UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL JUSTICE HEALTH ALLIANCE FOR CHEMICAL POLICY REFORM, and THE BREAST CANCER FUND,	:	
Plaintiffs,	:	
	:	16 Civ. 09401 (PKC)
- against -	:	
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS' MOTION TO INTERVENE

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

Proposed intervenor the National Association of Manufacturers (the "NAM") submits this memorandum of law in support of its motion to intervene as of right and by permission of the Court, pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, in the above-captioned action filed against the United States Consumer Product Safety Commission ("CPSC") by plaintiffs the National Resources Defense Council, the Environmental Justice Health Alliance for Chemical Policy Reform, and the Breast Cancer Fund. Pursuant to Federal Rule 24(c), the NAM has simultaneously moved to dismiss the Complaint for lack of subject-matter jurisdiction pursuant to Federal Rule 12(b)(1).[1]

Preliminary Statement

In this action, plaintiffs that lack standing under Article III of the U.S. Constitution to file this lawsuit nevertheless seek injunctive and declaratory relief to compel the CPSC to promulgate "as soon as possible" a final rule, pursuant to Section 108(b)(3) of the Consumer Product Safety Improvement Act ("CPSIA"), 15 U.S.C. § 2057c(b)(3), that would ban five organic compounds, known as "phthalates," from use in children's toys and child care articles. The CPSC published a proposed rule on December 30, 2014 to permanently ban the use of five specific phthalates in such products, abbreviated as: DINP, DPENP, DHEXP, DCHP,

[1] Federal courts have recognized that a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule 12(b)(1) satisfies Rule 24(c)'s requirement that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c); *see, e.g.*, *JPMorgan Chase Bank, N.A. v. Nell*, No. 10-cv-1656, 2012 WL 1030904, at *1-7 (E.D.N.Y. Mar. 27, 2012) (granting motion to intervene under Rule 24 and intervenor's simultaneous motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1)); *New Century Bank v. Open Solutions, Inc.*, No. 10-cv-6537, 2011 WL 1666926, at *1, *3 (E.D. Pa. May 2, 2011) (granting motion to intervene under Rule 24 and "[c]ontemporaneous" motion to dismiss counterclaim for lack of subject-matter jurisdiction under Rule 12(b)(1), and finding that intervenor's motion to dismiss "puts the court and other parties on clear notice of the position the [intervenor] will advance. This satisfies Rule 24(c)."). Although a "motion to dismiss for lack of subject-matter jurisdiction is not a pleading within the meaning of Rule 7" of the Federal Rules of Civil Procedure, "[l]ack of subject-matter jurisdiction is a defense, . . . and litigants are expressly permitted to raise that defense by motion." *Id.* at *3 (citing Fed. R. Civ. P. 12(b)(1)); *see also Windsor v. United States*, 797 F. Supp. 2d 320, 325-26 (S.D.N.Y. 2011); *Nelson v. Greenspoon*, 103 F.R.D. 118, 121 (S.D.N.Y. 1984).

and DIBP.[2] The Complaint alleges that the phthalates "are common in toys and child care products." (Compl. ¶ 1.) Despite the CPSC's diligence, publication of the final rule is technically overdue because the relevant statute imposed an unrealistic and unachievable schedule for such a complicated rulemaking. As the CPSC has acknowledged, the delay "is a result of the scientific complexity of the issues under consideration, the substantial public interest in the matter, and the continuing availability of new information relevant to the agency's decision-making."[3] Indeed, the CPSC continues to evaluate more recent data that is highly relevant to the final rule, and in February 2017 published an analysis of new data concerning phthalate exposure estimates that called for comments to be submitted by March 24, 2017.[4]

The Complaint alleges that plaintiffs and their members "are concerned about the health risks to their children from exposure to phthalates in toys and child care articles." (Compl. ¶ 8.) Plaintiffs claim that they "have been and continue to be injured by the CPSC's unlawful delay in publishing the final phthalate regulation" (*id.*), because the "delay is causing continued human exposure to five phthalates that would be banned from children's products if the proposed rule were finalized as proposed" (*id.* ¶ 26). The relief plaintiffs seek would compel the CPSC to publish the final regulation "as soon as possible" to prevent "continued human exposure" to the five phthalates that would be banned in such products. (*Id.* ¶¶ 4, 26.)

Although plaintiffs complain that the final rule is more than two years overdue, and allege that they have been injured by "continued human exposure" to phthalates in such products during the delay, they did not file this lawsuit until December 2016. Plaintiffs' own

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[2] *Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates*, 79 Fed. Reg. 78324 (Dec. 30, 2014). A copy of the notice of proposed rulemaking is attached as Exhibit H to the accompanying Declaration of Rosario Palmieri, sworn to on April 6, 2017 ("Palmieri Decl.").

[3] (Initial Joint Pretrial Conference Letter to Court, dated February 14, 2017, at 2 (Docket No. 20).)

[4] (Palmieri Decl. ¶¶ 6, 9, 27 & Exs. F, L.)

delay belies their current claim that they have been and continue to be suffering actual and imminent injury caused by the CPSC's delay based on alleged exposure to phthalates in children's toys and child care articles. The NAM has serious concerns and a substantial interest in ensuring that the process for implementing a final rule that will affect the interests of its members is driven by sound scientific analysis, rather than by plaintiffs' attempt to seek a tactical advantage in the rulemaking process, through an order from the Court or a consent decree with the CPSC, that would exclude the NAM and other stakeholders from that process. This is particularly true because the plaintiffs lack standing to sue in the first place.

