UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **PHILIP MORRIS, INC., *et al.*,** Defendants.	Civil Action No. 99-CV-2496 (GK)

MOTION TO INTERVENE BY THE TOBACCO-FREE KIDS ACTION FUND, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, AND NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the following organizations seek to intervene in this litigation for the very limited purpose of being heard on the issue of the permissible and appropriate remedies that the Court should order in this case, should the Court find the defendants liable for the unlawful activities alleged in the Amended Complaint by the plaintiff United States: The Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and the National African American Tobacco Prevention Network.

As demonstrated in the accompanying memorandum of law, the proposed intervenors meet all of the criteria for intervention of right under Rule 24(a), and their intervention solely on the remedy issue is particularly appropriate now that the federal Government has made clear its intention to seek extremely reduced remedies from those recommended by the Department

throughout the trial as reflected by the recommendations of the Department's own witness. Thus, not only do the proposed intervenors have the requisite Article III standing to intervene in this case, but the actions of the government clearly demonstrate that the organizations' interests are no longer being adequately represented here. Alternatively, the proposed intervenors seek permissive intervention pursuant to Rule 24(b).

As the proposed intervenors also explain, they do not seek to present any additional evidence in this case, nor do they seek to test any of the evidence that has already been produced. Rather, at this juncture, they seek only the opportunity to submit a brief and reply brief concerning the issue of permissible and appropriate remedies, pursuant to the same schedule that now applies to the government plaintiff – i.e., a post-trial brief on August 24, 2005, and a reply brief on September 19, 2005 – and to be heard on this issue should the Court entertain further argument on it. The proposed intervenors are also willing to limit the number of pages in their opening brief and reply brie, as the Court deems appropriate. Hence their participation in the case should not prejudice any of the existing parties. Counsel for the United States has represented that the United States presently takes no position on the motion to intervene, but may take a position after further review of the motion. Counsel for the defendants have represented that they oppose the motion to intervene.

In support of this motion, and in accordance with the Local Rules, the proposed intervenors submit the accompanying memorandum of law, the Declarations of William Corr, Cynthia Hallett, Sherri Watson Hyde, John L. Kirkwood, Daniel E. Smith, Sue Nelson and Ursula Bauer, a Proposed Complaint, and a Proposed Order.

Respectfully submitted,

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June 29, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Plaintiff,	Civil Action No. 99-CV-2496 (GK)
V.	
PHILIP MORRIS, INC., *et al.*,	
Defendants.	

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY THE TOBACCO-FREE KIDS ACTION FUND, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, AND THE NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK

Introduction

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, six national nonprofit public health organizations– the Tobacco-Free Kids Action Fund, the American Cancer Society, the American Heart Association, the American Lung Association, the Americans for Nonsmokers' Rights, and the National African American Tobacco Prevention Network – respectfully request leave to intervene in this case under the Racketeer Influenced and Corrupt Organizations provisions ("RICO"), concerning the defendants' unlawful marketing practices, for the sole purpose of advocating remedies that are necessary to redress the defendants' wrongful conduct, as alleged in the Complaint filed by the United States Government. See First Am. Compl. (February 28, 2001) ("Amended Complaint").

These groups seek to intervene at this stage of the litigation because the Government recently announced that it has drastically reduced the relief it sought to protect the public health and welfare. As the actions of the government demonstrate, the interests represented by the proposed intervenors are no longer being adequately represented within the meaning of Rule 24(a). See Fed. R. Civ. P. 24(a) (intervention of right is appropriate "unless the applicant's interest is adequately represented by existing parties") (emphasis added).

Therefore, the prospective intervenors seek party status in this matter for a limited, yet critical, purpose – i.e., to present to the Court arguments solely on the issue of the appropriate and necessary remedies that should be imposed in this case should the Court find the defendants liable for the unlawful conduct alleged in the Government's Amended Complaint. Thus, the proposed intervenors do not seek to enter new evidence into the record, nor will they challenge the admission of evidence already before the Court, or otherwise burden the Court or the existing parties with undue delay.

