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 DISMISS APPEAL AND SUSPEND BRIEFING SCHEDULE

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Rules

Company Doe respectfully moves to dismiss the appeal filed by Public Citizen, Consumer Federation of America, and Consumers Union (the "Consumer Groups") because, as the District Court concluded in its January 14, 2013 decision (attached as Appendix), the Consumer Groups are not proper intervenors. The sealing order to which they object is "ancillary" and "became moot" when the District Court issued a final judgment on the merits and enjoined publication of the incident report at issue. *Company Doe v. Tenenbaum*, Dkt. No. 11-2958-AW (D. Md. Jan. 14, 2013), Doc. No. 86 at 1; *cf. ACLU v. USCCB*, Nos. 12-1466, 12-1658, 2013 WL 150321, at *5 (1st Cir. Jan. 15, 2013) ("Mootness is a ground which should ordinarily be decided *in advance* of any determination on the merits") (emphasis added). Company Doe further requests that this Court suspend briefing pending resolution of this motion.[1]

INTRODUCTION

The decision to grant or deny permissive intervention is entrusted to the District Court's "sound discretion." *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003) (internal quotation marks omitted). Here, the District Court's decision to deny Consumer Groups' post-judgment motion to intervene was plainly within its discretion. Because the principal defendants in this case—the Consumer

[1] Counsel for the Consumer Groups does not consent to this motion. Company Doe does not seek oral argument on the straightforward issue presented by this motion.

Product Safety Commission ("CPSC") and its chairman—have declined to pursue an appeal of the District Court's final judgment, no extant case or controversy, in which Consumer Groups may properly intervene, survives.

Intervention inherently "presupposes pendency of an action in a court of competent jurisdiction" because it is an "ancillary proceeding in an already instituted suit." *Black v. Cent. Motor Lines*, 500 F.2d 407, 408 (4th Cir. 1974) (internal quotation marks omitted). That is especially true in this unique case, in which Company Doe challenged the accuracy of an incident report that the CPSC sought to post on its consumer-products database, under the Consumer Product Safety Improvement Act ("CPSIA") and the Administrative Procedure Act ("APA"). The proper remedy for the CPSC's violation of those statutes is nondisclosure of the inaccurate incident report. Thus, the District Court correctly concluded that "forcing Plaintiff to reveal its identity and/or the underlying facts of the case to the Consumer Groups (or anyone else) would undermine the very rights and interests Plaintiff filed suit to protect and that were ultimately vindicated." Dkt. No. 11-2958, Doc. No. 86 at 2.

The Consumer Groups do not seek to appeal (nor could they) the underlying judgment. They merely seek to appeal the District Court's decision to seal parts of the record that would identify Company Doe and the underlying incident. But that would in effect amount to a collateral attack on the underlying order, which

prohibits precisely those disclosures. Indeed, this collateral attack would render the District Court's well-reasoned, 73-page opinion a nullity. Because "the merits of the dispute and the issues related to sealing are inextricably intertwined," *id.*, the Consumer Groups cannot intervene for the purpose of challenging the court's sealing order. The District Court did not abuse its discretion in so concluding.

FACTUAL AND PROCEDURAL BACKGROUND

This case began when an "unidentified local government agency" submitted an incident report regarding Company Doe's product to saferproducts.gov, a database created and maintained by the CPSC. *Company Doe v. Tenenbaum*, Dkt. No. 11-2958-AW (D. Md. Oct. 22, 2012), Doc. No. 74, at 3. Company Doe exercised its statutory right to submit to the CPSC a materially inaccurate information ("MII") claim asserting that the report should not be published because it was confusing and misleading. *Id.*

When, after further proceedings, it became clear that the CPSC intended to publish some version of the inaccurate report, Company Doe filed suit in the District Court for the District of Maryland, Greenbelt Division, seeking an injunction to prevent the publication of the challenged report. *Id.* Along with its complaint, Company Doe filed a motion to seal the case and proceed under a pseudonym. *Id.* A local rule mandated that, pending a ruling on the motion to seal, the materials that Company Doe proposed to seal remain sealed. D. Md. Loc.

