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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RUMSEY INDIAN RANCHERIA OF WINTUN )	2:07-cv-02412-GEB-EFB
INDIANS OF CALIFORNIA; RUMSEY )	
GOVERNMENT PROPERTY FUND I, LLC; )	<u>ORDER</u>
RUMSEY DEVELOPMENT CORPORATION; )	
RUMSEY TRIBAL DEVELOPMENT )	
CORPORATION; RUMSEY MANAGEMENT )	
GROUP; and RUMSEY AUTOMOTIVE GROUP,) )	
Plaintiffs, )	
v. )	
HOWARD DICKSTEIN; JANE G. ZERBI; )	
DICKSTEIN & ZERBI; DICKSTEIN & )	
MERIN; ARLEN OPPER; OPPER )	
DEVELOPMENT, LLC; METRO V PROPERTY )	
MANAGEMENT COMPANY; CAPITAL CASINO )	
PARTNERS I; MARK FRIEDMAN; FULCRUM )	
MANAGEMENT GROUP, LLC; FULCRUM )	
FRIEDMAN MANAGEMENT GROUP, LLC, dba) )	
FULCRUM MANAGEMENT GROUP, LLC; )	
ILLINOIS PROPERTY FUND I )	
CORPORATION; ILLINOIS PROPERTY FUND) )	
II CORPORATION; ILLINIOS PROPERTY )	
FUND III CORPORATION; 4330 WATT )	
AVENUE, LLC; and DOES 1-100, )	
Defendants. )	
_____ )	

Plaintiffs move to remand this action to state court. Defendants Howard Dickstein, Jane G. Zerbi, Distein & Zerbi and Dickstein & Merin ("Defendants") oppose the motion. Oral arguments on

1 the motion were heard February 11, 2008. For the reasons stated,  
2 Plaintiffs' motion is granted and the case is remanded to state court.

3 BACKGROUND

4 Plaintiffs filed this action in Superior Court of the State  
5 of California in the County of Yolo on October 9, 2007. Plaintiff  
6 Rumsey Band of Wintun Indians ("the Tribe") is a sovereign Indian  
7 tribe who owns the Cache Creek Casino Resort. (Compl. ¶¶ 1, 3(b).)  
8 Defendant Howard Dickstein ("Dickstein") is the Tribe's former  
9 attorney and Defendant Arlen Oppen ("Oppen") is the Tribe's former  
10 financial advisor. (Id. ¶ 2.) Plaintiffs allege that Oppen and  
11 Dickstein "repeatedly involved the Tribe in complicated investments or  
12 transactions in which the business terms were more favorable to others  
13 than they were to the Tribe. Many such deals were fraught with self-  
14 dealing and conflicts of interest they failed to disclose." (Id.  
15 ¶ 2.) Plaintiffs further allege that Oppen

16 collected fees for purportedly managing Tribal  
17 assets, without actually managing them[, and]  
18 Oppen's entire method and structure of  
19 compensation was an artifice created [by Oppen and  
20 Dickstein] to avoid regulatory oversight of  
Oppen's management of an Indian-owned gaming  
facility, which was illegal without the prior  
approval of the National Indian Gaming Commission.

21 (Id. ¶ 7.) Plaintiffs' Complaint comprises fourteen state law claims  
22 including breach of contract, breach of fiduciary duty, unjust  
23 enrichment and violation of the California Business and Professions  
24 Code Section 17200. (Id. at 34:21, 36:11, 40:13, 50:14, 52:2.)

25 On November 8, 2007, Defendants removed the action to this  
26 Court under 28 U.S.C. §§ 1441 and 1446, arguing that federal question  
27 jurisdiction exists because the Indian Gaming Regulatory Act, 25  
28 U.S.C. §§ 2701-2721, completely preempts Plaintiffs' state law claims

1 and because Plaintiffs' claims raise substantial questions of federal  
2 law. (Notice of Removal ¶¶ 1, 2, 10.)

