

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

In the Matter of

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

and

**Juul Labs, Inc.
a corporation,**

Respondents.

Docket No. 9393

RESPONDENTS' RESPONSE TO NON-PARTIES' IN CAMERA MOTIONS

Respondents Altria Group, Inc. (“Altria”) and Juul Labs, Inc. (“JLI”) file this omnibus response to the separate motions for *in camera* treatment filed on May 7, 2021 (the “Non-Party *In Camera* Motions”) by non-parties Reynolds American, Inc.; Turning Point Brands, Inc.; Sheetz, Inc. (“Sheetz”); Wawa, Inc. (“Wawa”); ITG Brands, LLC; and NJOY, LLC. (the “Non-Parties”).¹ Respondents do not object to the Non-Party *In Camera* Motions to the extent they seek to protect the covered documents from public disclosure. Respondents file this limited response to preserve the ability of certain in-house counsel of Respondents to attend portions of the evidentiary hearing and other proceedings, and to review briefs, orders, or other litigation documents, that reflect information for which the Non-Parties seek *in camera* treatment.

¹ Non-parties Goldman Sachs, Logic Technology Development LLC (“Logic”), 7-Eleven, Inc. (“7-Eleven”), and Philip Morris International Inc. (“PMI”) also filed motions for *in camera* treatment. This response is not directed to any of those four motions. The Goldman Sachs motion does not raise the issues discussed herein and Respondents have no objection to that motion. With respect to Logic’s motion, Respondents note that they have objected to admission of all of the exhibits covered by that motion. Without prejudice to those objections, in the event that the Court admits into evidence exhibits for which Logic seeks *in camera* treatment, Respondents reserve the right to seek the same relief with respect to those documents as sought herein. Lastly, with respect to PMI and 7-Eleven, Altria does not oppose PMI or 7-Eleven’s *in camera* motions and JLI reserves its rights to seek in-house counsel access to PMI and 7-Eleven’s *in camera* information depending on how such evidence is admitted and used in future proceedings.

Respondents have initiated discussions with all of the Non-Parties seeking their consent to such in-house counsel access, and at this time have obtained such consent from Wawa and Sheetz. Respondents have not yet obtained such consent from the Non-Parties other than Wawa and Sheetz, but stand ready to engage in further discussions with those Non-Parties.

Rule 3.45(a) of the Part 3 Rules of Practice lists “*respondents, their counsel*, authorized Commission personnel, and court personnel concerned with judicial review” as the permitted recipients of access to material subject to an *in camera* order. 16 C.F.R. § 3.45(a) (emphasis added). Further, personal attendance and participation by the Respondents in the hearing is an integral feature of the statutes conferring authority for Part 3 adjudicative proceedings. *See* 15 U.S.C. § 45(b) (upon service of a complaint, “[t]he person, partnership, or corporation so complained of shall have *the right to appear* at the place and time” fixed for the hearing) (emphasis added); *see also id.* § 21(b) (same language).

To the extent that some Non-Parties take the position that Respondents’ in-house counsel should be automatically excluded from any proceedings in which material covered by the Non-Party *In Camera* Motions is referenced, that position is overbroad. Such a position would prejudice Respondents’ ability to put on their defense and deny Respondents’ right to have counsel of their choosing meaningfully participate in these proceedings. Respondents’ in-house counsel have been closely involved in every step of preparation for trial in this proceeding, as well as the investigation preceding it, and work together with outside counsel as a cohesive integrated unit. Moreover, given the nature of Respondents’ litigation exposure, in-house counsel are uniquely able to advise Respondents on the interaction of litigation risk across multiple matters (a role no external lawyer has).

Respondents believe the individuals set forth in Appendix A, who are in-house counsel responsible for supervising and personally participating the defense of this case, are entitled to access all *in camera* information of the Non-Parties that Complaint Counsel or Respondents have placed in issue. At a minimum, these in-house counsel for Respondents should have access to documents that go beyond purely internal, competitively sensitive information of Non-Parties (e.g., scientific information in an e-vapor manufacturer's PMTA filing, or pricing strategy regarding the Non-Party's products). The Non-Parties' motions seek *in camera* treatment for information that is not confined to that category, but rather includes documents discussing Respondents' products, e.g., the strengths or weaknesses of Nu Mark's product offerings back in 2018—a central issue in the case. Assuming *arguendo* that *in camera* treatment is warranted for such dated and externally focused materials at all, there is no legitimate reason to exclude Respondents' in-house counsel from portions of the hearing (or from the ability to review filings) referencing them. A list of the documents (or portions thereof) discussing Respondents' products, broken out by Non-Party, is attached as Appendix B.

Courts have recognized that party representatives should not be excluded from a trial at which their rights or liabilities are to be determined, except for the most compelling reasons. See, e.g., *Polyglycoat Corp. Hirsch Distribs., Inc.*, 442 So. 2d 958 (Fla. Ct. App. 1983); *Newark Group, Inc. v. Sauter*, 2004 WL 5623944, at *1 (S.D. Ohio Mar. 26, 2004). While a party may not have an absolute right to attend trial, “a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment.” *Helminski v. Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir. 1985); accord *In Re M-I L.L.C.*, 505 S.W.3d 569, 575 (Tex. 2016) (“Because of the presumption in favor of participation, due process ordinarily will preclude courts from excluding parties or

their representatives from proceedings, at least when they are able to understand the proceedings and to assist counsel in the presentation of the case.”). This imperative carries even greater force where, as here, the representatives who Respondents are seeking to have included are not businesspeople, but in-house counsel who (a) are not involved in day-to-day competitive decision-making, and (b) have been working hand in hand with outside counsel for years on coordinated defense strategy in the case and the preceding investigation.

