NEW YORK STATE SUPREME COURT
NASSAU COUNTY

Motion Seq. # 002

S.T.,

Plaintiff,

Index No.: 900007/2019

-against-

DIOCESE OF ROCKVILLE CENTRE ET AL.,

Defendants.

Child Victims Act Proceeding
22 YCRR 202.72

PLAINTIFF S.T.'S MEMORANDUM OF LAW IN OPPOSITION TO THE DIOCESE OF ROCKVILLE CENTRE'S MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff S.T. anticipated the Diocese's arguments, so the Diocese's motion does not assert that any of his claims were insufficiently pled or that he failed to plead viable claims or causes of action. With this in mind, Plaintiff S.T. respectfully requests the Court deny the Diocese's motion because (1) the Child Victims Act ("CVA") is constitutional as it is a reasonable effort by the Legislature to provide justice to countless children who were sexually abused as minors, including S.T. and the dozens of other abuse survivors who are the subject of its motion, (2) the CVA revived "all claims" based on negligent or intentional conduct, including S.T.'s claims for outrage and intentional infliction of emotional distress, (3) the Diocese can be held vicariously liable for the acts and omissions of its employees and agents, even intentional or reckless acts and omissions so long as they were undertaken with the Diocese's authority, (4) S.T.'s claims for negligence, outrage, and intentional infliction of emotional distress are not "duplicative" as they constitute separate torts with different elements, pled in conjunction with one another or in the alternative, and (5) S.T.'s claim for *respondeat superior* is not duplicative of his other claims as *respondeat superior* is simply a way to hold the Diocese liable for the knowledge, acts, and omissions of its agents.

Aside from its constitutional challenge, the Diocese's motion makes very few arguments regarding Plaintiff S.T.'s complaint, likely because his complaint anticipated the Diocese's arguments and is pleaded in a manner such that the Diocese cannot meet its extraordinarily high burden on a motion to dismiss on the pleadings. Although the Court is generally only being asked to find that the complaints of other plaintiffs are insufficiently pled, S.T. is concerned the Court is being asked to make rulings in those other cases that the Diocese may then try to use against S.T. in his case. Accordingly, this opposition brief addresses not only the arguments the Diocese makes

as to S.T.'s complaint but also addresses some of the other core arguments the Diocese makes concerning other plaintiffs.

The Court should deny the Diocese's motion to dismiss. However, if the Court believes any plaintiff has insufficiently pled certain claims or causes of action, the Diocese's motion should still be denied because it has not met its burden of specifically articulating how each complaint was insufficiently pled. The Diocese should be required to re-file its motion and specifically explain why each complaint is deficient. The Court may find it helpful to provide the parties with guidance on the Diocese's arguments so that the current parties and future parties can avoid or limit similar motion practice in the future.

II. BACKGROUND FACTS

Since the Diocese filed its motion to dismiss shortly after Plaintiff S.T. filed suit and before it or any other defendant answered discovery, the Court must view all of Plaintiff S.T.'s allegations as true, including "every possible favorable inference" that could be drawn from those allegations. The same is true of the allegations of every other plaintiff whose case the Diocese is trying to dismiss before it engages in discovery. Not only is the Diocese trying to dismiss some sixty-plus lawsuits, but it is trying to severely narrow their claims and causes of action before it has provided any discovery.

Plaintiff S.T.'s allegations demonstrate why the Court should deny the Diocese's motion in his case and the other cases, particularly since the Diocese has made only a few arguments regarding S.T.'s particular case (the numbered paragraphs correspond to the numbered paragraphs in S.T.'s Complaint, filed on August 14, 2019, which is attached as **Exhibit 1** to the Affirmation of James R. Marsh ("Marsh Affirm.")):

> 1. The Diocese of Rockville Centre (the "Diocese") knew for decades that its priests, clergy, employees, and volunteers were using their positions within the Diocese to groom and to sexually abuse children. Despite that knowledge, the

Diocese failed to take reasonable steps to protect children from being sexually abused and actively concealed the abuse. Based on the Diocese's wrongful conduct, a reasonable person could and would conclude that it knowingly and recklessly disregarded the abuse of children and chose to protect its reputation and wealth over those who deserved protection. The result is not surprising: for decades hundreds, if not thousands, of children were sexually abused by Catholic clergy and others who served the Diocese. The plaintiff in this lawsuit is one of those children who were sexually abused because of the Diocese's wrongful conduct.

2. This complaint is filed pursuant to the Child Victims Act (CVA) 2019 Sess. Law News of N.Y. Ch. 11 (S. 2440), CPLR 214-G, and 22 NVCRR 202.72. The CVA opened a historic one-year one-time window for victims and survivors of childhood sexual abuse in the State of New York to pursue lapsed claims. Prior to the passage of the CVA, plaintiff's claims were time-barred the day they turned 22 years old. The enactment of the CVA allows plaintiff, for the first time in his life, to pursue restorative justice in New York State. …

4. While he was a minor, plaintiff S.T. was a victim of one or more criminal sex acts in the State of New York. Since such criminal violation is the basis for this action, plaintiff S.T. S.T. is entitled to the protection of Civil Rights Law 50-b and will file a motion asking this Court for permission to proceed using a pseudonym.

9. Upon information and belief, Father Joseph McComiskey ("Father McComiskey") was a priest employed by the Diocese to serve Catholic families, including plaintiff S.T. and his family. During the time Father McComiskey was employed by the Diocese, he used his position as a priest to groom and to sexually abuse plaintiff S.T. …

13. Upon information and belief, at all relevant times defendant St. Philip and St. James Church ("St. Philip and St. James") was a not-for-profit religious corporation organized under New York law and wholly owned, operated, and controlled by the Diocese. …

16. St. Philip and St. James is a parish with a church located in St. James, New York.

17. Upon information and belief, Father Joseph McComiskey was a priest employed by St. Philip and St. James to serve Catholic families in its geographic jurisdiction, including plaintiff S.T. and his family. During the time Father Joseph McComiskey was employed by St. Philip and St. James, he used his position as a priest to groom and to sexually abuse plaintiff S.T. …

24. Upon information and belief, at all relevant times the Diocese, its agents, servants, and employees managed, maintained, operated, and controlled St. Philip and St. James.

25. Upon information and belief, at all relevant times the Diocese employed priests and others who served Catholic families at St. Philip and St. James, including plaintiff S.T. and his family.

26. Upon information and belief, at all relevant times the Diocese, its agents, servants, and employees managed, maintained, operated, and controlled St. Philip and St. James, and held out to the public its agents, servants, and employees as those who managed, maintained, operated, and controlled St. Philip and St. James.

27. Upon information and belief, at all relevant times the Diocese was responsible for the hiring and staffing, and did the hiring and staffing, at St. Philip and St. James. …

29. Upon information and belief, at all relevant times the Diocese materially benefited from the operation of St. Philip and St. James, including the services of Father McComiskey and the services of those who managed and supervised Father McComiskey. …

37. Upon information and belief, at all relevant times Father McComiskey was a priest of the Diocese.

38. Upon information and belief, at all relevant times Father McComiskey was on the staff of, acted as an agent of, and served as an employee of the Diocese.

39. Upon information and belief, at all relevant times Father McComiskey was acting in the course and scope of his employment with the Diocese.

40. Upon information and belief, at all relevant times Father McComiskey was employed by the Diocese and assigned to St. Philip and St. James. …

44. Upon information and belief, at all relevant times Father McComiskey had an office on the premises of St. Philip and St. James.

45. When plaintiff S.T. was a minor, he and his parents were members of the Diocese and St. Philip and St. James.

46. At all relevant times, the Diocese and St. Philip and St. James, their agents, servants, and employees, held Father McComiskey out to the public, to S.T., and to his parents, as their agent and employee.

47. At all relevant times, the Diocese and St. Philip and St. James, their agents, servants, and employees, held Father McComiskey out to the public, to S.T., and to his parents, as having been vetted, screened, and approved by those defendants.

48. At all relevant times, S.T. and his parents reasonably relied upon the acts and representations of the Diocese and St. Philip and St. James, their agents,

servants, and employees, and reasonably believed that Father McComiskey was an agent or employee of those defendants who was vetted, screened, and approved by those defendants.

49. At all relevant times, S.T. and his parents trusted Father McComiskey because the Diocese and St. Philip and St. James held him out as someone who was safe and could be trusted with the supervision, care, custody, and control of S.T.

50. At all relevant times, S.T. and his parents believed that the Diocese and St. Philip and St. James would exercise such care as would a parent of ordinary prudence in comparable circumstances when those defendants assumed supervision, care, custody, and control of S.T.

51. When S.T. was a minor, Father McComiskey sexually abused him.

52. S.T. was sexually abused by Father McComiskey when S.T. was approximately 16 years old.

53. Based on the representations of the Diocese and St. Philip and St. James that Father McComiskey was safe and trustworthy, S.T. and his parents allowed S.T. to be under the supervision of, and in the care, custody, and control of, the Diocese and St. Philip and St. James, including when S.T. was sexually abused by Father McComiskey.

54. Based on the representations of the Diocese and St. Philip and St. James that Father McComiskey was safe and trustworthy, S.T. and his parents allowed S.T. to be under the supervision of, and in the care, custody, and control of, Father McComiskey, including when S.T. was sexually abused by Father McComiskey.

55. Neither S.T. nor his parents would have allowed him to be under the supervision of, or in the care, custody, or control of, the Diocese, St. Philip and St. James, or Father McComiskey if the Diocese or St. Philip and St. James had disclosed to S.T. or his parents that Father McComiskey was not safe and was not trustworthy, and that he in fact posed a danger to S.T. in that Father McComiskey was likely to sexually abuse S.T.

56. No parent of ordinary prudence in comparable circumstances would have allowed S.T. to be under the supervision of, or in the care, custody, or control of, the Diocese, St. Philip and St. James, or Father McComiskey if the Diocese or St. Philip and St. James had disclosed to S.T. or his parents that Father McComiskey was not safe and was not trustworthy, and that he in fact posed a danger to S.T. in that Father McComiskey was likely to sexually abuse him.

57. In approximately 1976, Father McComiskey exploited the trust and authority vested in him by defendants by grooming S.T. to gain his trust and to

obtain control over him as part of Father McComiskey's plan to sexually molest and abuse S.T. and other children.

58. Father McComiskey used his position of trust and authority as a priest of the Diocese and of St. Philip and St. James to groom S.T. and to sexually abuse him, including when S.T. was under the supervision of, and in the care, custody, or control of, the Diocese, St. Philip and St. James, and Father McComiskey.

59. Father McComiskey's sexual abuse of S.T. occurred during activities that were sponsored by, or were a direct result of activities sponsored by, the Diocese and St. Philip and St. James, including during a camping trip on Long Island.

60. Upon information and belief, prior to the time mentioned herein, Father McComiskey was a known sexual abuser of children.

61. At all relevant times, defendants, their agents, servants, and employees, knew or should have known that Father McComiskey was a known sexual abuser of children.

62. At all relevant times, it was reasonably foreseeable to defendants, their agents, servants, and employees that Father McComiskey's sexual abuse of children would likely result in injury to others, including the sexual abuse of S.T. and other children by Father McComiskey.

63. The defendants, their agents, servants, and employees, knew or should have known that Father McComiskey was sexually abusing S.T. and other children at St. Philip and St. James and elsewhere.

64. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew or should have known that Father McComiskey was likely to abuse children, including S.T., because in approximately 1974—years before S.T. was abused by Father McComiskey—it was reported to St. Philip and St. James Church and the Diocese that another child was sexually abused by Father McComiskey.

65. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew or should have known before and during Father McComiskey's sexual abuse of S.T. that priests and other persons serving the Diocese and St. Philip and St. James had used their positions with those defendants to groom and to sexually abuse children.

66. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew or should have known before and during Father McComiskey's sexual abuse of S.T. that such priests and other persons could not be "cured" through treatment or counseling.

67. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, concealed the sexual abuse of children by Father McComiskey in order to conceal their own bad acts in failing to protect children from him, to protect their reputation, and to prevent victims of such sexual abuse by him from coming forward during the extremely limited statute of limitations prior to the enactment of the CVA, despite knowing that Father McComiskey would continue to molest children.

68. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, consciously and recklessly disregarded their knowledge that Father McComiskey would use his position with the defendants to sexually abuse children, including S.T.

69. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, disregarded their knowledge that Father McComiskey would use his position with them to sexually abuse children, including S.T.

70. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, acted in concert with each other or with Father McComiskey to conceal the danger that Father McComiskey posed to children, including S.T., so that Father McComiskey could continue serving them despite their knowledge of that danger.

71. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew that their negligent, reckless, and outrageous conduct would inflict severe emotional and psychological distress, as well as personal physical injury, on others, including S.T., and he did in fact suffer severe emotional and psychological distress and personal physical injury as a result of their wrongful conduct.

72. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, concealed the sexual abuse of children by priests and others in order to conceal their own bad acts in failing to protect children from being abused, to protect their reputation, and to prevent victims of such sexual abuse from coming forward during the extremely limited statute of limitations prior to the enactment of the CVA, despite knowing that those priests and other persons would continue to molest children.

73. By reason of the wrongful acts of the Diocese and St. Philip and St. James as detailed herein, S.T. sustained physical and psychological injuries, including but not limited to, severe emotional and psychological distress, humiliation, fright, dissociation, anger, depression, anxiety, family turmoil and loss of faith, a severe shock to his nervous system, physical pain and mental anguish, and emotional and psychological damage, and, upon information and belief, some or all of these

injuries are of a permanent and lasting nature, and S.T. has and/or will become obligated to expend sums of money for treatment. …

75. The Diocese and St. Philip and St. James had a duty to take reasonable steps to protect plaintiff S.T., a child, from foreseeable harm when he was under their supervision and in their care, custody, and control.

76. The Diocese and St. Philip and St. James also had a duty to take reasonable steps to prevent Father McComiskey from using the tasks, premises, and instrumentalities of his position with the defendants to target, groom, and sexually abuse children, including S.T.

77. The Diocese and St. Philip and St. James were supervising S.T., and had care, custody, and control of S.T., when he attended St. Philip and St. James as a parishioner and when he attended their camping trip, during which time those defendants had a duty to take reasonable steps to protect him.

78. These circumstances created a special relationship between the Diocese and S.T., and between St. Philip and St. James and S.T., which imposed on each of those defendants a duty to exercise the degree of care of a parent of ordinary prudence in comparable circumstances.

79. The Diocese and St. Philip and St. James breached each of the foregoing duties by failing to exercise reasonable care to prevent Father McComiskey from harming S.T., including sexually abusing him.

80. In breaching their duties, including hiring, retaining, and failing to supervise Father McComiskey, giving him access to children, entrusting their tasks, premises, and instrumentalities to him, failing to train their personnel in the signs of sexual predation and to protect children from sexual abuse and other harm, failing to warn S.T., his parents, and other parents of the danger of sexual abuse, and failing to create a safe and secure environment for S.T. and other children who were under their supervision and in their care, custody, and control, the Diocese and St. Philip and St. James created a risk that S.T. would be sexually abused by Father McComiskey. The Diocese and St. Philip and St. James through their actions and inactions created an environment that placed S.T. in danger of unreasonable risks of harm under the circumstances.

