

**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 Neuromuscular & Electrodiagnostic Medicine, 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,

A handwritten signature in black ink, appearing to read "Robert M. Portman". The signature is written in a cursive, flowing style.

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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>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.”<sup>2</sup> 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>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).<sup>3</sup> 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

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

<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. Beatty*, 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 Intervenor Societies want that relief extended to their members and all physicians.

**B. The Intervenor 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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Date: August 18, 2010

**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,

and

AMERICAN ACADEMY OF  
DERMATOLOGY, ASSOCIATION,  
AMERICAN ACADEMY OF FAMILY  
PHYSICIANS, AMERICAN ACADEMY OF  
HOSPICE AND PALLIATIVE MEDICINE,  
AMERICAN ACADEMY OF NEUROLOGY,  
AMERICAN ACADEMY OF  
OPHTHALMOLOGY, AMERICAN  
ACADEMY OF ORTHOPAEDIC  
SURGEONS, AMERICAN ACADEMY OF  
OTOLARYNGOLOGY-HEAD & NECK  
SURGERY, AMERICAN ACADEMY OF  
PEDIATRICS, AMERICAN ACADEMY OF  
PHYSICAL MEDICINE AND  
REHABILITATION, AMERICAN  
ASSOCIATION OF NEUROLOGICAL  
SURGEONS, AMERICAN ASSOCIATION  
OF NEUROMUSCULAR &  
ELECTRODIAGNOSTIC MEDICINE,  
AMERICAN COLLEGE OF CARDIOLOGY,  
AMERICAN COLLEGE OF CHEST  
PHYSICIANS, AMERICAN COLLEGE OF  
EMERGENCY PHYSICIANS, AMERICAN  
COLLEGE OF OCCUPATIONAL AND  
ENVIRONMENTAL MEDICINE,  
AMERICAN COLLEGE OF PHYSICIANS,  
AMERICAN COLLEGE OF RADIOLOGY,  
AMERICAN PSYCHIATRIC ASSOCIATION,  
AMERICAN SOCIETY OF  
ANESTHESIOLOGISTS, AMERICAN  
SOCIETY OF CATARACT & REFRACTIVE  
SURGERY, AMERICAN SOCIETY OF  
CLINICAL ONCOLOGY, AMERICAN

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

SOCIETY FOR CLINICAL PATHOLOGY,  
AMERICAN UROLOGICAL ASSOCIATION,  
COUNCIL OF MEDICAL SPECIALTY  
SOCIETIES, MEDICAL GROUP  
MANAGEMENT ASSOCIATION, and THE  
SOCIETY OF THORACIC SURGEONS

Intervenor-Plaintiffs

v.

FEDERAL TRADE COMMISSION,

Defendant.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF OF  
INTERVENOR-PLAINTIFF MEDICAL SOCIETIES**

NOW COME Plaintiffs, American Academy of Dermatology Association, American Academy of Family Physicians, American Academy of Hospice and Palliative Medicine, American Academy of Neurology, American Academy of Ophthalmology, American Academy of Orthopaedic Surgeons, American Academy of Otolaryngology–Head & Neck Surgery, American Academy of Pediatrics, American Academy of Physical Medicine and Rehabilitation, American Association of Neurological Surgeons, American Association of Neuromuscular & Electrodiagnostic Medicine, American College of Cardiology, American College of Chest Physicians, American College of Emergency Physicians, American College of Occupational and Environmental Medicine, American College of Physicians, American College of Radiology, American Psychiatric Association, American Society of Anesthesiologists, American Society of Cataract & Refractive Surgery, American Society of Clinical Oncology, American Society for Clinical Pathology, American Urological Association, Council of Medical Specialty Societies, Medical Group Management Association, and The Society of Thoracic Surgeons (hereinafter, the “Intervenor Societies”), by and through their undersigned counsel, and for their Complaint against the United States Federal Trade Commission (“FTC” or “Defendant”), state as follows:

## **NATURE OF THE ACTION**

1. This action is brought by the Intervenor Societies, on behalf of themselves and their members, to declare unlawful and set aside the FTC's application to physicians of the regulation, commonly known as the "Red Flags Rule," 16 C.F.R. § 681.2.

