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UNITED STATES DISTRICT COURT

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 QUASULA, SR., RUDOLPH CLARKE, HILDA COONEY, JEAN PAGILAWA, each individuals and members of the Hualapai Tribal Council, Defendants.	No. 3:13-cv-08054-DGC **OPPOSITION OF GREENBERG TRAURIG, LLP TO DEFENDANTS' MOTION TO DISQUALIFY GREENBERG TRAURIG AS COUNSEL FOR GCSD AND FOR RELATED ORDERS** (Oral Argument Requested)

Steptoe & Johnson LLP, as special counsel to Greenberg Traurig, LLP, respectfully files this Opposition to Defendants' Motion to Disqualify Greenberg Traurig as Counsel for GCSD and for Related Orders (the "Motion"). This Opposition is supported by (a) the following memorandum of points and authorities, (b) the contemporaneously filed Declarations of Mark I. Harrison, Pamela Overton and Theodore Quasula, and (c) the exhibits attached to, or incorporated by reference in, the Declarations.

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Preliminary Statement

Defendants' Motion to Disqualify Plaintiff's counsel, Greenberg Traurig, LLP ("GT") is a baseless effort to divert the Court from the merits of the controversy between the parties, in which GT's client has already been shown to have been seriously wronged by the moving parties.

The motion is based on GT's recent filing of two Gallagher & Kennedy ("G&K") memoranda which the Tribe contends are privileged; however, the Tribe has failed to disclose to the Court (or apparently their own expert) that on February 29, 2012, Tribal members openly disclosed and disseminated these same two G&K memoranda– by hand (leaving stacks of them at the post office, the Tribal office, the general store and other locations), and by email (sending them to 80 Tribal families, including one GCSD employee). [Quasula Decl., ¶ 47] Further, in early March 2012, these same ostensibly "confidential, privileged" memoranda were posted on the World Wide Web on a site sponsored by the Michigan State College of Law where they can still be seen today. [Overton Decl., Ex. ff; See also Request for Judicial Notice Regarding: http://turtletalk.wordpress.com/2012/03/01/more-grand-canyon-skywalk-materials/]

GT has acted appropriately and in good faith throughout this matter. Indeed, when G&K moved to strike these same documents from the record 16 months ago, GT promptly offered a stipulation to have the memoranda sealed. G&K did not accept that offer.

As explained by Mark I. Harrison, a well-recognized expert in the field of attorney ethics, "neither the G&K memoranda nor any other materials obtained or relied upon by GT were protected by the attorney-client privilege, which had been waived by their broad disclosure and the utter lack of any effort to recover them or protect their confidentiality before GT ever saw them." [Declaration of Mark I. Harrison ("Harrison Decl.") at 14, ¶ 1] In the expert opinion of Mr. Harrison, "the lack of any effort, let alone a prompt and reasonable effort, to preserve the confidentiality of the G&K memoranda and other materials over which G&K now asserts a privilege supports the

conclusion that any such privilege that may once have existed has been waived." [*Id.* at 13, ¶ 7]

Tribal Defendants also purport to base their motion on other activity that occurred well over a year ago, in prior litigation. Those attacks are untimely and cannot be considered. *See, e.g., Openwave Sys. Inc. v. Myriad Fr. S.A.S.*, No. C 10–02805 WHA, 2011 WL 1225978, at *6–7 (N.D. Cal. Mar. 31, 2011).

Additionally, even if considered, these attacks concerning matters that occurred in prior litigation are also baseless. For example, Defendants assert that David Jin's Declaration (filed over two years ago in *GCSD I*) indicates that Mr. Jin obtained privileged information through improper *ex parte* contacts with Tribal officials. To the contrary, as Mr. Harrison has explained, "any communications between Mr. Jin and members of the Tribe were permissible, client-to-client communications that do not implicate ER 4.2." [Harrison Decl. at 13, ¶ 11] The Tribe's belated accusation that GT conducted an improper *ex parte* interview of Louise Benson on February 22, 2011 (before she was dismissed from *GCSD II*) is equally without foundation. On February 22, 2011, GT represented to the Court that, if permitted to testify, Ms. Benson would say that the Tribe's eminent domain ordinance was improper. GT knew Ms. Benson's views (and hence her likely testimony) because of the statements Ms. Benson had made during a February 16, 2012 videotaped public meeting; GT had *not* interviewed Ms. Benson. [e.g., Quasula Decl., ¶ 45] Ms. Benson's statements at the public meeting were transcribed and submitted (without objection) to the Court. When GT later met with Ms. Benson to take her affidavit (which largely restated the matters she had already expressed publically), she was no longer a party (and the Tribe had never been a party) to the litigation, and the contact was entirely appropriate.

Even if (despite the foregoing) a technical violation were found to have occurred, disqualification would be not be appropriate, and Defendants' Motion should still be denied. Even when an ethical violation has occurred, courts must avoid the penalty of disqualification "[w]henever possible [and] . . . endeavor to reach a solution that is least

burdensome upon the client . . .” *Research Corp. Technologies, Inc. v. Hewlett-Packard Co*., 936 F.Supp. 697, 701 (D. Ariz. 1996) (quoting *Alexander v. Super. Ct*., 685 P.2d 1309, 1313 (1984)).

