NOT FOR PUBLICATION

United States Court of Appeals for the Ninth Circuit

FILED JUN 17 2021
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

No. 20-15457
D.C. No. 3:20-cv-00370-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.

MEMORANDUM*

Submitted: June 15, 2021†

Before: SCHROEDER, M. SMITH, and VANDYKE, Circuit Judges.

Appellants (Hotze) challenge the district court's award of attorneys' fees and costs to Appellee Environmental Research Center (ERC). Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

† The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

our ruling. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. "Although 28 U.S.C. § 1447(d) generally bars review of a district court order remanding the case to state court, we have jurisdiction to review the district court's award of fees and costs incurred as a result of removing the case." *Gardner v. UICI*, 508 F.3d 559, 560–61 (9th Cir. 2007) (internal citation omitted). "Absent unusual circumstances, [a district court] may award attorney's fees under [28 U.S.C.] § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

In cases with successive removal petitions, like this one, we have held that the defendant's second removal petition is "permitted only upon a relevant change of circumstances—that is, when subsequent pleadings or events reveal a *new* and *different* ground for removal." *Reyes v. Dollar Tree Stores, Inc.*, 781 F.3d 1185, 1188 (9th Cir. 2015) (citation and internal quotation marks omitted). "[A]n intervening change of law" or amended pleadings are examples of qualifying changes in circumstances. *Id.*

The district court did not err in awarding ERC attorneys' fees and costs. Contrary to Hotze's opening brief, the district court's first remand order did not rely on Hotze's failure to cite the supplemental jurisdiction statute in its first removal petition.[1] The district court remanded the case because Hotze failed to show that the district court had subject matter jurisdiction—either because ERC did not allege an injury-in-fact or because, if ERC were assigned California's injury, then California's presence in the suit would destroy diversity jurisdiction. In neither

[1] Hotze's opening brief does not allege a change in law justified its second removal petition.

instance would supplemental jurisdiction be relevant. *See Herman Family Revocable Tr. v. Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001) ("[S]upplemental jurisdiction may only be invoked when the district court has a hook of original jurisdiction on which to hang it."). Therefore, Hotze's second removal petition was not curing a defect in its first petition; it was merely arguing "the same grounds" that the district court "rejected the first time around."

The district court did not abuse its discretion in calculating the attorneys' fees. A district court has wide discretion in determining an appropriate fee award. *See Moore v. Permanente Med. Grp., Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). Here, the district court employed the lodestar method to determine reasonable attorney fees and excluded fees not "incurred as a result of the removal." 28 U.S.C. § 1447(c); *see also Moore*, 981 F.2d at 445. Accordingly, the district court did not abuse its discretion in setting the fee amount. Hotze's arguments to the contrary are conclusory and disregard the applicable standard of review.

2. ERC's renewed motion for damages is granted in part. Federal Rule of Appellate Procedure 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee." "An appeal is frivolous if the result is obvious or if the claims of error are wholly without merit." *Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir. 1984).

Hotze's challenge of the district court's second remand order and the preceding related case order was frivolous. Neither of these orders were appealable, yet Hotze continuously argued to the contrary, and, each time, we rejected its arguments as meritless. Accordingly, ERC is entitled to the

attorneys' fees it incurred in defending against those frivolous portions of this appeal.[2] *See Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (per curiam) ("A penalty is justified in favor of those litigants who have been needlessly put to trouble and expense."). Hotze's appeal of the district court's award of attorneys' fees and costs was not frivolous, and thus, ERC's motion for damages as to this portion of the appeal is denied.[3]

AFFIRMED.

[2] The determination of an appropriate amount of fees is referred to Appellate Commissioner Lisa B. Fitzgerald, who has authority to conduct whatever proceedings she deems appropriate and to enter an order awarding fees subject to reconsideration by the panel. *See* 9th Cir. R. 39-1.9.

[3] ERC's motion to take judicial notice is granted.

United States Court of Appeals for the Ninth Circuit

FILED JUL 28 2020
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

No. 20-15457
D.C. No. 3:20-cv-00370-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.

ORDER

Before: SCHROEDER, HAWKINS, and CALLAHAN, Circuit Judges.

Appellee's motions to dismiss (Docket Entry No. 11 and 12) are granted in part. To the extent appellants seek to challenge the merits of the district court's remand order or the preceding related case order, this Court lacks jurisdiction and those portions of the appeal are dismissed. However, this Court does have jurisdiction over appellants' challenge to the district court's attorneys' fee award and the motion to dismiss this portion of the appeal is denied. *See* 28 U.S.C. § 1447(d); *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) ("28 U.S.C. § 1447(d) generally bars review of a district court order remanding a case to state court,

and thus, whatever we decide here, we cannot recall the case to federal court. We consider only whether the district court properly awarded costs and attorney's fees to [plaintiff]." (footnote omitted))

Appellee's request for summary affirmance of the district court's attorney's fee award, contained in its motion to dismiss, and appellants' motion for summary reversal of the same (Docket Entry No. 13) are denied.

Appellee's request for damages, contained in its motion to dismiss, is denied without prejudice to renewal in the answering brief.

Appellants' opening brief is due August 28, 2020. Appellee's answering brief is due September 28, 2020. Appellants' optional reply brief is due 21 days after service of the answering brief.

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. 20-cv-00370-VC

ORDER REMANDING CASE, AWARDING COSTS AND FEES

RE: DKT. NOS. 19, 53, 61

This case is remanded to Alameda County Superior Court for the reasons stated at the hearing and in the first remand order. *See Environmental Research Center v. Hotze Health & Wellness Center*, Case No. 3:18-cv-05538-VC, Dkt. No. 36. The second removal was without objective basis, particularly in light of the fact that it was based almost entirely on the same grounds as were rejected the first time around. Accordingly, the plaintiff is awarded $42,164.30 fees and $96.95 costs incurred in its district-court response to the second removal. *See* 28 U.S.C. § 1447(c); Dkt. Nos. 61, 61-1. The Court finds these fees and expenses incurred by the firm hired to litigate the case in federal court to be reasonable. But billing for additional work beyond that—from in-house counsel and counsel litigating the state court matter—is duplicative and unreasonable.

The Court also issued an order to show cause why defense counsel and his clients should not be sanctioned under Rule 11 for removing the case in

bad faith for the purpose of delaying the litigation in state court. This is a close question. On the one hand, viewing the totality of frivolous filings by the defendants and their counsel (that is, including their filings on appeal), there is a strong argument that they are acting in bad faith. (There is also, by the way, a serious concern that defense counsel is wasting a tremendous amount of his client's money with these frivolous filings.) On the other hand, after the hearing on the order to show cause, the Court cannot, at this stage, discount the possibility that the second removal (not to mention the other frivolous filings) are a product of bad judgment and overzealousness rather than bad faith. Accordingly, the order to show cause is lifted. Counsel, however, is ordered to provide a copy of this ruling to each of his clients, and must file a declaration within seven days of this order proving that he has done so.

