Pamela M. Overton (AZ Bar No. 009062)
GREENBERG TRAURIG, LLP
2375 E. Camelback Rd., Ste. 700
Phoenix, Arizona 85016
Telephone: (602) 445-8000
Facsimile: (602) 445-8100
E-mail: OvertonP@gtlaw.com; WeissT@gtlaw.com

Attorneys for Grand Canyon Skywalk Development, LLC.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GRAND CANYON SKYWALK DEVELOPMENT,LLC, Petitioner, v. 'SA' NYU WA, Inc., Respondent.	NO. 12-cv-08183-FJM **PETITIONER'S REPLY IN SUPPORT OF ITS APPLICATION FOR CONFIRMATION OF ARBITRATION AWARD**

On September 9, 2012, Grand Canyon Skywalk Development, LLC ("GCSD") filed an Application for Confirmation of Arbitration Award with this Court. On September 25, 2012, 'Sa' NYU Wa, Inc. ("SNW") filed its Response to GCSD's Application for Confirmation of Arbitration Award ("Response").[1] As it has three times previously, SNW argues that it did not waive immunity for arbitration and therefore the arbiter exceeded his powers.[2] As is detailed below, it is clear that the arbiter did **not**

[1] SNW's Response also purports to be a "Motion to (1) Vacate the Arbitration Award; and (2) Dismiss this Matter." GCSD has attempted to separate SNW's arguments into those applicable to the application for confirmation and those applicable to SNW's motions, and address them in a separate Opposition and this Reply. Because the issues overlap, GCSD hereby incorporates its Opposition to SNW's motions in this Reply.

[2] SNW's Response made additional arguments as to why the award should be vacated; however, as detailed below, SNW only raised one basis regarding when an award may be vacated, and therefore, this Court's review of SNW's Response is extremely limited.

exceed this authority. Rather, the arbiter followed Supreme Court precedent and Tribal Court rulings to determine he possessed jurisdiction based on SNW's express immunity waiver. In this vein, GCSD filed this Reply.

A. Introduction

The arbiter did **not** exceed his powers when rendering an American Arbitration Association ("AAA") award against SNW in favor of GCSD. *See* **Exhibit 9** to Application for Confirmation of Arbitration Award ("Application") [Doc. No. 1]**.** GCSD's relationship with SNW began when the parties executed a Management and Development Agreement in 2003 (the "2003 Agreement") for the construction and management of the Skywalk. *See* Application **Exhibit 1.** The 2003 Agreement expressly stated "[a]ny controversy, claim or dispute arising out of or related to [the 2003] Agreement" will be resolved through binding arbitration, in accordance with the AAA Commercial Arbitration Rules. ***Id*.., at § 15.4.** Disputes between the parties arose, and after the parties were unable to resolve their disputes amicably, GCSD sought to initiate arbitration. In a gesture of good faith, GCSD initially sought to compel SNW to arbitration through an action in the Hualapai Tribal Court (the "Tribal Court"). *See* Complaint, attached hereto as **Exhibit 1.** The Tribal Court ruled that SNW had expressly waived its sovereign immunity for arbitration.[3] *See* Application **Exhibit 3.**

GCSD subsequently initiated arbitration. *See* Application **Exhibit 2.** SNW contested AAA's jurisdiction and argued – contrary to the Tribal Court order – that SNW had not waived immunity. After thoroughly and closely reviewing the parties' briefs and oral arguments, the arbiter, consistent with United States Supreme Court precedent, ruled SNW waived its immunity and he possessed jurisdiction. *See* Application **Exhibit 5.** The arbiter also provided SNW an opportunity to seek an injunction from another tribunal

[3] The Tribal Court also held it was without jurisdiction to compel arbitration and that GCSD **could**, but was not required to, seek to compel SNW to arbitration in federal court.

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GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

limiting the AAA's power.

Interestingly, the Hualapai Indian Tribe ("Tribe"), rather than SNW, sought to enjoin the arbitration in the Tribal Court. *See* motion to enjoin arbitration proceedings, attached hereto as **Exhibit 2.** The parties again fully briefed and argued whether SNW waived immunity and whether the arbiter possessed jurisdiction. Like the two tribunals preceding it, the Tribal Court ruled SNW had expressly waived immunity and the arbitration could proceed. *See* Application **Exhibit 12**. Rather than respect the Tribal Court's decision, SNW and the Tribe refused to participate in arbitration, and on August 16, 2012, the arbiter, finding he had jurisdiction for a second time, rendered an arbitration award in **favor of GCSD for $28,572,810.25**.

