IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SHERWIN-WILLIAMS COMPANY,	:	
Plaintiff,	:	Civil Case No. C2-06-829
v.	:	Judge Sargus
CITY OF COLUMBUS, OH, *et al.,*	:	Magistrate Judge Kemp
Defendants.	:	

***AMICUS CURIAE* BRIEF OF**
NATIONAL PAINT & COATINGS ASSOCIATION, INC.
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

This case arises, *inter alia*, because various city governments in Ohio ("City Governments") are, through the threat of civil litigation, penalizing Sherwin-Williams and other private companies for their exercise of their fundamental First Amendment rights to association and to petition the government. The National Paint & Coatings Association, Inc. ("NPCA") seeks leave to file this *amicus* brief in opposition to the motions to dismiss filed by the City Governments, because private associations and their members play a sacrosanct role in our constitutional democracy that this Court should protect. As the Supreme Court has recognized: "The right of association appears ... almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 n.80 (1982) (*quoting* 1 A. de Tocqueville, Democracy in America 2003 (P. Bradley ed. 1954)); *see also In re Sch. Asbestos Litig.*, 46 F.3d 1284 (3d Cir. 1994) (following *Claiborne Hardware* in rejecting tort claims brought by school districts against corporate defendants based on their involvement with a trade association).

The Supreme Court has made clear that government action that may impair even indirectly the right of association must be subject to the strictest scrutiny. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and any state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461 (1958); *see also Elrod v. Burns*, 427 U.S. 347, 362 (1976) (same). The City Governments' motions to dismiss this case prior to any discovery and without any meaningful judicial review of the government action in violation of Sherwin-Williams' First Amendment rights should be denied.

FIRST AMENDMENT ASSOCIATIONAL RIGHTS AT ISSUE

The United States Supreme Court has repeatedly emphasized the central role of the First Amendment right to association in our constitutional democracy. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Claiborne Hardware*, 458 U.S. at 907 (quoting *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)) "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.* at 908 (quoting *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. at 460).

The Supreme Court and other courts have specifically recognized the array of important services that are provided by trade associations. Trade associations "often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services." *In re Citric Acid Litig.*,

191 F.3d 1090, 1098 (9th Cir. 1999) (citing *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567 (1925)).

> Such organizations serve many laudable purposes in our society. They contribute to the specific industry by way of sponsoring educational activities, and assisting in marketing, maintaining governmental relations, researching, establishing public relations, standardization and specification within the industry, gathering statistical data and responding to consumer needs and interests. Furthermore, trade associations often serve to assist the government in areas that it does not regulate.

Meyers v. Donnatacci, 531 A.2d 398, 404 (N.J. Super. Ct. 1987); *see also DC Citizen Publ'g. Co. v. Merchants & Mfrs. Ass'n*, 83 F. Supp. 994, 998 (D.D.C. 1949) (trade associations "serve a useful purpose in the economic life of any community").

The Environmental Protection Agency has explained that trade associations provide crucial services as liaison between industry and government regulators in protecting the environment.

> [T]rade associations can play an important role in promoting environmental stewardship. For example, they can provide critical technical expertise in identifying and vetting innovative ideas to advance their sectors' performance, and they can take on leadership positions to encourage the adoption of these ideas. Many trade associations promote changes that better prepare members to meet evolving market conditions, such as increasing preferences for greener products and production activities or certification to International Organization for Standardization.

EPA Sector Strategies Performance Report (March 2006), at 1.[1] EPA accordingly has designed the Sectors Strategies Program to take advantage of trade associations' leadership positions

[1] Relevant excerpts of the EPA report are attached hereto as Ex. 1. A complete copy of the report can be found at http://www.epa.gov/sectors/performance.html.

within their respective industry sectors. *Id.* EPA has qualified 24 trade associations to take part in the Sectors Strategy Program, including NPCA. *Id.* at preface.

