UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, and PROJECT GUTPILE,

Plaintiffs,

vs.

LISA P. JACKSON and ENVIRONMENTAL PROTECTION AGENCY,

Defendants,

and

NATIONAL SHOOTING SPORTS FOUNDATION, INC., AMERICAN BATTERY RECYCLERS, NATIONAL RIFLE ASSOCIATION OF AMERICA, and SAFARI CLUB INTERNATIONAL,

Intervenor-Defendants.

Case No.: 10-CV-02007 (EGS)

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL

Intervenor-Defendant, American Battery Recyclers, Inc. ("ABR"), opposes Plaintiffs' Motion for Voluntary Dismissal, and in the alternative seeks fees and costs as a condition of dismissal, based on its baseless fear that dismissal of this suit will result in Plaintiffs filing a subsequent suit.[1] ABR's concern is unfounded and reflects a fundamental misreading of Plaintiffs' two petitions concerning lead fishing sinkers. Rather than being a tactical litigation maneuver by Plaintiffs, the 2011 petition is a substantively different petition than the 2010 petition that was filed with the EPA to seek a materially different remedy. The EPA properly regarded it as a separate petition and denied it on different grounds than it denied the 2010 petition. A challenge to the 2011 petition denial would require a potentially new group of plaintiffs to file a separate and independent lawsuit. Moreover, the claims currently before the court, if dismissed, would be time-barred and therefore could not be raised in subsequent litigation. ABR's alternative request for conditions to be imposed on dismissal that include fees and costs has no support in the Federal Rules of Civil Procedure ("FRCP" 41(a)(2) or in the Toxic Substances Control Act ("TSCA"). ABR's arguments are thus without merit and Plaintiffs' Motion for Voluntary Dismissal should be granted, with no conditions imposed regarding fees or costs.

Dismissal of this Action Raises No Threat of any Subsequent Action

Plaintiffs filed a petition for rulemaking on August 3, 2010, that sought, according to the EPA, "a uniform national ban of lead for use in all fishing gear." Docket #41.1, Exhibit 1 to Plaintiffs' Motion for Voluntary Dismissal (EPA letter, November 4, 2010). The EPA denied the petition on the grounds that it a) did not demonstrate how a uniform national ban was necessary to protect against an unreasonable risk of injury to health or the environment; b) did not demonstrate how a uniform national ban was the least burdensome alternative to adequately protect against the concerns, and c) did not demonstrate why a uniform ban was necessary given the actions being taken to address

[1] The motion is also opposed by intervenor-defendant National Shooting Sports Foundation, Inc. Federal defendants EPA and Administrator Jackson, as well as intervenor-defendants National Rifle Association and Safari Club, consent to the motion.

the concerns raised in the petition. *Id*. Plaintiffs filed the current action on November 23, 2010, challenging the EPA's denial of the 2010 petition. Docket #1 (Complaint).

On November 16, 2011, two of the current Plaintiffs, joined by a third conservation group, submitted a new petition for rulemaking to the EPA, requesting that rather than pursue a uniform national ban of lead for uses in all fishing gear, the agency instead "'evaluate the unreasonable risk of injury to the environment from fishing tackle containing lead (including fishing weights, sinkers, lures, jigs, and/or other tackle) of various sizes and uses that are ingested by wildlife resulting in lead exposure' and to 'initiate a proceeding for the issuance of a rulemaking under section 6 of TSCA to adequately protect against such risks.'" Docket #41.2, Exhibit 2 to Plaintiffs' Motion for Voluntary Dismissal (EPA letter, February 4, 2012). The EPA denied the 2011 petition on the grounds that "while the petition [did] provide evidence of exposure and a risk to waterfowl in some areas of the United States, it [did] not provide a basis for finding that the risk presented is an unreasonable risk for which federal action under section 6(a) of TSCA is necessary to adequately protect against such risks." *Id*.

