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, -against- UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, Defendant.	16 Civ. 9401 (PKC)

MEMORANDUM OF LAW OF DEFENDANT UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION IN OPPOSITION TO THE MOTION TO INTERVENE AND THE MOTION TO DISMISS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

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Defendant United States Consumer Product Safety Commission (the "CPSC"), by its attorney, Joon H. Kim, Acting United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in opposition to the motion to intervene and the motion to dismiss filed by proposed intervenor the National Association of Manufacturers (the "NAM").

PRELIMINARY STATEMENT

There is no dispute that the CPSC has a statutory obligation to promulgate a rule regarding chemicals known as phthalates, nor is there any dispute that the required rule has not yet been promulgated. The stated objective of the lawsuit filed by the Natural Resources Defense Council, the Environmental Justice Health Alliance for Chemical Policy Reform, and The Breast Cancer Fund (the "Plaintiffs") is to obtain a specific deadline to bring the CPSC into compliance with the Congressional mandate, and the parties have submitted to the Court a proposed consent decree that would resolve this matter by providing this narrowly-tailored relief, and nothing more. In negotiating the terms of the proposed consent decree, the CPSC took into account all of its other statutory and regulatory responsibilities with respect to the rulemaking process, including allocating sufficient time to independently develop a scientifically sound final rule.

Intervention is not warranted here, and it is not necessary even to resolve the issue about which the NAM purports to be most concerned. The NAM's motion to intervene should be denied because the proposed intervenor does not satisfy all of the conditions for intervention as of right, and because permissive intervention would prejudice the adjudication of the original parties' rights. Moreover, because the Court may address issues pertaining to its subject matter

jurisdiction on its own initiative, the arguments raised in the NAM's motion to dismiss can be considered even if the NAM's motion to intervene is denied.

At the April 7, 2017 court conference, the Court directed the CPSC to file a response to the NAM's motions that addresses the issue of subject matter jurisdiction. *See* Dkt. No. 33. The CPSC confirms that it entered into the proposed consent decree—which contains a "whereas" clause in which the parties agree that "this Court has subject matter jurisdiction sufficient to enter this Consent Decree containing the relief described herein"—because it believed that Plaintiffs had adequately alleged facts sufficient, at this stage of the proceedings, to support their standing to pursue their claims. Nothing in the motion to dismiss and supporting declaration filed by the NAM or the opposition brief and supporting declarations filed by Plaintiffs has altered that view. The NAM's motion to dismiss for lack of subject matter jurisdiction thus should be denied, and the CPSC respectfully submits that the proposed consent decree should be entered.

BACKGROUND

Plaintiffs filed this action on December 6, 2016, alleging that the CPSC has unlawfully withheld agency action required by Section 108(b)(3) of the Consumer Product Safety Improvement Act of 2008 (the "CPSIA"), 15 U.S.C. § 2057c(b)(3). Compl. ¶ 28. The CPSIA made it unlawful for any person to "manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains concentrations of more than 0.1 percent" of three different phthalates known as DEHP, DBP, and BBP. *See* 15 U.S.C. § 2057c(a); Compl. ¶ 14. In addition, the CPSIA imposed an interim prohibition on the manufacture for sale, offer for sale, distribution in commerce, or importation into the United States of child care articles and a narrower set of children's toys—those that "can

be placed in a child's mouth"—containing three other phthalates, known as DINP, DIDP, and DnOP in concentrations of more that 0.1 percent. 15 U.S.C. § 2057c(b)(1); *see* Compl. ¶ 15.

According to the complaint, phthalates are used to soften plastics, and "are common in toys and child care products"; Plaintiffs allege that phthalates "interfere with hormone production," and that "[h]uman exposure to phthalates during sensitive periods of development may cause permanent reproductive harm." Compl. ¶¶ 1-2. Plaintiffs assert that they bring this action on behalf of their members and their members' children, and that their "membership includes individuals and families who are concerned about the health risks to their children from exposure to phthalates in toys and child care articles." *Id.* ¶ 8.

