KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Renee D. Smith
To Call Writer Directly:
+1 312 862 2310
renee.smith@kirkland.com

300 North LaSalle
Chicago, IL 60654
United States

+1 312 862 2000
www.kirkland.com

Facsimile:
+1 312 862 2200

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The Honorable William H. Orrick, III
U.S. District Court for the N. 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 Orrick:

The bellwether cases will be the first JUUL personal injury trials in this MDL or anywhere else. Each case raises a host of variable substantive and temporal issues regarding alleged injuries, product use, marketing exposure, party conduct, reliance, and causation (among others). Plaintiffs cannot meet their burden to show that consolidation is appropriate under Rule 42.

First, grafting multi-plaintiff trials onto the inaugural bellwether process poses the inherent risk of unfair prejudice from aggregation, and the reinforcing effects that one plaintiff's evidence will have on others will only be magnified in the setting of youth use and the unique issues in these proceedings. Consolidation will erode the integrity of and confidence in verdicts or settlements—a situation that can neither be cured nor justified under the guise of efficiency. In this manner, separate trials are required to avoid prejudice and preserve Defendants' rights to a jury trial.

Second, consolidating the early bellwether trials will frustrate MDL goals by obscuring heterogeneous value- and viability-driving factors that are critical to focusing future trials and informing settlement. This is precisely the reason why MDL bellwether "[c]ases should generally ***not be consolidated for trial***." BOLCH JUD. INSTIT., DUKE LAW SCHOOL, GUIDELINES & BEST PRACTICES FOR LARGE & MASS-TORT MDLS 25 (2d ed. 2018) ("*Duke MDL Guidelines*") (emphasis added). Instead, "[a]t the bellwether stage, the goal should be to achieve valid tests, not to resolve large number of claims." *Id.* The Court should not consolidate these cases for trial.

Finally, adding two Florida plaintiffs would exacerbate these problems. Those two cases cannot be tried together simply because Florida law "would apply to each case." ECF No. 1981-3 at 8. The artificial masking of individual facts will remain. And enlarging the number of trial candidates from four to six to make room for two more Plaintiff picks now will only increase the unfair prejudice and amplify the representativeness concerns that already hang over the trial slate.

In sum, the Court should ***separately*** try ***four*** bellwether cases as contemplated by the extant trial selection process. Given the importance of this issue, Defendants respectfully request oral argument and look forward to discussion at the July 16, 2021 Case Management Conference.

I. Consolidated Trials Will Unfairly Prejudice Defendants And Frustrate Bellwether Goals.

A. Separate Trials Are Required To Avoid Unfair Prejudice To Defendants.

Consolidation is not appropriate here because it will result in "unfair prejudice to a party." *See Snyder v. Nationstar Mortg. LLC*, 2016 WL 3519181, at *2 (N.D. Cal. June 28, 2016) (J. Corley) (citation omitted); *see also* Fed. R. Civ. P. 42. Multi-plaintiff trials would improperly litigate cases on a group basis, even though, as Judge Corley recognized, "everything may be very individual with respect to someone's experience with Juul." 2/9/2021 Hr'g Tr. at 19:1-19:19.

First, each plaintiff alleges individualized: (i) means and content of ad exposure; (ii) knowledge of nicotine and its risks; (iii) reasons for and frequency of JUUL use; (iv) use of other nicotine products and/or other age-restricted substances. The Court's four bellwether trial picks, B.B., Clark Fish, Roberto Pesce, and Jayme Westfaul (ECF No. 2012), underscore the merits- and value-driving differences among the cases. For example, with respect to the content and timing of JUUL ad exposure: B.B. alleges she saw ads before JUUL use, but "never paid any attention." B.B. Dep. 117. Pesce claims he saw certain ads, while Fish claims he saw different ads stating that JUUL was safe for adult smokers. Pesce Dep. 206; Fish Dep. 154. And Westfaul does not remember "specifically seeing a certain ad before using JUUL." Westfaul Dep. 239. Different ad exposures go both to causation and the admissibility of specific ads, content or imagery at trial.[1] Similarly, certain plaintiffs modified their JUUL devices or used non-JUUL pods, thus raising product misuse defenses that may apply to some but not all bellwethers. B.B. Rog. Resp. 13; Pesce Dep. 112. The modes of acquisition are likewise diverse: B.B. never purchased from anyone but friends; Westfaul and Fish acquired their products from friends and retailers; and Pesce got his products from friends, retailers, and eventually through online sales. B.B. Dep. 85; Fish Dep. 172, 252; Pesce Dep. 51, 93; Westfaul Dep. 154, 158. Other individual factors include the following:[2]

