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Superior Court of California,
County of Orange

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Clerk of the Superior Court
By Margaret M Demaria, Deputy Clerk

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF ORANGE**

11 TWENTY-NINE PALMS BAND OF
12 MISSION INDIANS OF CALIFORNIA;
13 TWENTY-NINE PALMS ENTERPRISES
14 CORPORATION; and ECHO TRAIL
15 HOLDINGS, LLC, a limited liability
16 company,

17 Plaintiffs,

18 vs.

19 NADA L. EDWARDS, an individual, GARY
20 KOVALL, an individual, ROBERT A.
21 ROSETTE, an individual, ROSETTE &
22 ASSOCIATES PC, a professional corporation,
23 MONTEAU & PEEBLES LLP, a partnership,
24 FREDERICKS & PEEBLES, LLP, a
25 partnership, FREDERICKS PEEBLES &
26 MORGAN LLP, a partnership, and DOES 1
27 through 100,

28 Defendants.

CASE NO.: 30-2009-00311045

**PEGGY SHAMBAUGH'S OPPOSITION
TO MOTION TO ENFORCE BUSINESS
RECORDS SUBPOENAS SERVED ON
BANK OF AMERICA AS TO PEGGY
SHAMBAUGH**

DATE: October 7, 2010

TIME: 1:30 p.m.

DEPT: CX-101

Complaint Filed: 10/13/09

Trial Date: Not Yet Assigned

1 PEGGY SHAMBAUGH, a non-party to this action, hereby submits the following
2 Opposition to plaintiffs' Motion to Enforce Business Records Subpoenas Served On Bank of
3 America as to her private financial records.

4 I.

5 **PLAINTIFFS BEAR THE BURDEN OF PROVING TO THE COURT THAT**
6 **COMPELLING REASONS EXIST THAT JUSTIFY VIOLATING NON-PARTY PEGGY**
7 **SHAMBAUGH'S INALIENABLE RIGHT TO PRIVACY**
8

9 As plaintiffs have argued in their Motion to Quash Deposition Subpoenas Directed to
10 Pacific Western Bank issued by National Demographics in the related case of *Twenty-Nine*
11 *Palms Band of Mission Indians of California v. David Alan Heslop, et al., RIC 10006101*, the
12 right of an individual to privacy in her personal and private affairs, including those involving
13 financial bank records, is an "inalienable right" expressly protected by the California
14 Constitution, Article I, Section I. Before a court may take the serious step of ordering the
15 disclosure of private information, it must undertake a careful balancing between the right of the
16 civil litigants to discover relevant facts and the "inalienable right" of a person to maintain
17 reasonable privacy regarding the details of her private life, including her financial records.
18 *Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 656-57.* As plaintiffs have
19 conceded in their brief in the Riverside case, confidential financial information given to a bank
20 by its customer is particularly subject to protection under the right to privacy. California courts
21 have specifically held that a bank customer has a "reasonable expectation of privacy" as to the
22 information she provides to her bank. A bank customer exchanges information and data with her
23 bank with the understanding and expectation that it will be utilized only by the bank and only for
24 internal banking purposes. *Valley Bank of Nevada, supra., at p. 657.* This right to privacy as to
25 confidential customer information exists no matter what form the information takes, such as
26 account information, checks, deposits, or other data. *Fortunado v. Superior Court (2003) 114*
27 *Cal.App.4th 475, 480.*
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1 As plaintiffs also concede, it is the burden of the person seeking the private financial
2 information to demonstrate that the information sought is directly relevant to the issues arising in
3 the case and that there is no less intrusive means, or other available sources, to obtain the needed
4 information. *Board of Trustees of Leland Stanford Jr. University v. Superior Court (1981) 119*
5 *Cal.App.3d 516, 525; Harding Lawson Associates v. Superior Court (1992) 10 Cal.App.4th 7, 10;*
6 *Harris v. Superior Court (1992) 3 Cal.App.4th 661, 665.* Even where relevancy is shown, if the
7 disclosure of the private financial records invades the individual's right of privacy, the court may
8 deny such discovery. *Tien v. Superior Court (2006) 139 Cal.App.4th 528, 539.* The person
9 seeking to invade the privacy of the third-person must show that there is a "compelling reason"
10 for the individual's right of privacy to give way to the exigencies of litigation. The more
11 sensitive the nature of the personal information, such as financial records, the greater the
12 showing must be to justify the need for the discovery. *Hooser v. Superior Court (2000) 84*
13 *Cal.App.4th 997, 1004.* The court must consider the stated purpose for the information sought, the
14 effect disclosure could have on the affected person, the nature of the objections and the
15 availability of alternative, less intrusive means for obtaining the requested information. *Tien,*
16 *supra., at p. 540.*

