Attachment C

Motion Pursuant to SCRCP 59(e)
Filed August 22, 2017

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August 25, 2017

Via First Class Mail:
The Honorable J. C. Nicholson, Jr.
100 Broad Street, Ste. 106
Charleston, SC 29401

John Doe 2 and Jane Doe 4 v. Bishop of Charleston, et al.
Civil Action No. 10-CP-10-5520;
John Doe 10 v. Bishop of Charleston, et al
Civil Action No. 10-CP-10-7233;
John Doe 11 v. Bishop of Charleston, et al
Civil Action No. 12-CP-10-5559;
John Doe 193 v. Bishop of Charleston et al
Civil Action No. 13-CP-10-3733;
Father Doe 194 v. Bishop of Charleston, et al.
Civil Action No. 13-CP-10-4175;
John Doe 194 v. Bishop of Charleston, et al.
Civil Action No. 13-CP-10-4716

Dear Judge Nicholson:

Pursuant to Rule 59(g), I am providing you a copy of Plaintiff's filed SCRP 59(e) Motion to Alter or Amend, in regard to the above-referenced matter.

With kind regards, I am,

Sincerely,

Gregg Meyers

GM/mkg

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 10-CP-10-5520

John Doe 2 and Jane Doe 4,)
)
Plaintiffs,)
)
v.)
)
Bishop of Charleston et al.,)

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 10-CP-10-7233

John Doe 10,)
)
Plaintiff,)
)
v.)
)
Bishop of Charleston et al.,)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 12-CP-10-5559

Jane Doe 11,)
)
Plaintiff,)
)
v.)
)
Bishop of Charleston et al.,)

RECEIVED
SEP 27 2017
SC Court of Appeals

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 13-CP-10-3733
John Doe 193,)) Plaintiff,)) v.)) Bishop of Charleston et al.,))	

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 13-CP-10-4175
Father Doe 194,)) Plaintiff,)) v.)) Bishop of Charleston et al.,))	

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 13-CP-10-4176
John Doe 194,)) Plaintiff,)) v.)) Bishop of Charleston et al.,))	

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 15-CP-10-5486

John Doe 245 and Father Doe 245,)
)
Plaintiffs,)
)
v.)
)
Bishop of Charleston et al.,)
)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 16-CP-10-1632

John Doe 297,)
)
Plaintiff,)
)
v.)
)
Bishop of Charleston et al.,)
)

SCRCP 59(e) Motion To Alter or Amend

This motion is made pursuant to SCRCP 59(e) to alter or amend the Court's orders signed August 8, filed August 10, and received by email on August 11, 2017.

Issues Not Ruled On.

1. Although it was implicitly denied, the Court erred in not ruling on the plaintiff's request to have the motions decided only after full discovery. (The Supreme Court seems to prefer explicit denials rather than implicit denials). Discovery had been stayed as to the Lawyer Defendants when the actions were bifurcated. Prior to that the Lawyers had worked to avoid deposition. After their motion for a protective order had been denied, no date could be arranged

to depose them. When discovery as to them was stayed, it meant their depositions have not yet been taken and that discovery has not been completed about the collusive elements of the class settlement, class approval, and class administration. Among other things, the plaintiff was prevented from taking testimony and additional discovery about:

a. representation made to the Court that the Lawyer Defendants had eliminated notice to certain of their class members as an accommodation to their supposed adversary,

b. the Lawyer Defendants charging the class members a fee not authorized by any court order, without objection by the Diocese,

c. the Lawyer Defendants negotiating a fixed fee for themselves simultaneously with negotiating a variable recovery for the class, the fee to take priority over the client claims,

d. the Lawyer Defendants insistence on being paid before any class members had been identified, and class claim had been made, and any notice had been provided.

e. the patently fraudulent time records submitted by class counsel in the class action,

f. class counsel's failing to secure by written order the relief he represented on the record in the class action that he had obtained for absent class members who got no notice,

g. the agreements by which the Diocese took no position as to class certification, even though the difference to the Diocese was more than $11.5 million,

h. class counsel's awareness in 2007 that abuse victims sometimes had repressed memory,

i. that after the June, 2006 settlement, none of the putative class representatives met the definition of the class, and none of them qualified to be a class representative; and

j. the collusive conduct associated with the class action filed in Charleston County; dismissed without notice in Charleston; replicated in Dorchester County while still pending in Charleston; moved to a judge in Dorchester County with whom class counsel had long contacts; misrepresentations made to that judge; and omissions in the disclosures to that judge.

