

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RANDALL SALLY, on behalf of himself)	
and all others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	
)	
PANERA BREAD COMPANY, a/k/a)	Case No. _____
SAINT LOUIS BREAD CO.,)	
and)	
PANERA, LLC,)	
)	
Defendants.)	
)	
)	
)	

NOTICE OF REMOVAL

Defendants Panera Bread Company, a/k/a Saint Louis Bread Co.,¹ and Panera, LLC (“Panera”) remove to this court, pursuant to 28 U.S.C. §§ 1331, 1441, and 1446, the civil action entitled *Randall Sally, on behalf of himself and all others similarly situated v. Panera Bread Company, a/k/a Saint Louis Bread Co., and Panera, LLC*, Case No. 2022-CC01133, originally filed in the Circuit Court of the City of St. Louis, State of Missouri on June 10, 2020. In support of this Notice of Removal, Panera states the following:

¹ Panera notes that neither Panera Bread Company nor Saint Louis Bread Co. are properly named defendants. Panera Bread Company is a holding company that has no employees and does not market or advertise, and Saint Louis Bread Company is not a separate corporate entity, but is a fictitious name under Panera, LLC.

BACKGROUND

1. On June 10, 2020, Plaintiff Randall Sally, on behalf of himself and all others similarly situated, commenced the above-captioned lawsuit by filing a Class Action Petition for Damages (the “Petition”) in the Circuit Court of the City of St. Louis, State of Missouri (the “State Court”). In accordance with 28 U.S.C. § 1446(a), a true and accurate copy of the Petition, together with “all process, pleadings, and orders” on file in the State Court, are attached hereto as **Exhibit A**.

2. Panera was served with the summons and a copy of the Petition on July 14, 2020. *See* Ex. A, Notice of Process of Service.

3. Plaintiff brings this action individually and as class representative to recover damages for allegedly unlawful practices under the Missouri Merchandising Practices Act (“MMPA”), Mo. Rev. Stat. §§ 407.010 *et seq.* *See* Ex. A, Pet. ¶ 3.

4. Plaintiff’s Petition alleges that Panera “markets [its] Products as ‘100% clean’ and/or ‘clean’ with no artificial preservatives, sweeteners, flavors, or colors from artificial sources,” *id.* at ¶ 4, even though, according to Plaintiff, Panera’s “Products contain multiple ingredients that are artificial, chemical, and/or synthetic preservatives, sweeteners, flavors, and colors.” *Id.* at ¶¶ 6, 44. Plaintiff therefore contends that Panera “misrepresented, and/or concealed, suppressed, or omitted material facts in connection with the sale, distribution, and/or advertisement of the Products.” *Id.* at ¶ 7.

5. For example, Plaintiff alleges that Panera’s “claims that the Products contain no artificial preservatives is [sic] false and misleading. The Products contain **ascorbic acid, citric acid, potassium sorbate, and tocopherols**, whose functions as artificial preservatives have been well-documented. These ingredients function as preservatives in the Products.” *Id.* at ¶ 28 (emphasis in original).

6. Plaintiff bases its allegation that the Products contain artificial preservatives on its interpretation of how the U.S. Food and Drug Administration (“FDA”) defines “chemical preservative”:

any chemical that, when added to food, tends to prevent or retard deterioration thereof, but does not include common salt, sugars, vinegars, spices, oils extracted from spices, substances added to food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or herbicidal properties.

Id. at ¶ 29 (citing 21 C.F.R. § 101.22(a)(5)). Plaintiff relies on this definition to contend that “ascorbic acid, citric acid, potassium sorbate, and tocopherols have precisely this effect,” *id.* at ¶ 30, and therefore are artificial preservatives.

7. Plaintiff also alleges that FDA’s “regulatory listing of chemical preservatives” includes ascorbic acid and tocopherols. *Id.* at ¶¶ 34, 40. In addition, Plaintiff alleges that the FDA has warned third-parties in the past about their failures to properly label the inclusion of citric acid, ascorbic acid, and tocopherols as use of preservatives. *Id.* at ¶¶ 37, 41.

