NO. 12-2209

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COMPANY DOE,

Plaintiff - Appellee,

v.

PUBLIC CITIZEN; CONSUMER FEDERATION OF AMERICA; and CONSUMERS UNION,

Parties-in-Interest - Appellants,

and

INEZ TENENBAUM, in her official capacity as Chairwoman of the Consumer Product Safety Commission; and CONSUMER PRODUCT SAFETY COMMISSION,

Defendants.

On appeal from the U.S. District Court for the District of Maryland
(Hon. Alexander Williams, Jr., U.S. District Judge)

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO MODIFY BRIEFING SCHEDULE

Appellants (hereinafter "Consumer Groups") hereby oppose Plaintiff-Appellee Company Doe's motion to stay briefing in this case. The premise underlying Company Doe's motion is that "[i]f Company Doe successfully opposes the Consumer Groups' attempt to intervene, it would preclude the Consumer Groups from proceeding with this appeal on the merits." Mot. To

Modify Br. Schedule, at 1 (Dec. 10, 2012). That premise is fundamentally incorrect. This appeal will proceed regardless of the district court's resolution of the motion that Company Doe will file there in 10 days. As illustrated by the contrast between Company Doe's rush to move this Court for a stay and its slower pace in the district court (where the Company plans to file its motion late next week, on the Friday two business days before Christmas), granting Company Doe's motion to stay the briefing would serve no purpose other than its own interest in delay.

BACKGROUND

This appeal concerns judicial secrecy. The underlying action concerns whether a particular report concerning a consumer product may be published in the online consumer product safety database maintained pursuant to statute by the Consumer Product Safety Commission (CPSC). In October 2011, Company Doe sued the CPSC to keep a report about one of the Company's products from being published in the database. The Company also sought to litigate its case under seal and without revealing its name. Pursuant to local rule, Consumer Groups objected to the motion to seal and proceed under a pseudonym. The district court did not rule on the motion for nine months; in the interim, it conducted secret proceedings on the merits.

On July 31, 2012, without releasing its opinion to the public, the district court granted summary judgment to Company Doe and granted the Company's motion to seal the case and proceed pseudonymously. Consumer Groups then moved to intervene for the purpose of appealing the sealing and pseudonym rulings. Company Doe did not object, although it hypothesized that it might wish to object in the future. On September 28, Consumer Groups appealed, as did the CPSC. On October 9, the district court granted Consumer Groups' intervention motion nunc pro tunc. Company Doe subsequently moved the court to revise its order granting intervention to reflect that Company Doe might later wish to object to Consumer Groups' intervention if the government does not pursue its appeal. Ruling on that motion, the court stated that the Company would be permitted to revisit the question of intervention if the government decided not to pursue its appeal. Contrary to Company's Doe's repeated characterization in its motion to stay the briefing schedule, neither of the district court's orders on intervention suggested that the grant of intervention was "conditional."

On October 22, the court's July 31 decision was made available to the public with the name of the plaintiff, the facts of the case, and the court's application of law to fact redacted. As of this filing, only 5 documents in this year-long litigation before the district court are publicly available, though the docket numbering indicates that at least 79 documents have been filed.

Now, two days before the deadline for plaintiff's opening brief, Company Doe moves to stay the briefing before this Court to allow it to file a motion in 10 days asking the district court to reconsider that court's order granting intervention because the CPSC has dismissed its appeal.

ARGUMENT

Company Doe's motion should be denied for three reasons. First, the district court's ruling on Company Doe's motion will not affect whether Consumer Groups can pursue this appeal. Second, in the event that the district court rules on and grants Company Doe's motion, Company Doe will have sufficient time to address that order in its brief to this Court. Third, the important constitutional issues raised in this appeal warrant this Court's prompt attention, as the district court's reasoning and all of the facts of the case remain under seal, thus denying the public access to these materials and impeding the public's ability to understand the decision's implications for the CPSC database and to monitor the work of the courts.

1. The district court's action on Company Doe's motion will not affect Consumer Groups' ability to pursue this appeal. One issue on which Consumer Groups appealed (as reflected in Consumer Groups' unsealed docketing statement, filed October 15) is whether the district court abused its discretion in constructively *denying* Consumer Groups' motion to intervene. Thus, the proper

resolution of the motion to intervene has always been presented in this appeal, and it will remain so regardless of the outcome of the motion that Company Doe plans to file in 10 days.

There are, at present, three reasons Consumer Groups may take this appeal: (1) the district court granted intervention nunc pro tunc; (2) in the alternative, if the grant of intervention was ineffective because it occurred after the notice of appeal was filed, the district court's constructive denial of intervention was an abuse of discretion; and (3) regardless of their status as intervenors, Consumer Groups are entitled to appeal because they have participated in this case from the outset and are bound by the district court's adverse decision.

