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2
3 UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA

5 IN RE JUUL LABS, INC., MARKETING,
6 SALES PRACTICES, AND PRODUCTS
7 LIABILITY LITIGATION

Case No. 19-md-02913-WHO

8 **CASE MANAGEMENT ORDER NO. 4:
9 RULE 502(D) AND PRIVILEGED
10 MATERIALS ORDER**

11 This Document Relates to:

12 ALL ACTIONS

13 The Plaintiffs and Defendants to this multi-district litigation, by and through their respective
14 counsel, have jointly stipulated to the terms of the Rule 502(d) and Privileged Materials Order, and with
15 the Court being fully advised as to the same, it is hereby ORDERED:

16 **A. Applicability.**

17 1. This Order shall be applicable to any privileged or otherwise protected or exempted
18 information contained in deposition transcripts and/or videotapes, and documents produced in response to
19 requests for production of documents, answers to interrogatories, responses to requests for admissions,
20 affidavits, declarations and all other information or material produced, made available for inspection, or
21 otherwise submitted by any of the parties in this litigation pursuant to the Federal Rules of Civil Procedure,
22 as well as testimony adduced at trial or during any hearing (collectively "Information").

23 **B. Production of Discovery Materials Containing Potentially Privileged Information.**

24 2. Pursuant to Federal Rule of Evidence 502(d), the production of any privileged or otherwise
25 protected or exempted information in this case shall not be deemed a waiver or impairment of any claim
26 of privilege or protection in this case or in any other federal or state proceeding, including, but not limited
27 to, the attorney-client privilege, the protection afforded to work product materials, statutory privileges and
28 protections, or the subject matter thereof, as to the produced document and any related material.

1 3. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a
2 review of documents, ESI or information (including metadata) for responsiveness and/or segregation of
3 privileged and/or protected information before production.

4 4. The producing party must notify the receiving party promptly, in writing, upon discovery
5 that a document has been produced for which the producing party asserts privilege and/or other protection.
6 This "Clawback Notice" shall include (i) the bates range of the produced materials, (ii) a privilege log
7 listing the item(s) produced, and (iii) a new copy of the material (utilizing the same bates number as the
8 original material) with the privileged or protected material redacted (if the producing party claims that
9 only a portion of the document contains privilege or other protected). If the producing party claims that
10 the entire document is privileged or protected, then the producing party shall provide a slip sheet noting
11 that the document has been withheld.

12 5. Upon receipt of a Clawback Notice, all such information, and all copies thereof, shall be
13 sequestered and the receiving party shall not use such information for any purpose, except as provided in
14 paragraphs 6 and 7, until further Order of the Court. The receiving party shall also attempt, in good faith,
15 to retrieve and sequester all copies of the documents in electronic format.

16 6. The receiving party may contest the producing party's assertion of privilege or other
17 protection. In that instance, within seven (7) business days from receipt of the Clawback Notice, the
18 receiving party shall give the producing party written "Notice of Clawback Challenge" providing the
19 reason for said disagreement. The producing party will have seven (7) business days to respond to the
20 Notice of Clawback Challenge, in writing, by either: (i) agreeing to withdraw the claim of privilege or
21 other protection; or (ii) stating the reasons for such claim. If the producing party's response to the Notice
22 of Clawback Challenge does not resolve the issue, the parties shall meet and confer within five (5) business
23 days of the response. If the conference does not resolve the dispute, within five (5) business days of the
24 conference, the parties shall submit the dispute to Judge Corley for resolution. The producing party retains
25 the burden of establishing the applicability of the privilege or other protection as to any inadvertently
26 produced materials. If the receiving party does not serve a Notice of Clawback Challenge, then, upon
27 expiration of the seven (7) business day period, all copies of the disputed material shall be returned or
28 destroyed.

