

H032619

IN THE COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JEFFREY R.GOLIN, ELSIE Y. GOLIN and NANCY K. GOLIN,
Plaintiffs and Appellants,

vs.

CLIFFORD B. ALLENBY, ET AL.,
Defendants and Respondents.

Appeal from the Judgment of the Superior Court of California
County of Santa Clara

Honorable J. Michael Byrne, Presiding

Case No. 1-07-CV-082823

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants JEFFREY R. GOLIN and ELSIE Y. GOLIN (“the Golins”) are the natural parents and former care givers of their adult autistic child, appellant NANCY K. GOLIN (“Nancy”). They appeal dismissal of an action seeking compensatory and punitive damages on behalf of themselves and Nancy arising from the conduct of government officials and others charged with Nancy’s care before and after she was declared incompetent and conserved. The Golins’ verified amended complaint (“VAC”) lays out in meticulous and coherent fashion a series of events which if proved at a trial give fresh meaning to the idea that “the ten most terrifying words in the English language may be, ‘I’m from the government and I’m here to help you.’”¹

Among other things, the VAC alleges that after Nancy wandered away from the Golins, who raised her from birth to age 31, she was taken into police custody and placed on a 5150 hold. When a judge ordered her released from the hold, the defendants without judicial authority removed her from the hospital and concealed her for eleven months before a temporary conservator was appointed.²

¹ The quoted language comes from the recent decision of *Garcia-Aquilar v. United States District Court*, 2008 DJDAR 12252 (9th Cir., filed August 7, 2008) and is even more apt here than it is there.

² The Golins’ use the term “defendants” not to imply that each defendant is responsible in some manner for every tortious act alleged in the VAC which

While the defendants kept Nancy in extra-judicial detention, they also caused criminal charges to be filed against Jeffrey and Elsie.³ These charges were later dismissed and form the basis for claims of false arrest and malicious prosecution in the current action. During and after this time, the defendants abused her and negligently failed to provide for Nancy's medical and dental needs resulting in severe deterioration of her health.

Even though the defendants never answered the VAC, the record is breathtakingly long. It consists of more than 5,000 pages. Why? Because the eight law firms on the defense side peppered the Golins with multiple oversized demurrers laden with redundant requests for judicial notice of irrelevant material, a motion for a change of venue, repeated motions to vacate the appointment of Elsie as Nancy's guardian ad litem, motions to strike, a motion for judgment on the pleadings and even a special motion to strike under the anti-SLAPP motion.⁴ After the defendants' motion for a change of venue was granted by a Sacramento County judge, defendants filed thirteen motions in Santa Clara County setting them for hearing on the same date. The Golons, of course, were compelled to

itself makes clear who did what. Instead the term is used generically for ease of understanding where the individual identities of the defendants are not pertinent to issues addressed on this appeal.

³ For convenience, this brief refers to the Golins individually by their first names. No disrespect is intended.

⁴ The trial court never ruled on these motions.

respond to each of them.

At issue on appeal is the trial court's granting of defendants' motion to have Jeffrey and Elsie declared vexatious based on allegations that they filed multiple responses to defendants' motions and repeatedly sought to change venue. In granting the motion, the trial court brushed aside the salient fact that Elsie and Nancy were at all times represented by counsel, that Jeffrey was represented part of the time and that he worked closely with counsel even when he was on his own.

It is abundantly clear from the transcript of oral proceedings that the trial court conducted no examination of the Golin's filings to determine which, if any, were frivolous but instead reached its judgment based on cursory examination of a leviathan record generated by the defendants' massive slew of motions.

In an argument thick with irony, the defendants, represented largely by law firms with multiple partners and associates, claim that the Golins and their two primary counsel, both sole practitioners with scarce resources, harassed them with frivolous strong arm litigation tactics.

The record shows that the only motions filed by the Golins were to have a guardian ad litem appointed for Nancy and to change the venue out of Santa Clara County. While the Golins made successive motions to change venue, they were warranted in doing so by the constantly changing legal landscape and also were invited to renew. For example, they renewed their motion after the entire bench in

Santa Clara County recused itself and they were forced to accept visiting judges through the retired judges program of the Judicial Council, all of whom were appointed for very short stints, one for only three days, in this complex case.⁵

Defendants also say the present action is barred because the Golins previously litigated identical claims on the merits in federal court and lost. Contrary to these assertions, the record reveals that the Golins' claims were dismissed on federal abstention grounds and for other procedural reasons rather than on the merits.

Finally, the trial court dismissed Nancy's claims after Jeffrey and Elsie failed to post a daunting \$500,000 bond, even though Nancy was not declared vexatious and defendants never filed anything to seek that relief. The court's order, issued without notice or opportunity to be heard, is untethered to any legal principle or doctrine and falls classically in the heartland of cases justifying reversal for arbitrary and capricious judicial action.

The three Golins ask that the court reverse the dismissal of their action with directions to transfer the case to Alameda or San Francisco Counties. Since both venues are equipped with complex litigation departments, either would be capable of supervising the future course of this case.

⁵ The Golins will request by separate motion that this court take judicial notice of two appointment orders signed by the Chief Justice.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY⁶

A. NATURE OF THE ACTION

The Golins filed their VAC in the Sacramento County Superior Court. CT 230-368. The complaint asserts seventeen causes of action against 26 defendants and 50 doe defendants. They designated the case complex due to the large number of separately represented parties. CT 2.

It is not necessary to elaborate in great detail here the series of events that precipitated this action. A brief summary will suffice.

