

EXHIBIT A

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8 UNITED STATES DISTRICT COURT

9 DISTRICT OF ARIZONA

10 GRAND CANYON SKYWALK
DEVELOPMENT, LLC, a Nevada limited
11 liability company,

12 Plaintiff,

13 vs.

14 THE HUALAPAI INDIAN TRIBE OF THE
HUALAPAI INDIAN RESERVATION,
15 ARIZONA; BARNEY ROCKY IMUS,
SHERRY COUNTS, PHILBERT
16 WATAHOMIGIE, RONALD QUASALA,
SR., RUDOLPH CLARKE, HILDA
17 COONEY, JEAN PAGILAWA, each
18 individuals and members of the Hualapai
Tribal Council,

19 Defendants.

No. 3:13-cv-08054-DGC

**DECLARATION OF PAUL K.
CHARLTON**

20 I, Paul K. Charlton, declare as follows:

21 1. I make this Declaration based upon my position as an attorney at
22 Gallagher & Kennedy, P.A. representing the Hualapai Tribe in relation to Skywalk
23 matters since December of 2010, and based upon my review of pertinent documents,
24 including those referenced in or attached to this declaration.

25 2. The Hualapai Indian Tribe (the "Tribe") is a federally-recognized sovereign
26 Indian nation. The Hualapai Indian Reservation is located in northwestern Arizona, with
27 the western edge being about 120 miles from Las Vegas. The Tribe is governed by an
28 elected, nine-member, Tribal Council, which includes a chairperson and vice-chairperson.

1 3. The Tribe has two commercial arms in the form of tribally-chartered
2 corporations wholly-owned by the Tribe, one of which is 'Sa' Nyu Wa, Inc. ("SNW").
3 SNW is managed by a board of directors.

4 4. On December 31, 2003, SNW and Grand Canyon Skywalk Development,
5 LLC, a limited liability company based in Las Vegas and controlled by David Jin
6 ("GCSD"), entered into a Development and Management Agreement to build and manage
7 the Grand Canyon "Skywalk" (the "Skywalk Agreement"). Under the Skywalk
8 Agreement, GCSD undertook to build and manage the Skywalk on the Reservation, with
9 the Tribe being the owner of the Skywalk. In consideration for its services, GCSD was to
10 be paid a management fee calculated as a percentage of the net revenues (if any)
11 generated from the operation of the Skywalk. At the time the Skywalk Agreement was
12 signed, Louise Benson was chairwoman of the Tribe and a member of the Tribal Council.

13 5. The Skywalk was designed to be a horseshoe-shaped structure (the principal
14 structural components of which are steel beams and multiple layers of glass) jutting out
15 from the edge of a cliff overlooking a part of the Grand Canyon. Those on the structure
16 would be able to look directly down through the glass floor to see the canyon thousands of
17 feet below. The Skywalk was completed and opened to the public in March 2007. It has
18 become an important tourist attraction and hence an important source of revenue for the
19 Tribe.

20 6. Gallagher & Kennedy, P.A. ("G&K") has served as counsel to the Tribe in
21 connection with a variety of matters, and served as counsel for the Tribe's commercial
22 entities, including SNW, from September 2009 until March 2013 when SNW changed its
23 counsel to Quarles & Brady, LLP to assist SNW in navigating through bankruptcy
24 proceedings.

25 7. Many disagreements regarding the Skywalk Agreement have arisen over the
26 years. For a while, those disagreements were resolved or attempted to be resolved
27 through discussions and negotiations between GCSD representatives and members of the
28 Tribal Council or the SNW board.

1 8. In 2009 and 2010, SNW and GCSD successfully negotiated and executed
2 four key agreements that superseded relevant aspects of the Skywalk Agreement. Hence,
3 in early 2010, the shuttle-bus provisions of the Skywalk Agreement were superseded by
4 two new shuttle-bus agreements between GCSD and the Tribe's other commercial arm
5 which does business under the name Grand Canyon Resort Corporation ("GCRC"). Also
6 in early 2010, the provisions of the Skywalk Agreement dealing with the handling of
7 Skywalk revenues and disbursements were superseded by the Skywalk Trust Agreement,
8 whereby Skywalk revenues were removed from the control of GCSD and placed in a trust
9 account.

10 9. The parties also continued to negotiate two remaining agreements, which
11 contemplated the superseding of all other terms of the Skywalk Agreement by means of
12 (a) an agreement addressing GCSD's completion of the Skywalk project (the
13 "Construction Completion Agreement"), and (b) an agreement dealing with GCSD's
14 actual management of the facility, such as budgets, reports, audits, hours of operations,
15 and so on (the "Management Agreement"). In these negotiations, GCSD was represented
16 by Parker, Nelson & Associates, primarily through Theodore ("Teddy") Parker, III.

17 10. On December 6, 2010, GCSD and SNW held a final negotiating session in
18 Las Vegas regarding the proposed Construction Completion Agreement and the
19 Management Agreement. At the end of the session, which resulted in one change to a
20 provision of the proposed Management Agreement, David Jin said he was satisfied with
21 the agreements, had no other issues to address, and was prepared to sign them, as soon as
22 the signature pages could be provided. The following day, the final versions of the two
23 agreements were forwarded to Mr. Jin's attorney, Mr. Parker, for signature by Mr. Jin.

24 11. Nevertheless, Mr. Jin ultimately declined to sign the negotiated agreements.
25 Just prior to New Year's Eve in 2010, Mr. Parker sent G&K a substantial rewrite of the
26 material terms of the agreements under discussion, and on January 10, 2011, Mr. Parker
27 advised G&K that the agreements as discussed on December 6 had "not been approved by
28 Mr. Jin and will not be executed in their present form." **Exhibit 1**, January 10, 2011

1 email from Ms. Evans to Mr. Thompson. Mr. Parker further stated that the law firm of
2 Greenberg Traurig ("GT") was now working with him on the agreements. *Id.*

3 12. On January 27, 2011, GT sent a letter to G&K inquiring about the status of
4 the proposed agreements. GT said that "it has been four weeks since we delivered our
5 mark ups to the proposed agreements and there has been no response or comments relative
6 to those documents" **Exhibit 2**, January 27, 2011, Letter from Mr. Tratos to Mr.
7 Thompson.

8 13. On that same day, January 27, 2011, the nine members of the Tribal Council
9 (Sheri Yellowhawk, Wilfred Whatoname, Sr., Richard Walema, Sr., Waylon Honga,
10 Candida Hunter, Barney Imus, Wynona Sinyella, Ruby Steele, and Charlie Vaughn),
11 along with board members of SNW and certain Tribal officers, met in a confidential and
12 privileged Tribal Council executive session meeting at G&K's offices in Phoenix.
13 **Exhibit 3**, January 27, 2011 Special Tribal Council Meeting Minutes. The purpose of the
14 executive session meeting was to discuss strategy in light of GCSD's apparent decision
15 not to sign the proposed agreements in the form that had been agreed to on December 6,
16 2010, and to obtain the advice of legal counsel regarding the Tribal Council's available
17 strategies.

18 14. On February 8 and February 11, 2011, at the request of the Tribal Council,
19 G&K provided legal memoranda directed to the Tribal Council, each memorandum
20 bearing the clear legend at the top of every single page, in capital letters:

21 ATTORNEY-CLIENT COMMUNICATION
22 ATTORNEY WORK PRODUCT
23 PRIVILEGED & CONFIDENTIAL

24 *See* GCSD's Response in Opposition to Defendants' Motion to Dismiss (Doc. 21), in the
25 case *sub-judice*, at Exhibit 1 (Doc. 21-1) and at Exhibit 2 (Doc. 21-2).

26 15. The February 8 and February 11, 2011 confidential memoranda, following
27 up on the January 27, 2011 Tribal Council meeting at G&K's offices, discussed
28 confidential legal advice and strategy for the Tribal Council to consider in light of the
January 27, 2011 Tribal Council meeting. *Id.*

1 16. Sheri Yellowhawk was then a member of the Tribal Council, was present at
2 the January 27, 2011 meeting at G&K's offices, and received a copy of the February 8 and
3 11, 2011 confidential memoranda. Ms. Yellowhawk later professed in public that she was
4 opposed to the condemnation and believed that tribal members should be "aware of what
5 the Tribal Council does behind closed doors." **Exhibit 4**, February 29, 2012 email from
6 Ms. Hardridge to various recipients attaching Ms. Yellowhawk's letter.

7 17. On February 25, 2011, GT, on behalf of GCSD, filed a complaint in the
8 Hualapai Tribal Court against SNW, seeking to compel SNW to participate in binding
9 arbitration to resolve the disagreements regarding the Skywalk. **Exhibit 5**, GCSD's
10 Tribal Court Complaint.

11 18. On March 30, 2011 – before the Tribe had adopted an eminent domain
12 ordinance, and at a time when the plan to adopt such should have only been known to
13 G&K attorneys and the Tribal Council – GT filed, on behalf of GCSD, a complaint for
14 declaratory and injunctive relief in the United States District Court for the District of
15 Arizona ("*GCSD I*"), asking the Court to enjoin the Tribal Council from enacting an
16 eminent domain ordinance. **Exhibit 6**, GCSD's Complaint for Declaratory and Injunctive
17 Relief in *GCSD I*. The complaint named as defendants all nine members of the Tribal
18 Council, plus the Tribe's accountant and an SNW employee. *Id.* The complaint was
19 accompanied by a Motion for Preliminary Injunction, which was supported by a
20 Declaration signed by David Jin. **Exhibit 7**, GCSD's Motion for Preliminary Injunction
21 in *GCSD I*, and **Exhibit 8**, March 24, 2011 Declaration of David Jin.

22 19. The complaint alleged that the Tribal Council "intends to pass an ordinance
23 in the immediate future" allowing the Tribe to exercise its "purported eminent-domain
24 power to take certain contractual rights from Plaintiff [GCSD], who is a non-Indian."
25 **Exhibit 6**, *GCSD I* Complaint, at 10.

26 20. Mr. Jin's Declaration, dated March 24, 2011, made certain allegations
27 against SNW. **Exhibit 8**, March 24, 2011 Declaration of David Jin, at ¶ 32. The
28 Declaration then goes on to say, however, that:

1 Fortunately, I have **maintained good relations with a number of**
2 **the important members of the tribe** who have been involved at
3 **various levels of the tribal government and they continue to be**
4 **helpful in supporting our efforts** to improve the economic
 conditions of the Tribe through the expansion and development of
 these tours operations.

5 *Id.* at ¶ 33 (emphasis added).

6 21. Mr. Jin's Declaration represented that he had "learned" various facts from
7 his tribal contacts. Certain information in the Mr. Jin's Declaration was substantively
8 identical to information contained in G&K's February 8 and February 11 memoranda and
9 information that was discussed in the January 27, 2011 executive session. *Id.* at ¶¶ 35-36.

10 22. The facts in Mr. Jin's Declaration that the Tribe was intending to pass an
11 eminent domain ordinance, that the Tribe intended to acquire his interest in the
12 management agreement, and that the Tribe was intending to hire a PR firm, were all
13 information that was privileged and confidential. Such information almost certainly has
14 to have ultimately come from one or more members of the Tribal Council.

15 23. On April 4, 2011, the Tribal Council enacted the eminent domain ordinance.

16 24. Additionally, on April 4, 2011, due to the unauthorized disclosure of
17 information obtained from the Tribal Council's confidential and privileged executive
18 session meetings, as well as information covered under the Tribal Council's attorney-
19 client privilege, the nine Tribal Council members, including Ms. Yellowhawk, all signed
20 non-disclosure agreements reaffirming their understanding and commitment to preserve
21 the confidentiality of all discussions involving their legal counsel. **Exhibit 9**, April 4,
22 2011, executed confidentiality agreements of the Hualapai Tribal Council members.

23 25. In the non-disclosure agreements, each member of the Tribal Council
24 acknowledged that all information he or she received regarding "the Tribe's handling of
25 litigation, arbitration or other proceedings or disputes involving David Jin or his affiliates,
26 including strategies, positions, and legal and other advice," would be received as
27 "confidential and proprietary information of the Tribe." Each Council member also
28 agreed not to copy, duplicate, publish, or disclose such information to anyone "who is not

1 specifically bound by a nondisclosure agreement with the Tribe,” and further agreed not to
2 “use any of the Information in any manner without the prior consent of the Tribe.” *Id.*

3 26. On April 12, 2011, GT, on behalf of GCSD, filed a Motion for Temporary
4 Restraining Order with Notice. The Motion asserted that Jin had learned that “during a
5 closed-door meeting,” the Council had “passed a measure that purports to authorize the
6 Tribe to ‘take’ private property,” and that Jin had received a copy of the “Tribal
7 ordinance.” **Exhibit 10**, GCSD’s Motion for Temporary Restraining Order in *GCSD I*, at
8 2. The Motion also stated that Mr. Jin “had been provided materials prepared by the
9 Tribe’s public-relations firm,” Scutari Cieslak, which showed that the Tribe was “poised
10 to launch a massive media blitz to publicly justify the taking.” *Id.* at 3.

11 27. The TRO Motion was supported by another Declaration from Mr. Jin, dated
12 April 12, 2011. This second Declaration by Mr. Jin attached a copy of a document from
13 Scutari Cieslak, stamped on each page, “PRIVILEGED AND CONFIDENTIAL.”
14 **Exhibit 11**, April 12, 2011 Declaration of David Jin and exhibits attached thereto, at
15 Exhibit 2.

16 28. On April 27, 2011, the Tribe filed a motion to dismiss GCSD’s complaint,
17 which the District Court (Judge Campbell) subsequently granted on June 23, 2011.

18 29. The source of Mr. Jin’s knowledge set out in his two Declarations that GT
19 relied on, was plainly privileged and confidential. GT, in preparing and filing its March
20 30, 2011 Complaint and Motion for Preliminary Injunction, and its April 12, 2011 Motion
21 for a Temporary Restraining Order, presumably discussed with Mr. Jin the source of his
22 knowledge.

23 30. On May 11, 2011, G&K sent a letter to GT asking it to “cease and desist
24 from any further use of the attorney-client, or otherwise, privileged information and
25 documents received by you or your law firm.” G&K stated:

26 It is self-evident that the Complaint and Temporary Restraining Order
27 Application in this matter was based upon attorney-client privileged
28 information and documents, provided by this law firm to the Hualapai

1 Tribal Council in Executive Session meetings. Indeed, certain of the
2 exhibits are expressly labeled “privileged and confidential.”

3 **Exhibit 12**, May 11, 2011 Letter from Mr. Hallman to GT attorneys Mr. Tratos, Mr. Eid
4 and Ms. Overton.

5 31. The letter further stated that “[t]here is simply no doubt or debate that your
6 pleadings in this matter have included information and documentation which was
7 attorney-client and otherwise privileged, used ‘to gain maximum adversarial value.’” *Id.*

8 32. The May 11, 2011 letter thus asked GT:

9 You are specifically requested, in accordance with clear Arizona ethical
10 requirements, **upon receipt of any confidential or privileged material**, to
11 (1) refrain from further examination of the material or from making use of
12 it, (2) immediately notify this law firm of its receipt, and (3) immediately
abide by this law firm’s instructions as to the disposition of the information
or documentation.

13 *Id.* (emphasis added).

14 33. The letter stated in conclusion:

15 **If we become aware of any future use** by any of you of privileged
16 information or documentation, **we will be forced to file a motion** with
17 Judge Campbell **to have your firm disqualified**. Further, we reserve the
18 right to seek disqualification if you do not immediately notify this law firm
upon receipt of any privileged information or documentation, and abide by
this law firm’s instructions regarding its disposition.

19 *Id.* (emphasis added).

20 34. GT replied to Mr. Hallman’s May 11, 2011 letter via a short, May 11, 2011,
21 email:

22 We are in receipt of your letter today May 11, 2011 and we find it offensive
23 and unprofessional, therefore, we will not honor it with a response.

24 **Exhibit 13**, May 11, 2011 email from Mr. Tratos to Mr. Hallman.

25 35. In approximately July 2011, Louise Benson was elected as Chairwoman of
26 the Tribal Council. She had served as the Tribal Chairperson in 2003 when the Skywalk
27 Agreement was first approved, and then served continuously as a member of the Council
28 from mid-2006 through mid-2010.

1 36. In August 2011, GCSD, continuing to be represented by GT, filed an
2 arbitration complaint before the American Arbitration Association (“AAA”), seeking to
3 resolve the various monetary disputes between SNW and GCSD. SNW moved to dismiss
4 the complaint, but the AAA arbiter denied SNW’s motion in a ruling dated November 21,
5 2011. Thereafter, the arbitration proceeded under the protest of SNW for lack of
6 jurisdiction.

7 37. On February 7, 2012, the Tribal Council passed a resolution approving the
8 use of eminent domain to acquire GCSD’s interest in the Skywalk Agreement. On
9 February 8, 2012, the Council filed a Declaration of Taking and formally initiated the
10 condemnation action in Hualapai Tribal Court. Then on February 9, 2012, the Tribe –
11 standing in the shoes of GCSD as a result of having condemned GCSD’s interest in the
12 Skywalk Agreement – filed with the AAA arbiter a “Notice of Voluntary Dismissal with
13 Prejudice.”

14 38. On February 16, 2012, GT, on behalf of GCSD, then filed a second
15 complaint in the United States District Court for the District of Arizona, case No. 3:12-
16 CV-08030-DGC (“*GDSD II*”), again seeking declaratory and injunctive relief, as well as
17 a TRO. These filings, among other things, sought to enjoin the Tribe’s condemnation
18 action. GCSD also sought a ruling that the Tribe had to pursue the condemnation action
19 in federal court, not the tribal court.

20 39. During a February 24, 2012 TRO hearing in front of the District Court to
21 determine whether the condemnation action should be enjoined, GT attempted to call the
22 Tribe’s then-acting Chairwoman Benson as a witness for GCSD, without providing prior
23 notice to the Court or G&K that: 1) GCSD had any witness testimony to offer, or 2) that
24 GCSD would seek to offer one of G&K’s primary client representatives for the Tribe as a
25 witness. **Exhibit 14**, excerpt from the February 24, 2012 TRO Hearing before Judge
26 Campbell in *GCSD II*. GT represented to the Court that it was “surprise[d]” by being able
27 to call Ms. Benson because GT attorneys had only “met her for the first time just outside,
28 actually, the gallery here [in the courthouse].” *Id.* Nevertheless, GT was able to provide a

1 specific and detailed proffer to the Court as to Ms. Benson's expected testimony. *Id.* GT
2 claimed that her testimony was relevant to GCSD's bad faith exercise of tribal jurisdiction
3 claim. *Id.* The Court ultimately declined to allow Ms. Benson to testify and ordered the
4 parties to submit supplemental pleadings on the legal issue of bad faith.

5 40. On February 29, 2012, five days after the TRO hearing, Ms. Benson was in
6 Las Vegas with two other members of the Tribal Council to attend to some Council
7 business. **Exhibit 15**, April 3, 2012 Tribal Council Complaint against Louise Benson. On
8 that same day, while in Las Vegas, Ms. Benson apparently met with representatives of
9 GCSD and signed an affidavit for their use. *Id.*; *see also* February 29, 2012 Affidavit of
10 Louise Benson attached as Exhibit 8 to GCSD's Supplemental memoranda in Support of
11 Bad Faith in *GCSD II* (Doc. 37-1).

12 41. On March 1, 2012, at 5:26 p.m., GT sent a letter to G&K via email
13 attachment titled "Documents Produced to More than 80 Members of the Hualapai Tribe."
14 *See Exhibit 16*, March 1, 2012, email from Mr. Tratos to Mr. Hallman with March 1,
15 2012 letter attached. The letter explained that it enclosed, among other things,
16 memoranda from G&K "outlining the plan to resist arbitration and use eminent domain as
17 a way of taking GCSD's contractual rights." *Id.* The enclosed memoranda were G&K's
18 confidential and privileged memoranda to the Tribal Council referenced in paragraph 14,
19 above. *Id.* The letter went on to say that GT believed that "the distribution to the public
20 is a waiver of any claim to attorney client privilege" because the documents were
21 distributed by a "tribal council member who was authorized to receive it." *Id.*

22 42. Approximately 17 minutes after GT sent the email attaching the letter
23 referenced in paragraph 46, above, GT filed a Supplemental Brief in Support of Bad Faith
24 Exception as requested by the Court. **Exhibit 17**, GCSD's Supplemental Brief in Support
25 of Bad Faith in *GCSD II*; **Exhibit 18**, U.S. District Court Notice of Electronic Filing. The
26 brief attempted to show that, in trying to condemn GCSD's interest in the Skywalk, the
27 Tribe was acting in bad faith. *See Exhibit 17*. GT supported its brief with a lengthy
28 affidavit, dated February 29, 2012, signed by Chairwoman Benson, one of G&K's

1 primary client representatives. See February 29, 2012 Affidavit of Louise Benson
2 attached as Exhibit 8 to GCSD's Supplemental Brief in Support of Bad Faith in *GCSD II*
3 (Doc. 37-1). But GT never asked G&K if it was acceptable to speak directly to Ms.
4 Benson outside of G&K's presence, and had GT asked, G&K would not have given
5 approval and would have advised Ms. Benson not to communicate with GT.

6 43. GT had spoken to Ms. Benson at the February 24, 2012 TRO hearing, and
7 apparently solicited the affidavit, signed in Las Vegas on a GT pleading form on February
8 29, 2012, which disclosed confidential information, including privileged conversations
9 she had with G&K. For example, Ms. Benson's Affidavit relates to the substance of a
10 conversation she said she has with G&K. See February 29, 2012 Affidavit of Louise
11 Benson attached as Exhibit 8 to GCSD's Supplemental Brief in Support of Bad Faith in
12 *GCSD II* (Doc. 37-1), ¶ 9. (Emphasis added). On the same day, February 29, that Ms.
13 Benson signed her Affidavit, GCSD filed a "Notice of Voluntary Dismissal Without
14 Prejudice," dismissing Ms. Benson as a defendant in *GCSD II*. **Exhibit 19.**

15 44. GT's Supplemental Brief, referred to in paragraph 47, above, was further
16 supported by a Declaration from Theodore ("Ted") Quasula, a GCSD employee. See
17 February 29, 2012 Declaration of Theodore "Ted" Quasula attached as Exhibit 1 to
18 GCSD's Supplemental Brief in Support of Bad Faith in *GCSD II* (Doc. 37-1). Attached to
19 his affidavit were, among other things, the February 8 and February 11, 2011 memoranda
20 from G&K, clearly marked as confidential and privileged, referred to in paragraph 14,
21 above. *Id.* (Doc. 37-1, at pp. 3, 9-15). He claimed to have received those confidential
22 memoranda, and other materials, in a February 29, 2012 email from Sheri Yellowhawk's
23 Aunt, Charlene Hardridge, that was sent to numerous tribal members. *Id.*, ¶ 2. Ms.
24 Yellowhawk was also then serving on the Tribal Council, as she had been when GT had
25 filed *GCSD I*. The email included an attached letter from Ms. Yellowhawk, referred to
26 earlier, expressing her displeasure with the Council's actions in approving the
27 condemnation, and stating that she felt tribal members needed to know what the Council
28 was doing "behind closed doors." *Id.* at Exhibit 1 attached thereto, pp. 1-2.

1 45. Neither the Tribe nor G&K authorized or consented to Ms. Benson or Ms.
2 Yellowhawk's release of confidential materials or information. Indeed, the Tribal Council
3 briefly suspended both Ms. Benson and Ms. Yellowhawk from the Tribal Council as a
4 result of the unauthorized disclosures, and brought formal charges against them. **Exhibit**
5 **15**, Tribal Council Complaints against Ms. Benson and Ms. Yellowhawk (the Tribal Court
6 subsequently reinstated Mmes. Benson and Yellowhawk to their Council positions, but
7 the terms of each expired about two months later in July 2012).

8 46. On March 2, 2012, G&K moved to strike the two G&K confidential
9 memoranda and the Affidavit of Louise Benson as exhibits, and sought an order that
10 GCSD be "prohibited from contacting any other current or former representatives of the
11 Hualapai Tribal Council or employees of SNW." **Exhibit 20**, Tribe's Motion to Strike in
12 *GCSD II* (including Exhibits 1 and 2, thereto). As G&K advised the Court in that motion,
13 G&K limited the scope of the motion in order to address the "immediate" interests of its
14 client, but specifically "reserve[d] the right to request further remedies" consistent with
15 G&K's "duty as officers of this Court and members of the State Bar." G&K also sent its
16 second letter to GT advising GT, again, that its unauthorized use of confidential and
17 privileged documents was improper and unethical. **Exhibit 21**, March 2, 2012 Letter
18 from Mr. Charlton to Mr. Tratos. Mr. Tratos responded by accusing G&K of having
19 violated its "duty of candor" in an "effort to steal GCSD's intangible property rights in the
20 management agreement of the Skywalk." **Exhibit 22**, March 2, 2012 letter from Mr.
21 Tratos to Mr. Hallman.

22 47. G&K's Motion to Strike argued that GT's *ex parte* communication with Ms.
23 Benson violated ER 4.2 of the Arizona Rules of Professional Conduct, which prohibits a
24 lawyer from communicating about the subject of the representation with a party the
25 lawyer knows to be represented by counsel. GT's actions were also improper, G&K
26 argued, under comment 2 to Rule 4.2, which prohibits a lawyer from contacting "persons
27 having managerial responsibility on behalf of the [represented] organization"
28 Exhibit 19, Tribe's Motion to Strike in *GCSD II* at 5.

1 48. GT's use of the G&K confidential memoranda was improper, G&K further
2 argued, under Rule 4.4(b), which requires a lawyer in receipt of inadvertently-produced
3 documents to notify the sender and maintain the *status quo* to "permit the sender to take
4 protective measures." *Id.* at 8-9. G&K also cited Ariz. Ethics Op. 2001-04 (the "Ethics
5 Opinion"), which requires a lawyer who receives privileged documents from a client, who
6 in turn received those documents from a third party, to: (1) refrain from using them;
7 (2) subject to client's consent, notify opposing counsel of their receipt; and (3) abide by
8 opposing counsel's instructions or seek a ruling from the court as to whether they can be
9 kept or used. *Id.* at 9. The Ethics Opinion provides that if the client insists that an
10 attorney "review the documents or use the information in them," withdrawal is required
11 under ER 1.16(a). *Id.*

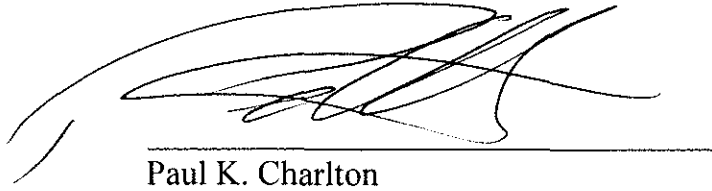
12 49. The District Court ultimately denied GCSD the relief it sought in *GCSD II*,
13 and required GCSD to initially pursue its complaints about the condemnation action in the
14 Tribal Court. On March 19, 2012, the District Court thus stayed the case, asking only for
15 semi-annual status reports to be jointly filed by the parties.

16 50. As to G&K's Motion to Strike the privileged exhibits, the Court treated the
17 matter as moot, stating:

18 The Court has reviewed the information in these exhibits and has
19 determined that it does not affect the outcome of this decision.

20 51. On April 24, 2013, GCSD then filed its third federal court complaint
21 relating to the Tribe and SNW ("*GCSD III*"), this time asking the Court to compel the
22 Tribe to arbitrate the condemnation matter. The Tribe moved to dismiss GCSD's
23 Complaint. In support of its Response in Opposition to the Tribe's Motion to Dismiss,
24 GCSD once again attached the two G&K confidential legal memoranda to the Tribal
25 Council dated February 8 and February 11, 2011. *See* GCSD's Response in Opposition to
26 Defendants' Motion to Dismiss in *GCSD III* (Doc. 21), at Exhibit 1 (Doc. 21-1) and at
27 Exhibit 2 (Doc. 21-2).
28

1 I declare under penalty of perjury under the laws of the United States that the
2 foregoing is true and correct, and that this Declaration was executed on June 26, 2013, in
3 Phoenix, Arizona.

4 
5 Paul K. Charlton

Grand Canyon Skywalk Development, LLC
v.
The Hualapai Indian Tribe of the Hualapai Indian Reservation, et al.

No. 3:13-cv-08054-DGC

EXHIBITS TO DECLARATION OF PAUL K. CHARLTON

Exhibit 1	January 10, 2011 email from Mrs. Evans to Mr. Thompson
Exhibit 2	January 27, 2011 letter from Mr. Tratos to Mr. Thompson
Exhibit 3	January 27, 2011 Special Tribal Council Meeting Minutes
Exhibit 4	February 29, 2012 email from Ms. Hardridge to various recipients attaching Ms. Yellowhawk's letter
Exhibit 5	February 25, 2011 GCSD's Tribal Court Complaint
Exhibit 6	March 30, 2011 GCSD Complaint for Declaratory and Injunctive Relief in <i>GCSD I</i>
Exhibit 7	March 30, 2011 GCSD Motion for Preliminary Injunction in <i>GCSD I</i>
Exhibit 8	March 24, 2011 David Jin Declaration
Exhibit 9	April 4, 2011 Executed Confidentiality Agreements of the Hualapai Tribal Council members
Exhibit 10	April 12, 2011 GCSD Motion for Temporary Restraining Order in <i>GCSD I</i>
Exhibit 11	April 12, 2011 Declaration of David Jin
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Exhibit 13	May 11, 2011 email from Mr. Tratos to Mr. Hallman
Exhibit 14	February 24, 2012 excerpt from TRO Hearing before Judge David Campbell in <i>GCSD II</i>
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Exhibit 17	March 1, 2012 GCSD Supplemental Brief in Support of Bad Faith in <i>GCSD II</i>
Exhibit 18	March 1, 2012 U.S. District Court Notice of Electronic Filing in <i>GCSD II</i>
Exhibit 19	February 29, 2012 GCSD Notice of Voluntary Dismissal Without Prejudice in <i>GCSD II</i>
Exhibit 20	March 2, 2012 Tribe Motion to Strike in <i>GCSD II</i>
Exhibit 21	March 2, 2012 Letter from Mr. Charlton to Mr. Tratos
Exhibit 22	March 2, 2012 Letter from Mr. Tratos to Mr. Hallman

EXHIBIT 1

Attorney Work Product

From: Patricia Evans [<mailto:pevans@pnalaw.net>]

Sent: Monday, January 10, 2011 5:16 PM

To: Thompson, Terence W.

Subject: Re: Hualapai - Oriental Travel and Tours, Inc. ("OTTI") and Grand Canyon Resort Corporation ("GCRC")

Terry,

Thank you for your e-mail of January 10, 2011 I hope that both you and Mr. Zavislak feel better after a weekend of rest and relaxation. With regards to the Skywalk Management Agreement and the Skywalk Construction Completion Agreement, these documents as I have discussed over the last two weeks have not been approved by Mr. Jin and will not be executed in their present form. Hence, we have sent over proposed revisions to both agreements. I look forward to hearing from you with regards to available dates to meet and discuss these two documents in person. As discussed Friday, January 7th, Mark Tratos of Greenberg Traurig, is also working with us in finalizing these two agreements. Hopefully, once we all have had a chance, we can get these documents finalized.

Finally, with regards to the Visitors Center, I will discuss with Mr. Jin the completion of the entire building. It is my understanding however having spoken with Mr. Jin on this topic before that he was not interested in building out the entire Visitors Center. I will also speak with Mr. Jin with regard to the first floor bathrooms to ensure that they are ADA compliant. Once, I've had the opportunity to speak with Mr. Jin regarding the Visitors Center, both with regards to the build outs of the entire Visitors Center as well as the bathrooms on the first floor, I will contact you.

In the meantime, if you have any questions or concerns, please do not hesitate to contact me.

Thank you again.


Teddy

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TRIBE002889

EXHIBIT 2




Mark G. Tratos

GCSD008123

EXHIBIT 3

APPROVED: 02/09/11

**HUALAPAI TRIBAL COUNCIL
SPECIAL COUNCIL MEETING
GALLAGHER & KENNEDY OFFICE
PHOENIX, AZ
Thursday, January 27, 2011 @ 8 AM**

SECRETARY: Addie

Roll call taken, seven members present constituting a quorum. Chairman Whatoname called meeting to order at 8:18 am.

MEMBERS PRESENT:

Wilfred Whatoname, Sr.
Richard Walema, Sr.-late
Waylon Honga
Candida Hunter
Barney Imus
Wynona Sinyella
Ruby Steele
Sheri YellowHawk – late
Charles Vaughn

OTHERS PRESENT:

Terry Thompson	Catherine Langford
Robert Bravo	Robert Yoder
Christine Smith	Paul Hamai
Henry Melton	Jack Erhardt
Wanda Easter	Don Simon
Erin Forrest	Reid Chambers
Joe T. Flies Away	
Paul Charlton	
Darrick Penney	
Monica Fonseca by telecom	

APPROVAL OF AGENDA:

Candida moved to approve the agenda with the addition of gaming issue of land annexation bill. Seconded by Waylon. VOTE: 7 - for, 2 - excused. Motion carried.

1. **UPDATE – T. Thompson**

Wynona moved to go into executive session at 8:24. Seconded by Candida. VOTE: 7 FOR, 2 EXCUSED. Motion carried.

Wynona moved to come out of executive at 10:49 am. Motion died for lack of Second.

Wynona moved to come out of executive at 11:56. Seconded by Sheri. VOTE: 9 – FOR. Motion carried.

2. **PENSION PLAN**

Catherine Langford and Robert Yoder, attorneys for the 401K Plan were present. A draft resolution approving the restated plan is the standard routine that the IRS requires.

Mr. Yoder explained that there are two different rules that apply to 401K plans, 1) government, and 2) private. Also explained was the process it took to consider native tribes as Indian Tribal Governments under the pension plan.

