

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

In the Matter of)	
)	
Altria Group, Inc.,)	
a corporation,)	Docket No. 9393
)	
and)	
)	
JUUL Labs, Inc.)	
a corporation,)	
)	
Respondents.)	

**ORDER ON NON-PARTIES' MOTIONS
FOR *IN CAMERA* TREATMENT**

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission (“FTC” or “Commission”) and the Scheduling Order entered in this matter, certain non-parties, identified below, filed motions for *in camera* treatment for designated materials that FTC Complaint Counsel and/or Respondents Altria Group, Inc., and JUUL Labs, Inc. (“Respondents”) have listed on their exhibit lists as materials that might be introduced at trial. Neither Complaint Counsel nor Respondents opposed the substance of the motions filed by the non-parties.

In addition, on May 18, 2021, Respondents filed a Motion for Leave to File an Omnibus Response to the non-parties’ motions for *in camera* treatment, together with a proposed response, as to which Complaint Counsel sought leave to submit an opposition. Non-parties ITG Brands, LLC, NJOY, LLC, Reynolds American, Inc., and Turning Point Brands, Inc. also sought leave to file oppositions to Respondents’ motion for leave and proposed response. Based on a review of Respondents’ motion and proposed response, Respondents’ motion for leave to file the response is DENIED as both procedurally and substantively improper. First, the response does not, in fact, respond to the assertions or arguments on the merits of the non-parties’ motions. Second, Respondents use the purported response to request an order modifying the standard Protective Order entered in this case on April 2, 2020 to allow in-house counsel access to the information contained in non-party, confidential documents, instead of filing a motion in accordance with Rule 3.22. Third, requests for such access by in-house counsel, such as Respondents’, are typically denied as contrary to the mandatory provisions of the Protective Order. *See In re Axon Enterprise, Inc.*, 2020 FTC LEXIS 31 (Jan. 31, 2020); *In re Benco Dental*

Supply Co., 2018 FTC LEXIS 109 (June 15, 2018). The respective motions of Complaint Counsel and the above-listed non-parties for leave to file oppositions to Respondents' motion for leave are DENIED AS MOOT.¹

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence “be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b).

A. Clearly defined, serious injury

“[R]equests for *in camera* treatment must show ‘that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.’” *In re Kaiser Aluminum & Chem. Corp.*, 1984 FTC LEXIS 60, at *1 n.1 (May 25, 1984), quoting *In re H. P. Hood & Sons, Inc.*, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The FTC recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). A full and open record also provides guidance to persons affected by the Commission's actions and helps to deter potential violators of the laws that the Commission enforces. *Hood*, 1961 FTC LEXIS 368, at *6-7. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be given *in camera* treatment. *Id.* at *10-11. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 1980 FTC LEXIS 99, at *4-5; *In re Crown Cork & Seal Co.*, 1967 FTC LEXIS 128, at *2-3 (June 26, 1967)).

¹ Respondents represent that they have obtained consent to allow in-house counsel access to the *in camera* materials of Sheetz, Inc. and Wawa, Inc. Accordingly, notwithstanding this denial of Respondents' motion, in instances where a non-party has explicitly consented to Respondents' in-house counsel attending portions of the evidentiary hearing related to that non-party's *in camera* documents or reviewing briefs, orders, or other litigation documents incorporating such information, Respondents' in-house counsel may have such access.

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3-4 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts which contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only "in unusual circumstances," including circumstances in which "the need for confidentiality of the material . . . is not likely to decrease over time . . ." 16 C.F.R. § 3.45(b)(3). "Applicants seeking indefinite *in camera* treatment must further demonstrate 'at the outset that the need for confidentiality of the material is not likely to decrease over time' 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration." *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (Apr. 25, 1990). In *DuPont*, the Commission rejected the respondent's request for indefinite *in camera* treatment. However, based on "the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry, . . ." the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 1961 FTC LEXIS 368, at *12. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 1961 FTC LEXIS 368, at *12; *General Foods*, 1980 FTC LEXIS 99, at *2; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g., McWane*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” (“SIP”) the Administrative Law Judge shall order that such material be given *in camera* treatment. 16 C.F.R. § 3.45(b). “Sensitive personal information” is defined as including, but not limited to, “an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.” 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals’ names and addresses, and witness telephone numbers have been found to be “sensitive personal information” and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers’ names or other personal data when it was not relevant). “[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law.” 16 C.F.R. § 3.45(b)(3).