Nancy, a 35-year old autistic adult developmentally disabled since birth was raised by Jeffrey and Elsie and continued to reside with them until she was seized by the defendants without a warrant or court order on November 15, 2001. Nancy had never been institutionalized or diagnosed with a mental illness. She had never been arrested nor had she ever posed a threat to the public. She was playful and gregarious. Although Nancy cannot read or write, she is capable of communicating effectively with gestures. Nancy had a propensity to wander, a trait common to autistics CT 240-241. On November 14, 2001, she wandered

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The Golins elect to consolidate their treatment of the facts of the case with its procedural history in aid the court's understanding. The detailed statement of the facts which support the Golin's claims are stated in the VAC. Largely, they are not relevant to the issues raised on appeal. Since we are not here after a trial, a ruling on summary judgment or even after a demurrer granted without leave to amend and defendants do not dispute the facts in any event, the court should accept them as true for the purpose of this appeal.

away and the Golins called police for assistance in locating her. CT 245. The following day, Nancy returned home on her own accord. CT 245. Later that day police officers acting without a warrant or consent to take Nancy or search the Golin's property did both. Nancy was transported to Stanford Medical Center and locked up as a 5150. CT 253. Following a detention hearing on November 25, a judge ordered her released finding no grounds to hold her. CT 259. Jeffrey and Elsie went to the hospital to pick her up but as they engaged with security guards threatening to arrest them, agents acting under state sanction were busy hustling Nancy out the back door to take her to a concealed location. Jeffrey and Elsie spent months trying to find out where she was. Nancy was maintained in state custody without judicial process for eleven months until October 15, 2002 when the court appointed a private temporary conservator. CT 263.

On November 30, after they were featured sympathetically in a series of newspaper articles, Jeffrey and Elsie were arrested on a felony charge of adult dependent abuse. Jeffrey bailed out but Elsie was held chained up overnight as a 5150 in a psychiatric facility until the following day when a psychiatrist examined her and found her to be of sound mind. The criminal charges were dismissed on January 29, 2003. CT 281.

Following a trial in the probate court, Nancy was placed in permanent conservatorship in the custody of the State Department of Developmental

Services. Elsie's petition to act as conservator was denied. Thereafter, Jeffrey and Elsie's contact with Nancy was extremely limited and subject to onerous conditions.

In this action the Golins allege, *inter alia*, that their First, Fourth and Fourteenth Amendment rights were violated and that Nancy was and is subjected to severe abuse and neglect in the custody of the defendants.

B. PROCEDURAL HISTORY

The procedural history of this case is complex. The best way to grasp it is to break it down topically rather than discuss it, as is customary, in temporal sequence.

Adopting that mode, the topics relevant to the vexatious litigant motion are (1) The Golins' Representation; (2) Guardian ad Litem orders; and (3) Change of Venue.

Other issues including the effect of prior proceedings in federal court and the probate court are discussed where pertinent in the argument section of this brief.

1. The Golins' Representation

At the time of the filing of the VAC, all three Golins were represented by Geoffrey V. White and Gerard Wallace, a New York attorney, appearing *pro hac*

vice under White's direction.⁷ CT 124-127.

On April 6, 2007, Lara Shapiro associated in as counsel for Elsie. CT 1013. Elsie terminated Shapiro's representation on June 19, 2007. CT 3048. During this period, Elsie was represented by three lawyers, White, Shapiro and Wallace.

On September 15, 2006, Jeffrey began formally to represent himself. CT 734.

David Beauvais first appeared formally in the action on September 17, 2007 for the limited purpose of arguing all pending motions on behalf of Elsie and Nancy. RT 53, lines 7-9. Gerard Wallace customarily appeared by telephone at hearings but was unavailable on September 17. RT 56, lines 7-24. Beauvais appeared at each court date thereafter through dismissal on December 11, 2007. The notice of appeal was filed prematurely on February 8, 2008. CT 5492. Notice of entry of judgment was filed on February 29, 2008. CT 5540. Jeffrey, Elsie and Nancy are all represented by counsel on this appeal.

2. Guardian ad Litem Orders

On August 16, 2006, Judge Kenney of the Sacramento County Superior Court appointed Elsie as Nancy's GAL. CT 191. Months later, the defendants

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Wallace had represented the Golins on a petition for certiorari to the United States Supreme Court in related federal proceedings. He was intimately familiar with the case when he requested *pro hac vice* status in this action.

made an application before another judge on an ex parte basis to “stay” the already granted order and moved to vacate it. CT 887. The second judge, Loren McMaster, ordered Elsie’s appointment vacated “without prejudice to reapplying for GAL status in Santa Clara County.” CT 898.

Elsie renewed her application for appointment in the Santa Clara Superior Court as authorized by Judge McMaster’s order. CT 1011-1012. Judge Hyman granted her application on April 9, 2007. CT 1012. Defendants then moved, again ex parte and before a different judge, for an order vacating Elsie’s appointment. CT 1067. Judge Murphy countermanded Judge Hyman’s order, vacating the appointment “without prejudice to reapply for guardian ad litem.” CT 1132-1133.

Elsie reapplied for GAL and a hearing was held on May 30, 2007 before Judge Hyman. The Golins also proposed, in the alternative, the appointment of John Lehman. RT 4, lines 4-16. Counsel for the state defendants opposed the applications of both candidates stating that they, the defendants, were perfectly capable of representing Nancy’s interests in the litigation against themselves and that it was not clear “that additional people need to be added as guardian ad litem.” RT 6, lines 4-15. This hearing took place just days before a scheduled hearing on potentially dispositive motions in which the defendants asserted that Nancy had no standing in the action and a GAL should have been appointed long ago. RT 9, lines 9-11, RT 23, line 28, RT 24, lines 1-9. Over the protestations of the

defendants, Judge Hyam ruled that Nancy needed a guardian and then appointed Claudia Johnson, a private professional. RT 14, lines 3-4.

On June 11, 2007, Claudia Johnson moved the court for an order vacating her appointment stating, in part, that she was unaware that she was being considered by the court to serve and that she had no notice of the motion. CT 2968. The court vacated her appointment. CT 2970.

On October 18, 2007, the Golins filed a motion to set aside void orders relating to the foregoing series of events premised on the theory that no judge of the superior court has the power to countermand orders of another superior court judge and that the orders purporting to terminate Elsie's GAL status were void. CT 4740-4742. This motion has never been ruled on because the court stayed all motions until it decided whether Jeffrey and Elsie had been vexatious.

