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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 **THE PEOPLE OF THE STATE OF**
CALIFORNIA, ex rel. Kamala D. Harris,
17 **Attorney General of the State of California,**
18 Plaintiff,
19 v.
20 **ARDITH HUBER, individually, dba**
HUBER ENTERPRISES, and DOES 1
21 **through 20 inclusive,**
22 Defendants,
23
24

Case No. 11-cv-01985 RS

**NOTICE OF MOTION AND MOTION
TO REMAND; MEMORANDUM OF
POINTS OF AUTHORITIES IN
SUPPORT THEREOF**

Hearing: June 30, 2011
Time: 1:30 p.m.
Courtroom: 3
Judge: The Hon. Richard Seeborg

25 **TO DEFENDANTS ARDITH HUBER, HUBER ENTERPRISES, AND THEIR**
26 **ATTORNEYS OF RECORD:**

27 PLEASE TAKE NOTICE THAT on June 30, 2011, at 1:30 p.m., or as soon thereafter as
28 this matter may be heard, in Courtroom 3, located at 450 Golden Gate Avenue, San Francisco,

California, Plaintiff People of the State of California (California) will move the court for an order, pursuant to 28 U.S.C. § 1447(c), remanding this action to the Superior Court in and for the County of Humboldt and granting attorneys fees and costs to the People.

California moves for remand on the grounds that:

(1) California's complaint does not raise a substantial federal question that is necessary to resolution of any of California's claims, and

(2) Anticipated or potential defenses based on the federal constitution, laws or treaties cannot support removal of an action.

California's motion for remand is based on this notice of motion and motion, the memorandum of law filed in support of this motion, and such other and further evidence and argument, both written and oral, as may be presented to the Court before the motion is submitted for decision.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff the People of the State of California ex rel. Kamala D. Harris, Attorney General, (California) ask this Court to remand this action to state court. Removal to federal court was improper because no basis for removal appears on the face of the complaint.

California filed this action against Ardith Huber and Huber Enterprises (Huber) in the Superior Court of California in and for the County of Humboldt on March 8, 2011. Huber is a cigarette retailer located in the state of California. The complaint charges Huber with selling cigarettes in California in violation of California state law and seeks civil penalties and an injunction against further violation of state law. The complaint alleges three causes of action:

Since at least November, 2008, Huber has sold cigarettes that cannot lawfully be sold in the state because neither the cigarette brands nor their manufacturer have ever qualified to be listed on California's Tobacco Directory, established pursuant to Cal. Rev. & Tax. Code, § 30165.1;

1. Since at least November, 2008, Huber has sold cigarettes that cannot lawfully be sold in the state because their manufacturer has not complied with the requirements of the

1 California Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf. Code
 2 §§ 14950-14960, relating to the testing, certification and marking of cigarettes that meet
 3 specified ignition-propensity standards; and

4 2. Huber has engaged in unfair competition by selling unlawful cigarettes in California,
 5 in violation of California's Unfair Competition Law, Business and Prof. Code 17200,
 6 et seq. California filed suit in superior court because all three claims arise under state
 7 law.

8 California sued in Humboldt County because Huber operates its retail cigarette store in
 9 Loleta, California.

10 On April 22, 2011, Huber filed a petition for removal in this Court, pursuant to 28 U.S.C.
 11 §§ 1441 and 1446. On April 22, 2011, Huber also filed a notice of removal in the superior court.
 12 The removal petition seeks removal on the basis of federal question jurisdiction, stating that
 13 "[t]his Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
 14 question)":

15 California's complaint seeks to impose and enforce state laws and regulations against a
 16 member of the Wiyot Indian Tribe for actions occurring exclusively within the Wiyot
 17 Indian Tribe's federally established reservation. Moreover, California's complaint
 18 implicitly seeks to invalidate, or restrict the reach and scope of the laws of the Wiyot
 19 Tribe as they pertain to regulation of tribal members and tribal land use. California's
 20 causes of action attempt to expand California's jurisdictional authority to enforce state
 21 laws against an Indian residing and conducting business on her reservation as
 22 authorized by Tribal law. This action necessarily implicates and required [sic]
 23 application of federal law as found in the Indian Commerce Clause and as established
 24 through nearly two centuries of federal common law. Additionally, California's
 25 complaint necessarily challenges the right of the Wiyot Tribe, and its members, to make
 26 and live under their own laws. This too necessarily implicates important aspects of
 27 long standing federal common law.