III.

The non-parties listed below filed separate motions for *in camera* treatment. Each motion included the documents for which *in camera* treatment is sought and was properly supported by a declaration of an individual within the company who had reviewed the documents at issue. These declarations supported the applicants’ claims that the documents are sufficiently secret and sufficiently material to their businesses that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of FTC decisions. *See Kaiser Aluminum*, 1984 FTC LEXIS 60, at *2 (“A public understanding of this proceeding does not depend on access to these data submitted by these third party firms.”). Moreover, in evaluating the specific motions of each of the non-parties under the standards set forth above, requests for *in camera* treatment by non-parties warrant “special solicitude.” *Crown Cork*, 1967 FTC LEXIS 128, at *2; *ProMedica*, 2011 FTC LEXIS 101, at *3-4. *See also Kaiser Aluminum*, 1984 FTC LEXIS 60, at *2-3 (“As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”).

7-Eleven, Inc. (“7-Eleven”)

7-Eleven seeks indefinite *in camera* treatment for six documents and *in camera* treatment for a period of five years for twenty-nine documents that it asserts constitute competitively sensitive confidential business documents. 7-Eleven supports its motion with a declaration from its senior category manager. The declaration asserts that the documents contain confidential information concerning sales, marketing, negotiations and proprietary store information, and its methodology for setting fees, and that such information is competitively sensitive. With respect

to the documents for which 7-Eleven seeks indefinite *in camera* treatment, the declaration states that the documents contain process and secret technical information. The declaration also describes in detail the significant steps 7-Eleven takes to protect the documents from disclosure and maintain their confidentiality.

Except as described below, 7-Eleven has met its burden of demonstrating that some of its documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as RX1205, RX1700, RX1701, RX1702, RX1703, and RX1704.

There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant's supporting declaration shows that such material remains competitively sensitive. 7-Eleven's supporting declaration fails to provide the necessary justification for granting *in camera* treatment to the following documents that are over three years old: PX3204, Attachment to PX3204 at 13384, Attachments to PX3205 at 5441-43, 5438-39, RX1212, RX1193, RX1195, RX1215, RX1706, Attachments to RX1706 at 13874-884, and Attachments to RX1708 at 18194-95. With respect to these documents, 7-Eleven's motion is DENIED WITHOUT PREJUDICE.

With respect to the documents for which 7-Eleven seeks indefinite *in camera* treatment, 7-Eleven has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. However, these documents consist of ordinary business records, and not trade secrets. Moreover, 7-Eleven has failed to demonstrate that the need for confidentiality of the material is unlikely to decrease over time. Accordingly, the documents are not entitled to indefinite *in camera* treatment. *In camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for documents identified as Attachment to PX3204 at 13385, Attachment to PX3204 at 13386, RX119/Attachment to PX3205 at 5440, RX1193, RX1194 and RX1195.

With respect to 7-Eleven's request for *in camera* treatment of portions of the deposition of Jack Stout (PX7044), 7-Eleven has designated page and line numbers it seeks to shield. However, 7-Eleven's designations are overbroad. As to many of the designations, 7-Eleven asserts that the testimony discusses documents that are confidential. A review of some of the designated testimony shows that the testimony does not reveal confidential information. For example, testimony that JUUL is occupying shelf space or that some shelf space is no longer specifically allocated to Altria, are general statements that do not meet the standard for *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7044, 7-Eleven's motion is DENIED WITHOUT PREJUDICE.

With respect to 7-Eleven's request for *in camera* treatment for the declaration of Jack Stout (PX8001/RX1190), upon review, information contained in the declaration fails to meet the standards for *in camera* treatment. General statements such as, open vape systems are typically sold at vape stores rather than convenience stores, Altria made an announcement that it was terminating its services agreement with JUUL, and rough estimates of the percentages of sales of

combustible cigarettes, are not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to PX8001/RX1190, 7-Eleven's motion is DENIED WITHOUT PREJUDICE.

Goldman Sachs Group, Inc. (“Goldman Sachs”)

Goldman Sachs seeks permanent *in camera* treatment for portions of documents containing sensitive personal information, including email addresses, telephone numbers, unique device identifiers of a device of an employee of an affiliate of Goldman Sachs and names of individuals associated with an employee that are unrelated to this case. Goldman Sachs does not seek to withhold entire documents from the record; rather, Goldman Sachs asks only that the sensitive personal information be redacted.

