No. 13-

IN THE

Supreme Court of the United States

GRAND CANYON SKYWALK DEVELOPMENT LLC,
Petitioner,
v.

GRAND CANYON RESORT CORPORATION; SHERRY COUNTS; PHILBERT WATAHOMIGIE; BARNY IMUS, RONALD QUASULA, SR., RUDOLPH CLARKE, HILDA COONEY, JEAN PAGILAWA, CHARLES VAUGHN AND CANDIDA HUNTER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Grand Canyon Skywalk Development, LLC (GCSD), a Nevada limited liability company, had a contract with a Hualapai tribal corporation that included a valid arbitration clause with an express and unequivocal waiver of the enterprise's tribal sovereign immunity. The Hualapai Indian Tribe ("Tribe") "condemned" this contract by eminent domain, purportedly stripping GCSD of any remedy outside of a hearing in tribal court as to whether the taking had been made for a public purpose. The Tribe's eminent domain ordinance expressly denies GCSD the right to be heard on any other substantive issue, including valuation, and did not require the posting of any bond. Pursuant to the contract, GCSD had built and operated the Grand Canyon Skywalk (Skywalk), a tourist attraction on federal trust land, and received an intangible contract right to be the sole manager of the Skywalk and share proceeds with the Tribe. The Tribe "seized" the Skywalk management contract in February 2012, immediately filed its eminent domain proceeding in tribal court, and has operated the Skywalk, without any remuneration to GCSD, ever since.

The Ninth Circuit, affirming the District Court, held that GCSD must exhaust its tribal court remedies and that the dispute did not fall under the exceptions to tribal court exhaustion laid out in *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985) for actions that are patently without jurisdiction or motivated by bad faith. The Ninth Circuit's decision raises four questions:

1. Does *Montana v. United States*, 450 U.S. 544 (1981) apply on tribal land, as this Court suggested in *Nevada v. Hicks*, 533 U.S. 353, 358 (2001), or does this Court acquiesce in the Ninth Circuit's contrary decision in *Water*

Wheel Camp Recreation Area v. LaRance, 642 F.3d 802 (9th Cir. 2011)?

2. Does a non-tribal member consent to tribal jurisdiction under *Montana* even when that "consent" comes in the form of a contract with a tribal corporation which expressly provides that disputes will be resolved through binding arbitration, not in tribal court, and where the tribal enterprise has expressly waived its sovereign immunity to permit arbitration?

3. Are intangible contract rights of a Nevada corporation located on federal land held in trust for the Tribe and thus subject to the Tribe's eminent domain powers because they relate to activities on tribal land?

4. Does the bad-faith exception to *National Farmers* exhaustion require a showing that the tribal court acted in bad faith, or is it sufficient to demonstrate that the Tribe's governing council (Tribal Council) did so and that the Tribe's judiciary lacked judicial independence?

PARTIES TO THE PROCEEDING

The petitioner, Grand Canyon Skywalk Development, LLC, is a Nevada limited liability company. The respondents listed in the caption are a tribal corporation wholly owned and controlled by the Tribe and, per Rule 35(3), the current members of the Hualapai Tribal Council, the singular executive and legislative branch of the Tribe.

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PETITION FOR A WRIT OF CERTIORARI

GCSD respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1198 (9th Cir. 2013), and is reprinted in the Appendix to this Petition ("Pet. App.") at 3a–20a. The District Court opinion is unofficially reported at 2012 WL 1207149, and is printed here at Pet. App. 21a–40a.

JURISDICTION

The Court of Appeals entered its judgment on April 26, 2013 and denied a petition for rehearing en banc on June 7, 2013, order reprinted at Pet. App. 1a–2a, and issued its mandate in this case on June 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF RELATED CASES

There are three related cases in this matter. The first is the Hualapai Tribal Court case that GCSD seeks to enjoin. *Hualapai Tribe v. Grand Canyon Skywalk Development*, Case No. 2012-CV-017 (Hualapai Tribal Court). The second is a separate federal district court action for the confirmation of an arbitral award in favor of GCSD and against the tribal corporation, 'Sa' Nyu Wa, Inc. ("SNW"). The District Court confirmed the arbitral award and the appeal of that decision is currently pending before the Ninth Circuit, although it is stayed by bankruptcy proceedings. *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, CV-12-08183-PCT-DGC, 2013 WL

525490 (D. Ariz. Feb. 11, 2013). The third case is SNW's bankruptcy proceeding, which is being conducted in the Bankruptcy Court for the District of Arizona. *In re 'Sa' Nyu Wa, Inc.*, No. 0:13-bk-02972-BMW.[1]

[1] In light of the bankruptcy action, in which appellate proceedings against the debtor, SNW, have been stayed, this Petition proceeds only against non-debtor parties, namely a different tribal corporation and the members of the Tribe's governing Tribal Council.

STATEMENT OF THE CASE

This case raises the question of whether, and to what extent, this Court's comity-based tribal court exhaustion doctrine applies when an Indian tribe – through the bad-faith actions of its governing council with effective control of the tribal judiciary – has used its purported eminent domain power to "take" the bargained-for contractual rights and remedies of a non-Indian corporation.

A. Factual Background

For several decades, the late David Jin worked closely with the Tribe, a federally recognized American Indian nation, to bring tourists to the Tribe's lands in the western portion of the Grand Canyon. In 1996, Jin conceived the idea of building a transparent glass bridge extending out over the canyon as a viewing platform for travelers from around the world. After extensive discussions with the Tribe, Jin spearheaded the design and construction of the Skywalk and fully financed it out of his own resources – an initial $30 million investment. Through Grand Canyon Skywalk Development ("GCSD"), a Nevada limited liability company with its principal place of business in Las Vegas, Jin entered into a contract with 'Sa' Nyu Wa, Inc. ("SNW"), a corporation charted under Hualapai law, and wholly owned by the Tribe, for the purpose of entering into this venture. Under this contract, GCSD was to build and operate the Skywalk for the Tribe in exchange for a multi-year contract that entitled GCSD to manage the Skywalk and receive half the profits for the first few years of operation, and then a declining share, as GCSD recouped its initial investment. This contract included a dispute

resolution provision requiring all disputes to be resolved by binding arbitration under American Arbitration Association rules and an accompanying, duly enacted waiver of the tribal enterprise's sovereign immunity.

The Skywalk opened in 2007 at Grand Canyon West, on federal land held in trust for the Tribe, and has been a major financial success. Yet to date, the Tribe has made no revenue distributions whatsoever to GCSD. Instead, year after year, SNW refused to turn over even the most basic financial documents, declined to complete the obligatory annual audits, and resisted Jin's attempts to resolve differences through amicable discussions or arbitration as provided by contract.

After years of failed attempts at amicable resolution and many months of litigation, GCSD succeeded in bringing SNW into arbitration. The arbitrator ordered the production of certain key financial documents. Immediately thereafter, instead of complying with the order, the Tribe put into effect a scheme to abrogate SNW's contract with GCSD through the use of its sovereign powers of eminent domain. Specifically, the Tribe's governing council (Tribal Council) exercised purported eminent domain powers under a tribal condemnation ordinance enacted in 2011, which was specifically designed as a weapon against GCSD, enabling the taking of intangible property interests. Faced with arbitration orders they did not like, the Tribal Council voted to condemn GCSD's intangible contract rights to manage the Skywalk, thereby supposedly consuming all GCSD's associated legal remedies and causes of action. The Tribe brought an ex parte condemnation action in its Tribal Court, which granted immediate legal effect to the Tribe's purported taking without

notice, a hearing, or posting of a bond – a procedure explicitly authorized by the eminent domain statute the Tribal Council had enacted in 2011, in contemplation of this scheme. GCSD estimates the value of the remaining years on the Skywalk contract at $277 million and believes that the Tribe lacks the resources to pay for the lost value of the Skywalk contract for even the two years that have already passed since the Tribe condemned GCSD's intangible property interest.

With the aid of a public relations firm, whose memorandum laying out this strategy was later published to the entire Tribe by a political opponent of the scheme, Pet. App. 88a– 97a, the Tribal Council compiled a list of clearly and demonstrably false allegations against GCSD to justify its actions. The Tribal Council resolution condemning the Skywalk opens by stating that "whereas, the Skywalk Agreement required GCSD to construct . . . electrical power infrastructure; telecommunications infrastructure; solid waste disposal infrastructure; potable water system; and a sewage/wastewater system" and "whereas, GCSD failed to complete a single Project Improvement other than the glass bridge . . . resulting in an eyesore and a blemish to the Hualapai Reservation" therefore "the Hualapai Tribal Council declares that construction and operation of the Project Improvements . . . is a public use and the acquisition of GCSD's contractual interest in the Skywalk is necessary to carry out such public use." Pet. App. 109a– 115a. Contemporaneous documents between the parties, however, make it clear that the utilities were the Tribe's responsibility, and the arbitral award which was eventually issued against SNW found that the Tribe knew that the utilities were its responsibility: "No agreement, memorandum, email, supplement, amendment or any

other reliable written record indicated otherwise" and "[e]very witness who testified on this point confirmed that fact." Pet. App. 90a & 92a. The Tribe also blamed GCSD for not completing the visitor's center, notwithstanding that the Tribe had issued an official "stop work" order through a formal letter from the Tribal Chairman to Jin. Pet. App. 98a. The AAA arbitrator found that "the available record, as shown in the exhibits, and four days of sworn testimony from fourteen percipient witnesses, confirms at least this much: the work from the [public relations] firm and the statements from tribal leaders in [the official Hualapai newspaper] reflect either grossly misinformed points of view or an intentional effort to distort the public record (not to say slander of Mr. Jin)." *Id*. at 93a–94a

After the Tribe's officials seized the Skywalk structure and barred GCSD's employees and contractors from accessing it, the Tribal Court issued temporary restraining orders, prohibiting GCSD from damaging, destroying, or removing from the Reservation its own personal property. These ex parte orders were signed by two permanent Tribal Court judges, both of whom then promptly recused themselves because they had close blood relationships with Tribal Council members – impermissible conflicts of interests expressly prohibited by the Tribe's Constitution. Despite the fact that the reason for their recusal applied no less to their earlier orders than to subsequent proceedings, the Tribal judges declined to withdraw their earlier orders. By that time these ex parte orders were issued, armed Tribal officers had taken control of the Skywalk – forcing open the safe and removing the cash, physically cutting the wires of the security cameras, and disabling the inventory control

system and replacing it with non-computerized cash registers.

GCSD immediately demanded arbitration as provided by the contract. The Tribe and SNW's attorney responded by sending a letter to the arbitrator, telling him that "Hualapai Tribe's initiation of eminent domain proceedings against GCSD's contractual interests in the agreement includes all such interests, including GCSD's limited rights to request or initiate any arbitration against SNW," and that as GCSD's successor in the contract the Tribe would be terminating the arbitration because "[o]bviously, it makes no sense for the Hualapai Tribe to be litigating" the tribe's own corporation. *See* Pet. App. 45a– 46a. The arbitrator rejected this argument and, following a lengthy arbitration hearing at which SNW refused to appear or participate, issued a $28.5 million award in favor of GCSD, determining that GCSD had committed no breaches of contract and that SNW's claims to the contrary, which were the stated public purpose for the eminent domain action, were "flatly contradicted . . . on nearly every point [by] the documentary and testimonial record" and that the Tribe had deliberately "worked to distort the public record." Pet. App. 89a. When GCSD attempted to collect on the arbitrator's award with federal court confirmation proceedings, SNW filed for federal bankruptcy protection.

B. Proceedings Below

GCSD brought suit in federal district court seeking a temporary restraining order against the actions of the Tribal Court and Tribal Council on the ground that they exceeded their authority over a non-Indian and its off-reservation, out-of-state intangible

property rights. The tribal defendants argued in response that under *National Farmers Union*, GCSD was required to exhaust its remedies in tribal court before it could bring an action in federal court. This would require a full trial on the merits of the Tribe's eminent domain action in Tribal Court because the Hualapai court system does not allow interlocutory appeals. The District Court agreed with the defendants. The court rejected GCSD's arguments that exhaustion was unnecessary because "the action is patently violative of express jurisdictional prohibitions," *National Farmers Union*, 471 U.S. at 338, because the eminent domain action exceeded the limited bounds of the Tribe's authority over non-members under *Montana v. United States*, 450 U.S. 544 (1981), and because the assertion of jurisdiction was "motivated by a desire to harass [and] [was] conducted in bad faith." *Nat'l Farmers Union*, 471 U.S. at 338. GCSD appealed this decision to the Ninth Circuit, while endeavoring to defend the eminent domain action in Tribal Court.

The Ninth Circuit affirmed. It held that "[t]he tribal court does not plainly lack jurisdiction because *Montana*'s main rule is unlikely to apply to the facts of this case." Pet. App. 15a. The court acknowledged that "*Montana v. United States*, 450 U.S. 544 (1981), is 'the path-marking case concerning tribal civil authority over nonmembers,'" Pet. App. 15a. (quoting *Strate v. A-1 Contractors,* 520 U.S. 438, 445 (1997)), but – relying on *Water Wheel* – found that "a tribe's inherent authority over tribal land may provide for regulatory authority over non-Indians on that land without the need to consider *Montana*," Pet. App. 15a. This holding appears to conflict with recent cases in the Eighth and Tenth Circuits, which found that since *Hicks*, the *Montana* analysis

presumptively applies to the exercise of tribal jurisdiction over a non-Indian. *See MacArthur v. San Juan County*, 497 F.3d 1057, 1069 (10th Cir. 2007); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010).

In the alternative, the Ninth Circuit found that the *Montana* exception for "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" gave the Tribal Court jurisdiction over GCSD and its Nevada contractual rights, without regard to the dispute resolution provisions and other protections included in the contract itself. Pet. App. 19a (quoting *Montana*, 450 U.S. at 565.).

Finally, the Ninth Circuit held that a showing of bad faith by the Tribal Council, and evidence that the tribal judiciary lacked functional independence, is insufficient to satisfy the *National Farmers* bad-faith exception to tribal court exhaustion requirement. Pet. App. 14a.

REASONS FOR GRANTING THIS PETITION

I. The Ninth Circuit's holding that *Montana* does not apply on tribal trust land appears to conflict with holdings of the Eighth and Tenth Circuits and this Court's decision in *Hicks*.

In *Hicks*, this Court stated that *Montana*, when "announcing the general rule of no jurisdiction over nonmembers . . . clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land." *Hicks*, 533 U.S. at 360. "The

ownership status of land, in other words, is only one factor to consider," although "sometimes . . . a dispositive factor." *Id.* *Hicks* therefore addressed the question of whether *Montana* applies to causes of action arising on tribal trust lands, and found that it does. In *Hicks*, the respondent tribal member and tribal court, and the federal government as *amicus curiae*, argued that *Montana* was not applicable because "since Hicks's home and yard are on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry." 533 U.S. at 359. The Court rejected this argument, holding that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Id.* "Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981), which this Court has called the 'path-marking case' on the subject, *Strate v. A-1 Contractors*, 520 U.S. 438, 445." *Hicks* at 358.

The Eighth and Tenth Circuits have both read *Hicks* to mean that although the ownership status of the land is a factor that weighs in favor of a finding of tribal jurisdiction, it is always necessary to show that the exercise of jurisdiction falls under one of the two exceptions to the overarching rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. As the Eighth Circuit recently held, "[a]lthough the issue in the *Montana* case was about tribal regulatory authority over nonmember fee land within the reservation, *Montana,* 450 U.S. at 547, *Montana's* analytic framework now sets the outer limits of tribal civil jurisdiction-both regulatory and adjudicatory-over nonmember activities on tribal and nonmember land." *Attorney's Process & Investigation*

Servs., 609 F.3d at 936. The Tenth Circuit put it more bluntly: "The notion that *Montana*'s applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in *Hicks*." *MacArthur*, 497 F.3d at 1069. "[T]he only relevant characteristic for purposes of determining *Montana*'s applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority." *Id*. at 1070.

The Ninth Circuit's decision in this case therefore represents both a circuit split and an apparent clash with this Court's precedent. The Ninth Circuit held that "[t]he tribal court does not plainly lack jurisdiction because *Montana*'s main rule is unlikely to apply to the facts of this case." Pet. App. 15a. The panel reached that result by relying on *Water Wheel Camp*, which "examine[d] the extent of an Indian tribe's civil authority over non-Indians acting on tribal land within the reservation" and held that "the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana,* 642 F.3d at 805. The *Water Wheel* court conceded that this approach evades the implications of "the path-marking case concerning tribal civil authority over nonmembers," Pet. App. 15a, but explained that *Montana* is not applicable because: "With the exception of *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court has applied *Montana* 'almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent,'" Pet. App. 18a, quoting *Water Wheel*, 642 F.3d at 809.[2]

[2] The statement that the Supreme Court has "almost exclusively" applied *Montana* to non-Indian land, of course, is

Even within the Ninth Circuit there appears to be a difference of opinion. In 2006 the Ninth Circuit held "[i]n *Hicks*, the Court emphasized that '*Montana* applies to both Indian and non-Indian land.'" *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006) (quoting *Hicks,* 533 U.S. at 360). But earlier, in 2002, the same court held that a tribe has inherent jurisdiction over tribal roads without looking to *Montana*. *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002). The dissent in that case observed that "contrary to the majority's position, no current authority from the Supreme Court or from any circuit court supports the view that the *Montana* rule does not apply to tribal land cases." *McDonald*, 309 F.3d at 543. (Wallace, J., dissenting).

Since *Water Wheel* came out and established a rule that *Montana* does not apply on tribal land outside a narrow exception for state government actors – the court's attempt to distinguish *Hicks* – two district courts within the Ninth Circuit, in contrast to the District Court in this case, have observed that this rule is in clear conflict with Supreme Court precedent. One district court order flatly refused to follow *Water Wheel*, saying "[t]he [Supreme] Court's most recent pronouncement leaves no ambiguity." *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938 (D. Ariz. Jan. 26, 2012) (unpublished). "Unless words are infinitely elastic, one cannot limit *Montana* to the activities of non-Indians on fee patented land." *Id*. Another district court judge, when a party argued that *Hicks* had held that *Montana* applied to tribal land, also observed that the "argument is not unfounded." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 2013 WL

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tantamount to an admission that the Court has sometimes applied *Montana* on Indian land.

321884 (D. Ariz. Jan. 28, 2013) (unpublished). In that case, however, the court held that "[in] spite of this apparently clear language, the Ninth Circuit Court of Appeals' *per curiam* holding in *Water Wheel Camp Recreational Area v. LaRance,* 642 F.3d 802 (9th Cir.2011), cannot be disregarded by the Court." *Id*.

Outside of the Ninth Circuit, where *Montana* either still applies or has been interpreted less narrowly, tribal courts are presumed to have no jurisdiction over non-members, apart from those limited exceptions where non-members enter into consensual arrangements with tribes, or where non-Indians act in a manner that that so threatens tribal governments that the results would be "catastrophic." *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.,* 554 U.S. 316, 341 (2008). Given this circuit split, the Court could provide welcome clarity by determining whether *Montana* does indeed apply to tribal lands, or whether tribes' inherent powers to exclude permit actions such as the ex parte condemnation proceeding and seizing of non-Indians' intangible property rights as are at issue in this case. As a practical matter, the seizing of GCSD's interest in the Skywalk nearly two years ago has resulted in no relief to a non-Indian that has not been paid anything from a joint venture with a tribally owned corporation. In order to evaluate risk factors in entering into such relationships concerning Indian lands, the question whether *Water Wheel* has carved out a geographically-limited exception to the *Montana* doctrine or not is a question of substantial national importance.

II. The Ninth Circuit's interpretation of the "consensual relationship" exception in *Montana* swallows its main rule and jeopardizes dispute-resolution provisions in contracts with Indian tribes and tribal companies

The Ninth Circuit's alternative holding that the *Montana* test is satisfied, thereby requiring tribal court exhaustion even when arbitration is the sole contractual remedy, is also problematic. By holding that merely entering into a contract with an Indian entity constitutes consent to the civil jurisdiction of that tribe – including implied consent to tribal eminent domain regulation and adjudication, that purport to take not just property interests, but the bargained-for remedy of arbitration, accompanied with an express waiver of tribal sovereign immunity – the Ninth Circuit has effectively abrogated the negotiated dispute resolution and choice of law provisions of many other arms-length contracts in Indian country. This sweeping interpretation of the "consensual relations" exception to the *Montana* doctrine not only ignores precedent limiting the application of this exception, but discourages commercial relationships with tribal corporations and enterprises. This Court should grant certiorari to clarify that a party entering into a contract with a tribal entity may limit its exposure to tribal jurisdiction through express contractual terms, including arbitration with the requisite express and unequivocal waiver of tribal sovereign immunity from suit.

"[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. Normally, therefore, neither a tribe's eminent domain powers

nor its adjudicatory jurisdiction extend beyond the reach of its own tribal members. There is an exception for "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* This exception is not, however, so unlimited that it "would swallow the rule." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001). Courts instead look to the "nexus" between the consensual relationship and "the tax or regulation imposed by the Indian tribe," *id.* at 656, and whether the parties would "reasonably have anticipated" that their transactions "could trigger tribal authority to regulate those transactions," *Plains Commerce Bank*, 554 U.S. at 338. The forced sale or disposition of a non-Indian interest has been explicitly rejected as an "activity" that tribes may regulate. *Id.* at 332-34.

The Ninth Circuit ignored those limitations on the consensual exception, and after observing that "GCSD voluntarily entered into a contract with SNW by signing an agreement to develop and manage the Skywalk and both parties were represented by counsel," Pet. App. 19a, found that "[g]iven the consensual nature of the relationship between the parties and the potential economic impact of the agreement, the tribal court could conclude it has jurisdiction over SNW's dispute with GCSD under either of *Montana*'s exceptions." *Id.* at 19a–20a.

It is true that GCSD voluntarily entered into a contract with SNW, a tribal entity, but that contract expressly stated that [a]ny controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binder arbitration" and that "any litigation" and all "civil matters" must be brought in federal district court in Arizona. Pet. App.

