

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Coordinated Proceeding Special Title	)	JUDICIAL COUNCIL COORDINATION
(Rule 1550(b))	)	PROCEEDING NO.: JCCP 4286
	)	
THE CLERGY CASES I	)	Trial Coordinating Judge:
	)	The Honorable Emilie H. Elias
	)	Department 324
	)	
	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION GRANTING,
	)	IN PART, PLAINTIFFS' DOCUMENT
	)	PRODUCTION DISCLOSURE AND
	)	PUBLICATION PROVISION OF THE
	)	CLERGY I SETTLEMENT AGREEMENTS
	)	
	)	Honorable Dickran M. Tevrizian (Ret.),
	)	Special Master
	)	

The above-entitled matter came on for hearing before the undersigned Special Master on
March 10, 2011.

Counsel for the parties are identified on the attached service list.

Briefs were submitted by the parties through their respective counsel of record. Oral argument was presented. The factual findings that follow are necessary to this Report and Recommendation. To the extent that this recitation differs from any party's position, such difference is the result of findings made by the Special Master as to determinations of relevance and considerations and weighing of the written evidence presented. The undersigned Special Master being fully advised submits this Report and Recommendation as follows:

I

THE PARTIES

A. Plaintiffs

There are approximately 562 plaintiffs who were victims of clergy sexual abuse at the hands of Los Angeles Archdiocese priests over a considerable period of time that involved decades. Of these sexual abuse victims, approximately 419 were young boys and 143 were young girls. The victims span at least four generations and represent individuals from all walks of life.

B. Defendants

The primary named Defendant is the Roman Catholic Archbishop of Los Angeles, a California Corporation sole.

C. Priests (who are nonparties)

There are approximately 233 priests or brothers represented in these actions who sexually abused the plaintiffs when they were children. The priests were not parties to the global settlement agreement entered into on July 13, 2007, between the Defendant, Roman Catholic

Archbishop of Los Angeles, a California Corporation sole and the Plaintiffs. The majority of these priests are represented by Mr. Steier and are similarly situated to the priests in the *Franciscan Friars* case, 188 Cal.App.4th 1224, where those priests either: (1) admitted to sexually abusing minors; (2) had a propensity to commit sexual acts against minors, based on available records; (3) were criminally convicted or had been criminally convicted of sexual abuse crimes against minors; or (4) had received treatment for their predatory sexual abuse actions against minor children. Some of these priests are deceased.

II

STATEMENT OF FACTS

A. Historical Overview Of Childhood Sexual Abuse Within The Church

According to a February 2004 Report to the People of God involving the Archdiocese of Los Angeles, more than 650 individuals had come forward with accusations of childhood sexual assault against more than 240 priests. Of these, 113 were diocesan priests, 49 were deceased, 54 were no longer in ministry, and 16 remained in ministry. This widespread assault on children spanned decades and the administration of three successive archbishops.

B. Factual Background Of The Case

Governor Gray Davis signed an amendment to the California Code of Civil Procedure, Section 340.1, on July 11, 2002. This amendment provided victims of sexual abuse with a one year window within which to file litigation against the perpetrator or perpetrators.

The first case filed against the Roman Catholic Archdiocese of Los Angeles under the newly amended statute was a class action. Filed on July 16, 2002, Manny V. and Tranquilino G.

complained of the sexual abuse of more than twenty eight children in Oxnard, California. Other cases then followed.

On January 2, 2003, a petition for coordination was filed with the Chairperson Of The Judicial Council Of The State Of California to have all clergy cases coordinated in the Superior Court Of The State of California For The County Of Los Angeles. Thereafter, the clergy cases were coordinated in Judicial Council Coordination Proceeding No.: JCCP 4286 and referred to as The Clergy Cases I. The parties continued in the litigation process for the next several years.

On July 13, 2007, the parties herein completed negotiations on a global settlement and consummated that agreement in the office of Los Angeles County Superior Court, Judge Tim McCoy. The essential terms and conditions of the agreement were set forth in a Memorandum of Understanding ("MOU"). A material term of the settlement agreement that was bargained for and as stated in the MOU is "the public disclosure of personnel and confidential files . . ."

Thereafter, the parties worked out the language of the settlement and memorialized it in the document entitled, "Settlement Agreement and Mutual Release," collectively, the 517 settled actions. Pursuant to Paragraph 19 of the settlement agreement, the parties expressly agreed to a general reference of the accused offender personnel and confidential files for possible production and disclosure. Set forth below is Paragraph 19.

19. General Release Under C.C.P. § 638 Of Accused Offender Personnel File Production And Disclosure Issues:

(a) The Parties stipulate and agree to appoint the Hon. Edward A. Panelli, retired Justice of the Supreme Court of the State of California, as a referee under California Code of Civil Procedure § 638(a), subject to and as limited by the terms and conditions set forth herein. This is a general consensual reference for the purpose of permitting Justice Panelli to make final and binding determinations with respect to whether any documents that have been subpoenaed

by any Party from a third party to this Settlement Agreement or otherwise, or were contained within the personnel file relating to any accused offender in any of the lawsuits listed in Exhibit "B," shall be produced to the KBL Plaintiffs for public disclosure (the "Referred Issues").

(b) The Parties understand and agree that the term "personnel file" as used herein includes the personnel file, the confidential file, and any other documents, if any, maintained by the Settling Defendants identified in Exhibit "B" with respect to any accused offender in the KBL Actions.

(c) Justice Panelli shall follow applicable law in making his determinations regarding the Referred Issues.

(d) [Left blank.]

(e) Justice Panelli shall report his determinations regarding the Referred Issues, and shall file them with the Clerk of Court (under seal when necessary or appropriate), in the form of a written Statement of Decision within forty-five (45) days after any hearing(s) has concluded and the matter has been submitted (unless otherwise extended by Justice Panelli), or within forty-five (45) days after the matter has been submitted to him if no hearing has been held (unless otherwise extended by him).

(f) The rulings, orders and decisions by Justice Panelli regarding the Referred Issues shall stand as the decision of the Court under California Code of Civil Procedure § 644, shall be final and binding on the Parties, and shall not be subject to appeal by any Party to this Settlement Agreement, under California Code of Civil Procedure § 645 or otherwise. The Parties hereby irrevocably waive any and all rights to appeal and review with respect to Justice Panelli's determinations of the Referred Issues by any court, including without limitation the Superior Court of the State of California, the Courts of Appeal of the State of California, the Supreme Court of the State of California, and any federal courts, including the Supreme Court of the United States. Rulings with regard to document admissibility at trial are to be determined by the trial judge, and are not covered by the Referred Issues.

(g) This Settlement Agreement is conditioned upon the entry of a Stipulation and Order Referring Accused Offender Personnel File Production And Publication issues to the Hon. Edward A. Panelli (the "Order of Reference"), in the form attached hereto as Exhibit "F." The Order of Reference shall be signed on behalf of the Parties by counsel, and be binding on the Parties, and, with respect to RCALA, this Order of Reference shall apply to RCALA's affiliates as well.

(i) Following entry of the Order of Reference, the Parties will immediately work cooperatively with Justice Panelli to expedite review of the personnel files of the accused offenders in the 517 Settled Actions, the documents subpoenaed from third

parties regarding the accused offenders, and the briefing of issues related to production of documents contained in those personnel files, so that Justice Panelli's determinations can be made in a reasonably short period of time and at his earliest convenience.

(ii) The Parties will lodge with Justice Panelli the personnel files of the accused offenders and the documents subpoenaed from third parties regarding the accused offenders, including all documents previously submitted to Judge Lichtman in the mediation process that are the subject of this Settlement Agreement with a privilege log identifying each document for which a claim of privilege or confidentiality is asserted, and setting forth the basis of any such claim. All such logs will be served upon counsel for plaintiffs at the same time they are filed with Justice Panelli.

(iii) Concurrently with the lodging of the personnel files, other documents regarding the accused offenders, and privilege logs with Justice Panelli, the party producing the files and logs shall provide notice of the occurrence of those events to all accused offenders whose personnel files are at issue, either individually (to their last known address) or through their counsel (if they are represented by counsel). Each accused offender will be permitted to file his own privilege logs, objections, and briefs in support thereof. Such privilege logs and objections shall be filed on a schedule as provided by Paragraph 19(g)(ii) above.

(iv) The Parties shall meet and confer in good faith, in consultation with Justice Panelli, regarding any additional procedures, including but not limited to the manner and timing of the Parties' briefings and hearings by Justice Panelli, that may be necessary or appropriate to resolve the Referred Issues. Such procedures, manner, and timing shall also be agreed to in writing by any accused offender who files objections or a privilege log, or who joins in the objections and privilege log filed by any other person or entity.

(v) The parties contemplate that claims of privilege will be resolved by Justice Panelli in an *in camera* procedure that will be *ex parte* as to the Plaintiffs. The Parties further agree that the act of submitting documents to Justice Panelli for his review and determination with respect to the referred issues will not constitute a waiver of any objections, of any nature whatsoever, by any party or the accused offender. Settling Defendants, agree, however, that they will not object on the basis of the formation privilege or on the basis of the First Amendment to the United States Constitution with respect to any documents contained in the personnel files reviewed by Justice Panelli.

(h) Justice Panelli's costs and fees incurred in connection with his determinations of the Referred Issues will be shared equally by the Defendant(s) producing the personnel file(s) or other third party defendants' documents at issue, on the one hand, and the settling plaintiff(s)

from the 517 Settled Actions requesting the production of disclosure of the personnel file(s) or other documents, on the other hand.

(i) As to all Actions relating to Fr. Jesus Dominguez and the criminal action relating to Fr. George Miller, any document in their respective personnel file ordered by Justice Panelli to be produced for public disclosure will be subject to the protective order entered on June 7, 2006 by the Hon. Haley J. Fromholz, Judge of the Superior Court of the State of California, for the County of Los Angeles, in the *Clergy Cases I* and will not be publically disclosed until the Actions relating to Fr. Jesus Dominguez and the criminal action relating to Fr. George Miller are resolved by settlement, dismissal or final judgment (including all appeals).

