UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR ENVIRONMENTAL HEALTH et al. *Plaintiffs*, v. INHANCE TECHNOLOGIES USA, *Defendant*.	Civil Action No. 22-03819 (JEB)

AMICUS BRIEF AND STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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The United States of America, by the authority of the Attorney General and through the undersigned attorneys, and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), respectfully submits this amicus brief and statement of interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice "to attend to the interests of the United States" in any judicial action. *See Hall v. Clinton*, 285 F.3d 74, 79 (D.C. Cir. 2002). Local Rule 7(o)(1) of the United States District Court for the District of Columbia also authorizes the United States or its officers to file an *amicus curiae* brief without consent of the parties or leave of Court.

The Environment and Natural Resources Division of the Department of Justice ("DOJ") enforces federal environmental laws and has a strong interest in their correct interpretation and application. The pending Motion to Dismiss, ECF No. 14, concerns the construction and application of the citizen suit provision of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2619—a provision that is similar to citizen suit provisions in many federal environmental statutes. The United States has a significant interest in the contours of this provision, particularly in this case where the citizen suit concerns the same alleged violations of TSCA, 15 U.S.C. § 2601 *et seq.,* that the United States has already sought to remedy in an earlier-filed case it brought against the same defendant, Inhance Technologies, LLC ("Defendant" or "Inhance") ("E.D. Pa. DOJ Action"). *See* Docket in *United States v. Inhance Techs. LLC*, Civ. A. No. 5:22-5055 (E.D. Pa.) (attached as Ex. 1); Complaint, *United States v. Inhance Techs. LLC*, Civ. A. No. 5:22-5055 (E.D. Pa. Dec. 19, 2022), E.D. Pa. ECF No. 3 ("E.D. Pa. DOJ Compl.") (attached as Ex. 2). Under Federal Rule of Evidence 201(b), the United States asks that the Court take judicial notice of the record in its first-filed action, TSCA, and the pertinent TSCA regulation. *See* FED. R. EVID. 201(b); *see also Roemer v. Bd. of Pub.*

Works of Md., 426 U.S. 736, 743 n.4 (1976); *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 464 (D.C. Cir. 2018); *Hurd v. D.C., Gov't*, 864 F.3d 671, 678, 686 (D.C. Cir. 2017).

Citizen suits are "critical components of" statutory schemes to enforce federal environmental laws. *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 526 (5th Cir. 2000). These suits—when properly initiated—serve a vital role in supplementing governmental enforcement efforts. *See, e.g.*, *The Piney Run Pres. Ass'n v. The Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 456 (4th Cir. 2008). Precisely because citizen suits are intended to "supplement rather than to supplant governmental action," *Gwaltney of Smithfield, Ltd v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), they may be initiated only if certain statutory prerequisites are satisfied. When these prerequisites are not met, a citizen suit is barred.

In this case, the citizens' suit is prohibited by a provision of TSCA known as the "diligent prosecution bar." This provision precludes citizen suits when "the Attorney General has commenced and is diligently prosecuting" an action to require compliance with TSCA or its regulations by the same entity the citizens would otherwise sue. *See* 15 U.S.C. § 2619(b)(1)(B). This standard is easily met here: the Attorney General initiated suit against Inhance to require it to comply with TSCA and its implementing regulations; eight days later—and well before the United States could begin discovery in the first-filed action—the Center for Environmental Health ("CEH") and Public Employees for Environmental Responsibility ("PEER") (collectively, the "Citizen Groups") filed this suit against Inhance to remedy the same statutory and regulatory violations. It is hard to conceive of a more clear-cut case for precluding a citizen suit under TSCA's diligent prosecution bar.

For these reasons, and as further explained below, the United States supports, and

requests that the Court grant, Inhance's motion to dismiss, ECF No. 14, on the grounds that the Citizen Groups' suit is incurably barred by TSCA. 15 U.S.C. § 2619(b)(1)(B). The Citizen Groups can still act to enforce TSCA: although TSCA preempts their suit, it also permits them to intervene as a matter of right in the earlier-filed action. *See id.*

BACKGROUND

I. Statutory and Regulatory Framework

The E.D. Pa. DOJ Action and this case concern TSCA, 15 U.S.C. § 2601 *et seq.*, and its implementing regulations. Congress enacted TSCA in 1976 to limit risks to public health and the environment posed by toxic chemical substances and mixtures. *See* PUB. L. NO. 94–469, 90 Stat. 2003 *et seq.* (1976) (codified as amended at 15 U.S.C. § 2601 *et seq.*); *see also Env't Def. Fund v. EPA*, 922 F.3d 446, 450 (D.C. Cir. 2019).

