

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BIG SANDY RANCHERIA OF WESTERN
MONO INDIANS, et al.,

Plaintiffs,

v.

BROWNSTONE, LLC,

Defendant.

1:11-cv-00198-OWW-GSA

MEMORANDUM DECISION REGARDING
MOTION TO DISMISS (Doc. 7)

I. INTRODUCTION.

Big Sandy Rancheria of Western Mono Indians and Big Sandy Rancheria Entertainment Authority ("Plaintiffs") proceed with an action for declaratory relief against Brownstone, LLC ("Defendant").

Defendant filed a motion to dismiss Plaintiffs' complaint on March 2, 2011 under Federal Rule of Civil Procedure 12(b)(3) for improper venue. (Doc. 7). The motion centers on proper interpretation of a forum selection clause. Plaintiffs filed a first amended complaint ("FAC") on March 23, 2011. (Doc. 8). Plaintiffs filed opposition to the motion to dismiss on April 4, 2011. (Doc. 9).

II. FACTUAL BACKGROUND.

Plaintiff Big Sandy Rancheria of Western Mono Indians

1 ("Tribe") is a federally recognized Indian Tribe. Plaintiff Big
2 Sandy Rancheria Entertainment Authority is a wholly owned
3 instrumentality of the Tribe organized under Tribal Law as an
4 authorized government agency.

5 On September 10, 1999, the Tribe and the State of California
6 executed and entered into a "Tribal-State Gaming Compact"
7 ("Compact") pursuant to the Indian Gaming Regulatory Act (25 U.S.C.
8 § 2701 *et seq.*) ("IGRA"). The United States Secretary of the
9 Interior approved the Compact on May 5, 2000. *Inter alia*, the
10 Compact sets forth specific and comprehensive licensing
11 requirements pursuant to which entities designated as "Gaming
12 Resource Suppliers" or "Financial Sources" must become licensed by
13 the Tribe's Gaming Agency before providing any services to the
14 Tribe. In order to become licensed, an entity must submit a formal
15 application from the Tribal Gaming Agency and must also submit to
16 a State Certification process with the California Gambling Control
17 Commission.

18 On May 21, 2002, the Tribe enacted the Big Sandy Rancheria
19 Tribal Gaming Ordinance ("Gaming Ordinance") and adopted the Big
20 Sandy Rancheria Tribal Gaming Regulations ("Gaming Regulations");
21 both were approved by the National Indian Gaming Commission on
22 November 7, 2002. The Gaming Ordinance established the Big Sandy
23 Rancheria Gaming Commission ("Gaming Commission"). The Gaming
24 Commission is responsible for carrying out the Tribe's regulatory
25 responsibilities.

26 On January 16, 2007, the Tribe and Defendant executed a
27 "Memorandum of Understanding" ("MOU") which memorialized their
28 attempt to enter into a formal development, financing agreement,

1 and consulting agreement for a new casino, hospitality, and
2 recreational project for the Tribe. Pursuant to the MOU, the Tribe
3 was to forego discussion with any entity other than Defendant with
4 respect to contracts or agreements related to the development,
5 construction, opening, financing, or on-going operation of the
6 Tribe's proposed project. The MOU provided that Defendant would
7 advance \$40,000.00 to the Tribe pursuant to a Credit Agreement the
8 parties intended to enter into at a later date.

9 On or about March 25, 2007, the Tribe and Defendant executed
10 two agreements as contemplated by the MOU: (1) a Development
11 Agreement; and (2) a Credit Agreement. The Development Agreement
12 stated that Defendant would provide an array of services to the
13 Tribe in connection with its gaming activities. Defendant was to
14 be paid a development fee equal to six percent of the total cost of
15 the project. The Development Agreement includes a provision that
16 purports to relieve Defendant from any licensing requirements
17 imposed under the IGRA, the Compact, the Gaming Regulations, or the
18 Gaming Ordinance. The Credit Agreement includes a similar
19 exemption provision.