Rather, these groups seek only to present arguments to the Court, based on the evidence that has already been presented, and in light of the Court of Appeals decision, United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005), as to the scope of remedies that remain permissible and are necessary to redress and prevent the defendants' unlawful practices. Specifically, granting intervention would allow these groups to submit post-trial opening and reply briefs as to the scope of permissible and appropriate remedies, pursuant to the same schedule that now applies to the Government – i.e., on August 24 and September 19, 2005, respectively – and to be heard on this issue should the Court entertain further argument on it.

As demonstrated below, the proposed intervenors easily satisfy the standards for both intervention of right under Rule 24(a) and permissive intervention under Rule 24(b). Accordingly, they should be allowed to participate as a party in this matter for the purpose of assisting the Court in fashioning remedies that are appropriate to this case.

BACKGROUND

The factual background and procedural posture of this matter are reflected in papers already filed with the Court by the existing parties, and will not be repeated here. The proposed intervenors will simply highlight the recent developments that are most pertinent to the request for intervention.

On March 21, 2005 – subsequent to the Court of Appeals' February 4, 2005 decision concerning the scope of permissible remedies in this case, Philip Morris USA Inc., 396 F.3d 1190 – the United States indicated that it would request the Court to order the defendants to fund a smoking cessation program of nationwide scope for twenty-five years, at a cost of $130 billion. See Expert Report of Michael C. Fiore, M.D., M.P.H. ¶¶ 5, 6, 12. In support of this request, the United States presented evidence to this Court that a program of such duration and scope was necessary to alleviate the tobacco addiction of all Americans who "wish to quit [smoking] but are unable to do so." Written Direct Examination of Michael C. Fiore, M.D., M.P.H. at 17, 22. Indeed, as recently as May 12, 2005, the Government affirmed its reliance on the testimony of Dr. Fiore with respect to the $130 billion remedies model, which the Government characterized as "forward-looking and aimed at future violations" and "offer[ing] a meaningful way for the Court to prevent and restrain future wrongful conduct by defendants." Reply in Opp'n to Defs.

Objections to the Written Direct Examination of Michael C. Fiore at 1-2 (emphasis added).

Nevertheless, during its closing argument in this case on June 7, 2005, the United States abruptly changed course on this issue and instead informed the Court that it seeks only $10 billion for an industry-funded cessation program. See Transcript of Closing Arguments (June 7, 2005) at 23097 - 98. In fact, at the Court's direction, the United States has now filed a "Proposed Remedies Order" in which it makes absolutely clear its decision to reduce the scope of the remedy requested for a cessation program to $10 billion. See Government's Proposed Remedies Order (June 27, 2005) at 6-10.[1]

ARGUMENT

I. THE PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Prior to Congress's 1966 amendments to Rule 24, courts had applied stringent criteria in determining whether seemingly affected parties should be allowed to intervene in ongoing litigation as a matter of right. See Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1967). The 1966 amendments relaxed the intervention standards considerably. Rule 24(a)(2) now provides:

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As explained in Nuesse, the D.C. Circuit's seminal opinion on intervention, the 1966 revision was "obviously designed to liberalize the right to intervene in federal actions." Id. Accordingly,

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[1] The Proposed Remedies Order also requests $4 billion for public education and countermarketing efforts. See id.

an applicant is entitled to intervene under Rule 24(a)(2) by demonstrating "(i) an interest in the transaction, (ii) which the applicant may be impeded in protecting because of the action, (iii) that is not adequately represented by others," and that the motion to intervene is timely. Id. at 699. As demonstrated below, the proposed intervenors easily satisfy each of these standards.

A. The Proposed Intervenors' Motion Is Timely.

Whether a motion to intervene is timely is a matter left to the Court's discretion, to be "determined from all the circumstances." NAACP v. New York, 413 U.S. 345, 366 (1973). More specifically, the Court of Appeals for this Circuit has held that:

> the amount of time which has elapsed since the litigation began is not in itself the determinative test of timeliness. Rather, the court should also look to the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already in the case.

