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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

NO. CIV. S-13-0675 LKK/DAD

Plaintiff,

v.

O R D E R

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

Defendants.

_____ /

Plaintiff State of California initially sued defendant Darren Rose in Shasta County Superior Court, alleging that Rose violated state law by selling certain unregistered cigarette brands and by failing to properly collect & remit tobacco excise taxes. Rose removed the matter to this court, alleging federal question jurisdiction. California now moves to remand, and seeks an accompanying award of attorney's fees and costs if it prevails on this motion.

1 The motion came on for hearing on May 13, 2013. Having
2 considered the matter, for the reasons set forth below, the court
3 will grant California's motion and remand this matter.¹

4 **I. BACKGROUND**

5 The following allegations are taken from the complaint and the
6 notice of removal.

7 California alleges that Rose's sale of certain cigarettes
8 (including the Skydancer, Sands, Seneca, Opal, Couture, King
9 Mountain, Heron, and Native Pride brands) were unlawful because
10 their manufacturers failed to comply with state financial
11 responsibility laws and/or because the brands have not been
12 certified as meeting state fire safety standards. California also
13 alleges that Rose failed to collect and remit excise taxes on the
14 sales of these cigarettes.

15 On February 14, 2013, California filed suit against Rose in
16 Shasta County Superior Court, alleging violations of
17 (1) California's Tobacco Directory Law, Cal. Rev. & Tax Code
18 § 30165.1; (2) the California Cigarette Fire Safety and Firefighter
19 Protection Act, Cal. Health & Safety Code §§ 14950-14960; and
20 (3) California's Unfair Competition Law, Cal. Bus. & Prof. Code §§
21 17200, *et seq.* The state seeks injunctive relief, monetary
22 penalties, and attorney's fees and costs.

23
24 ¹ Although the court believes that remand is appropriate, I
25 note that defendant's motion is not without substance, given the
26 implicit tension between Supreme Court codes noted below.
Nonetheless, that tension is resolved, for this court, by the Ninth
Circuit, also noted below.

1 Rose is a member of the Alturas Indian Rancheria of
2 California, a federally recognized Indian tribe. Rose sold
3 cigarettes at two smoke shops (Burning Arrow I in Siskiyou County,
4 and Burning Arrow II in Shasta County) on tribal land. He alleges
5 that these sales were pursuant to a Tribal Tobacco Ordinance
6 enacted by the tribe.

7 On March 29, 2013, Rose erroneously removed this action to the
8 U.S. District Court for the Northern District of California. (ECF
9 No. 1.) On April 5, 2013, the Northern District transferred the
10 case to this court. (ECF No. 5.) On April 10, 2013, California
11 moved to remand.

12 **II. STANDARD RE: REMOVAL**

13 Except where Congress has otherwise provided, "any civil
14 action brought in a State court of which the district courts of the
15 United States have original jurisdiction, may be removed by the
16 defendant . . . to the [appropriate] district court[.]" 28 U.S.C.
17 § 1441(a).

18 The Supreme Court has explained that:

19 Only state-court actions that originally could have been
20 filed in federal court may be removed to federal court
21 by the defendant. Absent diversity of citizenship,
22 federal-question jurisdiction is required. The presence
23 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 the plaintiff's properly
pleaded complaint.

24 Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

25 Generally, for a federal question to be presented, "a right
26 or immunity created by the Constitution or laws of the United

1 States must be an element, and an essential one, of the plaintiff's
2 cause of action." Gully v. First Nat'l. Bank, 299 U.S. 109, 112
3 (1936).

