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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

**DECLARATION OF
MARK I. HARRISON
IN SUPPORT OF OPPOSITION
TO DEFENDANTS' MOTION TO
DISQUALIFY GREENBERG
TRAURIG AS COUNSEL FOR
GCSD AND FOR RELATED
ORDERS**

Step toe & Johnson LLP ("Step toe"), as special counsel to Greenberg Traurig, LLP ("Greenberg Traurig"), respectfully files the attached Declaration of Mark I. Harrison in support of Step toe's Opposition to Defendants' Motion to Disqualify Greenberg Traurig as Counsel for Grand Canyon Skywalk Development, LLC and for Related Orders.

1 RESPECTFULLY SUBMITTED this 29th day of July, 2013.

2 STEPTOE & JOHNSON LLP

3
4 By s/ David J. Bodney
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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.

s/ Shannon Ramme

DECLARATION OF MARK I. HARRISON

Mark I. Harrison declares as follows:

BACKGROUND FACTS

1. I am a member of the law firm of Osborn Maledon, P.A. and have been licensed to practice law in the State of Arizona since 1961 and in the State of Colorado since 1991.

2. Over the past 52 years, with the exception of a judicial clerkship following graduation from law school, I have been continuously engaged in the active practice of law. The bulk of my practice has been in civil litigation and trial work. For the past two decades, my practice has focused increasingly on matters involving legal ethics, lawyers' licensure, professional liability, judicial ethics, and risk management.

During the course of my practice, I was involved in the management of my own law firm for more than 25 years and was then a partner and a member of the Ethics Committee of Bryan Cave LLP, an international law firm of more than 800 lawyers, from April 1, 1993 through January 16, 2004. Since January 20, 2004, I have been a member of Osborn Maledon and serve as the principal ethics partner for that firm. My professional and extra-curricular activities are set forth in greater detail on my resume, which is attached to this Declaration as Exhibit A. I have been retained in approximately 170 cases as an expert witness in matters in several states involving legal and judicial ethics.

3. I was retained by Steptoe and Johnson LLP, counsel for Greenberg Traurig ("GT"), to express opinions regarding GT's conduct in connection with its representation of Grand Canyon Skywalk Development, LLC ("GCSD") in various actions and disputes with the Hualapai Indian Tribe (the "Tribe") and members of its Tribal Council. More specifically, I was retained to render opinions regarding whether GT attorneys violated their ethical duties as alleged in the Tribe's June 26, 2013 Motion to Disqualify filed by Gallagher & Kennedy ("G&K") and as claimed in the supporting Declaration of J. Scott Rhodes.¹

4. I am being compensated for my services in this matter at the rate of \$600 per hour for my study, analysis, preparation of this Declaration, and testimony. I have no stake in the outcome of the matter.

5. In formulating my opinions in this matter, I have relied upon documents and information provided to me by Steptoe & Johnson and discovered through my firm's own research, to the extent that those materials contain information pertinent to the issues about which I was asked to express an opinion. Among the documents that I have reviewed are the following:

¹ The pending action is captioned *Grand Canyon Skywalk Development, LLC v. Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona, et al.*, United States District Court for the District of Arizona, No. 3:13-cv-08054-DGC.

- a. March 24, 2010 e-mails between Terence W. Thompson and Teddy Parker, with attachment;
- b. January 4, 2011 Infrastructure Meeting Minutes;
- c. January 31, 2011 letter from Paul K. Charlton to Mark G. Tratos;
- d. February 7, 2011 letter from Glen Hallman to Mark G. Tratos;
- e. February 8, 2011 Gallagher & Kennedy (“G&K”) Memorandum;
- f. February 8, 2011 letter from Mark G. Tratos to Glen Hallman;
- g. February 11, 2011 G&K Memorandum;
- h. February 17, 2011 letter from Glen Hallman to Mark G. Tratos;
- i. February 25, 2011 Complaint;
- j. February 25, 2011 letter from Mark G. Tratos to Glen Hallman;
- k. March 2, 2011 letter from Glen Hallman to Mark G. Tratos;
- l. March 24, 2011 Declaration of David Jin in Support of Plaintiff’s Motion for Preliminary Injunction;
- m. March 30, 2011 Complaint for Declaratory and Injunctive Relief;
- n. May 11, 2011 letter from Glen Hallman to Pamela M. Overton, Mark G. Tratos, and Troy A. Eid;
- o. June 23, 2011 Order;
- p. July 29, 2011 Order: Motion to Dismiss;
- q. August 9, 2011 Demand for Arbitration;
- r. December 21, 2011 Amended Arbitration Complaint;
- s. February 7, 2012 Report of Preliminary Hearing and Scheduling Order;
- t. February 8, 2012 Complaint in Condemnation;
- u. February 8, 2012 Temporary Restraining Order;

