Case No: S111585

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GENOVEVA ROJAS, et al.,

Petitioners,

vs.

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

Respondent,

JULIE COFFIN, Trustee of the 1979 Ehrlich Investment Trust, and RICHARD EHRLICH, et. al.

Real Parties in Interest,

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN
Case No. B158391

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

A. Petitioners' Answer Brief Fails to Address Any of the Points Presented in the Opening Brief.

Petitioners fail to address any of the salient points raised in the opening brief on the merits herein, which served as the basis for this Court's acceptance of review of this matter. Instead, they simply chose to reargue their original Court of Appeal petition.

As set forth in these defendants' opening brief on the merits, the absence of an absolute and unqualified privilege in place at mediation, would result in the abridgement of an important public right, related to every action which involves the potential for mediation. The very heart of a successful mediation forum is its facilitation of the opportunity for litigants to lay all of their cards on the table, without fear of its use during litigation. This entails use of facts, evidence, and theories developed by the parties, ***for the sole purpose of resolving the matter at mediation.*** Implicit in the mediation process is the understanding and expectation, based on language of the statute itself, that nothing developed by the parties for the specifically intended use at mediation, can or will be used against them, should the matter not resolve.

Any wavering as to the nature of unqualified privilege for communications, testimony and evidence prepared for the specific purpose of mediation of civil matters, would not only be devastating to the mediation process itself, it would also create serious questions as to the efficacy of private as well as court ordered mediation as an alternative means of conflict resolution in the State of California.

Of genuine concern to litigants, their counsel, and those involved in the mediation process, throughout the State, is that mediation would simply

become an improper discovery tool or mechanism for those not genuinely interested in mediating in good faith. ***This could be routinely achieved, as is the case here, by merely arguing that the materials brought to the mediation table should be characterized as "purely factual in nature," "raw evidence," or alternatively, are of a "qualifiedly privileged" or "derivative" nature, which "in balance" should be subject to discovery, in light of their relevance or present availability.***

The scope of the dangers created by such misuse would be massive in nature, as it would include those who may not have even participated in the mediation process, as well as wholly unknown individuals who were not participants in the litigation or mediation, as was the case here. Such would also include those who decide to take little or no action to properly develop facts, evidence or theories on their own, but are savvy enough to craft arguments regarding what materials others may have brought to mediation and may be subject to discovery. The cost of arguing what materials are and what materials are not subject to the mediation privilege would become prohibitively expensive and costly to those earnestly interested in engaging in the mediation process.

Thus, the very purpose of mediation, as a tool for potential avoidance of large expenditures of time and resources required of litigation, would be essentially become pointless, as parties coming to mediation would do so virtually empty handed, fearing that anything brought to the mediation table could potentially become a weapon to be used against them, in the future, either by the adverse party, should the matter not resolve, or by unknown individuals, in some other matter, regardless of whether the matter resolves at mediation.

Justice Perluss' strong dissent, in the subject decision, cogently and perceptively recognizes the very dangers presented by the majority's attempt to read and interpret into the mediation privilege statute that which does not exist.

B. Petitioners' Answer Brief Simply Reargues the Erroneous Contentions Presented Below.

Contrary to the unsupported opening premise set forth in the first paragraph of the answer brief presented by petitioners below (hereafter "petitioners"), ***the trial court appropriately found that the materials presented at mediation, which were twice examined by two different trial court judges, in both a compiled mediation binder format as well as individually, did not constitute raw evidence subject to production***.[1]

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[1] Petitioners again erroneously suggest that the trial court only considered the mediation materials presented in their compiled mediation binder form at the time it denied petitioners' motion to compel production. However, after careful review of the issues on multiple occasions, both Judge McCoy and Judge Mohr made clear that the materials were protected both in the compiled format as well as individually. In this regard, following an in camera inspection, on January 24, 2001, Judge McCoy clarified his September 18, 2000 ruling which ordered his in camera inspection of the materials stating as follows:

