

UNITED STATES OF AMERICA
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

COMPLAINT COUNSEL'S MOTION FOR AN ORDER THAT RESPONDENT ALTRIA
HAS WAIVED PRIVILEGE

Pursuant to Rules 3.22 and 2.11(d), of the Commission Rules of Practice, 16 C.F.R. § 3.22 and 16 C.F.R. § 2.11(d), Complaint Counsel respectfully moves the Court for an order that (1) Respondent Altria has waived any claims of privilege as to documents that it produced during the Commission's pre-complaint investigation and subsequently sought to claw back and (2) that Altria is precluded from clawing back any documents produced during the pre-complaint investigation going forward from the date of this motion.

As set forth in the attached memorandum, Respondent did not take even minimally reasonable steps to prevent disclosure of the purportedly privileged documents that it produced and did not promptly rectify its errors in producing nearly 10,000 documents that it subsequently sought to claw back. *See* Rule 2.11(d) of the Commission Rules of Practice, 16 C.F.R. 2.11(d).

A proposed order is attached.

Dated: February 12, 2021

Respectfully submitted,

/s/ Frances Anne Johnson
Frances Anne Johnson
Dominic E. Vote

Peggy Bayer Femenella
Jennifer Milici
James Abell
Erik Herron
Joonsuk Lee
Meredith Levert
Kristian Rogers
David Morris
Michael Blevins
Michael Lovinger
Stephen Rodger

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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In the Matter of

Altria Group, Inc.
a corporation;

and

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[PROPOSED] ORDER

Upon Complaint Counsel's Motion for an Order that Respondent Altria Has Waived Privilege, and having considered the papers in support and in opposition thereto, it is hereby

ORDERED, that Respondent's conduct constituted a waiver of any claim of privilege over the documents produced by Respondent in response to the Second Request in the pre-complaint investigation in the above-captioned matter, and it is further

ORDERED, that Respondent shall not claw back any additional documents after the date of this Motion, and it is further

ORDERED, that Complaint Counsel need not return, continue to sequester, or destroy any such documents, and it is further

ORDERED, that Complaint Counsel need not return, sequester, or destroy any documents produced by Respondent in response to the Second Request in the pre-complaint investigation in the above-captioned matter that were not identified by Respondent as privileged before the date of this Motion.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge

**STATEMENT OF CONFERENCE
PURSUANT TO PARAGRAPH 4 OF SCHEDULING ORDER**

In a telephone conversation at 4:30 p.m. EST on February 1, 2021, Complaint Counsel Jennifer Milici and Peggy Femenella and Respondent's counsel Adam Goodman, Jon Moses, Debbie Feinstein, Justin Hedge, Kevin Schwartz, and Adam Pergament met and conferred in an effort in good faith to resolve by agreement the issues raised by the attached motion and were unable to reach an agreement.

Dated: February 8, 2021

/s/ Jennifer Milici
Jennifer Milici

Attorney
Federal Trade Commission

UNITED STATES OF AMERICA
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

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR AN
ORDER THAT RESPONDENT HAS WAIVED PRIVILEGE**

Complaint Counsel requests that the Court issue an order finding that Respondent Altria Group, Inc. ("Altria") waived privilege with regard to documents that were produced to Commission staff during the pre-complaint investigation.

Altria failed to conduct a minimally competent privilege review before production or after being alerted multiple times to problems with its review. Altria's failure to take reasonable steps to prevent disclosure of privileged information and to rectify its errors results in waiver of privilege.

Background

From August 28, 2019 to January 13, 2021, Complaint Counsel alerted Altria eight times that its privilege review procedures had resulted in the production of apparently privileged documents. Exhibit A (Declaration of James Abell, February 8, 2021). Those documents, like thousands of others Altria ultimately produced to Complaint Counsel, would have been identified in an adequate privilege review. After receiving Complaint Counsel's initial notices, Altria continued to produce documents without taking reasonable steps to protect privileged

materials. From September 20, 2019 to January 14, 2021, Altria issued twelve notices (“Claw Back Letters”) asserting privilege over inadvertently produced documents. *Id.*¹ Many of those documents were only clawed back months after Complaint Counsel called attention to problems with Altria’s privilege review procedures. *Id.*

Despite claiming to have completed its privilege re-review on November 1, 2019, Altria subsequently clawed back 8,437 documents that it produced during the investigation. *Id.* And in a June 26, 2020 federal court filing, more than ten months after the first Claw Back Letter, and eight months after it finished producing documents in response to the Second Request, Altria admitted that it had yet to re-review more than 210,000 documents produced to Complaint Counsel that bore indicia of privilege, approximately one-fifth of the “over 1 million” total documents it had produced. Exhibit R, Declaration of Kimberly D. Harlowe, *In Re Juul Labs, Inc. Antitrust Litigation*, Case No. 20-02345, ECF No. 62-1, at 5-7 (N.D. Cal. June 26, 2020).

For over a year, Altria continued clawing back Second Request documents, disrupting our investigation, deposition, and trial preparation. Complaint Counsel will be further prejudiced if Altria can continue to do this while we are preparing for trial.

Complaint Counsel met and conferred with counsel for Altria on February 1, 2021 and did not resolve this issue.²

ARGUMENT

It is hornbook law that the attorney client privilege and work product protections are not absolute and may be waived by disclosure of a protected communication to an adversary.

Appleton Papers, Inc. v. EPA, 702 F.3d 1018, 1024 (7th Cir. 2012); *Woodard v. Victory Records*,

¹ Upon receiving Altria’s Claw Back Letters, Complaint Counsel deleted or sequestered the documents as required by Rule 2.11(d).

² Complaint Counsel reserves the right to challenge the underlying privilege claims.

Inc., No. 14 CV 1887, 2014 U.S. Dist. LEXIS 69512, at *24 (N.D. Ill. May 21, 2014). Rule 2.11(d) of the Commission Rules has one exception: The disclosure of privileged material shall not operate as a waiver if: (A) disclosure is inadvertent; (B) reasonable steps were taken to prevent disclosure; and (C) reasonable steps were promptly taken to rectify the error. 16 C.F.R. 2.11(d)(1)(i). Rule 2.11(d)(1)(i) tracks Federal Rule of Evidence 502(b). Where Federal Rules are similar to Commission Rules, “those rules and case law interpreting them may be useful, though not controlling, in adjudicating disputes.” *In re LabMD, Inc.*, 2014 WL 1100693, at *8 n.4 (F.T.C. Mar. 10, 2014). Before these rules were adopted, this Court applied the federal court five-part test to assess disputes concerning inadvertently disclosed documents. *See In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 WL 33944049, at *1-3 (F.T.C. Oct. 17, 2000); *In re Schering-Plough Corp.*, Docket No. 9297, 2002 WL 32388344, at *3 (F.T.C. Jan. 15, 2002) (considering: “(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness and the protection of an appropriate privilege.”). Rule 502 “is flexible enough to accommodate any of [the five factors.]” FRE 502(b) advisory committee’s note.

“When the producing party claims inadvertent disclosure it has the burden of proving that the disclosure was truly inadvertent, and that the privilege has not been waived.” *Hoechst Marion Roussel*, 2000 WL 33944049, at *3; *Amobi v. D.C. Dep’t of Corr.*, 262 F.R.D. 45, 53 (D.D.C. 2009). Altria cannot make the showing necessary to avail itself of Rule 2.11(d)(1)(i) and the Court should find that it waived any claims of privilege as to the documents produced during the pre-complaint investigation.

A. Altria Did Not Take Reasonable Steps to Prevent Disclosure

Altria admitted in federal court that it “did not handle [its] productions to the FTC in the same manner as would be typical in litigation, including with respect to the degree to which materials were prescreened for both relevance and confidentiality.” Exhibit Q, Joint Case Management Statement, *In Re Juul Labs, Inc. Antitrust Litigation*, Case No. 20-02345, ECF No. 48, at 5, (N.D. Cal., June 12, 2020); *see also* Exhibit R (admitting that Altria had produced over 210,000 documents bearing indicia of privilege to the FTC that it had yet to claw back or adequately review). This concession all but admits that Altria did not take reasonable steps to prevent disclosure of privileged materials. As the Commission Rules make clear, the standard for finding waiver is the same regardless of whether materials were disclosed during litigation discovery or during a pre-complaint investigation. *Compare* Rule 2.11(d) *with* Rule 3.31(g); *see also Schering-Plough Corp.*, 2002 WL 32388344, at *2-6 (finding waiver over materials produced during pre-complaint investigation); *Educ. Assistance Found. For the Descendants of Hungarian Immigrants in the Performing Arts, Inc. v. U.S.*, 32 F. Supp. 3d 35, 45 (D.D.C. 2014) (finding waiver over materials produced during IRS administrative audit); Fed. R. Evid. 502(b) advisory committee’s note.

Even without Altria’s admission of its own recklessness, it is obvious it failed to take reasonable precautions to prevent disclosure of privileged materials. Many of the produced documents were communications with outside counsel, marked privileged and confidential, or both. *See Irth Sols. LLC v. Windstream Commc’ns LLC*, No. 2:16-CV-219, 2017 WL 3276021, at *13 (S.D. Ohio Aug. 2, 2017) (finding that it was “completely reckless” to inadvertently produce documents that included the name of counsel or the word “legal”). Privilege logs produced by Altria on November 20, 2019 and September 18, 2020 for its claw back documents

reveal that an extraordinary number of them bear obvious indicia of privilege: 4,106 out of the 7,086 listed documents (58%) contain the term “Law” in the address or subject lines (suggesting the presence of an attorney or a legal topic); 2,846 contain the term “Garnick,” the name of Altria’s General Counsel (40%); 218 contain the terms “Wachtell” or “WLRK,” Altria’s outside counsel (3%).³ For example, ALGFTC0000314627 (clawed back on September 23, 2019), is titled { [REDACTED] } and attaches a document entitled “{ [REDACTED] }” If Altria had taken any reasonable steps to prevent disclosure of privileged documents, these documents would never have been produced.

Importantly, many of these documents contain substantive information that bears directly on the disputed issues in this case and support the Commission’s allegations. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. h (2000) (“What is reasonable depends on circumstances, including: the relative importance of the communication (the more sensitive the communication, the greater the necessary protective measures”); *see also Love v. Med. Coll. of Wisconsin*, No. 15-C-0650, 2018 WL 2862823, at *6 (E.D. Wis. 2018) (holding that where a party fails to take reasonable steps to avoid producing privileged documents that “contain evidence that directly supports [plaintiff’s] allegations of misconduct” that fact weighs in favor of waiver). In particular, a number of clawed back documents appear to contain information relating to Altria’s reasons for exiting the e-vapor business at the time of its investment in JLI. *See, e.g.*, ALGFTC0007150555, ALGFTC0007150572, ALGFTC0007150594, ALGFTC0007150603, ALGFTC0007150629, ALGFTC0007150636, ALGFTC0007150665, ALGFTC0007150669, ALGFTC0007150672, ALGFTC0007150691,, ALGFTC0007097109, ALGFTC0007150638, ALGFTC0007150640, ALGFTC0007150661, ALGFTC0007150695,

³ The Privilege Logs are large excel files and can be provided at the Court’s request.

