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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARBUTUS BIOPHARMA)
CORPORATION AND GENEVANT) **Case No.: 22-cv-00252-MSG**
SCIENCES GMBH,)
Plaintiffs,))

v.)

MODERNA, INC. and MODERNATX,)
INC.)
Defendants.))

EMANUEL MCCRAY, *On Behalf of*)
Himself and All Others Similarly Situated,)
Intervenors-Plaintiffs.))

MOTION TO INTERVENE
PROPOSED CLASS ACTION

Emanuel McCray (“McCray”), Proposed Intervenor, respectfully moves to
intervene in this action on behalf of himself and all other citizens of the United
States similarly situated, as a class, pursuant to Rule 24 of the Federal Rules of Civil
Procedure (Fed. R. Civ. P.), our sovereign powers reserved to the People in the

1 Tenth Amendment, and our power as a group acting as a class pursuant to *Bond v.*
2 *United States*, 572 U.S. 844, 853 (2014),¹ and *Califano v. Yamasaki*, 442 U.S. 682,
3 700, (1979).²
4

5 This Motion is supported by the attached Memorandum of Law. A Proposed
6 Complaint for declaratory relief as the pleading required under Rule 24
7 accompanies this Motion To Intervene.
8

9 For the reasons set forth in the attached Complaint, intervention is warranted
10 as of right or permission because Intervenor McCray was born in the United States
11 and the proposed class members were either born or naturalized in the United
12 States, were subjected to the claimed “pandemic”; the measures to control the
13 pandemic; and the vaccines produced by the Defendants were for McCray and the
14 other putative class members.
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25 ¹ Holding that: “‘An individual may ‘assert injury from governmental action taken in excess of the authority
26 that federalism defines.’”

27 ² Holding that “class relief is appropriate in civil actions brought in federal court, including those seeking to
28 overturn determinations of the departments of the Executive Branch of the Government in cases where judicial review
of such determinations is authorized.... Indeed, a wide variety of federal jurisdictional provisions speak in terms of
individual plaintiffs, but class relief has never been thought to be unavailable under them.”

1 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE**

2 **I. Legal Standard.**

3
4 The proposed Intervenor-Plaintiffs seek intervention (i) as of right or (ii)
5 permissively, solely to challenge Moderna’s attempt to shift liability for its
6 “Prototype Pathogen” vaccines to the United States, which would violate the
7 sovereignty of the United States and the individual sovereignty of the People
8 reserved in the Tenth Amendment.
9

10 What distinguishes intervention from other methods of adding new parties is
11 that it requires action by an outside party who seeks a seat at the table. *See* 7C
12 Charles Alan Wright et al., *Federal Practice and Procedure* § 1901, at 257–60 (3d
13 ed. 2007).
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16 The Third Circuit has held that:

17 “[A] litigant seeking intervention as of right under Rule 24(a)(2) must
18 establish 1) a timely application for leave to intervene, 2) a sufficient
19 interest in the underlying litigation, 3) a threat that the interest will be
20 impaired or affected by the disposition of the underlying action, and 4)
21 that the existing parties to the action do not adequately represent the
22 prospective intervenor’s interests. *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005) (citing *Kleissler v. United States Forest Service*, 157 F.3d 964, 969 (3d Cir. 1998)). ‘Each of these requirements must be met to intervene as of right.’” 419 F.3d at 220 (citing *Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995)).
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1 **II. The Third Circuit’s Requirements for Intervention Have Been Met.**

2 This Motion to Intervene is timely. The Plaintiffs’ Complaint was filed on
3 February 28, 2022 (Doc. 1).
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5 On November 2, 2022, (Doc. 32), Judge Goldberg denied Moderna’s motion
6 to dismiss and directed that: “Within fourteen (14) days from the date of this Order,
7 Defendants shall file an answer to the Complaint.”
8

9 On November 30, 2022, Moderna filed an Answer to Plaintiffs’ Complaint,
10 which was accompanied by a counterclaim against the Plaintiffs (Doc. 35).
11

12 On December 21, 2022, Plaintiffs filed an Answer to Defendants’
13 counterclaim (DOC. 38). On February 14, 2023, the United States filed a Statement
14 of Interest (Doc. 49). On February 16, 2023, Judge Goldberg filed an Order
15 directing that: “Within fourteen (14) days from the date of this Order, the parties
16 and the U.S. Government shall submit a letter of no more than ten pages regarding
17 the impact of the Governments Statement of Interest on the scheduling of this
18 matter.” (Doc. 51).
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21 As of the date of this Motion, February 26, 2023, the United States and the
22 existing parties have not filed the letters mandated by Judge Goldberg on February
23 16, 2023. Thus, timeliness required by the Third Circuit has been met.
24

25 As stated *supra* and *infra*, and in the attached Intervenors’ Complaint,
26 Intervenors have a significant interest in the underlying litigation. Whether Moderna
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1 can shift its liability for vaccines based on a “prototype pathogen” that required
2 infringement of Plaintiffs’ patents, is similar enough to the same concern of the
3 Plaintiffs and the declaratory relief Intervenor seek.
4

5 As the sole recipients/targets for Moderna’s COVID-19 vaccines, each citizen
6 of the United States, pursuant to the “powers” reserved under the Tenth
7 Amendment, would be the primary and sole enforcer of Moderna’s product liability
8 for its COVID-19 vaccines.
9

10 Moreover, the course of this litigation, which has been abruptly changed with
11 Moderna’s counterclaim and the statement of interest by the United States,
12 significantly demonstrates the existing parties represent only their interests.
13

14 Thus, a threat is created that the interests of the Intervenor will be impaired
15 or affected by the disposition of the underlying action, particularly should the
16 disposition fail to deny Moderna’s unlawful attempt to shift liability to the United
17 States. See *Liberty Mut. Ins.*, 419 F.3d at 220. Moreover, further litigation is on hold
18 pending letters regarding the “scheduling of this matter.” (Doc. 51).
19

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21 **III. Article III Standing To Intervene.**

22 To have standing to sue as a class representative it is essential that a party
23 must be a part of that class, that is, he must possess the same interest and suffer the
24 same injury shared by all members of the class he represents. To state differently,
25 proposed Intervenor’s interest must be “undifferentiated” from that of all other
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