EPA's 2006 Sectors Strategy report identifies a number of forward-looking initiatives undertaken by NPCA that illustrate the types of action that often can only be achieved through a vibrant and industry-supported trade association. For example, EPA highlights NPCA's Coatings Care® program. NPCA requires all member companies to commit to Coatings Care® as a condition of their membership. *Id.* at 2. As described by EPA, "Coatings Care is a comprehensive program developed by NPCA to assist its members with integrating EH&S [environmental health and safety] activities into corporate planning and operations." *Id.* Coatings Care® "organizes EH&S activities into five codes of management practice – Manufacturing Management, Transportation and Distribution, Product Stewardship, Community Responsibility, and Security – and NPCA provides extensive support to its members in these areas." *Id.* Coatings Care® has helped five paint and coatings facilities receive admission into EPA's Performance Track, a program established by EPA to highlight facilities that demonstrate strong environmental performance beyond regulatory requirements. *Id.*

EPA also recognizes NPCA for its product stewardship efforts in reaching a 2003 landmark cooperative agreement with Attorneys General from 46 states (including Ohio), plus the District of Columbia and three territories, "which establishes a national program of consumer paint warnings, point-of-sale information, and education and training to avoid the potential exposure to [EPA-HUD] lead-dust standards." *Id.* at 64. Through this agreement – which did not require any *quid pro quo* commitment from the states – NPCA member companies have adopted a universal product sticker program and permanent product labeling to alert consumers to the threat of lead dust exposure that may occur during renovation and have distributed

hundreds of thousands of copies of point-of-sale consumer information using EPA approved language. *Id.* NPCA also "devised and deployed a new national training program which is offered at no cost to contractors, state and local officials, and others." *Id.* As part of this training program, NPCA has, *inter alia*, employed a state certified trainer who has given free classes each year since 2003 in various Ohio cities, including Cincinnati, Toledo, Canton, Cleveland, and Springfield, with more classes scheduled for 2007. In 2005, approximately 200 attendees passed the course in Ohio, representing a completion certification rate of over 86%. The program has interfaced with the Departments of Health in Cleveland, Columbus, Springfield, and has a local training affiliation with a Cincinnati based group of State certified trainers.

EPA identifies other progressive environmental efforts by the paint and coatings industry that depend heavily on NPCA involvement. NPCA is collaborating with the Agency in analyzing hazardous waste flows and waste management practices with the goal of identifying opportunities for increased waste minimization and recycling. *Id.* at 63. NPCA likewise is actively participating in the National Post-Consumer Paint Management Dialogue, a collaborative multi-stakeholder effort to reduce the environmental impacts and costs of managing leftover latex and oil-based paints. *Id.* at 64.

In addition to these activities, NPCA has been in the forefront in protecting children from lead poisoning through its founding in 1995 of the Community Lead Education and Reduction Corps ("CLEARCorps"), a joint public service partnership of the paint industry and the non-profit Shriver Center at the University of Maryland. Since 1995, CLEARCorps has protected thousands of young children from lead poisoning through directed education programs for property owners, families and children, and through on-the-ground efforts to stabilize poorly-maintained paint, correct building conditions that may cause paints to deteriorate, reduce friction

and impact conditions on painted surfaces, and conduct specialized cleaning to remove lead-contaminated dust.[2] CLEARCorps has been engaged for the past year in setting up a new site in Cleveland, supported by local paint manufacturers and other sponsors.

By targeting industry support of and involvement in trade associations through their threat of litigation, the City Governments put all of these associational activities in jeopardy.

ARGUMENT

In this action, Sherwin-Williams seeks declaratory and injunctive relief against several City Governments that would penalize Sherwin-Williams for its exercise of its First Amendment right of association and petition through membership in NPCA and another trade association, the Lead Industries Association ("LIA").[3] In contravention of clear Supreme Court precedent, the City Governments have filed – or have announced their intent to file – tort claims against Sherwin-Williams and other companies that focus on their membership in trade associations as the primary basis for allegations of concert of action and public nuisance in connection with the lawful sale many decades ago of lead pigment.

