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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.

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

Defendants.

No. 3:13-cv-08054-PCT-DGC

**FIRST AMENDED COMPLAINT
 TO COMPEL ARBITRATION**

For its complaint against Defendants Richard Walema, Sr., Wynona Sinyella, Ruby Steele, Candida Hunter, Barney Rocky Imus, Waylon Honga, Charles Vaughn, Sr., Sherry Counts, Philbert Watahomigie, Ronald Quasula, Sr., Rudolph Clarke, Hilda Cooney, Jean Pagilawa (the “Council Defendants”) and the Hualapai Indian Tribe of the Hualapai Indian

Reservation, Arizona (the “Tribe”) (collectively, “Defendants”), Plaintiff Grand Canyon Skywalk Development, LLC (“GCSD”) alleges as follow:

I. NATURE OF THE ACTION

1. This action is based upon a currently pending and stayed eminent domain action in the Hualapai Indian Tribe Tribal Court (the “Tribal Eminent Domain Action”).

2. The Tribe initiated the Tribal Eminent Domain Action on February 8, 2012 by filing a complaint in condemnation in Hualapai Tribal Court and filing a declaration of taking that purported to take Plaintiff GCSD’s intangible contractual rights in a 2003 Development and Management Agreement (the “2003 Agreement”) relating to the world-famous Grand Canyon Skywalk tourist attraction.¹

3. After motion practice in the Tribal Eminent Domain Action, the Honorable Judge King requested supplemental briefing from the parties regarding, among other things, whether the contract rights that the Tribe purported to condemn were subject to government takings or whether instead, they were subject to the contractual remedies provided for by the 2003 Agreement that was purportedly condemned.

4. After evaluating the supplemental briefing on this issue, on March 5, 2013 Judge King entered an order staying the Tribal case until the parties have adjudicated their contractual remedies in Federal Court (Arbitration). *See* Minute Entry and Order, Case No. 2012-CV-017 (Hualapai Tribal Court March 5, 2013), attached as **Exhibit 1**.

5. The contract at issue contained an arbitration clause on page 42, section 15.4, under which the parties to the contract could compel arbitration in the United States Court for the District of Arizona. *See* 2003 Development and Management Agreement, attached as **Exhibit 2**, at § 15.4(a). While GCSD believes an order for arbitration is not required to proceed with arbitration under the agreement, out of an abundance of respect for the Tribal Court, GCSD is following the Tribal Court order and initiating the instant action.²

¹ By filing the Tribal Eminent Domain Action, the Tribe waived its sovereign immunity, at least before the Tribal Court.

² GCSD’s position regarding why a court order is not needed prior to initiating arbitration under the agreement is explained further in Note 3, *supra*.

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II. PARTIES

6. GCSD is a limited liability company, organized and existing under the laws of the State of Nevada, with its principal place of business in the State of Nevada. None of GCSD's members are residents of Arizona.

7. Defendant Tribe is a sovereign Indian tribe whose reservation is located in the State of Arizona.

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

9. Defendant Sherry Counts is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Tribal Council.

10. Defendant Philbert Watahomigie is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Tribal Council.

11. Defendant Ronald Quasula, Sr. is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Tribal Council.

12. Defendant Rudolph Clarke is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Tribal Council.

13. Defendant Hilda Cooney is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Tribal Council.

14. Defendant Jean Pagilawa is an individual, an enrolled member of the Tribe, a resident of Arizona, and a member of the Tribal Council.

III. JURISDICTION AND VENUE

15. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a), as the parties are diverse in citizenship and the amount at issue exceeds \$75,000.

16. Venue is proper in this Court because this is a judicial district specified in the underlying contract. *See Ex. 2*, at § 15.4(a).

IV. FACTUAL ALLEGATIONS

A. Background

17. Mr. David Jin ("Jin"), the managing member of GCSD, conceived and

1 developed the idea of constructing and operating a glass viewing platform (the “Skywalk”)
2 and related facilities on the edge of the Grand Canyon and proposed the project to the Tribe
3 as a revenue-sharing agreement.

4 18. The Tribe formed ‘Sa’ Nyu Wa, Inc. (“SNW”), a Hualapai tribally
5 chartered corporation, in 2003 for the express purpose of entering into a revenue-sharing
6 agreement with a company to be formed by Jin regarding the planning, construction and
7 operation of the Skywalk and related facilities.

8 19. Jin and other investors formed GCSD for the purpose of entering into a
9 relationship with the Tribe, whereby GCSD would manage the entire project and would
10 make an initial investment into the project and recoup that investment along with profits
11 from the management and operation of the Skywalk and related facilities under a
12 comprehensive management agreement.

