Case No. B215775

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION EIGHT

JOHN DOE 1 et al.
Plaintiffs and Respondents,

versus

FRANCISCAN FRIARS OF CALIFORNIA,
Defendant/Appellant.

Appeal from the Judgment of the Superior Court
County of Los Angeles
Case No. JCCP 4286
The Honorable Peter D. Lichtman
The Honorable Emilie Elias
The Honorable Haley Fromholz
The Honorable Charles McCoy, Jr.

RESPONDENTS' BRIEF REGARDING APPEAL BY SAMUEL CABOT ET AL.

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I.
INTRODUCTION

Although the twenty-five (25) respondents in this matter reached a tentative settlement agreement with the Franciscan Friars on approximately March 12, 2006, the terms were not finalized until May 25, 2006. The sole reason for the more than two months that passed before the terms were agreed to was two diametrically opposed competing interests: 1) respondents' determination to prevent further childhood sexual abuse by Franciscans by publicizing the evidence of the Franciscan hierarchy's conduct and their knowledge of the perpetrators' propensities. Such information likely would have saved respondents from suffering such abuse had it been known to anyone other than the Franciscans at the time of the abuse; and 2) the Franciscans' desire to preserve decades of secrecy that continues to put today's children at risk. Respondents refused to settle their lawsuits without the Franciscans' agreement to a protocol for the release of documents containing information that likely would have prevented respondents' abuse had such information been public knowledge.

After more than two months of negotiating a protocol for the publication of the perpetrators' files, Paragraph 15 became part of the Settlement Agreement. Respondents hoped that the Franciscans finally agreeing to the document disclosure protocol signaled that the Franciscans

were prepared to recognize the harm their decades of secrecy had wrought on countless children.

However, after nearly four years of the Franciscans employing no less than four law firms – representing three purportedly separate groups of Franciscans – to fight the production of documents and terminate the proceedings conducted pursuant to Paragraph 15, respondents now realize they were horribly naive to hope that a century-old province of a centuries-old religious order would change its ways and prioritize the welfare of children. Instead, the Franciscans now fight for even *greater* secrecy, and in so doing implicitly refuse to acknowledge the tragedy decades of secrecy has wrought.

Initially the Franciscans fought the disclosure of the subject documents solely based on privacy objections. They enthusiastically and repeatedly invoked the Trial Court's jurisdiction in the belief such objections would result in the early termination of the Paragraph 15 proceedings, just as such objections had in an earlier proceeding in the Trial Court involving the Diocese of Orange. Only when their objections failed to produce the expected result did the Franciscans shift their focus to striking Paragraph 15 from the Settlement Agreement and objecting to the Trial Court's previously invoked jurisdiction. However, because they had agreed to the inclusion of Paragraph 15 in the Settlement Agreement, the

Franciscans used the perpetrators in their efforts in this regard lest the Franciscans be found to have breached the Settlement Agreement.

From December 2006 to March 2009 respondents, the Franciscans, various Individual Friars,[1] and the appellant perpetrators[2] – Samuel Charles Cabot, Mario Cimmarrusti, David Johnson, Gus Krumm, Gary Pacheco, and Robert Van Handel – actively engaged in the document protocol set forth in Paragraph 15. Pursuant to this protocol numerous briefs were filed, stipulations entered, privilege logs served or reviewed, and appearances made, by counsel for all involved. Also during this time two appealable orders were issued by the Trial Court on privacy and jurisdictional issues

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1. The Individual Friars' reference to themselves in the underlying proceedings as "bystanders" was very misleading. It was misleading because "bystanders" is so often used with the word "innocent." The Friars who objected to the disclosure of documents are anything but innocent bystanders. Each of them is a member of the Franciscans. These are not just people that are outside the organization and happened to witness some action by the perpetrators. Rather, these Friars are part of the organization which allowed children to be sexually molested for decades. Some were members of the Franciscan hierarchy. Some such as Father Steve Kain and Father Mel Bucher are sexual offenders themselves. All were involved in fostering the culture of secrecy that resulted in at least sixty Santa Barbara children being abused by Friars. For these reasons respondents do not use the slanted term "bystanders" and instead refer to these men as Individual Friars throughout this brief.

2. There is no question each appellant herein has sexually abused or at least has a strong propensity to abuse children. Joint Appendix ("JA") 12, 15. Neither the perpetrators nor the Franciscans ever objected to plaintiffs' evidence in this regard, nor filed a timely challenge to the Trial Court's subsequent findings based thereon. A cursory review of their respective files eliminates any doubts as to the propensities of these men.

that would have terminated the entire proceeding had the Trial Court resolved either issue in the perpetrators' favor.[3] No timely appeals were taken from either of these orders. And only with the end of this extensive and time-consuming process in sight did the perpetrators argue for the first time that the Trial Court's jurisdiction was limited to determining the validity of the settlement agreement. After briefing and oral argument the Coordination Judge issued the second appealable order in the course of this proceeding, but again no timely appeal was taken.

For the reasons set forth in detail below, the perpetrators' appeal from the privacy and jurisdictional rulings are untimely. They waited almost two years to appeal the Trial Court's June 18, 2007 privacy ruling, despite the undisputably dispositive nature of the resolution of that issue, acknowledged by their counsel to be "like a summary judgment motion."

As to the issue of jurisdiction, for over two years the perpetrators not only consented to but repeatedly invoked the Trial Court's jurisdiction, arguing for specific relief in the form of favorable rulings to their various objections. Only when the end of the process was in sight did they argue affirmatively that any action beyond determining the validity of the

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3. A third appealable order was issued by the Trial Court on April 2, 2009. The April 2 order is the only appealable order from which any participant in these proceedings filed a timely notice of appeal.

settlement agreement was in excess of the Trial Court's jurisdiction, thus compelling the Trial Court to refer the matter back to the Coordination Judge for resolution of the objection to jurisdiction. When the Coordination Judge overruled that objection on March 17, 2009, no timely appeal was taken from this dispositive ruling.

In short, no timely appeal was taken from either the privacy or jurisdictional orders. Additionally, the perpetrators not only consented to but invoked the Trial Court's jurisdiction for over two years. Accordingly they have waived and/or were estopped from raising any objections to jurisdiction, and their appeal of issues decided in those orders should be dismissed. Additionally, even if their objections and/or notice of appeal were timely, they are not supported by the law regarding the Trial Court's jurisdiction pursuant to Code of Civil Procedure Section 664.6.

The only remaining issues for which the perpetrators filed a timely appeal are the application of the physician-patient and therapist-patient privileges. Like the Franciscans, the perpetrators seek to expand the statutory definition of the *purpose* for which a psychotherapist or physician is consulted, as set forth in Evidence Code section 1011. Their proposed expansion would enable the perpetrators to use the privilege for a purpose for which it was never intended: as a shield to preserve the secrecy of the Franciscans' child-endangering practices regarding their numerous

predatory friars. Specifically, they argue the definition includes the Franciscans' purpose in sending the perpetrators to therapists – to obtain a diagnosis for use in the Franciscans' employment decisions – and should not be limited to the long-standing statutory definition that limits the purpose of the consultation to diagnosis and/or treatment for the patient's benefit. By expanding the definition the perpetrators seek to render the privilege-waiving transmittal to the Franciscans of the documents at issue reasonably necessary, even though the disclosure did nothing to facilitate the diagnosis or treatment. The Franciscans will then use the restored protection of the privilege to shield the documents – and the evidence therein of the threat their longstanding policy of secrecy poses to children – from public disclosure. However, the perpetrators cite no legal authority that supports their proposed expansion because none exists.

The perpetrators also accuse both the Trial Court and this Court – in its decision in *Roman Catholic Archbishop of Los Angeles v. Superior Court*, 131 Cal.App.4th 417, 424 (2005), *cert. denied*, 547 U.S. 1071 (2006) ("*RCALA*") – of doing exactly what the perpetrators attempt in arguing for the expansion of the definition of "purpose": altering the psychotherapist-patient privilege in a way that conflicts with the purpose of the privilege, the relevant statutory language, and the applicable case law. Specifically, the perpetrators accuse this Court of creating and the Trial

Court of applying a new or heightened standard for determining whether the privilege survives the transmittal of privileged documents to third parties. However, neither court did any such thing. The *RCALA* opinion did not result in a new or heightened standard, nor did the Trial Court apply such a standard in the underlying proceedings. Instead, the Trial Court followed this Court's example in *RCALA*, considered all circumstances that might allow the documents disclosed to the Franciscans to remain privileged, and concluded that none of those circumstances existed at the time of the disclosure.

Accordingly, the perpetrators' argument regarding a new or heightened standard is a fiction. The therapist-patient privilege was created for the benefit of the patient, not for the benefit of an employer. The perpetrators' attempt to transform the privilege into a protective shield used by an employer to conceal their child-endangering conduct must be rejected, and the Trial Court's order affirmed.

