

**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,**

Respondents.

Docket No. 9393

ALTRIA GROUP, INC.'S OPPOSITION TO PRIVILEGE WAIVER MOTION

Complaint Counsel sat on this motion that would fundamentally alter the record in this case for seven months, filing it *on the day fact discovery closed*. In June 2020, Altria advised Complaint Counsel that Altria would undertake a supplemental privilege review. Complaint Counsel responded claiming waiver. Altria disagreed, but offered to meet and confer. Complaint Counsel did not respond. Altria completed its supplemental review in the fall. Still, Complaint Counsel did nothing. Because Altria acted reasonably and diligently at all times to protect the privilege, Complaint Counsel's motion fails on the merits. But the time to bring this motion was months ago, before 30 depositions were taken, witness lists were exchanged, and the factual record was developed. Complaint Counsel's eleventh-hour motion, seeking to compel the blanket production of *over 9,000* privileged documents, violates Part 3 Rules. It violates this Court's Scheduling Order. And it would cause Altria extreme prejudice. It should be denied.

BACKGROUND

On April 8, 2019, the FTC issued a “Second Request” concerning Altria’s investment in JUUL Labs, Inc. In response, Altria produced, over three months, 1,053,827 documents, consisting of 5.9 million pages from 40 custodians’ files. Harlowe Decl. ¶¶ 6, 9. This was a monumental undertaking and reflected Altria’s commitment to cooperating fully with the FTC’s investigation. Altria retained experienced discovery counsel at Shook, Hardy & Bacon (“SHB”) to manage a privilege review team of approximately 50 attorneys. *Id.* ¶ 8. SHB closely supervised the review, which was complex given that certain Altria lawyers also had non-legal roles. Talbert Decl. ¶¶ 2–9.

During the investigation, the FTC identified a small number of documents that were inadvertently produced, as did Altria’s antitrust counsel. Harlowe Decl. ¶¶ 21–24. Each time, Altria made diligent efforts to investigate and identify other potentially inadvertently produced documents. *Id.*; Feinstein Decl. ¶¶ 8–10, 15.

On April 1, 2020, Complaint Counsel filed the Complaint. In preparing Altria’s defense, Altria’s recently engaged trial counsel at Wachtell, Lipton, Rosen & Katz discovered additional inadvertently produced documents. Harlowe Decl. ¶ 25. On June 18, while the case was stayed in light of the pandemic, Altria notified Complaint Counsel of these inadvertent disclosures and advised that it would further review the Second Request production for inadvertently produced documents. Ex. A. In response, Complaint Counsel claimed that Altria had waived privilege and purported to “reserve[] all rights to challenge Altria’s privilege claims at an appropriate time.” Abell Ex. S at 5.¹ Altria

¹ “Abell Ex.” refers to exhibits to the Declaration of James Abell, filed in support of the motion.

promptly expressed its disagreement, but offered “to meet and confer.” Ex. B. Complaint Counsel did not respond.

In the face of Complaint Counsel’s silence, Altria proceeded and, by September 10, had completed a re-review of approximately 210,000 Second Request documents relevant to the Complaint, clawing back 5,477 documents. Ex. C; Harlowe Decl. ¶ 28. Altria provided a corresponding privilege log on October 14. Altria completed a review of *other* Second Request production documents, not relevant to the theories pursued in the Complaint, on November 6. Ex. D.²

Rather than press its waiver claim, Complaint Counsel sought Altria’s privileged documents through other means: an August 27 document request seeking all documents Altria “withheld from production in response to the Second Request, or clawed back, based on a claim of privilege.” Abell Decl. ¶ 26. On September 17, Altria objected to this request, Ex. E, and Complaint Counsel did not move to compel, much less within the 30 days required by the Scheduling Order.

On January 28, 2021, days before the fact discovery cutoff, Complaint Counsel announced that “all privilege claims have been waived” and demanded “Altria immediately produce all documents that it previously sought to claw back.” Ex. F. On a February 1, 2021 meet-and-confer call, Complaint Counsel conceded that nothing in particular had prompted it to raise the issue other than the approaching trial date. Asked for an explanation for its delay, Complaint Counsel offered none. Feinstein Decl. ¶ 16. The next day, Altria sent a letter detailing authorities showing why Complaint Counsel’s

² Complaint Counsel suggests the re-review continued into January 2021. *See* Mot. at 9. Not true. Seven documents were clawed back in January, but not in connection with the re-review, which completed months earlier.

contemplated motion was untimely and prejudicial. Ex. G. No response followed. Instead, on the discovery cutoff date, Complaint Counsel filed this motion.

ARGUMENT

I. Complaint Counsel’s delay bars this motion.

Part 3 Rules and the Scheduling Order prohibit Complaint Counsel from waiting until the close of fact discovery to file a motion that seeks to dramatically alter the document record.

First, under Rule 3.31(g)(1)(ii), receiving parties notified of inadvertent disclosures “must promptly return, sequester, or destroy the specified information.” Then, receiving parties “may *promptly* present the information to the Administrative Law Judge under seal for a determination of the claim.” *Id.* (emphasis added). Rule 3.31(g)(1)(ii) is modelled after and identical in relevant part to FRCP 26(b)(5)(B), which “*requires* a party who intends to challenge a claim of inadvertent production to promptly present it to the court for a determination of the claim.” *Coleman v. Sterling*, 2011 WL 13177041, at *3 (S.D. Cal. Nov. 4, 2011) (emphasis added).³ Complaint Counsel does not contend that it brought its motion “promptly,” nor could it.⁴ “Instead of complying with [the] requirement to promptly present the disputed information to the court,” Complaint Counsel “s[at] on [its] challenge,” and its motion must therefore be denied. *Id.* at *3; *see also Canamar v.*

³ In promulgating Rule 3.31(g), the Commission explained that the “obligations imposed [by Rule 26(b)(5)(B)] on the receiving party ... are sensible and should be incorporated into the Commission’s Part 3 rules.” 16 CFR Parts 3 and 4 Rules of Practice, 74 Fed. Reg. 20205, 20207 (May 1, 2009).

⁴ On the February 1 meet-and-confer call, Complaint Counsel contended that Rule 3.31(g)(1)(ii)’s promptness requirement is optional because it uses the word “may.” But *Coleman* rejected that interpretation of the rule. *See* 2011 WL 13177041, at *2–3. The use of “may” conveys that a party may challenge a clawback in court. It does not modify the timeframe in which that challenge must be brought. To suggest otherwise reads the word “promptly” out of the rule.

McMillin Tex. Mgmt., 2009 WL 2175105, at *2 (W.D. Tex. July 17, 2009) (receiving party violated Rule 26(b)(5)(B) when it waited five months, and until after critical deposition had occurred, to challenge clawback).⁵

This is only common sense. “[T]he purpose of the prompt requirement” is to prevent prejudice: “to allow parties to know whether a challenge is being made to a claim and have a determination of the claim so that they know whether the information may be used to litigate the case.” *Coleman*, 2011 WL 13177041, at *3.

Here, the prejudice Complaint Counsel aims to impose on Altria would be irreparable. By seeking a blanket waiver of over 9,000 privileged documents that Altria clawed back months ago (and, in many cases, more than a year ago), Complaint Counsel is attempting to dramatically alter the factual record in this case—after witness lists have been exchanged and after every party deposition has occurred. Had Complaint Counsel promptly filed this motion (and prevailed), Altria may have listed additional or different witnesses, prepared its witnesses differently, or asked witnesses different questions at depositions. But it is far too late for that now.

Second, the motion is independently untimely under the Scheduling Order. Additional Provision 8 of that Order provides 30 days to move to compel in response to responses and objections, absent circumstances not pertinent here. Complaint Counsel’s document requests sought the functional equivalent of the relief sought before this Court.

⁵ To evade Rule 3.31(g)(1)(ii), Complaint Counsel purports to bring its motion under Rule 2.11(d). Once a Part 3 proceeding is pending, however, Rule 3.31(g) governs inadvertent disclosures “during a Commission precomplaint investigation.” Complaint Counsel acknowledged the applicability of Rule 3.31(g) in its July 20 letter to Altria (*see* Abell. Ex. S at 1 (“Inadvertent disclosure is governed by Rule 3.31(g) ...”)) and in its January 28, 2021 email, Ex. F. In *In re Louisiana Real Estate Appraisers*, moreover, Complaint Counsel moved under *Rule 3.31(g)*, not Rule 2.11(d), and this Court analyzed Complaint Counsel’s waiver motion under that same rule. *See* 2018 WL 1409847, at *3 (F.T.C. Mar. 9, 2018).

Altria objected, making clear it would not comply. Ex. E. Complaint Counsel did not move to compel within 30 days and has now waived the right to do so.

II. Altria did not waive the privilege.

Should the Court reach the merits, it should deny the motion because Altria acted reasonably at every turn to protect the privilege. Attached in support of Altria's position are declarations setting out the steps taken to protect Altria's privilege by Kim Harlowe, senior director of Altria's in-house e-discovery team; Denise Talbert, co-chair of SHB's e-discovery practice, whose firm oversaw the review; and Debbie Feinstein, head of Arnold & Porter's antitrust group, which led Altria's response to the Second Request. Also attached is the expert declaration of Robert Owen, a leading practitioner in the field of e-discovery.

“Because of the sacrosanct nature of the attorney-client privilege, the privilege is ‘worthy of maximum legal protection.’” *In re Louisiana Real Estate Appraisers*, 2018 WL 1409847, at *2 (F.T.C. Mar. 9, 2018). Accordingly, there is no waiver if “(A) The disclosure is inadvertent; (B) [t]he holder of the privilege or protection took reasonable steps to prevent disclosure; and (C) [t]he holder promptly took reasonable steps to rectify the error” § 3.31(g)(1)(i).⁶ Each factor is met here.

First, the disclosures were inadvertent—Complaint Counsel has not contended otherwise—and attributable to the size, scope, complexity, prioritization requirements, and

⁶ In implementing Rule 3.31, the Commission expressly adopted the “standards in Fed. R. Evid. 502(b),” 74 Fed. Reg. at 20207, which apply equally to inadvertent disclosures to a “federal office or agency,” F.R.E. 502(b). The Commission explained that Rule 502(b)'s and Rule 3.31's more protective approach was animated by “[w]idespread concerns that the litigation costs necessary to protect against privileged ... materials” being disclosed “have become excessive”—concerns that are “particularly aggravated ... by the enormous amount of electronically stored information that needs to be reviewed in discovery.” 74 Fed. Reg. at 20207. Complaint Counsel's authorities that predate these amendments thus carry little, if any, weight.

speed of the production. Harlowe Decl. ¶¶ 3–6, 18–19, 31; Expert Decl. ¶ 24; 16 CFR Parts 3 and 4 Rules of Practice, 74 Fed. Reg. 20205, 20207 (May 1, 2009) (“Relevant considerations concerning the reasonableness of precautions taken include the number of documents to be reviewed [and] the time constraints for production”).

Second, while working hard to cooperate expeditiously with the FTC’s investigation, Altria took reasonable steps to prevent disclosure. It hired experienced discovery counsel, which trained and closely supervised a review team, created mechanisms to escalate uncertain privilege calls, and implemented quality-check processes. Talbert Decl. ¶¶ 2–9; Feinstein Decl. ¶ 6; Expert Decl. ¶¶ 34–43. Contrary to Complaint Counsel’s suggestion, Altria’s statements in a parallel federal litigation (made eight months ago) do not suggest otherwise. Altria explained there that because Second Request productions are confidential, Altria did not conduct a *relevance or confidentiality* review. That has no bearing on whether Altria conducted a diligent *privilege* review.⁷

Third, Altria took prompt, reasonable steps to remedy inadvertent disclosures. There were errors, as there would be in any production bearing this degree of complexity and size, prepared under “extreme time constraints.” *Siegmund v. Xuelian Bian*, 2018 WL 3725775, at *10 (S.D. Fla. Aug. 1, 2018); *see also Judson Atkinson Candies v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388 (7th Cir. 2008) (“[W]here discovery is extensive, mistakes are inevitable and claims of inadvertence are properly honored so long as appropriate precautions are taken.” (citation omitted)). But “the issue is whether [Altria] acted promptly to retrieve the documents after discovering the inadvertent disclosure,” and

⁷ Moreover, Altria did not “admit[.]” in June 2020 “that it had yet to re-review more than 210,000 documents ... that bore indicia of privilege.” Mot. at 2. Rather, Altria had no reason to believe a *re-review* was desirable until that time. Harlowe Decl. ¶¶ 24–25; Expert Decl. ¶¶ 55–58.

Altria plainly did so here. *See Louisiana Real Estate Appraisers*, 2018 WL 1409847, at *4; Harlowe Decl. ¶¶ 21–24; Expert Decl. ¶¶ 27, 47–60.

Section 3.31(g) “does not require the producing party to engage in full-scale post-production review to determine whether there had been an inadvertent disclosure.” 74 Fed. Reg. at 20207; *U.S. EEOC v. G.W. Univ.*, 2020 WL 6504573, at *13 (D.D.C. Nov. 5, 2020). And Altria should not be penalized for undertaking such an effort voluntarily, when the case was stayed and months before depositions began. Moreover, less than 0.9% of the Second Request production has been clawed back, an error rate far below courts’ typical threshold of concern. *See Louisiana Real Estate Appraisers*, 2018 WL 1409847, at *2, *4 (no waiver despite 7% error rate); *Kandel v. Brother Int’l*, 683 F. Supp. 2d 1076, 1085–86 (C.D. Cal. 2010) (no waiver where error rate was over 1%); Expert Decl. ¶¶ 25–26, 55–61.

What’s more, Complaint Counsel cannot show that it “would be prejudiced if not allowed to use these documents,” as its own authorities require. *In re Schering-Plough*, 2002 WL 32388344, at *5 (F.T.C. Jan. 15, 2002). To date, Complaint Counsel has notified Altria of just 20 potentially inadvertently produced documents, and it has not identified a single clawed-back document on which it relied. Its vague statement that it “read and analyzed a number of documents that Altria subsequently clawed back” does not establish (or even suggest) prejudice. Mot. at 6. Complaint Counsel does identify 23 additional documents, clawed back long ago, that it claims “bear directly” on “Altria’s reasons for exiting the e-vapor business.” *Id.* at 5–6. These documents are plainly privileged, and it is puzzling that Complaint Counsel apparently reviewed the bulk of them without alerting Altria to their existence. *See* ABA Model Rule of Prof’l Conduct 4.4(b). In any event, Complaint Counsel did not use these or any other inadvertently produced privileged documents during the investigational hearings, refer to them in the Complaint, cite them in

any papers (until now), or use them in depositions. Complaint Counsel’s cases are inapposite. *See Schering-Plough*, 2002 WL 32388344, at *5 (FTC “read, analyzed, and used the documents” at issue (emphasis added)); *Mount Hawley Ins. v. Felman Prod.*, 271 F.R.D. 125, 136 (S.D. W.Va. 2010) (document “had great influence on [adversaries’] discovery requests and deposition questions”).⁸

CONCLUSION

Complaint Counsel’s motion should be denied.⁹

⁸ ALGFTC0005437008 and ALGFTC0000744999, *see* Mot. at 6, were clawed back in error. Altria withdraws its privilege claim over both documents.

⁹ Should the Court rule otherwise, Altria respectfully requests that the Court stay its ruling to preserve the status quo and avert irreparable harm to Altria while it promptly exercises its right to seek review.

Dated: February 18, 2021

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**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 OF JONATHAN M. MOSES
IN SUPPORT OF ALTRIA GROUP, INC.'S
OPPOSITION TO PRIVILEGE WAIVER MOTION**

I, Jonathan M. Moses, state as follows:

1. I am a partner at the law firm of Wachtell, Lipton, Rosen & Katz, counsel to Respondent Altria Group, Inc. (“Altria”). I am one of the counsel of record for Altria in the above-captioned matter.
2. I respectfully submit this declaration to provide certain documents that are referred to in Altria’s Opposition to Privilege Waiver Motion.
3. Submitted herewith are true and correct copies of the following:

Exhibit	Description
A	Letter from Marc Wolinsky, Wachtell Lipton, and Debbie Feinstein, Arnold & Porter, to James E. Abell, Federal Trade Commission (June 18, 2020)
B	Letter from Marc Wolinsky, Wachtell Lipton, and Debbie Feinstein, Arnold & Porter, to James E. Abell, Federal Trade Commission (Aug. 7, 2020)
C	Letter from Marc Wolinsky, Wachtell Lipton, and Debbie Feinstein, Arnold & Porter, to James E. Abell, Federal Trade Commission (Sept. 10, 2020)

Exhibit	Description
D	Letter from Debbie Feinstein, Arnold & Porter, to James E. Abell, Federal Trade Commission (Nov. 6, 2020)
E	An excerpt of Altria’s Responses and Objections to Complaint Counsel’s First Set of Requests for Production of Documents (Sept. 17, 2020)
F	Emails between Jennifer Milici, Federal Trade Commission, and Jonathan M. Moses, Wachtell Lipton, <i>et al.</i> (Jan. 31, 2021)
G	Letter from Jonathan M. Moses, Wachtell Lipton, to Jennifer Milici, Federal Trade Commission (Feb. 2, 2021)

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: February 18, 2021

s/ Jonathan M. Moses
Jonathan M. Moses

PUBLIC

Exhibit A

PUBLIC

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JONATHAN M. MOSES
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JOHN F. LYNCH
WILLIAM SAVITT
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J. AUSTIN LYONS
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CONFIDENTIAL

June 18, 2020

By E-mail

James E. Abell, Esq.
Federal Trade Commission
Bureau of Competition
400 7th Street, SW
Washington, DC 20024

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

Dear Mr. Abell:

We are writing on behalf of Altria Group, Inc., which Wachtell, Lipton, Rosen & Katz is representing, along with Arnold & Porter, in the recently filed matter by the Federal Trade Commission challenging Altria's investment in JLI.

WACHTELL, LIPTON, ROSEN & KATZ

PUBLIC

James E. Abell, Esq.
June 18, 2020
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In connection with preparing for this proceeding, we have recently identified a number of plainly privileged communications that were inadvertently produced to the FTC during the course of Altria's rolling production of more than one million documents, constituting approximately 5.9 million pages, in response to the Second Request. Altria did not cite these documents in any of its written submissions or oral presentations to the Commission, and Staff did not use them in any IHS or quote or refer to them in the complaint. We request that you promptly return or destroy any copies that you might have made of the identified privileged documents, including any native documents stored on document databases and/or hard drives as well as any hard copies. We also ask that you dispose of any notes or work product that you may have generated based, in whole or in part, on these privileged documents.

Consistent with prior practice in this matter, the documents are set out in the enclosed index that identifies documents that should have been fully withheld or redacted in part. We will provide an overlay file to replace the identified documents with privilege slipsheets or redactions, and we will update the text and metadata files accordingly. We will also update Altria's Partial Privilege Log to include entries for these documents.

We are aware that in the fall of 2019, counsel for Altria and the FTC Staff corresponded regarding certain requests to clawback privileged documents inadvertently produced in response to the Second Request. In its letter dated October 29, 2019, Staff expressed concern that there were "systemic problems with Altria's privilege review." Altria responded by letter, dated November 1, 2019, noting that it had "conducted additional document search and review activities" to identify inadvertently produced privileged documents and that it was not "currently aware of any additional documents" subject to clawback. As you know, the FTC responded on November 4, 2019, identifying additional documents that appeared to be privileged, and Altria identified others in February 2020.

Based on our review of the documents in the enclosed index, it has become apparent there is a need to conduct a further review to identify any additional privileged material inadvertently produced during the extensive Second Request efforts. We will endeavor to promptly notify you if additional privileged documents are identified, and will otherwise keep you posted.

* * *

WACHTELL, LIPTON, ROSEN & KATZ

PUBLIC

James E. Abell, Esq.
June 18, 2020
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Please afford this letter confidential treatment.

Sincerely,



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



Debbie Feinstein
Arnold & Porter Kaye Scholer LLP
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June 18, 2020

Second Request Issued to Altria Group, Inc.

PUBLIC

BatesBegin	BatesEnd
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June 18, 2020

Second Request Issued to Altria Group, Inc.

PUBLIC

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June 18, 2020

Second Request Issued to Altria Group, Inc.

PUBLIC

BatesBegin	BatesEnd
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June 18, 2020

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June 18, 2020

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June 18, 2020

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ALGFTC0007216877	ALGFTC0007216880

Exhibit B

WACHTELL, LIPTON, ROSEN & KATZ

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CONFIDENTIAL

August 7, 2020

By E-mail

James E. Abell Esq.
 Federal Trade Commission
 Bureau of Competition
 400 7th Street, SW
 Washington, DC 20024

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

Dear Mr. Abell:

We write in response to your letter, dated July 20, 2020, regarding Altria's identification of privileged documents inadvertently produced to the FTC Staff during its investigation under the Hart-Scott-Rodino Act.

WACHTELL, LIPTON, ROSEN & KATZ

James E. Abell Esq.
August 7, 2020
Page 2

Altria disagrees with your assertion that it failed to take reasonable steps to prevent the disclosure of its privileged documents or that there has been any waiver. We are, of course, happy to meet and confer with you with respect to these matters. As noted in our letter dated June 18, 2020, in connection with preparations for this proceeding, Altria identified a need for further review of its expedited production. That supplemental review is ongoing and will be completed as promptly as possible.

Enclosed is a privilege log stating the basis for the privilege claims for the inadvertently produced documents Altria identified on June 18, 2020. Also enclosed is an overlay file to replace the identified documents with privilege slipsheets or redactions and an updated Partial Privilege Log.¹

* * *

Please afford this letter and enclosures confidential treatment.

Sincerely



Marc Wolinsky
Wachtell, Lipton, Rosen & Katz
51 w. 52nd St.
New York, NY 10019



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

¹ The June 18, 2020 letter listed certain documents under the "Privilege Recaptures" portion of the index that we have determined should be produced in redacted form. Those documents are: ALGFTC0000220699; ALGFTC0000314787; ALGFTC0000314793; ALGFTC0000314795; ALGFTC0000321065; ALFTC0000321070; ALFTC0000321081; ALGFTC0000728204; ALGFTC0000753395; ALGFTC0000753426; ALGFTC0005424638; ALGFTC0005424720; ALGFTC0005724093; and ALGFTC0007040506.

PUBLIC

Exhibit C

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CONFIDENTIAL

September 10, 2020

By E-mail

James E. Abell, Esq.
Federal Trade Commission
Bureau of Competition
400 7th Street, SW
Washington, DC 20024

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

Dear Mr. Abell:

We write to provide an update concerning Altria's review of the Second Request production for inadvertently produced privileged materials. Since our June 18, 2020 letter, Altria has re-reviewed tens of thousands of documents from the Second Request production and has

WACHTELL, LIPTON, ROSEN & KATZ

PUBLIC

James E. Abell, Esq.
September 10, 2020
Page 2

now completed its review of documents it identified as related to e-vapor issues.¹ The review of documents relating to combustible cigarettes, documents that are unlikely to bear on any issues raised in the complaint, is ongoing.

Set out in the enclosed index is a list of what Altria has identified through this process as the documents that were inadvertently produced and that should have been fully withheld or redacted. We have confirmed, as was the case with the documents identified in our June 18, 2020 letter, that Altria did not cite any of the documents set out in the attached index in any of its written submissions or oral presentations to the Commission, and Staff did not use them in any investigational hearings or quote or refer to them in the complaint.

We request that you promptly destroy all copies of the documents in the enclosed index, including any native documents stored on document databases and/or hard drives as well as any hard copies. We also ask that you destroy any notes or work product that you may have generated based, in whole or in part, on these privileged documents. We will promptly provide an overlay file to replace the documents identified as requiring redactions with redacted versions, and we will update the text and metadata files accordingly.

