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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

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

Plaintiff,

v.

DARREN PAUL ROSE, individually, and doing business as BURNING ARROW I and BURNING ARROW II, and Does 1 through 20,

Defendants.

Case No. 2:13-cv-00675-LKK-DAD

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND AND FOR ATTORNEY FEES AND COSTS

Date: May 13, 2013
Time: 10:00 a.m.
Dept: 4
Judge: The Hon. Lawrence K. Karlton

Removed from: Superior Court of California, County of Shasta

INTRODUCTION

Plaintiff, the People of the State of California, ex rel. Kamala D. Harris, California Attorney General (the "People") asks this Court to remand this action to state court and for an order awarding fees and costs, including attorney fees, to the People. Removal to federal court was improper because no basis for removal appears on the face of the complaint.

The People filed this action against Darren Rose, individually, and doing business as Burning Arrow I and Burning Arrow II ("Rose"), in the Superior Court of California in and for the County of Shasta on February 14, 2013. Rose is a cigarette retailer located in the State of California. The complaint charges Rose with selling cigarettes illegally in California and seeks civil penalties and an injunction against further violations of state law. The complaint alleges three causes of action:

1. Since at least February 2009, Rose has sold cigarettes that cannot lawfully be sold in California because neither the cigarette brands nor their respective manufacturers are listed on the California Tobacco Directory, in violation of the California directory law, Cal. Rev. & Tax. Code § 30165.1(e);

2. Since at least February 2009, Rose has sold cigarettes that cannot lawfully be sold in California because their manufacturers have not complied with the requirements of the California Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf. Code §§ 14950-14960, relating to the testing, certification and marking of cigarettes that meet specified state ignition-propensity standards; and

3. Rose has engaged in unfair competition by selling illegal cigarettes in California in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210.

In addition, Rose has never collected applicable California cigarette excise taxes from his customers, as required by state law.

All three claims arise under state law. The People sued in Shasta County because Rose resides in this county and one of his two tobacco retail shops is located in this county.

On March 29, 2013, Rose filed a notice of removal to the United States District Court for the Northern District of California under 28 U.S.C. section 1441. By stipulation, Rose agreed to

transfer to this Court. Rose seeks removal on the basis of federal question jurisdiction, stating that "[t]his Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question)." Notice of Removal, p. 2. Rose explains the basis for his removal petition as follows:

> California's complaint seeks to impose and enforce state laws and regulations against a member of the Alturas Indian Rancheria for actions occurring exclusively on Indian trust land within the Alturas Indian Rancheria's jurisdiction. Moreover, California's complaint implicitly seeks to invalidate, or restrict the reach and scope of the laws of the Alturas Indian Rancheria as they pertain to regulation of tribal members and tribal land use. California's causes of action attempt to expand California's jurisdictional authority to enforce state laws against an Indian residing and conducting business on Indian trust land as authorized by Tribal law. California's causes of action necessarily rely upon federal law, namely Public Law 280, 25 U.S.C. § 1360, and necessarily implicate and require application of federal law, as found in the Indian Commerce Clause and as established through nearly two centuries of federal common law. Additionally, California's complaint necessarily challenges the right of the Alturas Indian Rancheria, and its members, to make and live under their own laws. This too necessarily implicates important aspect [sic] of long standing federal common law.

Notice of Removal, pp. 2-3.

These alleged facts, even if true (which they are not), do not support removal. The possibility of a defense based on federal common law, Public Law 280, and the Indian Commerce Clause of the United States Constitution does not make this case removable. *Berg v. Leason*, 32 F.3d 422, 426 (9th Cir. 1994) (". . . neither an affirmative defense based on federal law [citations omitted], nor one based on federal preemption [citation omitted], renders an action brought in state court removable"). Even a defense of tribal sovereign immunity, which Rose does not assert, would not justify removal of this action. *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). In fact, counsel for Rose has presented virtually identical arguments in three recent cases, which the federal district courts promptly remanded to state court after uniformly rejecting such arguments.