R. 105(11). The local rule also required that the court not "rule upon the motion until at least fourteen (14) days after it is entered on the public docket to permit the filing of objections by interested parties." *Id.* Although the Consumer Groups were not otherwise involved in the case and do not have a private right of action under the CPSIA to seek access to unpublished saferproducts.gov incident reports, they filed objections to the motion to seal. *Id.* at 9. Their objections "duplicate[d] arguments that the Commission ma[de] in its Opposition to Plaintiff's Motion to Seal." *Id.* at 9-10.

After the complaint was filed, Company Doe and the CPSC engaged in long and robust litigation. The parties briefed a motion for preliminary injunction, a motion to dismiss, and cross-motions for summary judgment, and participated in a formal hearing as well as multiple telephonic hearings. The Consumer Groups did not participate in *any* of these aspects of the case.

On July 31, 2012, the District Court granted summary judgment for Company Doe and permanently enjoined the CPSC from publishing or disseminating the challenged report. Dkt. No. 11-2958-AW, Doc. No. 74, at 66. The court also permitted Company Doe to proceed pseudonymously and partially granted Company Doe's motion to seal certain documents, subject to the court's consideration of further submissions on the proper redaction of the court's opinion and other documents. *Id.* at 1-3. In so doing, the court recognized that the report's

material inaccuracy and the injury to Company Doe if the report were published required such protections, and that failure to provide such protections would "reduce Plaintiff's First Amendment interest in petitioning the Court for redress of its grievances to a Hobson's choice" and "fly in the face of fundamental notions of fairness." Doc. No. 74, at 70.

After the case was closed, Consumer Groups moved to permissively intervene in the case pursuant to Fed. R. Civ. P. 24(b) solely to challenge the Court's ruling on the sealing issue. *See id.*, Doc. No. 86, at 2 (Jan. 14, 2013). Company Doe stated that it did not oppose the post-judgment motion to intervene as long as "a continuing case in controversy in which intervention would be appropriate" remained. *Id.*, Doc. No. 80, at 5. Were the government to decide, as it eventually did, "not to pursue an appeal taken," Company Doe reserved the right to revisit the intervention issue. *Id.*

On September 28, 2012, during the pendency of its intervention motion before the District Court, Consumer Groups noticed this appeal, challenging the District Court's decision on sealing and including "intervention" among the issues appealed. Dkt. No. 12-2209, Doc. No. 15 (Oct. 12, 2012) (docketing statement).

On October 9, 2012, the District Court granted the motion to intervene—conditioned on Company Doe's consent. *See Company Doe v. Tenenbaum*, Dkt. No. 11-2958-AW (D. Md. Oct. 9, 2012), Doc. No. 67, at 7 & Doc. No. 68. As the

court clarified in a later order, its October 9 order was "clearly procedural" and "based on Plaintiff's conditional lack of opposition." *See id.*, Doc. No. 73, at 2 (Oct. 22, 2012). "[F]or good cause shown," Company Doe could "move the Court for reconsideration of its decision granting" the motion to intervene. *Id.*

On December 7, 2012, the government moved this Court to dismiss its appeal of the District Court's judgment—including its challenge to sealing—which this Court immediately granted. *See Company Doe v. Tenenbaum*, Dkt. No. 12-2210 (4th Cir. Dec. 7, 2012), Doc. Nos. 26 & 28. Company Doe then moved the District Court to reconsider its order provisionally granting the Consumer Groups leave to intervene.[2]

On January 14, 2013, the District Court granted Company Doe's motion for reconsideration and vacated its prior order conditionally granting the motion to intervene because "permissive intervention in this case is not substantively proper." Dkt. No. 11-2958, Doc. No. 86, at 2. As an initial matter, the court confirmed that its previous order on the intervention issue had "conditionally grant[ed] the Consumer Groups' Motion to Intervene," *id.* at 2-3, since Plaintiff's non-opposition to the motion to seal was "conditioned . . . on the existence of a continuing case or controversy." *Id.* at 1.

[2] Company Doe moved this Court for a stay in the briefing schedule pending the District Court's resolution of that motion. *See* Dkt. No. 12-2209, Doc. No. 30 (Dec. 10, 2012). The Court denied that motion, but at the time, the District Court had not yet ruled on the motion for reconsideration.

