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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: JUUL LABS, INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL ACTIONS

Case No.: 19-MD-02913-WHO

ALTRIA DEFENDANTS' MOTION TO COMPEL PRODUCTION OF SETTLEMENT AGREEMENTS AND RELATED MATERIALS

Judge: Hon. William H. Orrick
Date: January 20, 2023
Time: 1:00 p.m.
Ctrm: 2

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INTRODUCTION

On December 6, 2022, Defendant Juul Labs, Inc. ("JLI") publicly announced that it had entered into a "global resolution" with Plaintiffs to resolve all of the claims against JLI and other released parties in this multi-district litigation (the "Settlement Agreements" or "Agreements").[1] Details concerning the Settlement Agreements, however, remain shrouded in secrecy. The Settling Parties[2] have refused to provide copies of the Settlement Agreement or Agreements that would resolve claims brought by government entities that were brought on behalf of the public. The Settling Parties refuse to produce copies of the Agreements resolving the thousands of personal injury and tribal plaintiffs' claims as well. They offer little to no information concerning the total amounts that these thousands of plaintiffs will share as part of this "global resolution," or how the parties reached agreement on those amounts, or how a particular plaintiff's share is determined, or what a defendant's particular share in the settlement amount might be. They have said nothing about the relationship between the different groups of plaintiffs and how their disparate interests were represented during the negotiation process. In fact, like the Agreements themselves, the negotiation process that preceded the settlement remains a mystery.

The Altria Defendants[3] are not parties to or released by the Settlement Agreements. They instead remain defendants in almost all of the cases addressed by the Agreements. The terms of the Agreements, and the negotiations and discussions leading up to them, are therefore critical to the Altria Defendants and will impact, among other things, their ability to defend themselves, bring cross-claims and third-party claims for contribution, evaluate their potential liability, and explore and assess potential witness biases, and are relevant for other reasons as well. The Altria Defendants recognize that some Defendants might prefer to keep certain details about the Agreements from the general public and do not object to reasonable precautions to achieve that goal. But the Settling Parties'

[1] *JUUL Labs Reaches Global Resolution in U.S. Litigation*, JUUL Labs (Dec. 6, 2022), https://www.juullabs.com/jli-litigation-resolution/ ("Dec. 6, 2022 JLI Release") (Ex. 1).

[2] As used herein, the Settling Parties refers to the parties to the "global resolution" announced by JLI on December 6, 2022 and the underlying Settlement Agreements, including but not limited to JLI, JLI's officers and directors, and Plaintiffs acting through Plaintiffs' Lead Counsel.

[3] The "Altria Defendants" refer to Altria Group, Inc., Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution Company, and Altria Enterprises LLC.

refusal to produce Agreements or information about the settlements to the Altria Defendants, which are parties to this litigation, goes far beyond the protections needed to address those concerns, lack any legal basis, and would severely prejudice the Altria Defendants. Indeed, courts have repeatedly found that that settlement agreements and related information are not privileged or afforded any unique protections from disclosure and are relevant to a number of subjects.

Accordingly, the Altria Defendants respectfully request that this Court enter an order compelling the Settling Parties to produce the Settlement Agreements and related materials, including communications and other documents concerning the Settlement Agreements (together, the "Settlement Materials").

BACKGROUND

During the December 6, 2022 Case Management Conference, Plaintiffs, JLI, James Monsees, Adam Bowen, Riaz Valani, Nicholas Pritzker and Hoyoung Huh announced that they had reached a global settlement that would resolve the claims against them in this MDL and in the coordinated *Juul Labs Product Cases* pending in California state court ("the JCCP").[4] JLI issued a press release that same day announcing a "global resolution" of the claims against JLI in this MDL and the JCCP that "covers more than 5,000 cases brought by approximately 10,000 plaintiffs against Juul Labs and its officers and directors," which includes cases brought by personal injury plaintiffs, consumer class actions, government entities, and Native American tribes.[5] JLI explained that, "[a]s part of the settlement and court process, Juul Labs cannot disclose the settlement amount at this time, but has secured an equity investment to fund the resolution." *Id.* The Settlements would resolve these plaintiffs' claims against JLI, JLI's officers and directors, and a long list of additional defendants that includes retailers, distributors, e-liquid manufacturers, and other entities (collectively, "the Released Defendants").[6]

[4] Dec. 6, 2022 JLI Release (Ex. 1).

