

interests in the marketability of the covered substances. Having heard from the parties both orally and by written briefs, the Court concludes for the following reasons that Plaintiffs' motion for a TRO must be **DENIED**.

I. FACTUAL BACKGROUND

At the heart of this TRO request is Plaintiffs' desire to prevent ACGIH's imminent adoption of Threshold Limit Values ("TLVs") for occupational exposure to n-propyl bromide ("nPB"), copper, crystalline silica, and diesel particulate matter ("DPM"). It is anticipated by Plaintiffs, and not denied by ACGIH, that these proposed TLVs will in fact be adopted in the next few days.

Plaintiff International Brominated Solvents Associated is an Illinois non-profit trade association that represents the interests of small businesses which produce or use the substances soon to be affected by the new TLVs. Plaintiff AeroSafe Products, Inc. is a Georgia corporation that sells nPB-based products to the aviation maintenance industry, products which are used in the cleaning of copper and silica substances.

Defendant ACGIH is a private, non-profit association consisting of professionals who work in the field of occupational safety. Its members, who participate in the association on their own time and at their own expense, are employed in both the public and private sectors as well as in academia. One of the primary purposes of ACGIH is to create and publish TLVs—numerical values assigned to various substances that are designed to suggest the maximum exposure level at which a person can remain safe from the health risks associated with those substances. Once TLVs are released in ACGIH's trade publication, they are incorporated by reference into the federal regulatory scheme

implemented and monitored by the United States Department of Labor through the Occupational Safety and Health Administration (“OSHA”). TLVs have the force and effect of agency-created regulations once they are adopted by OSHA. See 29 C.F.R. §1910.6 (2004). The most current TLVs are required by OSHA to be listed on information sheets maintained and distributed by employers to their employees. See 29 C.F.R. §1910.1200(g) (2004). These sheets are known as material safety data sheets (“MSDS”).

The TLVs expected to be adopted by ACGIH at its next board meeting are more stringent than the ones currently in place for nPB, copper, silica, and DPM. Plaintiffs expect that once the lower acceptable standards are listed on their MSDS, Plaintiffs’ members will suffer adverse economic consequences because consumers will believe the continued use of the covered substances is a health hazard. Plaintiffs also argue that the new regulations will spawn unwarranted and costly litigation and will cause their members to be financially burdened by the imposition of additional regulatory measures.

Plaintiffs challenge ACGIH’s proposed TLVs under both federal and state law, alleging violations of: (1) the Federal Advisory Committee Act (“FACA”), 5 U.S.C.A. app. 2 §§1-15; (2) Georgia’s Deceptive Trade Practices Act, O.C.G.A. §10-1-372; and (3) Georgia’s common law tort of interference with business relations.

II. LEGAL DISCUSSION

A. Standing

The first issue the Court must address is whether Plaintiffs have standing to institute a private cause of action under FACA. The party invoking federal jurisdiction bears the burden of proving standing. *Fla. Pub. Interest Research Group Citizen Lobby Inc. v.*

EPA, 386 F.3d 1070, 1083 (11th Cir. 2004). Standing involves both constitutional limitations on a federal court’s jurisdiction and prudential limitations on the exercise of that jurisdiction. **Bennett v. Spear**, 520 U.S. 154, 162 (1997) (citing **Warth v. Seldin**, 422 U.S. 490, 498 (1975)). With regard to constitutional limitations, there are three requirements for parties to have standing: (1) that they have suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely the injury may be redressed by judicial action. *Id.*³ Among the prudential principles federal courts may consider is whether the plaintiff’s complaint falls within the “zone of interests” protected by the statute or constitutional provision at issue. **Bischoff v. Osceola County Fla.**, 222 F.3d 874, 883 (11th Cir. 2000). A party falls within a statute’s zone of interests if the statute grants that party a right to judicial relief. **Davis Forestry Corp. v. Smith**, 707 F.2d 1325, 1327-28 (11th Cir. 1983).