13 20. Consistent with and to effectuate these purposes, SNW and GCSD entered
14 into the 2003 Agreement, which provided for, among other things, GCSD to construct,
15 manage and operate the Skywalk and associated facilities. *See generally* **Ex. 2**.

16 21. The 2003 Agreement provided that the Tribe, not SNW, would own all
17 project improvements and that the Tribe was an intended third-party beneficiary of the 2003
18 Agreement. *See* **Ex. 2**, §§ 2.2(s), 15.3.

19 22. The 2003 Agreement also provided that any controversies, claims or
20 disputes arising out of or related to the 2003 Agreement were to be decided by binding
21 arbitration before the American Arbitration Association (the “AAA”). *See* **Ex. 2**, at §
22 15.4(a).

23 23. The 2003 Agreement also provided that the agreement “shall be binding
24 upon and inure to the benefit of SNW and Manager *and their successors and assigns*.” *See*
25 **Ex. 2**, at § 15.3 (emphasis added).

26 24. GCSD paid approximately \$30 million for the benefit of the Tribe for the
27 purpose of constructing the Skywalk and related facilities under the 2003 Agreement.

28 25. The Skywalk opened to visitors on March 28, 2007, with GCSD operating

the facilities and SNW in charge of maintaining the books and records of the project. The Tribe entered into a management agreement with SNW to manage the Skywalk on behalf of the Tribe in 2007 before the Skywalk opened. *See* Management Agreement Between the Tribe and SNW (Feb. 19, 2007), attached as **Exhibit 3**. Almost immediately from the outset of the Skywalk's operations, SNW breached material terms of the 2003 Agreement to which it was bound.

26. GCSD and SNW initially attempted to negotiate their disputes and find a satisfactory solution for both parties. When the attorneys for SNW refused to continue negotiating with GCSD, GCSD demanded the parties arbitrate their disputes as provided for by the 2003 Agreement. SNW refused GCSD's demand for arbitration.

B. Arbitration Between GCSD and SNW of Pre-2011 Claims

27. On February 25, 2011, GCSD filed an action in Hualapai Tribal Court seeking to compel arbitration on the outstanding management fee due GCSD and other issues. The Tribe opposed the action and asserted that only a Federal Court could order Arbitration. The Tribal Court ruled that only a Federal Court could compel arbitration and that GCSD had exhausted its tribal remedies and could seek resolution in Federal Court. *See* Order: Motion to Dismiss, Case No. 2011-CV-006 (Hualapai Tribal Ct. July 29, 2011), attached as **Exhibit 4**.

28. In fall 2011, GCSD filed an arbitration complaint with the AAA as required under the 2003 Agreement. Initially, SNW asserted that the arbitrator did not have the ability to arbitrate the matter because the arbitration had not been ordered by a Federal Judge. Reviewing the parties' agreement, however, the arbitrator concluded that an Order by a Federal Court for arbitration was unnecessary and that the arbitration could proceed.³

³ GCSD's position is and has always been that no court order is required to compel the parties to participate in binding arbitration, and that either party can initiate arbitration by written notice to the other party. *See* **Ex. 2**, at § 15.4(a). Specifically, the 2003 Agreement dictates that all controversies, claims, or disputes arising from or relating to the 2003 Agreement "***shall be resolved through binding arbitration***," and provides that "[e]ither party may request and ***thus initiate*** arbitration . . . by written notice to the other party." *Id.* (emphasis added). However, out of an abundance of caution and respect for the Tribe,

1 29. SNW filed nineteen (19) counterclaims in the arbitration action, paid all
2 arbitration fees and participated in arbitration discovery. However, SNW's participation in
3 the arbitration proceedings came to an abrupt halt when the arbitrator ordered that SNW
4 produce point-of-sale information related to monies received by the Tribe for Skywalk
5 admissions and related discovery.

6 30. In an effort to avoid having SNW comply with the arbitrator's order that it
7 produce vital point-of-sale information due the next day, on February 9, 2012, the Tribe
8 passed a taking resolution and filed an action of taking in Tribal Court to seize control of
9 GCSD's intangible contract rights and interests in the management operation of the famous
10 Grand Canyon Skywalk under a purported exercise of eminent domain.

11 31. Shortly after the Tribe's purported exercise of eminent domain, Glen
12 Hallman, who represents both the Tribe and SNW, informed the Federal District Court
13 Judge Campbell that the Tribe was terminating the arbitration as it had taken over the
14 contractual position of GCSD who was the Plaintiff in the AAA proceedings and that it, the
15 Tribe, was terminating GCSD's litigation against the tribe's chartered corporate entity,
16 SNW.