A. Citizen Suits

Citizen suits under TSCA are governed by 15 U.S.C. § 2619. This provision authorizes citizen suits "against any person . . . who is alleged to be in violation of" TSCA or its implementing regulations. 15 U.S.C. § 2619(a)(1). But it also imposes limitations on citizen suits: "No" citizen group "may . . . commence[]" suit unless it first provides sixty-days' notice to the potential defendant and EPA. *Id.* § 2619(b)(1)(A). And crucial here: no citizen suit may be initiated "if the Attorney General has commenced and is diligently prosecuting a civil action . . . to require compliance with" TSCA or its regulations. *Id.* § 2619(b)(1)(B).

B. Significant New Uses of Chemical Substances

Section 5 of TSCA, 15 U.S.C. § 2604, authorizes EPA to promulgate rules that designate uses of chemical substances as "significant new use[s]." 15 U.S.C. § 2604(a)(2). Once the use of a chemical substance is designated as a significant new use, Section 5 of TSCA establishes a

regulatory process that an entity must comply with *before* it may "manufacture or process" a "chemical substance for" a designated "significant new use." *Id.* § 2604(a)(1). Initially, the entity must "submit[] to the" EPA "a notice" of its intent to manufacture a chemical substance for a significant new use. *Id.* Next, EPA must (1) "conduct[] a review of the notice—referred to as a significant new use notice or SNUN—and (2) "make[] a determination" on the SNUN—including whether the significant new use "presents an unreasonable risk of injury to health or the environment." *Id.* §§ 2604(a)(1)(B)(ii), 2604(a)(3)(A). Only *after* this process is complete—and depending on the determination the agency renders—may the entity begin manufacturing or processing a chemical substance for a significant new use. *Id.* § 2604(a)(1). Indeed, although the agency may permit the proposed significant new use, it may also prohibit or limit that use. *Id.* §§ 2604(a)(1)(B)(ii), 2604(a)(3)(A), 2604(e)-(f).

C. The Final Rule

In 2020, pursuant to EPA's authority under section 5 of TSCA, the agency promulgated the "Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances Significant New Use Rule" (the "Final Rule" or "SNUR"). 40 C.F.R. § 721.10536. The Final Rule designates several uses of long-chain perfluoroalkyl carboxylate substances ("LCPFACs") as "significant new uses." As explained in the preamble to the Final Rule, LCPFACs are a subset of chemicals known as per- and polyfluoroalkyl substances ("PFAS"). *See* Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule, 85 Fed. Reg. 45109, 45113 (July 27, 2020). "LCPFACs . . . have been found in the blood of the general human population, . . . indicating that exposure to these chemicals substances is widespread." *Id.* One particular LCPFAC is perfluorooctanoic acid ("PFOA"). *Id.* at 45111. "Human epidemiology data report associations between PFOA exposure and high

cholesterol, increased liver enzymes, decreased vaccination response, thyroid disorders, pregnancy-induced hypertension and preeclampsia, and cancer (testicular and kidney)." *Id*. at 45113. Importantly, any use of a LCPFAC—including PFOA—that the Final Rule designates as a significant new use is subject to the regulatory process set forth in section 5 of TSCA, 15 U.S.C. § 2604. *See* 40 C.F.R. § 721.10536(b)(4).

II. The Two Pending Actions

A. The E.D. Pa. DOJ Action

On October 24, 2022, Inhance received notice from CEH and PEER of alleged violations of TSCA via letter dated October 21, 2022, and a similar notice from Mr. Jay De La Rosa on November 18, 2022. Complaint, *Ctr. for Env't. Health et al. v. Inhance Techs. USA*, Civ. A. No. 22-03819 (D.D.C. Dec. 27, 2022), ECF No. 12 ¶¶ 11, 55-60 ("D.D.C. Citizen Group Compl."). The Administrator of the EPA received the same notice from CEH and PEER on October 27, 2022, and from Mr. De La Rosa on November 25, 2022. *Id.*

To enforce TSCA's protections for public health and the environment, on December 19, 2022—less than sixty days after receiving the Citizen Groups' notice—the United States filed a redacted complaint in the United States District Court for the Eastern District of Pennsylvania. E.D. Pa. DOJ Compl. (redacted), E.D. Pa. ECF No. 1 (attached as Ex. 3). The complaint alleges that Inhance is violating TSCA and its implementing regulations by manufacturing or processing for a significant new use PFAS subject to the Final Rule before EPA has rendered determinations on SNUNs Inhance submitted to the agency. E.D. Pa. DOJ Compl. ¶ 52-72, E.D. Pa. ECF No. 3. The complaint seeks declaratory and injunctive relief against Inhance under the Declaratory Judgment Act, 28 U.S.C. § 2201, and Section 17(a) of TSCA, 15 U.S.C. § 2616(a), respectively. E.D. Pa. DOJ Compl. at Relief Sought ¶¶ A-C, E.D. Pa. ECF No. 3.