4 The Supreme Court has also recognized, however, that "in
5 certain cases federal-question jurisdiction will lie over state-law
6 claims that implicate significant federal issues." Grable & Sons
7 Metal Prods., Inc. v. Darue Eng'g. & Mfg., 545 U.S. 308, 312
8 (2005). To identify such cases, district courts are to ask whether
9 state law claims "necessarily raise a stated federal issue,
10 actually disputed and substantial, which a federal forum may
11 entertain without disturbing any congressionally approved balance
12 of federal and state judicial responsibilities." Id. at 314. The
13 Ninth Circuit has interpreted Grable to mean that "a state-law
14 claim will present a justiciable federal question only if it
15 satisfies *both* the well-pleaded complaint rule *and* passes the
16 'implicate[s] significant federal issues' test" articulated by
17 Grable. Cal. Shock Trauma Air Rescue v. State Compensation Ins.
18 Fund, 636 F.3d 538, 542 (9th Cir. 2011) (emphasis in original).
19 Thus, "a case may not be removed to federal court on the basis of
20 a federal defense . . . even if the defense is anticipated in the
21 plaintiff's complaint, and even if both parties admit that the
22 defense is the only question truly at issue in the case." Rivet v.
23 Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) (internal
24 quotation and citation omitted).

25 The party invoking the removal statute bears the burden of
26 establishing federal jurisdiction. California v. Dynergy, Inc., 375

1 F.3d 831, 838 (2004). The removal statute is to be strictly
2 construed against removal, and any doubt is resolved in favor of
3 remand. Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996).

4 **III. ANALYSIS**

5 **A. Is federal jurisdiction proper?**

6 **1. The precedential import of California v. Huber**

7 At the outset, the court notes that a recent order in
8 California v. Huber, No. C 11-1985, 2011 WL 2976824, 2011 U.S.
9 Dist. LEXIS 80089 (N.D. Cal. Jul. 22, 2011) (Seeborg, J.) appears
10 dispositive of this matter.² Huber concerns a member of an Indian
11 tribe who sold cigarettes on tribal land. California sued her under
12 state law, alleging the same state-law causes of action alleged
13 herein. The Huber defendant removed to federal court; subsequently,
14 on plaintiff's motion, the matter was remanded to state court. In
15 Huber, as in this action, plaintiff was represented by the
16 California State Attorney General's Office and defendant was

17
18 ² The court is also mindful that its decision in California
19 v. Native Wholesale Supply Co., 632 F. Supp. 2d 988 (E.D.
20 Cal. 2008) (Karlton, J.) bears on the issues presented. In Native
21 Wholesale, the State of California alleged that defendant, a
22 corporation chartered by a Native American tribe in Oklahoma, with
23 its principal place of business in New York, was distributing and
24 selling cigarettes in California in violation of state law. This
25 court held that, "[a]lthough resolution of this issue [of tribal
26 immunity] 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 993. Rose, the defendant herein,
seeks to distinguish Native Wholesale as involving the actions of
a Native American corporation operating on another tribe's
reservation, as opposed to a Native American acting on his own
tribe's reservation, as here. As discussed in this order, this
distinction does not change the court's conclusion that this matter
must be remanded.

1 represented by the law firm of Fredericks Peebles & Morgan LLP.

2 One rarely finds a precedent that is more squarely on point
3 with a case than Huber is with the present matter. While Huber is
4 not binding on this court, it must be treated as persuasive
5 precedent. The only reason not to follow it and remand this action
6 would be if it were decided wrongly.

7 This is precisely what Rose urges: he argues that, in reaching
8 its decision, the Huber court misapplied Oklahoma Tax Comm'n v.
9 Graham, 489 U.S. 838 (1989). Graham concerns a suit by the State
10 of Oklahoma against an Indian tribe for, *inter alia*, failing to
11 collect and remit to the state certain taxes collected from
12 cigarette sales. The tribe removed the suit to federal court, which
13 in turn denied a motion to remand by Oklahoma. In a per curiam
14 opinion, the Supreme Court held that the district court should have
15 remanded, reasoning:

16 [T]he existence of a federal immunity to the claims
17 asserted does not convert a suit otherwise arising under
18 state law into one which, in the statutory sense [under
19 28 U.S.C. § 1441(a)], arises under federal law. The
20 possible existence of a tribal immunity defense, then,
did not convert Oklahoma tax claims into federal
questions, and there was no independent basis for
original federal jurisdiction to support removal.