To provide information as to the basis of Altria's claims of privilege as to the listed documents, we anticipate producing a metadata log next week. Altria will produce a full privilege log promptly after it is completed.

Please afford this letter and enclosure confidential treatment.

Sincerely,



Marc Wolinsky
Wachtell, Lipton, Rosen & Katz
51 W. 52nd St.
New York, NY 10019



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

¹ Altria generated an e-vapor document subset through the use of the search terms set out in the Declaration of Kimberly D. Harlowe, *Reece v. Altria Group, Inc.*, Case No. 20-02345 (N.D. Cal. June 26, 2020), ECF No. 62-1, and then identified specific categories of documents for review within the subset, based on whether specific authors, recipients, or other privilege markers appeared on the documents.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privileged

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

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Second Request Issued to Altria Group, Inc.

PUBLIC

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Second Request Issued to Altria Group, Inc.

PUBLIC

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CONFIDENTIAL TREATMENT REQUIRED

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privileged

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

FTC File No. 20190791

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privileged

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privileged

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PUBLIC

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privileged

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privileged

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

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CONFIDENTIAL TREATMENT REQUIRED

Privileged

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privileged

Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

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CONFIDENTIAL TREATMENT REQUIRED

Privileged

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privileged

Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

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CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

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Privilege Recaptures

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CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

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CONFIDENTIAL TREATMENT REQUIRED

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

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Privilege Recaptures

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CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

PUBLIC

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Privilege Recaptures

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CONFIDENTIAL TREATMENT REQUIRED

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

PUBLIC

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FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

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Second Request Issued to Altria Group, Inc.

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Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

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BatesBegin	BatesEnd
ALGFTC0007223605	ALGFTC0007223609
ALGFTC0007223886	ALGFTC0007223886
ALGFTC0007224606	ALGFTC0007224608
ALGFTC0007235152	ALGFTC0007235153
ALGFTC0007240395	ALGFTC0007240395
ALGFTC0007245794	ALGFTC0007245794
ALGFTC0007250647	ALGFTC0007250649
ALGFTC0007253401	ALGFTC0007253402
ALGFTC0007255090	ALGFTC0007255091
ALGFTC0007258300	ALGFTC0007258300
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ALGFTC0007306375	ALGFTC0007306376
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ALGFTC0007306440	ALGFTC0007306441
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ALGFTC0007315617	ALGFTC0007315620
ALGFTC0007315625	ALGFTC0007315628

Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

PUBLIC

BatesBegin	BatesEnd
ALGFTC0007315629	ALGFTC0007315633
ALGFTC0007315634	ALGFTC0007315638
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ALGFTC0007355492	ALGFTC0007355494
ALGFTC0007365084	ALGFTC0007365087
ALGFTC0007365132	ALGFTC0007365136
ALGFTC0007365137	ALGFTC0007365141
ALGFTC0007365151	ALGFTC0007365155
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ALGFTC0007414066	ALGFTC0007414068
ALGFTC0007414317	ALGFTC0007414318
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ALGFTC0007414735	ALGFTC0007414737

Privilege Recaptures

FTC File No. 20190791

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Second Request Issued to Altria Group, Inc.

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BatesBegin	BatesEnd
ALGFTC0007414947	ALGFTC0007414949
ALGFTC0007414956	ALGFTC0007414958
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ALGFTC0007427831	ALGFTC0007427833
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ALGFTC0007429754	ALGFTC0007429756
ALGFTC0007429757	ALGFTC0007429760

Privilege Recaptures

FTC File No. 20190791

CONFIDENTIAL TREATMENT REQUIRED

Privilege Redacted

Second Request Issued to Altria Group, Inc.

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BatesBegin	BatesEnd
ALGFTC0007430291	ALGFTC0007430292
ALGFTC0007430357	ALGFTC0007430358
ALGFTC0007430365	ALGFTC0007430366
ALGFTC0007432408	ALGFTC0007432408
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ALGFTC0007446926	ALGFTC0007446933
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ALGFTC0007446968	ALGFTC0007446970
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ALGFTC0007447262	ALGFTC0007447266
ALGFTC0007447267	ALGFTC0007447270
ALGFTC0007452008	ALGFTC0007452072
ALGFTC0007456045	ALGFTC0007456149
ALGFTC0007462118	ALGFTC0007462188
ALGFTC0007462397	ALGFTC0007462397

Exhibit D

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Arnold & Porter

Debbie Feinstein
+1 202.942.6594 Direct
Debbie.Feinstein@arnoldporter.com

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November 6, 2020

VIA E-MAIL

James E. Abell III, Esq.
Federal Trade Commission
Bureau of Competition
400 7th Street, SW
Washington, DC 20024

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

Dear Jim:

We write to provide a further update concerning Altria's review of the Second Request production for inadvertently produced privileged materials. Altria has now completed its review of the "non-e-vapor" documents¹ it identified for further review for privilege. The enclosed index lists those non-e-vapor documents Altria has determined were inadvertently produced and should have been fully withheld or redacted.

As an initial matter, we believe the entire population of non-e-vapor documents Altria produced in this matter should be sequestered. The Commission voted out a complaint that alleges harm only in a market of e-vapor products. Thus, non-e-vapor documents such as those involving combustible cigarettes are irrelevant and not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any Respondent. Please confirm that you will sequester these documents.

At a minimum, however, we ask you to promptly destroy all copies of the inadvertently produced non-e-vapor documents identified in the enclosed index,

¹ As we indicated in our September 10th letter, Altria focused its initial review on documents it identified as relevant to e-vapor issues and that review was completed as of that letter. The e-vapor population of documents was determined through the use of the search terms set out in the Declaration of Kimberly D. Harlowe, *Reece v. Altria Group, Inc.*, Case No. 20-02345 (N.D. Cal. June 26, 2020), ECF No. 62-1. The "non-e-vapor" population of documents represents those documents that did not hit on an e-vapor search term.

Arnold & Porter

James E. Abell III
November 6, 2020
Page 2

including any native documents stored on document databases and/or hard drives as well as any hard copies. We also ask that you destroy any notes or work product that you may have generated based, in whole or in part, on these privileged documents. We will promptly provide an overlay file to replace the documents identified as requiring redactions with redacted versions, and we will update the text and metadata files accordingly.

To provide information as to the basis of Altria's claims of privilege as to the listed documents, we also enclose a metadata privilege log. We believe the metadata log is sufficient to identify Altria's privilege claims for these non-e-vapor documents, but are willing to meet and confer should you have concerns.

Please afford this letter and enclosure confidential treatment.

Sincerely,



Debbie Feinstein

cc: Justin P. Hedge
Bryan M. Marra
J.J. Snidow
Jonathan M. Moses
Adam L. Goodman

Enclosure

Exhibit E

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

In the Matter of

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

And

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

Docket No. 9393

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**ALTRIA GROUP, INC.’S RESPONSES AND OBJECTIONS
TO COMPLAINT COUNSEL’S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Pursuant to the Federal Trade Commission’s (“FTC”) Rules of Practice for Adjudicative Proceedings (“Rules of Practice”), 16 C.F.R. §§ 3.31 and 3.37, Respondent Altria Group, Inc. (“Altria”), by and through its undersigned counsel, hereby provides these responses and objections (the “Responses”) to Complaint Counsel’s First Set of Requests for Production of Documents (the “Requests”).

These Responses reflect the current status of Altria’s knowledge, understanding, and belief respecting the Requests. Altria reserves the right to modify, supplement, or amend its Responses as appropriate. Moreover, should Altria at any time supplement or amend its responses to these Requests, by agreement or otherwise, it expressly reserves the right to assert any applicable objection, privilege, or other protection in connection with such supplementation or amendment. Altria further reserves the right to produce additional information or other evidence at any time, including trial, and to object on any grounds to the introduction into evidence of any portion of these Responses. Altria further reserves all rights to modify,

supplement, or amend its Responses to Complaint Counsel’s Requests based on any ruling by Chief Administrative Law Judge Chappell.

Information contained in any Response or the production of any given document pursuant to these Requests is not an admission or acknowledgement by Altria that such information or document is relevant to any claim or defense in this action; is without prejudice to Altria’s right to contend at trial or in any other or subsequent proceeding, in this action or otherwise, that such document is inadmissible, irrelevant, immaterial, or not the proper basis for discovery; and is without prejudice to or waiver of any objection to any future use of such information or document that Altria may be advised to make.

Specific objections to each separate Request are made below. Additionally, Altria makes certain general objections to the Requests, also listed below (“General Objections”). These General Objections, including with respect to the Requests’ definitions and instructions, are incorporated by reference into all responses made with respect to each separate Request. Altria’s response to each individual Request is submitted without prejudice to, and without in any respect waiving, any General Objections not expressly set forth in that response. Accordingly, the inclusion of any specific objection in any response below is neither intended as, nor shall in any way be deemed, a waiver of any General Objection or of any other specific objection made herein or that may be asserted at a later date. Altria agrees to meet and confer with Complaint Counsel regarding any and all of its objections set forth herein.

GENERAL OBJECTIONS

1. Altria objects to each and every Request on the grounds that it is overly broad, unduly burdensome, unreasonable, and disproportionate to the extent that it purports to require Altria to search for and produce “all documents” from its files on a variety of subjects. Altria

REQUEST NO. 18:

Submit all documents that the Company withheld from production in response to the Second Request, or clawed back, based on a claim of privilege. To the extent that the Company continues to assert privilege over such documents and choses [sic] to withhold them from production, provide a privilege log as required by FTC Rule of Practice § 3.38A and outlined in Instruction VII.

RESPONSE TO REQUEST NO. 18:

Altria incorporates by reference the General Objections, including the General Objections to Definitions and Instructions, set forth above. Altria objects to the first sentence of this Request on the ground that it improperly seeks to require Altria to produce to Complaint Counsel documents that previously have been identified as subject to attorney-client privilege, the attorney work product doctrine, or any other applicable privilege. Altria objects to the second sentence of this Request on the ground that it seeks to require Altria to create a new document, rather than producing existing documents in its files; such is not a proper function of requests for production. Altria further objects to this Request to the extent it seeks either production or logging of privileged documents that relate solely to combustible cigarettes, a separate product category that was a subject of the Second Request but that is not relevant to this case. Altria further objects to this Request to the extent it purports to require Altria to create a new privilege log for previously produced documents, above and beyond the privilege log already submitted during the Second Request process with agreed-upon modifications by Complaint Counsel. Subject to and without waiving the foregoing objections, Altria will meet and confer with Complaint Counsel regarding this Request.

REQUEST NO. 19:

For each telephone or cellular number associated with Howard Willard, Murray Garnick, K.C. Crosthwaite, Dinyar Devitre, and William Gifford that was used to conduct the business of the Company or communicate with JLI, submit all telephone or cellular bills, logs, or documents that

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indicate the date and time of each telephone call, text message, email, or other communication sent or received from January 1, 2018 through December 31, 2018.

RESPONSE TO REQUEST NO. 19:

Altria incorporates by reference the General Objections, including the General Objections to Definitions and Instructions, set forth above. Altria objects to this Request for phone logs as overbroad, unduly burdensome, highly intrusive, irrelevant to the extent the identified individuals had an overwhelming number of business communications unrelated to the issues in this case, invasive of individual privacy to the extent the relevant phones are also used for personal matters, and disproportionate to the needs of the case. Subject to and without waiving the foregoing objections, Altria will meet and confer with Complaint Counsel regarding a less intrusive and more efficient means of providing any relevant information that Complaint Counsel may be seeking to elicit through this Request.

Respectfully submitted,

Dated: September 17, 2020

By: /s/ Robert J. Katerburg

Debbie Feinstein
Robert J. Katerberg
Justin P. Hedge
Francesca M. Pisano
Le-Tanya Freeman
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001
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tanya.freeman@arnoldporter.com

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Marc Wolinsky
Jonathan M. Moses
Kevin S. Schwartz
Adam L. Goodman
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
Telephone: (212) 403-1000
Fax: (212) 403-2000
MWolinsky@wlrk.com
JMMoses@wlrk.com
KSchwartz@wlrk.com
ALGoodman@wlrk.com

Counsel for Altria Group, Inc.

Exhibit F

From: Milici, Jennifer <jmilici@ftc.gov>
Sent: Sunday, January 31, 2021 11:01 AM
To: Moses, Jonathan M.
Cc: Morris, David (Federal Trade Commission); Blevins, Michael (Federal Trade Commission); Rogers, Kristian (Federal Trade Commission); Oberschmied, Simone; Draper, Julia; Vote, Dominic E. (Federal Trade Commission); Bayer Femenella, Peggy (Federal Trade Commission); Feinstein, Deborah L. (Arnold & Porter); Hedge, Justin P. (Arnold & Porter); Pisano, Francesca M. (Arnold & Porter); Katerberg, Robert J. (Arnold & Porter); Freeman, Tanya C. (Arnold & Porter); Schwartz, Kevin S.; Goodman, Adam L.; Wilkinson, Beth A. (Wilkinson Stekloff); Rosenthal, James M. (Wilkinson Stekloff); Penza, Moira Kim (Wilkinson Stekloff); Snidow, John James (Wilkinson Stekloff); Abell, James E., III (Federal Trade Commission Bureau of Competition)
Subject: RE: Altria document productions

*** EXTERNAL EMAIL ***

Jon:

To be clear, our position is that these documents are not privileged. By voluntarily disclosing them to an adversary without taking reasonable precautions to protect privilege, Altria waived any privilege that might otherwise have applied. Separately, as to documents that have not been clawed back after multiple privilege reviews and re-reviews, Complaint Counsel is entitled to presume that disclosure was not inadvertent under the ethical rules you cite.

Complaint Counsel is not suggesting that we will “unilaterally” decide to use documents that you have designated as privileged through claw back letters. If the parties cannot reach agreement on waiver, we will submit the matter to the Court.

We look forward to our discussion tomorrow.

Jennifer Milici | Federal Trade Commission
Chief Trial Counsel, Bureau of Competition
400 7th Street SW, Washington, DC 20024
Tel: 202-326-2912 | Email: jmilici@ftc.gov

From: Moses, Jonathan M. <JMMoses@WLRK.com>
Sent: Sunday, January 31, 2021 10:41 AM
To: Milici, Jennifer <jmilici@ftc.gov>
Cc: Morris, David <DMORRIS1@ftc.gov>; Blevins, Michael <mblevins@ftc.gov>; Rogers, Kristian <krogers@ftc.gov>; Oberschmied, Simone <soberschmied@ftc.gov>; Draper, Julia <jdraper@ftc.gov>; Vote, Dominic E. <dvote@ftc.gov>; Bayer Femenella, Peggy <PBAYER@ftc.gov>; Feinstein, Deborah L. (Arnold & Porter) <debbie.feinstein@arnoldporter.com>; Hedge, Justin P. (Arnold & Porter) <justin.hedge@arnoldporter.com>; Pisano, Francesca M. (Arnold & Porter) <francesca.pisano@arnoldporter.com>; Katerberg, Robert J. (Arnold & Porter) <robert.katerberg@arnoldporter.com>; Freeman, Tanya C. (Arnold & Porter) <tanya.freeman@arnoldporter.com>;

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Schwartz, Kevin S. <KSchwartz@wlrk.com>; Goodman, Adam L. <ALGoodman@wlrk.com>; Wilkinson, Beth A. (Wilkinson Stekloff) <bwilkinson@wilkinsonstekloff.com>; Rosenthal, James M. (Wilkinson Stekloff) <jrosenthal@wilkinsonstekloff.com>; Penza, Moira Kim (Wilkinson Stekloff) <mpenza@wilkinsonstekloff.com>; Snidow, John James (Wilkinson Stekloff) <jsnidow@wilkinsonstekloff.com>; Abell, James <jabell@ftc.gov>
Subject: RE: Altria document productions

Jennifer:

We disagree. Unilaterally using or relying on privileged documents would raise significant issues in this proceeding, and we urge Complaint Counsel not to do so. We will send a call-in for Monday later today.

Sincerely,

Jon

From: Milici, Jennifer <jmilici@ftc.gov>

Sent: Saturday, January 30, 2021 3:02 PM

To: Moses, Jonathan M. <JMMoses@WLRK.com>

Cc: Morris, David (Federal Trade Commission) <dmorris1@ftc.gov>; Blevins, Michael (Federal Trade Commission) <mblevins@ftc.gov>; Rogers, Kristian (Federal Trade Commission) <krogers@ftc.gov>; Oberschmied, Simone <soberschmied@ftc.gov>; Draper, Julia <jdraper@ftc.gov>; Vote, Dominic E. (Federal Trade Commission) <dvote@ftc.gov>; Bayer Femenella, Peggy (Federal Trade Commission) <pbayer@ftc.gov>; Feinstein, Deborah L. (Arnold & Porter) <debbie.feinstein@arnoldporter.com>; Hedge, Justin P. (Arnold & Porter) <justin.hedge@arnoldporter.com>; Pisano, Francesca M. (Arnold & Porter) <francesca.pisano@arnoldporter.com>; Katerberg, Robert J. (Arnold & Porter) <robert.katerberg@arnoldporter.com>; Freeman, Tanya C. (Arnold & Porter) <tanya.freeman@arnoldporter.com>; Schwartz, Kevin S. <KSchwartz@wlrk.com>; Goodman, Adam L. <ALGoodman@wlrk.com>; Wilkinson, Beth A. (Wilkinson Stekloff) <bwilkinson@wilkinsonstekloff.com>; Rosenthal, James M. (Wilkinson Stekloff) <jrosenthal@wilkinsonstekloff.com>; Penza, Moira Kim (Wilkinson Stekloff) <mpenza@wilkinsonstekloff.com>; Snidow, John James (Wilkinson Stekloff) <jsnidow@wilkinsonstekloff.com>; Abell, James E., III (Federal Trade Commission Bureau of Competition) <jabell@ftc.gov>

Subject: RE: Altria document productions

*** EXTERNAL EMAIL ***

Jon:

Rule 4.4(b) of the D.C. Rules of Professional Conduct on its face applies only if there is reason to know that a document was inadvertently produced before examining it; it does not require that the receiving party conduct a privilege review for the benefit of the producing party. The D.C. Ethics opinion that you refer to below explains at length the different obligations imposed when inadvertence is known before a document is examined and when it is not. See D.C. Ethics Opinion 256. There is “nothing improper or unethical about counsel’s use of [a] disclosed document” if the document was read prior to any notice or indication from the producing party that the production was inadvertent. *Id.* A lawyer is entitled to presume that “materials delivered to him were intended to be so delivered. Such a presumption accords with both common sense and experience; moreover, the absence of such a presumption would place the unreasonable burden on a lawyer of examining the circumstances of the delivery of all mail, faxes and other material before reading them.” *Id.*

Here, Complaint Counsel has already raised problems with Altria’s privilege review in over a half dozen letters and emails. Altria claimed to have re-reviewed its Second Request production for privilege on at least two separate occasions. Under these circumstances, Complaint Counsel has more than satisfied any applicable ethical obligation and

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is entitled to presume that any document that Altria has not clawed back after multiple privilege reviews and re-reviews was intentionally produced.

Complaint Counsel has sequestered documents that were previously clawed back and will keep them sequestered until they are reproduced by Altria voluntarily or by order of the ALJ.

We look forward to discussing this issue further on Monday.

Jennifer Milici | Federal Trade Commission
Chief Trial Counsel, Bureau of Competition
400 7th Street SW, Washington, DC 20024
Tel: 202-326-2912 | Email: jmilici@ftc.gov

From: Moses, Jonathan M. <JMMoses@WLRK.com>

Sent: Friday, January 29, 2021 6:25 PM

To: Milici, Jennifer <jmilici@ftc.gov>

Cc: Morris, David <DMORRIS1@ftc.gov>; Blevins, Michael <mblevins@ftc.gov>; Rogers, Kristian <krogers@ftc.gov>; Oberschmied, Simone <soberschmied@ftc.gov>; Draper, Julia <jdraper@ftc.gov>; Vote, Dominic E. <dvote@ftc.gov>; Bayer Femenella, Peggy <PBAYER@ftc.gov>; Feinstein, Deborah L. (Arnold & Porter) <debbie.feinstein@arnoldporter.com>; Hedge, Justin P. (Arnold & Porter) <justin.hedge@arnoldporter.com>; Pisano, Francesca M. (Arnold & Porter) <francesca.pisano@arnoldporter.com>; Katerberg, Robert J. (Arnold & Porter) <robert.katerberg@arnoldporter.com>; Freeman, Tanya C. (Arnold & Porter) <tanya.freeman@arnoldporter.com>; Schwartz, Kevin S. <KSchwartz@wlrk.com>; Goodman, Adam L. <ALGoodman@wlrk.com>; Wilkinson, Beth A. (Wilkinson Stekloff) <bwilkinson@wilkinsonstekloff.com>; Rosenthal, James M. (Wilkinson Stekloff) <jrosenthal@wilkinsonstekloff.com>; Penza, Moira Kim (Wilkinson Stekloff) <mpenza@wilkinsonstekloff.com>; Snidow, John James (Wilkinson Stekloff) <jsnidow@wilkinsonstekloff.com>; Abell, James <jabell@ftc.gov>

Subject: RE: Altria document productions

Jennifer:

Following up on your question regarding procedural rules and ethical obligations, I call your attention to the following without prejudice to our relying on additional authorities:

With respect to documents that remain in the production that bear indicia of privilege, if any, your position runs afoul of various well-established ethical rules.

-- ABA Model Rule of Professional Conduct 4.4(b) provides that “[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.” See also Model Rule 4.4 Cmt. 2 (“Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers.”).

-- Under Rule 4.4(b) of the D.C. Rules of Professional Conduct, “[a] lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.” See also Cmt. 2 (Rule 4.4.(b) “addresses the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered by an adversary lawyer and who knows that the sending lawyer inadvertently included these writings. . . . Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party’s instruction about disposition of the writing in this circumstances, and also prohibits the receiving lawyer from reading or using the material.”); see also D.C. Ethics Opinion 341 (“In

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Opinion No. 256, we stated that, where a lawyer knows that a privileged document was inadvertently sent, it is a dishonest act under D.C. Rule 8.4(c) for the lawyer to review and use it without consulting with the sender.”).

-- Under Rule 4.4(b) of the Maryland Attorneys’ Rules of Professional Conduct, “[a]n attorney who receives a document, electronically stored information, or other property relating to the representation of the attorney’s client and knows or reasonably should know that the document, electronically stored information, or other property was inadvertently sent shall promptly notify the sender.”

-- Under Virginia Rule of Professional Conduct 4.4(b), “[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender’s instructions to return or destroy the document or electronically stored information.”

We know of no authority that provides that opposing counsel may unilaterally determine that “all privilege claims have been waived” and disregard its ethical obligations to notify the sender of the existence of documents that concededly bear “indicia of privilege” in the production, particularly where opposing counsel is well aware that the producing party is not waiving privilege in the case and has clawed back privileged documents in the production. The whole point of these rules is that opposing counsel notify the sender so that the issue may be resolved before the document is used. If you still disagree, please identify with specificity what rules or authorities you are relying on in advance of our Monday call. If you are aware of documents bearing indicia of privilege in Altria’s production, you should so advise consistent with these rules.

With respect to documents that have been clawed back, and without regard to the merits (on which we disagree with you), Complaint Counsel has run afoul of the very Part 3 rule you cite as well as the procedural rules in this case.

Rule 3.31(g)(ii) requires the receiving party to “promptly” present the matter to the Administrative Law Judge for determination if a challenge is being pursued.

In addition, as relevant here, Additional Provision 8 of the Scheduling Order gives parties 30 days to move to compel in response to responses and objections. RFP No. 18 in Complaint Counsel’s document requests sought “all documents that the Company withheld from production in response to the Second Request, or clawed back, based on a claim of privilege.” On September 17, 2020, Altria objected to this request on the ground that it improperly sought privileged documents. Complaint Counsel did not move to compel within 30 days of service as required.

