Paul K. Charlton (Bar No. 012449)
Jeffrey D. Gross (Bar No. 011510)
Glen Hallman (Bar No. 005888)
Christopher W. Thompson (Bar No. 026384)
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
jeff.gross@gknet.com
gh@gknet.com
chris.thompson@gknet.com
Attorneys for Defendants

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 DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT TO COMPEL ARBITRATION AND FOR DECLARATORY RELIEF

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

I. INTRODUCTION.

The foundation for most of GCSD's response to the Tribe's motion is the assertion that the Tribal Court in its March 5, 2013 Minute Entry and Order ("Minute Entry") ordered the parties to arbitrate. The Tribal Court recently issued a subsequent ruling clearly demonstrating that GCSD is wrong.

GCSD is no more correct on any of its other arguments. First, there is no jurisdiction over any defendant even if GCSD dismisses the Tribe, but in any case GCSD still must exhaust its remedies in Tribal Court. Second, the Tribe has sovereign immunity,

which GCSD doesn't seem to contest, and there are no grounds to sue the Tribal Council members or the Tribe's non-party corporations to require them to arbitrate the eminent domain lawsuit. Third, the arbitration provision, whether by its express terms or the nature of this case, does not apply to an eminent domain action by the Tribe. Lastly, GCSD has waived any rights it allegedly had to compel arbitration. For any of these reasons, this case should be dismissed.

II. GCSD MISCHARACTERIZES THE TRIBAL COURT STAY RULING

For virtually every argument in its Response, GCSD relies heavily on its claim that the Tribal Court ordered the parties to arbitrate. GCSD goes so far as to call the Minute Entry staying the eminent domain case a "direct charge" that the parties resolve the condemnation action through arbitration. Response at 5. *See also* Response at 7, heading II.A ("The Tribal Court Order Unambiguously Orders" the parties to arbitrate). GCSD is wrong. Nowhere in the Minute Entry does the Tribal Court even hint that the parties are being ordered to arbitrate or, for that matter, take any other action.

Subsequent events confirm the error in GCSD's interpretation. On June 28, 2013, the Tribal Court issued another order requesting an update and a trial schedule:

> The parties are hereby ordered to provide an update for the Court as to matters that are proceeding either through arbitration, Federal District court or any other court related to this matter. *The parties shall also provide to the Court a revised Discovery and trial schedule for its adoption*. This shall be provided to the Court no later than 14 days from the date of this order.

Minute Entry and Order, June 28, 2013, attached as Exhibit 1 (emphasis added).

The Tribal Court would not have ordered the parties to submit a discovery and trial schedule for its adoption if the case was to be arbitrated.

This also is apparent from the March 5, 2013 Minute Entry itself. The Tribal Court recognized that its "review of recent filings" had suggested that the parties "will pursue contract remedies in Federal Court." According to GCSD, the Tribal Court was responding to claims in its supplemental pleading that the condemnation case was subject to arbitration. However, the Tribal Court ordered briefing on contract remedies on August 3, 2012 and GCSD filed its supplemental brief on August 24, 2012. GCSD later filed a

supplemental brief on November 28, 2012. Those are not "recent filings" under any definition of the term.

The Tribal Court's stay can be explained instead in the context of the SNW arbitration award and its subsequent bankruptcy. On August 16, 2013, the American Arbitration Association issued an award in favor of GCSD and against SNW for breach of contract. This Court confirmed the arbitration award on February 11, 2013, and SNW filed a Notice of Appeal on February 27, 2013. On March 4, 2013, SNW filed for bankruptcy protection, an event that generated no small amount of news coverage. It was no secret that GCSD, as the recipient of the arbitration award, was the largest creditor of SNW, and that GCSD's rights to collect on the award for breach of contract would be determined by the bankruptcy case. Therefore, as of March 4, 2013, it was apparent that GCSD was pursuing its contract remedies against SNW in the arbitration confirmation case and, by extension, SNW bankruptcy. The Tribal Court's stay reflects a concern over the pending resolution of the contract disputes between GCSD and the Tribe's corporation in those courts, not an order to compel arbitration.[1]

It also is telling that the Tribal Court stayed the case rather than dismissing it. If the Tribal Court had ordered arbitration there would have been no reason to stay the case, since (to the extent the case is arbitrable at all) only this Court would have jurisdiction to confirm the arbitration award. 2003 Agreement ¶ 15.4(a). The only reasonable reading of the Minute Entry is that the Tribal Court issued the stay to see what impact, if any, the federal arbitration confirmation and bankruptcy cases would have on the eminent domain case, not to order arbitration. The Tribal Court's June 28, 2013 order bears this out.