17 32. The Arbitrator delayed the final arbitration hearing to allow the Tribe to
18 obtain an injunction from either Tribal or Federal Court to enjoin the arbitration. The Tribe
19 failed to obtain an injunction and in fact, the Tribal Court issued an order declaring that the
20 arbitration could proceed. *See* Minute Entry and Order, Case No. 2012-CV-017 (Hualapai
21 Tribal Ct. July 15, 2012), attached as **Exhibit 5**, at 5. The arbitration proceeded in July
22 2012 as to amounts owed by SNW to GCSD up through December 31, 2011. Sixteen
23 witnesses including Tribal members and officials testified and thousands of pages of
24

25 GCSD initially filed an action in Tribal Court to Compel Arbitration. As discussed, the
26 Tribal Court held that only a Federal Court could compel arbitration pursuant to the terms in
27 the 2003 Agreement, and that GCSD could seek to compel arbitration in Federal Court. *See*
28 **Ex. 3**, at 3. Here, GCSD has already sent a demand for arbitration to the Tribe, but in an
effort to fully comply with the directives of the Tribal Court and Judge King, GCSD files
the instant action to compel arbitration in Federal Court.

documents were introduced into evidence. SNW failed to appear at the arbitration hearing.

33. The AAA Arbitrator determined that SNW had breached the 2003 Agreement in many ways and on multiple levels, and awarded approximately \$28.6 million in damages and fees to GCSD. *See* Final Arbitration Award, attached as **Exhibit 6**.

34. On February 11, 2013, the United States District Court for the District of Arizona entered an order confirming the Final Arbitration Award. *See* Order Granting GCSD's Application for Confirmation of Arbitration Award, Case No. CV-12-08183-PCT-DCG (Feb. 8, 2013), attached as **Exhibit 7**.

C. Purported Tribal Taking of GCSD's Intangible Contractual Interest in the 2003 Agreement

35. The Tribe's purported "taking" egregiously violated GCSD's constitutional rights, as the Tribe purportedly seized GCSD's intangible property located off the reservation without legal notice, posting a bond, or obtaining an immediate possession court order. *See* Hualapai Tribal Council Resolution No. 20-2011 ("Eminent Domain Ordinance" or "Ordinance"), attached as **Exhibit 8**.

36. In its Declaration of Taking, the Tribe claimed that it was exercising eminent domain because of "construction and operation concerns" relating to the Skywalk. *See* Declaration of Taking, Case No. 2012-CV-017 (Hualapai Tribal Ct. Feb. 8, 2012), attached as **Exhibit 9**. However, any construction and operation concerns relating to the Skywalk, by definition would "relate" to the 2003 Agreement, and would thus be subject to the binding arbitration as provided for in section 15.4 of the 2003 Agreement and resolvable through arbitration.

D. The Tribe's Termination of SNW's Interest in the 2003 Agreement

37. The Hualapai Tribal Council, in an October 5, 2012 letter to the editor of the Las Vegas Review Journal, Nevada's most widely circulated newspaper, stated that **the Tribe** has been managing operations at the Skywalk since the time that the Tribe purported to take GCSD's contractual rights in the 2003 Agreement. *See* Online Version of Letter to the Editor, Reviewjournal.com (Oct. 5, 2012), attached as **Exhibit 10**.

1 38. In the February 15, 2013 official Newsletter of the Hualapai Tribe, the
2 Chairwoman of the Tribe informed the Tribe's members that "[t]he Hualapai Tribe has been
3 successfully managing operations at the Grand Canyon Skywalk since we terminated our
4 contract with Mr. Jin." *See* Official Newsletter of Hualapai Tribe (Feb. 15, 2013), attached
5 as **Exhibit 11**; *see also* Official Newsletter of Hualapai Tribe (Dec. 14, 2012), attached as
6 **Exhibit 12**.

7 39. On February 27, 2013, the Tribe purportedly removed from SNW all
8 operational control of the Skywalk and designated GCRC to operate the Skywalk, making
9 all SNW's employees GCRC employees. *See* Declaration of Jennifer Turner in Support of
10 Chapter 11 Filing and First Day Motions, Case No. 0:13-bk-02972-BMW (Mar. 4, 2013),
11 attached as **Exhibit 13**, at ¶ 22.

12 40. On March 4, 2013, SNW filed a Chapter 11 bankruptcy petition in the
13 United States Bankruptcy Court for the District of Arizona along with a declaration in
14 support of the Chapter 11 petition stating that SNW no longer has the ability or intention to
15 continue its business operations. *See* **Ex. 13**, at ¶ 23.