17 In the instant case, plaintiffs have issued a subpoena to Bank of America for all of non-
18 party Peggy Shambaugh's private banking records, including: "any and all records in your
19 possession, custody or control including but not limited to: account transaction records; items
20 relating to account debits and credits; statements, signature cards, applications; stop payment
21 orders or instructions, canceled checks, electronic transfer records, wire records, cash deposit
22 and/or withdrawal records and/or communications related to any accounts maintained by YOU
23 for" Peggy Shambaugh and Gary Kovall "for the period June 1, 2006 through September 30,
24 2008.¹ Plaintiff has shown no compelling need to obtain Peggy Shambaugh's private financial
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¹ Three subpoenas were issued by plaintiffs to Bank of America: Subpoena No. 37218 was directed to Kovall's
accounts only; Subpoena No. 37228 was directed to both Kovall and Shambaugh's accounts; Subpoena No. 37227
was directed to Shambaugh's accounts only.

1 records from Bank of America in the instant case. Ms. Shambaugh is not a party to this action
2 and there are no allegations, either in the instant case or the Riverside County case, that she paid,
3 received or was involved in any alleged “kick-backs” between the other defendants in the various
4 lawsuits filed by plaintiffs. (See *FAC Twenty-Nine Palms Band of Mission Indians v. Heslop*,
5 *RIC 10006101*, attached as Exhibit A to this Opposition.) Although it is alleged she received a
6 commission check in regard to her work as plaintiffs’ real estate agent in connection with the
7 purchase of the 47 acres of real property next to plaintiffs’ Spotlight 29 Casino, plaintiffs already
8 have a copy of that commission check.² There is no issue as to whether or not Ms. Shambaugh
9 received that commission. Ms. Shambaugh’s personal financial information has no bearing on
10 whether or not the attorney defendants in the instant case breached any contract or professional
11 duties owed to plaintiffs. Thus, her private financial dealings should remain protected by this
12 court.

13 **II.**

14 **PLAINTIFFS HAVE FAILED TO OFFER ANY LEGITIMATE GROUNDS FOR**
15 **CONDUCTING A FISHING EXPEDITION INTO PEGGY SHAMBAUGH’S PRIVATE**
16 **BANKING RECORDS**

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18 In support of their Motion to Enforce the Bank of America subpoenas for Ms.
19 Shambaugh’s private and personal information, plaintiffs merely recite that she is the wife of
20 defendant Gary Kovall and was at one point involved in a personal relationship with him prior to
21 their marriage (as if this were some sort of mortal sin.) Instead of meeting their burden to show
22 the information they seek is so highly relevant to their case as to justify the invasion of Ms.
23 Shambaugh’s privacy, they resort to speculation and name-calling, attempting to besmirch Ms.
24 Shambaugh for being married to Mr. Kovall. (See *Plaintiffs’ Motion to Enforce*, p. 3, line 3-5,
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27 ² The commission checks to Windermere Real Estate Coachella Valley and Peggy Shambaugh were produced to
28 plaintiffs pursuant to a Request for Production of Documents and were also obtained by plaintiffs through a
subpoena of the escrow file for this transaction.

1 *lines 12-15 and footnote 2; p. 5, lines 8-13, 15-18.)* Plaintiffs offer no concrete evidence or
2 convincing argument to show why her bank records would be relevant in the instant professional
3 liability case. Rather, they rely upon her relationship to Mr. Kovall (even though she was not
4 even married to him at the time of the events alleged in the First Amended Complaint – *see*
5 *Plaintiffs’ brief, p. 8, lines 4-7)* and her status as a defendant in the related Riverside County case
6 of *Twenty-Nine Palms Bank of Mission Indians of California v. Heslop, et al.* As plaintiffs’
7 counsel declares in his purported “meet and confer” letter of July 14, 2010, on this subject, “I
8 find it somewhat disingenuous that you have served such objections on behalf of Ms.
9 Shambaugh, in light of the fact that she is a party to the *Twenty-Nine Palms Band of Mission*
10 *Indians v. Heslop* action and is married to Gary Kovall.” In other words, in the eyes of
11 plaintiffs, Ms. Shambaugh is guilty by association. If being associated with a defendant in a
12 lawsuit were sufficient grounds for having one’s privacy invaded and one’s complete financial
13 banking records produced in a lawsuit, there would be no such thing as a right to privacy.