[1] The Minute Entry states that the parties "will pursue" contract remedies in federal court, not that they "shall" pursue anything. There was no reason for the Tribal Court to believe that the Tribe would be pursuing any remedy, much less arbitration (which is not really a "remedy" anyway), in federal court. The Tribal Court knew this Court, at the Tribe's request, had ruled that the condemnation case should be first addressed in Tribal Court, *not* federal court or arbitration. But remedies *were* being pursued in federal courts – by GCSD against SNW.

III. THE COURT LACKS JURISDICTION OVER THE TRIBE AND TRIBAL COUNCIL MEMBERS.

A. The Complaint Does Not Plead Federal Question Jurisdiction.

GCSD argues that this Court can find a federal question by "looking through" the Amended Complaint to the underlying dispute that GCSD wants to arbitrate. Response at 16, ll. 11-17. Yet GCSD identifies only one "federal question" – whether the Tribe has jurisdiction over GCSD's property interest – and that is not in its Amended Complaint, only in its Response. However, a response to a motion to dismiss is "not incorporated into the original pleadings. . . . A Plaintiff may not amend [a] complaint 'through any document short of an amended pleading.'" *Schneider v. Calif. Dep't of Corrections,* 151 F.3d 1194, 1197, n.1 (9th Cir.1998) ("The focus of any . . . dismissal . . . is the complaint") (citations omitted)).

Looking at the Amended Complaint, there are only three identified arbitrable issues, none of which plead a federal question. *See* Amended Complaint at ¶ 51(a)-(c).[2]

The first dispute identified by GCSD is "[t]he value of GCSD's rights in the 2003 Agreement . . ." *Id*. at ¶ 51(a). This is not a federal question because valuation of GCSD's interest in the 2003 Agreement depends solely upon Tribal law under the Hualapai Constitution and the eminent domain ordinance. *See generally*, Felix S. Cohen, Handbook of Federal Indian Law § 4.01 (Supp.2009) ("Indian tribes are not constrained by the provisions of the United States Constitution, which are framed specifically as limitations on state or federal authority.").

The second dispute is "whether the Tribe may take GCSD's rights under the 2003 Agreement by eminent domain as a means to avoid contractual remedies dictated by the terms of the 2003 Agreement." Amended Complaint, at ¶ 51(b). The exact meaning of this question is unclear. GCSD pursued contractual remedies against SNW for its alleged

[2] As we explained, none of these issues are arbitrable under the 2003 Agreement. The question of whether an issue is arbitrable is an issue for the court. *See, e.g., Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241-243 (1962) (a court should decide whether a clause providing for arbitration of various "grievances" covers claims for damages for breach of a no-strike agreement).

breaches of the 2003 Agreement – the Tribe has avoided nothing. If the question is whether the use of eminent domain is governed by the 2003 Agreement, then that is a contractual question, not a federal one. If GCSD means to question whether the Tribe may use its sovereign power of eminent domain to take GCSD's rights, then that arises under the Hualapai Constitution and laws – not federal law.[3]

GCSD's third and final identified dispute is "whether the Tribe's use of the Ordinance to take GCSD's rights under the 2003 Agreement violates the constitutions of the [Hualapai and United States]." *Id*. at ¶ 51(b). Violations of the Hualapai Constitution arise under tribal law and do not present a federal question because the alleged violations (whatever they are in GCSD's eyes) require construction of Hualapai law, not federal law. Because tribal constitutions and laws do not "arise under" the United States Constitution or statutes they cannot confer federal question jurisdiction. *See R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 981 (9th Cir.1983).

The only potential federal question is unpleaded: whether the Tribe has jurisdiction to condemn GCSD's contract interests in the Skywalk.[4] Even were it in the Amended Complaint, it still cannot save this action from dismissal. This Court already ruled in *GCSD II* that the question of the Tribe's jurisdiction to take GCSD's contract rights must be determined, in the first instance, in Tribal Court. The same exhaustion requirement applies here. In *Gaming World International, Ltd. v. White Earth Band of Chippewa*, 317 F.3d 840, 851-852 (8th Cir. 2003) the district court compelled arbitration between a casino operating company and an Indian tribe in a dispute over an agreement to construct

---

[3] The fact that the Tribe has to guess at the meaning of GCSD's identified dispute is enough to conclude no federal question has been pled. A claim arising under federal law ***" must be clear*** from the face of the plaintiff's well-pleaded complaint " *Easton v. Crossland Mortgage Corp*., 114 F.3d 979, 982 (9th Cir. 1997) (emphasis added).

