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10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION  
14

15 **THE PEOPLE OF THE STATE OF**  
16 **CALIFORNIA, ex rel. Kamala D. Harris,**  
**Attorney General of the State of California,**

17 Plaintiff,

18 v.

19 **ARDITH HUBER, individually, dba**  
20 **HUBER ENTERPRISES, and DOES 1**  
21 **through 20, inclusive,**

22 Defendants.  
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Case No.: 11-cv- 01985 RS

**PEOPLE'S REPLY MEMORANDUM IN  
SUPPORT OF MOTION TO REMAND**

Date: July 14, 2011  
Time: 1:30 p.m.  
Courtroom: 3  
Judge: The Hon. Richard Seeborg

## INTRODUCTION

This case was improperly removed to federal court and must be remanded. California's complaint consists of three causes of action, all of which are based exclusively on state law, and none of which require resolution of a substantial federal question. Huber's acknowledgement that "California's complaint unquestionably only asserts claims based on California statutes" Opposition to Motion to Remand [dated June 20, 2011] (Huber Opp.) at 3, demonstrates that the Court lacks removal jurisdiction over this matter. Huber maintains that removal nevertheless was proper because there is a federal question "embedded" in the complaint. "[A]nytime a state attempts [to] regulate an Indian tribe or reservation Indian the federal authority for its action – and therefore federal law – is necessarily embedded in its claims." Huber Opp. at 16. This is not the law, and neither Congress nor any court has ever held that it is. As the Supreme Court has held, tribal immunity may be a defense, but it does not convert state claims into federal questions. *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 841 (1989). Thus, there is no federal question in the complaint, embedded or otherwise, and removal was therefore improper. Finally, given that counsel for Huber has tried, and failed, to remove two other very similar state actions to federal courts, counsel had no basis for seeking removal here. Thus, the People ask that the Court award the People some of the costs associated with responding to this remand motion.

## ISSUE PRESENTED

Was this case properly removed to federal court based on federal question jurisdiction?

## STATEMENT OF FACTS

California filed this action against 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 illegally selling cigarettes in California and seeks civil penalties and an injunction against further violation of state law. The complaint alleges three causes of action that Huber 1) sold cigarettes in violation of California's Tobacco Directory statute, Cal. Rev. & Tax. Code, § 30165.1; 2) sold cigarettes in violation of the California

1 Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf. Code §§ 14950-14960;  
 2 and 3) engaged in unfair competition by selling unlawful cigarettes in California, in violation of  
 3 California's Unfair Competition Law, Business and Prof. Code section 17200, et seq.

4 California filed suit in state court because all three claims arise under state law. On  
 5 April 22, 2011, Huber filed a petition for removal in this Court, pursuant to 28 U.S.C. §§ 1441  
 6 and 1446. On April 22, 2011, Huber also filed a notice of removal in the superior court. The  
 7 removal petition seeks removal on the basis of federal question jurisdiction, stating:

8 This action necessarily implicates and required [sic] application of federal law as  
 9 found in the Indian Commerce Clause and as established through nearly two centuries  
 10 of federal common law. Additionally, California's complaint necessarily challenges  
 11 the right of the Wiyot Tribe, and its members, to make and live under their own laws.  
 12 This too necessarily implicates important aspects of long standing federal common  
 13 law.

14 Notice of Removal, at 2-3.

## 15 **ARGUMENT**

### 16 **I. THIS ACTION SHOULD BE REMANDED BECAUSE THERE IS NO FEDERAL QUESTION 17 IN THE COMPLAINT – EMBEDDED OR OTHERWISE**

18 The possibility of a defense based on “federal common law, 28 U.S.C. § 1360, the  
 19 Commerce and Indian Commerce Clauses of the United States Constitution, and the doctrine of  
 20 federal preemption” Rem. Not. at 3, do not make this case removable. *Berg v. Leason*, 32 F.3d  
 21 422, 426 (9th Cir. 1994) (“... neither an affirmative defense based on federal law, nor one based  
 22 on federal preemption, renders an action brought in state court removable”). Even a complete  
 23 defense of tribal sovereign immunity (which Huber does not have) would not justify removal of  
 24 this action. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989).

