Paul K. Charlton (Bar No. 012449)
Mark C. Dangerfield (Bar No. 010832)
Mark A. Fuller (Bar No. 012149)
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
Facsimile: (602) 530-8500
E-mails: paul.charlton@gknet.com
mark.dangerfield @gknet.com
mark.fuller@gknet.com
Attorneys for Defendants Hualapai Tribe and Tribal Council members

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 QUASALA, SR., RUDOLPH CLARKE, HILDA COONEY, JEAN PAGILAWA, each individuals and members of the Hualapai Tribal Council, Defendants.	No. 3:13-cv-08054-DGC

REPLY IN SUPPORT OF MOTION TO DISQUALIFY AND FOR RELATED ORDERS

Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000

Greenberg Traurig's ("GT") Opposition makes it easy to lose sight of what really happened here. The chronology tells it all.

Let's go back to the February 24, 2012 TRO hearing. This is when Mr. Tratos drops his bombshell: he says he wishes to call to the stand the current Chairwoman of the Tribe, who signed the Declaration of Taking. Exh. 1. He then gives the Court a detailed description of her testimony, saying (among other things) that she is now prepared to testify, under oath, that it was all a bad faith scheme of some kind against Mr. Jin. Four days later, on February 28, the Court issues an order asking for expedited supplemental briefing on the bad faith allegation, to be submitted by March 1. The stage is set. GT has 48 hours to generate "evidence" of bad faith.

The next day, February 29, GT lawyers sit down and meet with Chairwoman Benson *ex parte*, without notice to G&K. They have what Mr. Quasula describes vaguely as a "substantive discussion," as a result of which GT drafts an affidavit for her to sign with a blistering attack on the Tribe. And by some strange coincidence, it is at 2:02 p.m. that very afternoon when Mr. Quasula receives an email from Councilmember Yellowhawk's aunt attaching the two privileged G&K memoranda. Quasula hands them over to GT. Without hesitation, the lawyers review them. They say nothing to G&K.

It only gets worse when we look at what happened the next day, March 1. GT has obtained signatures on the Benson affidavit and Mr. Quasula's Declaration, to which they have attached the privileged memoranda. And then, by yet another odd "coincidence," these documents magically appear on the Turtletalk internet site that GT trumpets in its Opposition as "evidence" that the memoranda were in the "public domain." In fact, these documents are posted on that website at 12:36 p.m. – *hours before they were even filed.* What does this mean? It means that someone with access to as-yet-unfiled GT documents fed them to Turtletalk so they could be published to the world at large before G&K or anyone else could get into court and try to put the genie back in the bottle. We don't yet know who this mystery person was, but the universe of candidates is extremely small. In

fact, it is difficult to conceive of any scenario under which the posting could have occurred without at least the knowledge and assistance of GT.[1]

Fast forward a few hours. With the G&K memos now safely on the Web, and the business day over, GT sends G&K a "courtesy" letter stating that Mr. Quasula had obtained the memoranda "last evening"[2] and that GT "believes" that the privilege has been waived. Just 17 minutes later, before G&K can even respond, GT proceeds to file both the memoranda and the Benson affidavit.

The sordid details of these events are still missing, because as the Court will surely have noted, GT is saying nothing (and resisting discovery). But it really doesn't matter. Even without filling in the rest of the blanks, one can see exactly what happened. GT orchestrated a completely unethical scheme to obtain and use privileged, confidential information from an opponent. That's the record before the Court. It was a deliberate, cynical disregard of the rules that govern this profession.

So what does GT offer the Court in lieu of a full and honest account of these events? A declaration from Mr. Quasula, a supporter and employee of Mr. Jin, who adds virtually nothing beyond confirming the clandestine meeting between Ms. Benson and GT and speculating that the G&K memoranda might have been distributed in other places. Meanwhile, Mr. Harrison, GT's expert, opines that everything is fine because: (1) he thinks the Tribe intentionally waived the privilege as to the memoranda – a proposition for which there is zero evidence, and for which he relies in part on the internet posting; and (2) he thinks Ms. Benson, a principal G&K contact and participant in all privileged and confidential Tribal meetings, might not have actually shared confidential or privileged information when she met with GT – a proposition that makes utterly no sense and is inconsistent with what she actually said in her affidavit.

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[1] GT has filed a motion asking the Court to take judicial notice of the Turtletalk web page, and we agree that the Court can and should consider what appears on that page (which includes the date and time). We have attached as Exhibit 2 another copy of the page, which shows the time it was posted.

[2] The email to Mr. Quasula and others was at 2:02 p.m., not in "the evening," as GT's letter states.

That this is the best GT can muster in response to the Tribe's motion speaks volumes, as does the fact that GT would now come before this Court and trumpet the internet posting as "evidence" that the Tribe waived its attorney-client privilege. But there is more. As incredible as it seems, GT is back at it again. Just two weeks ago, in the face of this motion, GT lawyers saw fit to have *ex parte* communications with a former Board member of SNW (the Tribally chartered corporation sued by GCSD), obtained an affidavit from him, and filed it in support of a motion to appoint a Trustee in the pending SNW bankruptcy proceedings. We will discuss this further below, but it just hammers the point home: GT is intentionally violating the ethical rules. Disqualification is both justified and necessary. *See* Exh. 3 (Supplemental Declaration of Mr. Rhodes), ¶ 91 ("Disqualification alone can restore order and integrity to a legal proceeding that has been corrupted by GT's misconduct").

I. The Facts: What Is, And Is Not, In The Record

The motion before the Court is a serious one, and it is critical to have the facts straight.

As we noted above, no GT lawyer has offered testimony about the events at issue, including the firm's *ex parte* communications with former Chairperson Benson and its receipt and use of the privileged memoranda. Instead, what GT offers – *all* it offers – is Mr. Quasula's declaration. A large portion of that declaration is just self-serving fluff, having nothing to do with our motion (*e.g.*, Mr. Quasula's background and relations with other Tribal members, the Tribe's internal political disputes, and the Tribe's supposed mistreatment of Mr. Jin). And when the Court reads those limited portions of Mr. Quasula's declaration that actually pertain in some way to the events in question, it will see that his testimony is not as portrayed by GT in its Opposition. For example:

(1) Mr. Quasula says that he became "suspicious" that the Tribe might take "legal action" against Mr. Jin, and heard "rumors" from some unnamed source that the Tribe might exercise its right of eminent domain. Quasula Dec. ¶¶28, 31, 36. At no point does Mr. Quasula support GT's statement that the Tribe's intent to condemn GCSD's interests

in the Management Agreement was "well known in early 2011 and the basis for *GCSD I*." There is no evidence to that effect.

(2) Mr. Quasula says that before the TRO hearing in *GCSD II*, he observed some "pleasantries" exchanged when Tribal Council members entered the courtroom, but that nothing substantive was discussed in those few seconds. Quasula Dec. ¶¶ 43-44. He then goes on to say "I know" that Mr. Tratos described Ms. Benson's testimony "based upon the videotape" from an earlier public hearing. *Id.* ¶ 45. But Mr. Quasula isn't a mind-reader, and he gives no basis for "knowing" the basis for Mr. Tratos's statements to the Court. Moreover, he's demonstrably wrong, because the videotape doesn't match up to what Mr. Tratos said. Among other things, Mr. Tratos represented that Ms. Benson "will testify that at the time the PR campaign was launched against Mr. Jin to discredit him for not completing the building, to discredit him for not bringing utilities and power, that that was [a] deliberate bad faith act because it was never Mr. Jin's obligation . . .." Mtn, Exh. 14. Ms. Benson said nothing even remotely like this in the earlier meeting.[3] If we assume Mr. Tratos had a good faith basis for making such a statement to the Court, he received this information from some other source (most logically from Ms. Benson herself).

(3) Mr. Quasula says that "*as far as I am aware*," the email from Councilmember Yellowhawk's aunt, attaching the G&K privileged memoranda, was "copied and distributed in the manner of other tribal communications," including the post office, the tribal office, and "the general store." Quasala Dec. ¶47. This was carefully crafted to give the *impression* that widespread distribution of the memoranda is somehow a "fact," and GT's Opposition portrays it as such. In fact, however, nothing in the record shows that the memoranda were treated as ordinary "tribal communications," let alone distributed to post offices or any other place, and Mr. Quasula does not purport to have such knowledge. Likewise, on the other side of the coin, there is no evidence that GT had any reason to believe that the memoranda had been widely distributed or were in the "public domain" when it received them.

[3] *See* GCSD's Supplemental Statement of Facts in *GCSD II*, Exh. B to Quasula Declaration.

(4) In the same paragraph where he speculates about distribution of the G&K memoranda, Mr. Quasula states that the memoranda were "additionally published" on the Internet. Quasula Dec. ¶47. We addressed this above. When GT received the privileged memoranda, they were *not* on the Internet; that happened on March 1, a few hours before GT filed them with the Court.