[4] GCSD's Response also attempts to incorporate the Condemnation Complaint, but the focus must be on GCSD's complaint. *Vaden v. Discover Bank*, 556 U.S. 49, 70 (2009) ("It does not suffice to show that a federal question lurks somewhere inside the parties' controversy, or that a defense or counterclaim would arise under federal law. [The] controversy between [parties] . . . is not one qualifying for federal-court adjudication, § 4 of the FAA does not empower a federal court to order arbitration of that controversy, in whole or in part").

and operate a casino. *Id.* at 851. The tribe had filed a tribal court action involving the same dispute. Notably, the casino also alleged bad faith assertion of jurisdiction in Tribal Court. *Id.* The Eighth Circuit held exhaustion was required prior to arbitration as its "[prior decisions] and those in similar cases decided by the Fifth, Ninth, and Second Circuits teach that exhaustion should be required when a party tries to avoid tribal court jurisdiction by seeking an order to compel arbitration in federal court." *Id.*, citing *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1227-29 (9th Cir. 1989) (rejecting argument that arbitration under FAA is not subject to exhaustion doctrine).[5] Similarly, all of GCSD's claims, including the arbitration issue, are subject to the exhaustion requirement.

B. There Is No Diversity Jurisdiction.

Admitting that inclusion of the Tribe as a party destroys diversity jurisdiction, GCSD claims it can drop the Tribe as a party to cure the lack of diversity. GCSD makes confused arguments that SNW and Grand Canyon Resort Corporation ("GCRC"), both corporate entities and non-parties in this action, can be compelled to arbitrate the condemnation case. *E.g.* Response at 15, ll. 2-4. Even more oddly, GCSD maintains that because the Court can compel the remaining defendants to order the corporations to arbitrate, it can obtain complete relief without the Tribe as a party. *Id.* at 18, ll. 9-11. From the premise that the Tribal Council members can make the corporations arbitrate without the Tribe, GCSD argues that the Court would have diversity jurisdiction and that the Tribe's sovereign immunity would be immaterial. However, corporations do not have the power of eminent domain. If the Tribe is not a party, arbitration would be a nullity, as the corporations do not have the power to condemn in the first place.

C. The Court Lacks Jurisdiction Over The Tribal Council Members.

Even if GCSD dismisses the Tribe, the Court would still lack jurisdiction over the remaining defendants, all of whom are Tribal Council members ("Council Defendants").

[5] Because exhaustion was already decided by the Court in *GCSD II*, GCSD is collaterally estopped from relitigating the exhaustion issues in this case.

1. The Tribal Council Members Have Legislative Immunity.

GCSD's legislative immunity arguments to circumvent legislative immunity are wrong. First, the Tribal Council is the Tribe's legislature. *See* Hualapai Const. Art. IV, sec. 1 ("The legislative body of the Hualapai Tribe shall be known as the Hualapai Tribal Council . . . ."); Hualapai Const. Art. III. ("The . . . government shall be divided into two separate and independent branches of government: the Legislative Department . . . and the Judicial Department"). The act of condemnation and adoption of a process for its use are both a legislative functions, exercised by the Tribal Council. *Id.* Art. V ("The Tribal Council shall have all of the legislative powers vested in the Hualapai Tribe"); *Cf.*, *Kelo v. City of New London*, 545 U.S. 469, 488 (2005) (because the power of eminent domain is governmental in nature, reserved only to a sovereign, the exercise of that power is a purely legislative act); *In re Legislative Route 1018, Section 4, Lower Chichester Twp., Delaware Cnty.*, 222 A.2d 906, 908 (Pa. 1966) ("The power of Eminent Domain . . . is an attribute of . . . sovereignty. However, it arises only when legislative action points out the occasions, the modes and the agencies for its exercise").