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II.
FACTUAL AND PROCEDURAL HISTORY[4]

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[4] The perpetrators' "Factual and Procedural Background" suggests some confusion regarding various events and orders that occurred in the coordinated proceedings. Respondents do not believe this is an intentional effort to mislead

The Global Settlement Agreement was entered on May 25, 2006. JA 0783.[5] Pursuant to Paragraph 15 of the settlement agreement, in September of 2006 the parties to the Settlement Agreement commenced the process agreed to with regards to the files and depositions at issue (collectively referred to as the "subject documents"). Specifically, the Franciscans voluntarily – pursuant to Paragraph 15 and without any order of the Trial Court – submitted perpetrator personnel files to the Trial Court and to plaintiffs' counsel. JA 783-84.

Pursuant to a schedule agreed to by the parties, in November 2006 the Franciscans notified the perpetrators and other individual Franciscans of their right to object to the publication of the subject documents. Pursuant to that notification, various individuals began serving objections on plaintiffs' counsel in December 2006. JA 784. This process resulted in the addition of two groups of nonparties to the proceedings: 1) the perpetrators who

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this Court, but rather is likely due to the fact the majority of the perpetrators were not named defendants in the subject lawsuits. Accordingly, their counsel's involvement in the day to day coordination proceedings was somewhat tangential. Because the majority of these misstatements are not discussed in the perpetrators' argument section of their opening brief, Respondents will not address each such misstatement. If necessary, Respondents' counsel will be prepared to discuss any related issues at oral argument.

[5] The Procedural History set forth in JA 783-788 was never disputed or objected to by any participant in the proceedings in the Trial Court.

were not parties to the Settlement Agreement, and who now, along with perpetrators/defendants Robert Van Handel and Mario Cimmarrusti, have filed the subject appeal; and 2) various Individual Friars consisting primarily of former members of the Franciscan hierarchy, and Franciscans who have been accused of sexual misconduct but who did not sexually assault any of the plaintiffs.

On December 27, 2006, the perpetrators, with the exception of Gary Pacheco, served (and later filed with the Trial Court) documents stating their objections to publication of the subject documents. JA 549-613. Each document was nine to ten pages in length, and set forth a variety of objections. *Id.* Each such document contained a section entitled "Summary of Objections." However, none of the objections referenced jurisdiction, Paragraph 15, or Code of Civil Procedure Section 664.6. *Id.* Each perpetrator also submitted a declaration from their counsel with a privilege log attached. *Id.* Neither the declarations nor the privilege logs made any reference to the Trial Court's jurisdiction, Paragraph 15, or Section 664.6. *Id.*

On January 8, 2007, counsel for the parties, for the perpetrators and for the Individual Friars appeared before the Trial Court. No objection was raised to the Trial Court's jurisdiction and no argument was made that any action beyond determining the validity of the settlement agreement was in

excess of jurisdiction. JA 784. No one asked the court to treat jurisdiction as a threshold issue to be resolved before any further proceedings. *Id.*

On February 9, 2007 counsel for the parties, the perpetrators and the Individual Friars signed a Stipulated Order wherein all counsel agreed there was a potentially dispositive threshold issue to be briefed in the proceeding before the Trial Court ruled on the numerous specific objections. Specifically, whether the perpetrators' privacy rights in the personnel files prohibited their disclosure altogether (hereafter "threshold issue"). No one ordered the perpetrators to so stipulate. To the contrary, the perpetrators recognized an opportunity to ask the Trial Court to exercise its jurisdiction and terminate the proceedings in their infancy, based on general privacy objections, just as the Trial Court had in prior similar proceedings involving the Diocese of Orange. *See* JA 711, ll. 15-20. Apparently confident they would obtain a similar result, the perpetrators raised no objections to jurisdiction, and did not argue that any action beyond determining the validity of the settlement agreement was in excess of jurisdiction.

The Trial Court signed the Stipulated Order on March 2, 2007. JA 619. Pursuant to the Stipulated Order, if the Trial Court sustained the perpetrators' privacy objections to the disclosure of their personnel files, that ruling would be dispositive and the proceeding would be concluded. JA 0615, para. 3, 754, 785. On the other hand, if the Trial Court overruled

the privacy objections the proceeding would continue so that the Trial Court could rule on objections by the Franciscans, the perpetrators, and the Individual Friars, to the disclosure of specific documents contained within those files. *Id.*

On March 15, 2007, the perpetrators filed and served their brief in reply to plaintiffs' opening brief regarding the agreed to threshold issue of personnel file privacy rights. The perpetrators again summarized their objections to the publication of the documents in a section entitled "The Petitioners' Objections." JA 706. This summary made no reference to jurisdiction or to any argument that any action beyond determining the validity of the settlement agreement was in excess of jurisdiction. Later in the brief the perpetrators expressly recognized the court's jurisdiction over the parties. JA 711, ll. 9-10. Additionally, for the first time in these proceedings the perpetrators argued "plaintiffs cite to no authority for this Court to disrupt these petitioners' constitutionally protected rights as part of its jurisdiction to enforce settlements." *Id.* at ll. 20-21. However, no demand was made that the Trial Court resolve any issue of jurisdiction before further proceedings. To the contrary, the perpetrators continued raising arguments that could only be resolved through the exercise of the Trial Court's jurisdiction. JA 714, ll. 24-26. In the final sentence of the brief the perpetrators asked the court to strike Paragraph 15 of the

settlement agreement. The only authority the perpetrators cited in support of this proposition was the Trial Court's "inherent power conferred under Code of Civil procedure section 664.6."

After completing briefing regarding the agreed to threshold issue of the perpetrators' personnel file privacy rights, on April 10, 2007, all counsel appeared before the Trial Court. At the start of the hearing the Trial Court confirmed that the threshold issue being addressed was whether the Perpetrators' privacy rights in the personnel files prohibited their disclosure. Counsel for the Individual Friars further stated any other rights and privileges would be addressed in the future, "if necessary," after the Trial Court ruled on the threshold issue. No objections or disagreements were voiced by anyone to these statements. Reporter's Transcript ("RT"), A-1 to A-4, line 10. Towards the end of the hearing counsel for the Individual Friars again confirmed, without objection by anyone, that the only issue being decided was the broad issue of whether any document in the personnel files could be published. RT A-34, line 25 to A-35, Line 2. At the conclusion of the hearing, the Trial Court requested further briefing on three specific subjects related to the threshold privacy issue. No objection was raised to the Trial Court's jurisdiction and no argument was made that any action beyond determining the validity of the settlement agreement was in excess of jurisdiction.

On May 11, 2007, counsel for the perpetrators and for the Individual Friars jointly filed their additional briefing as requested by the Trial Court. JA 786. No objection was raised to jurisdiction and no argument was made that any action beyond determining the validity of the settlement agreement was in excess of jurisdiction. In fact, the perpetrators and the Individual Friars again invoked the Trial Court's jurisdiction, asking it to find in their favor as to the three issues on which the Trial Court requested further briefing. JA 786.

On May 18, 2007, counsel for the perpetrators and for the Individual Friars filed their joint reply to additional briefing by plaintiffs on the same three issues for which further briefing was requested by the Trial Court. JA 786. The perpetrators again recognized the Trial Court's jurisdiction, but questioned the scope of its power under Section 664.6. *Id.* However, they did not question the Trial Court's ability to issue an order on the threshold privacy issue. *Id.* To the contrary, the perpetrators again invoked the Trial Court's jurisdiction to rule in their favor on the privacy objection, stating conclusively that "[t]he Court must deny access to plaintiffs and their attorneys of private information concerning the objecting priests." *Id.*

On June 7, 2007, all counsel appeared again before the Trial Court for final arguments regarding the threshold privacy issue. At the start of the hearing the Trial Court again confirmed the threshold privacy rights issue

was the only objection to be ruled on at that time. RT, B-1, Lines 8-13. No counsel disagreed with that statement, and it was understood that the Trial Court's ruling would be dispositive if the privacy objection was sustained. In fact, counsel for the perpetrators stated "the issue before the court is much like a summary judgment motion." RT, B-16, Line 24 to B-18, Line 5. And as at the earlier hearing, counsel for the Individual Friars confirmed, repeatedly, that the only issue before the Trial Court was whether the Perpetrators' privacy rights prevented disclosure of their personnel files, and that the Trial Court's ruling would be dispositive if the objection was sustained. RT, B-6, Line 26 to B-7, Line 6; B-22, Lines 16-18; B-41, Line 5 to B-42, Line 28. At the conclusion of the hearing the Trial Court asked all counsel, including counsel for the Franciscans, if they wished to state anything further for the record. Each attorney stated they submitted on behalf of their respective clients. RT, B-40, Lines 10-22. No argument was made that any action beyond determining the validity of the settlement agreement was in excess of the Trial Court's jurisdiction.

On June 18, 2007, the Trial Court issued its order ("2007 Order") on the threshold issue and overruled the perpetrators privacy objections. In that order the Trial Court confirmed, among other things, its power "to make findings of facts under a Section 664.6 reservation." JA 27. The Trial Court also stated that "the perpetrators at issue here have either

admitted to the abuse or have shown dangerous propensities towards youth." JA 23. Neither the perpetrators or the Individual Friars filed a motion for reconsideration or any other challenge to the Trial Court's 2007 Order until the perpetrators filed their notice of appeal almost two years later.