3 Congress passed the Indian Gaming Regulatory Act ("IGRA")  
4 "to provide a statutory basis for the operation and regulation of  
5 gaming by Indian tribes." Seminole Tribe of Fla. v. Florida, 517 U.S.  
6 44, 48 (1996). IGRA established the National Indian Gaming Commission  
7 ("NIGC") to oversee gaming activities on tribal lands. 25 U.S.C. §§  
8 2704, 2706. IGRA permits tribes to enter into management contracts  
9 for the operation and management of their gaming facilities subject to  
10 the NIGC's approval, which includes ensuring that the contracts  
11 provide minimum protection for the tribes. Id. § 2711. The NIGC also  
12 has the authority to hold a hearing and void any management contract  
13 that violates IGRA. Id. § 2711(f). NIGC regulations further  
14 establish that any management contract that is not approved by the  
15 NIGC is void. 25 C.F.R. § 533. Decisions by the NIGC are final  
16 agency actions for purposes of the Administrative Procedures Act and  
17 are appealable to a federal district court. 25 U.S.C. § 2714.

#### 18 REMOVAL STANDARDS

19 "[A]ny civil action brought in a State court of which the  
20 district courts of the United States have original jurisdiction, may  
21 be removed by [] the defendants, to the district court [] for the  
22 district and division embracing the place where such action is  
23 pending." 28 U.S.C. § 1441(a). The removal statute is strictly  
24 construed against removal jurisdiction, see Gaus v. Miles, Inc., 980  
25 F.2d 564, 566 (9th Cir. 1992), and the party seeking removal "has the  
26 burden of establishing that removal [is] proper." Duncan v. Stuetzle,  
27 76 F.3d 1480, 1485 (9th Cir. 1996). There is a "'strong presumption'

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1 against removal" with "any doubt" resolved in favor of remand. Gaus,  
2 980 F.2d at 566.

3 Defendants' removal is premised on allegations that federal  
4 question jurisdiction exists. To sustain removal on this basis, "a  
5 defendant [must establish] Plaintiff's case 'arises under' federal  
6 law." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S.  
7 1, 10 (1983). "The presence or absence of federal-question  
8 jurisdiction is governed by the 'well-pleaded complaint rule,' which  
9 provides that federal jurisdiction exists only when a federal question  
10 is presented on the face of the plaintiff's properly pleaded complaint  
11 . . . ." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). "As  
12 the master of the complaint, a plaintiff may defeat removal by  
13 choosing not to plead independent federal claims." ARCO Evtl.  
14 Remediation, L.L.C., v. Dep't of Health & Evtl. Quality, 213 F.3d  
15 1108, 1114 (9th Cir. 2000) (citing Caterpillar Inc., 482 U.S. at 399).  
16 However, "the artful pleading doctrine is a useful procedural sieve to  
17 detect traces of federal subject matter jurisdiction in a particular  
18 case," through a determination of whether Plaintiffs have "artfully  
19 phrased a federal claim by dressing it in state law attire." Lippitt  
20 v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042 (9th Cir.  
21 2003). Even where the complaint does not indicate on its face that a  
22 case "arises under" federal law, jurisdiction may lie if "Congress  
23 . . . so completely pre-empt[s] a particular area that any civil  
24 complaint raising [Plaintiffs'] select group of claims is necessarily  
25 federal in character," Metro. Life Ins. Co. v. Taylor, 481 U.S. 58,  
26 63-64 (1987), or when the claims "turn on substantial questions of  
27 federal law." Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.,  
28 545 U.S. 308, 312 (2005).

ANALYSIS

I. Complete Preemption

Defendants argue that "IGRA provides a textbook example of an exclusive federal regulatory regime, sufficient to convert state claims, such as those advanced by the Tribe, into federal claims."

(Opp'n at 4:26-5:7 (citing Great W. Casinos, Inc. v. Morango Band of Mission Indians, 74 Cal. App. 4th 1407, 1428 (1999); Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996)).)

Defendants argue evidence of this exclusive federal regime is IGRA's creation of the NIGC

to monitor and investigate tribal gaming activity . . . . The NIGC Chairman is responsible for approving all Indian gaming management contracts pursuant to federal guidelines . . . . If the Chairman fails to act in a timely manner or a tribe wishes to appeal the Chairman's decision, IGRA specifies the United States District Courts as the exclusive jurisdiction for relief.

(Opp'n at 5:17-22 (citing 25 U.S.C. §§ 2706, 2711, 2711(d), 2714).)

