Mark Tratos, Esq. (NV Bar No. 1086)
Donald L. Prunty, Esq. (NV Bar No. 8230)
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792 3773
Facsimile: (702) 792 9002
Email: TratosM@gtlaw.com, PruntyD@gtlaw.com

Troy A. Eid, Esq. (CO Bar No. 21164)
Robert S. Thompson IV, Esq. (CO Bar No. 90894)
GREENBERG TRAURIG, LLP
1200 17th Street
Suite 2400
Denver, Colorado, 80202
Telephone: (303) 572 6500
Facsimile: (303) 572 6540
Email: EidT@gtlaw.com, ThompsonRo@gtlaw.com

*Counsel for GRAND CANYON SKYWALK DEVELOPMENT, LLC*

**IN THE HUALAPAI TRIBAL COURT**
**HUALAPAI RESERVATION, STATE OF ARIZONA**

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| GRAND CANYON SKYWALK DEVELOPMENT LLC, a Nevada limited Liability company,<br>Plaintiff<br><br>VS.<br><br>'SA' NYU WA, INC, a Hualapai Indian Tribally-chartered corporation,<br>Defendant. | **CASE NO. 2011-CV-006** |

**PLAINTIFF GRAND CANYON SKYWALK DEVELOPMENT LLC'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE**

On June 14, 2011 Defendant 'Sa' Nyu Wa, Inc. ("SNW") filed an untimely Motion To Dismiss With Prejudice ("Motion") asking this Court to dismiss Grand Canyon Skywalk

Development LLC's ("GCSD") February 25, 2011 Complaint seeking to compel SNW to arbitration. Because SNW's Motion is out of time under Hualapai law, this Court should deny it. SNW's Motion is also substantively infirm. In its Motion, SNW argues that this Court does not have the authority to compel SNW to attend mandatory and binding arbitration because SNW's contractual "limited waiver of sovereign immunity . . . does not include an action in the Hualapai Tribal Court." Motion at 4. SNW makes this sweeping assertion without citation or reference to any specific provision of the 2003 Development and Management Agreement ("2003 Agreement")[1] between GCSD and SNW.

The fact that SNW's argument is wholly without supporting reference to the 2003 Agreement is not surprising because the 2003 Agreement and prevailing law make clear that GCSD's action in this Court is entirely appropriate. Contrary to SNW's implied arguments, there are no "magic words" missing but required for this Court to be able to enforce the mandatory arbitration provisions of the 2003 Agreement. Indeed, GCSD maintains that (i) this Court is one of general jurisdiction readily available to order SNW to arbitration; and (ii) neither the Hualapai Constitution nor the 2003 Agreement restrict this Court's ability to hear this case. On those grounds, GCSD submits this Response in Opposition to SNW's Motion per the Court's June 14, 2011 direction.

## PROCEDURAL BACKGROUND

On February 25, 2011, GCSD filed the Compliant with this Court to compel SNW to attend mandatory and binding arbitration pursuant to the 2003 Agreement, Section 15.4. SNW filed an Answer to the Complaint on April 1, 2011. The Court ordered that an Initial Pre-Trial Hearing occur on April 8, 2011. GCSD requested that the Initial Pre-Trial Hearing be extended until April 15, 2011 so that the Court and GCSD would have the time necessary to review

[1] Attached as Exhibit 1 to GCSD's February 25, 2011 Complaint, excerpts attached hereto as Exhibit 1.

SNW's Answer. In turn, SNW subsequently requested that the Initial Pre-Trial Hearing be delayed until May 2011.[2] GCSD opposed SNW's request. On April 13, 2011 the Court granted SNW's Motion to Vacate the Initial Pre-Trial Hearing date and rescheduled the Initial Pre-Trial Hearing for May 27, 2011.

The parties appeared before this Court on May 27, 2011. The Court then issued an Order requiring the parties to disclose information by June 10, 2011 and to meet in person on June 13-14, 2011. On June 10, 2011, GCSD, for the second time in roughly one year, turned over in excess of 25,000 documents to SNW. In return, SNW turned over three relevant pages to GCSD. The parties failed to meet on June 13-14, 2011 because the parties could not agree to compromise on the location of the proposed meetings.