The court then held that the "Consumer Groups' objection to sealing was an ancillary issue that effectively became moot when the court, after extensive analysis, determined that the Commission's action violated the APA." *Id.* at 2. Previously, the court had determined that "forcing Plaintiff to reveal its identity and/or the underlying facts of the case to the Consumer Groups (or anyone else) would undermine the very rights and interests that Plaintiff filed suit to protect and that were ultimately vindicated." *Id.* "In short," the court concluded, "the merits of the dispute and the issues related to sealing are inextricably intertwined," and thus, Consumer Groups' intervention was inappropriate. *Id.*

The court also found that it had jurisdiction to grant Company Doe's motion because its order "acts to aid the Fourth Circuit's resolution of the appeal by making it clear that, in the exercise of its sound discretion, the Court does not believe that this is an appropriate case for permissive intervention." *Id.* at 2-3.

In light of the District Court's decision, Company Doe is promptly filing this motion to dismiss under Loc. R. 27(f), on the basis that the Consumer Groups are not proper parties to the appeal.

STANDARD OF REVIEW

As the Consumer Groups concede, Dkt. No. 12-2209, Doc. No. 37, at 16-17 (Dec. 13, 2012), decisions regarding permissive intervention are committed to the "'sound discretion'" of the District Court. *Pennington*, 352 F.3d at 892 (quoting

Hill v. W. Elec. Co., 672 F.2d 381, 386 (4th Cir. 1982)). Indeed, "'in the absence of an abuse of discretion,'" typically "'no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court.'" *McClelland v. Johnson*, 111 F. App'x 697, 697 (4th Cir. 2004) (per curiam) (quoting *Bhd. of R.R. Trainmen v. B&O R.R.*, 331 U.S. 519, 524 (1947)).

The District Court properly exercised that discretion here. Intervention may be permitted under Fed. R. Civ. P. 24(b) only if three conditions are met: "1) the application is timely; 2) the moving party's claim or defense and the main action have a common question of law or fact; and 3) the proposed intervention will not unduly delay or prejudice the adjudication of the original parties' rights." *Hemphill v. McNeil- PPC, Inc.*, 134 F. Supp. 2d 719, 724 (D. Md. 2001), *aff'd*, 25 F. App'x 915 (Fed. Cir. 2001) (citing *Hill*, 672 F.2d at 386). These factors are not meant to be exhaustive, however; rather, it is "wholly discretionary" whether the District Court should permit a third party to permissively intervene in a given case. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1913 (3d ed. 2007); *see also McHenry v. Comm'r*, 677 F.3d 214, 222 (4th Cir. 2012) ("[r]egardless of what a court concludes in considering these factors, it may still either grant or deny intervention"). Particularly in light of unique considerations here, there is no basis to disturb the conclusion the District Court reached after considering these factors.

ARGUMENT

I. The Consumer Groups Are Not Proper Intervenors and Therefore May Not Pursue this Appeal Unilaterally.

The general rule in this circuit it is that only "original parties" or "intervenors" may "appeal a judgment of the District Court." *Kenny v. Quigg*, 820 F.2d 665, 668 (4th Cir. 1987). Because the Consumer Groups have never been party to the underlying suit and are not proper intervenors, their appeal of the District Court's final judgment must be dismissed.

A. The District Court's Denial of Intervention Was Proper.

1. There Is No Longer An Active Case Or Controversy That Would Permit Consumer Groups To Intervene.

This Court has held that "timeliness is a cardinal consideration of whether to permit intervention" and is "committed to the discretion of the District Court," to be reviewed only for abuse of discretion. *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999) (internal quotation marks omitted). Consumer Groups failed to move to intervene until after judgment was entered in this case, despite the fact that it was perfectly aware of the litigation, which already had stretched on for ten months. The continued existence of a live case or controversy depended on whether the CPSC noticed and pursued an appeal. Because the CPSC has decided not to pursue an appeal, intervention at this late stage is untimely and inappropriate.