Upon filing the complaint, the United States moved to file an unredacted version of the complaint under seal, requesting a ruling on an expedited basis. Motion to Seal, E.D. Pa. ECF No. 2 (attached as Ex. 4). As the United States explained, it filed a redacted complaint and sought to file an unredacted version of the complaint under seal because the Defendant had alleged in regulatory submissions to EPA that broad categories of information referenced in the complaint were entitled to protection as confidential business information ("CBI").

On December 20, 2022, the E.D. Pa. Court granted the United States' motion, Order, E.D. Pa. ECF No. 4 (attached as Ex. 5), and the unredacted complaint was filed under seal. The E.D. Pa. Court further ordered that the unredacted version of the United States' complaint was deemed filed, *nunc pro tunc*, on December 19, 2022.

Several weeks later, Inhance "informed the United States that it does not claim 'confidential business information' over the specific redacted information" in the E.D. Pa. DOJ Complaint, and the United States promptly moved to unseal the unredacted complaint. Motion to Unseal, E.D. Pa. ECF. No. 6 (attached as Ex. 6). On January 20, 2023, the E.D. Pa. Court unsealed the unredacted complaint. E.D. Pa. DOJ Compl.; Order, E.D. Pa. ECF Nos. 3, 8 (E.D. Pa. ECF No. 8 attached as Ex. 7).

B. The D.D.C. Citizen Group Action

On December 27, 2022—eight days after the United States filed the E.D. Pa. DOJ Action—the Citizen Groups filed this action in the United States District Court for the District of Columbia ("D.D.C.") (the "D.D.C. Citizen Group Action"). D.D.C. Citizen Group Compl., ECF No. 1. One month later, the Citizen Groups filed an amended complaint. ECF No. 12. In their original and amended complaints, the Citizen Groups make substantially similar factual allegations, assert substantively identical claims, and seek effectively the same relief against

Inhance as the United States does in its earlier-filed complaint in the E.D. Pa. DOJ Action. *See* discussion *infra* Argument Section I.A.

In their amended complaint, the Citizen Groups allege that "EPA's repeated delays and failures to enforce TSCA after learning of Inhance's violations of the [Final Rule] and Inhance's stated intention to continue [producing PFAS subject to the Final Rule] during EPA's review of the SNUNs in violation of the law, and EPA's filing of a Complaint against Inhance more than two years after learning of the violations and only after [the Citizen Groups] filed a 60 day notice all demonstrate that EPA has not been and is not now diligently prosecuting its action against Inhance." D.D.C. Citizen Group Compl. ¶ 106, ECF No. 12. The amended complaint adds Mr. De La Rosa, an individual, as a plaintiff. For simplicity, this memorandum refers to all plaintiffs as Citizen Groups.

On February 6, 2023, Inhance filed the pending motion to dismiss, contending that the Citizen Groups' action should be dismissed under TSCA's diligent prosecution bar. ECF. No. 14. As Inhance explains, "[e]ight days before [the Citizen Groups] filed their Complaint, the Department of Justice (DOJ) filed a TSCA complaint against Inhance in the U.S. District Court for the Eastern District of Pennsylvania. DOJ is diligently prosecuting that lawsuit. Plaintiffs' claims are thus incurably statutorily barred and should be dismissed without leave to amend." ECF No. 14 at 1.[1]

ARGUMENT

The question presented is whether the Citizen Groups can defeat the presumption that the

[1] Inhance's motion to dismiss based on TSCA's diligent prosecution bar is made under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. ECF No. 14-1 at 4. The D.C. Circuit does not appear to have weighed in on whether TSCA's diligent prosecution bar is jurisdictional. The United States expresses no view on this issue—no matter the standard, dismissal is required.

United States diligently prosecutes its suits by showing that DOJ failed to act diligently in its TSCA case against Inhance in the eight-day period before the Citizen Groups filed their materially identical suit against the same defendant. Because the answer is no, TSCA's diligent prosecution bar precludes the Citizen Groups' later-filed suit.

