

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

**SHAWN HORNBECK and MONTE
BURGESS, each on behalf of himself
and others similarly situated,**

Plaintiffs,

v.

**ORSCHELN FARM AND HOME, LLC
d/b/a ORSCHELN FARM AND HOME**

and

CITGO PETROLEUM CORPORATION,

Defendants.

Case No. 18-cv-941

State Case No. 18CA-CC00106

NOTICE OF REMOVAL

Defendant, CITGO Petroleum Corporation (“CITGO”), by and through its undersigned counsel, hereby gives notice of its removal of the state civil action filed in the Circuit Court of Cass County, Missouri, Case No. 18CA-CC00106, to the United States District Court for the Western District of Missouri, pursuant to 28 U.S.C. 1332, 1453 and 1446, and states the following grounds for removal:

1. On or about May 25, 2018, Plaintiffs filed their Class Action Petition entitled *Hornbeck et al. v. Orscheln Farm and Home, LLC*, Case No. 18CA-CC00106, in the Circuit Court of Cass County, Missouri (the “Cass County Action”).
2. On July 5, 2018, Defendant Orscheln Farm and Home, LLC timely filed its Answer. On August 10, 2018, CITGO timely filed its Answer.

3. On or about August 10, 2018, Plaintiffs served their first set of requests for production and interrogatories on CITGO.

4. On November 21, 2018, CITGO served amended responses to Plaintiffs' first requests for production, which included producing information in response to Plaintiffs' proposed putative class.

5. Removal is therefore timely under 28 U.S.C. § 1446(b) because this Notice is filed within 30 days after receipt of paper from which it may first be ascertained that the case is removable.

6. Under 28 U.S.C. § 1441, this Court is the appropriate forum in which to file this Notice of Removal because the United State District Court, Western District of Missouri, is the federal judicial district embracing Cass County, the county in which the Cass County Action was filed.

7. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. §1332(d), and this matter is one that may be removed to this Court for the following reasons.

8. Under Plaintiffs' proposed class definition, there are at least 100 members in each proposed class. Petition, ¶ 42 ("All individuals who purchased Orscheln Premium 303 Tractor Hydraulic Fluid and/or MileMaster 303 Tractor Hydraulic Fluid in Missouri at any point in time from May 25, 2013 to present.")

9. There is minimal diversity as required by 28 U.S.C. § 1332(d).

a. Plaintiffs are citizens and residents of Missouri. Petition, ¶¶ 1-2.

b. Defendant CITGO is a company incorporated in Delaware with its principal place of business in Houston, Texas. *See* 28 U.S.C. § 1332.

- c. As a result, because at least one Defendant is diverse from Plaintiffs, minimal diversity exists.

10. The damages that Plaintiffs and the putative classes seek exceed in the aggregate the sum or value of \$5,000,000 exclusive of interest and costs.

- a. In their requests for production served on August 10, 2018, Plaintiffs sought the following information related to their putative class definition:

1. RFP 36: Documents related to the sales of Premium 303 Tractor Hydraulic Fluid, for the time period January 1, 2013 to present
2. RFP 37: Documents related to the sales of MileMaster 303 Tractor Hydraulic Fluid, for the time period January 1, 2013 to present
3. RFP 46: Documents related to sales and/or the volume of sales of Premium 303 Tractor Hydraulic Fluid, for the time period January 1, 2013 to the present, in the State of Missouri
4. RFP 48: Documents related to sales and/or the volume of sales of MileMaster 303 Tractor Hydraulic Fluid, for the time period January 1, 2013 to the present, in the State of Missouri
5. Interrogatory No. 9: Please state (a) the amount of sales of Premium 303 Tractor Hydraulic Fluid to Orscheln in Missouri, by year, since January 1, 2013; and, (b) the amount of sales of Premium 303 Tractor Hydraulic Fluid nationwide to Orscheln, by year, since January 1, 2013
6. Interrogatory No. 10: Please state (a) the amount of sales of MileMaster 303 Tractor Hydraulic Fluid to Orscheln in Missouri, by year, since January 1, 2013; and, (b) the amount of sales of MileMaster 303

