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11
 12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 13 COUNTY OF LOS ANGELES, CENTRAL COURT
 14

15 Coordinated Proceeding)
 Special Title (Rule 1550(b)))
 16 **THE CLERGY CASES I**)
 17 _____)
 This Document Relates to Los Angeles Superior)
 18 Court Case No. BC307683)
 19 MOLLY MORAN HARDING,)
)
 20 Plaintiff,)
)
 21 v.)
)
 22 DEFENDANT DOE 1, et al,)
)
 23 Defendants.)
)
 24 _____)
)
 25)
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 26)
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 27)
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 28)

**JUDICIAL COUNCIL COORDINATION
 PROCEEDING NO. 4286**

Trial Coordinating Judge:
 The Honorable Haley J. Fromholz
 Department 20

**PLAINTIFF'S OPPOSITION TO
 DEFENDANT DOE 5'S DEMURRER TO
 PLAINTIFF'S FIRST AMENDED
 COMPLAINT**

Complaint Filed: December 12, 2003
 Trial Date: February 28, 2007

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1 **I. INTRODUCTION**

2 This case involves sexual abuse suffered by Molly Moran Harding (“Plaintiff”) at the hands of
3 Father Joseph A. Lopez, a Claretian Order priest assigned to San Gabriel Mission High School in the
4 Archdiocese of Los Angeles. Plaintiff was a minor student at San Gabriel Mission High School when
5 Father Lopez began to sexually abuse her in or about the Fall of 1964. The abuse continued beyond
6 Plaintiff’s 18th birthday in 1966, finally ending in 1970.

7 On December 12, 2003, Plaintiff filed a Complaint in this matter alleging causes of action related
8 to their sexual abuse and seeking damages from defendants. On December 14, 2006, the Court
9 sustained in part and denied in part Defendants’ Omnibus Demurrer (“December 14 Order”). As a
10 result, Plaintiff filed a First Amended Complaint (“FAC”) on January 3, 2007. In response, Defendant
11 Doe 5 filed this Demurrer.

12 **II. THE PLAINTIFFS’ COMPLAINT MUST BE LIBERALLY CONSTRUED, AND ALL OF**
13 **PLAINTIFFS’ ALLEGATIONS ARE TO BE ACCEPTED AS TRUE.**

14 A demurrer tests only the allegations contained in the complaint, and the function of a demurrer
15 is to test the sufficiency of a pleading by raising questions of law. Buford v. State of Cal. (1980) 104
16 Cal.App.3d 811, 818. On demurrer, pleadings are read liberally and the allegations contained therein
17 are assumed to be true. Banerian v. O’Malley (1974) 42 Cal.App.3d. 604, 610-11.

18 For purposes of ruling on demurrer, the allegations of the complaint are presumed true, regardless
19 on how improbable the facts may appear. Blank v. Kirwan (1985) 39 Cal.3d 311, 318. A general
20 demurrer does not put at issue the plaintiff’s ability to prove the allegations contained in the complaint,
21 and any perceived difficulty of proof is not to be considered by the courts in its examination of the
22 general demurrer. Alcorn v. Anbro Eng’g Inc. (1970) 2 Cal.3d 493, 496. Also taken as true are facts
23 that may be implied or inferred from those expressly alleged. Kiseskey v. Carpenters’ Trust for So.
24 Cal. (1983) 144 Cal.App.3d 222, 228.

25 Thus, in considering a demurrer, the complaint must be liberally construed by drawing all
26 reasonable inferences from the facts pleaded, with a view towards substantial justice to all parties.
27 Flynn v. Higham (1983) 149 Cal.App.3d 677, 679; Wilner v. Sunset Life Ins. Co. (2000) 78
28 Cal.App.4th 952, 958; King v. Central Bank (1977) 18 Cal.3d 840, 843.

1
2 In reviewing a complaint to determine whether a cause of action has been stated, the court is
3 to examine the complaint in its entirety, and if upon consideration of all the facts stated it appears the
4 plaintiff is entitled to some relief, the demurrer is to be overruled. Selby Realty Co. v. City of San
5 Buenaventura (1973) 10 Cal.3d 110, 123. “[I]f upon a consideration of all the facts stated, it appears
6 that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint
7 will be held good, although the facts may not be clearly stated, or may be intermingled with a
8 statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand
9 relief to which he is not entitled under the facts alleged.” Matteson v. Wagoner (1905) 147 Cal. 739,
10 742. In other words, a “plaintiff need only plead facts showing that he may be entitled to some relief.”
11 Alcorn, 2 Cal.3d at 496.

