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UNITED STATES DISTRICT COURT

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.	No. 2:15-cv-01135-DGC **DEFENDANT DANIEL BERGIN'S OPPOSITION TO PLAINTIFF'S MOTION FOR SPOLIATION SANCTIONS**

I. INTRODUCTION

Desperate to divert attention from and evade responsibility for its fraudulent conduct during Compact negotiations, the Tohono O'odham Nation ("Nation") asks the Court to strike Director Daniel Bergin's unclean-hands and bad-faith defenses and draw numerous adverse inferences that flatly contradict all the available evidence in this case. That extraordinary request should be denied.

The Nation bases its motion on the fact that Assistant Attorney General Roger Banan discarded brief notes he took during a meeting in May 2015 with representatives from the Governor's office, the Salt River-Pima Maricopa Indian Community ("Salt River"), and the Gila River Indian Community ("Gila River"). Mr. Banan took those short notes in order to brief Director Bergin (who did not attend the May 2015 meeting) and discarded the notes after he had done so, consistent with his usual practice. The Nation asserts "[t]hese facts present a classic case of spoliation" (Mot. at 1), but they do no such thing.

Mr. Banan had no duty to preserve his notes because he did not believe—and could not reasonably have known—that his brief notes could even potentially be relevant to any future lawsuit. Mr. Banan's notes concerned what he construed as suggestions by Donald Pongrace, an outside lawyer for Gila River, about possible actions the State could take regarding the Nation's unauthorized West Valley Resort. In sworn deposition testimony, Mr. Banan made clear that he "dismissed" Mr. Pongrace's suggestions "out of hand." Mr. Banan could not possibly have known that his attorney work product about "things that the Department of Gaming [("ADG")] was not going to do" might someday be claimed to be relevant to a future lawsuit involving ADG.

Even if Mr. Banan had a duty to preserve his notes, he did not discard them with a culpable state of mind. Mr. Banan's usual practice is to take notes for the purpose of advising Director Bergin, and to discard those notes after the briefing is complete. Mr. Banan followed that routine practice here—one that is consistent with the Arizona Public Records Law, ethics guidance from the Arizona State Bar, and common sense.

Finally, the Nation suffered no prejudice as a result of Mr. Banan's discarding his brief notes. Mr. Banan voluntarily appeared for deposition in a show of good faith. The Nation then deposed Mr. Banan for three hours, and Mr. Banan testified at length about the meetings he attended. Replying in part on the fact that Mr. Banan had discarded his notes from those meetings, the Nation argued it should be allowed to depose Mr. Pongrace, which the Court allowed. Tellingly, nine days before Mr. Pongrace's deposition was scheduled to occur (and thus before the Nation even heard from Gila River on these issues), the Nation filed the instant motion, asserting—contrary to the facts—that there was "no record at all" of the meetings at issue. Mot. at 2–3. The Nation has an ample record of what transpired in those meetings, including Mr. Banan's and Mr. Pongrace's combined six hours of sworn deposition testimony. Nothing in the record provides any support for the Nation's assertion that Director Bergin has unclean hands or acted in bad faith. Mr. Banan's deposition testimony made clear that ADG did not take regulatory action regarding the Nation's unauthorized casino at Gila River's or Salt River's behest or direction, as the Nation insinuates. Mot. at 2. On the contrary, (1) ADG had decided to send letters to the Nation's vendors *before* the May–June 2015 meetings Mr. Banan attended; (2) ADG had considered sending employee letters *before* the May–June 2015 meetings but never actually sent them; (3) Mr. Banan and Mr. Pongrace both testified that they did not discuss ADG's "sending a letter to Director Cocca of the Arizona Department of Liquor Licenses and Control suggesting denial of a liquor license for the West Valley Resort"; (4) both testified that they did not discuss ADG's "sending a letter to the Congressional Budget Office about the Keep the Promise Act"; (5) and both flatly denied that ADG and Gila River coordinated ADG's regulatory action to "delay the opening of the West Valley Resort so that Mr. Pongrace could continue to lobby to get the Keep the Promise Act enacted." Mot. at 3.

Even if the Court were to conclude that spoliation occurred, sanctions would not be warranted, much less the draconian and improper sanctions the Nation seeks. First, Mr. Banan's meeting notes have nothing to do with Director Bergin's unclean-hands and bad-faith defenses, which relate to the Nation's fraud and other misconduct during the 1999–2002 Compact negotiations and the Proposition 202 campaign. Forbidding Director Bergin to assert

the Nation's unclean hands based on alleged misconduct related to a wholly different transaction is contrary to law, and the Nation's tit-for-tat attempt to "level the playing field" is similarly unsupported. Mot. at 3. Second, as set forth above and explained in detail below, *none* of the adverse inferences the Nation seeks is appropriate, because *all* of them are directly contradicted by the evidence in the record. The Nation offers no reason—and there is none—why the Court should make inferences contrary to the facts.

