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**

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

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GLOSSARY OF RECORD REFERENCES

ABBREVIATION	MEANING
CCB	Complaint Counsel's Post-Trial Brief
CCPTB	Complaint Counsel's Pre-Trial Brief
CCRB	Complaint Counsel's Reply Appeal Brief
Compl.	Complaint
Extension Request	Judge Chappell's Request for Extension of Time for Filing Initial Decision (Jan. 11, 2022)
ID	Initial Decision
IDF	Judge Chappell's Findings of Fact
OA Tr.	Transcript of Oral Argument Before the Commission (Sept. 12, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/oral_argument_before_the_commission_altria_juul.pdf
OB	Complaint Counsel's Opening Appeal Brief
ORFB	Order Requesting Further Briefing (Nov. 3, 2022)
RB	Respondents' Post-Trial Brief
RRB	Respondents' Post-Trial Reply Brief
Tr.	Trial Transcript

PRELIMINARY STATEMENT

From the moment the Commission issued its Complaint in April 2020, Complaint Counsel, Altria Group, Inc. ("Altria") and JUUL Labs, Inc. ("JLI," collectively with Altria, "Respondents") have been litigating the Section 1 claim under the rule of reason. That is the theory of the Complaint the Commission unanimously approved as to both the actual written noncompete and the alleged unwritten agreement. That is the theory the Commission "instructed" Complaint Counsel to pursue. OA Tr. 3. And that is the theory Complaint Counsel presented to Judge Chappell before, during, and after trial. As Complaint Counsel confirmed in its post-trial brief, it "d[id] not rely on a *per se* theory." ID 15 n.11.

For good reason. The *per se* theory takes certain types of agreements and declares them unlawful outright. Here, after a three-week trial on an extensive record, Judge Chappell issued a comprehensive decision finding not only that there was no such unwritten agreement, but that Altria removed its e-vapor products from the market for independent business reasons and that Altria's investment in JLI did not have anticompetitive effects. Indeed, Judge Chappell found that the market for e-vapor products became even more competitive after the transaction.

Notwithstanding this history, and notwithstanding that Altria has since terminated its actual noncompete with JLI, the Commission seeks supplemental briefing on the applicability of the *per se* and "inherently suspect" theories as to a new version of the alleged unwritten agreement. ORFB 3 (the "Order"). The Commission asks if it would be proper to rely on these new theories "[i]f we find that prior to the closing of the challenged [t]ransaction on December 20, 2018, JLI and Altria entered an unwritten agreement for Altria to take steps to cease e-cigarette operations." ORFB 3.

Subjecting Respondents to either of these unpleaded theories would be improper, prejudicial, and a pathway to substantial error. Respondents have had neither notice of, nor an

opportunity to litigate, either theory. The Due Process Clause of the Constitution and the Administrative Procedure Act prohibit a midstream, let alone late-stage, change in the theory of the Commission's case. In federal court, there is no doubt this conduct would result in waiver—including against a government agency. And the Commission has not hesitated, in its own proceedings, to find waiver against parties that raise new arguments after completion of a trial. The result should be no different here.

To make matters worse, the Commission's Order refers to an alleged agreement that was not tested at trial—in fact, it wasn't even alleged in the Complaint. When it was voted out, the Complaint 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 *prior to the deal's execution*. Compl. ¶ 4 (emphasis added); *see also* 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."). Recognizing that this theory was unsupported by the evidence, Complaint Counsel "seemingly . . . abandoned" it by the time of trial. ID 66 n.20.

Instead, Complaint Counsel alleged that Respondents agreed that Altria would "ultimately" exit the market, but that JLI did not care how or when Altria did so. CCB 31, 37 ("JLI did not care whether Altria divested its existing e-cigarette products, shut them down, or contributed them to JLI"; "[w]hat mattered to JLI" was the "end state of Altria no longer competing," *not* "exactly how and when Altria would comply with [JLI's] demand"). Indeed, Complaint Counsel argued that "even if it were true that JLI had just assumed Altria would divest its e-cigarette assets following an antitrust investigation by the FTC, it does not change the antitrust analysis." CCB 3. The Commission's Order hypothesizes an alleged agreement—an

"unwritten agreement for Altria to take steps to cease e-cigarette operations"—that appears to sit somewhere between these two failed theories. ORFB 3. Though the latest hypothesis remains meritless, Respondents cannot be deprived of the opportunity to refute it.