ALGFTC0003157301, ALGFTC0000727568, ALGFTC0000314627, ALGFTC0000978690, ALGFTC0000978691, ALGFTC0005445949, ALGFTC0005483598, and ALGFTC0005483604.⁴ These documents bear directly on an issue that “resonates throughout this case—a bell which cannot be unrung” after their reckless disclosure to the Commission. *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 136 (S.D. W.Va. 2010).

Moreover, Altria’s privilege review was inconsistent, with many instances of serial claw backs of duplicate documents, apparent duplicates of claw backs left in the review set, duplicates of claw backs that were initially withheld, and duplicates of redacted documents that appear to reveal the redacted text. *See Schering-Plough*, 2002 WL 32388344, at *4 (finding that discovery procedures were unreasonable where attorneys applied inconsistent standards in reviewing for privilege). For instance, Altria clawed back ALGFTC0000744999 on September 10, 2019 and clawed back its duplicate, ALGFTC0005437008, on September 10, 2020, even though Altria quoted ALGFTC0005437008 in a March 24, 2020 advocacy letter addressed to the Commission as follows: {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }⁵

Complaint Counsel read and analyzed a number of documents that Altria subsequently clawed back in the ordinary course of its document review process, including the documents cited above. As this Court has held, the fact that Complaint Counsel reviewed disputed documents weighs in favor of waiver. *See Schering-Plough*, 2002 WL 32388344, at *5. Complaint Counsel’s review of these documents demonstrates that Altria’s disclosure was

⁴ Counsel has properly sequestered these documents in accordance with Rule 2.11(d). If the Court wishes to review them, or any other, disputed documents, Complaint Counsel will take appropriate steps to provide them.

⁵ Altria White Paper at 3 (Mar. 24, 2020).

“complete,” *i.e.*, this was not a “limited disclosure resulting from glancing at an open file drawer,” rather “a court order cannot restore confidentiality and, at best, can only attempt to restrain further erosion.” *Id.*

B. Altria Did Not Act “Promptly” To Rectify Its Errors

Rule 2.11(d)(i)(1) requires that the party asserting privilege “promptly took reasonable steps to rectify the error.” The parallel Federal Rule “require[s] the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.” Fed. R. Evid. 502(b) advisory committee’s note; *KKOCP LLC v. Walsh Const., Inc.*, No. 2018CV30301, 2019 WL 2070697, at *7 (D. Colo. 2019) (applying rule); *AdTrader, Inc. v. Google LLC*, 405 F. Supp. 3d 862, 866 (N.D. Cal. 2019) (same); *see also United States v. Sensient Colors, Inc.*, No. CV 07-1275, 2009 WL 2905474, at *5-6 (D.N.J. Sept. 9, 2009) (waiver occurred because party failed to promptly reassess its production after learning of inadvertent disclosure).

Commission staff first told Altria about potentially inadvertently produced documents on August 28, 2019. Despite several incomplete Claw Back Letters and subsequent notices of additional potentially privileged documents, Altria repeatedly failed to address the underlying issue of its inadequate review, stating more than a year later that its “review of documents . . . is ongoing.” Exhibit U. Altria ultimately clawed back, or partially clawed back, nearly 10,000 documents over a twelve-month period. The overwhelming majority of those documents were clawed back on or after September 10, 2020—that is, more than a year after Complaint Counsel first provided Altria notice of the production of potentially privileged documents and ten months *after* Altria reported that its privilege review was complete. *See* Exhibit A. Altria’s long delayed, sporadic, and incomplete efforts to claw back the disputed documents do not represent

“prompt” efforts to rectify its errors. *See, e.g., Schering-Plough*, 2002 WL 32388344, at *4 (delay of *eight months* weighed in favor of waiver); *Baranski v. United States*, No. 4:11-CV-123 CAS, 2015 WL 3505517, at *7 (E.D. Mo. June 3, 2015) (finding waiver after *five month* delay); *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 585-86 (Fed. Cl. 2012) (delay of *almost ten months* was “simply too long a time to try now to resuscitate the privilege.”).

C. Altria Did Not Take Reasonable Steps to Rectify Its Errors

Altria has not taken “reasonable steps to rectify the error” as required by Rule 2.11. Many of the claw back documents were produced *after* Altria became aware that it had produced a large number of potentially privileged documents. Exhibit A. Altria’s October 4, 2019 production contained at least 1,000 documents that Altria later identified as privileged and sought to claw back, even though Altria was aware of problems with its prior privilege review and had clawed back documents starting on September 20, 2019. *See FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991) (failure to make adequate “effort to prevent the problem from recurring” supported conclusion of waiver”); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 700 (S.D. Fla. 2009) (“In light of the fact that Humana was aware that it inadvertently produced a number of documents which it believed to contain privileged information, Humana had an obligation . . . to ensure that no additional privileged documents were divulged.”).

Altria’s twelve Claw Back Letters highlight its repeated failure to correct its errors despite multiple warnings from Commission staff. Despite repeated notifications from beginning in August 2018, and continuous discovery of inadvertently produced documents during the preceding 10 months, Altria acknowledged on June 26, 2020, that it still needed to conduct a comprehensive “privilege re-review” of more than 210,000 documents bearing indicia of

privilege. Exhibit R. Altria continued to claw back documents up to January 13, 2021. Exhibit A. This delay is incompatible with the requirements of Rule 2.11(d)(1)(i)(C). *See Adaptix, Inc. v. Alcatel-Lucent USA, Inc.*, No. 6:12-CV-122, 2015 WL 12781215, at *2-3 (E.D. Tex. 2015) (privilege waived for documents not listed on initial claw back letter); *see also Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 221 (E.D. Pa. 2008) (finding it “noteworthy” that party claiming waiver made the discovery of privileged documents rather than party claiming privilege).

Altria’s substantial delays and repeated failures to identify a large number of potentially privileged documents, despite having ample time and resources to do so, underscore that it did not take reasonable steps to prevent disclosure of privileged materials and did not promptly take reasonable steps to rectify its errors.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully moves the Court for an order that Respondent has waived privilege as to documents produced during the pre-complaint investigation and cannot claw back additional documents.

Dated: February 12, 2021

/s/ Frances Anne Johnson

Frances Anne Johnson
Dominic E. Vote
Peggy Bayer Femenella
Jennifer Milici
James Abell
Erik Herron
Joonsuk Lee
Meredith Levert
Kristian Rogers
David Morris
Michael Blevins
Michael Lovinger
Stephen Rodger

Counsel Supporting the Complaint

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EXHIBIT A

UNITED STATES OF AMERICA
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

**DECLARATION IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION FOR AN ORDER THAT RESPONDENT HAS WAIVED PRIVILEGE**

1. I have personal knowledge of the facts set forth in this declaration.
2. My name is James Abell, and I am an attorney admitted to practice law in the District of Columbia. I am employed by the Federal Trade Commission and am Complaint Counsel in this proceeding.
3. Beginning in December 2018, I conducted a non-public pre-complaint investigation of Respondents, Altria Group, Inc. ("Altria") and JUUL Labs, Inc. ("JLI"). I have been a member of Complaint Counsel since the Commission issued the complaint in this matter on April 1, 2020.
4. On December 20, 2018, Altria acquired a 35% non-voting interest in JLI.
5. On March 8, 2019, Altria filed an HSR application to convert that interest to voting securities and to appoint three members of JLI's Board.
6. On April 8, 2019, the Commission issued a Second Request to Altria.
7. On July 22, 2019, Altria began a rolling document production in response to the Second Request.

11. On September 23, 2019, Altria sent a second claw back letter asserting privilege over 602 claw back documents and adding partial redactions to another 157 documents (“partial claw back documents”). Exhibit E.
12. On October 22, 2019, Complaint Counsel alerted Altria that it had produced four versions of a document with inconsistent redactions, *i.e.*, with some versions displaying text that was identified as privileged in other versions. Exhibit F.
13. On October 23, 2019, Altria sent a third claw back letter, identifying 163 claw back documents and 69 partial claw back documents. Exhibit G.
14. On October 29, 2019, Complaint Counsel sent a letter to Altria expressing concern about the potential for serial claw back requests to disrupt Complaint Counsel’s investigation. Exhibit H.
15. On November 1, 2019, Altria explained { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } Exhibit I.
16. On November 4, 2019, Complaint Counsel alerted Altria that it had produced eight documents identified in the privilege log it had produced on October 30, 2019. Exhibit J.
17. On November 5, 2019, Altria issued its fourth claw back request, identifying ten claw back documents and five partial claw back documents. Exhibit K.
18. On November 8, 2019, Complaint Counsel alerted Altria as to the production of three potentially privileged documents. Exhibit L.
19. On November 15, 2019, Altria issued its fifth claw back request, identifying 453 claw back documents and 133 partial claw back documents. Exhibit M.

20. On November 20, 2019, Altria issued its sixth claw back request, asserting privilege over 11 claw back documents and four partial claw back documents, and produced a log of its claw back documents (“claw back log”). Exhibit N.
21. On February 28, 2020, Altria issued its seventh claw back letter, identifying eleven claw back documents and seven partial claw back documents. Exhibit O.
22. On March 24, 2020, Altria submitted a White Paper to the Commission wherein it directly quoted language in ALGFTC0005437008, which Altria later identified as a claw back document in its ninth Claw Back letter on September 10, 2020.
23. On June 18, 2020, Altria issued its eighth claw back letter, identifying 139 { [REDACTED] } [REDACTED] } claw back documents and 16 partial claw back documents. In this letter, Altria also admitted, { [REDACTED] } [REDACTED] } Exhibit P; *see also* Exhibit Q, Joint Case Management Statement, *In Re Juul Labs, Inc. Antitrust Litigation*, Case No. 20-02345, ECF No. 48, at 5 (N.D. Cal., June 12, 2020).
24. On June 26, 2020, Altria stated in a filing that it intended to conduct a privilege re-review of more than approximately 210,000 additional potentially privileged documents produced in response to the Second Request, which it expected to complete after approximately 90 days. Exhibit R, Declaration of Kimberly D. Harlowe, *In Re Juul Labs, Inc. Antitrust Litigation*, Case No. 20-02345, ECF No. 62-1, at 5-7 (N.D. Cal. June 26, 2020).
25. On July 20, 2020, Complaint Counsel submitted a response to Altria’s letter dated June 18, 2020. Exhibit S. In this response, Complaint Counsel outlined its view that Altria

did not take reasonable steps to prevent disclosure of its documents or act promptly to rectify its errors.

26. On August 27, 2020, Complaint Counsel issued its First Set of Requests for Production to Altria, which required Altria to submit all documents “withheld from production in response to the Second Request, or clawed back, based on a claim of privilege.” Exhibit T at ¶ 18.