The 2011 petition and the 2010 petition are unique to each other. The 2011 petitioners sought materially different remedies in the 2011 petition. The 2010 petition sought a uniform national ban on all fishing sinkers, while the 2011 petition asked the EPA to create appropriate regulation(s) to protect against harm caused by fishing tackle of sizes capable of being ingested by wildlife and that result in lead exposure. Upon receiving the EPA's denial of the 2011 petition and learning of the EPA's reasoning for denying it, Plaintiffs determined that the current action challenging the 2010 petition no longer merited pursuit.

Because the EPA separately denied the 2010 and 2011 petitions, on separate grounds, dismissal of the current action will have no impact on whether the 2011 petition denial will be challenged. Even if the Court were to deny dismissal of this action, a challenge to the 2011 petition denial would still require the initiation of a new lawsuit. Plaintiffs believe that litigation challenging the 2011 petition denial might be *related* to

the present action under Local Rule 45.5(a)(4), regardless of whether and when it is dismissed, but this is very different than the *consolidation* that ABR appears to regard as appropriate.

Dismissal of This Action Is Not Being Sought For Tactical Advantage

Because any action on the 2011 petition would necessarily require a new lawsuit, it is difficult to see how dismissal of the present action would confer any tactical advantage to Plaintiffs. The tactical advantage that ABR refers to regards instances where an action is dismissed and then the same action is re-filed, perhaps in a different venue or with different parties named. But here, since dismissal of this action would forever bar a challenge to the EPA's denial the 2010 petition due to TSCA's 60-day statute of limitations, re-filing those claims is impossible and dismissal would thus necessarily be with prejudice.

Moreover, even if dismissal was denied now and the current action was consolidated with a future action filed on the 2011 petition (which Plaintiffs do not believe would appropriate), there would be no material change in the legal analysis of a motion to dismiss the claims contained in this action. In other words, it makes no difference whether the Court considers dismissal now or subsequent to the potential filing of an action on the 2011 petition; the analysis and the result would be the same.

ABR Should Not be Awarded Fees and Costs

ABR should not be awarded fees because it has not shown that the effort it expended during this litigation would not be of use in subsequent litigation, ABR intervened on behalf of a fully competent federal defendant, and the plain language of TSCA and its legislative history indicate that industry intervenors like ABR should not be awarded fees and costs.

First, ABR seeks an award of fees and costs based on the "on terms that the court considers proper," citing FRCP 41(a)(2). Although an award of fees and costs under this rule is largely discretionary, any award must be limited only to those fees and costs that would be "rendered useless" by the dismissal of the action. *GAF Corp. v. Transamerica*

Ins. Co., 665 F.2d 364, 369-70 (D.C. Cir. 1981); *Conafay v. Wyeth Laboratories, Div. of American Home Products Corp.*, 841 F.2d 417, 419 (D.C. Cir. 1988) ("T)o the extent the district court was concerned about the burden on appellee of a second round of litigation with appellants in a different forum…the appropriate step would have been to award appellee costs and fees for the work it completed and the effort it expended during the first round of litigation *that would not be of use in the reinstated action*." (emphasis added)).

ABR makes no showing that its work in the present action would be rendered useless in any subsequent action, and it cannot. To date, ABR has filed a motion to intervene (Docket #8), an answer (Docket #17) and a reply in support of the motions to dismiss filed by defendants EPA and defendant-intervenors NSSF (Docket #31), along with its pending motion for abeyance. The vast majority of ABR's work, including its intervention motion and its reply to the motions to dismiss, would presumably be of some use in potential subsequent litigation, whether that litigation is on the 2011 petition denial or on the recently-filed petition concerning lead bullets and shot. Because ABR has not shown that its work in the present litigation will not be of use in a subsequent action and has not shown that dismissal of the current action is being sought in order to render useless any of its work to date, fees and costs should not be awarded under FRCP 41(a)(2).