A statute’s zone of interests can be expanded or contracted by a citizen-suit provision. **Bennett**, 520 U.S. at 163-64. Thus, citizen-suit provisions – or the lack thereof – can be one important indicator of whether the United States Congress intended to create a private cause of action under a statute. See *id.* The definitive test, however, to determine Congress’ intent requires federal courts to look to three sources: (1) the statutory text for “rights-creating” language; (2) the statutory structure within which the

³ Defendants do not appear to contest Plaintiffs’ standing for any claim in terms of constitutional requirements. And the Court finds that Plaintiffs meet the constitutional requirements for standing under the precedent established in **Anchor Glass Container Corp., et al. v. ACGIH**, No. 5:00CV563 (DF) (M.D. Ga. April 4, 2001)(slip op.).

provision in question is embedded; and (3) – if and only if the first two sources are inconclusive – the statute’s legislative history. **Love v. Delta Air Lines**, 310 F.3d 1347, 1352-53 (11th Cir. 2002) (citing **Alexander v. Sandoval**, 532 U.S. 275, 286, 88, 90 (2001)). If these three sources fail to show that Congress intended to create a private right of action and a private remedy, a court cannot infer that one exists. **Love**, 310 F.3d at 1353-54.

Here, Defendants argue that FACA does not provide for a private right of action.⁴ Plaintiffs did not directly respond to Defendants’ argument. Defendants cite **Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group**, to support their position. 219 F. Supp. 2d 20, 33 (D.D.C. 2002) (reversed and remanded on other grounds). **Judicial Watch** relied on **Sandoval** in holding that there was no private right to sue under FACA. **Id.** **Judicial Watch**’s conclusion was based on the absence statutory text granting a private right to sue and the absence of language evidencing an intent to create such a remedy. **Id.** Yet, **Judicial Watch** did not appear to conduct the analysis set forth in **Sandoval** in that it failed to examine FACA’s statutory structure. Therefore, this Court will conduct its own analysis by applying **Sandoval**.

1. “Rights-creating” Language

Regarding “rights creating” language, the Eleventh Circuit instructs the following:

Rights-creating language is language explicitly conferr[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case, or language identifying the class for whose especial benefit the statute was enacted. By

⁴ While Defendants do not specifically couch this argument in terms of a prudential standing issue, in light of the discussion above, this Court construes the argument as such.

contrast, statutory language customarily found in criminal statutes ... and other laws enacted for the protection of the general public, or a statute written simply as a ban on discriminatory conduct by recipients of federal funds, provides far less reason to infer a private remedy in favor of individual persons.

Id. at 1352-53. Indeed, a court's task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. **Sandoval**, 532 U.S. at 286. While a citizen-suit provision can be extremely helpful in this analysis, see **Bennett**, 520 U.S. at 163-64, not every statute contains one. **Strahan v. Linnon**, 967 F. Supp. 581, 592 (D. Mass. 1997) (noting that while review was available under the Administrative Procedure Act (the "APA"), the Endangered Species Act did not contain its own citizen-suit provision).

For example, in **Sandoval** the Supreme Court held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of Civil Rights Act of 1964. 532 U.S. at 285. With no citizen-suit provision for guidance, **Sandoval** looked to the text of the applicable statute, which provided that "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]." *Id.* (citing 42 U.S.C. § 2000d-1). **Sandoval** reasoned that this language failed to display congressional intent to create new rights; rather, the language limited agencies to effectuate rights already created by another statutory section. *Id.* Moreover, **Sandoval** noted that the statute's focus was twice removed from the individuals who would ultimately benefit from the statute's protection, emphasizing that "[s]tatutes that focus on the person regulated rather than the individuals protected creates "no implication of an intent to confer rights on a particular class of persons.'" *Id.* (quoting **California v. Sierra Club**, 451 U.S.

287, 294 (1981)).