As the nation's largest industrial trade association representing large and small manufacturers in every industrial sector and in all 50 states, the NAM's membership includes companies that manufacture or import the phthalates at issue here and companies that manufacture or import consumer products or components of such products that contain these and other phthalates. The proposed rule if finalized in its current form would directly harm the NAM's members by permanently prohibiting a specific class of products – children's toys and child care articles – containing the five phthalates at issue here. Some of the NAM's members have already suffered ongoing harm to their interests under the interim ban imposed by Congress in February 2009, which would become permanent under the proposed rule that plaintiffs seek to make final. The final ban would also adversely affect the entire product market for phthalates and other consumer products made with phthalates that are not subject to the final regulation due to the stigma that would attach to the banned substances. For the reasons set forth below, the NAM satisfies the four requirements for intervention as of right pursuant to Federal Rule 24(a) and, in the alternative, should be permitted to intervene pursuant to Federal Rule 24(b) to assist the Court in determining whether plaintiffs have proper standing to maintain this action.

First, the NAM has filed this timely motion to intervene in order to dismiss the Complaint for lack of subject-matter jurisdiction because plaintiffs lack standing under Article III of the U.S. Constitution to compel any relief impacting the rulemaking, including through a consent decree. "If a plaintiff lacks standing, the federal 'courts have no business deciding [the case], or expounding the law in the course of doing so.'" *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 162 (2d Cir. 2012) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-41 (2006)). Indeed, because this Court is "obligated at all times" to ensure that it has subject-matter jurisdiction, it must consider the NAM's standing argument "as a threshold matter, without regard to the outcome of the motion to intervene." *Cronin v. Browner*, 898 F. Supp. 1052, 1057 (S.D.N.Y. 1995) (deciding intervenors' objection to subject-matter jurisdiction "as a threshold matter" before addressing motion to intervene).[5]

As shown in the NAM's accompanying motion to dismiss, plaintiffs can show no "injury in fact" that is "fairly traceable" to the CPSC's delay in publishing a final rule, because there is no "concrete and particularized" evidence of "actual or imminent" harm[6] from current human exposure to any of the phthalates at issue here from toys or child care products. Plaintiffs can show no harm based on actual exposure that is caused by the CPSC's delay because the CPSC's experts, the Chronic Hazard Advisory Panel ("CHAP"), found that four of the five phthalates at issue *are not even currently used in children's toys or child care articles*,

[5] *Cf. also Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 262 (2d Cir. 1992) (where intervening utilities had "raised[ed] a question as to subject-matter jurisdiction, not discussed by the district court" in denying intervention, Second Circuit would "consider the issue on our own motion" because "we have a 'special obligation' to satisfy ourselves of our own jurisdiction as well as that of the district court") (citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986)).

[6] *NRDC v. FDA*, 710 F.3d 71, 79-80 (2d Cir. 2013) (citing U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

and further found "*[n]o quantifiable exposures*" to the fifth phthalate in such products.[7] Plaintiffs likewise cannot show that any alleged injury could be redressed by an order from this Court compelling publication of a final rule "as soon as possible." Because four of these phthalates currently are not present in toys and child care articles, the CHAP itself determined that a permanent ban on DINP, DPENP, DHEXP, and DCHP, if implemented, would not be expected to reduce exposure to children from these phthalates in such products,[8] and similarly found that "[t]here would be little reduction in exposure" to children from DIBP in such products if the permanent ban of DIBP were to be implemented.[9]

The NAM and its members have a legally protectable threshold interest in preventing an abuse of this Court's jurisdiction by ensuring that: (i) plaintiffs without standing do not compel the CPSC to impose a final regulation that will affect the interests of NAM and its members; (ii) the CPSC as regulator of the NAM's members does not negotiate a consent decree to impose a final regulation on the NAM's members with parties that lack standing; and (iii) the Court does not enter or enforce such a consent decree or grant any other relief where it lacks subject-matter jurisdiction because the plaintiffs have no standing. Because the Court ultimately must make this subject-matter determination on its own regardless of the intervention motion, granting intervention at this early stage of the case will not delay or prejudice these proceedings in any way. In fact, if intervention is granted, the NAM will assist the Court by presenting facts from the administrative record that establish plaintiffs' lack of standing. This is particularly appropriate because plaintiffs and the CPSC otherwise have no interest in addressing the

[7] (Palmieri Decl. ¶¶ 24-26 (emphasis added).)

[8] (Palmieri Decl. ¶¶ 25 & Ex. 26, CHAP Report at 99 (DINP), 113 (DPENP), 116 (DHEXP), 118 (DCHP).)

[9] (*Id.* ¶ 26 & Ex. I, CHAP Report at 112.)

standing issue because they have negotiated the Consent Decree—notwithstanding the CPSC asserting a defense based on lack of subject-matter jurisdiction in its Answer. *See* CPSC Ans. 2d Aff. Def.; *see, e.g.*, *Elliott Indus. L.P. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103-04 (10th Cir. 2005) (granting intervention on appeal under Rule 24(a) for purposes of challenging subject-matter jurisdiction where "neither party has an interest in contesting jurisdiction," which was "essential to this court's review" and must be addressed "without regard to whether the parties dispute its existence," and court's jurisdictional "inquiry is aided by the presence of" intervenor that challenged jurisdiction). Granting intervention under these circumstances will not delay the case but rather will provide grounds for appropriately terminating it at an early stage, thereby conserving judicial resources and protecting the interests of the NAM and its members.

