STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

MESCALERO APACHE TRIBE, a Federally Recognized Indian Tribe,

Plaintiff,

vs.

KENNETH J. WOODLEY, LEAVITT GROUP OF ALBUQUERQUE, INC., LEAVITT GROUP ENTERPRISES, INC., KELLY RUSSELL, and DANE O. LEAVITT,

Defendants.

Case No. CV 2005 07921

PLAINTIFF MESCALERO APACHE TRIBE'S OMNIBUS MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS

I. INTRODUCTION

Plaintiff Mescalero Apache Tribe ("Mescalero" and "the Tribe") respectfully files this Omnibus Motion to Compel and for Sanctions. Plainly, the scope and size of this Motion are extraordinary. Unfortunately, this extraordinary Motion was necessitated by the stubborn refusal of counsel for the Leavitt Defendants "to obey New Mexico's ethical and discovery rules," as required. *In re Estrada*, 2006-NMSC-047, 143 P.3d 731 (2006).

This Court held a two-hour hearing in this matter on September 6, 2006. The Leavitt Defendants' nonadmitted counsel wisely chose not to say a single word, but his local counsel defended his conduct. The only way to do so, however, was to play games ***on the record, with the Court***. *See, e.g.*, September 6, 2006 Transcript of Proceedings, p. 71 ("Okay. You guys are going to play this game. . . . Yes, it is [a game]. . . . And then I hear your response, which is

unfortunate . . . . I wouldn't expect it from you . . . .").[1] In this relatively brief encounter, the Court got a mild dose of the medicine that the Leavitt Defendants' counsel have dispensed to Mescalero and its counsel in all of their countless dealings for more than a year.

Not surprisingly, as this Motion will demonstrate, the conduct of ***nonadmitted*** counsel ***when the Court is not watching*** has been far worse. And the games nonadmitted counsel's local counsel have played to attempt to defend the misconduct have been even more exasperating.

Therefore, as the documentary record will demonstrate, this extraordinary Motion was necessitated by the Leavitt Defendants' unrelenting effort since the inception of this lawsuit to obstruct Mescalero's right to develop evidence of the damages resulting from the defendants' fraud. Moreover, Mescalero further will demonstrate that the Leavitt Defendants rebuffed Plaintiff's exhaustive attempts to resolve these issues informally. It thus is apparent that the Leavitts have made the strategic decision to force the Tribe to choose between two unpalatable options; that is, either (a) to acquiesce in the Leavitt Defendants' wholesale obstruction of the Tribe's discovery rights, or (b) to burden the Court with virtually endless motion practice to remedy the Leavitt Defendants' virtually endless instances of misconduct. Under the circumstances of this case – involving an admitted fraud and many millions of dollars in damages – Mescalero had no real alternative but to enforce its discovery rights, in order to prepare its case for trial.

II. PROCEDURAL HISTORY

This Motion follows the May 8, 2006 Motion to Revoke Privilege of Nonadmitted Counsel to Practice Law in New Mexico, Pursuant to Rule 1-089.1 NMRA 2006, with

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[1] Mescalero previously has provided a complete copy of the September 6, 2006 Transcript of Proceedings to the Court.

Supporting Points and Authority (hereinafter "Motion to Revoke"). Mescalero's Motion to Revoke presented evidence of subornation of perjury by the Leavitt Defendants' nonadmitted counsel, and selected examples of his relentless misconduct calculated to hog-tie the discovery process. Mescalero respectfully incorporates herein by reference all proceedings in connection with the pending Motion to Revoke.

Plaintiff's Motion to Revoke explained that Mescalero was relying on limited examples, because "[i]t plainly would be impossible to unravel all of the discovery disputes created by this conduct within the page limits provided in Local Rules LR2-119 and LR2-120." Motion to Revoke, p. 4. The Tribe further explained as follows:

> It is apparent that nonadmitted counsel intentionally has created a tangled mess that would be impossible for this Court to unravel without Herculean efforts far beyond what reasonably should be expected of the Court in regulating discovery, and far beyond what would be possible if litigants in this busy Court universally employed such tactics.

Id., p. 9-10.

The Leavitt Defendants opposed the Motion to Revoke in part by arguing repeatedly that this Court was obligated to review the entire record "to make an informed decision." *E.g.*, Response by Defendants Leavitt Group of Albuquerque, Leavitt Group Enterprises, Kelly Russell and Dane Leavitt to Plaintiff's Motion to Revoke Privilege of Nonadmitted Counsel (filed May 26, 2006) (hereinafter "Response to Motion to Revoke"), pp. 2 and 3. Specifically, the Leavitt Defendants attacked Mescalero's reliance on selected examples of the misconduct, in order to comply with this Court's page limits, accusing the Tribe of "unilaterally elect[ing] to withhold materials from the court." Response to Motion to Revoke, p. 3, n.2.

The Tribe replied by continuing to advocate for a less burdensome approach, while acknowledging that a complete record would demonstrate nonadmitted counsel's misconduct most effectively:

> Nonadmitted counsel's response accuses Mescalero of intentionally withholding information supposedly necessary for this Court "to make an informed decision" . . . . These arguments merely are a tactical effort to obfuscate the issues, by attempting to jumble the specific misconduct before this Court with the virtually endless morass nonadmitted counsel has created in the discovery process. No doubt, as discussed in Plaintiff's Motion, nonadmitted counsel has created an intractable mess that cannot be fully resolved by a single ten page Motion. But that is no defense to his demonstrated misconduct.
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> Regarding the transcript of the Davis deposition, it is two hundred ninety-nine (299) pages. Our local rules impose a ten (10) page limit for Motions and a twenty-five (25) page limit for exhibits, which Plaintiff's counsel understands to be designed to require parties to present disputes in a succinct and manageable format. Plaintiff's Motion is Mescalero's best effort to do so, by providing the Court with examples of nonadmitted counsel's misconduct within these constraints. Admittedly, however, the whole transcript would illustrate the pattern of nonadmitted counsel's deposition misconduct far more effectively, and the Tribe would welcome the Court's review of the transcript in its entirety.

Reply in Support of the Motion to Revoke (filed June 6, 2006), pp. 3-4.

At the September 6, 2006 hearing on the Motion to Revoke, this Court agreed with the Leavitt Defendants' contention that the Court was obligated to consider the entire record. Accordingly, this Court decided to withhold judgment on the Motion to Revoke, and to invite an expansive motion to compel. The Court informed the parties about how the Court intended to proceed to resolve the revocation issue, and in particular stated:

- "Okay. You guys are going to play this game. All right. . . . This is what we're going to do, since you're going to do this. . . . I'll allow them to file a motion to compel. Every time I think that the objection is frivolous, there's going to be sanctions. And then – I mean, its going to take a lot of time to go through this motion to compel, but there will be sanctions, because I've read all this. And then I hear your response, which is unfortunate, I think." Transcript of Proceedings, p. 71, l. 6-23.

- "I wouldn't expect it from you, but apparently – and then I see the testimony of this witness and then I see this affidavit, and I see there is a change in testimony here. There is a change. . . . And I don't know if Mr. Crofton influenced that or not, yet. But I'll find out." *Id.*, p. 71, l. 25 through p. 72, l. 6.

- "Well, I'm not going to revoke Mr. Crofton now, but I want a motion to compel, because you're right; it is probably viewed more properly as a potential sanction, than as just an out-and-out motion. And the I've got to – before I know if that's appropriate, I have to see the motion to compel and see whether or not there were any other frivolous objections imposed in there." *Id.*, p. 76, l. 25 through p. 77, l. 6.