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ARGUMENT

I. REMOVAL IS IMPROPER BECAUSE THE PEOPLE DID NOT ASSERT A CLAIM INVOLVING A FEDERAL QUESTION IN ITS COMPLAINT

A. The Defendant Has The Burden Of Demonstrating That Removal Is Proper

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The party seeking removal bears the heavy burden of establishing federal-question jurisdiction. *Ethridge v. Harbor House Rest.*, 861 F.3d 1389, 1393 (9th Cir. 1988). A district court strictly construes the removal statute and resolves any doubt in favor of remand. *Id.*; *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996). "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).

B. Removal Is Permitted Only If A Federal Question Appears On The Face Of The Complaint

"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 the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392; *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.,* 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 Nat'l Bank*, 299 U.S. 109, 113 (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 (1998). "A defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *Franchise Tax Bd.*, 463 U.S. at 13-14 (". . . [S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.").

As is evident from the People's complaint, all causes of action are based on violations of state law. The People allege that Rose violated the California directory law, the California Cigarette Fire Safety and Firefighter Protection Act, the California Unfair Competition Law, and California tax laws. Indeed, Rose admits in his Notice of Removal that "California's complaint *seeks to impose and enforce state laws and regulations* against a member of the Alturas Indian Rancheria . . . ." Notice of Removal, p. 2 (emphasis added). Accordingly, removal is improper because the People's complaint does not raise, nor require the Court to address, a federal question.

II. ROSE'S POSSIBLE AFFIRMATIVE DEFENSES ON FEDERAL CONSTITUTIONAL, STATUTORY, AND COMMON LAW GROUNDS CANNOT PROVIDE A BASIS FOR REMOVAL

Rose misstates the applicable law governing removal when he asserts that a federal question exists because the People's causes of action "necessarily rely upon federal law, namely Public Law 280, 25 U.S.C. § 1360, and necessarily implicate and require application of federal law, as found in the Indian Commerce Clause and as established through nearly two centuries of federal common law." Notice of Removal, p. 2. To the contrary, "'By 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.'" *Franchise Tax Bd*., 463 U.S. at 12 (quoting *Gully*, 299 U.S. at 116). That Indians may be involved in the transactions at issue in this action does not alter the conclusion. The result would be the same even if Rose himself were an Indian tribe, and not just an entity operating on tribal land:

> [I]t has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in 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.

Graham, 489 U.S. at 841 (citing *Gully*, 299 U.S. 109).

Rose claims that this action presents a substantial federal question because he is exempt from state regulation on the grounds that Burning Arrow I and Burning Arrow II are located on Indian trust land and that he is a member of an Indian tribe. Notice of Removal, p. 2. But that is

precisely the argument the Supreme Court rejected in *Graham*. Initially, the Tenth Circuit held that *Graham* was removable on the ground that the defendant's tribal status raised the potential question of the tribe's immunity from the state's suit, but the Supreme Court flatly rejected that reasoning and reversed. *Graham*, 489 U.S. at 840. The Supreme Court held that the defendant's status as a tribe might support a potential *defense* of tribal immunity, but that such a potential defense of federal immunity 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 Hous. 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"). Moreover, "it is the state courts, not the federal courts, that must decide in the first instance whether the states have jurisdiction over a given case." *Ethridge*, 861 F.2d at 1401-02.

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); *see also Caterpillar*, 482 U.S. at 393. 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.

III. THIS COURT AND TWO OTHER FEDERAL DISTRICT COURTS HAVE RECENTLY CONSIDERED AND REJECTED ARGUMENTS VIRTUALLY IDENTICAL TO THOSE IN ROSE'S NOTICE OF REMOVAL

In addition to binding Supreme Court precedent, this very Court, as well as two other federal district courts in California, have recently considered and rejected arguments virtually identical to those made by Rose in this case. In all three previous cases, the courts concluded that removal was improper because the defendants had introduced no more than an anticipated defense.

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Just a few years ago, this Court considered contentions virtually identical to the one Rose makes in this case and remanded the matter back to state court. In *California v. Native Wholesale Supply Company*, 632 F. Supp. 2d 988 (E.D. Cal. 2008), the People's complaint against a cigarette importer alleged the same three state law causes of action as in this matter: violation of the California Directory Law, Cal. Rev. & Tax. Code § 30165.1, the California Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf. Code §§ 14950-14960., and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210. *Id.* at 990. Native Wholesale, represented by the same law firm that represents Rose 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." *Id.* at 991. This Court categorically rejected the argument that this issue gave the court federal-question jurisdiction, holding:

> [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 992-993.