28 Notice of Removal at 2-3.

Even if true (which they are not), these alleged facts do not support removal. The
 possibility of a defense based on "federal common law, 28 U.S.C. § 1360, the Commerce and
 Indian Commerce Clauses of the United States Constitution, and the doctrine of federal
 preemption" Rem. Not. at 3:1-4, do not make this case removable. *Berg v. Leason*, 32 F.3d 422,
 426 (9th Cir. 1994) ("neither an affirmative defense based on federal law, nor one based on
 federal preemption, renders an action brought in state court removable"). Even a defense of tribal

sovereign immunity, which Huber does not assert, would not justify removal of this action.
Oklahoma Tax Com'n v. Graham, 489 U.S. 838, 841, 109 S. Ct. 1519, 103 L. Ed. 2d 924 (1989).

ARGUMENT

I. REMOVAL IS NOT PROPER BECAUSE CALIFORNIA DID NOT ASSERT A CLAIM INVOLVING A FEDERAL QUESTION IN ITS COMPLAINT

A. The Defendant Has the Burden of Demonstrating That Removal Is Proper

Huber has the burden of establishing that California's action is "founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b); *Ethridge v. Harbor House Restaurant*, 861 F.3d 1389, 1393 (9th Cir. 1988). This is a heavy burden because the removal statute is strictly construed, and any doubt is to be resolved in favor of remand. *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996).

Because of the "Congressional purpose to restrict the jurisdiction of the federal courts on removal," *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941), the statute is strictly construed, *id.* at 108-09, and federal 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) (citation omitted). [The defendant] . . . has the burden of establishing that removal was proper. *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994) (quotations and citations omitted).

Duncan, 76 F.3d at 1485.

B. Removal is Permitted Only If a Federal Question Appears on the Face of the Complaint

In general, the basis for removal jurisdiction must appear on the face of a well-pleaded complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust For Southern California*, 463 U.S. 1, 10 (1983). The federal issue "must be disclosed on the face of the complaint, unaided by the answer or the petition for removal." *Gully v. First National Bank*, 299 U.S. 109, 113, 57 S. Ct. 96, 81 L. Ed. 70 (1936). "A defense is not part of a plaintiff's properly pleaded statement of his or her claim." *Rivet v. Regions Bank*, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998). "A defense that raises a federal question is inadequate to confer federal jurisdiction."

1 *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed.
2 2d 650 (1986).

3 To determine whether the claim arises under federal law, we examine the “well
4 pleaded” allegations of the complaint and ignore potential defenses: “a suit arises
5 under the Constitution and laws of the United States only when the plaintiff’s
6 statement of his own cause of action shows that it is based upon those laws or that
7 Constitution.”

8 *Beneficial National Bank v. Anderson*, 539 U.S. 1, 6, 123 S. Ct. 2058, 156 L. Ed. 2d 1
9 (2003) (*quoting Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 53 L.
10 Ed. 126 (1908)); *see also Franchise Tax Bd.*, 463 U.S. at 10-11, 13-14 (“ since 1887 it has been
11 settled law that a case may not be removed to federal court on the basis of a federal defense,
12 including the defense of preemption, even if the defense is anticipated in the plaintiff’s complaint,
13 and even if both parties admit that the defense is the only question truly at issue in the case”).

