

AMERICAN ARBITRATION ASSOCIATION

Commercial Panel

No. 76 517 Y 00191 11 S1M

In the Matter of the Arbitration of

Grand Canyon Skywalk Development, LLC

and

'Sa' Nyu Wa, Inc.

FINAL AWARD

In this breach of contract case, the tribunal determines the rights to revenue from operation of the Grand Canyon Skywalk. Finding that 'Sa' Nyu Wa, Inc. ("SNW") wrongly withheld management and other fees due Grand Canyon Skywalk Development, LLC ("GCSD"), the tribunal awards contract damages and attorneys' fees to GCSD.

I.

BRIEF INTRODUCTION TO THE DISPUTE.

In 2003, The Hualapai Nation partnered with Mr. David Jin in the construction and management of a glass viewing bridge called the Grand Canyon Skywalk, located at Eagle Point. Mr. Jin and the Tribe agreed to share revenue from the operation of the Skywalk, including the sale of tickets and merchandise. In 2007, after four years of planning and construction, the Skywalk opened to rapturous praise from visitors who stood awestruck at the western edge of the Grand Canyon, over 4000 feet above and 70 feet out and over the Colorado River flowing below.

Despite (or perhaps because of) the immediate and enormous success of the Skywalk, disputes soon developed; over time, the Hualapai Tribe withheld millions of dollars in management fees (and other money) from Mr. Jin's company (GCSD). After hearing four days of testimony from members of the Tribe and many others,

and for the reasons below, the tribunal awards the sum of \$24,975,469 to GCSD and against SNW for amounts owed through December 31, 2011, plus other contract damages and attorneys' fees.

The Parties, Grand Canyon West, and the Skywalk. The Hualapai Tribal Nation is a federally recognized Indian Tribe, many of whose members live on the Hualapai Indian Reservation in northwestern Arizona. The Grand Canyon Resort Corporation ("GCRC") and its sister corporation, SNW, tribally chartered corporations owned by the Hualapai Indian Tribe, own the Skywalk, which lies within Grand Canyon West, a 9000-acre development and tourist destination on the southwestern rim of the Grand Canyon, about 120 miles southeast from Las Vegas, 70 miles north of Kingman, Arizona, and over 240 miles from the Grand Canyon National Park entrance to the east. The largely unpaved (and rugged) Diamond Bar Road serves as the primary road and access for most of the nearly 650,000 annual visitors to Grand Canyon West.

The Parties' Agreement to Arbitrate Their Disputes. In 2003, the Tribe chartered and allowed SNW to contract with GCSD for the construction and management of the Skywalk.¹ That agreement was described in GCSD's and SNW's *Development and Management Agreement*. The parties here – GCSD (Mr. Jin) and SNW (the Tribe) – agreed to arbitrate their disputes under the following provision of their 2003 *Development and Management Agreement*:

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

¹SNW and the Tribe are referred to interchangeably.

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).

* * *

Exh. 3.² In 2011, GCSD sued SNW in the Court of the Hualapai Nation (Case no. 2011-cv-006). SNW moved to dismiss. On July 29, 2011, the Hon. Ida Wilber, Judge Pro Tem of the Tribal Court, granted SNW's motion to dismiss finding, in part, that "[t]here is no dispute that SNW expressly waived its sovereign immunity for the limited purpose of mandatory arbitration." *Order*, at 2.

Several days later, on August 9, 2011, GCSD demanded arbitration. *See* Letter from D. Prunty to American Arbitration Association (enclosing *Demand for Arbitration* to SNW, c/o Mr. Glen Hallman (Gallagher & Kennedy), counsel for SNW). In this arbitration proceeding, SNW raised the jurisdictional question whether GCSD was compelled to first seek an order compelling arbitration from the U.S. district court. Following motion practice in November 2011, this tribunal ordered that GCSD had properly demanded arbitration without first seeking permission from the federal court. *See Order re Respondent's Motion to Dismiss GCSD's Arbitration Complaint* (11.21.11).

The final arbitration hearing remained on calendar for April 2012. In January 2012, the parties continued preparation for that hearing, including, for example, Mr. Hallman's request for issuance of subpoenas to David J. Emry and David J. Emry & Associates (1.20.12).

Then, on February 9, 2012, the Tribe seized GCSD's interest in the Skywalk through eminent domain proceedings filed in the Hualapai Tribal Court. As a result of that condemnation proceeding, the Tribe claimed ownership of GCSD's claims in this arbitration and voluntarily dismissed GCSD's demand for arbitration with prejudice. GCSD objected. After expedited motion practice in February 2012, the

² During the final hearing, GCSD offered and the tribunal received hearing exhibit nos. 1-95. The citations to "Exh. ___" refer to those exhibits.

tribunal upheld GCSD's objection. The arbitration proceeded. The final hearing was continued to July 2012. In the following months, neither the U.S. District Court nor the Hualapai Tribal Court enjoined this arbitration.³ This matter therefore proceeded to final hearing on July 16-20, 2012. Claimant GCSD appeared and presented its proofs.⁴

The Respondent SNW's Failure to Appear at the Final Hearing. After due notice, respondent SNW failed to appear at the final hearing. Under the parties' agreement, the arbitration was governed by the *Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)* of the American Arbitration Association as amended and in effect on June 1, 2010. Under R-29 (Arbitration in the Absence of a Party or Representative) of those rules, "[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award." Under the Revised Uniform Arbitration Act as adopted in Arizona, A.R.S. 12-3015(C), "[t]he arbitrator may hear and decide the controversy on the evidence produced although a party who was duly notified of the arbitration proceeding did not appear." On April 13, 2012, the AAA forwarded to counsel for SNW and GCSD the *Notice of Hearing* setting the final hearing for July 16-27, 2012. Accordingly, under the governing rules and controlling law, the hearing proceeded after due notice to respondent SNW through its counsel, Gallagher & Kennedy (Phoenix, Arizona).

³ United States District Judge David G. Campbell (Case 3:12-cv-08030-DGC) and the Hualapai Tribal Court have considered aspects of the parties' dispute. Months before GCSD demanded arbitration here, the Tribal Court expressly declined to hear the parties' dispute. *See Order* of Hualapai Tribal Court (8.2.11). Still another motion to enlarge the Tribal Court's temporary restraining order in Case No. 2012-CV-017 remains pending after argument on June 1, 2012 before the Hon. Lawrence King, Judge Pro Tem.

⁴ During the hearing, the following witnesses testified under oath: Mr. Jin; Mr. Steve Beattie (via recorded video statement (Exh. 31 (transcript))); Mr. Ted Quasula; Mr. Walter Mills; Ms. Sheri YellowHawk; Ms. Louise Benson; Ms. Kathryn Landreth (via recorded video statement (Exh. 79 (transcript))); Mr. Manuel Mojica; Mr. Barry Welch; Mr. Robert Bravo, Jr.; Mr. Jeff Whitaker; Ms. Jan Allen (via recorded video statement (Exh. 86 (transcript))); Mr. Erin Forest; Ms. Mia Jack; and, Mr. Steven Hazel.

II.

The Tribe's and SNW's Failure to Produce Financial and Other Records from 2008 to 2012. Two preliminary matters deserve attention before turning to the merits. First, before GCSD demanded arbitration, and during the months leading up to the final hearing, the respondent SNW and the Tribe failed to produce financial, operational, and other important records and documents, including records of Skywalk ticket and merchandise sales. The record strongly suggests that the Tribe also blocked GCSD's lawyers' efforts to gather testimony and documents from third parties.

Briefly, in 2003, Mr. Jin agreed to construct the Skywalk, at his own expense; however, Mr. Jim agreed that the Tribe would own the structure. GCSD and SNW also agreed that, following Mr. Jin's construction of the Skywalk, both GCSD and SNW would sell tickets to Skywalk. Each side would account to one another for revenues and expenses and share net revenue. However, shortly after the Skywalk opened, at the Tribe's request, GCSD took on the job of accounting for all revenues and expenses of the operation.

Later, the Tribe and SNW hired the accounting firm of Kafoury Armstrong & Co. to audit the books and records. So, in late 2008 and 2009, GCSD turned over thousands of pages of financial records to Kafoury Armstrong. In his letter dated June 5, 2009 to lawyers for SNW and the Tribe (Mr. Ohre (Snell & Wilmer) and Mr. Thompson (Gallagher & Kennedy)), Mr. Teddy Parker, counsel for GCSD, summarized and confirmed GCSD's turnover of records. Exh. 81 ("I would like to start from the beginning with the [Tribe's] first request [for records from GCSD] which was received [from Kafoury Armstrong] on November 12, 2008 at approximately 4:31 p.m."). Over the following months, in late 2008 and early 2009, less than two years after the Skywalk had opened, Mr. David Emry, CPA⁵ – GCSD's accountant who, after the Skywalk opened and at SNW's urgent request, kept the books of the Skywalk's operation – turned over thousands of pages of material to the

⁵ David J. Emry & Co., Ltd. Certified Public Accountants (Las Vegas).

Kafoury Armstrong accounting firm: ledgers, bank statements, and source documents. In early and mid-2009, Mr. Emry and his firm produced many more documents to the Kafoury firm, such as daily summaries and control sheets, including, for example, in January 2009, “original source documents and other financial information as requested.” *Id.* (GCSD007268).

For years, and to this day, after many requests, including subpoenas from this tribunal, the Tribe and SNW, together with the Kafoury firm and the Tribe’s lawyers, have refused to turn over copies of those same documents to GCSD, Mr. Jin, his accountants, or his lawyers. Over three years ago, Mr. Emry began requesting those records from the Tribe. *See, e.g.*, Exh. 81 (GCSD007270) (“As early as March 03, 2009, David Emry has requested from Jaci Dugan,⁶ information relative to the balance of Skywalk monies held by SNW and GCRC as of February 28, 2009.”). For many, many months thereafter, Mr. Jin’s lawyers diligently sought copies of the Skywalk’s financial records from the Tribe, its accountants (Kafoury Armstrong and Moss Adams), and its lawyers (Snell & Wilmer and, later, Gallagher & Kennedy).

Meanwhile, during this same period, the Tribe withheld operating funds from GCSD, which Mr. Parker noted in his June 2009 letter:

“As stated above, GCRC and SNW have failed to release operating funds for purposes of the operating expenses of the Grand Canyon Skywalk Development. No funds have been released since November, 2008. Demand is hereby made for your clients to transfer the funds for the operating expenses of the Grand Canyon Skywalk Development. At a minimum, a transfer of \$800,000 is needed to cover operating expenses. Please ensure that this wire transfer is performed no later than June 10, 2009.”

Exh. 81 (GCSD007270). Those funds never arrived. Undeterred, Mr. Jin continued to fund the Skywalk’s operation on his own, without the required financial contribution let alone basic financial reports and documents from the Tribe.

⁶ During her testimony, Ms. Mia Jack explained that Ms. Dugan replaced Mr. Beattie as the chief financial officer of SNW and GCRC.

In preparing for this arbitration, Mr. Jin and his lawyers sought the financial records of the Skywalk from Kafoury Armstrong. The Kafoury firm refused to turn over those records. Neither the Tribe nor its lawyers authorized the Kafoury firm to produce the records. And, the Kafoury firm sought no guidance from this tribunal or court on the matter, even though in nearly every case the records at issue were originally turned over to the firm by GCSD and Mr. Jin. The Kafoury firm, in other words, with the apparent blessing of the Tribe and its lawyers, withheld documents under the cloak of the accountant-client privilege when, by all indications on this record, those documents were not their client's records to withhold.