I. The Citizen Groups' Suit Must be Dismissed Because it is Prohibited by TSCA's Diligent Prosecution Bar, 15 U.S.C. § 2619.

When properly invoked, TSCA's citizen suit provision allows citizens to bring suit to enforce the statute. *See* 15 U.S.C. § 2619(a). Such citizen suit provisions are a common feature of federal environmental statutes. *See, e.g.*, Safe Drinking Water Act, 42 U.S.C. § 300j–8; Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365. Collectively, they embody Congress's recognition of the important role citizen groups can serve in vindicating environmental interests.

At the same time, citizens suits are generally "bar[red] . . . when governmental enforcement action is under way." *Gwaltney*, 484 U.S. at 60 (interpreting similar citizen suit provision in the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365(b)(1)(B)). This restriction reflects that governmental entities hold primary responsibility for enforcing federal environmental statutes like TSCA; citizen groups, on the other hand, play an "interstitial" role in enforcement. *Id.*

These roles are reflected in TSCA's diligent prosecution bar. *See* 15 U.S.C. § 2619(b)(1)(B). Like similar provisions in numerous federal environmental statutes,[2] TSCA's

[2] TSCA's citizen suit provision is expressly "modeled after similar provisions in the Safe Drinking Water Act, . . . Clean Air Act, [Clean Water Act], and Noise Control Act." S. Rep. No. 94-698, at 9 (1976). Because TSCA's citizen suit provision was patterned on these other citizen suit provisions, it should be interpreted similarly. *See, e.g.*, *Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 123 n.7 (3d Cir. 2016). Indeed, the only judicial decision

diligent prosecution bar prohibits citizen groups from filing their own suit if the government has already commenced suit and is diligently prosecuting the case. *See* 15 U.S.C. § 2619(b)(1)(B). But this limit does not prevent citizen groups from participating in TSCA's enforcement; rather, TSCA's citizen suit provision allows citizen groups to intervene as a matter of right in the ongoing litigation. *See* 15 U.S.C. § 2619(b)(1)(B).

This is a textbook case for application of the diligent prosecution bar. The United States filed the E.D. Pa. DOJ Action against Inhance to ensure compliance with TSCA and its implementing regulations. Then—just eight days later—the Citizen Groups filed this materially identical case against Inhance. Because the United States had commenced and was diligently prosecuting the E.D. Pa. DOJ Action when the Citizen Groups filed suit, the D.D.C. Citizen Group Action is barred by TSCA and must be dismissed.

A. The United States Commenced Suit Against Inhance Under TSCA Before the Citizen Groups.

Ultimately, the Citizen Groups must shoulder a heavy burden to show that the United States is *not* diligently prosecuting its suit. But the threshold question for the Court is whether the United States "ha[d] commenced" suit before the Citizen Groups to require compliance with TSCA and its implementing regulations. 15 U.S.C. § 2619(b)(1)(B). That is easily answered in the affirmative. These two cases—the E.D. Pa. DOJ Action and D.D.C. Citizen Group Action—are grounded in the same factual allegations, assert the same claims for violations of the same provisions of TSCA and its regulations, and seek the same relief against the same defendant. And the United States initiated the E.D. Pa. DOJ Action on December 19, 2022—eight days

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examining TSCA's diligent prosecution provision explicitly relied on citizen suit provisions in other federal environmental statutes. *N.Y. Cmtys. for Change v. N.Y.C. Dep't of Educ.*, No. 11 CV 3494, 2012 WL 7807955, at *5-*7 (E.D.N.Y. Aug. 29, 2012), *report and rec. adopted,* No. 11 CV 3494, 2013 WL 1232244 (E.D.N.Y. Mar. 26, 2013).

before the Citizen Groups filed their substantively identical suit.

Start with the factual allegations. Both complaints allege that Inhance generates PFAS. *Compare* E.D. Pa. DOJ Compl. ¶¶ 2, 29, 40, E.D. Pa. ECF No. 3, *with* D.D.C. Citizen Group Compl. ¶¶ 4, 8, 98, ECF No. 12. They allege that PFAS are "commonly known as 'forever chemicals' because of their persistence in the environment" and are linked to adverse health impacts on humans and animals. *Compare* E.D. Pa. DOJ Compl. ¶¶ 3, 50-51, *with* D.D.C. Citizen Group Compl. ¶¶ 8, 67. The complaints also allege that Inhance is a company that uses a process called "fluorination" to add barrier protection properties to plastic containers. *Compare* E.D. Pa. DOJ Compl. ¶ 29, *with* D.D.C. Citizen Group Compl. ¶ 4, 32. They both further allege that Inhance's fluorination activities produce PFAS subject to the Final Rule. *Compare* E.D. Pa. DOJ Compl. ¶ 39, 51, *with* D.D.C. Citizen Group Compl. ¶ 98. And both complaints allege that Inhance is manufacturing these PFAS for a use that is designated by the Final Rule as a significant new use. *Compare* E.D. Pa. DOJ Compl. ¶¶ 39, 51, *with* D.D.C. Citizen Group Compl. ¶¶ 6, 9, 53-54.

