employees of
10 any entity. Any list that's associated --

11 THE COURT: I don't disagree with you that the
12 proper method to deal with that is either through the
13 parties getting together or brought before the Court.
14 I'm not saying I disagree in terms of the timing
15 production that's based on whether or not you have enough
16 time to produce it, and, number two, whether some of the
17 definitions and other things are overbroad, and I'm not
18 saying they are, but I'm saying to raise the issue, this
19 is the proper forum to bring it up.

20 MR. MERTEN: What I'm suggesting, your Honor, you're
21 asking why we didn't withdraw our objection. We
22 originally called -- this is the prospective from the
23 prospective of the Diocese. We called and we say,
24 "We're willing to produce records. We have an issue with
25 the subpoena. Let's sit down and talk." We get a

1 letter saying, "No, produce the records by the 15th,"
2 which is eight business days. We say, okay, what can we
3 do under the circumstances? Rule 45 allows us and says
4 file an objection. We complied completely with Rule 45.
5 In response to that in the letter I say, "Give me a call.
6 Let's talk." In response to that we get a Motion to
7 Compel, not a phone call, a Motion to Compel, and so we
8 objected to that and we're still here. Yesterday I got a
9 phone call. I e-mailed -- if you look at the document
10 Mr. Wistow sent to you, I was in court all morning. I
11 came back. I dealt with my team. I was trying to get
12 the production done. I had a meeting at 3:00 and I said
13 to Mr. Wistow, "I am available at 4:00. Give me a call."
14 No call, your Honor. I was there until 9:00 last night
15 getting the production done. No call. The idea that we
16 are slow walking to get all this stuff done that's
17 required to produce a file with 7,000 documents -- I'm
18 sorry.

19 We did not withdraw the objection because we never
20 had a hand reach out to us and say let's talk about this
21 until just now in the court in front of everybody. If
22 that phone call had been made beforehand, we would have
23 sat down. We suggested it several times, three times at
24 this point. We're perfectly happy with that. We're fine
25 with sitting down and working out an order. That's what

1 we suggested from the start. I can go through and
2 delineate all of the problems we have with this, but if
3 that's the end result, I don't think we need to do that.
4 But I did want to set the record straight on the
5 presentation, what the Bishop was attempting to do and
6 the efforts we put in from this point on.

7 THE COURT: Certainly, I think both sides are saying
8 the same thing at this point. I just want to understand
9 it a little more. There was an objection talking about
10 to the extent we can locate reasonably accessible
11 documents. You would agree with me, counsel, that that's
12 not necessarily the standard under a subpoena in terms of
13 whether you have the ability to obtain from others. I
14 think for the purpose of the meeting that you're going to
15 have that that language needs to be clarified. The Court
16 doesn't understand what you mean.

17 MR. MERTEN: That's fine. I will tell you, your
18 Honor, we took the step of actually reaching out to
19 agents, including Partridge, Snow & Hahn and produced
20 records for Partridge, Snow & Hahn, so we have done that.
21 I think that's more an objection that goes to the
22 discovery, which is this provision of the federal laws
23 that require that it has to be reasonably acceptable or
24 you take other steps. I am happy to talk about that.

25 THE COURT: Again, it's something to talk about

1 because there is not a distinction in the objection. The
2 other is the issue that the Court has concern about, and
3 maybe once this is flushed out in the meeting, is the
4 idea of a general objection within a production. The
5 Court needs to understand specifically what is being
6 objected to, whether it's a category or whether it's
7 specific documents that are in a privilege log, because I
8 don't want to get into a position where all of a sudden
9 we go from documents to there is a deposition at some
10 point and the documents that weren't produced and the
11 answer is, well, it's because of our general production.

12 MR. MERTEN: I agree with that, your Honor. For the
13 record, there are a lot of general objections. We
14 objected to definitions like Diocese. That's something
15 we have to talk about. That is not a general objection.
16 That's an objection to the definition. There is some
17 other definitions we objected to. But with respect to
18 requests, we identified specific objections to requests.
19 The Diocese and those kinds of issues I agree should be
20 talked about. We've agreed with that from the first
21 phone call.