21 Id. at 841 (internal citation omitted).

22 Rose attempts to distinguish Graham and Huber on the grounds
23 that he is not asserting federal jurisdiction on the basis of
24 tribal immunity; instead, he claims, the complaint herein itself
25 gives rise to federal jurisdiction. The merits of his arguments are
26 considered below.

1 **2. Does federal jurisdiction arise from the face of the**
2 **complaint?**

3 Rose argues that he is not claiming federal jurisdiction based
4 on tribal immunity; rather, he asserts that jurisdiction arises
5 from California raising a federal issue on the face of its
6 complaint. Specifically, a pre-suit cease-and-desist letter to
7 Rose, attached as an exhibit to the complaint, provides: "It is
8 irrelevant to the application of these laws that the properties on
9 which your two smoke shops are operating are tribal-member
10 allotments held in trust by the United States." (ECF No. 1-2 at
11 14.) As "[a] copy of a written instrument that is an exhibit to a
12 pleading is a part of the pleading for all purposes," Fed. R. Civ.
13 P. 10(c), Rose contends that, by including the letter as an
14 exhibit, California has raised the immunity issue in its complaint.
15 (Opposition 8.)

16 This argument betrays a misunderstanding of the "well-pleaded"
17 complaint rule. Just because the complaint *discusses* a federal
18 doctrine does not mean that the complaint *presents* a federal
19 question. The test remains whether "a right or immunity created by
20 the Constitution or laws of the United States [is] an element, and
21 an essential one, of the plaintiff's cause of action." Gully, 299
22 U.S. at 112. See also 14B Charles Alan Wright & Arthur Miller,
23 Federal Practice and Procedure § 3722 (4th ed. 2013) ("The mere
24 reference to some aspect of federal law in the complaint does not
25 automatically mean that an action is removable"); 13D Charles Alan
26 Wright & Arthur Miller, Federal Practice and Procedure § 3566 (3d

1 ed. 2013) ("It is not uncommon for a plaintiff to allege not only
2 the claim but to anticipate and rebut a defense or to plead
3 something else irrelevant to the claim itself. The well-pleaded
4 complaint rule stands for the proposition that the court, in
5 determining whether the case arises under federal law, will look
6 only to the claim itself and ignore any extraneous material");
7 Rogers v. Rucker, 835 F. Supp. 1410, 1412 (N.D. Ga. 1993) ("[T]he
8 complaint will not avail as a basis of jurisdiction in so far as
9 it goes beyond a statement of the plaintiff's cause of action and
10 anticipates or replies to a probable defense").

11 Here, California's reference to the situs of Rose's smoke
12 shops on tribal land is evidently meant to disabuse him of the
13 notion that tribal immunity will protect him from suit. It is a
14 warning written in anticipation of a probable defense, not an
15 assertion of the ability to prove an essential element of a claim.³

16 Rose has failed to demonstrate that federal jurisdiction
17 arises from the face of plaintiff's complaint, even if the
18 complaint is deemed to include the exhibits thereto.

19 **3. Is a federal question inherently present in the state**
20 **law causes of action?**

21 Rose next argues that federal jurisdiction is warranted
22 because a federal question is inherent in the complaint. He
23 contends that, "Under established federal law, a state
24 presumptively lacks the authority to regulate the property or

25
26 ³ Whether the Attorney General's position is well taken will
have to be decided by the state courts.

1 conduct of Indian tribes or tribal-member Indians in Indian
2 country." (Opposition at 10, ECF No. 8.) According to Rose, states
3 may only regulate a tribal member on tribal land under an express
4 statutory grant from Congress. (Id. at 6.) Otherwise, "the only
5 sovereign other [sic] that may regulate a tribal members [sic]
6 acting within their reservations is the federal government." (Id.
7 at 10.) Accordingly, "California must rely on federal law . . . in
8 order [sic] enforce its statutes against an Indian acting in Indian
9 Country." (Id. at 11.)

