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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

THE TOHONO O'ODHAM NATION,

Plaintiff,

v.

DOUGLAS DUCEY, Governor of Arizona;
MARK BRNOVICH, Arizona Attorney General;
and DANIEL BERGIN, Director, Arizona
Department of Gaming, in their official
capacities,

Defendants.

Case No. 2:15-cv-01135-DGC

**PLAINTIFF'S MOTION FOR
SPOILIATION SANCTIONS**

**(ORAL ARGUMENT
REQUESTED)**

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1 Since this Court rejected Director Bergin's claim of "common interest" privilege
2 in its July 25, 2016 Order [Ex. A - Doc. 230], further discovery has revealed a remarkable
3 set of facts. In the spring of 2015, Director Bergin directed Assistant Attorney General
4 ("AAG") Roger Banan to attend and represent the Arizona Department of Gaming
5 ("ADG") in a series of meetings with officials, including lawyers and lobbyists, for the
6 Gila River Indian Community ("Gila River") and the Salt River Pima-Maricopa Indian
7 Community ("Salt River"), both of which have a commercial interest in preventing the
8 Tohono O'odham Nation ("the Nation") from opening a competing gaming facility. In
9 order to prevent the contents of their meetings from becoming known to the Nation, AAG
10 Banan signed a common-interest agreement with the tribes—without even reading it.
11 AAG Banan then discussed with the tribes, whose gaming operations are regulated by
12 ADG, various means of preventing the tribes' competitor (the Nation) from opening the
13 West Valley Resort. Specifically, the group discussed strategies for potential offensive
14 litigation (initiated by ADG) and defensive litigation (initiated by the Nation), as well as
15 regulatory tactics for ADG, such as letters threatening the Nation's employees and
16 vendors combined with efforts to pass federal legislation designed to effectively bar the
17 West Valley Resort. Banan took notes during each of the meetings and used them to
18 brief Director Bergin. Afterward, Banan destroyed his notes.

19 These facts present a classic case of spoliation. The duty to preserve relevant
20 documents had been triggered because, at the time Banan destroyed the notes, litigation
21 was pending and additional litigation was reasonably foreseeable. The 2011 litigation
22 before this Court to which the State was a party was on appeal to the Ninth Circuit. And
23 attendees of the meetings actively discussed additional litigation, including potential
24 claims by the Nation against ADG for tortious interference with the Nation's
25 relationships with its employees and vendors. In addition, Governor Ducey and Attorney
26 General Brnovich, as well as Director Bergin, asserted work product protection to avoid
27 producing documents created during this time period, precisely because litigation was
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1 anticipated. [Ex. B - Bergin Privilege Log, Entries 43, 55, 56, 64, 85-87, 94, 95, 100, and
2 116; Ex. C - Governor Privilege Log; Ex. D - Attorney General Privilege Log Entries 4,6,
3 7, and 8].

4 The destruction was accompanied by a culpable state of mind. This is not a case
5 in which electronic files were passively allowed to be erased or overwritten. AAG Banan
6 admitted that he intentionally destroyed his notes. And he did so having signed a
7 Common Interest Agreement that not only contemplates litigation, but that Banan
8 concedes was signed in part to keep the discussions secret. Banan's destruction of his
9 notes was all the more egregious because they were public records protected by the
10 Arizona Public Records Law; as such, Banan knew, or certainly should have known, he
11 had the legal obligation to preserve them.