27. On September 10, 2020—more than a year after Complaint Counsel first provided notice of the production of potentially privileged documents—Altria issued its ninth claw back letter, identifying 2,973 claw back documents and 2,504 partial claw back documents. Exhibit U.

28. On November 6, 2020, Altria issued its tenth claw back letter, identifying 1,219 claw back documents and 948 partial claw back documents. At that time, Altria { [REDACTED] } Exhibit V.⁷

29. On January 11, 2021, Altria issued its eleventh claw back letter, identifying four claw back documents. Exhibit W.

30. On January 13, 2021, Complaint Counsel alerted Altria as to the production of three potentially privileged documents, which had headers and footers containing terms such as “Privileged & Confidential,” “Attorney-Client Communication,” and “Attorney Work Product.” Exhibit X.

31. On January 14, 2021, Altria responded to Complaint Counsel’s January 13, 2021 notice stating that it claimed privilege over the referenced documents and that it would send a twelfth claw back letter. Exhibit Y.

⁷ The attachment to Exhibit T is a large excel file. If the Court would like to view the attachment, Complaint Counsel will provide an electronic copy.

32. On January 28, 2021, Complaint Counsel sent Altria an email asserting that Altria had failed to take reasonable steps to prevent disclosure of its privileged materials and had waived any claim of privilege as to documents produced to the Commission. Complaint Counsel further requested that Altria re-produce all documents that it had previously sought to claw back or meet and confer to discuss the issue.

33. On January 28, 2021, Altria sent Complaint Counsel an email denying that it had failed to take reasonable steps to prevent disclosure of its privileged materials or had waived any claim of privilege as to documents produced to the Commission. Altria agreed to meet and confer on the issue.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of February, in Rockville, MD.

/s/ James Abell
James Abell

EXHIBIT B

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT C

From: Abell, James
Sent: Thursday, September 19, 2019 5:31 PM
To: 'Hedge, Justin P.'
Subject: Another potentially privileged doc

Hey Justin,

I've got another one for you—**ALGFTC0000974364**. Please take a look and let us know whether this is indeed privileged and whether there are any other similar documents that we need to sequester.

Thanks,

Jim

James E. Abell III
Attorney
Mergers II Division
Federal Trade Commission
202-326-2289
jabell@ftc.gov

EXHIBIT D

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT E

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT F

From: Abell, James
Sent: Tuesday, October 22, 2019 1:06 PM
To: 'Hedge, Justin P.'
Subject: Priv Redaction Issue

Justin,

As I mentioned, we ran across four versions of an email exchange that have inconsistent privilege redactions. Here are the Bates numbers:

- **ALGFTC0003121906**
- **ALGFTC0003121956**
- **ALGFTC0003157224**
- **ALGFTC0003157301**

Please let us know how you would like to proceed.

Thanks,

Jim

James E. Abell III
Attorney
Mergers II Division
Federal Trade Commission
202-326-2289
jabell@ftc.gov

EXHIBIT G

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT H



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

James E. Abell III
Bureau of Competition
Phone: 202-326-2289
Email: jabell@ftc.gov

October 29, 2019

VIA ELECTRONIC MAIL

Justin P. Hedge, Esq.
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001

Re: Request for Additional Information and Documentary Materials issued to
Altria Group, Inc., No. 20190791

Dear Justin:

We have received your letters dated September 20, September 23, and October 23 in which you requested that the Commission destroy copies of documents produced in response to the Second Request over which you intend to claim privilege. We can confirm that Staff have taken all necessary steps to destroy any copies of the documents identified in these three letters, including any native documents stored on document databases and/or hard drives, as well as any hard copies. While we have complied with your requests, we reserve the right to challenge any of the asserted privilege claims at the appropriate time.

Staff have been receiving document productions and partial privilege logs from Altria since July 22. As you are aware, on August 28, September 19, and October 22, Staff notified you that we were in receipt of material that raised significant issues related to privilege. We intended that these early notifications would enable you to conduct a thorough review of current and pending document productions to ensure that you could identify and resolve any potential privilege issues expeditiously. Approximately four weeks ago, you informed Staff of the possibility of a systemic problem with Altria's privilege review process. We have not yet received final confirmation as to whether such a problem exists.

We remain concerned about the potential for future clawback requests to arrive in serial fashion if there is indeed a systemic problem with the privilege review. As you can appreciate, receiving numerous clawback requests in piecemeal fashion will disrupt our ability to conduct document review and prepare for investigational hearings. Furthermore, it takes significant time

and resources to repeatedly locate and remove all copies of clawed-back documents, in an investigation with an extensive record and a tight time schedule.

Altria has already been on notice of the existence of significant privilege-related issues for several weeks. We therefore request that you provide an update as to whether you have discovered any systemic problems with Altria's privilege review and what steps have been taken to remedy any such problems. In addition, we request that Altria prepare full privilege log entries for the documents that have been clawed back or redacted to date, so that we can assess the validity of the asserted claims of privilege. As noted above, we reserve all rights to challenge your claims of privilege and to assert that Altria has waived privilege with respect to some or all of the clawed-back documents.

If you have any questions or concerns regarding this letter, please contact me at (202) 326-2289.

Regards,

A handwritten signature in cursive script that reads "James Abell".

James Abell

EXHIBIT I

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT J



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

James E. Abell III
Bureau of Competition
Phone: 202-326-2289
Email: jabell@ftc.gov

November 4, 2019

VIA ELECTRONIC MAIL

Justin P. Hedge, Esq.
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001

Re: Request for Additional Information and Documentary Materials issued to
Altria Group, Inc., No. 20190791

Dear Justin:

Thank you for your letter dated November 1, 2019 providing further explanation as to the current status of Altria's internal review of its procedures for identifying and removing privileged materials from the document productions.

We are writing to inform Altria about another production of potentially privileged materials. In its privilege log, Altria included the following documents: **ALGFTC0000879849**, **ALGFTC0000947352**, **ALGFTC0000975191**, **ALGFTC0000976005**, **ALGFTC0000976024**, **ALGFTC0000967762**, **ALGFTC0000970395**, and **ALGFTC0000970406**. However, it appears that all of these documents were produced to the Commission as part of Altria's response to the Second Request.

We request that Altria inform us whether it intends to assert privilege over these materials as soon as possible. As I noted in my October 29, 2019 letter, we continue to have serious concerns regarding the possibility of multiple clawback requests arriving in serial fashion if there has been a systemic failure in Altria's privilege review process. We reaffirm our reservation of all rights to challenge your claims of privilege and to assert that Altria has waived privilege with respect to some or all of documents at issue.

If you have any questions or concerns regarding this letter, please contact me at (202) 326-2289.

Regards,

A handwritten signature in cursive script that reads "James Abell".

James Abell

EXHIBIT K

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT L



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

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November 8, 2019

VIA ELECTRONIC MAIL

Justin P. Hedge, Esq.
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Re: Request for Additional Information and Documentary Materials issued to
Altria Group, Inc., No. 20190791

Dear Justin:

We are writing to inform Altria about another production of potentially privileged materials. The following documents appear to contain privileged material and were produced to the Commission as part of Altria's response to the Second Request: **ALGFTC0007176626**, **ALGFTC0007106840**, and **ALGFTC0006457709**.

We request that Altria inform us whether it intends to assert privilege over these materials as soon as possible. As I noted in my previous two letters, we continue to have serious concerns regarding the possibility of multiple clawback requests arriving in serial fashion if there has been a systemic failure in Altria's privilege review process. Some of the documents that we have flagged for you involved direct communications between Altria and outside counsel, which we would have expected to be screened under a standard privilege review or subsequently corrected in light of the various privilege-related problems that Altria has already identified and acknowledged in this matter. We again encourage you to make immediate efforts to identify any additional potentially privileged documents, and we reaffirm our reservation of all rights to challenge your claims of privilege and to assert that Altria has waived privilege with respect to some or all of documents at issue.

If you have any questions or concerns regarding this letter, please contact me at (202) 326-2289.

Regards,

A handwritten signature in cursive script that reads "James Abell".

James Abell

EXHIBIT M

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT N

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT O

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT P

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EXHIBIT Q

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

DOUGLAS J. REECE, et al.,

Plaintiffs,

v.

ALTRIA GROUP, INC., et al.,

Defendants.

Case No. 20-02345-WHO

**JOINT CASE MANAGEMENT
STATEMENT**

Judge: Hon. William H. Orrick.

This Document Relates to:

Direct Purchaser Actions

*Douglas J. Reece v. Altria Group, INC. and
JUUL Labs Inc., Case No. 3:20-cv-02345*

*Matthew Blomquist v. Altria Group, INC. and
JUUL Labs Inc., Case No. 3:20-cv-02512*

*Anthony Martinez v. Altria Group, INC. and
JUUL Labs Inc., Case No. 3:20-cv-02597*

Benjamin Deadwyler v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-02729

John F. Stiles v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-02779

Aaron Licari v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-02778

Mallory Flannery v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-02891

Denise Redfield and Albert Riccelli v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-03288

Noor-Baig, Inc. v. Altria Group, Inc. et al., Case No. 3:20-cv-03867

Indirect Purchaser Actions

Daraka Larimore, Adam Matschullat, and Keith May v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-02999

Kerry Walsh and Allison Harrod v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-03183

Denise Redfield and Albert Riccelli v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-03288

Sheridan Carlson v. Altria Group, INC. and JUUL Labs Inc., Case No. 3:20-cv-03430

Indirect Reseller Actions

B&C Retail, Inc. v. Altria Group, Inc., et al., Case No. 3:20-cv-03868

Sofijon, Inc., et al. v. Altria Group, Inc., et al., Case No. 3:20-cv-03861

Pursuant to the Court's Order Relating Cases to 19-MD-2913 and Setting Case Management Conference ("Order"), with respect to the Antitrust actions, the Direct Purchaser Plaintiffs, Indirect Purchaser Plaintiffs, and Indirect Reseller Plaintiffs (collectively "Plaintiffs") and Defendants Altria Group, Inc., Altria Enterprises LLC, and JUUL Labs, Inc.¹ ("Defendants") jointly submit this Case Management Statement outlining the parties' respective positions on the issues raised by the Court.

I. LEADERSHIP FOR THE DIRECT AND INDIRECT PURCHASER CASES

Plaintiffs' antitrust counsel have conferred, agree and submit, consistent with this Court's Order, practice in the District and elsewhere,² that the Court should appoint separate Lead or Co-Lead Counsel for the Direct Purchaser Plaintiffs, Indirect Purchaser Plaintiffs, and Indirect Reseller Plaintiffs.

Direct Purchaser Actions: Plaintiffs in the direct purchaser class action are endeavoring to reach consensus on leadership through a private ordering agreement for this Court's consideration. To the extent that a consensus proposal cannot be reached, Direct Purchaser Plaintiffs suggest that counsel who seek to be appointed to, or wish to support, a leadership position submit an application to the Court no later than June 26, 2020. Each applicant shall submit a letter of no more than three single-spaced pages in addition to a two-page resume. Any applicant who wishes to respond to an application shall submit a letter of no more than two single spaced pages, no later than July 3, 2020, after which time the matter shall be submitted with no further response, objection or reply.