"By its very nature[,] intervention presupposes pendency of an action in a court of competent jurisdiction" because it is an "ancillary proceeding in an already instituted suit." *Black*, 500 F.2d at 408; *see also Houston Gen. Ins. Co.*, 193 F.3d at 840 (describing principle stated in *Black* as "well-settled law" and citing authorities). No underlying action is pending; therefore, the motion to intervene is untimely, and no ancillary intervention proceeding may be pursued in the absence of the underlying suit. Rule 24(b) itself envisions that the proposed intervenor's "claim or defense *and the main action*" have a common question of law or fact," *Hill*, 672 F.2d at 386 (emphasis added)—yet here, no main action exists.

Consumer Groups have argued that "the fact that the underlying dispute between the parties has been resolved [does not] render a motion to intervene untimely." Dkt. No. 12-2209, Doc. No. 37, at 18-19 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778-80 (3d Cir. 1994)). However, the Third Circuit case to which they cite was in point of fact distinguishing its decision from the Fourth Circuit's decision in *Black*, and the Third Circuit's earlier decision in *Littlejohn v. Bic Corp.*, 851 F.2d 673, 677 n.7 (3d Cir. 1988), which favorably cites *Black*. Though courts have sometimes allowed post-judgment intervention in other cases, those circumstances have been limited. For example, in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the court permitted post-judgment

intervention to challenge a class certification order, but in that case the intervenor was a member of the class and therefore had an individualized interest in the merits of the case.

By contrast here, Consumer Groups have never claimed that they have standing to appeal the District Court's order on the merits. Consumer Groups should not be permitted to make an end-run around lack of standing on the merits by intervening in a closed case and challenging a sealing order that is necessary to protect the efficacy of the remedy the District Court provided. *See infra* at 12-15. Indeed, without being a party to this case on the merits, Consumer Groups as intervenors would in effect be challenging the merits of the District Court's decision not to allow the dissemination or publication of this materially inaccurate and prejudicial report in any manner. *See id.*

In addition, intervention at this late stage and in the absence of a continuing case or controversy between the parties to the original suit would prejudice Company Doe because it would "require[] substantial additional litigation" that would not otherwise occur now that the government has dismissed its appeal. *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989); *CSX Transp., Inc. v. U.S. Cruises, Inc.*, Nos. 92-1670 & 97-1672, 1993 WL 89813, at *2 (4th Cir. Mar. 30, 1993) (denying a motion to intervene as untimely where "[g]ranting [the] motion would have required additional litigation"); *see also United States v. Blue Chip*

Stamp Co., 272 F. Supp. 432, 436-40 (C.D. Cal. 1967), *aff'd*, 389 U.S. 580 (1968); *Company Doe v. Tenenbaum*, Dkt. No. 11-2958-AW, Doc. No. 74, at 69 (Consumer Groups' arguments are "virtually identical" to those raised by the CPSC). For that reason too, the District Court did not abuse its discretion by denying as untimely the Consumer Groups' permissive intervention.

2. The District Court's Sealing Order Is Necessary to Effectuate the Underlying Judgment, Which the Consumer Groups Concede They Have No Right to Appeal.

Unlike the cases on which Consumer Groups have previously relied to support their motion to intervene, *see infra* at 15-17, the decision to seal is integral to the remedy provided in the District Court's final judgment. Consumer Groups cannot pursue an appeal of the underlying judgment in Company Doe's favor under the APA, and thus they may not appeal the sealing order entered in order to effectuate that final judgment. *Cf. Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) (intervenor lacking Article III standing could not "keep the case alive in the absence of [the original party] on [] appeal").

The District Court's sealing order was "inform[ed]" by its "prior determination that the [challenged] report is materially inaccurate and injurious to Plaintiff's reputation." Dkt. No. 11-2958, Doc. No. 74, at 66. The District Court's sealing order was also based on its factual findings concerning this case, which Consumer Groups cannot collaterally challenge on this appeal, and which are not

clearly erroneous. On the basis of those facts, the District Court concluded that: (1) "[t]he challenged report is materially inaccurate," *id.* at 68; (2) the report is "injurious to Plaintiff's reputation," *id.*; (3) the report "risks harm to Plaintiff's economic interests," *id.*; (4) "the harm the report describes bears no sensible relation" to the product; *id.* at 69; and (5) "the available evidence indicates that [the product] has a solid track record of safety," *id.* In light of these factual findings, the District Court determined that it was appropriate to allow Company Doe to proceed under a pseudonym and redact or seal documents in order to protect Company Doe's identity and the confidentiality of the challenged report. *Id.* at 68-73. These protections were integral to the final judgment entered on the APA issues because they were necessary to prevent "an unreasonably high risk that people could identify Plaintiff and link the challenged report to it," which would defeat the purpose of Company Doe's successful suit. *Id.*, Doc. No. 67, at 6.