As a matter of law, the court must weigh various factors – most notably, prejudice to the parties, and whether the motion is being used as a tactical device – to determine if disqualification is warranted. Here, those factors weigh heavily against disqualification: if GCSD were to lose its longtime counsel, the prejudice would be devastating, whereas the Tribe would suffer no prejudice if its Motion were denied because the documents and information at issue were all publically available when filed. The second factor – whether the Tribe is seeking to gain a tactical advantage from the Motion – also undercuts Defendants’ position because the Tribe’s motivation can only be tactical. The Tribe cannot truly be concerned about protecting documents that have been posted on the Internet for 16 months. Equally telling, the Tribe seeks an order that would not only disqualify GT as GCSD’s counsel, but also would bar GT from having any discussion with GCSD’s new counsel. Given the recent death of GCSD’s principal [Quasula Decl., ¶ 52], and GCSD’s loss of management income (e.g., the subject of GCSD’s recent AAA award which is now before the bankruptcy court), the relief requested appears designed to work an especially unfair hardship on the client.

In short, GT has committed no ethical violations, the balance of hardships weighs heavily in GT’s favor, and therefore Defendants’ Motion should be summarily denied.

Factual Background

1. The Parties’ Relationship

David Jin and his travel companies began working with the Hualapai Tribe in the mid-1990s to bring Asian visitors to the Tribal reservation on the west rim of the Grand Canyon. [Declaration of Pamela M. Overton (“Overton Decl.”) at ¶ 13, Ex. 1 (¶¶ 4, 5 and 7); Declaration of Theodore Quasula (“Quasula Decl.”), ¶¶ 9, 24]

In 2003, Jin developed the Grand Canyon Skywalk (“Skywalk”) pursuant to a development and management agreement (the “2003 Agreement”) between the Tribe’s

wholly-owned company, 'Sa' NY WA ("SNW"), and Jin's company, Grand Canyon Skywalk Development ("GCSD"). [Overton Decl. at ¶ 13, Ex. l (¶ 11-12)]. Despite the Skywalk's huge success, beginning in 2008, SNW refused to pay GCSD management fees due. [*Id.* at Ex. l, ¶¶ 20-22]

In 2010, SNW attempted to renegotiate the 2003 Agreement before accounting for or paying prior management fees due. [*Id.* at Ex. l, ¶¶ 27-29] The Tribe insisted that the new contracts contain provisions that essentially stripped GCSD of compensation should eminent domain be used, attempted to move inventory onto the reservation where the Tribe could seize it and refused to permit profit distribution. These actions telegraphed to GCSD the Tribe's intention of using eminent domain to resolve the parties' disputes. [Quasula Decl., ¶¶ 31-35]

In February 2011, GCSD filed an action in Hualapai Tribal Court to compel arbitration concerning the withholding of management fees. In connection with that proceeding, there was a meeting held in which counsel for the Tribe acknowledged that all options, including eminent domain, were being considered. [Quasula Decl., ¶ 37]

2. **The Tribe's Consideration of an Eminent Domain Action Was Well Known in Early 2011 and the Basis for *GCSD I*.**

GCSD filed "*GCSD I*" to prevent the enactment of an eminent domain ordinance. [Overton Decl., ¶ 10, Ex. i (at Ex. 22)] Only individual members of the Tribal Council were named as Defendants.

The *GCSD I* Complaint was supported by a Declaration from Mr. Jin in which he stated that he had learned that the Tribe was considering passing an eminent domain ordinance. [Overton Decl., ¶ 13, Ex. l (at 7)] Mr. Jin's statements were consistent with what was then commonly known. [Quasula Decl., ¶¶ 15-27, 31, 33, 35-36] The disputes involving Mr. Jin were frequently debated among Tribal members and it was common practice to discuss the goings on at the Tribal Council. [*Id.*, ¶¶ 19-23] Many Council Members believed and continue to believe that everything discussed at the Council must be made public. [*Id.*, ¶ 51 and Ex. 8]. At the time Mr. Jin's Declaration

was filed, there were rumors within the Tribe that the Council was going to pass an eminent domain ordinance. [*Id.*, ¶ 31]

On April 12, 2011, GCSD filed a second declaration of Mr. Jin, this one attaching a public relations plan created by the Scutari & Cieslak Public Relations firm ("Scutari Public Relations Plan"). [*See* Ex. 11 to Declaration of Paul K. Charlton filed in support of Motion to Disqualify ("Charlton Decl.")]

On May 11, 2011, G&K sent GT a letter asserting that the *GCSD I* complaint was "based on attorney-client privileged information." The letter did not specify what information it claimed was privileged. *GCSD I* was dismissed as unripe because the Tribe had not yet taken any affirmative action against GCSD. At no time during the pendency of *GCSD I* did the Tribe or any party file any objection in Court relating to the Jin Declarations or his communications with members of the Tribe.

3. The Eminent Domain Ordinance Is Passed During the AAA Arbitration.

On August 9, 2011, GCSD filed an arbitration demand and complaint with the AAA for past due management fees due to GCSD from SNW. During the arbitration, SNW was ordered to turn over critical point of sales information. [Overton Decl., ¶ 20, Ex. s] Rather than produce the information, the Tribe seized physical possession of the Skywalk through its eminent domain taking. [*Id.*, ¶ 21, Ex. t]

During the AAA arbitration, SNW objected to issuance of a subpoena directed to the Scutari Firm, argued that the Scutari Public Relations Plan was protected under the work product doctrine, and further suggested that GT should be disqualified for making use of the Scutari Public Relations Plan. The arbitrator rejected all of these arguments, finding that: "the work product doctrine does not apply in these circumstances. The tribunal denies the motion to disqualify GCSD's counsel." [*Id.* and Ex. tt.]

