

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

JOHN V. DOE,

Plaintiff,

v.

HOLY SEE, et al.,

Defendants.

No. CV 02-430-MO

OPINION AND ORDER

**MOSMAN, J.,**

Plaintiff filed this action against the Holy See, Archdiocese of Portland, and other defendants for the alleged tortious conduct of Father Andrew Ronan, a Catholic priest at St. Albert's Church in Portland, Oregon. Plaintiff asserts three causes of action against the Holy See: respondeat superior, negligence, and fraud. Currently before the court is the Holy See's motion (#133) to dismiss for lack of subject matter jurisdiction. The Holy See, a foreign sovereign, is presumptively immune from suit under the Foreign Sovereign Immunity Act ("FSIA") unless an exception applies. Plaintiff argues this court has subject matter jurisdiction under both the commercial activity exception and the tortious activity exception. Because the tortious activity exception applies in this case, the Holy See's motion (#133) to dismiss is DENIED.

I. FACTS

Plaintiff filed suit against the Holy See on April 3, 2002, and filed an amended complaint two years later on April 1, 2004. In August 2005, plaintiff properly served the Holy See. The amended complaint alleges defendants Holy See, Archdiocese of Portland, and Order of Friar

Servants ("Order") placed Father Andrew Ronan ("Ronan") in St. Albert's Church in Portland in approximately 1965. Pl.'s Compl. ¶ 15. There, Ronan allegedly subjected plaintiff, then 15 or 16, to sexual abuse occurring in the monastery and "surrounding areas." *Id.*

Prior to his placement in Portland, Ronan sexually molested a minor while employed with the Archdiocese of Armagh, at Our Lady of Benburb, Ireland in 1955-1956. *Id.* at ¶ 11. According to church records, Ronan apparently admitted to abusing the youth and was removed from his position due to his admissions. *Id.* Ronan was placed in defendant Order's Chicago province, at the all-boys St. Philip's High School where he worked in the private counseling office. *Id.* at ¶ 12. Three male students made independent reports of sexual abuse committed by Ronan, and Ronan admitted to all three reports. *Id.* Ronan also expressed confusion as to why he would be assigned to work in the private counseling office where temptation to molest children would be maximized. *Id.* In 1965, Ronan was placed in Portland. *Id.* at ¶ 13.

For purposes of the Holy See's motion to dismiss on grounds of sovereign immunity, the significant portions of the complaint are plaintiff's allegations that bring the Holy See's actions within the commercial or tortious activity exceptions. The most important facts alleged include the following:

- (1) Defendant Holy See has unqualified power over the Catholic Church, including each and every individual section of the Church. *Id.* at ¶ 3.
- (2) Defendant Holy See directs, supervises, supports, promotes and engages in providing religious and pastoral guidance, education and counseling services to Roman Catholics world-wide in exchange for all or a portion of the revenues derived from its members for these services. The Holy See engages in these activities through its agents, cardinals, bishops and clergy, including religious order priests, brothers and sisters, who engage in pastoral work under the authority of its bishop. *Id.*