As part of the CPSIA, Congress directed the CPSC to create a Chronic Health Advisory Panel ("CHAP") "to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles." 15 U.S.C. § 2057c(b)(2)(A); *see* Compl. ¶ 16. Pursuant to the statutory schedule, the CHAP was to "complete an examination of the full range of phthalates that are used in products for children" within 18 months of its appointment, and, not later than 180 days after completing its examination, "report to the Commission the results of the examination . . . and . . . make recommendations to the Commission regarding any phthalates (or combinations of phthalates) . . . that the panel determines should be declared banned hazardous substances." 15 U.S.C. § 2057c(b)(2)(B)-(C). The CHAP was appointed in April 2010, which made April 2012 the deadline for its submission of a report to the CPSC. *See* Compl. ¶ 20. Reflecting the complexity of the scientific issues and the unrealistic schedule of the statute, the CHAP report was provided to the CPSC on July 18, 2014, more than two years after the statutory submission deadline for that report. *See id.* ¶ 21; Dkt. No. 31-9 (CHAP Report). The CPSIA mandated that not later than 180 days after receiving

the CHAP report, "the Commission shall pursuant to section 553 of title 5, United States Code, promulgate a final rule" regarding phthalates. 15 U.S.C. § 2057c(b)(3); *see* Compl. ¶ 17.

The CPSC published a Notice of Proposed Rulemaking (the "NPR") in the *Federal Register* on December 30, 2014. *See* 79 Fed. Reg. 78,324 – 78,343. Among other things, the NPR includes a description of the CHAP report, an assessment of the CHAP report by the staff of the CPSC, the Commission's assessment of the CHAP report's recommendations for the proposed rule, a narrative description of the proposed rule, and the text of the proposed rule. *See id.*; Dkt. No. 31-6. The NPR adopts the recommendations set forth in the CHAP report, proposing a permanent ban on "the manufacture for sale, offer for sale, distribution in commerce, or importation into the United States of any children's toy or child care article that contains concentrations of more than 0.1 percent" of five phthalates: DINP, DIBP, DPENP, DHEXP, and DHCP. 79 Fed. Reg. at 78,343. Notably, with respect to DINP, the proposed rule extends further than the interim ban currently in place for DINP by prohibiting the use of DINP in *all* children's toys, and no longer limiting the restriction on DINP to those children's toys that can be placed in a child's mouth. *See id*. at 78,335. The other four phthalates for which a permanent ban is proposed are not currently subject to any interim ban; of these, DIBP has been found in children's toys and child care articles during routine compliance testing by the CPSC, while DPENP, DHEXP, and DHCP have not been detected in children's toys or child care articles during compliance testing thus far. *See id.* at 78,336 – 78,337. As set forth in greater detail in the NPR, the Commission generally concluded that a permanent ban of all five of these phthalates is necessary to protect the health of children. *See id.* at 78,334 – 78,337.

The statutory deadline to promulgate a final rule pursuant to 15 U.S.C. § 2057c(b)(3) was January 14, 2015, but the rule has not yet been promulgated. *See* Compl. ¶¶ 24-25. Plaintiffs

assert that the CPSC's "failure to comply with its mandatory duty to regulate phthalates in children's products exposes the public to serious health risks from exposure to harmful chemicals." *Id.* ¶ 4. The complaint alleges that the CPSC's "failure to publish a final rule regulating phthalates in children's products creates a risk of harm to plaintiffs' members and their children," that "Plaintiffs' members have been and continue to be injured by the CPSC's unlawful delay in publishing the final phthalate regulation," and that the "harm would be redressed by an order directing the CPSC to publish the required final rule as soon as possible." *Id.* ¶ 8. The CPSC answered the complaint on February 7, 2017, *see* Dkt. No. 18, and the Plaintiffs and the CPSC appeared for an initial conference on February 22, 2017.