Here, it is indisputable that FACA does not expressly provide a private entitlement to sue in district court. *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1194 (D. Utah 2004); *Judicial Watch*, 219 F. Supp. 2d at 33. And while FACA may create some rights for the public regarding a federal advisory committee's meetings and documents, 5 U.S.C.A. App. 2 § 10 (a)-(f), it does not demonstrate an intent for a private right to sue. This is because FACA is somewhat removed from those who would benefit from FACA's provisions, as FACA focuses more on federal advisory committees and those who are to manage those committees than on the public. Thus, this Court cannot conclude that "rights-creating language" exists in FACA.

2. The Statutory Structure

The absence of "right-creating language" does not end the analysis, for the second source of congressional intent is the statutory structure within which the provision in question is embedded. *Love*, 310 F.3d at 1353. The Eleventh Circuit stated that courts ought not imply a private right of action because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* (citing *Sandoval*, 532 U.S. at 290). "[T]his suggestion is [s]ometimes . . . so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff a member of the class for whose benefit the statute was enacted) suggest the contrary." *Id.* (citing *Sandoval* 532 U.S. at 290 (internal quotation marks omitted)). For example, *Love* determined that the Air Carrier Access Act and its attendant regulations provided three

separate enforcement mechanisms. 310 F.3d at 1357. These enforcement mechanisms strongly undermined the suggestion that Congress intended to create a private right of action in a federal district court but declined to say so expressly. *Id.*

Here, FACA's statutory structure creates an enforcement scheme that seems to belie Congressional intent to create a private remedy. For example, FACA requires continuing congressional review of each advisory committee to ensure that it fulfills its defined purpose, that its membership is "fairly balanced in terms of the points of view represented," and that its advice will be free of any "inappropriate[] influence[s] by the appointing authority or by any special interest." 5 U.S.C.A. app. § 5(b)(1)-(3) (West 1996). Additionally, Congress charged the Administrator of General Services with establishing and maintaining within the General Services Administration a Committee Management Secretariat, "which shall be responsible for all matters relating to advisory committees." 5 U.S.C.A. app. § 7. While this language does not expressly include a process for dealing with the public's complaints regarding a federal advisory committee, which was present in *Love*, the language is nevertheless sufficiently broad to include such complaints. Additionally, the GSA has set forth an elaborate system of managing the federal advisory committees as demonstrated in 41 C.F.R. § 102-3.90 – 102-3.175. Thus, under the first and second *Sandoval* factors, this Court finds that FACA does not provide for private rights of action. Due to this finding, the Court need not look to FACA's legislative history.

This Court is aware, however, that several federal courts – including the Supreme Court and the Eleventh Circuit – have decided cases brought under FACA by private entities. *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989) (addressing

constitutional, not prudential, standing considerations); ***Alabama Tombigbee Rivers Coalition v. Norton***, 338 F.3d 1244 (11th Cir. 2003) (stating that standing was not challenged on prudential grounds); ***Miccosukee Tribe of Indians of Florida v. Southern Everglades Restoration Alliance***, 304 F.3d 1076 (11th Cir. 2002) (lacking discussion of ***Sandoval*** or a private right of action under FACA); ***Fla. Ass'n of Med. Equip. Dealers v. Apfel***, 194 F.3d 1227 (11th Cir. 1999) (addressing only constitutional standing requirements). None of these cases, however, addressed whether Congress created a private right to sue under FACA in light of ***Sandoval***. One reason is that some of these cases were decided before ***Sandoval***. See, e.g., ***Public Citizen***, 491 U.S. at 440.