Now let us turn to what Mr. Quasula *doesn't* say. He doesn't purport to recount, or even have knowledge of, the universe of communications between GT and Ms. Benson (or anyone else, for that matter), whether before or after the TRO hearing. He doesn't suggest that he has any basis to tell the Court what GT "knew" or what it believed. And perhaps most significantly, he doesn't recount anything of substance about the meeting between GT and Ms. Benson in Las Vegas. All he offers is hearsay about how Mr. Tratos acknowledged he needed permission from G&K to have his "substantive discussion" with her, but thought that if he dismissed her from *GCSD II* he could proceed at will. Quasula Dec. ¶ 49. We will address that legal argument below, but for present purposes it is important to bear in mind the context of the meeting. *GCSD II* sought to enjoin the Tribe's February 8, 2012 condemnation action against GCSD, which was *already pending* in tribal court. Insofar as GT is now trying to draw some artificial distinction between Ms. Benson and the Tribe, this is an important point, so let us be clear: not only was there pending litigation between GCSD and the *Tribal Council* for authorizing the Tribe's condemnation action (*GCSD II)*, but there was also the pending condemnation case between GCSD and *the Tribe.* And Ms. Benson, as Chairperson, had signed the Declaration of Taking, and was at the very epicenter of the whole acrimonious dispute. It was under these circumstances that GT met with her behind closed doors, prepared an affidavit for her to sign, and then submitted her affidavit to the Court.

II. The Declaration of Mark Harrison

GT's choice of Mr. Harrison as an expert is an interesting one. He is, of course, an accomplished and respected attorney, and certainly has the qualifications to offer expert opinions in this area. But after preliminary discussions with the *Tribe's* counsel regarding

GT's conduct, he was prepared to serve as the *Tribe's* expert. The only reason he didn't undertake the engagement is because GT is an important client of his law firm. To quote: "I am unhappy to report that my fears and suspicions have been confirmed. GT has been a client frequently and in the very recent past and my partners think it more than inadvisable for us to be adverse to them in a matter going to their professional conduct." Exh. 4. We do not mean to impugn Mr. Harrison's integrity, but the Court should understand that his firm has such a significant financial stake in keeping GT happy that he was instructed not to serve as the Tribe's expert.

Turning then to the substance of Mr. Harrison's declaration, the Court will see that he has in most instances deferred to GT's faulty account of the facts. For example, he refers a number of times to what he says was "publicly available and widely known" information, even though there is no evidence of such. Harrison Dec. ¶¶ 7(bb), 7(ff), A(2). He takes it as a given that the G&K memoranda were distributed all over the reservation. *Id.* ¶ 7(dd). He cites the fact that the memoranda were posted on the Internet, apparently unaware that this didn't happen until after GT received and reviewed the memoranda. *Id.* ¶ 7(gg). Suffice it to say that insofar as Mr. Harrison's opinions are based on incorrect assumptions about the underlying facts, they are meaningless.

Perhaps the most important unfounded assumption made by Mr. Harrison is the notion that when Ms. Benson met with GT in their offices, she didn't share any privileged, confidential information. *Id.* ¶ 7(bb). This hypothesis is *essential* to Mr. Harrison's opinions: according to him, it is the reason why GT didn't actually violate ER 4.2, or if it did, why the Court shouldn't disqualify the firm. *Id.* pp. 12-14. But of course, and again with due respect to Mr. Harrison, his premise not only lacks any record support, but defies logic. GT wasn't meeting with Ms. Benson to discuss the weather. They met to discuss the disputes between GCSD and the Tribe, including the condemnation action. As we noted above, Ms. Benson had been privy to all of the privileged and confidential discussions between G&K and the Tribal Council on those subjects. And at the end of the process, GT prepared an affidavit for Ms. Benson to sign that not only disclosed

confidential and privileged matters, but referred *specifically* to privileged discussions with G&K. *See* February 29, 2012 Affidavit of Louise Benson attached as Exhibit 8 to GCSD's Supplemental Memoranda in Support of Bad Faith in GCSD II (Doc. 37-4).

One final point bears emphasis. Even Mr. Harrison acknowledges, albeit tacitly, that if GT *did* discuss confidential, privileged matters with Ms. Benson, that would not only be a violation of ER 4.2, but it would be grounds for disqualification. At least to that extent, the parties agree. And both the evidence and common sense show that this is exactly what happened.

III. GT Violated ER 4.2

A. *GT's Improper Meetings with Ms. Benson*

We have focused primarily on the February 29, 2012 meeting between GT and Chairwoman Benson in Las Vegas. As we explained in our motion, however, there is a strong inference that GT spoke with Ms. Benson at some point before the February 24 TRO hearing, as Mr. Tratos would not have had any basis to make his offer of proof otherwise. There is no evidence rebutting that inference. Moreover, according to Mr. Quasula, there was a luncheon meeting immediately following the TRO hearing in which he – an employee of GCSD – met privately with the Chairwoman and other Tribal Council members, including Ms. Yellowhawk (who later wrote the letter attaching the G&K memoranda). Quasula Dec. ¶ 46. Again, we don't know the details, but Mr. Quasula does say they specifically discussed, among other things, "the eminent domain ordinance" and "the conduct of the Tribe's lawyers."

GT maintains that this was perfectly acceptable because a client can meet with an adverse party. That is true as far as it goes. But it is highly improper for a client to solicit or receive privileged information from that adverse party, and then to pass that improperly-obtained information on to his or her lawyers. An "attorney may not do indirectly that which is prohibited directly." *Maldonado v. New Jersey,* 225 F.R.D. 120, 138-139 (D. N.J. 2004) (explaining that the "cease, notify and return" rule also applies when a lawyer obtains apparently privileged material from his or her client). And an

attorney or investigator meeting with a current client of an adversary organization "shall not, under any circumstances, seek to obtain attorney-client or work product information from the employee." *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1157 (D. Minn. 2001). This appears to be what happened at the luncheon meeting, and the inference is all the stronger when one considers that it is only a few days later when GT met with Ms. Benson and obtained the G&K memoranda via a letter written by Ms. Yellowhawk.[4]

In any event, the impropriety of the February 29 meeting is cut-and-dried. GT's only response is to argue that once it dismissed Ms. Benson as a defendant in *GCSD II*, it no longer had any ethical restraints in meeting with her *ex parte.* As a threshold matter, GT acknowledges in his Opposition that it actually met with Ms. Benson in the *afternoon*, which is *before* it dismissed her later that evening. *See* Opp. at 8; *compare* February 29, 2012 US District Court Notice of Electronic Filing, *GCSD II*, Notice of Party Dismissal (filed 6:56 p.m.). In other words, as we said in our motion, the dismissal was plainly a *quid pro quo* for Ms. Benson giving GT the affidavit it wanted. But even putting that aside, the dismissal of Ms. Benson from *GCSD II* is irrelevant to Rule 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 (emphasis added). And lest there be any doubt about whether this is somehow limited to "parties" in the sense of plaintiffs and defendants, the comments address this very point: the Rule "covers any person, *whether or not a party to a formal proceeding,* who is represented by counsel concerning the matter in question." Rule 4.2,

[4] Mr. Quasula also refers to another lunch meeting with Ms. Benson on February 29, 2012, before taking her to GT's offices. Quasula Dec. ¶ 48. Mr. Quasula claims that Benson said she wanted "to advise the Court of what was truly happening," and that she wanted to meet with GCSD's lawyers to discuss her perceptions of actions by "her lawyer," G&K. *Id.* ¶ 48. This is yet more hearsay, and can't be considered for the truth of his account, but it does reflect Quasula's admission that the conversation involved more confidential, privileged matters. As such it was improper for the same reason as the February 24 lunch meeting.

Cmt. 3 (emphasis added).

Not only does GT's argument fail to appreciate the language and reach of Rule 4.2, but it relies on a meaningless distinction. We have addressed this above, but it bears repeating. The Tribe filed its condemnation action on February 8, 2012, which in turn prompted GT to file *GCSD II*, seeking to enjoin the condemnation. Although *GCSD II* was what is commonly known as an *Ex Parte Young* action – i.e., GCSD named members of the Tribal Council individually as a way to avoid sovereign immunity – what was at issue was the legality of the Tribe's condemnation action.[5] Dismissing Ms. Benson didn't eliminate the dispute, nor did it eliminate the fact that she was the Chairwoman of the Tribe which was involved in still-ongoing litigation with GCSD, represented by counsel.

This leaves Mr. Harrison's theory that the Court need not be concerned about Rule 4.2 because, he says, nothing he saw "establishes" that Ms. Benson discussed privileged information with GT on February 29. Harrison Dec. ¶ A(11). It is true that so far as we know, the meeting wasn't recorded. But the notion that it didn't involve confidential, privileged information is not merely unrealistic – it is demonstrably false. After all, Ms. Bensons' affidavit is filled with testimony that could *only* be based on privileged, confidential information, and she even goes so far as to identify a particular discussion with G&K. Rhodes Dec. ¶ 19 (Benson: "I specifically asked the attorneys, Gallagher & Kennedy, where the funds would come from . . .").

Not only does Mr. Harrison make an unfounded assumption about what was or wasn't discussed between GT and Ms. Benson, but he has the law backwards. ER 4.2 prohibits the *meeting* in the first place, to protect the integrity of the judicial process and the attorney-client privilege. A lawyer violating this Rule cannot hide in the shadows and complain that exactly what was discussed hasn't been "established." To the contrary:

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[5] *Ex Parte Young,* 209 U.S. 123 (1908) allows suit against tribal officials who allegedly acted in violation of federal law, despite sovereign immunity. The doctrine of the case "rests on the premise – less delicately called a 'fiction' – that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Virginia Office for Prot. & Advocacy v. Stewart,* 131 S. Ct. 1632, 1638 (2011).

even in cases involving *ex*-employees in high ranking positions, "his or her exposure to confidential or privileged information may be assumed," and "no *ex parte* contact should be permitted absent notice to the former employer." *Kaiser v. AT&T,* 2002 WL 1362054, *6 (D. Ariz.) (disqualifying counsel for conversations with a former managerial employee). This is because "even if no confidential or privileged information is disclosed, the appearance of impropriety taints the integrity of the judicial system." *Id.* This principle obviously applies with even greater force here. After all, Ms. Benson wasn't an ex-employee of an opposing party – she was the Chairwoman of the Tribe, involved in litigation between the Tribe and GCSD over the condemnation action she had approved and authorized, and who had been privy to all privileged and confidential discussions between the Tribal Council and G&K.

