Superior Court of the State of California
For the County of Los Angeles

Coordinated Proceeding Special Title (Rule 1550(b))

THE CLERGY CASES I & III

This Order relates to:

1. **FRANCISCAN FRIARS' OBJECTIONS TO PUBLICATION OF THE ALLEGED PERPETRATORS' PERSONNEL FILES**
2. **ALLEGED PERPETRATORS' OBJECTIONS TO PUBLICATION OF THEIR PERSONNEL FILES**
3. **BYSTANDERS' OBJECTIONS TO PUBLICATION OF THE ALLEGED PERPETRATORS' PERSONNEL FILES**

Case Nos. JCCP 4286 & 4359

Assigned: Hon. Peter D. Lichtman

Court's Order re:

Publication of Confidential And Personnel Files

Hearing Date: March 24, 2009

Submitted: March 24, 2009

Background Facts
The Friars

On May 25, 2006, a settlement and general release of all claims (hereinafter "Settlement Agreement") was entered into by and between the Franciscan Friars of California, Inc.; St. Anthony's Seminary High School; Santa Barbara Boys Choir; and all corporate, legal or canonical entities owned or operated by, or affiliated with the Order of Friars Minor, Province of Saint Barbara (hereinafter referred to as the "Franciscan Friars or Friars"); the Roman Catholic Archbishop of Los Angeles and other named defendants on the one hand and a variety of plaintiffs identified more fully in the settlement agreement itself on the other.

The Settlement Agreement contains two essential components. One is monetary and this Court assumes, for the purposes of this order, that the monetary component has been successfully consummated. The other is non-monetary which calls for the production of certain documents so that transparency, accountability, public safety and responsibility can and could be assessed with the hope of providing closure for the settling plaintiffs. While each component is of no less import or significance than the other, this Court has been assigned the task of carrying out the non-monetary component as set forth in paragraphs 15 and 16 of the Settlement Agreement.

Pursuant to an Order dated August 16, 2006, signed by Judge Haley Fromholz, the Honorable Peter D. Lichtman (Judge of the Los Angeles Superior Court) was appointed the hearing officer for the purpose of judicially performing and enforcing the provisions of paragraph 15 of the Settlement Agreement which concerns a number of actions contained in two coordinated sets of litigation commonly referred to as "the Clergy Cases I and the Clergy Cases III." Paragraph 15 sets forth a procedure whereby the personnel files and confidential files of many of the alleged perpetrators are to be deposited with the Court for review and determination of the propriety of objections and asserted privileges.

In attempting to carry out the terms and provisions of paragraph 15, this Court conducted numerous telephonic conferences, as well

as, informal court conferences with all counsel in order to understand the scope of the review and the nature of the objections that would be interposed.

In that regard, it was stipulated by and between Timothy C. Hale, Esq. of Nye Peabody & Stirling (counsel for various plaintiffs) and Bryan Hance of Lewis Brisbos Bisgaard & Smith (counsel for the Franciscan Friars) that, inter alia, the Franciscan Friars would not assert privacy objections on behalf of those named priests or brothers whose documents were sought in connection with the Settlement Agreement. This did not mean, however, that certain individually named priests or brothers would not assert their own rights of privacy or objections if they felt the need to do so. In fact, the following named individuals asserted rights of privacy: (1) Brother Samuel Cabot; (2) Father Mario Cimmarusti; (3) Father David Johnson; (4) Father Gus Krumm; (5) Father Gary Pacheco; and (6) Father Robert Van Handel.

It should be noted that all of the personnel files and confidential files of the above-named individuals (if any exist) have been produced to the Court along with various privilege logs wherein certain legal privileges have likewise been asserted in addition to the right of privacy objection.[1]

In prior conferences with counsel, it was agreed that the initial issue to be decided by this Court would concern the right of privacy asserted by the above-named individuals.

In that regard and memorialized in a stipulation entered and filed on March 2, 2007, the threshold issue presented to the Court was whether the personnel or confidential files of any member of the Franciscan Friars (who had not waived his right to privacy) may be given to Plaintiffs pursuant to the settlement agreement so that the contents of the files could be disclosed to the public. If the issue were answered in the affirmative, this Court would then address (at a

[1] In prior opinions issued by this Court and likewise referenced herein, this Court has used the nomenclature "Confidential Files" and "Personnel Files." In many instances, these are not the same or similar files. In fact, they are generally separate files, both maintained by the religious entity referenced in the operative settlement agreement. For example, the Diocese of Orange did not maintain both a confidential file and personnel file on various former priests.

subsequent hearing) the legal privileges that have likewise been asserted.

On June 18, 2007, this Court issued a 22-page ruling/order wherein the privacy objections of those interested priests were overruled as to the production of their personnel and confidential files maintained by the Order of the Friars. As a result, counsel for the various interested parties and bystanders agreed that this Court would and should proceed to address all other legal objections. In that regard, this Court conducted conferences with all counsel in order to understand the scope of the review and the nature of the objections that would be interposed. A briefing schedule was agreed upon and an initial hearing date of March 6, 2009 was ultimately set.

On September 18, 2008, Defendant Franciscan Friars filed a notice of association of counsel.[2]

In reviewing the briefs submitted by Counsel for the alleged perpetrators, this Court noted that counsel Robert Howie of Howie & Smith[3] interposed an objection to this Court's jurisdiction and the mandate of the Settlement Agreement (paragraph 15) that this Court rule on post-settlement production of documents. Specifically, Mr. Howie challenged the Court's ability to even proceed with the hearing that was scheduled for March 6, 2009.

The Court's power to resolve the executory provisions of the Settlement Agreement is based on the Court's authority pursuant to C.C.P. §664.6 and the then Trial Coordination Judge's order of August 17, 2006. As this Court's authority was dependent upon the legality and enforceability of paragraph 25 of the Settlement Agreement itself, the precise issue had to be interpreted by the present Trial Coordinating Judge, the Honorable Emilie Elias. As the Court could not proceed to rule on the legality of the privilege objections until a ruling as to the enforceability and legality of the Court's jurisdiction was addressed by the Trial Coordinating Judge,

---

[2] Brian Brosnahan of Heller Ehrman LLP associated with Mark Hirschberg of Lewis Brisbois Bisgaard & Smith LLP as counsel for Defendant Franciscan Friars.

[3] Robert Howie of Howie & Smith is counsel for the alleged perpetrators: (1) Brother Samuel Cabot; (2) Father Mario Cimmarusti; (3) Father David Johnson; (4) Father Gus Krumm; (5) Father Gary Pacheco; and (6) Father Robert Van Handel.

the March 6, 2009 hearing date was vacated.[4] Additionally, the challenging parties were ordered to place the issue before the Trial Coordinating Judge within 30 days of the February 10, 2009 order. [5]

On March 17, 2009, the parties appeared before the Honorable Emilie Elias. Judge Elias found that, pursuant to the prior orders and the Settlement Agreement, Judge Lichtman has the authority to handle completion of the Settlement Agreement pursuant to C.C.P. §664.6.

Thereafter, this Court set a hearing date of March 24, 2009, to resolve the objections raised by Franciscan Friars, the alleged perpetrators, and the bystanders, to publication of the personnel and confidential files.

Legal Issues Presented

The litigation which gave rise to the original discovery requests has settled on specified conditions that confidential and personnel files be brought before this Court and legal challenges be resolved post-settlement.

Burden of Proof

California Evidence Code §917(a) provides, as follows: "If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor-victim relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

---

[4] Pursuant to this Court's February 10, 2009 order, the March 6, 2009 hearing date was subject to resetting once the Trial Coordinating Judge ruled on the jurisdictional issue.

[5] According to the February 10, 2009 order, if the parties challenging the Court's jurisdiction failed to secure a hearing date within 30 days of the order, the Court would proceed to reset the matter for hearing on all matters raised, except for the issue of the Court's jurisdiction pursuant to C.C.P. §664.6. The challenging parties secured a hearing date of March 17, 2009.

"Thus, in this context, the privilege-claimant 'has the *initial burden* of proving the *preliminary facts* to show the privilege applies.' [Citation.] 'Once the claimant establishes the preliminary facts ..., *the burden of proof shifts to the opponent of the privilege.* To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).] ... Alternatively, the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912..." ***Roman Catholic Archbishop of Los Angeles v. Superior Court*** (2005) 131 Cal.App.4th 417, 442 (citing to ***Story v. Superior Court*** (2003) 109 Cal.App.4th 1007, 1014-1015).

A. Franciscan Friar's Objections

On September 18, 2008, Defendant Franciscan Friars filed an opening brief regarding its request that certain documents be withheld from production and publication pursuant to paragraph 15 of the Settlement Agreement.[6] Defendant Franciscan Friars objected to the production of certain documents on the grounds that they post-date the Settlement Agreement, are protected by the psychotherapist-patient privilege, are protected by the attorney-client privilege and attorney work product doctrine, are protected by the Free Exercise Clauses of the United States and California Constitutions, and are protected by (third party) privacy rights.

On November 17, 2008, Plaintiffs filed an omnibus brief in response to various objections to publication and production of the contested documents. Plaintiffs contend that the objections should be overruled and the documents must be produced pursuant to the Settlement Agreement.

1. Documents that Post-Date the Settlement Agreement[7]

Defendant Franciscan Friars contends it does not have to produce

[6] As noted earlier, Defendant Franciscan Friars submitted all of the personnel files and confidential files of the aforementioned individuals (if any exist), as well as, various privilege logs. Defendant Franciscan Friars also identified the objections raised as to each document at issue.
[7] Defendant Franciscan Friars identified the following documents that post-date the Settlement Agreement: OFM CABO 1: 0148, 0152, 0153, 0154, 0165, 0173, 0174, 0179, 0180, 0181 and OFM CIMM 1: 0395-0400, 0417. The documents were created between 9/8/06 and 7/23/07.

any documents that post-date the Settlement Agreement.[8] Plaintiffs, on the other hand, argue that public safety was the purpose of the Settlement Agreement, the settlement does not provide a limitation as to the creation date of the documents to be produced, and the documents at issue would have been subject to discovery if not for the settlement.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." California Civil Code §1636. "A written agreement, unless it is ambiguous, must be construed by consideration of its own terms. The meaning and intent thereof is a question of law..." ***Beuhler v. Reily*** (1958) 157 Cal.App.2d 338, 343.

In this case, the terms of the Settlement Agreement evidence the parties' intent to restrict production and publication to those documents that were in existence at the time the Settlement Agreement was executed or, at the very latest, within forty-five (45) days thereafter. Specifically, paragraph 15(A)(1) of the Settlement Agreement provides, as follows: "Within Forty-Five (45) days following the execution by all Parties and delivery of this Settlement Agreement to counsel for the Franciscan Friars, the Franciscan Friars will produce to plaintiff's counsel and each of them, and for lodging with the Hearing Officer, the following documents..." Although Plaintiffs argue that the focus of paragraph 15 is public safety and the documents at issue would have been subject to discovery obligations[9] if the case did not settle, the terms of the Settlement Agreement clearly show that it was not the parties' intent to allow for unlimited disclosure of all documents.