12 **III. PLAINTIFF HAS ALLEGED A CAUSE OF ACTION AGAINST DEFENDANT DOE**
13 **5**

14 **A. The Facts Alleged by Plaintiff in Their Complaint Have Established That Defendant Doe**
15 **5 Owed a Duty to the Plaintiff to Protect Her from the Molestation by Father Lopez.**

16 Defendant Doe 5 (“Defendant”) states that Plaintiff’s First Amended Complaint (“FAC”) must fail
17 because Defendant because Defendant did not own or have “any control over the location where the
18 facts central to plaintiff’s claim arose.” (Demurrer MPA at 1). According to Defendant, the fact that
19 Lopez was admitted in Defendant Order is not sufficient to establish a “connection between plaintiff
20 and Defendant Doe 5 to state any claim.” (Id.) These facts, as stated by Defendant, ignore the fact that
21 as a priest of Defendant Order, Defendant had complete control over Lopez’s placement in schools
22 and/or parishes of the other Defendants. (FAC at 2-3.) Further, even if Defendant did not control
23 Lopez at the time of Plaintiff’s abuse (which Plaintiff does not concede), Defendant still is not excused
24 from liability.

25 There existed a duty by Defendant to inform subsequent employers that Father Lopez was a danger
26 to minors. Further, Plaintiffs have alleged an ongoing agency relationship between Father Lopez and
27 Defendant, as well as alleging the ratification of Father Lopez’s acts by Defendant. (FAC at 4.) All
28 of the facts alleged by the Plaintiffs must be assumed true for purposes of a demurrer. Defendant

1 argues essentially that since the abuse happened at locations owned or controlled by the other
2 Defendants in this case, there was no Duty to the Plaintiffs by this Defendant. This is incorrect.

3 Defendant does not dispute that Father Lopez was an agent and/or employee of the Defendant
4 Order before and during the time he was assigned to schools and/or parishes within Defendant
5 Archdiocese. The law of the State of California is clear that, where an employer has full knowledge
6 that the employee was, in fact, a child molester, there exists a duty on the part of the employer to
7 inform future or co-employers of that danger to children. Randi W. v. Muroc Joint Unified School
8 District, (1997) 14 Cal. 4th 1066, 1081-84.

9 In Randi W. v. Muroc Joint Unified School District, (1997) 14 Cal. 4th 1066, the California
10 Supreme Court made it clear that, where an educator knows or has reason to know that a
11 teacher/school administrator is a child molester, there exists a duty to any potential victims of that
12 perpetrator. In Randi W., a minor female who was molested by a school administrator sued a former
13 school district which had known that the administrator was a risk to children, but had failed to reveal
14 this information in their recommendation letters. The Court noted the compelling state interest in
15 protecting minors from sexual abuse. It should be noted that the recommendation letters sent out in
16 the Randi W. case did not specifically state that the perpetrator was not a child molester, rather, the
17 recommendation letters did not address the issue at all. In Randi W., it was the failure of the prior
18 employer to warn future employers in their recommendation letters that was at issue.

19 The court in the Randi W. case directly stated that it was proper to assign liability to prior
20 employers who could foresee that a known child abuser would be placed in positions of authority over
21 children, but did not provide any warning to those subsequent employers. "One of society's highest
22 priorities is to protect children from sexual or physical abuse." Randi W., 14 Cal. 4th at 1078-79 (citing
23 Barela v. Sup. Ct., (1981) 30 Cal. 3rd 244, 254 (duty of all citizens to protect children from all sexual
24 abuse)). The Randi W. court directly addressed the issue of whether the failure of the defendant school
25 district to indicate that the perpetrator was a child molester in their recommendation letters created a
26 duty to the plaintiff:

27 In this state, the general rule is that all persons have a duty to use ordinary care to prevent
28 others from being injured as the result of their conduct. (Rowland v. Christian (1968) 69 Cal.2d
108, 112 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]; see Civ. Code, § 1714.) As we have
observed, " Rowland enumerates a number of considerations ... that have been taken into account