Second, the legislative immunity defense does not turn on the nature of the relief sought. GCSD argues that *Sable v. Myers*, 563 F.3d 1120 (10th Cir. 2009), is distinguishable because GCSD does not seek money damages, but "prospective relief against illegal government action" to "compel[] the tribal officers to arbitrate the condemnation dispute." Response at 24-25. That distinction is irrelevant for purposes of legislative immunity. In applying the legislative immunity doctrine, the Supreme Court has reasoned that "a private civil action, *whether for an injunction or damages*, creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 733 (1980) (citation omitted). The only relevant question is one that GCSD never addresses: "Were the Tribal Council's actions 'in the sphere of legitimate legislative activity?'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). If so, legislative immunity applies - absolutely. *Kuzinich v. Santa Clara Cnty.*, 689 F.2d 1345, 1349 (9th Cir. 1982) ("We hold that members of local legislative bodies have complete immunity from suits based on their legislative acts . . . ."). Enacting a condemnation

ordinance and voting to exercise the power of eminent domain are purely legislative acts that easily satisfy this test. *Bogan*, 523 U.S. at 55 ("acts of voting for ordinance . . . were, in form, quintessentially legislative."). Legislative immunity also covers legislative acts beyond voting such as introducing and signing legislation into law. *Id.*[6]

2. The Court Does Not Have Jurisdiction Over The Tribal Council Members Under *Ex Parte Young*.

GCSD does not contest that the Council Defendants have sovereign immunity and have not waived it, but argues that *Ex Parte Young* provides an exception to this immunity. However, for *Ex Parte Young* to abrogate the immunity of a local official there must be ongoing conduct that will be ended by the relief sought:

> "*Young* has been focused on cases in which a violation of federal law by a state official is *ongoing* as opposed to cases in which federal law *has been violated at one time or over a period of time in the past*, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation."

Ulaleo v. Paty, 902 F.2d 1395, 1398 (9th Cir. 1990) (quoting *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986)) (emphases added).

Again, GCSD's Amended Complaint asserts no allegation that the Council Defendants' ongoing actions were illegal, beyond their power, or in violation of federal law. GCSD has, therefore, failed to plead an *Ex Parte Young* exception. GCSD concedes this point in its Response by noting that "Plaintiff has alleged in *related actions* that tribal officials acted beyond the scope of their authority when they seized intangible contract rights . . . ." Response at 23, ll. 19-22 (emphasis added). But allegations in a *separate* matter cannot be used to satisfy pleading requirements for *Ex Parte Young* in this case.

[6] *See also e.g., Torres-Rivera v. Calderón-Serra*, 412 F.3d 205, 212-14 (1st Cir. 2005) (governor entitled to legislative immunity for signing legislation into law); *Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1, 5 (1st Cir. 2000) (mayor entitled to absolute immunity for signing ordinance into law); *Bryan v. City of Madison*, 213 F.3d 267, 272, 274 (5th Cir. 2000) (mayor entitled to legislative immunity for vote with board of aldermen to rezone property).

GCSD also alleges that due process has not been provided under either the federal or Hualapai Constitution, but provides no allegation of how the individual Council Defendants have deprived GCSD of any due process rights or engaged in any continuing enforcement that has resulted in a purported due process deprivation.

GCSD also claims that refusal to arbitrate violates federal law. Response at 23. GCSD's invocation of the Federal Arbitration Act (the "FAA"), however, is insufficient. An action to compel arbitration under the FAA is not an action to enforce federal law (or an ongoing violation of federal law); it is an action to enforce an arbitration agreement. It cannot be the case that refusing to arbitrate is a violation of federal law when the FAA does not supply federal question jurisdiction on its own accord – if it were otherwise, then every refusal to arbitrate would be both a federal question and a violation of federal law.

GCSD's third asserted violation of federal law is the Council Defendants' allegedly improper exercise of jurisdiction over GCSD's contract rights in the 2003 Agreement. For the Council Defendants to have violated this law, they would have to have "'some connection with the enforcement of the [unconstitutional act].'" Response at 26, ll. 1-2. GCSD's mere allegation of "some connection with enforcement" lacks any fact upon which anyone can conclude that the Council Defendants are enforcing anything. The Council Defendants are not responsible for continuing enforcement of the condemnation action. The only acts the Council Defendants took were legislative – in 2011 they adopted the eminent domain ordinance and in 2012 voted to condemn GCSD's interest in the 2003 Agreement.[7] Ongoing enforcement is by the Tribal Court, not the Council Defendants