Natural Res. Def. Council v. Costle, 561 F.2d 904, 907 (D.C. Cir. 1977) (emphasis added), quoting Hodgson v. United Mine Workers of Am., 473 F.2d 118, 129 (D.C. Cir. 1972).

Here, the proposed intervenors could not have requested leave from this Court to intervene any earlier in the proceedings, since their interests had been adequately represented by the Government until the filing of the Government's Proposed Remedies Order less than two days ago, when the Government unambiguously stated that, contrary to what it had previously informed the Court was necessary to fund an effective cessation program, the Government now only seeks $10 billion for this purpose. Compare Plaintiff's Written Direct Examination of Michael C. Fiore, M.D., M.P.H. at 17, 22, with Proposed Remedies Order (June 27, 2005) at 6-10. Therefore, the intervenors – who fervently believe that the original sum of money requested by the Government is far more reflective of what is needed to make this particular remedy

effective – have acted as quickly as possible to intervene in this action. Indeed, the Court of Appeals has held that a motion for intervention – post-judgment – is "timely" within the meaning of Rule 24, under appropriate circumstances. See, e.g., Paisley v. Central Intelligence Agency, 724 F.2d 201, 203-04 (D.C. Cir. 1984) (permitting intervention on appeal because applicant for intervention may have been misled by ambiguities in previous rulings). Accordingly, here, where the proposed intervenors seek to intervene before judgment, and solely to advocate the imposition of remedies, the motion to intervene is certainly timely. See Hodgson, 473 F.2d at 129 (allowing intervention seven years after the case was filed when the applicant did not seek to reopen the settled issues in the case but sought to participate in an upcoming, remedial phase of the litigation).

B. The Proposed Intervenors Assert Legally Cognizable Interests in This Case.

The proposed intervenors clearly have an "interest" in this litigation that is protectable within the meaning of Rule 24(a). In this regard, the appropriate inquiry "is not whether the applicable law assigns the prospective intervenor a cause of action," Jones v. Prince George's County, Maryland, 348 F.3d 1014, 1018 (D.C. Cir. 2003), but rather, whether the intervenor can demonstrate a protectable interest in the proceedings. See also Trbovich v. United Mine Workers of Am., 404 U.S. 528, 531-37 (1972) (finding no bar to intervention where the statute at issue vested the sole right of action with the Government, as long as the intervenor did not assert any additional claims).

The D.C. Circuit Court of Appeals has construed the protectable "interest" requirement of Rule 24(a)(2) to mean that the proposed intervenors must demonstrate that they have Article III

standing. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998); see also Fund for Animals, Inc. v. Norton, 322 F.3d 728, 732-33 (D.C. Cir. 2003). Here, as demonstrated below, the proposed intervenors easily satisfy the requirements for Article III standing – i.e., injury in fact, causation, and redressability. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

1. The Membership Organizations Have Standing To Sue On Behalf Of Their Members.

It is well established that an organization seeking to establish standing on behalf of its members must demonstrate that at least one of its members would otherwise have standing to sue in their own right, that the interests the organization seeks to protect are "germane" to its overall purpose, and that neither the claim asserted nor the relief requested requires the participation of individual members. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

Here, as demonstrated in the attached Declarations, the Tobacco-Free Kids Action Fund, the Americans for Nonsmokers' Rights, and the National African American Tobacco Prevention Network are all membership organizations, whose members and their children include representatives of minority communities, are harmed by the defendants' tortious conduct, false and misleading statements and deceptive marketing practices, all of which place them at an increased risk for addiction to tobacco, illness, and death, and also make it difficult for those who are already addicted, and those who will become addicted, to end their addiction. See Declaration of William Corr ¶¶ 4, 6-15; Declaration of Cynthia Hallett ¶¶ 4-11; Declaration of Sherri Watson Hyde ¶¶ 10-16. Moreover, this harm is concrete and particularized, see Sierra Club v. Morton, 405 U.S. 727, 740 n.16 (1972), because it directly threatens the health and safety

of both the individual members and their children. See, e.g., Corr Decl. ¶¶ 6-16; Hallett Decl. ¶¶ 4-11; Hyde Decl. ¶¶ 10-16; see also Declaration of Ursula Bauer ¶ 13 ("[t]he more I know about tobacco products and how they are marketed, the more worried I am that my children are at risk for starting to smoke because of the deceptive marketing practices, false and misleading statements, and tortious conduct of defendants").