81a. GCSD could not reasonably have contemplated that entering into the contract with a tribally-chartered corporation would give the Tribe carte blanche to exercise jurisdiction over GCSD when the contract, which was negotiated by representatives of the Tribe and signed by its wholly-owned and controlled corporation, says just the opposite. More generally, arbitration, choice of forum, and choice of law clauses are a perfectly standard technique used by contracting parties to provide clarity and certainty in their relationships – both in Indian country and throughout the world – and federal law and policy heavily favors their enforcement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

III. The Ninth Circuit's expansive reading of tribal jurisdiction cannot be applied to the eminent domain power which, unlike traditional regulatory jurisdiction or the taxing power, is generally understood to be exclusive to a single sovereign.

This Court should grant certiorari to clarify the limitations on the extra-territorial application of the eminent domain power and to curb its abuse. Unlike the power to tax or regulate, the eminent domain power is fundamentally exclusive, eliminating all other claims to a piece of property. The exclusive nature of this power, especially when applied to out-of-state intangible contract rights that are property only in the most expansive sense of the word, is ill-suited to the type of loose jurisdictional analysis applied by the Ninth Circuit.

A sovereign's eminent domain powers only extend within its own boundaries, and there can only be one sovereign with eminent domain power over a particular piece of property: "[E]minent domain is, by its very nature, exclusive of another sovereign's power to condemn the same property." *Nichols on Eminent Domain* (3d ed. 1980), § 2.12. "In order to avoid conflicting judgments with respect to the same property, only one state may condemn a particular piece of property, whether tangible or intangible." *Mayor & City Council of Baltimore v. Baltimore Football Club Inc.*, 624 F. Supp. 278, 284 (D. Md. 1985).

For the purpose of powers that are exclusive to one sovereign, "intangible personal property is found at the domicile of its owner." *Texas v. New Jersey*, 379 U.S. 674, 682 (1965) (applying this principle to the law of escheat). It is uncontested that the domicile of GCSD is in Nevada, where it is incorporated and has its headquarters. The vast majority of GCSD's business operations take place in promoting the Skywalk business, especially to potential tourists from overseas, and then bringing them to the Skywalk and back. The remote location of the Skywalk itself requires that the situs of the business be located outside the boundaries of the Tribe's reservation. The Ninth Circuit sidesteps this problem by saying that "although this case involves an intangible property right within a contract . . . [w]here a tribe has regulatory jurisdiction and interests, such as those at stake here, it is also likely to have adjudicatory jurisdiction." Pet. App. 16a–17a. The law is well-settled, however, that the property right to a contract resides in the state of the party for whom the contract is an asset, not the state, or reservation, of the party for whom that contract is a liability. *Texas*, 379 U.S. at 680 (holding, in the

context of escheat, that the property was located in creditor's state not the debtor's because "it would be strange to convert a liability into an asset when the State decides to escheat.")

The Tribe has reached its eminent domain powers into another state to take property that was situated there. In the absence of this purported eminent domain power, the Tribe has no authority to force this dispute out of arbitration and into tribal court.

IV. The panel decision takes an overly narrow view of the *National Farmers* bad-faith exception to the tribal court exhaustion requirement.

This Court should grant certiorari because the decision below interprets the *National Farmers* bad-faith exception to the tribal court exhaustion requirement too narrowly, to the point that it can only be satisfied upon a showing of overwhelming bad faith by the tribal judiciary. In the courts below, GCSD presented substantial evidence supporting its claim that the Tribal Council had instigated its eminent domain action as part of a deliberate scheme to avoid disclosing financial information to an arbitrator, and that the Tribal Court lacked judicial independence. The Ninth Circuit held that evidence of bad faith actions other branches of the tribal government was irrelevant to the question of bad faith in the absence of "conclusive" evidence of a lack of judicial independence, adding that the bad faith on the part of the Tribal Council was irrelevant. Such a crabbed reading of the bad-faith exception is inconsistent with *National Farmers* and other controlling precedent of this Court.

In *National Farmers*, this Court "recognized that Congress is committed to a policy of supporting tribal self-government and self-determination" and held that this "policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 471 U.S. at 856. "[T]he exhaustion rule stated in *National Farmers* was 'prudential, not jurisdictional.'" *Strate*, 520 U.S. at 451, quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20, n. 14 (1987). There are several exceptions to the exhaustion rule, four of which were set forth in *National Farmers*:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," *cf. Juidice v. Vail*, 430 U.S. 327, 338 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Nat'l Farmers, 471 U.S. at 857 n. 21. Additional exceptions were established by *Strate*, for "[w]hen ... it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule," 520 U.S. at 459-60; by *Hicks*, for causes of action against state officials in performance of their official duties, 533 U.S. at 369; and by *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 (1999), for causes of action created by federal statutes that include provisions establishing the federal courts as the primary forum for adjudication of disputes.

Indeed, with the exception of *Iowa Mutual*, this Court has created a new exception to the tribal court exhaustion requirement every time it has considered the issue. In contrast, the Ninth Circuit has interpreted this doctrine to create an inexplicably narrow rule that, in practice if not in theory, elevates what should be a matter of judicial comity into a jurisdictional prerequisite.

GCSD made a showing of bad-faith on many levels: in the enactment of an eminent domain ordinance targeting GCSD; in that ordinance's provisions, which precluded any substantive judicial review apart from whether the taking was for a public purpose; in the fact that the two judges who issued the ex parte orders that have deprived GCSD of its property since February 2012 both violated the Hualapai Constitution and recused themselves from the case only after doing so; that the Tribal Council majority, advised by legal counsel, planned and executed a scheme to deprive GCSD of its intangible property interest through the use of eminent domain to take GCSD's bargained-for contractual right to arbitration; and that a leading expert on tribal sovereignty and self-governance

Joseph Myers, the longtime executive director of the National Indian Justice Center, had recently conducted a recent study of the Hualapai Tribal Court and concluded it "is not capable of functioning without control by the Tribal Council." *See* Pet. App 39a at n.5.

Under such circumstances, the Ninth Circuit has set the evidentiary bar for exceptions to the tribal court exhaustion rule unreasonably high, and has misinterpreted the legal requirement, first articulated in *National Farmers*, that the evidentiary

showing must go the question of bad faith on the part of the tribal judiciary. Such a restricted reading of the bad faith exception does not serve the purposes behind the tribal court exhaustion rule: to encourage respect for tribal courts through the exercise of the prudential doctrine of comity. The tribal court exhaustion rule exists to "support[ ] tribal self-government and self-determination" and allow the tribal court "to determine its own jurisdiction and to rectify any errors it may have made." *Nat'l Farmers,* 471 U.S. at 857. Yet such a rule was never intended to be absolute where the Tribal Council repeatedly acts in bad faith and the judiciary is controlled by it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12-15634

GRAND CANYON SKYWALK DEVELOPMENT, LLC,

PLAINTIFF-APPELLEE

v.

'SA' NYU WA; GRAND CANYON RESORT CORPORATION; RICHARD WALLERMA, SR.; WYNONA SINYELLA; RUBY STEELE; CANDIDA HUNTER; BARNEY ROCKY IMUS; WAYLON HONGA; CHARLES VAUGHN, SR.; WANDA EASTER; JACI DUGAN; and HON. DUANE YELLOWHAWK,

DEFENDANTS-APPELLANTS

ORDER

[Filed: June 7, 2013]

Before: RAYMOND C. FISHER, RICHARD C. TALLMAN, and CONSUELO M. CALLAHAN, Circuit Judges.

Judges Tallman and Callahan have voted to deny the petition for rehearing en banc, and Judge Fisher has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing en banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-15634

GRAND CANYON SKYWALK DEVELOPMENT, LLC,

PLAINTIFF-APPELLEE

v.

'SA' NYU WA; GRAND CANYON RESORT CORPORATION; RICHARD WALLERMA, SR.; WYNONA SINYELLA; RUBY STEELE; CANDIDA HUNTER; BARNEY ROCKY IMUS; WAYLON HONGA; CHARLES VAUGHN, SR.; WANDA EASTER; JACI DUGAN; and HON. DUANE YELLOWHAWK,

DEFENDANTS-APPELLANTS

[Argued and Submitted: October 19, 2012
Filed: April 26, 2013]

Before: RAYMOND C. FISHER, RICHARD C. TALLMAN, and CONSUELO M. CALLAHAN, Circuit Judges.

TALLMAN, Circuit Judge:

We must once again address the subject of tribal court jurisdiction over disputes arising when non-Indians choose to do business in Indian country. Underlying this jurisdictional question is a multi-million dollar development contract involving the building and operation of a tourist destination overlooking one of the world's great wonders, the Grand Canyon. The Skywalk is a glass-bottomed viewing platform suspended 70 feet over the rim of the Grand Canyon with the Colorado River flowing thousands of feet below.

Grand Canyon Skywalk Development, LLC ("GCSD"), a Nevada corporation, entered into a revenue-sharing contract with Sa Nyu Wa ("SNW"), a tribally chartered corporation of the Hualapai Indian Tribe. When a dispute arose over the contract, GCSD sued SNW in Hualapai Tribal Court to compel arbitration. While 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.

GCSD responded by filing suit against SNW in the United States District Court for the District of Arizona seeking declaratory judgment that the Hualapai Tribe lacked the authority to condemn its intangible property rights and injunctive relief. The district court denied the temporary restraining order ("TRO") to enjoin SNW based on the principle of comity and required GCSD to exhaust all possible tribal court remedies before proceeding in federal court. The district court relied on our decision in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir.2011), and also concluded there was not a sufficient basis to apply

the bad faith or futility exceptions. For the same reasons cited by the district court, we affirm.

I.

On December 31, 2003, GCSD and SNW entered into a revenue-sharing "Development and Management Agreement" to establish a glass bridge tourist overlook and related facilities known as the Skywalk on remote tribal land. In addition, GCSD agreed to provide shuttle services from locations outside the reservation to the Skywalk. The parties signed an amended agreement on September 10, 2007, and later created a trust to manage the shared revenues on March 10, 2010.

GCSD filed a complaint in Hualapai Tribal Court on February 25, 2011, seeking to compel SNW to engage in arbitration pursuant to their agreement's dispute resolution clause. SNW objected, but nonetheless participated, and on February 1, 2012, an American Arbitration Association arbitrator set deadlines for a joint prehearing schedule and resolution of any outstanding discovery disputes, including depositions and subpoenas.

As arbitration proceeded, the Hualapai Tribal Council passed Resolution No. 20–2011 on April 4, 2011, enacting § 2.16 of the Hualapai Law and Order Code, which codified the Tribe's power to invoke eminent domain to condemn property for public use. On February 7, 2012, acting under § 2.16, the tribal council passed Resolution No. 15–2012 to acquire "GCSD's contractual interest in the Skywalk Agreement under the power of eminent domain and to do all things necessary to accomplish th[at] purpose." The Hualapai Tribal Court followed by

issuing a TRO against GCSD, and SNW filed a Declaration of Taking with the tribal court.

GCSD responded on two fronts: it filed an expedited motion for a TRO in district court to stop the eminent domain proceedings, and it opposed the taking in Hualapai Tribal Court. After multiple hearings, the district court denied GCSD's TRO by invoking the principles of comity and ordered GCSD to exhaust tribal court remedies prior to review in federal court. GCSD timely appealed on March 22, 2012.

II.

We have jurisdiction under 28 U.S.C. § 1292(a)(1) as an appeal from denial of injunctive relief. Although TROs are not typically appealable interlocutory orders, we may review a TRO that "possesses the qualities of a preliminary injunction" where the "district court holds an adversary hearing and the basis for the court's order was strongly challenged." *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir.2010). We review questions of tribal court jurisdiction and exhaustion of tribal court remedies de novo and factual findings for clear error. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir.2006); *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 n. 1 (9th Cir.2009).[1]

[1] While appellate review of a district court's denial of a TRO is typically for an abuse of discretion, the question of tribal jurisdiction and exhaustion of tribal remedies takes priority in this case and provides the appropriate standard of review.

III.

SNW argues, for the first time on appeal, that collateral estoppel bars GCSD from raising similar jurisdictional questions on appeal that it raised before the district court in an earlier case dismissed without prejudice. Because GCSD's argument fails on the merits, we need not consider either whether SNW waived this argument by failing to raise it in the district court or whether collateral estoppel applies here.

IV.

Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15–16, (1987); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244–47 (9th Cir.1991). As support for this premise, the Supreme Court cites: (1) Congress's commitment to "a policy of supporting tribal self-government and self-determination;" (2) a policy that allows "the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge;" and (3) judicial economy, which will best be served "by allowing a full record to be developed in the Tribal Court." *Nat'l Farmers*, 471 U.S. at 856.

We have interpreted *National Farmers* as determining that tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. *Crow Tribal Council*, 940 F.2d at 1245 n. 3. "Therefore, under *National Farmers*, the federal courts should not even

make a ruling on tribal court jurisdiction ... until tribal remedies are exhausted." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir.1989). However, there are four recognized exceptions to the requirement for exhaustion of tribal court remedies where:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule.

Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir.1999) (citations omitted). GCSD raises bad faith, futility, and plain lack of tribal governance in support of its position. We review each of these exceptions in turn but ultimately conclude that none offers a sufficient basis to avoid exhaustion of tribal court remedies in this case.

V.

The Supreme Court has suggested that a federal court need not wait until tribal remedies have been exhausted to consider a case if "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." *Nat'l Farmers*, 471 U.S. at 856 n. 21 (internal citation omitted). Black's Law Dictionary defines bad faith as "[d]ishonesty of belief or purpose." 149 (9th ed. 2009). *National Farmers* used the passive voice and neither we, nor the

Supreme Court, have expressly stated who must act in bad faith for it to apply. We now hold that where, as here, a tribal court has asserted jurisdiction and is entertaining a suit, the tribal court must have acted in bad faith for exhaustion to be excused. Bad faith by a litigant instituting the tribal court action will not suffice.

A.

The source of the bad faith exception in the tribal court context is *National Farmers*, 471 U.S. at 856 n. 21, 105 S.Ct. 2447, which imported it from *Juidice v. Vail*, 430 U.S. 327, 338 (1977). In *Juidice*, the state court issued a commitment order, and the defendant was arrested after he failed to attend a deposition, appear for a hearing, and pay a fine. *Id.* at 329–30. Rather than appeal his case in state court, he filed a 42 U.S.C. § 1983 claim in district court. *Id.* at 328–30. Upon review, the Supreme Court held that a federal court must abstain from making a determination during a state proceeding based on the principle of comity unless the proceeding was motivated by a desire to harass or was conducted in bad faith. See *id.* at 334–38. The Court looked to the proceeding and the court overseeing that proceeding to make its determination. *See id.* at 338. (holding that the bad faith exception "may not be utilized unless it is alleged and proved that [the State Courts] are enforcing the contempt procedures in bad faith or are motivated by a desire to harass"). The defendant there alleged bad faith by the plaintiffs, which the Court explicitly held insufficient to trigger the exception. *See id.* (holding that the exception was not triggered because "[w]hile some paragraphs of the complaint could be construed to make [bad faith] allegations as to the creditors, there are no comparable allegations with respect to appellant

justices who issued the contempt orders"). Analogizing to this case, it must be the Hualapai Tribal Court that acts in bad faith to avoid the requirement to exhaust tribal court remedies.

Additionally, a broader interpretation would unnecessarily deprive tribal courts of jurisdiction and violate the principles of comity that underlie the exhaustion requirement. A party would need only allege bad faith by the opposing party, or a third party, to remove the case to federal court. Comity principles require that we trust that our tribal court counterparts can identify and punish bad faith by litigants as readily as we can. GCSD's proposed reading of the exception would swallow the rule and undermine the Supreme Court's general principle of deference to tribal courts.

GCSD points to two Ninth Circuit cases in support of its broader interpretation of who may act in bad faith to trigger the exception, but neither is dispositive of the issue. In *A & A Concrete, Inc. v. White Mountain Apache Tribe*, the appellants argued that enforcement of a statutory scheme had been in bad faith. 781 F.2d 1411, 1417 (9th Cir.1986). We rejected the argument because there was no evidence of bad faith in the record. *See id*. Similarly, in *Atwood v. Fort Peck Tribal Court Assiniboine*, we considered and rejected the bad faith exception in a single sentence by stating that "[t]here has been no showing that [the defendant] asserted tribal jurisdiction in bad faith or that she acted to harass [the plaintiff]." 513 F.3d 943, 948 (9th Cir.2008). Although both of these decisions looked beyond the tribal court for their bad faith analysis, the topic received only a cursory review and was quickly dismissed. Neither case defined the scope of bad faith, and more importantly, neither case applied the bad faith

exception. Ultimately, where a tribe has an established judicial system as here, the interpretation most faithful to *National Farmers* is that it must be the tribal court that acts in bad faith to exempt the party from exhausting available tribal court remedies.

B.

The facts of this case do not support a finding of bad faith on the part of the tribal court. GCSD urges us to determine that the Hualapai Tribal Court Evaluation,[2] the proffered testimony of its author, Executive Director Joseph Myers, and other evidence proved that the tribal court and tribal council were inextricably intertwined such that bad faith by the tribal council could be imputed to the tribal court. However, the proffered evidence does not conclusively support that claim. The majority of the statements in the Evaluation are broad generalizations or guiding principles. Two specific findings directly refute GCSD's contentions: (1) "no interviewee stated that there was any direct interference in court matters by tribal council members;" and (2) "[t]he judiciary is separate and apart from the tribal council." Additionally, the tribal council's act of bringing in an external auditing organization lends credibility to the tribal court system as a whole.

GCSD challenges the district court's refusal to hear testimony from the Evaluation's author, Mr. Myers. "A district court's evidentiary rulings should not be reversed absent clear abuse of discretion and some prejudice." *S.E.C. v. Jasper*, 678 F.3d 1116, 1122 (9th Cir.2012) (citation and internal quotation

[2] The tribal council commissioned the Evaluation prepared by the National Indian Justice Center.

marks omitted). "For us to reverse a decision as an abuse of discretion, we must have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached." *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1175 (9th Cir.2010) (citation and internal quotation marks omitted).

The district court did not abuse its discretion when it denied GCSD's request to introduce Mr. Myers' testimony. GCSD requested an emergency evidentiary hearing but failed to notify the court of its intention to introduce witness testimony. As a result, SNW did not have an opportunity to subpoena defense witnesses. Out of fairness to SNW and due to the urgency of a TRO proceeding, the court accepted only Mr. Myers' written report. The court reviewed the published Evaluation and left open the possibility of an additional evidentiary hearing if necessary.

Ultimately, the court's denial of the admission of his actual testimony was not an abuse of discretion because the Evaluation documented Mr. Myers' findings and provided a balanced review of the Hualapai judiciary. When considered together, the submitted evidence does not establish that the tribal court operated in bad faith or is controlled by the tribal council in its decision making.

VI.

Futility is also a recognized exception to the requirement to exhaust court tribal remedies. Where "exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction," a party is excused from exhausting claims in tribal court. *Red Wolf*, 196 F.3d at 1065. Generally, this exception applies narrowly to only the

most extreme cases. *See Johnson v. Gila River Indian Cmty*., 174 F.3d 1032, 1036 (9th Cir.1999) (two-year delay called into question the possibility of tribal court remedies); *Krempel v. Prairie Island Indian Cmty*., 125 F.3d 621, 622 (8th Cir.1997) (exhaustion not required where there was no functioning tribal court).

GCSD has failed to show that the Hualapai Tribal Court does not offer an adequate and impartial opportunity to challenge jurisdiction. Although Hualapai Law and Order Code § 2.16(K) originally precluded a judge pro tem from hearing condemnation cases, the tribal court remedied this separation of powers issue by invalidating that section and appointing a neutral pro tem judge to hear this case. The Hualapai adjudicatory process has continued, as evidenced by submitted tribal court and tribal court of appeals orders. Both parties to this appeal are participating in those proceedings.[3] The tribal court determined it has jurisdiction to review the condemnation act under the catchall section of the Hualapai Law and Order Code, § 3.1(d), which states: "the Tribal Court may be guided by common law as developed by other Tribal, federal or state courts" where no law is directly on point. Even the Evaluation offered as evidence by GCSD as proof of futility includes statements such as, "[t]he Hualapai Tribal Court is a functional, established system with court procedures" and "[t]he judiciary is separate and apart from the tribal council."

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[3] Appellees' outstanding Second Motion to Supplement the Record, Oct. 5, 2012, ECF No. 38, and Appellant's outstanding Motion to Supplement the Record, Oct. 15, 2012, ECF No. 39, are granted. Submitted materials have been reviewed and were considered in this decision.

The submitted evidence supports the district court's finding that the tribal court operates independently from the tribal council and the evidence presented does not meet the narrow futility exception. GCSD is actively litigating its case in Hualapai Tribal Court, contradicting its argument that it has not had an "adequate opportunity to challenge the court's jurisdiction." *Red Wolf*, 196 F.3d at 1065.

VII.

Finally, we turn to the third issue raised on appeal, whether the tribal court plainly lacked jurisdiction over this case. The Supreme Court stated in *Strate v. A–1 Contractors* that where "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." 520 U.S. 438, 459 n. 14 (1997) (*Montana* "described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Id*. at 446). We hold that this *Strate* exception does not apply here to deny the tribal court of its initial jurisdiction.

The tribal court does not plainly lack jurisdiction because *Montana*'s main rule is unlikely to apply to the facts of this case. Furthermore, the district court correctly relied upon *Water Wheel*, which provides for tribal jurisdiction without even reaching the application of *Montana*. Even if the tribal court were to apply *Montana*'s main rule, GCSD's consensual relationship with SNW or the financial implications of the agreement likely place it

squarely within one of *Montana*'s exceptions and allow for tribal jurisdiction.[4]

A.

Montana v. United States, 450 U.S. 544 (1981), is "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445. But as the district court properly determined, a tribe's inherent authority over tribal land may provide for regulatory authority over non-Indians on that land without the need to consider *Montana*. *See Water Wheel*, 642 F.3d at 804–05. As a starting point, we recognize "the long-standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude, unless Congress clearly and unambiguously says otherwise." *Id.* at 808 (citation omitted).