Defendants argue Plaintiffs' claims fall within the preemptive scope of IGRA because

[i]n deciding the meaning of management - and whether Oppor's agreement required NIGC approval - the state court would effectively decide the extent of the NIGC's regulatory reach. If the Court allows a state court to make such a decision, it will condone state interference with the Tribe's governance of gaming activity and require "a determination outside the administrative review scheme crafted by Congress."

(Opp'n at 7:17-22 (citing United States ex rel. The Saint Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt. Co. (Mohawk Tribe), 451 F.3d 44, 51 (2nd Cir. 2006). Plaintiffs rejoin that "disputes involving illegal management by 'consultants'" fall outside IRGA's preemptive scope because "the statutory provisions and framework[] do not address

1 consulting agreements disguised as management contracts, and . . .  
2 provide no remedy or right of action for such." (Mot. at 9:4-6.)

3 Removal is proper under the complete preemption doctrine  
4 when "the federal statute[] at issue provide[s] the exclusive cause of  
5 action for the claim asserted and also set[s] forth procedures and  
6 remedies governing that cause of action." Beneficial Nat'l Bank v.  
7 Anderson, 539 U.S. 1, 8 (2003). "Complete preemption is rare." ARCO  
8 Envtl. Remediation, 213 F.3d at 1115.

9 Defendants argue Plaintiffs' claims are completely preempted  
10 by IGRA since they are based on an alleged management contract that  
11 has not been approved by the NIGC. (Opp'n at 1:9-2:4.) Defendants  
12 assert that Plaintiffs "seek[] to have a state court invalidate  
13 [Opper's consulting agreement] as an illegal contract under IGRA."  
14 (Id. at 7:12-16.) However, Plaintiffs' Complaint includes no such  
15 claim. Instead, the first and second claims are for **breach** of  
16 contract. (Compl. at 34:20-21, 36:10-12.) Similarly, Plaintiffs'  
17 tenth cause of action for violation of California Business and  
18 Professions Code section 17200 ("section 17200") alleges:

19 The Opper Defendants engaged in unfair, unlawful  
20 and/or fraudulent acts under [section 17200] by,  
21 *inter alia*, . . . (2) disguising illegal  
22 management of a gaming facility as management of  
23 the Tribe's assets, and pursuant to that  
24 agreement, collecting as disguised "asset  
25 management" fees what were, in reality, casino  
26 management fees [and, therefore, t]he Tribe is  
27 entitled to restitution of all sums wrongfully  
28 held and/or obtained by [Defendants] as a result  
of the unlawful, unfair and fraudulent acts  
alleged above.

26 (Compl. ¶ 205.) Defendants argued at oral arguments that Plaintiffs'  
27 prayer for restitution damages evinces that they are seeking to void  
28 the Opper agreement. "However, restitution is also available as a

1 remedy to redress [state] statutory violations. And in a statutory  
2 action, rescission is not a prerequisite to granting restitution." 1  
3 B.E. Witkin, Summary of California Law (Contracts) § 1013 (10th ed.  
4 2005) (citing a section 17200 action).

5 At this point it is unknown whether the Opper agreements at  
6 issue are unapproved management contracts and therefore are void.  
7 Even if the agreements are ultimately construed as void management  
8 contracts, they would be found to have never been valid contracts, and  
9 "only an *attempt* at forming . . . management contract[s]. If that is  
10 the case, then [Plaintiff's] suit in no way interferes with the  
11 regulation of a management contract because none ever existed."  
12 Gallegos v. San Juan Pueblo Bus. Dev. Bd., Inc., 955 F. Supp. 1348,  
13 1350 (D.N.M. 1997).

14 Not every contract that is merely peripherally  
15 associated with tribal gaming is subject to IGRA's  
16 constraints . . . . For instance, in [Calumet  
17 Gaming Group-Kan., Inc. v. Kickapoo Tribe of Kan.,  
18 987 F. Supp. 1321, 1325 (D. Kan. 1997)], the court  
19 found that a dispute arising from a consulting  
20 agreement was not subject to IGRA and,  
21 consequently, there was no need to interpret or  
22 apply IGRA to resolve the plaintiff's state law  
23 claims for breach of that agreement.

