PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINSTRATIVE LAW JUDGES

In the Matter of **Altria Group, Inc.** **a corporation;** **and** **JUUL Labs, Inc.** **a corporation.**	**DOCKET NO. 9393**

COMPLAINT COUNSEL'S MOTION TO STRIKE DECLARATION OF ROBERT D. OWEN

On February 18, 2021, in its Opposition to Privilege Waiver Motion, Respondent Altria Group, Inc. ("Altria") attached and relied on a declaration by Robert Owen, a lawyer with experience in e-discovery, put forth as an expert to assess Altria's privilege review. The sole purpose of this expert declaration was to usurp this Court's legal expertise, and to have an improper expert spout legal conclusions. Therefore, Complaint Counsel respectfully moves the Court for an order striking the Robert D. Owen Declaration ("Owen Declaration") and the legal conclusions contained therein.

ARGUMENT

The Owen Declaration is unreliable and improper, and therefore inadmissible. Expert testimony is only germane if it "'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *In the Matter of S.C. State Bd. of Dentistry*, 2004 WL 1895865, at *2 (FTC Aug. 9, 2004) (quoting FED. R. EVID. 702(a)). Legal conclusions—rather than enlightenment on facts and evidence—are simply inadmissible. Furthermore, "[u]nder the Commission's Rules of Practice, evidence shall be excluded if it is [i]rrelevant, immaterial, [or]

unreliable." *In the Matter of Basic Research*, 2005 WL 3475713, *2 (FTC Dec. 6, 2005) (citing 16 C.F.R. § 3.43(b)). Specifically, "[c]ourts may exclude expert reports if they are unreliable." *Id.* For an expert's testimony to be admissible, it must "be the product of reliable principles and methods." *In the Matter of LabMD, Inc.*, 2014 WL 2331056, *3 (FTC May 8, 2014). Mr. Owen's declaration is inadmissible as it amounts to a legal opinion, covers a topic on which all attorneys are obliged to be competent, is clearly based on insufficient information, and fails to meet any of the core indicia of reliability.

First, and fundamentally, the diligence with which Altria conducted its privilege review, and thus whether it has waived privilege, is effectively a legal question for which an expert opinion is inadmissible under FED. R. EVID. 702. "The rule prohibiting experts from providing their legal opinions or conclusions is so well-established that it is often deemed a basic premise or assumption of evidence law—a kind of axiomatic principle." *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 63 (S.D.N.Y. 2001) (citations omitted). "[E]very circuit has explicitly held that experts may not invade the court's province by testifying on issues of law." *Id.* at 64 (citing cases); *see also, e.g.*, *Convertino v. U.S. Dep't of Justice*, 772 F. Supp. 2d 10, 13 (D.D.C. 2010); *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006); *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003). Here, the question is whether or not reasonable steps were taken by Altria to prevent disclosure of privileged information and to rectify the erroneous disclosure. This is a question for the Court. *See, e.g.*, *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (quoting *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)). In matters of law, "[c]ourts do not consult legal experts; they are legal experts." *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661–662 (7th Cir. 2018).

Mr. Owen's conclusions as to "best practices" for the practice of law are inadmissible legal opinions. *See* Owen Declaration ¶ 61.

Second, expert testimony must be of assistance to the trier of fact. *See, e.g.*, *LabMD*, 2014 WL 2331056, *3. But the issue to which Mr. Owen opines—"the reasonableness of Altria's processes in identifying, withholding, and/or clawing back privileged and potentially privileged documents," Owen Declaration ¶ 19—is not a topic for which a *judge* requires an expert opinion. Indeed, a lawyer's ethical obligation of "competent representation" includes competency in "relevant technology." *See* ABA Model Rule 1.1 and Comment 8; *see also DR Distributors, LLC v. 21 Century Smoking, Inc.*, -- F. Supp. 3d --, 2021 WL 185082, at *63 (N.D. Ill. Jan. 19, 2021) (noting competency in e-discovery "is not a new requirement…. 'It is no longer amateur hour. It is way too late in the day for lawyers to expect to catch a break on e-discovery compliance because it is technically complex and resource-demanding.'") (quoting Donald R. Lundberg, *Electronically Stored Information and Spoliation of Evidence*, 53 RES GESTAE 131, 133 (2010)). There is no call for expert testimony (and especially not at a bench trial) on a matter that is basic to the practice of law. Whether or not privilege has been waived is a matter routinely and squarely resolved by judges alone. *See, e.g.*, *Sidney I. v. Focused Retail Prop. I, LLC*, 274 F.R.D. 212, 218 (N.D. Ill. 2011); *Alpert v. Riley*, 267 F.R.D. 202, 213 (S.D. Tex. 2010); *Atronic Int'l, GMBH v. SAI Semispecialists of Am., Inc.*, 232 F.R.D. 160, 160 (E.D. N.Y. 2005).