However, two Eleventh Circuit decisions cited in the above paragraph, ***Norton*** and ***Miccosukee***, were decided after ***Sandoval***. This Court is unsure as to why the ***Sandoval*** issue was not addressed. Perhaps it was not raised on appeal. Or perhaps the Eleventh Circuit implicitly found that FACA did in fact provide a private right of action. Nevertheless, neither the Supreme Court nor the Eleventh Circuit has held that FACA grants a private right of action, and this Court refuses to rely on an implicit assumption – especially when ***Sandoval*** leads to a different result. Thus, Plaintiffs do not have standing to bring an action directly under FACA. The Court's standing decision does not mean that Plaintiffs' FACA claim cannot be heard under another statute's review provisions, such as the APA. This point, however, is discussed below.

B. First Amendment Implications

Because Plaintiffs have asked the Court to prevent ACGIH from adopting and

publishing its TLVs, the Court is compelled to recognize and address the important speech-related concerns which would be implicated by the issuance of injunctive relief under these circumstances. Plaintiffs want the Court to step in and render ACGIH powerless to adopt and publish its scientific findings with respect to the appropriate exposure levels for the four substances in question. This request raises immediate and fundamental questions under the First Amendment's prior restraint doctrine.

The Supreme Court has noted that “[t]he term prior restraint is used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.’” **Alexander v. United States**, 509 U.S. 544, 551 (1993) (citation omitted). The concerns raised by stifling speech before it occurs are so grave that “prior restraints on speech and publication [are considered] the most serious and least tolerable infringement on First Amendment rights.” **Nebraska Press Ass’n v. Stuart**, 427 U.S. 539, 559 (1976). One observer has defined a prior restraint as “a judicial order directing an individual not to engage in expression, on pain of contempt.” RODNEY SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH*, 8-4 (1996).

The relief sought by Plaintiffs squarely implicates the First Amendment because “[t]emporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.” **Alexander**, 509 U.S. at 550. “Injunctions are indeed at the ‘core of the prior restraint doctrine.’” **Polaris Amphitheater Concerts, Inc. v. City of Westerville**, 267 F.3d 503, 507 (6th Cir. 2001) (citations omitted). “When a prior restraint takes the form of a court-issued injunction, the

risk of infringing on speech protected under the First Amendment increases.”

Metropolitan Opera Ass’n v. Local 100, Hotel Employees and Restaurant Employees Int’l Union, 239 F.3d 172, 176 (2d Cir. 2001).

There is no doubt that, if issued, an injunction would operate as a prior restraint against ACGIH: the organization would be prohibited from publishing the challenged TLVs until such time as the injunction is overturned or dissolved. Plaintiffs make two arguments attempting to show why ACGIH’s TLVs are not entitled to full constitutional protection. Neither is availing.

First, Plaintiffs assert that, because ACGIH’s TLV manuals are sold for profit, the act of publishing the TLVs is commercial speech and, therefore, not entitled to the constitutional protection afforded by the prior restraint doctrine. This argument mischaracterizes the types of speech regarded as commercial for purposes of the First Amendment. The Supreme Court has identified commercial speech as “expression related solely to the economic interests of the speaker and its audience.” ***Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n***, 447 U.S. 557, 561 (1980). Commercial speech is subject to some degree of governmental regulation and is most often seen in the context of cases involving the content of product advertisements. See ***Bolger v Youngs Drug Prods. Corp.***, 463 U.S. 60 (1983). In this respect, the rules for regulating commercial speech are not applicable to ACGIH’s TLVs. TLVs cannot be construed as product advertisements and, thus, do not fall within the Supreme Court’s concept of commercial speech. Additionally, ACGIH’s interest in publishing TLVs is not solely economic. Although ACGIH does derive an economic benefit from selling its TLV manuals, that is not

the organization's primary motivation. There are any number of reasons why TLVs are not properly categorized as commercial speech, including the fact that they are aimed at promoting human health and workplace safety, not commercial profit.

