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15 UNITED STATES DISTRICT COURT  
16 DISTRICT OF ARIZONA

17 Russell B. Toomey,

18 Plaintiff,

19 v.

20 State of Arizona, *et al.*

21 Defendants.

No. 4:19-cv-00035

**DEFENDANTS STATE OF  
ARIZONA’S, ANDY TOBIN’S, AND  
PAUL SHANNON’S OPPOSITION  
TO PLAINTIFF’S MOTION TO  
ENFORCE COURT ORDER**

**(ORAL ARGUMENT REQUESTED)**

22 Defendants State of Arizona, Andy Tobin, and Paul Shannon (collectively, the “State  
23 Defendants”) hereby oppose Plaintiff Russell B. Toomey’s Motion to Enforce Court Order  
24 (Doc. 244 (the “Motion” or “Mtn.”)).<sup>1</sup> The State Defendants request that the Court deny  
25 Plaintiff’s Motion and, in turn, grant the State Defendants’ Motion to Stay (Doc. 242) the  
26 September 21, 2021 Order compelling production of their attorney-client privileged  
documents (Doc. 241 (the “Order”)).

<sup>1</sup> Plaintiff did not request either expedited briefing or expedited consideration of his Motion.  
(*See generally* Mtn.) The State Defendants have early filed this Opposition as further  
evidence that they are not attempting to unduly delay either discovery or the overall  
resolution of this matter.

1 **I. STATE DEFENDANTS' ACTIONS ARE SUBSTANTIALLY JUSTIFIED.**

2 A court may not issue sanctions for a party's failure to obey a discovery order if the  
3 failure was substantially justified or other circumstances make an award of expenses unjust.  
4 Fed. R. Civ. P. 37(b)(2)(C).

5 The State Defendants' actions, at every turn, have been reasonable and justified. The  
6 State Defendants have consistently cooperated throughout the discovery process (now  
7 spanning more than one year). The State Defendants produced thousands of documents,  
8 conducted additional document searches at Plaintiff's demand, agreed to permit their  
9 witnesses to be deposed for more than the presumptive seven hours, and agreed to permit  
10 two of their witnesses to be deposed a second time. (Doc. 246-1 at ¶¶ 9–13.) Indeed, the  
11 parties have only had two discovery disputes that necessitated the Court's involvement: (1)  
12 the application of the deliberative process privilege<sup>2</sup>; and (2) the application of the  
13 attorney-client privilege. (See Docs. 168, 195.)

14 The State Defendants' decision to seek review of the Order—a uniquely important  
15 and prejudicial ruling—is similarly reasonable and justified. The State Defendants opposed  
16 Plaintiff's attempts to obtain the attorney-client privileged documents in the parties'  
17 informal discovery conferences and in response to Plaintiff's Motion to Compel. (See Doc.  
18 201.) Upon entry of Magistrate Judge Bowman's Order granting the Motion to Compel  
19 (Doc. 213), the State Defendants' only options were compliance or objection under Federal  
20 Rule of Civil Procedure 72(a). Failure to object would leave the State Defendants without  
21 any ability to later challenge or appeal Magistrate Judge Bowman's Order. Fed. R. Civ. P.  
22 72(a). Exercising their right to object, the State Defendants timely complied with all  
23 timeframes set by the Court and the Federal Rules of Civil Procedure, and filed their  
24 objection within 14 days. (See Doc. 223.) Upon entry of the Order, the State Defendants

25 <sup>2</sup> The State Defendants timely produced documents protected by the deliberative process  
26 privilege in response to Magistrate Judge Bowman's April 20, 2021 Order. (See Doc. 246-  
1, ¶ 12.)

1 were again presented with limited options. Ultimately, the State Defendants determined  
2 that the appropriate option was to seek a Petition for Writ of Mandamus from the Ninth  
3 Circuit. It was reasonable and justified for the State Defendants to carefully consider the  
4 Order, conduct research, and make the decision to seek a Writ from the Ninth Circuit prior  
5 to seeking a stay from this Court. Indeed, if the State Defendants' research had revealed  
6 that seeking a Writ of Mandamus was not permissible for the Order, any motion to stay  
7 would have been moot and a waste of not only the State Defendants' time but also Plaintiff's  
8 and the Court's time and resources. The State Defendants sought a stay with this Court as  
9 soon as was reasonably possible after making the informed decision to file their Petition  
10 with the Ninth Circuit. In any case, the State Defendants filed their Motion to Stay only 10  
11 days after the Court entered the Order.<sup>3</sup> (Doc. 246.) The State Defendants similarly filed  
12 their Petition for Writ of Mandamus with the Ninth Circuit on October 4, 2021—less than  
13 two weeks after entry of the Order and before the date set for compliance. In essence, the  
14 State Defendants did their best to avoid non-compliance with the Order while also  
15 preserving their right to meaningful review. The State Defendants' actions are both  
16 reasonable and substantially justified.