2. The Red Flags Rule requires "financial institutions" and other "creditors" to develop and implement written plans to prevent and detect identity theft. The FTC has taken the position that physicians are "creditors" of patients if the physicians do not receive payment in full at the time of providing care to the patients. The FTC has announced that physicians must comply with the Red Flags Rule by December 31, 2010.

3. In applying the Red Flags Rule to physicians who do not require payment in full at the time of providing care to patients, the FTC is exceeding its statutory authority and acting arbitrarily and capriciously. In so doing, the FTC has also failed to follow the notice and comment process required by the Administrative Procedure Act, 5 U.S.C. § 553.

4. Timely judicial relief is required to stop the FTC's unlawful enforcement of the Red Flags Rule against members of the Intervenor Societies and other physicians and their medical practice groups.

## **PARTIES**

5. The American Academy of Dermatology Association ("AADA") is the resource for government affairs, health policy and practice information for dermatologists, and plays a major role in formulating policies that can enhance the quality of dermatologic care. With a collective membership of more than 16,000 physicians worldwide, AADA is committed to advancing the diagnosis and medical, surgical, and cosmetic treatment of the skin, hair and nails; advocating high standards in clinical practice, education, and research in dermatology; and

supporting and enhancing patient care for a lifetime of healthier skin. AADA is a not-for-profit organization headquartered at 930 E. Woodfield Road, Schaumburg, Illinois 60173.

6. The American Academy of Family Physicians (“AAFP”), founded in 1947, is the national association of family doctors. It is comprised of approximately 94,000 physician, resident, and student members in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and the Uniformed Services of the United States. The overall mission of the AAFP is to improve the health of patients, families and communities by serving the needs of members with professionalism and dignity. AAFP is a not-for-profit organization headquartered at 11400 Tomahawk Creek Parkway, Leawood, Kansas 66211.

7. The American Academy of Hospice & Palliative Medicine (“AAHPM”) is the not-for-profit professional organization for physicians specializing in hospice and palliative medicine. AAHPM’s has more than 4,000 members—primarily physicians—but also nurses, social workers and other clinicians interested in advancing hospice and palliative medicine and improving the care of patients with life-threatening or serious conditions. AAHPM is a nonprofit organization headquartered at 4700 West Lake Avenue, Glenview, Illinois 60025.

8. The American Academy of Neurology (“AAN”) is a specialty medical association of neurologists, residents, medical students, and affiliated medical professions. AAN currently has more than 22,500 worldwide members, with nearly 18,500 U.S. members. AAN’s mission is to provide superior educational opportunities for members, further the art and science of neurological medicine, assist neurologists with the increasingly complex regulatory environment, and advocate for the interests of neurology—all for the benefit of people suffering from neurological illnesses. AAN is a not-for-profit organization headquartered at 1080 Montreal Avenue, St. Paul, Minnesota 55116.

9. The American Academy of Ophthalmology (“AAO”) is the largest national membership association of ophthalmologists, the medical and osteopathic doctors who provide comprehensive eye care, including medical, surgical and optical care. AAO has approximately 32,000 members worldwide, of whom 71% practice in the United States. The mission of the American Academy of Ophthalmology is to advance the lifelong learning and professional interests of ophthalmologists (Eye M.D.s) to ensure that the public can obtain the best possible eye care. AAO is a not-for-profit organization headquartered at 655 Beach Street, San Francisco, California 94109.

10. The American Association of Orthopaedic Surgeons and its companion organization, the American Academy of Orthopaedic Surgeons (collectively “AAOS”), represent more than 23,000 U.S. Board-certified orthopaedic surgeons. The mission of the AAOS is to serve the profession, champion the interests of patients, and advance the highest quality of musculoskeletal health. AAOS provides musculoskeletal education through its annual scientific meeting, continuing medical education courses, publications, and electronic media materials. In addition to education, AAOS provides practice management services to orthopaedic surgeons and allied healthcare professionals. AAOS is a not-for-profit organization headquartered at 6300 N. River Road, Rosemont, Illinois 60018.

11. The American Academy of Otolaryngology – Head and Neck Surgery (“AAO-HNS”), one of the oldest medical associations in the nation, represents nearly 12,000 physicians and allied health professionals who specialize in the diagnosis and treatment of disorders of the ears, nose, throat, and related structures of the head and neck. Often referred to as ENT physicians, otolaryngologist–head and neck surgeons treat some of the most common medical disorders afflicting Americans, including hearing loss and balance problems; snoring and sleep

apnea; sinus and rhinological disorders; speech, voice and swallowing problems; and head and neck cancer. The AAO-HNS serves its members by facilitating the advancement of the science and art of medicine related to otolaryngology and by representing the specialty in governmental and socioeconomic issues. AAO-HNS is a not-for-profit organization headquartered at 1650 Diagonal Road, Alexandria, Virginia 22314.