On August 28, 2007, all counsel appeared before the Trial Court. Counsel for the Individual Friars argued that a specific ruling should be made regarding specific documents as to whether the right to privacy is outweighed by the compelling state interests confirmed in the 2007 Order. The Trial Court asked that counsel for the perpetrators submit his position in writing, and ordered the parties to meet and confer to narrow the remaining issues to be resolved. No objection was raised to jurisdiction and no argument was made that any action beyond determining the validity of the settlement agreement was in excess of jurisdiction. JA 787.

On January 17, 2008, all counsel appeared before the Trial Court, who then ordered counsel for the perpetrators and for the Individual Friars to prepare and submit privilege logs as to the subject documents. JA 787. No objection was raised to jurisdiction and no argument was made that any action beyond determining the validity of the settlement agreement was in excess of jurisdiction.

During the week of January 21, 2008, counsel for the parties, the

perpetrators and for the Individual Friars agreed on a proposed scheduling order to determine redactions and/or withholdings of documents. JA 787. The Trial Court signed the order on January 28, 2008. The order makes no reference to resolving any issue related to jurisdiction before any further proceedings, and the issue was not raised during discussions amongst counsel regarding the scheduling order. *Id.*

On March 17, 2008, counsel for the perpetrators and for the Individual Friars served privilege logs related to the subject documents. The privilege logs raised various objections, but made no reference to the Trial Court acting with either a lack of or in excess of jurisdiction. JA 787.

During the week of April 10, 2008, and pursuant to the January 28, 2008 scheduling order, counsel for the plaintiffs, the perpetrators and the Individual Friars began discussing dates to meet a confer regarding the privilege logs. *Id.* On April 17, 2008, plaintiffs' counsel submitted correspondence to the trial Court on behalf of the parties, the perpetrators and for the Individual Friars regarding the status of the meet and confer efforts. JA 787-788.

On April 25, 2008, plaintiffs' counsel circulated to all counsel a first draft of remaining issues to be briefed for the Trial Court regarding specific objections to production of the documents. JA 788. The meet and confer process continued through June, but no issue of jurisdiction was raised as a

possible issue. *Id.*

On June 19, 2008, all counsel appeared before the Court to discuss a further briefing schedule. No request was made to resolve any jurisdictional issue before any further proceedings. JA 788.

On July 2, 2008, all counsel stipulated to a further briefing schedule for specific objections. No request was made to resolve any jurisdictional issue before any further proceedings. JA 788.

On September 18, 2008, long after the time to move to reconsider or appeal the Trial Court's 2007 Order had expired, the perpetrators submitted a brief expressly asserting for the first time the scope of the Trial Court's jurisdiction was limited to determining whether the parties had a valid and binding settlement agreement. The perpetrators further argued any action beyond determining the validity of the settlement agreement was in excess of jurisdiction. JA 788.

In response to this objection to jurisdiction, the Trial Court referred resolution of the matter to the coordination judge. JA 756. The plaintiffs, the perpetrators, and the Individual Franciscans submitted briefing on the objections to jurisdiction. On March 17, 2009, after hearing oral argument, the coordination judge overruled the objections to jurisdiction. JA 274, 806-07. No request for reconsideration nor any notice of appeal was filed with regards to this order until May 29, 2009. JA 997.

III.

APPEALABILITY: THE APPEAL FROM THE TRIAL COURT'S JUNE 18, 2007 ORDER AND MARCH 17, 2009 ORDER IS TIME-BARRED

The Trial Court's June 18, 2007 Order and March 17, 2009 Order ("March 2009 Order") were appealable. As a result, the perpetrators' failure to timely file their notice of appeal deprived this Court of jurisdiction to consider their appeal of any portion of those orders.

Appellate courts lack jurisdiction to review appealable orders or judgments from which a timely appeal was not taken. *Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 (law of state does not allow appeal of order from which appeal might previously have been taken). Final judgments or orders are appealable. Additionally, some judgements and orders are considered final for purposes of appealability even if they do not dispose of all issues in the proceeding. *Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1235 (order preventing performance of an act was not appealable). Final orders on collateral issues are appealable. *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, 1148 (denial of motion to seal was final order on collateral issue). An order unsealing previously sealed records is appealable. *In re Providian Credit Card Cases* (2002) 96 CalApp.4th 292, 297 n. 2 (order unsealing records containing trade secrets was final determination of collateral matter); *see also Mercury*

Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60, 76-77 (order granting media motion to unseal amended complaint and exhibits was appealable).

The perpetrators contend the 2007 Order and March 2009 Order were "preliminary or intermediate ruling[s]," but cite no authority for this proposition. Opening Brief, pp. 17-18. In *In re Keisha T.* (1995) 38 Cal.App.4th 220, 229, a newspaper petitioned for the right to inspect the juvenile court records of ten minors. Although the type of records to be disclosed differed from the personnel files in this matter, the procedure the *Keisha T.* trial court employed in ruling on the petition was quite similar to the procedure herein. Specifically, the *Keisha T.* trial court first made a threshold determination as to whether the newspaper was entitled to access the records at all. *Id.* Only upon deciding the newspaper could access the records was there a subsequent proceeding wherein a determination was made as to what specific portions of the records the newspaper could access. The *Keisha T.* court concluded the threshold determination was "appealable as a final judgment in a special proceeding." *Id.*

Here, early in the proceedings in the Trial Court it was stipulated to by all counsel, and ordered by the Trial Court, that the perpetrators' privacy rights in their personnel files presented a potentially dispositive threshold issue that should be decided at the outset: were the privacy rights in the personnel files a complete barr to their disclosure? JA 0615, para. 3. It was

understood by all that if the Trial Court sustained this objection, the proceeding would be terminated. Resolving this threshold issue at the outset insured neither the Trial Court nor counsel would have to perform any briefing or analysis rendered unnecessary if the Trial Court sustained the privacy objection.

Both the Trial Court and various counsel confirmed the potentially dispositive nature of the issue repeatedly during two days of oral arguments (RT, A-1 to A-4, Line 10; RT A-29, Lines 3-12; RT A-34, Line 25 to A-35, Line 2; RT, B-1, Lines 8-13; RT, B-16, Line 24 to B-18, Line 5; RT, B-6, Line 26 to B-7, Line 6; B-22, Lines 16-18; B-41, Line 5 to B-42, Line 28; RT, B-40, Lines 10-22), with counsel for the perpetrators accurately analogizing the resolution of this threshold issue to a motion for summary judgment. RT, B-16, Line 24 to B-18, Line 5. Under such circumstances, the 2007 Order was appealable as a final judgment in a special proceeding, and the time to appeal that order has long since expired. *In re Keisha T.*, 38 Cal.App.4th at 229.

Similarly, in briefing their objection to the Trial Court's jurisdiction to conduct the proceeding regarding the publication of the subject documents, the perpetrators asked the Trial Court to strike Paragraph 15 from the Settlement Agreement, an act which, had the Trial Court so ordered, would have operated as a final order which terminated the

proceedings. JA 778, ll. 1-2. Accordingly, the Trial Court's March 17, 2009, ruling was "dispositive of the rights of the parties in relation to the collateral matter," in this case, the Trial Court's jurisdiction to follow the protocol set forth in Paragraph 15. *See Marriage of Weiss*, 42 Cal.App.4th at 119.

The Trial Court entered judgment on the threshold issue on June 18, 2007. Plaintiffs' counsel served notice of the entry of the March 2009 Order on March 23, 2009. The perpetrators, however, did not file their notice of appeal until May 29, 2009 (JA 997), a date that post-dates the cut-off to appeal either order. Cal. Rules of Court 8.104(a)(1-3). As a result, this Court lacks jurisdiction to entertain an appeal from either order, and the only issues for which the perpetrators filed a timely notice of appeal are from the April 2, 2009 Order: 1) the therapist-patient privilege; and 2) the physician-patient privilege.

IV.
STANDARD OF REVIEW

The standard of review for a trial court order unsealing records is abuse of discretion. *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 301-302; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 80-81.

V.
ARGUMENT

A. The Perpetrators Failed to Timely Appeal the Trial Court Orders Regarding Jurisdiction; Even if They had Filed a Timely Notice of Appeal, The Trial Court Had Jurisdiction To Enforce The Settlement Agreement And Rule On Objections To The Publication Of The Subject Documents

The perpetrators frame their appeal as if it is from issues raised in the April 2, 2009 Order and characterize the 2007 Order and the March 2009 Order as "preliminary" or "intermediate." However, the perpetrators' jurisdictional objections were resolved well before the April 2, 2009 Order. Specifically, the issue of jurisdiction was resolved by the Trial Court in its June 2007 Order (JA 27 ["Courts are permitted to make findings of facts under a Section 664.6 reservation"]), and by the Coordination Judge's March 2009 Order. JA 806.

