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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GRAND CANYON SKYWALK DEVELOPMENT, LLC, Petitioner, vs. 'SA' NYU WA, Inc., Respondent.	No. 12-cv-08183-FJM **SNW'S REPLY IN SUPPORT OF ITS MOTION TO VACATE THE ARBITRATION AWARD AND DISMISS THIS MATTER** **(Oral Argument Requested)**

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Respondent 'Sa' Nyu Wa, Inc. ("SNW") hereby files its reply in support of its Motion to Vacate the Arbitration Award and to Dismiss this Matter ("SNW's Motion").

I. THE COURT LACKS JURISDICTION TO CONFIRM THE AWARD.

A. The Federal Arbitration Act Does Not Confer Subject Matter Jurisdiction.

Petitioner Grand Canyon Skywalk Development, LLC ("GCSD") argues that the "Federal Arbitration Act gives this Court the jurisdiction to confirm the Arbitration Award." GCSD's Opposition to SNW's Motion to Vacate the Arbitration Award and Dismiss this Matter [Doc. 12] at 5 (the "Response"). The Federal Arbitration Act does not confer subject matter jurisdiction. The Ninth Circuit has held that "the only logical

interpretation of the statutory scheme is that actions under [the Federal Arbitration Act] require an independent jurisdictional basis." *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 970 (9th Cir. 1981). Thus, contrary to GCSD's assertion, the Federal Arbitration Act does not "moot jurisdictional arguments" and the Court must satisfy itself that jurisdiction, independent of the Federal Arbitration Act, is proper.

B. SNW Only Waived Sovereign Immunity For An Action to Enforce An Award of Specific Performance.

GCSD argues that SNW waived its sovereign immunity to allow the enforcement of an award of monetary damages in federal court because the parties agreed to submit "any controversy, claim or dispute" to arbitration. 2003 Agreement § 15.4(a). GCSD, however, ignores the full text of section 15.4(a), which specifies that the arbitration provision is "limited by **Section 15.4(d)**." *Id.* (emphasis original). Section 15.4(d)(iii), in turn, provides that SNW's waiver of sovereign immunity is "specifically limited" to an action to enforce an arbitral award of specific performance. Because SNW's waiver of sovereign immunity is "specifically limited" by section 15.4(d), that provision controls over section 15.4(a)'s more general agreement to resolve "any controversy, claim or dispute" in arbitration.

The parties also disagree as to the meaning of section 15.4(d)(iii) of the 2003 Agreement, which provides that SNW's waiver of sovereign immunity is "specifically limited" to an action in an Arizona federal court of competent jurisdiction to "enforce a determination by an arbitrator requiring SNW to specifically perform any obligation under this Agreement (other than an obligation to pay money damages under Section 15.4(d)(ii))." GCSD claims that the parenthetical language expands SNW's waiver of sovereign immunity to allow an action to enforce an award of monetary damages. SNW, on the other hand, argues that section 15.4(d)(iii) limits SNW's waiver by specifically excluding an award of monetary damages from the type of award that is enforceable in federal court.

GCSD's argument relies on generally-applicable principles of contract interpretation, but ignores the more specific principles of contract interpretation that require a waiver of sovereign immunity to be unequivocal, express, and clear. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). To the extent SNW consented to be sued, that consent must be strictly construed in favor of sovereign immunity. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001) ("[I]f a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.'"). And in all cases, there is a "strong presumption against tribal waivers of immunity." *Pan Am. Co.*, 884 F.2d at 419. To the extent the meaning of section 15.4(d)(iii) is ambiguous, the Court cannot find a waiver of sovereign immunity. By definition, an ambiguous provision is simply not a clear and unequivocal waiver. And because there has been no waiver of sovereign immunity – much less a clear and unequivocal waiver – SNW remains from suit and the Court lacks jurisdiction to confirm an award of monetary damages against SNW.

C. SNW Shares the Tribe's Immunity, Including the $250,000 Immunity Provision.

GCSD argues that the Hualapai Constitution's $250,000 limit on waivers of immunity is inapplicable to SNW because SNW is a "tribal corporation" and is not "the Tribe." Response at 9. This argument has no merit. SNW, like the casino in *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006), "functions as an arm of the Tribe. It accordingly enjoys *the Tribe's* immunity from suit." (emphasis added). The "settled law of [the Ninth] circuit is that tribal corporations acting as an arm of the tribe enjoy *the same sovereign immunity granted to a tribe itself*." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 726 (9th Cir. 2008) (emphasis added). Thus, SNW enjoys whatever protective immunity is enjoyed by the Tribe itself, including the $250,000 liability waiver provision.