- (3) Defendant Holy See creates, appoints, assigns and reassigns bishops, superiors of religious orders, and through the bishops and superiors of religious orders has the power to directly assign and remove individual clergy. Defendant Holy See also examines and is responsible for the work and discipline and all those things which concern bishops, superiors of religious orders, priests and deacons of the religious clergy. *Id.*
- (4) Father Ronan was employed by all defendants as a priest. The duties of Ronan's employment included but were not restricted to teaching the word of God and the law of the church, providing pastoral services, spiritual care, guidance and counseling, and obtaining financial support for the church. *Id.* at ¶ 10.
- (5) After Ronan admitted to sexually molesting minors in Armagh and Chicago, Defendant Catholic Bishop, acting in accordance with the policies, practices, and procedures of Defendant Holy See, failed to remove or discipline Ronan, or to warn others, including Defendant Archdiocese, of Ronan's propensities. *Id.* at ¶ 11-12.
- (6) Despite knowing of Ronan's dangerous propensities to abuse children, the Holy See placed Ronan in defendant Archdiocese in Portland, Oregon. *Id.* at ¶ 13.
- (7) Defendants held themselves out as the counselors and instructors on matters that were spiritual, moral and ethical. By maintaining and encouraging such a relationship with plaintiff, defendants entered into a fiduciary relationship with plaintiff. *Id.* at ¶ 14.
- (8) When plaintiff was approximately 15 to 16 years old, Ronan, using his position of authority, trust, reverence and control as a Roman Catholic priest, engaged in harmful sexual contact upon the person of plaintiff on repeated occasions. *Id.* at ¶ 15.
- (9) Ronan and Defendants Catholic Bishop, Archdiocese and Order were the agents of Defendant Holy See, acting in furtherance of the purposes of the Defendant Holy See, doing the kinds of acts they were engaged to perform, and were motivated, at least in part, to further the purposes of Defendant Holy See. *Id.* at ¶ 34.
- (10) Defendant Holy See, by and through its agents, granted Ronan faculties to perform as a Roman Catholic priest. Defendant Holy See, by and through its agents, also certified and held Ronan out to the community of the faithful as a fit and competent agent of the Holy See and a

- minister of Christ. *Id.* at ¶ 35.
- (11) Plaintiff was molested by Ronan while plaintiff was under the authority and influence of Ronan as a Roman Catholic priest which authority was granted to him by Defendant Holy See, Archdiocese and Order. *Id.* at ¶ 36.

## II. SUBJECT MATTER JURISDICTION UNDER THE FSIA

### A. Legal Standard Governing Motion to Dismiss under Rule 12(b)(1)

A party challenging the court's jurisdiction under Rule 12(b)(1) may do so either on the face of the pleadings (a facial attack) or by presenting extrinsic evidence to refute the facts alleged in the complaint (a factual attack). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In evaluating a facial attack to jurisdiction, the court must accept as true the factual allegations in plaintiff's complaint. *Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). Where the attack is factual, the court may consider evidence presented on the jurisdictional issue and resolve factual disputes, if necessary. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); see *Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993). The Holy See's motion to dismiss presents a facial attack to plaintiff's amended complaint, and I will accept as true plaintiff's factual allegations. Def.'s Motion to Dismiss ("MTD") at 1.

### B. FSIA Statutory Framework

The FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (internal quotation marks and citation omitted). Structurally, the FSIA articulates the general rule that foreign states are immune from the jurisdiction of the United States courts unless the claim against the foreign state falls within an exception to immunity. 28 U.S.C. §§ 1330(a) & 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 706 (9th Cir. 1992).

The FSIA places the ultimate burden on the foreign state to show it is immune from suit. 28 U.S.C. § 1605; *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991). Initially, the foreign state must show it falls within the protection afforded by the FSIA by showing that it is, in fact, a foreign state. *Siderman*, 965 F.2d at 708 n.9. If the foreign state makes that showing, the burden of production shifts to the plaintiff to show, either by the allegations in the complaint or by extrinsic evidence, that at least one of the FSIA exceptions applies. *Id.* "Once the plaintiff offers evidence that an exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Schoenberg*, 930 F.2d at 779 (quoting *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987)); *Meadows v. Dom. Rep.*, 817 F.2d 517, 522-23 (9th Cir. 1987); *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

Here, the sovereign status of the Holy See is not in dispute. Def.'s MTD at 5; Pl.'s Resp. at 2. Plaintiff invokes two exceptions to immunity under FSIA – the commercial activity exception, 28 U.S.C. § 1605(a)(2), and the tortious activity exception, 28 U.S.C. § 1605(a)(5). Before reaching these exceptions, the Holy See makes two threshold arguments.

C. Threshold Arguments in Holy See's Facial Attack

Before reaching the heart of FSIA immunity, the Holy See argues: (1) the court should disregard plaintiff's conclusory allegations, and (2) plaintiff's complaint fails to plead facts with specificity, especially regarding the presumed independence of the separate juridical entities of the diocese and order.

