No. 23-11189

United States Court of Appeals for the Fifth Circuit

James Shepherd, Trustee for the James B. Shepard Trust;
New Millennium Concepts, Limited,

Plaintiffs – Appellants

v.

Michael S. Regan, Administrator;
Environmental Protection Agency;
Christine Tokarz; David Cobb; Carol Kemker; Keriema Newman,

Defendants - Appellees

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

According to 5th CIR. R. 28.2.3, the Court would benefit from oral argument in this case. Counsel for both parties, if given the opportunity to appear before the Court, will be able to answer any questions the Court may have and expand on any reasoning that requires additional clarification.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal because the district court entered a final judgment disposing of all parties and claims, permitting parties to immediately appeal under Fed. R. App. Pro. 4 and 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the District Court err by not accepting the well-pleaded allegations of Appellants in its analysis regarding Plaintiffs/Appellants' standing?
2. Under the Administrative Procedures Act, do the Appellants have statutory standing?
3. Under Article III of the United States Constitution, do the Appellants have constitutional standing to bring suit?

STATEMENT OF THE CASE

I. Factual Background

Plaintiffs/Appellants are the owners of the intellectual property behind Berkey water filters and distributors of Berkey Products. In this case, they seek to stop the Environment Protection Agency from changing its characterization and treatment of Berkey water filters from "pesticide devices" under the treated article exemption under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), to an actual pesticide, similar to DDT and RoundUp.

The EPA's latest attempt at regulatory overreach was aimed at Berkey International, LLC ("Berkey Int'l"), a manufacturer for Appellants. ROA.931-938. In furtherance of this attempt, the EPA explicitly threatened Appellant Jim Shepherd and associated business, Appellant New Millenium Concepts, Ltd. ("NMCL"), which arranges for third-party manufacture and sale of Berkey water filters. ROA.851-868, 875-881, 1397-1407. In response, Appellants sued the EPA seeking to enjoin enforcement of any stop sale and use orders against Berkey International and NMCL dealers. ROA.8, 794. The district court dismissed this action based on a lack of Article III standing. ROA.1718-1726.

A. Berkey is a conglomeration of companies.

The business structure of Berkey is rather complicated. To start, the beneficiaries of the express *inter vivos* trusts, James B. Shepherd Trust and JMDBC Trust, own equitable title to the controlling member position in Berkey International,

LLC and the controlling partnership interest in NMCL, as assets of the trusts. ROA.851-868, 1667-1671. James "Jim" Shepherd is a beneficiary in the trust and acts as its trustee. ROA.851-868.

Berkey International, LLC is a Puerto Rico based manufacturer of Berkey filtration systems. ROA.851-868. Shepherd as trustee licensed Berkey Int'l to manufacture Berkey filtration systems. ROA.851-868. These systems include Black Berkey filters, the subject of the EPA's concerns. ROA.851-868.

Shepherd, as trustee, licensed NMCL to have exclusive marketing rights for Berkey Water Filtration systems and products. ROA.851. NMCL's headquarters are in Arlington, Texas. *Id.* This appeal jointly refers to NMCL and Berkey Int'l as "Berkey." ROA.851-868. The general partner in NMCL is Transglobal Management, LLC, a Texas company; Shepherd and the other beneficiaries are limited partners holding a majority interest. ROA.851-868. NMCL is a longstanding American company that has manufactured Berkey water filters and related products since 1998. ROA.858. During its 25-year existence, the EPA not sought to enforce any FIFRA regulations against Berkey products, until 2022. ROA.858-859.

The signature Berkey product is its Black Berkey Water filter, which employs proprietary, trade-secret technology to ensure superior performance, providing safer and more effective operation than competing household and camping water filters. Berkey distributes its filters through authorized retailers. ROA.1399.

B. The EPA originally accepted Berkey's designation as a producer of pesticide devices exempt from registration.

The initiating action of this litigation occurred around April 28, 2022, when the EPA stopped an inbound NMCL container at customs to conduct an EPA inspection. ROA.806. The next day, NMCL's shipper, Charles Shayer, set up a call for May 3, 2022, with Christine Tokarz, a Region 8 EPA inspector. ROA.806.

During that call, EPA agent Christine Tokarz reviewed the claims made on Berkey systems, which included the pesticidal claims of mechanically removing pathogenic bacteria, cysts and virus. Tokarz assured NMCL that these were "pesticide device" claims, which do not require pesticide registration, and informed NMCL that its manufacturing facilities needed to obtain an EPA establishment number. ROA. 851. This call established that the EPA confirmed that Black Berkey products qualify for the Mechanical removal exemption and therefore, do not need to be registered as a pesticide. ROA. 851. The EPA sent a letter to NMCL, claiming that NMCL's website, www.berkeyfilters.com, "related to the distribution of your company's water filter systems" may be marketing a pesticide device. ROA.875-76.

After the inspection, NMCL's EPA consultant learned that the EPA was considering reinterpreting their rules, because of COVID-19, and that they might clamp down on any claims about removing viruses. ROA.859, 866. However, the EPA was giving no guidance at that time but instead was being very tight-lipped about their potential reinterpretation. ROA.859, 866.

By June 7, 2022, an NMCL consultant notified the EPA that Texado, NMCL's manufacturer and packager for Berkey in Colorado, had obtained an EPA-establishment number required to sell pesticidal devices. The consultant also confirmed that NMCL had validated Berkey's pesticidal claims were valid, and filed a 30-day report regarding requirements to sell pesticidal devices. ROA.851-853.

In response to the NMCL consultant, EPA agent Tokarz stated that adding the EPA establishment number was insufficient, and informed the consultant that there seemed to be quite a few new [Berkey] establishments that are not submitting their Initial 30-day report, rendering them 'delinquent'." ROA.851-853.

In November 2022, the EPA inspected the facilities of James Enterprises, a key dealer in Berkey's supply chain, though it has no common ownership with the Berkey entities. ROA.808, 853-854. The EPA agents requested information on specific Berkey products. ROA.808, 853-854. The products about which the EPA inquired are sold nationwide by retailers and online sources. ROA.861.

C. The EPA changed course and began issuing SSUROs to Berkey businesses, alleging they were selling unregistered pesticides.

Prior to December 27, 2022, Berkey's discussions and correspondence with the EPA were based upon a joint understanding that Black Berkey elements were "pesticide devices" exempt from pesticide registration and were not "pesticides." However, on December 27, 2022, Tokarz issued an EPA Stop Sale, Use or Removal Order (SSURO) to James Enterprises, a Berkey dealer, in Docket Number: FIFRA-

08-2023-0011. ROA.854. This was the first SSURO alleging that Berkey water filter systems were unregistered, misbranded pesticides.

Tokarz explained that her rationale her discovery of a European website that suggested that Black Berkey filters utilized silver to protect the filter itself. No mention was made on the European website that the silver was in any way utilized to treat the water. EPA regulations allow a treated article exemption for articles that are treated with a registered pesticide to protect the article itself. Black Berkey elements utilize a registered silver pesticide to protect the Black Berkey filter itself.

On January 13, 2023, NMCL and James Enterprises met and agreed that rather than argue with the EPA about whether Black Berkey products were a pesticide or pesticide device, Berkey would emphasize that, regardless, Berkey products fall under the "treated article exemption" and remove all testing references and statements that could be construed as claims that the filters could remove waterborne human pathogens. ROA.855. James Enterprises and NMCL thereafter changed their websites to remove all waterborne pathogen removal claims. ROA.855.

On January 27, 2023, NMCL began working with James Enterprises to create new packaging designs consistent with Berkey products' categorization as treated articles, which James Enterprises could submit to the EPA for approval. ROA.855-856. The EPA repeatedly rejected the proposed packaging without providing sufficient guidance on how to avoid future rejections. ROA.855-856.

Between February 3 and May 8, 2023, the EPA issued SSUROs to Vendor B,[1] Fritz Wellness, Eden Family Farms LLC, Mountain Mama Natural Foods, Inc., Good Earth Natural Foods Co. South Dakota, and Berkey Int'l.[2] ROA.856-858. Each order alleged the respective business had violated FIFRA by selling the Black Berkey filter products, which the EPA errantly considered to be unregistered and misbranded pesticides**.**

D. Appellants have been injured by the SSUROs.

Appellants suffer concrete and particular injuries. Due to the SSUROs, Appellants have been injured by the choice of submitting to new regulation which Appellee EPA lacks the authority to enforce *or* risk civil and criminal enforcement. *See Nat'l Ass'n for Gun Rights, Inc. v. Garland*, Civil Action No. 4:23-cv-00830-O, 2023 U.S. Dist. LEXIS 181775, at *51 (N.D. Tex. 2023). The compliance costs of registering or closing down Berkey Int'l's manufacturing plant and NMCL's distributors will force Berkey Int'l, NMCL, and others out of business. ROA.858-862,1398-1400. Appellants have testified that EPA's actions will cause Appellants to be bankrupted by the end of these proceedings. ROA.1399.