In *Water Wheel*, a non-Indian corporation entered into a lease agreement with a group of tribes for the development and operation of a recreational park and marina on tribal land along the Colorado River. *Id*. at 805. Under the contract *Water Wheel* collected fees from users and made payments to the tribes. *Id*. After a dispute arose, *Water Wheel* stopped making payments and refused to vacate the premises after the lease ended. *Id*. The tribes filed suit in tribal court, and *Water Wheel* moved to dismiss the case, arguing the court did not have jurisdiction under *Montana*. *Id.* at 805–06. We held that "where the non-Indian activity in question occurred on tribal

[4] Although GCSD raises *mobilia sequuntur personam* as another means to preclude tribal jurisdiction in the first instance, its argument conflates the interlocutory jurisdictional question with the merits of the condemnation action. This opinion focuses on the jurisdictional question, and we need not determine the situs of the contract to render our decision.

land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*," *id*. at 814, and unless a limitation applies, adjudicatory jurisdiction, as well. *Id*. at 814–17.

Despite GCSD's attempts to distinguish Water Wheel, the factual differences do not diminish the reasoning or the application of the decision here. Just as in *Water Wheel*, GCSD agreed to develop and manage a tourist location on tribal land in exchange for a fee. It is the impressive beauty of the tribal land's location that is the valuable centerpiece of this controversy. Tourists visit the Skywalk because it provides unparalleled viewing of the Grand Canyon, a location to which the Tribe has the power to limit access through its inherent sovereignty and the right to exclude. *Water Wheel* is instructive because there, just as here, it was access to the valuable tribal land that was the essential basis for the agreement.

Although this case involves an intangible property right within a contract, rather than a leasehold as in *Water Wheel*, the contract in this case equally interfered with the Hualapai's ability to exclude GCSD from the reservation. The dispute between GCSD and SNW over the management of the Skywalk property resulted in the Hualapai taking drastic measures: passing an ordinance to condemn GCSD's property rights, purporting to substitute the Tribe in the place of GCSD to carry out the management of the overlook, and spending more than two years in litigation. With the power to exclude comes the lesser power to regulate. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Where a tribe has regulatory jurisdiction and interests, such as

those at stake here, it is also likely to have adjudicatory jurisdiction as the district court concluded. *See Water Wheel*, 642 F.3d at 814–16.

GCSD argues the Tribe waived its inherent sovereignty when it established SNW to manage the Skywalk contract, but that is not the case. *Merrion v. Jicarilla Apache Tribe* cautioned against conflating a tribe's agreement to contract with a waiver of tribal sovereignty. 455 U.S. 130, 144–48 (1982). "To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head...." *Id.* at 148. GCSD relies on *Merrion* where the Court stated "[w]hen a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." *Id.* at 144. But that argument goes to the merits of the condemnation action and not to the jurisdictional question before us now. Read in its entirety, *Merrion* holds that unless expressly waived "in unmistakable terms" within the contract, a tribe retains its inherent sovereignty, and as such, the tribe may have jurisdiction. *Id.* at 148, 102 S.Ct. 894.

B.

Furthermore, although the main rule in *Montana v. United States* is that a tribal court lacks regulatory authority over the activities of non-Indians unless one of its two exceptions apply, this case is not *Montana*. *Montana*, 450 U.S. at 565–66. *Montana* considered tribal jurisdiction over nonmember activities on non-Indian land, held in fee simple, within a reservation. *Id.* at 547, 565–66. The

land underlying this case, however, is federal Indian land held in trust for the Hualapai Tribe. The dispute arose out of an agreement related to the development, operations, and management of the Skywalk, an asset located in Indian country.

With the exception of *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court has applied *Montana* "almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent." *Water Wheel*, 642 F.3d at 809. When deciding whether a tribal court has jurisdiction, land ownership may sometimes prove dispositive, but when a competing state interest exists courts balance that interest against the tribe's. *See Hicks*, 533 U.S. at 360, 370. Here, as the dispute centers on Hualapai trust land and there are no obvious state interests at play, the *Hicks* exception is unlikely to require *Montana*'s application. At the very least, it cannot be said that the tribal court plainly lacks jurisdiction.

C.

Even if *Montana* applied, either of its two recognized exceptions could also provide for tribal jurisdiction in this case. The first exception allows "Indian tribes [to] retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations" where nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. The second exception exists where the conduct of a non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Additionally, tribal laws may be fairly imposed on nonmembers if the nonmember consents, either

expressly or through his or her actions. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008).

GCSD voluntarily entered into a contract with SNW by signing an agreement to develop and manage the Skywalk and both parties were represented by counsel. The scope of the agreement was extensive, lasting more than eight years at the time the case was filed in the district court, and with agreed upon possible damages of up to $50 million for early termination. The parties reviewed and signed an amended agreement and entered into a subsequent trust years later. While the agreement was between GCSD and SNW, and not the Tribe directly, the first exception applies equally whether the contract is with a tribe or its members. *Montana*, 450 U.S. at 565. Given the consensual nature of the relationship between the parties and the potential economic impact of the agreement, the tribal court could conclude it has jurisdiction over SNW's dispute with GCSD under either of *Montana*'s exceptions.

Moreover, GCSD should have reasonably anticipated being subjected to the Tribe's jurisdiction. *See Plains Commerce*, 554 U.S. at 338, 128 S.Ct. 2709. Article 2, § 2.1 of the original GCSD/SNW agreement specifies that the "Manager [GCSD] hereby accepts its appointment as the developer and manager of the Project and agrees to develop, supervise, manage, and operate the Project ... in compliance with all applicable federal, [*Hualapai Nation*], state, and local laws, ordinances, rules, and regulations, including all employment laws and regulations." (emphasis added). Thus, the necessary corollary would be that if GCSD operated in violation of the Tribe's laws, it could be subjected to its

jurisdiction. GCSD consented to be bound by this language when it signed the agreement with SNW.

VIII.

The judgment of the district court requiring exhaustion of tribal court remedies prior to proceeding with the action in federal court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV12–8030–PCT–DGC.

GRAND CANYON SKYWALK DEVELOPMENT, LLC, a Nevada Limited Liability Company, Plaintiff

v.

'SA' NYU WA, a tribally-chartered corporation established under the laws of the Hualapai Indian Tribe, et al., Defendants.

[Dated: March 26, 2012]

AMENDED ORDER

DAVID G. CAMPBELL, District Judge.

This is the second order the Court has entered on Plaintiff's request for a temporary restraining order ("TRO"). The factual background of this case is described in the Court's earlier order (Doc. 32) and will not be repeated here.

Plaintiff asks the Court to declare that the Hualapai Indian Tribe has no authority to condemn Plaintiff's private contract rights in the Skywalk Agreement and that its condemnation ordinance is invalid. Doc. 1. Plaintiff seeks a TRO barring Defendants "from taking any steps to enforce the

Tribe's purported 'condemnation' of Plaintiff's interest in the operation of the Grand Canyon Skywalk." Doc. 4 at 1–2.

Plaintiff argues that it is not required to exhaust its remedies in Hualapai Tribal Court because several exceptions to exhaustion apply. The Court's order of February 28, 2012, found that Plaintiff had failed to show that two of the exceptions apply—that it is "plain" that the Tribal Court lacks jurisdiction or that exhausting the issue of jurisdiction in the Tribal Court will be futile. Doc. 32 at 3–5. The Court found, however, that Plaintiff had made a colorable claim that the bad faith exception to the exhaustion requirement applies. *Id.* at 6. The Court ordered the parties to provide additional briefing (Doc. 32 at 6), and the parties filed supplemental briefs (Docs.35, 36). At Plaintiff's request, the Court also held a hearing on March 14, 2012, where it received additional factual information from the parties regarding recent activities related to the condemnation effort.

For the reasons stated below, the Court concludes that the bad faith exception to exhaustion does not apply. The Court therefore will deny Plaintiff's motion for a TRO, require Plaintiff to exhaust its jurisdictional arguments in Tribal Court, and stay this action.

I. The Bad Faith Exception.

Plaintiff argues vigorously that the Court should, in the interest of equity, intervene and prevent the tribe from perpetrating an injustice that is destroying the value of Plaintiff's Skywalk investment and will leave Plaintiff with little ability to recoup its losses. Although the Court is mindful of the equitable arguments Plaintiff has made, this is

not a Court of Chancery charged with broad ranging equitable powers. The Court must respect the principle of comity the Supreme Court has applied—and has instructed lower courts to apply—to sovereign Indian tribes. Comity requires that examination of the existence and extent of a tribal court's jurisdiction "be conducted in the first instance in the Tribal Court itself." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). "[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (quotation marks and citation omitted). This is particularly true when litigation concerns the validity of a tribal ordinance—an issue that goes to the heart of tribal self-government and self-determination. The "tribe must itself first interpret its own ordinance and define its own jurisdiction." *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir.1991).

Exhaustion in tribal court is not required where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir.1999). Plaintiff argues vehemently that Defendants have engaged in bad faith in this case, but Plaintiff's arguments focus primarily on the conduct of the Hualapai Tribal Council and its attorneys and only incidentally on the actions of the Tribal Court. For the reasons that follow, the Court concludes that the bad faith exception is not as broad as Plaintiff contends—that it is meant to apply primarily to actions of the Tribal Court, not the actions of litigants or other branches of tribal government.

A. The Source of the Exception.

The Supreme Court first recognized the bad faith exception in *National Farmers*. 471 U.S. at 857 n. 21. The Court stated that exhaustion would not be required "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith.' " *Id*. (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)). The Court gave no guidance as to what it meant by "an assertion of tribal jurisdiction," but it adopted the standard from the *Younger* abstention case of *Juidice v. Vail*. A review of *Juidice* suggests that the exception looks to the assertion of jurisdiction by the Tribal Court.

In *Juidice*, the Supreme Court held that a federal district court must abstain from exercising jurisdiction over a state court defendant's constitutional challenge to a contempt order the state court issued after the defendant failed to appear. 430 U.S. at 330. Applying principles of comity, the Supreme Court held that as long as the defendant had the opportunity to raise his federal claims in state court, the federal court should abstain from interfering. *Id*. at 337. *Juidice* recognized a bad faith exception to this abstention requirement, stating that abstention is not required where the federal court finds that "the state proceeding" is motivated "by a desire to harass or is conducted in bad faith[.]" *Id*. at 338 (quoting *Huffman v. Pursue, Ltd*., 420 U.S. 592, 611 (1975)). The "state proceeding" referred to in *Juidice* clearly was the legal action in the state court. 430 U.S. at 330. Thus, the source of the bad faith exception recognized in *National Farmers* suggests that the exception looks to the court proceeding below when asking whether bad faith has occurred.

B. Relevant Case Law.

Several cases have adopted this narrow view of the exception. In *Calumet Gaming Group–Kansas, Inc. v. The Kickapoo Tribe of Kansas*, 987 F. Supp. 1321 (D. Kan. 1997), the court confined its analysis of the bad faith exception to the actions of the Kickapoo tribe in asserting tribal court jurisdiction, and not to the tribe's alleged bad faith actions in the underlying controversy. The tribe had entered into a contractual agreement with a non-Indian consulting company ("Calumet"), but terminated the agreement and obtained a TRO in tribal court enjoining arbitration. 987 F. Supp. at 1324. Calumet sought relief for its contract claims in federal court as well as an injunction against further tribal court proceedings. *Id*. Like Plaintiff in this case, Calumet argued that the tribe, rather than the tribal court, had acted in bad faith:

> Calumet contends that the Tribe's bad faith is evidenced by its failure to pay amounts due under the consulting agreement, its refusal to give effect to the arbitration provision, its termination of the agreement without proper notice and an opportunity to cure, and its failure to abide by a "verbal" settlement agreement reached by the parties.

Id. at 1327. The district court held that the bad faith exception did not apply. Citing the language from *National Farmers*, the court stated that "[t]he exception requires bad faith or a desire to harass in the assertion of tribal court jurisdiction." *Id*. (emphasis in original). The court went on to explain that "[t]he instances of bad faith alleged by Calumet generally go to the merits of the dispute—i.e.,

whether the contract has been breached—instead of the Tribal Court's assertion of jurisdiction." *Id.* The court relied on the Tenth Circuit's unpublished opinion in *Harvey v. Starr*, 96 F.3d 1453 (10th Cir. 1996), which recognized the impropriety of reviewing the underlying merits of a child custody suit when determining whether the tribal court had acted in bad faith. *See* No. 95–2283, 1996 WL 511586, at *2 (10th Cir. Sept. 10, 1996).

Landmark Golf Limited Partnership v. Las Vegas Paiute Tribe, 49 F.Supp.2d 1169 (D. Nev. 1999), also involved allegations of bad faith on the part of a tribe. In *Landmark*, a tribal entity ("the Authority") had entered into separate consulting and management agreements with a non-Indian corporation ("Landmark") to develop golf courses and other recreational facilities on the reservation. 49 F. Supp.2d at 1172. Landmark alleged that the Authority fraudulently induced it to give up its rights under its original consulting agreement, including an $8,000,000 buyout provision. *Id.* As in *Calumet*, however, the district court's analysis of the bad faith exception did not extend to a review of the Authority's actions. Instead, the court concluded that the record did not show that "the tribal court's assertion of jurisdiction over this case would be made in bad faith." *Id.* at 1176.

More recently, the district court in *Rogers–Dial v. Rincon Band of Luiseno Indians*, No. 10cv2656–WQH–POR, 2011 WL 2619232 (S.D. Cal. July 1, 2011), refrained from employing the bad faith exception based on underlying acts, even where the plaintiffs alleged extreme measures on the part of the tribe. The non-Indian plaintiffs alleged an unlawful scheme by the Rincon Band to drive their business operations off their leaseholds on the Rincon Band

Reservation. *Id*. at *1. The plaintiffs alleged that the tribe put up concrete barriers to block them from driving in and out of their property and obtained an injunction against them in tribal court based on false accusations of environmental violations. *Id*. The court summarily rejected the bad faith exception on the basis that enforcement of the environmental statute was not in bad faith; it did not address the allegations of the underlying bad faith actions of the tribe. *Id*. at *6.

Other cases are in accord. *See Melby v. Grand Portage Band of Chippewa*, No. CIV 97–2065, 1998 WL 1769706, at *2 (D. Minn. Aug.13, 1998) ("An allegation that a tribal court claim is brought in bad faith does not mean that an assertion of subject matter jurisdiction by the tribal court over the claim would be in bad faith") (emphasis added); *Espil v. Sells*, 847 F.Supp. 752, 757 (D.Ariz.1994) ("The [bad faith] exception to the exhaustion rule relates to actions of courts and not the parties"); *Legg v. The Seneca Nation of Indians*, 518 F.Supp.2d 274, (D.D.C.2007) ("the record before the Court does not offer sufficient evidence of bad faith or intent to harass by the Peacemakers Court's assertion of jurisdiction.").

These cases confine the bad faith exception to actions of tribal courts. They decline to apply the exception when one of the parties before the tribal court can be accused of acting in bad faith.

In support of its broader reading of the exception, Plaintiff relies on language in *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir.1986), which stated that the bad faith exception did not apply because "enforcement of the statutory scheme" was not shown to be in bad

faith. *Id.* at 1417. Plaintiff argues from this statement that a bad faith attempt to enforce a statute can excuse exhaustion even though such enforcement is attempted by a party rather than the tribal court. But the Ninth Circuit held in *A & A* that the appellant should have exhausted its tribal court remedies. *Id.* at 1415. The case did not address the scope of the bad faith exception, and it cited only *National Farmers* and *Juidice* in support of its single statement regarding the exception. *Id.* at 1417.

Plaintiff similarly cites a statement from *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008), that "[t]here has been no showing that Defendant Hanson asserted tribal jurisdiction in bad faith or that she acted to harass Plaintiff." Plaintiff argues that this too shows that the bad faith of a party can satisfy the exception. But the Ninth Circuit in *Atwood*, as in *A & A*, did not address the scope or nature of the bad faith exception. Its only discussion of the exception is the one sentence quoted above, and its only citation is to a simple recitation of the *National Farmers* exceptions in *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

Decisions of the Ninth Circuit, of course, are binding on this Court. But the isolated statements in *A & A* and *Atwood* clearly do not constitute considered decisions that the bad faith exception includes the conduct of parties other than a tribal court. There is no indication that the parties in either case even raised this issue. The Court therefore concludes that the scope of the bad faith exception remains unresolved in this circuit, and finds the district court decisions discussed above to be more relevant to the question that must be decided in this case.

Plaintiffs also rely heavily on *Superior Oil Co. v. United States of America*, 798 F.2d 1324 (10th Cir. 1986), a case which suggests that the bad faith analysis can apply to the actions of a tribe or tribal officials. In *Superior Oil*, non-Indian oil companies applying for permits to conduct seismic drilling on leaseholds on tribal land filed a complaint against the tribe in district court seeking declaratory and injunctive relief requiring the tribe to approve their leasehold and permit applications. 798 F.2d at 1325. The district court dismissed the action on the basis of the tribe's sovereign immunity, but the Tenth Circuit held that the district court erred in reaching this issue without first requiring the plaintiffs to exhaust their claim in tribal court. *Id*. at 1329. The Tenth Circuit remanded the case for the district court to determine whether the actions of the Navajo Tribe of Indians and the named individual Navajo defendants in withholding consent to assignments of leases and requests for seismic permits were taken in bad faith or motivated by a desire to harass such as to render exhaustion of Navajo Tribal Court remedies futile. *Id*. at 1331; *c.f. Russ v. Dry Creek Rancheria Band of Pomo*, No. C 06–03714 CRB, 2006 WL 2619356 (N.D. Cal. Sept.12, 2006) ("[Plaintiffs] offer no explanation about why the Tribe's conduct in this case might have been in bad faith or for the purpose of harassment.") (emphasis added). Although the remand order and the language in *Russ* suggest that the bad faith inquiry extends to actions of the tribe beyond those of the tribal court, they are accompanied by virtually no analysis or explanation. Plaintiff has cited no case, and the Court has found none, where a court has invoked the bad faith exception to excuse tribal court exhaustion on the basis of conduct by a tribe or tribal council.

Plaintiff cited additional cases for the first time at oral argument on March 14. The Court also finds these cases unavailing. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 920 (9th Cir. 2008), stated in general terms that exhaustion is required "provided that there is no evidence of bad faith or harassment." *Marceau* cited *Atwood*, but *Atwood*, as explained above, does not represent a considered analysis of the exception's scope. *Marceau* does not address the meaning or scope of the exception.

Plaintiff argued that *Dodge v. Nakai*, 298 F.Supp. 26 (D. Ariz. 1969), shows that federal courts can assume jurisdiction where a tribal council passes punitive legislation targeted at a particular individual. In *Nakai*, the court concluded that the Navajo Tribal Council's order excluding a former legal services director from the Navajo Reservation constituted an "unlawful bill of attainder." *Id*. at 34. But *Nakai* predates the exhaustion requirement of *National Farmers* by sixteen years. The Court assumes the outcome of *Nakai* would have been different had the district court been under the Supreme Court's current direction to extend comity to tribal court proceedings.

Plaintiff argued that *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999), shows that where a tribal government is dysfunctional, as Plaintiff alleges is the case here, the assertion of tribal jurisdiction would be in bad faith. But *Johnson* dealt with the futility exception, not the bad faith exception, and found only that a party was not required to exhaust tribal remedies where it was doubtful that a functioning tribal court existed. *Id*. at 1036. This Court previously found that Plaintiff had not made such a showing *See* Doc. 32 at 4–5

(discussing *Johnson* and other cases and concluding that Plaintiff had not made a showing of futility).

In summary, cases that have actually addressed the scope of the bad faith exception have concluded that it looks to actions of the tribal court. Although there is broader language in cases that have not considered the exception's breadth, those statements do not provide a persuasive basis upon which to conclude that the exception is as broad as Plaintiff contends.

C. The Intent of *National Farmers*.

National Farmers reflects an attitude of respect for tribal courts as legitimate branches of sovereign governments. In holding that litigants seeking to invoke federal court power for the purpose of defeating tribal court jurisdiction must first exhaust their jurisdictional arguments in tribal court, the Supreme Court recognized that tribal courts are capable of resolving difficult jurisdictional issues. 471 U.S. at 856–57. *National Farmers* teaches that tribal courts should be afforded a "full opportunity" to determine their own jurisdiction, are capable of "rectifying errors," will create a more complete record for eventual federal court review, and will provide federal courts with the benefit of tribal court "expertise." *Id*. The comity *National Farmers* seeks to afford tribal courts, therefore, is more than judicial courtesy. It is based on the federal government's policy of promoting tribal self-government and on the federal courts' respect for tribal courts as judicial bodies. *Id*.

If the bad faith exception were to be expanded beyond the tribal court to include the bad faith of litigants appearing before the tribal court, exhaustion would be excused every time a party before a tribal

court acts in bad faith. Such a reading of the exception would entirely disregard the judicial abilities of tribal courts and would assume they are incapable of recognizing and rectifying the bad faith of litigants before them. Such a reading would be contrary to the respect *National Farmers* extends tribal courts. Thus, the deference recognized in *National Farmers* suggests that the bad faith exception is to be construed narrowly as applying only to bad faith of the tribal court itself.

Finally, Plaintiff argued at the March 14 hearing that the exhaustion requirement is prudential rather than jurisdictional, suggesting that it is less binding and may be disregarded in the interests of equity. This argument also misunderstands the import of *National Farmers*. The question at issue was whether the Crow tribal court had jurisdiction over claims arising from a motorcycle accident in a school parking lot on the Crow reservation. *Id*. at 847. Without deciding the jurisdictional issue, the Supreme Court determined that Congress' commitment to supporting tribal self-government and self-determination "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id*. at 856. Thus, the Court concluded that the existence and extent of a tribal court's jurisdiction "should be [examined] in the first instance in the Tribal Court itself." *Id*. The exhaustion rule may be prudential, but this fact does not diminish its importance as a principle of comity to be honored by federal courts. As the Ninth Circuit has explained, "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir.1991).

For all of the reasons explained above, the Court concludes that the bad faith exception focuses on the actions of the tribal court, not the actions of parties before the tribal court. The Court therefore will confine its bad faith analysis to Plaintiff's arguments regarding problems with the Hualapai Tribal Court's conduct in this case.

II. Applicability of the Bad Faith Exception.

The Tribal Court has been asked to exercise jurisdiction on three occasions related to this action: (1) an action brought by Plaintiff on July 29, 2011, asking the Tribal Court to compel SNW to participate in arbitration; (2) a condemnation action brought on February 8, 2012, including a request that the Tribal Court issue a TRO preventing Plaintiff from damaging or taking property from the Skywalk; and (3) a proceeding scheduled by the Tribal Court on February 17, 2012 to hear arguments regarding the TRO.