- v. February 9, 2012 letter from Glen Hallman to Sandra L. Marshall and Shawn Aiken;
- w. February 9, 2012 e-mail from Glen Hallman to Sandra L. Marshall and Shawn Aiken;
- x. February 9, 2012 Temporary Restraining Order;
- y. February 16, 2012 Complaint for Declaratory and Injunctive Relief;
- z. February 23, 2012 Declaration of Theodore Quasula in Support of Supplemental Statement of Facts;
- aa. February 24, 2012 Transcript of Proceedings;
- bb. February 29, 2012 Notice of Voluntary Dismissal Without Prejudice;
- cc. February 29, 2012 letter from Sheri K. YellowHawk to Hualapai Tribal Members;
- dd. February 29, 2012 Affidavit of Louise Benson;
- ee. March 1, 2012 letter from Mark G. Tratos to Glen Hallman;
- ff. Materials posted on March 1, 2012 on Turtle Talk website (<http://turtletalk.wordpress.com>);
- gg. March 1, 2012 Supplemental Brief in Support of Bad Faith Exception – Pursuant to Court Order;
- hh. March 2, 2012 Motion to Strike Exhibits 1 and 8 to GCSD’s Supplemental Brief in Support of Bad Faith Exception;
- ii. March 2, 2012 letter from Paul K. Charlton to Mark G. Tratos;
- jj. March 2, 2012 letter from Mark G. Tratos to Glen Hallman;
- kk. July 15, 2012 Minute Entry and Order;
- ll. August 16, 2012 Final Award;
- mm. February 11, 2013 Order;
- nn. February 27, 2013 letter from Sherry J. Counts to Jennifer Turner;
- oo. March 7, 2013 Notice of Filing Bankruptcy Case;

- pp. June 26, 2013 Motion to Disqualify Greenberg Traurig As Counsel for GCSD and for Related Orders Protecting the Tribe's Confidential Information ("Motion to Disqualify");
- qq. Exhibits to Motion to Disqualify, including the June 26, 2013 Declaration of Paul K. Charlton and the June 26, 2013 Expert Affidavit of J. Scott Rhodes ("Rhodes Affidavit");
- rr. July 17, 2013 Declaration of Theodore Quasula, with exhibits; and
- ss. The case law, ethical rules, and ethics opinions cited in this Declaration.

6. It is not the function of expert witnesses to resolve factual disputes. However, it is appropriate for expert witnesses to rely on facts for which there is appreciable support in the record. Accordingly, to the extent that my opinions are based on facts, it is my understanding that those facts are supported by competent evidence already of record in this litigation.

7. Based upon my review of the documents listed above, I have identified and relied upon the following facts:

- a. David Jin began working with the Tribe in the mid-1990s to bring visitors from various Asian countries to the west rim of the Grand Canyon, an area known as Grand Canyon West where the Tribe is located. [See March 24, 2011 Declaration of David Jin ("Jin Dec."), ¶¶ 4-5, 7.]
- b. Over the years, Mr. Jin developed friendships and relationships with many members of the Tribe. [See *id.* ¶ 9; July 17, 2013 Declaration of Theodore Quasula ("Quasula Dec."), ¶ 24.]
- c. After Mr. Jin conceived and developed the idea for the Grand Canyon Skywalk (the "Skywalk"), GCSD, one of his companies, entered into an agreement with 'Sa' Nyu Wa ("SNW"), a company owned by the Tribe, governing the construction and management of the Skywalk. [See Jin Dec., ¶¶ 12, 14.]
- d. The Skywalk opened in March 2007, but by early 2008, SNW was refusing to pay GCSD management fees due under the parties' agreement. [See *id.* ¶¶ 18, 21-22, 32.]
- e. In late 2010 and early 2011, GCSD and SNW attempted unsuccessfully to negotiate new agreements governing their relationship, and disputes over Mr. Jin's rights under the original contract continued to develop. [See Quasula Dec., ¶¶ 36-37; Jin Dec., ¶¶ 27-29.] Despite an arbitration provision in the parties' contract and SNW's limited waiver of sovereign immunity for such purposes, SNW also rejected GCSD's request to submit

disputes under the contract to arbitration. [See February 17, 2011 letter from Glen Hallman to Mark G. Tratos.]

- f. Rather than agreeing to litigate, through arbitration or otherwise, or negotiate a resolution of the parties' disputes, the Tribe and SNW took steps suggesting that they would attempt to "take" GCSD's contractual rights and other assets under a theory of eminent domain. In fact, during the parties' negotiations, one of the proposals made by SNW would have prevented GCSD from receiving adequate compensation in the event the Tribe asserted eminent domain. [See Quasula Dec., ¶ 36.] The Tribe also sought to move retail inventory relating to the Skywalk onto the reservation, asked for GCSD's construction plans for the Skywalk's Visitors Center, and attempted to prevent GCSD from continuing to provide transportation for Skywalk visitors. [See *id.* ¶¶ 34-35.]
- g. Following GCSD's filing of a February 25, 2011 action in tribal court to compel arbitration, the tribal court judge ordered the parties to meet in an attempt to resolve their disputes. SNW, however, refused to change its position regarding the provision relating to eminent domain, and its attorneys even stated that the Tribe was considering the use of eminent domain. [See *id.* ¶¶ 36-37.]
- h. By March 2011, various members of the Tribe had confirmed publicly that the Tribe was considering passing an ordinance to permit its use of eminent domain. [See *id.* ¶¶ 31, 33; Jin Dec., ¶¶ 36-37.]
- i. By this time, Mr. Jin had met with members of the Tribe to discuss issues relating to GCSD. [See Jin Dec., ¶ 33.] Nothing in the record suggests that those conversations related in any respect to communications, documents, or other information known by Mr. Jin to have been prepared by G&K or to be privileged or confidential.
- j. In late March 2011, GCSD filed an action in District Court against the members of the Tribal Council to prevent the passing of an eminent-domain ordinance (*GCSD I*). [See March 30, 2011 Complaint.] The accompanying Motion for Preliminary Injunction attached a March 24, 2011 declaration of Mr. Jin.
- k. Six weeks later, G&K sent a letter to GT, asserting that the March 30, 2011 Complaint was "based on attorney-client privileged information" provided to the Tribe by G&K. See May 11, 2011 letter from Glen Hallman to Pamela M. Overton, Mark G. Tratos, and Troy A. Eid.] Although Mr. Hallman stated in that letter that it was "self-evident" that the Complaint was based on privileged information and documents, he did not identify any specific information or documents on which GT allegedly relied in making that conclusory assertion. [See *id.* at 2.]