In their briefing on the jurisdiction objections before the March 17, 2009, hearing, the perpetrators made clear their belief that the Trial Court proceedings "should have concluded, under Code of Civil Procedure section 664.6, once [the perpetrators] interposed their objections . . .." JA 777. They further asked the Coordination Judge to "strike Paragraph 15 from the parties Settlement Agreement . . .." JA 778. Had the Coordination Judge sustained the perpetrators' objections and taken such action on March 17, 2009, the entire proceeding would have terminated. Accordingly, for all the reasons set forth in Section III of this brief, the June

2007 Order and the March 2009 Order were dispositive of the rights of the parties in relation to the collateral matter of jurisdiction. As a result, both orders were appealable, the perpetrators' appeal related to jurisdictional issues is untimely, and this Court lacks jurisdiction to consider any of those issues. The only remaining issues for the Court to consider from the perpetrators' appeal are the objections to specific documents based on the therapist-patient and physician-patient privilege.

However, even if the perpetrators had timely filed a notice of appeal from the March 2009 Order, for all the reasons set forth below such an appeal would not be well taken.

1. Even if the Trial Court had Acted in Excess of Jurisdiction, the Perpetrators are Estopped From Challenging Any Such Actions

For the reasons set forth in greater detail below, Respondents disagree with any contention the Trial Court exceeded its jurisdiction. However, even if such a contention were true, the perpetrators are estopped to challenge the Trial Court's exercise of jurisdiction as a result of their having repeatedly invoked and consented to it. "There is substantial authority for the proposition that a party who has invoked or consented to the exercise of jurisdiction beyond the court's authority may be precluded from challenging it afterward, even on a direct attack by appeal." 2 *Witkin*, Cal. Proc. 5th (2008) Jurisd., § 333, p. 949-50 (*citing In re Griffin* (1967)

67 Cal.2d 343, 347 ["a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction."] [citations omitted]; *Whitlow v. Superior Court* (1948) 87 Cal.App.2d 175, 185 [one who invokes jurisdiction is estopped to seek prohibition]; *West Coast Const. Co. v. Oceano Sanitary Dist.* (1971) 17 Cal.App.3d 693, 699 [time for hearing on preliminary injunction set 1 day late; jurisdictional defect, but defendant-appellant participated in hearing and was estopped to challenge validity of preliminary injunction]; *Lovett v. Carrasco* (1998) 63 Cal.App.4th 48, 54 [after settlement of personal injury action, medical lienholders who had treated plaintiff were estopped to challenge order apportioning attorneys' fees and costs incurred by plaintiff among lienholders on ground that claims must be adjudicated in separate action, where lienholders expressly asked trial judge to adjudicate them]; *Gee v. American Realty & Const.* (2002) 99 Cal.App.4th 1412, 1415.) *See also Remillard Brick Co. v. Dandini* (1941) 47 Cal.App.2d 63, 66 (court action in excess of jurisdiction was not improper after hearing at which all defendants appeared without objection); *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 842 (even if Commission failed to hear appeal of party objecting to subdivision approval within statutory time limit, developer and owners were estopped to assert

that Commission lost jurisdiction over appeal, where their actions over extended period constituted acquiescence in jurisdiction; as long as subject matter jurisdiction exists, party's consent to action in excess of court's power may be basis for estoppel).

Here, the perpetrators have acknowledged the Trial Court's jurisdiction (JA 786), but contend the Trial Court exceeded its jurisdiction with regards to ruling on the various objections raised by their counsel. They contend that any action beyond determining the validity of the settlement agreement was in excess of the Trial Court's jurisdiction. However, the perpetrators invoked the Trial Court's jurisdiction by repeatedly asking it to rule in their favor on the merits of the subject objections. JA 783-788. As set forth above in Section II, for over two years they very actively participated in a process that went well beyond determining the validity of the settlement agreement. Accordingly, even if the Trial Court acted in excess of its jurisdiction, the perpetrators are estopped to challenge such action.

2. The Trial Court had Jurisdiction to Enforce the Settlement Agreement

The Settlement Agreement provided in paragraphs 15, 16 and 25 for the Trial Court to retain jurisdiction pursuant to Section 664.6 to enforce the terms of the personnel file public release protocol. JA 210-216; 219-

220. Two and a half years into the process set forth in Paragraph 15, the perpetrators argued the Trial Court lacked jurisdiction to enforce the terms of the settlement agreement and engage in this protocol, and that the protocol somehow called for an expansion of the scope of jurisdiction under Section 664.6. According to the perpetrators, Section 664.6 allowed the Trial Court only to make legal and factual determinations as to the existence and terms of a settlement agreement. The perpetrators cite the Court to inapplicable case law while ignoring the language of Section 664.6. The perpetrators also ignore the Trial Court's ruling of June 18, 2007, an order they waited almost two years to appeal although it directly addressed and was dispositive of this issue. JA 27.

Section 664.6 provides:

> If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

The perpetrators fail to explain how the Trial Court was unable under Section 664.6 to "enforce the settlement until performance in full of the terms of the settlement." Instead, the perpetrators rely almost entirely on a series of cases either not discussing or decided before the 1993

amendment to Section 664.6 adding this provision, in which their was a dispute as to whether there was a valid request for retention of jurisdiction, or over the terms of the settlement agreement. Neither of those situations exists here.

A retention of jurisdiction under Section 664.6 allows a court to enforce all of the terms of a settlement agreement even if doing so requires the court to make factual determinations. In *Hernandez v. Board of Education* (2004) 126 Cal.App.4th 1161, 1176-1177, the parties to a school desegregation case entered into a settlement agreement which allowed the court to retain jurisdiction under Section 664.6 to continue its monitoring of compliance with desegregation orders long after the 1974 trial. Specifically the settlement allowed the Court to force the school board to adopt student assignment and funding plans consistent with prior orders of the Court. *Id.* These provisions would have been meaningless if the court was unable to make factual findings that the plans were consistent with the prior orders. And contrary to the limitations argued for by the perpetrators in the Trial Court and on this appeal, these provisions go beyond the Trial Court merely determining the validity of the settlement agreement. The *Hernandez* court explained, "A settlement agreement is simply a contract." *Id.* at 1176, *citing Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810. "The retention of the trial court's

jurisdiction to enforce the settlement agreement is no different than allowing a person with a contract with the school district to sue it for breach. The court is powerless to impose on the parties more restrictive or less restrictive or different terms than those contained in their settlement agreement." *Hernandez*, 126 Cal.App.4th at 1176.

As in *Hernandez*, the settlement agreement here allowed the Trial Court to make factual determinations in enforcing the terms of the settlement agreement, and even provided the Trial Court with the standard with which to make those decisions. The Trial Court was authorized to determine which documents can be released after considering the public interest. The public interest was even spelled out in the agreement to include whether the information or documents affects public safety, indicates knowledge of suspected sexual abuse of a child or reflects a cover-up of suspected sexual abuse of a child. *See* JA 210-216, Paragraph 15(A)(2)(c) at page 12 and Paragraph 15(A)(7). The Trial Court was authorized by the settlement agreement to make factual findings of specific issues in order to see that the terms of the settlement agreement were fully performed.

The perpetrators also contend that under *Hernandez* a court's jurisdiction is not plenary and thus does not extend to non-parties or fact-finding concerning the rights of nonparties. Respondents' agree such

jurisdiction is not plenary. However, *Hernandez* illustrates that the absence of plenary authority does not prevent a court from taking action which impacts non-parties. The rights of nonparties – students – were impacted by the *Hernandez* court's power to require the school district to adopt the student assignment plan, or to assign students consistent with that plan. *Hernandez*, 126 Cal.App.4th at 1176. Contrary to the argument by the perpetrators, the Trial Court's actions in ruling on the objections to the release of the subject documents was no more plenary than the *Hernandez* court's power to require the school district to adopt the student assignment plan, or to assign students consistent with that plan. The exercise of both powers impacts third parties, but are far from plenary in terms of the courts having limited power over the school district and, in this case, the Franciscans.

The perpetrators also fail to explain how the *Hernandez* trial court could have the right pursuant to the 2-year retention of jurisdiction to require the school district to adopt the student assignment plan absent a finding of fact that such further action was necessary. In *Hernandez*, as in this matter, such a finding would take place after briefing of the issues by the parties. *Id.*

3. Paragraph 15 Of The Settlement Agreement Is Not Internally Inconsistent

The perpetrators argue that Paragraph 15 is unenforceable because no discovery or disclosure of the personnel files can occur after a case has been settled and active litigation has ended. On June 18, 2007, the Trial Court flatly rejected this argument in its 22 page ruling. JA 11 (first paragraph under "Legal Issues Presented"), 25, 27. Over a year and half after this ruling the perpetrators devoted two and a half pages of briefing to this issue, without ever once referencing the Trial Court's order or analysis. This argument by the perpetrators was nothing more than an improper motion for reconsideration and was disregarded accordingly by the Trial Court. More important for purposes of this appeal, the perpetrators waited almost two years to file their untimely notice of appeal from the 2007 Order.