In addition, as previously noted, the settlement agreement, Paragraph 27, contains a materiality clause. All parties acknowledged and expressly agreed that each and every term and condition of the settlement agreement constitutes a material part of the bargained for consideration that induced the parties to enter into the agreement. Moreover, the settlement agreement precludes any party from modifying the agreement.

Justice Edward Panelli was initially selected as the referee to decide the production and publication issues surrounding the personnel and confidential files of the priests in *The Clergy Cases I*. Thereafter, on June 11, 2008, Justice Panelli recused himself.

Plaintiffs maintain that, as set forth in Paragraph 19, the terms, conditions, and purpose of the public release of personnel and confidential files are clear and straight forward obligations imposed on the Archdiocese. Plaintiffs' position is that the Archdiocese is required to turn over, for public dissemination, every document that is in the Archdiocese's possession relating to any of the accused priests in this coordinated litigation relying on *In re The Clergy Cases I* ("*Franciscan Friars*"), 188 Cal.App.4th 1224.

One of the essential terms of the settlement agreement in the within coordinated action provides for the maintenance of the Los Angeles Superior Court's jurisdiction over these cases.

Pursuant to Paragraph 20 of the settlement agreement, the terms are enforceable under California Code of Civil Procedure, Section 664.6 and the Court will retain jurisdiction for purposes of interpreting and enforcing the settlement agreement notwithstanding the dismissal of any of the actions.

After Justice Panelli recused himself, the parties met and conferred to determine who should replace him. Several names were submitted to Judge McCoy for determination. Pursuant to Paragraph 6(e) and 13 of the settlement agreement, Judge McCoy was appointed to resolve any issues regarding the terms and enforcement of the agreement. On October 6, 2008, Judge McCoy issued an order appointing the Hon. Dickran Tevrizian (retired State and Federal Court Judge) as the document protocol general consensual reference. In his order, Judge McCoy noted that:

the settlement agreement provided in paragraphs 10 and exhibit F, for a document protocol in which personnel files of the alleged offenders would be reviewed by general consensual reference for the purpose of determining what files may be made public.

Likewise, on January 23, 2009, Judge McCoy issued an order appointing Judge Tevrizian as the document review referee (“Special Master”) for the Los Angeles Archdiocese pre- and-post-settlement agreement. Pursuant to the order, the undersigned was substituted in place of Justice Panelli as the document protocol general consensual referee for the pre- and-post-cases.

On April 3, 2009, Judge Elias issued an order adopting the settling parties’ stipulation and proposed order referring accused offender personnel file production publication issues to the undersigned. Judge Elias modified the order, however, setting forth a specific process to enable the accused offender priests to object to the publication of portions of their file. The order

provided that any accused offender or third-party whose personnel file the Special Master recommended for public disclosure would receive notice and an opportunity to object to the Special Master's recommendation and proposed order, and to seek judicial review from Judge Elias. Such accused offenders or third parties, if they so choose, must object and seek judicial review within twenty days after receiving notice of the Special Master's recommendation and proposed order.

As plaintiffs' filing discloses, the public record is loaded with witness accounts, documentary evidence, police reports, white papers, evidentiary proffers, depositions, court filings and thousands of newspaper accounts of the events of clergy sexual abuse in the Archdiocese of Los Angeles. Every accused priest has been publicly identified in a white paper by the Archdiocese itself, on a victim group's website, and in countless newspaper stories. Numerous members of the church hierarchy have been deposed. In essence, the evidence produced discloses that all but a handful of accused priests have been removed from ministry.

The Archdiocese has furnished to the undersigned the significant steps that have been undertaken to ensure the safety of the children entrusted to it for education and religious matters. Following are some of the safeguards employed by the Archdiocese.

In 2002, the United States Conference of Catholic Bishops adopted the Charter for the Protection of Children and Young People and the Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests, Deacons or Other Church Personnel. The Charter established a policy of zero tolerance and created the National Review Board for the Protection of Children and Young People.

The National Review Board composed of lay Catholics investigated and published a report on the causes and context of the clergy abuse crisis. The Board commissioned the John Jay College of Criminal Justice to conduct a comprehensive surveys of all dioceses and religious orders to determine the scope and extent of sexual abuse by priests. The result of the surveys were published in the report by the National Review Board. In 2002, the criminologists at John Jay also published "Child Sexual Abuse: A Review of the Literature."

The National Review Board created the Office of Child and Youth Protection. Since 2003, this office has engaged in annual audits of the Archdiocese for compliance with the Charter and Essential Norms. The office uses teams of former FBI agents to meet with various constituencies within each Archdiocese, review documents and investigate practices to ascertain if each Archdiocese has created and maintains a safe environment for children.

Pursuant to the Charter and Essential Norms, the Archdiocese of Los Angeles has developed and adopted various training programs to create a safe environment for children. All clergy, lay volunteers, and lay employees take annual training for the protection of children. Similarly, all of the children at parish schools and in religious education classes take the Good-Touch/Bad-Touch or the Teaching Touching Safety programs. All clergy, employees and volunteers who work with children are fingerprinted and checked through the California Department of Justice and the FBI National Fingerprint Database for sexual molesters. Each parish has its own committee for the protection of children that oversees and implements the safe environment programs in their parish.

In 2004, the Archdiocese of Los Angeles, in turn, published its own report of the clergy sexual abuse within the Archdiocese from 1930-2003, named every accused priest, and published evidentiary proffers for the reports against each priest and the response thereto. This Archdiocese has developed and maintained all of the programs required by the National Review Board and the Office of Child and Youth Protection and has been certified as compliant in each audit conducted by the national oversight personnel.

Moreover, the Archdiocese of Los Angeles has been the subject of grand jury investigations in Ventura and Los Angeles Counties and by the United States Attorney for the Central District of California in Los Angeles. Documents have been subpoenaed and reviewed and various members of the hierarchy have testified.

The Archbishop has apologized, both in writing and orally, on numerous occasions before numerous divergent groups. The Archbishop has met personally with any victim of clergy sexual abuse who so desired (approximately 100 persons to date), listened to his or her experience, and apologized on behalf of the church. Prayer gatherings and healing masses have been held for victims and their families. A Victims Assistance Ministry monitors a clergy sexual abuse hotline and provides psychotherapy for victims and their relatives. A Clergy Misconduct Oversight Board of lay persons reviews all cases of reported childhood sexual abuse. All of these procedures were detailed in the Archdiocese of Los Angeles submission to the Referee dated January 12, 2009.

In sum, clergy sexual abuse in this Archdiocese has been disclosed for many years since the first action was filed on July 16, 2002. The accused priests have been publicly identified and

with a few exceptions involving false accusations, the priests have been removed from ministry. The Church's handling of this crisis, and its causes and context, have been the subject of national reports, local church reports, local grand jury investigations, public filings by plaintiffs' attorneys and numerous newspaper and magazine accounts.

III

DISCUSSION

Clergy files are vastly different from ordinary personnel files of individual employees maintained by secular employers. An ordinary personnel file would contain documents, such as, job applications, performance reviews, accident reports, medical insurance records, termination records, pension plan records, etc. Clergy files contain all of these and more. Since the Archbishop has a spiritual relationship with each priest and an obligation to oversee his religious formation and development; the files contain more intimate details of the priest's life than one normally associates with ordinary personnel files. In addition to his job performance such as his sermons or his management of a parish a priest's clergy file may contain reports of his moral (non-criminal) lapses, his personal addictions regarding alcohol, gambling, his celibacy and sexual orientation issues, his last will and testament, his personal financial affairs, complaints from third persons whether substantial or trivial and false, attorney letters containing legal advice and reports of investigations and other work product, and his medical and psychiatric records.

The files also contain information about persons other than the primary subject of the file. Reports about the subject, authored by witnesses, victims and supervisors, and reports about

victims and witnesses are included. The general expectation that documents placed in personnel files will be held confidential absent their compelling need in litigation is probably universal; and, as the custodian of these files, the Archbishop would appear to have a legal duty to protect the files from unauthorized disclosure.

The procedure agreed upon for this process in the settlement of these cases is different from the procedure used in settlements with other Roman Catholic entities. In other settlements, many of the documents had already been produced in the course of litigation and were physically in the possession of plaintiffs. In many cases, production and disclosure were agreed to if the documents were not found to be privileged.

Here, the majority of personnel file documents were never produced in discovery. Discovery was stayed during the mediation process which lasted over five years. In the other settlements, the issue was whether the plaintiffs could disclose documents already in the public or quasi-public realm. Here, however, the issue is whether the Archdiocese may produce its own files for inspection and public disclosure following the conclusion of litigation pursuant to the terms and conditions of the settlement agreement, where the priests were not signatories to the said settlement agreement.

Unlike the *Franciscan Friars* settlement, this Agreement did not establish a set of criteria agreed upon by the parties, for the Special Master to weigh in determining whether the documents should be made public. Instead, this Agreement provided that:

(c) Justice Panelli/Tevrizian shall follow applicable law in making his determinations regarding the Referred Issues.

In the settlement involving the Diocese of Orange, a related issue arose in a post-settlement hearing before Judge Peter D. Lichtman of the Los Angeles County Superior Court. As Judge Lichtman framed the issue in reviewing the privacy objections of the priests relating to their personnel files being sought by plaintiffs, “the issue that confronts the Court is whether or not a compelling state interest can be shown to outweigh the right of privacy when the information sought is no longer needed for the purposes of litigation.” Judge Lichtman concluded, “there is simply no existing case law that permits an intrusion on the constitutionally protected rights of privacy save and except to the extent necessary for the fair resolution of a lawsuit.” In summing up, Judge Lichtman ruled that “this Court is powerless to order the production of the personnel file in question.” This same legal issue has been resurrected in this case as a result of the settlement agreement’s terms and conditions.

Paragraph 19(g)(v) of the Global Settlement Agreement at issue provides that:

The Parties further agree that the act of submitting documents to Justice Panelli/Tevrizian for his review and determination with respect to the referred issues will not constitute a waiver of any objections, of any nature whatsoever, by any party or the accused offender.

The Referred Issues are defined in Paragraph 19(a) as follows:

This is a general reference for the purpose of permitting Justice Panelli/Tevrizian to make final and binding determinations with respect to whether any documents that . . . were contained within the personnel file relating to any accused offender in any of the lawsuits listed in Exhibit “B,” shall be produced to the Plaintiffs for public disclosure (the “Referred Issues”).