This Court finds that, pursuant to the terms of the Settlement Agreement, Defendant Franciscan Friars is not required to produce the following post-settlement documents: OFM CABO 1: 0148, 0152,

---

[8] In the alternative, Defendant Franciscan Friars contends that it only has to produce documents that were in existence before the 45 day deadline identified in paragraph 15(A)(1) of the Settlement Agreement.

[9] Paragraph 15 of the Settlement Agreement provides that the documents to be produced are those that "have been or would have been subject to discovery obligations in the litigation of THE ACTIONS."

0153, 0154, 0165, 0173, 0174, 0179, 0180, 0181, and OFM CIMM 1:0395-0400, 0417.[10] (See Exhibit "A").

2. Documents Protected by the Psychotherapist-Patient Privilege[11]

Defendant Franciscan Friars argues that the documents in question are protected from production and publication pursuant to the psychotherapist-patient privilege because they "consist principally of diagnoses and therapy reports prepared by an alleged perpetrator's therapist and communicated to the Franciscans."[12] Defendant Franciscan Friars also contend that they have standing to raise the privilege because the communications were reasonably necessary to accomplish the purpose for which the psychotherapists were consulted.[13] Plaintiffs, on the other hand, argue that Defendant Franciscan Friars does not have standing to raise the objection and disclosure of the communications was not reasonably necessary to accomplish the purpose for which the psychotherapists were consulted.

California Evidence Code §1014 provides, as follows:

> Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another

---

[10] This Court notes that all of the parties and attorneys signed the Settlement Agreement between 5/19/06 and 6/27/06. Although the parties failed to state when the executed Settlement Agreement was actually delivered to counsel for Defendant Franciscan Friars, the earliest document at issue was created on 9/8/06, more than 45 days after the Settlement Agreement was executed and presumably delivered.

[11] Defendant Franciscan Friars contends that the following documents are protected from production and publication under the Settlement Agreement pursuant to the psychotherapist-patient and physician-patient privileges: OFM CABO 1: 0165-0172, 0176-0189, 0190-0195, 0198-0219, OFM CIMM 1:0128, 0222-0225, 0226, 0234-0241, 0292-0302, 0327-0328, 0329, 0330-0331, 0334-0357, 0358-0373, 0374-0382, 0383-0394, 0418, 0420-0470, OFM JOHN 1: 0067, 0130-0131, 0154-0155, 0156, 0157, 0158-0159, 0168-0169, 0171, 0215, 0217-0218, 0219, 0220, 0246-0250, 0251, 0252, OFM KRUM 1: 0039, 0211-0212, OFM PACH 1: 0005-0007, 0284-0285, OFM VANH 1: 0518-0520, 0548, 0549, 0587, 0588, 0589, 0606, 0579.

[12] Defendant Franciscan Friars' Opening Brief 3:2-3.

[13] Pursuant to paragraph 15(A)(2)(e) of the Settlement Agreement, Defendant Franciscan Friars has the right to withhold or redact documents to be produced based on the psychotherapist-patient privilege and/or physician-patient privilege "only to the extent that the Franciscan Friars have the standing to assert such a privilege."

from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:
(a) The holder of the privilege.
(b) A person who is authorized to claim the privilege by the holder of the privilege.
(c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.[14]

California Evidence Code §1012 defines "confidential communication between a patient and psychotherapist" as follows: "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 parties other than those who are present to further the interest of the patient in the consultation, or 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,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Emphasis added.)

Disclosure "in confidence by a physician, with or without the consent of the patient, of communications protected by the physician-patient privilege to a third person to whom disclosure is reasonably necessary for the accomplishment of the purpose for which the physician is consulted confers upon the third person the right to claim the physician-patient privilege on behalf of the patient. In other words, that third person thereby becomes 'a person who is authorized to claim the privilege by the holder of the privilege' within the meaning of section 994." ***Rudnick v. Superior Court of Kern County*** (1974) 11 Cal.3d 924, 932.[15] In this case, if the disclosure was not made in

---

[14] Defendant Franciscan Friars contends that it is authorized to claim the privilege on behalf of the alleged perpetrators who are the holders of the privilege. California Evidence Code §1014(b).
[15] The physician-patient privilege is analogous to the psychotherapist-patient privilege. *See* ***Roman Catholic Archbishop of Los Angeles v. Superior Court*** (2005) 131 Cal.App.4th 417, 453. The physician-patient privilege (California Evidence Code §§ 992 & 994) mirrors the psychotherapist-patient privilege (California Evidence Code §§1012 & 1014), therefore, the same analysis can be used to determine whether a third party is authorized to claim the privilege on

confidence or was not reasonably necessary in order to accomplish the purpose for which the psychotherapists were consulted, Defendant Franciscan Friars cannot claim the privilege on behalf of the alleged perpetrators. ***Id.*** at 933.

Under California Evidence Code §1012, the "purpose" for which a psychotherapist is consulted consists of diagnosis and treatment of the patient. ***Roman Catholic Archbishop of Los Angeles v. Superior Court*** (2005) 131 Cal.App.4th 417, 449.[16] In fact, the Court of Appeal of California, Second Appellate District, Division Three (hereinafter the "Roman Court"), upheld a discovery referee's finding that a copy of a psychotherapeutic report prepared by a priest's therapists, which contained a detailed psychosexual history and diagnosis, did not "fall within the 'furtherance of the purpose' rule of Evidence Code section 1012 because no person at the Archdiocese was involved in rendering psychotherapy to the priest, or was being supervised by a treating psychotherapist." ***Roman Catholic Archbishop of Los Angeles*** at 454.[17] Also, the Roman Court

---

behalf of another (i.e. whether disclosure was reasonably necessary for the accomplishment of the purpose for which the psychotherapist/physician was consulted).

[16] California Evidence Code §1011 provides, as follows: "As used in this article, 'patient' means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventative, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems."

[17] The Court of Appeal, Second Appellate District, Division Three, reviewed several of the cases cited by Defendant Franciscan Friars before making its ruling, including the following: ***Rudnick v. Superior Court*** (1974) 11 Cal.3d 924, ***Blue Cross of Northern California v. Superior Court*** (1976) 61 Cal.App.3d 798, and ***In Re Pedro M.*** (2000) 81 Cal.App.4th 550. The Court also looked at cases involving supervision by a treating psychotherapist, including the following: **People v. Gomez** (1982) 134 Cal.App.3d 874 and ***Luhdorff v. Superior Court*** (1985) 166 Cal.App.3d. 485. Despite arguments to the contrary, this Court notes that ***Blue Cross of Northern California*** is distinguishable from the instant case. In ***Blue Cross of Northern California,*** the Court of Appeal of California, Third District, held that disclosure of patients' names and ailments to Blue Cross (operator of a pre-paid health plan) for the purpose of paying the doctor's fees was "reasonably necessary for the...accomplishment of the purpose for which the physician was consulted," therefore, "confidentiality was not lost and the privilege not waived." ***Blue Cross of Northern California*** at 801-802. At oral argument in the instant case, counsel represented that the Defendant Franciscan Friars paid for the alleged perpetrators' treatment. However, no such evidence is in the record. Even assuming Defendant Franciscan Friars paid for the treatment, its relationship with the alleged perpetrators is distinct from the "tripartite" relationship, between a doctor, patient, and insurer, identified in ***Blue Cross of Northern California***. The Court stated, as follows: "Here the question of reasonable necessity is posed when the disclosure occurs for the purpose of paying the doctor's fee. To ask the question is to answer it. Transmittal of a claim form to a prepaid health carrier necessarily denotes a paid relationship between physician and patient, an exchange of medical care for a fee. The carrier's participation transforms the dual medico-economic relation between physician and patient into a

upheld a discovery referee's finding that a "copy of a psychotherapeutic evaluation sent by a priest's therapists to a member of the Vicar for Clergy's staff," which contained both diagnosis and treatment recommendations, did not fall under the "furtherance of the purpose" rule "because the Vicar for the Clergy's staff was not involved in rendering psychotherapy to the priest, nor was that staff being supervised by a treating psychotherapist." ***Id.*** at 455.[18]

However, according to the Roman Court, any documents prepared by the clergy to a priest's treating psychotherapist, which contain information regarding the priest's personal history, as an aid to diagnosis and treatment, is privileged. The Roman Court overturned a discovery referee's ruling that a "memorandum from a member of the Vicar for Clergy's staff to a priest's" psychotherapists, which "supplied the therapeutic team with information about a troubled priest's personal history as an aid to diagnosis and" treatment, was not protected by the psychotherapist-patient privilege. ***Id.*** The Roman Court concluded that the document was "appropriately shielded by the psychotherapist-patient privilege because it was a disclosure reasonably necessary to accomplish the purpose for which the psychotherapist was consulted, namely diagnosis and treatment of the patient." ***Id.*** The Roman Court reasoned that the "inclusion of such material within the purview of the privilege 'encourages full disclosure of pertinent matters that

---

tripartite relationship. Anticipated payment is a prerequisite of medical care in all cases involving financial recourse to a prepaid health plan. Coverage determinations ineluctably call for disclosure of the patient's name and ailment. The information's disclosure to accomplish payment is reasonably necessary to achieve the consultation's diagnostic and treatment purposes." ***Id.*** at 801. Moreover, in this case, disclosure went beyond what was reasonably necessary to accomplish payment. Clearly, the contested psychotherapist/physician reports relate to the alleged perpetrators' treatment, diagnosis, sexual history, etc. In ***Blue Cross of Northern California***, however, where real party in interest sued for wrongful refusal to pay medical expenses, disclosure to Blue Cross was limited to the patients' names and ailments, which the parties agreed were disclosed for the purpose of paying the doctor's fees. ***Id.***

[18] The Roman Court also upheld a discovery referee's ruling that "a copy of a file note prepared by a member of the Vicar for Clergy's staff, reporting on a discussion he had with a priest," which included a description of the priest's self-reporting concerning his level of functioning, progress in therapy, and desires concerning future work assignments, did not fall within the "furtherance of the purpose" rule because it did not convey "significant psychological information," "the Vicar for Clergy's staff was not involved in rendering psychotherapy to the priest," and the staff was not "being supervised by a treating psychotherapist." ***Roman Catholic Archbishop of Los Angeles*** at 455.

otherwise might be withheld by [third persons] to the detriment of the patient.'" ***Id.***

For most of the documents at issue in this case, Defendant Franciscan Friars failed to establish that disclosure was reasonably necessary to accomplish treatment and diagnosis of the alleged perpetrators.[19] Specifically, Defendant Franciscan Friars failed to submit evidence to suggest that it was rendering psychotherapy to the alleged perpetrators or was being supervised by the treating psychotherapists. Instead, Defendant Franciscan Friars merely contends that "the evidence will show that there were two purposes for which alleged perpetrators were sent by the Franciscans for psychotherapy: 1) to obtain a diagnosis that would allow the Franciscans to make decisions concerning any continued ministry by the alleged perpetrator (including any monitoring or other restrictions that may need to be imposed on the alleged perpetrator); and 2) to obtain treatment for the alleged perpetrator of any mental or emotional condition of the alleged perpetrator, including diagnostic information necessary to such treatment."[20]

Based on the foregoing, this Court rules on Defendant Franciscan Friars' objection to the production and publication of the documents at issue, based on the psychotherapist-patient privilege, as outlined in Exhibit "A."