12. The American Academy of Pediatrics (“AAP”) was founded in 1930 and is a national organization dedicated to furthering the interests of children’s health and the pediatric specialty. Since its inception, the membership of AAP has grown from the original group of 60 physicians specializing in children’s health to 60,000 primary care physicians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 80 years, AAP has become a powerful voice for children’s health through education, research, advocacy, and expert advice, and has demonstrated a continuing commitment to working with hospitals and clinics, as well as with state and federal governments to protect the well-being of America’s children. AAP is a not-for-profit organization headquartered at 141 Northwest Point Boulevard, Elk Grove Village, Illinois 60007-1098.

13. As the premier medical society for the specialty of physical medicine and rehabilitation, the American Academy of Physical Medicine and Rehabilitation (“AAPM&R”) is the only organization exclusively serving the needs of practicing PM&R physicians, known as physiatrists. With more than 7,500 members, the AAPM&R represents more than 87 percent of U.S. physiatrists and international colleagues from 37 countries who provide physical medicine and rehabilitation services to persons with physical disabilities such as stroke, traumatic brain injury, spinal injury, amputations, musculoskeletal conditions, such as back and neck pain, tendonitis, arthritis, spinal disk disorders, fibromyalgia, and acute and chronic pain. Physiatrists

treat patients of all ages afflicted with function-limiting and/or painful conditions involving the central and peripheral nervous system and cardiopulmonary and musculoskeletal systems.

Physiatrists also treat neurological disorders such as multiple sclerosis, cerebral palsy, polio, and amyotrophic lateral sclerosis (often referred to as “Lou Gehrig’s Disease”). AAPM&R is a not-for-profit organization headquartered at 9700 Bryn Mawr Avenue, Suite 200, Rosemont, Illinois 60018.

14. Representing approximately 4,000 neurosurgeons in the United States, the American Association of Neurological Surgeons (“AANS”) is dedicated to advancing the specialty of neurological surgery to promote the highest quality of patient care. Neurosurgery is the medical specialty concerned with the prevention, diagnosis, treatment, and rehabilitation of those with disorders that affect the spinal column, spinal cord, brain, and peripheral nerves. AANS is a not-for-profit organization headquartered 725 Fifteenth Street, NW, Suite 500, Washington, D.C. 20005.

15. The American Association of Neuromuscular & Electrodiagnostic Medicine (“AANEM”) is a national professional organization representing over 5,000 neurologists and physiatrists. AANEM works to improve the quality of medical care to patients with muscle and nerve disorders and is dedicated to the advancement of neuromuscular, musculoskeletal, and electrodiagnostic (EDX) medicine. AANEM is a non-profit organization headquartered at 2621 Superior Drive NW Rochester, Minnesota 55901.

16. With over 29,000 members in the United States, the American College of Cardiology (“ACC”) is the leading national advocate for quality cardiovascular care. Incorporated as a teaching institution in 1949, its current purpose is to promote the science and art of cardiology, and to ensure that patients with disorders affecting the heart receive the highest

quality care. ACC is a not-for-profit organization headquartered at 2400 N Street, NW, Suite 767, Washington, D.C. 20037.

17. The American College of Chest Physicians (“ACCP”) is a medical specialty society comprised of over 17,800 physicians and allied health professionals whose everyday-practice involves diseases of the chest in the specialties of pulmonology, cardiology, thoracic and cardiovascular surgery, sleep medicine, critical care medicine, and anesthesiology. As a multidisciplinary society, the ACCP offers broad viewpoints on matters of public health and clinical policy in cardiopulmonary, sleep, critical care medicine, and surgery. ACCP is a not-for-profit organization headquartered at 3300 W. Dundee Road, Northbrook, Illinois 60062-2348.