1 by courts in various contexts to determine whether a departure from the general rule is appropriate:
2 'the major [considerations] are the foreseeability of harm to the plaintiff, the degree of certainty
3 that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct
4 and the injury suffered, the moral blame attached to the defendant's conduct, the policy of
5 preventing future harm, the extent of the burden to the defendant and consequences to the
6 community of imposing a duty to exercise care with resulting liability for breach, and the
7 availability, cost, and prevalence of insurance for the risk involved.' (Italics added.) (69 Cal.2d at
8 p. 113.) The foreseeability of a particular kind of harm plays a very significant role in this calculus
9 [citation], but a court's task-in determining 'duty'-is not to decide whether a particular plaintiff's
10 injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate
11 more generally whether the category of negligent conduct at issue is sufficiently likely to result in
12 the kind of harm experienced that liability may appropriately be imposed on the negligent party."
13 (Ballard v. Uribe (1986) 41 Cal.3d 564, 572-573, fn. 6 [224 Cal.Rptr. 664, 715 P.2d 624].)

8 a. Foreseeability and causality

9 Applying these factors here, we first examine whether plaintiff's injuries were a foreseeable
10 result of defendants' representations regarding Gadams's qualifications and character, coupled with
11 their failure to disclose to the Fresno Pacific College placement office information regarding
12 charges or complaints of Gadams's sexual misconduct. Could defendants reasonably have foreseen
13 that the representations and omissions in their reference letters would result in physical injury to
14 someone? Although the chain of causation leading from defendants' statements and omissions to
15 Gadams's alleged assault on plaintiff is somewhat attenuated, we think the assault was reasonably
16 foreseeable. Based on the facts alleged in the complaint, defendants could foresee that Livingston's
17 officers would read and rely on defendants' letters in deciding to hire Gadams. Likewise,
18 defendants could foresee that, had they not unqualifiedly recommended Gadams, Livingston would
19 not have hired him. And, finally, defendants could foresee that Gadams, after being hired by
20 Livingston, might molest or injure a Livingston student such as plaintiff. We must assume, for
21 purposes of demurrer, that plaintiff was indeed injured in the manner she alleges, and that a causal
22 connection exists between defendants' conduct and the injury suffered. As plaintiff's complaint
23 alleges, her injury was a "direct and proximate result" of defendants' fraud and misrepresentations.

17 Randi W. 14 Cal. 4th at 1077-78.

18 The parallels here are striking. Defendant Order knew that Lopez was a danger to sexually abuse
19 minors and, despite this fact, allowed (and presumably recommended) Lopez to be assigned to work
20 in the Defendant Archdiocese schools. Whether or not Defendant Order alerted the other Defendants
21 of Lopez's dangerous propensities is one of the facts Plaintiff seeks to discover now that this case has
22 been released from a discovery stay.

23 **B. Defendant Archdiocese's Arguments as to the Lack of an Agency Relationship at the**
24 **Time of Abuse Are Inappropriate in a Demurrer as Agency must Be Determined by the**
25 **Finder of Fact.**

25 Defendant Order demurs on the basis that there it had no control over Lopez because it "did not
26 have any "control" over the environment where the unlawful sexual conduct arose." (Demurrer at 5.)
27 However, control over the "environment" where Plaintiff's abuse occurred is irrelevant as to
28 Defendant Order, because, as Plaintiff alleges, Defendant Order had control over Lopez. (FAC at 2,

1 ¶ 2.2.) The question of the existence of a principal-agency relationship is a question of fact for the
2 fact-finder, and it is not proper for Defendant Order to demurrer on that issue.

3 Defendant does not dispute anywhere in their demurrer that an agency relationship existed while
4 Father Lopez was assigned to parishes and/or churches within Defendant Archdiocese. Defendant
5 does assert, by implication, that the agency relationship ended when Father Lopez was assigned to
6 schools and/or parishes within Defendant Archdiocese. The question of whether and when an agency
7 relationship existed is a question of fact, and during a demurrer, all questions of fact must be resolved
8 in favor of the complaining party. Banerian v. O'Malley (1974) 42 Cal.App.3d. 604, 610-11.

