

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
BOWLING GREEN DIVISION**

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COMMONWEALTH BRANDS, INC.; \*  
CONWOOD COMPANY, LLC; DISCOUNT \*  
TOBACCO CITY & LOTTERY, INC.; \*  
LORILLARD TOBACCO COMPANY; \*  
NATIONAL TOBACCO COMPANY, L.P.; and \*  
R. J. REYNOLDS TOBACCO COMPANY, \*

Plaintiffs, \*

v. \*

UNITED STATES OF AMERICA; UNITED \*  
STATES FOOD AND DRUG \*  
ADMINISTRATION; MARGARET \*  
HAMBURG, Commissioner of the United States \*  
Food and Drug Administration; and KATHLEEN \*  
SEBELIUS, Secretary of the United States \*  
Department of Health and Human Services, \*

Defendants. \*

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CIVIL ACTION  
NO. 1:09CV-117-M

(Electronically Filed)

**UNOPPOSED MOTION  
OF CAMPAIGN FOR TOBACCO-FREE KIDS,  
AMERICAN CANCER SOCIETY, AMERICAN CANCER SOCIETY  
CANCER ACTION NETWORK, AMERICAN HEART ASSOCIATION,  
AMERICAN LEGACY FOUNDATION, AMERICAN LUNG ASSOCIATION,  
AMERICAN MEDICAL ASSOCIATION, AMERICAN PUBLIC HEALTH  
ASSOCIATION, KENTUCKY MEDICAL ASSOCIATION,  
ONCOLOGY NURSING SOCIETY, AND PUBLIC CITIZEN  
FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE  
IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

Movants Campaign for Tobacco-Free Kids, American Cancer Society, American Heart Association, American Legacy Foundation, American Lung Association, American Medical Association, American Public Health Association, Kentucky Medical Association, Oncology Nursing Society,

and Public Citizen, hereby move for leave to file a memorandum as amici curiae in opposition to the motion of plaintiffs Commonwealth Brands, et al., for a preliminary injunction. Movants are 11 non-profit groups devoted to promoting and protecting public health. Each has significant knowledge of the deleterious health effects of tobacco products and the history of tobacco industry promotional practices, which together provided the impetus for the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 (2009) (hereafter the Act), which plaintiffs are challenging in this case. In particular, movants seek to file as amici curiae to respond to the plaintiffs' argument that provisions of the Act addressing claims about "modified risk tobacco products" violate their First Amendment rights. A copy of the memorandum is attached as Exhibit 1 to this motion.

All parties have consented to movants' filing a memorandum of up to 20 pages on or before September 30, 2009.

Movant Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has more than over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

The American Cancer Society, Inc. ("ACS") has more than three million volunteers nationwide, including 50,000 physicians. The organization works to eliminate cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy, and service. Since its founding in 1913, ACS has conducted groundbreaking research to identify the use of tobacco products as a major cause of cancer and worked to educate the public about its deadly effects. The American Cancer Society Cancer Action

Network is the advocacy affiliate of ACS, helping to educate public officials on ACS's views on public policy. ACS Cancer Action Network has more than 350,000 grassroots advocates, many of whom worked to help pass the Act.

The American Heart Association ("AHA") is a voluntary health organization founded in 1924 to reduce death and disability from cardiovascular diseases and stroke—two of the top three causes of death among Americans. AHA is one of the world's premier health organizations, with 22.5 million volunteers and supporters in nearly 2,000 community organizations in the 50 states as well as in Washington, D.C., and Puerto Rico. The association invested more than \$473.5 million in fiscal year 2004-05 for research, professional and public education, community service and advocacy so people across America can live stronger, longer lives. AHA has long been active before Congress and regulatory agencies on tobacco and other health-related matters.

The American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation was established in March 1999 as a result of the Master Settlement Agreement reached between the attorneys general in 46 states and five U.S. territories and the tobacco industry. The foundation develops programs that address the health effects of tobacco use through grants, technical assistance and training, youth activism, strategic partnerships, counter-marketing and grass roots marketing campaigns, research, public relations and outreach to populations disproportionately affected by the toll of tobacco.

The American Lung Association ("ALA") is the nation's oldest voluntary health organization, with 450,000 volunteers and affiliates in all 50 states and the District of Columbia. Because cigarette smoking is a major cause of lung cancer and chronic obstructive pulmonary disease, ALA has long been active in research, education and public policy advocacy on the adverse health effects

of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

The American Medical Association (AMA), an Illinois non-profit corporation founded in 1847, is an association of approximately 240,000 physicians, residents, and medical students. Its members practice in every state and in all fields of medical specialization. The AMA seeks to promote the science and art of medicine and the betterment of public health. The AMA has long had an interest in the regulation of tobacco products and the tobacco industry. As an institution, it has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. The AMA seeks to appear as *amicus curiae* in this case on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of each state and the District of Columbia, and was formed to represent the viewpoint of organized medicine in the courts.

The American Public Health Association (APHA) is a national organization devoted to protecting Americans and their communities from preventable serious health threats. Founded in 1872, APHA is the world's oldest and most diverse public health organization. APHA represents a broad array of health providers, educators, environmentalists, policy makers, and health officials at all levels working both within and outside governmental organizations and educational institutions. APHA advocates for national tobacco control measures to protect the public's health from the adverse effects of tobacco products.

The Kentucky Medical Association (KMA) is a Kentucky, non-profit, non-stock, membership organization. Initially organized in 1851, the KMA was first incorporated in 1929. The KMA

currently includes among its membership more than 4,000 physicians actively engaged in the practice of medicine in Kentucky. Among its purposes is the enlightenment of public opinion with regard to matters of great import to Kentucky physicians and their patients.

Oncology Nursing Society (ONS), the largest professional oncology association in the world, is composed of more than 37,000 registered nurses and other healthcare providers, including 455 in Kentucky, dedicated to excellence in patient care, education, research, and administration in oncology nursing. Because tobacco use is responsible for one in three cancer deaths in the United States, ONS has long supported the federal regulation of tobacco products to help reduce and prevent tobacco-related disease, disability, and death. ONS maintains a steadfast commitment to supporting federal, state, and local policies, programs, and other efforts that seek to reduce adult and youth tobacco use, promote tobacco cessation, protect nonsmokers against secondhand smoke, and help increase access to tobacco use prevention and cessation services.

Public Citizen is a consumer advocacy organization founded in 1971, with approximately 70,000 members nationwide. Public Citizen's members are ordinary consumers who are concerned that their children and grandchildren will be enticed into experimenting with tobacco products by the promotional efforts of the tobacco industry and that they may become addicted to tobacco products as a result. Public Citizen has long been active before Congress, regulatory agencies, and the courts in matters relating to public health in general and regulation by the Food and Drug Administration in particular. In addition, Public Citizen has substantial expertise on commercial speech doctrine, as its lawyers argued, among other cases, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the first case in which the United

States Supreme Court recognized that commercial speech is entitled to some level of First Amendment protection.

WHEREFORE, movants respectfully request that this Court grant their unopposed Motion for Leave to File a Memorandum as Amici Curiae in Opposition to Motion for Preliminary Injunction and enter the attached proposed order.

September 30, 2009

Respectfully submitted,

/s/ Jennifer A Moore

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## **CERTIFICATE OF SERVICE**

On September 30, 2009, I electronically filed this document through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

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