Second, Plaintiffs argue that ACGIH is not entitled to First Amendment protection because when the federal government speaks the First Amendment does not apply. Plaintiffs argue that ACGIH enacts "federal standards" and "thus, the First Amendment simply does not apply to the ACGIH's actions." Pls.' Reply to Defs.' Resp. to Mot. for TRO, tab 18, at 4. As support for this position, Plaintiffs rely on the government speech doctrine as applied in two cases which are both inapposite. See **CBS, Inc. v. Democratic Nat'l Comm.**, 412 U.S. 94 (1973); see also **Sons of Confederate Veterans, Inc. v. Holcomb**, 129 F. Supp. 2d 941 (W.D. Va. 2001). In **CBS** the Court had to decide whether an FCC broadcast licensee's policy of refusing to sell air time to groups who wished to speak out on important social issues violated the First Amendment. The Court held that it did not. Plaintiffs rely on the following language from **CBS** to support their argument: "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government. . . . Government is not restrained by the First Amendment from controlling its own expression. . . . [N]othing in [the First Amendment] precludes the government from controlling its own expression or that of its agents." *Id.* at 139-40 and n.7. This language refers only to the government's authority to tailor or restrict the content of its own speech when it decides to engage in expressive activity. It has no bearing on whether one branch of government may prohibit another from speaking. Arguments relying on that line of Supreme Court precedents have no application here. In any event, even if

the Court were to entertain the argument, it is not persuaded that ACGIH engages in government speech.

Having found no reason to doubt that ACGIH's TLVs are protected speech under the First Amendment, the traditional prerequisites for obtaining a TRO or a preliminary injunction, which will be set forth and discussed more fully below, cannot be considered in isolation. Though a plaintiff shoulders a rather heavy burden in persuading a court to issue a run-of-the-mill preliminary injunction, that burden is far more daunting when a potential prior restraint is involved. In fact one court has stated in this context that preliminary injunctive relief is appropriate only if the "publication [] threaten[s] an interest more fundamental than the First Amendment itself. Indeed, the Supreme Court has never upheld a prior restraint, even [when] faced with the competing interest of national security or the Sixth Amendment right to a fair trial." **Proctor & Gamble Co. v. Bankers Trust Co.**, 78 F.3d 219, 227 (6th Cir. 1996). Prior restraints on expression are viewed with a "heavy presumption" against [their] constitutional validity. See **Org. For a Better Austin v. Keefe**, 402 U.S. 415, 419 (1971). And while the "prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.'" **CBS v. Davis**, 510 U.S. 1315, 1317 (1994).

Here, Plaintiffs assert that an injunction is necessary to prevent them from suffering extraordinary economic harm in the form of increased regulatory costs, increased litigation expenses, decreased product marketability, and lost revenues. Given that prior restraints on speech have been prohibited even in the face of national security concerns and asserted violations of competing constitutional rights, it is impossible for the Court to

conclude that the threat of economic detriment is sufficient to overcome the presumption against the validity of prior restraints. See *Procter & Gamble*, 78 F.3d at 225 (“The private litigants’ interest in protecting their . . . commercial self-interest simply does not qualify as grounds for imposing a prior restraint.”).

For these reasons, the relief requested by Plaintiffs would amount to an abridgement of ACGIH’s First Amendment speech rights. Because Plaintiffs have not offered an argument compelling enough to overcome the prior restraint’s presumptive invalidity, their motion must be **DENIED**.

Even if enjoining ACGIH from publishing its TLVs did not constitute an impermissible prior restraint, the Court nevertheless finds that Plaintiffs have failed to meet the requirements of the traditional four-factor test applicable to TROs and preliminary injunctions.

C. TRO/Preliminary Injunction Analysis

The standard for obtaining a TRO in this Circuit is the same as that for obtaining a preliminary injunction. See *Parker v. State Bd. of Pardons and Paroles*, 275 F.3d 1032 (11th Cir. 2001). “A TRO or preliminary injunction is appropriate where the movant demonstrates that: (a) there is a substantial likelihood of success on the merits; (b) the TRO or preliminary injunction is necessary to prevent irreparable injury; (c) the threatened injury outweighs the harm that the TRO or preliminary injunction would cause to the non-movant; and (d) the TRO or preliminary injunction would not be adverse to the public interest. *Id.* (citing *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985)). “The chief function of a preliminary injunction is to preserve the status quo until the merits

of the controversy can be fully and fairly adjudicated.” ***Suntrust Bank v. Houghton Mifflin Co.***, 268 F.3d 1257, 1265 (11th Cir. 2001).

