December 9, 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), Plaintiffs' Co-Lead Counsel ("Plaintiffs") and counsel for Defendant Juul Labs, Inc. ("JLI") respectfully submit this Joint Letter Brief regarding public records requests served by JLI on school districts who are plaintiffs in this MDL.

Plaintiffs' Position

This Court should not allow Defendants to circumvent this Court's Order regarding the information that School Districts are required to gather at this stage. This Court considered the information sought by Defendants' proposed PFSs to be too burdensome on the schools. For instance, in its Order on PFSs, this Court wrote that "[m]uch of the information Defendants seek is inappropriate for inclusion in a fact sheet." (Order, Dkt. No. 1038, at p. 1). Yet, Defendants are now using non-judicial processes to demand information that **exceeds** the scope of the information that this Court deemed to be too burdensome. This Court should quash all of these improper records requests or, alternatively, should require the counsel who sent them to withdraw them.

I. Background

The parties and this Court engaged in a lengthy process in determining the allowable scope of the PFSs. The parties conferred and then submitted competing proposals before a hearing on September 1. The parties continued conferring and submitted revised proposals before a second hearing on October 7. The Court then issued its ruling, holding that the Plaintiffs' proposed PFSs should serve as the baseline for the PFSs. (Order, Dkt. No. 1038, at p. 1).

Undeterred by the Court's ruling, the Defendants are now demanding information that this Court deemed overly burdensome through sharply worded open records requests that have been served on the majority of the School District Plaintiffs.[1] These requests, sent by Defendants'

[1] Most of these requests were served on November 24, on the eve of the Thanksgiving holiday weekend, though Defendants agreed to a short extension, so that they would be deemed to have been served on the following Monday. Even with this short extension, many of the requests demand responses in a short time frame, such as three or five business days. (*See, e.g.*, Three Village Letter at 1 (five days); Letter to Blue Valley (Kan.) School District, attached as Exhibit C, at p. 1 (three days); Letter to Ava R-1 (Mo.) School District, attached as Exhibit D, at p. 1 (three days). Plaintiffs expect that Defendants will serve these requests on all School District Plaintiffs. And, as discussed below, some of the requests do not even comply with the applicable state laws.

counsel, all have similar language. Using the request sent to Three Village School District in New York as an example, Defendants urge that "[t]ime is of the essence in this request for public records." (Letter to Three Village School District ("Three Village Letter"), attached as Exhibit A, at p. 1). The letter also provides contact information for Defendants' counsel so they can "discuss why the public interest requires prompt compliance with this request." (*Id.*).

The request then lists 22 paragraphs of information sought, each of which is burdensome on its own. For instance, at the October hearing, this Court stated: "I don't think it would be reasonable to expect [school districts] to go through the school, pull each file and compile … the number of suspensions that were there." (10/7/20 Hearing Tr. at 9:23-10:1). Yet, the records requests seek information on all suspensions related not only to e-cigarettes, but also those related to combustible cigarettes, alcohol, illegal drugs, and cannabis. (Three Village Letter at ¶ 13).

Isolating only the first four requests, they clearly exceed what this Court has permitted, and also exceed the information sought in Defendants' rejected October proposal. For instance, Paragraph 1 seeks names of several district officials, such as principals, vice principals, counselors, nurses, and building services officials. (*Id.* at ¶ 1). None of that information was even in the Defendants' October proposed PFS, which sought only the names of superintendents and their assistants. (Def. Proposed PFS, 10/5/20, Dkt. No. 1016-1, at ¶ 16). This request mirrors question 23 in Defendants' first proposed PFS, submitted to this Court in August for informal guidance. (Def. Proposed PFS, attached as Exhibit B, at ¶ 23). At the September 1, 2020 hearing, this Court stated that Defendants' initial PFS was "[w]ay too detailed" and "would take days and days and hours and hours, which school personnel don't have." (9/1/20 Hearing Tr. at 42:14-16). The Court mentioned this question about names of school officers in particular, saying, "who's the vice principal? I don't know about that. What they need to know [is], who's the main person who's going to be knowledgeable. That's it." (*Id.* at 43:17-19).

Paragraph 2 then seeks "[a]ll documents concerning any research, investigation, studies, reports, evaluations, or analyses" related to e-cigarette products or manufacturers, "ENDS generally," vaping generally, tobacco products, illegal drug use, alcohol use, and/or cannabis use. (Three Village Letter at ¶ 2). Nothing similar appears in the Plaintiffs' proposed PFS, so the Court did not authorize any inquiry on this topic. The Defendants' proposed PFS asked only for studies related to vaping or e-cigarette use. (Dkt. No. 1016-1 at ¶ 1 of Document Requests). Thus, Defendants' request again goes beyond the information this Court allowed Defendants to seek, and even beyond the Defendants' submission in October, which this Court rejected as overbroad.