Further, Berkey Int'l is unable to manufacture Berkey products which has created a supply shortage for all Berkey-related businesses are due to the EPA's

[1]Vendor B is an OEM manufacturer for NMCL and the identity Berkey considers to be a trade secret.
[2]The SSURO Docket Numbers are FIFRA-04-2023-0700, FIFRA-08-2023-0015, FIFRA-08-2023-0014, FIFRA-08-2023-0017, FIFRA-08-2023-0037, FIFRA-08-2023-0038, respectively.

enforcement actions, which interferes with not just one Berkey-related facility, but has tremendously impacted Berkey's entire supply chain of Berkey vendors, dealers, and customers, causing a worldwide shortage of product. ROA.861. The trusts have suffered legally cognizable injuries because the EPA's actions are depriving beneficiaries of their present vested property interests in Berkey businesses, including complete loss of royalties from Berkey, and the benefits that result.

Appellants' property interest in Black Berkey filters has been invaded, impacting downstream commerce worldwide.

II. Procedural Background

On August 9, 2023, Appellants filed suit against the EPA and EPA administrator. ROA.794-850. In their complaint, Appellants brought a variety of claims under the Administrative Procedures Act ("the APA"), and the Declaratory Judgment Act arguing that the EPA had impermissibly forgone notice and comment rule making, that it had exceeded its statutory authority, and that it was improperly using an interpretive rule as an enforcement tool, despite APA provisions prohibiting such actions. Appellants also brought claims under the United States Constitution via the Declaratory Judgment Act. ROA.794-850.

On August 10, 2023, United States District Court Judge Terry Means assigned the case to Judge Mark Pittman. ROA.628. The following day, Appellants moved for a TRO, which Judge Pittman denied. ROA.629-631. On August 17, 2023, the

EPA responded to the Appellant's application for preliminary injunction. ROA.669-791. On August 24, 2023, Appellant's filed their *First Amended Complaint*. ROA.794-1479. In the meantime, Judge Pittman ordered the parties to brief the preliminary injunction application. ROA.1495-1496. Both sides submitted briefs. ROA.1497-1664. In November 2023, the District Court dismissed Appellants' complaint for lack of standing. ROA.1718-1727. Appellants filed their notice of appeal timely. ROA.1728.

STANDARD OF REVIEW

The Fifth Circuit reviews the grant or denial of a preliminary injunction based on an "abuse of discretion" standard. *Mann v. La. High Sch. Ath. Ass'n*, 535 F. App'x 405, 409 (5th Cir. 2013). During the preliminary injunction analysis, the Fifth Circuit reviews findings of fact for clear error, questions of law de novo, and mixed questions de novo. *Id.*

SUMMARY OF THE ARGUMENT

While Appellants respect the District Court's zealous defense of judicial resources, they contend that the District Court erred in its dismissal for lack of standing. Not only did the District Court's analysis fail to accept all well-pleaded facts as true and construe them in favor of Appellants, but the District Court also erred because the analysis for APA standing meets the requirements of Article III.

Appellants' argument has three parts: First, Appellants allege they have specific, legally cognizable injuries. Second, Appellants' injuries grant them statutory standing under the Administrative Procedures Act. Finally, Appellants have Article III standing.

Appellants have suffered legally cognizable injuries. Specifically, Berkey-related businesses are unable to obtain new Black Berkey filters due to the EPA's enforcement actions or threats thereof, as those actions interfere with not just one Berkey-related facility but have had a tremendous impact on the entire supply chain of Berkey vendors, dealers, and customers, worldwide. Appellants have stated that the compliance costs will put NMCL and Berkey Int'l out of business. Appellants face legal threats from EPA to comply with its new interpretation of FIFRA definitions to avoid prosecution and have created commercial uncertainty among Berkey's sales channels. Such uncertainty and pressure chill constitutional and ownership rights. The JBS trust has suffered legally cognizable injuries to their property because the EPA's actions are depriving the trust of royalties from Berkey Int'l, beneficiaries of their present vested property interests in Berkey businesses and the benefits that result.

A. Appellants have statutory standing.

Appellants have statutory standing because the EPA has determined to operate without following its required hearing and feedback process for rule-making, instead

merely deciding without notice that Appellants' filter elements are a pesticide. This unnoticed regulatory change invaded Appellants' property interests and did not comport with the APA. The same is true of the SSURO burdening Berkey Int'l, in which the beneficiaries have vested property interests.

Appellants also have statutory standing because the EPA exceeded its statutory authority in carrying out enforcement actions against Black Berkey filters. These enforcement actions invaded Appellants' property interests.

Finally, Appellants have statutory standing because the EPA relied on a procedurally improper rule, which cannot be used against Appellants. The EPA's reliance on this rule invaded Appellants' property interests.

B. Appellants have Article III standing.

For similar reasons to why the Appellants have statutory standing, the Appellants also have Article III standing. Appellants suffered real, legally cognizable injuries which are inherently related to the operation of administrative law. Each injury Appellants suffered is a concrete and particularized injury to the Appellants. Each concrete injury is traceable back to the EPA's actions. Each injury would have been redressable had the suit continued. Therefore, Appellants have Article III standing.

ARGUMENT

This Court should reverse the District Court and remand for further proceedings because the Appellants have statutory standing under the APA, as well as Article III standing, because they have suffered cognizable injuries.

I. The District Court erred by rejecting Appellants' well-pleaded allegations.

The District Court's analysis of Appellants' standing did not follow the proper standard for evaluating Appellants' facts on a motion for dismiss.

For purposes of ruling on a motion to dismiss for want of standing, the trial court should generally accept the well-pleaded allegations of the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ([B]oth the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.) The District Court cites this approach. ROA.1719-20. But after citing that standard, the District Court argues with and then rejects Appellants' allegations. For example. the District Court states:

> "Plaintiffs claim that the royalties they receive from licensing the right to sell Berkey water filters to Berkey International, LLC provide them with standing because the diminishing royalties serve as an injury in fact. See ECF No. 14 at 23–24. This connection is too attenuated to the EPA's actions to be considered a "concrete" injury. Plaintiffs are unable to specify and quantify any potential losses of royalties beyond mere conclusory statements that such losses would occur."

ROA.1721. Yet, Appellants stated that the complete loss of royalties are due to the SSUROs. ROA.1397. Additionally, the District Court simply ignores the stated

threats by EPA agents against NMCL and the record of their interactions. ROA.851-868, 875-881, 1397-1407.

Further, in the traceability section of the District Court's analysis, the District Court completely supplants' Appellants' well-pleaded facts for its own judgment. ROA.1723. The Court disregards Appellants' statement that the loss of all manufacturing royalties occurred only *after* the SSUROs, ROA.1397. The District Court instead decided that Appellants' injuries were the result of a class action suit filed two years prior to these events, and arise from a "change in consumer preferences to water filters, change in market conditions generally," over the actual sworn testimony evidence of the effects of the SSUROs on Appellants. ROA.858-862, 1091, 1398-1400, 1723. In fact, the District Court decided that the sworn testimony provided by Appellants which described these injuries as based on the SSUROs was not substantive evidence, rather than taking the well-pleaded facts as true, even deciding to choose between alternative theories, such as a class action that had no discernable impact on Berkey Sales. ROA.858-862, 1091, 1398-1400, 1723.

Again, in the redressability section, the District Court chooses to ignore the pleading standard and Plaintiffs' well-pleaded facts: "there is no guarantee a stay of the EPA's issuances of SSUROs to third parties would increase the royalties that Plaintiffs receive." ROA.1724. The District Court goes on to hypothesize consumers' knowledge as though the Court is an expert on such matters, ignoring

Appellants' sworn testimony, made by those who have been in the water filtration business for decades, and who have intimate knowledge of Berkey's filter sales. The District Court failed its obligation to accept the well-pleaded and reasonable allegation that the loss of all manufacturing royalties from Berkey Int'l to JBS Trust are due to the EPA's SSUROs. ROA.1397.

Further, the District Court sets aside the sworn testimony of the threats by the EPA and the actual interactions between NMCL and the EPA. ROA.851-858, 997-1077, 1725. *See also Garland*, 2023 U.S. Dist. LEXIS 181775, at *51. Also, the District Court misstated the requested relief: "the relief sought is a preliminary injunction enjoining the EPA from issuing such SSUROs." ROA.851-858, 997-1077, 1725. The actual relief sought was "a preliminary injunction preventing enforcement of the EPA's determination that Berkey filters are pesticides and the SSUROs subject of this suit." ROA.835, 847. Appellants have not requested a general injunction to stop the EPA from issuing any further stop orders. ROA.851-868, 875-881, 1397-1407.