Contrary to the Global Settlement Agreement at issue, the Franciscan Settlement Agreement provided in Paragraph 15(A)(1):

- (1) . . . the Franciscan Friars will produce to plaintiffs’ counsel . . . the following documents:

- (a) The personnel files . . .;
 - (b) Any confidential file of any alleged perpetrator . . .;
- * * *
- (2) With regard to such production . . ., the Franciscan Friars shall be entitled to withhold and/or redact such documents to assert the following only:
 - a. Attorney client privilege
 - b. Attorney work product privilege
 - c. [Non-perpetrator privacy under an agreed special set of parameters for weighing the privacy interests of the non-perpetrators.]

* * *

- e. Psychotherapists/patient privilege . . .

The difference between the two agreements appear to be plain. The Franciscans agreed to produce documents subject only to four objections: attorney client privilege; work product; privacy under a specially agreed upon definition; and psychotherapy-patient privilege. The Archdiocese reserved all objections of any nature whatsoever.

Moreover, the Global Settlement Agreement has an integration clause:

- 25. Full and Final Agreement: This Settlement Agreement, including the Exhibits attached hereto and incorporated herein by reference, constitute the full and final agreement among the Parties to this Settlement Agreement. This Settlement Agreement specifically supersedes all prior negotiations, representations and/or agreements. By entering into this Settlement Agreement, no Party is relying on any representation or understanding outside of the express written terms of this Settlement Agreement.

The Franciscan Settlement Agreement also has an integration clause.

Accordingly, analyzing the plain meaning of the two agreements establishes that the Archdiocese preserved its right to object to production of documents to plaintiffs when they are not needed in pending litigation to resolve a factual issue related to them. Nevertheless, the Archdiocese of Los Angeles specifically agreed to a procedure and process for the Plaintiffs to

obtain compulsory production of the priests' personnel and confidential files after the cases were settled.

Plaintiffs correctly maintain that the production of the documents at issue here "does not implicate state action" because the "documents will be produced pursuant to the parties' settlement, a voluntary agreement."

What is of concern to the undersigned are the rights of the priests pursuant to the terms of the settlement agreement executed by and between the plaintiffs and the Archdiocese of Los Angeles. None of the priests agreed to or signed any settlement agreement at issue here. Nevertheless, the plaintiffs unilaterally dismissed their claims in the above coordinated actions with prejudice against the priests.

During the prosecution of the underlying coordinated actions, these non-settling priests fought against invasion of their rights of privacy and other privileges relating to their employee records of which the Roman Catholic Archbishop of Los Angeles was the custodian of records. The coordinated litigation herein ended before confidential records of these priests were ordered released in any discovery order issued by the Court.

It has been pointed out that in parallel state grand jury, federal grand jury, and criminal prosecutions, a few of these priests also defended their private papers, and for the most part succeeded in preventing disclosure of any psychotherapy reports and communications to or from their psychotherapists.

In fact, when the plaintiffs and the Archdiocese attempted to disclose proffers prepared for the mediation previously referred to, the priests sought and obtained a writ of mandate to prevent such disclosure. *Doe I v. Superior Court*, 132 CA 4th 1160.

As was pointed out by counsel for the non-settling priests, when the trial court attempted to make wholesale rulings on claims of the constitutional privacy privilege, rather than conducting a document-by-document review, *in camera* (California Constitution, Article 1, Section 1), the affected priest sought a peremptory writ of mandate and forced the trial court to conduct the proper manner of review (Case B 193506).

It has been well established that no law compels a person to produce to the state or to any individual his private papers except for specific purposes in connection with pending criminal or civil litigation and governmental regulatory investigations and proceedings. Compelled production of documents is generally found to be unconstitutional unless an appropriate authority has determined that the documents are likely to provide evidence relevant to a civil or criminal lawsuit or a legitimate governmental investigation.

The Fourth Amendment of the United States Constitution provides:

“the right of the people to be secure in their persons, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.”

Also of concern in the inquiry conducted by the undersigned is the fact that California statutory and case law appears to affirmatively require a pending action as a prerequisite to

obtaining civil discovery. California Code of Civil Procedure, Section 2017.010 provides in pertinent part that, “any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . .” In *Department of Fair Employment and Housing v. Superior Court*, 225 Cal.App.3rd 728, the court held that, “the sine qua non of invoking the relief available under the Civil Discovery Act” is a pending action. See also, Weil & Brown, *Civil Procedure Before Trial* 8 B-4 (2008).

In approaching the analysis required here, the undersigned must consider the following salient facts:

1. These objecting non-party priests have never affirmatively consented to any disclosure of their privileged information;
2. These private papers were never obtained by the plaintiffs in discovery;
3. The underlying complaints were dismissed by plaintiffs several years ago; and,
4. Plaintiffs now seek to have the Court exercise its powers of compulsion to disclose the presumptively privileged information for public dissemination.

Judge Haley J. Fromholz, the former presiding judge for the coordinated cases, issued a protective order dated June 7, 2006, covering the public dissemination of all information discovered in any of the lawsuits.

The protective order prohibited the disclosure of six broad categories of information including among other things: (1) the names of plaintiffs and alleged perpetrators not already disclosed to the public; (2) the names of employees and agents of defendants with certain exceptions, (3) the names of non-party victims, (4) the names of witnesses with certain

exceptions, (5) background information that could potentially lead to the revelation of protected plaintiffs, alleged perpetrators, employees or witnesses; and (6) information such as employment, medical, psychiatric, financial and similar records regarding individual plaintiffs, individual defendants and non-party alleged perpetrators.

During pre-trial procedures, numerous documents exchanged by the parties were filed under seal, in connection with discovery motions, in order to comply with Judge Fromholz' protective order. Subsequent to settlement, plaintiffs moved to unseal the filings. On January 20, 2009, Judge Emilie H. Elias, the successor presiding judge for the coordinated cases, ruled among other things that the motion to unseal court records, listed in Exhibit B of her tentative order, was denied and the documents would remain under seal. The ruling states that there is no right of public access to discovery related materials citing *Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60, 90-100 and Weil & Brown, *Cal. Prac. Guide: Civ. Proc. Before Trial* (The Rutter Group 2008) § 9:418.25). Accordingly, the documents were to remain under seal.

An employee generally has an inalienable right of privacy as to the contents of his personnel files, even though the employer is the custodian of the files. The employer/custodian of these records has no rights in them, only the duty to protect them from disclosure. "We begin with the general proposition that the custodian of materials protected by evidentiary privilege owes a duty to the holder of the privilege to claim the privilege and to take actions necessary to ensure that the materials are not disclosed improperly." *People v. Superior Court (Laff)*, 25 Cal. 4th 703.

California Code of Civil Procedure, Section 1985.6, mandates that an employee be given notice whenever information from his personnel records are subpoenaed. In the instant matter, the “Omnibus Discovery Order,” issued by the Court, required notice to a non-party employee under California Code of Civil Procedure, Section 1985.6, whenever a party sought production of personnel records, whether by subpoena or otherwise. Likewise, the Order Of Reference in the instant matter also required such notice to the priests whose records might be subject to disclosure. In fact, some of the same priests who are objecting herein as non-parties were recognized to have standing to challenge grand jury subpoenas duces tecum for essentially the same personnel records. See *In Roman Catholic Archbishop of Los Angeles v. Superior Court*, 131 Cal.App.4th 417.

The right of privacy is implicitly guaranteed in the United States Constitution, *Griswold v. Connecticut*, 381 U.S. 479. Privacy is an “inalienable right” that is a “fundamental interest” of our society guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments of the U.S. Constitution. *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 524-5.

Privacy is expressly guaranteed in the California Constitution, Cal. Const. Art. I, Sec. I. The California right of privacy is broader than the federal right. *American Academy of Pediatrics v. Lundgren*, 16 Cal.App.4th 307.

Personnel files are protected by the right of privacy. *San Diego Trolley, Inc. v. Superior Court*, 87 Cal.App.4th 1083, 1097; *Palay v. Superior Court*, 18 Cal.App.4th 919, 934; *Harding Lawson Associates v. Superior Court*, 10 Cal.App.4th 7, 9-10; *El Dorado Savings & Loan Assoc. v. Superior Court*, 190 Cal.App.3d 342, 345; *Board of Trustees v. Superior Court*, 119

Cal.App.3d 516, 530. In addition to personnel files, the constitutional right of privacy also has been held to protect a person's financial affairs (*Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 656), political affiliations (*Britt v. Superior Court*, 20 Cal. 3d 844 852-862), medical history (*id.* at pp. 862-864), criminal history records (*Craig v. Municipal Court*, 100 Cal.App.3d 69, 76-77) and sexual relationships (*Morales v. Superior Court*, 99 Cal.App.3d 283, 289-290).

When documents subject to the right of privacy are sought in the course of civil litigation, mere relevance to the subject matter is not sufficient. *Britt v. Superior Court*, 20 Cal. 3d 844, 859; *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 526. Intrusion into constitutionally protected privacy cannot be justified on the ground that it may lead to relevant information, it must be shown that the private information is "directly relevant to the issues of ongoing litigation." *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 524-5.

In addition to admissibility, documents protected by the right of privacy are not discoverable in civil litigation unless a "compelling state interest" exists for their production. As the California Supreme Court summarized numerous decisions:

As we have explained, it has been clear for over two decades that the First Amendment provides substantial protection of an individual's interest in associational privacy and that it places severe restrictions on state-compelled disclosure of private affiliations and activities. The present decision simply recognizes that these firmly established constitutional precepts cannot be ignored merely because the issue of compelled disclosure arises in the context of litigation discovery; in this realm, as in all others, such disclosure of confidential associational affiliations and activities must be justified by a compelling state interest and must be precisely tailored to avoid undue infringement of constitutional rights.

