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SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

TWENTY-NINE PALMS BAND OF MISSION INDIANS OF CALIFORNIA; TWENTY-NINE PALMS ENTERPRISES CORPORATION; and ECHO TRAIL HOLDINGS, LLC, a limited liability company,

Plaintiffs,

vs.

DAVID ALAN HESLOP, an individual; DIVERSIFICATION RESOURCES, LLC, a limited liability company; NATIONAL DEMOGRAPHICS, INC., a corporation; PEGGY SHAMBAUGH, an individual; BENNION & DEVILLE FINE HOMES, INC., doing business as WINDERMERE REAL ESTATE COACHELLA VALLEY, a corporation, and DOES 1 through 100, inclusive

Defendants.

CASE NO.: RIC 10006101

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS PEGGY SHAMBAUGH AND BENNION & DEVILLE FINE HOMES, INC. dba WINDERMERE REAL ESTATE COACHELLA VALLEY TO TRANSFER ACTION TO STAY PROCEEDINGS

DATE: 5/26/10
TIME: 8:30 am
JUDGE: Hon. Bernard Schwartz
DEPT.: 08

Complaint Filed: 10/07/09
Trial Date: Not Yet Assigned

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

STATE STATUTES AND RULES

Defendants PEGGY SHAMBAUGH and BENNION & DEVILLE FINE HOMES, INC., doing business as WINDERMERE REAL ESTATE COACHELLA VALLEY, (collectively "Moving Parties") hereby submit the following Memorandum of Points and Authorities in support of their Motion to Stay Proceedings until the resolution of the investigation currently being conducted by the Federal Bureau of Investigation and the United States Attorney into the subject matter of this case.

I.

BACKGROUND OF CASE AND PLAINTIFFS' ALLEGATIONS

This action arises out of Plaintiffs' purchase of 47 acres of real property adjacent to their Spotlight 29 Casino in the City of Coachella, County of Riverside in September, 2007 (hereinafter "Echo Trail Property"). Moving Parties served as the real estate broker/agent representing Plaintiffs for the purposes of this land transaction. (*Complaint, p. 5, lines 6-11, lodged with the court as Exhibit A*). Plaintiffs allege Defendant David Alan Heslop served as the manager of Echo Trail Holding, LLC, (an entity created by plaintiffs in which to hold title to the subject property) and as an advisor to the tribe for the purposes of this acquisition. Defendants Diversification Resources, LLC and National Demographics, Inc., allegedly provided advisory services related to the purchase. (*Complaint, p. 4, line 25 to p. 5, line 5; p. 6, lines 18-20, lodged as Exhibit A.)* Plaintiffs paid a total of $31 million for the Echo Trail Property. (*Complaint, p.6 lines 11-13, lodged as Exhibit A.*)

The Complaint also contains allegations against the Tribe's own attorney, Gary Kovall[1], who represented Plaintiffs during their negotiation and acquisition of the Echo Trail Property and allegedly made recommendations to plaintiffs with regard to the retention of other lawyers, brokers, consultants, advisors and contractors, including Moving Parties and other Defendants in this case. (*Complaint, p. 4, line 16 to p. 5, line 11; p. 7, lines 1-4 and 7-11, lodged as Exhibit*

[1] Gary Kovall was not named as a defendant in this case but rather was sued separately in a related case in Orange County, entitled Twenty-Nine Palms Band of Mission Indians v. Edwards et al., Case No. 30-2009-00311045, (lodged as Exhibit K.)

A.) It is claimed plaintiffs had no knowledge of the "romantic relationship" between Kovall and Peggy Shambaugh. *(Complaint, p. 5, lines 14-17, lodged as Exhibit A.)*

Plaintiffs are now contending they overpaid for the Echo Trail Property and that its actual market value at the time of their purchase was no more than $20 million (*Complaint, p. 6, lines 1-2, lodged as Exhibit A.).* They accuse defendants of withholding and concealing information from them, including the true market value of the Echo Trail Property, the nature of the relationship between Defendant Peggy Shambaugh and attorney Gary Kovall, the details of the negotiations for the purchase of the subject property, Kovall's acquaintance with the contractor hired to work on the Spotlight 29 Casino, the quality of the contractor's work and his experience level and various other matters. (*Complaint, p.5 line 14 to p. 6, line 9; p. 6, lines 21-26; p. 7, lines 7-27; p. 8, lines 1-15, lodged as Exhibit A.*)