Because the District Court's standing analysis did not accept as true all well-pleaded facts and construed them in favor of Appellants throughout the entirety of the analysis, the District Court erred in dismissing the case. *See Warth*, 422 U.S. at 501. At the very least, this Court should remand this case back to the District Court with instructions to adjudicate standing based on the well-pleaded allegations of

Appellants, rather than weighing evidence and rejecting reasonable conclusions in order to arrive at a lack of standing.

II. The Administrative Procedures Act gives statutory standing to Appellants.

A. The Administrative Procedures Act governs agency authority.

The foundation of the administrative state is the Administrative Procedure Act, which outlines the general procedures that most federal agencies must follow. The APA requires agencies to conduct notice and comment rulemaking as they draft and finalize rules before their enforcement. 5 U.S.C. § 553.

Not only does the APA regulate agency conduct, it also provides a private cause of action for interested parties to sue when a final agency action injures them. 5 U.S.C. § 702. *See also,* ROA.829. Under the APA, a court must set aside a final agency action that is arbitrary, capricious, or exceeds statutory authority. 5 U.S.C. § 706(2). Final agency actions under § 704 include orders of the agency, which are anything relating to interested parties that are not rules. Rules that the agency promulgates are also considered final agency actions. *Id.*

B. FIFRA provides subject matter specific authority to the EPA.

The Federal Insecticide, Fungicide, and Rodenticide Act is an act of Congress originating in the early 20th Century and designed to regulate agricultural pesticides. FIFRA requires that all manufacturers of pesticides register those pesticides with the Environmental Protection Agency. 7 U.S.C. § 136a(a). By contrast, manufacturers

of pesticide devices need only register their facilities, not the devices, and manufacturers of treated articles need not register at all. 7 U.S.C. § 135e.

For the EPA to have authority to require product registration under FIFRA, the product in question must be a pesticide. 7 U.S.C. § 136a. FIFRA defines pesticides in Section 136(u) to be chemical products intended to destroy pests. Pursuant to its regulatory authority, the EPA further defined pesticides to exclude animal drugs and feed. 40 C.F.R. § 152.3. Relevant to this case, the EPA promulgated 40 C.F.R. § 152.10 to clarify that products which are not intended to destroy pests are not pesticides.

The legislative history of FIFRA and the regulations that the EPA has promulgated until recent years indicate that FIFRA was designed to regulate chemical compounds, particularly for use in agriculture, not mechanical devices that use nonchemical means to remove pests. For example, in the last major overhaul of FIFRA in 1978, the Senate Committee on Agriculture, Nutrition, and Forestry conducted a bill analysis and published a report on the proposed changes. Staff of S. Comm. on Agric., Nutrition, and Forestry, 95th Cong., *Comm. Rep. on Fed. Pesticide Act of 1978* (Comm. Pr. 1979). In the section on the history of FIFRA contained therein, the Committee noted that Congress passed FIFRA originally to deal with an explosion in the use of chemical agricultural pesticides in the United States. *Id.* at 189–90. Those particular pesticides that Congress wanted to target were

DDT and herbicides. *Id.* at 190. Continued concern over the use of pesticides on agricultural products that ended with human consumption drove further amendments. *Id.* at 190–91. Notably absent from consideration were any physical devices that Congress considered to be "pesticides." *See generally*, *id.* Instead, Congress was concerned with chemical cocktails that could poison humans, animals, and the environment.

Further, the EPA has promulgated regulations to define certain innocuous products that would otherwise be pesticides that are excepted from registration. 40 C.F.R. § 152.25. Some examples include embalming fluids, castor oil, pheromone traps, and peppermint oil. *Id.*

C. Appellants are interested parties with standing under the APA.

Appellants have statutory standing under the APA because the EPA has taken or imminently threatened final agency actions that will affect Appellants.

1. The Appellants are interested parties.

Under the APA, an interested party has standing to bring a claim against an agency concerning that agency's final actions. 5 U.S.C § 702. Courts have broadly defined "interested party" under the APA to include a party whose "property or liberty interests" are invaded by agency action. *Am. Trucking Assos. v. United States*, 627 F.2d 1313, 1319 (D.C. Cir. 1980). This definition extends at least as far as the concept of liberty interests in the Due Process clause, which is broad. *Id.*

At least two distinct property interests are at stake. First, the Appellants have a defined property interest in Black Berkey filters and their ability to sell these filters on the market. Second, the beneficiaries of the trusts have defined property interests in Berkey Int'l as the equitable title holders of the majority interest which is suffering the loss of royalties due to the EPA-caused product shortage. Shepherd as trustee with legal title must bring suit on their behalf in accordance with his duties to defend the estate from claims of third parties and to administer the estate.

The EPA has invaded Appellants' property and liberty interests by:

1) misclassifying Berkey filters from pesticide devices to pesticides, which triggers a legal duty in Appellants to register as well as comply with onerous federal regulations. ROA.875-876.
2) issuing SSUROs to most of NMCL's suppliers and to Berkey Int'l. Because of the SSUROs, Appellants' property interest in Black Berkey filters has been invaded, impacting downstream commerce worldwide. ROA.883-892, 899-938.
3) shutting down Berkey Int'l, which is an asset held in trust. The shut-down of Berkey Int'l invades Appellants' property interests. ROA.931-938.
4) impermissibly using an interpretive rule as an enforcement tool to shut down Appellant NMCL's businesses through extreme compliance costs and SSUROs to Berkey Int'l and others. ROA.931-938.

Therefore, Appellants qualify as interested parties under the APA because the EPA has invaded their liberty and property interests.

2. Appellants have statutory standing under APA because they suffered statutorily recognized legal injuries.

Appellants suffered statutorily recognized injuries due to the EPA's failure to adhere to the basic Due Process requirements in its informal adjudication, exceeding its statutory authority under FIFRA, and impermissibly basing its final agency actions on an interpretive rule that failed to provide adequate notice to Appellants.

i. The EPA failed to hold any hearings and acted arbitrarily and capriciously in issuing its order on Black Berkey filters.

First, the Appellants have statutory standing to bring claims under the APA because they have a legally recognized injury of no hearing in an adjudication as is required for minimum Due Process and the APA for informal adjudication for both the classification order and the SSUROs.

Of course, Appellants have no copy of any EPA decision to classify Black Berkey filters as pesticides. However, the EPA's actions, the references in its SSUROs, and conversations with Appellants were, in part, based on a de facto classification order materially changing the regulatory burden on NMCL and its network of vendors and supply chain. After initial discussions with Berkey companies, the EPA began, seemingly spontaneously, attacking multiple parts of the Berkey supply chain, issuing SSUROs based on this new rule and treatment, adopted

without notice, that Berkey-related companies involved in selling Black Berkey filters are selling unregistered pesticide devices. All the EPA-issued SSUROs, issued as distinct orders are independently based on the same erroneous grounds as the de facto classification order. ROA.856-858.

The decision to classify Black Berkey filters as pesticides is derived from an informal adjudication and qualifies as a final agency action. Final agency actions under § 704 include orders of the agency, which are anything relating to interested parties that are not rules. Here, the decision to classify Black Berkey filters as pesticides impacts Appellants, interested parties as discussed in Argument Section II.C.1, even if no SSURO has been issued directly to them. The EPA did not undergo notice and comment rule making procedures nor did it issue a statement of general applicability to numerous or all interested parties to FIFRA. Therefore, the EPA's decision was an order, which is a final agency action.

The EPA's order resulted from informal adjudication, as opposed to formal adjudication, because there was no public hearing on the record as described in 5 U.S.C. §§ 554, 556, and 557. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (holding that the substantial-evidence standard of review for agency actions did not apply to informal orders). *See also* 40 CFR § 164.131. As a result, the standard for review of the order is arbitrariness and capriciousness based on the record the agency considered while creating the order. *See generally, id.*

However, if an agency cannot describe its basis in the record of available data for the change in its treatment of an issue, reviewing courts view that decision as arbitrary and capricious. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

Additionally, minimum Due Process for informal adjudication requires the agency to hold some form of hearing for the interested parties. *See Am. Trucking Assos.*, 627 F.2d at 1319. Failure to do so is a structural defect with the action that amounts to a Constitutional defect. The EPA failed to hold any kind of hearing on its informal adjudication. Instead, the EPA internally determined that Black Berkey filters qualify as pesticides and proceeded to begin enforcement actions. ROA.856-858. No Berkey organization ever received notice or opportunity to engage in any form of hearing. ROA.851-868, 1397-1479. The complete absence of a hearing is a structural defect that violated Appellants' constitutional right to Due Process.