Finally, the clear import of Additional Provision 8 of the Scheduling Order is that the parties ought to resolve discovery disputes, and seek any resolution by the Administration Law Judge, if necessary, promptly and with due regard to the rest of the case schedule.

We can think of no good reason why Complaint Counsel waited until effectively one week before the close of fact of discovery (and only days before the original date for fact discovery to close) to make this broad demand relating to concededly privileged documents, most of which the FTC has known about for many months if not longer. There’s no question that the delay is highly prejudicial. *See Sawatzky v. United States*, 2013 WL 3771269, at *4 (D. Colo. July 16, 2013) (“If Defendant wished to challenge Plaintiff’s assertion of privilege, that needed to be done within the discovery process, by way of motion and in a timely fashion. By not timely challenging the privilege issue, Defendant has waived that challenge.”); *Fulghum v. Embarq Corp.*, 2011 WL 13237613, at *5 (D. Kan. Apr. 14, 2011) (finding that allowing plaintiff to file untimely challenge to defendants’ privilege log would be prejudicial to defendants). Whatever reservation of rights Complaint Counsel may have purported to make in the correspondence it sent on July 20, *more than six months ago*, this is not an “appropriate time [] to assert that Altria has waived privilege with respect to [] all of the current and future clawed-back documents.” July 20, 2020 Letter at 5. I hope we can persuade you on our call on Monday to drop this inappropriate effort to invade the privilege and use concededly privileged documents in this proceeding.

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Sincerely,
Jon

From: Moses, Jonathan M. <JMMoses@WLRK.com>

Sent: Friday, January 29, 2021 5:24 PM

To: Milici, Jennifer <jmilici@ftc.gov>

Cc: Morris, David (Federal Trade Commission) <dmorris1@ftc.gov>; Blevins, Michael (Federal Trade Commission) <mblevins@ftc.gov>; Rogers, Kristian (Federal Trade Commission) <krogers@ftc.gov>; Oberschmied, Simone <soberschmied@ftc.gov>; Draper, Julia <jdraper@ftc.gov>; Vote, Dominic E. (Federal Trade Commission) <dvote@ftc.gov>; Bayer Femenella, Peggy (Federal Trade Commission) <pbayer@ftc.gov>; Feinstein, Deborah L. (Arnold & Porter) <debbie.feinstein@arnoldporter.com>; Hedge, Justin P. (Arnold & Porter) <justin.hedge@arnoldporter.com>; Pisano, Francesca M. (Arnold & Porter) <francesca.pisano@arnoldporter.com>; Katerberg, Robert J. (Arnold & Porter) <robert.katerberg@arnoldporter.com>; Freeman, Tanya C. (Arnold & Porter) <tanya.freeman@arnoldporter.com>; Schwartz, Kevin S. <KSchwartz@wlrk.com>; Goodman, Adam L. <ALGoodman@wlrk.com>; Wilkinson, Beth A. (Wilkinson Stekloff) <bwilkinson@wilkinsonstekloff.com>; Rosenthal, James M. (Wilkinson Stekloff) <jrosenthal@wilkinsonstekloff.com>; Penza, Moira Kim (Wilkinson Stekloff) <mpenza@wilkinsonstekloff.com>; Snidow, John James (Wilkinson Stekloff) <jsnidow@wilkinsonstekloff.com>; Abell, James E., III (Federal Trade Commission Bureau of Competition) <jabell@ftc.gov>

Subject: Re: Altria document productions

Yes. That works. We can send a call in ahead of time.

Jonathan Moses

On Jan 29, 2021, at 5:09 PM, Milici, Jennifer <jmilici@ftc.gov> wrote:

*** EXTERNAL EMAIL ***

Jon:

Can you please let me know whether 4:30 pm Monday will work for you?

Thanks

Jennifer Milici | Federal Trade Commission
Chief Trial Counsel, Bureau of Competition
400 7th Street SW, Washington, DC 20024
Tel: 202-326-2912 | Email: jmilici@ftc.gov

From: Milici, Jennifer

Sent: Thursday, January 28, 2021 6:45 PM

To: Moses, Jonathan M. <JMMoses@WLRK.com>

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Cc: Morris, David <DMORRIS1@ftc.gov>; Blevins, Michael <mblevins@ftc.gov>; Rogers, Kristian <kr Rogers@ftc.gov>; Oberschmied, Simone <soberschmied@ftc.gov>; Draper, Julia <jdraper@ftc.gov>; Vote, Dominic E. <dvote@ftc.gov>; Bayer Femenella, Peggy <PBAYER@ftc.gov>; Feinstein, Deborah L. (Arnold & Porter) <debbie.feinstein@arnoldporter.com>; Hedge, Justin P. (Arnold & Porter) <justin.hedge@arnoldporter.com>; Pisano, Francesca M. (Arnold & Porter) <francesca.pisano@arnoldporter.com>; Katerberg, Robert J. (Arnold & Porter) <robert.katerberg@arnoldporter.com>; Freeman, Tanya C. (Arnold & Porter) <tanya.freeman@arnoldporter.com>; Schwartz, Kevin S. <KSchwartz@wlrk.com>; Goodman, Adam L. <ALGoodman@wlrk.com>; Wilkinson, Beth A. (Wilkinson Stekloff) <bwilkinson@wilkinsonstekloff.com>; Rosenthal, James M. (Wilkinson Stekloff) <jrosenthal@wilkinsonstekloff.com>; Penza, Moira Kim (Wilkinson Stekloff) <mpenza@wilkinsonstekloff.com>; Snidow, John James (Wilkinson Stekloff) <jsnidow@wilkinsonstekloff.com>

Subject: RE: Altria document productions

Jon:

Would 4:30 work on Monday?

In advance of that call, I would appreciate it if you identify each of the specific ethical obligations and procedural rules that you are relying on for your statement below.

thanks

From: Moses, Jonathan M. <JMMoses@WLRK.com>

Sent: Thursday, January 28, 2021 6:18 PM

To: Milici, Jennifer <jmilici@ftc.gov>

Cc: Morris, David <DMORRIS1@ftc.gov>; Blevins, Michael <mblevins@ftc.gov>; Rogers, Kristian <kr Rogers@ftc.gov>; Oberschmied, Simone <soberschmied@ftc.gov>; Draper, Julia <jdraper@ftc.gov>; Vote, Dominic E. <dvote@ftc.gov>; Bayer Femenella, Peggy <PBAYER@ftc.gov>; Feinstein, Deborah L. (Arnold & Porter) <debbie.feinstein@arnoldporter.com>; Hedge, Justin P. (Arnold & Porter) <justin.hedge@arnoldporter.com>; Pisano, Francesca M. (Arnold & Porter) <francesca.pisano@arnoldporter.com>; Katerberg, Robert J. (Arnold & Porter) <robert.katerberg@arnoldporter.com>; Freeman, Tanya C. (Arnold & Porter) <tanya.freeman@arnoldporter.com>; Schwartz, Kevin S. <KSchwartz@wlrk.com>; Goodman, Adam L. <ALGoodman@wlrk.com>; Wilkinson, Beth A. (Wilkinson Stekloff) <bwilkinson@wilkinsonstekloff.com>; Rosenthal, James M. (Wilkinson Stekloff) <jrosenthal@wilkinsonstekloff.com>; Penza, Moira Kim (Wilkinson Stekloff) <mpenza@wilkinsonstekloff.com>; Snidow, John James (Wilkinson Stekloff) <jsnidow@wilkinsonstekloff.com>

Subject: RE: Altria document productions

Jennifer:

We disagree that Altria has failed to take reasonable steps to prevent disclosure of privileged materials or that Altria has waived any claim of privilege as to documents produced to the FTC. Consistent with applicable rules and ethical obligations, we expect FTC counsel to call to our attention any documents it identifies in our production that are privileged and not to use them in this proceeding. We reserve all rights if FTC attorneys in this matter improperly rely on Altria's privileged information, including the right to seek disqualification.

Complaint Counsel's delay in regard to this issue and only pursuing it now a little more than one week before the discovery cut-off violates the procedural order as well as the very rules you cite, and is highly prejudicial.

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Without prejudice to our position in regard to any of the above, we will nonetheless make ourselves available to meet and confer on Monday to determine if a dispute in regard to this issue can be avoided.

Sincerely,
Jon Moses

From: Milici, Jennifer <jmilici@ftc.gov>
Sent: Thursday, January 28, 2021 3:38 PM
To: Moses, Jonathan M. <JMMoses@WLRK.com>
Cc: Morris, David (Federal Trade Commission) <dmorris1@ftc.gov>; Blevins, Michael (Federal Trade Commission) <mblevins@ftc.gov>; Rogers, Kristian (Federal Trade Commission) <kr Rogers@ftc.gov>; Oberschmied, Simone <soberschmied@ftc.gov>; Draper, Julia <jdraper@ftc.gov>; Vote, Dominic E. (Federal Trade Commission) <dvote@ftc.gov>; Bayer Femenella, Peggy (Federal Trade Commission) <pbayer@ftc.gov>; Feinstein, Deborah L. (Arnold & Porter) <debbie.feinstein@arnoldporter.com>; Hedge, Justin P. (Arnold & Porter) <justin.hedge@arnoldporter.com>; Pisano, Francesca M. (Arnold & Porter) <francesca.pisano@arnoldporter.com>; Katerberg, Robert J. (Arnold & Porter) <robert.katerberg@arnoldporter.com>; Freeman, Tanya C. (Arnold & Porter) <tanya.freeman@arnoldporter.com>; Schwartz, Kevin S. <KSchwartz@wlrk.com>; Goodman, Adam L. <ALGoodman@wlrk.com>; Wilkinson, Beth A. (Wilkinson Stekloff) <bwilkinson@wilkinsonstekloff.com>; Rosenthal, James M. (Wilkinson Stekloff) <jrosenthal@wilkinsonstekloff.com>; Penza, Moira Kim (Wilkinson Stekloff) <mpenza@wilkinsonstekloff.com>; Snidow, John James (Wilkinson Stekloff) <jsnidow@wilkinsonstekloff.com>
Subject: Altria document productions

*** EXTERNAL EMAIL ***

Counsel:

In light of Altria's documented and repeated failure to take reasonable steps to prevent disclosure of privileged materials, Altria has waived any claim of privilege as to documents produced to the FTC. See Rules 2.11 and 3.31. Because all privilege claims have been waived, Complaint Counsel will no longer bring to Altria's attention documents that bear indicia of privilege.

In addition, because Altria has waived any claim of privilege, we ask that Altria immediately produce all documents that it previously sought to claw back.

If Altria is unwilling to produce the clawed back documents voluntarily, then we would like to meet and confer tomorrow or Monday to see if there are any issues that can be narrowed before we file a motion with the ALJ.

Thanks

Jennifer Milici | Federal Trade Commission
Chief Trial Counsel, Bureau of Competition
400 7th Street SW, Washington, DC 20024
Tel: 202-326-2912 | Email: jmilici@ftc.gov

=====

Please be advised that this transmittal may be a confidential attorney-client communication or may otherwise be privileged or confidential. If you are not the intended recipient, please do not read, copy or re-transmit this communication. If you have received this communication in error, please notify us by e-mail (helpdesk@wlrk.com) or by telephone (call us collect at 212-403-4357) and delete this message and any attachments.

Thank you in advance for your cooperation and assistance.

=====

Exhibit G

WACHTELL, LIPTON, ROSEN & KATZ

MARTIN LIPTON
 HERBERT M. WACHTELL
 THEODORE N. MIRVIS
 EDWARD D. HERLIHY
 DANIEL A. NEFF
 ANDREW R. BROWNSTEIN
 MARC WOLINSKY
 STEVEN A. ROSENBLUM
 JOHN F. SAVARESE
 SCOTT K. CHARLES
 JODI J. SCHWARTZ
 ADAM O. EMMERICH
 RALPH M. LEVENE
 RICHARD G. MASON
 DAVID M. SILK
 ROBIN PANOVKA
 DAVID A. KATZ
 ILENE KNABLE GOTTS
 JEFFREY M. WINTNER
 TREVOR S. NORWITZ
 BEN M. GERMANA
 ANDREW J. NUSSBAUM
 RACHELLE SILVERBERG

STEVEN A. COHEN
 DEBORAH L. PAUL
 DAVID C. KARP
 RICHARD K. KIM
 JOSHUA R. CAMMAKER
 MARK GORDON
 JEANNEMARIE O'BRIEN
 WAYNE M. CARLIN
 STEPHEN R. DIPRIMA
 NICHOLAS G. DEMMO
 IGOR KIRMAN
 JONATHAN M. MOSES
 T. EIKO STANGE
 JOHN F. LYNCH
 WILLIAM SAVITT
 ERIC M. ROSOF
 GREGORY E. OSTLING
 DAVID B. ANDERS
 ANDREA K. WAHLQUIST
 ADAM J. SHAPIRO
 NELSON O. FITTS
 JOSHUA M. HOLMES
 DAVID E. SHAPIRO

**51 WEST 52ND STREET
 NEW YORK, N.Y. 10019-6150
 TELEPHONE: (212) 403-1000
 FACSIMILE: (212) 403-2000**

GEORGE A. KATZ (1965-1989)
 JAMES H. FOGELSON (1967-1991)
 LEONARD M. ROSEN (1965-2014)

OF COUNSEL

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 LAWRENCE S. MAKOW
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 JOHN L. ROBINSON
 JOHN R. SOBOLEWSKI
 STEVEN WINTER
 EMILY D. JOHNSON
 JACOB A. KLING
 RAAJ S. NARAYAN
 VIKTOR SAPEZHNIKOV
 MICHAEL J. SCHOBEL
 ELINA TETELBAUM
 ERICA E. BONNETT
 LAUREN M. KOFKE
 ZACHARY S. PODOLSKY
 RACHEL B. REISBERG
 MARK A. STAGLIANO
 CYNTHIA FERNANDEZ
 LUMERMANN
 CHRISTINA C. MA

* ADMITTED IN THE DISTRICT OF COLUMBIA
 ** ADMITTED IN DELAWARE

COUNSEL

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 AMANDA K. ALLEXON
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 JEFFREY A. WATIKER

**DIRECT DIAL: (212) 403-1388
 DIRECT FAX: (212) 403-2388
 E-MAIL: JMMoses@wlrk.com**

February 2, 2021

Via E-mail (jmilici@ftc.gov)

Jennifer Milici
 Chief Trial Counsel, Bureau of Competition
 Federal Trade Commission
 400 7th Street SW
 Washington, DC 20023

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

Dear Jennifer:

We write to confirm our understanding of the positions you expressed on our meet-and-confer call yesterday afternoon. With respect to documents that remain in the production, we appreciate your clarifications and set out our understanding below. With respect to documents in the Second Request production that have been clawed back, your position that Complaint Counsel may pursue the issue of waiver at effectively any time is inconsistent with the rules. We are troubled by Complaint Counsel's decision to pursue the issue now at the end of the discovery period, which will cause significant prejudice, and can think of no legitimate

WACHTELL, LIPTON, ROSEN & KATZ

Jennifer Milici
February 2, 2021
Page 2

reason for your doing so. We have set out further authorities below that we hope will persuade you not to pursue this improper course.

I. Documents Bearing Indicia of Privilege That May Remain in the Production

On Thursday, January 28, you emailed Altria's counsel to demand that "Altria immediately produce all documents that it previously sought to claw back." You further advised Altria of your position that, "[b]ecause all privilege claims have been waived, Complaint Counsel will no longer bring to Altria's attention documents that bear indicia of privilege." As we explained in our email correspondence, this position ran afoul of Complaint Counsel's ethical obligations under many jurisdictions' rules of professional conduct, including the District of Columbia, Maryland, and Virginia.

We appreciate Complaint Counsel's clarification of its position on yesterday afternoon's call. *First*, you confirmed that Complaint Counsel will sequester any documents that Altria claws back in the future, which you recognized is required under the Part 3 Rules. *Second*, you advised that your position applies only to the Second Request production and not to any documents produced in response to Complaint Counsel's document requests served after the filing of the Complaint. *Third*, you explained that you will continue to bring to our attention "clearly" or "very obviously" privileged documents that were produced in response to the Second Request—a standard which you said is not satisfied, alone, by the mere presence of an attorney on a document but which certainly would be satisfied by a witness outline or legal strategy memo for dealing with the FTC. *Fourth*, you represented that Complaint Counsel is not currently aware of any documents that it would bring to our attention but for the position it is now taking with respect to this issue. If we have misunderstood your position in any respect, please let us know.

We wish to reiterate our position that Complaint Counsel's ethical obligation is to promptly notify us of any document that it knows or reasonably should know was inadvertently produced. *See, e.g.*, ABA Model Rule of Prof'l Conduct 4.4(b); Maryland Attorneys' Rule of Prof'l Conduct 19-303.4(b); Virginia Rule of Prof'l Conduct 4.4(b); D.C. Rule of Prof'l Conduct 4.4(b). Altria reserves all rights in this regard, including the right to seek disqualification in the event Complaint Counsel does not act in accordance with its ethical obligations in this respect, thereby compromising the integrity of these proceedings. *See, e.g., Richards v. Jain*, 168 F. Supp. 2d 1195, 1201 (W.D. Wash. 2001) ("A failure by an attorney to abide by these rules is grounds for disqualification.").

II. Clawed Back Documents

With respect to documents that Altria has clawed back from the Second Request production, we disagree with you that Altria has failed to take reasonable steps to prevent disclosure of privileged materials. As we will demonstrate before the Administrative Law Judge, in the event you pursue this misguided effort, Altria has at all times taken reasonable steps to

WACHTELL, LIPTON, ROSEN & KATZ

Jennifer Milici
February 2, 2021
Page 3

prevent, and to rectify, any inadvertent disclosures. As you know, in response to the Second Request, and over the course of just a few months, Altria produced over one million documents from 40 custodians in 11 rolling productions. In doing so, Altria retained counsel at Shook Hardy & Bacon to manage a dedicated privilege review team comprising approximately 50 attorneys. After the Complaint was filed in this case, we identified additional privileged documents that had been inadvertently produced. Altria promptly notified Complaint Counsel on June 18, 2020 that it was necessary to conduct a further review to identify any additional privileged material that had been inadvertently produced during the extensive Second Request efforts. Ultimately, as a result of this wide-ranging and intensive re-review, which was completed well before any depositions in this action had been taken, Altria identified approximately 7,600 additional privileged documents that had been inadvertently produced. That figure represents only 0.7% of the total production, a testament to the diligent steps Altria had taken during its initial privilege review.

While we understand that you take a different view of the reasonableness of Altria's process, we cannot fathom why Complaint Counsel waited until the conclusion of fact discovery to press this issue. On yesterday's meet-and-confer call, you justified Complaint Counsel's delay by asserting that there is no deadline governing Complaint Counsel's right to challenge a clawback. You did not identify any recent development that caused Complaint Counsel to pursue Altria's privileged information now.

Your contemplated challenge is plainly untimely. Whatever rights Complaint Counsel purported to reserve (going back to *October 2019*) with respect to clawbacks, Complaint Counsel is not entitled to wait until the conclusion of fact discovery, after more than 35 depositions will have been taken, after having been in possession of Altria's pertinent privilege logs for months, and after respondents have served their preliminary and supplemental witness lists, to litigate this issue. Your decision to do so, should you press forward, is profoundly prejudicial to respondents, which have been preparing their defense and witness list for months on the basis of the existing document universe. *See Fulghum v. Embarq Corp.*, 2011 WL 13237613, at *5 (D. Kan. Apr. 14, 2011) (finding that allowing plaintiff to file untimely challenge to defendants' privilege log would be prejudicial to defendants); *Coleman v. Sterling*, 2011 WL 13177041, at *3 (S.D. Cal. Nov. 4, 2011) (“[T]he purpose of the prompt requirement [is] to allow parties to know whether a challenge is being made to a claim and have a determination of the claim so that they know whether the information may be used to litigate the case.”). When we explained on yesterday's meet-and-confer call how prejudiced respondents would be by Complaint Counsel's actions, you offered no means to remediate the prejudice, because there is no way to do so now.

You acknowledge that Section 3.31(g)(1)(ii) of the Part 3 Rules governs here. Contrary to the position you took on yesterday's meet-and-confer call, the requirement in Section 3.31(g)(1)(ii) to move “promptly” is not a mere suggestion. This language is based on Rule 26(b)(5)(B) of the Federal Rules. Courts interpreting this requirement have made clear that it requires a party to, indeed, move promptly. *See Coleman*, 2011 WL 13177041, at *2–3 (holding, in case where receiving party had taken position that “[t]he language in [Rule 26(b)(5)(B)] is

WACHTELL, LIPTON, ROSEN & KATZ

Jennifer Milici
February 2, 2021
Page 4

permissive, not mandatory,” that “Rule 26(b)(5)(B) *requires* a party who intends to challenge a claim of inadvertent production to promptly present it to the court for a determination of the claim” (emphasis added)). You did not contend on our call that Complaint Counsel was acting “promptly,” nor could you. *See Canamar v. McMillin Tex. Mgmt. Servs., LLC*, 2009 WL 2175105, at *2 (W.D. Tex. 2009) (receiving party did not promptly present privilege challenge when it delayed five months before seeking judicial assistance). Reservations of rights are not a license to disregard the procedural rules, and you cannot pursue this issue now having “s[a]t on [your] challenge” for so long. *See Coleman*, 2011 WL 13177041, at *3. Indeed, in response to Complaint Counsel’s July 20, 2020 letter, we wrote on August 7, 2020 with an offer to meet and confer. You never took us up on the offer and instead let us proceed with the clawback process, which we promptly conducted.

Waiting until the conclusion of discovery, a mere two months before trial, to seek thousands of documents that you have not disputed are privileged but for a purported blanket waiver also makes a mockery of the discovery schedule entered by Judge Chappell, which clearly contemplates all disputes being resolved before the end of the fact discovery period. Moreover, Additional Provision 8 of the Scheduling Order provides parties 30 days to move to compel in response to responses and objections. RFP No. 18 in Complaint Counsel’s document requests sought “all documents that the Company withheld from production in response to the Second Request, or clawed back, based on a claim of privilege.” On September 17, 2020, Altria objected to this request on the ground that it improperly sought privileged documents. Complaint Counsel did not move to compel within 30 days of service as required and has now waived the right to do so, both in form and substance. *See Sawatzky v. United States*, 2013 WL 3771269, at *4 (D. Colo. July 16, 2013) (“If Defendant wished to challenge Plaintiff’s assertion of privilege, that needed to be done within the discovery process, by way of motion and in a timely fashion. By not timely challenging the privilege issue, Defendant has waived that challenge.”). Your explanation that this rule does not apply because you do not plan to file a “motion to compel” responses to the document requests elevates form over substance and constitutes an attempt to execute an end-run around the Scheduling Order. Complaint Counsel is seeking to compel production of the same set of clawed-back documents Complaint Counsel sought in RFP No. 18. If Complaint Counsel’s ability to do so depended on how it styles its motion, the Scheduling Order’s protections in this regard would be rendered meaningless.

Complaint Counsel has offered no justification for its delay, and the timing of its demand, regretfully, smacks of gamesmanship. We hope Complaint Counsel will reconsider this unfair and prejudicial effort to invade Altria’s privilege. At minimum, we hope Complaint Counsel will make a serious proposal to narrow the dispute.

Altria reserves all rights.

Sincerely,



Jonathan M. Moses

WACHTELL, LIPTON, ROSEN & KATZ

Jennifer Milici
February 2, 2021
Page 5

Cc: Jim Abell
Dominic E. Vote
Peggy Bayer Femenella
Erik Herron
Joonsuk Lee
Meredith Levert
Kristian Rogers
Michael Blevins
Michael Lovinger
Frances Anne Johnson
Jasmine Rosner
Stephen Rodger

**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 OF KIMBERLY D. HARLOWE

I, Kimberly D. Harlowe, state as follows:

1. I am employed by Altria Client Services LLC (“ALCS”), a service company of Altria Group, Inc. (“Altria Group”). I serve as Senior Director, Litigation Support & Technology, in the Law Department of ALCS, and I am responsible for managing litigation technology and e-discovery projects for investigations and litigation involving the Altria family of companies (referred to within collectively as “Altria”).