B. GT's Ex Parte Communication(s) With Mr. Mills

The present motion was prompted by GT's renewed use of privileged memoranda in this case, reflecting that GT was not about to discontinue its pattern of misconduct. Recent events have only confirmed our fears in that regard. On July 26, 2013, GT filed a declaration of Walter Mills in support of GCSD's motion to appoint a Chapter 11 Trustee in the SNW bankruptcy proceeding. *In re: 'Sa Nyu Wa, Inc.*, United States Bankruptcy Court, District of Arizona, Case no. 13-BK-02972-BMW (Doc. 140). Mr. Mills is a disgruntled former Tribal leader who served for seven years on the Board of Directors of both SNW (the Tribal subsidiary which managed the Skywalk), and GCRC, another Hualapai Tribal Corporation. While in that position he was one of a select few that had complete management control over the Tribe's interest in the Skywalk. (Other than the board, SNW had no employees.) Yet GT interviewed Mills without seeking permission either from G&K or the Tribe's bankruptcy counsel, prepared an affidavit for him to sign, and submitted it to the Court.

This is yet another flagrant violation of ER 4.2. Again, to quote from this District's decision in *Kaiser*: "If a former employee occupied a high ranking position such that his or her exposure to confidential or privileged information may be assumed . . . then no *ex*

parte contact should be permitted absent notice to the former employer." *Kaiser, supra*, at *6 (emphasis added). GT willingness to violate this Rule yet again, even while being called to task for its other violations of this same Rule, just confirms a pattern of misconduct that demands judicial action. This isn't going to end unless and until the Court puts an end to it.

IV. GT's Receipt and Use of The Privileged Memoranda Violated ER 4.4

GT argues that it was free to decide on its own that the two G&K memoranda to the Tribal Council – marked "Attorney-Client Communication" and "Privileged & Confidential" – had lost their privileged status, and that having made that decision, it was free to use them as it saw fit. The argument is meritless.

First, ER 4.4(b) is not complicated. If an attorney receives a document that a reasonable person would view as having been "inadvertently" sent, he or she must "promptly notify the sender and reserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." The Rule gives no exception for documents received that the attorney contends were not privileged. And by design, Arizona's ER 4.4(b) "goes further than the ABA Model Rule by requiring the receiving lawyer to preserve the status quo for a reasonable period of time, after notifying opposing counsel of the receipt of the document." 12/6/02 Proposed Rule Changes, pp. 19-20.

GT argues that the memoranda were not "inadvertently" sent, because Councilmember Yellowhawk intentionally disclosed them. But of course, the *Tribe* holds the privilege, not Ms. Yellowhawk, and GT had no basis – *none* – for assuming that Ms. Yellowhawk had been given authority to waive the Tribe's attorney-client privilege. In fact, had GT followed the requirements of Rule 4.4 and given G&K a reasonable time to take appropriate action, it would have learned that Ms. Yellowhawk was bound by a Nondisclosure Agreement in which she promised to maintain the Tribe's privilege and not disclose any confidential information. Ironically, it was the Tribe's concern about GT's conduct that prompted this proactive measure in the first place.

In our motion we cited the 2001-04 Opinion from our State Bar Ethics Committee, which addresses what a lawyer must do when he or she receives materials from a client which "*appear, on their face, to be subject to the attorney-client privilege or to be otherwise confidential.*" Citing a number of ERs and an earlier ABA opinion, the Committee explained that the lawyer must notify "the adverse party's lawyer that she possesses such materials," and then must either abide by the instructions of the adversary's lawyer "or refrain from using the materials until a definitive resolution of the property disposition of the materials is obtained from the court." Precisely so.

GT argues that the Court should disregard Opinion 2001-04 because the ABA opinion cited by the Committee was later withdrawn. But we are not relying on the ABA opinion; we are relying on the *Arizona* opinion, which has never been withdrawn or questioned. In fact, the Committee acknowledged that not all jurisdictions followed the ABA approach even in 2001. Moreover, Opinion 2001-04 was issued *before* Arizona adopted ER 4.4(b) in 2003. As we noted above, Rule 4.4(b) goes further than the ABA and requires that lawyers practicing in Arizona preserve the status quo, and refrain from using any materials which appear to be privileged, until the parties have reached an agreement or the Court has resolved the privilege issue. Lawyers don't get to take a legal memorandum marked "privileged and confidential," pretend that they are judges, and decide that the privilege has been waived.

Not only is GT's argument wrong on the law, but it rests on a fictional account of the facts. The story, as told in the Opposition, is that by the time GT received the memoranda, "stacks" of them had been left all over the reservation and they had been posted on the Internet. We have commented above on the fact that Mr. Quasula does not claim to have any personal knowledge that the memoranda were physically distributed anywhere, and there is no evidence in the record that they were. And the memoranda were *not* posted on the Internet when GT received them; they were posted on March 1, under circumstances that suggest GT was either involved or at least complicit in the posting. All GT would have known on the afternoon of February 29, when Mr. Quasula

claims he handed over the memoranda, is that (1) they were obviously privileged, and (2) they had been disclosed by Ms. Yellowhawk, a disgruntled Council member, as attachments to a letter that was emailed to a group of Tribal members.[6] That's it.

V. Disqualification Is The Only Appropriate Remedy Here

The facts here speak for themselves, and we cited the relevant case law in our motion. Suffice it to say that disqualification is absolutely justified and appropriate under these circumstances. And the Opposition just makes our point. GT does not argue that it made a mistake, nor does it show any sign of acknowledging the limits of what it can do under our ethical rules. Instead, it digs in its heels, misrepresents the record, and insists that what it did was completely proper. And now, even with this motion pending, GT has done it again, having *ex parte* communications with Mr. Mills. GT just doesn't get it. And the prejudice to the Tribe here is very real. Attached as Exhibit 5 is a declaration from Sherry J. Counts, the current Chairwoman of the Tribe. She explains how GT's conduct has interfered with the Tribal Council's ability to have the kind of open communication with its counsel that all clients are entitled to have. Of course, the ethical rules do not have a "no harm, no foul" exception, particularly in situations like this one, where the violations go to the very heart of the attorney-client privilege. But that said, GT has caused real harm through its conduct.

In arguing that disqualification is too harsh a sanction, GT makes two conflicting arguments. On the one hand, GT argues that disqualification is a drastic remedy, which should not be sought nor given except in extreme circumstances. On the other hand, GT argues that by recognizing this and holding off filing this motion until it became clear that other steps hadn't worked, G&K waited too long and should have sought disqualification sooner. Heads we win, tails you lose.

[6] It is unclear how many Tribal members actually received and read the email, let alone opened and read the attachments. We do know that some of the 83 addressees were duplicates, and that some of the recipients were Tribal Council members who had already read the memoranda and were entitled to do so.

The truth is that G&K acted very reasonably under the circumstances. When GT filed Mr. Jin's affidavit with *GCSD I*, raising the specter that GT had somehow improperly accessed confidential and privileged information, G&K wrote to GT instructing it not to use any privileged or confidential materials it might have received. In addition, all Council members were required to sign nondisclosure agreements reaffirming their obligations not to disclose privileged communications, including legal advice and strategy. Once these proactive measures had been taken and *GCSD I* was dismissed, there was a lengthy hiatus during which nothing further occurred to suggest that GT was engaged in improper activities. Then, in *GCSD II*, after GT filed the Benson affidavit and the privileged memoranda, G&K not only sent another stern letter to GT but immediately filed a motion to strike and sought a protective order prohibiting GT from further contact with Tribal Council members or SNW employees. The Court declined to address the issue at that time in light of its decision to stay the case. What followed was another hiatus, followed only recently by GT's re-filing of the privileged memoranda in this latest case. The Tribe and G&K acted appropriately in taking incremental steps to try and address this problem, and the cases GT cites don't suggest otherwise.

GT cites *Sharma v. VW Credit, Inc.,* 2013 WL 1163801 (C.D. Cal.), for the proposition that the Tribe somehow waived its right to seek relief. To call *Sharma* inapposite would be an understatement. That case involved a party who knew the opposing counsel had a conflict of interest warranting disqualification from the time the lawsuit was filed, but did nothing. Under California law, a former client who is entitled to object to an attorney representing an opposing party on conflict of interest grounds, "but who knowingly refrains from asserting [the right] promptly is deemed to have waived that right." *Id.* *2 (citation and internal quotation marks omitted). That is not this case.

Conclusion – And Why This Motion Demands Consideration Now

Last year, when GT filed the Benson affidavit and the G&K memoranda, we asked the Court to address the issue through a motion to strike, noting at the same time the Tribe was not waiving its right to seek other remedies as well, including disqualification. The

Court did not rule on the motion because it stayed the case, pending exhaustion of remedies in the Tribal Court. Although we have another motion to dismiss pending in this action, we respectfully plead with the Court to address this motion first. In our view, GT's conduct in this matter cannot be brushed aside as moot. It has infected the litigation between the parties, the disputes are ongoing, and as recently as a couple of weeks ago, GT was engaged in yet more improper *ex parte* communications. And the fact is that we don't yet have the full picture as to what has been going on behind the scenes, and GT is remaining mute, presumably with good reason. This is not something to be put off for another day.