18. The American College of Emergency Physicians (“ACEP”) is a nonprofit, voluntary professional and educational society of over 28,400 emergency physicians practicing in the United States and other countries. Founded in 1968, ACEP is the nation’s oldest and largest association of emergency physicians. ACEP fosters the highest quality of emergency medical care through the education of emergency physicians, other health care professionals, and the public; the promotion of research; the development and promotion of public health and safety initiatives; and the provision of leadership in the development of health care policy. ACEP is a not-for-profit organization headquartered at 1125 Executive Circle, Irving, Texas 75038.

19. The American College of Occupational and Environmental Medicine (“ACOEM”) represents more than 4,000 physicians and other health care professionals specializing in the field of occupational and environmental medicine. Founded in 1916, ACOEM is the nation's largest medical society dedicated to promoting the health of workers through preventive medicine, clinical care, research, and education. ACOEM is a not-for-profit

organization headquartered at 25 Northwest Point Boulevard, Suite 800, Elk Grove Village, Illinois 60007.

20. The American College of Physicians, Inc. (“ACP”) is a national organization of internists—physicians who specialize in the prevention, detection and treatment of illnesses in adults. ACP is the largest medical-specialty organization and second-largest physician group in the United States. Its membership of 130,000 includes internists, internal medicine subspecialists, and medical students, residents, and fellows. ACP’s mission is to enhance the quality and effectiveness of health care by fostering excellence and professionalism in the practice of medicine. ACP is a non-profit organization headquartered at 190 North Independence Mall West, Philadelphia, Pennsylvania 19106.

21. The American College of Radiology (“ACR”) is a national medical professional membership association. The ACR’s 34,000 members include radiologists, radiation oncologists, medical physicists, interventional radiologists and nuclear medicine physicians. The ACR’s mission is to serve patients and society by maximizing the value of radiology, radiation oncology, interventional radiology, nuclear medicine and medical physics by advancing the science of radiology, improving the quality of patient care, positively influencing the socio-economics of the practice of radiology, providing continuing education for radiology and allied health professions, and conducting research for the future of radiology. ACR is a not-for-profit organization headquartered at 1891 Preston White Drive, Reston, Virginia 20191.

22. The American Psychiatric Association (“APA”) is the oldest medical specialty society in the United States. Founded in 1844, it represents over 38,000 psychiatrists working together to ensure humane care and effective treatment for all persons with mental disorders including substance-related disorders. APA is the voice and conscience of modern psychiatry,

working towards a society that has available, accessible, quality psychiatric diagnosis and treatment. The mission of the APA is to promote the highest quality care for individuals with mental disorders and their families; promote psychiatric education and research; advance and represent the profession of psychiatry; and serve the professional needs of its members. APA is a not-for-profit organization headquartered at 1000 Wilson Boulevard, Suite 1825, Arlington, VA 22209.

23. Founded in 1905, the American Society of Anesthesiologists (“ASA”) is an educational, research and scientific association with 44,500 members, organized to raise and maintain the standards of the medical practice of anesthesiology and improve patient care. ASA is a not-for-profit organization headquartered at 1501 M Street NW, 3rd Floor, Washington, D.C. 20005.

24. With approximately 10,000 members, the American Society of Cataract and Refractive Surgery (“ASCRS”) is the nation’s leading professional society of physicians providing anterior segment specialty care in ophthalmology. Founded in 1974, ASCRS promotes the science and art of ophthalmology and seeks to ensure that patients receive the highest quality innovative eye care. ASCRS is a not-for-profit organization headquartered at 4000 Legato Road, Suite 700, Fairfax, Virginia 22033.

25. The American Society of Clinical Oncology (“ASCO”) was founded in 1964 with the over-arching goal of improving cancer care. More than 28,000 oncology practitioners belong to ASCO, representing all oncology disciplines and subspecialties. ASCO is committed to improving cancer care and prevention and to advancing education and science in the care of patients with cancer. ASCO strongly supports all types of cancer research, but in particular,

patient-oriented cancer research. ASCO is a not-for-profit organization headquartered at 2319 Mill Road, Suite 800, Alexandria, Virginia 22314.

26. The American Society for Clinical Pathology (“ASCP”) is the largest and oldest organization representing the medical specialty of pathology and laboratory medicine. Founded in 1922, ASCP has 130,000 members working as pathologists and laboratory professionals throughout the United States and around the world. Of these, 8,500 are pathologists. ASCP members design and interpret the tests that detect diseases, predict outcomes, and determine the appropriate therapy for patients. ASCP is recognized for its excellence in continuing professional education, certification of laboratory professionals, and advocacy. ASCP is dedicated to patient safety, public health, and the practice of pathology and laboratory medicine. ASCP is a not-for-profit organization headquartered at 33 West Monroe Street, Suite 1600, Chicago, IL 60603.

