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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Tohono O'odham Nation,

10 Plaintiff,

11 v.

12 Douglas A Ducey, et al.,

13 Defendants.
14

No. CV-15-01135-PHX-DGC

ORDER

15 This discovery dispute involves the propriety of Director Bergin's assertion of the
16 common interest privilege. After a telephonic discovery conference, the Court ordered
17 Director Bergin to submit for in camera review Entry 102 on his privilege log. After
18 reviewing the document, the Court requested additional briefing. The Court has reviewed
19 the briefing (Docs. 227, 228), and concludes that the common interest privilege does not
20 protect Entry 102 from disclosure.

21 The common interest privilege was first adopted in the criminal defense context.
22 In *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), two defendants
23 were summoned to testify before a grand jury. They retained separate attorneys, each of
24 whom interviewed his or her client, prepared a summary of the interview, and exchanged
25 the summary with the other defense lawyer. *Id.* at 348. The purpose of this exchange
26 was to make "representation of their clients in connection with the Grand Jury
27 investigation and any resulting litigation, more effective." *Id.* at 348-49. The
28 government subsequently sought to discover these summaries, and the trial court held

1 that they were not privileged. *Id.* The Ninth Circuit reversed, finding that the attorney-
2 client privilege had not been waived when the summaries were shared. The court
3 recognized a “joint-defendant exception” to the ordinary rule that privileges are waived
4 when privileged material is shared with third parties. *Id.* at 350; *see also Hunydee v.*
5 *United States*, 355 F.2d 183, 185 (9th Cir. 1965) (“[W]here two or more persons who are
6 subject to possible indictment in connection with the same transactions make confidential
7 statements to their attorneys, these statements, even though they are exchanged between
8 attorneys, should be privileged to the extent that they concern common issues and are
9 intended to facilitate representation in possible subsequent proceedings.”).

10 The joint defense privilege has been extended to civil cases. In *United States v.*
11 *Gonzalez*, 669 F.3d 974 (9th Cir. 2012), a husband and wife were convicted in separate
12 trials for fraud arising from an insurance scam. The wife subsequently filed a petition for
13 habeas corpus – technically, a civil proceeding – arguing that her trial counsel had been
14 ineffective for failing to call as an exculpatory witness the husband, who had given a
15 statement that the wife had nothing to do with the crime before ultimately claiming at
16 trial that the wife was responsible. *Id.* at 976. When the government subpoenaed the
17 wife’s trial counsel about communications received from the husband’s lawyer, the
18 husband moved to quash the subpoena on the basis of the joint defense privilege. *Id.* at
19 976-77.

20 The Ninth Circuit acknowledged that it “has long recognized that the joint defense
21 privilege is ‘an extension of the attorney-client privilege.’” *Id.* at 978 (citations omitted).
22 The court explained:

23 [w]hether the jointly interested persons are defendants or plaintiffs, and
24 whether the litigation or potential litigation is civil or criminal, the rationale
25 for the joint defense rule remains unchanged: persons who *share a*
26 *common interest in litigation* should be able to communicate with their
27 respective attorneys and with each other to more effectively prosecute or
28 defend their claims.

Id. at 978 (citing *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990))

1 (emphasis added)). The court also made clear that parties invoking the privilege “need
2 not have identical interests and may even have some adverse motives,” but they must at
3 least “be engaged in maintaining substantially the same cause on behalf of other parties in
4 the same litigation.” *Id.* at 980-81 (quotation marks and citations omitted). The Ninth
5 Circuit found that a joint defense agreement existed between the husband and wife prior
6 to the trials, but found that the arrangement may have ended before the trials and
7 therefore remanded for further proceedings. *Id.* at 983.

8 From these cases we learn that the joint defense privilege, or, more broadly, the
9 common interest privilege, is essentially an extension of the attorney-client privilege.
10 Director Bergin argues that the privilege applies in the absence of pending litigation.
11 Doc. 228 at 2-4. He is correct; pending litigation is not a prerequisite. *Gonzalez*, 669
12 F.3d at 978 (citing *In re Grand Jury Subpoenas*, 902 F.2d at 249).

13 Director Bergin next argues that the privilege may apply in the regulatory context.
14 Doc. 228 at 4. The Director cites cases involving the regulatory context, but none is
15 particularly helpful. This case is unlike *United States v. Bergonzi*, 216 F.R.D. 487 (N.D.
16 Cal. 2003), which involved a direct adversity between the regulator and the regulated
17 party that is absent here. Nor is this case like *Broessel v. Triad Guaranty Insurance Co.*,
18 238 F.R.D. 215 (W.D. Ky. 2006), which recognized a common legal interest “that
19 extends to legislative and regulatory matters, as well as in matters in litigation or could
20 lead to litigation.” *Id.* at 220. *Broessel* does not shed light on whether a regulator like
21 the Arizona Department of Gaming may enter into a common interest agreement with an
22 entity it regulates for the purpose of opposing the actions of another entity it regulates.

23 The closest case to this dispute appears to be *In re Lidoderm Antitrust Litigation*,
24 MDL No. 2521, 2016 WL 861019 (N.D. Cal. 2016), which involved the denial of the
25 common interest privilege to parties that shared only a common commercial or business
26 interest, rather than a common legal interest. *Id.* at *4. As the court in *Lidoderm*
27 explained: “the common interest privilege protects documents shared between parties
28 who have a common *legal* interest; it does not extend to and cannot protect disclosure of

1 communications regarding a common *business* interest.” *Id.* (emphasis in original); *see*
2 *also In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (“a shared desire to
3 see the same outcome in a legal matter is insufficient to bring a communication between
4 two parties within this exception”); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575,
5 578 (N.D. Cal. 2007) (“that legal assistance must pertain to the matter in which the
6 parties have a joint legal interest, and the communication must be designed to further that
7 specific legal interest”).

8 Director Bergin has not identified a common legal interest between the Arizona
9 Department of Gaming and Gila River. True, they share a common goal of stopping the
10 West Valley Resort, but this common interest is not akin to those shared by parties faced
11 with or seeking to assert the same criminal or civil claims. Gila River has a strong
12 commercial incentive to stop the West Valley Casino. Director Bergin’s interest is not
13 commercial. As a state regulator, he seeks to bar what he views as a fraudulently
14 procured casino operation. Despite multiple opportunities to do so, Director Bergin has
15 been unable to locate, and the Court has not found, a single case recognizing a common
16 interest privilege in similar circumstances.

17 The Nation notes, correctly, that recognition of a common interest privilege in this
18 case would constitute a significant extension of the doctrine. Doc. 227 at 4-5. The Court
19 cannot find in the roots of the joint defense privilege a reasonable basis for extending the
20 doctrine to parties who merely share a common goal with no common legal interests.

21 The Court also finds troubling the notion that a state regulatory body could join in
22 a privilege-protected partnership with one of the entities it regulates to thwart expansion
23 efforts of another entity it regulates, whether or not the regulatory body has a valid basis
24 for opposing the expansion. That appears to be what is happening here. The Nation
25 identifies several relevant circumstances surrounding Entry 102, including the timing
26 with respect to the vendor letters, the involvement of a lobbyist for Gila River, and
27 additional letters to the Congressional Budget Office and the Arizona Department of
28 Liquor Licenses and Control.