On June 14, 2011 at a prescheduled and ordered status conference, counsel for GCSD appeared in person before this Court to update the Court regarding the document production and the failed attempts to meet with SNW. Also on June 14, 2011, just hours before the scheduled status conference, SNW filed its Motion to Dismiss. During the June 14, 2011 status conference, the Court ordered that the parties engage in further discovery, meet in Kingman and Peach Springs on June 27-28, 2011, and ordered the briefing schedule for the parties.[3]

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[2] When asking this Court to delay the Initial Pre-Trial Hearing, SNW claimed that such a delay was needed so that Hualapai community members could plan ahead and attend the hearing. SNW's April 7, 2011 Motion to Vacate Oral Argument Scheduled For April 15, 2011 at 11:30 A.M., pp. 2-3. But on the day of the hearing, no community involvement obtained; the only non-lawyers present were one Tribal Council member, two non-Indians from an outside public relations firm retained by SNW, two Navajo individuals attending out of personal interest, and a court reporter and his guest.

[3] During the June 14, 2011 status conference, the Court also reiterated its Order that the Hualapai Tribal Court has jurisdiction to hear this dispute and determine whether the parties should attend mandatory and binding arbitration. Exhibit 2, Excerpts of Transcript of June 14 proceedings at 22:4-6; 29:13-14.

## ARGUMENT

### I. THE COURT SHOULD DENY SNW'S MOTION BECAUSE IT WAS NOT TIMELY FILED UNDER CHAPTER 4 OF THE HUALAPAI LEGAL CODE.

SNW's Motion should be denied because it is untimely. GCSD's complaint was filed February 25, 2011 and served on March 8, 2011. *See* Civil Summons and Notice for Hearing (Amended) dated March 8, 2011. Chapter 4 of the Hualapai Law and Order Code ("Hualapai Code") allows a defendant to file a written response to a complaint, but requires that any such written response be made within thirty days of service of the complaint. Hualapai Code, Sec. 4.6. SNW did not file its Motion until June 14, 2011, more than 90 days after service of the Complaint. It is irrefutably untimely.

SNW timely filed its written Answer to GCSD's Complaint on April 1, 2011. In its Answer, SNW repeatedly averred that the 2003 Agreement restricted any effort to compel arbitration pursuant to the 2003 Agreement to federal court. Answer, ¶¶ 1, 9, 10, 31, 32. SNW also asserted that all GCSD claims were barred in this Court because they are barred "by SNW's sovereign immunity" and because "SNW lacked authority under the Constitution of the Hualapai Indian Tribe to make any waiver of sovereign immunity." *Id.*, ¶¶ 42, 43. While all of SNW's asserted defenses are infirm, as explained below, they were known and asserted by SNW on April 1, 2011. Therefore, a motion to dismiss on those grounds – such as the one filed by SNW on June 14, 2001 – would only have been appropriate if made on or before the thirty-day timeframe dictated in Section 4.6 of the Hualapai Code (e.g., by April 8, 2011, thirty days from the date of service).

Because SNW filed its Motion two and a half months following SNW's Answer, the Motion is untimely not only under Hualapai law, but also as a matter of axiomatic litigation

principle. Rule 12(b) of the Federal Rules of Civil Procedure provides: "A motion asserting any of these defenses [(including lack of jurisdiction)] *must* be made *before* pleading if a responsive pleading is allowed." (Emphasis added). *See generally, Elvig v. Calvin Presbyterian Church,* 375 F.3d 951, 954 (9th Cir. 2004) (motion to dismiss must be made before responsive pleading). Arizona law provides the same. Ariz.R.Civ.P. 12(b).

This bedrock litigation principle should be readily followed in Tribal Court. Section 3.1(D) of the Hualapai Code provides that the Tribal Court may be "guided by common law as developed by other Tribal, federal or state courts" as to "any matters not covered by the Tribal Constitution, codes, ordinances or resolutions of the Tribe or by Tribal Common Law or by applicable federal law or regulation." Because Hualapai law does not address the procedural matter of timing for motions to dismiss, but federal and state law address the issue clearly and in proscriptive terms, the Court may look to federal and state law for guidance and regard SNW's Motion as untimely thereunder, in addition to be untimely under Section 4.6 of the Hualapai Code. At a minimum, the federal and state authorities counsel for strict application of the thirty-day timeframe set forth in Section 4.6.