IT IS SO ORDERED.

Dated: May 20, 2020

VINCE CHHABRIA
United States District Judge

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. 20-cv-00370-VC

RELATED CASE ORDER

A Motion for Administrative Relief to Consider Whether Cases Should be Related or a Sua Sponte Judicial Referral for Purpose of Determining Relationship (Civil L.R. 3-12) has been filed. The time for filing an opposition or statement of support has passed. As the judge assigned to case

18-cv-05538-VC Environmental Research Center, Inc. v. Hotze Health Wellness Center International One, L.

I find that the more recently filed case(s) that I have initialed below are related to the case assigned to me, and such case(s) shall be reassigned to me. Any cases listed below that are not related to the case assigned to me are referred to the judge assigned to the next-earliest filed case for a related case determination.

Case	Title	Related	Not Related
20-cv-00370-PJH	Environmental Research Center, Inc. v. Hotze Health Wellness Center International One, L.	VC	

ORDER

The parties are instructed that all future filings in any reassigned case are to bear the initials of the newly assigned judge immediately after the case number. Any case management conference in any reassigned case will be rescheduled by the Court. The parties shall adjust the dates for the conference, disclosures and report required by FRCivP 16 and 26 accordingly. Unless otherwise ordered, any dates for hearing noticed motions are vacated and must be re-noticed by the moving party before the newly assigned judge; any deadlines set by the ADR Local Rules remain in effect; and any deadlines established in a case management order continue to govern, except dates for appearance in court, which will be rescheduled by the newly assigned judge.

Dated: April 15, 2020

VINCE CHHABRIA
United States District Judge

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

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 Court of Appeals
for the Ninth Circuit

FILED SEP 10 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.

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.

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. 20-cv-00370-VC

ORDER TO SHOW CAUSE

The defendants are ordered to show cause why they should not be required to pay all fees and costs that the plaintiff incurs as a result of this removal. See 28 U.S.C. § 1447. In addition, the defendants and their counsel are ordered to show cause why they should not each be subject to further sanctions under Rule 11 for filing a notice of removal in bad faith for purposes of delay. A written response to this order (or, if necessary, separate responses from the defendants and their counsel) is due on Wednesday, April 22, at 10:00 a.m., and a hearing on this order will take place on Thursday, April 23, at 10:00 a.m.

IT IS SO ORDERED.

Dated: April 15, 2020

VINCE CHHABRIA
United States District Judge

United States Court of Appeals for the Ninth Circuit

FILED MAR 23 2020
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

No. 20-15457
D.C. No. 3:20-cv-00370-VC
Northern District of California, San Francisco

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HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, INDIVIDUALLY AND ALLEGEDLY DOING BUSINESS AS HOTZE VITAMINS; *ET AL.*,

DEFENDANTS-APPELLANTS.

ORDER

This appeal challenges the district court's March 2, 2020 order relating the underlying action to another civil case pursuant to Northern District of California Local Rule 3-12.

A review of the record suggests that this court may lack jurisdiction over the appeal because the order challenged in the appeal may not be final or appealable. *See* 28 U.S.C. § 1291. Even if this court has jurisdiction, a review of the record suggests that this appeal may be appropriate for summary disposition under Ninth Circuit Rule 3-6 because the questions raised in this appeal may be so insubstantial as not to justify further proceedings. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982).

Within 21 days after the date of this order, appellants shall either: (1) move for voluntary dismissal of the appeal; or (2) show cause why it should not be dismissed for lack of jurisdiction and why, even if this court has jurisdiction, summary affirmance of the challenged order is not appropriate. If appellants elect to show cause, a response may be filed within 10 days after service of the memorandum.

If appellants do not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing is suspended pending further order of the court.

FOR THE COURT:
MOLLY C. DWYER
CLERK OF COURT
By: Lance C. Cidre
Deputy Clerk
Ninth Circuit Rule 27-7

United States Court of Appeals for the Ninth Circuit

FILED JUN 21 2021
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

No. 20-15457
D.C. No. 3:20-cv-00370-VC
Northern District of California, San Francisco

ENVIRONMENTAL RESEARCH CENTER, INC.,

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HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, INDIVIDUALLY AND ALLEGEDLY DOING BUSINESS AS HOTZE VITAMINS; *ET AL.*,

DEFENDANTS-APPELLANTS.

ORDER

Before: Lisa B. Fitzgerald, Appellate Commissioner.

The parties have not yet briefed the question of the appropriate amount of attorneys' fees. Appellee's application for attorneys' fees is due July 15, 2021. *See* 9th Cir. R. 39-1.6. Any objection to the application is due July 26, 2021, and any reply to the objection is due August 2, 2021. *See* 9th Cir. R. 39-1.7.

The Clerk is directed to forward the parties' submissions regarding attorneys' fees to the Appellate Commissioner.

Michael Freund & Associates Attn: Freund, Michael 1919 Addison Street Suite 105 Berkeley, CA 94704	Law Office of Lawrence J. Joseph Attn: Joseph, Lawrence J. 1250 Connecticut Avenue. NW Suite 700-lA Washington, DC 20036

Superior Court of California, County of Alameda
Hayward Hall of Justice

Environmental Research Center Plaintiff/Petitioner(s) VS. Hotze Health & Wellness Cen Defendant/Respondent(s) (Abbreviated Title)	No. RG18914802 Order Motion to Quash Service of Sununons Purs. to 418.10 CCP Granted

The Motion to Quash Service of Summons Purs. to 418.10 CCP filed for Paradigm Holdings, LLC and Steven F. Hotze M.D and Braidwood Management, Inc., and Physician's Preference International, LP, and Hotze Health & Wellness Center International One, L.L.C., was set for hearing on 07/30/2021 at 02:00 PM in Department 520 before the Honorable Julia Spain. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion to Quash Service and to Dismiss for Inconvenient Forum by Specially Appearing Defendants Physician's Preference International LP

("PPILP"), Hotze Health & Wellness Center

International One LLC, Braid,vood Management Inc., Paradigm Holdings LLC, and Steven F. Hotze M.D. is GRANTED, IN PART, as follows.

Plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. (See Pavlovich v. Superior Court (2002) 29 Cal.4th 262, 273.) Therefore, the ruling on this motion depends entirely on Plaintiffs showing that one or more of the Defendants is subject to jurisdiction in California.

Jurisdiction may be either general, or specific and limited. (See, e.g., Vons Companies Inc. v. Seabest Foods Inc. (1996) 14 Cal.4th 434, 445.) A nonresident defendant is subject to general jurisdiction if its contacts with the forum state are "substantial ... continuous and systematic". (Id. at 445.) Plaintiff has not contended that any of the Defendants are subject to general jurisdiction in California.

If a nonresident defendant is not subject to general jurisdiction in California, it may still be subject to limited jurisdiction "for the purposes of a particular cause of action depending on the nature and quality of the acts, the degree of relation to the asserted cause of action, and the balance between the convenience of the parties and the interest of the state in asserting jurisdiction." (See As You Sow v. Crawford Laboratories Inc. (1996) 50 Cal.App.4th 1859, 1867.) For a defendant to be subject to limited jurisdiction, there must be some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (Id.)

Plaintiff has submitted unrebutted evidence that PPILP has made at least 257 sales transactions to California customers in the one year before Plaintiff issued a Proposition 65 Notice of Violations to PPILP. (See the declaration of Charles Poss filed April 26, 2011, paragraph 6.) The Court of Appeal has held that only 16 sales within a seven year period, constituting less than l % of the defendant's annual sales, was sufficient to establish limited jurisdiction in a Proposition 65 case. (See As You Sow, supra, 50 Cal.App.4th at 1864, 1869-1870.) Here, Defendants assert that their California revenue was below 1 % of PPILP's total revenue (see the "Corrected Declaration" of Lawrence Bittrick), but they do not indicate how far below 1 % it was.

Defendants argue that As You Sow "is no longer a viable precedent" and is inapposite, but Defendants cite no case overrnling As You Sow or holding that it is no longer good law. Instead, Defendants cite Thurston v. Fairfield Collectibles of Georgia LLC (2020) 53 Cal.App.5th 1231, 1240, which actually affirmed the holding in As You Sow. The court in Thurston acknowledged, in passing, defendant's argument that California sales of less than 1 % would not be sufficient to constitute purposeful availment so as to subject the defendant to special or limited jurisdiction, but the court declined to decide that issue as um1ecessary. In the absence of any case overturning As You Sow, the Court declines to find that PPILP's 25 7 sales in California in the one vear before Plaintiff issued its Proposition 65 Notice of Violation is insufficient to establish limited jurisdiction over PPILP in this case.

As to the Defendants other than PPILP, however, Plaintiff has failed to establish that they

are subject to special or limited jurisdiction in California. In determining personal jurisdiction, "each defendant's contacts with the fornm state must be assessed individually" and "the exercise of jurisdiction must be based on fornm-related acts that vvere personally committed by each nonresident defendant". (See Burdick v. Superior Court (2015) 233 Cal.App.4th 8, 24.) Plaintiff has failed to submit evidence that any of the Defendants other than PPILP took any action to purposefully avail themselves of the privilege of conducting activities within California.

Instead, Plaintiff argues that the Defendants other than PPILP are subject to jurisdiction in California because they are the alter egos of, and engaged in a single enterprise with, PPILP, which is a transparent attempt to bootstrap the 2 or 3 employees of PPILP to the minimum of 10 as required by Prop 65. In support of this argument, Plaintiff cites Strasner v. Touchstone Wireless Repair & Logistics LP (2016) 5 Cal.App.5th 215, 223, which noted that the minimum contacts of a California subsidiary may be imputed to a nonresident parent through theories of alter ego or agency so as to establish general jurisdiction. Strasner is not applicable to this motion because (1) neither PPILP nor any other Defendant resides in California, and (2) Plaintiff does not argue - and has submitted no evidence suggesting - that either PPILP or any of the other Defendants are subject to general jurisdiction in California.

Theories of alter ego liability and agency (or single enterprise liability, which Plaintiff characterizes as similar to alter ego liability) are II encompassed within the purview of general

jurisdiction", such that one defendant may be subject to general jurisdiction based on the actions by another defendant. (See, e.g., F. Hoffman-La Roche Ltd. v. Superior Court (2005) 130 Cal.App.4th 782, 796.) But reliance on the law of agency and alter ego to determine specific jurisdiction is "unnecessary" and "an imprecise substitute for the appropriate jurisdictional question." (See Anglo Irish Bank Corp. PLC v. Superior Court (2008) 165 Cal.App.4th 969, 983.) The proper question is not whether a defendant can be liable for the acts of another person or entity, but rather each particular defendant has purposefully directed its activities at the fornm state by causing a separate person or entity to engage in fornm contacts. (Id.) As indicated above, Plaintiff has submitted evidence that PPILP made 257 sales to California customers in the one year prior to Plaintiffs issuance to PPILP of the Proposition 65 Notice of Violations. But Plaintiff has not submitted evidence that any of the other four Defendants, which include a health spa and a staffing agency both located and operating wholly within Texas, took any particular action directed at California customers or otherwise purposefully availed themselves of the privileges of conducting activities within California. Evidence that Defendants generally exercised control over PPILP or each other in Texas or elsewhere is insufficient.

The Court declines Plaintiffs request for a judicial finding on whether the Defendants were involved in a single enterprise, as irrelevant to this motion. As indicated above, in determining whether a particular defendant is subject to specific personal jurisdiction in California, the only relevant inquiry is whether each particular defendant has purposefully

directed its activities at California. Plaintiff has not submitted evidence that any Defendants other than PPILP have done so. Whether the Defendants other than PPILP can ultimately be held liable for the acts of PPILP under a theory of alter ego or single enterprise liability is an issue for determination at such time, if ever, that Plaintiff obtains a judgment against PPILP. It is not an issue that needs to be determined in rnling on this motion, absent any evidence that any Defendants other than PPILP have purposefully directed any activities at California.

Therefore, Defendants' motion to quash service of summons pursuant to Code of Civil Procedure § 418.IO(a)(l) is GRANTED as to Hotze Health & Wellness Center International One LLC, Braidwood Management Inc., Paradigm Holdings LLC, and Steven F. Hotze M.D, but DENIED as to PPILP.

In their opening brief, Defendants argue that PPILP is not subject to Proposition 65 because it has fewer than 10 employees, citing Health & Safety Code§ 25249.1 l(b). Defendants' assertion, if true, may provide PPILP with a complete defense to this action, but it is not relevant to whether PPILP is subject to special or limited jurisdiction in California for the claims raised in this case.