Thus, as the D.C. Circuit has recognized, "even beyond the injuries to children that can pass indirectly to parents, a parent has his or her own direct, legally cognizable interest in preserving the highest level of health for his or her child." Public Citizen v. Fed. Trade Comm., 869 F.2d 1541, 1550 (D.C. Cir. 1989). Indeed, "the parents of at-risk children are the ones that we might otherwise expect to bring suit." Id. Accordingly, when a child's health is placed at risk, as here, the parents suffer concrete and particularized injuries of their own. Id.

The harm to the organizations' members is also both presently occurring and imminent, as required under Article III. See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). Thus, as alleged in the Government's Amended Complaint and the accompanying Declarations, the deceptive and fraudulent practices that form the predicate to the Government's RICO claims continue to this day. See, e.g., Am. Compl. ¶¶ 114-125 ("The Present and Continuing Threat"); see also Corr Decl. ¶¶ 6-13; Hallett Decl. ¶¶ 4-11; Hyde Decl. ¶¶ 10-16; Bauer Decl. ¶ 13 (noting her daughter's routine and ongoing exposure to "advertisements for cigarettes that she sees on her bike ride to school, when she visits stores and when she reads magazines and watches movies"). Therefore, the organizations' members have the requisite concrete, particularized and imminent injury-in-fact required under Article III, and, accordingly, the organizations may assert those interests on their behalf. See Hunt, 432 U.S. at 343.

The interests sought to be protected are also clearly "germane to the organization's purpose." Id. Indeed, this lawsuit is pertinent to the goals of all three of the membership organizations, which are:

> to free America's youth from tobacco addiction and thereby protect children and adults from the serious and debilitating health problems caused by tobacco addiction . . . . (Tobacco-Free Kids Action Fund);
>
> to protect nonsmokers' rights to breathe smoke-free air in enclosed public places and workplaces . . . . (Americans for Nonsmokers' Rights); and
>
> to facilitate the development and implementation of comprehensive and community-competent tobacco control programs to benefit communities and people of African descent (National African American Tobacco Prevention Network).

See Corr Decl. ¶ 3; Hallett Decl. ¶ 2; Hyde Decl. ¶ 7. Accordingly, the organizations' members' interests in this matter are entirely consistent with each of the respective organizations' overall purposes.

The final requirement for associational standing – that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," Hunt, 432 U.S. at 343 – is also easily met here, since injunctive and monetary relief of the type sought by the government does not require "individualized proof" to apportion any award, and therefore is "properly resolved in a group context." Id. at 344. Indeed, the Government has not requested specific damages based on injury to any particular individuals, but rather has requested broad-based relief that would prevent, restrain, and redress the ongoing illegal conduct of the defendants. Accordingly, the participation of individuals, including members of all three of the membership organizations that seek to intervene, is unnecessary for the resolution of this lawsuit.

The organizations' members also readily satisfy the causation prong of Article III standing, since their injuries are "fairly traceable" to the defendants' unlawful actions, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976) – i.e., the unlawful practices complained of by the government in turn lead to more children becoming addicted to tobacco products. See, e.g., Am. Compl. ¶¶ 94-103; Bauer Decl. ¶¶ 13, 17, 18; Corr Decl. ¶¶ 9, 13-16; Hyde Decl. ¶¶ 10-16. Accordingly, it is indisputable that the members' injuries are "fairly traceable" to the alleged unlawful acts at issue here for purposes of causation.