## II. SNW HAD THE AUTHORITY TO – AND DID – EXPRESSLY WAIVE ITS SOVEREIGN IMMUNITY BY EXECUTING THE 2003 AGREEMENT.

### A. The Tribal Council Expressly Delegated SNW With The Authority To Waive SNW's Sovereign Immunity.

The Tribal Council expressly and unequivocally waived SNW's sovereign immunity when it authorized SNW to waive its own immunity by agreement and transaction. GCSD does not herein dispute that the Hualapai Tribe ("Tribe") and SNW are generally protected from suit by the Tribe's inherent sovereign immunity unless such immunity has been waived. Constitution of the Hualapai Indian Tribe ("Constitution"), Art. XVI; *Hwal'bay Ba:j Enterprises, Inc. v.*

*Beattie*, App. Div. Case No. 2008-AP-007, at 6 (Hualapai App. Div. 2008) (holding that the Tribal Council may delegate tribal corporations the power to waive tribal corporation sovereign immunity and quoting SNW's Plan of Operation at § 11.1 ("The Corporation shall be entitled to all the privileges and immunities of the Hualapai Indian Tribe. The Corporation. . . [is] immune from suit and the assets and other property of the Corporation are exempt from any levy or execution")). GCSD recognizes that tribal immunity may only be waived by the express and unequivocal action of the Tribe or by the United States Congress.

It is well established that the Tribal Council may delegate its power and authority to waive sovereign immunity to tribal corporations. *See generally, Hwal'bay Ba:j Enterprises.* The Constitution also allows the Tribal Council to "take *all* actions necessary and proper for the exercise of the foregoing powers and duties, including those powers and duties not enumerated" (emphasis added). Constitution, Art. V(dd). To further the economic wellbeing of the Tribe, the Tribal Council created SNW and empowered SNW's economic development potential by including the following in SNW's Plan of Operation: "[SNW] is *authorized to waive immunity from suit* of [SNW] . . . for any particular agreement, matter or transaction as may be entered into to further the purposes of [SNW]."[4] *Hwal'bay Ba:j Enterprises,* App. Div. Case No. 2008-AP-007, at 6 (emphasis added).

Here, the Tribal Council was empowered to waive the Tribe's sovereign immunity pursuant to Article XVI , Section 1 of the Constitution which provides: "The Hualapai Tribe hereby declares that, in exercising self-determination and sovereignty to its fullest extent, the Tribe is immune from suit, *except to the extent that the Tribal Council expressly waives sovereign immunity*" (emphasis supplied). The Tribal Council delegated its power to waive

[4] This quoted passage was the same passage which the Hualapai Appellate Court analyzed when reaching its decision in *Hwal'bay Ba:j Enterprises.*

sovereign immunity to SNW when it created SNW. *Hwal'bay Ba:j Enterprises,* App. Div. Case No. 2008-AP-007, at 6 (quoting SNW's Plan of Operation at §11.2). That was a proper delegation. Accordingly, the Tribal Council properly delegated its power to waive sovereign immunity to SNW when it created SNW. *Id.* Therefore, this Court may enforce SNW's waiver of immunity.

### B. SNW Expressly and Unequivocally Waived Its Sovereign Immunity from Suit by Executing the 2003 Agreement.

Acting on its properly delegated authority to waive sovereign immunity, SNW expressly did so as a material inducement to cause GCSD to execute the 2003 Agreement. SNW agreed to be subject to arbitration: "Any controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration." Ex. 1, Sec. 15.4(a). Specifically, Section 15.4(d) of the 2003 Agreement provides:

> ***SNW expressly waives its sovereign immunity with respect to all disputes arising out of this Agreement*** to the extent permitted under the Constitution of the Nation.

(emphasis supplied).

With its flat and unsupported denial that the 2003 Agreement does not allow for "an action to be brought against SNW in the Hualapai Tribal Court," (Motion at 2) SNW implies that either (i) its waiver lacked sufficient "magic words" to subject SNW to this Court's jurisdiction; or (ii) that the 2003 Agreement's references to federal court proceedings impose limitation's on this Court's jurisdiction. Both implications are incorrect.[5]

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[5] Because SNW fails to make any explanation of its assertion that this Court lacks jurisdiction, SNW has not met the standard of review on a motion to dismiss as articulated in both federal and state law available to guide the Tribal Court pursuant to Section 3.1(D) of the Hualapai Code where, as here, Hualapai law does not address the issue. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (where defendant brings facial attack on the subject matter of the court, the court assumes factual allegations in the plaintiff's complaint are true and draws all reasonable inferences in plaintiff's favor). While subject-matter jurisdiction challenges require the plaintiff to bear the burden in showing that jurisdiction is proper, GCSD more than meets this burden herein. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The Court may readily consider the extrinsic evidence presented by GCSD, such as the