The information Goldman Sachs seeks to protect appears to be work or business email addresses or telephone numbers. This information does not constitute sensitive personal information. However, home or private email addresses and telephone numbers do constitute sensitive personal information. Therefore, the motion is DENIED WITHOUT PREJUDICE. If Goldman Sachs can demonstrate that any of the information for which it seeks *in camera* treatment constitutes sensitive personal information, permanent *in camera* treatment shall be granted.

ITG Brands, LLC (“ITG”)

ITG seeks *in camera* treatment for a period of five years for nineteen documents and portions of two declarations and one deposition transcript, and indefinite *in camera* treatment for two documents, which ITG asserts constitute competitively sensitive confidential business documents. ITG supports its motion with a declaration from its general counsel and corporate secretary. The declaration asserts that the documents contain proprietary information including ITG's financial data, methodology for setting the fees, marketing strategies, product formulations and detailed scope of business operations and that such information is competitively sensitive. The declaration also describes in detail the significant steps ITG takes to protect the documents from disclosure and maintain their confidentiality.

ITG has met its burden of demonstrating that its documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3004/RX1735/RX1227, PX3005/RX1736, PX3014, PX3018/RX1734, RX1737/RX1230, PX3059, RX1738, RX1740/RX1231, RX1741, PX3063, PX3065, PX3066/RX1742/RX1233, RX1743/RX1225, PX3071, RX1744, RX1745, RX1746, RX1747/RX1237 and PX3105.

With respect to the documents for which ITG seeks indefinite *in camera* treatment, these documents consist of ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment. ITG has failed to demonstrate that the need for confidentiality of the material is unlikely to decrease over time. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for documents identified as PX3026 and PX3069.

With respect to ITG's request for *in camera* treatment of portions of the deposition transcript of Jeff Eldridge (PX7012/RX0091), ITG has designated page and line numbers it seeks to shield. However, ITG's designations are overbroad. General testimony, such as the witness' opinion that one product category has more growth potential than certain others, or a rough estimate of sales made through one channel as opposed to another, or that the company ran a particular promotion in 2018, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7012/RX0091, ITG's motion is DENIED WITHOUT PREJUDICE.

With respect to ITG's request for *in camera* treatment for declaration paragraph 7 of PX8010/RX0096 and for declaration paragraphs 11, 15, 16, 17, 20, 21, 29, 30, 33, 34 and 35 of PX8011/RX0090, ITG's request is narrowly tailored and is GRANTED for a period of five years, to expire on June 1, 2026.

Logic Technology Development LLC ("Logic")

Logic seeks *in camera* treatment for a period of five years for four documents and for portions of three documents that it asserts constitute competitively sensitive confidential business documents. Logic supports its motion with a declaration from its in-house legal counsel. The declaration asserts that the documents contain information regarding Logic's business development and marketing strategies, performance reviews, financial data, methodology for setting the fees, and detailed geographic scope of operations and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Logic has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3123, PX3201, PX3206, PX3209 and for the portions of PX3124 and PX3199 designated in Exhibit E to Logic's motion.²

In addition, Logic seeks *in camera* treatment for telephone numbers and email addresses in documents identified as PX3124, PX3125, PX3126, PX3127, PX3128, PX3129, PX3130, PX3131, PX3132, PX3199 and PX3200. The information Logic seeks to protect appears to be work or business email addresses or telephone numbers. This information does not constitute sensitive personal information. However, home or private email addresses and telephone numbers do constitute sensitive personal information. Therefore, the motion is DENIED WITHOUT PREJUDICE. If Logic can demonstrate that any of the information for which it

² With respect to the documents for which Logic seeks partial *in camera* treatment, the parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

seeks *in camera* treatment constitutes sensitive personal information, permanent *in camera* treatment shall be granted.³

NJOY, LLC (“NJOY”)

NJOY seeks *in camera* treatment for a period of five years for twenty-two documents, in part or in full, that it asserts constitute competitively sensitive confidential business information. NJOY supports its motion with a declaration from its chief engagement officer and deputy general counsel. The declaration asserts that the documents contain proprietary information, including information regarding NJOY’s marketing and distribution strategies, customer relationships, financial and sales data including pricing plans/sales projections and detailed geographic scope of operations, and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Except as described below, NJOY has met its burden of demonstrating that these documents or designated portions therein are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3149, PX3150 and PX3151 and for the identified portions of the documents identified as PX3008, PX3147, PX3148, PX3152, PX3190, PX3191, PX3192, PX3193, PX3194, PX3195, PX3216, PX3217, RX1758 and RX1761.⁴

There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant’s supporting declaration shows that such material remains competitively sensitive. NJOY’s supporting declaration fails to provide the necessary justification for granting *in camera* treatment to the following documents that are over three years old: PX3002 and PX3003. With respect to these documents, NJOY’s motion is DENIED WITHOUT PREJUDICE.

