

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

**In the Matter of**

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

**and**

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

**DOCKET NO. 9393**

**COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE A SURREBUTTAL  
REPORT OF DR. KEVIN MURPHY**

Pursuant to 16 C.F.R. §§ 3.22 and 3.31A, Complaint Counsel respectfully moves the Court to exclude a surrebuttal report of Dr. Kevin Murphy that Respondents produced several weeks after the close of expert discovery without obtaining or even seeking the consent of Complaint Counsel or the permission of the Court.

Dated: April 28, 2021

Respectfully submitted,

s/ Michael Lovinger  
Michael Lovinger

Stephen Rodger  
Peggy Bayer Femenella  
Jennifer Milici  
Dominic E. Vote  
James Abell  
Erik Herron  
Joonsuk Lee  
Meredith Levert  
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*Counsel Supporting the Complaint*

**UNITED STATES OF AMERICA  
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**In the Matter of**

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**[PROPOSED] ORDER**

Upon consideration of Complaint Counsel's Motion *In Limine* to Exclude a Surrebuttal Report of Dr. Kevin Murphy, it is hereby

ORDERED, that Complaint Counsel's motion is granted and that the Supplemental Analysis of Kevin M. Murphy, Ph.D. dated April 20, 2021 is inadmissible and may not be used in this matter pursuant to FTC Rule 3.31A(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.31A(a), and it is further

ORDERED, that Dr. Kevin Murphy may not testify on the subject matter found in the Supplemental Analysis of Kevin M. Murphy, PhD. dated April 20, 2021.

Dated: \_\_\_\_\_

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

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**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION *IN LIMINE*  
TO EXCLUDE A SURREBUTTAL REPORT OF DR. KEVIN MURPHY**

**INTRODUCTION**

Complaint Counsel respectfully asks the Court to exclude a surrebuttal report of Dr. Kevin Murphy that Respondents produced to Complaint Counsel long after the close of expert discovery, and that Respondents improperly added to their Final Proposed Exhibit List in violation of FTC Rule 3.31A(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.31A(a). What Respondents mischaracterize as a "Supplemental Analysis" is plainly a surrebuttal report that directly responds to the Rebuttal Report of Dr. Dov Rothman.<sup>1</sup> Pursuant to 16 C.F.R. § 3.31A(a), before submitting a surrebuttal report, Respondents must file a motion with the Court "not later than 5 days after the deadline for service of complaint counsel's rebuttal reports," and Respondents must show that Complaint Counsel presented "material outside the scope of fair rebuttal." Respondents have done neither. The Supplemental Analysis of Dr. Kevin Murphy therefore should be excluded.

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<sup>1</sup> See Exhibit A ¶¶ 2-3.

### **BACKGROUND**

On April 20, 2021, Respondents produced a document purporting to be a Supplemental Analysis of Dr. Kevin Murphy, more than 5 weeks after the deadline to provide expert witness reports pursuant to the Court’s Second Revised Scheduling Order. Exhibits A, B. Respondents did not consult with Complaint Counsel before submitting Dr. Murphy’s Supplemental Analysis.<sup>2</sup> Dr. Murphy’s Supplemental Analysis responded to claims in Dr. Rothman’s Rebuttal Report,<sup>3</sup> and the only way to characterize it is as a surrebuttal report as contemplated by 16 C.F.R. § 3.31A(a).

On April 22, 2021, Respondents improperly included Dr. Murphy’s surrebuttal report in their Final Proposed Exhibit List and branded it as RX0028. At no point did Respondents timely seek or obtain permission from the Court to introduce Dr. Murphy’s surrebuttal report as an Exhibit.

### **ARGUMENT**

On April 20, 2021, Respondents emailed Complaint Counsel a copy of a document purporting to be a Supplemental Analysis of Kevin M. Murphy, Ph.D. Exhibits A, B. Although cloaked in another name, Dr. Murphy’s “Supplemental Analysis” is unquestionably a surrebuttal report. Dr. Murphy does not try to hide the fact that his “Supplemental Analysis” responds directly to Dr. Rothman’s rebuttal report. Exhibit A ¶¶ 2-3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In his deposition, Dr. Murphy also

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<sup>2</sup> Notwithstanding the claim in the April 20 letter from Beth Wilkinson to Stephen Rodger, Complaint Counsel never asked to be provided with Dr. Murphy’s supplemental regression analysis. Exhibit B.

<sup>3</sup> See Exhibit A ¶¶ 2-3.

referenced the work presented in his “Supplemental Analysis” as a response to Dr. Rothman’s rebuttal report. PX7047 (Murphy Dep. Tr.) at 108:25-109:5 { [REDACTED] [REDACTED] [REDACTED] }.

FTC Rule 3.31A(a), 16 C.F.R. § 3.31A(a), is crystal clear about the process for submitting surrebuttal reports:

... a rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports. If material outside the scope of fair rebuttal is presented, a respondent may file a motion **not later than 5 days** after the deadline for service of complaint counsel's rebuttal reports, seeking appropriate relief with the Administrative Law Judge, including ... leave to submit a surrebuttal report by respondent's experts .... (emphasis added)

It is indisputable that Respondents have not met any of the requirements laid out in FTC Rule 3.31A(a) for submitting a surrebuttal report.