1. The 2003 Agreement Does Not Impose Any Limitations on This Court's Jurisdiction.

The 2003 Agreement contains several references to federal courts, but those references are permissive in nature and do not impose any forum restrictions on the parties. First, the 2003 Agreement provides under the subheading "Mandatory Arbitration," that an arbitration judgment "*may* be enforced ... in any federal court having jurisdiction." Ex. 1, Sec. 15.4(a) (emphasis added). Second, the 2003 Agreement also provides that it is to be governed by the laws of the State of Arizona and the Hualapai Indian Tribe, with the caveat that Arizona laws that "require SNW ... to appear in any courts, ... except federal courts" shall not apply. *Id.*, Sec. 15.4(b). In this case, however, GCSD is not relying on any Arizona law requiring appearance by SNW, and thus the "Governing Law" exception is irrelevant to the instant matter. Third, the 2003 Agreement provides permissive authority for a federal court to reform any unenforceable provisions (Sec. 15.4(c)), but does not state that such reform authority is exclusive. Lastly, the 2003 Agreement contains an erroneous statement of law that the Hualapai Constitution limits actions brought by GCSD to "a federal court of competent jurisdiction in Arizona." The Hualapai Constitution contains no such limitation. There is no clause in the Constitution stating that the Tribal Council's (or its delegate's) power to waive sovereign immunity is restricted to waiver for federal court proceedings. Nor is there any provision in the Constitution indicating that the Tribal Court lacks jurisdiction. Instead, as explained in Section III *infra*, the Tribal Court is established as a court of general jurisdiction under Tribal law. The 2003 Agreement's misstatement of law cites limitations on actions that do not exist in the Hualapai Constitution.

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2003 Agreement, in evaluating whether it has jurisdiction. Like its sister courts of general jurisdiction, this Court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction. *See Ass'n of Med. Colleges v. United States,* 217 F.3d 770, 778 (9th Cir. 2000); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987). In light of the evidence presented by GCSD, SNW's Motion must fail.

Such a misstatement of law can and should be deemed severed from the 2003 Agreement. Ex. 1, Section 15.4(c)

In fact, the 2003 Agreement specifically anticipates the jurisdiction of this Court. The "Governing Law" subsection of the 2003 Agreement provides that: "The venue and jurisdiction for (x) any litigation under this Agreement and (y) all other civil matters arising out of this Agreement shall be the federal courts sitting in the State of Arizona, and located in or around Peach Springs, Arizona." *Id.*, Sec. 15.4(b) (emphasis supplied). By its plain language, this provision allows for this Court's jurisdiction, as this Court is the only court "located in or around Peach Springs, Arizona." To read "federal courts" (as opposed to simply "courts") as the implied antecedent of the phrase "located in or around Peach Springs" in Section 15.4(b) would make the latter phrase entirely duplicative of the preceding phrase "federal courts sitting in the State of Arizona" because any federal court "located in or around Peach Springs, Arizona" would plainly also be a federal court "sitting in the State of Arizona." Thus, such as reading would make the use of the conjunctive word "and" inappropriate and its connecting phrase ("located in or around Peach Springs, Arizona") duplicative. It is a well-settled principle of contract law that courts shall not interpret contract provisions as superfluous, but rather must give effect to all provisions of a contract if a non-superfluous interpretation of the provision can reasonably be made. *See Allen v. Honeywell Retirement Earnings Plan,* 382 F.Supp.2d 1139, 1165 (D. Ariz. 2005) (holding that overriding purpose of contractual interpretation is to give effect to the parties' mutual intent at the time the contract was made and "consistent with this undertaking, 'a contract should be interpreted to give meaning to all of its terms, presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous'") (internal citations omitted); *Flores v. Am. Seafoods Co.,* 335 F. 3d 904, 910 (9th

Cir. 2003). The Court should follow this well-established rule of contract interpretation and hold that the 2003 Agreement impliedly provides for resolution of this dispute in Tribal Court.