17 Plaintiff argues that the State Defendants' pending Motion to Stay is an insufficient  
18 justification for their purported failure to comply with the Order. (Mtn. at 2–3.) However,  
19 Plaintiff's cited cases do not support this conclusion. In *Zapon v. U.S. Dept. of Justice*, 53  
20 F.3d 283, 285 (9th Cir. 1995)—the only published case cited by Plaintiff—the  
21 non-compliant party's motion to stay was *denied*. In *In re Lernout & Hauspie Sec. Litig.*,  
22 219 F.R.D. 28, 30 (D. Mass. 2003), the non-compliant party's motion to stay was not filed  
23 until *after* the date set for compliance with the court's order. In *Guardian Life Ins. Co. of*  
24 *Am. v. Andraos*, CV075732SJOFMOX, 2009 WL 10675048 (C.D. Cal. Feb. 10, 2009), the

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26 <sup>3</sup> It is also worth noting that the Order was entered after business hours on September 21,  
and the State Defendants and their counsel did not review the Order until the next day.

1 non-compliant party did not file any motion to stay.<sup>4</sup> Each of these situations is  
 2 diametrically different from the instant circumstances in which the State Defendants timely  
 3 filed a Motion to Stay the Order, which Motion has not yet been decided. Plaintiff has not  
 4 cited a single case holding that a motion to stay, filed prior to the date for compliance with  
 5 an order, is an insufficient justification for failing to comply with a discovery order.

6 **II. PLAINTIFF SEEKS AN IMPROPER ORDER OF CONTEMPT.**<sup>5</sup>

7 As Plaintiff notes, Rule 37 governs this Court’s ability to address the State  
 8 Defendants’ purported non-compliance with the Order. Rule 37 states that the court where  
 9 the action is pending may “treat[] as contempt of court the failure to obey” a discovery  
 10 order. Fed. R. Civ. P. 37(b)(2)(A).

11 Civil contempt sanctions are imposed for compensatory or coercive purposes. *Shell*  
 12 *Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016); *Falstaff Brewing*  
 13 *Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983). Before finding civil  
 14 contempt, a court must determine by clear and convincing evidence that: (1) there is a  
 15 “specific and definite” valid court order (*Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461,  
 16 465 (9th Cir. 1989)); (2) the non-compliant party had knowledge of the order, and notice of  
 17 and an opportunity to be heard about the alleged noncompliance (*Int’l Union, United Mine*  
 18 *Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994); *United States v. Ayres*, 166 F.3d 991,  
 19 995 (9th Cir. 1999)); and (3) the non-compliant party failed to take “all reasonable steps to  
 20 comply with the order” (*Kelly v. Wengler*, 822 F.3d 1085, 1096 (9th Cir. 2016)). Where

21 \_\_\_\_\_  
 22 <sup>4</sup> The *Guardian* court cited to *Tinsley v. Kemp*, 750 F. Supp. 1001, 1013 (W.D. Mo. 1990).  
 23 However, the language cited from *Tinsley* is purely dicta because the court denied the  
 24 motion to stay. The *Tinsley* court indeed stated “[d]enial of the motion to stay ordinarily  
 would have permitted summary disposition of the motion to compel, but the circumstances  
 suggested that some guidance on the local rules, especially concerning discovery, would be  
 helpful to the parties.” 750 F. Supp. at 1013.

25 <sup>5</sup> Ironically (and perhaps why Plaintiff did not expressly title his Motion as a motion for  
 26 contempt), if the State Defendants are held in contempt for their purported failure to comply  
 with the Order, the contempt order may be an appealable interlocutory order. *See Mohawk*  
*Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009).

