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

9 Grand Canyon Skywalk Development,
LLC, a Nevada limited liability company,

No. 3:12-08030-DGC

10 Plaintiff,

**SUPPLEMENTAL BRIEF IN SUPPORT
OF BAD FAITH EXCEPTION -
PURSUANT TO COURT ORDER [32]**

11 vs.

12 ‘SA’ NYU WA, Inc., *et al.*,

13 Defendants.
14

15 **INTRODUCTION**

16 Just yesterday, a Tribal Council Member of the Hualapai Tribe distributed to her
17 constituents an open letter, attaching documents showing that the Hualapai Tribe’s eminent
18 domain filing was a part of a long term secret plan (the “Secret Plan”) to take the interests of
19 GCSD. *See Ex. 1* to Declaration of Theodore Quasula (“Quasula Decl. 1”), attached hereto
20 as **Ex. 1**. This plan was not an open and transparent function of the Tribal Council or the
21 Hualapai as a whole, rather it was the plan of a few Tribal Council Members intent on taking
22 GCSD’s interests (the “Conspiring Members”). *See id.* at p. 2 (stating: “I think it is time that
23 the Hualapai Tribal Membership actually is aware of what the Tribal Council does behind
24 closed doors. . . We are hiding things.”) Conceived in secret executive sessions, Conspiring
25 Members even excluded Council Members who disagreed with them, for fear that their
26 deeds would be exposed. *See* transcript of Honga’s public meeting comments, attached as
27 **Ex. B** to the 2/21/12 Declaration of Theodore Quasula (“Quasula Decl. 2”), attached hereto
28

1 as **Ex. 2**. The Secret Plan was adopted at a time when GCSD and its Manager David Jin
 2 (“Jin”) had a “historical approach of conciliation and amicable discussion” with the Tribe.
 3 *See Ex. 1*, 2/8/10 Gallagher and Kennedy (“G&K”) Memo, pp. 11. The Secret Plan included
 4 a campaign to hire a public relations firm to counter the inevitable impression that the
 5 Tribe’s actions were an exhibit of “raw power”. *See Ex. 1*, 2/11/11 G&K Memo pp. 9-15.
 6 The public relations plan included provisions to cast Jin as the “Leona Helmsley” or “Bernie
 7 Madoff” of Arizona and included writing letters to which Tribal Member’s names would
 8 later be attached, thereby misleading the public (including unknowing Hualapai Tribal
 9 Members). *See* Public Relations plan attached hereto as **Ex. 3**. As more fully detailed
 10 below, instead of paying full value for GCSD’s interests, the Conspiring Members even
 11 attempted to force or mislead GCSD into signing away its rights for compensation in the
 12 event of a taking, or alternatively to stack the deck by using Tribal Court jurisdiction to
 13 minimize any “just compensation.”

14 As this Court noted, there is an exception from the exhaustion doctrine when “an
 15 assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith.”
 16 *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, n.21, 105 S.Ct.
 17 2447, 85 L.Ed.2d 818 (1985). The issue of whether an Indian Tribe has engaged in
 18 prohibited bad faith within the meaning of *National Farmers Union* - eliminating the need
 19 for Tribal Court exhaustion - is a determination for this Court, not the Tribal Court. *See*
 20 *Superior Oil Co. v. United States*, 798 F. 2d 1324, 1331 (10th Cir. 1986).

21 In this case the harassment and bad faith exception is particularly applicable. As set
 22 forth herein, in the Request for Temporary Restraining Order [Doc. No. 4] and the First
 23 Amended Complaint **and considering the critical fact that the jurisdiction by the Tribal**
 24 **Court was in bad faith**, and the fact that certain Members of the Hualapai Tribal Council
 25 have undertaken a campaign of harassment and have acted in bad faith to steal the interests
 26 of GCSD in the 2003 Agreement, the bad faith exception applies. The use of Tribal
 27 jurisdiction and the Tribal Courts is an integral part of this plan to motivate the Tribal
 28 Council Members.

THE SECRET PLAN

The Secret Plan was just made public by a member of the Hualapai Tribal Council in an open letter to the Tribe. *See Ex. 1*, p. 2. The letter and attached documents show that at least by January 27, 2011, *see Ex. 1*, p. 3, at the same time that the Tribe was demanding GCSD sign a new agreement that would have stripped GCSD of compensation provisions in the 2003 Agreement should the Tribe take GCSD's interests¹, it was already moving forward with a plan to do just that.