The Court should see the Nation's motion for what it is—a last-ditch effort to avoid the consequences of the Nation's years-long fraud on the State, the voters, and other tribes. That effort should be rejected.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Nation's Motion is based on a misleading account of the facts, apparently designed to prop up the Nation's baseless assertion that ADG, Salt River, and Gila River "coordinate[d] efforts to block [the Nation] from opening a competing [gaming] facility." Mot. at 2. That claim finds no support outside the Nation's fevered imagination.

A. The Nation Takes Mr. Banan's Deposition.

After Director Bergin produced a May 27, 2015 email Mr. Banan sent to Donald Pongrace, an outside attorney who represents Gila River, the Nation informed Director Bergin that it wanted to depose both Mr. Banan and Mr. Pongrace about the contents of that email, a meeting it referenced, and other similar meetings. Director Bergin believed both depositions were unnecessary and not reasonably related to any issues in the case, but Mr. Banan voluntarily appeared for a deposition in a spirit of candor and show of good faith.

The Nation deposed Mr. Banan for approximately three hours on August 23, 2016. Mr. Banan testified that in May and June 2015, he attended three meetings with representatives of the Governor's office and lawyers for (and possibly members of) the Salt River and Gila River tribes at one of those tribes' request. Mr. Banan testified he attended those meetings—which Director Bergin did not attend—for the "purpose" of "brief[ing] Director Bergin on what

took place." Banan Dep. at 41:15–19;[1] *see also* Declaration of Roger Banan ("Banan Decl."), ¶ 2. And while the Nation insinuates those meetings were somehow arranged in cloak-and-dagger fashion (*see* Mot. at 4), there was nothing sinister or unusual about them. ADG representatives generally are willing to meet with any tribe that requests such a meeting. Declaration of Daniel Bergin ("Bergin Decl."), ¶ 2. Indeed, in early 2015, ADG representatives had several meetings with tribal representatives—including those from the Nation—concerning the West Valley Resort. *Id.*, *see also* Banan Dep. at 52:7–17; 86:3–12.

At the second of his three meetings with lawyers for the Governor and the Salt River and Gila River tribes, on May 13, 2015, Mr. Banan was presented for the first time with a common-interest agreement, which purported to extend previous common-interest agreements to which ADG was not a party, and executed that agreement on ADG's behalf. Banan Dep. at 9:12–18; Banan Dep. Ex. 1; Banan Decl., ¶ 3. Mr. Banan signed that agreement based on his understanding that Salt River and Gila River "had both been defrauded by Tohono O'odham just as the State and the voters had been defrauded," such that ADG and the tribes "had a common legal interest." Banan Dep. at 65:15–66:2; Banan Decl., ¶ 3. But in any event, Mr. Banan never agreed to a common course of action with either tribe. Banan Decl., ¶ 4.

Prior to the May 13, 2015 meeting, ADG decided—without input from any regulated entity—to send letters to vendors of the West Valley casino informing them that the casino was not authorized. Bergin Decl., ¶ 3; Banan Decl., ¶ 5. At his deposition, Mr. Banan explained that, during the May 13, 2015 meeting, he discussed the letters that ADG had "*previous[ly]* … decided" to send to vendors "that were supplying gaming services and supplies to the tribes in order to apprise them of the fact that [ADG] considered the West Valley casino to be illegal, not authorized under the compact, and that by doing business with an illegal casino, … the vendors could be placing their own state certification in jeopardy." Banan Dep. at 23:25–24:12 (emphasis added). And Mr. Banan confirmed—repeatedly—that "[t]he vendor letter was

[1] Cited excerpts from Mr. Banan's deposition testimony are attached as Exhibit 1; cited excerpts from Mr. Pongrace's deposition testimony are attached as Exhibit 2; and cited excerpts from the transcript of the August 30, 2016 hearing are attached as Exhibit 3.

drafted by the Arizona Department of Gaming," and that ADG did not share "drafts" or "final versions" with Gila River or any other tribe. Banan Dep. at 24:4–25:4, 89:9–90:6; *see also id.* at 82:14–19.