- "I'm just going to reserve any ruling on this until after I've had a chance to review the various objections through the motion to compel." *Id.*, p. 83, l. 18-23.

Given the Leavitt Defendants' insistence that this Court must consider the entire record in order to render "an informed decision" regarding the discovery misconduct, the Court necessarily granted both parties leave to exceed the otherwise applicable page limits. Accordingly, the Leavitts now get the Motion they wished for. Unfortunately, its resolution will require the Herculean judicial effort Mescalero had hoped would not be necessary.

III. BACKGROUND

This is a case about an admitted fraud. *See, e.g.* Motion to Revoke, pp. 1-2. Although the Leavitt Defendants contend that certain unspecified liability issues remain, their counsel admitted in open court on September 6, 2006, that "the main part of the case is about damages." *Id.*, p. 16, l. 1-3. *See also* April 3, 2006 letter from the Leavitt Group to the New Mexico Insurance Division, p. 2, attached as Exhibit 1 to the June 30, 2006 Affidavit of Michael L. Chidester ("While the Leavitt Group Defendants concede that the Tribe is entitled to some measure of damages, the parties dispute the appropriate amount of such damages").

Mescalero's complaint describes in detail how the Tribe was victimized by the defendants' decade-long fraudulent scheme. In response, Defendant Woodley's answer "asserts his privilege against self-incrimination guaranteed by the Constitution of the United States and

the Constitution of New Mexico" four dozen times. Moreover, the Leavitt Defendants' answer specifically admits, among other things, all of the following:

- "[T]hese defendants admit that Woodley betrayed plaintiff's trust by making certain misrepresentations and that he concealed those misrepresentations for a period of time." Answer of Defendants Leavitt Group of Albuquerque, Leavitt Group Enterprises, Kelly Russell, and Dane O. Leavitt (filed December 30, 2005), ¶ 15.

- "[T]hese defendants admit that Woodley altered, inflated or fabricated certain bidding information submitted by competitive bidders as part of an effort to persuade plaintiff to accept bids favored by Woodley." *Id.*, ¶ 19(c).

- "[T]hese defendants admit that LGE has acknowledged that there was an instance, involving a package of insurance coverages, in which Woodley placed coverage with a carrier other than the insurer from which Woodley had received the lowest aggregate quote on comparable coverage for the same period and risk." *Id.*, ¶ 20(c).

See also the Press Release attached as Exhibit 1 to the complaint (admitting that "the misrepresentations harmed clients by creating a false appearance of competition and service, and by unfairly guiding client choice").

When Mescalero subsequently obtained fairly priced insurance coverage from a legitimate broker, ***the Tribe saved in excess of $ 1.4 million dollars in one year.*** And while Mescalero has not yet calculated the compensatory damages to which it will be entitled at trial, the Tribe has reason to believe that ***compensatory damages for the 2004-2005 policy year alone likely will exceed $ 2 million.*** *See* Declaration of James R. Dunathan, ¶¶ 9 through 16 (attached as Exhibit 2 to the Complaint). Nevertheless, when the Tribe brought all this to the attention of the Leavitt Defendants, they insisted that the Tribe's ***total damages*** for the ***decade-long*** fraud supposedly were only ***a few hundred thousand dollars, at the most.*** *See* Exhibit 2 to Plaintiff's Audit Motion, pp. 4-5 (filed May 24, 2006). When Mescalero refused to be victimized again by the Leavitt Defendants' phony "audit" reaching this patently absurd conclusion, the Leavitts cutoff settlement discussions and invited the Tribe to sue. Accordingly, in order to obtain fair

compensation for the Tribal Members victimized by the defendants' fraud, the Mescalero Tribal Council was constrained to proceed with this lawsuit.

In sum, to put this case in perspective, Mescalero is the victim of a decade-long scheme to defraud, and Plaintiff has come to this Court to remedy the grievous financial injury inflicted upon the Tribe and each of its members by the defendants. This Motion will demonstrate that the Leavitt Defendants have resorted to every dirty trick in the book in a relentless effort both to corrupt the fact-finding process and to tie discovery up in knots. This Motion further will demonstrate that the Leavitt Defendants have rejected every opportunity to change course.

IV. THE DISCOVERY ABUSE

A. PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

After Mescalero's informal efforts to obtain reasonable compensation failed, Plaintiff's Complaint was filed on October 17, 2005. The Tribe simultaneously served Plaintiff Mescalero Apache Tribe's First Request for Production of Documents, Addressed to Defendant Leavitt Group Enterprises, Inc. (hereinafter "RFPs"). A copy of the RFPs with responses is attached hereto as Exhibit A. An extensive record exists of the parties' communications over the following year relating to the RFPs, which reflect Mescalero's exhaustive attempts to resolve or at least narrow the discovery disputes arising out of these RFPs without the assistance of the Court. Ultimately, the Tribe's efforts were fruitless.

The record of the parties' communications regarding the RFPs bears directly on Mescalero's request for sanctions, and the relevant communications are attached hereto collectively as Exhibit B. This entire ninety (90) page record, considered as a whole, most effectively supports the Tribe's request for sanctions regarding the Leavitt Defendants' responses to the RFPs. Accordingly, the Tribe respectfully requests that this Court review Exhibit B in its

entirety. That being said, what follows is Mescalero's best effort to provide the Court with as succinct and manageable a summary as possible.

1. Nonadmitted Counsel Promised Scrupulously Good Faith Discovery Responses, Without Boilderplate Objections, in Order to Induce Plaintiff to Agree To Multiple Extensions of Time.

LGE's response to the RFPs was due on or about December 2, 2005; *i.e.*, forty-five days after service of the RFPs with the Complaint. On November 3, 2005, Stephen E. Crofton, (nonadmitted counsel for the Leavitt Defendants) and Erin Higgins (Massachusetts counsel for Defendants' insurer) contacted Mescalero's counsel to seek extensions of time to respond. In that very first conversation Plaintiff's counsel emphasized that Mescalero intended to avoid any unnecessary delay in remedying Defendants' fraud. Accordingly, from the get-go Plaintiff's counsel made it abundantly clear that, while Mescalero was prepared to agree to reasonable extensions of time, the Tribe intended only to do so in a thoughtful manner following specific discussions demonstrating that the extensions reasonably were necessary. The Tribe's counsel added that (i) Mescalero did not intend to grant lengthy extensions to permit Defendants to serve blanket objections that could be prepared in hours rather than months, and (ii) Plaintiff's counsel did not want to be in the position of having to explain to the Tribal Council in 90 or 120 days why there has been no substantial progress in the case. *See, e.g.* Exhibit B, p. 17.

Nonadmitted counsel responded by giving assurances that he did not play those sorts of games, and that he could be trusted to act fairly throughout the process. On that basis, the Tribe granted LGE its first extension of time. *Id.* That conversation occurred more than a year ago.

Four days later, regarding requests for further extensions, Plaintiff's counsel again emphasized, "that the Tribe's only interest in this regard is to avoid undue delay," and "to keep this case on track toward a prompt resolution." Exhibit B, p. 1. Thereafter, counsel for

Defendants' insurer confirmed that Plaintiff's counsel "agreed to extend the time for the Cedar City defendants' [discovery] responses to December 9, 2005, with the understanding that you would be open at that time to a request . . . for a further short extension of time *to produce documents or provide substantive interrogatory answers.*" Exhibit B, p. 3 (emphasis added). That is; the Tribe did *not* grant a further extension of time to serve objections.