Britt v. Superior Court, 20 Cal. 3d 844, 864-65. In *Winfred D. v. Michelin North America, Inc.*, 165 Cal.App.4th 1011, modified and rehearing denied, 2008 Cal. App. LEXIS 1361, the

identities of plaintiff's mistresses, common law wives and illegitimate children were disclosed in his personal injury case for product liability. The Court of Appeal stated:

[T]he federal and state Constitutions protect the right of sexual privacy, including evidence of extramarital affairs, in civil litigation. [citations] The party seeking the disclosure of such information must shoulder the 'heavy burden' of showing that the evidence serves 'a compelling interest in facilitating the ascertainment of truth in connection with legal proceedings.' [citations].

A compelling state interest means that the documents are necessary to prove the litigant's case. In *San Diego Trolley, Inc. v. Superior Court*, 87 Cal.App.4th 1083, 1095-8, plaintiff alleged personal injuries caused by negligent operation of a trolley. The discovery issue was whether the trolley company knew that the trolley driver had clinical anxiety and was taking medication that could affect his operation of the trolley. Plaintiff sought to obtain the driver's personnel file. The Court held that the privacy rights of the driver protected the file; and "only if" the trolley company denied prior knowledge of the driver's condition, could the relevant information be compelled to be produced.

Even when disclosure is necessary, it should be narrowly circumscribed so that individual privacy is invaded only to the extent needed for a fair resolution of the lawsuit. *Britt v. Superior Court*, 20 Cal. 3d 844, 864-65 [disclosure when appropriate "must be precisely tailored"]; *Moskowitz v. Los Angeles County Superior Ct.*, 137 Cal.App.3d 313, 316.

Thus, as a federal court incisively interpreted the California law in *Gottlieb v. Wiles*, 143 F.R.D. 235, 238:

Resolution of questions regarding the discoverability of documents or information falling within the privacy protection of Art. I, sec. I involves a three-step process. Initially, the court must determine whether the requested materials are relevant to the issues in litigation. The fact that the information might be calculated to lead to admissible

evidence is insufficient to overcome constitutionally protected privacy interests. *Binder v. Superior Ct.*, 196 Cal.App.3d 893, 242 Cal. Rptr. 231. Once the relevance of the materials is established, the Court must balance the need for discovery against the right to privacy. *Board of Trustees v. Superior Ct. of Santa Clara County*, 119 Cal.App.3d 516, 174 Cal. Rptr. 160. Finally, even where the balance is struck in favor of disclosure, the disclosure order should be narrowly circumscribed and crafted with as much specificity as possible. *El Dorado Savings & Loan Ass'n v. Superior Ct.*, 190 Cal.App.3d 342, 235 Cal. Rptr. 303.

In sum, the constitutional right of privacy is an important civil right not to be swept aside except for direct and material use in litigation.

Moreover, because personnel files are not normally kept by the subjects of the files and the impending disclosure of a file may not be known by its subject, the custodian of a personnel file must protect the right of privacy of the persons mentioned in it:

The custodian [of private information] has the right, *in fact the duty* to resist attempts at unauthorized disclosure and the person who is the subject of [it] is entitled to expect that his rights will be thus asserted.

Board of Trustees v. Superior Court, 119 Cal.App.3d 516, 525-6; *Binder v. Superior Court*, 196 Cal.App.3d 893, 899; *Gottlieb v. Wiles*, 143 F.R.D. 235, 238.

An example of the necessary analysis and balancing in the context of a pending childhood sexual abuse case is *Juarez v. Boy Scouts of Am.*, 81 Cal.App.4th 377. Plaintiff, suing for childhood sexual abuse, sought discovery of “ineligible volunteer files” kept by the Scouts. The ineligible volunteer files, also known as the “confidential files,” were the records maintained by the Scouts to: (1) identify individuals who have been determined to be “unfit” in case they try to register as scouting volunteers in the future; and (2) document information as to why an individual was declared ineligible in the event he should challenge that determination. The Scouts produced their file for the volunteer accused of abusing the plaintiff but objected to

production of the files for any other volunteers. The court held that the information in the files fell “manifestly within the Constitution’s protected area of privacy.” *Id* at 391. Plaintiff argued that he had a compelling need for the files because “The extensive ‘ineligible volunteer file[s],’ which document those scout masters who have been kicked out for molesting boy scouts, provide knowledge of the rampant risk of pedophiles entering the Boy Scouts and molesting vulnerable Boy Scouts.” *Id* at 392. The court held that the files were irrelevant to plaintiff’s case and, even if relevant, there was no compelling need for the information in the case because the Boy Scouts admitted that they were aware that volunteers had in the past molested boy and that the Scouts had a publicly known program to minimize the risk of molestation. *Id*.

Against the backdrop of the persuasive and longstanding authority previously discussed, the undersigned is of the opinion that the present coordinated case can be distinguished. The most important distinguishing factor is that there exists a comprehensively negotiated settlement agreement containing Paragraph 19 that specifically addresses many of the issues raised by the Archdiocese and the non-party priests. Specifically, there is a process and procedure in place that safeguards due process to all parties involved.

Interestingly, a substantially identical factual and legal argument regarding “no litigation pending” was raised in *Franciscan Friars*, 188 Cal.App.4th 1224, and was resolved in plaintiffs’ favor. The court in *Franciscan Friars* contrasted the case with one in which there is a final judgment and all appeals have been exhausted, and concluded that, since the parties specifically asked the court, pursuant to California Code of Civil Procedure, Section 664.6, to retain

jurisdiction over them to enforce their settlement until all terms were performed in full, the action was still pending.

The circumstances here are substantially identical. Specifically, the parties have asked the coordinated court, pursuant to California Code of Civil Procedure, Section 664.6, to retain jurisdiction over them in order to enforce their settlement until all terms have been performed in full. Paragraph 20 of the Settlement Agreement And Mutual Release provides:

“Binding Effect of Agreement: This Settlement Agreement, including all Exhibits hereto, is and shall be a binding agreement, enforceable under California Code of Civil Procedure Section 664.6 and the Court will retain jurisdiction for interpretation and enforcement of this Settlement Agreement notwithstanding the dismissal of any of the KBL Actions.”

The settlement agreement contemplates payment of compensation to the plaintiffs before the document production as is specified in Paragraph 19. As plaintiffs have articulated, post-compensation under the settlement agreement, then, the only remaining issue is that of document production. It logically follows that the parties request pursuant to Paragraph 20 was meant to ensure the Court’s continuing jurisdiction over the document disclosure process specifically bargained for and set forth in Paragraph 19 and 27.

Furthermore, the priests argue that document production is inappropriate here simply because the parties availed themselves of California’s public policy favoring settlement. *See, e.g., People ex rel. Department of Public Works v. Forster*, 58 Cal. 2d 257, 263. Precluding document production upon this basis would punish the plaintiffs for seeking an early resolution of their cases, and for seeking to avoid needlessly prolonging matters through trial. This would run directly counter to public policy, and would discourage future settlements. It would also

provide the alleged perpetrators and enablers with a haven through which their conduct would be forever hidden and kept safe from scrutiny. The Archdiocese should not, by the act of settlement, exalt privacy rights over the State's *parens patriae* obligation to its minor children. *See, e.g., Franciscan Friars*, 188 Cal.App.4th at 1228-29.

The priests claim a procedural due process right to notice and an opportunity to be heard. Yet the document production at issue does not implicate state action. *See, e.g. Coleman v. Dep't of Pers. Admin.*, 52 Cal.3d 1102, 1112 ("Only those actions that may fairly be attributed to the state . . . are subject to due process protections.") The documents should be produced pursuant to the parties' settlement, a voluntary agreement. The Special Master's role is to determine which documents the Archdiocese will produce in accordance with the terms of that agreement. If the Archdiocese attempts to contest the meaning of certain terms, then a judicial officer may interpret the terms and enforce them. This will not constitute state "compulsion" of document production, however. It will be the enforcement of a contract into which the parties entered voluntarily. So with respect to the document production, there is no colorable argument that the Court, in its capacity as a state actor, will affirmatively seize or disclose the private papers of an unwilling party here. Nor are the Archdiocese or the plaintiffs state actors. Absent state action, the priests have no basis to object on due process grounds.

Interestingly, the plaintiffs have not asked the Special Master to fashion a novel remedy, or any remedy here. Instead, the parties have asked the Special Master to perform his role in accordance with the parties' negotiated agreement.

The point may be moot in any event. The fact that the priests have filed Objections and that the Special Master is considering them indicates that the priests have received notice and an opportunity to be heard. *Franciscan Friars*, 188 Cal.App.4th at 1237 (“Even though the Individual Friars were not parties to the lawsuits or the settlement agreement, the agreement preserved their rights to assert any lawful objection to the publication of their confidential files. The settlement agreement and the procedures established provided the Individual Friars with notice and an opportunity for their privacy interests to be heard.”)

The Fourth Amendment protects individuals against unreasonable government searches and seizures. *E.g., People v. Ray* (1999), 21 Cal. 4th 464, 483 (“The Fourth Amendment to the United States Constitution protects citizens from unwarranted governmental intrusion.”) So to be viable, a Fourth Amendment claim requires state action. The documents in this action, however, will be produced pursuant to the parties’ settlement, a voluntary agreement. One of the Special Master’s roles is to determine which documents in the priests’ files will be produced. If the priests contest the meaning of certain terms, then a judicial officer may interpret the terms and enforce them. This will not constitute state “compulsion” of document production. It will be the enforcement of a contract into which the settling parties entered voluntarily. So with respect to the document production, there is no colorable agreement that the Court, in its capacity as a state actor, will affirmatively seize or disclose the private papers of an unwilling party here. Nor are the Archdiocese or the plaintiffs state actors. Absent state action, the priests have no basis to object on Fourth Amendment grounds. *See Id.*

Even assuming there was state action here, the priests would have no basis to object because the Fourth Amendment only protects against searches and seizures that are unreasonable. U.S. CONST. amend. IV; *e.g.*, *Hill, supra*, 7 Cal. 4th at 36; *see Franciscan Friars*, 188 Cal.App.4th at 1234. To whatever extent the document production here could be said to constitute a search or a seizure, it would be reasonable because the State has a compelling interest in protecting children from molestation, and this interest outweighs privacy rights in child abuse cases. *Franciscan Friars*, 188 Cal.App.4th at 1228-29; *see Lawrence v. Texas*, 539 US 558, 578 (no right to privacy in illegal sexual conduct; *Fredenburg v. City of Fremont*, 119 Cal.App.4th 408, 412 (released sex offenders have a reduced expectation of privacy); *People v. Martinez*, 88 Cal.App.4th 465, 475 (sex offender has substantially reduced right to privacy in medical and psychological records); *Rosales v. Los Angeles*, 82 Cal.App.4th 419 (no reasonable expectation of privacy in personnel records pertaining to inappropriate sexual conduct, and no viable cause of action for production of these records to plaintiff's counsel in underlying litigation); *In re T.A.J.*, 62 Cal.App.4th 1350, 1359-61 (no privacy right among minors to engage in consensual sexual intercourse); *People v. Mills*, 81 Cal.App.3d 171, 181 (no right to privacy in information about one's molestation of a minor); Cal. Penal Code Sec. 290.03(a)(3) (one convicted of molesting a minor has a reduced expectation of privacy due to public's interest in public safety); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1499 (9th Cir.); *Stidham v. Peace Officer Standards and Training*, 265 F.3d at 1155; 265 F.3d 1144, 1155 (10th Cir.) (no constitutional right to privacy with respect to unproven allegations that plaintiff raped a young

girl; “[i]t is irrelevant to a constitutional privacy analysis whether these allegations are true or false”).

