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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Grand Canyon Skywalk Development, LLC, Plaintiff, vs. Charles Vaughn, et al., Defendants.	No. 3:11-cv-08048-DGC **MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE** ***Expedited Hearing and Consideration Requested***

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Grand Canyon Skywalk Development, LLC ("Plaintiff" or "GCSD") hereby moves the Court for a temporary restraining order to prevent Defendants Charles Vaughn; Waylon Honga; Ruby Steele; Candida

Hunter-Yazzie; Wilfred Whatoname, Sr.; Richard Walema; Wynona Sinyella; Sheri Yellowhawk; and Barney Imus (collectively, the "Council Defendants"), as well as Wanda Easter and Jaci Dugan (the "Administrative Defendants," who, collectively with the Council Defendants, are referred to herein as "Defendants") from taking any steps to enforce the Tribe's purported "condemnation" of GCSD's interest in the glass Skywalk overlooking the Grand Canyon. ***Because this unlawful "taking" of GCSD's contractual rights could happen literally at any moment, GCSD requests an immediate hearing and ruling on this motion.*** This motion is supported by the following memorandum of points and authorities, the attached exhibits, and the entire court record herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

GCSD has spent more than $25 million to conceive, design, engineer, build, and open to the public the world-famous glass-bottomed viewing platform overlooking the Grand Canyon known as the "Skywalk." GCSD has managed the Skywalk since it opened in 2007, and its contract allows it to continue managing the site for another two decades. The Council Defendants are members of the current Tribal Council (the "Council") of the Hualapai Indian Tribe (the "Tribe"), a federally-recognized Indian tribe.

On April 30, 2011, GCSD filed this action for declaratory and injunctive relief. As explained in GCSD's Complaint [Doc. 1] and its Motion for Preliminary Injunction ("Injunction Motion") [Doc. 3], in the days leading up to the filing of the complaint, GCSD had received information indicating that Defendants intended to "condemn," through the Tribe's purported eminent-domain power, Plaintiff's contractual right to control and manage the Skywalk. At the time the complaint was filed, GCSD did not know precisely when Defendants would take this action.

David Jin, the founder of GCSD, has since learned that during a closed-door meeting, the Council passed a measure that purports to authorize the Tribe to "take" private property and private contract rights, without due process, notice, or timely payment, through the exercise of eminent domain. Mr. Jin has also received a copy of the Tribal ordinance (the "Ordinance") that

the Council has considered and approved. *See* **Exhibit A**, Declaration of David Jin (Jin Decl."), ¶ 4 & Exhibit 1 thereto.[1] The Ordinance was carefully drafted to allow the Tribe to "take" GCSD's contractual right to manage the property, and to deprive GCSD of the right to receive fair-market value for it.

Among other things, the Ordinance purportedly allows the Tribe to take "[a]ll tangible or intangible property, including intangibles" such as "*contracts* pertaining to the possession, occupation, use, design, development, improvement, construction, operation and/or management of property, including property owned by the Tribe." *See* Ordinance § 2.16(D)(3) (emphasis added). The Ordinance further provides that when a contract is "taken," "the Tribe shall be the party thereto in the full place and stead of the defendant, to the full extent as if the Tribe and not the defendant were the original signator [sic] or party thereto, and the defendant shall no longer be a party thereto . . . ." *Id.* § 2.16(F)(4)(a). The Ordinance also states that once the Tribe declares a "taking," the title to the interest owned, including contractual interests, *immediately* vests in the Tribe. *See id.* § 2.16(F)(2), (F)(4)(a). These provisions were no doubt tailored specifically to allow the Tribe to take over management of the site, without first allowing GCSD an opportunity to contest the condemnation. Moreover, the Ordinance was passed without the knowledge or approval of the members of the Tribe as required by the Tribe's own laws. *See* **Exhibit B** (Hualapai Constitution, Article V(n) ("[A]ll sales or exchanges of tribal lands, natural resources or other tribal assets shall be approved by the eligible voters of the Tribe voting at a special election ….")).