Four days before the extended deadline, nonadmitted counsel requested another extension of the deadline to respond to the RFPs. Mescalero's counsel responded as follows:

> *2.* Regarding scheduling, . . . we previously had agreed that the extensions in place should be sufficient. My client and I are concerned that the demands of your other cases mean that you apparently require an additional twenty-one days to respond to the discovery . . . . Again, we are trying to keep this case on track, and would prefer that your other work not take priority over this matter. Nevertheless (while emphasizing that the Tribe would like this case to be the scheduling priority in the future), ***I take it from your request that you truly need the additional time now, so the Tribe reluctantly agrees on the following conditions.*** First, that you will not request any further extensions of time to respond to the pending complaint and discovery. Second, that the extension on the complaint is to answer only . . . . And third, ***that your discovery responses will be consistent with what you described on the telephone as your intention. That is, that you will not be serving boilerplate objections, which could be prepared in a few hours and do not require two-and-one-half months to assemble. Rather, you intend to provide substantial discovery, including discovery regarding the audit, and that you intend to provide a privilege log or the substantial equivalent thereof in your discovery responses, to the extent that you decide to withhold any item(s) of discovery.***

Exhibit B, p. 4. Nonadmitted counsel secured the agreed-upon extension on these terms, stating: "***Your conditions (as stated in ¶ 2 below) for giving my clients an extension . . . are acceptable to me . . . .***" Exhibit B, p. 6 (emphasis added).

2. Nonadmitted Counsel Served RFP Responses That Failed To Comply With Our Discovery Rules, and That Breached Every One of His Promises.

Notwithstanding all of the above, nonadmitted counsel did exactly what he had assured the Tribe it could trust he would not do, in order to induce Plaintiff to agree to multiple extensions on false pretenses. That is, nonadmitted counsel served extensive boilerplate objections and refusals to provide discovery, without the privilege log or the substantial equivalent thereof nonadmitted counsel had promised would come with his responses. *See* Exhibit A (including 7 general objections spanning multiple pages, incorporated in each specific response, followed in each by a litany of additional boilerplate objections). Particularly in light of the Leavitt Defendants' insistence that the Court review the entire record in order to make an "informed decision," Mescalero respectfully requests that this Court review Exhibit A in its entirety. While the following excerpts are instructive, the entire exhibit best illustrates the gross inadequacy of the response under both our discovery Rules and nonadmitted counsel's promises.

In addition to attaching Exhibit A, Mescalero would like to emphasize the following notable examples of nonadmitted counsel's objections:

- Directly contrary to nonadmitted counsel's promises to provide "a privilege log or the substantial equivalent thereof in [his] discovery responses" and "discovery regarding the audit," his response even objected to providing a privilege log regarding the materials generated in the Leavitt Defendants' audit. Exhibit C, p. 2, General Objection 4 ("[t]he burden or expense of identifying and conducting a privilege review of all post-9/14/05 documents and listing them individually in a privilege log outweighs the likely benefits of the exercise"). *See also* Exhibit B, p. 16.

- Each and every specific response asserts that each and every RFP is objectionable as "vague," "ambiguous," "overbroad," and "unduly burdensome."

- General Object 2, specifically incorporated in each and every response, states: "To the extent that the Request is not limited to plaintiff and its affiliated entities but rather encompasses the entire 'audit' as defined in Request No. 1, the Request is unduly broad, calls for production of documents that are not relevant to any issue in

this case and are not reasonably calculated to lead to the discovery of admissible evidence, and is unduly burdensome and expensive. Many of the requested documents, or portions of the contents of those documents, that pertain to clients other than plaintiff and its affiliated entities are protected from disclosure under the relevant privacy provisions of state and federal law. Attempting to segregate or redact such protected documents or information from the entire population of documents encompassed by the Request would be unduly burdensome and expensive."

- General Objection 3, also specifically incorporated in each and every response, states: "Many of the requested documents, or portions of the contents of those documents, that pertain to clients other than plaintiff and its affiliated entities constitute confidential or proprietary business information of such a nature that disclosure to competitors of LGE would injury LGE and defendant Leavitt Group of Albuquerque, Inc. Attempting to segregate or redact such confidential or proprietary documents or information from the entire population of documents falling within the Request would be unduly burdensome and expensive."

- And General Objection 6, likewise specifically incorporated in each and every response, states: "LGE objects to the Request to the extent it exceeds the requirements imposed by applicable court rules."

Moreover, subsequent statements by the Leavitt Defendants further demonstrate that these responses both renege on nonadmitted counsel's promises and fail to comply with New Mexico discovery rules. For example:

- In a January 16, 2006 telephone conversation, confirmed by an e-mail that same day, nonadmitted counsel acknowledged that he had not yet provided any privilege log whatsoever, and promised to provide of a privilege log of the documents that he was ***aware*** had been withheld by the end of that week. He further stated that there were categories of documents that were the subject of objections that had not been reviewed, so that he was unable to commit at that time to a date for providing a complete privilege log. Exhibit B, p. 16. *See also* Exhibit B, p. 18. ***In the more than one year that has passed since, the Leavitt Defendants never have provided a supplemental privilege log regarding the documents that had not been reviewed as of January 16, 2006, notwithstanding nonadmitted counsel's promise that the functional equivalent of a privilege log would be served with the responses on December 30, 2005.*** *See* Exhibit B, pp. 4 and 6. Moreover, this is ***directly contrary to counsel's representations*** at the September 6, 2006 motions hearing that "All the documents we claimed were privileged, we listed on a privilege log. . . . Each document, Your Honor." Transcript, p. 18, l. 7-14.

- Nonadmitted counsel admitted in an April 29, 2006 letter that the Leavitt Defendants were withholding voluminous documents beyond those purportedly protected by the

attorney-client privilege and work product doctrine, stating: "With respect to the documents that have been withheld from production, ***most*** of the objections raised by LGA or LGE fall within three general categories: (A) that certain documents are protected under the attorney-client privilege and/or work product doctrine; (B) that the documents contain confidential information that LGA and LGE are contractually or statutorily prohibited from disclosing absent a court order;[2] and (C) that producing the documents would be unduly burdensome considering their relevance, value and other factors." Exhibit B, p. 47 (emphasis added). Again, this admission is contrary to the arguments of the Leavitt Defendants' counsel on September 6, 2006. *See, e.g.*, Transcript, p. 20, l. 13-15 ("That's why we're not trying to keep anything secret").

- In that same letter, nonadmitted counsel admitted to having withheld sixty (60) boxes of documents regarding the Leavitt Defendants' other victims, all of which are relevant and potentially admissible at trial to prove the pattern of racketeering activity alleged in Mescalero's complaint. *See* Exhibit B, p. 49. Mescalero estimates that these boxes contain between ***200,000 and 300,000 withheld documents***. Based on the Leavitt Defendants' "burdensomeness" objection, they have refused to redact these withheld documents or provide a privilege log.

3. Mescalero Made Every Conceivable Effort to Secure the Leavitts' Compliance with Our Ethical and Discovery Rules, But to No Avail.