Defendants Hotze Health & Wellness Center International One LLC, Braidwood Management Inc., Paradigm Holdings LLC, and Steven F. Hotze M.D. are DISMISSED from this action.

Defendants' motion to stay or dismiss action on the grounds of inconvenient forum pursuant to Code of Civil Procedure§ 418.10(a)(2) is MOOT as to

Hotze Health & Wellness Center International One LLC, Braidwood Management Inc., Paradigm Holdings LLC, and Steven F. Hotze M.D. The motion is DENIED as to PPILP.

In order to prevail on a motion to stay or dismiss an action on the grounds of inconvenient forum, PPILP must first establish that a suitable alternative forum exists. If PPILP had established that, the Court would consider the private interest of the parties and the public interest in keeping the case in California. (See National Football League v. Fireman's Fund Ins. Co. (2013) 216 Cal.App.4th 902, 917.)

However, PPLIP failed to submit any admissible evidence demonstrating that Texas courts provide a suitable alternative forum for this case. In particular, PPILP fails to present any evidence that Texas state courts would agree to hear cases for violations of California's Proposition 65, or that there is any equivalent state law in Texas that encompasses the claims alleged by Plaintiff in this case.

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Dated: 09/02/2021

/s/

Judge Julia Spain

United States Court of Appeals for the Ninth Circuit

FILED JAN 12 2021
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

No. 20-15457
D.C. No. 3:20-cv-00370-VC
Northern District of California, San Francisco

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PLAINTIFF-APPELLEE,

v.

HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, INDIVIDUALLY AND ALLEGEDLY DOING BUSINESS AS HOTZE VITAMINS; *ET AL.*,

DEFENDANTS-APPELLANTS.

ORDER

Before: SCHROEDER, HAWKINS, and CALLAHAN, Circuit Judges.

Appellants' motion to refer all pending motions to the merits panel (Docket Entry No. 40) is granted in part and denied in part.

The request to refer the motion for reconsideration to the merits panel is denied. Appellants' motion for reconsideration (Docket Entry No. 20) is denied. The scope of this appeal remains limited to the district court's attorneys' fees award.

Appellee's motion for sanctions (Docket Entry No. 34) and request for judicial notice (Docket Entry No. 36) are referred to the panel assigned to decide the merits of this appeal. Appellants may file an opposition to appellee's motion by January 20, 2021.

The opening and answering briefs have been filed. The optional reply brief remains due January 15, 2021.

CAL. CODE OF CIV. PROC. § 17(6)

"Person" includes a corporation as well as a natural person.

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. CODE OF CIV. PROC. § 1060

Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the

premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

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.

CAL. HEALTH & SAFETY CODE § 25249.13

Nothing in this chapter shall alter or diminish any legal obligation otherwise required in common law or by statute or regulation, and nothing in this chapter shall create or enlarge any defense in any action to enforce such legal obligation. Penalties and sanctions imposed under this chapter shall be in addition to any penalties or sanctions otherwise prescribed by law.

28 U.S.C. § 1332(a)(1)

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 … citizens of different States[.]

28 U.S.C. § 1367(a)

[I]n 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.

28 U.S.C. § 1441(a)-(c)

(a) Generally.—

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of

the United States for the district and division embracing the place where such action is pending.

(b) Removal Based on Diversity of Citizenship.—

(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal Law Claims and State Law Claims.—

(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

28 U.S.C. § 1446(b)

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)

(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

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. § 1653

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

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; PHYSICIAN'S PREFERENCE INTERNATIONAL, LP, individually and doing business as HOTZE VITAMINS; PARADIGM HOLDINGS, LLC, individually and allegedly doing business as HOTZE VITAMINS; BRAIDWOOD MANAGEMENT, INC., individually and allegedly doing business as HOTZE VITAMINS; STEVEN F. HOTZE, M.D., and DOES 1-100,.

Case No. 20-cv-0370

NOTICE OF REMOVAL

REMOVAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, CIVIL CASE NO. RG18914802 (FILED JULY 30, 2018; AMENDED TO ADD PARADIGM HOLDINGS, LLC DEC. 10, 2019), HON. JULIA SPAIN PRESIDING

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

PLEASE TAKE NOTICE that defendant Paradigm Holdings, LLC ("Paradigm") hereby

removes to this Court, pursuant to 28 U.S.C. §§ 1332(a), 1367, 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 diversity of citizenship and, to the extent that California not only is a real party in interest but also lacks citizenship pursuant to *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) ("a State is not a 'citizen' for purposes of diversity jurisdiction"), supplemental jurisdiction provides this Court jurisdiction over any non-diverse claims (*e.g.*, Count I). Defendant Paradigm appears solely for the purpose of removal and not for any other purpose, reserving all defenses available to it. Defendant Paradigm 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" 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.

2. On August 14, 2018, Plaintiff served the three original defendants – namely Hotze Health & Wellness Center International One, L.L.C. ("HHWCIO"), Braidwood Management, Inc. ("Braidwood"), and Physician's Preference International, LP ("PPILP") – captioned above.

3. On September 10, 2018, defendant PPILP removed the initial complaint in this action to this Court.

4. On or about December 27, 2018, this Court remanded the case to the California Superior Court, Alameda County for the reasons stated in *Hotze Health & Wellness Ctr. Int'l One, L.L.C. v. Envtl. Res. Ctr., Inc.,* No. 3:18-cv-05538-VC (N.D. Cal. Dec. 21, 2018).

5. On March 15, 2019, defendants Braidwood and HHWCIO were dismissed, without prejudice, as defendants in the state-court action.

6. On December 10, 2019, Plaintiff filed an amended state-court complaint to add Paradigm and Steven F. Hotze, M.D., as defendants, and to add back Braidwood and HHWCIO, as shown in the new caption:

> 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; PARADIGM HOLDINGS, LLC, individually and doing business as HOTZE VITAMINS; BRAIDWOOD MANAGEMENT, INC., individually and doing business as HOTZE VITAMINS; STEVEN F. HOTZE, M.D., and DOES 1-100[.]

7. In an email exchange on December 12, 2019, Plaintiffs' counsel inquired whether the undersigned counsel had authorization to accept

service on behalf of any defendants other than PPILP, and the undersigned replied that same day that his only authorization for accepting service was for PPILP.

8. Plaintiff served a copy of the amended complaint on the undersigned counsel by certified mail sent on December 12, 2019 and received on December 17, 2019. In addition, counsel previously had an arrangement whereby they would email a PDF courtesy copy of filings, but Plaintiff's counsel did not email the amended complaint or the two proofs of service for the amended complaint.