> "The Court's September 18, 2000 Statement of Decision did not foreclose the possibility that documents produced before July 2, 1998 *may* be protected by the mediation privilege. That was not one of the very purposes of the *in camera* review – to determine whether documents prepared before July 2, 1998 were subject to the mediation privilege. Rather, the Court stated that the defendants' blanket mediation privilege objection was overbroad because it may have encompassed documents subject to the discovery process prior to entry of the CMO which were not prepared for mediation purposes. ***The Court's statement, however, did not foreclose the possibility that documents had been prepared for mediation prior to entry of the CMO and would***

Accordingly, the trial court properly ruled that pursuant to Evidence Code §§ 1119 and 1120 all of the subject materials, *which were prepared for exclusively for mediation,* were protected from discovery and use in this litigation by the mediation privilege. [CAD at 6; Petition Exhibit H at 9:14-22.]

The mediation binder and all of its contents were specifically prepared for mediation. ***This meditation and the umbrella protections were specifically agreed to by all parties as early as June 23, 1997, well prior to the creation of any mediations materials referred to by petitioners herein.*** [Petition Exhibit N at 155:8-13] None of the parties to the mediation raised

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> ***be protected by the mediation privilege.***[¶] ***The Court has reviewed its in camera ruling regarding photographs in light of the 5th District's recent decision in Magill v. Superior Court, 2001 Daily Journal D.A.R. 432, and has determined that all photographs not ordered produced were found to be within the mediation privilege and thus not producible. Magill, therefore, does not alter the prior result.***" (Emphasis added.) [Petition Exhibit D at p. 171].

Subsequently, in the March 7, 2002 proceedings, when these same erroneous contentions were presented by petitioners to Judge Mohr, in an effort to limit the prior trial court ruling by Judge McCoy, Judge Mohr again rejected petitioner's understanding of the ruling noting from the sealed transcript of the in-camera review that Judge McCoy considered the photographs in both in compilation and individual and that the mediation privilege applied to both. [Answer to Petition, Exhibit 17, at pp. 1152-53]

As a final observation, petitioners erroneous suggestion that the trial court's ruling did not preclude their discovery and use of mediation materials, inclusive of photographs, and testing materials, data, analysis, and results, individually (in an un-complied format) is simply disingenuous. Clearly, petitioners understood at all times herein that the scope of the trial court's rulings encompassed all the materials prepared specifically for mediation, including both those in the compiled mediation binder format, as well as the materials individually, otherwise there would be no basis for their writ.

any objection to operating with the mediation privilege in place so as to protect all of the items in question. ***The agreed to umbrella protection of the mediation privilege was subsequently expressly incorporated into the July 2, 1998 CMO, to which all parties signed off.*** [CAD at 2-3; Petition ¶ 4; Exhibit D:26-27.]

The parties could have opted out of protecting materials from use beyond mediation by simply writing out the mediation privilege. However, the parties understood that preservation of this privilege would assist in resolving the matter. Indeed, the claims were resolved pursuant to mediation here since parties were free to disclose both the strengths and weaknesses of their case, without concern that the materials prepared exclusively for mediation would be used to either party's determent if the matter did not resolve at mediation.

It remains undisputed that the subject materials would not have been prepared had the parties understood that the absolute protections afforded by the express language of mediation privilege statute were not in place to protect the parties. [See Petition Exhibit D at 120-121; 180-185 and Petition Exhibit H at 11:11-20; and 13:18-26; see also, Answer to Court of Appeal Petition at page 39, footnote 33 and Return in opposition to Petition at 7, footnote 4, 9 at ¶12; 20.][2]

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[2] The fact injected into petitioners' answer brief regarding defendant Coffin's offer at mediation to make its investigation binder available to other counsel for the costs of replication ($60.00) ***only serves to dispel petitioners' arguments that the mediation privilege was intended to be used as either a "pretext for secreting evidence crucial to proving petitioners' case" or a "pretext to shield materials from disclosure."*** The parties understood and agreed that the disclosure of these materials at mediation would in no manner be construed as a waiver of the mediation privilege and that the materials for which the privilege was asserted could not be used by any party had the matter not resolved at meditation.