Executive Order 13175 in regards to consultation with Native tribes as established by President Clinton and thereafter reiterated by previous Presidents and the latest by

TRIBEMM000609

APPROVED: 02/09/11

President Obama, the IRS has not complied with this order since day one. This is an important issue that should be addressed.

Wynona moved to adopt Resolution No. 07-2011, (401(k) Plan for the Hualapai Tribe. Seconded by Candida. VOTE: 8 FOR, 1 ABSTAIN. Motion carried

3. **PRE-PLANNING-WATER NEGOTIATIONS**

Paul Hamai of NRCE presented a power point presentation and discussed what was to be presented for tomorrow's meeting. Due to flight problems, Mr. Simon wasn't available at this time but would be here about 4 pm.

Wynona moved to go into executive session at 2:02 pm. Seconded by Candida. VOTE: 8 FOR, 1 - ABSTAIN. Motion carried.

Wynona moved to come out of executive session at 5:16 pm. Seconded by Candida. VOTE: 9 – FOR. Motion carried

Wynona moved for adjournment at 5:16 pm. Seconded Rocky. VOTE: 9 - IN FAVOR. Motion carried.

TRIBEMM000610

EXHIBIT 4

Subject: Letter
Attachments: Dear Hualapai Tribal Members.docx; Memorandum No-3 to Hualapai Tribal Council re Skywalk Matters.pdf; Memorandum No-4 to Hualapai Tribal Council re Action as to Skywalk Agreement.pdf

From: 1Hardridge1@comcast.net [<mailto:1Hardridge1@comcast.net>]

Sent: Wednesday, February 29, 2012 2:02 PM

To: acrock87@yahoo.com; AHavatone@Hualapai-nsn.gov; acabillo@hotmail.com; ann_fielding@grandcanyonresort.com; AQuerta@Hualapai-nsn.gov; Beautifulhualapai@yahoo.com; bimus@hualapai-nsn.gov; bravoava@yahoo.com; DBravo@Hualapai-nsn.gov; c_klinekole@hotmail.com; tedquasula@cox.net; richard_powskey@bla.gov; CBravo@Hualapai-nsn.gov; clarkedamon@hotmail.com; CLee@Hualapai-nsn.gov; cnlgthorse@hotmail.com; dorisbutler@rocketmail.com; Cataleeh2@aol.com; CBegay@Hualapai-nsn.gov; cbherbert@yahoo.com; cbowtique@aol.com; chiravanette@hotmail.com; clmus@frontiernet.net; gsuminimo@cox.net; hwhatoname@hotmail.com; kertsmit@gmail.com; baker.amber81@yahoo.com; bimus@hualapai-nsn.gov; DBravo@Hualapai-nsn.gov; emanakaja3@yahoo.com; em-clark@hotmail.com; fcrook24@yahoo.com; flora02@frontiernet.net; gathut@yahoo.com; gloria_susanyatame@yahoo.com; graybar@frontiernet.net; julietsteele2005@yahoo.com; kohojm@yahoo.com; michelle_zephier@yahoo.com; mistywatahomigie@msn.com; MRomo@Hualapai-nsn.gov; MSullivan@Hualapai-nsn.gov; vickiea@popshealth.com; wakasmana@yahoo.com; oleda.benson@ihs.gov; pete.lmus@yahoo.com; powseysr@yahoo.com; psquaglia@hualapai-nsn.gov; RCClark@Hualapai-nsn.gov; Rmajenty@aol.com; wiquasula@yahoo.com; CMahone@Hualapai-nsn.gov; cmbravo2000@yahoo.com; coleenyvettmahone@yahoo.com; DSelana@Hualapai-nsn.gov; earlene_havatone@grandcanyonresort.com; Lenora.Pablo@ihs.gov; ljwia@yahoo.com; lorena_bender@grandcanyonresort.com; sashia2003@yahoo.com; shane_charley@yahoo.com; shar_torres@yahoo.com; sherry.counts@yahoo.com; susanyatamesherlene@yahoo.com; waunekajc@yahoo.com; white_n8tive@yahoo.com; woodee36@yahoo.com; WQuasula@Hualapai-nsn.gov; gmwhatoname@yahoo.com; kkdashee@yahoo.com; heleniwata@yahoo.com; hilda2212@yahoo.com; hualapailcwa@yahoo.com; hubertimus@yahoo.com; hwhatoname@hotmail.com; iwalema@Hualapai-nsn.gov; JDavis@Hualapai-nsn.gov; jeanimus@yahoo.com; jktmarshall@yahoo.com; joannwhatoname@yahoo.com; joe_montana554@hotmail.com; JSchrum@Hualapai-nsn.gov; jtapila@yahoo.com

Subject: Fwd: Letter

GCSD007530

Dear Hualapai Tribal Members:

It is with deep sorrow that I need to share information with my fellow Tribal Members. When I was sworn into office; I took an oath to uphold the US and Hualapai Constitution which includes the laws of the Hualapai Tribe. I understand there is a recall being conducted on me at this time. My term is up in June so it really isn't necessary. I will no longer be in office and seems my services are not wanted nor required. It is bothering me that a lot of information is not being shared with the membership. Everything that is shared is based on opinion and not fact. There is talk of being on one side or another. That concept does not sit well with me. I thought we were supposed to be working toward one purpose: To serve the Hualapai People.

I read all the legal documents, some more than 200 pages in length. There are shocking discoveries from both sides. In trying to keep an open mind, I look at both sides and what can actually be proven. I have asked where the various amounts that are supposedly owed to us come from and where I can see the figures. I am told they are estimations and summations. That will not hold up in court. This scares me as a Tribal Council Member because we should be very sure of ourselves before we assert wrong doing. I am very logical and analytical when it comes to the law. I want proof and documentation not just opinion and emotion.

I think it is time that the Hualapai Tribal Membership actually is aware of what the Tribal Council does behind closed doors. I read on face book a comment from a child who observed our community meeting that we looked like we are hiding things. We are hiding things. I was disciplined as a child for not telling the truth. What are we teaching our future leaders? To be sneaky and lie?

I stated at the community meeting that this Eminent Domain Ordinance was Ex Parte. Meaning that it was created after the fact to address a specific issue, namely the Skywalk. However, this ordinance is lasting and can affect anyone on the reservation either privately or doing business. According to our constitution, this is not legal nor is it legal anywhere else in the US to adopt a law to enforce a specific issue. I voiced this very clearly and was scrutinized for my opinion which I can back up with facts. Now my job and family are in jeopardy.

I continue to hear at the council and public meetings that Hualapai's are first and foremost. That is not what I see. My own job has been threatened and I am a Hualapai that has lived here 27 years. My family is buried here and this is where I call home. I raised my children here and they know who they are. I have close connections to my family and know who I am related to in the community. How many more Hualapai people will this issue continue to effect?

In closing, please continue to ask questions based on facts and documentation, not emotion and hidden motives. People should not be hurting people on purpose. Our elders did not teach us to do that. My grandmother Lois Willets Irwin would not have approved of people being so mean. Thank you for your time and energy in reading my words.

Respectfully Submitted,

Sheri K YellowHawk, Tribal Member

GCSD007531

EXHIBIT 5

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12 Counsel for GRAND CANYON SKYWALK DEVELOPMENT, LLC

13 HUALAPAI INDIAN TRIBE, TRIBAL COURT
14 HUALAPAI INDIAN RESERVATION (AZ)
15 P.O. BOX 275 - 960 RODEO DRIVE
PEACH SPRINGS, ARIZONA 86434

16 GRAND CANYON SKYWALK
17 DEVELOPMENT, LLC, a Nevada limited
liability company,

18 v.

19 'Sa' Nyu Wa, Inc., a Hualapai Indian tribally
20 chartered corporation

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2011-CV-006
COMPLAINT

23 COMES NOW, GRAND CANYON SKYWALK DEVELOPMENT, LLC ("GCSD"), a
24 limited liability company organized under the laws of the State of Nevada with its principal place of
25 business in Las Vegas, Nevada, by and through its attorneys, Greenberg Traurig, LLP, respectfully
26 moves this Court to compel 'Sa' Nyu Wa, Inc. ("SNW"), a Hualapai tribally chartered corporation,
27 to submit to mandatory and binding arbitration as set forth in Article 15 of the 2003 Development
28 and Management Agreement (the "2003 Agreement") executed between GCSD and SNW on

December 31, 2003. In support of its Motion, GCSD states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of the above-entitled action pursuant to Articles VI (2) of the Constitution of the Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona (the "Hualapai Constitution"), as well as Chapter 2.2 of the Hualapai Law and Order Code.

2. This Court has jurisdiction over Defendant SNW, a tribally chartered corporation, and this action arose from events occurring on the Hualapai Indian Reservation (the "Reservation"). Furthermore, in conformance with Chapter 2(2.4), SNW waived its inherent sovereign immunity pursuant to Article 15 of the 2003 Agreement for the purposes of (1) compelling arbitration, and (2) enforce arbitration determinations.

3. Venue is proper in the Hualapai Tribal Court under Article VI of the Hualapai Constitution, and Chapter 2 of the Hualapai Law and Order Code in that the events giving rise to the claims in this Complaint occurred within the jurisdiction of the Hualapai Tribal Court. Venue lies in the Hualapai Tribal Court in Peach Springs, Arizona.

FACTUAL BACKGROUND

4. Mr. David Jin ("Jin"), the managing member of GCSD, conceived and developed the idea of constructing and operating a glass viewing platform (the "Skywalk") and related facilities on the edge of the Grand Canyon and proposed the project to the Hualapai Indian Tribe (the "Tribe") as a revenue-sharing agreement.

5. The Tribe formed SNW in 2003 for the purpose of entering into a revenue-sharing agreement with a company to be formed by Jin regarding the planning, construction and operation of the Skywalk and related facilities at a location commonly known as Eagle Point on the Reservation, with the company formed by Jin managing the entire project ("Manager").

6. Jin and other investors formed GCSD for the purpose of entering into a relationship with the Tribe, whereby Manager would make an initial investment and recoup that investment along with profits from the management of the operations of the Skywalk and related facilities.

1 under a comprehensive management agreement.

2 7. Consistent with and to effectuate these purposes, SNW and GCSD (collectively, "the
3 Parties") entered into the 2003 Agreement. Attached as Exhibit 1.

4 8. The 2003 Agreement provided for, among other things, the construction,
5 management and operation of the Skywalk and related facilities by Manager. After subsequent
6 enlargement in scope requested by SNW, GCSD advanced more than \$30 million to the Tribe and
7 SNW for the purpose of constructing the Skywalk.

8 9. Pursuant to Article 15.4 of the 2003 Agreement, the Parties have elected to have
9 "any controversy, claim or dispute arising out of or related to this agreement . . . resolved by
10 binding arbitration."

11 10. Pursuant to Article 15.4(d) SNW has waived sovereign immunity from suit for an
12 action to compel arbitration.

13 11. The Skywalk opened to visitors on March 28, 2007, with Manager operating the
14 facilities but SNW maintaining the books and records of the project.

15 12. In Article 2.1 of the 2003 Agreement, SNW engaged Manager to "act as the
16 developer and manager of the Project throughout the Construction Term and the Operating Term in
17 accordance with the terms of and having the duties set forth in [the 2003 Agreement]."

18 13. Article 2.3 of the 2003 Agreement further provides: "During the Operating Term,
19 Manager shall manage the Project in accordance with the requirements of this Agreement, with full
20 responsibility and authority to supervise, direct and control the management and operation of the
21 Project."

22 14. Despite the requirements of the 2003 Agreement to allow Manager to manage the
23 Project, SNW has interfered with and impeded Manager's contractual right to supervise, direct and
24 control the management and operation of the project by, without limitation, making unjustified
25 demands relative to employees and employee transportation.

26 15. Article 3.1(a) of the 2003 Agreement provides, in part, that for the relevant term,
27 SNW shall pay Manager a fee equal to 50 percent of net revenues as defined in the 2003 Agreement
28

1 (the "Manager Fee").

2 16. Article 3.3 provides for interim payment of 90 percent of the Manager Fee by SNW
3 on a quarterly basis.

4 17. Article 4 of the 2003 Agreement sets forth the responsibilities of the Parties in
5 regards to books and records, accounting and related audits.

6 18. Article 4.1 of the 2003 Agreement requires, in part, that SNW keep full and adequate
7 books in accordance with generally accepted accounting principles, that such books shall be
8 available to Manager, and within 30 days of Manager's written request, SNW will provide manager
9 with copies of all books of account and other records of the Skywalk project.

10 19. Article 4.2(a) of the 2003 Agreement requires, in part, that SNW deliver to Manager
11 within 20 days of each calendar quarter an interim accounting showing the results of operation for
12 the Skywalk project, stating the amount of the Manager's fee ("the Manager's Fee").

13 20. Article 4.2(b) of the 2003 Agreement provides, in part, that within 60 days of the end
14 of each Fiscal Year, SNW shall deliver to Manager an unaudited annual income statement and
15 balance sheet showing gross revenues, gross operating expenses, and net revenues for the Skywalk
16 project with any other information necessary to make computations required for the fiscal year.

17 21. Article 4.2(c) of the 2003 Agreement provides, in part, that the annual financial
18 statements for the project shall be audited by an independent firm of certified public accountants
19 selected by SNW.

20 22. Article 4.5 of the 2003 Agreement provides, in part, that Manager may audit the
21 books and records of the Skywalk project, and that SNW agrees to make all records available for
22 the audit. If the results of an audit show any discrepancies that would affect amounts paid or
23 payable by Manager under the 2003 Agreement, then within 10 days of the completion of the audit
24 and the determination of such discrepancy, Manager and SNW shall make any necessary adjusting
25 payments between themselves to remedy the discrepancy.

26 23. Article 15.5 of the 2003 Agreement provides that the 2003 Agreement "may not be
27 modified, amended, surrendered or changed, except by a written instrument executed by SNW and
28

1 Manager."

2 24. Despite the requirements listed above, SNW has not paid Manager a Manager's Fee,
3 nor did it perform an independent audit by a CPA for the years of 2008 and 2009. Furthermore,
4 SNW has not provided the required financial statements, has not allowed Manager access to the
5 books and records of the Skywalk project, and has not made such records available for an audit by
6 Manager for the years of 2007, 2008 and 2009.

7 25. In 2010, based in part on the expanded scope of the Skywalk that was specifically
8 requested by SNW and the failure of SNW to pay amounts owed to Manager as required by the
9 2003 Agreement, the Parties began a negotiation process to adjust their contractual relationship.
10 GCSD has at all times participated in these negotiations in good faith.

11 26. This negotiation process resulted in the execution of a Document entitled "Skywalk
12 Trust Agreement dated as of March 10, 2010 among SNW, GCSD and US Bank National
13 Association, as Trustee" (the "Trust Agreement") to help resolve cash control and disbursement
14 issues after the effective date.

15 27. Additionally, the Parties' negotiations sought to determine whether the 2003
16 Agreement should remain in effect, in whole or in part, and to resolve various other issues between
17 the parties regarding the management of the Skywalk.

18 28. During these negotiations, several versions of a draft document entitled "Skywalk
19 Management Agreement" (the "Draft Agreements") were circulated for discussion purposes, but
20 have never been finalized, agreed to, approved or executed by the Parties.

21 29. SNW has refused to proceed with negotiations claiming the 2003 Agreement has
22 been superseded by some unsigned document thereby adversely affecting Skywalk operations and
23 inflicting serious financial damage on GCSD, all in violation of both the 2003 Agreement and the
24 Trust Agreement.

25 30. GCSD has demanded arbitration of the above issues as provided by the 2003
26 Agreement, but SNW has not agreed to this demand.

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PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing arguments authorities, GCSD respectfully requests this Court order SNW to participate in binding arbitration as required under the 2003 Agreement.

Respectfully submitted this 25th day of February 2011.

GREENBERG TRAURIG, LLP



Mark Tratos, Esq.

Donald L. Prunty, Esq.

Troy A. Eid, Esq.

Robert S. Thompson IV, Esq.

ATTORNEYS FOR GRAND CANYON SKYWALK
DEVELOPMENT, LLC

EXHIBIT 6

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiff,

vs.

Charles Vaughn; Waylon Hong; Ruby
Steele; Candida Hunter-Yazzie; Wilfred
Whatname, Sr.; Richard Walema;
Wynona Sinyella; Sheri Yellowhawk;
and Barney Imus, Wanda Easter, Jaci
Dugan,

Defendants.

No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 For its complaint against defendants Charles Vaughn, Waylon Honga, Ruby Steele,
2 Candida Hunter-Yazzie, Wilfred Whatoname, Sr., Richard Walema, Wynona Sinyella, Sheri
3 Yellowhawk, and Barney Imus, (the "Council Defendants") and Wanda Easter and Jaci Dugan,
4 ("The Administrative Defendants"), with the Council Defendants and the Administrative
5 Defendants hereafter referenced to as the "Defendants," Plaintiff Grand Canyon Skywalk
6 Development, LLC ("GCSD") alleges as follows:

7 **NATURE OF THE ACTION**

8 1. This is an action for declaratory and injunctive relief. Council Defendants are
9 members of the Tribal Council of the Hualapai Indian Tribe (the "Tribe"), a federally
10 recognized American Indian tribe. The Tribal Council (the "Council") intends to pass an
11 ordinance in the immediate future allowing the Tribe to exercise its purported eminent-domain
12 power to take certain contractual rights from Plaintiff, who is a non-Indian. The Tribe does not
13 possess the civil regulatory or civil adjudicatory jurisdiction to exercise eminent-domain power
14 over non-Indians such as Plaintiff. Further, even if the Council had the authority to affect the
15 purported "condemnation," the Tribe that they represent does not have the financial ability to
16 pay just compensation for the taking. Council Defendants, who intend to vote to pass the
17 ordinance, are therefore acting outside the scope of their authority as members of the Council.
18 Indeed, these Council members' planned actions violate well-settled federal common law.
19 Likewise the Administrative Defendants have administrative positions with the Tribe and/or
20 Grand Canyon Resort Corporation ("GCRC") and "Sa" Nyu Wa ("SNW"). These
21 Administrative Defendants intended to, in conjunction with the Council Defendants, seize
22 control of the plaintiffs interests, acts which are also outside of the Defendants scope of
23 authority. Accordingly, the Court is requested to (1) issue a judicial declaration that
24 Defendants' planned actions are unlawful and in violation of federal law; and (2) grant
25 immediate relief in the form of a preliminary injunction to prevent irreparable harm to Plaintiff.

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PARTIES, JURISDICTION AND VENUE

2. Plaintiff Grand Canyon Skywalk Development, LLC ("GCSD"), is a limited liability company, organized and existing under the laws of the State of Nevada, with its principal place of business located in the State of Nevada.

3. Defendant Charles Vaughn is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Council.

4. Defendant Waylon Honga is an individual, an enrolled member of the Tribe, a resident of Arizona, a member of the Council, and an employee of GCRC.

5. Defendant Ruby Steele is an individual, an enrolled member of the Tribe, a resident of Arizona, a member of the Tribal Council and an employee of GCRC.

6. Defendant Candida Hunter-Yazzie is an individual, an enrolled member of the Tribe, a resident of Arizona and a member of the Council.

7. Defendant Wilfred Whatoname, Sr., is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Council.

8. Defendant Richard Walema is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Council.

9. Defendant Wynona Sinyella is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Council.

10. Defendant Sheri Yellowhawk is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Council.

11. Defendant Barney Imus is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Council.

12. Defendant Wanda Easter is an individual, an enrolled member of the Tribe, a resident of Arizona, works as the Tribe's accountant, and attends council meetings as an employee of the Tribe.

13. Defendant Jaci Dugan is an individual, an enrolled member of the Tribe, a resident of Arizona, an employee of SNW, and oversees SNW's financial information.

1 14. This Court has subject-matter jurisdiction over the action pursuant to 28 U.S.C.
2 § 1331 because this action arises under the Constitution, laws, or treaties of the United States.
3 *See Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2716 (2008) (noting
4 that determining a tribe's civil authority over nonmembers [of a federally recognized Indian
5 tribe] is a *federal question*." (emphasis added)). *See, Nevada v. Hicks*, 533 U.S. 353, 367
6 (Indian tribes' inherent adjudicative jurisdiction over nonmembers "is at most only as broad as
7 its legislative jurisdiction.")

8 15. This Court further has subject matter jurisdiction in this instance under *Nevada v.*
9 *Hicks*, 533 U.S. 353, 369 (2001), which holds that tribal-court exhaustion is unnecessary where
10 it would serve no purpose except delay and the tribe's jurisdiction is clearly precluded. Here,
11 tribal civil jurisdiction is clearly precluded because the non-Indian Plaintiff has not expressly
12 consented to tribal civil jurisdiction, and neither of the two *Montana v. U.S.*, 450 U.S. 544
13 (1981), exceptions apply.¹

14 16. The Court has personal jurisdiction over all parties to this action.²

15 17. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1), (b)(2), and
16 (b)(3).

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22 ¹ GCSD, the non-Indian Plaintiff, entered into a contractual agreement with a tribally chartered
23 corporation, not the Tribe itself. The contract does not give the Tribe any civil jurisdiction over
24 Plaintiff. This is true whether asserted against Plaintiff's property directly by the Council,
25 through the exercise of its legislative powers, or through the regulatory or adjudicative actions
26 of the Tribe's courts. This is because the Tribe cannot assert *any* civil jurisdiction over Plaintiff
27 as a non-Indian corporation that never expressly consented to the Tribe's civil jurisdiction.

28 ² The Defendants are not cloaked in the traditional doctrine of tribal sovereign immunity. The
doctrine of *Ex Parte Young*, 209 U.S. 123, 155-156 (1908), extends to tribal officials whenever
a plaintiff seeks declaratory or injunctive relief. *Accord Burlington N.R.R. Co. v. Blackfeet*
Tribe, 924 F.2d 899, 901 (9th Cir. 1991) ("tribal sovereign immunity does not bar suit from
prospective relief against tribal officers allegedly acting in violation of federal law.")

GENERAL ALLEGATIONS

The 2003 Agreement for the Construction and Management of the Skywalk

18. Mr. David Jin ("Jin") came to the United States from China in 1988. While his first job was as a dishwasher in a Las Vegas restaurant, by the early 1990s Jin had invested in a travel company, Trans Tours, that provided tour services to Chinese customers.

19. One of the destinations for Trans Tours' customers was the Grand Canyon. As a result of his involvement with Trans Tours, Jin developed strong relationships with members of the Tribe.

20. Initially, the Tribe had few destination activities or facilities to offer visitors, other than to look over the edge of the Grand Canyon after a long drive on dirt roads.

21. Jin formed his own company, Oriental Tours, Inc. ("OTI") in 1995 to cater to travelers primarily from China, Hong Kong, Singapore, and Taiwan. Since 1995, travel to the United States from OTI's customer base has increased dramatically and continues to grow.

22. For example, the outbound Chinese tourist visitor growth was more than 13 percent from 2009 to 2010, but during the same timeframe, OTI's revenue increased more than 20 percent.

23. On information and belief, OTI has become the largest provider of tour services to Chinese nationals visiting the Grand Canyon in the Western United States.

24. Jin worked with the Tribe to develop helicopter rides and whitewater rafting trips for tourists on the Tribe's reservation, with Jin providing funding for pontoon boats and organizing paying activities for visitors, from which the Tribe greatly benefited and continues to benefit.

25. In 1996, Jin conceived and developed the idea of constructing and operating a glass viewing platform (the "Skywalk") and related facilities on the edge of the Grand Canyon.

26. The Tribe lacked the funding or expertise to move the Skywalk project forward until 2003, when Jin agreed to finance, develop, and operate the Skywalk project as part of a revenue-sharing agreement.

1 27. In connection with Skywalk discussions, the Tribe in 2003 formed a tribally
2 chartered company called 'Sa' Nyu Wa ("SNW") for the purpose of entering into a revenue-
3 sharing agreement with a Nevada limited liability corporation to be formed by Jin for the
4 planning, construction and operation of the Skywalk and related facilities.

5 28. The Tribe is the sole shareholder of SNW.

6 29. The Skywalk was to be located at a place commonly known as Eagle Point on
7 federal trust property owned by the United States government for the Tribe's benefit. A
8 company to be formed by Jin was to manage the Skywalk after its completion.

9 30. In accordance with these plans, Jin and other investors formed GCSD (sometimes
10 referred to herein as "Manager"). The company was created for the purpose of entering into a
11 relationship with the Tribe, under which GCSD would make a substantial up-front initial
12 investment in the Skywalk project, and later recoup that investment along with profits, by
13 managing the Skywalk and related facilities.

14 31. Consistent with and to effectuate these purposes, GCSD and SNW (collectively,
15 "the Parties") entered into a Development and Management Agreement (the "2003 Agreement")
16 on December 31, 2003. See Exhibit 1.

17 32. The 2003 Agreement provided for, among other things, the construction,
18 management, and operation of the Skywalk and related facilities solely and exclusively by
19 GCSD.

20 33. Shortly after the 2003 Agreement was executed, SNW requested a change order
21 for substantial expansion of the Skywalk project, expanding the length of the extension of the
22 projection over the Grand Canyon from 30 to 70 feet and widening the walkway to increase the
23 visitor capacity.

24 34. These SNW-requested changes required the re-engineering of the project,
25 significantly delayed the opening, and greatly expanded the cost to construct the Skywalk.

26 35. GCSD invested more than \$25 million in the planning and construction of the
27 Skywalk project in order to meet its obligations to SNW under the 2003 Agreement.
28

1 36. Substantial completion of initial phases of the Skywalk occurred in March 2007,
2 when the project opened to the public.

3 **Operations Under the 2003 Agreement**

4 37. The 2003 Agreement provided for GCSD to act as the Manager of the Skywalk,
5 but also provided that SNW would perform certain finance and accounting functions relative to
6 the project.

7 38. An outside Certified Public Accountant was to audit the records of the project on
8 an annual basis.

9 39. Under the 2003 Agreement, financial information would be provided to GCSD by
10 SNW on a monthly basis, and GCSD would be paid quarterly for its Management Fee, with an
11 annual reconciliation.

12 40. Under the 2003 Agreement, GCSD had the right to examine and audit the books
13 and records of the project on demand.

14 41. After the Skywalk opened to the public in 2007, it became apparent that there
15 were substantial irregularities in the numbers being reported to GCSD by SNW.

16 42. Furthermore, due to the infighting and irregularities, from the signing of the 2003
17 Agreement to date, SNW has had six C.E.O.s and four separate Boards of Directors.

18 43. A fraudulent scheme was uncovered in which employees of a tribally chartered
19 corporate entity owned by the Tribe, Grand Canyon Resorts Corporation, were embezzling and
20 absconding with revenue from Skywalk ticket sales.

21 44. Revenue records that purported to relate to ticket sales did not correspond to the
22 actual number of tickets presented to GCSD. Moreover, funds were being transferred to and
23 from other entities owned by the Tribe without any authorization by GCSD as Manager.

24 45. What were to be equal distributions to GCSD and to SNW did not occur. While
25 SNW received funds, GCSD did not receive corresponding distributions. Moreover, payments
26 were made to third parties, which were not authorized by GCSD under the 2003 Agreement.

27 46. During 2008 and 2009, no distributions were made by SNW to GCSD for its
28 contractually required Manager's Fees.

1 47. GCSD demanded records and audits as provided by the 2003 Agreement, but
2 SNW did not provide them.

3 48. GCSD demanded arbitration on the issues under the terms of the 2003 Agreement,
4 but SNW has refused to participate.

5 49. As a result of the refusal of SNW to release financial records or allow an audit of
6 them, the true value of the Skywalk project is difficult to ascertain with precision.

7 50. In response to and as a result of the Scheme and the substantial financial
8 irregularities it caused, on March 10, 2010, the Parties entered into a trust agreement between
9 and among GCSD, SNW and U.S. Bank (the "Trust Agreement") to institute at least minimal
10 internal controls.

11 51. After the institution of the Trust Agreement, reported cash balances increased
12 approximately \$5 million during the nine-month period it was in effect in 2010.

13 52. SNW has still refused to allow a distribution to GCSD for 2010 in violation of the
14 2003 Agreement.

15 53. Despite the requirements of the 2003 Agreement to allow Manager to run the
16 Project, SNW has increasingly interfered with and impeded Manager's contractual right to
17 supervise, direct and control the management and operation of the project.

18 54. SNW's interference with Manager's contractual rights includes, but is not limited
19 to, undermining and thwarting Manager's ability to transport and delivers employees needed to
20 operate the Skywalk and related facilities, and denying transportation access for employees to
21 travel to and from the Skywalk. SNW has also interfered with the advertising and promotion of
22 the skywalk and the completion of the skywalk support building.

23 55. GCSD attempted to address some of the above issues by beginning negotiations
24 for a new management agreement with SNW. SNW terminated negotiations, however, when
25 GCSD objected to certain SNW proposals. These proposals included the deletion of a specific
26 provision allowing GCSD to seek compensation with respect to its rights under the 2003
27 Agreement in the event of an eminent-domain taking, despite the fact GCSD had invested over
28 \$25 million in the project, and the Tribe would be orchestrating any taking attempts.

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26 provision allowing GCSD to seek compensation with respect to its rights under the 2003
27 Agreement in the event of an eminent-domain taking, despite the fact GCSD had invested over
28 \$25 million in the project, and the Tribe would be orchestrating any taking attempts.

56. With negotiations at a standstill, GCSD on February 25, 2011 filed an action in Hualapai Tribal Court to compel arbitration on the outstanding amounts due GCSD and other issues. See Exhibit 2.

GCSD's Contract Rights are Valuable Assets.

57. GCSD's rights in the Skywalk Agreements, which pursuant to the 2003 Agreement and other controlling documents extend for decades to come, are valuable assets.

58. Typical prices for visiting the Skywalk include \$29.95 for a ticket to the Skywalk, \$27.99 for a picture on the Skywalk (which is otherwise prohibited); and \$14.95 for a meal. Souvenirs are sold on site and over the Internet, catering for special events is provided for, and revenue can be generated from sponsorship and filming activities, adding additional revenues and profits. A typical family of five visiting the Skywalk can expect to spend \$250-300 and a single tourist bus can produce revenues of more than \$4,000.

59. Annual visitation to the Skywalk is increasing for this new destination, with at over 1.4 million visitors to date.

60. With minimal internal controls finally established under the Trust Agreement, the first credible partial-year revenues have been in excess of \$20 million, with cash flows exceeding \$5 million, even in the midst of a recession and with fuel prices rising.

61. Foreign travel to the United States from OTI's feeder countries is continuing to grow at double-digit rates. The Skywalk has the capacity to absorb the growth and profit disproportionately from the revenue, as fixed costs are being carried by base visitation, and per-person costs for additional tourists are minimal.

62. In addition to a 50-percent initial share of the net revenue of the Skywalk project, GCSD is also entitled to favorable pricing and enjoys the ability to reserve for itself and OTI, up to 50 percent of Skywalk's capacity for its own customers. These contractual entitlements will become even more valuable as visitation to the Skywalk increases.

63. Based on the future earnings capacity of the Skywalk, GCSD estimates the value of its rights in the Skywalk Agreements are far in excess of \$100 million.

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The Tribal Council

64. The Tribal Council ("Council") is the Tribe's governing body.

65. The Council is comprised of nine individuals, including a Chairman, a Vice-Chairman, and seven members.

66. The Council passes laws (called "ordinances"), which govern the affairs of the Tribe and its members.

67. An ordinance becomes law when a simple majority of the Council's members votes in favor of the ordinance.

The Tribe's Plan to "Condemn" GCSD's Interest in the Parties' Agreements

68. Even though GCSD has operated the Skywalk for nearly four years, SNW has not paid GCSD the Manager's Fee called for under the 2003 Agreement, and has blocked access to all of the books and records for the project (the "accounting issues").

69. As a result of SNW's actions, GCSD has not only been deprived of the fees, but also lacks the ability even to determine with certainty the amounts it is owed. Most recently, SNW has interfered with Manager's ability to manage the workforce responsible for operating the Skywalk and attendant facilities, and has inhibited Manager's ability to provide transportation access to and from the Skywalk for employees.

70. As previously telegraphed by SNW's insistence on a provision giving the Tribe the right to cancel the proposed management agreement in the event of a taking, any proceeds of a taking, GCSD has recently learned that the Tribal Council intends to pass an ordinance in the immediate future to "condemn" GCSD's rights in the 2003 Agreement and the Trust Agreement. Put another way, the Tribe, acting through the Council, intends to exercise its purported eminent-domain power to "take" GCSD's contractual rights. Upon information and belief, the Tribe does not intend to pay GCSD just compensation for these rights, nor does the Tribe apparently have the financial resources to do so.

71. GCSD is informed and believes that each of the Defendants favors the proposed ordinance "condemning" GCSD's interest, and that each of them intends to vote in favor of it once the issue comes before the Tribal Council.

1 72. GCSD is also informed and believes that a vote on the “condemnation” ordinance
2 is imminent.

3 73. GCSD is also informed and believes that, once the ordinance is passed, the
4 Council Defendants in concurent with the Administrative Defendant intends to take immediate
5 possession of GCSD’s contractual interest prior to a case being heard on the merits, effectively
6 terminating its ability to access the Skywalk and related facilities, let alone its ability run them
7 as required by the 2003 Agreement. This immediate possession and loss of these valuable
8 contract rights would cause irreparable harm to GCSD.

9 74. Although the precise justification for Defendants’ planned taking is not yet clear,
10 GCSD is informed and believes that the “condemnation” is designed to avoid paying past-due
11 and future Manager’s Fees and other compensation to GCSD, and to allow the Tribe to place an
12 artificially low value on GCSD’s contract rights, based on inaccurate revenue and profit
13 information reported by SNW.

14 75. Upon information and belief, neither SNW nor the Tribe has the financial ability
15 to pay just compensation for any taking of GCSD’s rights in the Skywalk project.

