United States Court of Appeals for the Ninth Circuit

FILED MAR 21 2019
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

No. 18-17463
D.C. No. 3:18-cv-05538-VC
Northern District of California, San Francisco

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.

Submitted: June 14, 2018, Decided: June 18, 2018

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.

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

CAL. CODE CIV. PROC. §367

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.

CAL. CODE OF CIV. PROC. §1021.5

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.
…

CAL. HEALTH & SAFETY CODE §25249.7(c)-(d)

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California, by a district attorney, by a city attorney of a city having a population in excess of 750,000, or, with the consent of the district attorney, by a city prosecutor in a city or city and county having a full-time city prosecutor, or as provided in subdivision (d).

(d) Actions pursuant to this section may be brought by a person in the public interest if both of the following requirements are met:

(1) The private action is commenced more than 60 days from the date that the person has given notice of an alleged violation of Section 25249.5 or 25249.6 that

is the subject of the private action to the Attorney General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator. If the notice alleges a violation of Section 25249.6, the notice of the alleged violation shall include a certificate of merit executed by the attorney for the noticing party, or by the noticing party, if the noticing party is not represented by an attorney. The certificate of merit shall state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. Factual information sufficient to establish the basis of the certificate of merit, including the information identified in paragraph (2) of subdivision (h), shall be attached to the certificate of merit that is served on the Attorney General.

(2) Neither the Attorney General, a district attorney, a city attorney, nor a prosecutor has commenced and is diligently prosecuting an action against the violation.

CAL. HEALTH & SAFETY CODE §25249.11(b)

(b) "Person in the course of doing business" does not include any person employing fewer than 10 employees in his or her business; any city, county, or district or any department or agency thereof or the state or any department or agency thereof or the federal government or any department or agency

thereof; or any entity in its operation of a public water system as defined in Section 116275.

CAL. HEALTH & SAFETY CODE §25249.12(d)

(d) Twenty–five percent of all civil and criminal penalties collected pursuant to this chapter shall be paid to the office of the city attorney, city prosecutor, district attorney, or Attorney General, whichever office brought the action, or in the case of an action brought by a person under subdivision (d) of Section 25249.7, to that person.

U.S. CONST. art. III, §2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

28 U.S.C. §1332(a)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an

action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

28 U.S.C. §1376(a)

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. §1447(c)-(d)

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall

be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. §1651(a)

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

FED. R. APP. P. 35(a)(1)

Rule 35. En Banc Determination

(a) WHEN HEARING OR REHEARING EN BANC MAY BE ORDERED. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

FED. R. APP. P. 47(a)

Rule 47. Local Rules by Courts of Appeals

(a) LOCAL RULES.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving

appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

NINTH CIR. 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.

Ninth Circuit General Order ¶6.11

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)*

In the United States Court of Appeals
for the Ninth Circuit

No. 18-17463
D.C. No. 3:18-cv-05538-VC
Northern District of California, San Francisco

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.

DECLARATION OF LAWRENCE J. JOSEPH

I, Lawrence J. Joseph, hereby declare and state as follows:

1. I am over 18 years of age, and I reside in McLean, Virginia.

2. I am the counsel for appellants in the above-captioned action.

3. On January 9, 2019, I met and conferred by phone with appellee's counsel – Jason Flanders – to discuss appellee's forthcoming motion to dismiss and appellants' cross-motion to renew the stay-and-recall relief that appellants sought in district court. Our meet-and-confer discussions continued via email on January 10, 2019, with me advising Mr. Flanders

that he could "represent to the Court that appellants will oppose [appellee's] motion and cross-move to stay and recall the remand pending resolution of the appeal, renewing in the Court of Appeals the motion that appellants filed below on December 27, which the District Court denied on January 2." Mr. Flanders replied by email that appellee "opposes [the] proposed [cross-]motion on the basis that the court of appeals lacks jurisdiction."

4. Appellee's complaint in the underlying action seeks "civil penalties for each and every violation," "injunctive orders, or other orders as are necessary to prevent Hotze Vitamins from exposing persons to lead without providing clear and reasonable warning," and "such other relief as the Court may deem just and proper." See Appellee's Mot. to Dismiss Appeal, Flanders Decl. Ex. B, at 8-9 (copy filed as ECF #1-1 below).