Indirect Purchaser Actions: Plaintiffs in the indirect purchaser class actions have reached an agreement on organization to present to the Court and will provide that proposal no later than June 26, 2020.

¹ In filing this Case Management Statement as requested by the Court, Defendants preserve all objections to jurisdiction, venue and the right to move to compel arbitration of claims subject to binding arbitration provisions.

² See e.g., *In re Lidoderm Antitrust Litigation*, No. 14-MD-02521-WHO (N.D. Cal.); *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1058 (N.D. Cal. 2015) (separate consolidated amended complaints filed for direct and indirect purchasers); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, MDL No. 1819, 2008 WL 426522, at *1 (N.D. Cal. Feb. 14, 2008) (same); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2008 WL 62278, at *1 (N.D. Cal. Jan. 4, 2008) (same); *In re Graphics Processing Units Antitrust Litig.*, No. C 06-7417 WHA, 2007 WL 3342602, at *2 (N.D. Cal. Nov. 7, 2007) (same). See also Federal Judicial Center, *Managing Related Proposed Class Actions in Multidistrict Litigation* at 5 (2018) (explaining that, in MDL proceedings, "direct and indirect purchasers are treated separately as a general rule.").

Indirect Reseller Actions: Plaintiffs in the indirect reseller plaintiffs' actions have reached an agreement on organization to present to the Court and will provide that proposal no later than June 26, 2020.

II. FILING OF CONSOLIDATED COMPLAINTS

A. Responses to Current Complaints

Plaintiffs and Defendants believe that a deadline to file a Consolidated Class Action Complaint should be set following this Court's selection of lead counsel to lead and manage each respective case and, therefore, respectfully suggest this issue be deferred until at or after the appointment of counsel, who will be prepared to meet and confer with Defendants and then make a recommendation for the Court's consideration. The parties agree that Defendants do not need to respond to the current complaints, including any applicable motions to compel arbitration, and that their response be deferred until Court-appointed Plaintiffs' leadership files amended and consolidated complaints. Plaintiffs and Defendants' counsel have conferred about the outline of a schedule and believe that following the appointment of Plaintiffs' leadership the parties will be able to submit an agreed proposed schedule for Defendants' responses to the Court.

B. Timing of Consolidated Complaint and Documents Produced to the FTC

Plaintiffs and Defendants are conferring on Plaintiffs' request that Defendants produce all documents they produced to the Federal Trade Commission ("FTC") in connection with the FTC's review of the transaction where Altria acquired a 35% stake in JLI currently at issue *In the Matter of Altria Group, Inc. and JUUL Labs, Inc.*, FTC Matter No. 1910075 (the "FTC Documents") as well as materials produced to the FTC in connection with the Hart-Scott-Rodino Antitrust Improvements Act review of that transaction (the "HSR Documents"). See <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents>; see 16 CFR § 803.20 (second requests).

1. Plaintiffs' Position: Plaintiffs request that this Court order Defendants to produce the FTC Documents and HSR Documents without delay. This request is consistent with requests made in other antitrust cases where documents have already been gathered, Bates stamped, and produced to another entity. Re-producing these electronically stored documents requires no additional review and

otherwise imposes virtually no burden on Defendants, while promoting and facilitating the just, speedy and inexpensive determination of these actions consistent with Rule 1 of the Federal Rules of Civil Procedure.³ In addition, Plaintiffs request the production of the unredacted administrative complaint filed against Defendants by the FTC on April 1, 2020.⁴ For purposes of expediting early production, Plaintiffs propose that the FTC Documents and HSR Documents be produced on an “Attorneys’ Eyes Only” basis, with the parties reserving rights with respect to a protective in this case.

<https://www.cand.uscourts.gov/forms/model-protective-orders>.

Contrary to Defendants’ position below, *Mujica v. AirScan, Inc.*, 771 F.3d 580, 593 n. 7 (9th Cir. 2014) does not prohibit the production of the FTC Documents prior to the filing of Plaintiffs’ Consolidated Amended Complaint. As Judge Breyer recently explained in *In re German Automotive Mfrs. Antitrust Litig.*, No. 3:17-md-02796-CRB, 2020 WL 3060748 (N.D. Cal. June 9, 2020), *Mujica* concerned an impermissible request for discovery regarding *already dismissed* claims. *Id.* at *2 (“Supreme Court and Ninth Circuit precedent prevents this Court from allowing discovery related to dismissed claims.). This is “manifestly different” from cases (like this one) where “plaintiffs requested some discovery before filing initial consolidated complaints.” *Id.* at *3 (emphasis in original) (citing, *inter alia*, *In re Lithium Ion Batteries Antitrust Litigation*, No. 13-MD-02420 YGR, 2013 WL 2237887 (N.D. Cal. May 21, 2013)). Accordingly, the *Mujica* court’s reasoning does not apply.⁵

³ See, e.g., *In re: Resistors Antitrust Litigation*, Case No. 3:15-cv-03820 (N.D. Cal. Feb. 2, 2016), Dkt. 112 (ordering production of documents previously produced to Department of Justice 28 days before filing of consolidated complaint); *In re: Farm-Raised Salmon and Salmon Products Antitrust Litigation*, Case No. 1:19-cv-21551-CMA (S.D. Fla. Apr. 6, 2020), Dkt. 207 (“Records already produced by Defendants to the Department of Justice and other foreign and domestic government entities will be produced to Plaintiffs upon request. All other discovery is stayed pending resolution of the forthcoming motion to dismiss.”); *In re: Diisocyanates Antitrust Litigation*, Case No. 2:18-mc-01001-DWA (W.D. Pa. Jan. 15, 2019), Dkt. 149 (granting production of document previously produced to Department of Justice based on lack of burden and because “efficiency and economy is best served by production at this time”).

⁴ https://www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint-public_version.pdf

⁵ Defendants further rely on *In re Flash Memory Antitrust Litig.*, Case No. 07-cv-0086, 2008 WL 62278 (N.D. Cal. Jan. 4, 2008), but that case is also distinguishable. There, the court held that a prior

Defendants also resist producing the requested documents by relying on the confidentiality provisions of 15 U.S.C. § 57b–2(f)(1). As one court in this district has stated, “the regulation governs *public disclosure by the FTC*; it does not purport to create some privilege that can be asserted by the producing party in litigation with a third party.” *Church & Dwight Co., Inc. v. Mayer Labs., Inc.*, No. C11–3288 EMC (JSC), 2011 WL 587222, at *2 (N.D. Cal. Nov. 18, 2011) (emphasis added).

2. Defendants’ Position: Defendants agree to produce to Antitrust Plaintiffs an unredacted copy of the FTC’s administrative complaint, subject to Plaintiffs’ agreement that this document is Highly Confidential and subject to the same Protective Order terms adopted in the MDL.⁶

Defendants, however, oppose the immediate production of materials previously produced to the FTC. As an initial matter, Plaintiffs appear to want immediate access to such materials to assist with their efforts to plead viable amended claims in their forthcoming Consolidated Complaint. But as a general rule, Plaintiffs are not entitled to “plausibility discovery” to allow them to state plausible claims; to hold otherwise would turn ordinary civil practice on its head. *See, e.g., Hu Honua Bioenergy, LLC v. Hawaiian Elec. Indus., Inc.*, No. 16-cv-00634, 2017 WL 11139576, at *2 (D. Haw. July 6, 2017) (“The law is well settled that a plaintiff is not entitled to discovery it might need to state a plausible claim for relief.”) (citing *Mujica v. AirScan, Inc.*, 771 F.3d 580, 593 (9th Cir. 2014)); *see also Mujica*, 771 F.3d at 593 (“[P]laintiffs must satisfy the pleading requirements of Rule 8 *before* the discovery stage, not after it.” (emphasis in original)); *Alexander v. Diaz*, No. 20-cv-100, 2020 WL 2794546, at n.1 (S.D. Cal. May 29, 2020) (same).

Indeed, courts in this District and elsewhere have denied similar requests for discovery of government productions before the filing of a consolidated complaint. *See, e.g., In re Flash Memory Antitrust Litig.*, Case No. 07-cv-0086, 2008 WL 62278, at *5 (N.D. Cal. Jan. 4, 2008) (denying discovery before filing of consolidated complaint because “the timing of discovery under the Federal Rules is not a mere formalism that easily gives way to a plaintiff’s invocation of efficiency or merely

version of Fed. R. Civ. P. 26(d) barred the taking of discovery before a Rule 26(f) conference. 2008 WL 62278, at *4.

⁶ Defendants submit that the same Protective Order that applies in the MDL proceedings should also apply in the antitrust proceedings.

because the marginal costs of duplicating documents already provided to a grand jury may be negligible”); *In re: Graphics Processing Units Antitrust Litig.*, No. 06-cv-07417, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007) (denying discovery of government productions until complaint survives motion to dismiss); *In re Domestic Airline Travel Antitrust Litig.*, 174 F. Supp. 3d 375, 377 (D.D.C. 2016) (same).

Those concerns have special force here, because the documents produced to the FTC as part of its HSR investigation are deemed confidential and are exempt from FOIA and other public disclosure. 15 U.S.C. § 57b–2(f)(1). Relying on those protections, the Defendants did not handle their productions to the FTC in the same manner as would be typical in litigation, including with respect to the degree to which materials were pre-screened for both relevance and confidentiality. For these and other reasons, there would be material complications associated with reproducing the same materials in this litigation, without appropriate reviews to ensure responsiveness and to guarantee appropriate confidentiality designations under the applicable protective order in this case, once entered. Contrary to Plaintiffs’ assertion, Defendants are not arguing that submitting the materials to the FTC creates a “privilege” that would foreclose otherwise discoverable materials from production. Rather, Defendants’ point is that because the production to the FTC could not be made public, Defendants have not done the responsiveness and confidentiality review as to those materials that would be done in ordinary litigation. *See Domestic Airline Travel*, 174 F. Supp. 3d at 377 (“With respect to the burden on Defendants, it is important to consider that Defendants’ responses to Plaintiffs’ discovery request may differ properly from their responses to the Government’s subpoenas requesting the materials in question. Relatedly, Defendants’ privacy interests militate against providing the materials now when they, possibly, may never have to be provided in this case. Even a protective order cannot fully dissipate the burden of responding to the request and providing responsive materials. Those issues are best left untouched until after the Court resolves Defendants’ planned motions to dismiss.”).