[7] *Ex Parte Young* is not an exception to legislative immunity – legislative immunity is an absolute bar to against suits official capacity suits. *Scott v. Taylor*, 405 F.3d 1251, 1255-56 (11th Cir. 2005) ("Following *Consumers Union*, we hold that the legislator defendants in the instant official capacity suit for prospective relief are entitled to absolute immunity"); *Tolman v. Finneran*, 171 F. Supp. 2d 31, 37-38 (D. Mass. 2001) (noting absence of any cases utilizing *Ex Parte Young* to abrogate legislative immunity and noting that "it is unlikely that *Ex Parte Young* is broad enough to abrogate legislative immunity and authorize suit against a legislator acting in a purely legislative capacity.").

individually, and relief against the Council Defendants will have no effect on the pending Tribal Court case. As a result, *Ex Parte Young* does not apply.

Moreover, *Ex Parte Young* also does not apply because the relief sought by GCSD is in fact against the Tribe itself. The Supreme Court has made it clear that all forms of relief against a state are barred; even where injunctive relief against officers is permissible under *Ex Parte Young*, an injunction cannot run against the state itself. *Cory v. White*, 457 U.S. 85, 89-90 (1982) (where case against officials is in effect a suit against the state, *Ex Parte Young* exception no longer valid).

While GCSD's Response nominally suggests it can obtain relief from Council Defendants, the remedy sought actually runs against the Tribe. GCSD has named all of the Council Defendants to obtain relief that would force *the Tribe* into arbitration and render *the Tribe* subject to arbitration damages. GCSD's request for relief goes far beyond enjoining a prospective *ultra vires* act by an official (the limited basis upon which official capacity suit are permitted); GCSD clearly seeks to compel the Tribe, through the individually named Council Defendants, to compel the Tribe to arbitrate. *Ex Parte Young* is not available in this circumstance.

3. The Council Defendants Are Not Proper Parties And GCSD Has Failed To State A Claim Against Them.

While not a jurisdictional issue, the Amended Complaint does not even attempt to assert a cause of action against the Council Defendants. The Amended Complaint only requests relief against the Tribe. GCSD defines the Tribe and Council Defendants separately in its Amended Complaint, and also collectively as "Defendants." *See* Amended Complaint at 1-2. In GCSD's one and only Claim for Relief, all allegations and requested relief are against the "Tribe." Indeed, not one allegation or request for relief mentions Defendants or Council Defendants or identifies a wrongful act by any of them. Nor does the Amended Complaint state, since it cannot, that the individuals are subject to the 2003 Agreement. GCSD offers no authority allowing the Court to compel individuals, who are not parties to the 2003 Agreement, to arbitrate if the Tribe is not a party to, and will not be bound by, the arbitration. GCSD's Amended Complaint simply fails to

state a claim for relief against the Council Defendants. *AT & T Technologies, Inc*., 475 U.S. at 648 ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

IV. THE TRIBE'S SOVEREIGN POWER TO CONDEMN PROPERTY FOR PUBLIC USE IS NOT SUBJECT TO ARBITRATION.

A. The 2003 Agreement Excludes From The Scope Of Arbitration Any Monetary Awards Against The Tribe.

In response to the Tribe's argument that the 2003 Agreement does not subject the eminent domain case to arbitration because ¶ 15.4(d)(ii) prohibits "money damages, awards, fines, fees, costs or expenses" from being "brought or awarded against the Tribe" in arbitration, GCSD focuses solely on the two words "money damages," maintaining that the term means something other than "just compensation." GCSD's selective reading ignores the larger clause. The 2003 Agreement exempts the Tribe not only from money damages, but from any "awards" against the Tribe in an "arbitration, judicial, or governmental agency action." 2003 Agreement ¶ 15.4(d)(ii). Whether an arbitration award of just compensation against the Tribe is the same as money damages or not, it still would be an "award." Therefore, the Tribe's eminent domain action is not subject to the arbitration provisions of the 2003 Agreement.