[5] *Id.*

[6] Joint Case Management Conference Statement and Proposed Agenda, ECF No. 3707 (filed Dec. 14, 2022). The released parties were identified therein to include the "Director Defendants" (Messrs. Monsees, Bowen, Pritzker, Huh and Valani), the "E-Liquid Defendants" (Mother Murphy's Labs, Inc., Alternative Ingredients, Inc., Tobacco Technology, Inc., and Eliquitech, Inc.), the "Retailer Defendants" (Chevron Corporation, Circle K Stores, Inc., Speedway LLC, 7-Eleven, Inc., Walmart,

(Footnote Cont'd on Following Page)

JLI has since filed a proposed "implementation order" for the settlement.[7] According to that proposed order, the Settlement Agreements would "resolve claims against JLI and other released parties in the above-captioned matter involving the design, manufacture, production, advertisement, marketing, distribution, sale, use, and performance of JUUL Products."[8] The proposed order states further that the Settlement Agreements purport to "establish voluntary programs to settle the claims of the Personal Injury, Government Entity, and Tribal Plaintiffs, as specifically defined in each Settlement Agreement."[9] The proposed implementation order also proposes certain deadlines for plaintiffs that want to be part of the settlement to take certain actions.[10]

The Altria Defendants are not parties to or released by the Settlement Agreements but their interests would plainly be impacted by them. Accordingly, shortly after JLI announced its "global resolution," the Altria Defendants requested copies of the Settlement Materials from the Settling Parties. The Parties have since met and conferred however the Settling Parties continue to refuse to produce any such information concerning the Settlement Agreements, forcing the Altria Defendants to file this motion to compel.

ARGUMENT

I. THE SETTLEMENT MATERIALS ARE NOT PRIVILEGED AND CANNOT BE WITHHELD AS "CONFIDENTIAL"

Despite the Settling Parties' staunch refusal to provide the Settlement Materials to the Altria Defendants—or even to the Court—they can offer no reason why relevant materials or information about the Settlement should not be disclosed. Settlement agreements and communications related to settlement are not protected by any unique privilege, even if they are designated as "confidential" by parties to the settlement.

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and Walgreen Co.), and the "Distributor Defendants" (McLane Company, Inc., Eby-Brown Company, LLC, and Core-Mark Holding Company, Inc.). *See* ECF No. 3707 at 1 nn. 2-5 & 3.

[7] [Proposed] Case Management Order No. 16 (Implementing JLI Settlement), ECF No. 3706-1 ("Proposed Implementation Order").

[8] *Id*. at 1.

[9] *Id*.

[10] *Id*. at 5-8.

Federal Rule of Evidence 408 ("Rule 408") does not protect settlement agreements or related materials from disclosure. Rule 408 addresses the *admissibility* of evidence, not its *discoverability*, and contains numerous exceptions. *See Rhoades v. Avon Prods, Inc.*, 504 F.3d 1151, 1161 (9th Cir. 2007) (denying an "absolute [settlement] privilege" for admissible evidence because "statements made in settlement negotiations are only excludable under the circumstances protected by [Rule 408]"). "[I]t is 'plain that Congress chose to promote this goal [in Rule 408 to promote settlements] through limits on the *admissibility* of settlement material rather than limits on their *discoverability*. In fact, the Rule on its face contemplates that settlement documents may be used for several purposes at trial, making it unlikely that Congress anticipated that discovery into such documents would be impermissible.'" *Vondersaar v. Starbucks Corp.*, 2013 WL 1915746, at *3 (N.D. Cal. May 8, 2013) (emphases in original) (quoting *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F. Supp. 2d 201, 211 (D.D.C. 2005)).[11] Courts in the Ninth Circuit and beyond therefore consistently refuse to find any privilege preventing the discovery of settlement materials. *See, e.g.*, *In Re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 13202833, at *1 (N.D. Cal. April 4, 2012) (denying the plaintiff's objection to the magistrate judge's order compelling the plaintiff to produce its settlement agreement with a co-defendant); *Davis v. Prison Health Servs.*, 2011 WL 3353874, at *10–11 (N.D. Cal. Aug. 3, 2011) (granting motion to compel settlement agreement with co-defendants); *Phoenix Sols. Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 581–85 (N.D. Cal. 2008) (compelling production of third-party settlement negotiations and finding "no convincing basis for [the plaintiff's] proposition that its licensing negotiation communications are protected from discovery by a settlement privilege").[12] Simply put, there is "no federal privilege preventing the discovery of