The decision to grant or deny injunctive relief is within the sound discretion of the trial court. See ***Café 207, Inc. v. St. Johns County***, 989 F.2d 1136, 1137 (11th Cir. 1993). A district court ““must exercise its discretion in light of the four prerequisites.” ***Church v. City of Huntsville***, 30 F.3d 1332, 1342 (11th Cir. 1994) (citations omitted). It has been noted in this Circuit that “a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden of persuasion on each of these prerequisites.” ***Suntrust Bank v. Houghton Mifflin Co.***, 252 F.3d 1165, 1165 (11th Cir. 2001). Bearing this standard in mind, the Court will now consider and apply these factors.

1. Likelihood of Success on the Merits

Although the Court has found that Plaintiffs lack standing to bring a suit directly under FACA, because this matter is before the Court on a TRO motion the Court will nevertheless address Plaintiffs’ likelihood of success on the merits of their FACA claim.

a. Federal Advisory Committee Act

In gauging whether Plaintiffs are likely to succeed on this claim, the Court must first determine whether the Federal Advisory Committee Act (“FACA”), 5 U.S.C.A. App. 2 §§1-15, applies to ACGIH. In 1972, Congress enacted FACA for the purpose of controlling the establishment of advisory committees, implementing uniform standards and procedures to prevent biased opinions, and allowing Congress and the public to monitor their existence and activities. See ***Pub. Citizen v. U.S. Dep’t of Justice***, 491 U.S. 440, 446 (1989). To

meet these goals, Congress required, among other things, that each advisory committee file a charter, that the committees keep detailed minutes of its meetings, and that subject to Freedom of Information Act limitations, advisory committee documents be made available to the public. See 5 U.S.C.A. app. 2 §§ 9, 10. In order to fall within the reach of FACA, an organization must be an “advisory committee,” which is defined as follows:

- (2) The term “advisory committee” means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other such subgroup thereof (hereafter in this paragraph referred to as “committee”), which is—
- (A) established by statute or reorganization plan, or
 - (B) established or utilized by the President, or
 - (C) *established* or *utilized* by one or more agencies,
- in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.

5 U.S.C.A. app. 2 §3 (Lexis 1996) (emphasis added). For purposes of this case, the Court need only address §3(2)(C) in determining whether ACGIH is governed by FACA. Plaintiffs claim that ACGIH meets the definition of “advisory committee” because it was either “established” by a federal agency or is “utilized” by a federal agency.

i. Established

The Supreme Court has construed the words “established” and “utilized” narrowly “to prevent FACA from sweeping more broadly than Congress intended.” **Byrd v. U.S. E.P.A.**, 174 F.3d 239, 245 (D.C. Cir. 1999) (citing **Pub. Citizen**, 491 U.S. at 452). “In addition, the [Supreme] Court indicated that an advisory panel is ‘established’ by an agency only if it is actually formed by the agency.” **Byrd**, 174 F.3d at 245. In **Byrd**, the District of Columbia Circuit Court of Appeals concluded that an advisory panel was not established under FACA where the panel was formed by an outside contractor, even

though the formation was at the request of the EPA. See also *PETA v. Barshefsky*, 925 F. Supp. 844, 848 (D.D.C. 1996) (noting that the “mere fact that the [United States Trade Representative] has indirectly facilitated the formation of [an advisory] group does not rise to the level necessary for this court to conclude that USTR ‘directly established’ the working group.”).

