

1 Thomas G. Ryan (NV Bar No. 9378)
LEWIS ROCA ROTHGERBER LLP
2 3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
3 Telephone: (702) 949-8232
Facsimile: (702) 949-8349
4 E-mail: tryan@lrllaw.com

5 Jeffrey D. Gross *Admitted Pro Hac Vice*
(AZ Bar No. 011510)
6 Christopher W. Thompson *Admitted Pro Hac Vice*
(AZ Bar No. 026384)
7 GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
8 Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
9 Facsimile: (602) 530-8500
E-mails: jeff.gross@gknet.com
10 chris.thompson@gknet.com
11 *Attorneys for The Hualapai Indian Tribe of the
Hualapai Indian Reservation*

12 UNITED STATES DISTRICT COURT

13 DISTRICT OF NEVADA

14 GRAND CANYON SKYWALK DEVELOPMENT,
LLC, a Nevada limited liability company; DAVID JIN,
15 an individual; THEODORE (TED) R. QUASULA, an
individual,

16 Plaintiffs,

17 vs.

18 RUBY STEELE, CANDIDA HUNTER, WAYLON
HONGA, CHARLES VAUGHN, SHERRY COUNTS,
19 WILFRED WHATONAME, SR., each individuals and
members of the Hualapai Tribe Council; PATRICIA
20 CESSPOOCH, an individual and member of the
Hualapai Tribe; DAVID JOHN CIESLAK, an
21 individual; NICHOLAS PETER "CHIP" SCUTARI, an
individual; SCUTARI & CIESLAK PUBLIC
22 RELATIONS. INC., an Arizona corporation,

Defendants.

23 DAVID JOHN CIESLAK, an individual; NICHOLAS
24 PETER "CHIP" SCUTARI, an individual; SCUTARI
& CIESLAK PUBLIC RELATIONS. INC., an Arizona
25 corporation,

26 Third-Party Plaintiffs,

27 vs.

28 HUALAPAI TRIBE,

Third-Party Defendant.

Case No. 2:13-cv-00596-JAD-GWF

**REPLY IN SUPPORT OF MOTION
TO DISMISS THIRD-PARTY
COMPLAINT**

1 **I. INTRODUCTION.**

2 Third-Party Plaintiff Scutari & Cieslak (“S&C”) seeks indemnification from the Hualapai
3 Tribe (“Tribe”) under a Communications and Public Relations Agreement (“Agreement”) and
4 common law principles. S&C drafted the Agreement and negotiated it with the Tribe. Despite
5 dealing with a sovereign entity, S&C did not seek an express waiver of tribal immunity or include
6 any equivalent language that would clearly and unequivocally act as such a waiver. S&C would
7 now like this Court to relieve S&C of the consequences of its own failure to bargain for an
8 express waiver by *implying* a waiver from other cobbled bits of the Agreement.

9 Implied waivers of tribal sovereign immunity do not legally exist. Because nothing in the
10 Agreement rises to the level of an express and unequivocal waiver, the Tribe maintains sovereign
11 immunity from suit, and the Third-Party Complaint must be dismissed.

12 Further, if there is any question about tribal immunity, the starting point is Tribal Court.
13 As S&C previously recognized in moving to dismiss the Complaint when Tribal Council
14 members were defendants, an action involving Tribal affairs belongs in Tribal Court. What was
15 true when Plaintiffs were suing Tribal Council members for defamation is just as true when S&C
16 is suing the Tribe for indemnity from that same alleged defamation: “federal court is not the
17 proper venue for this current litigation.” [Doc. 17 at 8, ll. 26-27]. Therefore, if this Court
18 declines to dismiss the Third-Party Complaint outright, the Tribal Court should be permitted to
19 determine whether and to what extent S&C may pursue its claims against the Tribe.¹

20 **II. THE TRIBE HAS NOT WAIVED SOVEREIGN IMMUNITY.**

21 **A. Whether Through Legislation Or Contract, Waiver Must Be Express And**
22 **Unequivocal, Or At Least Clear.**

23 S&C argues that only Congressional waiver of tribal sovereign immunity must be express
24 and unequivocal, but that the same rule does not apply to contractual waivers. For this argument,
25 S&C relies on two Supreme Court cases and a Seventh Circuit case. *Santa Clara Pueblo v.*
26 *Martinez*, 436 U.S. 49 (1978); *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014);
27 *Sokaogon Gaming Entr. Corp. v. Tushie-Montgomery Assoc. Inc.*, 86 F.3d 656 (7th Cir. 1996).

