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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**

RESPONDENTS ALTRIA GROUP, INC. AND JUUL LABS, INC.'S SUPPLEMENTAL REPLY BRIEF

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GLOSSARY OF RECORD REFERENCES

ABBREVIATION	MEANING
CCB	Complaint Counsel's Post-Trial Brief
CCSB	Complaint Counsel's Supplemental Brief in Response to the Commission's November 3, 2022 Order
Compl.	Complaint
ID	Initial Decision
IDF	Judge Chappell's Findings of Fact
ORFB	Order Requesting Further Briefing (Nov. 3, 2022)
RAB	Respondents' Answering Appeal Brief
RFF	Respondents' Post-Trial Findings of Fact and Conclusions of Law
RSB	Respondents' Supplemental Brief in Response to the Commission's November 3, 2022 Order
Tr.	Trial Transcript

PRELIMINARY STATEMENT

As Complaint Counsel's supplemental brief makes clear, all parties agree: "the Commission should refrain from applying either the *per se* rule or the inherently suspect standard here." CCSB 1; RSB 3, 30. The Commission should apply, as Judge Chappell did, the "full rule of reason." CCSB 4, 15.

In light of the parties' agreement on this point, Respondents will not belabor the intractable impediments to applying the *per se* or inherently suspect theories at this late stage of this action. *See* RSB 10-20. Respondents submit this reply brief, instead, to respond to three discrete misstatements of law and fact raised in Complaint Counsel's supplemental brief:

First, Complaint Counsel distorts the analysis required under the rule of reason. The burden at the third step of the analysis is on Complaint Counsel, not Respondents. And there is no "fourth step" to this well-settled burden-shifting framework.

Second, Complaint Counsel's case cannot withstand rule of reason analysis. As an initial matter, Complaint Counsel wrongly asserts that it has "already proven the illegality of the unwritten agreement following a 13-day hearing." CCSB 2. To the contrary, Judge Chappell found that Complaint Counsel offered only "highly circumstantial" and "often ambiguous" evidence and failed to prove the existence of any unwritten agreement. ID 63, 70. Furthermore, he credited the testimony of the witnesses at trial who all denied the existence of such an unwritten agreement. That the alleged unwritten agreement that is hypothesized in the Commission's November 3, 2022 Order differs both from the version of the alleged agreement presented at trial and the one alleged in the Complaint underscores the weakness of the claim. For the Commission to find that an unwritten agreement existed in these circumstances would be without basis and improper. In any event, Respondents prevail at each step of the rule of reason analysis.

Third, Complaint Counsel's contention that Commission action is needed to "restore competition," CCSB 1, blinkers reality. It ignores critical developments—most notably Altria's permanent termination of its contractual noncompete with JLI—that underscore why the Initial Decision should be affirmed and the Complaint dismissed.

ARGUMENT

I. Complaint Counsel misstates the rule of reason framework.

All parties agree that the rule of reason analysis utilizes a burden-shifting framework to determine whether a restraint is unreasonable. CCSB 9; *NCAA* v. *Alston*, 141 S. Ct. 2141, 2160 (2021). But Complaint Counsel fails to accurately describe each step in that analysis.

Complaint Counsel concedes that, at the first step, the "burden is on the FTC" to show anticompetitive effects. CCSB 9 (citing *Impax Labs., Inc.* v. *FTC*, 994 F.3d 484, 492 (5th Cir. 2021)). Indeed, Complaint Counsel must show "*substantial* anticompetitive effect[s]." *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (emphasis added). Complaint Counsel further acknowledges that if (but only if) it meets that burden, the second step shifts the burden to Respondents to "show a procompetitive rationale for the restraint." *Id.*; *see* CCSB 9.[1] From here, Complaint Counsel goes astray in two distinct ways.

First, Complaint Counsel describes the burdens of the third step incorrectly. Once Respondents successfully articulate a procompetitive rationale, the "burden shifts back to the

[1] At one point, CCSB 9, Complaint Counsel cites *Impax Laboratories, Inc.* v. *FTC*, which describes the relevant standard as requiring Respondents to show that a restraint "produced procompetitive benefits." 994 F.3d 484, 492 (5th Cir. 2021). *Impax* cites the Supreme Court's decision in *American Express* on this point, *see id.*, and cannot be read to create a higher standard than the Supreme Court itself set forth in *American Express* when it required only that respondents show a "procompetitive rationale." *See, e.g.*, *Aya Healthcare Servs., Inc.* v. *AMN Healthcare, Inc.*, 9 F.4th 1102, 1111 (9th Cir. 2021) (citing *American Express* as requiring a "procompetitive rationale"); *Viamedia, Inc.* v. *Comcast Corp.*, 951 F.3d 429, 464 n.14 (7th Cir. 2020) (same); *US Airways, Inc.* v. *Sabre Holdings Corp.*, 938 F.3d 43, 55 (2d Cir. 2019) (same).

plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Am. Express Co.*, 138 S. Ct. at 2284. Yet in its supplemental brief, Complaint Counsel repeatedly insists that it is *Respondents* who allegedly "failed to establish that their claimed procompetitive justifications could not be achieved through less-restrictive means." CCSB 4, 9. This turns the applicable burden upside down.