2. ALCS handles hundreds of cases each year for Altria, and I lead a team of 15 people who have many decades of collective experience in e-discovery. One of my team’s core functions is to ensure that Altria’s privileged and confidential information is protected. We take a variety of steps in seeking to accomplish that mission. We use a robust records management system with rigorous access protocols designed to store documents and maintain confidentiality. And we use a technology vendor, Technology Concepts & Design Incorporated (“TCDI”), to assist in all aspects of e-discovery work, including in connection

with litigations and investigations such as the second request described below. When Altria is required to produce documents, in addition to working with Altria in-house attorneys, my team regularly engages outside counsel to assist in the review of potentially privileged documents prior to productions and to establish rigorous review processes and protocols to prevent the disclosure of privileged material. These processes and protocols include using analytical software and search tools to screen productions for potentially privileged documents.

Altria Produced Over One Million Documents in Response to the FTC’s Second Request

3. On April 8, 2019, the FTC issued Altria a request for additional information and documentary materials with respect to the proposed acquisition by Altria of certain voting securities of JUUL Labs, Inc. (the “Second Request”). The FTC’s Second Request—the first Altria has responded to in decades—was extremely broad, frequently requesting “all documents” on a wide range of topics related to both combustible and electronic cigarettes. On its face, it required such documents to be identified and produced without limitation to the emails and files of specific custodians. Ex. A.

4. On June 7, 2019, FTC staff agreed to a search of 40 identified custodians, as well as their actual or functional predecessors and relevant departmental shared files, for a time period of generally a little over two years. Altria also submitted proposed search terms to the FTC staff, and the FTC staff provided feedback that Altria incorporated. Before limiting the Second Request even to this extent, FTC staff required that Altria agree to a prioritization schedule. Under this schedule, Altria was required to first produce documents from ten custodians chosen by the FTC—some of whom were Altria’s most senior officers—and to make further productions on a rolling basis. Exs. B; C.

5. While the FTC required a prioritization schedule that differed from Altria's normal practices, Altria endeavored to produce documents sought by the FTC staff as expeditiously as possible and on a rolling basis. To do so, we made 11 productions over a three-month period beginning in July—an extraordinarily fast time frame in Altria's experience for a production of this size. We made productions on July 22, July 30, August 4, August 8, August 15, August 21, August 29, September 5, September 12, October 4 and October 29, 2019. Altria certified substantial compliance with the Second Request on October 30, 2019.

6. Altria produced 1,053,827 documents to the FTC in response to the Second Request, amounting to approximately 5.9 million pages of documents, and including approximately 130,000 native files, including Excel and PowerPoint files. With each production, pursuant to the FTC's Second Request instructions, Altria provided certain basic information about the documents withheld or redacted on the basis of a privilege claim. In total, Altria identified approximately 87,000 documents as privileged or partially privileged. Consistent with the Second Request instructions and negotiations with staff, Altria provided a detailed privilege log for over 10,000 documents withheld in whole or in part based on privilege.

Altria Conducted a Reasonable Privilege Review During the Second Request

7. Because of Altria's commitment to being as forthcoming as possible in response to the FTC's modified but still broad document requests (calling for the production of "all" documents), Altria identified documents to be produced through search terms and did not review individual documents for relevance. Altria did, however, expend significant effort to protect its privileged information. We engaged experienced outside counsel, provided extensive training for document reviewers that focused on issues specific to the matter and set up multiple layers of review in an effort to ensure that privileged documents were

identified and not missed, properly withheld and, if appropriate, consistently redacted. At no point did Altria intend to waive any privilege claims.

8. Altria retained the national e-discovery group at Shook Hardy & Bacon (“SHB”). A team of seven SHB e-discovery attorneys managed a dedicated privilege review team comprising approximately 50 licensed attorneys employed by The Gnoêsis Group (“Gnoêsis”), which SHB retained for this project. We also worked with a team at Arnold & Porter Kaye Scholer LLP (“A&P”) experienced in responding to second requests and responsible for engaging with the FTC staff.

9. The search terms negotiated with the FTC were applied to several million documents in the files of the 40 custodians and other agreed-upon sources, resulting in a working production set of over 1.1 million documents. Then privilege search terms were applied to those documents, resulting in a privilege review universe of approximately 763,000 documents.

10. Prior to the start of the privilege review, the in-house legal team at Altria and attorneys with SHB and A&P conducted privilege review training for the Gnoêsis reviewers. The one-and-a-half-day training, held on May 28 and May 29, 2019, included relevant factual background information (e.g., information on Altria employees, the e-vapor category, Altria, Altria’s Nu Mark subsidiary and Altria’s investment in JLI), training on relevant privilege standards and a document-by-document review of dozens of exemplar documents to illustrate the application of privilege standards to Altria’s documents.

11. Throughout the training, Gnoêsis reviewers asked questions and received additional guidance and input on privileged documents from Altria and SHB in response.

12. We implemented a number of systems to facilitate the identification of privileged

documents, including assigning clusters of like documents to individual reviewers to facilitate efficient coding of documents, using technology to highlight attorney names and privilege terms to the extent they appeared in each document being reviewed and using metadata to identify duplicates. All reviewers also received a list of outside counsel and internal in-house counsel names.

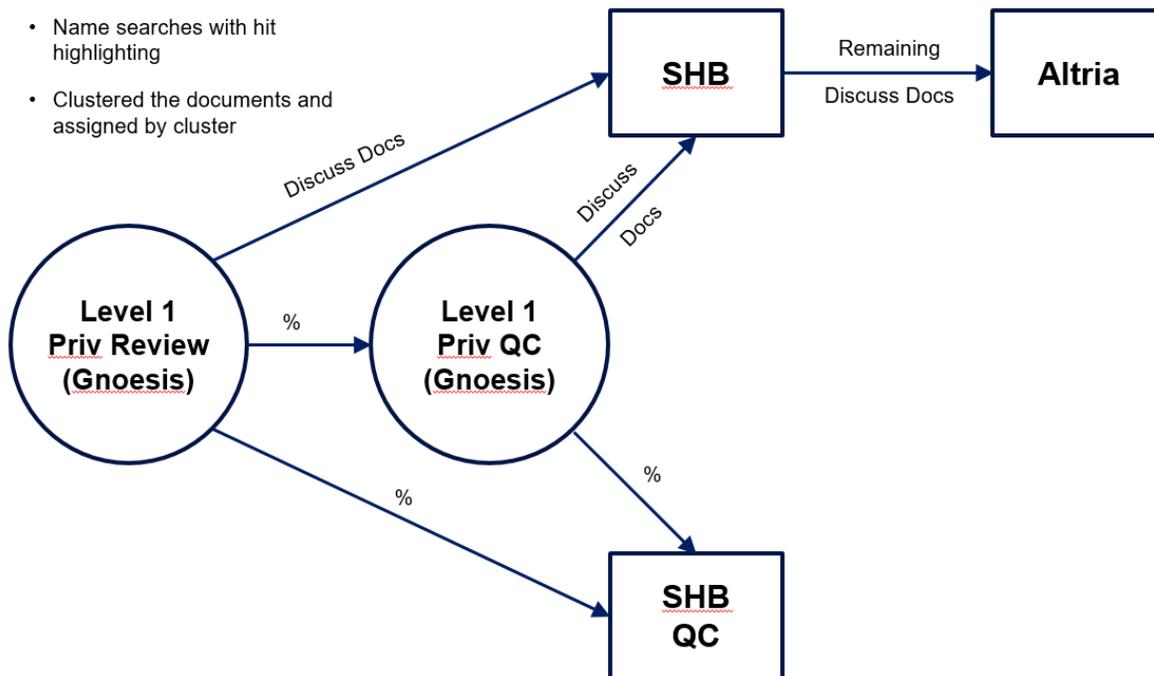
13. Once the review began, a team of six to eight experienced Gnoêsis supervisors performed quality control reviews of approximately 16% of the documents reviewed by the contract attorneys. All the while, SHB and Altria's in-house legal team supervised Gnoêsis reviewers closely. There were check-ins almost daily. Over the course of many dozens of interactions with the Gnoêsis review team, the SHB team provided substantive guidance, including by continuing to use exemplar documents as discussion points to ensure that reviewers understood the application of privilege to the facts of the case. The SHB team also established a protocol allowing the Gnoêsis reviewers to designate certain documents for "discussion" with SHB. Ultimately, SHB provided individual guidance to Gnoêsis reviewers on thousands of documents.

14. In addition to providing real-time oversight, SHB conducted its own independent check on the Gnoêsis review, by re-reviewing a sample consisting of approximately 53,000 of the documents that were reviewed for privilege. That re-review process gave us confidence that the Gnoêsis reviewers were accurately making privilege calls.

15. The diagram below illustrates the privilege review workflow and the multiple quality checks built into the process:

Prep Work By Altria

- Privilege searches with hit highlighting
- Name searches with hit highlighting
- Clustered the documents and assigned by cluster



- Families always travelled together
- “Discuss Docs” = all documents flagged for discussion by reviewers

16. Prior to each production, Altria ran checks to seek to ensure exact duplicates, as identified by the document’s hash code, were consistently coded for privilege. SHB reviewed and resolved discrepancies for approximately 11,000 documents.

17. In total, SHB and Gnoêsis attorneys collectively devoted nearly 25,000 billable hours to the initial privilege review effort.

The Specific Nature of the Production Added Considerable Complexity to the Review

18. Because of the FTC’s requirement that documents be produced on a rolling basis, there was no stable production set of privileged documents to use for consistency checks. In order to compensate, Altria would have typically prioritized the production of documents from custodians who were less likely to have privileged content in their files and processed

the more privilege-rich document sets later in the production process, after completing privilege review and duplicate analysis for those more privilege-rich documents. In light of the FTC's requirements for prioritized custodians (chosen by the FTC), however, this approach was not possible. Indeed, because of the FTC's prioritization requirements, we needed to produce documents from Altria senior level executives—like the Chief Executive Officer and Chief Financial Officer—earlier in the process, including their communications with Altria's General Counsel.

19. The complexities of the privilege review were compounded because two of the document custodians, Murray Garnick and C. Anthony Reale, served as both Altria attorneys and business executives. Mr. Garnick served as Altria's General Counsel and also as Executive Vice President for Regulatory Affairs. Mr. Reale served as Vice President and Associate General Counsel providing law support to Strategy and Business Development, and later became the Vice President of Strategy and Business Development. The privilege analysis of their communications was particularly complex because their communications with other Altria personnel while acting in their attorney roles are typically privileged, as are many of their communications with outside counsel, but communications made strictly in their role as business executives are typically not, unless requesting or receiving legal advice from others.

20. In order to minimize the risk that privileged documents would be inadvertently produced, during training, we spent time with Gnoêsis reviewers explaining the possibility that custodians would have dual roles. We also reviewed a number of exemplar documents. A significant amount of Mr. Garnick and Mr. Reale's documents were subjected to privilege review for the Second Request, and ultimately Altria withheld approximately 47,000 of their

documents as privileged. However, Altria produced more than 144,000 documents from Mr. Garnick and Mr. Reale's files in its good-faith effort to produce all non-privileged information from these two custodians.

Altria Conducted Reasonable and Prompt Re-Reviews of its Production in Response to FTC Notifications of Potential Inadvertent Disclosures

21. From the end of August to November 2019, the FTC alerted Altria five times to the existence of potentially inadvertently produced privileged documents. In this period, the FTC notified Altria about just 17 potentially privileged documents out of Altria's production of over one million documents. Each time Altria received such notice, it took prompt and reasonable steps to investigate the documents at issue and considered whether re-review of additional portions of its production was warranted to identify potentially inadvertent disclosures not identified by the FTC. These steps included reviewing the documents to confirm they were indeed privileged, running searches to identify duplicates and other similar inadvertently produced documents and reviewing duplicates to ensure consistent redactions.

22. For example, in September 2019, the first time the FTC alerted Altria to an inadvertently produced document that Altria concluded was privileged, we took the following steps, resulting in a re-review of approximately 27,000 documents. Within a day of being notified, we began an expedited three-day review of approximately 7,000 documents that hit on certain search terms or involved the attorneys in question in the inadvertently produced document. SHB conducted the review and identified documents that should have been withheld entirely or produced with redactions, in addition to the inadvertently produced document and its duplicate. Altria notified the FTC of 759 documents the day the review was completed, ultimately clawing back 1,066 documents from the review. Because many of

these documents were also reviewed by one particular Gnoêsis contract attorney, SHB proceeded to re-review every document—approximately 20,000 documents—that had been initially reviewed by that attorney. That review resulted in additional 359 inadvertently produced privileged documents being identified.

23. We took similar steps each time either we or the FTC identified an inadvertently produced privilege document:

FTC Notification Date	Number of Documents Identified by FTC	Steps Taken
8/28/2019	1	Determined document not privileged
9/19/2019	1	Reviewed approximately 27,000 documents
10/22/2019	4 (inconsistent redactions)	Resolved issue
11/4/2019	8 (identified on second request privilege log but not yet clawed back)	Reviewed 8 documents and determined that a handful of documents, including but not limited to these 8, were identified in finalizing the Second Request privilege log, but had not yet been separately identified to FTC as clawbacks
11/8/2019	3	Reviewed 712 documents

24. Altria and its counsel also identified on their own other documents that were inadvertently produced, which were promptly brought to the FTC's attention. Up until the filing of the Complaint, we and the FTC had identified approximately 1,600 inadvertently produced privileged documents, an extremely small number relative to the over one million documents produced (0.15%).¹ Given the extensive procedures we had put in place to

¹ The FTC identified three additional potentially inadvertently produced documents on January 13, 2021, meaning that, to date, they have brought to our attention a total of 20 documents.

identify privileged documents, I believed that there were no outstanding systemic issues with the privilege review conducted in connection with the Second Request.

Altria Conducted a Broader Re-review of Its Production After the FTC Filed Suit

25. After the FTC filed the Complaint in this case, Altria's newly engaged trial counsel, Wachtell, Lipton, Rosen & Katz ("WLRK"), began additional work to defend against the allegations set forth in the Complaint, which was the first written account of the FTC's theory provided to Altria. As a result of these preparation efforts, WLRK identified additional inadvertently produced documents. Accordingly, on June 18, 2020, after giving prompt attention to this matter amid the Covid-19 pandemic and a stay in this case, Altria sent a letter providing notice of these inadvertently produced privileged documents to the FTC staff and requesting their destruction. At the same time, Altria informed the FTC staff of its intent to undertake a broader re-review effort in light of the documents most recently identified.

26. Altria prioritized the re-review of the e-vapor-related documents in the Second Request production (as opposed to the documents related to combustible cigarettes, which had been called for by the Second Request, but were not the focus of the Complaint). SHB, working in conjunction with A&P and WLRK, supervised a team of contract attorneys from UnitedLex, SHB attorneys and SHB contract attorneys during the e-vapor re-review.

27. Throughout the review, there were regular calls between the review team and outside counsel at SHB, A&P and WLRK to answer review questions about specific documents. A process was also put into place to allow reviewers to elevate certain documents to SHB, A&P and WLRK. SHB also conducted quality checks of samples of reviewed documents.

28. In total, approximately 210,000 documents were in the review universe during the

e-vapor re-review, and Altria identified 5,477 documents from that set, or 0.52% of the entire Second Request production, as inadvertently produced. Upon completion of the e-vapor re-review, Altria promptly notified the FTC about the inadvertently produced documents on September 10, 2020, and produced a privilege log for these documents on October 14, 2020. In its September 10, 2020 letter, Altria noted it was also reviewing Second Request documents relating to combustible cigarettes (“non-e-vapor re-review”), documents unlikely to bear on any issues raised in the Complaint, and that the review was ongoing.

29. In connection with the non-e-vapor re-review, UnitedLex attorneys, SHB attorneys and SHB contract attorneys supervised by SHB, A&P and WLRK conducted a re-review process with similar procedures to the e-vapor re-review. Ultimately, of the more than 45,000 documents reviewed, 2,167 documents, or 0.2% of the Second Request production, were determined to have been inadvertently produced. Upon completion of the non-e-vapor re-review, Altria promptly notified the FTC on November 6, 2020, of the inadvertently produced documents, also providing a metadata privilege log for the documents.

30. In total, since the completion of the re-review of e-vapor and non-e-vapor documents, only seven additional documents have been identified for clawback in the intervening four months, most of them near-duplicates of one another. In addition, there have been no clawbacks of documents produced in response to Complaint Counsel’s Requests for Production in connection with this litigation.

* * *

31. Altria never intended to waive privilege over any documents, and it devoted tremendous resources under extreme time constraints to (i) identify approximately 87,000 privileged or partially privileged documents in the first instance during the Second Request,

(ii) respond to the FTC's handful of notifications of inadvertent disclosure over a two-year period, and (iii) investigate the potential for additional inadvertent disclosures.

32. Despite our best efforts, some privileged documents were inadvertently produced. Up until the filing of the Complaint, the FTC had identified just 17 inadvertently produced privileged documents, and Altria had asserted claims for approximately 1,600 inadvertently produced documents in response to the FTC and as a result of its own diligence—representing 0.15% of the total production.

33. After the filing of the Complaint and at a time when the case was stayed, Altria began a further review in light of inadvertently produced documents identified by its counsel at that time. This review led Altria to assert privilege claims for approximately 7,800 additional inadvertently produced documents, representing 0.74% of all documents produced in connection with the Second Request. In total, Altria inadvertently produced fewer than 0.9% of all documents produced for the Second Request. These figures significantly overstate the amount of unique substantive material actually withheld as privileged because they include a large number of duplicate documents and documents belonging to the same or similar email threads.

34. Altria is committed to protecting its privilege—a commitment reflected in the approximately \$4.3 million it has spent on privilege-related work in this matter—and the inadvertent productions in this case are personally disappointing to me. But I know that Altria undertook immense efforts to protect the privilege in the course of reviewing and producing over one million Second Request documents and throughout the course of the FTC's investigation efforts were undertaken in good faith and in the spirit of cooperation with the FTC.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 18th day of February 2021.


Kimberly D. Harlowe

Exhibit A

PUBLIC



THE CHAIRMAN

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

April 8, 2019

Justin Hedge, Esquire
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001

Re: Premerger Notification Requirements under the Hart-Scott-Rodino
Antitrust Improvements Act of 1976;
Transaction Identification Number: 20190791
Altria Group, Inc.

Dear Mr. Hedge:

This is a request for additional information and documentary materials with respect to the proposed acquisition by Altria Group, Inc. of certain voting securities of JUUL Labs, Inc. This request is made pursuant to Section 7A(e) of the Clayton Act, 15 U.S.C. §18a(e), and §803.20 of the Premerger Notification Rules, 16 C.F.R. §803.20, and in accordance with Section 20(I) of the Federal Trade Commission Act, 15 U.S.C. §57b-1(I). The purpose of this request is to investigate a possible violation of Section 5 of the Federal Trade Commission Act, §15 U.S.C. §45, and Section 7 of the Clayton Act, 15 U.S.C. §18.

Under Section 7A(e)(2) of the Clayton Act, this request extends the 30-day waiting period until 30 days following the date of our receipt of the requested information and documentary materials. We will notify you of our receipt of the requested information and documentary materials and will inform you of the expiration of the extended waiting period.

A certification attesting to the completeness of your response in accordance with §803.6 of the Rules must be submitted with the response.

If you have any questions concerning this matter, please call or write James Abell, Esquire (202) 326-2289, Federal Trade Commission, 400 7th Street SW, Suite 7513A, Washington, DC 20024.

Sincerely,

Handwritten signature of Joseph A. Simons in cursive script.
Joseph Simons

Attachment ~f

**REQUEST FOR ADDITIONAL INFORMATION
AND DOCUMENTARY MATERIAL
ISSUED TO ALTRIA GROUP, INC.**

Unless modified by agreement with the staff of the Federal Trade Commission, each Specification of this Request requires a complete search of “the Company” as defined in Paragraph “A” of the Definitions, which appear after the following Specifications. If the Company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission’s need for documents and information, you are encouraged to discuss any questions and possible modifications with the Commission representatives identified on the last page of this Request. All modifications to this Request must be agreed to in writing by those representatives. You may find it useful to provide the response to Specifications 1 and 10(a) of this Request promptly and discuss limiting the required search with the Commission’s representatives before you begin your search.

SPECIFICATIONS

1. Submit:
 - (a) one copy of each organization chart in effect since January 1, 2017 for the Company as a whole and for each of the Company’s facilities or divisions involved in any activity relating to any Relevant Product;
 - (b) a list of all agents and representatives of the Company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other Persons retained by the Company in any capacity relating to the Proposed Transaction or any Relevant Product (excluding those retained solely in connection with environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues);
 - (c) for each agent and representative listed in response to Specification 1(b), the agent’s or representative’s title, business address, and telephone number; and
 - (d) a Data Map for the Company.
2. List each brand of Relevant Product manufactured or sold by the Company in the Relevant Area since January 1, 2015, and for each:
 - (a) identify each SKU of each brand of Relevant Product, and for each SKU identify the associated trade name and describe the distinguishing characteristics, including but not limited to product design, features, and packaging.
 - (b) state the division, subsidiary, or affiliate of the Company that manufactures or

- sells or has manufactured or sold the product.
3. Since January 1, 2015, for each Relevant Product listed in response to Specification 2 above, state or provide:
 - (a) the Company's Sales to all customers in each Relevant Area, stated separately in units and dollars;
 - (b) that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured in the U.S.;
 - (c) that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured outside the U.S.;
 - (d) that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products purchased from sources outside the Company and resold by the Company rather than of products manufactured by the Company;
 - (e) for each Channel, the names and addresses of the 25 Persons who purchased the greatest unit and dollar amounts of the Relevant Product from the Company in the United States;
 - (f) a sample contract for each customer type; and
 - (g) the name, address, estimated Sales, and estimated market share of the Company and each of the Company's competitors in each Relevant Area in the manufacture or sale of the Relevant Product, stated separately by Channel and, for Electronic Cigarettes, by system type (e.g., cig-a-like, open, pod).
 4. State the location of each facility that manufactures or sells, including distribution centers, etc., or has manufactured or sold, any Relevant Product in the Relevant Area for the Company, and for each such facility state: the current nameplate and practical capacity and the monthly capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate capacity; the number of shifts normally used at the facility; and the feasibility of increasing capacity by 10% or more, including the costs and time required.
 5. For each Relevant Product manufactured or sold in the Relevant Area, submit (a) one copy of all current selling aids and promotional materials and (b) all documents relating to advertising and marketing Plans and strategies, including but not limited to promotional programs, partnership programs, and incentives relating to shelf space and positioning.