16 76. Defendants’ planned “condemnation” is unlawful for a multitude of reasons,
17 including, without limitation:

- 18 (1) Defendants’ (and the Tribe’s) eminent-domain power (if any) does not
19 extend to the property of non-Indians such as GCSD;
- 20 (2) There is no valid public use for which GCSD’s contract rights could be
21 taken by way of Defendants’ (and the Tribe’s) eminent-domain power (if
22 any);
- 23 (3) For Defendants (or the Tribe) to exercise eminent-domain power (if any) in
24 this manner would constitute a gross abuse of discretion;
- 25 (4) For Defendants (or the Tribe) to exercise eminent-domain power (if any) in
26 this manner would be arbitrary and capricious;
- 27 (5) GCSD’s contractual rights are not “property” that can validly be taken by
28 Defendants (or the Tribe) pursuant to their eminent-domain power (if any);

(6) The Tribe lacks the financial wherewithal to pay for the proposed taking; and

(7) Defendants' (and the Tribe's) exercise of eminent-domain power (if any) against GCSD without just compensation would violate GCSD's civil rights as a non-Indian pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302(5).

CLAIMS FOR RELIEF
Count One: Declaratory Relief

77. GCSD realleges and incorporates by reference each of the preceding paragraphs.

78. Pursuant to 28 U.S.C. § 2201, this Court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

79. As set forth herein, GCSD and Defendants have an actual controversy regarding GCSD's rights under the 2003 Agreement and the Trust Agreement, and more specifically, Defendants' ability to "condemn" those rights under its purported eminent-domain power.

80. GCSD is entitled to, and requests, a declaratory judgment regarding the propriety of Defendants' planned imminent "condemnation" of GCSD's rights in the 2003 Agreement and the Trust Agreement.

81. Specifically, GCSD requests, and is entitled to, a ruling that Defendants' planned taking violates United States Supreme Court precedent. Specifically, Defendants lack civil jurisdiction over Plaintiff, who is a non-Indian. Neither of the two exceptions provided in *Montana v. United States*, 450 U.S. 544 (1981), which holds that Indian tribes ordinarily lack civil jurisdiction over non-Indians, and narrowed in subsequent Court rulings, is satisfied in this instance. First, there is no "consensual relationship" between GCSD and the Tribe. GCSD's contract is with SNW, a tribally chartered corporation, not the Tribe itself. GCSD has never expressly consented to the civil jurisdiction of the Tribe's courts regarding this matter, nor can the Council legislate against Manager and its property interest using purported "eminent domain" powers or any other legislative authority. *Montana*, 450 U.S. at 565. Nor does the

1 second exception to the *Montana* doctrine apply here. *Hicks*, 533 U.S. at 359 (“Where
2 nonmembers are concerned, the ‘exercise of tribal power *beyond what is necessary to protect*
3 *tribal self-government or to control internal relations* is inconsistent with the dependent status
4 of the tribes, and so cannot survive without express Congressional delegation.” (citing
5 *Montana*, 450 U.S. at 564) (emphasis in original)).

6 82. Furthermore, because it is clear that Defendants lack civil jurisdiction over the
7 non-Indian Plaintiff under *Montana*, exhausting tribal court remedies is also unnecessary. When
8 neither *Montana* exception applies, the Supreme Court has made it clear that the tribal-court
9 exhaustion requirement does not apply to non-Indians such as the Plaintiff. *See Strate v. A-1*
10 *Contractors*, 520 U.S. 438, 459-60 (1997) (“When . . . it is plain that no federal grant provides
11 for tribal governance of nonmembers’ conduct,” so the exhaustion requirement “would serve no
12 purpose other than delay.”).

13 83. Thus, under United States Supreme Court precedent, Defendants’ eminent-domain
14 authority does not extend to the property of non-American Indians such as GCSD. Accordingly,
15 each of Defendants, by voting in favor of, or attempting to enforce, the proposed
16 “condemnation” ordinance, is acting outside the scope of his or her authority as a member of the
17 Tribal Council.

18 84. GCSD also requests, and is entitled to, a ruling that Defendants are not entitled to
19 take possession of GCSD’s interest in the Skywalk project, without substantiating to this Court
20 that the Tribe is capable of paying just compensation for such taking.

21 85. Pursuant to 28 U.S.C. § 2202, “[f]urther necessary or proper relief based on a
22 declaratory judgment or decree may be granted, after reasonable notice and hearing, against any
23 adverse party whose rights have been determined by such judgment.”

24 86. The Court is requested to grant GCSD any such “further necessary or proper
25 relief,” as appropriate.

26 ///

27 ///

28 ///

Count Two: Injunctive Relief

87. GCSD realleges and incorporates by reference each of the preceding paragraphs.

88. As set forth above, GCSD is likely to succeed on the merits of its claim for declaratory relief because Defendants' vote to effectuate a taking of GCSD's property, or any attempt to enforce such a taking, violates United States Supreme Court precedent.

89. Unless Defendants are immediately enjoined from casting their votes in favor of, or attempting to enforce in any manner, the proposed ordinance "condemning" GCSD's rights in the 2003 Agreement and the Trust Agreement, GCSD will suffer irreparable harm, and has no adequate remedy at law. GCSD's rights in the 2003 Agreement and the Trust Agreement cannot be compensated with money damages or, in the alternative, GCSD's damages cannot easily be quantified.

90. The balance of hardships tips sharply in favor of GCSD.

91. Public policy favors the issuance of an injunction.

92. Based on the foregoing, GCSD is entitled to temporary, preliminary, and permanent injunctive relief, barring Defendants, and each of them, from voting in favor of, or attempting to enforce in any manner whatsoever, any Tribal ordinance whose effect is to "condemn" or "take" GCSD's rights in the 2003 Agreement or the Trust Agreement.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Grand Canyon Skywalk Development, LLC, demands judgment against defendants Charles Vaughn, Waylon Honga, Ruby Steele, Candida Hunter Yazzie, Wilfred Whatoname, Sr., Richard Walema, Wynona Sinyella, Sheri Yellowhawk, and Barney Imus, Wanda Easter, Jacki Dugan and each of them, as follows:

(a) For declaratory relief, as set forth herein;

(b) For a temporary, preliminary, and permanent injunctive relief, as set forth herein;

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1 (c) For its costs of suit and related non-taxable expenses; and

2 (d) For any further, necessary, or proper relief that the Court deems appropriate.

3 DATED this 30th day of March, 2011.

4 GREENBERG TRAURIG, LLP

5
6 By: /s/ Pamela M. Overton

Pamela M. Overton

7 Aaron C. Schepler

8 By: /s/ Mark G. Tratos

9 Mark G. Tratos

10 By: /s/ Troy A. Eid

11 Troy A. Eid

12 Attorneys for Plaintiff

EXHIBIT 7

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2 Aaron C. Schepler (AZ Bar No. 019985)
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8 E-mail: OvertonP@gtlaw.com; ScheplerA@gtlaw.com

9 Attorneys for Plaintiff

10
11 **IN THE UNITED STATES DISTRICT COURT**

12 **FOR THE DISTRICT OF ARIZONA**

13 Grand Canyon Skywalk Development,
14 LLC,

15 Plaintiff,

16 vs.

17 Charles Vaughn, et al.

18 Defendants.

No.

**MOTION FOR PRELIMINARY
INJUNCTION**

19 Plaintiff Grand Canyon Skywalk Development, LLC, ("Plaintiff" or "GCSD") by and
20 through its counsel, hereby moves the Court for an injunction to prevent Defendants Charles
21 Vaughn, Waylon Honga; Ruby Steele; Candida Hunter-Yazzie; Wilfred Whatoname, Sr.;
22 Richard Walema; Wynona Sinyella; Sheri Yellowhawk; and Barney Imus (the "Council
23 Defendants") and Wanda Easter and Jaci Dugan (the "Administrative Defendants" who
24 collectively with the Council Defendants are hereafter referred to as the "Defendants") from
25 their planned condemnation and seizure of GCSD's interest in the glass Skywalk
26 overlooking the Grand Canyon.

27 This Motion is made pursuant to Rule 65 of the Federal Rules of Civil Procedure and
28 is based upon the attached Memorandum of Points and Authorities, the papers and pleadings
on file herein and any oral argument that this Court may allow.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

3 **I. INTRODUCTION**

4 Plaintiff, Grand Canyon Skywalk Development, LLC has spent more than \$25 million
5 to conceive, design, engineer, build, and open to the public the world-famous glass Skywalk
6 overlooking the Grand Canyon (the "Skywalk" or "Project"). The Project is a revenue-
7 sharing venture with 'Sa' Nyu Wa ("SNW"), a corporation formed and owned by the
8 Hualapai Indian Tribe (the "Tribe"). Now that the Project is opened and generating profits,
9 GCSD has learned that the Council Defendants – the nine members of the Tribal Council –
10 are planning to "condemn" GCSD's interest in the Skywalk, and in conjunction with the
11 Administrative Defendants are further planning to immediately seize GCSD's interest even
12 though they and the Tribe lack the civil jurisdiction to do so, and cannot pay just
13 compensation for such a taking. Accordingly, Plaintiff filed this lawsuit to obtain: (1) a
14 judicial declaration that the Defendants' planned actions are unlawful and in violation of
15 federal law; and (2) relief in the form of a preliminary injunction to prevent irreparable harm
16 to Plaintiff.

17 Plaintiff is entitled to an injunction to prevent Defendants from taking any action to
18 affect the purported "condemnation," and the irreparable harm that will result from the
19 taking. Plaintiff is a non-Indian. Under *Montana v. U.S.*, 450 U.S. 544 (1981), and its
20 progeny, the Tribe has no civil jurisdiction over non-Indians except in certain limited
21 circumstances, which do not apply here. As a result, Defendants have no legal authority to
22 "take" Plaintiff's property under the Tribe's purported eminent-domain power. Further,
23 under the United States Constitution, the Arizona Constitution, the Hualapai Constitution,
24 and the Indian Civil Rights Act, the Tribe must pay "just compensation" for any property
25 taken by eminent domain. Here, it is beyond dispute that the Tribe lacks the financial
26 resources to pay GCSD the fair-market value of its interest in the Skywalk, which is likely
27 worth more than \$100 million. Therefore, even if Defendants had the *authority* to
28 "condemn" Plaintiff's property – and they do not – the Tribe cannot pay for it. For all of

1 these reasons, and those discussed below, the proposed “taking” is unlawful. Accordingly,
2 the Court should enjoin the proposed “condemnation.”

3 **II. FACTUAL BACKGROUND**

4 In the late 1990s, David Jin (“Jin”), the managing member of GCSD, developed the
5 idea of a glass viewing platform extending over the Grand Canyon. *See*, Declaration of
6 David Jin (“Jin Decl.”), at ¶ 12, attached hereto as **Exhibit 1**. It was just one of a series of
7 attractions that he and his companies developed for tourists visiting the Hualapai
8 Reservation, along with activities like river rafting and helicopter rides to the floor of the
9 canyon. *Id.* at ¶¶ 7, 8, 11. During the past 15 years or more, the Tribe has benefited greatly
10 from the increased visitor traffic that Jin, through his companies and through these
11 attractions, has brought to the Hualapai Reservation.

12 The “Skywalk” – as the glass viewing platform later came to be known – is a revenue-
13 sharing project between GCSD and SNW, a Hualapai corporation owned solely by the Tribe.
14 Under the Management and Development Agreement (the “2003 Agreement”) between these
15 parties, GCSD built and operates the Skywalk. In return for these services, GCSD is entitled
16 to receive a percentage of the Project’s revenues for approximately 25 years. *See*, 2003
17 Development and Management Agreement §3.1, pp. 20-21, attached as **Exhibit A** to the Jin
18 Decl.; Quasula Decl. at ¶ 8. Specifically, GCSD is to receive 50% of the net revenue from
19 the Project until its entire investment is repaid. Thereafter, GCSD will receive a lower, but
20 still substantial, percentage of the revenues. In total, GCSD has invested more than \$25
21 million in the Skywalk. The Skywalk opened for business in March 2007, and has been a
22 popular attraction ever since. *See*, Quasula Decl. at ¶ 10.

23 Since the signing of the 2003 Agreement, SNW has had six CEO’s and four Boards of
24 Directors, and has failed to abide by the terms of the 2003 Agreement. *See*, Declaration of
25 Ted Quasula (“Quasula Decl.”), ¶ 5, attached hereto as **Exhibit 2**. Under the 2003
26 Agreement, SNW was responsible for certain accounting and payment functions of the
27 Skywalk. Despite SNW’s obligation to pay GCSD management fees on a quarterly basis,
28 and to perform audits and to make books and records available to GCSD, SNW has refused

1 to do any of these things. *See*, Quasula Decl. at ¶¶ 9, 11. As a result, GCSD has not
2 received the management fees to which it was due for the years 2008, 2009 or 2010, and
3 cannot calculate the amount due with precision. Accounting irregularities, including
4 embezzlement by an employee of a ticket-selling affiliate of SNW, and discrepancies
5 between the number of tickets redeemed at the Skywalk and those reported sold by SNW and
6 its affiliates, remain sources of conflict between the parties. On multiple occasions, Wilfred
7 Whatoname, Chairman of the Tribal Council, has stated the only way to resolve the GCSD
8 controversy with the Tribe may be through arbitration. *See*, Quasula Decl. at ¶ 24. Despite
9 these controversies, SNW has refused to participate in binding arbitration as required under
10 the 2003 Agreement. As a result, GCSD has filed an action in Tribal Court to compel
11 arbitration.

12 In part because of the above, SNW and GCSD have sought to adjust their business
13 relationship in various respects. For example, in March 2010, a trust agreement between
14 SNW, GCSD, and U.S. Bank National Association, as Trustee (the "Trust Agreement") was
15 put in place to institute at least minimal internal financial controls. *See*, Quasula Decl. at ¶
16 12; **Exhibit C** attached thereto. The Project has generated approximately \$5 million in cash
17 flow during the first nine months that the Trust Agreement was in effect. Even with these
18 improvements, SNW and its affiliates continue to sell tickets directly to patrons in violation
19 of the Agreements, and refuse to pay GCSD the management fee to which it is undisputedly
20 entitled under the 2003 Agreement. Also in 2010, SNW and GCSD had attempted to
21 negotiate other changes to the 2003 Agreement. Those negotiations came to a standstill
22 when GCSD objected to several proposals by SNW. These proposals included the deletion
23 of a specific provision allowing GCSD to seek compensation with respect to its rights under
24 the 2003 Agreement in the event of an eminent-domain taking, despite the fact GCSD had
25 invested over \$25 million in the project, and the Tribe would be orchestrating any taking
26 attempts.

27 Apparently, the condemnation provision was a harbinger of things to come. GCSD
28 has learned that the members of the Tribal Council intend to pass and enforce a new

1 ordinance to “condemn” – via the Tribe’s purported eminent-domain power – GCSD’s
2 interest in the 2003 Agreement and other related contracts. *See*, Jin Decl. at ¶ 36. Put
3 another way, the Tribe, through the Council, intends to simply “take” GCSD’s exclusive
4 rights to manage the Skywalk. The apparent motivation for this is to avoid the
5 embarrassment of explaining how and why ticket revenues evaporated under SNW’s watch,
6 and, more importantly, to avoid paying past-due and future management fees to GCSD. *See*,
7 Jin Decl. at ¶ 39.

8 There is no way that the Tribe can pay for the purported taking, even if it had the
9 authority to do so. Before the Skywalk opened, the finances of the Tribe were precarious at
10 best, and they still are in most respects. *See*, Quasula Decl. at ¶ 22. As just one example, the
11 Tribe is completely dependant on Federal funds to operate its criminal justice system. *Id.* It
12 is also believed that the Tribe’s cash balances total less than \$10 million, all of which are
13 needed to pay for the upcoming year’s operating expenses. *Id.* at ¶ 19. Clearly, then, the
14 Tribe’s resources are insufficient to pay just compensation for a taking, since GCSD’s
15 contractual rights in the Skywalk are worth well in excess of \$100 million dollars.

16 **III. ARGUMENT**

17 **A. GCSD Satisfies Each Of The Standards For Obtaining The** 18 **Requested Preliminary Injunction.**

19 To obtain a preliminary injunction, the moving party must show: (1) a likelihood of
20 success on the merits; (2) a likelihood that the moving party will suffer irreparable harm
21 absent a preliminary injunction; (3) that the balance of equities tips in the moving party’s
22 favor; and (4) that an injunction is in the public interest. *See, Winter v. Nat’l Res. Def.*
23 *Council, Inc.*, 129 S. Ct. 365, 374 (2008); *see also California Pharmacists Ass’n v. Maxwell-*
24 *Jolly*, 563 F.3d 847, 849 (9th Cir. 2009) (citing the *Winter* factors). Here, each of these
25 factors favors the issuance of an injunction in favor of GCSD.

26 **1. GCSD will likely prevail on its merits of its claim for** 27 **declaratory relief.**

28 GCSD is likely to prevail on the merits of its declaratory-judgment claim because: (i)
the Tribe has no civil jurisdiction over non-Indian GCSD to assert a taking, and (ii) even if

1 the Tribe had the legal authority to exercise its eminent-domain power over Plaintiff's
2 contractual rights, the Tribe does not have the resources to pay GCSD "just compensation"
3 for those rights – which is required under the Indian Civil Rights Act and under any federal,
4 tribal, or state constitution that could possibly apply to this case.

5 a. **The Tribe has no civil jurisdiction over non-Indian**
6 **GCSD.**

7 Defendants' planned attempt to take GCSD's property rights in the Skywalk
8 contracts, by eminent domain or otherwise, violates federal law because the Tribe lacks civil
9 jurisdiction over non-Indian GCSD. The prototypical rule is that an Indian tribe lacks the
10 authority to exercise civil jurisdiction over non-Indians. An Indian tribe may *only* exercise
11 civil jurisdiction over a non-Indian party when: (i) the non-Indian has a consensual
12 relationship with the tribe under which it should reasonably expect to be subject to the
13 jurisdiction of the tribe from an express consent to such jurisdiction and (ii) the exercise of
14 civil jurisdiction is necessary to protect tribal self-government or to control internal tribal
15 relations. *See generally Montana v. U.S.*, 450 U.S. 544 (1981). The heavy burden rests on
16 the Defendants to establish that one of these *Montana* "exceptions" applies in this instance.

17 (i) **Neither of the *Montana* "exceptions" justify**
18 **Defendants' purported exercise of civil**
jurisdiction.

19 *Montana v. United States*, 450 U.S. 544 (1981), holds that Indian tribes ordinarily
20 lack civil jurisdiction over non-Indians, and neither of the two exceptions outlined in that
21 case is satisfied in this instance. First, there is no "consensual relationship" between GCSD
22 and the Tribe. GCSD's contract is with SNW, not the Tribe. GCSD has never contractually
23 consented to the civil jurisdiction of the Tribe's courts, nor can the Council legislate against
24 Plaintiff and its property interest using purported "eminent-domain" powers or any other
25 legislative authority. *See, Montana*, 450 U.S. at 565.

26 Because GCSD never entered into a consensual commercial relationship with the
27 Tribe in which it could anticipate later becoming subject to Tribal civil jurisdiction, the Tribe
28 may not shoe-horn civil jurisdiction against it under the first *Montana* exception. Indeed,

1 GCSD's contract with SNW does not even mention Tribal jurisdiction or give GCSD any
2 indication that it could be governed by Tribal law. Instead, the 2003 Agreement specifically
3 states that "[t]he venue and jurisdiction for (x) any litigation under this Agreement and (y) all
4 other civil matters arising out of this Agreement shall be the federal courts sitting in the State
5 of Arizona" 2003 Agreement, § 15.4(b).

6 As the Supreme Court has emphasized, "it is not in for a penny, in for a pound." *See*,
7 *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Under federal law, no
8 Indian tribe may exercise civil jurisdiction over a non-Indian solely because the non-Indian
9 entered into a commercial contract with a tribal *corporate* entity. Such a commercial
10 contract will satisfy the first *Montana* exception only if the contract creates a reasonable
11 anticipation that such consensual dealings could later result in tribal civil authority. *See*,
12 *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 338 (2008).
13 In *Plains Commerce*, the non-Indian defendant's contractual dealings with tribal members
14 never gave the defendant any reason to anticipate that the tribe would attempt to regulate its
15 sale of non-Indian property. *Id.* The same is true here. GCSD could not have reasonably
16 anticipated that merely entering into the 2003 Agreement would give the Tribe the authority
17 to regulate the disposition of its contractual interest. On the contrary, the 2003 Agreement
18 expressly states that all "litigation" and all "civil matters" must be brought in *this Court*.
19 Furthermore, the first *Montana* exception does not grant a tribe unlimited civil authority over
20 non-Indians. Rather, *Montana* expressly limits the first exception to particular non-Indian
21 "activities." The sale of a non-Indian interest has been explicitly rejected as an "activity"
22 which tribes may regulate. *See, Plains Commerce*, 554 U.S. at 332-34. Yet, that is exactly
23 what the Tribe is attempting to do. Defendants' attempted use of eminent domain would
24 result in the equivalent of a forced sale where GCSD will be compelled to liquidate its
25 property to the Tribe. This is analogous to the situation in *Plains Commerce*, and the
26 Supreme Court has already ruled that as a general rule, tribes do not have the civil authority
27 to regulate the sale by a non-Indian of a non-Indian interest. *Id.*

28 Nor does the second exception to the *Montana* doctrine apply here. *See, Nevada v.*

1 *Hicks*, 533 U.S. 353, 359 (“Where nonmembers are concerned, the ‘exercise of tribal power
2 *beyond what is necessary to protect tribal self-government or to control internal relations* is
3 inconsistent with the dependent status of the tribes, and so cannot survive without express
4 Congressional delegation.”) (citing *Montana*, 450 U.S. at 564) (emphasis in original)); *see*
5 *also Plains Commerce Bank*, 554 U.S. at 330. In this instance, GCSD is not performing or
6 engaging in any conduct that threatens¹ the tribal community. In fact, just the opposite is
7 true. GCSD conceived the idea for, financed, designed and built the Skywalk. GCSD
8 manages the Skywalk and attempts to perform all its obligations under the 2003 Agreement.
9 GCSD also employs tribal members as provided by the contract and transports them and
10 roughly one-third of all Skywalk patrons to the Tribe’s reservation. GCSD seeks only to
11 perform its obligations as set out in the 2003 Agreement, which generate substantial
12 revenues for the benefit of the Tribe and its members.

13 In sum, neither the Tribe nor the Defendants can carry the heavy burden of
14 demonstrating that either of the *Montana* exceptions apply in this instance.

15 b. The Hualapai Tribe does not have the financial
16 resources to pay GCSD just compensation.

17 The proposed taking of GCSD’s interest in the Skywalk agreements would violate the
18 Indian Civil Rights Act and applicable constitutions, as the Hualapai Tribe does not have the
19 financial resources to pay just compensation.

20 (i) ICRA and all possibly relevant Constitutions
21 require the payment of “just compensation” for
22 a taking

23 Under all relevant constitutions, any taking of private property by the government
24 must be justly compensated. *See* U.S. CONST. amend. V; ARIZ. CONST. art. II, § 17;
25 HUALAPAI CONST. art. IX (c). Likewise, the Indian Civil Rights Act states that “no tribe in
26 exercising powers of self-government shall ... take any private property for public use
27 without just compensation.” 25 U.S.C. § 1302(a)(5).

28 ¹ *See Plains Commerce*, 554 U.S. at 341 (stating that a mere threat to a tribal community is
not enough, rather the conduct sought to be regulated “must ‘imperil the subsistence’ of the
tribal community” and pose the risk of “catastrophic consequences.”)

1 The standards for determining precisely how much compensation is “just” are well
2 established. “[Just] compensation means the full and perfect equivalent in money of the
3 property taken.” *See, U.S. v. Miller*, 317 U.S. 369, 373 (1943) (citing *Monongahela*
4 *Navigation Co. v. U.S.*, 148 U.S. 312, 326 (1893)). “The owner is to be put in as good
5 position pecuniarily as he would have occupied if his property had not been taken.” *Id.* at
6 373. Just compensation is the fair market value of the land taken, as of the time of the
7 taking. *See, U.S. v. Smith*, 355 F.2d 807, (5th Cir. 1966) (citing *Miller*, 317 U.S. at 374).²
8 Fair market value is what a willing buyer of the property would pay in cash to a willing seller
9 of the property. *See, Miller*, 317 U.S. at 374. The fair-market-value determination must
10 include consideration of all the facts and circumstances that would be reasonably considered
11 in the making of a bargain between a willing buyer under no obligation to buy, and a willing
12 seller under no obligation to sell. *See, Smith*, 355 F.2d at 809 (citing *U.S. v. Leavell &*
13 *Ponder, Inc.*, 286 F.2d 398, 401 (5th Cir. 1961)).

14 Here, the fair-market value of GCSD’s contract interests easily exceeds \$100 million.
15 Under the 2003 Agreement and related documents, GCSD must be paid its management fee.
16 This fee is initially equal to 50% of “Net Revenue” (as defined in the agreement), with
17 subsequent reductions after GCSD is repaid in full its investment in the Project. *See*, 2003
18 Agreement, Article 3, attached as Exhibit A to Jin Decl.. Originally under the 2003
19 Agreement, when the investment by GCSD was intended to be between \$6 and \$10 million,
20 and the capacity of the Skywalk was designed to be 80 customers per hour, the Tribe had an
21 option to buy out the interests of GCSD for an agreed-upon price of \$50 million during the
22 first five years of operation. *See*, Jin Decl. at ¶17; 2003 Agreement, § 10.1(c). However, as
23 the investment of GCSD in the Skywalk expanded due to changes in scope requested by
24 SNW, and the capacity of the Skywalk was increased from 80 to 500 visitors per hour, the
25 parties acknowledged that that the \$50 million buyout figure did not reflect the increased
26 investment by GCSD. *See*, Jin Decl. at ¶¶ 14, 17. As a result, that option was deleted from
27

28 ² The law of Arizona is identical. *See, e.g., City of Scottsdale v. CGP-Aberdeen, L.L.C.*, 177 P.3d 1198, 1200-01 (Ariz. Ct. App. 2008).

1 the 2003 Agreement requiring SNW to pay fair-market price for GCSD's interests if SNW
2 were to attempt a buyout. *See*, Jin Decl. at ¶ 17; 2007 First Amendment to Development and
3 Management Agreement, attached to Jin Decl. as **Exhibit B**, Section 2.8.

4 Because SNW has not permitted GCSD to review all of the Project's books for the
5 period of time during which SNW was directly collecting revenue, it is difficult to gauge the
6 precise profitability of the Skywalk for that period. *See*, Jin Decl. at ¶ 22. Now that minimal
7 internal controls have been implemented through the Trust Agreement, the Skywalk is
8 generating substantial revenue. Quasula Decl. at ¶ 13. Revenues last year were more than
9 \$20 million. *Id.* at ¶ 14. There is no outside debt on the Project and all activities at the
10 Skywalk are high-profit-margin transactions. *Id.* A ticket to step out onto the Skywalk
11 costs \$29.95. *Id.* at ¶ 15. Those wishing to have their pictures taken on the Skywalk must
12 pay a minimum of \$27.99. *Id.* A typical meal is \$14.95. *Id.* Over 1.4 million tourists have
13 visited the Skywalk already. *Id.* The balance of the cash account for the Skywalk increased
14 from zero to over \$5 million from March 2010 through December 31, 2010. *Id.* at ¶ 16.
15 Visitation to the Skywalk continues to increase despite a recession and high gas prices. *Id.* at
16 17. Visitors from the primary feeder markets of GCSD and related companies, including
17 China, Hong Kong, Taiwan, and Singapore, which make up a significant percentage of
18 Skywalk's visitors, continue to grow at double-digit levels. Jin Decl. at ¶ 20.

19 Currently, revenue at the Skywalk is hampered due to unpaved road to the Skywalk.
20 Quasula Decl. at ¶ 18. Once paved (and it likely will be in the near future), the attraction
21 will generate greater revenue. *See*, 2003 Agreement Sections 13.3 and 13.4(f); Quasula
22 Decl. at ¶ 18, Jin Decl. at ¶ 48. At current retail prices and full capacity visitor volume, the
23 Skywalk could potentially generate more than \$65 million per year in revenue, not including
24 photography, food-and-beverage, and souvenir sales. *Id.* at ¶ 43.

25 In addition to these direct Skywalk revenue streams, Jin's other companies enjoy
26 pricing and booking preferences, which also have substantial value. In fact, these
27 preferences will be in place for decades to come, since they extend for 15 years beyond the
28 termination of the 2003 Agreement. *See*, 2003 Agreement, §§ 2.11 & 10.3. Thus, with more

1 than 21 years remaining on the 25-year agreement, GCSD reasonably values its contractual
2 interests in the Skywalk at least \$100 million, and possibly much more.

3 (ii) **The Hualapai Indian Tribe does not have the**
4 **resources to pay just compensation to GCSD.**

5 The Hualapai Indian Tribe has few liquid resources. Quasula Decl. at ¶ 19. The
6 Tribe has only about 2,000 members with approximately 600 living on the reservation in
7 Peach Springs, Arizona. *Id.* As things stand today, the Tribe lacks the ability to fund many
8 of its own needs and those of its members. *Id.* In fact, 42.6% of the Hualapai population
9 lives below the poverty level. *Id.* See also, Census Bureau facts sheet attached to Quasula
10 Decl. as **Exhibit D**. Thus, the Tribe does not have the resources to pay \$100 million – or
11 even the \$50 million to which SNW and GCSD initially agreed to when the Project was
12 intended to be much smaller in scope. *Id.* at ¶ 21.

13 In prior informal talks with the Tribe about purchasing GCSD's interests, Tribal
14 representatives candidly admitted that the Tribe does not have the money to pay for such a
15 purchase. See, Quasula Decl. at ¶ 23. The income for the Tribe comes primarily from
16 government grants, the operations of Grand Canyon Resort Corporation ("GCRC"), a
17 Tribally-chartered corporation that runs certain other enterprises on behalf of the Tribe, the
18 operations of the Skywalk, and the taxes the Tribe collects on these revenue sources. *Id.* at ¶
19 25. Significantly, governmental grants, the Tribe's main source of income, are not "free
20 money" that the Tribe can spend on whatever it wants to. These monies must be used for
21 certain specific purposes, such as roads, housing, social services, the criminal justice system
22 and other discrete projects. Quasula Decl. at ¶ 26. Accordingly, the Tribe could not redirect
23 those funds in order to pay GCSD for its interest in the Skywalk. *Id.* While GCRC
24 generates some payments to the Tribe, they are used for the benefit of the Tribe members. In
25 fact, the Tribe has instituted a spending freeze for all budgets stating they do not have
26 sufficient revenue to approve any increases. See, Quasula Decl. at ¶ 27. Financing is not
27 likely to be an option for the Tribe, either. The Tribe has never obtained any loan in excess
28

1 of \$5.5 million in its entire history. *See*, Quasula Decl., at ¶ 28.³ Finally, as to operations of
2 the Skywalk, although SNW has refused to produce detailed records to GCSD, SNW has
3 reported only marginal distributions from SNW to the Tribe. In fact, SNW has not
4 authorized any distributions to the Tribe in 2010. *See*, Withholding of Consent to
5 Disbursement attached as **Exhibit F** to Quasula Decl. Thus, despite the fact that GCRC,
6 SNW, and the Tribe are now poised to reap substantial profits from the Skywalk, SNW has
7 not distributed nearly enough capital to allow the Tribe to purchase GCSD's interests.

8 In short, regardless of which constitution applies, all require the Tribe to pay GCSD
9 "just compensation" for any condemnation. The value of GCSD's interest in the Skywalk is
10 far in excess of \$100 million. The Tribe simply does not have the resources to pay for
11 GCSD contract interests. Absent a showing that the Tribe has the ability to pay just
12 compensation, Defendants do not have the authority to "take" GCSD's property, and, in the
13 process, destroy its business.

14 **2. The proposed condemnation ordinance would cause**
15 **irreparable harm to Plaintiff.**

16 The harm caused by Defendants' proposed "condemnation" ordinance is clearly
17 irreparable. Harm is irreparable if it "cannot be prevented or fully rectified by the final
18 judgment after trial." *See, Roland Machinery Co. v. Dresser Inds., Inc.*, 749 F.2d 380, 386
19 (7th Cir. 1984) (Posner, J.). Likewise, an injury is irreparable if money damages will not
20 provide an adequate remedy for the harm. *See, Rent-A-Center, Inc. v. Canyon Television &*
21 *Small Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). A damages award may be
22 an inadequate remedy for several reasons, including: (1) the award may come too late to save
23 the plaintiff's business; (2) "[d]amages may be unobtainable from the defendant because he
24 may become insolvent before a final judgment can be entered and collected"; or (3) the
25 "nature of the plaintiff's loss may make damages very difficult to calculate." *See, In re*
26 *Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1479 (9th Cir. 1994)

27
28 ³ The Dunn and Bradstreet report for the Tribe likewise discloses no promising financial
resources. *See* Quasula Decl. ¶ 29; **Exhibit G** thereto.

1 (quoting *Roland Machinery Co.*).

2 In this case, unless Defendants are enjoined from enforcing a “condemnation”
3 ordinance, GCSD will suffer a number of injuries. First, GCSD’s entire business will be
4 destroyed. GCSD was formed for the sole purpose of investing in building and managing the
5 Skywalk. Once GCSD’s contract interests are “taken” by the Council, GCSD will be forced
6 out of business. Second, GCSD will lose the customers and accompanying goodwill that it
7 has worked to develop over the last four years. Once the Council “condemns” the contracts,
8 GCSD will no longer have the right to manage the Skywalk, or to serve the many thousands
9 of patrons who flock to the attraction each year. Third, GCSD and David Jin, its founder,
10 will suffer damage to their business reputations. The damages that stem from these injuries
11 are very difficult to calculate, which in turn makes them irreparable.