24 Casino Res. Corp. v. Harrah's Entm't, Inc., 243 F.3d 435, 439 (8th  
25 Cir. 2001) (citations omitted).

26 However, claims "which would interfere with [Plaintiffs']  
27 ability to govern gaming [] fall within the scope of IGRA's preemption  
28 of state law" because "Congress unmistakably intended that tribes play

1 a significant role in the regulation of gaming.”<sup>1</sup> Gaming Corp., 88  
2 F.3d at 549-50.

3 Defendants argue that Plaintiffs’ claims interfere with the  
4 Tribe’s “ability to govern gaming” because to address Plaintiffs’  
5 breach of fiduciary duties, breach of contract, and violation of  
6 section 17200 claims, “the Court must first decide whether Opper’s  
7 agreement is subject to NIGC review as a management contract [and t]he  
8 meaning of ‘management’ under IGRA implicates tribal control over  
9 gaming activity because it provides a standard for subjecting [tribal  
10 contracting] decisions to NIGC approval.” (Opp’n at 8:10-18.)

11 This argument concerns fact-bound questions regarding the  
12 nature of the agreements at issue, and whether they are void  
13 management contracts, but it does not establish that these  
14 determinations interfere with the Tribe’s ability to govern gaming.  
15 “Congressional intent is the touchstone of the complete preemption  
16 analysis.” Magee v. Exxon Corp., 135 F.3d 599, 601 (8th Cir. 1998).  
17 “It is a stretch to say that Congress intended to preempt state law  
18 when there is no valid management contract for a federal court to  
19 interpret, when [Plaintiffs’] broad discretion . . . is not impeded,  
20 and when there is no threat to [Plaintiffs’] sovereign immunity or  
21 interests.” Casino Res. Corp., 243 F.3d at 440; see also Confederated  
22 Tribes of Siletz Indians v. Oregon, 143 F.3d 481, 486 n.7 (9th Cir.  
23 1998) (rejecting argument that IGRA entirely preempts a field

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25 <sup>1</sup> The Gaming Corporation court relied in part on the following  
26 legislative history: “‘S. 555 [(IGRA)] is intended to expressly preempt  
27 the field in the governance of gaming activities on Indian lands.  
28 Consequently, Federal courts should not balance competing Federal,  
State, and tribal interests to determine the extent to which various  
gaming activities are allowed.’” Gaming Corp., 88 F.3d at 544 (quoting  
S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988  
U.S.C.C.A.N. 307, 3076).



1 including Oregon public records laws because "the application of  
2 [state public record laws] has no effect on the determination 'of  
3 which gaming activities are allowed.'" (citing S. Rep. No. 446, 100th  
4 Cong., 2d Sess. 6 (1988)).

5 Defendants also argue Mohawk Tribe supports their complete  
6 preemption position. In Mohawk Tribe, the Second Circuit held that it  
7 was without jurisdiction to issue "a declaration that the [] Contract  
8 is void for lack of contract approval by the Commission as required by  
9 IGRA" because the tribe failed to exhaust its administrative remedies.  
10 Mohawk Tribe, 451 F.3d at 50-51. In Mohawk Tribe, the Indian tribe  
11 filed a *qui tam* action seeking to void a contract under IGRA. But  
12 Plaintiffs' claims do not seek to void the agreements. As Plaintiffs  
13 assert, Mohawk Tribe "is perhaps relevant to a defense on the merits  
14 as to whether a state (or federal) court can pass on the validity of a  
15 contract before NIGC has done so, but such provides no support for  
16 removal . . . ." <sup>2</sup> (Reply at 18:28-19:3.)

17 For the reasons stated, Defendants have not shown that IGRA  
18 completely preempts Plaintiffs' claims.

19 II. Substantial Question of Federal Law

20 Defendants also contend that removal is appropriate because  
21 Plaintiffs' "complaint presents a [substantial] question of federal  
22 law on which many of its claims depend: what does 'management' mean  
23 for purposes of applying IGRA?" (Opp'n at 11:19-20.) The gist of  
24 Defendants' position follows:

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26 \_\_\_\_\_  
27 <sup>2</sup> Indeed, the Mohawk Tribe court explicitly stated that it  
28 "decline[d] to hold that regulation of Indian gaming contracts under  
IGRA creates federal question jurisdiction over any contract claim  
relating to Indian gaming." Mohawk Tribe, 451 F.3d at 51 n.6.