On December 11, 2008 the court dismissed Jeffrey and Elsie's claims for failure to post bond. The court then addressed Nancy's claims and the Golins' proposed new candidates for GAL, Sandra Gey and Nancy Delaney, who were present in court at the hearing, ready to take the stand to testify concerning their qualifications and ready to serve. RT 215, lines 23-28. Counsel made an offer of proof concerning their qualifications noting that they had no personal stake in the outcome of the action and barely knew the Golins. RT 216, lines 18-28, RT 217 (full), RT 218, lines 1-2. The court stated that it would not rule on their

applications without hearing from both sides, noting that they seemed to have professional experience in the area and an understanding of the field. RT 226, lines 24-28, RT 227, lines 1-2. The court nevertheless declined to hold such a hearing. Instead it summarily dismissed Nancy's claims apparently moved by arguments of defense counsel that Nancy was not properly before the court since she had no guardian ad litem.

3. Change of Venue

The Golins initially filed their action in the Sacramento County Superior Court. Defendants moved for a change of venue to Santa Clara County which the Golins opposed on the ground that Santa Clara County was not a neutral forum. The trial court ruled that their showing was inadequate but that they "would have an opportunity to fully address this issue" in Santa Clara County. CT 642. The court denied defendants' application for attorney fees under Code of Civil Procedure section 396b(b) noting that "given the complex interplay of venue statutes" the Golins' initial selection of venue was not made in bad faith. CT 642. The Golins requested reconsideration of the order was denied. CT 861.

After the case was transferred to Santa Clara County, the Golins filed a motion for change of venue on similar grounds as the court in Sacramento signaled they could do. CT 2841. The Golins later amended this motion before a ruling.

CT 4146. The motion was denied on August 24, 2007 by visiting judge Breen without a hearing or any statement of reasoning. CT 4208-4209. After he denied the motion, Judge Breen was challenged for cause and recused himself. The Golins argued in a subsequent motion that Judge Breen's venue order was voidable in light of the recusal and asserted that on August 8, the entire bench in Santa Clara County had recused itself, an extraordinary development that in itself which seemed to supply the indication of bias the Sacramento judge had found wanting. CT 4541.

The Golins argued that the combination of these circumstances created an intolerable litigation burden because they effectively they were denied access to a full service court. For example there was no judge available to appoint a GAL which is handled by local rule in the probate department and no place to go with ex parte applications. And a visiting judge who maintained no chambers in the County and who would have to travel to attend court would not be motivated to give the case the attention it needed. This was clearly a problem with Judge Breen who said he would only be available on scheduled days. It was foreseeable that the parties would encounter similar problems when a new visiting judge was appointed. The Golins' renewed motion to change venue based on these changed circumstances was never heard because they were declared vexatious before a hearing could be held.

III. ARGUMENT

A. THE GOLINS DO NOT QUALIFY AS VEXATIOUS LITIGANTS

Defendants filed a motion to have Jeffrey and Nancy declared vexatious litigants under the definitions contained in CCP §§391, subdivisions (b)(2) and 391(b)(3).⁸

The court granted the motion and ordered Jeffrey and Nancy to post a bond of \$500,000. When they did not post the bond, the court dismissed the action. It also entered a pre-filing order under section 391.7.

The motion itself was deficient in that it did not comply with section 391.1 which requires that it be “supported by a showing that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.”

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Under subdivision (b)(2) a vexatious litigant is a person who “[a]fter a litigation has been finally determined against the person, repeatedly litigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by that final determination against the same defendant or defendants as to whom the litigation was finally determined.”

Under subdivision (b)(3) a vexatious litigant is a person who “[i]n any litigation while acting in propria persona repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.”

The defendants' motion consists mainly of bullet points and bombast with scant citation to authority and what few cases they cite do not apply. They refer to the doctrines of res judicata and collateral estoppel in passing but do not analyze them to explain how they control the outcome. As to their claims of litigation harassment, defendants point to no specific filing except the Golins' response to their venue motion. The judge who had heard that motion found that the Golins filed their action in Sacramento in good faith and denied defendants' application for fees noting the complex interplay of contradictory venue statutes. CT 642.

1. The Golins Did Not Qualify as Vexatious Litigants Because They Were Represented By Counsel

As a preliminary matter, both provisions cited in support of the motion apply only to litigants in *propria persona* and therefore are facially inapplicable to Elsie and Nancy who at all times have been represented by counsel. Jeffrey was also represented by counsel at the time of the filing of the VAC. Therefore, subdivision (b)(2) which applies to repeated relitigation of claims determined finally on the merits does not apply to him.

Defendants argue that "the presence of attorneys is no impediment to a vexatious litigant determination" CT 4609-4910. This is a vast overstatement given the clear statutory language of the two subdivisions under which the motion

was brought and the case law construing them. Defendants cite two extreme cases where attorney representation did not avert dismissal but that was because the litigants in both cases had been declared vexatious in earlier litigation.

In *Muller v. Tanner* (1969) 2 Cal.App.3d 438, 444, the plaintiff was determined to be a vexatious litigant in a prior identical action and had been ordered to post \$5,000 security. In an end run around the security requirement, he filed his second complaint which was signed by an attorney. The court struck the second complaint from the docket and found that the plaintiff's representation by counsel made no difference. The distinction between *Muller* and this case is that the Golins were never declared vexatious litigants in a prior action. In making its order striking the second complaint in *Muller*, the court merely exercised its inherent power to control its own processes. The presence or absence of counsel in the second action was not a fact relevant to whether the plaintiff had complied with the security requirement. He was not ordered to get an attorney, he was ordered to pay security.

In *In re Sheih*, (1993) 17 Cal.App.4th 1154, also cited by defendants, the attorney was found to be acting as a mere puppet or rubber stamp for a litigant who was also an attorney. The attorney litigant had been declared vexatious in numerous prior identical lawsuits against the same parties when he sued yet again through counsel. The court found that just because he had an attorney when he

filed his new case did not mean that he was not a vexatious litigant because his conduct came within subdivision (b)(4) which does not have as one of its requirements that the litigant act in *propria persona*. Unlike *Sheih*, the Golins have not been declared vexatious in previous litigation and the defendants did not bring their motion under subdivision (b)(4).