The plan to use Tribal Court to obtain the lowest possible valuation for the Skywalk was an integral part of the overall plan. The Hualapai Tribal Court is not independent from the Tribal counsel. *See* Hualapai Tribal Court Evaluation Report, prepared by the National Indian Justice Center, attached hereto as **Ex. 4**, which on page 15 notes recommendations that the Hualapai Tribe clarify and integrate the policy of separation of powers between the council and the judiciary, and also notes that it may take several generations for a community to understand and appreciate the policy of separation of powers. The plan specifically notes that "the Tribe could present a "bare bones" case in Tribal court and potentially obtain a minimal valuation of "just compensation", but that the better strategy would be to use experts to present a valuation in Tribal Court to increase the odds that the Tribal Court's decision could withstand inevitable review by United States courts. *See Ex. 1*, pp. 11-12. It correctly noted that GCSD can be expected to present the strongest case possible that its interests in the Agreement can only be taken with "just compensation" of \$50 million or more, but that experts, which the law firm knows and "have qualified as expert witnesses in numerous judicial proceedings" should be able to present an argument that "just compensation" should be just a fraction of that number, "perhaps as low as one-fourth or one-fifth" thus enticing the Tribal Council to adopt the plan to obtain GCSD's interests at a substantial discount. *See generally id.* at pgs 4 and 5. Evidence of this perceived advantage in using the Tribal Court was confirmed, when a provision of the

¹ *See* letter from Hallman refusing to accept any changes to proposed management agreement, attached hereto as **Ex. 5**; and minutes of meeting wherein Vaughn stated he might consider approving completion of the visitors center if the agreements were signed. *See* 1/4/11 Infrastructure meeting minutes, attached hereto as **Ex. 6**.

1 adopted ordinance prohibited the appointment of a Judge pro temp, which only left the
 2 adoptive father and the first cousin of two Tribal Council Members as possible Judges. *See*
 3 4/4/11 Resolution No. 20-2011 (“Ordinance”) attached hereto as **Ex. 7**. Furthermore, part of
 4 the plan was to generate offsetting claims to argue an even greater reduction. *See Ex. 1*, p.
 5 13, stating “the Tribe will seek to argue that it has offsetting claims against GCSD and its
 6 affiliates. . .” The need to create offsets led to false claims being asserted. These false
 7 claims included that GCSD was responsible for infrastructure and that it abandoned
 8 construction of the visitors center. *See* 2/29/12 Affidavit of Louise Benson (“Benson Aff.”),
 9 ¶¶ 5-7, attached hereto as **Ex. 8**.

10 The legal plan also notes that the Tribe’s exercise of eminent domain would be
 11 portrayed by the public at large as an exercise of raw power. *See Ex. 1*, p.13. So the Tribe’s
 12 legal counsel recommended a public relations firm to present the Tribe’s actions more
 13 reasonably to the public at large. *Id.* at pp. 13-14. That public relations plan included
 14 provisions to portray Mr. Jin, the manager of GCSD as, “Arizona’s version of Leona
 15 Helmsley and Bernie Madoff leaving uninhabitable buildings in his wake and ignoring the
 16 pleas of those who trusted him.” *See* Tribal Public Relations Plan, attached hereto as **Ex. 3**.
 17 This smear campaign despicably was even designed to mislead innocent Tribal Members
 18 and included a plan wherein the public relations firm would ghost write letters to which
 19 Tribal Members names would later be attached. *Id.*

20 The Tribe’s plans, including the use of Tribal Court jurisdiction, were motivated by
 21 the desire of a limited number of Tribal Council Members to harass GCSD and to strip
 22 GCSD’s interests away in bad faith, instead of honoring the 2003 Agreement’s provisions
 23 for arbitration. **Moreover, when the Order of Taking was presented to the Tribal Court**
 24 **it was Judge Yellowhawk that signed the order, that which ignited the wrongful taking,**
 25 **only to later admit that he could not preside over this matter (he recused himself) but**
 26 **refused to revoke the Order of Taking.**

27 **IMPLEMENTATION OF THE SECRET PLAN**

28 The Defendants’ conduct demonstrates that they were determined to implement their

secret plan to condemn GCSD's interest in managing the Skywalk through harassment and bad faith.

