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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA, et al.,

Plaintiffs,

vs.

HOWARD DICKSTEIN, et al.,

Defendants.

Case No. 2:07-CV-02412 GEB EFB

REPLY IN SUPPORT OF MOTION TO REMAND

Date: January 28, 2008
Time: 9:00 a.m.
Courtroom: 10

Judge: Hon. Garland E. Burrell, Jr.

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I. INTRODUCTION

Ignoring and mischaracterizing Plaintiffs' 14 state law causes of action, Defendants cobble together a selection of quotations from a handful of the Complaint's 228 paragraphs to paint this action as a lawsuit about Indian gaming and its regulation. It is no such suit. The Rumsey Band of Wintun Indians and its entities (collectively "the Tribe") sued the Tribe's former general legal counsel and financial advisor ("Defendants") for putting their own interests ahead of the Tribe's, in violation of basic duties of trust and care owed the Tribe under California law. As the Complaint details, Defendants engaged the Tribe in a series of complicated investments in which the terms routinely and disproportionately favored others more than the Tribe, in connection with business deals that were fraught with self dealing and undisclosed conflicts of interest. (*See* Complaint, ¶¶ 46-57, 59-66, 58-76, 81-85 , 88-89, 93-96, 100-103, 119-126.) The Tribe further contends Defendants misappropriated its assets for their personal use in a variety of ways, and that they literally fed off the Tribe's financial success, by taking secret profits and collecting unapproved revenues (or allowing others to do so) without the Tribe's knowledge and consent. (*Id*., ¶¶ 8, 11, 72, 74, 96, 110.) While Defendants work to paint this case as a frontal assault on the Indian Gaming Regulatory Act (IGRA) and its policy of promoting tribal self-governance and regulation over tribal gaming facilities, in actuality, ***the only practical connection between the Defendants' alleged misconduct and the Tribe's gaming facility was that it generated the money Defendants converted***.

This Complaint contains no claims supporting removal jurisdiction. Only one of the Tribe's 14 state law claims — its claim under Section 17200 of the California Business & Professions Code for "unfair competition" — potentially involves an issue of IGRA interpretation. That claim seeks no relief under IGRA, but rather, disgorgement of ill-gotten monies that Arlen Opper procured from the Tribe, without its knowledge and consent, on the ground that such monies were "fraudulent" (concealed under California law), "unlawful" (as illegal management fees under IGRA) and/or "unfair" (monies paid based on inflated invoices or for work not performed).

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Defendants' shrill warnings aside, this case is not about "how tightly federal regulatory power should constrain Indian sovereignty." (Opp. at 2:2.) Nor is it about "the Tribe's authority to govern certain gaming-related activity without federal oversight." (Opp. at 2:3-4.) This case is about an Indian tribe's effort to recover that which was taken by a gaming consultant-turned-business advisor, who embarked on a scheme to swindle the Tribe out of millions of dollars (with the help of the Tribe's former general counsel) through a compensation structure that was never disclosed to the Tribe — ill-gotten gains that are recoverable under California's unfair competition statute. It is this single cause of action that potentially implicates the IGRA. Even then, recovery on this cause of action *does not depend upon the* IGRA's resolution, since liability can attach by resort to alternative theories that are pled and that are grounded solely in state law. As such, under bedrock law, there is no substantial question of federal law presented by the Tribe's Complaint. Likewise, the Tribe's request to disgorge Opper's ill-gotten fees does not support complete preemption, since such hardly interferes with the Tribe's governance of its gaming facility.

In sum, under all existing authority, there is no federal subject matter jurisdiction to support this claim (or any other), meaning there was no basis to remove the Tribe's Complaint. The Court should remand.[1]

II. DEFENDANTS MISCHARACTERIZE THE TRIBE'S CLAIMS

While Defendants make a passing reference to the Tribe's Section 17200 Claim (Count 10) — which is the only claim that potentially (albeit not necessarily) involves an interpretation of Opper's "consulting" activities under IGRA — Defendants primarily focus on the Tribe's claims for Breach of Contract (Count 2), Breach of Fiduciary Duties (Counts 4 and 5) and Unjust Enrichment (Count 11). (Opp. at 8, 12.) In so doing, they distort the claims, both as to

[1] As this Court knows, there exists a "strong presumption" against removal, *Gaus v. Miles, Inc.*, 980 F. 2d 564, 566 (9th Cir. 1992), with "any doubt" resolved in favor of remand. *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996).

the nature of the Complaint's allegations supporting such claims, as well as the elements necessary to establishing liability under same.

A. The Breach of Contract Claim Against Opper (Count 2)

Defendants contend that "[b]efore the Court can decide whether Opper breached a contract with the Tribe, it must decide whether the [consulting] contract is void, as the Tribe alleges." (Opp. at 8:8-10.) Defendants misread the Tribe's claims, failing to grasp what is plain from the Complaint. Specifically, the Tribe pled the existence of several contracts with Opper — *e.g.*, a written consulting contract in connection with the Tribe's gaming facility and oral agreements to manage the Tribe's assets (*see* Complaint, ¶¶ 15-16 (detailing nature of oral agreements and gaming consultant contracts).) The Complaint only seeks to recover contract damages from Opper under the oral agreements related to investments and asset management, not for breach of any gaming "consulting contract." (*Id.*, ¶¶ 143-44.) The breaches arise out of Opper's handling of the Tribe's various investments and Tribal (non-Casino) assets, not any gaming contract. (*Id.*, ¶ 144.)