At that conference the parties reported that they had reached an agreement in principle to resolve this action, and on March 23, 2017, they submitted a proposed consent decree to the Court for consideration. The proposed consent decree would require the CPSC to vote on a final phthalates rule no later than October 18, 2017, and transmit the resulting final rule to the Office of the Federal Register for publication within seven days of the vote. The proposed consent decree does not, however, dictate anything about the content of the rule that must be voted on by that deadline, and expressly reserves to the CPSC the discretion accorded to the agency by applicable statutes and principles of administrative law.

After receiving leave of the Court, the NAM filed the instant motion to intervene and motion to dismiss for lack of subject matter jurisdiction on April 6, 2017.

ARGUMENT

I. THE NAM'S MOTION TO INTERVENE SHOULD BE DENIED

The NAM does not satisfy all of the requirements for intervention as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and the Court should not exercise its

discretion to allow the NAM to intervene pursuant to Rule 24(b)(1). As the NAM repeatedly stresses, a court in this District has held that when presented with a motion to intervene predicated on a challenge to the court's subject matter jurisdiction to decide the underlying action, a court "must consider [p]roposed [i]ntervenors' 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) (substantively addressing proposed intervenors' jurisdictional objection and denying motion to intervene); *see* Dkt. No. 30 at 4, 17, 24; *see also Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 261-63 (2d Cir. 1992) (affirming denial of motion to intervene, and separately considering and rejecting proposed intervenors' jurisdictional arguments). Accordingly, the NAM's arguments regarding its role in presenting arguments as to Plaintiffs' supposed lack of standing are not persuasive as a *basis* for intervention, particularly where, as here, the Court already has signaled its intention to address the question of subject matter jurisdiction even though it has not yet ruled on the motion to intervene. *See* Dkt. No. 33.

A. Legal Standard for Intervention

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) (internal quotation marks omitted), *cert. granted*, 137 S. Ct. 810 (2017). Intervention as of right may only be granted if all four of these conditions are satisfied. *See Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 389 (2d Cir. 2006). Alternatively, a court may allow intervention pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure, which provides, in relevant

part, that a "court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." But "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

B. The NAM Does Not Satisfy the Second, Third, or Fourth Requirements for Intervention as of Right

1. The NAM Does Not Have the Requisite Interest in This Action to Permit Intervention

The purported interests that the NAM asserts in support of its motion to intervene do not constitute the type of "direct, substantial, and legally protectable" interests required for intervention as of right. *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy [Rule 24(a)(2)].").

First, the Court should not consider the NAM's desire to raise a subject matter jurisdiction challenge as an independent "interest" for purposes of the intervention analysis. To do so would be to allow any potential intervenor to satisfy this element of the intervention standard simply by asserting a legal point about which it has a different view than the parties. This is particularly unwarranted in the context of the NAM's subject matter jurisdiction arguments, which, as the NAM acknowledges, can be evaluated by the Court even if the motion to intervene is denied.

Second, the NAM's asserted interests in this matter pertain to the potential substantive outcome of the CPSC's rulemaking process, rather than to the agency's timing for coming into compliance with its statutory obligation. The NAM's substantive interests in the rulemaking cannot be a protectable interest for purposes of intervention here, because this case is exclusively

