

No. 18A \_\_\_\_\_

# In the Supreme Court of the United States

---

HOTZE HEALTH & WELLNESS CTR. INT'L ONE, LLC, individually and allegedly doing business as HOTZE VITAMINS; PHYSICIAN'S PREFERENCE INT'L, LP, individually and doing business as HOTZE VITAMINS; BRAIDWOOD MGMT., INC., individually and allegedly doing business as HOTZE VITAMINS,  
*Applicants,*

v.

ENVTL. RES. CTR., INC.,  
*Respondent.*

---

*On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit*

---

## **APPLICATION TO EXTEND THE TIME TO FILE PETITION FOR A WRIT OF *CERTIORARI* TO THE NINTH CIRCUIT**

---

LAWRENCE J. JOSEPH  
*Counsel of Record*  
D.C. Bar No. 464777  
1250 Connecticut Ave., NW, Suite 700-1A  
Washington, DC 20036  
Telephone: (202) 355-9452  
Facsimile: (202) 318-2254  
Email: lj@larryjoseph.com

*Counsel for Applicant*

## **APPENDIX**

<i>Hotze Health &amp; Wellness Ctr. Int'l One, L.L.C. v. Envtr. Res. Ctr., Inc.,</i> No. 3:18-cv-05538-VC (N.D. Cal. Dec. 21, 2018).....	1a
<i>Hotze Health &amp; Wellness Ctr. Int'l One, L.L.C. v. Envtr. Res. Ctr., Inc.,</i> No. 18-17463 (9th Cir. Mar. 21, 2019).....	3a
Ninth Circuit Rule 27-10 .....	4a
Ninth Circuit General Order ¶6.11.....	7a

To the Honorable Elena Kagan, as Circuit Justice for the Ninth Circuit:

Pursuant to this Court’s Rules 13.5, 22.2, and 30.3, Physician’s Preference International, LP (a Texas limited partnership registered as doing business as Hotze Vitamins), Hotze Health & Wellness Center International One, L.L.C. and Braidwood Management, Inc. (collectively, “Applicants”) – defendants-appellants in the underlying action – respectfully apply for a sixty-day extension of the time within which to petition this Court for a writ of *certiorari* to the U.S. Court of Appeals for the Ninth Circuit. This application sets forth several factors that justify an extension. Without an extension, the petition for a writ of *certiorari* is currently due by June 19, 2019, although the motions panel below or the Ninth Circuit *en banc* could (but need not) act in a way that triggers a new 90-day period within which to petition this Court.<sup>1</sup> With the requested extension, the petition for a writ of *certiorari* would be due by Monday, August 19, 2019. Applicants file this application more than ten days prior to the current deadline for the petition for a writ of *certiorari*.

#### **BACKGROUND**

1. This action commenced on July 30, 2018, when Environmental Research Center, Inc. (“ERC”) filed a two-count complaint in California state court against

---

<sup>1</sup> As explained, *supra*, the uncertainty over the deadline to petition for a writ of *certiorari* arises from the interplay between the time-extending provisions of this Court’s Rule 13.3 for petitions for rehearing under FED. R. APP. P. 35 and 40 versus the impact of Ninth Circuit Rule 27-10, which replaces petitions for rehearing with *motions* for reconsideration when an order on a motion disposes of an appeal. *Compare* S. Ct. Rule 13.3 *with* Ninth Cir. Rule 27-10 (App. 5a-6a). Because Applicants did not file a “petition” below, Rule 13.3 does not literally apply here, even though Applicants have *moved* the Ninth Circuit to reconsider the dismissal of their appeal.

Applicants – which are three Texas-based entities – to enforce CAL. HEALTH & SAFETY CODE §§25249.5-25249.14 (“Proposition 65”) and to seek related relief (Counts I and II, respectively).