9 **IV. PLAINTIFF'S FIRST AMENDED COMPLAINT IS NOT TIME-BARRED**

10 Defendant argues that Plaintiff's claims are time-barred under C.C.P. § 340.1(b) because Plaintiff
11 has failed to allege facts sufficient to "knew or had reason to know of unlawful *sexual* conduct by the
12 perpetrator *before or during the alleged abuse of the plaintiff*, but nevertheless failed to take actions
13 to prevent further sexual misconduct by the accused." (Demurrer at 4-5 (emphasis in original).)
14 Defendant cites as authority this Court's January 22, 2007 Order in the Michael S. Case. First and
15 foremost, it should be noted that the Order Defendant cites is a ruling on a Motion for Summary
16 Judgment, not a Demurrer. The threshold for Plaintiff to survive a motion for summary judgment
17 is more difficult, and rightly so where both Plaintiff and Defendant have had the opportunity to
18 conduct discovery prior to the motion. Where, as here, Plaintiff has not had the opportunity to conduct
19 discovery prior to filing her Complaint, Plaintiff's allegations are given much greater weight.

20 Nevertheless, Defendant argues that Plaintiff's claims are a "novel 'guilt by association' theory of
21 recovery[.]" (Demurrer at 5.) Plaintiff claims that Defendant Order "is the religious order that had
22 jurisdiction and control over the Perpetrator during the dates of abuse" (FAC at 6.) Plaintiff's claims
23 of a principal-agent relationship between Defendant Order and Lopez are hardly novel. As discussed,
24 supra, agency is not an appropriate question to be decided on a demurrer.

25 Defendant also argues that Plaintiff has failed to allege facts sufficient to show notice to Defendant
26 Order in the FAC. (Demurrer at 5-6.) Defendant argues that "plaintiff at best alleges facts evidencing
27 a close friendship with her alleged abuser" and these facts are insufficient to extend the statute of
28 limitations under 340.1(b). Plaintiff takes offense at Defendant's characterization of this relationship

1 between a sixteen year old girl and a priest more than 20 years her senior. Regardless, the facts alleged
2 by Plaintiff are sufficient to overcome a demurrer. Should the Court agree that Plaintiff's FAC is
3 somehow deficient, based on evidence received in discovery, Plaintiff can easily amend the facts as
4 pled in such a way that would satisfy even Defendant Order's stringent notice standards.

5 Defendant Order also argues that Plaintiff's claims are time-barred because the facts alleged only
6 show notice to other Defendants. (Demurrer at 6-7). Again, Defendant ignores the agency
7 relationships alleged in Plaintiff's FAC: "Plaintiffs [sic] is informed and believe, and on that basis
8 allege, that each Defendant is the agent, servant and/or employee of other Defendants, and . . . ratified
9 the acts of the other Defendants." (FAC at 4, ¶ 4.) Again, the agency relationship or lack thereof on
10 the part of all Defendants is not a proper decision on a demurrer.

11 Finally, Defendant appears to argue that Plaintiff's claims are time-barred because language in the
12 original Complaint was omitted from the FAC. (Demurrer at 7 (quoting Complaint at ¶ 14).) The
13 language Defendant refers to has to do with whether the Defendants "failed to take reasonable steps
14 and failed to implement reasonable safeguards to avoid acts of unlawful sexual conduct in the future
15 by the Perpetrator" as required by C.C.P. 340.1(b). Defendant ignores paragraph 7 of the FAC,
16 however, which alleges, on information and belief:

17 that even though the Defendants knew and should have known that the Perpetrator had
18 molested and sexually abused minors, and even though the Defendants had actual and
19 constructive knowledge of the molestations and sexual abuses, the Defendants covered up the
20 molestations and abuses by the Perpetrator, continued to hold the Perpetrator out as a Catholic
21 priest who could be trusted with minor parishioners and/or minor students, continued to allow
22 the Perpetrator to work with minor parishioners and/or minor students on a daily basis, and
23 continued to move the Perpetrator to different Catholic churches and/or schools within the
24 Defendants, and failed to supervise and/or monitor the Perpetrator to ensure that he was not
25 molesting minor parishioners and students again.
26 (FAC at 6, ¶ 7 (emphasis added).)

27 Plaintiff submits that these allegations are sufficient to satisfy the "reasonable steps" requirement of
28 340.1. Should the Court agree that Plaintiff's FAC is somehow deficient in this regard, Plaintiff can
easily amend the facts based on the discovery conducted thus far to satisfy this requirement.