The numerous assertions regarding petitioner's access to purported raw evidence and speculated assistance that such might provide on issues of liability and damages as set forth in the introduction to petitioners' answer brief are unsupported by any reference to the record and are simply not relevant in light of the absolute nature of the mediation privilege.[3]

Petitioners fail to cite any authority to support the notion that any waiver of the meditation privilege occurred, and this Court has expressly rejected that notion. (See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 4, 14 ["[T]he purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past . . . . ***This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes***...."].)

[3] To the extent that these irrelevant assertions lack any referenced support in the record, it is noted here that the contentions further appear to be untrue. In this regard, petitioners appear to concede that any alleged mold problem was completely abated by the mold remediation. ***According to petitioners' allegedly "half-hearted" remediation efforts were so successful that they could not find any "ultra-dangerous" mold spores in their own sampling***.

In that any alleged effects of mold exposure, including as sneezing and cold ailments (which are common and ordinary conditions that ordinary school-aged children experience, regardless of the presence of mold) would resolve within 72 hours of removal, it is no wonder why the vast majority of petitioners' sought little or no medical attention and that the alleged health care providers for the limited number who did, could not resolve any purported health issues, ***because they consisted of nothing more than common cold and flu symptoms***.

Contrary to petitioners' assertions, it is further noted here that nothing prevented petitioners from conducting their own samplings and taking pictures throughout the entire salient period. After all, petitioners remained in possession, custody and control of their own units at all times that all such inspections and testing were performed by defendants. This fact is further confirmed in petitioners' answer brief wherein petitioners note that "***numerous petitioners informed their counsel that during the underlying action, the building management would knock on their doors***

and claim a need to take photographs of their children and the conditions of their apartments." [Petitioners' Answer Brief ("PAB") at 28; Petition Exhibit M at 43-44.]

Moreover, petitioners had unlimited access and opportunities to conduct such inspection testing and photography ***both before and after*** defendants commenced preparation of their materials for mediation. [See Petition Exhibit M at 68:7-70:13 (***setting forth the inspections by petitioners' expert, Dr. Steven C. Wexler P.E., both before and during the remediation work which was performed***.]

Petitioners chose to undertake extremely limited efforts in inspecting and testing. This testing consisted of destructive testing and mold sampling throughout the apartment complexes, including interior and exterior areas. However, the focus of petitioners' efforts then progressed to seeking to destroy the absolute protections afforded by the mediation privilege. In this manner they could potentially secure mediation materials via the discovery process that are otherwise absolutely protected statutorily, thereby avoiding the inequitable "freeride" in pursuit of questionable claims and only to the detriment of those subject to the claims. [See Petition Exhibit M, at 72:19-23 (***setting forth the contention by petitioners' expert, Dr. Steven C. Wexler P.E., that he does not believe that the expense of destructive inspection and testing was warranted***.] ***This is precisely what the mediation privilege is sought to protect against***.

If petitioners were truly suffering any genuine or significant health problems as a result of alleged mold exposure, surely the evidence would remain so as to merit independent inspection. It is noted here that petitioners never stated in either their papers or during oral argument that they did not actually photograph or conduct testing in their apartment units. Furthermore, to the extent that plaintiffs claim that they suffered damages commencing from 1999 and continuing to the present, which is well after the time period that photographs from 1998 are being sought, there is no articulable basis or demonstration why petitioners have not bothered to take or cannot take their own pictures of, take samples of and conduct testing on of whatever they believe may be causing their injuries.