In addition, the NAM and its members unquestionably have direct and substantial economic interests in the transaction at issue here because their products are the target of the plaintiffs' claims of harm in this lawsuit and the subject of the CPSC's regulatory action, and some members have already been directly and substantially affected by the interim ban on certain phthalates. The law is clear that when a third party sues to compel government agency action that would directly harm a regulated company, the company's economic interests in the lawsuit clearly satisfy Rule 24(a)(2)'s recognized-interest requirement. It would be manifestly unfair for decisions that will dictate the process for the final rule to proceed in an action filed by plaintiffs without proper standing, and without the involvement of the NAM and its members, who ultimately will be affected by the outcome of that process.

The NAM and its members likewise have direct and substantial procedural and policy interests related to the transaction at issue here. The declaratory and injunctive relief plaintiffs seek, and the proposed Consent Decree, clearly relate to those interests: they would

affect the NAM's efforts to protect its members' interests in the final rulemaking, and to ensure that the CPSC has adequate time to thoroughly review and consider the highly complex scientific and statistical evidence relevant to the rulemaking. That information should include the new comments submitted by March 24, 2017 in response to supplemental data that was only published by the CPSC on February 22, 2017. Because the parties submitted the proposed Consent Decree on March 23, 2017, it is clear that the CPSC did not consider the information in the latest round of comments when negotiating the timeline for the final rule in that decree. If the Consent Decree is entered in its current form, without sufficiently accounting for the time necessary to consider all of the recent data and relevant public comments, that disposition would impair the interests of the NAM and its members in obtaining a scientifically sound final rule.

The Consent Decree further impairs those interests because it does not permit the NAM or its members to seek relief in this Court if more time is needed for the rulemaking based on the scientific issues, and the CPSC itself would have no discretion under the Consent Decree to extend the time frame on its own. The NAM's harm from its exclusion from the process of setting a schedule for the final rule also could not be mitigated by challenging the final rule under the APA after a final ban is implemented, as the parties have suggested, because of the stigma that would attach to the banned substances once the permanent ban is implemented.

Finally, the interests of the NAM and its members are not adequately represented by the existing parties to this action. The CPSC has not vigorously pursued the defense it shares with the NAM based on lack of subject-matter jurisdiction. The parties have negotiated a settlement and asked the Court to enter the Consent Decree, in which they "agreed" that the Court has subject-matter jurisdiction to enter the order. The CPSC obviously has no interest in challenging plaintiffs' lack of standing at this stage. Furthermore, the CPSC's broader interests

in the general public welfare similarly diverge from the narrower interests of the NAM and its members in connection with the final rule regulating phthalates in children's toys and child care articles. That conflict is evident in the fact that the CPSC has already issued a proposed rule that, if made permanent, would harm the interests of the NAM and its members by permanently banning the phthalates at issue in such products.

In the alternative, permissive intervention under Rule 24(b) is appropriate here because the NAM shares a common defense in this action which the CPSC will not adequately pursue, and because the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The NAM's early intervention will not materially delay or prejudice the case in any way, because the Court must make a threshold jurisdictional determination before entering the Consent Decree and retaining continuing jurisdiction to enforce that order, regardless of the resolution of the motion to intervene. Under the circumstances, the NAM's intervention could assist the Court in making that determination by presenting the facts from the administrative record and legal arguments that are necessary to establish that the plaintiffs lack standing under Article III. For these reasons, the Court should grant the NAM's motion to intervene on a permissive basis so that the Court can consider the accompanying motion to dismiss for lack of subject-matter jurisdiction.

Statement of Facts

The relevant facts at issue on this motion to intervene are set forth in the accompanying Palmieri Declaration.

Argument

I. THE NAM IS ENTITLED TO INTERVENE AS OF RIGHT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24(A)

A district court "must grant an applicant's motion to intervene under Rule 24(a)(2) if '(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.'" *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 66 (2d Cir. 2016) (citation omitted), *cert. granted*, 137 S. Ct. 810 (2017); *see Chen-Oster v. Goldman, Sachs & Co.*, No. 10-cv-6950, 2015 WL 4619663, at *4 (S.D.N.Y. Aug. 3, 2015) (citation omitted). "The test is flexible and courts generally look at all of the factors rather than focusing narrowly on any one of the criteria." *JPMorgan Chase Bank N.A. v. Nell*, No. 10-cv-1656, 2012 WL 1030904, at *2 (E.D.N.Y. Mar. 27, 2012) (citations omitted). The NAM satisfies each prong of this test and therefore should be permitted to intervene as of right.[10]

A. The NAM's Motion to Intervene Is Timely

Timeliness under Rule 24 "defies precise definition" and "is not confined strictly to chronology." *Chen-Oster*, 2015 WL 4619663, at *5 (internal quotation marks and citation omitted). In determining timeliness, courts "consider '(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual

[10] A party seeking to intervene as of right is not required to satisfy the requirements for Article III standing. *See Laroe Estates*, 828 F.3d at 64-65. In any event, the NAM would satisfy the requirements for standing if it were necessary in this case because it can establish that one or more of its members has suffered an "injury in fact" that is "fairly traceable" to the challenged action here that likely can be "redressed by a favorable decision" of the Court. *NRDC*, 710 F.3d at 79 (internal quotation marks and citations omitted).

circumstances militating for or against a finding of timeliness.'" *Laroe Estates*, 828 F.3d at 66-67 (citation omitted).