The few unpublished orders cited by Plaintiffs do not provide any reasoning. Moreover, based on the submissions filed by the parties in those cases, it does not appear that any of the government productions in question involved the same types of confidentiality and responsiveness issues implicated here. *See In re: Resistors Antitrust Litigation*, Case No. 3:15-cv-03820 (N.D. Cal.), Dkt. 82

(joint case management conference statement filed by the parties, raising no concerns about the content of the DOJ production itself); *In re: Farm-Raised Salmon and Salmon Products Antitrust Litigation*, Case No. 1:19-cv-21551-CMA (S.D. Fla.), Dkt. 205 (same); *In re: Diiscocyanates Antitrust Litigation*, Case No. 2:18-mc-01001-DWA (W.D. Pa.), Dkt. 149 (defendants' response brief opposing plaintiffs' motion for discovery, raising no confidentiality or responsiveness concerns regarding DOJ production).

Notwithstanding the foregoing, Defendants are willing to agree that, as long as these matters remain pending before this Court, each Defendant will simultaneously produce to the Antitrust Plaintiffs any documents produced in the related MDL action, including future productions of materials previously produced to the FTC, again subject to entry of a Protective Order governing discovery in this matter.

III. EFFICIENT COORDINATION WITH THE MDL

1. Plaintiffs' Position: Plaintiffs intend, and will seek, to promote effective and efficient coordination with the MDL Plaintiffs. Plaintiffs anticipate coordinating the timing and scope of discovery with MDL Plaintiffs to the extent possible to avoid unnecessarily duplicative discovery, but further believe that this process should be conducted by interim lead counsel. Likewise, Plaintiffs anticipate that issues regarding sufficiency of the pleadings and other law and motion matters can be addressed promptly after leadership has been selected. Plaintiffs have already begun these discussions with MDL Plaintiffs in the hopes of identifying areas for potential coordination and will be prepared to further address this topic at the Case Management Conference.

2. Defendants' Position: Defendants agree that discovery with the MDL should be closely coordinated, as illustrated by their view that the same Protective Order should apply and that any forthcoming document productions in the MDL should simultaneously be made available to the Antitrust Plaintiffs.

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DATED: June 12, 2020

Respectfully submitted,

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E-Filing Attestation

I, Jeff S. Westerman, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above have concurred in this filing.

/s/ Jeff S. Westerman

Jeff S. Westerman

EXHIBIT R

June 26, 2020

VIA ECF

The Honorable William H. Orrick
United States District Court
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Reece v. Altria Group, Inc.*, No. 20-02345-WHO (and related cases)

Dear Judge Orrick:

As ordered, enclosed is the declaration of Kimberly D. Harlowe, which explains the nature of Altria's FTC production and the burden and expense associated with producing those materials at this time.¹

Altria maintains that ordering production at this early stage of the litigation would be inappropriate in light of the burden on Altria and lack of immediate need by Plaintiffs. *See, e.g., In re: Graphics Processing Units Antitrust Litig.*, No. 06-cv-07417, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007) (Alsup, J.); *In re Domestic Airline Travel Antitrust Litig.*, 174 F. Supp. 3d 375, 377 (D.D.C. 2016).

Ms. Harlowe's declaration describes three categories of documents encompassed by Altria's broad and confidential submission to the FTC: (1) approximately 520,000 documents falling within search terms that expressly relate to e-vapor issues and that are unlikely to include privileged material inadvertently produced to the FTC; (2) approximately 210,000 documents falling within those search terms that may include inadvertently produced privileged materials and are subject to an ongoing review in connection with the FTC proceedings; and (3) approximately 350,000 documents falling within search terms that were chosen when the FTC was investigating both traditional combustible cigarettes as well as e-vapor products, but that would not bear on a case, like this one, involving only e-vapor products.

In the event the Court is inclined to order a production of documents provided to the FTC, over Altria's objection, Altria respectfully submits that the following approach best balances the burden to Altria with the alleged need by Plaintiffs: (1) production of the first

¹ In filing this Letter and Declaration, Altria preserves all arguments that would properly be made in its responsive pleadings to the amended complaints, including personal jurisdiction and venue.

category of documents within 30 days of the Court's order, without any responsiveness review, so long as those documents are treated as highly confidential within the meaning of the Protective Order entered by the Court in the related MDL and thus entitled to "attorneys' eyes only" status; and (2) production of non-privileged documents in the second category under the same circumstances after the privilege re-review is completed, estimated to be within 60 days. Altria does not believe production of the third category is appropriate given the likelihood that very few (if any) of these documents are responsive and the burden that would be required to produce them.

In the event the Court is considering an alternative approach, Altria respectfully requests an opportunity to be heard before either Judge Corley or the Court, given the complexities of these issues and the potential burdens on Altria.

Respectfully submitted,

/s/ Beth A. Wilkinson

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

<p>DOUGLAS J. REECE, et al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>ALTRIA GROUP, INC., et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 20-02345-WHO</p> <p>DECLARATION OF KIMBERLY D. HARLOWE</p> <p>Judge: Hon. William H. Orrick</p>
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This Document Relates to:

Direct Purchaser Actions

*Douglas J. Reece v. Altria Group, Inc. and
 JUUL Labs Inc., Case No. 3:20-cv-02345*

*Matthew Blomquist v. Altria Group, Inc. and
 JUUL Labs Inc., Case No. 3:20-cv-02512*

*Anthony Martinez v. Altria Group, Inc. and
 JUUL Labs Inc., Case No. 3:20-cv-02597*

Benjamin Deadwyler v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-cv-02729

Aaron Licari v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-02778

John F. Stiles v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-cv-02779

Mallory Flannery v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-cv-02891

Noor-Baig, Inc. v. Altria Group, Inc. et al., Case No. 3:20-cv-03867

Indirect Purchaser Actions

Daraka Larimore, Adam Matschullat, and Keith May v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-cv-02999

Kerry Walsh and Allison Harrod v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-cv-03183

Denise Redfield and Albert Riccelli v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-cv-03288

Sheridan Carlson v. Altria Group, Inc. and JUUL Labs Inc., Case No. 3:20-cv-03430

Indirect Reseller Actions

Sofijon, Inc., et al. v. Altria Group, Inc., et al., Case No. 3:20-cv-03861

B&C Retail, Inc. v. Altria Group, Inc., et al., Case No. 3:20-cv-03868

I, Kimberly D. Harlowe, state as follows:

1. I am employed by Altria Client Services LLC (ALCS), a service company of Altria Group, Inc. I serve as Director, Litigation Technology, in the Law Department of ALCS, and I am responsible for managing litigation technology and e-discovery projects for litigation involving the

Altria family of companies (referred to here collectively as “Altria”). Currently I am overseeing document production in litigation arising out of Altria Group’s minority investment in JUUL Labs Inc. (JLI), including the private antitrust actions and multidistrict litigation pending before the Court, and an administrative proceeding before the Federal Trade Commission (FTC).

2. On February 4, 2019 and March 8, 2019, Altria Group filed notifications under the Hart-Scott-Rodino Act (HSR) of its intent to convert Altria’s 35% interest in JLI, consisting of shares of non-voting stock, into voting shares. Altria produced 125 documents along with these initial HSR filings.

3. On April 8, 2019, pursuant to 15 U.S.C. § 18a and 16 C.F.R. § 803.20, the FTC issued to Altria Group a request for additional information and documentary materials with respect to the proposed acquisition by Altria Group of certain voting securities of JLI (“Second Request”). A Second Request is a procedure that allows the FTC to request additional materials as part of its review of an HSR notification.

4. I understand that the Plaintiffs in the private antitrust actions pending before the Court are seeking immediate access to all documents that were produced to the FTC as part of Altria’s HSR filings and Second Request response. I was personally involved in overseeing the process of collecting and producing those documents to the FTC.

5. The FTC’s Second Request was extremely broad, frequently requesting “all documents” on a wide range of topics. For the broad document requests, Altria submitted proposed search terms to the FTC, and the FTC provided feedback that was incorporated by Altria. The full list of the search terms Altria used in identifying the documents potentially responsive to the document requests of the Second Request is attached as Exhibit 1.

6. The products at issue in the FTC’s investigation, and consequently the Second Request, included both traditional combustible cigarettes as well as e-vapor products. Ultimately, the FTC’s administrative complaint filed against Altria and JLI alleged only a relevant market for “closed” e-

vapor products, and did not include combustible cigarettes. My understanding is that Plaintiffs in the above-captioned cases allege the same market definition as alleged in the FTC's administrative complaint, allege anticompetitive effects solely in a market for e-vapor products, and seek to represent putative classes of e-vapor purchasers.

7. In light of the FTC's initial consideration of traditional combustible cigarette products, certain search terms were designed to capture documents that might relate to those products, but not necessarily e-vapor products. For example, the search terms include the names of many combustible cigarette brands, such as "Marlboro" and "Parliament."

8. Other search terms were broadly phrased to generate a substantial number of documents that relate only to other non-e-vapor tobacco products manufactured by Altria's operating companies. Although these search terms could also potentially generate documents related to e-vapor topics, in those instances the documents would almost always already be included in the production because they would also have other e-vapor-specific search terms. For example, one of the search terms is "coupon." Many documents with the word "coupon" would refer to a coupon for a combustible cigarette brand such as Marlboro or Parliament. It is of course possible that other documents would refer to a coupon for MarkTen, which was an e-vapor brand manufactured by Altria's subsidiary, Nu Mark, and might be relevant to the antitrust issues presented here. But in those circumstances, those documents would already be collected, because MarkTen is also a search term. In other words, when a document is included in the collection because it has the word "coupon" but does not have any of the e-vapor specific search terms, it is extremely unlikely that the document is related in any way to e-vapor issues. This conclusion applies to many of the search terms used in connection with the Second Request.

9. Although these broad terms may have made sense when the FTC was considering a broader set of products than are at issue in its now pending administrative case, they would never have been the subject of proper discovery in cases (like these) where Plaintiffs allege a market definition consisting of closed e-vapor products, allege anticompetitive effects solely in that alleged market, and seek to represent classes of purchasers of e-vapor products (not combustible cigarettes). Attached as Exhibit 2 is copy of the search term list highlighted to focus on those terms that on their face relate to e-vapor products (and even those will have captured many documents relating to non-e-vapor products). For purposes of this affidavit, I describe the terms highlighted in Exhibit 2 as the “e-vapor terms.”

10. In a typical document production in a complex civil litigation, counsel reviews each document identified by the negotiated search terms to determine whether it is actually responsive, because many documents may include a search term but in fact have no bearing on the issues in the underlying litigation. Of those documents that are responsive, counsel conducts further review to determine whether they are (1) attorney-client privileged and/or reflect attorney work product, and/or (2) confidential or highly-confidential within the meaning of the applicable protective order.

11. The FTC production was designated confidential in whole, and I understand it is exempt from FOIA and other public disclosure. In light of this understanding, and given the breadth and volume of documents the FTC requested and the speed with which the production was made, we did not undertake the responsiveness and confidentiality review that is standard operating procedure in civil litigation. We did conduct a privilege review and withheld approximately 75,000 documents on that basis. We also excluded a few documents that were identified (based on a non-systematic search) as containing purely personal and sensitive information. Ultimately, as part of the Second Request, Altria produced over 1 million documents, amounting to approximately 5.9 million pages of documents, in addition to approximately 130,000 native Excel and Powerpoint files.