81. In breaching their duties, including hiring, retaining, and failing to supervise Father McComiskey, giving him access to children, entrusting their tasks, premises, and instrumentalities to him, failing to train their personnel in the signs of sexual predation and to protect children from sexual abuse and other harm, failing to warn S.T., his parents, and other parents of the danger of sexual abuse, and failing to create a safe and secure environment for S.T. and other children who were under their supervision and in their care, custody, and control, the Diocese and St. Philip and St. James acted willfully and with conscious disregard for the need to protect

> S.T. The Diocese and St. Philip and St. James through their actions and inactions created an environment that placed S.T. in danger of unreasonable risks of harm under the circumstances.
>
> 82. It was reasonably foreseeable that defendants' breach of these duties of care would result in the sexual abuse of S.T.
>
> 83. As a direct and proximate result of the acts and omissions of the Diocese and St. Philip and St. James, Father McComiskey groomed and sexually abused S.T., which has caused S.T. to suffer general and special damages as more fully described herein. …
>
> 85. The Diocese and St. Philip and St. James engaged in reckless, extreme, and outrageous conduct by providing Father McComiskey with access to children, including plaintiff S.T., despite knowing that he would likely use his position to groom and to sexually abuse them, including S.T. Their misconduct was so shocking and outrageous that it exceeds the reasonable bounds of decency as measured by what the average member of the community would tolerate and demonstrates an utter disregard by them of the consequences that would follow.
>
> 86. As a result of this reckless, extreme, and outrageous conduct, Father McComiskey gained access to S.T. and sexually abused him.
>
> 87. The Diocese and St. Philip and St. James knew that this reckless, extreme, and outrageous conduct would inflict severe emotional and psychological distress, including personal physical injury, on others, and S.T. did in fact suffer severe emotional and psychological distress and personal physical injury as a result, including severe mental anguish, humiliation and emotional and physical distress.

Marsh Affirm., Ex. 1, at ¶¶ 1, 2, 4, 9, 13, 16, 17, 24-27, 29, 37-40, 44-73, 75-83, 85-87.

The Diocese's motion is a motion to dismiss on the pleadings, which means S.T. is not required to provide evidence in support of this opposition brief. This is not a summary judgment motion and S.T. is not responding to this like it is a summary judgment motion because he has not had a fair and full opportunity to obtain any discovery from the Diocese regarding any of these issues, including its knowledge, acts, and omissions with regard to Father McComiskey and his sexual abuse of S.T. and other children. Marsh Affirm., at ¶ 4.

To the contrary, S.T. served discovery on the Diocese with his complaint, but then agreed to give the Diocese until mid-November to answer his complaint or move against the complaint,

which was to be followed by the start of discovery. However, the Court issued its case management order before the parties could begin discovery, and the parties understood the case management order to mean the parties were required to issue the Court-approved standard discovery once approved. As it stands, Plaintiff S.T. has not received any discovery from the Diocese, including any information or records regarding S.T.'s threshold allegations that (1) the Diocese knew or should have known that Father McComiskey posed a danger to S.T. before Father McComiskey sexually abused him, and (2) the Diocese negligently, recklessly, or intentionally ignored that danger and allowed Father McComiskey to sexually abuse him, just like it had done with many of its other priests and agents who sexually abused children before and after S.T. The Court this past week approved the standard discovery that Plaintiff S.T. may serve on the Diocese, which he will issue this week. Marsh Affirm., at ¶ 5.

III. LEGAL ARGUMENT

The Court should deny the Diocese's motion because (1) the CVA is constitutional as it is a reasonable effort by the Legislature to provide justice to countless children who were sexually abused as minors, including S.T. and the dozens of other abuse survivors who are the subject of its motion,, (2) the CVA revived "all claims" based on negligent or intentional conduct, including S.T.'s claims for outrage and intentional infliction of emotional distress, (3) the Diocese can be held vicariously liable for the acts and omissions of its employees and agents, even intentional or reckless acts and omissions so long as they were undertaken with the Diocese's authority, (4) S.T.'s claims for negligence, outrage, and intentional infliction of emotional distress are not "duplicative" as they constitute separate torts with different elements, and (5) S.T.'s claim for *respondeat superior* is not duplicative of his other claims since *respondeat superior* is simply a

way to hold the Diocese liable for the knowledge, acts, and omissions of its agents.[1]

A. The Revival of Claims Under the Child Victims Act Is Consistent With New York's Due Process Clause

The Court should deny the Diocese's motion to the extent it argues that the CVA is unconstitutional because New York courts have repeatedly upheld the Legislature's revival of time-barred claims when, as here, the Legislature's intent is expressly stated and permitting such claims is a reasonable way to do justice to deserving parties. Under these long-standing precedents, the revival of S.T.'s claim and the claims of other survivors of childhood sexual abuse comports with due process.

1. The Court of Appeals Has Repeatedly Upheld the Constitutionality of Claim-Revival Statutes, and Has Never Struck One Down

As a preliminary matter, the Diocese would have the Court believe that "the Court of Appeals has for nearly 100 years interpreted the Due Process Clause in our State Constitution to allow for revival of time-barred claims only in exceptional circumstances where claimants were previously prevented in some specific manner from asserting timely claims." Diocese's Amended Memorandum of Law, at 15. Nothing of the sort is true. In fact, in nearly 100 years, the Court of Appeals ("COA") has repeatedly upheld the constitutionality of claim-revival statutes and has never struck one down as unconstitutional. A search of New York case law reveals the COA has never held such a statute unconstitutional. It appears the only court ever to do so was a federal trial court in *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F Supp 3d 466 [SDNY 2014], *vacated and remanded,* 892 F3d 108 [2d Cir 2018], but that decision was vacated and the rationale underlying it was expressly and categorically rejected by the COA on a certified

[1] S.T.'s complaint does not include a "claim" or "cause of action" for *respondeat superior*, so it is unclear what the Diocese seeks to dismiss. S.T. alleges that the Diocese is liable for the knowledge, acts, and omissions of its employees and other agents, including failing to protect S.T. from being sexually abused by one of its priests, but those are simply the facts that give rise to *respondeat superior* liability.

question from the U.S. Court of Appeals for the Second Circuit. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 394-400, 89 NE3d 1227 [2017].

To read the Diocese's motion, one would think that the vacated District Court's decision was a correct statement of New York law governing the constitutionality of claim-revival statutes. Nothing could be further from the truth. Despite the Diocese's repeated suggestion that the Legislature may only revive time-barred claims as an "extreme" measure under "exceptional circumstances," that is simply not the rule. On the contrary, the COA has explicitly rejected these very characterizations. The correct rule is deferential and liberal: "[A] claim-revival statute will satisfy the Due Process Clause of the State constitution if it was enacted as a reasonable response in order to remedy an injustice." *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 30 NY3d at 400. This standard is only "slightly more demanding than pure reasonableness." *Id.* at 399.

As discussed more fully below, the Legislature's one-year revival of claims under CPLR §214-g for historic child sexual abuse easily passes muster. It is a reasonable response: a short, limited revival, enacted to remedy an injustice—that is, the inability of thousands of child sex abuse survivors to bring timely actions because of their psychological scars. The fact that the Diocese and the broader Catholic Church in New York supported the statute severely undercuts the Diocese's effort to now claim the statute is unreasonable. Marsh Affirm., **Exhibit 2**. However, it is worth pointing-out that this particular Diocese is the only Catholic diocese or archdiocese in New York that did not publish a list of "credibly accused priests," a point that suggests the Diocese wanted to downplay the injustice needed to be remedied by this statute that it supported.

2. Childhood Sexual Abuse Injuries Often Render Survivors Incapable of Seeking Help or Taking Legal Action Against Responsible Parties Until Many Years into Their Adult Lives

Modern psychological research increasingly recognizes that survivors of childhood sexual

abuse suffer severe psychological injuries and that they are often unable to recognize their injuries for months, years, and often decades. *See generally* David Viens, *Countdown to Injustice: The Irrational Application of Criminal Statutes of Limitations to Sexual Offenses Against Children,* 38 SUFFOLK U. L. REV. 169, 176 [2004] (describing effects of childhood sexual abuse).

In order to even survive the sexual abuse – particularly when perpetrated by a trusted figure – survivors of sexual abuse develop "psychological armor to survive the experience: repression, denial and emotional avoidance. As a result, the symptoms of childhood sexual abuse may lie dormant for days or decades until detonated by a 'developmental trigger' or therapy itself." Rebecca L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations. A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1254 [1991]. It is not unusual for survivors of childhood sexual abuse to wait decades before confronting the abuse that they had compartmentalized and fully comprehend its effect on their lives. *Id.* ("one study of 365 adult survivors found that, on the average, survivors entered therapy 17 years after the abuse terminated"). According to the scientific literature, the typical "triggering event" (aside from entering therapy) that eventually allows the survivor to recognize and deal with his or her abuse can be varied, but is typically a significant life event that causes intense reflection or replicates the environment of the abuse, often occurring later in adult life. *Id*. at 1254 n. 78.

Consistent with those defense mechanisms is the fact that children typically do not disclose sexual abuse during or immediately after the time they are abused. Marsh Affirm., **Exhibit 3** (*Ramona Alaggia, Many Ways of Telling: Expanding Conceptualizations of Child Sexual Abuse Disclosure,* 28 CHILD ABUSE & NEGLECT 1213, 1218 [2004] (58% of child sexual abuse victims do not purposefully disclose their abuse until adulthood)). The pressures to remain silent are wide-ranging and often overwhelming, including pressure or threats from the perpetrator, a

relationship with the perpetrator, fear of the anticipated consequences of telling, fear of negative reactions from parents or family, fear of not being believed, and feelings of embarrassment, shame, and self-blame. *Id.* 1213-27.

Given the extensive scientific research, it should come as little surprise that, for more than 30 years, courts around the country have recognized the unique and insidious nature of child sexual abuse injuries that prevent survivors from being able to take action against those responsible for the abuse for many years into their adult lives. *See e.g. Evans v Eckelman*, 216 Cal App 3d 1609, 265 Cal Rptr 605 [Cal Ct App 1990] (child's "psychological blocking mechanisms" broke down when he was convicted of sexual assault and ordered to undergo therapy); *K.E. v Hoffman*, 452 NW2d 509 [Minn Ct App 1990] (memories of sexual abuse resurfaced while adult survivor was serving in Army); *Meiers-Post v Schafer*, 170 Mich App 174, 427 NW2d 606 [Mich Ct App 1988] (thirty-year-old's repression of sexual relations with high school teacher unearthed while watching television show on sexual exploitation of students by teacher); *Hammer v Hammer*, 142 Wis 2d 257, 418 NW2d 23 [Wis Ct App 1987] (victim discovered psychological damage when she realized her sister was her father's next victim); *Jasmin v Ross*, 177 Or App 210, 212-13, 33 P3d 725 [Or Ct App 2001] (recognition of injury from abuse by step-uncle triggered by discussions with high school confidant approximately 12 years from the last incident of sexual contact); *Korst v McMahon*, 136 Wash App 202, 209-10, 148 P3d 1081 [Wash Ct App 2006] ("the victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs").

3. The Legislature Revived Certain Child Sex Abuse Claims Under CPLR 214-g to Protect Children and to Restore Justice to Thousands of Abuse Survivors

On February 14, 2019, after years of advocacy in support of its enactment, Governor Cuomo signed into law Chapter 11 of the Laws of 2019 – the CVA. The legislation was primarily

intended to revive civil claims by survivors of childhood sexual abuse that were time-barred under the existing statute of limitations, and to provide a more generous statute of limitations for such claims in the future. CPLR 214-g, Practice Commentaries, by Vincent C. Alexander.

The "Justification" for the Senate Bill (S2440) that became the Child Victims Act makes clear that the legislation was passed to remedy a great injustice to abuse survivors in recognition of the widely accepted scientific evidence, noted above, that found victims of childhood sexual abuse are often unable to understand their injuries or take meaningful action against the responsible parties until many years into their adult lives. The Sponsor's Memorandum explained that New York was "one of the worst states in the nation" on this issue and "thousands of survivors" were left unable to pursue redress for their injuries:

> New York is one of the worst states in the nation for survivors of child sexual abuse. New York currently requires most survivors to file civil actions or criminal charges against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average. Because of these restrictive statutes of limitations, thousands of survivors are unable to sue or press charges against their abusers, who remain hidden from law enforcement and pose a persistent threat to public safety.
>
> This legislation would open the doors of justice to the thousands of survivors of child sexual abuse in New York State by prospectively extending the statute of limitations to age 28 for charging felony sexual offenses, age 25 for charging misdemeanor sexual offenses, and age 55 for bringing civil actions for physical, psychological or other injury suffered as a result of child sexual abuse against any party whose intentional or negligent acts or omissions are alleged to have resulted in the abuse.
>
> This legislation would also establish a one-year window in which adult survivors of child sexual abuse would be permitted to file civil actions, even if the statute of limitations had already expired or, in the case of civil actions against public institutions, a notice of claim requirement had gone unmet.
>
> Passage of the Child Victim Act will finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties.

Senate Introducer's Memorandum in Support, S2440. The Sponsor's Memorandum accompanying the legislation further noted that "[t]he societal plague of sexual abuse against minors is ... well documented," as is the fact that the crimes of many abusers have been covered up by the institutions that employed them. Senate Introducer's Memorandum in Support, A2683. Yet, as the Practice Commentary notes when discussing the Sponsors' Memorandums:

> "the doors to the courthouse [have] been closed to civil claims by victims whose psychological scars have disabled them from suing until well into their adult years. Relatively short statutes of limitation and deficient tolling provisions [have] kept the doors locked to them. In 2006, the Court of Appeals criticized two church dioceses for hiding sexual abuses committed by their priests, but found no basis in existing law for equitably estopping the defendants from invoking the then-governing statute of limitations to preclude civil actions for money damages by the victims. *Zumpano v Quinn*, 6 NY3d 666, 849 NE2d 926 [2006] ..."

CPLR 214-g, Practice Commentaries, by Vincent C. Alexander.

Now, with the passage of the CVA, New York joins nearly a dozen states across the country that have amended their statutes of limitations in recent years to comport with the scientific evidence noted above, restore justice to countless abuse survivors, and better protect children by expanding the time for survivors to bring civil claims, including "window legislation" that allows survivors with time-barred claims a limited time period to file lawsuits against the perpetrators who abused them and the institutions responsible for their abuse. *See, e.g.,* **New Jersey**, NJ Stat Ann 2A:14-2b (increased statute of limitations to age 55, plus discovery rule and two-year window for time barred claims); **Connecticut**, Conn Gen Stat Ann § 52-577d (retroactively increased statute of limitations to age 51, including for time-barred claims); **California**, Cal Civ Proc Code § 340.1 (increased statute of limitations to age 40, plus discovery rule and three-year window for time barred claims); **Minnesota**, Minn Stat Ann § 541.073 (increased statute of limitations to age 24, plus discovery rule and three-year window for time-barred claims); **Hawaii**, Haw Rev Stat Ann § 657-1.8 (increased statute of limitations to age 26, plus discovery rule and eight-year

window for time-barred claims); **Montana**, Mont Code Ann 27-2-216 (increased statute of limitations to age 27, plus discovery rule and one-year window for time barred claims); **Washington D.C.**, DC Code Ann § 12-301 (increased statute of limitations to age 40, plus discovery rule and two-year window for time barred claims); **North Carolina**, NC Gen Stat Ann § 1-52 (increased statute of limitations to age 28, plus discovery rule and two year window for time-barred claims); **Vermont**, Vt Stat Ann T. 12 § 522 (retroactively abolished the statute of limitations and window never expires for time-barred claims); **Rhode Island,** 9 RI Gen Laws Ann § 9-1-51 (increased statute of limitations to age 53, plus discovery rule)**;** and **Arizona**, Ariz Rev Stat Ann § 12-514 (increased statute of limitations to age 30, plus discovery rule and 19-month window for time-barred claims).