In *Camerado Ins. Agency v. Superior Court* (1993) 12 Cal.App.4th 838 the court explicitly made this point when it said the vexatious litigant statute may be applied to litigants who are represented by counsel where they were found vexatious *in past litigation* under subdivisions (b)(1) and (b)(4) of section 391. By implication, the court construed the legislative purpose to leave counseled cases outside the reach of sections (b)(2) and (b)(3). *Camerado* does not help the defendants.

Thus, even if defendants could establish that the Golins' counsel were mere puppets or rubber stamps, they still could not bring this case within the rationale of *Muller*, *Sheih*, or *Camerado* because they deal with an issue not relevant to the one raised here. But the attorneys never have been puppets or rubber stamps. Wallace and Beauvais both filed declarations explaining their roles. CT 5073, CT 5078. Wallace described in detail the nature of his work and the long hours spent supervising Jeffrey and consulting with him including reviewing the motions. Wallace appeared numerous times in the action telephonically. He explained that

Jeffrey went in *propria persona* for their mutual convenience and not because of any disagreements between them.

Beauvais stated that he has been consulting with Jeffrey and Wallace since April, 2006 and that he agreed to make limited appearances on behalf of the Golins to argue the motions. He explained that Jeffrey often consulted him, that he reviewed Jeffrey's work and found his research trustworthy. CT 5078. As further evidence that Beauvais was not mere puppet, he took time away from his vacation in Argentina to deal with the preparation of his declaration. A barely engaged figurehead of an attorney certainly would not have done this. The defendants' unsubstantiated allegation is further eroded by Judge Byrne's comment on the record praising Beauvais for the quality of his argument. RT 199, line 27.

Both Wallace and Beauvais indicated they had investigated the Golins' claims and believe them to have merit. Since public policy strongly favors members of the bar providing *pro bono* representation, it would be perverse then to punish Jeffrey for helping these attorneys engaged in the joint effort to vindicate the rights of a family horribly abused by the reprehensible conduct of these defendants.

2. The Golins Have Not Engaged in Repeated Litigation Under

Subdivision (b)(2) of Section 391

Defendants contend that the Golins are relitigating issues resolved against them in prior probate court and federal court proceedings.⁹ CT 4600-4603. Even if that were true, two attempts to relitigate a matter finally determined are insufficient to bring the Golin's conduct within the purview of subdivision (b)(2). In *Holcomb v. U.S. Bank Nat. Ass'n*, (2005) 129 Cal.App.4th 1494, the court held that "repeated relitigation" under the statute requires at least greater than two prior attempts [two attempts at relitigation alone are not sufficient to satisfy the requirement a party "repeatedly" relitigates a matter that has been "finally determined"], see 3 Witkin, Cal. Proc. 4th (1997) Actions, § 340, p. 433, Chapter IV. Actions, 2. [§ 340] Definition of Vexatious Litigant. Even if the Golins had relitigated twice, and they did not, they still would fall short of the threshold required to invoke subdivision (b)(2) of section 391.

a. The Probate Court Trial

⁹ The Golins challenged in the trial court and here the taking of judicial notice of the probate court findings and the federal court dismissal order insofar as they were offered for the truth of the matters asserted. CT 2452, 2569, 3694, RT 152, lines 5-10. This sound objection was sustained by Judge Hyman on May 30, 2007 and the point was conceded by defendant SARC.. RT 19, lines 25-28, RT 20, line 1, RT 27, lines 5-9. The Golins renew the objection in this court.

Defendants argue that the court's findings in the probate proceedings bar litigation in this action under the doctrines of res judicata and collateral estoppel. Neither doctrine applies. Res judicata or claim preclusion describes the preclusive effect of a final judgment on the merits and prevents relitigation of the same cause of action in a suit between the same parties or parties in privity with them.. *Noble v. Draper* (2008) 160 Cal.App.4th 1, 11. And it bars claims that could have been raised in the first action regardless of whether or not they were raised. *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821. Conversely, if the claims made in the current action could not have been raised in the earlier one, res judicata does not apply. *People v. Damon* (1996) 51 Cal.App.4th 958, 974-975.

The probate court performed a limited function entirely unrelated to the claims asserted in the current action. It had to decide whether a conservatorship was appropriate for Nancy and who the conservator would be. That is all. CT 1185, lines 20-25. The probate court had no jurisdiction to decide, and did not decide, whether Nancy's rights were violated when the defendants kidnapped her, whether the Golins were illegally searched and arrested, and whether the defendants abused and neglected Nancy after the probate court trial was concluded. It certainly could not have awarded monetary damages. There is simply no identity of claims between the two actions.

It is also questionable that the judgment in the probate court is final since custody orders arising from conservatorship proceedings can be modified and conservatorships themselves terminated at any time. Prob. Code §§ 2561, 1861. Collateral estoppel, or issue preclusion, bars the relitigation of an issue that was previously adjudicated if the issue is identical to an issue decided in a prior proceeding, the issue was actually litigated, the issue was necessarily decided, the decision in the prior proceeding is final and on the merits, and the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding.” *Bostick v. Flex Equip. Co., Inc.* (2007) 147 Cal.App.4th 80, 96 citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.

The only issues decided in the conservatorship trial were: (1) whether Nancy should be conserved, (2) who should conserve her and (3) what kind of conservatorship was appropriate. The probate court noted in its ruling that “this trial has essentially been about who should be Nancy’s limited conservator” with the state and the Golins vying for the job. CT 1185, lines 20-25. Those were entirely different claims and issues than here and none of them implicate the violation of rights asserted in the current action. Therefore, the probate court never actually decided, for example, whether Nancy had been illegally seized falsely imprisoned or whether Jeffrey and Elsie had been illegally searched and

maliciously prosecuted. Nor could the probate have decided such issues because it did not have jurisdiction. And the decision in the probate case was not final because conservators can always be removed and conservatorships can be terminated. Prob. Code §§ 2561, 1861.

b. Federal Court Proceedings

The Golins filed substantially the same claims asserted here in the federal courts.¹⁰ Their federal action was dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). A review of the order dismissing the claims shows that the court's rationale rested largely upon federal abstention doctrines including *Rooker-Feldman* and *Younger*. CT 1278-1283. The court also held that the parents had no standing to assert Nancy's rights because they could not act as her attorney. CT 1278. That defect in the federal court proceedings has been cured here. Nancy is now represented by counsel.