20 The Compact, Gaming Ordinance, and Gaming Regulations require
21 Defendant's licensure in light of the terms and provisions of the
22 Development Agreement and the Credit Agreement. Defendant has
23 never applied for or been granted any Tribal Gaming License, nor
24 has Defendant ever submitted to a Suitability Determination by the
25 California Gambling Control Commission.

26 On or about December 10, 2009, the Gaming Commission notified
27 Defendant that it was required to be licensed. The Gaming
28 Commission requested that Defendant submit all necessary

1 applications within ten days. Approximately thirty days later,
2 Defendant responded to the Gaming Commission and asserted that it
3 was not subject to licensing requirements pursuant to the exemption
4 provisions entailed in the Development Agreement and Credit
5 Agreement. Defendant also asserted that it did not need to obtain
6 any licensing because Defendant did not deem any of its services to
7 the tribe to be "Gaming Resources."

8 The Gaming Commission reiterated its position in a letter to
9 Defendant on February 9, 2010, noting that the contract language
10 Defendant sought to rely on conflicted with the express terms of
11 the Compact, the Gaming Ordinance, and the Gaming Regulations. The
12 Gaming Commission notified Defendant that until it received the
13 necessary licenses, Defendant was to refrain from further contact
14 with the Tribal Council or the Entertainment Authority.

15 On or about July 13, 2010, the Gaming Commission notified the
16 Tribe of its "Findings of Regulatory Review of Brownstone, LLC and
17 Associated Documents with resulting Business Relationships with the
18 Big Sandy Entertainment Authority and the Big Sandy Rancheria Band
19 of Western Mono Indians" ("the Findings"). Inter alia, the
20 Findings provided that the Gaming Commission determined that the
21 Development Agreement and Credit Agreement were "null and void" for
22 failure to comply with the Compact, Gaming Ordinance, and Gaming
23 Regulations.

24 On or about July 16, 2010, the Tribe notified Defendant that
25 the Development Agreement, Credit Agreement, and the MOU were each
26 null and void. Defendant responded on July 22, 2010 and asserted
27 that the agreements remained in effect and binding. The Tribe
28 responded on September 7, 2010 and reiterated its position, but

1 also indicated a willingness to entertain further proposals once
2 Defendant complied with applicable licensing provisions. Defendant
3 refuses to submit to any licensing requirements and continues to
4 demand that the Tribe withdraw its licensing requirements.

5 **III. LEGAL STANDARD.**

6 Defendant moves to dismiss the complaint on the basis of forum
7 selection clauses contained in the parties' agreements.
8 Enforcement of a forum selection clause is an appropriate basis for
9 a motion to dismiss pursuant to Rule 12(b)(3). Fed. R. Civ. P.
10 12(b)(3); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009). In
11 adjudicating a motion to dismiss for improper venue under Rule
12 12(b)(3), pleadings need not be accepted as true, and facts outside
13 the pleadings may be considered. *Id.* Federal law applies to
14 interpretation of a forum selection clause under Rule 12(b)(3). *Id.*

15 Forum selection clauses are prima facie valid and should not
16 be set aside unless the party challenging enforcement of such a
17 provision can show it is "'unreasonable' under the circumstances."
18 *E.g., Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir.
19 1996). A forum selection clause is unreasonable if (1) its
20 incorporation into the contract was the result of fraud, undue
21 influence, or overweening bargaining power; (2) the selected forum
22 is so "gravely difficult and inconvenient" that the complaining
23 party will "for all practical purposes be deprived of its day in
24 court;" or (3) enforcement of the clause would contravene a strong
25 public policy of the forum in which the suit is brought. *Id.*
26 (citations omitted).

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IV. DISCUSSION.