	B.B.	Fish	Pesce	Westfaul
Pre-JUUL Nicotine Use	No	Yes	No	Yes
Pre-JUUL Knew Nicotine Is Addictive	No	Yes	No	Yes
Used Nicotine Cessation Aids In Quit Attempts	Yes	No	No	Yes

Consolidation will confuse jurors who will "sift through large quantities of complicated evidence to determine claims that may present different issues." *Duke MDL Guidelines* at 25.

[1] As Plaintiffs noted regarding vaping or tobacco education materials, the evidence "probably should be related to something" that "the *class representatives actually received*." 6/30/2021 Hr'g Tr. at 30-31 (emphasis added).

[2] B.B. Dep. 100, 106, 187; Fish Dep. 104, 108, 151, 187; Pesce Dep. 72, 78, 112; Westfaul Dep. 121, 142, 201, 293; *see also generally* PFS Resp. Q.25.

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Importantly, courts are overwhelmingly reluctant to consolidate tobacco-product personal injury cases because of similar individualized issues. In *Ford v. R.J. Reynolds Tobacco Co.*, for example, a federal court just days ago denied consolidation where, as here, "[e]ach plaintiff will be required to prove his or her injury was caused by Defendant's products," and the "different products, injuries, amount of smoking, time the plaintiffs started smoking and the plaintiffs' ages, all of which are different, demonstrate that the issues of fact are diverse enough to require separate discovery ***and trials***." 2021 WL 2646413, at *2 (E.D. Mo. June 28, 2021) (emphasis added). And despite numerous motions to consolidate, each and every one of the ***300+*** *Engle*-progeny tobacco personal injury cases in Florida courts have likewise been tried separately, as courts consistently reject consolidation efforts in smoking and health cases for precisely these reasons.

Second, joining two (or more) underage plaintiffs will itself imply a prevalent problem that is both divorced from the evidence presented at trial and untethered to an individual plaintiff's claims. Moreover, a more sympathetic or "stronger" plaintiff case may unfairly buoy the claims of a weaker one to the unfair detriment of Defendants. *See Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016) ("by trying the two [toxic tort] claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case."). Effectively reducing a plaintiff's burden on injury, reliance, causation and damage issues by allowing composite proof is manifestly prejudicial.

Third, consolidation will expose the same jury to evidence that may be relevant to only one claim. This "spillover evidence may prejudice [defendants]." *McCoy v. Biomet Orthopedics, LLC*, 2019 WL 6324558, at *8 (D. Md. Nov. 25, 2019). "The jury may simply resolve the confusion by considering all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case." *Bailey v. N. Trust Co.*, 196 F.R.D. 513, 518 (N.D. Ill. 2000)." "Consolidation will require the jury to weave back and forth between the two actions, each involving a different [plaintiff] with different key players, different factual scenarios and supporting evidence, and different [legal] violations." *Snyder*, 2016 WL 3519181, at *3. And, "significantly, consolidation may unfairly prejudice[ ] Defendant[s] as the jury might transfer some liability for one plaintiff over to others, whereas, no plaintiff will be prejudiced in any way through separate trials." *Ford*, 2021 WL 2646413, at *3. "Under these circumstances, the risk of jury confusion and prejudice to Defendants weighs against consolidation." *See Snyder*, 2016 WL 3519181, at *3.[3] And, the

[3] *See also Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) ("[T]here is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims."); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 461 (E.D. Mich. 1985) (the verdict "could potentially be a product of cumulative confusion and prejudice."); *Ulysse v. Waste Mgmt., Inc.*, 2013 WL 11327137, at *5 (S.D. Fla. Sept. 13, 2013) ("The potential that the jury could find in favor of one plaintiff based on the anecdotal evidence presented by other plaintiffs in these cases would not only prejudice the defendant, but would also violate American jurisprudence.").

