

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

In the Matter of)
)
Altria Group, Inc.,)
a corporation,)
)
and)
)
JUUL Labs, Inc.)
a corporation,)
)
Respondents.)

Docket No. 9393

**NON-PARTY PHILIP MORRIS INTERNATIONAL INC.'S
SECOND MOTION FOR *IN CAMERA* TREATMENT**

Counsel for non-party Philip Morris International Inc. ("PMI"), pursuant to Rule 3.45(b) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), respectfully moves this Court for *in camera* treatment for five years for one additional document, RX2080. Respondents Altria Group, Inc. and JUUL Labs, Inc. (together, "Respondents") have informed PMI that (1) Respondents intend to move the Court to admit RX2080 as an exhibit and (2) Complaint Counsel does not object to the document's admission. The parties do not oppose this motion for *in camera* treatment of RX2080.

Respectfully submitted,

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DATED: June 22, 2021

Counsel for Non-Party PMI

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

In the Matter of)	
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Altria Group, Inc.,)	
a corporation,)	Docket No. 9393
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and)	
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JUUL Labs, Inc.)	
a corporation,)	
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Respondents.)	

**NON-PARTY PHILIP MORRIS INTERNATIONAL INC.'S MEMORANDUM OF LAW
 IN SUPPORT OF ITS SECOND MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission, 16 C.F.R. § 3.45(b), non-party Philip Morris International Inc. ("PMI") respectfully submits this Memorandum of Law in support of its second motion for *in camera* treatment for RX2080, described in the chart below, for five years.

Exhibit No.	Beginning Bates	Ending Bates	Date
RX2080	PMI-FTC-000041482	PMI-FTC-000041517	7/31/2019

RX2080 is attached as Attachment A.

During the *in camera* session of the witness testimony of Martin King, Chief Executive Officer of Philip Morris International America, Respondents sought to introduce into evidence RX2080. Respondents and Complaint Counsel had not previously notified PMI that RX2080 was a proposed trial exhibit. Respondents have since informed PMI that (1) Respondents intend to

move the Court to admit RX2080 as an exhibit and (2) Complaint Counsel does not object to the document's admission. The parties do not oppose this motion for *in camera* treatment of RX2080.

As with other documents that PMI produced, RX2080 was marked at the time of production as "Confidential" and is subject to the Protective Order in this matter.

RX2080 contains competitively sensitive, non-public confidential business information that, if it were to become part of the public record, would significantly harm PMI's ability to compete in the smoke-free product industry or otherwise likely cause serious injury to PMI. For the reasons discussed in this memorandum of law in support of PMI's motion, PMI respectfully requests that this Court afford RX2080 *in camera* treatment for a period of five years. In support of the motion, PMI relies on the Declaration of Carrie Freed, Assistant General Counsel, PMI Global Services Inc. ("Freed Declaration," attached as Attachment B), which provides additional details regarding RX2080.

I. RX2080 Merits *In Camera* Treatment

In camera treatment of material is appropriate when, as in this case, the material's "public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting" such treatment. 16 C.F.R. § 3.45(b). *In camera* treatment is appropriate if the "information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). The FTC and this Court have repeatedly recognized the necessity of granting *in camera* treatment to business records, *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 WL 65882, at *2, *4 (Mar. 14, 1961) ("[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible"), and that "[t]he likely loss of business advantages is a good example of a

clearly defined, serious injury," *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138, at *6 (Sept. 19, 2000).

Courts may consider the following factors when analyzing the secrecy and materiality standard under *In re General Foods*: (1) the extent to which information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others (Factors 1-3 are referred to as the "Secrecy Factors"; factors 4-6 are referred to as the "Materiality Factors"). *In re Bristol-Myers Co.*, 1977 WL 189054, at *2 (Nov. 11, 1977). Each of these factors weighs in favor of *in camera* treatment of RX2080.

In addition, PMI's status as a third party is relevant to the *in camera* treatment of the materials sought. Non-parties deserve "special solicitude" when requesting *in camera* treatment for confidential information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984) ("As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests."). Here, PMI is a non-party to this matter and produced RX2080 pursuant to a third-party subpoena and under the protection of the Protective Order issued by this Court. Therefore, PMI's non-party status weighs in favor of granting *in camera* treatment to RX2080.

A. The Secrecy Factors Support *In Camera* Treatment for RX2080

PMI has taken all reasonable steps to protect the confidential information contained in RX2080, which was produced pursuant to compulsory process and under the terms of the Protective Order in this matter. When PMI produced its documents in this matter, it took steps to ensure and maintain confidentiality by conducting a confidentiality review of each document and designating, as appropriate, documents it produced as "Confidential" pursuant to the Protective Order. PMI produced RX2080 and other confidential documents with the understanding that they would be kept confidential pursuant to the Protective Order entered in this matter.