Most recently, the District Court for the Northern District of California considered contentions virtually identical to the ones Rose makes in this case and remanded the matter back to state court. In *California v. Huber*, No. C 11-01985 RS, 2011 WL 2976824 (N.D. Cal., July 22, 2011), attached hereto as Exhibit A, the People's complaint against a cigarette distributor and retailer included the same three state causes of action: the California directory law, the Cigarette Fire Safety and Firefighter Protection Act, and the California Unfair Competition Law. Huber, again represented by the same law firm that represents Rose in this matter, argued that because she was a member of the Wiyot Rancheria operating a retail store within the boundaries of her tribe's reservation, "California cannot avoid raising a federal issue, purportedly because the question of whether federal law authorizes state regulation of a tribal member's conduct on her

reservation is 'embedded' within each of California's state law claims." *Id.* at *2. In *Huber*, Judge Seeborg flatly rejected the defendant's argument that this issue vested the federal court with removal jurisdiction over the action. Judge Seeborg explained:

> The mere fact that a federal law may prohibit state conduct does not necessarily convert a state claim into a federal claim, justifying removal. What it certainly does, of course, is to create a federal *defense* to state law claims that Huber can raise in state court. The Supreme Court's reasoning in *Oklahoma Tax Comm'n v. Graham* is instructive here. 489 U.S. 838, 841 (1989). . . . In *Graham*, the "possible existence of a tribal immunity defense" did not convert Oklahoma's tax claims into federal questions, and California argues it cannot do so here either.
>
> At oral argument, Huber accepted *Graham*'s reasoning but insisted that her basis for removal differs from the sovereign immunity argument that failed in *Graham*. She argues not only that she is immune from *suit*, but also that, absent some federal grant of authority, California lacks regulatory power over a tribal member's activities on her own reservation. If state's power to regulate the activities of reservation Indians assumes Congressional permission, Huber argues that a federal question must be "embedded" in every state effort to regulate. No matter how she words it, however, the directly analogous argument failed in *Graham*: a state's power to *sue* a tribal member, for example, would appear to be "embedded" in any hopeful lawsuit in exactly the same way. . . . Huber introduces no legal authority, or even a logical explanation, to support her theory that one, but not the other, is merely an expected *defense*. In other words, although Huber has identified a slight distinction between her argument and the one raised in *Graham*, she has not explained why it makes any difference.

Id. at *2-3, emphasis in original.

Lastly, the District Court for the Central District of California remanded a nearly identical case to the state court without even hearing argument on the People's motion for remand. In *People of the State of California v. Black Hawk Tobacco Inc.*, No. EDCV 09-1380-VAP (C.D. Cal., August 14, 2009), the People filed a complaint against Black Hawk, a cigarette retailer, based again upon the same three state causes of action found in the complaint against Rose. Black Hawk, again represented by the same firm that represents Rose in this matter, removed the case on the basis that the People's claims "arise under" federal law. *See Black Hawk* Minute Order, dated July 14, 2009, attached hereto as Exhibit B. Based on well-established precedent, Judge Phillips remanded the case to the state court without even hearing argument on the motion. *Id.*

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Here, there is no material difference between Rose's basis for removal and the defendants' bases for removal in *Native Wholesale*, *Huber*, and *Black Hawk*. Accordingly, the Court should reach the same conclusion in this matter.

IV. THE COURT SHOULD REQUIRE ROSE TO PAY THE PEOPLE'S JUST COSTS AND ACTUAL EXPENSES, INCLUDING ATTORNEY FEES, INCURRED AS A RESULT OF THE REMOVAL

The People further ask the Court for an order that Rose pay to the People all "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Counsel for Rose have again presented the same arguments in Rose's notice of removal as they have made in three recent cases involving virtually identical state causes of action, which the Eastern District (*Native Wholesale*), Northern District (*Huber*), and Central District (*Black Hawk*) uniformly rejected. In all three cases, the district courts found no basis for removal and remanded the cases back to the state court. Further, after Rose filed his Notice of Removal, the People advised Rose's counsel that because this was the fourth time they had raised the same arguments in nearly identical cases despite their lack of success in their last three attempts, the People would seek costs and expenses, including attorney fees, associated with responding to the motion. *See* E. Rosenberg letter to M. Robinson, dated April 4, 2013, attached hereto as Exhibit C.