And even if they had timely appealed, their arguments are unsupportable. C.C.P. §2017.010 provides, in pertinent part, as follows:

> "Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence ... "

Pursuant to this language Paragraph 15 is valid and enforceable. The perpetrators cite no case law or authority that suggests the Civil Discovery Act cannot be applied to enforce the terms of a settlement agreement

pursuant to a motion under C.C.P. § 664.6. For instance, the perpetrators cite *Department of Fair Employment & Housing v. Superior Court* (1990) 225 Cal.App.3d 728 for the proposition that discovery cannot be conducted if there is no case pending. In *Department of Fair Employment*, the DFEH petitioned for a writ of mandate directing respondent court to vacate its order denying a motion to compel further responses to written interrogatories and demands for inspection of documents. *Id.* at 729-730. The discovery requests and motion to compel further responses were served after the DFEH's motion for summary judgment was granted. *Id.* at 731. No appeal was taken from the judgment, which became final. *ld.* The Court of Appeal denied the petition, holding that "the existence of a pending action is a condition precedent to the application of" the Civil Discovery Act, therefore, "parties in whose favor a final judgment for injunctive relief has been entered," cannot obtain aid from the Act in enforcing that judgment. *Id.* at 730.

The court further noted that as "a general rule, the entry of a final judgment, which is not appealed, constitutes the conclusion of the case; and such case is no longer pending. If the judgment is not complied with voluntarily, then further proceedings are available to the prevailing party to enforce that judgment. A proceeding in contempt is the process for the enforcement or execution of a judgment of the court which is in the nature

of an injunction. [Citation] In the present case no such contempt proceeding has been initiated by DFEH." *Id.* at 732. The Court also held that "absent the initiation of a contempt proceeding to enforce the judgment, there is no action pending, which is the sine qua non of invoking the relief available under the Civil Discovery Act of 1986." *Id.*

In contrast, the instant case involves enforcement of a settlement agreement pursuant to C.C.P. §664.6. C.C.P. § 664.6 provides, in pertinent part, that if requested by the parties, "the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." Moreover, C.C.P. §2017.010 specifically provides that any party may obtain discovery regarding any matter, not privileged, that is "relevant to the determination of any motion made in that action ... " Here, the parties to the Settlement Agreement sought enforcement of its terms by way of judicial intervention. As such, the case was still technically "pending" for purposes of the Civil Discovery Act.

In addition, Paragraph 15 is consistent with the Civil Discovery Act. Although the perpetrators contend that the Settlement Agreement improperly provides for disclosure of their records to respondents and the Trial Court prior to notice or a hearing, the disclosure mechanism of the Settlement Agreement is proper. First, Paragraph 15 only provides for the production of documents that "have been or would have been subject to

discovery obligations in the litigation" of the actions. JA 210-216. Second, Paragraph 15 preserves the perpetrators' rights to assert any lawful objections to the production and publication of the documents at issue. Specifically, Paragraph 15(A)(9) provides, as follows: "Third party objections, including those asserted by any defendant who is an ALLEGED PERPETRATOR, are not bound by this contractual standard; it is the intent of the parties that such third parties may assert any objections supported by law." *Id.* Third, under Paragraph 15(A)(7), the parties agreed the documents would not be publicized without authorization of the Trial Court. *Id.* Finally, Paragraph 15(A)(6) & 15(A)(7) provide for disclosure to protect the rights of third parties, as well as, an opportunity for the perpetrators to be heard by the Trial Court. *Id.*

Accordingly, the perpetrators' rights were preserved by Paragraph 15, as well as by the Trial Court. The perpetrators were given sufficient notice and an opportunity to be heard on all lawfully posed objections to the production and publication of the subject documents. No term of the Settlement Agreement was decided by the Trial Court. The only task left to the Trial Court was to rule on the perpetrators' objections.

4. The Document Protocol Contained In Paragraph 15 Is A Central Provision Of The Settlement Agreement And Should Not Be Stricken

The perpetrators argue that Paragraph 15 is illegal and

unenforceable. This argument is premised on their erroneous assertions addressed above that the Trial Court did not have jurisdiction and personnel files could not be ordered disclosed post-settlement. The perpetrators action of arguing at such a late junction to the Trial Court that the Settlement Agreement should be modified by having the Trial Court rescind Paragraph 15 was and is troubling and contrary to the terms of the agreement. Both the parties, their lawyers and the Trial Court invested significant amounts of time in this process over the course of the last three (soon to be four) years. The Franciscan Friars, an entity to which the perpetrators have sworn oaths of loyalty, agreed to this process. They agreed in the settlement and/or consented by their active participation in this process and invocation of the Trial Court's jurisdiction that Paragraph 15 is enforceable and the Trial Court had jurisdiction to enforce its terms.

The perpetrators also argue Paragraph 15 should be stricken because it requires a court ruling on objections without findings of fact on the allegations of the complaints. In their brief filed February 23, 2007, respondents submitted to the Trial Court citation to pages contained in the subject documents that established the fact the perpetrators' have sexually assaulted children. JA 631-632. The perpetrators offered no opposition to respondents' contentions in this regard, undoubtedly because the documents were unequivocal in establishing the perpetrators' propensities to harm

children. In its 2007 Order, the Trial Court confirmed that "the perpetrators at issue here have either admitted to the abuse or have shown dangerous propensities towards youth." JA 23. The perpetrators never filed a motion for reconsideration, notice of appeal, or any other challenge to the Trial Court's order. Accordingly, this argument by the perpetrators is untimely.

B. The Perpetrators’ Appeal from June 18, 2007 Order Regarding the Threshold Privacy Issue is Untimely; Even if Their Appeal was Timely the Compelling State Interest in Preventing Childhood Sexual Abuse Outweighs the Perpetrators’ Privacy Rights

The issue of whether the right to privacy bars publication of the personnel files at issue was resolved by the Trial Court in its 2007 Order. The perpetrators frame their appeal as if it is from issues raised in the April 2, 2009 Order, and characterize the 2007 Order as “preliminary” or “intermediate.” However, the perpetrators’ privacy objections were resolved well before the April 2, 2009 Order. Had the Trial Court sustained the perpetrators’ objections on June 18, 2007, the entire proceeding would have terminated. Accordingly, for all the reasons set forth in Section III of this brief, the perpetrators’ appeal related to these issues is untimely, and this Court lacks jurisdiction to consider any of those issues. The only remaining issues for the Court to consider are the objections to specific documents based on the therapist-patient and physician-patient privilege.

However, even if the perpetrators had timely filed a notice of appeal

from the 2007 Order, for all the reasons set forth below such an appeal would not be well taken.

The perpetrators' privacy rights in their personnel files and medical/psychiatric records are outweighed by the compelling state interest in preventing childhood sexual abuse. In *Pioneer Electronics (USA), Inc. v. Superior Court*, (2007) 40 Cal.4th 360, 370- 371, the Supreme Court set forth the:

> analytical framework for assessing claims of invasion of privacy under the state Constitution. First, the claimant must possess a "legally protected privacy interest."
> . . .
> Second, . . . the privacy claimant must possess a reasonable expectation of privacy under the particular circumstances, including "customs, practices, and physical settings surrounding particular activities ... ."
> . . .
> Third, . . . the invasion of privacy complained of must be "serious" in nature, scope, and actual or potential impact to constitute an "egregious" breach of social norms, for trivial invasions afford no cause of action.
> Assuming that a claimant has met the . . . criteria for invasion of a privacy interest, that interest must be measured against other competing or countervailing interests in a " 'balancing test.'" "Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests."

Pioneer Electronics (USA), Inc. v. Superior Court, (2007) 40 Cal.4th 360, 370- 371 (citation omitted).

Respondents do not dispute the privacy interest in personnel files in general, nor that the publication of the files would be a serious invasion of

that interest. However, with regards to the second step in the analysis, Sex offenders and child abusers have a reduced expectation of privacy. Generally, criminal activity is not protected by the right of privacy. *Stidham v. Peace Officer Standards and Training* (10th Cir. 2001) 265 F.3d 1144. Additionally, there is no right to sexual privacy in illegal sexual conduct. *See Lawrence v Texas* (2003) 539 US 558, 578; *Fleisher v. City of Signal Hill* (9th Cir. 1987) 829 F.2d 1491, 1499 (probationary police officer's right to privacy did not extend to his illegal sexual contact with a minor); *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1359-61 (no privacy right among minors to engage in consensual sexual intercourse)

In *Rosales v. Los Angeles* (2000) 82 Cal.App.4th 419, the court found that a police officer who had engaged in inappropriate sexual conduct had no cause of action against the City who had produced his personnel records to plaintiff's counsel in the underlying litigation against the City for negligent hiring. The court found that the plaintiff had no expectation of privacy in that context. The same is true for any documents in the files that are medical or psychiatric records. *See People v. Martinez* (2001) 88 Cal.App.4th 465, 475 (convicted sex offender's expectation of privacy in his medical/psychological records must be evaluated in light of circumstances including his criminal background. A defendant's expectation of privacy in this context concerning his records is substantially reduced).

