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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA DEPARTMENT OF  
EDUCATION, a State agency,

NO. 2:08-cv-2209 FCD GGH

Plaintiff,

v.

MEMORANDUM AND ORDER

INDEMNITY COMPANY OF  
CALIFORNIA, a corporation and  
INSCO INSURANCE SERVICES,  
INC., a corporation, and DOES  
1-59,

Defendants.

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This matter is before the court on defendant<sup>1</sup> Indemnity  
Company of California's ("defendant" or "Indemnity") motion for  
summary judgment pursuant to Rule 56 of the Federal Rules of  
Civil Procedure. Plaintiff California Department of Education  
("plaintiff" or "CDE") opposes the motion. On February 22, 2010,  
following a review of the submissions of the parties, including

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<sup>1</sup> The parties represent that they have agreed to dismiss  
defendant INSCO without prejudice in return for a waiver of  
costs. (Pl.'s Reply Brief [Docket # 25], filed Mar. 12, 2010, at  
1 n.1.)

1 the Notice of Removal, the complaint, and the briefs related to  
2 defendant's motion for summary judgment, the court directed the  
3 parties to file supplemental briefing regarding the basis for  
4 federal question jurisdiction. Specifically, in light of the  
5 sole state law claim for breach of contract alleged in the  
6 complaint, the parties were ordered to address whether  
7 "plaintiff's right to relief necessarily depends on resolution of  
8 a substantial question of federal law." Franchise Tax. Bd. v.  
9 Constr. Laborers Vacation Trust, 463 U.S. 1, 28 (1983); see  
10 Christianson v. Colt Industries Operating Corp., 486 U.S. 800,  
11 810 (1988) ("[A] claim supported by alternative theories in the  
12 complaint may not form the basis for [federal] jurisdiction  
13 unless [federal] law is essential to each of those theories.").  
14 Indemnity asserts that the exercise of federal jurisdiction is  
15 proper. The CDE contends that this action should be remanded to  
16 the Superior Court of the State of California in and for the  
17 County of Sacramento.<sup>2</sup>

#### 18 **BACKGROUND**

19 CDE commenced this action against defendants in the  
20 California Superior Court, County of Sacramento, stating a  
21 single, state-law cause of action for breach of contract, namely  
22 for breach of a surety bond issued by defendant Indemnity. In  
23 its complaint, CDE alleges that it is a state agency with  
24 statutory jurisdiction to administer the Donated Food Program of  
25 the United States Department of Agriculture ("USDA") and enforce  
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27 <sup>2</sup> Because oral argument will not be of material  
28 assistance, the court orders the matter submitted on the briefs.  
E.D. Cal. L.R. 230(g).

1 the program requirements under applicable state and federal  
2 statutes and regulations, including 7 C.F.R. Parts 210 and 250.  
3 CDE further alleges that Southland Bagel Company, Inc. ("SBC")  
4 was a California corporation authorized to process donated food  
5 under the USDA's Donated Food Program. CDE entered into a  
6 written contract with SBC, called a Master Processing Agreement  
7 ("MPA"), for the period July 1, 2003, to June 30, 2004, under  
8 which SBC was to process USDA-donated food into specified end  
9 products (Articles 5, 35 O(1)) for delivery to eligible recipient  
10 agencies ("RA"s). (Compl. ¶¶ 1, 4, 9A, 9D.) The MPA is governed  
11 by the laws of California. (MPA, Ex. 1 to Compl., at 31.)

12 Article 16 of the MPA required SBC to "fully account" for  
13 all donated food delivered or carried forward from a previous  
14 contract year into its possession, by production and delivery of  
15 an appropriate number of end products specified in the MPA to  
16 eligible RAs. Under Articles 16 and 18, SBC was financially  
17 liable for the value of all donated food inventory for which SBC  
18 could not account in accordance with the requirements of the MPA.  
19 (Compl. ¶ 9B.) Moreover, Article 19 required SBC to obtain a  
20 surety bond to guarantee that SBC "shall faithfully account for,  
21 return, or pay for all of the [donated food] received or carried  
22 forward" in accordance with the MPA. To satisfy this  
23 requirement, SBC provided a bond issued by Indemnity in the  
24 initial amount of \$100,000, which was later increased to  
25 \$400,000. (Compl. ¶¶ 9C, 9E.) In the bond, Indemnity  
26 specifically recited the existence of the MPA and that the bond  
27 was given to secure SBC's obligation to account for, return or  
28 pay for "all federally donated foods delivered by [CDE], at the

1 time and in the manner *specified in the MPA.*" (Ex. 2) (emphasis  
2 added).

