

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**Altria Group, Inc.
a corporation;**

And

**JUUL Labs, Inc.
a corporation.**

Docket No. 9393

**MOTION OF THIRD PARTY ITG BRANDS, LLC FOR LEAVE TO
FILE A REPLY TO RESPONDENTS' RESPONSE TO NON-PARTIES' *IN*
CAMERA MOTIONS**

Pursuant to 16 C.F.R. § 3.22, third party ITG Brands, LLC (“ITG”), by and through its undersigned counsel, respectfully moves for leave to file a reply to Respondents’ Response to Non-Parties’ *In Camera* Motions filed on May 14, 2021. ITG’s proposed reply brief is being conditionally filed herewith. In support of this motion, ITG states as follows:

1. ITG believes a Reply is necessary to address certain omissions in Respondents’ Response.
2. ITG’s Reply will assist the Administrative Law Judge in understanding the issues raised by its principal motion as to why the requested *in camera* treatment is necessary to protect certain ITG documents containing competitively sensitive and confidential information from being disclosed to anyone, including Respondents’ in-house counsel.
3. The Reply is limited to responding to Respondents’ arguments.

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Dated: May 24, 2021

Respectfully submitted,

By: s/ M. Elaine Johnston

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**UNITED STATES OF AMERICA BEFORE
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JUDGES**

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**Altria Group, Inc.
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Docket No. 9393

**[PROPOSED] ORDER GRANTING MOTION OF THIRD PARTY ITG BRANDS,
LLC FOR LEAVE TO FILE A REPLY TO RESPONDENTS' RESPONSE TO NON-
PARTIES' *IN CAMERA* MOTIONS**

It is HEREBY ORDERED that, upon due consideration, the Motion of Third Party ITG Brands, LLC for Leave to File a Reply to Respondents' Response to Non-Parties' *In Camera* Motions is GRANTED.

SO ORDERED.

Hon. D. Michael Chappell

Chief Administrative Law Judge

Date: _____

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OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

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**REPLY OF THIRD PARTY ITG BRANDS, LLC TO RESPONDENTS’
RESPONSE TO NON-PARTIES’ *IN CAMERA* MOTIONS**

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence be placed *in camera* “after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting in camera treatment.” 16 C.F.R. § 3.45(b). ITG Brands, LLC (“ITG”) has submitted a detailed motion and supporting declaration requesting *in camera* treatment of 21 competitively sensitive documents and portions of two declarations and one deposition testimony transcript which the parties to this matter intend to offer at trial. *See* Motion of Third Party ITG Brands, LLC for *In Camera* Treatment. Neither Complaint Counsel nor Respondents have objected to ITG’s motion. In an unprecedented and novel step, however, Respondents have requested “to preserve the ability of certain in-house counsel of Respondents to attend portions of the evidentiary hearing and other proceedings, and to review briefs, orders, or other litigation documents, that reflect information for which the Non-Parties [(including ITG)] seek *in camera* treatment.” *See* Respondents’ Response to Non-Parties’ *In Camera* Motions, at 1.

Respondents have gone at great lengths to show the benefits that they would gain from allowing their in-house counsel access to ITG's information for which it seeks *in camera* protection. But this misses the point. The focus of Rule 3.45(b) is not on the benefits to the recipients in allowing them access to *in camera*-protected information, but rather the injury to the company whose information is sought to be disclosed. Through the declaration of its General Counsel, ITG has demonstrated the serious and significant injury that it would suffer if *in camera* protection were not permitted. *See* Declaration of Robert D. Wilkey in Support of Motion of Third Party ITG Brands, LLC for *In Camera* Treatment. Yet, there is nothing in Respondents' response which suggests why their proposal would not cause or otherwise limit any such injury to ITG.

Notably missing from Respondents' motion are declarations or affidavits from any of the in-house counsel who seek to access ITG's information attesting that they would not use such information to the competitive detriment of ITG. Respondents mention in passing that the in-house counsel "are not involved in day-to-day competitive decision-making" but they fail to substantiate this claim. Whether an in-house attorney is a "competitive decision-maker" hinges on a comprehensive inquiry into "a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n. 3 (Fed. Cir. 1984). Respondents' failure to provide any declaration testimony establishing that the proposed in-house counsel are not "competitive decision-makers" is reason enough to deny their request. *Compare Pfizer Inc. v. Apotex Inc.*, 744 F. Supp. 2d 758, 765 (N.D. Ill. 2010) (denying patent holder's request to prevent in-house counsel from accessing certain documents as the company "has not provided the Court with an affidavit, declaration, or other form of evidence" establishing that the

requested attorneys are competitive decision-makers”) with *United States v. AB Electrolux*, 139 F. Supp. 3d 390, 393 (D.D.C. 2015) (holding that in-house counsel were not competitive decision-makers where such counsel “have explicitly declared that they are not, and will not for the next two years, be involved in the type of competitive decision making”).

Setting aside the evidentiary issue, given the nature of Respondents’ industry, it would be impossible for the proposed in-house counsel to be divorced from the competitive decision-making of their employers. “Competitive decision-making” includes “business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions.” *F.T.C. v. Whole Foods Mkt., Inc.*, No. civ. A 07 1021 PLF, 2007 WL 2059741, at *2 (D.D.C. July 6, 2007). As ITG is well aware from its own business, in-house counsel in the cigarette and e-vapor industries are often the key decision-makers on many important corporate issues such as marketing, advertising and product design, all of which are subject to strict and comprehensive legal and regulatory requirements. Given their close contacts with the business, there is a significant risk that the proposed in-house counsel could use ITG’s competitively sensitive information in their decisions about the competitive aspects of their own businesses. And even if they do not, there is still a significant risk that ITG’s confidential information could be “used or disclosed inadvertently because of the lawyer's role in the client's business decisions.” *F.T.C. v. Sysco Corp.*, 83 F. Supp. 3d 1, 3–4 (D.D.C. 2015).

Finally, to the extent Respondents seek to modify the Protective Order issued in this matter, ITG adopts and incorporates the arguments submitted by Complaint Counsel in its Motion for Leave to File an Opposition to Respondents’ Response to Non-Parties’ *In Camera* Motions.

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For all of the foregoing reasons, ITG respectfully requests that this Court deny Respondents' request as set forth in their Response to Non-Parties' *In Camera* Motions.

Dated: May 24, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 24, 2021, I caused a true and correct copy of the foregoing Motion to Seek *In Camera* Treatment to be served via electronic mail to:

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