Even absent a conviction, a perpetrator's rights are greatly diminished. In *Stidham*, a police officer brought suit against the Peace Officer Standards and Training agency ("POST"), alleging among other things a violation of his constitutional right to privacy by disclosing to potential employers that Stidham's file contained allegations that he raped a young girl and assaulted a resident. *Stidham,* 265 F.3d at 1155. The Tenth Circuit held that he did not have a constitutional right to privacy or protection from disclosure of this information, because the allegations involved alleged criminal activity. *Id.* The Court stated, "[i]t is irrelevant to a constitutional privacy analysis whether these allegations are true or false; '[t]he disclosed information itself must warrant constitutional protection.'" *Id.*

In *Cinel*, a state law claim for invasion of privacy in Louisiana, the Fifth Circuit noted that one of the elements of such a claim was that the information was not of legitimate public concern. *Cinel v. Connick* (5th Cir. 1994) 15 F.3d 1338, 1345. The Fifth Circuit affirmed the district court's holding that this element was not met because the videotape of the plaintiff, a priest, engaging in homosexual conduct with two adult males, related to the plaintiff's guilt or innocence of criminal conduct. Thus, the videotape was a matter of legitimate public concern. *See id.* Also, the videotape was of legitimate public concern because it concerned plaintiff's

activities while an ordained Catholic priest and the Church's response to those activities. *Id.*

Even if the law required more than just an allegation, an admission to abuse shows that the perpetrator engaged in illegal sexual conduct. Also, an admission to a sexual interest in or sexual problems with youth shows a propensity to engage in criminal activity. Those that admit to abuse or show dangerous propensities know that the activities are criminal in nature. Like those that are ultimately convicted, those engaging in criminal activity should not benefit from secrecy under the right to privacy. Here, the perpetrators have either been convicted of abuse, admitted to the abuse or have shown dangerous propensities towards youth. JA 12, 15. Accordingly, they should be accorded a reduced expectation of privacy.

Finally, although the privacy invasion is serious, the fourth step in the analysis – engage in a balancing test measuring the privacy rights against competing interests such as the State's obligation to protect its children from abuse – favors disclosure. There can be no dispute regarding the State’s compelling interest in preventing childhood sexual abuse. In *Fredenburg v. City of Fremont* (2004) 119 Cal.App.4th 408, 412, the California Legislature "found that sex offenders pose a high risk of engaging in further offenses after release"; that "protection of the public from these offenders is a paramount public interest"; that "the public had a

compelling and necessary ... interest in obtaining information about released sex offenders so they can adequately protect themselves and their children"; and that "[b]ecause of the public's interest In public safety, released sex offenders have a reduced expectation of privacy .. ."

The State's compelling interest in protecting children from harm is present regardless of the stage of litigation. Many cases at both the federal and state levels have ordered the re-opening of sealed settlement agreements in recognition of the strong common law presumption favoring access to public records, which presumption may be overcome only by a showing of an "overriding" interest in closure. *See, e.g. Estates of Zimmer v. Mewis*, Wis.2d 122, 442 N.W.2d 578, 583 (Wis. Ct. App. 1989); *Zuckerman v. Piper Pools, lnc*., 256 N.J. Super. 622, 607 A.2d 1027 (1992).

Accordingly, the fact the parties have availed themselves of California's public policy favoring settlement should not prevent dissemination of the documents. Nor should the settlement extinguish the scrutiny element and exalt rights of privacy over the State's parens partiae obligation to its minor children. Arguments to the contrary only further the Franciscans' goal of keeping their conduct forever hidden and safe from scrutiny, further endangering today's children in the process. Privacy interests are not absolute and must be balanced against other important

interests. Intrusion into constitutionally protected areas of privacy is appropriate where there is a balancing of the privacy right with a state interest and a finding that the state interest is compelling and outweighs the individual's privacy right. *Palay v. Sup, Crt.* (1993) 18 Cal.App.4th 919, 933.

Courts have also recognized an interest in making documents public which show cover-ups and concealment of the truth, so as to provide the transparency necessary to ensure a cessation of this type of conduct in the future. For instance, in *Kalinaiskas v. Wong*, 151 F.R.D. 363, 365-66 (D. Nev. 1993), the Federal District Court granted the Plaintiff's motion to depose a former employee who had settled a similar sex discrimination claim against the employer under a Protective Order and Confidentiality Order. The sealed Stipulation for Protective Order and for Confidentiality Order stated that the employee would not "discuss any aspect of the plaintiff's employment at Caesars other than to state the dates of her employment and her job title." *Wong*, 151 F.R.D. at 365.

When noting the public interest in protecting the finality of suits and the secrecy of settlements desired by the parties, the court also was concerned that preventing the deposition of the former employee would "condone the practice of 'buying the silence of a witness with a settlement agreement', and that the secrecy agreement not only protected Caesar's

interests, it could serve to conceal "legitimate areas of public concern. This concern grows more pressing as additional individuals are harmed by identical or similar action." *Id.* at 365-66.

There can be no doubt that there exists legitimate public concern regarding how the Franciscans have covered up and concealed the sexual abuse of children for years. This concern, as in *Wong*, grows more pressing as additional individuals may be harmed by identical or similar action, as in the case of Father Ladenburger. This public concern clearly weighs in favor of publicizing these documents.

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C. Transmittal of the Documents at Issue Resulted in the Waiver of the Therapist-Patient Privilege

At the heart of the perpetrators' arguments regarding the therapist-patient privilege are two unsupportable arguments. One is for the expansion of the definition of the purpose for which a therapist is consulted beyond the benefit to the patient. This argument ignores the fact the privilege exists for the benefit of the patient, not the patient's employer. The perpetrators' proposed expansion is really a covert attempt to transform the disclosure of privileged documents to third parties in this dispute from unnecessary to the consultation and therefore unprotected, to reasonably necessary to the consultation and entitled to the protection of the privilege.

However, they cite no authority supporting their proposed expansion.

The perpetrators' second argument is a classic case of the pot calling the kettle black, except, in this instance, only the pot is black. Specifically, before arguing for the unsupportable expansion of the definition of "purpose," the Franciscans accuse this Court and the Trial Court of creating and/or applying a new and unsupported heightened standard for the therapist-patient privilege. Neither court did any such thing. Both courts recognized multiple circumstances where communications to a third party remain within the scope of the therapist-patient privilege, such as where the third party is being supervised by or is a licensed therapist. However, neither court elevated any one of these circumstances to the status of a new or heightened standard by which all such communications should be judged. The transmittals to the Franciscans of the documents at issue herein simply do not fit within any of these circumstances necessary to retain the privilege.

1. Facilitating an Employer's Personnel Decisions is Not a Recognized Purpose That Brings Communications by a Therapist to a Third-Party Employer Within the Protection of the Therapist-Patient Privilege

The perpetrators cannot render the disclosure of privileged documents to third-parties reasonably necessary by arguing for the unsupportable expansion of the definition of the "purpose" for which a

patient consults a therapist. A patient consults a therapist for diagnosis and/or treatment for the benefit of the patient, not for the benefit of an employer such as the Franciscans. Although there are circumstances where the transmittal of privileged communications to third parties is reasonably necessary to the purpose of the consultation, none of those were present in the disclosure of the documents at issue.

Evid. Code § 1011 defines the purpose for which a therapist is consulted. *RCALA*, 131 Cal.App.4th at 450. Specifically, Section 1011 states:

> "[P]atient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition[.]

Evid. Code § 1012 defines confidential communication between a patient and a psychotherapist as:

> information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted[.]

Recognizing that the disclosure of the documents to the Franciscans was not reasonably necessary to the therapist accomplishing diagnosis and/or

treatment of the perpetrators, the perpetrators attempt to expand the definition of "purpose" to include the Franciscans' purpose in hopes of making transmittal of the privileged documents to them reasonably necessary. However, nowhere is there any language in these definitions that supports the perpetrators' contention that "purpose" includes obtaining a diagnosis for the benefit of and use by the patient's employer in making employment decisions regarding the patient. To the contrary, subject to certain exceptions discussed below, none of which apply to the Franciscans, disclosure of privileged documents to third parties terminates the protection offered by the therapist-patient privilege unless the disclosure was reasonably necessary to accomplish the consultation. *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 932.[6] The privilege exists for the benefit of the patient, not the patient's employer. *Id.* at 933, n.13 (*quoting City and County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 232 ["The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments."]).

The perpetrators argue *Story v. Superior Court* (2003) 109 Cal.App.4th 1007 supports their interpretation of Evidence Code sections 1011 and 1012. However, *Story* does not involve the disclosure of records

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The physician-patient privilege is analogous to the therapist-patient privilege. *RCALA*, 131 Cal.App.4th at 453.

to a third-party employer. To the contrary, *Story* involved a defendant-patient's efforts to prevent the State from accessing his records. *Story,* 109 Cal.App.4th at 1010-13. Further, in *Story* the holder of the privilege took the step the perpetrators failed to take in this case: he objected to the disclosure of his records to third parties. Conversely, the Franciscan perpetrators were informed of and did not object to the Franciscans' policy of demanding the disclosure to them of the perpetrators' records. No court, including the court in *Story*, has ever found that the purpose of securing a diagnosis or treatment of an employee's mental or emotional condition includes an employer's desire to obtain such information to make an employment decision related to the employee/patient. The privilege exists for the benefit of patients, not for use by an employer attempting to conceal from the public its shameful and child-endangering conduct. The perpetrators' proposed expansion should be rejected accordingly.

a. The Perpetrators' Public Policy Arguments Provide No Justification for Continuing the Franciscans' Policies of Secrecy

The perpetrators argue that documents transmitted to third parties should remain privileged – even if the transmittal contributed nothing to a patient's diagnosis or treatment – lest future patients be discouraged from seeking treatment in the future. Any such concerns by patients can be alleviated simply by their doing what the perpetrators failed to do in this

matter: object to the transmittal of their privileged records to unnecessary third parties.

