

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS)	
ASSOCIATION, <i>et al.</i> ,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	
)	Case No. 5:14-cv-00117-CR
WILLIAM H. SORRELL, in his official capacity))	
as the Attorney General of Vermont, <i>et al.</i> ,)	
)	
<i>Defendants,</i>)	
and)	
)	
VERMONT PUBLIC INTEREST RESEARCH))	
GROUP and CENTER FOR FOOD SAFETY,))	
)	
<u><i>Proposed Intervenor-Defendants.</i></u>)	

VERMONT PUBLIC INTEREST RESEARCH GROUP AND CENTER FOR FOOD SAFETY’S MOTION TO JOIN DEFENDANTS’ MOTION TO DISMISS

The Vermont Public Interest Research Group and the Center for Food Safety (“Movants”) hereby move to join Defendants’ Motion to Dismiss (Doc. 24), adopting the laws and facts set forth therein.

MEMORANDUM OF LAW

Movants filed a Motion to Intervene with this Court on July 21, 2014 (Doc. 18). The Motion was filed 39 days after Plaintiffs filed their Complaint (Doc. 1) and 18 days before Defendants filed their Motion to Dismiss (Doc. 24). The Federal Rules of Civil Procedure require a proposed intervenor to file a “pleading that sets out the claim or defense for which intervention is sought.” Fed. R. Civ. P. 24(c); *Windsor v. United States*, 797 F. Supp. 2d 320, 325-26 (S.D.N.Y. 2011) (noting, but waiving, requirement where movant’s position was clear from other filings and non-prejudicial). Consistent with this Rule, Movants filed a Proposed

Answer (Doc. 18-9) with the Motion to Intervene and requested the right to submit briefing on any Motion to Dismiss, notwithstanding the fact that a Proposed Answer was also filed:

“Though Applicants have filed a Proposed Answer as required by Rule 24(c), we request the right to submit briefing on any Fed. R. Civ. P. 12(b) papers filed by the parties.”¹ Mot. to Int. (Doc. 18) at 2. Additionally, Movants asserted the defense of failure to state a claim in the Proposed Answer. Doc. 18-9 at 18. For these reasons, if the Court allows Movants to participate in this case, the Court should also allow Movants to join Defendants’ Motion to Dismiss.

Allowing Movants to join Defendants’ Motion to Dismiss will not be prejudicial to the parties or result in delay. Movants are not attempting to file a separate motion to dismiss after Defendants’ August 8th deadline for a response to Plaintiffs’ Complaint has passed. Further, Movants will adhere to the briefing schedule for existing parties should the Court grant Movants’ request to participate in this case.

Therefore, in the event that the Court grants Movants’ request to participate in this case, Movants respectfully request that the Court also grant this Motion to Join Defendants’ Motion to Dismiss so that Movants may participate in the motion to dismiss phase of this case, including Reply briefing. This will ensure that Movants can participate in this potentially decisive phase of the case.

¹ The Federal Rules of Civil Procedure state that a motion asserting a Rule 12(b)(6) defense “must be made before pleading if a responsive pleading is allowed.” Fed. R. Civ. P. 12(b). The Second Circuit has not “expressly addressed” whether a party may file a Rule 12(b)(6) motion to dismiss after the close of the pleadings and treats such 12(b)(6) motions as motions for judgment on the pleadings. *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 125-26 (2d Cir. 2001) (noting that, under Fed. R. Civ. P. 12(h), “the defense of failure to state a claim is not waivable”).

DATED: August 28, 2014

Respectfully submitted,

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Counsel for Proposed Intervenor-Defendants

LOCAL RULE 7(A)(7) CERTIFICATE

I hereby certify that Movants made good faith efforts to obtain the parties' agreement to this motion to join. Defendants consent to this motion. Plaintiffs do not consent to this motion.²

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² Plaintiffs were willing to consent upon conditions that were unacceptable to Movants. Plaintiffs would consent if: 1) Proposed Intervenor-Defendants receive intervenor status and 2) Proposed Intervenor-Defendants agree not to file additional papers on the motion to dismiss.

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2014, I electronically filed with the Clerk of Court the following document:

Vermont Public Interest Research Group and Center for Food Safety's Motion to Join Defendants' Motion to Dismiss

using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

For Plaintiffs:

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Catherine E. Stetson

For Defendants:

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And I also caused to be served, by United States Postal Service, the following non-NEF parties:

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DATED: South Royalton, VT, August 28, 2014

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