Given that the underlying factual allegations are the same, it is no surprise that the two complaints allege the same violations of TSCA and its regulations. The E.D. Pa. DOJ Complaint alleges that Inhance has and continues to violate section 15 of TSCA, 15 U.S.C. § 2614. E.D. Pa. DOJ Compl. ¶¶ 4, 9. That provision makes it unlawful to "fail or refuse to comply with any requirement of" TSCA "or any rule promulgated" under the statute. 15 U.S.C. § 2614. As alleged in the E.D. Pa. DOJ Complaint, the "requirement of" of TSCA that Inhance has and continues to fail to comply with is the regulatory process prescribed by section 5 of TSCA, 15 U.S.C. § 2604. Specifically, the E.D. Pa. DOJ Complaint alleges that, although Inhance has submitted SNUNs to EPA for its significant new uses of PFAS subject to the Final Rule, it

continues to manufacture or process such PFAS for a significant new use without the agency having completed its review of the SNUNs and issued determinations on them. *Id.* ¶¶ 46, 57-58, 67-68.

Likewise, the D.D.C. Citizen Group Complaint alleges that Inhance has failed to comply with section of 5 of TSCA. D.D.C. Citizen Group Compl. ¶ 98. And the D.D.C. Citizen Group Complaint alleges that Inhance's "violations comprise 'prohibited acts' under TSCA section 15." *Id.* ¶ 104.

Last, the two complaints request effectively the same relief. The United States seeks a declaratory judgment that Inhance "*has and continues to violate Section 15 of TSCA*, 15 U.S.C. § 2614, *by failing or refusing to comply with Section 5 of TSCA*, 15 U.S.C. § 2604, and all applicable regulatory requirements." E.D. Pa. DOJ Compl. at Relief Sought ¶ A (emphases added). So do the Citizen Groups. D.D.C. Citizen Group Compl. at Prayer for Relief ¶ 1.

And the United States requests an injunction to:

> "(A) restrain the Defendant from any violation of Section 15 of TSCA, 15 U.S.C. § 2614; [and] (B) restrain the Defendant from the manufacture or processing of PFAS for a significant new use subject to the [Final Rule], except in compliance with TSCA; and (C) direct the Defendant to give notice of its manufacturing in violation of Section 5 of TSCA, 15 U.S.C. § 2604, to distributors in commerce of the PFAS subject to the Long-Chain PFAS Rule that it has produced for a significant new use, and, to the extent reasonably ascertainable, to other persons in possession of such PFAS or exposed to such PFAS.

Id. Relief Requested ¶ B. No different, the Citizen Groups ask for an injunction "[o]rdering defendant to cease and desist from all manufacture and processing of LCPFAC substances . . . until and unless it has fully complied with the requirements of the [Final Rule] and TSCA section 5(a)(3)" and "[o]rdering defendant to inform all purchasers and users of containers fluorinated by Inhance that they contain . . . LCPFACs manufactured in violation of TSCA SNUR requirements and cannot be further processed or distributed in commerce until and unless the SNUN review

and regulatory process has been completed." D.D.C. Citizen Group Compl. at Prayer for Relief ¶¶ 3-4. The relief sought is materially identical.

Under TSCA's plain text, the diligent prosecution bar applies where, as here, the Attorney General is prosecuting an action to require compliance with TSCA and its rules. This is not a difficult case: Both actions arise from the same set of operative facts, concern the same violations of TSCA and its regulations by the same defendant, and seek "to require compliance with" the same provisions of the statute and its regulations. 15 U.S.C. § 2619(b)(1)(B). The Citizen Groups are thus subject to the diligent prosecution bar: their case is foreclosed, provided the United States is diligently prosecuting the E.D. Pa. DOJ Action. Unquestionably, it is.