6. Submit all documents relating to the Company's or any other Person's Plans relating to any Relevant Product in the Relevant Area, including, but not limited to, business plans; plans related to marketing and trade incentive programs; plans related to regulatory approval; short-term and long-range strategies and objectives; expansion or retrenchment plans; research and development efforts; presentations to management committees, executive committees, and boards of directors; investment banker and other consultant reports; and budgets and financial projections. For regularly prepared budgets and financial projections, the Company need only submit one copy of final year-end documents for prior years, and cumulative year-to-date documents for the current year.
7. Submit all documents relating to competition in the manufacture or sale of any Relevant Product in the Relevant Area, including, but not limited to, market studies, forecasts and surveys, and all other documents relating to:
 - (a) the Sales, market share, or competitive position of the Company or any of its competitors;
 - (b) the relative strength or weakness of Persons producing or selling each Relevant Product;
 - (c) supply and demand conditions;
 - (d) attempts to win customers from other Persons and losses of customers to other Persons;
 - (e) allegations by any Person that any Person that manufactures or sells any Relevant Product is not behaving in a competitive manner, including, but not limited to, customer and competitor complaints; threatened, pending, or completed lawsuits; and federal and state investigations; and
 - (f) any actual or potential effect on the supply, demand, cost, or price of any Relevant Product as a result of competition from any other possible substitute product.
8. Submit:
 - (a) all documents relating to the Company's or any other Person's price lists, pricing Plans, pricing policies, pricing forecasts, pricing strategies, price structures, pricing analyses, price zones, and pricing decisions relating to any Relevant Product in the Relevant Area; and
 - (b) all studies, analyses, or assessments of the pricing or profitability of any Relevant Product.

9. Identify the Person(s) at the Company responsible for creating or monitoring price strategy, price zones, pricing practices, and pricing policies for the Relevant Product in the Relevant Area. Describe in detail the Company's pricing strategy, pricing practices, and pricing policies, including, but not limited to:
- (a) a description regarding how, and how often, the prices for each Relevant Product in each Relevant Area are determined;
 - (b) whether, and how, pricing based on customer characteristics, presence of other competitors, or other factors are used by the Company in determining the prices for each Relevant Product in each Relevant Area; and
 - (c) whether, and how, price zones and/or pricing based on geographic areas, the presence of local competitors, or other factors are used by the Company for each Relevant Product in each Relevant Area.
10. Identify each electronic database used or maintained by the Company in connection with any Relevant Product at any time after January 1, 2015, that contains information concerning the Company's (i) products and product codes; (ii) facilities; (iii) production; (iv) shipments; (v) bids or sales proposals; (vi) sales; (vii) prices; (viii) margins; (ix) costs, including but not limited to production costs, distribution costs, standard costs, expected costs, and opportunity costs; (x) patents or other intellectual property; (xi) research or development projects; or (xii) customers. For each such database:
- (a) identify the (i) database type, i.e., flat, relational, or enterprise; (ii) fields, query forms, and reports available or maintained; (iii) software product(s) or platform(s) required to access the database;
 - (b) for each Relevant Product in each Relevant Area, compile and submit one or more Data Sets from the database comprising data used or maintained by the Company at any time after January 1, 2015 that constitutes, records, or discusses:
 - (i) discount requests or approvals (including rebates and other promotions);
 - (ii) sales personnel call reports;
 - (iii) meeting competition requests or approvals;
 - (iv) win/loss reports;
 - (v) prices, quotes, estimates, or bids submitted to any customer;
 - (vi) the results of any bid or quote submitted to any customer or prospective

- customer;
 - (vii) customer relationships; and
 - (viii) for each Channel, transaction-level Sales data for the Company's top 50 customers by revenue and unit volume and a 10 percent random sample of the remaining customers, including, but not limited to, customer name, customer address, product code, product description, and transaction date; and
- (c) for each Data Set provided in response to Specification 10(b), provide a data dictionary that includes:
- (i) a list of field names and a definition for each field contained in the Data Set;
 - (ii) the meaning of each code that appears as a field value in the Data Set; and
 - (iii) the primary key in the Data Set or table that defines a unique observation.

The Company should consult Instruction I(3) regarding the inclusion of Sensitive Personally Identifiable Information or Sensitive Health Information in a Data Set(s) responsive to Specification 10.

11. Since January 1, 2015, for each SKU identified in response to Specification 2, for each Relevant Area, and for each Channel, state on a monthly and annual basis:
- (a) the Company's gross sales and net sales, stated separately in units and dollars, and the Company's prices, including but not limited to: (i) list price; (ii) average wholesale price; and (iii) average selling price;
 - (b) any deductions from the Company's gross sales, identified separately by deduction type, including but not limited to: (i) allowances; (ii) discounts; (iii) returns; (iv) promotional payments; (v) excise taxes; and (vi) any other dollar amount deducted to reach true net sales total;
 - (c) the Company's cost of goods sold, stated separately in units and dollars, for total production cost per unit and separately for the following components: (i) tobacco; (ii) other materials; (iii) packaging; (iv) direct labor; (v) plant overhead costs; and (vi) any other costs (itemized by title) that are used to calculate cost of goods sold, or if the product sold is purchased or co-packed, provide the purchase price;
 - (d) gross margins;

- (e) selling expenses by type, including but not limited to advertising and promotional costs;
- (f) customer training expenses by type, including but not limited to conferences, sessions, and workshops;
- (g) research and development costs by type;
- (h) royalty expenses;
- (i) any other costs, stated separately, directly attributable to the SKU;
- (j) general and administrative expenses by type;
- (k) operating margins;
- (l) any assets or liabilities directly attributable to the SKU as tracked in the ordinary course of business, by type; and
- (m) the Company's estimated market share, stated separately in units and dollars, for the sale of the relevant SKU.

All cost data should be identified as to whether it reflects: (a) indirect costs; (b) direct costs; (c) fixed costs; (d) variable costs; (e) indirect fixed costs; (f) indirect variable costs; (g) direct fixed costs; (h) direct variable costs; and (i) any other related cost types used in the ordinary course of business. All terms, calculations, and methods of computation must be clearly explained and defined; the costs must be disaggregated to the greatest extent possible and fully allocated to the relevant SKU as applicable.

12. Since January 1, 2015, at the lowest level of aggregation that the Company maintains for each Relevant Product sold in each Relevant Area, state on a monthly and annual basis:
- (a) the Company's production cost variances stated separately by type;
 - (b) stated separately, the Company's expenditures on: (i) wholesale trade discounts; (ii) retail trade discounts; (iii) free goods; (iv) direct mail discounts; (v) media and advertising; (vi) point-of-sale displays; (vii) returned goods; and (viii) stated separately, any other type of wholesale, retail, and consumer discount or promotion that the Company has accounted for individually; and
 - (c) the Company's expenditures on other SG&A and overhead.
13. Identify all data and reports received by the Company or to which the Company has access, including but not limited to data and reports from retailers, wholesalers, and data

analytics companies (e.g., Management Science Associates, Inc., Information Research, Inc.) related to any Relevant Product, and submit all such data and reports received since January 1, 2015.

14. Provide each financial statement, budget, profit and loss statement, cost center report, profitability report, and any other financial report regularly prepared by or for the Company on any periodic basis, since January 1, 2016, including, but not limited to, such statements and reports for the Company as a whole; for each of the Company's manufacturing facilities, sales offices, and distribution facilities relating to the research, development, manufacture, license, sale, or provision of any Relevant Product in each Relevant Area; and for any product line or customer for any Relevant Product in each Relevant Area. For each such statement, budget, or report, state how often it is prepared, and identify the Person responsible for its preparation; provide all such statements and reports on both a quarterly basis and a yearly basis. For each Relevant Product, provide all regularly prepared customer profitability reports and product line profitability reports.
15. Provide all documents relating to the Company's decision to discontinue the MarkTen and Green Smoke Electronic Cigarette products.
16. Provide all documents, including but not limited to surveys, studies, analyses, and reports, since January 1, 2015, relating to customer purchasing patterns, substitution, switching, dual use or poly-use among any set of Relevant Products, and submit any underlying data and programs used in the creation of any such documents.
17. For each brand of Relevant Product identified in response to Specification 2, describe in detail the Company's promotional programs and marketing strategies (including but not limited to buydowns, rebates, coupons, incentives for retail shelf space or position) since January 1, 2016. Identify the Person(s) at the Company responsible for developing and approving any such programs or strategies.
18. Identify each instance since January 1, 2016, in which the Company has increased its wholesale list price for any brand of Relevant Product identified in response to Specification 2, and for each such instance:
 - (a) Identify (i) the brand of Relevant Product; (ii) the effective date of the increase; (iii) the amount of the increase; (iv) any other manufacturer of any Relevant Product that increased its wholesale list price within three months of the effective date of the Company's increase; (v) the effective date of the increase by any such other manufacturer; and (vi) how the Company became aware of the increase by any such other manufacturer; and
 - (b) State whether the price increase was rescinded at any point and the reasons for the rescission.

19. State the name and address of each Person that has entered or attempted to enter into, or exited from, the manufacture or sale of each Relevant Product in any Relevant Area from 2009 to the present. For each such Person, state:
- (a) the product(s) it sells, sold, or attempted to sell in each Relevant Area;
 - (b) the date of its entry into, attempted entry into, or exit from the market; and
 - (c) whether such Person constructed a new facility, converted assets previously used for another purpose, or began using facilities that were already being used for the same purpose.
20. For each Relevant Product, identify or describe (including the bases for your response) and submit all documents relating to:
- (a) requirements for entry into the production or sale of the Relevant Product in each Relevant Area including, but not limited to, research and development, planning and design, production requirements, distribution systems, service requirements, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement;
 - (b) the total costs required for entry into the production or sale of the Relevant Product in each Relevant Area; the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the manufacture or sale of the Relevant Product; the methods and amount of time necessary to recover such costs; and the total Sunk Costs entailed in satisfying the requirements for entry;
 - (c) possible new entrants into the manufacture or sale of the Relevant Product in each Relevant Area; and
 - (d) the Minimum Viable Scale; the minimum and optimum plant size, production line size, capacity utilization rate, and production volume; requirements for multi-area, multi-plant, multi-product, or vertically integrated operations; and other factors required to attain any available cost savings, economies of scale or scope, or other efficiencies necessary to compete profitably in the manufacture or sale of the Relevant Product in each Relevant Area.
21. For each Relevant Product, describe: (a) the federal and state rules and regulations governing the development, marketing, or sale of the Relevant Product in any Relevant Area; and (b) the cost and time required to comply with each such regulation. Submit all documents since January 1, 2016, related to the impact of the FDA Deeming Regulation or changes in the PMTA Submission Deadline on the development, marketing, or sale of any Electronic Cigarette.

22. State whether the Company has entered into the manufacture or sale of any Relevant Product in any Relevant Area from January 1, 2013 to the present and provide date(s) of entry. For each Relevant Product in each Relevant Area, describe in detail the steps taken by the Company to enter, including but not limited to steps related to research and development, planning and design, production, distribution, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time required to complete each step. For each entry event provide the costs associated with each step taken by the Company to enter.
23. Submit all documents relating to any Plans of the Company or any other Person for the construction of new facilities, the closing of any existing facilities, or the expansion, conversion, or modification (if such modification has a planned or actual cost of more than \$1,000,000) of current facilities for the manufacture or sale of any Relevant Product.
24. Identify, and state whether the Company is a member of or subscribes to, all trade associations, information services, and other organizations relating to the production or sale of any Relevant Product. Submit one copy of all documents submitted to or received from each identified organization (or its agents) by any Person that discuss or describe production, Sales, prices, competition, or entry conditions relating to the Relevant Product.
25. Submit all documents relating to the Company's or any other Person's Plans for, interest in, or efforts undertaken to bring about any acquisition, divestiture, joint venture, alliance, or merger of any kind involving the manufacture or sale of any Relevant Product other than the Proposed Transaction. Provide a copy of all submissions provided to any regulatory agency relating to or in connection with any prior transaction involving the manufacture or sale of any Relevant Product in the Relevant Area other than the Proposed Transaction.
26. Submit all documents (except documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues) relating to the Proposed Transaction and provide:
 - (a) a timetable for the Proposed Transaction, a description of all actions that must be taken prior to consummation of the Proposed Transaction, and any harm that will result if the Proposed Transaction is not consummated or is delayed;
 - (b) a detailed description of (including the rationale for) all Plans for changes in the Company's and JUUL's operations, structure, policies, strategies, corporate goals, financing, business, officers, employees, or any other area of corporate activity as a result of the Proposed Transaction. Include a detailed description of (including the rationale for) all services the Company has provided, plans to provide, or may provide to JUUL in connection with the Proposed Transaction, including but not limited to services relating to distribution, logistics, and marketing (e.g., shelf

- space, access to customer information, sales support). For each service, state the time frame and geographic scope for the provision, planned provision, or proposed provision of the service. Identify all documents directly or indirectly used to prepare the Company's response to this subpart;
- (c) a detailed description of the reasons for the Proposed Transaction and the benefits, costs, and risks anticipated as a result of the Proposed Transaction; and
 - (d) a detailed description of all statements or actions by any Person (identifying the Person by name, title, and business address) in support of, in opposition to, or otherwise expressing opinions about the Proposed Transaction or its effects.
27. Describe in detail, quantify (if possible), and submit all documents relating to the benefits, costs, and risks anticipated as a result of the Proposed Transaction, including, but not limited to, all cost savings, economies, or other efficiencies of any kind anticipated as a result of the Proposed Transaction, including:
- (a) a description of the steps the Company will take to achieve each benefit, cost saving, economy, or other efficiency;
 - (b) the estimated time and cost required to achieve each benefit, cost saving, economy, or other efficiency and an explanation for how the cost was derived;
 - (c) the estimated dollar value of each benefit, cost saving, economy, or other efficiency, stating separately the one-time fixed cost savings, recurring fixed cost savings, and variable cost savings in dollars per unit and dollars per year, and an explanation of how that value was derived;
 - (d) an explanation of why the Company could not achieve each benefit, cost saving, economy, or other efficiency without the Proposed Transaction; and
 - (e) the identity of each Person (including the Person's title and business address) employed or retained by the Company with any responsibility for achieving, analyzing, or quantifying each benefit, cost saving, economy, or other efficiency described.
28. Describe and submit all documents related to any Relevant Product that discuss the Company's Plans or attempts to:
- (a) reduce its costs;
 - (b) improve its products or services;
 - (c) expand its sales or distribution efforts;

- (d) introduce new products or services;
 - (e) integrate the Relevant Products sold by the Company with any products sold by JUUL;
 - (f) improve its operating performance, financial condition, or competitive viability;
 - (g) close, consolidate or rationalize any facility;
 - (h) discontinue the research, development, manufacture, license, or sale of any Relevant Product or product line; and
 - (i) achieve any benefits as a result of any multi-plant, multi-product, or vertically integrated operation of the Company.
29. Describe in detail (including the time and cost required to achieve), quantify (if possible), and submit all documents related to projected and actual cost savings, economies, or other efficiencies resulting or predicted to result from each previous merger, acquisition, or joint venture by the Company that is being relied upon by the Company to support any claim of predicted cost savings, economies, or other efficiencies expected to result from the Proposed Transaction. Provide a copy of all submissions provided to any regulatory agency relating to expected efficiencies with respect to any prior transaction.
30. Submit, without regard to custodian:
- (a) all documents provided to the Company's Board of Directors relating to any Relevant Product in any Relevant Area; and
 - (b) all minutes or other recordings of meetings of the Company's Board of Directors relating to any Relevant Product in any Relevant Area.
31. Submit documents sufficient to show and, to the extent not reflected in such documents, describe in detail the Company's policies and procedures relating to the retention and destruction of documents.
32. List (a) each federal judicial district (e.g., District of Columbia, Southern District of New York) within the United States in which the Company has an agent to receive service of process, and provide each such agent's name, current business and home addresses, and telephone numbers; (b) each federal judicial district within the United States in which the Company is incorporated or licensed to do business or currently is doing business; and (c) each federal judicial district within the United States in which the Company has an office or a facility, and, for each such office or facility, list the address and the individual in charge (with his or her title).

Alternatively, the Company may respond to this Specification by providing a written stipulation that it agrees to accept service of process, and to subject itself to personal jurisdiction, in all federal judicial districts within the United States.

33. Identify the Person(s) responsible for preparing the response to this Request and submit a copy of all instructions prepared by the Company relating to the steps taken to respond to this Request. Where oral instructions were given, identify the Person who gave the instructions, describe the content of the instructions, and identify the Person(s) to whom the instructions were given. For each Specification, identify the individual(s) who assisted in the preparation of the response, with a listing of the Persons (identified by name and corporate title or job description) whose files were searched by each.
34. Identify any electronic production tools or software packages utilized by the Company in responding to this Request for: keyword searching, Technology Assisted Review, email threading, de-duplication, and global de-duplication or near-de-duplication (please note that the use of all forms of de-duplication requires advance approval from Commission staff per Instruction I(4)(e)), and:
 - (a) if the Company utilized keyword search terms to identify documents and information responsive to this Request, provide a list of the search terms used for each custodian;
 - (b) if the Company utilized Technology Assisted Review software:
 - (i) describe the collection methodology, including: (a) how the software was utilized to identify responsive documents; (b) the process the Company utilized to identify and validate the seed set documents subject to manual review; (c) the total number of documents reviewed manually; (d) the total number of documents determined nonresponsive without manual review; (e) the process the Company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; (f) how the Company handled exceptions (“uncategorized documents”); and (g) if the Company’s documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and
 - (ii) provide all statistical analyses utilized or generated by the Company or its agents related to the precision, recall, accuracy, validation, or quality of its document production in response to this Request; and
 - (c) identify the Person(s) able to testify on behalf of the Company about information known or reasonably available to the organization, relating to its response to this Specification.

DEFINITIONS

For the purposes of this Request, the following Definitions apply:

- D 1. The term “the Company” or “Altria” means Altria Group, Inc.; its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25% or more) or total ownership or control between the Company and any other Person.
- D 2. The term “JUUL” means JUUL Labs, Inc.; its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25% or more) or total ownership or control between JUUL and any other Person.
- D 3. The term “Data Map” means an organized list, schematic, diagram, or other representation sufficient to show where and how the Company stores all physical and electronic information in its possession, custody, or control, including, but not limited to, information systems (e.g., email messages, voice-mail messages, communications logs, enterprise content management, instant messaging, database applications), locations where information is stored, including servers and backup systems (e.g., physical Company facility, third-party vendor location, cloud), and the physical and logical network topology of the Company’s computer systems.
- D 4. The term “Data Set” means all or a subset of data held by, or accessible to, the Company in the normal course of business provided by the Company to respond to any Specification in this Request.
- D 5. The term “documents” means any information, on paper or in electronic format, including written, recorded, and graphic materials of every kind, in the possession, custody, or control of the Company. The term “documents” includes, without limitation: email messages; audio files; instant messages; drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that Person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Company.
- (a) Unless otherwise specified, the term “documents” excludes:
- (i) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature;

- (ii) architectural plans and engineering blueprints;
 - (iii) documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues; and
 - (iv) relational and enterprise databases, except as required to comply with an individual Specification.
- (b) The term “computer files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission’s need for documents and information, you are encouraged to discuss a possible modification to this Definition with the Commission representatives identified on the last page of this Request. The Commission representative will consider modifying this Definition to:
- (i) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;
 - (ii) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain Specifications identified by Commission representatives; or
 - (iii) include other proposals consistent with Commission policy and the facts of the case.
- D 6. The term “Person” includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- D 7. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
- D 8. The terms “and” and “or” have both conjunctive and disjunctive meanings.
- D 9. The term “Plans” means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been

adopted.

- D 10. The term “Sales” means net sales (i.e., total sales after deducting discounts, returns, allowances and excise taxes). “Sales” includes Sales of the Relevant Product whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.
- D 11. The term “Relevant Product” as used herein means, and information shall be provided separately for, (a) combustible cigarettes; and (b) Electronic Cigarettes.
- D 12. Electronic Cigarette means any electronic nicotine delivery system, including but not limited to the products included in Altria’s MarkTen and Green Smoke product lines, as well as JUUL’s product line.
- D 13. The term “Relevant Area” means, and information shall be provided separately for, (a) the United States; (b) each State in which the Company or any other Person sells, or has sold, any Relevant Product; and (c) each Metropolitan Statistical Area (or, if not available, the smallest geographic area for which the Company is able to provide information) in which the Company or any other Person sells, or has sold, any Relevant Product.
- D 14. The term “State” refers to each of the fifty states of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico.
- D 15. The term “Channel” means, and information shall be provided separately for, each of the following retail formats: (a) supermarkets; (b) gas or convenience stores; (c) drug stores or pharmacies; (d) tobacco shops; (e) vape shops; (f) club or warehouse stores; (g) online; and (h) all other types of outlets where consumers purchase any Relevant Product.
- D 16. The term “Deeming Regulation” means Food and Drug Administration Rule 81 FR 28973, issued May 10, 2016, and effective August 8, 2016.
- D 17. The term “PMTA Submission Deadline” means the deadline for submitting Premarket Tobacco Product Applications related to electronic nicotine delivery systems pursuant to Section 910 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 387j.
- D 18. The term “Proposed Transaction” means Altria’s purchase and conversion of stock in JUUL, as agreed to on December 20, 2018, and includes any related relationship agreement, services agreement, intellectual property licensing agreement, voting agreement, investors’ rights agreement, and right of first refusal and co-sale agreement.
- D 19. The term “Minimum Viable Scale” means the smallest amount of production at which average costs equal the price currently charged for the Relevant Product. It should be noted that Minimum Viable Scale differs from the concept of minimum efficient scale,

which is the smallest scale at which average costs are minimized.

- D 20. The term “Sunk Costs” means the acquisition costs of tangible and intangible assets necessary to manufacture and sell the Relevant Product that cannot be recovered through the redeployment of these assets for other uses.
- D 21. The term “Technology Assisted Review” means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.

INSTRUCTIONS

For the purposes of this Request, the following Instructions apply:

- I 1. All references to year refer to calendar year. Unless otherwise specified, each of the Specifications calls for: (1) documents for each of the years from January 1, 2017 to the present; and (2) information for each of the years from January 1, 2016 to the present. Where information, rather than documents, is requested, provide it separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If calendar year information is not available, supply the Company's fiscal year data indicating the 12-month period covered, and provide the Company's best estimate of calendar year data.
- I 2. This Request shall be deemed continuing in nature so as to require production of all documents responsive to any Specification included in this Request produced or obtained by the Company up to 45 calendar days prior to the date of the Company's full compliance with this Request, except for documents responsive to Specification 7 and Specification 26, for which the date is 21 calendar days prior to the date of the Company's full compliance with this Request.
- I 3. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any document responsive to a particular Specification contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document.

The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address, or phone number in combination with one or more of the following:

- date of birth
- driver's license number or other state identification number, or a foreign country equivalent
- passport number
- financial account number
- credit or debit card number

The term "Sensitive Health Information" includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

I 4. Form of Production: The Company shall submit documents as instructed below absent written consent.

(a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:

- (i) Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and metadata.
- (ii) Submit emails in TIFF format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the email.
Bates End	Bates number of the last page of the email.
Custodian	Name of the person from whom the email was obtained.
Email BCC	Names of person(s) blind copied on the email.
Email CC	Names of person(s) copied on the email.
Email Date Received	Date the email was received. [MM/DD/YYYY]
Email Date Sent	Date the email was sent. [MM/DD/YYYY]
Email From	Names of the person who authored the email.
Email Message ID	Microsoft Outlook Message ID or similar value in other message systems.
Email Subject	Subject line of the email.
Email Time Received	Time email was received. [HH:MM:SS AM/PM]
Email To	Recipients(s) of the email.

Email Time Sent	Time email was sent. [HH:MM:SS AM/PM]
Folder	File path/folder location of email.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt

- (iii) Submit email attachments other than those described in subpart (a)(i) in TIFF format. For all email attachments, provide extracted text and the following metadata and information as applicable:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.
Bates End	Last Bates number of the document.
Custodian	Name of person from whom the file was obtained.
Date Created	Date the file was created. [MM/DD/YYYY]
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY]
Filename with extension	Name of the original native file with file extension.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Native Link	Relative file path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls

Parent ID	Document ID or beginning Bates number of the parent email.
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

- (iv) Submit all other electronic documents, other than those described in subpart (a)(i), in TIFF format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.
Bates End	Last Bates number of the document.
Custodian	Name of the original custodian of the file.
Date Created	Date the file was created. [MM/DD/YYYY]
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY HH:MM:SS AM/PM]
Filename with extension	Name of the original native file with file extension.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls

Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC-0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

- (v) Submit documents stored in hard copy in TIFF format accomplished by OCR with the following information:

Metadata/Document Information	Description
Bates Begin	Beginning Bates number of the document.
Bates End	Bates number of the last page of the document.
Custodian	Name of person from whom the file was obtained.