22 THE COURT: I guess what I'm referring to, and I
23 understand in terms of definitions, to the extent that
24 the request is vague, overbroad, unduly burdensome,
25 unlimited in time and scope, I just want to tell you

1 upfront, I understand there needs to be a discussion and
2 a production schedule and how this is going to work, but
3 the Court is not going to permit a general objection.
4 Once you have your discussion, you need to drill down. I
5 completely understand there may be a dispute over
6 relevancy. There may be a dispute over what is
7 privileged and what's not privileged. But, again, to
8 assist you, and I think what both sides are saying, the
9 sit down, that's going to happen. I just wanted to let
10 you know.

11 MR. MERTEN: I don't disagree with that at all, I
12 just want the Court to understand the reason the
13 objections are written that way is because of the
14 definitions and we gave specific objections to the
15 definitions.

16 THE COURT: I didn't raise those on purpose because
17 I understand that there are issues that you have and I'm
18 not going to go through what the proper definition of the
19 word concern. I'm not going to spend court time until
20 the two of you sit down and say to me we can't agree.

21 MR. MERTEN: The reason I'm saying that, your Honor,
22 I'm suggesting that because of the definitions,
23 concerning, Diocese, Bishop, all of those pervade the
24 following requests that that's why we had to state it
25 that way. If we had sat down and talked about it, we

1 could have potentially resolved all of that.

2 THE COURT: I think you understand exactly what I'm
3 saying is at the end of the day we're going to have a
4 production here.

5 MR. MERTEN: We already do.

6 THE COURT: Go ahead.

7 MR. MERTEN: We already do. We already do have a
8 production, your Honor, but, yes. We've already produced
9 7,000 records.

10 THE COURT: I understand that completely. You
11 mentioned electronic discovery. I think it's important,
12 because I dealt with this last week with the Attorney
13 General's Office. Put the federal rules aside,
14 unfortunately, Rhode Island on November 7th, the Supreme
15 Court adopted an electronic discovery rule and that is
16 the pathway that you will take to go through the
17 discussions regarding the electronic discovery. I don't
18 know what's in the 7,000 pages or 7,000 documents. I
19 understand that there is a lot of documents that counsel
20 has to look at. I appreciate, you know, the production
21 that were made at this point. But whatever disconnect
22 there is, you need to sit down.

23 MR. MERTEN: Absolutely. That's what we have been
24 suggesting all long and that's why I suggested this is
25 moot because the reasonable way to proceed is to sit

1 down, and we don't mind doing it quickly, to sit down and
2 figure out exactly what they want in this overbroad
3 subpoena and the time table we can work towards, what
4 kind of electronic discovery they want, what format. We
5 haven't had any of those discussions, your Honor, and we
6 have asked three times. That's what I want the Court to
7 understand, at least three times.

8 THE COURT: And I will hear from counsel afterwards.
9 He has the last word in terms of any reply because
10 whoever asked for it and whoever didn't to it, we are
11 here now. In terms of the word overbroad, the Court
12 hasn't made a decision on whether its overbroad. The
13 Court will make a decision after there is a meet and
14 confer if the parties can't come to an agreement.

15 MR. MERTEN: That's all we ever asked for, your
16 Honor.

17 THE COURT: Thank you very much, counsel. Counsel.

18 MR. WISTOW: I'm sorry to hear that Mr. Merten has
19 trouble understanding the definition of Bishop and
20 Diocese. I thought it was reasonably clear. But more
21 important than that, your Honor, it's very easy to come
22 here today and say they wanted to meet and confer. I put
23 in Exhibit C, it's the Bishop's memo. It says it all.
24 It's after they tell us we can't even discuss this with
25 you for a week and a half, we can't even talk about it,

1 then we will talk about it and we write immediately and
2 say, "We appreciate that it's inconvenient, but with
3 2,700 plan participants facing imminent pension cuts, we
4 cannot agree to the delays you propose. Can your client
5 at least make a substantial production, with further
6 production at an agreed date?" We asked for the very
7 thing we are asking for today, to set up some kind of
8 schedule and what we got was the objection. Our instinct
9 is very clear that in order to get this moving, we need
10 your Honor's intervention. That's why we filed the
11 motion. Otherwise, we would be talking today still about
12 the definition of Bishop, the definition of Diocese.
13 Your Honor, if you put some timetable on us, it will get
14 done.

