

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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R.J. REYNOLDS TOBACCO COMPANY, )  
 LORILLARD TOBACCO COMPANY, )  
 COMMONWEALTH BRANDS, INC., )  
 LIGGETT GROUP LLC, and SANTA FE )  
 NATURAL TOBACCO COMPANY, INC., )

Plaintiffs, )

v. )

Civil Action No. 11-01482 (RJL)

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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**UNOPPOSED MOTION OF ASSOCIATION OF NATIONAL ADVERTISERS, INC.,  
AND AMERICAN ADVERTISING FEDERATION FOR LEAVE TO FILE BRIEF AS  
AMICI CURIAE IN SUPPORT OF PLAINTIFFS**

Movants the Association of National Advertisers (“ANA”) and American Advertising Federation (“AAF”) (collectively, the “Advertising Associations”), hereby move the Court for leave to file a brief as *amici curiae* in support of the motion by Plaintiffs R.J. Reynolds Tobacco Company, *et al.*, for summary judgment on their Complaint against the graphic labeling requirements for tobacco packaging and advertising adopted on June 22, 2011, under Section 201 of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (the “Tobacco Control Act”), by the Food and Drug Administration (“FDA”). *See*

*Required Warnings for Cigarette Packages and Advertisements*, 76 Fed. Reg. 36628 (June 22, 2011) (the “*Graphic Warnings Rule*”).

Movants are advertising trade associations that serve their members by advocating clear and coherent legal standards governing advertising, and by opposing laws that violate established First Amendment protections for commercial speech. Movant ANA’s members include over 400 companies with 9,000 brands that collectively spend over \$250 billion annually in U.S. marketing communications and advertising. The ANA provides insights, collaboration and advocacy on behalf of its marketing community membership, which strives to communicate marketing best practices, to lead industry initiatives, and to advance, promote, and protect advertisers and marketers. Movant AAF is a trade association whose 130 advertiser, ad agency and media company members, comprising the nation’s leading brands and corporations, represent 50,000 advertising industry professionals.

The Advertising Associations’ interest in this matter lies in their concern that the *Graphic Warnings Rule*, and the Tobacco Control Act under which the FDA adopted it, require tobacco purveyors to carry government-mandated graphic images and textual warnings to proselytize the public in an effort to change behavior, not to prevent deception or to convey product information about which consumers are unaware. Although the particular provisions challenged affect tobacco marketing, the constitutional focus of this case is not “about” cigarettes or other tobacco products, but rather involves our nation’s commitment to the First Amendment, and particularly its command that “the speaker and the audience, not the government, assess the value of the information presented.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671-72 (2011) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). These constitutional concerns bear directly on the Advertising Associations’ members, and the industry generally.

Plaintiffs have consented to Movants' filing of their *amicus* brief, and the government parties have stated they do not object to its filing.

Finally, leave is sought insofar as this motion is being filed, and its accompanying *amicus* brief re-filed, outside the time specified by the September 27, 2011, Stipulation and Order to Establish Briefing Schedule for Summary Judgment (Dkt. 30) ("SJ Briefing Schedule"), which the Court accepted the next day, establishing a November 18, 2011, due date for *amicus* briefs in support of plaintiffs. The Advertising Associations in fact electronically filed their *amicus* brief in support of plaintiffs on summary judgment on November 18, 2011. However, it was not accompanied by a motion for leave to file (or a proposed order granting leave), based on prior instruction from the Court. Specifically, before filing the *amicus* brief, this office contacted the Court to inquire whether, since (a) the Advertising Associations had filed previously an *amicus* brief in this case in support of plaintiffs' motion for preliminary injunction, accompanied by a motion for leave, which was granted (Dkt. 20), and (b) the parties expressly provided for *amici* in the SJ Briefing Schedule, another motion for leave would be required. At that time, the Court staff contacted indicated another such motion for leave was *not* required. In addition, in electronically filing the Advertising Associations' *amicus* brief on summary judgment, this office consulted with the Court again and was told, as ECF did not have an "*amicus* brief" option, it could be submitted into ECF as a "memorandum," which is how the brief was filed.<sup>1</sup> Accordingly, the Advertising Associations' *amicus* brief was timely filed per the SJ Briefing Schedule.