12. After we began submitting our Second Request productions to the FTC, the FTC notified Altria that it had identified potentially privileged documents within the productions. Upon

investigation, we determined that Altria had inadvertently produced privileged documents. Before the FTC filed its complaint, Altria notified the FTC of its inadvertent production of these documents and requested their return or destruction. In connection with preparations to defend the FTC's administrative case that have begun more recently, Altria identified additional inadvertently produced privileged documents. Altria has notified the FTC of the inadvertent production of these documents and requested their return or destruction as well. Altria is now in the process of conducting a review to identify any additional inadvertently produced privileged documents within the Second Request productions. Altria has notified the FTC that it is conducting this review, and once completed Altria will provide the FTC with a list of any additional inadvertently produced documents for return or destruction.

13. With this background in mind, in assessing the burden and expense that would be incurred in producing the FTC production in civil litigation, it is useful to divide the contents of the production into three categories.

14. The first category comprises documents that (a) include the e-vapor terms, and (b) are likely non-privileged based on the authors and recipients of the documents and the absence of markers such as the word "privileged." Many of these documents would be considered confidential or highly confidential within the meaning of the Protective Order entered by the Court in the MDL. This category includes approximately 520,000 documents.

15. Our estimate is that it would take approximately 60 days and cost approximately \$1,000,000 to conduct a responsiveness and confidentiality review of this category. If the category as a whole were deemed highly confidential pursuant to the bulk designation provision of the MDL Protective Order, and we did not undertake any responsiveness review, we could produce this category within 30 days of any order to do so. Thirty days is approximately the minimum length of time necessary to execute the production, including the process of downloading a production of this size onto hard drives.

16. The second category comprises documents that include the e-vapor terms, but based on the authors and recipients of the documents and privilege markers may include inadvertently produced privileged materials. This category consists of approximately 210,000 documents. As noted, these documents are currently the subject of the ongoing privilege re-review in connection with the FTC action itself, and we have prioritized the re-review of the documents that include the e-vapor terms. We expect the review of the documents with the e-vapor terms to be completed within 60 days. To also review these documents for responsiveness and confidentiality would take an estimated additional 30 days and cost an additional \$400,000.

17. The third category comprises documents that do not include any of the e-vapor terms, and thus are highly likely to relate only to other products such as combustible cigarettes. This category consists of approximately 350,000 documents. As discussed above, we are already engaging in a systematic review of the subset of the FTC documents that, based on the authors and recipients and privilege markers, may include inadvertently produced privileged materials. Our estimate is that the privilege re-review of this category of documents would take approximately 30 days, to be completed after we re-review the documents with the e-vapor terms. An additional review for responsiveness and confidentiality of this category would cost an estimated \$650,000 and take an additional 45 days to complete. As noted, our belief is that very few of these documents will be responsive to discovery requests in these e-vapor antitrust cases.

18. The time and cost estimates in this Declaration are based upon my personal experience and my conversations with vendors, contractors and outside counsel, who would be participating in any reviews. For the reviews described in paragraphs 15-17, the time and cost estimates assume sequential reviews. I know from personal experience that when reviewing documents for responsiveness, privilege, and confidentiality, simply adding more people to the review will not make the process go faster. If there are too many individuals involved, consistency and quality suffer, and both the litigants and the court ultimately have to spend more time later addressing mistakes. Additionally, the time and

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cost estimates included in this Declaration account for the additional significant burdens caused by the Covid-19 pandemic, which has caused delays in the technical review process.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on June 26, 2020.

Kimberly D. Harlowe
KIMBERLY D. HARLOWE

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EXHIBIT 1

Altria Group, Inc.
Exhibit 34.1
Confidential

Altria Second Request Search Terms

General Search Terms: All Custodians; January 1, 2017 forward:¹

- Tree
- “Project Sail”
- JUUL
- Juul
- juul
- JLI
- Pax
- Richard AND Jack
- Allen AND Jackson
- vap*
- “e-vapor” OR “e-vape” OR “e-vaping”
- evap*
- pod
- hybrid
- open /20 system
- closed /20 system
- “electronic cigarette”
- “e-cig”
- “e-cigarette”
- “e-liquids”
- “cig-a-like”
- MarkTen OR “Mark Ten” OR Mark-Ten OR Mark-10
- King w/5 size
- “Green Smoke” OR GreenSmoke
- Elite
- Apex
- Cync
- VIM
- Hudson
- Panama
- Fusion
- “TVS II”
- Basic w/50 brand
- “Benson & Hedges”
- Cambridge
- Chesterfield
- Commander

¹ All custodians as modified by Modification Letter #2. Includes the search terms identified in Altria’s Mary 23, 2019 Letter as well as the terms identified in the June 14, 2019 email from J. Abell to J. Hedge.

Altria Group, Inc.
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- “Dave’s”
- “English Ovals”
- Lark
- “L&M”
- Marlboro
- Merit
- Parliament
- Players
- Saratoga
- “Virginia Slims”
- Sherman
- Timeless
- Fantasia
- “Black and Gold”
- Cigarettellos
- “Classic Lights”
- “Classic Mint”
- Classic w/50 brand
- “Havana Oval”
- “Hint of Mint”
- MCD
- Naturals w/50 brand
- “New York Cut”
- “Touch of Clove”
- promo*
- advert*
- strateg*
- market*
- trade w/5 incent*
- buydown*
- “direct mail”
- coupon
- “dollar-off”
- “off-invoice”
- “retail leaders”
- “wholesale leaders”
- “progressive partner option”
- PPO
- PPP
- SPI
- STARS
- (“three-year” or “3 year”)_ w/5 plan

Altria Group, Inc.
Exhibit 34.1
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- compet*
- “market share”
- SWOT
- R&D
- research w/5 development
- survey
- RFP
- bid
- proposal
- quote
- demand
- supply
- budget
- “financial statement”
- “profit and loss”
- “P&L”
- “profit & loss”
- forecast*
- pric*
- profit*
- discontinu*
- switch*
- substitut*
- convert* OR conversion
- ATCT
- CATTS
- “dual use” OR “dual-use”
- “poly use” OR “poly-use”
- prevalence
- pharmacokinetic*
- pH
- satisfaction w/50 nicotine
- nicotine w/20 salt*
- elastic*
- divert
- enter* w/50 cigarette OR (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- entr* w/50 cigarette OR (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- promot*
- “shelf space”

Altria Group, Inc.
Exhibit 34.1
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- “Marlboro Rewards”
- ITP
- “innovative tobacco”
- position*
- PMTA or “premarket tobacco product application”
- “electronic nicotine delivery system”
- ENDS w/50 FDA
- deem* w/50 FDA
- “minimum viable scale” or “min*” w/10 (“scale” OR “capacity”)
- facil* w/20 (expan* OR clos* OR construct* OR modif* OR conver*)
- acqui*
- divest*
- JV or “joint venture”
- merg*
- synerg*
- efficien*
- reduc*
- improv*
- expan* w/20 (sale* OR sell* OR distrib*)
- introduc*
- BAT
- “British American Tobacco”
- RJR
- Reynolds
- Imperial
- ITG
- JTI OR JT
- “Japan Tobacco”
- Fontem
- myBlu
- blu
- Vuse
- Vype
- Alto
- “Logic Power”
- “Logic Compact”
- “Logic Pro”
- Xfire OR “X Fire”
- Vapeleaf
- Phix
- Fin
- Cue

Altria Group, Inc.
Exhibit 34.1
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- KandyPens
- Cora
- Bo
- Pulse
- “Smok FIT”
- CIG20
- MyJet
- Uboat
- “Clic Vapor”
- Fuchai
- Hangsen
- OVNS
- Saber
- Vladdin
- Vappecino
- “Edge Vapor”
- Coco
- Epoch
- “ALD Amaze”
- “V-Fire”
- “V-Peak”
- Myle
- NicoStic
- “Twelve Vapor”
- Byrd
- NJoy
- GhoStick
- Kian
- Atmos
- Zeal
- “Chic Group”
- “Ten Motives”
- VIP
- Pax
- Haus
- Vapin
- Mystic
- “24/7”
- “Von Erl”
- Juno
- “J Well” or “jwell”
- Apollo

Altria Group, Inc.
Exhibit 34.1
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- FITT
- Hilo
- Kimsun
- XOLO
- Ploom
- iFuse
- Kanger
- eGo
- Joytech
- Siglelei
- Vapeccino
- Stik
- “21st Century” OR Century
- BullSmoke
- EverSmokeze
- Faze
- “Fifty One”
- “Greensmart Living” or Greensmart
- Krave
- “Pro Smoke” or ProSmoke
- “Safe Cig”
- Skycig or “Sky cig”
- SmokeTip
- “South Beach”
- Storm
- Swisher
- V2
- “Vapor Couture”
- “Vapor King”
- “Vapor X”
- Victory
- Volcano
- BAT
- “British American Tobacco”
- Newport
- Camel
- “Pall Mall”
- Maverick
- “Santa Fe”
- Winston
- Kool
- “USA Gold”

Altria Group, Inc.
Exhibit 34.1
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- Salem
- “Lucky Strike”
- “American Spirit”
- Rothmans
- Dunhill
- Kent
- RJR
- Reynolds
- Doral
- Eclipse
- Eve
- Barclay
- Belair
- Capri
- Carlton
- GPC
- Misty
- Monarch
- Tareyton
- Vantage
- Viceroy
- Imperial
- ITG
- JTI OR JT
- “Japan Tobacco”
- Davidoff
- West
- JPS
- “Parker & Simpson”
- Gauloises
- Gitanes
- “Dutch Masters”
- Backwoods
- Lorillard
- “Du Maurier”
- “Canadian Classics”
- Prince
- Dosal
- 305
- Dakota
- Liggett
- Max

Altria Group, Inc.
Exhibit 34.1
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- Pyramid
- Strand
- MT
- GS
- wholesale w/10 leaders
- retail w/10 leaders
- RAI
- Mark10 OR “Mark 10”
- combust*
- “antitrust” OR “anti-trust”
- oligopol*
- monopol*
- duopol*
- dominant
- dominat*
- threat*
- cannibal*
- stewardship
- rival*
- leverag*
- foreclos*
- margin w/10 “pressur*” OR “erod*” OR “erosion*” OR “reduc*”
- category w/10 lead*
- industry w/10 lead*
- aggressive*
- punish*
- retaliat*
- irrational*
- price war
- “gain*” OR “steal*” OR “tak*” w/15 “share” OR “sales”
- encroach*
- entrench*
- “obstacle” OR “hurdle” OR “barrier” w/15 “entry” OR “entrant” OR “enter*”
- “obstacle” OR “hurdle” OR “barrier” w/15 regulat*
- “entry” OR “entrant” w/50 cigarette OR (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- leak* w/15 pod
- “product” OR “design” w/10 lock
- formaldehyde
- “back bar” OR “backbar”
- “c-store” OR “convenience store”
- cross w/5 “sell*” OR “sale”

Altria Group, Inc.
Exhibit 34.1
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- retail w/10 channel
- “usage” OR “consumer” w/10 pattern

Additional Search Terms:² Pascal Fernandez and Simeon Chow; January 1, 2015 to December 31, 2016

- substitut* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- switch* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- conver* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- survey AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- churn AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- purchas* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- “dual use” OR “poly us*” OR “poly-us*” OR “multi us*” OR “multi-us*”
- demographic OR demo) AND AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)

Additional Search Terms:³ Jody Begley and Jose Louis Murillo; January 1, 2016 to December 31, 2016

- PMTA or “premarket tobacco product application” AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- “electronic nicotine delivery system”
- ENDS w/50 FDA
- deem* w/50 FDA AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)

² Previously identified in the May 23, 2019 Letter.