Tractor Hydraulic Fluid nationwide to Orscheln, by year, since January 1, 2013

- b. In preparation of its amended responses to Plaintiffs' first set of written discovery, CITGO investigated the information and documents sufficient to respond to Plaintiffs' above-identified discovery responses. On November 21, 2018, CITGO served its amended responses to Plaintiffs' discovery requests and produced certain information in response.
- c. Plaintiffs bring claims on behalf of the putative class. CITGO does not concede any liability, and denies that Plaintiffs are entitled to any damages and/or that Plaintiffs may maintain this action on behalf of the putative class. However, given Plaintiffs' proposed putative class definition and the information requested in the above-identified discovery requests, and Plaintiffs' allegation that the putative class members have been harmed in the same manner as Plaintiffs, CITGO has a reasonable, good faith belief that the combined damages the proposed putative class members seek exceed in the aggregate the sum or value of \$5,000,000 exclusive of interest or costs.
- d. Although Plaintiffs considerably overstate their claims and those of the putative class, and the requested relief is neither appropriate nor actionable, based on Plaintiffs' proposed class definition and information identified in CITGO's records to respond to Plaintiffs' discovery request, Plaintiffs allege a potential amount in controversy in excess of the jurisdictional minimum. While Plaintiffs have not specified an exact amount of requested

recovery in each count alleged against Defendants, by calculation, Plaintiffs and the putative class are seeking actual damages and attorneys' fees from CITGO that aggregate to more than \$5,000,000.

- e. Plaintiffs identify payments of \$23-25 per 5 gallons of Premium 303 Tractor Hydraulic Fluid or MileMaster 303 Tractor Hydraulic Fluid. Petition, ¶¶ 32, 34. Plaintiffs seek, on behalf of the putative class, "all money paid" to purchase Premium 303 Tractor Hydraulic Fluid or MileMaster 303 Tractor Hydraulic Fluid. Petition, ¶ 41.
- f. As defined by Plaintiffs, without conceding any liability, that Plaintiffs are entitled to any damages, and/or that Plaintiffs may maintain this action on behalf of the putative class, there were more than 2,900,000 gallons of Premium 303 Tractor Hydraulic Fluid or MileMaster 303 Tractor Hydraulic Fluid sold by CITGO to suppliers in Missouri from May 25, 2013 to present. *See* Declaration of Benjamin A. Briseno, Exhibit A; Petition, ¶ 42.
- g. By simple calculation, 2,900,000 gallons of Premium 303 Tractor Hydraulic Fluid or MileMaster 303 Tractor Hydraulic Fluid sold by CITGO to suppliers in Missouri from May 25, 2013 to present multiplied by an average of \$24 per 5 gallons alleged by Plaintiffs is \$13,920,000.
- h. Based on Plaintiffs' allegations and their contention that they represent similarly situated class members, the amount in controversy requirement, therefore, substantially exceeds \$5,000,000.

- i. Additionally, Plaintiffs also request an award of reasonable attorneys' fees and costs, which should be included in the evaluation of the amount in controversy. Petition, p. 19.
- j. As such, the amount in controversy could certainly exceed in the aggregate the sum of \$5,000,000.

11. This removal is timely. Nothing on the face of the Petition identified that this case was removable. Pursuant to 28 U.S.C. § 1446(b)(3), a party may remove within thirty days of receipt, "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." CITGO is removing within thirty days of serving its responses to Plaintiffs' discovery requests and corresponding production identifying the sum being sought by Plaintiffs and the putative class.

12. Copies of the Petition and documents filed in the Cass County Action are attached, per 28 U.S.C. 1446(a), as **Exhibit 1**.

13. Pursuant to 28 U.S.C. § 1446(d), counsel for CITGO will cause a copy of this Notice of Removal to be filed in the Cass County Action and to be served on the attorneys for Plaintiffs.

WHEREFORE, Defendant CITGO Petroleum Corporation hereby removes the Cass County Action described above and proceeds hereafter in this Court and further requests that no additional proceedings be had in the Cass County Action.

Respectfully submitted,

Dated: November 28, 2018

GREENSFELDER, HEMKER & GALE, P.C.

By /s/ Peter W. Mueller
Abby L. Risner, MO # 57999 (pro hac vice pending)
alr@greensfelder.com
Robert L. Duckels, MO # 52432 (pro hac vice
pending)
rld@greensfelder.com
John C. Drake, MO # 64822 (pro hac vice pending)
jdrake@greensfelder.com
Peter W. Mueller MO #70262 (admitted)
pmueller@greensfelder.com
10 S. Broadway, Suite 2000
St. Louis, MO 63102
Telephone: (314) 345-4785
Facsimile: (314) 345-5465

*Attorneys for Defendant CITGO Petroleum
Corporation and Defendant Orscheln Farm and
Home, LLC and d/b/a Orscheln Farm and Home*

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, I electronically filed the foregoing by using the ECF system for the United States District Court, Western District of Missouri. Participants in the case who are registered ECF users will be served by the ECF system, and counsel will also be served via U.S. Mail, postage prepaid.

/s/ Peter Mueller