The deprivation of Due Process has substantially prejudiced Appellants. To make a Due Process claim, as the Appellants have, they are required to show property infringement in addition to their interest in the matter. *Earth Res. Co. v. Fed. Energy Regulatory Com.*, 617 F.2d 775, 777–78 (D.C. Cir. 1980). Appellants made such a showing in their *Original Complaint* and *First Amended Complaint* and do so again here. ROA.794-850.

Prior to 2023, the EPA had never required Berkey to register its water filters or even suggested that it should do so. ROA.851-868, 1397-1479. This radical shift

in EPA actions can only be attributed to an internal decision to treat a specific interested party, Berkey, and its products differently from other, similarly situated peer competitors of Berkey. This decision fundamentally changed Berkey's rights and responsibilities under the law and completely deprived it of its property interest in Black Berkey filters and intellectual property. The EPA's enforcement actions and the new registration and compliance responsibilities prevent Berkey from manufacturing its filters and selling them to affected dealers that have been issued SSUROs. ROA.851-868, 1397-1479. This relates the fundamental property right "stick" of alienability in the property rights bundle of sticks.

As to the beneficiaries of the trusts whom Shepherd represents in this action, the EPA's SSUROs has completely shut down Berkey Int'l and damaged NMCL. Both businesses are assets held in trust, but their value has been severely diminished and threatens their continued economic viability. ROA.851-868, 1397-1479. The EPA's enforcement actions have deprived the beneficiaries of the trusts of the benefit of their equitable title, such as profits from the assets and royalty payments to which the beneficiaries have property rights. ROA.851-868, 1397-1479. Therefore, the deprivation of Due Process has substantially prejudiced Appellants.

Additionally, the EPA's decision to reclassify Black Berkey filters as pesticides is arbitrary and capricious. The EPA has provided no record of data nor explained its reasoning for why it now considers Black Berkey filters as pesticides.

This type of unsupported change mirrors the FCC's arbitrary and capricious order in *Fox TV* where the agency could not explain on a record of data why it suddenly changed order on what words were television appropriate and which were prohibited. *See generally*, *Fox Tv*, 556 U.S. 502. In the same way, the EPA originally viewed Berkey filters as pesticide devices, but suddenly changed position after it discovered foreign websites claiming silver as treating the article itself and then began to adjudicated the filters as pesticides. The EPA's determination that Berkey filters are pesticides is arbitrary and capricious and the EPA is in violation of 5 U.S.C. § 704–706. The EPA's violations have substantially injured Appellants and provide statutory standing for Appellants to bring their suit. Therefore, the District Court erred in dismissing Appellants' claims for lack of standing.

ii. The EPA exceeded its statutory authority under FIFRA to require pesticide registration.

Second, the EPA violated the APA by exceeding its statutory authority in applying FIFRA to mechanical water filters, which do not qualify as pesticides.

As previously described, the decision to reclassify Black Berkey filters as pesticides is an order and, therefore a final agency action subject to review under 5 U.S.C. § 704–06. This final agency action forcing Berkey to register its water filters as pesticides exceeds the bounds of the congressionally granted authority found in FIFRA. Water filters are not chemical compounds used to eliminate pests. *See* Argument Section II.C. Black Berkey filters are mechanical products designed to

mechanically trap waterborne pests to make water more palatable for human consumption. ROA.1397-1432. They do not fall within the scope of FIFRA and, therefore, the EPA may not require registration. The EPA is in violation of 5 U.S.C. § 704–06. The EPA's violations of the scope of FIFRA grant Appellants statutory standing under the APA.

iii. The EPA impermissibly bases its enforcement actions on an interpretive rule.

Third, Appellants have statutory standing because EPA impermissibly uses an interpretive rule to change the rights and duties of interested parties. The EPA claims that Black Berkey filter elements are pesticides under a new interpretive rule, based on a 1975 rule and 1976 and 2022 guidance on that rule. By declaring that mechanical devices containing pesticides not intended for a pesticidal purpose are pesticides and must be registered as such, the EPA stretches an interpretive rule to create new requirements that never existed before. ROA. 683-684. This rule does not give the EPA such authority and is invalid as applied to Black Berkey filters.

To change the rights and duties of interested parties, an agency must promulgate rules by notice and comment rulemaking. 5 U.S.C. § 553. However, Section 553 provides for exceptions to notice and comment rulemaking, for example, interpretive rules. *Id.* The condition on using this exception for notice and comment rule making is that it cannot change the rights and duties of interested parties that would be subject to the rule, and it cannot use mandatory language.

Further, notice for notice and comment rule making must include information for interested parties on how to make comments. 5 U.S.C. § 553(b). The EPA provided no notice in the 1975 rule, or in the 1976 or 2022 guidance published subsequently, that mechanical filters treated with pesticides to protect the filter itself and are not intended to destroy pests are now pesticides, themselves. There was no federal register notice that contained language describing how to make public comments regarding this new rule. This points to the fact that this was an interpretive rule and not a notice and comment rule, and thus not binding on Appellants as parties potentially subject to the rule.

Further, even if this was a notice and comment rule, the notice failed because it did not give any water filter element manufacturers adequate notice that they would be subject to the rule. The EPA provided no notice in the 1975 rule or 1976 or 2022 guidance that mechanical filters that include a pesticide to protect the filter elements themselves (and not as a pesticide to impact effluent water) are now considered pesticides. ROA.683-684. Rather, the 1976 document specifically states just the opposite: "Thus, if an article uses physical or mechanical means to trap, destroy, repeal, or mitigate any pest or animal life . . . it is considered to be a device." ROA.1306.

Even though the EPA provides some caveat that the description was not intended to be exhaustive, no rational manufacturer of a passive water filter element

would place itself in the same category as pesticide manufacturers based on EPA literature publicly available in 1950, 1975, 1976, or any time until 2023. ROA.1302-1308. Thus, the EPA's new rule cannot pass notice-and-comment muster and must be a policy rule, or be totally invalid. 5 U.S.C. § 706(2). And because the notice was insufficient, the EPA cannot use the rule, regardless of its status as interpretive or notice and comment, to require Appellants to register their filter elements as pesticides. Thus, Appellants have statutory standing under the APA to bring suit.

III. The Appellants have standing under Article III.

Incorporating the above argument and statements regarding Appellants' statutory standing, the same analysis that satisfies the APA's standing requirements also satisfies Article III standing. Appellants have Article III standing because: 1) Appellants have suffered injuries in fact; 2) those injuries are traceable to the challenged conduct of the Appellees; and 3) the injury is likely to be redressed by a favorable judicial decision. Further, the EPA's actions have caused irreparable injury to Appellants to satisfy the injury-in-fact requirement of Article III standing.

A. Article III of the United States Constitution and accompanying common law provide the standard for general standing.

Article III standing is designed to be a constitutional limit on judicial authority to prevent courts from issuing advisory opinions. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980). The Case-or-Controversy provision of Article III requires that plaintiffs have standing to sue, such that the court's adjudication is

not advisory. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997). Because standing is jurisdictional, parties cannot waive the standing requirement. *See Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). The Supreme Court insists upon strict compliance with the standing requirement. *See id.* at 811.

To satisfy the Article III standing requirement, "[the] plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). At the pleading stage, the plaintiffs' general factual allegations are sufficient to establish their standing. *See Stallworth v. Bryant*, 936 F.3d 224, 230 (5th Cir. 2019).

To demonstrate an injury in fact, plaintiffs must show "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo. Inc.*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). An injury is "particularized" when it "affect[s] the plaintiff in a personal and individual way." *Id*. A "concrete" injury must "actually exist… [be] real, and not abstract." *Id.* at 340. (cleaned up). Further, the injury must be traceable to the defendant's actions. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021). "Any finding of injury-in-fact due to compliance costs would also support a finding of irreparable harm, and vice versa." *See Texas v. BATFE*, Civil Action No.

6:23-CV-00013, 2023 U.S. Dist. LEXIS 193593, at *23 n.8 (S.D. Tex. 2023). Finally, the plaintiff must show that the court can redress the injury.

B. Appellants satisfy Article III standing as to each of their claims.

Appellants raised three claims under the APA, and sought a declaratory judgment regarding the EPA's enforcement of its new rule. Additionally, Appellants made claims regarding constitutional infringements by the EPA. The District Court dismissed these claims, opining that: 1) Appellants have not been harmed by the financial losses resulting from stop sale orders issued to their vendors and suppliers; and, 2) Appellants have not directly received a stop sale order from the EPA.

Appellants have shown above that they have suffered an injury in fact though the EPA's ongoing threat of unlawful enforcement action, litigation from the EPA and compliance demands made by EPA agents regarding regulation compliance through Appellants of their worldwide network of manufacturers and dealers. ROA.851-868, 879, 1397-1479.

i. EPA's threat of prosecution satisfies injury-in-fact of Article III.