In any event, still, as late as October 2010, Mr. Theodore Parker, counsel for GCSD, wrote in part as follows to Mr. Terence Thompson (Gallagher & Kennedy), counsel for SNW and the Tribe:

“Please allow this correspondence to confirm our conversation of October 11, 2010. I reiterated my concern over the lack of response to our many requests for the accounting information from Kafoury and Armstrong. As you are aware, for over eighteen (18) months, we have been requesting this information from GCRC/Sa Nyu Wa. These requests began while Mr. Ohre [Snell & Wilmer] was still counsel for the Tribal Enterprises, including Sa Nyu Wa. Mr. Ohre never provided the documentation and as a result, I began requesting this information directly from you, once you took over as counsel for not only the Tribe, but the Tribal Enterprises. During our meeting with the Tribal Counsel (sic), which took place on August 2 and 3 of this year, the Tribal Counsel (sic) mandated the exchange of accounting information from Kafoury and Armstrong. Specifically, we have been requesting the gross receipts from Skywalk ticket sales sold by GCRC/Sa Nyu Wa. We have also requested the expenditures by GCRC/Sa Nyu Wa from these proceeds. Finally, we requested the remaining balance of those proceeds. It was clear after the Counsel (sic) meeting that these documents were to be provided and to this date, we have not received the documentation.”

Exh. 64 (GCSD007274).⁷ In short, nearly two years after Mr. Emry began requesting records, the Tribe finally promised to deliver the requested information (by October 15, 2010). *Id.* (GCSD007275). No record (or witness for that matter)

⁷ Letter from Teddy Parker to Terence Thompson (10.11.10)(GCSD007274-75),

suggested (let alone confirmed) that the Tribe, its lawyers, or accountants then or ever turned over any financial reports or source documents to GCSD. *Cf.* Exh. 65 (11.14.10) (“Again, we look forward to receiving Kafoury and Armstrong’s documentation immediately[.]”).⁸ To this day, the Tribe and its professionals have withheld these documents, including records of gross receipts from Skywalk ticket sales and expenditures from those revenues.⁹

Instead, the Tribe not only refused to respond but also demanded that Mr. Jin sign a revised Skywalk Management Agreement and Construction Completion Agreement; then, the record suggests, the Tribe would turn over the financial records of the operation. *Cf.* Exh. 65 (“When Mr. Jin and GCSD have been asked for documentation, I have not suggested that the completion of these Agreements must come before the production of the requested information.”). Aside from the Skywalk Trust Agreement (Exh. 19) and shuttle bus agreement (Exhs. 20 and 21), which were signed in May 2010, SNW and GCSD never came to agreement on the proposed, superseding management agreement (Exh. 22 (12.28.10 redline draft)) or construction completion agreement (Exh. 23 (10.18.10 handwritten markup)).¹⁰ And, the Tribe has produced none of the critical financial records.

Mr. Emry persisted. In May 2009, he sent an email to Ms. Dugan requesting, among other information, documentation of the 2007 proceeds from the sale of

⁸ Letter from Teddy Parker to Terence Thompson (10.14.10)(GCSD007277).

⁹ The statement for an account that apparently holds at least some portion of the unaccounted-for ticket proceeds (U.S. Bank statement for account no. 136496000 (Exh. 60 (GCSD009364-37)) reflects a balance as of December 31, 2011 in the amount of \$10,164,569.75. During the period January 1, 2011 to December 31, 2011, the statement shows “[c]ontributions” in the amount of \$19,222,885.48 and “[d]istributions” in the amount of \$14,073,243.26. *See also* Exh. 61 (Trust Account Summary (GCSD07279)). In March 2010, SNW and GCSD signed the 112-page agreement with U.S. Bank, as trustee, that established and governed this joint trust account. *See* Exh. 19 (Skywalk Trust Agreement (GCSD006331-6442)) (“The Parties desire to enter into this Agreement to facilitate the collection and disbursement of funds relate to the operation of the bridge and the related facilities, and to have the Trustee administer the same.”). The Tribe has produced none of the records supporting these “contributions” or “distributions.”

¹⁰ *See also* Exh. 25 (Letter from Paul Charlton to Mark Tratos ((1.31.11)(attaching redlined draft agreements)(GCSD007949-8105)). Mr. Charlton wrote in part: “Just as soon as the Tribe has fully considered all of the ramifications of the re-opening of numerous issues long thought to be resolved, we will contact you and Mr. Parker.” *Id.* (GCSD007950).

Skywalk tickets (total \$3,819,918) so that he could tie the ticket prices to the number of tickets sold. *See* Exh. 81 (GCSD007271)(describing request and email).¹¹ He also asked for the records concerning the 2007 payments made for and to Skywalk, including payments and supporting invoices for sales tax, marketing, insurance, office supplies, repairs, maintenance, and other expenses. In June 2009, when Mr. Parker wrote to Mr. Ohre, the Tribe’s lawyer, Ms. Dugan still had not produced the records. *Id.* (GCSD007272)(“Mr. Emry is still waiting for these documents, despite the many requests over the last several months.”). To this day – over four years after Mr. Jin, his accountants, and his lawyers undertook the pursuit of these basic financial records – the Tribe, SNW, GCRC, Kafoury Armstrong, Snell & Wilmer, Gallagher & Kennedy, and every other advisor on behalf of the Tribe, steadfastly refuses to turn over these and every other important financial record to Mr. Jin and GCSD.

In the teeth of this sustained effort by the Tribe and its professional advisors to withhold documents, fees, and reimbursements, Mr. Emry nevertheless turned over records to the Kafoury firm. For example, in February 2009, he sent the following to Ms. Carlene Gaydosh, CPA, at Kafoury, Armstrong & Co.: Grand Canyon Skywalk Operations Document Transmittal Control Sheet; two CDs with Grand Canyon Skywalk Excel and PDF files; and, two boxes of original source documents as requested. *See* Exh. 85 (GCSD008128) (showing handwritten confirmation of receipt by “Carlene Gaydosh CPA 2/20/09”).¹² Those records included monthly payroll registers, agreements, leases, contracts, payment details, inventory detail, and numerous compilations of source documents. *Id.*

For months during early to mid-2009, Mr. Emry sent financial and business records to Kafoury Armstrong, including original bank statements, daily sales reports, and point of sale documents. *See generally* Exh. 85 (collection of transmittal logs to and receipts by Kafoury Armstrong). Mr. Emry transmitted records in, for

¹¹ Letter from Teddy Parker to Mark Ohre and Terence Thompson (6.5.09)(GCSD007266-72).

¹² Transmittal and acknowledgement of receipts of financials from David Emry (GCSD008127-94; 163-164).

example, March 2009 (GCSD008136), April 2009 (GCSD008145 (receipt confirming delivery and Kafoury firm's receipt of disc containing Skywalk revenue reports for February 2008), GCSD008150 (trial balances and check stubs), and GCSD008151 (2008 Year End for Grand Canyon Skywalk Development, LLC and the Trial Balance for 2007)), May 2009 (GCSD008159) ("20 discs containing requested information"), June 2009 (GCSD008176 (2 discs) and GCSD008178 (2 boxes)), July 2009 (GCSD008182 ("Original daily sales reports (see attached list.)"), GCSD008186 ("10 boxes containing original [point of sale] documents for March 2007 through December 2007"), and GCSD008191 (original bank statements, etc.)), and September 2009 (GCSD008193 ("Original cash disbursements for July 2009")). In every case, the documents confirm Mr. Emry's hand delivery and Kafoury Armstrong's receipt of these records. *See, e.g.*, Exh. 85 (GCSD008178 ("David J. Emry Co. Ltd Receipt" signed and date stamped by Mindy Roberts ("JUN 05 2009"))).

During these months in 2009, the record reflects the Kafoury firm's thorough requests for records and Mr. Emry's equally thorough, patient responses. As late as September 2009, Mr. Emry delivered one box "containing all of the items from the 'Open Items List – Sa' Nyu Was 7/20/09' excluding the construction costs"; his firm had already "provided the schedule of values which documented in excess of twenty million [dollars] in construction costs to the Tribal Council, its attorneys and a representative of the Grand Canyon Resort Corporation Board." Exh. 85 (GCSD000163).

All of this effort by the Kafoury firm (not to say Mr. Emry's) apparently resulted in an audit report. On March 30, 2009, Mr. Jeffrey Manuel, CPA, a manager at the Kafoury firm, wrote in an email to Mr. Emry asking for "the documents we requested earlier including the remaining 2008 (sic) and the additional request items." Exh. 85 (GCSD008153). Ms. Gaydosh wanted the items, she wrote in a related email, because "[t]he auditors are very anxious to get started." *Id.* As noted above, Mr. Emry not only produced those records but also hosted representatives of the Kafoury firm as part of that audit. Mr. Emry wrote in

an email that “Kafoury Armstrong and Co. representatives are scheduled to be in our office on May 4th, 5th, 11th, and 12th, 2009 to complete testing of internal accounting controls.” *Id.* (GCSD008160). But, since that time, in over three years, after having produced thousands of pages of records, many in original form, no one for the Tribe has ever turned over any audit report to Mr. Emry, Mr. Jin, GCSD, or its lawyers.¹³

The Tribe’s Efforts to Interfere with the Gathering of Evidence for Presentation at the Final Hearing. The second preliminary matter is the Tribe’s sustained effort to block GCSD’s gathering of evidence. Mr. Tratos, counsel for GCSD in this matter, sought accounting records from the Kafoury firm, including issuance of subpoenas to the firm for records and Ms. Gaydosh’s testimony. As noted above briefly, counsel for Kafoury Armstrong, McDonald Carano Wilson (Mr. Mark Dunagan), objected to the subpoena on privilege grounds. *See* Letter from M. Dunagan to M. Tratos, Exh. 92 (5.31.12) (“Kafoury has been instructed by SNW not to produce the requested documents on the basis of the accountant-client privilege.”). But, beyond that objection, however well taken, SNW also instructed the Kafoury firm to return the records to SNW. *Id.* (“Please be advised that the original version of SNW’s entire file is being returned to it by Kafoury, pursuant to SNW’s request. *** As a result, the best source from which to pursue production of the original documents is SNW.”). In turn, despite several requests, SNW never produced these financial records. So, in the months leading to the hearing, SNW possessed the core financial records, but refused to exchange those records with GCSD.¹⁴ We turn now to the merits.

¹³ Mr. Mark Tratos (Greenberg Traurig), counsel for GCSD, wrote on February 3, 2011 to Mr. Terence Thompson (Gallagher & Kennedy), counsel for SNW, recapping Mr. Parker’s requests for the records, requesting again the accounting and other project records, and demanding the audit permitted under Section 4.5 of the 2003 agreement. *See* Exh. 27 (GCSD008125-26) (“This letter is to notify you that GCSD hereby requests access to the books and records of the project in SNW’s possession to conduct such an audit.”). Neither the Tribe nor SNW complied.

¹⁴ According to counsel for GCSD, Mr. Tratos, the Tribe’s lawyers (Gallagher & Kennedy) also advised witnesses not to respond to subpoenas from this tribunal for records and testimony but, because those efforts were not relevant to the dispute here, nothing further need be discussed on that point.