In an amorphous argument that is difficult to understand, Defendants cite a string of 14 provisions of the Complaint that invoke Opper's "compensation structure," apparently suggesting these allegations implicate IGRA. (Opp. at 3:20-23.) First, as the Complaint details, much of Opper's compensation came from self-dealing and secret profit-taking in connection with tribal investments that had nothing to do with the collection of fees under a gaming contract. (*See* Complaint, ¶¶ 53, 66, 75-76, 84-85, 89, 94, 101-102, 144.) More fundamentally, in order to demonstrate that a particular allegation supports the existence of federal question jurisdiction, Defendants must tie the allegation to recovery under a particular claim. The only claim that potentially (but not necessarily) implicates IGRA because of Opper's "compensation structure" is the Section 17200 claim discussed above.

B. The Breach of Fiduciary Duty Claims (Counts 4 and 5)

Defendants similarly misread the Tribe's breach of fiduciary duty claims, contending that to determine "whether Opper or Dickstein breached their fiduciary duties, the court must determine the nature of Opper's relationship with the Tribe, potentially altering Dickstein's

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duties to both parties." (Opp. at 8:10-12.) That determination, they suggest, somehow depends upon the character of Opper's consulting contract under IGRA, and in particular, whether it was a *de facto* management contract. (Opp. at 8:15-16.) One has nothing to do with the other, and Defendants are rewriting the Complaint.

Nowhere in the Fourth Cause of Action (Breach of Fiduciary Duty) or Fifth Cause of Action (Aiding and Abetting Breach of Fiduciary Duty) does the Tribe even mention IGRA, the NIGC, Opper's gaming contract, or the Tribe's Casino. (*See* Complaint, ¶¶ 156-69.) To the contrary, Opper's and Dickstein's status as fiduciaries arises exclusively under state law, as one served as the Tribe's agent and the other as the Tribe's general counsel in *all* matters (*i.e.*, in matters unrelated to gaming). Correspondingly, the alleged breaches primarily relate to Defendants' misappropriation, including Opper's secret profit-taking facilitated by Dickstein. *See id.*, ¶ 159 (*e.g.*, Dickstein misappropriated tribal assets for his own use, and failed to disclose Opper's secret interests in tribal investments and payments to Opper under compensation scheme Dickstein facilitated without disclosure to the tribe); *id.*, ¶ 160 (*e.g.*, Opper submitted inflated asset management fees, misappropriated tribal assets for personal use, and collected fees for "assets" he never managed).

C. The Unjust Enrichment Claim (Count 11)

Here too, the Tribe's Complaint contends that Opper's unjust enrichment is unrelated to his gaming-related activities. Rather, it relates solely to his misappropriation of tribal assets and secret profit-taking in connection with various tribal investments. *See* Complaint, ¶ 211 (Opper unjustly enriched by use of Plaintiffs' aircraft, inflated fees for asset management, and improper payments in connection with specific investments).) Nonetheless, and taking the same tact as above, Defendants suggest that "it is unclear that the Tribe can recover for unjust enrichment based upon a contract rendered illegal by the absence of NIGC approval." (Opp. at 13:12-13.) Putting aside whether this reading of the substantive law is correct, it is wholly irrelevant, since the Tribe's claim for unjust enrichment is completely unrelated to Opper's gaming contract. (Complaint, ¶ 211.) The Complaint contains no allegation that Opper's agreement to provide

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"consulting" services for the Tribe's casino constitutes a basis for relief on an unjust enrichment theory.

III. ARGUMENT

A. Defendants' Complete Preemption Argument Rests On Distortion And Obfuscation.

Defendants distort the law and mischaracterize the Tribe's claims, in an effort to suggest this lawsuit is about tribal governance of gaming. It is not. Try as they might, Defendants cannot make this lawsuit into something else, and none of Defendants' authority supports a conclusion that this Court possesses exclusive jurisdiction over the Tribe's claims under the doctrine of complete preemption. Defendants failed to meet their high burden justifying removal on the basis of this doctrine (*ARCO Environmental Remed. LLC v. Dep't of Health & Env'al Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000)), and the Court should remand.[2]

1. Defendants Distort The Holding Of The One Case Upon Which They Rely And Dismiss Without Meaningful Analysis Those That Reject Their Jurisdictional Theory.

Defendants contend the Tribe "disregards the established principle that questions involving the interpretation, construction or application of IGRA must be exclusively resolved in the federal courts." (Opp. at 1:13-14; *see also id.* at 7:12-13 (same).) They support this rather sweeping proposition with *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996), a decision in which the Eighth Circuit held that *certain types of state claims* involving Indian gaming — not all claims, but only those that interfere with "the tribal governance of gaming" — fall within IGRA's completely preemptive scope, thereby converting such claims into federal ones beyond the jurisdiction of the state courts. 88 F.3d at 544-45, 549. How Defendants could read that decision to mean all cases involving "*the interpretation,*

[2] Without citing the Tribe's brief, Defendants suggest the Tribe argued that complete preemption is defeated through "reliance on alternative state law grounds." (Opp. at 9:14-21.) The Tribe never so argued, and it makes no sense in any event, since complete preemption is a doctrine that *converts* completely preempted state law claims into federal ones. See *Beneficial National Bank v. Anderson*, 539 U.S. 1, 11 (2003); *Rivet v. Regions Bank*, 522 U.S. 470, 476 (1998).