3. Documents Protected by the Attorney-Client Privilege/Attorney Work Product Doctrine[21]

Defendant Franciscan Friars argues that the documents in question are protected from production and publication pursuant to the attorney-client privilege and attorney work product doctrine. Also,

---

[19] Moreover, this Court will not accept Defendant Franciscan Friars' assertion that its relationships with the alleged perpetrators are akin to that of a parent and child, such that any disclosure was made to permit Defendant Franciscan Friars to make decisions concerning further treatment.

[20] Defendant Franciscan Friars' Opening Brief 5:13-18.

[21] Defendant Franciscan Friars contend that the following documents are protected from production and publication pursuant to the attorney-client privilege and attorney work product doctrine: OFM CONN 1: 0392-0397, 0497, 0498-0500, 0503-0504, 0505-0506, 0507-0508, 0501-0502, 0668, 0669, OFM JOHN 1:0238-0239, 0241, 0242, OFM PACH 1: 0284-0285, OFM VANH 1: 0355-0356, 0357, 0358, 0359, 0363, 0364, 0371-0373, 0374-0392, 0393-0395, 0396-0400, 0402-0403, 0404, 0405, 0406, 0410, 0417-0419, 0420-0444, 0445-0446, 0447, 0448, 0449, 0453, 0461-0463, 0464-0490, 0655-0714.

Defendant Franciscan Friars contends that it has standing to raise the objections.[22] Plaintiffs, on the other hand, argue that the attorney-client privilege and attorney work product doctrine do not bar production and publication of the documents at issue. According to Plaintiffs, the documents are not privileged because they were not created for the dominant purpose of preparing for litigation, they were not authored or received by an attorney, and/or they are evidentiary in nature. Also, Plaintiffs contend that the privilege was waived as to some of the documents.

California Evidence Code §954 provides, in pertinent part, as follows[23]:

> Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:
> (a) The holder of the privilege;[24]
> (b) A person who is authorized to claim the privilege by the holder of the privilege; or
> (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

---

[22] Pursuant to paragraph 15(A)(2)(a-b), Defendant Franciscan Friars are entitled to withhold and/or redact documents to be produced based on the attorney-client privilege and attorney work product doctrine.

[23] California Evidence Code §954 also provides, as follows: "The relationship of attorney and client shall exist between a law corporation...and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word 'persons' as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities."

[24] California Evidence Code §953 defines "holder of the privilege" as follows: "(a) The client when he has no guardian or conservator. (b) A guardian or conservator of the client when the client has a guardian or conservator. (c) The personal representative of the client if the client is dead. (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence."

California Evidence Code §952 defines "confidential communications between a client and lawyer" as follows: "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

If disclosure of a confidential communication to a third person was "reasonably necessary" for the accomplishment of the purpose for which the attorney was consulted, that third person thereby becomes an authorized holder of the privilege. ***Rudnick v. Superior Court of Kern County*** (1974) 11 Cal.3d 924, 932.[25] *See also* California Evidence Code §§954(b) and 952. In this case, if the disclosure was not made in confidence or was not reasonably necessary in order to accomplish the purpose for which the attorney was consulted, Defendant Franciscan Friars cannot claim the privilege on behalf of the alleged perpetrators.[26] ***Id.*** at 933.

The joint defense/common interest doctrine will play a role in this determination because its application will also involve a determination as to whether disclosure was "reasonably necessary," (i.e. whether there was a waiver of the privilege).[27] The joint defense/common interest doctrine is not a privilege separate and apart from the attorney-client privilege and attorney work product doctrine. ***OXY Resources California, LLC v. Superior Court*** (2004) 115 Cal.App.4th 874, 889. Also, the joint defense/common interest doctrine is not an extension of the attorney-client privilege.

---

[25] Although ***Rudnick*** involved the physician-patient privilege, the attorney-client privilege and the psychotherapist-patient privilege are governed by the same statutory standards.

[26] If disclosure to Defendant Franciscan Friars was reasonably necessary in order to accomplish the purpose for which the attorney was consulted, then Defendant Franciscan Friars becomes a person who is authorized to claim the privilege by the holder of the privilege. California Evidence Code §954(b). As such, the death of the alleged perpetrator Connolly would not affect Defendant Franciscan Friars' ability to assert the privilege.

[27] For the purpose of this analysis, the Court assumes the alleged perpetrators and Defendant Franciscan Friars share a common interest.

Id. Instead, the joint defense/common interest doctrine is a "nonwaiver" doctrine, which is "analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine." ***Id.***

A "party seeking to rely on the common interest doctrine does not satisfy its burden to justify a claim of privilege simply by demonstrating that a confidential communication took place between parties who purportedly share a common interest. Rather, the party seeking to invoke the doctrine must first establish that the communicated information would otherwise be protected from disclosure by a claim of privilege...The next step in the analysis is to determine whether disclosing the information to a party outside the attorney-client relationship waived any applicable privilege." ***Id.*** at 890. *See also* California Evidence Code §§912[28] and 954.[29] For "the common interest doctrine to attach, most courts seem to insist that the two parties have in common an interest in securing legal advice related to the same matter – and that the communications be made to advance their shared interest in securing legal advise on a common matter." ***OXY Resources California, LLC*** at 890.

Documents that were not created for the dominant purpose of preparing for litigation are not privileged. When "a corporate employer requires that its employees make a report, the privilege of that report is determined by the employer's purpose in requiring the report. [Citation.] When the corporate employer has more than one purpose in requiring the report, the dominant purpose will control." ***Scripps Health v. Superior Court*** (2003) 109 Cal.App.4th 529, 533.[30]

---

[28] California Evidence Code §912(d) provides, as follows: A disclosure in confidence of a communication that is protected by a privilege..., when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer...was consulted, is not a waiver of the privilege."

[29] "There is no statutory provision governing waiver of work product protection. [Citations.] However, California courts have recognized that the waiver doctrine is applicable to the work product rule as well as the attorney-client privilege. [Citation.] The work product protection may be waived 'by the attorney's disclosure or consent to disclosure to a person, other than the client, who has no interest in maintaining confidentiality...of a significant part of the work product.' [Citations.] Thus, work product protection 'is not waived except by disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation.'" ***OXY Resources California, LLC*** at 891.

[30] The Court of Appeal of California, Fourth Appellate District, Division One, concluded that the trial court abused its discretion by finding that a hospital's "occurrence reports," which stated

Documents that were not authored or received by an attorney are not protected by the privilege. In ***Doe 2 v. Superior Court*** (2005) 132 Cal.App.4th 1504, 1521-1522, the Court of Appeal of California, Second Appellate District, Division Eight, held that the trial court did not abuse its discretion in rejecting the contention that the attorney-client privilege applied to Pastor Fernandez's July 22, 2002 letter to Reverend Stewart even though Pastor Fernandez expected that the letter would be passed to the Bishop of the Annual Conference and the attorney for the Annual Conference. Both Pastor Fernandez and Reverend Stewart were members of the crisis management team that was dealing with issues relating to the church's potential liability for acts of sexual abuse committed by Gary Allen Carson-Hull, a probationary clergy member of the church. ***Id.*** at 1514. The Court noted that the letter was never actually transmitted to an attorney. ***Id.*** at 1521. Also, the Court noted that "a communication which was not privileged to begin with may not be made so by subsequent delivery to the attorney." ***Id.*** at 1522 (citing ***Alpha Beta Co. v. Superior Court*** (1984) 157 Cal.App.3d 818, 825).[31]

For most of the documents at issue in this case, Defendant Franciscan Friars has standing to raise the privilege.[32] Defendant Franciscan Friars established that disclosure of certain documents and/or information was reasonably necessary for the accomplishment of the purpose for which the attorneys were consulted, i.e. preparing

---

"CONFIDENTIAL: Not part of medical record/Do not photocopy," sought information about the occurrence, and asked for "an evaluation of the significance level of the occurrence in terms of the potential for claims or litigation," were created for accident prevention. ***Scripps Health*** at 532-534. Instead the Court determined that the undisputed facts show[ed] the dominant purpose of the hospital's "occurrence reports" was for transmittal to an attorney in the course of the professional attorney-client relationship under circumstances where confidentiality was expected. ***Id.*** at 534. This is true even if the reports "were 'primarily created for the purpose of attorney review whether or not litigation is actually threatened at the time a report is made.'" ***Id.*** at 535.

[31] *See also* ***Roman Catholic Archbishop of Los Angeles v. Superior Court*** (2005) 131 Cal.App.4th 417, 457 (noting the 15 disputed documents did not fall within either the attorney-client privilege or the attorney work product doctrine because there was no indication that the disputed documents constituted "information transmitted between the Archdiocese and its lawyer").

[32] This Court finds that Defendant Franciscan Friars has standing to assert an objection based on the attorney work product doctrine, as well as, the attorney-client privilege. The waiver doctrine applies equally to the work product doctrine and the attorney client privilege. As such, this Court assumes that when there is disclosure of documents protected by the work product doctrine to a third party who has an interest in maintaining confidentiality of the work product, including other parties/attorneys with a common interest/joint defense, the third party can assert the privilege.

a defense against civil and criminal charges of sexual abuse. In addition, Defendant Franciscan Friars properly asserted the joint defense/common interest doctrine for most documents. Defendant Franciscan Friars and the alleged perpetrators share a common interest in defending against the claims of sexual abuse. Also, a majority of the documents at issue would otherwise have been protected from disclosure by a claim of privilege (attorney-client and attorney work product). Moreover, this Court finds that most of the documents were intended to be confidential and were geared toward advancement of the common interest.[33]

Based on the foregoing, this Court rules on Defendant Franciscan Friars' objections to the production and publication of the documents at issue, based on the attorney-client privilege and attorney work product doctrine, as outlined in Exhibit "A."

4. Documents Protected by the Free Exercise Clauses of the United States and California Constitutions & Establishment Clause of the United States Constitution[34]

Defendant Franciscan Friars argues that the documents in question, specifically the laicization files, are protected from production and publication pursuant to the Free Exercise Clauses of the United States and California Constitutions, as well as, the Establishment Clause of the United States Constitution.[35] Specifically, Defendant Franciscan Friars contends that the laicization files "deal with both the procedures and substance of laicization, a

---

[33] Plaintiffs contend that the documents at issue were not created for the dominant purpose of preparing for litigation. Plaintiffs rely on Defendant Franciscan Friars' policies and procedures to support this argument. (See Hale Declaration, Exhibit 2). However, this Court's review of the contested documents reveals that they were created for the dominant purpose of preparing for litigation.

[34] Defendant Franciscan Friars contend that the following documents are protected from production and publication pursuant to the Free Exercise Clauses of the United States and California Constitutions: OFM JOHN 1: 0460-0462, 0464, 0494, OFM KRUM 1: 0280-0305, 0308-0310, 0313-0326, OFM VANH 1: 0805, 0813-0872, OFM PACH 1:0390-0447.