about the timing of agency action. *See United States v. City of New York*, 179 F.R.D. 373, 378-79 (E.D.N.Y. 1998), *aff'd*, 198 F.3d 360 (2d Cir. 1999); *Cronin*, 898 F. Supp. at 1062; *Am. Lung Ass'n v. Reilly*, 141 F.R.D. 19, 22 (E.D.N.Y. 1992), *aff'd*, 962 F.2d 258 (2d Cir. 1992); *Sierra Club v. McCarthy*, 308 F.R.D. 9, 12 (D.D.C. 2015). The relief provided in the proposed consent decree reflects the narrow scope of the lawsuit—that the CPSC will vote on a Final Phthalates Rule by October 18, 2017, and transmit the resulting Final Phthalates Rule to the Office of the Federal Register for publication. *See* Proposed Consent Decree ¶ 3. The proposed consent decree expressly reserves to the CPSC all discretion afforded to it by applicable statutes and principles of administrative law, and in no way requires the agency to promulgate a final rule in the form in which it was set forth in the NPR. *See id.* ¶ 4. It is misleading for the NAM to suggest that this proceeding is analogous to a suit to "compel governmental agency action that would directly harm a regulated company," *see* Dkt. No. 30 at 12-13, because this action does not seek to compel the CPSC to act in a particular way, and the proposed consent decree does not compel any particular substantive outcome. Accordingly, any potential harm to the interests of the NAM from the substantive result of the rulemaking is "contingent upon the occurrence of a sequence of events before it becomes colorable," *Wash. Elec. Coop., Inc.*, 922 F.2d at 97, and cannot fulfill this requirement for intervention.

Third, the NAM claims that it has a separate and distinct protectable interest in participating in the timing—as opposed to the substance—of the rulemaking, ostensibly because the NAM would somehow be limited in its ability to continue to advocate on behalf of its members. But nothing in the proposed consent decree restricts the NAM's ability to continue to participate in the rulemaking process with the CPSC. If anything, the setting of a concrete deadline by which the CPSC will complete the rulemaking process is beneficial for the NAM—it

provides greater transparency to the NAM and other interested parties who might seek to provide additional input to the agency in advance of a final decision. The suggestion that this lawsuit somehow has "short-circuited" the CPSC's process for considering and analyzing the complex issues relevant to the rulemaking regarding phthalates, *see* Dkt. No. 30 at 16, is hard to fathom, in light of the fact that the CPSC has been working diligently on this rule for more than two years, and is more than two years past the statutory deadline for completion of the rulemaking.

None of the alleged interests enumerated by the NAM are sufficiently direct, substantial, and legally protectable to require the Court to allow intervention here.

2. Denial of the Motion to Intervene Will Not Prevent the NAM from Protecting Its Interests

Even if the Court determines that the NAM has identified a legally protectable interest in this action, the NAM's ability to protect that interest would not be impaired if its motion to intervene is denied. In sum and substance, the NAM claims that by agreeing, in the proposed consent decree, to a date certain by which the CPSC must complete the statutorily-required rulemaking regarding phthalates, the parties have hindered the NAM's ability to advocate that the CPSC should take additional time to be sure to promulgate "a scientifically sound final rule." *See* Dkt. No. 30 at 19-21. The NAM's criticisms of the proposed consent decree are meritless.

While it is factually accurate for the NAM to note that the proposed consent decree was negotiated and agreed to before the CPSC's March 24, 2017 deadline for receipt of public comments regarding additional data being considered by the agency, *see* Dkt. No. 30 at 20, the CPSC was aware of, and did account for, this deadline and all of the anticipated comments in the course of the negotiations. Indeed, the CPSC referenced the fact that the Commission was contemplating seeking additional comments on this data as part of its February 14, 2017 submission to the Court in advance of the initial pre-trial conference. *See* Dkt. No. 20 at 3. The

CPSC solicited additional comments on February 22, 2017, and CPSC personnel were well-equipped to estimate the potential volume of comments that were expected by the March 24, 2017 deadline. *See* 82 Fed. Reg. 11,348. As part of this same rulemaking, the CPSC solicited comments about similar data sets in June 2015 (with comments due by August 7, 2015), and received a total of 10 comments. *See* Rulemaking Docket No. CPSC-2014-0033, *available at* https://www.regulations.gov/docket?D=CPSC-2014-0033 (last visited Apr. 27, 2017). Consistent with this prior volume of feedback, in connection with the March 24, 2017 deadline, the CPSC received seven non-duplicative comments (including submissions from the NRDC and the NAM) totaling 83 pages of information. *See id.* The October 18, 2017 deadline in the proposed consent decree affords the CPSC nearly seven months beyond the March 24 deadline to complete the rulemaking process. It is therefore spurious to suggest that the proposed deadline would provide insufficient time for the CPSC to consider this modest volume of additional material, or that the NAM's interests are in some way impaired by the fact that the proposed consent decree was submitted before these brief comments were received.