The sealing order is also integral to the final judgment because the CPSIA specifically provides that in the event the CPSC cannot correct material inaccuracies in reports submitted to its database, it shall "decline to add the materially inaccurate information to the database." 15 U.S.C. § 2055a(c)(4)(A). Inherently, therefore, the remedy in this case is non-publication and non-dissemination of the challenged report. *See* Dkt. No. 11-2958, Doc. No. 74, at 73. If the sealing order were lifted, it would vitiate the District Court's order enjoining

publication, and Company Doe "would sacrifice the same right it sought to safeguard by filing suit." *Id.* at 68. Of particular note, there is no private right of action for third parties to challenge the nondisclosure remedy the statute provides. Moreover, lifting the sealing order would effectively deny judicial review of the CPSC's publication decisions, since it would suggest that companies cannot prevent publication of a report on the database without publishing it in court filings.

Absent an underlying case or controversy with any defendant, Consumer Groups may not challenge a sealing order premised on factual findings integral to the underlying judgment. The Consumer Groups' position, if countenanced, would lead to absurd results in other contexts: For example, if a company were to bring a reverse-FOIA suit to enjoin an agency's disclosure of information to a FOIA-requester and succeed, it would be manifestly unjust for Rule 24(b) to permit intervention by an unrelated third party who lacked standing to assert a claim or a defense in the reverse-FOIA proceeding but wished to challenge "only" a sealing order protecting the confidentiality of the requested documents in the lawsuit. *Cf. United States v. Ky. Utils. Co.*, 927 F.2d 252, 255 (6th Cir. 1991) (expressing skepticism about the propriety of intervention to seek access to confidential discovery papers if the proposed intervenor's FOIA request for the materials were denied). Where post-judgment intervention "disturbs the final adjudication of the

parties' rights" in this way, intervention is not appropriate. *Bond v. Utreras*, 585 F.3d 1061, 1071 (7th Cir. 2009).

3. The Consumer Groups' Cases Are Inapposite Either Because the Sealing Issue Was Not Vigorously Litigated by the Parties or Was Incidental to the Underlying Judgment.

The cases the Consumer Groups cited to the District Court in support of their intervention motion are inapposite and fail to demonstrate that in this unique case, the District Court abused its discretion by denying the motion to intervene. Critically, in *none* of the cases on which Consumer Groups rely was the sealing order necessary to effectuate the underlying judgment in the case. *Cf. Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 777 (1st Cir. 1988) (permitting intervention where parties sought access to ordinary, non-confidential discovery materials).

In one tranche of cases cited by Consumer Groups, the proposed intervenor had a particularized interest in the documents (despite broadly asserting the public's right to the documents). *See, e.g.*, *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1044 (D.C. Cir. 1998) (intervention permitted for individuals who brought separate claims that were "nearly identical" to underlying action) (internal quotation marks omitted); *Liggett Grp., Inc.*, 858 F.2d at 775-76 (Public Citizen permitted to intervene where representing "a group of public health organizations" seeking research work created by consultants to a cigarette manufacturer); *see also*

Black, 500 F.2d at 408 (citing "unique factual situations" in which parties with particularized interest in suit were permitted to intervene post-judgment.).

In addition, some courts have allowed intervention to assert a public interest in court materials when both parties have consented to a court order sealing the material or maintaining its confidentiality. *See, e.g.*, *Pansy*, 23 F.3d at 775 (newspapers permitted to intervene to challenge order maintaining confidentiality of a settlement agreement; court makes no reference to any party to underlying action challenging confidentiality order); *In re Associated Press*, 162 F.3d 503, 506-07 (7th Cir. 1998) (newspapers could intervene to challenge use of video deposition for governor's trial testimony, to which parties had agreed). These two sets of cases are inapposite to this case, where the Consumer Groups have established no particularized interest in the materials sought, and the parties have already thoroughly and vigorously litigated the sealing issue.