III.

Mr. David Jin, Oriental Tours, Inc., and Tourism at Grand Canyon

West. In 1995, Mr. David Jin formed Oriental Tours, Inc. (OTI) to bring travelers to the western United States from China, Hong King, Singapore, and Taiwan. Stops on those tours included San Francisco, Los Angeles, Las Vegas, and Grand Canyon West. Over the years, in cooperation with the Tribe, Mr. Jin developed helicopter rides, pontoon water trips, and shuttle bus tours for visitors to Grand Canyon West. Mr. Jin estimates that OTI brings perhaps one-third of all visitors to Grand Canyon West. Both the Tribe and Mr. Jin profited from this tourism.

Mr. Jin testified that, in the late 1990s, he conceived of and then developed the idea for a glass viewing bridge at Grand Canyon West. He formed GCSD (with other investors) to finance, construct, and manage the facility. The Tribe formed SNW to contract and share revenues with GCSD.¹⁵ Over time, David Jin and Steve Beattie (for the Tribe) negotiated and came to agreement on the terms of the construction and management of the Skywalk.¹⁶

After four years of planning and construction, the Skywalk bridge opened in March 2007. Through June 7, 2009, GCSD had invested over \$28 million in the construction of the Skywalk bridge and adjacent Visitors' Center shell. Exh. 59 (Schedule of construction costs (GCSD003953-57)). The Visitor's Center remains largely but not fully completed. In June 2009, GCSD had budgeted \$1.25 million to complete the shell of the Visitor's Center (after the Tribe delivered utilities to Grand Canyon West) and \$5.022 million to build future tenant improvements at the Visitors' Center. Exh. 59 (GCSD003957). In order to provide an adequate return to Mr. Jin and his investors on their investment of over \$30 million in construction costs, the parties agreed that GCSD alone would manage the Skywalk and share

¹⁵ The Tribe is the sole shareholder of SNW, which, in turn, partially waived its sovereign immunity for purposes of the agreement with GCSD. *See* Exh. 3 (execution copy of agreement), at §15.4(d) ("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.").

¹⁶ *See* Exhs. 4, 5, 6 and 7 for examples of the letters and notes between Mr. Jin and Mr. Beattie during 2004 and 2006.

revenue with the Tribe for 25 years (and an additional 15 years after termination of the agreement).

The GCRC, SNW's sister Tribal corporation, controls admission to Grand Canyon West and, therefore, to the Skywalk. Visitors must first stop at the reservation entrance where, in many cases, GCRC sells tickets for admission to the Skywalk (and meal tickets). Those sales make up perhaps half of all ticket sales, more or less, with GCSD selling the balance of the tickets at its Las Vegas offices. When the Skywalk opened in March 2007, the receipts from ticket sales were deposited into SNW's bank accounts; SNW then issued checks to GCSD for operating expenses. But, in 2008, SNW stopped accounting for revenues and reimbursements. GCRC may (or may not) have delivered ticket revenues to SNW. But, any event, SNW paid no manager's fee to GCSD for 2008 through today. During these years, therefore, GCSD redirected its portion of the ticket revenues to operating expenses. And, for its part, OTI advanced funds to GCSD for repairs and other operating expenses. Most importantly, as noted above, SNW turned over none of the records or audits of the operations.

The Parties and the Relevant Terms of Their 2003 Agreement for the Construction and Management of the Skywalk Bridge and Visitor's Center.

In their 2003 *Development and Management Agreement*, Grand Canyon Skywalk Development contracted with Sa Nyu Wa for the construction and management of the Skywalk glass bridge and Visitor's Center.¹⁷ This dispute arises out of that agreement. Several terms of the agreement bear on this dispute, including the following provisions, which are excerpted together for ease of reference as follows:

2.2 Development of Project.

* * *

¹⁷ See Exh. 3 (execution copy of agreement (GCSD005563 – 5611)). The agreement defined the "Project Improvements" to mean "the Glass Bridge and adjacent building 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." Exh. 3, at 4 (GCSD005566) and Exh. B (Description of the Project Improvements)(referring in part to "an approximate 5500 square foot building that includes a VIP room, a gift shop, a coffee shop, a display area, at least 2 restrooms and a small kitchen[.]").

(c) Project Entitlements.

* * *

(ii) SNW shall be responsible, at its expense, for obtaining any and all required permits and licenses from any governmental authority, including the Nation, other than agencies of the federal government (the “Non-Federal Entitlements”). SNW shall pursue obtaining the Non-Federal Entitlements with due diligence and shall provide Manager with appropriate written evidence of such Federal Entitlements when they are received. Manager will cooperate with SNW in SNW’s efforts to obtain the Federal Entitlements. The date that all required Federal Entitlements and Non-Federal Entitlements have first been obtained is referred to as the “Entitlement Date”.

* * *

2.3 Management of Project. During the Operating Term, Manager shall manage the Project in accordance with the requirements of this Agreement, with full responsibility and authority to supervise, direct and control the management and operation of the Project, subject in every case to the authority limitations and other restrictions set forth in Section 2.7 and elsewhere in this Agreement and to the requirement that all such actions shall be consistent with the then effective approved Annual Operating Budget and Annual Capital Budget, such responsibility and authority (as so limited) to include, without limitation, the following:

(a) Manage the Project in manner consistent with the Standards of Operation and the requirements of this Agreement;

(b) Determine appropriate pricing for retail customers to use the Glass Bridge, subject to the prior written approval of such pricing by SNW. It is agreed that during the period from the date of commencement of the Operating Term to the first anniversary of such commencement date, the retail price will be not less than \$12 per individual, unless the parties otherwise agree;

(c) Determine appropriate pricing for Tour Operators or other organized, commercial tour groups for the use the Glass Bridge, subject to the prior written approval of such pricing by SNW. It is agreed that during the period from the date of commencement of the Operating Term to the first anniversary of such commencement date, the price to Tour Operators or other organized, commercial tour groups will be not less than \$9 per individual, unless the parties otherwise agree;

(d) Arrange, in SNW's name, for utility, telephone, pest control, security service, trash removal and other services reasonably necessary or appropriate for the operation of the Project;

(e) Determine, establish, and maintain advertising, public relations and promotional policies appropriate for the Project;

(f) Cause all ordinary and necessary repairs and maintenance to be made to the Project and after prior notification and approval by SNW cause all such other things to be done in or about the Project as shall be necessary to comply with all requirements of governmental Authorities, boards of fire underwriters and other bodies exercising similar functions, *provided, however*, that repairs the costs of which are properly capitalized shall be made by Manager only to the extent that (i) such costs are included within an Annual Capital Budget that has been approved by the parties or (ii) emergency conditions require the performance of capitalized repairs in order to prevent damage or injury to persons or property before approval by SNW of an appropriate modification of the Annual Capital Budget can be reasonably obtained;

(g) Purchase all Inventories and such other services and merchandise as are necessary for the proper operation of the Project in accordance with the Standards of Operation, to the extent the costs thereof are included within an approved Annual Capital Budget, and arrange for the purchase and installation of Furniture and Equipment (including additions to or replacements of such items) to the extent the costs thereof are included within an approved Annual Capital Budget;

(h) Institute and defend such proceedings at law or in equity in the name of SNW (to the extent that SNW is a party in any such proceeding) or Manager, using counsel selected by Manager and approved by SNW, as Manager shall deem reasonably necessary or proper in connection with the collection of accounts receivable and all other matters arising from the operation of the Project. Manager shall obtain SNW's written approval prior to filing any litigation on behalf of SNW;

(i) Collect all Gross Revenues at the point of sale or service and, on a daily basis, after the total amount of Gross Receipts for such day have been determined jointly by a representative of Manager and SNW, such Gross Receipts shall be transferred and delivered to SNW at the Glass Bridge facility. Following transfer of the daily Gross Receipts to SNW as provided above, Manager shall have no further responsibility for security for such daily Gross Receipts.

(j) Collect directly from customers any and all federal, Nation, state and municipal excise, sale, transaction privilege, and use taxes imposed on the sales price of any goods or services furnished (collectively, "Sales Taxes"), with such amounts to be handled in the same manner as provided above in Section 2.3(i) for Gross Revenues;

(k) Within 3 days of receipt of invoices and other documentation that relate to the Project, provide to SNW copies of all such invoices and other documentation, including all documentation relating to Gross Operating Expenses and capital expenditures that need to be paid. All such invoices and other documentation must be sent to SNW via facsimile within the 3-day period, with copies to also be sent simultaneously by mail or other method of delivery authorized pursuant to Section 15.11. Documentation provided pursuant to this Section 2.3(k) need not be sent to legal counsel for SNW. Manager will also use its commercially reasonable efforts to have all such invoices and other documentation sent directly to SNW;

(l) Comply with all laws, statutes, regulations and ordinances of all governmental authorities with respect to the management, use and operation of the Project, except that Manager shall be responsible for capital expenditures in connection therewith only as required by the Annual Capital Budget or Article 9;

(m) Bond over or make other adequate provision for the payment of any liens by mechanics, materialmen, suppliers, vendors or others producing labor or services to the Project from work for which SNW has made funds available in the Operating Account or otherwise; and

(n) Clean and maintain the Project, including the restrooms, floors, windows and parking facilities, on a daily basis in order to ensure a clean and sanitary environment.

(o) The Glass Bridge shall be operated and available for use by the public throughout the Operating Term at the following times:

(A) Daily, starting each day at 8:00 AM Arizona time and ending at 6:00 PM Arizona time during the summer, and starting at 9:00 AM Arizona time and ending at 5:00 PM Arizona time during the winter, and

(B) At such other times as SNW and Manager shall mutually agree upon from time to time, as necessary or appropriate to facilitate and encourage visits to the Glass Bridge.

* * *

2.8 Approval Process. Whenever in this Agreement the consent or approval of a party is required, unless otherwise provided in this Agreement with respect to such matter, the party requesting such approval or consent shall provide the other party with a written request for such approval or consent, providing sufficient detail to allow the other party to adequately and properly evaluate the request. Unless otherwise provided in this Agreement, a party shall not unreasonably withhold, delay, or condition its consent or approval; however, if a party fails to respond to a written request for consent or approval within 20 Business Days of receipt of the request and the detailed explanation, such party shall be deemed to have approved the matter. All disapprovals must be in writing and contain a detailed explanation for such disapproval.

* * *

2.10 Performance of Management Services by Subsidiary. From time to time, Manager may provide its management services pursuant to this Agreement through a Qualified Subsidiary; subject in all cases to the following:

(a) Manager shall remain fully liable and obligated for all of the obligations and duties of Manager under this Agreement;

(b) Prior to performing any services under this Agreement, the Qualified Subsidiary shall agree in writing, for the benefit of SNW and Manager, to be bound by the terms of this Agreement applicable to Manager, as they relate to the services to be performed by such Qualified Subsidiary, and to perform those services in accordance with the terms and conditions of this Agreement;

(c) Manager shall not be entitled to delegate any right to approve or consent to any matter under this Agreement requiring the consent or approval of Manager, and under no circumstances will any consent or approval ever be required from the Qualified Subsidiary;

(d) Manager shall supervise the Qualified Subsidiary in all aspects of the services performed by the Qualified Subsidiary, and Manager agrees to indemnify, defend, and hold SNW and its Related Parties harmless for, from and against any and all Claims arising out of or resulting from the services performed by the Qualified Subsidiary or the actions of the Qualified Subsidiary, to the extent such services or actions are not in compliance with the terms of this Agreement, which indemnity shall survive the expiration or termination of this Agreement; and

(e) Any and all costs that are incurred in connection with the delegation permitted by this Section 2.10 that would not have been incurred but for the delegation, such as fees payable to the Qualified Subsidiary, shall be paid exclusively by Manager promptly when due, and under no circumstances shall such costs be deemed Gross Operating Expenses.

