

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

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

**ORDER DENYING MOTION FOR AN ORDER DECLARING THAT
RESPONDENT ALTRIA HAS WAIVED PRIVILEGE**

I.

On February 8, 2021, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a Motion for an Order that Respondent Altria Has Waived Privilege (“Motion”). Complaint Counsel seeks an order declaring that Respondent Altria Group, Inc. (“Respondent” or “Altria”) has waived any claims of privilege regarding the documents produced by Respondent in response to the FTC staff’s requests for additional information under the Hart-Scott-Rodino Act. Respondent filed an opposition on February 18, 2021 (“Opposition”). For the reasons set forth below, the Motion is DENIED.¹

II.

Based on the Motion, the Opposition, and the declarations and other exhibits submitted therewith, the following is a summary of the relevant facts.

¹ On February 24, 2021, Complaint Counsel filed a Motion to Strike the Declaration of Robert D. Owen, which Respondent submitted with its Opposition, on the ground that the declaration improperly interjects expert opinion on the issue of privilege waiver. Because this Order does not reach the merits of the privilege waiver issue, and because the declaration has not been considered, Complaint Counsel’s Motion to Strike is DENIED AS MOOT.

On April 8, 2019, as part of the pre-Complaint investigation in this matter, the FTC issued to Altria a request for additional information and documentary materials regarding the proposed acquisition by Altria of certain voting securities of JUUL Labs, Inc. (the “Second Request”). Declaration of James Abell in support of the Motion (“Abell Decl.”) ¶ 6; Declaration of Kimberly D. Harlowe in support of the Opposition (“Harlowe Decl.”) ¶ 3. The FTC’s Second Request requested “all documents” on a wide range of topics related to both combustible and electronic cigarettes. Harlowe Decl. ¶ 3.

On July 22, 2019, Altria began a rolling document production in response to the Second Request. Abell Decl. ¶ 7; Harlowe Decl. ¶ 5. Altria made 11 document productions over a three-month period; 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. Harlowe Decl. ¶ 5.

On August 28, 2019, Complaint Counsel alerted Altria that Altria had produced a document that was potentially privileged. Abell Decl. ¶ 8. Altria determined that the document was not privileged. Declaration of Debbie Feinstein in support of the Opposition (“Feinstein Decl.”) ¶ 8 n.1.

On September 19, 2019, Complaint Counsel alerted Altria to the existence of another apparently privileged document. Altria determined that the second document was privileged. Altria sent a clawback letter for the document, and a duplicate of it, on September 20, 2019. Abell Decl. ¶¶ 9, 10; Exhibit C;² Feinstein Decl. ¶ 8.

On September 23, 2019, Altria sent a second clawback letter asserting privilege over 602 clawback documents and adding partial redactions to another 157 documents. Abell Decl. ¶ 11; Exhibit E (9/23/19 letter from Altria to Complaint Counsel: “We write to provide notice that privileged documents were inadvertently produced to the Federal Trade Commission in the above-captioned matter.”).

On October 22, 2019, Complaint Counsel alerted Altria that it had produced four versions of a document with inconsistent redactions, i.e., with some versions displaying text that had been identified as privileged in other versions. Abell Decl. ¶ 12; Exhibit F.

On October 23, 2019, Altria sent a third clawback letter, identifying 163 clawback documents and 69 partial clawback documents. Abell Decl. ¶ 13; Exhibit G (10/23/19 letter from Altria to Complaint Counsel: “We write to provide notice that privileged documents were inadvertently produced to the Federal Trade Commission in the above-captioned matter.”).

On November 1, 2019, Altria informed Complaint Counsel: “Altria conducted additional document search and review activities in connection with and in response to these notifications. Those search and review activities are complete” Abell Decl. ¶ 15; Exhibit I (11/1/19 letter from Altria to Complaint Counsel).

² “Exhibit” refers to exhibits to the Motion. “Opposition Exhibit” is used to denote exhibits to the Opposition.

On November 4, 2019, Complaint Counsel alerted Altria that it had produced eight documents identified in the privilege log it had produced on October 30, 2019. Abell Decl. ¶ 16; Exhibit J.

On November 5, 2019, Altria issued a fourth clawback letter, identifying ten clawback documents and five partial clawback documents. Abell Decl. ¶ 17; Exhibit K.

On November 8, 2019, Complaint Counsel alerted Altria to the production of three potentially privileged documents. Abell Decl. ¶ 18; Exhibit L.