In any event, an award of just compensation is the functional equivalent of an award of money damages.[8] In *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 710 (1999), the Supreme Court held that just compensation in a takings case was a legal remedy like any other action for monetary relief: "As its name suggests, then, just compensation is, like ordinary money damages, a compensatory remedy." This similarity is universally recognized. *E.g. Williamson Cnty. Reg'l Planning Comm'n v.*

[8] That is not to say just compensation includes any damages a property owner claims to suffer. The term "just compensation" has a precise meaning, measured by the fair market value of the property taken, and excludes non-compensable items such as loss of business goodwill, *U S. v. 1.377 Acres of Land*, 352 F.3d 1259, 1266 (9th Cir. 2003), frustration of contract, *U.S. v. 1.604 Acres of Land*, 844 F. Supp. 2d 668, 682 (E.D. Va. 2011), lost profits and other consequential losses, *U.S. v. Petty Motor Co.*, 327 U.S. 372, 378 (1946). Nevertheless, just compensation is an award of monetary relief against the Tribe that the 2003 Agreement excludes from arbitration.

Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (referring to "just compensation" as "money damages"); *Eide v. Sarasota Cnty.*, 908 F.2d 716, 720 (11th Cir. 1990) ("The remedy for a violation of the Just Compensation Clause is money damages . . . ."); *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987) ("the '*just compensation*' required by the Fifth Amendment has long been recognized to confer . . . the right to recover *money damages* from the government") (emphases added).

GCSD's cited authorities lend it no help. *Bowen v. Massachusetts*, 487 U.S. 879 (1988) involves a state's claim against the United States for Medicaid reimbursement; it has nothing to do with condemnation and nowhere mentions just compensation. To the extent *Bowen* is even relevant, it supports the Tribe's position: "The term 'money damages' . . . we think, normally refers to a sum of money used as compensatory relief." *Id.* at 895 (emphasis original, citation omitted). Just compensation is no different: "[t]he fifth amendment, on its face, requires only compensatory relief." *Unix Sys. Laboratories, Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 803 (D.N.J. 1993)

U.S. v. Miller, 317 U.S. 369 (1943) is at least a condemnation case, but also provides no support to GCSD. *Miller* held that just compensation is the "equivalent in money of the property taken." 317 U.S. at 280. The Court's banal observation in no way distinguishes just compensation from money damages. GCSD itself cannot offer any meaningful distinction, saying only that just compensation is a "form of legal relief that is distinct from money damages." Response at 19.

B. This Case Arises Out Of The Tribe's Exercise Of The Sovereign Power Of Eminent Domain, Not A Contract Dispute.

GCSD's only response to the Tribe's argument that the eminent domain case does not arise out of the 2003 Agreement is that the Amended Complaint pleads a sufficient relationship between the two. Response at 20-21. Merely pleading in the complaint that the eminent domain action is a controversy, claim or dispute arising out of the 2003 Agreement is not enough to withstand a motion to dismiss.

To survive dismissal under Federal Rule of Civil Procedure 12(b)(6), a pleading must contain more than mere "labels and conclusions" or a "formulaic recitation of the

elements of a cause of action," but must contain factual allegations sufficient to "raise a right of relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007). While "a complaint need not contain detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). Similarly, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

The entire factual basis for GCSD's bare allegation that the condemnation arose out of the 2003 Agreement is that the Tribal Council initiated condemnation due to concerns about construction and operation at the Skywalk. GCSD did not respond to the merits of the Tribe's legal arguments that the Court may not infer motives to the Tribal Council and that the Tribe's power of eminent domain is separate from the contract remedies provided in the 2003 Agreement. Instead, GCSD dismissed the arguments as irrelevant. Response at 20-21. These legal issues are appropriate at the motion to dismiss stage. Neither *Twombly* nor *Iqbal* require this Court to uncritically accept that allegation, especially when there are legal reasons not to.

With respect, this Court may not make the leap that even GCSD must concede is necessary for it to succeed – that the Tribal Council filed the eminent domain action as a result of concerns with GCSD's performance of its contractual obligations at the Skywalk. GCSD has not disputed that the Court may not examine the motives of the Tribal Council members, that the reasons do not have to be addressed in the Declaration of Taking, or that the Declaration of Taking contains reasons for the condemnation separate from GCSD's non-performance of its obligations. As explained in the Tribe's motion, and as GCSD has not contested, the Court may not draw any factual inferences that the condemnation "arose out of" GCSD's breach of contract.

GCSD's best argument is that a dispute over the value of the 2003 Agreement must "arise out of" the 2003 Agreement. That argument, however, assumes the underlying *dispute* is one "arising of or related to this Agreement." As we have explained, the condemnation of GCSD's interest in the 2003 Agreement arises out of the Tribe's exercise of its sovereign power of eminent domain. The Tribe could have condemned GCSD's property even if it never became involved with a dispute with SNW over the two parties' contractual rights and obligations, and even if the Tribe was not a third party beneficiary. The Tribe's power of condemnation is not tethered to the 2003 Agreement in any way whatsoever.