As used in this Section 2.10, a “Qualified Subsidiary” means an entity that is wholly owned by Manager, David Jin, Yvonne Tang, or a trust in which David Jin and/or Yvonne Tang are the sole trustees, or any combination of the foregoing and in which David Jin has primary management responsibility; *provided, however*, that, up to 10% of the ownership interests in the Qualified Subsidiary may be held by third parties that have been approved in writing by SNW, such approval not to be unreasonably withheld, delayed, or conditioned.

* * *

3.1 Amount of Manager’s Fee. In consideration of Manager’s performance hereunder, including during the Construction Term, SNW shall pay to Manager a Manager’s Fee equal to the following:

(a) For the Fiscal Year commencing on the first day of the Operating Term Date and ending on December 31 of that year and for the next five full Fiscal Years, an amount equal to 50% of Net Revenues;

(b) For the next five full Fiscal Years, an amount equal to 40% of Net Revenues for each such Fiscal Year;

(c) For the next five full Fiscal Years, an amount equal to 30% of Net Revenues for each such Fiscal Year; *provided, however*, that if, by the time of commencement of the period described in this subsection (c), Manager has not earned an aggregate total Manager’s Fee pursuant to subsections (a) and (b) equal to the Manager’s Investment, then, until such time as Manager has earned an aggregate total Manager’s Fee pursuant to subsections (a) and (b) and this subsection (c) equal to the Manager’s Investment, the amount paid to Manager pursuant to this subsection (c) shall be 50% of Net Revenues rather than 30% of Net Revenues; *provided, further, however*, that Net Revenues for the fiscal year in which Manager has finally earned an aggregate total Manager’s Fee equal to Manager’s Investment, shall, for purposes of the annual reconciliation pursuant to Section 3.4, be prorated for such year, based on a 365-day year, and Manager shall be deemed to have earned and shall be paid 50% of such Net Revenues on a daily basis, until the aggregate total Manager’s Fee pursuant to subsections (a) and (b) and this subsection (c) equal to the Manager’s Investment, and thereafter Manager shall be deemed to have earned and shall be paid 30% of such Net Revenues. If at the end of the 5-year period described in this subsection (c), Manager

still has not received an aggregate total Manager's Fee equal to Manager's Investment, there shall be no further adjustments to the amount of the Manager's Fee, but the Manager's Fee shall be payable pursuant to subsection (d) below.

(d) For the remainder of the Operating Term, an amount equal to 25% of Net Revenues for each Fiscal Year during the remainder of the Operating Term.

* * *

3.4 Annual Reconciliation. Within 60 days following the end of each Fiscal Year for which there are Net Revenues, SNW shall pay to Manager an amount equal to the Manager's Fee for such Fiscal Year less the aggregate total of the Interim Payments made to Manager pursuant to Section 3.3 with respect to such Fiscal Year; *provided, however*, that if the aggregate total of such Interim Payments exceeds the Manager's Fee for such year, then Manager shall pay the excess to SNW within the 60-day period.

* * *

4.1 Books and Records. SNW shall keep full and adequate books of account and other records reflecting the results of operation of the Project, all in accordance with generally accepted accounting principles. The books of account and all other records relating to or reflecting the operation of the Project shall be kept at the offices of SNW and shall be available to Manager and its representatives and its auditors or accountants, at all reasonable times and upon reasonable notice for examination, audit, inspection, copying and transcription. All of such books and records pertaining to the Project at all times shall be the property of SNW. Within 30 days of Manager's written request and at Manager's expense, SNW will provide Manager with copies of all books of account and other records of the Project, which are reasonably available and not disposed of in accordance with SNW's document retention policy. Within 30 days of SNW's written request and at SNW's expense, Manager will provide SNW with copies of all invoices, books of account and other records relating to the construction phase of the Project, which are reasonably available and not disposed of in accordance with Manager's document retention policy.

4.2 Accounting.

(a) SNW shall deliver to Manager within 20 days after the end of each calendar quarter an interim accounting showing the results of the operation of the Project for such quarter and for the Fiscal Year to date (including a computation of Gross Revenue and Gross Operating Expenses). Such interim accounting and the annual accounting referred to below shall:

(i) be taken from the books and records maintained by SNW for the Project in the manner hereinafter specified; and (ii) separately state the amount of the Manager's Fee.

(b) Within 60 days after the end of each Fiscal Year, SNW shall deliver to Manager an unaudited annual income statement and balance sheet for the Project, prepared on an accrual basis, showing Gross Revenues, Gross Operating Expenses, Net Revenues, and any other information necessary to make the computations required hereby for such Fiscal Year (collectively, the "Annual Operations Statement").

(c) The annual financial statements for the Project shall be audited by an independent firm of certified public accountants selected by SNW. If the audit is conducted by a Qualified Accounting Firm, the cost of the audit shall be included within Gross Operating Expenses. Otherwise, the cost of the audit shall be borne by SNW. The audit shall be conducted in accordance with generally accepted accounting principles. As used in this Agreement, a "Qualified Accounting Firm" is an accounting services firm (i) approved by Manager, or (ii) meeting the following criteria: (A) having offices in at least three states; (B) having a regional or national reputation for high standards of professionalism within the accounting and auditing field; (C) having at least 75 partners or principals; (D) having expertise in the area of auditing within the hospitality industry; and (E) having one or more partners or principals licensed as certified public accountants within the State of Arizona. The parties agree that Moss Adams LLP qualifies as a Qualified Accounting Firm.

* * *

4.5 Right to Audit. At any time within two years after the end of a Fiscal Year, Manager may cause an audit of the books and records of the Project to be made, at Manager's sole expense and not as a Gross Operating Expense, for the purpose of verifying the accuracy of the Annual Operations Statement for such Fiscal Year and any other computations under this Agreement relating to such Fiscal Year. The audit shall be performed by a certified public accountant selected by Manager, and SNW agrees to make all records available for the audit at its offices, unless Manager agrees to a different location. If the results of the audit show any discrepancies that would affect amounts paid or payable by Manager under this Agreement, then within 10 days of the completion of the audit and the determination of such discrepancy, Manager and SNW shall make any necessary adjusting payments between themselves to remedy the discrepancy.

* * *

5.1 Annual Operating Budget; Marketing Budget.

(a) Annual Operating Budget. The “Annual Operating Budget” for each Fiscal Year, commencing with the Fiscal Year in which the Operating Term commences, shall consist of reasonable estimates of Gross Revenues and Gross Operating Expenses for such Fiscal Year, itemized in a reasonable format, together with the assumptions, in narrative form, forming the basis of such estimates. The Annual Operating Budget shall also include provisions for an operating reserve (the “Operating Reserve”), with the Operating Reserve to be funded as provided in this Agreement. At least 60 days prior to the commencement of each Fiscal Year, commencing with the Fiscal Year in which the Operating Term commences, SNW shall prepare and submit the Annual Operating Budget for such Fiscal Year to Manager for its review and approval. Once both Manager and SNW are in agreement on the terms of the Annual Capital Budget for a particular Fiscal Year, Manager shall be authorized to implement such approved Annual Capital Budget.

(b) Marketing Budget. The Annual Operating Budget shall include as a component thereof, a separate marketing budget (the “Marketing Budget”) which shall be subject to review and approval by SNW. The Marketing Budget for a particular year shall be prepared by Manager and submitted to SNW for review at least 30 days prior to the date that SNW is required to submit to Manager the Annual Operating Budget for the same year, and, when approved by the parties, for inclusion in the Annual Operating Budget. Unless the parties otherwise agree, each in their sole and absolute discretion, total aggregate expenditures for marketing during the first Fiscal Year, commencing with the Fiscal Year in which the Operating Term commences, and the next five full Fiscal Years shall not exceed \$500,000 and thereafter, the annual Marketing Budget for a particular Fiscal Year shall not exceed 5% of Gross Revenues for the prior Fiscal Year. Once both Manager and SNW are in agreement on the terms of the Marketing Budget for a particular Fiscal Year, Manager shall be authorized to implement such approved Marketing Budget.

* * *

5.6 Operations on behalf of SNW. In performing its duties under this Agreement, Manager shall act solely for the account of SNW. All debts and liabilities to third persons incurred by Manager in the course of its operation and management of the Project, shall be pursuant to the terms and subject to the limitations of this Agreement, and shall be the debts and liabilities of SNW only, and Manager shall not be liable for any such obligations by reason of its

management, supervision, direction and operation of the Project for SNW or for any other reason whatsoever. Manager may so inform third parties with whom it deals on behalf of SNW and may take any other steps to carry out the intent of this provision. The foregoing is not intended to relieve or release Manager from any of its funding obligations pursuant to any provision of this Agreement or from liability for damages or other Claims arising as a result of a default by Manager pursuant to this Agreement.

* * *

13.4 Shuttle Bus Service.

(a) Agreement to Provide. Manager agrees that, from and after commencement of the Operating Term through the earlier of (i) the 10th anniversary following the Diamond Bar Road Completion Date, or (ii) the 25th anniversary of the Effective Date (the “Shuttle Service Term”), Manager will, at Manager’s sole cost and expense, maintain and operate the Shuttle Bus Service in accordance with the terms, conditions and requirements of this Section 13.4. Under no circumstances will any costs or expenses associated with the Shuttle Bus Service, including, without limitation, costs to design and construct the Staging Lodge, costs for the Tour Vehicles, and ongoing operational costs be deemed to be Gross Operating Expenses or capital expenditures subject to Article 6.

(b) Description of the Shuttle Bus Service. The “Shuttle Bus Service” shall consist of a first class shuttle bus service meeting the requirements of this Section 13.4 and providing shuttle service for members of tour groups and other individuals to and from the Staging Lodge and the Project Improvements, including (i) a shuttle to and from the Staging Lodge and Grand Canyon West (the “Diamond Bar Shuttle”), (ii) a shuttle to and from Grand Canyon West and the Glass Bridge (the “Glass Bridge Shuttle”), and (iii) a shuttle to and from Grand Canyon West and Guano Point (the “Guano Point Shuttle”).

(c) Staging Lodge; Hours of Operation.

(i) Prior to commencement of the Shuttle Service Term, Manager shall design and construct a first class staging and check-in facility of at least 4,000 square feet, with associated paved and lighted parking lot and ancillary improvements (all such improvements being referred to collectively as the “Staging Lodge”). The Staging Lodge shall be constructed in a good and workmanlike manner by a licensed

general contractor on the real property owned by Manager, located on Pierce Ferry Road, near its intersection with the Diamond Bar Road, and more particularly described on Exhibit C. The design of the Staging Lodge shall be subject to the prior review and approval of SNW, such approval not to be unreasonably withheld, delayed, or conditioned.