The parties' agreements each contain sections entitled "Forum Selection" which provide as follows:

Each party hereto irrevocably and unconditionally submits, for itself and its property subject to the provision in this SECTION 8, to the exclusive jurisdiction for any claim arising hereunder of (i) the United States District Court for the Central District of California (of [sic] if such court determines it is unwilling or unable to hear any dispute, any other federal court of competent jurisdiction in the State of California) (and any court having appellate jurisdiction thereof) and (ii) if, and only if the federal courts identified in Section 6.02(I) [sic] determine that they lack jurisdiction over any claim arising hereunder, the Superior Court in and for Los Angeles County, California (of [sic] if such court determines it is unwilling or unable to hear the dispute, any other state court of [sic] in the State of California (and any court having appellate jurisdiction thereof) (collectively, the "Applicable Courts")

(FAC, Ex. K, Development Agreement at 13; Ex. L, Credit Agreement at 14).¹ Defendant invokes the forum selection clauses as a basis for dismissal under Rule 12(b)(3).

A. Scope of the Forum Selection Clauses

Plaintiffs contend that their claims for declaratory relief are outside the scope of the forum selection clauses. Plaintiffs cite *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) and *Cedars-Sinai Med. Ctr. v. Global Excel*

¹ Defendant's motion misquotes the forum selection provisions by substituting the word "or" in place of the word "of" in two separate clauses. (Doc. 7, Motion to Dismiss at 3). Although the syntax and apparent purpose of the forum selection provisions indicate that use of the word "of" instead of "or" was likely a typographical error (Plaintiffs do not contend otherwise), attorneys do not have license to substitute words they believe *should* have been included in a contract for the words that are actually set forth in the agreement when quoting contract provisions to a court. At a minimum, typographical errors should be flagged by including the correct words in brackets, or by use of the term "[sic]." Presenting an edited contract provision as a direct quote in a pleading is inappropriate, particularly when an attorney's edits have a material impact on the force and effect of the provision. See Fed. R. Civ. P. 11.

Mgmt., Inc., 2010 U.S. Dist. LEXIS 139848 *14, 2010 WL 5572079 *5 (C.D. Cal. 2010) for the proposition that the phrase "any claims arising hereunder" only encompasses claims "requiring the court to interpret the agreements in the context of...performance under them. [It] does not cover claims that merely relate to the agreements, nor [does it] cover claims having their origin in the agreements." (Doc. 9, Opposition at 3). Neither case cited by Plaintiffs supports this reading of the forum selection clauses contained in the Development Agreement and the Credit Agreement.

In *Mediterranean*, the Ninth Circuit interpreted, in the context of an arbitration agreement, the phrase "arising hereunder." The Ninth Circuit interpreted "arising hereunder" as synonymous with the phrase "arising under the Agreement." 708 F.2d at 1464. The Court then examined the scope of that phrase:

The phrase "arising under" has been called "relatively narrow as arbitration clauses go." *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 364 (S.D.N.Y. 1966). In *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961), Judge Medina concluded that when an arbitration clause "refers to disputes or controversies 'under' or 'arising out of' the contract," arbitration is restricted to "disputes and controversies **relating to the interpretation of the contract** and matters of performance." Judge Medina reasoned that the phrase "arising under" is narrower in scope than the phrase "arising out of or relating to," the standard language recommended by the American Arbitration Association. *Id.*

Id. (emphasis added). As Defendant points out, *Mediterranean* establishes that the phrase "arising hereunder" encompasses claims "relating to the interpretation...of the contract." *Id.*

Cedars-Sinai is of no help to Plaintiffs, as it says nothing about the meaning of the phrase "arising hereunder." *Cedars-Sinai* discusses generally the three categories of forum selection

1 clauses:

2 First, the most limited forum selection clauses cover
3 claims "arising under" the relevant agreement.

4 Second, an intermediate category is occupied by forum
5 selection clauses that govern disputes "arising out of or
6 relating to" the contract. These clauses cover claims
7 that have a significant relationship to the contract or
8 have "their origin or genesis" in the contract.

9 Third, at the most extreme end of the spectrum, some
10 forum selection clauses purport to govern "all claims"
11 without qualification.

12 *Cedars-Sinai*, 2010 U.S. Dist. LEXIS 139848 *14 (citations omitted).