2. Proposition 65 authorizes private parties like ERC to bring enforcement actions to enforce Proposition 65 “in the public interest,” as distinct from government attorneys’ ability to enforce Proposition 65 “in the name of the people of the State of California.” *Compare* CAL. HEALTH & SAFETY CODE §25249.7(d) *with id.* §25249.7(c). In such private enforcement actions, the private party recoups a quarter of the civil penalties, and a California state agency gets the balance. *Id.* §25249.12(d).

3. Only applicant Physician’s Preference International, LP operates under the registered fictitious name of Hotze Vitamins, with the other two applicants’ being uninvolved in the sales that allegedly violated Proposition 65. Applicant Physician’s Preference International, LP has – and always has had – less than 10 employees, which exempts it from Proposition 65. *See* CAL. HEALTH & SAFETY CODE §25249.11(b).

4. On September 10, 2018, Applicants timely removed the action to federal court.

5. On November 1, 2018, ERC moved to remand, citing a lack of an Article III case or controversy and an insufficient amount in controversy for diversity jurisdiction. Applicants cross-moved to transfer the case to the Southern District of Texas pursuant to 28 U.S.C. §1404.

6. In connection with oral argument on the motions, the District Court raised the issue that the State of California – a non-party that has authorized private

enforcers like ERC to bring Proposition 65 suits “in the public interest” but not “in the name of the people of the State of California,” CAL. HEALTH & SAFETY CODE §25249.7(c)-(d) – might destroy diversity because “a State is not a ‘citizen’ for purposes of diversity jurisdiction.” *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).

7. In the District Court, at the Court’s invitation (ECF #33), *see* 28 U.S.C. §1653, Applicants submitted a letter brief that cited “an expert on Unfair Competition Law (‘UCL’), stating that *‘a plaintiff who prevails on [a UCL claim], individually or as a private attorney general, and subsequently moves for attorneys’ fees under Section 1021.5 of the Code of Civil Procedure will virtually always receive a fee award in excess of \$75,000.00.’*” ECF #35 (*quoting Reyes v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 113821, at \*5-6 (N.D. Cal. June 29, 2010)) (emphasis in Applicants’ letter brief). Indeed, as of January 17, 2019, ERC admitted to having incurred \$138,235.61 in legal fees, which ERC seeks to recover under CAL. CODE OF CIV. PROC. §1021.5; up to that point, the litigation had involved almost exclusively issues of removal and remand.

8. In the District Court and before the Ninth Circuit motions panel, Applicants made two arguments for ERC’s Article III standing and the amount in controversy:

(a) “Assignee standing” under *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771-73 (2000) (*qui tam* relators have assignee-based standing), with the amount in controversy made up by the \$2,500 maximum

penalty for each of the 44 allegedly unlawful shipments that ERC admitted to purchasing; and

(b) “Purchaser standing” for both economic injury, *Degelmann v. Advanced Med. Optics Inc.*, 659 F.3d 835, 840 (9th Cir. 2011) (purchase price); *Havens Realty Corp. v. Coleman*, 455 U. S. 363, 373 (1982) (“tester” standing), and informational injury, *Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1259 (9th Cir. 2010); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1550 (D.C. Cir. 1989); *Fed'l Election Comm'n v. Akins*, 524 U. S. 11, 19-20 (1998), with the amount in controversy made up by the attorney-fee award that ERC claims under CAL. CODE OF CIV. PROC. §1021.5.<sup>2</sup>

9. Applicants also argued in the District Court and before the Ninth Circuit motions panel that the District Court’s supplemental jurisdiction would provide jurisdiction for Count I if non-party California’s interest in enforcing Proposition 65 destroyed complete diversity. 28 U.S.C. §1337. Specifically, the purchaser-based argument does not rely on diversity jurisdiction over Count I (the Proposition 65 count) because diversity jurisdiction would nonetheless cover Count II (the non-Proposition 65 count), in which California has no interest. Under the circumstances, the District Court was required to retain Count II under diversity jurisdiction and either remand Count I or retain Count I under supplemental jurisdiction.