4. The New York Legislature's Enactment of a One-Year Claim Revival Window Comports with Due Process, and Was a Reasonable Response to Remedy a Longstanding Injustice and to Protect Children

The cornerstone of the Diocese's motion is *In re World Trade Center Lower Manhattan Disaster Site Litigation*, or more precisely, the federal trial court's decision in that matter, which was vacated and its reasoning explicitly rejected by the New York COA. The matter was referred to the COA by the U.S. Court of Appeals for the Second Circuit on two certified questions. Only the second question is relevant: "Does the 'serious injustice' standard articulated in [*Gallewski v H. Hentz & Co.*], or the less stringent 'reasonableness' standard articulated in [*Robinson v Robins Dry Dock & Repair Co.*], govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?" *Matter of World Trade Ctr.*, 30 NY3d at 381. The COA reformulated the question as follows: "Under *Robinson* and *Gallewski*, what standard of review governs the merits of a New York State Due Process Clause challenge to a claim revival statute?"

To answer that question, the COA revisited the landmark decisions that previously dealt with such challenges. But before addressing the first of those cases, the Court noted that "our law

on claim revival statutes has differed from the development of the federal rule." *Id.* at 394. The Court observed that "claim-revival statutes generally pose no issue under the Fourteenth Amendment to the United States Constitution." *Id.* The Court quoted from the United States Supreme Court's decision in *Chase Sec. Corp. v Donaldson*, 325 US 304, 311-312 [1945], which held the Fourteenth Amendment allows a state to repeal or extend a statute of limitations so long as the lapse of time has not invested a party with title to real or personal property: "[W]here lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." *Id.*

The COA then turned to New York's constitution and explained that its cases take a "more functionalist approach":

> Unlike the federal rule, our state standard has not turned on this formal distinction between claim-revival statutes that intrude upon a 'vested' property interest and those that do not. Rather, as we illustrate below, our cases have taken a more functionalist approach, weighing the defendant's interests in the availability of a statute of limitations defense with the need to correct an injustice. Each time we have spoken on this topic, we described circumstances that would be sufficient for a claim-revival statute to satisfy the State Due Process Clause, with specific reference to the facts then before us. Each of these cases merits our close attention.

Id.

The first of those cases was *Robinson v Robins Dry Dock & Repair Co.*, 238 NY 271, 144 NE 579 [1924], where injured workers faced a limitations bar after they had pursued workers' compensation benefits under a system later invalidated by the U.S. Supreme Court. The COA upheld a statute reviving the workers' legal claims for one year. *Id.* at 274-76. The Court observed that applying the original limitations period would "deprive a plaintiff without fault of a cause of action," and concluded that extending the limitations period was "no arbitrary deprivation" of

rights but rather was a "reasonable" response to a situation that "reasonably call[ed] for remedy." *Id.*

Looking back on *Robinson* nearly a century later in *Matter of World Trade Ctr.*, the COA clarified its holding and remarked that it would be "revolting" to hold a claim-revival statute unconstitutional where enforcement of the prior statute of limitations would be contrary to "all prevailing ideas of justice":

> While the Court acknowledged the possibility that, in some cases, a claim-revival statute would be unconstitutional, it declared that 'both instinct and reason revolt at the proposition that redress for a wrong must be denied' where the enforcement of a statute of limitations would be 'contrary to all prevailing ideas of justice' ....

Matter of World Trade Ctr., 30 NY3d at 395. The COA also noted that in *Robinson* it had cited approvingly to a pair of decisions written by then-Chief Justice Holmes of the Supreme Judicial Court of Massachusetts, where he observed that the "prevailing judgment of the profession has revolted" at efforts to bar claims based on "some slight technical defect" and that "multitudes" of cases have recognized the power of the Legislature to "call a liability into being where there was none before":

> [T]he prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds .... [M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seemed small.

Id. at 396 (internal quotation marks and citations omitted). "Ultimately," the COA observed that *Robinson* "upheld the claim-revival statute at bar on the grounds that there was 'no arbitrary deprivation by the Legislature' and that the statute 'was reasonable' in response to a situation that 'call[ed] for remedy … " *Id.*

Robinson set the standard that would be applied three more times by the COA before its

decision synthesizing those holdings in *Matter of World Trade Ctr*. *See Gallewski v H. Hentz & Co.*, 301 NY 164, 93 NE2d 620 [1950]; *McCann v Walsh Const. Co.*, 282 AD 444, 123 NYS2d 509 [3d Dept 1953], *affd,* 306 NY 904, 119 NE2d 596 [1954]; *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 539 NE2d 1069 [1989]. In each case the COA upheld the challenged claim-revival statute as constitutional.

In examining each of these cases closely, the COA in *Matter of World Trade Ctr.* explained that the federal trial court had misinterpreted the standard applicable to a due process challenge of a claim-revival statute. The COA noted that the trial court had "found [Jimmy Nolan's] law unconstitutional on the grounds that it was not passed in response to 'exceptional' circumstances or a 'serious injustice' ...." *Matter of World Trade Ctr.*, 30 NY3d at 383. As noted above, this erroneous standard is what the Diocese is asking the Court to employ in weighing the constitutionality of the CVA and its revival of child sexual abuse claims that were time-barred under the prior statute of limitations.

The COA explained that this erroneous standard was based on a misreading of *Gallewski* and that the standard is whether a claim-revival statute was reasonable:

> A close reading of *Gallewski* reveals that it did not overrule or narrow *Robinson*. To the contrary, it expressly reaffirmed the *Robinson* standard (*see Gallewski*, 301 NY at 175 ['Here, as in the *Robinson* case, the "extension of time to bring ... action was reasonable"']). By elaborating that '[*Robinson*] may be read ... as holding that the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and ... serious injustice would result to plaintiffs not guilty of any fault' (*id.* at 174), the Court was describing the particular circumstances of the case before it, providing additional color on *Robinson* and concluding that the extraordinary events of World War II more than satisfied the test. Any purported dichotomy between *Robinson*'s and *Gallewski*'s holdings is illusory.

Matter of World Trade Ctr., 30 NY3d at 399.

The COA explicitly rejected the Diocese's suggestion that either "exceptional"

circumstances or "serious injustice" is required to uphold a claim-revival statute. By reference to the earlier cases, it explained that the correct standard is far more permissive and deferential to the Legislature and its determination of what is reasonable in light of the injustice at issue:

> The salient facts in each of *Robinson*, *Gallewski*, *McCann* and *Hymowitz* fall into the same pattern. First, there existed an identifiable injustice that moved the legislature to act. In *Robinson*, it was the plaintiffs' exclusive reliance on a provision of the workers' compensation law that was struck down by the United States Supreme Court ...; in *Gallewski*, it was the occupation of the plaintiffs' countries of residence during World War II ...; in *Hymowitz* and *McCann*, it was latent injuries caused by harmful exposure, which the plaintiffs were not able to attribute to an action or omission of the defendant until the statutory period to bring a claim had already expired .... Second, in each case, the legislature's revival of the plaintiff's claims for a limited period of time was reasonable in light of that injustice.

Matter of World Trade Ctr., 30 NY3d at 399-400.

In acknowledging New York courts must simply decide whether a revival statute "was a reasonable measure to address an injustice," the Court explained that any higher standard "would be too strict" and that the "moral determinations" needed to decide whether a particular injustice deserves a remedy through a revival statute are "left to the elected branches of government":

> A more heightened standard would be too strict. In the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government. While we have traditionally expressed an aversion to retroactive legislation ... of which claim-revival statutes are one species ... we have noted that the modern cases reflect a less rigid view of the Legislature's right to pass such legislation .... Nonetheless, there must first be a judicial determination that the revival statute was a reasonable measure to address an injustice.

Id. at 400 (internal quotation marks and citations omitted). The COA unequivocally held that a revival statute is constitutional if it is a reasonable response to remedy an injustice: "a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice." *Id.*

By this standard – indeed, even by the rejected but higher standard the Diocese advocates – the CVA conforms to New York's Due Process Clause. Not even the Diocese can deny that the CVA addresses an "identifiable injustice" and not even the Diocese can deny that a limited "window" for abuse survivors to bring their claims is reasonable, which is likely why the Diocese tries to assert a much higher standard. The Legislature found that, under the former statute of limitations, "thousands" of "survivors of child sexual abuse" were "unable to sue or press charges against their abusers, who remain[ed] hidden from law enforcement and pose[d] a persistent threat to public safety." CPLR 214-g, Practice Commentaries, by Vincent C. Alexander (quoting the sponsor's memorandum to Chapter 11 of the Laws of 2019). Consistent with the well-documented scientific research, the Legislature found that "most survivors" did not and could not "come to terms with their abuse" until long after the expiration of the statute of limitations, "which has been estimated as high as 52 years old on average." *Id.*

Nor can it be credibly argued that the "extension of time to bring ... [an] action [under the claim-revival provision of the CVA] was unreasonable" as a response to the injustice presented. *See Matter of World Trade Ctr.*, 30 NY3d at 397 (quotation marks omitted). Such limited revival periods are typical and have repeatedly been upheld by the COA. *See Hymowitz*, 73 NY2d at 515; *Gallewski*, 301 NY at 172; *Robinson*, 238 NY at 276; *see also Raquet v J.M. Braun Builders, Inc.*, 273 AD2d 850, 709 NYS2d 292 [4th Dept 2000] (one-year revival clause under General Municipal Law § 205-a, reviving personal-injury claims on behalf of firefighters injured in the line of duty, did not violate state due process of law).

As *Hymowitz* recognized, when some (even if not all) injured individuals fail to file suit in time under a pre-existing statute of limitations, the Legislature can reasonably determine that it would be fairest "for all plaintiffs to uniformly now have one year to being their actions."

Hymowitz, 73 NY2d at 515. This holding, by itself, belies the Diocese's repeated argument that the COA has only upheld claim-revival statutes enacted to revive actions on behalf of claimants who were unable to sue within the statute of limitations. That is simply untrue, as *Hymowitz* demonstrates.

Moreover, even assuming that were true, it would not bar the Legislature from enacting such legislation now as long as it was a reasonable response to remedy an injustice. The applicable standard does not require a claim-revival statute to constitute "a reasonable response to remedy an injustice, *but only where the claimants were previously all unable to bring an action within the statute of limitations*." If the COA had intended for that to be the standard, it would have said that, and *Hymowitz*, for one, would have been decided the other way. But that is not the rule. The rule, as made abundantly clear in *Matter of World Trade Ctr.*, and as explained further below, is that "a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response to remedy an injustice." 30 NY3d at 400.

Even if somehow, as incorrectly suggested by the Diocese, claim revival would only be proper when the victim suffered a latent injury, such as in *Matter of McCann*, 282 AD 444, or *Hymowitz*, it is well established that survivors of childhood sexual abuse face similarly slow manifestation of their injuries. As discussed above, many fail to realize the egregious effect of the abuse until many years later, further demonstrating the fallacy of the Diocese's argument.

The Court should deny the Diocese's motion because the Legislature acted reasonably in enacting a short, one-year window to revive the time-barred claims of "thousands" of survivors of childhood sexual abuse, many of whom were disabled by their psychological scars from suing until well into their adult years. The Legislature's claim revival was a reasonable response to remedy this great injustice, as recognized by the Legislature and by many other states that have

reformed their statute of limitations for the same reason.

5. The Diocese Inaptly Relies on *Zumpano v. Quinn*

Professor Alexander's citation to *Zumpano*, 6 NY3d 666 points out the irony of the Diocese's reliance on it. Hoping to turn an insurmountable negative into a positive, the Diocese invokes *Zumpano* for its holding that the plaintiffs there could have brought timely actions for child sexual abuse. The plaintiffs in that case were 43 victims of childhood sexual abuse by clergy. The defendants were thirteen priests, a Bishop, and the Roman Catholic Diocese of Brooklyn. *Id.* at 672. Initiated under the statute of limitations preceding the CVA, all the claims were untimely and the COA declined to extend the doctrine of equitable estoppel to save them. *Id.* at 673-675.

However, what the Diocese would have this Court ignore is that the COA in *Zumpano* practically begged the Legislature to amend the statute of limitations so that survivors of childhood sexual abuse could obtain justice, particularly given the "countless priests" who have been accused of sexually exploiting the children in their care and the fact that their victims have "regrettably" had their claims dismissed as time-barred:

> In recent years, countless priests have been accused of impermissibly touching and sexually exploiting young people entrusted to their care, resulting in a plethora of claims seeking compensation for the injuries caused by these deplorable acts. Regrettably, many of these claims are time-barred, and absent relief from the Legislature will remain unredressed.

Id. at 671.

The COA ended its decision by noting the Legislature had authority to provide such relief "as other states have done":

> We conclude as we began: however reprehensible the conduct alleged, these actions are subject to the time limits created by the Legislature. Any exception to be made to allow these types of claims to proceed outside of the applicable statutes of limitations would be for the Legislature, as other states have done.

Id. at 677. In proposing the Legislature adopt reasonable relief for these "deplorable acts" and

"reprehensible conduct," the COA went so far as to include a footnote to this final paragraph that referenced the statute of limitations reform of Connecticut and California, which extended the statute of limitations and created a one-year "window" for such claims, respectively. *Id.* at 686. Nowhere does the Diocese argue that the CVA's one-year window is unreasonable, likely because the COA has already suggested that such a window would meet its approval. In short, Zumpano, by itself, mandates the denial of the Diocese's motion.

6. Earlier COA Decisions Similarly Called for Legislative Claim-Revival

The COA's clarion call for legislative action in *Zumpano* is reminiscent of the COA's call for legislative action in *Fleishman v Eli Lilly and Co.*, 62 NY2d 888, 890, 467 NE2d 517, 478 NYS2d 853 [1984]. In *Fleishman*, several plaintiffs brought suit for injuries caused by exposure to diethylstilbestrol (DES). The cases were dismissed as untimely. New York did not then have the discovery rule codified by CPLR §241-c. The statute of limitations began to run on the date of exposure to a toxic substance, usually resulting in the expiration of a claim even before the first onset of symptoms of injury. But, in dismissing the claims in *Fleishman*, the COA took the occasion to invite legislative reform: "Any departure from the policies underlying these well-established precedents," said the court, "is a matter for the Legislature and not the courts." *Id.* at 890. Two years later, the Legislature enacted CPLR 214-c, New York's discovery rule applicable to claims of injury from the latent effects of toxic exposure. The legislation included a one-year window, the same as the CVA, reviving "actions for damages caused by the latent effects of DES." *See Hymowitz*, 73 NY2d at 513.