The AAA Arbitration decision, awarding GCSD $28.5 million, was issued on August 16, 2012. [Overton Decl., ¶ 39, Ex. ll] This Court approved the award on

February 11, 2013. [*Id.*, ¶ 40, Ex. mm] SNW filed its notice of bankruptcy in the U.S. Bankruptcy Court in Arizona on March 7, 2013. [Overton Decl., ¶ 42]

4. **GT's Use of Publically-Available Information for the *GCSD II* Complaint and Subsequent Proffer.**

On February 16, 2012, after the Tribe filed an action in Hualapai Tribal Court to assert eminent domain over the Skywalk, GCSD filed a new action with this Court seeking an injunction requiring the return of the Skywalk management to GCSD ("*GCSD II*"). Again, the action was against Tribal Council members only. The Tribe was not a party to *GCSD II*. [*Id.*, ¶ 26, Ex. y]

On February 16, 2012 a videotaped open public meeting was held at the reservation to explain the taking of the Skywalk management contract to the Tribal members. The Council members acknowledged on the tape that the meeting was being videotaped. At that meeting, Tribal Chairwoman Benson stated that she was concerned that the takings ordinance had been passed by the Tribal Council in secret, that the public had no ability to consider or comment on it, that the ordinance was passed specifically and exclusively to use against Mr. Jin, that a public relations company had been retained and was giving training to Council members, and that it was the Tribe, not Mr. Jin, that had the responsibility for installing utilities. [Overton Decl., ¶ 31, Ex. dd ("Benson Aff.")] On Feb. 23, 2012, GCSD filed a copy of the transcript containing Louise Benson's comments from that meeting. [Overton Decl., ¶ 27, Ex. z (at Ex. B)] The Tribe did not then, and does not now, object to the filing of the transcripts from the public meeting.

On February 24, 2012, an evidentiary hearing occurred before this Court regarding GCSD's Motion for Temporary Restraining Order. At issue was the bad faith exception to comity between the Federal and Tribal courts. Ms. Benson and certain other Tribal members observed the proceedings.

GT attorney Mark Tratos met Ms. Benson for first time immediately before the hearing. [Quasula Decl., ¶ 44] The introduction lasted only seconds, and the substance

of the case was not discussed. Ms. Benson did offer she was willing to testify and would do so truthfully. [*Id.*]

At the hearing, Mr. Tratos requested that Ms. Benson be allowed to testify. At the Court's request, Mr. Tratos made a proffer of Ms. Benson's likely testimony. [Overton Decl., ¶ 28, Ex. aa (59:21-22)] The proffer was based on the contents of the videotape of the February 16, 2012 public hearing, and not on any conversation he had had with Ms. Benson. There was no objection to the proffer. [*Id.* (58:23-61:8)].

5. **Tribal Members Intentionally Make a Massive Distribution of the G&K Memoranda; the Memoranda Are Available on the Internet.**

On February 29, 2012, Sheri Yellowhawk, former CEO of SNW and a member of the Tribal Council, wrote an open letter to the Tribe that attached memos from G&K dated February 8 and February 11, 2011 (the "G&K memoranda"). [Overton Decl., ¶ 30, Ex. cc] The open letter and its attachments were initially distributed by leaving stacks of the documents at the post office, tribal headquarters, the general store and other locations. [Quasula Decl., ¶ 47] When another tribal member received the letter, she emailed it (with its attachments) to approximately 80 individuals. [Overton Decl., ¶ 45, Ex. rr; Quasula Decl., ¶ 47] Mr. Quasula, the General Manager of GCSD, was emailed a copy and he provided it to GT. [Quasula Decl., ¶ 46.]

Also in early March 2012, Ms. Yellowhawk's letter, and its attachments, were posted on the world wide web on a site called "Turtle Talk." [Overton Decl., ¶ 33, Ex. rr; Quasula Decl., ¶ 47] The Turtle Talk site is devoted to providing information about legal issues involving Native American persons. *Anyone in the world can click on this link and obtain copies of the G&K Memoranda.* [*Id.*]

6. **The Benson Declaration Is Obtained After Her Dismissal.**

Based upon the videotape from the February 16, 2012 Hualapai public meeting, GCSD determined that it would dismiss several defendants, including Ms. Benson.

A few weeks after the evidentiary hearing, GT was notified by Mr. Quasula that Ms. Benson was in Las Vegas and requesting a meeting. [Quasula Decl., ¶ 48] GCSD

directed that Ms. Benson be dismissed from *GCSD II* before any meeting with her. When Ms. Benson arrived, she was informed that the substance of the court actions could not be discussed until her dismissal had been filed, and therefore she left for another meeting. [Quasula Decl., ¶ 49] No answer had been filed in the case, and GT filed the dismissal with this Court as a matter of right.

Benson returned in the afternoon on February 29, 2012 and thereafter provided an affidavit. [Benson Aff.] The Affidavit provided information substantially similar to what Ms. Benson had already stated in the February 16, 2012 public meeting. [*Id.*]

7. The March 2, 2012 Filings and the Tribe's Failure to Accept GT's Offer to Seal or to Otherwise Block Further Publication.