5. Paragraph 25 of the plaintiff's complaint (ECF #1-1) provides as follows:

> There exists an actual controversy relating to the legal rights and duties of the Parties, within the meaning of Code of Civil Procedure section 1060, between ERC and Hotze Vitamins, concerning whether Hotze Vitamins has exposed individuals to a chemical known to the State of California to cause cancer, birth defects, and other reproductive harm without providing clear and reasonable warning.

(ECF #1-1).

6. In apparent response to appellants' quotation of the foregoing language from the complaint (see Paragraph 5, supra) in the notice of

removal (ECF #1), plaintiff's counsel responded via email – which plaintiff subsequently submitted as evidence in the District Court – as follows:

> Your allegation that ERC alleges that its "legal rights and duties" are in "actual controversy" does NOT establish injury in fact. Note that this allegation was set forth in the cause of action for declaratory relief.

(ECF #20 (capitalization in original)).

7. Paragraph 4 of the Prayer for Relief in plaintiff's complaint (ECF #1-1) provides as follows: "On all Causes of Action, for reasonable attorneys' fees pursuant to Code of Civil Procedure section 1021.5 or the substantial benefit theory[.]"

8. In its motion to remand the case, ERC stated that "[a]ny allegations in the Complaint that Defendants or the Court interpret to allege concrete, particularized, and actual harm, Plaintiff will seek leave to amend." Mot. to Remand Case to California Superior Court, at 7 (ECF #19).

9. In the District Court, appellee filed a declaration from its executive director admitting to forty-four (44) instances of purchasing Hotze Vitamins products that appellee claims violate Proposition 65 (EFC #29), which I summarized under penalty of perjury in a declaration (ECF #31) and in the table appended hereto as Exhibit A.

10. In the District Court, appellants submitted declarations from James Bittick (ECF #24, and attached hereto as Exhibit B) and Gina Teafatiller (ECF #25, and attached hereto as Exhibit C) to the effect that the limited partnership operating as Hotze Vitamins has fewer than 10 employees and that the other two defendants are

wholly uninvolved in the Hotze Vitamins business. In the District Court, appellee neither rebutted this evidence nor even responded to it.

11. Appellants filed sworn statements (ECF #24, #25) that two defendants (Hotze Health & Wellness Center International One, L.L.C. and Braidwood Management, Inc.) do not engage in vitamin sales and that the third defendant (Physician's Preference International, LP) – which operates as "Hotze Vitamins" – has had fewer than 10 employees threshold at all times relevant to this action.

12. In briefing the remand and transfer issues below, I am not aware that plaintiff sought to rebut the evidence that defendants submitted (see Paragraph 11, supra) or made a good-faith, information-and-belief basis for thinking that two defendants (Hotze Health & Wellness Center International One, L.L.C. and Braidwood Management, Inc.) are involved in vitamin sales or that Proposition 65 applies to Physician's Preference International, LP based on Proposition 65's 10-employee threshold.

13. In the District Court, appellants' counsel submitted two declarations (ECF #23, 31, and attached hereto as Exhibit D and E, respectively, with their exhibits removed).

14. Appellants submitted a post-hearing brief (ECF #35) at the direction of the district judge's invitation (ECF #33), and that letter brief provided inter alia that:

> Even if California were a real party in interest, this Court still would have diversity jurisdiction over Count II, based on the

> monetary reimbursement that ERC could seek plus the attorney-fee award. While taking away the penalties makes the amount-in-controversy rely on the attorneys fees, they still would easily exceed $75,000. *See* Second Joseph Decl. 2 (¶6) (ECF #31) (attorney-fee award over $150,000). With diversity jurisdiction thus established, this Court would have supplemental jurisdiction over Count I. 28 U.S.C. §1367; *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 858 (9th Cir. 2001) ("we hold that if a named plaintiff in a diversity class action has a claim with an amount in controversy in excess of $75,000, 28 U.S.C. § 1367 confers supplemental jurisdiction over claims of unnamed class members irrespective of the amount in controversy in those claims"); *Riggs v. Plaid Pantries, Inc.*, 233 F. Supp. 2d 1260, 1269 (D. Or. 2001).