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construction or application of IGRA" are subject to the *exclusive* jurisdiction of the federal courts is obviously a mystery. It is, in any event, an inaccurate statement of the law. No case has so held, and indeed, the contrary is true.[3]

Not only do Defendants overstate the jurisdictional holding of *Gaming Corp*., they also largely ignore the authorities that undermine their own theory, relegating to a footnote those decisions that decline to extend complete preemption to other contexts because they do not interfere with an Indian tribe's governance (or regulation) of its own gaming facility. Rather, Defendants simply dismiss such cases as factually inapposite, without any meaningful analysis. (*See* Opp. at 9-10 n.8.) As shown here, Defendants' distinctions are facile and wrong. Indeed, many of the cases Defendants ignore involved alleged illegal management by a gaming contractor. For example, Defendants try to distinguish *Gallegos v. San Juan Pueblo Development Board, Inc.*, 955 F. Supp 1348, 1350 (D.N.M 1997) by observing that the "plaintiff never alleged claims involving gaming management or IGRA regulation." (Opp. at 10 n.8.) However, these allegations were nonetheless before the court because the *defendants* in *Gallegos* raised the issue. Moreover, the court's analysis assumed the truth of the defendants' allegation that the contract violated IGRA as an unapproved "management contract," but it nonetheless reasoned the claim was insufficient to "establish federal court jurisdiction." (*Id.*)

To the same effect is *American Vantage Companies v. Table Mountain Rancheria,* 103 Cal. App. 4th 590, 596-97 (2002), which likewise held that a contract action involving a gaming contractor's allegedly illegal management could be adjudicated in state court. Defendants

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[3] *See, e.g., Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe Of The Miss. in Iowa*, 656 N.W.2d 167, 171-72 (Iowa 2003) (upholding state courts court's jurisdiction to adjudicate Indian tribe's federal defenses to the validity of an arbitration agreement, which included an argument that the agreement was void under IGRA for lack of NIGC approval); *Doe v. Santa Clara Pueblo*, 154 P.3d 644, 652-57 (N.M. 2007) (interpreting the text of IGRA, its legislative history, and federal cases, state cases, and a law review article discussing it to determine the meaning of "directly related to, and necessary for, the licensing and regulation" of gaming under 25 U.S.C. § 2710(d)(3)(C)); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 380 (Minn. App. 1996) (interpreting scope of waiver of sovereign immunity under IGRA); *Tri-Millennium Corp. v. Jena Band of Choctaw Indians*, 725 So. 2d 533, 537-38 (La. App. 1998) (exercising state court subject matter jurisdiction over a dispute regarding agreement allegedly void under IGRA for lack of NIGC approval).

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distinguish *American Vantage* because the NIGC had earlier found the contracts were not subject to its approval (Opp. at 10 n.8), but neither the court's ruling nor its analysis turned on that issue. Indeed, the court noted that it only had information as to the "present" status of the contracts, as they had not "been further interpreted by the NIGC." *American Vantage*, 103 Cal. App. 4th at 596. Nonetheless, as in *Gallegos*¸ the court addressed the tribe's contention that the contracts violated IGRA, concluding that "although the IGRA may play a role in the resolution of this matter, it does not preempt appellant's claims," because (as here) appellant's "remedy" rested on "California law." *Id*. at 596-97.

Notably, in the face of this authority, Defendants continue to invoke *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1428 (1999) for the proposition that there exists "*no authority* permitting the 'resolution of Indian gaming and gaming contract disputes in state court…' " (Opp. at 5:1-5 (emphasis added); *see also id*. at 9.) The reference is patently disingenuous as the holding in *American Vantage* makes clear. Moreover, not only did *American Vantage* expressly hold that that a state court can adjudicate a dispute involving an Indian gaming contract, it also addressed the analysis of *Great Western*, finding it "stated the IGRA preemption rule too broadly." *American Vantage, supra*, 103 Cal. App. 4th at 597. The court went on to clarify that IGRA preemption extends not to the "entire field of Indian gaming," but rather, only to those "causes of action which would interfere with the nation's ability to govern gambling…" *Id.* Under this standard (which is consistent with *Gaming Corp*.), a state court has jurisdiction to adjudicate a gaming contract, notwithstanding a contractor's allegedly illegal performance of that contract. *Id*.; *see also J.C. Hatcher v. Harrah's NC Casino Co*., LLC, 565 S.E.2d 241 (N.C. App. 2002) (where plaintiff sued management contractor for failure to pay a slot machine jackpot, court found plaintiff's "claims alleging unfair and deceptive trade practices and fraud [to be] state law claims that neither affect the Tribe's internal governmental decisions, nor directly relate to the regulation of gaming.")