Plaintiffs are also alleging that Moving Parties and other Defendants provided business advice designed to benefit Defendants at Plaintiffs' expense and that Defendants received secret profits and other re-numeration as a result of their undisclosed relationships. It is also contended that Moving Parties and Defendants received large sums of money for services that were of little or no value. (*Complaint, p. 4, line 25 to p. 5, line 5; p. 5, line 9 to p. 6, line 2; p. 7, lines 1-6, 11-27 and p. 8, lines 1-15, lodged as Exhibit A.*)

II.

COURTS ARE AUTHORIZED TO STAY CIVIL PROCEEDINGS TO PROTECT A DEFENDANT'S CONSTITUTION RIGHT AGAINST SELF-INCRIMINATION

California courts have long recognized that accommodation must be made for a party caught between the "Scylla and Charybdis" of trying to protect his constitutional right against self-incrimination while attempting to defend his interests in a civil action involving the same set of facts and circumstances. The United States Supreme Court has held that a party asserting the Fifth Amendment privilege against self-incrimination "should suffer no penalty for his silence." *Spevack v. Klein (1967) 385 U.S. 511, 514-15. (All federal cases cited are lodged with the court as Exhibit L)* The California Supreme Court has charged trial courts with assessing and balancing the nature and substantiality of the injustices claimed on both sides and

arriving at an accommodation that takes the constitutional rights of the defendant into consideration. *People v. Coleman (1975) 13 Cal.3d. 867, 885-86.* Thus, courts are obligated to weigh the competing interests of the defendant seeking to invoke his Fifth Amendment privilege, versus the plaintiff seeking redress for alleged civil wrongs, with a view toward protecting the interests of both parties. A solution that does not provide a remedy that accommodates defendant's dilemma is an abuse of discretion by the court. *Pacers, Inc. v. Superior Court (1984) 162 Cal.App.3d 686, 688.*

In *Pacers,* several agents from the Drug Enforcement Administration sued a nightclub and its employees for assault and battery as a result of a fight that broke out while the agents were working undercover at the club. Although the federal grand jury had refused to issue indictments against the club and its employees for the incident, the United States Attorney was maintaining an "open file" on the case. At their depositions in the civil action the club employees asserted their Fifth Amendment privilege against self-incrimination due to the threatened criminal proceedings. The trial court penalized the employees by prohibiting them from testifying at trial as to all matters forming the subject matter of the lawsuit. The Court of Appeal overturned the ruling, finding that the trial court abused its discretion in failing to fashion a remedy accommodating the interests of both sides. It also granted the request for a Stay of Proceedings until the statutes of limitation ran on the criminal prosecution. *Pacers, supra., at pp. 687-88.*

The Pacer's court held that the employees could not be penalized for exercising a fundamental constitutional right. Their inability to testify on their own behalf because they asserted their Fifth Amendment privilege made asserting that privilege "too costly". Further, because the agents had no right to information protected by the Fifth Amendment, Pacer's and the employees had not violated any discovery rules and the imposition of an order that protected only the agents was an abuse of discretion. *Pacers, supra., at p. 689.*

Citing to numerous federal cases, the court found that where a person's silence is constitutionally guaranteed, the court should weigh the competing interests and fashion a remedy that protects the rights involved while accommodating both parties. An order Staying

the matter until expiration of the criminal statute of limitation is just such a remedy. Imposing a Stay is in accord with federal practice, "where it has been consistently held that when both civil and criminal proceedings arise out of the same or related transactions, an objecting party is entitled to a stay of discovery in the civil action until disposition of the criminal matter." *Pacers, supra., at p. 690; United States v. Kordel (1970) 397 U.S. 1, 9; Campbell v. Eastland (1962) 307 F.2d 478, 492-93.* The *Pacers* court found it to be in the best interests of all parties that the civil case be Stayed until the threat of criminal prosecution was resolved. Where delay and inconvenience to a civil plaintiff is weighed against the Fifth Amendment privilege, "a party's constitutional right is paramount." *Pacers, supra., at p. 690.* The trial court abused its discretion by failing to accommodate these rights. *Pacers, supra., at p. 688.*