Plaintiff has not argued, and the Court does not find, that the first action supports a showing of bad faith. In that action, brought by Plaintiff to compel arbitration, the Tribal Court ruled that it did not have jurisdiction to compel arbitration under the contract between the parties because SNW had "expressly waived sovereign immunity for the limited purpose of mandatory arbitration in federal court." Doc. 4–6, ¶ 13. The Tribal Court ruled that Plaintiff had exhausted its Tribal Court remedies and could seek redress in federal court. Doc. 4–6 at 30. Upon dismissing the case, the pro tem judge stated, "[i]f counter-intuitive and disappointing ... the attorneys who negotiated the agreement advised SNW to specifically seek arbitration outside Hualapai jurisdiction." Doc. 4–6, ¶ 11. This demonstrates a

willingness of the Tribal Court to defer to the federal court, as agreed to by the parties, rather than undertake a wrongful assertion of tribal jurisdiction.

Plaintiff argues that the next action of the Tribal Court, in which it approved a TRO against Plaintiff, shows bad faith for reasons that came to light in the Tribal Court's third action when it reconvened on February 17, 2012, to hear objections to the TRO. Doc. 36 at 8; see Docs. 4–6 at 87, 91; Doc. 21–1 at 139. In the third proceeding, Chief Judge Duane Yellowhawk, who had issued the initial TRO orders, recused himself and Associate Judge Marshall from presiding over the condemnation action due to conflicts pursuant to Article VI § 10 of the Hualapai Constitution.[1] Doc. 21–1, ¶ 5. Judge Yellowhawk also struck the provision of the Tribe's condemnation ordinance that barred pro tem judges from presiding over the condemnation action. He held that the provision invaded the province of the Tribal Court and violated the principle of separation of powers. *Id*., ¶¶ 1, 5–6.

Plaintiff argues that Judge Yellowhawk showed bad faith when he allowed the TRO to remain in place after recusing himself. See Doc. 21–1 at 145: 22–24. When Judge Yellowhawk stated that he was recusing, Plaintiff's attorneys asked that the TRO be immediately withdrawn. Judge Yellowhawk stated "I can't make a ruling on this one." *See* Doc. 21–1 at 146: 20–21. Judge Yellowhawk continued to hold this position and to defend the TRO even after counsel

[1] The Tribal Court's order does not specify which conflicts are covered by this provision, but attorneys for Defendants stated at oral argument that Chief Judge Yellowhawk recused himself and Associate Judge Marshall because of their blood relation to members of the Hualapai Tribal Council.

argued that if the Tribal Constitution precluded him from ruling on withdrawing the TRO, it also invalidated the initial order that Judge Yellowhawk had signed. *Id*. at 147: 3–9.

The Court does not agree that Judge Yellowhawk's refusal to withdraw the TRO compels a finding that the bad faith exception applies. The Tribal Court arguably had jurisdiction to enter a TRO regarding actions on tribal land, and Plaintiff cites no authority that would compel a judge to void an otherwise valid judicial action because a conflict surfaces after it has been entered, particularly where further litigation on the issue is still pending. The transcript of the February 17th hearing indicates that the Tribal Court and opposing counsel received Plaintiff's pleadings for the first time that day, and Judge Yellowhawk ordered a new hearing to take place March 23, giving time for the appointment of a pro tem judge and for the parties to respond to motions that had been filed. Doc. 21–1 at 144:21–145:3, 15–17.

Moreover, to the extent that Plaintiff argues Judge Yellowhawk should have voided the TRO immediately because his conflict suggests a bias when he entered it, allegations of bias are not sufficient to excuse exhaustion under any recognized exception. The Ninth Circuit addressed the issue of alleged bias on the part of a tribal judge in *A & A* and determined on the basis of "the plain import" of *National Farmers* that plaintiffs had to exhaust this argument in Tribal Court. 781 F.2d at 1417. Here, Judge Yellowhawk ordered that a pro tem judge be appointed to preside over further actions in this case, and Plaintiff is not foreclosed from raising arguments related to the TRO in Tribal Court after that appointment is made.

Plaintiff also argues that Judge Yellowhawk acted in bad faith when he failed to engage in an independent review of the merits of the TRO and simply signed the order as presented to him by the Tribal Council. Plaintiff raised this argument for the first time at the evidentiary hearing on March 14, after Plaintiff had been given multiple opportunities to make arguments regarding exceptions to exhaustion. This was not one of the issues on which Plaintiff requested to present evidence at the hearing; nor did Plaintiff proffer evidence showing that Judge Yellowhawk's consideration of the matter was deficient under tribal law. Judge Yellowhawk's own statement on the issue was that "we had ample time to review all the documents, plus constitutional law and our code and ordinance." Doc. 21–1 at 147:11–13. Absent citations to tribal authority concerning when and under what evidentiary showing TROs can be entered, and without a showing of what evidence the Tribal Court had before it when it issued the TRO, the Court cannot conclude that the Tribal Court issued the TRO in bad faith.[2]

Even if the Court accepts Plaintiff's allegations that Judge Yellowhawk summarily accepted the Tribe's TRO application without proper judicial review, approval of the TRO does not constitute a full-scale ratification of the Tribe's condemnation action as Plaintiff suggests. Repeatedly in its supplemental briefing on bad faith, Plaintiff alleges that Judge Yellowhawk "signed the takings orders." *See* Doc. 36 at 4, 7, 8. In fact, Plaintiff presents no evidence that Judge Yellowhawk or any other Tribal Court judge ever signed orders approving the Tribe's

[2] Even this Court may enter TROs *ex parte* in appropriate circumstances. *See* Fed. R. Civ. P. 65.

assertion of eminent domain. The TRO that Judge Yellowhawk signed merely prevents Plaintiff "from destroying or damaging any property located at the Grand Canyon Skywalk ... and from taking, removing, or absconding with such property from the Hualapai Reservation." Doc. 4–6 at 87, 91. Plaintiff later insists in its motion requesting an evidentiary hearing that the TRO orders "constitute the lone judicially-executed orders by the Tribal Court in any way related to the purported condemnation at issue herein." Doc. 42 at 4. In emphasizing the unlawfulness of the Tribal Council's actions, Plaintiff goes on to state in bold print that "the Tribal Court has not issued any other order related to or authorizing the taking of GCSD's non-Indian, intangible, contract rights and interest." *Id.* at 5 (emphasis removed). Plaintiff's prior mischaracterization of Judge Yellowhawk's orders as approving the taking is an apparent attempt to show that the Tribal Court lacks independence from the Tribal Council and has acted summarily to approve the Council's alleged bad faith conspiracy to deprive Plaintiff of its contract rights. But the evidence shows, and Plaintiff emphatically agrees, that the Tribal Court has not yet considered the lawfulness of the Tribe's condemnation action.

In short, Plaintiff's arguments do not show that the Tribal Court has acted in bad faith. The Tribal Court's denial of jurisdiction over Plaintiff's motion to compel arbitration was correctly based on the Skywalk Agreement and showed deference to the parties' choice of forum. The court's recusal of judges related to members of the Tribal Council, and its striking down of the ordinance prohibiting pro tem judges from sitting on the condemnation case, were acts of judicial independence. Finally, Plaintiff has provided no tribal-law basis for the Court to conclude

that the Tribal Court acted in bad faith when it approved the TRO.

Nor is the Court persuaded by Plaintiff's use of extrinsic evidence that the Tribal Court lacks independence from the Tribal Council. Plaintiff cites to the Hualapai Tribal Court Evaluation Report prepared by The National Indian Justice Center in May, 2010, recommending that the Hualapai Tribal Council issue a declaration stating that it has not and will not hear statements by individuals pertaining to pending actions in Tribal Court and advising the Tribal Council to guard against involvement in court proceedings. Doc. 36 at 3; see Doc. 37–1 at 59. The Report, however, does not indicate a lack of independence as one of the Hualapai Tribal Court's identified weaknesses. *See* Doc. 37–1 at 56–58. Conversely, in its evaluation of the Hualapai Tribal Court's strengths, the Report notes that "[t]he Hualapai Tribal Council understands that it is crucial that its members minimize involvement in cases pending before the tribal court. This is the concept of separation of powers in which the decision making of the court remains free from council interference." *Id*. at 55. It is true, as Plaintiff notes, that the Report states that "it may take generations for a community to understand and appreciate the policy of separation of powers" (*Id*. at 59), but the Report makes this statement in the context of recommending steps to educate the community and future tribal councils. Thus, although the Report does identify matters the Tribe must consider going forward, it does not show that the assertion of jurisdiction by the Tribal Court has been made in bad faith.[3]

[3] At the March 14 hearing, Plaintiff sought to present testimony from tribe members regarding recent actions of the Tribal

Because the Court finds insufficient evidence to invoke the bad faith exception, and the Court previously found that Plaintiff's other asserted exceptions to exhaustion do not apply (Doc. 32 at 3–5), comity compels the Court to require that Plaintiff exhaust its remedies in Tribal Court. Once a court determines that exhaustion of tribal remedies is required, it has discretion to stay or dismiss the case. *National Farmers*, 471 U.S. at 857. The Court finds that a stay is appropriate. The Court will require the parties to file a joint status reports in six months to update the Court on the developments of this action in Tribal Court.

III. Motion to Strike.

Defendants move to strike exhibits 1 and 8 to Plaintiff's supplemental brief. Doc. 40. Defendants argue that these exhibits contain documents and information protected by attorney-client privilege and that Plaintiff's procurement and use of this information was in violation of the Arizona Rules of Professional Conduct. *Id.* The Court has reviewed the information in these exhibits and has determined that it does not affect the outcome of this decision. The Court has refrained from referencing information

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Council, and testimony from Joseph Myers, the expert who conducted the study upon which the Report is based. The Court did not receive the testimony because it was outside the scope of the evidentiary hearing Plaintiff had requested and Defendants had not received notice or an opportunity to prepare witnesses in response. The Court concludes that a hearing for such testimony is not required because the testimony of the tribe members would concern actions of the Tribal Council, not actions of the Tribal Court, and would therefore be beyond the scope of the bad faith exception. Testimony from Mr. Myers likewise would not go to the bad faith of the Tribal Court.

in these exhibits and will deny Defendants' motion as moot.

IT IS ORDERED:

1. Plaintiff Grand Canyon Skywalk Development Company's complaint is stayed in the interest of requiring Plaintiff to exhaust tribal court remedies.

2. Plaintiff's motion for an emergency TRO (Doc. 4) is denied.

3. Defendant's motion to strike (Doc. 40) is denied as moot.

4. Defendants Louise Benson, Jolene Cooney Marshall, and Sheri Yellowhawk are dismissed.

5. The Parties shall file a joint status report, not to exceed ten pages, by September 10, 2012.

APPENDIX D

AMERICAN ARBITRATION ASSOCIATION COMMERCIAL PANEL

No. 76 517 Y 00191 11 S1M

In the Matter of the Arbitration of

GRAND CANYON SKYWALK DEVELOPMENT, LLC,

and

'SA' NYU WA

[Dated: August 16, 2012]

FINAL AWARD

In this breach of contract case, the tribunal determines the rights to revenue from operation of the Grand Canyon Skywalk. Finding that 'Sa' Nyu Wa, Inc. ("SNW") wrongly withheld management and other fees due Grand Canyon Skywalk Development, LLC ("GCSD"), the tribunal awards contract damages and attorneys' fees to GCSD.

I.

BRIEF INTRODUCTION TO THE DISPUTE.

In 2003, The Hualapai Nation partnered with Mr. David Jin in the construction and management of

a glass viewing bridge called the Grand Canyon Skywalk, located at Eagle Point. Mr. Jin and the Tribe agreed to share revenue from the operation of the Skywalk, including the sale of tickets and merchandise. In 2007, after four years of planning and construction, the Skywalk opened to rapturous praise from visitors who stood awestruck at the western edge of the Grand Canyon, over 4000 feet above and 70 feet out and over the Colorado River flowing below.

Despite (or perhaps because of) the immediate and enormous success of the Skywalk, disputes soon developed; over time, the Hualapai Tribe withheld millions of dollars in management fees (and other money) from Mr. Jin's company (GCSD). After hearing four days of testimony from members of the Tribe and many others, and for the reasons below, the tribunal awards the sum of $24,975,469 to GCSD and against SNW for amounts owed through December 31, 2011, plus other contract damages and attorneys' fees.

The Parties, Grand Canyon West, and the Skywalk. The Hualapai Tribal Nation is a federally recognized Indian Tribe, many of whose members live on the Hualapai Indian Reservation in northwestern Arizona. The Grand Canyon Resort Corporation ("GCRC") and its sister corporation, SNW, tribally chartered corporations owned by the Hualapai Indian Tribe, own the Skywalk, which lies within Grand Canyon West, a 9000-acre development and tourist destination on the southwestern rim of the Grand Canyon, about 120 miles southeast from Las Vegas, 70 miles north of Kingman, Arizona, and over 240 miles from the Grand Canyon National Park entrance to the east. The largely unpaved (and rugged) Diamond Bar Road serves as the primary

road and access for most of the nearly 650,000 annual visitors to Grand Canyon West.

The Parties' Agreement to Arbitrate Their Disputes. In 2003, the Tribe chartered and allowed SNW to contract with GCSD for the construction and management of the Skywalk.[1] That agreement was described in GCSD's and SNW's *Development and Management Agreement*. The parties here – GCSD (Mr. Jin) and SNW (the Tribe) – agreed to arbitrate their disputes under the following provision of their 2003 Development and Management Agreement:

15.4 Arbitration; Governing Law; Jurisdiction.

> (a) Mandatory Arbitration. Any controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration. The arbitration shall be conducted by a sole arbitrator; provided however, if the parties cannot agree upon an arbitrator, each party will select an arbitrator and the two arbitrators will select the sole arbitrator to resolve the dispute. Either party may request and thus initiate arbitration of the dispute by written notice ("Arbitration Notice") to the other party. The Arbitration Notice shall state specifically the dispute that the initiating party wishes to submit to arbitration. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the

[1] SNW and the Tribe are referred to interchangeably.

> American Arbitration Association then in effect, as limited by Section 15.4(d).

Exh. 3.[2] In 2011, GCSD sued SNW in the Court of the Hualapai Nation (Case no. 2011-cv-006). SNW moved to dismiss. On July 29, 2011, the Hon. Ida Wilber, Judge Pro Tem of the Tribal Court, granted SNW's motion to dismiss finding, in part, that "[t]here is no dispute that SNW expressly waived its sovereign immunity for the limited purpose of mandatory arbitration." *Order*, at 2.

Several days later, on August 9, 2011, GCSD demanded arbitration. *See* Letter from D. Prunty to American Arbitration Association (enclosing *Demand for Arbitration* to SNW, c/o Mr. Glen Hallman (Gallagher & Kennedy), counsel for SNW). In this arbitration proceeding, SNW raised the jurisdictional question whether GCSD was compelled to first seek an order compelling arbitration from the U.S. district court. Following motion practice in November 2011, this tribunal ordered that GCSD had properly demanded arbitration without first seeking permission from the federal court. *See Order re Respondent's Motion to Dismiss GCSD's Arbitration Complaint* (11.21.11).

The final arbitration hearing remained on calendar for April 2012. In January 2012, the parties continued preparation for that hearing, including, for example, Mr. Hallman's request for issuance of subpoenas to David J. Emry and David J. Emry & Associates (1.20.12).

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[2] During the final hearing, GCSD offered and the tribunal received hearing exhibit nos. 1-95. The citations to "Exh. ___" refer to those exhibits.

Then, on February 9, 2012, the Tribe seized GCSD's interest in the Skywalk through eminent domain proceedings filed in the Hualapai Tribal Court. As a result of that condemnation proceeding, the Tribe claimed ownership of GCSD's claims in this arbitration and voluntarily dismissed GCSD's demand for arbitration with prejudice. GCSD objected. After expedited motion practice in February 2012, the tribunal upheld GCSD's objection. The arbitration proceeded. The final hearing was continued to July 2012. In the following months, neither the U.S. District Court nor the Hualapai Tribal Court enjoined this arbitration.[3] This matter therefore proceeded to final hearing on July 16-20, 2012. Claimant GCSD appeared and presented its proofs.[4]

The Respondent SNW's Failure to Appear at the Final Hearing. After due notice, respondent SNW failed to appear at the final hearing. Under the

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[3] United States District Judge David G. Campbell (Case 3:12-cv-08030-DGC) and the Hualapai Tribal Court have considered aspects of the parties' dispute. Months before GCSD demanded arbitration here, the Tribal Court expressly declined to hear the parties' dispute. *See Order* of Hualapai Tribal Court (8.2.11). Still another motion to enlarge the Tribal Court's temporary restraining order in Case No. 2012- CV-017 remains pending after argument on June 1, 2012 before the Hon. Lawrence King, Judge Pro Tem.

[4] During the hearing, the following witnesses testified under oath: Mr. Jin; Mr. Steve Beattie (via recorded video statement (Exh. 31 (transcript))); Mr. Ted Quasula; Mr. Walter Mills; Ms. Sheri Yellowhawk; Ms. Louise Benson; Ms. Kathryn Landreth (via recorded video statement (Exh. 79 (transcript))); Mr. Manuel Mojica; Mr. Barry Welch; Mr. Robert Bravo, Jr.; Mr. Jeff Whitaker; Ms. Jan Allen (via recorded video statement (Exh. 86 (transcript))); Mr. Erin Forest; Ms. Mia Jack; and, Mr. Steven Hazel.

parties' agreement, the arbitration was governed by the *Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)* of the American Arbitration Association as amended and in effect on June 1, 2010. Under R-29 (Arbitration in the Absence of a Party or Representative) of those rules, "[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award." Under the Revised Uniform Arbitration Act as adopted in Arizona, A.R.S. 12-3015(C), "[t]he arbitrator may hear and decide the controversy on the evidence produced although a party who was duly notified of the arbitration proceeding did not appear." On April 13, 2012, the AAA forwarded to counsel for SNW and GCSD the *Notice of Hearing* setting the final hearing for July 16-27, 2012. Accordingly, under the governing rules and controlling law, the hearing proceeded after due notice to respondent SNW through its counsel, Gallagher & Kennedy (Phoenix, Arizona).

II.

The Tribe's and SNW's Failure to Produce Financial and Other Records from 2008 to 2012. Two preliminary matters deserve attention before turning to the merits. First, before GCSD demanded arbitration, and during the months leading up to the final hearing, the respondent SNW and the Tribe failed to produce financial, operational, and other important records and documents, including records of Skywalk ticket and merchandise sales. The record

strongly suggests that the Tribe also blocked GCSD's lawyers' efforts to gather testimony and documents from third parties.

Briefly, in 2003, Mr. Jin agreed to construct the Skywalk, at his own expense; however, Mr. Jin agreed that the Tribe would own the structure. GCSD and SNW also agreed that, following Mr. Jin's construction of the Skywalk, both GCSD and SNW would sell tickets to Skywalk. Each side would account to one another for revenues and expenses and share net revenue. However, shortly after the Skywalk opened, at the Tribe's request, GCSD took on the job of accounting for all revenues and expenses of the operation.

Later, the Tribe and SNW hired the accounting firm of Kafoury Armstrong & Co. to audit the books and records. So, in late 2008 and 2009, GCSD turned over thousands of pages of financial records to Kafoury Armstrong. In his letter dated June 5, 2009 to lawyers for SNW and the Tribe (Mr. Ohre (Snell & Wilmer) and Mr. Thompson (Gallagher & Kennedy)), Mr. Teddy Parker, counsel for GCSD, summarized and confirmed GCSD's turnover of records. Exh. 81 ("I would like to start from the beginning with the [Tribe's] first request [for records from GCSD] which was received [from Kafoury Armstrong] on November 12, 2008 at approximately 4:31 p.m."). Over the following months, in late 2008 and early 2009, less than two years after the Skywalk had opened, Mr. David Emry, CPA[5] – GCSD's accountant who, after the Skywalk opened and at SNW's urgent request, kept the books of the Skywalk's operation – turned over thousands of pages of material to the Kafoury

[5] David J. Emry & Co., Ltd. Certified Public Accountants (Las Vegas).

Armstrong accounting firm: ledgers, bank statements, and source documents. In early and mid-2009, Mr. Emry and his firm produced many more documents to the Kafoury firm, such as daily summaries and control sheets, including, for example, in January 2009, "original source documents and other financial information as requested." *Id*. (GCSD007268).

For years, and to this day, after many requests, including subpoenas from this tribunal, the Tribe and SNW, together with the Kafoury firm and the Tribe's lawyers, have refused to turn over copies of those same documents to GCSD, Mr. Jin, his accountants, or his lawyers. Over three years ago, Mr. Emry began requesting those records from the Tribe. *See*, *e.g.*, Exh. 81 (GCSD007270)("As early as March 03, 2009, David Emry has requested from Jaci Dugan,[6] information relative to the balance of Skywalk monies held by SNW and GCRC as of February 28, 2009."). For many, many months thereafter, Mr. Jin's lawyers diligently sought copies of the Skywalk's financial records from the Tribe, its accountants (Kafoury Armstrong and Moss Adams), and its lawyers (Snell & Wilmer and, later, Gallagher & Kennedy).

Meanwhile, during this same period, the Tribe withheld operating funds from GCSD, which Mr. Parker noted in his June 2009 letter:

> "As stated above, GCRC and SNW have failed to release operating funds for purposes of the operating expenses of

[6] During her testimony, Ms. Mia Jack explained that Ms. Dugan replaced Mr. Beattie as the chief financial officer of SNW and GCRC.

> the Grand Canyon Skywalk Development. No funds have been released since November, 2008. Demand is hereby made for your clients to transfer the funds for the operating expenses of the Grand Canyon Skywalk Development. At a minimum, a transfer of $800,000 is needed to cover operating expenses. Please ensure that this wire transfer is performed no later than June 10, 2009."

Exh. 81 (GCSD007270). Those funds never arrived. Undeterred, Mr. Jin continued to fund the Skywalk's operation on his own, without the required financial contribution let alone basic financial reports and documents from the Tribe.

