# UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN MEDICAL ASSOCIATION, the AMERICAN OSTEOPATHIC ASSOCIATION, and the MEDICAL SOCIETY FOR THE DISTRICT OF COLUMBIA

Plaintiff.

v.

FEDERAL TRADE COMMISSION,

Defendant.

Case No. 1:10-cv-00843-RBW

# CONSENT MOTION OF MEDICAL SOCIETIES TO INTERVENE AS PLAINTIFFS

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the following medical societies hereby move this Court for leave to intervene as plaintiffs in the above-captioned case: American Academy of Dermatology Association, American Academy of Family Physicians, American Academy of Hospice and Palliative Medicine, American Academy of Neurology, American Association of Neurological Surgeons, American Academy of Ophthalmology, American Academy of Otolaryngology-Head and Neck Surgery, American Academy of Orthopaedic Surgeons, American Academy of Pediatrics, American Academy of Physical Medicine and Rehabilitation, American College of Cardiology, American College of Chest Physicians, American College of Emergency Physicians, American College of Physicians, American College of Occupational and Environmental Medicine, American College of Radiology, American Psychiatric Association,

American Society of Anesthesiologists, American Society of Clinical Oncology, American Society for Clinical Pathology, American Society of Cataract and Refractive Surgery, American Urological Association, Council of Medical Specialty Societies, Medical Group Management Association, and The Society of Thoracic Surgeons (hereinafter, the "Intervenor Societies"). The proposed Intervenor Societies seek intervention as a matter of right pursuant to Fed. R. Civ. P. 24(a) because they have a significant legal interest in the issues to be decided in this case and their interests will not be represented adequately by the existing parties. Specifically, the current plaintiff medical societies request for relief covers only themselves, their members, and members of state medical societies. The majority of Intervenor Societies' members are not members of any of these groups. Thus, Intervenor Societies seek to join this lawsuit to expand the request for relief to include themselves, their members, and all physicians and their medical practice groups. In the alternative, the proposed Intervenor Societies seek permission of the Court to intervene pursuant to Fed. R. Civ. P. 24(b) because the claims of the proposed Intervenor Societies share questions of law and fact with the underlying action, and intervention will not unduly delay or prejudice the rights of the original parties. The proposed Intervenor Societies support this Motion of Medical Societies to Intervene as Plaintiffs with the attached Memorandum of Points and Authorities and the attached Complaint.

Pursuant to Local Civil Rule 7(m), the undersigned counsel for the proposed Intervenor Societies discussed this Motion in good faith with counsel for plaintiffs and counsel for defendant. Plaintiffs and the FTC have consented to this motion.

Respectfully submitted,

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Date: August 18, 2010

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF MEDICAL SOCIETIES TO INTERVENE AS PLAINTIFFS

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### I. Introduction

The proposed Intervenor Societies respectfully submit this Memorandum of Points and Authorities in Support of their Motion of Medical Societies to Intervene as Plaintiffs.<sup>1</sup> The Plaintiffs in this action, the American Medical Association ("AMA"), the American Osteopathic Association ("AOA"), and the Medical Society for the District of Columbia ("MSDC") have sought relief only for themselves, their own members, and members of state medical societies. Plaintiffs and the state medical societies, however, represent only a fraction of the physicians in this country. Plaintiffs seek declaratory and injunctive relief to prevent the Federal Trade Commission ("FTC") from applying the "Red Flags Rule" to Plaintiffs' member physicians. Plaintiffs argue that physicians are not "creditors" as that term is used in the statutory provisions mandating the Red Flags Rule. Plaintiffs' arguments are not specific to their members and apply equally to all physicians and their medical practice groups. Accordingly, the proposed Intervenor Societies seek to intervene to ensure that any relief granted to Plaintiffs will apply to all physicians and their group practices, including members of the proposed Intervenor Medical Societies.