Finally, petitioners presented no evidence here or below to demonstrate that any of the subject photographs could be used to identify the type and quantity of mold spores, so as to serve any useful purpose with respect to establishing liability or damages in this case. Accordingly, it should be apparent that petitioners' efforts to pierce the absolute mediation

These unsupported contentions remain irrelevant to the matter presented as: (1) the controlling statute and this Court's previous decisions relating to the same establish that mediation privileges is absolute; (2) there remains no basis in law to suggest that the privilege is subject to any qualification other than that expressly enumerated by the Code [i.e. Evidence Code § 1122.]; and (3) *there remains no raw evidence for which petitioners have lacked access, in any instance.* Contrary to petitioners' argument, there is no appropriate basis in law to find that the absolute protection afforded to materials presented for mediation would be subject to any qualification not expressly enumerated in the Code itself, as is pointed out by the dissenting opinion in decision below.

As discussed above and in the opening brief on the merits, none of the mediation materials sought constitutes raw evidence that is subject to discovery. Each of these points will be discussed more fully below in the context of petitioners' answer brief on the merits.

LEGAL DISCUSSION

I.

THE LEGISLATIVE INTENT OF EVIDENCE CODE §§ 1119 AND 1120 IS TO MAKE THE MEDIATION PRIVILEGE ABSOLUTE AS TO ALL MATERIALS, INCLUSIVE OF EVIDENCE PREPARED SOLELY AND EXCLUSIVELY FOR MEDATION

Petitioners appear to turn the legislative intendment of the mediation privilege statutes on its head, by stressing their belief that the absolute and unqualified mediation privilege should nonetheless be limited to prevent

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privilege were presented for the sole purpose of harassing defendants, in a further effort to secure settlement moneys in this case.

misuse of mediation as a pretext to shield certain evidence from subsequent disclosure, during litigation.

A. Petitioners' Attempt to Argue that the Mediation Privilege is Neither a Privilege Nor Absolute is Not Well Taken.

Here, petitioners purport to acknowledge the precedent established by the Supreme Court in Foxgate, finding that there is nothing ambiguous in the provisions of Section 1119, or the Legislative intent. However, petitioners refuse to acknowledge that which was confirmed by the majority and minority opinions which are the subject of this Court's review, namely that the Section 1119 statutorily conveys an unqualified mediation privilege. The majority's opinion here acknowledges the unqualified nature of the privilege, stating as follows:

> "Fortunately, our Supreme Court has spoken on ***the legislative purpose behind the mediation privilege, which is to encourage mediation by providing for confidentiality of documents introduced therein***. [Citation.] "[T]he purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past . . . . ***This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes***.' [Citations]." [Citation.] . . . . The Supreme Court has stressed that "confidentiality is essential to effective mediation," (*ibid*) and therefore, "the statutory scheme . . . ***unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception***." [Citation.]' (Emphasis added.) (102 Cal.App.4th 1062, 1074.)

The minority opinion, as express by Justice Perluss' opinion here acknowledges the unqualified nature of the privilege, stating as follows:

> "Section 1119, subdivision (b), protects from disclosure *all* 'writings,' as defined by section 250, 'prepared for the purpose of, in the course of, or pursuant to, a mediation.***' I agree with the majority that the language of this section is clear***: Absent an express statutory exception 'as provided in this chapter,' ***section 1119 affords absolute confidentiality to writings prepared for a mediation, whether or not the document or other writing is actually used in the mediation itself and whether or not the document is "purely evidentiary" in nature. There is no room in this provision for judicially created limitations.*** (Emphasis added.) (*Id*. at p. 1081, citing, *Foxgate Homeowners' Assn., supra,* 26 Cal.4th at p. 4.)