13 In discussing the scope of the first and most limited type of forum
14 selection clause, *Cedars-Sinai* cites *In re Kinoshita*. *Id.* As noted
15 in *Mediterranean*, *Kinoshita* holds that the phrase "arising under"
16 encompasses "disputes and controversies relating to the
17 interpretation of the contract." *Mediterranean*, 708 F.2d at 1464
18 (citing *Kinoshita*, 287 F.2d at 953).

19 The FAC asserts two causes of action, each of which arise under
20 the contract as alleged by the FAC's express terms. The FAC's first
21 cause of action alleges "there is an actual and justiciable
22 controversy relating to the legal rights and duties of Plaintiffs
23 and Defendant *under the Development Agreement*." (FAC at 22).
24 Similarly, the second cause of action alleges "there is an actual
25 and justiciable controversy relating to the legal rights and duties
26 of Plaintiffs and Defendant *under the Credit Agreement*." (FAC at
27 22). *Inter alia*, the FAC seeks a declaration from the court that
28 "the two agreements...impermissibly encumber Indian lands." (FAC
at 2). It cannot be denied that the FAC calls on the court to
interpret the parties' agreements respecting the need for a license.
Absent interpretation of the parties' respective rights and duties

1 under the contract, Plaintiffs' claims cannot be adjudicated.
2 Plaintiffs' claims for relief fall within the ambit of the forum
3 selection clauses. *See, e.g., Mediterranean*, 708 F.2d at 1464
4 (holding that phrase "arising hereunder" covers disputes and
5 controversies "relating to the interpretation of the contract")
6 (citing *Kinoshita*, 287 F.2d at 953).

7 **B. Exclusivity Entailed by the Forum Selection Clauses**

8 Plaintiffs contend that the forum selection clauses are
9 permissive, rather than mandatory. (Opposition at 6). Plaintiffs
10 argue that the language of the forum selection clauses does not
11 establish exclusive jurisdiction in the United States District Court
12 for the Central District of California, because the forum selection
13 clauses contemplate jurisdiction in other California courts.
14 Plaintiffs' argument misses the mark. That the forum selection
15 clause does not establish the Central District as the *only* possible
16 venue for litigation does not provide for alternative fora. A forum
17 selection clause, like any other contractual agreement, must be
18 construed and enforced according to the plain meaning of its terms.
19 *E.g., Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77
20 (9th Cir. 1987) (noting that plain meaning must be afforded to
21 words contained in a forum selection provision). Here, the forum
22 selection clauses specifically state that the forum of first resort
23 for claims arising under the parties agreements is the United State
24 District Court for the Central District of California. Plaintiffs
25 do not contend otherwise.

26 Plaintiffs' citations to *Northern Cal. Dist. Council of*
27 *Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th
28 Cir. 1995) and *Krish v. Balasubramaniam*, 2006 U.S. Dist. LEXIS 76194

* 14-16 (E.D. Cal. 2007) are of no avail, as neither case involved forum selection clauses similar to the parties' agreements. The forum selection clause in *Pittsburg-Des Moines Steel Co.* "mandate[d] nothing more than that the Orange County courts have jurisdiction." 69 F.3d at 1037. In *Krish*, the court acknowledged that, in order to justify dismissal under Rule 12(b)(3), "[a] forum selection clause needs to contain additional language mandating that venue be in a particular place." 2006 U.S. Dist. LEXIS 76194 * 14. The subject forum selection agreements contain language mandating that suit must first be brought in the Central District; only if that court "determines it is unwilling or unable to hear any dispute" is suit in another district appropriate. (FAC, Ex. K, Development Agreement at 13; Ex. L, Credit Agreement at 14).

C. Remedy

Plaintiffs request that this case be transferred rather than dismissed, and Defendant does not oppose transfer of this case to the Central District. (Reply at 4). The court finds that a transfer, as opposed to a dismissal, is in the interest of justice.

ORDER

For the reasons stated, this case is TRANSFERRED to the United States District Court for the Central District of California, Los Angeles Division.

IT IS SO ORDERED.

Dated: April 21, 2011

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE