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7 Brownstone, LLC

8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

11 BIG SANDY RANCHERIA OF WESTERN  
12 MONO INDIANS and the BIG SANDY  
13 RANCHERIA ENTERTAINMENT  
14 AUTHORITY,

14 Plaintiffs,

15 v.

16 BROWNSTONE, LLC,

17 Defendant.

CASE NO. 1:11-cv-00198 OWW GSA

**DEFENDANT BROWNSTONE, LLC'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(3)**

Date: April 18, 2011  
Time: 10:00 a.m.  
Ctrm.: Three  
Judge: Hon. Oliver W. Wanger

19 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

20 PLEASE TAKE NOTICE that on April 18, 2011, at 10:00 a.m., in Courtroom Three of  
21 the above-entitled Court located at 2500 Tulare Street, Fresno, California, Defendant  
22 Brownstone, LLC will and hereby does move to dismiss this action pursuant to Federal Rule of  
23 Civil Procedure 12(b)(3), on the ground that this action was filed in an improper venue in  
24 violation of a mandatory forum selection clause contained in the agreements at issue.

25 The Motion will be based on this Notice, the accompanying Memorandum of Points and  
26 Authorities, the Declaration of Anna M. Morrison, the records and files in this action, and such  
27 oral argument as the Court may permit at the hearing on this Motion.

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Dated: March 2, 2011

STEVENS, O'CONNELL & JACOBS LLP

By /s/ Matthew G. Jacobs  
MATTHEW G. JACOBS  
Attorneys for Defendant  
Brownstone, LLC

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12 MONO INDIANS and the BIG SANDY  
13 RANCHERIA ENTERTAINMENT  
14 AUTHORITY,

14 Plaintiffs,

15 v.

16 BROWNSTONE, LLC,

17 Defendant.

CASE NO. 1:11-cv-00198 OWW GSA

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT BROWNSTONE, LLC'S  
MOTION TO DISMISS PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(3)**

Date: April 18, 2011  
Time: 10:00 a.m.  
Ctrm.: Three  
Judge: Hon. Oliver W. Wanger

19  
20 **I. INTRODUCTION**

21 Pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, defendant  
22 Brownstone, LLC ("Brownstone") moves to dismiss this action on the ground that this litigation  
23 was filed in an improper venue in violation of a mandatory forum selection clause.<sup>1</sup>

24 Plaintiffs Big Sandy Rancheria of Western Mono Indians and the Big Sandy Rancheria  
25 Entertainment Authority (collectively, "Big Sandy" or "the Tribe") have sued for declaratory  
26 relief to determine the legal rights and duties of the parties to two contracts. Both agreements

27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise designated, all citations to rules are to the Federal Rules of Civil Procedure.

1 contain a mandatory forum selection clause, which provides that the “exclusive jurisdiction for  
2 any claim arising hereunder” is “the United States District Court for the Central District of  
3 California . . . .” Comp., Ex. K, § 8.02, at 13, Ex. L, § 6.02, at 14.

4 Big Sandy has disregarded these provisions and filed suit in this District. Since the  
5 forum selection clauses are mandatory, the Court should enforce them by granting this motion to  
6 dismiss the Complaint on the grounds of improper venue pursuant to Rule 12(b)(3).

## 7 II. STATEMENT OF FACTS

8 On March 25, 2007, Brownstone and Big Sandy entered into two contracts, known as the  
9 “Development Agreement” and the “Credit Agreement.” Comp., Exs. K, L. The Development  
10 Agreement and Credit Agreement were the culmination of a process that began with a  
11 Memorandum of Understanding, dated January 16, 2007 (“MOU”). In the MOU, the parties  
12 stated their intention to enter into agreements “to document the relationship between the Parties  
13 for the development, construction, opening, financing and on-going operation” of “the Tribe’s  
14 planned casino, gaming, hospitality and recreational project” on land near Friant, California. *Id.*,  
15 Ex. J at 1. The MOU stated that “[t]he execution of the Project Agreements is subject to the  
16 negotiation of terms and conditions satisfactory to each Party in its sole and absolute  
17 discretion.” (Emphasis added.) *Id.*