[35] Paragraph 15(A)(2)(f) of the Settlement Agreement provides that Defendant Franciscan Friars are entitled to withhold and/or redact certain documents from production based on the "First Amendment of the United States' Constitution and the religion clauses of the California Constitution with regard to formal documents reflecting a petition for laicization ONLY, and ONLY as to Gary Pacheco, Robert Van Handel, Dave Johnson and Gus Krum. Any other alleged assertion of the United States' Constitution First Amendment and/or California Constitution Religion Clauses will NOT be asserted by defendants."

process that addresses the circumstances under which an ordained priest may be released from his vows, and are thus undeniably religious in character even if some of the information contained in the files relates to the allegations of sexual abuse."[36] Defendant Franciscan Friars also argues that compelled release of the files would burden its constitutional rights.[37] Plaintiffs, on the other hand, argue the Free Exercise Clauses of the California and United States Constitutions and the Establishment Clause of the United States Constitution do not bar production and publication of the laicization files. Specifically, Plaintiffs contend Defendant Franciscan Friars is bound by the law of the Coordination Proceeding, Defendant Franciscan Friars agreed to production of the documents pursuant to the Civil Discovery Act, which is a law that is valid, neutral, and of general applicability, and the release of the files is justified by a compelling state interest (i.e. preventing childhood sexual abuse). Also, Plaintiffs argue the Civil Discovery Act has a secular purpose, does not have the principal effect of advancing or inhibiting religion, and does not result in any excessive entanglement with religion.

Free Exercise Clause of the United States Constitution

"'The Religion Clauses of the First Amendment provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people.'" ***Roman Catholic Archbishop of Los Angeles*** at 430 (citing ***Cutter v. Wilkinson*** (2005) 544 U.S. 709, 718). "The First Amendment 'safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of

---

[36] Defendant Franciscan Friars' Opening Brief 12:13-16.

[37] The Court notes that Defendant Franciscan Friars' Opening Brief only contains arguments pertaining to the Free Exercise Clauses of the United States and California Constitutions, not the Establishment Clause of the United States Constitution. However, Defendant Franciscan Friars raised objections to production of the laicization files based on the First Amendment of the United States Constitution and the religion clauses of the California Constitution. Therefore, this Court addressed each argument.

society.'" ***Roman Catholic Archbishop of Los Angeles*** at 430 (citing ***Cantwell v. Connecticut*** (1940) 310 U.S. 296, 303).

"In addressing the constitutional protection for free exercise of religion,... a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice...A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." ***Roman Catholic Archbishop of Los Angeles*** at 431 (citing ***Church of the Lukumi Babalu Aye, Inc. v. Hialeah*** (1993) 508 U.S. 520, 531-532).

California's Civil Discovery Act is a law that is valid, neutral, and of general applicability, therefore, Defendant Franciscan Friars cannot invoke the Free Exercise Clause to avoid production of the alleged perpetrators' laicization files.[38] By executing the Settlement Agreement, the parties agreed that California's Civil Discovery Act would determine whether certain documents would be produced by Defendant Franciscan Friars. Specifically, the Settlement Agreement provides that Defendant Franciscan Friars would produce certain documents that "have been or would have been subject to discovery obligations in the litigation of THE ACTIONS." (Settlement Agreement ¶15). Also, the Settlement Agreement provides that California law would govern interpretation of the Settlement Agreement, notwithstanding any conflicts of laws analysis. (Settlement Agreement ¶20).[39]

Free Exercise Clause of the California Constitution

The California Constitution provides, as follows: "Free exercise and enjoyment of religion without discrimination or preference are

[38] It should be noted that on July 26, 2006, Judge Fromholz also determined that the Civil Discovery Act is a valid and neutral law of general applicability and that invocation of the free exercise clause could not be used to escape compliance with the Act. (Plaintiffs' Omnibus Brief, Exhibit A). *See also* Judge Fromholz' September 25, 2008 ruling (Plaintiffs' Omnibus Brief, Exhibit B).

[39] Paragraph 20 of the Settlement Agreement provides, as follows: "The Settlement Agreement shall be interpreted in accordance with and governed in all respects by California law, notwithstanding any conflicts of law analysis. Any action at law, suit in equity or judicial proceeding for the enforcement of this Settlement Agreement or any provision shall be instituted in the courts of the State of California, County of Los Angeles."

guaranteed." ***North Coast Women's Care Medical Group, Inc. v. San Diego Superior Court*** (2008) 44 Cal.4th 1145, 1158. The appropriate standard of review for a challenge, under the California Constitution's guarantee of free exercise of religion, to a state law that is valid, neutral, and of general applicability, has not been determined. ***Id.*** Although the California Supreme Court declined to determine the appropriate test, it suggested three possibilities: (1) strict scrutiny; (2) the test outlined in ***Lukumi*** (discussed above); or (3) an intermediate standard. ***Id.*** at 1159-1160.

Under the strict scrutiny standard, "a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored. [Citations.] For these purposes, a law substantially burdens a religious belief if it 'conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denied such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." ***Catholic Charities of Sacramento, Inc. v. Superior Court*** (2004) 32 Cal.4th 527, 562.

Defendant Franciscan Friars cannot invoke the Free Exercise Clause of the California Constitution to avoid production of the alleged perpetrators' laicization files even if the strict scrutiny standard is applied. Even assuming, for the sake of argument, application of California's Civil Discovery Act substantially burdens a religious belief or practice, the law serves compelling state interests and is narrowly tailored to achieve those interests. Here, the parties agreed that California's Civil Discovery Act would essentially govern which documents Defendant Franciscan Friars would have to produce under the Settlement Agreement. As discussed previously, California's Civil Discovery Act is a law that is valid, neutral, and of general applicability. California's Civil Discovery Act serves several compelling state interests, including seeking the truth in court proceedings, "ensuring those injured by the actionable conduct of others receive full redress" of the injuries, and most importantly in this case, protecting children from sexual abuse.[40] ***Johnson v. Superior***

[40] See Judge Lichtman's June 18, 2007 ruling.

Court (2000) 80 Cal.App.4th 1050, 1071. Moreover, there are no less restrictive means readily available to achieve the state's interests.[41]

Establishment Clause of the United States Constitution

"The Establishment Clause provides that 'Congress shall make no law respecting the establishment of religion.' ***Roman Catholic Archbishop of Los Angeles*** at 434. The "Supreme Court established a three-part test for determining whether a statute violates the Establishment Clause: [f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." ***Id.*** (citing ***Lemon v. Kurtzman*** (1971) 403 U.S. 602, 612). "Although it is difficult to attach a precise meaning to the word 'entanglement,' courts have found an unconstitutional entanglement with religion in situations where a 'protected legal process pit[s] church and state as adversaries,' [citation], and where the Government is placed in a position of choosing among 'competing religious visions.' 'Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable" and some level of involvement between the two has always been tolerated. ***Roman Catholic Archbishop of Los Angeles*** at 434 (citing ***Agostini v. Felton*** (1997) 521 U.S. 203, 233). "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." ***Id.***

In ***Roman Catholic Archbishop of Los Angeles***, the Court of Appeal of California, Second Appellate District, Division Three, held that disclosure of documents subpoenaed by a grand jury, during an investigation of allegations that priests sexually assaulted children while they worked for Roman Catholic Archbishop of Los Angeles, was not barred by the Establishment Clause because "the primary effect of enforcing the subpoenas will not require the government either to interfere with the internal workings of the Archdiocese, or to choose between competing religious doctrines." ***Roman Catholic Archbishop of Los Angeles*** at 434. The Roman Court relied on

[41] *See also* ***Roman*** at 438 (concluding that a "grand jury's investigation into suspected child molestation serves a compelling state interest and is narrowly tailored to achieve that interest").

The Society of Jesus of New England v. Commonwealth (2004) 441 Mass. 662, "in which the Massachusetts Supreme Judicial Court rejected a claim that disclosure of a priest's subpoenaed personnel file, in connection with a criminal prosecution for sexual assault, would violate the establishment clause." ***Roman Catholic Archbishop of Los Angeles*** at 435.

The Supreme Judicial Court of Massachusetts explained that the Court must look at the law's "principal or primary effect," not at its incidental effects, with regard to the test of the effect on religion. ***The Society of Jesus of New England*** at 674. The Court determined that "the alleged inhibition on religion is not a principal or primary' effect of the subpoena, although it may, in a subtle way, provide some disincentive that would arguably discourage accused priests from being totally forthcoming with their superiors." ***Id.*** The Court also determined that enforcement of the subpoena would not "result in any excessive government entanglement with religion. The court can decide issues of relevance, burdensomeness, and the applicability of the asserted privileges without having to decide matters of religion or embroil itself in the internal workings of the Jesuits." ***Id.*** at 675. In fact, the Court noted that the "only form of 'entanglement' with religion at issue in the motions to quash is a form that Talbot and the Jesuits have themselves invited, namely, the court's consideration whether Talbot's communications qualify for protection under the priest-penitent privilege [citation]. Assessment of the applicability of that privilege does not lead to excessive government entanglement in religion." ***Id.***

Defendant Franciscan Friars cannot invoke the Establishment Clause of the United States Constitution to avoid production of the alleged perpetrators' laicization files. Enforcement of the Settlement Agreement, via the California Civil Discovery Act, does not result in any excessive entanglement with religion. The parties in this case have asked the Court to decide whether the asserted privileges have merit. "Assessment of the applicability" of a privilege "does not lead to excessive government entanglement in religion." ***Id.*** at 675. Moreover, the California Civil Discovery Act is secular in purpose and its "principal or primary effect" is not to inhibit a religion. ***Id.*** at 674.

Based on the foregoing, this Court overrules Defendant Franciscan Friar's objections, based on the Free Exercise Clauses of the United States and California Constitutions and the Establishment Clause of the United States Constitution, to the production and publication of the alleged perpetrators' laicization files. (*See* Exhibit "A").

5. Documents Protected by Third Party Privacy Rights[42]

Defendant Franciscan Friars argues that it has standing to assert privacy rights on behalf of Fr. Joseph Prochnow and Fr. Pedro Vasquez.[43] Specifically, Defendant Franciscan Friars contends that Fr. Joseph Porchnow and Fr. Pedro Vasquez are not considered alleged perpetrators under the Settlement Agreement. Plaintiffs, on the other hand, argue that Fr. Joseph Porchnow and Fr. Pedro Vasquez are considered alleged perpetrators under the Settlement Agreement, therefore, Defendant Franciscan Friars does not have standing to raise any privacy objections on their behalf. Moreover, any privacy rights are outweighed by disclosure for public safety reasons.

Pursuant to paragraph 15(A)(2)(c) of the Settlement Agreement,[44] Defendant Franciscan Friars has standing to assert privacy rights on behalf of Fr. Joseph Prochnow and Fr. Pedro Vasquez. The parties agree that Fr. Joseph Prochnow and Fr. Pedro Vasquez were not alleged to have abused any of the Plaintiffs in this

---

[42] Defendant Franciscan Friars contends that the names of Fr. Joseph Prochnow and Fr. Pedro Vasquez should be redacted, pursuant to privacy rights, from the following documents: OFM CABO 1: 0009, 0143, and thirty transcripts of depositions.