Other courts have found it to be "in the exercise of sound discretion and in the interest of public policy" that civil proceedings be stayed "until the final disposition of the criminal proceedings." *United States v. Bridges (1949) 86 F. Supp. 931, 933.* "The noncriminal proceedings, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery" beyond statutory limits, "expose the basis of the defense to the prosecution in advance of criminal trial", and otherwise prejudice the parties. *Brock v. Tolkow (1985) 109 F.R.D. 116, 119.* Requiring a party threatened with criminal prosecution to "participate in a civil action at the peril of being denied his worldly goods" violates concepts of elementary fairness and basic justice. *Avant! Corporation v. Superior Court (2000) 79 Cal.App.4th 876, 882.*

Even in the absence of any indictments or actively filed charges, constitutional rights must prevail. To allow prosecutors to monitor civil proceedings hoping to obtain incriminating testimony through civil discovery would not only undermine the Fifth Amendment privilege but would also violate concepts of fundamental fairness and work a grave injustice on the defendant. *Pacers, supra. at p. 690; United States v. Kordel, supra., at p. 5.* As stated by the California Supreme Court, forcing a party under suspicion of a crime to choose between the privilege against self-incrimination and his opportunity to be heard in a civil proceeding subjects that party to a "cruel" and grossly unfair penalty. Requiring an individual to choose

between such unpalatable alternatives "runs counter to our historic aversion to cruelty reflected in the privilege against self-incrimination." *People v. Coleman (1975) 13 Cal.3d 867, 878.* For this reason courts have discretion to remove this dilemma by Staying the civil matter until the criminal proceedings have run their course, or the statutes of limitation expire. Where the interests of law enforcement and redress for civil wrongs collide, the appropriate remedy is for the trial court to Stay the civil matter in the interests of justice. *County of Orange v. The Superior Court of Orange County (2000) 79 Cal.App.4th 759, 768.*

III.

A STAY OF PROCEEDINGS IN THIS CASE IS REQUIRED TO PROTECT MOVING PARTIES' CONSTITUTIONAL RIGHTS AGAINST THE INVESTIGATION BY THE FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES ATTORNEY INTO THE FACTS ALLEGED IN PLAINTIFFS' COMPLAINT

A. Moving Parties Are Under Investigation by The Federal Bureau of Investigation And the United States Attorney As To The Allegations In Plaintiffs' Complaint

Moving Parties have been contacted by agents from the Federal Bureau of Investigation in regard to the allegations in Plaintiffs' Complaint. (*Declaration of Cheryl D. Davidson, para. 3, filed herewith.*) Special Agent George Krumpotich and Special Agent Mark C. Hunter, have contacted Peggy Shambaugh in regard to her involvement in plaintiffs' purchase of the Echo Trail Property. (*Declaration of Cheryl D. Davidson, para. 3, filed herewith.*) From the business cards these agents gave to Ms. Shambaugh, it appears they are based out of the FBI office at 601 E. Tahquitz Canyon Way, Palm Springs, CA 92262. (*Business cards, lodged as Exhibit B*). From information obtained from these agents, it appears they are investigating plaintiffs' purchase of the Echo Trail Property, including the price paid for it, the purpose of the acquisition, how it was acquired, and the role the Moving Parties and other Defendants and persons played in the transaction. The FBI is also investigating Moving Parties and Defendants' involvement in other transactions with the Tribe (*as referred to in the Complaint,*

p. 7, lines 1-6; p. 7; p. 8, lines 1-15.) (*Declarations of Matthew M. Horeczko, para.3 and 4, Edward M. Robinson, para. 2-5 and Cheryl D. Davidson, para. 3, filed herewith.*)

Counsel for Moving Parties and for Gary Kovall have also contacted the office of the United States Attorney, who confirmed that an investigation is being conducted into Moving Parties and Defendants' roles in the Tribe's acquisition of the Echo Trail Property and in various other business ventures and transactions. The United States Attorney has also indicated in indictment is under consideration. (*Declaration of Edward Robinson, paras. 2-5 and Declaration of Matthew M. Horeczko, para.3 and 4, filed herewith.*)