**V. PLAINTIFF HAS AMENDED HER COMPLAINT IN COMPLIANCE WITH THE
COURT'S ORDER ON THE OMNIBUS DEMURRERS**

In the December 14 Order, the Court granted Plaintiffs leave to amend their Complaint to allege
facts sufficient to sustain various causes of action. Defendant argues that Plaintiffs' First Amended

1 Complaint still fails to allege sufficient facts to overcome a demurrer to these claims. Defendant is
2 wrong.

3 **A. Plaintiff Has Stated Valid Causes of Action for Fraud and Misrepresentation (Count 5)**

4 Defendant argues that Plaintiffs have failed to state specific facts sufficient to give rise to a cause
5 of action for fraud. This is in error.

6 Defendant first argues that C.C.P. § 340.1 does not revive the three year statute of limitations for
7 fraud claims because the alleged damages we not suffered “as a result of childhood sexual abuse.”
8 (Demurrer at 8.) Defendants’ contention is without merit.

9 The statute defines “childhood sexual abuse”:

10 "Childhood sexual abuse" as used in this section **includes** any act committed against the
11 plaintiff that occurred when the plaintiff was under the age of 18 years and that would have
12 been proscribed by Section 266j of the Penal Code; Section 285 of the Penal Code; paragraph
13 (1) or (2) of subdivision (b), or of subdivision (c), of Section 286 of the Penal Code;
14 subdivision (a) or (b) of Section 288 of the Penal Code paragraph (1) or (2) of subdivision (b),
15 or of subdivision (c), of Section 288a of the Penal Code; subdivision (h), (i), or (j) of Section
16 289 of the Penal Code; Section 647.6 of the Penal Code; **or any prior laws of this state of
17 similar effect at the time the act was committed. Nothing in this subdivision limits the
18 availability of causes of action permitted under subdivision (a), including causes of action
19 against persons or entities other than the alleged perpetrator of the abuse.**
20 C.C.P. § 340.1(e) (emphasis added).

21 In the omnibus demurrer, Defendants made a similar contention that “in prescribing the Penal Code
22 Sections that can be predicate acts, the law [340.1(e)] excludes all other conduct that is not a predicate
23 under the law.” December 14, 2006 Order, at 15. The Court rejected Defendants’ argument, noting
24 that “[t]he word ‘includes’ clearly denotes that the list is not exclusive.” *Id.* Defendants’ argument
25 appears to invite the Court to reexamine a decision handed down just two months ago. Because these
26 issues were fully briefed for the omnibus demurrer, Plaintiffs decline to take the bait, so to speak.
27 Plaintiffs respectfully request that the Court deny Defendants’ argument, again.¹

28 Further, in ruling on the omnibus demurrer, the Court held that “as to the fifth cause of action [for
fraud], Plaintiffs are correct [that i]f Defendants concealed or failed to disclose knowledge of the

¹ Should the Court disagree, Plaintiffs would respectfully request leave of the Court to
file supplemental briefing with regard to Defendants’ arguments as they relate to the
timeliness of Plaintiffs’ Fraud-Related Claims and claims for various Penal Code
violations, discussed *infra*. Because the Court’s prior Order was abundantly clear on
this issue, Plaintiffs’ counsel chose not to waste the Court’s time addressing these
redundant issues. See December 14 Order, at 42-44; 54-57.

1 perpetrator's tendency or history of child molestation would likely be more available to Defendants
2 than to Plaintiffs." Id. at 44. For this reason, the Court overruled Defendants' demurrer on the fifth
3 cause of action for fraud.²

4 The facts stated by the Plaintiff retain sufficient specificity to state a cause of action for fraud
5 against Defendant Archdiocese. This issue has been litigated at length in the prior demurrers and the
6 Court has clearly stated that the representations made by the Plaintiffs were sufficient to state a claim
7 for fraud. December 14 Order, at 42-49. Further, Plaintiff has stated with specificity that Defendant
8 was guilty of fraud or misrepresentation in that any statements made to other Defendants regarding the
9 fitness of Father Lopez should have included statements that he was a danger to children. See Randi
10 W., (1997) 14 Cal. 4th 1066, 1081-84. This provides more than sufficient notice for the Defendant
11 Order to present a defense to Fraud. They need only demonstrate that either (a) they had no actual
12 and/or constructive notice that Father Lopez was a child molester, or (b) that they knew Father Lopez
13 was a child molester, but that they provided notice of that fact to subsequent employers.