[43] Defendant Franciscan Friars contends that it has resolved third party privacy issues with respect to references to Fr. Virgil Cordano, Fr. Owen DaSilva, Fr. Xavier Harris, and Fr. Michael Harris. (Defendant Franciscan Friars' Opening Brief 15:5-6). Also, Defendant Franciscan Friars has withdrawn its redactions in the deposition of Armando Quiros concerning Fr. Cordano and Fr. Van Handel. (September 18, 2008 Letter from Defendant Franciscan Friars' Counsel).

[44] Paragraph 15(A)(2)(c) of the Settlement Agreement provides, as follows: "Third party privacy rights (i e , not belonging to an ALLEGED PERPETRATOR). The redaction by the Franciscan Friars on the basis of alleged third party privacy rights shall NOT include, however, the redaction of any information where the privacy right is outweighed by a public interest in disclosure based upon the fact that the information sought to be redacted: (1) Affects public safety issues relating to childhood sexual abuse; or, (2) Reflects the knowledge of the defendants as to the suspected sexual abuse of a child; or, (3) Reflects a 'cover up' of the suspected sexual abuse of a child."

settlement.[45] Therefore, Fr. Joseph Prochnow and Fr. Pedro Vasquez cannot be considered alleged perpetrators under the Settlement Agreement. Under the Settlement Agreement, an "alleged perpetrator" is defined as "any alleged perpetrator of childhood sexual abuse in" the actions. (Settlement Agreement ¶15(A)(1)(a). The actions include all claims arising in the coordinated litigation commonly referred to as the "Clergy Cases I" and "Clergy Cases III." (Settlement Agreement, Recitals B-C). Although Plaintiffs contend that they conducted discovery about the individuals for use in support of the claims for punitive damages, as well as, the claims of public nuisance and Business & Professions Code §17200, Fr. Porchnow and Fr. Pedro were not named as perpetrators of childhood sexual abuse against Plaintiffs' in the actions.

In this case, the privacy right of Fr. Joseph Prochnow is outweighed by a public interest in disclosure of information that affects public safety relating to childhood sexual abuse. (Settlement Agreement ¶15(A)(2)(c)). This Court has already determined that the State has a compelling interest in protecting children from sexual abuse.[46] In addition, it appears Fr. Prochnow admitted to having sexually abused a child.[47] Therefore, this Court overrules Defendant Franciscan Friars' objection on privacy grounds. Fr. Joseph Prochnow's name will not be redacted from any of the documents at issue. (*See* Exhibit "A").

However, the privacy right of Fr. Pedro Vasquez is not outweighed by a public interest in disclosure of information that affects public safety relating to childhood sexual abuse. There is no evidence to suggest that any claims of childhood sexual abuse have been made against Fr. Pedro Vasquez. Therefore, this Court sustains Defendant Franciscan Friars' objection on privacy grounds. Fr. Pedro Vasquez' name will be redacted from any of the documents at issue. (*See* Exhibit "A").

B. Alleged Perpetrators' Objections[48]

[45] Plaintiffs' Omnibus Brief 35:10-12; Defendant Franciscan Friars' Opening Brief 15:12-13.
[46] See this Court's prior ruling of June 18, 2007.
[47] Hale Declaration ¶6.
[48] Samuel Charles Cabot, Mario Cimmarusti, David Johnson, Gus Krumm, Robert Van Handel, and Gary Pacheco are the "alleged perpetrators" in this case. Although the alleged perpetrators asserted various objections to production of the contested documents, they failed to identify

On September 19, 2008, the alleged perpetrators filed a memorandum of points and authorities in support of objections to the disclosure of documents to Plaintiffs and public release of documents. The alleged perpetrators objected to the production and publication of documents on the grounds that paragraph 15 of the Settlement Agreement is void, illegal, and unenforceable. The alleged perpetrators also objected to the production and publication of documents on the grounds that the documents are protected by the psychotherapist-patient privilege, physician-patient privilege, attorney-client privilege and attorney work product doctrine, priest-penitent privilege, Free Exercise Clauses of the United States and California Constitutions, privacy rights, and Civil Code §985.

On November 17, 2008, Plaintiffs filed an omnibus brief in response to various objections to the production and publication of the documents at issue. Plaintiffs contend that the objections should be overruled and the documents must be produced pursuant to the Settlement Agreement.

1. Paragraph 15 of the Settlement Agreement[49]

The alleged perpetrators argue that paragraph 15 of the Settlement Agreement is void, internally inconsistent, illegal, and unenforceable. Plaintiffs, on the other hand, argue that paragraph 15 is not internally inconsistent and must be enforced.

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

---

which objections applied to each contested document. Therefore, in the interests of justice, this Court applied all of the alleged perpetrators' objections to each of the contested documents, with exception of the priest-penitent privilege. According to the alleged perpetrators, the only communications at issue, with regard to the priest-penitent privilege, are the laicization files. Alleged Perpetrators' Brief 15:6-9.

[49] Mario Cimmarusti and Robert Van Handel have standing to raise arguments regarding the enforceability of paragraph 15 of the Settlement Agreement. Both of the alleged perpetrators are named Defendants in the actions and both signed the Settlement Agreement.

reasonably calculated to lead to the discovery of admissible evidence..." [Emphasis added.]

This Court finds that paragraph 15 of the Settlement Agreement is valid and enforceable. Although the alleged perpetrators contend that paragraph 15 of the Settlement Agreement is inconsistent and unenforceable because the standards of the Civil Discovery Act cannot apply to the release of a person's private and privileged records when there is no pending action, they failed to cite to any 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.

In fact, the case cited by the alleged perpetrators, in support of the proposition that discovery cannot be conducted if there is no case pending, is distinguishable from the instant case. ***Department of Fair Employment & Housing v. Superior Court*** (1990) 225 Cal.App.3d 728. In ***Department of Fair Employment & Housing***, 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 were served *after* the DFEH's motion for summary judgment was granted and judgment was entered. ***Id.*** at 731. No appeal was taken from the judgment, which became final. ***Id.*** The Court of Appeal of California, Second Appellate District, Division Three, denied the petition. The Court held 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 ***Department of Fair Employment & Housing*** Court 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 seek enforcement of its terms by way of judicial intervention. As such, the case is still technically "pending" for purposes of the Civil Discovery Act. Moreover, this Court notes, once again, that the settlement agreements and dismissals of the actions do not end the Court's inquiry. Courts are permitted to make findings of fact under a Section 664.6 reservation. *See* ***Hernandez v. Board of Education*** (2004) 126 Cal.App.4^{lh} 1161, 1176 and ***Malouf Bros. v. Dixon*** (1991) 230 Cal.App.3d 280.[50]

In addition, paragraph 15 of the Settlement Agreement is consistent with the Civil Discovery Act. Although the alleged perpetrators contend that the Settlement Agreement improperly provides for disclosure of their records to Plaintiffs and the court prior to notice or a hearing, the disclosure mechanism of the Settlement Agreement is proper. First, the Settlement Agreement only provides for the production of documents that "have been or would have been subject to discovery obligations in the litigation" of the actions. (Settlement Agreement ¶15). Second, the Settlement Agreement preserves the alleged perpetrators' rights to assert any lawful objections to the production and publication of the documents at issue. Specifically, the Settlement Agreement 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

[50] *See* Judge Lichtman's June 18, 2007 ruling.

parties may assert any objections supported by law."[51] (Settlement Agreement ¶15(A)(9)). Third, the parties to the Settlement Agreement agreed that any redacted or withheld documents would not be released to the public or provided to third parties unless authorized by the Court. (Settlement Agreement ¶15(A)(7)).[52] Finally, the Settlement Agreement provides for disclosure to protect the rights of third parties, as well as, an opportunity for the alleged perpetrators to be heard by the Court. (Settlement Agreement ¶¶15(A)(6)[53] & 15(A)(7)).[54]

Accordingly, this Court finds that the alleged perpetrators' rights have been preserved by the Settlement Agreement, as well as, by this Court. The alleged perpetrators have been given sufficient notice and an opportunity to be heard on all lawfully posed objections to the production and publication of the contested documents in this case. This Court also finds that the alleged perpetrators failed to establish that this Court does not have the authority or jurisdiction to apply the Civil Discovery Act to enforce the terms of the Settlement Agreement.

---

[51] Although the alleged perpetrators argue that there is no authority to support "the disclosure of one person's private and privileged records to salve the feelings of another," they have been given ample opportunity to assert objections to the production and publication of the contested documents. (Alleged Perpetrator's Brief 6:12-17).

[52] The Supreme Court of California, in ***Valley Bank of Nevada v. Superior Court*** (1975) 15 Cal.3d 652, 658, held that "before confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered." This Court notes that a majority, if not all, of the documents at issue in this case do not appear to have been produced to Plaintiff or any third party. Instead, the contested documents were submitted to this Court with a privilege log for *in camera* review.

[53] Paragraph 15(A)(6) of the Settlement Agreement provides, as follows: "Upon such submission to Judge Lichtman or such other designated Hearing Officer, the Franciscan Friars may, within fifteen days thereafter, provide appropriate notice of the potential release of such documents to any ALLEGED PERPETRATOR and/or any affected third parties, including but not limited to any member of the Franciscan Friars. Any third party may submit his or her objection(s) to the Hearing Officer, and shall have thirty days to do so."

[54] Paragraph 15(A)(7) of the Settlement Agreement provides, as follows: "Judge Lichtman or such other designated hearing officer shall thereafter hold a hearing, not earlier than fifty days after the submission of the DOCUMENTS to determine:

a. Which redactions and/or withholdings shall be allowed;
b. Which redactions and/or withholdings shall be disallowed;
c. Whether any third party objection(s) shall be allowed or disallowed,

and shall thereafter issue an order authorizing the release to the public of all appropriate redacted and/or un-redacted DOCUMENTS. By this Settlement Agreement, Plaintiffs and their counsel agree that redacted or withheld DOCUMENTS will not be released to the public or provided to third parties unless authorized by order of the Hearing Officer, or prior binding order of the Court."

(*See* Exhibit "B").

2. Documents Protected by the Psychotherapist-Patient Privilege & Physician-Patient Privilege

The alleged perpetrators argue that the documents in question are protected from production and publication pursuant to the psychotherapist-patient privilege and physician-patient privilege because the documents were "generated as a result of" the confidential relationships and Plaintiffs "cannot rebut the presumption that communications arising from these relationships were privileged."[55] The alleged perpetrators also contend that the privileges were not waived, none of the statutory exceptions under the Evidence Code apply, and "the policy goals of the psychotherapist-patient privilege would not be well served by the post-litigation public release of the privileged records of these non-parties."[56] Plaintiffs, on the other hand, argue that disclosure of the communications was not reasonably necessary to accomplish the purpose for which the psychotherapists/physicians were consulted and/or the alleged perpetrators waived the privileges.