Accordingly, the Fourth Amendment is not implicated in this case. The priests’ argument that, under Fourth Amendment jurisprudence, the scope of the document production is too broad here is, in the opinion of the undersigned, not well taken in view of the *Franciscan Friars* holding.

The priests express concern that the Archdiocese’s documents could contain false accusations or inaccuracies that might be used to present them in a false light. Balancing privacy rights against the State’s compelling social interest in protecting children from molestation, however, the Court of Appeal concluded that the privacy rights of accused perpetrators must yield. *Franciscan Friars*, 188 Cal.App.4th at 1228-29; see *Lawrence v. Texas*, 539 US 558, 578 (no right to privacy in illegal sexual conduct, *Fredenburg v. City of Fremont*, 119 Cal.App.4th 408, 412 (released sex offenders have a reduced expectation of privacy); *People v. Martinez*, 88 Cal.App.4th 465, 475 (sex offender has substantially reduced right to privacy in medical and psychological records); *Rosales v. Los Angeles*, 82 Cal.App.4th 419 (no reasonable expectation of privacy in personnel records pertaining to inappropriate sexual conduct, and no viable cause of action for production of these records to plaintiff’s counsel in underlying litigation); *In re T.A.J.*, 62 Cal.App.4th 1350, 1359-61; *People v. Mills*, 81 Cal.App.3d 171, 181 (no right to privacy in information about one’s molestation of a minor); Cal. Penal Code Sec. 290.03(a)(3) (one convicted of molesting a minor has a reduced expectation of privacy due to public’s interest in public safety); *Fleisher v. City of Signal Hill*, 829 F.2d 1499 (9th Cir.) (probationary police

officer's right to privacy under the U.S. Constitution did not extend to his illegal sexual contact with a minor).

In *Franciscan Friars*, The Franciscans produced some personnel files and other confidential files of Individual Friars to the trial court and plaintiffs during the pendency of the proceedings, along with various privilege logs. 188 Cal.App.4th at 1229. The priests were not named defendants in all of the lawsuits, and most of them did not sign the settlement agreement. *Id.* The Franciscans notified the priests of their rights to object to the publication of the documents. In response, and as permitted by the settlement agreement, most of the individual priests served objections to the release of some documents, or parts of documents. *Id.* at 1230.

The individual priests argued that the documents were protected from disclosure by their constitutional rights to privacy. *Id.* at 1230. The Court of Appeal held, however, that the trial court did not abuse its discretion in balancing the competing interests and concluding the individual priests' privacy interests did not preclude disclosure of the documents. *Id.* at 1234. "Here, the compelling social interests in disclosure of information relating to sexual predators of children outweigh the Individual Friars' privacy interests." *Id.* at 1235. Accordingly, the Court of Appeals affirmed all of the orders of the trial court challenged in the appeal and held that the documents in the possession of the Franciscans concerning the individual priests could be publicly released. *Id.* at 1243.

It has been held that regardless of whether an individual has ever been convicted of a crime, the rights of a perpetrator or alleged perpetrator are greatly diminished. In *Stidham v. Peace Officer Standards and Training*, a police officer brought suit against the Peace Officer

Standards and Training agency (“POST”), alleging among other things that disclosure of allegations that he had raped a young girl and assaulted a resident violated his constitutional right to privacy. 265 F.3d 1144, 1155 (10th Cir.). The Tenth Circuit Court of Appeals held that he did not have a constitutional right to privacy or protection from disclosure of this information because the allegations involved alleged criminal activity. *Id.* The Court stated, “as we have previously noted, ‘a validly enacted law places citizens on notice that violations thereof do not fall into the realm of privacy’, and ‘[c]riminal activity is thus not protected by the right to privacy.’ . . . [citations omitted]. It is irrelevant to a constitutional privacy analysis whether these allegations are true or false; ‘[t]he disclosed information itself must warrant constitutional protection.’” *Id.* [citations omitted.] Because Stidham did not have a legitimate expectation of privacy with respect to the allegations against him, he did not state a claim for violation of his constitutional right to privacy. *Id.*; see *Humphrey v. Appellate Division* (2002), 29 Cal. 4th 569 (facts merely asserted on information and belief constituted a sufficient basis for a search warrant to test an accused child molester for human immunodeficiency virus).

Before the United States Supreme Court issued its opinion in *Stogner v. California* (“Stogner”), 539 U.S. 607, on June 26, 2003, the District Attorney had arrested and sought to indict several priests. Mr. Steier objected, and in *Stogner* the United States Supreme Court found that the statute of limitations could not be extended for criminal conduct. The criminal cases against several accused priests were therefore thrown out, and other accused priests were not arrested.

Plaintiffs argue that these priests did not cease to present a threat to the safety and well-being of children. These priests come before the Court seeking protection on the basis of their right to privacy. However, they do so with unclean hands. They avoided criminal convictions due to elapsed statutes of limitation. This does not mean that it is safe for these priests to live and work in proximity to minors. The Church itself has taken action against them, laicizing them or giving them extended leaves of absence. Where there are sustained or proven allegations of this type of behavior, information about that specific behavior compels it to be released.

The California Legislature has found that “sex offenders pose a high risk of engaging in further offenses after release,” and that “protection of the public from those offenders is a paramount public interest.” *Fredenburg v. City of Fremont* (2004), 119 Cal.App.4th 408, 412. It found that the public has a “compelling and necessary ... interest in obtaining information about released sex offenders so they can adequately protect themselves and their children,” and that “[b]ecause of the public’s interest in public safety, released sex offenders have a reduced expectation of privacy....” *Id.*

The Archdiocese and the priests argue that “[s]ome of the documents may contain confidential information pertaining to third parties who are not connected with the non-party objecting priests or the Archdiocese.” To the extent that unrelated third parties may raise colorable objections in this action is of concern to the undersigned.

In *Franciscan Friars*, the trial court held that the State’s compelling interest in protecting against child abuse outweighed not only the privacy interests of individual priests, but also of third parties. The privacy interests of bystanders “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." "[R]edacting 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." Courts routinely decide the rights of third parties when information relating to them is directly relevant to issues in litigation and there is a compelling need for disclosure essential to the resolution of the case. *E.g.*, Civ. Proc. Code Sec. 1985.3(e) (consumer records subpoena); *id.* Sec. 1985.6 (employment records); *id.* Sec. 2016.010 *et seq.* (Civil Discovery Act); *Alch v. Superior Court*, 165 Cal.App.4th 1412 (personal information about third persons subpoenaed, documents released over privacy right objections).

The priests assert that they are indispensable parties to this matter because the settlement would affect and impair their legal rights. The settlement does not threaten their protectable rights, however. They cite *Tracy Press, Inc. v. Superior Court*, which involved an attempt to obtain documents that a councilwoman possessed on her personal computer at home through her private e-mail account. 164 Cal.App.4th 1290. This case does not involve documents in the priests' possession. It involves the Archdiocese's documents and the Archdiocese has agreed to the document production in the negotiated settlement agreement.

Code of Civil Procedure, Section 389(a) provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party if:

- (1) in his absence complete relief cannot be accorded among those already parties[;]
or

- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may
 - (i) as a practical matter impair or impede his ability to protect that interest[,] or
 - (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest . . .”

Cal. Civ. Proc. Code Sec. 389.

In this case, those who are already parties to the litigation can secure complete relief because they have arranged a settlement process that is to their satisfaction without any involvement from the individual priests. The priests are strangers to the settlement, and they are nonparties to the litigation. So their stated interests have no bearing upon the parties’ own ability to recover completely through negotiations among themselves.

The priests argue that there is no “public right” to information contained in the documents at issue. The Court of Appeal has ruled, however, that the public has a compelling interest in just such information. The court in *Franciscan Friars* declared that:

all members of the Santa Barbara Franciscan province, as well as members of the Catholic Church throughout California, have a compelling interest in knowing [about the abuse].... Plaintiffs ... who have suffered the lifelong effects of childhood abuse, have the same interests as other members of the province and society in having the documents of their abusers released. Indeed, all citizens have a compelling interest in knowing if a prominent and powerful institution has cloaked in secrecy decades of sexual abuse revealed in the psychiatric records of counselors who continued to have intimate contact with vulnerable children while receiving treatment for their tendencies toward child molestation.

Franciscan Friars, 188 Cal.App.4th at 1236.

The priests raise the legal argument that “protection of the public is a matter exclusively reserved to the government.” They further maintain that it is inappropriate for private parties to

seek redress, such as this, for child abuse through the courts. This same position of the priests was raised and rejected in the *Franciscan Friars* case, 188 Cal.App.4th at 1236.

The psychotherapist/patient privilege is waived in the present context. To remain confidential, privileged communications must not knowingly be disclosed to third parties outside the privileged relationship. *E.g.*, *Franciscan Friars*, 188 Cal.App.4th at 1240, citing Cal. Evid. Code sec. 912. The documents at issue were not taken from the files of a patient, physician, or psychotherapist; they are presently housed in the Archdiocese's files. That they are in the possession of the Archdiocese, which is a third party to the relationship between the priests and their psychotherapists, is controlling evidence that the documents are not subject to the psychotherapist-patient privilege. *See id. at 1237* ("it is immaterial that the Individual Friars were not parties to the litigation; what is material is that the court and the parties possessed documents produced by the Franciscans in discovery or listed on privilege logs, and the parties had every right to agree upon the means to determine if those documents were to be made public.")

