

## KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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October 5, 2020

The Honorable Jacqueline Scott Corley  
United States District Court for the  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, CA 94102

Re: *In re Juul Labs, Inc., Mktg., Sales Prac. & Prods. Liab. Litig.*, 19-md-02913

Dear Judge Corley,

Pursuant to Case Management Order No. 6 (ECF No. 357), counsel for Defendants Juul Labs, Inc. (“JLI”), Altria,<sup>1</sup> and Director Defendants<sup>2</sup> (collectively “Defendants”), and Plaintiffs’ Co-Lead Counsel (“Plaintiffs”) (collectively referred to herein as the “Parties”) respectfully submit this Joint Letter Brief regarding proposed Government Entity and School District Plaintiff Fact Sheets (“PFSs”).

Judge Orrick’s Scheduling Order requires that a “PFS must be completed for all potential [Government Entity] bellwether trial candidates” by November 16, 2020. (ECF No. 938 at 3.) The Parties have engaged in multiple good faith meet-and-confers regarding the content and procedures for Government Entity PFSs, and appreciate the Court’s guidance at the September 1, 2020 Informal Discovery Conference. However, significant unresolved issues remain and are ripe for Court resolution. The Parties respectfully submit their positions on disputed issues for the Court’s consideration below.

### **Defendants’ Position**

At the first MDL status conference, Judge Orrick set forth his expectation that the case “move forward in a speedy and collaborative way,” and directed the Parties to be prepared to exchange “information without serving a single document request.” (11/8/19 Hr’g Tr. at 12, 102.)

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<sup>1</sup> “Altria” refers to Altria Group, Inc., and the Altria-affiliated entities named in Plaintiffs’ Consolidated Class Action Complaint and Consolidated Master Complaint (collectively, “Complaints”), *see* ECF Nos. 387, 388.

<sup>2</sup> “Director Defendants” refers to Messrs. James Monsees, Adam Bowen, Nicholas Pritzker, Hoyoung Huh, and Riaz Valani.

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Defendants have heeded those instructions.<sup>3</sup> In contrast, the Government Entity Plaintiffs have not produced a single document or provided Rule 26(a) Initial Disclosures, ostensibly because the Parties have been engaged in robust discussions on these issues. Nonetheless (and consistent with Judge Orrick’s counsel), Defendants expect the Government Entities have been collecting and preparing to produce materials that are manifestly relevant to their claims. It is precisely those documents and information that Defendants have carefully crafted their proposed PFSs to capture. Defendants respectfully request the Court adopt their proposed School District and Government Entity PFSs (Exhibits A & B), as well as the proposed Government Entity Fact Sheet Implementation Order (Exhibit C), including the proposed dismissal-with-prejudice provision.

**1. Bellwether Selection Is An Important, But Not Exclusive, Purpose Of Fact Sheets.**

The Government Entity cases are a significant category in this MDL. The PFS process is a critical means to efficiently assess, litigate, and/or otherwise resolve these claims and the overall MDL. Plaintiffs’ exclusive focus on “bellwether selection” is misplaced. While PFSs are certainly central to the bellwether selection process, “they also can provide an efficient mechanism to assist the parties and the court in assessing whether certain claims may be candidates for expedited resolution through voluntary withdrawal, dispositive motions, or through a settlement process.” *Guidelines & Best Practices For Large & Mass-Tort MDLs, Bolch Jud. Instit.*, Duke Law School, 2nd Ed. (Sept. 2018) at 10; *see also Plaintiff Fact Sheets in Multidistrict Litigation – a Guide for Transferee Judges*, Fed. Jud. Ctr and J.P.M.L. (2019) at 2 (purposes of fact sheets include “to facilitate settlement negotiations” and “to screen cases in which plaintiffs lack information to support a claim against a defendant”). Defendants’ proposal will both advance the bellwether selection process and facilitate the overall resolution of the MDL.

**2. Defendants’ Proposal Will Elicit Probative Information With Minimal Burden.**

The Government Entity Plaintiffs have chosen to file lawsuits seeking sweeping damages and remedies, including abatement, injunctions, compensatory damages, treble damages, punitive damages, and attorneys’ fees. (*See, e.g.,* Compl., *Three Village Central Sch. Dist. v. Juul Labs, Inc.* (ECF No. 543) (“*Three Village Sch. Compl.*”) ¶¶ 645, 754-764; Compl. *County of Santa Cruz, Indiv. & On Behalf of People of State of Calif. v. Juul Labs, Inc.* (ECF No. 539) (“*Santa Cruz Compl.*”) ¶¶ 671, 745-755.) Defendants’ proposal is proportional in both scope and sequencing and incorporates Initial Disclosure requirements that are required under Rule 26(a).