Plaintiff's counsel cried foul in a January 9, 2006 e-mail, promptly upon receiving nonadmitted counsel's responses:

> I would like to speak with you at your earliest convenience regarding your clients' discovery responses. In my experience, our Courts frown upon broad general objections and lengthy boilerplate objections that leave a party scratching its head about what discovery actually exists, and what discovery specifically the responding party is producing, is agreeing to produce in the future, and is declining to produce. Your clients' objections, viewed as a whole, create a sort of "fun house" effect,

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[2] The Leavitt Defendants' claim that they are "contractually . . . prohibited" from producing fifty (50) boxes of documents is based on a contract they negotiated ***after they were on notice of this lawsuit***. Indeed, this self-serving contract became "effective December 1, 2005" (Exhibit B, p. 48); that is, ***one day before the original deadline for the Leavitt Defendants' RFP responses.*** Mescalero anticipates that the Leavitt Defendants' attempt to manufacture a confidentiality objection in the course of litigation will have been resolved in advance of the resolution of this Motion. Nevertheless, the assertion of that objection and the surrounding circumstances are another example of the Leavitt Defendants' discovery misconduct that should be taken into consideration when the Court determines the extent of the appropriate sanctions.

> obscuring the landscape of requested discovery from view and making it impossible for my client to know what exists, what it is getting, and what it is not. In order to work constructively toward hopefully completing the pending discovery amicably, I will need to be able to show my client transparent discovery responses that clearly and specifically demonstrate what exists, what we have received, and what is being refused. Then we can attempt to reach common ground on the discovery that is being refused, and failing that, seek the assistance of the court in resolving concrete disputes about particular, existing discovery items. . . .

Exhibit B, p. 8. In addition to relying upon the discovery Rules and New Mexico appellate authority regarding our liberal discovery practice, Plaintiff's counsel specifically reminded nonadmitted counsel of his prior promises, detailed above. *Id.*, p. 8-9. Plaintiff's counsel concluded by stating:

> My hope is that you will amend and supplement your clients' responses, so that we will have the transparency required to work through these issues, as described above.

Id., p. 9. ***To this date – more than a full year later – nonadmitted counsel has not served a single amended or supplemental discovery response. Indeed, nonadmitted counsel has never even deigned to acknowledge his discovery promises, let alone make the slightest belated effort to live up to them.***

On January 10, 2005, Plaintiff's counsel sent an e-mail to the Leavitt Defendants' New Mexico counsel, seeking his assistance to resolve the situation. Exhibit B, p. 12.[3] When there was no progress by January 21, 2006, Plaintiff's counsel sent an e-mail to nonadmitted counsel recounting the circumstances described above, and stating:

> I told you in our telephone conversation on the morning of January 16, 2006, that I was very concerned about whether the status of defendants' discovery efforts is consistent with the understandings that we had reached in our prior communications, and I confirmed in my e-mail that morning that I would review the matter in detail and then write with my specific concerns.
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> I since have gone back and reviewed my file, and I am disappointed to say that I consider the trust that you requested in our initial conversation to have been betrayed. This is particularly troubling under the circumstances, given both your clients' answer admitting that their agent betrayed the Tribe's trust in the events giving rise to this lawsuit, and your clients' repeated assurances of their high integrity and intention to treat the Tribe fairly. At this point, neither I nor my client consider these assurances to be credible. The resulting damage to our working relationship is unfortunate for everyone, to the extent that the parties would like to bring this dispute toward a just, speedy, and efficient conclusion.

Exhibit B, p. 17. Plaintiff's Counsel then concluded with the following:

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[3] The response from New Mexico counsel was that "Steve [Crofton] will be taking the lead on these issues for now." This was the first of many statements by the Leavitt Defendants and their counsel making it clear that – contrary to the image of Mr. Crofton sitting mutely at the September 6th hearing – nonadmitted counsel is in the driver's seat. Most recently, Mr. Crofton's local counsel rebuffed Mescalero's request for a meeting of New Mexico counsel *only*, in an attempt to resolve some of these issues reasonably, stating in pertinent part as follows: "Gregg, I am writing regarding your request to meet with me and Steve Vidmar. I can participate in a meeting, but do not want to meet without the participation of Mr Crofton. I don't think Steve Vidmar is necessary. . . . I feel that the client has selected Mr Crofton as lead counsel and me as local counsel and it would be wrong to try and by pass that relationship." Exhibit C, hereto, pp. 1 and 6 (including January 11,2 006 and October 6, 2006 e-mails).

> I would like to take the opportunity now to attempt to put this situation in a context that I hope will get you to see the situation and your ongoing discovery obligations in a different way.
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> This is a case about an admitted fraud. Your clients have conceded in their answer (1) that their agent "betrayed plaintiff's trust by making certain misrepresentations" (¶ 15), (2) "that he concealed those misrepresentations" (id.), (3) that their agent "made certain false representations to plaintiff that he had obtained a competing quote" (¶ 17), (4) that he did so "in order to create a heightened sense of trust and confidence by plaintiff in the quote recommended" (id), (5) that their agent "altered, inflated or fabricated certain bidding information submitted by competitive bidders as part of an effort to persuade plaintiff to accept bids" (¶ 19), (6) that he "created certain false documents that purported to reflect bidding information that in fact was altered, inflated and/or fabricated (id), (7) that their agent "admitted to LGE multiple instances of misrepresentation in handling plaintiff's account and a number of other Native American client accounts" (¶ 20), (8) that he "placed coverage with a carrier other than the insurer from which [he] had received the lowest aggregate quote" (id.), and (9) that their agent "falsely represented the existence of a competing quote, when in fact there was no such quote, thus creating a falsely-enhanced appearance of a competitive environment" (id). In addition, the agent asserted his Fifth Amendment right against self-incrimination in refusing to admit these facts. Moreover, had it not been for the Tribe's decision to hire a consultant to review its exorbitant insurance costs, it likely never would have uncovered the fraud at all.
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> Plainly, this is an extraordinarily unusual case, in which there is no dispute whatsoever that the Tribe is an innocent victim of wrongdoing. This is the last case in which defendants should be playing discovery games designed to delay and obstruct the information plaintiff needs to seek a just remedy. I trust that the Court would agree, if ultimately you force us to seek an order enforcing our discovery rights.

Exhibit B, p. 18.

That was more than one year ago. Mescalero has been banging its proverbial head against the wall ever since – both before and after the September 6, 2006 hearing on the Motion to Revoke – to attempt to obtain amended, transparent responses, consistent with what nonadmitted counsel promised the Tribe would receive by ***December 30, 2005***. *See* Exhibit B, pp. 21 through 90. But the Leavitt

Defendants steadfastly have refused. Moreover, notwithstanding the promise in each and every one of LGE's specific responses to RFPs 1 through 18 that it "will supplement" its responses "following completion of its aforementioned review of post-9/14/05 documents," the Leavitt Defendants never have done so.

The following is a chronology of the highlights of Mescalero's attempts to resolve this dispute between January 21, 2006, and May 3, 2006:

- On January 25, 2006, Mescalero's counsel wrote: "PLEASE KEEP IN MIND, AS I HAVE SAID BEFORE, THAT IN ADDITION TO DOCUMENTS THE TRIBE WILL NEED TRANSPARENT WRITTEN RESPONSES, UNOBSCURED BY OBJECTIONS, THAT IDENTIFY CLEARLY AND UNAMBIGUOUSLY WHAT RESPONSIVE DISCOVERY YOUR CLIENTS HAVE, WHAT HAS BEEN OR WILL BE PRODUCED, AND WHAT HAS BEEN WITHHELD. ACCORDINGLY, WHERE NO DOCUMENTS ARE BEING WITHHELD, WE REQUEST THAT ALL OBJECTIONS BE WITHDRAWN. I UNDERSTAND THAT PRIVILEGE LOGS WILL IDENTIFY THE DOCUMENTS THAT ARE BEING WITHHELD; AND WE REQUEST THAT THE RESPONSES BE AMENDED TO OBJECT ONLY ON THE BASIS THAT DEFENDANTS CLAIM SUPPORTS WITHHOLDING THE DOCUMENTS. FINALLY, I WOULD APPRECIATE HAVING THESE THINGS AS SOON AS POSSIBLE. THANK YOU." Exhibit B, p. 22.

