

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROLEO BEVERAGE CORP. and LEONARD COSTA, :

Plaintiffs, :

- versus - :

PEPSI-COLA BOTTLING COMPANY OF NEW
YORK, INC., :

Defendant. :

----- X

Case No. _____

NOTICE OF REMOVAL

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TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant
Pepsi-Cola Bottling Company of New York, Inc. (“Defendant” or “PCNY”), by its undersigned
counsel, respectfully removes civil action Index No. 811845/2022E from the Supreme Court of
the State of New York, County of Bronx, to the United States District Court for the Southern
District of New York. The grounds for such removal are as follows:

THE STATE COURT ACTION

1. On August 11, 2022, counsel for Plaintiffs Roleo Beverage Corp. (“Roleo”) and
Leonard Costa (“Costa”) (collectively, “Plaintiffs”) informed Defendant that Plaintiffs would be
filing an Order to Show Cause seeking injunctive relief on August 12, 2022 in the Supreme
Court of the State of New York, County of Bronx (the “State Court Action”). True and accurate
copies of: (i) the Summons with Notice filed by Plaintiffs on August 12, 2022, civil action Index
No. 811845/2022; and (ii) Plaintiffs’ Order to Show Cause, supporting documents, Affidavit of
Leonard Costa in support of application for injunctive relief and temporary restraining order,
with Exhibits A and B; Plaintiffs’ Memorandum of Law in support of application for preliminary
injunction and temporary restraining order; Affirmation of Good Faith Notice Pursuant to 22

NYCRR 202.7(F); and Request for Judicial Intervention, filed by Plaintiffs on August 12, 2022, which, upon information and belief, constitute all of the process and pleadings filed in the State Court Action, are attached hereto as Exhibit A.

2. Defendant has not yet been served in the State Court Action. However, based on the representations by Plaintiffs' counsel regarding the anticipated filing of the Order to Show Cause, Defendant retrieved the documents attached hereto as Exhibit A filed in the State Court Action from the Court's docket on August 12, 2022, and will deem service effective as of that date.

3. The State Court Action is removable from the New York State Supreme Court to this Court pursuant to 28 U.S.C. § 1441(a) because it is a civil action wherein: (1) complete diversity of citizenship exists among the parties; and (2) the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

BASIS FOR REMOVAL

4. This Court has jurisdiction over the State Court Action pursuant to 28 U.S.C. § 1441 because there is complete diversity of citizenship between Plaintiffs and PCNY in this action, as follows:

5. Plaintiff Leonard Costa is an adult citizen of the State of New York, whose address, upon information and belief, is 15 Eagle Lane, Hauppauge, New York 11788. (Leonard Costa Affidavit, Exh. A (NYSCEF Doc. No. 5).) Plaintiff acknowledges he received correspondence from PCNY directed to him at that address. (Costa Aff. ¶ 2 (NYSCEF Doc. No. 4).)

6. Plaintiff Roleo Beverage Corp. is a New York corporation with offices located at 650 Brush Avenue, Bronx, New York 10465. (Costa Aff., Exh. A (NYSCEF Doc. No. 5).) By

reason of said corporate address, Plaintiff Roleo Beverage is a citizen of the State of New York.

7. Defendant is a bottling and distribution company doing business in and around New York City. (Exh. A, Summons with Notice.) Defendant is incorporated in Pennsylvania, with its principal place of business located at 8275 North Crescent Boulevard, Pennsauken, New Jersey. Defendant also has facilities in New York City, including at 650 Brush Avenue, Bronx, New York. For purposes of removal, “a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business” 28 U.S.C. § 1332(c)(1). Defendant is therefore a citizen of Pennsylvania and New Jersey, and not a citizen of the State of New York.

8. Plaintiffs and Defendant are parties to a Distributor Agreement, pursuant to which Plaintiffs sell and distribute Pepsi products in a territory in New York City. (Pl’s Mem. of Law in Support of Application for Preliminary Injunction and Temporary Restraining Order (“Pl’s Brief”) at 1-2 (NYSCEF Doc. No. 3).)

