IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

JOHN DOE B.P.,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	Case No. 1016-CV-29995
	)	
FATHER MICHAEL TIERNEY, et al.,	)	DIVISION 7
	)	
DEFENDANTS.	)	

DAVID CLOHESSY'S REPLY SUGGESTIONS IN SUPPORT OF HIS MOTION TO RECONSIDER AND CLARIFY PROTECTIVE ORDER

COMES NOW David Clohessy, and for his Reply Suggestions in Support of his Motion to Reconsider and Clarify Protective Order, states as follows:

I. Settled First Amendment Doctrine Compels This Court To Reconsider

This Court may impose on SNAP's expressive association rights only if it can be shown that the reason for doing so satisfies a "compelling state interest" and is the least restrictive means of achieving that compelling interest. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.") The Supreme Court has interpreted the First Amendment "to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a 'previous' or 'prior' restraint on speech." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557 (1976). Indeed, prior restraints are the "least tolerable infringements on First Amendment rights." *Id.* at 559.

Stuart is instructive in this matter. In that case, a Nebraska trial court judge and later the Nebraska Supreme Court issued a gag order on local press organizations from publishing confession-related materials of the defendant in a high-profile murder case. *Id.* at 545 ("The Nebraska Supreme Court balanced the 'heavy presumption against . . . constitutional validity' that an order restraining publication bears . . . against the importance of the defendant's right to trial by an impartial jury"). A judicial order preventing communication on a subject in advance of such communication qualifies as a prior restraint. *United Youth Careers, Inc. v. City of Ames, IA*, 412 F.Supp.2d 994, 1002 (S.D. Iowa 2006). The Court's Order dated November 29, 2011 purports to require SNAP to produce all records associated with a Kansas City Diocese—including all press releases, drafts of press releases, and correspondence to or from members of the press for more than two decades—and, indeed, all records from time immemorial referencing repressed memories. It is clear that this Order functions to prevent Clohessy and SNAP from engaging in communication vital to its function as a peer support person and an advocate for those who have shared their struggles with SNAP. Further, because there are myriad other existing and future sexual abuse lawsuits against clergymen, the Order clearly and unequivocally restrains SNAP's free speech rights with respect to these other lawsuits. This is a clear example of a functional prior restraint on SNAP's and Clohessy's right to free speech and association. Moreover, even a general showing by Clohessy that his First Amendment right to free speech will be infringed by discovery requests imposes on Fr. Tierney the burden "to demonstrate a compelling need for the discovery, 'such that the disclosure of the requested information warrants the infringement of the disclosing party's First Amendment rights.'" *In re Deliverance Christian Church*, 2011 WL 6019359 at *5 (N.D. Oh. 2011), citing *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

Here, it is evident as an initial matter that there is no compelling interest in forcing Clohessy to submit to deposition. Defendant Father Michael Tierney's ("Fr. Tierney") argument is simply that he is entitled to depose Clohessy as a matter of course, pursuant to Rule 56.01(b)(1), allowing for discovery of any relevant, non-privileged matter. Clearly, this right to discovery pales in comparison to the Sixth Amendment right to fair trial discussed at length in *Stuart*. *See id.* at 561 (equating the Sixth Amendment's guarantees to the First Amendment's).

More importantly, deposing Clohessy and forcing SNAP to compile voluminous records to comply with Fr. Tierney's subpoena—this Court's Order barring discovery of records protected by RSMo § 455.003 notwithstanding—is not the least restrictive means available to discover the information sought.

Fr. Tierney's filings in this matter have made clear that he contends Clohessy is complicit in a conspiracy whereby he advises victims of sexual abuse of the effect a repressed memory has on the application of the statute of limitations. In twenty-three years of dedicated service to victims of sexual abuse, SNAP has never endured such an unfounded allegation. Fr. Tierney has also openly stated that this subpoena directed to SNAP is in large part an effort to determine whether Plaintiff John Doe B.P.'s counsel has violated this Court's August 2, 2011 "gag" Order. Moreover, the most clearly discoverable information would involve communication between John Doe B.P. himself and SNAP—although this information certainly might fall within the confines of RSMo § 455.003.

Leaving aside the fact that SNAP has represented to this Court that John Doe B.P. has not contacted SNAP at any point, it is clear that the least restrictive means by which to obtain all this information would be from John Doe B.P. himself. Yet, Fr. Tierney has not deposed John Doe B.P. In fact, he has not so much as served pattern interrogatories on John Doe B.P. Clearly,

engaging in straightforward discovery between litigants to determine what, if any, questions remain for non-party SNAP would be less restrictive than forcing SNAP to compile voluminous documents and potentially submit to deposition testimony. Fr. Tierney has instead chosen to harass SNAP—a victim's self-help organization with which he is diametrically opposed—with a voluminous subpoena rather than even bother to seek discovery from John Doe B.P. As this Court is aware, there are numerous pending lawsuits against clergymen that involve repressed memories, and there are numerous other victims of sexual abuse who have been denied their day in court because of Missouri statutes of limitations. The array of discovery options available to a clergyman defendant wishing to challenge the veracity of a repressed memory claim is wide—deposing the individual, deposing fact witnesses, perhaps medical testimony. SNAP is not the proper party to bear the burden to confirm or undermine Fr. Tierney's paranoia that a litigant may be less than sincere about his or her repressed memory, particularly where the ramifications on SNAP's ability to exercise its free speech to advocate for victims is muted in the process.