3 CDE alleges that SBC failed to account for donated food  
4 having a total value of \$700,737.31. CDE submitted a claim to  
5 Indemnity on the surety bond, but Indemnity denied the claim.  
6 (Compl. ¶¶ 9F-9L, 10-14.) Subsequently, CDE brought suit for  
7 breach of written contract for surety bond. (Compl. ¶¶ 10-14.)

#### 8 STANDARD

9 Jurisdiction is a threshold inquiry before the adjudication  
10 of any case before the court. See Morongo Band of Mission  
11 Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380  
12 (9th Cir. 1988). Even if no objection is made to removal and the  
13 parties stipulate to removal, the district court has an  
14 independent obligation to examine whether the exercise of  
15 jurisdiction is proper before deciding any issue on the merits.  
16 Rains v. Criterion Sys., Inc., 80 F.3d 339, 342 (9th Cir. 1996);  
17 see Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1093 (9th Cir.  
18 2004); Matheson v. Progressive Specialty Ins. Co., 318 F.3d 1089,  
19 1091 (9th Cir. 2003). Moreover, the absence of federal  
20 jurisdiction may be raised at any time during the litigation.  
21 Rains, 80 F.3d at 342 (examining whether removal was proper for  
22 the first time on appeal). "If the district court at any time  
23 determines that it lacks jurisdiction over the removed action, it  
24 must remedy the improvident grant of removal by remanding the  
25 action to state court." California ex rel. Locker v. Dynegy,  
26 Inc. ("Dynegy"), 375 F.3d 831, 838 (9th Cir. 2004).

27 The removal statute is strictly construed against removal  
28 jurisdiction. Id. "Federal jurisdiction must be rejected if

1 there is any doubt as to the right of removal in the first  
2 instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir.  
3 1992) (citing Libhart v. Santa Monica Dairy Co., 592 F.2d 1062,  
4 1064 (9th Cir. 1979)). The party seeking removal has the burden  
5 of establishing grounds for the exercise of federal jurisdiction.  
6 Dynegy, 375 F.3d at 838.

#### 7 ANALYSIS

8 Defendant asserts that the court has proper removal  
9 jurisdiction because plaintiff's claim arises under federal law.  
10 Specifically, defendant asserts that the court has original  
11 jurisdiction over plaintiff's breach of contract claim because  
12 federal law expressly controls and governs the terms of the MPA  
13 and because defendant has "derivative liability" for SBC's  
14 violations of federal regulations.<sup>3</sup>

15 "The presence or absence of federal question jurisdiction is  
16 governed by the 'well-pleaded complaint rule,' which provides  
17 that federal jurisdiction exists only when a federal question is  
18 presented on the face of the plaintiff's properly pleaded  
19 complaint." Sacramento Metropolitan Air Quality Management Dist.  
20 v. United States, 215 F.3d 1005, 1014 (9th Cir. 2000). Federal  
21 jurisdiction may also lie if "it appears that some substantial  
22 disputed question of federal law is a necessary element of one of  
23 the well-pleaded state claims." Rains v. Criterion Sys., Inc.,  
24 80 F.3d 339, 345 (9th Cir. 1996) (quoting Franchise Tax Bd. of  
25 California v. Construction Laborers Vacation Trust for Southern  
26 California, 463 U.S. 1, 13 (1983). Where federal issues are

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28 <sup>3</sup> It is undisputed that federal law does not create the  
sole cause of action in this case.

1 imbedded in state law claims between non-diverse parties, the  
2 determinative questions is whether "a state-law claim *necessarily*  
3 raise[s] a stated federal issue, actually disputed and  
4 substantial, which a federal forum may entertain without  
5 disturbing any congressionally approved balance of federal and  
6 state judicial responsibilities." Grable & Sons Metal Prods.,  
7 Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) (emphasis  
8 added).