Indeed, despite the Nation's suggestion that ADG was somehow acting at Salt River's, Gila River's, or Mr. Pongrace's behest (*see* Mot. at 2–3), Mr. Banan testified that he had "dismissed … out of hand" what he construed as "suggestions" by Mr. Pongrace that the State could "prevent utility services to the … West Valley parcel, specifically electricity, water [and] trash pickup." Banan Dep. at 29:11–23. Mr. Banan "refused [even] to discuss" those suggestions, he explained, because "it was clearly beyond the authority of the Department of Gaming to do any such thing." *Id.* at 29:24–30:7.

Moreover, the Nation's suggestion that ADG and Gila River somehow "coordinated efforts" in other ways (*see* Mot. at 2, 3, 5) is simply false. ADG never discussed with Gila River or Salt River the letters it sent to the Arizona Department of Liquor Licenses and Control and Congressional Budget Office on May 18, 2015 and June 17, 2015, respectively. Bergin Decl., ¶¶ 6–7. At no time did ADG make *any* regulatory decision based on input from either Gila River or Salt River. Bergin Decl., ¶ 8. During his deposition, Mr. Banan testified that (1) to his knowledge, "there was never any communication between [ADG] and Gila River or Salt River concerning the licensing of the West Valley Resort with the State Department of Liquor" (Banan Dep. at 31:9–13); (2) he did not recall Mr. Pongrace even "discussing [Gila River's] efforts with respect to the … Congressional Budget Office" (Banan Dep. at 79:18–25), and (3) Mr. Pongrace never requested that Mr. Banan "draft[] any correspondence to any federal legislators concerning the Keep the Promise Act," and to Mr. Banan's knowledge ADG did not do so (*id.* at 81:2–82:1). In fact, Mr. Banan testified not only that "there was no coordination" between ADG and Mr. Pongrace regarding "activities in Washington," but that "there was never any *discussion* about the timing of actions that Gila and River [sic] were taking in … Washington and the Department of Gaming was taking here in Arizona." *Id.* at 94:14–23, 95:19–23 (emphasis added).

The Nation ignores *all* of this. Instead, the Nation seizes on Mr. Banan's testimony that he took "brief notes, less than half a page," and that "[a]fter [he] had briefed Director Bergin on them, [he] destroyed the notes" because "[t]hey were of no further use." Banan Dep. at 60:13–21. Mr. Banan further explained that it is generally his practice to discard his notes "[a]s soon as [he] brief[s] the director and [he] no longer needs them." *Id.* at 69:4–13. Mr. Banan's brief notes from the May 13, 2015 meeting only recorded impressions of what others, including Mr. Pongrace, seemed to suggest as possible courses of action during the portion of the meeting in which Mr. Banan was not actively participating. Banan Decl., ¶ 6; Banan Dep. at 63:3–10. Because Mr. Banan believed that ADG would not be acting on any of the ideas presented at these meetings, he simply did not believe that his attorney work product regarding those ideas had any relevance to possible litigation. In turn, he did not believe he had a duty to preserve that work product once he briefed Director Bergin. Banan Decl. ¶ 7.

B. The Nation Seeks to Take Mr. Pongrace's Deposition and Then Files This Motion.

After Mr. Banan's deposition, the Nation pointed to this testimony as a core reason why the Nation should be allowed to depose Mr. Pongrace. Aug. 30, 2016 Hrg. Tr. at 5:9–21, 9:20–25. The Court correctly surmised that the Nation sought Mr. Pongrace's deposition because it "didn't get anything in the deposition of Mr. Banan that would support an assertion that the Department of Gaming was following an agenda set by two other tribes." *Id.* at 11:12–20. But the Court allowed Mr. Pongrace's deposition "because there is an issue of unclean hands being asserted in this case by the Nation," and "[w]hether that's well-founded or not," the Court "would have allowed [the Nation] to do discovery on it." *Id.* at 13:13–14:9. Following the Court's order, the parties scheduled Mr. Pongrace's deposition for September 23, 2016.

On September 13, the Nation filed the parties' stipulation extending the deadline for the Nation's motion for summary judgment in light of Mr. Pongrace's deposition. ECF 250. And on September 14—without any notice to Director Bergin, and nine days before Mr. Pongrace's scheduled deposition—the Nation filed the instant motion based on the same discarded notes it used to justify taking Mr. Pongrace's deposition in the first place.