With respect to NJOY’s request for *in camera* treatment for portions of the deposition transcript of Andrew Farrell (PX7029), NJOY has designated the text it seeks to shield through yellow highlight. For transcripts, citation to specific page and line numbers is required. Furthermore, NJOY’s designation of testimony is overbroad. For example, testimony that NJOY has told retailers that NJOY had made PMTA filings is not sufficiently secret or material.

³ Logic’s motion includes a request for *in camera* treatment of certain paragraphs of a declaration identified as PX8007. On May 5, 2021, an Order was issued precluding admission of PX8007. Order Granting Respondents’ Motion *in Limine* to Exclude Declaration and Witness (“May 5 Order”). The May 5 Order further allowed Complaint Counsel to seek relief from the preclusion Order, if the declarant is made available for deposition by Respondents by June 15, 2021. Based on the foregoing, Logic’s request as to the declaration is DENIED as presently moot; however, this denial is WITHOUT PREJUDICE to Logic’s right to refile a motion for *in camera* treatment as to PX8007, should the conditions of the May 5 Order be met and the issue of the declaration become ripe.

⁴ With respect to the documents for which NJOY seeks partial *in camera* treatment, NJOY has indicated the specific pages or portions for which it seeks *in camera* in yellow highlighting without identifying the pages or portions by specific bates numbers. The parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

General testimony stating, for example, the names of the companies with which NJOY competes, or NJOY's beliefs about youth usage of its product, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7029, NJOY's motion is DENIED WITHOUT PREJUDICE.

With respect to NJOY's request for *in camera* treatment of portions of the declaration of Andrew Farrell (PX8004), upon review, information contained therein fails to meet the standards for *in camera* treatment. General testimony, such as, the witness' opinion that obtaining agreements to sell products in retail stores or a manufacturer's ability to verify a customer's age are important aspects of competition, is not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to PX8004, NJOY's motion is DENIED WITHOUT PREJUDICE.

With respect to NJOY's request for *in camera* treatment of portions of the declaration of David Graham (PX8005), upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as NJOY was one of the first United States companies to sell e-cigarettes or that NJOY has long-standing relationships with certain (unidentified) labs or that product testing takes a significant amount of time, are not sufficiently secret or material. Accordingly, with respect to PX8005, NJOY's motion is DENIED WITHOUT PREJUDICE.

Phillip Morris International Inc. ("PMI")

PMI seeks *in camera* treatment for a period of five years for fifty-eight documents and portions of one deposition transcript that it asserts constitute competitively sensitive confidential business documents. PMI also seeks permanent *in camera* treatment for telephone numbers and email addresses contained in the documents. PMI supports its motion with a declaration from its assistant general counsel. The declaration asserts that the documents contain proprietary information including information regarding PMI's contemplated merger between PMI and Respondent Altria, PMI's business relationship with Altria, PMI's business strategies, and the development, commercialization, and marketing of its products, and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

PMI has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3009, PX3011, PX3012, PX3013, PX3027, PX3030, PX3034, PX3036, PX3039, PX3041, PX3042, PX3043, PX3044, PX3045, PX3046, PX3047, PX3048, PX3049, PX3050, PX3052, PX3053, PX3054, PX3055, PX3073, PX3074, PX3078, PX3079 (as partially redacted), PX3081, PX3084, PX3085, PX3086, PX3087, PX3088, PX3089, PX3090/RX1020, PX3091, PX3092, PX3093, PX3094, PX3098/RX1057, PX3099, PX3100, PX3101, PX3102 (as partially redacted), PX3106, PX3107, PX3108, PX3109,

PX3111/RX1036, PX3112/RX1049, PX3210, PX3221, RX1016, RX1021, RX1029, RX1035 (as partially redacted), RX1762 and RX1764.⁵

With respect to PMI's request for *in camera* treatment of portions of the deposition transcript of Martin King (PX7020/RX0111), PMI has designated page and line numbers it seeks to shield. However, PMI's designation of testimony is overbroad. For example, designated testimony that a reference in a document to new e-liquids refers to continuing to improve taste or liquid, is not sufficiently secret or material. Testimony that in most international e-cigarette markets, the level of nicotine is capped, is publicly available knowledge. General testimony, for example, that PMI has made changes to its operating model to allow people to work in a more agile, collaborative, project-based way, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7020/RX011, PMI's motion is DENIED WITHOUT PREJUDICE.