- On February 1, 2006, Mescalero's counsel wrote: "We have not made any progress on some of the points discussed in [the above-quoted] exchange of e-mail. Please let's not allow any of these items to fall by the wayside." Exhibit B, p. 24.

- Nonadmitted counsel responded on February 5, 2006, and stated: "As to the last paragraph of your 1/25/06 e-mail, I think your request that various objections be withdrawn is unreasonable and unfounded. I see no reason to withdraw any of the objections." Exhibit B, p. 28.

- Mescalero's counsel persisted on February 6, 2006, stating: "The most significant step you can take at this point to bring transparency to your clients' discovery responses, putting aside your refusal to withdraw objections, is to serve amended responses specifically representing as to

each discovery request whether or not discovery has been withheld that has not been listed specifically in the privilege log." Exhibit B, p. 29.

- Notwithstanding all of the above, nonadmitted counsel continued to refuse to amend a single response. On April 6, 2006, Mescalero's counsel wrote an extensive e-mail recounting the circumstances and stating: "While it always is preferable for litigants to find a way to get the discovery accomplished without any substantial involvement of the Court, at this point the prospects of doing so appear to me to be dim. Nevertheless, this e-mail is intended to make a final attempt to secure your clients' compliance with their fundamental obligation to provide transparent discovery responses that disclose what is and what is not being withheld." Exhibit B, p. 32. This e-mail concluded with the following paragraph: "If you notify me within ten (10) days that defendants intend to comply with this request, but that you need an extension of time in which to prepare the amended responses, I would be willing to discuss a reasonable extension. Otherwise, as one step toward breaking the discovery logjam that has prevented any real progress in this litigation, the Tribe promptly will move the Court for an order compelling your clients to serve amended responses providing the requisite disclosures." Exhibit B, pp. 32-33. Mescalero respectfully requests that this Court review this April 6th e-mail in its entirety.

- Twelve days later, in what turned out to be another broken promise, nonadmitted counsel wrote: "We are also working on supplementing previous discovery responses. I anticipate providing the supplement to you next week." Exhibit B, p. 39.

- Later that day, on April 18, 2006, Mescalero's counsel wrote: "I will wait to see your supplemental responses as the next step, assuming they come at or around the time promised. It is unfortunate that it took so long for you to relent and agree to provide them, only upon the threat of an imminent motion. Hopefully they will be more than just a tactical effort to delay the motion, and will provide the transparency we have been requesting for months. Time will tell. If not, we certainly will point that out to the Court. . . . While the Tribe is giving your clients one last opportunity to provide real, tranparent discovery responses in the dimming hope of moving things forward without Court involvement, we will not engage in an endless and fruitless dialogue either. If called for by the amended reponses, the Tribe will file its motion to compel without further notice (rather than spending two more months debating), so please give us your best, last voluntary effort this time." Exhibit B, p. 39.

- Nothing came within a week, and Mescalero's counsel sent a follow-up e-mail on April 28, 2006, in response to which nonadmitted counsel stated: "I prepared a draft of the supplement and provided it to my clients, who

indicated they will review it and get back to me today or over the weekend." Exhibit B, pp. 41 and 43.

- On April 29, 2006, rather than the promised supplemental responses, nonadmitted counsel sent a nine (9) page letter, the first page of which included the following sentences: "Your e-mail suggests that the objections raised to certain requests are not well-grounded and that the original responses were not sufficiently 'transparent' with regard to documents which may be responsive but which were withheld from production pursuant to the objections that were asserted." "I believe that the responses, including objections, to defendants' [sic] document requests were appropriately and adequately stated." "This letter supplements, and incorporates by reference, my numerous previous communications to you regarding plaintiff's document requests." It then proceeds to provide a long and elaborate defense of his responses, as well as various informal assurances about the responses. Exhibit B, pp. 45-54.

- That same day, Mescalero's counsel responded in pertinent part as follows: "You again have provided a long letter purporting to justify your discovery positions and to criticize the Tribe's, and yet again you have not provided the amended responses we repeatedly requested and you ultimately promised. As you know, this is not the first time you have failed to keep your word. While that means it no longer is a surprise, it nonetheless is disappointing. The Tribe is entitled to formal responses that comply with the Rules, and for which we can hold your clients accountable. After making far more efforts than are required by the Rules, we still do not have responses that comply with the Rules. Therefore, we will analyze your communications, attempt to determine the extent to which they may possibly narrow the areas of dispute, and thereafter seek the assistance of the Court to obtain the discovery to which the Tribe is entitled." Exhibit B, p. 55.

- On May 3, 2006, nonadmitted counsel responded as follows: "I disagree with the assertions in your first paragraph. As to your second paragraph, I believe my clients have complied with the applicable court rules. I do not understand your basis for asserting that the responses are not in compliance with those rules. You seem to be trying to elevate form over substance." Exhibit B, p. 57.

Mescalero's Motion to Revoke and first motion to compel followed later that month. Notwithstanding all of the above, the Leavitt Defendants' local counsel made the following representations at the September 6, 2006 motions hearing:

- "We see this as a case where all of the underlying documents, all of the insurance files, everything that LGE and LGA had regarding the Mescalero Apache Tribe, has been turned over to them . . . ." Transcript, p. 16, l. 3 through 6.

- "The documents that are relevant documents that regard the handling of the insurance matters for the tribe, every one of those documents has been turned over, without exception." *Id.*, l. 13 through 17.

- "All the documents we claimed were privileged, we listed on a privilege log." Transcript, p. 18, l. 7 through 9. And in response to the Court's request that the Leavitt Defendants' counsel confirm this representation, counsel stated: "Each document, Your Honor." *Id.*, l. 14.

- In response to the Court's question about regular audits, the Leavitt Defendants' counsel said: "That's not what we're talking about here. If there were such regular audits, we turned that over." *Id.*, p. 20, l. 5 through 7.

- "Every document that the audit team reviewed, every file regarding the Mescalero packages, has been turned over." *Id.*, l. 13 through 15.

- "That's why we're not trying to keep anything secret." *Id.*, l. 20 through 21.

Following the September 6th hearing, in light of these representations and the Court's stern warning about sanctions, Mescalero's counsel turned again to the Leavitt Defendants' New Mexico counsel to attempt to put discovery back on the track required by New Mexico's ethical and discovery rules. On September 28, 2006, the Tribe's counsel wrote a long letter recapping much of the history discussed above, and proposing a resolution that included amended, transparent discovery responses. Exhibit B, pp. 58-63. In light of the substantial delays resulting from the Tribe's previous attempts to work out discovery issues amicably, this letter requested an answer "as soon as possible." *Id.*, p. 63. The transcript of the hearing then became available, and Mescalero's counsel sent a follow-up e-mail on October 8, 2006, which pointed out counsel's representations at the hearing and stated:

> I think, once you review the items referenced in my September 28th letter, it will be beyond obvious to you that the discovery responses prepared by Mr. Crofton and relentlessly defended by him are at odds with your broad representations to the Court, which repeatedly sent the unequivocal message

> that -- in all respects other than the work product objection -- your clients are "not trying to keep anything secret." My client's proposal gives your clients one final opportunity to live up to a standard of discovery conduct consistent with your representations, and to move forward in accordance with the Rules. I would appreciate your clients' answer within twenty days, so that Tribe can press forward with the motion invited by the Court, if it is necessary to do so.