14 **II. HUBER’S POSSIBLE AFFIRMATIVE DEFENSES ON FEDERAL CONSTITUTIONAL AND 15 COMMON LAW GROUNDS CANNOT PROVIDE A BASIS FOR REMOVAL**

16 As is evident from California’s complaint, all three causes of action are based on state law.
17 Thus, Huber misstates the applicable law governing removal when it asserts that removal
18 jurisdiction exists because “this action necessarily implicates and required [sic] application of
19 federal law as found in the Indian Commerce Clause and as established through nearly two
20 centuries of federal common law.” Rem. Not. at 2. “By unimpeachable authority, a suit brought
21 upon a state statute does not arise under an act of Congress or the Constitution of the United
22 States because prohibited thereby.” *Franchise Tax Bd.*, 463 U.S. at 12 (*quoting Gully*, 299 U.S.
23 at 116). That Indians may be involved in the transactions at issue in this action does not alter the
24 conclusion. The result would be the same even if Huber itself were an Indian tribe, and not just
25 an entity operating on tribal land:

26 [I]t has long been settled that the existence of a federal immunity to the claims
27 asserted does not convert a suit otherwise arising under state law into one which, in
28 the statutory sense, arises under federal law. The possible existence of a tribal

immunity defense, then, did not convert [state claims] into federal questions, and there was no independent basis for original federal jurisdiction to support removal.

Oklahoma Tax Com'n v. Graham, 489 U.S. 838, 841 (1989) (citing *Gully*, 299 U.S. 109).

Defendant asserts that this action presents a substantial federal question, making it removable, because it has some special legal status in that Huber Enterprises is on Indian land and is owned by a member of an Indian tribe. Rem. Not. at 2. But that is precisely the argument the Supreme Court rejected in *Graham*. Although the Tenth Circuit in that case concluded that the defendant's tribal status raised the potential question of the tribe's immunity from the state's suit and, thus, the action was removable, *see Graham*, 489 U.S. at 840, the Supreme Court flatly rejected that reasoning, and reversed. It held that the defendant's status as a tribe might support a potential defense of tribal immunity, but that such a potential defense did not "convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." *Id.* at 841; *see also, e.g., Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) ("federal question jurisdiction does not exist merely because an Indian tribe is a party") and *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 672 (8th Cir. 1986) ("federal question jurisdiction does not exist merely because an Indian tribe is a party or because the action involves Indian property or contracts").

The Supreme Court and the Ninth Circuit are clear: "State courts resolve matters of federal law in similar circumstances with no difficulty; neither an affirmative defense based on federal law, nor one based on federal preemption, renders an action brought in state court removable." *Berg v. Leason*, 32 F.3d 422, 426 (9th Cir. 1994), *citing Merrell Dow*, 478 U.S. at 808; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). This is true "even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd.*, 463 U.S. at 12.

The District Court for the Eastern District of California considered contentions virtually identical to the one Huber makes in this case and remanded the matter back to state court. In *People of the State of California v. Native Wholesale Supply Co.*, 2008 U.S. Dist LEXIS 108677,

2008 WL 6526755, E.D.Cal., October 08, 2008 (NO. CIVS08-1827 LKK/KJM), California's complaint against a cigarette importer (Native Wholesale Supply) alleged state law causes of action, three of which were based on the same laws California alleges Huber is violating: the Tobacco Directory Law, Cal. Rev. & Tax. Code § 30165.1, the Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf. Code § 14950, and the UCL, Cal. Bus. & Prof. Code § 17200. *Id.* at 1. Native Wholesale, represented by the same law firm that represents Huber in this matter, argued that because it was chartered by the Sac and Fox Tribe of Oklahoma and its sole shareholder was an Indian, "the underlying issue raised by the complaint is whether a state can regulate out-of-state activities or tribes." 2008 U.S. Dist. LEXIS at 5 (footnote omitted) (the decision of the District Court is attached as Ex. A). The court flatly rejected argument that this issue vested the federal court with removal jurisdiction over the action.

[F]ederal law has not created the plaintiff's causes of action, nor has it created the underlying right the plaintiff seeks to vindicate. . . . The plaintiff, as a sovereign, has an inherent right to enforce its own laws and judicial decrees. The defendant does not dispute this generally, but contends that, as a tribal corporation, the state may not enforce its laws against it. Although resolution of this issue will require application of federal law, defendant's argument is essentially an affirmative defense to the plaintiff's causes of action. As such, this does not give rise to federal question jurisdiction.