In addition, PMI seeks permanent *in camera* treatment for telephone numbers and email addresses contained in 36 documents. It is not clear whether PMI is seeking to protect work or business email addresses or telephone numbers, as opposed to home or private email addresses and telephone numbers. The first category does not constitute sensitive personal information; the second category does. Therefore, the motion is DENIED WITHOUT PREJUDICE. If PMI can demonstrate that any of the information for which it seeks *in camera* treatment constitutes sensitive personal information, permanent *in camera* treatment shall be granted.

Reynolds American, Inc. ("RAI")

RAI seeks *in camera* treatment for a period of five years for twenty-four documents that it asserts constitute competitively sensitive confidential business documents. RAI supports its motion with a declaration from its assistant secretary. The declaration asserts that the documents contain proprietary information including information regarding RAI's future marketing plans and pricing, financial information, decision-making processes, internal business strategies, and internal consumer surveys and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Except as described below, RAI has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3006, PX3207, PX3208, PX3211/RX1710, PX3212, PX3213, PX3218, PX3223, PX3224, PX3225,

⁵ With respect to the documents for which PMI seeks partial *in camera* treatment, the parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

PX3226/RX1709, PX3227, PX3228, PX3229, RX1711, RX1713, and for the identified portions of the documents identified as RX1716, RX1717, RX1718, RX1719 and RX1720.⁶

There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant's supporting declaration shows that such material remains competitively sensitive. RAI's supporting declaration fails to provide the necessary justification for granting *in camera* treatment to the following documents that are over three years old: PX3218 and PX3223. With respect to these documents, RAI's motion is DENIED WITHOUT PREJUDICE.

With respect to RAI's request for *in camera* treatment of portions of the deposition transcript of Lamar Huckabee (PX7037/RX0109), RAI has designated page and line numbers it seeks to shield. However, RAI's designation of testimony is overbroad. For example, testimony that RAI monitors what other products are being sold, or that new competition limits share growth or that a particular company sells e-vapor products, is not sufficiently secret or material. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7037/RX0109, RAI's motion is DENIED WITHOUT PREJUDICE.

With respect to RAI's request for *in camera* treatment of portions of the declaration of Lamar Huckabee (PX8008/RX1981), upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as, statements explaining the corporate structure of RAI and stating that the company sells e-cigarette products in the United States partly through a subsidiary, or that the company sells combustible cigarettes through a variety of retail channels, or a description of who RAI views as its competitors, or that a company acquired a product and introduced it to market in 2016, or that the adult consumer demand for cigarettes has declined slowly but steadily, are not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to (PX8008/RX1981), RAI's motion is DENIED WITHOUT PREJUDICE.

With respect to RAI's request for *in camera* treatment of portions of the declaration of Charles Garner (PX8009/RX0098), RAI's motion is narrowly tailored. *In camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the following portions of PX8009/RX0098: ¶ 43 third sentence only, ¶¶ 50-59.

Sheetz, Inc. ("Sheetz")

Sheetz seeks *in camera* treatment indefinitely, or in the alternative, for a period of five years, for twelve documents that it asserts constitute competitively sensitive confidential business documents. Sheetz supports its motion with a declaration from its category manager for cigarettes and tobacco. The declaration asserts that the documents contain proprietary information including information regarding Sheetz's pricing, sales and margin information, development and competition marketing strategies, Sheetz's relationships and negotiations with

⁶ With respect to the documents for which RAI seeks partial *in camera* treatment, the parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

its manufacturers, and detailed geographic scope of operations and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Sheetz has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. However, these documents consist of ordinary business records, and not trade secrets, and Sheetz has failed to demonstrate that the need for confidentiality of the material is unlikely to decrease over time. Accordingly, the documents are not entitled to indefinite *in camera* treatment. *In camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3113/RX1126, PX3115, PX3116/RX1134, PX3117, PX3119, RX1135, RX1136, RX1145, RX1146 and DX1127.