8. Plaintiff requests “on behalf of himself and the putative class . . . a refund for monies paid as a result of their purchases of the Products,” declaratory and injunctive relief enjoining Panera from continuing the allegedly unlawful practices, punitive damages, pre-judgment interest, post-judgment interest, and attorney’s fees and costs. *Id.* at ¶¶ 7, 106.

STATEMENT OF GROUNDS FOR REMOVAL

9. The Petition asks the St. Louis City Circuit Court to determine important issues of federal law that would have ramifications for the nationwide labeling of food products. In order to resolve this action, the St. Louis City Circuit Court would need to determine whether the alleged synthetic ingredients (ascorbic acid, citric acid, potassium sorbate and tocopherols) necessarily function as preservatives and must be declared and labeled as “preservatives” under federal law. A judicial finding that these ingredients must always be declared as preservatives, if FDA

regulations are properly applied, would potentially have wide-ranging impacts on food labeling across the country.

10. Accordingly, this court has original jurisdiction under 28 U.S.C. § 1331, which confers federal question jurisdiction for “all civil actions arising under the Constitution, laws, or treaties of the United States.”

11. A federal question is raised in those cases in which a “well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” *Williams v. Ragnone*, 147 F.3d 700, 702 (8th Cir. 1998) (citing *Franchise Tax Bd. v. Contr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)).

12. The Supreme Court provides further guidance:

federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met . . . jurisdiction is proper because there is a ‘serious federal interest in claiming the advantages thought to be inherent in a federal forum,’ which can be vindicated without disrupting Congress’s intended division of labor between state and federal courts.

Gunn v. Minton, 568 U.S. 251, 258 (2013).

13. Plaintiff contends that Panera has “misrepresented, and/or concealed, suppressed, or omitted material facts in connection with the sale, distribution, and/or advertisement of the Products,” Ex. A, Pet. ¶ 7, because Panera claims that its Products are “100% clean” or “clean,” “with no artificial preservatives, sweeteners, flavors, or colors from artificial sources,” *id.* at ¶¶ 17-18, even though the Products contain “ascorbic acid, citric acid, potassium sorbate, and tocopherols,” *id.* at ¶ 28, which, according to Plaintiff, “function as preservatives in the Products.” *Id.* Plaintiff also contends that various other Panera Products that the Plaintiff did not purchase

allegedly also contain a variety of “Sweeteners, Flavors, and Color Ingredients” that make Panera’s “100% clean” and “clean” claims misleading. *See id.* at ¶¶ 44-45.

14. Whether ascorbic acid, citric acid, potassium sorbate, and tocopherols in fact do “function as preservatives” in the Products depends on whether they fall within the FDA’s definition for “chemical² preservative.” While Plaintiff emphasizes the portion of the FDA’s definition of chemical preservative as a substance that “tends to prevent or retard deterioration,” he does not allege any facts that would demonstrate that the allegedly improper “chemical” ingredients actually serve this function in the challenged Products. Rather, it is very clear that Plaintiff contends that all of the allegedly improper chemical ingredients *always* “tend to” function as preservatives and therefore must be declared as such under federal law. In other words, Plaintiff’s case depends on a reading of federal law that *requires* ascorbic acid, citric acid, potassium sorbate and tocopherols to be labeled as “chemical preservatives.” Panera contends that this badly misreads federal law.

15. Whether any of the other substances that Plaintiff lists in Paragraph 44 of the Petition constitute “Artificial Preservatives, Sweeteners, Flavors, and Color Ingredients” as they are used in Panera Products depends on application of the FDA regulations defining such terms. *See, e.g.*, 21 C.F.R. § 101.22.

16. In fact, the FDA has specifically recognized that substances like citric acid, ascorbic acid, and tocopherols have multiple, *non-preservative*, uses. For instance, FDA Guidance notes that citric acid can be used as a preservative *or* as a “pH Control Agent[] and acidulant[.]” U.S. FDA, “Overview of Food Ingredients, Additives & Colors” (rev. April 2010).³ The same is true

² Panera does not concede that “chemical” and “artificial” have the same meaning.