The district court also refused to exercise supplemental jurisdiction over the Golins' state law claims, allowing them to be refiled in state court. CT 1284. The Ninth Circuit affirmed the district court's ruling purely on procedural grounds and

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One major difference between the cases is that in the federal case the Golins asked for custody of Nancy. CT 1261. They do not seek custody in the current action.

not on the merits of the claims. CT 1293-1296. Under California law, an order denying a motion or dismissing a proceeding for procedural reasons such as lack of jurisdiction is not res judicata as to the merits of any underlying substantive question. *Kalai v. Gray* (2003) 109 Cal. App4th 768, 774 (quoting *Gorman v. Gorman* (1979) 90 Cal. App. 3d 454, 462).

Since the principles of res judicata and collateral estoppel do not apply, the Golins cannot be vexatious within the meaning of subdivision (b)(2) of Section 391.

3. The Golins Are Not Vexatious Litigants Within the Definition of Subdivision (b)(3) Of Section 391

Not all failed motions can support a vexatious litigant designation. The repeated motions must be so devoid of merit and be so frivolous that they can be described as a ‘flagrant abuse of the system,’ have ‘no reasonable probability of success,’ lack ‘reasonable or probable cause or excuse’ and are clearly meant to ‘abuse the processes of the courts and to harass the adverse party than other litigants.’ (See *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 55. (quoted in *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 972). “[W]hat constitutes ‘repeatedly’ and ‘unmeritorious’ under subdivision (b)(3), in any given case, is left to the sound discretion of the trial court. *Holcomb v. U.S. Bank Nat.*

Ass'n. (2005) 129 Cal.App.4th 1494, 1505-1506", (*Morton, supra* at 971). "This discretion, while broad, is not unfettered" (*Id.* at 826).

"While there is no bright line rule as to what constitutes 'repeatedly,' most cases affirming the vexatious litigant designation involve situations where litigants have filed dozens of motions either during the pendency of an action or relating to the same judgment." *Morton* at 972 quoting *Bravo v. Ismaj* (2003) 99 Cal.App.4th 211, 225]. In *Bravo* the court found that approximately 20 motions constituted "repeated" filings because they all arose during the same action and many of the motions were identical to motions previously brought and denied." (*Id.*, at 972)

Unlike in *Bravo*, the Golins did not file motions that were "numerous", "unmeritorious" or "frivolous" so as to come within the meaning of the vexatious litigant legislation.

In their moving papers, defendants characterize as frivolous the Golins multiple applications for appointment of a guardian ad litem, repetitive motions to change venue and repeated attempts to disqualify judges. The Golins were successful in having a GAL appointed twice only to have their work undone by the defendants when they shopped for different judges to vacate these orders. Even in these instances, the judges who vacated the orders did so without prejudice to the filing of new applications. There was nothing frivolous about seeking a GAL. It is required.

Defendants also criticize the Golins for seeking a change of venue on more than one occasion. These renewed motions which speak for themselves show that Golins filed new motions (a total of three) when circumstances changed in the course of the litigation. The Golins first opposed defendants' motion to change venue from Sacramento County to Santa Clara County.

The Golins then sought to move the case out of Santa Clara County for various reasons including the fact that the entire bench in Santa Clara County had recused itself *sua sponte* once one of the defendants in this case had been appointed to the bench, relegating the case to part-time visiting judges who traveled 110 miles from Napa County and 65 miles from San Benito County to hear it. These judges were appointed only for short periods of time, 30 days at the most. The Golins asked that venue be changed so that they would have access to a full-service court rather than be dependent on the calendars of judges who did not even maintain their own chambers in Santa Clara County and who were not there to hear emergent matters or grant GAL appointments. They will seek on remand to have this case transferred to a complex litigation department in another county.

Defendants fault the Golins for seeking to disqualify judges claiming these efforts were frivolous and nonmeritorious. Their argument is belied by the fact that all but one of the judges recused themselves in response to the Golins' challenges, then the entire bench recused itself, thus conceding bias.

At the hearing before Judge Byrne, defendants tried to substantiate their claim of repetitious and meritless filings by referring to the docket sheet and even then failed to meet their burden. It is difficult, if not impossible, to make a determination under subdivision (b)(3) simply by resort to a docket sheet. *Holcomb v. U.S. Bank Nat. Ass'n* (2005), 129 Cal.App.4th 1494, 1506.

Judge Byrne repeatedly challenged defendants to show which of Golins' motions were vexatious or repetitive (RT 168, lines 22-26):

THE COURT: How many motions do you have? And let me get your chart so we're clear on -- I know you put the information in, but I was listening carefully to Mr. Beauvais' argument on the appointment of the guardian ad litem.

Then, (RT 169, lines 2-26):

THE COURT: Oh, I understand that. No, I'm talking about how many abusive -- might be interpreted as abusive motions and what are they --

Mr. Pinsky stumbles around for the answer and Mr. Beauvais objects (RT 170, lines 15-22):

MR. PINSKY: As I look, Your Honor, *it may or may not be here*. But as I said, what we are more than happy to do is to prepare and submit after today's hearing a list of all the proceedings that we believe are frivolous or relitigating the same issue that have been submitted by plaintiff.

MR. BEAUVAIS: I would object to that procedure, Your Honor. They've had ample time to tell us which ones.

Defendants were plainly unprepared to answer this central question and

stumbled around trying to find the answer, and never did. Mr. Gale took a third stab at it (RT 173, lines 20-26):

MR. GALE: Afternoon, Your Honor. Eric Gale for defendant San Andreas Regional Center. Earlier you asked about, you know, well, which motions have been filed that are frivolous. And if we go through the register of action, Your Honor, we could find so many that it's astounding, and that's the reason.

THE COURT: That's what I want to know.