For all the reasons explained in our Motion and in our Reply, we ask that the Court disqualify GT from representing GCSD in any litigation in the District of Arizona.

RESPECTFULLY submitted this 8th day of August 2013.

GALLAGHER & KENNEDY, P.A.

By: /s/ Paul K. Charlton

Paul K. Charlton
Mark C. Dangerfield
Mark A. Fuller
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Defendants Hualapai Tribe and Tribal Council members

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2013, a copy of the foregoing document was filed electronically via the Court's CM/ECF system. Notice of filing will be served on all parties by operation of the Court's CM/ECF system, and parties may access this filing through the Courts' CM/ECF system.

/s/ Deborah Yanazzo

EXHIBIT 1

HUALAPAI TRIBAL COURT
2012 FEB -8 PM 3:56
FILED

Glen Hallman (SBN 05888)
Paul Charlton (SBN 012449)
Christopher W. Thompson (SBN 026384)
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
Facsimile: (602) 530-8500
Email: gh@gknet.com
paul.charlton@gknet.com
chris.thompson@gknet.com
Attorneys for Plaintiff

GALLAGHER & KENNEDY, P.A.
2575 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-8000

IN THE HUALAPAI TRIBAL COURT

PEACH SPRINGS, ARIZONA

THE HUALAPAI INDIAN TRIBE OF THE HUALAPAI INDIAN RESERVATION, Arizona, Plaintiff, v. GRAND CANYON SKYWALK DEVELOPMENT, LLC, a Nevada limited liability company, Defendant.	Case No. 2012-CV-017 **DECLARATION OF TAKING** (Eminent domain)

Plaintiff, the Hualapai Indian Tribe (the "Tribe"), by and through its attorneys, pursuant to Section 2.16(F)(2-4) of the Hualapai Tribe Law and Order Code, hereby declares that it has taken possession of all interests of Grand Canyon Skywalk Development, LLC ("GCSD") in that certain Development and Management Agreement by and between GCSD and 'Sa' Nyu Wa, a tribally chartered corporation, dated

December 31, 2003, and that certain first amendment to Development and Management Agreement by and between GCSD and 'Sa' Nyu Wa, a tribally chartered corporation, dated September 10, 2007 (hereinafter individually and collectively referred to as the "Skywalk Agreement").

Accordingly, the Tribe is entitled to an order from the Court that absolute title in such contractual interests vests in the Tribe and that the Tribe shall be the party to the Skywalk Agreement in full place and stead of GCSD, with the right to just compensation vesting in GCSD.

The public use for which the property is taken is the construction and management of the Skywalk located at Eagle Point within the Hualapai Tribal Reservation, which construction and operation concerns the entirety of the Hualapai Indian Tribe and its people and promotes the general interest of the Hualapai Indian Tribe and its peoples.

The amount of money estimated by the Tribe to be just compensation for the property taken is $11,040,000.

Now, therefore, the Tribe requests the Court enter an order vesting absolute title in GCSD's contractual interests in the Skywalk Agreement and that the Tribe shall be the party thereto in full place and stead of GCSD, with the right to just compensation vesting in GCSD.

Respectfully submitted this 8 day of February, 2012.

GALLAGHER & KENNEDY, P.A.

By: _____

Glen Hallman
Paul Charlton
Christopher W. Thompson
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Plaintiff

Tribal Certification

I, Chairwoman, Louise Benson hereby certify this Declaration of Taking, and declare that the property described in the Complaint is taken for the Tribe.

Louise Benson

Louise Benson

ORIGINAL of the foregoing filed
this 8th day of February, 2012 with:

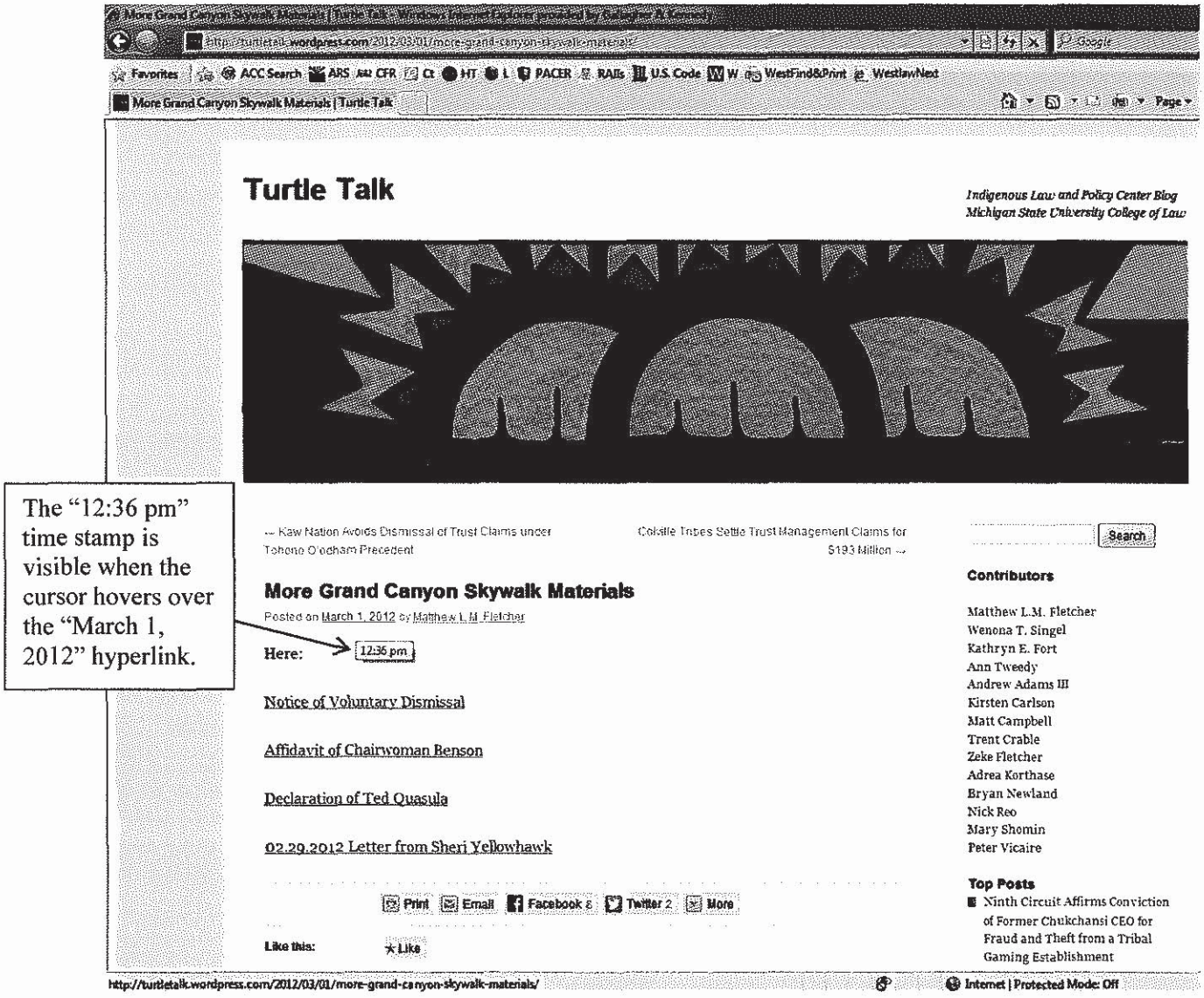
The Hualapai Tribal Court
960 Rodeo Way
P.O. Box 275
Peach Springs, AZ 86434

COPY sent via U.S. Mail
this same day to:

Pamela M. Overton
GREENBERG TRAURIG, LLP
2375 East Camelback Road, Suite 700
Phoenix, AZ 85016
E-mail: OvertonP@gtlaw.com
AND
Mark Tratos
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, NV 89169
E-mail: TratosM@gtlaw.com
AND
Troy A. Eid
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
E-mail: EidT@gtlaw.com
Attorneys for Grand Canyon Skywalk Development, LLC

Deborah Yanazzo

EXHIBIT 2



The "12:36 pm" time stamp is visible when the cursor hovers over the "March 1, 2012" hyperlink.

EXHIBIT 3

SUPPLEMENTAL EXPERT AFFIDAVIT OF J. SCOTT RHODES

State of Arizona)
) ss.
County of Maricopa)

I, J. Scott Rhodes, give the following sworn supplemental expert opinion under penalty of perjury.

This declaration is intended to supplement, but not to modify or amend, my Expert Affidavit dated June 28, 2013, which is incorporated herein by reference.

ADDITIONAL DOCUMENTS

In formulating my supplemental opinions in this matter, I relied on my background and experience in the field of professional responsibility, and I reviewed the following documents in addition to the documents previously disclosed:[1]

1. Motion for Leave to File 22-Page Opposition to Motion to Disqualify Greenberg Traurig As Counsel For Grand Canyon Skywalk Development, LLC (Filed 7/29/13)

2. Lodged Proposed Opposition Of Greenberg Traurig, LLP to Defendants' Motion To Disqualify Greenberg Traurig As Counsel For GCSD And For Related Orders (Filed 7/29/13)

3. Declaration of Mark I. Harrison In Support Of Opposition To Defendants' Motion To Disqualify Greenberg Traurig As Counsel For GCSD And Related Orders (Filed 7/29/13)

4. Declaration Of Theodore Quasula In Support of Opposition To Defendants' Motion To Disqualify Greenberg Traurig As Counsel For GCSD And Related Orders (Filed 7/29/13)

5. Declaration Of Pamela Overton In Support of Opposition To Defendants' Motion To Disqualify Greenberg Traurig As Counsel For GCSD And Related Orders (w/o exhibits) (Filed 7/29/13)

6. Greenberg Traurig, LLP's Request For Judicial Notice In Support Of Its Opposition To Defendants' Motion To Disqualify Greenberg Traurig As Counsel For GCSD And For Related Orders (Filed 7/29/13)

7. GCSD's Joinder To Greenberg Traurig's Opposition To Motion To Disqualify Greenberg Traurig (Filed 7/29/13)

8. Defendants' Memorandum Re Reasons For Opposing Plaintiff's Request For Extension of Time And Request For Order To Accompany Extension (Filed 7/8/13)

[1] I reviewed these items only with respect to the issues for which I was asked to render an opinion.