Nor can it be said that the term "Tribe" in Article XVI, section 2(b)(1) of the Hualapai Constitution is defined in a way that excludes SNW. The Hualapai

Constitution's more general sovereign immunity provision states that "***the Tribe*** is immune from suit . . . ." Hualapai Const. art. XVI, § 1(a) (emphasis added). GCSD has never argued that SNW is not immune from suit, only that SNW contractually agreed to a limited waiver of immunity under certain circumstances. If, as GCSD apparently concedes, SNW generally is immune from suit, the term "Tribe" in section 1(a) necessarily includes SNW. If the term "Tribe" in section 1(a) blankets SNW with sovereign immunity, there is no reason to conclude that the same term in section 2(b)(1) is defined differently to exclude SNW. Because nothing in the 2003 Agreement specifically waived the $250,000 limitation, that provision remains applicable to SNW's liability in this dispute.

As a practical matter, moreover, SNW and its assets are Tribal assets. The unfinished Skywalk facility is a public facility of the Hualapai Tribe which is located on unique, priceless and unalienable Hualapai land which is of cultural significance to the Tribe, and the economic benefits produced by the Skywalk inure to the Tribe's benefit. *See* Hualapai Tribal Council Resolution No. 15-2012, Exhibit 12 to GCSD's Response. The damages sought by GCSD directly impact the Hualapai Tribe's economic prospects with respect to its limited natural resources. Given this relationship between the Tribe and SNW, and the impact the multi-million dollar arbitration award will have on the Tribe itself, there is simply no reason to conclude that the $250,000 special waiver limitation in section 2(b)(1) excludes SNW. Because SNW shares the Tribe's sovereign immunity, and because there was no vote to waive that immunity for liability in excess of $250,000, the Court lacks jurisdiction to confirm the Arbitration Award in any amount in excess thereof.

Finally, GCSD claims that the Tribal Council, through SNW's Plan of Operation, gave SNW the authority to waive sovereign immunity from suit. Response at 9-10. However, the Tribal Council may only authorize a waiver of sovereign immunity to the extent permitted by the Hualapai Constitution. *See* Hualapai Const. Art. V ("The Tribal Council shall have all of the legislative powers vested in the Hualapai Tribe . . . subject to

the express limitations contained in this constitution . . . .").[1] And the Hualapai Constitution expressly prohibits the Tribal Council from unilaterally waiving sovereign immunity if the waiver results in liability exposure in excess of $250,000. There is no merit to GCSD's argument that SNW's Plan of Operation authorized a waiver of sovereign immunity in excess of what the Hualapai Constitution allows.

II. THE ARBITRATOR EXCEEDED HIS POWERS.

A. The Tribal Court's July 15, 2012 Minute Order Was Not Binding Because SNW Was Not Before the Court.

GCSD claims that the arbitrator did not exceed his powers because the Tribal Court authorized the parties to proceed to arbitration. Response at 11. On August 3, 2012 – several days *after* the final arbitration hearing was complete – the Hualapai Tribal Court entered a Minute Order denying the Tribe's motion to enjoin GCSD from pursuing arbitration (the "Minute Order).[2] A copy of the Minute Order is attached as Exhibit 13 to GCSD's Response. The Minute Order was issued in the now-pending condemnation action between the Tribe and GCSD. SNW is not a party to the condemnation action. In the Minute Order, the Court found that SNW "expressly waived sovereign immunity for the sole purpose of the 2003 Agreement" and that "SNW and GCSD may proceed with arbitration as agreed to in the [2003 Agreement]." Minute Order at 4-5.

The Minute Order is not binding on SNW, however, because SNW was not a party to the condemnation action and was given no opportunity to be heard. Courts cannot adjudicate upon a party's rights without the party being before it. *See Printz v. United States*, 521 U.S. 898, 935 (1997) (courts have long "decline[d] to speculate regarding the

[1] In fact, GCSD understood that SNW's waiver of sovereign immunity was "specifically limited by the Constitution of the Nation . . . ." 2003 Agreement § 15.4(d). Thus, GCSD cannot argue that the Tribal Council waived SNW's sovereign immunity in a manner that is inconsistent with the Hualapai Constitution.