10. Addressing only assignee-based standing and diversity jurisdiction, the

---

<sup>2</sup> Because CAL. CODE OF CIV. PROC. §1021.5 is a general-purpose provision not tied to Proposition 65 *per se*, ERC’s complaint seeks an attorney-fee award for each count.

District Court remanded without addressing purchaser-based standing or supplemental jurisdiction. *See* App. 1a. Even as to assignee-based standing and diversity jurisdiction, the District Court rejected Applicants' theory as an insufficient showing under the evidentiary standard of *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), without deciding the binary, yes-no question of whether jurisdiction exists (*i.e.*, the District Court *doubted* jurisdiction, without *finding a lack* of jurisdiction). *See* App. 1a.

11. Applicants filed their notice of appeal to the U.S. Court of Appeals for the Ninth Circuit on December 25, 2018, and the District Court remanded to state court on or after December 27, 2018.

12. In the Ninth Circuit, ERC moved to dismiss the appeal for lack of appellate jurisdiction, and Applicants cross-moved to stay the District Court proceedings and to recall the remand.<sup>3</sup>

13. On March 21, 2019, a motions panel of the Ninth Circuit granted ERC's motion to dismiss without addressing Applicants' arguments that the District Court had failed to address Applicants' purchaser-based standing theory and supplemental jurisdiction.

14. Because Ninth Circuit Rule 27-10 (App. 5a-6a) replaces petitions under FED. R. APP. P. 35 and 40 with a motion for reconsideration, Applicants timely moved the Ninth Circuit for panel reconsideration and rehearing *en banc* on April 4, 2019.

---

<sup>3</sup> Applicants had moved in the District Court to stay the proceedings and to recall the remand, which the District Court summarily denied without awaiting a response from ERC.

15. Under Ninth Circuit Rule 27-10(b), “[n]o answer to a motion for clarification, modification, or reconsideration of a motions panel’s order is *permitted* unless requested by the Court” (App. 5a) (emphasis added).

16. In the 51 days since Applicants filed their motion for reconsideration, the motions panel has neither ruled on Applicants’ motion nor requested a response from ERC. Indeed, the motions panel has not taken any publicly available action on Applicant’s motion.

17. Because Applicants did not file a “petition” under FED. R. APP. P. 35 and 40 below, the time-extending provisions of this Court’s Rule 13.3 do not appear to apply here:

The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But *if a petition for rehearing is timely filed* in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

S. Ct. Rule 13.3 (emphasis added). Specifically, in the event of a summarily denied motion under Ninth Circuit Rule 27-10, the interplay between Rule 27-10 and this Court’s Rule 13.3 appears to leave Applicants with a judgment date based on the Ninth Circuit’s original dismissal, not based on the denial of the Rule 27-10 motion. *Compare* S. Ct. Rule 13.3 *with* Ninth Cir. Rule 27-10.

18. The Ninth Circuit’s rules and orders allow the motions panel to choose

between presenting Applicants' motion to the *en banc* Court (*i.e.*, to treat the motion like a petition for rehearing *en banc*) and denying the motion for the *en banc* Court:

The panel may follow the relevant procedures set forth in Chapter 5 in considering the motion for rehearing *en banc*, or may reject the suggestion on behalf of the Court.

Ninth Circuit Gen'l Order ¶ 6.11 (App. 8a). Thus, the possible explanations for the Ninth Circuit's apparent 51-day inaction ranges from simple delay, to ongoing polling of – or consideration by – the *en banc* Court, to the motion panel's planning to snooker Applicants into non-reviewability by waiting 91 days to deny summarily Applicants' motion to reconsider.

19. Under the circumstances, it is possible that 65 of the 90 days allotted for Applicants' petitioning this Court to review the dismissal of their appeal on March 21, 2019, have elapsed, without any certainty that the Ninth Circuit proceedings will ultimately resolve in a way that extends the time to seek review of the final action. Moreover, it also remains theoretically possible that Applicants will prevail in the Ninth Circuit on their motion for reconsideration.