2. SNW's Agreement to Binding Arbitration Subjects It to This Court's Jurisdiction.

SNW erroneously contends that GCSD "cannot establish an express waiver of SNW's sovereign immunity to allow it to be sued in Hualapai Tribal Court to enforce the arbitration provision." Motion at 4. SNW vaguely explains that "SNW is *not* contending that this action should (or could) be brought in any other court." *Id.* at n.2 (emphasis in original). To put it more directly, SNW contends that there is no forum with jurisdiction to compel SNW to arbitrate even though SNW clearly agreed to mandatory and binding arbitration in the 2003 Agreement. Given SNW's express agreement to submit to arbitration (Ex. 1, Sec. 15.4(a)), U.S. Supreme Court precedent prohibits SNW's desired subterfuge: that SNW could agree to binding arbitration, but game the other contracting party out of that contractual right to arbitrate by agreeing solely to federal court jurisdiction, believing that there may be no federal court jurisdiction over typical tribal contract disputes.[6]

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[6] Some contractual agreements do not establish the requisite subject matter jurisdiction for federal courts. *See Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) ("To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction."). To establish subject matter jurisdiction in federal courts, parties must demonstrate the presence of a federal question or establish diversity of state citizenship. 28 U.S.C. § 1331; 28 U.S.C. § 1332. Most disputes involving business transactions with Indian tribes involve contract interpretation or enforcement, not federal questions. No federal question is presented simply because a tribe or tribal entity is involved. *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945 (9th Cir. 2004) (suit by lessee of coal mining rights against Indian tribe, seeking enforcement of arbitration settlement agreement setting royalty rates, not within federal question); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221 (9th Cir. 1989) (breach of contract claim brought by tribe against nonmember contractor who entered contract to construct sawmill on tribal land does not raise federal question). Nor does the Federal Arbitration Act yield federal question jurisdiction in all cases involving arbitration disputes. *Douglas v. U.S. Dist. Court for Cent. Dist. Cal.*, 495 F.3d 1062, 1067 n.2 (9th Cir. 2007) (recognizing that "[t]he FAA does not create any independent federal-question jurisdiction") (citation omitted). Furthermore, tribes and tribal corporations are not considered to be citizens of any state, and, therefore, cannot sue or be sued in federal court based solely on diversity jurisdiction. *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974). In addition, even when a federal court has jurisdiction over a claim involving a tribal entity, the court generally will be required to stay its hand until the plaintiff exhausts available tribal remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat. Farmers Union*

In fact, U.S. Supreme Court precedent makes clear that a sovereign entity's contractual obligation to arbitrate is enforceable irrespective of whether or not the sovereign entity agreed to a particular forum for enforcement of the arbitration provision. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 59, 58-59 (1978) (holding that a waiver of sovereign immunity has never required the invocation of "magic words" stating that the tribe hereby waived its sovereign immunity); *C & L Enter. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 420 (2001) (Indian tribe's waiver of sovereign immunity must be clear and express but need not employ the specific words to be effective); *Griffith v. Choctaw Casino of Pocola*, 230 P.3d 488, 498 (Okla. 2009) ("We also recognize that a tribe's waiver of immunity to suit in state court does not require specific or magic words - an arbitration provision together with a choice-of-law provision may constitute an unequivocal waiver of tribal immunity to suit in state court").

In *C & L Enterprises*, the United States Supreme Court ruled that an Indian tribe expressly and unequivocally waived its sovereign immunity when it agreed to arbitration under American Arbitration Association Rules ("AAA Rules") in a contractual agreement. 532 U.S. at 418. In reaching its ruling, the Supreme Court noted that the contract between the tribe and the plaintiff included a provision which read:

> All claims or disputes between the contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association. . . unless the parties mutually agree otherwise.

*Id.* at 415. The Court reasoned that the quoted language illustrated that the parties intended to incorporate the AAA Rules and that those rules in turn provided forums for judicial enforcement. *Id.* The Court rejected the tribe's assertion that "[n]o court – federal, state, or even tribal – ha[d]

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*Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). Had GCSD brought its suit to compel arbitration in federal court, the likely would have yielded an order to file the action before this Court and to exhaust tribal remedies. Out of respect for the Hualapai Tribal Court and to avoid the circular result of an order to exhaust, GCSD filed its claims with this Court in the first instance.

jurisdiction over C & L's suit . . . because [the tribe] has not expressly waived its sovereign immunity in any judicial forum." *Id.* at 421.