So in denial of the existence of the absolute nature of the mediation privilege are petitioners, notwithstanding the above statements, set forth in both the majority and minority opinions, that petitioners go so far as to argue that: (a) no mediation privilege actually exists; and (b) this Court *never* "referred to mediation confidentiality as a privilege." [See petitioners' answer brief at p. 9, fn. 9] ***In arguing these blatantly erroneous assertions, petitioners ignore their very statement to the contrary, expressed in the preceding page of their answer brief, wherein petitioners state as follows:***

> "This Court has made clear that the ***legislative purpose behind the mediation privilege*** is to encourage mediation by providing for confidentiality of documents introduced herein." (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001*)* 26 Cal.4th 1,14....)" (Emphasis added.) [See petitioners' answer brief at p. 8.]

Thus, this argument is not well taken, as petitioners do not actually believe their own contentions. Moreover, petitioners contentions are untrue. In discussing the absolute nature of the protection for items

prepared for mediation in the context of both the *Rinaker* and *Olam* cases, this Court specifically referred to the protections as "statutory privilege" and a "mediation privilege". (See *Foxgate Homeowners' Assn., supra*, 26 Cal.4th at p. 16.)

B. Petitioners' Attempt to Argue that the Mediation Privilege Does Not Apply to Evidence is Similarly Not Well Taken.

Petitioners**'** argument to the effect that the confidentially provisions of **Evidence** Code § 1119 do not apply to "***evidence***" but rather apply only to communications made in the context of the mediation, in light of the Law Revision Comments to Evidence Code § 1120 is similarly nonsensical.

Again, their argument directly contradicts prior statements contained in petitioners' answer brief, wherein it is conceded that not only does Section 1119 protect oral communications in the context meditation, but it also protects writings inclusive of those defined in Evidence Code § 250, prepared for the purposes of, in the course of as well as pursuant to a mediation or consultation. [See petitioners' answer brief at pp. 11-12.]

Repeatedly ignored by petitioners is Justice Perluss' observation, which runs counter to the unsupported arguments of petitioners, as referenced in Section A, *supra*:

Contrary to the assertion set forth in petitioners' answer brief, and as articulated in Justice Perluss' dissent, when read together, Sections 1119 and 1120 preclude compelled discovery of any writing (including witness statements, photographs and test results) that were, in fact, prepared for use in a mediation. [CADDO 2.]

Even if such material could properly be described as "raw material" or "purely evidentiary," it remains confidential and protected from

disclosure, not only because it was used during a mediation, but because it was "prepared for" the mediation, the touchstone for application of the privilege contained in Section 1119. [CADDO 2.]

Justice Perluss' dissent provides a meaningful distinction between "raw material" or "purely evidentiary," materials that are absolutely protected and those that are not protected. Physical objects that exist independently of the mediation (spore or mold samples, defective piping, for example, or a broken window pane) are discoverable, even if used at a mediation because, quite apart from the exception contained in Section 1120, they are not statements made or writings prepared for the purpose of mediation within the meaning of Section 1119. This is in contrast to the improper items and materials for which petitioners have sought to compel disclosure, which were actually prepared for mediation, including: photographs and testing materials and results which would not have existed but for the mediation. [CADDO 2-3.]

Further misplaced is the assertion set forth in petitioners' answer brief that Section 1120 would be a "utter surplussage" if Section 1119 was read as written.

To be sure, as is stated by the majority opinion, pursuant to Section 1120, evidence otherwise discoverable outside of a mediation does not gain protection from disclosure "*solely* by reason of its introduction or use in a mediation . . . ." (§ 1120, subd. (a), italics added.) Section 1120 is thus a statutory limitation on the "in the course of" prong of Section 1119; but, by its plain language, this section does not restrict the scope of the privilege when applied to communications or writings "prepared for the purpose of" a mediation.

Indeed, Section 1120 contains an express exception to the absolute

privilege, for materials and evidence which are not prepared exclusively for mediation. ***In this regard, there was no evidence presented here that any of the evidence was prepared to avoid production outside the scope of admissible evidence. In fact, discovery was stayed by the CMO, so it cannot be claimed that the mediation served as a tactic to shield otherwise legitimate discovery from being revealed, through use at mediation.*** [CAD at 2-3; Petition ¶ 4; Exhibit D:26-27.]