Finally, Defendants do not, and cannot, dispute that in the context of "management contracts" involving IGRA, the ***only*** cases where the courts have found complete preemption are those involving contracts that provided for management on their face (as opposed to consulting

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services) **or** where the NIGC has determined a particular contract to be a management contract. *See Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407 , 1411-13 (1999) (IGRA preemption applied where the case involved undisputed management contract the NIGC had approved); *see also Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (finding preemption and recognizing that a management contract "once approved remains so until disapproved by the NIGC"); *Casino Resource Corp. v. Harrah's Entertainment Inc.*, 243 F.3d 435, 439 (8th Cir. 2001) (noting that IGRA preemption would not apply because there was not "an approved management contract at issue"). As a result, unless Defendants are prepared to stipulate that Opper's "consulting agreement" was a management contract — thereby eliminating any dispute as to the matter — they cannot escape this dispositive case law, let alone, their burden of establishing complete preemption.[4]

2. Allowing The Tribe To Recover Ill-Gotten Gains From A Gaming Consultant Under Section 17200 Will Not Interfere With The Tribe's Governance Of Its Gaming Facility.

While Defendants deem inapposite cases involving assertions of illegal management by consultants, they gloss over the facts in *Gaming Corp.*, 88 F.3d 536, 549 (8th Cir. 1996) — a case challenging a Tribe's *licensing decision*, not a tribe's effort to recoup a consultant's illegal management fees. A careful analysis, however, confirms that *Gaming Corp.* provides no basis to find complete preemption here either.

[4] The remaining cases Defendants deem "factually distinguishable from this action" — presumably because they do not involve casino "management contracts" *per se* — is curious since the Tribe relied on these cases to show that numerous IGRA-related disputes are ***not*** subject to complete preemption. Thus, as the Tribe agrees, complete preemption under IGRA was not found in the following cases: *Missouri ex rel Nixon v. Couer D'Alene Tribe*, 164 F.3d 1102, 1005 (8th Cir.) (no preemption under IGRA where the gaming did not occur on tribal land); *County of Madera v. Picayune Rancheria of the Chukchansi Indians*, 467 F. Supp 2d 993, 1002 (E.D Cal. 2006) (nuisance claims were not preempted under IGRA because they did not implicate the tribe's decisions regarding gaming); *Sungold Gaming (U.S.A.) Inc. v. United Nation Chippewa Ottawa*, 1999 U.S. Dist. LEXIS 8891, *10-11 (W.D. Mich. June 7, 1999) (no IGRA preemption because an agreement to enter into a management agreement does not "interfere with tribal governance of gaming"). The reason for these results is apparent: IGRA preemption only applies where it interferes with the tribal governance of gaming. *Gaming Corp., supra*, 88 F.3d at 550.

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Defendants find apparent solace in the fact that the Tribe has not challenged *Gaming Corp.* as erroneously decided. (Opp. at 7:3-8.) However, it need not do so, since none of its claims (including its unfair competition claim, the only claim that seeks disgorgement of Opper's illegal management fees) falls within the scope of that decision. As the Court there noted, "[t]he key question," when deciding whether a particular claim falls within IGRA's preemptive reach, is "whether [the] particular claim will interfere with tribal governance of gaming." 88 F.3d at 549. By reference to the specific provisions giving Indian tribes authority to self-regulate their gaming facilities (with some federal oversight and limited state oversight), the Eighth Circuit concluded IGRA's text and structure show "Congress unmistakably intended that tribes [would] play a significant role in the regulation of gaming," with the "question of licensing" in particular being of "central concern" to that self-regulation. *Id. at* 549. Therefore, said the Court, "[a]ny claim which would directly affect or interfere with a tribe's ability to conduct its own licensing process should fall within the scope of complete preemption." *Id.*

Other cases have similarly clarified the scope of IGRA preemption. In *County of Madera v. Picayune Rancheria of the Chukchansi Indian*, 467 F. Supp. 2d 993 (E.D. Cal. 2006), the district court held that a county's nuisance abatement claim (in connection with the un-permitted construction of a hotel and spa for a casino) would not interfere with "the Tribe's governance of gaming activities," including a tribal decision "as to which gaming activities are allowed." *Id. at* 1002. "The County's claim does not, for example, attempt to shut down the casino, to limit the number of slot machines that are on the premises, to limit the types of games that are played in the casino, or to regulate how the games are played." *Id.* As such, the "Tribe has not adequately met its burden of explaining how this suit [] affect[s] the Tribe's decision of which gaming activities are allowed." *Id.*; *see also Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 486 n.7 (9th Cir. 1998) (rejecting IGRA preemption since "application of Oregon law here has no effect on the determination of which gaming activities are allowed.' ")

Importantly, the Tribe's claims are based upon independent duties Opper owed the Tribe under state law, not IGRA. This is important to the question of preemption because, as the court

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held in *Gaming Corp*., "[t]o the extent a court alleges a violation of a duty owed to one of the [plaintiffs] because of an attorney-client relationship or other independent duty, it may be a valid state law count." *Gaming Corp*., 88 F.3d at 50. Here, Opper is sued for breaching duties owed the Tribe under California law. (Complaint, ¶¶ 142-45, 160, 166, 176-79, 187, 193, 218-24.) Notably, Defendants nowhere address this critical distinction — despite the fact that it is highlighted in the Tribe's motion. (*See* Mot. to Remand at 7:23-27.)