1 7. Nothing in this Stipulation prevents a receiving party from submitting the item(s) listed in
2 the Clawback Notice to the Court for review or using the content of the item(s) in briefing submitted in
3 connection with any challenge to such notice that is raised in accordance with paragraph 6. Prior to
4 submitting the item(s) to the Court for review and/or using the content of the item(s) in briefing, the
5 receiving party must (1) provide the Court with a factual basis adequate to support a good-faith belief by
6 a reasonable person that the privilege or protection does not apply and (2) obtain an order from the Court
7 authorizing the submission of the items to the Court and/or use of the item(s) in briefing submitted in
8 connection with the clawback dispute. If any information is found to be privileged or protected in
9 accordance with the procedures described herein, all copies of the information shall be returned or
10 destroyed. The joint discovery letter brief must be filed under seal and the receiving party must not assert
11 as a ground for compelling disclosure the fact or circumstances of the disclosure.

12 8. Any analyses, memoranda or notes or portions thereof which were internally generated and
13 contain or were based upon the item(s) listed in the Clawback Notice shall immediately be sequestered,
14 and shall be destroyed in the event that (a) the receiving party does not contest that the information is
15 privileged or subject to other protection pursuant to paragraph 6 above, or (b) the Court rules that the
16 information is privileged or otherwise protected. Such analyses, memoranda or notes or portions thereof
17 may only be removed from sequestration and returned to its intended purpose in the event that (a) the
18 producing party agrees in writing that the information is not privileged or otherwise protected, or (b) the
19 Court rules that the information is not privileged or otherwise protected.

20 9. If, during a deposition, a producing party claims that a document being used in the
21 deposition (e.g., marked as an exhibit, shown to the witness, or made the subject of examination) contains
22 material that is subject to the attorney-client privilege, the attorney work product doctrine, or other
23 protection, the producing party may (a) allow the document to be used during the deposition without
24 waiver of any claim of privilege or other protection; (b) instruct the witness not to answer questions
25 concerning the parts of the document containing privileged or protected material; or (c) object to the use
26 of the document at the deposition to the extent the entire document is privilege or protected, in which case
27 no testimony may be taken relating to the document during the deposition until the matter is resolved by
28 agreement or by the court. If the producing party allows the examination concerning the document to

1 proceed consistent with this paragraph, all parties shall sequester all copies of the inadvertently produced
2 document. As to any testimony subject to a claim of privilege or other protection, the producing party
3 shall serve a Clawback Notice within five (5) business days of the deposition's conclusion, after which
4 the parties shall follow the procedures set forth in paragraphs 5 and 6. With respect to any document or
5 testimony that is the subject of a Clawback Notice that is sent more than twenty (20) days after the
6 conclusion of the deposition, the asserted privilege or protection will be deemed as waived absent
7 extraordinary circumstances. Pending determination of the clawback dispute, all parties with access to the
8 deposition transcript shall treat the relevant testimony in accordance with paragraph 5.

9 10. If a receiving party uses produced material in a brief or at a hearing, and the producing
10 party has not served a Clawback Notice in advance of the briefing event or hearing, the producing party
11 shall serve a Clawback Notice within five (5) business days of the briefing event or hearing. Thereafter,
12 the procedures set forth in paragraphs 5 and 6 shall apply. With respect to any produced material used in
13 a brief or at a hearing that is the subject of a Clawback Notice that is sent more than twenty (20) days after
14 the filing of the brief or conclusion of the hearing, the asserted privilege or protection will be deemed as
15 waived absent extraordinary circumstances.

16 11. This Stipulation does not preclude a party from voluntarily waiving any claims of privilege
17 or protection. The provisions of Fed. R. Evid. 502(a) apply when a party uses privileged or other protected
18 information to support a claim or defense.

19 **C. Privilege Logging.**

20 12. Unless otherwise provided in this Order, any document falling within the scope of any
21 request for production or subpoena that is withheld on the basis of a claim of attorney-client privilege,
22 work product, or any other claim of privilege or immunity from discovery is to be identified by the
23 producing party on a privilege log, which the producing party shall produce in Excel format.