[11] To the extent the Settling Parties may argue that California rather than federal law applies and claim that the Settlement Materials fall under the protections of the California mediation privilege, *see* Cal. Evid. Code § 1123, such argument also fails. *See Arch Specialty Ins. Co. v. Univ. of S. Cal.*, 2022 WL 2342565, at *3 (C.D. Cal. June 29, 2022) ("[T]he court concludes that Section 1123 permits disclosure of the settlement agreement between USC and Chivaroli. The California mediation privilege does not otherwise apply.").

[12] *See also, e.g.*, *M.P. v. Holy Names Univ.*, 2022 WL 247557, at *2 (N.D. Cal. Jan. 27, 2022) ("[T]o the extent Plaintiffs are refusing to produce settlement communications, courts have found that 'Rule 408 does not warrant protecting settlement negotiations from discovery.'" (quoting *Phoenix Sols. Inc.*, 254 F.R.D. at 584)); *Manzo v. Cty. of Santa Clara*, 2019 WL 2866047, at *3 (N.D. Cal. July 3,

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settlement agreements and related documents." *Bd. of Trs. of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 521, 523 (C.D. Cal. 2008).

That parties to a settlement agreement designate the agreement as "confidential" also does not preclude its production in discovery. *See, e.g.*, *Chevron Mining Inc. v. Skanska USA Civ. W. Rocky Mountain Dist., Inc.*, 2019 WL 11556844, at *1 (N.D. Cal. Sept. 13, 2019) (holding that confidentiality clause "does not bar the settlement from being discoverable"); *BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 20 F. 4th 1231, 1251 (9th Cir. 2021) (Rawlinson, J., concurring) ("Any concerns regarding unauthorized disclosure of the settlement terms may be addressed by a protective order fashioned by the district court.").[13] That is especially true here, where the Amended Stipulated Protective Order (ECF 1282) obviates any purported concerns regarding the disclosure of proprietary or sensitive information.[14] Courts have repeatedly found that protective orders adequately protect the confidentiality interests of settling parties while allowing the disclosure of settlement agreements and related materials. *See, e.g.*, *Phillips ex rel. Ests. of Byrd*, 307 F.3d at 1212 (recognizing that "courts have granted protective orders to protect confidential settlement agreements"); *O'Brien v. Johnson & Johnson Med. Devices Co.*, 2020 WL 5215384, at *5 (C.D. Cal. June 24, 2020) (ordering production

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2019) ("Rule 408 does not address the *discoverability* of settlement-related materials, and the Ninth Circuit has not found a federal privilege for settlement communications. . . . Several district courts in the Ninth Circuit have observed that an absolute privilege against discovery of such materials would be inconsistent with both Rule 408 and Federal Rule of Civil Procedure 26(b)." (internal citation omitted) (emphasis in original)); *Conde v. Open Door Mktg., LLC*, 2018 WL 1248094, at *3 (N.D. Cal. Mar. 12, 2018) (concluding that "Rule 408 does not apply to shield discovery of the settlement communications . . . ."); *Matsushita Elec. Indus. Co. v. Mediatek, Inc.*, 2007 WL 963975, at *3 (N.D. Cal. Mar. 30, 2007) ("The inescapable conclusion is that a privilege against disclosure cannot be found in Rule 408. To the contrary, because the Rule anticipates that settlement negotiations may be admissible, a privilege against their discovery would be inconsistent with Rule 26."), *objections to magistrate judge's order denied* ECF No. 1145 (N.D. Cal. May 25, 2007).