B. The United States is Diligently Prosecuting the E.D. Pa. DOJ Action.

The United States is presumed to diligently prosecute its suits. *Piney Run*, 523 F.3d at 459 (citing *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.,* 382 F.3d 743, 760 (7th Cir. 2004)); *Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). Citizen groups bear a heavy burden to overcome this presumption. *See Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). That is because only a minimal showing is needed to demonstrate diligent prosecution: the United States' prosecution of an action "will ordinarily be considered 'diligent' if [it] 'is capable of requiring compliance with the [statute] and is in good faith calculated to do so.'" *Piney Run*, 523 F.3d at 459 (quoting *Friends of Milwaukee's Rivers*, 382 F.3d at 760); *Karr*, 475 F.3d at 1197-9; *Ellis v. Gallatin Steel Co.,* 390 F.3d 461, 477-78 (6th Cir. 2004).

Here, the Court must determine whether the "Attorney General" was diligently prosecuting the E.D. Pa. DOJ Action on December 27, 2022, the date the Citizen Groups initiated this suit—eight days after the United States filed suit. *See* 15 U.S.C. § 2619(b)(1)(B);

see also Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc., 728 F.3d 868, 873 (9th Cir. 2013) (holding in a Clean Water Act case "that the phrase 'has commenced and is diligently prosecuting' . . . requires an inquiry as to whether the government was diligently prosecuting its action at the time when the citizen filed his or her complaint"); *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63, 76 n.8 (1st Cir. 2021) (same); *Friends of Milwaukee's Rivers*, 382 F.3d at 752 (same). And even if the Court deems the date the Citizen Groups filed their amended complaint—January 27, 2023—the applicable date for assessing the diligence of the United States' action, the passage of an additional month does not alter the analysis or the result: the United States was and is diligently prosecuting its action.

As a brief recounting of the course of the E.D. Pa. DOJ Action makes clear, the United States has diligently endeavored to move its case forward during its short lifespan. First, to scrupulously comply with TSCA's restrictions on disclosing information that Inhance had arguably claimed as CBI,[3] the United States commenced suit on December 19, 2022, by filing a redacted complaint, shielding reference to any purported CBI. The next day, the United States moved to file an unredacted version of the complaint under seal. In the motion, the United States explained that EPA was reviewing Defendant's CBI claims. The United States also stated that it disagreed with many of Defendant's CBI assertions and anticipated asking the Court to reject them at a later date. That same day, the United States sent a waiver of service to counsel for Inhance.

On December 27, 2022—the same day that the Citizen Groups filed this suit—Inhance

[3] Inhance had alleged in regulatory submissions to the EPA that broad categories of information referenced in the complaint were entitled to protection as CBI. Under Section 14 of TSCA, 15 U.S.C. § 2613(e), EPA must not disclose information that a regulated entity claims as confidential until EPA "becomes aware that the information does not qualify for protection." *See also* 40 C.F.R. §§ 2.203, 2.204(d), 2.306.

returned to the United States an executed copy of the waiver. Because December 27, 2022, is when the Citizen Groups filed suit, the Court should not look beyond this date in conducting its diligent prosecution analysis. *See Cebollero-Bertran*, 4 F.4th at 76 n.8; *Cal. Sportfishing*, 728 F.3d at 873; *Friends of Milwaukee's Rivers*, 382 F.3d at 752. The judicially noticeable facts clearly show that, in the brief period after the United States filed suit, it acted diligently to prosecute its case.

For the sake of completeness, the United States notes that, the next day, December 28, 2022, it filed the signed waiver of service with the E.D. Pa. Court. Then, on January 13, 2023, the United States filed an Unopposed Motion to Unseal the Unredacted Complaint in the E.D. Pa. DOJ Action. E.D. Pa. ECF No. 6. In the unopposed motion, the United States explained that, by letter dated January 13, 2023, which was attached to the motion, Inhance informed the United States that it had reviewed the redactions to the complaint and did not believe that the redacted material constituted CBI within the meaning of 5 U.S.C. § 552(b)(4). Accordingly, the United States asked the E.D. Pa. Court to unseal the unredacted complaint to permit public access to that filing forthwith. The Court granted the motion, and the unredacted pleading was unsealed on January 20, 2023. E.D. Pa. ECF Nos. 3, 8.

On February 21, 2023, Inhance moved to dismiss the E.D. Pa. DOJ Action. Motion to Dismiss, E.D. Pa. ECF No. 10. There, Inhance correctly represented that "Plaintiff's counsel takes the position that discovery should proceed while the motion is pending." E.D. Pa. ECF No. 10 at 2. Such discovery is necessary to determine the extent of the health risk to individuals who are exposed to the PFAS that Inhance unlawfully generates—both consumers who come into contact with containers that Inhance fluorinates and Inhance's workers—and the harm to the environment. The E.D. Pa. Court approved the parties' joint stipulation to extend the briefing

schedule for the motion to dismiss given the significant issues raised in the motion. E.D. Pa. ECF No. 19.

