

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARSHALL BANK, N.A.,

Plaintiff,

v.

NOOKSACK BUSINESS
CORPORATION II, and NOOKSACK
INDIAN TRIBE,

Defendants.

Case No. CV9 1245 RSL

**PLAINTIFF'S MOTION FOR
REMAND**

NOTE ON MOTION CALENDAR:
October 2, 2009

Plaintiff Marshall Bank, N.A. respectfully submits this motion for remand of this action to the state court from which it was removed under 28 U.S.C. § 1447(c), and for an award of attorneys' fees, expenses, and costs incurred as a result of the removal.

On a motion to remand, the burden of establishing the federal court's jurisdiction falls on the party that sought removal. *See, e.g., Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999), *superseded in part by statute as stated in Patterson v. John Drows, Invirion Diagnostics LLC*, No. C 09-2741, 2009 WL 2474687, at *3 (N.D. Cal. Aug. 11, 2009). Moreover, in determining whether removal was proper, federal courts must "strictly construe the removal statute against removal jurisdiction [and] [f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citations omitted). As explained below, removal in this case was clearly improper for two separate and independent reasons.

On September 2, 2009, Defendants Nooksack Business Corporation II (“NBC II”) and Nooksack Indian Tribe (the “Tribe”) filed a Notice of Removal of *Marshall Bank, N.A. v. Nooksack Business Corporation II and Nooksack Indian Tribe*, CV 09-2-02160-7, then pending in the Superior Court of Washington for Whatcom County, to this Court. Defendants’ Notice of Removal alleges that federal jurisdiction exists over this action based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a). Defendants allege that Plaintiff is a “national banking association, with its principal place of business in Hallock, Minnesota.” Dkt. No. 1 ¶ 3. Defendants also allege that “[NBC II] is a tribal corporation with its principal place of business in Whatcom County, Washington. Defendant Tribe is a federally-recognized Indian tribe located in Whatcom County, Washington.” *Id.* ¶ 4. These facts establish that this action should be remanded to state court because: (1) Defendant NBC II is a citizen of Washington state and therefore cannot remove this action under 28 U.S.C. § 1441(b); and (2) Defendant Tribe is not a citizen of any state, and therefore destroys diversity under 28 U.S.C. § 1332.

First, 28 U.S.C. § 1441(b) states that, when the basis for federal jurisdiction is diversity of citizenship, removal is only proper if no defendant is a citizen of the state in which the action is pending. Under 28 U.S.C. § 1332(c)(1), a corporation is a citizen of any state in which it has been incorporated *and* a citizen of the state in which it has its principal place of business. Here, Defendants’ Notice of Removal states that defendant NBC II is a citizen of Washington state because its principal place of business is in Whatcom County, Washington. Because NBC II is a citizen of the state in which this action is pending, removal is improper under 28 U.S.C. § 1441(b).

Second, it is well settled that an unincorporated Indian tribe is not a citizen of any state and its presence in a case, therefore, always destroys complete diversity. *See Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094-95 & n.1 (9th Cir. 2002) (noting that all circuits to have addressed this issue, including the Ninth Circuit, agree that “unincorporated Indian tribes cannot sue or be sued in diversity because they are not citizens of any state”); *see also* James Wm. Moore, 15 *Moore’s Federal Practice* §§ 102.56[10] & 102.57[10] (3d ed.) (noting that presence of unincorporated tribes or tribal entities destroy diversity, even if tribe is

1 acting in a commercial capacity). Here, Defendants' Notice of Removal alleges that the Tribe
2 is a federally recognized Indian tribe, but does not allege that it is an incorporated Indian tribe.
3 In the absence of any allegation or evidence to this effect, the Notice of Removal fails to allege
4 that diversity jurisdiction exists over this action, and Defendants, therefore, have failed to meet
5 their burden of establishing that federal jurisdiction exists in this case.¹ Accordingly, this
6 action should be remanded to state court.

7 Finally, Plaintiff seeks an award of just costs and actual expenses, including attorney
8 fees, incurred as a result of this removal under 28 U.S.C. § 1447(c). An award of fees is
9 appropriate when the removing party lacks an objectively reasonable basis for seeking
10 removal. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, Section
11 1441(b) of the removal statute plainly states that removal is not proper in this case because at
12 least one defendant is a Washington citizen. Further, the Ninth Circuit and every circuit to
13 have addressed the question of citizenship of an unincorporated Indian Tribe has come to the
14 conclusion that such entities are not citizens of any state and therefore always destroy
15 diversity. Given this clear authority, Defendants' removal of this action was not objectively
16 reasonable, and an award of fees and expenses in this case is appropriate.

17 Accordingly, Plaintiff respectfully requests that the Court remand this action back to
18 the Superior Court of Washington for Whatcom Country, pursuant to 28 U.S.C. § 1447(c), and
19 award expenses and fees incurred as a result of this removal.

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27 ¹ Even if the tribe were considered a citizen of a state, that state would be Washington, and as noted above, a
28 Washington defendant cannot remove a case filed in Washington state court on diversity grounds under 28 U.S.C.
§ 1441(b).

1 Dated: September 17, 2009.

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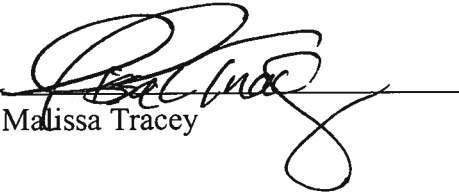
9 Attorneys for Plaintiff Marshall Bank, N.A.

CERTIFICATE OF SERVICE

I, Malissa Tracey, do hereby certify and declare under penalty of perjury under the laws of the State of Washington as follows:

That I am an employee of Orrick, Herrington & Sutcliffe LLP, 701 Fifth Avenue, Suite 5700, Seattle, Washington 98104. On September 17, 2009, I caused the foregoing documents to be electronically filed with the CM/ECF system, which will send notification to counsel of record.

Dated this 17th day of September 2009.


Malissa Tracey

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