The passage of the Ordinance, however, is just the first step in the Council's plan. The Tribe is also poised to launch a massive media blitz to publicly justify the taking. Mr. Jin has been provided materials prepared by the Tribe's public-relations firm, Scutari and Cieslak.[2] *See*

[1] The copy of the Ordinance that Mr. Jin obtained was accompanied by "Hualapai Tribal Resolution No. 20-2011." Signed by Mr. Whatoname, the Tribal Chairman, the Resolution indicates that the Ordinance was passed into law by a 9-0 vote during a "Special Council meeting" on April 4, 2011.

[2] According to the PR firm's website, "Scutari and Cieslak Public Relations helps all types of folks successfully navigate the unpredictable intersection that connects PR, public policy and

Ex. A, Jin Decl., ¶ 6 & Exhibit 2 thereto. The introduction, written by the PR firm, acknowledges the fact that the Tribe now faces "a significant public relations opportunity – and some considerable challenges – with [the Tribe's] *planned legal action against David Jin.*" *See id*. (emphasis added). The purpose and nature of the "planned legal action" becomes apparent by reading the materials that are included in the Tribe's media package. These materials include a draft letter from the Tribal Chairman, Mr. Whatoname, addressed to Tribal members, which purports to justify the Tribe's taking of GCSD's interest in the Skywalk. The letter states, among other things, that Mr. Jin had "failed to abide by his most basic obligations and keep even the most basic promises he made to our community." As a result, the letter continues, "*we [i.e., the Tribal Council] are considering eminent domain proceedings*" against Jin. The PR materials also contain a schedule, which outlines how the Tribe plans to take its "message" to the public – through a slew of local and national media outlets – beginning on ***April 11, 2011***. Unbelievably, the Tribe intends to tell the media that Mr. Jin "and his various subsidiaries have behaved like *Arizona's version of Leona Helmsley and Bernie Madoff*"! *See id*. (emphasis in original). Thus, Defendants, not content with merely taking GCSD's $100 million asset without just compensation, are also bent on destroying its business reputation.

Defendants' purported condemnation of GCSD's contractual interest in the Skywalk could happen literally at any moment. With the "taking" now imminent, GCSD requests a temporary restraining order enjoining Defendants from taking any further steps to affect the purported "condemnation." A TRO is appropriate for at least four reasons: (1) Defendants have no legal authority to exercise jurisdiction over a non-Indian, such as GCSD; (2) even if Defendants could "condemn" GCSD's contract interests, Defendants have not followed or enacted any procedures to ensure even a modicum of fairness to Plaintiff in the event of a condemnation; (3) even if the Council Defendants had authority to pass a condemnation ordinance, they failed to follow their own Tribal law requirement for approval by a vote of all the Tribal members in doing so; and (4) even if Defendants had the authority to "condemn"

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politics. It's our sweet spot, our niche where we comfortably reside – and excel." *See* www.scutariandcieslak.com.

GCSD's contract rights, the Tribe they represent cannot pay "just compensation" for those rights, which is required under any law that could conceivably apply to this situation. Because Defendants' intended actions violate federal law, and will cause irreparable harm to GCSD, a temporary restraining order is warranted.

II. ARGUMENT

A. GCSD Is Entitled to a Temporary Restraining Order

The facts and legal arguments set forth in GCSD's Injunction Motion also support the issuance of a TRO. Rather than repeat those facts and arguments here, GCSD incorporates those portions of its Injunction Motion [Doc. 3, pp. 3-17] by reference as though fully set forth herein. *See* LRCiv 7.1(d)(2) ("If a party desires to call the Court's attention to anything contained in a previous pleading, motion or minute entry, the party shall do so by incorporation by reference."). For the Court's convenience, a copy of GCSD's Injunction Motion will be hand-delivered with this motion.

To summarize, GCSD has proven all four elements of its claim for injunctive relief: (1) a likelihood of success on the merits; (2) a likelihood that it will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in GCSD's favor; and (4) that an injunction is in the public interest. *See Winter v. Nat'l Res. Def. Council, Inc*., 129 S. Ct. 365, 374 (2008); *see also California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009) (citing the *Winter* factors).

1. GCSD will succeed on the merits of its claim for declaratory relief that Defendants' actions are unlawful because neither the Council Defendants nor the Tribe has civil regulatory authority over GCSD, the Tribal eminent-domain law was not validly enacted, and the Tribe cannot pay just compensation.