(1) Conclusory Allegations

The Holy See correctly states that on a facial attack, plaintiff's well-pleaded allegations must be taken as true. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Nevertheless, the Holy See urges the court to disregard much of plaintiff's complaint because courts should not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Def.'s MTD at 1 (quoting *Warren*, 328 F.3d at 1139).

Certain portions of plaintiff's allegations against the Holy See appear conclusory. For example, Count V alleges vicarious liability on the part of Holy See because "[t]he molestation of the plaintiff occurred while Ronan was acting in the scope of his employment." Pl.'s Compl. ¶ 36. If plaintiff's complaint contained only such conclusory statements on ultimate issues, it would probably not survive a motion to dismiss. However, much of plaintiff's complaint alleges facts, not legal conclusions, regarding the dates, players, and locations involved and descriptions of the hierarchical structure of the church. The Holy See might disagree with these characterizations, but it has not offered contradictory evidence to attack the factual underpinnings of plaintiff's complaint, nor has it explained why plaintiff's allegations are "unwarranted." I find the complaint contains sufficient well-pleaded factual allegations to overcome the argument that it is conclusory.

(2) Specificity and Separateness

The Holy See's second threshold argument urges the court to disregard plaintiff's complaint because it fails to satisfy the FSIA's requirement of pleading facts with specificity. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 n.17 (5th Cir. 1992) (in suing a foreign sovereign, plaintiff has a "duty" to allege "specific facts" sufficient to invoke an exception to immunity); *Dames & Moore v. Emirate of Dubai*, 1996 WL 671279 at \*6 (N.D. Cal. Nov. 14, 1996) (same); *BPA Int'l, Inc. v. Kingdom of Swed.*, 281 F. Supp. 2d 73, 81 (D.D.C. 2003) (plaintiff must allege sufficient facts for the court to entertain a FSIA suit). The Holy See concentrates the specificity argument on the concept of separateness and points to plaintiff's failure to allege specific facts that would overcome the presumption of independent status accorded to foreign instrumentalities and agencies. *See Arriba*, 962 F.2d at 533.

The FSIA's definition of "foreign state" includes a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). As explained by the Fifth Circuit, the FSIA's normal burden shifting, in which the foreign sovereign bears the burden of proof on immunity, is subject to an exception where jurisdiction depends on an allegation that the defendant was an agent or instrumentality of the sovereign. *Arriba*, 962 F.2d at 533-34. In that circumstance, the plaintiff bears the burden of proving the agency relationship. *Id.* at 534. Unlike *Arriba*, this is not a case in which plaintiff is suing only a political subdivision, instrumentality, or agent of the sovereign. The defendants in this case include the foreign sovereign Holy See, which is being sued for its own negligence as well as the acts of its "agents." In any case, I will address the Holy See's separateness argument followed by the specificity issue.

(a) Separateness

Holy See relies on *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983), to support its argument that this court should refrain from finding the Holy See liable for the acts of the separate juridical entities of the Archdiocese and Order. Def.'s Reply at 5. I read *Bancec* to be unhelpful for the position advanced by the Holy See because that case articulated the flip-side of the Holy See's argument – separate juridical entities (government corporations acting independently from the government) should not be held liable for the acts of the sovereign. *Bancec*, 462 U.S. at 626-27. But sometimes, as in the corporate law context, the court will break down the artificial wall or veil between separate juridical entities. The *Bancec* decision carved out two exceptions to the presumption of independence in the international context where it would be appropriate to disregard the corporate entity: (1) "where a corporate entity is so extensively controlled by its owner [sovereign] that a relationship of principal and agent is created;" and (2) where recognizing the separateness of the corporate entity would work fraud or injustice. *Bancec*, 462 U.S. at 629-30.