1 the sanctions imposed are coercive, additional requirements must be met, including that the  
2 contemnor must also have an opportunity to purge through compliance. *Bagwell*, 512 U.S.  
3 at 829.

4 Plaintiff effectively requests that this Court hold the State Defendants in civil  
5 contempt but fails to satisfy any of the elements or procedural requirements. Plaintiff has  
6 not provided any evidence supporting his request for contempt. Plaintiff’s Motion consists  
7 entirely of conjecture and suppositions, without any evidentiary support and without even  
8 a declaration from counsel. In addition, even if Plaintiff had provided evidence supporting  
9 his Motion, holding the State Defendants in contempt based solely on briefing does not  
10 satisfy the requirement that they be given “notice and an opportunity to be heard.” *See*  
11 *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1324 (9th Cir. 1998), *as amended on*  
12 *denial of reh’g and reh’g en banc* (June 15, 1998) (“a district court ordinarily should not  
13 impose contempt sanctions solely on the basis of affidavits”). Finally, Plaintiff has not  
14 shown—and cannot show—that the State Defendants did not take “all reasonable steps to  
15 comply” with the Order. As explained above, the State Defendants took all steps possible  
16 to avoid non-compliance with the Order, including timely filing a Motion to Stay the Order.  
17 In sum, Plaintiff cannot satisfy the elements of contempt and his disguised request for such  
18 an order is improper.

### 19 **III. PLAINTIFF’S PROPOSED SANCTIONS ARE INAPPROPRIATE.**

20 Plaintiff requests that the Court “award Plaintiff costs and fees” as sanctions for the  
21 State Defendants’ purported non-compliance. (Mtn. at 3–4.) These amounts are not  
22 recoverable upon Plaintiff’s Motion.

23 Rule 37(b)(2)—the basis for Plaintiff’s Motion (Mtn. at 2)—provides that a court  
24 may award “reasonable expenses, including attorney’s fees, *caused by the failure*” to obey  
25 a court order to provide or permit discovery. Fed. R. Civ. P. 37(b)(2)(C) (emphasis added).  
26 This limitation is distinct from the authority to award costs provided in Rule 37(a), which

1 provides that the court may award “reasonable expenses incurred *in making the motion*,  
2 including attorney’s fees.” Fed. R. Civ. P. 37(a)(5)(A) (emphasis added).

3 Plaintiff has not identified any expenses or fees arising from the State Defendants’  
4 purported failure to comply with the Order. (*See generally* Mtn.) Plaintiff’s request for  
5 costs and fees incurred appears to relate to his attorney’s fees incurred in bringing the  
6 Motion. (*See* Mtn. at 4.) However, the Rules make clear that costs incurred in bringing the  
7 instant Motion are not recoverable. Plaintiff’s request for undefined “costs and fees” should  
8 be denied.

9 Plaintiff also requests “in the alternative” an adverse inference “to be determined at  
10 a later date.” Mtn. at 3–4. Generally, courts may order an adverse inference if evidence is  
11 destroyed by a party. *See Marceau v. Int’l Broth. of Elec. Workers*, 618 F. Supp. 2d 1127,  
12 1174 (D. Ariz. 2009); *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1008  
13 (D. Ariz. 2011); *see also* Fed. R. Civ. P. 37(e) (permitting adverse inference to be ordered  
14 as a sanction for destruction of electronically stored information).<sup>6</sup> As such, an adverse  
15 inference is improper. Moreover, Plaintiff’s request for an adverse inference makes no  
16 sense. If the relief requested in the State Defendants’ Petition is granted, Plaintiff will not  
17 be entitled to the privileged documents because the privilege was not waived. If the State  
18 Defendants’ Petition or the relief requested therein is denied, the State Defendants will  
19 produce the documents to Plaintiff. In either case, an adverse inference would be  
20 unnecessary and improper.

#### 21 **IV. CONCLUSION**

22 For the foregoing reasons, the State Defendants respectfully request that the Court  
23 deny Plaintiff’s Motion to Enforce Court Order.

24  
25 <sup>6</sup> The single case cited by Plaintiff as support for his request for an adverse inference—  
26 *Renteria v. Ramanlal*, 07-CV-00658-PHX-ROS, 2008 WL 11338783, at \*2 (D. Ariz. Aug.  
25, 2008)—does not involve a request or grant of an adverse inference.

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DATED this 11th day of October, 2021.

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