(RT 176, lines 4-16), Mr. Gale is still punting and asks for another break):

And that addresses just the tip of the iceberg.

THE COURT: Well, tell me the iceberg if --

MR. GALE: Well, that's the tip of the iceberg.

THE COURT: I don't want the tip. I want to know the ice --

MR. GALE: The iceberg --

THE COURT: How many motions you've got. That's what I would --

MR. GALE: Your Honor, if we could take a break for 15 minutes, a half an hour I could go through the register of action which we've attached to one of our briefs.

(RT 177, lines 22-28), Mr. Gale is *still* desperately searching for the answer while

Ms. Fligor (Santa Clara County) offers a recitation of statutory language lacking

any evidentiary support:

(MS. FLIGOR)... We have Jeffrey Golin, who's acting in pro per, and as Eric Gale -- he's currently going through his files -- has pointed out, Mr. Golin has filed all unmeritorious motions, pleadings and other papers and conducted other tactics that are frivolous and solely intended to cause unnecessary delay. If you look at the different pleadings that have occurred since May of this

year, Your Honor –

The court demands again to know which ones (RT p178, lines 4-7):

THE COURT: There are 16 boxes or 16 files. I went through and spent some time this morning, went through it all. It's -- I just want to know -- I'd like to know how many and which ones they are.

Clearly defendants appear to have come to court unprepared to defend their motion and finally (20 transcript pages later) just refer to the entire register of actions (RT p 189, lines 5-11).

MR. GALE: Yeah, but, I mean, if you look at that register of action, and take a look at it, that in between all of those filings are those additional filings, those amended and supplemental, and that's what's driving us nuts. And that's why this has to be stopped because they are frivolous. They're not substantiated. They're not -- they don't have reason

By the time he rules, even Judge Byrne cannot say that *any* motion, *individually*, is meritless. His ruling rested on the notion that the *number of motions and pleadings*, somehow “created an unmeritoriousness to the motions themselves” (RT 200, lines 7-8) even though the pleadings were individually conceded to be “reasonable” (RT 199, line 27). The whole cannot exceed the sum of its parts, and if each pleading was reasonable, then the totality of them cannot reach a level of vexatiousness.

The defendants also complained that Jeffrey had signed Beauvais' name on a declaration which Beauvais indicated he had given Jeffrey permission to do

because Beauvais was out of the country. Mr. Wallace also indicated that he approved Jeffrey signing pleadings on his behalf. RT 162, lines 24-25. This was proper. *Stanford v. Superior Court* (2007) 149 Cal.App.4th 1154, affirming the propriety of the “doctrine of amanuensis,” providing authority to sign another’s name with their approval.¹¹

The record shows that Judge Byrne’s ruling came only after seeing that the case had grown to 16 volumes but he never sorted out *whose papers were whose*. A review shows that the defendants padded the record with numerous redundant filings to create the appearance that the case had run amok and then pointed to the Golins as the cause.¹² This strategy worked well here because Judge Byrne did not take the time to examine the record before he ruled.

¹¹

The defendants offered evidence that Jeffrey had signed the names of other persons on proofs of service without their consent. It did not appear that this improper conduct caused the defendants any prejudice inasmuch as they received the documents to which the proofs of service related.

¹²

Defendants filed copies of the Golins’ complaint as exhibits to various motions at least 5 times. CT 1303-1444, CT 1732-1872, CT 2298-2468, CT 3102-3244, CT 3445-3586. Defendants filed the probate court decision at least 12 times. CT 538-557, CT 597-614, CT 795-812, CT 1044-1061, CT 1077-1094, CT 1181-1198, CT 1611-1630, CT 2111-2128, CT 2244-2263, CT 3391-3410, CT 4638-4655, CT 4894-4913. Defendants filed the order dismissing the federal action at least 13 times. CT 558-573, CT 615-630, CT 813-830, CT 1272-1288, CT 1701-1717, CT 2129-2153, CT 2264-2281, CT 2678-2694, CT 3083-3101, CT 3411-3428, CT 4292-4301, CT 4671-4687, CT 4914-4927. Defendants also filed extraneous and voluminous exhibits. One set is 708 pages. CT 1165-1872. Another set is 103 redundant to the 607 pages. CT 1891-199. A third redundant set is 201 pages. CT 2240-2440.

Even the supplemental and amended opposition briefs filed by the Golins simply went back and rebutted issues raised by defendants that *had* to be addressed, and rebutted them decisively, only once. This was not “obsessive”, but *necessary* to move the matter forward. It would have been fatal to the Golins’ claims not to have responded.

Defendants’ motions and oppositions were comprehensively rebutted in the Golins’ opposition briefing. The oral record shows Judge Byrne briefly considered actually examining the record to evaluate the alleged meritlessness of the Golins’ responses (RT 147, lines 11-21) but he abandoned that wise approach after defendants began ranting that the Golins’ responses were repetitive (“over and over and over and over” (RT 175, lines 1, 5, 19-20), representing without referencing a single document that the Golins’ amended and supplemental filings were “frivolous” and “unsubstantiated” (RT 189, line 10), raving that “the tail is wagging the dog” (RT 188, line 25) and saying “that’s what’s driving us nuts” (RT 189, line 8).

The record is bare of any showing that the defendants met their burden under subdivision (b)(3). Yet, in the end, Judge Byrne caved in to the defendants’ pressure tactics and ruled in their favor despite defendants’ poor showing.

4. The Trial Court Erred in Finding that the Golins Had No Probability of Success on the Merits

Section 391.1 requires that the defendant's motion be "supported by a showing that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."

The oral record shows the court perfunctorily ruled, without supporting evidence or examination of the record, that the Golins were unlikely to prevail on the merits. The defendants submitted no evidence as required by the statute that the Golins' case was factually or legally weak but instead relied upon the purported preclusive effect of prior litigation. It was this position that the judge adopted when he said:

THE COURT: I think having read and gone over Judge -- is it Alsup? How do you spell it, A-1 --

MR. GALE: s-u-p.

THE COURT: s-u-p rulings and findings in that I would find that it is unlikely that the -- *which I believe is the language required* -- unlikely that the plaintiffs would prevail in the lawsuit. All right, and thank you for catching me on that. RT 203, lines 17-24.