18 During negotiations over the terms of the Development and Credit Agreements,  
19 Brownstone and the Tribe were represented by separate counsel from national law firms.  
20 Declaration of Anna M. Morrison (“Morrison Dec.”), ¶ 3. Brownstone was represented by Akin  
21 Gump Strauss Hauer & Feld LLP. *Id.* The Tribe was represented by Holland & Knight LLP.  
22 *Id.*<sup>2</sup> Through their principals and legal counsel, both parties were involved in drafting the  
23 specific language that went into the agreements. *Id.*, ¶ 4. The agreements themselves  
24 documented that Big Sandy had consulted its own legal advisors, stating that Brownstone “has  
25 not provided any legal, accounting, regulatory or tax advice with respect to the transactions  
26

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27 <sup>2</sup> Both the Development and Credit Agreements include notice provisions that require a  
28 copy of any notice or communication under the agreements to be provided to the parties’  
respective counsel. Comp., Ex. K, § 10.01, at 23-24, Ex. L, § 8.01, at 23-24.

1 contemplated hereby and the Tribal Parties have consulted their own legal, and other advisors to  
2 the extent they deemed appropriate.” *Id.*, Ex. K, § 5.01(j)(vii) at 8, Ex. L, § 2.12(v) at 7.

3 Both the Development Agreement and the Credit Agreement contain a mandatory forum  
4 selection cause. The clause, appropriately titled “Forum Selection,” states in relevant part:

5 Each party hereto irrevocably and unconditionally submits, for itself and its  
6 property . . . to the exclusive jurisdiction for any claim arising hereunder of (i) the  
7 United States District Court for the Central District of California (or if such court  
8 determines it is unwilling or unable to hear the dispute, any other federal court of  
9 competent jurisdiction in the State of California) (and any court having appellate  
10 jurisdiction thereof) and (ii) if, and only if the federal courts identified in [section  
11 (i)] determine that they lack jurisdiction over any claim arising hereunder, the  
12 Superior Court in and for Los Angeles County, California ([or] if such court  
13 determines it is unwilling or unable to hear the dispute, any other state court of . .  
14 . the State of California (and court having appellate jurisdiction thereof) . . . .

15 Comp., Ex. K, § 8.02, at 13, Ex. L, § 6.02, at 14 (emphasis added).

16 The Tribe’s Complaint asserts two claims, both of which arise from the parties’  
17 agreements. The first cause of action is for “Declaratory Relief under Contract Claim –  
18 Development Agreement.” Comp., at 21. The second cause of action is for “Declaratory Relief  
19 under Contract Claim – Credit Agreement.” *Id.* Both causes of action allege that there is “an  
20 actual and justiciable controversy relating to the legal rights and duties of Plaintiffs and  
21 Defendant under” the Development Agreement and Credit Agreement, respectively. *Id.*, ¶ 81, at  
22 21 and ¶ 84, at 22.<sup>3</sup>

23 Despite the explicit “Forum Selection” clauses and the Tribe’s claims arising from the  
24 Development and Credit Agreements, Big Sandy filed the present action in this Court, instead of  
25 in the Central District of California.

26 <sup>3</sup> The Tribe seeks a declaration that the Development and Credit Agreements are void  
27 because, according to the Tribe, in order to perform its part of the contracts, Brownstone needs  
28 (but does not yet have) a tribal gaming license. *Id.*, ¶¶ 81, 82, 84, 85; *see also* ¶¶ 67-79. Big  
Sandy acknowledges, however, that both agreements expressly provide that Brownstone would  
not need a tribal gaming license at this stage of the project. Comp., ¶¶ 54-55, 62-63.  
Notwithstanding the advice and representation the Tribe received from Holland & Knight, the  
Tribe now attributes the inclusion of these provisions to Brownstone’s “demand” for their  
inclusion. *Id.*, ¶¶ 53, 60. The Tribe’s changed position on this issue is likely explained by its  
change in leadership. Compare Comp., Ex. K at 29 (agreement signed by Tribal Chair Lewis)  
*with* Comp., Ex. P (letter informing Brownstone that Big Sandy would not honor its agreements,  
signed by new Tribal Chair Kipp).