In preparing for this arbitration, Mr. Jin and his lawyers sought the financial records of the Skywalk from Kafoury Armstrong. The Kafoury firm refused to turn over those records. Neither the Tribe nor its lawyers authorized the Kafoury firm to produce the records. And, the Kafoury firm sought no guidance from this tribunal or court on the matter, even though in nearly every case the records at issue were originally turned over to the firm by GCSD and Mr. Jin. The Kafoury firm, in other words, with the apparent blessing of the Tribe and its lawyers, withheld documents under the cloak of the accountant-client privilege when, by all indications on this record, those documents were not their client's records to withhold.

In any event, still, as late as October 2010, Mr. Theodore Parker, counsel for GCSD, wrote in part as follows to Mr. Terence Thompson (Gallagher & Kennedy), counsel for SNW and the Tribe:

"Please allow this correspondence to confirm our conversation of October 11, 2010. I reiterated my concern over the lack of response to our many requests for the accounting information from Kafoury and Armstrong. As you are aware, for over eighteen (18) months, we have been requesting this information from GCRC/Sa Nyu Wa. These requests began while Mr. Ohre [Snell & Wilmer] was still counsel for the Tribal Enterprises, including Sa Nyu Wa. Mr. Ohre never provided the documentation and as a result, I began requesting this information directly from you, once you took over as counsel for not only the Tribe, but the Tribal Enterprises. During our meeting with the Tribal Counsel (sic), which took place on August 2 and 3 of this year, the Tribal Counsel (sic) mandated the exchange of accounting information from Kafoury and Armstrong. Specifically, we have been requesting the gross receipts from Skywalk ticket sales sold by GCRC/Sa Nyu Wa. We have also requested the expenditures by GCRC/Sa Nyu Wa from these proceeds. Finally, we requested the remaining balance of those proceeds. It was clear after the Counsel (sic) meeting that these documents were to be provided and to this date, we have not received the documentation."

Exh. 64 (GCSD007274).[7] In short, nearly two years after Mr. Emry began requesting records, the Tribe finally promised to deliver the requested information (by October 15, 2010). *Id.* (GCSD007275). No record (or witness for that matter) suggested (let alone confirmed) that the Tribe, its lawyers, or accountants then or ever turned over any financial reports or source documents to GCSD. Cf. Exh. 65 (11.14.10) ("Again, we look forward to receiving Kafoury and Armstrong's documentation immediately[.]").[8] To this day, the Tribe and its professionals have withheld these documents, including records of gross receipts from Skywalk ticket sales and expenditures from those revenues.[9]

Instead, the Tribe not only refused to respond but also demanded that Mr. Jin sign a revised

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[7] Letter from Teddy Parker to Terence Thompson (10.11.10) (GCSD007274-75).

[8] Letter from Teddy Parker to Terence Thompson (10.14.10) (GCSD007277).

[9] The statement for an account that apparently holds at least some portion of the unaccounted-for ticket proceeds (U.S. Bank statement for account no. 136496000 (Exh. 60 (GCSD009364-37)) reflects a balance as of December 31, 2011 in the amount of $10,164,569.75. During the period January 1, 2011 to December 31, 2011, the statement shows "[c]ontributions" in the amount of $19,222,885.48 and "[d]istributions" in the amount of $14,073,243.26. *See also* Exh. 61 (Trust Account Summary (GCSD07279)). In March 2010, SNW and GCSD signed the 112-page agreement with U.S. Bank, as trustee, that established and governed this joint trust account. *See* Exh. 19 (Skywalk Trust Agreement (GCSD006331-6442) ("The Parties desire to enter into this Agreement to facilitate the collection and disbursement of funds relate to the operation of the bridge and the related facilities, and to have the Trustee administer the same.")). The Tribe has produced none of the records supporting these "contributions" or "distributions."

Skywalk Management Agreement and Construction Completion Agreement; then, the record suggests, the tribe would turn over the financial records of the operation. *Cf.* Exh. 65 ("When Mr. Jin and GCSD have been asked for documentation, I have not suggested that the completion of these Agreements must come before the production of the requested information."). Aside from the Skywalk Trust Agreement (Exh. 19) and shuttle bus agreement (Exhs. 20 and 21), which were signed in May 2010, SNW and GCSD never came to agreement on the proposed, superseding management agreement (Exh. 22 (12.28.10 redline draft)) or construction completion agreement (Exh. 23 (10.18.10 handwritten markup)).[10] And, the Tribe has produced none of the critical financial records.

Mr. Emry persisted. In May 2009, he sent an email to Ms. Dugan requesting, among other information, documentation of the 2007 proceeds from the sale of Skywalk tickets (total $3,819,918) so that he could tie the ticket prices to the number of tickets sold. *See* Exh. 81 (GCSD007271) (describing request and email).[11] He also asked for the records concerning the 2007 payments made for and to Skywalk, including payments and supporting invoices for sales tax, marketing, insurance, office supplies, repairs, maintenance, and other expenses. In June 2009, when Mr. Parker wrote to Mr. Ohre,

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[10] *See also* Exh. 25 (Letter from Paul Charlton to Mark Tratos ((1.31.11)(attaching redlined draft agreements)(GCSD007949-8105)). Mr. Charlton wrote in part: "Just as soon as the Tribe has fully considered all of the ramifications of the re-opening of numerous issues long thought to be resolved, we will contact you and Mr. Parker." *Id.* (GCSD007950).

[11] Letter from Teddy Parker to Mark Ohre and Terence Thompson (6.5.09) (GCSD007266-72).

the Tribe's lawyer, Ms. Dugan still had not produced the records. *Id*. (GCSD007272) ("Mr. Emry is still waiting for these documents, despite the many requests over the last several months."). To this day – over four years after Mr. Jin, his accountants, and his lawyers undertook the pursuit of these basic financial records – the Tribe, SNW, GCRC, Kafoury Armstrong, Snell & Wilmer, Gallagher & Kennedy, and every other advisor on behalf of the Tribe, steadfastly refuses to turn over these and every other important financial record to Mr. Jin and GCSD.

In the teeth of this sustained effort by the Tribe and its professional advisors to withhold documents, fees, and reimbursements, Mr. Emry nevertheless turned over records to the Kafoury firm. For example, in February 2009, he sent the following to Ms. Carlene Gaydosh, CPA, at Kafoury, Armstrong & Co.: Grand Canyon Skywalk Operations Document Transmittal Control Sheet; two CDs with Grand Canyon Skywalk Excel and PDF files; and, two boxes of original source documents as requested. *See* Exh. 85 (GCSD008128) (showing handwritten confirmation of receipt by "Carlene Gaydosh CPA 2/20/09").[12] Those records included monthly payroll registers, agreements, leases, contracts, payment details, inventory detail, and numerous compilations of source documents. *Id*.

For months during early to mid-2009, Mr. Emry sent financial and business records to Kafoury Armstrong, including original bank statements, daily sales reports, and point of sale documents. *See generally* Exh. 85 (collection of transmittal logs to and receipts by Kafoury Armstrong). Mr. Emry

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[12] Transmittal and acknowledgement of receipts of financials from David Emry (GCSD008127-94; 163-164).

transmitted records in, for example, March 2009 (GCSD008136), April 2009 (GCSD008145 (receipt confirming delivery and Kafoury firm's receipt of disc containing Skywalk revenue reports for February 2008), GCSD008150 (trial balances and check stubs), and GCSD008151 (2008 Year End for Grand Canyon Skywalk Development, LLC and the Trial Balance for 2007)), May 2009 (GCSD008159) ("20 discs containing requested information"), June 2009 (GCSD008176 (2 discs) and GCSD008178 (2 boxes)), July 2009 (GCSD008182 ("Original daily sales reports (see attached list.)"), GCSD008186 ("10 boxes containing original [point of sale] documents for March 2007 through December 2007"), and GCSD008191 (original bank statements, etc.)), and September 2009 (GCSD008193 ("Original cash disbursements for July 2009")). In every case, the documents confirm Mr. Emry's hand delivery and Kafoury Armstrong's receipt of these records. *See*, *e.g.*, Exh. 85 (GCSD008178 ("David J. Emry Co. Ltd. Receipt" signed and date stamped by Mindy Roberts ("JUN 05 2009")).

During these months in 2009, the record reflects the Kafoury firm's thorough requests for records and Mr. Emry's equally thorough, patient responses. As late as September 2009, Mr. Emry delivered one box "containing all of the items from the 'Open Items List – Sa' Nyu Was 7/20/09' excluding the construction costs"; his firm had already "provided the schedule of values which documented in excess of twenty million [dollars] in construction costs to the Tribal Council, its attorneys and a representative of the Grand Canyon Resort Corporation Board." Exh. 85 (GCSD000163).

All of this effort by the Kafoury firm (not to say Mr. Emry's) apparently resulted in an audit report.

On March 30, 2009, Mr. Jeffrey Manuel, CPA, a manager at the Kafoury firm, wrote in an email to Mr. Emry asking for "the documents we requested earlier including the remaining 2008 (sic) and the additional request items." Exh. 85 (GCSD008153). Ms. Gaydosh wanted the items, she wrote in a related email, because "[t]he auditors are very anxious to get started." *Id*. As noted above, Mr. Emry not only produced those records but also hosted representatives of the Kafoury firm as part of that audit. Mr. Emry wrote in an email that "Kafoury Armstrong and Co. representatives are scheduled to be in our office on May 4th, 5th, 11th, and 12th, 2009 to complete testing of internal accounting controls." *Id*. (GCSD008160). But, since that time, in over three years, after having produced thousands of pages of records, many in original form, no one for the Tribe has ever turned over any audit report to Mr. Emry, Mr. Jin, GCSD, or its lawyers.[13]

The Tribe's Efforts to Interfere with the Gathering of Evidence for Presentation at the Final Hearing. The second preliminary matter is the Tribe's sustained effort to block GCSD's gathering of evidence. Mr. Tratos, counsel for GCSD in this matter, sought accounting records from the Kafoury firm, including issuance of subpoenas to the firm for records and Ms. Gaydosh's testimony. As noted above

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[13] Mr. Mark Tratos (Greenberg Traurig), counsel for GCSD, wrote on February 3, 2011 to Mr. Terence Thompson (Gallagher & Kennedy), counsel for SNW, recapping Mr. Parker's requests for the records, requesting again the accounting and other project records, and demanding the audit permitted under Section 4.5 of the 2003 agreement. *See* Exh. 27 (GCSD008125-26) ("This letter is to notify you that GCSD hereby requests access to the books and records of the project in SNW's possession to conduct such an audit.")). Neither the Tribe nor SNW complied.

briefly, counsel for Kafoury Armstrong, McDonald Carano Wilson (Mr. Mark Dunagan), objected to the subpoena on privilege grounds. *See* Letter from M. Dunagan to M. Tratos, Exh. 92 (5.31.12) ("Kafoury has been instructed by SNW not to produce the requested documents on the basis of the accountant-client privilege."). But, beyond that objection, however well taken, SNW also instructed the Kafoury firm to return the records to SNW. *Id*. ("Please be advised that the original version of SNW's entire file is being returned to it by Kafoury, pursuant to SNW's request. *** As a result, the best source from which to pursue production of the original documents is SNW."). In turn, despite several requests, SNW never produced these financial records. So, in the months leading to the hearing, SNW possessed the core financial records, but refused to exchange those records with GCSD.[14] We turn now to the merits.

III.

Mr. David Jin, Oriental Tours, Inc., and Tourism at Grand Canyon West. In 1995, Mr. David Jin formed Oriental Tours, Inc. (OTI) to bring travelers to the western United States from China, Hong King, Singapore, and Taiwan. Stops on those tours included San Francisco, Los Angeles, Las Vegas, and Grand Canyon West. Over the years, in cooperation with the Tribe, Mr. Jin developed helicopter rides, pontoon water trips, and shuttle bus tours for visitors to Grand Canyon West. Mr. Jin estimates that OTI brings perhaps one-third of all

[14] According to counsel for GCSD, Mr. Tratos, the Tribe's lawyers (Gallagher & Kennedy) also advised witnesses not to respond to subpoenas from this tribunal for records and testimony but, because those efforts were not relevant to the dispute here, nothing further need be discussed on that point.

visitors to Grand Canyon West. Both the Tribe and Mr. Jin profited from this tourism.

Mr. Jin testified that, in the late 1990s, he conceived of and then developed the idea for a glass viewing bridge at Grand Canyon West. He formed GCSD (with other investors) to finance, construct, and manage the facility. The Tribe formed SNW to contract and share revenues with GCSD.[15] Over time, David Jin and Steve Beattie (for the Tribe) negotiated and came to agreement on the terms of the construction and management of the Skywalk.[16]

After four years of planning and construction, the Skywalk bridge opened in March 2007. Through June 7, 2009, GCSD had invested over $28 million in the construction of the Skywalk bridge and adjacent Visitors' Center shell. Exh. 59 (Schedule of construction costs (GCSD003953-57)). The Visitor's Center remains largely but not fully completed. In June 2009, GCSD had budgeted $1.25 million to complete the shell of the Visitor's Center (after the Tribe delivered utilities to Grand Canyon West) and $5.022 million to build future tenant improvements at the Visitors' Center. Exh. 59 (GCSD003957). In order to provide an adequate return to Mr. Jin and his investors on their investment of over $30 million in construction costs, the parties agreed that GCSD

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[15] The Tribe is the sole shareholder of SNW, which, in turn, partially waived its sovereign immunity for purposes of the agreement with GCSD. *See* Exh. 3 (execution copy of agreement), at §15.4(d) ("SNW expressly waives its sovereign immunity with respect to all disputes arising out of this Agreement to the extent permitted under the Constitution of the Nation.").

[16] *See* Exhs. 4, 5, 6 and 7 for examples of the letters and notes between Mr. Jin and Mr. Beattie during 2004 and 2006.

alone would manage the Skywalk and share revenue with the Tribe for 25 years (and an additional 15 years after termination of the agreement).

The GCRC, SNW's sister Tribal corporation, controls admission to Grand Canyon West and, therefore, to the Skywalk. Visitors must first stop at the reservation entrance where, in many cases, GCRC sells tickets for admission to the Skywalk (and meal tickets). Those sales make up perhaps half of all ticket sales, more or less, with GCSD selling the balance of the tickets at its Las Vegas offices. When the Skywalk opened in March 2007, the receipts from ticket sales were deposited into SNW's bank accounts; SNW then issued checks to GCSD for operating expenses. But, in 2008, SNW stopped accounting for revenues and reimbursements. GCRC may (or may not) have delivered ticket revenues to SNW. But, any event, SNW paid no manager's fee to GCSD for 2008 through today. During these years, therefore, GCSD redirected its portion of the ticket revenues to operating expenses. And, for its part, OTI advanced funds to GCSD for repairs and other operating expenses. Most importantly, as noted above, SNW turned over none of the records or audits of the operations.

The Parties and the Relevant Terms of Their 2003 Agreement for the Construction and Management of the Skywalk Bridge and Visitor's Center. In their 2003 *Development and Management Agreement*, Grand Canyon Skywalk Development contracted with Sa Nyu Wa for the construction and management of the Skywalk glass bridge and Visitor's Center.[17] This dispute arises out of that

[17] *See* Exh. 3 (execution copy of agreement (GCSD005563 – 5611)). The agreement defined the "Project Improvements" to

agreement. Several terms of the agreement bear on this dispute, including the following provisions, which are excerpted together for ease of reference as follows:

2.2 Development of Project.

* * *

(c) Project Entitlements.

* * *

(ii) SNW shall be responsible, at its expense, for obtaining any and all required permits and licenses from any governmental authority, including the Nation, other than agencies of the federal government (the "Non-Federal Entitlements"). SNW shall pursue obtaining the Non-Federal Entitlements with due diligence and shall provide Manager with appropriate written evidence of such Federal Entitlements when they are received. Manager will cooperate with SNW in SNW's efforts to obtain the Federal Entitlements. The date that all required Federal Entitlements and Non-Federal Entitlements have first been obtained is referred to as the "Entitlement Date."

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mean "the Glass Bridge and adjacent building providing security and structural support for the Glass Bridge and which will also contain a gift shop, together with all related on and off-site improvements and infrastructure." Exh. 3, at 4 (GCSD005566) and Exh. B (Description of the Project Improvements)(referring in part to "an approximate 5500 square foot building that includes a VIP room, a gift shop, a coffee shop, a display area, at least 2 restrooms and a small kitchen[.]")

2.3 Management of Project. During the Operating Term, Manager shall manage the Project in accordance with the requirements of this Agreement, with full responsibility and authority to supervise, direct and control the management and operation of the Project, subject in every case to the authority limitations and other restrictions set forth in Section 2.7 and elsewhere in this Agreement and to the requirement that all such actions shall be consistent with the then effective approved Annual Operating Budget and Annual Capital Budget, such responsibility and authority (as so limited) to include, without limitation, the following:

(a) Manage the Project in manner consistent with the Standards of
Operation and the requirements of this Agreement;

(b) Determine appropriate pricing for retail customers to use the Glass Bridge, subject to the prior written approval of such pricing by SNW. It is agreed that during the period from the date of commencement of the Operating Term to the first anniversary of such commencement date, the retail price will be not less than $12 per individual, unless the parties otherwise agree;

(c) Determine appropriate pricing for Tour Operators or other organized, commercial tour groups for the use the Glass Bridge, subject to the prior written approval of such pricing by SNW. It is agreed that during the period from the date of commencement of the Operating Term to the first anniversary of such commencement date, the price to Tour Operators or other organized, commercial tour groups will be not less than $9 per individual, unless the parties otherwise agree;

(d) Arrange, in SNW's name, for utility, telephone, pest control, security service, trash removal and other services reasonably necessary or appropriate for the operation of the Project;

(e) Determine, establish, and maintain advertising, public relations and promotional policies appropriate for the Project;

(f) Cause all ordinary and necessary repairs and maintenance to be made to the Project and after prior notification and approval by SNW cause all such other things to be done in or about the Project as shall be necessary to comply with all requirements of governmental Authorities, boards of fire underwriters and other bodies exercising similar functions, provided, however, that repairs the costs of which are properly capitalized shall be made by Manager only to the extent that (i) such costs are included within an Annual Capital Budget that has been approved by the parties or (ii) emergency conditions require the performance of capitalized repairs in order to prevent damage or injury to persons or property before approval by SNW of an appropriate modification of the Annual Capital Budget can be reasonably obtained;

(g) Purchase all Inventories and such other services and merchandise as are necessary for the proper operation of the Project in accordance with the Standards of Operation, to the extent the costs thereof are included within an approved Annual Capital Budget, and arrange for the purchase and installation of Furniture and Equipment (including additions to or replacements of such items) to the extent the costs thereof are included within an approved Annual Capital Budget;

(h) Institute and defend such proceedings at law or in equity in the name of SNW (to the extent that SNW is a party in any such proceeding) or Manager, using counsel selected by Manager and approved by SNW, as Manager shall deem reasonably necessary or proper in connection with the collection of accounts receivable and all other matters arising from the operation of the Project. Manager shall obtain SNW's written approval prior to filing any litigation on behalf of SNW;

(i) Collect all Gross Revenues at the point of sale or service and, on a daily basis, after the total amount of Gross Receipts for such day have been determined jointly by a representative of Manager and SNW, such Gross Receipts shall be transferred and delivered to SNW at the Glass Bridge facility. Following transfer of the daily Gross Receipts to SNW as provided above, Manager shall have no further responsibility for security for such daily Gross Receipts.

(j) Collect directly from customers any and all federal, Nation, state and municipal excise, sale, transaction privilege, and use taxes imposed on the sales price of any goods or services furnished (collectively, "Sales Taxes"), with such amounts to be handled in the same manner as provided above in Section 2.3(i) for Gross Revenues;

(k) Within 3 days of receipt of invoices and other documentation that relate to the Project, provide to SNW copies of all such invoices and other documentation, including all documentation relating to Gross Operating Expenses and capital expenditures that need to be paid. All such invoices and other documentation must be sent to SNW via facsimile within the 3-day period, with copies to also

be sent simultaneously by mail or other method of delivery authorized pursuant to Section 15.11. Documentation provided pursuant to this Section 2.3(k) need not be sent to legal counsel for SNW. Manager will also use its commercially reasonable efforts to have all such invoices and other documentation sent directly to SNW;

(l) Comply with all laws, statutes, regulations and ordinances of all governmental authorities with respect to the management, use and operation of the Project, except that Manager shall be responsible for capital expenditures in connection therewith only as required by the Annual Capital Budget or Article 9;

(m) Bond over or make other adequate provision for the payment of any liens by mechanics, materialmen, suppliers, vendors or others producing labor or services to the Project from work for which SNW has made funds available in the Operating Account or otherwise; and

(n) Clean and maintain the Project, including the restrooms, floors, windows and parking facilities, on a daily basis in order to ensure a clean and sanitary environment.

(o) The Glass Bridge shall be operated and available for use by the public throughout the Operating Term at the following times:

(A) Daily, starting each day at 8:00 AM Arizona time and ending at 6:00 PM Arizona time during the summer, and starting at
9:00 AM Arizona time and ending at 5:00 PM Arizona time during the winter, and

(B) At such other times as SNW and Manager shall mutually agree upon from time to time, as necessary or appropriate to facilitate and encourage visits to the Glass Bridge.

* * *

2.8 Approval Process. Whenever in this Agreement the consent or approval of a party is required, unless otherwise provided in this Agreement with respect to such matter, the party requesting such approval or consent shell provide the other party with a written request for such approval or consent, providing sufficient detail to allow the other party to adequately and properly evaluate the request. Unless otherwise provided in this Agreement, a party shall not unreasonably withhold, delay, or condition its consent or approval; however, if a party fails to respond to a written request for consent or approval within 20 Business Days of receipt of the request and the detailed explanation, such party shall be deemed to have approved the matter. All disapprovals must be in writing and contain a detailed explanation for such disapproval.