The NAM's motion to intervene is timely because the case is in its very early stages, the Court has yet to issue a case management order, and there has been no discovery or motion practice. The Complaint was filed on December 6, 2016, and the NAM sought to intervene as soon as it became apparent, from a press articles published after the February 22, 2017 initial pretrial conference in this case, that the CPSC would not adequately represent the interests of the NAM and its members in this case. (Palmieri Decl. ¶ 10 & Ex. G); *see Chen-Oster*, 2015 WL 4619663, at *11 (granting motion as timely where intervenors "moved promptly after learning that their interests could no longer be adequately represented" by existing parties). The CPSC's decision to settle with entities that lack proper standing, despite the CPSC's affirmative defense based on lack of subject-matter jurisdiction,[11] means that the government will not vigorously pursue the NAM's interest in preventing an abuse of this Court's jurisdiction. *See Elliott Indus.*, 407 F.3d at 1103-04 (intervention was timely where "neither of the parties will raise or adequately address the issue of subject matter jurisdiction").

Moreover, the NAM's intervention at this stage will not materially delay or prejudice the case in any way. Instead, it will assist the Court in making a jurisdictional determination that must be made regardless of the outcome of the motion to intervene. *Id.* at 1104 (finding intervention for purposes of moving to dismiss for lack of subject-matter jurisdiction was proper where court's jurisdictional "inquiry is aided by the presence of" intervenor challenging jurisdiction). Under the circumstances, the NAM will not raise any new issues beyond the scope of the Complaint, because it seeks to address the necessary threshold

[11] Ans. 2d Aff. Def. (Docket No. 18); Joint Letter at 3 (Docket No. 20).

issue of whether the Complaint itself meets the requirements for federal subject-matter jurisdiction. *Disability Advocates*, 675 F.3d at 162 ("If a plaintiff lacks standing, the federal 'courts have no business deciding [the case].'") (citation omitted). The NAM seeks not to delay but rather to appropriately dismiss the case at a preliminary stage based on lack of standing. *See id.* at 161-63 (vacating judgment and dismissing action where district court "decided important questions of fact and law based entirely on the presentation of a plaintiff who lacked standing.").

In any event, any purported "prejudice to either party" based on "additional delay and expense" of briefing the Rule 12(b)(6) motion would be "minimal compared with the importance of addressing the question of subject matter jurisdiction." *Elliott Indus.*, 407 F.3d at 1103-04. Because this litigation is "still at an early stage," and the NAM's motion clearly "does not represent an attempt by an intervenor to join a lawsuit at the eleventh hour," the motion is timely. *Laroe Estates*, 828 F.3d at 67; *see also Wal-Mart Stores, Inc. v. Texas Alco. Bev. Comm'n*, 834 F.3d 562, 565-66 (5th Cir. 2016) (holding that motion was timely under Rule 24(a) where trade association "sought intervention before discovery progressed" and "did not seek to delay or reconsider phases of the litigation that had already concluded").

B. The NAM and Its Members Have Substantial Interests Relating to the Transaction That Is the Subject of This Action

In requiring an intervenor to assert an interest "relating" to the property or transaction which is the subject of the action, Rule 24(a) "asks only whether the proposed intervenor has an 'interest in the proceeding' that is 'direct, substantial, and legally protectable.'" *Laroe Estates*, 828 F.3d at 69 (citation omitted). An interest meets the first two requirements where it is not "remote from the subject matter of the proceeding, or . . . contingent upon the occurrence of a sequence of events." *Id.* (citation omitted). "An interest that is otherwise sufficient under Rule 24(a)(2) does not become insufficient because the court

deems the claim to be legally or factually weak." *Id.* (citation omitted). The NAM and its members have substantial legal, economic, procedural, and policy interests that are related to the transaction at issue here.

First, the NAM and its members have a substantial threshold interest in preventing an abuse of this Court's jurisdiction by plaintiff organizations that lack legal standing to impose a final process for implementing a permanent ban of phthalates that clearly would harm the broader interests of the NAM and its members. *See Elliott Indus.*, 407 F.3d at 1104 (granting motion to intervene where court's jurisdictional "inquiry is aided by the presence of" intervenor challenging subject-matter jurisdiction); *Alto v. Salazar*, No. 11-cv-2276, 2012 WL 12871182, at *4-5 (S.D. Cal. May 9, 2012) (granting motion to intervene where tribe had "significant protectable interest in making sure the Court correctly draws the line" between tribal law issues "over which the Court lacks jurisdiction" and other "matters properly within the scope of the Court's review under the APA" or other federal laws, and where federal agency defendants did not "share the same interests in adjudicating the jurisdictional scope of the Court's review of the agency action."). It would be unfair and inequitable to permit plaintiffs who lack standing to compel entry of an order that would dictate the CPSC's process for implementing a final rule that will affect the interests of the NAM's members. The NAM thus has a direct, substantial, and legally protectable interest in preventing such an abuse of the court's jurisdiction by plaintiffs and harm to its members' interests.