B. Federal Arbitration Act

Pursuant to the Federal Arbitration Act (the "FAA"), a party to an arbitration may "apply to the court . . . for an order confirming [an] award." 9 U.S.C. § 9. "[T]he Court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, *i.e.*, avoidance of litigation, would be frustrated." *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp*., 274 F.2d 805, 808 (2d Cir. 1960). Complying with Congressional policy favoring arbitration "requires that courts do not intrude unnecessarily into questions that have been settled by an arbitration process agreed to by the parties, lest the efficiency of the arbitration process be lost." *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990); *see also Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 143 (4th Cir. 1994) (held that subjecting "arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings"). "An arbitrator's decision must be upheld unless it is 'completely irrational' . . . or it constitutes a 'manifest disregard of the law.'" *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986) (citations omitted). In addition, "confirmation is

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GREENBERG TRAURIG
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PHOENIX, ARIZONA 85016
(602) 445-8000

required even in the face of 'erroneous findings of fact or misinterpretations of law.'" *Id.*

The grounds for vacatur provided by 9 U.S.C. § 10 are exclusive under the FAA, and even manifest legal error does not constitute sufficient cause to disturb an arbitration award. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 583 (2008); *see also Remmey*, 32 F.3d at 146 (held FAA grounds for vacatur "do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached"). Pursuant to 9 U.S.C. § 10, an arbitration decision may only be vacated:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceed their powers.

In its Response, SNW's sole challenge was to the fourth and final FAA basis for vacating GCSD's award. Although SNW attempts to divert the Court's attention to tangential and irrelevant arguments, the only inquiry should be whether the arbitrator exceeded his power.

1. Standard of review

Federal law recognizes that arbitration awards may be vacated where jurisdictional defects arise, and courts should use a de novo review when examining an arbiter's jurisdictional determination. *See Int'l Brotherhood of Teamsters, Local Union No. 249, v. Motor Freight Express, Inc*, 356 F. Supp. 724, 725 (W.D. Pa 1973); *see also Beach Air Conditioning and Heating, Inc. v. Sheet Metal Workers Int'l Ass'n, Local Union No. 102*, 55 F.3d 474, 476 9th Cir. 1995). The Court must show non-jurisdictional challenges greater deference, however. *See*, Northrop *Corp*, 811 F.2d at 1269.

SNW's Response attempts to argue that the arbiter exceeded his powers by exercising jurisdiction over SNW because: (i) SNW remained immune, and (ii) the Tribe

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(602) 445-8000

condemned GCSD's rights pursuant to the 2003 Agreement, therefore, GCSD no longer had a right to arbitrate its disputes with SNW. Response, at 7-14. Only the first argument speaks to whether the arbiter had jurisdiction over SNW, and demands de novo review.

As to SNW's second argument, this Court should **not** use the de novo standard. SNW's second argument is not a jurisdictional argument. SNW's second argument is that the Tribe seized GCSD's intangible contractual rights and thus the arbiter should have dismissed GCSD's breach of contract claims which arose prior to the Tribe's purported seizure. This is not a jurisdictional question. SNW recognizes that its second argument is not jurisdictional because SNW failed to mention the word "jurisdiction" throughout the entirety of the argument. Response, at 11-13. Therefore, SNW's second argument should be reviewed pursuant to deferential standard outlined above. *See French*, 784 F.2d at 906 ("An arbitrator's decision must be upheld unless it is 'completely irrational'").

C. The Arbitrator Did *NOT* Exceed His Powers

1. SNW waived its sovereign immunity for purposes of arbitration

The crux of SNW's argument is that it never waived its immunity and therefore, the arbiter was without jurisdiction. Response, at 7-11. The Supreme Court of the United States, the Tribal Court, and the arbiter, however, all **disagree** with SNW's assertion. The 2003 Agreement contains the following relevant arbitration provisions:

> 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. . . . Either party may request and thus initiate arbitration of the dispute by written notice ("Arbitration Notice") to the other party . . . The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the [AAA] . . .
>
> (d) Limited Waiver of Sovereign Immunity. SNW *expressly waives sovereign immunity* . . . SNW's *waiver of sovereign immunity* [is limited to the following actions]:
>
> (iii) An action in a federal court of competent jurisdiction in Arizona to ***either*** (i) compel arbitration ***or*** (ii) enforce a determination by

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(602) 445-8000

an arbitrator . . .