28 ¹ The Tribe is not asking for this entire case to be moved to Tribal Court in the event this Court has
any doubts about whether the Tribe waived sovereign immunity, only S&C’s Third-Party Complaint.

1 In fact, the only case drawing this distinction is *Sokaogon. Martinez* involved a claim that
 2 Congress had abrogated tribal immunity through enactment of the Indian Civil Rights Act. *Bay*
 3 *Mills* similarly addressed whether Congress abrogated tribal immunity by enacting the Indian
 4 Gaming Regulatory Act. Neither Supreme Court case involved alleged contractual waivers.
 5 However, the *Martinez* court stated generally, “It is settled that a waiver of sovereign immunity
 6 ‘cannot be implied but must be unequivocally expressed.’” 436 U.S. at 58 (citations omitted).
 7 The Supreme Court later noted in *dicta* that Congressional abrogation of tribal immunity must be
 8 “unequivocally” expressed and tribal waivers must be “clear.” *C&L Enterprises, Inc. v. Citizen*
 9 *Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001). However, the Supreme
 10 Court in *C&L* did not define these standards, draw any meaningful distinction between them or
 11 overrule *Martinez*, and has never held that contractual waivers of tribal immunity may be implied.

12 The Seventh Circuit decision also is directly contrary to the law in the Ninth Circuit,
 13 which requires all waivers to be express and unequivocal. *E.g. Maxwell v. Cnty. of San Diego*,
 14 697 F.3d 941, 953 (9th Cir. 2012) (contractual waivers of tribal sovereign immunity must be
 15 explicit and unequivocal); *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (tribal
 16 immunity remains intact “absent express and unequivocal waiver of immunity by the tribe or
 17 abrogation of tribal immunity by Congress”) (emphasis added, citation omitted); *Pit River Home*
 18 *& Agr. Co-op. Ass’n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (“Any waiver of
 19 immunity” must be unequivocally expressed) (emphasis added); *McClendon v. United States*, 885
 20 F.2d 627, 629 (9th Cir. 1989) (Indian tribes can waive sovereign immunity, but “such waiver may
 21 not be implied, but must be expressed unequivocally”).

22 In any case, the discussion is academic. Whether the waiver standard is “unequivocal” or
 23 “clear,” the language of the Agreement does not meet it, and the rule that sovereign immunity
 24 waivers may not be implied still is the law.

25 **B. The Tribe Did Not Clearly Waive Sovereign Immunity In The Agreement.**

26 S&C spills much ink arguing that the Tribe, which was represented by counsel in the
 27 contract negotiations, never specifically preserved sovereign immunity in the Agreement. The
 28 law is clear that the Tribe does not have to do anything to preserve its sovereign immunity, which

1 is maintained unless there is an adequate waiver. Even though S&C apparently chose not to have
 2 counsel in the negotiations, S&C is deemed to know the law and is presumed to know that the
 3 Tribe has sovereign immunity. *McClendon*, 885 F.2d at 631-32, *quoting American Indian Agric.*
 4 *Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir.1985)
 5 (“[t]ribes and persons dealing with them long have known how to waive sovereign immunity
 6 when they so wish”). S&C, which admits it drafted the Agreement, never requested an express or
 7 clear waiver, an arbitration mechanism, a choice of forum clause, or any other provision that
 8 federal courts have demanded as a waiver of sovereign immunity.² Instead, S&C only included
 9 two provisions that it now claims constitute a waiver: that the Agreement would be governed by
 10 Arizona law, and that the Tribe would indemnify S&C for claims by third parties.³ Neither
 11 provision, taken together or individually, act as an express and clear waiver of the Tribe’s
 12 sovereign immunity or consent to be sued in this or any federal court.