9. Objection to Defendants' Memorandum Re Reasons For Opposing Plaintiff's Request For Extension of Time And Request For Order To Accompany Extension (Filed 7/12/13)

10. Reply of Grand Canyon Skywalk Development, LLC In Support of Motion For Order Directing The Appointment Of A Chapter 11 Trustee, *In re 'SA 'NYU' WA, Inc.* (U.S. Bkr. Ct., Dist. Ariz. No. 2:13-bk-02972-BMW) (Filed 7/26/13)

11. Declaration of Walter R. Mills In Support of Motion Of Grand Canyon Skywalk Development, LLC For Order Directing The Appointment Of A Chapter 11 Trustee, *In re 'SA 'NYU' WA, Inc.* (U.S. Bkr. Ct., Dist. Ariz. No. 2:13-bk-02972-BMW) (Filed 7/26/13)

12. Complaint for Declaratory and Injunctive Relief, *Grand Canyon Skywalk Development LLC v. 'SA' NYU WA, et al.* (Filed 2/16/12)

13. Complaint in Condemnation, *The Hualapai Indian Tribe of the Hualapai Indian Reservation v. Grand Canyon Skywalk Development, LLC,* In the Hualapai Tribal Court, Case No. 2012-CV-017 (Filed 2/8/12)

14. Declaration of Taking, *The Hualapai Indian Tribe of the Hualapai Indian Reservation v. Grand Canyon Skywalk Development, LLC,* In the Hualapai Tribal Court, Case No. 2012-CV-017 (Filed 2/8/12)

15. Declaration of Chairperson Sherry J. Counts, dated 8/6/13

16. http://turtletalk.wordpress.com/2012/03/01/more-grand-canyon-skywalk-materials/

OPINIONS

29. The Restatement (Third) of the Law Governing Lawyers § 79 (2000) explains that, in the event of an inadvertent disclosure, a waiver of the attorney-client privilege does not occur if the client or disclosing person "took precautions reasonable in the circumstances to guard against such disclosure." *Id.* at cmt. h. To determine what is reasonable, the following factors are considered: "the relative importance of the communication (the more sensitive the communication, the greater the necessary protective measures); the efficacy of precautions taken and of additional precautions that might have been taken; whether there were externally imposed pressures of time or in the volume of required disclosure; whether disclosure was by act of the client or lawyer or by a third person; and the degree of disclosure to nonprivileged persons." *Id.* The Restatement requires that once the client is aware or should know that the privileged information has been disclosed, prompt action must be taken, including "reasonable steps to recover the communication, to reestablish its confidential nature, and to reassert the privilege," and the failure to do so indicates an "apparent acceptance." *Id.*

30. In this case, the G&K Memos were clearly labeled on each page:

Attorney-Client Communication
Attorney Work Product
Privileged & Confidential

31. The G&K Memos contained legal strategy, analysis, and advice and were not a mere recitation of information that could have been obtained or discovered from sources other than those made privy to the Memos under circumstances intended to be maintained as privileged and confidential.

32. The G&K Memos were distributed to and discussed with the Council in a closed, executive session.

33. In my opinion, the clear and unambiguous labeling of the G&K Memos (on each page thereof), coupled with the fact that the G&K Memos were discussed in executive session, constituted sufficient "precautions reasonable in the circumstances" to protect the privileged nature of the communications. When G&K prepared the G&K Memos, the firm neither knew nor should have known that privileged communications ultimately would be divulged by certain Council members. G&K had no prior knowledge that certain individual Council member(s) intended to violate their duty to maintain the confidential nature of the discussions and communications occurring in executive session, including divulgence of attorney-client privileged communications. The precautionary measures of labeling the G&K Memos and discussing them in executive session thus were reasonable based on the fact that, at the time, the firm had no knowledge of any breaches of confidentiality or divulgence of privileged information. As of the executive session on January 27, 2011, therefore, G&K conformed with the requirements of the Restatement (quoted above), while at the same time being able to communicate with the Tribe through the Council. More restrictive measures could have impinged on G&K's ability to counsel its client. Nothing in the Restatement indicates that the concept of "precautions reasonable in the circumstances" is intended to swallow the ability of a law firm to perform its duties to its client.

34. There is no evidence that the Council intended to waive the privilege through voluntary disclosure to third parties.

35. G&K's first information obtained indicating release of confidential information did not occur until approximately two months later, when GT attached the first Jin declaration (dated March 24, 2011) to the *GCSD I* Complaint filed March 30, 2011. The Jin declaration alluded to information that could only have been obtained from Council members present in the executive session meeting.

36. The Opposition of Greenberg Traurig, LLP To Defendants' Motion To Disqualify Greenberg Traurig As Counsel For GCSD And For Related Orders ("Opposition") claims that "Defendants assert that David Jin's Declaration ... indicates that Mr. Jin obtained privileged information through improper *ex parte* contacts with Tribal officials." (Opposition, at 2:8-13.) However, my opinion dated June 26, 2013 never asserts that Mr. Jin acted inappropriately. To the contrary, as stated in my opinion, it was *GT that acted unethically* by accepting and then using the information that Mr. Jin possessed:

> At some point, David Jin must have informed Greenberg Traurig that he possessed information related to communications between the Tribal Council and Gallagher & Kennedy related to

> the Tribe's strategy discussions in connection with the Skywalk litigation (including, but perhaps not limited to, the condemnation option). Once Mr. Jin so informed GT, GT knew or should have known that the information was privileged, and that possession of it created ethical duties for GT.
>
> Specifically, GT had an immediate obligation to prohibit David Jin from imparting any privileged information to GT lawyers. *See* Ariz. Ethics Op. 01-04.
>
> As evidenced, in part, by the two Jin declarations of March 24 and April 11, 2011, GT breached that ethical duty. Instead of prohibiting their client from giving the firm privileged information of the opposing party, GT accepted receipt of such information and then published all or part of the privileged information in its possession through a new lawsuit, of which the subject matter was the privileged information.

[Rhodes 6/26/13 Opinion, at 5, ¶¶ 2-5.]

37. After becoming aware of the first Jin declaration, the Tribe took immediate action, as required by the Restatement, to forestall disclosure of privileged and confidential information. Specifically, on April 4, 2011, each Tribal Council member executed a Nondisclosure Agreement in which each member "acknowledges receipt of the [privileged and confidential] Information" and promises to "receive the Information in confidence and treat the Information as embodying confidential and proprietary information of the Tribe." *Every Council member executed the Nondisclosure Agreement, thus creating a reasonable expectation under the circumstances that the attorney-client privilege and legal confidentiality requirements would be respected and maintained in the future.*

38. On April 12, 2011, GT attached a second declaration of David Jin (also dated April 12, 2011) to GT's Motion for Temporary Restraining Order. Attached to the second Jin declaration was a document stamped "Privileged and Confidential" from Scutari Cieslak, a public relations firm hired by the Tribe. In addition, the second Jin declaration referred to information contained in the G&K Memos (without making a direct reference to the Memos).

39. G&K then acted again to protect the attorney-client privilege. On May 11, 2011, Glen Hallman of G&K wrote a letter to GT advising them of their use of "attorney-client, or otherwise, privileged information and documents" and demanding that GT "cease and desist from any further use" of the same.

40. On the same day, Mark G. Tratos of GT emailed Mr. Hallman: "We are in receipt of your letter today May 11, 2011 and we find it offensive and unprofessional, therefore, we will not honor it with a response."

41. In its Opposition, GT claims the May 11, 2011 G&K letter was insufficient to protect the attorney-client privilege, because "[t]he letter did not specify what information it claimed was privileged." [Opposition, at 5:8-10.] However, the ethical issue is not whether G&K gave a complete listing of all privileged information that had been divulged. GT's ethical obligation had been, first, not to accept privileged information from its client and, second, if it obtained such information, to follow the procedures stated in ER 4.4 to

"promptly notify" G&K, and then "preserve the status quo for a reasonable period of time to permit the sender to take protective measures." ER 4.4(b).

42. In any event, the May 11, 2011 G&K letter did describe the privileged information at issue, as follows:

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

43. The May 11, 2011 G&K letter also expressly "reserve[d] the right to seek disqualification" in the event of further misconduct.

44. In my opinion, the May 11, 2011 G&K letter demonstrates that the Tribe and Council had no intent to waive the attorney-client privilege with respect to any communications. The letter was thus a "precaution[] reasonable under the circumstances," as required by the Restatement.

45. In my further opinion, GT's response that the G&K May 11, 2011 letter was "offensive and unprofessional, therefore, we will not honor it with a response" was ethically deficient. When viewed in the context of GT's subsequent conduct, it reveals a callous approach to GT's ethical responsibilities, the extent of which later grew to encompass other attorney-client privileged communications that GT published through its pleadings.