2003 Agreement at § 15.4 (emphasis supplied).

SNW's waiver of immunity is explicit from the arbitration provisions in the 2003 Agreement. As set forth below, federal courts – including the United States Supreme Court – as well as the Tribal Court, and the arbiter have interpreted the same provisions and, **without exception**, determined the clear meaning is a waiver of immunity.

In *C & L Enterprises, Inc. v. Citizen Band, Potawatomi Indian Tribe of Okla*., the Supreme Court, interpreting language similar to that quoted above, found:

> [t]here is nothing ambiguous about the language of the arbitration clause. The tribe agrees to submit to disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law."

532 U.S. 411, 420 (2001); *see also Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995) (cert. denied 116 S.Ct. 78 (1995). Thus, the Supreme Court and other federal courts have specifically held that immunity is waived when an agreement contains provisions similar to those in the 2003 Agreement. In fact, when considering SNW's wavier of immunity, the arbiter conducted a thorough analysis of the weight of authority before he concluded that he properly possessed jurisdiction. *See* Application **Exhibit 5**.

After GCSD initiated arbitration, SNW immediately contested the arbiter's jurisdiction. *See* Motion to Dismiss GCSD's Arbitration Complaint, attached hereto as **Exhibit 3.** It is clearly established under the AAA rules that arbiters are empowered to determine whether there is jurisdiction over the parties. *See* AAA Commercial Rule 7(a). SNW's arguments challenging the arbiter's jurisdiction mirror the arguments presented to this Court in SNW's Response. *Id***.** After carefully and closely considering the parties briefs and oral arguments, the arbiter correctly determined that he had jurisdiction over SNW. *See* **Exhibit 3** hereto**;** Plaintiff's Opposition to Motion to Dismiss, attached hereto as **Exhibit 4**; and Application **Exhibit 5.** *See Northrop Corp*, 811 F.2d at 1269 (Where

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PHOENIX, ARIZONA 85016
(602) 445-8000

the "legal issues were fully briefed and argued to the arbitrator[] [and] the arbitrator[] carefully considered and decided them in a lengthy written opinion," the highly deferential review of arbitration awards must apply).

Thereafter, **in an abundance of caution**, the arbiter granted SNW time to seek an injunction. Making full use of the opportunity, the Tribe, **not** SNW, sought to enjoin the arbitration in Tribal Court.[4] *See* **Exhibit 2.** In its second bite at the proverbial apple, the Tribe made the same arguments before the Tribal Court which SNW made before the arbiter, and which SNW now makes before this Court. For a second time, the matter was fully briefed and argued before the Tribal Court. Not surprisingly, the Tribal Court, like the arbiter before it, ruled "[SNW had] expressly waive[d] its sovereign immunity with respect to all disputes arising out of the [2003] Agreement[,]" and further "ORDERED that SNW and GCSD may proceed with the Arbitration." *See* Application **Exhibit 12**. The Tribal Court, therefore, agreed with the arbiter that SNW could be compelled to proceed with arbitration. After the Tribal Court's ruling, however, SNW refused to participate in arbitration and on July 16, 2012, the arbitration continued without SNW.

The arbiter's arbitration award confirmed his earlier analysis and legal support for the determination to assert jurisdiction. *See* Application **Exhibit 9.** Specifically, the arbiter stated, "**this tribunal [determines that] GCSD had properly demanded arbitration without first seeking permission from the federal court**." *Id*. at 3. Based upon the specific language of the 2003 Agreement and Supreme Court precedent, the arbiter and the Tribal Court properly held that SNW waived immunity for arbitration and that the arbiter could exercise jurisdiction over SNW. The arbiter, therefore, did not

[4] The Tribe's filing in Tribal Court could also have ramifications regarding the Tribe's immunity with respect to the arbiter's award because the Tribe unilaterally interested itself into the arbitration. *See United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) (held Tribe consents to full adjudication, and thereby waives its immunity, with respect to claims the Tribe sues upon). This issue, however, is not currently before this Court.