The nature of the City Governments' attack on Sherwin-Williams' membership in trade associations is evident from the complaints that the City Governments have already filed in various Ohio state courts. While the City Governments seek to impose liability on eight corporate defendants, the complaints are virtually devoid of any allegations specific to those defendants. For example, while the City of Lancaster complaint contains 23 paragraphs of "conduct allegations," only three of the paragraphs identify actions allegedly taken by individual companies. *See* Lancaster Complaint (attached to Sherwin-Williams' Complaint as Ex. I). The

[2] This and further information about CLEARCorps is available at http://www.clearcorps.org.

[3] LIA was a trade association for producers of lead products and is now defunct.

bulk of the allegations instead center on those defendants' membership in trade associations, including NPCA,[4] and on constitutionally protected activities taken by the trade associations in promoting the interests of the member companies, including communications with legislatures and regulating agencies. Thus, the City of Lancaster alleges that Sherwin-Williams and the other manufacturers should be held liable because they belonged to trade associations that, *e.g.*, monitored information or reports of alleged health risks associated with lead (¶¶ 23-26), participated in marketing activities (¶ 34), and engaged in successful lobbying efforts (¶¶ 35 & 36).

Corporations and associations, like individuals, are entitled to First Amendment protection against government actions that would interfere with their rights to free speech, association, and petition. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D. Minn. 1984) ("Defendants, even though they are corporations, also enjoy first amendment rights."). The City Governments' filing or threat of filing of these claims strikes at the core of Sherwin-Williams' First Amendment rights and should not be allowed.

I. Injunctive and Declaratory Relief is Necessary to Protect Sherwin-Williams' First Amendment Right to Association.

The Supreme Court has made clear that the First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another" because allowing such actions would present "a real danger that legitimate political expression or association would be impaired." *Claiborne Hardware*, 458 U.S. at 919 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)). As the Court has explained in other contexts, "[state]

[4] The City Governments' complaints point to alleged actions taken by NPCA under its prior name, National Paint, Varnish and Lacquer Association ("NPVLA").

regulation can be as effectively exerted through an award of damages as through some form of preventive relief" and "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). Moreover, "[i]n the domain of ... indispensable liberties, whether of speech, press, or association, the decisions of [the Supreme] Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Alabama*, 357 U.S. at 461. Government action may be precluded where it "may induce members to withdraw from [an] Association and dissuade others from joining it." *Id.* at 463.

Thus, "[c]ivil liability may not be imposed merely because an individual belongs to a group." *Claiborne Hardware Co.*, 458 U.S. at 920. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held to a specific intent to further those illegal aims." *Id.* The Court explained that the individual group member's intent "must be judged according to the strictest law." *Id.* at 919. "In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id. a*t 920.

Numerous courts have rejected as unconstitutional claims like those threatened and filed by the City Governments against Sherwin-Williams. In *In re School Asbestos*, for example, the Third Circuit Court of Appeals granted the extraordinary remedy of mandamus to reverse a district court opinion that would have allowed plaintiff school districts to proceed with concert of action claims premised on an asbestos manufacturer's membership in a trade association.[5] Of particular relevance here, the Third Circuit held that mandamus relief was necessary because

[5] As with the City Governments here, the school district plaintiffs in *In re School Asbestos* argued that the manufacturer could be held liable due to the trade association's alleged

even allowing the claims to proceed would have imposed an intolerable restraint on the petitioner's First Amendment rights. "Mandamus has been found to be proper in these cases because the duration of a trial is an 'intolerably long' period during which to permit the continuing impairment of First Amendment rights." *In re School Asbestos Litig.*, 46 F.3d at 1294. As the Third Circuit explained:

> [R]equiring [petitioner] to stand trial ... predicated solely on its exercise of its First Amendment freedoms could generally chill the exercise of the freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate. An amicus (which represents [various trade associations]) has argued that the district court's decision may have such an effect. ... While we do not want to overestimate the likely impact of a single, interlocutory district court decision, we do not think the amicus's concern is wholly unfounded.