13 S&C cites *C&L* in support of its argument that the choice of law and indemnification
 14 provisions act as an express waiver. In *C&L*, the Supreme Court held that a tribe waived its
 15 sovereign immunity by (1) entering into a contract requiring arbitration of all disputes, and
 16 (2) providing that an arbitration award may be reduced to judgment “in any court having
 17 jurisdiction thereof.” 532 U.S. at 420. As the Court explained, “the contract specifically
 18 authorizes judicial enforcement of the resolution arrived at through arbitration.” *Id.* at 422

20
 21 ² Because S&C chose not to obtain an express waiver, S&C cannot rely on equity or fairness
 22 arguments to avoid the Tribe’s sovereign immunity. *See McClendon*, 885 F.2d at 632 (“Given that
 23 courts consistently have required express and unequivocal waiver of sovereign immunity, if
 McClendon failed to negotiate such a waiver, considerations of equity are not in McClendon’s
 favor”).

24 ³ S&C also refers to ¶ 4(c) of the Agreement, which provides that S&C will assist in defending any
 25 action against the Tribe that involves a challenge to S&C’s work. Response at 7-8. The Complaint is
 26 not against the Tribe, and ¶ 4(c) does not contain any obligation for the Tribe to defend S&C, so that
 27 provision does not apply. Also, ¶ 4(c) does not state that the Tribe is waiving sovereign immunity as
 28 to an action brought by anyone, much less S&C, nor does it satisfy the parameters of *C&L* or any
 other case. Finally, even if the Tribe somehow waived sovereign immunity in ¶ 4(c) to lawsuits by
 third parties (it did not), waivers of sovereign immunity are limited to the boundaries of the language,
 which cannot be enlarged to include an action brought by S&C. *See United States v. Nordic Village,*
Inc., 503 U.S. 30, 34 (1992) (waivers of sovereign immunity are strictly construed and not enlarged
 beyond what the express language requires).

1 (emphasis added). Thus, the Court held that the tribe expressly consented to arbitration and to
2 suit to enforce the arbitration award.

3 In contrast, S&C and the Tribe did not agree to submit any actions between themselves to
4 any type of dispute resolution process or name this Court, or any other court, as a forum for any
5 action whatsoever. S&C and the Tribe agreed only that the Agreement would be governed by
6 Arizona law, and that the Tribe would pay to indemnify S&C for certain third-party claims. The
7 choice of law provision merely establishes a body of law to help define the parties' obligations.
8 Unlike a choice of forum clause, the choice of law provision is not consent to submit to Arizona
9 courts (and certainly not this Court) in the event of a dispute.

10 The indemnity provision likewise is not an express consent to suit. A contractual promise,
11 without more, clearly does not carry with it a waiver of immunity and consent to suit; otherwise
12 tribes would be found to have waived immunity under any contract. S&C does not, and cannot
13 argue, for example, that the Tribe waived its sovereign immunity by agreeing in ¶ 2 of the
14 Agreement to make monthly payments that, if missed, arguably would place the Tribe in default.
15 Contractual indemnity is nothing more than another promise to pay. Instead of a monthly
16 payment, the indemnitor agrees to pay amounts the indemnitee becomes legally obligated to pay
17 to someone else. *See* Black's Law Dictionary ("Term pertains to liability for loss shifted from
18 one person held legally responsible to another person"). Just as the Tribe's promise to pay S&C a
19 monthly fee does not waive sovereign immunity, its promise to pay S&C the amount S&C may
20 become obligated to pay a third party has no greater effect.

21 Unlike the contract in *C&L*, the Tribe did not agree to arbitration, judicial enforcement of
22 an arbitration award, or any other provision authorizing court involvement. Neither the choice of
23 law nor the indemnity provision in the Agreement is tied to any tribunal or remedy. To reach the
24 result S&C advocates, the Court would have to imply that the Tribe waived immunity from a
25 lawsuit by S&C to enforce the promise of indemnification. Because implied waivers are not
26 recognized, S&C's argument fails, and this case must be dismissed.

27 ///

28 ///

III. S&C MUST EXHAUST ITS TRIBAL COURT REMEDIES.

A. S&C Has Admitted This Case Belongs In Tribal Court Because Events Giving Rise To Its Claims Occurred On The Hualapai Reservation.