* * *

2.10 Performance of Management Services by Subsidiary. From time to time, Manager may provide its management services pursuant to this Agreement through a Qualified Subsidiary; subject in all cases to the following:

(a) Manager shall remain fully liable and obligated for all of the obligations and duties of Manager under this Agreement;

(b) Prior to performing any services under this Agreement, the Qualified Subsidiary shall agree in writing, for the benefit of SNW and Manager, to be bound by the terms of this Agreement applicable to Manager, as they relate to the services to be performed by such Qualified Subsidiary, and to perform those services in accordance with the terms and conditions of this Agreement;

(c) Manager shall not be entitled to delegate any right to approve or consent to any matter under this Agreement requiring the consent or approval of Manager, and under no circumstances will any consent or approval ever be required from the Qualified Subsidiary;

(d) Manager shall supervise the Qualified Subsidiary in all aspects of the services performed by the Qualified Subsidiary, and Manager agrees to indemnify, defend, and hold SNW and its Related Parties harmless for, from and against any and all Claims arising out of or resulting from the services performed by the Qualified Subsidiary or the actions of the Qualified Subsidiary, to the extent such services or actions are not in compliance with the terms of this Agreement, which indemnity shall survive the expiration or termination of this Agreement; and

(e) Any and all costs that are incurred in connection with the delegation permitted by this Section 2.10 that would not have been incurred but for the delegation, such as fees payable to the Qualified Subsidiary, shall be paid exclusively by Manager promptly when due, and under no circumstances shall such costs be deemed Gross Operating Expenses.

As used in this Section 2.10, a "Qualified Subsidiary" means an entity that is wholly owned by Manager, David Jin, Yvonne Tang, or a trust in which David Jin and/or Yvonne Tang are the sole trustees, or any combination of the foregoing and in which David Jin has primary management responsibility; provided, however, that, up to 10% of the ownership interests in the Qualified Subsidiary may be held by third parties that have been approved in writing by SNW, such approval not to be unreasonably withheld, delayed, or conditioned.

* * *

3.1 Amount of Manager's Fee. In consideration of Manager's performance hereunder, including during the Construction Term, SNW shall pay to Manager a Manager's Fee equal to the following:

(a) For the Fiscal Year commencing on the first day of the Operating Term Date and ending on December 31 of that year and for the next five full Fiscal Years, an amount equal to 50% of Net Revenues;

(b) For the next five full Fiscal Years, an amount equal to 40% of
Net Revenues for each such Fiscal Year;

(c) For the next five full Fiscal Years, an amount equal to 30% of Net Revenues for each such Fiscal Year; provided, however, that if, by the time of commencement of the period described in this subsection (c), Manager has not earned an aggregate total Manager's Fee pursuant to subsections (a) and (b) equal to the Manager's Investment, then, until such time as Manager has earned an aggregate total Manager's Fee pursuant to subsections (a) and (b)

and this subsection (c) equal to the Manager's Investment, the amount paid to Manager pursuant to this subsection (c) shall be 50% of Net Revenues rather than 30% of Net Revenues; provided, further, however, that Net Revenues for the fiscal year in which Manager has finally earned an aggregate total Manager's Fee equal to Manager's Investment, shall, for purposes of the annual reconciliation pursuant to Section 3.4, be prorated for such year, based on a 365-day year, and Manager shall be deemed to have earned and shall be paid 50% of such Net Revenues on a daily basis, until the aggregate total Manager's Fee pursuant to subsections (a) and (b) and this subsection (c) equal to the Manager's Investment, and thereafter Manager shall be deemed to have earned and shall be paid 30% of such Net Revenues. If at the end of the 5-year period described in this subsection (c), Manager still has not received an aggregate total Manager's Fee equal to Manager's Investment, there shall be no further adjustments to the amount of the Manager's Fee, but the Manager's Fee shall be payable pursuant to subsection (d) below.

(d) For the remainder of the Operating Term, an amount equal to 25% of Net Revenues for each Fiscal Year during the remainder of the Operating Term.

* * *

3.4 Annual Reconciliation. Within 60 days following the end of each Fiscal Year for which there are Net Revenues, SNW shall pay to Manager an amount equal to the Manager's Fee for such Fiscal Year less the aggregate total of the Interim Payments made to Manager pursuant to Section 3.3 with respect to such Fiscal Year; provided, however, that if

the aggregate total of such Interim Payments exceeds the Manager's Fee for such year, then Manager shall pay the excess to SNW within the 60-day period.

* * *

4.1 Books and Records. SNW shall keep full and adequate books of account and other records reflecting the results of operation of the Project, all in accordance with generally accepted accounting principles. The books of account and all other records relating to or reflecting the operation of the Project shall be kept at the offices of SNW and shall be available to Manager and its representatives and its auditors or accountants, at all reasonable times and upon reasonable notice for examination, audit, inspection, copying and transcription. All of such books and records pertaining to the Project at all times shall be the property of SNW. Within 30 days of Manager's written request and at Manager's expense, SNW will provide Manager with copies of all books of account and other records of the Project, which arc reasonably available and not disposed of in accordance with SNW's document retention policy. Within 30 days of SNW's written request and at SNW's expense, Manager will provide SNW with copies of all invoices, books of account and other records relating to the construction phase of the Project, which are reasonably available and not disposed of in accordance with Manager's document retention policy.

4.2 Accounting.

(a) SNW shall deliver to Manager within 20 days after the end of each calendar quarter an interim accounting showing the results of the operation of the Project for such quarter and for the Fiscal Year to

date (including a computation of Gross Revenue and Gross Operating Expenses). Such interim accounting and the annual accounting referred to below shall:

(i) be taken from the books and records maintained by SNW for the Project in the manner hereinafter specified; and (ii) separately state the amount of the Manager's Fee.

(b) Within 60 days after the end of each Fiscal Year, SNW shall deliver to Manager an unaudited annual income statement and balance sheet for the Project, prepared on an accrual basis, showing Gross Revenues, Gross Operating Expenses, Net Revenues, and any other information necessary to make the computations required hereby for such Fiscal Year (collectively, the "Annual Operations Statement").

(c) The annual financial statements for the Project shall be audited by an independent firm of certified public accountants selected by SNW. If the audit is conducted by a Qualified Accounting Firm, the cost of the audit shall be included within Gross Operating Expenses. Otherwise, the cost of the audit shall be borne by SNW. The audit shall be conducted in accordance with generally accepted accounting principles. As used in this Agreement, a "Qualified Accounting Firm" is an accounting services firm (i) approved by Manager, or (ii) meeting the following criteria: (A) having offices in at least three states; (B) having a regional or national reputation for high standards of professionalism within the accounting and auditing field; (C) having at least 75 partners or principals; (D) having expertise in the area of auditing within the hospitality industry; and (E) having one or more partners or principals licensed as certified public accountants within the State of

Arizona. The parties agree that Moss Adams LLP qualifies as a Qualified Accounting Firm.

* * *

4.5 Right to Audit. At any time within two years after the end of a Fiscal Year, Manager may cause an audit of the books and records of the Project to be made, at Manager's sole expense and not as a Gross Operating Expense, for the purpose of verifying the accuracy of the Annual Operations Statement for such Fiscal Year and any other computations under this Agreement relating to such Fiscal Year. The audit shall be performed by a certified public accountant selected by Manager, and SNW agrees to make all records available for the audit at its offices, unless Manager agrees to a different location. If the results of the audit show any discrepancies that would affect amounts paid or payable by Manager under this Agreement, then within 10 days of the completion of the audit and the determination of such discrepancy, Manager and SNW shall make any necessary adjusting payments between themselves to remedy the discrepancy.

* * *

5.1 Annual Operating Budget; Marketing Budget.

(a) Annual Operating Budget. The "Annual Operating Budget" for each Fiscal Year, commencing with the Fiscal Year in which the Operating Term commences, shall consist of reasonable estimates of Gross Revenues and Gross Operating Expenses for such Fiscal Year, itemized in a reasonable format, together with the assumptions, in narrative form, forming the basis of such estimates. The Annual

Operating Budget shall also include provisions for an operating reserve (the "Operating Reserve"), with the Operating Reserve to be funded as provided in this Agreement. At least 60 days prior to the commencement of each Fiscal Year, commencing with the Fiscal Year in which the Operating Term commences, SNW shall prepare and submit the Annual Operating Budget for such Fiscal Year to Manager for its review and approval. Once both Manager and SNW are in agreement on the terms of the Annual Capital Budget for a particular Fiscal Year, Manager shall be authorized to implement such approved Annual Capital Budget.

(b) Marketing Budget, The Annual Operating Budget shall include as a component thereof, a separate marketing budget (the "Marketing Budget") which shall be subject to review and approval by SNW. The Marketing Budget for a particular year shall be prepared by Manager and submitted to SNW for review at least 30 days prior to the date that SNW is required to submit to Manager the Annual Operating Budget for the same year, and, when approved by the parties, for inclusion in the Annual Operating Budget. Unless the parties otherwise agree, each in their sole and absolute discretion, total aggregate expenditures for marketing during the first Fiscal Year, commencing with the Fiscal Year in which the Operating Term commences, and the next five full Fiscal Years shall not exceed $500,000 and thereafter, the annual Marketing Budget for a particular Fiscal Year shall not exceed 5% of Gross Revenues for the prior Fiscal Year. Once both Manager and SNW are in agreement on the terms of the Marketing Budget for a particular Fiscal Year, Manager shall be authorized to implement such approved Marketing Budget.

* * *

5.6 Operations on behalf of SNW. In performing its duties under this Agreement, Manager shall act solely for the account of SNW. All debts and liabilities to third persons incurred by Manager in the course of its operation and management of the Project, shall be pursuant to the terms and subject to the limitations of this Agreement, and shall be the debts and liabilities of SNW only, and Manager shall not be liable for any such obligations by reason of its management, supervision, direction and operation of the Project for SNW or for any other reason whatsoever. Manager may so inform third parties with whom it deals on behalf of SNW and may take any other steps to carry out the intent of this provision. The foregoing is not intended to relieve or release Manager from any of its funding obligations pursuant to any provision of this Agreement or from liability for damages or other Claims arising as a result of a default by Manager pursuant to this Agreement.

* * *

13.4 Shuttle Bus Service.

(a) Agreement to Provide. Manager agrees that, from and after commencement of the Operating Term through the earlier of (i) the 10th anniversary following the Diamond Bar Road Completion Date, or (ii) the 25th anniversary of the Effective Date (the "Shuttle Service Term"), Manager will, at Manager's sole cost and expense, maintain and operate the Shuttle Bus Service in accordance with the terms, conditions and requirements of this Section 13.4. Under no circumstances will any costs or expenses

associated with the Shuttle Bus Service, including, without limitation, costs to design and construct the Staging Lodge, costs for the Tour Vehicles, and ongoing operational costs be deemed to be Gross Operating Expenses or capital expenditures subject to Article 6.

(b) Description of the Shuttle Bus Service. The "Shuttle Bus Service" shall consist of a first class shuttle bus service meeting the requirements of this Section 13.4 and providing shuttle service for members of tour groups and other individuals to and from the Staging Lodge and the Project Improvements, including (i) a shuttle to and from the Staging Lodge and Grand Canyon West (the "Diamond Bar Shuttle"), (ii) a shuttle to and from Grand Canyon West and the Glass Bridge (the "Glass Bridge Shuttle"), and (iii) a shuttle to and from Grand Canyon West and Guano Point (the "Guano Point Shuttle").

(c) Staging Lodge; Hours of Operation.

(i) Prior to commencement of the Shuttle Service Term, Manager shall design and construct a first class staging and check-in facility of at least 4,000 square feet, with associated paved and lighted parking lot and ancillary improvements (all such improvements being referred to collectively as the "Staging Lodge"). The Staging Lodge shall be constructed in a good and workmanlike manner by a licensed general contractor on the real property owned by Manager, located on Pierce Ferry Road, near its intersection with the Diamond Bar Road, and more particularly described on Exhibit C. The design of the Staging Lodge shall be subject to the prior review and approval of SNW, such approval not to be unreasonably withheld, delayed, or conditioned.

(ii) The Staging Lodge shall be operated and maintained in first class condition and repair throughout the Shuttle Service Term.

(iii) The Shuttle Bus Service and the Staging Lodge shall be operated and available for use by the public throughout the Shuttle Service Term at the following times (collectively, the "Hours of Operation"):

(A) Daily, starting each day at least 30 minutes prior to the first scheduled arrival of any organized tour group at the Staging Lodge and operating continuously thereafter throughout the day until the later of (1) 120 minutes following the last scheduled arrival of any organized tour group at the Staging Lodge and (2) 30 minutes following the last scheduled return of an organized tour group from the Glass Bridge to the Staging Lodge; and

(B) At such other times as SNW and Manager shall mutually agree upon from time to time, as necessary or appropriate to facilitate and encourage visits to the Glass Bridge.

(iv) All costs and expenses of design and construction of the Staging Lodge, as well as all operational costs and expenses, shall be borne exclusively by Manager.

(d) Required Tour Vehicles. Throughout the Shuttle System Term and during the Hours of Operation, Manager shall have ready and available the following tour vehicles (collectively, the "Tour Vehicles"):

(i) For use on the Diamond Bar Shuttle, at least four tour coaches, each with a minimum capacity of 40 persons, specially designed and built to handle the

rigors of Diamond Bar Road with a minimal chance of breakdown; provided, however, that once the Diamond Bar Shuttle ceases to operate as stated in Section 13.4(e)(i), the tour coaches used for the Diamond Bar Shuttle shall be used for the other Shuttle Bus Service or, if not so used, they shall transferred to SNW as provided in Section 13.4(j), as if, on the Diamond Bar Road Completion Date, the Shuttle Service Term had ended with respect to such vehicles;

(ii) For use on the Glass Bridge Shuttle and Guano Point Shuttle, at least three high-end tour buses, each with a minimum capacity of 40 persons; and

(iii) For the use of VIP guests for both the Guano Point Shuttle and the Glass Bridge Shuttle, at least one VIP limousine bus, with a minimum capacity of 12 persons.

Each of the Tour Vehicles shall be continuously maintained by Manager in a first class, safe and clean condition and state of repair. All costs and expenses of acquiring, replacing, maintaining, repairing, and operating the Tour Vehicles shall be paid exclusively by Manager.

(e) Shuttle Operations.

(i) The Diamond Bar Shuttle shall be operated seven days a week, 365 days a year, with the Diamond Bar Shuttle ceasing operations on the Diamond Bar Road Completion Date. While operating, the Diamond Bar Shuttle shall be operated on a daily basis during the Hours of Operation. Following the Diamond Bar Road Completion Date, the Diamond Bar Shuttle service will be permanently discontinued.

(ii) The Glass Bridge Shuttle and the Guano Point Shuttle shall be operated during the Hours of Operation seven days a week, 365 days a year during the entire Shuttle Service Term.

(f) Improvement of Diamond Bar Road. The federal government is involved in a project to completely pave Diamond Bar Road from its intersection with the Pierce Ferry Road to the border of the Nation's reservation (such improvements being referred to as the "Diamond Bar Road Improvements". The date of completion of the Diamond Bar Road Improvements is the date that the government has completed all work to completely pave Diamond Bar Road and all lanes of Diamond Bar Road are first open to the public (the "Diamond Bar Road Completion Date").

(g) Payments to Manager for Shuttle Bus Service.

(i) For each individual using the Diamond Bar Shuttle, SNW shall pay $3 to Manager; subject, however, to increases in such per person amount permitted by Section 13.4(g)(iv). There shall be no additional fee for any individual using the Diamond Bar Shuttle who also uses either or both of the Glass Bridge Shuttle and the Guano Point Shuttle.

(ii) During the period that the Diamond Bar Shuttle is operating, SNW shall also pay to Manager the following amounts, each of which is subject to increase as permitted by Section 13.4(g)(iv), with respect to individuals who utilize either or both of the Glass Bridge Shuttle and the Guano Point Shuttle:

(A) $6 for every individual that arrives at Grand Canyon West by private vehicle; provided, however,

that there shall be no fee for any individual that takes a Jeep tour to Grand Canyon West.

(B) $4 for every individual arriving at Grand Canyon West by a fixed wing Tour Operator; and

(C) $5 for every individual arriving at the Staging Lodge by transportation provided by a bus Tour Operator.

(iii) After the Diamond Bar Shuttle no longer operates, SNW shall pay to Manager $6 for every individual utilizing either or both of the Glass Bridge Shuttle and the Guano Point Shuttle; subject, however, to increases in such per person amount permitted by Section 13.4(g)(iv).

(iv) On each anniversary of the commencement of the Shuttle Service Term, Manager may increase the fees payable pursuant to Sections 13.4(g)(i), 13.4(g)(ii) and 13.4(g)(iii) to an amount equal to the fee in effect on the day preceding such anniversary multiplied by the CPI Adjustment Factor.

(v) Notwithstanding the foregoing, during the Shuttle Service Term, employees, of SNW and/or Manager shall be entitled to use the Shuttle Bus Service without charge or payment to Manager from SNW on regularly scheduled routing.

(vi) Amounts due and payable by SNW under this Section 13.4(g), shall be payable no more frequently than once in a calendar month, within 15 days of receipt by SNW of a detailed invoice and statement of fees due from SNW for the period of time covered by the invoice.

(vii) Under no circumstances will amounts paid or otherwise collected by Manager pursuant to this Section 13.4(g) in connection with the Shuttle Bus Service be deemed to be Gross Revenues.

(viii) In lieu of payments from SNW to Manager under Section 13.4(g)(ii)(B) and (C) and upon SNW's written request, Manager shall, during the period that the Diamond Bar Shuttle is operating, be required to charge the amounts that SNW would have paid under Section 13.4(g)(ii)(B) and (C) from the Tour Operators.

(h) Compliance. Manager shall be responsible, at Manager's sole cost and expense, for obtaining and maintaining in full force and effect, any and all governmental permits, entitlements, licenses, and approvals necessary or appropriate to design, construct, maintain and operate all aspects of the Shuttle Bus Service, including the Staging Lodge and the Tour Vehicles. All of the activities of Manager pursuant to this Section 13.4 shall be undertaken and completed in compliance with all applicable governmental laws, rules and regulations.

(i) Operational Issues; Insurance and Indemnity.

(i) Throughout the Shuttle Service Term, the Shuttle Bus Service shall be advertised by Manager as free to the public, and other than the amounts to be paid to Manager pursuant to Section 13.4(g), Manager shall not charge or collect any other fees for the Shuttle Bus Service.

(ii) All of the individuals involved in providing the Shuttle Bus Service shall be employees of Manager and all labor costs associated with such personnel shall be borne exclusively by Manager. Such

employees shall not be deemed to be Project employees and Manager shall not be subject to the requirements of Section 2.6 with respect to such employees. No individual shall be allowed to operate a Tour Vehicle unless such individual has a current, valid state vehicle operator's permit and is otherwise physically, mentally, and emotionally competent to safely and properly operate vehicles such as the Tour Vehicles.

(iii) Throughout the Shuttle Service Term, Manager shall provide and maintain commercial general liability and business automobile liability insurance in amounts satisfactory to SNW, but in any event not less than a combined single limit of $5,000,000 for each occurrence, for personal injury and death, and property damage, which shall, among other risks, including coverage against liability arising out of the ownership or operation of motor vehicles, as well as coverage in such amount against all claims brought anywhere in the world arising out of alleged (i) bodily injury, (ii) death, (iii) property damage, (iv) assault or battery, (v) false arrest, detention or imprisonment or malicious prosecution, (vi) libel, slander, defamation or violation of the right of privacy, or (vii) wrongful entry or eviction. In providing and maintaining such insurance, Manger shall comply with the requirements of Sections 7.2 and 7.3 with respect to such insurance; however, the insurance that Manager is required to carry pursuant to this Section 13.4(i)(iii) is in addition to the insurance required pursuant to Article 7, and the cost of the insurance required hereby shall be borne exclusively by Manager.

(iv) Manager agrees to indemnify SNW and its Related Parties and hold each of them harmless for, from and against any and all Claims attributable,

directly or indirectly, to the operation by Manager of the Shuttle Bus Service, to any of the activities of Manager, its Related Parties, or their employees, agents, and contractors pursuant to this Section 13.4, or to the breach by Manager of any of its duties and obligation pursuant to this Section 13.4. This indemnity shall survive the expiration or termination of this Agreement.

(j) Ownership of Shuttle Assets. During the Shuttle Service Term, all of the real and personal property assets used in connection with the Shuttle Bus Service, including, without limitation, all Tour Vehicles, the Staging Lodge, the real property on which the Staging Lodge is constructed, and all other real and personal property owned by manager and used in connection with the Shuttle Bus Service (collectively, the "Shuttle Assets") shall be owned by manager. Upon expiration of the Shuttle Service Term, Manager agrees to convey and transfer title to all of the Shuttle Assets to SNW, free and clear of any and all liens and encumbrances and in the condition required by this Agreement, without further payment of any amount by SNW to Manager.

* * *

15.4 Arbitration; Governing Law; Jurisdiction.

(a) Mandatory Arbitration. Any controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration. The arbitration shall be conducted by a sole arbitrator; provided however, if the parties cannot agree upon an arbitrator, each party will select an arbitrator and the two arbitrators will select the sole arbitrator to resolve the dispute. Either party may request and thus initiate arbitration of the dispute by written

notice ("Arbitration Notice") to the other party. The Arbitration Notice shall state specifically the dispute that the initiating party wishes to submit to arbitration. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect, as limited by Section 15.4(d). Judgment upon the award (as limited by Section 15.4(d)) rendered by the arbitrator may be enforced through appropriate judicial proceedings in any federal court having jurisdiction. Prompt disposal of any dispute is important to the parties. The parties agree that the resolution of any dispute shall be conducted expeditiously, to the end that the final disposition thereof shall be accomplished within 120 days or less.[18]18

(b) Governing Law. The validity, meaning and effect of this Agreement shall be determined in accordance with the laws of the State of Arizona and the Hualapai Indian Tribe. The laws of the State of Arizona specifically exclude, however, any laws of the State of Arizona that may be interpreted to (i) waive SNW's or the Nation's sovereign immunity, (ii) require arbitration, other than as agreed to in Section 15.4(a); or (iii) require SNW or the Nation to appear in any courts or other proceedings in the State of Arizona, except federal courts. The venue and jurisdiction for (x) any litigation under this Agreement and (y) all other civil matters arising out of this Agreement shall be the federal courts sitting in the State of Arizona, and located in or around Peach Springs, Arizona.

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[18] During the Preliminary Hearing No. 1 (10.31.11), "the parties agree[d] to waive that provision." Report of Preliminary Hearing and Scheduling Order (No. 1), at 1

(c) Unenforceability. With respect to any provision of this Agreement finally determined by a federal court of competent jurisdiction to be unenforceable, such federal court shall have jurisdiction to reform such provision so that it is enforceable to the maximum extent permitted by applicable law, and the parties shall abide by such federal court's determination. In the event that any provision of this Agreement cannot be reformed, such provision shall be deemed to be severed from this Agreement, but every other provision shall remain in full force and effect.