FALSE AND NEGATIVE PRESS

- The Tribe hired a PR firm to begin telling the story that they were victims of an unscrupulous businessman who they labeled as the Arizona equivalent of Leona Helmsley and Bernie Madoff.²
- Tribal Spokespersons Waylon Honga and Charlie Vaughn were trained by the PR firm on how to spin the negative story.³
- The Tribal Spokespersons began telling the press that the visitors center was a unfinished eye sore because GCSD had failed to bring utilities to Eagle Point and had walked away from an abandoned building.⁴ The Tribe, however, knew that it was responsible for utilities and that certain Council Members prevented GCSD from completing the visitors center. *See* Benson Aff., **Ex. 8**, ¶¶ 5-7.
- The Tribal Spokespersons invited press and journalist to the Skywalk to give tours of the unfinished building.⁵

INTENTIONAL EFFORTS TO INTERFERE WITH OPERATIONS OF THE SKYWALK

- The Defendants also harassed GCSD by cutting off funds to GCSD and by interfering with Skywalk Operations. They unilaterally halted GCSD's ability to transport Skywalk employees to the remote site on comfortable passenger buses claiming that Y Travel, the company that had been doing so for many years, and had been approved as a line item in the Tribe's Skywalk budget year over year, was not entitled to be paid because it was a related or affiliated company of GCSD and Oriental Tours and Travel.⁶ The Defendants refused to pay Y Travel more than \$1 million that it had earned transporting employees.
- The Defendants refused to distribute funds from the trust account that had been created in March, 2010, thereby preventing GCSD from receiving any of its share of the revenues from the Skywalk operation.⁷
- The Defendants unilaterally ceased compensating GCSD the cost of motel rooms near the Skywalk which were rented for managers and employees who could not travel back and forth from their homes in Las Vegas or Kingman each day even though these rooms had

² *See*, media narrative contained in the communication from the PR firm of Scutari Cieslak to the Hualapai Tribal Council. **Ex. 3**.

³ *See*, Ex. 8, Benson Aff., ¶ 8.

⁴ *See*, press releases and stories reporting the comments, attached hereto as **Ex. 9**.

⁵ The spokespersons never explained that it was the Tribal Council who had refused to allow the building to be completed. *See* Benson Aff., ¶ 7; and the Affidavit of Robert Bravo, Jr., former CEO of GCRC, ¶ 7, attached hereto as **Ex. 10**.

⁶ *See*, 2/7/11 letter from Glen Hallman to Mark Tratos, attached hereto as **Ex. 11**.

⁷ *See* attached correspondence declining distribution under the pre-text that a full accounting was not yet possible and therefore, no funds were to be distributed attached as **Ex. 12**.

1 been in use for the majority of time the Skywalk was in operation.⁸

2 • The Defendants declined permission to international film crews to film on the Skywalk thereby cutting off positive press about the tourist attraction.

3 • Tribal Chairwoman Louise Benson confirmed that the Tribe intended to use these improperly withheld funds to pay GCSD as its compensation for giving up its contractual rights. *See Ex. 8*, Benson Aff., ¶ 9.

4 **The Defendants Concerted Efforts to Resist Resolution of the Parties' Dispute Through** 5 **Arbitration**

6 • The Defendants' attorneys repeatedly rejected as void GCSD and Jin's request for arbitration of their disputes as called for in the 2003 Agreement.⁹

7 • Opposed the request for arbitration made as a courtesy to the tribal court by asserting that the tribal court had no jurisdiction over SNW to order arbitration under the 2003 agreement.¹⁰

8 • Refused to provide GCSD documents as ordered by the tribal court prior to the dismissal.¹¹

9 • When the American Arbitration Association action for arbitration under the 2003 agreement commenced in Phoenix, the Defendant sought to terminate the arbitration by claiming that arbitration could only be commenced by Federal Court order.¹²

10 • When the arbitration proceeded under the 2003 Agreement, the Defendants attempted to slow down the process by claiming they did not have documents, could not get access to documents and were unable to find deposition dates for witnesses.¹³

11 • When GCSD learned that the Defendants intended to vote on a resolution taking the management contract from Skywalk, it sought an Order from the AAA arbiter preventing such action by SNW. The Defendants, through their counsel, claimed ignorance of such and indicated that they would work in good faith to produce the critical point of sales documents from the tribe and GCRC's systems showing the total number of Skywalk tickets sold, cash receipts and prices.¹⁴

12 **THE TAKING RESOLUTION**

13 • The Defendants passed the resolution of taking the same day, Tuesday, February 7, 2012, by canceling the first vote when the resolution failed to pass and then

14 ⁸ See Exhibit to Consent to Disbursement, attached hereto as Ex. 13.

15 ⁹ See Ex. 1, p. 3

16 ¹⁰ See Opposition to Request for Arbitration filed in Tribal Court by G&K, attached hereto as Ex. 14.