Notably, Consumer Groups have pointed to no similar opinions issued by this Court clearly asserting the propriety of using Rule 24(b) to challenge confidentiality or sealing orders in civil cases. Instead, Consumer Groups have primarily pointed to a criminal case in which the Court summarily granted media groups leave to intervene on appeal (nowhere suggesting that the parties to the criminal case opposed intervention). *See United States v. Moussaoui*, 65 F. App'x 881, 884 (4th Cir. 2003). Alternatively, the Consumer Groups point to cases in

which the court "has decided on the merits [an appeal] in which third parties intervened to seek access to judicial records" but did not consider the merits of the intervention issue in the opinion. *See* Dkt. No. 12-2209, Doc. No. 37, at 18 (citing *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 428 (4th Cir. 2005); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 572 (4th Cir. 2004); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 250 (4th Cir. 1988)). This distinguishable case law provides no relevant guidance in resolving the intervention issue, much less in demonstrating an abuse of discretion by the District Court.[3]

4. The District Court's Decision to Vacate its Conditional Grant of Intervention Was in Aid of the Appeal.

As Consumer Groups themselves explain, "permitting the district court to act [on an intervention motion post-judgment] would be more consistent with this court's pragmatic approach to the powers of a district court during appeal," insofar as "a district court does not lose jurisdiction to proceed as to matters in aid of the

[3] The Consumer Groups have previously argued that regardless of their intervenor status, they may pursue this appeal as a nonparty, because a local rule provides "interested parties" with the ability to file objections with the district court before it rules on a motion to seal. D. Md. Loc. Rule 105(11) (emphasis added). This rule, however, does not purport to provide anyone with appeal rights or to create a new exception to "the general rule that persons who are neither original parties to, nor intervenors in, district court proceedings . . . may not appeal a judgment of the district court." *Kenny*, 820 F.2d at 667. There are only narrow circumstances in which a non-party may pursue an appeal, none of which apply to Consumer Groups.

appeal," and the "grant of intervention . . . reliev[es the appellate court] from considering the substance of an issue it does not need to consider." *See* Dkt. No. 12-2209, Doc. No. 37, at 15-16 (internal citations and quotation marks omitted). Company Doe agrees that the District Court's latest, more definitive ruling on whether Consumer Groups are proper intervenors considerably clarified and narrowed the issues presented on appeal, thereby acting in "aid" of the appeal. *See, e.g.*, *Lytle v. Griffith*, 240 F.3d 404, 408 n.2 (4th Cir. 2001) (district court could issue a post-appeal order clarifying an ambiguous injunction because such clarification aided the appeal). Consumer Groups cannot credibly claim that this Court only has jurisdiction in cases where the District Court *grants* a request for intervention, but not in cases where it denies a post-judgment request for intervention.[4] The District Court's decision "acts to aid the Fourth Circuit's resolution of the appeal by making it clear that, in the exercise of its sound discretion, the [district] [c]ourt does not believe that this is an appropriate case for permissive intervention." Dkt. No. 11-2958, Doc. No. 86, at 3.

CONCLUSION

For the foregoing reasons, Company Doe's motion to dismiss should be granted.

[4] Resolving Consumer Groups' status before unnecessarily delving into the underlying sealing issue also protects Company Doe's rights, as recognized by the District Court, and is in the interest of judicial economy.

Dated: January 25, 2013

Respectfully submitted,

/s/ Baruch A. Fellner

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2013, I electronically filed the foregoing Motion to Dismiss Appeal and Suspend Briefing Pending Resolution of the Motion to Dismiss 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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

COMPANY DOE, Plaintiff, v. INEZ TENENBAUM *et al.*, Defendants.	Civil Action No. 8:11-cv-02958-AW

ORDER

On October 22, 2012, the Court issued an Order approving Plaintiff's request for clarification. Doc. No. 73. Plaintiff had asked the Court to clarify that its decision to grant the Consumer Groups' Motion to Intervene was a procedural ruling based exclusively on Plaintiff's lack of opposition to the Motion to Intervene. As the Court noted in its Order, Plaintiff conditioned its lack of opposition on the existence of a continuing case or controversy. Therefore, the Court stated that Plaintiff could move for reconsideration of its decision granting the Motion to Intervene for good cause shown.