1 By arguing that Opper's agreement should be voided  
 2 as an unapproved management contract, the Tribe  
 3 necessarily raises a federal question that must be  
 4 resolved before the Court can decide state law  
 5 claims for breach of contract (Count 2), breach of  
 6 fiduciary duties by Opper and Dickstein (Counts 4  
 7 and 5), and unjust enrichment by Opper (Count 11).  
 8 The Tribe cannot recover for breach of contract  
 9 without demonstrating the existence of a valid  
 10 contract. . . . Similarly, the fiduciary duties  
 11 owed by Opper to the Tribe will vary depending  
 12 upon the nature and legal force of their agreement  
 13 . . . . Moreover, the availability of the Tribe's  
 14 requested relief for the fiduciary claims –  
 15 disgorgement – will depend upon how the Court  
 16 characterizes Opper's agreement. . . . Finally,  
 17 it is unclear that the Tribe can recover for  
 18 unjust enrichment based upon a contract rendered  
 19 illegal by the absence of NIGC approval.

11 (Opp'n at 12:16-13:15 (citations omitted).) Plaintiffs reply that  
 12 those claims do not allege or seek recovery for any IGRA violation  
 13 and, therefore, do not raise illegality of the Opper agreement as an  
 14 essential element.<sup>3</sup> (Reply at 15:1-18.)

15 Defendants argue "the [general allegations section of the]  
 16 Complaint contains extensive allegations concerning Opper's management  
 17 of gaming activity" and since Plaintiffs' state law claims incorporate  
 18 all of the allegations into each cause of action, "the Tribe  
 19 necessarily raises a federal question" as an element of their state  
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21 <sup>3</sup> Since Defendants argue that a substantial federal question  
 22 justifies removal based on four specific claims, only those claims are  
 23 analyzed. Plaintiffs argue that because Defendants' Notice of Removal  
 24 "does not specifically contend that any of Plaintiffs'" claims aside  
 25 from Counts 4 and 5 "raise questions of federal law" Defendants are  
 26 "foreclosed" from basing their arguments on those claims now. (Mot.  
 27 19:19-27, 20:1-15 (citing Mattel, Inc. v. Bryant, 441 F. Supp. 2d 1081,  
 28 1091 n. 11 (C.D. Cal. 2005)).) The Notice of Removal, however, states  
 "[t]he factual allegations . . . (pertaining to the alleged violation of  
 IGRA) are incorporated by reference into every cause of action asserted  
 in this case. The IGRA allegations figure particularly prominently in  
 the causes of action for breach of fiduciary duty . . . and aiding and  
 abetting in breaches of fiduciary duty . . . ." (Notice of Removal ¶  
 4.) This statement was sufficient to put Plaintiffs on notice that  
 Defendants based removal jurisdiction on all of Plaintiffs' claims.

1 law claims.<sup>4</sup> (Opp'n at 3:2-20, 12:16-18.) The Ninth Circuit rejected  
2 such an argument in Duncan v. "Footsie Wootsie Machine Rentals",  
3 stating that the plaintiff's incorporation by reference of a general  
4 allegation that she owned the trademark to "Footsie Wootsie" did not  
5 provide a basis for substantial federal question jurisdiction since  
6 the state law claim was not necessarily based on the misappropriation  
7 of the federal trademark. 76 F.3d 1480, 1488 n.11 (9th Cir. 1995).

8 Federal question removal jurisdiction exists where a state  
9 law claim "necessarily raise[s] a stated federal issue, actually  
10 disputed and substantial, which a federal forum may entertain without  
11 disturbing any congressionally approved balance of federal and state  
12 jurisdictional responsibilities." Grable & Sons Metal Prods. Inc.,  
13 545 U.S. at 314. "When a claim can be supported by alternative and  
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15 <sup>4</sup> For instance, Plaintiffs allege:  
16 [B]y restructuring Opp'er's contracts to pay him a  
17 set fee for "consulting" for the Casino, while  
18 paying him under a separate agreement of "managing"  
19 assets he did not actually manage, Dickstein and  
20 Opp'er ensured a continued cash flow of a particular  
21 sum to Opp'er, while circumventing the NIGC  
oversight otherwise required. (In truth, if Opp'er  
was managing under these contracts, irrespective of  
their terms and titles, his contracts were *de facto*  
management contracts and thus void.)