As tribal officials acting *ultra vires*, the Council Defendants have no authority whatsoever over GCSD. *Burlington N. & Santa Fe R. Co. v. Vaughn*, 509 F..3d 1085, 1092 (9th Cir. 2007). Likewise, the Tribe has no civil regulatory authority over GCSD because GSCD is not an Indian and GSCD's contractual relationship with 'Sa' Nyu Wa ("SNW"), a Tribal corporation, expressly provides that federal court is the proper forum for the litigation of

contract matters.[3] Thus, GCSD has not contractually submitted itself to Tribal authority. Under *Montana v. U.S.*, 450 U.S. 544 (1981), and its progeny, the Tribe has no civil jurisdiction over non-Indians in limited commercial circumstances such as those presented here. *See Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 338 (2008). As a result, Defendants have no legal authority to "take" Plaintiff's contract under the Tribe's purported self-enforcing eminent-domain power. *See* Injunction Motion, pp. 5-8. Moreover, even if Defendants had the authority to "take" GCSD's contract by way of condemnation, they have neither followed any of the procedures established by federal law for the taking of property interests by eminent domain, nor included any fundamental hallmarks of fairness in the Ordinance.

The land upon which the Skywalk is located is trust land held by the United States for the benefit of the Tribe. The Tribe and its officials lack the power to condemn federal property. *See, e.g.,* 25 U.S.C. §§ 177-202 (Non-Intercourse Act, providing Indian lands not subject to alienation absent approval of the United States); 1A-2 NICHOLS ON EMINENT DOMAIN § 2.20 (discussing how Indian tribes have always been subject to the sovereignty of the United States and likewise subject to the power of federal eminent domain). But it is Plaintiff's understanding that the Tribe's condemnation intentions are limited to Plaintiff's contract rights and not to the physical property of the Project. Even assuming that private contract rights are susceptible to the exercise of eminent domain, some basic protections of individual rights are required.[4] For example, Rule 71.1 of the Federal Rules of Civil Procedure requires those exercising eminent domain to file a complaint and personally serve it on all affected persons, and allows the party

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[3] GCSD's contract with SNW specifically states that "[t]he 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 . . . ." *See* Agreement, § 15.4(b) (Exhibit A to the Declaration of David Jin, filed with the Injunction Motion).

[4] No known Ninth Circuit, Arizona, or Hualapai Indian Tribe authorities allow for the exercise of eminent domain with respect to contract rights. In fact, Arizona law is generally much more restrictive as to eminent domain. *See generally*, A.R.S. §§ 12-1131 through 1138 (further clarifying the definition of "public use"). Indeed, governmental authority to unilaterally substitute itself in place of a private party to a contract would eviscerate the fundamental concept of meeting of the minds.

whose property is being taken to file an answer. *See* Fed. R. Civ. P. 71.1(c), (d) & (e). The Rule also sets forth the specific procedures that must be followed in a condemnation action, and provide for, among other things, a *trial* on the issue of compensation, and has specific procedures to be followed before immediate possession can occur. *See* Fed. R. Civ. P. 71.1(h). Moreover, the plaintiff in a condemnation case must post a bond. *See* Fed. R. Civ. P. 71.1(i). Defendants have made no attempt whatsoever to comply with the letter or spirit of Rule 71.1. Instead, Defendants have passed an ordinance – in a closed-door meeting – that purportedly allows the Tribe to take immediate possession of GCSD's contractual interest in the Skywalk, without notice, without an opportunity to object or respond, and without a hearing before an impartial tribunal to determine the legitimacy of Defendants' actions.

The secret nature of the passage of the Ordinance also makes it invalid under the Hualapai Indian Tribe Constitution. The Constitution requires that *any exchange of Tribal assets* must be approved by the eligible voters of the Tribe voting at a special election. Ex. B, Article V(n). "Taking" a multi-million-dollar asset certainly meets this threshold requirement for community approval. But as the PR materials makes clear, the Council Defendants have thus far intentionally kept the Hualapai community in the dark, and only intend to tell them about this asset exchange after the fact with a cursory letter from Chairman Whatoname. Ex. A., Jin Decl., ¶ 6 & Exhibit 2 thereto. Thus, the Council Defendants' plan violates the Hualapai Constitution.