(ECF #35 (italics in original)). The district judge's order allowed appellants until noon (Pacific) on December 21, 2018, to file the letter brief, and the EFC notice of docket activity for the letter's filing shows docketing at 11:47 a.m. (Pacific), which was 4 hours and 25 minutes before the notice of docket activity for the remand order (ECF #36) at 4:12 p.m. (Pacific) on the same day.

15. By email dated January 17, 2019 (attached hereto as Exhibit F in redacted form), appellee's counsel – Michael Freund – admitted that appellee's legal fees already exceed $75,000 (specifically, $36,585.00 for MF, $21,677.50 for RH, $31,509.00 for ATA, and $41,199.49 for ERC, which on information and belief represent Mr. Freund, his

associate Ryan Hoffman, the Aqua Terra Aeris Law Group, and appellee Environmental Research Center, respectively). Although the redacted information discussed settlement of other issues, the email expressly stated that "The fees … are non-negotiable."

16. In the District Court, appellants' counsel submitted evidence that appellee recovers restitution-like funds to "reimburse its reasonable costs in bringing" the action (or words to that effect) in settlements. (ECF #31, and attached hereto as Exhibit E with its exhibits removed). In the District Court, appellee neither rebutted this evidence nor even responded to it.

17. In the remanded case, Appellants filed a declaration (attached hereto as Exhibit G) that states that "[Hotze Vitamins] has disabled the ability to order from its website to a California shipping address, and [Hotze Vitamins] has no current plans to reinstate the ability for users of its website to order to a California shipping address." In preparing this declaration, I attempted to purchase products from the website using a California shipping address, and the website rejected by other with the message "Sorry for the inconvenience but we are no longer able to ship into California."

I declare under penalty of perjury that the foregoing is true and correct of my personal knowledge, which I believe to be true and if called as a witness I would be competent to testify thereto. Executed on this 4th day of April, 2019.

/s/ Lawrence J. Joseph

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA

ENVIRONMENTAL RESEARCH CENTER, INC., a California non-profit corporation

Plaintiff,

vs.

HOTZE HEALTH AND WELLNESS CENTER INTERNATIONAL ONE, LLC, individually and allegedly doing business as HOTZE VITAMINS; BRAIDWOOD MANAGEMENT, INC., individually and allegedly doing business as HOTZE VITAMINS; PHYSICIAN'S PREFERENCE INTERNATIONAL, LP, individually and doing business as HOTZE VITAMINS; and DOES 1-100
Defendants.

Case No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND CIVIL PENALTIES

Plaintiff Environmental Research Center. Inc. hereby allege:

I. INTRODUCTION

1 Plaintiff Environmental Research Center, Inc. (hereinafter "Plaintiff" or 'ERC") brings this action as a private attorney general enforcer and i n the public interest pursuant to Health & Safety Code section 25249.7, subdivision (d). The Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Safety Code section 25249.5 et seq.) also known as "Proposition 65," mandates that businesses with ten or more employees must provide a "clear and reasonable warning prior to exposing any individual to a chemical known to the state to cause

cancer or reproductive toxicity . Lead is a chemical known to the State of California to cause cancer, birth defects, and other reproductive harm. This complaint seeks injunctive and declaratory relief and civil penalties to remedy the ongoing failure of Defendants Hotze Health & Wellness Center International One, L.L.C., individually and doing business as Hotze Vitamins; Physician's Preference International, LP, individually and doing business as Hotze Vitamins; Braidwood Management, Inc., individually and doing business as Hotze Vitamins (collectively, "Hotze Vitamins"); and Does 1-100 (hereinafter individually referred to as "Defendant" or collectively as "Defendants"), to warn consumers that they have been exposed to lead from a number of Hotze Vitamins' nutritional health products as set forth in paragraph 3 at levels exceeding the applicable Maximum Allowable Dose Level ("MADL") and requiring a warning pursuant to Health & Safety Code section 25249.6.

II PARTIES

2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

3. Defendant Hotze Vitamins is a business that develops, manufactures, markets, distributes, and/or sells nutritional health products that have exposed users to lead in the State of California within the relevant statute of limitations period. These "SUBJECT PRODUCTS" (as identified in the Notice of Violation dated May 10, 2018 attached hereto as Exhibit A) are:(1) Hotze Vitamins Pure Cleanse Functional Detoxification Powder Natural Berry Flavor; (2) Hotze Vitamins Pure Pea Protein Natural Vanilla Flavor, (3) Hotze Vitamins Pure Pea Protein Natural Chocolate Flavor, (4) Hotze Vitamins Optimal Greens Detoxification and Mental

Clarity Lemon-Lime Flavor, (5) Hotze Vitamins Bodyworks Plus by Dr Hotze, (6) Hotze Vitamins Fiber Blend Plus Probiotics, (7) Hotze Vitamins Milk Thistle Extract 150 mg, (8) Hotze Vitamins Dr Hotze's Mocha Protein Bar, (9) My Hotze Pak Detox Starter Pak which includes the following products: a. My Hotze Pak Detox Starter Pak Breakfast, b. My Hotze Pak Detox Starter Pak Lunch, and c. My Hotze Pak Detox Starter Pak Dinner; (l 0) My Hotze Pak Skinny Pak which includes the following products: a.My Hotze Pak Skinny Pak Breakfast and b. My Hotze Pak Skinny Pak Dinner; 11) Hotze Vitamins Dr. Hotze's Dark Chocolate Coconut Bar, (12) My Hotze Pak ·14 Day Detox Kit which includes the following products: a. My Hotze Pak 14 Day Detox Kit Bedtime, b. My Hotze Pak 14 Day Detox Kit Dinner; c. My Hotze Pak 14 Day Detox Kit Breakfast, d. My Hotze Pak 14 Day Detox Kit Upon Rising, e. Hotze Vitamins Pure Cleanse Functional Detoxification Powder Natural Berry Flavor, and f. Hotze Vitamins Pure Pea Protein Natural Vanilla Flavor; and (13) Hotze Vitamins Cranberry Concentrate. Hotze Vitamins is a company subject to Proposition 65 as it employs ten or more persons and has employed ten or more persons at all times relevant to this action.

4. Defendants Does 1-100, are named herein under fictitious names, as their true names and capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that each of said Does is responsible, in some actionable manner, for the events and happenings hereinafter referred to, either through said Does' conduct, or through the conduct of its agents, servants or employees, or in some other manner, causing the harms alleged by ERC in this complaint. When said true names and capacities of Does are ascertained, ERC will seek leave to amend this complaint to set forth the same.

III JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to

California Constitution Article VI, Section 10, which grants the Superior Court original jurisdiction in all causes except those given by statute to other trial courts. The statute under which this action is brought does not specify any other basis for jurisdiction.

6. This Court has jurisdiction over Hotze Vitamins because Hotze Vitamins has sufficient minimum contacts with California, and otherwise intentionally avails itself of the California market through the marketing, distribution, and/or sale of the SUBJECT PRODU CTS in the State of California so as to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

7. The Complaint is based on allegations contained in the Notice of Violation dated May 10, 2018, served on the California Attorney General, other public enforcers, and Hotze Vitamins. The Notice of Violation constitutes adequate notice to Hotze Vitamins because it provided adequate information to allow Hotze Vitamins to assess the nature of the alleged violations, consistent with Proposition 65 and its implementing regulations. A certificate of merit and a certificate of service accompanied each copy of the Notice of Violation, and both certificates comply with .Proposition 65 and its implementing regulations. The Notice of Violation served on Hotze Vitamins also included a copy of "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary." Service of the Notice of Violation and accompanying documents complied with Proposition 65 and its implementing regulations. Attached hereto as Exhibit A is a true and correct copy of this Notice of Violation and associated documents. More than 60 days have passed since ERC mailed the Notice of Violation and no public enforcement entity has filed a complaint in this case.

8. This Court is the proper venue for the

action because the causes of action have arisen in the County of Alameda where some of the violations of law have occurred, and will continue to occur, due to the ongoing sale of Hotze Vitamins' products. Furthermore, venue is proper in this Court under Code of Civil Procedure section 395.5 and Health & Safety Code section 25249.7.

IV STATUTORY BACKGROUND

9. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as "Proposition 65"by an overwhelming majority vote of the people in November of 1986.

10. The warning requirement of Proposition 65 is contained in Health & Safety Code section 25249.6, which provides:

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249. 10. .

11. Implementing regulations for Proposition 65 define expose as "to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical." An individual may come into contact with a listed chemical through water, air, food, consumer products and any other environmental exposure as well as occupational exposures." (Cal. Code Regs., tit. 27, § 25102, subd. (i).)

12. In this case, the exposures are caused by consumer products. Implementing regulations for Proposition 65 define a consumer product exposure as "an exposure which results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service."(Cal. Code Regs., tit. 27, § 25602, subd. (b).)

13. Whenever a clear and reasonable warning is required under Health & Safety Code

section 25249.6, the "method employed to transmit the warning must be reasonably calculated considering the alternative methods available under the circumstances, to make the warning message available prior to exposure." (Cal. Code Regs., tit. 27, §25601.) The warning requirement may be satisfied by a warning that appears on a product's label or other labeling, shelf labeling, signs, a system of signs, public advertising identifying the system and toll-free information services, or any other system, that provides clear and reasonable warnings. (Cal. Code Regs., tit. 27, §25603.1, subd. (a)-(d).)

14. Proposition 65 establishes a procedure by which the State is to develop a list of chemicals "known to the State to cause cancer or reproductive toxicity."(Health & Safety Code, § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months after the chemical is publishe on the State list. (Health & Safety Code, § 25249.10, subd. (b).)

15. Lead was listed as a chemical known to the State of California to cause developmental toxicity in the fetus and male and female reproductive toxicity on February 27, 1987. Lead was listed as a chemical known to the State of California to cause cancer on October 1, 1992. (State of Califorrua EPA OEHHA Safe Drinking Water and Toxic Enforcement Act of 1986 Chemicals Known to the State to Cause Cancer and Reproductive Toxicity.) The MADL for lead as a chemical known to cause reproductive toxicity is 0.5 micrograms per day.(Cal. Code Regs., tit. 27, §25805, subd. (b).) The No Significant Risk Level for lead as a carcinogen is 15 micrograms per day. (Cal. Code Regs., tit. 27, §25705, subd. (b).)

16. Proposition 65 pi:ovides that any person "violating or threatening to violate" Proposition 65 may be enjoined in any court of competent jurisdiction. (Health & Safety Code, §25249.7, subd. (a).) To "threaten to violate" means "to create a condition in which there is a substantial probability

that a violation will occur."(Health & Safety Code, § 25249. 11, subd. (e).) Furthermore, violators are subject to a civil penalty of up to $2,500 per day for each violation. (Health & Safety Code, § 25249.7, subd. (b)(l).)

17. Proposition 65 may be enforced by any person in the public interest who provides notice sixty days before filing suit to both the violator and designated law enforcement officials. The failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed pursuant to Health & Safety Code section 25249.7, subdivisions (c) and (d).

V STATEMENT OF FACTS

18. Hotze Vitamins has developed, manufactured , marketed, distributed, and/or sold the SUBJECT PRODUCTS containing lead into the State of California. Consumption of the SUBJECT PRODUCTS according to the directions and/or recommendations provided for said products causes consumers to be exposed to lead at levels exceeding the 0.5 micrograms per day MADL and requiring a warning. Consumers have been ingesting these products for many years, without any knowledge of their exposure to lead, a very dangerous chemical.

19. For many years, Hotze Vitamins has knowingly and intentionally exposed numerous persons to lead without providing a Proposition 65 warning. Prior to ERC's Notice of Violation and this Complaint, Hotze Vitamins failed to provide a warning on the labels of the SUBJECT PRODUCTS. Hotze Vitamins has at all times relevant hereto been aware that the SUBJECT PRODUCTS contained lead and that persons using these products have been exposed to this chemical. Hotze Vitamins has been aware of the presence of lead in the SUBJECT PRODUCTS and has failed to disclose the presence of this chemical to the public, who undoubtedly believe they have been ingesting totally healthy and pure products pursuant to the company 's

statements. On the company's website (https://www.hotzevitamins.com/our-story), various representations from Steven F. Hotze, M.D. are conveyed regarding the quality and beneficial nature of its products including but not limited to the following:

* "Our goal is to help you achieve health and wellness naturally so that you may

enjoy a better quality of life, and these products will help to ensure that."

* "All of the products designed for Hotze Vitamins® are formulated at state-of-

the-art facilities following strict Good Manufacturing Practices (GMP) guidelines."

* "As a medical doctor, I am convinced of the absolute need for vitamin and mineral supplementation, and I can assure you that all of the Hotze Vitamins® nutritional products have been researched and developed with your good health in mind ."

20. Both prior and subsequent to ERC's Notice of Violation, Hotze Vitamins failed to provide consumers of the SUBJECT PRODUCTS with a clear and reasonable warning that they have been exposed to a chemical known to the State of California to cause cancer, birth defects and other reproductive harm. This failure to warn is ongoing.

FIRST CAUSE OF ACTION

(Violation of Section 25249.6 of the Health and Safety Code, Failure to Provide Clear and Reasonable Warning under Proposition 65)

21. ERC refers to paragraphs 1-20, inclusive, and incorporates them herein by this reference.

22. By committing the acts alleged above, Hotze Vitamins has, in the course of doing

business, knowingly and intentionally exposed users of the SUBJECT PRODUCTS to lead, a chemical known to the State of California to cause

cancer, birth defects, and other reproductive harm, without first giving clear and reasonable warning to such individuals within the meaning of Health & Safety Code section 25249.6. In doing so, Hotze Vitamins has violated Health & Safety Code section 25249.6 and continues to violate the statute with each successive sale of the SUBJECT PRODUCTS.

23. Said violations render Hotze Vitamins liable for civil penalties, up to $2,500 per day for each violation, and subject Hotze Vitamins to injunction.

SECOND CAUSE OF ACTION

(Declaratory Relief)

24. ERC refers to paragraphs 1-23, inclusive, and incorporates them herein by this reference.

25. There exists an actual controversy relating to the legal rights and duties of the Parties, within the meaning of Code of Civil Procedure section 1060, between ERC and Hotze Vitamins, concerning whether Hotze Vitamins has exposed individuals to a chemical known to the State of California to cause cancer, birth defects, and other reproductive harm without providing clear and reasonable warning.

VI PRAYER

WHEREFORE ERC prays for relief as follows:

1. On the First Cause of Action, for civil penalties for each and every violation according to proof;

2. On the First Cause of Action, and pursuant to Health & Safety Code section 25249.7, subdivision (a), for such temporary restraining orders, preliminary and permanent injunctive orders, or other orders as are necessary to prevent Hotze Vitamins from exposing persons to lead without providing clear and reasonable warning;

3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil

Procedure section 1060 declaring that Hotze Vitamins has exposed individuals to lead without providing clear and reasonable warning; and

4. On all Causes of Action, for reasonable attorneys' fees pursuant to Code of Civil Procedure section 1021.5 or the substantial benefit theory;

5. For costs of suit herein; and

6. For such other relief as the Court may deem just and proper.

DATED: July 30, 2018

MICHAEL FREUND & ASSOCIATES

/s/

Michael Freund

Ryan Hoffman

Attorneys for Plaintiff

ENVIRONMENTAL RESEARCH CENTER, INC.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

ENVIRONMENTAL RESEARCH CENTER, INC., a California non-profit corporation, PLAINTIFF,

v.

HOTZE HEALTH & WELLNESS CENTER INTERNATIONAL ONE, L.L.C., individually and allegedly doing business as HOTZE VITAMINS; BRAIDWOOD MANAGEMENT, INC., individually and allegedly doing business as HOTZE VITAMINS; PHYSICIAN'S PREFERENCE INTERNATIONAL, LP, individually and doing business as HOTZE VITAMINS; and DOES 1-100, DEFENDANTS.

