

GALLAGHER & KENNEDY, P.A.
2575 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-8000

1 Glen Hallman (SBN 005888)
2 Paul K. Charlton (SBN 012449)
3 Jeffrey D. Gross (SBN 011510)
4 Christopher W. Thompson (SBN 026384)

GALLAGHER & KENNEDY, P.A.

5 2575 East Camelback Road
6 Phoenix, Arizona 85016-9225
7 Telephone: (602) 530-8000
8 Facsimile: (602) 530-8500

9 E-mail: gh@gknet.com
10 E-mail: paul.charlton@gknet.com
11 E-mail: jeff.gross@gknet.com
12 E-mail: chris.thompson@gknet.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

13 GRAND CANYON SKYWALK
14 DEVELOPMENT, LLC,

15 Plaintiff,

16 vs.

17 'SA' NYU WA, et al.,

18 Defendants.
19

No. 3:12-cv-08030-DGC

**DEFENDANTS' SUPPLEMENT TO
THEIR OPPOSITION TO MOTION
FOR TEMPORARY RESTRAINING
ORDER**

20 Defendants supplement their Opposition to Plaintiff's Motion for a Temporary
21 Restraining Order to address two issues raised at the hearing on February 24, 2012.

22 **The 2007 Amendment Deleted The Payment-for-Termination Provisions in**
23 **the 2003 Agreement**

24 The primary purpose of this supplement is to add to the record the First
25 Amendment to Development and Management Agreement dated September 10, 2007
26 ("2007 Amendment"), attached as Exhibit 1, which amended the 2003 Agreement. The

1 2007 Amendment was not included in GCSD's voluminous exhibits, leading the Tribe to
2 believe that it was not pertinent to any issue before the Court. At the hearing, however,
3 the Court mentioned that the apparent purpose of the Tribe's exercise of eminent domain
4 was to avoid paying \$50 million to GCSD. The Court's comment presumably was based
5 on § 10.1 of the 2003 Agreement, which allowed for termination without cause subject to
6 payment of certain sums to GCSD, such as a \$50 million payment if termination occurred
7 within five years after operations commenced. 2003 Agreement, § 10.1(c)(ii). The 2007
8 Amendment deleted § 10.1(c), (d) and (e). 2007 Amendment, § 2.8.

9 It is the Tribe's position that the 2003 Agreement had been discharged and
10 relieved SNW of any further duty to comply with its terms for two independent reasons.
11 First, SNW declared (as evidenced in its counterclaim in the arbitration) that the parties'
12 obligations under the 2003 Agreement were discharged some time ago by GCSD's
13 material failure and refusal to perform.¹ The discharge extinguished any requirement for
14 the Tribe to pay GCSD to terminate the 2003 Agreement. Second, the Tribe also was
15 relieved of any obligation to pay GCSD to terminate the 2003 Agreement because,
16 pursuant to its express provisions, (1) the relevant portions of § 10.1 had been deleted by
17 the 2007 Amendment, and (2) termination would not be "without cause." Nevertheless,
18 the Tribe elected to exercise its sovereign power of eminent domain, to condemn GCSD's
19 contract interests and to commit to pay just compensation to GCSD. Even if the eminent
20 domain action does not go forward, however, the 2003 Agreement has been discharged
21 and GCSD has no rights to continue to operate the Skywalk.

22
23
24
25 ¹ To the extent GCSD contests SNW's determination that the 2003 Agreement has been
26 discharged, GCSD in theory still may have a contingent interest in the 2003 Agreement
that is subject to condemnation.

Nothing in the Tribe’s Eminent Domain Ordinance Limits GCSD’s Ability to Challenge its Constitutionality in Tribal Court.

In the context of the “futility” exception to exhaustion of Tribal Court remedies, the Court asked whether § 2.16(F)(6) of the Tribe’s eminent domain ordinance (“Ordinance”), which provides that a defendant may move to dismiss only on the ground that the taking was not for a “public use,” precludes GCSD from challenging the constitutionality or validity of the Ordinance in Tribal Court. The answer is no.