15 THE COURT: Yes. Attorney Callaci.

16 MR. CALLACI: Good morning, your Honor, Chris
17 Callaci for United Nurses and Allied Professionals. I
18 feel compelled to rise because there is an exhibit to
19 Special Counsel's motion, Exhibit 5, which is a letter.

20 THE COURT: To you?

21 MR. CALLACI: To me.

22 THE COURT: Yes, I read it.

23 MR. CALLACI: I hope you have the letter in front of
24 you, your Honor.

25 THE COURT: Yes, I do.

1 MR. CALLACI: It's dated August 23, 2017. It's a
2 letter from Attorney Bernardo and he complains about the
3 criticism that I had to offer on the conduct of the
4 Diocese, if you want to put it that way in this matter.
5 I don't know Mr. Bernardo. I didn't get a phone call
6 from Mr. Bernardo. I didn't get an e-mail from Mr.
7 Bernardo. No courtesy whatsoever that that letter was
8 coming, and if you look at the letter, there was no
9 follow up. There was no offer to meet or talk to discuss
10 the subject matter of this receivership process. On its
11 face, this letter, your Honor, was not designed to bring
12 the parties together. It was designed to silence people.
13 Perhaps it was designed to intimate people, that I have
14 the good fortune of representing, people that are in this
15 courtroom today who are participants in this plan.

16 On page two of that letter, if you would indulge me,
17 it reads as follows: "It is unproductive and unfair to
18 knowingly assert blame and poor motive to a party who do
19 not have ownership, management, or oversight
20 responsibilities to the plan. This only causes
21 unnecessary confusion and animosity. Therefore, I urge
22 you to refrain from continued misguided broad sides at
23 the church." I disagree with that characterization and I
24 hope the Bishop now knows that the participants in this
25 plan will not refrain, they will not be silenced, they

1 will not be intimidated, not back in August, not tomorrow,
2 not ever. Thank you.

3 THE COURT: Thank you very much. Attorney Violet.

4 MS. VIOLET: Thank you, your Honor. As the Court
5 knows, this is not our motion, but, obviously, it has an
6 impact on every retiree who is facing potential cuts and
7 the specter of potential recoupment certainly is relevant
8 for this Court, so I thank the Court for keeping on all
9 of the folks for discovery. I do, however, want to bring
10 to the Court's attention my dismay when I was reading the
11 memorandum of the Diocese and the Bishop because of the
12 repeated reference to irrelevancy, page, 26, privilege
13 this, privilege that.

14 Your Honor, in the sex abuse cases against the
15 Diocese that was a civil case, I just want to bring to
16 the Court's attention that the Diocese has its own
17 definition of what constitute privileges even though, in
18 fact, they are not recognized in law. Those series of
19 cases are, for example, any time any priest spoke to the
20 Bishop, it was determined to be an expansion or an
21 extension of the priest penitent provision and,
22 therefore, the discovery was done, et cetera.

23 I just wanted to indicate to the Court how gratified
24 I am to hear the Court talk about the specificity with
25 which you will require any type of certifications of

1 privilege because some of the privilege provisions that
2 were deeply litigated back in that series of civil sexual
3 abuse cases involving priests were just ones that were
4 made up by the Diocese. So thank you, your Honor, for
5 requiring the specificity of those privileges.

6 THE COURT: Counsel, as I allowed and I allowed at
7 the prior proceedings the attorneys of record, I will
8 certainly give you the opportunity.

9 MR. MERTEN: Very briefly, your Honor. A reference
10 was made by Attorney Wistow as to how could we possibly
11 understand the word Diocese. I think it's important for
12 the record.