Next the perpetrators argue essentially that the compelling state interest in preventing childhood sexual abuse somehow becomes less compelling upon the settlement of a lawsuit. They cite no authority for this outrageous proposition because none exists. Publicizing the documents at issue will empower the public to do what the Franciscans have failed to do for decades: protect children from sexual abuse by Franciscan predators by placing the welfare of children first. Through the disclosure of the documents at issue Plaintiffs seek to return to the public what the Franciscans have deprived them of for decades: the ability to make *informed* decisions regarding whether the perpetrators and the Franciscans can be trusted with the welfare of children.

2. Neither This Court in *RCALA* Nor the Trial Court Created or Applied a New or Heightened Standard for Determining Whether a Document Disclosed to a Third Party Remains Protected by the Therapist-Patient Privilege

Neither the *RCALA* opinion created nor the Trial Court applied a heightened or new standard for the therapist-patient privilege.

Both courts cited with approval authorities recognizing circumstances where disclosures to third parties were reasonably necessary. In *RCALA*, this Court cited and discussed with approval an extensive list of

authorities setting forth circumstances where disclosures to third parties remain privileged. *RCALA*, 131 Cal.App.4th at 450-453.

This Court then applied the facts related to the disclosures to the Archbishop and his agents to the law, noting that in so doing it was "[g]uided by these authorities." *Id.* at 453. The Trial Court acknowledged this Court's review of and reliance on these authorities. JA 0279, n. 17. Neither court gave any indication it considered these authorities, or the propositions stated therein, anything other than good law, nor that the circumstances set forth in these authorities had been superseded by a new or heightened standard.

According to the perpetrators, however, this Court in *RCALA* created a new standard, subsequently applied by the Trial Court, that in order for transmittals to third parties to remain privileged, the third parties either had to be either treating therapists or be supervised by therapists. Neither the *RCALA* opinion nor the Trial Court's order supports the perpetrators' contention. Although both paid particular attention to whether the third party was either a therapist or being supervised by a therapist, they did so only after ruling out and/or distinguishing all other circumstances that might have preserved the privilege. No new standard was created.

In *RCALA*, this Court applied Section 1012 and the authorities cited above to the specific circumstances of the disclosure of the documents. In

one instance the Court found the privilege remained intact, pursuant to the *Grosslight* opinion, notwithstanding the fact the third party was neither a treating therapist nor being supervised by a therapist. *RCALA*, 131 Cal.App.4th at 455. In the remaining instances the Court first considered whether the disclosure was reasonably necessary to accomplish the purpose of the consultation. *Id.* at 454-56. The Court also considered whether the privilege remained intact because the disclosure was to a third party who either was a therapist or was being supervised by a therapist. *Id.* However, at no point did the Court state this was a new standard. Such a holding would have been utterly inconsistent with the statement it was "[g]uided by the[] authorities" cited above.[7]

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[7] The *RCALA* rulings on objections to specific documents are somewhat inconsistent in a few instances, and, read alone, could be interpreted to mean the Court was creating a new standard. Specifically, in ruling on documents Doe 1 #74 and Doe 1 #80, this Court flatly stated the communication at issue did not remain privileged because the recipient was not rendering therapy to the priest or being supervised by a therapist. However, when read in the context of this Court's analysis for all of the documents, it is clear the Court did not create a new standard. To the contrary, the Court first considered whether the disclosure was reasonably necessary. Then, in addition, it considered whether the third party was either rendering therapy to the priest or being supervised by a therapist. In each of these instances, after determining whether the disclosure was reasonably necessary, this Court stated "*Moreover*, the [third party] was not involved in rendering therapy to the priest or being supervised by a therapist." *RCALA*, 131 Cal.App.4th at 454-56 (emphasis added). The fact this Court started each of these sentences with "moreover" contradicts the Franciscans' contention that *RCALA* makes it necessary to the survival of the privilege that third parties who receive such communications must either be a treating therapist or being supervised by a therapist. To the contrary, this is simply an additional circumstance that would allow the privilege to remain intact. Such circumstances were not present in the

Similarly, although the Trial Court acknowledged the documents at issue were not privileged because there was no evidence they had been transmitted to third parties who were treating therapists or were being supervised by therapists (JA 300), it ultimately concluded that the perpetrators had waived the privilege by attending therapy sessions with the knowledge that the information provided during the course of the sessions would be shared with the Franciscans. JA 300-301.

Like this Court in *RCALA*, the Trial Court did in fact find that some transmittals involving third parties remained privileged despite the fact the third parties were not treating therapists nor being supervised by a therapist. JA 350, 352, 355. For the remaining documents, the Trial Court first considered whether the documents actually contained privileged information, and if so, whether any of the circumstances in the authorities cited in *RCALA* were present. JA 341-57. Only after determining they were not did the Trial Court then consider whether the third parties were treating therapists or being supervised by a therapist. JA 341-57.

This process can be seen in each instance the Trial Court overruled objections to specific documents that were privileged before transmittal. First the Trial Court concluded the "disclosure was not reasonably

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disclosure of the documents at issue in this matter.

necessary to accomplish the purpose for which the therapists were consulted (i.e. treatment and diagnosis)." Only after ruling out the presence of the circumstances that would have allowed privilege to remain intact did the Trial Court consider the additional circumstances that might save the privilege: whether the third parties were treating therapists or being supervised by a therapist. When it concluded such circumstances did not exist, the Trial Court then stated "*Moreover*, the documents were not disclosed to individuals that were involved in rendering psychotherapy and/or were being supervised by the treating psychotherapists." JA 341-357 (emphasis added). Thus, the Trial Court ruled out the final remaining circumstance, but not the only possible circumstance.

In short, the perpetrators claim that this Court created and the Trial Court applied a new standard is a fiction. Neither court "engrafted" an additional requirement into the statutory scheme that allows documents disclosed to third parties to remain privileged only where the third party is a treating therapist or being supervised by a therapist. The standard remains unchanged. A reviewing court must determine whether the disclosure to the third party was reasonably necessary. One of the circumstances, but not the only, that renders such a disclosure reasonably necessary is where the third party either is a treating therapist or being supervised by a therapist. Such circumstances did not exist in the disclosure of the documents at issue.

D. The Trial Court was Correct in Finding That None of the Privilege-Preserving Circumstances Considered in *RCALA* Were Present in the Disclosures of the Documents at Issue in this Appeal

Disclosure of the documents at issue to the Franciscans was not reasonably necessary to diagnosis or treatment of the perpetrators, and was not analogous to any of the recognized circumstances considered in *RCALA* wherein such disclosures remain privileged.

Like this Court in *RCALA,* the Trial Court in the underlying proceeding considered authorities that recognize certain circumstances where disclosures to third parties can remain privileged. *RCALA*, 131 Cal.App.4th at 450-53; JA 279-81, nn. 17 and 19. The Trial Court then considered those circumstances with regards to the disclosure of the documents at issue and found such circumstances did not exist. JA 341-57.

The circumstances where disclosures to third parties remain privileged, as illustrated by the decisions discussed in *RCALA*, generally involve one of two scenarios: 1) where the third party is making decisions for the patient and the patient has lost the right to make such decisions, such as in the cases of parolees, juvenile delinquents or juvenile dependents; or 2) where the disclosure to the third party assists in or facilitates the therapist in diagnosing or treating the patient, such as where the third party is an insurer, or the manufacturer of a drug used by the patient, or is a

participant in group therapy that benefits the patient. *RCALA*, 131 Cal.App.4th at 450-53. The Trial Court correctly found that no such circumstances existed in the disclosures to the Franciscans.

The first scenario often involves a trial court or a social worker making a decision regarding a juvenile delinquent or dependent, or an adult probationer. *See In re Pedro M.* (2000) 81 Cal.App.4th 550 (disclosure of juvenile delinquent's records to juvenile court was reasonably necessary where court was empowered to make treatment decisions on behalf of minor); *In re Kristine W.* (2001) 94 Cal.App.4th 521, 528 (limited disclosure of records to court in juvenile dependency context reasonably necessary to decisions regarding child's welfare); *In re Mark L.* (2001) 94 Cal.App.4th 573 (disclosure of records to court in juvenile dependency context reasonably necessary to decisions regarding child's welfare); *In re Christopher M.* (2005) 127 Cal.App.4th 684 (limited disclosure of records to juvenile court and probation officer reasonably necessary to their ability to make decisions for benefit of juvenile); *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1018-19 (therapy records remain privileged where disclosed to court only to extent necessary to allow monitoring of patient's progress and participation in therapy ordered as condition of probation).