Regardless, as a matter of substantive antitrust law, the *per se* and inherently suspect theories do not apply. As the Supreme Court has explained, those theories apply to specific categories of agreements that courts have experience finding so consistently anticompetitive that they should be condemned without further inquiry into their effects on the market, or when an observer with even a rudimentary understanding of economics could conclude in "the twinkling of an eye" that the arrangement would be anticompetitive. *NCAA* v. *Alston*, 141 S. Ct. 2141, 2155 (2021); *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999) (Breyer, J., concurring in part and dissenting in part). There is no history of courts condemning agreements in which negotiating parties contemplate a potential divestiture under the supervision of the FTC and as part of the regulatory process. And it is well settled that the *per se* and inherently suspect theories do not apply to noncompetes ancillary to broader agreements, as was clearly the case here in regard to both the actual noncompete agreed upon by the parties and the unwritten one alleged in the Complaint. *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1365 (5th Cir. 1980).

After a year-long investigation, five Commissioners deemed this case unsuitable for *per se* treatment and voted out the Complaint under the rule of reason. Eighteen months later, after a three-week trial, Judge Chappell examined a voluminous record and concluded that there was no unwritten agreement and that the transaction did not cause competitive harm. These bells cannot be unrung.

BACKGROUND

A. Investigation and Complaint

On December 20, 2018, Altria invested $12.8 billion in JLI in exchange for a 35% economic interest. IDF 948-49. Altria, the owner of multiple tobacco companies, had failed to innovate an e-vapor product that could convert large numbers of smokers. IDF 4, 50-54. JLI, in contrast, had developed JUUL, a transformative "pod" product that relied on "nicotine salt" technology to replicate the nicotine experience delivered by combustible cigarettes. IDF 10-12, 431-34, 473. In the transaction documents, Altria agreed to divest its e-vapor assets as needed to obtain HSR approval, to provide services to JLI, including regulatory services in support of JLI's effort to seek premarket tobacco authorization ("PMTA") from FDA, and not to compete with JLI for as long as Altria was providing services. IDF 950-53, 957.

After the deal closed, the Commission initiated an investigation that lasted over a year and involved the production of millions of documents and a dozen investigational hearings with Altria and JLI representatives. Ultimately, the Commission voted to issue an administrative complaint. Filed on April 1, 2020, the Complaint proceeded under both Section 1 of the Sherman Act and Section 7 of the Clayton Act. Relevant here, the Complaint alleged that during negotiations over the summer of 2018, JLI insisted that Altria's exit from the e-cigarette market was a condition for any deal, and that to meet that demand, Altria removed its e-vapor products from the market, first by withdrawing its pod-based product (MarkTen Elite) in October 2018, and then announcing on December 7, 2018 the decision to wind down the remainder of Nu Mark, Altria's e-vapor business. Compl. ¶¶ 4, 5. This alleged unwritten agreement was supposedly formed through the exchange of lawyer-drafted term sheets in negotiating the ultimate transaction, ID 63-64, and it allegedly preceded the actual noncompete found in the transaction agreement.

The Complaint alleged that this conduct "amount[ed] to an agreement whereby Altria agreed not to compete in the U.S. e-cigarette market . . . in return for a substantial ownership stake in the market leader." Compl. ¶ 78. The Complaint alleged that Altria and JLI had thus violated Section 1 of the Sherman Act "under rule of reason analysis." Compl. ¶ 79.