Case No. 3:18-cv-5538

NOTICE OF REMOVAL

REMOVAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, CASE NO. RG18914802 (FILED JULY 30, 2018), HON. BRAD SELIGMAN PRESIDING

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that defendant Physician's Preference International, LP, doing business as Hotze Vitamins ("PPILP"), hereby removes to this Court, pursuant to 28 U.S.C. §§1331, 1332(a), 1337, 1441 & 1446, the above-referenced case pending in the Superior Court of California, County of Alameda, for which this federal District Court has original subject matter jurisdiction. The basis for federal jurisdiction is federal complete

preemption, diversity of citizenship, and federal law regulating commerce or protecting trade and commerce. Defendant PPILP appears solely for the purpose of removal and not for any other purpose, reserving all defenses available to it. Defendant PPILP expressly and fully reserves its right to object to personal jurisdiction in its first responsive pleading.

1. On July 30, 2018, Plaintiff Environmental Research Center, Inc., a California non-profit corporation ("Plaintiff"), filed in the Superior Court of the State of California, Alameda County, a lawsuit entitled "Complaint for Injunctive and Declaratory Relief and Civil Penalties" (hereinafter, "Complaint" or "Compl.") and captioned as follows:

> ENVIRONMENTAL RESEARCH CENTER, INC., a California non-profit corporation v. HOTZE HEALTH & WELLNESS CENTER INTERNATIONAL ONE, L.L.C., individually and doing business as HOTZE VITAMINS; BRAIDWOOD MANAGEMENT, INC., individually and doing business as HOTZE VITAMINS; PHYSICIAN'S PREFERENCE INTERNATIONAL, LP, individually and doing business as HOTZE VITAMINS; and DOES 1-100.

The Superior Court assigned the case number RG1891480, with the Hon. Brad Seligman presiding. Contrary to this caption, only defendant PPILP does business as Hotze Vitamins.

2. Plaintiff served Defendants on August 14, 2018.

3. Federal statutes fully regulate the labeling of vitamins and dietary supplements, and thereby completely preempt this field, particularly with respect to the non-additive, trace amounts of substances allegedly in the natural ingredients at

issue here. These federal statutes include, but are not limited to, the Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§301-399a, the Nutrition Labeling and Education Act of 1990, 21 U.S.C. §343(r) et seq. the Dietary Supplement Health and Education Act of 1994, 21 U.S.C. §321(ff), the Food And Drug Modernization Act of 1997, 21 U.S.C. §353a, and the implementing federal regulations issued thereunder and pursuant to additional federal statutory authority.

4. This complete preemption by federal labeling laws and regulations concerning vitamins and dietary supplements is within the meaning of complete preemption for removal purposes as established in Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson, 201 F.3d 1212, 1215 (9th Cir.), amended by 208 F.3d 1170 (9th Cir.), cert. denied, 531 U.S. 992 (2000).

5. Plaintiff's Complaint attached hereto seeks to compel Defendants to modify the labeling on vitamins and dietary supplements with respect to trace amounts of lead as it allegedly exists in their natural ingredients, and to impose substantial fines despite the full compliance of the labeling with applicable federal law.

6. This removal is timely in accordance with 28 U.S.C. §1446(b)(3), because this notice of removal is filed within 30 days of service of the Complaint on Defendants on August 14, 2018.

7. Because the federal labeling laws for vitamins and dietary supplements completely preempt state law with respect to non-additive, natural ingredients, removal is appropriate here. See Rutledge, cited supra.

8. Removal is also appropriate pursuant to 28 U.S.C. §1332(a) based on the complete diversity of the parties, whereby Plaintiff is a resident of California (Compl. ¶ 2) and Defendants are all residents of Texas, and the amount in dispute is in excess of $75,000 exclusive of interest and costs.

Specifically, Plaintiff demands payment by Defendants of $2,500 per alleged violation dating back to 2015, which exceeds $75,000.

9. In addition, Plaintiff demands payment by Defendants of attorneys' fees which likewise, upon information and belief, will exceed $75,000. Attorneys' fees, including expected future fee demands, may be included in the calculation for diversity threshold purposes. See Brady v. Mercedes-Benz USA, Inc., 243 F. Supp. 2d 1004, 1010-11 (N.D. Cal. 2002) (including potential future attorneys' in order to calculate the amount in controversy for the purposes of establishing diversity jurisdiction).