In view of the information received from the FBI and the United States Attorney, there is a substantial threat of criminal proceedings being instituted by the FBI against the Moving Parties and Defendants in this action in regard to the same facts and circumstances alleged in plaintiffs' Complaint. Defendants in this case, including Moving Parties, have been forced to retain criminal defense attorneys to protect their interests in this matter and in any criminal action that may be brought by the U.S. Attorney or any other law enforcement agency. These criminal defense attorneys have instructed their clients to assert their rights to remain silent. (*Declarations of Edward Robinson, paras. 2 and 3, and Matthew M. Horeczko, para.5, filed herewith.)*

B. Discovery Disputes Have Already Arisen Due To Moving Parties' Assertion of The Fifth Amendment Privilege Against Self-Incrimination

Shortly after Moving Parties were served with the Summons and Complaint in this matter, Plaintiffs propounded discovery to them, consisting of Form Interrogatories and Requests for Production of Documents. The Form Interrogatories contained the appended definition of the term "INCIDENT" as follows: "The Purchase of the property identified in paragraph 13 of the Complaint in this action." (*Form Interrogatories to Shambaugh, lodged as Exhibit C.*)[2] The Requests for Production of Documents demanded production of all documents "related in any way to the Echo Trail Property" and/or to communications with any other person

[2] Nearly identical discovery requests were propounded on Windermere, but for purposes of economy, are not lodged.

or entity related to the Echo Trail Property. Plaintiffs also demanded production of Moving Parties computers, files, and other private documents, including Ms. Shambaugh's bank and credit card records, real property records, and "All Documents and Electronic Data that refer to You and Gary Kovall as being husband and wife." (*Requests for Prod., lodged as Exhibit C.*)

On December 16, 2009, Moving Parties served timely and verified Written Responses to this Discovery, lodging appropriate objections. (*Discovery Responses, lodged as Exhibit D.*)[3] Responsive, non-privileged and non-objected to documents were Bates Stamped and prepared for Inspection by plaintiffs. However, prior to the production, Ms. Shambaugh was contacted by the FBI and Defendants became aware of the current investigation. To protect the rights of Moving Parties, production of these documents was withheld on the basis of the Fifth Amendment until such time as Moving Parties could seek legal advice from criminal defense attorneys as to their rights and alternatives in view of the circumstances. (*Declaration of Cheryl D. Davidson, para. 5, filed herewith.*)

On December 1, 2009, plaintiffs propounded a second set of Form Interrogatories and Requests for Production containing the same set of definitions as the first set. The Interrogatories asked Moving Parties to "State all facts upon which you base the denial or special or affirmative defense" in your Answer. It also requested the names of persons with knowledge of these facts and the identification of all documents upon which the denial or affirmative defense was based. The Requests for Production demanded production of these documents. (*Discovery Requests, Set Two, lodged as Exhibit E.*) Moving Parties asserted their Fifth Amendment rights against self-incrimination in response to this discovery. (*Responses to Discovery, Set Two, lodged as Exhibit F.*)[4]

Although counsel for Moving Parties attempted to explain the situation to plaintiffs' counsel and obtain an extension of time in which to address the Fifth Amendment issues, this request was continually denied. (*Correspondence of Cheryl D. Davidson and Gordon*

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[3] For purposes of economy, Windermere's Responses have not been lodged.

[4] For purposes of economy, only the discovery to and from Shambaugh have been lodged.

Bosserman, lodged as Exhibit I.) Plaintiffs filed a Motion to Compel Responses to the Discovery, which was set by the court in San Luis Obispo for April 15, 2009. The motion was taken off calendar by the San Luis Obispo court when the Motion to Transfer was granted and this case was transferred to Riverside County. (*Declaration of Cheryl D. Davidson, para. 4, filed herewith.*)

For their part, Moving Parties served several sets of Discovery on Plaintiff on November 30, 2009, prior to discovering the FBI investigation. (*Moving Parties Discovery Requests, Set One, lodged as Exhibit G.*)[5] In retaliation for the assertion of the Fifth Amendment, Plaintiffs served Objections to each and every request. In their responses Plaintiffs stated that they would "provide only objections in connection with this response", citing Moving Parties assertion of the Fifth Amendment as the reason why they would not respond to Moving Parties Discovery Requests. Although Moving Parties attempted to "meet and confer" in regard to this improper retaliatory response by plaintiffs, no response was elicited from Plaintiffs on this issue.[6] (*Plaintiffs' Responses to Moving Parties' Discovery, lodged as Exhibit H; Letter of Cheryl D. Davidson, lodged as Exhibit J.*)