25 Huber acknowledges that California's complaint asserts only state claims (Huber  
 26 Opp. at 3,) but argues that the complaint raises an embedded federal question; namely, whether  
 27 California is authorized by federal law to enforce its statutes on tribal land. While this may be  
 28 Huber's affirmative defense, it is not embedded within the complaint. None of the authority cited  
 by defendant suggests otherwise. Notably, in only one of the four cases Huber cites for the  
 “embedded in the complaint” proposition (Huber Opp. at 2-3) did the court even uphold removal

jurisdiction, and in that case, *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers*, 159 F.3d 1209, 1212 -13(9th Cir. 1998) the court denied the remand motion only because the federal courts had exclusive jurisdiction over the type of claim. In *Sparta*, the plaintiff brought several state - law claims against a stock market for wrongfully suspending trading and delisting a public offering. Yet, the federal courts are vested with the exclusive jurisdiction to enforce any liability or duty created by the exchange rules, and these rules were directly at issue in the plaintiff's case. *Sparta Surgical Corp, supra*. Consequently, the court found that the case was properly removed to federal court. Federal courts lack exclusive jurisdiction over any of the three California statutes (California's tobacco directory law, California's fire safe cigarette law and California's unfair competition law) at issue here. In defendant's other cases, the "embedded complaint" doctrine was discussed and found to be inapplicable. See *Franchise Tax Board of California v. Construction Laborers Vacation Trust of Southern California*, 463 U.S. 1 (1983); *Rains v. Criterion Systems, Inc.*, 80 F. 3d 339, 344 (9th Cir. 1996); *Ultramar America Limited v. Dwelle*, 900 F. 2d 1412 (9th Cir. 1990). In *Rains*, 80 F.3d at 344, the Ninth Circuit noted that under the artful pleading doctrine a plaintiff may not avoid federal jurisdiction by "omitting from the complaint federal law essential to his claim, or by casting in state law terms a claim that can be made only under federal law," but found that, in fact, the plaintiff had not done so. Similarly in *Ultramar*, 900 F. 2d 1412, the Ninth Circuit found that the district court lacked jurisdiction over the plaintiff's case and should have remanded the case to state court. In each of those cases, however, the defendant was able to state an actual federal claim upon which the complaint could have been based. The current case is based solely on California law claims which do not even have federal counterparts.<sup>1</sup> The "embedded complaint" doctrine has no bearing here.

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<sup>1</sup> While California's Unfair Competition Statute, Business and Prof. Code § 17200, is often described as a "Little FTC Act," the two statutes have been interpreted differently by the courts, and have different enforcement mechanisms.

1           Significantly, Huber does not even respond to the Supreme Court authority squarely  
2 on point, *Oklahoma Tax Comm'n v. Graham*, *supra*, cited by the People in their opening brief at  
3 6. There, the Court stated:

4           [I]t has long been settled that the existence of a federal immunity to the claims  
5 asserted does not convert a suit otherwise arising under state law into one which, in  
6 the statutory sense, arises under federal law. The possible existence of a tribal  
7 immunity defense, then, did not convert [state claims] into federal questions, and  
8 there was no independent basis for original federal jurisdiction to support removal. *Id.*  
9 at 841.

10           Huber does not attempt to distinguish *Oklahoma Tax Comm'n v. Graham* because it is  
11 impossible to do so. Defendant's removal of this case was improper and a waste of time and  
12 resources.

13           *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545  
14 U.S. 308 (2005), another case relied upon by Huber, is distinguishable from the case at hand. In  
15 *Grable*, a property owner claimed that a purchaser's title was invalid because the IRS had failed  
16 to give proper notice, as defined under a federal law (26 U.S.C. § 6335(a)) when it seized the  
17 property. Thus, the state law causes of action were premised on the application of the federal  
18 statute. Obviously, the court found that the meaning of the federal law, and whether the notice  
19 complied with the federal law, was an essential element in the complaint. Thus, the case was  
20 removable to federal court as the allegations "turn on substantial questions of federal law."  
21 *Grable*, 545 U.S. at 312-13. In the present matter, however, California's complaint charges  
22 Huber with illegally selling cigarettes in California and seeks civil penalties and an injunction  
23 against further violation of state law. All three causes of action are based exclusively on state  
24 law, and none of them raise any question of federal law.

25           The present matter is similar to the situation in *Franchise Tax Board of California v.*  
26 *Construction Laborers Vacation Trust of Southern California*, 463 U.S. 1 (1983), a case also  
27 cited by Huber. In *Franchise Tax Board*, the state filed a complaint based on state law seeking to  
28 attach assets held in an employee welfare benefit plan. The defense claimed that the Employee  
Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq., precluded the state

1 from enforcing the claim, and removed the case to federal court. The court found that removal  
2 was improper as the complaint did not raise the federal issue.

3 Although such allegations [as were in the complaint] show that very likely, in the  
4 course of the litigation, a question under the Constitution would arise, they do not  
5 show that the suit, that is, the plaintiff's original cause of action, arises under the  
6 Constitution." *Louisville & Nashville R. Co. v. Mottley, supra*, at 152. For better or  
worse, under the present statutory scheme as it has existed since 1887, a defendant  
may not remove a case to federal court unless the *plaintiff's* complaint establishes that  
the case "arises under" federal law.