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prejudice concerns here implicate due process right as well. *See Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (punitive damages may not "punish a defendant" for injuries to others).[4]

Fourth, purported efficiency or convenience benefits are insufficient to support consolidation. Perceived "benefits of efficiency can never be purchased at the cost of fairness." *Malcolm*, 995 F.2d at 350. "[A] trial must remain fair to both parties, and such considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983).

In sum, Defendants are "entitled to defend a case on its merits and should not be required to lump its defense into one," *Ford*, 2021 WL 2646413, at *2, and the trials should be separate.

B. Multi-Plaintiff Trials Will Obscure Key Metrics And Impede Resolution.

It is axiomatic that "[c]onsolidation can tilt the playing field, undermining the goal of producing representative verdicts." *Duke MDL Guidelines* at 25. Multi-plaintiff bellwethers will prejudice Defendants and cast substantial doubt on the reliability of any verdict or settlement, which is counter to the use of bellwether trials as "test cases" to gather "reliable information about other mass tort cases." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 ("*MCL*"). Bellwether trials are designed "to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis and what range of values the cases may have if resolution is attempted on a group basis." *Id* (emphasis added).[5] Thus the Federal Judicial Center contemplates a "a series of individual trials on all issues" that "can inform parties about likely court rulings and the range of jury verdicts that may be expected in similar cases." Melissa J. Whitney, BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 35 (Fed. Jud. Ctr. & JPML 2019). By distorting heterogeneous metrics, consolidation will impede, rather than facilitate, resolution. Accordingly, in this MDL setting involving highly individualized issues and evidence, Plaintiffs cannot meet their "burden of demonstrating that convenience and judicial economy would result from consolidation." *See Snyder*, 2016 WL 3519181, at *2 (citation omitted).

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[4] The prejudice of consolidation falls mostly upon defendants. D. Faigman., MODERN SCIENTIFIC EVIDENCE § 3:29 (2020-2021 ed. 2020) ("[C]hances of a particular defendant being found civilly or criminally liable increase when trials are joined.); I. Horowitz & K. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOLOGY 909, 914 (2000) ("as the number of plaintiffs increased, more liability adhered to the defendant.").

[5] *See also In re Tylenol Mktg., Sales Pracs. & Prods. Liab. Litig.*, 181 F. Supp. 3d 278, 283 n.2 (E.D. Pa. 2016) (bellwether "verdicts and settlements" gauge claim strength to "determine if a global resolution" "is possible.").

Moreover, multi-plaintiff cases in mass tort MDLs are particularly disfavored where—as here—the litigation is not "mature." *See Duke MDL Guidelines* at 25 ("'until enough trials have occurred so that the contours of various types of claims within the . . . litigation are known, courts should proceed with extreme caution in consolidating claims.'");[6] *MCL* § 22:314, at 359 (a series of "single-plaintiff, single-defendant trials" may be needed at first to "test the claims of causation and damages and whether the evidence applies across groups, in order to provide the necessary information as to whether aggregation is appropriate, the form and extent of aggregation, and the likely range of values of the various claims.").[7]

Finally, consolidated MDL bellwether cases are the exception, not the rule, at any stage in MDLs. Plaintiffs' reliance on outlier and controversial trial consolidations in *3M Combat Arms Earplugs* MDL—which involves hearing loss claims brought by current or former members of the military—is misplaced. (ECF No. 1981-3 at 8). The *3M* orders are (i) inconsistent with the weight of MDL authority; (ii) have not been subject to appeal; (iii) involved adult use in a military setting, where the diverse ad content and exposure; reasons for use; and uniquely case-specific evidence in these underage consumer cases were not at issue; and (iv) were rendered in an MDL that includes hundreds of thousands of claims on the administrative docket.[8]