C. The Nation Takes Mr. Pongrace's Deposition.

The Nation deposed Mr. Pongrace as scheduled on September 23, and the Nation *still* "didn't get anything … that would support an assertion that [ADG] was following an agenda set by two other tribes." *See* Aug. 30, 2016 Hrg. Tr. at 11:12–20. To be sure, Mr. Pongrace remembered some details of the meetings he and Mr. Banan attended differently—for example, Mr. Pongrace (1) recalled that he and not Mr. Banan had first raised the concept of an *Ex Parte Young* suit at the May 13 meeting (Pongrace Dep. at 47:11–21), (2) clarified that he had not "suggest[ed]" that the state cut off trash, electricity, and water service to the West Valley casino but rather presented "options that other opponents of other gaming projects had explored and used in opposition to other projects" about which Mr. Banan "did not make comment … at all" (*id.* at 32:6–34:16, 35:10–36:8), and (3) did not recall whether "employee letters were discussed" (*id.* at 34:17–35:9).[2] But those differences are unsurprising—Mr. Pongrace testified that "there was a clear miscommunication occurring … between [himself] and Mr. Banan" (whom he "had never met before" and has "never seen since"), and that they "were not understanding one another in the meeting," as "it was clear [Mr. Banan] was not listening to [Mr. Pongrace] and" vice versa. Pongrace Dep. at 23:21–24:1, 41:4–5, 111:15–18.

Mr. Pongrace left no doubt that ADG and Gila River did not "coordinate efforts" as the Nation insinuates—in fact, he testified that he and Mr. Banan "were talking at cross-purposes." *Id.* at 111:12–14. *First*, Mr. Pongrace confirmed that "the vendor letters had been presented by Mr. Banan as the approach that [Mr. Banan] was advocating and that he believed that … Director Bergin was taking." Pongrace Dep. at 52:16–19. Indeed, Mr. Pongrace testified that Mr. Banan was "[t]he *only* person who seemed to have a course of action in mind" or "that he had decided upon," and that it concerned "*only* … the vendor letters." *Id.* at 91:1–10 (emphases added). Mr. Pongrace further explained that Mr. Banan had presented only "[t]he idea, but not the actual letter" and testified he "never saw the letter until after it had been issued." *Id.* at

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[2] Mr. Pongrace's memory regarding discussions about employee letters differs from Mr. Banan's (*e.g.*, Banan Dep. at 30:15–31:8), but that is irrelevant: Before the May–June 2015 meetings, ADG already had considered sending such letters but ultimately decided not to do so and never did. Bergin Decl., ¶¶ 4–5.

54:17–21. *Second*, Mr. Pongrace confirmed that "the topic of communications with the Arizona liquor licensing department [did not] come up at the meeting [he] attended," and that he was not "made aware of any potential action the Arizona Department of Liquor Licensing might take." *Id*. at 28:1–15. *Third*, Mr. Pongrace did not recall discussing the Congressional Budget Office's "activities or conclusion" regarding the West Valley casino. *Id.* at 108:20–109:9; *see also id.* at 111:22–112:14. *Fourth*, he did not recall even discussing "the topic … [of] the State doing anything with respect to the [Keep the Promise Act]." *Id.* at 86:11–88:2. Finally, Mr. Pongrace confirmed that "[t]here was no agreement on a common course of action that would entail … any … of the various items … discussed" at the meetings. *Id.* at 113:8–22.

III. ARGUMENT

"'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) (quoting *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 509 (D. Md. 2009)). The Nation cannot satisfy any of the elements, let alone all three.

A. Mr. Banan Had No Duty to Preserve His Notes.

As a threshold matter, Mr. Banan had no duty to preserve the half page of notes he discarded. "It is well established that the 'duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation." *Surowiec*, 790 F. Supp. 2d at 1005 (quoting *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 800 (N.D. Tex. Feb. 22, 2011)). But even "upon recognizing the threat of litigation," a party need not "preserve every shred of paper." *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). And there is "'no legal duty to be a pack rat.'" *Pirv v. Glock, Inc.*, No. CV 06-145-PK, 2009 WL 54466, at *5 (D. Or. Jan. 8, 1999).