Furthermore, PMI takes substantial measures to guard the secrecy of the sensitive information contained in RX2080 and its other documents by limiting the information's dissemination and taking every reasonable step to protect its confidentiality. As described in the Freed Declaration, PMI has a comprehensive information security policy protecting the information contained in RX2080, which includes policies regarding passwords, physical access, and network security. In addition, the information contained in RX2080 is only known to a limited number of PMI employees.

B. The Materiality Factors Also Support *In Camera* Treatment for RX2080

As to the materiality-related factors enumerated in *Bristol-Myers*, the information PMI is seeking *in camera* treatment for contained in RX2080 is valuable, secret, and of competitive significance to PMI's business. PMI has invested significant resources into developing and commercializing smoke-free products. PMI has publicly announced its goal "to deliver a smoke-free future by focusing its resources on developing, scientifically substantiating and responsibly commercializing smoke-free products that are less harmful than smoking, with the aim of

completely replacing cigarettes as soon as possible."¹ To achieve this goal, PMI has invested in researching and developing innovative products and analyzing how to commercialize these products. RX2080 includes proprietary and highly confidential information about these products; product testing and results of those tests; details regarding PMI's product formulation; and comparative analyses of competing products. The disclosure of this information would adversely affect PMI's competitive position by unfairly equipping competitors and other third parties with the competitively sensitive information reflected in RX2080.

The statements and information contained in RX2080 regarding on-going product development, formulations, results of testing, and recommendations, if made public, would result in significant competitive injury to PMI, including losing significant business advantages. As this Court has recognized, "the likely loss of business advantages is a good example of a 'clearly defined, serious injury.'" *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999). If this information is made public, competitors would learn PMI's product formulations, plans and market strategies, including self-assessed strengths and weaknesses, allowing competitors to unfairly compete against PMI.

C. *In Camera* Protection for RX2080 Should Extend for Five Years

Given the highly sensitive and technical nature of the information reflected in RX2080, including competitively significant information that PMI continues to use today, PMI requests that RX2080 be given *in camera* treatment for five years. As discussed in the Freed Declaration, the information contained in RX2080 is highly sensitive and will remain so for the foreseeable future. Protection for five years is appropriate to ensure that PMI is not competitively injured. *See In re*

¹ See PMI's Statement of Purpose, Excerpt from 2020 Proxy Statement, available at: <https://www.pmi.com/statement-of-purpose>.

Otto Bock Healthcare N. Am., Inc., No. 9378, 2018 FTC LEXIS 111, at *11 (July 6, 2018) (granting *in camera* treatment for five years from time of order to non-party's ordinary course business documents). *In camera* treatment for five years is also consistent with the duration that this Court has already granted for other PMI materials accorded *in camera* treatment pursuant to the May 26, 2021 and June 7, 2021 Orders in this matter.

II. Conclusion

For the reasons set forth above and in the accompanying Freed Declaration, PMI respectfully requests that this Court grant *in camera* treatment for five years for RX2080.

Respectfully submitted,

/s Peter J. Mucchetti

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Counsel for Non-Party PMI

Attachment A

(RX2080 - Withheld In Its Entirety From Public Version)

Attachment B

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of)	
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)	

DECLARATION OF CARRIE FREED IN SUPPORT OF NON-PARTY PHILIP MORRIS INTERNATIONAL INC.'S SECOND MOTION FOR *IN CAMERA* TREATMENT

I, Carrie Freed, hereby declare as follows:

1. I am an Assistant General Counsel for non-party PMI Global Services Inc. ("PMI Global Services"), an affiliate of non-party Philip Morris International Inc. ("PMI"), and I submit this declaration in support of PMI's Second Motion for *In Camera* Treatment (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.
2. I am familiar with the documents and testimony that PMI produced in the above-captioned matter in response to the subpoenas from the Federal Trade Commission ("FTC") and respondent Altria Group, Inc. ("Altria"), including the document that is the subject of the Motion (RX2080). Given my position at PMI Global Services and my knowledge of PMI's business, I am personally familiar with the contents of RX2080, the level of confidentiality

associated with the information contained therein, and the competitive significance of this information to PMI. Based on my review of RX2080 and my knowledge of PMI's business, I submit that the disclosure of this document for which PMI is seeking *in camera* treatment to the public, PMI's competitors, and PMI's potential business partners would cause serious injury to PMI.

3. PMI is an international tobacco company engaged in the manufacture and sale of cigarettes, as well as non-combusted tobacco products, associated electronic devices and accessories, and other nicotine-containing products. As of 2016, PMI made a public statement that it had shifted its focus and purpose "to deliver a smoke-free future by focusing its resources on developing, scientifically substantiating and responsibly commercializing smoke-free products that are less harmful than smoking, with the aim of completely replacing cigarettes as soon as possible."²
4. In September 2019, Altria's subsidiary, Philip Morris USA Inc. ("PM USA"), began commercializing PMI's innovative tobacco heating device, IQOS, and associated consumables (HeatSticks), under a license in the US. IQOS heats, but does not burn, tobacco. PMI's IQOS device and its consumables have received marketing authorization from the US Food and Drug Administration ("FDA") under the premarket tobacco product application ("PMTA") pathway. The FDA has also authorized the marketing of a version of PMI's IQOS device and its consumables as a Modified Risk Tobacco Product ("MRTP"), finding that an exposure modification order for these products is appropriate to promote the public health. IQOS is the first product of its kind to receive these FDA authorizations.

