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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

TIMBISHA SHOSHONE TRIBE, a federally-recognized tribe, EDWARD BEAMAN, Individually and as Vice Chairman of the Timbisha Shoshone Tribe, VIRGINIA BECK, Individually and as Executive Council Member of the Timbisha Shoshone Tribe, and CLEVELAND LYLE CASEY, Individually and as Executive Council Member of the Timbisha Shoshone Tribe,

Plaintiffs,

v.

JOSEPH KENNEDY, Individually and as Member of the Timbisha Shoshone Tribe Tribal Council, MADELINE ESTEVES, Individually and as Executive Council Member of the Timbisha Shoshone Tribe, PAULINE ESTEVES, an Individual, ANGELA BOLAND, an Individual, ERICK MASON, an Individual, and DOES 1 to 100, inclusive,

Defendants.

Case No. 1:09-cv-1248

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND REMAND

Courtroom: 4
Judge: Hon. Lawrence J. O'Neill

Pursuant to the court's February 17, 2010 Order, Plaintiffs TIMIBISHA SHOSHONE TRIBE, EDWARD BEAMAN, CLEVELAND LYLE CASEY, and VIRGINA BECK (collectively "Plaintiffs") urge the court to dismiss this case and remand it to the California Superior Court for the County of Inyo on the grounds that this court lacks jurisdiction over the subject matter of the case.

Plaintiffs initiated this suit in state court, alleging ten causes of action: (1) violation of Tribal law; (2) conversion of Tribal funds; (3) fraud; (4) breach of fiduciary duty; (5) abuse of Tribal government process; (6) a request for imposition of a constructive trust on the Tribal funds wrongfully acquired by Defendants; (7) wrongful interference with prospective economic advantage; (8) unfair competition in violation of California Business and Professions Code § 17200, *et seq.*; (9) a request for an accounting of Tribal funds expended by Defendants; and (10) relief in the form of a declaration of the rights and obligations of the Parties regarding the use of Tribal funds.

Defendants JOSEPH KENNEDY, MADELINE ESTEVES, PAULINE ESTEVES, ANGELA BOLAND, and ERICK MASON (collectively "Defendants") filed a Notice of Removal to Federal Court on July 15, 2009, on the stated basis that "[t]his action is a civil action over which this Court has original jurisdiction under 28 U.S.C. §§1331 or 1362..." (Notice of Removal, Doc. 1, p.2.)

Defendants cannot meet their burden of showing that federal subject matter jurisdiction existed in this matter at the time the action was removed to this court. The court is therefore bound to dismiss the case and remand it to state court.[1]

ARGUMENT

I. Legal Standard Governing Motions For Remand

Subdivision (b) of 28 U.S.C. § 1441 provides that a defendant may remove an action to federal district court to state court if the district court would "have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States[.]" *See Sidhu v. Sierra Entertainment*, No. CV F 06-1838 AWI LJO, 2007 WL 334130, at *1 (E.D. Cal. Jan. 31, 2007). This statute's language is virtually identical to 28 U.S.C. § 1331, which states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or

[1] In addition to the foregoing rules, when it applies, the United States Supreme Court has concluded that 28 U.S.C. § 1447(c) "is mandatory and may not be disregarded based on speculation about the proceeding's futility in the state court." *Univ. of So. Alabama*, 168 F.3d at 410, citing *Int'l. Primate Protection Leage v. Administrators of Tulane Educ.*, 500 U.S. 72, 87-89 (1991); *Bruns v. Nat'l. Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (section 1447(c) is mandatory). Furthermore, the removal statutes are construed strictly and all doubts about jurisdiction are resolved in favor of remand. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990).

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treaties of the United States."[2] "The presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint." *Murphy v. Lopez*, No. 1:09-cv-00756-LJO-GSA PC, 2009 WL 1929385, at *1 (E.D. Cal. July 2, 2009). The "existence of federal jurisdiction is determined by the complaint at time of removal." *Id.*

This Court has previously laid out the rules governing motions for dismissal and remand:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. Federal courts are presumably without jurisdiction over civil actions, and the burden establishing the contrary rests with the party asserting jurisdiction. Lack of subject matter jurisdiction is never waived and may be raised by either party or the court at any time. Nothing is to be more jealousy guarded by a court than its jurisdiction.