12 Finally, the destroyed notes were clearly relevant to the issues in this case. In his
13 deposition, Director Bergin testified, as ADG's 30(b)(6) representative, that no one from
14 ADG spoke with Donald Pongrace (Gila River's principal congressional lobbyist for the
15 Keep the Promise Act) regarding this matter. Ex. E - Bergin May 19, 2016 Depo. Tr. at
16 136:14-137:16. Yet Banan admitted in his deposition (taken after the close of discovery)
17 that, at Director Bergin's request, he met several times with Donald Pongrace and
18 officials from Gila River and Salt River to discuss actions ADG might take to block the
19 West Valley Resort, including the vendor and employee letters precipitating this
20 litigation. The meetings between a regulator and representatives of tribes with regulated
21 gaming operations to coordinate efforts to block a competitor from opening a competing
22 facility raise serious questions of regulatory fairness that have troubled this Court. As
23 this Court has recognized in ordering the deposition of Donald Pongrace, "there is an
24 issue of unclean hands being asserted in this case by the Nation" [Ex. F - August 30,
25 2016 Hearing Transcript at 13:20-21], and the interaction between ADG and tribes with
26 competing gaming interests has shed considerable, and troubling, light on the regulatory
27 about-face that precipitated this litigation. Moreover, no other set of notes—in fact no
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1 record at all—of these meetings has emerged in discovery. The destruction of Banan's
2 notes therefore prejudiced the Nation because it deprived the Nation of both a record of
3 what occurred at the meetings and a record of what AAG Banan relayed to Director
4 Bergin.

5 In view of this intentional destruction of relevant evidence, this Court should
6 exercise its inherent powers to order an appropriate sanction. Because the intentional
7 spoliation of evidence has deprived the Nation of the opportunity to fully explore
8 Director Bergin's bad faith and unclean hands in connection with the regulatory actions
9 giving rise to this litigation, the Court should level the playing field by striking Director
10 Bergin's affirmative defenses asserting unclean hands and bad faith on the part of the
11 Nation. In addition, the Court, as the trier of fact, should infer Director Bergin took the
12 actions he did as the direct result of these secret meetings, including sending letters
13 threatening the legal status of vendors who did business with the West Valley Resort;
14 sending letters threatening certification of employees who accepted positions with the
15 West Valley Resort; sending a letter to Director Cocca of the Arizona Department of
16 Liquor Licenses and Control suggesting denial of a liquor license for the West Valley
17 Resort; sending a letter to the Congressional Budget Office about the Keep the Promise
18 Act; and seeking to delay the opening of the West Valley Resort so that Mr. Pongrace
19 could continue to lobby to get the Keep the Promise Act enacted. Such inferences are
20 necessary to eliminate prejudice and return the Nation to the position it would have
21 occupied absent the spoliation.

22 **FACTS**

23 The facts in support of this motion are largely undisputed—drawn from the
24 August 23, 2016 deposition of AAG Roger Banan [Ex. G]. He testified that he attended
25 three meetings in 2015 on behalf of Director Bergin with representatives of the
26 Governor's office, and officials from Gila River and Salt River, including lawyers,
27 lobbyists, and tribal members. *Id.* at 22:8-15. Altogether, there were about a dozen
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1 people present at each meeting. *Id.* at 22:25-23:5. The meetings took place sometime in
2 early May, on May 13, and then sometime in June. *Id.* at 24:22-24, 49:8-11. The tribal
3 representatives insisted on “keeping things secret.” *Id.* at 66:8-11. The meetings were
4 arranged by telephone or in person – never in writing. *Id.* at 62:9-14. Director Bergin
5 had AAG Banan attend the meetings “in his stead” because Director Bergin thought it
6 would be “inappropriate” for Director Bergin to attend them. *Id.* at 36:2-36:5.

7 At the second meeting (the May 13th meeting), Banan signed the Common Interest
8 Agreement of his “own accord” Ex. H - Banan Dep. Ex. 1; *see also* Ex. G - Banan Dep.
9 Tr. at 9:19-23; 21:23-25. He did not review the contents of the agreement (or a draft of
10 the agreement) before signing it. *Id.* at 9:25-10:2, 11:5-10; 22:1-7. In his nearly thirty
11 years of practice, this was the only time AAG Banan executed a document as an attorney
12 without reviewing its contents, other than pro forma documents. *Id.* at 13:5-12. Still,
13 AAG Banan acknowledged that “the point of the Common Interest Agreement” was to
14 keep the communications among the participants at the meetings secret. *Id.* at 66:13-17.