12 As courts have held for decades, “the loss or destruction of a going business
13 constitutes irreparable harm, whether viewed as an injury not compensable in money
14 damages, or as one which cannot be reduced to monetary value with ‘sufficient accuracy to
15 make damages an adequate substitute’ for injunctive relief” *Janmort Leasing, Inc. v.*
16 *Econo-Car Int’l, Inc.*, 475 F. Supp. 1282, 1294-95 (E.D.N.Y. 1979) (citing Second Circuit
17 authorities dating back to 1970) (citations omitted). Likewise, the *nature* of the loss is
18 impossible to compensate fully with money. As Judge Friendly famously observed in
19 *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2nd Cir. 1970), a case involving the
20 termination of a car-dealer franchise, “the right to continue a business in which [one has been
21 engaged for years] . . . is not measurable entirely in monetary terms; [the plaintiff] wants to
22 sell automobiles, not to live on the income from a damages award.” *Id.* at 1205. The same is
23 true here. The loss of GCSD’s business represents not just the loss of money. It also
24 represents the loss of GCSD’s and its founders *emotional* investment in a unique and
25 enduring tourist attraction that David Jin himself imagined and, through his own hard work,
26 turned into a reality. In a very real sense, the Skywalk is David Jin’s legacy. Accordingly,
27 the destruction of GCSD’s business is undeniably irreparable.

28 The other intangible injuries GCSD will suffer, such as the destruction of its goodwill,

1 the damage to its business reputation, and interference with its ongoing customer
2 relationships all qualify as irreparable harm sufficient to support injunctive relief. *See, e.g.,*
3 *Rent-A-Center, Inc.*, 944 F.2d at 603 (damage to goodwill is irreparable harm); *Duct-O-Wire*
4 *Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509-10 (7th Cir. 1994) (damage to goodwill, business
5 reputation, and interference with customer relationships are all irreparable harms); and
6 *Lineback v. Chauffeurs, Teamsters, and Helpers Local Union No. 414*, 513 F. Supp.2d 988,
7 998 (N.D. Ind. 2007) (“loss of goodwill, permanent loss of customers and business, and
8 [resulting] layoffs” are all irreparable harms). Courts consider these harms to be irreparable
9 because the damages that flow from these injuries are difficult to measure, and money
10 damages rarely provide full compensation for them. *See, e.g., Lineback*, 513 F. Supp.2d at
11 998; *Desert Subway, Inc. v. City of Tempe*, 322 F. Supp.2d 1036, 1041 (D. Ariz. 2003); and
12 *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp.2d 1081, 1103 (N.D. Cal.
13 2001). As one court has observed, “it is precisely the difficulty of pinning down what
14 business has been or will be lost that makes an injury ‘irreparable.’” *See, Hess Newmark*
15 *Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 632 (7th Cir. 2005).

16 A money-damages remedy in this case is also inadequate because it is extremely
17 unlikely that GCSD will ever be able to collect a judgment against SNW. GCSD estimates
18 that if the “condemnation” ordinance passes, the loss of its investment, coupled with lost
19 revenues over the life of the contract, will total well over \$100 million dollars. *See, Jin*
20 *Decl.*, ¶ 36. The party with whom GCSD contracted, SNW, is a corporation formed by the
21 Tribe for the sole purpose of entering into the Skywalk agreements. SNW is “judgment
22 proof” – it has no assets.⁴ Therefore, any potential damages award that GCSD could obtain
23 against SNW will never adequately compensate GCSD for its loss. *See, In re Estate of*
24 *Ferdinand Marcos*, 25 F.3d at 1479 (a damages remedy is inadequate if the plaintiff is
25 unable to collect due to the defendant’s insolvency). The fact that the Tribe may well be
26

27 ⁴ The only assets that SNW has today are its contracts relative to the Skywalk. Once those
28 are gone, the Tribe itself will likely assume the management of the Skywalk and will collect
and hold all of the revenues that it generates. Thus, after the purported “taking” occurs,
SNW may be defunct.

1 immune from suit likewise renders any damages remedy inadequate. *See, e.g., California*
2 *Pharmacists Ass'n*, 563 F.3d at 852 (finding that monetary relief was an inadequate remedy
3 because the Eleventh Amendment barred plaintiffs from recovering damages against the
4 state). In short, even if GCSD can someday obtain a judgment against SNW, that avenue of
5 relief will never provide adequate compensation for GCSD's losses.

6 **3. The balance of the equities tips in GCSD's favor.**

7 The balance of the equities tips sharply in GCSD's favor. As discussed at length
8 above, unless Defendants are enjoined from "condemning" GCSD's contracts, the company
9 will suffer palpable, and likely irreparable, harm. This harm includes the total loss of its
10 business, the potential loss of customers, the destruction of hard-earned goodwill, and
11 damage to its business reputation, which could in turn result in the loss of future business
12 opportunities. On the other hand, if an injunction is entered, Defendants will suffer no
13 hardship at all. The Court's order will merely preclude them from taking action that is
14 unlawful to begin with. While the injunction is in effect, GCSD will, of course, continue to
15 manage the Skywalk in the same skilled and dedicated manner it always has. Thus, an
16 injunction will merely maintain the *status quo*. *See, Univ. of Texas v. Camenisch*, 451 U.S.
17 390, 395, 101 S. Ct. 1830, 1834 (1981). "The purpose of a preliminary injunction is merely
18 to preserve the relative positions of the parties until a trial on the merits can be held." *Id.*

19 **4. An injunction will serve the public interest.**

20 The issuance of an injunction will likewise serve the public interest. The public has
21 an interest in ensuring that government officials do not abuse the enormous power with
22 which they are vested. The enormity of that power – and its abuse – could not be clearer in
23 this case. The Council intends to take, with the mere stroke of a pen, a substantial and
24 valuable property interest from an entity over which it has no civil authority in the first
25 instance. Unless Defendants' unlawful action is enjoined, the loss that GCSD will sustain
26 could very likely be permanent, and once taken, cannot be adequately compensated with an
27 award of money damages. Curbing such a gross abuse of legislative and administrative
28 power through the issuance of an injunction will therefore serve the public interest.

1 5. **GCSD is also entitled to an injunction under the alternative**
2 **"serious questions" test.**

3 The Ninth Circuit has long employed, as an alternative formulation, a "sliding-scale"
4 test to determine whether a preliminary injunction should be issued: "[a] preliminary
5 injunction is appropriate when a plaintiff demonstrates ... that serious questions going to the
6 merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *See,*
7 *Alliance for the Wild Rockies v. Cottrell*, --F.3d--, 2011 WL 208360, at *7 (9th Cir. Jan. 25,
8 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc)).
9 Under this "serious questions" test, "the elements of the preliminary injunction test are
10 balanced, so that a stronger showing of one element may offset a weaker showing of another.
11 For example, a stronger showing of irreparable harm to plaintiff might offset a lesser
12 showing of likelihood of success on the merits. *Id.*, at *4 (citing *Clear Channel Outdoor,*
13 *Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003))." Under this alternative test,
14 GCSD is likewise entitled to injunctive relief.

15 A plaintiff raises "serious questions" by showing that it has at least a "fair chance of
16 success" on the merits, *See, Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362, or
17 by raising "questions serious enough to require litigation." *See, Dep't of Parks & Recreation*
18 *v. Bazaar del Mundo, Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006). Based on the analysis set
19 forth above, GCSD has, at a minimum, raised "serious questions" going to the merits of its
20 claim for declaratory relief. As to the second prong of the "serious questions" test, the
21 balance of hardships tips sharply in GCSD's favor. As discussed above, unless Defendants
22 are enjoined from "condemning" GCSD's contracts, the company will suffer not only
23 "hardship," but very real, and undeniably irreparable, harm. Irreparable harm is the ultimate
24 hardship. On the other hand, if an injunction is entered, Defendants will suffer no hardship
25 at all. The Court's order will merely preclude them from taking action that is, on its face,
26 unlawful. Accordingly, under the "serious questions" test, GCSD is entitled to an injunction.

27 B. **By Acting Outside The Scope Of Their Valid Legal Authority, The**
28 **Named Officers Lack Tribal Immunity.**

Defendants may argue that they are cloaked with the Tribe's sovereign immunity, and therefore cannot be sued in this proceeding. Not true. In sharp contrast to the customary immunity from suit that Indian tribal governments possess except as limited by Congress, *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), tribal officials such as Defendants lack immunity when they act outside the scope of their valid legal authority. *See, Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th Cir. 1985). The doctrine of *Ex Parte Young*, 209 U.S. 123, 155-56 (1908), extends to officials of Indian tribes and nations whenever a plaintiff seeks declaratory or injunctive relief. *Accord, Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991) ("tribal sovereign immunity does not bar suit from prospective relief against tribal officers allegedly acting in violation of federal law").⁵

To determine if the named Defendants are protected by tribal sovereign immunity, this Court must examine whether (1) Plaintiff has alleged facts sufficient to show that a violation of federal law will occur, and (2) Plaintiff seeks only injunctive or declaratory relief. In this case, Defendants are acting outside their legal authority by attempting to impose civil jurisdiction over GCSD and its contract interests in the Skywalk.

IV. CONCLUSION

Based on the foregoing, the Court should enter a preliminary injunction against Defendants, and each of them, as requested herein.

RESPECTFULLY SUBMITTED this 30th day of March, 2011.

GREENBERG TRAURIG, LLP

By: /s/ Pamela M. Overton

Pamela M. Overton

Aaron C. Schepler

Attorneys for Plaintiff

⁵ The Fifth Circuit has held that tribal officials are not protected by sovereign immunity in suits for declaratory or injunctive relief even when they act *within* their legal authority. *See, Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes*, 261 F.3d 567, 570 (5th Cir. 2001). This Court need not consider that question, however, because the Council members here are plainly acting *ultra vires*.

EXHIBIT 8

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9 Attorneys for Plaintiff

10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF ARIZONA

12 Grand Canyon Skywalk Development,
13 LLC, a Nevada limited liability
14 company,

15 Plaintiff,

16 vs.

17 Charles Vaughn; Waylon Honga; Ruby
18 Steele; Candida Hunter-Yazzie; Wilfred
19 Whatoname, Sr.; Richard Walema;
20 Wynona Sinyella; Sheri Yellowhawk;
21 Barney Imus; Wanda Easter; and Jaci
22 Dugan,

23 Defendants.

No.

**DECLARATION OF DAVID JIN IN
SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

24 I, DAVID JIN, declare as follows:

25 1. I declare under penalty of perjury under the laws of the United States of
26 America that the foregoing is true and correct.

27 2. I was born in Shanghai China, March 21, 1962. In 1988, I first came to the
28 United States. I began my work life in the United States as a dishwasher in a Las Vegas
restaurant called the Golden Wok on Eastern and Tropicana Avenues in Las Vegas.

3. I was very fortunate in being able to work with individuals who allowed me to
learn, grow and experience financial success.

///

1 4. In the early 1990's, I became involved with a tour company, Trans Tours, that
2 helped set up tours to the Grand Canyon for Chinese visitors. Initially, I was just an investor
3 in that tour company. However, to protect and grow my investment, I became more and
4 more involved in the operations of the tour company.

5 5. As I developed an understanding of the tour industry, I believed that I could
6 develop my own tour company to work even more effectively and efficiently than the tour
7 company I had invested in, and in 1995, I started Oriental Tours, Inc. (hereinafter, "OTT" or
8 "Oriental Tours").

9 6. Oriental Tours started by taking advantage of the opportunity to show Chinese
10 tourist who are arriving from Hong Kong, Taiwan, Shanghai and Malaysia through Los
11 Angeles and San Francisco, the opportunity to visit Las Vegas and the surrounding sites and
12 attractions.

13 7. I had gotten to know a number of the Hualapai tribal officials in working with
14 them for Trans Tours and was fortunate enough to be able to propose some new activities at
15 the West Rim of the Grand Canyon I thought would be attractive to the Chinese tourists.

16 8. In particular, I suggested a tour operation whereby the visitors could take a
17 helicopter ride down to the floor of the Grand Canyon. The helicopter tours that previously
18 existed on the South Rim were simply tours that flew above the canyon and I believed that
19 actually flying down into the canyon and seeing the beauty of the rock formations would
20 provide genuine, exciting tourist opportunities, photo opportunities and the like.

21 9. I was fortunate that our good relations with the tribe made the idea attractive to
22 them and we were able to begin to bring a significant number of Chinese tourists to the
23 Grand Canyon.

24 10. By 1996, we were able to bring as many as 700 customers per day to the Grand
25 Canyon on our most successful days.

26 11. This, in turn, led us to have the opportunity to work with the Indians on other
27 projects and in the next several years, I was able to propose various activities including boat
28 rides on the Colorado River for the tourist who got off the helicopters and we were able to

1 propose various other options and attractions for the tourists visitors that we were bringing to
2 the Grand Canyon.

3 12. In particular, in the late 1990's, I conceived and proposed to the tribe, the idea
4 of building a glass viewing platform. That glass viewing platform would allow visitors to
5 walk out over the Grand Canyon and peer down into the canyon to see its spectacular natural
6 beauty.

7 13. My proposal took a number of years to develop. There were only a few Tribal
8 members who were not interested in this type of development, but the vast majority of the
9 Tribe found merit in increasing the economic viability of the Tribe by engaging in expanded
10 tourist operations.

11 14. In 2003, my company, Grand Canyon Skywalk Development, LLC ("GCSD")
12 entered into an agreement with the Hualapai Tribe to build and manage the Skywalk viewing
13 platform (the "2003 Agreement"), which is attached hereto as Exhibit A.

14 15. Shortly after we agreed to build the original structure, which was initially
15 proposed to extend 30 feet out over the canyon, the Tribe requested that I expand the size of
16 the Skywalk so that additional visitors could view the Grand Canyon and a greater volume of
17 visitors could be handled per day.

18 16. My original proposed investment was to be between \$6-10 million and the
19 capacity of the Skywalk was designed to be 80 customers per hour, however, with the
20 request for an expanded operation from 80 to 500 visitors per hour, my required investment
21 rapidly increased and I have now invested over \$25 million in the construction of the
22 Skywalk and the adjacent building facilities.

23 17. The Tribe had an option to buy out the interests of GCSD for an agreed-upon
24 price of \$50 million during the first five years of operation. *See*, 2003 Agreement at 10.1(c).
25 However, as my investment in the Skywalk expanded due to the requested changes in scope
26 by "Sa" Nya Wa ("SNW"), the parties acknowledged that the \$50 million buyout figure did
27 not reflect my increased investment. As a result, that option was deleted from the 2003
28 Agreement in favor of SNW paying a greater fair-market price for GCSD's interests if SNW

1 were to attempt a buyout. The deletion of that option is reflected in the September 10, 2007
2 First Amendment to Development and Management Agreement, attached hereto as Exhibit
3 B at 2.8.

4 18. We opened the Skywalk in March of 2007. From the start, the Skywalk was an
5 immediate hit with visitors. Our opportunities to bring more tourists increased
6 exponentially. They are anticipated to have major additional increases with the completion
7 of the visitor center and the paving of the road to the Skywalk site at later dates.

8 19. The financial arrangements for my investment had always been that I would
9 have the opportunity to manage and operate the Skywalk in exchange for the investment. I
10 would receive a preferable rate on the tickets that were sold for the attraction insuring that
11 my ticket prices were the best and thereby, I could make a reasonable return on my
12 investment by having the profit on the lowest priced tickets and that splitting the net
13 operating proceeds after certain agreed upon fees and prices were deducted.

14 20. From the Skywalk's opening, the numbers of visitors to the Skywalk began to
15 increase steadily. In particular, the number of visitors grew as more and more tourists heard
16 about the unique opportunity of seeing the Grand Canyon in a one day trip from Las Vegas
17 and the exceptional opportunity to view it in the most unique manner that had been
18 developed at the Skywalk. Visitors from the primary feeder markets of GCSD and related
19 companies, including China, Hong Kong, Taiwan and Singapore, which make up a
20 significant percentage of Skywalk's visitors, continue to grow at double-digit levels.

21 21. In 2007, we received a distribution pursuant to the agreement that we had
22 entered in 2003, however, we were unable to obtain the back up information on the
23 financials which SNW had provided.

24 22. Unfortunately, in 2008 and 2009, not only did SNW not provide a distribution,
25 but we were unable to secure any of the underlying data or information about the overall
26 finances of the Skywalk, making it difficult to gauge the true profitability of the Skywalk for
27 that period.

28 ///

1 23. Moreover, and even more disturbing, we learned that the Tribe through GCRC
2 had begun selling its own tickets to the Skywalk and had failed to fully account for those
3 tickets thus making the bookkeeping and financial record keeping for the project inaccurate.

4 24. Further, our efforts to complete the support facility adjacent to the Skywalk
5 which was to have been a restaurant/gift shop/restroom facilities and the like, was stymied
6 when SNW refused authorization to complete the building or conduct additional tours.

7 25. In an effort to resolve the disputes, and in order to avoid the need to enforce
8 the binding arbitration provisions to the 2003 Agreement, I began negotiating with the Tribe
9 to resolve the issues of the responsibility for cash handling and accounting and to insure that
10 we had accurate accountings and records for the Skywalk proceeds. In March of 2010, we
11 were able to successfully negotiate a new trust agreement which provided for how the funds
12 from the Skywalk ticket sales would be distributed. We also successfully completed new
13 agreements regarding bus services which I was providing as we transported tourists onto the
14 reservation from the paved highway in air conditioned coaches.

15 26. Much of the development, including the roads leading to the Skywalk, remain
16 unpaved and therefore, having adequate air conditioned bus service is vital to maintain the
17 tourists interests.

18 27. During the later part of 2010, my attorney and I, began negotiation of revised
19 agreements for the completion of the building connected to the Skywalk and revised
20 agreements for the management of the Skywalk.

21 28. These new agreements were important because my investment had grown to
22 more than three times that of the original agreement and because the Tribe's conduct of
23 selling tickets and failing to provide accountings made it difficult for me to ascertain the
24 reasonable time frame that would be required for me to receive the full benefit of the
25 proposed agreement for operation.

26 29. We negotiated those agreements through December of 2010 and I submitted
27 proposed changes to the agreements just after Christmas. We were surprised that those
28 particular proposed changes were not addressed by the Tribes' council in a timely fashion

1 and when we began asking for reasonable timelines as to when we would be able to complete
2 the agreements and thus, finish the construction of the remaining adjacent building and
3 clarify the remaining issues, we were given no satisfaction as opposing counsel would
4 simply not commit to a reasonable timetable.

5 30. During the same timeframe, I asked my lawyers at Greenberg Traurig to assist
6 me in the collection of outstanding fees which were owed to me for transporting Skywalk
7 employees from their homes in Las Vegas, Nevada; Peach Springs, Arizona; and Kingman,
8 Arizona to work at the Skywalk.

9 31. Inexplicably, SNW has refused to pay the fees for transporting those
10 employees to the site and has informed me that they will not be paying my bus service for
11 the transportation of the employees to the site even though the cost of the transportation of
12 those employees was a line item in the budget which was approved by the Tribal council.
13 Those fees are almost \$1 million to date.

14 32. Despite the 2003 Agreement, SNW has refused to approve a reasonable request
15 for distribution of the proceeds for 2010, thus meaning that GCSD has not received a
16 distribution of the proceeds for 2008, 2009 or 2010.

17 33. Fortunately, I have maintained good relations with a number of the important
18 members of the tribe who have been involved at various levels of the tribal government and
19 they continue to be helpful in supporting our efforts to improve the economic conditions of
20 the Tribe through the expansion and development of these tours operations.

21 34. Unfortunately, I have learned that our efforts are not valued by other members
22 of the Tribe and I have learned that there has been an active organized effort to end my
23 management contract and to take away the operation of the Skywalk from me.

24 35. I have learned that the two (2) members who were appointed to be the
25 representatives for the negotiation of the Skywalk agreements, Charlie Vaughn and Whalen
26 Honga, have led an effort to remove me from the operation of the Skywalk that I conceived,
27 developed, built and have operated in order that the Tribe can take the potential profits in the
28 project for itself.

1 36. It is my understanding that they are seeking to invoke a new ordinance which
2 they intend to pass providing for eminent domain over my management agreement. Should
3 this ordinance pass, the loss of my investment, coupled with lost revenues over the life of the
4 contract, will total well over \$100 million dollars.

5 37. I have learned that the Tribe intends to use the new ordinance to take away my
6 ability to manage or operate the Skywalk. Certain Council members, apparently, have
7 engaged in an effort to justify this taking by improperly asserting that I owe them money.

8 38. In fact, the truth is that SNW owes me money and has failed to provide access
9 to their books and records, have failed to provide an accounting, and have failed to make a
10 financial distribution of the proceeds that were derived from sales of Skywalk tickets.

11 39. I have learned that their efforts to take this property away is because they
12 believe, improperly, that they can pay me a fraction of what my total investment in the
13 underlying Skywalk project is or that they can pay me a fraction of what the value of the
14 business Grand Canyon Skywalk actually generates. I also believe that another motivation
15 is to avoid the embarrassment of explaining how and why ticket revenues evaporated under
16 SNW's watch and to avoid paying past due and future management fees to GCSD.

17 40. There are a number of factors which support my contention that the value of
18 my management company's operation is worth hundreds of millions of dollars.

19 41. For example, during the recession, while tourism generally has suffered,
20 tourism from China has increased 13% in 2010. As China's economic condition continues to
21 strengthen versus that of the United States, I believe that our ability to successfully involve
22 ourselves in the expanding oriental tourist base will continue to thrive.

23 42. I believe, that our continued development of further tourism from the Asian
24 market will allow us to expand our operation from last year in which we averaged
25 approximately 330 visitors a day to the Skywalk from my own sources and another 670
26 visitors from other related sources. This equates to more than 389,000 visitors last year
27 visiting the Skywalk.

28 ///

1 43. The actual capacity of the Skywalk in its present configuration is over 6,200
2 visitors per day or over \$65 million per year in admission ticket sales at retail rates. This
3 does not include ancillary sources of revenue, including photography, food-and-beverage and
4 souvenir sales.

5 44. My right to continue to operate the Skywalk as embodied in the 2003
6 agreement for twenty one (21) more years, also provides me with the unique opportunity of
7 being able to expand the types of activities and actions which would allow for even greater
8 revenue and profits.

9 45. For example, renting the Skywalk for breakfast events or sunset events or
10 major corporate activities or sponsors will greatly increase the overall revenue potential for
11 the Skywalk operations.

12 46. Similarly, being able to add additional revenue sources from completion of the
13 Skywalk visitors' center will add additional revenue opportunities.

14 47. I believe that the potential revenues on an annual basis will continue to grow at
15 a rate of at least 15% per year over the next two decades.

16 48. Furthermore, the paving of the road to the Skywalk is a major opportunity
17 which will allow us to substantially increase visitation to the Project by individual travelers
18 and tour companies. The completion of the paving is addressed in the 2003 Agreement to
19 take place in the next few years.

20 49. I had been advised by other members of the tribe that the Hualapai Tribe is
21 also planning on hiring a PR firm to try to put the best face upon their taking of the property
22 from me and from their conduct, in essentially trying to remove me, even before they have
23 begun any meaningful payment for the investment that I and my company and outside
24 investors have undertaken and before they have made any sincere effort to work with me in
25 good faith to resolve the difficulties that we have experienced from their inability to provide
26 accounting, books and records or access to the basic financial information.

27 50. Additionally, the fact that SNW has failed to provide me with the financial
28 information or disbursements in 2008, 2009 and 2010 further suggests that there is an active

1 effort to keep me from having reasonable numbers upon which I can calculate GCSD's
2 damages for the planned improper eminent domain taking.

3 51. On the one hand, the Tribe refuses to give me access to the numbers and the
4 accounting and on the other hand, the Tribe is planning to set their own price and pay me
5 pennies on the dollar for the value of the management agreement I have in place.

6 52. I am informed by members of the Tribe that the tribal financial condition is
7 such that they would be unable to pay the reasonable value of both the Skywalk and the
8 management agreement and that therefore, I would have no remedy at law as a money
9 damage award simply could not be paid by the Tribe.

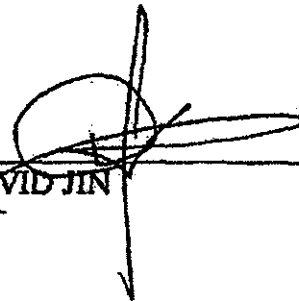
10 53. For the foregoing reasons, I request this Court to enter a preliminary injunction
11 enjoining the tribe from taking my property interests in the management agreement.

12 54. Attached hereto as Exhibit A is a true and correct copy of the 2003
13 Agreement.

14 55. Attached hereto as Exhibit B is a true and correct copy of the September 10,
15 2007 First Amendment to Development and Management Agreement.

16 Dated this 24 of March, 2011.

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28



DAVID JIN

EXHIBIT 9

NONDISCLOSURE AGREEMENT

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1. The Recipient acknowledges receipt of the Information and that the Information is being provided to the Recipient for the sole purpose of enabling the Recipient to perform and discharge Recipient's duties to the Tribe and to otherwise assist the Tribe and preserve and protect the Tribe's best interests.

2. The Recipient acknowledges that the Information constitutes and contains confidential and proprietary information of the Tribe. The Recipient shall receive the Information in confidence and treat the Information as embodying confidential and proprietary information of the Tribe.

3. The Recipient shall not copy or duplicate the Information, shall not publish or otherwise disclose the Information to any third party or employee who is not specifically bound by a nondisclosure agreement with the Tribe, and shall not use any of the Information in any manner without the prior written consent of the Tribe.

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5. The Recipient agrees to return the Information and all duplicates thereof to the Tribe immediately upon the request of the Tribe.

IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"

Wilfred Whetstone Sr.
Signature

Wilfred Whetstone Sr.
Printed Name

POB 35

Perch Springs AZ. 86434
Address

NONDISCLOSURE AGREEMENT

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IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4th, 2011.

"RECIPIENT"

Richard A. Walema Sr.
Signature

RICHARD A. WALEMA SR.
Printed Name

P.O. Box 308 Peach Springs

808 Diamond Creek Circle AZ 86434
Address

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Date: April 4, 2011.

"RECIPIENT"



Signature

Sheri K. Yellowhawk

Printed Name

Po Box 1029, Peach Springs
1047 Nelson Rd, Az 86434

Address

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IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"


Signature

WYNONA Sinyella
Printed Name

Box 87
Lead Springs, Az. 86434
Address

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IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"


Signature

Ruby Steele

Printed Name

PO Box 313

Peach Springs, AZ 86434

Address

NONDISCLOSURE AGREEMENT

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IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"

Candida L. Hunter
Signature

Candida L. Hunter
Printed Name

PO Box 179

Peach Springs, AZ 86454
Address

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Date: April 4, 2011.

"RECIPIENT"

Charles E. Vaughn Sr.
Signature

Charles E. Vaughn Sr.
Printed Name

P.O. Box 282
Peach Springs, Az. 86434
Address

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5. The Recipient agrees to return the Information and all duplicates thereof to the Tribe immediately upon the request of the Tribe.

IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"

Barney Rocky Imus
Signature

BARNEY ROCKY IMUS
Printed Name

P.O. BOX 761

PEACH SPRINGS, ARIZ
Address 86434

NONDISCLOSURE AGREEMENT

In the undersigned's capacity as a Tribal Council member or other officer, director or employee of the Hualapai Indian Tribe or its tribally-chartered corporations (collectively, the "Tribe"), the undersigned ("Recipient") acknowledges that Recipient may learn of or otherwise come into the possession of information regarding the Tribe's handling of litigation, arbitration or other proceedings or disputes involving David Jin or his affiliates, including strategies, positions, and legal and other advice (the "Information"). The Recipient understands that the nature of the Information requires that the Information be disclosed to the Recipient on a confidential basis only. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Recipient agrees as follows:

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IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"

Wg HB
Signature

Waylon Honga
Printed Name

501 Canyon View Dr.
Peach Springs AZ 86434
Address

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Date: April 4, 2011.

"RECIPIENT"



Signature

Wanda Easter

Printed Name

PO Box 179

Peach Springs, AZ 86439

Address

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Date: April 4, 2011.

"RECIPIENT"



Signature

Jaci Ulmer

Printed Name

P.O. Box 359

PEACH SPRINGS, AZ 86454

Address

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IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"


Signature

ADELINE CROZIER
Printed Name

PO BOX 231
PEACH SPRINGS, AZ 86434
Address

NONDISCLOSURE AGREEMENT

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IN WITNESS WHEREOF, the undersigned has executed this Agreement as of the date and year written below.

Date: April 4, 2011.

"RECIPIENT"

Christine Lee
Signature

CHRISTINE LEE
Printed Name

PO BOX 284

Peach Springs, AZ 86434
Address

EXHIBIT 10

Pamela M. Overton (AZ Bar No. 009062)
Aaron C. Schepler (AZ Bar No. 019985)
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Telephone: (602) 445-8000
Facsimile: (602) 445-8100
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Mark Tratos (NV Bar No. 1086) (Admitted *Pro Hac Vice*)
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Facsimile: (702) 792-9002
Email: TratosM@gtlaw.com

Troy A. Eid (CO Bar No. 21164) (Admitted *Pro Hac Vice*)
GREENBERG TRAUIG, LLP
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Denver, Colorado 80202
Telephone: (303) 572-6500
Facsimile: (303) 572-6540
Email: EidT@gtlaw.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Grand Canyon Skywalk Development,
LLC,

Plaintiff,

vs.

Charles Vaughn, et al.,

Defendants.

No. 3:11-cv-08048-DGC

**MOTION FOR TEMPORARY
RESTRAINING ORDER WITH
NOTICE**

**Expedited Hearing and Consideration
Requested**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Grand Canyon Skywalk Development, LLC ("Plaintiff" or "GCSD") hereby moves the Court for a temporary restraining order to prevent Defendants Charles Vaughn; Waylon Honga; Ruby Steele; Candida

Hunter-Yazzie; Wilfred Whatoname, Sr.; Richard Walema; Wynona Sinyella; Sheri Yellowhawk; and Barney Imus (collectively, the "Council Defendants"), as well as Wanda Easter and Jaci Dugan (the "Administrative Defendants," who, collectively with the Council Defendants, are referred to herein as "Defendants") from taking any steps to enforce the Tribe's purported "condemnation" of GCSD's interest in the glass Skywalk overlooking the Grand Canyon. *Because this unlawful "taking" of GCSD's contractual rights could happen literally at any moment, GCSD requests an immediate hearing and ruling on this motion.* This motion is supported by the following memorandum of points and authorities, the attached exhibits, and the entire court record herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

GCSD has spent more than \$25 million to conceive, design, engineer, build, and open to the public the world-famous glass-bottomed viewing platform overlooking the Grand Canyon known as the "Skywalk." GCSD has managed the Skywalk since it opened in 2007, and its contract allows it to continue managing the site for another two decades. The Council Defendants are members of the current Tribal Council (the "Council") of the Hualapai Indian Tribe (the "Tribe"), a federally-recognized Indian tribe.

On April 30, 2011, GCSD filed this action for declaratory and injunctive relief. As explained in GCSD's Complaint [Doc. 1] and its Motion for Preliminary Injunction ("Injunction Motion") [Doc. 3], in the days leading up to the filing of the complaint, GCSD had received information indicating that Defendants intended to "condemn," through the Tribe's purported eminent-domain power, Plaintiff's contractual right to control and manage the Skywalk. At the time the complaint was filed, GCSD did not know precisely when Defendants would take this action.

David Jin, the founder of GCSD, has since learned that during a closed-door meeting, the Council passed a measure that purports to authorize the Tribe to "take" private property and private contract rights, without due process, notice, or timely payment, through the exercise of eminent domain. Mr. Jin has also received a copy of the Tribal ordinance (the "Ordinance") that

1 the Council has considered and approved. See Exhibit A, Declaration of David Jin (Jin Decl.),
2 ¶ 4 & Exhibit 1 thereto.¹ The Ordinance was carefully drafted to allow the Tribe to “take”
3 GCSD’s contractual right to manage the property, and to deprive GCSD of the right to receive
4 fair-market value for it.

5 Among other things, the Ordinance purportedly allows the Tribe to take “[a]ll tangible or
6 intangible property, including intangibles” such as “*contracts* pertaining to the possession,
7 occupation, use, design, development, improvement, construction, operation and/or management
8 of property, including property owned by the Tribe.” See Ordinance § 2.16(D)(3) (emphasis
9 added). The Ordinance further provides that when a contract is “taken,” “the Tribe shall be the
10 party thereto in the full place and stead of the defendant, to the full extent as if the Tribe and not
11 the defendant were the original signator [sic] or party thereto, and the defendant shall no longer
12 be a party thereto” *Id.* § 2.16(F)(4)(a). The Ordinance also states that once the Tribe
13 declares a “taking,” the title to the interest owned, including contractual interests, *immediately*
14 vests in the Tribe. See *id.* § 2.16(F)(2), (F)(4)(a). These provisions were no doubt tailored
15 specifically to allow the Tribe to take over management of the site, without first allowing GCSD
16 an opportunity to contest the condemnation. Moreover, the Ordinance was passed without the
17 knowledge or approval of the members of the Tribe as required by the Tribe’s own laws. See
18 Exhibit B (Hualapai Constitution, Article V(n) (“[A]ll sales or exchanges of tribal lands, natural
19 resources or other tribal assets shall be approved by the eligible voters of the Tribe voting at a
20 special election”)).

21 The passage of the Ordinance, however, is just the first step in the Council’s plan. The
22 Tribe is also poised to launch a massive media blitz to publicly justify the taking. Mr. Jin has
23 been provided materials prepared by the Tribe’s public-relations firm, Scutari and Cieslak.² See
24

25 ¹ The copy of the Ordinance that Mr. Jin obtained was accompanied by “Hualapai Tribal
26 Resolution No. 20-2011.” Signed by Mr. Whatoname, the Tribal Chairman, the Resolution
27 indicates that the Ordinance was passed into law by a 9-0 vote during a “Special Council
28 meeting” on April 4, 2011.

