No. 19A_____

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 Applicants

CORPORATE DISCLOSURE STATEMENT

No applicant has a parent corporation, and no publicly held company owns 10% or more of any applicant's stock.

APPENDIX

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. By order dated September 10, 2019, the Ninth Circuit denied Applicant's timely motion for en banc and panel reconsideration (App. 4a), which makes the petition for a writ of *certiorari* due December 9, 2019.[1] With the requested extension, the petition for a writ of *certiorari* would be due by February 7, 2020. Applicants file this application more than ten days prior to the presumed December 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 complaint in California state court against Applicants – which are three Texas-based entities – to enforce CAL. HEALTH & SAFETY CODE §§25249.5-25249.14 ("Proposition 65") and to seek related relief.

---

[1] As explained below, because this Court and the Ninth Circuit's rules use differently phrasing, *compare* S. Ct. Rule 13.3 *with* Ninth Cir. Rule 27-10 (App. 7a-8a), Applicants protectively sought an extension from the earlier milestone of the Ninth Circuit's dismissal (March 21, 2019), but that milestone was non-final because Applicants subsequently and timely moved the Ninth Circuit for panel and *en banc* reconsideration.

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 cross 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, 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.[2]

8. By order dated December 21, 2018, the District Court granted ERC's motion to remand 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 statutory

[2] 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.

or constitutional subject-matter jurisdiction exists (*i.e.*, the District Court *doubted* jurisdiction, without *finding a lack* of jurisdiction). *See* App. 1a. In doing so, the District Court ignored Applicants' arguments for purchaser-based standing. *Id.*

9. Applicants filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit on December 25, 2018.

10. On December 27, 2018, Applicants moved the District Court to stay or recall the remand, which the District Court denied *sua sponte* the same day.

11. On or after December 27, 2019, the District Court remanded the case to state court.

12. In the Ninth Circuit, ERC moved to dismiss for lack of appellate jurisdiction under 28 U.S.C. §1447(d), which a motions panel of the Ninth Circuit granted on March 21, 2019 (App. 3a). In doing so, the panel did not address Applicants' arguments that the District Court had failed to address Applicants' purchaser-based standing theory and supplemental jurisdiction. *Id.*

13. Because Ninth Circuit Rule 27-10 (App. 7a-8a) replaces petitions for *en banc* and panel rehearing under FED. R. APP. P. 35 and 40 with motion for *en banc* and panel reconsideration, Applicants moved the Ninth Circuit for *en banc* and panel reconsideration on April 4, 2019.

14. Because the Ninth Circuit had not yet acted on Applicants' then-pending motion for reconsideration of the motion panel's dismissal order dated March 21, 2019 (*i.e.*, it was unclear whether or how the Ninth Circuit would rule), on May 25, 2019, Applicants applied to the Circuit Justice for a 60-day extension of the time within

which to file a petition for a writ of *certiorari* from the dismissal dated March 21, 2019.

15. By order dated May 28, 2019, the Circuit Justice granted Applicants a 60-day extension of the time within which to petition for a writ of *certiorari*. *Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 18A1222 (U.S.).

16. Because the Ninth Circuit had not yet acted on Applicants' then-pending motion for reconsideration of the motion panel's dismissal order dated March 21, 2019, Applicants petitioned this Court on August 19, 2019, for a writ of mandamus to the U.S. District Court for the Northern District of California – or alternatively a petition for a writ of certiorari before judgment – to compel the lower courts to recall the remand. *Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 19-238 (U.S.).

17. On September 10, 2019, the Ninth Circuit motions panel denied Applicants' motion for panel and *en banc* reconsideration not only for itself as a motions panel but also for the *en banc* court: "The motion for reconsideration is denied (Docket Entry No. 11) and the motion for reconsideration en banc (Docket Entry Nos. 11, 12) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11." App. 4a; *see also* Ninth Cir. Rule 27-10 (App. 7a-8a); Ninth Cir. Gen'l Order ¶ 6.11 (App. 10a).[3]

[3] The Ninth Circuit's general order provides that a motions "panel may follow the relevant procedures set forth in Chapter 5 [*i.e.*, standard *en banc* procedures] in considering the motion for rehearing en banc, or may reject the suggestion on behalf of the Court." Ninth Cir. Gen'l Order ¶ 6.11 (App. 10a).

18. On September 18, 2019, the Ninth Circuit issued its mandate, providing in part that "[t]he judgment of this Court, entered March 21, 2019, takes effect this date." App. 5a.

19. On November 4, 2019, this Court denied Applicants' petition for a writ of mandamus, without addressing the alternative basis as a petition for a writ of *certiorari* before judgment. *In re Hotze Health Wellness Ctr. Int'l One, LLC*, __ S.Ct. __, No. 19-238, 2019 U.S. LEXIS 6747 (Nov. 4, 2019) ("[t]he petition for a writ of mandamus is denied").