On December 20, 2012, Plaintiff filed an Expedited Motion for Reconsideration of the Court's October 9, 2012 Order Conditionally Granting Consumer Groups' Motion to Intervene (Motion for Reconsideration). Doc. No. 80. Plaintiff notes in its Motion for Reconsideration that the Commission has abandoned its appeal of the Court's Memorandum Opinion granting its Cross-Motion for Summary Judgment and closing the case. Thus, Plaintiff asks the Court to

address whether it is substantively proper to allow the Consumer Groups to Intervene in the dispute between Plaintiff and the Commission.

The Consumer Groups oppose Plaintiff's Motion for Reconsideration. The Consumer Groups argue that the Court lacks jurisdiction to revisit its Order conditionally granting their Motion to Intervene because the appeal has been docketed in the Fourth Circuit. The Consumer Groups also argue that Plaintiff cannot satisfy the standard for reconsideration under Rule 60 of the Federal Rules of Civil Procedure.

For reasons stated at length in its Memorandum Opinions of July 31, 2012 and October 9, 2012, permissive intervention in this case is not substantively proper. The substantive dispute was between Plaintiff and the Commission. The Consumer Groups' objection to sealing was an ancillary issue that effectively became moot when the Court, after extensive analysis, determined that the Commission's action violated the APA. As the Court has discussed at length, forcing Plaintiff to reveal its identity and/or the underlying facts of the case to the Consumer Groups (or anyone else) would undermine the very rights and interests that Plaintiff filed suit to protect and that were ultimately vindicated. In short, the merits of the dispute and the issues related to sealing are inextricably intertwined.

Therefore, the key issue is whether the Court has jurisdiction to reconsider its decision to grant the Consumer Groups' Motion to Intervene. The Consumer Groups concede that, under Fourth Circuit caselaw, district court may issue postappeal decisions that act in aid of the appeal. *See Dixon v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002) (citing *Lytle v. Griffith*, 240 F.3d 404, 408 n.2 (4th Cir. 2001)); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890–91 (4th Cir. 1999); *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991) (citation omitted). Here, a narrow decision vacating the Court's Order conditionally

granting the Consumer Group's Motion to Intervene acts to aid the Fourth Circuit's resolution of the appeal by making it clear that, in the exercise of its sound discretion, the Court does not believe that this is an appropriate case for permissive intervention. *Cf.* Fed. R. Civ. P. 24(b) (stating that courts "may" permit parties to intervene); *Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 385–86 (4th Cir. 1982) (citation omitted) ("a decision on a Rule 24(b) motion lies within the sound discretion of the trial court"). Needless to say, however, it is the Fourth Circuit's purview to decide whether and/or to what extent the Consumer Groups should be able to prosecute their appeal.

On an unrelated note, Plaintiff filed a Sealed Emergency Motion for Provisional Relief over two months ago in which it asked the Court to allow it, in its sole discretion, to reveal facts under seal to protect its reputation if certain events unfolded. Doc. No. 75. However, the emergency situation that Plaintiff contemplated has not materialized. Therefore, the Court denies this Motion without prejudice to refiling.

Accordingly, IT IS this **11th day of January, 2013**, by the U.S. District Court for the District of Maryland, hereby **ORDERED**:

1. That Plaintiff's Motion for Reconsideration is **GRANTED** (Doc. No. 80). Consequently, the Court **VACATES IN PART** its Memorandum Opinion and Order of October 9, 2012 (Doc. Nos. 67–68) and **DENIES** the Consumer Groups' Motion to Intervene (Doc. No. 52);

2. That the Clerk **UNSEAL** the instant Order;

3. That the Court **DENIES**, without prejudice to refiling, Plaintiff's Sealed Emergency Motion for Provisional Relief (Doc. No. 75);

4. That the Clerk **UNSEAL IN PART** the record in strict accordance with Doc. No. 77 and Doc. No. 77-1; the case **SHALL** remain under **SUPER SEAL**;

5. That the Clerk transmit a copy of this Order to all counsel of record, including counsel for the Consumer Groups.

January 11, 2013
Date

/s/
Alexander Williams, Jr.
United States District Judge