C. Petitioners' Purported Concerns Regarding "Secreting" Materials or Evidence from Disclosure are Unfounded; In Contrast, the Potential Dangers of Misuse of the Discovery Process is Very Real.

Any rejection of the plain meaning of Sections 1119 and 1120, inclusive of the absolute and unqualified mediation privilege, based on the premise that such would foster evils, and namely use of mediation as a shield for otherwise admissible evidence, is itself error.

The appellate courts lack both the power and authority to usurp the function of the Legislature in its enactment of an unambiguous statute. As stated by this Court, the appellate courts may not simply rewrite the statute to their own liking based on unsubstantiated concerns as to potential misuses of the statute. (See *Foxgate*, *supra*, 26 Cal.4th at pp.13-14.)

Indeed, in a previous ruling, Division Seven of the Second Appellate District acknowledged there are ***no exceptions*** to the confidentiality of mediation communications. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 869, citing *Foxgate*, *supra*, 26 Cal.4th at 4.)

Adequate protections from the "evils" perceived by the majority in their opinion (including potential misuse of mediation privilege to shield "otherwise" admissible evidence) already exist, including, but not limited

to, evidence and issue preclusion sanctions. [CADDO 2.] Furthermore, the Legislature has, no doubt, already considered the perceived dangers involved including potential misuses of the privilege, and it has balanced such with the interests of justice, including early case resolution (as occurred with respect to the matter presented in the mediation in this instance), when it enacted the subject statute.

Here, Coffin's offer of its mediation binder to all counsel for the costs of replication only serves to dispel petitioners' arguments that the mediation privilege was intended to be used as either a "pretext for secreting evidence crucial to proving petitioners' case" or a "pretext to shield materials from disclosure."

Moreover, the concerns related to mediation simply becoming an improper discovery tool or mechanism for those not genuinely interested in mediating in good faith are born out by the very case presented here. ***As has occurred here, the overwhelming evidence demonstrates that there remains no compelling basis for the materials sought by petitioners. [See footnote 3 herein above.]***

Yet, by merely arguing that the materials brought to the mediation table should be characterized as "purely factual in nature," "raw evidence," or alternatively, are of a "qualifiedly privileged" or "derivative" nature, which "in balance" should be subject to discovery, in light of their relevance or present availability, petitioners have endeavored to turn this mediation into just another discovery mechanism. This is at great expense to those who reasonably relied on the mediation privilege as an effective tool for alternative dispute resolution.

D. This Court has Rejected Other Attempts By the Court of Appeal to Add Judicial Constructions to the Mediation Privilege Statutes.

This court expressly rejected the attempt by Division 5 to add analogous judicial constructions to Section 1119 in the *Foxgate* decision, *supra*, stating as follows:

> ***We do not agree with the Court of Appeal that there is any need for judicial construction of section 1119 and section 1121 or that a judicially crafted exception to the confidentiality of mediation they mandate is necessary either to carry out the purpose for which they are enacted or to avoid an absurd result***. . . .[¶] ***Moreover, a judicially crafted exception to the confidentiality mandated by section 1119 and section 1121 is not necessary either to carry out the legislative intent or to avoid an absurd result***." (Emphasis added.) (26 Cal.4th at pp.13-14.)

Where petitioners' analysis further falters is in its unfounded sense of distrust of parties asserting the privilege and purported concern for potential misuse of the privilege.

II.

THE WORK PRODUCT DOCTRINE DOES NOT PROVIDE THE PROPER AND APPROPRIATE ANALYTIC FRAMEWORK TO DELIMIT THE PROTECTIONS AFFORDED EVIDENCE PREPARED SPECIFICALLY FOR MEDIATION

As set forth above, interjection of judicial constructions to the mediation privilege statutes, including ones gleaned from the work product doctrine statute, is not appropriate and deprives the public of a statutory right. ***The Legislature has enunciated the test which is – that the mediation materials and evidence must be prepared solely for the purpose***

of mediation.