[13] *Accord Burke v. Regalado*, 935 F.3d 960, 1048 (10th Cir. 2019) ("The settlement's confidentiality does not bar discovery."); *St. Bernard Parish v. Lafarge N. Am., Inc.*, 914 F.3d 969, 975 (5th Cir. 2019) ("[D]iscovery of confidential settlement agreements is generally available under an appropriate protective order.").

[14] The Settling Parties bear the burden of establishing that a protective order is necessary in the first place. *See Phillips ex rel. Ests. of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002) ("[T]he party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted.").

of a settlement agreement over objections and noting that even a non-party's privacy interests would be adequately protected by the protective order). The Court should reach that conclusion here.

Indeed, even if the Settlement Materials include sensitive information, the Court "must balance Defendants' interest in the discovery of potentially relevant information against [Settling Parties'] interest[s] in protecting a settlement negotiated with the expectation of confidentiality." *Gao v. Campus 150 Venture II, LLC*, 2021 WL 6103537, at *2 (C.D. Cal. Oct. 29, 2021) (internal quotations omitted) (quoting *Big Baboon Corp. v. Dell, Inc.*, 2010 WL 3955831, at *4 (C.D. Cal. Oct. 8, 2010)); *Abbott Diabetes Care Inc. v. Roche Diagnostics Corp.*, 2007 WL 4166030, at *4 (N.D. Cal. Nov. 19, 2007) ("[T]he pro-settlement posture of the federal courts does not absolutely shield settlement agreements from disclosure.")). And unlike situations involving nonparties, *cf. MedImmune, LLC v. PDL BioPharma, Inc.*, 2010 WL 3636211 at *1 (N.D. Cal. 2010), the settlement agreements at issue here involve parties to the instant litigation and, as discussed in Section II below, are directly relevant and critically important to the Altria Defendants' defenses, claims, and liability.

Moreover, many of the cases resolved by the Agreements were brought by government entities to address claims of public nuisance and seek relief on behalf of public citizens. These entities likely have transparency obligations that require disclosure to the public and undercut any argument that the Settlements are entitled to absolute protection. Likewise, certain details concerning the Settlement Agreements have been leaked publicly by "people familiar with the matter."[15] Even if the leaked information is not comprehensive or completely accurate, the fact that parties to the Agreements have disclosed information to the public further undermines the position that details about the Agreements are so deserving of protection that they cannot be produced to party defendants that are subject to a protective order.

[15] Christina Jewett, *Vaping Settlement by Juul Is Said to Total $1.7 Billion*, New York Times (Dec. 10, 2022), https://www.nytimes.com/2022/12/10/health/juul-settlement-teen-vaping.html; Jennifer Maloney, *Juul to Pay $1.7 Billion in Legal Settlement*, Wall Street Journal (Dec. 9, 2022, 3:13 p.m. EST), https://www.wsj.com/articles/juul-to-pay-1-7-billion-in-legal-settlement-11670616693; Ty Roush, *Juul To Pay $1.2 Billion To Settle Youth-Vaping Lawsuits*, Forbes (Dec. 9, 2022, 1:28 p.m. EST), https://www.forbes.com/sites/tylerroush/2022/12/09/juul-to-pay-12-billion-to-settle-youth-vaping-lawsuits/?sh=534642cc345c; *Juul agrees to pay $1.2 bln in youth-vaping settlement*, Reuters (Dec. 9, 2022, 11:47 a.m. EST), https://www.reuters.com/legal/juul-agrees-pay-12-bln-youth-vaping-settlement-bloomberg-news-2022-12-09/.

II. THE SETTLEMENT MATERIALS ARE HIGHLY RELEVANT TO THE LITIGATION AGAINST THE ALTRIA DEFENDANTS

The Altria Defendants are entitled to "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ." Fed. R. Civ. P. 26(b)(1). Information and materials do not need to be admissible to be discoverable. *See id.* A "relevant matter" under Rule 26(b)(1) is any matter that "bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, (1978). These rules create a "'broad right of discovery' because 'wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth.'" *Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993)).