Id. at 8-9.

More recently, in *People of the State of California v. Black Hawk Tobacco Inc.* (Aug. 14, 2009) (No. EDCV 09-1380-VAP), California filed a complaint against a cigarette retailer (Black Hawk) based upon the same three causes of action found in the complaint against Huber. Based on well-established precedent, the court in Black Hawk remanded the case to the state court without even hearing argument on Black Hawk's motion for removal. (The order of the District Court is attached as Ex. B.)

There being no material difference between the situations presented by California's complaints against both Native Wholesale and Black Hawk and the situation presented by the complaint here against Huber, the court should reach the same result.

A. The Absence of Any Valid Basis for the Motion to Remove Warrants Awarding Plaintiff Fees and Costs Associated with This Motion to Remand

Finally, California asks the Court to include in its order remanding the case an order requiring Huber to pay California's "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Counsel for Huber presented the identical arguments they have made in this matter when they sought removal in the Native Wholesale and Black Hawk matters, and in both of those prior cases, the court found no basis for removal and remanded the cases back to the state court. Further, after Huber filed the Motion for Removal, California advised counsel that since this was the third time they had raised the same arguments in nearly identical cases, California would seek costs and expenses for responding to the motion. (Ex. C.)

The Court should exercise its discretion and grant California's request for fees and costs given defense counsel's conduct in this matter. By presenting a motion to the court, counsel represents that the claims are warranted by existing law and further, that the motion is not being presented for any improper purpose such as to cause unnecessary delay. Fed. R. Civ. P. 11(b). As the above discussion illustrates, the motion for remand is not supported by existing law. In fact, the law is clear that removal is improper in this case as there is no federal question on the face of the complaint. Further, in the two previous actions that were almost identical to the present case, counsel also filed motions for removal, also claiming the complaints raised a federal question. In both cases, the courts denied the motion. Absent any legal basis for the motion to remand, and defense counsel's practice of filing similar unsuccessful motions in the earlier matters, there does not appear to be any valid purpose for filing the motion to remove this case to Federal Court. Thus, an award of California's fees and costs in filing this motion to remand is warranted. Prior to the hearing of this motion, California will provide the Court with an affidavit setting forth its costs and expenses.

1 **CONCLUSION**

2 As demonstrated above, this court lacks removal jurisdiction over this action. The
 3 complaint seeks relief exclusively under state law and Huber's potential federal defenses do not
 4 support removal jurisdiction. Therefore, the Court should grant California's motion to remand
 5 this action to the superior court and award California its just costs and expenses incurred in
 6 connection with defendant's attempted removal of this action.

7 Dated: May 19, 2011

Respectfully submitted,

8 KAMALA D. HARRIS
 Attorney General of California
 9 KAREN LEAF
 Senior Assistant Attorney General
 10 DENNIS ECKHART
 Deputy Attorney General
 11 JEANNE FINGER
 Deputy Attorney General
 12

13
 14
 15 /s/ Phillip Priesman
 PHILLIP S. PRIESMAN
 Deputy Attorney General
 16 *People of the State of California*
 17

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CERTIFICATE OF SERVICE

Case Name: **People of the State of California
v. Huber Enterprise**

No. **11-cv-01985 RS**

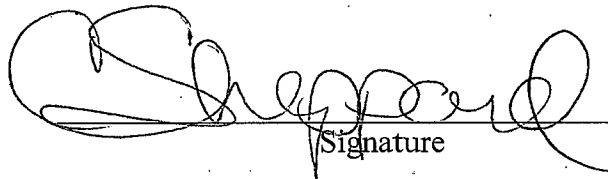
I hereby certify that on May 19, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT THEREOF**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 19, 2011, at San Diego, California.

Charlette Sheppard
Declarant



Signature