The Benson Affidavit and Quasula Declaration (with attached G&K memoranda) were filed with the Court on March 1, 2012 in support of GCSD's Supplemental Brief in Support of Bad Faith Exception. On March 2, 2012, G&K filed a Motion to Strike the Benson Affidavit and G&K memoranda. [Overton Decl., ¶ 35, Ex. hh] On the same day, March 2, 2012, Mr. Tratos responded with a letter offering to stipulate that GCSD's Motion and Defendants' Motion to Strike be sealed, pending review by the Court. [*Id.*, ¶ 37] G&K and the *GCSD II* defendants never accepted nor took any action on the offer to stipulate to the sealing. Therefore, these documents remain unsealed and available on the public court system to this day. Further, GT is unaware of any effort by G&K or Tribal Defendants to have the G&K memoranda taken down from the Turtle Talk website, or to have it recalled in any way. [Quasula Decl., ¶ 47]

David Jin died after a four year battle with cancer on June 14, 2013. [Quasula Decl., ¶ 52]

Argument

I. DISQUALIFICATION IS A DRASTIC MEASURE, PERMITTED ONLY IN "EXTREME CIRCUMSTANCES," WHICH ARE NOT PRESENT HERE.

The Ninth Circuit discourages disqualification orders, explicitly cautioning that motions seeking disqualification should be subjected to "particularly strict scrutiny"

because of their potential for abuse. *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (quoting *Rice v. Baron*, 456 F. Supp. 1361, 1370 (S.D.N.Y. 1978)). "A motion to disqualify a law firm can be a powerful litigation tactic to deny an opposing party's counsel of choice." *In re Cnty. of L.A.*, 223 F.3d 990, 996 (9th Cir. 2000). Accordingly, courts must be vigilant in preventing "parties from misusing motions for disqualification as 'instruments of harassment or delay.'" *In–N–Out Burger v. In & Out Tire & Auto, Inc.*, 2008 WL 2937294, at *3 (D. Nev. July 24, 2008) (citation omitted); *United States v. Titan Pac. Const. Corp.*, 637 F. Supp. 1556, 1562 (W.D. Wash 1986) (disqualification is a "drastic measure" that courts should not impose except when "absolutely necessary" (citation omitted).

Similarly, the Arizona Supreme Court has required movants to bear the burden of showing "sufficient reason" why the court should disqualify an attorney from representing its client. *Alexander v. Super. Ct.*, 685 P.2d 1309, 1313 (1984). Because of the "great prejudice often associated with an enforced change of counsel" courts recognize that disqualification should only be granted when the moving party has demonstrated "substantial and irreparable harm growing out of the ethical violation." *Complaint of Korea Shipping Corp.*, 621 F. Supp. 164, 169 (D. Alaska 1985). The Arizona Supreme Court has cautioned that "[o]nly in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent." *Alexander*, 685 P.2d at 1313.

Nor are the ethical rules a litmus test for disqualification. The Preamble to the Arizona Rules of Professional Conduct explains that a *violation of an ethical rule "does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation,"* and warns that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Pmbl. ¶ 20, Ariz. R. Prof'l Conduct (emphasis added). *Amparano v. ASARCO, Inc.*, 93 P.3d 1086, 1092 (Ariz. Ct. App. 2004) (the Rules are for "ethical enforcement and are not designed to be used as a means to disqualify counsel.")

Therefore, even *if* the court finds that there has been a technical violation of an ethical rule (which is *not* present here), the court should not automatically order disqualification. Rather, the court is required to employ a balancing test to determine whether disqualification is appropriate, keeping in mind that "[w]henever possible, the court should endeavor to reach a solution that is least burdensome upon the client." *Research Corp. Technologies, Inc. v. Hewlett–Packard Co.*, 936 F. Supp. 697, 701 (D. Ariz. 1996) (quoting *Alexander*, 685 P. 2d at 1313). The balancing test requires the court to weigh the following factors: (1) the nature of the ethical violation; (2) whether a motion to disqualify has been used as a tactical device; (3) the prejudice to the parties; (4) the effectiveness of counsel in light of the violations; and (5) the public's perception of the profession. *Research Corp. Technologies, Inc.*, 936 F. Supp. at 703 and *Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist.*, 810 F. Supp. 2d 929, 986 (D. Ariz. 2011).[1]

Here, Defendants' Motion fails because the Tribe cannot show that *any* ethical violation occurred. Moreover, even if such a violation occurred, the Tribe has failed to demonstrate that disqualification is an appropriate remedy.

A. The Motion Must Be Denied Because GT's Filing of the Publically-Available G&K Memoranda Did Not Violate any Ethical Rules.

Defendants argue that GT violated ER 4.4(b) by submitting two "privileged and confidential" G&K memoranda to the Court on April 24, 2013. This argument is baseless.

ER 4.4(b) addresses a lawyer's receipt of documents sent *inadvertently*: "A lawyer who receives a document and knows or reasonably should know that the document was *inadvertently* sent shall promptly notify the sender and preserve the status

[1] While these factors are articulated slightly differently by different courts, the factors are relatively consistent. *See Alexander*, 685 P.2d at 1317 (articulating factors to consider when ruling on a motion based on the appearance of impropriety); *Sellers v. Super. Ct.*, 742 P.2d 292, 297 (Ariz. Ct. App. 1987) (noting that the first three *Alexander* considerations apply to a discussion of disqualification based on other ethical rules); *Gomez v. Super. Ct.*, 717 P.2d 902, 905 (1986).

quo for a reasonable period of time in order to permit the sender to take protective measures." (Emphasis added.) The Tribe's Motion relies on a now withdrawn ABA opinion 94-382 (1994) and its progeny. The ABA withdrew that opinion and has explained that "if the providing of the materials is not the result of the sender's inadvertence, [Model] Rule 4.4(b) does not apply . . . ." ABA Formal Ethics Opinion 06-440 (May 13, 2006) A lawyer receiving materials in such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules. *Id.* More specifically, whether a lawyer may be required to take any action in the event of intentional disclosure is a matter of law *beyond the scope of Rule 4.4(b)*. *Id*. (emphasis added).