- l. In addition to G&K's failure to identify any privileged or confidential documents that GT purportedly used, there also is no evidence in the record that the Tribe or its counsel ever objected during *GCSD I* to Mr. Jin's supporting declaration, GT's alleged use of any privileged materials, or Mr. Jin's communications with any members of the Tribe.
- m. Contrary to Mr. Charlton's statement that certain information in Mr. Jin's declaration was "substantively identical" to information contained in G&K's February 7, 2011 and February 11, 2011 memoranda, no evidence in the record suggests that Mr. Jin, GT, or anyone associated with GCSD ever received or saw those memoranda until February 29, 2012, *more than one year later*, when they were publicly disseminated. In any event, Mr. Jin in his declaration simply discussed his general understanding that the Tribe intended to enact an eminent-domain ordinance to take away his contractual right to manage the Skywalk in exchange for a fraction of the value of his interest. [See Jin Dec., ¶¶ 36-39.] That declaration, along with GCSD's related filings at that time, do not appear to reflect any information that was not already publicly available and widely known and discussed by and among members of the Tribe.
- n. Following the filing of Mr. Jin's declaration, G&K never took any steps at that time to protect or preserve the privilege or confidentiality of any documents that it believed GT had obtained or used improperly.
- o. In early August 2011, after the tribal court determined that tribal remedies had been exhausted, GCSD filed an arbitration action for past-due management fees under the parties' initial management contract. The chosen arbitrator was Shawn Aiken. [See August 9, 2011 Demand for Arbitration.]
- p. On February 8, 2012, the Tribe seized possession of the Skywalk through the use of eminent domain. [See February 8, 2012 Complaint in Condemnation; February 8, 2012 Temporary Restraining Order; February 9, 2012 Temporary Restraining Order.]
- q. Because its initial suit in District Court had been dismissed on ripeness grounds, GCSD filed another action on February 16, 2012 (*GCSD II*). That suit was brought against only individual members of the Tribal Council, not the Tribe itself. [See February 16, 2012 Complaint for Declaratory and Injunctive Relief.]
- r. On February 16, 2012, at an open, public meeting on the reservation, several members of the Tribal Council, including Ms. Benson, discussed the Tribe's taking of the Skywalk contract. The meeting was videotaped

by a member of the Tribe known to Mr. Quasula, himself a member of the Tribe, as well as the General Manager of GCSD.

- s. In the open public meeting, Ms. Benson, in response to a question from a tribal member, expressed concern that the Council had passed the eminent-domain ordinance in secret without the ability of members to consider or comment on it and that the ordinance was passed specifically to use against Mr. Jin and his company. [See February 23, 2012 Declaration of Theodore Quasula in Support of Supplemental Statement of Facts, Ex. B.]
- t. Mr. Quasula provided a copy of the videotape of the February 16 open public meeting to GCSD, which filed with the District Court transcripts containing Ms. Benson's comments at the meeting as an exhibit to a declaration of Mr. Quasula. [See *id.*] Neither the Tribe nor G&K ever objected to the filing of the transcripts or to GCSD's possession of the transcript or videotape. In addition, all of the information in the filing appears to have been based on publicly available information, and nothing in the record suggests that it was based on any privileged or confidential documents or communications.
- u. GCSD decided after becoming aware of the videotape to dismiss Ms. Benson and other defendants from the lawsuit (GCSD II) because it was clear that only certain members of the Tribal Council were responsible for the conduct at issue, and GCSD directed GT to dismiss Ms. Benson from the then-pending action.
- v. At a February 24, 2012 hearing in District Court on GCSD's motion for temporary restraining order, Mr. Quasula introduced Mr. Tratos for the first time to Ms. Benson, who was attending the hearing along with other tribal members. Mr. Tratos did not discuss the substance of any matters in dispute during that conversation, which took place in the courtroom near G&K's attorneys, but Ms. Benson expressed her willingness to testify if called. [See Quasula Dec., ¶¶ 43-44.]
- w. At the February 24, 2012 hearing, Mr. Tratos proffered Ms. Benson as a witness, explaining to the Court the topics on which Ms. Benson could testify. Based on the transcript of the hearing, Mr. Tratos's knowledge of such topics appears to have been based on Ms. Benson's comments at the open public meeting that had taken place eight days earlier.
- x. As G&K stated to the Court, the parties were aware that the Tribe was considering the use of eminent domain to take GCSD's contractual interest and had even discussed this possibility with arbitrator Shawn Aiken. [See February 24, 2012 Transcript of Proceedings at 81:5-8.]