The revival statute came under attack in *Hymowitz*, with defendants challenging its constitutionality under New York's Due Process Clause. In rejecting that challenge, the Court harkened to its prior calls for legislative action to redress the injustice:

For at least 25 years this court maintained an exposure rule for toxic substances,

> because it was felt that change in this area was the responsibility of the Legislature .... Indeed, in *Fleishman v. Lilly & Co.* ... the Legislature's attention was drawn specifically to DES by the majority, which stated that any change in the exposure rule was the Legislature's role.
>
> The Legislature has now revived DES actions that were time barred under the exposure rule, while also instituting a discovery rule for future application (L.1986, ch. 682, § 4; CPLR 241-c). The latent nature of DES injuries is well known, and it is clear that in the past the exposure rule prevented the bringing of timely actions for recovery.

Hymowitz, 73 NY2d at 514. The Court upheld the revival statute as constitutional under New York's Due Process Clause because it "has a rational basis," the "number of DES-caused injuries was relatively well known," and DES victims were "prejudiced under current law":

> As it pertains to DES, surely the revival statute has a rational basis, and the Legislature acted within its broad range of discretion in enacting the law. The number of DES-caused injuries was relatively well known by the Legislature, ... Furthermore, it was also well known, particularly after *Fleishman v. Lilly & Co. (supra)*, that DES victims were prejudiced under current law. This, we believe, is enough of a basis for the Legislature to revive DES claims ....

Hymowitz, 73 NY2d at 515.

Significantly, the touchstone of the Court's analysis was "rationality," not whether there existed "exceptional circumstances" to justify the Legislature's action. As noted above, the COA's decision in *Hymowitz* was neither the first, nor the last, New York decision upholding a claim-revival statute because it was a reasonable or rational way to address an injustice.

7. The Diocese's Cry that the Revival of Plaintiffs' Claims is "Unfair" is Irrelevant and Unfounded

Without any evidentiary support, the Diocese protests that some of the revived claims may be difficult to defend because they go back many years. What the Diocese fails to acknowledge, of course, is that each plaintiff has the burden of proof, just like the plaintiff in every other case that has been revived by statute of limitations reform.

As a threshold matter, the Diocese's memorandum admits it had a historic, systemic problem with its priests and other agents using their positions with the Diocese to sexually abuse children. More specifically, the Diocese proclaims that "it has committed to wide-ranging, ongoing, and concrete actions to reconcile with, heal, and compensate victims of these heinous offenses." Diocese's Amended Memorandum, at 3-4. The Diocese then admits that since 2017 it has paid "more than 275 victims of sexual abuse" more than $50,000,000. *Id.* at 4 n.1. Apparently, most of the compensation given was paid out before passage of the CVA, when most of the claimants would not have had viable legal claims, which is presumably why the Diocese paid an average of less than $182,000 per claimant. The Diocese's assertion that the CVA is "unfair" because the Diocese created a program to settle with abuse survivors when they had no legal rights is not well taken. If anything, the fact that the Diocese has settled with 275 claimants vividly illustrates why the CVA is a reasonable effort by the Legislature to bring justice to the children who suffered as a result of the Diocese's misconduct.

In any event, the Diocese's protest rings hollow for several reasons. First, there are many types of cases the material events of which may stretch back many years. These include, to name a few, toxic tort cases brought under CPLR 214-c; murder and rape cases which carry no statute of limitations yet impose the harshest penalties and deprivation of liberty; "foreign-body" and failure-to-diagnose cancer cases brought under CPLR 214-a; Phonoxy-herbicides cases brought under CPLR 214-b; and now, cases brought under the CVA, the statute of limitations which extends to the age of 55 under CPLR 208(b).

Second, although the Diocese claims that it would be "unfair" for it to defend these "stale" claims, it simultaneously trumpets its Individual Reconciliation and Compensation Program (IRCP) as an appropriate stand-in for the CVA's claim revival. Far from proving the difficulty of

defending plaintiffs' claims under the CVA, the IRCP proves just the opposite. It demonstrates that the Diocese was able to administer more than 275 claims of childhood sexual abuse, presumably stretching back as far as any plaintiff who chooses to file suit under the CVA. And it is safe to assume that the Diocese did not just hand over more than $50 million without investigating the reliability of the claims. Using its archives of records, and cross-checking claimants' allegations, the Diocese presumably evaluated the claims before tendering compensation. As noted above, the passage of time will surely prove to be a greater hurdle to overcome for plaintiffs than the Diocese, not just because plaintiffs bear the burden of proof, but because they do not possess, like the Diocese, an institutional memory, vast resources, and extensive archives of records going back many decades.

Finally, the Diocese also expresses concern that the CVA's claim revival is unfair to those who settled their claims with the Diocese in the IRCP. Fortunately, there is an easy fix for this issue and it is entirely in the Diocese's hands: the Diocese can relieve any or all of the 275 abuse survivors from the general releases they signed, allow them, if they wish, to bring an action under the CVA, and treat any compensation already paid to them as an offset to an award or settlement in the lawsuit. Of course, the Diocese is unlikely to make any such offer because the IRCP was plainly designed to lull abuse survivors into accepting unreasonably low settlement offers without any transparency or regard to the strength of their claim.

8. There is Every Reason to Believe the COA Would Have Upheld Claim Revival in *Matter of World Trade Ctr.*, and There is No Basis to Assume the COA Would Have Invalidated It

Plaintiff S.T. agrees with the Diocese that it is appropriate to consider whether the COA in *Matter of World Trade Ctr.* would have upheld the claim-revival of Jimmy Nolan's Law. S.T. disagrees, however, with the Diocese's opinion that the COA would have struck it down as a violation of New York's Due Process Clause. Once again, the Diocese's vision proves myopic:

there is nothing in the COA's decision, which comprises three opinions, to suggest that any of the judges on the Court found fault with Jimmy Nolan's law, or that the Court was prepared, if asked, to invalidate a claim-revival statute for the first time in its history. On the contrary, there is good evidence that the COA approved of Jimmy Nolan's Law, just like it approved of the other one-year revival statutes in *Robinson, Gallewski, and Hymowitz,* and the Appellate Division approved of the one-year revival in *Raquet*. One of the judges in *Matter of World Trade Ctr.* even expressed her approval of Jimmy Nolan's Law under New York's Due Process Clause. In her concurrence, Judge Rivera stated that "[j]ust as has been true every other time the Court has considered the constitutionality of a claim-revival statute, the rule announced by the majority will result in a finding that the statute does not deprive the defendant of due process." *Matter of World Trade Ctr.*, 30 NY3d at 406. None of the other six members of the Court expressed a different opinion.

The same reasoning applies in this case. The COA would likely uphold CPLR 214-g as a reasonable response to remedy an injustice, just like the COA has done on every other occasion when it has been asked to evaluate a claim-revival statute enacted by the Legislature. The Court should do likewise as the Diocese utterly fails to argue that the CVA is an unreasonable response to the injustice of childhood sexual abuse, particularly given the scores of children who allege the Diocese is responsible for that injustice.

B. The Diocese's Motion Fails to Meet Its Burden of Explaining Why Each Complaint is Supposedly Deficient

The Court should deny the Diocese's motion because it fails to meet its burden of explaining why each complaint, including Plaintiff S.T.'s complaint, is supposedly deficient, and more specifically, which of its legal arguments supposedly applies to each complaint. *Roland Pietropaoli Trucking, Inc. v Nationwide Mut. Ins. Co.*, 100 AD2d 680, 473 NYS2d 879, 880 [3d Dept 1984] ("A movant must specify in its motion papers and affidavits the precise alleged defects

in the complaint."). As the Court held in *Syrang Aero Club, Inc. v Foremost Ins. Co.*, 54 AD2d 1095, 1095-96, 388 NYS2d 739 [4th Dept 1976], a plaintiff subject to a motion to dismiss for failure to state a cause of action has a right to seek leave to replead. But that right is meaningless if the defendant does not specifically articulate how the complaint is supposedly deficient because it does not provide the plaintiff with a meaningful opportunity to amend its compliant to cure the deficiency. It is not the job of the Court, or of each plaintiff, to weed through the Diocese's many arguments in its 40-plus motions to dismiss to try to determine which arguments apply to each complaint, and if a valid argument is made, what each plaintiff must do to cure the defective pleading. While the Diocese provided a table that purports to explain which legal arguments apply to each complaint, the table is nothing more than a list of the sections of the Diocese's brief without any effort to explain which specific arguments in each section apply to each complaint.

At most, the Court should deny the Diocese's motion without prejudice, provide the parties with guidance as to the threshold arguments made in the motion, allow each plaintiff a reasonable amount of time to amend their complaints to accord with the Court's guidance, and then allow the Diocese to renew its motion as to any complaints that remain defective.

Other than the Court declaring whether the CVA is constitutional, it appears this is the type of guidance that the Diocese seeks with its motions since it cannot genuinely expect the Court to dismiss claims or lawsuits when the Diocese has not met its burden of explaining which specific argument applies to each complaint. The Diocese requests this exact relief in its motion: "if the Court affords leave to re-plead the plaintiffs should be instructed to identify the asserted causes of action with clarity." Diocese's Amended Memorandum at 60. Moreover, such relief would provide future plaintiffs with guidance so that their complaints can be drafted in a manner that avoids unnecessary motion practice.

C. In Deciding the Diocese's Motion to Dismiss, the Court Must Accept the Truth of All Allegations in the Complaint and Draw "Every Possible Favorable Inference" for the Benefit of the Plaintiff

In analyzing the Diocese's non-constitutional arguments, the Court must view each plaintiff's allegations under the most liberal pleading standard afforded under New York law. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Al Rushaid v Pictet & Cie*, 28 NY3d 316, 326, 68 NE3d 1, 45 NYS3d 276, 2016 NY Slip Op 07834, 2016 WL 6837930 [2016] (citation omitted). This is black letter law. *See e.g. J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334, 992 NE2d 1076 [2013]; *Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 999 NE2d 1121 [2013]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 NE2d 26 [2005] (whether a plaintiff will ultimately be successful in establishing the allegations "is not part of the calculus"); *Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511 [1994]; *Foley v D'Agostino*, 21 AD2d 60, 63, 248 NYS2d 121 [1st Dept 1964] so long as there is a supportable claim alleged).

In reviewing each plaintiff's allegations as true and affording them "every possible favorable inference," the Court must keep in mind that the fundamental question is "whether plaintiffs have a cause of action, *not* whether they have properly labeled or artfully stated one." *Al Rushaid*, 28 NY3d at 284-285. (citation omitted) (emphasis added). The Diocese's motion to dismiss "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152, 773 NE2d 496 [2002] (citations omitted). The COA has further held that "[i]f any portion of a cause of action is sufficient, it should not be dismissed on a motion." *Lacks v Lacks*, 12 NY2d 268, 271, 189 NE2d 487 [1963].

The Diocese's motion should be denied because each complaint, including Plaintiff S.T.'s complaint, alleges core facts that, when "liberally construed, accepted as true, and afforded every favorable inference," establish a viable cause of action even if they are not properly labeled or artfully stated. If the Court applies this liberal standard and concludes the existing allegations are sufficient to justify a cause of action, then the Diocese's motion must be denied. However, if the Court concludes that the existing allegations remain deficient and fail to support any cause of action, then the Court should allow Plaintiff S.T. and the other plaintiffs a reasonable opportunity to cure the defective allegations. CPLR 3025(b) ("leave shall be freely given" to amend a complaint). As the COA has explained, "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies and Assoc., Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757, 450 NE2d 240 [1983]; *Mawere v Landau*, 170 AD3d 826, 95 NYS3d 575, 576 [2d Dept 2019] (upholding second amendment of complaint where no prejudice).

The Diocese's motion fails to show that it will be prejudiced or surprised if Plaintiff S.T. or any other plaintiff is allowed to amend, particularly since none of the complaints subject to its motion were filed before August 14, 2019, and as the Court is aware, the parties subject to the Diocese's motion gave the Diocese extensions to answer the complaints or to otherwise move against the complaints. On the other hand, Plaintiff S.T. issued discovery to the Diocese with his complaint and agreed that it would be deemed served in mid-November, but the parties then agreed that the Court's case management order required the parties to serve the Court-approved standard discovery, which was just approved on January 17, 2020. Despite his diligent efforts to obtain discovery, Plaintiff S.T. has not received any discovery from the Diocese, including any information or records regarding S.T.'s threshold allegations that (1) the Diocese knew or should

have known that Father McComiskey posed a danger to S.T. before Father McComiskey sexually abused him, and (2) the Diocese negligently, recklessly, or intentionally ignored that danger and allowed Father McComiskey to sexually abuse him, just like it had done with many of its other priests and agents who sexually abused children before and after S.T. The Court this past week approved the standard discovery that Plaintiff S.T. may serve on the Diocese, which he will issue this week.

Finally, given this is a motion to dismiss under CPLR 3211(a)(5) and (a)(7), the Court should disregard any factual assertions in the Diocese's motion because the sole question is whether the plaintiff's allegations, including "every favorable inference," establish at least one cause of action. CPLR 3211(c) provides the limited and drastic ability to treat a motion to dismiss as a motion for summary judgment, even before issue has been joined, only in very specific limited circumstances and on notice to the parties so that they are afforded the opportunity to put forth a complete record for the court to consider. A motion to dismiss cannot be converted to a motion for summary judgment when the parties "were not put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered." *Nonnon v City of New York*, 9 NY3d 825, 827, 874 NE2d 720 [2007]. Moreover, this notice "must come from the court when the action is in the pre-joinder-of-issue-phase." *See* CPLR 3211, Commentaries at C3211:43.

The Diocese's motion should be denied because it fails to establish that Plaintiff S.T. has not pled at least one viable cause of action against it, particularly where the Diocese does not challenge anything about S.T.'s claim for negligence. At most, the Diocese makes the misplaced arguments that (1) S.T.'s claims for outrage and intentional infliction of emotional distress were not revived by the CVA, despite the fact that the CVA revived "all claims" based on negligent or

intentional conduct, (2) the Diocese cannot be found vicariously liable for the acts and omissions of its employees and agents, even if they were acting for the benefit of the Diocese and even if a jury could find that the scope of their authority included such acts and omissions, and (3) S.T.'s claims for negligence, outrage, and *respondeat superior* are somehow "duplicative," even though negligence and outrage constitute separate torts with different elements and *respondeat superior* is simply a way to hold the Diocese liable for the knowledge, acts, and omissions of its agents.

D. CPLR 214-g Revived *Respondeat Superior* Claims Against a Defendant for the Acts and Omissions of an Employee or Agent Acting Within the Scope of His or Her Authority

The Court should deny the Diocese's motion to the extent it asserts that the CVA did not revive *respondeat superior* claims for the acts and omissions of an employee or agent acting within the scope of his or her authority because the Diocese ignores the revival statute's use of different words to describe (1) *against whom* a cause of action is brought or liability is sought (that is, a "party"), and (2) *by whom* the tortious act was committed (that is, a "person").