Here, the Franciscans are not a court tasked with assessing and making decisions regarding a minor's welfare or a defendant's compliance

with the terms of probation. And despite their paternalistic delusions, the Franciscans are not a parent sending a child to a psychologist. Similarly, the perpetrators are not juveniles; they are adult men who sexually assaulted children. Unlike the patients in the authorities cited above, the perpetrators are not bound by the decision of a third party nor in custody of the state or under the control of a court. To the contrary, and notwithstanding any vow of obedience they may have taken to the Franciscans, the perpetrators are grown men who are free to refuse treatment, or to leave the Franciscan Order at any time. In fact, a number of perpetrators have done just that in the last ten years, with at least one such departure producing recent tragic results for children.[8]

Case law considering the second scenario has involved a variety of

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[8] Early in his career as a Franciscan Fr. Louis Ladenburger was treated for what a former Franciscan Provincial Minister described only as "inappropriate professional behavior and relationships," vague terms that are standard procedure for the Franciscans when describing acts of childhood sexual abuse by friars. After sending Ladenburger for treatment for his criminal conduct twice in the 1980s, the Franciscans sent him for another psychological review in 1993. The Franciscans were sufficiently concerned to restrict Ladenburger's ministry, but never reported Ladenburger's criminal acts to law enforcement. Nor did they warn any families or communities where Ladenburger had worked or was working as a priest. As a result, when he grew frustrated with the restrictions and left the Order in 1996 – nearly twenty-years after the Franciscans first learned of and began to conceal the risk he posed to children – Ladenburger had never been convicted of a sex crime, was not a registered sex offender, and only the Franciscans were aware of his pedophilic propensities. In May of 2007 Ladenburger was arrested and ultimately pleaded guilty to sexually assaulting several children in Idaho, receiving a five year prison sentence. CT, B-25, line 1 to B-26, line 15.

circumstances necessitating disclosures because they somehow facilitated diagnosis or treatment. *See Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502 (medical records reflecting statements by parents to child's caregivers remained privileged because such statements furthered the child's interest by facilitating treatment and diagnosis of child); *Rudnick v. Superior Court* (1974) 11 Cal.3d 924 (disclosure of records by doctor to drug manufacturer reasonably necessary to doctor obtaining assistance in use of drug in treating patient); *Blue Cross v. Superior Court* (1976) 61 Cal.App.3d 798 (transmittal to insurer of claims form identifying only patients' names and ailments was reasonably necessary so that insurer would pay for medical care); *Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521 (statements made during group therapy session remained privileged because they furthered the interest of the patient in the consultation or the accomplishment of the purpose of the consultation).

As in *Grosslight*, the Trial Court did in fact sustain a number objections to the disclosure of documents where it determined they contained communications from the Franciscans to the therapists that facilitated and thus were reasonably necessary to the diagnosis or treatment of the perpetrators. JA 350, 352, 355. However, it rejected all other analogies, expressly rejecting the application of the circumstances in *Blue Cross* by noting the Franciscans' "relationship with the alleged perpetrators

is distinct from the 'tripartite relationship, between a doctor, patient, and insurer.'"[9] JA 279, n. 17. The Franciscans are not a health insurer, paying for the treatment of their insured. In fact, in the underlying proceeding Plaintiffs submitted evidence that the Franciscans obtain health insurance for their members, and in some cases even for their former members. JA 100-01; 156-57. This evidence was neither objected to nor disputed by the Franciscans. Although the perpetrators objected, they cited no evidentiary basis to exclude this evidence. JA 751H-I. Additionally, the Trial Court never ruled on the objection, nor did the perpetrators ever demand such a ruling.

Additionally, even if the Franciscans could somehow be considered analogous to the insurer in *Blue Cross,* the amount of information disclosed in the subject documents could not be considered reasonably necessary to the decision making process of an insurer in deciding whether to pay for the treatment. In *Blue Cross*, there was no disclosure, as here, of entire records. To the contrary, the only information disclosed was the patients' names and ailments contained on a <u>claim form</u> transmitted to the insurers.

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[9] Again, as with its rejection of the parent-child analogy, the Trial Court rejected the application of the *Blue Cross*/health insurer analogy without reference to whether the Franciscans were therapists or being supervised by therapists. The fictional new standard was not a factor in the Trial Court's decision. JA 279-80 n. 17.

Blue Cross, 61 Cal.App.3d at 799, 801. Here, it was not just the names and ailments of the perpetrators on claims forms that were disclosed to the Franciscans, but entire pages of records. Nothing in *Blue Cross* or any other authority cited by the Franciscans or the perpetrators supports finding that the disclosure of entire medical records is reasonably necessary to allow an insurer to pay for medical care. Thus, even if the Franciscans were in a position analogous to an insurer, the disclosed documents would not be protected as their disclosure was not reasonably necessary.

The circumstances in *Rudnick v. Superior Court* also have no application here as disclosures by a doctor to a drug manufacturer would remain protected so long as they were reasonably necessary for the treating physician to obtain assistance in the use of a drug in treating patients. *Rudnick*, 11 Cal.3d at 933. The Franciscans are not in a position analogous to a drug manufacturer whose knowledge of the drug it manufacturers – such as symptoms or side-effects the drug triggers – may help a caregiver treat her patient. Additionally, unlike the subject dispute where entire records were disclosed, the only information disclosed in *Rudnick* was contained in reports by doctors to drug manufacturers referencing adverse drug reactions of their patients, all for the purpose of the doctors obtaining information from the manufacturers to facilitate their diagnosis or treatment of the patients. *Id.* Here, the disclosure of entire records to the Franciscans

was not reasonably necessary to the purpose of diagnosis and/or treatment. Nothing in *Rudnick* or *Blue Cross* supports such a complete disclosure of records as being reasonably necessary. Even assuming *arguendo* that the perpetrators' caregivers required input and oversight from the Franciscans, neither of these would have required transmittal to the Franciscans of purportedly confidential and privileged records. To the contrary, input and/or oversight would have required transmittals from the Franciscans to the caregivers. In fact, where such circumstances were present in the transmittal, the Trial Court sustained the objections.

E. The Perpetrators Waived the Physician-Patient Privilege By Agreeing and/or Submitting to the Transmission of Their Records Third-Parties Who Were Not Reasonably Necessary to Their Treatment

The Franciscans to whom the perpetrators' records were transmitted were neither being supervised by nor were themselves treating physicians. Nor do any of the other recognized circumstances allowing documents transmitted to third parties to retain their privilege apply. Accordingly, for all the reasons set forth in the prior section regarding the therapist-patient privilege, the physician-patient privilege does not bar the release of the subject documents.

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VI.

CONCLUSION

Respondents insisted that the inclusion of the document protocol in Paragraph 15 of the Settlement Agreement in the belief that the information in the subject documents should have been disclosed by the Franciscans and would have empowered parents and childcare custodians to prevent other children from suffering childhood sexual abuse by the perpetrators and other friars. Respondents believed the Franciscans never would have disclosed such information voluntarily.

Consistent with the Respondents' belief, the Franciscans are doing everything in their power to prevent the publication of these most important documents that most graphically show how much they knew and when they first learned about the threat posed by the perpetrators. Through the perpetrators, the Franciscans now attack the entire process by questioning the Trial Court's jurisdiction and seeking to strike the document protocol the Franciscans previously agreed to in Paragraph 15.

When it served their purpose because they expected a favorable ruling on their privacy objections, the perpetrators repeatedly invoked the Trial Court's jurisdiction. Only after not receiving the ruling they anticipated, and only after waiting over a year after the 2007 Order was issued, did the perpetrators' expressly question the Trial Court's

jurisdiction. Accordingly, the perpetrators' appeal should be dismissed as untimely as to all issues other than those related to the physician-patient and therapist-patient privileges. As to those two remaining issues, respondents' respectfully request that the Trial Court's April 2, 2009 Order be affirmed.

DATED: March 4, 2010 NYE, PEABODY, STIRLING & HALE, LLP

By: ____________________________

Timothy C. Hale, Esq.
Attorneys for Plaintiffs and Respondents

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to California Rules of Court, Rule 8.204(c)(1), the undersigned certifies that the attached Respondents' Brief Regarding Appeal By Samuel Cabot Et Al. is proportionately spaced, has a typeface of at least 13-point and contains approximately 13,997 words, including footnotes, excluding tables, this certificate, and supporting documents. In making this Certificate, I am relying on the "word count" function of the Computer word processing program used in preparing this brief.

Dated: March ____, 2010 NYE, PEABODY, STIRLING & HALE, LLP

By:

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PROOF OF SERVICE

I am employed in the County of Santa Barbara, State of California. I am over the age of eighteen years and not a party to this action. My business address is 33 West Mission Street, Suite 201, Santa Barbara, California 93101.

On the date stated below, I served the following document: **RESPONDENTS' BRIEF REGARDING APPEAL BY SAMUEL CABOT ET AL.** on the interested parties in this action, by placing a COPY thereof in a sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 4, 2010 ______________________________

Suzanne Gorelick