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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **Altria Group, Inc.,** **a corporation,** **and** **JUUL Labs, Inc.,** **a corporation,** **Respondents.**	**Docket No. 9393**

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION REQUESTING OFFICIAL NOTICE OF FDA DECISION

Complaint Counsel has filed a Motion requesting that the Commission take official notice of FDA's March 24, 2022 decision to grant Premarket Tobacco Application ("PMTA") authorization to several of Logic Technology Development LLC's e-cigarette products, including the Logic Pro and Logic Power devices and associated e-liquids. Respondents oppose Complaint Counsel's Motion.

Respondents ordinarily would not oppose notice of an official document from a government agency, such as FDA. But here, granting the Motion would prejudice Respondents, who were never afforded the opportunity to examine an executive of the parent company that owns Logic. That executive had submitted a declaration, which Complaint Counsel sought to introduce into the record. After Complaint Counsel failed to make the executive available for a deposition, Judge Chappell excluded the declaration from the record, explaining that "[t]o require a party [such as Altria or JLI] to defend against evidence that the party has not been able to sufficiently examine or test is prejudicial." Order at 4, Dkt. No. 9393 (May 5, 2021). This is

in contrast to the executives of other third-party e-vapor manufacturers who submitted declarations but nonetheless were made available and examined in detail about the performance, consumer appeal, and PMTA potential of their e-vapor products. For example, Respondents were able to examine the executive of the manufacturer of the Vuse Solo cig-a-like product, the only other e-vapor product that has obtained FDA approval, who testified in detail about the PMTA process the company underwent and the diminishing market share for the product. Initial Decision Findings of Fact ("IDFF") 972.

In the absence of a similar opportunity, the evidentiary record on the Logic Pro and Power is extremely limited. Across the hundreds of pages of pre-trial and post-trial briefing, the Logic Pro and Power are mentioned fewer than a dozen times. And there is nothing in the record about their PMTAs: nothing about their planning, preparation, submission, or the costs associated with the PMTA processes. Complaint Counsel should not be permitted to trumpet the Logic Pro and Power PMTA authorizations after having refused Respondents' attempts to develop a meaningful record with respect to those products.

Absent discovery and context, the inferences that Complaint Counsel draws to justify its claim as to the materiality to this proceeding of the authorization of tobacco-flavored varieties of the Logic Pro and Power devices do not survive scrutiny. The authorization of these products has no bearing on whether entirely different products, which suffered from significant regulatory problems, would have been able to obtain PMTA authorization—and certainly no bearing on the far more salient determination, made by Judge Chappell, that there was a consensus within Altria at the time of the investment at issue here that its on-market products *would not* have obtained PMTA authorization. *See, e.g.*, IDFF 541, 559, 583, 593, 594, 596. Nor does it undo cig-a-like products' lack of competitive significance, both at the time of the transaction and since. *See, e.g.*, IDFF 293, 294, 972, 976.

Indeed, FDA received at least a half million PMTA applications and is continuing to review them. IDFF 259. As Complaint Counsel notes, only three products have received PMTA authorization thus far, Vuse Solo and now the Logic Pro and Power, none of which have

remotely meaningful market shares. IDFF 1017. FDA authorization was based, in part, on a set of opaque considerations that very well may be unique to these products, including "microbial stability data" and other "conditions" and "restrictions." Motion at Ex. A.

CONCLUSION

For the foregoing reasons, Respondents oppose Complaint Counsel's Motion Requesting Official Notice of FDA Decision.

Dated: April 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2022, I caused a true and correct copy of the foregoing to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: April 7, 2022

s/ Beth Wilkinson

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