17 ¹¹ See Tribal Court Order, attached hereto as Ex. 15.

18 ¹² See Ex. 14.

19 ¹³ See AAA Arbitrator Order, attached hereto as Ex. 16.

20 ¹⁴ See 2/10/12 AAA Order, attached hereto as Ex. 17.

conducting a second vote to allow the resolution to narrowly pass.¹⁵

- Judge Yellowhawk signed the Order taking the management agreement by eminent domain on Wednesday, February 8, 2012 without notice or hearing to GCSD and signed a TRO the same day.¹⁶

- The justifications for the Taking were substantially identical to the contract counterclaims at issue in the AAA arbitration. *See* Ordinance, **Ex. 7**.

- The taking order set a valuation of \$11 million without the benefit of an evidentiary hearing or any opportunity for GCSD to present evidence.¹⁷

- The valuation of \$11 million was within \$1 million of the amount held in the SNW/GCSD trust account which the tribe had refused to distribute. Half belongs to GCSD and the tribe intends to use those funds to pay for the \$11 million taking.¹⁸

- Evidence that the jurisdiction of the Tribal Court was in bad faith is the fact that Judge Yellowhawk, signed the takings orders and then ruled certain provisions to prohibit the appointment of a Judge pro temp unconstitutional and recused himself rescheduling the next hearing for late March.¹⁹

- The attorneys for SNW and the Defendants used Judge Yellowhawk's Order as evidence that Mr. Jin would receive just treatment and compensation before the Tribal court, however this move also left GCSD with no one to even hear a request for TRO and obtain immediate relief within the Tribal system.

LEGAL ARGUMENT

Typically, a party must exhaust tribal remedies prior to seeking relief in the federal courts, although this is a matter of comity, not a jurisdictional prerequisite. *See Strate v. A-1 Contractors*, 520 U.S. 438, 451, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). This exhaustion requirement is due to "the Federal Government's longstanding policy of encouraging tribal self-government." *See Iowa Mutual Ins. Co. v. Laplante*, 480 U.S. 9, 14, 107 S.Ct. 971, 94 L.Ed. 2d 10 (1987). This policy exists because "Indian tribes retain attributes of sovereignty over both their members and their territory..." *Id.* (internal quotations omitted). As a result, a federal court should typically stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction. *Id.*, 480 U.S. 9, 16.

¹⁵ *See* **Ex. 8**, Benson Aff., ¶¶ 10-11

¹⁶ *See* 2/8/12 Temporary Restraining Order, attached hereto as **Ex. 18**

¹⁷ *See*, 2/8/12 Declaration of Taking, attached hereto as **Ex. 19**.

¹⁸ *See* **Ex. 8**, Benson Aff., ¶ 9.

¹⁹ *See* 2/17/12 Order, attached hereto as **Ex. 20**

1 However, this policy is not without exceptions: the Supreme Court has held that
 2 exhaustion is not required “[1] where an assertion of tribal jurisdiction is motivated by a
 3 desire to harass or is conducted in bad faith, or [2] where the action is patently violative of
 4 express jurisdictional prohibitions, or [3] where exhaustion would be futile because of the
 5 lack of an adequate opportunity to challenge the [tribal] court's jurisdiction.” *Nat'l Farmers*
 6 *Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, n.21, 105 S.Ct. 2447, 85
 7 L.Ed.2d 818 (1985). In those types of cases, the policy interests behind the exhaustion
 8 doctrine are not furthered, and exhaustion is not required.

9 At issue here is the “bad faith” exception. The issue of whether an Indian tribe has
 10 engaged in prohibited bad faith within the meaning of *National Farmers Union* - eliminating
 11 the need for Tribal Court exhaustion - is a determination for this Court, not the Tribal Court.
 12 *Superior Oil Co. v. United States*, 798 F. 2d 1324, 1331 (10th Cir. 1986). Very few cases
 13 have addressed the nuances of this exception, although several facets have been fleshed out
 14 within the Ninth Circuit. First, this exception applies only where proof of bad faith conduct
 15 or a motive to harass appears in the record. *See A & A Concrete, Inc. v. White Mountain*
 16 *Apache Tribe*, 781 F.2d 1411, 1416–1417 (9th Cir. 1986) (noting that “this exception to the
 17 exhaustion requirement, however, may not be utilized unless it is alleged and proved that
 18 enforcement of the statutory scheme was the product of bad faith conduct or was perpetuated
 19 with a motive to harass.”), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 2008, 90 L.Ed.2d 659
 20 (1986); *but see Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida* (in motion
 21 to dismiss context, alleging bad faith enough to prevent dismissal). Additionally, allegations
 22 of bias are not sufficient to support a bad faith claim. *Landmark Golf Ltd. Partnership v. Las*
 23 *Vegas Paiute Tribe*, 49 F.Supp.2d 1169, 1176 (D. Nev. 1999). In this case, the “bad faith” is
 24 more than amply supported by the record, and Plaintiff has shown far more than simply
 25 allege bias. **Moreover, the fact that Judge Yellowhawk recused himself after he allowed**
 26 **the taking and would not reverse it is absolute evidence that the jurisdiction of the**
 27 **Tribal Court was invoked in bad faith.** Accordingly, this Court should find that the “bad
 28 faith” exception applies.