[2] The Minute Order was signed by Judge Lawrence King on July 15, 2012 – the day before the final arbitration hearing commenced – but the order was not entered until August 3, 2012 and neither party was aware of the order until *after* the final arbitration hearing was conducted.

rights and obligations of parties not before the Court"); *State of Washington v. United States*, 87 F.2d 421, 427 (9th Cir. 1936) ("[N]o court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.") (internal citations and quotations omitted). Because SNW is not a party to the condemnation action, the Minute Order – purporting to adjudicate upon SNW's rights and obligations under the 2003 Agreement – is not binding on SNW.

B. GCSD was Required to Obtain a Federal Court Order to Initiate Arbitration.

GCSD argues that under the "plain language of the 2003 Agreement" it was not required to obtain a federal court order to effectuate a limited waiver of SNW's sovereign immunity. Response at 13. Specifically, GCSD claims that section 15.4(a) of the 2003 Agreement, which requires the parties to give "written notice" of the arbitration demand, constitutes a waiver of SNW's sovereign immunity. Response at 12. Any other interpretation, GCSD contends, is contrary to the plain language of the 2003 Agreement.

Contrary to GCSD's claim, section 15.4(a)'s "written notice" provision is a mere procedural requirement, not a substantive waiver of immunity; its only purpose is to ensure the parties receive notice of the arbitration demand. GCSD itself characterizes section 15.4(a) as a "procedural requirement." *See* Response at 14 (arguing that it "complied with the procedural requirements for initiating arbitration"). This procedural requirement is not, under the plain language of the 2003 Agreement, a waiver of sovereign immunity. Section 15.4(a) itself says that the agreement to submit to arbitration is "limited by **Section 15.4(d)**." 2003 Agreement § 15.4(a) (emphasis original). Section 15.4(d), titled "Limited Waiver of Sovereign Immunity" is the *only* provision that serves as a limited waiver of sovereign immunity. It provides that SNW's waiver is "specifically limited" to an action in federal court to compel arbitration.

Taken together, section 15.4(a) and 15.4(d) require GCSD to give SNW written notice of its arbitration demand. If SNW refuses to submit to arbitration after such

notice, GCSD must obtain an order from a federal court of competent jurisdiction compelling SNW to arbitration. SNW's sovereign immunity is only waived *after* GCSD obtains the required federal court order (which, under section 15.4(d) is necessary to effectuate a limited waiver of sovereign immunity).

This interpretation is not, as GCSD suggests, intended to "prolong decisions by the layering on of tribunals." Response at 12. It is designed to protect tribal sovereign immunity by requiring GCSD to first obtain a federal court order compelling arbitration. Here, as in many other cases, the question of arbitrability is an issue for judicial determination that should have been resolved prior to commencing arbitration. *See AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986) (question of arbitrability is an issue for judicial determination). That principle applies with even more force here because the judicial determination triggers a waiver of sovereign immunity. GCSD failed to *first* obtain a federal court order compelling arbitration such that SNW remains immune from suit and the AAA never had jurisdiction to adjudicate the parties' dispute.

This interpretation gives effect to sections 15.4(a) and 15.4(d) of the 2003 Agreement and is consistent with the requirement that waivers of sovereign immunity be clear, unequivocal and express, and the strong presumption against waivers of sovereign immunity. *See Pan Am. Co.*, 884 F.2d at 418 (there is a "strong presumption against tribal waivers of immunity"). Likewise where, as here, SNW placed conditions on its consent to be sued, that consent must be strictly construed in favor of immunity. *Missouri River Services, Inc.*, 267 F.3d at 852 ("[I]f a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.'").

GCSD's position is also belied by its own conduct. Before unilaterally initiating arbitration, GCSD sought an order from the Hualapai Tribal Court compelling SNW to submit to arbitration. *See* Exhibit E to SNW's Motion. In that action, the Tribal Court ruled that GCSD was required to obtain a federal court order compelling arbitration. *See*

Exhibit G to SNW's Motion. GCSD also filed an action in this Court seeking to compel arbitration. *See* February 16, 2012 Motion for Temporary Restraining Order with Notice attached hereto as **Exhibit A**. Judge Campbell denied GCSD's request to compel arbitration and ordered GCSD to exhaust its remedies in Hualapai Tribal Court. *See* March 26, 2012 Order attached hereto as **Exhibit B**. GCSD's conduct confirms what the 2003 Agreement says: that SNW agreed to a limited waiver of sovereign immunity to arbitrate disputes under the 2003 Agreement on the condition that GCSD *first* obtain a federal court order compelling arbitration.

Having failed to *first* obtain a federal court order compelling arbitration, SNW remains immune from suit and the arbitrator exceeded his powers by purporting to exercise jurisdiction over SNW and entering the Arbitration Award.