14 As indicated supra, the claims of the Plaintiff against Defendant Order are based in part upon
15 Defendant's failure to inform subsequent employers that Father Lopez was a danger to children.
16 Plaintiffs have demonstrated that Defendant Archdiocese did, in fact, have a duty to make
17 representations to subsequent employers. Accordingly, Plaintiff's claims for fraud are valid.

18 Accordingly, Plaintiffs have stated a valid causes of action for Count 5. Should the Court agree
19 that Plaintiff's FAC is somehow deficient in this regard, Plaintiff can easily amend the facts based on
20 the discovery conducted thus far to satisfy this requirement.

21 **B. Plaintiff Has Pled Sufficient Facts to Support Their Breach of Fiduciary Duty Claim**
22 **(Counts 7)**

23 **1. Plaintiff Has Sufficiently Alleged a Confidential Relationship Based on Their**
24 **Attendance at a School Operated by the Defendants**

25 _____
26 ² The court granted Defendants' demurrer, with leave to amend, Plaintiffs' sixteenth
27 cause of action for fraud/misrepresentation to the Plaintiff because these facts would
28 more likely be known to the Plaintiff than the Defendants. December 14 Order at 44.
Plaintiff's FAC omits this cause of action, because at the time of filing, Plaintiff did not
feel she had sufficient facts to state a claim for misrepresentation. Defendant, however,
erroneously cites this discussion in the Order to support their demurrer on the fifth cause
of action. (Demurrer at 8.)

1 In Richelle L. v. Roman Catholic Archbishop, (2004) 106 Cal. App. 4th 257, the Court of Appeals
2 held that the confidential relationship between priest and parishioner may give rise to fiduciary duties
3 where the parishioner's youth, among other factors, makes him more vulnerable to the priest's superior
4 power. Defendant misconstrues the Court's ruling asserting that it precludes the assertion of a breach
5 of fiduciary duty claim when they contend that Plaintiff's claim must fail because the relationship
6 between Plaintiff and Defendants is not "legally defined [nor] regulated." (Demurrer at 10).

7 In his September 23, 2004 Order in Clergy III cases, The Honorable Judge Sabraw recognized that
8 the operation of a school could be a basis for imposition of a fiduciary duty against a religious
9 organization. The court noted that there may be authority that a fiduciary relationship may exist
10 between children and "*schools*, youth organizations, summer camps, and similar organizations." Sept.
11 23 Order at 19-20 (emphasis added).

12 A school-student relationship clearly fits within the California definition of one that creates a
13 fiduciary duty. "One standing in a fiduciary relation with another is subject to liability to the other for
14 harm resulting from a breach of duty imposed by the relation." Restatement (Second) of Torts,
15 Violation of Fiduciary Duty, § 874, quoted in Richelle L., supra. The fiduciary's obligations to the
16 dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Restatement
17 (Second) of Trusts, §§ 170, 174. Thus, "[a] fiduciary who commits a breach of his duty as a fiduciary
18 is guilty of tortious conduct to the person for whom he should act...[T]he liability is not dependent
19 solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results
20 from the relation." Restatement (Second) of Torts § 874 cmt. b. "The essence of a fiduciary or
21 confidential relationship is that the parties do not deal on equal terms, because the person in whom
22 trust and confidence is reposed and who accepts that trust and confidence is in a superior position to
23 exert unique influence over the dependent party. Richelle L., Cal. App. 4th at 271. A "confidential
24 relationship may be founded on a moral, social, domestic, or merely personal relationship, as well as
25 on a legal relationship. Id. The elements of a confidential relationship have been described as: "1) The
26 vulnerability of one party to the other which 2) results in the empowerment of the stronger party by
27 the weaker which 3) empowerment has been solicited and accepted by the stronger party and 4)
28 prevents the weaker party from effectively protecting itself." Langford v. Roman Catholic Diocese

1 of Brooklyn, 177 Misc. 2d 897, 900 (N.Y. Sup. Ct. 1998), aff'd, 271 A.D. 2d 494 (N.Y. App. Div.
2 2000) (quoted in Richelle L., Cal. App. 4th at 272.) “A ‘confidential relationship’...refers to an unequal
3 relationship between parties in which one surrenders to the other some degree of control because of
4 the trust and confidence which he reposes in the other.” Richelle L., Cal. App. 4th at 273 n.6.