(ii) The Staging Lodge shall be operated and maintained in first class condition and repair throughout the Shuttle Service Term.

(iii) The Shuttle Bus Service and the Staging Lodge shall be operated and available for use by the public throughout the Shuttle Service Term at the following times (collectively, the “Hours of Operation”):

(A) Daily, starting each day at least 30 minutes prior to the first scheduled arrival of any organized tour group at the Staging Lodge and operating continuously thereafter throughout the day until the later of (1) 120 minutes following the last scheduled arrival of any organized tour group at the Staging Lodge and (2) 30 minutes following the last scheduled return of an organized tour group from the Glass Bridge to the Staging Lodge; and

(B) At such other times as SNW and Manager shall mutually agree upon from time to time, as necessary or appropriate to facilitate and encourage visits to the Glass Bridge.

(iv) All costs and expenses of design and construction of the Staging Lodge, as well as all operational costs and expenses, shall be borne exclusively by Manager.

(d) Required Tour Vehicles. Throughout the Shuttle System Term and during the Hours of Operation, Manager shall have ready and available the following tour vehicles (collectively, the “Tour Vehicles”):

(i) For use on the Diamond Bar Shuttle, at least four tour coaches, each with a minimum capacity of 40 persons, specially designed and built to handle the rigors of Diamond Bar Road with a minimal chance of breakdown; *provided, however*, that once the Diamond Bar Shuttle ceases to operate as stated

in Section 13.4(e)(i), the tour coaches used for the Diamond Bar Shuttle shall be used for the other Shuttle Bus Service or, if not so used, they shall be transferred to SNW as provided in Section 13.4(j), as if, on the Diamond Bar Road Completion Date, the Shuttle Service Term had ended with respect to such vehicles;

(ii) For use on the Glass Bridge Shuttle and Guano Point Shuttle, at least three high-end tour buses, each with a minimum capacity of 40 persons; and

(iii) For the use of VIP guests for both the Guano Point Shuttle and the Glass Bridge Shuttle, at least one VIP limousine bus, with a minimum capacity of 12 persons.

Each of the Tour Vehicles shall be continuously maintained by Manager in a first class, safe and clean condition and state of repair. All costs and expenses of acquiring, replacing, maintaining, repairing, and operating the Tour Vehicles shall be paid exclusively by Manager.

(e) Shuttle Operations.

(i) The Diamond Bar Shuttle shall be operated seven days a week, 365 days a year, with the Diamond Bar Shuttle ceasing operations on the Diamond Bar Road Completion Date. While operating, the Diamond Bar Shuttle shall be operated on a daily basis during the Hours of Operation. Following the Diamond Bar Road Completion Date, the Diamond Bar Shuttle service will be permanently discontinued.

(ii) The Glass Bridge Shuttle and the Guano Point Shuttle shall be operated during the Hours of Operation seven days a week, 365 days a year during the entire Shuttle Service Term.

(f) Improvement of Diamond Bar Road. The federal government is involved in a project to completely pave Diamond Bar Road from its intersection with the Pierce Ferry Road to the border of the Nation's reservation (such improvements being referred to as the "Diamond Bar Road Improvements". The date of completion of the Diamond Bar Road Improvements is the date that the government has completed all work to completely pave Diamond Bar Road and all lanes of Diamond Bar Road are first open to the public (the "Diamond Bar Road Completion Date").

(g) Payments to Manager for Shuttle Bus Service.

(i) For each individual using the Diamond Bar Shuttle, SNW shall pay \$3 to Manager; *subject, however*, to increases in such per person amount permitted by Section 13.4(g)(iv). There shall be no additional fee for any individual using the Diamond Bar Shuttle who also uses either or both of the Glass Bridge Shuttle and the Guano Point Shuttle.

(ii) During the period that the Diamond Bar Shuttle is operating, SNW shall also pay to Manager the following amounts, each of which is subject to increase as permitted by Section 13.4(g)(iv), with respect to individuals who utilize either or both of the Glass Bridge Shuttle and the Guano Point Shuttle:

(A) \$6 for every individual that arrives at Grand Canyon West by private vehicle; *provided, however*, that there shall be no fee for any individual that takes a Jeep tour to Grand Canyon West.

(B) \$4 for every individual arriving at Grand Canyon West by a fixed wing Tour Operator; and

(C) \$5 for every individual arriving at the Staging Lodge by transportation provided by a bus Tour Operator.

(iii) After the Diamond Bar Shuttle no longer operates, SNW shall pay to Manager \$6 for every individual utilizing either or both of the Glass Bridge Shuttle and the Guano Point Shuttle; *subject, however*, to increases in such per person amount permitted by Section 13.4(g)(iv).

(iv) On each anniversary of the commencement of the Shuttle Service Term, Manager may increase the fees payable pursuant to Sections 13.4(g)(i), 13.4(g)(ii) and 13.4(g)(iii) to an amount equal to the fee in effect on the day preceding such anniversary multiplied by the CPI Adjustment Factor.

(v) Notwithstanding the foregoing, during the Shuttle Service Term, employees, of SNW and/or Manager shall be entitled to use the Shuttle Bus Service without charge or payment to Manager from SNW on regularly scheduled routing.

(vi) Amounts due and payable by SNW under this Section 13.4(g), shall be payable no more frequently than once in a calendar month, within 15 days of receipt by SNW of a detailed invoice and statement of fees due from SNW for the period of time covered by the invoice.

(vii) Under no circumstances will amounts paid or otherwise collected by Manager pursuant to this Section 13.4(g) in connection with the Shuttle Bus Service be deemed to be Gross Revenues.

(viii) In lieu of payments from SNW to Manager under Section 13.4(g)(ii)(B) and (C) and upon SNW's written request, Manager shall, during the period that the Diamond Bar Shuttle is operating, be required to charge the amounts that SNW would have paid under Section 13.4(g)(ii)(B) and (C) from the Tour Operators.

(h) Compliance. Manager shall be responsible, at Manager's sole cost and expense, for obtaining and maintaining in full force and effect, any and all governmental permits, entitlements, licenses, and approvals necessary or appropriate to design, construct, maintain and operate all aspects of the Shuttle Bus Service, including the Staging Lodge and the Tour Vehicles. All of the activities of Manager pursuant to this Section 13.4 shall be undertaken and completed in compliance with all applicable governmental laws, rules and regulations.

(i) Operational Issues; Insurance and Indemnity.

(i) Throughout the Shuttle Service Term, the Shuttle Bus Service shall be advertised by Manager as free to the public, and other than the amounts to be paid to Manager pursuant to Section 13.4(g), Manager shall not charge or collect any other fees for the Shuttle Bus Service.

(ii) All of the individuals involved in providing the Shuttle Bus Service shall be employees of Manager and all labor costs associated with such personnel shall be borne exclusively by Manager. Such employees shall not be deemed to be Project employees and Manager shall not be subject to the requirements of Section 2.6 with respect to such employees. No individual shall be allowed to operate a Tour Vehicle unless such individual has a current, valid state vehicle operator's permit and is otherwise physically, mentally, and emotionally competent to safely and properly operate vehicles such as the Tour Vehicles.

(iii) Throughout the Shuttle Service Term, Manager shall provide and maintain commercial general liability and business automobile liability insurance in amounts satisfactory to SNW, but in any event not less than a combined single limit of \$5,000,000 for each occurrence, for personal injury and death, and property damage, which shall, among other risks, including coverage against liability arising out of the ownership or operation of motor vehicles, as well as coverage in such amount against all claims brought anywhere in the world arising out of alleged (i) bodily injury, (ii) death, (iii) property damage, (iv) assault or battery, (v) false arrest, detention or imprisonment or malicious prosecution, (vi) libel, slander, defamation or violation of the right of privacy, or (vii) wrongful entry or eviction. In providing and maintaining such insurance, Manager shall comply with the requirements of Sections 7.2 and 7.3 with respect to such insurance; however, the insurance that Manager is required to carry pursuant to this Section 13.4(i)(iii) is in addition to the insurance required pursuant to Article 7, and the cost of the insurance required hereby shall be borne exclusively by Manager.

(iv) Manager agrees to indemnify SNW and its Related Parties and hold each of them harmless for, from and against any and all Claims attributable, directly or indirectly, to the operation by Manager of the Shuttle Bus Service, to any of the activities of Manager, its Related Parties, or their employees, agents, and contractors pursuant to this Section 13.4, or to the breach by Manager of any of its duties and obligation pursuant to this Section 13.4. This indemnity shall survive the expiration or termination of this Agreement.

(j) Ownership of Shuttle Assets. During the Shuttle Service Term, all of the real and personal property assets used in connection with the Shuttle Bus Service, including, without limitation, all Tour Vehicles, the Staging Lodge, the real property on which the Staging Lodge is constructed, and all other real and personal property owned by manager and used in connection with the Shuttle Bus Service (collectively, the “Shuttle Assets”) shall be owned by manager. Upon expiration of the Shuttle Service Term, Manager agrees to convey and transfer title to all of the Shuttle Assets to SNW, free and clear of any and all liens and encumbrances and in the condition required by this Agreement, without further payment of any amount by SNW to Manager.

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.¹⁸

(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 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

¹⁸ During the Preliminary Hearing No. 1 (10.31.11), “the parties agree[d] to waive that provision.” *Report of Preliminary Hearing and Scheduling Order (No. 1)*, at 1.

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)).

* * *

15.12 Attorneys' Fees. In the event of any action or proceeding brought by either party against the other under this agreement, the prevailing party will be entitled to recover attorneys' fees in such amount as the arbitrator or arbitration panel may judge reasonable.

Arizona Standards for Finding and Resolving Ambiguity in Contract Language; Summary of Breaches of the Agreement. The ultimate goal for the court is to "ascertain and give effect to the intentions of the parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). If the terms of a contract are clear and unambiguous, the court must enforce them as written. *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982); *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 302, 197

P.3d 758, 763 (App. 2008). A contract is ambiguous if its terms are reasonably open to more than one interpretation. *Id.* Here, the written terms of the parties' 2003 contract are unambiguous.

The testimonial and documentary record confirms and the tribunal finds that SNW breached the 2003 agreement by failing to: (a) allow GCSD to manage the Skywalk (§2.1); (b) keep adequate books and records (§4.1); (c) deliver interim accountings to GCSD within 20 days of each calendar quarter (§4.2(a)); (d) deliver unaudited annual income statements to GCSD within 60 days of the end of each fiscal year (§4.2(b)); (e) select an independent certified public accountant to perform annual audits (§4.2(c)); (f) make records available for GCSD to audit (§4.5); (g) pay business expenses of the Skywalk operations (§5.6); and, pay GCSD the manager's fee (§3.1(a)).

IV.

The Agreement, Construction of the Skywalk, and Immediate Success: Increased Visitation to Grand Canyon West. GCSD operates its headquarters in Las Vegas, not on the reservation. As a result, GCSD's sale of tickets, hiring and training of employees, and other management operations take place largely in Las Vegas. In contrast, SNW's operations occur at Grand Canyon West, including its sale of tickets, hiring of employees, and the like. Under the 2003 agreement, SNW would provide financial information to GCSD on a monthly basis; SNW would pay GCSD its management fee on a quarterly basis; and, the parties would undertake an annual reconciliation. Exh. 3, at §§3.3 and 4.1. GCSD had the right to examine and audit the books and records of the project on demand. *Id.*, at §4.5.