A legislative body cannot act in excess of its constitutionally-delegated authority. *See City of Boerne v. Flores*, 521 U.S. 507, 545-46, (1997) (O’Connor, J., concurring) (“[W]hen [a legislative body] enacts legislation in furtherance of its delegated powers, [it] must make its judgments consistent with this Court’s exposition of the Constitution and with the limits placed on its legislative authority . . .”). Just as Congress is restrained by the limits of the United States Constitution, the Hualapai Tribal Council—the Tribe’s legislative body—is restrained by the limits of its own Constitution. *See, e.g.,* Constitution of the Hualapai Indian Tribe, Art. IX, § d (the Hualapai Tribe, in exercising its powers of self-government “shall not . . . deny any person of liberty or property without due process of law”). All laws enacted by the Tribe—including the Ordinance—must pass constitutional muster and are subject to an attack that they do not.

The limiting language of § 2.16(F)(6) does nothing to change the result. The United States Supreme Court has held that statutory provisions limiting judicial review do not foreclose constitutional challenges to the statute. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 367 (1974) (provision in statute barring judicial review of administrative body decision did not bar a constitutional challenge to the statute). A constitutional challenge is available despite statutorily-limited judicial review because it arises under the constitution, “not under the statute whose validity is challenged.” *Id.* at 367.

1 Arizona courts have applied this rule in the condemnation context. Pursuant to
 2 A.R.S. § 12-1116(H), the only basis for challenging the condemnor's ability to take
 3 immediate possession is lack of necessity. *Town of Paradise Valley v. Laughlin*, 174
 4 Ariz. 484, 489, 851 P.2d 109, 114 (App. 1992) ("at a hearing on immediate possession
 5 the only issue is that of necessity and probable damages"). However, Arizona courts
 6 have permitted challenges to the constitutionality of the statute itself and to whether the
 7 proposed taking is for a "public use" as required by the Arizona Constitution. *Gardiner*
 8 *v. Henderson*, 103 Ariz. 420, 443 P.2d 416 (1968) (challenge to constitutionality of
 9 former version of A.R.S. § 12-1116); *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (App.
 10 2003) (challenge to lack of "public use"). In considering the challenge to public use, the
 11 court in *Bailey* noted that the constitutional requirement of "public use" differs from the
 12 statutory requirement of "necessity." 206 Ariz. at 227, n.1, 76 P.3d at 901.

13 In short, the Tribe could not insulate its Ordinance from a challenge to its
 14 foundational constitutionality or validity in Tribal Court merely by stating in the
 15 Ordinance that it could only be challenged on one specified ground. GCSD will have a
 16 meaningful opportunity to challenge the Ordinance in Tribal Court, and the Tribe will
 17 defend it vigorously. Therefore, seeking exhaustion of its remedies in Tribal Court
 18 would not be futile.

19 Respectfully submitted this 27th day of February, 2012.

20 **GALLAGHER & KENNEDY, P.A.**

21
 22 By: /s/ Jeffrey D. Gross
 23 Glen Hallman
 24 Paul K. Charlton
 25 Jeffrey D. Gross
 26 Christopher W. Thompson
 2575 East Camelback Road
 Phoenix, Arizona 85016-9225
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Pamela M. Overton / Tracy L. Weiss
GREENBERG TRAURIG, LLP
2375 East Camelback Road, Suite 700
Phoenix, AZ 85016

Mark Tratos
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, NV 89169

Troy A. Eid / Robert S. Thompson
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Attorneys for Plaintiff

By: /s/ Candice J. Cromer

2990744 / 14434-15

Exhibit 1

**FIRST AMENDMENT TO
DEVELOPMENT AND MANAGEMENT AGREEMENT**

This First Amendment to Development and Management Agreement (this "*Amendment*") is entered into this Sept 10, 2007, by and between 'SA' NYU WA, a tribally chartered corporation, ("SNW"), and GRAND CANYON SKYWALK DEVELOPMENT, LLC, a Nevada limited liability company. ("*Manager*").

RECITALS

A. Manager and SNW are parties to that certain Development and Management Agreement dated December 31, 2003 (the "*Agreement*").

B. Manager and SNW now desire to amend the Agreement in accordance with the terms and conditions set forth in this Amendment.