If, in response to Company Doe's yet-to-be-filed motion, the district court reverses its order granting intervention, the first argument becomes moot, but the other two do not. There is no question a prospective intervenor may appeal the denial of intervention. *See, e.g.*, *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 207 (4th Cir. 2006). And the question of intervention does not even arise in determining whether Consumer Groups may appeal as non-parties under *Kenny v. Quigg*, 820 F.2d 665, 667-68 (4th Cir. 1987) (permitting non-party appeal where party participated in the proceedings below and had a substantial interest in the outcome); *accord Davis v. Scott*, 176 F.3d 805, 807 (4th Cir. 1999) (reaffirming

and applying the *Kenny* standard). Each of these points will be addressed in detail in Consumer Groups' opening brief, due to be filed in two days.

However vigorously Company Doe may dispute the substance of Consumer Groups' arguments, these arguments (like any argument about who is a proper party) will ultimately be resolved by this Court. Just as a question about jurisdiction does not eliminate a court's jurisdiction to decide that threshold question, Company Doe's contention that Consumer Groups are not proper parties does not obviate the need for this Court to rule on whether they are proper parties. It does not prejudge any of the questions presented in Consumer Groups' appeal to acknowledge that no matter the outcome of Company Doe's anticipated motion, Consumer Groups will have the opportunity to present their arguments to this Court so the Court can decide the threshold questions relating to Consumer Groups' ability to appeal.

In any event, the district court likely lacks jurisdiction to act on Company Doe's anticipated motion. A notice of appeal divests the district court of jurisdiction to act *except* in furtherance of the appeal. *See, e.g., Dixon v. Edwards*, 290 F.3d 699, 709 n. 14 (4th Cir. 2002); *Lytle v. Griffith*, 240 F.3d 404, 407 n.2 (4th Cir. 2001). Granting nunc pro tunc an intervention motion that was *already pending* prior to appeal is just such an action: it assists the appellate process by acknowledging Consumer Groups' role as parties to the proceedings and thus

"relieving [this Court] from considering the substance of an issue" it does not need to consider. *Lytle*, 240 F.3d at 407 n.2; *see also* Wright, Miller & Cooper, 15A Fed. Prac. & Pro. Juris. § 3902.1. By contrast, if the district court, two months after granting intervention, abruptly reverses course and revokes it in response to a motion filed months *after* the notice of appeal, that action would obstruct, not facilitate, the appeal process — as Company Doe's very late motion to stay briefing itself illustrates.

2. Nor do the parties need a delay in the briefing schedule in order to respond to any ruling the district court may make on Company Doe's anticipated motion. As noted, all of Consumer Groups' arguments about their status as parties — two of which do not rely on the district court's grant of intervention — will be before this Court in their opening brief. It is notable that the party whose brief is due in two days *opposes* delay here. Company Doe's brief is not due until February 13, 2013, leaving two full months for the district court to decide the motion and for Company Doe to tailor its arguments to that decision.

3. In contrast to the argument for delay, the reasons for proceeding with dispatch are non-speculative and weighty. At stake in this case is the public right of access to judicial proceedings under the First Amendment and common law — access that is critical to ensuring public oversight and institutional accountability in a democracy. *See, e.g.*, *Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 203

F.3d 291, 303 (4th Cir. 2000) ("Publicity of such records, of course, is necessary . . . so that the public can judge the product of the courts in a given case."); *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification."). This case has been ongoing for more than a year in the district court, and the public still does not know the identity of the plaintiff, the key evidence on which the district court based its decision, the sources of that evidence, or the court's reasoning in applying law to fact. The functioning of the federal statute mandating the consumer product database (the Consumer Product Safety Improvement Act of 2008), turns on how narrowly or broadly the CPSC's authority is construed, and this case is the first to address that issue. Yet the facts behind the decision and the analysis that defines the scope of the district court's ruling are hidden from public view.

This Court should not permit these constitutionally dubious circumstances to persist longer than necessary. The current briefing schedule was agreed upon by the parties to accommodate the government's uncertainty about its participation and to provide the parties additional time to comply with this Court's requirements regarding sealed materials. Now that the former question has been resolved and

sufficient time provided to accommodate the latter concern, no further extensions should be permitted absent compelling circumstances.

CONCLUSION

Company Doe's motion to stay the briefing schedule should be denied.

Dated: December 11, 2012

Respectfully submitted,

/s/ Scott Michelman

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CERTIFICATION OF SERVICE

I certify that on December 11, 2012, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman