

**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

**RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF
RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE A DECLARATION AND A
WITNESS**

Pursuant to Rules 3.22(c) and 3.22(d), Respondents respectfully request leave to file the attached three page reply brief in response to Complaint Counsel's opposition to Respondents' motion *in limine* to exclude a declaration and testimony of a witness Respondents have had no opportunity to depose. The basis for this request is that Complaint Counsel makes an argument about a report from Respondents' expert that had not previously been raised and that Respondents did not foresee having to address in their principal brief.

Complaint Counsel has advised Respondents that it does not consent to Respondents filing a Reply.

Dated: May 4, 2021

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[PROPOSED] ORDER

Upon consideration of Respondents' Motion for leave to file a Reply in Support of Respondents' Motion *in Limine* to Exclude a Declaration and a Witness, it is hereby

ORDERED, that Respondents are granted leave to file their Reply.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge

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**RESPONDENTS' REPLY BRIEF IN SUPPORT OF RESPONDENTS' MOTION *IN*
LIMINE TO EXCLUDE A DECLARATION AND A WITNESS**

In its opposition, Complaint Counsel ignores the plain language of Additional Provision 9 of the Court's August 4, 2020 Scheduling Order, which provides that "no declaration shall be admitted unless a fair opportunity was available to depose the declarant." The Court previously held that Respondents made reasonable efforts to obtain the deposition at issue before the discovery cut-off and Respondents have not been able to depose the Declarant since that time. Indeed, Complaint Counsel now acknowledges that it is unlikely Respondents will have any opportunity to depose the Declarant before the evidentiary hearing. Opposition at 2.

Rather than address the plain language of the Scheduling Order on which Respondents' motion is based, Complaint Counsel makes arguments about relevance, materiality, and reliability. There is nothing in Additional Provision 9, however, that requires Respondents to show lack of relevance, materiality, and reliability *in addition to* showing that they have not had a fair opportunity to depose the Declarant. Nor is there

anything in that provision that makes an exception for situations where a Declarant is unavailable for a deposition because he has located himself in a jurisdiction that does not permit depositions. Complaint Counsel's opposition brief is therefore largely beside the point.

We write briefly to address Complaint Counsel's argument that Respondents' expert cited the Declaration in his report. Complaint Counsel argues that it should be able to rely on all of the assertions in the Declaration – even those that are contested such as the Declarant's unfounded speculation about Altria's and JLI's businesses – because Respondents' expert “cited to and relied on the Declaration.” Opposition at 5. Complaint Counsel suggests that prejudice resulting from the Declaration's admission into the record would be “mitigated by Respondents' own dependence on the Declaration.” *Id.*

However, Respondents' expert cited the Declaration for two uncontroverted background facts that are obviously within the Declarant's knowledge and, in any case, are part of the public record. One is the identity of a product that the Declarant's company sells. *See* footnote 71. And the other is the fact that his company has submitted an application for approval of its products with the FDA. *See* footnote 72. This hardly renders the rest of the Declaration admissible against Respondents notwithstanding Additional Provision 9 of the Scheduling Order, especially since the expert report was prepared before knowing how the Court would rule on Respondents' motion *in limine*. And of course it is a basic principle of evidence law that an expert's reliance on a document does not mean the document itself is admissible. *See* Rule 703 of the Federal Rules of Evidence (“If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.”).

For this reason and others set forth in our principal brief, Respondents respectfully request that the Court exclude the Declaration and any testimony from the Declarant.

Dated: May 4, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 4, 2021, I caused a true and correct copy of the foregoing Motion for Leave to File Reply in Support of Motion *In Limine* to Exclude a Declaration and a Witness to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I caused the foregoing document to be served via email to:

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