On November 15, 2019, Altria issued a fifth clawback letter, identifying 453 clawback documents and 133 partial clawback documents. Abell Decl. ¶ 19; Exhibit M (11/15/19 letter from Altria to Complaint Counsel: “We write to provide notice that privileged documents were inadvertently produced to the Federal Trade Commission in the above-captioned matter.”).

On November 20, 2019, Altria issued a sixth clawback letter, identifying 11 clawback documents and four partial clawback documents, and produced a log of its clawback documents. Abell Decl. ¶ 20; Exhibit N.

On February 28, 2020, Altria issued a seventh clawback letter, identifying 11 clawback documents and seven partial clawback documents. Abell Decl. ¶ 21; Exhibit O (2/28/20 letter from Altria to Complaint Counsel: “We write to provide notice that privileged documents were inadvertently produced to the Federal Trade Commission in the above-captioned matter.”).

On April 1, 2020, the Commission issued the Complaint in this matter.

By the time of the filing of the Complaint, Altria had notified Complaint Counsel of approximately 1,600 alleged inadvertently produced privileged documents. Harlowe Decl. ¶ 24.

On June 18, 2020, Altria issued an eighth clawback letter, identifying 139 clawback documents and 16 partial clawback documents. Abell Decl. ¶ 23; Exhibit P (6/18/20 letter from Altria to Complaint Counsel: “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. . . . 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.”).

On July 20, 2020, Complaint Counsel responded to Altria’s June 18, 2020 letter stating: “Based on Altria’s failure to correct problems with its document production despite

repeated notifications, we believe Altria has waived its right to claim privilege over at least some and potentially all of the documents it has identified” Abell Decl. ¶ 25; Exhibit S.

On August 7, 2020, Altria responded to Complaint Counsel’s July 20, 2020 letter stating: “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.” Opposition Exhibit B.

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

By September 10, 2020, Altria completed a re-review of approximately 210,000 Second Request documents and issued a ninth clawback letter, identifying 2,973 clawback documents and 2,504 partial clawback documents. Abell Decl. ¶ 27, Exhibit U (9/10/20 letter from Altria to Complaint Counsel: “Altria has re-reviewed tens of thousands of documents from the Second Request production and has now completed its review of documents it identified as related to e-vapor issues.”).

On September 17, 2020, Altria served its Responses and Objections to Complaint Counsel’s First Set of Requests for Production, in which Altria objected to Complaint Counsel’s request to submit all documents “withheld from production in response to the Second Request, or clawed back, based on a claim of privilege.” Altria further stated it would meet and confer with Complaint Counsel regarding this request. Opposition Exhibit E ¶ 18.

On November 6, 2020, Altria issued a tenth clawback letter for documents pertaining to non-e-vapor products. Abell Decl. ¶ 28; Exhibit V.

On January 11, 2021, Altria issued an eleventh clawback letter, identifying four clawback documents. Abell Decl. ¶ 29; Exhibit W (1/11/21 letter from Altria to Complaint Counsel representing that the four privileged documents are near-duplicates of email threads that Altria had previously clawed back as privileged on November 20, 2019 and had logged on its November 20, 2019 privilege log.).

On February 8, 2021, fact discovery in this matter closed. *See* January 13, 2021 First Revised Scheduling Order. Complaint Counsel filed this Motion the same day.

Complaint Counsel argues that Altria should be held to have waived any privilege that might otherwise have applied to the clawback documents. According to Complaint Counsel, Altria failed to take reasonable steps to prevent disclosure of privileged information and to rectify errors that caused the disclosures. Relying on Rule 2.11(d), Complaint Counsel contends that the foregoing results in a waiver of privilege.

Altria argues that Complaint Counsel's Motion should be denied because, by waiting until the close of fact discovery to file, Complaint Counsel unduly delayed seeking a resolution of the privilege waiver issue, contrary to the provisions of FTC Rule 3.31(g)(1)(ii) and the Scheduling Order issued in this case. Altria further argues that even if the Motion were considered timely, it has not waived any privilege. Altria asserts that the disclosures were inadvertent, that Altria took reasonable steps to prevent disclosure, and that Altria promptly took reasonable steps to remedy the errors that occurred.

III.

Complaint Counsel filed its Motion pursuant to Rules 3.22 and 2.11(d) of the Commission's Rules of Practice. Rule 3.22 is the general motions rule for adjudicative proceedings. 16 C.F.R. § 3.22(a) ("During the time a proceeding is before an Administrative Law Judge, all other motions shall be addressed to and decided by the Administrative Law Judge, if within his or her authority.").