² According to the PR firm’s website, “Scutari and Cieslak Public Relations helps all types of
folks successfully navigate the unpredictable intersection that connects PR, public policy and

1 Ex. A, Jin Decl., ¶ 6 & Exhibit 2 thereto. The introduction, written by the PR firm,
2 acknowledges the fact that the Tribe now faces “a significant public relations opportunity – and
3 some considerable challenges – with [the Tribe’s] *planned legal action against David Jin*.” See
4 *id.* (emphasis added). The purpose and nature of the “planned legal action” becomes apparent
5 by reading the materials that are included in the Tribe’s media package. These materials include
6 a draft letter from the Tribal Chairman, Mr. Whatoname, addressed to Tribal members, which
7 purports to justify the Tribe’s taking of GCSD’s interest in the Skywalk. The letter states,
8 among other things, that Mr. Jin had “failed to abide by his most basic obligations and keep
9 even the most basic promises he made to our community.” As a result, the letter continues, “we
10 [*i.e., the Tribal Council*] are considering eminent domain proceedings” against Jin. The PR
11 materials also contain a schedule, which outlines how the Tribe plans to take its “message” to
12 the public – through a slew of local and national media outlets – beginning on *April 11, 2011*.
13 Unbelievably, the Tribe intends to tell the media that Mr. Jin “and his various subsidiaries have
14 behaved like *Arizona’s version of Leona Helmsley and Bernie Madoff*”! See *id.* (emphasis in
15 original). Thus, Defendants, not content with merely taking GCSD’s \$100 million asset without
16 just compensation, are also bent on destroying its business reputation.

17 Defendants’ purported condemnation of GCSD’s contractual interest in the Skywalk
18 could happen literally at any moment. With the “taking” now imminent, GCSD requests a
19 temporary restraining order enjoining Defendants from taking any further steps to affect the
20 purported “condemnation.” A TRO is appropriate for at least four reasons: (1) Defendants have
21 no legal authority to exercise jurisdiction over a non-Indian, such as GCSD; (2) even if
22 Defendants could “condemn” GCSD’s contract interests, Defendants have not followed or
23 enacted any procedures to ensure even a modicum of fairness to Plaintiff in the event of a
24 condemnation; (3) even if the Council Defendants had authority to pass a condemnation
25 ordinance, they failed to follow their own Tribal law requirement for approval by a vote of all
26 the Tribal members in doing so; and (4) even if Defendants had the authority to “condemn”

27
28 politics. It’s our sweet spot, our niche where we comfortably reside – and excel.” See
www.scutariandcieslak.com.

GCSD's contract rights, the Tribe they represent cannot pay "just compensation" for those rights, which is required under any law that could conceivably apply to this situation. Because Defendants' intended actions violate federal law, and will cause irreparable harm to GCSD, a temporary restraining order is warranted.

II. ARGUMENT

A. GCSD Is Entitled to a Temporary Restraining Order

The facts and legal arguments set forth in GCSD's Injunction Motion also support the issuance of a TRO. Rather than repeat those facts and arguments here, GCSD incorporates those portions of its Injunction Motion [Doc. 3, pp. 3-17] by reference as though fully set forth herein. See LRCiv 7.1(d)(2) ("If a party desires to call the Court's attention to anything contained in a previous pleading, motion or minute entry, the party shall do so by incorporation by reference."). For the Court's convenience, a copy of GCSD's Injunction Motion will be hand-delivered with this motion.

To summarize, GCSD has proven all four elements of its claim for injunctive relief: (1) a likelihood of success on the merits; (2) a likelihood that it will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in GCSD's favor; and (4) that an injunction is in the public interest. See *Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); see also *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009) (citing the *Winter* factors).

1. GCSD will succeed on the merits of its claim for declaratory relief that Defendants' actions are unlawful because neither the Council Defendants nor the Tribe has civil regulatory authority over GCSD, the Tribal eminent-domain law was not validly enacted, and the Tribe cannot pay just compensation.

As tribal officials acting *ultra vires*, the Council Defendants have no authority whatsoever over GCSD. *Burlington N. & Santa Fe R. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). Likewise, the Tribe has no civil regulatory authority over GCSD because GCSD is not an Indian and GCSD's contractual relationship with 'Sa' Nyu Wa ("SNW"), a Tribal corporation, expressly provides that federal court is the proper forum for the litigation of

contract matters.³ Thus, GCSD has not contractually submitted itself to Tribal authority. Under *Montana v. U.S.*, 450 U.S. 544 (1981), and its progeny, the Tribe has no civil jurisdiction over non-Indians in limited commercial circumstances such as those presented here. See *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 338 (2008). As a result, Defendants have no legal authority to “take” Plaintiff’s contract under the Tribe’s purported self-enforcing eminent-domain power. See Injunction Motion, pp. 5-8. Moreover, even if Defendants had the authority to “take” GCSD’s contract by way of condemnation, they have neither followed any of the procedures established by federal law for the taking of property interests by eminent domain, nor included any fundamental hallmarks of fairness in the Ordinance.

The land upon which the Skywalk is located is trust land held by the United States for the benefit of the Tribe. The Tribe and its officials lack the power to condemn federal property. See, e.g., 25 U.S.C. §§ 177-202 (Non-Intercourse Act, providing Indian lands not subject to alienation absent approval of the United States); 1A-2 NICHOLS ON EMINENT DOMAIN § 2.20 (discussing how Indian tribes have always been subject to the sovereignty of the United States and likewise subject to the power of federal eminent domain). But it is Plaintiff’s understanding that the Tribe’s condemnation intentions are limited to Plaintiff’s contract rights and not to the physical property of the Project. Even assuming that private contract rights are susceptible to the exercise of eminent domain, some basic protections of individual rights are required.⁴ For example, Rule 71.1 of the Federal Rules of Civil Procedure requires those exercising eminent domain to file a complaint and personally serve it on all affected persons, and allows the party

³ GCSD’s contract with SNW specifically states that “[t]he 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” See Agreement, § 15.4(b) (Exhibit A to the Declaration of David Jin, filed with the Injunction Motion).

⁴ No known Ninth Circuit, Arizona, or Hualapai Indian Tribe authorities allow for the exercise of eminent domain with respect to contract rights. In fact, Arizona law is generally much more restrictive as to eminent domain. See generally, A.R.S. §§ 12-1131 through 1138 (further clarifying the definition of “public use”). Indeed, governmental authority to unilaterally substitute itself in place of a private party to a contract would eviscerate the fundamental concept of meeting of the minds.

1 whose property is being taken to file an answer. *See* Fed. R. Civ. P. 71.1(c), (d) & (e). The
2 Rule also sets forth the specific procedures that must be followed in a condemnation action, and
3 provide for, among other things, a *trial* on the issue of compensation, and has specific
4 procedures to be followed before immediate possession can occur. *See* Fed. R. Civ. P. 71.1(h).
5 Moreover, the plaintiff in a condemnation case must post a bond. *See* Fed. R. Civ. P. 71.1(i).
6 Defendants have made no attempt whatsoever to comply with the letter or spirit of Rule 71.1.
7 Instead, Defendants have passed an ordinance – in a closed-door meeting – that purportedly
8 allows the Tribe to take immediate possession of GCSD’s contractual interest in the Skywalk,
9 without notice, without an opportunity to object or respond, and without a hearing before an
10 impartial tribunal to determine the legitimacy of Defendants’ actions.

11 The secret nature of the passage of the Ordinance also makes it invalid under the
12 Hualapai Indian Tribe Constitution. The Constitution requires that *any exchange of Tribal*
13 *assets* must be approved by the eligible voters of the Tribe voting at a special election. Ex. B,
14 Article V(n). “Taking” a multi-million-dollar asset certainly meets this threshold requirement
15 for community approval. But as the PR materials makes clear, the Council Defendants have
16 thus far intentionally kept the Hualapai community in the dark, and only intend to tell them
17 about this asset exchange after the fact with a cursory letter from Chairman Whatoname. Ex.
18 A., Jin Decl., ¶ 6 & Exhibit 2 thereto. Thus, the Council Defendants’ plan violates the Hualapai
19 Constitution.

20 Finally, under the United States Constitution, the Arizona Constitution, the Hualapai
21 Constitution, and the Indian Civil Rights Act, the Tribe must pay “just compensation” for any
22 property taken by eminent domain. Here, as discussed in the Injunction Motion, and supported
23 by evidence, the fair-market value of GCSD’s interest in the Skywalk exceeds \$100 million.
24 *See also* Ex. A, Jin Decl., ¶ 8. It is beyond dispute that the Tribe lacks the financial resources to
25 pay GCSD \$100 million, or anything approaching that amount.⁵ Therefore, even if Defendants
26

27 ⁵ Plaintiff has information indicating that the Council Defendants are hoping to find an appraiser
28 who will value GCSD’s contract rights at the vastly understated amount of less than \$15
million. Ex. A, Jin . Decl., ¶ 7.

1 had the *authority* to “condemn” Plaintiff’s contract rights – and they do not – the Tribe cannot
2 pay for them. This is yet another reason why the proposed “taking” is unlawful. See Injunction
3 Motion, pp. 8-12.

4
5 **2. GCSD will suffer irreparable harm and the balance of the**
6 **equities tips in its favor.**

7 Unless Defendants are enjoined from “condemning” GCSD’s Skywalk contract and
8 enjoined from taking “immediate” possession of its contractual rights, the company will suffer
9 irreparable harm. This harm includes the total loss of its business, the potential loss of
10 customers, the loss of key employees, the destruction of hard-earned goodwill, and damage to
11 its business reputation, which could in turn result in the loss of future business opportunities.
12 See Injunction Motion, pp. 12-15. By contrast, if an injunction is entered, Defendants will
13 suffer no hardship at all. The Court’s order will merely preclude them from taking actions that
14 are unlawful to begin with. While the injunction is in effect, GCSD will, of course, continue to
15 manage the Skywalk in the same skilled and dedicated manner it always has.⁶ Thus, an
injunction will merely maintain the *status quo*. See *id.* p. 15.

16 **3. The public interest favors the issuance of an injunction.**

17 The issuance of an injunction will likewise serve the public interest. The public has an
18 interest in ensuring that government officials do not abuse the enormous power with which they
19 are vested. The enormity of that power – and its abuse – could not be clearer in this case. The
20 Council Defendants intend to take, with the mere stroke of a pen, the entirety of substantial and
21 valuable contract interests from an entity over which they have no civil authority in the first

22
23 ⁶ The smear campaign outlined in the publicity plan is meritless. And even if there were some
24 dispute about Plaintiff’s establishment of acceptable restroom facilities (the primary point of
25 dissatisfaction indicated in the PR materials) – which there is not – the appropriate course of
26 action would be for SNW to follow the contract’s provisions for dispute resolution and
27 remedies, not for the Tribal government to attempt to expropriate the contract assets for
28 whatever low-ball number the Tribe determines it wants to pay. A party dissatisfied with
contract performance is limited to its contract remedies and review by the designated
adjudicative body. There is no governmental super-power, at any level, to “take” any contracts
that are formed within their territorial boundaries and insert the government in place of a party
to the contract.

1 instance. Curbing such a gross abuse of legislative and administrative power through the
2 issuance of an injunction will therefore serve the public interest. *See* Injunction Motion, p. 15.

3 **B. Defendants Have Willfully Evaded Service.**

4 Defendants, or their counsel, may complain that they have not yet been served with the
5 summons and complaint. In fact, the Chief of Police for the Tribe attempted to serve
6 Defendants at the April 4 meeting of the Council. But their attorney, Paul K. Charlton of
7 Gallagher & Kennedy, P.A., turned the police chief away, representing to him that his clients
8 could not be served because they are protected by “sovereign immunity.” Defendants are
9 wrong – they are not protected by sovereign immunity, and had no right to “refuse” service on
10 that basis.

11 By way of background, during the weekend of April 2-3, 2011, GCSD’s counsel, Mark
12 Tratos, contacted the Hualapai Tribe’s Chief of Police, Francis E. Bradley, Sr. *See Exhibit C,*
13 Declaration of Mark Tratos, at ¶ 3. Mr. Tratos asked Chief Bradley whether he would be
14 willing to serve the summons and complaint on Defendants. *Id.* Chief Bradley indicated that he
15 would be happy to do so if Mr. Tratos simply provided him with instructions as to how he
16 should proceed. *Id.* ¶ 4. On Monday, April 4, 2011, Mr. Tratos sent Chief Bradley an
17 instruction letter, the summonses, and copies of the complaints, and asked Chief Bradley to
18 please affect service. *Id.* ¶ 5. Chief Bradley advised Mr. Tratos that he would do so as promptly
19 as he was able. *Id.*

20 That same day, Chief Bradley attempted to serve one of the defendants, Mr. Whatoname,
21 at the Hualapai Tribal offices. *Id.* ¶ 6. When he arrived, a closed-door meeting of the Tribal
22 Council was taking place. *Id.* Chief Bradley was prevented from entering the meeting and was
23 told to wait. *Id.* Defendants’ counsel, Mr. Charlton, emerged from the meeting about ten
24 minutes later, and advised Chief Bradley that he could not serve the summonses and complaints
25 because the Defendants were protected by sovereign immunity. *Id.* ¶ 7. Mr. Charlton then
26 instructed Chief Bradley to return the papers to GCSD’s counsel. *Id.* ¶ 8. Further, Mr. Charlton
27 stated that if GCSD’s counsel wished to obtain a copy of the police report of the incident, Chief
28

1 Bradley was required to first submit the request to *Mr. Charlton* before a copy of the report
2 could be provided to GCSD's counsel. *Id.*

3 Mr. Charlton's representation to Chief Bradley was not only legally incorrect, it was
4 completely improper. The Council Members have no right to refuse service of federal court
5 subpoenas directed to them individually based on sovereign immunity. It is true that Indian
6 tribes are immune from lawsuits or court process in both state and federal court unless
7 "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg.*
8 *Tech., Inc.* 523 U.S. 751, 754 (1998). However, sovereign immunity does not extend to
9 members of the tribe just because of their status as members, *see Puyallup Tribe v. Dep't of*
10 *Game*, 433 U.S. 165, 172-173 (1977), or to tribal officials alleged to have acted outside the
11 bounds of their lawful authority. *See, e.g., Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572,
12 574-575 (10th Cir. 1984). Rather, federal courts have extended the doctrine of *Ex parte Young*,
13 209 U.S. 123 (1908), to allow suits against tribal officials, at least for declaratory or injunctive
14 relief. *Tenneco Oil*, 725 F.2d at 574-575. Indeed, in *Santa Clara Pueblo v. Martinez*, the
15 Supreme Court squarely addressed this issue, and specifically stated that tribal officials are not
16 protected by tribal immunity when acting beyond the scope of their authority. 436 U.S. 49, 59
17 (1978); *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505,
18 514 (1991) ("[w]e have never held that individual agents or officers of a tribe are not liable for
19 damages in actions brought by the State").

20 Here, the validity of the Council Defendants' actions has been expressly challenged.
21 GCSD alleges in its complaint that the Council Defendants, by taking steps to condemn the
22 contractual rights of a non-Indian, are acting beyond the scope of their legal authority. *See, e.g.,*
23 Complaint ¶¶ 1, 16, 81 & 83. As a result, no sovereign immunity attaches. *See Burlington N. R.*
24 *Co. v. Blackfeet Tribe*, 924 F.2d 899, 901-902 (9th Cir. 1991), *overruled on other grounds by Big*
25 *Horn County Elec. Coop, Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). This rule could not
26 be more clear in the Ninth Circuit:

1 In determining whether *Ex Parte Young* is applicable to overcome the tribal
2 officials' claim of immunity, the relevant inquiry is only whether BNSF has
3 *alleged* an ongoing violation of federal law and seeks prospective relief. *See*
4 *Verizon Md., Inc.*, 535 U.S. at 645-46. Clearly it has done so. BNSF's complaint
5 states that "Defendants have acted, have threatened to act, or may act under the
6 purported authority of the Tribe, to the injury of BNSF and in violation of federal
7 law and in excess of federal limitations placed on the power of the Defendants" by
8 seeking to enforce an unauthorized tax against BNSF that the Tribe lacks the
jurisdiction to impose. Compl. P 5. BNSF seeks a declaration that the tax is
invalid as applied to its right-of-way and a permanent injunction prohibiting the
tribal officials from enforcing the tax against it. Compl. P 1. This is clearly the
type of suit that is permissible under the doctrine of *Ex Parte Young*.

9 *Burlington N. & Santa Fe R. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007).

10 Mr. Charlton's statement to law enforcement – that the Council Defendants could
11 "refuse" service based on sovereign immunity – was incorrect. Accordingly, Defendants should
12 not be heard to complain that they have not been served with process. Chief Bradley was at the
13 meeting at which the Council Defendants were present, and was prepared to hand each of them
14 a copy of the summons and complaint. Were it not for counsel's improper interference, Chief
15 Bradley could have accomplished service.

16 **III. CONCLUSION**

17 Based on the reasons outlined above, and those set forth in GCSD's Injunction Motion,
18 the Court should temporarily restrain Defendants, and each of them, from taking any steps to
19 enforce the proposed "condemnation" of GCSD's Skywalk management contract. A proposed
20 temporary restraining order has been lodged with this motion.

21 ///

22 ///

23 ///

1 RESPECTFULLY SUBMITTED this 12th day of April, 2011.

2 GREENBERG TRAURIG, LLP

3
4 By: /s/ Pamela M. Overton

Pamela M. Overton

5 Aaron C. Schepler

6 By: /s/ Mark G. Tratos

7 Mark G. Tratos

8 By: /s/ Troy A. Eid

9 Troy A. Eid

10 Attorneys for Plaintiff

EXHIBIT 11

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14 Email: EidT@gtlaw.com

15 Attorneys for Plaintiff

16 IN THE UNITED STATES DISTRICT COURT

17 FOR THE DISTRICT OF ARIZONA

18
19 Grand Canyon Skywalk Development,
20 LLC, a Nevada limited liability
company,

21 Plaintiff,

22 vs.

23
24 Charles Vaughn; Waylon Honga; Ruby
Steele; Candida Hunter-Yazzie; Wilfred
25 Whatoname, Sr.; Richard Walema;
Wynona Sinyella; Sheri Yellowhawk;
26 Barney Imus; Wanda Easter; and Jaci
Dugan,

27
28 Defendants.

No. 3:11-cv-08048-DGC

**DECLARATION OF DAVID JIN IN
SUPPORT OF PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING
ORDER**

1 I, DAVID JIN, declare as follows:

2 1. I declare under penalty of perjury under the laws of the United States of
3 America that the following is true and correct.

4 2. I am over the age of eighteen years and have never been convicted of a felony.
5 I submit this Declaration in support of Plaintiff's Motion for Temporary Restraining Order.

6 3. I am an owner and manager of Plaintiff Grand Canyon Skywalk Development,
7 LLC ("GCSD") which is a non-tribal Nevada limited liability company, and the manager of
8 the Skywalk, a glass viewing platform extending out over the Grand Canyon at Eagle Point
9 on the Hualapai Indian Reservation in Arizona.

10 4. I have received a copy of a signed ordinance (the "Takings Ordinance"), a true
11 and correct copy of which is attached as Exhibit 1, hereto.

12 5. I have many concerns with the Takings Ordinance including but not limited to:

13 a) The Takings Ordinance seems to be tailored to allow the taking of
14 GCSD's interests in the Skywalk without appropriate safeguards of due
15 process;

16 b) The Takings Ordinance prohibits independent judges from hearing a
17 takings case, allowing only the full time tribal judges appointed (and subject to
18 immediate termination) by the Tribal Council to hear a takings case;

19 c) The Takings Ordinance purports to allow the taking of property from
20 non-Indians;

21 d) Under the Takings Ordinance, even before a taking, the Tribe may
22 exclude any persons from exercising their own property rights and the
23 ordinance allows no cause of action for improperly excluding a defendant;

24 e) Under the Taking Ordinance, the Tribal Council may take immediate
25 possession of property without notice by executing a Declaration of Taking;
26
27
28

1 f) Upon the filing of a Declaration of Taking, the Tribe substitutes as the
2 party to a contract and the defendant is no longer be a party thereto – I feel this
3 was done to prevent the uncovering of improprieties in 2008, 2009 and 2010
4 by members of the Tribe that would be occasioned by the arbitration demand
5 GCSD has filed and to prevent GCSD from obtaining all past due amounts
6 under its contracts;

7
8 g) The Tribe does not have to show it has the money to pay for a taking or
9 to deposit it with any court. It can have up to 180 days after any decision to pay
10 and can get extensions under the Takings Ordinance. If the Tribe cannot pay,
11 it can just dismiss the case, without bearing the financial consequences of the
12 disruption. Realistically, if applied to GCSD it would destroy our business,
13 with no recourse on GCSD's part. The Tribe could then start the whole process
14 over again in one year;

15
16
17 h) The Takings Ordinance would prohibit introduction of the Declaration
18 of a Taking and evidence of the amount of money deposited by the Tribe, if
19 any, from a court hearing; and

20
21 i) Any potential defendant would be penalized if it gets a new trial and
22 does not win more, with the full cost of a new trial plus a penalty of 30% being
23 charged against it, whereas the Tribe does not have any such onerous
24 provision.

25
26 6. Attached is what appears to be the outline of a media campaign to destroy my
27 company's reputation and assist the Tribe in taking GCSD's rights in the Skywalk, a copy of
28 which is attached hereto as Exhibit 2. My reading of this media campaign outline indicates to

1 me that the Tribe intends to take GCSD's interests in the Skywalk during the week of April
2 11, or April 18, 2011, and to defame GCSD to justify the taking to its members and the
3 public at large.

4 7. I also understand that the Hualapai Tribal Council is seeking to find an
5 appraiser who would give them an appraisal for less than \$ 15 million for GCSD's
6 contractual interests in the Skywalk.

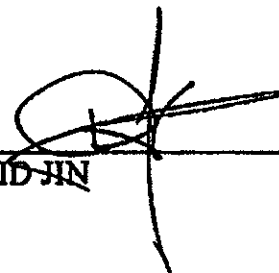
7 8. It is my good faith belief that the fair market value of GCSD's interests in the
8 Skywalk is in excess of \$100 million.

9 9. I am very fearful and anticipate that without an order of this Court to maintain
10 the status quo, the Hualapai Tribe (the "Tribe") through its tribal council, its tribally owned
11 corporation, Sa Nyu Wa ("SNW"), and its administrative employees is going to immediately
12 seize operation of the Skywalk, banish GCSD's employees from the project, and prohibit
13 GCSD from managing the Skywalk as is GCSD's contractual right.

14 10. These anticipated actions of the Tribe would destroy GCSD's business,
15 resulting in the loss of its workforce, damage to GCSD's reputation, and otherwise
16 irreparably harm GCSD's ability to continue operations, without the Tribe having the ability
17 to pay just compensation for the improper taking.

18 Dated this 12 day of April, 2011.

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DAVID JIN

EXHIBIT 1

**HUALAPAI TRIBAL COUNCIL
RESOLUTION NO. 20-2011
OF THE GOVERNING BODY OF THE
HUALAPAI TRIBE OF THE HUALAPAI RESERVATION
PEACH SPRINGS, ARIZONA**

(Enactment of Law and Order Code Section 2.16, Eminent Domain)

WHEREAS, the Hualapai Tribal Council is the legislative body of the Hualapai Tribe and is empowered by inherent sovereign rights and powers, and the Constitution of the Hualapai Indian Tribe to exercise eminent domain over all property subject to the jurisdiction of the Hualapai Tribe; and

WHEREAS, it has been the law, customs and tradition from a time beyond memory that the Hualapai People, acting through their leaders, may take the property of an individual within its territory for the public good, provided a fair trade is made for such property; and

WHEREAS, the Hualapai Tribal Council is empowered by the Constitution of the Hualapai Indian Tribe to take any and all actions necessary and proper to the exercise of its powers and duties under the Constitution, and those powers and duties vested in the Tribal Council through its inherent sovereignty; and

WHEREAS, the Hualapai Tribal Council has a duty under the Constitution of the Hualapai Indian Tribe and the traditions of the Hualapai People to ensure just compensation for the taking of private property for a public use; and

WHEREAS, to ensure due process and equal protection under the law, the Hualapai Tribal Council finds it necessary to create procedures for the exercise of its listing and inherent power of eminent domain.

NOW, THEREFORE, BE IT RESOLVED that the Hualapai Tribal Council assembled this 4th day of April, 2011, does hereby approve and enact Section 2.16 of the Hualapai Tribe Law and Order Code, attached hereto as Ex. A; and

BE IT FINALLY RESOLVED that Section 2.16 shall go into effect immediately upon passage by the Tribal Council.

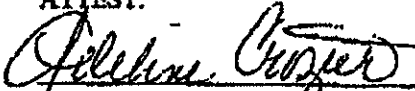
CERTIFICATION

I, the undersigned, as Chairman of the Hualapai Tribal Council, hereby certify that the Hualapai Tribal Council of the Hualapai Tribe is composed of nine (9) members of whom (9), constituting a quorum, were present at a Special Council meeting held on the 4th day of April, 2011; and that the foregoing resolution was duly adopted by a vote of (9) in favor, (0) opposed, (0) not voting, (0) excused, pursuant to authority of Article V, Section (a) of the Constitution of the Hualapai Tribe, approved March 13, 1991.



Wilfred Whatoname, Sr., Chairman
HUALAPAI TRIBAL COUNCIL

ATTEST:



Adeline Crozier, Assistant Secretary
HUALAPAI TRIBAL COUNCIL

Sec. 2.16

A. Definitions

1. Throughout this Section, "public use" means any of the following:

- a. The possession, occupation, use and/or enjoyment of property by the general public or the Tribe;
 - b. The use of property for the creation or functioning of utilities;
 - c. The acquisition of property to eliminate (i) a threat or hazard to public health or safety, (ii) a blight or detriment to an area possessed, occupied, used and/or enjoyed by the general public, or (iii) an obstacle or hindrance, whether tangible or intangible, to the possession, occupation, use and/or enjoyment by the general public of property belonging to the Tribe, caused in any such case by the property in its current condition or by an encumbrance, tangible or intangible, affecting such property, including elimination by means of (a) the removal of a structure that is or is foreseeably beyond repair at a reasonable expense or unfit for human habitation or use, (b) completion of a structure in order to facilitate human habitation or use, and/or (c) the removal of the obstacle, hindrance or encumbrance;
 - d. The acquisition of abandoned property; or
 - e. The public benefit of economic development, including an increase in tax base, tax revenues, general revenues, tourism, employment or general economic health.
2. Throughout this Section, "take," "taken" and "taking" mean the transfer of ownership or use from a property owner to the Tribe.
3. Throughout this Section, "include," "included" and "including" denote a partial definition, by way of illustration and not by way of limitation, and have the same effect as if the phrase "without limitation" (or any variation thereof) were added thereto.
4. Throughout this Section, "Tribe" means and refers to the Hualapai Indian Tribe, a federally recognized Indian Tribe, its governmental departments and agencies, and/or its tribally owned businesses. This definition shall not be construed to limit the definition of "Tribe" or its variants in other portions of the Hualapai Law and Order Code.

B. Purposes For Which Eminent Domain May Be Exercised

Subject to the provisions of this Section, the right of eminent domain may be exercised by the Tribe, through action of the Tribal Council, for the following uses:

1. All public uses authorized by the government of the United States or the Tribe.
2. Buildings, grounds and other facilities for the use of the Tribe.
3. All property interests, tangible or intangible, for any use of the Tribe, or any other use authorized by the Tribal Council.
4. Sanitary sewage systems, including collection, transport, storage, treatment, dispersal, effluent use and discharge.
5. Drainage and flood control systems, including collection, transport, diversion, storage, detention, retention, dispersal, use and discharge.

6. Water systems for domestic, industrial, irrigation, tribal government or fire protection purposes, including production, collection, storage, treatment, transport, delivery, connection and dispersal.

7. Electrical systems, including generation, storage, transmission, and distribution of electrical power.

8. Telecommunications systems, including all forms of telecommunications equipment, towers, receivers, transmitters, lines, antennae, and dishes.

9. Highways, streets, roadways and parking facilities, including all areas for vehicular use for travel, ingress, egress and parking.

10. Areas for pedestrian, equestrian, bicycle or other nonmotor vehicle use for travel, ingress, egress and parking.

11. Pedestrian malls, parks, performance venues, views, vistas, outlooks and other prospects, recreational facilities, stadiums, other structures, facilities and improvements, and open space areas for use of members of the public for entertainment, assembly, tourism and recreation.

12. Landscaping, including earthworks, structures, lakes and other water features, plants, trees, and related water delivery systems.

13. Lighting systems.

14. Traffic control systems and devices, including signals, controls, markings and signage.

15. Wharves, docks, piers, ramps, marinas, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads and highways.

16. Railroads, railways, transit lines, and trolley lines, including rights of way, station grounds, pits, yards, sidetracks and other necessary facilities for the foregoing.

17. Pipe lines used for carrying gas, petroleum, petroleum products or any other gas or liquid.

18. All transportation, transmission and intercommunication facilities of public service agencies.

19. Aviation fields.

20. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines, and outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines, or any place for the flow, deposit or conduct of tailings or refuse matter from their several mines.

C. Estates In Land Subject to Condemnation

All estates and interests, including rights, assignments, easements, encumbrances and other interests, in, on or to land located on or within the boundaries of the Hualapai Reservation are subject to be taken for public use.

D. Private Property Subject to Condemnation

In addition to the estates and interests in land in subsection C, estates and interests in private property which may be taken includes:

1. All property located on or within the boundaries of the Hualapai Reservation belonging to any person.
2. All property subject to the jurisdiction of the Tribe having an effect on the Hualapai Reservation, the Tribe or a Hualapai Tribal Member.
3. All tangible or intangible property, including intangibles such as contracts, franchises, licenses, leases, patents, trade routes, and other types of property, including contracts pertaining to the possession, occupation, use, design, development, improvement, construction, operation and/or management of property, including property owned by the Tribe.
4. Property appropriated to public use.
5. All other classes of private property not enumerated may be taken for public use.

F. Right of Tribe to Enter, and Examine, Survey, Inspect or Inventory

1. Where land is required for public use, the Tribe, through its agent(s), may enter upon the land, and make examinations, surveys and maps thereof.
2. Where property other than land is required for public use, the Tribe, through its agent(s), may subject the property to examination, inventory or inspection, including any property that is associated with a contract, franchise, license, lease, patent, trade route or other type of property which is subject to being taken. The person in control of such property shall cooperate with the Tribe, or its agent(s), in making the property available for examination, inventory or inspection.
3. A person authorized by the Tribal Council to seek to acquire property for any of the public uses authorized by this Section is an agent of the Tribe. The Tribe, or its agent(s), may exclude other persons, including the person in control of the property, from the property or portions thereof as and to the extent deemed necessary or appropriate by the Tribe, or its agent(s), to facilitate any examination, survey, mapping, inventory or inspection.
4. No one shall have a cause of action against the Tribe, or its agent(s), for exercising the authority granted under this subsection.
5. The Tribal Council may, but is not required to, enforce this subsection through judicial process or its inherent contempt power. The Tribal Council is not required to obtain a writ, subpoena or other judicial process prior to exercising its rights under this subsection. If deemed necessary or appropriate, the Tribal Council may, but is not required to, issue one or more subpoenas and/or enlist the assistance of the Hualapai Nation Police Department in exercising its rights under this subsection.

F. Actions for Condemnation: Declaration of Taking

1. All actions for condemnation shall be brought as other civil actions in the Hualapai Tribal Court.
2. At the time of filing the complaint, or at any time after filing the complaint, the Tribe may file with the tribal court a declaration of taking, signed by the Tribal Chairperson, the Tribal Vice-Chairperson, or the Tribal Council's authorized agent, declaring that the property described in the Complaint is taken for the use of the Tribe.

3. The declaration of taking shall contain or have annexed to it:

a. A statement of the public use for which the property is taken, which declaration may take the form solely of citing the pertinent category or categories of public use set forth in subsection A of this Section;

b. A description of the property sufficient to identify it;

c. A statement of the estate or interest in the property taken, which statement may be identical or similar to the description provided pursuant to paragraph 3(b) of this subsection; and

d. A statement of the amount of money estimated by the Tribe to be just compensation for the property taken.

e. The declaration of taking is not required to, and need not, contain or have annexed to it any other statement or other material.

4. On filing the declaration of taking:

a. title to the estate or interest specified in the declaration of taking shall vest in the Tribe, and such vesting shall include that, if the property is an estate or interest in an intangible such as a contract, franchise, license, lease, patent, trade route or other types of property, the Tribe shall be 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, and the defendant shall no longer be a party thereto;

b. the property is condemned and taken for the use of the Tribe;

c. the parties in possession of the property shall be deemed to have surrendered possession to the Tribe, and any attempt by such parties to remain in possession of the property or otherwise to exert control over or with respect to the property shall be deemed a trespass against the Tribe; and

d. the right to just compensation vests in the person(s) entitled to just compensation.

5. The Court shall not require the Tribe to post a bond or deposit any money as a condition of filing a declaration of taking or initiating a condemnation proceeding; however, if the Tribal Council, in its sole and absolute discretion, deems a deposit necessary or appropriate under the circumstances, the Tribe may elect to deposit in the court the amount of estimated compensation listed in the declaration of taking.

a. The making of a deposit shall not be a condition to the effectiveness of matters set forth in subsections F(4)(a) through (4)(d) of this Section.

b. The absence of a deposit at the time of the filing of the declaration of taking shall not preclude the Tribe from subsequently electing to make such a deposit.