By seeking more than two decades of communications between journalists and victims of sexual abuse, their loved ones, their advocates, police, prosecutors, whistleblowers and concerned citizens and Catholics—in a civil lawsuit to which none of them are parties—Fr. Tierney is launching an unprecedented, unjustified, chilling attack on freedoms of expression and privacy that have long been a foundation of our society. Because this Court's Order amounts to a prior restraint on SNAP's and Clohessy's fundamental right to free speech, Clohessy urges it to reconsider its November 29, 2011 Order in this respect.

In the alternative, if the Court is in fact ordering communication between SNAP and the media, Clohessy requests such discovery be limited to the timeframe during which this Court's

August 2, 2011 Order could have possibly been violated—only from August 2, 2011 until the date of subpoena.

II. This Court Should Prohibit Deposition Testimony On All Subjects That Violate RSMo §455.003.

Clohessy reiterates his request that the Court also reconsider or clarify its Order with respect to any deposition testimony from Clohessy.

Missouri's rape crisis statute provides as follows in pertinent part, with emphasis added:

> 1. A rape crisis center shall:
>
> (1) Require persons employed by . . . the rape crisis center to maintain confidentiality of any information that would identify individuals served by the center and any information or records that are directly related to the advocacy services provided to such individuals; and
>
> ***
>
> 2. Any person employed by or volunteering services to a rape crisis center for victims of sexual assault shall be incompetent to testify concerning any confidential information in subsection 1 of this section, unless the confidentiality requirements are waived in writing by the individual serving the center.

Fr. Tierney's response to this request entirely misses the mark, urging that Clohessy, upon the advice of counsel, may simply "refuse to reveal any victims' identity." While Clohessy certainly can and will refuse to reveal victims' identities, as to do so would undermine his integrity, effectiveness, and promises as the director of SNAP and would also violate Missouri law, RSMo § 455.003's prohibitions on disclosure of confidential information are far stricter. In fact, the statute renders Clohessy incompetent to testify as to any confidential information. *See e.g. Schabell v. Nozawa-Joffe*, 2010 WL 1704471 (N.D. Il., April 27, 2010).

Accordingly, Clohessy moves this Court to clarify its protective order to indicate that any subject that would require Clohessy to violate RSMo § 455.003's restrictions is strictly

prohibited from discovery in any deposition that may eventually take place.

In the alternative, Clohessy requests this Court ban deposition testimony from being given until it has had a chance to review Clohessy's privilege log and corresponding production of documents not ultimately privileged even from *in camera* review by RSMo § 455.003.

III. This Court Should Temporally and Geographically Limit The Document Production Sought.

In twenty three years of SNAP's existence, no party has ever sought—let alone obtained—the voluminous discovery Fr. Tierney seeks in this matter. In the event this Court does not reconsider its decision and quash Fr. Tierney's subpoena outright, Clohessy requests that this Court at least issue an Order placing reasonable restrictions on its breadth, in addition to the above restriction regarding media communication.

In order to balance the need to discover the truth with the great expense of civil discovery, the Missouri Rules of Civil Procedure limit discovery to relevant matters. "The party seeking discovery shall have the burden of establishing relevance." Rule 56.01(b)(1). Discovery lacking appropriate geographic, temporal, or subject matter limitation is overbroad. *State ex rel. General Motors Acceptance Corp. v. Standridge*, 181 S.W.3d 76, 78 (Mo. Banc 2006).

Fr. Tierney's subpoena seeks discovery across geographic, temporal, and subject matter boundaries with no limitation whatsoever, something clearly not allowed as a matter of Missouri law. *See Standridge*, 181 S.W.3d at 78.

WHEREFORE, David Clohessy requests the Court Reconsider and Clarify its Protective Order in this matter and grant Clohessy the aforementioned relief.

Respectfully Submitted,

JENSEN, BARTLETT & SCHELP, LLC

By: _____

Jeffrey B. Jensen, #46745
Matthew P. Diehr, #61999
Attorneys for David Clohessy
222 S. Central Ave, Suite 110
St. Louis, MO 63105
314-725-3939
314-725-5595 Facsimile
JJensen@jbslawyers.com
MDiehr@jbslawyers.com

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of December, 2011, a true and correct copy of the above and foregoing was served by First Class Mail, postage prepaid, to:

Rebecca M. Randles
Dan Curry
Randles, Mata & Brown, LLC
406 W. 34th Street, Suite 623
Kansas City, MO 64111
Attorneys for Plaintiff

Jonathan R. Haden
Mara H. Cohara
Chad Blomberg
Lathrop & Gage, L.C.
2345 Grand Blvd., Suite 2200
Kansas City, Mo. 64108
Attorneys for Defendant Catholic Diocese of Kansas City-St. Joseph

Brian J. Madden
Diane K. Watkins
Adam S. Davis
Wagstaff & Cartmell, LLP
4740 Grand Ave., Suite 300
Kansas City, MO 64112
Attorneys for Defendant Father Michael Tierney

_____
Jeffrey B. Jensen, #46745