1 **III. ARGUMENT**

2 **A. The Forum Selection Clause Requires Dismissal Of This Action.**

3 The forum selection clauses in the Development and Credit Agreements set forth the  
4 parties' stipulation that the Central District of California would be the "exclusive" forum for  
5 claims arising under these contracts. Because Big Sandy has chosen to disregard the agreements  
6 by filing an action in this Court to determine the "legal rights and duties" of the parties under the  
7 agreements, the action is subject to dismissal for "improper venue" under Rule 12(b)(3).

8 **1. Standard of Review.**

9 "Parties may by contract designate the forum in which any litigation is to take place, and  
10 litigation commenced elsewhere may be subject to dismissal for improper venue." *Multimin*  
11 *USA, Inc. v. Walco Int'l, Inc.*, 2006 WL 1046964, \*4 (E.D. Cal. April 11, 2006), citing, inter alia,  
12 *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); see also *Argueta v. Banco Mexicano*, 87  
13 F.3d 320, 324 (9th Cir. 1996) (concluding that a motion to dismiss based on a forum selection  
14 clause should be brought under Rule 12(b)(3)). Forum selection clauses are presumptively valid.  
15 *Doe I v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009). Once the defendant challenges venue,  
16 the plaintiff bears the burden of establishing that the action was filed in a proper venue.  
17 *Multimin*, 2006 WL 1046964 at \*2; *Modius v. Psinaptic*, 2006 WL 1156390, at \*5 (N.D. Cal.  
18 May 2, 2006), citing *Bartholemew v. Virginia Chiropractors Ass'n*, 612 F.2d 812, 816 (4th Cir.  
19 1979). Under Rule 12(b)(3), the plaintiff's pleadings need not be accepted as true and the Court  
20 can consider facts outside the pleadings. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137  
21 (9th Cir. 2004); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998); *Argueta*, 87  
22 F.3d at 324.

23 "In a federal question action . . . the validity and effect of a forum-selection clause is  
24 controlled by federal standards." *Multimin*, 2006 WL 1046964 at \*4, citing, inter alia, *Carnival*  
25 *Cruise Lines*, 499 U.S. at 588-89; see also *Doe I*, 552 F.3d at 1077; *Manetti-Farrow, Inc. v.*  
26 *Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). In interpreting contracts under federal  
27 law, contract terms are given their common, normal and ordinary meaning. *Doe I*, 552 F.3d at  
28 1081.

1           **2. The Parties' Mandatory Forum Selection Clause Must Be Enforced.**

2           A forum selection clause will be enforced when the venue is specified in mandatory  
3 language. *Krish v. Balasubramaniam*, 2006 WL 2884794, at \*5 (E.D. Cal. Oct. 10, 2006). “To  
4 be a mandatory forum selection clause, the clause must contain language that clearly designates  
5 a forum as the exclusive one.” *Id.*, citing *Northern Cal. Dist. Council of Laborers v. Pittsburgh-*  
6 *Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995). “A forum selection clause needs to  
7 contain . . . mandatory language requiring a case be litigated in only one forum.” *Id.*; *see also*  
8 *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 275 (9th Cir. 1984).

9           The forum selection clauses in the Development and Credit Agreements manifestly meet  
10 this requirement. Both state that “*the exclusive jurisdiction for any claim arising hereunder [is]*  
11 *the United States District Court for the Central District of California . . .*” Comp., Ex. K, §  
12 8.02, at 13, Ex. L, § 6.02, at 14 (emphasis added); *see New Image Painting, Inc. v. Home Depot*  
13 *U.S.A. Inc.*, 2009 WL 4730891, \*3 (E.D. Cal. Dec. 7, 2009) (“The parties’ use of the words  
14 ‘exclusive’ and ‘shall’ shows the parties’ intent to make the forum selection clause mandatory  
15 rather than permissive.”), citing *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir.  
16 1989).<sup>4</sup> As it stands, under the parties’ agreed-upon forum selection clauses, the federal court  
17 for the Central District of California is the exclusive and only proper forum for this litigation.<sup>5</sup>