There can be no dispute that G&K memoranda were *intentionally* disclosed to the Tribe and Ted Quasula, manager of GCSD (and many, many others). Accordingly, ER 4.4(b) and the cases interpreting it are irrelevant here. When dealing with intentional disclosure, the question is one of waiver, which is *expressly* beyond the scope of ER 4.4(b). *See* Comment [2] to ER 4.4(b) ("[t]he question of whether the privileged status of a document has been waived is beyond the scope of these Rules.").

The holder of an alleged privilege bears the affirmative burden of proving that the protection was not waived. Moreover, "an express waiver [of an attorney-client privilege] occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). In common parlance, once the cat is out of the bag, the client has defeated the underlying purpose of maintaining confidentiality, and therefore the communications are no longer worthy of protection. *See Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). *See also*, *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978) (because the attorney-client privilege "impedes full and free discovery of the truth," it will be strictly construed).

Disclosure (even if involuntary) serves as a waiver of the privilege unless the privilege holder made efforts reasonably designed to protect the privilege. *Gomez v. Vernon*, 255 F. 3d 1118, 1131-32 (9th Cir. 2001). Thus, in *United States v. de la Jara*, 973 F.2d 746, 749–50 (9th Cir. 1992), the Ninth Circuit held that the privilege was waived where the defendant failed to recover the privileged material or otherwise protect its confidentiality during the six months between seizure of the privileged material and introduction of the material into evidence. Similarly, in *Knudsen v. City of Tacoma*, 2008 WL 1805665, at * 3 (W.D. Wash. April 21, 2008), the court found the inadvertent disclosure of an attorney-client privileged memorandum to constitute waiver because no efforts had been made to retrieve the memo. The court stated that it could not hold documents "available in the public domain and not subject to any apparent efforts to maintain confidentiality" protected by the attorney-client privilege. *Id. See also Luna Gaming-San Diego, LLC v. Dorsey & Whitney*, LLP, 2010 WL 275083, at *5 (S.D. Cal. Jan. 10, 2010) ("Rule 502(b)(3) requires that the holder of the privilege 'promptly [take] reasonable steps to rectify the error . . . .")

Here, any privilege was waived in late February 2012 when Council Member Shari Yellowhawk intentionally disseminated the memoranda attached to her "open letter." Not only did Ms. Yellowhawk distribute the G&K memoranda in hard copy at the post office, convenience stores, Tribal offices and other locations, but the memoranda were further intentionally distributed by email to over 80 families. [Quasula Decl., ¶ 47] By that point the cat was assuredly out of the bag. The following day, the memoranda were posted on the Internet on a site focused on Tribal law matters, and were filed in *GCSD II* by GT. [See Request for Judicial Notice filed concurrently]

Defendants knew of these developments, yet took no reasonably appropriate steps to retrieve or protect the memoranda. Although G&K moved to strike the memoranda, it did *not* accept GT's offer to stipulate to place the memoranda under seal (even after it learned that its Motion would not be ruled on), did not try to retrieve the documents, and evidently did not try to have the memoranda removed from the Internet.

To the contrary, the Tribe appeared resigned to the fact that the memoranda had become public. On April 3, 2012, the Tribe acknowledged that the memoranda, "went public as can be seen on "Turtle Talk" (a public news website) for anyone who has access to the internet to see (worldwide)." [See Ex. 15, p. 1 to Charlton Decl.]

If ever they had been privileged, the G&K memoranda lost all privileged status well before GT filed them on April 24, 2013. Accordingly, GT breached no ethical obligations or rules by filing such memoranda with this Court. *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). *See also Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (privilege does not apply when the legal advice obtained is disseminated beyond those persons who "need to know"); *Verschoth v. Time Warner Inc.*, 2001 WL 286763, *2 (S.D.N.Y. Mar. 22, 2001).

B. The Motion Must Be Denied Because the Tribe's Accusations of Ethical Violations From Over a Year Ago Are Untimely and Baseless.

In addition to complaining about GT's April 2013 filing in this case, the Tribe also complains about a variety of actions that it claims occurred in *GCSD I* and *GCSD II* (to which the Tribe was not a party) in 2011 and 2012. These complaints are untimely and cannot now be considered.

"A motion to disqualify counsel must be immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification, and it may not be used as a manipulative litigation tactic." *Zions First Nat. Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 480-81 (Utah Ct. App. 1989). In *Openwave Sys. Inc.*, 2011 WL 1225978, at *7, the court explained: "Motions to disqualify should be promptly made before the parties are invested substantially in their litigation line-ups." *See also Central Milk Producers Co-op. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978) (a party cannot delay filing a motion to disqualify and then use the motion "as a tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed.")

Where a party seeks disqualification on grounds that were well known to it before the motion, courts have not hesitated to find the motion untimely, even where the delay was much shorter and the prejudice less apparent than exist here. *See, e.g., Sharma v. VW Credit, Inc.,* No. CV 11–08360 DDP (Ex), 2013 WL 1163801, at *5-7 (C.D. Cal. Mar. 20, 2013) (denying a motion to disqualify after an almost one and a half year delay); *Openwave Sys. Inc.*, 2011 WL 1225978, at *6–7 (denying a motion to disqualify after a four-month delay); *Skyy Spirits, LLC v. Rubyy, LLC*, No. C 09–00646 WHA, 2009 WL 3762418, at *4 (N.D. Cal. Nov. 9, 2009) (denying a motion to disqualify after an eight-month delay).