- y. After the hearing, Ms. Benson and other members of the Tribal Council invited Mr. Quasula to lunch, along with former SNW board member Walt Mills. Ms. Benson expressed concern that G&K, counsel for her and the other members of the Tribal Council, had not been truthful with the Court. [See Quasula Dec., ¶ 46.]
- z. On February 29, 2012, Ms. Benson called Mr. Quasula when she was in Las Vegas and asked to meet him. During that meeting, she told Mr. Quasula that she wanted to tell the truth to the Court and speak with GCSD's counsel. [See *id.* ¶ 48.]
- aa. When Ms. Benson appeared at GT's offices, she was told by GT attorneys that they could not discuss with her the substance of any pending matters until she was dismissed from the suit or had been given permission by her attorneys to do so. [See *id.* ¶ 49.] Ms. Benson left, to return later in the day. On that day, GT filed a notice dismissing the claims against her. [See February 29, 2012 Notice of Voluntary Dismissal.]
- bb. Later that day, Ms. Benson executed an affidavit, which made points similar to those that she had publicly expressed at the February 16, 2012 meeting. [See Quasula Dec., ¶ 49; February 29, 2012 Affidavit of Louise Benson.] All of the statements in the affidavit reflect publicly available information, and nothing in the record suggests that, even after her dismissal, Ms. Benson discussed with GT any privileged or confidential matters that were not otherwise publicly known and available.
- cc. On February 29, 2012, Sheri YellowHawk, a member of the Tribal Council, wrote an open letter to tribal members to which she attached several documents. Two of those documents were memoranda from G&K to the Tribe, dated February 8, 2011 and February 11, 2011. [See February 29, 2012 letter from Sheri K. YellowHawk to Hualapai Tribal Members.]
- dd. Ms. YellowHawk's letter and attachments were copied and distributed as other tribal communications often were, by leaving copies at the post office, tribal headquarters, general store, and other locations. [See Quasula Dec., ¶ 47.]
- ee. Ms. YellowHawk's aunt, Charlene Hardridge, scanned and e-mailed the letter and attachments the same day to approximately 80 individuals, representing nearly every major family living on the reservation. Mr. Quasula received the e-mail and provided it to GT. [See *id.*]
- ff. No evidence in the record suggests that GT or any representative of GCSD ever received or saw the G&K memoranda until at least February 29,

2012, when they were publicly available and had been distributed throughout the Tribe and its members.

- gg. On March 1, 2012, Ms. YellowHawk's letter and attachments also were posted online at an internet website called "Turtle Talk," located at <http://turtletalk.wordpress.com>. [See *id.*] The site, which is unrelated to GCSD or GT, claims to be a "blog for the Indigenous Law and Policy Center at Michigan State University College of Law." The documents posted remain to this day available on that site on the world wide web.
- hh. On March 1, 2012, GCSD filed a supplemental brief, attaching, among other materials, the affidavit executed by Ms. Benson and the G&K memoranda that GT had received from Mr. Quasula on February 29, 2012. [See March 1, 2012 Supplemental Brief in Support of Bad Faith Exception – Pursuant to Court Order.]
- ii. In the sixteen months since Ms. YellowHawk sent her letter and disclosed its attachments, including the G&K memoranda, neither the Tribe nor G&K has taken any steps to remove the letter and attachments from the Turtle Talk website or otherwise curtail the availability of electronic or hard copies of the allegedly privileged and confidential materials.
- jj. On March 2, 2012, G&K filed a Motion to Strike, to which it attached and filed the G&K memoranda. [See March 2, 2012 Motion to Strike Exhibits 1 and 8 to GCSD's Supplemental Brief in Support of Bad Faith Exception.]
- kk. In a March 2, 2012 letter, GT disagreed that it had disclosed any privileged or confidential material, but nevertheless offered to stipulate to seal its filings and G&K's filings that included the memoranda. [See March 2, 2012 letter from Mark G. Tratos to Paul K. Charlton.] G&K never accepted that offer and to this day has taken no steps (apart from the instant motion) to seal the memoranda, which remain available to the public.
- ll. The arbitrator issued a Final Award on August 16, 2012 in favor of GCSD. [See August 16, 2012 Final Award.] The District Court confirmed the arbitration award on February 11, 2013. [See February 11, 2013 Order.]
- mm. On June 26, 2013, G&K for first time filed a motion to disqualify GT as counsel for GCSD, despite its involvement in the matter for more than two years and G&K's allegations for more than two years that GT had acted improperly.

KEY LEGAL PRINCIPLES

1. Several key legal principles govern the parties' dispute and my opinions in this matter. Although I do not believe that any party, or Mr. Rhodes in his opinion, disagrees with these principles, I summarize them below.

2. The ethical rules explain that a lawyer may not communicate with a represented party in a matter absent the consent of that party's counsel. *See* Ariz. R. Sup. Ct. 42, Ethical Rule (hereinafter "ER") 4.2 ("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 by law to do so."). ER 4.2, however, expressly provides that "parties to a matter may communicate directly with each other." *See id.*, cmt. 1.

3. The ethical rules also address a lawyer's obligations relating to the receipt or use of privileged or confidential materials. ER 4.4 provides that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of such a person." ER 4.4(a); *see also* ER 4.4 cmt. 1 (obligations "include legal restrictions on methods of obtaining evidence from others and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship"). The rule further explains what steps a lawyer should take if a privileged document is inadvertently disclosed. *See* ER 4.4(b) ("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 quo for a reasonable period of time in order to permit the sender to take protective measures.").

4. Whether a document is subject to the attorney-client privilege or the privilege has been waived, however, is not addressed by the ethical rules. *See* ER 4.4 cmt. 2. Moreover, ethics opinions, such as the one primarily relied upon by the Tribe, distinguish between situations where a lawyer has knowledge that information is privileged and where a lawyer has reason to believe the privilege has been waived. *See* Ariz. Eth. Op. 01-04 (distinguishing facts because in matter at issue, "the lawyer has no reason to believe that the [opposing party's] conduct has resulted in the waiver of any privilege").