The People's request for fees and costs is justified by 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, Rose's notice of removal is not supported by existing law. In fact, the law is clear that remand is improper in this case as there is no federal question on the face of the complaint. Further, Rose's counsel has been reminded by federal district courts on three separate occasions that the arguments presented here do not warrant removal. Absent any legal basis for removal, defense counsel's repeated practice of filing nearly identical unsuccessful notices in other, similar matters lacks an objectively reasonable basis. Thus, an award of the People'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.

CONCLUSION

As demonstrated above, Rose's potential defenses do not justify removal of this action pursuant to 28 U.S.C. section 1441. Therefore, the Court should grant the People's motion to remand this action to the Shasta County Superior Court and award the People its just costs and expenses, including attorney fees, incurred as a result of Rose's removal of this action.

Dated: April 10, 2013

Respectfully Submitted,

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/s/

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Exhibit A

Not Reported in F.Supp.2d, 2011 WL 2976824 (N.D.Cal.)
(Cite as: 2011 WL 2976824 (N.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court, N.D. California,
San Francisco Division.
People of the State of CALIFORNIA, Plaintiff,
v.
Ardith HUBER, Defendant.

No. C 11–1985 RS.
July 22, 2011.

Phillip S. Priesman, State Attorney General's Office, San Diego, CA, Jeanne Finberg, State Attorney General's Office, Oakland, CA, for Plaintiff.

Michael Arthur Robinson, Fredericks Peebles & Morgan LLP, Sacramento, CA, for Defendant.

ORDER OF REMAND

RICHARD SEEBORG, District Judge.

I. INTRODUCTION

***1** Defendant removed this matter from the Superior Court for the County of Humboldt on April 22, 2011. Plaintiff, the People of the State of California ("California"), moves here to remand. California insists its complaint relies solely on state law, and does not raise a substantial federal question necessary to resolution of these claims. Accordingly, it argues there are no grounds to support removal. Defendant counters first that, absent authorization under federal law, California lacks regulatory authority over a member of an Indian Tribe, like Huber, for actions taken within the boundaries of her Tribe's reservation. The question for decision here is whether, as plaintiff argues, defendant's argument operates merely as an anticipated defense to plaintiff's state law claims or if it instead constitutes a "substantial issue of federal law" necessarily raised in the underlying claims. The weight of authority supports California's view that Huber has introduced no more than an anticipated defense. Removal therefore was improper and the matter must be remanded to the Superior Court for Humboldt County. California's request for an award of attorney's fees and costs associated with this motion will be denied.

II. Background

Defendant Ardith Huber is a cigarette retailer who operates in the State of California. More specifically, Huber is a member of the Wiyot Tribe and apparently operates Huber Enterprises out of her home, which is also located on the Wiyot Reservation. California seeks damages and injunctive relief, pursuant to three legal theories: (1) Huber has violated the Tobacco Directory Law, Cal. Rev. & Tax.Code § 30165.1, by selling cigarette brands which have never qualified for listing on California's Tobacco Directory; (2) Huber has violated the Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf.Code § 14950, by selling cigarettes that have not undergone testing required by the Code; and (3) the conduct amounts to unfair competition, pursuant to Cal. Bus. & Prof.Code § 17200.

III. LEGAL STANDARD

The federal removal statute, 28 U.S.C. § 1441(a), permits a defendant to remove to federal court "only [those] state court actions that originally could have been filed in federal court...." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Absent diversity of citizenship, federal-question jurisdiction is required. *Id.* The party invoking section 1441 bears the burden of establishing federal question jurisdiction and a district court strictly construes the statute against removal. *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir.1988).