The NAM's suggestion that its interests are impaired because the proposed consent decree would limit the organization's ability to seek further delay of the completion of the rulemaking is similarly unavailing. Irrespective of the proposed consent decree or this lawsuit, the CPSC could promulgate a final rule on its own initiative any day, and the NAM would have no basis to seek relief from this or any other court to postpone the rulemaking process. It is thus unclear how the NAM believes that the proposed consent decree somehow abrogates any right or interest that it currently has. And to the extent the CPSC believes that more time is necessary to complete a scientifically sound final rule, the proposed consent decree allows the agency to seek such relief "for good cause shown." *See* Proposed Consent Decree ¶ 5.

In addition, the NAM will be able to continue to protect its interests in the substance of the final rule regarding phthalates regardless of the outcome of its motion to intervene. The CPSC fully expects that the NAM will continue to participate in the rulemaking process—as it did most recently on March 24, 2017—by submitting comments on recent data and via any other authorized method of providing input. Moreover, upon completion of the rulemaking, if the NAM is dissatisfied with the rule that the CPSC elects to promulgate, the NAM can further advocate for its members by challenging the final rule. *See City of New York*, 179 F.R.D. at 379 (proposed intervenors "will have opportunities to press their interests in the site during and after the site selection process and, if and when any rate changes are proposed, their interests in rates, in the appropriate regulatory and judicial forums"); *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 68 (D.D.C. 2004) (denying proposed intervenor's motion to intervene and entering consent decree where, among other things, "nothing in the decree would preclude [the proposed intervenor] from participating in the rulemaking or from challenging the final rule that emerges").

3. The NAM's Interests Are Adequately Represented

The NAM also does not satisfy the fourth requirement for intervention as of right because its interests in the issues actually presented in this lawsuit are adequately represented. First, the fact that the NAM disagrees with the CPSC as to whether Plaintiffs have done enough, at this stage of the proceeding, to meet the requirements for Article III standing is not sufficient to demonstrate that the NAM's interests are not adequately represented. "Representation is not inadequate simply because . . . the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy." *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999). In any event, because the Court can reach the subject matter jurisdiction question on its own without the intervention of the

NAM, *see Cronin*, 898 F. Supp. at 1057, there is no need for the NAM to further participate as an intervenor simply to raise its standing argument.

Second, there is a "presumption that the United States, as a government litigant, is adequately protecting" the interests of its constituents. *United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002). While the NAM ultimately may take issue with the final phthalates rule promulgated by the CPSC upon completion of the rulemaking process, the substance of the final rule is not the subject of this lawsuit, and should not color the question of whether the CPSC is adequately representing the interests of the proposed intervenor. Indeed, the NAM repeatedly claims that its interest here is in ensuring that the CPSC's final phthalates rule is "scientifically sound," *see* Dkt. No. 30 at 7, 16, 20, an objective that certainly is shared by the CPSC and, presumably, by Plaintiffs and the general public. *See City of New York*, 198 F.3d at 367 ("The governmental parties to this litigation share [proposed intervenors'] concerns about safety and cost, and their representation is not inadequate simply because they have different ideas about how best to achieve these goals."). Accordingly, there is no reason why the presumption of adequate representation by a government agency should be set aside in this action, the purpose of which is to establish a date by which the CPSC's rulemaking process will be finalized. *See Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 977 (8th Cir. 2014) (the "presumption of adequate representation is triggered only to the extent the proposed intervenor's interests coincide with the public interest" (internal quotation marks and alteration omitted)). While the NAM's candid admission that the "legal and economic interests" of the organization and its members are not aligned with "the CPSC's interest in the general public welfare," Dkt. No. 30 at 23, may turn out to be true upon completion of the rulemaking, those interests *are* aligned now, when the issue is limited to the CPSC's efforts to come into compliance with a

statutory deadline in a manner that is consistent with all of its other statutory and regulatory obligations regarding rulemaking.