Finally, Defendants suggest Opper's "closer" relationship with the Tribe (the Tribe alleges he was a fiduciary) supports complete preemption here. (Opp. at 8 n.7.) It is certainly true the Eighth Circuit found a fiduciary relationship relevant to *Gaming Corp*. (88 F.3d at 549), but that does not help Defendants here. In *Gaming Corp*., the interests of the Tribe and the fiduciary (the Tribe's legal counsel) were aligned, so a suit against the law firm to challenge the Tribe's licensing decision (made on the basis of the firm's advice), constituted an indirect challenge of the Tribe's own licensing decision. *Id*. No such concern exists here, where *the Tribe has sued its fiduciary* for improperly procuring tribal assets without its knowledge and consent — not for anything he did (or did not do) at the Tribe's gaming facility. To put a point on it, there is no claim here that Opper somehow *interfered with* the Tribe's regulation of its gaming facility, through its licensing procedures or decisions about the kind of games that would be played. The fact that the Tribe alleges Opper managed the Tribe's casino operations does not alter that reality. Nor will the adjudication of the Tribe's claim to recover fees he collected (either fraudulently, illegally or unfairly) under California's unfair competition statute in any way impede these interests of concern to IGRA preemption.[5] Indeed, rather than being

[5] The violation of federal law can serve as a basis for violation of Section 17200, without creating federal subject matter jurisdiction, a rule of jurisprudence Defendants decline to embrace. *See* Mot. to Remand at 20-22, citing *Roskind v. Morgan Stanley Dean Witter & Co*., 165 F. Supp. 2d 1059, 1067 (N.D. Cal. 2001) (no subject matter jurisdiction where plaintiff advanced a Section 17200 theory based on the Exchange Act, as well as a purely state law theory); *Baker v. BDO Seidman*, 390 F. Supp. 2d 919, 920, 925 (N.D. Cal. 2005) (district court lacked subject matter jurisdiction over Section 17200 claim based on federal law theory regarding defendants' incorrect tax advice where complaint also alleged an alternative and independent state law theory that defendants failed to disclose notices and warnings regarding the advice); *see also Lippitt v. Raymond James Fin. Servs*., 340 F.3d 1033, 1043 (9th Cir. 2003) (reversing district court's refusal to remand of unfair competition claim, and recognizing that

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"'incompatible with federal and tribal interests reflected in federal law' " (*Gaming Corp.*, 88 F.3d at 549 n.15 (citation omitted)), the Tribe's effort to require Opper to disgorge his ill-gotten management fees is entirely consistent with IGRA's concerns, since one of its purposes is to protect Indian tribes from unscrupulous non-Indian contractors. 25 U.S.C. § 2702(2).

In the end, Defendants argue "the Court should reject the Tribe's arbitrary distinctions as to the types of claims that interfere with IGRA's federal regulation." (Opp. at 6:22-23.) However, the distinctions are not arbitrary, and in any event, they are the judiciary's, not the Tribe's. They are, in fact, found in the very decisions upon which Defendants rely. *See Gaming Corp.*, 88 F.3d at 549-50; *and see Sungold Gaming (U.S.A.) Inc. v. United Nation Chippewa, Ottawa* 1999 U.S. Dist. LEXIS 8891, **10-11 (W.D. Mich. June 7, 1999) (claim alleging tribe breached agreement to enter management contract does not "interfere with tribal governance of gaming" and falls outside IGRA's preemptive reach). The courts have tied those distinctions to the express purpose and content of the statutory scheme at issue, a scheme that gives Indian tribes authority to regulate their own facilities, with some federal oversight. 88 F.3d at 549-50. However, where — as here — regulation of tribal gaming is not at issue, the state court is not divested of jurisdiction.

3. Defendants Erroneously Argue This Case Presents Issues Of Far-Reaching Significance Beyond The Competence Of State Courts.

Defendants attach great significance to the fact that a state court may construe IGRA, and the meaning of "management" in particular, when deciding whether Opper collected illegal fees subject to disgorgement under the Tribe's Section 17200 claim. Specifically, they argue complete preemption necessarily exists where a contractor allegedly "managed" under IGRA, since such supposedly "implicates tribal control over gaming activity because it provides a standard for subjecting decisions to NIGC approval." (Opp. at 8:17-18.) However, "implicating

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"[i]f a plaintiff can support his claim with 'alternative and independent theories — one of which is a state law theory and one of which is a federal law theory — federal question jurisdiction does not attach' ").

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tribal control" over gaming activity is not enough to justify divesting state court authority over the Tribe's state law claims; under all apparent authority addressing IGRA's "extraordinary" preemptive reach, the preempted claim must *interfere with*, not merely implicate, an Indian tribe's governance of gaming.[6]

Moreover, while Defendants contend the interpretation of "management" interferes with tribal governance by definition (Opp. at 9 (expansive definition of "management" constrains "Indian autonomy" while narrow definition increases it)), the federal courts have rejected such arguments. At least two such cases (cited in the Tribe's motion to remand but virtually ignored by Defendants) specifically reject the argument that disputes involving illegal management *necessarily* interfere with tribal governance of gaming. *See American Vantage*, 103 Cal. App. 4th at 598-99 (rejecting argument that contractor's effort to enforce alleged management contract interfered with tribe's "ability to autonomously govern its gaming operation," since contractor sought money damages, not specific performance of the contract); *Trump Hotels & Casino Resorts Development Co., LLC v. Roskow*, 2004 U.S. Dist. LEXIS 5401, *7 (D. Conn. Mar. 31, 2004) (while IGRA preemption only applies to "management contracts and collateral agreements," "*[e]ven then*, the critical issue in the preemption analysis is whether resolution of the claim would interfere with tribal governance of gaming.").