As underscored by the allegations in the Complaint, the questions propounded in their Discovery Requests (and attached "Definitions") and the Motion to Compel Responses to Discovery, plaintiffs are attempting to obtain facts, documents and witness names pertaining to the purchase of the Echo Trail Property and the involvement of Defendants therein. This is the identical subject matter currently being investigated by the FBI. Moving Parties are caught in the precarious situation of having to defend themselves in a multi-million dollar civil lawsuit while at the same time preserving their fundamental constitutional right against self-

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[5] For purposes of economy, only the discovery propounded to the Tribe, and their responses have been lodged, although identical requests were went to all three plaintiffs and nearly identical responses received from them.

[6] Moving Parties were unable to file a Motion to Compel Further Responses Due to the filing of the Motion to Transfer Proceedings to Riverside County and the court's lack of jurisdiction to hear other matters prior to that motion.

incrimination. This is exactly the type of scenario for which courts have fashioned the remedy of a Stay of Proceedings.

C. Moving Parties Should Not Be Penalized For Protecting Their Constitutional Rights In This Case

The Fifth Amendment to the United States Constitution guarantees that no person shall be compelled "in any criminal case" to be a witness against himself. Article One of the California Constitution provides that persons may not be compelled "in a criminal cause" to be a witness against themselves. *Cal.Const., art. I, Section 15.* California courts have found that these protections extend even further, allowing a person not to answer questions in any proceeding, civil or criminal, formal or informal, administrative or judicial, investigatory or adjudicatory, where that person believes the answers might incriminate him in a criminal action. One cannot be forced to choose between forfeiting the privilege against self-incrimination on the one hand or asserting it and suffering a penalty for doing so on the other. *Spielbauer v. County of Santa Clara (2009) 45 Cal.4th 704, 714; Segretti v. State Bar (1976) 15 Cal.3d. 878, 886.*

As embodied in the statutes, "A person has a privilege to refuse to disclose any matter that may tend to incriminate him." *California Evidence Code Section 940.* Privileged matters thus lie beyond the reach of discovery and trial courts may not compel individuals to make responses that they reasonably believe could be used in a criminal prosecution or which could, at the very least, lead to evidence that might be so used. *A & M Records, Inc. v. Heilman (1977) 75 Cal.App.3d 554, 566.*

To invoke this privilege a witness need not be guilty of any offense. Rather the privilege is properly invoked whenever the witnesses' answers would furnish a link in the chain of evidence needed to prosecute the witness for a criminal offense. *Sachs v. Sachs (2002) 95 Cal.App.4th 1144, 1151.*

As the United States Supreme Court and California courts have held, a party to a civil suit should not be forced to suffer any sanction, penalty or other "costly" action for protecting their fundamental constitutional right against self-incrimination. *People v. Coleman, supra., at*

p. 885; Spevack, supra. at p. 515; Pacers, supra., at p. 689. However, without a Stay, Moving Parties and Defendants in this action would be precluded from testifying at trial as to all matters for which they have asserted the privilege. *A & M Records, supra. at p. 566.* Essentially, they would be unable to testify as to their role in the Tribe's purchase of the Echo Trail Property and in the other transaction of which plaintiffs complain. This "costly" penalty could "cost" Moving Parties millions of dollars, their excellent reputation among real estate professionals and clients and ultimately, their livelihood. Should Moving Parties be forced to litigate this matter without being able to respond to relevant discovery, produce their documents, or testify on their own behalf as to the issues in this case, their defense would be severely crippled, to the point of being nearly non-existent. In addition, their inability to fully participate in their defense by testifying and producing documents could cause them to lose their insurance coverage, exposing them to millions of dollars in civil liability and defense costs. Not being able to defend themselves in a court of law, or in the court of public opinion, while plaintiffs' allegations are freely pronounced, reported in the media and brandished to the public, would cause permanent harm to Moving Parties' ability to continue in their chosen fields. Especially in the real estate profession, where referrals and repeat business are essential, a one-sided trial with the attendant publicity would severely impact their business and personal lives. An award for plaintiffs, earned merely by taking advantage of Moving Parties' need to protect their constitutional rights, could bankrupt Moving Parties and significantly impact their own security and welfare and that of their families.