The rules in Part 2 govern "non-adjudicative procedures." 16 C.F.R. Part 2. Rule 2.11 pertains to withholding information responsive to an investigative subpoena or any other request for production of material under Part 2. Rule 2.11(d), relied on by Complaint Counsel, describes the circumstances under which, in an investigation, the inadvertent disclosure of privileged information during an investigation will operate as a waiver of the privilege. "The rules in [Part 3] govern procedure in formal adjudicative proceedings," such as the instant proceeding. 16 C.F.R. § 3.1. Although the documents that are the subject of this Motion were produced during the precomplaint investigation, now that this case is a Part 3 adjudicative proceeding, Rule 2.11 does not govern. Rather, the applicable Commission Rule is Rule 3.31(g), which applies to "[t]he disclosure of privileged or protected information or communications during a part 3 proceeding *or during a Commission precomplaint investigation . . .*" 16 C.F.R. § 3.31(g)(1)(i) (emphasis added).³

Under Rule 3.31(g)(1)(ii), when a party is notified of inadvertent disclosures of asserted privileged information, the recipient "must promptly return, sequester, or destroy the specified information. . . , must not use or disclose the information until the claim is resolved, . . . [and] may promptly present the information to the Administrative Law Judge under seal for a determination of the claim." 16 C.F.R. § 3.31(g)(1)(ii).

Neither party cites an FTC case interpreting or applying the phrase "may promptly present" used in Rule 3.31(g)(1)(ii). While "may" is typically permissive language, the word here is necessarily qualified by the word "promptly." The most logical interpretation of the phrase "may promptly present" is that it is optional to seek a determination of a claim relating to asserted inadvertent disclosures of privileged information; however, if a party wants such a

³ Complaint Counsel choose to rely upon Rule 2.11(d) as support for its Motion, yet Complaint Counsel acknowledged the applicability of Rule 3.31(g) to its waiver claim in correspondence with Respondent's counsel. Exhibit S (July 20, 2020 letter from Complaint Counsel to Altria: "Inadvertent disclosure is governed by Rule 3.31(g) of the Commission Rules of Practice . . ."). Unlike Rule 2.11(d), Rule 3.31(g)(1)(ii), discussed below, requires that waiver challenges be pursued "promptly."

determination, it must seek it “promptly.” To hold otherwise would read the word “promptly” out of the Rule.

This conclusion is consistent with that reached by the court in *Coleman v. Sterling*, 2011 WL 13177041 (S.D. Cal. Nov. 4, 2011), which held that Federal Rule 26(b)(5)(B),⁴ upon which FTC Rule 3.31(g)(1) is based,⁵ “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*, 2011 WL 13177041, at *3. The court explained:

The Advisory Committee notes regarding the addition of Rule 26(b)(5)(B) state that the subsection “[was] added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.” The Committee notes go on to state that, “the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived.” Therefore, Rule 26(b)(5)(B) puts the burden on the receiving party to present the claim of privilege or work product protection to the Court if it chooses to challenge the producing party’s assertion. If the receiving party

⁴ Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure states:

Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Fed. R. Civ. P. 26(b)(5)(B).

⁵ In amending the Rules of Practice for Adjudicative Proceedings in 2009 to add Rule 3.31(g), the Commission stated: “The Commission concludes that the standards in Fed. R. Evid. 502(b) in combination with the incorporated provisions from Fed. R. Civ. P. 26(b)(5)(B), including the reasonableness of efforts to prevent disclosure, steps taken by the privilege holder to rectify the error, and the subsequent obligations imposed on the receiving party after receiving the information, are sensible and should be incorporated into the Commission’s Part 3 rules. . . . The Commission adopts the federal provisions into its final Rule 3.31(g)(1).” 74 Fed. Reg. 20205, 20207 (FTC Final Rules May 1, 2009).

“[S]ince many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists.” *In re LabMD, Inc.*, 2014 FTC LEXIS 2, *5 n.3 (Jan. 16, 2014) (quoting FTC Op. Manual § 10.7); *Thompson Medical Co.*, 1983 FTC LEXIS 98, at *9 n.7 (Mar. 11, 1983) (“Where the Commission has adopted provisions substantially similar to provisions in the Federal Rules, judicial constructions of such analogous provisions may serve as interpretive aids, but they are not to be regarded as binding, because application of the Commission’s rules must be tailored to the circumstances of Commission proceedings.” (citing 43 Fed. Reg. 56862, 56863 (FTC Final Rules Dec. 4, 1978))).

decides to present the information to the court to challenge a claim, it must do so promptly according to the rule.

