UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR ENVIRONMENTAL HEALTH et al

Plaintiffs,

v.

INHANCE TECHNOLOGIES LLC

Defendant.

Case No. 1:22-cv-03819-JEB

PLAINTIFFS' MEMORANDUM IN RESPONSE TO THE AMICUS CURIAE BRIEF OF THE UNITED STATES

Hon. James Boasberg

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INTRODUCTION AND SUMMARY

Plaintiffs Center for Environmental Health ("CEH") and Public Employees for Environmental Responsibility ("PEER") hereby respond to the March 6, 2023 Amicus Brief and Statement of Interest filed by the Department of Justice ("Government" or "DOJ") at the request of the Administrator of the Environmental Protection Agency ("EPA" or "Agency") in support of the motion to dismiss of defendant Inhance Technologies LLC ("Inhance").

Inhance is engaged in the "fluorination" of tens of millions of plastic containers. The fluorination process has been demonstrated to form numerous per- and polyfluoroalkyl substances ("PFAS"), a class of chemicals that has prompted widespread alarm around the globe because of its prevalence in people and the environment and known harmful effects. Several of the PFAS formed during fluorination are long-chain perfluoroalkyl carboxylate ("LCPFAC") substances prohibited by a July 2020 significant new use rule ("SNUR") promulgated by EPA under section 5(a) of the Toxic Substances Control ("TSCA"), 15 U.S.C. § 2604(a). 85 Fed. Reg. 45109 (July 27, 2020), 40 C.F.R. § 721.10536. These LCPFACs include the highly toxic perfluorooctanoic acid ("PFOA"), for which EPA just last week proposed landmark regulations setting stringent limits on levels in drinking water to protect public health.

EPA has known for over two years that Inhance's production of PFOA and other PFAS during fluorination is violating the SNUR and putting human health at risk. Yet it did not take legal action to stop defendant's willful and knowing non-compliance until after receiving plaintiffs' notice of intent to sue under section 20 of TSCA on October 21, 2022. 15 U.S.C. § 2619. Belatedly, the Agency then filed a complaint against Inhance in the Eastern District of Pennsylvania on December 19, 2022. Eight days later, concerned that the Government would not

act forcefully to restrain Inhance's violations after over two years of inaction, plaintiffs separately filed suit in this Court.

Inhance has moved to dismiss both suits. In this Court, it argues that plaintiffs' suit is barred under section 20(b)(1)(B) of TSCA because the Government is "diligently prosecuting" its case in the Eastern District of Pennsylvania. 15 U.S.C. § 2619(b)(1)(B). Yet its February 21 motion in the Eastern District seeks dismissal of that case on the ground that it is not "ripe" for judicial consideration and that the Government's complaint misconstrues the scope of EPA's SNUR authority under section 5(a) of TSCA.[1] Meanwhile, three months after bringing its case, the Government has neither filed a motion to restrain Inhance's SNUR violations nor provided a projected time-frame for that motion. As a result, Inhance continues to produce PFOA and other harmful PFAS in disregard of the SNUR and to unlawfully distribute in commerce millions of fluorinated containers that expose workers and consumers throughout the country to these dangerous chemicals.

The central thrust of the Government's amicus brief is that the filing of its Eastern District case creates a "presumption" of diligent prosecution – even if it is not in fact pursuing that case and taking steps to restrain Inhance's ongoing TSCA violations. While earlier cases treating the reasonable prosecution bar as jurisdictional under Federal Rule of Civil Procedure ("FRCP") 12(b)(1) may have applied such a presumption, more recent decisions of several courts

[1] *United States v. Inhance Techs. LLC*, Civ. A. No. 5:22-5055 (E.D. Pa.) (ED Pa. ECF 10). The motion argues that, because Inhance recently filed TSCA Significant New Use Notices ("SNUNs") in an eleventh-hour attempt to comply with the LCPFAC SNUR, the Government suit could somehow "subject Inhance to inconsistent governmental positions and judicial outcomes." The motion also argues that TSCA does not allow EPA to treat production activities that were ongoing when the SNUR was proposed as "new uses" that can be restricted under a SNUR.

of appeals reject this approach. Applying FRCP 12(b)(6), these decisions instead accept as true the allegations of lack of diligence in plaintiffs' complaint and draw inferences from these allegations favorable to plaintiffs.

The Government argues that the long history of EPA non-enforcement against Inhance described in plaintiffs' amended complaint is irrelevant because DOJ's diligence – not EPA's – is at issue. But EPA is charged with enforcing TSCA and DOJ represents its interests. It is thus groundless to assume that DOJ is writing on a clean slate, divorced from the two years of EPA inaction that preceded the filing of DOJ's case. The Government also argues that the Court should examine its diligence only during the eight-day period between the filing of its case and lodging of plaintiffs' complaint. But this would make the concept of diligent prosecution an absurdity: since the Government did nothing to advance its claims during this short period, the Court would be crediting it for diligent prosecution based solely on its filing of a complaint, without any tangible effort to restrain Inhance's violations or to move the case forward. This would negate Congress' rationale for authorizing citizens' enforcement of TSCA requirements – "to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternate enforcement mechanism." *Baughman v. Bradford Coal Co., Inc*., 592 F.2d 215, 218 (3rd Cir. 1979).

The Government's excuse for not seeking injunctive relief – that it needs discovery to determine whether Inhance's TSCA violations are harming public health – only confirms its lack of diligent prosecution. To begin with, discovery has not begun in the Eastern District case and its status is highly uncertain in light of Inhance's motion to dismiss and opposition to discovery. Equally important, it strains credulity that EPA needs more information from Inhance after a two-year investigation in which the Agency determined that the fluorination process produces numerous PFAS, conducted multiple tests on fluorinated containers to determine the levels of

PFAS present, issued a subpoena to Inhance and then a notice of violation, and received several information submissions from the company. In fact, EPA just gained access to extensive additional information in Inhance's possession through the nine voluminous SNUNs it recently submitted for the LCPFACs generated during fluorination. Moreover, it is simply not believable that the Government would need help from Inhance in understanding the health impacts of PFAS when they are one of EPA's highest priorities and hundreds of EPA scientists are engaged in PFAS research, assessment and regulation. And finally, case law indicates that the Government may be able to obtain an injunction based solely on Inhance's ongoing violations of TSCA without satisfying the traditional criteria for equitable relief.

In short, the Government's case is simply not on a path to abate Inhance's health-threatening TSCA violations any time soon. Plaintiffs are willing and ready to ask this Court to restrain these violations – without discovery – in the near future. Without a basis for finding diligent prosecution, Inhance's motion to dismiss should be denied, allowing plaintiffs to pursue their case.

ARGUMENT

I. THE GOVERNMENT IS NOT ENTITLED TO A PRESUMPTION OF DILIGENT PROSECUTION

Under TSCA section 20(b)(1)(B), 15 U.S.C. § 2619(b)(1)(B), commencing a civil action is alone insufficient to bar a citizens' suit; the Government must also be "diligently prosecuting" its case. DOJ argues that the government is entitled to a "presumption" of diligent prosecution and need not provide affirmative evidence that it is diligently seeking to restrain the alleged violation. Amicus Brief, at 12. However, to presume that filing a complaint demonstrates diligent prosecution would read this separate requirement out of the law. As a result, citizens would be barred from enforcing TSCA even though the Government has taken no action beyond filing a

complaint, has articulated no strategy for restraining the violation and may never pursue its case. This would negate the ability of "citizens to abate pollution when the government cannot or will not command compliance.'" *La. Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 740 (5th Cir. 2012) (quoting *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 62 (1987)).

The cases cited by the Government to support a presumption of diligent prosecution were all decided under FRCP 12(b)(1) and treat the diligent prosecution bar as a jurisdictional requirement which plaintiffs have an affirmative obligation to overcome. *Piney Run Pres. Ass'n v. The Cnty. Comm'rs of Carroll Cnty*., 523 F.3d 453, 459 (4th Cir. 2008); *Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986); *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007). However, as shown in plaintiffs' opposition to Inhance's motion, more recent cases from four courts of appeals squarely reject the application of FRCP 12(b)(1) and hold that motions to dismiss based on the diligent prosecution bar must be decided under FRCP 12(b)(6). *La. Envtl. Action Network*, 677 F.3d at 745-51*; Adkins v. Vim Recycling, Inc.*, 644 F.3d 483, 492-95 (7th Cir. 2011); *Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116 (3d Cir. 2016)*; Cebollero-Bertran v. P.R. Aqueduct & Sewer Auth.*, 4 F.4th 63 (1st Cir. 2021).