24 13. Within thirty (30) days of each production of documents or ESI, the producing party shall
25 provide a privilege log or logs concerning any information that has been redacted or withheld in whole or
26 in part from that production.

27 14. The privilege log shall set forth the privilege or protection relied upon and specify
28 separately for each document:

- 1 (a) Bates-number range, or if no Bates-number range, a unique document identifier;
- 2 (b) Family relationship, if applicable (*i.e.* identification of parent emails and all attachments)
- 3 (c) A description of the document, including the factual basis sufficient to support the claim
- 4 that the document is privileged and/or protected;
- 5 (d) The names of the author(s);
- 6 (e) The names of all addressees and recipients, including copyees and blind copyees;
- 7 (f) The document date;
- 8 (g) An indication of whether the document has been produced in redacted form or withheld in
- 9 its entirety; and
- 10 (h) The privilege designation (attorney-client; attorney work product; joint defense and/or
- 11 common interest, etc.).

12 15. Attachments to emails shall be logged as separate documents on the log, with family

13 relationships identified.

14 16. Attorneys or their staff must be identified on the log with an asterisk (or similar notation).

15 17. With the exception of materials produced by Altria, privilege log identification is not

16 required for work product created by counsel after April 26, 2018, or for communications exchanged after

17 April 26, 2018, among: (i) the producing party and their counsel; (ii) counsel for the producing party; (iii)

18 counsel for plaintiffs; and/or (iv) counsel for defendants. For materials produced by Altria, privilege log

19 identification is not required for work product created by counsel after October 2, 2019, or for

20 communications exchanged after October 2, 2019, among the individuals listed in the preceding sentence.

21 Privilege log identification is also not required for internal communications solely within: (a) a law firm

22 representing a party or (b) a legal department of a party that is a corporation or another organization. The

23 parties reserve their rights to seek modification of this paragraph upon a showing of good cause why such

24 modification is appropriate.

25 18. Where multiple email messages are part of a single chain or “thread,” a party is only

26 required to include on a privilege log the most inclusive message (“Last In Time Email”) and need not log

27 earlier, less inclusive email messages or “thread members” that are fully contained within the thread,

28 provided that the log entry includes the names of the authors, addressees, and recipients (including

1 copyees and blind copyees) for all thread members, that the description of the thread include the factual
2 bases sufficient to support the claim of privilege for each thread member over which privilege is asserted,
3 and that the log entry include the privilege designations applicable to any thread members.

4 19. Documents withheld on the basis of privilege and/or work product protection may be
5 grouped in categories based on content, and a categorical privilege log prepared, including a description
6 of the nature or general subject matter of the communications for each category sufficient to support the
7 claim that the documents within the category are privileged and/or protected. The categorical log shall
8 also include the metadata listed in paragraphs 14(a), (b), and (d)-(g) for each document within the
9 category. Notwithstanding the forgoing, the decision to log documents on a categorical basis does not
10 waive party's right to adjudicate any challenge(s) to privilege on a document-by-document basis.

11 20. After the receipt of a privilege log, any Party may dispute a claim of privilege. Prior to
12 seeking Court intervention, the Party disputing, questioning, or otherwise objecting to a claim of privilege
13 shall provide in writing the identification of the documents or category of documents for which it questions
14 the claim of privilege and the reasons for disputing, questioning, or otherwise objecting to the privilege
15 designation. Within fourteen (14) days, the Party that designated the documents as privileged will provide
16 a written response explaining the basis for its claim or privilege, or if applicable, de-designating
17 documents as privilege and producing such documents in accordance with this Order. Thereafter, if the
18 Parties continue to disagree, they will then then meet and confer in good faith as to the claims of
19 privilege. If agreement has not been reached after fourteen (14) days, the parties shall submit the dispute
20 to Judge Corley for resolution.

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23 **IT IS SO ORDERED:**



24 Hon. William H. Orrick
United States District Court Judge

25 **DATED: December 17, 2019**
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