46. However, notwithstanding GT's response, for a period of approximately nine months, GT appeared to cease and desist from its revelations of the opposing party's privileged information.

47. Louise Benson became the Chairperson of the Hualapai Tribal Council in June 2011. When she took over as Chairperson, G&K had no reason to suspect that Ms. Benson intended to, or eventually would, violate her duties to the Tribe and Council by divulging attorney-client privileged communications to the opposing party.

48. G&K's measures to protect the attorney-client privilege appeared to have been successful until March 1, 2012 (approximately nine months later), when at 5:26 PM, GT emailed a letter to G&K. In that letter, GT stated that it was enclosing "as a professional courtesy" a copy of a document "received last evening by our client, Ted Quasula," which included "memorandums from your firm" and that GT "believed" there was a "waiver of any claim of attorney client privilege."

49. Only seventeen minutes later, at 5:43 PM on March 1, 2012, GT filed its Supplemental Brief in Support of Bad Faith Exception, in *GCSD II* ("Supplemental Brief"). A declaration by Theodore Quasula, dated February 29, 2012, was attached to the Supplemental Brief.

50. Both G&K Memos were attached to the Quasula declaration. The Quasula declaration did not claim that the G&K Memos had been widely distributed throughout the Reservation.

51. The assault on the Tribe's privilege in the Supplemental Brief did not end with the attachment of the G&K Memos. GT also attached to the Supplemental Brief an affidavit by Chairperson Louise Benson dated February 29, 2012. In her affidavit, Chairperson Benson made direct reference to a privileged communication with G&K attorneys: "I specifically asked the attorneys, Gallagher & Kennedy, where the funds would come from ...."

52. When she signed her affidavit, Ms. Benson was still Chairperson of the Hualapai Tribal Council. On February 8, 2012, the Tribe had filed a Tribal Court Condemnation complaint (the "Condemnation Action") against GCSD. On the same day, Ms. Benson had signed a "Declaration of Taking" related to the Condemnation Action.

53. On February 29, 2012, Ms. Benson was dismissed as a named Defendant in *GCSD II*.

54. GT admits in the Opposition that it dismissed Ms. Benson as a defendant in an intentional attempt to evade the ethical restriction pursuant to ER 4.2 that prohibited talking to her because G&K was her lawyer. (Opposition, at 8: "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.") However, GCSD remained adverse to Ms. Benson and the Tribe in the Condemnation Action.

55. Even if there had not been ongoing adversity (which there was) between GCSD and Ms. Benson and the Tribe in the Condemnation Action which alone prohibited *ex parte* communication with Ms. Benson, her dismissal from *GCSD II* did not, as a matter of law in Arizona, absolve GT of its obligation not to communicate with Ms. Benson. Comment 3 to ER 4.2 states that the Rule "covers any person, **whether or not a party to a formal proceeding**, who is represented by counsel concerning the matter in question." ER 4.2, cmt. [3] (emphasis added). In her capacity as Tribal Chairperson, G&K still represented Ms. Benson in "the matter in question" (*GCSD II* and the Condemnation Action) even though she was no longer "a party to a formal proceeding."

56. Nor could Ms. Benson merely decide to participate in an *ex parte* communication and thus absolve GT of its ethical duties. (Indeed, GT recognized this when at first it sent Ms. Benson away and told her to come back later after GT had dismissed her as a party.) Under ER 4.2 "a client cannot waive the no-contact rule short of firing her lawyer, or at the very least stating that she has fired her lawyer." Jessica J. Berch, Michael A. Berch, *May I Have A Word with You: Oops, Have I Already Violated the No-Contact Rule?*, 6 Phoenix L. Rev. 433, 449-50 (2013)(citing *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993)).

57. There is no question that Councilwoman Benson was represented by G&K concerning the Skywalk matter, even if she was no longer a party to *GCSD II*. There is no evidence in the record to suggest that Ms. Benson terminated her representation prior to consulting with GT. To the contrary, according to Mr. Quasula, Ms. Benson referred to G&K as "her lawyer." (Quasula Declaration in Support of Opposition, ¶ 48.)

58. Although Ms Benson became a former defendant in *GCSD II*, she remained Tribal Chairperson. Under ER 4.2 in Arizona, "in the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." ER 4.2, cmt [2].

59. The Opposition claims there is some significance to the fact that the Council members were named defendants in *GCSD II* and not the Council itself or the Tribe. (Opposition, at 6:8-9.) This is an artificial distinction that does not absolve GT of its ethical violations for communicating with and obtaining an affidavit from Chairperson Benson, because:

a. The Condemnation Action was still pending;

b. The caption of the *GCSD II* Complaint lists each Council member as "individuals and members of the Hualapai Tribal Council";

c. In the *GCSD II* Complaint, the members are referred to collectively as "the Council Defendants";

d. The *GCSD II* Complaint (at ¶ 120) alleges the condemnation was unlawful for several reasons, all of which pertain to the Council members' acts in their official capacities;

e. GT admits in the Opposition that it could not talk to Chairperson Benson while she was a party to the lawsuit; therefore, GT believed that G&K represented Ms. Benson in her official capacity as Chairperson;

f. On approximately February 8, 2011, Chairperson Benson had signed the Declaration of Taking, which was filed in Tribal Court; therefore, while acting in her official capacity, Ms. Benson had signed the act that was at issue in *GCSD II*.

60. When on March 1, 2012, GT filed the Supplemental Brief and thereby took the most direct and blatant actions that it had taken to date to violate the opposing party's attorney-client privilege by publishing privileged communications, GT was already on notice that G&K considered its communications privileged, that it believed GT had already acted improperly on more than one occasion, and that G&K insisted that GT cease and desist such conduct. The arguments in the Opposition blame G&K, in essence, for not doing enough to stop GT's own misbehavior.

61. GT's act of sending an end-of-day letter to G&K, just minutes before filing the Supplemental Brief, is an admission that GT knew what ER 4.4(b) required it to do. GT's actions demonstrate an obvious and intentional decision to honor its ethical obligations only to the extent of a farcical last-minute notice that left G&K no meaningful opportunity "to take protective measures" against publication of its attorney-client privileged documents and information in a filed pleading.

62. The Arizona Supreme Court has recently reaffirmed the process that Arizona lawyers *must follow* when they come into possession of inadvertently disclosed documents and information:

> when a party has inadvertently disclosed privileged information, Rule 26.1(f)(2) [Ariz. R. Civ. P.] outlines the proper procedure for claiming privilege and resolving any dispute. The party who claims that inadvertently disclosed information is privileged should 'notify any party that received the information of the claim and the basis for it.' Ariz. R. Civ. P. 26.1(f)(2). Once the receiving party has been notified of the privilege claim, that party 'must promptly return, sequester, or destroy the specified information ... and may not use or disclose the information until the claim is resolved.' *Id.; accord* Fed.R.Civ.P. 26(b)(5)(B). [The Arizona] rule, like its federal counterpart, 'is intended merely to place a 'hold' on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition.' Ariz. R. Civ. P. 26.1(f)(2) State Bar committee's note to 2008 amend. Ethical Rule 4.4(b) also addresses inadvertent disclosures, providing that 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.' **Together, these provisions emphasize that a receiving party has a duty to suspend use and disclosure of the allegedly privileged documents until the privilege claim has been resolved either through agreement or court ruling.**

Lund v. Myers, CV-12-0349-PR, 2013 WL 3583944 (Ariz. July 16, 2013), at *2-3, ¶¶ 11-12.

63. Rather than following any of the procedures described (but not held for the first time) in *Lund*, GT instead gave only token and belated notice to G&K and, rather than sequestering the documents, GT published those documents to the world.

64. In its Opposition, however, GT claims that G&K waived the privilege for not doing enough to protect it. In my opinion, G&K took "precautions reasonable in the circumstances" to protect the privilege after each new violation by GT.

65. Even after the Supplemental Brief was filed on March 1, 2012, G&K acted immediately to protect the privilege. First, on March 2, 2012, G&K moved to strike the Benson and Quasula affidavits and sought a protective order prohibiting GT from further contact with Tribal Council members or SNW employees. G&K also expressly reserved the right to seek other sanctions or remedies as appropriate.

66. Mr. Harrison is mistaken when he states in his Declaration that "[o]n March 1, 2012, G&K filed a Motion to Strike, *to which it attached and filed the G&K memoranda*." (Harrison Declaration, at 9, ¶ 7.jj; *see also id.* at 13, ¶ 6)(emphasis added). That did not occur. G&K did not attach or file the G&K Memos.

67. Second, G&K sent a second letter to GT, dated March 2, 2012, again advising the firm of its unauthorized use of privileged information.

68. On March 2, 2012, GT responded to G&K's letter, claiming that *G&K, not GT*, had engaged in unethical conduct.

69. In an Order dated March 19, 2012, the District Court did not rule on the merits of the G&K Motion to Strike, finding instead that the G&K Memos did not affect the Court's decision to stay the proceeding, and requiring that GCSD first pursue relief in Tribal Court.

70. In my opinion, the Court's decision not to reach the issue of G&K's conduct does not relieve GT of responsibility for its participation in the repeated violation of the Tribe's attorney-client privilege; nor does the decision mean that G&K did not take timely and reasonable measures under the circumstances to forestall GT's conduct and protect the privilege.