C. The Court Should Not Exercise Its Discretion to Permit Intervention

The NAM's only argument in support of permissive intervention is that the CPSC has not vigorously pursued a jurisdictional defense and that participation by the NAM will allow the proposed intervenor to contribute to the full development of factual issues regarding standing. *See* Dkt. No. 30 at 23-25. But the NAM's motion to dismiss already has accomplished this objective, particularly because, as the NAM itself points out, the Court may make the "threshold jurisdictional determination regardless of the resolution of the motion to intervene." *Id.* at 24. If the Court considers and rejects the NAM's arguments as to jurisdiction, the remaining interest that the NAM would have as a potential intervenor only would be to continue to attempt to frustrate the parties' efforts to resolve this case. This is precisely the outcome that Rule 24(c) of the Federal Rules of Civil Procedure seeks to avoid. *See Sierra Club*, 308 F.R.D. at 13 ("Because this litigation pertains to the timeline and not the substance of EPA's decision on the Sierra Club's petition, the Court is unwilling to put [the movant] in a position to draw out ongoing settlement negotiations and to further delay the resolution of this case.") (internal quotation marks omitted)).

For all of these reasons, the NAM's motion to intervene should be denied.

II. THE NAM'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION SHOULD BE DENIED

When a government agency believes that a plaintiff has satisfied the requirements for standing at a particular stage of litigation—or that it is more likely than not that a court would reach that conclusion if the issue were disputed—regular practice is for the agency simply to proceed with the lawsuit, at times accompanied by an assertion of particular defenses to preserve

the agency's rights to assert arguments in the future if warranted by developments in the case. Indeed, that is what the CPSC did here by answering the complaint and including in its answer a defense of lack of subject matter jurisdiction. *See* Dkt. No. 18 at 6. This approach is especially prudent in cases such as this one, where issues fundamental to the standing analysis—*i.e.* whether Plaintiffs' members are experiencing an injury in fact based on exposure to phthalates in children's toys and child care articles—are intertwined with the substantive analysis being undertaken by the CPSC as part of the rulemaking process that is the subject of the lawsuit.

Contrary to the NAM's unfounded and hyperbolic accusations, the CPSC is not, in any way, engaged in an effort to perpetrate "an abuse of this Court's jurisdiction." *See, e.g.*, Dkt. No. 30 at 5, 10, 12, 24. Instead, after assessing its litigation position, the CPSC concluded that the Court was more likely than not to find that the allegations in the complaint satisfied the requirements for Article III standing at this preliminary stage of the proceeding. Rather than expend agency resources to contest this matter through discovery in order to later put Plaintiffs to their burden of proof for Article III standing at summary judgment, the CPSC entered into the proposed consent decree to resolve the suit. In doing so, the CPSC agreed to language reflecting its view that Plaintiffs' allegations with respect to standing were sufficient, at this stage of the litigation, for the Court to exercise subject matter jurisdiction over this action, and to enter the proposed consent decree. Nothing submitted by the NAM or the Plaintiffs as part of the briefing of the NAM's motion to dismiss has altered this view.