1 1. “Bad Faith” In This Matter is Supported by the Record and Extends Beyond mere
2 Potential Bias.

3 Courts generally require that a showing of “bad faith” or “a motive to harass” be
 4 supported by evidence in the record. *See, e.g., A & A Concrete, Inc. v. White Mountain*
 5 *Apache Tribe*, 781 F.2d 1411, 1416–1417. For example, in *Armstrong v. Mille Lacs County*
 6 *Sheriffs Dept.*, the plaintiffs argued that a motion to stay the federal court proceedings “can
 7 only be characterized as a bad faith motion brought solely to harass Plaintiffs, delay these
 8 proceedings and increase costs of litigation for all parties concerned.” *See* 112 F.Supp.2d
 9 840, 849 (D. Minn. 2000). The federal court held that while if that contention was proven,
 10 return to the tribal court would be inappropriate, the plaintiffs had no evidence of such bad
 11 faith. *Id.*

12 Here, Plaintiff has done far more than simply allege bad faith or a motive to harass.
 13 Instead, GCSD has established an outline of a conspiracy from at least as early as July 2011
 14 to take GCSD’s interests. It has provided a copy of a public relations plan which was set in
 15 place by the Tribe to vilify GCSD and its manager David Jin. GCSD has presented evidence
 16 that claims made to create offsets to minimize or eliminate any potential payments to GCSD,
 17 including claims GCSD was required to but failed to bring in utilities and that it refused to
 18 complete the visitors center, were knowingly false. GCSD has presented evidence that the
 19 Tribe’s attorneys in bad faith, feigned good faith efforts to produce critical documents,
 20 driving up GCSD’s costs and delaying and hindering discovery intentionally, already
 21 knowing that a takings plan had been approved and that they would use the Tribal Courts
 22 taking to attempt to kill the arbitration. GCSD has presented evidence that the Tribal court is
 23 not independent of the Tribal Council. Finally, GCSD has shown that the Tribe in fact
 24 withheld moneys due to GCSD, so that at the most, they would pay Jin with amounts that
 25 they unjustifiably kept from him. The use of Tribal court jurisdiction to enforce this plan was
 26 an integral part of the plan as shown by the Gallagher and Kennedy memo, **Ex. 1**, pp. 9-15
 27 and as shown by the attempts to prohibit anyone other than the existing tribal judges, who
 28 were close relatives of the Tribal Council members to hear the case.

1 Ample evidence exists for a determination of bad faith. Applying the doctrine of
2 judicial comity based on these facts is inappropriate because the Hualapai Tribal Court has
3 acted in bad faith, which requires that this Court assert its own jurisdiction in order to
4 adjudicate the protected rights of a non-Indian under federal, not Tribal, law. Tribal court
5 exhaustion "is required as a matter of comity, not as a jurisdictional prerequisite . . . and
6 instead is 'analogous to principles of abstention articulated in Colorado River Water
7 Conservation Dist. v. United States, 424 U.S. 800 (1976)'." Iowa Mut. Ins. Co. v. LaPlante,
8 480 U.S. 9, 16 n.8 (1987). The doctrine of comity/abstention must be interpreted narrowly in
9 light of the "virtually unflagging obligation of federal courts to exercise the jurisdiction
10 given to them." Colorado River, 424 U.S. At 817.

11 CONCLUSION

12 For all the reasons stated above, including but not limited to the fact that the
13 jurisdiction in or by the Tribal Court has been in bad faith, this Court should retain
14 jurisdiction over this case to protect the rights of non-Indian plaintiff GCSD.

15 Dated this 1st day of March, 2012.

16 **GREENBERG TRAURIG, LLP**

17 By: /s/ Pamela M. Overton

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CERTIFICATE OF SERVICE

☒ I hereby certify that on March 1, 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:

/s/ Tammy Mowen