5. Evidentiary rules and case law make clear that documents and information are not privileged where they have become publicly available and the party asserting the privilege does not take prompt and reasonable steps to preserve the documents' confidentiality. Thus, even where disclosure is inadvertent, the Federal Rules of Evidence provide that the disclosure will not constitute a waiver only if "the holder of the privilege or protection took reasonable steps to prevent disclosure" and "the holder promptly took reasonable steps to rectify the error." Fed. R. Evid. 502(b)(2), (3); *see also* Ariz. R. Evid. 502(b)(2), (3) (same). Courts have applied this principle and rejected claims of privilege where the party asserting privilege did not take sufficient steps to protect the allegedly confidential material once it learned of the disclosure. *See, e.g., Bowles v. Nat'l Ass'n of Home Builders*, 224 F.R.D. 246, 253-57 (D.D.C. 2004) (despite asserting privilege in letters to opposing counsel, party waived privilege by waiting more than fifteen months after learning of disclosure to file motion to recover documents or obtain related ruling); *In re Grand Jury (Impounded)*, 138 F.3d 978, 982 (3d Cir. 1998)

(asserting privilege to opposing counsel repeatedly was not enough to preserve it, and “party acted unreasonably in waiting nearly four months to seek a judicial vindication of his assertion of the privilege”); *United States v. de la Jara*, 973 F.2d 746, 750 (9th Cir. 1992) (As a result of his failure to act [for six months], . . . he allowed the mantle of confidentiality which once protected the document[] to be irretrievably breached, thereby waiving his privilege.”) (citation and internal quotation marks omitted).

6. The Restatement of the Law Governing Lawyers applies the same principles, supporting a waiver of the privilege where a party does not take steps as soon as possible to remedy the allegedly improper or inadvertent disclosure. *See, e.g.*, Restatement (Third) of Law Governing Lawyers § 79 cmt. h (“Once the client knows or reasonably should know that the communication has been disclosed, the client must take prompt and reasonable steps to recover the communication, to reestablish its confidential nature, and to reassert the privilege. Otherwise, apparent acceptance of the disclosure may reflect indifference to confidentiality. Even if fully successful retrieval is impracticable, the client must nonetheless take feasible steps to prevent further distribution.”); *see also id.* § 78 (privilege is waived if client or client’s lawyer “in a proceeding before a tribunal, fails to object properly to an attempt by another person to give or exact testimony or other evidence of a privileged communication”).

7. Documents relied upon by a governmental body, such as the Tribal Council, also may lose their privileged status where they are adopted or incorporated into an accepted policy decision. *See Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 360 (2d Cir. 2005) (“Like the deliberative process privilege, the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency’s policy.”).

8. Arizona courts have made clear that disqualification is not favored and “[o]nly in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent.” *Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984). “The burden should be upon the moving party to show sufficient reason why an attorney should be disqualified from representing his client. Whenever possible the courts should endeavor to reach a solution that is least burdensome upon the client or clients.” *Id.*; *see also Gomez v. Superior Court*, 149 Ariz. 223, 226, 717 P.2d 902, 905 (1986) (courts “view with suspicion motions by opposing counsel to disqualify a party’s attorney based upon conflict of interest”).

9. Courts also routinely hold that a party seeking disqualification of an opposing party’s counsel must move to disqualify at the earliest possible time. *See Stirling Bridge, L.L.C. v. Quarles & Brady, LLP*, No. 1 CA-CV 08-0255, 2009 WL 4753956, at *6 ¶ 27 (Ariz. Ct. App. Dec. 10, 2009) (waiver of conflict claim by failing to object to counsel’s involvement); *see also Amparano v. ASARCO, Inc.*, 208 Ariz. 370, 378-79 ¶¶ 32-33, 93 P.3d 1086, 1095-96 (App. 2004) (finding waiver where party did not timely assert disqualification of lawyer); *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W. 2d 400, 410 (Tenn. 1991) (“The client cannot hold the right in reserve for tactical purposes until it would be most helpful to his position. Failure to move for disqualification at the earliest practical opportunity will constitute a waiver.”).

10. Given the ability of a party seeking disqualification to burden the opposing party and hinder litigation, courts have cautioned that motions to disqualify “are particularly susceptible to misuse as a “technique of harassment.” *Foulke v. Knuck*, 162 Ariz. 517, 521, 784 P.2d 723, 727 (App. 1989) (citation omitted). “To call for the disqualification of opposing counsel for delay or other tactical reasons, in the absence of prejudice to either side, is a practice which will not be tolerated.” *Alexander*, 141 Ariz. at 165, 685 P.2d at 1317 (quoting *Cottonwood Estates v. Paradise Builders*, 128 Ariz. 99, 105, 624 P.2d 296, 302 (1981)).

ANALYSIS OF KEY ISSUES

A. Alleged Violations of ER 4.2 and ER 4.4.

1. A necessary aspect of any proper analysis of GT’s conduct is an understanding of the nature of the documents and communications at issue. In the Tribe’s Motion to Disqualify, as well as in the Rhodes Affidavit, it is presumed that the G&K memoranda, as well as information regarding the Tribe’s actions expressed in the declarations of Mr. Jin, Mr. Quasula, and Ms. Benson, were privileged and confidential when GT became aware of them. The facts of record, however, demonstrate otherwise.