Judge Byrne's final comments on record are starkly revealing even though they have nothing to do with the ostensible legal basis for dismissal. He describes the lawsuit as "unique" (RT 224, line 26) questions whether a civil case should be "the vehicle" (RT 224 line 27) to bring an action, and suggests that the concerns of the Golins could be addressed in the probate court where there is no statutory jurisdiction to bring damages claims.

Judge Byrne is especially clear when he compares this case not to “the fox in the henhouse” but to “the camel’s nose in the tent” (RT 226, lines 26-17). Here, Judge Byrne reveals that his primary concern is to foreclose a damage remedy for persons already stripped of their civil rights feeling comfortable leaving their fate in the hands of their abusers.

5. The Golins Were Given No Warning that their Conduct Could Be Considered Abusive Before The Court Dismissed the Case

At no time in the course of this case before the ruling declaring the Golins vexatious did the court tell the Golins that their pleadings were frivolous or repititious. The Golins had never been sanctioned for any of their litigation conduct. There are remedies available to the court short of the drastic step of dismissal to curb litigation abuse but none were pursued in this case.

Prior to the vexatious litigant ruling, defendants had not sought the protections afforded them under CCP §128.7, thus depriving the Golins of an opportunity to withdraw or appropriately correct “the challenged paper, claim, defense, contention, allegation, or denial...” CCP §128.7(c)(1). Only after the Golins filed several effective oppositions to defendants vast slew of motions did the defendants suddenly file their vexatious litigant motion.

Dismissal is a drastic sanction, to be used only if less severe sanctions prove

ineffective. *Carlson v. State of California Department of Fish and Game* (1998) 68 Cal.App.4th 1268. (See, e.g., *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491; *Traweek v. Findley, Kumble etc, Myerson & Casey* (1991) 235 Cal.App.3d 1128, 1134.). Here the court abused its discretion in dismissing the case as its first and final sanction.

B. SUMMARY DISMISSAL OF NANCY'S CLAIMS DEPRIVED HER OF NOTICE AND OPPORTUNITY TO BE HEARD

Even though the defendants did not seek to have Nancy declared vexatious, the court dismissed her claims *sua sponte* without notice or opportunity to be heard. In the court's apparent view, the Golins' litigation tactics would taint future proceedings on Nancy's claims even though their own had been dismissed. The defendants argued that Nancy's claims should be dismissed because she had no guardian ad litem and because her parents had no authority to name her as a plaintiff.

It is, of course, fundamental that the court should not take an action that affects a party's rights without providing prior notice to the party and allowing the party an opportunity to be heard. Due process requires that parties have notice of the proceedings involving their interests and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). This requires "notice reasonably calculated, under all the circumstances, to appraise interested

parties of the pendency of the action and afford them an opportunity to present their objections.” *Ibid.* The Supreme Court explained that “[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing.’ ” *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).

The right of a potential litigant to the use of judicial procedures is constitutionally protected by the prohibitions against state deprivation of property without due process of law. (See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-429 (1982) [holding that a cause of action is a species of property protected by due process]; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914, fn. 3). The potential litigant is also protected by a constitutional right of access to the courts for all persons. *Boddie v. Connecticut* 401 U.S. 371, 377 (1971).

The United States Supreme Court addressed the interplay of these constitutional rights in *Logan v. Zimmerman*, *supra*, 455 U.S. at p. 430, fn. 5, 102 S.Ct. at 1154 fn. 5: “The Court's cases involving the right of access to courts provide an analogous method of analysis supporting our reasoning here. In *Boddie*, the Court established that, at least where interests of basic importance are involved, ‘absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.’ The relationship between these

opinions and the right to procedural due process at issue in the instant case is made clear in *Boddie*, which relied in large part on the analysis of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and its guarantee ‘to all individuals [of] a meaningful opportunity to be heard.’ [Citation.] Thus, while the right to seek a divorce may not be a property interest in the same sense as is a tort or a discrimination action, the theories of the cases are not very different: having made access to the courts an entitlement or necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme.”

The persistent argument of the defendants supporting denial of Nancy’s right of access to the courts was that Nancy did not bring this suit herself and, since she did not appear, the court could not know if she wanted her claims raised or not. RT 12, lines 24-28. “There’s nothing in the record to show that she is interested in bringing these claims.” They also argued that her parents did not have standing to bring the action on her behalf. RT 6, lines 21-28, RT 7, lines 1-2; RT 14, lines 23-25, claiming that the parents should be relegated to work with *the conservator, a defendant*, or some other executive state bureaucracy, before being allowed to bring the suit, or that when DDS might be dismissed, it could become the guardian ad litem. They suggested, and the Hyman court agreed, that a neutral third party should be appointed a guardian ad litem to review these claims.

There is no requirement that Nancy be represented by her conservator in this action. Code of Civil Procedure section 372(a) authorizes the appointment of a person other than the conservator. “A guardian ad litem may be appointed in any case when it is deemed by the court . . . or a judge thereof, expedient to appoint a guardian ad litem to represent . . . the incompetent person or person for whom a conservator has been appointed . . .” CCP § 372(a). It would seem expedient to make such an appointment in this case where the conservator is not able to act due to a conflict of interest.

The Golins are persons who have the greatest incentive to protect Nancy’s interests in the litigation. The defendants have pointed to no statute or case that denies the Golins standing to represent Nancy’s interests.

The Golins have sued the defendants under the 1992 Elder Abuse and Dependent Adult Civil Protection Act. Welf.& Inst. Code § 15660 et seq. CT 366-367. “The intent of the statute was to enable interested persons to engage private attorneys to represent victims and make litigation economically feasible.”

Seymour Moskowitz, *Honor thy Mother & Father: Symposium on the Legal Aspects of Elder Abuse*, 36 Loy. L. A. L. Rev. 589, 606 (Winter 2003).