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<sup>&</sup>lt;sup>1</sup> The proposed "Intervenor Societies" include the following: American Academy of Dermatology Association ("AADA"), American Academy of Family Physicians ("AAFP"), American Academy of Hospice and Palliative Medicine ("AAHPM"), American Academy of Neurology ("AAN"), American Association of Neuromuscular & Electrodiagnostic Medicine ("AANEM"), American Association of Neurological Surgeons ("AANS"), American Academy of Ophthalmology ("AAO"), American Academy of Otolaryngology-Head and Neck Surgery ("AAO-HNS"), American Academy of Orthopaedic Surgeons ("AAOS"), American Academy of Pediatrics ("AAP"), American Academy of Physical Medicine and Rehabilitation ("AAPM&R"), American College of Cardiology ("ACC"), American College of Chest Physicians ("ACCP"), American College of Emergency Physicians ("ACEP"), American College of Physicians ("ACP"), American College of Occupational and Environmental Medicine ("ACOEM"), American College of Radiology ("ACR"), American Psychiatric Association ("APA"), American Society of Anesthesiologists ("ASA"), American Society of Clinical Oncology ("ASCO"), American Society for Clinical Pathology ("ASCP"), American Society of Cataract and Refractive Surgery ("ASCRS"), American Urological Association ("AUA"), Council of Medical Specialty Societies ("CMSS"), Medical Group Management Association ("MGMA"), and The Society of Thoracic Surgeons ("STS").

### II. Background

In 2003, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), which amended and modernized the 1970 Fair Credit Reporting Act ("FCRA"). Pub. L. 108-159, 116 Stat. 1952 (2003) (codified as amended at 15 U.S.C. § 1681 *et seq.*). Congress intended to provide consumers with increased protection from identity theft. FACTA required six federal agencies, including the FTC and various bank regulatory agencies, jointly to establish and maintain guidelines that "identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft." FACTA § 114 (codified at 15 U.S.C. § 1681m(e)(1)(A) & (2)(A)). As a result, the six agencies published final regulations on Nov. 9, 2007 and those regulations became effective January 1, 2008. 72 Fed. Reg. 63,718 (November 9, 2007) (codified at 12 C.F.R. pts. 41, 222, 334, 364, 571, and 717 and 16 C.F.R. pt. 681).

These regulations are collectively referred to as the Red Flags Rule. *Id.* at 63,718. The broad purpose of the Red Flags Rule is to require financial institutions and creditors to address the risks of identity theft and develop mitigation plans. *Id.* at 63,719. The Red Flags Rule requires financial institutions and other creditors to establish written programs to detect and respond to activities, or "red flags," that could indicate identity theft. *Id.* 

The Red Flags Rule applies to "financial institutions" and "creditors" that offer or maintain "covered accounts." *Id.* "Financial institutions" are defined as "a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transactional account . . . belonging to a consumer." *Id.* at 63,772; *see also* 15 U.S.C. § 1681a(t). Physicians clearly do

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<sup>&</sup>lt;sup>2</sup> The six agencies responsible for issuing the joint guidelines are the: (1) Office of the Comptroller of the Currency, Treasury; (2) Board of Governors of the Federal Reserve System; (3) Federal Deposit Insurance Corporation; (4) Office of Thrift Supervision, Treasury; (5) National Credit Union Administration; and (6) Federal Trade Commission.

not fit within this definition of a financial institution. The FACTA relies on the definition of "creditor" provided in the Equal Credit Opportunity Act ("ECOA"). 72 Fed. Reg. at 63,722; *see also* 15 U.S.C. §§ 1681a(r)(5), 1691a(e). ECOA defines a "creditor" as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend renew, or continue credit." 15 U.S.C. § 1691a(e).

Although the regulations were issued in November of 2007 and became effective January of 2008, until recently, it was generally believed that the regulations did not apply to health care entities, including physicians. The commentary to the proposed regulations only mentioned health care in passing: "[f]or instance, creditors in the health care field may be at risk of medical identity theft (*i.e.*, identity theft for the purpose of obtaining medical services) and, therefore, must identify Red Flags that reflect this risk." 72 Fed. Reg. at 63,727. The Intervenor Societies were not aware at that time that the FTC considered physicians to be "creditors" subject to the Red Flags Rule.

