

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.

Docket No. 9393

**COMPLAINT COUNSEL’S MOTION FOR LEAVE TO FILE AN OPPOSITION TO  
RESPONDENTS’ RESPONSE TO NON-PARTIES’ *IN CAMERA* MOTIONS**

Pursuant to Rule 3.22 of the Rules of Practice for Adjudicative Proceedings (“Rules”) Complaint Counsel respectfully moves for leave to file the attached brief opposing Respondents’ Response to Non-Parties’ *In Camera* Motions filed on May 14, 2021. In support of its motion for leave, Complaint Counsel states as follows:

1. As explained in more detail in the Opposition, Respondents seek to circumvent this Court’s Protective Order and do not oppose third party requests for *in camera* treatment to protect confidential information from the public. Instead, Respondents ask this Court to provide access to their in-house counsel to some, if not all, information that third parties have requested this Court designate as *in camera*. Respondents fail to cite or mention the strong confidentiality protections governing this matter that prohibit *in camera* materials from being shared with employees of any Respondent, which includes in-house counsel. As such, third parties may not be aware that Respondents seek permission to violate the Protective Order and the FTC

Rules, and Complaint Counsel respectfully requests that Respondents' arguments are not permitted to go un rebutted.

2. Respondents seek to create a new, legally unfounded category of confidentiality that would make evidentiary presentation difficult (if not impossible) to administer and lengthen the hearing. The FTC Rules and Protective Order governing this proceeding allow the introduction of evidence at the hearing that is either 1) public material or 2) *in camera* material. See Protective Order, section 10. Respondents argue for a novel, third category of *in camera* information for their in-house counsel. Creating this novel category of quasi *in camera* confidentiality would make it difficult for this Court, Complaint Counsel, third parties, and possibly even Respondents, to avoid inadvertently sharing confidential information, heightening the risks of competitive injury to the third parties. Defining the contours of this quasi *in camera* evidence would most certainly require additional time during the hearing. Complaint Counsel's proposed Opposition seeks to raise this issue before the Court to ensure an orderly, timely hearing that adequately protects all *in camera* materials as required by the FTC Rules and the Protective Order.
3. Complaint Counsel's proposed opposition brief complies with the timing and word count requirements or Rule 3.22 and this Court's Scheduling Order.

For these reasons, as set forth in the proposed Opposition, Complaint Counsel respectfully requests leave to file its Opposition pursuant to Rule 3.22.

Dated: May 18, 2021

Respectfully submitted,

s/ Nicole Lindquist

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

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

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**Docket No. 9393**

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION FOR LEAVE  
TO FILE AN OPPOSITION TO  
RESPONDENTS’ RESPONSE TO NON-PARTIES’ *IN CAMERA* MOTIONS**

On May 18, 2021, Complaint Counsel filed a Motion for Leave to File an Opposition to Respondents’ Response to Non-Parties *In Camera* Motions. Complaint Counsel’s Motion is GRANTED. IT IS HEREBY ORDERED that Complaint Counsel has leave to file its Opposition to Respondents’ Response to Non-Parties *In Camera* Motions.

ORDERED:

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

Date: \_\_\_\_\_

UNITED STATES OF AMERICA  
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In the Matter of

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Docket No. 9393

**COMPLAINT COUNSEL'S OPPOSITION TO  
RESPONDENTS' RESPONSE TO NON-PARTIES' *IN CAMERA* MOTIONS**

On the eve of trial, a year after the Protective Order issued in this matter, upon which third parties relied, Respondents now seek to subvert the confidentiality protections afforded to third parties for their own personal gain. While they have styled their legally unsupported and factual void argument as a “response” to *in camera* treatment of third party information, they are effectively asking this Court permission to 1) violate the Protective Order and Rule 3.31 to provide their employee in-house counsel access to *in camera* third party information, and 2) create a novel category of quasi *in camera* materials that would add immense complexity and slow down trial presentation. Respondents fail to mention the protections afforded by the Protective Order in their filing, and in doing so, make a backdoor last-minute attempt to gain access to confidential third party information the Commission intended to protect when it promulgated Rule 3.31. Moreover, Respondents’ requests for *in camera* access directly contradict this Court’s prior rulings barring in-house counsel access to confidential information. Complaint Counsel respectfully asks this Court to deny Respondents’ requests to allow their in-house counsel access to third party *in camera* material in any form and attend *in camera* third

party sessions of the evidentiary hearing that Respondents seek in Respondents’ Response to Non-Parties *In Camera* Motions (“Response”).

### BACKGROUND

More than a year ago, on April 2, 2020, this Court issued the standard protective order required by the Commission Rules of Practice (“Rules”), 16 C.F.R. Section 3.31(d) (“Rule 3.31(d)”). As described in more detail below, the Protective Order itself expressly states that confidential material (which includes *in camera* material) may be disclosed to “outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent.” Protective Order, section 7(c). The Protective Order does not permit confidential materials to be supplied to Respondents’ in-house counsel. As further required under the Rules, Complaint Counsel provided a copy of the Protective Order to third parties and informed them that their competitively sensitive information would be produced to Respondents’ outside counsel in accordance with the Protective Order. Third parties have since recently requested *in camera* treatment of their competitively sensitive materials in order to protect against competitive injury as a result of being part of this litigation challenging a consummated transaction between two major competitors for closed-system e-cigarettes.