G&K suggests that its delay is justified because it had chosen to take "incremental steps to address this problem, sending GT letters, filing motions to strike, and so forth." [Motion, at 1] This precise argument was rejected in *Sharma v. WV Credit, Inc.,* No., CV 11–08360 DDP (Ex), 2013 WL 1163801 (C.D. Cal. Mar. 20, 2013). There, the defendant similarly waited almost a year and a half to file its motion to disqualify, even though it knew of the conflict at issue upon receipt of the lawsuit. *Id.* at *3-5. The defendant argued its delay was reasonable because during this time "it was in the process of meeting and conferring . . . to resolve the issue informally and did not want to prematurely involve the Court." *Id.* at *5. The court rejected defendant's position because its delay was highly prejudicial to plaintiff. *Id.* at *5-6. Here, Defendants have waited even longer than the defendant in *Sharma* to bring their Motion.

During Defendants' roughly two-year delay in bringing any motion to disqualify, GT invested substantial time and effort into representing GCSD. GT represented GCSD before the AAA, this Court (in *GCSD I* and *GCSD II*, and the motion to confirm the AAA judgment) and the Tribal Court on numerous occasions. Currently, GT is representing GCSD not only in this action, but also in various forums, including the United Stated Bankruptcy Court (regarding SNW's bankruptcy petition) and a Ninth Circuit appeal of this Court's affirmation of the arbitration award. As a result, GT has

developed a comprehensive understanding of the facts and law surrounding this dispute, the loss of which would be devastating to GCSD.

If G&K and its clients had really been concerned about the filing of privileged material, they would have sought to recover them and moved to disqualify two years ago; at the very least, they would have accepted GT's offer to seal GCSD's March 2012 brief. To disqualify GT now, after it has invested substantially in the litigation, and after the principal who could bring new counsel up to speed is no longer available, would impose an unwarranted hardship on the GCSD. Accordingly, GT respectfully submits that the Tribe's claims concerning events which occurred over a year ago (in prior actions in which the Tribe was not even a party) are untimely and should not be considered. However, should the Court consider such arguments, it will find that they are without merit, for the reasons discussed below, and in the accompanying declaration of Mr. Harrison.

1. Mr. Jin's March 24, 2011 Declaration Did Not Reveal Any Privileged Information and Does Not Demonstrate Any Ethical Violation by GT.

Defendants assert that Mr. Jin had "an *ex parte* meeting with an unknown Tribal official (or officials) in roughly February or March of 2011" from whom he learned confidential information.[2] [Motion, at 7:17-20] The Tribe bases this assertion on Mr. Jin's March 24, 2011 Declaration, which states that Mr. Jin had continuing "good relations" with a number of Tribal members at "various levels of the tribal government"[3] and separately that he had learned that the Tribe intended to use an eminent domain ordinance to take away his contractual rights. The Tribe contends that these "facts"

[2] Although these "officials" are or were allegedly G&K's clients, G&K is apparently unable to identify them.

[3] Mr. Jin does not state that these Tribe officials provided him with any information. The paragraph states only: "Fortunately, I have maintained good relations with a number of the important members of the tribe who have been involved at various levels of the tribal government and they continue to be helpful in supporting our efforts to improve the economic conditions of the Tribe through the expansion and development of these tours operation." Overton Decl. at ¶ 13, Ex. 1 (¶ 33).

establish a violation of ER 4.2, which prohibits a lawyer from communicating "about the subject of the representation with a party the lawyer knows to be represented . . . ."

The Tribe's arguments are meritless for two separate reasons. First, Mr. Jin was perfectly free to discuss the parties' disputes with his longtime colleagues within the Tribe. Comment [1] to ER 4.2 plainly states: ". . . parties to a matter may communicate directly with each other…" The prohibition against a lawyer contacting a person he or she knows is represented by another lawyer simply does not apply to non-lawyers. *Northwest Bypass Group v. U.S. Army Corps of Engineers*, 488 F.Supp.2d 22, 28 (D.N.H. 2007). *See also Holdren v. General Motors Corp*, 13 F.Supp.2d 1192, 1195 (D. Kan. 1998) ("there is nothing in the disciplinary rules which restrict a client's right to act independently in initiating communications with the other side, or which requires that lawyers prevent or attempt to discourage such conduct"). The ABA Standing Committee on Ethics and Professional Responsibility recently explained: "Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 11–461 (2011). Here, Mr. Jin's communications with the tribal members were consistent with his longstanding relationship with them. There was nothing unethical, illegal or improper in such communications.

Second, there is nothing in Mr. Jin's Declaration to indicate that Mr. Jin or GT was privy (knowingly or otherwise) to privileged information. Mr. Jin states that he had learned that "certain council members" intend to "use the new ordinance to take away my ability to manage or operate the Skywalk," but in late February of 2011 there was nothing secret about these facts. [Harrison Decl., at 5 (¶ i), 6 (¶ m), 10 (¶ 2) and 14 (¶ 3)]

2. GT's Meeting with Louise Benson, When Neither Ms. Benson Nor the Tribe Were Parties, Did Not Violate Any Ethical Rules.