As the United States has shown through its E.D. Pa. DOJ Action, it is fully capable of pursuing Inhance's compliance with TSCA and initiated its suit to achieve this end. *See Piney Run*, 523 F.3d at 459. There are no grounds to suggest otherwise—especially considering that the Citizen Groups initiated the D.D.C. Citizen Group Action eight days after the United States filed the E.D. Pa. DOJ Action. The Citizen Groups cannot meet their burden to surmount the strong presumption—backed by the record of the E.D. Pa. DOJ Action—of diligent prosecution by the United States. *See Karr*, 475 F.3d at 1198.

C. The Citizen Groups' Attempt to Circumvent the Diligent Prosecution Bar Fails.

The Citizen Groups assert that the diligent prosecution bar should not apply because the "EPA" allegedly acted slowly to address Inhance's TSCA violations, did not "file for an injunction at the earliest possible date," and agreed to waive service in the E.D. Pa. DOJ Action. ECF No. 16 at 21-22. This argument is fatally flawed for two reasons: First, EPA's pre-filing activities are irrelevant to the diligent-prosecution analysis; only DOJ's—*i.e.*, the Attorney General's—conduct matters. Second, the claim that the United States' decision to not immediately file for injunctive relief and to file a waiver of service equates to a lack of diligence finds no support in TSCA's diligent prosecution provision and the applicable caselaw—and if accepted, would create an unreasonable standard.

To begin, the citizen groups misread TSCA's plain text, improperly conflating EPA with DOJ. They focus—incorrectly—on *EPA's* supposed inaction in tackling Inhance's unlawful conduct before the filing of the E.D. Pa. DOJ Action, claiming that this provides "reason to question" whether the agency will diligently prosecute its case. ECF No. 16 at 22. The Citizen

Groups' allegations, it merits noting, do not show that EPA's actions lacked diligence. But that is beside the point.

Under TSCA's diligent prosecution provision, it is the *DOJ's* prosecution of the case that matters, not *EPA's*. That provision expressly distinguishes between the roles of EPA and the DOJ. It refers to a "civil action in a court of the United States" that "the Attorney General has commenced and is diligently prosecuting." 15 U.S.C. § 2619(b)(1)(B); *see also Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26 (1989) ("Under Rule 3 of the Federal Rules of Civil Procedure, '[a] civil action is commenced by filing a complaint with the court.'" (brackets in original)). And the provision differentiates a civil judicial action started by the Attorney General from an administrative "proceeding" begun by "the Administrator" of the EPA. 15 U.S.C. § 2619(b)(1)(B). It is only the DOJ's prosecution that is relevant. And any speculation that the history of EPA's administrative efforts provides a basis to doubt that DOJ will diligently prosecute its case gets the presumption of diligence backwards: the presumption is that the United States *is* diligently prosecuting, not that it *might* in the future fail to diligently prosecute a case.

Next, the Citizen Groups' make the meritless contention that DOJ (again, the Citizen Groups incorrectly say "EPA") has not been diligent because it did not move for an injunction "at the earliest possible date" and "agreed to a waiver of service pursuant to FRCP 4(d)." ECF No. 16 at 16. The Citizen Groups concede "that the phrase 'has commenced and is diligently prosecuting' . . . requires an inquiry as to whether the government was diligently prosecuting its action at the time when the citizen filed his or her complaint." ECF No. 16 at 21-22 (quoting *Cal. Sportfishing*, 728 F.3d at 873). Here, that is an eight-day period. Yet, they fault the United States for allegedly failing to prosecute the E.D. Pa. DOJ Action "between the filing of plaintiffs'

suit on December 27, 2022, and today." ECF No. 16 at 22. "Today," however, is not the correct date to assess the United States' diligence. *See Cal. Sportfishing*, 728 F.3d at 873.

Regardless of the timeframe, the Citizen Groups cannot overcome the presumption of diligence by merely alleging that the United States is prosecuting its action less aggressively than they would like. *See, e.g.*, *Piney Run*, 523 F.3d at 459. *A fortiori*, the Citizen Groups cannot establish a lack of diligence based solely on the United States' litigation choice not to seek the maximum possible relief at the earliest stage of the case.