Yet "Plaintiffs need not wait for Defendants to bring an actual prosecution to vindicate their rights." *See Garland*, 2023 U.S. Dist. LEXIS 181775, at *51. As *Garland* unequivocally shows, a credible threat of civil or criminal prosecution from an agency constitutes more than a de minimis harm justifying the need for equitable protection until a full decision on the merits is rendered. *Id*. The court also concluded

that threats that lead an individual to comply often lack compensation after the fact for the deprived use and enjoyment of the surrendered regulated property (assuming the property is even returned). *Id.* Further, empty guarantees by agencies to not seize property in the immediate future provide little, if any, reassurance. *Id.* Irreparable injury is found "where the loss threatens the very existence of the movant's business" *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)).

Here, the EPA has been primarily using NMCL to communicate its new regulations to all related companies and repeatedly threatened NMCL. ROA.851-858, 879, 997-1077, 1725. The EPA's threats toward NMCL and Berkey products are credible and represent more than a de minimis harm justifying the need for equitable protection. ROA.851-858, 997-1077, 1725. *See Garland*, 2023 U.S. Dist. LEXIS 181775, at *51; *See BATFE*, 2023 U.S. Dist. LEXIS 193593, at *23 n.8.

The EPA has given no instruction or assurance that NMCL can escape prosecution in the future by taking any action other than registration as a pesticide. Further, Appellants have testified that the cost of compliance will put NMCL and Berkey Int'l out of business, which will frustrate the trust property for the beneficiaries, to say the least. ROA.851-868, 1397-1479. The threated prosecution, compliance costs, and the threatened existence of Appellant's business is more than enough injury-in-fact to satisfy Article III standing. ROA.851-868, 879, 1397-1479.

ii. Costs not recoverable by Defendants that enjoy qualified immunity satisfies injury-in-fact for Article III.

Though Appellants are suffering monetary damages, and the EPA generally enjoys sovereign immunity from monetary damages, case law recognizes that Appellants can claim irreparable harm, and Appellants have an injury-in-fact supporting standing under Article III. *Garland*, 2023 U.S. Dist. LEXIS 181775, at *51; see *BATFE*, 2023 U.S. Dist. LEXIS 193593, at *23 n.8.

iii. Allegations by Plaintiffs that government exceeds its statutory authority and violated APA satisfies irreparable harm.

Allegations of an agency exceeding its authority given by Congress and alleged violations of the APA, which did not allow sufficient time for public comments, also satisfies the necessary requirements for irreparable injury. *See Garland*, 2023 U.S. Dist. LEXIS 181775, at *51. (citing *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 617 F. Supp. 3d 478, 500 (W.D. La. 2022)).

In this case, Appellants have alleged that the EPA exceeded its statutory authority and violated the APA in multiple ways, most notably by changing its approach to mechanical filter regulations and designating them as pesticides based on the application of a registered pesticide. ROA.794-848, 851-858, 997-1077, 1725.

The District Court should have accepted these allegations as true, and recognized irreparable harm in Appellants' pleadings. Because a finding of irreparable harm should have been recognized, the District Court should have also

found an injury-in-fact under Article III. *See BATFE,* 2023 U.S. Dist. LEXIS 193593, at *23 n.8.

CONCLUSION STATING RELIEF SOUGHT

This Court should reverse the District Court's dismissal of Appellants' claims because Appellants' claims satisfy the statutory requirements of the Administrative Procedures Act and standing requirements of Article III of the United States Constitution, and remand the case as appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE REQUIRED BY FED. R. APP. P 25(D)

I certify that on January 17, 2024, the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure on all registered counsel of record, and has been transmitted to the Clerk of the Court, including:

Andrew Coghlan (CA Bar. No. 313332), andrew.coghlan@usdoj.gov
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/s/ Warren V. Norred
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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(G)(1) AND 5TH CIR. R. 32.3. (SEE FED. R. APP. P. 28(A)(10))

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7), which limits a principal brief because, excluding the parts of the document exempted by Fed. R. App. P. 32(f); this document contains 6774 words and does not exceed 30 pages.

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportional-spaced typeface using Microsoft Word with a 14-point Times New Roman font.

/s/ Warren V. Norred
Warren V. Norred

No. 23-11189

United States Court of Appeals for the Fifth Circuit

James Shepherd, Trustee for the James B. Shepard Trust;
New Millennium Concepts, Limited,

Plaintiffs – Appellants

v.

Michael S. Regan, Administrator;
Environmental Protection Agency;
Christine Tokarz; David Cobb; Carol Kemker; Keriema Newman,

Defendants - Appellees

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

RECORD EXCERPT

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/s/ Warren V. Norred
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1. Docket Sheet for Original Court

APPEAL,CLOSED,JURY

U.S. District Court
Northern District of Texas (Fort Worth)
CIVIL DOCKET FOR CASE #: 4:23-cv-00826-P

Shepherd et al v. Regan et al
Assigned to: Judge Mark Pittman
Demand: $9,999,000
Case in other court: United States Court of Appeals 5th Circuit, 23-11189
Cause: 05:702 Administrative Procedure Act

Date Filed: 08/08/2023
Date Terminated: 11/17/2023
Jury Demand: Plaintiff
Nature of Suit: 899 Other Statutes: Administrative Procedure Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

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Date Filed	#	Docket Text
08/09/2023	1 (p.8)	COMPLAINT WITH JURY DEMAND against All Defendants filed by New Millennium Concepts, Ltd., James Shepherd. (Filing fee $402; Receipt number ATXNDC-13941974) Clerk to issue summons(es) for federal defendant(s). In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements and Judge Specific Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 (p.8) Declaration(s) Shepherd, # 2 (p.614) Declaration(s) Spaar, # 3 (p.616) Exhibit(s) Relevant Law, # 4 (p.628) COIP, # 5 Cover Sheet) (Norred, Warren) (Entered: 08/09/2023)
08/09/2023	2 (p.614)	New Case Notes: A filing fee has been paid. File to: Judge Means. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. (wxc) (Entered: 08/09/2023)
08/09/2023	3 (p.616)	***DISREGARD-SUMMONS HAS BEEN RE-ISSUED*** Summons Issued as to All Defendants. (wxc) Modified on 8/11/2023 (wxc). (Entered: 08/09/2023)
08/09/2023	4 (p.628)	NOTICE OF RECUSAL: The undersigned judge, having assumed senior status, desires to have this case re-assigned to an active-status judge. Case is assigned to the docket of Judge Mark Pittman. Future filings should indicate the case number as: 4:23-cv-826-Y. Senior Judge Terry R Means no longer assigned to case. (Ordered by Senior Judge Terry R Means on 8/9/2023) (bdb) (Entered: 08/09/2023)
08/09/2023		CERTIFICATE OF INTERESTED PERSONS by New Millennium Concepts, Ltd., James Shepherd. (Clerk QC note: Affiliate entry indicated). (See doc 1 (p.8) for image) (bdb) (Entered: 08/10/2023)
08/09/2023	5	MOTION for Temporary Restraining Order filed by New Millennium Concepts, Ltd., James Shepherd. (See doc 1 (p.8) for image) (bdb) (Entered: 08/10/2023)
08/10/2023	6 (p.629)	ORDER: Plaintiffs' request for a TRO is DENIED. The Court, however, finds that expedited briefing on the preliminary injunction sought by Plaintiffs is warranted. As such, it is ORDERED that Defendants shall file their response to Plaintiff's motion for a preliminary injunction on or before August 17, 2023. It is further ORDERED that Plaintiffs shall file their reply on or before August 24, 2023. (Ordered by Judge Mark Pittman on 8/10/2023) (bdb) (Main Document 6 replaced on 8/11/2023) (bdb). (Main Document 6 replaced on 8/11/2023) (bdb). (Entered: 08/10/2023)
08/11/2023	7 (p.632)	Summons issued as to All Defendants, U.S. Attorney, and U.S. Attorney General. (wxc) (Entered: 08/11/2023)
08/11/2023	8 (p.668)	CERTIFICATE OF SERVICE by New Millennium Concepts, Ltd., James Shepherd (Norred, Warren) (Entered: 08/11/2023)
08/17/2023	9 (p.669)	RESPONSE filed by Environmental Protection Agency, Michael S Regan re: 5 MOTION for Temporary Restraining Order (Howard, Shari) (Entered: 08/17/2023)