CPLR 214-g revives "every civil claim or cause of action *brought against any party* alleging *intentional or negligent acts or omissions by a person* for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute" certain listed crimes of a sexual nature. (emphasis added). The use of two different nouns ("party" and "person") preceded by two different prepositions respectively ("against" and "by") demonstrates the legislature's intent that in some instances the party held liable, such as the Diocese, and the person committing the tort, such as the employee, are different. And that is precisely what *respondeat superior* liability posits – that the employer (the "party") against whom the action is brought is liable for the tortious conduct by its employee (the "person") if those torts are committed within the scope of his or her employment. *See Riviello v Waldron*, 47 NY2d 297, 302, 391 NE2d 1278 [1979] ("[W]e first note what is hornbook law: the doctrine of *respondeat superior* renders a master

vicariously liable for at tort committed by his servant while acting within the scope of his employment."). By using different terms to refer to the liable party and the tortiously acting person, CPLR 214-g plainly revives *respondeat superior* claims.

This reading is also supported by a cardinal principle of statutory construction – to wit, a court "must avoid giving words meaning that render them redundant of other words in the same statute or ordinance ... and rather assume that the Legislature had something in mind when it chose to use such different words." *People v Kleber*, 168 Misc 2d 824, 827, 641 NYS2d 488 [Just Ct 1996]. In *Kleber*, the court applied this principle of statutory construction to hold that the words "offense" and "violation" in the same statute have different meanings. *See also United States v Menasche*, 348 US 528, 538-539 [1955] ("The cardinal principle of statutory construction is to save and not to destroy.... It is our duty to give effect, if possible, to every clause and word of a statute.") (citations and internal quotation marks omitted). The Diocese's argument violates this rule of statutory construction because it would require the Court to hold that the word "party" and the "person" used in the same sentence in CPLR 214-g is always the same.

The Diocese's heavy reliance on *Weissman v Dow Corning Corp.*, 892 F Supp 510 [SDNY 1995] is misplaced. In *Weissman,* the federal trial court held that a statute reviving causes of action "for personal injury or death caused by the effects of silicone gel injected or implanted within the body" did not revive fraud claims because personal injury actions and fraud actions are different. *Id.* at 515. This interpretation of a different revival statute and a different construction issue (does "personal injury" include "fraud"?) has no application here, where the question is whether the words "party" and "person" used in the same statute are to be read as synonymous, and as demonstrated above, they are not.

Weissman's rationale is also without application here. The *Weissman* court first reasoned

that New York's statutes of limitations provide for different limitations periods for "personal injury" actions (CPLR 214(5) – three years) and "fraud" actions (CPLR 213(8) – six years). By contrast, there is no separate statute of limitations for *respondeat superior* claims; the law borrows the limitations period applicable to the tortious conduct on which the claim is predicated. *See Sweet v Austin*, 226 AD2d 942, 945, 641 NYS2d 165 [3d Dept 1996]. In this case, the statute of limitations for the *respondeat superior* claim is that applicable to intentional and negligent claims grounded in the sexual abuse of minors – CPLR 214-g. *Weissman* also reasoned that personal injury actions and fraud actions are substantively distinct, with fraud claims requiring proof of scienter, and that each claim yields different damage awards, with personal injury actions alone awarding damages for pain and suffering. Again, because a *respondeat superior* claim is derivative of the underlying tort action, the elements of the claims and the damages for the predicate claims largely overlap – the only additional element needed for *respondeat superior* liability being that the employee was acting within the scope of his or her employment. If anything, *Weissman's* rationale supports a construction finding that CPLR 214-g revives *respondeat superior* claims against the Diocese.

The Court should deny the Diocese's motion because the CVA plainly revived claims for *respondeat superior*. However, given the Diocese's heavy reliance on *Weissman*, it should be noted that the Diocese repeatedly cites *Weissman* in a misleading manner by making an unsupported assertion about *Weissman* in the same sentence as an actual quote from the case, and then citing *Weissman* as if the case supported the Diocese's assertion. For example, at page 30 of its Amended Memorandum, the Diocese, quoting and citing *Weissman,* represents that the case held statutes of limitations generally make a distinction between claims for intentional and negligent acts and claims for vicarious liability, and the Legislature does not intend to revive

vicarious liability claims if they are not specifically addressed in a revival statute:

> The court's reasoning in *Weissman* (in the context of personal injury versus fraud actions) is directly applicable here: "limitations statues clearly make a distinction between" intentional and negligent acts, on the one hand, and vicarious liability, on the other hand. *Id.* at *15.* Thus, there is no revival of vicarious liability claims because "the legislature, presumably aware of those distinctions, did not explicitly include" vicarious liability actions with the scope of the revival provisions. *Id.*

Diocese's Amended Memorandum at 30. *Weissman* contains no such holding and the Diocese's suggestion to the contrary is highly misleading.

E. CPLR 214-g Revived Gross Negligence and Recklessness Claims

The Court should deny the Diocese's motion to the extent it asserts the CVA did not revive claims based on gross negligence or reckless conduct because the statute revives "every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions." It is a cardinal principle of statutory construction that a general term is to be given its broad, ordinary meaning and not circumscribed absent express restriction. The COA in *In re Di Brizzi*, 303 NY 206, 101 NE2d 464 [1951], considered whether a law granting authority to a Crime Commission to investigate "matters concerning the public peace, public safety and public justice" included the authority to investigate the relationship between organized crime and the government. A party subpoenaed to testify before the Commission protested that because the legislation was enacted to address a war emergency, the authority should be limited to the investigation of "riots, insurrections, rebellions, sabotage and similar acts interfering with the very foundations of the State." *Id.* at 214. The COA rejected any such limitation to a "general law" that is expressed "in general language" without "express restrictions," and held New York courts must apply such laws "to all cases that come within its terms and its general purpose and policy":

> A general law may originate in some particular case or class of cases which is in the mind of the Legislature at the time, but so long as it is expressed in general language, the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms

and its general purpose and policy.

Id.; see also Kersellius v Bratton, 53 Misc 3d 1017, 38 NYS3d 381 [NY Sup Ct 2016] (refusing to restrict the term "stroke" in a statute to those strokes caused by hypertension).

The Diocese's construction would also lead to an absurd and unreasonable result and would ignore the CVA's sweeping statute of limitations reform for survivors of childhood sexual abuse. *Williams v Williams*, 23 NY2d 592, 599, 246 NE2d 333 [1969] ("[w]e will not blindly apply the words of a statute to arrive at an unreasonable or absurd result"). Simply put, in the spectrum of tortious conduct, one end of the spectrum is negligent misconduct and the other end is intentional misconduct. It is absurd for the Diocese to suggest the Legislature intended to allow claims on each end of the spectrum but not claims arising in the middle – according to the Diocese, a claim for intentional misconduct was revived, but a claim for gross negligence was not revived. Even more absurd, the Diocese's argument means a claim for negligence is revived, but a claim for gross negligence (worse misconduct) or a claim for intentional misconduct (even worse misconduct) are not revived. The Diocese's argument makes no sense, and there is nothing in the statute which explicitly or implicitly restricts the meaning of these words. If anything, the Legislature's use of misconduct at each end of the spectrum illustrates that the Legislature intended to revive all claims for tortious conduct, including those that fall in the middle of the spectrum. Such a reading of the statute is in accord with the plain language of CPLR's 214-g, which says "*every* civil claim or cause of action" arising from "negligent" or "intentional" misconduct is revived. (emphasis added).

The Diocese's suggestion that claims for gross negligence are excluded because ordinary negligence and gross negligence "differ in kind" is not well taken – both claims involve "negligent" conduct and there is no evidence that the Legislature intended to exclude claims based

on the more egregious form of "negligence" while allowing claims based on intentional misconduct. The fact that New York courts often define gross negligence to be the equivalent of intentional wrongdoing further underscores why the Diocese's argument is both absurd and unreasonable. *See e.g., Bennett v State Farm Fire and Cas. Co.*, 161 AD3d 926, 929, 78 NYS3d 169 [2d Dept 2018] ("To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others") (internal quotations and citations omitted). To the extent that gross negligence claims are based on "negligent" or "intentional" acts, such claims fall comfortably within the CVA's revival of "every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions."

Finally, the Diocese's suggestion that claims for recklessness are excluded is misplaced for largely the same reasons. A claim for recklessness is just another way of expressing the idea of "gross negligence":

> It is recognized in this State that "gross negligence" is something more than "ordinary negligence." "Gross," "culpable," "criminal," and "reckless" are the equivalent of each other in meaning and sense when applied to negligence.

Coniber v Hults, 15 AD2d 252, 255-256, 222 NYS2d 773 [4th Dept 1962] (quoting *In the Matter of Jenson v Fletcher*, 277 AD 454, 1950, 101 NYS2d 75 [4th Dept 1950], *affd,* 303 NY 639, 101 NE2d 759 [1951])). And again, the Diocese's focus on the name of the cause of action is unfounded because the CVA revives "every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions." By definition, a claim for recklessness is based on someone's intentional or negligent acts or omissions, with the distinction simply being one of degree.

F. The Diocese's Motion Regarding Duty Should Be Denied

Although the Diocese's motion does not attack the sufficiency of S.T.'s pleadings, including any of his allegations that give rise to his causes of action for negligence or outrage /

intentional infliction of emotional distress, S.T. is concerned with the Diocese's assertion that other plaintiffs should have their claims dismissed if their complaints (1) do not contain allegations that the Diocese knew or should have known of a perpetrator's propensity to commit sexual abuse of minors, (2) allege abuse that did not occur on the Diocese's property, (3) fail to adequately allege where the abuse occurred, or (4) do not allege the abuse occurred with the Diocese's chattels. More specifically, S.T. is concerned the Court may rule on these arguments in another case and the Diocese may then try to use those rulings against S.T. and other plaintiffs.

The Diocese's motion fails to meet its burden of explaining why each complaint is supposedly deficient, and, more specifically, which of these arguments supposedly apply to each complaint. As noted above, it is not the job of the Court, or of each plaintiff, to weed through the Diocese's many arguments to try to determine which arguments from each section of its brief apply to each complaint, and if a valid argument is made, what the plaintiff must do to cure the defective pleading. The Court should deny the Diocese's motion without prejudice, provide the parties with guidance on these issues, direct the Diocese to inform each plaintiff of what specific arguments it believes apply to the plaintiff's complaint, and grant the plaintiffs a reasonable opportunity to amend their complaint to address the supposed deficiency. For the reasons outlined below, every plaintiff should be afforded an opportunity to plead 1) the Diocese knew or should have known that the perpetrator of their abuse might sexually abuse them, 2) the sexual abuse occurred while the plaintiff was in the care, custody or control of the Diocese, 3) the sexual abuse occurred on the Diocese's property, 4) the sexual abuse occurred as a result of the perpetrator using the tasks, instrumentalities, or premises entrusted to the perpetrator by the Diocese, and/or 5) the sexual abuse occurred as a foreseeable result of the perpetrator's position with the Diocese.

1. The Diocese Concedes It Can Be Held Liable if a Plaintiff Alleges the Diocese Knew or Should Have Known a Priest or Other Agent Posed a Danger to the Plaintiff, or if the Diocese Failed to Take Reasonable Steps to Protect a Plaintiff in Its Care, Custody, or Control

As a threshold matter, the Diocese does not dispute that it can be held liable if a plaintiff alleges it knew or should have known that one of its priests or other agents might sexually abuse a child before he or she sexually abused the plaintiff. This point is well-illustrated by one of the cases cited by the Diocese in its motion, *Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 160-61, 654 NYS2d 791 [2d Dept 1997]. In *Kenneth R.*, the minor plaintiffs alleged they were sexually abused by a Catholic priest while the priest was serving within the Diocese of Brooklyn. Although the defendant Diocese could not be held *vicariously* liable for the sexual abuse because the priest's misconduct did not fall within the scope of his employment, the Second Department concluded the Diocese could be held directly liable if it knew or should have known that the employer posed a danger to children:

> In instances where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision (see, *Hall v. Smathers*, 240 NY 486; Restatement (Second) of Torts § 317). However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury …

Kenneth R., 229 AD2d at 161 (internal citations omitted). As discussed in more detail below, the Court noted that "[r]eligious entities have some duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct …" *Id.* at 165.

The Diocese's motion also does not challenge the fact that it can be held liable for failing to take reasonable steps to protect a plaintiff while the plaintiff was in its care, custody, or control regardless of where the abuse occurred or whether the abuse was carried-out using the Diocese's chattels. *Mirand v City of New York*, 84 NY2d 44, 637 NE2d 263 [1994] ("[t]he duty owed derives from the simple fact that a school, in assuming physical custody and control over its students,

effectively takes the place of parents and guardians"); *Pratt v Robinson*, 39 NY2d 554, 555, 349 NE2d 849 [1976]; *Shante D. by Ada D. v City of New York*, 190 AD2d 356, 361, 598 NYS2d 475 [1st Dept 1993], *affd,* 83 NY2d 948, 638 NE2d 962 [1994]. Underscoring this point is the fact that the Diocese moves to dismiss "claims for breach of duty *in loco parentis*" because it asserts *in loco parentis* "is merely an element of a negligence claim" and it asserts such claims are "duplicative" of claims for negligence. Diocese's Amended Memorandum at 55.

2. The Diocese May Be Held Liable for Sexual Abuse by Its Priests or Other Agents That Occurred Off Its Property and Without the Use of Its Chattels

Given the holding in *Kenneth R.*, and the other cases and legal authority discussed below, the Diocese's assertion that it only had a duty to protect children who were abused on its property or through the use of its chattels is not well taken.

For example, *Jones by Jones v Trane*, 153 Misc 2d 822, 591 NYS2d 927 [NY Sup Ct 1992], is in accord with *Kenneth R.* and directly rejects the Diocese's argument that it is only liable for sexual abuse that occurred on its premises or using its chattels. In *Jones*, an infant child and his mother alleged he was sexually abused by a parish priest in the Diocese of Syracuse. The priest obtained permission from the child's mother to visit an athletic facility at the SUNY Oswego Campus, where he then sexually abused the child. Despite the fact that the abuse occurred off the employer's premises and without the use of any tangible chattel provided by the employer, the Court concluded the Diocese could be held liable for the abuse if the Diocese knew the priest posed a danger to children and "placed or continued him in a setting in which such abuse occurred":

> Liability for negligent hiring or failing periodically to evaluate [the abusive priest] will of course be dependent upon a sufficient showing of notice of perverted proclivities—the nature and extent of which notice is not appropriately for decision on these motions to dismiss, in view of the allegations of both actual and constructive notice that are set out in the amended pleading. If, however, plaintiffs are successful in establishing that, with knowledge that the priest was likely to commit sexual abuse on youths with whom he was put in contact, his employers placed or continued him in a setting in which such abuse occurred, the fact that the

> placement occurred in the course of internal administration of the religious units does not preclude holding the institutions accountable to the victim of their neglect in administration. Indeed, a contrary holding—that a religious body must be held free from any responsibility for wholly predictable and foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets—would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded. As the Supreme Court of Ohio has declared, "even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or tortious acts" (*Byrd v. Faber*, 57 Ohio St.3d 56, 61, 565 N.E.2d 584, 590).