20. The foregoing procedural circumstances present two potential dates on which the ninety-day window to petition for a writ of *certiorari* might have started to run: (a) the dismissal on March 21, 2019 (App. 3a); and (b) the denial of Applicants' motion for panel and *en banc* reconsideration on September 10, 2019 (App. 4a).

21. Applicants are seeking new counsel to assist them with this ongoing matter, both in federal and state court.

ARGUMENT

With that background, Applicants respectfully submit that a 60-day extension is necessary and appropriate.

Importantly, the prior extension (No. 18A1222) applied to a different appellate action (namely, the dismissal on March 21, 2019) and so does not bar an extension from the denial of reconsideration on September 10, 2019. Although this Court's Rule 13.3 extends the 90-day period to begin running upon the denial of *petitions* for rehearing under Rules 35 and 40, FED. R. APP. P. 35 and 40, the distinction between petitions and motions is a distinction without a difference. For example, in *U.S. v.*

Dieter, 429 U.S. 6, 8-9 (1976), this Court construed a motion to "set aside" an order as a "petition for rehearing" of that order. *See also Kingman v. W. Mfg. Co.*, 170 U.S. 675, 678 (1898) ("if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of"). This Court or the Circuit Justice should hold that this Court's Rule 13.3 applies to Ninth Circuit motions under Local Rule 27-10.

This Court's denial of the earlier petition for a writ of mandamus does not bar future review on a writ of *certiorari* because the criteria for mandamus are more stringent than the criteria for *certiorari* review. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980). Similarly, the criteria for *certiorari* before judgment are more stringent than the criteria for *certiorari* after judgment. *Compare* S.CT. RULE 11 (*certiorari* before judgment) *with* S.CT. RULE 10 (*certiorari* after judgment). Under the circumstances, Applicants should have a reasonable time within which to find new counsel and to prepare a petition for a writ of *certiorari* to the Ninth Circuit.

In addition to the procedural justifications for an extension, this matter raises important issues that this Court should resolve:

- First, the Ninth Circuit's local rules and general order expressly allow a three-judge motions panel to reject reconsideration *en banc* without consulting the *en banc* court. In allowing that, the Ninth Circuit procedures conflict with the *en banc* review required by Rule 35, FED. R. APP. P. 35(a)(1), and – as such – violate Rule 47's requirement that "[a] local rule must be consistent with …

Acts of Congress and rules adopted under 28 U.S.C. §2072." FED. R. APP. P. 47(a)(1). Here, Applicants motion for reconsideration *en banc* argued that the motions panel flouted Circuit precedent, but the motions panel withheld that argument from the *en banc* court, which fails to adopt a " 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). That failure 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).

- Second, the "history of liberty has largely been the history of observance of procedural safeguards," *McNabb v. U.S.*, 318 U.S. 332, 347 (1943), and it remains entirely possible – procedurally – that the *en banc* Ninth Circuit would agree with Applicants that the District Court's ignoring one argument and merely doubting the other do not qualify as a jurisdictional dismissal. *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); *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); *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); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002).

- Third, 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. This Court could decide the need for *en banc* review under the doctrine of procedural standing, but that would also implicate the underlying Article III case or controversy to ensure that Applicants do not seek procedural standing without a concrete interest: "deprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).
- Fourth, it would benefit this Court to have the Ninth Circuit's view on California law as to whether California is an indispensable party for private enforcement actions under Proposition 65. *See Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 944 (D.C. Cir. 1991) ("a home circuit's view of state law is entitled to deference"); *cf. Glacier Gen. Assurance Co. v. G. Gordon Symons Co.*, 631 F.2d 131, 134 (9th Cir. 1980) (state's interest does not defeat diversity under Montana law). Remanding the case for *en banc* review in the Ninth Circuit could thus benefit this Court's resolution of the issue.

Applicants respectfully submit that the foregoing rationales justify providing a 60-day extension to allow Applicants to regroup and file a petition for a writ of *certiorari*.

REQUESTED RELIEF

Assuming *arguendo* that the current deadline to petition for a writ of *certiorari* is December 9, 2019, Applicants respectfully request a 60-day extension – to February 7, 2020 – of the time within which to petition for a writ of *certiorari*.

In addition, and without regard to whether the current deadline to petition for a writ of *certiorari* has lapsed or is December 9, 2019, or to whether this Court or the Circuit Justice grant an extension, Applicants respectfully submit that the Court or Circuit Justice should clarify the timing of how this Court's Rule 13.3 interacts with Ninth Circuit Rule 27-10 for purposes of seeking review in this Court following the denial of a motion for reconsideration under Circuit Rule 27-10.

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 should be extended by 60 days, from December 9, 2019, to and including February 7, 2020.

Dated: November 27, 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 Applicants

No. 19A_____

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 Applicants

APPENDIX

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

MAR 21 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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.

sz/MOATT

FILED

SEP 10 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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.