Id. at 1295-96. "[T]he harm in the present case goes well beyond the mere expense and inconvenience of litigation. Failure to issue a writ in this case would subject Pfizer to a continuing impairment of its First Amendment freedoms." *Id.* at 1295. Likewise, here, absent the requested relief from this Court, Sherwin-Williams will be required to defend against what could be expensive and prolonged litigation in a number of state court actions, and so long as those claims are pending or the threat of new claims exist, Sherwin-Williams and the other manufacturers will face the same impermissible chilling effect on their involvement in NPCA activities.

In ordering a halt to the school district's claims, the Third Circuit held that the district court's opinion allowing the claims to proceed lay "far outside the bounds of established First Amendment law," was "clearly wrong," and had "implications that broadly threaten First

---

misleading conduct in disseminating information about the potential health impacts of the manufacturer's products. *See* 46 F.3d at 1287.

Amendment rights." *Id.* at 1289, 1294. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. ... But the district court's holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.* at 1294 (citations omitted).

A similar ruling was recently handed down in the welding rod products litigation, where plaintiffs sought to bring concert of action claims against members of two trade associations that had allegedly concealed or misrepresented purported hazards of welding fumes. *See Hunt v. Air Prods. & Chems.*, No. 053-9419, 2006 WL 1229082 (Mo. Cir. Apr. 20, 2006). The court ruled that "[p]laintiffs' reliance on the thread of membership in trade associations is patently insufficient to establish an actionable conspiracy. Obviously, defendants enjoy a constitutional right to form and maintain trade associations. Defendants likewise enjoy a constitutional right to disseminate information." *Id.* at *3. In dismissing plaintiffs' claims, the court held: "Paramount is the burdening of fundamental rights of speech and association. ... [D]efendants have an absolute right to associate and speak on matters of public importance. ... [P]laintiffs would impose substantial burdens on those rights if, by associating for the purpose of promoting their economic interests, the defendants thereby were exposed to liability." *Id.* at *5; *see also Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 206-07 (Ct. App. 2003) (agreeing with *In re School Asbestos*); *Morgan v. W.R. Grace & Co.*, 779 So. 2d 503, 505 (Fla. Dist. Ct. App. 2000) (rejecting claims against trade association based on its alleged marketing, promoting, and encouraging the sale of radioactive land "given the First Amendment concerns this would raise").

III. Injunctive and Declaratory Relief is Necessary to Protect Sherwin-Williams' First Amendment Right to Petition the Government Through Trade Associations.

The Supreme Court likewise has held that trade associations and their members have the constitutional right to communicate with state and federal governments and regulatory bodies. Sherwin-Williams, the NPCA, and others have a protected right to express their views and "lobby" the government – a right that the City Governments' complaints would impermissibly chill.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court rejected anti-trust allegations brought against railroad companies and a trade association that were premised on the industry's efforts to influence governmental action adverse to the trucking industry. As the Court explained, allowing such a claim would impermissibly intrude upon the First Amendment right to petition the government. "In a representative democracy such as this, the[legislative and executive] branches of government act on behalf of the people, and to a very large extent, the whole concept of representation depends upon the ability of people to make their wishes known to their representatives." *Id.* at 137.

The Court rejected the argument – like that made by the City Governments in their lawsuits – that the railroads could be held liable because they intended through their lobbying efforts to further their own economic interests and damage those of the trucking industry: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek actions on laws in the hope that they may bring advantage to themselves and a disadvantage to their competitors." *Id.* at 139. Thus, the City Governments' strident claim that a trade association's alleged "concern was the financial success of the ... member companies and not the health and safety of the general public," *see*

Lancaster Complaint at ¶ 35(c), illustrates how they would impermissibly impair constitutionally protected activity.