Jones by Jones v Trane, 153 Misc 2d 822, 830-31; 591 NYS2d 927, 932 [NY Sup Ct 1992]. Perhaps the best illustration of why the Diocese's motion must be dismissed is *Krystal G. v R.C. Diocese of Brooklyn*, 34 Misc 3d 531, 933 NYS2d 515 [Kings Cty Sup Ct 2011], which the Diocese repeatedly cites in its motion. In *Krystal G.*, the plaintiff was sexually abused as a child by a religious order priest and she alleged the religious order knew or should have known the priest posed a danger to her and other children. Just like the Diocese in this case, the defendant employer asserted a negligent supervision claim must be committed on the employer's property or with the employer's chattels. The Court flat-out rejected any such requirement and held that it was "unnecessary for plaintiffs to allege that [the priest's] tort was committed on his employer's premises or with his employer's chattels":

> Finally, [the defendant employer's] argument that New York law requires that a negligent supervision claim involves tortious conduct committed with the defendant's chattels or on the defendant's property is unpersuasive. ... it is thus unnecessary for plaintiffs to allege that [the perpetrator priest's] tort was committed on his employer's premises or with his employer's chattels.
>
> In summary, a sufficient relationship exists between [the perpetrator priest] and [the defendant employer] to create [the defendant employer's] duty to supervise [the perpetrator priest], and plaintiffs' amended complaint and supporting papers adequately allege that [the defendant employer] knew or should have known of [the perpetrator priest's] propensity to engage in the alleged tortious conduct. Consequently, plaintiffs have a cause of action sounding in negligent supervision and negligent retention.

Id. at 539; *see also Doe v Whitney*, 8 AD3d 610, 611-12, 779 NYS2d 570 [2d Dept 2004] (reasonable jury could find sexual abuse that occurred off-premises reasonably foreseeable in light of warning signs regarding employee); *Jones ex rel. Jones v R.C. Archdiocese of New York*, 29 Misc 3d 1213(A), 5, 918 NYS2d 398 [NY Sup Ct 2010] (same).

While *Kenneth R., Jones*, and *Krystal G.* all involve children who were sexually abused by religious figures in the Catholic Church, there is no shortage of New York cases holding that an employer may be held directly liable for failing to protect others from an employee who the employer knows, or should know, is dangerous. For example, in *Gonzalez v City of New York*, 133 AD3d 65, 67-68, 17 NYS3d 12 [1st Dept 2015], the Court noted "New York's long recognized tort of negligent hiring and retention," and then explained the important distinction between holding an employer vicariously liable for an employee's misconduct (not at issue here) and holding an employer directly liable for an employee's misconduct (at issue here):

> This theory of employer liability should be distinguished from the established legal doctrine of "*respondeat superior*," where an employer is held liable for the wrongs or negligence of an employee acting within the scope of the employer's duties or in furtherance of the employee's interests. … In contrast, under the theory of negligent hiring and retention, an employer may be liable for the acts of an employee acting outside the scope of his or her employment …
>
> Thus, in this case, plaintiffs' negligence claims do not depend on whether [the employee] acted within the scope of his employment or whether the City participated in, authorized, or ratified [the employee's] tortious conduct. Rather, the alleged breach of duty stems from the claim that during [the employee's] employment with the City, the City became aware or should have become aware of problems with [the employee] that indicated he was unfit (i.e. possessed violent propensities), that the City failed to take further action such as an investigation, discharge, or reassignment, and that plaintiff's damages were caused by the City's negligent retention, or supervision of [the employee].

Gonzalez is particularly instructive given the Diocese's argument that it can only be held liable for sexual abuse that occurred on its premises or with its "chattels." In rejecting that very argument,

the Court in *Gonzalez* analyzed three other cases where an employer was held liable for placing a dangerous employee in a position where he could harm others, even if the harm occurred outside the scope of employment:

> As *McCrink*, *Wyatt*, and *Jones* illustrate, the torts of negligent retention and supervision of governmental employees with dangerous propensities do not specifically require allegations that the employees' misconduct occur within the scope of the employment. Rather, what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance. In this case, plaintiff alleges such a connection or nexus. The City is alleged to have played a part in both creating the danger (by training and arming an officer) and rendering the public more vulnerable to the danger (by allowing him to retain his weapon and ammunition after it allegedly learned of his dangerous propensities). Thus, [the employee's] alleged tort was made possible through the use of his pistol, which he carried by authority of the City.

Id. at 70 (citing *McCrink v City of New York*, 296 NY 99, 71 NE2d 419 [1947], *Wyatt v State*, 176 AD2d 574, 575 NYS2d 31 [1st Dept 1991], and *Jones v City of Buffalo*, 267 AD2d 1101, 700 NYS2d 338 [4th Dept 1999].

The Court unequivocally rejected the Diocese's argument that a plaintiff must be harmed while its employee is acting within the scope of his employment:

> … plaintiff has presented evidence that the City was informed on numerous occasions, prior to the fatal shooting, about the officer's abusive conduct toward [the victims who were injured while the officer was off-duty]. Under the circumstances, this case presents genuine issues of material fact as to whether the City negligently supervised and retained an officer with violent propensities, and whether the intervening intentional tort of the off-duty officer was itself a foreseeable harm that shaped the duty imposed upon the City when it failed to guard against a police officer with violent propensities.

Id.; see also J.A. v City of New York, 34 Misc 3d 1214(A), 946 NYS2d 67 [Bronx Cty Sup Ct 2009], *affd sub nom. Acosta-Rodriguez v City of New York*, 77 AD3d 503, 909 NYS2d 712 [1st Dept 2010] (unreported decision); *Demartino v 3858, Inc.*, 34 Misc 3d 1227(A), 950 NYS2d 608 [Kings Cty Sup Ct 2012], *affd,* 114 AD3d 634, 979 NYS2d 648 [2d Dept 2014] (unreported decision).

The half-dozen cases analyzed above are in accord with Restatement (Second) of Torts § 302B (1965), which states the Diocese can be held liable for exposing a plaintiff to a dangerous person:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

See Robinson v Reed-Prentice Div. of Package Mach. Co., 49 NY2d 471, 484, 403 NE2d 440 [1980] (observing the principle embodied in § 302B is "hardly new"). As stated in Comment e to Restatement (Second) of Torts § 302B (1965), this rule reflects that there are "situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise … where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account." For example, liability may exist "[w]here the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct." *Id.* Similarly, liability may exist "[w]here the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others." *Id.*

The Diocese's position that every plaintiff must have been abused on its premises or using chattel provided by the Diocese seems inappropriately rigid because it is a strained effort to impose a bright line rule where no such rule exists:

> It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291- 293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct

> causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Restatement (Second) of Torts § 302B (1965).

Restatement (Second) of Agency § 213 (1958) and Restatement (First) of Torts § 308 further illustrate why the Diocese's arguments have been repeatedly rejected by New York courts:

> Restatement (Second) of Agency § 213 (1958): Principal Negligent or Reckless
>
> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders of in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.
>
> Restatement (First) of Torts § 308 (1934): Permitting Improper Persons to Use Things or Engage in Activities
>
> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

While the Diocese can plainly be held liable when there is evidence that it *should have known* that one of its agents posed a danger to children, Comment d to the Restatement (Second) of Agency § 213 (1958) addresses when a principal can be held liable for an agent who the principal knows poses a danger to others:

> *d. Agent dangerous.* The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating conduct having an undue tendency to cause harm is liable therefor. See the Restatement (First) of Torts § 308 (1934).
>
> … An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. The negligence may be in entrusting an agent with instrumentalities which, in connection with his known propensities and the qualities of the instrumentalities, constitute an undue risk to third persons. These propensities may be either viciousness, thoughtlessness, or playfulness.
>
> One who employs another to act for him is not liable under the rule stated in this Section merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand. What precautions must be taken depend upon the situation.

Not only does the Diocese's motion conflict with New York case law and multiple Restatements that it follows, but it also conflicts with the New York Pattern Jury Instruction regarding "Negligent Hiring or Retention of Employee":

> When the employer fails in its duty, it is liable for harm that results provided a reasonably prudent person would have foreseen the likelihood of injury to others by that employee. The employer is liable for any harm to other persons resulting from its employee's (incompetent, vicious, mean, horseplay) act, even though the employee was not at the time acting within the scope of (his, her) authority. By reasonable care is meant that degree of care that a reasonably prudent employer would use under the same circumstances.

New York Pattern Civil Jury Instruction 2:240. The official Comment to this jury instruction explains why an employer can be held liable if the employer puts the employee "in a position to cause foreseeable harm," as each plaintiff alleges or should be allowed to allege:

> The negligence of an employer under theories of negligent hiring and negligent retention is premised upon its having placed an employee in a position to cause foreseeable harm that the injured party most probably would have been spared had the employer used reasonable care in making its decision regarding the hiring and

> retention of the employee. …
>
> Liability is imposed because of the negligence of the employer in selecting or retaining an incompetent employee in a situation which involves the risk of harm to others … It is not necessarily predicated on any special relationship between the employer and plaintiff … The principle upon which liability is based is the same as that involved when an instrumentality is furnished to one not competent to handle it … or when a landowner permits acts harmful to passersby to be carried on by the employees or third persons on the land … or when an incompetent contractor is hired … The negligence of the employer in such cases is direct, not vicarious …

The Comment rejects the Diocese's argument that it cannot be held liable for continuing to employ individuals who posed a danger to others as a result of their position:

> Religious entities have a duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct, *Kenneth R.*, 229 AD2d 159; *see Sharon B. v Reverend S.*, 244 AD2d 878, 665 NYS2d 139, 1997 NY Slip Op 09971, 1997 WL 718990 [4th Dept 1997].

The Comment also rejects the Diocese's argument that an employer can never be held liable for acts that occur outside the scope of employment:

> An employer is not responsible for the acts of an employee outside the scope of the employment … except under the principal of this charge …

Id. (emphasis added).

The Diocese is simply wrong when it asserts that a plaintiff can only recover for sexual abuse if he or she was abused on premises owned by the Diocese or with chattels provided to the perpetrator by the Diocese. To the extent the Diocese wants to assert that such a litmus test exists, which it does not, the foregoing cases make clear that a jury must decide whether the Diocese knew or should have known that the perpetrator might use his or her position with the Diocese to gain access to children and abuse them. A reasonable jury could easily conclude that the Diocese knew that the "premises" entrusted to their agents included using their position to sexually abuse children on property that was not owned by the Diocese, and that the "chattels" of their position included their titles with the Diocese, such as "priest."

The few cases cited by the Diocese illustrate why its motion should be denied, particularly on a motion to dismiss without the benefit of any discovery where all allegations are to be viewed as true and every plaintiff must be afforded "every possible favorable inference." On the other hand, the plaintiffs in the cases cited by the Diocese lacked sufficient evidence to allow a jury to find in their favor, failed to plead such evidence in light of a motion to dismiss, or failed to present such evidence in response to a motion for summary judgment, which the courts specifically acknowledged in each of their opinions. For example, in *Anonymous v Dobbs Ferry Union Free School Dist.*, 290 AD2d 464, 736 NYS2d 117 [2d Dept 2002], the minor plaintiffs were sexually abused by a teacher who their parents invited to attend a New Years Eve party. There was no showing that the defendant knew or should have known that the teacher posed a danger to the plaintiffs, and there was no showing that the perpetrator teacher was present at the party because of his position with the defendant employer. *Id.* at 464-65. In concluding the plaintiffs' claims should have been dismissed on summary judgment, the Court acknowledged that summary judgment is not appropriate if the plaintiff can demonstrate a nexus between the perpetrator's position with the defendant and his or her sexual abuse. *Id.* at 465. The only reason the plaintiffs' claims were dismissed is because they did not provide any evidence to rebut the defendant's prime facie showing that *any* nexus between the perpetrator's position with the defendant and their sexual abuse had been severed by time, distance, and the intervening actions of their parents: "the plaintiffs failed to raise a triable issue of fact" after the defendant "made a prima facie showing of their entitlement to judgment as a matter of law by establishing that any nexus between [the perpetrator's] employment at the [defendant] and his alleged sexual molestation of the infant plaintiffs was severed by time, distance, and the intervening independent actions of their parents." *Id.* It is worth repeating that the plaintiffs' claims were dismissed on *summary judgment*, not on a

motion to dismiss, which underscores why the Diocese's motion is premature given the parties have not yet conducted any discovery.

Similarly, in *Ehrens v Lutheran Church*, 385 F3d 232, 235 [2d Cir 2004], the Court upheld dismissal of the plaintiff's claim on summary judgment because the plaintiff failed to provide evidence that the defendant knew or should have known that the perpetrator posed a danger to the plaintiff. The Court also noted summary judgment was appropriate because the plaintiff admitted the sexual abuse did not occur on the defendant's property and the plaintiff made no showing that the sexual abuse occurred with the employer's chattels. *Id.* at 235-36. The plaintiff also could not raise the holdings in *Kenneth R.* or *Jones,* and given *Ehrens* was decided in 2004, the plaintiff did not raise the later holdings in *Gonzalez, McCrink*, or *Wyatt*. As discussed above, all of those cases rejected the Diocese's argument that New York follows some sort of rigid, bright-line rule that all abuse must have taken place on a defendant's property or using its chattels: "Rather, what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance." *Gonzalez*, 133 AD3d at 70.

Next, in *K.I. v New York City Bd. of Educ.*, 256 AD2d 189, 191-92, 683 NYS2d 228 [1st Dept 1998], the Court concluded summary judgment should have been granted when the plaintiff failed to produce evidence that the defendant knew or should have known that its volunteer posed a danger to children, including the plaintiff. Far from concluding a defendant is only liable if it has actual knowledge of such a danger, the Court noted the defendant had no duty to investigate the perpetrator "in the absence of facts which would lead a reasonably prudent person to suspect the [perpetrator] of dangerous propensities." *Id.* at 192. Although the defendant's teachers encouraged the plaintiff to have a personal relationship with the perpetrator, the plaintiff failed to meet his burden of showing that his sexual abuse was a foreseeable result. *Id.* However, in line

with the holdings of *Kenneth R., Jones, Gonzalez, McCrink*, and *Wyatt*, as well as the numerous Restatements and other legal authority cited above, the Court noted the plaintiff's burden was simply to show the defendant's negligence "was the proximate cause of his injuries" – some sort of viable "nexus" between the perpetrator's position with the defendant and his sexual abuse of the plaintiff. *Id.* at 192. For example, the Court observed that the plaintiff made no showing that his encounters with the perpetrator were arranged through the defendant, or that the plaintiff was present in the perpetrator's apartment to participate in activities that were sponsored or organized by the defendant. *Id.*

Finally, in *Sheila C. v Povich*, 11 AD3d 120, 128, 781 NYS2d 342 [1st Dept 2004], the Court held the defendants had no duty to protect the plaintiff from being sexually abused when the plaintiff was in the custody of her parents and snuck away from them in order to meet up with the man who raped her. The Court concluded no duty existed because the plaintiff failed to make any showing that the defendant exposed her to a foreseeably hazardous situation or that the defendants encouraged her rendezvous with the perpetrator. *Id.* at 128-29. The Court also upheld dismissal because the plaintiff failed to allege that the defendants knew or should have known that the perpetrator posed a danger to her and, "in the face of defendants' motion to dismiss the complaint, plaintiff opted not to make any additional submissions to cure these deficiencies … or to establish that additional discovery was necessary." *Id.* at 129-30.

As reflected by the foregoing authority, it is unclear why the Diocese's motion equivocates on whether it had a duty to protect others from being sexually abused by its employees and other agents. As noted above, the case cited by the Diocese for that novel proposition, *Kenneth R.*, plainly held that religious entities, like the Diocese, have a duty to take reasonable steps to protect "persons in their employ" from using their positions to harm others, including child sexual abuse:

"Religious entities have some duty to prevent injuries incurred by persons in their employ whom they have reason to believe will engage in injurious conduct …" *Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 165 [2d Dept 1997].