27. The American Urological Association, Inc. (“AUA”) was established in 1902, and its members today number more than 17,000 urologists worldwide, of whom about 9,000 are engaged in the active practice of medicine in the United States. The specialty focuses on diseases and conditions of the genito-urinary tract of both men and women. Together with affiliated nonprofit corporations and eight regional Sections, AUA advances its mission to promote the highest standards of urological clinical care through education, research, and in the formulation of health care policy. AUA is a not-for-profit organization headquartered at 1000 Corporate Boulevard, Linthicum, Maryland 21090.

28. The Council of Medical Specialty Societies (“CMSS”), founded in 1965, was created to provide an independent forum for the discussion by medical specialists of issues of national interest and mutual concern. Today, CMSS represents thirty-four medical societies with

an aggregate membership of more than 650,000 U.S. physicians (many of whom are among the Intervenor Societies). Its main purpose is to provide a forum for collaboration to influence policy, medical education and accreditation from a broad, cross-specialty perspective. CMSS is the unified voice for specialty societies established to improve the United States healthcare system and the health of the public. CMSS is a not-for-profit organization headquartered at 230 E. Ohio Street, Suite 400, Chicago, Illinois 60611.

29. The Medical Group Management Association (“MGMA”) is the premier membership association for professional administrators and leaders of medical group practices, with approximately 21,500 members managing and leading some 13,700 organizations, in which more than 275,000 physicians practice. MGMA is dedicated to improving continually the performance of medical group practice professionals and the organizations they represent. MGMA is a nonprofit organization headquartered at 104 Inverness Terrace East, Englewood, Colorado 80112.

30. With over 6,000 members, The Society of Thoracic Surgeons (“STS”) is the largest professional society in the world representing the interests of cardiothoracic surgeons, who perform heart, lung and other surgical procedures within the chest. Founded in 1964, the Society’s mission is to enhance the ability of cardiothoracic surgeons to provide the highest quality patient care through education, research and advocacy. STS is an Illinois not-for-profit organization headquartered at 633 North Saint Clair Street, Chicago, Illinois 60611.

31. The Intervenor Societies each have been injured by being required to incur the costs of advising members on compliance with the Red Flags Rule even though the Rule is not lawfully applied to such members. Moreover, each association has standing to pursue this action on behalf of its respective members under the test enunciated in *Hunt v. Washington State Apple*

*Adver. Comm'n*, 432 U.S. 333, 343 (1977). Specifically, the members of each organization would have standing to sue in their own right. The interests at stake in this case are germane to the organizational purposes of each of the associations. Moreover, neither the claims asserted nor the relief requested requires the participation of individual members of the associations. Intervenor societies have established ethical and professional standards for their physician members. These standards require that physicians maintain a fiduciary duty to safeguard the interests of the patient and respect the patient's confidentiality in accordance with all state and federal laws and regulations addressing patient privacy. Intervenor societies seek to protect their members from undue government interference in their medical practices and in the conduct of their offices.

32. Defendant FTC is an independent agency of the United States. *See* 15 U.S.C. § 41 et seq. The FTC promulgated the Red Flags Rule pursuant to the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. § 1681 et seq. The FTC's headquarters are at 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

33. Sovereign immunity does not preclude this suit because this is "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

### **JURISDICTION AND VENUE**

34. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

35. The relief requested by the Intervenor Societies is authorized by 5 U.S.C. § 702 (Administrative Procedure Act); 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 2201 (Declaratory Judgment Act); and 28 U.S.C. § 2202 (further relief). The Intervenor Societies have a right to bring this action pursuant to the judicial-review provision of the Administrative

Procedure Act, 5 U.S.C. § 702, and the implied nonstatutory review procedure provided by 28 U.S.C. § 1331.

36. Venue lies in this district under 28 U.S.C. § 1391(e).

### **BACKGROUND AND FACTUAL ALLEGATIONS**

37. The Intervenor Societies incorporate by reference paragraphs 17 through 66 of the Complaint of Plaintiffs American Medical Association, American Osteopathic Association, and Medical Society for the District of Columbia.