Exhibit B, pp. 66-67.

On October 9, 2006, the Leavitt Defendants' local counsel agreed to respond within twenty (20) days (Exhibit B, p. 68), Mescalero's counsel followed up when there was no response by November 2, 2006 (Exhibit B, p. 71), and the Leavitt Defendants' counsel apologized and said "I cannot say when that response will be and now know better than to make promises I cannot keep" (Exhibit B, p. 74). Then in a November 8, 2006 e-mail, Mescalero's counsel followed-up again, and the Tribe respectfully requests that the Court read this e-mail in its entirety. Exhibit B, p. 80. This e-mail requested a yes or no to the proposal by November 13, 2006, and included the following passage:

> To make certain that there is no room for misunderstanding, I would like to raise another point that is based on my experience with Mr. Crofton, and be explicit about my client's intentions if history were to repeat itself. Under similar circumstances in the past, Mr. Crofton has dragged his feet as long as possible, and then upon the threat of an imminent motion he has sought more time for what proved to be more fruitless dialogue. This time, in the event that our proposal is not accepted by November 13th, we would consider unavoidable the conclusion that your clients have no interest in moving the case forward amicably. It then would be naive of us to keep playing the role of Charlie Brown trying to kick the football, while your clients perfect the role of Lucy. Instead, without wasting time on further fruitless discussions, my instructions at that point would be to devote my time and my client's resources solely and unwaveringly to the formal process required to resolve all these issues in Court.

Finally, on November 13, 2006, the Leavitt Defendants responded to Mescalero's September 28, 2006 letter. Exhibit B, pp. 85-89. This belated response rejected Mescalero's proposal, did not include a single supplemental or amended response, and continued vigorously

to defend all of the above-described discovery misconduct. But in true Lucy-like fashion, the Leavitt Defendants did offer to keep talking about the issues.[4]

4. The Application of New Mexico' Ethical and Discovery Rules.

Our Supreme Court repeatedly has emphasized the importance of ethics and professionalism to the proper functioning of our system of justice. Most recently, in *In re Estrada*, 2006-NMSC-047, 143 P.3d 731, 743 (2006), the Supreme Court once again explained:

> As we stated in *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 169, 629 P.2d 231, 245 (1980), in construing our discovery rules, "we must begin with the notion that discovery is designed to 'make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Id.* (quoted authority omitted). Thus, when attorneys do not comply with the rules of discovery, rather than engaging in zealous advocacy for their clients, they are violating their professional obligations to the system of justice itself.

Simultaneously herewith, Mescalero is delivering a copy of *In re Estrada* to the Court.

The following additional passages from the *Estrada* decision likewise are particularly instructive here:

> Rule 16-304 addresses the issue of an attorney's duty to be fair to the opposing party and opposing counsel . . . , which specifically states that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." In addition, Rule 16-304(D) . . . states that a lawyer shall not "in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." . . . .
>
> As the ABA observes, "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively

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[4] Notwithstanding all of these communications, including the Leavitt Defendants' foot-dragging, and their counsel's apologies, the Leavitts still had the audacity to file papers chiding the Tribe for not filing this Motion more promptly after the September 6, 2006 hearing. *See* pending Response to Plaintiff's Motion for Appointment of Special Master, p. 4.

> by the contending parties. *Model Rules of Prof'l Conduct* cmt. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." *Model Rules of Prof'l Conduct* R. 3.4 (2003). Courts in other jurisdictions have held that concealing documents with potential evidentiary value violates ethical rules. *See, e.g., Briggs v. McWeeny,* 260 Conn. 296, 796 A.2d 516, 535-40 (2002) (holding that attorney who failed to disclose an engineering report with potential evidentiary value violated the state's rules of professional conduct); *Miss. Bar v. Land,* 653 So.2d 899, 900-01 (Miss.1994) (concluding that attorney's concealing of evidence of cause of injury in responding to interrogatories was a violation of the rules).

Id. at 742.

The *Estrada* Court warned that it is impermissible for an attorney to place his or her "duty toward the New Mexico judiciary and the administration of justice in a subordinate position to the desires of [the] client to succeed in litigation. It should be clear to the Members of the New Mexico Bar and those who provide or offer to provide legal services here, that such conduct will not be tolerated." *Id.* at 741.

Finally, the *Estrada* Court explained that the involvement of out-of-state counsel does not change these principles. With regard to nonadmitted counsel, the Court stated:

> [W]hile we have no authority to impose requirements on attorneys who are neither licensed to practice law in this state nor providing legal services here, *see* Rule 16-805 NMRA, we emphasize that when lawyers are licensed to practice here or providing legal services in this jurisdiction, they are subject to our rules and will be held responsible for actions they take in violation of those rules.

Id. at 744. And with regard to New Mexico counsel, the Court warned:

> [W]hen New Mexico attorneys must confer with out-of-state counsel for corporate clients involved in litigation in New Mexico. . . , attorneys licensed to practice in New Mexico have an independent duty to the New Mexico judiciary to obey New Mexico's ethical and discovery rules, regardless of the opinion of out-of-state counsel.

Id. at 735.

As demonstrated above, nonadmitted counsel (a) served abusive written discovery responses that violated New Mexico's ethical and discovery rules as well as his explicit promises, (b) he stubbornly refused to serve amended responses, and (c) he engaged in repeated duplicitous conduct in relentlessly defending his positions. His local counsel then misrepresented the circumstances to the Court, and defended the misconduct throughout Mescalero's attempt to secure compliance with the Rules. This conduct would be acceptable only if the rule in New Mexico Courts were "all's fair in litigation." Our Supreme Court has made clear in no uncertain terms, however, that a far different standard applies.

Accordingly, with the exception of the attorney-client privilege and work product objections, which are being addressed separately, Mescalero respectfully requests that this Court overrule all of the Leavitt' objections, and order that within thirty (30) days the Leavitt Defendants serve amended responses and produce all documents withheld based on any such objections. In addition, at the conclusion of this Motion, Mescalero also will request sanctions for this and for the other misconduct demonstrated below.

B. NONADMITTED COUNSEL'S MISCONDUCT AT THE DAVIS DEPOSITION

1. Subornation of Perjury

Mescalero's Motion to Revoke presented evidence of subornation of perjury that the Court considered inconclusive. September 6, 2006 Transcript of Proceedings, p. 71, l. 25 through p. 72, l. 6. Simultaneously herewith, the Tribe is delivering to the Court a copy of the two-volume transcript of the Deposition of Tawnya J. Davis (February 15-16, 2006) (hereinafter "Davis Transcript"). Mescalero believes that this transcript as a whole demonstrates exactly what nonadmitted counsel was doing, and that it adequately supports the conclusion that he suborned perjury. If this Court considers the transcript on its face to be inconclusive, the Tribe

respectfully requests that the Court refer the matter to the appropriate authorities for further investigation.