This "broad right of discovery" includes the discovery of settlement agreements. *See, e.g.*, *Vondersaar*, 2013 WL 1915746, at *3 ("[t]he Ninth Circuit favors broad discovery, and settlement material may reasonably lead to persuasive or relevant evidence"); *Phoenix Sols. Inc.*, 254 F.R.D. at 582 (finding settlement negotiations relevant under Rule 26(b)(1) because they "could help [the defendant] ascertain the extent of its liability to [the plaintiff] and to formulate an appropriate litigation strategy"); *see also, e.g.*, *BladeRoom Grp. Ltd.*, 20 F. 4th at 1251 (Rawlinson, J., concurring) (citing Rule 26(b)(1) for the proposition that upon remand the defendant would be entitled to discovery of the settlement terms between the plaintiff and another co-defendant). The Settlement Materials are relevant to a number of issues in this litigation and should be produced to the Altria Defendants.

A. The Settlement Materials Are Relevant To Which Claims Remain Against The Altria Defendants And The Altria Defendants' Potential Liability

The Settlement Materials are needed to determine the extent to which the Altria Defendants might be liable for a plaintiff's alleged injuries. *See, e.g.*, *Hem & Thread, Inc. v. Wholesalefashionsquare.com, Inc.*, 2020 WL 5044610, at *2 (C.D. Cal. June 16, 2020) ("The settlement amount is relevant to the claims and defenses of the present case."); *Lytel v. Simpson*, 2006 WL 8459764, at *2 (N.D. Cal. June 23, 2006) (noting that settlement agreements are particularly

relevant "with respect to ascertaining any remaining liability"). Under California law, plaintiffs "are not permitted to seek double or duplicative recovery for the same item of damages." *O'Brien*, 2020 WL 5215384, at *4; *see also Gao*, 2021 WL 6103537, at *3 ("The one-satisfaction rule is an equitable doctrine [which] operates to reduce a plaintiff's recovery from the nonsettling defendant to prevent the plaintiff from recovering twice from the same assessment of liability.") (citation omitted).[16] Under this "double recovery doctrine," a "plaintiff who has received full satisfaction of its claims from one tortfeasor generally cannot sue to recover additional damages corresponding to the same injury from the remaining tortfeasors." *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755, 760 (9th Cir. 2015).

Plaintiffs' claims against the Altria Defendants involve the same legal theories and arise out of the same alleged injuries as their allegations against the Settling Defendants. As a result, these involve the same claims for purposes of the double recovery doctrine. *In re JTS Corp.*, 617 F.3d 1102, 1116–17 (9th Cir. 2010) (internal citations and quotations omitted) (finding the "same wrong may emanate from two successive independent torts and does not require unity of purpose, action, or intent by the two or more tortfeasors"). The Settlement Agreements should be produced to ensure that a settling plaintiff does not obtain a windfall recovery.

Likewise, the extent to which a plaintiff received payment as part of the settlement for their alleged harm would inform the extent to which the Altria Defendants might be entitled to a set-off in the event that a later trial results in a verdict against them. California Code of Civil Procedure § 877 in particular "requires that an offset be given reducing the judgment by the amount of the consideration paid for a dismissal given to one or more of a number of tortfeasors claimed to be liable for the same tort." *Knox v. County of Los Angeles*, 109 Cal. App. 3d 825, 832 (2nd Dist. 1980). This statute provides that:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before

[16] California law applies to the Settlement Agreements. *See* Proposed Class Settlement, ECF No. 3724-2 § 22.11 ("All the terms of this Class Settlement Agreement shall be governed by and interpreted according to the laws of the State of California except to the extent federal law applies.").

> verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:
>
> (a) It shall not discharge any other such party from liability unless its terms so provide, *but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater*.

Cal. Code Civ. Proc. § 877 ("section 877") (emphasis added). Section 877 "is designed to provide for equitable sharing of damages, and assure that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another." *Cty. of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 544 (Cal. Ct. App. 2008) (citation omitted); *see also Karim v. City of Pomona*, 2010 WL 1966186, at *9 (Cal. Ct. App. May 18, 2010) (noting that "Section 877 provides that when a plaintiff settles with one or more persons liable for a tort, the trial court shall reduce the claims against the others by the greater of the amount stipulated in the release or in the amount of consideration paid"). The Altria Defendants cannot evaluate the existence of potential set-offs without information about what each plaintiff recovered through the Settlement Agreements.