2. The Court erred in failing to consider the factual record submitted by the plaintiffs, the Court concluding instead that only argument and "not a scintilla of evidence" was offered. In fact, a considerable factual record was provided by the plaintiffs, and citations were made to the factual record provided by the defendants.

3. The Court failed to consider any of the factual evidence from which a jury could find collusion among the defendants once the class settlement was reached, if not before. E.g., that no motions had been heard or decided prior to the 2006 mediation; that between June, 2006 and October, 2006, extensively detailed in the record, the defendants judge-shopped, filed a duplicative class action for the same putative class representative, moved the cases to Dorchester County where a more pliable judicial oversight (it must be presumed when the record is viewed favorably to the plaintiff) was expected by the parties, and received by the parties, due to the long-standing affiliation between the court and class counsel. Among the manifestations of the collusive conduct is that (a) the notice to the class, once the class was approved, was constitutionally deficient, the shortcoming of which was observed in the record of the class action to have been deficient. Due to the collusive nature of the settlement, the issue was not raised by either the Lawyer or Diocese Defendants or ruled on by the class action court.

4. The Court erred in failing to consider the factual record in the light most favorable to the plaintiffs.

5. The Court erred in not ruling on the notice publication issue as to Jane Doe 4.

6. The Court erred in concluding that the class notice was run as ordered, since no factual record to that effect was offered.

7. The Court failed to rule on the Lawyer Defendants having provided no explanation to the class action court as to why they deliberately impaired notice to absent class members in their second Motion to Certify Classes (January, 2007) compared to their original Motion to Certify Classes (October, 2006), and the Diocese making no objection to that modification.

8. The Court failed to rule on the Lawyer Defendants' proffer (about which discovery was not permitted) that they modified the notice to disadvantage the classes they agreed to with the Diocese as part of the class settlement as an accommodation of their supposed adversary, the Bishop, and the inherent breach of fiduciary duty that represented.

9. The Court failed to rule on the fiduciary duties of class counsel in providing notice to class members after class certification, and the breach of those duties. Nor did the court construe the obligations from the attorney-client relationship concededly established by certification.

10. The Court failed to rule on the argument that the notice provided to the class necessarily could not have been "the best practicable" notice when the notice program was deliberately changed from national notice in *USA Today* to only local notice, changes made deliberately to *weaken* the notice program. Nor has the court explicitly reconciled the obligations breached by class counsel having given notice to the class that was constitutionally insufficient, including class counsel giving deliberately reduced notice to the class when the Settlement Agreement, once approved, provided funding for nationwide notice.

11. The Court failed to rule on the significance of the collusion among defendants, their judge-shopping, the mis-information provided and the information withheld from the class

action court and the effect of that conduct on the orders of the class action court. If class counsel has failed to do what Due Process requires, and failed to explain to the class action court why it had deliberately reduced notice, class counsel has breached his obligation to his client class members.

12. The Court filed to rule on the defendant having withheld information from the class action court (changes to the notice program; "cloned" Doe 53 class complaint; class representatives not meeting class definition; patently false billing records; and why that judge was shopped-for by the defendants), issues which relate to the collusive nature of the class action.