Plaintiffs argue that ACGIH was “established *at the request* of federal officials with the convening of the National Conference of Governmental Industrial Hygienists (“NCGIH”) in 1938.” Pls.’ Memo. in Supp. of Mot. for TRO., tab 3, at 2-3. Plaintiffs also note that some of its founding members were employed by “several federal agencies (including agencies that are now subunits of Defendant HHS).” *Id.* Plaintiffs state in their complaint that “[o]fficials of the federal government . . . established Defendant ACGIH.” Pls.’ Compl., tab 1, at 3. However, Plaintiffs’ arguments and allegations do not show that ACGIH was created by a federal agency as the term “created” is used in FACA. As a result, the Court is unable to conclude that Plaintiffs are likely to show that FACA applies based on the “established” prong of §3(2)(C).

ii. Utilized

A committee “utilized” by an agency may also fall within FACA. In *Public Citizen*, the Supreme Court adopted a restrictive definition of “utilized,” noting that it was a “wooly verb” and declining to adopt its dictionary definition. 491 U.S. at 452, 462. The District of Columbia Circuit Court of Appeals has articulated two standards under which an organization may be said to be “utilized” by a federal agency for FACA purposes. See *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 430 (D.C. Cir. 1997); see also

Food Chem. News v. Young, 900 F.2d 328, 333 (D.C. Cir. 1990). As set forth in these cases, an organization is utilized by an agency if it is “so closely tied to an agency as to be amenable to strict management by (1) agency officials” or (2) “by [any] semiprivate entity the Federal Government helped bring into being.” ***Young***, 900 F.2d at 333.

The first test is a strict one, and “denot[es] something along the lines of actual management or control over the advisory committee.” ***Wash. Legal Found.***, 17 F.3d at 1450. Plaintiffs allege that ACGIH is permeated by federal officials and that it is inextricably linked to OSHA by virtue of OSHA’s automatic adoption of ACGIH’s TLVs. However, there is insufficient evidence before the Court to conclude that this close relationship confers upon OSHA any degree of actual management or control over ACGIH’s affairs. While the Court does not mean to foreclose this inquiry for the duration of the lawsuit, there simply is not enough information to show that Plaintiffs are likely to prove that ACGIH is utilized by a federal agency within the meaning of this agency-management test.

An organization is also said to be utilized by a federal agency under FACA if that organization is “amenable to management . . . by [any] semiprivate entity that the Federal Government helped bring into being.” ***Young***, 900 F.2d at 333. Plaintiffs argue that ACGIH is utilized by OSHA under this prong because the federal government brought ACGIH into being and that its Board and TLV Committee are influenced by federal involvement. Under the semiprivate-entity inquiry, the focus is not on how the advisory committee is used, but rather, on “whether or not the character of its creating institution can be thought to have a quasi-public status.” Though OSHA adopts ACGIH’s TLVs into the

regulatory scheme governing workplace safety standards, in the Court's view Plaintiffs have not shown a substantial likelihood that this automatic-adoption procedure somehow converts ACGIH's character into that of a semi-public entity. An argument can be made that ACGIH has the look and feel of a semi-public organization, even though it is technically a private association. The Court merely notes that the arguments in favor of Plaintiffs' interpretation at this point are not compelling enough to warrant an inference that ACGIH is likely to be covered under FACA.⁵

b. Deceptive Trade Practices Act

Georgia's Deceptive Trade Practices Act proscribes certain types of actions taken by a person "in the course of his business, vocation, or occupation." O.C.G.A. §10-1-372 (Lexis 2000). Plaintiffs allege that ACGIH has engaged in three of the statute's impermissible actions. According to Plaintiffs, ACGIH's proposed adoption of its new TLVs