9. Plaintiff also engaged a process server, who dropped off four copies of the amended complaint and summons at defendant PPILP's address in Texas on December 17, 2019, with follow-up copies by U.S. mail. In addition, Plaintiff has filed proofs of service on defendants Braidwood and Dr. Hotze, but not defendants HHWCIO, PPILP, or Paradigm.

10. Although neither Paradigm nor any of its agents had been served with the amended complaint by or on December 17, 2019, that is the earliest day that Plaintiff could allege that Paradigm received the amended complaint.

11. Paradigm retained the undersigned counsel today to file this notice of removal.

12. Contrary to Plaintiff's captions, only defendant PPILP does business as Hotze Vitamins. Indeed, the three original defendants (HHWCIO, Braidwood, and PPILP) have advised Plaintiff in correspondence, court pleadings, sworn testimony, and state-court discovery responses that (a) defendants are distinct legal entities under Texas law, (b) only defendant PPILP does business as Hotze Vitamins, and (c) 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 and

then amended it to include defendants Paradigm and Dr. Hotze without any good-faith basis for believing that any defendant has violated Proposition 65.

13. Plaintiff's First Amended Complaint (hereinafter, "Compl." or "Complaint") and a summons are attached hereto at Exhibit A. The Complaint 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.

14. This removal is timely in accordance with 28 U.S.C. § 1446(b), because this notice of removal is filed within 30 days of defendant Paradigm's receiving the Complaint.

15. Removal is 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.

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

17. Regarding the amount in controversy, Plaintiff demands payment by defendants of $2,500 per alleged violation dating back to 2015, which exceeds $75,000. Indeed, Plaintiff – through is Executive Director – has admitted to purchasing 44 Hotze Vitamins products (*i.e.*, up to $110,000 in penalties) that Plaintiff alleges to violate Proposition 65.

18. In addition, for each count of its two-count Complaint, Plaintiff demands payment by Defendants of attorneys' fees pursuant to CAL. CODE OF CIV. PROC. §1021.5, which likewise exceeds $75,000. Indeed, Plaintiff – through is counsel – has admitted to incurring $130,970.99 in attorneys' fees and $7,264.62 in costs (*i.e.*, a total of $138,235.61) as

of January 17, 2019. On information and belief, that amount would have increased significantly in the ensuing year. Nothing has happened to *decrease* the amount.

19. Plaintiff is in the business of enforcing Proposition 65 through suits like this action (*viz*, Plaintiff purchases and tests products, then sues). Plaintiff has always sought – and when successful in a case – recovered an amount to "reimburse its reasonable costs in bringing" the action (or words to that effect), which was distinct from its civil-penalty and attorney-fee awards, as shown in the following judgments. *Environmental Research Ctr. v. Ardyss Int'l, Inc.*, No. CGC-11-514452 (Cal. Super. Ct. San Francisco May 16, 2016); *Environmental Research Ctr. v. Taxus Cardium Pharms. Group*, No. CGC-14-539326 (Cal. Super. Ct. San Francisco Nov. 2, 2015); *Environmental Research Ctr. v. BioPharma Sci.*, No. CGC-14-539327 (Cal. Super. Ct. San Francisco Nov. 16, 2015); *Environmental Research Ctr. v. Altasource*, No. CGC-13-532293 (Cal. Super. Ct. San Francisco Oct. 29, 2014); *Environmental Research Ctr., Inc. v. Nutiva, Inc.*, No. CGC-15-545713 (Cal. Super. Ct. San Francisco Oct. 22, 2015); *Environmental Research Ctr., Inc. v. Sabre Scis., Inc.*, No. CGC-15-543826 (Cal. Super. Ct. San Francisco July 14, 2015); *Environmental Research Ctr. v. Aloe Vera of America, Inc.*, No. CGC-11-515588 (Cal. Super. Ct. San Francisco Oct. 26, 2013); *Environmental Research Ctr. v. Fit Foods Ltd.*, No. CGC-14-541777 (Cal. Super. Ct. San Francisco June 17, 2015); *Environmental Research Ctr. v. Heartland Products, Inc.*, No. BC537505 (Cal. Super. Ct. Los Angeles Oct. 6, 2015).

20. There is ample 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).

21. Significantly, this Court in remanding the prior removal did not address either

(a) Plaintiff's status as a purchaser of Hotze Vitamins products, or (b) supplemental jurisdiction over the claims to which California potentially was a real party-in-interest. Indeed, the removing defendant (PPILP) did not assert supplemental jurisdiction under 28 U.S.C. § 1367 in its Notice of Removal. If the Court and removing defendant in the prior removal had addressed supplemental jurisdiction and Plaintiff's status as a purchaser of Hotze Vitamins products, removal would have been proper, and jurisdiction would have existed for the prior removal of the original complaint.

22. 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. ¶ 34.)

23. Although defendant Paradigm reserves the right to challenge venue based on its residence in the Southern District of Texas or Plaintiff's residence in the Southern District of California, removal to this Court is proper 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).

24. 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" and a summons. To date, Plaintiff has not served a proof of service with respect to Paradigm. If the Court requests, Paradigm can file with this Court the process, pleadings, and orders served on the non-removing defendants.

25. The other four defendants – namely, PPILP, HHWCIO, Braidwood, and Dr. Hotze – all consent to this removal. The defendants sued under fictitious names "shall be disregarded" for removal purposes. 28 U.S.C. § 1441(b)(1).

26. Defendant Paradigm, 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). Pursuant to 28 U.S.C. § 1446(d), defendant Paradigm 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 – and a courtesy chambers copy on the presiding judge.

WHEREFORE, defendant Paradigm Holdings, LLC hereby removes this action from the Superior Court of the State of California, County of Alameda, to this Court.

Dated: January 16, 2020

Respectfully submitted,

/s/

Lawrence J. Joseph (SBN 154908)
Law Office of Lawrence J. Joseph
1250 Connecticut Ave, NW, Suite 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for defendant Physician's Preference International, LP, doing business as Hotze Vitamins

IN THE 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. 20-cv-00370-VC

DECLARATION OF GINA TEAFATILLER

I, Gina Teafatiller, do hereby declare under penalty ofpe1jmy pursuant to 28 U.S.C. § 1746 as follows:

1. I am more than I 8 years of age.

2. I am the Executive Vice President of Braidwood Management, Inc. ("Braidwood"), and in my position I am thoroughly familiar with the business structures and activities of not only Braidwood but also Hotze Health & Wellness Center International One, L.L.C. ("HHWCIO"), Physician's Preference International, LP ("PPILP"), and Paradigm Holdings, LLC ("Paradigm").