B. The Settlement Materials Are Relevant To Determine The Purpose Any Awards Will Serve

Information concerning the amount of settlement payments alone is insufficient. Given the different theories of recovery and different kinds of injuries alleged by each plaintiff, the Altria Defendants need additional information to evaluate whether the settlement amounts received by a plaintiff were intended to serve a certain purpose. For example, the government entities seek monetary relief for past damages and to abate an alleged nuisance. If the settlement funds received by plaintiffs was intended to specifically compensate past damages or instead to abate an existing nuisance, that information would be relevant to the plaintiff's ability to obtain certain relief in a

subsequent trial against the Altria Defendants. Likewise, if the parties discussed the extent to which settlement funds were intended to be used for certain purposes, such as addressing past harm or adopting prospective remedial programs, those discussions could be relevant to the Altria Defendants' entitlement to set-off against certain relief and the Altria Defendants' potential liability.

In addition, Plaintiffs acknowledged in their Motion For Preliminary Approval Of Class Action Settlement that certain class representatives also serve as bellwether plaintiffs in this MDL. *See* Mot. for Preliminary Approval, ECF No. 3724 ("Mot. for Prelim. App.), at 11. The Class Plaintiffs are requesting higher service awards for certain plaintiffs based on their levels of participation in their cases. *See id.* at 11-12. The amounts, and the purported justification for higher awards for certain plaintiffs, would be relevant for both set-off purposes as well as informing the Altria Defendants what purposes those awards sought to achieve. Likewise, as acknowledged during a recent hearing in the JCCP, the class settlement affects the claims of certain government entities, since those claims "would encompass the damages being sought in that context of the [JCCP] class action complaint." *See* JCCP No. 5052 Hr'g Tr. at 10:9-10 (Dec. 16, 2022) (Ex. 2).

The relevance of the Settlement Materials to the relief that plaintiffs can seek from the Altria Defendants alone warrants that they be produced. Indeed, courts have routinely found that settlement agreements must be disclosed because they are relevant to issues of offset with the remaining defendants. *Harrison v. Bankers Standard Ins. Co.*, 2015 WL 3617108, at *4 (S.D. Cal. June 9, 2015) ("Plaintiffs' confidentiality interests must yield to disclosure of the Settlement Agreement, as it is directly relevant to determining the offset of damages."); *Davis*, 2011 WL 3353874, at *10 (ordering disclosure of settlement agreement because it was "relevant to determining an offset of attorneys' fees").

C. The Settlement Materials Are Relevant To Witness Bias And Prejudice

Rule 408 makes clear that settlement materials can be relevant to "proving a witness's bias or prejudice." FRE 408(b). Consistent with this rule, courts in this Circuit "have permitted settlement documents to be used to attack credibility." *Conde v. Open Door Mktg., LLC*, 2018 WL 1248094, at *2 (N.D. Cal. Mar. 12, 2018); *see also, e.g.*, *Gunchick v. Fed. Ins. Co.*, 2015 WL 1781467, at *2 (C.D. Cal. Apr. 20, 2015) (finding that Rule 408 did not prohibit settlement evidence to be used to attack

the plaintiff's credibility); *Davis*, 2011 WL 3353874, at *10 (finding that "the settlement agreement may be relevant to exploring whether the [settling party] witnesses, who the Court expects would testify at trial, have any bias"). The Settlement Materials are highly relevant to these subjects.

Individuals involved in negotiating the Settlement Agreements, parties to those Agreements, and individuals employed by parties to the Agreements are among those most likely to possess critical information about the facts at issue in this litigation and might be called to testify at trial. JLI has been the lead defendant throughout these proceedings and designed, manufactured, and sold the products at issue. Five of the individual defendants who are expressly released by the Agreements and presumably parties to them are the same five individuals who, according to Plaintiffs, formed the alleged RICO enterprise, planned the schemes of fraud, and conducted the alleged racketeering activity throughout the time it existed – before, during, and after any alleged involvement by the Altria Defendants. The Settlement Agreements would have resolved the same claims against JLI and these and other Defendants that remain against the Altria Defendants.