If the Citizen Groups' argument were accepted, then the diligent prosecution provision would only bar duplicative citizen suits when the United States seeks the most far-reaching relief possible. So, whenever a citizen group notices its intent to sue, the United States would be compelled to move at the outset of its action for a sweeping injunction—regardless of whether warranted by facts to be determined through discovery—lest it lose its congressionally conferred priority with respect to leading environmental enforcement actions. That result would subvert the purpose of the diligent prosecution bar.

Likewise, the fact that the United States sent Inhance a waiver of service—thereby extending its time to plead or otherwise respond to the E.D. Pa. DOJ complaint—does not establish a lack of diligence. Waivers of service are expressly authorized and encouraged by Federal Rule of Civil Procedure 4. This commonplace practice serves important interests: it "eliminate[s] the costs of service of a summons . . . and . . . foster[s] cooperation among adversaries and counsel." FED. R. CIV. P. 4(d) advisory committee's note to 1993 amendment. That the United States followed favored procedures grounded in economy and comity comes nowhere close to showing that it is not "capable of requiring compliance with" TSCA or that its action is not "calculated to do so." *Piney Run*, 523 F.3d at 459.

Similarly unavailing is the Citizen Groups' complaint that the United States has not sought civil or criminal penalties against Inhance. ECF No. 16 at 22. While EPA can seek civil penalties (though not an injunction) in an administrative proceeding under TSCA, 15 U.S.C. § 2615(a)(2)(A), the statute does not authorize the United States to file a civil complaint seeking monetary penalties (but authorizes it to seek an injunction). *Id.* § 2616(a). And it is a non-sequitur to argue that the United States has failed to diligently prosecute its *civil* action because it has not also started a separate *criminal* action.

Last, the Citizen Groups' diligent-prosecution argument is without authority. In support of the Citizen Groups' first contention—that Inhance's motion should be decided under Federal Rule of Civil Procedure 12(b)(6) rather than 12(b)(1)—they cite cases where courts held that diligent prosecution provisions did not bar citizen suits. ECF No. 16 at 20-21. But the Citizen Groups do not claim that these cases support their second contention—that the United States failed to diligently prosecute its case. A brief review of the Citizen Groups' cited cases shows why they are inapt. They either involved situations where the government did not file suit,[4] citizens sought relief exceeding what the government requested,[5] or the government effectively

[4] *Pub. Int. Rsch. Grp. of N.J., Inc. v. Rice*, 774 F. Supp. 317, 327 (D.N.J. 1991) (citizen suit not barred "where the EPA has not filed suit to enforce the [effluent] permit limitations, but rather chosen to allow continued discharges in excess of the limits").

[5] *See Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 494 (7th Cir. 2011) (holding that citizens could "pursue their claims that are beyond the scope of" an earlier suit by a state environmental agency); *Hudson River Fishermen's Ass'n v. Westchester Cnty.*, 686 F. Supp. 1044, 1046 n.2, 1051-53 (S.D.N.Y. 1988) (Citizens "actions are not barred . . . when it appears that the Government's effort does not address the factual grievances asserted by private attorneys general."). Although the Citizen Groups do not cite *Hudson River Fishermen's Association*, their parenthetical to *New York Coastal Fishermen's Association*, *see infra* note 6, concerns a discussion of *Hudson River Fishermen's Association* and consists almost entirely of a quotation from that case.

abdicated its enforcement duties.[6] None of those circumstances apply here.

In sum, the Citizen Groups fall far short of sustaining their burden to show that the United States is not diligently prosecuting its suit.

II. The Citizen Groups May Intervene in the E.D. Pa. DOJ Action.

Although TSCA's diligent prosecution bar prevents the Citizen Groups from initiating this duplicative action, they can still litigate to enforce the statute: TSCA authorizes them to intervene as a matter of right in the E.D. Pa. DOJ Action. *See* 15 U.S.C. § 2619(b)(1)(B).

CONCLUSION

For the reasons above, the United States respectfully requests that the Court grant Defendant's Motion to Dismiss.

Respectfully submitted,

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[6] *See Friends of Milwaukee's Rivers*, 382 F.3d at 752-55 (allowing citizen suit where the government's prior "judicial action . . . never resulted in any legally binding agreement to resolve the violations alleged by the" citizens); *N.Y. Coastal Fisherman's Ass'n v. N.Y.C. Dep't of Sanitation*, 772 F. Supp. 162 (S.D.N.Y. 1991) (state not diligently pursuing cleanup of a hazardous waste dump where it granted the dump operator 5 years to adopt a plan to rectify discharges of hazardous waste—even though state had been aware of problem for 7 years).

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