3. Dr. Hotze does not receive - and has never received- any wages or salary from HHWCIO, PPILP, or Paradigm.

4. The phrase "Hotze Enterprises" is a figure of speech - *i.e.,* not a formal entity - that refers to Braidwood plus the collection of separate entities that Steven F. Hotze, M.D. ("Dr. Hotze") has

established as separate legal entities for which Braidwood provides management services and to which Braidwood provides employees at the entities' request. No Braidwood employee is simultaneously assigned to two of the other Hotze entities at the same time *(e.g.,* a Braidwood employee might work for PPILP or another Hotze entity, but not both PPILP and another Hotze entity).

5. Braidwood, HHWCIO, PPILP, Paradigm, and Dr. Hotze all maintain their own separate books, banking and credit-card accounts, and records, and they pay rent to the office building's owner (Northwest Paradigm LP) for any office or retail space that they use in their own right. Similarly, Braidwood charges management fees to the separate entities *(e.g.,* PPILP) for the management services provided to those entities. For example, PPILP licensed the "Dr. Hotze's PowerPak" trademark from Braidwood.

6. The plaintiff's allegation that all defendants promote, develop, manufacture, market, distribute, and/or sell the Hotze Vitamins products that are the subject of this litigation is misleading. PPILP (with Paradigm as the general partner) was the only defendant manufacturing, distributing, marketing, or selling Hotze Vitamins products into California until PPILP ceased those activities in the second half of F ebrumy in 2019. To the extent that any of the non-PPILP defendants either promoted or developed the products, that promotion or development concerned the products for use in that defendants' operations in Texas, not to PPILP's internet sales into California.

7. HHWCIO, Braidwood, and Paradigm do not

do any business as "Hotze Vitamins," although Paradigm is the general partner of the PPILP partnership.

8. Braidwood does not sell any vitamins or nutritional supplements, or goods of any kind.

9. HHWCIO does not sell any vitamins or nutritional supplements, or goods of any kind.

10. In its own capacity, Paradigm does not sell any vitamins or nutritional supplements, or goods of any kind, although Paradigm is the general partner of the PPILP partnership.

11. All Braidwood employees who are not also PPILP employees and who have performed management tasks for PPILP in their capacity with Braidwood did so as salaried Braidwood employees, and their compensation did not increase because of any work that they did or did not do for any Hotze entity, including PPILP.

12. HHWCIO, Braidwood, and Paradigm are companies that are separate and distinct from PPILP, although Paradigm is the general partner of the PPILP partnership.

13. Paradigm does not have any employees.

14. HHWCIO, Braidwood, Paradigm, and Dr. Hotze's medical practice are located entirely in Katy, Texas, and neither HHWCIO, Braidwood, Paradigm, nor Dr. Hotze's medical practice has any offices, books, records, or property located in the State of California.

15. HHWCIO, Braidwood, Paradigm, and Dr. Hotze's medical practice have never engaged in any business or sold any goods or services in the State of California, although Paradigm was the general partner of the !'PILI' partnership at the times when

PPILP sold products into California.

16. PPILP has been a separate, independent legal company since 2004, when it first registered with the State of Texas.

17. PPILP has never had ten (I 0) or more employees.

18. I served as PPILP's Business Director until 2011, when I joined Braidwood's 12 management. I have not been a PPILP employee or agent since 2011.

19. James Bittick is unexpectedly out of the office this week.

20. I have personal knowledge of the foregoing and am fully competent to testify to it at trial.

I declare under penalty of pe1jury that the foregoing is true and correct. Executed on this 28th day of February 2020.

/s/
Gina Teafatiller

IN THE 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. 20-cv-00370-VC

DECLARATION OF LAWRENCE J. JOSEPH

I, Lawrence J. Joseph, do hereby declare under penalty of perjury pursuant to 28 U.S.C. §1746 as follows:

1. I reside in McLean, Virginia, am more than 18 years of age, and am fully competent to testify in a federal court.

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

3. I was admitted to practice before this Court on December 16, 1991, and I have been a member of the State Bar of California since 1991, but – because I now live in the Washington, DC area – I do not maintain an office in this District.

4. In my declaration dated April 4, 2019 and previously filed in court, I stated under penalty of perjury that following:

> In the remanded case, Appellants filed a declaration … 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."

5. By email dated January 17, 2019 and previously filed in court 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."

6. According to the most recent data I could locate on relative caseloads, there were 8,654 civil cases in this District and 4,887 civil cases in the Southern District of Texas on June 30, 2018. United States Courts, Statistical Tables For The Federal Judiciary, (June 30, 2018) (available at https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2019/06/30 (last visited Feb. 28, 2020).

7. According to the data published online at https://businesssearch.sos.ca.gov/ by the California Secretary of State for Environmental Research Center, Inc. ("ERC"), ERC's address and mailing address are both "3111 Camino Del Rio North #400, San Diego CA 92108," and posts its most recent Statement of Information, which

listed Chris Heptinstall as its Chief Executive Officer and Phyllis Dunwoody as its Secretary.

8. In a declaration dated November 29, 2018 and previously filed in court (ECF #29), the plaintiff's executive director admitted to forty-four (44) instances of purchasing Hotze Vitamins products that the plaintiff claims violate Proposition 65, which I tallied and summarized in my declaration dated December 6, 2018 and previously filed in court (ECF #31). My summary showed the plaintiff expended $1,731.08 on the products alleged to be in violation.

9. In my declaration dated December 6, 2018 and previously filed in court (ECF #31), I reviewed and attached several representative court-filed settlements from the plaintiff, which had the plaintiff receiving an amount ranging from $768.94 (Sabre) to $18,035.00 (Altasource) to "reimburse its reasonable costs in bringing" the action (or words to that effect).

10. The referenced prior evidentiary submissions are available if needed and all were served on plaintiff's counsel in different phases of this litigation.

11. I have personal knowledge of the foregoing and am competent to testify to it at trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 28th day of February 2020.

/s/ Lawrence J. Joseph

IN THE 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. 20-cv-00370-VC

DECLARATION OF JAMES BITTICK

I, James Bittick, do state as follows:

1. I am more than 18 years of age and have personal knowledge of the facts set forth herein and am fully competent to testify to them at trial.

2. Counsel has advised me that the complaint against the Hotze Vitamins business is ambiguous as to the timing and type of violations covered. Specifically, counsel has advised me that it is unclear whether the statute of limitations is one or three years from the filing of the initial complaint on or about July 30, 2018, and that it is unclear whether the current complaint alleges that sales into California continued as of that complaint's filing on or about December 10, 2019, or whether instead the current complaint merely alleges that for past sales Hotze Vitamins has not provided past customers with the Proposition 65 warnings that the plaintiff claims is required for certain Hotze Vitamins products sold into California.