With respect to Sheetz's request for *in camera* treatment of portions of the deposition transcript of Paul Crozier (PX7019/RX0083), Sheetz has designated the page and line numbers it seeks to shield. However, Sheetz's designation of testimony is overbroad. For example, testimony about why pod products may be more attractive to some consumers, or that, in 2018, Sheetz planned to fill its top three shelves with Altria's MarkTen, or that Sheetz sells vapor products only from companies that have committed to submit a PTMA application prior to the FDA deadline, or that Altria sent a letter to all of its retail partners announcing that it had terminated a services agreement with JUUL, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents or that discusses information that is generally known will not be accorded *in camera* treatment. Accordingly, with respect to PX7019/RX0083, Sheetz's motion is DENIED WITHOUT PREJUDICE.

With respect to Sheetz's request for *in camera* treatment of portions of the declaration of Paul Crozier (PX8000/RX0082), upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as statements that Sheetz sets prices at a level that will be competitive with other convenience stores in the region, or that when cigarette companies implement price increases, Sheetz will typically pass higher costs on to end customers, or that prices at vape stores are not a factor when Sheetz considers when deciding how to price vapor products, or that Sheetz does not sell open systems, are not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to (PX8000/RX0082), Sheetz's motion is DENIED WITHOUT PREJUDICE.

Turning Point Brands, Inc. ("Turning Point")

Turning Point seeks *in camera* treatment for a period of five years for five documents that it asserts constitute competitively sensitive confidential business documents. Turning Point supports its motion with a declaration from its vice president of sales. The declaration asserts that the documents contain proprietary information including information regarding Turning Point's marketing and sales strategies, product performance and distribution information relating to Turning Point's retailers, financial and sales data including pricing plans/sales projections and detailed geographic scope of operations, and that such information is competitively sensitive.

The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Turning Point has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents or designated portions thereof identified as PX3133/RX1790 (0130-35, 0138-41), PX3134/RX1791 (0228, 0231, 0233, 0235, 0238, 0241, 0244-45, 0248-49, 0252-53, 0256-57, 0259, 0261-63, 0265-72), PX3135, PX3145 (0041-42) and PX7030/RX0133 (25:10 to 26:15; 152:21 to 153:11).

Wawa, Inc. (“Wawa”)

Wawa seeks indefinite *in camera* treatment for one document that it asserts constitutes a competitively sensitive confidential business document. Wawa supports its motion with a declaration from its category manager for tobacco and alcohol. The declaration asserts that the document contains proprietary information including information regarding Wawa’s business contracts relating to prices, discounts and rebates, marketing and sales strategies, product distribution, financial and sales data including pricing plans/sales projections, and detailed geographic scope of operations, and that such information is competitively sensitive. The declaration also describes the steps it takes to protect the information contained therein from disclosure and maintain its confidentiality.

The document for which Wawa seeks *in camera* treatment is a declaration from William Kloss. Wawa seeks *in camera* treatment for the entire declaration. Upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as statements that Wawa is a privately held chain of over 850 convenience stores, or that Wawa sells a variety of tobacco products, or that from 2014 to 2018 there was a steady decline in the volume of combustible cigarettes, or that promotions for combustible cigarettes are complex, or that Altria announced it would discontinue the MarkTen Elite, are not sufficiently secret to merit *in camera* treatment. Accordingly, Wawa’s motion is DENIED WITHOUT PREJUDICE.

IV.

All of the documents for which *in camera* treatment has been granted shall also be treated as confidential under the Protective Order and may only be disclosed to those entities covered by the Protective Order. Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order.

The parties are permitted to elicit testimony that includes references to, or general statements derived from, the content of information that has been granted *in camera* treatment. 16 C.F.R. § 3.45. However, any testimony revealing the confidential information from documents that have been granted *in camera* treatment shall only be provided in an *in camera* session. Counsel shall segregate their questions of witnesses in such a manner that all questions on *in camera* materials will, to the extent practicable, be grouped together and elicited in one *in camera* session during the examination of a witness.

For those non-parties whose motion was denied without prejudice in part or in full, each non-party may refile a motion for *in camera* treatment by June 4, 2021. Each non-party is directed to carefully and thoroughly review all documents for which it seeks *in camera* treatment, and strictly narrow its requests to only those documents that comply with the Commission's strict standards for *in camera* treatment. Any refiled motion shall include a sworn statement containing sufficient detail regarding the documents to identify the bases for the request for *in camera* treatment and demonstrate that such documents are entitled to *in camera* treatment.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 26, 2021