C. **Differences In State Law Pose Additional Obstacles To Consolidation.**

Differences in governing state laws—Tennessee, Kentucky, Rhode Island/Connecticut,[9] and Mississippi—provide an additional reason to reject consolidation. "Federal courts have frequently concluded that dispersed mass tort personal injury claims, particularly those involving the law of different states, cannot generally be tried on a consolidated or aggregated basis." *MCL*

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[6] Quoting *In re Levaquin Prods. Liab. Litig.*, 209 U.S. Dist. LEXIS 116344, at *9-11 (D. Minn. Dec. 14, 2009). *See also Duke MDL Guidelines* at 25 n. 95 (citing MDL cases denying motions to consolidate).

[7] *Cf. In re E.I. Du Pont De Nemours & Co. C-8 Pers. Injury Litig.*, 2019 WL 2088768 (S.D. Ohio May 13, 2019) (Consolidating trials in "mass tort" trials only after case "has reached maturity and is headed into its dotage.").

[8] *In re 3M Admin. Dkt.*, No. 3:19-mc-87, ECF No. 3 (N.D. Fla. Jan. 7, 2020). And consolidated *3M* trial verdict included virtually identical damages awards to each plaintiff, despite distinct histories and alleged injuries. Case No. 7:20-cv-00104, ECF No. 186; Case No. 7:20-cv-00131, ECF No. 202; Case No. 7:20-cv-00137, ECF No. 184. This result is concerning as well. *See Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (identical verdicts may have resulted from "jury throwing up its hands in the face of a torrent of evidence.").

Pacific Fertility Center trial does not advance Plaintiffs' cause either. ECF. No. 1981-3 at 8. That non-MDL case involved a single tragic incident that resulted in the loss of reproductive eggs or embryos. *In re Pacific Fertility Ctr. Litig.*, 2020 WL 3432689 (N.D. Cal. June 23, 2020). And publicly-available filings indicate that (unlike here) the parties stipulated to consolidation. *See, e.g.*, *In re Pacific Fertility Ctr. Litig.,* No. 3:18-cv-1586, ECF Nos. 16, 552 (N.D. Cal. Sept. 14, 2020).

[9] Pesce first used JUUL products in Connecticut, then later in Rhode Island (where he moved for college).

§ 22.93. *See also In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 447 (D.N.J. 1998) (consolidation would require the jury "to apply their factual findings to a host of complex legal principles within each issue and each case."). The state-law differences are material. For example, in Kentucky, evidence of defendants' net worth is inadmissible for purposes of punitive damages. But in Tennessee, Rhode Island, and Mississippi, the evidence is allowed; and in Connecticut, it may be admitted for certain punitive damages claims, but not others.[10] And including *seven different defendants* in each trial would require byzantine jury instructions and verdict forms to address which claims could be brought by which plaintiffs against which defendants in which case.[11]

In sum, the Court should not consolidate any of the four initial bellwether picks for trial. At this stage, individual, single-plaintiff trials are best positioned to facilitate resolution, while preserving the integrity of the process and avoiding unfair prejudice to Defendants.[12]

II. Tacking Two Florida Plaintiffs On To The Initial Four Bellwether Trial Selections Will Not Solve The Consolidation Problem And Would Be Fundamentally Unfair.

Since September 9, 2020, the Court and the parties have assessed, prepared, and nominated cases from which the Court would "select a total of four cases to be set for bellwether trials." ECF No. 938 at 2. On June 21, 2021, the Court picked those four cases (B.B., Fish, Pesce, and Westfaul). ECF No. 2012. Defendants appreciate the Court's view that the two Florida plaintiffs (Lucas Willis and Cameron Widergren) also "would be appropriate for the first round of trials." *Id.* at 2. But the Court should not revamp the bellwether trial selection process now under an expectation that adding these cases to the mix will justify consolidated trials. Nor should the Court accelerate the selection of next wave picks by bringing these plaintiff-selected Florida cases to the front of the line.