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2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

exceed his authority when following Supreme Court precedent and ruling in accord with the Tribal Court.

2. GCSD did NOT need a court order compelling arbitration

This Court should not allow SNW a third attempt to avoid a process SNW agreed to follow, arbitration. Whether the arbiter had jurisdiction over SNW has already been determined by two tribunals. Despite its defeats, SNW continues to argue that the arbiter had no jurisdiction. SNW's primary argument – as presented to the arbiter, the Tribal Court, and now this Court – is that GCSD should have first obtained an order from this Court compelling arbitration. The arbiter and the Tribal Court, however, previously held SNW's position untenable. As the language quoted above makes clear, GCSD was **permitted**, **not required**, to seek an order from this Court compelling arbitration. Such a permissive option is evident in the words "**either**" and "**or**" from § 15.4(d). If SNW's interpretation of the 2003 Agreement was correct, GCSD would be required to take three steps to complete arbitration: (i) obtain an order compelling arbitration, (ii) arbitrate, and (iii) obtain an order enforcing an award. This three step adjudication process is simply **not** possible pursuant to the plain language of § 15.4(d) of the 2003 Agreement.

Furthermore, SNW's continued reliance and improper reading of the Tribal Court's August 2, 2011 order is inappropriate. GCSD in a gesture of good faith, initially sought an order from the Tribal Court to compel SNW to arbitration. *See* **Exhibit 1** hereto**.** Instead of addressing the question of whether arbitration was proper, SNW attempted to avoid the issue by contesting the Tribal Court's jurisdiction. *See* Motion to Dismiss, attached hereto as **Exhibit 5.** A reluctant Tribal Court ruled that it was **without authority** to compel SNW to arbitration stating that such a decision was "counter-intuitive and disappointing." *See* Application **Exhibit 3**. Despite SNW's repeated statements to the contrary, the Tribal Court never held that GCSD was "required" to seek an order from this Court compelling arbitration. Rather, the most telling statement in the Tribal Court's

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2375 EAST CAMELBACK ROAD, SUITE 700
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(602) 445-8000

order reads, "**Plaintiff has exhausted all tribal court remedies and may seek resolution in federal court**." *Id*. at 3 (emphasis added). Importantly, both the arbiter and the second Tribal Court **disagreed** with SNW's interpretation of the August 2, 2011 order.

This Court will be the third tribunal to determine whether the arbiter had jurisdiction to render the award against SNW. GCSD respectfully requests this Court agree with the arbiter and the Tribal Court, and refuse to reward SNW's continued unfounded attempts to limit the arbiter's jurisdiction. The arbiter did not exceed his authority when exercising jurisdiction over SNW.

3. The arbitration award is a separate chose in action and was NOT capable of being condemned by the Tribe

SNW claims that by condemning GCSD's arbitration rights, the Tribe stepped into the shoes of GCSD and could, therefore, terminate the arbitration. SNW is incorrect.[5] The right to sue for a breach of contract is a personal property right separate from the contract itself, in the form of a chose of action that vests in the contract holder at the time of breach. *See, e.g.*, *Wallace v. Paulus Bros. Packing Co.*, 191 Or. 564, 231 P.2d 417 (1951). ("It is a general rule that a grantee may sue for a breach of the covenant in a lease occurring after the [sic] acquires title, but not for a breach of covenant before the conveyance to him, unless the cause of action has been assigned to him."). An assignment of a contract does not pass the assignee rights of action for past breaches unless *explicitly stated* in the assignment. *Gibbons v. Tenneco, Inc.*, 710 F. Supp. 643, 648-49, 652 (E.D. Ky. 1988). Thus, the Tribe has no authority to strip GCSD of its right to arbitrate by attempting to condemn the underlying 2003 Agreement.