Divining a distinction between "derivative" and "non-derivative" materials nowhere found in the statutory scheme and acknowledging only a qualified protection from disclosure even for concededly privileged materials, the majority's position in the subject Court of Appeal decision effectively eradicates any significance of the mediation privilege in California. [4]

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[4] Coffen and Deco further contend that even if the work product doctrine analysis were applied to the subject evidence, there was no basis for compelling production of this evidence in light of petitioners' failure to meet their burdens of demonstrating that: (a) the evidence was not protected under the qualified privilege; (b) there was not similarly available evidence which was in petitioners' possession custody and control; and (c) petitioners had not waived any such claim to the discovery, by agreeing to the multiple in camera inspections, as well as not timely pursuing the issues presented. With respect to these points, Coffin and Deco argued that the photographs were "advocacy" in the sense that were taken to show impressions, and have arrows pointing out significant features. They also argued that the photographs and statements of the expert consultants constituted privileged reports, as they were more than just raw evidence. [CAD 7.] Petitioners' repeated challenges to the privilege assertion appear calculated to seek undiscoverable expert evidence, from non-designated expert consultants in a prior action, including: their testing, reports and statements which constitute analysis and opinions, under the pretext that such constitutes raw evidence which is not protected by the mediation privileged. Coffin and Deco have repeatedly stated there is no raw evidence amongst the materials prepared and presented at mediation. (Further elaboration on these points appears in the Answer to Petition at page 39, footnote 33 and Return in opposition to Petition at 7, footnote 4, 9 at ¶12; 20.) [See also Petition Exhibit D at 120-121; 180-185 and Petition Exhibit H at 11:11-20; and 13:18-26.] Coffin and Deco also brought to the court's attention that petitioners' failure to represent that they did not have photographs or testing of their own, even if such were the case. (Petition Exhibits B at 204:2-9 and H at 24:22-25:10; Return in Opposition to Petition at 16 and 22.] Coffin and Deco also raised their objections, as the same discovery was simply re- propounded and petitioners raised the same issues on grounds previously ruled on. Petitioners further agreed to the multiple in camera review proceedings. Accordingly, petitioners were barred from

As explained above, this Court expressly rejected the attempt by Division 5 to add analogous judicial constructions to Section 1119 in the *Foxgate* decision, *supra*. The Legislature itself balanced those competing interests and concluded that, except as specifically provided by statute, the confidentiality provisions for mediation proceedings are absolute. (*Foxgate Homeowners' Assn. v. Bramalea California, Inc*., *supra*, 26 Cal.4th at p. 4.) "To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme, which includes Sections 703.5, 1119, and 1121, unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception." (*Id*. at p. 15.) [See CADDO at 3.]

To compel disclosure of mediation materials over the objection of the parties upon a sufficient showing of need is inconsistent with this narrowly drawn exception to the otherwise absolute protection created by Section 1119.

The case law relied on by petitioners is of no aid. None of the cases cited lend any support for notion that a work product standard is intended by the statute, nor does any authority suggest that a judicial construct is needed.

While many of the statements associated with the referenced cases are taken wholly out of context, of particular note is petitioners' primary reliance on *Grand Lake Drive In, Inc. v. Superior Court* (1960) 179 Cal.App.2d 122. In that case, the court held that an expert report and

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raising any challenge to the trial court's ruling as well as re propounding the same discovery requests on Coffin and Deco. [Petition Exhibits J-O; Return in Opposition to Petition at 30-36, and Exhibit 4 thereto; Answer to Petition at 35, 56-57 and, Exhibit 22 thereto.]

underlying facts and evidence of the hired expert were not protected from discovery since the expert had been retained and designated as an expert for purposes of trial. Indeed, that premise is hardly novel, and it remains totally irrelevant to the issues presented, as that is what is expressly required pursuant to the expert discovery statute. (See Code of Civil Procedure § 2034.)