13. The Court considered the class definitions in the complaints (e.g., at pp. 18 and 19 of the Lawyer order), but did so without viewing those complaints in the light most favorable to the plaintiff, or without considering the complaints as a whole. But more importantly, the Court failed to rule in any way on (a) the classes as defined by class counsel in their October 2006 motion to certify classes; the January, 2007 Settlement Agreement; and the January, 2007 Motion to Certify Classes; each of which specifically defined the classes for the first time; or (b) the fiduciary obligations by class counsel to absent members of the class upon class certification, and their obligation to accommodate the class as certified with notice which satisfied Due Process requirements.

14. The Court failed to rule on the breached fiduciary obligations which arose from class counsel's failure, without objection from the Diocese defendants, in failing to secure for absent class members a waiver of defenses of statute of limitations and charitable immunity; or in failing to obtain a written order securing the relief for absent class members who did not get notice as was represented had been obtained, without objection by the Diocese (in the cited July 13, 2007 hearing).

15. The Court failed to rule on the defendants' failure to change the notice program when lack of nationwide notice was explicitly identified.

16. The Court failed to rule on the defendants' failing to disclosure to the class action court why the notice program had been reduced from nationwide notice.

17. The Court has failed to rule on class counsel failing to disclose to the class his long affiliation with the Diocese, or the better settlement terms given to those who opted out of the class.

18. The Court failed to rule on class counsel placing their fee interest ahead of the class recovery, both in priority (the fee, which was to come from the common fund, was fixed and class members would get a pro rata reduction, the fee being more important than the class recovery), and in time (class counsel demanded to be paid before the class claims period had even begun, before the extent of the class was known and any class member had been compensated); or that the Diocese made no objection to those provisions.

19. The Court failed to rule on the professional and fiduciary breach inherent in (a) class counsel's fees negotiated simultaneously with class payment and (b) class settlement agreements reached prior to class certification, and (c) how reducing the notice program served only the lawyers' fee interest, not any interest of the plaintiffs who are conceded to have been clients of the Lawyer Defendants after class certification.

20. The Court has subsumed the lawyers breach of duty to the class by the class action trial having issued orders plainly deficient to the class as to Due Process. The Court has not ruled on the fiduciary obligation of class counsel to protect absent members of the class given the evidence that colluding defendants had ceased to be adversarial, and failed to present the issues to the class action court.

21. The Court erred in failing to rule on the fiduciary duty assumed by a class representative and by class counsel after classes were certified but then breached when class counsel failed to propose notice sufficient to inform the classes that had been certified.

22. At p. 20, the court erred in not ruling on the issue as to John Doe 193 that after certification, class counsel had defined the class so as to include him, but failed to accommodate those such as John Doe 193 with repressed memory.

Rulings Made But Which Should be Altered or Amended

23. The Court has erred factually, e.g., Jane Doe 11 order as to the Diocese, at p. 3, in concluding that no settlement had been agreed upon between the Lawyer and Diocese Defendants before class certification. The class settlement was reached, and reduced to writing sufficient to be enforceable, in June, 2006. It is undisputed that the settlement reached was a class settlement with two proposed classes, and that if the agreed upon class settlement was not approved, that the individual settlements would nevertheless occur. That is the 2006 handwritten agreement, but it satisfied the requirements of SCRCP 43(k).

24. The Court has erred in ruled that no fiduciary duty is assumed to absent members of a class when a putative class representative and putative class counsel voluntarily advance themselves as representatives by pleading a class action, citing cases in which class certification was denied or had not been granted. This class was certified.

25. The Court erred in ruling, Order as to the Diocese at p.4, that complying with orders that fail to give proper Due Process notice to absent members of the class relieves the class representative or class counsel of their fiduciary obligations, either before or after certification. The trial court, the class representative, and class counsel each have obligations to the class, but only class counsel and the class representative volunteer for those roles, and they breach those obligations when the court is not given full information.

26. The Court erred in considering Bishop Baker's testimony about his desire for widespread class notice in the light most favorable to the Diocese, rather than considering in the light most favorable to the plaintiffs the offsetting evidence that (a) the Diocese made no objection in the class proceedings to the notice being reduced from nationwide to statewide, (b) made no objection to the class definition having no geographic limit, or the class being certified without geographic limit, and (c) the proffer of the Lawyer Defendants that they deliberately disadvantaged their absent class members who lived out of state at the request of their adversary, the Bishop, and made no change to it when the class was certified without geographic limit. In the light most favorable to the plaintiff, the collusive aspect of that change should be accepted.