³ Previously identified in the May 23, 2019 Letter.

Letter to J. Abell
May 23, 2019

Appendix D

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EXHIBIT 2

Altria Group, Inc.
Exhibit 34.1
Confidential

Altria Second Request Search Terms

General Search Terms: All Custodians; January 1, 2017 forward:¹

- Tree
- “Project Sail”
- JUUL
- Juul
- juul
- JLI
- Pax
- Richard AND Jack
- Allen AND Jackson
- vap*
- “e-vapor” OR “e-vape” OR “e-vaping”
- evap*
- pod
- hybrid
- open /20 system
- closed /20 system
- “electronic cigarette”
- “e-cig”
- “e-cigarette”
- “e-liquids”
- “cig-a-like”
- MarkTen OR “Mark Ten” OR Mark-Ten OR Mark-10
- King w/5 size
- “Green Smoke” OR GreenSmoke
- Elite
- Apex
- Cync
- VIM
- Hudson
- Panama
- Fusion
- “TVS II”
- Basic w/50 brand
- “Benson & Hedges”
- Cambridge
- Chesterfield
- Commander

¹ All custodians as modified by Modification Letter #2. Includes the search terms identified in Altria’s Mary 23, 2019 Letter as well as the terms identified in the June 14, 2019 email from J. Abell to J. Hedge.

Altria Group, Inc.
Exhibit 34.1
Confidential

- “Dave’s”
- “English Ovals”
- Lark
- “L&M”
- Marlboro
- Merit
- Parliament
- Players
- Saratoga
- “Virginia Slims”
- Sherman
- Timeless
- Fantasia
- “Black and Gold”
- Cigarettellos
- “Classic Lights”
- “Classic Mint”
- Classic w/50 brand
- “Havana Oval”
- “Hint of Mint”
- MCD
- Naturals w/50 brand
- “New York Cut”
- “Touch of Clove”
- promo*
- advert*
- strateg*
- market*
- trade w/5 incent*
- buydown*
- “direct mail”
- coupon
- “dollar-off”
- “off-invoice”
- “retail leaders”
- “wholesale leaders”
- “progressive partner option”
- PPO
- PPP
- SPI
- STARS
- (“three-year” or “3 year”)_ w/5 plan

Altria Group, Inc.
Exhibit 34.1
Confidential

- compet*
- “market share”
- SWOT
- R&D
- research w/5 development
- survey
- RFP
- bid
- proposal
- quote
- demand
- supply
- budget
- “financial statement”
- “profit and loss”
- “P&L”
- “profit & loss”
- forecast*
- pric*
- profit*
- discontinu*
- switch*
- substitut*
- convert* OR conversion
- ATCT
- CATTS
- “dual use” OR “dual-use”
- “poly use” OR “poly-use”
- prevalence
- pharmacokinetic*
- pH
- satisfaction w/50 nicotine
- nicotine w/20 salt*
- elastic*
- divert
- enter* w/50 cigarette OR (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- entr* w/50 cigarette OR (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- promot*
- “shelf space”

Altria Group, Inc.
Exhibit 34.1
Confidential

- “Marlboro Rewards”
- ITP
- “innovative tobacco”
- position*
- PMTA or “premarket tobacco product application”
- “electronic nicotine delivery system”
- ENDS w/50 FDA
- deem* w/50 FDA
- “minimum viable scale” or “min*” w/10 (“scale” OR “capacity”)
- facil* w/20 (expan* OR clos* OR construct* OR modif* OR conver*)
- acqui*
- divest*
- JV or “joint venture”
- merg*
- synerg*
- efficien*
- reduc*
- improv*
- expan* w/20 (sale* OR sell* OR distrib*)
- introduc*
- BAT
- “British American Tobacco”
- RJR
- Reynolds
- Imperial
- ITG
- JTI OR JT
- “Japan Tobacco”
- Fontem
- myBlu
- blu
- Vuse
- Vype
- Alto
- “Logic Power”
- “Logic Compact”
- “Logic Pro”
- Xfire OR “X Fire”
- Vapeleaf
- Phix
- Fin
- Cue

Altria Group, Inc.
Exhibit 34.1
Confidential

- KandyPens
- Cora
- Bo
- Pulse
- “Smok FIT”
- CIG20
- MyJet
- Uboat
- “Clic Vapor”
- Fuchai
- Hangsen
- OVNS
- Saber
- Vladdin
- Vappecino
- “Edge Vapor”
- Coco
- Epoch
- “ALD Amaze”
- “V-Fire”
- “V-Peak”
- Myle
- NicoStic
- “Twelve Vapor”
- Byrd
- NJoy
- GhoStick
- Kian
- Atmos
- Zeal
- “Chic Group”
- “Ten Motives”
- VIP
- Pax
- Haus
- Vapin
- Mystic
- “24/7”
- “Von Erl”
- Juno
- “J Well” or “jwell”
- Apollo

Altria Group, Inc.
Exhibit 34.1
Confidential

- FITT
- Hilo
- Kimsun
- XOLO
- Ploom
- iFuse
- Kanger
- eGo
- Joytech
- Siglelei
- Vapeccino
- Stik
- “21st Century” OR Century
- BullSmoke
- EverSmokeze
- Faze
- “Fifty One”
- “Greensmart Living” or Greensmart
- Krave
- “Pro Smoke” or ProSmoke
- “Safe Cig”
- Skycig or “Sky cig”
- SmokeTip
- “South Beach”
- Storm
- Swisher
- V2
- “Vapor Couture”
- “Vapor King”
- “Vapor X”
- Victory
- Volcano
- BAT
- “British American Tobacco”
- Newport
- Camel
- “Pall Mall”
- Maverick
- “Santa Fe”
- Winston
- Kool
- “USA Gold”

Altria Group, Inc.
Exhibit 34.1
Confidential

- Salem
- “Lucky Strike”
- “American Spirit”
- Rothmans
- Dunhill
- Kent
- RJR
- Reynolds
- Doral
- Eclipse
- Eve
- Barclay
- Belair
- Capri
- Carlton
- GPC
- Misty
- Monarch
- Tareyton
- Vantage
- Viceroy
- Imperial
- ITG
- JTI OR JT
- “Japan Tobacco”
- Davidoff
- West
- JPS
- “Parker & Simpson”
- Gauloises
- Gitanes
- “Dutch Masters”
- Backwoods
- Lorillard
- “Du Maurier”
- “Canadian Classics”
- Prince
- Dosal
- 305
- Dakota
- Liggett
- Max

Altria Group, Inc.
Exhibit 34.1
Confidential

- Pyramid
- Strand
- MT
- GS
- wholesale w/10 leaders
- retail w/10 leaders
- RAI
- Mark10 OR “Mark 10”
- combust*
- “antitrust” OR “anti-trust”
- oligopol*
- monopol*
- duopol*
- dominant
- dominat*
- threat*
- cannibal*
- stewardship
- rival*
- leverag*
- foreclos*
- margin w/10 “pressur*” OR “erod*” OR “erosion*” OR “reduc*”
- category w/10 lead*
- industry w/10 lead*
- aggressive*
- punish*
- retaliat*
- irrational*
- price war
- “gain*” OR “steal*” OR “tak*” w/15 “share” OR “sales”
- encroach*
- entrench*
- “obstacle” OR “hurdle” OR “barrier” w/15 “entry” OR “entrant” OR “enter*”
- “obstacle” OR “hurdle” OR “barrier” w/15 regulat*
- “entry” OR “entrant” w/50 cigarette OR (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- leak* w/15 pod
- “product” OR “design” w/10 lock
- formaldehyde
- “back bar” OR “backbar”
- “c-store” OR “convenience store”
- cross w/5 “sell*” OR “sale”

Altria Group, Inc.
Exhibit 34.1
Confidential

- retail w/10 channel
- “usage” OR “consumer” w/10 pattern

Additional Search Terms:² Pascal Fernandez and Simeon Chow; January 1, 2015 to December 31, 2016

- substitut* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- switch* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- conver* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- survey AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- churn AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- purchas* AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- “dual use” OR “poly us*” OR “poly-us*” OR “multi us*” OR “multi-us*”
- demographic OR demo) AND AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)

Additional Search Terms:³ Jody Begley and Jose Louis Murillo; January 1, 2016 to December 31, 2016

- PMTA or “premarket tobacco product application” AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)
- “electronic nicotine delivery system”
- ENDS w/50 FDA
- deem* w/50 FDA AND (“e-vapor” OR “e-vape” OR “e-vaping” OR evap* OR pod OR “electronic cigarette” OR “e-cig” OR “e-cigarette” OR “e cig” OR “ecig” OR “e cigarette” OR “e-liquids” OR “cig-a-like”)

² Previously identified in the May 23, 2019 Letter.

³ Previously identified in the May 23, 2019 Letter.

Letter to J. Abell
May 23, 2019

Appendix D

EXHIBIT S



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

James E. Abell III
Bureau of Competition
Phone: 202-326-2289
Email: jabell@ftc.gov

July 20, 2020

VIA ELECTRONIC DELIVERY

Marc Wolinsky
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Debbie Feinstein
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001

Re: In the Matter of Altria Group, Inc. and JUUL Labs, Inc., FTC Docket No. 9393

Dear Mr. Wolinsky and Ms. Feinstein:

I write in response to your letter dated June 18, 2020. In that letter, Altria claims that it inadvertently disclosed a large number of privileged documents to Complaint Counsel and requests that Complaint Counsel promptly return or destroy any copies of the identified privileged documents. This most recent request comes after Complaint Counsel notified Altria of potential privilege review problems on five occasions, over a ten-month period, resulting in Altria issuing seven previous claw back letters. Courts have found far less egregious delays to have resulted in waiver of privilege with respect to inadvertently disclosed documents.

Inadvertent disclosure is governed by Rule 3.31(g) of the Commission Rules of Practice, which provides that “The disclosure of privileged or protected information or communications during a Part 3 proceeding or during a Commission pre-complaint investigation shall not operate as a waiver if: (A) The disclosure is inadvertent; (B) The holder of the privilege or protection took reasonable steps to prevent disclosure; and (C) The holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.” 16 C.F.R. 3.31(g)(1)(i).