The redressability prong of Article III is also met because it is certainly "likely" that the relief sought will redress the asserted injuries, to some degree, either by enjoining defendants from engaging in the acts that cause the members' injuries, or providing resources to treat those who have become addicted to tobacco as a result of these continuing unlawful practices. See Lujan, 504 U.S. at 561 (setting forth redressability standard); see also Larson v. Valente, 456 U.S. 228, 243 n.15 (1982) (parties satisfy the redressability requirement when they show that a favorable decision will relieve some of their injuries, and "need not show [it] will relieve [] every injury") (emphasis in original); Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 185-86 (2000) (holding that the plaintiffs' injuries would be redressed even where the relief sought merely deterred the conduct in question).[2]

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[2] Moreover, as the Court observed in Public Citizen, the injuries complained of by parents whose children are exposed to the defendants' deceptive marketing practices and false and misleading public statements are no less redressable simply because the parents "have told their children of the risks associated with [ ] tobacco," if, as demonstrated in the accompanying declarations, "their children pick up conflicting messages from other sources including [tobacco industry] promotional messages." 869 F.2d at 1552 n.23. See also, e.g., Bauer Decl. ¶ 16 ("[e]ven for my children, who are well informed on the topic, the existence of tobacco advertisements in their community and in their lives sows confusion and doubt about the dangers of smoking. As my daughter pointed out at the age of ten: if we're not supposed to smoke, why

2. Prospective Intervenors American Cancer Society, American Heart Association, and American Lung Association Have Standing to Sue on Their Own Behalf.

Prospective intervenors American Cancer Society, American Heart Association, and American Lung Association seek to intervene in this matter on their own institutional behalf, because the defendants' conduct harms them directly as organizations. See Declaration of Daniel E. Smith ¶¶ 4-7; Declaration of Sue Nelson ¶¶ 5-10; Declaration of John L. Kirkwood ¶¶ 3-14. Here, as demonstrated by the attached declarations, all three organizations devote substantial resources toward educating the public about the true health risks of tobacco and counteracting the deceptive and fraudulent marketing practices of the defendants. See Smith Decl. ¶¶ 4-7; Nelson Decl. ¶¶ 5-10; Kirkwood Decl. ¶¶ 3-14.

Specifically, the organizations have spent considerable resources, including, but not limited to, research and public education on the ill effects of smoking, in order to:

> warn their supporters, volunteers, and the general public about the dangers inherent in the defendants' products – dangers about which the defendants had a duty to warn the public but failed to do so;
>
> counter the adverse public health effects of the defendants' deceptive marketing practices, which target children, induce smokers not to quit by marketing "low-tar" cigarettes, and induce consumers to smoke by convincing them that it will be easy for them to quit;
>
> correct erroneous information conveyed to the public by the defendants' false and misleading statements; and
>
> implement cessation programs at their own expense, to relieve the addiction of teen and adult smokers who seek to quit.

Smith Decl. ¶¶ 4-7; Nelson Decl. ¶¶ 5-10; Kirkwood Decl. ¶¶ 3-14. Each of these "devot[ions]

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are there so many signs all around us telling us to smoke?").

of significant resources" drains the fisc and otherwise frustrates the purposes of these organizations, which could have instead directed these resources to the advancement of the public health or their other institutional goals and programs. Therefore, since the defendants' conduct has "perceptibly impaired" the organizations' mission to promote the public health, "there can be no question that the organization[s] [have] suffered injury in fact." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982).

These injuries – like those of the membership organizations – are also "fairly" traceable to the defendants' unlawful actions, Simon, 426 U.S. at 41-42, and hence these organizations can demonstrate the causation required by Article III. Indeed, as illustrated in the Government's Amended Complaint, the defendants have made, and continue to make, false and deceptive statements and to engage in other deceptive marketing practices that mislead the public as to the dangers of tobacco addiction and tobacco-caused illness. See, e.g., Am. Compl. ¶¶ 37-91, 114-125. As a result, the proposed intervenors' have had to undertake public education, research, clinical programs, and outreach – at their own expense – to counteract the defendants' fraudulent and harmful messages. See Smith Decl. ¶¶ 5-6; Nelson Decl. ¶¶ 5-10; Kirkwood Decl. ¶¶ 7-11. Therefore, since the organizations would not have had to divert as many, if any, institutional resources toward such projects absent the defendants' unlawful conduct, the organizations' injuries are"fairly" traceable to this conduct. Simon, 426 U.S. 41-42; see also Havens Realty, 455 U.S. at 379-80 (organizational plaintiff has standing where it must devote significant resources to counteracting allegedly unlawful practices).