2. The documents and declarations show that all of the ostensibly privileged information in GT’s filings was publicly available and widely disseminated before GT received it; nothing in the record establishes that GT was aware of, received, or relied upon the G&K memoranda until at least February 29, 2012, when they had become publicly available. Even if the Tribe or G&K was not responsible for the disclosure of the memoranda, they have failed to this day to take any steps (other than in the instant motion) to preserve the confidentiality of the memoranda and protect the claimed privilege.

3. Although G&K contends that it was aware of GT’s possession and use of confidential information from the memoranda and from other communications with the Tribe as early as March 30, 2011, when GCSD filed its first District Court Complaint, it did not raise any concern until May 11, 2011, and even then it did not identify the specific documents or information it believed had been disclosed, let alone seek to recover or otherwise protect the ostensibly confidential and privileged material.

4. In February 2012, when GT learned at a hearing that Ms. Benson was willing to testify on behalf of GCSD, G&K did not seek a ruling from the Court or otherwise attempt to recover documents and information that it now contends GT improperly possessed. Furthermore, by that time, the possibility that the Tribe would use eminent domain to take GCSD’s contractual interests had been discussed by Tribal Council members in an open, public, videotaped meeting, and the parties even had addressed that possibility in the pending arbitration proceeding.

5. By the time GT filed a brief attaching the G&K memoranda on March 1, 2012, those memoranda had been distributed throughout the Tribe in hard copies and electronically. Shortly thereafter, the memoranda had also been published on the internet.

6. Beyond moving to strike GT's filing, neither the Tribe nor G&K attempted to remove the memoranda or related materials from the internet or otherwise recover them or prevent their further disclosure. In fact, sixteen months later, those memoranda remain in the public domain, and even G&K has filed copies with the Court. Significantly, rather than seeking to protect them and preserve the privilege, G&K refused even to accept GT's offer to place them under seal.

7. In my opinion, 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 have once existed has been waived.

8. Absent any facts showing that GT ever obtained or used privileged or confidential information, ER 4.4 is inapplicable and does not support a finding that GT or its attorneys violated their ethical duties.

9. Mr. Rhodes, who claims in his affidavit to have reviewed only Mr. Charlton's declaration and the two 2011 G&K memoranda, assumes that the memoranda were privileged when GT filed them in March 2012, but he fails to acknowledge their earlier broad distribution and public accessibility or G&K's lack of any reasonable effort to maintain their confidentiality or to seal them when GT offered to do so. Mr. Rhodes cites to no authority for his statement that "[e]ven if GT believed there had been a waiver of the attorney-client privilege, the Ethical Rules did not permit GT to make such a unilateral determination." In my opinion, unlike the situation presented in the cited ethics opinion, GT had ample "reason to believe that the [opposing party's] conduct has resulted in the waiver of any privilege." Ariz. Eth. Op. 01-04.

10. Mr. Rhodes appears to speculate that other, unspecified information in GT's filings must have been based on privileged or otherwise confidential communications, but he provides no factual basis for this speculation and does not address or acknowledge the public discussions and widespread dissemination of the ostensibly privileged information that occurred prior to those filings. Nor did he identify any evidence in the record showing that GT, Mr. Jin, or any other representative of GCSD ever received or relied upon the G&K memoranda or other, unspecified legal communications before the memoranda had become publicly available in February 2012.

11. None of the documents or information I have reviewed establishes that Ms. Benson, or anyone else representing the Tribe, discussed information with GT that had not lost its privileged and confidential status before those discussions occurred. Based on the information in her affidavit, as well as her previous public comments, it does not appear that her discussions with GT after her dismissal disclosed any information that had not already been widely discussed and disclosed. Of course, any communications between Mr. Jin and members of the Tribe were permissible, client-to-client communications that do not implicate ER 4.2.

12. Even if GT's meeting with Ms. Benson constituted a technical violation of ER 4.2 – which would require GT to know that G&K had served or would serve as her counsel – any

such technical violation would be mitigated by the fact that no privileged or confidential information was disclosed at that meeting and would not support an order of disqualification.

CONCLUSION

1. It is my opinion that 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.

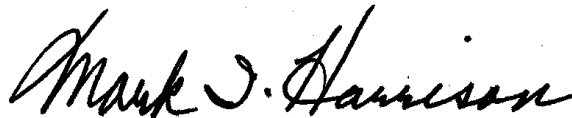
2. As such, ER 4.4 is not implicated, and GT did not violate any duties under that rule.

3. The record does not support any finding that GT discussed any privileged or confidential matters with any representatives of the Tribe, including Ms. Benson. Even if GT's meeting with Ms. Benson could have constituted a technical violation of ER 4.2, such violation would be mitigated by the fact that nothing privileged or confidential was communicated at that meeting. In any event, such a technical violation would not support the drastic remedy of disqualification.

4. I reserve the right to modify my opinions by addition or deletion or to offer revised opinions upon review of additional materials developed in discovery or because of changes in the legal theories asserted by the parties in this matter.

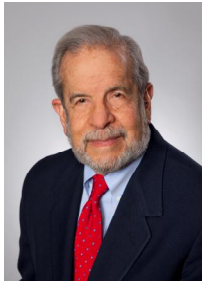
5. The foregoing statements and opinions are true and correct to the best of my knowledge, information, and belief.

Dated this 26th day of July, 2013.