Moreover, many if not most, of the documents were generated during a referral process in which the Archdiocese ordered the priests to undergo psychological evaluations and treatment due to a suspected or admitted sexual attraction toward children. The Archdiocese's arguments set forth in its Memorandum of Points and Authorities, as well as in its own written policy statements as discussed fully below, demonstrate that these priests had no expectation that the information obtained during the evaluations and treatment would remain confidential. The

Archdiocese concedes that all such information was to be disclosed to members of the hierarchy, none of whom was in privy to the therapist-patient relationship.

The Court of Appeal in *Franciscan Friars* has already rejected the contention that such a disclosure is necessary to fulfill the purpose of a priest's therapy. The Archdiocese repeatedly cites to trial court orders while all but ignoring published appellate precedent. Twice in the last five years, religious entities that have engaged in concealing and covering up childhood sexual abuse by their priests have attempted to use the psychotherapist-patient privilege as a shield to prevent the public from learning the truth about this conduct. Most recently, the Franciscan Friars attempted and failed to employ the privilege for this purpose. *Franciscan Friars*, 188 Cal.App.4th 1224, *passim*.

It was the Archdiocese, however, that made the first such attempt. Specifically, in *Roman Catholic Archbishop of Los Angeles v. Superior Court*, the court concluded that the disclosure of two pedophile priests' communications with their psychotherapists to the Archdiocese vitiated the psychotherapy-patient privilege because (1) no one at the Archdiocese was a psychotherapist rendering therapy, and (2) no one at the Archdiocese was supervised by a treating psychotherapist. 131 Cal.App.4th 417, 424. The instant case is substantially identical.

California Evidence Code Section 1014 defines the psychotherapist-patient privilege as follows:

[T]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist[.]

Cal. Evid. Code Sec. 1014.

Section 1011 defines “patient” as follows:

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

Cal. Evid. Code Sec. 1011.

Section 1012 defines “confidential communication between patient and psychotherapist” as follows:

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

Cal. Evid. Code Sec. 1012.

For several decades, the Los Angeles Archdiocese has maintained various written policies regarding the procedures that are to be followed when an allegation of child sexual abuse is lodged against one of its priests. All priests were informed that the results of any psychological evaluations that the Archdiocese asked them to undergo would not remain confidential, but would be disclosed to the Archbishop and to other chancery officials. So the priest-patients were made aware that their psychological information would be disclosed to third persons who were not in privy to the psychotherapist-patient relationship within the meaning of Section 1012.

For example, the policy statement styled “Archdiocesan Policy on Sexual Abuse by Clergy” provides:

1. Procedures for Investigating and Response to Allegations of Sexual Abuse by Clergy....

2. Situations in Which Clergy Are Accused By Another or Other of Sexual Abuse.

A. Denial of the allegation(s) and credible explanation of events by the priest or deacon:

In cases where there are no other witnesses, no previous allegations of a similar nature, or where no other behavior from the past lends substance to the allegations, and where the explanation of events given by the priest or deacon is credible, such denial will normally bring the case to a close....

B. Denial by the priest or deacon when substantial issues remain unresolved:

In instances where there is a previous or unrelated allegation against a priest or deacon concerning sexual abuse, or where other behavior on his part lends substance to the allegations, he will ordinarily be asked to undertake a professional evaluation voluntarily. If he refuses to undertake such an evaluation and the evidence is such that the Archbishop must act as envisioned by canon 1718, the appropriate canonical process will be initiated and a professional evaluation employed in an appropriate manner as part of the development of the process.

Such an evaluation is not considered therapy, but rather, a professional psychological assessment through interview and testing to identify problematic areas that may be present in the priest or deacon's life and to make recommendations on how to proceed.

The Archdiocese will determine what professional person or institution will be entrusted with the task of conducting the evaluation. Should the priest or deacon disagree with the results of the evaluation, he has the right to consult another agreed-upon professional for a second evaluation.

Once the evaluation has taken place, a full report of the allegation(s) and the priest and deacon's response will be given to the Archbishop. If the truth of the allegation(s) has been established, or the case is so serious as to warrant residential treatment or resignation from office or the canonical removal of a

priest or deacon from his assignment, the Archbishop will meet personally with him following receipt of the evaluation report[.]

If mutual agreement is not reached, the Archbishop may consider initiating the canonical process deemed most appropriate to protect the Christian community (such as the canonical process for removal from office, for withdrawing faculties, for declaring the presence of an impediment to the exercise of ordained ministry, or for the imposition or declaration of a canonical penalty).

This statement demonstrates that, if a priest is accused of molesting a minor, the following takes place: (1) the priest undergoes a psychological evaluation arranged by the Archbishop; (2) the psychologist prepares a comprehensive evaluation of the priest; (3) the psychologist discloses the results of that evaluation to the Archbishop; and (4) the Archbishop uses the evaluation to make decisions about the priest's future ministry within the Church, such as whether to remove the priest from his office or ministry, whether to place him on administrative leave, whether to withdraw the priest's faculties, or whether to penalize the priest under some canonical provision. Although the Archdiocese now asserts that the purpose of the disclosures was to facilitate diagnosis and treatment, this written policy statement demonstrates otherwise.

In sum, priests within the Archdiocese knew that once they submitted to a psychological evaluation, the results would be disclosed to a third party who was not in privy to the psychotherapist-patient relationship.

Pursuant to Code Civ. Proc. section 664.6, this Court has jurisdiction to enforce the document disclosure provisions of *The Clergy Cases I* settlement agreements. Faced with the

same issue, the trial court in the *Friar* case determined that further proceedings are available to a prevailing party to enforce a settlement. (*Franciscan Friar* Trial Court Order at 28.)

[T]he instant case involves enforcement of a settlement agreement pursuant to C.C.P. §664.6[, which] provides ... 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 action do not end the Court’s inquiry. Courts are permitted to make findings of fact under a Section 664.6 reservation. [Citations.]

Id. at 27; *In re The Clergy Cases I*, 188 Cal.App.4th 1224, 1236-1239.

The parties set forth the definitive terms of their settlements in the two binding settlement agreements. They stipulated to allow this Special Master to make final and binding determinations regarding whether “any documents that have been subpoenaed by any party from a third party to the Settlement Agreement or otherwise,” or that were “contained within the personnel file ... relating to any accused offender in any of the lawsuits” shall be “produced to the Plaintiffs ... for public disclosure (the ‘Referred Issues’).” *Id.* Sec. 1 at 4. The parties defined the term “personnel file” to include everything. Specifically, it includes “the personnel files, the confidential files, and any other documents, if any, maintained by the Settling Defendants with respect to any accused offender in the Settled Actions.” *Id.* Sec. 2 at 4. These material terms and conditions of the settlement agreement have yet to be fulfilled. The settlement is not complete, and consequently this is not a “post settlement compelled production.”

Pursuant to Section 664.6, the parties expressly provided that the Court would retain jurisdiction after dismissal of the individual actions to enforce the terms of the settlement agreements. The document production and disclosure provisions are material provisions which contemplated that in deciding the document disclosure issues, the Special Master would receive evidence, determine disputed facts, and have the Court enter a binding and enforceable order. The Archdiocese has produced many records of the individual priests in discovery, and it is in possession of more such records not produced but listed in privilege logs. The plaintiffs bargained for disclosure of these records, and the Archdiocese agreed to a procedure by which the Court would retain jurisdiction to decide whether the documents could be disclosed. *See In re The Clergy Cases I*, 188 Cal.App.4th 1224, 1236-1239 (2010).

The parties' settlement is "enforceable under California Code of Civil Procedure §664.6." Settlement Agreement and Mutual Release Sec. 20 at 12. Section 664.6 provides that "[i]f 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." C.C.P. § 664.6. The parties did provide that "the Court will retain jurisdiction for interpretation and enforcement of this Settlement Agreement notwithstanding the dismissal of any of the KBL Actions." Sec. 20 at 12; *see In re The Clergy Cases I*, 188 Cal.App.4th 1224, 1236-1239.

Many of the priests whose records are at issue in this proceeding are now deceased. The privacy rights and privilege determinations regarding all files for priests who are now deceased is made simple. Under California law, privacy rights are personal. Therefore, the rights and

privilege that these deceased individuals possessed terminated upon, or shortly after, their demise. *Rittenhouse*, 235 Cal.App.3d at 1588.

Once a patient dies, the psychotherapist-patient privilege may only be claimed by the personal representative of the deceased patient's estate. *Boling v Superior Court* (1980), 105 Cal.App.3d 430, 440; Cal. Evid. Code Sec. 1013(c) ("if the patient is dead," "[t]he personal representative of the patient" is the holder of the psychotherapist-patient privilege); Cal. Evid. Code Sec. 993(c) ("if the patient is dead," "[t]he personal representative of the patient" is the holder of the physician-patient privilege). These privileges terminate, however, upon final distribution of the estate and the resulting discharge of the personal representative. *Rittenhouse v. Superior Court* ("*Rittenhouse*"), 235 Cal.App.3d 1584, 1588 n.2; *see also Boling v. Superior Court, supra*, 105 Cal.App.3d at 440 (pertinent historical sources support the conclusion the Legislature intended the term "personal representative of the patient" to mean the patient's "executor," or "administrator," as those titles would be used in association with his or her estate).

There is no dispute in the law regarding the files of deceased priests. All those files, including the files for which the psychotherapist-patient privilege is asserted, are to be produced immediately for publication. *Hendrickson v. Cal. Newspapers, Inc.*, 48 Cal.App.3d 59; *see Boling v. Superior Court*, 105 Cal.App.3d 430, 440; *Rittenhouse v. Superior Court*, 235 Cal.App.3d at 1588.