\* \* \*

22 [O]n information and belief, Dickstein and Opp'er  
23 purposefully structured Opp'er's compensation so as  
24 to avoid triggering NIGC approval for his actual  
25 management of the Casino. In reality, on  
26 information and belief, the asset management  
27 agreement that Dickstein and Opp'er devised was an  
28 artifice to allow Opp'er to continue to exert  
managerial control of all or part of the Tribe's  
Casino, while still securing a target sum that was  
roughly equivalent to what Opp'er would have  
received under the initial "consulting" contract  
with the Casino, had it remained in place.

(Compl. ¶¶ 16, 44.)

1 independent theories - one of which is a state law theory and one of  
2 which is a federal law theory - federal question jurisdiction does not  
3 attach because federal law is not a necessary element of the claim."

4 Rains v. Criterion Sys., Inc., 80 F.3d 339, 346 (9th Cir. 1996).

5 "While [Defendants] may defend against the state law claims by arguing  
6 that [they fail because the agreements are void under the federal  
7 IGRA], this answer is a defense to [Plaintiffs'] claimed right, not an  
8 element of [Plaintiffs'] state law cause of action." ARCO Env'tl

9 Remediation, 213 F.3d at 1116. Thus, the issue is whether Plaintiffs'  
10 **right to relief** arises out of a necessary, substantial and "disputed  
11 issue of federal law," Bennett v. Southwest Airlines Co., 484 F.3d  
12 907, 909 (7th Cir. 2007); it is not enough that Plaintiffs' right to  
13 relief could fail because of a Defendant's defense based on federal  
14 law. "In the main, a claim 'arises under' the law that creates the  
15 cause of action." Id. at 909.

16 The unjust enrichment claim against Opper can be supported  
17 simply by showing that he failed "to reimburse the Tribe for his  
18 personal use of aircraft in which the Tribe possessed rights of use."  
19 (Compl. ¶ 211.) The obligation to reimburse the tribe appears to have  
20 arisen from tribal policies, completely independent from any contract  
21 that Opper made with the Tribe. "Pursuant to the Tribe's policies,  
22 the Tribal Council permitted . . . Dickstein and Opper to use the  
23 NetJets aircraft for personal trips for 10 hours per year as long as  
24 they reimbursed the Tribe for half the trip's hourly rate." (Compl. ¶  
25 128.) Thus, the unjust enrichment claim can be supported by  
26 alternative and independent state law theories.

27 Nor has it been shown that Plaintiffs' breach of contract,  
28 breach of fiduciary duties and unjust enrichment claims arise under a

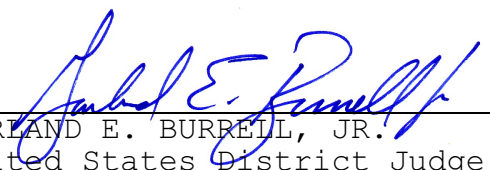
1 necessary federal question of IGRA law. Plaintiffs' breach of  
2 contract claim arises out of state contractual rights. Similarly,  
3 Plaintiffs' breach of fiduciary duties claims arise out of the duties  
4 Defendants owe the tribe as their lawyers, agents and managers, not  
5 out of any right created by federal law.<sup>5</sup> (Compl. ¶¶ 157, 165.)  
6 Therefore, Defendants have not shown that the substantial federal  
7 question doctrine supports removal jurisdiction.

8 CONCLUSION

9 For the reasons stated, Plaintiffs' motion to remand is  
10 granted and the Clerk of the Court shall remand this action to the  
11 Yolo County Superior Court.

12 IT IS SO ORDERED.

13 Dated: March 5, 2008

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GARLAND E. BURRELL, JR.  
United States District Judge

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26 <sup>5</sup> Plaintiffs' request for disgorgement does not necessarily mean  
27 Plaintiffs premised their breach of fiduciary duties claims on an  
28 illegal contract. See Jain v. Clarendon Am. Co., 304 F. Supp. 2d 1263,  
1265 (W.D. Wash. 2004) (citing previous decision ordering defendant to  
disgorge profits as award for breach of contract and breach of fiduciary  
duties claims).