³ <https://www.fda.gov/food/food-ingredients-packaging/overview-food-ingredients-additives-colors>

for ascorbic acid and tocopherols, both of which the FDA notes can be used as a preservative *or* as a “nutrient.” *Id.*

17. Plaintiff concedes that understanding “artificial preservatives and additives requires a scientific investigation and knowledge of chemistry beyond that of the average consumer.” Ex. A, Pet. ¶ 54. This acknowledges the importance of the FDA’s expertise and its definitions of “chemical preservative” and other “artificial” substances. The resolution of the key issue in this case—whether certain substances in Panera’s Products serve as preservatives, sweeteners, flavors, or color ingredients from artificial sources—turns on the interpretation and application of federal regulations and therefore necessarily raises a substantial federal question that is actually disputed, warranting removal to this court. *See Reider-Gordon v. Synthes Spine Co., L.P.*, No. CV-10-00641-ODW(EX), 2010 WL 2569058, at *6 (C.D. Cal. June 22, 2010); *In re Zyprexa Products Liab. Litig.*, 375 F. Supp. 2d 170, 172-73 (E.D.N.Y. 2005). Panera further avers that this dispute can be resolved by this court without disrupting the federal-state balance approved by Congress. *See Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005); *see also* 28 U.S.C. § 1331. Indeed, Missouri federal courts have extensive experience adjudicating MMPA claims. *See, e.g., Craggs v. Fast Lane Car Wash & Lube, L.L.C.*, 402 F. Supp. 3d 605, 612 (W.D. Mo. 2019) (noting the frequency with which federal judges have decided MMPA cases).

CONCLUSION

18. For the foregoing reasons, this court may exercise original jurisdiction over this action under 28 U.S.C. § 1331, and removal is proper under 28 U.S.C. § 1441(a).

19. This Notice of Removal is timely filed under 28 U.S.C. §§ 1453(b), 1446(b) because Panera was served on July 14, 2020 and is filing this Notice of Removal within thirty (30) days of service.

20. This Notice of Removal is filed in the District Court of the United States for the district and division in which the case is pending. *See* 28 U.S.C. §§ 1441, 1446(a). The United States District Court for the Eastern District of Missouri, Eastern Division, encompasses the location where the State Court action is pending: City of St. Louis, Missouri. *See* 28 U.S.C. § 105.

21. In accordance with 28 U.S.C. § 1446(a) and Local Rule 2.03, a copy of all “process, pleadings, and orders served upon” Panera with respect to this action, “a copy of the state court’s docket sheet,” and any other documents on file in the State Court, are attached. *See* Ex. A.

22. As required by 28 U.S.C. § 1446(d), Panera has given Plaintiff written notice of the filing of this Notice of Removal by service on counsel. Per Local Rule 2.03, a copy of that notice is filed contemporaneously herewith.

23. In accordance with 28 U.S.C. § 1446(d), Panera is filing a copy of this Notice of Removal with the Clerk of the Circuit Court of St. Louis City, State of Missouri. Per Local Rule 2.03, a copy of that notice is filed contemporaneously herewith.

24. Panera has complied with Local Rule 2.02. A completed Civil Cover Sheet, an Original Filing Form, and a Disclosure of Organizational Interests Certificate accompanies this Notice of Removal.

WHEREFORE, Panera respectfully requests that this action now pending in the Circuit Court of the City of St. Louis, State of Missouri be removed to this court, that this court exercise its subject matter jurisdiction over this action, and that the court grant such other and further relief as it deems just and proper.

Respectfully submitted,

HAAR & WOODS, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2020, I electronically filed the foregoing Notice of Removal with the Clerk of the Court using the CM/ECF system, and have served via electronic mail and U.S. mail, first class, postage prepaid, the Notice of Removal to the following:

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