Appellants have filed a combined motion for reconsideration and motion for reconsideration en banc and a related notice of supplemental authority (Docket Entry Nos. 11, 12).

The motion for reconsideration is denied (Docket Entry No. 11) and the motion for reconsideration en banc (Docket Entry Nos. 11, 12) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

sz/MOATT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 18 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
U.S. District Court for Northern California, San Francisco

MANDATE

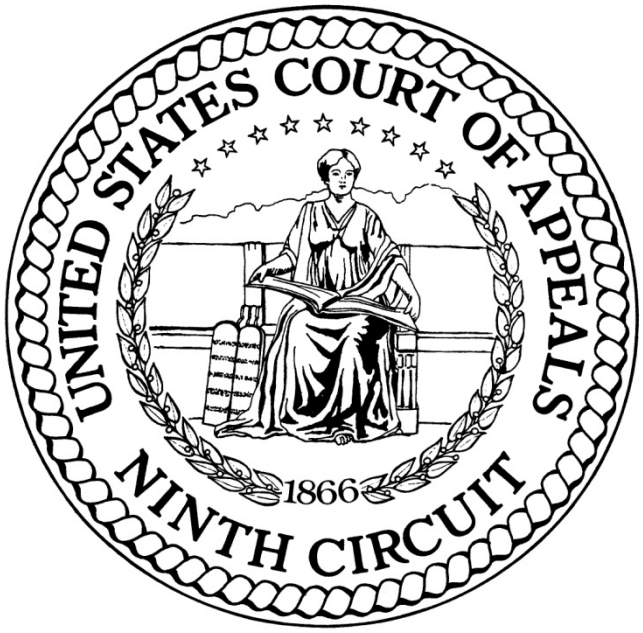
The judgment of this Court, entered March 21, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7



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;

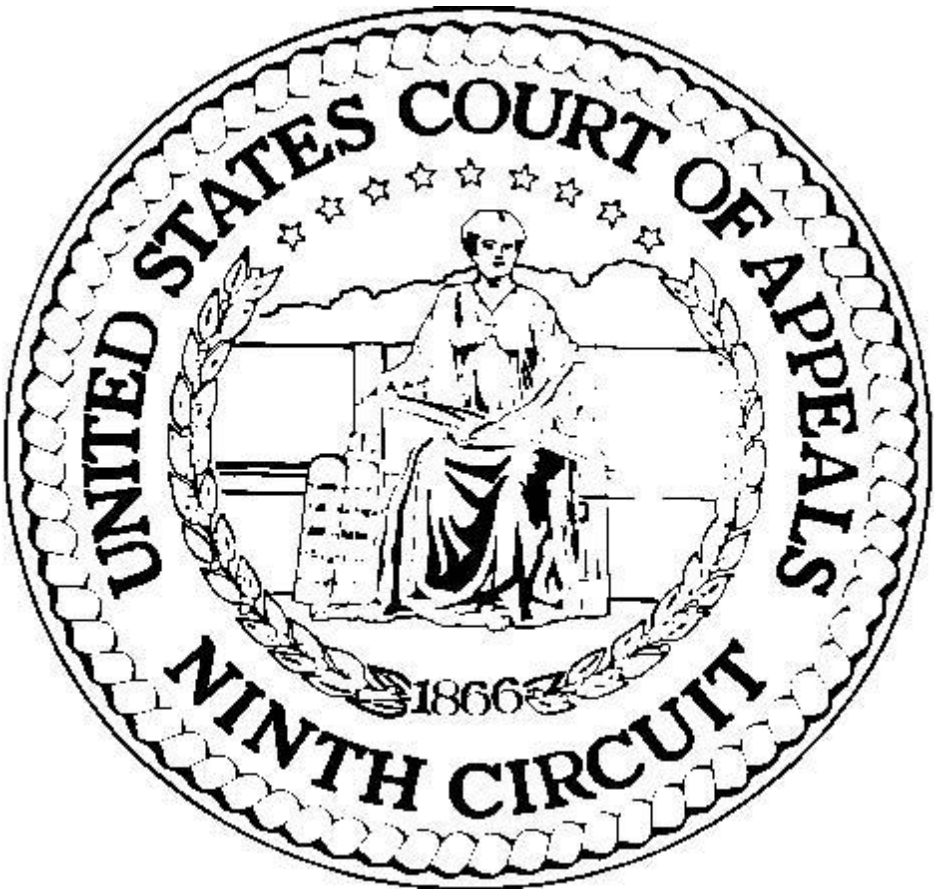
(4) in forma pauperis status in this Court; *(Rev. 1/1/03)*

(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 27th day of November 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

In addition, 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 27th day of November 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 November 27, 2019,

/s/ Lawrence J. Joseph
Lawrence J. Joseph