PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M. Bedoya

In the Matter of **Altria Group, Inc.** **a corporation;** **and** **JUUL Labs, Inc.** **a corporation.**	**DOCKET NO. 9393**

COMPLAINT COUNSEL'S REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF

John Newman
Deputy Director

Peggy Bayer Femenella
Assistant Director

James Abell
Deputy Assistant Director

Stephen Rodger
Deputy Assistant Director

Laura Antonini
Nicole Lindquist
Leslie Okonta
Eric Sprague

Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Email: jabell@ftc.gov

Dated: December 20, 2022

TABLE OF CONTENTS

RECORD REFERENCES

References to the record are made using the following abbreviations:

CC Supp. Br. – Complaint Counsel's Response to the Commissioner's Order Requesting Further Briefing and Extending Deadline for Commission Ruling

CCAB – Complaint Counsel's Appeal Brief

CCRAB – Complaint Counsel's Reply to Respondents' Answering Brief

CCB – Complaint Counsel's Post-Trial Brief

R. Supp. Br. – Respondents' Supplemental Brief

RAB – Respondents' Answering Brief

RB – Respondents' Post-Trial Brief

RPTB – Respondents Pre-Trial Brief

INTRODUCTION

The Commission's Order Requesting Further Briefing and Extending Deadline for Commission Ruling ("Order") asked the parties for briefing on three specific questions regarding "the potential applicability of the *per se* rule and the inherently suspect standard to the Respondents' [JUUL Labs, Inc. ("JLI") and Altria Group, Inc. ("Altria")] alleged unwritten agreement." Order at 2. Respondents' brief included a specious, unrelated argument outside the scope of the Commission's questions, which Complaint Counsel addresses here.

Relying on little more than a tortured—and inaccurate—reading of a *single statement* made by Complaint Counsel at a prehearing scheduling conference, Respondents argue that Complaint Counsel changed its factual allegations about the nature of Respondents' "unwritten agreement" mid-litigation. R. Supp. Br. 2, 13. This claim is belied by the record. From the beginning of this proceeding all the way through appeal, the factual basis for Complaint Counsel's theory of harm has remained the same: in its Complaint, in its trial briefs before the Court, and in its appeal briefs before the Commission, Complaint Counsel has alleged and established that Respondents agreed that Altria would exit the U.S. closed-system e-cigarette market in exchange for a stake in JLI. Contrary to Respondents' claim, Complaint Counsel has never alleged that Respondents' agreement required Altria to exit the e-cigarette business "*prior to the deal's execution*." R. Supp. Br. 2 (emphasis in original).

Complaint Counsel and Respondents both submitted briefs describing impediments to deviating from the rule of reason standard pled and tried in this case. CC Supp. Br. 10-14; R. Supp. Br. 10-20. Complaint Counsel therefore submits this reply brief only to address Respondents' misrepresentations regarding the factual allegations consistently pursued and established by Complaint Counsel in this litigation.

I. COMPLAINT COUNSEL HAS CONSISTENTLY ALLEGED THROUGOUT THIS LITIGATION THAT RESPONDENTS AGREED THAT ALTRIA WOULD EXIT THE CLOSED-SYSTEM E-CIGARETTE MARKET

Contrary to Respondents' baseless argument, the Complaint contains express allegations that Respondents agreed that Altria would exit the closed-system e-cigarette market as part of the deal—allegations that Complaint Counsel has consistently presented and established throughout the entirety of the litigation.

A. The Complaint alleges that Respondents agreed Altria would exit the closed-system e-cigarette market for a stake in JLI

Respondents' assertion that their agreement for Altria to exit the market "wasn't even alleged in the Complaint" (R. Supp. Br. 2) is untrue. There is no question that the Commission's Complaint alleges that Respondents agreed that Altria would exit the closed-system e-cigarette market as part of the deal:

- "Negotiations between Altria and JLI intensified in the summer of 2018, and the future of Altria's e-cigarette business emerged as a key point of contention. During negotiations, JLI insisted, and Altria recognized, that Altria's exit from the e-cigarette market was a non-negotiable condition for any deal." Compl. ¶4.

- "In order to meet JLI's demand that Altria cease to compete in the e-cigarette market, Altria began taking steps to withdraw its e-cigarettes from the relevant market, including pulling its MarkTen Elite product from the market in October 2018, and then, after five years of continuous operation, announcing on December 7, 2018, its decision to wind down the remainder of its e-cigarette business." Compl. ¶5.

- On July 30, 2018, JLI sent Altria a term sheet that included a provision requiring Altria to "divest (or if divestiture is not reasonably practicable, contribute at no cost to [JLI], and if such contribution is not reasonably practicable, then cease to operate), all [Altria] assets related to the field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed or has under development." Compl. ¶¶47-48.

- On October 25, 2018, "Altria announced that it was temporarily halting its MarkTen Elite business" and on December 7, 2018, "Altria announced its decision to wind down its remaining e-cigarette business, including its MarkTen cig-a-like." Compl. ¶¶56-58.

- "[L]ess than two weeks after Altria announced its decision to discontinue its e-cigarette operations," Respondents executed the transaction. Compl. ¶60.

Nowhere does the Complaint specifically allege—or even suggest—that Respondents agreed that Altria had to exit the closed-system e-cigarette market "prior to the deal's execution," as Respondents claim. R. Supp. Br. 2. To support their claim, Respondents strain the language in Paragraph 4 of the Complaint, which states only that "Altria's exit from the e-cigarette market was a non-negotiable condition for any deal." Compl. ¶4. The allegation was that Altria had to *agree to exit* the e-cigarette business in order for JLI to do a deal. Neither Paragraph 4 of the Complaint, nor any other language in the Complaint, alleges that Altria had to *actually exit* the e-cigarette business before the transaction was executed.