08/17/2023	10 (p.672)	Brief/Memorandum in Support filed by Environmental Protection Agency, Michael S Regan re 9 (p.669) Response/Objection *in Support of Opposition to Motion for Preliminary Injunction* (Howard, Shari) (Entered: 08/17/2023)
08/17/2023	11 (p.710)	Appendix in Support filed by Environmental Protection Agency, Michael S Regan re 9 (p.669) Response/Objection *in Support of Opposition to Motion for Preliminary Injunction* (Howard, Shari) (Entered: 08/17/2023)
08/18/2023	12 (p.792)	NOTICE of Attorney Appearance by Shari Howard on behalf of Environmental Protection Agency, Michael S Regan. (Filer confirms contact info in ECF is current.) (Howard, Shari) (Entered: 08/18/2023)
08/24/2023	13	(Document Restricted) PLAINTIFFS MOTION TO FILE AND PRESERVE IN PERPETUITY UNDER SEAL DOCUMENT CONTAINING TRADE SECRET INFORMATION (Sealed pursuant to motion to seal) filed by New Millennium Concepts, Ltd. (Attachments: # 1 (p.8) Declaration(s) TO BE SEALED) (Norred, Warren) (Entered: 08/24/2023)
08/24/2023	14 (p.794)	AMENDED COMPLAINT WITH JURY DEMAND against All Defendants filed by James B. Shepherd Trust. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 (p.8) Declaration(s) Jim Shepherd, # 2 (p.614) Declaration(s) Susan Spaar, # 3 (p.616) Relevant Law (Amended), # 4 (p.628) Second Shepherd Declaration) (Norred, Warren) (Entered: 08/24/2023)
08/24/2023	15 (p.1480)	REPLY filed by New Millennium Concepts, Ltd. re: 5 MOTION for Temporary Restraining Order (Norred, Warren) (Entered: 08/24/2023)
08/28/2023	16 (p.1495)	ORDER: Because the First Amended Complaint does not refer to or incorporate prior pleadings and attempts to rectify issues identified in the First Motion for Preliminary Injunction, the First Motion for a Preliminary Injunction (ECF No. 1 (p.8)) is DENIED as moot. The Court thus takes up the Amended Preliminary Injunction (ECF No. 14 (p.794)) and ORDERS the following expedited briefing schedule: Defendants' Response: on or before August 31, 2023. Plaintiffs' Reply: on or before September 5, 2023. It is further ORDERED that the preliminary-injunction hearing scheduled for August 30, 2023, is hereby CANCELED. If needed, a new date for the hearing will be set by the Court after the motion is ripe. (Ordered by Judge Mark Pittman on 8/28/2023) (sre) (Entered: 08/28/2023)
08/31/2023	17 (p.1497)	RESPONSE filed by David Cobb, Environmental Protection Agency, Carol Kemker, Keriema Newman, Michael S Regan, Christine Tokarz re: 5 MOTION for Temporary Restraining Order (Walters, Mark) (Entered: 08/31/2023)
08/31/2023	18 (p.1500)	Brief/Memorandum in Support filed by David Cobb, Environmental Protection Agency, Carol Kemker, Keriema Newman, Michael S Regan, Christine Tokarz re 17 (p.1497) Response/Objection *to Plaintiffs' Amended Motion for Preliminary Injunction* (Walters, Mark) (Entered: 08/31/2023)
08/31/2023	19 (p.1538)	Appendix in Support filed by David Cobb, Environmental Protection Agency, Carol Kemker, Keriema Newman, Michael S Regan, Christine Tokarz re 18 (p.1500) Brief/Memorandum in Support of Motion, 17 (p.1497) Response/Objection *to Plaintiffs' Amended Motion for Preliminary Injunction* (Walters, Mark) (Entered: 08/31/2023)

09/05/2023	20 (p.1603)	REPLY filed by James B. Shepherd Trust, New Millennium Concepts, Ltd., James Shepherd re: 5 MOTION for Temporary Restraining Order (Attachments: # 1 (p.8) Affidavit(s)) (Norred, Warren) (Entered: 09/05/2023)
09/07/2023	21 (p.1659)	OBJECTION filed by David Cobb, Environmental Protection Agency, Carol Kemker, Keriema Newman, Michael S Regan, Christine Tokarz re: 20 (p.1603) Reply (Howard, Shari) (Entered: 09/07/2023)
09/12/2023	22 (p.1665)	ORDER: The Court ORDERS Plaintiffs to provide supplemental briefing of no more than five pages addressing their legal and/or commercial connection to Berkey International and explaining why Plaintiffs bring this action, rather than Berkey International, on or before September 15, 2023. Thereafter, Defendants may submit up to three pages of reply briefing addressing the same points on or before September 20, 2023. (Ordered by Judge Mark Pittman on 9/12/2023) (mmw) (Entered: 09/12/2023)
09/15/2023	23 (p.1667)	Supplemental Document by James Shepherd as to 22 (p.1665) Order Setting Deadline/Hearing, . (Norred, Warren) (Entered: 09/15/2023)
09/15/2023	24 (p.1672)	REPLY filed by James Shepherd re: 21 (p.1659) Response/Objection (Norred, Warren) (Entered: 09/15/2023)
09/20/2023	25 (p.1676)	REPLY filed by David Cobb, Environmental Protection Agency, Carol Kemker, Keriema Newman, Michael S Regan re: 23 (p.1667) Supplemental Document (Howard, Shari) (Entered: 09/20/2023)
09/20/2023	26 (p.1682)	Appendix in Support filed by David Cobb, Environmental Protection Agency, Carol Kemker, Keriema Newman, Michael S Regan re 25 (p.1676) Reply *to Plaintiffs' Supplemental Brief* (Howard, Shari) (Entered: 09/20/2023)
09/26/2023	27	(Document Restricted) Sealed ORDER granting sealed motion 13 . The Court GRANTS the Motion. Accordingly, the documents attached as Exhibit A to Plaintiff's Motion shall be considered filed under seal as of September 26, 2023, and are part of the Court's record for purposes of Plaintiff's First Amended Complaint and Reply in support of Application for Preliminary Injunction. (Ordered by Judge Mark Pittman on 9/26/2023) (tjc) (Entered: 09/26/2023)
09/26/2023	28 (p.1707)	MOTION for Leave to File Sur-Reply filed by James Shepherd with Brief/Memorandum in Support. (Attachments: # 1 (p.8) Proposed Order, # 2 (p.614) Proposed Sur-Reply) (Norred, Warren) (Entered: 09/26/2023)
10/03/2023	29 (p.1714)	ORDER denying 28 (p.1707) Motion for Leave to File. Having considered the Motion and the current status of the case, the Court finds that the Motion should be and hereby is DENIED. (Ordered by Judge Mark Pittman on 10/3/2023) (tjc) (Entered: 10/03/2023)
10/25/2023	30 (p.1715)	ORDER: The Court ORDERS the Parties to file written objections to the Court advancing Plaintiffs' Amended Motion for Preliminary Injunction to a determination on the merits on or before November 6, 2023. (Ordered by Judge Mark Pittman on 10/25/2023) (sre) (Entered: 10/25/2023)
11/06/2023	31 (p.1716)	RESPONSE filed by New Millennium Concepts, Ltd. re: 30 (p.1715) Order Setting Deadline/Hearing, (Norred, Warren) (Entered: 11/06/2023)
11/17/2023	32 (p.1718)	MEMORANDUM OPINION & ORDER: This case must be DISMISSED for want of subject matter jurisdiction. (Ordered by Judge Mark Pittman on 11/17/2023) (bdb)

		(Entered: 11/17/2023)
11/17/2023	33 (p.1727)	FINAL JUDGMENT: This final judgment is issued pursuant to Federal Rule of Civil Procedure 58(a). In accordance with the Court's Order on this same day, this case is DISMISSED. (Ordered by Judge Mark Pittman on 11/17/2023) (bdb) (Entered: 11/17/2023)
11/20/2023	34 (p.1728)	NOTICE OF APPEAL as to 33 (p.1727) Judgment, 32 (p.1718) Memorandum Opinion and Order to the Fifth Circuit by James B. Shepherd Trust, James Shepherd. Filing fee $505, receipt number ATXNDC-14188171. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Norred, Warren) (Entered: 11/20/2023)
12/01/2023	35 (p.1729)	USCA Case Number 23-11189 in United States Court of Appeals 5th Circuit for 34 (p.1728) Notice of Appeal, filed by James B. Shepherd Trust, James Shepherd. (tle) (Entered: 12/01/2023)

2. Notice of Appeal

Selected docket entries for case 23−11189

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Filed	Document Description	Page	Docket Text
11/27/2023	1 NOA	2	US CIVIL CASE docketed. NOA filed by Appellants New Millennium Concepts, Limited and Mr. James Shepherd [23−11189] (AS)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS - FORT WORTH DIVISION

JAMES SHEPHERD,	§	
Trustee for the James B. Shepherd Trust, and	§	
NEW MILLENNIUM CONCEPTS, LTD.,	§	**CIVIL CAUSE NO.**
Plaintiffs,	§	**4:23-cv-826**
	§	
v.	§	
	§	
ENVIRONMENTAL PROTECTION AGENCY,	§	
MICHAEL S. REGAN, Administrator, CHRISTINE	§	
TOKARZ, DAVID COBB, CAROL KEMKER, and	§	
KERIEMA NEWMAN, in their personal capacities	§	
Defendants.	§	

PLAINTIFFS' NOTICE OF APPEAL

COMES NOW Plaintiffs James Shepherd and New Millennium Concepts, Ltd., pursuant to Fed. R. App. P. 3, file notice of intent to appeal this Court's Final Judgment (ECF No. 33) as described in the Court's Memorandum Opinion and Order (ECF No. 32) in the instant case. This appeal is taken by Plaintiffs to the 5th Circuit Court of Appeals in New Orleans, Louisiana.