6. Within ten (10) days of the filing of the declaration of taking, the defendant may file a motion to dismiss the condemnation action and declaration of taking solely for the purpose of challenging the validity of the taking as not being for a public use.

a. The motion to dismiss and hearing on the motion to dismiss shall be limited to a judicial determination on whether the taking is for a public use. The motion to dismiss shall not contain and the court shall not adjudicate any other challenge or issue at this stage of the

proceeding, including any claim that the defendant is not a real party in interest, that the defendant does not hold title to any estate or interest in the property, or that there are other persons who might hold an estate or interest in the property or might otherwise be interested in the taking.

b. Within twenty (20) days of the filing of the motion to dismiss, the Tribe may respond to the motion to dismiss.

c. The court shall set a hearing on the matter, which hearing shall be held within forty (40) days of the filing of the declaration of taking, and the court shall rule on the matter within sixty (60) days of the filing of the declaration of taking. The taking shall be presumed in all cases to have been for a public use. The defendant(s) shall have the burden of proving and establishing by clear and convincing evidence facts rebutting the presumption.

d. During the period of defendant(s)' challenge to the taking as not being for an authorized public use, the Tribe shall hold a defeasible title to the property listed in the declaration of taking. The Tribe shall have the full right and authority to possess and use the property, including acting as the party to the contract or other intangible property, described in the declaration of taking. The Tribe's right and authority to possess and use the property, including acting as the party to the contract or other intangible property, described in the declaration of taking shall not be delayed or prevented through any court action.

e. If, after a hearing, the court determines that the taking is for a public use, fee simple absolute title to the property described in the declaration of taking shall vest in the Tribe and, in the case of a contract or other intangible property, the Tribe shall be the party thereto in the full placement and stead of the defendant(s), all as provided in paragraph 4(a) of this subsection, and the right to just compensation shall vest in the defendant(s).

f. No subsequent proceedings shall affect the title acquired by the Tribe to the property, or its status as a party to the contract or other intangible property, described in the declaration of taking.

7. Just compensation shall be determined and awarded as prescribed in subsection L of this Section.

a. If compensation finally awarded is more than the amount of money, if any, deposited in the court at the time of the filing of the declaration of taking, the court shall enter judgment against the Tribe in the amount of the deficiency.

b. If compensation finally awarded is less than the amount of money deposited in the court at the time of the filing of the declaration of taking, the court shall immediately refund the excess to the Tribe.

8. If the Tribe elected to make a deposit as provided in subsection F(5) of this Section, on application of the defendant, the court may order that any part of the money deposited in the court, if any, be paid immediately to the defendant as compensation for the taking, subject to the following conditions:

a. The application must contain (i) a statement of the defendant's interest in the property described in the declaration of taking, how much money the defendant is seeking as compensation for that interest, a representation that the defendant has not conveyed or become obligated to convey the defendant's interest in such property to any other person, and the names and addresses of all other persons having an interest in such property, and (ii) an indemnity in form and substance satisfactory to the Tribe in its sole and absolute discretion regarding the true and complete nature of such statement.

b. In addition to the application, the defendant shall file with the court a stipulation that the money applied for constitutes full and just compensation for the taking.

c. Payment of the money to the defendant shall constitute a complete settlement of the case with respect to that defendant, a full relinquishment of that defendant's claims arising in connection with the action or proceeding and of that defendant's right, title and interest in and to the property described in the declaration of taking, and an abandonment of that defendant's defenses to the action or proceeding, other than the right to the just compensation described Section 2.16(F)(7)(b).

d. Any other defendant having an interest in the property described in the declaration of taking may contest the amount of compensation sought by the defendant filing an application for an award out of the deposited funds. The court shall determine the respective rights of the defendants seeking compensation for the taking.

9. On the filing of the declaration of taking, the court may make just and equitable orders, not inconsistent with the other provisions of this subsection, with respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges.

10. Any information contained in the declaration of taking and the amount of money, if any, deposited by the Tribe into the court shall not be introduced in evidence or used to the prejudice of any party on the trial of the action.

11. In the event of any inconsistency or conflict between subsection F of this Section and any other provision of this Section, subsection F shall control and govern the matter.

G. Complaint

The complaint shall set forth:

1. The Tribe and, if applicable, the name of the Tribe's agent(s), as plaintiff.
2. The names of all persons having an interest in the property, if known, or a statement that they are unknown, as defendants.
3. A statement of the right of the Tribe, including a statement of the public use for which the property is sought, which statement may take the form solely of citing the pertinent category or categories of public use set forth in subsection A of this Section.
4. A general description of the property subject to condemnation sufficient to identify it.
5. A statement of the estate or interest in the property taken, which statement may be identical or similar to the description provided pursuant to paragraph 4 of this subsection.
6. The Tribe is not required to, and need not, plead or prove any other matter, including that the public use is "necessary."

H. Joint or Separate Actions; Consolidation

All separate property required for the same public use may be included in the same or separate proceedings, at the election of the Tribe, but the court may consolidate or separate them for convenience of the parties.

I. Summons; Contents; Service

1. Upon receiving the Complaint for filing, the clerk of the court shall follow the procedures for issuance of a summons and notice of hearing prescribed by Sections 4.4 and 4.5 of this Code.

2. Notice to defendants shall include a statement for them to appear and show cause why the property described should not be condemned as prayed for in the Complaint.

3. Failure of the clerk of the court to follow any of the specialized procedures in this Section shall not constitute grounds for dismissal of the action or affect the consequences of a declaration of taking; however, the court may remedy the procedural error in a manner equitable to the parties.

1. Right to Defend Action

1. All persons occupying, or having or claiming an interest in any of the property described in the Complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend such interest in the property or damages as if named in the complaint.

2. This Section provides the sole and exclusive means to defending one's interest in any of the property described in the Complaint. The Court shall issue no injunction, stay or other order, or provide any right or remedy not provided for in this Section.

2. Powers of the Court; Precedence over Other Actions

The court shall hear or adjudicate actions arising under this Section. Only judges, or persons appointed to full-time positions on the Hualapai Tribal Court may adjudicate actions arising under this Section.

The court shall hear and determine all adverse or conflicting claims to the property condemned and the claim of damages therefor, and shall determine the respective rights of the parties seeking condemnation of the same property.

3. The court shall, at the request of any party, give the condemnation action precedence over all other actions.

3. Ascertainment and Assessment of Value, Damages and Benefits

1. The court shall ascertain and assess:

- a. The value of the property sought to be condemned.
- b. The value of all improvements on or to the property, if applicable.
- c. The value of each and every separate estate or interest in the property.
- d. The value of each parcel or portion, and each separate estate or interest in the parcel or portion, if the property consists of different parcels or portions.
- e. The damages that will accrue to the portion of the property not sought to be condemned by reason of its severance from the portion sought to be condemned, if the property sought to be condemned constitutes only a part of a larger whole.
- f. How much the portion not sought to be condemned and each estate or interest in such portion will be benefited, if at all, by the condemnation proposed by the Tribe. If the benefit is equal to the damages assessed, the owner of the parcel shall be allowed no

compensation except for the value of the portion taken. If the benefit is less than the damages so assessed, the benefit shall be deducted from the damages, and the remainder shall be the only damages allowed in addition to the value.

g. Any effect on the value of the property due to the condition of improvements on the property, or of the defendant's performance or failure to perform all of its obligations pertaining to or arising in connection with the property

2. As far as practicable, compensation shall be assessed for each source of damage separately. In ascertaining and assessing value, the court shall take into all of the applicable items listed in subsection 1(1) of the Section.

3. Value shall be determined by ascertaining the most probable price estimated in terms of cash in United States dollars or comparable market financial arrangements that the property would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser buying with knowledge of all of the uses and purposes to which it was adapted and for which it is capable.

4. The defendant shall have the burden of proving the amount of just compensation.

to Compensation and Damages: Limitation

1. For the purpose of assessing compensation and damages, the right to compensation and damages shall be deemed to accrue at the date of the summons, and its actual value at that date shall be the measure of compensation and damages.

2. If there is a declaration of taking filed, the compensation and damages awarded shall bear interest from the date of the declaration of taking at the weekly average one-year constant rate (nominal) Treasury yield, as published by the United States Federal Reserve Bank. The court shall not be allowed on as much of the compensation as has been deposited with the court at the time of the filing of the declaration of taking. Amounts deposited with the court shall not be charged with commissions, fees, or poundage.

3. No improvements placed upon or made in connection with the property, and no performance by defendant of any of its obligations pertaining to or arising in connection with the property, subsequent to the date of service of the summons or, if later, filing of the declaration of taking shall be included in the assessment of compensation or damages.

N. Payment of Compensation: Effect of Failure to Pay

1. Payment of compensation and damages may be made to a defendant or defendants entitled thereto, or the money may be deposited with the court and distributed to the defendant or defendants entitled thereto.

2. If the Tribe does not pay the compensation and damages ordered by the court within one hundred eighty (180) days of such an order, upon a showing to that effect, the court shall set aside and annul the entire proceedings, and restore possession and title of the property to defendant or defendants, if possession has been taken by the Tribe.

3. The Tribe shall be granted extensions of time for payment of compensation for good cause shown.

O. Final Order of Condemnation: Vesting of Property

1. When the final judgment has been satisfied, the court shall make a final order of condemnation, describing the property condemned and the purposes of the condemnation.

2. Upon issuance of the final order of condemnation, all interest in the property described shall vest in the Tribe for the purposes therein specified.

3. This subsection does not apply when the Tribe has filed a declaration of taking.

P. Possession by the Tribe After Judgment or Pending Appeal; Receipt of Payment as Abandonment; Custody of Money Paid Into Court; Costs of New Trial

1. Unless a declaration of taking has been filed, at any time after judgment is entered, or pending an appeal from the judgment, when the Tribe has paid into court for defendant or defendants the full amount of the judgment, and such other amounts as required by the court as a fund to pay further damages and costs which may be recovered in the proceedings, as well as all damages that may be sustained by defendant or defendants if for any cause the property is not finally taken for public use, the court may, upon notice of not less than ten days, authorize the Tribe, if already in possession, to continue therein (including, in the case of a contract or other intangible property, to continue as the party thereto in the full place and stead of the defendant(s)), or if not, then to take possession of and use the property (including, to act as the party to and otherwise perform such contract or other intangible property) until final conclusion of the litigation.

2. The defendant or defendants who are entitled to the money paid into court upon any judgment may demand and receive the money at any time thereafter upon an order of the court. The court shall, upon application, order the money so paid into court delivered to the party entitled thereto upon his filing with the Court either a satisfaction of the judgment or a receipt for the money, as well as a stipulation fully relinquishing that defendant's claims arising in connection with the action or proceeding and that defendant's right, title and interest in and to the property, and abandoning all defenses to the action or proceeding except as to the amount of damages to which he may be entitled if a new trial is granted. Such payment shall be deemed an abandonment of all defenses and claims, except the party's claim for greater compensation.

3. The money paid into court on final judgment may be placed by order of court in the custody of the clerk to be held or disbursed upon order of court.

4. When a new trial is granted upon application of a defendant, and he fails upon the trial to obtain greater compensation than was allowed upon the first trial, the costs of the new trial, plus a penalty in the amount of thirty percent (30%) of such costs, shall be taxed against him.

Q. Costs and Fees

Except as provided in Section 2.16(f)(4), each party shall be responsible for its own costs and fees, and no party shall be entitled to recover such costs and fees from any other party.

R. Dismissal of Condemnation Action

1. If the Tribe causes a condemnation action under this article to be dismissed without prejudice before payment of the compensation and damages awarded the defendant by the court, the Tribe shall not initiate any eminent domain proceeding with respect to the same property for the same or a related project for at least one year after the date of the verdict or judgment.

2. At any time after service of the Complaint and before the court renders judgment on the issues of compensation and damages, the Tribe may dismiss the action without prejudice upon motion to the court.

3. The Tribe may not dismiss the condemnation action if a declaration of taking has been filed unless the defendant(s) have agreed to the just compensation offered by the Tribe as a settlement of the action or the Tribe revokes the declaration of taking prior to the defendant(s) receiving just compensation.

5. Applicability

If a conflict arises between this Section and any other law, this Section controls.

7. Severability

If any provision of this Section or its application to any person or circumstance is held invalid, that invalidity does not affect other provisions or applications of this Section that can be given effect without the invalid provision or application, and to this end the provisions of this Section are severable.

11. Sovereign Immunity

Nothing in this Section shall be construed as a waiver of the Hualapai Tribe's inherent sovereign immunity, or any other immunity or privilege.

EXHIBIT 2



HUALAPAI NATION: SKYWALK AND BEYOND

The Hualapai Nation has a fascinating and important story to tell, and we're honored that the tribe has chosen us to help in that endeavor. The Hualapai people have a proud history of perseverance which serves at the core of their existence. They are now facing a significant public relations opportunity -- and some considerable challenges -- with their planned legal action against David Jin. It's imperative that we immediately establish the tribe's public brand with key messages, offer communications coaching to tribal spokespeople, and engage newspaper, TV and radio media outlets within the next 4-6 weeks. The following is a brief outline based on our initial knowledge of the project, and the information will be revised following our meeting with the Tribal Council.

Narrative

Based on our initial observations and meetings with the Gallagher & Kennedy team, we have developed a narrative to guide our communications strategy. This is simply a draft that will be updated immediately following our first meeting with tribal leaders. Keywords and phrases that should be incorporated into our talking points have been underlined.

The Hualapai Nation is a community of proud, hard-working Native Americans who value their rich history and legacy. For many years, the Hualapai endured financial challenges and suffered from a lack of tourism on their magnificent but very remote land along the Grand Canyon. Still, this resilient tribe built a strong community for its people and embraced opportunities to grow.

About 10 years ago, Las Vegas businessman David Jin strolled into Peach Springs with a clever idea: build a glass-bottom walkway over the Hualapai's land along the Grand Canyon and create an internationally renowned tourist attraction. The deal seemed straightforward and genuine enough: Jin would finance construction of the Skywalk, a visitors' center and gift shop. In exchange, the Hualapai Nation would award Jin the management contract for Skywalk and the surrounding facilities. Revenue generated by the Skywalk and the gift shop would benefit the Hualapai Nation's elementary school, police and fire departments, and help the tribe improve the quality of life for its members. In 2007, the Skywalk opened to much fanfare and large crowds that flocked to the site.

PRIVILEGED AND CONFIDENTIAL



When something seems too good to be true, it usually is. Sadly, the Hualapai people have learned that lesson the hard way – at the hands of David Jin.

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.

Timeline of Next Steps

Week of April 4

- Meet with Hualapai Tribal Council
 - Review and approve letters to public, tribal members
- Tour Skywalk and facilities
- Finalize key messages to be used in media interviews, speeches
- Schedule communications coaching/media training session for week of 4/11

Week of April 11

- On-camera, advanced communications coaching/media training
- Shoot photos, video of visitors' center, port-a-johns, other incomplete areas
- Film amateur-style, Flip cam videos of incomplete areas for potential YouTube postings
- Contact correspondent Marc Lacey with the New York Times (after initial meeting with Hualapai Tribal Council)

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- Tape testimonials with Tribal Council and members expressing their disappointment with Jin's incomplete build:ngs. (Testimonials will be edited/reviewed and considered for posting on YouTube)
- After media training, pitch key reporters from:
 - Arizona Republic
 - Las Vegas Review Journal
 - Las Vegas Sun (editorial writer)
 - Associated Press
 - Arizona Daily Sun

Week of April 11

- Assist Hualapai Tribal Council with improving communications to members, including discussion of enhancing newsletter, blog and website.
- Pitch media outlets including:
 - KJZZ-FM (Phoenix NPR affiliate)
 - KNPR-FM (Las Vegas NPR affiliate)
 - Las Vegas Weekly
 - Reuters
 - Los Angeles Times
- Write op-ed for Hualapai President Wilfred Whatoname Sr. that will be submitted to Las Vegas Review Journal, Arizona Republic and rural newspapers

Week of April 18

- Pitch media outlets including:
 - KVBC-TV (Las Vegas NBC affiliate)
 - KTNV-TV (Las Vegas ABC affiliate)
 - KLAS-TV (Las Vegas CBS affiliate)
 - KVVU-TV (Las Vegas Fox affiliate)
 - KNXV-TV (Phoenix ABC affiliate)
 - KPNX-TV (Phoenix NBC affiliate)
 - KPHO-TV (Phoenix CBS affiliate)
 - KSAZ-TV (Phoenix Fox affiliate)
- Write and coordinate letters to newspaper editors from Hualapai tribal members

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April xx, 2011

Members of the Hualapai Nation:

By now, you may have heard news that the Tribal Council is considering legal action involving the Skywalk to protect our investment. I would appreciate the opportunity to provide you some details about our plans and why these critical steps are being taken.

Our community is filled with proud, hard-working people who value the rich history and legacy of the Hualapai Tribe. Many of our members played an integral role in the Skywalk's creation and success. Because of you, we welcome visitors from around the world to our magnificent land and give them the opportunity to view the Grand Canyon from a unique perspective.

As you know, we entered into an agreement with Las Vegas businessman David Jin to develop the Skywalk and manage the project. The deal seemed straightforward and genuine; Jin would finance construction of the Skywalk, a visitors' center and gift shop. In exchange, we awarded Jin the management contract for Skywalk and the surrounding facilities. Revenue generated by the Skywalk and the gift shop would benefit the Hualapai Nation's elementary school, police and fire departments, and help us improve the quality of life for our members – especially our youth. In 2007, the Skywalk opened to much fanfare and large crowds that flocked to the site.

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 our community. 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.

We have repeatedly asked Jin to keep his promises and complete the work. Because of his failure to uphold his end of the bargain, we are considering eminent domain proceedings to pay Jin a fair amount, reclaim our investment and terminate his involvement with the Skywalk.

In the last couple of weeks, Jin decided to file a lawsuit against individual members of the Tribal Council. It is clearly Jin's attempt to get attention from the media and not a legitimate legal action. The documents are not grounded in reality; they are instead filled with grandstanding rhetoric. We will fight this frivolous lawsuit and continue moving forward with our plans to protect and preserve the Skywalk.

By now, you have probably heard news that the Hualapai Tribal Council is considering legal action involving the Grand Canyon Skywalk to protect our critical investment. I would appreciate the opportunity to provide you some details about our plans and why these steps are being taken.

The Hualapai Nation is a community of proud, hard-working people who value our rich history and legacy. For many years, we endured financial challenges and suffered from a lack of investment on our magnificent but very remote land along the Grand Canyon. Still, our annual built a strong community and cultural opportunities to grow. Many of our members played an integral role in the Skywalk's creation and success. Because of them, we welcome visitors from around the world and give them the opportunity to view the Grand Canyon from a unique perspective.

About 10 years ago, Las Vegas businessman David J. Jett came to Peach Springs with a clever idea to build a glass-bottomed walkway over the Hualapai's land along the Grand Canyon and create an international museum. Jett wanted to build a museum and gift shop. In exchange, we would receive a management contract for the Skywalk and the surrounding facilities. Revenue generated by the Skywalk and the gift shop would benefit the Hualapai Nation's economy and provide a new source of income for the tribe. Jett's idea seemed like a good one, but we were not convinced. We wanted to make sure we were getting the best deal possible and that the Skywalk would be a long-term investment for our people. We wanted to make sure we were getting the best deal possible and that the Skywalk would be a long-term investment for our people.

When something seems too good to be true, it usually is. Now, four years after the Skywalk's grand opening, Jett has failed to abide by his contractual obligations and keep even the most basic promises he made to the Hualapai. The Hualapai center is an empty shell - a non-functional building that sits with exposed wiring, hanging from the ceiling and holes in the floor. There are almost no jobs, not even for Hualapai. Jett has provided for the thousands of families who built their lives around the walkway. Jett has provided for the thousands of families who built their lives around the walkway. Jett has provided for the thousands of families who built their lives around the walkway.

We have repeatedly asked Jett to keep his promises and complete the work. Because of his failure to uphold his end of the bargain, we are seeking court action to pay Jett a fair amount, reclaim our investment and terminate his involvement with the Skywalk.

April 20, 2011

Friends,



We have spent years negotiating with Jett, but he refuses to make even basic concessions and complete the work he promised. The Council has simply had enough.

I pledge to keep you updated as this situation continues to unfold. Please do not hesitate to contact my office with any questions or concerns.

Sincerely,

Wilfred Montano, Sr.
Hualapai Tribal Council Chairman



In the last couple of weeks, Jin decided to file a lawsuit against individual members of the Tribal Council. The documents are ridiculous; it's clearly Jin's attempt to get attention from the media and not a legitimate legal action. We will fight this frivolous lawsuit and continue moving forward with our plans to protect the Skywalk.

Believe me, nobody wanted this. We have spent years negotiating with Jin, but he refuses to make even basic concessions and complete the work he promised. The Council has simply had enough. Our people – and tourists from across the globe – deserve better.

I pledge to keep you updated as this situation continues to unfold. Please don't hesitate to contact my office with any questions or concerns.

Sincerely,

Wilfred Whetstone Sr.
Wilfred Whetstone Sr.
Hualapai Tribal Council Chairman

EXHIBIT 12

GALLAGHER & KENNEDY

P.A.
LAW OFFICES

GLEN HALLMAN
DIRECT DIAL: (602) 530-8471
E-MAIL: GH@GKNET.COM

2575 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
PHONE: (602) 530-8000
FAX: (602) 530-8500
WWW.GKNET.COM

May 11, 2011

VIA EMAIL ONLY

Pamela M. Overton
Aaron C. Schepler
GREENBERG TRAURIG, LLP
2375 East Camelback Road, Suite 700
Phoenix, AZ 85016

Sent
04

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

Troy A. Eid
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202

Re: Grand Canyon Skywalk Development, LLC v. Vaughn, et al.
United States District Court, District of Arizona
Case Number 3:11-CV-08048-DGC

Dear Counsel:

The purpose of this letter is to request that each of you cease and desist from any further use of attorney-client, or otherwise, privileged information and documents received by you or your law firm.

The United States District Court for the District of Arizona has adopted the Arizona Rules of Professional Conduct. See L.R. Civ. 83.2(e). Therefore, the Arizona Canons and Disciplinary Rules are proscriptive, and the Court may impose sanctions upon any attorney whose conduct contravenes the governing ethical

standards. *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir. 1983).

Arizona E.R. 4.4 requires an attorney to respect the rights of third persons by prohibiting a lawyer from using “methods of obtaining evidence that violate the legal rights of such a person.” Arizona State Bar Opinion, Arizona OP. 2001-04, governs what attorneys must do when they receive information from a client, who in turn obtained information from an unidentified “ally” of an opposing party. The opinion notes that a lawyer is required to withdraw from representation “if the client insists that the lawyer review the documents or use the information in them,” where the client refuses to consent to the lawyer’s disclosure that he was in possession of confidential information.

Simply, when a lawyer knows that an “ally” is not authorized to disclose materials and that the lawyer’s receipt of those documents is a result of deception or misappropriation, then the lawyer’s use of those documents makes him or her an accomplice. Such continued acceptance of protected material is therefore a violation of E.R. 8.4(c).

We also direct your attention to *Rico v. Mitsubishi Motors Corp.*, 42 Cal.4th 807, 171 P.3d 1092 (Cal. 2007), in which counsel received a privileged document, and made use of it in the litigation. The court found that the attorney acted unethically by failing to notify the adverse party and instead attempted “to gain maximum adversarial value from it.” 42 Cal.4th at 813, 171 P.2d at 1096. The court upheld disqualification of the attorney and his firm as the appropriate sanction.

It is self-evident that the Complaint and Temporary Restraining Order Application in this matter was based upon attorney-client privileged information and documents, provided by this law firm to the Hualapai Tribal Council in Executive Session meetings. Indeed, certain of the exhibits are expressly labeled “privileged and confidential.”¹ There is simply no doubt or debate that your pleadings in this matter have included information and documentation which was attorney-client and otherwise privileged, used “to gain maximum adversarial value.”

You are specifically requested, in accordance with clear Arizona ethical requirements, upon receipt of any confidential or privileged material, to (1) refrain from further examination of the material or from making use of it, (2) immediately

¹ This conduct is also exacerbated by the fact your law firm formerly represented the Tribe.

Pamela M. Overton
Aaron C. Schepler
Mark Tratos
Troy A. Eid
May 11, 2011
Page 3

notify this law firm of its receipt, and (3) immediately abide by this law firm's instructions as to the disposition of the information or documentation.

If we become aware of any future use by any of you of privileged information or documentation, we will be forced to file a motion with Judge Campbell to have your firm disqualified. Further, we reserve the right to seek disqualification if you do not immediately notify this law firm upon receipt of any privileged information or documentation, and abide by this law firm's instructions regarding its disposition.

Sincerely yours,

GALLAGHER & KENNEDY, P.A.

By: 
Glen Hallman

GH:kjh
2742935 / 14434-15

EXHIBIT 13

Hallman, Glen

From: robertsde@gtlaw.com on behalf of TratosM@gtlaw.com
Sent: Wednesday, May 11, 2011 2:44 PM
To: Hallman, Glen
Cc: PruntyD@gtlaw.com; overtonp@gtlaw.com; weddlej@gtlaw.com; eidt@gtlaw.com; thompsonro@gtlaw.com; ScheplerA@gtlaw.com; ChavezR@gtlaw.com; TratosM@gtlaw.com; robertsde@gtlaw.com

Subject: Hualapai Tribe

Dear Mr. Hallman:

We are in receipt of your letter today May 11, 2011 and we find it offensive and unprofessional, therefore, we will not honor it with a response.

Mark G. Tratos
Managing Shareholder
Greenberg Traurig, LLP | Suite 400 North
3773 Howard Hughes Parkway | Las Vegas, Nevada 89169
Tel 702.938.6888
tratosm@gtlaw.com | www.gtlaw.com



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5/12/2011

EXHIBIT 14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Grand Canyon Skywalk Development, LLC,)	
)	
Plaintiff,)	CV 12-08030-PCT-DGC
)	
vs.)	Phoenix, Arizona
)	February 24, 2012
'Sa' Nyu Wa, Inc., et al.,)	
)	
Defendants.)	

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TEMPORARY RESTRAINING ORDER HEARING

Official Court Reporter:
Patricia Lyons, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC 41
Phoenix, Arizona 85003-2150
(602) 322-7257

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared with Computer-Aided Transcription

27:56 1 Commerce Bank case would trump Water Wheel, because it says at
2 554 U.S. 332, 334, those pages, that a tribe may not, quote,
3 unquote, regulate a forced sale or disposition of a non-Indian
4 property interest. So you can't go down this path. The
28:11 5 Supreme Court has actually considered this question. And even
6 if I'm wrong about *Water Wheel*, the Supreme Court's case in
7 *Plains Commerce Bank* would control this case for sure.

8 THE COURT: *Plains Commerce* was what I relied upon in
9 ruling the other direction in *Water Wheel* before I got
28:27 10 reversed by the Ninth Circuit.

11 MR. EID: I understand. But very different facts, as
12 I mentioned. Very different facts.

13 THE COURT: All right. Hold on just a second.

14 Okay.

29:46 15 MR. EID: Your Honor, one more thing, if I may,
16 please. The chair of the Hualapai tribe, the Honorable Louise
17 Benson is here, and we'd like to call her as a witness with
18 your permission. I think it goes to the issue of bad faith
19 and will absolutely get to the issue of why the ordinance and
30:00 20 the behavior afterward in the Court and so on has been in bad
21 faith, so the tribal exhaustion is not required under Supreme
22 Court precedent.

23 THE COURT: I want to hear from defendants first, and
24 then we'll decide what evidence we'll take.

30:14 25 MR. EID: Thank you, Your Honor.

21:38 1 this property wasn't properly described, they didn't give me
2 fair value, they didn't post a bond, how do I know they'll
3 ever pay me and my family?

4 The U.S. Supreme Court said way back in the 1930s --
21:50 5 we have this in our case -- the test is perfect and just
6 compensation. It is to make you whole.

7 They don't have any obligation to pay us one dime.
8 They can say \$11 million and then they can assert tribal
9 sovereign immunity, as they have the tribal sovereign power to
22:04 10 do, and we'll never collect a dime under the way this
11 ordinance is written. It is a diabolical ordinance.

12 It was written with one purpose in mind, to deprive a
13 non-Indian person, Mr. David Jin, of his right to collect
14 anything. And to leave the reservation, yes, but to leave
22:20 15 without any of the property that he put into -- if they kick
16 him out, he still has a right to his property. You can't take
17 away his right to his property, not in the United States. And
18 no government can do that; not this one, not the City of
19 Phoenix, not the State of Arizona, not -- the U.S. Congress
22:35 20 couldn't do it.

21 THE COURT: All right. Thank you.

22 MR. EID: Thank you.

23 MR. TRATOS: Your Honor, we can go through the
24 material that we've previously presented in the TRO materials.
22:48 25 But to our surprise today, the chairwoman of the Hualapai is

12:52 1 here. I met her for the first time just outside, actually, in
2 the gallery here. She is willing to testify. I would ask you
3 to allow us to present for your consideration the unusual and
4 highly prejudicial manner in which this ordinance was passed,
13:10 5 in secret, and her specific knowledge of it.

6 She was also the tribal chairwoman when the agreement
7 was entered in 2003. She is familiar with what the
8 obligations were for each party, and she can testify directly
9 to these issues. And I'd ask you to allow me to call her and
13:28 10 share with you the facts as she knows it as the chairwoman of
11 the Hualapai tribe.

12 THE COURT: What is the legal issue this goes to?

13 MR. TRATOS: It goes to the issue of bad faith. This
14 is the issue where -- one of the exceptions is the bad-faith
13:42 15 exception. And clearly this entire ordinance, the entire
16 manner in which it was passed, the entire manner in which it
17 has been secretly pushed is demonstration of bad faith. It's
18 that kind of bad faith that would take the exception. We
19 don't need to apply the exhaustion remedy for exactly this
13:58 20 reason.

21 THE COURT: Tell me what you think she would say.
22 What's the proffer you would make?

23 MR. TRATOS: The proffer I would make, she would
24 testify that, in fact, unlike every other ordinance that has
24:09 25 been passed at the Hualapai where it is put out in the

publication, where there is discussion amongst the tribal members, where the tribe gets to make comment and have a constant discussion, this particular ordinance was passed in secret executive session without having the ability to have comment from the tribe. It was literally thrust on the tribe as a surprise.

It was done specifically and exclusively for one person. It was to take this property, the Skywalk management agreement. It was not done to essentially do as Mr. Hallman argued to you in April of last year, this -- every tribe's entitled to have a -- a -- amend a main ordinance, and that's all they did. This ordinance was expressly tailored to prevent Mr. Jin's company, GCSD, from being able to protect itself and so that they could literally steal the property. That's what I believe she will testify to.

I also believe she will testify that at the time that the PR campaign was launched against Mr. Jin to discredit him for not completing the building, to discredit him for not bringing utilities and power, that that was a deliberate bad faith act because it was never Mr. Jin's obligation to bring utilities to Eagle Point. That was always the obligation of the tribe.

And, in fact, it was the tribe itself, through an issuance of a stop-work order and refusal to authorize him to complete the building, because there was an internal dispute

as to the size of the building, that, in fact, there has been a media campaign mounted by the tribe's PR firm to discredit Mr. Jin in order to justify the condemnation based upon the false assertion he has breached his contract.

I believe she can testify that those obligations were never his and that, in fact, the tribe has engaged a PR firm to specifically discredit him. That's what I believe she will testify to.

THE COURT: All right. Before I decide if we need that, there was something else that Mr. Eid said you wanted to present in terms of the rights under the contract.

MR. TRATOS: Yeah. In particular, we point this out in the supplemental material, but Mr. Hallman has done three specific things I would call to the Court's attention. On the same day that the taking of the Skywalk interest occurred, he contacted the arbiter here in Phoenix who had ordered documents be produced and he told the arbiter we stand in the shoes of GCSD and now we dismiss with prejudice this action.

Now, on a prospective basis the tribe says we're now going to manage the Skywalk.

What they have essentially done is saying the disputes and money owed in the past doesn't matter any more. We're going to not only prospectively manage, but they have retrospectively eliminated the 14 causes of action in the existing arbitration.

C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 2nd day of March, 2012.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter

EXHIBIT 15

IN THE HUALAPAI TRIBAL COUNCIL

PEACH SPRINGS, ARIZONA

Date: April 3, 2012

In Re : VIOLATION OF HUALAPAI CODE OF ETHICS

To : Sheri Yellowhawk, Council Member, Hualapai Tribe

Personal Jurisdiction: As an elected official you are notified that the Hualapai Code of Ethics is applicable to you pursuant to Article II § 1 and 2.

Charging Authority: The Hualapai Tribe, by and through the undersigned official and pursuant to Article VII, Section 2; you, Sheri Yellowhawk, is hereby notified that you are being charged for violating the following provisions of the Hualapai Code of Ethics and/or Hualapai Personnel Policies and Procedures:

Count I

You are charged for violating Article VI, Section 1(A) – The Official Engaged in conduct While Acting on Official Tribal Business That Brings Disrespect to the Tribe and the Office of the Official.

Facts: On February 29, 2012 you (Sheri Yellowhawk – Council Member of the Hualapai Tribe) provided the opposing party to Skywalk Lawsuit, a statement with attachments (see attached **Exhibit A**) that brought disrespect to the Hualapai Tribe and your office when you directly acted against the interest of the Hualapai Tribe for whom you are a council member. Your statement with attached confidential information including attorney/client work product and correspondence went public as can be seen on “Turtle Talk” (a public news website) for anyone who has access to the internet to see (worldwide). You disclosed with your statement the following: confidential memorandum dated February 8, 2011 from Tribal Government Attorney to Hualapai Tribal Council; February 7, 2012 letter between Government attorney and Mark G. Tratos (David Jin’s attorney); two emails of March 24, 2010 between Teddy Parker and Terence Thompson; Memorandum from Skywalk Management dated March 6, 2010; and Attorney/Client correspondence from Tribal Government Attorney to Hualapai Tribal Council. Your information was used by opposing party to lawsuit as is seen in a declaration submitted by Theodore Quasula consisting of your statement and the confidential information mentioned in the foregoing.

Penalty: upon a finding that you violated Article VI, Section 1(A), the Hualapai Tribal Council may publicly censure you after you have been provided a due process hearing.