The presence or absence of a federal question 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 a plaintiff's properly pleaded complaint. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998) (quoting *Caterpillar*, 482 U.S. at 392). This is possible in one of two scenarios. First, and most commonly, federal question jurisdiction exists if a federal right or immunity is " 'an element, and an essential one, of the plaintiff's cause of action.' " *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 11, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70 (1936)). Crucially, however, a "defense is not part of a plaintiff's properly pleaded statement of his or her claim." *Rivet*, 522 U.S. at 471 (citation omitted). "[A] case

may not be removed to federal court on the basis of a federal defense, ... even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). *Cf. Franchise Tax Bd.*, 463 U.S. at 14

***2** Second, a federal question may arise where a state claim "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally-approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). The federal issue must be "a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Id.* at 313. That said, insofar as the doctrine "raises difficult issues of state and federal relationships," a court may invoke it only in limited, fitting circumstances. *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1041 (9th Cir.2003).

IV. DISCUSSION

A. *Federal Question Jurisdiction*

Plainly, California has not alleged any claims that, at least facially, arise under the laws of the United States. Removal would only be appropriate, then, if California's claims "necessarily raise" a federal issue that is "actually disputed and substantial." *Grable*, 545 U.S. at 314. Huber insists California cannot avoid raising a federal issue, purportedly because the question of whether federal law authorizes state regulation of a tribal member's conduct on her reservation is "embedded" within each of California's state law claims. Defendant invokes numerous Supreme Court cases generally recognizing the federal government's plenary authority, vis-à-vis individual states, over tribal affairs (particularly where a state endeavors to *tax* resident members of an Indian tribe). *See, e.g., Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 167–68, 179–80, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). What none of the cases cited actually do, however, is hold that plenary authority means a federal issue is "embedded" in any application of state law against a member of an Indian tribe, creating a basis for removal.

The mere fact that a federal law may prohibit state conduct does not necessarily convert a state claim into a federal claim, justifying removal. What it certainly does, of course, is to create a federal *defense* to state law claims that Huber can raise in state court. The Supreme Court's reasoning in *Oklahoma Tax Comm'n v. Graham* is instructive here. 489 U.S. 838, 841, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). There, Oklahoma filed a complaint against both the Chickasaw Tribe and the individual who managed a tribal enterprise that conducted bingo games and sold cigarettes. *Id.* at 839. Oklahoma sought to collect unpaid state excise taxes on the sale of cigarettes and taxes on the receipts from the bingo games. The Chickasaw Nation, asserting federal question jurisdiction under 28 U.S.C. section 1331, removed the action. Oklahoma moved to remand, arguing in part that the complaint alleged on its face only state statutory violations and state tax liabilities.

***3** The Supreme Court determined that "[t]ribal immunity may provide a federal defense to Oklahoma's claims." *Id.* at 841 (citing *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977)). "But it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." *Id.* (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936)). The jurisdictional question, in other words, was not affected by the fact that "tribal immunity is governed by federal law." *Id.* "Congress," the Court reminded, "has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities" but has not done so in this arena. *Id.* In *Graham*, the "possible existence of a tribal immunity defense" did not convert Oklahoma's tax claims into federal questions, and California argues it cannot do so here either.[FN1]

> FN1. Huber did not address *Graham* in her papers or attempt to explain how the Court's subsequent *Grable* framework might somehow render *Graham'* s analysis outdated or incorrect. A brief review of *Grable* suggests she could not. As the Ninth Circuit recently emphasized, *"Grable* did not implicitly overturn the well-pleaded complaint rule—which has long been a 'basic principle

> marking the boundaries of the federal question jurisdiction of the federal district courts,'*Metropolitan Life,* 481 U.S. at 63 —in favor of a new 'implicate[s] significant federal issues' test."*Cal. Shock Trauma Air Rescue v. State Compensation Ins. Fund,* 636 F.3d 538, 542 (9th Cir.2011) . The complaint in Grable did present a federal issue on its face. As the Supreme Court explained, that complaint "premised its [state-law] superior title claim on a failure by the IRS to give it adequate notice, as *defined by federal law." Grable,* 545 U.S. at 314–15 (emphasis added). The Ninth Circuit has therefore instructed that *"Grable* stands for the proposition that a state-law claim will present a justiciable federal question only if it satisfies both the well-pleaded complaint rule and passes the 'implicate[s] significant federal issues' test." *Cal. Shock Trauma,* 636 F.3d at 542. Particularly where *Graham* expressly found that tribal immunity is a defense, and not a federal question implicit in any application of state law against a tribe or member of a tribe, an immunity argument is distinguishable from the complaint in *Grable,* and it would not satisfy the test outlined there.