Now, a year after the Protective Order issued, after third parties relied upon its strict confidentiality provisions, Respondents make an unsupported challenge to third party *in camera* motions and seek to permit Respondents’ employee in-house counsel to gain access to some, if not all, of the materials third parties have sought to protect and to allow those employee in-house counsel to attend some undefined “portions” of evidentiary hearing. Respondents’ Response at 1. In fact, Respondents are not contesting the *in camera* motions “to the extent they seek to

protect the covered documents from public disclosure.” Respondents’ Response at 1. Instead, Respondents filed the 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.” Respondents’ Response at 1. Granting Respondents’ requests for access to *in camera* information would create a significant risk that third parties could suffer competitive injury from inappropriate disclosure of *in camera* materials and would create a quasi *in camera* category of information that would add complexity to the administration of the hearing. It is also inconsistent with this Court’s prior orders.

### ARGUMENT

Respondents’ requests to allow their in-house counsel access to third party *in camera* material in any form and attend *in camera* third party sessions of the hearing should be denied because the Protective Order in this matter, Rule 3.31(d), Rule 3.31 Appendix A, and this Court’s prior Orders, all clearly prohibit sharing third party *in camera* material with in-house counsel. The meager arguments raised by Respondents were considered when Rule 3.31 was formulated and rejected by the Commission. Moreover, this Court has consistently rejected attempts by in-house counsel to gain access to confidential third party information. Respondents further fail to provide any special need for access to the information and granting their request would add complexity to the hearing and risk competitive injury to third parties.

**A. The Protective Order Does Not and Should Not Allow In-House Counsel Access to Confidential Information**

1. Rule 3.31(d) Protects Confidential Third Party Information From Disclosure to In-House Counsel

As noted above, Rule 3.31(d) requires that the Administrative Law Judge issue the protective order as set forth in Appendix A in Rule 3.31 in every Part 3 proceeding. Rule 3.31(d); *In re Axon Enterprise, Inc.* Docket No. 9389, 2020 FTC LEXIS 31 (F.T.C. Jan. 1, 2020); *see also In re Tronox Ltd.*, Docket No. 9377, 2018 WL 852244, at \*2 (F.T.C. Feb. 2, 2018) (“Rule 3.31(d) . . . requires the ALJ to issue the standard protective order.”). This standard protective order, which was issued in this case, allows for confidential information to pass to “outside counsel of record for any respondent . . . provided they are not employees of a respondent. . . .” Rule 3.31, Appendix A § 7. This standard order was issued in this matter. Accordingly, in-house counsel of Respondents may not receive information designated confidential under the protective order. The exclusion of all in-house counsel from the standard protective order was intentional.

When it promulgated Rule 3.31, with notice and public comment, the Commission “rejected arguments that parties should be able to negotiate orders suited to the needs of the particular case on grounds that the negotiations can delay discovery, prevent the Commission from protecting confidential material in a uniform manner in all Part 3 cases, and reduce the confidence of third party submitters that their confidential submissions will be protected.” *Tronox*, 2018 WL 852244, at \*2 (citing FTC Rules of Practice, Interim Rules with Request for Comment, 74 Fed. Reg. 1804, 1812 (Jan. 13, 2009) (“Interim Rules”)). The Commission specifically considered the question of whether in-house counsel should have access to confidential information in response to a comment submitted by the Section of Antitrust Law of



the American Bar Association. Much as Respondents do here, the Antitrust Section suggested that prohibiting disclosure of confidential discovery materials to a respondent’s in-house counsel might “inhibit a respondent’s ability to defend itself.” Interim Rules, 74 Fed. Reg. 1804, 1812. The Commission carefully considered this comment, weighed it against the Commission’s own statutory confidentiality obligations, and concluded that, as a policy matter, protective orders in Part 3 proceedings should not permit in-house counsel access to confidential information:

The Commission’s statutory obligation to maintain the confidentiality of commercially sensitive information . . . raises serious questions about the wisdom of allowing disclosure of information in its custody to in-house counsel, who might intentionally or unintentionally use it for purposes other than assisting in respondent’s representation, for example, by making or giving advice about the company’s business decisions. The Commission believes it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.

*Id.* at 1812-13 (footnote omitted); *see also Tronox*, 2018 WL 852244, at \*2 (“The Commission specifically rejected the suggestion that in-house counsel be allowed access to confidential materials because prohibiting such access might inhibit a respondent’s ability to defend itself[.]”). Thus, in adopting Rule 3.31(d), the Commission considered the arguments that Respondents now raise and rejected them.