G. The Diocese is Vicariously Liable for the Intentional, Outrageous, or Reckless Conduct of Its Agents Acting in the Scope of Their Authority

The Court should deny the Diocese's motion to the extent it asserts that it cannot be held liable for the intentional, outrageous, or reckless conduct of its agents who were acting in the course and scope of their authority – such as supervising priests or Bishops who knowingly transferred serial sexual abusers and allowed them to continue molesting children – because this argument plainly raises an issue of material fact as to the course and scope of their authority. *Mendez v City of New York*, 7 AD3d 766, 767-78, 778 NYS2d 501 [2d Dept 2004]. As the Court held in Mendez, "[s]ince the determination of whether an employee's actions fall within the scope of employment depends heavily on the facts and circumstances of the particular case, the question is ordinarily for the jury." *Id*.

The Diocese's motion must be denied because the Court must view all allegations regarding such misconduct as true, including the "possible reasonable inference" that the scope of their authority included such misconduct for the Diocese's ultimate benefit. As discussed above, it is common to hold a principal or employer, like the Diocese, liable "for the acts of an employee acting outside the scope of his or her employment" based on the employer's own wrongful conduct in allowing the misconduct to occur. *Gonzalez*, 133 AD3d at 67-68; *see also Nevaeh T. v City of New York*, 132 AD3d 840, 18 NYS3d 415 [2d Dept 2015]. The Diocese cites no authority for the novel argument that an employer cannot be held liable for its negligent, intentional, outrageous, or reckless conduct in allowing such misconduct. Even if the Diocese cannot be held vicariously liable for the sexual abuse of children by its priests and agents, it surely can be held liable for its

conduct in allowing such abuse to take place, whether its own conduct be negligent, intentional, outrageous, or reckless. *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 378, 494 NE2d 70 [1986] (diocese is liable if it consented to or ratified the sexual abuse by the perpetrator); *Kenneth R.*, 229 AD2d 159 (priests at the church had notice of the perpetrator's sexually predatory conduct); *Shante D. by Ada D.*, 190 AD2d 356 (upholding jury verdict against school which negligently supervised student in its custody and control, who was assaulted by two fellow students); *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 585, 596 NYS2d 136 [2d Dept 1993] (employer can be held liable for punitive damages if plaintiff established the employer's complicity in the wrongdoing or ratification of the conduct of its employee); *Pinks v Turnbull*, 25 Misc 3d 1245(A), 906 NYS2d 782 [NY Sup Ct 2009] (jury could find defendant's conduct *after* discovering that the sexual abuser was abusing plaintiff constituted "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly").

S.T.'s allegations illustrate why the Diocese's motion must be denied, since these allegations, if proven true, will plainly support holding the Diocese liable for the negligent, reckless, outrageous, and intentional acts and omissions of its employees and agents who allowed Father McComiskey to sexually abuse S.T. and other children in order to protect the Diocese's reputation and to protect it from civil liability for his abuses:

> 17. Upon information and belief, Father Joseph McComiskey was a priest employed by St. Philip and St. James to serve Catholic families in its geographic jurisdiction, including plaintiff S.T. and his family. During the time Father Joseph McComiskey was employed by St. Philip and St. James, he used his position as a priest to groom and to sexually abuse plaintiff S.T. …
>
> 24. Upon information and belief, at all relevant times the Diocese, its agents, servants, and employees managed, maintained, operated, and controlled St. Philip and St. James.

25. Upon information and belief, at all relevant times the Diocese employed priests and others who served Catholic families at St. Philip and St. James, including plaintiff S.T. and his family.

26. Upon information and belief, at all relevant times the Diocese, its agents, servants, and employees managed, maintained, operated, and controlled St. Philip and St. James, and held out to the public its agents, servants, and employees as those who managed, maintained, operated, and controlled St. Philip and St. James.

27. Upon information and belief, at all relevant times the Diocese was responsible for the hiring and staffing, and did the hiring and staffing, at St. Philip and St. James. …

29. Upon information and belief, at all relevant times the Diocese materially benefited from the operation of St. Philip and St. James, including the services of Father McComiskey and the services of those who managed and supervised Father McComiskey. …

51. When S.T. was a minor, Father McComiskey sexually abused him.

52. S.T. was sexually abused by Father McComiskey when S.T. was approximately 16 years old. …

59. Father McComiskey's sexual abuse of S.T. occurred during activities that were sponsored by, or were a direct result of activities sponsored by, the Diocese and St. Philip and St. James, including during a camping trip on Long Island.

60. Upon information and belief, prior to the time mentioned herein, Father McComiskey was a known sexual abuser of children.

61. At all relevant times, defendants, their agents, servants, and employees, knew or should have known that Father McComiskey was a known sexual abuser of children.

62. At all relevant times, it was reasonably foreseeable to defendants, their agents, servants, and employees that Father McComiskey's sexual abuse of children would likely result in injury to others, including the sexual abuse of S.T. and other children by Father McComiskey.

63. The defendants, their agents, servants, and employees, knew or should have known that Father McComiskey was sexually abusing S.T. and other children at St. Philip and St. James and elsewhere.

64. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew or should have known that Father McComiskey was likely to abuse children, including S.T., because in

approximately 1974—years before S.T. was abused by Father McComiskey—it was reported to St. Philip and St. James Church and the Diocese that another child was sexually abused by Father McComiskey.

65. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew or should have known before and during Father McComiskey's sexual abuse of S.T. that priests and other persons serving the Diocese and St. Philip and St. James had used their positions with those defendants to groom and to sexually abuse children.

66. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew or should have known before and during Father McComiskey's sexual abuse of S.T. that such priests and other persons could not be "cured" through treatment or counseling.

67. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, concealed the sexual abuse of children by Father McComiskey in order to conceal their own bad acts in failing to protect children from him, to protect their reputation, and to prevent victims of such sexual abuse by him from coming forward during the extremely limited statute of limitations prior to the enactment of the CVA, despite knowing that Father McComiskey would continue to molest children.

68. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, consciously and recklessly disregarded their knowledge that Father McComiskey would use his position with the defendants to sexually abuse children, including S.T. …

70. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, acted in concert with each other or with Father McComiskey to conceal the danger that Father McComiskey posed to children, including S.T., so that Father McComiskey could continue serving them despite their knowledge of that danger.

71. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, knew that their negligent, reckless, and outrageous conduct would inflict severe emotional and psychological distress, as well as personal physical injury, on others, including S.T., and he did in fact suffer severe emotional and psychological distress and personal physical injury as a result of their wrongful conduct.

72. Upon information and belief, the Diocese and St. Philip and St. James, their agents, servants, and employees, concealed the sexual abuse of children by priests and others in order to conceal their own bad acts in failing to protect children from being abused, to protect their reputation, and to prevent victims of such sexual abuse from coming forward during the extremely limited statute of limitations prior

> to the enactment of the CVA, despite knowing that those priests and other persons would continue to molest children.

Marsh Affirm., Ex. 1, at ¶¶ 17, 24-27, 29, 51, 52, 59-68, 70-72.

The Diocese's motion on this issue underscores the need for the Court to view all allegations by each plaintiff as true, including "every possible favorable inference," particularly where the parties have not conducted any discovery. More specifically, the Court must view as true any allegation, and any possible favorable inference, that the Diocese and its agents intentionally, outrageously, or recklessly allowed priests and others to continue sexually abusing children in order to protect its reputation and to avoid civil liability, to the point that such misconduct fell within the course and scope of their authority.

H. The Diocese is Liable for Authorizing or Ratifying the Sexual Abuse of Minors

The Court should deny the Diocese's motion to the extent it argues that it can never be held vicariously liable for the sexual abuse of a child by one of its priests or other agents. While defendants often attempt to misdirect courts by grouping all theories of vicariously liability under the umbrella of *respondeat superior*, it is well established that a principal may be held vicariously liable for the intentional, reckless, or criminal conduct of third parties, even those acting outside the scope of their authority, if it *authorized or ratified* the misconduct. *Loughry*, 67 NY2d at 378; *Kelleher*, 192 AD2d at 585 (employer can be held liable for punitive damages if plaintiff establishes complicity in the wrongdoing or ratification of the conduct of its employee).

The Diocese can be held liable for the intentional, reckless, or criminal conduct of third parties, even those acting outside the scope of their authority, if it authorized or ratified the misconduct. "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." (Rest. 3d Agency § 4.01(1).) When a principal ratifies its agent's tort, it is bound as it would have been "had the actor been an agent

acting with actual authority at the time of the act." (Rest. 3d Agency § 4.01(1), com. b.) Although ratification commonly occurs in the contractual arena – e.g., when an agent is unauthorized to contract for the principal, but upon learning of the contract the principal accepts its benefits - a principal may also ratify an agent's tortious conduct. (Rest. 3d Agency § 4.01(1), com. b ["[i]f the agent's act constituted a tort, the time of the act is the time as of which the principal becomes vicariously liable, if the principal ratifies the agent's act"]; *see also* Illustration 1 [principal ratified agent's intentional tort].)

By knowingly retaining an agent who was committed a tort – even childhood sexual assault – the principal retroactively accepts the consequences of the earlier tort. *See*, *e.g.*, *DeBose By & Through DeBose v Bear Valley Church of Christ*, 890 P2d 214, 230 [Colo. App. 1994], rev'd on other grounds, 928 P2d 1315 [Colo. 1996] (retaining pastor despite multiple complaints sufficient to establish ratification of improper touching of a minor); *C.R. v Tenet Healthcare Corp.*, 169 CalApp4th 1094, 1110 [Cal. App. 2009]; *Murillo v Rite Stuff Foods, Inc.*, 65 CalApp4th 833, 852 [Cal. App. 1998]; *Ventura v ABM Industries*, 212 CalApp4th 258, 272 [Cal. App. 2012].

Murillo persuasively explained:

> [a] plaintiff need not necessarily rely upon the doctrine of respondeat superior. A principal is liable when it ratifies an originally unauthorized tort. The failure to discharge an agent or employee may be evidence of ratification. . . . [i]f the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages.

Murillo, 65 CalApp4th at 852 (internal citations omitted).

The Courts of this State agree. *See Neal v C. F. M. Enterprises, Inc.*, 133 AD2d 941, 942 [1987] (corporation may be liable for punitive damages when its management "management has authorized, participated in, consented to *or ratified* the conduct giving rise to such damages, or deliberately retained the unfit servant"). Similarly, in *Cleghorn v New York Cent. & H.R.R. Co.*,

the court explained that punitive damages are available for the gross misconduct of a master for the gross misconduct of a servant:

> … Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability, as well as privatc[sic] persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer, or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages ...

56 NY 44, 47-48, 11 Sickels 44, 15 Am Rep 375, 1874 WL 11045 [1874] (internal citations omitted).

Ratification is, by its very nature, heavily dependent on the facts of each particular case. *See* Rest. 3d Agency § 4.01, com. d ("it is a question of fact whether conduct is sufficient to indicate consent.) While not every case filed pursuant to the CVA will meet the requirements of ratification, so too ratification cannot be ruled out from every case at the pleading stage. The Diocese cannot evade liability for the sexual abuse of children by its priests and other agents if it knew of those acts, benefited from those acts or form the continued employment of its agents, and/or took no steps to cure them. If the Diocese was correct on this issue, an employer could never be held liable for the intentional acts of its employees of which it was not only aware, but also accepted. That is not the law, nor should it be the law.

For example, vicarious liability in S.T.'s case is premised on the Diocese's knowledge and ratification of Father McComisky's sexual abuse of children: he alleges the Diocese knew that Father McComiskey was a known sexual abuse of children, he alleges that the Diocese knew or should have known that Father McComiskey might sexually abuse him and other children, and he

alleges the Diocese failed to take any steps to protect him or other children in order to protect its reputation and to avoid civil liability. Marsh Affirm., Ex. 1, at ¶¶ 60-67. Each of these allegations must be accepted as true, and if discovery proves them true, the Diocese is liable for Father McComisky's sexual abuse of Plaintiff S.T.

I. Claims for *Respondeat Superior*, Outrage, *In Loco Parentis*, Negligent Infliction of Emotional Distress, and Breach of Fiduciary Duty May Be Pled in the Alternative and Are Not Duplicative

The Court should deny the Diocese's motion to the extent it argues that five "claims" – *respondeat superior*, outrage, *in loco parentis*, negligent infliction of emotional distress, and breach of fiduciary duty – should be dismissed from all complaints where they are pled because its arguments are contrary to bedrock principles found in both statutes and case law.

To be clear, the Diocese's only arguments regarding these issues as to Plaintiff S.T. is that (1) his "claim" for *respondeat superior* is "duplicative" of his claim for negligence, and (2) his claims for negligence and outrage / intentional infliction of emotional distress are duplicative. Those arguments are addressed below. However, as with its arguments regarding duty, including its argument that it cannot be held liable for sexual abuse of children that occurred off its property or without the use of its chattels, S.T. addresses these other arguments because of the likelihood that the Diocese will try to use the Court's ruling in other cases against S.T. and other plaintiffs.

As a threshold matter, the Diocese ignores that complaints are to be liberally construed (CPLR 3026), that plaintiffs are permitted to plead alternative and inconsistent causes of action, and that plaintiffs are entitled to seek alternative forms of relief. These are central tenets of New York law which are well-settled and ubiquitous. *See* CPLR 3014 ("Separate causes of action [] may be stated regardless of consistency. Causes of action [] may be stated alternatively or hypothetically."); CPLR 3017 ("Relief in the alternative or of several different types may be demanded."); *Man Advisors, Inc. v Selkoe*, 174 AD3d 435, 101 NYS3d 843 [1st Dept 2019]

(plaintiff may plead in the alternative); *Raglan Realty Corp. v Tudor Hotel Corp.*, 149 AD2d 373, 375, 540 NYS2d 240 [1st Dept 1989] ("It is well established that a party may plead alternative theories, even on the basis of allegations that contradict each other"); *Perkins v Volpe*, 146 AD2d 617, 618, 536 NYS2d 845 [2d Dept 1989] ("[I]t is appropriate for the plaintiff to advance different theories of recovery regardless of their incompatibility"); *Mitchell v New York Hosp.*, 61 NY2d 208, 218, 461 NE2d 285 [1984] ("We note the well-settled rule that 'a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery"'). Given this well-established law, the Diocese's attempt to dismiss claims that are potentially incompatible or overlapping – before plaintiffs are given the benefit of discovery – is unfounded.

As it does throughout its motion to dismiss, the Diocese fails to recognize that "the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one." *Al Rushaid*, 28 NY3d at 327 (citation omitted). Moreover, "[t]he fact that a cause of action is not expressly denominated is not fatal if the factual allegations in the complaint fit within a cause of action." *Scollar v City of New York*, 160 AD3d 140, 144-45, 74 NYS3d 173 [1st Dept 2018] (citations omitted); *Wayne S. v Nassau County, Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981] ("If the pleading states a cause of action and if, from its four corners, the factual allegations, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail"). Accordingly, the Diocese's attempts to split hairs over whether certain "claims" are freestanding causes of action, or whether they are merely a manner in which plaintiff may prove an element of a larger claim, is inapposite on a motion to dismiss.