A. Legal Requirements for Standing

"To establish that a case or controversy exists so as to confer standing under Article III, a plaintiff must satisfy three elements: (a) the plaintiff must suffer an 'injury in fact,' (b) that injury must be 'fairly traceable' to the challenged actions, and (c) the injury must be likely to be 'redressed by a favorable decision' of the federal court." *Nat. Resources Def. Council v. U.S.*

Food & Drug Admin., 710 F.3d 71, 79 (2d Cir. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A challenge to a plaintiff's Article III standing may be raised at any point in the litigation, but "the stage at which, and the manner in which, the issue is raised affect (a) the obligation of the plaintiff to respond, (b) the manner in which the district court considers the challenge, and (c) the standard of review applicable to the district court's decision." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). For a plaintiff seeking to establish standing at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal quotation marks and alteration omitted).

B. Plaintiffs' Allegations Satisfy the Requirements for Standing at This Stage of the Litigation

The briefs filed both by Plaintiffs and the NAM contain numerous citations to documents from the record of the CPSC's ongoing rulemaking efforts with respect to phthalates, including the CHAP report and the NPR. *See, e.g.*, Dkt. No. 29 at 6-9; Dkt. No. 36 at 6-10. Among other things, this reflects the degree to which the questions at the heart of the "injury-in-fact" component of the standing inquiry—including questions about direct exposure to particular phthalates, the cumulative risk associated with exposure to phthalates, and the appropriate weight to give to scientific studies about exposure to phthalates and risk to human health—are active and complicated aspects of the phthalates rulemaking process.

1. The CPSC Concluded that Plaintiffs' Allegations Satisfied the Injury-In-Fact Requirement

The complaint alleges that phthalates are "common in toys and child care products," that humans are subject to exposure to phthalates as they "leach" from plastics, and that phthalates have various harmful health effects, particularly for male children during infancy and childhood.

See Compl. ¶¶ 1, 2, 22. Plaintiffs assert that their "membership includes individuals and families who are concerned about the health risks to their children from exposure to phthalates in toys and child care articles." *Id.* ¶ 8. While these allegations are presented at a high level of generality, the Court, at this stage, may presume that such allegations embrace those specific facts necessary to support the claim, *see Lujan*, 504 U.S. at 561, and indeed specific facts contained in the record of the CPSC rulemaking do support these allegations. On balance, the CPSC concluded that these allegations would be sufficient for the Court to determine, at this stage, that Plaintiffs had satisfied their obligation to show an injury in fact.

The Second Circuit has held that "exposure to potentially harmful products may satisfy the injury-in-fact requirement of Article III standing," and in such cases, "the relevant injury for standing purposes may be exposure to a sufficiently serious risk of medical harm—not the anticipated medical harm itself. That is, the injury contemplated by exposure to a potentially harmful product is not the future harm that the exposure risks causing, but the present exposure to risk. To establish injury in fact based on exposure to a potentially harmful product, a plaintiff must show a credible threat of harm due to that exposure." *Nat. Resources Def. Council*, 710 F.3d at 80-81 (internal quotation marks and citations omitted).

In its moving brief, the NAM does not appear to contest any of the allegations as to potential harms to human health from exposure to phthalates. Instead, the proposed intervenor's argument regarding the injury-in-fact requirement is that Plaintiffs cannot adequately allege an injury because they cannot support their assertions that the phthalates that are the subject of the CPSC's ongoing rulemaking process are common in children's toys and child care articles, and therefore cannot plausibly assert that their members are exposed to these phthalates at all. *See* Dkt. No. 29 at 14-19. But Plaintiffs point to evidence to indicate that a meaningful number of

