

No. 12-2209

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

COMPANY DOE,

Plaintiff-Appellee,

v.

PUBLIC CITIZEN; CONSUMER FEDERATION OF AMERICA; CONSUMERS UNION,

Parties-in-Interest-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MARYLAND AT GREENBELT

**MOTION TO MODIFY BRIEFING SCHEDULE
TO STAY BRIEFING PENDING DISTRICT COURT RESOLUTION
OF CONSUMER GROUPS' INTERVENOR STATUS**

Appellee Company Doe intends to file a motion in the District Court of Maryland, Greenbelt Division, on or about December 21, 2012, seeking relief from that court's order conditionally granting the motion to intervene filed by Public Citizen, Consumer Federation of America, and Consumers Union ("the Consumer Groups"). If Company Doe successfully opposes the Consumer Groups' attempt to intervene, it would preclude the Consumer Groups from proceeding with this appeal on the merits. In the interests of judicial economy, Company Doe respectfully requests that this Court stay the briefing schedule currently in place until the District Court resolves the issue of intervention. As the Appellant's

opening brief is due Thursday, December 13, this motion is highly time-sensitive, and Company Doe respectfully requests that this court consider this motion on an expedited basis.¹

ARGUMENT

The District Court previously granted the Consumer Groups permission to intervene, conditioned upon the continuation of a case or controversy between the Plaintiff and Defendants. *See* Doc. No. 71, at 2; Doc. No. 73, at 2. On December 7, 2012, Appellants (the Defendants below) Consumer Product Safety Commission and Inez Tenenbaum moved to dismiss their appeal. Dkt. No. 12-2209, Doc. No. 28. That same day, this Court granted the motion to dismiss, and deconsolidated that appeal from the Consumer Groups' appeal. Dkt. No. 12-2209, Doc. No. 29; Dkt. No. 12-2210, Doc No. 28. There is thus no longer a case or controversy between the Plaintiff and Defendants in this appeal.

Company Doe intends to file a motion in District Court seeking relief from that court's order granting the Consumer Groups conditional leave to intervene. Because the Consumer Groups' appeal to this Court was premised on their status as Intervenors, the Consumer Groups would have no basis on which to proceed with this appeal if Company Doe prevailed before the District Court. Thus, in the

¹ Company Doe has spoken with counsel for the Consumer Groups, who has indicated that they do not consent to this motion. Plaintiff respectfully submits that no response is necessary for this Court to resolve this motion.

interest of judicial economy, this Court should stay the current briefing schedule until the District Court definitively resolves the question of the Consumer Groups' status as intervenors.

On July 31, 2012, the District Court entered its final judgment in the matter of *Company Doe v. Tenenbaum*, Dkt. No. 11-cv-2958 (D. Md.), Doc. No. 50. The District Court granted Company Doe's motion for summary judgment on its claims under the Administrative Procedure Act, and permanently enjoined the publication of a report on saferproducts.gov, a database maintained by the Defendant-Appellants. In addition, the District Court granted Company Doe's motion to protect its identity by proceeding pseudonymously and maintaining a seal on documents that reveal Company Doe's identity and the nature of the incident underlying the enjoined report. *See id.*, Doc. No. 51.

On August 7, 2012, Consumer Groups moved to intervene in the case pursuant to Federal Rule of Civil Procedure 24(b) for the limited purpose of challenging the District Court's ruling on the sealing issue. *See id.*, Doc. No. 52. Plaintiff responded to this motion on August 23, 2012, stating that it did not oppose the motion to intervene *so long as* "a continuing case in controversy in which intervention would be appropriate" remained. *Id.*, Doc. No. 55 at 2. Company Doe specifically stated that should the government decide, as it did on

December 7, “not to pursue an appeal taken,” it would wish to revisit the intervention issue. *Id.*

On October 9, 2012, the District Court granted the Consumer Groups’ motion to intervene on the basis that Company Doe did not oppose the motion. *See id.*, Doc. No. 67; Doc. No. 68. On October 16, 2012, Company Doe requested that the District Court clarify its October 9, 2012 order.² Company Doe alerted the District Court to the fact that its non-opposition was conditional and premised upon the existence of a continuing case or controversy. *See id.*, Doc. No. 71, at 1. Accordingly, Plaintiff requested clarification of the District Court’s order “whereby the granting of intervention is contingent upon the continuation of a case or controversy between the Plaintiff and Defendants.” *See id.* at 2.

In an order dated October 22, 2012, the District Court granted Company Doe’s request and clarified that its previous order had been “procedural and based on Plaintiff’s conditional lack of opposition.” *See id.*, Doc. No. 73, at 2. The Court stated that, “For good cause shown, Plaintiff may move the Court for reconsideration of its decision granting the Consumer Groups’ Motion to Intervene.” *Id.*

That good cause has now presented itself. As the District Court recognized, the granting of Consumer Groups’ motion to intervene was conditioned on

² Consumer Groups opposed this motion. *Company Doe v. Tenenbaum*, Dkt. No. 11-cv-2958 (D. Md.), Doc. No. 72.

Company Doe's consent, which was in turn conditioned on the Defendant-Appellants pursuing the appeal. The Defendant-Appellants have declined to do so. Company Doe now intends to request that the District Court revisit its previous order, and deny the motion to intervene. That denial would fully dispose of the case between Company Doe and the Consumer Groups, and would be a critical threshold issue if this case returned to this Court on appeal.³

In the interests of judicial economy, Company Doe requests that this Court stay the briefing schedule until such time as the intervention has been resolved by the District Court.

Dated: December 10, 2012

Respectfully submitted,

s/ Baruch A. Fellner

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³ In the ordinary course, Company Doe would attach to this motion a copy of the motion for relief as filed with the District Court. However, in this instance, Company Doe is responding to new circumstances that arose on Friday, December 7. Company Doe will promptly prepare and file a motion with the District Court but is first seeking a stay of the briefing schedule because the Appellant's opening brief is due this Thursday, December 13.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2012, I electronically filed the foregoing Motion to Modify Briefing Schedule to Stay Briefing Pending District Court Resolution of Consumer Groups' Intervenor Status with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Court's appellate CM/ECF system. Service was accomplished on the following persons by the appellate CM/ECF system:

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s/ Baruch A. Fellner

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