Count II

You are charged for violating Article VI, Section 1(B) – The Official Has Acted In Excess of the Official's Authority or in Contravention of Tribal Council Directive.

Facts: On February 29, 2012 you (Sheri Yellowhawk – Council Member of the Hualapai Tribe) acted in excess of your official authority when you provided the opposing party(ies) to the Skywalk Litigation information intended to support David Jin who is engaged in litigation against the Hualapai Tribe. The Code of Ethics of the Hualapai Tribal Constitution at Article IV, Section 7 states that “the Tribal council shall make decisions by a majority vote of those present, unless otherwise stated in the Constitution.” You acted in excess of your official authority as a Hualapai Tribal Council Member when you provided an independent statement with confidential attorney/client information attached (see Exhibit A) to benefit opposing party David Jin without the consent or vote of the Council body authorizing your statement and release of confidential information.

Penalty: upon a finding that you violated Article VI, Section 1(B), the Hualapai Tribal council may publicly censure you after you have been provided a due process hearing.

Count III

You are charged for violating Article VI, Section 1(C) – The Official Has Failed to Disclose a Conflict of Interest as Required Under Article III, Section 4(B) of this Ethics Code.

Facts: On March 3, 2012 you (Sheri Yellowhawk – Council Member of the Hualapai Tribe), voted on a matter in which you had a duty pursuant to Article III, Section 2(A)(1) to recuse yourself. On February 29, 2012 you provided a statement and divulged confidential attorney client information (see Exhibit A) to benefit David Jin, opposing party of the Hualapai Tribe in the Skywalk litigation. In your statement with attachments you clearly state your direct personal interest against the Hualapai Tribal Council body who represent the Hualapai Tribe that is not similarly shared by all members of the Tribal Council and after you made a statement against the Tribe, you turned around and motion to rescind the enforcement of eminent domain on March 3, 2012 which was directly related to your personal interest for David Jin an opponent of the Hualapai Tribe after your information was received by David Jin's attorneys who used your information against the Hualapai Tribe, in litigation.

Penalty: upon a finding that you violated Article VI, Section 1(C), the Hualapai Tribal Council may publicly censure you after you have been provided a due process hearing.

Count IV

You are hereby charged for violating Article VI, Section 3(B), Converting Tribal Property or Monies Without Authorization Through Omission or Misrepresentation of Facts.

Facts: You supplied opposing party with information (Exhibit A) to the detriment of the Tribe. Your unauthorized release of confidential attorney client information and statement to opposing party(ies) to Skywalk litigation resulted in Tribal monies spent unnecessarily to defend itself against your actions. As such you indirectly converted tribal monies because of your unauthorized actions, you ignored (omitted) your responsibility to maintain confidence of sensitive attorney client information that directed resulted in tribal monies spent for your improper actions.

Penalty: Upon a finding that you violated Article VI, Section 3(B), you are subject to automatic mandatory removal as a council member after due process proceedings.

Count V

You are hereby charged for violating Article VI, Section 2(D), False Statements.

Facts: You provided a statement (Exhibit A – dated February 29, 2012) making false and unsupported statements intended only to unfairly prejudice people against the Hualapai Tribal Council member(s) whom you disagree with. You purported to be on the side of the Hualapai people but clearly your statement was intended to be used for the opposing party in the Skywalk litigation as your document is dated the same date as Louise Benson who also provided an affidavit against the Tribe; and your statement is filed as a declaration by Theodore Quasula (a top official of opposing party David Jin) who states that your statement coincidentally fell into his hands through your aunt, Cherlene Hardridge. You also falsely assert that information is not being shared with membership which is false, community meetings to inform the people and provide an open forum for questions is on-going, you know this and have been a part of the meetings; you state that “being on one side or another” does not sit well with you and state you thought “we were supposed to be working toward one purpose: To serve the Hualapai People”, however you defy majority vote decision of the Tribal Council and provided an independent statement that fell in the hands of opposing party to Skywalk which was used against the Tribe directly contradicting your statement that you thought “we were supposed to be working toward one purpose: “To serve the Hualapai People”; you false assert that “everything is based on opinion and not fact” with nothing supporting your statement; you falsely state that we should be very sure of ourselves before we assert wrong doing when you know that the attorney’s working for the Tribe are professionally licensed attorneys whose ethics are on the line and cannot allege things untrue, furthermore, the Tribe did not initiate the lawsuit concerning the Skywalk, as such it was not the Tribe who asserted any “wrong

doing”; you also make misleading and false statements about the effect of eminent domain clearly intending only to cater to the senses of the common people although it was made quite clear to you in the memorandum you divulged dated 2/11/2012 that eminent domain is not taking and grabbing property at will; you also falsely state that Eminent Domain is not legal according to “our Constitution” nor legal anywhere else in the US when you have been advised as a Council Member that Article 9, Subsection (c) of the Constitution of the Hualapai Indian Tribe expressly allows for eminent domain and states, the Tribe may “take any private property for public use” but states that it may not do so “without just compensation”, you also should be aware of the general due process rights of citizens in the Constitution that also protects citizens from unlawful seizure of property without due process.

Penalty: Upon a finding that you violated Article VI, Section 2(D), you are subject to disciplinary action that may include, at the discretion of the Tribal Council, public censure, suspension or removal from office. These disciplinary actions are not progressive and the Tribal Council shall have the discretion to impose any of these disciplinary actions or a combination thereof on a Council Member found, after the due process set forth in Article VII (Hualapai Ethics Code) to have violated any of the following provisions of the Ethics code. ////

YOUR RIGHTS AND HEARING NOTICE

You are summoned to appear for a hearing before the Hualapai Tribal Council:

ON: Friday, April 13, 2012 at 9:00 a.m. /p.m.

**AT: The Hualapai Tribal Council Chambers to hear and discuss the above charges
filed against you.**

Your rights: Pursuant to Article VII, Section 3; you have the right to present oral or written testimony to the Hualapai Tribal Council; you may present testimony in person or through an authorized representative. You may present witnesses or other evidence in your defense to the charges filed against you. Pursuant to Article VII, Section 3B, you are not required to appear and defend against the charge; however, if you have been provided notice of the charge and the time and date of the Tribal Council meeting to discuss and hear your charge; your failure to present testimony or a defense shall not prevent the Hualapai Tribal Council from hearing and discussing and voting on the charge as to whether or not you violated the Code of Ethics and the penalty(ies) to be imposed. The Hearing: The Tribal Council may discuss the charge in executive session; If you request an executive session, the Tribal Council shall hold the discussion on your charge in executive session.

Upon conclusion of the hearing and discussions by Hualapai Tribal Council on the statement of charge cited above; the Hualapai Tribal Council will rule on the alleged violation of the Ethics Code. The decision rendered by the Hualapai Tribal Council shall be final and not subject to appeal to the Hualapai Tribal Court unless a claim is made that the tribal constitution has been violated or the due process rights set forth in Article VII were not followed.



Hualapai Tribal Council, Presiding Officer

Certificate of Service

I _____ hereby certify that I personally gave an original copy of this document to Louise Benson, in person on this 3rd day of April, 2012 at:

_____.

IN THE HUALAPAI TRIBAL COUNCIL

PEACH SPRINGS, ARIZONA

Date: April 3, 2012

In Re : VIOLATION OF HUALAPAI CODE OF ETHICS

To : Louise Benson, Chairwoman, Hualapai Tribe

Personal Jurisdiction: As an elected official you are notified that the Hualapai Code of Ethics is applicable to you per, Article II § 1 and 2.

Charging Authority: The Hualapai Tribe, by and through the undersigned official and pursuant to Article VII, Section 2; you, Louise Benson, is hereby notified that you are being charged for violating the following provisions of the Hualapai Code of Ethics and/or Hualapai Personnel Policies and Procedures:

Count I

You are charged for violating Article VI, Section 1(A) – The Official Has Engaged In Conduct While Acting On Official Tribal Business That Brings Disrespect to the Tribe and the Office of the Official.

Facts: On February 29, 2012 you (Louise Benson – Chairwoman of the Hualapai Tribe), Charlie Vaughn (Council Member), and Candida Hunter (Council Member) met on tribal business with Rocket Gaming in Las Vegas, Nevada; on that same day, you met with the opposing party(ies) to the Skywalk Litigation while you were in Nevada and provided the opposing party an affidavit (see attached Exhibit A – notarized in Nevada). The affidavit you provided was used in litigation against the Hualapai Tribe. Your actions brought disrespect to the Hualapai Tribe and your office when you directly acted against the interest of the Hualapai Tribe for whom you are the Chairwoman. Your statement went public as can be seen on "Turtle Talk", a public news website for anyone who has access to the internet to see (worldwide).

Penalty: upon a finding that you violated Article VI, Section 1(A), the Hualapai Tribal Council may publicly censure you after you have been provided a due process hearing.

Count II

You are charged for violating Article VI, Section 1(C) – The Official Has Failed To Disclose a Conflict of Interest as Required Under Article III, Section 4(B) of the Ethics Code.

Facts: On March 3, 2012 you (Louise Benson – Chairwoman of the Hualapai Tribe), voted on a matter in which you had a duty pursuant to Article III, Section 2(A)(1) to recuse yourself. On February 29, 2012 you provided a statement (see Exhibit A) to benefit David Jin, opposing party of the Hualapai Tribe in the Skywalk litigation. In your affidavit you clearly state your direct personal interest against the Hualapai Tribe that is not similarly shared by all members of the Tribal Council and after you made a statement against the Tribe, you turned around and voted to rescind the enforcement of eminent domain on March 3, 2012 which was directly related to your personal interest for David Jin an opponent of the Hualapai Tribe.

Penalty: upon a finding that you violated Article VI, Section 1(B), the Hualapai Tribal Council may publicly censure you after you have been provided a due process hearing.

Count III

You are hereby charged for violating Article VI, Section 2(B), Bribery.

Facts: On February 29, 2012, evidence shows that in exchange for an affidavit you provided to benefit David Jin in the Skywalk litigation, you were dismissed as a “defendant” in the Skywalk litigation, see Exhibit A – dated February 29, 2012 (your affidavit) and the Notice of Voluntary Dismissal Without Prejudice (Exhibit B) filed by David Jin attorney (both documents dated February 29, 2012).

Penalty: Upon a finding that you violated Article VI, Section 2(A), at the discretion of the Hualapai Tribal council you may be subject to censure, suspension, or removal from office. These disciplinary actions are not progressive and the Tribal council shall have the discretion to impose any of these disciplinary actions or a combination thereof after due process proceedings.

Count IV

You are hereby charged for violating Article VI, Section 3(B), Converting Tribal Property or Monies Without Authorization Through Omission or Misrepresentation of Facts.

Facts: On February 29, 2012, when you were scheduled to attend a meeting in Las Vegas, Nevada with Rocket Gaming at 12:00 noon; you were late to the meeting, and attended the meeting from approximately 1:10 p.m. to 2:15 p.m.; thereafter you apparently went to David Jin’s Las Vegas attorney (Mark Tratos) office to provide a statement to benefit David Jin in

his suit against the Hualapai Tribe. Although you performed approximately 1 hour of actual business for the Hualapai Tribe (meeting with Rocket Gaming), you claimed 8 hours of regular work hours on your time sheet for hours worked on behalf of the Hualapai Tribe.

Penalty: Upon a finding that you violated Article VI, Section 3(B), you are subject to automatic mandatory removal as a council member after due process proceedings.

Count V

You are hereby charged for violating Article VI, Section 2(D), False Statements.

Facts: when you knowingly, willfully, provided false statements in your affidavit (Exhibit A) on matters involving official tribal business when you falsely state that you oppose eminent domain because of your concern for the Hualapai people when your primary concern about eminent domain is to benefit David Jin as shown in your affidavit for David Jin.

Penalty: Upon a finding that you violated Article VI, Section 2(A), at the discretion of the Hualapai Tribal council you may be subject to censure, suspension, or removal from office. These disciplinary actions are not progressive and the Tribal council shall have the discretion to impose any of these disciplinary actions or a combination thereof after due process proceedings.

////

YOUR RIGHTS AND HEARING NOTICE


You are summoned to appear for a hearing before the Hualapai Tribal Council:

ON: Thursday, April 12, 2012 at 9:00 a.m. /p.m.

**AT: The Hualapai Tribal Council Chambers to hear and discuss the above charges
filed against you.**

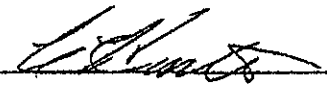
Your rights: Pursuant to Article VII, Section 3; you have the right to present oral or written testimony to the Hualapai Tribal Council; you may present testimony in person or through an authorized representative. You may present witnesses or other evidence in your defense to the charges filed against you. Pursuant to Article VII, Section 3B, you are not required to appear and defend against the charge; however, if you have been provided notice of the charge and the time and date of the Tribal Council meeting to discuss and hear your charge; your failure to present testimony or a defense shall not prevent the Hualapai Tribal Council from hearing and discussing and voting on the charge as to whether or not you violated the Code of Ethics and the penalty(ies) to be imposed. The Hearing: The Tribal Council may discuss the charge in executive session; if you request an executive session, the Tribal Council shall hold the discussion on your charge in executive session.

Upon conclusion of the hearing and discussions by Hualapai Tribal Council on the statement of charge cited above; the Hualapai Tribal Council will rule on the alleged violation of the Ethics Code. The decision rendered by the Hualapai Tribal Council shall be final and not subject to appeal to the Hualapai Tribal Court unless a claim is made that the tribal constitution has been violated or the due process rights set forth in Article VII were not followed.



Hualapai Tribal Council, Presiding Officer

Certificate of Service

I  hereby certify that I personally gave an original copy of this document to Louise Benson, in person on this 3rd day of April, 2012 at:




EXHIBIT 16

From: robertsde@gtlaw.com on behalf of TratosM@gtlaw.com
Sent: Thursday, March 01, 2012 5:26 PM
To: Hallman, Glen; Charlton, Paul K.
Cc: Kannberg, Gloria J.
Subject: GCSD adv. Hualapai / Documents Produced
Attachments: Tratos 3.1.12 ltr to Hallman.pdf

Please see attached.

Denise Michele Roberts, CP
Certified Paralegal /Executive Assistant to
Mark G. Tratos * Ted Quirk
John Brewer * Bethany Rabe
Greenberg Traurig, LLP | Suite 400 North
3773 Howard Hughes Parkway | Las Vegas, Nevada 89169
Tel 702.938.6912
robertsde@gtlaw.com | www.gtlaw.com

*"Life isn't about waiting for the storm to pass...
It's about learning to dance in the rain."*



USA LAW FIRM OF THE YEAR, CHAMBERS GLOBAL AWARDS 2007

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Mark G. Tratos, Esq.
Tel: 702.938-6888
tratosm@gtlaw.com

Via Electronic Mail

Re: Documents Produced to More than 80 Members of the Hualapai Tribe

I am enclosing as a professional courtesy, a copy of a document received last evening by our client, Ted Quasula. Attached to a letter from one of the tribal council members is a number of letters and memorandums from your firm outlining the plan to resist arbitration and use eminent domain as a way of taking GCSD's contractual rights.

The list of recipients, including Mr. Quasula, is contained on the front of the email. Given the broad distribution throughout the tribal community of this memorandum by a tribal council member who was authorized to receive it, we believe the distribution to the public is a waiver of any claim of attorney client privilege.

To say we are shocked at the content of this communication would be a gross understatement. It appears that there have been clear misrepresentations made to the Federal Court, the Tribal Court and the Arbiter throughout the last year. At the very least, there has not been complete candor to those tribunals.

Mr. Quasula, as a member of the tribe who received this, brought this to our attention and we intend to bring it to the Court's attention.

Very truly yours,

GREENBERG TRAURIG, LLP

Mark G. Fratos

MGT/dr

Finels.

EXHIBIT 17

1 Pamela M. Overton (AZ Bar No. 009062)
2 Tracy L. Weiss (AZ Bar No. 027289)
3 GREENBERG TRAURIG, LLP
2375 E. Camelback Rd., Ste. 700
4 Phoenix, Arizona 85016
Telephone: (602) 445-8000
5 Facsimile: (602) 445-8100
E-mail: OvertonP@gtlaw.com; WeissT@gtlaw.com

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

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

No. 3:12-08030-DGC

10 Plaintiff,

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

11 vs.

12 'SA' NYU WA, Inc., *et al.*,

13 Defendants.
14

15 **INTRODUCTION**

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

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

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

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

THE SECRET PLAN

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

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

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

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

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

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

27 IMPLEMENTATION OF THE SECRET PLAN

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

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

3 FALSE AND NEGATIVE PRESS

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

11 INTENTIONAL EFFORTS TO INTERFERE WITH OPERATIONS OF THE 12 SKYWALK

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

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

23 ³ *See*, Ex. 8, Benson Aff., ¶ 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 **THE TAKING RESOLUTION**

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

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

23 ⁹ See Ex. 1, p. 3

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

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

26 ¹² See Ex. 14.

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

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

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

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

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

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

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

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

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

20 LEGAL ARGUMENT

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

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

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

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

27 ¹⁸ *See* Ex. 8, Benson Aff., ¶ 9.

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

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

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

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

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

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

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

11 **CONCLUSION**

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

15 Dated this 1st day of March, 2012.

16 **GREENBERG TRAURIG, LLP**

17 By: /s/ Pamela M. Overton

18 Pamela M. Overton

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CERTIFICATE OF SERVICE

☒ I hereby certify that on March 1, 2012 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

/s/ Tammy Mowen

EXHIBIT 18

Dangerfield, Mark C.

From: azddb_responses@azd.uscourts.gov
Sent: Thursday, March 01, 2012 5:44 PM
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Subject: Activity in Case 3:12-cv-08030-DGC Grand Canyon Skywalk Development LLC v. 'Sa' Nyu Wa Incorporated et al Supplement

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DISTRICT OF ARIZONA

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Case Name: Grand Canyon Skywalk Development LLC v. 'Sa' Nyu Wa Incorporated et al
Case Number: 3:12-cv-08030-DGC
Filer: Grand Canyon Skywalk Development LLC
Document Number: 36

Docket Text:

SUPPLEMENT Supplemental Brief In Support of Bad Faith Exception - Pursuant to Court Order [32] re [32] Order by Plaintiff Grand Canyon Skywalk Development LLC. (Overton, Pamela)

3:12-cv-08030-DGC Notice has been electronically mailed to:

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bb8bb37b61a887bd06d7771d72b14615ae22e46e52de183184948e5b56a8]]

EXHIBIT 19

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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 Grand Canyon Skywalk Development,
20 LLC, a Nevada limited liability
21 company,

22 Plaintiff,

23 vs.

24 'SA' NYU WA, Inc., *et al.*,

25 Defendants.

No. 3:12-08030-DGC

**NOTICE OF VOLUNTARY
DISMISSAL WITHOUT
PREJUDICE**

26 ///

1 Pursuant to Fed. R. Civ. P. 41(a) of the Federal Rules of Civil Procedure, Plaintiff
2 Grand Canyon Skywalk Development, LLC ("Plaintiff") voluntarily dismisses the instant
3 action without prejudice as to Defendants Louise Benson and Jolene Cooney Marshall
4 only.

5 Dated February 29, 2012.

6
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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF ARIZONA

14 GRAND CANYON SKYWALK
15 DEVELOPMENT, LLC, a Nevada limited
16 liability company,

17 Plaintiff,

18 vs.

19 'SA' NYU WA, a tribally-chartered
20 corporation established under the laws of the
21 Hualapai Indian Tribe; GRAND CANYON
22 RESORT CORPORATION, a tribally-
23 chartered corporation established under the
24 laws of the Hualapai Indian Tribe; LOUISE
25 BENSON, RICHARD WALERMA, SR.,
26 WYNONA SINYELLA, RUBY STEELE,
27 SHERI YELLOWHAWK, CANDIDA
28 HUNTER, BARNEY ROCKY IMUS,
WAYLON HONGA, CHARLES VAUGHN,
SR., each individuals and members of the
Hualapai Tribal Council; WANDA EASTER
and JACI DUGAN, each individuals and
Hualapai Indian Tribe employees and HON.
JOLENE COONEY and HON. DUANE
YELLOWHAWK, each individuals and
judges of the Hualapai Tribal Court,

Defendants.

No. 3:12-cv-08030-DGC

**MOTION TO STRIKE EXHIBITS 1
AND 8 TO GCSD'S
SUPPLEMENTAL BRIEF IN
SUPPORT OF BAD FAITH
EXCEPTION**

(Oral Argument Requested)

1 Defendants respectfully submit this Motion to Strike certain Exhibits attached to
2 GCSD's supplemental pleading as they were obtained in violation of the Arizona Rules
3 of Professional Responsibility. We limit the scope of this motion at this time to the
4 exclusion of the Exhibits identified in order to address the immediate and interests of our
5 client. We reserve the right to request further remedies for these violations consistent
6 with our duty as officers of this Court and members of the State Bar.

7
8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. INTRODUCTION**

10 Last night, GCSD filed its supplemental brief regarding the bad faith exception to
11 the tribal exhaustion of remedies doctrine. Exhibits 1 to GCSD's supplemental brief is
12 the Affidavit of GCSD employee Ted Quasula, and Exhibit 8 to GCSD's supplemental
13 brief is the Affidavit of Louise Benson, the Chairwoman of the Hualapai Tribal Council
14 and former board member of 'Sa' Nyu Wa ("SNW"). Both affidavits are dated February
15 29, 2012.

16 Exhibit 8 indicates that Greenberg Traurig attorneys conducted ex parte
17 communications with Chairwoman Benson, in Las Vegas, Nevada. Additionally, Exhibit
18 8 reflects that Greenberg Traurig's attorneys' ex parte communication with Chairwoman
19 Benson included privileged and confidential matters pertaining directly to the civil
20 litigation concurrently proceeding in this Court, the eminent domain action pending in the
21 Hualapai Tribal Court and the arbitration brought by GCSD against SNW. Moreover, it
22 appears that the ex parte communications may be related to Greenberg Traurig's decision
23 to dismiss Chairwoman Benson from this case without prejudice on February 29, 2012.
24 Chairwoman Benson engaged in the ex parte communications and provided the Affidavit
25 without the consent or knowledge of the Tribal Council, SNW, or undersigned counsel.

26 Similarly, the Affidavit of Ted Quasula (Exhibit 1), contains numerous materials
27 protected under the attorney-client privilege in a letter from Councilmember Shari
28

1 Yellowhawk. These documents, memoranda from the Tribe's attorneys to their clients,
2 were clearly marked as privileged and confidential. There could be no mistake that these
3 documents were the work-product of the Tribal Council's attorneys and protected from
4 disclosure and/or use as evidence in any court proceeding. Councilmember Yellowhawk
5 did not have the authority of the Tribal Council to disclose the memoranda.

6 We note that Greenberg Traurig's attorneys submitted confidential materials in its
7 *GCSD I* TRO. At that time, Gallagher & Kennedy alerted Greenberg Traurig that its
8 knowing use of confidential and privileged work-product was improper. *See Exhibit 1*,
9 attached hereto.

10 For the reasons set forth below, we respectfully request that the Court strike the
11 Affidavits and the exhibits from the record as they contain information obtained in
12 violation of the Arizona Rules of Professional Conduct and contain materials protected
13 by the attorney-client privilege, work-product doctrine, and legislative privilege for
14 which no waiver has occurred.

15 **II. THE AFFIDAVITS SHOULD BE EXCLUDED FOR ETHICAL VIOLATIONS**

16 The United States District Court for the District of Arizona has adopted the
17 Arizona Rules of Professional Conduct ("ethical rules" or "ER") as its ethical standards.
18 LR Civ 83.2(e); *Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist.*, 810 F.
19 Supp. 2d 929, 944-45 (D. Ariz. 2011). "District courts may apply a wide range of
20 sanctions to address ethical violations," including exclusion of evidence. *Richards v.*
21 *Holsum Bakery, Inc.*, No. CV 09-00418-PHX-MHM, 2009 WL 3740725, at *7 (D. Ariz.
22 Nov. 5, 2009) (finding that violation of ER 4.2 merits "excluding from any future
23 proceedings any and all documents and evidence that are the product of counsel's ex-
24 parte contacts."). *See also Kaiser v. AT&T*, No. CIV 00-724-PHX JWS, 2002 WL
25 1362054, at *8 (D. Ariz. Apr. 5, 2002) ("Potential sanctions typically include exclusion
26 of evidence, disqualification, dismissal, and imposition of costs and fees.")

27 Other courts have similarly recognized the principle that evidence obtained or
28 derived in violation of the ethical rules should be excluded from consideration. For

1 example, the District of Kansas excluded all statements, affidavits, documents, and other
2 materials in a case where plaintiff's counsel engaged in improper ex parte contact with
3 defendant's employees. *Hammond v. City of Junction City, Kansas*, 167 F. Supp. 2d
4 1271, 1293 (D. Kan. 2001). Another court refused to permit the defendant to submit into
5 evidence the testimony of any of the fact witnesses who received monetary compensation
6 from defendant's counsel in violation of the ethical rule prohibiting a lawyer from
7 offering inducement to a witness. *Golden Door Jewelry Creations, Inc. v. Lloyds*
8 *Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1526-27 (S.D. Fla. 1994). Another
9 court, recognizing that it had "an obligation to take measures to prevent unethical conduct
10 from occurring in any proceeding . . . and broad discretion in fashioning an appropriate
11 remedy," excluded tape recordings made of defendants' counsel's conversations with
12 plaintiffs' employees without the employees' consent, in violation of the ethical rules.
13 *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1159-60
14 (D.S.D. 2001).

15 As is explained below, without exclusion of the materials Greenburg Traurig
16 obtained in violation of the Arizona Rules of Professional Conduct, the Tribal Council
17 would be required to further relinquish its privileged materials in order to rebut and/or
18 cross-examine the Chairwoman, as well as being forced to discuss confidential and
19 privileged work-product that Greenburg Traurig has taken out of context for its
20 advantage.

21 1. **Greenberg Traurig's Ethical Violations Regarding Chairwoman**
22 **Benson.**

23 Greenberg Traurig's ex parte communication with Chairwoman Benson, who
24 currently is a member of the Hualapai Tribal Council, (and until dismissed later on the
25 same day as the making of Exhibit 8), a defendant in this case, represents a clear violation
26 of the ethical rules governing ex parte communications, and raises additional concerns
27 regarding evidence gathered by Greenberg Traurig in violation of the ethical rules.
28

1 **a. ER 4.2 – Communication with Person Represented by Counsel**

2 ER 4.2 governs a lawyer's duties with respect to communication with persons
3 represented by counsel. It states:

4 In representing a client, a lawyer shall not communicate about the subject
5 of the representation with a party the lawyer knows to be represented by
6 another lawyer in the matter, unless the lawyer has the consent of the other
lawyer or is authorized by law to do so.

7 ER 4.2. Moreover, ER 4.2, comment 2, clarifies that this prohibition extends to
8 organizations. It states:

9 In the case of an organization, this Rule prohibits communications by a
10 lawyer for one party concerning the matter in representation with persons
11 having a managerial responsibility on behalf of the organization, and with
12 any other person whose act or omission in connection with that matter may
13 be imputed to the organization for purposes of civil or criminal liability or
14 whose statement may constitute an admission on the part of the
organization...

15 *See also* State Bar of Arizona Op. 87-25 (December 30, 1987)(it is unethical for an
16 attorney to contact and interview a named but yet unserved defendant in litigation
17 instituted by the attorney because an adversarial relationship exists); Op. 89-05 (May 17,
18 1989)(even ex parte contact with a former employee of an entity is improper if employee
19 communication may be imputed to employer or where topics of communication are
20 protected under attorney client privilege).

21 Greenberg Taurig currently represents GCSD in three separate actions adverse to
22 the Hualapai Tribe and Hualapai Tribal Council. Chairwoman Benson is a member of the
23 Council, she has "managerial responsibility on behalf of the organization" and is,
24 therefore, one for whom the rule prohibits communication. Greenberg Taurig's meeting
25 in Las Vegas with Chairwoman Benson, and their communications with her as reflected
26 in Exhibit 8, constitute a violation of Rule 4.2.

27 Moreover, as is evidenced by paragraph 8 of the Affidavit, the Chairwoman,
28 without the knowledge or consent of the Tribal Council, has disclosed confidential and

1 privileged information. Chairwoman Benson has no authority to waive either the
2 attorney-client privilege or executive session privilege pertaining to closed-door
3 legislative sessions of the Hualapai Tribal Council called to discuss legal strategy and
4 receive the advice of counsel – the Tribal Council has not authorized a waiver or
5 disclosure of any of its confidential communications or the work-product received from
6 its attorneys.¹ The Tribal Council is similar to a board of directors of a corporation.
7 They are a tribal entity, organized under provisions set forth in the Constitution, who
8 have a duty to run the Hualapai Nation by managing “all tribal affairs and enterprises.”
9 Hualapai Const., art. V.

10 Like a corporate board, the Tribal Council has quorum requirements and makes
11 decisions by majority vote of the quorum. Hualapai Const., art. IV, §§ 6-7. Fundamental
12 principles of corporate law state that “the power to waive the corporate attorney-client
13 privilege rests with the corporation’s management and is normally exercised by its
14 officers and directors.” *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S.
15 343, 348-49 & n.4, 105 S.Ct. 1986, 1990 & n.4 (1985) (finding management authority
16 resides with the board of directors under state law corporate principles, and that
17 “managers must exercise the privilege in a manner consistent with their fiduciary duty to
18 act in the best interests of the corporation and not of themselves as individuals.”); *United*
19 *States v. Tei Fu Chen*, 99 F.3d 1495, 1502 (9th Cir.1996) (corporate employee cannot
20 waive the attorney-client privilege).

21 As the power to waive the privilege resides with the Tribal Council, a single
22 council member cannot act unilaterally to waive the privilege. In *H.D.C. v. City of*
23 *Fresno, California*, applying the rationale laid out in *Weintraub* and *Tei Fu Chen*, the
24 District Court reasoned that as City Council members are like a board of directors
25 who were subject to a quorum rule to conduct business, no single Council member would

26 ¹ One of the centerpieces of GCSD’s “conspiracy theory” in their supplemental brief is
27 the fact that the Tribal Council met in “secret,” but the meetings, in fact, were held in
28 executive sessions to discuss legal matters and to receive legal advice, a normal
legislative process.

1 be able to waive the attorney-client privilege. No. CV-F-97-5498 OWW SMS, 2000 WL
2 35810718, at *4 (E.D. Cal. Aug. 31, 2000) (holding that former council member could
3 not waive the privilege). Similarly, in *Galli v. Pittsburg Unified School District*, the
4 District Court held that because the entire Board of Education holds the attorney-client
5 privilege, “the actions of an individual Board member alone cannot waive the
6 privilege.” No. C 09-3775 JSW (JL), 2010 WL 4315768, at *4 (N.D. Cal. Oct. 26,
7 2010) (citing *Weintraub* in holding that “the Board, as a body, holds the privilege, not an
8 individual Board member”); *see also Sampson v. Sch. Dist. of Lancaster*, 262 F.R.D. 469,
9 478-80 (E.D. Pa. 2008) (school board president could not unilaterally waive attorney-
10 client privilege); *Diemer v. Fraternal Order of Police, Chicago Lodge 7*, 242 F.R.D. 452,
11 458 (N.D.Ill. 2007) (citing *Weintraub* in finding that because power to waive attorney-
12 client privilege rests with the labor union’s board of directors, one board member did not
13 have the power to waive the entity’s privilege, “even had he been so inclined”); *Milroy v.*
14 *Hanson*, 875 F.Supp. 646, 648 (D. Neb. 1995) (citing *Weintraub* for proposition that
15 individual director “cannot unilaterally waive or otherwise frustrate the corporation’s
16 attorney-client privilege if such an action conflicts with the majority decision of the board
17 of directors”).²

18 Greenberg Traurig’s drafting and proffering of the Chairwoman’s Affidavit after
19 its ex parte contact with her in violation of Rule 4.2 is disconcerting. However, the larger
20 issue in Greenberg Traurig’s ex parte communication is that the source of the
21 Chairwoman’s knowledge or opinion regarding this and related litigation cannot be
22 separated out from privileged and confidentially obtained sources. This would prejudice
23 the Tribe. If the testimony in the Affidavit that Greenburg & Traurig drafted for

24 ² In contrast to the above, one district court case outside the Ninth Circuit stated that
25 while a mayor may waive a city’s attorney-client privilege, a town council member may
26 not waive the privilege on behalf of the town council. *See Interfaith Housing Del., Inc. v.*
27 *Town of Georgetown*, 841 F. Supp. 1393, 1399-1400 (D. Del. 1994). Another Court
28 adopted a magistrate judge’s decision which raised the possibility that a director might be
permitted to disclose privileged information to the SEC for issues related to fraud.
Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP, 994 F. Supp. 202, 214
(S.D.N.Y. 1998).

1 Chairwoman Benson is not excluded, then the Tribal Council may be forced in fact to
2 waive the executive or deliberative process privileges in order to challenge the veracity
3 and motivations behinds her testimony. This may also require inquiry and possible cross-
4 examination into the basis for her testimony, forcing disclosure of more privileged and
5 confidential information obtained during executive Tribal Council sections or in
6 discussions with its attorneys.³

7 For all the foregoing reasons, Chairwoman Benson's Affidavit should be stricken
8 from the record, along with all assertions or allegations in GCSD's supplemental brief on
9 bad faith which rely upon her Affidavit.

10 **2. Greenberg Traurig's Ethical Violations Regarding Materials Attached**
11 **to Ted Quasula Affidavit.**

12 Greenberg Traurig's receipt and use of confidential and privileged documents
13 received from a GCSD employee, Ted Quasula, is also a violation of the Arizona Rules
14 of Professional Conduct. Mr. Quasula's Affidavit attaches a letter from a Tribal Council
15 member, in which she included the unauthorized disclosure of confidential and privileged
16 work-product of the Tribal Council's attorneys' legal advice to the Tribal Council. This
17 disclosure was also unilateral and without the approval of the entire Tribal Council.