- (vi) Submit redacted documents in TIFF format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction I(6).
- (b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact. Submit data separately from document productions.
- (c) Produce electronic file and TIFF submissions as follows:
 - (i) For productions over 10 gigabytes, use hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in USB 2.0 or 3.0 external enclosure.
 - (ii) For productions under 10 gigabytes, CD-ROM (CD-R, CD-RW) optical disks and DVD-ROM (DVD+R, DVD+RW) optical disks for Windows-

compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats.

- (iii) All documents produced in electronic format shall be scanned for and free of viruses prior to submission. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this Request.
- (iv) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
- (d) Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
- (e) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this Request.

I 5. All documents responsive to this Request:

- (a) shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files;
- (b) shall be marked on each page with corporate identification and consecutive document control numbers when produced in TIFF format (e.g., ABC-00000001);
- (c) if written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;
- (d) shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (e.g., a chart or graph), makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-colored photocopy, or a JPEG format TIFF);

- (e) shall be accompanied by an index that identifies: (i) the name of each Person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that Person's documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that, Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request; and
- (f) shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents.

I 6. If any documents are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log (hereinafter, "Complete Log") that includes each document's authors, addressees, and date; a description of each document; and all recipients of the original and any copies. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the Person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Commission staff, the Commission, or a court to assess the applicability of the privilege claimed. For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this Instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third party, such as internal law firm memoranda, may be omitted from the log. Provide the Complete Log in Microsoft Excel readable format.

In place of a Complete Log of all documents withheld from production based on a claim of privilege, the Company may elect to submit a Partial Privilege Log ("Partial Log") for each Person searched by the Company whose documents are withheld based on such claim and a Complete Log for a subset of those Persons, as specified below:

- (a) The Partial Log will contain the following information: (1) the name of each Person from whom responsive documents are withheld on the basis of a claim of privilege; and (2) the total number of documents that are withheld under a claim

of privilege (stating the number of attachments separately) contained in each such Person's files. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this Instruction), noting where redactions in the document have been made. Provide the Partial Log in Microsoft Excel readable format.

- (b) Within five (5) business days after receipt of the Partial Log, Commission staff may identify in writing five individuals or ten percent of the total number of Persons searched, whichever is greater, for which the Company will be required to produce a Complete Log in order to certify compliance with this Request.
 - (c) For the Company to exercise the option to produce a Partial Log, the Company must provide a signed statement in which the Company acknowledges and agrees that, in consideration for being permitted to submit a Partial Log:
 - (i) the Commission retains the right to serve a discovery request or requests regarding documents withheld on grounds of privilege in the event the Commission seeks relief through judicial or administrative proceedings;
 - (ii) the Company will produce a Complete Log of all documents withheld from production based on a claim of privilege no later than fifteen (15) calendar days after such a discovery request is served, which will occur promptly after the filing of the Commission's complaint; and
 - (iii) the Company waives all objections to such discovery, including the production of a Complete Log of all documents withheld from production based on a claim of privilege, except for any objections based strictly on privilege.
 - (d) The Company must retain all privileged documents that are responsive to this Request until the expiration of the Hart-Scott-Rodino waiting period or the completion of any litigation challenging the Proposed Transaction.
 - (e) The Commission will retain the right to require the Company to produce a Complete Log for all Persons searched in appropriate circumstances.
- I 7. If the Company is unable to answer any question fully, supply such information and data as are available. Explain why the answer is incomplete, the efforts made by the Company to obtain the information and data, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation

“est.” If there is no reasonable way for the Company to make an estimate, provide an explanation.

- I 8. If documents responsive to a particular Specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company’s document retention policy as disclosed or described in response to Specification 26 of this Request, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the Specification(s) to which they are responsive, and identify the Persons having knowledge of the content of such documents.
- I 9. In order for the Company’s response to this Request to be complete, the attached certification form must be executed by the Company official supervising compliance with this Request, notarized, and submitted along with the responsive materials.
- I 10. Any questions you have relating to the scope or meaning of anything in this Request or suggestions for possible modifications thereto should be directed to James Abell at 202-326-2289. The response to the Request shall be addressed to the attention of James Abell and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission, 400 7th Street, SW, Washington, DC 20024. If you wish to submit your response by United States mail, please call the staff listed above for mailing instructions.

CERTIFICATION

As required by §803.6 of the implementing rules for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, this response to the Request for Additional Information and Documentary Material, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required information, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete. If the Commission uses such copies in any court or administrative proceeding, the Company will not object based on the Commission not offering the original document.

_____ (Signature)

(Type or Print Name and Title)

Subscribed and sworn to before me at the City of _____,

State of _____, this ____ day of _____, 20__.

(Notary Public)

(Date Commission Expires)

Exhibit B



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

June 6, 2019

BY E-MAIL

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

Michael L. Sibarium
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW
Washington, DC 20036

Jeremy Calsyn
Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037

Re: Altria's Proposed Acquisition of JUUL Labs, Inc.'s voting securities

Dear Counsel:

This letter ("the Agreement") sets forth the understanding between the staff of the Bureau of Competition of the Federal Trade Commission ("FTC Staff") and Altria Group, Inc. and JUUL Labs, Inc. (collectively the "Parties") in connection with Altria's proposed acquisition of JUUL's voting securities (the "Proposed Transaction"), which is the subject of Requests for Additional Information and Documentary Material issued by the Federal Trade Commission on April 8, 2019 ("Second Requests").

This Agreement does not alter the Parties' obligations to certify substantial compliance with the Second Requests, as modified in writing by FTC Staff.

This Agreement does not bind the Federal Trade Commission ("FTC"), any individual Commissioner, or any other federal or state Government entity, but rather is an agreement with FTC Staff. This Agreement does not alter the FTC's legal ability to challenge the Proposed Transaction, including, but not limited to, after expiration of the timing set out below.

It is agreed as follows:

I. Timing and Communication

The Parties agree not to close the Proposed Transaction before 11:59 PM Eastern Time on the 70th calendar day following the date on which both Parties substantially comply with the Second Requests, as modified in writing by FTC Staff, unless the FTC earlier (i) terminates the Hart-Scott-Rodino Act waiting period without issuance of a complaint or following issuance of a complaint and consent order, and/or (ii) provides written notice that the FTC has closed its investigation.

A. Notices

1. The Parties agree to provide FTC Staff with thirty (30) calendar days advanced notice before certifying that they have substantially complied with the Second Requests. Such notice shall be provided no earlier than ten (10) calendar days following the execution of this Agreement.
2. The parties agree to provide thirty (30) calendar days advanced notice before consummating the Proposed Transaction. The date identified for consummation of the Proposed Transaction shall be deemed the Closing Date for purposes of this Agreement. The Parties may not provide this advanced notice more than forty (40) calendar days prior to the Closing Date and must have a good faith basis for believing that they can consummate the proposed transaction on that Closing Date.

All notices required in Sections I.A. are to be made in writing in the form of the letters provided as Attachments A and B to this letter, as appropriate.

B. Computing Time and Extension of Deadlines

In computing any period specified in this Agreement, the day of the act, event, or default that triggers the period shall be excluded. The first day of the period shall be the first business day after the act, event, or default that triggers the period. The last day of the period of time shall be included unless it is a Saturday, Sunday, or federal holiday, in which case the period runs until 11:59 PM Eastern Time of the next business day on which the federal government is open. Any material received by the Bureau of Competition or the FTC after 5:00 PM Eastern Time shall be deemed received on the next business day.

In the event that the Federal Trade Commission is closed pursuant to a lapse in appropriations from Congress lasting no longer than five (5) business days, all dates specified herein shall be extended day-for-day, for each calendar day the Federal Trade Commission closure is in place. This day-for-day extension shall include but is not limited to any date(s) between notice and certification of substantial compliance and any date(s) between certification of substantial compliance and close. Notices and certifications of substantial compliance may not be given if the Commission is closed pursuant to the first sentence of this paragraph. Any

portion of a calendar day affected by a federal government closure shall be considered an entire day for the purposes of extending, day-for-day, the date(s) specified herein. For example, if the federal government is reopened at noon on a given calendar day, the date(s) specified herein shall be extended as if the federal government closure lasted that entire day.

Except as specifically provided herein, the failure of a Party to comply with any deadline in this Agreement shall cause any subsequent deadlines specified herein to be extended, day-for-day, for each calendar day the deadline is not met.

C. Communication / Exchange of Information

During the course of the investigation, FTC Staff and staff from the FTC's Bureau of Economics ("BE") will make a good faith effort to meet with the Parties, either in person or by phone, as reasonably requested by either FTC Staff or either Party, to promote a continuing dialogue regarding the facts and the relevant legal and economic issues and to discuss progress in meeting the agreed-upon schedule discussed in this Agreement. FTC Staff and the Parties intend that the ongoing dialogue include a good faith exchange of information regarding any substantive issues, theories, or questions that FTC Staff may have regarding the Proposed Acquisition.

The Parties are encouraged to provide to FTC Staff the results of their own economic and econometric analyses, and any underlying data. FTC Staff will make good faith and reasonable efforts to provide feedback on the Parties' submissions. Also, as soon as practicable upon discovery of any deficiencies relating to a Party's certification, FTC Staff will notify the Party in writing of the deficiencies.

D. Investigational Hearings and Document Productions

To the extent investigational hearings ("IHs") are conducted in this matter, FTC Staff will use reasonable best efforts to identify IH witnesses no later than the fifteenth (15th) business day after both Parties certify substantial compliance with the Second Requests ("Compliance Date"). The Parties agree to make such witnesses available such that their IHs may be completed within ten (10) business days after FTC Staff identifies each witness, or ten (10) business days after receipt of documents belonging to each witness, or a later date if agreed to by staff, provided that such agreement by staff shall not be unreasonably withheld. The Parties also agree to produce an up-to-date resume for each IH witness at least five (5) business days prior to the date of that witness's IH.

For each IH witness identified prior to a Party certifying substantial compliance, the Party will produce a substantially complete document production, including relevant non-custodial Specifications identified by FTC Staff, to the FTC at least fifteen (15) business days prior to the agreed-upon date of the witness's IH (the "IH Document Production Date"). Contemporaneous with the substantial completion of the document production for each custodian or at the earliest practicable date, the Parties shall identify in writing the cut-off date for the collection of documents for each custodian. If additional responsive, non-duplicative, and non-privileged documents or information from a witness's files or in response to relevant non-custodial productions are produced after this deadline, FTC Staff reserves the right to hold open, re-open,

continue, or reschedule that witness's IH. If FTC Staff decides to hold open or re-open an IH for this reason, FTC Staff will use the additional hearing time to question the witness on only the documents and information produced after the IH Document Production Date and any additional topics related to those documents and that information.

II. Second Request Production and Post-Compliance Period

A. Rolling Production and Priority Custodians/Specifications

The Parties shall use good faith efforts to produce responsive materials on a rolling basis (i.e., the responsive documents from each individual's files will be produced as soon as practicable after such documents are reviewed, processed, and copied, and the Parties' documents will be produced in multiple, sequential batches). Each production shall be accompanied by a data overlay updating metadata for the entire production (e.g., updating the alternative custodian field for all documents in the current production and all documents previously produced).

Within five (5) business days of execution of this Agreement, the Bureau shall identify no more than ten (10) Priority Custodians from each Party. The Priority Custodians shall be listed and attached as an appendix to this Agreement following identification by FTC Staff. The Parties agree to produce substantially complete document productions from the Priority Custodians at least thirty five (35) calendar days prior to certifying substantial compliance with the Second Requests. The Parties shall submit written confirmation of compliance with this obligation upon completion of its submissions of Priority Custodian materials.

The Parties will substantially comply with Specifications 11, 12, and 13 in the Second Requests ("Priority Data") at least thirty five (35) calendar days prior to certifying substantial compliance with the Second Requests. The Parties shall submit written confirmation of compliance with this obligation upon completion of its submissions of Priority Data.

B. Second Request Modifications

Staff agrees to work in good faith with the Parties to consider reasonable requests for modification to the Second Request.

III. Preliminary Injunction Proceeding

The Parties shall not initiate a declaratory judgment action against the FTC relating to the Proposed Transaction. In the event that the FTC files an enforcement action pursuant to Section 13(b) of the Federal Trade Commission Act, on or before the Closing Date, seeking to enjoin the Proposed Transaction, the Parties agree to file a joint stipulation with the court as follows:

A. The Parties and the FTC hereby stipulate to a Temporary Restraining Order (an executed version is attached hereto as Attachment C) preventing the Parties from consummating the Proposed Transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after a court rules on a motion for a preliminary injunction or the date set by the District Court, whichever is later; and

B. The Parties shall take any and all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, the Proposed Transaction until the timing identified in the paragraph immediately above.

This agreement shall not be construed to limit in any way the FTC's or the Parties' right to seek additional discovery in the context of any federal court hearing.

IV. Construction

Nothing in this Agreement affects FTC Staff's ability, within the time period provided, to reject a submission that it determines is not in substantial compliance with the Second Requests, or in the case of an HSR filing, is deficient. This Agreement may only be amended or modified through a written instrument signed by the parties.

If you agree to the terms set forth in this Agreement, please indicate your agreement by countersigning below and returning to us.

Delbank & Fierstein
Counsel for Altria Group, Inc.

June 6, 2019
Date

Paul Kelly
Counsel for JUUL Labs, Inc.

June 6, 2019
Date

Michael P. Silber
Counsel for JUUL Labs, Inc.

June 6, 2019
Date

Exhibit C



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

June 7, 2019

VIA ELECTRONIC MAIL

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

Re: Altria Group, Inc.'s proposed acquisition of JUUL Labs, Inc's voting securities,
FTC File No. 191-0075

Dear Justin:

This letter ("Altria Modification Letter #2") sets forth agreements of the Federal Trade Commission to modifications requested by Altria in connection with the April 8, 2019 Request for Additional Information and Documentary Material ("Second Request") issued to Altria in relation to its proposed acquisition of JUUL's voting securities. Please construe all terms in this letter consistent with the Definitions and Instructions of the Second Request, incorporated by reference.

This letter, along with Altria Modification Letter #1, constitute the full extent of any modifications of the Second Request to date. Commission Staff base our modification decisions on the accuracy and completeness of the information that you have provided us. If we determine that this information is inaccurate or incomplete, we reserve the right to re-examine any issue affected by our modification decisions.

Custodian Modifications

We agree to exclude all individuals identified in the organization charts submitted by Altria to the FTC on April 18, 2019 from the scope of search under the Second Request, with the exception of the following custodians and their actual or functional predecessors:

1. Howard Willard, Chairman and CEO, Altria Group, Inc.
2. Kevin Crosthwaite, SVP & Chief Growth Officer, Altria Group, Inc.
3. Pascal Fernandez, SVP Consumer & Marketplace Insights, Altria Client Services

4. Simeon Chow, VP CMI Center of Excellence, Altria Client Services
5. Bruce Neidle, Managing Director, CMI Account Teams, Altria Client Services
6. Richard Jupe, VP Product Development, Altria Client Services
7. Robert Arents, Sr. Dir. Product Engineering & Regulatory Support, Altria Client Services
8. Maria Gogova, VP Product Innovation, Altria Client Services
9. William Gardner, Dir. Product Innovation, Altria Client Services
10. Eric Hawes, Sr. Dir. Technology Development, Altria Client Services
11. Brian Quigley, SVP Brand Engagement & Commerce, Altria Client Services
12. Carmine (Anthony) Reale, VP Strategy & Business Development, Altria Client Services
13. David Wise, Managing Director, Business Development, Altria Client Services
14. Brian Blaylock, Sr. Mgr. Business Development, Altria Client Services
15. Murray Garnick, EVP & General Counsel, Altria Group, Inc.
16. Jose Luis Murillo, SVP Regulatory Affairs, Altria Client Services
17. Willie McKinney, VP Regulatory Sciences, Altria Client Services
18. William Gifford, Vice Chairman and CFO, Altria Group, Inc.
19. Jody Begley, SVP Tobacco Products, Altria Group, Inc.
20. Heather Newman, President & CEO, PM USA, Philip Morris USA Inc.
21. Michael Golden, Dir. Brand, PM USA, Philip Morris USA Inc.
22. Mark Cruise, VP Engineering, Altria Client Services
23. Chad Wrisberg, Managing Director, Trade Marketing, Altria Group Distribution Co.
24. Craig Johnson, President & CEO, Altria Group Distribution Co.
25. Laura Skarie, Director, Sales Analytics, Altria Group Distribution Co.
26. Michele Allen, Managing Director, Customer Supply Chain, Altria Group Distribution Co.
27. Nicole Baumstark, Managing Director, Digital & Marketing Services, Altria Client Services
28. Melissa Burroughs, Senior Director, Consumer Insights & Innovation, Altria Client Services
29. Kirby Forlin, Senior Director, Advanced Analytics Center, Altria Client Services
30. Peter Diatelevis, VP Region Sales (Sales Region 4), Altria Group, Inc.
31. Michelle Baculis, Dir. Portfolio Brands, Nu Mark LLC
32. Douglas Monroe, Manager - Brand (Nu Mark IV), Nu Mark LLC
33. James Mullenau, Manager - Brand (Nu Mark I), Nu Mark LLC
34. Kimberlee Pepple, Manager - Brand (Nu Mark II), Nu Mark LLC
35. Michael Brace, Director, MarkTen and Managing Director, Nu Mark LLC
36. Brent Chambers, Director, Global Infrastructure, Nu Mark LLC
37. Craig Schwartz, SVP Operations & Business Development, Nu Mark LLC
38. Cynthia Cunningham, Dir. Operations Logistics, Nu Mark LLC
39. Michael (Dave) Drisko, Dir. Manufacturing & Logistics, Nu Mark LLC
40. Brian Wells, Senior Manager, Quality, Nu Mark LLC

These modifications do not alter Altria's obligation to search databases and shared files, including materials provided to the Board of Directors, for documents and information responsive to the Second Request.

Pursuant to Section II.A of the Timing Agreement between the parties and Commission Staff, **Appendix A** contains the names of the Altria Priority Custodians.

Second Request Modifications

With respect to the following former Nu Mark employees who have remained with Altria in other roles after the wind-down of Nu Mark, we agree to modify the relevant period of the Second Request for the search for and production of relevant documents from these custodians to end as of the time of their Nu Mark departure as follows:

Former Nu Mark Employee Custodian	Relevant Period End Date
Michael Brace	Feb. 1, 2019
Cynthia Cunningham	Feb. 16, 2019
Michael (Dave) Drisko	Nov. 1, 2018
Michelle Baculis	June 20, 2018
Brian Wells	Feb. 16, 2019
James Mullenaux	Feb. 16, 2019
Kimberlee Pepple	Nov. 1, 2018

With respect to the following custodians, we agree to modify the relevant period of the Second Request for the search for and production of relevant documents from these custodians to begin as of the announcement of Altria's minority investment JLI in light of their role in providing services to in connection with Altria's minority investment:

Proposed Custodian	Modified Relevant Period
Michele Allen	December 20, 2018 to present
Nicole Baumstark	December 20, 2018 to present

We agree to modify Instruction I 6 to eliminate the requirement to log privileged communications between Altria employees and their outside counsel ("outside counsel communications"). After Staff identifies the custodians for whom it would like a full privilege log, Altria shall provide a log of the metadata for those documents in lieu of providing a full privilege log for outside counsel communications.

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

Regards,



James Abell

Appendix A: Altria Priority Custodians

Howard Willard	Chairman and CEO, Altria Group, Inc.
William Gifford	Vice Chairman and CFO, Altria Group, Inc.
Kevin Crosthwaite	SVP & Chief Growth Officer, Altria Group, Inc.
Pascal Fernandez	SVP Consumer & Marketplace Insights, Altria Client Services
Richard Jupe	VP Product Development, Altria Client Services
Heather Newman	President & CEO, PM USA, Philip Morris USA Inc.
Jose Luis Murillo	SVP Regulatory Affairs, Altria Client Services
Michelle Baculis	Dir. Portfolio Brands, Nu Mark LLC
Michael Brace	Director, MarkTen and Managing Director, Nu Mark LLC
Brian Quigley	SVP Brand Engagement & Commerce, Altria Client Services

**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 OF DENISE J. TALBERT

I, Denise J. Talbert, state as follows:

1. I am the Co-Chair of the Data & Discovery Strategies Practice Group at the law firm Shook, Hardy & Bacon (“SHB”), based in Kansas City, Missouri. I have more than two decades of experience managing discovery in complex litigation, including issues related to preservation, collection, organization, review, production, privilege, privilege logging, written discovery responses and issue analysis.
2. On April 8, 2019, the FTC issued to Altria Group a “Second Request” for documents. Altria Group engaged SHB to manage and supervise the privilege review. After applying search terms to over one million documents to identify indicia of privilege, SHB supervised a review team that reviewed a universe of approximately 763,000 documents for privilege. The review team initially identified about approximately 87,000 documents as privileged, in whole or in part, which is a reasonable percentage of actual privileged documents in a working production set of this size.

3. The process that we used to identify and review privileged documents described below was consistent with industry practices. Given the volume of documents involved in the privilege review, we recommended that Altria use an experienced review firm, The Gnoêsis Group (“Gnoêsis”), which SHB has worked with in the past and which has extensive experience in conducting privilege reviews. Engaging such contract review firms is common in projects of this nature.

4. SHB exercised oversight over approximately 50 Gnoêsis contract review attorneys, all of whom were licensed and in good standing and had conducted at least one or more privilege reviews in the past. In addition, the Gnoêsis contract review attorneys had been thoroughly vetted by a Gnoêsis recruiter through a process that included an interview, a bar and grievance check and a reference check. On average, the Gnoêsis contract review attorneys had been practicing law for 20 years.

5. SHB, Altria and Arnold & Porter Kaye Scholer LLP (“A&P”), Altria’s antitrust counsel, began by conducting a one-and-a-half-day training on May 28 and 29, 2019. During the training, the Gnoêsis reviewers were provided with background about Altria, its employees, the e-vapor category, Altria’s Nu Mark subsidiary and Altria’s investment in JUUL Labs, Inc. SHB also provided training on the attorney-client privilege, work-product doctrine, and other potentially applicable privileges, reviewed dozens of exemplar documents and discussed guidelines designed to help reviewers understand and interpret the applicable privileges as applied in this particular review set. SHB also gave the reviewers guidelines on privilege law and standards that they could consult throughout their review.

6. Certain of the custodians, for example, Murray Garnick and C. Anthony Reale, had both legal and business roles at Altria—Mr. Garnick served as Altria’s General Counsel and Executive Vice President for Regulatory Affairs, while Mr. Reale served as Vice President and Associate General Counsel and later as Vice President of Strategy and Business Development. Given complexities of this nature, SHB discussed with the Gnoêsis reviewers the type of documents that would be privileged (i.e., those primarily providing legal advice) and not privileged (i.e., those providing business advice).

7. The review platform used was CV Lynx, which is owned by Technology Concepts and Designs Inc. (“TCDI”). TCDI trained the Gnoêsis reviewers on how to use CV Lynx and its various functions, including text highlighting and the use of metadata, both of which help reviewers identify documents that might involve either attorneys or legal advice.

8. As the review got underway, SHB worked alongside Altria’s in-house legal team to supervise the Gnoêsis reviewers. SHB had numerous conference calls with the Gnoêsis reviewers and provided substantive guidance on illustrative documents. SHB also established a protocol by which Gnoêsis reviewers escalated more challenging privilege calls to SHB for further consideration and/or discussion. Through this process, SHB provided guidance on thousands of documents. As a quality check, SHB performed a review of over 53,000 Gnoêsis-reviewed documents and provided feedback to reviewers as appropriate.