Following GCSD's completion of the Skywalk bridge in March 2007,¹⁹ visitation to Grand Canyon West increased dramatically. Visitation to Grand Canyon West (GCW) had increased by 4 percent annually between 2002 and 2006

¹⁹ See Exh. 1 (*How We Did It* (DVD)(GCSD007549)) and 2 (photographs of bridge, visitor's center, and other facilities)(GCSD005670-90)).

before the Skywalk opened. Exh. 50 (GCSD007705). However, after the Skywalk opened, visitation to GCW increased by 156 percent for 2007. *Id.* For the full year 2008, total visitation increased to 535,000 people. *Id.* In 2008, visitors to GCW spent more than \$40 million. *Id.* (GCSD007706).

Mr. Walter Mills, who, from 2001 to 2008 served on the GCRC and SNW Boards of Directors, testified that the 2003 agreement turned out to be a “hell of an agreement” and “really a sweetheart deal” for the Tribe. Mr. Steve Beattie, the chief financial officer for both SNW and GCRC, and who negotiated the agreement for the Tribe, agreed that the 2003 agreement heavily favored the Tribe. Most counterparties in Mr. Jin’s position, Mr. Mills explained, would have negotiated for and received a long-term leasehold interest or some other form of semi-permanent interest in the project. Mr. Beattie skillfully avoided granting that to Mr. Jin.

Over four days of testimony, every witness agreed that the 2003 agreement, GCSD’s construction of the Skywalk, and resulting increase in tourism represented an unqualified success for the Tribe. Ms. Sheri YellowHawk, a member of the Tribe who has served on the Tribal Council since 1998, and who served as the chief executive officer of SNW and, for eight years, as CEO of GCRC, testified that annual revenues for GCRC were only \$2 million in 2002 but now total over \$53 million. She attributed “all of the growth [in revenue] to Skywalk.” In October 2008, she wrote that Skywalk, a “one of kind project,” would “not have happened without the investor, David Jin.” Exh. 69 (GCSD007941). “His patience,” she wrote, “persistence, and commitment made the project work. He, in good faith, invested millions of dollars from the first phase including testing and preparation. He attended thousands of hours of meetings with the management of the corporations to insure a quality project.” *Id.*

The Skywalk’s unquestioned success makes all the more puzzling, then, SNW’s and the Tribe’s refusal to disclose financial records, naked grab of management fees owed to Mr. Jin, and unfounded but carefully orchestrated campaign against him.

The Root of the Dispute Over Management Fees: Mr. Jin Takes Over Accounting for the Skywalk from SNW. After the immediate success of the Skywalk, in March 2007, SNW was unable to keep up and maintain records of the operation. The Tribe asked Mr. Jin for help. He agreed. Mr. Emry and his firm stepped in. In one of his later letters to Mr. Ohre, Mr. Parker explained in part as follows:

“Less than one (1) month into the operations of this business, my client was asked and agreed to take over the responsibility of performing the accounting and maintaining the books of this operation. It is my understanding that well over \$400,000 of sales had not been documented during the time period SNW performed the accounting for this project. Additionally, it is my understanding that a substantial amount of money was lost due to employee theft at the GCRC ticket sales, resulting in the prosecution of several employees (footnote omitted). Pursuant to the contractual agreement, SNW would be responsible for replacing these funds for the betterment of this project. At this point, my client has not instructed me to demand the reimbursement of these amounts. My client is strictly interested in continuing a cooperative effort towards the proper maintenance of these books, accounting records and promoting this project. My client has invested tens of millions of dollars into this project and does not relish the vulnerable position it has been placed in due to the uncertainly (sic) of SNW’s Board and current conduct.”

Exh. 80 (GCSD007263). As noted at length above, Mr. Teddy Parker, counsel for GCSD, asked for SNW’s audited financial statements. *Id.* (GCSD007264). As described above, the record confirms that SNW never supplied its own audited or even unaudited financial statements; and, SNW never turned over financial statements reflecting the company’s operations. With that decision, the dispute began.

Over the coming months and years, Mr. Jin asked for financial records from SNW. For its part, the Tribe refused to turn over the financial records and then, to make matters worse, and without apparent basis, beginning in 2008, refused to turn over *any* portion of the management fees due GCSD for its continued operation of the Skywalk. The Tribe also suspended reimbursements to GCSD and Mr. Jin’s companies (OTI and Y Travel) for expenses related to the operation of the Skywalk

(e.g., employee housing, transportation, advertising, etc., etc.). All of these developments, coupled with the Tribe's failure to supply utilities to the project, led to this proceeding.

The Tribe's Case Against Mr. Jin and GCSD for Breach of the 2003 Management Agreement. At this point, and for the sake of completeness, SNW's and the Tribe's position should be stated. But, because SNW did not appear at the hearing, the tribunal must rely on the Tribe's public relations firm, Scutari Cieslak, which stated the Tribe's case against Mr. Jin and his company most clearly. In one memorandum, the Scutari firm wrote as follows:

"Now four years after the Skywalk's grand opening, Jin has failed to abide by his contractual obligations and keep even the most basic promises he made to the Hualapai. The visitors' center is an empty shell – a ramshackle building that sits idle with exposed wiring hanging from the ceilings and holes in the floor. There are abysmal port-a-johns, not luxurious bathrooms, as Jin promised for the thousands of tourists who visit from around the world. Worse yet, there is no electricity, water or sewer utilities running to the attraction at all. It's an appalling breach of the contract's most critical terms, and tourists from around the world get a front-row view of this debacle every single day.

The Hualapai have begged Mr. Jin to keep his promises and complete the work. Instead, Jin and his various subsidiaries have behaved like Arizona's version of Leona Helmsley and Bernie Madoff, leaving uninhabitable buildings in his wake and ignoring the pleas of those who trusted him. The tribe has simply asked Jin to uphold his end of the bargain. Now, the Hualapai are forced to seek the court's assistance to protect what's left of their investment."

Exh. 29 (Scutari Cieslak's "Hualapai Nation: Skywalk and Beyond" (GCSD007354)(emphases in original)). Setting aside the outlandish references to Mr. Madoff and Ms. Helmsley, that is the Tribe's argument: Mr. Jin failed to complete construction of utilities. But, in fact, on nearly every point, the documentary and testimonial record flatly contradicted the Scutari memorandum. No available evidence even suggested that Mr. Jin failed to keep any promise or that the Tribe 'begged' him to do so. In fact, the Tribe failed to construct utilities,

blocked GCSD's efforts to complete the Visitor's Center and, more than that, as the Scutari memorandum demonstrates, worked to distort the public record.

The Record Confirming Mr. Jin's Completion of the Visitor's Center: Meeting Minutes and the Testimony of Messrs. Mills, Forrest, Quasula, and Mojica. GCSD completed construction of and opened the Skywalk in March 2007. Before and after the opening of the Skywalk, GCSD broke ground and constructed the nearby Visitor's Center. However, from 2006 to date, the Tribe failed to construct or otherwise deliver power, water, or wastewater service to Grand Canyon West and the Visitor's Center. As a result, GCSD could not, for example, install elevators at the Center, complete and test electrical installations, or otherwise fully complete the Center. Today, the Center stands an empty although nearly completely constructed shell because the Tribe failed for years to deliver sufficient water, electrical service, or wastewater treatment to Grand Canyon West.

To make matters worse, for whatever reason, the Tribe (or at least four members of the Tribal Council known locally as the "Gang of Four"), decided to withhold Mr. Jin's share of the management fees on the ground that Mr. Jin had been obligated to construct millions of dollars of infrastructure for the delivery of utilities to the reservation. Along the way, the Tribe withheld Mr. Jin's share of the management fees without any basis in the 2003 agreement (or otherwise) and despite the unqualified success of the Skywalk bridge that Mr. Jin had built.

The exhibits and witnesses confirmed this basic point: the Tribe, not Mr. Jin, was obligated to complete the construction of water, power, and wastewater treatment facilities to service the Visitor's Center. Every witness who testified on this point confirmed that fact.

One example illustrates the point. Mr. Walter Mills retired in 1996 from 25 years of service around the country with the Bureau of Indian Affairs. After retirement, at Mr. Quasula's invitation, Mr. Mills agreed to serve on the board of directors for Grand Canyon Resort Corporation, the tribal corporation in Peach Springs that owns the Tribe's enterprises, including Grand Canyon West. He served one complete and one partial term on the board, from November 2001 to September

2008, including four years as vice-president. During his years on the GCRC board, he served with Mr. Ted Quasula, Ms. Kathryn Landreth (the former U.S. Attorney for the District of Nevada), and others. More important for these purposes, he also served on the SNW board of directors (along with Mr. Quasula and Ms. Landreth (and others)).

Mr. Mills explained that the division of labor called for Mr. Jin to construct and then, after completion, manage the Skywalk; SNW would account for and report on its financial operations. But, he explained, the accounting system failed from the outset because of “too much business.” The accountants, he testified, explained that the system was set up to handle \$6-7 million in revenues but the Skywalk was on the verge of receiving \$30-50 million in business. In the days after the Skywalk opened, Tribal employees could not count the cash fast enough. They stuffed hundreds of bills into envelopes for haphazard safekeeping. Tribal employees lost thousands of dollars to theft.²⁰ The Tribe (SNW) simply could not keep up or even protect the money received so SNW asked GCSD and Mr. Jin to step in. GCSD agreed. From that point on, Mr. Emry accounted for the operations of the Skywalk – until, that is, the Tribe stepped in during 2008 and 2009, as noted above, took the records from Mr. Emry’s firm, and began withholding management fees due GCSD.

In any event, Mr. Mills testified, he and the other outside members of the board sought to address and solve the shortcomings of SNW’s accounting system (apart from hiring Mr. Emry). First, the members of the SNW board of directors asked Mr. Mills to locate an accounting firm to report on the problem. He found and hired Protiviti, a management and consulting firm, who prepared at least a draft report. *See* Exh. 46 (*Contract Management Process Review* (June 2008)). In that draft, Mr. Mills recalled, Protiviti reported that GCSD had the better accounting

²⁰ *E.g.*, Exh. 35 (Schedule reflecting insurance proceeds (\$25,000) from theft of tickets (GCSD007259-61)); Exh. 33 (11.26.07)(email from Steve Beattie to GCRC board members)(“This is my report regarding the theft that took place at GCW.” (GCSD005505) and “The interview conducted with Jason Pullen indicated that he had been doing this for several months.” (GCSD005507)); and Exh. 34 (12.18.07)(email from Steve Beattie to GCRC board members)(update “as to our progress on the theft issue from October 26th.”).

systems (as compared to the Tribe's), but Mr. Mills could not testify to the action taken by SNW in response to Protiviti's report, if any, because, in September 2008, without notice, the Hualapai Tribal Council removed Mr. Mills (and the only other outside members of the board, Mr. Quasula and Ms. Landreth) before the board could take any action. Meanwhile, Mr. Jin and GCSD faithfully continued to finance and operate the Skywalk.