Arce v. Pomares, No. 1:07cv0505 LJO DLB, 2007 WL 1373877, at *1 (E.D. Cal. May 8, 2007) (citations and quotations omitted).

Federal subject matter – the issues "arising under the Constitution, treaties, or laws of the United States" – must be "substantial" (*Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974)), must be sufficiently central to the plaintiffs' claims (*Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)), and must be evident in plaintiffs' "well-pleaded complaint" (*Vaden v. Discover Bank*, ---U.S.---, 129 S.Ct. 1262, 1272 (2009)). In addition, because of the "'Congressional purpose to restrict the jurisdiction of the federal courts on removal,' the removal statute is strictly construed against removal." *Sidhu*, 2007 WL 334130, at *1, quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941). Federal jurisdiction "must be rejected if there is any doubt as to the right of removal in the first instance." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996).

It is the defendant's burden to establish that jurisdiction in the federal court is proper. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403 (9th Cir. 1996); *Stuetzle*, 76 F.3d at 1485. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c); *accord Wright v. Neptune Society of Central California, Inc.*, No. CV F 07-0117 LJO TAG, 2007 WL 963302, at *2 (E.D. Cal. March 29, 2007).

[2] 28 U.S.C. § 1362 provides the same standard: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

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In addition, "[a]n order remanding the case may require payment of just costs any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Courts should award such fees when no objectively reasonable basis supports the removal. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). *See Patel v. Del Taco, Inc.*, 446 F.3d 996, 999 (9th Cir. 2006) (upholding award of attorney's fees when removing defendant had no objectively reasonable basis for removal).

For the reasons set forth below, at the time Defendants removed this case, the face of the complaint did not support federal question jurisdiction, and for that reason this case should be dismissed and remanded. In addition, as Defendants had no objectively reasonable basis to remove this case in the first instance, Plaintiffs respectfully request that this Court award attorneys fees to them, and set a briefing schedule to determine the amount owed.

II. Plaintiffs' Complaint is Based Entirely On State Law And Removal Jurisdiction Is Lacking.

Because none of the claims made in Plaintiffs' Complaint arise under the Constitution, treaties or laws of the United States, this court lacks jurisdiction based on the presence of a federal question, and therefore lacks subject matter jurisdiction and must remand the case. Defendants' premise for their removal of this case to federal court is "that plaintiffs' purported claims for relief arise under federal statutes including 28 U.S.C. §1360 ("Public Law 280"), and various administrative decisions of the United States Department of the Interior, Bureau of Indian Affairs; the False Claims Act, 31 U.S.C. §3729; and the Administrative Procedure Act, 5 U.S.C. §702, among others." (Notice of Removal, Doc. 1, p. 2.) However, none of these statues form a proper basis for the removal of the present action, as only individual members of the Tribe are parties to this dispute.

A. Public Law 280 Does Not Confer Removal Jurisdiction On This Court

Public Law 280 is a federal law that confers upon California's courts "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in … Indian country … to the same extent that such State has jurisdiction over other civil causes of action." 28 U.S.C. § 1360(a). State courts are to give "full force and effect" to Tribal laws and customs to the extent they do not contravene applicable state civil law, "in the determination of civil causes of action pursuant to

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this section." 28 U.S.C. § 1360(c). Public Law 280 is thus a basis of the state court's jurisdiction to hear this case, as an action between Indians arising in Indian country, and to apply Tribal law. It does not form the basis of the Plaintiffs' claims, and it cannot be the basis for vesting this court with jurisdiction over this matter.

In *State of Wisconsin v. Wisconsin Winnebago Indian Tribe*, 603 F.Supp. 428 (W.D.Wisc. 1985), the district court emphatically rejected the notion that Public Law 280 could serve such a purpose. This opinion is worth quoting at length:

> Now, it may be true that a state court's assumption of jurisdiction in a particular case will run afoul of Indian sovereignty or federal supremacy such that those doctrines of federal law may provide a defense in state court, [citation], or the basis for an independent action in federal court challenging the state prosecution, [citations]. But to go one step further and hold that the state court action "arises under" federal law would not only confuse the issue of jurisdiction to review the propriety of a state prosecution under federal law with the issue of jurisdiction to decide the merits of such a prosecution, it would also in the course of that confusion throw open the doors of the federal courts to entertain the merits of every state prosecution arguably entered into under the authority of P.L. 280. That result would be absurd.
>
> To summarize: P.L. 280 and the body of federal law of which it is a part may provide a defense in a state court action; the statute may also provide the basis for an independent federal court action for declaratory and injunctive relief; but P.L. 280 does not provide for original jurisdiction in the district court over the merits of the challenged state court action itself.