Defendants speculate that GT *must* have met with Ms. Benson before the February 24, 2012 hearing in *GCSD II* because during that hearing Mr. Tratos made a

proffer of Ms. Benson's expected testimony. [Motion, at 4] The Tribe even supplied the "fact" that Mr. Tratos "interviewed" Ms. Benson prior to the hearing as an assumption for their expert, Mr. Rhodes. [Rhodes Affidavit, at 3, ¶ 18] The Tribe argues that this imaginary contact was prohibited by ER 4.4, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

As Mr. Tratos expressly told the Court at the February hearing, he met Ms. Benson for the first time in the courtroom that morning. [Quasula Decl., ¶¶ 43-44] At that time he spoke to her for only a few seconds to warn her he might ask the Court take her testimony. He did not "interview" her, and did not discuss the substance of her testimony. *Id.* He didn't need to; he knew what Ms. Benson had said publicly, and made a proffer of her testimony, based on his review of her recorded statements made at the public Tribal meeting on February 16, 2012. G&K and its clients knew about Ms. Benson's public statements – in fact, a transcript of those statements had been filed with the Court *without objection*. [Overton Decl. ¶ 28]

Defendants also complain that obtaining Ms. Benson's Declaration after her dismissal from an unanswered complaint in *GCSD II* violated ER 4.2. The Tribe cites two Arizona Ethics opinions to support this argument: State Bar of Arizona Op. 87-25, for proposition that it is unethical for an attorney to contact and interview a named but unserved defendant, and Op. 89-05, for the proposition that *ex parte* contact even with a former employee of an entity is improper if employee communication may be imputed to employer or where topics of communication are protected under A/C privilege. Neither of these opinions applies to the instant case.

First, the Motion misrepresents Op. 89-05. That Opinion states that the committee *deadlocked* on the issue of whether an ex parte contact with a former employee is improper and that no definitive opinion could be rendered. Two alternative

(neither definitive) opinions were issued and the Tribe merely cites unilaterally to the more favorable opinion (which was completely inapposite to the alternative opinion).

Second, the Motion misstates the holding of Op. 87-25. This Opinion advised that it would be unethical for an attorney to contact and interview a named but unserved defendant *without* revealing the adversarial nature of the relationship between the defendant and the attorney's client. Here, Ms. Benson was a Tribal Council member named as a defendant in *GCSD II* in her personal capacity. She was fully aware that she had been named as a defendant. The Tribe was not a defendant (making comment [2] to ER 4-2 inapplicable) – indeed, there was a split of opinion among the Tribal Council members (and within the Tribe) as to what positions the Tribe should take. As Chairwoman of the Counsel, Ms. Benson was well versed in the disputes and therefore Opinion 87-25 is inapposite[4].

Because Ms. Benson was a party when she initially tried to communicate with GT, GT appropriately took the position that it could not speak with her until after she was dismissed and no longer represented. Indeed, she voluntarily arrived at GT's offices on the morning of February 29, 2012, but was turned away and told that so long as she was a represented party in *GCSD II*, Mr. Tratos could not discuss the case with her. It was only after Ms. Benson was dismissed, no longer represented in the litigation and no longer under the purview of ER 4.2 that GT obtained Ms. Benson's Declaration.[5]

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[4] In fact, G&K appears to have ignored its own ethical obligations to Ms. Benson whose position was adverse to the view of other Tribal Council members it also represented who favored the eminent domain taking. *See* ER 1.7 and 1.8.

[5] Ms. Benson's statements at the public meeting were not privileged, and the Tribe does not appear to contend otherwise. The privilege attaches only to communications made in confidence, where there has been no waiver as a result of disclosure to third parties. *U.S. v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). There was no expectation of confidentiality at the public meeting. The meeting was open to the community, was openly videotaped, and there is no evidence that attendees were warned that confidential information was being discussed. Moreover, as Council Chairperson, Ms. Benson was fully empowered to waive any privilege that might otherwise have applied to the matters she discussed at that meeting. *Gregory v. Correction Connection, Inc.,* Civ. A. No. 88–7990, 1990 WL 182130 at *3 & n. 3 (E.D.Pa. Nov.20, 1990) (disclosure by one corporate director results in a waiver of the attorney-client privilege); *Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F. Supp. 1393, 1399 (D. Del. 1994).

The Tribe has failed its burden of proof to show GT violated ER 4.2 in its dealings with Ms. Benson.

C. The Motion Must Be Denied Under the Balancing Test.

Even if the Court were to find a technical violation of an ethical rule, disqualification would still be improper. [Harrison Decl., 14, ¶ 3] Disqualification is appropriate only where the court has determined that there is no other solution less burdensome to the client, and has balanced the equitable factors required under *Research Corp. Technologies, Inc.,* 936 F. Supp. at 703. A balancing of the these factors leads to the conclusion that disqualification would be wholly inappropriate here.

First, the "nature of the violation" prong weighs against disqualification. GT proceeded in the good faith belief that due to the widespread public dissemination of the G&K memoranda (including on the Internet), it could share such documents with the Court. Similarly, GT acted with candor in its dealings with Ms. Benson. GT did not attempt to conceal its communication with Ms. Benson, but promptly revealed the contact via the Declaration it filed with the Court on the following day. Finally, when G&K complained about the Benson Declaration and the G&K memoranda, GT immediately (on the same day as the complaint) offered to stipulate to have those documents placed under seal. Accordingly, the nature and extent of any ethics violation, if one were found, weighs strongly against disqualification. *See Rebel Communications, LLC v. Virgin Valley Water Dist.*, No. 2:10–cv–00513–LRH–GWF, 2011 WL 677308, at *9-10 (D. Nev. Feb. 15, 2011) (plaintiffs' counsel did not engage in prohibited ex parte communication, but even if he had, plaintiff's counsel had promptly disclosed his contact and the sanction of disqualification would not be justified).