2. The Entirety of the Davis Deposition Transcript Demonstrates that Nonadmitted Counsel's Pervasive Obstructive Conduct is Sanctionable.

The two-volume Davis Transcript unambiguously demonstrates that nonadmitted counsel frustrated the truth-seeking process by pervasive obstructive conduct, including speaking objections to coach the witness, incessant attempted dialogue with deposing counsel to derail the questioning, and countless frivolous objections. Accordingly, Mescalero respectfully requests that this Court review the transcript in its entirety, and overrule all objections other than those based on attorney-client privilege and the work product doctrine, which are being addressed separately. Again, Mescalero also will request sanctions at the conclusion of this Motion based on the entirety of the discovery abuse in this case.

Our Supreme Court recently cited South Carolina's disciplinary jurisprudence with approval in construing our own ethical rules. *In re Estrada*, 2006-NMSC-047, 143 F.3d 731, 740 (2006). Accordingly, the Supreme Court of South Carolina's treatment of analogous (albeit less egregious) deposition abuse is instructive. *In re Anonymous Member of South Carolina Bar*, 552 S.E.2d 10 (2001). Simultaneously herewith, Mescalero is delivering a copy of the *South Carolina Bar* case to the Court. The following passages from this case apply precisely to the case at bar:

> "The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Alford Chevrolet-Geo,* 997 S.W.2d 173, 180 (Tex.1999). The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. *Samples v. Mitchell,* 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1997). In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the

> fullest practicable extent." *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986-87, 2 L.Ed.2d 1077 (1958).
>
> Depositions are widely recognized as one of the "most powerful and productive" devices used in discovery. *See* A. Darby Dickerson, *The Law and Ethics of Civil Depositions,* 57 Md. L.Rev. 273, 277 (1998). Since depositions are so important in litigation, attorneys face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys. Claiming that any such improper behavior was merely "zealous advocacy" will not justify discovery abuse. When attorneys cross the line during a deposition, their actions do not promote the "just, speedy, and inexpensive determination of every action." *See* Rule 1, SCRCP.
>
> Actions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions. In South Carolina, our judges have broad discretion in addressing misbehavior during depositions. *See* Rule 37, SCRCP. In addition to their traditional contempt powers, judges may issue orders as a sanction for improper deposition conduct: (1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees. *Id.* Among the costs a judge may deem appropriate could be those incurred for future judicial monitoring of depositions or payment for the retaking of depositions. Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.

Id. at 18.

The *South Carolina Bar* case explicitly relied upon "Judge Robert S. Gawthrop's seminal opinion in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D.Pa. 1993)." Mescalero is delivering a copy of this decision to the Court as well. As the *Hall* case states (*id.* at 528):

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did--what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness

> comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness--not the lawyer--who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.

But in this case, rather than accept the facts as they developed, nonadmitted counsel tried to play the role of ventriloquist, and he turned Ms. Davis into a "a parody of Charlie McCarthy." Our Courts simply cannot tolerate that sort of corruption of the truth-finding process. As the *Hall* Court warned (*id.* at 531):

> Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.

3. Although Review of the Entirety of the Transcript is Necessary to Appreciate Nonadmitted Counsel's Complete Obstruction of the Truth-Finding Process, Individual Examples are Illustrative.

This Court determined on September 6, 2006, that the objection appearing on page 43, l. 22 through page 44, l. 1 of the Davis transcript was frivolous. The Tribe hereby respectfully incorporates the prior proceedings regarding that objection herein by reference.

Mescalero next respectfully draws this Court's attention to page 16, l. 10, through page 20, line 5. As the transcript reflects, deposing counsel asked questions calculated to identify potential witnesses, and nonadmitted counsel obstructed the attempt to ask what should have been a few brief questions for a full five transcript pages. The objections were frivolous, and served no purpose other than to harass the questioner, spook the witness, and impede the discovery process. *See Hall*, 150 F.R.D. at 530 ("objections and colloquy by lawyers tend to

disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony. . . . As for those few objections that would be waived if not made immediately, they should be stated pithily"); Advisory Committee Note to Fed. R. Civ. Pro. 30 (1993 amendment) ("Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the witness should respond. . . . The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct").

Ultimately, after five pages of wrangling, the witness claimed lack of knowledge. Page 20, l. 2-5. Whether the witness truly did not know, or just got the message from nonadmitted counsel that she should not say, will remain a mystery to Mescalero and this Court. What is certain is that deposing counsel was forced to persist through five pages of coaching and heckling, and swallow the accompanying waste of time, before finally securing a simple: "I don't know."

Mescalero further respectfully draws the Court's attention to the following additional examples of nonadmitted counsel's deposition misconduct:

On page 69, l. 24 through page 74, l. 22, deposing counsel asked the witness if she understood what Dane Leavitt was apologizing for in his September 29, 2005 letter to Mescalero's President. The question was simply: "Do you understand what Dane Leavitt was apologizing about?" Page 69, l. 24-25. Deposing counsel was required to persist through six pages of interference to get the answer "Yes" to this question, and the answer "No" to one follow-up question. Again, whether these answers were corrupted by nonadmitted counsel's obstructive conduct is an unknown.

On page 78, l. 1 through page 81, l. 16, the transcript reflects nonadmitted counsel's obstruction of questioning seeking discovery regarding the change from Ms. Davis's prior

testimony. Nonadmitted counsel's objections to these questions likewise were frivolous, and they plainly were calculated to obstruct deposing counsel's effort to expose nonadmitted counsel's witness tampering.

On page 90, l. 21 through page 94, l. 5, deposing counsel was forced to persist through five pages of heckling and obstruction by nonadmitted counsel to obtain answers to a few simple questions about comments the witness observed and the witness's understanding of events. At the conclusion of these transcript pages, nonadmitted counsel went so far as to instruct the witness not to answer the question: "As you sit here today, do you have some understanding about what [Dane Leavitt] was talking about [when he said something to the effect that 'Sometimes you get lucky']?" Although the comment was made in a meeting with Mescalero, nonadmitted counsel nevertheless relied for his instruction on the contention that the question purportedly "encompasse[d] attorney-client privilege and work product." Page 93, l. 8 through page 94, l. 5.

On page 96, l. 12 through page 99, line 15, deposing counsel again asked questions designed to identify potential witnesses. Again, nonadmitted counsel obstructed the questioning and interposed frivolous objections.

On page 100, l. 6-7, deposing counsel asked: "Do you feel any pressure from any source whatsoever about what you might say at this deposition?" Nonadmitted counsel asserted a frivolous objection, which led to the witness asking that the question be rephrased, ***even though she understood the question.*** Page 96, l. 8 through 19.

Beginning on page 112, l. 3 and ending on page 122, l. 2, deposing counsel posed a series of questions relating directly to damages. Nonadmitted counsel relentlessly attempted to obstruct this questioning with frivolous objections, commentary, and witness coaching.

On page 126, l. 16 through page 130, l. 1, deposing counsel asked questions concerning documents relevant to damages and the Leavitt Defendants' knowledge. Again, nonadmitted counsel repeatedly interrupted the testimony and interposed frivolous objections.