13 THE COURT: I apologize. What I was referring to
14 was Attorney Callaci and Attorney Violet. As far as
15 Attorney Wistow, and I think you completely understand
16 the direction I'm going. If there is going to be a
17 discussion about the definition of that term, you can
18 work it through.

19 MR. MERTEN: The only other clarification I'd make
20 with respect to Attorney Violet's argument, I don't agree
21 with her characterization, obviously, but no objection
22 with respect to religious elements are involved here at
23 this point as far as we know.

24 THE COURT: Thank you, counsel. The Court is
25 prepared to rule on the Motion to Compel. In terms of

1 background, on August 17th a petition was filed and an
2 order was entered by Justice Silverstein of this Court
3 appointing a temporary Receiver. On October 17th
4 Attorney Wistow was appointed Special Counsel for the
5 Receiver by this Court to investigate claims of the
6 estate. On October 27th the permanent Receiver was
7 appointed. Once the permanent Receiver was appointed,
8 the Special Counsel was engaged, and just a couple of
9 days later or a day later on November 1st a subpoena was
10 issued to the Bishop of Providence for documents due
11 November 15th issued by the Special Counsel. On November
12 2nd, proof of service was filed with this Court. On
13 November 15th, the Bishop of Providence filed an
14 objection to the subpoena. On November 21st, Special
15 Counsel filed a motion to overrule the objection and
16 compel responses, on December 1st the objection of the
17 Bishop of Providence to the motion, and today this is set
18 down for a hearing.

19 As was represented by the Special Counsel as well as
20 counsel for the Bishop of Providence, a large document
21 production or a document production containing over 7,000
22 documents and/or pages were produced at approximately
23 9:23 last evening. The Court does not expect nor would
24 it require the Special Counsel at this point to review
25 all of the documents for compliance to make a

1 determination whether or not they are in compliance with
2 the subpoena itself.

3 As the Special Counsel is aware and counsel for the
4 Diocese may be aware, the Court feels very strongly that
5 the meaningful meet and confer should occur in that case
6 and in this case to determine any issues between the
7 parties in terms of definition of terms, scope of
8 production to see whether or not the parties can come to
9 some type of agreement achieving the goals of the Special
10 Master, which is to achieve, and as Rule 45 talks about,
11 in as narrow a fashion as possible to the non-party at
12 this point, the Bishop of Providence.

13 The next step in this process is for the parties to
14 meet and confer, meaning get together in this case, and
15 talk about the substantive issues. The Court finds it is
16 critical for the meet and confer, which will occur this
17 week and will begin today, to have the appropriate
18 subject matter experts from the Bishop of Providence at
19 that meeting, even if it's in a conference room next
20 door, to determine by what method documents are kept by
21 the Bishop of Providence to understand the information
22 technology, structure, types of programs, and other
23 records of the Bishop of Providence to work through a
24 production to the subpoena that is both effective,
25 efficient, and also gives the Special Master the

1 documents that he requires to conduct this very, very
2 important investigation.

3 While the Court understands that in normal
4 circumstances a 14 or 15-day timeframe, which now I will
5 note we are at about 30 days, is relatively short for the
6 scope of documents that are being requested. The Court
7 must balance that against the fact that we have 2,700
8 plus retirees that are facing significant benefit cuts or
9 the possibility of in February of this year. The Court
10 also appointed the Special Counsel to conduct an
11 investigation. There is no litigation pending in terms
12 of a lawsuit at this point. It is certainly important,
13 if not critical, for the Special Counsel to very quickly
14 go through this process of investigation to determine
15 whether or not he is going to proceed against any
16 potential party for a third-party claim. This is not in
17 the interest of the pension holders in terms of having a
18 determination in terms of whether or not there are
19 claims, and I would also suggest this is very much in the
20 interest of a number of parties that have what could be
21 called a cloud over them at this point as this
22 investigation takes place.

23 So the first step is that the Court is going to
24 order a meet and confer among the parties. The meet and
25 confer is going to occur at the courthouse in the jury

1 room. This way the Court is available at the end of that
2 meet and confer to put on the record any agreement
3 between the parties and to deal with any issues between
4 the parties that cannot be agreed to.