In June 2008, the FTC issued an "Alert" to remind entities of the upcoming November 1, 2008 compliance date. In that Alert, the FTC stated "[w]here non-profit and government entities defer payment for goods or services, they, too are to be considered creditors." *FTC Business Alert: New "Red Flag" Requirements for Financial Institutions and Creditors Will Help Fight Identity Theft*, Federal Trade Commission (June 2008). Although this statement appeared to apply the Red Flags Rule beyond those traditional extenders of credit such as banks, credit card companies, and other financial institutions, physicians were still not aware that the FTC intended to apply the Rule to physicians. Indeed, of the 129 comments that were submitted in response to

<sup>&</sup>lt;sup>3</sup> Available at http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm.

the proposed red flag rulemaking, none regarded applicability to the health care field. 72 Fed. Reg. at 63,718.

Not until March 2009 did the FTC publically state that it considered health care providers to be "creditors" within the meaning of the Red Flags Rule. *Fighting Fraud with the Red Flags Rule: A How-To Guide for Businesses*, Federal Trade Commission.<sup>4</sup> On April 30, 2009, the FTC clarified its belief that "creditors" subject to the Red Flags Rule include "health care providers, who bill their clients after services are rendered." *FTC Extended Enforcement Policy: Identify Theft Red Flags Rule, 16 CFR 681.1*, Federal Trade Commission, at 1 n.3.<sup>5</sup> The FTC, however, delayed enforcement of the Red Flags Rule several times, most recently until December 31, 2010.

The FTC also interpreted "creditors" as including other professionals, such as lawyers. On August 27, 2009, the American Bar Association ("ABA") filed suit against the FTC seeking to enjoin enforcement of the Red Flags Rule against lawyers. *Am. Bar Ass'n v. FTC*, 671 F.

Supp. 2d 64, 66 (D.D.C. 2009). The ABA sought relief on behalf of all lawyers. The court held that the FTC's application of the Red Flags Rule to attorneys was beyond the FTC's statutory authority because attorneys are not "creditors" as that term is defined in ECOA. *Id.* at 76, 82. The legislative history also did not indicate that Congress intended FACTA to apply to lawyers, a profession traditionally regulated by the states. *Id.* at 76, 82, 87. Even if the FTC had the authority to apply FACTA to lawyers, the FTC failed to comply with APA rulemaking procedures for doing so. *Id.* at 86-87. The FTC appealed the court's ruling, and the case is now pending before the D.C. Circuit as case number 10-5057.

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<sup>&</sup>lt;sup>4</sup> Available at http://www.ftc.gov/bcp/edu/microsites/redflagsrule/index.shtml.

<sup>&</sup>lt;sup>5</sup> Available at http://www.ftc.gov/os/2009/04/P095406redflagsextendedenforcement.pdf.

On May 21, 2010, Plaintiffs filed their complaint with this Court seeking to halt enforcement of the Red Flags Rule against their physician members and state medical society members. Unlike the ABA, which sought relief from the Red Flags Rule for all attorneys (not just its members), the Plaintiffs did not seek relief for all physicians. This is significant because Plaintiffs represent only 30% to 40% of physicians in the United States. By contrast, the Intervenor Societies represent at least 60% of physicians in America, many of whom are not members of the Plaintiffs or the state medical societies.

On June 25, 2010, the parties filed a Stipulation in which they agreed to hold the case in abeyance pending the outcome of the D.C. Circuit's decision in *American Bar Association v*.

FTC. The FTC also stipulated that it would not enforce the Red Flags Rules against the Plaintiffs' members and state medical society members until 90 days after the decision in *American Bar Association v. FTC*. Significantly, this stipulation did not apply to physicians who are not members of the Plaintiffs or state medical societies. On June 25, 2010, the Court signed the Stipulation holding the case in abeyance.