5 The basic elements of a confidential relationship clearly exist here, both in terms of a general
6 relationship between a high school and its students, as well as in the specific terms of the relationship
7 between the Defendant and Plaintiff. As to the general relationship, there clearly is an unequal
8 relationship between a school and one of its students in which the student surrenders to the school
9 some degree of control because of the trust and confidence which he reposes in the other. Moreover,
10 even if this Court were to find that a school generally does not have a fiduciary obligation to its
11 students, the Defendant’s demurrer should be overruled based on the allegations of a *specific*
12 relationship between Plaintiffs and the Defendant school. Plaintiff attended the Defendant school,
13 which Plaintiff alleges had a principal/agency relationship with the Defendant Order. Plaintiff is
14 informed and believes that Defendant Order founded Defendant School and regularly supplied priests
15 to teach at Defendant School, including the Perpetrator.³ Thus, a special fiduciary relationship of trust
16 existed between Plaintiff and Defendant Order.

17 Further, “the existence of a confidential relationship is a question of fact.” December 14 Order at
18 47. Any contention by the Defendant that this Court can now hold as a matter of law that there was
19 no confidential relationship between the Defendant and Plaintiff must be rejected, since Plaintiff’s
20 FAC can be read as alleging sufficient factual elements of a confidential relationship that gives rise
21 to a claim for breach of fiduciary duty. Since on a demurrer the allegations of a complaint must be
22 taken as true, then Plaintiffs’ cause of action for breach of fiduciary duty cannot be dismissed at the
23 pleading stage, and the Defendant’s demurrer must be overruled.

24 **2. Plaintiffs Have Sufficiently Alleged a Confidential Relationship Based on Her**
25 **Provision of Services to the Defendants as a Work-Study Employee**

26
27 ³ Who controls and operates the Defendant School is a question which, to date, has not
28 been answered by discovery. Plaintiff’s FAC did not include these specific allegations
(beyond the existence of an agency relationship), however the FAC could be amended
to state these facts with more particularity should the Court so require.

1 Plaintiff was employed as part of a work-study program at Defendant school and assisted Father
2 Lopez in the provision of services by and on behalf of the Defendants. (FAC at 6, ¶ 8.) By
3 considering the factors for the creation of a confidential relationship described above, it is clear that
4 Plaintiff has sufficiently alleged that when she entered into the relationship with the Defendant school
5 as an employee, and as an individual providing services to Father Lopez on behalf of the Defendants,
6 this created a special relationship sufficient to give rise to fiduciary duties. Plaintiff, a minor, clearly
7 was the weaker party and the Defendants the stronger party in this relationship. The Diocese requested
8 that Plaintiff provide services in return for tuition, and thus solicited this power over Plaintiff and
9 accepted the benefits of this empowerment.

10 Plaintiff's FAC, as it stands, sufficiently alleges a confidential relationship between the Defendants
11 and Plaintiff concerning Plaintiff's services to the Defendants as an employee. Should the Court
12 disagree, Plaintiff can easily amend the facts based on the discovery conducted thus far to satisfy this
13 requirement.

14 **C. Plaintiff Has Stated a Claim for Negligent Failure to Warn (Count 8)**

15 Defendant argues that Plaintiff's claim for negligent failure to warn, train, or educate Plaintiff must
16 fail because Plaintiff has not alleged "facts demonstrating that defendants owed her a duty in the first
17 place." (Demurrer at 11.) The Court did not address this specific cause of action in its ruling omnibus
18 demurrer, however, the Court did address and overrule Defendants' demurrer on other negligence
19 counts. December 14 Order at 31-42 (analyzing vicarious and direct liability of Defendants and
20 overruling Defendants' demurrer thereon).

21 Defendant fails to recognize that in Count 8 of the FAC, Plaintiff incorporated "all paragraphs of
22 this Complaint as if fully set forth therein." (FAC at 13, ¶ 53.) By incorporating, for instance,
23 paragraphs 7, 18-20, which more fully elucidate Plaintiff's negligence theory, Plaintiff has sufficiently
24 alleged facts sufficient to support a claim of negligent failure to warn, train, or educate. Should the
25 Court disagree, Plaintiff respectfully requests leave to amend the FAC to state, for each count, the facts
26 germane to Plaintiff's theory of liability.