18           **3. There Are No Grounds To Invalidate The Forum Selection Clauses.**

19           No doubt Big Sandy will endeavor to justify its disregard of the agreements by asserting  
20 that the forum selection clauses are unenforceable. However, a “party seeking to avoid a forum  
21 selection clause bears a “heavy burden” to establish a ground upon which [the court] will  
22

23           <sup>4</sup> The forum selection clauses in the two agreements at issue here allow the parties to  
24 litigate their disputes in other specified forums, *but only if* the Central District of California  
25 “determines it is unwilling or unable to hear the dispute . . .” In this instance, Big Sandy has  
made no effort to ascertain whether the Central District of California would or could decline to  
entertain this action (*i.e.*, by filing its Complaint in the designated forum).

26           <sup>5</sup> The forum selection clauses in the Development and Credit Agreements encompass a  
27 declaratory relief action, as here, to determine the parties’ rights and obligations under the  
28 agreements. *See Modius*, 2006 WL 1156390 at \*7 (finding that plaintiff’s claims for “breach of  
written contract, breach of oral contract, *declaratory relief*, and rescission . . . are contractual  
disputes which arise under the [agreement], and are thus governed by the forum selection clause”  
(emphasis added)).

1 conclude the clause is unenforceable.” *Doe I*, 552 F.3d at 1083, quoting *M/S Bremen v. Zapata*  
2 *Off-Shore Co.*, 407 U.S. 1, 17 (1972). Moreover, the grounds to invalidate a forum selection  
3 clause are limited to the following: “(1) its incorporation into the contract was the result of  
4 fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely  
5 difficult and inconvenient that the complaining party will for all practical purposes be deprived  
6 of its day in court; or (3) enforcement of the clause would contravene a strong public policy of  
7 the forum in which the suit is brought.” *Argueta*, 87 F.3d at 325 (internal quotation marks and  
8 citations omitted).

9 None of the grounds for rendering a mandatory forum selection clause unenforceable  
10 exist here. To begin with, there was no fraud, undue influence or overweening bargaining  
11 power exercised by Brownstone, and none is even alleged or suggested in the Tribe’s Complaint.  
12 To the contrary, the Tribe was represented by sophisticated legal counsel in the extensive  
13 negotiations that led to the parties entering into the Development and Credit Agreements. *See*  
14 *Zenger-Miller v. Training Team, GMBH*, 757 F. Supp. 1062, 1066 (N.D. Cal. 1991).

15 Moreover, it is not enough to claim that the agreement was the product of fraud or undue  
16 influence. A party seeking to avoid a mandatory forum selection clause must prove that the  
17 “fraud complained of must be specifically related to the inclusion of the forum selection clause.”  
18 *Zions First National Bank v. Allen*, 688 F. Supp. 1495, 1498 (D. Utah 1988), citing *Scherk v.*  
19 *Alberto/Culver Company*, 417 U.S. 506, 519 n. 14 (1974) (“This qualification does not mean that  
20 any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause  
21 is unenforceable.”). “Thus, in cases where one party fraudulently induces another to enter into a  
22 contract, the forum selection clause is still valid unless the party charged with fraud also  
23 fraudulently induces the other party to accept the forum selection clause.” *Zions*, 688 F. Supp. at  
24 1499 (citations omitted).

25 Likewise, there is nothing “gravely” inconvenient for the Tribe about the federal court  
26 specified in the forum selection clauses.<sup>6</sup> To the contrary, the Central District of California,

27 <sup>6</sup> Moreover, in both the Development Agreement and Credit Agreement, Big Sandy  
28 expressly waived any objection or claim that the court designated in the Forum Selection clauses  
is an “inconvenient forum.” Comp., Ex. K, § 8.02(e)(i) at 15, Ex. L, 6.03(e)(1) at 16.