The likelihood that Defendants brought this Motion as a means to gain a tactical device cannot be doubted, and weighs strongly against disqualification. They have long known about the facts at issue, yet did not bring this Motion until GT filed the memoranda on April 24, 2013. Defendants cannot possibly be concerned about protecting the memoranda, which have been widely circulated and available on the

Internet for the past 16 months. Given the failure of G&K and its Tribal clients to accept GT's offer to seal the records, the only possible explanation for this Motion is the Tribe's desire to gain an advantage in this litigation.

If the Motion were granted, the prejudice to GCSD would be severe. As discussed above, GT has represented GCSD before the AAA, this Court, the Ninth Circuit and the Tribal Court. It is currently representing GCSD not only in this action but also in various other forums. GT has developed an irreplaceable, comprehensive understanding of the facts and law surrounding this dispute. If GT were disqualified, the loss would be staggering to GCSD.

II. THE TRIBE IS NOT ENTITLED TO ANY OF THE ANCILLARY RELIEF IT REQUESTS.

In its concluding paragraph, the Tribe asks this Court to: (1) "permit the Tribe to conduct discovery of both GT and GCSD to determine what improper *ex parte* communications they have previously had with members of the Tribal Council," (2) disqualify GT in this and "future" litigation before this Court, (3) seal the two G&K Memoranda, and (4) bar GT from communicating with GCSD's new counsel about this or related cases. [Motion, at 13] The Tribe is not entitled to any of this relief.

First, in requesting that the Court provide a blanket order permitting discovery against GT, the Tribe seeks to subvert the Federal Rules of Civil Procedure and GT's right to move for a protective order. "A party wishing to depose the opposing party's counsel must follow the same procedural rules as anyone else, and serve a Rule 45 subpoena on counsel for a deposition or production of documents." *U.S. v. Philip Morris, Inc.,* 209 F.R.D. 13, 19 (D.D.C. 2002). If and when Defendants serve a GT attorney with a subpoena, GT may (and would) move for a protective order under Rule 26, and the burden would shift to Defendants to establish the right to discovery.

Because of the negative impact that deposing a party's attorney can have on the litigation, an opposing counsel's deposition is only allowed in limited circumstances. *Riverbank Holding Co., LLC v. New Hampshire Ins. Co.*, 2012 WL 4748047, at *2

(E.D. Cal., Oct. 3, 2012). Opposing counsel's deposition may not be taken unless the party seeking discovery shows that: (1) there is no other means to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. *Shelton v. American Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986). Plainly, Defendants have not met their burden under the *Shelton* test.

Defendants' request for disqualification "in any other related future litigation between the parties in the District of Arizona" is also improper.[6] Courts should not "make determinations or seek to establish precedents which go beyond the facts of the case before it. This is particularly true with a case involving charges of unethical conduct . . . ." *Meat Price Investigators Ass'n v. Iowa Beef Processors, Inc.,* 448 F. Supp. 1, 3 (S.D. Iowa 1977), aff'd, 572 F. 2d 163 (8th Cir. 1978). Courts should narrowly tailor disqualification orders to the matters pending before them and should not attempt to bring one action within the framework of another. *Slater*, 338 A.2d at 591.

Third, playing out a sort of charade, G&K also requests that the Court seal the two G&K memoranda, and yet (as G&K has known since at least April 2012) the memoranda are available to the public on the Internet, have been available on PACER for 16 months, and have otherwise been widely distributed. At this late date, and on

[6] Defendants have *not* requested that GT be removed from cases now pending (or to be pending) in *other tribunals*, nor would such a request be proper. *See, e.g., Slater v. Rimar, Inc.*, 338 A.2d 584, 591 (1975) (the Supreme Court of Pennsylvania vacating part of the disqualification order that applied to matters other than the suit pending before the lower court). For the sake of clarity, GT states that it currently represents GCSD in the following cases: *In Re: 'Sa' Nyu Wa, Inc*., Debtor, Case No.: 2:13-bk-02972, in The United States Bankruptcy Court for the District of Arizona; *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Incorporated, et al.*, No. 12-15634, in the United States Court of Appeals for the Ninth Circuit; *The Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona v. Grand Canyon Skywalk Development, LLC,* Case No.: 2012-cv-017, in The Hualapai Tribal Court, Peach Springs, Arizona; and *Grand Canyon Skywalk Development, LLC, et al. v. Ruby Steele*, et al., Case No.: 2:13-cv-00596, in The United States District Court for the District of Nevada. Should the Tribe later contend that it is entitled to a disqualification order with respect to any of these pending actions, GT requests an opportunity to further brief the issue.

these facts, for G&K and these Tribal Defendants to ask the Court to "seal" the G&K memoranda does not speak well of their candor to this Court.

None of Defendants' requested "relief" is sustainable, but their last requested remedy is perhaps the most egregious. G&K asks this Court to prohibit GT from communicating with "GCSD's new counsel about this or related cases and proceedings." This request is legally untenable and can have no legitimate purpose. While courts have ordered disqualified counsel not to reveal confidential or wrongfully-procured information to new counsel, a complete bar to any communication is unreasonable. The only possible rationale for this request is to prejudice GCSD by depriving it of the comprehensive case knowledge developed by GT over the years. *Cf.* Ariz. Ethics Op. 09–02 (noting that a withdrawing lawyer is ethically obliged to brief new counsel as to the issues and status in a case with more detail than simply conveying court dates, settings, and deadlines).

Conclusion

For the foregoing reasons, Defendants' Motion to Disqualify and for Related Orders should be denied.

RESPECTFULLY SUBMITTED this 29th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing was served on all parties by operation of the Court's CM/ECF System, and access to this filing is available thereon.

s/ Shannon Ramme