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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE BUENA VISTA RANCHERIA OF ME-WUK INDIANS, a federally recognized Indian Tribe,

Plaintiff,

vs.

AMADOR COUNTY, CALIFORNIA; and THE AMADOR COUNTY BOARD OF SUPERVISORS,

Defendants.

Case No. 2:20-cv-01383-MCE-AC

DEFENDANTS' MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

DATE: April 8, 2021
TIME: 2:00 p.m.
COURTROOM: 7 (14th Floor)
JUDGE: Hon. Morrison England

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NOTICE OF MOTION & MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on Thursday, April 8, 2021, at 2:00 p.m., or as soon thereafter as the parties may be heard, Defendant COUNTY OF AMADOR will move this Court, at the United States Courthouse located at 501 I Street, Sacramento, California, 95814, Courtroom #7 (14th Floor), for an order dismissing the First Amended Complaint on file in this action (ECF No. 5), based on *forum non conveniens* on the ground that a forum selection clause contained in the intergovernmental services agreement that forms the basis of this suit prescribes the California Superior Court in County of Sacramento as the appropriate forum for this action.

This motion is based on the following documents: this Notice of Motion and the attached Points & Authorities; and all the other papers, documents, or exhibits on file or to be filed in this action, and the argument to be made at any hearing on the motion ordered by the Court.

Respectfully submitted,

Dated: March 8, 2021

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: /s/ Christopher E. Skinnell
Christopher E. Skinnell

Attorneys for Defendant
COUNTY OF AMADOR

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

In 2019, Plaintiff Buena Vista Rancheria of Me-Wuk Indians opened a casino in Amador County pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). The construction of that casino was only made possible by the existence of an "intergovernmental services agreement" between the Tribe and the County ("ISA"), in which the Tribe committed to various specified payments to local agencies—the County and others—to address the casino's impacts on the local environment and public services. The Tribe's compact with the State of California required the Tribe to "enter into an enforceable written agreement with the County" "before the commencement of a [casino] Project." *See* Defendant's Request for Judicial Notice, filed herewith ("RJN"), Ex. 3, pp. 25-26 (§ 10.8.8).[1]

Now that the casino is built and operational, however, and the Tribe has derived the chief benefit of the agreement, the Tribe cynically seeks, by this action, to avoid its obligations under the ISA, to the detriment of the local community. In pursuit of that goal, it mounts a wide-ranging attack on the ISA and on the County, seeking to invalidate the agreement or to compel the County to otherwise forgo the payments prescribed therein.

But the Tribe's challenge must fail because the ISA contains a mandatory forum selection clause that commits judicial resolution of disputes pertaining to that agreement to the Sacramento County Superior Court. Under Supreme Court case law, such a provision is to be enforced by dismissal, unless it would effectively deprive the party seeking to avoid the forum selection clause of "his day in court" altogether—which is not remotely the case here.

Accordingly, this case should be dismissed.

[1] A true and correct copy of the ISA, referred to throughout the FAC but not attached thereto, is submitted herewith as Exhibit 1 to the RJN. The 1999, 2004, and 2016 Compacts between the State of California and the Tribe are submitted as Exhibits 2-4.

II. FACTUAL BACKGROUND

In the interests of judicial economy, Defendants incorporate the "Factual Background" section set forth in the Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed concurrently herewith.

III. MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

Section 4.a of the ISA governs the resolution of disputes arising under the ISA. It commits the parties to meeting-and-conferring with respect to disagreements; permits—but does not require—arbitration upon mutual agreement, if the parties cannot resolve the dispute on their own; and provides for judicial remedies as follows:

> Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in this Section ***may be resolved in the Superior Court of the State of California, County of Sacramento. The parties agree that venue is proper in the Sacramento County Superior Court. To further support venue being proper in Sacramento County Superior Court, the parties agree to execute this Agreement in Sacramento County. If the Sacramento Superior Court refuses jurisdiction for any reason, then the matter shall be heard in the Superior Court of the State of California, County of Amador.*** The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Agreement. In no event may the Tribe be precluded from pursuing any arbitration or judicial remedy against the County on the grounds that the Tribe failed to exhaust its administrative remedies. The parties agree that, without prejudice to the right of either party to seek immediate injunctive relief against the other when circumstances are deemed to require immediate relief, reasonable efforts will be made to explore alternative dispute resolution avenues prior to resorting to judicial process.

RJN, Ex. 1, p. 18 (ISA § 4.a.4) (emphasis added).

A federal court sitting in diversity applies federal law to determine the enforceability of a forum selection clause. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). "The appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 60 (2013). "[B]ecause both § 1404(a) and the *forum non conveniens* doctrine from which it

derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum [through 28 U.S.C. § 1404(a)]." *Id.* at 61.