27. In its order as to the Lawyer Defendants, at p. 3, the Court recounted none of the 2005 and 2006 origins of the class action and class settlement, and mistakenly attributes the 2006 class settlement as occurring only in January, 2007, when an expanded version of the 2006 mediation agreement was prepared. The Court has elided over the collusive conduct that began in June, 2006, once the mediation agreement had been reached, and has ignored the specific class definitions which were advanced starting in October, 2006 and which contained no geographic limitation.

28. On pages 6 and 7 of the order as to the Lawyer defendants, the Court failed to properly recognize the language quoted at pages 3 and 4 from the John Doe 2 and Jane Doe 4 complaint that claims against the Lawyer Defendants are critical, "If the court finds that the plaintiffs are precluded for any reasons, including . . . charitable immunity, or by the statute of limitations . . . then claims are properly made against . . . the [Lawyer] defendants who failed to properly represent them." Because many of the plaintiff's claims arose from a period in which charitable immunity would have otherwise barred their claim, and because they were precluded from participating in the class action by the lack of Due Process notice, many plaintiffs needed

the waiver of charitable immunity to get any recovery from the Diocese. Their proper remedy, and only remedy, are their claims against the Lawyer Defendants who failed to give them notice. It is not only a "finding of preclusion by the Court," order at 7, that opens lawyer liability, but also the defenses that were otherwise waived in the class action, a benefit of which the plaintiffs were deprived by the lack of notice given by their lawyers. The Court has erred in simply mis-reading the complaint as hinging lawyer claims only on *res judicata*, when it hinged on **either** *res judicata* or not being able to benefit from the defenses waived in the class action. The Court has simply gotten it wrong. Lack of proper notice kept the plaintiffs from any chance of the benefits from the defenses waved in the class action but not waived outside of the class action, as was concluded in *Doe v. Bishop*, 754 S.E. 2d 494 (S.C. 2014). Not being barred by the class action does not put the plaintiffs in the same position as they would have enjoyed with proper notice in the class action.

29. Similarly, the Court erred in concluding, order as to the Lawyer Defendants at p. 8, that no damage was caused to the plaintiffs by the Lawyer Defendants failing to give them Due Process notice. Because of lack of proper notice, the plaintiffs' claims as to the Diocese have to overcome defenses that would have been waived in the class action. They lost the benefit of that waiver due to the conduct of the lawyer defendants, and those claims have been misconstrued by the Court. The plaintiffs were excluded, intentionally, by the notice program of the class action, could not participate in the class action, and thereby lost the benefit of the defenses waived in the class action. The Court erred by ignoring that proper notice or, in the case of John Doe 193, proper accommodation by class counsel for the known issue of repressed memory, would have permitted each of the plaintiffs to participate in the class action. The Court has erred in concluding there has been no injury, and the plaintiff have no damages, when it was the deliberate conduct of the Lawyer Defendants, without objection from the Diocese

Defendants, that prevented them from participating in the class action. No defendant disclosed to the trial court the rationale for the deliberately reduced notice.

30. At page 10 of the order as to the Lawyer defendants, the Court erred in concluding that that plaintiff has only one injury and that S.C. Code § 15-38-50 does not apply. A few plaintiffs that could obtain settlements with the Diocese outside of the class action, because they had at least an argument that could respond to limitations or immunity defenses that in the class action had been waived. But for the conduct of the defendants, each plaintiff could have avoided those defenses in the context of the class action. The Court has erred by concluding, Lawyer order at p. 10, that the "Plaintiffs' claims are based upon one loss — the abuse at the hands of the Diocese defendants." That is incorrect, as the personal injury claim is distinct from the breach of professional duty claim, the way the professional misconduct claim in failing to disclose a conflict in *True v. Monteith*, 489 S.E.2d 615 (S.C. 1997) was distinct from the damage from the commercial lease injury, lack of cost of living provision. 489 S.E.2d at 617.

The Plaintiffs were each sexually abused by an agent of the Diocese. That is a personal injury by a priest or employee made possible by arguable gross negligence of the Diocese. The Lawyer Defendants assumed the duty of creating for that personal injury a remedy for a class that included the plaintiffs. The Lawyer Defendants then deliberately, and (they say) to accommodate the Bishop, defined the class so as to include the plaintiffs but deliberately reduced the notice to the class so the plaintiffs would not get notice, and failed to accommodate the repressed memory of John Doe 193. As in *True v. Monteith*, that conduct by counsel is arguably a breach of professional or fiduciary duty. No lawyer has committed personal injury against any plaintiff. Through the Lawyers' conduct, the Plaintiffs were included in the class definition but were given no chance of participating in the class. Each plaintiff has lost the benefit of the defenses waived in the class.

The plaintiffs' professional malpractice injury, or breach of fiduciary duty injury, is a different injury than the personal injury from the sexual abuse and negligence by the Diocese. As is necessarily true for a legal malpractice claim, the injury inflicted by the Lawyer Defendants is entirely different in nature compared to the bodily injury inflicted by the Diocese defendants, which the agreement with the Diocese reflects.[1] The Court has erred in deciding that the plaintiffs have but one injury, in negating the terms of their agreements, in relieving the Lawyer Defendants of liability for their conduct, and, if there is but one injury, in failing to properly apply S.C. Code § 15-38-50 consistently with its text, with § 15-38-15, or with *Smith v. Tiffany*, 799 S.E.2d 479 (S.C. 2017).

The Lawyer Defendants are not entitled to the claims against them being extinguished by any of the partial settlements with the Diocese by the four plaintiffs whose claims could possibly have survived the defenses that would have been waived in the class action.

31. At page 11 (and pp. 13 and 16) of the Lawyer order, the Court has misconstrued the breach of fiduciary duty claim, which rests on the holding of *Premium Investment*. The court has determined that *Premium Investment Corp. v. Green*, 324 S.E.2d 72 (S.C. App. 1984) does not impose, an *attorney-client* relationship when the Lawyer Defendants included class allegations in their 2005 class complaint. The argument has been that *Premium Investment* (and many other jurisdictions including the U.S. Supreme Court) impose by operation of law a

[1] The Court purported to have reviewed the confidential agreements some Plaintiffs (Does 10, 194, 240 and 245) reached with the Diocese, which explicitly do not settle any claims made against the Lawyer defendants, explicitly distinguishes the personal injury of the abuse from the breach of professional obligation of class counsel, and invokes S.C. Code § 15-38-50, should a court find that a contribution interest by the Diocese exists, to define the amount paid as a *pro rata* share by the Diocese for its contribution. The agreements were provided to counsel for the Lawyer Defendants.

fiduciary duty when a class is alleged.[2] The attorney-client relationship for those within the class definition arose when the class was approved by the court. E.g., *Newberg on Class Actions* (5th Ed.) Sec. 7.28.

Many other courts recognize the fiduciary obligation to the class that arises when a class is alleged. "Constructive certification," which the court uses to dismiss the import of *Premium Investment*, is not required to impose the fiduciary obligation. E.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549–50, 69 S.Ct. 1221, 1227 (1949) (pleading creates a "fiduciary obligation towards the members of the class that may not be abandoned at will or by agreement with the defendant if prejudice to the class members would result"). That fiduciary obligation is why SCRCP 23(c) does not permit a class complaint from being dismissed or compromised without notice to the class — which can apply even before certification. E.g., *Shelton v. Pargo*, 582 F.2d 1298, 1305 (4th Cir. 1978) (setting criteria for when to require notice to the class of a settlement before certification, footnote omitted):

> By asserting a representative role on behalf of the alleged class, [the putative class representative] voluntarily accepted a fiduciary obligation towards the members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement with the appellant, if prejudice to the members of the class they claimed to represent would result or if they have improperly used the class action procedure for their personal aggrandizement. This has been declared in repeated decisions.