1 where neither party is located but which is relatively close to both, serves as a neutral forum as  
2 between the parties and is desirable on that basis for resolution of their disputes. Schwarzer,  
3 Tashima, Wagstaffe, *Cal. Practice Guide: Federal Civil Procedure Before Trial, California*  
4 ¶ 4:95, at 4-13 (The Rutter Group 2010). Thus, these exceptions to the enforcement of the  
5 mandatory forum selection clauses do not apply here.

6 Nonetheless, Big Sandy may assert that the forum selection clauses are unenforceable  
7 because the agreements allegedly violate public policy and/or are illegal and void, since  
8 Brownstone does not have a tribal gaming license. Indeed, this is the declaration the Tribe seeks  
9 in this lawsuit. Comp., ¶¶ 81, 84 & at 22.

10 Such an argument misses the mark because forum selection clauses are separate and  
11 severable agreements from the contracts containing them. The Eleventh Circuit so held in the  
12 recent case of *Rucker v. Oasis Legal Finance, L.L.C.*, 2011 WL 476519 (11th Cir. Feb. 11,  
13 2011). In *Rucker*, the plaintiffs were Alabama residents who sold their interests in pending  
14 litigation to the defendant, which was in the business of providing funding for litigation. *Id.* at  
15 \*1. The agreements between the plaintiffs and defendants included a mandatory forum selection  
16 clause requiring any dispute arising out of the agreements to be litigated in state court in Cook  
17 County, Illinois. *Id.* The plaintiffs filed a putative class action in federal court in Alabama  
18 seeking a declaration that their agreements with defendants were illegal gambling contracts  
19 under Alabama law. *Id.* at \*2. As here, the court in *Rucker* first noted that no allegation of fraud  
20 had been raised and the requisite level of “grave” inconvenience could not be established. *Id.* at  
21 \*4.<sup>7</sup>

22 However, the plaintiffs also asserted that the forum selection clause was unenforceable  
23 because the contracts were illegal and void as a matter of law. *Rucker*, 2011 WL 476519 at \*4-5.  
24 The court made short shrift of this contention:

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27 <sup>7</sup> The court in *Rucker* also rejected the contention that the contract violated Alabama  
28 public policy against illegal gambling contracts, pointing out that the court in Illinois would  
apply Alabama law, so there would be no impact on that issue in enforcing the forum selection  
clause. *Id.* at \*4.

1 [P]laintiffs assert that the forum selection clause cannot be given effect because it  
2 is included within a contract that is void as a matter of law. Specifically, the  
3 plaintiffs maintain that the purchase agreements are void as illegal gambling  
4 contracts under Alabama law and because the forum selection clause is included  
5 within those agreements, it also is void. We do not agree. A forum selection  
6 clause is viewed as a separate contract that is severable from the agreement in  
7 which it is contained.

8 *Rucker*, 2011 WL 476519 at \*5, citing, inter alia, *Scherk*, 417 U.S. at 519 n.14 (forum selection  
9 clause is not invalid merely because it is contained in a contract procured by fraud); *see also*  
10 *Marra v. Papandreou*, 216 F.3d 1119, 1123 (D.C. Cir. 2000) (“A forum-selection clause is  
11 understood not merely as a contract provision, but as a distinct contract in and of itself-that is, an  
12 agreement between the parties to settle disputes in a particular forum-that is separate from the  
13 obligations the parties owe to each other under the remainder of the contract.”); *Northwestern*  
14 *Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 375-76 (7th Cir. 1990) (a forum selection clause is best  
15 understood as a potential defendant’s *ex ante* agreement to waive venue objection to a particular  
16 forum).

17 In sum, Big Sandy’s allegations that the Development and Credit Agreements are illegal  
18 and void have no effect on the parties’ separate and severable agreement and obligation to  
19 resolve their disputes in the mandated forum. Put another way, the Tribe has not pled and cannot  
20 prove that the forum selection clauses are illegal. Moreover, the Development Agreement itself  
21 contains a specific provision that “[i]n the event any one or more of the provisions contained in  
22 this Agreement should be held invalid, illegal or unenforceable in any respect, the validity,  
23 legality and enforceability of the remaining provisions contained herein and therein shall not in  
24 any way be affected or impaired thereby.” Comp., Ex. K, ¶ 10.10 at 27; *see also* Ex. L, ¶ 8.11, at  
25 28. *A fortiori*, the Tribe cannot render unenforceable a forum selection clause based on the  
26 premise that the agreement containing it may someday be found unenforceable. *See Zions*, 688  
27 F. Supp. at 1498.