[5] It should also be noted that the Tribe's purported condemnation is **not** complete. The parties are vehemently contesting the Tribe's ability to condemn extraterritorial intangible contract rights. Furthermore, presuming the Tribe has the ability to condemn GCSD's rights, the condemnation is not complete because GCSD has not been granted due process through a hearing, let alone just compensation, for its "taken" rights.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

Furthermore, courts have held that a property owner retains standing to sue an entity with eminent domain powers for past damage to property, even after the entity has commenced condemnation proceedings against that property. *See Sterbenz v. Kansas City Power & Light Co.*, 333 S.W.3d 1, 5 (Mo. Ct. App. 2010). Here, the Tribe's purported taking was explicitly limited to GCSD's interests in the 2003 Agreement and did not include GCSD's rights for past breaches. Specifically, the Tribe's Declaration of Taking lists the following items of property as condemned:

> all interests of Grand Canyon Skywalk Development, LLC ("GCSD") in [the 2003 Agreement], and that certain first amendment to Development and Management Agreement by and between GCSD and 'Sa' Nyu Wa, a tribally chartered corporation, dated September 10, 2007.

See Application **Exhibit 11**, at 1-2.

GCSD's right of action for breach of the 2003 Agreement by SNW vested when the 2003 Agreement was breached. GCSD's arbitration claims are personal property distinct from GCSD's interests in the 2003 Agreement. As these rights of action were not identified in the Tribe's Declaration of Taking, and moreover, because they do not touch and affect the Tribe's land (and thus are not subject to the Tribe's eminent domain jurisdiction), the rights of action contained in the arbitration are not affected by the Tribe's attempted condemnation. Even the Tribal Court acknowledged this critical point when the Tribe sought to enjoin the arbitration, and the Tribal Court refused and ordered that the arbitration to proceed. *See* Application **Exhibit 12.** The arbitrator did not exceed his authority by following established law and properly permitted the arbitration to proceed.

D. <u>Conclusion</u>

The only basis on which SNW's Response challenged the arbiter's award was by claiming the arbiter exceeded his powers. Response, at 7. Pursuant to 9 U.S.C. § 10, there are only four grounds for which an arbiter's award may be vacated. SNW only

argued one such ground, and this Court's determination as to whether to vacate the arbiter's award should also be so limited. The arbiter did **not** exceed his powers when determining that: (i) he had jurisdiction over the parties, and (ii) that the Tribe's purported condemnation of GCSD's intangible contract rights did **not** give the Tribe and SNW power to unilaterally cancel the arbitration.

The arbiter determined that he had jurisdiction over the parties not once, but twice, and in both instances, the arbiter's decision is supported by United States Supreme Court precedent.[6] The arbiter's decision to exercise jurisdiction was also twice supported by the Tribal Court. Thus, two adjudicatory tribunals have already determined that the arbiter rightfully possessed jurisdiction over the parties. GCSD respectfully requests this Court not to disturb those decisions, and thereby **not** reward SNW for taking multiple bites of the apple.

It is also extremely evident that the arbiter did not exceed his powers when refusing to terminate the arbitration based upon the Tribe's purported seizure of GCSD's intangible contract rights. As noted above, governmental entities –even those empowered with real and legitimate condemnation authority – cannot strip an entity of its breach of contract claims which arose prior to the condemnation. Thus, the arbiter did not exceed his powers in permitting the arbitration to continue.

GCSD, therefore, respectfully requests this Court confirm the arbiter's award against SNW, and because this Reply demonstrates the inability of SNW to prove why the arbiter's award should be vacated pursuant to 9 U.S.C. § 10(a)(4), this Court should not reach SNW's Motion to vacate.

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[6] With respect to the arbiter's first determination, it was only after a thorough and detailed review of the parties' briefs and oral arguments that he ruled he had jurisdiction. The arbiter's second determination that he possessed jurisdiction would also have been after a thorough and detailed review of the parties' briefs and oral arguments, however, SNW refused to participate in the arbitration after July 15, 2012.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

Respectfully submitted this 25th day of October, 2012.

By: */s/ Pamela M. Overton*

Pamela M. Overton
Greenberg Traurig, LLP
2375 East Camelback Road, Suite 700
Phoenix, AZ 85016

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

CERTIFICATE OF SERVICE

☒ I hereby certify that on October 25, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and service to counsel of record.

Glen Hallman
Paul K. Charlton
Jeffrey D. Gross
Christopher W. Thompson
GALLAGHER & KENNEDY, P.A.
2575 E. Camelback Road
Phoenix, Arizona 85016-9225

/s/ Tammy Mowen
Employee of Greenberg Traurig, LLP

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000