The Nation argues a "duty [to preserve] was clearly triggered here," because "litigation was anticipated when [Mr.] Banan destroyed his notes," and "AAG Banan [supposedly] knew that the notes were potentially relevant to the litigation because one of the principal subjects of the meetings [he attended] was precisely how to defend or initiate litigation with the Nation." Mot. at 7, 9–10. While ADG may have anticipated possible litigation by May 2015 (when the meeting at issue took place), neither ADG nor Mr. Banan could have known that his brief notes were "relevant to pending or future litigation." *Surowiec*, 790 F. Supp. 2d at 1005. Mr. Banan's notes recorded his impressions of what Mr. Pongrace suggested as possible courses of action. Banan Decl. ¶ 6. But Mr. Banan had "dismissed" those suggestions "out of hand," finding them "beyond the authority of the Department of Gaming." Banan Dep. at 29:24–30:3. And Mr. Banan could not reasonably anticipate that notes about "things that the Department of Gaming was *not going to do*" could even be potentially relevant to some future lawsuit. *Id.* at 63:3–10 (emphasis added); *see also* Banan Decl., ¶¶ 6–7.

To the extent ADG or Mr. Banan anticipated defending a lawsuit at all, they anticipated that they might have to defend against a tortious-interference claim based on ADG's vendor letters, which was the subject of Mr. Banan's email to Mr. Pongrace. *See* Banan Dep. at 43:23–44:14. Mr. Banan testified he discussed such a claim at the May 13 meeting he attended. *Id.* But Mr. Banan made clear (and Mr. Pongrace confirmed) that, by the time of that meeting, ADG had already decided to send the vendor letters. *Id.* at 23:25–25:4, 89:9–90:6; *see also id.* at 82:14–19; Pongrace Dep. at 52:16–19, 54:17–21, 91:1–10. And Mr. Banan's notes did not reflect any issues relating to the vendor letters or the possible tortious-interference claim. Banan Decl., ¶ 6. Nor did Mr. Banan's notes record any issues relating to possible employee letters or a possible *Ex Parte Young* lawsuit. *Id.* As a result, neither ADG nor Mr. Banan could have reasonably anticipated that Mr. Banan's meeting notes could be even minimally relevant in a future lawsuit arising from the vendor letters.

B. Mr. Banan Did Not Discard His Notes With a Culpable State of Mind.

Even if the Nation could show ADG or Mr. Banan had a duty to preserve his brief privileged notes, it cannot establish that Mr. Banan acted with a "culpable state of mind" in discarding them. *Surowiec*, 790 F. Supp. 2d at 1005.

The Nation speculates that Mr. Banan "destroyed the notes" in an "attempt[] to ensure that the contents of the secret meetings were never revealed," something the common-interest agreement supposedly "confirms." Mot. at 1, 10. And the Nation claims "[t]he culpable nature of the destruction is underscored by the fact that the notes were public records protected by the Arizona Public Records Law." *Id.* at 11. None of that is true.

Mr. Banan made clear why he discarded the notes at issue: Mr. Banan testified that "[a]fter [he] had briefed Director Bergin on them, [he] destroyed the notes" because "[t]hey were of no further use." Banan Dep. at 60:13–21. That is consistent with Mr. Banan's general practice of discarding his notes "[a]s soon as [he] brief[s] the director and [he] no longer needs them." *Id.* at 69:4–13. And it is consistent with the State Bar of Arizona's guidance that "[c]lients and lawyers both benefit from a rule of reasonableness with regard to file retention, such that unnecessary and duplicative materials can be discarded while materials necessary to the representation are retained." State Bar of Ariz. Ethics Ops. 15-02 (June 2015). "For example, a lawyer may scratch out a new theory on a whiteboard, or even the back of a napkin …. Once the theory has been incorporated into advice to the client, … the napkin is discarded or the whiteboard wiped clean for use in the next brainstorming session." *Id.* That is akin to what happened here: Once Mr. Banan advised his client, he reasonably discarded his notes.

Moreover, the Nation's reliance on the Arizona Public Records Law is misplaced. That law does not require that public officers like Mr. Banan preserve *all* documents, but instead makes clear that "[a]ll officers and public bodies shall maintain" only those records that are "*reasonably necessary or appropriate* to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state." A.R.S. § 39-121.01(B) (emphasis added). Especially in light of Mr. Banan's and Mr. Pongrace's deposition testimony, the Nation cannot show that

Mr. Banan's notes were "reasonably necessary or appropriate to maintain an accurate knowledge of" his attendance at the meetings at issue, much less that Mr. Banan is guilty of a class 4 felony for "steal[ing], remov[ing] or secret[ing]" a "record, map or book, or … any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands," as the Nation irresponsibly suggests. A.R.S. § 38-421. It is patently unreasonable to contend that all public attorneys must indefinitely maintain all of their work product/attorney-client briefing notes as public records.