This Special Master or the Court will have to review and rule upon the personnel records and confidential files of living priests who have submitted objection to the Court, whether directly or through counsel. It is as to this category of documents that the *Franciscan Friars*

decision is most instructive. In that decision, Judge Lichtman's analysis evolved regarding the privacy rights of living priests who interposed objections. In the *Franciscan Friars* decision, faced with the exact same circumstances as in the Orange Diocese case, Judge Lichtman ordered the complete production and publication of the personnel records and psychiatric patient records of the living priests over their objections. That decision has been upheld by the Second District Court of Appeal, which has jurisdiction over this case, and it is now final.

Addressing whether "it was appropriate to publicly release confidential files of the alleged perpetrators[.]" over the objection of the priests, the court in *Franciscan Friars* held that "compelling social interests in protecting children from molestation outweigh [Individual Friars] privacy rights, and [that] the trial court correctly ordered the public release of confidential records in the possession of the Franciscans." *In re The Clergy Cases I* ("*Franciscan Friars*"), 188 Cal.App.4th 1224, 1228-29. After objections were served in the underlying action, the trial court balanced competing interests and determined that the Friars' privacy rights "must give way to the State's interest in protecting its children from sexual abuses." *Id.* at 1230, 1231. The Individual Friars asserted on appeal that public disclosure would violate their constitutional right to privacy, however, the appellate court affirmed the trial court's decision. *Id.* at 1232, 1234.

The court cited precedent for the proposition that "the right of privacy protects the individual's reasonable expectation of privacy against a serious invasion." *Id.* at 1234, citing *Pioneer Elec. (USA) v. Superior Court* ("*Pioneer Electronics*") (2007), 40 Cal. 4th 360, 370. "Privacy concerns are not absolute; they must be balanced against other important interests. [Citations.] '[N]ot every act which has some impact on personal privacy invokes the protections

of [our Constitution].... [A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy.” *Hill v. Nat’l Collegiate Athletic Assn.*

(“*Hill*”), 7 Cal. 4th 1, 37. Accordingly,

“[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.”

Hill, 7 Cal. 4th at 38. “[I]n applying the *Hill* balancing test, trial courts necessarily have broad discretion to weigh and balance the competing interests.” *Pioneer Electronics*, 40 Cal. 4th at 371. “Here, the compelling social interests in disclosure of information relating to sexual predators of children outweigh the Individual Friars’ privacy interests. ““The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.””⁴ *Id.*, citing *Enrique M. v. Angelina V.*, 174 Cal.App.4th 1148, 1154.

“Demonstrating this important public interest, numerous statutes have been enacted to protect children from sexual predators.” *Id.* at 1235; *see, e.g.*, 42 U.S.C. Sec. 14071 (Megan’s Law, requiring every state to enact legislation to protect children from sexual predators); *Welf. & Inst. Code* Sec. 300 *et seq.*; *id.*, Sec. 300.2 (dependency laws to protect children from abuse); *Pen. Code* Sec. 647.6 (criminal penalty for child sexual molestation); *id.* Sec. 290 *et seq.* (Sex Offender Registration Act; Legislature “found that the public ha[s] a ‘compelling and necessary ... interest’ in obtaining information about released sex offenders so they can ‘adequately protect

themselves and their children from these persons.’”; *Fredenburg v. City of Fremont*, 119 Cal.App.4th 408, 412-413, citing Stats. 1996, ch. 908, Ec. 1(b).)

The trial court declared that the Discovery Act serves several compelling state interests, “including seeking the truth in court proceedings, ‘ensuring those injured by the actionable conduct of other receive full redress’ of the injuries, and most importantly in this case, protecting children from sexual abuse.” (Order re: Publication of Confidential and Personnel Files, Apr. 2, 2009, *The Clergy Cases I & III*, L.A.S.C. Case Nos. JCCP 4286 & 4359 (Hon. Peter Lichtman presiding) (“*Franciscan Friars* Trial Court Order”) at 20). “For [counsel for] any Diocese or Archdiocese 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.” *Id.* at 39 n.78. “This Court has determined that there exists legitimate public concern regarding how church officials have allegedly covered up and concealed the sexual abuse of children for years.” *Id.* at 47. “Release of the contested documents would certainly further the State’s interest in protecting its children from sexual abuse. *Id.* Accordingly, the alleged perpetrators’ rights to privacy were outweighed by the State’s compelling interest in protecting its children from sexual abuse. *Id.* at 39.

The Court of Appeal’s reasoning in the *Franciscan Friars* case is compelling here. The decades of abuse by a record number of priests have had a devastating impact upon the victims, many of whom continue to suffer a hurt in silence.

IV

CONCLUSION & RECOMMENDATION

Employing the same “Four Step Analysis” utilized by Judge Peter D. Lichtman in the *Franciscan Friars* case, the undersigned concludes that a compelling state interest mandates a production of the documents in question, especially in view of the terms and conditions of the settlement agreement entered into between the plaintiffs and the Archdiocese of Los Angeles. The “Four Step Analysis” following *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, is set forth below:

Step one is to determine the existence of a recognized privacy right. Applied to the Clergy, personnel files are generally recognized as confidential. *See e.g. El Dorado Savings & Loan Assn. v. Superior Court* (1987), 190 Cal.App.3d 342. Hence, for the purposes of the undersigned’s recommendation, it will be assumed that the files in question trigger a privacy right.

Step two examines whether the person asserting the privacy right enjoys a reasonable expectation of privacy. Here, sex offenders and child abusers have a reduced expectation of privacy. Generally, criminal activity is not protected by the right of privacy. *Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144 (10th Cir. 2001).

Objectors have no right to sexual privacy in illegal sexual conduct. *See Lawrence v. Texas*, 539 US 558, 578 (2003); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1499 (1987) (probationary police officers right to privacy did not extend to his illegal sexual contact with a

minor under the US Constitution); *In re T.A.J.* (1998), 62 Cal.App.4th 1350, 1359-61 (no privacy right among minors to engage in consensual sexual intercourse).

In *Rosales v. Los Angeles* (2000), 82 Cal.App.4th 419, the court found that a police officer who has engaged in inappropriate sexual conduct has no cause of action against the City who had produced his personnel records to plaintiffs counsel in the underlying litigation against the City for negligent hiring. The court found that the plaintiff had no expectation of privacy in that context.

The same is true for any documents in the files that are medical or psychiatric records. See *People v. Martinez* (2001), 88 Cal.App.4th 465, 475 (convicted sex offenders reasonable expectation of privacy in his medical/psychological records must be evaluated in light of circumstances including his criminal background. A defendant's expectation of privacy in this context concerning his records is substantially reduced).

Even absent a conviction, a perpetrator's or alleged perpetrators' rights are greatly diminished. In *Stidham*, a police officer brought suit against the Peace Officer Standards and Training agency ("POST"), alleging among other things a violation of his constitutional right to privacy by disclosing to potential employers that Stidham's file contained allegations that he raped a young girl and assaulted a resident. *Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144, 1155 (10th Cir. 2001). The Tenth Circuit Court of Appeals held that he did not have a constitutional right to privacy or protection from disclosure of this information because the allegations involved alleged criminal activity. *Id.* The Court stated, "as we have previously noted, 'a valid enacted law places citizens on notice that violations thereof do not fall into the

realm of privacy’, and ‘[c]riminal activity is thus not protected by the right to privacy.’ ... [citations omitted]. It is irrelevant to a constitutional privacy analysis whether these allegations are true or false; ‘[t]he disclosed information itself must warrant constitutional protection.’” *Id.* [citations omitted]. Because the allegations against Stidham did not give him a legitimate expectation of privacy, he did not state a claim for violation of his constitutional right to privacy. *Id.*

In *Cinel*, the Fifth Circuit Court of Appeals, addressing the plaintiff’s state law claim for invasion of privacy, noted that to recover in Louisiana for invasion of privacy, one must prove that: 1) the defendant publicized information concerning the plaintiff’s private life; 2) the publicized matter would be highly offensive to the reasonable person; and 3) the information is not of legitimate public concern. *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994). The Fifth Circuit affirmed the district court’s holding that the third element was not met, because the videotape of the plaintiff, a priest, engaging in homosexual conduct with two adult males, related to the plaintiff’s guilt or innocence of criminal conduct. Thus, the videotape was a matter of legitimate public concern. *See id.* Also, the videotape was of legitimate public concern because it concerned plaintiff’s activities while an ordained Catholic priest and the Church’s response to those activities. *Id.*

Even if the law required more than just an allegation, an admission of the abuse shows that the perpetrator engaged in illegal sexual conduct. Also, an admission to a sexual interest in youth and sexual problems with youth shows a propensity to engage in criminal activity. Those that admit to the abuse or show dangerous propensities know that the activities are criminal in

nature. Like those that are ultimately convicted, those engaging in criminal activity should not benefit from secrecy under the right to privacy.

The briefs submitted by the plaintiffs disclosed that the perpetrators at issue here have either admitted to the sexual abuse of children or have shown dangerous propensities toward minors. In most instances, these admissions and propensities have not been contested either by the Archdiocese or by the priests.

Accordingly, to the extent that the objecting priests in this action have given testimony or statements admitting to abusing or molesting children, there no longer exists an expectation of privacy.

Convictions of many priests throughout the United States have been elusive due to the passage of time. Numerous alleged offenders, including clergy, were arrested under California's former law allowing for retroactive criminal prosecutions for child sexual abuse offenses. The vast majority of these alleged offenders were released when the United States Supreme Court issued its decision in *Stogner v. California*, 539 U.S. 607 (2003).

The public's interest in information regarding the alleged perpetrators at issue who admitted the abuse or admitted to dangerous propensities towards children may be even stronger because these alleged perpetrators are not known to the communities and often have unlimited access to children. The state has a compelling interest in making the information known to the community.

Hence, the perpetrators at issue in this case - those convicted of abuse, those that admitted to abuse, and those that admitted to dangerous propensities to harm children - should be accorded a reduced expectation of privacy.

Step three of the analysis set forth in *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, looks at whether the privacy invasion is serious. Here, this Special Master acknowledges that the privacy invasion is serious. This is not simply a matter of releasing the addresses of consumers (as was the case in *Pioneer*), but rather, releasing legally protected files.

Step four requires the Special Master to engage in a balancing test measuring the privacy rights against competing interests such as the State's obligation to protect its children from abuse.