Second, the NAM and its members have significant economic interests relating to the transaction at issue here because the proposed final rule specifically targets the industry for manufacturing and importing phthalates and products and components that use them. The law is clear that when "a third party files suit to compel governmental agency action that would

directly harm a regulated company, the company's economic interests in the lawsuit satisfy Rule 24(a)(2)'s recognized-interest requirement." *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 972, 976 (8th Cir. 2014) (finding protectable interest to intervene where plaintiffs claimed that they "only urge the EPA to begin rulemaking" but where final rule sought, if promulgated, would compel intervenor "to change the emission-control technology" at power plant," and intervenor's "interests are the ultimate target" of regulatory action). The Second Circuit similarly has held that a trade association and its members clearly "have an interest in the transaction which is the subject of the action" for purposes Rule 24(a)(2) in an action relating to the promulgation of a proposed regulation that "affects the economic interests of members" of the association, and where the relief sought "might well lead to significant changes in the profession" and manner the association's members "conduct their businesses." *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (holding that association of pharmacists had "a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged."); *see also Wal-Mart Stores*, 834 F.3d 562, 565-66 (finding trade association had protectable interest for intervention purposes where plaintiff sued agency to challenge "protectionist" regulatory scheme and intervenors had interest in defending scheme).

Here there "can be little doubt" that the NAM has an interest relating to the transaction at issue, because the relief to compel the proposed final rule as soon as possible clearly would "affect[] the economic interests of members" of the NAM. *N.Y. Pub. Interest Research Grp.*, 516 F.2d at 351-52. The final rule that plaintiffs seek to compel specifically targets the industry for manufacturing and importing phthalates and products and components that use them. Some of the NAM's members have already experienced ongoing harm to their

interests under the interim phthalates ban. (Palmieri Decl. ¶ 15.) The proposed rule would make that interim ban permanent for DINP and for the four other phthalates in children's toys and child care articles. (*Id.* ¶ 23 & Ex. H.) The proposed rule would also impact the whole industry for other consumer products using phthalates not affected by the final rule based on the stigma associated with the banned substances. (*Id.* ¶ 16.)

Third, the NAM and its members have substantial procedural and policy interests directly relating to this action to ensure that the CPSC does not publish a final rule that would harm the interests of NAM's members without taking sufficient time to consider the new scientific evidence and assess the public comments relevant to the rulemaking, including those recently received in response to the March 24, 2017 public comment deadline. The federal courts have recognized that where proposed intervenors "are the real targets of the suit and are the subjects of the regulatory plan," as is the case here, they have a protectable interest for purposes of intervening under Rule 24(a) in cases "centered on the procedure provided for implementation of a federal regulatory scheme." *Conservation Law Found. of N.E., Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992); *see NRDC v. Costle*, 561 F.2d 904, 908-09 (D.C. Cir. 1977). The courts have also recognized that intervenors have a protectable interest for purposes of Rule 24(a) where the agency at issue in the lawsuit has already made preliminary determinations that the intervenor's products merit further regulation, as the CPSC has done here in publishing a proposed rule that would permanently ban the use of phthalates in children's toys and child care articles. *See, e.g.*, *NRDC. v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (finding that intervenors had "a substantial and direct interest" where complaint related to "procedures pursuant to which EPA reached preliminary decisions that the intervenors' pesticide products merited continued registration.").

This is true even in so-called "deadline" suits relating to the timing of an agency action. *See Mosbacher*, 966 F.2d at 43; *Costle*, 561 F.2d at 908-10. In *Mosbacher*, for example, the plaintiff entities filed suit to request an order directing the Secretary of Commerce "to adopt a schedule for developing amendments and submitting proposed regulations" to a fishery plan required by federal statute, but the complaint did not specifically "ask the Court to invalidate the existing plan, nor determine the content of a new one." *Id.* at 40. In holding that the fishing companies were entitled to intervene to participate in consent decree negotiations, the court found that they had a "legally cognizable interest" because they were the "real targets of the suit and [] the subjects of the regulatory plan," and "should have been allowed to intervene in order to adequately present their opposition to it." *Id.* at 41, 43-44. The court further found that the intervenors' interests were "not speculative simply because the explicit terms of the consent decree do not implement those changes, but merely begin the process through which they would come about." *Id.* at 43; *see also Costle*, 561 F.2d at 908-09 (granting intervention to challenge settlement agreement obligating agency "to initiate rule-making proceedings for the regulation of named pollutants" with "timetables and priorities," where intervening companies had a protectable "interest in the promulgation of valid regulations").

Here, likewise, the relief plaintiffs seek and the proposed Consent Decree clearly relate to the validity of the regulatory "process through which" a final rule banning phthalates permanently "would come about." *Mosbacher*, 966 F.2d at 43; *see Costle*, 561 F.2d at 908-09; *NRDC*, 99 F.R.D. at 609. The proposed Consent Decree relates to the NAM's direct and substantial interests in the final regulation itself, and in ensuring that the process implementing the final rule allows adequate time for the CPSC to thoroughly review all the relevant data and most recent comments concerning the complex science at issue. (Palmieri Decl. ¶ 12.) The

NAM and many of its members have been participating in the rulemaking for many years to protect their interests and ensure that any regulation follows a fair and scientifically sound process that is consistent with standards used by other federal agencies in assessing chemical safety. (*Id*.) Plaintiffs have also participated in this process for years, but now seek to obtain an apparent tactical advantage by using the court to exclude the NAM and other interested stakeholders from any involvement in the Consent Decree that would set the parameters for the final rulemaking process. (*Id.)* It would clearly impair the NAM ability to protect the interests of its members by excluding them from participating in these proceedings. *NRDC*, 99 F.R.D. at 609. The long history of this rulemaking shows that the scientific and technical issues are highly complicated and the economic and public policy stakes are significant. The CPSC's process for evaluating those issues should not be short-circuited (notwithstanding the unrealistic deadlines under the statute) by plaintiffs' efforts in this Court to advance their agenda to finalize the proposed rule at the expense of, and without participation from, the NAM and its members, particularly where plaintiffs lack standing to sue. (*Id.* ¶ 14.)