Next, fees and costs are not appropriate for another important reason: ABR intervened on behalf of the federal government, which has been competently and fully represented in this case by the Department of Justice. ABR requested intervention here to protect the unique interests of its members, not to represent the interests of the general public, which ABR has admitted are already represented by the federal agency defendants. Docket #8, paragraph 8 (ABR Motion to Intervene). As this Circuit has clearly stated, the fee-shifting "citizen attorney general" statute found in TSCA is not meant to apply to intervenors on behalf of the government, when the government defendant adequately represents the interests of the general public. *N.J. v. EPA*, 663 F.3d

1279, 1281 (D.C. Cir. 2011) *quoting Donnell v. United States*, 682 F.2d 240, 247 (D.C. Cir. 1982) ("Because '[w]e will not lightly infer that the Justice Department has violated this statutory obligation [to represent the federal agency],' the protection of intervenors' interests in such cases normally requires no intervention—and thus no fee shifting to incentivize intervention.").[2]

Finally, the long-standing presumption against defendant-intervenor compensation was specifically addressed during the Senate Conference Committee's deliberation over TSCA's fee-shifting provision. As one senator stated, "[t]he standard for awarding fees and costs to a prevailing defendant is not the same as for a plaintiff because, if it were, the risk to the average citizen of bringing suit under this section would be so great it would discourage such suits." *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42, 49 (D.C. Cir. 1982) (*quoting* S. 3149, 94th Cong., 2d Sess. § 19(c)(3) (1976); H.R. 14032, 94th Cong., 2d Sess. § 19(c)(3) (1976), reprinted in Legislative History of the Toxic Substances Control Act, at 136, 727-28 (1976)). With respect to persons or organizations who have an economic interest in the outcome of TSCA proceedings, "attorneys' fees would not be appropriate for 'persons, including corporations or trade associations, that could otherwise afford to participate or whose economic interest in the outcome of a proceeding is not insubstantial.'" *Id*. at 49, quoting TSCA Legislative History at 730. As was contemplated by the Senate, Plaintiffs here should not be exposed to the risk of fees and costs for defendants or intervenors for a case that was brought in good faith and for which voluntary dismissal is now sought.

Because ABR is a trade association with an economic interest in the outcome of this case, and it intervened on behalf of Defendant EPA who is fully represented by the

[2] *N.J. v. EPA* regards the fee-shifting provision of the Clean Air Act, but the court's reasoning applies equally to TSCA, as both act's fee shifting-provisions contain similar language. *Compare* 42 USCS § 7607(f) (*Clean Air Act*: "Costs. In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.") and 15 U.S.C. § 2620(4)(c) (*TSCA*: "Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.")

Department of Justice, it should not be awarded fees or costs under any circumstances, even if the provisions of FRCP 41(a)(2) were found to apply. But because ABR cannot show that its efforts can be of no use to any potential subsequent litigation, FRCP 41(a)(2) does not provide for any fees or costs to be awarded.

If the Court finds these arguments prohibiting fees and costs from being awarded unpersuasive, the Court should find the reasoning behind the policy decisions persuasive, and deny ABR its request for fees and costs according to its discretionary authority. There is no logic in awarding fees and costs under FRCP 41(a)(2) to a party who would otherwise not be eligible for fees and costs under the fee-shifting provisions of TSCA, as this would only incentivize the needless and wasteful continuation of litigation. But if the Court is inclined to grant dismissal of the action contingent upon Plaintiffs' payment of fees and costs, Plaintiffs hereby chose instead to abandon their motion to dismiss and maintain the present action.

Respectfully submitted,

Dated: April 5, 2012

/s/ Adam Keats

Adam Keats (*pro hac vice*, Cal. Bar No. 191157)
Jaclyn Lopez (*pro hac vice*, Cal. Bar No. 258589)
CENTER FOR BIOLOGICAL DIVERSITY
351 California St., Suite 600
San Francisco, CA 94104
Telephone: 415-436-9682
Facsimile: 415-436-9683
akeats@biologicaldiversity.org
jlopez@biologicaldiversity.org

William J. Snape, III (DC Bar No. 455266)
CENTER FOR BIOLOGICAL DIVERSITY
5268 Watson Street, NW
Washington, DC 20016
Telephone: 202-537-3458
Telephone: 202-536-9351
Facsimile: 415-436-9683
billsnape@earthlink.net