10 California counters that states have additional grounds,
11 beyond an express Congressional grant of authority, to exercise
12 jurisdiction over tribal members on tribal land. (Reply at 4-5, ECF
13 No. 9.) California has the better of this argument. It is well-
14 settled that "Indian activities and property in Indian country are
15 ordinarily immune from state taxes and regulation." 1-6 Nell J.
16 Newton, et al. Cohen's Handbook of Federal Indian Law § 6.03
17 (2012). This principle dates back as far as Worcester v. Georgia,
18 31 U.S. 515, 557 (1832) ("[T]he several Indian nations [constitute]
19 distinct political communities, having territorial boundaries,
20 within which their authority is exclusive . . ."). Nevertheless,
21 the Supreme Court has recognized that there exists no "inflexible
22 *per se* rule precluding state jurisdiction over tribes and tribal
23 members in the absence of express congressional consent."
24 California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-5
25 (1987). As it stands, "in exceptional circumstances a State may
26 assert jurisdiction over the on-reservation activities of tribal

1 members." Id. at 215 (quoting New Mexico v. Mescalero Apache Tribe,
2 462 U.S. 324, 331-2 (1983)). With these principles in mind, I turn
3 to a recent decision by by a unanimous Supreme Court, Grable, 545
4 U.S. at 308, for whether state law claims sufficiently implicate
5 federal issues so as to warrant removal.

6 The first Grable prong asks whether the state law claims
7 "necessarily raise a stated federal issue[.]" Here, they do not.
8 The statutes under which California sues do not appear to require
9 proof of the ability to regulate conduct on tribal land.
10 Accordingly, California need not demonstrate that it has the right
11 to proceed against Rose (whether under an enabling federal statute
12 or due to some "exceptional circumstance" recognized by the courts)
13 *unless Rose first raises tribal immunity as an affirmative defense.*
14 If California asserts that unlawful cigarette sales took place
15 within its territory, it is up to Rose to contest this fact. In the
16 absence of such a defense, California could go about proving the
17 elements of its state law claims without any reference to, say,
18 Public Law 280.⁴ In other words, California's right to recovery
19 does not "require[] resolution of a substantial question of federal
20 law in dispute between the parties." Franchise Tax Bd. v Constr.
21 Laborers Vacation Trust, 463 U.S. 13 (1983).

22
23 ⁴ "In Pub.L. 280, Congress expressly granted six States,
24 including California, jurisdiction over specified areas of Indian
25 country within the States In § 2, California was granted
26 broad criminal jurisdiction over offenses committed by or against
Indians within all Indian country within the State. Section 4's
grant of civil jurisdiction was more limited." Cabazon, 480 U.S.
202, 207 (1987).

1 To be clear, there is little doubt that the other two Grable
2 prongs could be satisfied. The limits of state authority to
3 regulate tribe members' activities on tribal land continues to be
4 a "disputed and substantial" issue. Grable, 545 U.S. at 314. And
5 as for concerns about "disturbing any congressionally approved
6 balance of federal and state judicial responsibilities," it has
7 been recognized that federal court may be the better forum for
8 resolving disputes between the states and Native American tribes.
9 See, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886)
10 ("Because of the local ill feeling, the people of the States where
11 [the Indians] are found are often their deadliest enemies"); Idaho
12 v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 313 n.11 (Souter,
13 J., dissenting) ("[W]hen the plaintiff suing the state officers has
14 been an Indian tribe, the readiness of the state courts to
15 vindicate the federal right has been less than perfect").

16 Ultimately, Rose has failed to show that the complaint
17 necessarily raises tribal immunity, rather than merely creating a
18 (substantial) likelihood that immunity will be raised as an
19 affirmative defense.

20 **4. Is a federal question raised as to property rights in**
21 **tribal land?**

22 Rose also argues that, at bottom, this dispute "may be
23 characterized as one concerning ownership and possession of Indian
24 land, and is therefore barred from state court jurisdiction."
25 (Opposition at 15, quoting Boisclair v. Superior Court, 51 Cal. 3d
26 1140, 1154 (1990) (holding, *inter alia*, that California courts

1 cannot adjudicate rights to alleged tribal land.))