7 463 U.S. at 10 (emphasis in original; citations omitted.)

8 Here, federal constitutional questions may also arise during the course of the  
9 litigation, but none of California's causes of action arise under the Constitution or any other  
10 federal law. Thus, as in *Franchise Tax Board*, removal jurisdiction does not exist.

11 The fatal defect in Huber's argument is that nothing in California's claims depends on  
12 resolution of a substantial federal question. Huber states that, "Under established federal law, a  
13 state presumptively lacks the authority to regulate the power or conduct of Indian tribes or tribal-  
14 member Indians in Indian Country. Huber Opp. at 5, citing *Oklahoma Tax Comm'n v. Sac & Fox*  
15 *Nation*, 508 U.S. 114, 125 (1993). Huber's own statement demonstrates exactly why this matter  
16 may not be removed to federal court. The mere fact that a federal law may prohibit state conduct  
17 (exactly the basis for removal that Huber asserts) does not magically convert a state claim into a  
18 federal claim, justifying removal. After this case is remanded state court, Huber is free to raise  
19 any and all defenses, including allegations that California is not authorized to enforce its laws  
20 regarding the sale of tobacco products on tribal land.<sup>2</sup>

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24 <sup>2</sup> Although it is unnecessary to consider the matter in the context of this remand motion,  
the People do, in fact, have authority to pursue this case against Huber. The Supreme Court has  
25 repeatedly found that states have authority to regulate and tax the sale of tobacco products on  
tribal land. The Court has found that such laws and regulations are neither preempted by federal  
26 law nor inconsistent with Indian sovereignty. See *Moe v. Confederated Salish and Kootenai*  
*Tribes of Flathead Reservation*, 425 U.S. 463 (1971); *Washington v. Confederated Tribes of*  
*Colville Indian Reservation*, 447 U.S. 134 (1980); *California Board of Equalization v.*  
27 *Chemehuevi Indian Tribe* 474 U.S. 9 (1985); *Oklahoma Tax Comm. v. Potawatomi Tribe* 498  
U.S. 505 (1991); and *Department of Taxation v. Milhelm Attea & Bros. Inc.*, 512 U.S. 61 (1994).  
28

**II. THIS ACTION SHOULD BE REMANDED TO STATE COURT BECAUSE A POSSIBLE AFFIRMATIVE DEFENSE CANNOT SERVE AS THE BASIS FOR REMOVAL JURISDICTION**

Huber maintains that this action presents a substantial federal question, making it removable, because Huber enjoys a special legal status as Huber Enterprises was chartered by an Indian tribe, and is owned and operated by an Indian. Huber devotes almost a full page of its brief to highlighting the relationship between Huber and the Wiyot Tribe. Huber Opp. at 4. This argument, however, is the precise argument that the Supreme Court rejected in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). In that case, the Tenth Circuit observed that the defendant's tribal status raised the potential question of the tribe's immunity from suit. On that basis, the Tenth Circuit concluded – as Huber argues here – that the action was removable because “a [substantial federal] question is inherent within the complaint because of the parties subject to the action.” *Graham*, 489 U.S. at 840. However, 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”); *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”).

In support of its argument that California's complaint raises a federal question, Huber relies on *Smith v. Kansas City Title & Trust*, 255 U.S. 180 (1921). In that case, the Court found that federal jurisdiction was proper because the plaintiff included a federal constitutional issue directly in his complaint. (“The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is therefore apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question.” *Smith*, 255 U.S. at 201.) *Smith*, therefore, is unlike the situation here, where the



1 federal question is not a necessary element of California's complaint, but arises only as a  
2 potential defense to California's claims.

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

### 10 11 **III. DEFENDANT'S REMOVAL OF THIS CASE WAS IMPROPER AND WARRANTS AN** 12 **ORDER REQUIRING HUBER TO PAY CALIFORNIA ITS JUST COSTS AND EXPENSES** 13 **INCURRED BY THE REMOVAL**

#### 14 **A. Defendant's Law Firm Recently Improperly Removed Two Similar Cases** 15 **Brought by the State Involving Nearly Identical Circumstances**

16 The present case is one of several cases California has filed in state courts in the last  
17 few years against tobacco retailers on tribal land who fail to comply with applicable state laws  
18 and sell contraband cigarettes. In two of these cases, the retailers, represented by the same law  
19 firm representing the defendant here, also removed the cases to federal court, claiming that there  
20 was some federal question that warranted removal. *People of the State of California v. Native*  
21 *Wholesale Supply Co.*, 2008 U.S. Dist LEXIS 108677, 2008 WL 6526755, E.D.Cal., October 8,  
22 2008 (NO. CIVS08-1827 LKK/KJM); *People of the State of California v. Black Hawk Tobacco*  
23 *Inc.* (August 14, 2009) (NO. EDCV 09-1380-VAP). In both cases, however, the courts remanded  
24 the cases to state court, finding that removal had been improper. In one case the court ordered the  
25 case remanded the action sua sponte without waiting for the Motion for Remand to be heard  
26 because it was abundantly clear that the removal attempt was improper. (*Black Hawk Tobacco*  
27 *Inc.* (August 14, 2009) (NO. EDCV 09-1380-VAP).