Finally, even if the Court determines that Mr. Banan had a duty to preserve his notes, there is no evidence suggesting that Mr. Banan was grossly negligent or acted in bad faith in discarding those notes. Mr. Banan did not (and could not) foresee that brief notes he took for the purpose of briefing his client regarding ideas that ADG was not going to act upon would have any relevance to possible litigation. Banan Decl., ¶¶ 6–7.

C. The Nation Has Not Suffered Any Prejudice.

The Nation also cannot show that it suffered any prejudice as a result of Mr. Banan's routine actions. The prejudice factor assesses "whether the spoliating party's actions impaired the non-spoliating party's ability to go to trial or threatened to interfere with the rightful decision of the case." *Surowiec*, 790 F. Supp. 2d at 1009 (citation omitted). A party may be prejudiced when the spoliation *severely* impairs the party's ability to litigate its claim, and the party is "force[d] … to rely on 'incomplete and spotty' evidence." *Id*. The non-moving party, however, may demonstrate that the moving party has not been prejudiced by the alleged missing information. *See Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378, 417 (S.D.N.Y. 2010). The Nation clearly was not prejudiced here.

First, even if Mr. Banan's brief notes were relevant to this or any other lawsuit (and they are not), the Nation cannot show severe prejudice because those notes would not have been discoverable in the first place—they were protected by the attorney-client privilege and the work product doctrine.

Mr. Banan's notes were privileged because he took them with the intention of sharing their contents with his client, for the purpose of providing legal advice and providing

information related to that advice. *See* A.R.S. § 12-2234 (holding as privileged any communication that is either "[f]or the purpose of providing legal advice to the entity or employer or to the employee, agent or member" or "[f]or the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member."); *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) ("the traditional rationale for the [attorney-client] privilege applies with special force in the government context.").

Mr. Banan's notes also constituted work product because they reflected his mental impressions regarding what to write down during the meeting that he attended. Mr. Banan did not take verbatim notes of the meeting; instead, he selectively jotted down half a page of notes to discuss with Director Bergin. *See Dir. of Office of Thrift Supervision v. Vinson & Elkins, L.L.P.*, 168 F.R.D. 445, 446–47 (D.D.C. 1996) ("Interview notes … are properly treated as opinion work product because, in choosing what to write down and what to omit, a lawyer necessarily reveals his mental processes."); *Friends of Hope Valley v. Frederick Co.*, 268 F.R.D. 643, 647 (E.D. Cal. 2010) ("Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories," "enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances ….") (citation omitted). The Nation has not even attempted to show why it would have been entitled to obtain privileged communications between Director Bergin and his attorney.

Second, the Nation cannot seriously contend that Mr. Banan's notes are unique evidence of his meetings with representatives from the Governor's office and the Gila River and Salt River tribes. Mr. Banan testified under oath for three hours regarding those meetings. Just two weeks before it filed the instant motion, the Nation argued it should be allowed to depose Mr. Pongrace in part to make up for the fact that Mr. Banan had discarded his meeting notes. And then the Nation deposed Mr. Pongrace, who testified extensively about the meetings and corroborated Mr. Banan's testimony in all material respects—confirming, among other things, that (1) Mr. Banan had represented that ADG already had decided to send the vendor letters by the time of the May 13 meeting, (2) Mr. Pongrace did not discuss the CBO's activities, (3) Mr. Pongrace did not discuss "the State doing anything with respect to the [Keep the

Promise Act],” and (4) “[t]here was no agreement on a common course of action that would entail … any … of the various items … discussed” at the meetings. Pongrace Dep. at 52:16–19, 54:17–21, 86:11–88:12, 108:20–109:9, 113:8–22. In light of all that testimony, the Nation’s assertion that Mr. Banan’s notes are “critical to understanding why Director Bergin did what he did” does not even pass the straight-face test. Mot. at 12.

The Ninth Circuit’s decision in *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 825 (9th Cir. 2002), is instructive. There, the district court denied an adverse evidentiary inference based on the defendants’ loss of three medical slides that were critical to issues raised in the litigation. *Id.* at 823–25. The Ninth Circuit affirmed, concluding that the plaintiffs had not suffered any prejudice because other evidence of the slides’ contents was available. *Id.* at 825. Among other things, the court noted that the plaintiffs could depose two doctors regarding their evaluation of the slides. *Id.* Here, similarly, the Nation has ample alternative evidence regarding the substance of the May–June 2015 meetings at issue: a combined six hours of sworn deposition testimony by Mr. Banan and Mr. Pongrace.[3]

D. Sanctions Are Not Warranted.

Even if the Nation could satisfy the three-part test for spoliation of evidence, sanctions would not be warranted. *See, e.g.*, *Med. Lab.*, 306 F.3d at 825 (affirming court’s refusal to draw an adverse evidentiary inference where there was no evidence of bad faith or prejudice).