In *Bancec*, the Cuban government established an autonomous state-owned bank to serve as a credit institution for foreign trade. *Id.* at 613. The state-owned Cuban bank sought to collect on a letter of credit issued by an American bank. *Id.* at 615. Shortly thereafter, the Cuban government seized all of the American bank's assets in Cuba. *Id.* When the Cuban bank brought suit in United States federal district court, the American bank counterclaimed, asserting its right to offset the value of its assets seized in Cuba. *Id.* at 616. The Cuban bank dissolved, and Cuba stepped into the shoes of plaintiff suing in America while shielding itself from counterclaims by transferring the Cuban bank's assets. *Id.* at 632-33. This substitution of

plaintiffs muddied the waters in that the sovereign and its corporation were less easily categorized as separate entities. The Court concluded the American bank could obtain a setoff in its counterclaim, notwithstanding the fact that the Cuban bank was established as a separate juridical entity. *Id.* at 633.

The *Bancec* decision was driven, at least in part, by the procedural history in that the case involved a Cuban instrumentality suing an American company. When a foreign sovereign brings suit in the United States, it waives immunity from counterclaims. 28 U.S.C. § 1607. Justice O'Connor relied on equitable principles to disregard the corporate entity, holding:

Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of [the American bank's] assets [in violation of international law]. We decline to adhere blindly to the corporate form where doing so would cause such an injustice. . . . To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises.

*Bancec*, 462 U.S. at 632-33 (citations omitted). In other words, a foreign sovereign is not entitled to immunize itself from suit for its own wrongs by hiding behind the separate juridical status of its government corporations.

The Holy See's separateness argument is undercut by its own briefing and an attempted contortion of the instrumentality analysis. Footnote three of the Holy See's reply states: "This is not to suggest that dioceses and orders are instrumentalities of the Holy See – instead, both . . . are even more distant than instrumentalities which can be majority-owned by the foreign

sovereign."<sup>1</sup> Essentially, the Holy See culled select phrases from *Bancec* in its attempt to invoke the reverse of the presumption of independent status accorded to foreign instrumentalities, while denying that the diocese and order defendants are instrumentalities, all in order to avoid the piercing of a non-existent "corporate" veil in this religious, non-corporate, setting.

As for the application of the corporate law instrumentality concept to this case, *Bancec* does not win the day for the Holy See. This is not a case in which an instrumentality of the Holy See has brought suit in America after which the Holy See dissolved the instrumentality and stepped into its shoes while inequitably shielding itself from counterclaims by invoking principles of corporate separateness. If anything, *Bancec* supports a result contrary to the Holy See's position. That is, viewing the Archdiocese and Order as separate instrumentalities of the Holy See would shield *them* from the wrongs allegedly committed by the Holy See. This is the message of *Bancec*: foreign states cannot avoid their obligations to third parties by engaging in abuses of the corporate form.

(b) Specific Facts Alleging Agent-Principal Relationship

Cases relied upon by the Holy See in arguing plaintiff failed to allege facts sufficient to show an agency relationship are distinguishable. For example, in *BPA Int'l, Inc. v. Kingdom of Sweden*, the plaintiff's complaint alleged, in very general terms, that Sweden engaged in commercial activity because it allegedly owned phone companies Telia and Validation. 281 F.

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<sup>1</sup> If, by describing the Archdiocese and Order as "even more distant than instrumentalities," the Holy See intends to invoke canon law to prove separateness or independence, the Supreme Court has rejected this kind of choice of law. In *Bancec*, the Court declined "[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of the instrumentality should be respected [because doing so] would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *Bancec*, 462 U.S. at 621-22.

Supp. 2d at 80. The undisputed facts in *BPA Int'l* showed the major wrongdoer was Validation, a subsidiary of parent company Telefon, a company in which both its parent company, Telia, and Sweden held an interest. *Id.* at 81. Notably absent from plaintiff's complaint was any allegation of action taken by Sweden. *Id.* Addressing the instrumentality concept, the district court also evaluated whether plaintiff specifically alleged any facts to overcome the presumption of independence accorded to government corporations acting as separate juridical entities. *Id.* The court concluded, the "extremely tenuous relationship between Sweden and the alleged conduct," and the non-existence of facts showing control exerted by Sweden over the wrongdoer, was insufficient to show an agency relationship between Validation and Sweden. *Id.* Interestingly, the court's conclusion regarding the lack of agency relationship depended on defendant's submission of affidavits, undisputed by plaintiff, showing Sweden's lack of control over the alleged agents. *Id.*