71. After the District Court's March 19, 2012 decision, for a period of 13 months, G&K once again had reason to believe that its actions to end GT's misconduct and protect the privilege had been successful. But then, on April 24, 2013, GT struck again -- the firm attached the G&K Memos to *yet another* pleading, this time in connection with a third Federal Court complaint, wherein GT asked the Court to compel arbitration and declare the Tribe's eminent domain ordinance unconstitutional.

72. In the Opposition, GT alleges that G&K failed somehow to "unring the bell" after, allegedly, the G&K Memos were widely distributed on the Reservation and were posted on an Internet website. (*See* Opposition, at 1.) This is an unreasonable assertion. First, it fails to recognize the multiple efforts that G&K undertook to protect the privilege, as described above. Second, the Quasula Declaration in Support of Opposition states only that "[a]s far as [he is] aware" the G&K Memos "were copied and distributed in the manner of other tribal communications by leaving stacks of the documents at the post office." (Quasula Declaration, at 13, ¶ 47.) Mr. Quasula does not testify in his declaration that he has first-hand knowledge that any such distribution actually occurred. Third, if such a distribution in fact occurred, GT offers no legal basis that G&K could have used to require Tribal members to return the Memos.

73. GT also claims that the Tribe waived the privilege by not taking action to "take down" the G&K Memos from a website. GT fails to address in its Opposition, however, the fact that GT received the G&K Memos on February 29, 2012, and filed them attached to the Supplemental Brief on March 1, 2012, the same day they were first posted on the Internet. (*See* Overton Declaration, ¶ 33.) Review of the relevant website page reveals: (a) the posting occurred at 12:36 P.M. on March 1, 2012, which I presume to be Central Standard Time because it is a Michigan State University College of Law blog; (b) the posted copies of the Benson affidavit and Quasula declaration do not have the Electronic Court Filing (ECF) header, which (together with the time of the posting) indicates that the website obtained the documents before the Supplemental Brief was filed (at 5:43 P.M. MST, or 7:43 P.M. CST) and not from the Court's public record. The facts that the Benson and Quasula statements are both in GT pleading format, and the signed versions of the statements were posted on the Internet on March 1 *before* GT filed them with the Court later that day, provide a fair inference that GT was involved with providing them to the website. Like the letter sent just 17 minutes before filing the Supplemental Brief, the timing and circumstances of the Internet posting appears to have been orchestrated so that GT could later attempt to justify its conduct.

74. GT cites to no legal authority that the Tribe could have used to require the website to "take down" the Memos. Nor does GT suggest how, once the Memos were published on the Internet, merely asking the website to "take down" the Memos would have

been effective. Anyone having seen the documents could have forwarded them to others, or merely downloaded them and/or copied them.

75. As described above, G&K took immediate "reasonable precautions" in response to the Supplemental Brief. Nothing in the Restatement is intended to require an attorney to take actions that he or she knows will be futile in an attempt to meet the requirement to take "precautions reasonable in the circumstances," especially when the lawyer is instead taking other "precautions" that constitute clear and unambiguous (and in this case, repeated) notice of intent to preserve the privileged nature of inadvertently disclosed privileged communications.

76. In the Opposition, GT claims that Council member Yellowhawk intentionally disclosed the G&K Memos, therefore their disclosure was not inadvertent. That reasoning is false. I have reviewed no evidence that indicates the Tribe authorized Ms. Yellowhawk, nor any other Council member (including but not limited to the Chairperson), to release or divulge any privileged or confidential information.

77. To the contrary, the Nondisclosure Agreements expressly state the Tribe's intent *to protect confidentiality and prohibit such disclosures*:

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

(Emphasis added.)

78. As stated in *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 414 (S.D.N.Y. 2004); *see also In re Grand Jury Proceedings,* 219 F.3d 175, 185 (2d Cir. 2000): "[A]n officer or director may be without authority to waive the privilege when acting in his or her individual capacity, especially in the face of a board or management decision to the contrary."

79. Multiple cases from a variety of jurisdictions align with this holding. *See Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454 (Colo. Ct. App. 2003) (holding that a director alone, without the consent of management, cannot waive or assert the attorney-client privilege belonging to corporation for own personal benefit); *Milroy v. Hanson*, 875 F.Supp. 646 (D. Neb. 1995) (finding that director/minority shareholder could not waive the attorney-client privilege of the corporation because he sought documents solely to further his personal goals in litigation); *Symmons v. O'Keefe*, 419 Mass. 288, 644 N.E.2d 631 (Mass. 1995) (holding that plaintiffs' position as directors did not entitle them to waive attorney-client privilege where they were not asserting a derivative action but an action for their benefit only); *State ex rel. Lause v. Adolf*, 710 S.W.2d 362 (Mo. Ct. App. 1986) (recognizing that directors could not waive a corporation's privilege because the corporation was not a party to the action); *Allen v. Burns Fry, Ltd.*, No. 83 C 2915, 1987 WL

12199 at *3 (N.D.Ill. June 8, 1987) (production of privileged document by former corporate officer does not waive company's privilege); *Interfaith Housing Delaware, Inc. v. Town of Georgetown,* 841 F.Supp. 1393, 1398–400 (D. Del. 1994) (each member of town council "share[s] in its attorney-client privilege," but public statement by one council member does not waive privilege).

80. The principles established in these decisions allow lawyers and clients to engage in a free exchange of information and advice, notwithstanding the fact that the lawyer's client is represented by a Board or Council of which a minority of the members might disagree with the majority. In *Galli v. Pittsburg Unified Sch. Dist.*, C 09-3775 JSW JL, 2010 WL 4315768 (N.D. Cal. Oct. 26, 2010), the court explained that "when legal counsel advises the [School] District on legal matters, including this litigation, counsel do so and can only do so by providing advice to the Board or the Board's designated representative." *Id.*

81. In *Galli*, the Plaintiff's argument was similar to GT's argument here -- that the attorney-client privilege or work-product doctrines did not extend to the Board because the Board was not a named party in the underlying litigation. *Id.* The Court rejected that argument, stating that the District was a defendant, and in this case, "the Board is the District as a practical and legal matter." *Id.* The Court specifically held that the Board, as the client, held the attorney-client privilege, and as a result, the power to waive such a privilege rested solely with the Board. *Id.*

82. In *Commodity Futures Trading Commission v. Weintraub,* 471 U.S. 343, 348–349 (1985), the Court stated that "the actions of an individual Board member alone cannot waive the privilege," and that "[Board members] must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interest of the [District] and not of themselves as individuals." *Id.* at 349.

83. On April 24, 2013, after becoming aware of the most recent violation by GT of the attorney-client privilege, and after having made reasonable and prompt attempts to protect the privilege through (a) the procurement of signed Nondisclosure Agreements by all Council members, (b) demands to GT to cease and desist invasion of its attorney-client relationships and publication of privileged communications and information, and (c) filing a Motion to Strike, G&K concluded that GT had no intention to and would never conform its conduct with the straight-forward and well-established ethical principles that direct lawyers' conduct when they can or do come into possession of the opposing party's privileged documents and information. Only when G&K concluded that no precautions would suffice to stop GT's actions, did G&K file its motion asking the Court to stop GT through disqualification.

84. G&K's conclusion that GT is so callous to its ethical obligations that it must be removed as counsel for GCSD is supported by GT's conduct in *In re 'SA 'NYU' WA, Inc.* (U.S. Bkr. Ct., Dist. Ariz. No. 2:13-bk-02972-BMW). In that case, less than two weeks ago, GT filed the declaration of Walter R. Mills as an attachment to GT's Reply of Grand Canyon Skywalk Development, LLC In Support of Motion For Order Directing The Appointment Of A Chapter 11 Trustee (filed 7/26/13). Mr. Mills is a former Board member of the debtor 'SA 'NYU' WA, Inc. Just as GT could not engage in an ex parte communication with Ms. Benson, so it was prohibited from doing so with Mr. Mills.

85. G&K's reasonable precautions to protect the privilege also demonstrate that G&K is well aware that disqualification is an extreme measure. G&K's approach to GT's conduct has balanced the Restatement's requirement of taking appropriate measures to

protect the privilege, with clear and unambiguous messages to its respected colleagues at GT that their unethical conduct must cease. G&K's Motion to Disqualify is not a tactic but a necessary and appropriate remedy for the spreading virus of GT's misconduct.

86. GT has caused severe and lasting prejudice to the Tribe as a direct result of its conduct. Current Tribal Chairperson Sherry J. Counts stated in her August 6, 2013 declaration, that GT's actions have caused her:

a. "to carefully consider how best (and to what extent) to communicate with the Tribe's legal counsel in the Skywalk litigation and how to interact with other Councilmembers and Tribal officials";

b. "to sometimes implement rather awkward procedures for arranging for communication with legal counsel ... in order to guard against the conduct of Greenberg Traurig."

87. Chairperson Counts further states that GT's conduct "has caused Councilmembers to regard other Councilmembers and tribal official with suspicion as to who has been or is in communication with Greenberg Traurig."

88. Chairperson Counts further states that GT's conduct "has hurt the ability of the Council to discuss the defense of the Tribe in the Skywalk litigation."

89. Finally, Chairperson Counts states that GT's conduct "has taken away from the Tribe's investment in the valuable legal advice paid for by the Tribe in connection with the Skywalk litigation. By using advice and documents paid for by the Tribe, Greenberg Traurig's conduct has taken a valuable asset of the Tribe and caused and continues to cause economic harm to the Tribe and also represents an infringement of the Tribe's sovereignty."