children's toys and child care articles do, in fact, contain two of the phthalates—DINP and DIBP—that are potentially subject to regulation. Specifically, Plaintiffs highlight an October 2014 CPSC memorandum regarding testing results for phthalates, which explained that: (i) problematic concentrations of DINP were found in approximately 8 percent of samples, despite the fact that DINP was subject to the interim ban during the time period when the testing took place; and (ii) DIBP was found in nearly 12 percent of samples tested. *See* Dkt. No. 39-1. In addition, the NAM repeatedly overstates the significance of the interim ban on DINP as it relates to the CPSC's proposed rule regarding phthalates. *See, e.g.*, Dkt. No. 29 at 2, 15, 20, 22. While the interim ban theoretically should have eliminated the potential for exposure to DINP for children's toys that could be placed in a child's mouth and child care articles , the October 2014 testing memorandum demonstrates that it did not even do that. The proposed rule regarding phthalates contemplates expanding the restriction on DINP to include *all* children's toys, suggesting that there is very likely an additional degree of exposure to DINP in products that are not currently subject to the interim ban.[1] Even without reaching Plaintiffs' arguments regarding potential additional exposure associated with the phthalates which were not, at the time the CHAP report was issued, currently found in children's toys or child care articles, the CPSC concluded that it was more likely than not that the Court would find that the Plaintiffs' allegations with respect to actual present exposure to DINP and DIBP were sufficient to satisfy the injury-in-fact requirement. *See Baur v. Veneman*, 352 F.3d 625, 636-37 (2d Cir. 2003).

[1] The October 2014 memorandum notes that a small number of the samples that contained DINP came from products that were too large to be subject to the interim ban on DINP. *See* Dkt. No. 39-2.

2. The CPSC Concluded that Plaintiffs' Allegations Satisfied the Traceability Requirement

The Second Circuit has described "traceability" as the "causal connection" element of Article III standing, and has made clear that the requirement that the plaintiff's injury be "fairly traceable to the challenged conduct of the defendant . . . does not create an onerous standard." *Carter*, 822 F.3d at 55 (internal quotation marks, citation, and alterations omitted). In addition, the Second Circuit has held that "so long as the defendants have engaged in conduct that may have contributed to causing the injury, it would be better to recognize standing." *Nat. Resources Def. Council*, 710 F.3d at 85 (internal quotation marks and alteration omitted) (quoting *St. Pierre v. Dyer*, 208 F.3d 394, 402 (2d Cir. 2000)). Finally, the Supreme Court has indicated that an agency's "refusal to regulate" a pollutant "contributes" to a plaintiff's alleged harms for purposes of the traceability requirement. *See Massachusetts v. EPA*, 549 U.S. 497, 523 (2007). Accordingly, the CPSC concluded that the Court would most likely find that Plaintiffs' key traceability allegation—that the CPSC's delay in issuing a final phthalates rule is contributing to the continued exposure of Plaintiffs' members to certain phthalates—would satisfy this requirement.

3. The CPSC Concluded that Plaintiffs' Allegations Satisfied the Redressability Requirement

Finally, the CPSC further concluded that the Court most likely would find that Plaintiffs could satisfy the redressability requirement for standing, even though the "favorable decision" of the court would only require the CPSC to take *an* action to comply with its statutory obligations, rather than requiring it to take any specific action to regulate one or more phthalates. In cases where a government agency is alleged to have unlawfully withheld agency action, courts typically may direct the agency to take action, but may not impose a particular outcome on the administrative process. The NAM asserts that the agency's remaining discretion as to how to

finalize the substance of the rule necessarily means that the "favorable decision" of the court cannot provide redress for Plaintiffs' injuries. But to adopt this view of redressability effectively would defeat standing in a wide range of cases where the Government is alleged to have unlawfully withheld agency action, and appears to be inconsistent with language from *Lujan* regarding the role of the redressability factor for plaintiffs asserting procedural rights related to concrete and particularized interests. *See* 504 U.S. at 573 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

Accordingly, the CPSC concluded that it was more likely than not that the Court would find that Plaintiffs had satisfied their burden with respect to standing at least at this stage of the proceedings, and elected to pursue the proposed consent decree to resolve this case, rather than continue to litigate and divert agency resources away from the rulemaking process.

CONCLUSION

For the foregoing reasons, the NAM's motion to intervene and motion to dismiss both should be denied.

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