California Evidence Code §1012 defines "confidential communication between a patient and psychotherapist" as follows: "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 parties other than those who are present to further the interest of the patient in the consultation, or 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,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Emphasis added.)[57]

As discussed previously, disclosure "in confidence by a physician, with or without the consent of the patient, of

---

[55] Alleged Perpetrators' Brief 7:18-20.
[56] Alleged Perpetrators' Brief 7:20-22.
[57] A confidential communication between a patient and a physician is defined in Evidence Code §992.

communications protected by the physician-patient privilege to a third person to whom disclosure is reasonably necessary for the accomplishment of the purpose for which the physician is consulted confers upon the third person the right to claim the physician-patient privilege on behalf of the patient. In other words, that third person thereby becomes 'a person who is authorized to claim the privilege by the holder of the privilege' within the meaning of section 994." ***Rudnick v. Superior Court of Kern County*** (1974) 11 Cal.3d 924, 932.[58]

"However, if disclosure of the communications is not reasonably necessary to accomplish such purpose, two different situations ensue. First, if the patient expressly or impliedly consents to such disclosure, he thereby waives the privilege and the communications are subject to discovery. (§ 912, subd. (a).) If the patient does not consent by word or deed to such disclosure, then conversely he has not waived the privilege. Thus if the patient is a party to the court proceeding he may claim the privilege to prevent disclosure in court by such third person of the confidential communications between patient and physician disclosed by the physician without the patient's consent. If the patient is not a party to the court proceedings, the appropriate court, in its discretion and on its own motion, may protect an absentee holder of the privilege who has not waived it." ***Id.***

California Evidence Code §912(a) provides, as follows: "Except as otherwise provided in this section, the right of any person to claim a privilege provided by" Sections 994 (physician-patient privilege) and 1014 (psychotherapist-patient privilege) "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in

[58] The physician-patient privilege is analogous to the psychotherapist-patient privilege *See* **Roman Catholic Archbishop of Los Angeles v. Superior** Court (2005) 131 Cal.App.4th 417, 453. The physician-patient privilege (California Evidence Code §§ 992 & 994) mirrors the psychotherapist-patient privilege (California Evidence Code §§1012 & 1014).

which the holder has the legal standing and opportunity to claim the privilege."[59]

As already discussed in detail, the "purpose" for which a psychotherapist is consulted, under California Evidence Code §1012, consists of diagnosis and treatment. ***Roman Catholic Archbishop of Los Angeles v. Superior Court*** (2005) 131 Cal.App.4th 417, 449. For most of the documents at issue in this case, this Court has already determined that disclosure to Defendant Franciscan Friars was not reasonably necessary to accomplish treatment and diagnosis of the alleged perpetrators. (*See* Section (A)(2)). There is no evidence to suggest that Defendant Franciscan Friars was rendering psychotherapy to the alleged perpetrators or was being supervised by the treating psychotherapists. Instead, the alleged perpetrators merely argue that evidence "can be provided to show that this disclosure does not constitute a waiver of the psychotherapist-patient privilege because it was necessary to further the interest of the patients in the consultation, for transmission of information between the therapists and the patients, and reasonably necessary to accomplish the purpose for which the psychotherapists were consulted."[60] However, no such evidence has been provided to this Court.

Moreover, there is evidence to suggest that the alleged perpetrators waived the privilege by attending the therapy treatments knowing that the information provided during the course of the therapy sessions would be shared with members of Defendant Franciscan Friars. In this regard, Plaintiffs provided a copy of the "Operating Policies and Procedures in the St. Barbara Province for Friar Conduct." (Hale Declaration, Exhibit 2). The Operating Policies advised of "what would happen in the event they [the friars] were accused of" child sexual abuse and clearly indicated that information relating to the alleged perpetrators' treatment and diagnosis would be disclosed to other members of Defendant Franciscan Friars.[61]

---

[59] However, disclosure in confidence of a communication that is protected by the psychotherapist-patient privilege or physician-patient privilege, "when disclosure is reasonably necessary for the accomplishment of the purpose" for which the psychotherapist or physician were "consulted, is not a waiver of the privilege." Evidence Code §912(d).

[60] Alleged Perpetrators' Brief 9:3-8.

[61] Plaintiffs' Omnibus Brief 9:9-23.

Specifically, the Operating Policies provide that a "team," consisting of the provincial minister and two friars knowledgeable about the province, would "operate" when dealing with accusations of child sexual abuse. (Hale Declaration, Exhibit 2, Operating Policies, I). The team was responsible for, among other things, arranging "for appropriate psychological evaluation." (Operating Policies, II(5)). Moreover, the "recommendations of the evaluation" were to be followed "regarding treatment, limitations on ministry, and other considerations of the friar." (Operating Policies, II(5)). Also, the "provincial minister and the team he" appointed were responsible for supervising "long term care" and following-up "programs resulting from evaluations and treatment." (Operating Policies, II(10)). In addition, the team was charged with seeing to it that "appropriate superiors and supervisors" were "informed on the basis of 'need to know.'" (Operating Policies, II(10)). These polices were to be promulgated to all the friars of the province." (Operating Policies, II(11)).[62]

Based on the foregoing, this Court rules on the alleged perpetrators' objections to the production and publication of the documents at issue, based on the psychotherapist-patient privilege and physician-patient privilege, as outlined in Exhibit "B."

3. Documents Protected by the Attorney-Client Privilege & Attorney Work Product Doctrine[63]

The alleged perpetrators argue that the documents at issue are protected from production and publication pursuant to the attorney-client privilege and attorney work product doctrine. The alleged perpetrators argue that disclosure of the documents was reasonably necessary for accomplishment of the purpose for which the lawyer was consulted and the common interest doctrine applies. Plaintiffs, on the other hand, argue that the attorney-client privilege and attorney work product doctrine do not bar production and publication of the documents at issue. According to Plaintiffs, the documents are

[62] This Court also notes that contested documents indicate that alleged perpetrator Cimmarusti authorized release of his confidential information despite the fact that he felt it was a violation of Cannon Law. OFM CIMM 1:420-470.

[63] The alleged perpetrators also argue that the documents are protected from production and publication pursuant to Evidence Codes §§1152 (settlement offers) and 1115-1128 (mediation privilege). Alleged Perpetrators' Brief 14:15-17.

not privileged because they were not created for the dominant purpose of preparing for litigation, they were not authored or received by an attorney, and/or they are evidentiary in nature. Also, Plaintiffs contend that the privilege was waived as to some of the documents.

California Evidence Code §954 provides, in pertinent part, as follows: "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) The holder of the privilege[64]..."

California Evidence Code §952 defines "confidential communications between a client and lawyer" as follows: "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

California Evidence Code §912(a) provides, as follows: "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege)...is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

---

[64] California Evidence Code §953 defines "holder of the privilege" as follows: "(a) The client when he has no guardian or conservator. (b) A guardian or conservator of the client when the client has a guardian or conservator. (c) The personal representative of the client if the client is dead. (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence."

However, disclosure in confidence of a communication that is protected by the attorney-client privilege, "when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer...was consulted, is not a waiver of the privilege." Evidence Code §912(d).

As discussed previously in Section (A)(3), the joint defense/common interest doctrine will play a role in this determination because its application will also involve a determination as to whether disclosure was "reasonably necessary," (i.e. whether there was a waiver of the privilege).[65] The joint defense/common interest doctrine is not a privilege separate and apart from the attorney-client privilege and attorney work product doctrine. ***OXY Resources California, LLC v. Superior Court*** (2004) 115 Cal.App.4th 874, 889. Also, the joint defense/common interest doctrine is not an extension of the attorney-client privilege. ***Id.*** Instead, the joint defense/common interest doctrine is a "nonwaiver" doctrine, which is "analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine." ***Id.***

A "party seeking to rely on the common interest doctrine does not satisfy its burden to justify a claim of privilege simply by demonstrating that a confidential communication took place between parties who purportedly share a common interest. Rather, the party seeking to invoke the doctrine must first establish that the communicated information would otherwise be protected from disclosure by a claim of privilege...The next step in the analysis is to determine whether disclosing the information to a party outside the attorney-client relationship waived any applicable privilege." ***Id.*** at 890. *See also* California Evidence Code §§912 and 954.[66] For "the common interest doctrine to attach, most courts seem to insist that

---

[65]As noted earlier, for the purpose of this analysis, the Court assumes the alleged perpetrators and Defendant Franciscan Friars share a common interest.

[66] "There is no statutory provision governing waiver of work product protection. [Citations.] However, California courts have recognized that the waiver doctrine is applicable to the work product rule as well as the attorney-client privilege. [Citation.] The work product protection may be waived 'by the attorney's disclosure or consent to disclosure to a person, other than the client, who has no interest in maintaining confidentiality...of a significant part of the work product.' [Citations.] Thus, work product protection 'is not waived except by disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation.'" ***OXY Resources California, LLC*** at 891.

the two parties have in common an interest in securing legal advice related to the same matter – and that the communications be made to advance their shared interest in securing legal advise on a common matter." ***OXY Resources California, LLC*** at 890.

As noted earlier in Section (A)(3), documents that were not created for the dominant purpose of preparing for litigation are not privileged.[67] Also, documents that were not authored or received by an attorney are not protected by the privilege.

Like Defendant Franciscan Friars, the alleged perpetrators established that disclosure of certain documents and/or information was reasonably necessary for the accomplishment of the purpose for which the attorneys were consulted, i.e. preparing a defense against civil and criminal charges of sexual abuse. In addition, the alleged perpetrators properly asserted the joint defense/common interest doctrine for most documents. As discussed previously, Defendant Franciscan Friars and the alleged perpetrators share a common interest in defending against the claims of sexual abuse. Also, a majority of the documents at issue would otherwise have been protected from disclosure by a claim of privilege (attorney-client and attorney work product). Moreover, this Court has already determined that most of the documents were intended to be confidential and were geared toward advancement of the common interest.

Based on the foregoing, this Court rules on the alleged perpetrators' objections to the production and publication of the documents at issue, based on the attorney-client privilege and attorney work product doctrine, as outlined in Exhibit "B."

4. Documents Protected by the Clergy-Penitent Privilege[68]

[67] As noted previously, Plaintiffs contend that the documents at issue were not created for the dominant purpose of preparing for litigation. Plaintiffs rely on Defendant Franciscan Friars' policies and procedures to support this argument. (See Hale Declaration, Exhibit 2). However, this Court's review of the contested documents reveals that they were created for the dominant purpose of preparing for litigation.

[68] Again, the alleged perpetrators only contend that the laicization files are protected from publication and production pursuant to the priest-penitent privilege.

The alleged perpetrators argue that the laicization files[69] are protected from production and publication pursuant to the clergy-penitent privilege. The alleged perpetrators contend that the laicization records are their personal and confidential communications to God, via the Pope, and any disclosure to third parties was necessary to make the penitential communication. Plaintiffs, on the other hand, contend that the clergy-penitent privilege does not bar production and publication of the alleged perpetrators' laicization files. According to Plaintiffs, "the law of the coordination is settled that the contents of laicization files are discoverable absent a showing of penitential communications."[70] Plaintiffs argue that the alleged perpetrators made absolutely no showing that the laicization files are penitential communications to God, via the Pope.

California Evidence Code §1033 provides, as follows: "Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege."

California Evidence Code §1032 defines a penitential communication as "a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret."