*First*, Defendants tailored the PFSs to focus on Plaintiffs’ allegations, which presumably were included in the complaints only “after a reasonable inquiry under the circumstances.” Fed. R

<sup>3</sup> For example, JLI produced hundreds of thousands of pages of documents before any MDL discovery was served. And JLI has now produced one million documents (over four million pages) into the MDL Document Depository.

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Civ. P. 11(b). The PFSs focus on what Plaintiffs’ counsel has described as the “gravamen” of their claims, which is that the “youth vaping epidemic” “imposes costs on communities and the key institutions within those communities.” (9/1/2020 IDC Tr. at 36.)

For example, Plaintiffs allege “increased absenteeism, classroom disruptions, suspensions, loss of class time for students, increased nurse visits by students, diversions of and losses of critical funding to school districts, and many other harms and expenses directly due to Defendants’ actions” (*Santa Cruz Compl.* ¶ 642; *see also Three Dist. Sch. Compl.* ¶¶ 593-608), and claim that “county governments and Public Health Divisions . . . are required to spend increased time and resources combating the misinformation spread by Defendants, educating their communities about the addictive nature and address the rise in youth e-cigarette use created by Defendants, and supporting and assisting schools overwhelmed by youth e-cigarette use.” (*Santa Cruz Compl.* ¶ 643.) Defendants’ proposed PFSs request information about these allegations. (*E.g.*, Ex. A ## 4-14 (absenteeism, expulsions, detentions, suspensions); 25-36 (vaping prevalence, policies); Ex. B ## 37-38 (vaping expenditures); 49-50 (vaping education programs).)

Defendants’ proposed PFSs are also consistent with the Court’s observation that these cases and claims may not be considered in a JLI-only vacuum. “[I]t’s obvious the comparison has to be made” between use of alcohol, drugs, etc. (9/1/2020 IDC Tr. at 41-42; *see also e.g.*, Ex. A ## 37-44 (tobacco and other nicotine); 45-53 (alcohol); 54-61 (drugs); Ex. B ## 55-70 (tobacco and other nicotine); 71-81 (alcohol); 82-93 (drugs).) Nor is it fair to focus solely on JUUL products (or to lump them in an undifferentiated manner with all other vaping (or other nicotine) products). (*E.g.*, Ex. A # 28 (prevalence of e-cigarette use by various brands); Ex. B # 41(same).)

*Second*, Defendants are mindful of the Court’s concerns about burden. Defendants removed over 40 questions from each of their proposed PFS following the Court’s guidance and added protections to require Plaintiffs to only share data they already maintain. Thus, “for each of the questions” on the PFS, Plaintiffs are requested only to “provide information that is available to it,” and may indicate the information is unavailable if that is the case. In addition, Plaintiffs may respond to questions “by referring to documents” attached to the PFS and identified Bates numbers. (Ex. A at 1; Ex. B. at 1.) This is also consistent with the Court’s guidance: if Plaintiffs “have the data, why not share?” “If it doesn’t exist, it doesn’t exist.” (9/1/2020 IDC Tr. at 46.)

*Third*, Defendants’ proposed PFSs include questions that Plaintiffs would otherwise be required to provide in Rule 26(a) Initial Disclosures, regarding, among other things, persons with knowledge and damages claims. (*E.g.* Ex. A at ## 16-24.)

In short, Defendants’ proposed PFSs are tailored to seek only highly probative information, and require production only of materials available to the Plaintiff in the format in which it exists.

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Plaintiffs' proposed PFSs, on the other hand, are insufficient in several respects. *First*, as a general matter, their barebones nature is not close to proportional to the needs of case. Fed. R. Civ. P. 26(b)(1). *Second*, their proposal does not cover the "relevant factors" the Federal Judicial Center (upon which they rely) has identified for bellwether selection. For example, Plaintiffs contend that two questions asking Plaintiffs to "state generally" "how [they] have been damaged" and to "identify the approximate date" they allege they were "first injured" sufficiently cover the "circumstances of exposure" factor. But the Federal Judicial Center notes that the "circumstances of exposure" covers more than that—"e.g., length of exposure, dose, particular product at issue, particular indication for use." *Bellwether Trials in MDL Proceedings*, Federal Judicial Center and Judicial Panel on Multidistrict Litigation (2019) at 22. That type of detail (translated to the context of this case) is precisely what is missing from Plaintiffs' proposal. And rather than include any questions about different brands or products, Plaintiffs instead claim they have covered the "*defendant's* market share" factor by asking questions about each *plaintiff's* size. *Third*, the proposed language departs from the default rules of discovery, for example, limiting documents to "reports" maintained "in the ordinary course of business." But regardless of whether the materials are "reports," under Rule 26, reasonably accessible relevant materials that are proportional to the needs of the case should be produced. *Fourth*, materials that would be called for in initial disclosures are pared down, asking Plaintiffs to only "state generally" how they have been damaged.<sup>4</sup>