Finally, this case is not a simple "deadline suit," as plaintiffs and the CPSC contend, relating only to "purely procedural" timing issues that are "collateral" to the NAM's interests in the substantive rulemaking. (NRDC Pre-Motion Letter at 1-2 (Docket No. 25); CPSC Pre-Motion Letter at 2 (Docket No 26).); *see NRDC*, 99 F.R.D. at 609 (rejecting plaintiffs' claim that their lawsuit "only challenges EPA's procedures, not substantive decisions affecting the intervenors"). The "deadline" cases on which the parties rely are inapposite for the primary reason that they do not involve motions to intervene for purposes of challenging the jurisdictional standing of the plaintiffs to even file a "deadline" suit in the first place. Federal subject-matter jurisdiction and standing are foundational issues in this case, not "collateral

issues." Indeed, in those cases referenced by the parties in which the intervenors raised other subject matter-jurisdiction challenges, the courts ultimately found that they had an independent obligation to address the subject-matter jurisdiction question regardless of the status of the intervention motion. *See Am. Lung Ass'n*, 962 F.2d 258, 262 (2d Cir. 1992) (addressing intervening utilities' "question as to subject-matter jurisdiction" on appellate court's own motion to "satisfy ourselves of our own jurisdiction as well as that of the district court"); *Cronin*, 898 F. Supp. at 1057 (addressing proposed intervenors' objection to subject-matter jurisdiction "as a threshold matter").[12] The NAM's substantial and direct interest in preventing implementation of an order that would affect the timing of the final rulemaking brought by plaintiffs with no standing is therefore sufficient to support intervention under Rule 24(a). *See Elliott Indus.*, 407 F.3d at 1103-04.

This case is also distinguishable from the "deadline" decisions referenced by the parties because those cases involved actions to compel an agency to *initiate* a rulemaking process or other agency determination, where no proposed regulation or other action that would directly affect the intervenors had been issued.[13] Here, some NAM members are already

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[12] *See also Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012), *aff'd in part, appeal dismissed in part sub nom. Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013) (court addressed proposed intervenors' subject-matter jurisdiction challenge before considering motion to intervene).

[13] *See, e.g.*, *United States v. City of N.Y.*, 179 F.R.D. 373, 378 (E.D.N.Y. 1998), *aff'd*, 198 F.3d 360 (2d Cir. 1999) (denying intervention where U.S. filed action to compel New York City to *initiate* compliance with EPA's determination requiring construction of filtration plant as environmental impact statement process had not started, and subsequent site selection process and water rate discussions had yet to occur, which weighed against intervention of proposed plant sites who claimed that they would bear rate increases); *Cronin,* 898 F. Supp. at 1062-63 (action seeking to compel EPA to *initiate* rulemaking procedures and thus no proposed rule had been issued); *Am. Lung Ass'n v. Reilly*, 141 F.R.D. 19, 21 (E.D.N.Y. 1992) (action for EPA to review National Ambient Air Quality Standards pursuant to deadlines in Clean Air Act, which could lead to changes in standards that might eventually govern specific controls on industry); *In re Idaho Conservation League*, 811 F.3d 502, 507 (D.C. Cir. 2016) (action seeking to compel EPA to *initiate* rulemaking procedures for one industry where no proposed rule had been issued, and, for the other industries at issue, to compel the EPA to determine whether to engage in rulemaking at

affected by the interim ban that the CPSC's proposed rule would make final, so any action relating to the timing of that process directly and substantially relates to those members' interests. None of the cases referenced by the parties involved circumstances in which an interim product ban was already in place, or where the rulemaking had advanced to the proposed rulemaking stage, so there was little visibility into the content or scope of the proposed or impending final rule in those cases. Here, by contrast, there is an interim ban that may become final, the rulemaking has run for many years, the CHAP has already made its scientific assessments and recommendations, and the CPSC has published a proposed rule that will ban the phthalates at issue permanently if finalized in its current form. (Palmieri Decl. ¶¶ 15, 22-24.)

Furthermore, publication of that proposed rule in its current form has been plaintiffs' goal for some time in the rulemaking itself. (*Id.* ¶ 7 & Exs. D, E.) The purpose and effect of this suit is to accelerate "the process through which [the final ban] would come about," *Mosbacher*, 966 F.2d at 43, notwithstanding plaintiffs' claim here that they only seek purely procedural relief relating to the timing, rather than the content, of the final rule, *see Nat'l Parks Conservation* Ass'n, 759 F.3d at 972, 976 (party targeted by regulation had protectable interest to intervene where plaintiffs claimed that they "only urge the EPA to begin rulemaking" but where final rule, if promulgated, would compel intervenor "to change the emission-control technology" at power plant); *NRDC*, 99 F.R.D. at 609 (finding industry groups had substantial and direct interest in lawsuit even where plaintiffs claimed to challenge only preliminary decisions of agency, "not substantive decisions affecting the intervenors").

