

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>ROBERT B. BERUBE, et al.,</b>	)	
	)	
<i>Plaintiffs</i>	)	
	)	
<b>v.</b>	)	<i>Civil Docket No. 97-26-P-DMC</i>
	)	
<b>DOWN EAST ENERGY CORP.,</b>	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM DECISION ON PLAINTIFFS' OBJECTION  
TO REMOVAL AND MOTION FOR REMAND<sup>1</sup>**

The plaintiffs, Robert B. Berube and Berube's, Inc., object to the removal of this action from the Maine Superior Court, Androscoggin County, and move this court to remand the case to that court.

The original complaint (Docket No. 1A), filed in state court in late December 1996, includes nine counts alleging breach of contract, violation of federal law concerning trademarks, and violation of certain Maine statutes. The plaintiffs are alleged to be franchisees of defendant Down East Energy Corp. for the sale of motor fuel. Complaint ¶¶ 4-7. On January 6, 1997 the plaintiffs amended their complaint by striking paragraph 33 and replacing the demand for relief in Count II,

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

a count brought under state law. Docket No. 1B. By pleading dated January 13, 1997 the plaintiffs again amended the complaint by removing references to the federal trademark statutes and replacing the demand for relief in Count I with language specifying that the count was one for breach of contract. Docket No. 1C. The defendant filed an answer on January 23, 1997, along with a notice of removal of the action to this court. Docket Nos. 1 & 1D. The plaintiffs filed their objection to the removal and motion for remand on February 12, 1997. Docket No. 7.

The only references to federal law remaining in the complaint are found in paragraphs 59 and 61: “That the actions of the Defendant as complained of in this Count of Plaintiff’s [sic] complaint amount of [sic] violations of Sec. 2(d) and 2(e) of the Robinson-Patman Act (15 U.S.C. Sec. 2 *et seq.*)” and “That by violating the provisions of the Robinson-Patman Act, Defendant has breached its covenant of good faith and fair dealing with Plaintiffs.” These paragraphs are found in Count V of the complaint, which alleges breach of contract. The parties agree that this reference to federal law is the basis for the notice of removal, which asserts that it is brought pursuant to 28 U.S.C. § 1446(a).

Section 1446 establishes the procedure for removal of an action from state to federal court; 28 U.S.C. § 1441(b) provides the authority for removal, which in this case is the assertion that the plaintiffs’ claims include a question of federal law. A civil action “of which the district courts have original jurisdiction” is removable. 42 U.S.C. § 1441(b). The federal district courts have original jurisdiction “of all actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Whether a case arises under the laws of the United States must be determined by what necessarily appears in the statement of a claim in the complaint. *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for S. California*, 463 U. S. 1, 10 (1983)

(quoting *Taylor v. Anderson*, 234 U. S. 74, 75-76 (1914)). A right under federal law must be an essential element of the plaintiff's cause of action. *Id.* at 11 (quoting *Gully v. First Nat'l Bank in Meridian*, 299 U. S. 109, 112 (1936)). In deciding for removal purposes whether a case presents a federal claim or right, a court is to ask whether the plaintiff's claim to relief rests upon a federal right, and the court is to look only to the plaintiff's complaint to find the answer. *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 2 (1st Cir. 1984) (quoting *Gully*, 299 U. S. at 112).

If, on the face of the complaint, there are reasons completely unrelated to the provisions and purposes of the federal law at issue why the plaintiff may or may not be entitled to the relief he seeks, the claim does not "arise under" that law. *Christianson v. Colt Indus. Operating Corp.*, 486 U. S. 800, 810 (1988) (quoting *Franchise Tax Bd.*, 463 U.S. at 26). The federal claim must be substantial and verifiable. *James v. Bellotti*, 733 F.2d 989, 992 (1st Cir. 1984). If the issue of federal law is not necessary to the overall success of any claim, there is no federal jurisdiction. *Christianson*, 486 U.S. at 811. "Under *Christianson*, every theory of a claim as pled must depend on [federal] law if there is to be federal jurisdiction." *A.T. & T. v. Integrated Network Corp.*, 972 F.2d 1321, 1324 (Fed. Cir. 1992). If jurisdiction is doubtful, remand is required. *Mulcahey v. Columbia Organic Chem. Co.*, 29 F.3d 148, 151 (4th Cir. 1994).

Against this background, Down East, the removing defendant, asserts that

plaintiff's Count V rests solely upon his theory that violation of the Robinson-Patman Act was a breach of his dealer agreement with defendant. His complaint avers, not one breach of contract supported by alternative theories, but at least four distinct breach of contract claims, each one based on a different incident or incidents and a different injury. . . . Each claim will require different proof of both liability and damages. Plaintiff will not be entitled to recover Count V damages, if any there are, unless he can establish violation of the Robinson-Patman Act.

Defendant's Objection to Plaintiff's [sic] Motion for Remand and Incorporated Memorandum of Law (Docket No. 12) at 2. Not surprisingly, the plaintiff asserts that his complaint merely advances "five theories of recovery for breach of contract, only one of which involves Federal law." Memorandum in Support of Plaintiffs' Motion for Remand and Objection to Removal (Docket No. 8) at [3].

The defendant's characterization of Count V is incorrect. The cause of action asserted by Count V is clearly one for breach of contract, a state-law claim. The complaint does not seek remedies for this breach under federal law despite the fact that the Robinson-Patman Act provides for treble damages and attorney fees. 15 U.S.C. § 15(a). The specific breach of contract alleged in Count V is that of the implied covenant of good faith and fair dealing, which is a creation of state law. *E.g.*, *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 647 (Me. 1993). While the complaint does allege that the covenant was breached by violation of the Robinson-Patman Act, it also alleges other ways in which the covenant was breached, having nothing to do with federal law. *E.g.*, Complaint ¶¶ 48-58, 60, 63-64. Therefore, the allegation of breach of the federal statute is not an essential or necessary element of Count V inasmuch as the plaintiffs may be entitled to relief on this count without regard to the provisions of the Robinson-Patman Act. It follows that Count V does not "arise under" the Robinson-Patman Act. *Christianson*, 486 U.S. at 810.

For the foregoing reasons, the plaintiffs' motion for remand is **GRANTED**. This action is hereby remanded to the Maine Superior Court, Androscoggin County.

Dated at Portland, Maine, this 10th day of March, 1997.

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David M. Cohen  
United States Magistrate Judge