### III. The Intervenor Societies Meet the Standards for Intervention

The Federal Rules of Civil Procedure address two types of intervention: intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). Fed. R. Civ. P. 24. Under Rule 24(a)(2), "a prospective intervenor must be permitted to intervene as of right if the applicant claims an interest relating to the subject matter of the case, if the disposition of the case stands to impair that interest, and if the applicant's interest is not adequately represented by the existing parties." *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 129 S. Ct. 2183 (2009). The D.C. Circuit has held that "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing

requirements as original parties." *Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Alternatively, under Rule 24(b)(1) and (3), a court may permit an applicant to intervene if its claim shares a question of law or fact in common with the underlying action and if the intervention will not unduly delay or prejudice the rights of the original parties. Under either intervention option, the applicant's motion must be timely. Fed. R. Civ. P. 24(a), (b). Evaluation of the timeliness of a motion to intervene lies within the sound discretion of the court. *Acree*, 370 F.3d at 49. The proposed Intervenor Medical Societies clearly meet these standards for intervention.

### A. The Intervenor Societies Qualify for Intervention as a Matter of Right

The Intervenor Societies satisfy the standards for intervention as of right. Their members and physicians generally have a direct and compelling interest in the outcome of this case, including an adjudicated right that will be seriously impaired if the Intervenor Societies are not permitted to intervene on their members' behalf. The Plaintiffs have requested relief only for their members and state medical society members, which excludes hundreds of thousands of members of the Intervenor Societies, as well as other physicians. Accordingly, for this and other reasons, Plaintiffs do not adequately represent the interests of the Intervenor Societies' members, physicians generally, or their patients. The Intervenor Societies also meet all the requirements for representational standing and timeliness.

# 1. The Intervenor Societies Have a Strong Interest in the Subject Matter of This Case That Will Be Impaired if They Are Not Allowed to Intervene

The proposed Intervenor Societies have a strong interest in the subject matter of this litigation. Plaintiffs' complaint sets forth in detail the legal background of the Red Flags Rule and why it may not be enforced against any physician. Those arguments apply to the members of the Intervenor Societies and other physicians, as equally as to Plaintiffs' members and state

medical society members. The FTC has exceeded its statutory authority by applying the Red Flags Rule to physicians. (Compl. ¶ 75.) Physicians do not reasonably fall within the definition of "creditors" who are subject to the Red Flags Rule. (Compl. ¶ 76). The FTC's application of the Red Flags Rule to physicians is contrary to the longstanding principle that when Congress intends to regulate the practice of medicine, it does so explicitly, which it did not do in FACTA. *Gonzales v. Oregon*, 546 U.S. 243, 270-71 (2006); (Compl. ¶ 77). Complying with the Red Flags Rule will significantly harm the physician members of the Intervenor Societies and physicians generally because compliance will be costly, time consuming, and adversely impact patient care.

The Intervenor Societies' Interest in this litigation will be impaired if they are not allowed to intervene. As explained below, Plaintiffs have sought relief only for their own members and state medical society members and have excluded the majority of physicians in this country from the relief that Plaintiffs seek from the Red Flags Rule for their own members and state medical society members. The parties have stipulated that the FTC will not enforce the Red Flags Rule against Plaintiffs' members and state medical society members until 90 days after the D.C. Circuit decides *American Bar Association v. FTC*, but that stipulation does not protect the members of the Intervenor Societies or physicians generally. Thus, hundreds of thousands of Intervenor Society members and other physicians are currently vulnerable to enforcement of the Red Flags Rule by the FTC.

Likewise, if Plaintiffs ultimately prevail in this case, the Intervenor Societies' members and other physicians will not benefit from a judgment preventing the enforcement of the Red Flags Rule against Plaintiffs' members and state medical society members. The Intervenor Societies would have to file a second suit seeking to protect the rights of their members, thus re-

litigating the issue and needlessly expending judicial resources. If, on the other hand, Plaintiffs do not prevail in this case, members of the Intervenor Societies would then be subject to the Red Flags Rule, even though they had no opportunity to present their arguments to the Court. The Intervenor Societies must be allowed to intervene to protect the rights of their physician members.

# 2. The Plaintiffs Do Not Adequately Represent the Interests of the Intervenor Societies or Their Members

Despite having recognized that all physicians have a strong interest in the subject matter of this case, Plaintiffs have shown that they do not adequately represent the interests of the Intervenor Societies and their members in this action. As the D.C. Circuit has held, the intervenor's burden on this issue "is not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). The proposed Intervenor Societies have the "minimal' burden of showing that representation of [their] interest[s] by existing parties may be inadequate." *Id.* at 193. ("The applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate."). The Intervenor Societies meet this test.