Defendants, evincing a fundamental misunderstanding of the federal-state system of dual sovereignty, suggest that "[t]he Tribe provides no authority by which state courts may expand or contract the scope of IGRA's federal regulation." (Opp. at 1:9-10.) It is as if Defendants ask this Court to do everything in its power to eliminate any possibility that a state court might end up interpreting an issue of federal law, specifically, whether particular activities amount to

[6] Defendants invite the Court to disregard the facts of this case when deciding whether the Tribe's claims interfere with its governance of gaming, so as to "not mistake the litigation-specific interests of the Rumsey Tribe" when evaluating IGRA preemption here. (Opp. at 7 n.5.) The invitation must be rejected. Courts are "not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

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"management" under IGRA. *See* 25 U.S.C. § 2711(a)(1). However, state courts are presumed competent — and in fact possess "inherent authority" — to interpret and apply federal law. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) ("Under our 'system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.' " (quoted case omitted)); *Howlett v. Rose*, 496 U.S. 356, 371-73 (1990) (recognizing the existence of "a system of federalism in which the state courts share responsibility for the application and enforcement of federal law"); *see also Higbee v. Malleris*, 470 F. Supp. 2d 845, 853 (N.D. Ill. 2007) ("[E]ven the most fundamental of Title VII questions can be resolved by state courts, with the Supreme Court available to reconcile any certiorari-worthy federal questions that might arise.").

In recognition of this dual system, state courts are only completely stripped of their jurisdiction by "extraordinary" statutes, where "Congress has clearly manifested an intent" to makes a specific class of state law causes of action removable. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987); *cf. Yellow Freight*, 494 U.S. at 823 (the absence of statutory language expressly confining jurisdiction over Title VII claims to the federal courts "is strong, and arguably sufficient, evidence that Congress had no such intent"); *Holmes Fin. Assocs. v. Resolution Trust Corp.*, 33 F.3d 561, 565 (6th Cir. 1994) ("concurrent jurisdiction always exists under the Supremacy Clause until affirmatively and expressly revoked by federal law" (citing *Howlett*, 496 U.S. at 370 n.17)). Similarly, given considerations of comity and respect for the plaintiff's role as the master of his complaint, a district court may not responsibly deny a remand motion based on a preference that it generate useful Federal appellate precedent. *See Landry v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 38703, **7-8 (E.D. La. June 12, 2006) (despite "compelling" argument that the Fifth Circuit had not addressed the point of law at issue, which was likely to present itself again in a "flood" of Hurricane Katrina litigation, the court was forced to remand the case).

State courts' competence to interpret federal law even extends to decisions as to whether Congress intended a federal statute to bar state law claims. *Railway Labor Executives Ass'n v.*

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Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936, 942 (3d Cir. 1988) ("[S]tate courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary."); *Beneficial National Bank v. Anderson*, 539 U.S. 1, 6 (2003) ("[A] defense that relies on . . . the pre-emptive effect of a federal statute . . . will not provide a basis for removal." (citations omitted)).[7]

B. No Cause Of Action Requires Resolution Of IGRA For Liability To Be Imposed.

1. All Of The Tribe's Claims — Including The Only One That Potentially Involves IGRA Interpretation — Are Supported By Separate And Independent State Law Theories

Defendants implicitly concede that all of Plaintiffs' claims, as pleaded, are supported by separate and independent grounds based solely on state law. This concession is apparent from Defendants' failure to dispute or even attempt to distinguish the Tribe's citations showing that "[w]hen a claim can be supported by alternative and independent theories — one of which is a state law theory and one of which is a federal law theory — federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Rains v. Criterion Sys. Inc.*, 80 F.3d 339, 346 (9th Cir. 1996) (citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 810 (1988)); *see also* Mot. to Remand at 11, 12, 20-22. Because there is no dispute that each of the Tribe's causes of action are grounded in independent state law theories, the mere fact that a claim *also* references an alternate theory asserting a violation of federal law "does not create a necessary federal issue." *See Christianson*, 486 U.S. at 810.

[7] Defendants act as if some talismanic issue is at stake here, since they claim, the Ninth Circuit has never resolved what it means to "manage" under the Indian Gaming Regulatory Act. Other courts have done so, however (*see First American Kickapoo Operations, LLC v. Multimedia Gams, Inc.*, 412 F.3d 1166, 1172 (10th Cir. 2005)), and in addition to basic rules of statutory construction requiring courts to give words their common and ordinary meaning (*Leocal v. Ashcroft,* 543 U.S. 1, 9 (2004)), the NIGC has provided regulatory guidance in any event. *See* 25 C.F.R. § 502.19 (defining key management official as any person "who has authority … [t]o *set up working policy* for the gaming operation."); *see also* NIGC Bulletin 94-5 (Oct. 14, 1994) (defining managing as "planning, organizing, directing, coordinating and controlling").