Third, Mr. Owen relied on limited information in reaching his improper legal conclusions. As Mr. Owen's declaration clearly states, in preparation to opine he only reviewed Complaint Counsel's Motion for an Order that Respondents Waived Privilege (Feb. 8, 2021), the Second Request (Apr. 8, 2019) issued to Altria, and declarations and interviews of Altria's

counsel. *See* Owen Decl., ¶¶ 20-23. This methodology is concerning. It appears that Mr. Owen reached his conclusions without reviewing significant categories of underlying direct evidence that would shed light on the actual privilege review conducted by Altria. These categories include: materials from the "extensive" "one-and-a-half day" privilege review training for document reviewers, Harlowe Decl. ¶¶ 7, 10; *see also* Talbert Decl. ¶ 5; the "substantive guidance" provided by the supervisors of the privilege review team, Harlowe Decl., ¶ 13; *see also* Talbert Decl., ¶ 8; the privilege search term list used, *see* Harlowe Decl., ¶ 12; Talbert Decl., ¶ 9; any production quality control protocol employed; or most importantly, representative exemplars among the over 9,000 privileged documents that Altria is attempting to claw back.[1] Mr. Owen never took into account the number of inadvertently disclosed documents that contained the email addresses of outside counsel, the terms "privileged and confidential," or the term "law" in the email address or subject line. Mr. Owen also never took into account Altria's inconsistent redactions or withholding determinations. Mr. Owen's approach is akin to a proposed medical expert who interviews the treating physician *without* also reviewing the patient's medical files. Reliance on information filtered through Altria's counsel does not support expert testimony. "An expert who simply regurgitates what a party has told him provides no assistance to the trier of fact through the application of specialized knowledge." *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424 (S.D.N.Y. 2009).

Finally, among the minimum requirements for expert testimony is that it is reliable. As *Daubert* instructs, factors for assessing reliability include whether the expert's "'theory or

[1] Courts often review some or all of the disclosed documents *in camera* in order to determine whether counsel has taken sufficient care in its privilege review. *See, e.g.*, *In re Zetia (Ezetimibe) Antitrust Litig.*, 2019 WL 6122012, at *5 (E.D. Va. July 16, 2019) (conducting *in camera* review of the two documents that producing counsel sought to claw back as inadvertently produced); *Williams v. Dist. of Columbia*, 806 F. Supp. 2d 44, 49 & n.5 (D.D.C. 2011) (concluding, after reviewing the document *in camera*, that privilege was waived as to an inadvertently produced email); *cf. In the Matter of Labmd, Inc.*, 2015 WL 1941468, at *2 (FTC Apr. 21, 2015) (conducting *in camera* review to resolve privilege dispute).

technique… can be (and has been) tested, … been subjected to peer review and publication," avoids a "high… 'rate of error,'" or "enjoys 'general acceptance' within a 'relevant scientific community.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-150 (1999) (quoting *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 592–594 (1993)). Mr. Owen's approach—reliant on non-replicable, non-discoverable interviews and avoiding contact with direct evidence—satisfies zero of the four *Daubert* factors.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully moves the Court for an order striking the declaration of Robert D. Owen.[2]

Dated: February 24, 2021

Respectfully Submitted,
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[2] In the alternative, should the Owen Declaration not be stricken, Complaint Counsel respectfully requests permission to take Mr. Owen's deposition and file a short reply before the Court rules on Complaint Counsel's Motion.

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[PROPOSED] ORDER

Upon Complaint Counsel's Motion to Strike Declaration of Robert D. Owen, and having considered the papers in support and in opposition thereto, it is hereby

ORDERED, that the Declaration of Robert D. Owen is stricken.

Date:_____

_____
D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2021, I served the foregoing document via email to:

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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: February 24, 2021

By /s/ Dominic E. Vote
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