The Plaintiffs represent only a portion of the nearly 1 million physicians in America. The AMA has approximately 240,000 members, and the AOA has about 61,000. These numbers include both retirees and student physicians who are not fully licensed. MSDC has 2,000 members, many of whom are also included on the AMA's rolls. This is equally true of the state medical societies. In short, the Plaintiffs represent, at most, only 30% to 40% of the practicing physicians in this country.

The Intervenor Societies collectively represent over 600,000 U.S. physicians, most of whom are not represented by Plaintiffs. Most of the Intervenor Societies focus on highly specialized areas of medicine and represent at least 70% of the physicians in their respective

specialty areas. The majority of the Intervenor Societies' members choose not to participate in societies with a more general focus, such as the AMA, the AOA, or the state medical societies. Only 20-30% of their members belong to one of these groups. In addition, one of the Intervenor Societies, the Council of Medical Specialty Societies is an umbrella organization comprising thirty-two medical societies with an aggregate membership of more than 650,000 U.S. physicians. The Medical Group Management Association has 21,500 members who lead 13,700 organizations nationwide in which roughly 275,000 physicians provide more than 40% of the healthcare services delivered in the United States. The reach of the Intervenor Societies is broad, and the Intervenor Societies collectively comprise many more doctors than the Plaintiff Societies.

That Plaintiffs have sought relief only for their own members and state society members is manifest from their Complaint. They state from the outset that "[t]his action is brought by the AMA, AOA, and MSDC, on behalf of themselves and their members . . . . " (Compl. ¶ 1.) In Count I, Plaintiffs state that the FTC has exceeded its statutory authority by applying the Red Flags Rule to physicians but ask this Court only to "declare the Red Flags Rule unlawful as applied to the physician members" of the AMA, AOA, and the state medical societies, not all physicians. (Compl. ¶ 79.) Similarly, in Count II, Plaintiffs argue that by applying the Red Flags Rule to all physicians, the FTC has acted arbitrarily, capriciously, and contrary to law, in violation of the Administrative Procedure Act ("APA"), and yet Plaintiffs only request that the Court "declare the Red Flags Rule unlawful as applied to the physician members of the" AMA, AOA, and state medical societies. (Compl. ¶ 84.) In Count III, Plaintiffs declare that the FTC did not comply with the notice and comment rulemaking requirement of the APA when applying the Red Flags Rule, but, again, Plaintiffs seek relief only for their own members and state

medical society members. (Compl. ¶ 90.) In Count IV, Plaintiffs seek a declaratory judgment finding that the Red Flags Rule is unlawful and void as applied only to Plaintiffs' members and members of state societies. Nowhere in their complaint do Plaintiffs seek relief for any physicians who are not members of one of the Plaintiff societies or the state medical societies.

This omission is not inadvertent or an oversight. Representatives of Plaintiff AMA have informed various representatives of the proposed Intervenor Societies that Plaintiffs purposely sought relief only for their own members and state medical society members (many of whom are not members of any of the Plaintiff societies). Plaintiffs also declined requests by representatives of the Intervenor Societies to amend Plaintiffs' complaint to encompass all physicians. Accordingly, Plaintiffs do not, and will not, adequately represent the interests of the proposed Intervenor Societies or their members.

3. The Intervenor Societies Have Clear Standing to Intervene in This Case on Behalf of Their Members and to Request Relief for Physicians Generally

Given the potential adverse effects that physicians and their medical groups will suffer if they are forced to comply with the onerous procedures of the Red Flags Rule, the physician members of the Intervenor Societies would clearly have standing to intervene in this action in their own right. *Dimond*, 792 F.2d at 190-91. Article III standing requires 1) that the individual be adversely affected by the challenged conduct; 2) that the injury be fairly traceable to the defendant's challenged conduct; and 3) that the injury is likely to be redressed by a favorable decision of the court. *Id.* at 191. As Plaintiffs have correctly set forth in their complaint, physicians and medical societies are adversely affected by application of the Red Flags Rule to physicians. (Compl. ¶¶ 67-72.) Complying with the Red Flags Rule will require physicians to expend significant time and financial resources. The time that physicians and their medical groups must devote to complying with the Red Flags Rule will detract from their patient-care

duties. The Intervenor Societies must also expend time and resources advising their members about the Red Flags Rule and how to comply. These injuries are traceable to the FTC's conduct in applying the Red Flags Rule to physicians without adequate statutory authority and without complying with APA rulemaking procedures. These injuries may be redressed by a favorable decision of this Court declaring the Red Flags Rule unlawful as applied to physicians and enjoining the FTC from requiring physicians to comply with the Red Flags Rule.