2 Rose's argument makes little sense, as it is based on the
3 assumption that "[i]f Exhibit A [*i.e.*, the state's pre-suit letter
4 to Rose, discussed *supra*] is not included in the face of
5 California's Complaint, the Complaint fails to acknowledge the
6 trust status of the land and, by that omission, asserts that the
7 land is non-trust land in California." (Opposition at 15.) First,
8 under Fed. R. Civ. P. 10(c), it appears that the letter should be
9 treated as part of the complaint, and Rose gives no reason for not
10 doing so. Second, federal jurisdiction cannot be premised on
11 speculation about an argument that the plaintiff might make in the
12 course of litigation. If, at some point in this lawsuit, California
13 seeks to obtain property rights in tribal land, then the propriety
14 of federal jurisdiction can be considered at that time.

15 In sum, Rose has failed to establish federal jurisdiction over
16 this action, and it should be remanded to state court.

17 **B. Is California entitled to an award of fees and costs?**

18 California moves for an award of fees and costs under Fed. R.
19 Civ. P. 11(b), asserting that Rose's removal petition was presented
20 to cause unnecessary delay, and was not warranted by existing law,
21 particularly given the recent remand orders in Native Wholesale,
22 632 F. Supp. 2d at 988, and Huber, 2011 WL 2976824, 2011 U.S. Dist.
23 LEXIS 80089.

24 I do not find Rule 11 sanctions to be warranted. Huber
25 provides that the defendant therein "did not . . . attempt to
26 explain how the [Supreme] Court's subsequent Grable framework might

1 somehow render Graham's analysis outdated or incorrect." Id. at *3
2 n.1. While the court went on to make a brief application of Grable
3 to the facts of that case, the parties evidently did not brief the
4 relevant issues as they did here. Their briefing enabled a more
5 thorough consideration of the subject.

6 Further, the question of when remand is warranted in cases
7 involving tribal sovereignty remains unsettled. The Second
8 Circuit's recent opinions in New York v. Shinnecock Indian Nation,
9 686 F.3d 133 (2nd Cir. 2012) (remanding on the basis that the
10 complaint, which alleged that construction of casino would violate
11 state gaming & environmental laws and local zoning & wetlands
12 protection ordinances, only alleged violations of state law); 701
13 F.3d 101 (2nd Cir. 2012) (denying rehearing *en banc*) each provoked
14 powerful dissents. To wit:

15 [F]ederal-question jurisdiction exists in this case not
16 because of these anticipated defenses [of tribal
17 immunity] but because the Plaintiffs, in order to
18 establish that they have any authority over the Tribe's
19 activities at issue, must prove in their case-in-chief
20 that [the disputed property] is not Indian land. The
21 majority ignores the antecedent nature of this inquiry
and overlooks the fact that the Plaintiffs' authority to
regulate the Tribe's activities on the [disputed] parcel
necessarily turns on whether the Tribe holds aboriginal
title to the land in question and ultimately whether
[it] is Indian land – issues plainly arising under the
laws of the United States.

22 701 F.3d at 106 (Hall, J., dissenting).

23 These arguments echo those of the defendant herein: that
24 California's ability to regulate Rose's conduct on tribal land turn
25 on the question of whether the state has the requisite authority
26 to enforce its laws. While I found (as the majority of the

1 Shinnecock panel did) that this inquiry is in the nature of an
2 affirmative defense, rather than an element of plaintiff's lawsuit,
3 it is apparent that reasonable jurists continue to disagree as to
4 whether district courts have subject matter jurisdiction over state
5 law claims that implicate Native American sovereignty.

6 Sanctions are hardly warranted under such circumstances.

7 **IV. CONCLUSION**


8 The court orders as follows:

9 [1] Plaintiff's motion to remand is GRANTED. The clerk
10 of the court is directed to close this case.

11 [2] Plaintiff's motion for attorney's fees and costs is
12 DENIED.

13 IT IS SO ORDERED.

14 DATED: May 14, 2013.

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18 LAWRENCE K. KARLTON
19 SENIOR JUDGE
20 UNITED STATES DISTRICT COURT
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