Finally, under the United States Constitution, the Arizona Constitution, the Hualapai Constitution, and the Indian Civil Rights Act, the Tribe must pay "just compensation" for any property taken by eminent domain. Here, as discussed in the Injunction Motion, and supported by evidence, the fair-market value of GCSD's interest in the Skywalk exceeds $100 million. *See also* Ex. A, Jin Decl., ¶ 8. It is beyond dispute that the Tribe lacks the financial resources to pay GCSD $100 million, or anything approaching that amount.[5] Therefore, even if Defendants

[5] Plaintiff has information indicating that the Council Defendants are hoping to find an appraiser who will value GCSD's contract rights at the vastly understated amount of less than $15 million. Ex. A, Jin . Decl., ¶ 7.

had the *authority* to "condemn" Plaintiff's contract rights – and they do not – the Tribe cannot pay for them. This is yet another reason why the proposed "taking" is unlawful. *See* Injunction Motion, pp. 8-12.

2. GCSD will suffer irreparable harm and the balance of the equities tips in its favor.

Unless Defendants are enjoined from "condemning" GCSD's Skywalk contract and enjoined from taking "immediate" possession of its contractual rights, the company will suffer irreparable harm. This harm includes the total loss of its business, the potential loss of customers, the loss of key employees, the destruction of hard-earned goodwill, and damage to its business reputation, which could in turn result in the loss of future business opportunities. *See* Injunction Motion, pp. 12-15. By contrast, if an injunction is entered, Defendants will suffer no hardship at all. The Court's order will merely preclude them from taking actions that are unlawful to begin with. While the injunction is in effect, GCSD will, of course, continue to manage the Skywalk in the same skilled and dedicated manner it always has.[6] Thus, an injunction will merely maintain the *status quo*. *See id.* p. 15.

3. The public interest favors the issuance of an injunction.

The issuance of an injunction will likewise serve the public interest. The public has an interest in ensuring that government officials do not abuse the enormous power with which they are vested. The enormity of that power – and its abuse – could not be clearer in this case. The Council Defendants intend to take, with the mere stroke of a pen, the entirety of substantial and valuable contract interests from an entity over which they have no civil authority in the first

[6] The smear campaign outlined in the publicity plan is meritless. And even if there were some dispute about Plaintiff's establishment of acceptable restroom facilities (the primary point of dissatisfaction indicated in the PR materials) – which there is not – the appropriate course of action would be for SNW to follow the contract's provisions for dispute resolution and remedies, not for the Tribal government to attempt to expropriate the contract assets for whatever low-ball number the Tribe determines it wants to pay. A party dissatisfied with contract performance is limited to its contract remedies and review by the designated adjudicative body. There is no governmental super-power, at any level, to "take" any contracts that are formed within their territorial boundaries and insert the government in place of a party to the contract.

instance. Curbing such a gross abuse of legislative and administrative power through the issuance of an injunction will therefore serve the public interest. *See* Injunction Motion, p. 15.

B. Defendants Have Willfully Evaded Service.

Defendants, or their counsel, may complain that they have not yet been served with the summons and complaint. In fact, the Chief of Police for the Tribe attempted to serve Defendants at the April 4 meeting of the Council. But their attorney, Paul K. Charlton of Gallagher & Kennedy, P.A., turned the police chief away, representing to him that his clients could not be served because they are protected by "sovereign immunity." Defendants are wrong – they are not protected by sovereign immunity, and had no right to "refuse" service on that basis.

By way of background, during the weekend of April 2-3, 2011, GCSD's counsel, Mark Tratos, contacted the Hualapai Tribe's Chief of Police, Francis E. Bradley, Sr. *See* **Exhibit C**, Declaration of Mark Tratos, at ¶ 3. Mr. Tratos asked Chief Bradley whether he would be willing to serve the summons and complaint on Defendants. *Id*. Chief Bradley indicated that he would be happy to do so if Mr. Tratos simply provided him with instructions as to how he should proceed. *Id.* ¶ 4. On Monday, April 4, 2011, Mr. Tratos sent Chief Bradley an instruction letter, the summonses, and copies of the complaints, and asked Chief Bradley to please affect service. *Id.* ¶ 5. Chief Bradley advised Mr. Tratos that he would do so as promptly as he was able. *Id.*