For similar reasons, the proposed intervenors can demonstrate that the relief sought in this case would "likely" redress their injuries, Lujan, 504 U.S. at 561, since a favorable ruling will

enjoin and restrict the unlawful conduct that compels the organizations to divert their scarce resources toward counteracting and correcting the defendants' deceptive and erroneous statements concerning the harm to the public health from tobacco products.

Therefore, because all six of the proposed intervenors clearly satisfy the requirements for Article III standing, they have demonstrated a protectable "interest" within the meaning of Rule 24(a).[3]

C. Disposition of the Matter Will Impair the Ability of the Proposed Intervenors to Protect Their Interests.

As demonstrated above, it is also clear that the proposed intervenors are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest" within the meaning of Rule 24(a). See Fed. R. Civ. P. 24(a). Indeed, for example, in light of the Government's very recent decision to seek only a fraction of the funding that, according to the Government's own expert, is required to maintain an effective tobacco cessation program, see Written Direct Examination of Michael C. Fiore, M.D., M.P.H. at 17, 22, having an opportunity – as parties to this action – to advocate adherence to the government's prior position

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[3] The interests sought to be protected by the proposed intervenors also fall well within the applicable zone of interests for purposes of prudential standing. See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (the court must ascertain "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute"). Here, the government alleges numerous violations of the wire and mail fraud provisions of the criminal code by defendants in their efforts to deceive the public, particularly children, about the dangers of tobacco products. See Am. Compl. ¶¶ 204-06. Accordingly, because each of the organizations seeks to protect the public, particularly children, from such dangers, the organizations' interests fall squarely within the pertinent zone of interest. See also Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 288 (1992) (Scalia, J., concurring) (noting that "the zone-of-interests test that will be applied to the various causes of action created by [RICO]
. . . vary according to the nature of the criminal offenses upon which those causes of action are based").

may be the only way the proposed intervenors can adequately protect their interests. Accordingly, the organizations also amply meet this requirement for intervention of right. Cf. United States v. LTV Corp., 746 F.2d 51, 54 n.7 (D.C. Cir. 1984) (private party may intervene to prevent impairment of its own interests where the "'government is not vigorously and faithfully representing the public interest'"), quoting United States v. Hartford-Empire Co., 573 F.2d 1, 2 (6th Cir. 1978).

D. The Federal Government No Longer Adequately Represents the Interests of the Proposed Intervenors.

The final criterion for intervention of right – a demonstration that the applicants' interests are not "adequately represented by existing parties" – is also easily shown here. Fed. R. Civ. P. 24(a). Indeed, it is well established that this requirement "is not onerous." Dimond v. Dist. of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986). Rather, "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate," moreover, "the burden of making that showing should be treated as minimal." Trbovich, 404 U.S. at 538 n. 10 (emphasis added); see also Nuesse, 385 F.2d at 703. Moreover, the interests asserted by the applicants "need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." Nuesse, 385 F.2d at 703.

Particularly in light of the Proposed Remedies Order filed by the Government less than two days ago, the Court need not speculate as to whether the Government may continue to adequately represent the interests of the proposed intervenors – it is evident that the Government's continued representation is now manifestly inadequate. Indeed, for example, when the Government confirmed in its Proposed Remedies Order that it would no longer seek

more than ninety per cent of the original remedy it had urged throughout this case – as recently as May 12, 2005 – it no longer adequately represented the interests of the proposed intervenors.