20. Depending on how the Ninth Circuit rules on the pending motion for reconsideration, Applicants might prevail in the Ninth Circuit or may lose and thus need to petition this Court for a writ of *certiorari*, either by June 19, 2019, or perhaps by some later date. Given the possibility of Applicants' prevailing, the undersigned counsel did not begin researching and drafting the petition until recently. In addition to that task, the undersigned counsel has prior engagements to draft one dispositive and two *amicus* briefs in pending litigation between now and June 19, as well as an opposed motion to amend a complaint, which should be filed in early June.

## ARGUMENT

With that background, Applicants respectfully submit that a 60-day extension is necessary and appropriate because it would violate due process for Applicants to face the possibility that their deadline to seek review of the dismissal from March 21, 2019, may lapse before Applicants know if the Ninth Circuit will act on Applicants' motion for reconsideration in a way that extends the time for petitioning for review under this Court's Rule 13.3. Under the circumstances, the All Writs Act allows this Court to preserve its future appellate jurisdiction. 28 U.S.C. §1651(a); *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). If this action is not returned to the federal system, Applicants could prevail in the California state system before a federal court can resolve the important questions of whether Article III jurisdiction and diversity jurisdiction exist for private enforcement actions like the underlying litigation here. These jurisdictional questions are important for several reasons.

First, the Ninth Circuit's decision that an argument for federal jurisdiction that the federal District Court *ignored* somehow qualifies as a jurisdictional ruling conflicts with the decisions of several circuits. *See, e.g., U.S. v. Lynn*, 592 F.3d 572, 585 (4th Cir. 2010) ("court erred and so abused its discretion by ignoring [a party's] non-frivolous arguments"); *accord Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 612 (3d Cir. 1991); *see also Brookshire Bros. Holding v. Dayco Prods.*, 554 F.3d 595, 598-99 (5th Cir. 2009) (exercise of discretion is not jurisdictional under §1447(c)-(d) and thus is reviewable on appeal); *accord Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223-24 (3d Cir. 1995) (collecting cases).

Second, in treating an ignored basis for federal jurisdiction as a jurisdictional

dismissal, the Ninth Circuit panel also conflicts with binding Ninth Circuit precedent that ignoring an argument is an abuse of discretion, *see, e.g., Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261-62 (9th Cir. 2010); *Barroso v. Gonzales*, 429 F.3d 1195, 1208-09 (9th Cir. 2005); *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013); *Romero v. Nev. Dep’t of Corr.*, 673 F. App’x 641, 646 (9th Cir. 2016), and that abuses of discretion are not jurisdictional. *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002). Thus, the Ninth Circuit motions panel’s finding the District Court’s remand order jurisdictional not only splits with other circuits but also fails to follow Ninth Circuit precedent.

Third, in failing to adopt “[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts,” *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 271 (1941), the Ninth Circuit thus implicates this Court’s “general power to supervise the administration of justice in the federal courts,” and “the responsibility lies with this Court to define [the] requirements and insure their observance.” *Western Pacific*, 345 U.S. at 260 (interior quotations omitted). Indeed, by allowing a three-judge motions panel to deny a motion for *en banc* review without notifying or consulting the *en banc* court, Ninth Circuit General Order ¶6.11 (App. 8a, quoted in Paragraph 18, *supra*), the Ninth Circuit’s local rules *exacerbate* that court’s failure to avoid and resolve intra-circuit splits

Fourth, the underlying Article III issue of federal-versus-state jurisdiction for private-attorney-general styled enforcement mechanisms is important. Congress did not intend 28 U.S.C. §1447(d) to prohibit appeals of remand orders when federal

courts abuse their discretion by refusing to consider valid bases for jurisdiction and by refusing to exercise their discretion to hear related, but non-diverse, claims under supplemental jurisdiction. 28 U.S.C. §1337(a). If it takes \$140,000 in attorney-fee exposure to ask a federal court to exercise their jurisdiction, Paragraph 7, *supra*, the constitutional promise of a federal forum in diversity cases will be hollow.