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2. There Is No Federal Question Raised In Plaintiffs' Breach Of Contract, Breach Of Fiduciary Duty And Unjust Enrichment Claims Because They Do Not Allege, Or Seek Recovery For, Any IGRA Violation.

Despite Defendants' concession and the clarity of the above-cited cases, they try to manufacture a substantial federal question, by speculating that ***if*** Opper's consulting agreement with the Tribe is found to be a management contract, such would render the contract void, and would preclude the Tribe from recovering on some of its claims. Defendants rest this argument on the Tribe's claims for breach of contract (Count 2), breach of fiduciary duty (Counts 4 and 5), and unjust enrichment (Count 11).[8] (Opp. at 12.)

Defendants' argument fails for several reasons. First, and perhaps most fundamentally, Defendants do not and cannot contend — as they must to support federal jurisdiction on this theory — that the character of Opper's contract under IGRA is an "essential element" of any of these claims. This failure is dispositive, because under controlling law, a party invoking substantial federal question jurisdiction must establish that a "right or immunity created by the Constitution or laws of the United States [is] an element, ***and an essential one***, of the plaintiff's cause of action." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10-11 (1983) (cited case omitted). Here, none of the claims Defendants invoke mention an allegation involving Opper's illegal management under IGRA; nor do they raise it as an essential element. Rather, as shown above (pp. 2-3 *supra*), the breach of contract claim (Count 2) is premised on oral agreements having nothing to do with Opper's gaming "consulting" services to the Tribe under his "consulting contract." The remaining claims, for Unjust Enrichment and Breach of Fiduciary Duties, are likewise based on Opper's misdeeds in connection with the Tribe's various investments, i.e., nothing having to do with his "services" to the Casino.[9] *See* pp. 3-4 *supra*.

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[8] Notably, Defendants do not argue the Tribe's unfair competition claim (Count 10) creates a basis for federal subject matter jurisdiction. *See also* Motion to Remand at 20:16-22:23 (Section 17200 claim can be resolved without resort to federal law).

[9] To the extent Defendants' argument rests on the notion that by incorporating each general allegation of the Complaint "by reference" into each cause of action, the Tribe has somehow made the issue of Opper's consulting agreement a necessary element of Counts 2, 4, 5, and 11, Defendants are wrong. The Ninth Circuit rejected such an argument in *Duncan v. "Footsie*

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In addition, even if the Tribe had alleged a violation of IGRA as part of these causes of action (which it did not), Defendants would still not be able to establish that IGRA was "essential" for the Tribe to succeed on these claims, for the simple fact that the Tribe's right to recover for these claims is based solely on state law. *See Franchise Tax Bd.*, 463 U.S. at 9 (recognizing the general rule that a "suit arises under the law that creates the cause of action."). Moreover, and contrary to the premise of Defendants' argument, these causes of action seek monetary damages, not a ruling that any contract at issue in this lawsuit is void and/or must be rescinded.

Finally, Defendants' argument as to IGRA's relevance to those claims — to wit, that ***if*** Opper's agreement violated IGRA, it would be void and no damages would be owed on these claims — constitutes a theoretical "defense" having no bearing on jurisdiction. Under settled law, "[t]o determine whether [a] claim arises under federal law, we examine the 'well pleaded' allegations of the complaint *and ignore potential defenses*." *Beneficial*, 539 U.S. at 6; *City of Walnut Creek v. UACC Midwest*, 1997 U.S. Dist. LEXIS 2253, *10-11 (N.D. Cal. Feb. 13, 1997) (for federal question jurisdiction to exist, "the right to sue must arise out of federal law, without reference to any defenses which federal law might provide" (citing *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807-08)).[10] This is true even when the complaint itself asserts the federal defense that defendants may raise. *See Franchise Tax Bd.*, 463 U.S. at 10 ("Although such allegations show that very likely, in the course of the litigation, a question under [federal law] would arise, they do not show that the suit, that is, the plaintiff's original

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Wootsie Machine Rentals", 76 F.3d 1480, 1488 (9th Cir. 1995), a case addressing substantial federal question jurisdiction, holding that the plaintiffs' incorporation by reference of a general allegation that she owned the trademark to "Footsie Wootsie" did not provide a basis for federal jurisdiction because the "mere mention of the existence of a [federally] protected trademark" was not essential to proving her state law misappropriation claim.

[10] *See also Yokeno v. Mafnas*, 973 F.2d 803, 807-08 (9th Cir. 1992) (federal element alleged only "in anticipation of avoidance of defenses which it is thought the defendant may interpose" is not relevant to jurisdictional calculus); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1314-15 (9th Cir. 1982) (subject matter jurisdiction absent where complaint simply anticipated a defense based on federal law).

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cause of action, arises under [federal law].” (quotations and cited case omitted).) Remanding to state court is appropriate even “in cases in which neither the obligation created by state law nor the defendant’s factual failure to comply are in dispute, and both parties admit that the only question for decision is raised by a federal pre-emption defense.” *Id.* at 12. This is because, “[b]y unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.” *Id.*

3. Defendants’ Authorities Are Unavailing.

Defendants cite only three cases purportedly bearing on substantial federal question jurisdiction — *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996), *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and *Sparta Surgical Corp. v. Nat’l Assoc. of Secs. Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998). Each is inapposite, and supports remand, not removal.