To avoid any infringement of the right to petition the government, either individually or through an association, the constitutional protection is broad in scope. As the Sixth Circuit has explained, *Noerr* "immunizes parties from liability ... for actions taken when petitioning authorities to take official action ... [except where such petitioning] activities are not genuinely aimed at procuring favorable government action." *Knology, Inc. v. Insight Commc'ns Co.*, 393 F.3d 656, 658 (6th Cir. 2004). All statements made in petitioning legislatures and executive agencies for actions are protected, even if the statements were false. *E.g., Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (misrepresentations are "condoned in the political arena"); *Noerr*, 365 U.S. at 140 (protecting petitioning even though it involved "deception of the public," the manufacture of bogus sources of reference" and "distortion of public sources of information").

"[A]lthough originally developed in the antitrust context, the doctrine has now universally been applied to business torts." *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003). Courts thus have held that this doctrine applies "to product liability claims brought under a concert of action or civil conspiracy theory and under negligence." *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996) (*citing Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 505-06 (D. Minn. 1984) and *Anchorage Joint Venture v. Anchorage Condo. Ass'n*, 670 P.2d 1249 (Colo. Ct. App. 1983)). *See also Sizemore v. Georgia-Pacific Corp.*, Nos. 6:94-2894 3, 6:94-2895 3 and 6:94-2896 3, 1996 WL 498410, *9 n.13 (D.S.C. Mar. 8, 1996) (allegations against trade association based on its activities in advocating

the interests of its members before governmental bodies "raise serious First Amendment concerns") *aff'd*, 114 F.30 1177 (4th Cir. 1997) (unpublished table decision).

For example, in *Senart*, the court rejected concert of action product liability claims brought against manufacturers of toluene diisocyanate based on their trade association's lobbying efforts before OSHA. The court upheld the right of corporations to participate in scientific debate on regulatory standards without fear of liability: "In short, plaintiffs assail defendants for taking a particular view in a scientific debate and trying to retain a regulatory standard which defendants preferred. Not only do these actions not constitute torts, they are protected by the first amendment." *Senart*, 597 F. Supp. at 506; *see also Hamilton*, 935 F. Supp. at 1321 (First Amendment prohibits liability to be imposed on gun manufacturers for lobbying against handgun restrictions).

CONCLUSION

Sherwin-Williams' case is straightforward and calls upon this Court to exercise its necessary and proper role in protecting and ensuring the rights bestowed under the Constitution. By threatening and in fact filing lawsuits against Sherwin-Williams based on its associational activities, the City Governments are impermissibly chilling Sherwin-Williams' exercise of its First Amendment rights and are attacking a foundational precept of our society. Moreover, the City Governments are impermissibly attacking NPCA and other trade associations that play a vital role in our constitutional democracy. The City Governments' motions to

dismiss should be denied, and this Court should proceed to grant Sherwin-Williams the declaratory and injunctive relief that the Constitution requires.

Respectfully Submitted,

/s/ Adam J. Hubble 12/13/06
Eliott R. Good (0025635)
Adam J. Hubble (0063301)
585 S. Front Street, Suite 250
Columbus, Ohio 43215
614/469-1301
614/469-0122
ergood@chorgood.com
ajhubble@chorgood.com
Attorneys for National Paint & Coatings Association, Inc.

/s/ Eric G. Lasker 12/13/06
Eric G. Lasker (DC Bar # 430180)
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
Washington, DC 20005-3305
(202) 898-5800
ELasker@SPRIGGS.com
Pending Admission Pro Hac Vice as Attorneys for National Paint & Coatings Association, Inc. Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed electronically on December 13, 2006. Notice of this filing will be sent to all parties by operation of the Court's electronic system. Parties may access the filing through the Court's system.

/s/ Adam J. Hubble 12/13/06