Before the Tribal Council members were dismissed, S&C moved to dismiss the case on the grounds that Tribal Court was the appropriate forum for the litigation, and that the Tribal Court must determine in the first instance whether it has jurisdiction. [Doc. 17 at 5, ll. 16-20]. S&C even quoted at length an excerpt from the Tribal Council defendants' Motion to Dismiss, explaining that the Tribal Court has jurisdiction in civil matters that arise on an Indian reservation or that involve reservation affairs. [Doc. 31 at 5-6, *citing Stock West Corp. v. Taylor*, 964 F.2d 912, 919-920 (9th Cir. 1992)]. The Tribe incorporated the very same argument nearly verbatim into its pending Motion to Dismiss. [Doc. 96 at 8-9]. To show that the Tribal Court had jurisdiction under the case law that both S&C and the Tribe agree applies here, S&C argued that nearly every "key event pinpointed was an event *that occurred on the reservation*," including:

- S&C met with representatives/members of the Tribe regarding the Skywalk and toured the Skywalk facilities;
- S&C and others drafted an internal memorandum detailing the state of the Skywalk; and
- S&C entered into a consensual business relationship with the Tribe, *i.e.*, the Agreement.

[Doc. 31 at 6-7] (emphasis added).

Having judicially admitted that it met with members of the Tribe, toured the Skywalk, drafted a memorandum and, most importantly, entered into the Agreement with the Tribe that S&C now seeks to enforce, *all of which occurred on the Hualapai Reservation*, S&C cannot avoid the only logical conclusion of its own argument – Tribal Court is the proper forum for any viable claims S&C may have against the Tribe arising out of the consensual business relationship.

B. The Tribal Court Also Has Jurisdiction Under The Montana Exceptions.

1. The Tribal Court has adjudicatory jurisdiction through S&C's consensual contractual relationship with the Tribe.

The first *Montana* exception allows tribes to regulate the conduct of non-Indians who enter into "consensual relationships with the tribe or its members, through commercial dealings,

1 contracts, leases or other arrangements.” *Montana v. United States*, 450 U.S. 544, 565 (1981).
2 *Montana* involved tribal regulatory authority over non-Indians “through taxation, licensing or
3 other means.” *Montana*, 450 U.S. at 565 (emphasis added). S&C tries to use this language to
4 limit the exception to regulatory matters, but the Supreme Court’s language has not been
5 interpreted so restrictively. In fact, the Ninth Circuit held that the agreement between Plaintiffs
6 and a Tribal corporation to manage the Skywalk was a consensual contractual relationship that
7 could satisfy the first *Montana* exception. *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa*
8 *Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013), *cert. denied sub nom. Grand Canyon Skywalk Dev.,*
9 *LLC v. Grand Canyon Resort Corp.*, 134 S. Ct. 825 (2013).

10 In other words, the Ninth Circuit in *Grand Canyon Skywalk* held that *Montana* applied to
11 a tribe’s jurisdiction to adjudicate disputes with non-Indians, not just a tribe’s power to regulate
12 them. As the Ninth Circuit recognized in *Grand Canyon Skywalk*, regulatory authority and
13 adjudicatory jurisdiction have the same contours: “Where a tribe has regulatory jurisdiction and
14 interests, such as those at stake here, it is also likely to have adjudicatory jurisdiction as the
15 district court concluded.” 715 F.3d at 1205. S&C’s consensual contractual relationship with the
16 Tribe gives the Tribe regulatory jurisdiction over S&C, which S&C admits. Response at 11, ll. 6-
17 7. As a result, the Tribe has adjudicatory jurisdiction as well. *See Water Wheel Camp*
18 *Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 (9th Cir. 2011) (non-Indian’s lease with
19 tribe for use of tribal property established a consensual relationship giving tribal court
20 adjudicatory jurisdiction in eviction action concerning the same property).

21 In addition, issues raised by S&C such as the alleged waiver of sovereign immunity in the
22 Agreement or the alleged duty of indemnification arise directly out of its consensual relationship
23 with the Tribe. *See Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 942
24 (9th Cir. 2009) (a tribal court has jurisdiction over a non-member “where the claim has a nexus to
25 the consensual relationship between the nonmember and the disputed commercial contacts with
26 the tribe”). The claims S&C has raised in the Third-Party Complaint would not exist but for that
27 consensual relationship. Therefore, there is an adequate nexus between the consensual
28 relationship and the claims at issue.