Id. at pp. 429-430.

Just as in *Wisconsin Winnebago Indian Tribe*, in the instant case Public Law 280 does not give the district court original jurisdiction over the merits of Plaintiffs' claims, because Plaintiffs' claims do not "arise under" Public Law 280. Plaintiff's claims arise under tribal and state law, namely the Tribe's Constitution and state prohibitions against conversion, fraud, breach of fiduciary duty, wrongful interference with economic advantage, and unfair competition.

It is not significant for jurisdictional purposes that the factual background of the case includes decisions by the Bureau of Indian Affairs ("BIA"). Plaintiffs allege that the BIA decisions provide evidence of the federally-recognized membership of the governing Tribal Council. But Plaintiffs' claims do not "arise under" federal law simply because these BIA decisions underlie the factual

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circumstances of Plaintiffs' state law claims. Plaintiffs are not presently requesting administrative review of the BIA's interim decisions, nor is such review required to determine the merits of Plaintiffs' claims.[3] Indeed, judicial review likely would be premature at this point, as the relevant decisions the subject of a pending appeal. *See* 25 C.F.R. § 2.6(a), 43 C.F.R. § 4.314(a) (both providing that decisions appealable to BIA officials or the Interior Board of Indian Appeals are not "considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704").

Indeed, that Public Law 280 does not confer federal question, and therefore subject matter jurisdiction on this court is confirmed by the Ninth Circuit's decision in *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). In that case, one of the issues the Court decided was whether a civil dispute involving the State of California was within the scope of civil adjudicatory jurisdiction conferred on the State of California under Public Law 280. Under Public Law 280, California courts may assert civil jurisdiction over cases that are "civil causes of action between Indians or to which Indians are parties" and that involve "those civil laws . . . that are of general application to private persons or private property." *Id.* at 1058. In addition, and as noted above those courts can give "full force and effect" to Tribal laws and customs to the extent they do not contravene applicable state civil law, "in the determination of civil causes of action pursuant to this section." 28 U.S.C. § 1360(c).

In that case, the Court concluded that a child dependency matter was a private dispute involving Indians because "the simple fact that the state steps in as a party does not transform what is an adjudicatory proceeding involving private parties into a regulatory proceeding." *Id.* at 1059. Likewise, just because the tribe is a party to this adjudicatory proceeding, does not mean that a civil action is transformed from a case asserting private civil causes of action to one that cannot be heard consistent with Public Law 280. At its heart, this dispute involves a disagreement between Indians over who is entitled to supervise property and funding, much of which, is located off-reservation in private bank accounts. California courts are expressly permitted by Congress to interpret tribal law in resolving these types of private disputes between Indians. Accordingly, this case should be remanded

[3] Indeed, Plaintiffs asserted administrative review provisions as the basis for seeking preliminary injunctive relief in this Court, and that basis appeared to be rejected.

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to the Inyo County Superior Court, so that it can determine the scope of its civil adjudicatory jurisdiction over this dispute under Public Law 280.

B. The Defense That The Defendants, As Purported Tribal Officials, Were Cloaked In The Tribe's Sovereign Immunity Does Not Confer Removal Jurisdiction.

Jurisdiction is gleaned from the well-pleaded complaint, and the potentially federal nature of a defense does not affect the existence or non-existence of a federal question in the Complaint. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1272 ("Under the longstanding well-pleaded complaint rule, ... a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].' *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Federal jurisdiction cannot be predicated on an actual or anticipated defense. The fact that Defendants may intend to assert tribal sovereign immunity as a defense does not give rise to federal subject matter jurisdiction. Indeed, the Supreme Court has already decided the issue and held that "[t]he possible existence of a tribal immunity defense . . . did not convert Oklahoma tax claims into federal questions, and there was no independent basis for original federal jurisdiction to support removal." *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). As this decision had long been issued, at the time that Defendants sought to remove this case, there was no objectively reasonable basis for the removal.