In its haste and desire to dismiss all claims before it without having to address each case on its merits, the Diocese claims that the above-mentioned claims consist of the "same set of facts and theories and seek identical damages" and therefore "are duplicative of one another and must

be dismissed." But the Diocese does so without meeting its burden of proof of identifying *which* sets of facts or theories overlap and *which* damages are identical. These fatal flaws should be determinative of the Diocese's arguments pertaining to: (1) *respondeat superior*, (2) outrage, (3) *in loco parentis*, (4) negligent infliction of emotional distress, and (5) breach of fiduciary duty. Nevertheless, because the Diocese also misconstrues or misapplies New York law in other ways, plaintiff discusses each in further detail below.

1. *Respondeat Superior*

As discussed in detail above, the Diocese is incorrect that it cannot be held vicariously liable for the acts and omissions of its agents that are committed in the scope of their authority. Nevertheless, the Diocese argues that claims for *respondeat superior* are "duplicative" of claims for negligence, including negligent hiring, retention, and supervision. But while framed as an argument that the claims are duplicative, the Diocese actually asserts that plaintiffs should be precluded from arguing these claims in the *alternative* – an argument that is directly contrary to established New York law. Diocese's Amended Memorandum of Law, at 58 ("to the extent plaintiffs seek damages for negligence *and* to impose liability under the *respondeat superior* doctrine, they cannot proceed under both theories of recovery; counts under one of the doctrines must be dismissed at this stage."). The Diocese argues that plaintiffs – before any discovery has commenced and not knowing what the evidence will show – must elect between their *respondeat superior* claims and their negligence claims.

There is no authority for this proposition. Indeed, the authority points to the opposite. In *Pickering v State*, 30 AD3d 393, 394, 816 NYS2d 566 [2d Dept 2006], the court confirmed the propriety of pleading claims that covered acts *both* within and outside the scope of employment. The court noted that "[t]he allegations set forth in the claims . . . were sufficiently broad to include causes of action sounding in negligent hiring and/or negligent training. Moreover, at this early

stage of the proceedings, and in the absence of a clear concession by the defendant that the officer acted completely within the scope of his employment, the claimants were entitled to plead incompatible theories of recovery in the alternative." *Id*. (internal citations omitted).

The right to plead alternative theories is particularly important where one negligent act can give rise to liability for direct negligence and another could result in vicarious liability through *respondeat superior*. Without discovery, on a motion to dismiss, there is no basis to force plaintiffs to elect between two potentially viable claims.

2. Outrage / Intentional Infliction of Emotional Distress

The Court should deny the Diocese's motion to the extent it asserts that claims for outrage / intentional infliction of emotional distress are duplicative of claims for negligence because they are plainly separate and unique torts that address different types of misconduct.

A negligence claim requires the plaintiff to establish a duty, which was breached, causing injury. The tort of outrage / intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v New York Post Co., Inc.*, 81 NY2d 115, 121, 612 NE2d 699 [1993]. *Howell* explained the uniqueness of claims for outrage / intentional infliction of emotional distress, which among other things, do not require proving the existence of a pre-established legal duty:

> Unlike other intentional torts, intentional infliction of emotional distress does not proscribe specific conduct (*compare, e.g.,* Restatement (Second) of Torts § 18 (1965) [battery]; *id.*, § 35 [false imprisonment]), but imposes liability based on after-the-fact judgments about the actor's behavior. Accordingly, the broadly defined standard of liability is both a virtue and a vice. The tort is as limitless as the human capacity for cruelty. The price for this flexibility in redressing utterly reprehensible behavior, however, is a tort that, by its terms, may overlap other areas of the law, with potential liability for conduct that is otherwise lawful. Moreover,

> unlike other torts, the actor may not have notice of the precise conduct proscribed (*see*, Givelber, *Social Decency*, 82 Colum.L.Rev., at 51–52).

Id. at 122. Courts have allowed claims for outrage / intentional infliction of emotional distress to proceed in cases where the plaintiff alleges an institution negligently allowed an employee to sexually abuse a child. *See, e.g. Pinks*, 25 Misc 3d 1245(A) (refusing to dismiss claim of outrage / intentional infliction of emotional distress against Boys Choir of Harlem for sexual abuse by an employee when it was alleged the defendant, after notice, did nothing to protect the plaintiff from the perpetrator). The Diocese's motion should be denied because claims for outrage / intentional infliction of emotional distress are plainly not duplicative of claims for negligence and both may be maintained in the same lawsuit.

3. *In loco parentis*

The Diocese asserts that all claims of *in loco parentis* should be dismissed because it is not a standalone cause of action, and even if it were, the Diocese asserts that a plaintiff cannot plead both *in loco parentis* and negligent supervision. Whether *in loco parentis* is classified as a claim or simply a way to prove that the Diocese owed the plaintiff a duty is a distinction without difference. *Mirand*, 84 NY2d 44 ("[t]he duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians"); *Pratt*, 39 NY2d at 555; *Shante D. by Ada D.*, 190 AD2d at 361. If the Diocese is correct that *in loco parentis* is not a freestanding claim, then that is *precisely why it cannot be dismissed*: by definition only claims are subject to dismissal, not manners of proof.

Moreover, the cases cited by the Diocese do not conclude that claims for negligent supervision and *in loco parentis* are duplicative. For example, *Bauver v Commack Union Free School Dist.*, 2014 N.Y. Slip Op. 31169[U] [Suffolk Cty Sup Ct 2014], demonstrates that one of the ways to prove duty – whether for general negligence or negligent supervision – is to show that

the defendant had a duty of *in loco parentis*. *Bauver* recognized that, as a matter of law, schools are "expected to exercise the same degree of care towards [their students] as would a reasonably prudent parent placed under the same circumstances…" *Id*. at *1. Only after determining that the school owed a duty of *in loco parentis*, as a matter of law, did the court then conclude that the claim for negligent supervision subsumed the *in loco parentis* claim. Notably, the plaintiffs in *Bauver* – and other cases cited by the Diocese – were permitted to plead both "claims" and the question of their propriety was only considered on summary judgment – *after* plaintiffs had the benefit of full discovery.

4. Negligent Infliction of Emotional Distress

The Diocese argues that a plaintiff cannot proceed with a claim for negligence and a claim for negligent infliction of emotional distress. The Diocese's attempt to cherry-pick cases that so hold is unavailing. The cases cited by the Diocese in support of its argument are unhelpful because they were either decided on summary judgment after plaintiff had the benefit of discovery (*see Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 585, 819 NYS2d 44 [2d Dept 2006] and *Afifi v City of New York*, 104 AD3d 712, 713, 961 NYS2d 269 [2d Dept 2013]), dealt with issues surrounding *intentional*, not *negligent*, infliction of emotional distress (see *Afifi*, 104 AD3d 712*)*, or involved cases where either negligent or intentional infliction of emotional distress were unavailable as a matter of public policy (*Afifi*, 104 AD3d at 713 ("Public policy bars claims alleging intentional infliction of emotional distress against governmental entities") and *Wolkstein v Morgenstern*, 275 AD2d 635, 713 NYS2d 171 [1st Dept 2000] ("cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss, so there can be no recovery for emotional or psychological injury.")).

In contrast to the Diocese's cases, numerous New York courts have recognized that there is a significant difference between a claim for conventional negligence and a claim for negligent

infliction of emotional distress. Here, facts may be elicited during discovery that would easily meet the standard for negligent infliction of emotional distress – "a breach of duty owed directly to plaintiff which either endangered plaintiff's physical safety or caused plaintiff fear for his or her own physical safety." *Graber v Bachman*, 27 AD3d 986, 987, 812 NYS2d 659 [3d Dept 2006]; *and see Ferrara v Galluchio*, 5 NY2d 16, 21, 152 NE2d 249 [1958] ("[f]reedom from mental disturbance is now a protected interest in this State"); *Battalla v State*, 10 NY2d 237, 176 NE2d 729 [1961] (failure properly to lock ski-lift belt); *Johnson v State*, 37 NY2d 378, 334 NE2d 590 [1975] (false information that plaintiff's mother had died); *Lando v State*, 39 NY2d 803, 351 NE2d 426 [1976] (failure for 11 days to recover plaintiff's daughter's body). The Diocese's motion should be denied because the acts that resulted in endangering plaintiff's safety could be wholly independent from those proving other forms of negligence, it is perfectly proper to plead both claims in the alternative, and there is no basis to dismiss a plaintiff's negligent infliction of emotional distress claim on a motion to dismiss.

5. Breach of Fiduciary Duty

The Diocese next makes a cursory argument that all claims for breach of fiduciary duty stem from "the same set of facts and theories" as negligence claims and should therefore be dismissed. As discussed above, the Diocese does so without analyzing any individual case, despite the fact that courts have consistently held that the doctrine hinges on specific facts and is therefore largely unsuitable for dismissal on a CPLR 3211 motion. This is amply demonstrated in *Penato v George*, 52 AD2d 939, 942, 383 NYS2d 900 [2d Dept 1976], where the court held that a fiduciary duty is one "founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence is acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies

upon, another."

Courts in other jurisdictions have held the same, and on facts similar to those presented here. By way of example, *Martinelli v Bridgeport R.C. Diocesan Corp.*, 10 F Supp 2d 138 [D Conn 1998], *affd in part, vacated in part,* 196 F3d 409 [2d Cir 1999], involved a minor sexually abused by a priest. The Second Circuit Court of Appeals upheld the jury finding that a fiduciary relationship existed between the plaintiff and the defendants:

> A fiduciary relationship or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party afford him great opportunity for abuse of the confidence reposed in him. Once a fiduciary relationship is found to exist, the burden for fair dealing properly shifts to the fiduciary.

Id. at 420.

The cases cited by Diocese, on the other hand, are far afield. In *In Re Mundo*, the Southern District bankruptcy court dismissed claims for breach of fiduciary duty and negligence of a bankruptcy trustee because they were unsupportable under bankruptcy law. In *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271, 780 NYS2d 593 [1st Dept 2004], the court held that in the unique context of legal malpractice, breach of fiduciary duty is subsumed within the malpractice claim. The court makes clear that its holding is limited to legal malpractice claims.

The Court should deny the Diocese's motion because it must accept all allegations by each plaintiff as true, including all possible favorable inferences from those allegations, and each plaintiff's allegations would support a claim for breach of fiduciary duty.

J. No Complaints Fail to Make Proper CPLR 208(b) or CPLR 214-g Allegations

The Court should deny the Diocese's motion because no complaints addressed in its motion fail to make proper allegations under CPLR 208(b) and CPLR 214-g. While the Diocese does not

make this argument as to Plaintiff S.T., again, S.T. is concerned the Diocese may try to obtain rulings in other cases and then use those against him or other plaintiffs.

The Diocese suggests that certain complaints that allege "unpermitted sexual contact with plaintiff" "do not provide any details as to whether the alleged conduct … falls within the specified penal laws," and that "such a generic description is insufficient to meet the requirements of CPLR 208(b) or CPLR 214-g." Diocese's Amended Memorandum of Law, at 59. As discussed above, the Court is required to view these allegations as true along with "every possible favorable inference" based on those allegations. Whether a plaintiff alleged they were "sexually abused" or were the subject of "unpermitted sexual contact," the possible favorable inferences include allegations that plainly satisfy every requirement of CPLR 214-g, including (1) a violation of the requisite penal laws and (2) conduct against a child under the age of eighteen.

CPLR 214-g revives:

> … every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct ***which would constitute a sexual offense*** *as defined in article one hundred thirty of the penal law* committed against a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law *committed against a child less than eighteen years of age*, or the *use of a child in a sexual performance as defined in section 263.05 of the penal law*, ***or a predecessor statute that prohibited such conduct at the time of the act***, which conduct was committed against a child less than eighteen years of age, which is barred as of the effective date of this section because the applicable period of limitation has expired, and/or the plaintiff previously failed to file a notice of claim or a notice of intention to file a claim.

NY CPLR 214-g (emphasis added); *see also* NY CPLR 208(b). It is unclear how the Diocese can take issue with complaints that allege "unpermitted sexual contact" when article one hundred thirty of the penal law (PL 130.00) uses the term "sexual contact" in a number of its offenses and defines it as including "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party":

> 'Sexual contact' means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

PL 130.00[3]. The term to which the Diocese objects—"sexual contact"—is a defined term that is foundational to many of the offenses mentioned in CPLR 214-g, and an allegation of "sexual contact" is a basis for multiple sexual offenses under article 130, including sexual abuse. *See, e.g.,* PL 130.53, 130.55, 130.60, 130.65, 130.65-a, 130.66, 130.67, 130.70; *see also People v Redfield*, 144 AD3d 1548, 1549, 41 NYS3d 632 [4th Dept 2016]. Furthermore, practice commentary on CPLR 214-g notes, "[p]enal [l]aw article 130…includes virtually any type of sexual contact." Alexander, McKinney Practice Commentary, CPLR 214-g (2019). It is unclear how the Diocese can assert that a claim for "unpermitted sexual contact" is not covered by CPLR 214-g when such unlawful contact is the basis for many of the sexual offenses found in PL 130. On a motion to dismiss, the Court is required to infer that an allegation of "unpermitted sexual contact" includes every type of unlawful sexual conduct proscribed by PL 130.

Article 130 includes various sexual offenses against children, including sexual abuse and course of sexual conduct against a child. *See, e.g.,* PL 130.53, 130.55, 130.60, 130.65, 130.66, 130.67, 130.70, 130.75, 130.80. For example, PL 130.65 defines the offense of sexual abuse in the first degree as "subject[ing] another person to sexual contact (1) By forcible compulsion; or (2) When the other person is incapable of consent by reason of being physically helpless; or (3) When the other person is less than eleven years old; or (4) When the other person is less than thirteen years old and the actor is twenty-one years old or older." PL 130.65. Similar distinctions based on consent, age, and conduct distinguish the various sexual abuse offenses under article 130 from one another, but article 130 as a whole encompasses a broad range of sexual offenses against

children that are referred to as "sexual abuse" or similar terminology throughout.

Finally, the Diocese's argument that each plaintiff must plead that their claim "must have been time-barred by August 14, 2019," makes no sense because the plaintiff's claim is either timely under the former statute of limitations or it is now timely under CPLR 214-g; if the former, then the Diocese's argument is moot.

IV. CONCLUSION

The Court should deny the Diocese's motion because (1) the CVA is constitutional as it is a reasonable effort by the Legislature to provide justice to countless children who were sexually abused as minors, including S.T. and the dozens of other abuse survivors who are the subject of its motion, (2) the CVA revived "all claims" based on negligent or intentional conduct, including S.T.'s claims for outrage and intentional infliction of emotional distress, (3) the Diocese can be held vicariously liable for the acts and omissions of its employees and agents, even intentional or reckless acts and omissions so long as they were undertaken with the Diocese's authority, (4) S.T.'s claims for negligence, outrage, and intentional infliction of emotional distress are not "duplicative" as they constitute separate torts with different elements, and (5) S.T.'s claim for *respondeat superior* is not duplicative of his other claims as *respondeat superior* is simply a way to hold the Diocese liable for the knowledge, acts, and omissions of its agents.

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Respectfully submitted,

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