9. The Complaint in this matter has not yet been filed, and the amount in controversy of Plaintiffs’ claim is not specified in the Order to Show Cause, which seeks a preliminary injunction and temporary restraining order. (*Id.*) “In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.” *Correspondent Servs. Corp. v. First Equities Corp.*, 442 F.3d 767, 769 (2d Cir. 2006) (quoting *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977)). “[T]he amount in controversy is calculated from the plaintiff’s standpoint; the value of the suit’s intended benefit or the value of the right being protected or the injury being averted constitutes the amount in controversy when damages are not requested.” *Kheel v. Port of New York Auth.*, 457 F.2d 46, 49 (2d Cir. 1972) (internal quotation marks omitted).

10. Plaintiffs claim injunctive relief is necessary to prevent “[t]he loss of an entire profession or livelihood,” including “Plaintiffs’ invaluable customer relationships, reputation, and goodwill,” which were “cultivated over decades of time and effort.” (Pl’s Brief at 6.) Plaintiffs assert that Defendant’s “[t]ermination of the Agreement would cause Plaintiffs to forfeit the Distributorship, as if it were being sold with no consideration.” (*Id.* at 10.) Accordingly, the amount in controversy is measured by the value of Plaintiffs’ distributorship. *See Element Snacks, Inc. v. Garden of Light, Inc.*, 3:18-cv-1128 (VLB), 2018 WL 3799908, at *1, 4 (D. Conn. Aug. 9, 2018) (holding amount-in-controversy requirement satisfied in action for preliminary injunction to prevent termination of contract for manufacture of goods where termination threatened viability of business valued at over \$2 million); *Khan v. CXA-16 Corp.*, No. 16-CV-6672, 2017 WL 1906885, at *4 (S.D.N.Y. May 5, 2017) (finding amount-in-controversy requirement satisfied where value of property subject to action to quiet title exceeded \$75,000).

11. Plaintiffs intend to assert claims for “breach of contract, and declaratory relief as well as: anticipating breach of contract, specific performance; interference with contract, including breach; promissory estopped; unjust enrichment; interference with prospective and/or actual economic relations; permanent injunction; declaratory judgment; preliminary injunction; replevin; anticipatory repudiation; ... and/or prima facie tort.” Plaintiffs’ Summons with Notice, at 2 (NYSCEF Doc. No. 1).

12. Accordingly, by reason of the factual allegations of the Order to Show Cause and supporting papers, the nature of the claims asserted by Plaintiffs, and the relief Plaintiffs have requested, it appears to a reasonable probability that the claims exceed the sum or value of \$75,000.00, exclusive of interest and costs, as required by 28 U.S.C. § 1332(a).

13. Therefore, this Court has diversity jurisdiction over the above-captioned action pursuant to 28 U.S.C. § 1332, and this action may properly be removed to this Court pursuant to 28 U.S.C. § 1441 *et seq.*

TIMELINESS OF REMOVAL PROCEDURAL COMPLIANCE

14. This Notice of Removal is timely filed within the time prescribed by 28 U.S.C. § 1446(b), as amended, having been filed within thirty (30) days of service on PCNY. The time for PCNY to answer has not expired.

15. Written notice of the filing of this Notice of Removal is being served this date by email on Plaintiffs' counsel, and by e-filing with the New York State Courts Electronic Filing ("NYSCEF") system, and a true and correct copy of this Notice of Removal is being filed this date with the County of Bronx Clerk's Office, Supreme Court of the State of New York.

16. By filing this Notice, PCNY does not waive any defenses which may be available to it.

WHEREFORE, PCNY respectfully removes the State Court Action (Index No. 811845/2022E) now pending in the Supreme Court of the State of New York, County of Bronx.

Dated: New York, New York
August 15, 2022

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