The court’s inherent powers must be exercised with restraint and discretion. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). In assessing the appropriate sanction, the Court “must determine which sanction best (1) deters parties from future spoliation, (2) places the risk of an erroneous judgment on the spoliating party, and (3) restores the innocent party to their rightful litigation position.” *Surowiec*, 790 F. Supp. 2d at 1008. And the court should impose “‘the least onerous sanction’” considering the “‘willfulness of the destructive act and

[3] Notably, the total amount of time the Nation spent deposing Mr. Banan and Mr. Pongrace about the May–June 2015 meetings at issue exceeded the total amount of time of the actual meetings.

the prejudice'" to the opposing party. *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 888 F. Supp. 2d 976, 992 (N.D. Cal. 2012) (citations omitted); *see also In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1078 (N.D. Cal. 2006).

The Court should reject both of the Nation's proposed sanctions, one stripping Director Bergin of defenses, the other inferring facts directly contradicted by Mr. Banan's and Mr. Pongrace's testimony.

1. There Is No Basis to Strike Director Bergin's Unclean-Hands Defense.

Because the Nation supposedly has been deprived of evidence regarding its own unclean-hands defense, the Nation asks the Court to "strike Director Bergin's unclean hands and/or bad faith defenses to the Nation's preemption claim." Mot. at 15. Imposing such a sanction would be contrary to law and logic.

The Nation argues that "[a] party guilty of willful spoliation of evidence pertaining to his own unclean hands should not be heard to press this same defense." Mot. at 15. The Nation fundamentally misunderstands the unclean-hands doctrine. For that doctrine to apply, "the alleged misconduct" must "relate directly to the transaction concerning which the complaint is made." *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 986–87 (9th Cir. 2010) (citations omitted); *Sines v. Holden*, 89 Ariz. 207, 210 (1961) ("The dirt upon his hands must be his bad conduct in the transaction complained of. If he is not guilty of inequitable conduct toward the defendant in that transaction, his hands are as clean as the court can require." (citation omitted)). Indeed, a case the Nation cites confirms as much: A party's unclean hands may preclude that party from asserting another party's unclean hands "as to the controversy in issue," but "unclean hands does not constitute 'misconduct in the abstract, unrelated to the claim to which it is asserted as a defense.'" *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th Cir. 2002).

This longstanding relatedness requirement is fatal to the Nation's position. Even if Mr. Banan had spoliated evidence regarding "the regulatory actions that gave rise to this litigation" by discarding his meeting notes from 2015 (Mot. at 15), that conduct obviously had nothing to do with the "transaction" underlying Director Bergin's unclean-hands and bad-faith

defenses—*i.e.*, the Nation's extensive, years-long fraud during the 1999–2002 Compact negotiations and Proposition 202 campaign. For this reason alone, the Court should reject the Nation's request to strike Director Bergin's unrelated defenses.

The Nation's eye-for-an-eye theory of sanctions is unsupported by the case law in any event. Any remedy for spoliation of evidence should be aimed at restoring what was lost, not at leveling the playing field in some arbitrary, tit-for-tat way. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386–87 (9th Cir. 2010) ("A district court's adverse inference sanction should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other relevant evidence.").

2. There Is No Basis to Draw the Nation's Overreaching Adverse Inferences.

To the extent the Nation seeks adverse inferences to remedy what was lost when Mr. Banan discarded his brief notes, it overreaches. Even "[w]hen *relevant* evidence is lost accidentally or for an innocent reason, an adverse inference may be rejected." *KnightBrook Ins. Co. v. Payless Car Rental Sys., Inc.*, 43 F. Supp. 3d 965, 982 (D. Ariz. 2014) (emphasis added). Rather, an adverse inference is warranted only where the spoliating party's degree of fault and the resulting prejudice to the other party are significant. *Surowiec*, 790 F. Supp. 2d at 1009 ("When a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability, a harsh but less extreme sanction than dismissal or default is to permit the fact finder to presume that the destroyed evidence was prejudicial."). Either way, an adverse inference is harsh and should not "be imposed casually." *Apple*, 888 F. Supp. 2d at 993–94 (collecting cases); *United States v. Town of Colorado City, Ariz.*, No. 3:12-CV-8123-HRH, 2014 WL 3724232, at *8 (D. Ariz. July 28, 2014) (adverse inference instruction not warranted where prejudice to plaintiff would only be minimal). And given the totality of the circumstances here, the adverse inferences the Nation seeks are wholly inappropriate. *See Med. Lab.*, 306 F.3d at 824 (a district court may base its conclusion regarding whether to issue an adverse jury instruction on the totality of the circumstances).