B. Complaint Counsel's factual allegations remained consistent throughout the litigation

Respondents' claim that Complaint Counsel advanced some new theory regarding the timing of the unwritten agreement that was not presented at trial (R. Supp. Br. 13) is similarly untrue. Since the filing of the Complaint—and throughout this litigation—Complaint Counsel has consistently argued that Respondents agreed that Altria would exit the U.S. closed-system e-cigarette market and that JLI was indifferent as to how Altria achieved this result. *See* Opening Statement Tr. (June 2, 2021) 36:4-40:14, 41:5-49:12; CCB 28-58; CCAB 11-26; CCRAB 3-16.

Complaint Counsel has never alleged that Altria's exit was a pre-condition to entering the deal. In a disingenuous attempt to convince the Commission otherwise, Respondents rely on a remark made by Complaint Counsel during a pre-trial scheduling conference. R. Supp. Br. at 13 (citing Remote Telephonic Prehearing Scheduling Conference Tr. 12:16-19 (Aug. 3, 2020)) ("The bottom line is this: Juul communicated and Altria knew that it had to get out of the e-cigarette business in order to complete its investment in Juul."). But this single, stray statement cannot reasonably be interpreted, in light of the Complaint, to support Respondents' claim that

Complaint Counsel originally alleged the agreement between Respondents required Altria to exit the e-cigarette business before the deal's execution.[1]

Moreover, Respondents fully engaged—at every step in the litigation—on Complaint Counsel's Section 1 allegations that Respondents agreed for Altria to exit the market in exchange for a stake in JLI. *See* Opening Statement Tr. (June 2, 2021) 135:13-139:17 (Altria's counsel discussing term sheets exchanged between Respondents and the "cease to operate" language); 139:18-150:23 (Altria's counsel discussing pretextual reasons for removing Altria's e-cigarettes from the market); 161:13-174:21 (JLI's counsel discussing the term sheet that included the "cease to operate" language); RPTB 70-84; RB 68-88, 69 ("Complaint Counsel's alleged 'agreement' is premised on the notion that JLI presented Altria in its July 30, 2018 Term Sheet with 'three options to meet JLI's demand that Altria not compete with JLI' (Tr. 39-40)—divestiture, contribution, or ceasing to operate its e-vapor business—and that 'Altria chose the third option that JLI put on the table' to avoid a delay in its provision of services to JLI (Tr. 49)."); RAB 18-28.

Respondents are unable to point to anything in Complaint Counsel's briefs to support their argument that their anticompetitive agreement required Altria to actually exit prior to the deal's execution, because they cannot. Complaint Counsel's factual allegations were consistent from the Complaint through the appeal, and nowhere is there an allegation that Altria was required to exit *prior* to the deal.

[1] Even if the Commission were to adopt Respondents' tortured reading of Complaint Counsel's remark at the pre-trial scheduling conference, it is well established that Complaint Counsel's statements in pre-trial hearings are not binding on the Commission. *See In the Matter of LabMD*, *Inc.*, Dkt. No. 9357, 2014 WL 2331027, *7 (F.T.C. May 19, 2014) ("the Commission is not bound by characterizations employed by Complaint Counsel").

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission reverse the Initial Decision and find that Respondents violated Section 1 of the Sherman Act (15 U.S.C § 1) under the rule of reason, and that the transaction violated Section 7 of the Clayton Act (15 U.S.C. § 18), both of which thus constitute unfair methods of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Respectfully submitted,

Dated: December 20, 2022

s/ James Abell
James Abell
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Email: jabell@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Debbie Feinstein
Robert J. Katerberg
Justin P. Hedge
Francesca M. Pisano
Tanya C. Freeman
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Tel: (202) 942-5000
debbie.feinstein@arnoldporter.com
robert.katerberg@arnoldporter.com
justin.hedge@arnoldporter.com
francesca.pisano@arnoldporter.com
tanya.freeman@arnoldporter.com

David Gelfand
Jeremy J. Calsyn
Matthew Bachrack
Linden Bernhard
Jessica Hollis
Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
Tel: (202) 974-1500
dgelfand@cgsh.com
jcalsyn@cgsh.com
mbachrack@cgsh.com
lbernhardt@cgsh.com
jholis@cgsh.com

Counsel for Respondent JUUL Labs, Inc.

Beth A. Wilkinson
James M. Rosenthal
Hayter Whitman
Megan Braun
Alysha Bohanon
Wilkinson Stekloff LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Tel: (202) 847-4000

bwilkinson@wilkinsonstekloff.com
jrosenthal@wilkinsonstekloff.com
hwhitman@wilkinsonstekloff.com
mbraun@wiklinsonstekloff.com
abonhanon@wilkinsonstekloff.com

Moira Penza
Ralia Polechronis
Wilkinson Stekloff LLP
130 W 42nd Street, 24th Floor
New York, NY 10036
Tel: (929) 264-7773
mpenza@wilkinsonstekloff.com
rpolechronis@wilkinsonstekloff.com

Jonathan Moses
Kevin Schwartz
Adam Goodman
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
Tel: (212) 403-1000
JMMoses@wlrk.com
KSchwartz@wlrk.com
ALGoodman@wlrk.com

Counsel for Respondent Altria Group, Inc.

By: *s/ James Abell*
James Abell, Attorney

Counsel Supporting the Complaint