28 Huber argues that these two cases are factually distinguishable from the present  
matter, but the factual differences are not legally significant. In the earlier cases, both retailers



were Indian-owned corporations selling cigarettes on tribal land. The same is true for Huber. Huber suggests, however, that unlike the other retailers, Huber is a member of the tribe where the retail outlet is located. And because of this difference, Huber continues, this court should not be guided by the two earlier district court decisions. Even if the facts are as Huber suggests, the case is not properly removable because there is still no federal question raised in the complaint. The previous courts found that there was no federal question in the complaints in the two earlier matters, and California filed a nearly identical complaint based on the same causes of action here. The earlier remand decisions turned on the fact that the claims in the complaints were based exclusively on state law. The distinction Huber raises relates solely to potential defenses, and is immaterial to the remand decision

**B. The People Should Be Awarded Reasonable Attorneys' Fees for Being Forced to File This Motion**

Defendant removed this action to federal court without a proper basis. The People warned defendant that removal was improper and that they should voluntarily remand the case or face sanctions. Letter from Phil Priesman to Michael Robinson, May 9, 2011. Nonetheless, defendant refused to remand the case, forcing the People to file this motion. Defendant vigorously defended its position, filing an eighteen page brief. Notably, defendant ignored the Supreme Court precedent cited by the People which squarely rejects the position taken by the defendant herein. Instead, defendant attempted to obfuscate the issue before the Court by discussing irrelevant Native American history (Huber Opp. at 6, 9-14, 17-18) and making bold statements which are unsupported by any authority. See e.g., "California bears the burden of showing federal authorization." Huber Opp. at 13; [A]nytime a state attempts [to] regulate an Indian tribe or reservation Indian the federal authority for its action – and therefore federal law – is necessarily embedded in its claims." Huber Opp. at 16.

Because the People needed to be sure that the proper authority was before the court and to verify that none of the numerous cases cited by the defendant actually bear on the remand

1 issue, the People were forced to spend a considerable amount of time on the motion<sup>3</sup>. Although  
2 the People actually spent many more hours on the case, the People request compensation for 52  
3 hours on the federal action. As described in the Declaration of Phillip S. Priesman filed herewith,  
4 a reasonable market rate for this time is \$450. Therefore, the People request \$23,400 for time  
5 spent on this action.

### 6 CONCLUSION

7 A party invoking the removal statute bears the burden of establishing federal  
8 jurisdiction. Furthermore, the removal statute is strictly construed against removal jurisdiction.  
9 There is a strong presumption against removal jurisdiction, and any doubt must be construed in  
10 favor of remand. Huber cannot satisfy that burden here.

11 Huber certainly may press its contention as an affirmative defense that it is an Indian  
12 and supported by the tribe, and therefore federal law somehow preempts the enforcement of  
13 California's cigarette statutes against it. But Huber must press those allegations in state court, not

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25 <sup>3</sup> The People also negotiated two stipulations with the Defendant. First, we agreed on a  
26 briefing schedule with the Defendant so that the Motion to Dismiss which Defendant immediately  
27 filed in this court after the removal, did not have to be briefed before the remand motion could be  
28 heard, and then we accommodated defense counsel's request for additional time for medical  
reasons.

1 in this Court, which lacks jurisdiction to address them. The People request an immediate remand  
2 of this action and an award of attorneys' fees in the amount of \$23, 400.

3  
4 Dated: June 27, 2011

Respectfully Submitted,

5 KAMALA D. HARRIS  
6 Attorney General of California  
7 KAREN LEAF  
8 Senior Assistant Attorney General  
9 JEANNE FINBERG  
10 Deputy Attorney General

11 /s/ Phillip S. Priesman  
12 PHILLIP S. PRIESMAN  
13 Deputy Attorney General for  
14 People of the State of California

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### CERTIFICATE OF SERVICE

Case Name: **People of the State of California** No. **11-cv-01985 RS**  
**v. Huber Enterprise**

I hereby certify that on June 27, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**PEOPLE'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO REMAND**

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 June 27, 2011, at San Diego, California.

\_\_\_\_\_  
Charlette Sheppard  
Declarant

  
\_\_\_\_\_  
Signature

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