Here, plaintiff's complaint contains many factual allegations asserting actions or omissions on the part of the Holy See. For example, plaintiff asserts the Holy See employed Ronan and exerted supervision and control over him, Compl. ¶ 10, the Holy See misrepresented Ronan's suitability to serve as a priest, *id.* at ¶ 14, and despite knowing of Ronan's dangerous propensities to abuse children, the Holy See placed him at St. Albert's Church in Portland, *id.* at ¶ 13, and failed to warn those coming into contact with him. *Id.* at ¶ 39. As to the agency relationship, plaintiff also alleges facts regarding the Holy See's exercise of control over individual clergy, the Archdiocese, bishops, and orders. *See* Pl.'s Resp. at 11. These allegations include the following: (1) the Holy See has unqualified power over the Catholic Church including each and every individual section of the church; (2) the Holy See creates, appoints,

assigns, and reassigns bishops, superiors of religious orders, and, through the bishops and superiors, it has the power to directly assign and remove individual clergy; (3) all bishops, clergy, and priests vow to show respect and obedience to the Pope; (4) in furtherance of its duty to discipline bishops, priests, and other religious clergy members, the Holy See requires bishops to file a report on a regular basis to outline the status of, and any problems with, clergy; (5) defendant Order is a religious order "Of Pontifical Right" which means that it is under the ultimate authority of defendant Holy See and not a diocesan bishop; (6) at all times material, the Holy See had the right to control Ronan, the Archdiocese, the Order, and defendant Bishop; and (7) defendants Order and Bishop were acting in accordance with the policies, practices, and procedures of the Holy See when they failed to remove or discipline Ronan and failed to warn others of Ronan's propensities.

Therefore, unlike *BPA Int'l*, it cannot be said that plaintiff's complaint is devoid of factual allegations regarding the Holy See's wrongdoing or its agency relationship with the Archdiocese, Order, and individual clergy. Moreover, defendant Holy See has not offered any affidavit, much less an affidavit undisputed by plaintiff, with facts showing an extremely attenuated relationship between the main wrongdoer, Ronan, and the Holy See. *Contra BPA Int'l*, 281 F. Supp. 2d at 81. This is a facial attack to plaintiff's complaint, and assuming the truth of plaintiff's specific factual allegations, I conclude plaintiff has sufficiently pled the existence of an agency relationship to overcome the presumption of independence accorded to separate juridical entities.

### III. DISCUSSION - EXCEPTIONS TO IMMUNITY UNDER FSIA

By enacting the FSIA in 1976, Congress intended to codify the restrictive theory of sovereign immunity<sup>2</sup> under which a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts, but not as to those acts that are commercial or private in character. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488-89 (1983). The two potentially applicable exceptions to immunity in this case are the commercial activity exception and the tortious activity exception.

Plaintiffs in at least two other lawsuits sought to impose liability on the Holy See for the sexual abuse allegedly inflicted by a Catholic priest. *English v. Thorne*, 676 F. Supp. 761, 763-64 (S.D. Miss. 1987) (dismissing the case against the Holy See for lack of subject matter jurisdiction under the FSIA's discretionary exception to the tortious activity exception); *O'Bryan v. Holy See*, 2005 WL 2487944 (W.D. Ky. Oct. 6, 2005) (extending time for plaintiff to properly execute service on the Holy See). This may be one of the first cases in which a plaintiff has relied, at least in part, on the commercial activity exception to the FSIA in suing the Holy See based on a priest's sexual misconduct. *But see Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 841 (S.D. Miss. 2004) (finding subject matter jurisdiction against the Holy See under commercial activity exception where underlying action was based not on a priest's sexual misconduct but on a monsignor's fraudulent scheme to misappropriate insurance company assets), *vacated*, 443 F.3d 425 (5th Cir. 2006).

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<sup>2</sup>Under this restrictive theory, "the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." H.R. Rep. No. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 [hereinafter "House Report"].