AGREEMENT

1. **DEFINITIONS.** Unless otherwise expressly defined herein, all capitalized terms used in this Amendment shall have the same meanings assigned to such terms as set forth in the Agreement.
2. **AMENDMENTS.** The Agreement is modified as follows:
 - 2.1. Definition of "*Affiliate*" is amended by deleting "five percent (5%)" and adding "30%" in its place.
 - 2.2. Definition of "*Funding Change-Over Date*" is hereby amended in its entirety and restated as follows:

"Funding Change-Over Date" means March 28, 2031.
 - 2.3. Definition of "*Operating Term*" is hereby amended in its entirety and restated as follows:

"Operating Term" means the period commencing on March 28, 2007, and terminating on March 28, 2032, unless the Agreement is terminated earlier as provided in this Agreement.
 - 2.4. Definition of "*Manager*" is amended to delete the term "West" and add "Skywalk" in its place.
 - 2.5. Add the following new Section 2.2(m)(iii):

If Manager fails to achieve Substantial Completion of the Skywalk Facility portion of the Project Improvements by March 28, 2008 (the "**Facility Completion Date**"), Manager shall pay to SNW, in addition to all other sums which Manager is obligated to pay to SNW under this Agreement, as liquidated

damages and not as a penalty, the sum of \$1,000 per calendar day for each calendar day commencing with the day after the Facility Completion Date and concluding on, and including, the day on which Substantial Completion of the Skywalk Facility portion of the Project Improvements is achieved. In addition, if Manager fails to achieve Substantial Completion of the Skywalk Facility portion of the Project Improvements by the date which is 60 days after the Facility Completion Date (the "**Facility Completion Date Anniversary**"), Manager shall pay to SNW, in addition to all other sums which Manager is obligated to pay to SNW under this Agreement, as liquidated damages and not as a penalty, the sum of \$10,000 per calendar day for each calendar day commencing with the day after the Facility Completion Date Anniversary and concluding on, and including, the day on which Substantial Completion of the Skywalk Facility portion of the Project Improvements is achieved. The liquidated damages represent a reasonable endeavor by the parties to estimate a fair compensation for the foreseeable losses which might result from such delay, it being understood that the amount of actual damages would be extremely difficult, impracticable or impossible to ascertain. The liquidated damages do not include and specifically exclude any costs, expenses and damages to SNW caused by claims made against SNW by any Person as a consequence of such delay. SNW also reserves the right to prove and recover additional damages beyond the liquidated damages for breaches of its obligations under this **Section 2.2(m)(iii)**: other than failure to complete the Skywalk Facility portion of the Project Improvements by the Facility Completion Date. The term "**Skywalk Facilities**" means the building adjacent to the Glass Bridge providing security and structural support for the Glass Bridge and which will also contain a gift shop, together with all related on and off-site improvements and infrastructure, as more particularly described on **Exhibit A** to this Amendment.

- 2.6. Section 2.10, last paragraph, is amended by deleting "10%" and adding "30%" in its place.
- 2.7. Section 4.3 is amended by deleting "\$1,500" and adding "\$3,000" in its place.
- 2.8. Sections 10.1(c), (d) and (e) of the Agreement are hereby deleted.
- 2.9. Section 12.4 is amended by deleting "10%" and adding "30%" in its place.
- 2.10. Add the following new Section 13.4(k):

On or before January 1, 2009, Manager will convey the Staging Lodge property described on Exhibit C to the Agreement to SNW free and clear of all encumbrances, liens, or restrictions, pursuant to a Special Warranty Deed approved by SNW.

12 Sky

3. ENTIRE AGREEMENT.

The Agreement as modified herein contain the entire understanding and agreement of Manager and SNW in respect of the Project and supersede all prior representations, warranties, agreements, arrangements, and understandings. No provision of the Agreement as modified herein may be changed, discharged, supplemented, terminated, or waived except in a writing signed by SNW and Manager.

4. INTERPRETATION. Except as modified herein, the Agreement shall remain unchanged and in full force and effect.5. COUNTERPARTS. This Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the day and year first written above.

SNW:

'SA' NYU WA

By: _____

Name: _____

Title: _____

MANAGER:

GRAND CANYON SKYWALK
DEVELOPMENT, LLC

By: _____

Name: _____

Title: _____

D

dyg