Commissioner Chopra, joined by Commissioner Slaughter, issued a statement in connection with the Complaint, arguing that it was "too narrow" and that the Commission should have also sued for "conspiracy to monopolize in violation of Section 2 of the Sherman Act and [for] includ[ing] an illegal board observer from Altria in violation of Section 5 of the FTC Act." Statement of Comm'r Rohit Chopra 3, *In the Matter of Altria Group, Inc. and JUUL Labs, Inc*. (Apr. 2, 2020), https://tinyurl.com/2mjwx5j5. The statement did not suggest that the Commission should be proceeding on a *per se* theory with respect to its Section 1 claim.

B. Litigation and Trial Before Judge Chappell

After the filing of the Complaint, the parties proceeded to litigate against the backdrop of the rule of reason. As Complaint Counsel put it at oral argument before the Commission, "Complaint Counsel was instructed by the Commission to pursue a [Section 1] claim under the rule of reason, and that's what Complaint Counsel did." OA Tr. 3.

In June 2021, Judge Chappell presided over a three-week trial. Nearly 2,500 exhibits were admitted into evidence, 37 witnesses testified live or by deposition, and there were approximately 3,400 pages of trial transcript from the testimony of the 20 witnesses who appeared live. Extension Request 1. The parties submitted over 4,000 pages of briefing, including 3,900 proposed findings of fact. Extension Request 1-2. The "amount of information to review [was] extraordinarily high." Extension Request 2.

On February 15, 2022, Judge Chappell issued a 270-page Initial Decision, including more than 1,000 findings of fact. Judge Chappell recognized that the *per se* theory had no place in the

case before him: "The Complaint expressly allege[d] a Section 1 violation based upon a rule of reason analysis . . . and Complaint Counsel confirm[ed] in its post-trial brief that it d[id] not rely on a *per se* theory." ID 15 n.11 (citing CCB 58 n.17); *see also* CCPTB 51 n.299.

Judge Chappell thus evaluated the transaction under the rule of reason. He observed that Complaint Counsel "seemingly had abandoned" the version of the alleged agreement pleaded in the Complaint. ID 66 n.20. He then found no evidence for Complaint Counsel's revamped theory, concluding that no unwritten agreement existed between Altria and JLI and that there were "logical" reasons "supported by substantial, credible evidence" for Altria to independently remove its e-vapor products. ID 63. Judge Chappell further found that the transaction had no anticompetitive effects. ID 2, 88-112.

Judge Chappell's determination that there was no unwritten agreement between Respondents was grounded in extensive findings based on his assessments of witness credibility and contemporaneous documents. ID 63. Key factual findings included the following:

- Altria scientists with no involvement in the JLI negotiations advised management that Altria's existing products were so laden with problems that "no one thinks we can get" PMTA authorization from FDA. IDF 541.

- The leadership of Nu Mark, Altria's e-vapor subsidiary, conducted a review of its products in 2018 and concluded that Nu Mark, which had lost over $700 million since its inception, was failing. IDF 533, 576, 624-25, 633-34, 661, 675.

- In the fall of 2018, when negotiations with JLI had broken down, Altria's management recognized that its current e-vapor offerings were uncompetitive and therefore committed resources away from Nu Mark in order to fund "Growth Teams," which were charged with exploring the possibility of developing new products over a five-to-ten-year timeframe. IDF 600-06, 630-45.

- In late September 2018, at a time when "there were no substantive negotiations between Altria and JLI . . ., no term sheets exchanged, and no meetings held between JLI and Altria," Altria decided to remove MarkTen Elite and "non-traditional flavored cig-a-like products" from the market "in response to" a letter from FDA that demanded "bold action" to address the crisis in youth vaping, encouraged Altria to remove non-traditional flavors, and threatened regulatory and criminal action if its efforts were insufficient. ID 46-50, 73-74; IDF 613-25.

- JLI had no prior notice of Altria's decision to remove products in response to the FDA letter, was "shocked" by it, and viewed it as unwelcome and "hostile." IDF 898-99, 900-07.