C. The Tribe Condemned GCSD's Arbitration Rights and Duly Terminated the Arbitration.

GCSD, relying on inapposite legal authority, claims that its arbitration claims were not condemned by the Tribe and were thus properly before the arbitrator. It is well settled that the power of eminent domain extends to tangibles and intangibles, including contracts and choses in action. *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912). As a sovereign nation, the Tribe has the authority to condemn intangible property, such as contracts and choses in action. Hualapai Constitution art. IX, Exhibit M to SNW's Motion. The parties do not dispute this.

Whether GCSD's arbitration rights were condemned by the Tribe turns on the interpretation of the Tribe's eminent domain ordinance. The ordinance has specific provisions that define the breadth and scope of the condemnation. When the Tribe files a declaration of taking to condemn a contract: (1) title to the condemned interest immediately vests in the Tribe; and (2) the Tribe becomes "the party thereto in the full place and stead of the defendant, to the full extent as if the Tribe and not the defendant were the ***original signator or party thereto***." Hualapai Law & Order Code § 2.16(F)(4)(a), Exhibit M to SNW's Motion.

Under Hualapai law, therefore, it is as if GCSD was *never* a party to the 2003 Agreement. The Tribe, on the other hand, is deemed to be the *original* party to the 2003 Agreement. Because GCSD was, in effect, never a party to the 2003 Agreement, it had no standing to initiate arbitration or pursue a claim for a breach of the 2003 Agreement. To the extent GCSD did have a "vested chose in action constituting its Arbitration claims," those vested rights were condemned by operation of Hualapai law.[3]

The cases cited by GCSD are, therefore, inapposite. The Tribe is not merely an assignee of GCSD's rights under the 2003 Agreement. Unlike an assignee, the Tribe is deemed to be the *original* party to the agreement in the full place and stead of GCSD. Whatever vested property rights GCSD had under the agreement have been condemned, and GCSD is entitled to just compensation for that condemned property interest. As the original party to the 2003 Agreement (and, therefore, the owner of GCSD's arbitration rights), the Tribe duly terminated the arbitration. By refusing to acknowledge the Tribe's termination, the arbitrator exceeded his authority.

To the extent there is a dispute about whether GCSD's "vested chose in action" was condemned by the Tribe, that is an issue that will be litigated and decided in the now-pending Tribal Court condemnation proceeding. This Court and the arbitrator acknowledged as much:

> The Tribal Court, not the federal court, must first consider the lawfulness of the Tribe's condemnation action, Judge Campbell confirmed, so the parties now move to Tribal Court where the parties presumably would litigate and receive resolution of at least the following questions: (1) whether [certain provisions of the Hualapai Eminent Domain Ordinance] pass constitutional muster; if so, (2) ***whether the claims at issue here fall within the scope of the Declaration of Taking, (Case No. 2012-CV-017)***; and, if so, (3) whether for any other reason this arbitration should not proceed to a final award.

March 27, 2012 Supplemental Order, Exhibit 15 to GCSD's Response (emphasis added).

[3] Subject, of course, to the payment of just compensation in the now-pending condemnation proceeding.

In spite of Judge Campbell's order, and the arbitrator's own acknowledgement that the scope of the condemnation was an issue for the Tribal Court to determine in the first instance, the arbitrator proceeded to a final hearing and issued the Arbitration Award that is at issue here. In so doing, the arbitrator exceeded his powers.

Finally, GCSD claims that "the Tribe has no extra-territorial power to take GCSD's vested chose in action, cited [sic] with its owner in Las Vegas . . . ." Response at 15. This question, too, was put before the Tribal Court and was recently argued to the Ninth Circuit.[4] GCSD claims that, as a bright-line rule, a contract is sited with its owner. It cites no controlling authority for this proposition. In the Ninth Circuit, courts look to several factors in determining the locus of a contract: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the place of residence of the parties. *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979, 985 (9th Cir. 1983). As set forth in more detail in the Tribe's brief to Judge King in the Tribal Court condemnation action, this multi-factorial test weighs heavily against GCSD's position. *See* Supplemental Pleading Requested by Court in August 3, 2012 Minute Entry and Order, attached hereto as **Exhibit C**. Under this test, the 2003 Agreement is sited on the Hualapai Reservation within the jurisdiction of the Hualapai Tribe.

[4] SNW's position is that GCSD failed to properly preserve the issue for appeal.

III. CONCLUSION.

For the foregoing reasons, and those in SNW's Motion, the Court should vacate the arbitration award and dismiss this matter.

RESPECTFULLY SUBMITTED this 5th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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