27 **D. Plaintiff Has Stated a Cause of Action for Violation of Penal Code § 32 (Count 10)**

1 Defendant argues that Plaintiff's tenth cause of action must fail because it is not revived by C.C.P.
2 § 340.1(c). (Demurrer at 11-12.) Defendant is incorrect. This argument is addressed, supra, with
3 regard to the fraud cause of action, and applies with equal or greater force to the various causes of
4 action for violations of the Penal Code. With regard to Penal Code § 32, the Court has already ruled
5 that Plaintiffs have stated a claim sufficient to withstand a demurrer. December 14 Order, at 54-55.

6 **E. Plaintiff Has Stated a Cause of Action for Violation of Penal Code § 11166 (Count 11)**

7 Defendant argues that Plaintiff's eleventh cause of action for violation of Penal Code § 11166 must
8 fail because Defendant is not a "mandated reporter." (Demurrer at 12.) Defendant fails to recognize,
9 as this Court did in ruling on the omnibus demurrer, that Defendants may be liable as "child care
10 custodians or school administrators." December 14 Order at 55-56. Further, even if Defendant is
11 correct, they fail to acknowledge that various agents, including other teachers or school administrators
12 belonging to Defendant Order, may have been mandated reporters. Under Plaintiff's vicarious liability
13 theory, Defendant may be liable for the acts and omissions of their agents. Id. at 57. Indeed, the Penal
14 Code provides:

15 Employers are strongly encouraged to provide their employees who are mandated reporters
16 with training in the duties imposed by this article. This training shall include training in child
17 abuse and neglect identification and training in child abuse and neglect reporting. Whether or
18 not employers provide their employees with training in child abuse and neglect identification
19 and reporting, the employers shall provide their employees who are mandated reporters with
20 the statement required pursuant to subdivision (a) of Section 11166.5.

21 Cal. Pen. Code § 11165.7(c).

22 Whether Defendant was a mandated reporter or in any way violated its duties under the Penal Code
23 as an employer is "a question of fact that cannot be determined as a matter of law." Id. at 55.

24 **F. Plaintiff Has Stated a Cause of Action for Violation of Penal Code § 273a (Count 12)**

25 Defendant argues that Plaintiff fails to state a claim for violation of Penal Code 273a because
26 Plaintiff fails to allege facts sufficient to prove the higher standard of criminal negligence that is
27 required. (Demurrer at 13). Of course, whether the facts alleged are sufficient to support a finding of
28 criminal negligence is a question of fact. The Court has already determined that the allegations in the
Master Complaint, on which Plaintiff's FAC are based, are sufficient to overrule a demurrer on this
claim. December 14 Order at 56-57. Moreover, Defendant fails to consider that it may be liable for
the acts of its agents, including the other Defendants, on a theory of vicarious liability. Id. at 57.

PROOF OF SERVICE

I am employed in the City of Margate, County of Atlantic, State of New Jersey. I am over the age of 18 years and not a party to the within action. My business address is Ross & Rubino, LLP, 8510 Ventnor Avenue, Margate City, NJ 08402.

On March 27, 2007, I served the foregoing document described as **PLAINTIFF'S OPPOSITION TO DEFENDANT DOE 5'S DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**, as follows:

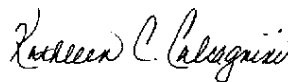
By Mail. The document was served on the parties in this action listed on the attached Mailing List by placing a true copy thereof, enclosed in a sealed envelope, and addressed as indicated on the Mailing List. I deposited such envelope in the mail at Margate, New Jersey. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U. S. Postal Service on that same day, with postage thereon fully prepaid, at Margate, New Jersey, in the ordinary course of business.

By Electronic Service. Pursuant to Case Management Order of Judicial Counsel Coordination Proceeding Nos. 4286, the document was served via CaseHomePage. I forwarded an electronic version (Portable Document Format (pdf)) of the within papers for uploading on March 27, 2007, to CaseHomePage.

By Facsimile. In addition to regular mail, I sent this document via facsimile, to the number(s) as listed on the attached Mailing List.

By Overnight Mail. I arranged for this document to be delivered to the address(es) listed on the attached Mailing List by overnight mail.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed on March 27, 2007, at Margate, NJ.



Kathleen C. Calcagnini

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