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all); *see also Sierra Club v. McCarthy*, 308 F.R.D. 9, 13 (D.D.C. 2015) (requesting that EPA act on petition to object to power plant operating permit that exceeded 60-day deadline required by the Clean Air Act, and explicitly differentiating action from typical rulemaking case).

At this late stage in the regulatory process, therefore, the NAM's direct and substantial interest in the "timing" of the final rulemaking cannot be distinguished from its interest in the substance of the rulemaking, particularly when a proposed rule that would ban the phthalates at issue has been published and the interim ban would become permanent for DINP. (Palmieri Decl. ¶ 15.) The NAM and its members have participated for many years in the rulemaking and have substantial interests at stake. It defies logic for the parties to now claim in this Court that the NAM and its members have no direct, protectable interest that would be impaired by excluding them in this Court from the process of determining what comes next in the rulemaking. For these reasons, it would be fundamentally unfair for decisions that will dictate the process for the final rule to proceed, in an action filed by plaintiffs without standing, without the involvement of the NAM and its members who ultimately will be affected by that process. *See NRDC*, 99 F.R.D. at 609 ("The intervenors have spent years trying to demonstrate to EPA that the pesticides they manufacture are not so dangerous that their registration should be restricted or terminated. If plaintiffs prevail in this case, this effort may be nullified.").

C. Disposition of the Case May Impair or Impede the NAM's Ability to Protect Its Interests and the Interests of Its Members

To show impairment of interests for the purposes of Rule 24(a)(2), proposed intervenors need only show that the disposition of the action "*may* as a practical matter" impede the intervenor's ability to protect its interests related to the subject of the matter. Fed. R. Civ. P. 24(a)(2) (emphasis added). "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is minimal." *Am. Farm Bureau Fed'n v. U.S. EPA*, 278 F.R.D. 98, 108 (M.D. Pa. 2011) (citations omitted). The court "is free to look at the realistic

and practical consequences of a potential ruling, not just the affects [sic] of the resolution of narrowly-tailored legal issues." *Id.* (citations omitted).

The legal, policy, and economic interests of the NAM and its members, as a practical matter, will be impaired if the NAM is excluded from intervening in this lawsuit. *See NRDC*, 99 F.R.D. at 610 ("The possibility that even preliminary decisions of EPA relating to the intervenors' pesticide products would be set aside satisfies the practical impairment of interest requirement."). The NAM will not be able to protect its members' interests in the final rule, or that ensure that the CPSC has sufficient time to fully consider the relevant scientific and statistical evidence. The proposed Consent Decree does not provide adequate protection because it was negotiated and agreed to before the CPSC had even received or analyzed all the public comments submitted by March 24, 2017 relating to the most recent data released by CPSC. If the Consent Decree is entered in its current form, without accounting for the time necessary to consider all of the recent data and relevant public comments, the NAM and its members could not protect their interests in obtaining a scientifically sound final rule. The Consent Decree further impairs those interests because it precludes the NAM or its members from seeking relief from the Court if it became apparent that the CPSC needed more time to adequately consider all of the relevant information. *See Costle*, 561 F.2d at 910 (finding impairment of intervenor's interest "in valid regulations arises from their exclusion from possible proceedings about modifications in the timetable" in court action). The NAM also could not obtain such relief from the CPSC itself, because the CPSC has no discretion under the decree to extend the time on its own.

The NAM's harm from being excluded from the process of setting a schedule for the final rule is not mitigated by the possibility of challenging the final rule under the APA *after*

a final ban is implemented. It "is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interest in some later, albeit more burdensome, litigation." *Costle*, 561 F.2d at 910. The courts have recognized that judicial review "of regulations after promulgation may, 'as a practical matter,' afford much less protection than the opportunity to participate in . . . proceedings that seek to ensure sustainable regulations in the first place." *Id.* at 909. That is the case here. If intervention is denied, the NAM's ability to effectively challenge an inadequate schedule under the Consent Decree, or the CPSC's failure to conduct a complete scientific and statistical analysis of the relevant data as a result, will be impaired as a practical matter because of the stigma that will attach to the banned substances once the final rule is published. (*See* Palmieri Decl. ¶ 16.)

D. The NAM's Interests May Not Be Adequately Represented by the CPSC

The "burden to demonstrate inadequacy of representation is generally speaking minimal." *Laroe Estates*, 828 F.3d at 70 (internal quotation marks and citations omitted). The requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The NAM meets this requirement here.

As discussed above, the NAM's interests include protecting the legal rights and economic and policy interests of its members by moving to dismiss this action. The CPSC has not adequately represented the NAM because it has already adopted positions here and in the rulemaking that diverge from the NAM's interests. First, the CPSC has not vigorously represented the NAM's legal interest in the subject-matter defense it shares with the CPSC, because it did not move to dismiss based on lack of standing. *See N.Y. Pub. Interest Research Grp.*, 516 F.2d at 352. Now that the parties have agreed to a Consent Decree, the CPSC obviously has even less interest in presenting the standing arguments to contest the Court's

subject-matter jurisdiction. *See Elliott Indus.*, 407 F.3d at 1103 (granting intervention to challenge subject-matter jurisdiction where "at this stage in the litigation, neither party has an interest in contesting subject matter jurisdiction"); *see also Alto*, 2012 WL 12871182, at *5 (granting intervention where agency "d[id] not share the same interests in adjudicating the jurisdictional scope of the Court's review of the agency action").