3. Hotze Vitamins sales into California ceased on or about February 20, 2019, when we disabled the hotzevitamins.com website's ability to accept orders with a California delivery address, with no plans ever to reinstate the ability for website

users to order to a California delivery address. If an online order uses a California delivery address, the website reports back "Sorry for the inconvenience but we are no longer able to ship into California" and does not process the order.

4. With that background on timing, I was employed by Physician's Preference International, LP ("PPILP") from 2014 (*i.e.*, more than three years prior to the initial complaint) and was employed as PPILP's Business Director – its highest-ranking employee – from July 2017 (*i.e.*, more than one year prior to the initial complaint) through the termination of sales into California. In my capacity as an employee and later Business Director, I became familiar with all aspects of the Hotze Vitamins business, and I am fully knowledgeable about its business practices and the number of its employees.

5. The Hotze Vitamins business (including all books, records, offices, property and staff) is located entirely in Katy, Texas, and does not have any employees, offices, sales agents, books, records, property, staff, or consultants located in the State of California.

6. From 2014 onward, the Hotze Vitamins business did not (and does not) sell any goods or services to any retail stores or other distributors in the State of California.

7. Other than having the hotzevitamins.com website, the Hotze Vitamins business does not market – and has not since 2014 (or, ever as far as I know) marketed – any goods or services in California.

8. The Hotze Vitamins business does not use – and has not since 2014 (or, ever as far as I

know) used – any online processes to purposefully direct internet traffic to California-based consumers.

9. From at least the beginning of 2015, the Hotze Vitamins business had less than ten (10) employees. Indeed, as far as I am aware, the Hotze Vitamins business has never had more than ten (10) employees.

10. In hiring three "temp" workers for a limited probationary period before hiring them fulltime, PPILP used the services of the recruiting and staffing firm Medix through its Houston office. In reporting the number of employees here, I have included these temp workers as employees for the periods of their employment as temps.

11. Although we understand that Proposition 65 does not apply to Hotze Vitamins because the business has less than 10 employees, we exited the California market because sales did not justify the compliance costs for the wider California regulatory environment.

12. The Hotze Vitamins business is a separate, stand-alone business.

13. Hotze Health & Wellness Center International One, L.L.C., Paradigm Holdings, LLC, Braidwood Management, Inc., and Dr. Steven F. Hotze do not engage in any business under the Hotze Vitamins name.

14. Earlier in this case, I reviewed Hotze Vitamins' sales records, which showed that Chris Heptinstall placed 17 orders between the dates of December 7, 2017, and May 14, 2018, for orders shipped to him or Phyllis Dunwoody at two San Diego addresses: (a) 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108, and (b) 16031 Big Springs Way, San Diego, CA 92108. The total of

these orders was $4,336.

15. It would be enormously inconvenient for the Hotze Vitamins business for me to relocate to California for a one to two-week trial. Professionally, I manage operations and provide as-needed backup to the staff, and the former function would not have a ready replacement in my absence. Personally, my wife was re-hospitalized with complications from a stroke during the week of February 24, 2020, and she still is recovering and needs my care. While she is expected to recover eventually, there is no estimate as to how long that might take.

16. About a year ago, Monica Luedecke transitioned from her position as president of Braidwood Management, Inc., to contracting with Braidwood Management, Inc.to do work not involving the Hotze Vitamins business. That contract ended on or about March 14, 2020. Although she still lives in the Houston metropolitan area, she no longer has any role with Braidwood Management, Inc. (She also has no role with any of the other defendants in the above-captioned action.)

17. With Monica Luedecke no longer serving as president of Braidwood Management, Gina Teafatiller's role as executive vice president now fills many of president's duties, so her absence from Braidwood Management for a trial in California would disrupt its operations.

18. I have personal knowledge of the foregoing and am competent to testify to it at trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of March 2020.

/s/
James Bittick

IN THE 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. 20-cv-00370-VC

DECLARATION OF LAWRENCE J. JOSEPH

I, Lawrence J. Joseph, do state as follows:

1. I, Lawrence J. Joseph, do state as follows:

1. I reside in McLean, Virginia, am more than 18 years of age, and am fully competent to testify in a federal court.

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

Removal Chronology

3. On January 16, 2020, I filed – and served by U.S. Priority Mail – the Notice of Removal (ECF #1) in the above-captioned action.

4. On February 14, 2020, the plaintiff Environmental Research Center, Inc. ("ERC") files its motion to remand the case back to the California state court and for other relief (ECF #19).

5. Counting holidays and weekends, the 30th day after removal was Tuesday, February 18, 2020 (i.e., day 30 was Saturday, February 15, extended to Tuesday by the weekend and the Presidents' Day holiday on Monday). Accordingly, the day after the 30th day was Wednesday, February 19, 2020.

6. On Friday, March 13, 2020, ERC filed its

document captioned as a combined reply in support of its motion to remand and opposition to the defendants' motion to transfer (ECF #37), but failed to file an ECF reply event to the defendants' motion to transfer.

7. On Monday, March 16, 2020, the ECF help desk for the U.S. District Court for the Northern District of California advised me how to file a reply/response to ERC's document captioned as a combined reply in support of its motion to remand and opposition to the defendants' motion to transfer (ECF #37).

Collation of Violations and Costs Alleged in Heptinstall Declaration

8. To collate the sales data in the Heptinstall Declaration (ECF #29 in No. 3:18-cv-05538-VC (N.D. Cal.)), I entered the data into an Excel spreadsheet showing the paragraph number (¶), product description (Product), number of units received (#), the order date (Date), and cost (Cost) for each transaction in the declaration.

9. Because the Heptinstall Declaration included a second transaction for the first seven products, I repeated the data for those seven products.

10. The total cost was $1,731.08. Assuming that each sale was a single, non-continuing violation, the transactions represented 44 violations.

11. In connection with preparing the prior declarations in this litigation, I contacted counsel for ERC to inquire as to whether the second –apparently residential –address to which ERC ordered products shipped was confidential, and ERC's counsel accepted my offer to redact that address, which we can provide to the Court if relevant.