1 This result makes sense given the policy favoring exhaustion of tribal remedies, which is
 2 intended to advance Congress' commitment to tribal self-government and self-determination,
 3 allow the tribal court the first opportunity to address jurisdictional challenges and promote
 4 judicial economy by allowing a full record to be developed in tribal court. *Grand Canyon*
 5 *Skywalk*, 715 F.3d at 1200, citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,
 6 471 U.S. 845, 856 (1985). To promote the primary goal of advancing tribal self-government and
 7 self-determination, a tribal judicial system should resolve a dispute brought against a tribe arising
 8 out of a contract with the tribe, made on tribal land, to provide services to the tribe on tribal land.

9 Finally, S&C could reasonably have anticipated being subject to the Tribe's jurisdiction.
 10 *Grand Canyon Skywalk*, 715 F.3d at 1206 ("GCSD should have reasonably anticipated being
 11 subjected to the Tribe's jurisdiction"). After all, S&C argued early in this case that the Tribal
 12 Court had jurisdiction because, among other things, the Agreement was entered into on the
 13 Hualapai Reservation and performance took place there. Tribal jurisdiction can come as no
 14 surprise now.

15 **2. This action plausibly threatens the political integrity, economic**
 16 **security, or health and welfare of the Tribe.**

17 The second *Montana* exception exists where the conduct of the non-Indian may impact the
 18 "political integrity, economic security, or the health or welfare of the Tribe. 450 U.S. at 565.
 19 S&C argues that the amount at issue is not sufficient to threaten the economic security of the
 20 Tribe. S&C forgets its own words in its motion to dismiss Plaintiffs' Complaint, that if tribal
 21 jurisdiction is even "colorable" or "plausible," the Tribal Court should decide its own jurisdiction
 22 in the first instance. [Doc. 31 at 5, citing *comity Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916,
 23 920 (9th Cir. 2008)].

24 S&C is not in a position to determine what amount of money would be substantial enough
 25 to threaten the economic security of the Tribe. Plaintiffs seek compensation for claimed past and
 26 future harm, as well as punitive damages. It is at least plausible that the amount of damages
 27 sought by Plaintiffs, for which S&C would seek indemnity, could threaten the economic security
 28 or welfare of the Tribe.

1 In addition, more than money is possibly at stake. S&C's argument that the Tribe can
2 waive immunity despite the complete absence of an express waiver in a contract goes to the heart
3 of the Tribe's sovereignty. Determining waiver under these circumstances could impact other
4 Tribal agreements and open the door for other vendors to make similar arguments. This could
5 place the Tribe's political integrity, welfare, and economic security at risk. As such, the issues in
6 the Third-Party Complaint should be decided, if necessary, in Tribal Court.

7 **IV. CONCLUSION.**

8 The Tribe did not waive sovereign immunity in the Agreement, and S&C has identified no
9 other conduct that would constitute a waiver. To the extent there is any question, however,
10 S&C's claims against the Tribe belong in Tribal Court. Therefore, the Third-Party Complaint
11 should be dismissed.

12 DATED this 30th day of March, 2015.

13 GALLAGHER & KENNEDY, P.A.

14 By: /s/ Jeffrey D. Gross

15 Jeffrey D. Gross (admitted *pro hac vice*)
16 Christopher W. Thompson (admitted *pro hac*
17 *vice*)
2575 East Camelback Road
Phoenix, Arizona 85016-9225

18 Thomas G. Ryan (NV Bar No. 9378)
19 LEWIS ROCA ROTHGERBER LLP
3993 Howard Hughes Parkway, Ste. 600
20 Las Vegas, Nevada 89169

21 *Attorneys for The Hualapai Indian Tribe of*
22 *the Hualapai Indian Reservation*

CERTIFICATE OF SERVICE

I certify that I am an employee of GALLAGHER & KENNEDY, P.A., and that on this 30th day of March, 2015, I served a true and correct copy of **REPLY IN SUPPORT OF MOTION TO DISMISS THIRD-PARTY COMPLAINT** via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk.

/s/ Candice J. Cromer

an Employee of
GALLAGHER & KENNEDY, P.A.