In contrast, here, the materials were never subject to expert discovery as there was no expert designation or expert discovery that had taken place in light of the stay on all discovery, pending completion of mediation. Thus, real parties herein had every reasonable expectation that the mediation privilege remain intact.

Finally, in this regard, even the Federal authority cited by petitioner below, and specifically, *Ramada Development Company v. Rauch* (5th Cir. 1981) 644 F.2d 1097, does not support the application of a work product doctrine analysis to the mediation privilege. There, defendant Rauch claimed that a report prepared by plaintiff's retained architect, *a year before the action had even been filed*, should have been disclosed. Applying Federal Rules of Evidence, Rule 408 (the Federal equivalent to Section 1119), the Fifth Circuit ruled that the report remained confidential because it was prepared for mediation. (*Id*. at p. 1100.) There, the court observed that Federal Rule 408, does not require that there be a pretrial understanding of or agreement of the parties to regarding the nature of the report. (*Id*. at p. 1107.) Contrary to the claims of petitioners, this case is a even stronger one for application of the mediation privilege, as there is no question that the materials were developed solely for the mediation itself and agreed to by al the parties, inclusive of the photographs and testing materials.

Thus, there is considerable authority for the understanding that the mediation privilege must remain intact, without judicial constructs, for the benefit of the general public, even where the evidence may not have been prepared in the course and scope of the mediation itself.

III.

NONE OF THE PHOTOGRAPHS OR OTHER PHYSICAL EVIDENCE TAKEN PRIOR TO THE CASE MANAGEMENT ORDER, SOLELY FOR MEDIATION, ARE DISCOVERABLE

In a last ditch effort to walk away with some of the materials prepared solely for mediation; petitioners again claim that there must be some materials that are discoverable since there is evidence suggesting that some of the materials predated issuance of the CMO.

As petitioners conceded, the meditation and the umbrella protections were specifically agreed to by all parties as early as June 23, 1997, well prior to the creation of any mediations materials referred to by petitioners. [See petitioners' answer brief at p. 32; Petition Exhibit N at 155:8-13.] Accordingly the CMO issuance date would not be the proper date to measure when the mediation privilege commenced for those documents which were prepared solely for the mediation.

Thus, any and all evidence or materials which were prepared solely for the mediation before the CMO issued would not be discoverable as was appropriately determined by the trial court. [See Judge McCoy's order of January 24, 2001, Petition Exhibit D at p. 171 referenced in footnote 1, hereinabove].

Petitioners complain here regarding the sufficiency of the privilege logs provided, notwithstanding the assurances that there were no unprotected materials, as established in Mr. Monteleone's declaration and

verified by two Superior Court Judges following two separate in camera hearings. Had any genuine issue remained in that regard, the proper forum for petitioners to have raised any such concern would have been at the trial court level, not here.

Lastly, to the extent that petitioners may attempt to suggest that the trial court abused its discretion in denying their motions to compel, there are no findings upon which to make such an assertion, nor for that matter is such issue presented for here for review. The issues presented are appropriately framed in both the petition for review as well as the opening brief.

IV.

CONCLUSION

Based on the forgoing, it is respectfully requested that this Court overturn the Court of Appeal decision, on each of the issues presented.

Respectfully Submitted,

DATED: June 5, 2003

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CERTIFICATE OF WORD COUNT

Counsel hereby certifies that the forgoing brief contains 4,155 words according to the computer word processing program.

By_____
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 55 South Lake Avenue, Suite 220, Pasadena, California 91101.

On June 5, 2003, I served the foregoing document described as **PETITIONER'S REPLY BRIEF ON THE MERITS** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on June 5, 2003, at Pasadena, California.

JANICE McCROSKEY

SERVICE LIST
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