WHEREFORE, Respondents respectfully request that in ruling on the Non-Party *In Camera* Motions, the Court provide that its *in camera* order shall not be construed to exclude any in-house counsel to whom a Non-Party has consented, or in the absence of any consent the in-house counsel set forth in Appendix A, from attending portions of the evidentiary hearing related to Non-Party *in camera* information, or from reviewing briefs, orders, or other litigation documents incorporating Non-Party *in camera* information.

In the alternative, Respondents respectfully request that the Court provide that its *in camera* order shall not be construed to exclude any in-house counsel to whom a Non-Party has consented, or in the absence of any consent the in-house counsel set forth in Appendix A, from attending portions of the evidentiary hearing related to the Non-Party *in camera* documents set forth in Appendix B, or from reviewing briefs, orders, or other litigation documents incorporating such information.

Dated: May 14, 2021

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By: /s/ David Gelfand

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Appendix A -- In Camera Access Group

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- Theodore J. Edlich IV, VP and Associate General Counsel
- Mike Klein, Sr. Associate General Counsel
- Michael Sieja, Assistant General Counsel

JLI

- Scott Richburg, Vice President, Litigation

Appendix B - Exhibits Proposed for Limited In-House Access

ITG Brands, LLC

Exhibit Number	Requested Access ²
PX3004 / RX1735 / RX1227	Slides 40-41; 70- 73; and 82-84
PX3005 / RX1736	Slides 2; 4-6; 8-9; and 15
PX3014	-001 and -002
PX3018	-005
RX1737 / RX1230	Slides 3-10; 22; 28; and 46-49
PX3059	-002; -004; -005; -006; -007; -008
RX1738	-006; -007
RX1740 / RX1231	Slides 9-10; 26-32; 34; 36; and 40
RX1741	-007; -008; -009
PX3063	-008
PX3065	-036
PX3066	-008
RX1743 / RX1225	Slides 7; 9; 12; 17; 40-46; 52; 59; 70-72; 81-85; 94; and 102-103
RX1744	Slides 5; 9; and 12
RX1745	Slides 7; 9-11; and 25
RX1746	Slide 13
RX1747	Slide 21
PX3105	-025
PX7012	Full access to discussion of Respondents' products

²Some ITG documents were produced as native PowerPoint files and/or as stamped exhibits. For ease of review across file formats, we have listed the relevant slide numbers where applicable.

NJOY, LLC

Exhibit Number	Requested Access
PX3002	-035
PX3003	-011; -012; -013
PX3147	-005; -006; -008; -009; -010; -011; -012; -013
PX3148	Full Access
PX3150	-001
PX3151	Full Access
PX3152	Full Access
PX3190	-139; -153; -154, -155, -156, -158
PX3195	-010; -015; -027
PX7029	Full access to discussion of Respondents' products
PX8004	Full access to discussion of Respondents' products
PX8005	Full access to discussion of Respondents' products

Reynolds American Tobacco, Inc.

Exhibit Number	Requested Access
RX1720	Full Access
RX1711	-004; -008
RX1713	-068; -069; -070; -071; -072; -073
PX3208	-005
PX3212	-023; -024; -025; -033; 041; -047; -048; -049; -050; -067; -073; -083; -099; -114; -115; -118
PX3213	-005; -006; -007; -009; -010; -017; -018; -042; -043; -082; -091; -092; -093; -094; -100; -113; -117; -124; -125; -127; -128; -133; -091
PX3218	-002; -005; -006; -007; -022; -023; -024; -026
PX3223	-002; -091; -094; -095; -096; -111; -112; -123; -125
PX3224	-029; -030; -031; -032; -033
PX3225	-032; -062; -063; -064;
PX3227	-029; -030; -031; -057; -058; -059
PX3207	-003
PX3211	-002; -003; -007; -008; -009; -010; -011; -019; -021; -024, -025; -026
PX3228	-003; -004; -006; -008; -009; -010; -013; -015; 016; 018; 023; -031; -032
PX3229	-011; -012; -022; -023; -024; -026
PX7037 / RX0109	Full access to discussion of Respondents' products
PX8008 / PX1981	Full access to discussion of Respondents' products
PX8009 / RX0098	Full access to discussion of Respondents' products

Sheetz, Inc.

Exhibit Number	Requested Access
PX3113 / RX1126	Full Access
PX3115	Full access to discussion of Respondents' products
PX3116 / RX1134	Full Access
PX7019 / RX0083	Full access to discussion of Respondents' products
PX8000 / RX0082	Full access to discussion of Respondents' products
RX/DX1135	Full Access
RX/DX1136	Full Access
PX3117	Full Access
PX3119	Full Access
RX1145	Full Access
RX1146	Full Access
DX1127	Full Access

Turning Point Brands, Inc.

Exhibit Number	Requested Access
PX3133 / RX1790	-029
PX3134 / RX1791	-019
PX7030 / RX0133	Full Access to discussion of Respondents' products

Wawa, Inc.

Exhibit Number	Requested Access
RX0112 / PX8006	Full Access to discussion of Respondents' products

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 14, 2021, I caused a true and correct copy of the foregoing Response to Third Parties' In Camera Motions from Respondents Altria Group, Inc. and Juul Labs, Inc. to be served via electronic mail upon the following:

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