9. In addition, in order to facilitate a more efficient review, a technology-assisted review tool was used to cluster and batch like documents to reviewers. Reviewers had a number of additional resources available to them. For example, attorney names and privilege terms

were highlighted in each document being reviewed. Reviewers were provided with lists of outside counsel and in-house counsel.

10. SHB and Gnoêsis billed approximately 25,000 hours during the initial privilege review effort.

11. On September 19, 2019, Altria's in-house legal team notified SHB that the FTC had identified an inadvertently produced privileged document. Because the document involved Altria's general counsel and outside counsel, SHB and Altria decided to conduct additional document searches and reviews to seek to identify any other similar inadvertently produced privileged documents.

12. As part of this effort, Altria's in-house legal team identified and SHB reviewed approximately 7,000 documents. Ultimately 1,066 inadvertently produced privileged documents were clawed back that should have been withheld in their entirety or redacted.

13. After further investigation, it was determined that a large percentage of the inadvertently produced privileged documents discussed above had been marked as not privileged by a single Gnoêsis contract attorney. In light of that determination, SHB re-reviewed all additional produced documents reviewed by that Gnoêsis contract attorney, which amounted to over 20,000 documents. As a result of that review, 359 additional inadvertently produced privileged documents were identified that should have been withheld in their entirety or produced with redactions.

14. In November 2019, Altria notified SHB that certain inadvertently produced documents had been discovered, and Altria and SHB undertook a search and review to identify similar documents. As a result of that review, 168 inadvertently produced privileged

documents were identified that should have been withheld in their entirety or produced with redactions.

15. In a production of over a million documents, after a review of approximately 763,000 documents, the inadvertent production of some privileged documents is not unusual. In total, prior to the filing of the Complaint, approximately 1,600 inadvertently produced privileged documents were identified or just 0.15% of the total production.

16. After the FTC filed its Complaint, Altria notified SHB that it had discovered that certain additional privileged documents had been produced and requested that SHB conduct a broader re-review of documents that had been produced to the FTC during the Second Request as discussed below.

17. This re-review, which first focused on Second Request documents relating to the e-vapor category, was conducted by contract attorneys from UnitedLex Corporation, SHB attorneys and SHB contract attorneys with supervision by SHB, A&P and Wachtell, Lipton, Rosen & Katz (“WLRK”). Search terms were applied to generate a set of documents—approximately 210,000 in total including family members—that would be subject to the re-review.

18. Over the course of the review, outside counsel at SHB, A&P and WLRK communicated with reviewers regularly to address questions about specific documents and offer further guidance. Documents were also elevated by the reviewers for further consideration and/or discussion. SHB also conducted quality checks of samples of reviewed documents. Ultimately, 5,477 documents, privileged in whole or in part, were identified as

having been inadvertently produced, comprising 0.52% of the entire Second Request production.

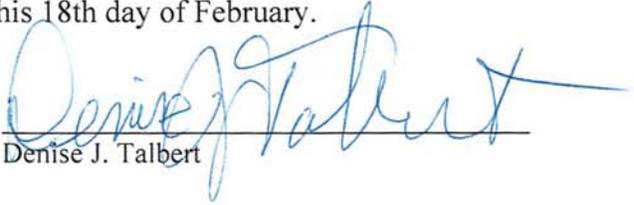
19. A similar re-review of the Second Request “non-e-vapor” documents was also conducted by contract attorneys from UnitedLex Corporation, SHB attorneys and SHB contract attorneys with supervision by SHB, A&P and WLRK. In total, more than 45,000 documents were reviewed during the non-e-vapor re-review, and 2,167 documents, or 0.2% of the total Second Request production, were identified as inadvertently produced.

* * *

20. At Altria’s direction, SHB established a system of extensive protocols, spent many hours training contract reviewers from reputable firms, exercised close supervision over those reviewers and created a mechanism to escalate difficult privilege calls. We strongly believe this was a reasonable privilege review process, one that is consistent with industry practices.

21. Ultimately, fewer than 0.9% of the documents produced in response to the Second Request were inadvertently produced, and that number includes many duplicates and email threads. In my experience with privilege reviews, errors are as inevitable as they are regrettable. Given, among other things, the large number of documents involved and the complexity of reviewing documents from custodians with dual legal and business responsibilities, this rate of inadvertently produced privileged documents was relatively low.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 18th day of February.


Denise J. Talbert

**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 OF DEBBIE FEINSTEIN

I, Debbie Feinstein, state as follows:

1. I am a Partner with the law firm Arnold & Porter Kaye Scholer LLP (“A&P”). I am one of the counsel of record for Altria Group, Inc. (“Altria”) in the above referenced matter. I also represented Altria in the Federal Trade Commission (“FTC”) investigation of Altria’s acquisition of certain voting securities of JUUL Labs, Inc.

2. In the past, I have served at the Federal Trade Commission (“FTC”) in a variety of positions. Most recently, I served as the Director of the Bureau of Competition at the Federal Trade Commission (“FTC”) from July 1, 2013 until March 3, 2017. From November 1989 to November 1991, I served as the Assistant to the Director of the Bureau of Competition and as a Commissioner’s attorney advisor.

3. In my positions at the FTC, I was involved in or oversaw dozens of merger investigations, the vast majority of which involved the FTC issuing Requests for Additional Information under the Hart-Scott-Rodino Act (“second requests”). Similarly as a private

antitrust lawyer, I have represented clients in dozens of investigations involving second requests the FTC or the Department of Justice issued.

4. Based on over 30 years of experience as an antitrust lawyer for both the government and private parties, it is my experience that parties' productions in response to second requests, given the broad nature of those productions and the time periods in which they are made, frequently contain inadvertently produced privileged materials despite the reasonable efforts of parties and their counsel.

5. The FTC's April 18, 2019 second request to Altria ("Second Request") included broad document requests related to both electronic cigarettes and combustible cigarettes. Altria ultimately produced over one million documents from dozens of custodians. Adding to the normal challenges of any privilege review in this case was that Altria's General Counsel was a custodian, which is relatively uncommon in a second request production. In addition to the usual questions about whether the General Counsel for Altria was operating in a legal or business role in any given communication, the General Counsel was also the head of Regulatory Affairs for much of the period covered by the Second Request.

6. In connection with preparing its document productions in response to the Second Request, Altria retained outside counsel specializing in discovery matters at the Shook, Hardy & Bacon ("SHB") law firm to manage a review of potentially responsive documents for privileged materials that were to be withheld from Altria's Second Request production. SHB's role in this privilege review included supervising and reviewing the work of approximately 50 attorneys employed by The Gnoêsis Group ("Gnoêsis"), which SHB retained for the Second Request privilege review. SHB, along with A&P lawyers, engaged in detailed training of the Gnoêsis reviewers and were available to answer questions as they

arose. In my experience, it is consistent with ordinary practices for a party receiving a second request to use outside counsel to manage a privilege review conducted by contract attorneys.

7. Altria made 11 rolling productions in response to the Second Request totaling over a million documents in 2019. Altria identified and claimed privilege over approximately 87,000 documents in whole or in part in the first instance.

8. On September 19, 2019, the FTC brought to our attention one document that upon review Altria determined had been inadvertently produced.¹ Altria and SHB reviewed this document and determined that it was privileged. In light of the nature of the information in the document and the individuals on the document (namely Altria's General Counsel and outside counsel), Altria undertook additional review to identify similar documents that were inadvertently produced.

9. Upon identifying additional inadvertently produced privileged materials as a result of that review, I understand that Altria and SHB determined that one particular Gnoêsis contract attorney involved in the privilege review was responsible for a disproportionate number of the inadvertently produced privileged materials identified. SHB attorneys then undertook an additional privilege re-review effort for all produced documents that attorney had reviewed. In sum, based on the FTC bringing one document to Altria's attention, Altria re-reviewed approximately 27,000 documents to determine whether other privileged documents had been inadvertently produced. Based on my experience, this was more than a reasonable response to the FTC's identification of one inadvertently produced document.

10. In the fall of 2019, as both the FTC and Altria were reviewing documents and then

¹ The FTC had previously identified one document as potentially privileged; Altria determined it was not.

preparing for investigational hearings (“IHs”), both the FTC and Altria identified inadvertently produced privileged documents. The FTC identified only a very small number; Altria took steps throughout this process to identify any inadvertently produced documents. Altria and SHB reviewed any inadvertently produced privileged documents and conducted duplicate analysis and additional searches to find documents containing similar search terms that may have been privileged and inadvertently produced. As a result of this review, Altria identified additional inadvertently disclosed privileged documents and notified the FTC that it was clawing them back.

11. It is my experience that counsel inevitably find inadvertently produced privileged documents in the course of preparing for IHs and that counsel do not undertake broad re-reviews of second request productions upon finding such documents.

12. On April 1, 2020, the FTC filed the Complaint in this case. Altria retained additional counsel at Wachtell, Lipton, Rosen & Katz (“WLRK”) to defend against the Complaint. In preparing Altria’s defense in this litigation, WLRK identified additional inadvertently produced privileged documents within the Second Request productions. Based on this discovery, Altria, in consultation with WLRK, A&P and SHB, determined in light of the number of documents identified and their nature that it would undertake a re-review effort to identify potential additional inadvertent disclosures. It notified the FTC on June 18, 2020 of its intention to do so.² Together, Altria, WLRK, A&P and SHB devised a process that involved the re-review of approximately 210,000 e-vapor related documents and more than 45,000 non-e-vapor related documents based on search terms and author and recipient information. SHB managed this privilege re-review, supervising UnitedLex contract

² In this letter, Altria also identified additional inadvertently produced privileged documents known at the time.

attorneys, SHB attorneys and SHB contract attorneys. SHB, WLRK and A&P attorneys participated in additional reviews of the work performed by the first-level reviewers. On September 10, 2020 and November 6, 2020, Altria clawed back another 5,477 (e-vapor) and 2,167 (non-e-vapor) documents, respectively, as a result of this broad re-review.

13. In the roughly four months since the completion of this broad re-review process, Altria -- both on its own and in response to documents raised by the FTC -- has identified only seven additional documents as inadvertently produced privileged materials, all from the Second Request production and most of them near-duplicates of one another.

14. Altria produced over 40,000 documents in response to Complaint Counsel's Requests for Production in this administrative litigation. Neither the FTC nor Altria has identified any inadvertently produced privileged documents, demonstrating that Altria's processes are sound.

15. In sum, Altria had no intention to waive privilege. When Altria became aware of inadvertently produced documents -- either for the 20 documents the FTC brought to its attention or when its own lawyers identified them -- Altria made substantial efforts to find other inadvertently produced documents. Those inadvertently produced privileged documents represented fewer than 0.9% of the total documents produced in response to the Second Request. That there was a small percentage of inadvertently produced privileged documents produced in response to the Second Request is not surprising given the time-constraints, size and complexity of that process.

16. On January 28, 2021, after silence on the privilege waiver issue for many months, Jennifer Milici of Complaint Counsel emailed me and other counsel for Altria demanding that "Altria immediately produce all documents that it previously sought to claw back." On

February 1, 2021, I participated in a meet-and-confer call with Ms. Milici. On that call, Ms. Milici reiterated her view that Altria had waived the privilege, suggesting a motion to the Court would be forthcoming. Asked why Complaint Counsel had not sought relief months ago, Ms. Milici stated her view that Complaint Counsel had not been under an obligation to file a motion promptly and offered no other explanation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 18, 2021



Debbie Feinstein

**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 OF ROBERT D. OWEN

1. My name is Robert D. Owen, and I am an attorney admitted to practice law in the States of New York and Illinois. I am also admitted to practice before the United States District Courts for the District of Columbia, Northern District of Illinois, and all Districts in the State of New York, among others, as well as numerous United States Courts of Appeals and the United States Supreme Court. I am Senior Counsel at Eversheds Sutherland (US) LLP. I was graduated with a B.A. from Northwestern University in 1970, and with a J.D. *cum laude* from the University of Pennsylvania Law School in 1973.

Professional History

2. I have been a commercial litigator my entire career, which began in 1973 when I joined Sullivan & Cromwell in New York as an associate. I remained there until April 1981, when I became a partner in Towne, Dolgin, Furlaud, Sawyer & Owen, also in New York. In April 1983, I formed a firm known as Owen & Fennell. In May 1987, I formed a firm known as Owen & Davis P.C., both of which were litigation boutique specialty firms. On December 1, 2001, I joined Fulbright & Jaworski LLP as a partner and later became head of that firm's New

York litigation department. On June 1, 2011, I joined Sutherland, Asbill & Brennan LLP (which became Eversheds Sutherland (US) LLP on February 1, 2017) as a litigation partner in New York, and served as that firm's New York office partner in charge for approximately five years. In 2019, I relocated to that firm's Chicago office where I have continued to litigate commercial cases.

3. In connection with my litigation career, I developed an expertise in complex discovery, with a particular focus on the field of e-discovery. Annexed to this Declaration as Appendix "A" is a copy of my professional biography from the website of Eversheds Sutherland (US) LLP.

Representative Experience With E-Discovery

4. Throughout my career, I have kept abreast of developments in state-of-the-art practices around litigation technology, including pertaining to privilege review. For example, my prior firm Owen & Davis was an early adopter of computer-assisted litigation technology. More recently, I lead Eversheds Sutherland's Litigation Technology Working Group, which is tasked with ensuring that our litigation department has adopted and uses cutting-edge litigation support technology, including technology for conducting reviews for privilege.

5. In 2003, I wrote the litigation hold policy, and devised associated processes, for a global pharmaceutical company whose litigation docket includes thousands of product liability cases in state and federal courts. I remain the senior outside member of a small team that oversees that company's e-discovery policies and processes.

6. In 2004, I wrote the litigation hold policy for a global oil company, and later authored a comprehensive e-discovery manual for that company. I have led training for that company's inside and outside lawyers on both documents.

7. In approximately 2008, I advised another major oil company on its e-discovery policies and separately, some years later, I testified at trial as an expert witness on behalf of that company on issues of document preservation.

Involvement in Federal Civil Rules Reform

8. During the past decade, parties and courts have increasingly recognized the immense costs and burdens that can accrue in modern discovery given the exploding electronic data volumes and increasing complexity of data sources. As a result, there have been efforts to update litigation rules to ease the burdens on all litigants, including in connection with issues posed by the presence of privileged documents in those enormous data sets. I have participated in and contributed to those discussions and efforts.

9. In 2010, I was asked by the founder of The Sedona Conference to co-chair “The 12th Annual Sedona Conference® on Complex Litigation: The Future of Civil Litigation: Legislative & Behavioral Changes” and to organize and oversee a brainstorming session on needed federal civil rules amendments to address the challenges of e-discovery.

10. In 2011, I was one of five defense firm lawyers invited by the federal Advisory Committee on Civil Rules to participate in the Committee’s “Mini-Conference on Preservation and Sanctions.” It was that conference that began the four-year process that led to the 2015 amendments to the Federal Rules of Civil Procedure, which addressed issues of data preservation and spoliation, relevance scope, and privilege review, among others. As part of that process, the Committee convened three all-day public hearings around the country to receive testimony regarding the proposed rules. My specific testimony focused on proposed Rule 37(e), which was intended to nationalize the law on spoliation and sanctions.

11. I was also a key member of the drafting team for written submissions made to the Committee by the Lawyers for Civil Justice, which in 2016 gave me its highest award – the Al Cortese Award – in recognition of my contributions to its core mission of civil justice fairness and reform.

12. I learned in my dealings with the Rules Committee how much care the Committee and the Judicial Conference¹ take in preparing the Notes that accompany each rule. The Notes are subject to the same review and approval process as the Rules themselves and are typically given much weight in interpreting and applying the Rules.

Electronic Discovery Institute and Judicial Education

13. In 2013, I became President of the Electronic Discovery Institute (“EDI”), a not-for-profit organization dedicated to education, leadership, service, advocacy, and research at the intersection of law and technology. I still serve in that position. EDI’s core mission is to educate the bench and bar on issues of electronic discovery. To that end, EDI runs regular meetings, seminars, and annual “Leadership Summits,” which focus on educating attendees on developments in discovery and e-discovery. The Summits are attended by leaders in the field of discovery and e-discovery, including inside counsel, outside counsel, technology vendors, and judges from state and federal courts across the United States. Annexed to this Declaration as Appendix “B” is a sample of participating organizations at the most recent Summit, held in 2020.

¹ The Judicial Conference reviews proposed rules and their associated Notes and passes them on to the United States Supreme Court for final action, subject of course to the right of Congress pursuant to the Rules Enabling Act to reject or change them. (In the case of Federal Rule of Evidence 502, because of provisions of the Rules Enabling Act, 28 U.S.C. § 2072(b), that prevented procedural rules from abridging, enlarging, or modifying any substantive right, Rule 502 was enacted into law by an act of Congress, Pub. L. 110–322, Sept. 19, 2008, 122 Stat. 3537.)

14. In 2012 and 2013, I was asked by the Federal Judicial Center (“FJC”)² to participate as faculty at the FJC’s annual “E-Discovery Seminar for Federal Judges.” When the FJC canceled its e-discovery training programs due to the 2013 budget sequestration, I led the EDI to produce, in conjunction with the FJC leadership, a similar annual training for 50 federal judges, entirely at EDI’s expense. EDI has conducted annual training for federal judges on issues of e-discovery since 2015 (with the exception of 2020, due to Covid precautions).

15. In 2015, I organized the publication by EDI of The Federal Judges’ Guide to Discovery and served as its Editor-in-Chief. EDI distributed copies to the attendees of its judicial training program and to every active federal district judge and magistrate judge in the nation.

16. In 2017, we published an updated edition of the Judges’ Guide, and I again served as Editor-in-Chief. EDI once again distributed copies to all active judges. A new edition of the Judges’ Guide is in process now under my leadership.

Professional Recognition

17. Chambers and Partners is a widely respected³ company that annually publishes guides to practicing lawyers in the United States and elsewhere. Chambers began ranking e-discovery lawyers in approximately 2010, and I was one of five lawyers ranked that year in

² From the FJC website: “The Federal Judicial Center is the research and education agency of the judicial branch of the United States Government. The Center supports the efficient, effective administration of justice and judicial independence. Its status as a separate agency within the judicial branch, its specific missions, and its specialized expertise enable it to pursue and encourage critical and careful examination of ways to improve judicial administration. The Center has no policy-making or enforcement authority; its role is to provide accurate, objective information and education and to encourage thorough and candid analysis of policies, practices, and procedures.” About the FJC | Federal Judicial Center, <https://www.fjc.gov/about> (last accessed Feb. 14, 2021).

³ “Chambers & Partners is one of the legal industry’s most prestigious rankings — and also the most notoriously difficult to crack.” THE NATIONAL LAW REVIEW, “It’s Chambers Season: What You Want to Know,” Aug. 21, 2018, <https://bit.ly/3pptpTP> (last accessed Feb. 14, 2021).

“Band 1” as a Leading Individual for “Litigation: E-Discovery” in the United States. I have been ranked in Band 1 by Chambers annually ever since, both in the United States directory and in its Global edition.

Scope of My Engagement

18. I have been asked to comment on the processes undertaken by Respondent Altria Group, Inc. (“Altria”), with respect to certain aspects of its document production in connection with the above FTC investigation that led to the captioned matter.

19. More specifically, I have been asked to provide my opinion as to the reasonableness of Altria’s processes in identifying, withholding, and/or clawing back privileged and potentially privileged documents.⁴

Materials Reviewed and Persons Interviewed

20. Through counsel, I have been provided the Federal Trade Commission (“FTC”) Complaint Counsel’s “Motion for an Order that Respondent Altria has Waived Privilege,” (“Motion”), dated February 8, 2021, the memorandum in support of the motion, and the exhibits thereto.

21. I have reviewed the FTC’s request for additional information and documentary materials, dated April 8, 2019 (“Second Request”).

22. I have also reviewed the declarations of: Kimberly D. Harlowe, Senior Director, Litigation Support & Technology, at Altria Client Services LLC (“ALCS”)⁵; Denise J. Talbert, Co-Chair of the Data & Discovery Strategies Practice Group at the law firm Shook, Hardy &

⁴ For the sake of clarity and simplicity, I use the terms “privilege” or “privileged” to describe the attorney-client privilege and/or work product doctrine protections.

⁵ ALCS is a service company of Altria.

Bacon (“SHB”); and Debbie Feinstein, Partner with the law firm Arnold & Porter Kaye Scholer LLP (“A&P”).

23. In addition to reviewing these documents, I met with inside and outside counsel for Altria in this matter, and I have interviewed Kimberly D. Harlowe of ALCS.

Summary of Opinion

24. Based on the facts made available to me, summarized below, Altria, its outside counsel, and its third-party vendor followed best practices in conducting a privilege review. Given the size and scope of the production, various complexities associated with the production as described below, and the high percentage of potentially privileged documents in the set of documents containing “hits” on the parties’ agreed search terms, it is not surprising that Altria inadvertently produced some small percentage of privileged documents.

25. In this era of exploding data volumes, courts recognize that the mere existence of even a large number of inadvertently produced privileged documents does not establish that the producing party acted unreasonably in identifying privileged documents.⁶

26. In this matter, the number of privileged documents that were inadvertently produced is neither unusual nor indicative of a lack of reasonable effort on the part of Altria. In my opinion, Altria acted reasonably in implementing precautions to avoid producing privileged documents.

⁶ *W. Penn Allegheny Health Sys. v. UPMC*, No. 2:12-cv-0692-JFC, 2013 WL 12141531, at *5 (W.D. Pa. Apr. 9, 2013) (0.9% is a “small percentage of the total produced”; “courts have been reluctant to compel disclosure even in light of disclosures of much larger percentages”); *see also Burnett v. Ford Motor Co.*, No. 3:13-cv-14207, 2015 WL 1650439, at *10 (S.D. W.Va. Apr. 14, 2015) (collecting cases).

27. In addition, in my opinion, Altria acted reasonably and promptly to address inadvertently produced privileged documents. In fact, Altria took extraordinary corrective steps when it learned that it had produced privileged documents.

Relevant Rules and Commentary

28. Federal Rule of Evidence (“FRE”) 502(b), “Inadvertent Disclosure,” states, in full: “When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”

29. The 2007 Advisory Committee Notes for FRE 502(b) set forth a list of non-determinative “guidelines,” “factors,” and “considerations” to consider in evaluating “whether inadvertent disclosure is a waiver” and whether the producing party’s “efforts” were “reasonable.”

30. These factors include:

- a. The reasonableness of precautions taken by the producing party to prevent inadvertent disclosure of privileged documents;
- b. The time taken to rectify the error in the event of a mistakenly-produced privileged document;
- c. The scope of the overall discovery and production in relation to the proportion of inadvertently-produced privileged documents, as well as the time constraints involved;
- d. The scope of the inadvertently produced documents;

- e. Whether the producing party used advanced analytical software or other technology to screen for potentially privileged documents; and
- f. The producing party's use of a record management system.

31. The Advisory Committee Notes also state that FRE 502(b) “does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.” Instead, the producing party should “follow up on any obvious indications that a protected communication or information has been produced inadvertently.”

32. Significantly, Part 3 Rule 3.31(g), which applies to “the disclosure of privileged or protected information or communications during a part 3 proceeding or during a Commission precomplaint investigation,” directly tracks the three-part test in FRE 502(b).⁷ Moreover, when the FTC amended Rule 3.31(g), effective May 1, 2009, it referenced and quoted the FRE 502(b) Advisory Committee Notes discussed above.⁸

33. The 2017 edition of the Judges' Guide of which I was Editor-in-Chief, as discussed above, describes the challenges that handling privileged material can present for parties in an era of exploding data volumes. The Judges' Guide also notes the impetus behind Rule 502(b):

As reflected in the Rulemaking and Legislative history of Rule 502, and in the Advisory Committee's Notes to the rule, Rule 502 is designed to reduce the cost of

⁷ Part 3 Rule 2.11(d), cited in Complaint Counsel's Motion, also tracks FRE 502(b).