Similar to the contract at issue in *C & L Enterprises*, the 2003 Agreement invokes AAA Rules. Section 15.4(a) of the 2003 Agreement states: "arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect, as limited by Section 15.4(d)." Ex. 1. As discussed above in Section II.B.1, the only limitation that Section 15.4(d) imposes on SNW's waiver of sovereign immunity is that it be consistent with the Hualapai Constitution. Rule 48(c) of the AAA Commercial Rules invoked in the 2003 Agreement mirrors the AAA Rule quoted in *C & L Enterprises* and provides specific forums for judicial redress: "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." Exhibit 3 hereto (excerpts of AAA Commercial Rules). SNW's invocation of the AAA Rules and selection of some forums for litigation – federal and Hualapai Tribal Court per the terms of Section 15.4(b) – is sufficient to allow SNW to be hailed into this Court in clear keeping with *C&L Enterprises*. Where, as here, a tribal entity makes an agreement "by express contract, to adhere to certain dispute resolution procedures" and to be bound by those resolution procedures, that agreement constitutes an explicit waiver of sovereign immunity for judicial enforcement. *C&L Enter.*, 532 U.S. at 420.

## III. AS A COURT OF GENERAL JURISDICTION, THIS COURT HAS THE AUTHORITY TO COMPEL SNW TO PARTICIPATE IN MANDATORY AND BINDING ARBITRATION.

While the Constitution does not contain the limitations advocated by SNW, the Constitution does clearly state that this Court is a court of general jurisdiction with broad powers to hear all cases arising from events which occur within the Hualapai Reservation. Art. VI, Sec.

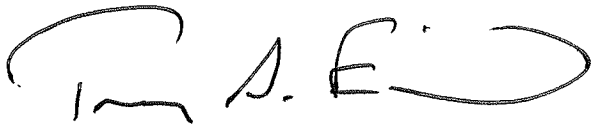
2 of the Constitution reads, "tribal courts shall *exercise jurisdiction over all cases and controversies within the jurisdiction of the Tribe*. . . by virtue of the Tribe's inherent sovereignty" (emphasis added). The Tribe's jurisdiction is Constitutionally-defined as extending "to all lands within the boundaries of the Hualapai Indian Reservation . . . the Hualapai Tribe *shall have jurisdiction over all* persons, property, lands, water, air space, resources, and all activities occurring within the boundaries of the reservation." Constitution, Art. I (emphasis added). In addition, the Hualapai Code provides, "the Tribal Court shall have *general* civil jurisdiction over all actions arising under Tribal law . . . [and] over *all general* civil claims which arise within the Tribal jurisdiction" Hualapai Code, § 2.2. (emphasis added). This Court is a court of general jurisdiction which clearly has the inherent and codified authority to compel SNW to attend arbitration. Moreover, as explained in Section II.B.2 above, this Court's exercise of general jurisdiction over this matter is consistent with binding U.S. Supreme Court precedent which precludes gamesmanship of the sort attempted by SNW.

**CONCLUSION**

As a court of general jurisdiction, this Court has the power to compel SNW to arbitrate disputes arising under the 2003 Agreement, as specifically contemplated in Section 15.4(b) of the 2003 Agreement and as a matter squarely within the boundaries of the arbitration/sovereign immunity jurisprudence of the United States Supreme Court. Accordingly, the Court should deny Defendant's Motion and proceed to order SNW to arbitration in accord with the terms of the 2003 Agreement.

Respectfully submitted this 29th day of June 2011,

GREENBERG TRAURIG, LLP



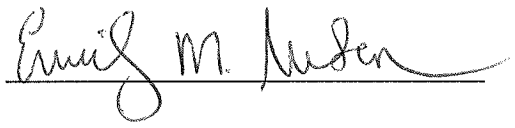
Troy A. Eid

## CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2011, I filed the foregoing **RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE** with the Clerk of the court via facsimile and U.S. Mail, and served the same upon the following:

Hualapai Tribal Court
Clerk of Court
P.O. Box 275 - 960 Rodeo Drive
Peach Springs, AZ 86434
Fax: 928-769-2736

Gallagher & Kennedy, P.A.
Glen Hallman
Paul K. Charlton
Benjamin C. Runkle
2575 East Camelback Road
Phoenix, AZ 85016-9225
Fax: 602-530-8500



deliver every document and instrument necessary or appropriate to consummate the transactions contemplated hereby.

(b) Entity Action. All company action on the part of Manager and its members which is required for the execution, delivery and performance by Manager of this Agreement has been duly and effectively taken.