15 The Common Interest Agreement noted that “legal and legislative challenges to
16 [the Nation’s plans for the West Valley Resort] are ongoing” and provided for the sharing
17 of confidential and privileged information between the ADG and the two tribes “in
18 connection with ongoing *legal*, regulatory, and legislative *challenges*” to the Nation’s
19 plans. Despite the Common Interest Agreement, AAG Banan claimed to be completely
20 unaware of any documents relating to ADG’s interactions with Gila River and Salt River,
21 other than his May 27, 2015 email to Donald Pongrace, which the Court previously
22 reviewed. Ex. I - Banan Dep. Ex. 2; Ex. G - Banan Dep. Tr. at 15:15-16:18. The email
23 stated:

24 At our meeting you said you had some law about tort[i]ous
25 interference with contract regarding the Department’s vendor
26 letters. Can you point me to that please? In addition, we are
27 somewhat worried that the vendor letters will prompt
28 Waxman/TON to fund a vendor suit against ADG in order to
get a court declaration that the Department’s conduct is

1 improper, i.e. a back door order for ADG to stop interfering
2 with Glendale Casino operations or something like that.

3 Ex. I - Banan Dep. Ex. 2.

4 Banan testified that the vendor letters were discussed during at least two of the
5 three meetings. Ex. G - Banan Dep. Tr. at 23:19-23, 24:17-20. The tribes endorsed the
6 idea of sending the vendor and employee letters [Ex. J - Banan Dep. Ex. 10] as a means
7 of stopping the West Valley Resort. Banan Dep. Tr. at 28:24-29:4. The vendor and
8 employee letters had not yet been written at the time of the May 13th meeting, but the two
9 tribes said they wanted ADG to send those letters. Ex. G - Banan Dep. Tr. at 43:9-20.
10 When Banan raised the risk of a tortious interference suit, Pongrace said, “Oh, don’t
11 worry about that. We’ve already done research on that issue, and that claim will – will
12 never work.” *Id.* at 46:20-22. Shortly thereafter, ADG sent the letters.

13 Pongrace also suggested other means of stopping the West Valley Resort. He
14 talked at length about his efforts and “stratagems” to lobby Congress to pass the Keep the
15 Promise Act, which would bar the West Valley Resort from operating. *Id.* at 38:14-20,
16 49:14-51:7. He proposed that the State cut off utility services—including electricity,
17 water and trash pickup—to the West Valley Resort. *Id.* at 29:19-23. He also urged “that
18 the State send letters to gaming employees who had been certified to put them on notice
19 that employment at a – an illegal casino could possibly jeopardize their state
20 certification.” *Id.* at 30:23-31:3. For his part, Banan “was reviewing the legal options of
21 the department” and proposed bringing an *Ex Parte Young* lawsuit against the officials of
22 the Nation [*id.* at 27:10-13 and 42:9-19], but the tribal representatives “didn’t seem to be
23 much interested in – in legal solutions.” *Id.* at 27:24-25. “They were actually more
24 interested in . . . ‘What can the Department of Gaming do for us to stop this casino?’”
25 *Id.* at 28:2-4.

26 Banan took notes on what was important during the meetings, and he then used the
27 notes to brief Director Bergin as to what happened and what was discussed during the
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1 meetings. *Id.* at 41:15-19; 60:17-18; 68:21-25. After briefing Director Bergin, Banan
 2 destroyed his notes. *Id.* at 60:20-21; 63:3-10. (“After I had briefed Director Bergin on
 3 them, I destroyed the notes.”). Banan testified that there was no litigation hold in place
 4 at the time because “we had no idea there was any litigation pending,” and claimed, he
 5 “wasn’t anticipating” any litigation. *Id.* at 60:25- 61:1; 61:5.