Moreover, it is quite likely that an assertion of tribal immunity by Defendants would fail because Defendants waived any such immunity when they removed this action to federal court. *See Embury v. King*, 361 F.3d 562, 566 (9th Cir. 2004) (holding that state defendant waives sovereign immunity under Eleventh Amendment when removing to federal court because "removal itself affirmatively invokes federal judiciary authority," *citing Lapides v. Bd. of Regents*, 535 U.S. 613 (2002)). *See also Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1204-06 (10th Cir. 2002) (state's removal of case waives Eleventh Amendment immunity), *In re Regents of Univ. of Cal.*, 964 F.2d 1128, 1135 (Fed.Cir. 1992) ("Having invoked the jurisdiction of the frderal court, the state accepted the authority of the court.").[4]

[4] Judge Ishii for the Eastern District of California recently ruled that tribal sovereign immunity was not sufficiently similar to states' Eleventh Amendment immunity, and that therefore "removal to federal court does not waive tribal sovereign immunity." *Ingrassia v. Chicken Ranch Bingo and Casino*, 2009 WL 5030658, *6 (E.D.Cal. 2009). Judge Ishii

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C. Plaintiff Does Not Assert A Cause of Action Based On The False Claims, Nor Does Its Inclusion As a Predicate Violation of California's Unfair Competition Law Provide a Basis For Removal Jurisdiction.

Finally, the False Claims Act, 31 U.S.C. § 3729, does not serve to imbue Plaintiffs' claims with a substantial and central federal question. Plaintiffs allege that defendants diverted tribal funding in violation of tribal law and state law. Federal jurisdiction is available only if "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). Here, the alleged violations of state law and tribal law do not depend upon any disputed question of federal law, including the False Claims Act. Indeed, those violations were independently asserted as additional predicate violations under the tenth cause of action.

Defendants' alleged misuse of Tribal funds would constitute fraud, conversion, breach of fiduciary duty, and violation of the Tribal Constitution regardless of the federal source of the misused funds. The issues in dispute are the parties' respective rights under tribal law and, given those rights, whether state and tribal laws were violated. The federal aspect of the cause of action is merely an additional basis for this claim. Plaintiffs did not plead a direct cause of action for violation of the False Claims Act and courts have consistently held that where a federal claim is pleaded as a predicate violation to an unfair competition law cause of action under Business and Professions Code section 17200, and where there is another independent state law basis upon which the cause of action is based, the cause of action is not removable. *Lighting Science Group Corp. v. Koninklijke Philips Electronics N.V.*, 624 F.Supp.2d 1174, 1180-1183 (E.D. Cal. 2008), citing *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033 (9th Cir. 2003); *Gebhard v. Bank of America, N.A.*, No. 2:09-CV-03159-GEB-JFM, 2010 WL 580995, at *6-7 (E.D. Cal. Feb. 11, 2010); *Rotenberg v. Brain Research Labs LLC*, No. C-09-2914 SC, 2009 WL 2984722, at *4 (N.D. Cal. Sept. 15, 2009); O'Grady *v. Wachovia Bank, N.A.*, No. CV 08-5065 SVW(SSX), 2008 WL 4384282, at *2 (C.D. Cal. Sept. 10, 2008).

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pointedly cautioned, however, that "the case law is not absolutely clear" and "the issue is not settled and appeal may be fruitful." *Id.* Here, Defendants submit that the individuals named in the Complaint are not entitled to continue their sovereign immunity as tribal officials when they chose to remove this action to federal court, accordingly, this court should rule that they have removal waived their claims that, as officials, they are cloaked in the Tribe's sovereign immunity. *See Lapides v. Bd. of Regents*, 535 U.S. 613, 616 (2002); *Embury v. King*, 361 F.3d 562, 565-566 (9th Cir. 2004) (citing cases).

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Here, Plaintiffs plead violations of California and tribal law as additional predicate violations, and incorporated by reference all of the preceding causes of action and those violations into the UCL cause of action. Consequently, as Defendants could have simply consulted the authorities in this circuit and district to discover these rules, they did not have an objectively reasonable basis to remove the action on the basis of the False Claims Act.