## ARTICLE 15
## GENERAL PROVISIONS

15.1 Indemnity. Each party to this Agreement agrees to indemnify the other party and such other party's Related Parties and hold each of them harmless for, from and against all Claims attributable, directly or indirectly, to the breach by such indemnifying party of any obligation hereunder or the inaccuracy of any representation or warranty made by such indemnifying party herein or in any instrument delivered pursuant hereto or in connection with the transactions contemplated hereby. This indemnity shall survive the expiration or termination of this Agreement.

15.2 Further Assurances. SNW and Manager shall execute and deliver all other appropriate supplemental agreements and other instruments, and take any other action necessary to make this Agreement fully and legally effective, binding and enforceable as between them and as against third parties.

15.3 Successors and Assigns. Subject to the provisions of Article 12, this Agreement shall be binding upon and inure to the benefit of SNW and Manager and their successors and assigns. The Nation is a designated third-party beneficiary of the provisions of this Agreement intended for its benefit.

15.4 Arbitration; Governing Law; Jurisdiction.

(a) Mandatory Arbitration. Any controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration. The arbitration shall be conducted by a sole arbitrator; *provided, however*, if the parties cannot agree upon an arbitrator, each party will select an arbitrator and the two arbitrators will select the sole arbitrator to resolve the dispute. Either party may request and thus initiate arbitration of the dispute by written notice ("Arbitration Notice") to the other party. The Arbitration Notice shall state specifically the dispute that the initiating party wishes to submit to arbitration. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect, as limited by Section 15.4(d). Judgment upon the award (as limited by Section 15.4(d)) rendered by the arbitrator may be enforced through appropriate judicial proceedings in any federal court having jurisdiction. Prompt disposal of any dispute is important to the parties. The parties agree that the resolution of any dispute shall be conducted expeditiously, to the end that the final disposition thereof shall be accomplished within 120 days or less.

(b) Governing Law. The validity, meaning and effect of this Agreement shall be determined in accordance with the laws of the State of Arizona and the Hualapai Indian Tribe. The laws of the State of Arizona specifically exclude, however, any laws of the State of Arizona that may be interpreted to (i) waive SNW's or the Nation's sovereign immunity; (ii) require arbitration, other than as agreed to in Section 15.4(a); or (iii) require SNW or the Nation to appear in any courts or other proceedings in the State of Arizona, except federal courts. The venue and jurisdiction for (x) any litigation under this Agreement and (y) all other civil matters



PJ S.B.

**Exhibit 1**

arising out of this Agreement shall be the federal courts sitting in the State of Arizona, and located in or around Peach Springs, Arizona.

(c) Unenforceability. With respect to any provision of this Agreement finally determined by a federal court of competent jurisdiction to be unenforceable, such federal court shall have jurisdiction to reform such provision so that it is enforceable to the maximum extent permitted by applicable law, and the parties shall abide by such federal court's determination. In the event that any provision of this Agreement cannot be reformed, such provision shall be deemed to be severed from this Agreement, but every other provision shall remain in full force and effect.

(d) Limited Waiver of Sovereign Immunity. SNW expressly waives its sovereign immunity with respect to all disputes arising out of this Agreement to the extent permitted under the Constitution of the Nation. SNW's waiver of sovereign immunity from suit is specifically limited by the Constitution of the Nation to the following actions and judicial remedies:

(i) The action must be brought by Manager and not by any other person, corporation, partnership, government, governmental agency or entity whatsoever; and

(ii) Any money damages will be limited to the assets that are solely owned by SNW. No money damages, awards, fines, fees, costs or expenses can be brought or awarded against the Nation in arbitration, judicial, or governmental agency action; and

(iii) An action in a federal court of competent jurisdiction in Arizona to either (i) compel arbitration or (ii) enforce a determination by an arbitrator requiring SNW to specifically perform any obligation under this Agreement (other than an obligation to pay any money damages under Section 15.4(d)(ii)).

15.5 Amendments. This Agreement may not be modified, amended, surrendered or changed, except by a written instrument executed by SNW and Manager.

15.6 Inspection Rights. SNW shall have the right to inspect the Project at any time during the Construction Term and the Operating Term to determine compliance by Manager with its obligations under this Agreement and otherwise in connection with the performance by SNW of its obligations under this Agreement.