As explained above, the Nation suffered no prejudice as a result of Mr. Banan's discarding of meeting notes he took in order to brief his client, and there is no evidence whatsoever that he discarded them in bad faith or with ill intent.

Even more to the point, the ample available evidence directly contradicts the adverse inferences the Nation seeks. The Nation seeks inferences "that the tribes through these meetings inappropriately caused Director Bergin to:

> (1) send the letters threatening the legal status of vendors who did business with the West Valley Resort; (2) send letters threatening the certification of employees who accepted positions with the West Valley Resort; (3) send the letter to Director Cocca of the Arizona Department of Liquor Licenses and Control suggesting denial of a liquor license for the West Valley Resort; (4) send the letter to the Congressional Budget Office about the Keep the Promise Act; and (5) seek to delay the opening of the West Valley Resort so that Mr. Pongrace could continue to lobby Congress to get the Keep the Promise Act enacted.

Mot. at 15. As detailed above, however, Mr. Banan's and Mr. Pongrace's deposition testimony unequivocally disproves the Nation's claims:

(1) Mr. Banan and Mr. Pongrace both testified that ADG had decided to send vendor letters *before* the May–June 2015 meetings (Banan Dep. at 23:25–24:12; Pongrace Dep. at 52:16–19);

(2) Although Mr. Banan remembered Mr. Pongrace discussing letters regarding employee certifications at the meetings (Banan Dep. at 30:21–31:3), and Mr. Pongrace did not remember such a discussion (Pongrace Dep. 34:17–35:9), that apparent discrepancy is irrelevant, because ADG had considered sending such letters *before* the May–June 2015 meetings and ultimately decided not to send them (Bergin Decl. ¶¶ 4–5);

(3) Both Mr. Banan and Mr. Pongrace testified that ADG and Gila River never discussed a letter to Director Cocca of the Arizona Department of Liquor Licenses and Control (Banan Dep. at 31:9–13; Pongrace Dep. at 28:1–15);

(4) Neither Mr. Banan nor Mr. Pongrace recalled discussing the CBO (Banan Dep. at 79:18–25; Pongrace Dep. at 108:20–109:9);

(5) And both Mr. Banan and Mr. Pongrace made clear that ADG was not coordinating its regulatory actions with Gila River's efforts regarding the Keep the Promise Act (Banan Dep. at 94:14–23, 95:19–23; Pongrace Dep. 86:11–88:2).

Neither Gila River nor Salt River had any input into any of Director Bergin's regulatory decisions. Bergin Decl., ¶¶ 3, 6–8. There is no reason why the Court should draw adverse inferences directly contrary to all of this testimony, and the Nation offers none.

E. To the Extent the Court Is Inclined to Consider the Nation's Baseless Assertions, the Court Should Hold an Evidentiary Hearing.

Finally, to the extent the Court is inclined to entertain the Nation's unwarranted allegations at all, the court should hold an evidentiary hearing to determine witness credibility. *See Marceau v. Int'l Bhd. of Elec. Workers*, 618 F. Supp. 2d 1127, 1177 (D. Ariz. 2009) (denying adverse inference without prejudice to refile because questions of material fact existed as to "the nature of the destroyed documents, in addition to credibility determinations" that was "inappropriate for resolution" through summary judgment).

The Nation's motion does not show that Mr. Banan intentionally destroyed evidence with ill intent, nor did he: Consistent with his normal practices, Mr. Banan discarded his notes after briefing Director Bergin about their contents, and there is no evidence Mr. Banan sought to prejudice the Nation or somehow destroy relevant evidence. Banan Decl., ¶ 7. But to the extent the Court is willing to credit the Nation's assertions, the Court should hold an evidentiary hearing to evaluate Mr. Banan's credibility through live testimony.

IV. CONCLUSION

The adversary process is designed to facilitate the search for truth. The Nation apparently has the opposite goal, and has attempted at every turn to conceal the truth about its egregious fraud against the State, the voters, and other tribes during the 1999–2002 Compact negotiations and Proposition 202 campaign. This motion is only the latest effort in the Nation's campaign to avoid the facts at all costs—including impugning the reputation of Mr. Banan. The Nation's Motion should be denied.

DATED this 3rd day of October, 2016.

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