Id.

Having established that Rule 3.31(g)(1)(ii) requires Complaint Counsel to assert its waiver claim promptly, the next issue to resolve is whether Complaint Counsel's motion meets this requirement. The Rule does not define "promptly" and neither party cites an FTC case on point.

The record shows that between September 2019 and February 2020, Altria had asserted inadvertent disclosures of privileged materials and issued clawback letters seven times. By the time the Complaint was issued (April 1, 2020), Altria had alerted Complaint Counsel to approximately 1,600 alleged inadvertently produced privileged documents. Harlowe Decl. ¶ 24. All of this put Complaint Counsel on notice of a potential waiver claim. By Orders of the Commission, this matter was stayed from April 3, 2020 through July 6, 2020. Once the stay was lifted, Complaint Counsel had the choice and ability under Rule 3.31(g) to seek a determination as to whether Altria had waived any asserted privilege over the inadvertently disclosed documents.

The parties' respective positions on the issues of privilege and waiver were clearly staked out in correspondence exchanged in July 2020 and August 2020, with Complaint Counsel asserting that Altria had waived any privilege as to the clawed back documents, and Altria disputing the same. *See* Exhibit S (July 20, 2020 letter from Complaint Counsel to Altria: "Based on Altria's failure to correct problems with its document production despite repeated notifications, we believe Altria has waived its right to claim privilege over at least some and potentially all of the documents it has identified . . ."); Opposition Exhibit B (August 7, 2020 letter from Altria to Complaint Counsel: "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."). The dispute between the parties was clearly ripe for determination by this time; yet no motion was filed until approximately five months later, on the last day of fact discovery. These facts do not support a conclusion that Complaint Counsel has "promptly" submitted the waiver claim for determination, as required by Rule 3.31(g)(1)(ii). *See Canamar v. McMillin Texas Mgmt. Servs., LLC*, 2009 WL 2175105, at *2 (W.D. Tex. July 17, 2009) (holding that the receiving party did not promptly submit privilege waiver claim for determination when it waited five months after the producing party asserted the privilege and clawed back the materials, and after a related deposition had occurred).

Furthermore, Complaint Counsel delayed filing a motion until February 8, 2021, the final date of the period for fact discovery provided under the First Revised Scheduling Order. With fact discovery now closed, the potential prejudice to Altria in having to rebut the evidence contained in the challenged materials, were Complaint Counsel to prevail on the merits of its waiver claim, is apparent. *See Fulghum v. Embarq Corp.*, 2011 WL 13237613, at *5 (D. Kan. Apr. 14, 2011) (holding that allowing plaintiff to file an untimely challenge to defendants' privilege log would be prejudicial to defendants). In *Coleman*, the court held that the purpose of

the requirement in Federal Rule 26(b)(5)(B) that a recipient act promptly when challenging a privilege claim 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.” *Coleman*, 2011 WL 13177041, at *3. This purpose is not served by waiting until the fact discovery deadline to seek a determination, particularly given that the issue was ripe for determination since at least July 2020. According to Respondent’s counsel, 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 and when asked for an explanation for its delay, Complaint Counsel offered none. Feinstein Decl. ¶ 16.

Finally, in evaluating whether Complaint Counsel promptly presented this issue to the Administrative Law Judge, it is also worth noting that Complaint Counsel’s First Set of Requests for Production to Altria, issued on August 27, 2020 (“RFPs”), requested Altria to submit all documents “withheld from production in response to the Second Request, or clawed back, based on a claim of privilege.” Exhibit T (RFP 18). Altria objected to this request in its Responses and Objections to Complaint Counsel’s RFPs, served on September 17, 2020. Opposition Exhibit E (Response to RFP 18). Complaint Counsel had the ability to present its waiver claim in the context of a motion to compel production; however, the deadline for doing so was October 19, 2020, more than four months ago.⁶

IV.

For all the foregoing reasons, the Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 26, 2021

⁶ Under Additional Provision 8 of the Scheduling Order issued in this case: “Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, the deadline for the motion to compel shall be within 5 days of reaching an impasse.” (August 4, 2020 Scheduling Order). Thirty days from the date on which Altria served its responses and objections to Complaint Counsel’s RFPs was October 19, 2020, which is earlier than the discovery deadline of February 8, 2021, set under the First Revised Scheduling Order, issued January 13, 2021. In addition, the record does not show any negotiations concerning Altria’s objections to RFP 18.