Moreover, the Supreme Court has made amply clear that "antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes." *Alston*, 141 S. Ct. at 2161. It would be "a recipe for disaster" for courts to "second-guess degrees of reasonable necessity" and to accept the "possible less restrictive alternatives" that might be "imagin[ed]" by counsel. *Id.* (internal quotation marks and citations omitted). It is Complaint Counsel—not Respondents—who must overcome the "substantial latitude" afforded to businesses "to fashion agreements that serve legitimate business interests." *Id.* at 2163.

Second, Complaint Counsel wrongly suggests that there is a fourth step in the rule of reason framework, such that even if Complaint Counsel fails to meet its burden at the third step, a tribunal must nevertheless balance the anticompetitive and procompetitive effects of the restraint. CCSB 9-10. However, the Supreme Court has clarified that the rule of reason inquiry involves only three discrete stages. *See Alston*, 141 S. Ct. at 2160 (describing "a three-step, burden-shifting framework") (quoting *Am. Express Co.*, 138 S. Ct. at 2284). In neither *Alston* nor *American Express* did the Supreme Court contemplate a fourth stage of additional balancing. If Complaint Counsel fails to meet its burden by proving the viability of a substantially less restrictive alternative at the third step, the inquiry ends and the restraint must be upheld as reasonable.

Indeed, courts regularly dismiss claims where plaintiffs fail to carry their burden at the third step without conducting a further balancing inquiry as a fourth step. *See, e.g.*, *O'Bannon* v. *NCAA*, 802 F.3d 1049, 1074, 1076-79 (9th Cir. 2015) (vacating judgment in part where district court erred at the "final inquiry" by concluding that plaintiffs' proposal was "a substantially less restrictive alternative restraint"); *Virgin Atl. Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001) (affirming summary judgment in favor of defendants where the court found "nothing in the record in which [the plaintiff] suggests an alternative program that would achieve the same procompetitive effect"). That is because it is the three-step "burden-shifting framework" itself that courts use to operationalize "this balancing." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014). There is no fourth step.

II. Complaint Counsel did not in any event prove its case under the rule of reason.

Under any articulation of the rule of reason, Complaint Counsel's Section 1 claim still fails. To sustain a Section 1 claim, Complaint Counsel must prove two elements: (1) "a contract, combination, or conspiracy"—*i.e.*, an agreement; and (2) the contract, combination, or conspiracy "unreasonably restrained trade in the relevant market." *Worldwide Basketball & Sport Tours, Inc.* v. *NCAA*, 388 F.3d 955, 958-59 (6th Cir. 2004). Complaint Counsel does neither.

A. Complaint Counsel failed to show the existence of the alleged agreement.

Complaint Counsel's Section 1 claim fails at the outset because there is no evidence of any unwritten agreement between Altria and JLI. Complaint Counsel's constantly changing theories as to what that agreement may be underscore this lack of evidence.

Complaint Counsel recognizes that, when the Complaint was voted out, it alleged that "JLI insisted, and Altria recognized, that Altria's exit from the e-cigarette market was a *non-*

negotiable condition for any deal" that would need to be satisfied before the deal's execution. Compl. ¶ 4 (emphasis added); CCSB 3. Complaint Counsel put it unequivocally to Judge Chappell: "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." Remote Telephonic Prehearing Scheduling Conference Tr. 12:16-19 (Aug. 3, 2020) (emphasis added).

Despite being "[b]ound by the specific allegations in the Complaint," CCSB 3 & n.3 (citing 16 C.F.R. § 3.11(b)(2)), Complaint Counsel "seemingly . . . abandoned" them, ID 66 n.20. Instead, at trial and in its post-trial briefing, Complaint Counsel argued not that Altria agreed to exit the e-vapor market to satisfy JLI's demand and as a pre-condition to completing the transaction, but that "what [JLI] cared about was the end state of Altria no longer competing, and that they left it up to Altria how to achieve that end state." CCB 37. Complaint Counsel was just as unequivocal about this new position: "JLI did not care whether Altria divested its existing e-cigarette products, shut them down, or contributed them to JLI." CCB 37.

As Respondents have explained, Judge Chappell flatly rejected this new theory. *See* RSB 6-7, 28. He contrasted the "highly circumstantial" and "often ambiguous" evidence on which Complaint Counsel relied with the "substantial, credible evidence" that there was no such agreement.[2] ID 63, 70. And he observed that Complaint Counsel had not "clearly explain[ed] how an agreement to submit a transaction for antitrust review and approval . . . could be deemed an antitrust violation." ID 67.