The next two paragraphs follow the same pattern, requesting information that goes far beyond vaping and e-cigarettes. Paragraph 3 seeks information about all expenditures related to e-cigarettes, tobacco products, alcohol, illegal drug use, and cannabis. (Three Village Letter at ¶ 3). Again, the Plaintiffs' proposed PFS has no comparable request, and the Defendants' proposed PFS was limited to vaping or e-cigarettes. (Def. Proposed PFS at ¶ 25). Paragraph 4 seeks documents related to donations or funding related to e-cigarettes, tobacco, alcohol, illegal drug use, or cannabis. (Three Village Letter at ¶ 4). The information sought on this topic was limited to vaping and e-cigarettes, in both the Plaintiffs' and the Defendants' proposed PFS. (*See* Def.

Proposed PFS at ¶ 27). This pattern continued throughout these request letters, with Defendants seeking information about alcohol, drugs, and other issues going well beyond vaping and e-cigarettes. (*See id.* at ¶¶ 9, 12-13, 15-16).

More generally, this pattern continued throughout the requests, in that the Defendants consistently request more information than this Court authorized, and even more information than Defendants requested in October, when this Court held their proposed fact sheets to be overbroad. (*See generally* Three Village Letter).

II. Argument

This Court should uphold the integrity of its prior Order by preventing the Defendants' attempt to flout that Order. This Court should either quash all of these public records requests as violating this Court's prior Order, or it should order counsel for Defendants to withdraw these improper, unnecessary, and extraordinarily burdensome open records requests.

1. Jurisdiction

This Court should first conclude that it has the authority to issue the requested order. Defendants argue that this matter is beyond the purview of the Court, but case law and logic say otherwise. All federal courts possess "inherent powers," which include the right "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017). These open records requests contradict the clearly stated will of this Court, in exceeding this Court's order as to the information that the School District Plaintiffs must gather. (Order, Dkt. No. 1038). By quashing these improper records requests, the Court would ensure the "orderly and expeditious disposition" of this case.

Several federal courts have prevented or limited litigants' public records requests. For instance, the District of Colorado held that it had the right to prohibit open records requests to any party in the litigation. *Citizen Ctr. v. Gessler*, 2012 U.S. Dist. LEXIS 98066, at *12-13 (D. Colo. July 16, 2012). The court wrote that it was prohibiting the plaintiffs "from using CORA as a means to circumvent this court's Scheduling Order … and to abuse the discovery process to obtain discovery in excess of the limitations set by this court … ." *Id.* at *6-7. Several other cases have reached similar conclusions. *See, e.g., CFGenome, LLC v. Streck, Inc.*, No. 4:16CV3130, 2019 WL 3969178, at *12–13 (D. Neb. Aug. 22, 2019) (improper to issue public records request when discovery was stayed); *Gibson v. Indiana State Pers. Dep't*, No. 117CV01212JPHTAB, 2019 WL 2411330, at *2 (S.D. Ind. June 7, 2019) (enforcing agreement not to use open records requests "to circumvent discovery and the related deadlines"); *Lowe v. New Mexico ex rel. King*, No. CV 10-315 JH/LFG, 2011 WL 13284675, at *3 (D.N.M. Oct. 3, 2011) (attorney who issued public records request during stay of discovery breached duties to the court and counsel by seeking "identical information which had been denied him at the Court's front door by a back door artifice").

In the MDL context, the opioid court adjudicated a dispute over allegedly confidential information produced to local government plaintiffs. Media organizations filed open records

requests in multiple states to try to obtain the information. *In re Nat'l Prescription Opiate Litig.*, 325 F. Supp. 3d 833, 834–35 (N.D. Ohio 2018), *vacated and remanded*, 927 F.3d 919 (6th Cir. 2019). The trial court and Sixth Circuit disagreed on the merits of balancing the public and private interests. *Id.* at 839-40; *In re Opiate Litig.*, 927 F.3d at 937-38. But both courts adjudicated the dispute, thereby concluding that they had jurisdiction to do so. *See United States v. Ceja-Prado*, 333 F.3d 1046, 1047 (9th Cir. 2003) (noting that "every federal court has a continuing obligation to ensure that it possesses subject-matter jurisdiction").