18 ***b. ER 4.4 – Respect for Rights of Others***

19 ER 4.4 states:

20 (a) In representing a client, a lawyer shall not use means that have no
21 substantial purpose other than to embarrass, delay, or burden any other
22 person, or use methods of obtaining evidence that violate the legal rights of
23 such a person.

24 (b) A lawyer who receives a document and knows or reasonably should
25 know that the document was inadvertently sent shall promptly notify the

26 ³ For example, GCSD takes isolated words and phrases from the legal memoranda out of
27 context in an attempt to demonstrate bad faith. Rebutting GCSD's incorrect portrayal of
28 the advice and the Tribe's response to the advice may require more explanation about the
advice, thereby opening the door to wholesale waiver of privileged communications.

1 sender and preserve the status quo for a reasonable period of time in order
2 to permit the sender to take protective measures.

3 Moreover, Ariz. Ethics Op. 2001-04 adopts ABA Formal Op. 94-382, which
4 provides if an attorney receives documents from his client (here GCSD employee Ted
5 Quasula), who in turn received those documents from a third party, the attorney is
6 required to:

7 “(i) refrain from further examination of the material or from making any
8 use of them, (ii) subject to client’s consent, notify opposing counsel of their
9 receipt, and (iii) if such notification is made, either abide by that counsel’s
10 instructions as to their disposition or seek a ruling from a court as to
11 whether they may be kept or used.”

12 Ariz. Bar Ethics Op. No. 2001-04, at 5, attached hereto as Exhibit 2. If a client insists
13 that an attorney “review the documents or use the information in them,” withdrawal is
14 required under ER 1.16(a). Ariz. Ethics Op. No. 2001-04, at 5.

15 Exhibit 1 to the Affidavit of Ted Quasula, which was filed with this Court on
16 March 1, 2012, contains information that is subject to the attorney-client privilege and
17 work product doctrine. The first privileged document is titled “Memorandum No. 3 to
18 Hualapai Tribal Council re Skywalk Matters.” The document contains information that is
19 plainly and facially protected by the attorney client privilege and the work product
20 doctrine. Lest an unwary recipient question its privileged and confidential nature, each
21 page of the document prominently states that it is “ATTORNEY-CLIENT
22 COMMUNICATION,” “ATTORNEY WORK PRODUCT,” and “PRIVILEGED &
23 CONFIDENTIAL.” The second memorandum titled “Memorandum No. 4 – Exercise of
24 Eminent Domain over Skywalk Agreement” is also clearly privileged and contains an
25 identical prominently-displayed notice of that fact.

26 Greenberg Traurig’s use of these memoranda, which contain undersigned
27 counsels’ legal analysis and advice as to pending and anticipated litigation, constitutes a
28 violation of the Arizona Rules of Professional Conduct and is prejudicial to the Tribe.
Striking these documents and excluding them from the record is the minimum sanction at
this time.

1
2 **V. CONCLUSION.**

3 For the above stated reasons, undersigned counsel respectfully requests that
4 Exhibits 1 and 8 be stricken, and that an order issue prohibiting GCSD from contacting
5 any other current or former representatives of the Hualapai Tribal Council or employees
6 of SNW. Defendants also request an accelerated hearing and ruling.

7 RESPECTFULLY submitted this 2nd day of March, 2012.

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

9
10 By: /s/ Paul Charlton

11 Glen Hallman

12 Paul K. Charlton

13 Jeffrey D. Gross

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17 *Attorneys for Defendants*
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28

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 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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2994359v1/14434-0015

Exhibit 1

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May 11, 2011

VIA EMAIL ONLY

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Re: Grand Canyon Skywalk Development, LLC v. Vaughn, et al.
United States District Court, District of Arizona
Case Number 3:11-CV-08048-DGC

Dear Counsel:

The purpose of this letter is to request that each of you cease and desist from any further use of attorney-client, or otherwise, privileged information and documents received by you or your law firm.

The United States District Court for the District of Arizona has adopted the Arizona Rules of Professional Conduct. See L.R. Civ. 83.2(e). Therefore, the Arizona Canons and Disciplinary Rules are proscriptive, and the Court may impose sanctions upon any attorney whose conduct contravenes the governing ethical

Pamela M. Overton
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standards. *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir. 1983).

Arizona E.R. 4.4 requires an attorney to respect the rights of third persons by prohibiting a lawyer from using "methods of obtaining evidence that violate the legal rights of such a person." Arizona State Bar Opinion, Arizona OP. 2001-04, governs what attorneys must do when they receive information from a client, who in turn obtained information from an unidentified "ally" of an opposing party. The opinion notes that a lawyer is required to withdraw from representation "if the client insists that the lawyer review the documents or use the information in them," where the client refuses to consent to the lawyer's disclosure that he was in possession of confidential information.

Simply, when a lawyer knows that an "ally" is not authorized to disclose materials and that the lawyer's receipt of those documents is a result of deception or misappropriation, then the lawyer's use of those documents makes him or her an accomplice. Such continued acceptance of protected material is therefore a violation of E.R. 8.4(c).

We also direct your attention to *Rico v. Mitsubishi Motors Corp.*, 42 Cal.4th 807, 171 P.3d 1092 (Cal. 2007), in which counsel received a privileged document, and made use of it in the litigation. The court found that the attorney acted unethically by failing to notify the adverse party and instead attempted "to gain maximum adversarial value from it." 42 Cal.4th at 813, 171 P.2d at 1096. The court upheld disqualification of the attorney and his firm as the appropriate sanction.

It is self-evident that the Complaint and Temporary Restraining Order Application in this matter was based upon attorney-client privileged information and documents, provided by this law firm to the Hualapai Tribal Council in Executive Session meetings. Indeed, certain of the exhibits are expressly labeled "privileged and confidential."¹ There is simply no doubt or debate that your pleadings in this matter have included information and documentation which was attorney-client and otherwise privileged, used "to gain maximum adversarial value."

You are specifically requested, in accordance with clear Arizona ethical requirements, upon receipt of any confidential or privileged material, to (1) refrain from further examination of the material or from making use of it, (2) immediately

¹ This conduct is also exacerbated by the fact your law firm formerly represented the Tribe.

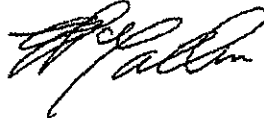
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notify this law firm of its receipt, and (3) immediately abide by this law firm's instructions as to the disposition of the information or documentation.

If we become aware of any future use by any of you of privileged information or documentation, we will be forced to file a motion with Judge Campbell to have your firm disqualified. Further, we reserve the right to seek disqualification if you do not immediately notify this law firm upon receipt of any privileged information or documentation, and abide by this law firm's instructions regarding its disposition.

Sincerely yours,

GALLAGHER & KENNEDY, P.A.



By:

Glen Hallman

GH:kjh
2742935 / 14434-15

Exhibit 2

01-04: Confidentiality; Disclosure; Withdrawal from Representation

03/2001



This Opinion discusses a lawyer's ethical obligations not to use information obtained by a client in a civil case from documents copied from the records of a potentially adverse party that contain privileged or otherwise confidential information without the consent of opposing counsel or court order. The lawyer also must advise the client to refrain from obtaining other privileged documents and notify opposing counsel of the receipt of the information. [ERs 1.2, 1.6, 1.16, 3.4, 4.1, 4.4, 8.4]

FACTS[1]

The inquiring attorney poses the following factual situation:

An attorney represents a former employee of a state agency who was recently terminated for alleged violations of the agency's policies and procedures. The former employee is a female member of a racial minority. She believes that the agents of the ex-employer who terminated her were motivated by gender and racial bias. The former employee believes that the ex-employer has not terminated similarly-situated male, non-minority employees who have engaged in the same conduct for which the former employee was terminated. No lawsuit has been filed, although an administrative charge of discrimination was filed with the federal agency (U.S. Equal Employment Opportunity Commission) and its State counterpart (Arizona Civil Rights Division, Office of the Attorney General). If a lawsuit were to be filed, it would not be for several months, depending on what those agencies decide as to the merits of the former employee's case.

The former employee recently gave her attorney copies of documents of the ex-employer that appear, on their face, to be subject to the attorney-client privilege or to be otherwise confidential. The materials are addressed from officials of the ex-employer to the ex-employer's attorney and concern her matter. The former employee was provided copies of the documents by an "ally" who is still employed by the ex-employer and has access to the confidential information.

The former employee believes that her ally will continue to provide such information to her on an on-going basis. The ex-employer's lawyer and others within the ex-employer do not know that copies of these documents are being provided to the former employee, according to the former employee's ally.

If the ex-employer knew about the ally's activities, he or she would be terminated. If the ex-employer knew about the former employee's receipt of the documents, it would likely take aggressive action against her, her counsel, and everyone else identified with the disclosure of the documents.

QUESTIONS PRESENTED

1. What is the ethical duty of a lawyer who receives from his or her client copies of the documents and the information described above?
2. May the lawyer use the information in the documents?
3. May the lawyer continue to accept other such documents in the future?
4. Does the lawyer have an obligation not to use the information and, if so, what steps should he or she follow?

RELEVANT ETHICAL RULES

ER 1.2. Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

* * * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

ER 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(2).

* * * *

(c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

* * * *

ER 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

* * * *

ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

* * * *

ER 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

* * * *

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

ER 4.4. Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

* * * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

* * * *

OPINION

The facts pit a lawyer's ethical obligations to his or her client against a lawyer's competing obligations to treat potentially adverse parties fairly and to respect the legal rights of others in obtaining evidence. Compare ER 1.3 Comment ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.") and ER 1.6(a) (except as specifically authorized, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents") with ER 4.4 ("In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [third] person[s].").

This Opinion is intended to apply only to the facts as presented by the inquiring attorney. At the outset, it is important to identify the issues that are not directly involved here:

- According to the facts, the lawyer obtained the documents through no effort of his or her own. Therefore it is unnecessary to discuss the ethical propriety of a lawyer attempting to obtain privileged or confidential information from an adverse party or its counsel. See, e.g., *Ariz. Op.* 2000-05 at 3-4 (Sept. 2000) (in interviewing a former employee of an adverse party, a lawyer must refrain from inquiring into any privileged communications the former employee may have had with employer's counsel during his or her employment).

- This also is not a situation where the lawyer receives privileged or confidential documents through the inadvertence of opposing counsel. Instead, the facts involve the unauthorized receipt of such materials through a client, who obtained them from a third party (the current employee of the ex-employer) who intended the lawyer to receive them. As such, the issue is not merely whether a lawyer may take advantage of an opposing counsel's mistake in erroneously transmitting or producing privileged or confidential documents to the lawyer. See ABA Formal Op. 92-368 (Nov. 10, 1992) (a lawyer who inadvertently receives privileged or confidential materials must (i) refrain from examining the materials, (ii) notify the sending lawyer of the mistaken transmission and (iii) abide the instructions of the lawyer who sent them).

- There also is nothing in the facts to suggest that the documents at issue disclose potentially criminal or illegal activity, which would give rise to other ethical considerations. See *Hitch v. Pima County Superior Ct.*, 146 Ariz. 588, 708 P.2d 72 (1985) (setting forth disclosure obligations if a lawyer obtains from a third party evidence relevant to a crime). Also, the facts set forth by the inquiring attorney arise in the context of civil litigation rather than in a criminal case, where different considerations might apply. As such, this Opinion should be understood as not necessarily applying to a lawyer's obligations in a criminal case.

- Last, the lawyer received the documents from his or her client, who in turn obtained them from an unidentified "ally" who is still employed by the ex-employer. Thus, although it is closely related, this is not a situation where a lawyer has received privileged or confidential information merely from an unidentified source or from someone other than his or her client.

I. ABA FORMAL OPINION 94-382 (JULY 5, 1994).

The issues raised by the inquiring attorney are related, but not identical, to those considered in ABA Formal Op. 94-382, which discusses a lawyer's obligations if an unauthorized person offers to provide the lawyer with documents of an adverse party that appear to be privileged under the attorney-client privilege or "confidential" under ER 1.6. Acknowledging that none of the Model Rules explicitly address the issue, it opines that "public policy considerations" dictate that a lawyer has "a professional obligation to notify the adverse party's lawyer that she possesses such materials and either follow the instructions of the adversary's lawyer with respect to the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court." *Id.* at 2.

The Opinion reasons that a rule allowing a lawyer to use such materials "would place an adversary at the mercy of those who would use, on an unauthorized basis, the adversary's confidential communications" and who would seek "to undermine or sabotage" the adversary's legitimate efforts to protect its proprietary interests and privileges. *Id.* at 4. It stops short, however, of endorsing a rule requiring a lawyer to return such materials in all circumstances. It recognizes that the offering party in some instances "may be seeking to rectify improper or unjust conduct - for example, the failure to disclose such documents in response to a production request clearly calling for them." *Id.* at 3. The Opinion concludes that in such circumstances, it would be ethically proper for the lawyer to retain the material so long as he or she notifies opposing counsel of their receipt and "refrain[s] from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court." *Id.* at 5.

Neither the Arizona courts nor the past opinions of this Committee have cited or discussed ABA Formal Op. 94-382. Several courts in other jurisdictions, however, have endorsed it. Thus, reasoning that "a lawyer who uses privileged information improperly obtained from an opponent potentially subverts the litigation process," the Texas Supreme Court has recently held that "ABA Formal Opinion 94-382 represents the standard to which attorneys should aspire in dealing with an opponent's privileged information." *In re Meador*, 968 S.W.2d 346, 351 (Tex. 1998) (lawyer acted improperly in using privileged documents which the lawyer's client secretly removed from defendants' offices, but holding that lawyer should not be disqualified because defendant had not shown that it had suffered harm and because disqualification would cause the client to suffer serious hardship).^[2] The ABA Opinion also is consistent with several other decisions that either predate it or do not explicitly refer to it.^[3]

Not all jurisdictions, however, have embraced the Opinion's reasoning. One appellate court in California, which still follows a version of the Model Code of Professional Responsibility, has held that a lawyer could use confidential information set forth in documents that his client obtained from an adverse party's employee and was not required to inform opposing counsel of their receipt, at least where the lawyer played no role in obtaining the documents and where the information in the documents was not privileged. See *Aerojet-General Corp. v. Transport Indem. Ins.*, 18 Cal. App. 4th 996, 1002-07, 22 Cal. Rptr. 2d 862, 865-68 (1993) (reversing sanctions against counsel; documents contained the identity of a witness that plaintiff argued should have been disclosed in discovery).^[4] Ethics committees in several other jurisdictions also have issued opinions allowing a lawyer to make similar use of

documents innocently obtained from an opposing party.^[5] Those opinions, however, interpreted provisions of the Model Code rather than the Model Rules, which are applicable in Arizona. It also is not clear whether the documents at issue in some of those opinions contained privileged information.

II. RELEVANT OPINIONS OF THIS COMMITTEE.

A. Ariz. Op. 88-08 (Oct. 24, 1988).

In Ariz. Op. 88-08, a wife in a dissolution proceeding had surreptitiously tape-recorded her husband's deposition. During a break, the wife inadvertently left the tape recorder running and recorded a confidential communication between her husband and his counsel. *Id.* at 1. After later listening to the conversation, the wife asked her lawyer to listen to it because it contained information that was highly damaging to her husband and his counsel. *Id.*

The Committee concluded that the wife's lawyer could not listen to, rely on or otherwise use the tape recording. *Id.* at 7-9. Finding that there were "reasonable grounds to believe that the inquiring attorney's client could face criminal prosecution if her conduct were disclosed," the Committee reasoned that if the lawyer were to listen to or use the information on the tape-recording, the lawyer would: (i) violate ER 1.2(d) by assisting the client in her improper conduct by allowing her to benefit from conduct that the lawyer knew was criminal or fraudulent; (ii) expose the wife to possible criminal liability because any use of the tape's information would lead inevitably to the disclosure of the tape's existence; and (iii) breach ER 1.6's confidentiality requirements absent client consent to the disclosure of the tape's existence. *Id.* at 7-8. It also found that because the client had not "demanded" that the lawyer listen to the tape, the lawyer was not required to withdraw from the representation. *Id.* at 6.

The Opinion also concluded that while "under other circumstances, ER 4.1(b) might require that the inquiring attorney inform opposing counsel that the private conversation with her client had been tape-recorded," ER 4.1(b) specifically exempted disclosures prohibited by ER 1.6 and, as such, the lawyer was prohibited from notifying opposing counsel without client consent because ER 1.6 did not specifically authorize such a disclosure. *Id.* at 9.

B. Ariz. Op. 93-14 (Sept. 23, 1993).

Ariz. Op. 93-14 also discusses issues that are relevant here. In that Opinion, a client in a dissolution proceeding provided the lawyer with a cassette tape that the client had found in the client's residence. The tape contained a recording of a conversation between the client's spouse and an attorney who had represented the client's spouse in an earlier dissolution proceeding involving another party. *Id.* at 1. When the cassette was found, the client had exclusive possession and use of the residence under the terms of a temporary order entered in the dissolution proceeding. *Id.*

Emphasizing the absence of any facts to suggest that the client obtained the cassette through any impropriety or illegal conduct, the Committee concluded that the inquiring attorney could listen to the tape if the client consented to it after being informed that an attempt could be made to disqualify the lawyer if the lawyer listened to it. *Id.* at 3-4. The Opinion acknowledged that ABA Formal Op. 92-368 calls upon a lawyer, among other things, not to examine privileged or confidential material that is inadvertently sent to the lawyer by opposing counsel, but distinguished that Opinion on the ground that it was "the [client's] spouse, not the [client's] spouse's attorney" who "left the tape behind." *Id.* at 4.^[6]

The Opinion also noted that if the tape was an original belonging to the spouse, "the inquiring attorney may have a duty" under ER 1.15 "to return the original to its owner," but the Opinion did not decide that issue. *Id.* at 5. It did opine, however, that if the circumstances required "disclosure of the existence of the tape or even its return to the spouse, the inquiring attorney must obtain the client's consent after consultation" before taking any action. *Id.* It relied, among other things, upon two ethics opinions from New York and Pennsylvania that expressed the view that without client consent, a lawyer may not disclose the fact that the client had obtained confidential information belonging to an adverse party. *Id.*^[7]

III. DISCUSSION

The facts provided by the inquiring attorney do not reveal what role, if any, the client played in assisting or inducing her "ally" to provide her with copies of the ex-employer's documents. As the client's involvement in obtaining the documents affects a lawyer's ethical obligations, the following discussion first analyzes those obligations if the "ally" provided the documents without any prompting or assistance by the client and then examines a lawyer's obligations if client misconduct was involved.

A. If No Client Misconduct Is Involved.

Assuming that the documents were obtained through no misconduct by the lawyer's client, the ethical guidelines set forth in ABA Formal Op. 94-382 should govern because they strike the appropriate balance between a lawyer's obligations to his or her client and those that a lawyer owes to an adverse party and its counsel.

The protection of the attorney-client privilege and work product immunity should not be disregarded lightly, as lawyers cannot perform their professional roles unless they and their clients know that client communications and the lawyer's work product will not be put on public display. Non-privileged client confidences, although not rising to the same level of importance as privileged communications and materials, also are deserving of protection, particularly if they involve proprietary or otherwise sensitive information. The social value of those interests also dictate against endorsing a rule that would encourage people to attempt to

override their protection unilaterally by engaging in subterfuge, espionage and deception. At the same time, the protections afforded to those interests should not be permitted in all circumstances to shield evidence of wrongdoing, especially when the information at issue is not privileged.

ABA Formal Op. 94-382 accommodates those competing concerns by requiring a lawyer who receives such material from a third party (i) to refrain from further examination of the material or from making use of it, (ii) to notify opposing counsel of its receipt, and (iii) either to abide by that counsel's instructions as to its disposition or to seek a ruling from a court as to whether it may be used. By "freezing" the receiving counsel's use of the information and by requiring opposing counsel to be notified of its receipt, the policy minimizes the harm arising from the information's disclosure while at the same time giving all parties the opportunity either to reach agreement as to what should be done about the disclosure or to seek assistance from a court to determine whether the information deserves protection against further disclosure or use.

The policy suggested by ABA Formal Op. 94-382 presupposes that the parties have a court from which they can seek relief. That is not the case here as no litigation has yet been brought, and presumably cannot be brought unless, and until, the appropriate federal and/or state agencies authorize it. Nonetheless, the same considerations apply. Although no lawsuit has been filed, the necessary prelitigation procedures have been initiated and the parties to the matter are clearly adverse. In such circumstances, the lawyer should refrain from reviewing or making use of the information in the documents and notify the ex-employer's counsel that they have come into the lawyer's possession. At that juncture, it would be ethically permissible for the lawyer to retain (but not examine or use) the documents if he or she decides it is in the client's best interest to contest their protected status once a lawsuit is filed.

Adhering to the procedures set forth in ABA Formal Op. 94-382, however, is subject to one major qualification not discussed in that Opinion - client consent. Because the lawyer here learned of the documents' existence as a result of his or her representation of the client and because no exception to ER 1.6(a) applies here, ER 1.6 requires client consent before the lawyer may notify the ex-employer or its attorney that the lawyer has received privileged or confidential material belonging to the ex-employer. See ER 1.6 Comment ("The confidentiality rule applies . . . to all information relating to the representation, whatever its source."); Ariz. Op. 93-14 (assuming lawyer had a duty to disclose to an adverse party the existence of a tape recording of a conversation between that party and his attorney, "the inquiring attorney must obtain the client's consent" before making disclosure). Moreover, the facts set forth by the inquiring attorney indicate that the ex-employer would terminate the "ally" if his or her actions were discovered. If the lawyer anticipates that the client will be concerned about the "ally's" welfare, ER 1.2(a) also requires the lawyer to seek client consent before taking any action. See ER 1.2(a) Comment ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as . . . concern for third persons who might be adversely affected.").

If the client refuses to consent to notification, the considerations discussed earlier dictate that the lawyer still should refrain from examining the documents or making use of the information in them. The Committee's advice in Ariz. Op. 93-14 is not to the contrary. While the Committee concluded that it was ethically permissible for the inquiring attorney to listen to a tape-recording of what appeared to be a privileged conversation, the conversation at issue was between an opposing party in pending litigation and that party's attorney from an earlier lawsuit not involving the client. Additionally, the lawyer had grounds for believing that client's spouse either abandoned the cassette or carelessly had left it at the client's residence, arguably waiving any applicable privilege. Here, in contrast, the communications at issue are between a potentially adverse party and its counsel concerning the client's case and the lawyer has no reason to believe that the ex-employer's conduct has resulted in the waiver of any privilege. In such circumstances, the case for safeguarding the information against improper use is much stronger, especially given the likelihood that a court would rule that the "ally's" misappropriation of the ex-employer's documents did not waive any privilege the ex-employer otherwise would have with respect to them.

If the client refuses to consent to notification, the lawyer would not be required to withdraw from representing her. ER 1.16(a) mandates withdrawal only if "the representation will result in violation of the Rules of Professional Conduct or other law." If the lawyer does not review or make use of the information in the documents, the lawyer's continuing representation of the client will not by itself violate any of the Ethical Rules. See Ariz. Op. 88-08 at 6 (withdrawal not required where client was "suggest[ing], but apparently . . . not demanding" that lawyer listen to tape recording that client had improperly made of a conversation between the opposing party and his lawyer). Withdrawal, however, would be required if the client insists that the lawyer review the documents or use the information in them. *Id.*

If the client gives her consent and the lawyer notifies the ex-employer or its counsel of the documents' receipt, the lawyer may not disclose the documents' source without the client's consent as such information falls within the scope of ER 1.6(a)'s bar because the lawyer learned that information during the course of the lawyer's representation of the client.

The last issue is whether the lawyer may receive additional documents from the client's "ally." Based on the facts set forth above, the lawyer knows that the "ally" is not authorized to disclose documents to the lawyer and that his or her receipt of those documents can only be the result of the "ally's" deception of others employed by the ex-employer. Once aware of those facts, the lawyer becomes an accomplice to that deception if he or she encourages the "ally" in any way to copy more documents. Such conduct would violate ER 8.4(c), which prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." As such, the lawyer should tell his or her client to inform the "ally" that the lawyer will not accept any more copies of the ex-employer's documents.

B. If Client Misconduct Is Involved.

Similar, but not identical, considerations apply if the client solicited the "ally" to obtain the documents or played an illegal or improper role in assisting the "ally" to secure them.

First, the lawyer should refrain from examining or using the materials, both because of the reasons set forth in ABA Formal Op. 94-382 and because of the concern set forth in Ariz. Op. 88-08 that such a review or use would allow the client to benefit from the misconduct and thereby lead the lawyer to violate ER 1.2(d). See ER 1.2(d) ("A lawyer shall not . . . assist a client[] in conduct that the lawyer knows is criminal or fraudulent . . ."). For the reasons stated in ABA Formal Op. 94-382 and subject to client consent (discussed below), the lawyer should notify the ex-employer's counsel about the documents' receipt and then either abide by that counsel's instructions regarding their disposition or retain them pending a resolution of their status by a court.

Second, because the lawyer learned of the documents as a result of the lawyer's representation of the client and because disclosure of the client's misconduct would adversely affect her substantive rights by possibly exposing her to criminal or other legal liability, ERs 1.2(a) and 1.6(a) prohibit the lawyer from notifying the ex-employer or its counsel of the documents' receipt without first obtaining client consent. See Ariz. Op. 88-08 at 9 (without client consent, lawyer may not inform opposing counsel that the client has tape-recorded a privileged conversation between opposing counsel and the opposing party).[8] If the client refuses to give consent, the lawyer may not further examine or use the documents, but the lawyer is not required to withdraw from representing her. See *id.* at 6 (where client improperly tape-recorded deposition, lawyer was not required to withdraw from representation where the client had not demanded that the lawyer listen to it). If the client consents to notification, ER 1.6 forbids the lawyer from disclosing where he or she got the documents unless the client consents to such a disclosure. See ER 1.2 Comment ("The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by ER 1.6"); *Lake Havasu Community Hosp., Inc. v. Arizona Title Ins. & Trust Co.*, 141 Ariz. 363, 376, 687 P.2d 371, 384 (App. 1984) (lawyer retained by insurance company to defend insured cannot reveal to the insurance company information learned from client or during course of engagement that might prejudice insured's right to insurance coverage).

Third, for the reasons given earlier, ER 8.4 bars the lawyer from accepting any more documents from the client's "ally."

Fourth, the lawyer must counsel the client about the possible legal consequences of her conduct and tell her to discontinue it. If she refuses, the lawyer must withdraw from further representation. See ER 1.16(a) ("[A] lawyer . . . where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law"); *In re American Continental Corp./Lincoln Savings & Loan Sec. Litig.*, 794 F. Supp. 1424, 1452 (D. Ariz. 1992) (attorneys must advise clients in a clear and direct manner when the client violated the law, and if the client continues the objectionable activity, the attorney must withdraw).

Fifth, if the client refuses to discontinue the conduct and if the lawyer concludes that her actions will be illegal, ER 1.6(c) allows, but does not require, the lawyer to disclose the client's intention to the ex-employer or other appropriate authorities. ER 1.6 (c) ("A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime."). ER 1.6 (c), however, does not allow such a disclosure if the lawyer believes the conduct is merely "fraudulent" rather than criminal. *Id.*; cf. Rule 42 of the Rules of the Supreme Court, Terminology ("Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."). ER 4.1(b) also does not authorize such a disclosure. Although it prohibits a lawyer from knowingly "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client," the Rule is qualified by the phrase "unless disclosure is prohibited by ER 1.6." Because ER 1.6(c) authorizes disclosure only of an intention to commit a crime and not merely an intention to commit a fraudulent act, ER 4.1(b) does not authorize the lawyer to disclose the activity without client consent.

CONCLUSIONS

1. The lawyer should (i) refrain from further examination of the documents or from making any use of them, (ii) subject to client consent, notify the ex-employer's counsel of their receipt, and (iii) if such notification is made, either abide by that counsel's instructions as to their disposition or seek a ruling from a court as to whether they may be kept or used.
2. The lawyer may not use the information in the documents unless the ex-employer consents or a court issues a ruling allowing the lawyer to use the information.
3. The lawyer may not continue to accept other such documents in the future. Whether or not the ex-employer's counsel is notified, the lawyer must ask the client to inform the employee that the lawyer will not accept any further documents from the employee.
4. Under the facts presented, the lawyer has an obligation not to use the information without the ex-employer's consent or a court ruling authorizing such use. The steps the lawyer should follow are described above in Conclusion #1. Additionally, if client misconduct was involved in obtaining the documents, the client should be counseled about the possible legal consequences of her conduct and be told to discontinue it.

[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2001

[2] See also *Weeks v. Samsung Heavy Indus., Ltd.*, No. 93-C-4899, 1996 U.S. Dist. LEXIS 7397 at 7-8 (N.D. Ill. May 30, 1996) (granting motion for protective order directing the return of an opposing counsel's billing statement that was obtained through an undisclosed source; endorsing ABA Formal Opinion); *Utah Op. 99-01* (Jan. 29, 1999) (discussing ABA Formal Opinion with approval and concluding that under ER 8.4 "an attorney in possession of an opposing party's attorney-client communications for which the attorney-client privilege has not been intentionally waived should advise opposing counsel of the fact of its disclosure, regardless of

the specific facts surrounding its disclosure").

[3] See *In re Shell Oil Refinery*, 143 F.R.D. 105, 108-09 (E.D. La. 1992) (ordering, inter alia, that plaintiff's counsel could not use information that counsel had learned from documents he obtained from a current employee of corporate adversary; counsel's receipt of documents was "inappropriate and contrary to fair play"); *Lipin v. Bender*, 644 N.E.2d 1300, 1302-05 (N.Y. Ct. App. 1994) (lawyer improperly used privileged materials that the client took from a stack of materials opposing counsel left at conference table at a hearing; affirming dismissal of complaint as a sanction where lower courts had characterized client's and her lawyer's conduct as "a threat to the attorney-client privilege, to the concept of civilized orderly conduct among attorneys, and even to the rule of law").

[4] But see *State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 654-57, 82 Cal. Rptr. 2d 799, 806-08 (1999) (distinguishing *Aerojet* on the ground that the information at issue in that case was not privileged and generally adopting the standard of ABA Formal Op. 92-368 to require that "whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact"; disposition of document to be governed by agreement or court order).

[5] See, e.g., Md. Op. 89-53 (1989) (Model Code) ("A lawyer who receives from an unidentified source copies of documents belonging to an opposing party has no obligation to reveal the matter to the court or the opposing party. The lawyer should keep copies to avoid destruction of the evidence; however, if the lawyer receives original documents he must attempt to return them to the rightful owner.") (as quoted in ABA Formal Op. 94-382); Mich. Op. Ct-970 (Oct. 5, 1983) (Model Code) ("A lawyer who comes into possession of an internal private memorandum of the opposite party during litigation" may use the document at trial for impeachment purposes in civil rights action "provided that the lawyer or client did not procure or participate in the removal of the document"; document at issue was "an internal self-evaluating and critical report by the county's affirmative action officer"); Va. Op. 1076 (1988) (Model Code) ("The [receiving] lawyer may retain, read, and make use of material from his opponent's file that was sent to him by an unknown third party," although opposing counsel should be notified of their receipt as a matter of "professional courtesy"), overruled, Va. Op. 1702 (Nov. 24, 1997) (Model Code) (endorsing ABA Formal Op. 94-382 as "fairly balance[ing] the competing interests" and overruling earlier opinion; "a 'use whatever you have, no matter how you got it' rule may reflect the rules of the marketplace," but "[h]igher standards should prevail in the practice of law").

[6] One member of the Committee dissented from the Opinion, arguing that the Opinion's distinction of ABA Formal Op. 92-368 was "unjustifiabl[e]" and concluding that "[t]he inquiring lawyer should return the tape without listening to it and pursue the matter through proper motion to the court." Ariz. Op. 93-14 at 6.

[7] New York City Bar Ass'n Op. 1989-1 (March 13, 1989) (Model Code) (under Disciplinary Rules, although a lawyer was under an ethical obligation to notify opposing counsel that a client had improperly obtained confidential communications between opposing counsel and that counsel's client, the lawyer was ethically barred from notifying opposing counsel without client consent because "the fact that the inquirer has obtained the documents through an unauthorized interception is a 'secret' within the meaning of DR 4-101(A)"); Philadelphia Bar Ass'n Op. 91-19 (1991) (Model Rules) (without client consent, Rule 1.6(a) "affirmatively prohibits disclosure" to opposing counsel that client had innocently taken a letter written by opposing counsel when it became mixed-up with client's own papers).

[8] The Committee reached a contrary conclusion in Ariz. Op. 80-23 (Oct. 8, 1980), an Opinion that was written before Arizona's adoption of the Model Rules. That Opinion concluded that where a client had secretly copied part of opposing counsel's file without his lawyer's knowledge, Arizona's version of the Model Code required the lawyer to call upon his client to rectify the fraud, and, if the client refused or was unable to do so, the lawyer was ethically required to advise opposing counsel that his file had been copied. In Ariz. Op. 88-08 the Committee concluded that while that Opinion's result may have been correct under Arizona's version of the Model Code, ER 1.6 forbids such a disclosure without client consent. See Ariz. Op. 88-08 at 10.

EXHIBIT 21

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March 2, 2012

VIA ELECTRONIC MAIL

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Re: *Receipt and Use of Privileged Information*

Dear Mr. Tratos:

We are in receipt of your letter dated March 1, 2012, regarding your receipt and use of privileged information provided by our firm to our client. Such receipt and use constitutes a violation of Arizona Law, and a number of ethical rules, principal among them, Ethical Rules 4.2 and 4.4.

Very truly yours,

GALLAGHER & KENNEDY, P.A.



By:

Paul K. Charlton

PKC:gk

cc: Pamela M. Overton (via e-mail)
Tracy L. Weiss (via e-mail)
Troy A. Eid (via e-mail)

EXHIBIT 22

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