At oral argument, Huber accepted *Graham'* s reasoning but insisted that her basis for removal differs from the sovereign immunity argument that failed in *Graham.*[FN2] She argues not only that she is immune from *suit,* but also that, absent some federal grant of authority, California lacks regulatory power over a tribal member's activities on her own reservation. If a state's power to regulate the activities of reservation Indians assumes Congressional permission, Huber argues that a federal question must be "embedded" in every state effort to regulate. No matter how she words it, however, the directly analogous argument failed in *Graham:* a state's power to *sue* a tribal member, for example, would appear to be "embedded" in any hopeful lawsuit in exactly the same way. Indeed, the argument endorsed by the circuit court but *rejected* by the Supreme Court ran as follows: "as a prerequisite to stating jurisdiction over a recognized Indian tribe, ... 'an alleged waiver or consent to suit is a necessary element of the well-pleaded complaint.' " *Graham,* 489 U.S. at 840 (quoting lower court opinion). The Supreme Court disagreed. It characterized the immunity question as a defense incapable of converting a state claim into a federal one. Huber introduces no legal authority, or even a logical explanation, to support her theory that one, but not the other, is merely an expected *defense.* In other words, although Huber has identified a slight distinction between her argument and the one raised in *Graham,* she has not explained why it makes any difference.

> FN2. The assertion is somewhat inconsistent with her opposition papers. There, plaintiff claimed a federal question was at stake for two reasons. First, she claimed the "case depends" on whether California can point to federal authority allowing it to enforce its laws. Second, Huber indicated the case depends on whether "federal law allows California to upset tribal laws" by ignoring an ordinance that "cloaks Huber with the Wiyot Tribe's sovereign immunity." (Pl.'s Opp'n at 5:10–17.)

Lending additional support are two recent federal district court orders remanding identical state law claims lodged against tobacco retailers for the sale of contraband cigarettes on tribal lands. *See California v. Native Wholesale Supply Co.,* 632 F.Supp.2d 988 (E.D.Cal.2008); *California v. Black Hawk Tobacco, Inc.,* (August 14, 2009) (No. EDCV 09–1380–VAP). In both cases, the defendants removed to federal court, claiming that a federal question warranted removal. In both cases, the district courts remanded—either sua sponte or upon California's motion—to the state court. In *Native Wholesale Supply,* the court disagreed that federal law either created the plaintiff's cause of action or the underlying right that California sought to vindicate:

> ***4** 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.... [T]his does not give rise to federal question jurisdiction. *Native Wholesale Supply,* 632 F.Supp.2d at 993.

In *Black Hawk Tobacco,* the district court remanded the matter sua sponte by minute order, and so only briefly noted that remand was necessary because plaintiff's claims did not arise under federal law. Al-

though defendant does not argue these courts misapplied the law, she attempts to distinguish this matter from those on the facts. In both cases, the defendant retailers were Indian-owned corporations that sold cigarettes on tribal land. The same is true of Huber and Huber Enterprises. The difference is that the two other retailers were not members of the particular tribe on whose reservation their retail outlets were located. As Huber points out, states have broader authority to regulate the conduct of non-Indians that takes place on a reservation. *See, e.g.*, *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) (recognizing "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"). Huber asserts the same is true for the conduct of non-*member* Indians on a reservation. Again, however, Huber has located a distinction without any legal significance, at least as to the removal question. Possibly, Huber, as a resident Indian, would have a stronger defense to state regulation than the defendants in *Native Wholesale Supply* and *Black Hawk Tobacco. Graham,* however, renders the "embedded" argument unworkable.