Among other things, fiduciary obligation can protect against a class counsel who will compromised matters in exchange for "red-carpet treatment on fees," *Weinberger v. Great*

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[2] The scope of the fiduciary obligation is also imposed by law: it is to not "prejudice unfairly the members of the class he seeks to represent." *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1306 (4th Cir.1978) (footnote omitted). Failing to even try to give notice to the class that class counsel asked to be certified breaches that duty, and it disadvantaged each of the plaintiffs.

Northern Nekoosa Corp., 925 F.2d 518, 524 (1st Cir.1991).[3]

> [B]ecause the abuses which Rule 23(e) is designed to combat can occur prior to class certification, this Court holds that Rule 23(e) approval must be obtained for the proposed settlement of a named plaintiff's claim when the plaintiff has purported to represent a class that he now seeks to dismiss.

Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 66 (S.D. Tex. 1977). This class settlement was reached before class certification, and posed the same dangers.

The Court also has a duty to act as a fiduciary of the class. *Runion v. U.S. Shelter*, 98 F.R.D. 313, 318 (D.S.C. 1983):

> the district court acts as a fiduciary who must serve as a guardian of the rights of the absent class members. *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975). Although no class has been certified, this court accepts its fiduciary responsibilities at this stage of the litigation. Absent class members have substantial due process rights that are being affected in this case even though a class has not been certified. In *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978), the court recognized the need of the district court to protect the rights of absent class members even at the precertification stage of the litigation.

Compare, Martin v. Ball, 326 Fed. Appx. 191 (4th Cir. 2009) (breach of fiduciary duty claims against class counsel, including lack of notice, remanded for further proceedings.) But the court does not have professional obligations to class member clients. Nor has the court volunteered to represent the class, as have class counsel and the class representative.

The comment to SCRCP 23(d) states, emphasis added, "This Rule requires those *seeking to maintain* an action on behalf of a class to notify the members of the class of the pendency of the action." In other words, the fiduciary obligation applies to class counsel and the class representative even before certification. That is the principle of *Premium Investment*, embedded

[3] As put in *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 65 (S.D. Tex. 1977), the "plaintiff's attorney may accept an insufficient judgment for the class in trade for immediate and certain compensation for himself in the form of legal fees deducted from the total available funds proffered by defendant." Evidence in this record shows that class counsel placed his fee interest above the class recovery, which provided the incentive to restrict notice to not have "too many" class claimants.

in Rule 23. The Court has erred in concluding that no fiduciary duty existed, or that *Premium Investment* did not impose a fiduciary obligation when the class was alleged. *See, Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 331, 100 S.Ct. 1166 (1980) (class representatives have a responsibility "to represent the collective interest of the putative class" in addition to their private interests).

The fiduciary duty to the clients within the class definition is not lessened after certification, it is merely made more precise. *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934, 938–39 (8th Cir.1995) ("certified representatives and the class counsel assume[ ] certain fiduciary responsibilities to the Class," and as a result, "the certified representatives may not take any action which will prejudice the Class's interest, or further their personal interests at the expense of the Class"). The voluntarily assumed obligations of class counsel to his class member clients, including his absent class member clients, do not disappear when the court has certified a class, but are enhanced and made more precise by the class definition that is approved. "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." *Sosna v. Iowa,* 419 U.S. 393, 399, 95 S.Ct. 553, 557 (1975).

The class that was certified had no geographic limit, as proposed by class counsel in October, 2006, when nationwide notice was proposed. In January, 2007, the class definition proposed by class counsel remained unchanged, but the proposed nationwide notice was eliminated by class counsel. No explanation was given for that change to the class action court, even after that lack of nationwide notice to the certified class was called to the attention of the defendants after certification.