C. The Tribe Is Not Subject To Arbitration As A Third Party Beneficiary.

To the extent GCSD attempts to draw the Tribe into contractual arbitration as a third party beneficiary to the 2003 Agreement, the Tribe's sovereign immunity remains intact. GCSD does not dispute that the Tribe has sovereign immunity or that waiver must be unequivocal. The Tribe did not waive sovereign immunity in the 2003 Agreement, unequivocally or otherwise, nor engage in any conduct that would legally constitute waiver. And, as explained in the motion, any arguable waiver of sovereign immunity is limited to the specific claim and forum selected by the sovereign. Therefore, the Tribe is not subject to arbitration under the 2003 Agreement as a third party beneficiary.

V. GCSD WAIVED ANY RIGHT IT ARGUABLY HAD TO DEMAND ARBITRATION OF THE CONDEMNATION ACTION.

Although GCSD argued in Tribal Court that the condemnation action was subject to the arbitration provisions of the 2003 Agreement, it never asked any court to compel the Tribe to arbitrate until this case was filed. GCSD could have immediately moved to compel arbitration in Tribal Court and to stay further proceedings until the forum was determined. Or GCSD could have asked this Court in *GCSD II* to refer the case to arbitration. GCSD made no effort to demand that the case or the discovery process be subject to arbitral oversight, but actively participated in taking depositions, exchanging documents, submitting scheduling orders and engaging in motion practice in Tribal Court. This conduct is inconsistent with the intent to compel arbitration. *See Robinson v. Food*

Serv. of Belton, Inc., 415 F. Supp. 2d 1221, 1226 (D. Kan. 2005) ("While plaintiffs may have been made aware of defendants' *right* to arbitrate, they were not notified of defendants' *intent* to arbitrate") (emphasis in original).

GCSD completed most of its depositions, and the Tribe was trying to schedule its depositions, when the Tribal Court issued its stay. Having taken advantage of the more liberal federal discovery rules the parties agreed applied in Tribal Court, the Tribe would be prejudiced if it were forced to abide the more restrictive rules of the AAA. *Id.* (finding prejudice because defendants "defendants would not, in the context of arbitration, have access to certain information gleaned from discovery"). For these reasons, GCSD lost whatever ability it ever had to compel arbitration in this Court.[9]

VI. CONCLUSION.

For the foregoing reasons, Defendants request their Motion to Dismiss Plaintiff's First Amended Complaint to Compel Arbitration and for Declaratory Relief be granted.

RESPECTFULLY submitted this 8th day of July, 2013.

GALLAGHER & KENNEDY, P.A.

By: /s/ Jeffrey D. Gross

Paul K. Charlton
Jeffrey D. Gross
Glen Hallman
Christopher W. Thompson
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Defendants

[9] In addition, as the Ninth Circuit stated in *GCSD II*, "[w]hile the arbitration proceeded, the Hualapai Tribal Council exercised eminent domain and condemned GCSD's intangible property rights in the contract, which practically speaking left SNW, as a tribal corporation, in contract with the Hualapai Tribe." *Grand Canyon Skywalk Development, LLC v. 'Sa'Nyu Wa Inc.*, No. 12-15634, at 4-5. Upon the February 8, 2012 condemnation filing, GCSD lost its interest in the 2003 Agreement and whatever power it had to demand arbitration pursuant to the terms of a contract to which it no longer was a party.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Pamela M. Overton
GREENBERG TRAURIG, LLP
2375 East Camelback Road, Suite 700
Phoenix, AZ 85016
e-mail: overtonp@gtlaw.com

Mark G. Tratos (*Pro Hac Vice* admission pending)
Donald L. Prunty (*Pro Hac Vice* admission pending)
Bethany L. Rabe (*Pro Hac Vice* admission pending)
Moorea L. Katz (*Pro Hac Vice* admission pending)
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, NV 89169
e-mails tratosm@gtlaw.com
pruntyd@gtlaw.com
rabeb@gtlaw.com
katzm@gtlaw.com
Attorneys for Plaintiff

/s/ Deborah Yanazzo

3546218