(d) Limited Waiver of Sovereign Immunity. SNW expressly waives its sovereign immunity with respect to all disputes arising out of this Agreement to the extent permitted under the Constitution of the Nation. SNW's waiver of sovereign immunity from suit is specifically limited by the Constitution of the Nation to the following actions and judicial remedies:

(i) The action must be brought by Manager and not by any other person, corporation, partnership, government, governmental agency or entity whatsoever; and

(ii) Any money damages will be limited to the assets that are solely owned by SNW. No money damages, awards, fines, fees, costs or expenses can be brought or awarded against the Nation in arbitration, judicial, or governmental agency action; and

(iii) An action in a federal court of competent jurisdiction in Arizona to either (i) compel arbitration or (ii) enforce a determination by an arbitrator requiring SNW to specifically perform any obligation under this Agreement (other than an obligation to pay any money damages under Section

15.4(d)(ii)).

* * *

15.12 Attorneys' Fees. In the event of any action or proceeding brought by either party against the other under this agreement, the prevailing party will be entitled to recover attorneys' fees in such amount as the arbitrator or arbitration panel may judge reasonable.

Arizona Standards for Finding and Resolving Ambiguity in Contract Language; Summary of Breaches of the Agreement. The ultimate goal for the court is to "ascertain and give effect to the intentions of the parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). If the terms of a contract are clear and unambiguous, the court must enforce them as written. *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982); *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 302, 197 P.3d 758, 763 (App. 2008). A contract is ambiguous if its terms are reasonably open to more than one interpretation. *Id.* Here, the written terms of the parties' 2003 contract are unambiguous.

The testimonial and documentary record confirms and the tribunal finds that SNW breached the 2003 agreement by failing to: (a) allow GCSD to manage the Skywalk (§2.1); (b) keep adequate books and records (§4.1); (c) deliver interim accountings to GCSD within 20 days of each calendar quarter (§4.2(a)); (d) deliver unaudited annual income statements to GCSD within 60 days of the end of each fiscal year (§4.2(b)); (e) select an independent certified public accountant to perform annual audits

(§4.2(c)); (f) make records available for GCSD to audit (§4.5); (g) pay business expenses of the Skywalk operations (§5.6); and, pay GCSD the manager's fee (§3.1(a)).

IV.

The Agreement, Construction of the Skywalk, and Immediate Success: Increased Visitation to Grand Canyon West. GCSD operates its headquarters in Las Vegas, not on the reservation. As a result, GCSD's sale of tickets, hiring and training of employees, and other management operations take place largely in Las Vegas. In contrast, SNW's operations occur at Grand Canyon West, including its sale of tickets, hiring of employees, and the like. Under the 2003 agreement, SNW would provide financial information to GCSD on a monthly basis; SNW would pay GCSD its management fee on a quarterly basis; and, the parties would undertake an annual reconciliation. Exh. 3, at §§3.3 and 4.1. GCSD had the right to examine and audit the books and records of the project on demand. *Id.*, at §4.5.

Following GCSD's completion of the Skywalk bridge in March 2007,[19] visitation to Grand Canyon West increased dramatically. Visitation to Grand Canyon West (GCW) had increased by 4 percent annually between 2002 and 2006 before the Skywalk opened. Exh. 50 (GCSD007705). However, after the Skywalk opened, visitation to GCW increased by 156 percent for 2007. *Id*. For the full year 2008, total visitation increased to

[19] *See* Exh. 1 (How We Did It (DVD) (GCSD007549)) and 2 (photographs of bridge, visitor's center, and other facilities) (GCSD005670-90)).

535,000 people. *Id*. In 2008, visitors to GCW spent more than $40 million. *Id*. (GCSD007706).

Mr. Walter Mills, who, from 2001 to 2008 served on the GCRC and SNW Boards of Directors, testified that the 2003 agreement turned out to be a "hell of an agreement" and "really a sweetheart deal" for the Tribe. Mr. Steve Beattie, the chief financial officer for both SNW and GCRC, and who negotiated the agreement for the Tribe, agreed that the 2003 agreement heavily favored the Tribe. Most counterparties in Mr. Jin's position, Mr. Mills explained, would have negotiated for and received a long-term leasehold interest or some other form of semi-permanent interest in the project. Mr. Beattie skillfully avoided granting that to Mr. Jin.

Over four days of testimony, every witness agreed that the 2003 agreement, GCSD's construction of the Skywalk, and resulting increase in tourism represented an unqualified success for the Tribe. Ms. Sheri Yellowhawk, a member of the Tribe who has served on the Tribal Council since 1998, and who served as the chief executive officer of SNW and, for eight years, as CEO of GCRC, testified that annual revenues for GCRC were only $2 million in 2002 but now total over $53 million. She attributed "all of the growth [in revenue] to Skywalk." In October 2008, she wrote that Skywalk, a "one of kind project," would "not have happened without the investor, David Jin." Exh. 69 (GCSD007941). "His patience," she wrote, "persistence, and commitment made the project work. He, in good faith, invested millions of dollars from the first phase including testing and preparation. He attended thousands of hours of meetings with the management of the corporations to insure a quality project." *Id*.

The Skywalk's unquestioned success makes all the more puzzling, then, SNW's and the Tribe's refusal to disclose financial records, naked grab of management fees owed to Mr. Jin, and unfounded but carefully orchestrated campaign against him.

The Root of the Dispute Over Management Fees: Mr. Jin Takes Over Accounting for the Skywalk from SNW. After the immediate success of the Skywalk, in March 2007, SNW was unable to keep up and maintain records of the operation. The Tribe asked Mr. Jin for help. He agreed. Mr. Emry and his firm stepped in. In one of his later letters to Mr. Ohre, Mr. Parker explained in part as follows:

> "Less than one (1) month into the operations of this business, my client was asked and agreed to take over the responsibility of performing the accounting and maintaining the books of this operation. It is my understanding that well over $400,000 of sales had not been documented during the time period SNW performed the accounting for this project. Additionally, it is my understanding that a substantial amount of money was lost due to employee theft at the GCRC ticket sales, resulting in the prosecution of several employees (footnote omitted). Pursuant to the contractual agreement, SNW would be responsible for replacing these funds for the betterment of this project. At this point, my client has not instructed me to demand the reimbursement of these amounts. My client is strictly interested in continuing a cooperative effort towards the proper

> maintenance of these books, accounting records and promoting this project. My client has invested tens of millions of dollars into this project and does not relish the vulnerable position it has been placed in due to the uncertainly (sic) of SNW's Board and current conduct."

Exh. 80 (GCSD007263). As noted at length above, Mr. Teddy Parker, counsel for GCSD, asked for SNW's audited financial statements. *Id*. (GCSD007264). As described above, the record confirms that SNW never supplied its own audited or even unaudited financial statements; and, SNW never turned over financial statements reflecting the company's operations. With that decision, the dispute began.

Over the coming months and years, Mr. Jin asked for financial records from SNW. For its part, the Tribe refused to turn over the financial records and then, to make matters worse, and without apparent basis, beginning in 2008, refused to turn over *any* portion of the management fees due GCSD for its continued operation of the Skywalk. The Tribe also suspended reimbursements to GCSD and Mr. Jin's companies (OTI and Y Travel) for expenses related to the operation of the Skywalk (e.g., employee housing, transportation, advertising, etc., etc.). All of these developments, coupled with the Tribe's failure to supply utilities to the project, led to this proceeding.

The Tribe's Case Against Mr. Jin and GCSD for Breach of the 2003 Management Agreement. At this point, and for the sake of completeness, SNW's and the Tribe's position should be stated. But, because SNW did not appear at the hearing, the

tribunal must rely on the Tribe's public relations firm, Scutari Cieslak, which stated the Tribe's case against Mr. Jin and his company most clearly. In one memorandum, the Scutari firm wrote as follows:

> "Now four years after the Skywalk's grand opening, Jin has failed to abide by his contractual obligations and keep even the most basic promises he made to the Hualapai. The visitors' center is an empty shell – a ramshackle building that sits idle with exposed wiring hanging from the ceilings and holes in the floor. There are abysmal port-a-johns, not luxurious bathrooms, as Jin promised for the thousands of tourists who visit from around the world. Worse yet, there is no electricity, water or sewer utilities running to the attraction at all. It's an appalling breach of the contract's most critical terms, and tourists from around the world get a front-row view of this debacle every single day.
>
> The Hualapai have begged Mr. Jin to keep his promises and complete the work. Instead, Jin and his various subsidiaries have behaved like Arizona's version of Leona Helmsley and Bernie Madoff, leaving uninhabitable buildings in his wake and ignoring the pleas of those who trusted him. The tribe has simply asked Jin to uphold his end of the bargain. Now, the Hualapai are forced to seek the court's assistance to protect what's left of their investment."

Exh. 29 (Scutari Cieslak's "Hualapai Nation: Skywalk and Beyond" (GCSD007354) (emphases in original)). Setting aside the outlandish references to Mr. Madoff and Ms. Helmsley, that is the Tribe's argument: Mr. Jin failed to complete construction of utilities. But, in fact, on nearly every point, the documentary and testimonial record flatly contradicted the Scutari memorandum. No available evidence even suggested that Mr. Jin failed to keep any promise or that the Tribe 'begged' him to do so. In fact, the Tribe failed to construct utilities, blocked GCSD's efforts to complete the Visitor's Center and, more than that, as the Scutari memorandum demonstrates, worked to distort the public record.

The Record Confirming Mr. Jin's Completion of the Visitor's Center: Meeting Minutes and the Testimony of Messrs. Mills, Forrest, Quasula, and Mojica. GCSD completed construction of and opened the Skywalk in March 2007. Before and after the opening of the Skywalk, GCSD broke ground and constructed the nearby Visitor's Center. However, from 2006 to date, the Tribe failed to construct or otherwise deliver power, water, or wastewater service to Grand Canyon West and the Visitor's Center. As a result, GCSD could not, for example, install elevators at the Center, complete and test electrical installations, or otherwise fully complete the Center. Today, the Center stands an empty although nearly completely constructed shell because the Tribe failed for years to deliver sufficient water, electrical service, or wastewater treatment to Grand Canyon West.

To make matters worse, for whatever reason, the Tribe (or at least four members of the Tribal Council known locally as the "Gang of Four"), decided to withhold Mr. Jin's share of the management fees on the ground that Mr. Jin had been obligated to construct millions of dollars of infrastructure for the

delivery of utilities to the reservation. Along the way, the Tribe withheld Mr. Jin's share of the management fees without any basis in the 2003 agreement (or otherwise) and despite the unqualified success of the Skywalk bridge that Mr. Jin had built.

The exhibits and witnesses confirmed this basic point: the Tribe, not Mr. Jin, was obligated to complete the construction of water, power, and wastewater treatment facilities to service the Visitor's Center. Every witness who testified on this point confirmed that fact.

One example illustrates the point. Mr. Walter Mills retired in 1996 from 25 years of service around the country with the Bureau of Indian Affairs. After retirement, at Mr. Quasula's invitation, Mr. Mills agreed to serve on the board of directors for Grand Canyon Resort Corporation, the tribal corporation in Peach Springs that owns the Tribe's enterprises, including Grand Canyon West. He served one complete and one partial term on the board, from November 2001 to September 2008, including four years as vice-president. During his years on the GCRC board, he served with Mr. Ted Quasula, Ms. Kathryn Landreth (the former U.S. Attorney for the District of Nevada), and others. More important for these purposes, he also served on the SNW board of directors (along with Mr. Quasula and Ms. Landreth (and others)).

Mr. Mills explained that the division of labor called for Mr. Jin to construct and then, after completion, manage the Skywalk; SNW would account for and report on its financial operations. But, he explained, the accounting system failed from the outset because of "too much business." The accountants, he testified, explained that the system

was set up to handle $6-7 million in revenues but the Skywalk was on the verge of receiving $30-50 million in business. In the days after the Skywalk opened, Tribal employees could not count the cash fast enough. They stuffed hundreds of bills into envelopes for haphazard safekeeping. Tribal employees lost thousands of dollars to theft.[20] The Tribe (SNW) simply could not keep up or even protect the money received so SNW asked GCSD and Mr. Jin to step in. GCSD agreed. From that point on, Mr. Emry accounted for the operations of the Skywalk – until, that is, the Tribe stepped in during 2008 and 2009, as noted above, took the records from Mr. Emry's firm, and began withholding management fees due GCSD.

In any event, Mr. Mills testified, he and the other outside members of the board sought to address and solve the shortcomings of SNW's accounting system (apart from hiring Mr. Emry). First, the members of the SNW board of directors asked Mr. Mills to locate an accounting firm to report on the problem. He found and hired Protiviti, a management and consulting firm, who prepared at least a draft report. See Exh. 46 (Contract Management Process Review (June 2008)). In that draft, Mr. Mills recalled, Protiviti reported that GCSD had the better accounting systems (as compared to the Tribe's), but Mr. Mills could not testify to the action taken by SNW in response to Protiviti's report, if any, because,

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[20] *E.g.*, Exh. 35 (Schedule reflecting insurance proceeds ($25,000) from theft of tickets (GCSD007259-61)); Exh. 33 (11.26.07)(email from Steve Beattie to GCRC board members)("This is my report regarding the theft that took place at GCW." (GCSD005505) and "The interview conducted with Jason Pullen indicated that he had been doing this for several months." (GCSD005507)); and Exh. 34 (12.18.07)(email from Steve Beattie to GCRC board members)(update "as to our progress on the theft issue from October 26th.")).

in September 2008, without notice, the Hualapai Tribal Council removed Mr. Mills (and the only other outside members of the board, Mr. Quasula and Ms. Landreth) before the board could take any action. Meanwhile, Mr. Jin and GCSD faithfully continued to finance and operate the Skywalk.

In 2007, during these first several months after the Skywalk opened, when Mr. Mills served on the SNW board with Mr. Quasula and Ms. Landreth, the chief executive officer of GCRC was Sheri Yellowhawk and the chief financial officer was Steve Beattie. During the final hearing, these two (and other) witnesses – all of whom had firsthand knowledge of the Skywalk and its operations from the Tribe's point of view – confirmed every major point made by Mr. Mills.

Mr. Mills testified that Mr. Jin timely constructed the Skywalk. The agreement had no deadlines and, in any event, as he pointed out, the construction cost the Tribe nothing. Mr. Mills persuasively explained – just as the other witnesses testified – that water, power, roads, and wastewater always had been and forever remained the Tribe's obligation. Neither GCSD nor Mr. Jin took on that responsibility. No agreement, memorandum, email, supplement, amendment or any other reliable written record indicated otherwise. Mr. Mills also explained that the Tribe had received over $30 million to pave and improve Diamond Bar Road, the only overland access to Grand Canyon West.[21] That project is still not complete.

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[21] *Cf.* Exhs. 49 (10.27.11) (Diamond Bar Road Reconstruction Grant Application (GCSD005623)) and 50 (9.1.09)(Economic Impacts of Prospective Diamond Bar Road Improvements (GCSD07703-13)).

The Scutari firm and others including, for example, some quoted in the Tribal newsletters,[22] suggested that Mr. Jin was obligated to build power and supply water. But, as Mr. Mills and others testified, those claims were unfounded. The construction of the power grid alone, Mr. Mills explained, would have cost about $40 million. Why, Mr. Mills asked, would GCSD have agreed to build that infrastructure? With no prospect for economic return? And what agreement obligated GCSD to do so? None. In any event, the Tribe also has not completed construction of the electrical power supply to Grand Canyon West.

There is of course nothing otherwise wrong with the Tribe's failure to construct power, water, wastewater treatment, and improved roads for Grand Canyon West. But, use of those Tribal failures as an excuse against Mr. Jin and GCSD was plainly wrong. Although no witnesses from the Scutari firm testified, the available record, as shown in the exhibits, and four days of sworn testimony from fourteen percipient witnesses, confirms at least this much: the work from the Scutari firm and the statements from tribal leaders in the *Gamyu* newsletter reflect either grossly misinformed points of view or an intentional effort to distort the public record (not to say slander of Mr. Jin). However, for reasons noted below, no relief is available in these proceedings against individual tribal leaders, the Scutari firm, or the national and international media outlets, including prominent U.S. newspapers (which accepted the Scutari firm's

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[22] Copies of excerpts from the *Gamyu* (Newsletter of the Hualapai Nation) from 2008, 2009 and 2011were received as Exhs. 36 – 43, 67, and 91.

version of reality with, apparently, little journalistic effort).[23]

One more example illustrates the point. Mr. Robert Bravo, Jr. testified during the hearing and offered his affidavit (Exh. 66 (2.28.12)). In addition to other positions with the Tribe over the years, Mr. Bravo served as the interim chief executive officer of GCRC from September 2009 to 2011. Exh. 66, at 2 ((GCSD007252). In his affidavit, he testified in part as follows: "I know from being both a member of the Tribe and involved with GCRC in various capacities that it was always anticipated that the Tribe would solely be responsible for bringing utilities to Eagle Point and the Skywalk. *** Importantly, the Tribe has been attempting to get Federal funding to install these utilities for the time I have been involved with GCRC." *Id.*, at 2-3.[24]

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[23] The Scutari & Cieslak memorandum (GCSD007289) and media articles were exhibit nos. 29 and 30 respectively.

[24] During the final hearing, other witnesses testified similarly, including, for example, Ms. Louise Benson, who has twice served as Tribal Council chairwoman over a period of five years and once as vice chair for four years. She was on the council when SNW contracted with GCSD to build and manage the Skywalk. In her affidavit submitted to the U.S. District Court, she testified in part as follows: "I saw a great opportunity for the Tribal members when the idea of building the Skywalk came about. I also recognized that the business would not profit immediately because of the infrastructure that would need to be completed. My belief and that of the Tribal Council members at the time was that the Tribe had two years to complete the building of roads and to get water and power to the site of the Skywalk at Eagle Point. The completion of the infrastructure at the Skywalk site was the Tribe's responsibility. David Jin and his company were never obligated to bring the utilities to Eagle Point." Exh. 74, at 2-3 (GCSD007347-8).

The most telling documents were the "Skywalk Construction – Meeting Minutes," Exhs. 9 – 14.[25] The minutes of the meeting on April 8, 2009, for example, reflect the following:

> "Construction of the Base Shell is 99% complete, but requires power and water for testing of mechanical, electrical and plumbing, as well as installation of the elevator."

Exh. 55 (GCSD00768). But the Tribe had not delivered the power and water. Three witnesses who attended that (and nearly every other) construction meeting testified at the final arbitration hearing: Erin Forrest, Ted Quasula, and Manuel Mojica. Mr. Forrest was the Hualapai Tribe's Engineer and Director of Public Works. Mr. Quasula was GCSD's representative. Mr. Mojica managed the construction project for Executive Construction Management (Las Vegas) on behalf of GCSD. These witnesses confirmed that the Visitor's Center was complete but for the supply of utilities to the site, as the construction meeting minutes confirm. More important, these witnesses testified that the Tribe – not GCSD – was obligated to supply the power, water, and sewage treatment for the Center.

Even the Tribe's own construction plans and internal documents show that the Tribe for years has planned to build water, power, and electricity to serve Grand Canyon West. *See* Exh. 51 (Grand Canyon Resort Corporation Board of Director Meeting Minutes (9.22.06)(GCSD006944-48)("GCW Westwater

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[25] The Skywalk construction meeting minutes included the following exhibits: nos. 9 (7.16.08), 10 (8.20.08), 11 (11.5.08), 12 (12.3.08), 13 (1.14.09), 14 (3.4.09), and 55 (4.8.09).

Pipeline – Sheri was under the impression that we had $750K from EPA. The line needs to be a domestic line. We'll know in December if we get the money." *** (GCSD006948)); Exh. 52 (Grand Canyon Resort Corporation Board of Director Meeting Minutes (10.27.10)(GCSD006948-53)("Future Projects – towers at [G]uano [P]oint, quartermaster, etc. Cameron [Daines] solicited civil engineering bids for the entire GCW area. How do we get from Masterplan to development? We need to quantify the needs of water, sewer, etc. at each site. We need to increase our capacity. *** We need road development, wastewater plans overlaid with power and telephone. Cameron broke CTW into four zones. Each zone has a site. Each site will go through a process. Prioritize the sites for the next five years." (GCSD006950)); Exh. 47 (Grand Canyon West Infrastructure Plan (GCSD007714-24) (discussing water requirements ["assumes a 15-year build out period between 2005-20"], wastewater reclamation, power distribution ["Extending electric power to GCW will require approximately 21 miles of line from the closest electrical substation on the Pierce Ferry Road."], telephone/internet requirements, and additional infrastructure)); and, Exh. 48 (Grand Canyon West Land Use Plan (GCSD007725-45)). Using original plans from Tribal offices showing detailed drawings for the construction of utility services to Grand Canyon West,[26] Mr. Forrest underlined the point in convincing fashion.

Finally, the public record also confirms the point. *See*, *e.g.*, Exh. 56 (*Daily Miner* newspaper (Kingman, Arizona) for Friday, July 31, 2009

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[26] Exh. 45 (4.3.09)(Grand Canyon West Eagle Point Utility Extension Plans (GCSD004858-4880)).

(GCSD007571)("The Hualapai Tribe's struggle to provide adequate water to the Grand Canyon West area may soon be over. The Tribe has contracted with Stantec to design a 30-mile, six-inch water pipeline that will replace a two-inch existing line. *** The Tribe has already applied for U.S. Department of Agriculture and Environmental Protection Agency grants to help with the cost, said Jack Ehrhardt, Hualapai Nation Planning and Economic Development director.")).

In the end, SNW's and the Tribe's only defense falls under the weight of the evidence from witnesses on the scene and the contemporaneous, written record. Mr. Jin and GCSD kept his promises to the Tribe; breached no material provision of the 2003 agreement; and, in the bargain, suffered damages. The tribunal turns now to that aspect of the case.

V.

The Claimant's Claims for Compensation: Components and Resolution. The Skywalk opened on March 27, 2007. The 2003 agreement provides that SNW would pay a management fee to GCSD equal to one-half of "net revenues" from the operation of the Skywalk. *See* Exh. 3, at §3.1(a). GCSD contends that SNW has not done so. The record confirms that SNW has not paid the required portion of net revenues to GCSD. SNW also has not paid its share of shuttle bus and other expenses of the operation.