D. A Stay Is Necessary To Preserve All Parties' Rights, Efficiently Use Court Resources and Ensure a Fair and Meaningful Trial in Accordance with Public Policy

In determining whether to Stay the Proceedings until the completion of a criminal matter or the running of the statutes of limitation on the underlying actions, courts must attempt to protect the constitutional rights of the party asserting the privilege, while taking into consideration a litigants' interest in pursuing its lawsuit. Although issuing a Stay of Proceedings may cause some inconvenience to an adverse party, courts have usually deemed the

prohibition against self-incrimination to be the more important consideration. *United States v. Kordel, supra. at p. 9; Brock, supra., at p. 119; County of Orange, supra., at p. 767.* Protecting a party's constitution rights is paramount and overrides any inconvenience or delay it might cause to the complaining party. *Pacer's, supra., at p. 690.* In addition, Staying the Proceedings until all parties are free from the threat of criminal actions ensures that all the parties to the civil litigation can obtain a fair trial.

1. All Parties' Rights Are Protected by a Stay, Including Plaintiffs

California courts have held that Staying a civil action to await the outcome of a related criminal case can benefit all litigants to the civil action and does not create an undue burden upon the civil plaintiff. *Fuller v. Superior Court (87 Cal.App.4th 299, 306.* A Stay of Proceedings in this matter would preserve not only the constitutional rights of Moving Parties, but Plaintiffs' right of discovery against Moving Parties. As evidenced by their Discovery Requests, their counsel's refusal to allow an extension of time to respond to them, and by their Motion to Compel Responses, Plaintiffs are in need of Moving Parties' evidence, documents and testimony to prepare their case. Without discovery responses and deposition testimony from the Moving Parties and Defendants in this matter, Plaintiffs' ability to prepare their case and meet their burden of proof will be significantly prejudiced. Staying this matter until Moving Parties (and all Defendants) are free to respond to discovery and provide documents and testimony would ensure all parties to this action are able to fully prepare their case before trial and elicit testimony from all witnesses at trial.

In addition, a Stay would prevent all parties from expending significant time, effort and money in bringing and defending discovery motions. Plaintiffs have already incurred the time and expense of "meeting and conferring" and bringing a Motion to Compel as against Moving Parties. Plaintiffs also face these same types of expenses as to all the Defendants (and some witnesses) in this matter as long as the criminal action looms. Staying this case would obviate these issues.

Finally, Staying this matter would prevent the "unfairness" plaintiffs perceive in having to respond to discovery when they are unable to obtain it from Moving Parties. As evidenced

by the retaliatory "Objections only" responses received by Moving Parties to their Form Interrogatories and basic contention interrogatories, Plaintiffs are unwilling to produce their evidence in this case without reciprocity. (*Plaintiffs' Responses to Discovery, lodged as Exhibit H.*) Staying this matter would resolve these issues.

2. Staying the Case Would Avoid Burdening the Court with Discovery Motions, Evidence Hearings, "In Camera" Proceedings and Other Adjudications and Promote Efficient Use of Court Resources

The alternative to imposing a Stay on this case is proceeding with the litigation and dealing with Moving Parties, Defendants and witnesses' assertions of their Fifth Amendment rights as to each discovery request that could impinge on their rights against self-incrimination. The court's time and resources would be taken up with motions and hearings into the numerous issues generated by the assertion of this privilege. The court would be required to continually balance the competing interests of the parties in an effort to keep this case on track. Already, Plaintiffs have filed one Motion to Compel Discovery Responses. More are sure to follow. Disagreements have already arisen in regard to a few of the issues that are sure to arise. As evidenced by the letters between counsel, these parties already disagree about issues such as the applicability of the Fifth Amendment to entities and to the production of documents, whether certain discovery requests pertain to evidence protected under the privilege, and the procedures that are followed in connection with the assertion of the privilege. (*Correspondence between Plaintiffs' counsel and Cheryl D. Davidson, lodged as Exhibit I.*) Inevitably, the court will be brought in to adjudicate these disputes through motions to compel, motions for protective orders, "in camera" hearings, ex parte applications and other procedures.