### 3. The Implementation Order Should Reflect The Aggressive Case Schedule.

The Parties are mostly aligned on the proposed Implementation Order, with two exceptions. *First*, the Court should maintain the procedure for eventual dismissals with prejudice. This provision is in the personal injury Fact Sheet Order (CMO #8), and provides a reasonable and fair process to terminate claims of those Plaintiffs who do not or cannot comply with basic PFS discovery. *Second*, the Court's scheduling order limits eligibility for bellwether selection to those cases whose PFSs have been submitted by November 16, 2020. (ECF No. 938 at 3.) There should be guardrails to prevent artificially limiting bellwether candidates by failing to submit PFSs for what may be perceived as weaker cases by that time, while still maintaining the claims through the generous notification procedure before any dismissal with prejudice.

In sum, Defendants appreciate the resource constraints of Covid, but Plaintiffs "decided to pursue the[se] suit[s] and are still deciding to pursue the[se] suit[s]" (9/1/2020 IDC Tr. at 42) and pressed for an aggressive schedule for Government Entity cases. Consequences for failure to provide basic discovery on a reasonable timeframe is fair and appropriate here.

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<sup>4</sup> If the Court elects to adopt Plaintiffs' proposed questions as worded, Defendants request the Court also direct the Plaintiffs to provide Rule 26 Initial Disclosures by November 16, 2020.

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**Plaintiffs' Position**

During the September 1, 2020 Informal Discovery Conference, the Court remarked that the Defendants' proposed Government Entity ("GE") Plaintiff Fact Sheets ("PFS's") were "[w]ay too detailed" and that they "would take days and days and hours and hours, which school personnel don't have, counties either."<sup>5</sup> The Court did, however, suggest that in addition to including information related to youth usage of e-cigarette products, Plaintiffs' proposed GE PFS's should be modified to also include information related to youth usage of certain other substances such as alcohol, drugs or other illicit substances. For example, the Court suggested that if the GE Plaintiffs maintained reports in the ordinary course of business that are reasonably available and include information relevant to youth usage of such products, such reports could be provided to the Defendants and that would be a satisfactory means of providing information on these topics.<sup>6</sup>

Following the Court's guidance, the GE Plaintiffs revised and expanded their proposed GE PFS's to call for additional detail concerning subjects such as reports of youth usage of various products (tobacco and nicotine products, e-cigarettes and vaping products, alcohol, drugs and other illicit substances), efforts undertaken to curb youth usage of each of these products, and additional detail on persons with relevant information, among other topics. These additions were substantial and resulted in the Plaintiffs' proposed GE PFS's including almost twice as many questions as were included in the previous drafts that the Court reviewed prior to the September 1 conference – the School District PFS was expanded from 24 questions to 43 questions and the Government Entity PFS was expanded from 25 questions to 43 questions, not including subparts. Plaintiffs' proposed GE PFS's reflect, and in some respects go beyond, the guidance the Court provided on September 1. Plaintiffs respectfully request the Court adopt their proposed GE PFS's (Exhibits D & E).

**1. Bellwether Selection is the Primary Purpose of the GE PFS's at this stage of the case.**

Among the primary purposes of fact sheets are to create a census of the claims including types of injuries, grouping cases for purposes of motion practice or into litigation tracks, and to identify cases for targeted discovery and/or to select bellwether cases.<sup>7</sup> Because a census of claims was previously created, cases have already been grouped for purposes of motion practice and motions have been fully briefed and argued and now are decisional, and the Court determined not to formally create litigation tracks, the overarching purpose for the GE PFS's at this stage of the proceedings relates to selecting bellwether cases. The Federal Judicial Center has identified the

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<sup>5</sup> 9/1/20 IDC Tr. at 42:13-16.

<sup>6</sup> *Id.* at 45:15-22.

<sup>7</sup> *Plaintiff Fact Sheets in Multidistrict Litigation – a Guide for Transferee Judges*, Federal Judicial Center and Judicial Panel on Multidistrict Litigation, 1<sup>st</sup> Ed. 2019 at 2.

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