In 2007, during these first several months after the Skywalk opened, when Mr. Mills served on the SNW board with Mr. Quasula and Ms. Landreth, the chief executive officer of GCRC was Sheri YellowHawk and the chief financial officer was Steve Beattie. During the final hearing, these two (and other) witnesses – all of whom had firsthand knowledge of the Skywalk and its operations from the Tribe's point of view – confirmed every major point made by Mr. Mills.

Mr. Mills testified that Mr. Jin timely constructed the Skywalk. The agreement had no deadlines and, in any event, as he pointed out, the construction cost the Tribe nothing. Mr. Mills persuasively explained – just as the other witnesses testified – that water, power, roads, and wastewater always had been and forever remained the Tribe's obligation. Neither GCSD nor Mr. Jin took on that responsibility. No agreement, memorandum, email, supplement, amendment or any other reliable written record indicated otherwise. Mr. Mills also explained that the Tribe had received over \$30 million to pave and improve Diamond Bar Road, the only overland access to Grand Canyon West.²¹ That project is still not complete.

The Scutari firm and others including, for example, some quoted in the Tribal newsletters,²² suggested that Mr. Jin was obligated to build power and supply water. But, as Mr. Mills and others testified, those claims were unfounded. The construction of the power grid alone, Mr. Mills explained, would have cost about \$40 million. Why, Mr. Mills asked, would GCSD have agreed to build that

²¹ Cf. Exhs. 49 (10.27.11)(Diamond Bar Road Reconstruction Grant Application (GCSD005623)) and 50 (9.1.09)(Economic Impacts of Prospective Diamond Bar Road Improvements (GCSD07703-13)).

²² Copies of excerpts from the *Gamyu* (Newsletter of the Hualapai Nation) from 2008, 2009 and 2011 were received as Exhs. 36 – 43, 67, and 91.

infrastructure? With no prospect for economic return? And what agreement obligated GCSD to do so? None. In any event, the Tribe also has not completed construction of the electrical power supply to Grand Canyon West.

There is of course nothing otherwise wrong with the Tribe's failure to construct power, water, wastewater treatment, and improved roads for Grand Canyon West. But, use of those Tribal failures as an excuse against Mr. Jin and GCSD was plainly wrong. Although no witnesses from the Scutari firm testified, the available record, as shown in the exhibits, and four days of sworn testimony from fourteen percipient witnesses, confirms at least this much: the work from the Scutari firm and the statements from tribal leaders in the *Gamyu* newsletter reflect either grossly misinformed points of view or an intentional effort to distort the public record (not to say slander of Mr. Jin). However, for reasons noted below, no relief is available in these proceedings against individual tribal leaders, the Scutari firm, or the national and international media outlets, including prominent U.S. newspapers (which accepted the Scutari firm's version of reality with, apparently, little journalistic effort).²³

One more example illustrates the point. Mr. Robert Bravo, Jr. testified during the hearing and offered his affidavit (Exh. 66 (2.28.12)). In addition to other positions with the Tribe over the years, Mr. Bravo served as the interim chief executive officer of GCRC from September 2009 to 2011. Exh. 66, at 2 ((GCSD007252). In his affidavit, he testified in part as follows: "I know from being both a member of the Tribe and involved with GCRC in various capacities that it was always anticipated that the Tribe would solely be responsible for bringing utilities to Eagle Point and the Skywalk. *** Importantly, the Tribe has been attempting to get Federal funding to install these utilities for the time I have been involved with GCRC." *Id.*, at 2-3.²⁴

²³ The Scutari & Cieslak memorandum (GCSD007289) and media articles were exhibit nos. 29 and 30 respectively.

²⁴ During the final hearing, other witnesses testified similarly, including, for example, Ms. Louise Benson, who has twice served as Tribal Council chairwoman over a period of five years and once as vice chair for four years. She was on the council when SNW contracted with GCSD to build and manage the

The most telling documents were the “Skywalk Construction – Meeting Minutes,” Exhs. 9 – 14.²⁵ The minutes of the meeting on April 8, 2009, for example, reflect the following:

“Construction of the Base Shell is 99% complete, but requires power and water for testing of mechanical, electrical and plumbing, as well as installation of the elevator.”

Exh. 55 (GCSD00768). But the Tribe had not delivered the power and water. Three witnesses who attended that (and nearly every other) construction meeting testified at the final arbitration hearing: Erin Forrest, Ted Quasula, and Manuel Mojica. Mr. Forrest was the Hualapai Tribe’s Engineer and Director of Public Works. Mr. Quasula was GCSD’s representative. Mr. Mojica managed the construction project for Executive Construction Management (Las Vegas) on behalf of GCSD. These witnesses confirmed that the Visitor’s Center was complete but for the supply of utilities to the site, as the construction meeting minutes confirm. More important, these witnesses testified that the Tribe – not GCSD – was obligated to supply the power, water, and sewage treatment for the Center.

Even the Tribe’s own construction plans and internal documents show that the Tribe for years has planned to build water, power, and electricity to serve Grand Canyon West. *See* Exh. 51 (Grand Canyon Resort Corporation Board of Director Meeting Minutes (9.22.06)(GCSD006944-48)(“GCW Westwater Pipeline – Sheri was under the impression that we had \$750K from EPA. The line needs to be a domestic line. We’ll know in December if we get the money.” *** (GCSD006948)); Exh. 52 (Grand Canyon Resort Corporation Board of Director Meeting Minutes (10.27.10)(GCSD006948-53)(“Future Projects – towers at [G]uano [P]oint,

Skywalk. In her affidavit submitted to the U.S. District Court, she testified in part as follows: “I saw a great opportunity for the Tribal members when the idea of building the Skywalk came about. I also recognized that the business would not profit immediately because of the infrastructure that would need to be completed. My belief and that of the Tribal Council members at the time was that the Tribe had two years to complete the building of roads and to get water and power to the site of the Skywalk at Eagle Point. The completion of the infrastructure at the Skywalk site was the Tribe’s responsibility. David Jin and his company were never obligated to bring the utilities to Eagle Point.” Exh. 74, at 2-3 (GCSD007347-8).

²⁵ The Skywalk construction meeting minutes included the following exhibits: nos. 9 (7.16.08), 10 (8.20.08), 11 (11.5.08), 12 (12.3.08), 13 (1.14.09), 14 (3.4.09), and 55 (4.8.09).

quartermaster, etc. Cameron [Daines] solicited civil engineering bids for the entire GCW area. How do we get from Masterplan to development? We need to quantify the needs of water, sewer, etc. at each site. We need to increase our capacity. *** We need road development, wastewater plans overlaid with power and telephone. Cameron broke CTW into four zones. Each zone has a site. Each site will go through a process. Prioritize the sites for the next five years.” (GCSD006950)); Exh. 47 (Grand Canyon West Infrastructure Plan (GCSD007714-24) (discussing water requirements [“assumes a 15-year build out period between 2005-20”], wastewater reclamation, power distribution [“Extending electric power to GCW will require approximately 21 miles of line from the closest electrical substation on the Pierce Ferry Road.”], telephone/internet requirements, and additional infrastructure)); and, Exh. 48 (Grand Canyon West Land Use Plan (GCSD007725-45)). Using original plans from Tribal offices showing detailed drawings for the construction of utility services to Grand Canyon West,²⁶ Mr. Forrest underlined the point in convincing fashion.

Finally, the public record also confirms the point. *See, e.g.*, Exh. 56 (*Daily Miner* newspaper (Kingman, Arizona) for Friday, July 31, 2009 (GCSD007571)) (“The Hualapai Tribe’s struggle to provide adequate water to the Grand Canyon West area may soon be over. The Tribe has contracted with Stantec to design a 30-mile, six-inch water pipeline that will replace a two-inch existing line. *** The Tribe has already applied for U.S. Department of Agriculture and Environmental Protection Agency grants to help with the cost, said Jack Ehrhardt, Hualapai Nation Planning and Economic Development director.”)).

In the end, SNW’s and the Tribe’s only defense falls under the weight of the evidence from witnesses on the scene and the contemporaneous, written record. Mr. Jin and GCSD kept his promises to the Tribe; breached no material provision of the 2003 agreement; and, in the bargain, suffered damages. The tribunal turns now to that aspect of the case.

²⁶ Exh. 45 (4.3.09)(Grand Canyon West Eagle Point Utility Extension Plans (GCSD004858-4880)).

V.

The Claimant's Claims for Compensation: Components and Resolution. The Skywalk opened on March 27, 2007. The 2003 agreement provides that SNW would pay a management fee to GCSD equal to one-half of “net revenues” from the operation of the Skywalk. *See* Exh. 3, at §3.1(a). GCSD contends that SNW has not done so. The record confirms that SNW has not paid the required portion of net revenues to GCSD. SNW also has not paid its share of shuttle bus and other expenses of the operation.

Claimant's Claim for Contract Damages: the RGL Forensics Report. Mr. Steven J. Hazel, CPA/ABV/CFF, ASA, CVA, CMC (CV-Exh. 77) testified to GCSD's claimed losses from these breaches of the 2003 agreement. Mr. Hazel offered his written report (Exh. 76), dated June 22, 2012, and over 1800 pages of supporting material (Exh. 78), including financial records, in support of his conclusions.

First, some background is in order. In 2008, GCSD submitted a proposal to SNW for approval to complete the shell and interior of the Visitor's Center, which GCSD had scheduled for June 1, 2009. SNW never gave that approval. In fact, on September 25, 2008, SNW issued a “stop work” order to halt construction of the Center altogether. *See* Exh. 17 (9.25.08)(Letter from Wilfred Whatoname Sr., Hualapai Tribal Chairman, to David Jin (GCSD007283)) and Exh. 18 (9.25.08)(Letter from William Allison (Gallagher & Kennedy) to Mr. David Jin (GCSD005445)). The record reveals no supportable reason for that stop work order.²⁷ GCSD nevertheless obliged and stopped work.

²⁷ In his affidavit (Exh. 66), which he also submitted to the U.S. District Court, Mr. Bravo testified in part as follows: “I know also that the completion of the building was halted by the Tribal council and was never abandoned by GCSD or Mr. Jin. I was physically at a Tribal council meeting in December of 2010 where the Tribal council voted to allow Mr. Jin to complete only one floor of the existing structure. Surprisingly, just a week later, the Tribal council reversed itself and withdrew the authorization and has refused to allow Mr. Jin to complete the building. As the interim CEO of GCRC, I can tell the court this was frustrating to me because a completed visitor center would generate considerably more revenue and a better visitor experience for GCRC and the Tribe. It appears that some members of the Tribal council who have taken over and now manipulate the Tribal activities believed that they needed a basis for alleging a breach of contract.”

To this day, although the shell of the Center remains almost 99% complete, the Center remains unfinished. As a result, today, GCSD must supply food and beverage to Skywalk visitors from kitchens in Las Vegas and food trucks on site. Exh. 76, at 2. The retail, photo and other facilities remain limited. Without permanent water, electricity, or even sewage treatment facilities, the Center operates at a much diminished capacity. GCSD must, for example, operate the facility with portable toilets.