That same day, Chief Bradley attempted to serve one of the defendants, Mr. Whatoname, at the Hualapai Tribal offices. *Id.* ¶ 6. When he arrived, a closed-door meeting of the Tribal Council was taking place. *Id.* Chief Bradley was prevented from entering the meeting and was told to wait. *Id.* Defendants' counsel, Mr. Charlton, emerged from the meeting about ten minutes later, and advised Chief Bradley that he could not serve the summonses and complaints because the Defendants were protected by sovereign immunity. *Id.* ¶ 7. Mr. Charlton then instructed Chief Bradley to return the papers to GCSD's counsel. *Id.* ¶ 8. Further, Mr. Charlton stated that if GCSD's counsel wished to obtain a copy of the police report of the incident, Chief

Bradley was required to first submit the request to *Mr. Charlton* before a copy of the report could be provided to GCSD's counsel. *Id.*

Mr. Charlton's representation to Chief Bradley was not only legally incorrect, it was completely improper. The Council Members have no right to refuse service of federal court subpoenas directed to them individually based on sovereign immunity. It is true that Indian *tribes* are immune from lawsuits or court process in both state and federal court unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Tech., Inc*. 523 U.S. 751, 754 (1998). However, sovereign immunity does not extend to *members* of the tribe just because of their status as members, *see Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977), or to tribal officials alleged to have acted outside the bounds of their lawful authority. *See*, *e.g*., *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 574-575 (10th Cir. 1984). Rather, federal courts have extended the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to allow suits against tribal officials, at least for declaratory or injunctive relief. *Tenneco Oil*, 725 F.2d at 574-575. Indeed, in *Santa Clara Pueblo v. Martinez*, the Supreme Court squarely addressed this issue, and specifically stated that tribal officials are not protected by tribal immunity when acting beyond the scope of their authority. 436 U.S. 49, 59 (1978); *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State").

Here, the validity of the Council Defendants' actions has been expressly challenged. GCSD alleges in its complaint that the Council Defendants, by taking steps to condemn the contractual rights of a non-Indian, are acting beyond the scope of their legal authority. *See*, *e.g*., Complaint ¶¶ 1, 16, 81 & 83. As a result, no sovereign immunity attaches. *See Burlington N. R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901-902 (9th Cir. 1991), *overruled on other grounds by Big Horn County Elec. Coop, Inc. v, Adams*, 219 F.3d 944, 953 (9th Cir. 2000). This rule could not be more clear in the Ninth Circuit:

> In determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether BNSF has *alleged* an ongoing violation of federal law and seeks prospective relief. *See Verizon Md., Inc.*, 535 U.S. at 645-46. Clearly it has done so. BNSF's complaint states that "Defendants have acted, have threatened to act, or may act under the purported authority of the Tribe, to the injury of BNSF and in violation of federal law and in excess of federal limitations placed on the power of the Defendants" by seeking to enforce an unauthorized tax against BNSF that the Tribe lacks the jurisdiction to impose. Compl. P 5. BNSF seeks a declaration that the tax is invalid as applied to its right-of-way and a permanent injunction prohibiting the tribal officials from enforcing the tax against it. Compl. P 1. This is clearly the type of suit that is permissible under the doctrine of *Ex Parte Young*.

Burlington N. & Santa Fe R. Co. v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007).

Mr. Charlton's statement to law enforcement – that the Council Defendants could "refuse" service based on sovereign immunity – was incorrect. Accordingly, Defendants should not be heard to complain that they have not been served with process. Chief Bradley was at the meeting at which the Council Defendants were present, and was prepared to hand each of them a copy of the summons and complaint. Were it not for counsel's improper interference, Chief Bradley could have accomplished service.

III. CONCLUSION

Based on the reasons outlined above, and those set forth in GCSD's Injunction Motion, the Court should temporarily restrain Defendants, and each of them, from taking any steps to enforce the proposed "condemnation" of GCSD's Skywalk management contract. A proposed temporary restraining order has been lodged with this motion.

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RESPECTFULLY SUBMITTED this 12th day of April, 2011.

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