In addition, the Class Settlement Agreement contains non-disparagement clauses by which these same individuals "shall not make any public statements disparaging any Party . . . or JUUL products." Proposed Class Settlement, ECF No. 3724-2, § 21.1.[17] If a class trial is held against the Altria Defendants, the "Class Plaintiffs agree that they shall not subpoena any individual current or former director or any current or former employee of JLI to testify in-person or via video at such trial." *Id.* § 21.2. And the Class Settlement also provides that the parties to that agreement must cooperate with respect to implementing the settlement and seeking preliminary approval. *Id.* § 4.1. In order to evaluate potential biases and credibility, the Altria Defendants need to know whether non-disparagement and cooperation provisions appear in the other Settlement Agreements and background information concerning their scope and intended application.

Given the significant overlap between the parties, claims, and factual allegations, the negotiation process and resulting Agreements could have created biases or prejudice among the

[17] Exhibit 1 to the Motion for Preliminary Approval appears to include two sections "21.1" and "21.2" twice. To be clear, the Altria Defendants are citing in this paragraph the second sections 21.1 and 21.2 in Section 21.

parties to the settlement and Released Defendants concerning the Altria Defendants or the issues in the case. Certain witnesses may be biased in favor of or against the Altria Defendants because of communications or discussions made in the process of reaching the Settlement Agreements. And certain witnesses may be biased in favor of or against the Altria Defendants because, based on the settlement, their interests would be impacted based on the outcome of litigation against the Altria Defendants. These are just examples; there are many reasons why issues related to the Settlement Agreements could color a witness' testimony in a trial based on the same claims resolved in those agreements. It is therefore imperative that the Altria Defendants be permitted an opportunity to review the Settlement Agreements and the underlying communications and negotiations.

D. The Settlement Materials Are Relevant To Whether The Parties Negotiated And Entered Into The Settlement Agreements In Good Faith

The Settlement Materials are also highly relevant to whether the parties reached their agreement through good faith negotiations. This question is important for several reasons. For starters, the Court cannot approve the class action portion of the Settlement Agreements without first deciding that the settlement is fair. But the Class Settlement cannot be assessed in a vacuum. That settlement was the product of negotiations that also included the personal injury and government entity cases and is part of a broader global agreement. As the Motion for Preliminary Approval notes, "JLI has concurrently but separately agreed to resolve claims brought by individuals who asserted claims for personal injury and by government entities that asserted claims for public nuisance." Mot. for Prelim. App. at 13. Yet the Settling Parties have not provided the Altria Defendants, or the Court, any additional information concerning these related agreements. As a result, additional information about this broader context and how the different interests involved here were balanced is needed to determine if the Class Settlement is fair. *See, e.g.*, *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.").

Moreover, good faith would be relevant because the Settlement Agreements purport to release claims for which the Released Defendants and the Altria Defendants have been jointly liable. The Agreements release claims brought under the laws of every state as well as federal law. State and

federal law vary with respect to how a partial settlement might affect a non-settling defendant's right to seek contribution or other relief from the Released Defendants. But regardless of the state or claim at issue, the Settling Parties' good faith, among other things, would likely be a necessary prerequisite for an argument that the Altria Defendants cannot seek contribution from a Released Defendant after an adverse judgment. Take, for example, claims brought under California law. As noted above, section 877 applies "where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment *is given in good faith* before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort." Cal. Code Civ. Proc. § 877 (emphasis added). By contrast, "when a settlement with a tortfeasor has judicially been determined not to have been made in good faith . . . the nonsettling tortfeasors are entitled to contribution from the settling tortfeasor for amounts paid in excess of their equitable shares of liability." *Leung v. Verdugo Hills Hosp.*, 282 P.3d 1250, 1259 (Cal. 2012).