14 Contrary to plaintiffs’ representation in their brief, this court has NOT made any
15 assessment, evaluation or adjudication as to the Objections lodged by Ms. Shambaugh to the
16 wholesale subpoenaing of her private banking records by plaintiffs in this case to which she is
17 not even a party. As plaintiffs admit in their moving papers, they issued this subpoena for Peggy
18 Shambaugh’s bank records merely because they believe she had a personal relationship with a
19 defendant in the instant action, Gary Kovall, at the time of the events chronicled in the First
20 Amended Complaint. Although plaintiffs are claiming that some checks between two non-
21 parties to this instant action, Paul Bardos and David Alan Heslop, constitute “illegal kickbacks”
22 this is sheer speculation on their part. Of note, there are no allegations in either the instant
23 lawsuit or the Riverside County case (in which Ms. Shambaugh is a defendant) that she was the
24 recipient of any alleged “kick-backs.” Rather, the Riverside County case alleges Breach of
25 Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Breach of Fiduciary
26 Duty and Professional Negligence against Ms. Shambaugh. (*See FAC, attached as Exhibit A to*
27 *Opposition.*)

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1 Plaintiffs have completely ignored the “careful balancing of the right of civil litigants to
2 discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable
3 privacy regarding their financial affairs, on the other” laid out in the very case they cited in their
4 brief. *Valley Bank of Nevada, supra., at p. 657*. The California Supreme Court requires that the
5 court consider the purpose of the information sought, the effect of the disclosure on the parties,
6 the nature of the objections, and the ability of the requesting party to obtain the information in
7 another form or from other sources. *Valley Bank of Nevada, supra., at p. 657; Tien, supra., at p.*
8 *540*.

9 Plaintiffs have failed to specify exactly what information they are seeking from Ms.
10 Shambaugh’s bank accounts and to what purpose this information would be used in the instant
11 case. Although they speculate that Ms. Shambaugh could have received some “kick-backs” from
12 Heslop on behalf of Gary Kovall, and that she may have “received improper payments of monies
13 at plaintiff’s expense” they have not concretely described exactly how this would be evidenced
14 by the documents they have subpoenaed. Certainly Ms. Shambaugh’s applications, signature
15 cards, communications, statements, stop payment orders, transaction records, debits and credits
16 will not yield any information as to the “kick-back” issue. Plaintiffs have failed to site any
17 particular purpose for issuing this subpoena and have failed to offer any information as to what
18 they intend to do with the information once it is in their hands. They have not produced even
19 one piece of evidence to justify their wholesale invasion of Ms. Shambaugh’s private financial
20 records. If being associated with a defendant was a sufficient basis for the subpoena of private
21 banking records, then every single friend and family member of any defendants in any litigation
22 would be vulnerable to the invasion of their personal matters. Clearly, under California law,
23 “association” with a defendant is woefully insufficient. In the absence of any showing of
24 purpose, relevancy and need, plaintiff’s subpoena is merely a ploy designed harass and
25 intimidate Ms. Shambaugh and to obtain personal information to use against her in the Riverside
26 case.

27 Plaintiffs have also failed to address the effect the release of Ms. Shambaugh’s private
28 information would have on her. Although a subpoena for bank records immediately brings to

1 mind “financial privacy rights”, the production of these records would also invade Ms.
2 Shambaugh’s privacy in other personal matters. The records held by Bank of America would
3 necessarily contain information relating to Ms. Shambaugh and to her family’s medical doctors,
4 medical treatment, clubs and associations, legal issues, friends, family issues, political
5 affiliations, credit standing, and other private matters. Privacy in one’s associations is a
6 constitutionally protected right and courts require an even heavier burden for the disclosure of
7 such information. A party attempting to acquire such information must not only demonstrate a
8 compelling state interest, but also make a showing that the purpose pursued cannot be more
9 narrowly achieved. *Britt v. The Superior Court (1978) 20 Cal.3d 844, 855-56*. Plaintiff has not
10 even stated a “compelling interest” let alone showed that the information they are seeking cannot
11 be determined by another manner.

12 Plaintiffs profess that their interest in her private banking information is based upon their
13 speculation that maybe she received alleged “kick-backs” from non-parties Paul Bardos or David
14 Alan Heslop and then passed them on to Gary Kovall, a defendant in this malpractice action.
15 Thus, Ms. Shambaugh’s conduct is not at issue in this case. If indeed they are merely interested
16 in determining whether or not Ms. Shambaugh received improper monies, or passed on these
17 monies, to other defendants who they claim actually took part in the alleged “kick-back” scheme
18 they can make this determination by obtain the bank records of these targeted defendants. Any
19 payments to or from Ms. Shambaugh would be evidenced in the bank records of these
20 defendants. Plaintiffs do not need Ms. Shambaugh’s bank records to make this determination.

21 Plaintiffs have failed to make any showing that the factors required to invade the privacy
22 of a third-person by obtaining her private financial documents and other personal information,
23 have been satisfied. Nor have they demonstrated that their purpose for issuing these subpoenas,
24 cannot be satisfied by a means that does not invade Ms. Shambaugh’s privacy. Thus, their
25 Motion to Enforce should be denied.

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1 III.

2 **PLAINTIFFS ARE ATTEMPTING TO CIRCUMVENT THE STATUTORY**
3 **PRECLUSION AGAINST DISCOVERY OF SHAMBAUGH'S FINANCIAL**
4 **CONDITION IN THE RIVERSIDE CASE BY CONDUCTING THAT DISCOVERY IN**
5 **THE INSTANT CASE**

6 Civil Code Section 3295(a)-(c) provides that a plaintiff may NOT conduct any pre-trial
7 discovery as to a defendant's financial condition, or to the alleged profits gained by a defendant
8 by virtue of the alleged wrongful course of conduct, unless the court first enters an order
9 permitting such discovery. Plaintiffs' subpoena of "any and all records" relating to Peggy
10 Shambaugh's private bank account and banking information at Bank of America from June 1,
11 2006 through September 30, 2008, is an attempt to circumvent the statutory proscription on the
12 discovery of a defendant's financial information that prevents plaintiffs from pursuing these
13 records in the related case in which Ms. Shambaugh is a defendant. This tactic of conducting
14 discovery in one case to use in related cases is not new with this Motion. Plaintiffs have filed
15 three different lawsuits in three different counties. They have obtained, or attempted to obtain
16 three corresponding confidentiality agreements to prevent defendants in those lawsuits from
17 sharing information. They are now proceeding to exploit this tactical advantage by manipulating
18 the discovery in all three actions to their own benefit and to the detriment of the defendants.
19 While defendants are restricted from sharing information, plaintiffs freely use this information in
20 whichever case they wish. An example of this tactic is plaintiffs' use of David Alan Heslop's
21 personal financial information which they obtained from the San Bernardino case against Paul
22 Bardos. Plaintiffs succeeded in having the instant court remove the confidentiality restrictions
23 placed on the Paul Bardos/San Bernardino case documents. From these records plaintiffs
24 obtained banking information as to David Alan Heslop, a defendant in the Riverside action,
25 which enabled them to subpoena and obtain his private records to use against Heslop in the
26 Riverside action. Such an abuse of the discovery statutes and manipulation of the discovery
27 process should not be condoned, or aided, by the court.

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V.

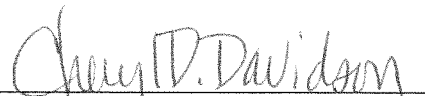
CONCLUSION

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3 Plaintiffs have made no compelling showing that their need for the information listed in
4 their subpoena to Bank of America overrides Ms. Shambaugh's inalienable right to privacy in
5 her personal affairs and financial records. Their stated basis for issuing this subpoena, Ms.
6 Shambaugh's association with Gary Kovall, is grossly insufficient. They have not provided any
7 evidence to show Ms. Shambaugh's banking records are relevant to the issues of attorney
8 malpractice and breach of contract in the instant case. In addition, it is clear plaintiffs do NOT
9 need the information in Ms. Shambaugh's bank records at all in order to pursue their case against
10 the attorney defendants in this action. Finally, plaintiffs are prohibited by statute from obtaining
11 financial information as to a defendant in an action, absent court order, and cannot circumvent
12 this statutory provision by issuing subpoenas in a related case.

13 Based upon the foregoing, the pleadings and files in this action, Ms. Shambaugh
14 respectfully requests that the court deny plaintiffs' Motion to Enforce the Business Records
15 Subpoenas Served on Bank of America as to Peggy Shambaugh.

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17 DATED: September 24, 2010

SUNDERLAND | McCUTCHAN, LLP

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19 By: 
20 Robert J. Sunderland
21 Cheryl D. Davidson
22 Attorneys for PEGGY SHAMBAUGH
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