Although purporting to take no position on whether FRCP 12(b)(6) controls Inhance's motion to dismiss, the Government seeks to construe section 20(b)(1)(B) as though the more rigorous jurisdictional standards of Rule 12(b)(1) govern. The Court should not allow the Government to straddle this fence. The four appellate decisions holding that the diligent prosecution bar is not jurisdictional are based on a careful examination of Supreme Court precedent and rigorous analysis of legislative intent notably lacking in earlier cases applying FRCP 12(b)(1). Even the Fourth Circuit, on whose *Piney Run* decision the Government heavily

relies, has now cast doubt on whether the diligent prosecution bar is jurisdictional and subject to FRCP (12)(b)(1). *See Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342, 347-48 (4th Cir. 2022) ("there may well be reason for skepticism about whether the judicial proceeding bar is properly labeled jurisdictional under the Supreme Court's current approach"). This Court should follow the reasoning of these cases and decide Inhance's motion under FRCP 12(b)(6).

Decisions addressing the diligent prosecution bar under FRCP 12(b)(6) do not grant the Government a "presumption of diligence." Instead, they recognize that "'[i]t is the Court's duty to probe the government's prosecutorial vigor'" and that, in performing this task, "the facts alleged in the complaint [must be] taken as true by the court, which also draws all inferences in the pleader's favor." *Cebollero-Bertran,* 4 F.4th at 70, 74. *See also Adkins*, 644 F.3d at 492-392 ("We construe the complaint in the light most favorable to the plaintiffs, accepting as true all well-pled facts alleged, taking judicial notice of matters within the public record, and drawing all reasonable inferences in the plaintiffs' favor").

In the instant case, the absence of diligent prosecution is demonstrated not only by the two-year history of EPA non-enforcement recounted in plaintiffs' amended complaint but by the lack of forward movement in the Government's case three months after it was filed.

II. THE GOVERNMENT OFFERS WEAK AND UNPERSUASIVE ARGUMENTS TO AVOID AN EXAMINATION OF ITS DILIGENCE IN PROSECUTING THIS CASE

A. The Government Cannot Divorce Itself from EPA's Two-Year History of Inaction

As the amended complaint describes in detail (¶¶ 75-93), EPA learned in late 2020 that Inhance's fluorination process was producing dangerous LCPFACs prohibited by its July 2020 SNUR. It issued a subpoena to Inhance in early 2021 and conducted its own testing confirming the presence of numerous LCPFACs in fluorinated containers. Yet EPA failed to act on its own

test data and other information demonstrating clearcut violations of the SNUR even after putting Inhance on notice of its non-compliance and asking it to cease producing a class of substances universally recognized as a serious threat to human health and the environment. From this history, the amended complaint draws the inference (¶106) that "EPA's repeated delays and failures to enforce TSCA after learning of Inhance's violations of the SNUR and Inhance's stated intention to continue fluorination 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 CEH and PEER filed a 60-day notice all demonstrate that EPA has not been and is not now diligently prosecuting its action against Inhance."

The Government does not try to defend EPA's troubling history of inaction in the face of serious health-threatening TSCA violations. Instead, it claims that this history is immaterial because "[u]nder TSCA's diligent prosecution provision, it is the *DOJ's* prosecution of the case that matters, not *EPA's*" (emphasis in original). Am. Br. at 16. However, DOJ is EPA's counsel, not an independent actor, and Congress has assigned responsibility for implementing TSCA to EPA, not DOJ. As in any case where DOJ represents an agency, EPA's interests and objectives are critical to the formulation of DOJ's litigation strategy. *Cf. In re Straight v. Straight*, 143 F.3d 1387, 1391 (10th Cir. 1998) (federal government "should be regarded as one unified entity with different arms through which it carries out [its] affairs"). Indeed, the Government acknowledges that its brief is being filed "at the request of the Administrator of the United States Environmental Protection Agency." Am. Br. at 1. Thus, EPA's past passivity in pursuing Inhance's violations is directly relevant to the degree of urgency with which DOJ will pursue its case on EPA's behalf.

Taking plaintiffs' amended complaint as true, the Court should presume that, having sat on their hands for over two years, DOJ and EPA now have little motivation to prosecute a case that they failed to file until PEER and CEH threatened their own suit. Without evidence to the contrary, this should defeat the Government's claim of diligent prosecution. That the Government is now joining forces with Inhance to seek dismissal of plaintiffs' suit simply confirms that it regards the citizen plaintiffs as an obstacle to its lackadaisical approach to enforcement.

B. Limiting the Diligent Prosecution Analysis to the Eight-Days After the Government Filed its Complaint Would Negate the Goals of Citizens' Enforcement under TSCA

The Government might have sought to counter the evidence of EPA's protracted foot-dragging by presenting the Court with a concrete timeline and action plan for expeditiously seeking injunctive relief against Inhance. However, DOJ chose to deflect any inquiry into the current and future direction of its case by implausibly arguing that "[b]ecause December 27, 2022, is when the Citizen Groups filed suit, the Court should not look beyond this date in conducting its diligent prosecution analysis."[2] Am. Br. at 14. Under this approach, the touchstone for examining the Government's diligence would be the eight-day period following the filing of EPA's complaint on December 19, 2022. But EPA did nothing during these eight days to demonstrate its determination to move its case forward, let alone to implement a strategy to obtain a court order restraining Inhance's TSCA violations. Accordingly, the Government's

[2] The Government erroneously cites *Cal. Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc*., 728 F.3d 868 (9th Cir. 2013), for its assertion that diligent prosecution should be evaluated only for the period before the citizen plaintiff has filed its enforcement action. Am. Br. at 14. In that case, the court found the *absence of diligent prosecution* because previously initiated enforcement actions under state law did not address violations of the federal statute. The decision does not address whether, as in this case, the mere filing of a government enforcement action before a citizens' suit is brought can be equated with "diligent prosecution."

actions between December 19 and December 27, 2022 provide no basis to conclude that, going forward, the Government will diligently prosecute its case to a successful conclusion.

If plaintiffs' amended complaint is dismissed because of the Government's alleged "diligence" in the week after it filed suit, plaintiffs would be left without a judicial remedy in the event that the DOJ suit then languishes indefinitely and is never diligently prosecuted. This enforcement vacuum – in a case about TSCA violations that are endangering public health -- would negate the very rationale for authorizing citizens' suits under TSCA and other environmental laws, which is "to enable affected citizens to push for vigorous law enforcement even when government agencies are more inclined to compromise or go slowly." *Adkins,* 644 F.3d at 499, 501.

Thus, in *Cebollero-Bertran*, the First Circuit found that a previously concluded consent decree did not create a diligent prosecution bar where the government had failed to enforce the decree in the face of evidence it was being violated. 4 F.4th at 74-76. As in this case, the issue was not whether the consent decree provided the tools for enforcement but whether these tools were being used in a diligent manner and, if not, the citizens' suit could provide a remedy against violations of law that the government was failing to pursue. Similarly, in *Friends of Milwaukee's Rivers v. Milwaukee Metro*, 382 F.3d 743, 764 (7th Cir. 2004), the court of appeals found that an earlier settlement between the state and polluter did not comprise "diligent prosecution" barring a later citizens' suit because "we do not feel confident that the 2002 Stipulation will indeed result in elimination of the root causes underlying the large-scale violations alleged by the plaintiffs, regardless of the State's and MMSD's self-serving statements that it is intended to do so." In comments directly relevant to this case, the court emphasized that "it took eight years and a

notice of intent to sue from the plaintiffs before the State took any actions that went beyond investigating and evaluating the violations." *Id.*

Here, should the Government later take concrete actions demonstrating a commitment to diligent prosecution of its case in the Eastern District, Inhance can at that time renew its motion to dismiss plaintiffs' amended complaint. But to dismiss this case now – when the Government has done nothing to advance its case -- would prematurely extinguish what in hindsight may prove the only viable remedy against willful TSCA violations that endanger the health of workers and consumers.[3]

In some previous cases applying the diligent prosecution bar, citizen suits were filed after the agency's enforcement case had resulted in a favorable decision or a settlement imposing obligations on the defendant. E.g., *Karr*, 475 F.3d at 1197 ("Particularly when the EPA chooses to enforce the CWA through a consent decree, failure to defer to its judgment can undermine agency strategy"). In these cases, the issue was whether the relief secured by the agency was sufficient to address the alleged violation, not whether the agency had failed to prosecute its case at all. Here, however, there is simply no litigation track-record that the Court can examine to gauge the Government's diligence because the Government has taken no concrete action to pursue its case. Not surprisingly, the Government falls back on a presumption of diligence to compensate for the lack of direct evidence of diligent prosecution. However, *assuming* diligent

[3] As the Seventh Circuit has pointed out, the diligent prosecution bar "has the potential to ebb and flow depending on whether the government agency is 'diligently prosecuting' an earlier lawsuit . . . [T]he citizen suit could disappear, return, and disappear again, depending on the government agency's changing approach to its own enforcement action." *Adkins*, 644 F.3d at 492.

prosecution when there are no concrete actions *demonstrating* it would write a blank check to the Government and ignore the plain language of the statute.

III. THE MINIMAL ACTIONS THE GOVERNMENT HAS TAKEN SINCE FILING ITS CASE DO NOT DEMONSTRATE DILIGENT PROSECUTION

A. The Filing of An Unredacted Complaint and Waiver of Service Do Not Qualify as Diligent Prosecution

While insisting that its diligence should be judged on the basis of the eight-day period before plaintiffs filed suit, the Government points later actions that it claims demonstrate diligent prosecution. Am. Br. at 14-16. However, these actions do not bear the weight that the Government gives them. For example, after filing a heavily redacted complaint on December 19, 2022, DOJ secured Inhance's consent to substitute an unredacted version and the district court entered it into the public docket on January 13, 2023. ED Pa. ECF 8. Far from showing that the Government was advancing the merits of its case, the belated filing of an unredacted complaint occurred because EPA had failed to perform its statutory obligation to review Inhance's overreaching claims of confidentiality under TSCA in a timely manner and DOJ had no choice but to initially file a complaint lacking in basic transparency.[4] DOJ's belated efforts to satisfy the elementary disclosure obligations of federal court litigants should hardly count as "diligent prosecution."

[4] Virtually all of Inhance's detailed submissions to EPA during 2021-2022 were claimed to be confidential business information (CBI) that EPA was barred from disclosing under section 14 of TSCA. However, section 14(g)(1)(A), 15 U.S.C. § 2613(g)(1)(A), required EPA to review these CBI claims and either uphold or deny them within 90 days. EPA failed to perform this responsibility and, on the eve of filing suit, DOJ was unable to inform the public of the most basic aspects of Inhance's unlawful conduct and its consequences for protection of public health. Despite public docketing of DOJ's unredacted complaint on January 20, 2023, EPA continues to withhold a massive amount of information received from Inhance under claims of confidentiality. On January 5, 2023, plaintiffs filed a request under the Freedom of Information Act for this information but, over two months later, have received no responsive documents.

The same is true of DOJ's December 28, 2022 return to the district court of the waiver of service of its complaint requested by Inhance. This waiver had the effect of delaying Inhance's deadline for responding to the complaint by six weeks. While waivers of service may be authorized by FRCP 4(d) to conserve resources, they hardly reflect prosecutorial zeal in a case that demands immediate judicial action to abate TSCA violations endangering public health.

B. The Government's Claim That It Cannot Seek to Restrain Inhance's TSCA Violations Without Completing Discovery Is a Feeble Excuse for Inaction

Notably, the Government declines to provide even an approximate timeframe for seeking an injunction against Inhance even though this is the only step capable of restraining Inhance's ongoing TSCA violations.[5] Instead, the Government says it must first pursue discovery to determine whether an injunction is warranted. Am. Br. at 14. To date, however, the Government has neither served discovery requests on Inhance nor sought leave from the district court to undertake discovery while Inhance's motion to dismiss is pending.[6] Thus, many months may pass before discovery is completed and the Government is in a position to seek equitable relief. And if Inhance's motion to dismiss EPA's complaint is granted, its case will not move forward at all.[7]

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[5] In seeking dismissal of the Government's case in the Eastern District, Inhance itself has noted that the Government's failure to seek injunctive reflects a lack of urgency in seeking a remedy against its TSCA violations. *See* Memorandum in Support of Inhance Technologies LLC's Motion to Dismiss, February 23, 2023 (ED Pa. ECF 10-1) at 10 ("If there were truly an emergent need for this Court to enter the regulatory thicket before the agency had completed its work, the Government could have sought relief under Rule 65. It did not"). FRCP 65 addresses injunctions and restraining orders.

[6] Inhance has taken the position that discovery should be stayed until and unless the motion is denied. Inhance Technologies LLC's Motion to Dismiss (ED Pa. ECF 10) at 2. The parties have agreed to extend the Government's deadline for opposing the motion to March 22 and Inhance's deadline for filing a reply to April 5. ED Pa. ECF 19.

[7] Inhance's motion to dismiss the EPA case is based on grounds that are not included in its motion to dismiss plaintiffs' case, which is focused primarily on the diligent prosecution bar.

The Government's claimed need for discovery is based on the dubious rationale that "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." Am. Br. at 14. Even assuming that the Government might need this information to obtain injunctive relief, it boggles the mind that EPA would lack the basic facts about the "extent of the health risk" of fluorinated containers after conducting a two-year investigation in which it identified Inhance's fluorination process as a source of PFAS, conducted multiple tests on fluorinated containers to determine the levels of PFAS present, issued a subpoena to Inhance and then a notice of violation, and received several information submissions from the company. In fact, since December 30, 2022, EPA has been reviewing nine detailed SNUNs submitted by Inhance that, in accordance with section 5(d)(1) of TSCA, must contain all known and reasonably ascertainable information about the process of fluorination, worker and consumer exposure to LCPFACs from fluorinated containers and their contents, and releases of PFAS to air and water at the facilities of Inhance and container users. 88 Fed. Reg. 10320 (Feb. 17, 2023) (announcing receipt of Inhance SNUNs and seeking public comment). It is hard to imagine what EPA might learn during discovery that Inhance has not already provided to the Agency in either its previous submissions or the recent SNUNs.

As one of its highest priorities, EPA has hundreds of scientists dedicated to the myriad aspects of PFAS exposure and risk that the Agency is addressing across multiple programs. https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024. Among these experts are the technical staffers in the Office of Pollution Prevention and Toxics (OPPT) who are now reviewing the SNUNs to make the determinations of unreasonable risk called for by section 5(a)(3) of TSCA. Inhance – which has no apparent expertise in toxicology and

epidemiology -- is very unlikely to have meaningful insights into the health impacts of PFOA and other PFAS that augment the considerable expertise of EPA itself.

Following an exhaustive review of its health effects, EPA on March 15, 2023, announced landmark drinking water regulations for the highly toxic PFOA, one of nine LCPFACs found in fluorinated containers. Concluding that "there is no dose below which [the] chemical is considered safe," EPA is proposing to limit PFOA allowable in drinking water to *four parts per trillion,* a level far below the amount formed during fluorination. Pre-Publication Federal Register Notice_PFAS NPDWR_NPRM_Final_3.13.23.pdf (epa.gov), at 6. The Biden Administration states that removing PFOA from drinking water will "prevent thousands of deaths and reduce tens of thousands of serious PFAS-attributable illnesses." FACT SHEET: Biden-Harris Administration Takes New Action to Protect Communities from PFAS Pollution | The White House. These findings, standing alone, provide powerful evidence that fluorination is a serious public health menace, raising further doubt about why the Government could possibly need discovery to support determinations that EPA has already made.

Finally, the principal remedy available to the Government in an enforcement action under section 17(a)(1) of TSCA, 15 U.S.C. § 2616(a)(1), is to "restrain" violations of the law. While the Government apparently assumes that it must satisfy the traditional criteria for equitable relief to obtain this remedy, courts applying similar statutes have issued injunctions against unlawful conduct based on a more limited showing. E.g. *Murry v. American Standard, Inc*., 488 F.2d 529 (5th Cir. 1973) ("'[W]here the statutory rights of employees are involved and an injunction is authorized by statute, the usual prerequisite of irreparable injury need not be established before obtaining an injunction because irreparable injury should be presumed from the very fact that the statute has been violated"); *EEOC v. Cosmair, Inc*., 821 F.2d 1085, 1090

(5th Cir. 1987)("irreparable injury should be presumed from the very fact that the statute has been violated"); *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 867 (7th Cir. 1994) ("[i]t is an accepted equitable principle that a court does not have to balance the equities in a case where the defendant's conduct has been willful"). Thus, even if the Government somehow needed discovery to demonstrate that the PFAS formed during fluorination are harming public health, it could well obtain an injunction against Inhance based solely on evidence that it is willfully violating TSCA. Should this case proceed, plaintiffs intend to move for such an injunction without seeking discovery as soon as possible.

IV. PLAINTIFFS' RIGHT TO INTERVENE IN THE GOVERNMENT'S CASE IS NOT A SUBSTITUTE FOR PURSUING THEIR OWN CASE IN THIS COURT

The Government emphasizes that, if this case is dismissed, plaintiffs would be entitled to intervention as of right in its Eastern District action under section 20(b)(1)(B) of TSCA, 15 U.S.C. § 2619(b)(1)(B). Am. Br. at 19. However, this could place limits on plaintiffs' ability to pursue their claims and make it more difficult to obtain the injunctive relief they are seeking in this case. They may also be unable to block a weak settlement between Inhance and the Government. Thus, whether this case is dismissed should turn on whether the Government has justified invoking the diligent prosecution bar, not whether a less effective remedy might be available to plaintiffs in another forum.

CONCLUSION

Inhance's motion to dismiss should be denied.

Respectfully submitted this 20th day of March 2023.

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