Respectfully submitted,

/s/ *Warren V. Norred*
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CERTIFICATE OF SERVICE

I certify that on November 20, 2023, I electronically filed this notice with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Andrew Coghlan, Shari Howard, and Mark Walters, counsel for defendants, via email to andrew.coghlan@usdoj.gov, shari.howard@usdoj.gov, and mark.walters@usdoj.gov, respectively.

/s/Warren V. Norred
Warren V. Norred

3. Judgment Dismissing Case

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JAMES SHEPHERD, ET AL.,

Plaintiffs,

v. **No. 4:23-cv-00826-P**

MICHAEL S. REGAN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Defendants.

FINAL JUDGMENT

This final judgment is issued pursuant to Federal Rule of Civil Procedure 58(a). In accordance with the Court's Order on this same day (ECF No. 32), this case is **DISMISSED**. The Clerk of the Court shall transmit a true copy of this judgment to the parties.

SO ORDERED on this **17th day of November 2023.**

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

4. Memorandum of Judge Pittman

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JAMES SHEPHERD, ET AL.,

Plaintiffs,

v. **No. 4:23-cv-00826-P**

MICHAEL S. REGAN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Defendants.

MEMORANDUM OPINION & ORDER

Before the Court is Plaintiffs' amended request for a Preliminary Injunction filed August 24, 2023. ECF No. 14. On October 25, 2023, this Court issued an Order advancing Plaintiffs' Amended Motion for Preliminary Injunction to a determination on the merits. ECF No. 30. However, due to Plaintiffs' lack of standing to bring this case, the Court must **DISMISS** Plaintiffs' claims.

BACKGROUND

This case centers around the Environmental Protection Agency's ("EPA") issuance of a Stop, Sale, Use, or Removal Order ("SSURO") to manufacturers and sellers of Berkey water filtration products.

In 2022, the EPA became aware that Berkey water filtration systems contain silver for antimicrobial purposes. The EPA has regulated silver in microbial pesticide products since 1954. After investigating, the EPA determined Berkey water filtration systems are not registered as required by the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"). Between December 2022 and March 2023, the EPA issued SSUROs to certain third-party distributors and manufactures of Berkey filtration products. These SSUROs required each recipient to stop the sale, use, and distribution of the offending products, and to provide the EPA with an update on compliance with the SSURO every thirty days until the offender no longer had FIFRA-violating products.

In August 2023, Plaintiffs James Shepherd, on behalf of the James B. Shepherd Trust, and New Millennium Concepts, LTD ("NMCL") filed this suit against the EPA. In their lawsuit, Plaintiffs requested a temporary restraining order ("TRO"), along with preliminary and permanent injunctions estopping the EPA from issuing SSUROs pertaining to the Berkey filtration systems. But neither Shepherd nor NMCL ever received an SSURO from the EPA. On August 10, this Court denied Plaintiffs' TRO request and set an expedited briefing schedule for Plaintiffs' preliminary injunction. On October 25, the Court issued an order advancing the request for a preliminary injunction to a determination on the merits under Federal Rule of Civil Procedure 65. However, before the Court can reach the merits of the case, it must first address standing under Federal Rule of Civil Procedure 12(b)(1).

LEGAL STANDARD

A Rule 12(b)(1) motion "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006). A court must dismiss the action if it determines that it lacks jurisdiction over the subject matter. FED. R. CIV. P. 12(h)(3); *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). A dismissal under Rule 12(b)(1) "is not a determination of the merits," and it "does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." *Id.* Accordingly, considering Rule 12(b)(1) motions first "prevents a court without jurisdiction from prematurely dismissing a case with prejudice." *Id.*

A district court may dismiss for lack of subject matter jurisdiction based on (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). A motion to dismiss based on the complaint alone presents a "facial attack" that

requires the court to decide whether the complaint's allegations, which are presumed to be true, sufficiently state a basis for subject matter jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1998). If sufficient, those allegations alone provide jurisdiction. *Id.*

ANALYSIS

A. Plaintiffs Have No Article III Standing

Defendants argue in their Response in Opposition to Plaintiffs' First Motion for Preliminary Injunction that Plaintiffs lack Article III standing. *See* ECF No. 10 at 21. While Defendants' subsequent briefing assumes arguendo that Plaintiffs "may" have Article III standing, Defendants reserved the right to address Article III standing at a later stage. ECF No. 18 at 21. The Court is duty-bound to address standing at this juncture. *See Filer v. Donley,* 690 F.3d 643, 646 (5th Cir. 2012) (It is the duty of a federal court to first decide, *sua sponte* if necessary, whether it has jurisdiction before the merits of the case can be addressed).

"Article III of the Constitution limits federal 'Judicial Power,' that is, federal-court jurisdiction, to 'Cases' and 'Controversies.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980). "One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Similar to other jurisdictional requirements, this standing requirement cannot be waived. *See Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). The Supreme Court insists upon strict compliance with the standing requirement. *See Raines*, 521 U.S. at 811. "Even when standing is not raised by the parties, the Court must, where necessary, raise the issue *sua sponte*." *Reed v. Rawlings*, 3:18-CV-1032-B, 2018 WL 5113143, at *3 (N.D. Tex. Oct. 19, 2018) (citing *Collins v. Mnuchin*, 896 F.3d 640, 654 n.83 (5th Cir. 2018)) (Boyle, J.). Courts are to assess a plaintiff's "standing to bring each of its claims against each defendant." *Coastal Habitat Alliance v. Patterson*, 601 F. Supp. 2d 868, 877 (W.D. Tex. 2008) (citing *James v. City of Dall.*, 254 F.3d 551, 563 (5th Cir. 2001)).

A plaintiff must have standing to request a preliminary injunction. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 329 (5th Cir. 2020). To satisfy the prerequisites of Article III standing, "[the] plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements[, and when] a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element." *Id.* (citations omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998). At the pleading stage, general factual allegations are sufficient to establish standing. *See Stallworth v. Bryant*, 936 F.3d 224, 230 (5th Cir. 2019). But, if the allegations are not sufficient to establish standing, the district court is powerless to create jurisdiction on its own accord. *See Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990). "[I]f the plaintiff does not carry his burden clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute, then dismissal for lack of standing is appropriate." *Hotze v. Burwell*, 784 F.3d 984, 993 (5th Cir. 2015) (internal citation omitted).

I. Injury In Fact

The Court first addresses the first prong in *Spokeo*—injury in fact. To demonstrate an injury in fact, a plaintiff "must show that [he] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo. Inc.,* 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). A "particularized" injury "affect[s] the plaintiff in a personal and individual way." *Id.* A "concrete" injury must "actually exist… [the injury must be] real, and not abstract." *Id.* at 340. (cleaned up).

Here, Plaintiffs have not established how they have suffered an invasion of a legally protected interest that is either concrete or particularized. Plaintiffs claim that the royalties they receive from licensing the right to sell Berkey water filters to Berkey International, LLC provide them with standing because the diminishing royalties

serve as an injury in fact. *See* ECF No. 14 at 23–24. This connection is too attenuated to the EPA's actions to be considered a "concrete" injury. Plaintiffs are unable to specify and quantify any potential losses of royalties beyond mere conclusory statements that such losses would occur. *See generally* ECF Nos. 14 and 20. These statements fall far short of the particularized injury required to establish Article III standing.