#### **The Application of the Red Flags Rule to Physicians Is Harming and Will Continue to Harm the Intervenor Societies and Their Members**

38. Members of the Intervenor Societies are “adversely affected or aggrieved” within the meaning of 5 U.S.C. § 702 by the requirements set forth in the Red Flags Rule as applied to physicians by the Extended Enforcement Policy.

39. Compliance with the Red Flags Rule imposes significant burdens on physicians, particularly sole practitioners and those practicing in small groups.

40. Compliance with the Red Flags Rule requires physicians, acting primarily through their medical practice groups, to develop a plan to detect “red flags.” This will require significant resources to address the unique nature of each practice. A plan for a physician who serves in a rural area in which patients are well-known will be different from one for a physician in a large group in an urban area. Once a plan is developed, it has to be implemented and maintained. “Red flags” must be detected and appropriate responses must be made. The development of a plan will substantially drain the financial resources of physicians, particularly those whose support systems are limited. Correspondingly, the time required to comply with the Red Flags Rule will necessarily detract from the attention physicians are able to give their patients.

41. The Intervenor Societies themselves are harmed because they must expend resources giving guidance to their members about a rule that is not properly being applied to such members.

42. The Red Flags Rule and the Extended Enforcement Policy constitute “final agency action” within the meaning of 5 U.S.C. § 704.

43. The injuries suffered by the Intervenor Societies and their members from application of the Red Flags Rule to physicians cannot be remedied at law and are irreparable.

## CAUSES OF ACTION

### COUNT I:

#### **The FTC Acted Beyond Its Authority in Applying the Red Flags Rule to Physicians Who Do Not Require Payment at the Time of Providing Care to the Patient**

44. The Intervenor Societies repeat and reallege paragraphs 1-43 as if set forth fully herein.

45. Pursuant to 5 U.S.C. § 706(2)(C), a reviewing court shall hold unlawful and set aside agency action found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

46. By applying the Red Flags Rule to physicians and their medical practice groups that do not require payment at the time of providing care, the FTC has exceeded its statutory authorization from Congress under FACTA.

47. FACTA cannot reasonably be read to include physicians as “creditors” or patients as “account holders” or “customers.” Nothing in the text of FACTA or its legislative history suggests that Congress intended the FTC to regulate physicians or their medical practice groups under that statute.

48. The FTC’s belief that Congress impliedly intended physicians to fall within FACTA’s definition of “creditors” is contradicted by the principle that when Congress intends to regulate the practice of medicine, it does so expressly. *See Gonzalez v. Oregon*, 546 U.S. 243, 270-72 (2006).

49. The FTC has taken agency action in excess of its statutory jurisdiction, authority, and limitations, and short of statutory right.

50. This Court should, therefore, declare the Red Flags Rule unlawful as applied to physicians and their medical practice groups, even if they do not require payment at the time they provide care to patients—and the Court should enjoin such application of the rule.

## **COUNT II:**

### **Application of the Red Flags Rule to Physicians Is Arbitrary, Capricious, and Contrary to Law**

51. The Intervenor Societies repeat and reallege paragraphs 1-43 as if set forth fully herein.

52. Pursuant to 5 U.S.C. § 706(2)(A), a reviewing court must hold unlawful and set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

53. The FTC has acted arbitrarily, capriciously, and contrary to law by failing to articulate a rational connection between the practice of medicine and identity theft; an explanation of how the manner in which physicians bill their patients can be considered an extension of credit under FACTA; or any legally supportable basis for application of the Red Flags Rule to physicians.

54. Because application of the Red Flags Rule to physicians and their practice groups is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, it must be set aside.

55. This Court should, therefore, declare the Red Flags Rule unlawful as applied to physicians and their medical practice groups, even if they do not require payment at the time they provide care to patients, and should enjoin such application of the rule.

### COUNT III

#### **The Red Flags Rule Was Not Applied to Physicians in Accordance with Notice-and-Comment Rulemaking Procedures of the Administrative Procedure Act. Its Application to Physicians Is Therefore Unlawful.**

56. The Intervenor Societies repeat and reallege paragraphs 1-43 as if set forth fully herein.

57. Pursuant to 5 U.S.C. § 706(2)(D), a reviewing court shall hold unlawful and set aside agency action found to have been taken “without observance of procedure required by law.” The procedures required for promulgating a rule are set forth in 5 U.S.C. § 553. They include the publication of notice of a proposed rule and the opportunity for public comment.