However, on November 21, 2011, a notice issued from ECF instructing the Advertising Associations to re-file their *amicus* brief, under cover of a motion for leave. After conferring with ECF staff to confirm this obligation to re-file notwithstanding prior guidance received from

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<sup>1</sup> Undersigned counsel was able to do so using his ECF password and identifying the Advertising Associations as *amicus* parties.

the Court,<sup>2</sup> this motion is submitted in furtherance of the ECF instruction (via email, according to the Court's protocol). To the extent re-filing of the motion and accompanying *amicus* brief fall outside the date the SJ Briefing Schedule specifies, it is hereby further respectfully requested that, in granting leave to file, the Court accept the Advertising Associations' *amicus* brief on summary judgment and deem it timely filed.

WHEREFORE, Movants respectfully request that this Court grant their Unopposed Motion for Leave to File Memorandum in Support of Plaintiffs and enter the attached proposed order.

Respectfully submitted,

/s/ Robert Corn-Revere

Robert Corn-Revere (D.C. Bar No. 375415)

Ronald G. London (D.C. Bar No. 456284)

DAVIS WRIGHT TREMAINE LLP

19191 Pennsylvania Avenue, N.W., Suite 800

Washington, D.C. 20006-3401

Tel: (202) 973-4200

Fax: (202) 973-4499

COUNSEL FOR *AMICI CURIAE*

**ASSOCIATION OF NATIONAL ADVERTISERS**

**AMERICAN ADVERTISING FEDERATION**

November 22, 2011

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<sup>2</sup> During that consultation with ECF staff, this office was instructed that, although the original motion for leave to file the Advertising Associations *amicus* brief in support of plaintiffs' motion for a preliminary injunction was required to have a Corporate Disclosure Statement pursuant to LCVR 7.1, another Corporate Disclosure Statement would not be required with this motion, unless the information in the original Statement has changed, which it has not.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Unopposed Motion for Leave to File Brief as Amici Curiae in Support of Plaintiffs, Proposed Order on Motion for Leave to File Brief as Amici Curiae, and Proposed Amici Curiae Brief were, this 22nd day of November, 2011, filed via email to the court's generic email address. After being docketed by the case administrator into the ECF system, the system electronically will send a notice of electronic filing to the following counsel for all parties in this case:

Noel J. Francisco  
Geoffrey K. Beach  
Warren Postman  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001

Floyd Abrams  
Joel Kurtzberg  
Kayvan Sadeghi  
CAHILL GORDON & REINDELL LLP  
80 Pine Street  
New York, N.Y. 10005

**Counsel for Plaintiff R. J. Reynolds and  
Santa Fe Natural Tobacco Company**

- and-

Philip J. Perry  
LATHAM & WATKINS LLP  
555 11<sup>th</sup> Street, N.W., Suite 1000  
Washington, D.C. 20004

Patricia A. Barald  
Scott D. Danzis  
COVINTON & BURLING LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

**Counsel for Plaintiff Commonwealth  
Brands, Inc.**

Jonathan D. Hacker  
O'MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006

**Counsel for Plaintiff Lorillard Tobacco  
Company**

Drake S. Cutini  
DEPARTMENT OF JUSTICE  
Civil Division  
Office of Consumer Litigation  
P.O. Box 386  
Washington, D.C. 20044

**Counsel for Plaintiff Liggett Group LLC**

**Counsel for Defendant United States Food  
and Drug Administration, Margaret A.  
Hamburg and Kathleen Sebelius**

/s/ Robert Corn-Revere  
Robert Corn-Revere  
DAVIS WRIGHT TREMAINE LLP  
1919 Pennsylvania Avenue, N.W., Suite 800  
Washington, D.C. 20006-3401  
Tel: (202) 973-4200  
Fax: (202) 973-4499