6 During the period that these secret meetings took place and the ADG was
 7 receiving updates on the status of the Keep the Promise Act from Donald Pongrace [Ex.
 8 G - Banan Dep. Tr. 50:4-17], ADG carried out a series of actions against the Nation’s
 9 West Valley Resort. On May 18, 2015, Director Bergin wrote to the Arizona Department
 10 of Liquor License and Control, urging action against the Nation’s liquor license. Ex. K -
 11 Bergin Dep. Ex. 16. Director Bergin testified that he had never done anything like that in
 12 the past. Bergin Dep. Tr. 96:20-24; 100:15-22. On May 26, 2015, ADG warned the
 13 Nation’s vendors and employees about “providing goods or services to unauthorized
 14 facilities,” including the West Valley Resort. Ex. J - Banan Dep. Ex. 10. On June 16-17,
 15 2015, Director Bergin exchanged multiple emails with attorneys, including AAG Banan,
 16 concerning communications with an unidentified Senator. Bergin Privilege Log, Entries
 17 130-134. And on June 17, 2015, after exchanging drafts with multiple attorneys,
 18 including AAG Banan, Director Bergin wrote to the Congressional Budget Office noting
 19 the actions taken against the Nation’s liquor license, vendors, and employees. Ex. L -
 20 Banan Dep. Ex. 8; Ex. M - Doc. 227-2; Ex. N - ADG0002235-6.¹

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 24 ¹ The CBO had issued a report stating that the passage of the Keep the Promise
 25 Act might impose substantial liability on the United States. Director Bergin’s letter
 26 claimed that the actions he and others took to block the West Valley Resort were
 27 “relevant to any opinion, evaluation or analysis that CBO has issued or may be asked to
 28 make concerning that facility or HR308: Keep the Promise Act.” Ex. L Banan Dep. Ex.
 8; Ex. M - Doc. 227-2. Nonetheless, despite receiving multiple emails concerning
 communications with the unnamed Senator and the CBO, AAG Banan repeatedly said he
 knew nothing about such communications. Ex. G - Banan Dep. Tr. at 39:6; 90:10-22.

ARGUMENT

Spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The standard for a spoliation claim has been articulated in these terms:

A party seeking sanctions for spoliation of evidence must prove the following elements: (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a “culpable state of mind;” and (3) the evidence that was destroyed or altered was “relevant” to the claims or defenses of the party that sought the discovery of the spoliated evidence.

Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011) (internal quotes and citations omitted). This case satisfies all three elements.

A. Duty to Preserve

Banan had a duty to preserve his notes. “A duty to preserve information arises when a party knows or should know that information is relevant to pending or future litigation.” *Pettit v. Smith*, 45 F. Supp. 3d 1099, 1105 (D. Ariz. 2014). Stated another way, the duty to preserve is not only triggered “during litigation, but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Marceau v. Int’l Broth. Of Elec. Workers*, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009) (quotation marks omitted); *Surowiec, supra*, 790 F. Supp. 2d at 1005.

That duty was clearly triggered here. The record is crystal clear that litigation was anticipated when Banan destroyed his notes. Director Bergin, Governor Ducey, and Attorney General Brnovich all have asserted attorney work product as a basis to withhold documents created during this time period—a privilege applicable only if litigation is anticipated. Ex. B - Bergin Privilege Log, Entries 43, 55, 56, 64, 85-87, 94, 95, 100, and 116; Ex. C - Governor Privilege Log; Ex. D - Attorney General Privilege Log Entries 4,6,

7, and 8. *See generally* Fed. R. Civ. P. 26(b)(3)(A). Governor Ducey also opposed a discovery motion by the Nation, in part by asserting that in early 2015, “continuing and additional litigation with the Nation was expected.” Ex. O - Declaration of Michael Liburdi, Doc. 214-2 at ¶4.

Other documents also show that litigation was anticipated. By April 10, 2015, ADG had written to the Nation identifying “the risks that TON is taking” [Ex. P - Banan Dep. Ex. 6] and the Nation had responded with a letter of April 15 expressing its willingness to bring suit:

ADG’s refusal to execute its duties under the existing tribal-state compact is unlawful, as a matter of state and federal law. The Nation is prepared to exercise all available remedies to compel ADG’s compliance with the law.