15.7 Relationship. In the performance of this Agreement, Manager shall act solely as an independent contractor. Neither this Agreement nor any agreements, instruments, documents or transactions contemplated hereby shall in any respect be interpreted, deemed or construed as making Manager a partner or joint venturer with SNW, and each party agrees that it will not make any contrary assertion, contention, claim or counterclaim, in any action, suit or other legal proceedings involving Manager and SNW.

15.8 Entire Agreement. This Agreement, which includes the attached Exhibits, constitutes the entire agreement between the parties' relating to the subject matter hereof, superseding all prior agreements or undertakings, oral or written.

15.9 Time of the Essence; Force Majeure. Time is of the essence of this Agreement; *provided, however*, that time limitations set forth in this Agreement (other than in Section 2.2, which shall be governed by the provisions of Section 2.2 rather than this Section 15.9), except with respect to monetary obligations, shall be extended for the period of any delay due to causes beyond the delayed party's control



DJ S.B.

**Exhibit 1**

ORIGINAL



IN THE HUALAPAI TRIBAL COURT

PEACH SPRINGS, ARIZONA

| | |
|---|---|
| GRAND CANYON SKYWALK, DEVELOPMENT, LLC, a Nevada limited liability company, Plaintiff, vs. 'SA' NYU WA, INC., a Hualapai Indian tribally chartered corporation, Defendant. | STATUS CONFERENCE<br>Case No. 2011-CV-006 |

Before the Honorable Ida B. Wilber, Judge

Tuesday, June 14, 2011

3:36 p.m.

Peach Springs, Arizona

Reporter's Transcript of Proceedings

Reported by: John W. Boyd, CCR, RPR
Arizona CCR #50774 / Nevada CCR #877



**Exhibit 2**

Appearances:

For the Plaintiff:

Troy A. Eid, Esq.
Robert S. Thompson IV, Esq.
GREENBERG TRAURIG, LLP
The Tabor Center
1200 17th Street, Suite 2400
Denver, Colorado 80202
303.572.6521

For the Defendant:
(Telephonically)

Glen Hallman, Esq.
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016
602.530.8471



**Exhibit 2**

lack of respect that I can perceive is plaintiff's with regard to the Hualapai Tribe.

THE COURT: Okay. For both -- In regards to both parties, the Court's goal -- First of all, the Court does have jurisdiction to hear this -- this matter, and I did place that in my Order.

Secondly, the Court is more -- Instead of having the parties engage in -- in a sandbox fight, the Court is interested in whether or not the parties really want to proceed in good faith and to make full disclosure and work this out.

I will tell you that I have read the documents that were submitted to the Court previously, and I've looked at the sections of the -- of the Complaint and sections of the Contract that were initiated initially, and I really need to understand whether or not...

Whether the meeting is -- is in the community or in Kingman or split, that's something that you all need to determine. The Court won't determine that for you; however, if we're not really going to proceed with full disclosure in a reasonable time, then the Court would have no alternative but to look at the plain language of the Contract and make a decision, so that's what my thoughts are at this point.

I had hoped to hear that the parties had



**Exhibit 2**

because it talks about business dealings and -- and everything else, so -- And I don't have -- Wait a minute. Hold on. Let me give you guys the cite.

Just came out June 10th. Number 09-17349 D.C. Number 2:08-CV-00474. And I'm not sure if that's the permanent -- Well... But anyway, that should get you to that -- to that case.

But in any event, I am really concerned and I -- I am disappointed that there's not more progress. I will make findings -- some findings specific to the Court's jurisdiction, as that was requested. I will do that within the next week.

I believe at this point that the Court does have jurisdiction to hear matters that come before it, but I'll do it specifically. What I am going to order is that the disclosure of the documents, Mr. Hallman, need to be made no later than the 22nd of June.

If there is a problem, you need to notify the Court and notify opposing counsel.

In regards to -- I believe the parties had said previously that there should be -- you should meet a week after that time.

Is that correct? That's what was said last time?

MR. EID: Yes, Your Honor. That's what I



**Exhibit 2**

# Commercial Arbitration Rules and Mediation Procedures

## Including Procedures for Large, Complex Commercial Disputes

*Rules Amended and Effective June 1, 2009*
*Fee Schedule Amended and Effective June 1, 2010*

American Arbitration Association
*Dispute Resolution Services Worldwide*

www.adr.org

**Exhibit 3**

## R-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

## R-48. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

## R-49. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.



**Exhibit 3**