Summary of Terms of Judgments in Proposition 65 Litigation by Plaintiff

12. To review the resolutions of prior Proposition 65 litigation by the Environmental Research Center ("ERC"), I used LexisAdvance to identify pleadings from such cases, then the relevant court's website to download the judgment for each case.[1]

13. That process provided the following judgments, copies of which can be provided to the Court if requested: *Environmental Research Ctr. v. Ardyss Int'l, Inc.*, No. CGC-11-514452 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr. v. Taxus Cardium Pharms. Group*, No. CGC-14-539326 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr. v. BioPharma Sci.*, No. CGC-14-539327 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr. v. Altasource*, No. CGC-13-532293 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr., Inc. v. Nutiva, Inc.*, No. CGC-15-545713 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr., Inc. v. Sabre Scis., Inc.*, No. CGC-15-543826 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr. v. Aloe Vera Of America, Inc.*, No. CGC-11-515588 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr. v. Fit Foods Ltd.*, No. CGC-14-541777 (Cal. Super. Ct. San Francisco) ; *Environmental Research Ctr. v. Heartland Products,*

[1] For Superior Court in San Francisco, I used https://www.sfsuperiorcourt.org/online-services (last visited Dec. 6, 2018), and for Superior Court in Los Angeles I used https://www.lacourt.org/paonlineservices/civilImages/searchbycasenumber.aspx (last visited Dec. 6, 2018).

Inc., No. BC537505 (Cal. Super. Ct. Los Angeles) .[2]

14. For each matter in which it prevailed, ERC received an amount ranging from $768.94 (*Sabre*) to $18,035.00 (*Altasource*) to "reimburse its reasonable costs in bringing" the action (or words to that effect), which was distinct from its civil-penalty and attorney-fee awards. Typical reimbursement was in the range of $1,346.27 (*Fit Foods*), $1,394.60 (*Heartland*), $1,400 (*Nutiva*), $1,728.23 (*Taxus Cardium*), and $1,993.60 (*BioPharma*), close to plaintiff's expenditures on Hotze Vitamins products that the plaintiff alleges to violate Proposition 65.

15. I reviewed the docket for the Heartland litigation cited in this matter, No. 2:14-cv-03364-SVW-VBK (C.D. Cal.), and the parties briefing of the remand motion in ECF #13 (remand motion), #19 (opposition), and #20 (reply) did not cite *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269 (2008).

Fee Claims of Plaintiffs' Counsel

16. By email dated January 17, 2019 (attached hereto as Exhibit A in redacted form), plaintiff's counsel – Michael Freund – admitted that plaintiff's legal fees as of that date already exceeded $130,000 (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) at that early stage in this litigation. Although the redacted information discussed settlement of other issues, the email

[2] I deleted the document-scanning lead sheet and any exhibits to these judgments (*e.g.*, copies of the complaint, etc.).

expressly stated that "The fees … are non-negotiable."

Plaintiffs' Allegations of a Case or Controversy

17. With respect to the allegation in the initial complaint that "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" – which is repeated verbatim in Paragraph 34 of the operative complaint – plaintiff's counsel responded via email dated September 17, 2018 that "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." A copy of that email was submitted by plaintiff's counsel under penalty of perjury as docket item (ECF #20 in No. 3:18-cv-05538-VC (N.D. Cal.)).

Corporate Facts about ERC

18. According to the online business search maintained by the Georgia Secretary of State, plaintiff ERC has had an office in Georgia since 2012. On March 20, 2020, I used the search feature on the Secretary's website (https://ecorp.sos.ga.gov/BusinessSearch) with "Environmental Research Center" as a search term and found the data record for ERC's Georgia office, a copy of which I saved to PDF format and can provide to the Court if requested

19. According to the data published online at

https://businesssearch.sos.ca.gov/ by the California Secretary of State for Environmental Research Center, Inc., ERC's address and mailing address are both "3111 Camino Del Rio North #400, San Diego CA 92108," and posts its 2017 Statement of Information which lists Chris Heptinstall as its Chief Executive Officer and Phyllis Dunwoody as its Secretary, whereas its 2019 Statement of Information which lists Chris Heptinstall in both positions.

Depositions and Witnesses.

20. The witnesses that defendants would call to establish that the Hotze Vitamins business has less than 10 employees would be employees of one or more defendants (James Bittick and Gina Teafatiller), a former employee of the Braidwood defendant (Monica Luedecke), and unknown employees of a Houston staffing agency (Medix). Non-employee Ms. Luedecke also would be a witness on the issue of the level of involvement or non-involvement of each defendant with the vitamins business, as would Mr. Bittick and Ms. Teafatiller.

21. I have identified these employees and the staffing agency to ERC's counsel (Mr. Freund) previously in state-court discovery-related matters.

22. Staffing depositions in Texas would be more convenient to the defendants if they could have one Texas counsel handling this case; it does not make economic sense for me to travel to Texas for depositions or to bring counsel there up to speed on the issues while the case remains in California federal court.

Relative Congestion

23. In a prior declaration, I provided relative caseloads for this Court and the U.S. District Court

for the Southern District of Texas for the most recent date then available on the uscourts.gov website.

24. According to the most recent data I could locate on relative caseloads, there were 10,642 civil cases in this District and 5,910 civil cases in the Southern District of Texas on June 30, 2019. United States Courts, Statistical Tables For The Federal Judiciary, (June 30, 2019) (available at https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2019/06/30 (last visited Mar. 20, 2020).

25. To attempt to normalize the cases in each district for the number of judges in each district, I visited the Federal Judiciary Center ("FJC") website

26. According to the FJC website search tool, the Northern District of California has 14 active duty judges (William Haskell Alsup; Edward Milton Chen; Vince Girdhari Chhabria; Edward John Davila; James Donato; Beth Labson Freeman; Haywood Stirling Gilliam, Jr.; Phyllis Jean Hamilton; Lucy Haeran Koh; William Horsley III Orrick; Yvonne Gonzalez Rogers; Richard G. Seeborg; Jon Steven Tigar; Jeffrey Steven White).

27. According to the FJC website search tool, the Southern District of Texas has 18 active duty judges (Micaela Alvarez ; Alfred Homer Bennett ; Jeffrey Vincent Brown ; Randy Crane ; Keith P. Ellison ; Charles R. III Eskridge ; Marina Garcia Marmolejo ; Vanessa D. Gilmore ; Andrew S. Hanen ; George Carol Hanks, Jr.; Ricardo H. Hinojosa ; Lynn Nettleton Hughes ; David Steven Morales ; Jose Rolando Olvera, Jr.; Nelva Gonzales Ramos ; Fernando Rodriguez, Jr.; Lee Hyman Rosenthal ; Diana Saldaña).

Conclusion

28. I have personal knowledge of the foregoing and am competent to testify to it at trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of March 2020.

/s/ Lawrence J. Joseph