Claimant's Claim for Damages: the RGL Forensics Report. Mr. Steven J. Hazel, CPA/ABV/CFF, ASA, CVA, CMC (CV-Exh. 77) testified to GCSD's claimed losses from these breaches of the 2003 agreement. Mr. Hazel offered his written report (Exh. 76), dated June 22, 2012, and

over 1800 pages of supporting material (Exh. 78), including financial records, in support of his conclusions.

First, some background is in order. In 2008, GCSD submitted a proposal to SNW for approval to complete the shell and interior of the Visitor's Center, which GCSD had scheduled for June 1, 2009. SNW never gave that approval. In fact, on September 25, 2008, SNW issued a "stop work" order to halt construction of the Center altogether. *See* Exh. 17 (9.25.08)(Letter from Wilfred Whatoname Sr., Hualapai Tribal Chairman, to David Jin (GCSD007283)) and Exh. 18 (9.25.08)(Letter from William Allison (Gallagher & Kennedy) to Mr. David Jin (GCSD005445)). The record reveals no supportable reason for that stop work order.[27] GCSD nevertheless obliged and stopped work.

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[27] In his affidavit (Exh. 66), which he also submitted to the U.S. District Court, Mr. Bravo testified in part as follows: "I know also that the completion of the building was halted by the Tribal council and was never abandoned by GCSD or Mr. Jin. I was physically at a Tribal council meeting in December of 2010 where the Tribal council voted to allow Mr. Jin to complete only one floor of the existing structure. Surprisingly, just a week later, the Tribal council reversed itself and withdrew the authorization and has refused to allow Mr. Jin to complete the building. As the interim CEO of GCRC, I can tell the court this was frustrating to me because a completed visitor center would generate considerably more revenue and a better visitor experience for GCRC and the Tribe. It appears that some members of the Tribal council who have taken over and now manipulate the Tribal activities believed that they needed a basis for alleging a breach of contract."

To this day, although the shell of the Center remains almost 99% complete, the Center remains unfinished. As a result, today, GCSD must supply food and beverage to Skywalk visitors from kitchens in Las Vegas and food trucks on site. Exh. 76, at 2. The retail, photo and other facilities remain limited. Without permanent water, electricity, or even sewage treatment facilities, the Center operates at a much diminished capacity. GCSD must, for example, operate the facility with portable toilets.

Regarding completion of the Center, the Tribe's position remains unchanged. In fact, on March 8, 2012, the Hualapai Tribal Council adopted Resolution no. 29-2012, which provided in part that "GCSD (including any parent company, subsidiary or other affiliate of GCSD) is hereby prohibited from transacting or otherwise engaging in business or other activities on the Hualapai Reservation or otherwise within the jurisdiction of the Hualapai Tribe[.]" Exh. 95. That resolution permitted OTI to continue to perform under the two shuttle bus agreements. *Id*.

Turning to the claimant's damage case, Mr. Hazel's analysis proceeded from the reasonable assumption that, absent the wrongful stop work order in September 2008, GCSD would have timely completed the Visitor's Center and thereby generated increased revenue for both GCSD and SNW. For example, if GCSD had been allowed to complete the Center by June 1, 2009 – which, Mr. Mojica testified, his firm was scheduled to do – then GCSD would have:

- Implemented a new online photos sales system for personalized Skywalk photo souvenirs (mugs, clothing, caps, etc.);

- Increased retail space from the current, temporary size (2000 square feet) to the planned size (5000 square feet); and,

- Offered three dining options to visitors – the first restaurant on the second floor (8000 square feet with 5000 square feet of casual dining seating); the second restaurant on the rooftop (2000 square feet of patio space and full service dining); and, the third on the bottom floor, including a portion of the floor made of glass (offering a fine dining menu).

Mr. Hazel's work also proceeded from the knowledge that during 2008, 2009, 2010, and 2011, SNW reimbursed no expenses and made no distributions of the contractually required manager's fees to GCSD.

With these assumptions in mind, Mr. Hazel and his firm identified and calculated three components of damages: Historical Unpaid Management Fees Payable to GCSD; Historical Unpaid Shuttle Bus Fees Payable to GCSD; and, Additional Lost Management Fees Due to Interference. *See* Exh. 76, at 3 ff.

Based on RGL Forensics' review of the available records, all as more fully described in its report (Exh. 76), RLG Forensics and Mr. Hazel summarized the losses in these three categories through December 31, 2011 as follows (RGL's Schedule 1): unpaid management fees (Schedule 4) in the amount of $12,147,244; unpaid shuttle bus fees (Schedule 5) in the amount of $8,935,591; less other deductions (Schedule 4) in the amount of $420,292, which results in historical unpaid management fees and shuttle bus fees owing to GCSD in the amount of

$20,662,544.[28] In addition, Mr. Hazel expressed his opinion that GCSD lost net revenues from the expected incremental sale of tickets, food and bar, retail, photo, and events (Schedule 8) in the amount of $3,440,155; and, the lost sales of engraved tiles and structure tours in the amount of $872,770 (Schedule 7). (During his testimony, Mr. Jin persuasively described visitors' demand for the tiles included in this latter category of consequential losses.) In total, Mr. Hazel testified to and his report described total losses in the amount of $24,975,469. See Exh. 76, at 3 ("We have calculated total damages to be $24,975,469 to December 31, 2011, as shown on Schedule 1, and summarized in the following table[.]" (table omitted)).

The GCSD financial statements and records were offered and admitted separately into evidence as Exhs. 82 (GCSD financials for 2007 – 2009), 83 (GCSD financials for 2010 – 2011) and 84 (period sales reports (GCSD006671 – 6745).

Therefore, based on the entire record, including the testimony of and report from Mr. Hazel and his firm (RGL Forensics (Englewood, Colorado)), the tribunal hereby awards the sum of $24,975,469 to

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[28] In Schedule 3 of the report, RGL Forensics summarized the restated income statements and balance sheets from GCSD for the years 2007 through 2011. Gross revenues for that four-year period stand at $74,426,889. After deductions for the cost of goods sold and other gross operating expenses in the amount of $50,132,401, the restated financial statements show net revenues of $24,294,488, or, in other words, a management fee of one-half that amount due to GCSD in the amount of $12,147,244. Exh. 76, at Schedule 3 (RGL00023). In Schedule 4 (RGL00024), RGL Forensics reconciled the amount due to GCSD and noted a difference of $126,904, but adopted the lower amount due to GCSD per the financial statements ($20,789,448) as shown on Schedule 3.

GCSD for those categories of contract and consequential losses.

In addition to the damages outlined in the report from Mr. Hazel and RGL

Forensics, GCSD claimed these other, additional losses:

Stop and Start Costs. GCSD claims $100,000 for these losses, which arise out of the Tribe's repeated orders allowing and stopping work at the Center site. This claim is granted. The tribunal hereby awards the sum of $100,000 for these losses.

Salary for Mr. Quasula. GCSD claims $120,000 for the salary of Mr. Quasula to work on documents and for consultation. Mr. Quasula's effort and time were doubtless helpful, but the tribunal denies this claim.

Construction Insurance Wasted. GCSD claims the sum of $250,000 for wasted construction insurance. This claim is denied.

Costs of Housing Y Travel Employees, Transportation, and Advertising. In this claim, GCSD seeks $1.7 million for unreimbursed costs associated with Y Travel employee housing, transportation, and advertising. Mr. Jeff Whitaker testified to these losses. *See* Exhs. 88 (2010 unpaid invoices from Y Travel ($917,725) and 89 (2011 unpaid invoices from Y Travel ($821,000)). The tribunal grants this claim and awards the sum of $1.7 million to GCSD.

Retrofit Wasted Equipment. Mr. Mojica testified to additional costs to repair the damage to the building in the amount of $800,000, including the

cost of repairing damage to the exterior walls, roof decks, and the electrical, mechanical, and plumbing installations that have been exposed to the weather since late 2008 at the site, when the Tribe stopped work. This claim is granted. The tribunal hereby awards the sum of $800,000 for these losses.

GCSD's Claim for Defamation. GCSD seeks recovery for defamatory remarks by members of the Tribal Council, the publisher of the *Gamyu* newsletter, newspapers, and others. He seeks the sum of $1.44 to $2.16 million for repair and $2.12 million to $3.18 million for damages suffered in the Chinese market.

In her affidavit to the U.S. District Court, Chairwoman Benson testified in part as follows:

> "David Jin and his company were never obligated to bring the utilities to Eagle Point. The claims by certain Tribal Council members and the PR firm that represents the Tribal council are incorrect. GCSD was never required to provide the utilities to that site. GCSD was only required to hook up to the utilities once they were provided to Eagle Point. *** The public relations campaign of negative publicity that was undertaken to discredit GCSD and Mr. Jin is intended to persuade the members of the Tribe that they are justified in taking Mr. Jin's property. Charlie Vaughn and Waylon Honga were the council members who dealt with the public relations firm and were even trained by them on what to say regarding these issues."

Exh. 74, at 3 (GCSD007348). As Chairwoman testified, the claims by certain Tribal Council members and the Scutari firm were incorrect, but one element of defamation requires proof that the defendant "knew the statement was false, acted in reckless disregard of whether the statement was true or false, or negligently failed to ascertain the truth or falsity of the statement." *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315 (1977). SNW's campaign against Mr. Jin and GCSD was not only meritless but profoundly unjustified. Still, the record does not permit the tribunal to make a judgment on this third element of the claim. More to the point, and aside from the merits, the claim is outside the scope of the arbitration provision. Mr. Jin himself, who is not a party here, would presumably recover any defamation losses against others who also were not parties here. Finally, the original demand for arbitration does not describe this claim. For at least these reasons, the tribunal denies GCSD's claimed losses arising out of SNW's alleged defamation.

The Alter Ego Claim. Claimant GCSD asks to hold GCRC liable for the award. SNW had no employees. The board of SNW was also the board of the HBBE Corp. dba Grand Canyon Resort Corporation (GCRC). *See* Exh. 80 (10.22.08) (same). Mr. Beattie served as the CFO for both SNW and GCRC. In other words, SNW was for all practical purposes the same as GCRC and the Tribe. In 2008, Mr. Jin's lawyer, Mr. Parker, discovered and expressed concern about this very point. *E.g.*, Exh. 80(GCSD007262) ("Quite simply, SNW appears to be a corporation in name only and in turmoil at this point."). Many of the proposed findings that were suggested on this point by GCSD in its post-hearing submission (7.25.12) were supported by the record.

Nevertheless, the claim is denied. First, section 15.4(d)(ii) of the agreement provides:

> "Any money damages will be limited to the assets that are solely owned by SNW. No money damages, awards, fines, fees, costs or expenses can be brought or awarded against the nation in arbitration, judicial, or governmental agency action[.]"

So, although GCSD may in later collection efforts seek relief against GCRC, that contention is not at issue here. Second, the only parties to the arbitration agreement are GCSD and SNW. And, as to those parties, no alter ego or similar claim was made in the demand for arbitration. See Arbitration Complaint, at 6-12 (8.9.11). It would be unfair to entertain this claim now. So, for at least these reasons, and without passing on the merits, the tribunal denies this claim.

The Claim for Attorney's Fees. R-43(d)(ii) provides that the award "may include . . . an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement[.]" In its response to the demand for arbitration (12.1.11), SNW requested an award of fees. And, in section 15.12 of the agreement, the parties agreed as follows:

> "In the event of any action or proceeding brought by either party against the other under this agreement, the prevailing party will be entitled to recover attorneys' fees in such amount as the arbitrator or arbitration panel may judge reasonable."

GCSD claims over $1.5 million in attorneys' fees and costs. *See* Exhs. 93 (Greenberg Traurig schedule of fees) and 94 (Greenberg Traurig invoices for legal work to David Jin (288 pages)). The claim for fees related to the Tribal Court litigation (Exh. 93 ($310,147.76)) for legal work from April to September 2011 is denied. Those fees may fall within the scope of the fee provision in the arbitration agreement ("any action or proceeding"), but, even so, the tribunal judges that GCSD was not the prevailing party in that portion of the wider litigation between these two parties.

Next, the requested fees for the arbitration total $1,204,349.74 for work from August 2011 through July 26, 2012. Exh. 93, at 2. Mr. Jin has paid $526,972.74 of those charges. In this arbitration, GCSD was unquestionably the prevailing party. After reviewing the statements, and considering the circumstances, the tribunal judges that an award of fees in the amount of $950,000 is reasonable.

Fees of RGL. Finally, GCSD claims reimbursement of the fees paid to RGL Forensics in the sum of over $195,000. This claim is denied as outside the scope of the fees provision.

Administrative and Other Costs of the Arbitration. Respondent shall bear the costs of the arbitration. The administrative filing and case service fees of the AAA, totaling $91,800, shall be borne entirely by 'Sa' Nyu Wa, Inc., a Hualapai chartered corporation. The fees and expenses of the arbitrators, totaling $53,082.50, shall be borne entirely by 'Sa' Nyu Wa, Inc. Therefore, 'Sa' Nyu Wa, Inc. shall reimburse Grand Canyon Skywalk Development, LLC, the sum of $47,341.25, representing that portion of said fees and expenses in

excess of the apportioned costs previously incurred by Grand Canyon Skywalk Development, LLC.

Summary of the award. The tribunal awards the following sums to GCSD and against SNW: (a) $24,975,469 for unpaid management and shuttle bus fees; (b) $100,000 for start and stop costs; (c) $1,700,000 for reimbursement of costs for Y Travel employee housing, transportation, and bus advertising; (d) $800,000 to repair damage to equipment and other installations at the site; (e) $950,000 for attorneys' fees; and, (f) $47,341.25 for costs of the arbitration. These amounts result in and the tribunal does hereby award the total sum of $28,572,810.25 to GCSD and against SNW.

Conclusion. The tribunal denies all claims and any counterclaims (including SNW's intended counterclaims (12.1.11)) not otherwise addressed above.

Dated: August 16, 2012
Phoenix, Arizona

Shawn K. Aiken, Arbitrator

APPENDIX D

HUALAPAI TRIBAL COUNCIL RESOLUTION NO. 1.5-2012 OF THE GOVERNING BODY OF THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION PEACH SPRINGS, ARIZONA

WHEREAS, 'Sa' Nyu Wa, Inc. ("SNW"), a Hualapai Indian tribally-chartered corporation, and Grand Canyon Skywalk Development., LLC ("GCSD"), a Nevada limited liability company, entered into a Development and Management Agreement, dated as of December 31, 2003, as amended (the "Skywalk Agreement'"), pursuant to which GCSD became obligated to construct a glass bridge known as the Skywalk and other project improvements at Eagle Point and to manage certain Skywalk operations;

WHEREAS, the Skywalk Agreement required GCSD to construct, inter alia, the following project improvements: glass bridge; visitor's center (including VIP room, a gift shop, a display area, at least 2 restrooms and a small kitchen); amphitheater; outdoor landscape; drainage structures; parking; exterior lighting and signage; electrical power infrastructure; telecommunications infrastructure; solid waste disposal infrastructure; potable water system; and a sewage/wastewater system (collectively, the "Project Improvements");

WHEREAS. the Skywalk Agreement specified that "time was of the essence" and originally required GCSD to substantially complete the Project Improvements no later than May 1, 2005;

WHEREAS, GCSD failed to provide to SNW or the Hualapai Tribe design contracts and construction contracts regarding the Project Improvements and failed to provide to SNW or the Hualapai Tribe complete plans and specifications regarding any Project Improvements, and thereby undertook a trust responsibility in connection with constructing the Project Improvements;

WHEREAS, GSCD has failed to complete a single Project Improvement other than the glass bridge (which work, in its unfurnished condition, is sometimes referred to herein collectively as the "unfinished Skywalk facility,);

WHEREAS. GCSD has indicated by statements and conduct that it has no intention of ever doing any further construction of the Project Improvements;

WHEREAS, the Skywalk Agreement required GCSD to manage the project and, in addition, shortly after the glass bridge opened to the public in 2007, GCSD accepted the trust responsibility of handling all moneys paid by visitors to the unfinished Skywalk facility;

WHEREAS, GCSD has failed to account to SNW or the Tribe for such moneys and has disregarded and abused its management and fiduciary obligations under the Skywalk Agreement;

WHEREAS, GCSD's actions and failures to act have resulted in loss of revenues from the maximization of visitor use of the unfinished Skywalk facility, and other revenue-producing activities that could be conducted on or in the unfinished Skywalk facility;

WHEREAS, GCSD's actions and failures to act have adversely affected revenues of the Tribe and the Tribe's other enterprises, including visitorship to other attractions at Grand Canyon West and utilization of the Hualapai Lodge;

WHEREAS, GCSD's actions and failures to act have resulted in the deterioration and unpleasant nature of the unfinished Skywalk facility on the Hualapai Reservation, resulting in an eyesore and a blemish to the Hualapai Reservation, and in safety and health issues;

WHEREAS, GCSD's actions and failures to act have resulted in the long-prevailing unsightliness and adverse conditions on the Hualapai Reservation at the site of the unfinished Skywalk facilities arising in connection with: outdoor portable toilets; and the noise and expense arising in connection with external portable electric generators that consume diesel fuel, that generate loud noise, and that expel polluting exhaust;

WHEREAS, GCSD has repeatedly commenced and vexatiously pursued litigation against the Hualapai Tribal Council, SNW, and Tribal officials in the Hualapai Tribal Court, the United States District Court for the District of Arizona, and with the American Arbitration Association;

WHEREAS, the unfinished Skywalk facility is the property of, and a public facility of, the Hualapai Tribe, and is located on unique, priceless and unalienable Hualapai land known as Eagle Point, which is of cultural significance to the Tribe;

WHEREAS, the foregoing actions and failures to act of GSCD have damaged unique, priceless,

unalienable, and cultural1y-significant Hualapai land, the reputation and goodwill of the Hualapai Tribe and its people, and the Hualapai Tribe's economic prospects with respect to its limited natural resources;

WHEREAS, the Hualapai Tribal Council is the legislative body of the Hualapai Tribe and is empowered by the inherent sovereign rights and powers and the Constitution of the Hualapai Indian Tribe to exercise eminent domain over all property subject to the jurisdiction of the Hualapai Tribe, and to control access to, and the conduct of business on, Tribal lands;

WHEREAS, Article IX, Section (c) of the Constitution of the Hualapai Indian Tribe expressly states that the Tribe may "take any private property for a public use,"' so long as just compensation is provided";

WHEREAS, United States law similarly recognizes the right of Indian tribes to exercise the power of eminent domain (including 25 U.S.C. § 1302);

WHEREAS, "United States and Hualapai law also recognize the exercise of eminent domain over intangible property such as contracts;

'-.._./.

WHEREAS, Section 2.16 of the Hualapai Law and Order Code sets forth the procedures by which the Hualapai Tribe may exercise its powers of

eminent domain over all property on or within the Hualapai Reservation;

WHEREAS, Section 2.16(B) of the Hualapai Law and Order Code provides that the Hualapai Tribe may exercise its powers of eminent domain over all tangible or intangible property, including intangibles such as contracts, franchises, leases, patents, trade routes, and other types of property, including contracts pertaining to the possession, occupation, use, design, development, improvement, construction, operation, and/or management of property, including property owned by the Tribe;

WHEREAS, Section 2.l6(B) of the Hualapai Law and Order Code provides that the Hualapai Tribe may exercise its power of eminent domain for public use, any use of the Tribe) or any other use authority the Hualapai Tribal Council;

WHEREAS, 1he Hualapai Tribal Council declares that construction and operation of the Project Improvements and the integration thereof with the life and traditions of the Hualapai Tribe is a public use and the acquisition of GCSD's contractual interest in the Skywalk Agreement is necessary to carry out such public use;

WHEREAS, the Hualapai Tribal Council declares that the protection and preservation of its unique, priceless, and unalienable lands and natural resources is a public use and the acquisition of GCSD's contractual interest in the Skywalk Agreement is necessary to carry out such public use;

WHEREAS, the exercise of the Hualapai Tribe's inherent powers of eminent domain over GCSD's contractual interest in the Skywalk

Agreement is a purpose for which eminent domain may be exercised under sections 2.16(B), subparts (1) through (14), of the Hualapai Law and Order Code;

WHEREAS, the Hualapai Tribe stands ready to make just compensation to GCSD for the exercise of eminent domain over GCSD's contractual interest in the Skywalk Agreement;

WHEREAS, the amount of currently-estimated just compensation for GCSD's contractual interest in the Skywalk Agreement is $11,040,000;

WHEREAS, pursuant to section 2.16 of the Hualapai Law and Order Code) the Hualapai Tribe may, but is not required to, post a bond or deposit as a condition of initiating a condemnation proceeding;

NOW, THEREFORE, BE IT RESOLVED that the Hualapai Tribal Council assembled this 7th day of February, 2012, does hereby authorize and direct the Hualapai Tribe to consummate the acquisition of GCSD's contractual interest in the Skywalk Agreement under the power of eminent domain and to do all things necessary to accomplish this purpose;

BE IT FURTHER RESOLVED that no settlement figure, purchase price, or stipulation to purchase such interest is binding upon the Tribe or its agents until the Hualapai Tribal Council approves any figure, purchase price, or stipulation to purchase either by ordinance or resolution; and

BE IT FINALLY RESOLVED that the Hualapai Tribe shall not post a bond or deposit any money as a condition of initiating a condemnation proceeding unless the Hualapai Tribal Council

approves any such bond or deposit by ordinance or resolution.

CERTIFICATION

I, the undersigned, as Chairwoman of the Hualapai Tribal Council, hereby certify that the Hualapai Tribal Council of the Hualapai Tribe is composed of nine (9) members of whom eight (8), constituting a quorum, were present at a Special Council meeting held on the 7th day of February, 2012; and that the foregoing resolution was duly adopted by a vote of five (5) in favor, one (1) opposed, one (1) not voting, two (2) excused, pursuant to the authority of Article V and Article IX of the Constitution of the Hualapai Tribe, approved March 13, 1991.

Louise Benson, Chairwoman
HUALAPAI TRIBAL COUNCIL

ATTEST:
Adeline Crozier, Assistant Secretary
HUALAPAI TRIBAL COUNCIL