“In appropriate cases damages actions against perpetrators may bring some measure of redress to victims. A largely unused legal tool is the traditional tort suit. . . . and there are particularly useful tools in situations where the abuser

occupied a fiduciary status such as trustee, guardian, conservator or power of attorney [citations omitted].” *Id.* at 604-605. The purpose of the Act is to protect a “disadvantaged class” and to “enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.” *Delaney v. Baker* (1999) 20 Cal.4th 23, 33. Certainly the Golins are interested persons with standing to assert Nancy’s claims.

County counsel embellished this lack-of-standing argument claiming that “*the Court has already determined that they’re not suitable to be Nancy’s parents*” (RT 25 lines 25-26) attempting to graft inapplicable family law concepts relating to custody of minors onto the law governing appointment of guardians ad litem. The Golins had never lost their parental rights. Nancy is now an adult, and her parents have always been her parents and will always remain so. Despite the fact that the Golins offered four qualified candidates to be GAL, it became clear that the defendants would oppose the appointment of anyone but themselves. RT 6, lines 4-13. The notion that the defendant should have a right to control or even have a voice in the selection of the guardian ad litem for an incompetent plaintiff is simply unprecedented.

The defendants unabashedly shopped for judges to vacate prior orders appointing Elsie as Nancy’s guardian and accused the Golins of surreptitiously seeking Elsie’s appointment by filing ex parte applications with no notice to them.

But an appointment may be made on an ex parte application and in the absence of a conflict of interest involves little exercise of discretion. *Sarracino v. Superior Court* (1974) 13 Cal.3d 1; *In re Marriage of Caballero*, (1994) 27 Cal.App.4th 1139, 1149).

In *State of California v. Superior Court* (1978) 86 Cal.App.3d 475, 482, the court recognized a parent's "preferential status" in seeking a guardian ad litem appointment. [disapproved on other grounds in *Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, 1027]. Generally, when a minor is represented by a parent who is a party to the lawsuit, and who has the same interests as the child, there is no inherent conflict of interest. *See, e.g., Gonzalez v. Reno*, 86 F.Supp.2d 1167, 1185 (S.D.Fla.2000), *aff'd*, 212 F.3d 1338 (11th Cir.2000) (explaining that "when . . . the interests of each are the same, no need exists for someone other than the parent to represent the child's interests under [Federal] Rule 17(c).").

A guardian ad litem's role is limited to protecting the child's interests in the litigation and the role is intimately supervised by the judge. *See: Nancy J. Moore, Conflicts of Interests in the Representation of Children*, 64 Fordham L. Rev. 1819, 1855 (1996). Therefore any controversy concerning Elsie's capacity to manage Nancy's day-to-day care is irrelevant to her ability to act as Elsie's GAL.

When the defendants first sought to vacate Elsie's GAL appointment in Sacramento, they went to a judge different from the one who made the

appointment. Defendants did the same thing in Santa Clara County. The ensuing orders of these judges are void and Elsie remains Nancy's GAL in this case notwithstanding these orders purporting to nullify Judge Kenney's initial order in Sacramento.

It is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been assigned. "A judge of one department of a superior court has no jurisdiction to sit in appellate review of the orders of another judge of the same court." *Ford v. Superior Court*, (1986), 188 Cal.App.3d 737 [One department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court].) Because a superior court is but one tribunal, "[a]n order made in one department during the progress of a cause can neither be ignored nor overlooked in another department. *People v. Grace* (1926) 77 Cal.App. 752, 759. *See also, Williams v. Superior Court* (1939) 14 Cal.2d 656 [superior court judge has no authority to annul an order to show cause re contempt issued by a different department of the same court]. When a court lacks jurisdiction in a fundamental sense, as it did here, the ensuing judgment is void and thus vulnerable to direct or collateral attack at any time. *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1478.

Since the orders vacating Elsie's appointment are nullities she remains

Nancy's GAL notwithstanding them. All this court needs to do is give recognition to that fact in determining that Nancy appears in this action as a legitimate party represented by her GAL and by counsel.

**C. THIS CASE SHOULD BE REMANDED WITH INSTRUCTIONS
ORDERING TRANSFER TO ANOTHER COUNTY FOR
ASSIGNMENT TO A FULL-TIME JUDGE**

Since the full bench recusal in Santa Clara County, this case has been heard by judges appointed through the retired judges program administered by the Judicial Council. These appointments are typically for short periods of time and are entirely inappropriate for the handling of complex litigation.

The effect of administering the case through the program has been to leave the parties without access to a full service court with no judge available for discovery matters and no court in which to take emergent matters. Given its complexity, delegation of the entire case to one reluctant retired judge, who had no chambers of his own or access to the normal resources of an active judge imposed handicaps and adverse conditions on the Golins that are not generally imposed on other litigants, without any countervailing benefit.

Judge Breen lives in Hollister, 56 miles from the San Jose courthouse, and thus declined to be available for ex parte motions when they were requested by either side.

Judge Byrne was appointed for only 30 days. He lives in Calistoga, 107 miles from the San Jose courthouse, having to drive 214 miles roundtrip in a single day through a densely populated metropolitan area to attend the proceedings.

These conditions would create powerful incentives for any judge to dispose of the case in a summary fashion with the attendant risk that the due process rights of the plaintiffs will suffer. That is precisely what has happened here. The vexatious litigant motion is so bereft of merit, a fact that Judge Byrne appeared to recognize before ruling in favor of the defendants, that an inference can be drawn that considerations outside the merits of the case guided judicial decision making. To avoid repetition of these conditions, it is appropriate to transfer this complex case to another county to be heard by an active judge, preferably in a complex litigation department. Alameda and San Francisco Counties are nearby and qualify as appropriate courts to hear this case.

Transfer of the case to another county is authorized under CCP §§ 397(d) and 398.

IV. CONCLUSION

For the foregoing reasons, appellants respectfully request that the judgment of dismissal be reversed and that the case be transferred to a complex litigation department of the Alameda or San Francisco Superior Courts.

DATED: August 26, 2008

DAVID J. BEAUVAIS
Attorney for Appellants

CERTIFICATE OF WORD COUNT

Appellants certify that this brief excluding the table of contents and table of authorities consists of 9,748 words.