"In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: 1) *it must be intended to be in confidence*; 2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and 3) such member of the clergy *has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret.*" ***Roman Catholic***

---

[69] OFM JOHN 1: 0460-0462, 0464, 0494, OFM KRUM 1: 0280-0305, 0308-0310, 0313-0326, OFM VANH 1: 0805, 0813-0872, OFM PACH 1:0390-0447.

[70] Plaintiffs' Omnibus Brief 44:4-7. *See also* Judge Haley J. Fromholz' 9/25/08 order.

Archbishop of Los Angeles at 443-444 (citing ***People v. Edwards*** (1988) 203 Cal.App.3d 1358, 1362-1363).[71]

The alleged perpetrators have the "initial burden of proving the *preliminary facts* to show the" clergy-penitent privilege applies. ***Roman Catholic Archbishop of Los Angeles*** at 442 (citing ***Story v. Superior Court*** (2003) 109 Cal.App.4th 1007, 1014). If the alleged perpetrators meet this burden, "*the burden of proof shifts to the opponent of the privilege.* To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).][72]... Alternatively, the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912... ***Roman Catholic Archbishop of Los Angeles*** at 442 (citing ***Story*** at 1014).

This Court finds that the alleged perpetrators failed to establish the preliminary facts to show that the clergy-penitent privilege applies to the laicization files. In order to establish the preliminary facts, the alleged perpetrators must show the existence of a clergy-penitent relationship, i.e. that the person consulted was a member of the clergy under California Evidence Code §1030 and the claimant of the privilege was a penitent within the meaning of California Evidence Code §1031. *See* ***Story v. Superior Court*** (2003) 109 Cal.App.4th 1007, 1014 (preliminary facts show the existence of a psychotherapist-patient relationship, i.e. that the person claimant consulted was a psychotherapist under Evidence Code §1010 and the claimant was a patient under Evidence Code §1011).

---

[71] The privilege, however, can be waived. California Evidence Code §912(a) provides, as follows. "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section...1033 (privilege of penitent)...is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

[72] California Evidence Code §917(a) provides, as follows: "If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor-victim relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

In this case, the alleged perpetrators failed to establish that they are penitents within the meaning of California Evidence Code §1031. A "penitent" is a "person who has made a *penitential communication* to a member of the clergy." California Evidence Code §1031. [Emphasis added.] The alleged perpetrators have failed to establish that the laicization files consist of their penitential communications. Instead, the alleged perpetrators merely assert, without proof, that the laicization files are their confidential and "penitential communications to God, via the Pope."[73] There is no attempt to explain how the laicization files qualify as penitential communications. The laicization files consist of communications regarding the alleged perpetrators' requests for dispensation from their religious vows to the church. However, the alleged perpetrators failed to show that the communications were made in confidence and the members of the clergy, to whom the communications were made, had a duty under the discipline or tenets of the church to keep the communications secret. In fact, a reading of the documents themselves[74] establish that the process of laicization requires participation by several members of the church who did not, in fact, have a duty to keep the communications a secret.[75]

Based on the foregoing, this Court overrules the alleged perpetrators' objection, based on the clergy-penitent privilege, to the production and publication of the alleged perpetrators' laicization files. (*See* Exhibit "B").

5. Documents Protected by the Free Exercise Clauses of the United States and California Constitutions

[73] Alleged Perpetrators Brief 15:5-9. The alleged perpetrators also contend that any disclosure to third parties "was necessary to do so in order to make the penitential communication." Alleged Perpetrators' Brief 15:7-9.

[74] The laicization files include letters of petition for dispensation, depositions/statements of witnesses, summaries, and even psychological reports.

[75] *See* ***Roman Catholic Archbishop of Los Angeles*** at 445 ("sharing of information violates Evidence Code section 1032's requirement that the penitent's communication be 'made in confidence, in the presence of no third person so far as the penitent is aware,' to a cleric who is obligated 'to keep those communications secret'").

The alleged perpetrators argue that their laicization files[76] "implicate" the Free Exercise Clauses of the United States and California Constitutions. However, this Court has already determined, in Section (A)(4), that the Free Exercise Clauses of the United States and California Constitutions, as well as, the Establishment Clause of the United States Constitution, cannot be invoked to prevent production and publication of the laicization files. Therefore, the alleged perpetrators' objections, on these grounds, are overruled. (*See* Exhibit "B").

6. Documents Protected by the Constitutional Right to Privacy

The alleged perpetrators argue that the contested documents are protected from production and publication based on the right to privacy guaranteed by the California Constitution. The alleged perpetrators contend the "Civil Discovery Act limits discovery of private records, such as personnel files, medical and psychological records, and other categories of recognized confidential records..."[77] However, this Court has already determined that the alleged perpetrators' rights to privacy are outweighed by the State's compelling interest in protecting its children from sexual abuse.[78] Therefore, the alleged perpetrators' objection, on this ground, is overruled. (*See* Exhibit "B").

---

[76] OFM JOHN 1: 0460-0462, 0464, 0494, OFM KRUM 1: 0280-0305, 0308-0310, 0313-0326, OFM VANH 1: 0805, 0813-0872, OFM PACH 1:0390-0447.

[77] Alleged Perpetrators' Brief 15:18-21.

[78] "There is no dispute, based on the record before it, and in accord with the balancing test required by law that a compelling state interest mandates a production of the documents in question and that discovery of these documents would have been ordered. The rights of privacy must give way to the State's interest in protecting its children from sexual abuse. The Friars, Franklyn Becker and counsel for the individual priests cannot refute the fact that if the instant actions were still ongoing the materials subject to the dispute would have been produced in discovery if the only objection was right of privacy. For individual defense counsel, counsel for the Archdiocese of Milwaukee or for any Diocese or Archdiocese for that matter to argue that the right of privacy trumps a state's interest in protecting its children from sexual abuse must ring hollow and has no support in the law. Accordingly, this Court hereby overrules all objections interposed on behalf of the priests listed or named above wherein rights of privacy have been asserted..." (Judge Peter D. Lichtman's 6/18/07 Order, pgs. 21-22).

This Court's Minute Order of 2/10/09 also acknowledges that the alleged perpetrators previously asserted privacy rights which were addressed in the Court's 6/18/07 ruling.

7. Documents Protected By California Civil Code §985

The alleged perpetrators argue that the contested documents are protected from production and publication pursuant to California Civil Code §985. Plaintiffs, on the other hand, argue that California Civil Code §985 was preempted by the Federal Copyright Law of 1976, the alleged perpetrators are not the owners of the copyrights, and allowing the alleged perpetrators to assert this right would be destructive for all civil discovery and dangerous to the public.

California Civil Code §985 provides, as follows: "PRIVATE WRITINGS. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law. *(Enacted 1872).*"

"A review of the pertinent sections of the Civil Code, 980 through 985, describes the rights and liabilities in what is generally referred to as 'common-law copyright. [Citation.] ... We learn that the author or proprietor of a composition in letters owns exclusively the representation or expression of composition (Civ. Code, § 980); that such owner may transfer his ownership (Civ. Code, § 982); that if the owner publishes the composition, it may be used by any person, and that letters and private communications belong to the person to whom they are addressed but may not be published without the author's consent (Civ. Code, § 985)." ***Carpenter Foundation v. Oakes*** (1972) 26 Cal.App.3d 784, 793.

Although the alleged perpetrators contend that California Civil Code §985 applies, this Court finds that California's common-law copyright was preempted by the Federal Copyright Law of 1976. The Federal Copyright Law of 1976 provides, in pertinent part, as follows: "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or after that date and whether published or unpublished, are *governed exclusively by this title. Thereafter, no person is entitled to any such*

right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. §301(a).[79] [Emphasis added.]

By passing the 1976 law, Congress intended to abolish the "dual system of common-law copyright for unpublished works and statutory copyright for published works, and to adopt a single system of federal statutory copyright from 'creation,' that is, from the time a

---

[79] 17 U.S.C. §301 provides, as follows:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to–
(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], including works of authorship not fixed in any tangible medium of expression; or
(2) any cause of action arising from undertakings commenced before January 1, 1978;
(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106]; or
(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8) [17 USCS § 102(a)(8)].
(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303 [17 USCS § 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.
(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.
(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.
(f) (1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990 [17 USCS § 106A note], all legal or equitable rights that are equivalent to any of the rights conferred by section 106A [17 USCS § 106A] with respect to works of visual art to which the rights conferred by section 106A [17 USCS § 106A] apply are governed exclusively by section 106A [17 USCS § 106A] and section 113(d) [17 USCS § 113(d)] and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.
(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to–
(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990 [17 USCS § 106A note];
(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A [17 USCS § 106A] with respect to works of visual art; or
(C) activities violating legal or equitable rights which extend beyond the life of the author.

work is 'fixed' in a copy or phono record for the first time." ***Klekas v. EMI Films, Inc.*** (1984) 150 Cal.App.3d 1102, 1109.[80] "Prior to 1978, unpublished letters, like other unpublished works, were protected by common law copyright, but the 1976 Copyright Act preempted the common law of copyright, 17 U.S.C. § 301(a), and brought unpublished works under the protection of federal copyright law, which includes the right of first publication among the rights accorded to the copyright owner..." ***Salinger v. Random House, Inc.*** (2nd Cir. 1987) 811 F.2d 90, 95.

Even assuming the contested documents fall under the protection of the Federal Copyright Law of 1976, which this Court seriously questions, the alleged perpetrators, as employees, are not the owners of the copyrights. The Federal Copyright Law of 1976 provides, as follows: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. §201(b). The definition of a "work made for hire" includes "a work prepared by an employee in the scope of his or her employment." 17 U.S.C. §101.

This Court finds that the contested documents were created in the course and scope of the alleged perpetrators' employment with Defendant Franciscan Friars. Whether the alleged perpetrators were working in the course and scope of their employment when the contested documents were written is ordinarily a question of fact for a jury,[81] however, courts are permitted to make findings of fact under a Section 664.6 reservation. *See* ***Hernandez v. Board of Education*** (2004) 126 Cal.App.4th 1161, 1176. In this case, there is ample

---

[80] ***In Klekas v. EMI Films, Inc.*** (1984) 150 Cal.App.3d 1102,1109, the Court of Appeal of California, Second Appellate District, Division Two, noted that enactment "of this new law, however, did not affect any rights a plaintiff may have had based on a theory of common law copyright if the cause of action arose 'from *undertakings commenced* before January 1, 1978.' [Citation.] The difficult question is what is meant by the phrase 'undertakings commenced before January 1, 1978.'" However, the Court held that the "date when plaintiff created or began creation of the work which was allegedly subsequently plagiarized by the defendant is of no legal significance. What is dispositive, however, is the date the alleged plagiarism occurred." ***Id.*** at 1110.

[81] ***Mary M. v. City of Los Angeles*** (1991) 54 Cal.3d 202, 221 ("The question of scope of employment is ordinarily one of fact for the jury to determine.").

uncontested evidence that the employer, Defendant Franciscan Friars, implemented policies and procedures, including the creation of a team, to deal with accusations of child sexual abuse made against its friars. (Hale Declaration, Exhibit 2). This team was charged with, among other things, supervising follow-up programs resulting from the alleged perpetrators' psychological evaluations, keeping superiors and supervisors informed on a need to know basis, and determining whether reassignment was appropriate.[82] The contested documents clearly pertain to the alleged perpetrators' treatment, child sexual abuse, placement, self-reporting, and laicization, all of which were generated as the result of Defendant Franciscan Friars' above-mentioned policies and the alleged perpetrators' employment.