D. An Intratribal Dispute, Like This One, Does Not Confer Subject Matter Jurisdiction On This Court, and Therefore, Removal Jurisdiction Is Improper.

In *Sac & Fox Tribe of the Mississippi In Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 836 (8th Cir. 2006), the Eighth Circuit considered whether a district court possessed subject matter jurisdiction to hear an intratribal dispute like the one pending in this matter. The court concluded that the district court did not have jurisdiction to reach the merits of the dispute, and cited the following reasons: (1) "the district court would necessarily have to construe and apply tribal law"; (2) "the district court would then have to determine which [tribal governing body] is the proper plaintiff"; (3) "the district court lacked jurisdiction to determine which tribal faction rightfully controlled the [Tribe]." On this basis, the court concluded that the district court "appropriately dismissed the case for lack of subject matter jurisdiction." *Id.* at 835.

A slew of opinions have come to the same conclusion on similar facts. *See, e.g., Longie v. Spirit Lake Tribe,* 400 F.3d 586, 589 (8th Cir. 2005) (explaining that federal courts should refrain from exercising jurisdiction where the case involves an intratribal dispute); *Sac & Fox Tribe of Mississippi in Iowa v. Bear*, 258 F.Supp.2d 938, 943 (same); *Wade v. Blue,* 369 F.3d 407, 412 (4th Cir. 2004) (concluding that civil action related to intratribal dispute had to be brought in state court); *Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) ("the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute"); *Attorney's Process & Investigation Serv., Inc. v. Sac & Fox Tribe of the Mississippi In Iowa,* 401 F.Supp.2d 952, 961 (D. Iowa 2005) ("This court is without jurisdiction to determine whether the Walker Council or the Bear Council was the governing body of the Tribe . . . because such a matter is an

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intra-tribal dispute"); *Sac & Fox Tribe of the Mississippi in Iowa Election Bd. v. Bureau of Indian Affairs,* 360 F.Supp.2d 986 (N.D. Iowa 2005) (same); *Sac & Fox Tribe of the Mississippi in Iowa v. Bear,* 258 F.Supp.2d 938 (N.D. Iowa 2003) (same); *Ordinance 59 Association v. Babbitt*, 970 F.Supp. 914, 927 (D. Wyo. 1997) (collecting cases); *Colebut v. Mashantucket Pequot Tribal Nation Elders Council*, No. 3:05CV00247 (DJS), 2007 WL 174384, at *5 (D. Conn. Jan. 19, 2007) ("with regard to adjudication of internal tribal laws, this court does not have jurisdiction"); *Wopsock v. Natchees,* No. 204CV00675TS, 2005 WL 1503425 (D. Utah June 21, 2005) (same).

The foregoing voluminous authority demonstrates that Defendants lacked an objectively reasonable basis to remove this action, and this matter should be remanded to the Inyo County Superior Court.

E. An Award Of Attorneys' Fees To Plaintiffs Is Proper As Defendants Did Not Have Objectively Reasonable Basis For Removing This Action In The First Place.

"In remanding an improperly removed action back to state court, the court 'may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal.'" *Beauford v. E.W.H. Group Inc.*, No. 1:09-CV-00066-AWI-SMS, 2009 WL 3162249 (E.D. Cal. Sept. 29, 2009), citing 28 U.S.C. § 1447(c). "[I]t is clear that an award of attorney's fees is a collateral matter over which the court normally retains jurisdiction even after being divested of jurisdiction on the merits." *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 445 (9th Cir. 1992). "The decision to award fees and costs under 28 U.S.C. § 1447(c) is discretionary." *Watson v. Charleston Housing Authority*, 83 F.Supp.2d 709, 712 (S.D. W.Va. 2000). The court may require the payment of fees and costs by a party which removed a case which the court then remanded, even though a party removing the case did not act in bad faith." *Espinosa v. Continental Airlines*, 80 F.Supp.2d 297, 306 (D.N.J. 2000). Fees may be awarded "only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

For all the reasons set forth above, Plaintiffs submit that Defendants lacked an objectively reasonable basis for removing this action. If the court concludes that remand is appropriate, Plaintiffs

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request that the court retain jurisdiction over this matter for the sole purpose of deciding what amount of attorneys fees Plaintiffs are entitled to.

Dated: March 10, 2010

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