10. On information and belief, Plaintiff and its counsel have no good-faith basis to view Proposition 65 as applying to Hotze Vitamins, and an attorney-fee award for the nuisance value of this litigation is their purpose for bringing suit.

11. Moreover, the cost to defendant PPILP of complying with Plaintiff's demanded injunctive relief would exceed $75,000, and "[t]he amount in controversy may include the cost of complying with such an injunction." See Simmons v. PCR Tech., 209 F. Supp. 2d 1029, 1034 (N.D. Cal. 2002) (citing Schwarzer, Tashima & Wagstaffe, Cal. Practice Guide: Fed. Civ. Pro. Before Trial P2:483 (The Rutter Group 2001); In re Ford Motor Co./Citibank, 264 F.3d 952, 958 (9th Cir. 2001)).

12. Thus there is more than sufficient evidence for this Court to find, pursuant to 28 U.S.C. §1446(c)(2), that the amount in controversy exceeds $75,000 and thereby satisfies the threshold requirement in 28 U.S.C. §1332(a).

13. The location of the unidentified defendants having fictitious names is not relevant to diversity jurisdiction. 28 U.S.C. §1441(b)(1).

14. Plaintiff filed six (6) separate lawsuits nearly simultaneously against numerous businesses, including Defendants, and scheduled a "Complex Determination Hearing" on the same day for all of

them (Sept. 11, 2018). In written correspondence dated July 13, 2018, Defendants advised Plaintiff (a) that they are distinct legal entities under Texas law, (b) that only defendant PPILP does business as Hotze Vitamins, and (c) that defendant PPILP has at all relevant times had fewer than the ten employees necessary for Proposition 65 to apply, CAL. HEALTH & SAFETY CODE § 25249.11(a)-(b). Notwithstanding the foregoing, Plaintiff filed its state-court action without any good-faith basis for believing that Defendants violated Proposition 65. This excessive litigation by Plaintiff and its counsel constitutes a conspiracy in restraint of trade, in violation of Section One of the Sherman Act, for which there is exclusive jurisdiction in federal court. 15 U.S.C. §1; 28 U.S.C. §1337(a).

15. Upon information and belief, Plaintiff seeks recovery of its expenses incurred in arranging for the testing of products sold by defendant PPILP, and this expense by Plaintiff establishes an injury-in-fact to Plaintiff.

16. In addition, Plaintiff expressly alleges that its "legal rights and duties" are in "actual controversy" in its lawsuit, and thus Plaintiff has alleged and acknowledged an injury-in-fact at issue in its Complaint. (Compl. ¶ 25)

17. Furthermore, the State of California is an appropriate co-plaintiff and counter-defendant to this action, and Defendants' responsive pleadings will seek to join appropriate California officials pursuant to the Federal Rules of Civil Procedure. The State of California and its officials have an alleged injury-in-fact in the form of the sought-for penalties of $2,500 per alleged violation. (Id. ¶ 23)

18. Venue is proper here because this district encompasses Alameda County, California, the county where the state court action is pending, which falls within the San Francisco and Oakland Division of this Court under Local Rule 3-2(d).

19. In compliance with 28 U.S.C. §1446(a),

the following items are attached: Exhibit A – "Complaint for Injunctive and Declaratory Relief and Civil Penalties."

20. All Defendants consent to this removal, except for the defendants sued under fictitious names who "shall be disregarded" for removal purposes. 28 U.S.C. §1441(b)(1).

21. Defendant PPILP, as the removing party, will timely give all other parties written notice of the filing of this Notice of Removal as required by 28 U.S.C. §1446(d). Pursiant to 28 U.S.C. §1446(d), defendant PPILP will also timely file a copy of this Notice of Removal with the Clerk of the Superior Court of the State of California, Alameda County, where the action is pending.

WHEREFORE, defendant Physician's Preference International, LP, individually and doing business as Hotze Vitamins, hereby removes this action from the Superior Court of the State of California, County of Alameda, to this Court.

Dated: September 10, 2018

Respectfully submitted,

/s/

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