A full review of the timeline associated with these privilege claims establishes that Altria did not take reasonable steps to prevent disclosure of its documents or promptly to rectify its errors. Based on Altria’s failure to correct problems with its document production despite repeated

notifications, we believe Altria has waived its right to claim privilege over at least some and potentially all of the documents it has identified (the “disputed documents”).

Altria has also not yet notified Complaint Counsel of the basis for its privilege claims over many disputed documents, as required by Rule 3.31(g)(1)(i)(C). Altria must provide specific facts establishing each element of its privilege claim for each of the disputed documents.¹ Further, Complaint Counsel requests that Altria provide a log of disputed documents in Excel format, as copying text from PDF files is likely to lead to error and identification of the wrong documents.

Timeline of Inadvertent Disclosures

1. Nearly one year ago, on August 28, 2019, Complaint Counsel put Altria on notice that its productions included a potentially privileged document, [REDACTED].
2. On September 19, 2019, Complaint Counsel again alerted Altria to the existence of a potentially privileged document, [REDACTED]. Notably, the title of the email contained the terms “Privileged and Confidential” and a document with the same title and date was listed in the privilege log in Altria’s February 4, 2019 HSR filing.²
3. Altria first responded on September 20, 2019, when it issued its first of eight communications asserting privilege over inadvertently produced documents (“claw back letters”), identifying two inadvertently produced documents (“claw back documents”).
4. On September 23, 2019, Altria sent its second claw back letter asserting privilege over 602 claw back documents and adding partial redactions to another 157 documents (“partial claw back documents”).
5. On October 22, 2019, Complaint Counsel alerted Altria that it had produced four versions of an email exchange with inconsistent redactions, *i.e.*, with some versions including content that was identified as privileged in other versions.
6. On October 23, 2019, Altria sent a third claw back letter, identifying 163 claw back documents and 69 partial claw back documents.
7. As you have acknowledged, Complaint Counsel sent a letter on October 29, 2019 to Altria’s outside counsel expressing serious concerns about the possibility of a systemic failure in Altria’s privilege review process.

¹ See *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 232 (S.D.W. Va. 2015) (stating that a party’s “conclusory assertion that a document is privileged” is inadequate to meet the producing party’s burden); *United States v. Von Biberstein*, No. 7:14-CV-175-BO, 2015 WL 1781498, at *2 (E.D.N.C. Mar. 25, 2015) (a privilege log is “problematic[]” when “it merely restates boilerplate language directly from the . . . test for privilege without giving the Court any way to ascertain whether, in fact, the documents are privileged”).

² See Altria, FTC Form C4 at 12 (Feb. 4, 2019) (withholding “P3”).

8. In response to that letter, Altria explained the status of its privilege review on November 1, 2019 as follows: [REDACTED]
9. Notwithstanding this assurance, on November 4, 2019, Complaint Counsel alerted Altria that it had produced eight documents identified in its October 30, 2019 privilege log and repeated its concerns about a potential systemic failure in Altria's privilege review process.
10. On November 5, 2019, Altria issued its fourth claw back request, identifying ten claw back documents and five partial claw back documents.
11. On November 8, 2019, Complaint Counsel once again alerted Altria to three additional potentially privileged documents. In that letter, Complaint Counsel specifically highlighted the fact that some of the documents it had flagged for Altria involved direct communications between Altria and outside counsel.
12. On November 15, 2019, Altria issued its fifth claw back request, identifying 453 claw back documents and 133 partial claw back documents.
13. On November 20, Altria issued its sixth claw back request, asserting privilege over twenty claw back documents and four partial claw back documents, and produced a log of claw back documents ("claw back log").
14. Months later, on February 28, 2020, Altria issued its seventh claw back letter, identifying eleven claw back documents and seven partial claw back documents.
15. Finally, on June 18, 2020—nearly ten months after Complaint Counsel first provided notice of the production of potentially privileged documents—Altria issued its eighth claw back letter, identifying 139 [REDACTED] claw back documents and 16 partial claw back documents, and conceding that it still had [REDACTED]

In total, Altria has clawed back 1,791 documents over a ten-month period, including 798 after reporting that its privilege review was complete. Altria's long delayed, sporadic, and still incomplete efforts to claw back the disputed documents do not represent "prompt" rectification of Altria's errors as required by Rule 3.31(g)(1)(i)(C).³

Reasonableness of Procedures

A number of factors suggest that Altria also did not take reasonable steps to prevent disclosure or to rectify its errors.

³ See, e.g., *In re Schering-Plough Corp.*, Docket No. 9297, 2002 WL 32388344, *4 (F.T.C. Jan. 15, 2002) (finding that delay of eight months weighed heavily in favor of waiver.); *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 585-86 (Fed. Cl. 2012) (aggregating cases and finding that "once a party realizes a document has been accidentally produced, it must assert privilege with virtual immediacy" and that delay of almost ten months was "simply too long a time to try now to resuscitate the privilege. Its spirit has long since entered the Elysian Fields of the public domain.").

1. A large portion of the disputed documents bear clear indicia of privilege, such as names of outside counsel in their address lines. Moreover, Altria recently admitted to the federal district judge overseeing the private antitrust lawsuits against it and JLI that “approximately 210,000 documents” produced to the FTC in response to the Second Request—nearly one fifth of the “over 1 million” documents produced—“may include inadvertently produced privileged materials” and are currently undergoing a “privilege re-review.”⁴ This startling admission suggests that Altria did not adequately train its privilege reviewers; did not perform basic tests to check their work before production; and did not conduct thorough document searches in connection with its earlier claw back requests.⁵
2. Altria produced a majority of the disputed documents in a series of productions made after it was put on notice that it had inadvertently produced a number of privileged documents. Moreover, in some cases, Altria appears to have reproduced information that it previously identified as privileged. This shows that Altria did not correct its review procedures after it was notified by Complaint Counsel that those procedures had resulted in the inadvertent disclosure of a large number of disputed documents.⁶
3. When Altria clawed back some documents, it neglected to include *identical* versions of those same documents in its claw back request and, in some cases, did not recognize this error until several months later. These circumstances raise serious doubts about the thoroughness of the document searches that Altria conducted in response to Complaint Counsel’s multiple notices.⁷
4. Altria’s attorneys appear to have applied inconsistent standards in reviewing for privilege.⁸ It appears that (1) many of the documents Altria clawed back have potential duplicates that were withheld in full from the beginning; (2) many of the documents that Altria produced with redactions have potential duplicates that were withheld in full and/or potential duplicates produced with inconsistent redactions, *i.e.*, apparently revealing the purportedly privileged information; (3) many documents that Altria withheld have potential duplicates that were produced and have not been clawed back;

⁴ Declaration of Kimberly D. Harlowe, *Reece v. Altria Group, Inc.*, Case No. 20-02345, ECF No. 62-1, at 5-7 (N.D. Cal. June 26, 2020).

⁵ See *Irth Sols. LLC v. Windstream Commc’ns LLC*, No. 2:16-CV-219, 2017 WL 3276021, at *13-14 (S.D. Ohio Aug. 2, 2017) (fact that many disputed documents bore indicia of possible privilege, *e.g.*, nearly one-third of documents contained the word “legal”, demonstrated lack of reasonable steps to avoid waiver).

⁶ See *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991) (failure to modify procedures after discovery of disclosure weighs in favor or waiver for subsequently inadvertently produced documents); *Irth Sols.*, 2017 WL 3276021, at *14 (fact that that defendant produced disputed documents a second time after receiving notice weighed in favor of waiver).

⁷ See *Marine Midland Realty Credit Corp.*, 138 F.R.D. at 483 (failure to search for duplicates of claw back documents weighs in favor of waiver for overlooked copies).

⁸ See *Schering-Plough*, 2002 WL 32388344, at *4 (fact that reviewing attorneys applied inconsistent standards for determining privilege weighs in favor of waiver).

and (4) many partial claw back documents appear to have duplicates with inconsistent redactions that have not been clawed back.

In a Tenth Circuit opinion, now-Justice Gorsuch asked, “How many times can a litigant ignore his discovery obligations before his misconduct catches up with him,” and answered, “no one, we hold, should count on more than three chances to make good a discovery obligation.”⁹ Altria has so far attempted eight times to make good on its obligation to rectify its errors and has admitted that it still needs to review over 200,000 documents produced to Complaint Counsel that may contain privileged material.

Altria’s failure to adopt reasonable discovery procedures and failure to this day to rectify its errors, despite having ample time and resources, are comparable to cases where courts have found broad waiver and demonstrate an indifference that is fundamentally at odds with the principle that the attorney-client privilege “must be jealously guarded by the holder of the privilege lest it be waived.”¹⁰

* * *

Pursuant to Rule 3.31(g)(1)(ii) of the Commission Rules of Practice, Complaint Counsel has taken appropriate steps to sequester the relevant documents pending a final determination by the Chief Administrative Law Judge of Altria’s privilege claims. As you are aware, Complaint Counsel has continuously reserved all rights to challenge Altria’s privilege claims at an appropriate time and to assert that Altria has waived privilege with respect to some or all of the current and future clawed-back documents. Complaint Counsel reaffirms its reservation of those rights.

If you have any questions or concerns, please do not hesitate to contact me at (202) 326-2289.

Sincerely,

/s/

James Abell

⁹ *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1319 (10th Cir. 2011).

¹⁰ *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *see also Schering-Plough*, 2002 WL 32388344, at *5 (finding that “counsel was not under unduly burdensome time constraints” where “it produced documents on a rolling basis three to four months after it was served with the FTC’s subpoena”).

EXHIBIT T

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT U

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT V

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT W

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT X

From: Abell, James
Sent: Wednesday, January 13, 2021 9:14 PM
To: Marra, Bryan M.
Cc: Bayer Femenella, Peggy; Vote, Dominic E.; Milici, Jennifer; Oberschmied, Simone; Draper, Julia; Feinstein, Debbie; Hedge, Justin P.; JMMoses@wlrk.com; ALGoodman@wlrk.com; jsnidow@wilkinsonwalsh.com
Subject: Altria: Potentially Privileged Documents

Bryan,

We wanted to flag three documents that we recently came across during our review. These documents appear to contain privileged material: **ALGFTC0002196011**, **ALGFTC0002196024**, and **ALGFTC0002196042**. We have not been able to locate them in Altria's privilege logs or claw back letters. The documents have headers and footers containing terms such as "Privileged & Confidential," "Attorney-Client Communication," and "Attorney Work Product." Please let us know whether you intend to assert privilege over these documents.

Regards,

Jim

James E. Abell III
Mergers II Division
Federal Trade Commission
400 7th Street, SW
Washington, DC 20024
202-326-2289

EXHIBIT Y

CONFIDENTIAL - REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2021, I served the foregoing document via email to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Debbie Feinstein
Robert J. Katerberg
Justin P. Hedge
Francesca M. Pisano
Tanya C. Freeman
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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: February 12, 2021

By /s/ Frances Anne Johnson
Frances Anne Johnson, Attorney