Alternatively, this Court at least has jurisdiction over the attorneys before it. As the U.S. Supreme Court has written, "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989). The same logic applies to an MDL. And, even outside of the mass action context, a New York judge recently exercised authority over counsel in adjudicating a dispute over open records requests. She wrote, in pertinent part: "Plaintiff's counsel is to take NO STEPS, whether under or outside the Federal Rules of Civil Procedure, to obtain information to use in the presentation of this case."[2]

Briefly addressing Defendants' arguments, Plaintiffs are not contending that federal courts have unlimited power to quash public records requests. Plaintiffs **do** contend that where a federal court has issued an order regarding the scope of discovery, the court may enforce that order, even if that enforcement happens to involve quashing public records requests. Plaintiffs have cited cases to that effect, so they are not asking this Court to do anything "unprecedented."

Defendants rely on distinguishable cases, as demonstrated by the two cases they initially highlight. In *American Bank v. City of Menasha*, 627 F.3d 261 (7th Cir. 2010), the appellate court commented that the district court's stay was "a slap in federalism's face" because a state court had already issued a mandamus order requiring that the records at issue be produced. *Id.* at 263-64. Quashing Defendants' public records requests here would not contradict any existing state-court orders. In *Mid-Atlantic Recycling Techs., Inc. v. City of Vineland*, 222 F.R.D. 81 (D.N.J. 2004), the information sought through open-records requests was also available through discovery, so there was no conflict. *Id.* at 85. Here, requiring responses to these expansive requests would directly contradict this Court's existing order on the scope of PFSs. (*See* Order, Dkt. No. 1038).

Both sides have cited New Mexico cases, but a third case addressing the opposite results in *Lowe* and *Noland* is instructive. *See Monarque v. City of Rio Rancho*, No. CV 11-0135 MV/KBM, 2011 WL 13285718, at *3–4 (D.N.M. May 20, 2011). The key issue as to whether the court has the power to act is whether the open records request contradicts an existing order of the court. *See id.* In *Monarque*, there was no such order in place. *Id.* at *4. But here, the Court has judicially determined the permissible scope of the inquiry to school districts. (Order, Dkt. No.

[2] Judge McMahon's order is handwritten in *J.T. v. de Blasio*, No. 1:20-cv-5878 (CM) (S.D.N.Y Oct. 23, 2020). The Order is attached hereto as Exhibit E.

1038). Thus, the Court has the power to protect its existing Order by quashing the Defendants' open records requests. *See Lowe*, 2011 WL 13284675, at *3.

Notably, Defendants have cited no case law indicating that this Court lacks jurisdiction over Defendants' counsel. For these reasons, this Court has jurisdiction over both the subject matter and Defendants' counsel, and can therefore take appropriate action.

2. Merits

Once this Court determines that it has authority to act, it should have little trouble concluding that it **should** quash the Defendants' open records requests. These requests are a direct assault on this Court's ability to control discovery. In ruling on the PFSs, the Court was appropriately concerned about placing too much burden on the schools. Yet, as laid out above, the open records requests require districts to dig for much more information than even the proposed PFSs that this Court rejected. Clearly, Defendants are flouting this Court's Order and using what *Lowe* described as "a back door artifice" to cause hassle for the School District Plaintiffs.

This back door/front door distinction is important, because if the Court permits this round of records requests, the Court will lose any control of the discovery process in this litigation. There will likely be more discovery disputes in the future, and if Defendants are permitted to use open records requests as an end run around any limitations set by this Court, then those limitations will have no practical effect. *See Lowe*, 2011 WL 13284675, at *3 ("In the context of ongoing federal litigation where specific discovery was denied a party due to a court-imposed stay, the use of an IPRA request to obtain the same information is improper.").

A related point is that only the Defendants would have this "back door artifice" available to them, if the Court allows this tactic. The *Gessler* court wrote that its ruling avoided giving one side an unfair advantage, as the defendants did not "have the parallel ability to submit CORA requests to Plaintiff." *Gessler*, 2012 U.S. Dist. LEXIS 98066, at *7. The same logic applies here. This Court carefully weighed the benefits and burdens of the information being sought when it ruled on the scope of the PFS. (*See* Order, Dkt. No. 1038). Defendants will get limited information from **all** Plaintiffs, with the ability to obtain even more information from the selected bellwethers. Defendants should not be permitted to use public records requests to circumvent this Court's process and dramatically increase the burden on all non-bellwether Plaintiffs.

Defendants may argue that these requests present state-law issues that should be resolved in state court. But that approach would subvert the very purpose of the MDL process. As the opioid court noted, "centralized discovery is a core purpose of the creation of this MDL." *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2020 WL 3166631, at *2 (N.D. Ohio June 15, 2020); *see also* 28 U.S.C. § 1407 (stating that MDL proceedings "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions").

Here, that convenience will be lost if the parties are litigating open records requests all over the country. In at least two states where Defendants sent open records requests, only citizens of

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