A handwritten signature in black ink, reading "Mark I. Harrison". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Mark I. Harrison

Exhibit A



**Résumé of
MARK I. HARRISON**

Osborn Maledon PA
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Phoenix, AZ 85012
Telephone: 602-640-9324
mharrison@omlaw.com

Admitted to practice before all courts in Arizona since May, 1961; United States District Court--District of Arizona, the United States Court of Appeals for the Ninth and Federal Circuits, and the United States Supreme Court; admitted to practice in Colorado in 1991

PROFESSIONAL EXPERIENCE:

- 2004— **OSBORN MALEDON, P.A. (Partner)** Specializing in Legal and Judicial Ethics & Professional Liability; Alternative Dispute Resolution; Appellate; Commercial Litigation
- 1993-2004 **BRYAN CAVE LLP (Partner)** 2 N. Central Ave, Suite 2200, Phoenix, Arizona
- 1966-1993 **HARRISON, HARPER, CHRISTIAN & DICHTER, P.C. (& predecessor firms)**
- 1960-1961 **Law Clerk** to Justice Lorna E. Lockwood, Supreme Court of Arizona
- 1968-1974 **Special Counsel** to the Attorney General of Arizona for Antitrust Matters
- 1992-2012 **Judge Pro Tem** - Maricopa County Superior Court; Arizona Court of Appeals

EDUCATION

- Harvard Law School, Cambridge, Massachusetts (LL.B. - 1960)
- Antioch College, Yellow Springs, Ohio (B.A. - 1957)

AWARDS

- Ø **Burnham "Hod" Greeley Award, ABA Judicial Division, 2013**
[Award presented to individuals and organizations for making a significant, positive impact on public understanding of the role of the judiciary.]
- Ø **NCBP Fellows Award, National Conference of Bar Presidents, 2010**
[Award recognizes the accomplishments of a past bar president who has demonstrated a continuing commitment to leadership, service, the work of the organized bar and the purposes of the NCBP.]
- Ø **Hall of Fame Award, Maricopa County Bar Association, 2009**
[Award presented to individuals who have built the legal profession in Maricopa County, made extraordinary contributions to the law and justice, and who have distinguished themselves at the highest levels of public service]
- Ø **Presidential Commendation Award, Arizona Attorneys for Criminal Justice, 2008**
[Award presented for pro bono representation of contract defense counsel and public defenders in connection with capital representation and indigent defense caseload issues]

- Ø **University of Arizona Alumni Association Honorary Alumnus Award, 2007**
[Award conferred by UofA Alumni Association for exceptional loyalty and service to the University of Arizona]
- Ø **Judge Learned Hand Award, 2005**
[Award given annually by the American Jewish Committee to outstanding leaders of the legal profession who exemplify the high principles for which Judge Learned Hand was renowned]
- Ø **Arizona Women's Political Caucus, Good Guys Award, 2004**
[Award conferred annually to men in the community who have championed the efforts to advance women's rights and causes]
- Ø **University of Arizona Law College Association Appreciation Award, 2003**
[Award given annually to the President of the Law College Association]
- Ø **University of Arizona Distinguished Honorary Alumnus Convocation Award, 2003**
[Award conferred by law faculty in recognition of professional accomplishments]
- Ø **Peggy Goldwater Award, presented by Planned Parenthood-AZ, 2003**
[Award given annually to an individual who demonstrates a commitment to promoting family planning services for all persons regardless of their economic circumstances]
- Ø **State Bar of Arizona, Walter E. Craig Award, 2002**
[Lifetime achievement award to honor an attorney who has adhered to the highest principles and traditions of the legal profession and served the public in the community in which he or she lives]
- Ø **American Bar Association Mike Franck Award for Professional Responsibility, 1996**
[Award given annually to an individual dedicated to the constant improvement of lawyer regulation in the public interest who has also made major contributions in the field of professional responsibility]
- Ø **State Bar of Arizona Award of Special Merit, 1993**
[Award given annually to that member(s) of the State Bar of Arizona who has made significant contributions to the furtherance of public understanding of the legal system, the administration of justice and confidence in the legal profession.]

NATIONAL RECOGNITION

- ✓ Who's Who in America/American Law/Arizona
- ✓ Best Lawyers in America: Appellate Law, Commercial Litigation, Ethics and Professional Responsibility Law, Legal Malpractice Law, editions 1993-2013 (20 years)
- ✓ Best Lawyers in America/2011 Phoenix Ethics & Prof. Responsibility Lawyer of the Year
- ✓ Chambers USA
- ✓ Southwest Super Lawyers, Top 50 Arizona Attorneys (2007-10)
- ✓ Southwest Super Lawyers, Professional Liability: Defense, General Litigation, Appellate [(2007-12)]

PROFESSIONAL RESPONSIBILITY ACTIVITIES

State Bar of Arizona

- Ethics Committee (1968-74)
- Supreme Court Special Committee on Lawyer Discipline and Professional Conduct (1983-84)
- State Bar Committee on Model Rules of Professional Conduct (1981-83)
- Member, State Bar Committee on Professionalism (1988-2011); Chair, State Bar Professionalism Course Committee (1988-93)

- Supreme Court Advisory Committee on the Rules of Judicial Conduct (2000)
- Ethical Rules Review Group, State Bar of Arizona (2001-03)
- Supreme Court Taskforce on Rules Relating to Lawyer Discipline (2002-03)