58. The extension of the Red Flags Rule to physicians is a substantive rule that was not anticipated by the public, a fact demonstrated by the FTC’s repeated extensions of the Rule’s effective date citing “confusion” among those whom the FTC contends are subject to the Rule.

59. The possibility that the FTC would apply FACTA to physicians was not suggested or reasonably inferable from the FTC’s notice of proposed rulemaking. Nor was the FTC’s interpretation of FACTA as applying to physicians apparent from the Final Red Flags Rule. Only later, in press releases and the publication of the Extended Enforcement Policy, did the FTC publically announce that it intended the Red Flags Rule to apply to physicians.

60. The FTC did not follow the notice-and-comment requirements of 5 U.S.C. § 553. As a result, the Intervenor Societies, their member physicians, and physicians generally did not have reasonable notice of, or opportunity to comment on, the FTC's interpretation of FACTA as applying to physicians.

61. This Court should, therefore, hold unlawful and set aside pursuant to 5 U.S.C. § 706(2)(D) the Red Flags Rule to the extent that it purports to apply to physicians and their medical practice groups, even if they do not require payment at the time they provide care to patients.

#### **COUNT IV:**

##### **The Intervenor Societies and Their Members Are Entitled to a Judgment Declaring Their Legal Rights and Duties under the Red Flags Rule**

62. The Intervenor Societies repeat and reallege paragraphs 1-43 as if set forth fully herein.

63. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the Intervenor Societies and their members, as well as physicians generally, with respect to the FTC's application of the Red Flags Rule to warrant relief under 28 U.S.C. § 2201.

64. The harm to the Intervenor Societies and their members as a direct and indirect result of the FTC's conduct is sufficiently real and imminent to warrant the issuance of a declaratory judgment clarifying the legal relations of the parties.

65. This Court should, therefore, enter a declaratory judgment finding that the Red Flags Rule is unlawful and void as applied to physicians and their medical practice groups, even if they do not require payment at the time they provide care to patients.

## REQUEST FOR RELIEF

WHEREFORE, the Intervenor Societies respectfully requests that this Court:

- A. Declare the Red Flags Rule unlawful and void as applied to physicians and their medical practice groups, even if they do not require payment at the time they provide medical care to patients;
- B. Permanently enjoin the FTC, and its agents, servants, employees, and successors from implementing the Red Flags Rule in any manner that includes physicians and their medical practice groups that do not require payment at the time they provide medical care to patients;
- C. Award the Intervenor Societies their costs and reasonable attorneys' fees incurred in this action pursuant to 28 U.S.C. §2412; and
- D. Grant the Intervenor Societies such other relief as the Court deems just and proper.

Respectfully submitted,

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Robert M. Portman (D.C. Bar. No. 445665)  
Ronald S. Connelly (D.C. Bar. No. 488298)  
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1501 M Street, NW, Seventh Floor  
Washington, DC 20005  
*Counsel for the Proposed Intervenor Societies*

Date: \_\_\_\_\_, 2010

**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**

**[PROPOSED] ORDER GRANTING  
MOTION OF MEDICAL SOCIETIES TO INTERVENE AS PLAINTIFF**

Upon consideration of the Memorandum of Points and Authorities in Support of Motion of Medical Societies to Intervene as Plaintiffs and for good cause shown, the Court **ORDERS** that the Consent Motion of Medical Societies to Intervene as Plaintiffs is hereby **Granted**.

Accordingly, the following medical societies are hereby added as plaintiffs to case number 1:10-cv-00843-RBW: American Academy of Dermatology (“AAD”), 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”).

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Hon. Reggie B. Walton  
United States District Judge

**CERTIFICATION OF SERVICE**

I hereby certify that on August 18, 2010, I filed the foregoing Consent Motion of Medical Societies to Intervene as Plaintiffs with supporting Memorandum of Points and Authorities and attached Complaint and Proposed Order with the Clerk of the Court using electronic mail ([dcd\\_cmecf@dcd.uscourts.gov](mailto:dcd_cmecf@dcd.uscourts.gov)), and will send, via electronic mail, notification of such filing to the following:

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