² See PMI's Statement of Purpose, Excerpt from 2020 Proxy Statement, available at <https://www.pmi.com/statement-of-purpose>.

Other than the commercialization of its IQOS devices and consumables through the license with Altria, PMI does not currently have any other products commercialized in the US.

5. As of 2020, PMI began the international commercialization of the latest version of its electronic cigarette, which is marketed under the brand-name IQOS VEEV. IQOS VEEV uses a proprietary technology known as MESH to heat pre-filled pods containing nicotine. While currently commercialized in select international markets, as part of its aim to deliver a smoke-free future, PMI intends to expand its commercialization efforts, including at some point in the future seeking the necessary US FDA authorizations to commercialize IQOS VEEV in the US.
6. Given PMI's focus on smoke-free tobacco and nicotine-containing products, information pertaining to PMI's smoke-free product development and commercialization is critically important to PMI. Because other firms compete with respect to these or similar products, both internationally and in the US, PMI's strategic information pertaining to PMI's smoke-free products are highly commercially sensitive. Given the time it takes to research, develop, determine a plan for distribution, and receive authorization to commercialize these products, PMI's confidential information regarding its smoke-free products and the industry will remain sensitive for several years.
7. Complaint and Respondents' counsel had previously informed PMI that they intended to use certain documents that PMI produced in response to a third-party subpoena at the administrative hearing in this matter. PMI filed, and this Court granted, PMI's Motion for *In Camera* Treatment³ and PMI's Renewed Motion for *In Camera* Treatment.⁴ On June 16,

³ PMI's Motion for *In Camera* Treatment was filed on May 7, 2021, and granted in part and denied without prejudice in part on May 26, 2021.

⁴ PMI's Renewed Motion for *In Camera* Treatment was filed on June 4, 2021, and granted on June 7, 2021.

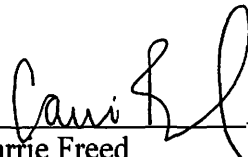
2021 Respondents' counsel informed PMI that they intend to use an additional document not on their original proposed exhibit list, RX2080, and therefore, was not subject to PMI's motion for *in camera* treatment or renewed motion. On June 20, 2021 Respondents' counsel informed PMI that Complaint Counsel did not object to the document's admission. RX2080 contains sensitive, confidential, and material business information, the public disclosure of which would cause PMI significant competitive harm. As described in the Motion and Memorandum of Law in Support of the Motion, PMI seeks *in camera* treatment for a period of five years for RX2080.

8. PMI takes significant measures to ensure the secrecy of its confidential information. PMI's document security policies, which govern RX2080, include, but are not limited to, policies regarding user access to PMI's network; computer passwords; physical controls; and network security. PMI has taken and continues to take steps to limit the commercially sensitive information contained in RX2080 to PMI senior management and select employees. To the best of my knowledge, the information in RX2080 is not broadly known throughout PMI. Moreover, RX2080 was designated Confidential pursuant to the Protective Order entered in this matter.
9. Based on my review, RX2080 contains sensitive confidential information, the disclosure of which would significantly harm PMI. RX2080 contains confidential information of strategic issues pertaining to PMI's electronic cigarettes, PMI's non-public development plans, information about competitively sensitive product formulations, and testing procedures and results for PMI's electronic cigarettes.
10. If the commercial sensitive and secret information contained in RX2080 were disclosed to the public, PMI would face serious competitive injury. Disclosure of PMI's product

formulation, development plans, testing results, and analysis of competing products would undermine and otherwise hinder PMI's ability to fairly compete. Other market participants could use this information to their advantage and to the competitive detriment of PMI.

11. To the best of my knowledge, the competitively sensitive information contained in RX2080 is not known to competitors or the general public and remains confidential within PMI. For the reasons described above, PMI requests that RX2080 receive *in camera* treatment for five years.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 22, 2021.



Carrie Freed

**UNITED STATES OF AMERICA
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_____)

Docket No. 9393

**[PROPOSED] ORDER GRANTING NON-PARTY PHILIP MORRIS
INTERNATIONAL INC.'S SECOND MOTION FOR *IN CAMERA* TREATMENT**

Having considered non-party Philip Morris International Inc.'s ("PMI") Second Motion for *in camera* treatment, and the supporting memorandum, PMI's motion is granted. It is hereby **ORDERED** that RX2080 is to be provided *in camera* treatment for five years from the date of this order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing document to be served via email upon the following:

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CERTIFICATE FOR ELECTRONIC FILING

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

Dated: June 22, 2021

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