In *Ormet*, plaintiff sued to obtain emission “allowances,” issued under the Clean Air Act. 98 F.3d at 802. The Clean Air Act authorizes the holder of one of these “allowances” to emit one ton of sulphur dioxide. *Id.* (citing 42 U.S.C. §§ 7651g(a), 7651a(3)). Plaintiff’s suit alleged that its partial ownership interest in a plant entitled it to a share of the plant’s allowances under the terms of the Act. *Id.* (citing 42 U.S.C. § 7651a(27); 40 C.F.R. § 72.2). The Fourth Circuit acknowledged, citing Supreme Court precedent, that substantial federal question jurisdiction exists only “when plaintiff’s *right to relief* ‘necessarily depends on resolution of a substantial question of federal law.’ ” *Id.* at 806 (quoting *Franchise Tax Bd.*, 463 U.S. at 27-28 (emphasis added)). Because the plaintiff’s right to relief depended on its establishing that it was “a part ‘owner,’ as defined by the Act,” this determination was a substantial federal question supporting subject matter jurisdiction. *Id.* at 807.

Likewise, in *Grable*, the rights plaintiff sought to vindicate in its complaint were allegedly created by federal law. 545 U.S. at 314-15. Specifically, plaintiff, whose property had been seized by the IRS, filed a quiet title action against the purchaser of the property. *Id.* at 311. Plaintiff claimed its title was superior because the IRS had failed to give notice of the seizure “in the exact manner required by [26 U.S.C.] § 6335(a).” *Id.* at 311, 314-15.

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In *Sparta*, plaintiff sued the NASD, claiming it improperly de-listed its shares from the NASDAQ Stock Market. 159 F.3d at 1211. Plaintiff alleged violations of rules enacted pursuant to the Exchange Act, which explicitly "grants the federal courts 'exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder.' " *Id.* at 1212 (quoting 15 U.S.C. § 78aa). The court concluded that each of plaintiffs' claims was premised on allegations that the NASD had violated duties "exclusively determined by federal law." *Id*. at 1211-12. Accordingly, the court held that the exercise of subject matter jurisdiction was appropriate. *Id.* at 1213 (quoting 15 U.S.C. § 78aa).

In each of the above cases, the plaintiffs could not recover without resort to federal law. Not so here. None of the Tribe's claims — including its claims for breach of contract, breach of fiduciary duty and unjust enrichment — is necessarily premised on an issue of federal law. Even if Defendants were correct that the validity of the Opper agreement could ultimately affect the Tribe's ultimate recovery on some claims, it need not affirmatively plead or demonstrate the federal law proposition that the agreement at issue is *not invalid* in order to establish its right to recover. Nor, of course, could the Tribe be foreclosed from pleading alternative claims, such as one of alleging an agreement is illegal and another premised on the validity of the same agreement. *See* Fed. R. Civ. P.8(e)(2) (party may plead "as many separate claims or defenses as the party has regardless of consistency"). So long as none of the Tribe's claims *necessarily depend upon* resolution of a federal issue — and none do (*see* Mot. to Remand at 13-22) — substantial federal question jurisdiction is unavailable.

Defendants place undue reliance on *U.S. ex rel. Saint Regis Mowhak Trbie v. President R.C.-St. Regis Management Company*, 451 F.3d 44 (2d Cir. 2006), a case in which an Indian tribe filed a *qui tam* action seeking to void a contract under IGRA. (*See* Opp. at 7:19-22, 9:25-14.) The court held the doctrine of administrative exhaustion barred the claim from proceeding, since the tribe had not first sought relief from the NIGC. That case is irrelevant to jurisdiction, and indeed the Second Circuit clarified that it was not holding "that regulation of Indian gaming contracts creates federal question jurisdiction over any contract claim relating to Indian gaming." *Mohawk*, 451 F.3d at 51 n.6 (citation omitted). Moreover, this case is perhaps

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relevant to a defense on the merits as to whether a state (or federal) court can pass on the validity of a contract before the NIGC has done so, but such provides no support for removal in any event. *See Beneficial*, 539 U.S. at 12 (federal subject matter jurisdiction is not created simply because plaintiff may have alleged facts in support of a state law claim that "do not support a state law claim and that would only support a federal claim," since " 'jurisdiction may not be sustained on a theory that the plaintiff has not advanced.'").[11]

III. CONCLUSION

For all the above reasons, this case belongs in state court. Because federal jurisdiction is lacking, the Court should grant the Tribe's remand motion.

Dated: January 18, 2007

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[11] For jurisdictional purposes, it does not "even suffice that the facts alleged in support of an asserted state law claim do not support a state law claim and would only support a federal claim." *Beneficial*, 539 U.S. at 12. While the Second Circuit concluded in *Mohawk* that IGRA provides a mechanism for the NIGC to pass on the validity of "contracts that have not been approved," the Eighth Circuit disagrees. *See Bruce H. Lien v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996) ("Despite the breadth of the approval and review process, passing on the legal validity of the document (as opposed to approval for a contract seemingly in compliance with IGRA and the regulations) is not within the scope of the administrative bodies.").