5 The Court is not going to set down today a deadline
6 for production. First of all, the Court is going to
7 entertain that and have that on a rolling basis. The
8 Court believes it will be in a better position, since the
9 meet and confer will occur this week, to see if the
10 parties can work that through themselves, otherwise the
11 Court will order a rolling production deadline. As a
12 part of any order dealing with production, the Court will
13 require, as it requires with the Motion to Compel with
14 the attorney general, weekly written updates by the
15 parties in terms of where we stand in terms of the
16 production itself. The Court is also aware that the
17 Diocese in this case may choose to exercise certain
18 privileges that may be allowed under the law. I stress
19 that if a determination by the Diocese is made to claim a
20 privilege, the Court will require a detailed privilege
21 log and the Diocese should have available for the Court's
22 review, if the Court determines it's necessary, depending
23 on which privilege it is, documents for an in-camera
24 review by the Court. And, certainly, if there are
25 documents that are withheld pursuant to what is called

1 the work product doctrine that the Court is in a position
2 to make such determination as there is not an absolute
3 privilege with respect to those documents.

4 The Court appreciates the fact that while it
5 certainly wasn't by the date that the subpoena was due,
6 the Court understands that an objection under Rule 45 was
7 properly filed before the subpoena was due, that the
8 Diocese has produced documents prior to this hearing,
9 even if it was only twelve or so hours ago, and that the
10 Court appreciates the time that has gone into it. But I
11 want the Diocese to understand that there are extenuating
12 circumstances in this case where we need to get the
13 production done and we need to get the production right
14 and the Court wants to take every step possible to make
15 sure we don't get mired in general objections to the
16 extent to which searches are taking place.

17 And I ask the parties to discuss and work through
18 the language in those issues upfront so the Court can
19 make those decisions upfront rather than having to deal
20 with months and months of litigation, or, as I mentioned
21 to counsel, to have to deal with an issue where there was
22 a general objection or a disagreement and all of a sudden
23 during a deposition down the road there is a document
24 that wasn't produced. I'm not saying whether it should
25 have been produced or not, but there is a dispute between

1 the parties. Let's get all of that done upfront and that
2 is going to begin today.

3 The Court is going to reserve on the Motion to
4 Compel to allow the parties to meet and confer and
5 attempt to work out an agreement. If not, the Court will
6 hear from the parties and make such determinations as are
7 necessary. The Court certainly understands that we are
8 going to schedule a meet and confer this week at the
9 courthouse with the appropriate parties, but the Court
10 very much believes let's strike while the iron is hot.
11 The Court is going to order after the Court recesses
12 from the bench by 11:00 a.m. that counsel in this case
13 convene in the jury room above this courtroom to begin
14 their discussions in terms of when the date will be and
15 what can be worked out as far as today.

16 The issue in terms of who asked who for a meet and
17 confer conference is in the past. That's not the topic
18 of the conversation. The topic of the conversation is
19 what are the issues, what can we work through in terms of
20 a production, what can we work through in terms of a
21 rolling basis, the scope, and attempt to work through
22 anything we possibly can by agreement. And if there are
23 issues left that can't be agreed to, put them on the side
24 on a piece of paper and the Court will address them.
25 Also, please advise the Court before you leave what is

1 the date and time that you wish to have your meet and
2 confer and the Court will make the jury room available to
3 you. Is there anything else from either party before we
4 break today?

5 MR. WISTOW: I just want to be clear on what we're
6 going to be doing immediately following this. It's
7 simply to try to agree on a date to come back? The
8 reason I say that, as I indicated, your Honor, we
9 promised the attorney general that we would go over there
10 right after this to try to work out.

11 THE COURT: I will tell the attorney general that
12 it's twenty of 11:00 now, by 11:45 you can get over
13 there. I want enough of the discussion of not only when
14 you're going to meet, but also to start talking about
15 what some of the topics you're going to be discussing so
16 you can all come back and come to that conference
17 prepared to discuss it. Thank you all very much. The
18 Court will be in recess. Mr. Sheriff, if you would make
19 the jury room available.

20 (R E C E S S)

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