Viewed favorably to the plaintiffs, the record suggests that the change to notice was collusive. The defendants agreed to deliberately give notice that would not reach the certified

class, which necessarily cannot be "the best practicable" notice under the circumstances, and, as the record shows, lack of nationwide notice was pointed out in the class proceeding before any class notice was published.[4]

The Court has erred in concluding, Lawyer order at pp. 13 and 15, that no professional malpractice, or breach of fiduciary duty, even could arise when the change to make the notice intentionally ineffective was made before certification but not disclosed to the class action court. The inadequate notice was given after certification, meaning after the attorney-client relationship unarguably had arisen among those within the class definition.[5]

32. The court has erred at p. 19 of the Lawyer order in construing the plaintiffs as being "outside the class definitions," when they are within the class definition as it was proposed for certification in October, 2006 and as it was certified. There is no basis to conclude that any of the plaintiffs are not within the classes as defined.

33. The Court also erred at p. 19 in mis-stating the class definition so as to contend that claims which are "barred by law," such as by charitable immunity, are excluded from the class. This is plain error. Charitable immunity was waived in the class action, and the "Primary Class" definition as proposed by class counsel and as certified had nothing to do with whether a claim was "barred by law." The certified definition, first proposed in October, 2006 and eventually approved was:

> All individuals born on or before August 30, 1980, who, as minors, were sexually abused at any time by agents or employees of the Diocese of Charleston who have not previously had any similar claim adjudicated resolved, or released.

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[5] The court relied on *Gillespie v. Scherr*, 987 S.W. 2d 129 (Tex. App. 1998), and *Formento v. Joyce*, 522 N.E.2d 312 (Ill. App. 1988), but in neither of those cases had a class been certified. In *Joyce*, the court permitted amendment to withdraw a class allegation. *Compare*, *Masztal v. City of Miami*, 971 So. 2d 803 (Fla. App. 2007) (upholding breach of fiduciary duty claim and a disgorgement order against lawyers who alleged a class for leverage in negotiating a settlement). This class action, of course, was certified.

The definition contains no geographic limitation, and contains no exclusion for someone whose claim might *otherwise* be "barred by law." The Court has erred in falsely imposing a criteria nowhere applicable to the class definition, and has for some reason scrambled into the class definition a defense which did not apply to the class because it was waived in the class action. That waiver is why it is significant that the plaintiffs were given no notice of the class action, and why it is significant that the "best practicable" notice was deliberately not used.

34. For the general reasons set forth above, the Court also erred at pp. 19-20 in concluding as to Jane Doe 4 that no breach of fiduciary or other professional duty could apply because the breach supposedly took place before certification, when intentionally deficient notice was given only after certification.

35. The Court erred at pp. 19-20 in concluding that Jane Doe 4 was not an intended beneficiary of the class action. She was explicitly within the class definition the lawyers chose to use and which the court adopted. The court erred in ignoring that class counsel proposed more precisely an unambiguously a class defined without geographic limitation.

36. The Court erred at p. 20 of the Lawyer order in concluding that John Doe 193 is somehow excluded by the class action because his claim is "barred by law." As noted above, the court has plainly mis-read the class definition. John Doe 193 had not previously "adjudicated resolved or released his claim" his claim. He would not have been barred if he had been able to participate in the class, and met the class definition. His claim is barred by charitable only because he had no opportunity to participate in the class action. The Court also erred in concluding he was not an intended beneficiary since he met the class definition.

Conclusion

The orders should be altered or amended.

Respectfully submitted

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Certificate of Service

I certify that a copy of the enclosed

Plaintiffs' Motion to Alter or Amend

By causing a copy of the document to be placed in the United States mail, first –class postage prepaid, addressed to:

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In addition, a pdf copy of the document was emailed to:

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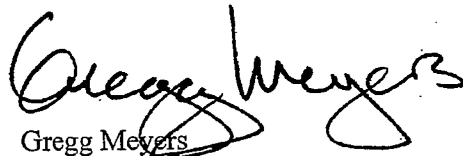
Done August 21, 2017.



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