### **REQUESTED RELIEF**

Applicants respectfully request a 60-day extension of the time within which to petition for a writ of *certiorari* for the dismissal of their appeal on March 21, 2019.

### **CONCLUSION**

For the foregoing reasons, Applicants respectfully submit that the time within which to file a petition for a writ of *certiorari* for the dismissal of their appeal on March 21, 2019, should be extended by 60 days, from June 19, 2019, to and including August 19, 2019.

Dated: May 25, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

---

LAWRENCE J. JOSEPH

*Counsel of Record*

D.C. Bar No. 464777

1250 Connecticut Av NW Suite 700-1A

Washington, DC 20036

Telephone: (202) 355-9452

Facsimile: (202) 318-2254

Email: lj@larryjoseph.com

*Counsel for Applicant*

No. 18A \_\_\_\_\_

# In the Supreme Court of the United States

---

HOTZE HEALTH & WELLNESS CTR. INT'L ONE, LLC, individually and allegedly doing business as HOTZE VITAMINS; PHYSICIAN'S PREFERENCE INT'L, LP, individually and doing business as HOTZE VITAMINS; BRAIDWOOD MGMT., INC., individually and allegedly doing business as HOTZE VITAMINS,  
*Applicants,*

v.

ENVTL. RES. CTR., INC.,  
*Respondent.*

---

*On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit*

---

## APPENDIX TO APPLICATION TO EXTEND THE TIME TO FILE PETITION FOR A WRIT OF *CERTIORARI* TO THE NINTH CIRCUIT

---

LAWRENCE J. JOSEPH  
*Counsel of Record*  
D.C. Bar No. 464777  
1250 Connecticut Ave., NW, Suite 700-1A  
Washington, DC 20036  
Telephone: (202) 355-9452  
Facsimile: (202) 318-2254  
Email: lj@larryjoseph.com

*Counsel for Applicant*

## APPENDIX

<i>Hotze Health &amp; Wellness Ctr. Int'l One, L.L.C. v. Envtr. Res. Ctr., Inc.,</i> No. 3:18-cv-05538-VC (N.D. Cal. Dec. 21, 2018).....	1a
<i>Hotze Health &amp; Wellness Ctr. Int'l One, L.L.C. v. Envtr. Res. Ctr., Inc.,</i> No. 18-17463 (9th Cir. Mar. 21, 2019).....	3a
Ninth Circuit Rule 27-10.....	4a
Ninth Circuit General Order ¶6.11.....	7a

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL RESEARCH  
CENTER, INC.,

Plaintiff,

v.

HOTZE HEALTH WELLNESS CENTER  
INTERNATIONAL ONE, L.L.C., et al.,

Defendants.

Case No. 18-cv-05538-VC

**ORDER GRANTING MOTION TO  
REMAND**

Re: Dkt. Nos. 19, 21.

The Environmental Research Center's motion to remand the case to Alameda County Superior Court is granted. The defendants have not shown that Environmental Research Center would have Article III standing to pursue their Proposition 65 action in federal court. *Cf. Environmental Research Ctr. v. Heartland Prods.*, 29 F. Supp. 3d 1281, 1282 (C.D. Cal. 2014). The defendants argue that Environmental Research Center has standing as a qui tam assignee of the State of California's claims under *Vermont Agency of Nat. Res. v. U.S. ex. rel. Stevens*, 529 U.S. 765, 773 (2000). Even assuming that *Stevens* applies, that theory raises significant concerns that California is the real party in interest to this case, such that there is no diversity jurisdiction. *See Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973); *New Mexico ex rel. Nat'l Educ. Ass'n of New Mexico, Inc. v. Austin Cap. Management Ltd.*, 671 F. Supp. 2d 1248, 1251 (D.N.M. 2009). Because the removal statute is strictly construed against jurisdiction and any doubt as to the right of removal is resolved in favor of remand, the motion to remand is granted. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

Environmental Research Center's request for attorney's fees and the defendants' request for 28 U.S.C. § 1292(b) certification are denied. The defendants' motion to transfer is denied as moot.