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[10] *Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998); *Anderson v. Latham Trucking Co.*, 728 S.W.2d 752, 754 (Tenn. 1987); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 182 F.R.D. 386, 401 (D.R.I. 1998); MISS. CODE ANN. § 11-1-65(1)(e); *Izzarelli v. R.J. Reynolds Tobacco Co.*, 767 F. Supp. 2d 324, 329 (D. Conn. 2010); *Lenz v. CNA Assur. Co.*, 42 Conn. Supp. 514, 515, 630 A.2d 1082, 1083 (Conn. Super. Ct. 1993).

[11] The complexities are sampled in the Court's recent ruling on motions to dismiss bellwether claims, where it tentatively: (i) dismissed strict liability claims against the Founders under all states laws, "except perhaps" certain states, including Mississippi, Tennessee, and Connecticut; and (ii) dismissed strict liability claims against Altria as preempted under Connecticut law, but allowed them under Mississippi and Tennessee law. ECF No. 1997.

[12] Unlike in the class certification context, "[a] common question or questions do not have to predominate," for Rule 42 consolidation. *Indiana State Dist. Council of Laborers and Hod Carriers Pension Fund v. Gecht*, 2007 WL 902554 (N.D. Cal. Mar. 22, 2007). But the overwhelmingly individualized issues in the personal injury cases must be considered here in balancing the benefits and risks of consolidation. *See McCoy*, 2019 WL 6324558, at *7 (denying consolidation because "despite some factual similarities, individual issues predominate" where plaintiffs were "implanted with different [ ] devices in different states"). Ultimately, however, the predominance question can and should be addressed in connection with class certification motions.

First, these cases should not be consolidated. With the exception of state law issues, the primary problems with and risk of unfair prejudice from consolidated trials as described above apply with equal force to their claims. Among other things, these plaintiffs differ in their claimed (i) knowledge of nicotine and its presence in JUUL products; (ii) ad exposure and content; and (iii) means of acquisition. Widergren Dep. 58, 95, 98, 158-59, 240; Willis Dep. 123, 251-53.

Second, the Court should not change the rules of engagement now. The Court already gave Plaintiffs a second chance to amend their complaints to change their designated forum (*see* ECF No. 1125), which in turn resulted in a skewed plaintiff-driven 147-plaintiff bellwether eligible pool. ECF No. 1191 at 3-4. Adding two additional plaintiff picks to the early bellwether trial candidates will result in a trial roster consisting of ***all five remaining plaintiffs' initial picks***; one random initial pick; and ***zero defense initial picks***. This one-sided menu will undermine confidence in the process and the reliability of bellwether verdicts in gauging settlement value.

Third, Defendants agree with Plaintiffs' suggestion that it may be helpful to start to "talk about a second round" of bellwether candidates. 6/21/2021 Hr'g Tr. at 62. But the status of the Florida plaintiffs in subsequent bellwether trial waves should be addressed as part of a comprehensive second round selection process. Among other things, plaintiff-pick cases must be accompanied by additional defense-selected cases drawn from a now-expanded bellwether-eligible case pool, which includes at least 50 more plaintiffs who designated N.D. California for trial. And special care must be taken to include candidates from core categories—like adult initiators and former smokers—who were wholly excluded from any representative presence at all in the first round trials. *See id.* at 57; ECF No. 1981-3 at 1; ECF No. 1981-4 at 1-2.

* * *

For these reasons, Defendants respectfully request that the Court: (i) hold individual trials for each of the four initial bellwether picks (B.B., Fish, Pesce, and Westfaul); (ii) decline any invitation to consolidate cases for trials in this first round; and (iii) consider joint or competing proposals regarding the process and criteria for the next wave of personal injury bellwether cases.

Respectfully submitted,

/s/ Renee D. Smith
/s/ Peter A. Farrell

Counsel for Defendant Juul Labs, Inc.
Liaison Counsel for Defendants

cc: MDL Counsel of Record