Therefore, although the Government continues to pursue this matter as a whole, its lack of diligence with respect to the particular remedies needed to redress and enjoin the unlawful activities of the defendants fails to protect the interests of the proposed intervenors and those they represent. Indeed, as a result of the government's recent announcement that it will not pursue a fully funded cessation program, which, according to its own expert witness, is necessary to redress the defendants' ongoing illegal acts, members of Congress have expressed their own doubts concerning the government's representation of the public's interests in this case. Thus, in a letter sent to the Attorney General of the United States on June 24, 2005, five Senators expressed concern that the Department of Justice's "apparent intention to seek $10 billion in remedies for smoking cessation is woefully inadequate to meet the needs of the 45 million Americans who currently smoke and those who will become addicted in the future due to the companies' ongoing efforts to obtain new consumers of their deadly products." Letter to Attorney General Alberto Gonzales from Senators Richard Durbin, Jack Reed, Frank Lautenberg, Tom Harkin, Edward Kennedy (June 24, 2005) (attached as Proposed Intervenors' Exhibit A) (emphasis added); see also United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (D.C. Cir. 1976) ("[c]ertainly, . . . the government's virtual abandonment of the relief originally requested [ ] was a sufficient showing that the public interest was not being adequately represented") (citing Cascade Natural Gas Corp. v. El Paso Gas Co., 386 U.S. 129, 147-49 (1967)).

Moreover, the six public health organizations that seek to intervene have a clear incentive and particular aptitude for "mak[ing] a more vigorous presentation" of the arguments – previously made to this Court by the government, but now abandoned – concerning the scope of remedies necessary to fully redress and prevent the ongoing harms that flow from the defendants' unlawful activities. See Natural Res. Def. Council v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977) (internal citations omitted). Therefore, as the Supreme Court stated in Trbovich, "[s]ince the court is not limited . . . to consideration of remedies proposed by the [Government], there is no reason to prevent the intervenors from assisting the court in fashioning a suitable remedial order." 404 U.S. at 537 n.8 (emphasis added).

Accordingly, because the proposed intervenors meet all of the requirements for intervention as of right, they "shall" be permitted to intervene at this stage of the litigation for purposes of presenting to the Court their arguments in support of "a suitable remedial order" that will effectively ameliorate the consequences of defendants' continuing unlawful practices. See Rule 24(a); Trbovich, 404 U.S. at 537 n.8.

II. IN THE ALTERNATIVE, THE PROPOSED INTERVENORS SHOULD BE GRANTED PERMISSIVE INTERVENTION.

Although the proposed intervenors amply satisfy the criteria for intervention as of right under Rule 24(a), in the alternative, this Court should exercise its discretion by allowing the applicants to intervene in this action as a permissive matter under Rule 24(b). Rule 24(b) provides for permissive intervention when "an applicant's claim or defense in the main have a question of law or fact in common," and further provides that "[i]n exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of

the rights of the original parties." Here, the prospective intervenors' limited purpose for intervention ensures not only that they present common questions of law and fact, but also that their participation will not unduly delay the proceedings or prejudice the existing parties.

Thus, in their proposed Complaint filed concurrently with their motion to intervene, the proposed intervenors do not allege any new legal claims or any additional facts, other than those necessary to identify their interests in this litigation. See Proposed Intervenors' Compl. ¶ 9. Instead, the proposed intervenors simply incorporate by reference – paragraph by paragraph – the same factual contentions and claims alleged by the Government in its Amended Complaint. See id. As the proposed intervenors have further explained, they seek only to participate in this case for the limited purpose of ensuring that the scope of remedies considered by the Court will fully address the harm to their protectable interests and those of their members. As they have also made clear, the proposed intervenors will abide by the same schedule for post-trial briefs that currently applies to the government, and they are willing to substantially limit the length of those submissions. See Mot. to Intervene; Proposed Order.

Therefore, since the proposed intervenors' claims present questions of law and fact that are common to those already before the Court, and their participation will neither prejudice the existing parties nor cause any undue delay, this Court should exercise its discretion and grant permissive intervention in this case.

CONCLUSION

For all of the foregoing reasons, the proposed intervenors' Motion to Intervene should be granted.

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