**IT IS SO ORDERED.**

Dated: December 21, 2018



---

VINCE CHHABRIA  
United States District Judge

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MAR 21 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ENVIRONMENTAL RESEARCH  
CENTER, INC.,

Plaintiff-Appellee,

v.

HOTZE HEALTH WELLNESS CENTER  
INTERNATIONAL ONE, LLC,  
individually and allegedly doing business as  
HOTZE VITAMINS; et al.,

Defendants-Appellants.

No. 18-17463

D.C. No. 3:18-cv-05538-VC  
Northern District of California,  
San Francisco

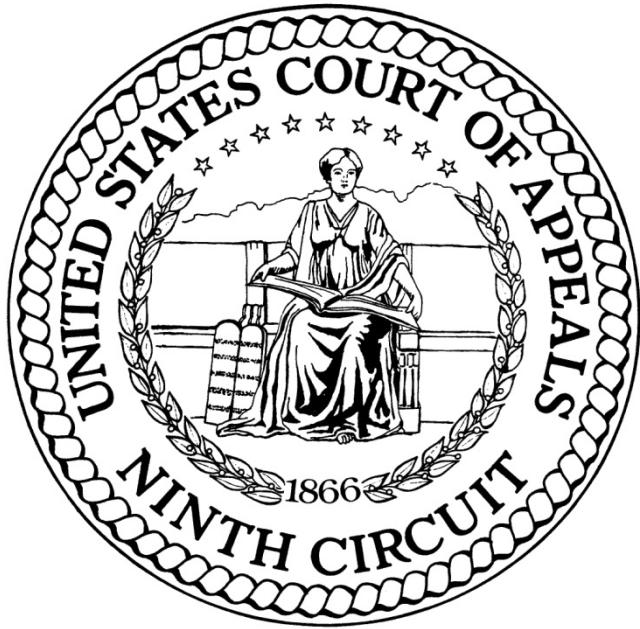
ORDER

Before: SILVERMAN, TALLMAN, and MURGUIA, Circuit Judges.

Appellee's motion to dismiss this appeal for lack of jurisdiction (Docket Entry No. 4) is granted. *See* 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Kunzi v. Pan Am. World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987).

Appellants' motion to order the district court to recall the case and stay proceedings pending appeal (Docket Entry No. 6) is denied as moot.

**DISMISSED.**



**FEDERAL RULES OF APPELLATE PROCEDURE**  
**NINTH CIRCUIT RULES**  
**CIRCUIT ADVISORY COMMITTEE NOTES**

**1 December 2018**

**Cross Reference:**

- FRAP 42. Voluntary Dismissal on page 166

**27-9.2. Involuntary Dismissals**

Motions by appellees for dismissal of criminal appeals, and supporting papers, shall be served upon both appellant and appellant's counsel, if any. If the ground of such motion is failure to prosecute the appeal, appellant's counsel, if any, shall respond within 10 days. If appellant's counsel does not respond, the clerk will notify the appellant of the Court's proposed action. (Rev. 12/1/09)

If the appeal is dismissed for failure to prosecute, the Court may impose sanctions on appellant's counsel. Counsel will be provided with 14 days notice and an opportunity to respond before sanctions are imposed.