In part because nonadmitted counsel repeatedly objected to questions as being vague, ambiguous, and lacking foundation, at times deposing counsel found it useful to begin a line of questioning by drawing the witness's attention to particular language in a document. When deposing counsel did so, nonadmitted counsel used that as an alternative basis to obstruct the questioning. The following excerpt from page 132, l. 9-17 provides the Court with one example of this misconduct:

> Q That page lists the $ 232,876 number as a quote by Hudson Insurance Company for Mescalero Forest Products; correct?
>
> MR. CROFTON: Object to the form. The document speaks for itself.
>
> THE WITNESS: As it appears on this –
>
> MR. CROFTON: It calls for speculation.
>
> THE WITNESS: Yeah. As it appears on this, it appears that would be my speculation.

From page 133, l. 19 through page 136, l. 18, deposing counsel again attempted to question the witness regarding matters directly relevant to damages. Again, nonadmitted counsel interposes frivolous objections and obstructs the testimony. The same is true on page 144, l. 18 through page 147, l. 7.

On page 148, l. 16 through page 152, l. 14, nonadmitted counsel wasted time and transcript pages attempting to limit the second day of the deposition to three hours, notwithstanding the fact that the scheduling of the deposition had been changed at defense counsel's request and exhaustively negotiated to accommodate defense counsel's schedules. The

next day, nonadmitted counsel partially backed down on this issue, but only after this further effort at obstruction.

On page 175, l. 23 through page 177, l. 2, nonadmitted counsel even asserted frivolous objections and obstructed basic questioning regarding the witness's educational background.

On page 188, l. 5 through page 190, l. 6, nonadmitted counsel asserted frivolous objections and obstructed testimony regarding the witness's expertise and job experience.

On page 192, l. 5 through page 194, l. 23, nonadmitted counsel asserted frivolous objections regarding Defendant Leavitt Group's (her employer's) structure.

On page 199, l. 18 through page 202, l. 13, nonadmitted counsel asserted frivolous objections and obstructed discovery regarding the existence of documents.

On page 203, l. 19 through page 204, l. 24, nonadmitted counsel asserted frivolous objections to foundational questions relevant to whether certain documents would fall within the business records exception to the hearsay rule.

On page 210, l. 18 through page 218, l. 20, nonadmitted counsel repeatedly asserted frivolous objections and obstructed testimony directly related to damages.

On page 253, l. 9 through page 254, l. 5, nonadmitted counsel asserted and persisted in frivolous objections to the question: "Is it your understanding that internal auditors should develop and record a plan for engagement, including the scope, objectives, timing, and resource allocation for the engagement?" In addition to other objections, nonadmitted counsel insisted that his "lacking foundation" objection is proper to this question, which simply asked for the auditor/witness's understanding.

On page 257, l. 17 through page 259, l. 21, nonadmitted counsel again asserted frivolous objections to questions seeking to identify the existence of documents.

On page 259, l. 22 through page 260, l. 22 and page 262, l. 2 through 264, l. 2, nonadmitted counsel asserted frivolous objections to questions concerning commissions.

On page 271, l. 21 through page 274, l. 8, nonadmitted counsel asserted frivolous objections and obstructed testimony regarding the auditor/witness's role at Defendant Leavitt Group, and her previously undisclosed family connections to Defendant Dane Leavitt and others in the ownership and management of Defendant Leavitt Group Enterprises, Inc.

From page 277, l. 5 through page 297, l. 25, in questioning directly relevant to the issues in this case, nonadmitted counsel relentlessly obstructed the testimony and asserted more than two dozen frivolous objections.

These are only selected examples of the frivolous objections and obstructive conduct. The transcript reflects many more. And notwithstanding all of the above, incredibly, the Leavitt Defendants' final response to Mescalero's exhaustive efforts to resolve these issues amicably states in pertinent part as follows:

> I have reviewed the transcript of the deposition of Tawnya Davis and believe that all of the objections are defensible. . . . We recognize that Judge Baca's preliminary reaction was skepticism about some of the objections, but having reviewed the transcript, I believe that if specific objections were fully briefed and argued so that Judge Baca would have all of the relevant facts before him, he would conclude that the objections were not improper and that no sanctions should be awarded.

Exhibit B, p. 87. Notwithstanding the prediction of the Leavitt Defendants' counsel, however, Mescalero respectfully requests that the Court conclude that each and every one of these objections was frivolous.

V. SANCTIONS

There can be no serious doubt that the New Mexico Supreme Court – the Court that decided *In re Estrada* – would consider the witness tampering and relentless pattern of discovery

abuse catalogued above to be appalling. There also can be no serious doubt that our Supreme Court would consider the imposition of severe sanctions absolutely necessary to protect "the system of justice itself." *In re Estrada*, 2006-NMSC-047, 143 P.3d 731, 743 (2006). In the first instance, that unpleasant task falls to this Court. The extreme misconduct of the Leavitt Defendants and their counsel, coupled with their complete intransigence, has left this Court with no other choice.

Our Supreme Court repeatedly has warned: "We emphasize that '[w]hen a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants.' *United Nuclear,* 96 N.M. at 241, 629 P.2d at 317." *Medina v. Foundation Reserve Insurance Company, Inc.*, 117 N.M. 163, 167 (1994). Moreover, the seminal New Mexico case on discovery misconduct announced more than twenty-five (25) years ago that such sanctions are essential to the protection of nothing less than "the integrity of the truth-seeking function of the trial court." *United Nuclear Corporation v. General Atomic Company*, 96 N.M. 155, 238 (1980), *appeal dismissed and cert. denied*, 451 U.S. 901 (1981).

The New Mexico Supreme Court likewise repeatedly has cautioned that "an abuse of the discovery process affects more than private litigants. It also affects the integrity of the court and, when left unchecked, would encourage future abuses. 'Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.' *United Nuclear,* 96 N.M. at 241, 629 P.2d at 317." *Gonzalez v. Surgidev Corporation,* 120 N.M. 151, 157 (1995). And in language directly applicable to the case at bar, the *United Nuclear* Court counseled (96 N.M. at 239) that "in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh

sanctions where, as in this case, they are clearly warranted." *See also Lewis v. Samson*, 2001-NMSC-035, 131 N.M. 317 (2001).

In accordance with this authority, to address all of this misconduct, Mescalero respectfully requests the following sanctions:

1. An award of all costs and attorney fees incurred by Mescalero in this matter from January 9, 2006, through the date of this Court's Sanctions Order. While Mescalero concedes that it would have incurred some costs and fees to get to this point in the litigation even absent the misconduct, there has been very little progress in this case and the lion's share of the costs and fees during this time period were necessitated by the misconduct. Accordingly, to the extent that a small portion of this sanction may amount to windfall to Plaintiff, it nevertheless appropriately punishes the Leavitt Defendants and their counsel for this gross misconduct.

2. In the event that this Court does appoint a special master, an Order that the Leavitt Defendants must bear 100% of the cost of the special master, which was necessitated by the misconduct of the Leavitt Defendants and their counsel.

3. An Order compelling the Leavitt Defendants, upon reasonable notice, to produce Tawnya Davis in Albuquerque for the resumption of her deposition, at their expense.

4. With regard to each additional witness who is an employee, officer, or agent of the Leavitt Defendants, an Order compelling the Leavitt Defendants, upon reasonable notice, to produce each such witness for his or her deposition in Albuquerque, at their expense.

5. An Order revoking the privilege of nonadmitted counsel to practice law in New Mexico, pursuant to Rule 1-089.1 NMRA 2006.

6. Such other and further relief as this Court may deem appropriate.

VI. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Plaintiff Mescalero Apache Tribe respectfully requests that this Court grant the Tribe's Omnibus Motion to Compel Discovery and for Sanctions.

Respectfully submitted,

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