B. *Attorney's Fees and Costs*

An order remanding a removed case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 134, 126 S.Ct. 704, 163 L.Ed.2d 547, (2005). California seeks such an award here. As the Supreme Court has instructed, "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin,* 546 U.S. at 141. Plaintiffs argue that because two federal courts have rejected nearly identical removal arguments advanced by the law firm representing defendants in this case, defendants should have known the argument lacked merit. Those cases do not represent binding authority, however, and even though Huber's arguments are not persuasive, there was at least an objectively reasonable basis to make them. The fee motion must be denied.

V. Conclusion

***5** For the reasons stated above, this action will remanded to the Superior Court for Humboldt County. Defendant's request for attorney's fees and costs is denied.

IT IS SO ORDERED.

N.D.Cal.,2011.
California v. Huber
Not Reported in F.Supp.2d, 2011 WL 2976824 (N.D.Cal.)

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Exhibit B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. EDCV 09-1380-VAP (CTx) Date: August 14, 2009

Title: THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN, JR. -*v*- BLACKHAWK TOBACCO, INC., et al.

==========

PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: MINUTE ORDER REMANDING ACTION TO CALIFORNIA SUPERIOR COURT, RIVERSIDE COUNTY (IN CHAMBERS)

On June 10, 2009, the People of the State of California ("Plaintiffs") filed a Complaint against Defendants Blackhawk Tobacco, Inc., and Frederick Allen McAllister ("Defendants"). On July 9, 2009, Defendant removed the action on the basis of federal question jurisdiction, 28 U.S.C. § 1331. (See Not. of Removal at 1-2.)

Removal jurisdiction is governed by statute. See 28 U.S.C. §1441, et seq. The Ninth Circuit applies a strong presumption against removal jurisdiction, ensuring "the defendant always has the burden of establishing that removal is proper." Gaus

v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (citing Nishimoto v. Federman-Bachrach & Assocs., 903 F.2d 709, 712 n.3 (9th Cir. 1990)); see also In re Ford Motor Co./Citibank (South Dakota), N.A., 264 F.3d 952, 957 (9th Cir. 2001) ("The party asserting federal jurisdiction bears the burden of proving the case is properly in federal court.").

Defendants claim the basis for removal is federal question jurisdiction, 28 U.S.C. § 1331, because the claims "arise under" federal law. (See Not. of Removal at 1.) From the face of the Complaint, Plaintiffs' claims allege only violations of California state law. See Franchise Tax Bd. v. Constr. Laborers Trust, 463 U.S. 1, 10 (1983) (defendant may not remove case to federal court unless basis for federal jurisdiction apparent on the face of the complaint). Accordingly, Defendants have not shown the Court's jurisdiction based on federal question, 28 U.S.C. § 1331.

Defendants have not met their burden of establishing that the case is properly in federal court. Gaus, 980 F.2d at 566. Accordingly, the Court REMANDS the action to the Superior Court of California, Riverside County.

Plaintiff's Motion for Remand, currently set for hearing on August 31, 2009 at 10:00 a.m. is MOOT and the Court VACATES the hearing.

IT IS SO ORDERED.

Exhibit C

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

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April 4, 2013

Sent via Certified Mail and Electronic Mail
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RE: *People of the State of California v. Darren Paul Rose, et al.*
United States District Court, Northern District of California,
Case No. 3:13-CV-01420-JSC

Dear Mr. Robinson:

I have reviewed the Notice of Removal that you filed on behalf of Darren Rose in the above-entitled case. As far as I can tell, the basis asserted for removing this action is virtually identical to the bases your firm previously asserted for removing the Huber, Native Wholesale Supply, and Black Hawk matters. As you know, the federal district courts remanded all three of these matters back to the state superior courts. We see no objectively reasonable basis for your firm continuing to remove these matters to federal court based on the same unsuccessful arguments. Thus, we intend to seek payment of costs and expenses, including attorney fees, associated with the removal action in this matter pursuant to 28 U.S.C. section 1447(c). Please let me know whether your client will reconsider and stipulate to remand in this matter.

Sincerely,

ERIN W. ROSENBERG
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

EWR: kl/de

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