**CIRCUIT RULE 27-10. MOTIONS FOR RECONSIDERATION****(a) Filing for Reconsideration****(1) Time limit for orders that terminate the case**

A party seeking further consideration of an order that disposes of the entire case on the merits, terminates a case, or otherwise concludes the proceedings in this Court must comply with the time limits of FRAP 40(a)(1). (Rev. 7/1/16)

**(2) Time limit for all other orders**

Unless the time is shortened or expanded by order of this Court, a motion for clarification, modification or reconsideration of a court order that does not dispose of the entire case on the merits, terminate a case or otherwise conclude proceedings in this Court must be filed within 14 days after entry of the order. (Rev. 12/1/09; Rev. 7/1/16)

**(3) Required showing**

A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

**(b) Court Processing**

**Motions Panel Orders:** A timely motion for clarification, modification, or reconsideration of an order issued by a motions panel shall be decided by that panel. If the case subsequently has been assigned to a merits panel, the motions panel shall contact the merits panel before disposing of the motion. A party may file only one motion for clarification, modification, or reconsideration of a motions panel order. No answer to a motion for clarification, modification, or reconsideration of a motions panel's order is permitted unless requested by the Court, but ordinarily the Court will not grant such a

motion without requesting an answer and, if warranted, a reply. The rule applies to any motion seeking clarification, modification, or reconsideration of a motions panel order, either by the motions panel or by the Court sitting en banc. (New 1/1/04; Rev. 12/1/09; Rev. 7/1/16)

**Orders Issued Under Circuit Rule 27-7:** A motion to reconsider, clarify, or modify an order issued pursuant to Circuit Rule 27-7 by a deputy clerk, staff attorney, circuit mediator, or the appellate commissioner is initially directed to the individual who issued the order or, if appropriate, to his/her successor. The time to respond to such a motion is governed by FRAP 27(a)(3)(A). If that individual is disinclined to grant the requested relief, the motion for reconsideration, clarification, or modification shall be processed as follows: (New 1/1/04; Rev. 7/1/16)

- (1) if the order was issued by a deputy clerk or staff attorney, the motion is referred to an appellate commissioner;
- (2) if the order was issued by a circuit mediator, the motion is referred to the chief circuit mediator;
- (3) if the order was issued by the appellate commissioner or the chief circuit mediator, the motion is referred to a motions panel.

## ***CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-10***

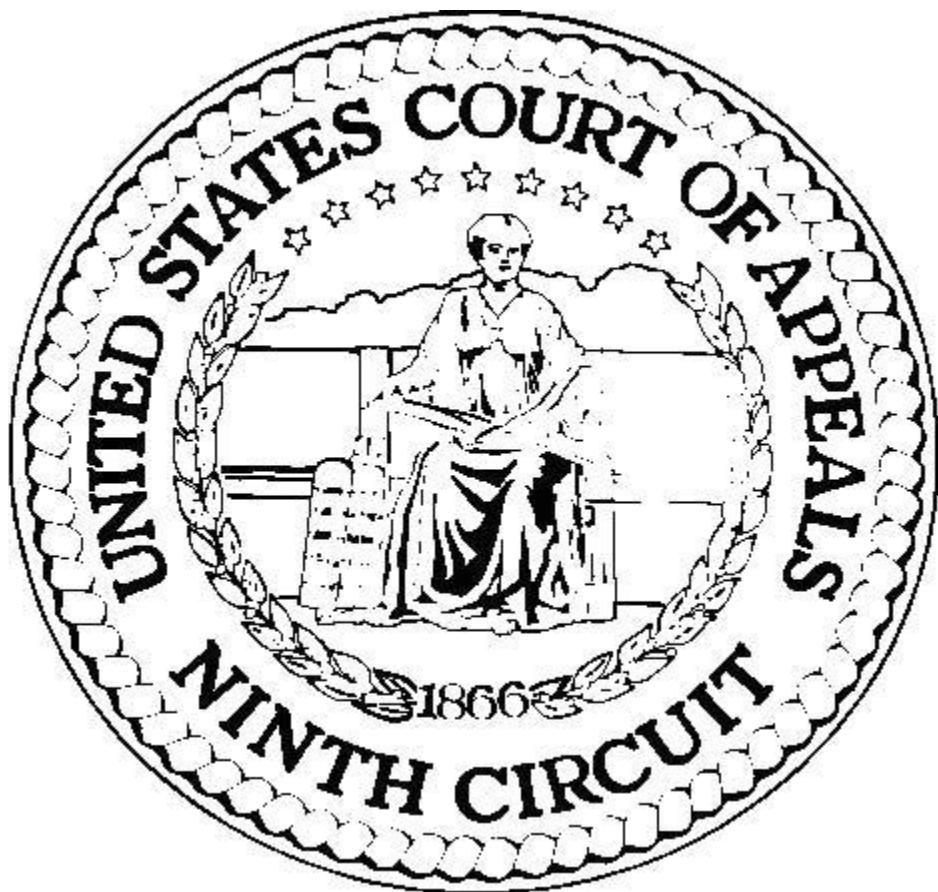
*Motions for clarification, reconsideration or modification of orders entered by a motions panel are not favored by the Court and should be utilized only where counsel believes that the Court has overlooked or misunderstood a point of law or fact, or where there is a change in legal or factual circumstances after the order which would entitle the movant to relief. (Rev. 1/1/04)*