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

Accordingly, can the fact that the actions have settled derail dissemination of the documents simply because the parties have availed themselves of California's public policy favoring settlement?

Can the act of settlement turn off the scrutiny switch and exalt rights of privacy over the States's *parens patriae* obligation to its minor children?

The answer to each of these questions has to be **no**.

To answer any of the above questions in the affirmative would be to punish the alleged victims for seeking an early resolution of the cases and would needlessly prolong matters through trial. Additionally, it would provide the alleged perpetrators and enablers with a safe haven for settlement. The defendant's conduct would be forever hidden and safe from scrutiny.

Privacy interests are not absolute and must be balanced against other important interests. Intrusion into constitutionally protected areas of privacy is appropriate where there is a balancing of the privacy right against a state interest and a finding that the state interest is compelling and outweighs the individual's privacy right. *Palay v. Sup. Ct.* (1993), 18 Cal.App.4th 919, 933.

In this regard, courts have also recognized an interest in making documents public which show cover ups and concealment of the truth, so as to provide the transparency necessary to ensure a cessation of this type of conduct in the future.

In *Kalinaiskas v. Wong*, 151 F.R.D. 363, 365-66 (D. Nev. 1993), the Federal District Court granted the motion of the Plaintiff to depose a former employee who had settled a similar sex discrimination claim against the employer under a Protective Order and Confidentiality Order. The sealed Stipulation for Protective Order and for Confidentiality Order stated that the employee would not "discuss any aspect of the plaintiff's employment at Caesars other than to state the dates of her employment and her job title." *Wong*, 151 F.R.D. at 365.

When noting the public interest in protecting the finality of suits and the secrecy of settlements desired by the parties, the court also was concerned that preventing the deposition of the former employee would “condone the practice of ‘buying the silence of a witness with a settlement agreement’, and that the secrecy agreement not only protected Caesar’s interests, it could serve to conceal ‘legitimate areas of public concern. This concern grows more pressing as additional individuals are harmed by identical or similar action.” *Id.* at 365-66.

A second concern to the court was that the deposition of the former employee was likely to lead to relevant evidence, and that preventing her deposition “or the discovery of documents created in her case, could lead to wasteful efforts to generate discovery already in existence.” *Id.* at 366. The court held that the plaintiff in *Wong* would be permitted to depose the former employee, but would not be allowed to inquire as to the substantive terms of the settlement. *Id.* at 367.

There can be no doubt, that in the matters presently before this Court, there exists legitimate public concern regarding how church officials have allegedly covered up and concealed the sexual abuse of children for decades. This concern, as in *Wong*, grows more pressing as additional individuals may be harmed by identical or similar action. This public concern clearly weighs in favor of allowing these documents to be made public. Surely, all members of the Catholic Church throughout California and especially the members of the Archdiocese of Los Angeles have a compelling interest in knowing what treatment the individual priests received, if any, for their predatory proclivities, and whether the policies and procedures employed and undertaken was adequate to protect young parishioners in their ministries.

The settlement agreements contain provisions dictating that the court is to retain jurisdiction over the actions pursuant to Code Civ. Proc. § 664.6 to oversee compliance with the settlement agreements. Plaintiffs urge that fundamental terms of those settlement agreements were the disclosure of the personnel files of priests accused of sexually molesting children. Thus, the settlement agreements and dismissals of the actions do not end this Court's inquiry. Courts are permitted to make findings of facts under a Section 664.6 reservation. See *Hernandez v. Board of Education* (2004), 126 Cal.App.4th 1161, 1176; *Malouf Bros. v. Dixon* (1991), 230 Cal.App.3d 280.

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 if the coordinated cases continued. The rights of privacy must give way to the State's interest in protecting its children from sexual abuse. The Archdiocese, the priests and counsel for the individual priests cannot refute the fact that, if the instant actions were still ongoing, and if the only objection was right of privacy, the materials subject to the dispute would have been produced in discovery.

For individual defense counsel, counsel for the Archdiocese of Los Angeles 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 of the law.

Accordingly, the undersigned Special Master hereby recommends that the Court overrule all objections interposed on behalf of the Archdiocese of Los Angeles and the non-party priests wherein rights of privacy and/or standing have been asserted and GRANT relief to the plaintiffs.

The relief GRANTED shall apply to all personnel files, confidential files and any other documents maintained by the settling defendants, the Roman Catholic Archdiocese of Los Angeles, a California Corporation sole, that were produced for the parties in the course of the pending coordinated litigation or on the website or in the course of discovery or maintained by the settling defendants in the regular course of conducting its affairs. The files shall be produced or made available to plaintiffs' counsel in redacted form within ninety (90) days of entry of an Order by the Superior Court of the State of California as follows:

1. The publication of unredacted medical records bearing no relationship to issues of sexual abuse or molestation of children, dispensation from fasting obligations, discussion of homily topics and the like, serve no useful public purpose and may be redacted. These documents have no relation to sexual abuse or molestation claims brought by the plaintiffs. These topics to be redacted include such matters as: the priests' last will and testament, the priests' pension plan, the priests' health insurance and personal and administrative issues bearing no relevant information on the child abuse issues involved in the coordinated litigation.

2. The personnel and confidential files of all deceased priests and deceased former priests that any allegations or complaints were made against for sexual abuse or molestation of minors whether the allegations were sustained or not. Redacted from the said files will be the names of victims, names of employees and agents of the Archdiocese, names of non-party victims and witnesses. Also to be redacted are the names of individuals protected by specific privileges under California law such as licensed health care providers, priest penitent, attorney

client, et al. The nature and extent of treatment, together with any psychotherapist, psychiatric or psychological reports, are not to be redacted except to the extent as set forth above.

3. The personnel and confidential files of all priests and former priests that were either convicted or pled guilty or nolo contendere in any criminal prosecution for sexual abuse or molestation, felony or misdemeanor, brought against them. The same redactions as set forth in Paragraph 2 above shall be made here.

4. The personnel and confidential files of all priests and former priests that were found liable or admitted in court proceedings or to the court in any civil action brought against them for sexual abuse, molestation or civil battery involving minors. The same redactions as set forth in Paragraph 2 above shall be made here.

5. The personnel and confidential files of all priests and former priests that were accused and named in this coordinated proceeding, after an investigation by the Los Angeles Archdiocese, in which no criminal or civil proceedings were brought and where the investigation resulted in the allegations being sustained. The same redactions as set forth in Paragraph 2 above shall be made here. However, in these cases, the names of the priest or former priest against whom the accusations were brought against, as the perpetrator, will be initially redacted. These priests or former priests shall be identified by assigned identity number in order to determine and track if they were involved in any way in repeat, multiple or serial incidents of sexual abuse or molestation of children. If so, the name or names of these priests or former priests shall be unredacted and disclosed.

6. The Archdiocese shall produce the redacted files to the custody of the Court on a date certain to be set by the Court and shall provide written notice to the accused priest and former priest offenders. Each accused priest or former priest offender may then file his own privilege log with the Court. The Special Master will then resolve the issue or issues presented on a file by file basis, considering each file in alphabetical order, *in camera*. Thereafter, in the event the individual objections by the accused priest or former priest are overruled by the Special Master and/or the Court, the redacted file will be made available to plaintiffs' counsel to be disclosed to their clients and to the public.

In the *Franciscan Friars* matter, 188 Cal.App.4th 1224, the Court of Appeal held that the public interest in information identifying child molesters, especially when the individuals had been convicted of such conduct, admitted to such conduct or their personnel files indicated a propensity for such conduct, outweighed the molesters' rights of privacy. The Court of Appeal also ruled that the individual priests waived the psychotherapist/patient privilege by permitting their reports to be disclosed to the Archdiocese for purposes unrelated to diagnosis and treatment.

The purpose of the Special Master's assignment in this coordinated case was not for the purpose of: 1) sanitizing the personnel files of the priests; 2) punishing anyone; or 3) to prepare and publish an investigative report. The sole purpose and function of this assignment was to enforce Paragraph 19 of the Global Settlement Agreement And Mutual Release entered into by the plaintiffs and the Los Angeles Archdiocese "follow[ing] applicable law in making [his] determinations regarding the Referred Issues." Paragraph 19(c). This assignment should not be

morphed into something beyond the bargained for objectives. This Special Master is not the judge or jury for any of the reprehensible conduct complained about here.

The personnel and confidential files will be released and disclosed, in a redacted form, following applicable law, to be reviewed by plaintiffs and the public who will then make their own assessment of the conduct contained therein. The conduct of the predatory priests and the Church hierarchy in recycling these priests will be evaluated and judged by the "rule of law."

There is no amount of compensation that can serve as a substitute or recompense for the indignities and personal violations inflicted by the rogue predator priests upon the innocent children of the Church over a span of decades. The person or persons responsible for all of the misdeeds will, according to the doctrine and teachings of the Church, ultimately answer to a higher authority.

DATED: April 5, 2011

Dickran Tevrizian
DICKRAN TEVRIZIAN
Judge United States District Court (Retired)
SPECIAL MASTER / REFEREE

ORDER

The Court, having duly considered the Report and Recommendation of the Special Master under date of _____, 2011, hereby approves and adopts said Report and Recommendation.

DATED: _____

EMILIE H. ELIAS
Judge, Los Angeles Superior Court

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Clergy Cases I
Reference No. 1220039160

I, Christina Dobszewicz, not a party to the within action, hereby declare that on April 06, 2011 I served the attached SPECIAL MASTER'S REPORT AND RECOMMENDATION GRANTING, IN PART, PLAINTIFFS' DOCUMENT PRODUCTION DISCLOSURE AND PUBLICATION PROVISION OF THE CLERGY I SETTLEMENT AGREEMENTS on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Los Angeles, CALIFORNIA, addressed as follows:

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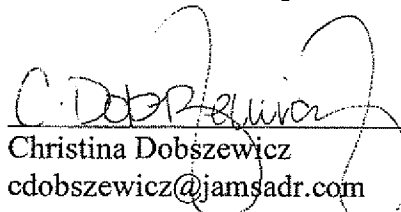
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Hon. Emilie Elias
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<<<VIA US MAIL ONLY

I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA on April 06, 2011.


Christina Dobszewicz
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