⁵ Plaintiffs place heavy reliance on an order entered by this Court several years ago in a case against ACGIH involving virtually identical facts and legal claims. **Anchor Glass Container Corp., et al. v. ACGIH**, No. 5:00CV563 (DF) (M.D. Ga. April 4, 2001)(slip op.). However, Plaintiffs mistakenly fail to recognize the procedural posture in which that case presented itself to the court: That order addressed Defendant's motion to dismiss. The Court found that the plaintiff had alleged sufficient facts to allow the FACA claim to avoid dismissal. That in no way answers the question now before the Court on Plaintiffs' motion for a temporary restraining order. To defeat a motion to dismiss for failure to state a claim, a plaintiff faces a very insubstantial burden. He need only demonstrate that there *may be some* set of facts under which he can state a claim for relief. That standard is far different from the required showing here; that Plaintiffs are *likely* to succeed on the underlying merits of their claims. Therefore, Plaintiffs' extensive reliance on that order to support their FACA claim is misplaced.

The Court notes that Plaintiffs have alleged a claim against ACGIH under the Administrative Procedure Act ("APA") in their complaint. This provides an alternative avenue of relief for Plaintiffs in light of lack of standing to sue under FACA. However, in order to proceed under the APA, one must assert a claim against an agency and may only challenge "final" agency actions. See Administrative Procedure Act, 5 U.S.C. §704. Here, Plaintiffs have not shown that ACGIH is an agency as that term is used in the APA. Even assuming ACGIH is an agency under the APA, there has been no final agency action at this point, and Plaintiffs have not shown any exceptional circumstances that would warrant review of a non-final agency action.

(1) “represents that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;” (2) “disparages the goods, services, or business of another by false or misleading representation of fact;” and (3) “engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.” O.C.G.A. §10-1-372 (7), (8), and (12).

In reviewing the Georgia cases that have interpreted and applied this statute, the Court must point out that a significant number deal with issues of trade name or product confusion. Of course, there is nothing dispositive about that observation, although it causes the Court to doubt whether the statute is applicable in this case. By the statute’s own terms, the listed actions are only prohibited when taken “in the course of [a person’s] business, vocation, or occupation.” It is not apparent that voting on and adopting TLVs is in any way related to anyone’s vocation or occupation. While similar allegations may have been able to withstand the lenient standard for opposing motions to dismiss for failure to state a claim,⁶ they do not, on the evidence before the Court, provide a basis for believing that Plaintiffs will prevail on the merits of this claim. Accordingly, Plaintiffs are unable at this time to show a likelihood of success under this statute.

c. Tortious Interference with Business Relations

In Georgia, this tort requires proof of four elements: (a) improper action or wrongful conduct by defendant without privilege; (b) defendant acts purposely and with malice with the intent to injure; (c) defendant induced a breach of contractual obligations or caused a

⁶ See *Anchor Glass*, at 29-30.

party or third parties to discontinue or fail to enter anticipated business relationships with the plaintiff; and (d) defendant's tortious conduct proximately caused damage to plaintiff. See *Dalton Diversified, Inc. v. AmSouth Bank*, No. A04A2344, 2004 WL 2404578, at *5 (Ga. Ct. App. Oct. 27, 2004). At this time the Court is without sufficient information to speculate about Plaintiffs' likelihood of success on this claim. However, the Court notes that Plaintiffs have not shown that ACGIH is set to act "with malice with the intent to injure" their economic interests.

2. Remaining TRO Factors

Because it does not appear at this point that Plaintiffs have shown a likelihood of succeeding on the merits of their claims, the Court finds it unnecessary to apply the remaining factors, as the burden is on the party moving for injunctive relief to satisfy *each* prerequisite. See *Suntrust Bank*, 252 F.3d at 1165 (11th Cir. 2001).

III. CONCLUSION

For the reasons set forth above, the Court finds that a TRO is not warranted. Accordingly, Plaintiffs' motion is hereby **DENIED**.

SO ORDERED, this 26th day of November, 2004.

s/Hugh Lawson

HUGH LAWSON, JUDGE
UNITED STATES DISTRICT COURT

HL/sew