## **CIRCUIT RULE 27-11. MOTIONS; EFFECT ON SCHEDULE**

(a) Motions requesting the types of relief noted below shall stay the schedule for record preparation and briefing pending the Court's disposition of the motion: (Rev. 1/1/03)

- (1) dismissal; (Rev. 1/1/03)
- (2) transfer to another tribunal; (Rev. 1/1/03)
- (3) full remand;
- (4) in forma pauperis status in this Court; (Rev. 1/1/03)
- (5) production of transcripts at government expense; and (Rev. 1/1/03)
- (6) appointment or withdrawal of counsel. (Rev. 1/1/03)

**UNITED STATES COURT OF APPEALS  
for the NINTH CIRCUIT**



**GENERAL ORDERS**

Revised as of April 1, 2019

An Appellate Commissioner may direct the Clerk or a staff attorney to file an order or other document that has been approved by an Appellate Commissioner.

*(Rev. 9/17/14)*

**6.10. Motions for Clarification and Petitions for Reconsideration or Rehearing (Abrogated 7/1/03)**

**6.11. Motions for Reconsideration En Banc**

Any motion or petition seeking en banc review of an order issued by a motions or oral screening panel shall be processed as a motion for reconsideration en banc. The Clerk shall forward a motion for reconsideration en banc of a motion previously considered by a motions or oral screening panel to the appropriate staff attorney for processing. If the motion was decided by published order or opinion, the motion will be circulated to all active judges. In cases involving judgments of death, the Clerk shall forward all motions for reconsideration en banc to Associates.

The motion shall be referred by the staff attorney to the panel which entered the order in issue. The panel may follow the relevant procedures set forth in Chapter 5 in considering the motion for rehearing en banc, or may reject the suggestion on behalf of the Court. *(Rev. 3/24/04; 12/13/10; 9/17/14)*

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on this 25th day of May 2019, a true and correct copy of the foregoing application and its appendix was served by first-class mail, postage prepaid, on the following counsel for the respondent:

Jason R. Flanders  
Aqua Terra Aeris Law Group  
490 43rd Street, Suite 108  
Oakland, CA 94609  
Email: [jrf@atalawgroup.com](mailto:jrf@atalawgroup.com)

Michael Freund  
Freund & Associates  
1919 Addison St., Suite 105  
Berkeley, CA 94704  
Email: [freund1@aol.com](mailto:freund1@aol.com)

In addition, by agreement among the parties, the undersigned counsel also sent a PDF courtesy copy of the foregoing application and its appendix to the above-listed counsel at the email addresses indicated above.

The undersigned further certifies that, on this 25th day of May, 2019, the foregoing application and its appendix were electronically filed with the Court, and an original and two true and correct copies of the foregoing application and its appendix were lodged with the Clerk of the Court by messenger for filing.

Executed May 25, 2019,

/s/ Lawrence J. Joseph

---

Lawrence J. Joseph