90. The fact that disqualification is an extreme measure does not mean it is never justified. Courts may impose litigation sanctions for violations of ER 4.2, including disqualification of the offending attorney. Jessica J. Berch, Michael A. Berch, *May I Have A Word with You: Oops, Have I Already Violated the No-Contact Rule?*, 6 Phoenix L. Rev. 433, 446 (2013). GT has engaged in intentional and repeated ethical violations by persistently invading the Tribe's attorney-client relationships (Ms. Benson and Mr. Mills) and attorney-client privilege (the G&K Memos). GT's conduct has continued, even after G&K's demands to cease and desist. After being warned by G&K, GT's violations became more flagrant, and its misconduct has resulted in prejudice to the Tribe that is so severe that it has eroded the core of the attorney-client relationship – a client's belief that it can communicate freely with its counsel. The current Tribal Chairperson now fears that GT might steal and publish to the world any communication with the Tribe's attorneys. Trust among Councilmembers has been affected, and the Tribe's investment in its legal advice has been compromised.

91. In light of the ongoing and pervasive nature of GT's misconduct, and the prejudice that goes to the fundamental purpose of the attorney-client privilege (that of promoting free and open communication between lawyer and client), disqualification in this case, in my opinion, would be more than a mere sanction against GT, although that is warranted. Disqualification alone can restore order and integrity to a legal proceeding that has been corrupted by GT's conduct.

RESERVATION OF RIGHTS

My supplemental opinions expressed herein are based on my knowledge and experience under Arizona law pertaining to lawyer professional responsibility and the law of lawyering. These supplemental opinions are qualified by the information contained in the documents I have reviewed. I reserve the right to amend or supplement this opinion and to offer additional opinions if additional facts are brought to my attention (provided that I believe such additional facts warrant modification of the opinion), if opposing counsel asks questions that require modification or supplementation of the opinions stated herein, or if I am asked to provide a rebuttal opinion or testimony.

This statement is made under penalty of perjury.

DATED this 8th day of August, 2013.

J. Scott Rhodes

SUBSCRIBED AND SWORN TO before me this 8th day of August, 2013, by J. Scott Rhodes.

Notary Public

My Commission Expires:

October 7, 2015

OFFICIAL SEAL
MARY TERESE LISKA
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires Oct. 7, 2015

EXHIBIT 4

From: Charlton, Paul K.
Sent: Friday, June 14, 2013 3:43 PM
To: Harrison, Mark
Cc: Dangerfield, Mark C.
Subject: RE: Hualapai

Understood, Mark. Thanks, Paul

From: Harrison, Mark [mailto:mharrison@omlaw.com]
Sent: Friday, June 14, 2013 3:43 PM
To: Charlton, Paul K.
Cc: Dangerfield, Mark C.
Subject: RE: Hualapai

Paul:

I am unhappy to report that my fears and suspicions have been confirmed. GT has been a client frequently and in the very recent past and my partners think it more than inadvisable for us to be adverse to them in a matter going to their professional conduct.

CONFIDENTIAL AND PRIVILEGED COMMUNICATION OF COUNSEL

MARK I. HARRISON (attorney profile)
mharrison@omlaw.com | Add me to your address book

OSBORN MALEDON
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012
(602) 640-9324 (direct)
(602) 640-9050 (fax)
www.omlaw.com

From: Charlton, Paul K. [mailto:paul.charlton@gknet.com]
Sent: Friday, June 14, 2013 11:08 AM
To: Harrison, Mark
Cc: Dangerfield, Mark C.
Subject: FW: Hualapai

Mark,

Thanks for returning my call. Mark Dangerfield and I will plan on calling you around 1:00 p.m. today. In the meantime, please see the attached pleading to assist you in a conflict check, and in our initial discussion.

We represent the defendants in this action. We are adverse to the plaintiff, and would be adverse to Greenberg Traurig. An individual named David Jin is adverse, as well. We are before Judge David Campbell.

Look forward to talking to you soon.

Best,

Paul

From: Kannberg, Gloria J.
Sent: Friday, June 14, 2013 11:00 AM
To: Charlton, Paul K.
Subject: Hualapai

EXHIBIT 5

Paul K. Charlton (Bar No. 012449)
Mark C. Dangerfield (Bar No. 010832)
Mark A. Fuller (Bar No. 012149)
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
Facsimile: (602) 530-8500
E-mails: paul.charlton@gknet.com
mark.dangerfield@gknet.com
mark.fuller@gknet.com
Attorneys for Defendants Hualapai Tribe and Tribal Council members

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 J. COUNTS, PHILBERT WATAHOMIGIE SR, RONALD QUASALA, 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 CHAIRPERSON SHERRY J. COUNTS**

I, Chairperson Sherry J. Counts, declare as follows:

1. I am the Chairperson of the Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona, and a member of the Hualapai Tribal Council. As Chairperson, under Section 1 of Article VII of the Hualapai Constitution, I am in charge of the tribal administration.

2. Pursuant to paragraph (d) of Article V of the Hualapai Constitution, the constitutional powers of the Tribal Council include the employment of legal counsel

3. From time to time the Tribal Council has retained and continues to retain

various law firms to represent the Tribe and its officials in connection with various matters. The Tribe compensates those law firms for those legal services.

4. In connection with any particular legal representation, it is necessary for the Tribal Council or other Tribal official to communicate with legal counsel orally and in writing regarding those matters, including issues and documents associated with those matters. Those communications and attorney work-product often include exchange of documentation, receipt of legal advice, discussion of alternative courses of action, and instruction to legal counsel.

5. It is my understanding that those attorney-client communications and attorney work-product are confidential and privileged. Like any client talking to his or her attorney, as Chairperson, I want to be able to have open discussions with our attorneys. The confidential and privileged nature of our communications should allow the Tribal Council and Tribal officials to be open with legal counsel, and should allow legal counsel to be open with the Tribal Council and Tribal officials.

6. No individual – neither a Councilmember nor any other Tribal official, including any official of the Tribe's commercial arms ('Sa' Nyu Wa, Inc. ["SNW"] and HWAL'BAY BAJ ENTERPRISES, INC. ["HBBE" doing business as Grand Canyon Resort Corporation ["GCRC"]) – has the power or authority to waive that confidentiality and privilege.

7. It has come to my attention that, in connection with litigation against Grand Canyon Skywalk Development ("GCSD") in various courts involving the Tribe's Skywalk project and in connection with related legal matters (collectively, the "Skywalk litigation"), certain of the Tribe's attorney-client communications and attorney work-product somehow have come into the hands of third parties.

8. More troubling, though, is that it has come to my attention that GCSD's counsel Greenburg Traurig LLP ("Greenburg Traurig") has, among other things, (a) allowed itself to be provided with those communications and work product, (b) filed

those communications and work product in public court records and has used and referred to those communications and work product in various legal proceedings, (c) been in direct and personal communication with current and former Councilmembers and other Tribal officials, including directors and officers of SNW and GCRC, regarding the Skywalk litigation, without the knowledge or approval of either the Council or its legal counsel, and (d) prepared and filed in public court records statements signed by such Councilmembers and other officials and has otherwise used and referred to those statement in various legal proceedings.

9. I consider myself to be honest in all my dealings. Greenburg Traurig's conduct, including use of those communications, work product and statements, has made it challenging for me as Chairperson and leader of the Tribe to determine how best to oversee the legal defense of the Tribe in the Skywalk litigation. As a result, the Council is more cautious and not able to relate with its attorneys with the same degree of openness a client should expect. For example:

a. Greenburg Traurig's conduct has caused me to carefully consider how best (and to what extent) to communicate with the Tribe's legal counsel in the Skywalk litigation and how to interact with other Councilmembers and Tribal officials in connection with the Skywalk litigation. Executive Sessions are the means by which the Council has been able to meet and discuss together in confidence these sensitive legal matters, including the Skywalk litigation.

b. Greenburg Traurig's conduct has caused the Council to sometimes implement rather awkward procedures for arranging for communication with legal counsel in connection with the Skywalk litigation (such as having Councilmembers sign confidentiality agreements, constantly warning Councilmembers about the need for preservation of confidentiality and privilege, restricting the use of written communications, and so on), in order to guard against the conduct of Greenburg Traurig. By making these additional measures necessary, Greenburg Traurig's conduct has interfered with the ability of the Tribe to obtain legal advice.

c. Greenburg Traurig's conduct has caused Councilmembers to regard other Councilmembers and Tribal officials with suspicion as to who has been or is in communication with Greenburg Traurig. Greenburg

Traurig's conduct has hurt the ability of the Council to discuss the defense of the Tribe in the Skywalk litigation.

d. Greenburg Traurig's conduct has taken away from the Tribe's investment in the valuable legal advice paid for by the Tribe in connection with the Skywalk litigation. By using advice and documents paid for by the Tribe, Greenburg Traurig's conduct has taken a valuable asset of the Tribe and has caused and continues to cause economic harm to the Tribe and also represents an infringement of the Tribe's sovereignty.

10. It is my understanding and belief that Greenburg Traurig's conduct is unfair and unethical and should not be allowed.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on August 6, 2013, in Peach Springs Arizona.

Chairperson Sherry J. Counts

State of Arizona)
)
County of Mohave)

On this 6th day of August, 2013, before me personally appeared Sherry J. Counts (name of signer), whose identity was proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this document, and who acknowledged that he/she signed the above/attached document.

(seal) [Affix notary seal here]

Notary Public [Notary's Signature]
My commission expires July 29, 2014 [Commission Expiration Date]

ARTEMISA VAUGHN
Notary Public - Arizona
Mohave County
My Comm. Expires Jul 29, 2014