⁸ See 16 C.F.R. Parts 3 and 4 Rules of Practice, 74 Fed. Reg. 20,207 (May 1, 2009) (“Relevant considerations concerning the reasonableness of precautions taken include the number of documents to be reviewed, the time constraints for production, whether certain advanced analytical software application and linguistic tools were used for document screening, and the implementation of an efficient pre-litigation records management system.”).

discovery by limiting the scope of waiver and eliminating the fear of broad subject matter waiver in the event of an inadvertent disclosure.

THE EDI JUDGES' GUIDE TO DISCOVERY (3d ed.), at 34.

Background and Discussion

34. In my opinion, based on my experience with the approach practitioners take to large-scale electronic document productions, and in light of the factors set forth in the Rule 502(b) Advisory Committee Notes, Altria took reasonable steps to: (1) avoid inadvertently producing privileged documents in the first instance; and (2) identify and rectify the problem when instances of inadvertent production occurred. The following facts have been conveyed to me for purposes of rendering this opinion, and I have assumed them to be true.

Reasonable Precautions to Avoid Producing Privileged Documents

35. The FTC issued its Second Request to Altria on April 8, 2019. In order to comply, I understand that Altria ran search terms across several million documents to identify potentially responsive documents collected from 40 custodians, their predecessors, and central files. I further understand that Altria identified more than 1,000,000 potentially responsive documents through its search, and then ran additional search terms across that population to identify potentially privileged documents. That search yielded more than 700,000 potentially privileged documents.

36. In identifying potentially privileged documents, Altria “clustered” documents together and highlighted certain privilege filter terms. Those terms included the names of in-house counsel and the names of outside counsel.

37. Clustering is a method used to group similar documents together to reduce errors (such as inconsistent review designations) that can arise when multiple reviewers are engaged in a large review. In this case, Altria clustered documents that generated direct hits on privilege

filter terms; attachments and emails were kept together to ensure the appropriate context for the reviewers. From a technical standpoint, the clustering process used latent semantic indexing (“LSI”). LSI is a technique in natural language processing that identifies patterns and relationships between terms based on their co-occurrence in the documents.

38. As is typical of document reviews and productions of this scope, SHB retained a specialized discovery vendor, The Gnoêsis Group (“Gnoêsis”), to assist with the review of the more than 700,000 potentially privileged documents.

39. Gnoêsis employed a team of approximately 50 document review attorneys to undertake the privilege review. I understand that all of the reviewers on this project had previously worked for Gnoêsis and/or had significant document review experience. I further understand that Gnoêsis vets its attorneys through an interview, bar and grievance check, and reference check. For the Altria review, the average Gnoêsis attorney had approximately 20 years of legal experience, including with document reviews. In addition, the Gnoêsis Project Manager who oversaw the Altria project is a Certified E-Discovery Specialist with 10 years of experience managing document review projects, including several projects with between 50 and 110 reviewers.

40. The approximately 50 Gnoêsis attorneys were located at three physical locations: Cleveland, OH, Indianapolis, IN, and Columbus, OH; all locations had at least one team lead on-site. SHB’s attorneys, with involvement of Altria’s antitrust counsel at A&P, provided training to the Gnoêsis attorneys prior to the beginning of the review. The training consisted of a presentation covering an overview of the case, background about Altria, a chronology of the subject transaction, privilege guidelines, and a large number of exemplar documents. Among other things, the training highlighted the complexity resulting from the roles of custodians,

including Altria's General Counsel (who also became its head of Regulatory Affairs during the period covered by the documents at issue), who had legal and business roles in the company. The Gnoêsis attorneys were also provided with a glossary of names (including those of in-house and outside counsel) and a guide for privilege law and standards.

41. The review was conducted in CV Lynx, a tool owned by another vendor, Technology Concepts and Design Inc. ("TCDI"). Representatives from TCDI were on-site at all of the Gnoêsis review sites for the training. TCDI provided the Gnoêsis attorneys with an overview of the software and addressed individual reviewer questions related to the CV Lynx software. The Gnoêsis attorneys used dual monitors and were taught how to set up the review to have the metadata and text highlighting on one screen and the image of the document on the other, to optimize the usage of the tools made available by SHB and TCDI. Attorney names and privilege terms were highlighted on each document being reviewed.

42. During the review, between six and eight Gnoêsis attorneys acted as in-person "quality control," or "QC," reviewers for the larger group. The Gnoêsis QC reviewers, in turn, forwarded questions to SHB as they arose and had frequent calls with SHB to discuss questions and concerns with the review. In addition, from the last week of May through the middle of August 2019, several SHB attorneys conducted their own QC review of the potential production set. In total, the SHB QC review consisted of approximately 53,000 documents from batches that were generated from a sampling of documents that had been reviewed by the Gnoêsis attorneys.

43. In my opinion, the measures taken by Altria during its privilege review were consistent with current best practices, and constituted reasonable precautions to avoid the inadvertent production of privileged documents. Those measures included utilizing high-quality

technology, establishing a multi-layer review and quality-control system, and employing well-trained and experienced attorneys at all levels of the review.

44. Between July and October 2019, Altria produced to the FTC, on a rolling basis, the documents that it had identified as potentially responsive and not privileged. It is my understanding that Altria typically attempts to avoid producing documents on a rolling basis and, when it does produce on a rolling basis, it tries to prioritize producing documents from the custodians whose files are less likely to contain privileged documents and leave until later the custodian files more likely to have privileged documents. Here, on the other hand, the FTC staff identified certain priority custodians (including Altria's CEO and CFO, both of whom regularly communicated with Altria's General Counsel), and Altria collected and produced documents from those custodians first.

45. As noted, more than 700,000 documents generated hits for potentially privileged search terms. Altria claimed approximately 87,000 of those documents as privileged, either in whole or in part. Nonetheless, in light of the large scope of the production and the extremely high percentage (>70%) of potentially privileged documents within that production set, and notwithstanding Altria's reasonable precautions, I would expect that some number of privileged documents would be inadvertently produced.

46. FRE 502(b) and comparable civil rules provisions, including Federal Rule of Civil Procedure 26(b)(5), exist precisely because experience teaches that any human-engineered system, no matter how well-constructed, is imperfect.

Reasonable Measures to Identify and Rectify the Problem

47. As the commentary recognizes, the applicable rules do not require the producing party to conduct a re-review of the production any time a privileged document is identified. Nor

is it common practice to do so. Based on the facts available to me, Altria acted reasonably when it became aware of potentially privileged documents it had produced to the FTC. In fact, in some respects, Altria took extraordinary measures, beyond what the Rules require, to address the problem of inadvertently produced privileged documents.

48. On August 28, 2019, the FTC identified one document from Altria's production as potentially privileged. Altria determined that document was not privileged, so Altria did not claw it back.

49. Then, on September 19, 2019, the FTC identified a second document as potentially privileged. Altria determined that the second document was, in fact, privileged. Altria clawed the document back the next day, along with a duplicate of the privileged document.

50. Upon learning of the inadvertently produced privileged document identified by the FTC, Altria took two significant remedial measures.

51. Altria first used search terms and the names of the attorneys involved to identify documents similar to the privileged document. Based, in part, on the results of that analysis, Altria then identified all documents reviewed by a particular Gnoêsis reviewer who appeared to have misidentified a higher percentage of privileged documents during the initial review than the other 50 Gnoêsis reviewers. SHB conducted a re-review of the approximately 27,000 documents generated by those two searches. In total, and beginning just four days after learning of the single privileged document, Altria clawed back approximately 1,400⁹ privileged documents.

52. In sum, when Altria learned of a single inadvertently produced document, it re-reviewed approximately 27,000 additional documents to identify and then rectify additional mistakes. In my opinion, Altria's efforts were more than reasonable under the circumstances, and

⁹ This is inclusive of documents Altria clawed back in full and in part.

in harmony with the FRE 502(b) Committee Notes' guidance. Although this example is, in my view, one of the most compelling instances of Altria's remedial measures, it is indicative of its practices in this matter more generally.

53. From September 23, 2019, when Altria identified privileged documents as inadvertently produced, until the filing of the FTC's Complaint on April 1, 2020, the FTC identified approximately 15 additional potentially privileged documents and/or redaction mistakes in Altria's production. As a result of the FTC's notifications, combined with additional searches by A&P in conjunction with investigational hearings that took place near the end of 2019, Altria identified and clawed back approximately 160 privileged documents.¹⁰ In my opinion, and based on the facts I have been provided, Altria acted reasonably and promptly in identifying and then clawing back these documents.

54. By this time, of the total production of over 1,000,000 documents, Altria clawed back, in whole or in part, approximately 1,600 privileged documents, or approximately 0.15% of the total production.

The 2020 Re-Review

55. Given the large number of produced documents, the FTC's prioritization schedule, complexities of the review, and the very high number and percentage of potentially privileged documents identified by Altria prior to its production, the total number of documents clawed back by Altria is relatively small.

¹⁰ This is inclusive of documents clawed back in full and in part.

56. Furthermore, in my opinion and experience, the small proportion of clawed back documents did not justify or require a wholesale re-review.¹¹

57. Nonetheless, on June 18, 2020, after Altria's trial counsel identified certain additional inadvertently produced documents in the course of preparing Altria's defense, Altria advised Complaint Counsel that it would undertake a re-review for privileged documents.

58. Although, in my view, Altria did not have an independent obligation to conduct a re-review, the fact that Altria did so is consistent with its pattern of going "above and beyond" its obligations to prevent or rectify the inadvertent disclosure of privileged documents.

59. The results of the 2020 re-review confirmed the effectiveness of Altria's prior efforts to maintain privilege: Altria identified an additional 7,644¹² inadvertently produced privileged documents. Despite the re-review uncovering these documents, the percentage of inadvertently produced privileged documents discovered in the entire production remained quite low, at less than 0.9%.

60. Furthermore, neither Complaint Counsel nor Altria has identified any privileged documents inadvertently produced in response to Complaint Counsel's Requests for Production in this administrative matter. This indicates that it was the breadth and complexities of the Second Request review that led to the inadvertent production of a small percentage of privileged documents.

¹¹ This is also consistent with the FRE 502(b) Committee Notes, quoted above, which state that FRE 502(b) "does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake."

¹² This number includes documents Altria clawed back in full and in part. Altria has subsequently clawed back a total of seven additional documents.

Conclusion

61. In my opinion, these facts demonstrate that:
- a. Altria acted reasonably and consistent with best practices to implement precautions to avoid producing privileged documents; and
 - b. Altria acted reasonably and promptly to address inadvertently produced privileged documents.

Date: February 18, 2021



Robert D. Owen

APPENDIX

A

ATTORNEY BIOGRAPHY

EVERSHEDS
SUTHERLAND**Robert D. Owen**Senior Counsel
New YorkP: +1.212.389.5090
E: robertowen@eversheds-sutherland.com**Education**J.D., *cum laude*, University of
Pennsylvania Law School
B.A., Northwestern University**Bar Admissions**New York
Illinois**Background**

Bob Owen has decades of commercial litigation experience in New York, Illinois and around the country. A nationally recognized adviser to financial services, energy and technology companies, Bob is known for efficient, creative and early dispute resolution. He has handled hundreds of cases before federal and state courts and arbitration panels throughout the United States. His accomplishments as a trial lawyer are recognized by the National Institute of Trial Advocacy which has invited him to teach trial skills at its flagship national program in Boulder, Colorado (seven times) and at many of its regional programs.

Bob is a nationally recognized authority in e-discovery, managing the costs and risks that e-discovery now adds to the litigation calculus. Praised by *Acritas* for being "extremely trustworthy" and having a "very high level" of experience, *Chambers* consistently rates him as one of six first rank leading individuals in e-discovery nationally. *Chambers* also reports that he "commands very high respect" and is "*clearly a leader in the field*" of e-discovery" who is "revered by his clients as 'a visionary whose knowledge...of e-discovery is top tier'" and is "recognized as 'a seasoned litigator who has the unique perspective of being both skilled in the law and in technology.'" In addition, he is president of the non-profit Electronic Discovery Institute and a member of *Bloomberg Law's* Litigation Innovation Board, which advises Bloomberg on the company's forthcoming litigation and analytics solutions.

Experience

- Secured a zero-dollar settlement for a consumer goods manufacturer in multiple statewide consumer fraud class actions.
- Defends a New York-based financial services firm against a \$100 million bankruptcy-related claim and other litigation.
- Settled favorably a breach of contract case as lead jury trial counsel for a global telecom company.
- Represents a financial services company in New York state court regarding a fraudulent conveyance claim.

Awards

- Recognized as a stand-out lawyer by *Acritas Stars: Independently Rated Lawyers (2019-2020)*

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- Recognized by *Chambers Global: World's Leading Lawyers for Business* as a Leading Individual nationally in the area of Litigation: eDiscovery, Band 1 (2010-2020)
- Recognized by *Chambers USA: America's Leading Lawyers for Business* as a Leading Individual nationally in the area of Litigation: eDiscovery, Band 1 (2009-2020)

Professional Activities

- President, Electronic Discovery Institute (EDI)
- Board Member, Advisory Board of the Georgetown Law Advanced eDiscovery Institute
- Conference co-chair, The Sedona Conference Complex Litigation Conference on "The Future of Civil Litigation," Phoenix (April 8-9, 2010)
- Conference Chairman, The Masters Conference: "Security, Privacy and Compliance Within Corporate Litigation," Washington, D.C. (October 3-5, 2011)
- Member, Editorial Advisory Board, *Law Technology News*, American Law Media publication (2010 to present)
- Senior Contributing Editor, Working Group 1 (Managing Information and Records in the Electronic Age), The Sedona Conference
- Member, New York City Bar Association
- Member, Federal Bar Council (Second Circuit)
- Member, Litigation Advisory Board for Bloomberg Law

Articles

- A Look At Spoliation Risk In The 11th Circ., By The Numbers (December 16, 2020)
Law360
- Tackling Spoliation Risk with Artificial Intelligence (Fall 2020)
ACC Georgia Newsletter
- US Cybersecurity and Data Privacy review and update: Looking back on 2019 and planning ahead for 2020 (February 4, 2020)
In collaboration with Eversheds Sutherland attorneys [Paula Barrett](#), [Jake McQuitty](#), [Craig Rogers](#), [Jennifer Van Dale](#), [Rhys McWhirter](#) and [David Cook](#).
- The state of the states: Under the national radar, state discovery rules are changing, too (Fall 2019)
Partnering Perspectives
- The perils of direct marketing: Why cannabis industry participants should undergo a TCPA/ADA compliance checkup (September 20, 2019)
Cannabis Business Times

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- Cybersecurity and Data Privacy review and update: Looking back on 2018 and planning ahead for 2019 (March 1, 2019)
 - 2017 Cybersecurity Litigation Year in Review and Forecasts (December 21, 2017)
New York Law Journal
 - The Triggers for Work Product Protection and the Duty to Preserve Are Not Identical (Fall 2017)
Partnering Perspectives
 - Skin in the Game: A Proposed Co-Pay Requirement for Discovery-Requesting Parties (October 6, 2017)
Washington Legal Foundation – Legal Backgrounder
 - Federal Court's Inherent Authority Revisited (June 2017)
Captive Insurance Company Reports
 - Rule 41 - A Hacking by Any Other Name... (Spring 2017)
Partnering Perspectives
 - Are You Prepared for New York State's Cybersecurity Requirements for Financial Services Companies? (November 14, 2016)
New York Law Journal
 - 2015 Amendments to the Federal Rules of Civil Procedure (November 24, 2015)
 - Safe Harbor Ruling: A Digital Pearl Harbor? (October 12, 2015)
Legal Tech News
 - The E-Discovery Institute Announces Leadership Summit and New Judges' Training Symposium (September 18, 2015)
Legal Tech News
 - Navigating Data Loss at Trial (June 16, 2015)
InsideCounsel
 - Brief of Amicus Curiae Lawyers For Civil Justice in Support of Appellants (June 2015)
 - E-Discovery Institute Unveils 2014 Summit (August 7, 2014)
Law Technology News
 - Resolved: A National Preservation Rule Must Require Bad Faith Before Sanctions Can Be Ordered (March 11, 2014)
Bloomberg BNA Digital Discovery & e-Evidence
 - Book Review: 'Spoliation of Evidence' (October 14, 2013)
Law Technology News
 - SEC's Proposed 'Conflict' Resolution (July 10, 2012)
Law360

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- Reset to Neutral (December 1, 2011)
Law Technology News
 - Restoring the Balance: An Expanded Proposal Concerning Preservation (October 2011)
Letter to U.S. Judicial Conference's Advisory Committee on Civil Rules - Published in BNA
 - The Plausibility of Pleadings After Twombly and Iqbal (Fall 2010)
The Sedona Conference Journal, Vol. 11
 - The Sedona Conference Commentary on Inactive Information Sources (July 9, 2009)
The Sedona Conference ® Working Group Series

Presentations

- Disclosure and Discovery, including E-Discovery, and Litigating Cases Efficiently (May 4, 2017)
NYSBA Commercial Litigation Academy 2017
- Game Over: Ending Custodian-Based Over-Preservation using 26(b)(1) & 37(e) (April 28, 2017)
EDI Spring Meeting
- Top Ten Tools for Rules-Based Advocacy (February 2, 2017)
LegalTech
- Rules Update – Key Issues for In-House Counsel (January 30, 2017)
Corporate Counsel Roundtable
- Federal Judges' Guide to Discovery Webinar Series (May 4, 2016)
Electronic Discovery Institute
- Mitigating Risk with Information Governance and Insight (February 3, 2016)
LegalTech New York 2016 Conference
- Webcast: *Winter Is Coming* and So Are Changes to the Federal Rules of Civil Procedure (e-Discovery) (December 2, 2015)
- Webcast: *Once More Unto the Breach*: Litigating the Aftermath of Cyberknives' Invasions (November 17, 2015)
- Video: FRCP Amendments: Fresh Approaches to Scope, Sanctions and More? (October 10, 2015)
Defense Research Institute Annual Meeting
- *Once More Unto the Breach*: Litigating the Aftermath of Cyberknives' Invasions (September 28, 2015)
BlueCross BlueShield Association Legal Department Cooperative Cybersecurity Summit
- Preservation and Cooperation (September 17, 2015)
Zapproved Conference on Preservation Excellence

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- Webcast: Government Records: Confidentiality, Access, and Electronic Records (June 23, 2015)
American Law Institute
 - Webcast: Real Life "Minority Report"? - Insurers Grapple With Big Data's Implications (January 13, 2015)
 - Cybercrime: Issues in the Era of BitCoin & Data Breach (October 17, 2014)
EDI Leadership Summit
 - Confidentiality, Access & Use of Electronic Records (June 4, 2014)
Judicial Records Forum
 - The Sedona Conference Institute, Houston, TX (March 13, 2014)
 - The Great Debate: Is the Harbor Any Safer Under Proposed New Federal Rule 37(e)? (November 21-22, 2013)
Georgetown Law Advanced eDiscovery Institute
 - At the Crossroads of Bad Faith and Negligence: How Sekisui Shows We Need New Rule 37(e) (September 18, 2013)
The Masters Conference
 - Judges Meet the General Counsel (May 1, 2013)
West LegalEdcenter and Electronic Discovery Institute Consortium on Litigation, Information Law and E-Discovery
 - Fostering a Culture of Compliance and Defending Preservation (April 29, 2013)
New York Mini-Conference on Preservation Excellence
 - Public Access to Governmental Electronic Records (February 8, 2013)
2013 NAGARA Judicial Records Forum
 - What's Next in eDiscovery? Looking Beyond the Court Decisions (December 7, 2012)
Advanced E-Discovery Institute
 - Discovery and E-Discovery (October 16, 2012)
Shell Oil Global Litigation Learning Event
 - The Masters Conference (October 8, 2012)
 - What happened in the case law this year, and why did it happen so fast? (May 18, 2012)
American Bar Association's Sixth Annual National Institute on E-Discovery
 - Four Perspectives on Preservation and Proportionality (May 17, 2012)
Legal Hold Pro
 - The Great Preservation Debate (March 28, 2012)
International Legal Technology Association

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- The Preservation Games: How We Got Here and What You Can Do (March 20, 2012)
The Masters Series
 - A Momentous Moment in Fed. R. Civ. P. History: Will the Preservation Beast Be Tamed?
(February 23, 2012)
Houston, Texas
 - The Great Preservation Debate: Where It Is Today and Where It Might Go (February 7, 2012)
Bloomberg BNA Webinar
 - E-discovery Preservation: Reset to Neutral (December 5, 2011)
Law Technology Now Podcast
 - The Preservation Challenge and Some Proposed Solutions (December 2, 2011)
Lawyers for Civil Justice 2011 Membership Meeting
 - Cloud Computing (November 10, 2011)
West LegalEd Center - Electronic Discovery and Records Retention Conference
 - Mini-conference on Preservation and Sanctions (September 9, 2011)
U.S. Judicial Conference's Advisory Committee on Civil Rules
 - Preservation: Costs, Burdens, and Solutions - EDI Annual Conference (September 7, 2011)
The Electronic Discovery Institute
 - The Social Network: Strategies for Coping with Social Media in Litigation (August 11, 2011)
Houston ACC Best Practices Committee Meeting
 - The Future of E-discovery (February 2, 2010)
Legal Tech
 - Guest Lecturer (Fall 2008 and 2009)
Columbia Law School
 - The Recent Qualcomm E-Discovery Sanctions Order and Its Ramifications (January 2008)
The Sedona Conference's Voices From the Desert Program Webinar
 - What's in Your Closet? Discovery of Disaster Recovery, Legacy and Other 'Inaccessible' Data
(June 26, 2007)
DRI Audio Seminar

Books

- The Federal Judges' Guide to Discovery (December 2015)
Electronic Discovery Institute
- Chapter 7: Navigating Data Loss at Trial (© 2015 American Bar Association)
From the Trenches: Strategies and Tips from 21 of the Nation's Top Trial Lawyers

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Court Admissions

- U.S. Supreme Court
- U.S. Tax Court
- U.S. Court of Appeals for the District of Columbia
- U.S. Court of Appeals for the Second Circuit
- U.S. Court of Appeals for the Fourth Circuit
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Seventh Circuit
- U.S. Court of Appeals for the Eighth Circuit
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. District Court for the District of Columbia
- U.S. District Court for the Central District of Illinois
- U.S. District Court for the Northern District of Illinois
- U.S. District Court for the District of Nebraska
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Southern District of New York
- U.S. District Court for the Western District of New York
- U.S. District Court for the Northern District of Oklahoma
- U.S. District Court for the Eastern District of Texas
- U.S. District Court for the Western District of Texas

APPENDIX

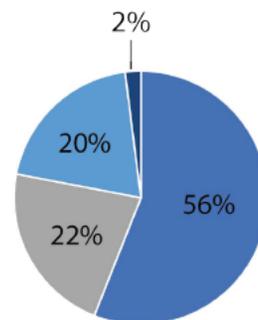
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Attendance at the EDI Leadership Summit is made up of the industry's leading experts and professionals. Almost half of all attendees are active corporate counsel in the most influential organizations in the world.



CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2021, I served the foregoing document via email on:

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Federal Trade Commission
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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 served a copy of the foregoing document via email upon the following:

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s/ Adam Sowlati

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CERTIFICATE OF ELECTRONIC FILING

I hereby 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 18, 2021

s/ Adam Sowlati

Adam Sowlati
Counsel for Altria Group, Inc.