American Bar Association

- Member, Standing Committee on Professional Discipline (1975-84) and Chairman (1982-84)
- Member, Editorial Board, ABA/BNA Lawyer's Manual on Professional Conduct (1984-87)
- Chairman, ABA Committee on Professionalism (1987-89)
- Member, Standing Committee on Lawyers Professional Liability (1992-94)
- Member, Advisory Council, ABA Commission on Evaluation of the Rules of Professional Conduct (1997-99)
- Member, Standing Committee on Ethics and Professional Responsibility (1999-2002)
- Chair, ABA Joint Commission to Evaluate and Revise the Code of Judicial Conduct (2003-07)

Association of Professional Responsibility Lawyers, President (1992)

Adjunct Professor, College of Law, University of Arizona (1995-97) - Legal Ethics

Adjunct Professor, College of Law, Arizona State University (2001-10) - Legal Ethics

PROFESSIONAL ACTIVITIES

Maricopa County Bar Association

- Board of Directors (1966-71)
- President (1970) (Association won ABA Award of Merit)

State Bar of Arizona

- Board of Governors (1971-77)
- President (1975-76) (Association won ABA Award of Merit)

Arizona Bar Foundation

- Founding Fellow; Member, Board of Directors (1984-92); President (1991)

Western States Bar Conference

- President (1978-79)

National Conference of Bar Presidents

- Executive Council (1971-73, 1975-78); President (1977-78)

American Bar Association

- State Delegate, House of Delegates (1981-84)
- State Bar Delegate, House of Delegates (1978-81) (1997-2000)
- Assembly Delegate, House of Delegates (1987-96)
- Antitrust Section; Litigation Section; Section of Individual Rights and Responsibilities [Council Member (1983-89)] Section of Torts and Insurance Practice [Council Member (1989-92)]
- Commission on Women in the Profession (1994-97)
- Chairman and Member, ABA Commission on Public Understanding About the Law (1984-87)
- *Brown v. Board of Education* Commission (Member, 2003-04)

Life Fellow, American Bar Foundation

Fellow, American Academy of Appellate Lawyers; President, (1993-94)

The Order of Barristers (Appellate Advocacy Honorary Society)

American Judicature Society: Board of Directors (1981-87); Executive Committee (1983-86)

American Board of Trial Advocates

Arizona Center for Law in the Public Interest: Founding Member and Board of Directors (1974-83)

Master, Sandra Day O'Connor Inn of Court (President, 1993-94)

Life Member, American Law Institute (Members Consultative Group, Restatement of the Law, The Law Governing Lawyers) (Members Consultative Group, Ethics in Government Project, 2010--)

ALI-ABA Professional Responsibility Advisory Panel (2006-10)

Member, National Council, Human Rights First (1997-2010)

Member, Board of Directors, Lawyers' Committee for Civil Rights Under Law (2002--2010)

Justice For All: Founding Member and President (2005--)(Arizona organization dedicated to the preservation of an independent judiciary)

Justice At Stake: Board of Directors (2008--); Vice-Chair (2010-2011); Chair (2011--) (National organization dedicated to the preservation of an independent judiciary)

ACTIVITIES (Non-Professional)

Careers for Youth: Board of Directors (1963-67) and President (1966-67)

Democratic Party of Arizona: Executive Committee (1964-74); Vice-Chairman (1968-70); Legal Counsel (1970-72)

Phoenix Citizens Bond Advisory Commission, Chairman (1975-79)

Phoenix Environmental Quality Commission, Member (1972-75)

Valley Commerce Association, President (1978)

Camelback Mental Health Foundation: Member, Board of Trustees (1979-87) and Vice President (1982-84)

Harvard Law School Association: Member, National Executive Council (1980-84)

Planned Parenthood of Northern Arizona: Member, Board of Directors (1993-96); President (1995); Board of Trustees, Vice-Chairman (1997--)

Teach for America: Member, Advisory Committee (Arizona) (1995-98)

University of Arizona College of Law Board of Visitors: Member (1995--); University of Arizona Law College Association Board of Directors: Member (1995--), President (2002-03)

Arizona State University Law Society; (Board of Directors 1999--)

Arizona Friends of Talking Books: President (2000-01); Board Member (2000-03)

Jazz in Arizona, Inc., Board of Directors (2000-02)

PUBLICATIONS

Ø Co-author (Kenneth Sherk), Arizona Appellate Practice (1966)

Ø Co-author (Samuel Langerman), Actions Against Insurer for Bad Faith Failure to Settle Claim, 21 Am. Jur. Trials 229 (1974)

Ø "Standards for Lawyer Discipline and Disability Proceedings," 11 Capital U.L.R. 529 (1982)

Ø "An Overview: The New Arizona Rules of Professional Conduct," 20 Arizona Bar Journal 4 (1985)

- Ø “LLPs Are Just Another Star Wars!” 39 S. Tex. L.R., 633 (1998)
- Ø Co-author (Mary Gray Davidson), *Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers*, 22 Penn St. Int'l L. Rev. 4 (2004)
- Ø Co-author (Sara Greene, Keith Swisher, Meghan Grabel), *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present and Future*, XXXIV, No. 1 Fordham Urb. L.J. 239 (2007)
- Ø *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, Vol. 28 The Justice Journal, No. 3 (2007)
- Ø *Extrajudicial Comments Concerning Pending Cases: The New Code's Controversial Self-Defense Exception*, 64 N.Y.U. ANN. SURV. AM. L. (2009) (with Keith Swisher)
- Ø *Can We Allow Justice To Become a Saleable Commodity?*, 30 Yale L. & Pol'y Rev. Inter Alia 29 (2012)

PERSONAL INTERESTS AND HOBBIES

Music (piano), physical fitness (swimming), reading