28 The forum selection clauses in the Development and Credit Agreements are valid,  
enforceable and mandatory regardless of any allegations made by Big Sandy with respect to the

1 overall agreements. On that basis, Brownstone's Rule 12(b)(3) motion to dismiss for improper  
2 venue should be granted.

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**IV. CONCLUSION**

For the foregoing reasons, Brownstone respectfully submits that its motion to dismiss should be granted.

Dated: March 2, 2011

STEVENS, O'CONNELL & JACOBS LLP

By           /s/ Matthew G. Jacobs            
MATTHEW G. JACOBS  
Attorneys for Defendant  
Brownstone, LLC

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CASE NO. 1:11-cv-00198 OWW GSA

**DECLARATION OF ANNA M.  
MORRISON IN SUPPORT OF  
DEFENDANT BROWNSTONE, LLC'S  
MOTION TO DISMISS PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(3)**

Date: April 18, 2011  
Time: 10:00 a.m.  
Ctm.: Three  
Judge: Hon. Oliver W. Wanger

25 I, Anna M. Morrison, declare as follows:

26 1. I am the Board Secretary and Treasurer of Brownstone, LLC ("Brownstone") and  
27 have been with the company since 2006. The following facts are based on my personal  
28 knowledge, and, if called as witness, I could and would testify competently thereto.

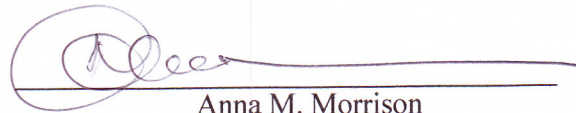
2. I participated directly in the negotiation and drafting of the terms of the  
Development and Credit Agreement, attached as Exhibits K and L, respectively, to the  
Complaint filed in this action.

3. During those negotiations, both Brownstone, on the one hand, and Big Sandy  
Rancheria of Western Mono Indians and Big Sandy Rancheria Entertainment Authority (the

1 “Tribal Parties”), on the other hand, were represented by independent legal counsel. Brownstone  
2 was represented by Frank Reddick with the firm of Akin Gump Strauss Hauer & Feld LLP. The  
3 Tribal Parties were represented by Rory E. Dilweg of the firm of Holland & Knight LLP.

4 4. Through the principals of Brownstone and the Tribal Parties and their respective  
5 legal counsel, both Brownstone and the Tribal Parties were involved in proposing and drafting  
6 the specific language that was ultimately included in the final form of the Development  
7 Agreement and Credit Agreement executed by the parties.

8 I declare under penalty of perjury under the laws of the United States of America that the  
9 foregoing is true and correct. Executed this 2nd day of March 2011, at Las Vegas, Nevada.

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11 \_\_\_\_\_  
12 Anna M. Morrison

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**[Proposed] ORDER GRANTING  
DEFENDANT BROWNSTONE, LLC'S  
MOTION TO DISMISS PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(3)**

Date: April 18, 2011  
Time: 10:00 a.m.  
Ctrm.: Three  
Judge: Oliver W. Wanger

18  
19 The motion by Defendant Brownstone LLC to dismiss pursuant to Federal Rule of Civil  
20 Procedure 12(b)(3) came on for hearing in Department Three of this Court on April 18, 2011.

21 Matthew W. Jacobs and Steven S. Kimball appeared on behalf of the defendant. John M.  
22 Peebles appeared on behalf Plaintiffs Big Sandy Rancheria of Western Mono Indians and Big  
23 Sandy Rancheria Entertainment Authority.

24 After full consideration of the evidence, and the written and oral submissions by the  
25 parties, the Court hereby GRANTS the motion to dismiss.

26 IT IS SO ORDERED.

27 Dated: \_\_\_\_\_, 2011

28 \_\_\_\_\_  
UNITED STATES DISTRICT COURT JUDGE