California courts have explained that the good faith requirement in section 877, which would be relevant to California claims that are resolved by a settlement agreement, turns on whether the settlement is "within the reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries" based on the facts and circumstances of the particular case. *Travelers Com. Ins. Co. v. Gabai Const.*, 2015 WL 6828482, at *1 (S.D. Cal. Nov. 6, 2015) (quoting *Tech-Bilt, Inc. v. Woodward-Clyde Associates*, 38 Cal. 3d 488, 499 (Cal. 1985)). This determination is based on "(1) a rough approximation of the plaintiff's total recovery and the settlor's proportionate liability; (2) the amount paid in settlement; (3) a recognition that a settlor should pay less in settlement than if found liable after a trial; (4) the allocation of the settlement proceeds among plaintiffs; (5) the settlor's financial condition and insurance policy limits, if any; and (6) evidence of any collusion, fraud, or tortious conduct between the settlor and the plaintiffs aimed at making the non-settling parties pay more than their fair share." *Id.* It is impossible to evaluate these factors, or assess whether the agreements were the product of good faith for purposes of possible contribution claims, without the Settlement Agreements and more information concerning how the Agreements were reached. *See, e.g.*, *BTIG LLC v. Floyd Assocs., Inc.*, 2017 WL 10378327, at *6 (C.D. Cal. June 12, 2017) ("whether the settlements were made in good faith and so justify a contribution bar are not

properly before this Court at this time . . . because the complete settlement terms are unknown"). This is yet another reason to produce the Settlement Materials.

In addition, the Settlement Materials are necessary to determine whether the Altria Defendants would be legally prejudiced in future proceedings. Legal prejudice exists where a settlement "purports to strip [a non-settling defendant] of a legal claim or cause of action, an action for indemnity or contribution for example" or "invalidates the contract rights of one not participating in the settlement." *In re Cathode Ray Tube Antitrust Litig.*, 2021 WL 4306895, at *1 (9th Cir. Sept. 22, 2021). For example, if the Released Defendants seek to limit or prohibit the Altria Defendants from seeking contribution or indemnification in any capacity under the terms of the Agreements, the Altria Defendants may be legally prejudiced. *See Ciuffitelli v. Deloitte & Touche LLP*, 2019 WL 1441634, at *6 (D. Or. Mar. 19, 2019), *Report and Recommendation adopted*, 2019 WL 2288432 (D. Or. May 29, 2019) (non-settling defendants in class action could object to the methodology proposed in contribution claim bar for off-setting settlement amount received by plaintiff in future claims against nonsettling defendants). And this is just an example. The Altria Defendants need additional information to evaluate the extent to which the Settlement Agreements might legally prejudice them.

E. The Settlement Materials Are Relevant To The Altria Defendants' Litigation Strategy

The Settlement Materials are relevant and necessary for the Altria Defendants to formulate future litigation strategy. *See Lytel*, 2006 WL 8459764, at *2 (noting that delay in the production of the settlement agreement until post-trial was not justified); *see also In re MSTG, Inc.*, 675 F.3d 1337, 1348 (Fed. Cir. 2012) (noting that the "magistrate judge reconsidered and ordered production of the negotiation documents 'because they might contain information showing that the grounds [plaintiff's expert] relied on to reach his conclusion are erroneous'"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 WL 13756260, at *3 (N.D. Cal. July 31, 2015) ("Rule 26 and the Ninth Circuit's broad discovery decisions do not require such sequencing for discoverability of information" and ordering production of settlement agreements before trial), *adopted in part, denied in part* ECF No. 4102 (N.D. Cal. Oct. 7, 2015).

The Altria Defendants are entitled to information that allows them to evaluate each plaintiff's claims and their potential exposure in the aggregate so they can make informed decisions with respect to this litigation. This includes sufficient information necessary to make strategic decisions about the litigation as a whole, how to defend against plaintiffs' claims, and whether and to what extent they have cross-claims, counter-claims, or other rights against the Released Defendants. This information is not only critical for purposes of litigation strategy, but also to evaluate whether resolving claims without further litigation might be possible.

CONCLUSION

For the foregoing reasons, the Altria Defendants respectfully request that this Court enter an Order compelling the Settling Parties to produce the Settlement Agreements and related materials.

Dated: January 4, 2023

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CERTIFICATE OF SERVICE

I, John C. Massaro, hereby certify that on the 4th day of January 2023, I electronically filed the foregoing **ALTRIA DEFENDANTS' MOTION TO COMPEL PRODUCTION OF SETTLEMENT AGREEMENTS AND RELATED MATERIALS** with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notifications to all counsel of record.

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