Here, the Intervenor Societies have standing to intervene on behalf of their physician members (including their medical practice groups, which are directly represented by Intervenor Society Medical Group Management Association) under well-established representational or association standing principles. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 341-45 (1977). An association has standing to sue on behalf of its members when the following three factors are met:

- (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and
- (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343. As explained above, the members of the Intervenor Societies have standing to sue in their own right. The interests that the Intervenor Societies seek to protect are germane to their purposes because the Intervenor Societies are all professional societies comprised primarily of physicians or their medical groups, and the societies seek both to advance the understanding of their members' practices and to advocate on their behalf. Finally, neither the claims asserted nor the relief requested requires the participation of any individual members because this suit concerns solely questions of law (i.e., whether the FTC may enforce the Red Flags Rule against physicians) and the outcome will not turn on the facts specific to any individual physician.

Intervenor Societies not only have standing to represent their members, they also have the right to request relief that prevents the enforcement of the Red Flags Rule against physicians generally. *See ABA v. FTC*, 671 F. Supp. 2d at 88 (enjoining enforcement of the Red Flags Rule against attorneys generally, not just ABA members, based on complaint that sought relief for all attorneys). The adverse effects of the Red Flags Rule apply equally to all physicians practicing medicine. Therefore, any equitable relief issued in this case should be structured to protect all physicians and their medical groups from its enforcement.

#### 4. The Intervenor Societies' Motion to Intervene Is Timely

The Intervenor Societies' motion to intervene is timely. Neither the Federal Rules of Civil Procedure nor the D.C. District's Rules establish a time for intervening. The D.C. Circuit has held that "[t]he timeliness of a motion to intervene must be considered in light of all the circumstances of the case, . . . including the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties." Acree, 370 F.3d at 49-50 (internal citations omitted). A motion to intervene may even be timely after a court renders a decision. Dimond, 792 F.2d at 193. Here, intervention will serve the important purpose of protecting the rights of several hundred thousand physicians who are not members of the Plaintiff societies or state medical societies, and who are not encompassed within the relief requested by the Plaintiff societies. No existing parties will be prejudiced, and, in fact, all existing parties have consented to the Intervenor Societies' motion to intervene. The FTC has not even answered Plaintiffs' complaint, and need not do so until 60 days after the D.C. Circuit decides American Bar Association v. FTC. Plaintiffs will not be harmed because no briefing schedule has been set, and the Intervenor Societies seek the same declaratory and injunctive relief as the Plaintiffs, except that the Intevenor Societies want that relief extended to their members and all physicians.

В. The Intevenor Societies Meet the Standards for Permissive Intervention

Alternatively, under Rule 24(b)(1) and (3) of the Federal Rules of Civil Procedure, the

court may permit an applicant to intervene if its claim shares a question of law or fact in common

with the underlying action, and if the intervention will not unduly delay or prejudice the rights of

the original parties. For all of the reasons stated above, the Intervenor Societies' claims that the

FTC's enforcement of the Red Flags Rule on the physician members of the Intervenor Societies

raise questions of law that justify permissive intervention in this case. As noted above, allowing

the Intervenor Societies to intervene at this stage, prior to the filing of an answer or the issuance

of a briefing schedule, and while all proceedings are in abeyance, would not unduly prejudice the

parties or inconvenience the Court. The Intervenor Societies also meet the timeliness

requirement for permissive intervention, as discussed above.

IV. **Conclusion** 

For the foregoing reasons, the proposed Intervenor Societies should be granted leave to

intervene in this matter as plaintiffs.

Respectfully submitted,

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