16 41. Although legal counsel for both the Tribe and SNW represented in Federal
17 Court that Skywalk revenues were being placed in an escrow account pending the resolution
18 of the Tribal Eminent Domain Action, the Tribe's chief financial officer recently testified
19 the Tribe had already taken approximately \$2 million from SNW's bank accounts.
20 *Compare* Reporter's Transcript of Proceedings, Temporary Restraining Order Hearing, Case
21 No. CV 12-08030-PCT-DGC (D. Ariz. Feb. 24, 2012, excerpts attached as **Exhibit 14**, at
22 33:21-34:7, *with* Deposition of Wanda Easter (Dec. 13, 2012), excerpts attached as **Exhibit**
23 **15**, at 100:25-105:2.

24 42. As a third party beneficiary under the 2003 Agreement, the Tribe, is
25 subject to the provisions of the 2003 Agreement, including the mandatory arbitration
26 provisions and waiver of sovereign immunity.

27 43. As a Plaintiff in the underlying tribal takings case, the Tribe has waived
28 sovereign immunity.

CLAIMS FOR RELIEF

Count One: Request to Compel Arbitration

(Against the Tribe as Intended Third-Party Beneficiary under 2003 Agreement, and its Council Members)

44. Plaintiff realleges and incorporates by reference each of the preceding paragraphs.

45. GCSD, by the 2003 Agreement, entered into a valid and enforceable written agreement that contained a provision whereby all claims and controversies relating to the agreement were required to be submitted to binding arbitration.

46. Specifically, Article 15.4 of the 2003 Agreement clearly states that “any controversy, claim or dispute arising out of or related to the [2003 Agreement] shall be resolved through arbitration” (the “Arbitration Provision”).

47. The Tribe was explicitly made an intended third-party beneficiary under the 2003 Agreement, and for this reason is bound by the Arbitration Provision.

48. The Tribe received direct benefits of over \$30 million under the 2003 Agreement, benefits which the Tribe accepted and never repudiated.

49. As a result of its status as an intended third-party beneficiary under the 2003 Agreement, the Tribe is bound by the terms of the 2003 Agreement, including the Agreement’s mandatory arbitration provision.

50. The Hualapai Tribal Court has stayed the Eminent Domain Action until GCSD and the Tribe have pursued their contractual remedies in Federal Court, contractual remedies which per the 2003 Agreement involve mandatory binding arbitration. *See Ex. 1.*

51. GCSD is entitled to a Court order compelling the Tribe to arbitrate its disputes with GCSD under the 2003 Agreement, disputes which include but are not limited to:

(a) The value of GCSD’s rights in the 2003 Agreement as of the date of the Tribe’s purported “taking,” February 9, 2012.

(b) Whether the Tribe may take GCSD's rights under the 2003 Agreement by eminent domain as a means to avoid the contractual remedies dictated by the terms of the 2003 Agreement.

(c) Whether the Tribe's use of the Ordinance to take GCSD's rights under the 2003 Agreement violates the constitutions of the Hualapai Tribe and the United States of America.

52. GCSD is entitled to a Court order declaring this Court maintain jurisdiction to enforce any judgment the arbitrator may award.

53. In the event this Court does not compel the issue of the Ordinance's constitutionality to arbitration, GCSD requests the Court declare from which court, tribunal or forum Plaintiffs may properly seek such a determination.⁴

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, GCSD respectfully requests this Court compel the parties to participate in binding arbitration as required under the 2003 Agreement. Additionally, GCSD requests declaratory relief as set forth herein and for any further, necessary or proper relief as this Court deems appropriate.

⁴ GCSD has challenged in Tribal Court the constitutionality of the Ordinance as applied to GCSD's rights under the 2003 Agreement; however, rather than review the constitutionality of the Ordinance as applied to the 2003 Agreement, the Tribal Court has instead stayed the case so that the parties may pursue their contractual remedies in Federal Court. Because the constitutionality of the Ordinance as applied to the 2003 Agreement is a "claim or controversy" relating to the 2003 Agreement, pursuant to § 15.4(a) of the 2003 Agreement, GCSD believes the matter may properly be submitted to arbitration. Additionally, GCSD contends that determining the constitutionality of the Ordinance is paramount, as it has now been over fourteen (14) months since the Tribe seized possession and title of GCSD's rights in the 2003 Agreement, and the Tribe has failed to pay GCSD just compensation or take adequate protections to ensure that GCSD will eventually receive just compensation. Moreover, GCSD has since discovered that neither the Tribe nor GCRC has the financial capacity to ever pay GCSD just compensation for the taking.

Respectfully submitted this 24th day of April 2013.

GREENBERG TRAURIG, LLP

By: /s/ Pamela M. Overton

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CERTIFICATE OF SERVICE

☒ I hereby certify that on April 24, 2013, 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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