Court intervention will also be required to prevent retaliatory refusals to participate in Discovery from Plaintiffs. In response to Moving Parties' assertion of their Fifth Amendment privilege, Plaintiffs have refused to serve any substantive responses to Moving Parties Discovery requests. As they indicated in their Responses to the Special Interrogatories served by Moving Parties, "Plaintiff will only provide objections in connection with this response", citing the Fifth Amendment issues that had arisen between the parties. As a result, Moving

Parties must now bring a Motion to Compel, further clogging up the court's calendar.[7] (*Plaintiffs' Discovery Responses, lodged as Exhibit H.*)

Unless this matter is Stayed until these issues are moot, the court will be dealing with these types of disputes not only between Moving Parties and Plaintiffs, but between Plaintiffs and the Defendants and witnesses named in the Complaint, such as Gary Kovall. (*See Declaration of Edward Robinson, paras. 2 and 3.*) These issues would no doubt also arise as to any person called to testify in this case who is a party or witness in the other lawsuits filed by Plaintiffs alleging the same facts alleged in the instant matter. (*See Twenty-Nine Palms Band of Mission Indians v. Edwards, et. al, Orange County Case No. 30-2009-00311045*[8]*; and Twenty-Nine Palms Enterprises v. Cadmus Construction, San Bernardino County Case No. CIVRS 908132, lodged with the court as Exhibit K.*) Obviously, this would take up a significant amount of the court's time and resources and would still yield a trial in which none of the parties have the information it needs to conduct a fair and meaningful presentation of evidence. In addition, any verdict arrived at by the trier of fact would be based not upon the true evidence in the case, but rather an abridged and lop-sided rendering of the allegations by Plaintiffs.

3. A One-Sided Trial Against Defendants Asserting Their Fifth Amendment Protections Is Inherently Unfair and Against Public Policy

There is a strong public policy in California that favors trial on the merits of a case, where all sides have an opportunity to put forth their entire case and testify on their own behalf. *Hamburg v. Wal-Mart Stores, Inc. (2004) 116 Cal.App.4th 497, 502.* In fact, California promulgated its Discovery Act in an effort to make trial a fair contest with the basic issues and facts disclosed to the fullest possible extent. The fairness and efficiency of trials are of paramount importance to the court system and to the public. Rights long deemed essential to a

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[7] Although Moving Parties sent a "Meet and Confer" letter to Plaintiffs' Counsel in regard to the refusal to comply with Discovery, no response was ever received to this letter. (*See Cheryl D. Davidson letter, lodged as Exhibit* J *and Declaration of Cheryl D. Davidson, para. 6, filed herewith.*)

[8] This is the lawsuit in which Gary Kovall was named a defendant. The allegations in this Orange County Complaint mirror those in the instant case (See Orange County Complaint, lodged as Exhibit K and the instant Complaint, Exhibit A.)

fair trial are the right to effective counsel, to summon, confront and cross-examine witnesses, and the right to testify on one's own behalf. *Wilson v. Superior Court (2010) 2010 WL 1009962; Greyhound Corporation v. Superior Court (1961) 56 Cal.2d 355, 376.*

Without a Stay, the court and all parties to this action would labor significantly and expend excessive time, effort and resources to give birth to a verdict that is hollow, inherently unfair, one-sided and not reflective of the actual merits of the case. A civil trial in which all the defendants are forced to remain silent to protect their constitutional rights is unjust and punitive and would be more of a "prove-up" hearing than a trial. Public policy, California law, and Federal law dictate that all possible efforts must be made to avoid such a result. *U.S. v. Bridges, supra., at p. 933; Pacers, supra., at p. 690.*

IV.

CONCLUSION

Based upon the foregoing, the complete file, the moving papers, and the evidence presented, Moving Parties respectfully request that the court grant its Motion to Stay Proceedings until the resolution of the criminal matter being investigated by the Federal Bureau of Investigation and the United States Attorney's office, or the running of all applicable statutes of limitation.

DATED: April 8, 2010

SUNDERLAND | McCUTCHAN, LLP

By: Cheryl D. Davidson
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