This Court also notes that even if California Civil Code §985 was not preempted by the Federal Copyright Law of 1976, the alleged perpetrators' objection would fail for two reasons. First, as discussed above, this Court finds that the alleged perpetrators are not owners of the copyrights because the contested documents were created within the course and scope of their employment with Defendant Franciscan Friars. Second, compelled disclosure would not deprive the alleged perpetrators' of any property rights. California common-law copyright "confers on the owner of an intellectual production the exclusive right to make first publication of it, that is, the right to copy it in the first instance..." ***Carpenter*** at 794. "Destruction of a 'common-law copyright' in California is accomplished only by 'publication of the composition by the owner thereof.' [Citation] This implies voluntary publication." ***United States v. Certain Parcels of Land*** (1953) 15 F.R.D. 224, 234. Here, the parties have asked this Court to enforce the terms of the Settlement Agreement. To do so, this Court must rule on all objections and order Defendant Franciscan Friars to produce certain documents. "Since publication pursuant to order of court cannot be said to constitute voluntary publication by the

---

[82] According to the Operating Policies, the team was charged with taking steps to protect the possible victims, appropriately report any abuse, ascertain whether there are any other victims, determine how to address the problem, arrange for appropriate psychological evaluations of the perpetrators, follow recommendations regarding treatment, limitations on ministry, and other considerations of the friar, recommend whether reassignment is appropriate, consult with legal counsel, notify the insurance company, keep knowledge of the accusations on a need to know basis (i.e. the provincial council, the superior, the formation director, or the person responsible the ministries in the situation), and supervise long term care and follow-up programs resulting from evaluations and treatment. (Hale Declaration, Exhibit 2).

owner within the meaning of §983(a) of the California Civil Code, such an order could not have the effect of depriving" the alleged perpetrators "of any property right they may...have under California law." ***Id.*** at 234-235.

Based on the foregoing, this Court overrules the alleged perpetrators' objections, pursuant to the Federal Copyright Law of 1976 and California Civil Code §985, to the production and publication of the contested documents. (*See* Exhibit "B").

C. Bystanders' Objections[83]

On September 18, 2008, the bystanders filed a memorandum of points and authorities in support of objections to disclosure and publication of documents to Plaintiffs. The bystanders objected to the production and publication of documents on the grounds that the documents are protected by Civil Code §985 and the bystanders' rights to privacy.[84]

On November 17, 2008, Plaintiffs filed an omnibus brief in response to various objections to the production and publication of the documents at issue. Plaintiffs contend that the objections should be overruled and the documents must be produced pursuant to the Settlement Agreement.

1. California Civil Code §985

The bystanders argue that the contested documents are protected from production and publication pursuant to California Civil Code §985, Civil Code §985 was not preempted by the Federal Copyright Law of 1976, whether the bystanders created the contested

---

[83] The "bystanders" are the non-parties, including Joseph Chinnici, Michel Gagnon, Steve Kain, Alan McCoy, Pedro Vasquez, Finian McGinn, Eugene Burnett, Louis Vitale, Kevin Dunne, Ray Bucher, and Mel Bucher.

[84] The bystanders indicate that they have objected to 413 documents. "Of these 413 objections, 384 are to 1-page documents, 47 are to 2-page letters, and 2 are to 3-page letters." Bystanders' Brief 2:13-14. The bystanders also reference a "chart" showing the objections. However, this Court notes that the bystanders failed to attach such a chart to their brief. Therefore, in the interests of justice, each objection made by the bystanders will be applied to each contested document.

documents within the course and scope of their employment is a question of fact, and even if Civil Code §985 is preempted, federal law enjoins the publication of private letters. Plaintiffs, on the other hand, argue that California Civil Code §985 was preempted by the Federal Copyright Law of 1976, the bystanders are not the owners of the copyrights, and allowing the bystanders to assert this right would be destructive for all civil discovery and dangerous to the public.

As discussed in Section (B)(7) above, this Court has already determined that California Civil Code §985, part of California's common-law copyright, was preempted by the Federal Copyright Law. Therefore, the bystanders' objection fails.

Again, even assuming the contested documents fall under the protection of the Federal Copyright Law of 1976, which this Court seriously questions, the bystanders, as employees, are not the owners of the copyrights. As with the alleged perpetrators, this Court finds that the bystanders created the contested documents within the course and scope of their employment with Defendant Franciscan Friars. As discussed above, the contested documents clearly pertain to the alleged perpetrators' treatment, child sexual abuse, placement, and laicization, all of which were generated as the result of Defendant Franciscan Friars' above-mentioned policies and the bystanders' employment.

This Court is not persuaded by the bystanders' argument that it is a "huge leap of reasoning to suggest that each and every letter was written 'in the course and scope of employment' simply because it was placed in a file kept by the employer."[85] Such an argument is disingenuous at best and belied by Defendant Franciscan Friars' policies and procedures, as well as, the nature of the contested documents. Clearly, Defendant Franciscan Friars created a team to investigate claims of child sexual abuse, determine whether reassignment was necessary or whether any restrictions should be imposed, and keep superiors and supervisors informed on a need to know basis. The contested documents were created pursuant to Defendant Franciscan Friars' policy. As such, the documents were

[85] Bystanders' Brief 6:11-13.

created in the course and scope of the bystanders' employment with Defendant Franciscan Friars.

Also, as discussed above in Section (B)(7), this Court has already determined that even if Civil Code §985 was not preempted by the Federal Copyright Law of 1976, the bystanders' objection would fail for two reasons. First, the Court finds that the bystanders are not the owners of the copyrights because the contested documents were created within the course and scope of their employment with Defendant Franciscan Friars. Second, compelled disclosure would not deprive the bystanders of any property rights.

Based on the foregoing, this Court overrules the bystanders' objections, pursuant to the Federal Copyright Law of 1976 and California Civil Code §985, to the production and publication of the contested documents. (*See* Exhibit "C").

2. Documents Protected by the Constitutional Right to Privacy

The bystanders contend that their constitutional right to privacy prevents production and publication of documents that contain their personal information, including social security numbers, home addresses, and information about their personal medical conditions. Also, any information the bystanders may have supplied in confidence to their employers, such as evaluation reports, are protected by the constitutional right to privacy. Plaintiffs, on the other hand, contend that the bystanders were involved in the cover-up and concealment of child sexual abuse, the bystanders have a reduced expectation of privacy, disclosure of documents that contain some limited information pertaining to the bystanders would not be a serious invasion of privacy, and any invasion of privacy would be greatly outweighed by the State's compelling interest in protecting children from sexual abuse.

As a preliminary matter, this Court notes that Plaintiffs do not object to redaction of the bystanders' social security numbers, home

addresses, and medical conditions.[86] As such, this Court rules that any such information should be redacted from the contested documents as requested by the bystanders.

This Court finds that the bystanders' privacy interests in any confidential evaluation reports, created within the course and scope of their employment with Defendant Franciscan Friars, are outweighed by the State's compelling interest in protecting children from sexual abuse.[87] As discussed previously, this Court has already determined that the State has a compelling interest in protecting its children from sexual abuse.[88] This Court has also determined that "there exists legitimate public concern regarding how church officials have allegedly covered up and concealed the sexual abuse of children for years."[89] The contested documents consist of reports and/or evaluations of the alleged perpetrators' treatment, behavior, history of abuse, and requests for laicization. Release of the contested documents would certainly further the State's interest in protecting its children from sexual abuse.

However, this Court also recognizes that the "scope of such disclosure" must be "narrowly circumscribed" where possible. ***Board of Trustees v. Superior Court of Santa Clara County*** (1981) 119 Cal.App.3d 516, 526 (citing to ***Britt v. Superior Court*** (1978) 20 Cal.3d 844, 856, and ***Valley Bank of Nevada v. Superior Court*** (1975) 15 Cal.3d 652, 658). As such, this Court rules that the names of the bystanders must be redacted from all of the contested documents. Although Plaintiffs contend that some of the bystanders

---

[86] Plaintiffs' Omnibus Brief 51:5-8. However, Plaintiffs also argue that any information regarding the bystanders' role in concealment of the child sexual abuse and what they witnessed about the alleged perpetrators is not protected by the right to privacy. Plaintiffs' Omnibus Brief 51:9-11.
[87] This Court assumes, for the purpose of this ruling only, that the bystanders have a privacy interest in the publication and disclosure of their personal information, as well as, any confidential evaluation reports they may have created during the course and scope of their employment with Defendant Franciscan Friars. The Court also assumes, for the purpose of this ruling only, that the bystanders have not waived their rights to assert the privacy objection.
[88] Judge Lichtman's 6/18/07 ruling. In the 6/18/07ruling, this Court also noted that the "State's compelling interest in protecting children from harm is present regardless of the stage of litigation. The State's interest in the prevention of child abuse does not change." In addition, this Court noted that the act of settlement does not "turn off the scrutiny switch and exalt rights of privacy over the State's parens partiae obligation to its minor children." As such, the bystanders' argument that that the court may not, outside the context of discovery, weigh privacy interests against compelling state interests, is without merit.
[89] Judge Lichtman's 6/18/07 order.

participated in the cover-up and concealment of child sexual abuse committed by the alleged perpetrators,[90] the contested documents do not conclusively support this contention. Therefore, redacting the bystanders' names from the contested documents will preserve their right to privacy, but will still allow for the production and publication of important documents.

Based on the foregoing, this Court overrules, in part, the bystanders' objection, pursuant to the constitutional right to privacy, to the production and publication of the contested documents. (*See* Exhibit "C").

Order

Accordingly, Defendant Franciscan Friars is ordered to produce all documents wherein the objections have been overruled in accord with this Court's rulings as set forth in Exhibits "A-C," within 21 days of the date of this order.

This Court notes that there is no reason for any further briefing regarding objections to the production and publication of the contested documents. This Court addressed every argument raised by Defendant Franciscan Friars. In addition, this Court addressed every argument raised by the alleged perpetrators and the bystanders. In the interests of justice, this Court even applied the arguments raised by the alleged perpetrators and the bystanders to each of the contested documents.[91] No further arguments remain. As such, the matter is resolved.

Dated: April 2, 2009

PETER D. LICHTMAN

Peter D. Lichtman
Judge of the Superior Court

[90] This Court already acknowledged that Plaintiffs' counsel "identified 41 child abusing clergy transferred to and/or allowed to live in Santa Barbara County at various times from 1960 to the present. Of the 40 or so perpetrators, 24 of them were Franciscan priests or brothers from the province of St. Barbara, including 9 of the perpetrators who are the subject of the current settlement." Judge Lichtman's 6/18/07 ruling.

[91] With the exception of the alleged perpetrators' objection to the production and publication of the contested documents pursuant to the clergy-penitent privilege. As discussed previously, the alleged perpetrators specifically identified that the objection only pertained to the laicization files.