9       However, "[w]hen a claim can be supported by alternative and  
10 independent theories - one of which is a state law theory and one  
11 of which is a federal law theory - federal question jurisdiction  
12 does not attach because federal law is not a necessary element of  
13 the claim." Raines, 80 F.3d at 345 (holding that the  
14 plaintiff's wrongful discharge claim did not give rise to federal  
15 question jurisdiction because it could be supported by violations  
16 of the state law constitution, not only violations of a federal  
17 statute); Lippit v. Raymond James Fin. Servs., Inc., 340 F.3d  
18 1033, 1043 (9th Cir. 2003) (holding that California unfair  
19 competition law claims did not give rise to federal question  
20 jurisdiction because such claims are based on unfair or  
21 fraudulent conduct generally, and not necessarily violations of  
22 federal rules and regulations); Mulcahey v. Columbia Organic  
23 Chemicals, 29 F.3d 148. 153 (4th Cir. 1994) (holding that  
24 negligence action alleging violations of local, state, and  
25 federal environmental laws did not confer federal question  
26 jurisdiction). Removal cannot be based on mere reference to  
27 federal law. See Berg v. Leason, 32 F.3d 422, 425-26 (9th Cir.  
28 1994) (holding that a state malicious prosecution claim could not

1 be removed to federal court even though the underlying case was a  
2 federal RICO cause of action).

3       Indeed, the United States Supreme Court has determined even  
4 if federal law provides an element of a state cause of action, it  
5 is insufficient to confer federal removal jurisdiction. Merrell  
6 Dow Pharmacy, Inc v. Thompson, 478 U.S. 804, 814 (1986). In  
7 Merrell Dow, parents sued a drug manufacturer in state court for  
8 their children's birth defects resulting from the mother  
9 ingesting the drug while pregnant. The complaint alleged various  
10 state causes of action, such as negligence, breach of warranty,  
11 and strict liability. The complaint also alleged the drug had  
12 been misbranded in violation of the Food Drug and Cosmetic Act,  
13 creating a rebuttable presumption of negligence. The Supreme  
14 Court held "the presence of the federal issue as an element of  
15 the state tort" was not a sufficient basis for removal  
16 jurisdiction. Id.; see also Easton v. Crossland Mortgage Corp.,  
17 114 F.3d 979, 982 (9th Cir. 1997) (state claim for sexual  
18 harassment could not be removed even though reference made to  
19 federal statute).

20       The Ninth Circuit has expressly held that even if a contract  
21 is regulated by federal law, such regulation is an insufficient  
22 basis for the exercise of federal question jurisdiction. In  
23 Hunter v. United Van Lines, the plaintiff sued an interstate  
24 carrier for fraud and bad faith in settling a claim for damages  
25 to goods shipped interstate. 746 F.2d 635, 638 (9th Cir. 1984).  
26 The contract for interstate shipment was regulated by federal  
27 law. Id. at 645. While the court noted that federal law could  
28 be deemed "an ingredient in plaintiffs' state-law claim for

1 tortious bad faith," the court held that the exercise of federal  
2 jurisdiction was inappropriate because (1) federal law would not  
3 be controlling, and (2) at most, the determination of federal law  
4 was merely a "preliminary, threshold" role in the case. Id. at  
5 647.

6 In this case, resolution of plaintiff's breach of contract  
7 claim does not necessarily raise an issue of federal law. On its  
8 face, CDE's action is a state law cause of action for breach of a  
9 contract made in California, guaranteeing obligations made in  
10 California, which, by its own terms, is governed by California  
11 law. While CDE's complaint references various regulations, the  
12 specific violations alleged in the complaint are directed to  
13 Articles of the MPA, not violations of federal law.

14 Moreover, the federal regulations referenced in the  
15 complaint and relied upon by defendant expressly ground liability  
16 in the contract created between the parties. See 7 C.F.R. §  
17 250.12(b) ("Distributing agencies *shall* enter into written  
18 agreements with all subdistributing agencies, recipient agencies,  
19 warehouses, carriers, or other entities to which distributing  
20 agencies deliver donated foods under their distribution  
21 program.") (emphasis added); 7 C.F.R. 250.30(a) ("This section  
22 sets forth the terms and conditions under which distributing  
23 agencies, subdistributing agencies, or recipient agencies may  
24 enter into contracts for the processing of donated foods and  
25 prescribes the minimum requirements to be included in such  
26 contracts."). The regulations also contemplate that a  
27 distributing agency, like plaintiff, "may impose additional  
28 requirements for participation," so long as they are not