Regarding completion of the Center, the Tribe's position remains unchanged. In fact, on March 8, 2012, the Hualapai Tribal Council adopted Resolution no. 29-2012, which provided in part that "GCSD (including any parent company, subsidiary or other affiliate of GCSD) is hereby prohibited from transacting or otherwise engaging in business or other activities on the Hualapai Reservation or otherwise within the jurisdiction of the Hualapai Tribe[.]" Exh. 95. That resolution permitted OTI to continue to perform under the two shuttle bus agreements. *Id.*

Turning to the claimant's damage case, Mr. Hazel's analysis proceeded from the reasonable assumption that, absent the wrongful stop work order in September 2008, GCSD would have timely completed the Visitor's Center and thereby generated increased revenue for both GCSD and SNW. For example, if GCSD had been allowed to complete the Center by June 1, 2009 – which, Mr. Mojica testified, his firm was scheduled to do – then GCSD would have:

- Implemented a new online photos sales system for personalized Skywalk photo souvenirs (mugs, clothing, caps, etc.);
- Increased retail space from the current, temporary size (2000 square feet) to the planned size (5000 square feet); and,
- Offered three dining options to visitors – the first restaurant on the second floor (8000 square feet with 5000 square feet of casual dining seating); the second restaurant on the rooftop (2000 square feet of patio space and full service dining); and, the third on the bottom floor, including a portion of the floor made of glass (offering a fine dining menu).

Mr. Hazel's work also proceeded from the knowledge that during 2008, 2009, 2010, and 2011, SNW reimbursed no expenses and made no distributions of the contractually required manager's fees to GCSD.

With these assumptions in mind, Mr. Hazel and his firm identified and calculated three components of damages: Historical Unpaid Management Fees Payable to GCSD; Historical Unpaid Shuttle Bus Fees Payable to GCSD; and, Additional Lost Management Fees Due to Interference. *See* Exh. 76, at 3 ff.

Based on RGL Forensics' review of the available records, all as more fully described in its report (Exh. 76), RLG Forensics and Mr. Hazel summarized the losses in these three categories through December 31, 2011 as follows (RGL's Schedule 1): unpaid management fees (Schedule 4) in the amount of \$12,147,244; unpaid shuttle bus fees (Schedule 5) in the amount of \$8,935,591; less other deductions (Schedule 4) in the amount of \$420,292, which results in historical unpaid management fees and shuttle bus fees owing to GCSD in the amount of \$20,662,544.²⁸ In addition, Mr. Hazel expressed his opinion that GCSD lost net revenues from the expected incremental sale of tickets, food and bar, retail, photo, and events (Schedule 8) in the amount of \$3,440,155; and, the lost sales of engraved tiles and structure tours in the amount of \$872,770 (Schedule 7). (During his testimony, Mr. Jin persuasively described visitors' demand for the tiles included in this latter category of consequential losses.) In total, Mr. Hazel testified to and his report described total losses in the amount of \$24,975,469. *See* Exh. 76, at 3 ("We have calculated total damages to be \$24,975,469 to December 31, 2011, as shown on Schedule 1, and summarized in the following table[.]" (table omitted)).

²⁸ In Schedule 3 of the report, RGL Forensics summarized the restated income statements and balance sheets from GCSD for the years 2007 through 2011. Gross revenues for that four-year period stand at \$74,426,889. After deductions for the cost of goods sold and other gross operating expenses in the amount of \$50,132,401, the restated financial statements show net revenues of \$24,294,488, or, in other words, a management fee of one-half that amount due to GCSD in the amount of \$12,147,244. Exh. 76, at Schedule 3 (RGL00023). In Schedule 4 (RGL00024), RGL Forensics reconciled the amount due to GCSD and noted a difference of \$126,904, but adopted the lower amount due to GCSD per the financial statements (\$20,789,448) as shown on Schedule 3.

The GCSD financial statements and records were offered and admitted separately into evidence as Exhs. 82 (GCSD financials for 2007 – 2009), 83 (GCSD financials for 2010 – 2011) and 84 (period sales reports (GCSD006671 – 6745)).

Therefore, based on the entire record, including the testimony of and report from Mr. Hazel and his firm (RGL Forensics (Englewood, Colorado)), the tribunal hereby awards the sum of **\$24,975,469** to GCSD for those categories of contract and consequential losses.

In addition to the damages outlined in the report from Mr. Hazel and RGL Forensics, GCSD claimed these other, additional losses:

Stop and Start Costs. GCSD claims \$100,000 for these losses, which arise out of the Tribe's repeated orders allowing and stopping work at the Center site. This claim is granted. The tribunal hereby awards the sum of **\$100,000** for these losses.

Salary for Mr. Quasula. GCSD claims \$120,000 for the salary of Mr. Quasula to work on documents and for consultation. Mr. Quasula's effort and time were doubtless helpful, but the tribunal denies this claim.

Construction Insurance Wasted. GCSD claims the sum of \$250,000 for wasted construction insurance. This claim is denied.

Costs of Housing Y Travel Employees, Transportation, and Advertising. In this claim, GCSD seeks \$1.7 million for unreimbursed costs associated with Y Travel employee housing, transportation, and advertising. Mr. Jeff Whitaker testified to these losses. *See* Exhs. 88 (2010 unpaid invoices from Y Travel (\$917,725) and 89 (2011 unpaid invoices from Y Travel (\$821,000)). The tribunal grants this claim and awards the sum of **\$1.7 million** to GCSD.

Retrofit Wasted Equipment. Mr. Mojica testified to additional costs to repair the damage to the building in the amount of \$800,000, including the cost of repairing damage to the exterior walls, roof decks, and the electrical, mechanical, and plumbing installations that have been exposed to the weather since late 2008 at the site, when the Tribe stopped work. This claim is granted. The tribunal hereby awards the sum of **\$800,000** for these losses.

GCSD's Claim for Defamation. GCSD seeks recovery for defamatory remarks by members of the Tribal Council, the publisher of the *Gamyu* newsletter, newspapers, and others. He seeks the sum of \$1.44 to \$2.16 million for repair and \$2.12 million to \$3.18 million for damages suffered in the Chinese market.

In her affidavit to the U.S. District Court, Chairwoman Benson testified in part as follows:

“David Jin and his company were never obligated to bring the utilities to Eagle Point. The claims by certain Tribal Council members and the PR firm that represents the Tribal council are incorrect. GCSD was never required to provide the utilities to that site. GCSD was only required to hook up to the utilities once they were provided to Eagle Point. *** The public relations campaign of negative publicity that was undertaken to discredit GCSD and Mr. Jin is intended to persuade the members of the Tribe that they are justified in taking Mr. Jin's property. Charlie Vaughn and Waylon Honga were the council members who dealt with the public relations firm and were even trained by them on what to say regarding these issues.”

Exh. 74, at 3 (GCSD007348). As Chairwoman testified, the claims by certain Tribal Council members and the Scutari firm were incorrect, but one element of defamation requires proof that the defendant “knew the statement was false, acted in reckless disregard of whether the statement was true or false, or negligently failed to ascertain the truth or falsity of the statement.” *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315 (1977). SNW's campaign against Mr. Jin and GCSD was not only meritless but profoundly unjustified. Still, the record does not permit the tribunal to make a judgment on this third element of the claim. More to the point, and aside from the merits, the claim is outside the scope of the arbitration provision. Mr. Jin himself, who is not a party here, would presumably recover any defamation losses against others who also were not parties here. Finally, the original demand for arbitration does not describe this claim. For at least these reasons, the tribunal denies GCSD's claimed losses arising out of SNW's alleged defamation.

The Alter Ego Claim. Claimant GCSD asks to hold GCRC liable for the award. SNW had no employees. The board of SNW was also the board of the HBBE

Corp. dba Grand Canyon Resort Corporation (GCRC). *See* Exh. 80 (10.22.08) (same). Mr. Beattie served as the CFO for both SNW and GCRC. In other words, SNW was for all practical purposes the same as GCRC and the Tribe. In 2008, Mr. Jin's lawyer, Mr. Parker, discovered and expressed concern about this very point. *E.g.*, Exh. 80(GCSD007262) ("Quite simply, SNW appears to be a corporation in name only and in turmoil at this point."). Many of the proposed findings that were suggested on this point by GCSD in its post-hearing submission (7.25.12) were supported by the record.

Nevertheless, the claim is denied. First, section 15.4(d)(ii) of the agreement provides:

"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[.]"

So, although GCSD may in later collection efforts seek relief against GCRC, that contention is not at issue here. Second, the only parties to the arbitration agreement are GCSD and SNW. And, as to those parties, no alter ego or similar claim was made in the demand for arbitration. *See Arbitration Complaint*, at 6-12 (8.9.11). It would be unfair to entertain this claim now. So, for at least these reasons, and without passing on the merits, the tribunal denies this claim.

The Claim for Attorneys' Fees. R-43(d)(ii) provides that the award "may include . . . an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement[.]" In its response to the demand for arbitration (12.1.11), SNW requested an award of fees. And, in section 15.12 of the agreement, the parties agreed as follows:

"In the event of any action or proceeding brought by either party against the other under this agreement, the prevailing party will be entitled to recover attorneys' fees in such amount as the arbitrator or arbitration panel may judge reasonable."

GCSD claims over \$1.5 million in attorneys' fees and costs. *See* Exhs. 93 (Greenberg Traurig schedule of fees) and 94 (Greenberg Traurig invoices for legal work to David

Jin (288 pages)). The claim for fees related to the Tribal Court litigation (Exh. 93 (\$310,147.76)) for legal work from April to September 2011 is denied. Those fees may fall within the scope of the fee provision in the arbitration agreement (“any action or proceeding”), but, even so, the tribunal judges that GCSD was not the prevailing party in that portion of the wider litigation between these two parties.

Next, the requested fees for the arbitration total \$1,204,349.74 for work from August 2011 through July 26, 2012. Exh. 93, at 2. Mr. Jin has paid \$526,972.74 of those charges. In this arbitration, GCSD was unquestionably the prevailing party. After reviewing the statements, and considering the circumstances, the tribunal judges that an award of fees in the amount of **\$950,000** is reasonable.

Fees of RGL. Finally, GCSD claims reimbursement of the fees paid to RGL Forensics in the sum of over \$195,000. This claim is denied as outside the scope of the fees provision.

Administrative and Other Costs of the Arbitration. Respondent shall bear the costs of the arbitration. The administrative filing and case service fees of the AAA, totaling \$91,800, shall be borne entirely by 'Sa' Nyu Wa, Inc., a Hualapai chartered corporation. The fees and expenses of the arbitrators, totaling \$53,082.50, shall be borne entirely by 'Sa' Nyu Wa, Inc. Therefore, 'Sa' Nyu Wa, Inc. shall reimburse Grand Canyon Skywalk Development, LLC, the sum of **\$47,341.25**, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Grand Canyon Skywalk Development, LLC.

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Summary of the award. The tribunal awards the following sums to GCSD and against SNW: (a) **\$24,975,469** for unpaid management and shuttle bus fees; (b) **\$100,000** for start and stop costs; (c) **\$1,700,000** for reimbursement of costs for Y Travel employee housing, transportation, and bus advertising; (d) **\$800,000** to repair damage to equipment and other installations at the site; (e) **\$950,000** for attorneys' fees; and, (f) **\$47,341.25** for costs of the arbitration. These amounts result in and the tribunal does hereby award the total sum of **\$28,572,810.25** to GCSD and against SNW.

Conclusion. The tribunal denies all claims and any counterclaims (including SNW's intended counterclaims (12.1.11)) not otherwise addressed above.

Dated: August 16, 2012
Phoenix, Arizona

Shawn K. Aiken, Arbitrator

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