Second, the CPSC's broader public interest clearly diverges from the narrower legal and economic interests of the NAM and its members. As a government agency, the CPSC necessarily focuses on a broader representation of the "general public" interest, and not the "more narrow interest" of certain businesses. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995). "The government must represent the broad public interest, not just the economic concerns" of a particular industry. *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994). Furthermore, the "*parens patriae* presumption of adequate representation" by a government agency "is triggered only 'to the extent [the proposed intervenor's] interests coincide with the public interest.'" *Nat'l Parks Conservation Ass'n*, 759 F.3d at 977 (finding intervenor targeted by regulations was "seeking to protect a more narrow and 'parochial' financial interest not shared by [the general public]") (citations omitted). Accordingly, "when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light" to show inadequate representation. *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998).

This distinction between the broader public interest and narrow private interests has justified intervention in other cases. *See, e.g.*, *Wal-Mart Stores*, 834 F.3d at 569 (finding trade association's interests not adequately represented by agency because "its interests—

protecting its members' businesses—are narrower than the Commission's broad public mission"); *N.Y. Pub. Interest Research Grp.*, 516 F.2d at 352 (finding pharmacist association and members were "not adequately represented" where regulator's interests in enforcing advertising prohibition "'may significantly differ' from those of the pharmacists," and "there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the Regents"); *Costle*, 561 F.2d at 912 (finding inadequate representation where "EPA is broadly concerned with implementation and enforcement of the settlement agreement," and "appellants are more narrowly focussed [sic] on the proceedings that may affect their industries."). Here, the CPSC's interest in the general public welfare is not aligned with the legal and economic interests of the NAM and its members. That divergence is evident from the fact that the CPSC already has published a proposed rule that would permanently ban phthalates used by the NAM and its members.

For all of the foregoing reasons, the NAM is entitled to intervention under Federal Rule 24(a).

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION TO THE NAM UNDER FEDERAL RULE 24(B)

Rule 24(b) allows permissive intervention on a timely motion by anyone who "has a claim or defense that shares with the main action a common question of law of fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," *id.* at 24(b)(3), and may also consider a range of factors including "the nature and extent of the intervenors' interests," the degree to which those interests are "adequately represented by other parties," and "whether [the] parties seeking intervention will significantly contribute to [the] full development of the underlying factual issues in the suit and to the just and equitable

adjudication of the legal questions presented," *Int'l Design Concepts, LLC v. Saks Inc.*, 486 F. Supp. 2d 229, 235 (S.D.N.Y. 2007) (Castel, J.) (citation omitted).

As set forth above, the NAM has a protectable legal interest in this action and shares a common jurisdictional defense with the CPSC that is not being adequately represented by the agency, because the CPSC has not vigorously pursued dismissal based on lack of standing, and will have no interest in asserting the defense in connection with the Consent Decree. *See Elliott Indus.*, 407 F.3d at 1103 (granting intervention for purposes of challenging subject-matter jurisdiction where "at this stage in the litigation, neither party has an interest in contesting subject matter jurisdiction"); *Int'l Design Concepts*, 486 F. Supp. 2d at 235 (granting rule 24(b) intervention where licensors shared "some overlapping interests" but intervenor's "sufficiently distinct" interests where "not adequately represented" by other licensor alone).

Likewise, "no significant prejudice to the existing parties ought to result" from granting intervention. *Int'l Design Concepts*, 486 F. Supp. 2d at 235. The NAM's early intervention will not materially delay or prejudice the case in any way, because the Court must make a threshold jurisdictional determination regardless of the resolution of the motion to intervene. *See Elliott Indus.*, 407 F.3d at 1103-04; *Cronin*, 898 F. Supp. at 1057. For this reason, the NAM's "entrance will contribute to the full development of factual issues" by presenting the applicable law and administrative record evidence that establish why plaintiffs here lack standing, as well as to the "efficient adjudication of all parties' interests" by moving to dismiss for lack of subject-matter jurisdiction to prevent abuse of the court's jurisdiction. *Int'l Design Concepts*, 486 F. Supp. 2d at 235 (granting permissive intervention pursuant to rule 24(b)); *see also Chen-Oster*, 2015 WL 4619663, at *11-*12 (granting permissive motion to

intervene where motion was timely, parties to "current litigation would not be unduly prejudiced," and intervenors "would risk prejudice if intervention were denied").

In any event, any potential prejudice from "additional delay and expense" or diversion of resources would be "minimal compared with the importance of addressing the question of subject matter jurisdiction." *Elliott Indus.*, 407 F.3d at 1103-04. The Court ultimately must satisfy itself that there is proper jurisdiction to enter and enforce the Consent Decree. The Court should grant the NAM's motion to intervene and consider its motion to dismiss for lack of standing in connection with that jurisdictional analysis. Accordingly, because it will contribute to the just and equitable adjudication of the legal issues presented in the case, the NAM's motion to intervene should be granted under Rule 24(b).

Conclusion

For the foregoing reasons, proposed intervenor the NAM respectfully requests that the Court issue an order granting the NAM's motion to intervene as of right or, alternatively, by permission of the Court pursuant to Rule 24(a) and (b), respectively, and granting such other and further relief as the Court deems appropriate.

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Respectfully submitted,

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