[2] Complaint Counsel notes that the Commission reviews the Initial Decision *de novo* under its rules. CCSB 10 & n.7. Complaint Counsel omits that Judge Chappell's factual determinations, which were informed by his assessment of the credibility of live witness testimony, are entitled to deference. *See* RAB 18.

The alleged unwritten agreement that the Commission's November 3, 2022 Order now hypothesizes differs from these prior, failed theories. The Order supposes "an unwritten agreement prior to the closing of the challenged [t]ransaction on December 20, 2018, for Altria to take steps to cease e-cigarette operations." ORFB 3. It is not clear what the contours of this supposed agreement are, nor what "steps" are contemplated. Regardless, there is no evidence for this version of the agreement either. As detailed in Respondents' opening supplemental brief, *see* RSB 6-7, 28, the evidence presented to Judge Chappell included, among many other pieces of powerful evidence, "unrebutted testimony" that JLI did not have prior notice of Altria's announcement in October 2018 that it would withdraw certain of its e-vapor products from the market, nor of Altria's December 2018 announcement that it was discontinuing its remaining e-vapor products, ID 54-55, 57. Judge Chappell further found that "JLI clearly desired and expected that Altria would cooperate with the antitrust review process and that Altria's e-vapor assets would be disposed of in compliance with that process." ID 67. There is no basis for the Commission to find that the agreement the Order contemplates existed.

B. Even assuming the existence of an unwritten agreement, Complaint Counsel fails at each step of the rule of reason's burden-shifting framework.

Setting aside the vague, ever-shifting nature of the alleged unwritten agreement, and assuming that such an agreement did exist (notwithstanding the evidence), Complaint Counsel's claim still fails at each step of the rule of reason analysis.

At the first step, Complaint Counsel failed to prove any anticompetitive harm stemming from Altria's exit from the market. Complaint Counsel's obligation to demonstrate substantial anticompetitive effects was "no slight burden": "courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect." *Alston*, 141 S. Ct. at 2160-61. In line with that trend, Judge Chappell

concluded that Complaint Counsel failed at the first step, too.[3] He found that "Altria was not a meaningful competitor with Elite," ID 94; that MarkTen was in a fast-declining segment and unlikely to obtain regulatory approval due to carcinogenic emissions, IDF 396, 399, 539-41, 963-73; and that real-world data showed that competition had increased following the transaction, with prices falling, output increasing, and concentration "significantly decreas[ing]." ID 100-04. Whatever version of the unwritten agreement Complaint Counsel now claims to have proven, there can be no anticompetitive harm considering these facts. The Section 1 claim thus fails at the first step.

Even if Complaint Counsel could clear the first step, Respondents satisfied their burden at the second step by "show[ing] a procompetitive rationale for the restraint." *Am. Express Co.*, 138 S. Ct. at 2284. Complaint Counsel concedes that any unwritten agreement was ancillary to the broader transaction. *See* CCSB 11 & n.10. In that context, any noncompete between the parties—whether written or unwritten—would have the same purpose of protecting JLI's "technology, trade secrets, data," and other confidential information, while facilitating the provision of critical, "existential" regulatory services to JLI to enable it to keep its immensely popular products on the market. *See, e.g.*, IDF 776, 925; Pritzker (JLI) Tr. 820-21.

At bottom, the noncompete that Altria and JLI entered into aimed to "enable[] a product to be marketed which might otherwise be unavailable," which the Supreme Court has recognized

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[3] Complaint Counsel claims that Judge Chappell, having rejected the existence of an unwritten agreement, "did not address whether that agreement was unlawful under the rule of reason." CCSB 1 n.1. As Respondents have explained, *see* RSB 25-26, there is no reason to treat the alleged unwritten agreement any differently from the written noncompete that *was* evaluated under the rule of reason, *see* ID 85. Regardless, Judge Chappell's numerous factual findings on the absence of any competitive harm apply with equal force to the alleged unwritten agreement. *See* ID 94-95 (explaining that, even assuming Altria's products would still be on the market but for the transaction, "the evidence fail[ed] to prove" that their withdrawal caused any competitive harm).

to be a permissible procompetitive rationale. *NCAA* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984). Any unwritten agreement—even if Complaint Counsel could prove its existence—would be no different.