First, Rule 3.31A(a) requires Respondents to file a motion no later than 5 days after the deadline for service of Complaint Counsel’s rebuttal report. Dr. Rothman served his rebuttal report on March 26, 2021 on the deadline specified in the Second Revised Scheduling Order. Therefore, under Rule 3.31A(a), Respondents were required to seek leave from this Court no later than March 31, 2021. Respondents failed to seek leave from the Court prior to March 31, 2021, and did not even send Complaint Counsel a copy of Dr. Murphy’s surrebuttal report until April 20, 2021. Exhibit B. The deadline to seek permission to submit a surrebuttal report has now long passed.

Second, before being allowed to submit a surrebuttal report, Respondents were required to show that Dr. Rothman presented material outside the scope of fair rebuttal. Respondents have made no such claim in any of their written or oral communications with Complaint Counsel or the Court. Respondents, therefore, fail to satisfy either requirement set out by Rule 3.31A(a) to submit a surrebuttal report.

This Court has ruled against parties seeking to introduce surrebuttal reports under similar circumstances. For example, this Court denied a motion for leave to submit a surrebuttal report in *In re ECM BioFilms, Inc.* because Respondents did not file a motion on time and Respondents did not show that the rebuttal report was “outside the scope of fair rebuttal.”

Respondent fails to point to any material in [the] rebuttal expert report that is “outside the scope of fair rebuttal.” Moreover, Respondent did not file its request for surrebuttal within “5 days after the deadline for service” of Complaint Counsel’s rebuttal report.... Respondent was required to seek leave no later than July 7, 2014. Respondent’s request was filed July 9, 2014, and is therefore untimely. For all these reasons, Respondent’s request for surrebuttal is DENIED.

*In re ECM BioFilms, Inc.*, FTC Dkt. 9358, Order on Respondent’s Combined Motion for Sanctions, to Exclude Expert Witness, and for Leave (July 23, 2014).

This Court denied a similar motion for leave to file a surrebuttal report in *In re North Carolina Board of Dental Examiners* even when the motion was filed on time because the respondent “failed to fulfill its burden of demonstrating that any of the Challenged Portions in either [rebuttal] report are outside the scope of fair rebuttal.” *In re North Carolina Board of Dental Examiners*, FTC Dkt. 9343, Order Denying Respondent’s Motions to Strike (In Part) Expert Witness Rebuttal Reports and for Leave to Submit Surrebuttal Report (January 28, 2011).

Although the Rules are clear that Dr. Murphy’s surrebuttal report is improper, weighing the equities further supports the exclusion of the surrebuttal report. Introducing Dr. Murphy’s surrebuttal report at this late stage would substantially and unfairly prejudice Complaint Counsel. Complaint Counsel first received Dr. Murphy’s surrebuttal report more than 5 weeks after the deadline for Respondents’ to provide their expert reports; 18 days after Complaint Counsel deposed Dr. Murphy; and only 2 days before the surrebuttal report was added to Respondents’ Final Proposed Exhibit List. Complaint Counsel was denied a fair opportunity to question Dr. Murphy on the material presented in his surrebuttal report during the prior deposition. Even if

Complaint Counsel were given the opportunity to question Dr. Murphy on his surrebuttal report, the additional time and cost incurred in doing so would impose an undue burden. Moreover, Dr. Rothman will not have had an opportunity to respond to the claims in Dr. Murphy's surrebuttal report.

### **CONCLUSION**

Respondents do not have an automatic right to submit a surrebuttal report, and it is clear that they have not met the requirements for doing so pursuant to FTC Rule 3.31A(a). For the foregoing reasons, Dr. Murphy's surrebuttal report (marked as RX0028) should be excluded, and Dr. Murphy should not be permitted to testify about issues raised in his surrebuttal report.

Dated: April 28, 2021

Respectfully submitted,

s/ Michael Lovinger  
Michael Lovinger

Stephen Rodger  
Jennifer Milici  
Dominic E. Vote  
Peggy Bayer Femenella  
James Abell  
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*Counsel Supporting the Complaint*

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**DOCKET NO. 9393**

**COMPLAINT COUNSEL'S MEET AND CONFER STATEMENT**

Pursuant to the August 4, 2020 Scheduling Order, Complaint Counsel submit this statement in support of their Motion *in Limine* to Exclude a Surrebuttal Report of Dr. Kevin Murphy. Complaint Counsel conferred with Respondents in good faith and did not reach agreement. Complaint Counsel contacted Respondents on April 26, 2021 and asked for Respondent's position on the Motion. On April 28, 2021, Respondents' informed Complaint Counsel that they opposed the Motion.

Dated: April 28, 2021

Respectfully submitted,

s/ Michael Lovinger  
Michael Lovinger

Stephen Rodger  
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Jennifer Milici  
Dominic E. Vote  
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*Counsel Supporting the Complaint*

# **EXHIBIT A**

**CONFIDENTIAL - REDACTED IN ENTIRETY**

# **EXHIBIT B**

**CONFIDENTIAL - REDACTED IN ENTIRETY**

## CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2021, I served the foregoing document via email to:

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

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

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

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*Counsel for Respondent Altria Group, Inc.*

By: s/ Michael Lovinger  
Michael Lovinger, Attorney

*Counsel Supporting the Complaint*

**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: April 28, 2021

By: s/ Michael Lovinger  
Michael Lovinger, Attorney

*Counsel Supporting the Complaint*