2. The Standard Protective Order May Not Be Modified or Amended Absent Further Rule Making

As noted above, Rule 3.31(d) requires that the Administrative Law Judge issue the same, standard protective order automatically in every case. Rule 3.31(d); Interim Rules, 74 Fed. Reg. at 1812; *Axon*, 2020 FTC LEXIS 31, \*1; *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 WL 3249715, at \*3 (F.T.C. June 15, 2018); *Tronox*, 2018 WL 852244, at \*1; *In re McWane, Inc.*, Docket No. 9351, 2012 WL 3518638, at \*2 (F.T.C. August 8, 2012). Respondents are effectively asking the Court to change Rule 3.31’s standard protective order. The last time that

the Commission revised the Rules in 2009 it engaged in a formal rulemaking process. Interim Rules, 74 Fed. Reg. 1804, 1812-13, 1824-26; FTC Rules of Practice, Proposed Rule Amendments; Request for Public Comment, 73 Fed. Reg. 58832, 58837, 58846-48 (Oct. 7, 2008). To change the Rules, the Commission would be required, at a minimum, to “currently publish [the new rules] in the Federal Register for the guidance of the public.” 5 U.S.C. § 552(a)(1)(C).

3. The Standard Protective Order Has Never Been Modified to Permit Disclosure of Confidential Third Party Information to In-House Counsel

This Court has consistently rejected attempts by respondents to modify the standard protective order to allow in-house counsel access to confidential third party information. *Axon*, 2020 FTC LEXIS 31; *Tronox*, 2018 WL 852244 (denying motion to amend the protective order to disclose confidential third party information to in-house counsel; respondents argued that their in-house counsel needed the information to adequately participate in and direct the defense); *McWane*, 2012 WL 3518638; *Benco*, 2018 WL 3249715, at \*2-3 (rejecting respondent’s claim that in-house counsel’s access to confidential information was “vital” and/or “essential” to provide “meaningful input”). Similar to *McWane*, Respondents, after waiting for over one year to challenge the Protective Order, have “failed to articulate any reason for failing to request access to confidential information for in-house counsel earlier in the case, prior to the production of confidential information by these nonparties, or to assert any special circumstances that might justify a deviation from the standard protective order language.” *McWane*, 2012 WL 3518638, at \*2.

Moreover, since 3.31(d) was adopted in 2009, Complaint Counsel is not aware of any Commission administrative proceeding in which the standard protective order was modified to permit disclosure of confidential or *in camera* third party information to in-house counsel.

Respondents do not cite any Commission administrative precedent to support their position. Granting Respondents' requests for access to *in camera* information would subvert the intent behind the Rule: to promote efficiency, uniformity, and protect third party expectations.

**B. Respondents Fail to Demonstrate a Special Need to Modify the Protective Order**

For the reasons set forth in this Opposition, Respondents' requests to access *in camera* material in any form and attend *in camera* third party sessions of the hearing should be denied. Even if this Court could modify the standard protective order, Respondents fail to provide any special need or prejudice that warrants modifying the standard protective order. *Benco*, 2018 WL 3249715, at \*3 (citing *McWane*, 2012 WL 3518638, at \*2). Respondents hired well-qualified outside counsel. While Respondents argue that in-house counsel take a key role in this proceeding, that same argument has been considered and rejected by this Court. *Axon*, 2020 FTC LEXIS 31, \*2; *see also Tronox*, 2018 WL 852244, at \*2. Respondents fail to provide any specific reason why its in-house counsel, as opposed to Respondents' outside counsel, needs access to confidential third party information. *Benco*, 2018 WL 3249715, at \*3 ("there is no valid basis for concluding that [respondent's] outside counsel will be unable to sufficiently develop these arguments absent in-house counsel's access to" confidential third party information); *United States v. Aetna Inc.*, 2016 WL 8738420, at \*8-9 (D.D.C. Sept. 5, 2016).

Respondents fail to provide declarations supporting their position that their in-house counsels should receive access to *in camera* documents belonging to third parties and attend *in camera* third party sessions at the hearing. It may be the case that the five in-house counsel that Respondents seek permission to access *in camera* information have competitive decision making responsibilities, advise their businesses on competitive issues, or otherwise are involved in situations where their access to *in camera* third party information could be used to give

Respondents an edge on the competition. *See F.T.C. v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 670 (N.D. Ill. 2016) (“[O]nce . . . a lawyer . . . learns the confidential information that is being sought, that individual cannot rid himself of the knowledge he has gained; he cannot perform a prefrontal lobotomy on himself, as courts in various contexts have recognized.”).

### CONCLUSION

Complaint Counsel respectfully requests that this Court deny Respondents’ requests to access *in camera* information belonging to third parties and deny Respondents’ in-house counsel permission to attend the evidentiary hearing during third party *in camera* sessions. Granting Respondents’ requests, as they have set forth in their Response, would complicate the evidentiary hearing and lengthen the proceedings and create an undue risk of competitive harm to third parties.

Dated: May 18, 2021

Respectfully submitted,

s/ Nicole Lindquist

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 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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**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.

May 18, 2021

By: s/ Nicole Lindquist  
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