However, the analysis is slightly different when a forum selection clause is at issue in that private factors that a court normally considers in determining whether to grant a motion *forum non conveniens*, relating to the convenience of the parties and the witnesses, do not apply. *Id.* at 64. Only public interest factors are considered, and "[b]ecause those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* The public interest factors include "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). None of those factors militate against the enforcement of the forum selection clause here.

"Under federal law, a forum selection clause is prima facie valid and should be enforced unless enforcement is shown to be 'unreasonable' under the circumstances." *Stone v. Cty. of Lassen*, 2013 U.S. Dist. LEXIS 9271, at *7-8 (E.D. Cal. Jan. 22, 2013) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)). The Supreme Court has construed the "unreasonableness" exception narrowly. *The Bremen*, 407 U.S. at 10. The party seeking to avoid a forum selection clause bears a "heavy burden of proof" which can generally be overcome only by a showing that the designated forum is so "gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of his day in court." *Id.* at 17-18; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592 (1991). Absent such a showing, "there is no basis for concluding that it would be unfair, unjust, or unreasonable" to enforce the forum

selection clause. *The Bremen*, 407 U.S. at 18.

Where a valid forum selection clause points to a state venue, dismissal is the appropriate remedy. *See, e.g.*, *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018) (affirming district court's dismissal for *forum non conveniens* where parties' forum selection clause designated California state court); *S & J Rentals, Inc. v Hilti, Inc.*, 294 F. Supp. 3d 978, 990 (E.D. Cal. 2018) (dismissing without prejudice because of parties' forum selection clause pointing to Oklahoma state court).

While the initial sentence of the highlighted language above provides that disputes "may be resolved" in the Sacramento Superior Court, the use of "may" does not foreclose the conclusion that the provision is mandatory,[2] and, read as a whole, this passage clearly evidences an intention to make that court the exclusive forum for resolving disputes (unless it refuses jurisdiction, in which case the mandatory fall-back forum is the Amador Superior Court). For one thing, the fall-back provision provides that the case "shall" be heard in Amador if the Sacramento court refuses jurisdiction. Moreover, "[t]he express language of a forum-selection clause may render it mandatory in one of two ways: (1) where it clearly designates a forum as the exclusive one, or (2) where it specifies venue in addition to jurisdiction." *Abundancia, LLC v. R.D.T. Bus. Enters.*, 2015 U.S. Dist. LEXIS 72669, at *7 (C.D. Cal. June 3, 2015) (quoting *BRC Grp., LLC v. Quepasa Corp.*, 2009 U.S. Dist. LEXIS 72521, at *3 (N.D. Cal. Aug. 7, 2009)). *See also Docksider, Ltd. v. Sea Technology*, 875 F.2d 762, 763 (9th Cir. 1989) (agreement providing that "Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia" found to be mandatory). And, particularly instructive on this point, because the language is so similar, is the Tenth Circuit's decision in *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342

[2] *See Cortez Byrd Chips v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198-99 (2000) (use of "may" not conclusive as to whether a provision is permissive or mandatory); *Torres-Ruiz v. United States Dist. Court*, 120 F.3d 933, 935 (9th Cir. 1997) (Fed. R. Crim. Proc. 15(a) held to be mandatory, despite use of "may"); *Tarrant Bell Prop., LLC v. Superior Court*, 51 Cal. 4th 538, 542 (2011) (use "of 'may' or 'shall' is merely indicative, not dispositive or conclusive.").

(10th Cir. 1992), in which the court held that an agreement providing that "*venue shall be proper* under this agreement in Johnson County, Kansas" was mandatory and enforceable. *Id.* at 1345-46; *see also* *Dawson v. Fitzgerald*, 189 F.3d 477, at *9, published in full-text format at 1999 U.S. App. LEXIS 20260 (10th Cir. 1999) (unpublished table decision) ("venue is proper" held to be a mandatory forum selection clause). And, finally, this clause also must be read in conjunction with Section 4.e of the ISA, in which the Tribe has granted a limited waiver of its sovereign immunity to enforce the agreement only in Sacramento Superior Court (again, with Amador Superior Court as a fall-back). *See* RJN, Ex. 1, p. 18; *United States v. Rodgers*, 461 U.S. 677, 706, 103 S. Ct. 2132, 2149 (1983) (whether "may" is mandatory or permissive depends on context).

Federal courts have recognized only three grounds for declining to enforce a valid forum selection clause: (1) where the inclusion of the clause in the contract was the result of "fraud or overreaching," (2) if the party seeking to avoid the clause would be effectively deprived of its day in court in the forum specified in the clause, or (3) if enforcement would contravene a strong public policy of the forum where the suit was filed. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2003). None of these factors are present here.

IV. CONCLUSION

For the foregoing reasons, the First Amended Complaint should be dismissed.

Respectfully submitted,

Dated: March 8, 2021

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