Ex. Q - Doc. 1-5 Ex. G to Complaint. Even had the Nation not expressly threatened litigation, Director Bergin’s privilege log describes a chain of emails preceding ADG’s April 15 letter as being prepared “in anticipation of litigation regarding draft letter to Tohono O’odham Nation.” Ex. B - Bergin Privilege Log, Entry 56. Likewise, Director Bergin withheld a series of emails dated May 13 and 14, 2015, between AAG Banan and an attorney for Governor Ducey (both of whom attended the May 13, 2015, meeting) claiming they were “prepared in anticipation of litigation.” *Id.*, Entry 95. Moreover, the Common Interest Agreement by its terms sought to conceal discussions of “ongoing *legal*, regulatory, and legislative *challenges*” to the Nation’s plans to operate the West Valley Resort. Ex. H - Banan Dep. Ex. 1 (emphasis added).

In fact, as Banan himself acknowledged, the parties discussed various kinds of potential or anticipated litigation at the meetings. This included the potential for litigation, described by Banan as a potential means for the Nation to seek “a back door order for ADG to stop interfering with the Glendale casino operations,” based on ADG’s unprecedented act of sending letters to vendors and employees characterizing the West Valley Resort as an “unauthorized facility.” Ex. I - Banan Dep. Ex. 2. Banan was

1 sufficiently concerned about the possibility of a lawsuit predicated on the vendor letters
2 to request research from Pongrace, who, in turn, was sufficiently concerned about that
3 possibility to have already researched and collected cases dealing with a “tortious
4 interference” claim. *Id.* The parties’ own statements and conduct show that they
5 anticipated litigation over ADG’s efforts to block the West Valley Resort – separate and
6 apart from the fact that they claimed to be anticipating litigation to justify withholding
7 documents from the Nation.

8 The duty to preserve relevant evidence clearly had been triggered at the time the
9 notes were destroyed.

10 **B. Culpability**

11 “‘Courts have not been uniform in defining the level of culpability – be it
12 negligence, gross negligence, willfulness, or bad faith – that is required before sanctions
13 are appropriate.’” *Surowiec, supra*, 790 F. Supp. 2d at 1006, *quoting Ashton v. Knight*
14 *Transp., Inc.*, 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011). The degree of culpability
15 required is to some degree dependent upon the sanction sought. *See Pettit v. Smith*, 45 F.
16 Supp. 3d 1099, 1113 (D. Ariz. 2014). For example, this Court has held that gross
17 negligence will support an adverse inference instruction. *See Surowiec, supra*, 790 F.
18 Supp. 2d at 1007, 1009.

19 In this case, counsel for ADG intentionally destroyed notes of a meeting he
20 attended “in Director Bergin’s stead,” while admittedly discussing potential litigation
21 with competing tribes. “A party’s destruction of evidence qualifies as willful spoliation if
22 the party has ‘some notice that the documents were potentially relevant to the litigation
23 before they were destroyed.’” *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir.
24 2006), *quoting United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.
25 2002). AAG Banan knew that the notes were potentially relevant to the litigation
26 because one of the principal subjects of the meetings was precisely how to defend or
27

1 initiate litigation with the Nation. In fact, that was the subject of Banan's own follow-up
2 email to Mr. Pongrace.

3 Further, the notes were not lost, or misplaced, or erased by some periodic
4 computer function—they were deliberately destroyed. “Contrasted with the typical
5 spoliation scenario where determining the spoliator's culpability level turns upon the
6 nuances of a company's document retention policy, here there are no such subtleties.”
7 *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d at 802. Here, at the behest of Director
8 Bergin, AAG Banan attempted to meet behind a cloak of privilege with representatives
9 of, and lobbyists for, two tribes with regulated gaming operations to discuss their ideas
10 for blocking the opening of a competing gaming operation, while receiving updates on
11 the status of their efforts to pass federal legislation designed to effectuate the same. AAG
12 Banan attended the meetings “in Director Bergin's stead,” took notes on the meetings,
13 and briefed his boss (who previously testified that no one representing the ADG had
14 spoken to Mr. Pongrace about this matter). Ex. E - Bergin Dep. Tr. at 136:14-137:16.
15 AAG Banan then destroyed the notes—thus attempting to ensure that the contents of the
16 secret meetings were never revealed.

17 The Common Interest Agreement confirms that the document destruction was
18 culpable. AAG Banan admitted that the Agreement was designed to prevent the Nation
19 from learning the contents of the meetings between the other tribes and ADG. Ex. G -
20 Banan Dep. Tr. at 94:12-13. The May 13, 2015 Amendment [Ex. H - Banan Dep. Ex. 1]
21 added the Arizona Department of Gaming to the parties who had already signed a
22 “Common Interest in Anticipation of Litigation Joint Participation Agreement.” ADG
23 was apparently sufficiently anxious to keep communications with competing tribes secret
24 that Banan signed the Common Interest Agreement without even reading it (or consulting
25 his client). This was the first time in his legal career Banan had executed a substantive
26 agreement on behalf of a client without first reviewing it.

1 The culpable nature of the destruction is underscored by the fact that the notes
2 were public records protected by the Arizona Public Records Law. As acknowledged in
3 the Arizona Attorney General’s own handbook, a public record includes:

4 *all books, papers, maps, photographs or other documentary materials,*
5 *regardless of physical form or characteristics . . . made or received by any*
6 *governmental agency in pursuance of law or in connection with the*
7 *transaction of public business and preserved or appropriate to be preserved*
8 *by the agency . . . as evidence of the organizations, functions, policies,*
9 *decisions, procedures, operations or other activities of the government, or*
10 *because of the information and historical value of the data contained in the*
11 *record, and includes records that are made confidential by statute.*

12 A.R.S. § 41-151.18 (quoted in the Arizona Attorney General’s Agency Handbook
13 § 6.2.1.1 (revised 2013), [https://www.azag.gov/sites/default/files/sites/all/docs/agency-](https://www.azag.gov/sites/default/files/sites/all/docs/agency-handbook/ch06-2013B.pdf)
14 [handbook/ch06-2013B.pdf](https://www.azag.gov/sites/default/files/sites/all/docs/agency-handbook/ch06-2013B.pdf)) (emphasis added). Thus, notes of meetings are clearly public
15 records under Arizona law. *See McKee v. Peoria Unified Sch. Dist.*, 338 P.3d 994, 996-
16 97 (Ariz. Ct. App. 2014) (applying public records laws to “interview notes on a note pad
17 in a desk drawer” and “notes of [] interviews with the three additional witnesses on a
18 separate note pad.”). Furthermore, as the Attorney General’s website makes clear: “In
19 accordance with A.R.S. § 39-121 through 39-128, *all work-related records of [the*
20 *Attorney General’s] Office, regardless of format, are presumed to be public records.*”
21 Ariz. Attorney Gen., Public Records Request, [https://www.azag.gov/public-records-](https://www.azag.gov/public-records-request)
22 [request](https://www.azag.gov/public-records-request) (emphasis added).

23 State law imposes robust protections for covered public records. State agencies
24 are required to preserve public records (*see* Arizona Attorney General’s Agency
25 Handbook § 6.7.1 and statutes referenced therein), and an agency may destroy its records
26 only when authorized by the Records Management Division of the State Library,
27 pursuant to procedures that do not appear to have been followed by AAG Banan. *See id.*
28 at § 6.7.5 (and statutes cited therein). Indeed, “[a] public officer or other person having
custody or possession of any record for any purpose “who . . . ‘knowingly and without
lawful authority destroys . . . all or any part of a public record, or who permits another

1 person to do so, is guilty of a class 4 felony.’’ Arizona Attorney General’s Agency
2 Handbook § 6.7.5 (quoting A.R.S. § 38-421). These are undoubtedly obligations of
3 which AAG Banan was aware.

4 Here, AAG Banan’s notes were records of official activities – a meeting between a
5 regulator and regulated entities. Their intentional destruction violated the terms of the
6 Arizona Public Records Law and thus was culpable for that reason alone.

7 **C. Prejudice**

8 AAG Banan’s intentional destruction of his notes prejudiced the Nation. The
9 notes were a unique resource. Banan attended the meetings in Director Bergin’s stead,
10 and no other written records of Banan’s meetings with the tribes have emerged in
11 discovery. Other than the May 27, 2015 email reviewed by this Court [Ex. I - Banan
12 Dep. Ex. 2], no writings scheduling the meetings, setting an agenda or summarizing their
13 contents have been produced. Banan’s recollection of the events is fuzzy. Ex. G - Banan
14 Dep. Tr. at 49:14-16 (“Q. And what was discussed at the third meeting, if you know? A. I
15 can't remember anything about that meeting.”). Banan recalled that “it was largely Mr.
16 Pongrace who was doing the – doing the talking” (Ex. G - Banan Dep. Tr. at 25:13-14;
17 49:14-50:1), and testified that he had only a limited recollection of what Mr. Pongrace
18 had to say. *See, e.g., id.* at 50:25-51:2 (“Q. What did he say about the stratagems? A. I do
19 not remember”); 50:21-22 (“Q. Did he discuss timing? A. I don’t recall.”).

20 The loss of the notes is prejudicial for another reason: they are the only written
21 records of what facts and agreements Banan relayed to Director Bergin. Banan used his
22 notes to brief Director Bergin, and then Bergin took a number of actions designed to
23 block the West Valley Resort, including writing to the vendors, notifying the employees
24 that their certifications were in jeopardy, writing to the Congressional Budget Office, and
25 so on. Thus, the information conveyed to Director Bergin is critical to understanding
26 why Director Bergin did what he did, and proving the chain of causation, particularly
27 given Director Bergin’s denial that the meetings even took place.

1 These actions must be considered in the context in which they occurred. The
 2 events disclosed in Banan's deposition certainly suggest that the ADG was strategizing
 3 with lobbyists for the Nation's competitors on ways to delay the opening of the West
 4 Valley Resort -- while those lobbyists assured the ADG that the Keep the Promise Act
 5 was "moving forward well" and there were "great hopes that it would pass and be signed
 6 into law." Ex. G - Banan Dep. Tr. at 50:4-10. Added to the peculiarity of the AAG's
 7 being "anxious to acquire" legal research from a lobbyist for a regulated entity to use
 8 against another entity [Ex. G - Banan Dep. Tr. at 47:3-16], is the fact that more than a
 9 year earlier, in January 2014, ADG had already received legal advice from its own
 10 outside counsel, James Stipe, "regarding the state's options to address the Tohono
 11 O'odham Glendale Casino." Ex. C - Governor Privilege, Log Entry 2.

12 Moreover, by AAG Banan's own admission, ADG had no litigation hold in place -
 13 - despite both pending and anticipated litigation—and thus other responsive documents
 14 may well have been destroyed, notwithstanding ADG's duties both to this Court and
 15 under public records laws to preserve them.²

16 All of this is relevant to the Nation's case. The Nation's Sixth Affirmative
 17 Defense to Bergin's First Amended Counterclaims calls for dismissal of the
 18 counterclaims "because Director Bergin's unclean hands and/or bad faith preclude the
 19 relief being sought." Ex. R - Doc. 130 at 17. If Director Bergin's actions stemmed not
 20 from his responsibility under statute, but from pressure from other entities ADG
 21 regulates, that both explains why Director Bergin has cycled through various (and
 22

23 ² If a full set of records were available, the Nation would have been in a better
 24 position to establish that outside influence by other tribes with competing gaming
 25 interests regulated by ADG caused Director Bergin to (1) send the letters threatening the
 26 legal status of vendors who did business with the casino; (2) send the letters threatening
 27 the certification of employees who accepted positions with the casino; (3) send the letter
 28 to Director Cocca of the Arizona Department of Liquor Licenses and Control suggesting
 denial of a liquor license for the casino; (4) send the letter to the Congressional Budget
 Office about the Keep the Promise Act; and/or (5) seek to delay the opening of the West
 Valley Resort until the Keep the Promise Act could be enacted.

contradictory) legal justifications for his conduct and prevents Director Bergin from claiming the mantle of equity in this litigation. It is thus vital to understand and be able to scrutinize what was said at the meetings with the tribes and what Director Bergin was told about the meetings afterward – particularly given Director Bergin’s deposition testimony that those meetings never even occurred. “Generally, the prejudice element is satisfied ‘where a party’s ability to present its case or to defend is compromised.’” *Ashton v Knight Transp., supra*, 772 F. Supp. 2d at 801, *quoting Victor v. Stanley*, 269 F.R.D. 497, 532 (D. Md. 2010). When “‘the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party to support its claims or defenses, that may be a sufficient showing on both relevance and prejudice to make [sanctions] appropriate.’” *Surowiec, supra*, 790 F. Supp. 2d at 1008, *quoting Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010). The destroyed notes clearly meet this standard.

D. Sanctions

This Court has inherent authority to enter appropriate sanctions for spoliation of evidence, including, as here, spoliation before litigation commences. *Pettit v. Smith*, 45 F. Supp. 3d at 1114; *accord Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). “‘Sanctions that a federal court may impose for spoliation include assessing attorney’s fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment.’” *Surowiec, supra*, 790 F. Supp. 2d at 1008, *quoting Victor Stanley*, 269 F.R.D. at 533. “‘Sanctions that a federal court may impose for spoliation include assessing attorney’s fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment.’” *Surowiec*, 790 F. Supp. 2d at 1008, *quoting Victor Stanley*, 269 F.R.D. at 533; *see also U.S. ex rel. Baker v. Cmty. Health Sys., Inc.*, 2012 WL 12294413, at *17-18 (D.N.M. Aug. 31, 2012) (a “district court has a great deal of discretion in exercising its inherent powers to fashion

1 an appropriate sanction,” including, for example, compelling production of related
2 documents that were withheld on the basis of privilege).

3 In this case, two minimum sanctions are appropriate. First, the Court should strike
4 Director Bergin’s unclean hands and/or bad faith defenses to the Nation’s preemption
5 claim. *See Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 141-142
6 (S.D.N.Y. 2009) (collecting cases). Spoliation has deprived the Nation of the opportunity
7 to explore during discovery the extent of Director Bergin’s bad faith and/or unclean
8 hands in connection with the regulatory actions that gave rise to this litigation. Such
9 evidence is relevant, among other things, to Director Bergin’s entitlement to assert
10 equitable defenses at all, including his assertion of unclean hands and/or bad faith. *See*
11 *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th Cir. 2002). A party
12 guilty of willful spoliation of evidence pertaining to his own unclean hands should not be
13 heard to press this same defense.

14 Second, the Court should draw an evidentiary inference about the effect of
15 Banan’s meetings with the two tribes on Director Bergin’s subsequent actions relating to
16 the West Valley Resort. The inference would be that the tribes through these meetings
17 inappropriately caused Director Bergin to:

18 (1) send the letters threatening the legal status of vendors who did business with
19 the West Valley Resort;

20 (2) send the letters threatening the certification of employees who accepted
21 positions with the West Valley Resort;

22 (3) send the letter to Director Cocca of the Arizona Department of Liquor Licenses
23 and Control suggesting denial of a liquor license for the West Valley Resort;

24 (4) send the letter to the Congressional Budget Office about the Keep the Promise
25 Act; and

26 (5) seek to delay the opening of the West Valley Resort so that Mr. Pongrace
27 could continue to lobby Congress to get the Keep the Promise Act enacted.

1 If a full set of records were available, the Nation would be better able to establish
 2 each of these facts. At minimum, an adverse evidentiary inference regarding these facts
 3 is necessary to eliminate prejudice and return the Nation to the position it would have
 4 occupied absent the spoliation. ““When a party is prejudiced, but not irreparably, from
 5 the loss of evidence that was destroyed with a high degree of culpability, a harsh but less
 6 extreme sanction than dismissal or default is to permit the fact finder to presume that the
 7 destroyed evidence was prejudicial.”” *Surawiec, supra*, 790 F. Supp. 2d at 1009 (*quoting*
 8 *Rimkus*, 688 F. Supp. 2d at 618). The sanction is also necessary to deter spoliation in the
 9 future.

10 CONCLUSION

11 For the reasons stated above, this Court should enter a finding of spoliation and
 12 grant the Nation all just and proper relief requested in this motion.

13 DATED this 14th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2016, I caused the foregoing document to be served via email upon the following persons to the addresses noted below:

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