Finally, at the third step, Complaint Counsel cannot meet its burden to show that "substantially less restrictive means exist to achieve any proven procompetitive benefits." *Alston*, 141 S. Ct. at 2162. To carry its burden, Complaint Counsel must prove that its proffered alternative is "viable," "substantially less restrictive," and "virtually as effective" in serving the legitimate objective "without significantly increased cost." *O'Bannon*, 802 F.3d at 1074. As the Supreme Court has warned, "antitrust courts must give wide berth to business judgments before finding liability." *Alston*, 141 S. Ct. at 2163. Complaint Counsel "cannot just point to" a hypothetical alternative without demonstrating "equivalent viability." *N. Am. Soccer League, LLC* v. *U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 45 (2d Cir. 2018).

But that's all Complaint Counsel has ever done. It has offered hypothetical alternatives without a shred of evidence that any would be similarly effective in achieving the transaction's procompetitive benefits. For example, Complaint Counsel has suggested that "Respondents could have implemented firewalls" as an alternative method of protecting JLI's trade secrets. CCB 72. Yet it offered no evidence at trial to show that this would have been as effective as a noncompete, cited none in its briefing, and made no attempt to describe how such firewalls would operate. Complaint Counsel likewise hypothesized that JLI could have engaged other third parties or hired away Altria's team, ignoring unrebutted testimony that doing so would have been infeasible and its own prior recognition that Altria has significant "regulatory expertise." RFF ¶¶ 1228, 1276-78; CCB 67. Complaint Counsel thus falls far short of its burden on step three of the analysis.

The analysis, assuming it gets this far, should end here. But if the Commission were to apply a fourth "balancing" step—despite Supreme Court precedent to the contrary, *see* Part I, *supra*—Respondents would still prevail under this step. As discussed above, Judge Chappell found that there was *no* anticompetitive effect from Altria's withdrawal of its e-vapor products from the market. There is nothing to balance. And even if there were some *de minimis* impact to competition, it clearly does not outweigh the substantial procompetitive justifications of the transaction, which were intended to try keep JUUL on the market amid a complex and fraught regulatory landscape. Viewed in its totality, the transaction promoted competition and withstands Section 1 scrutiny.

III. The notion that Commission action is needed to restore competition blinkers reality.

In the opening paragraph of its supplemental brief, Complaint Counsel suggests that "the Commission can restore competition" in the e-vapor market "by reversing the Initial Decision." CCSB 1. The notion that Commission action is necessary or appropriate to restore competition could not be further from reality.

For starters, competition in the e-vapor market was never in need of restoration. For the myriad reasons set forth in the Initial Decision, Judge Chappell found that Altria's investment in JLI caused no anticompetitive harm, and that the market became more competitive—not less—following the transaction. ID 97-104; *see* RSB 8.

Complaint Counsel's suggestion also overlooks critical recent developments. Most importantly, in September 2022, Altria permanently terminated its contractual noncompete with JLI. *See* RSB 8. Altria is now free to try and compete in the e-vapor market without any contractual restraint. JLI also is far from the dominant player that Complaint Counsel portrayed at trial. *See* Altria's Motion for Official Notice 1-2 (Oct. 12, 2022). By December 2019, just one year after Altria's investment, Reynolds had overtaken JLI as the leading seller of pod-based

devices. ID 102. And on June 23, 2022, FDA initially denied marketing authorization for all JUUL products in the United States.[4] Complaint Counsel's Third Motion Requesting Official Notice 1 (July 5, 2022). FDA has further demonstrated its power to shape the e-vapor market by issuing orders that permit certain products to continue to be sold but not others. *See* Respondents' Motion for Official Notice of Recent FDA Decisions (May 16, 2022); RSB 8 n.2.[5]

Reversing the Initial Decision would change none of this. As the Supreme Court has explained, "[w]hether an antitrust violation exists necessarily depends on a careful analysis of market realities." *Alston*, 141 S. Ct. at 2158. "Given the sensitivity of antitrust analysis to market [and regulatory] realities" and "how much has changed" in the e-vapor market, *id.*, not to mention Altria's relationship with JLI, nothing about the Commission's proposed order would restore any lost competition. To the contrary, these developments confirm why imposing relief—especially at this stage—would inappropriately "punish" Respondents, not restore supposedly lost competition. *See United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

CONCLUSION

The Commission should apply the rule of reason to this case and affirm Judge Chappell's Initial Decision.

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[4] FDA subsequently stayed the marketing denial order, and its decision regarding PMTAs for JUUL products is currently subject to further review within FDA. *See* FDA, *FDA Denies Authorization to Market JUUL Products* (June 23, 2022), https://tinyurl.com/9877efrk.

[5] The pervasive regulatory scheme here must be taken into account in determining whether there is any anticompetitive harm. *See City of Pittsburgh* v. *W. Penn Power Co.*, 147 F.3d 256, 267-68 (3d Cir. 1998) ("The presence of [a] regulatory scheme and need for approval" may "convert[] what might have been deemed antitrust injury in a free market into only a speculative exercise.").

Dated: December 20, 2022

Respectfully submitted,

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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: December 20, 2022

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