1 inconsistent with the regulations. 7 C.F.R. § 250.2(b). As  
2 such, the MPA's requirements may impose obligations beyond those  
3 minimum requirements set forth in the federal regulations and  
4 liability may be based purely on breach of those additional  
5 obligations. Accordingly, resolution of the potential federal  
6 issues raised in the complaint is not essential, and thus,  
7 determination of federal law is not a necessary element of one of  
8 the well-pleaded state claims. See Christianson v. Colt  
9 Industries Operating Corp., 486 U.S. 800, 810 (1988) ("[A] claim  
10 supported by alternative theories in the complaint may not form  
11 the basis for [federal] jurisdiction unless [federal] law is  
12 essential to each of those theories.").<sup>4</sup>

13 Further, the court notes that defendant's arguments in  
14 support of its motion for summary judgment are based exclusively  
15 on state law determinations. While defendant now asserts that  
16 plaintiff's interpretation of the MPA contradicts the express  
17 language of the applicable and controlling federal regulations,  
18 it is undisputed that no such argument was raised in its  
19 dispositive motions. (Def.'s Supp. Brief re. Basis for Federal  
20 Jurisdiction [Docket # 24], filed Mar. 5, 2010, at 5 & n.6.) The  
21 absence of this purportedly pivotal federal issue is further  
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23 <sup>4</sup> The court notes that to the extent the federal  
24 regulations have some effect on the determination of plaintiff's  
25 state law claim, such effect is incidental. See Hunter, 746 F.2d  
26 at 646 (noting that courts must determine whether the federal  
27 element was "pivotal," not merely "incidental"). That the  
28 federal regulations may provide that certain conduct constitutes  
prima facie evidence of improper distribution or loss, 7 C.F.R. §  
250.16(a)(6), does not elevate the role of the regulations to a  
substantial federal issue. See Merrell Dow, 478 U.S. at 812, 814  
(holding no federal question jurisdiction where federal law  
created rebuttable presumption in state law cause of action).

1 compelling evidence that resolution of federal law is not  
2 necessary to the resolution of this action.

3 Defendant's reliance on the Ninth Circuit's decision in  
4 People of the State of Cal. v. Dynegy, Inc., 375 F.3d 831 (9th  
5 Cir. 2004), is misplaced. In Dynegy, the Ninth Circuit held that  
6 an action alleging unfair competition under Section 17200 was  
7 inherently federal because plaintiff's claim rested entirely on  
8 alleged violations of federal tariff obligations under the  
9 Federal Power Act. Id. at 841. Though the complaint only  
10 asserted state-law claims, it cited the tariffs filed with  
11 Federal Energy Regulatory Commission and directly implicated the  
12 federal regulatory regime, which was committed exclusively to  
13 federal jurisdiction. Id. Thus, the Ninth Circuit reasoned that  
14 the state claim turned "entirely upon the defendant's compliance  
15 with a federal regulation." Id. However, in this case, the  
16 complaint implicates contractual provisions that are regulated by  
17 federal law. As set forth above, resolution of the contractual  
18 provisions does not directly implicate those federal regulations.  
19 Further, unlike in Dynegy and the majority of cases cited by  
20 defendant, the underlying federal issues referenced in this case  
21 is not "a subject matter committed exclusively to federal  
22 jurisdiction." Cf. Sparta Surgical Corp. v. Nat'l Assoc. of Sec.  
23 Dealers, Inc., 159 F.3d 1209 (9th Cir. 1998) (holding that state  
24 law causes of action based upon violation of the federal Exchange  
25 Act, which conferred exclusive jurisdiction upon the federal  
26 courts, arose under federal law); Brennan v. Southwest Airlines  
27 Co., 134 F.3d 1405 (9th Cir. 1998) (holding that plaintiffs state  
28 law claim for unfair business practices was in reality a suit for

1 a tax refund, for which the Internal Revenue Code provided the  
2 exclusive federal remedy, and thus, arose under federal law).

3 **CONCLUSION**

4 For the foregoing reasons, because the court does not have  
5 federal question jurisdiction over plaintiff's claims, the court  
6 REMANDS this action to the Superior Court of the State of  
7 California in and for the County of Sacramento.

8 IT IS SO ORDERED.

9 DATED: March 31, 2010

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12 FRANK C. DAMRELL, JR.  
13 UNITED STATES DISTRICT JUDGE  
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