Further, the Court is flummoxed as to why Berkey, a recipient of an SSURO, has not been impleaded into this case.[1] Considering Plaintiffs acknowledge that the James B. Shepherd Trust has a controlling interest in both NMCL and Berkey, it makes little sense to the Court why Plaintiffs would not implead a party that is directly impacted by the actions at issue, instead of rolling the proverbial standing dice with a significantly attenuated injury—or better yet, why Berkey has not filed suit on its own accord against the EPA. Plaintiffs cite an unreported, out-of-district case to support their argument that owed royalties serve as grounds for standing. *See* ECF No. 14 at 23 (citing *Pizza Hut, LLC v. Ronak Foods, LLC*, 2022 WL 3544403 (E.D. Tex. June 17, 2022), *aff'd sub nom*. *Pizza Hut L.L.C. v. Pandya,* 79 F.4th 535 (5th Cir. 2023)). However, in *Pizza Hut*, the "royalties" at issue were advertising fees that franchisees had to pay in order to receive credit to offset payment obligations owed to Pizza Hut. *See Pizza Hut, LLC,* 2022 WL 3544403 at *11–12. Further, in *Pizza Hut,* the defendants alleged that Pizza Hut had no standing as to advertising fees because the fees were payable to the International Pizza Hut Franchise Holders Association, who were not a party to the case. *Id.* at 12. The Court held that Pizza Hut had standing to recover the advertising fees because if they were not paid to the Franchise Holders Association, the payment obligations defendants owed to Pizza Hut would not be offset and Pizza Hut would be owed the amount due in any event. *Id.* at 39. Thus,

[1]In a September 12, 2023 Order, the Court instructed Plaintiffs to provide briefing as to why Berkey International, LLC was not bringing this action as an actual recipient of an SSURO from the EPA. The Court was perplexed when Plaintiffs provided no rational explanation, but instead focused on how the two Plaintiffs, neither of whom received an SSURO, had standing. *See* ECF Nos. 22 and 23.

payments to the non-party Franchise Holders Association ipso facto served as payments to Pizza Hut, who *was* a party to the case.

This case is different. The case here does not deal with royalties or fees the defendant owes the plaintiff, but rather potential royalties owed by a third party to a plaintiff. Further, the royalties in *Pizza Hut* were a concrete injury that was enumerated and specified, not merely hypothesized as is the case here. *Id.* at 20. The royalties were also tied directly to the cause of action in that case, not a tangential, conjectural outcome affecting a third-party. Even further, Plaintiffs cite *Pizza Hut* in their Amended Complaint to support the notion that standing can be achieved based on diminished royalty payments "due to an agency action." ECF No. 14 at 23–24. But *Pizza Hut* never mentions agency action as a causal factor for the relevant dispute. Thus, the Court sees no relevance to this out-of-district, unreported case and is unconvinced there is an injury in fact facing the Plaintiffs here.

II. Traceability

The Court next turns to whether Plaintiffs' injury is fairly traceable to Defendants' challenged conduct. Assuming arguendo that there was an injury in fact (the Court determined there is not), the supposed injury that Plaintiffs claim (loss of royalties) must be traceable to the EPA issuing SSUROs to third-parties. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021). The Court determines they are not. There could be a multitude of reasons as to why Plaintiffs have received diminished royalties. There could be a change in consumer preferences to water filters, change in market conditions generally, and as Defendants point out, a class action lawsuit has been filed against NMCL concerning Berkey products in this district. *See* ECF No. 18 at 32; *see also Farrell, et al. v. New Millennium Concepts, LTD*, 3:22-cv-728-M (N.D. Tex.) (Lynn, J., presiding). Plaintiffs offer no substantive evidence to show that their supposed injury is fairly traceable to the EPA issuing SSUROs to third parties.

III. Redressability

The Court finally addresses the question of redressability. Here, Plaintiffs cannot show that a favorable decision would redress Plaintiffs'

supposed injuries. Once again, even assuming Plaintiffs satisfy the first two prongs of *Spokeo*, there is no guarantee a stay of the EPA's issuances of SSUROs to third parties would increase the royalties that Plaintiffs receive. As discussed above, there are outside factors that can affect the sales for which Plaintiffs receive royalties. For example, consumers could be aware that it took an injunction for the SSUROs to be lifted, not action taken by the EPA themselves, and still decide to not purchase Berkey products until they get assurances from the EPA that they are safe. There is no guarantee an injunction will redress the Plaintiffs' supposed injury here.

While the higher courts have done no favors for the district court by giving them a distinct blueprint to identify standing[2], the Court simply does not see an injury in fact facing the Plaintiffs, cannot fairly trace the supposed injury to conduct by the EPA, and does not believe granting an injunction would redress Plaintiffs' alleged injury. Royalties from sales from a third party are not enough to support standing and the Court has found no precedent in this Circuit to find standing under such circumstances.

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[2] Standing jurisprudence has been aptly described as a "morass of imprecision." *N.H. Rt. to Life Pol. Action Comm. v. Gardner*, 99 F. 3d 8, 12 (1st Cir. 1996). Recent decisions from the Supreme Court on this issue are notoriously difficult to reconcile. *See, e.g., Haaland v. Brackeen*, 599 U.S. 255, 277 (2023) (holding that a state lacks standing to challenge federal law preempting state laws on foster child placement, despite that "Congress's Article I powers rarely touch state family law."); *contra. Massachusetts, et al. v. EPA, et al.*, 549 U.S. 497, 519 (2007) (holding that a state had standing to challenge the EPA's decision not to regulate emissions of greenhouse gases because that power was preempted and greenhouse gases affected "the earth and air within [their] domain"); *contra. United States v. Texas*, 599 U.S. 670, 671 (2023) (holding that states near an international border lacked standing to challenge the federal government's immigration enforcement policies because the state's financial injury was not "legally cognizable"); *but see Biden, et al. v. Nebraska, et al,* 143 S. Ct. 2355, 2358 (2023) (holding that Missouri established standing by showing that it "suffered ... a concrete injury to a legally protected interest, like property or money"); *contra. Dept. of Ed. v. Brown*, 600 U.S. 551, 568 (2023) (holding that individual loan borrowers lacked standing to allege the federal government unlawfully excluded them from a one-time direct benefit program purportedly designed to address harm caused by an indiscriminate global pandemic).

IV. NMCL is not "Effectively and Constructively" Stopped

Plaintiffs also claim the third-party SSUROs "effectively and constructively" stop NMCL from selling Berkey filtration systems, thus granting them standing to challenge the SSUROs. ECF No. 23 a 4–5. However, as the facts stand currently, neither James Shepherd, on behalf of the James Shepherd Trust, nor NMCL are at the risk of being held liable by any EPA actions. While Plaintiffs state that NMCL may become subject to the stop orders, the relief sought is a preliminary injunction enjoining the EPA from issuing such SSUROs. *Id.* at 3–4. The Court is unable to grant relief vis-à-vis *existing* SSUROs that would ameliorate a threat of *future* action. Thus, the Court currently has no subject matter jurisdiction to any potential claims NMCL might have in the future. The mere possibility of future harm does not confer Article III standing. *See Clapper,* 568 U.S. at 409 (threatened injury must be certainly impending to constitute injury in fact and allegations of possible future injury are not sufficient).

B. Plaintiffs Lack Third-Party Standing

The Supreme Court generally frowns upon third-party standing. A plaintiff must "assert his own legal rights and interests, and cannot rest his claims to relief on the legal rights of interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). To invoke third-party standing, a party must have a close relationship to the holder of the rights and the holder must face obstacles to bringing the lawsuit personally. *See e.g., Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Singleton v. Wulff*, 428 U.S. 106, 114–116 (1976) (plurality opinion).

As discussed above ad nauseum, the Court struggles to understand why Berkey cannot bring suit on its own behalf for alleged wrongs it has faced at the hands of the EPA. While Plaintiffs have a close relationship with Berkey, there is nothing in the record or briefing to suggest that Berkey, the holder of the rights at issue, cannot bring suit on its own behalf. Accordingly, the Court finds that Plaintiffs do not have third-party standing to bring this suit on Berkey's behalf. If Berkey wants to challenge the EPA's actions, it should bring a lawsuit itself, as this Court signaled in a prior Order. *See* ECF No. 22.

C. Conclusion

Given a preliminary injunction cannot be requested by a plaintiff who lacks standing, the Court had to first determine whether Plaintiffs have standing to challenge the EPA's SSUROs at issue here. *See Fenves*, 979 F.3d at 329. As explained above, the Court finds that they do not. Accordingly, this case must be **DISMISSED** for want of subject matter jurisdiction.[3]

SO ORDERED on this **17th day of November 2023.**

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

[3] In finding that standing is lacking in this case, the Court is in no way disparaging, or opining on, Plaintiffs' claims. Indeed, if true, the claims are quite concerning. However, it is incumbent on the judicial branch to always keep in mind its proper role under our Constitution. The concepts of standing and the case or controversy requirement helps ensure that federal judges "stay in their lane." Otherwise, we risk fulfilling Thomas Jefferson's prediction written 45 years after he wrote the Declaration of Independence:

> It has long however been my opinion, and I have never shrunk from its expression, ... that the germ of dissolution of our federal government is in the constitution of the federal judiciary; ... working like gravity by night and by day, gaining a little to-day and a little tomorrow, and advancing it's noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the states, and the government of all be consolidated into one. To this I am opposed; because whenever all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated.

Letter from Thomas Jefferson to Charles Hammond (August 18, 1821), in 15 THE WRITINGS OF THOMAS JEFFERSON 330–33 (Albert Ellery Bergh Ed.) (1905).