- JLI likewise had no prior notice of Altria's announcement in December 2018 that it would withdraw its remaining e-vapor products. ID 57; IDF 937-38. The decision "was of no consequence" to JLI, which viewed MarkTen as a "terrible" product and "barely even registered" Nu Mark's discontinuation. IDF 939.[1]

Against the weight of this "substantial, credible evidence," including testimony by all the principal Altria and JLI negotiators that there was no such agreement, *see* ID 54-55, RRB 27, Judge Chappell found the evidence relied on by Complaint Counsel "highly circumstantial," including "snippets" that were "often ambiguous, lacking in context, and unexplained." ID 63. Complaint Counsel "fail[ed] to take into account important context for Altria's actions and instead merely juxtapose[d] negotiation events and business events, and then urge[d] linkages that [we]re not supported by evidence." ID 70. At bottom, Complaint Counsel was "assuming a conspiracy and then explaining the evidence accordingly," all without even questioning the credibility of the JLI witnesses who swore they never had any side agreement with Altria. ID 70 (quoting case law).

Similarly, Judge Chappell found that "the evidence fail[ed] to prove . . . that the [t]ransaction has substantially harmed . . . competition," ID 97, and that there was overwhelming evidence that it did not result in competitive harm:

- Altria's cig-a-like product, MarkTen, was in an obsolete segment. IDF 963-73.

- MarkTen was unlikely to obtain regulatory approval, partly because it emitted carcinogenic formaldehyde at levels far exceeding competitor products. IDF 396, 399, 539-41.

[1] To clarify a point raised at oral argument by one of the Commissioners, and as these findings reflect, there was no testimony and no suggestion at trial that JLI was "surprised" by Nu Mark's discontinuation in December 2018. OA Tr. 12. JLI had no notice of it ahead of time. ID 57, IDF 938. In fact, two of JLI's principal negotiators could not even recall learning about the discontinuation prior to this litigation. IDF 939.

- MarkTen Elite, Altria's pod product, was not competitive, and it was "illogical" to think it ever would have been: Elite lacked the key ingredient of nicotine salts, never exceeded 1% market share in spite of heavy discounting, and likely could not obtain regulatory approval. ID 26-27, 97; IDF 445.

- "Altria was not a competent innovator of e-vapor products." ID 99.

Indeed, Judge Chappell found that the market became more competitive following the transaction:

- Competitors, including Reynolds and ITG, pursued "aggressive price activity and expansion," triggering a "price war" in the e-vapor category. ID 100-02.

- By December 2019, Reynolds had overtaken JLI as the leading seller of pod-based devices. ID 102.

- Output "dramatically" increased, with other sellers able to expand their sales "31 times what would be required to offset the loss of [MarkTen] Elite." ID 103.

- The discontinuation of Altria's products freed up shelf space for other "more attractive" products, resulting in "increased competition for shelf space for innovative tobacco products" and "offset[ting] potential anticompetitive effects." ID 98-99, 103-04.

- Market concentration "significantly *decreased*." ID 104.

There have also been important developments since the Initial Decision confirming both the lack of any competitive harm and the speculative nature of Complaint Counsel's case, given that FDA review is required for e-vapor products to remain on the market.[2] Most significantly, on September 30, 2022, Altria announced that, since it concluded that the carrying value of its investment in JLI had fallen below 10 percent of the original investment, it had exercised its contractual option to permanently and irrevocably terminate its noncompete obligations. Altria

[2] On June 23, 2022, for example, FDA initially denied market authorization for all JUUL products. Complaint Counsel's Third Motion Requesting Official Notice 1 (July 5, 2022); *see also* Respondents' Mot. for Official Notice of Recent FDA Decisions (May 16, 2022) (decisions regarding myBlu and NJOY Ace products). The decision regarding JUUL is now subject to further review within FDA.

is now free to attempt to compete without any contractual restraint. *See* Altria's Motion for Official Notice 1-3 (Oct. 12, 2022).

C. Appeal

Complaint Counsel appealed the Initial Decision. Similar to its post-trial brief, Complaint Counsel mentioned the *per se* theory only in a footnote. Speculating that Respondents' conduct "may well amount" to a *per se* violation, Complaint Counsel added that "a federal district court has allowed a private action challenging this same Altria/JLI agreement to proceed with quick look and *per se* theories of liability." OB 40 n.37.[3] In its reply brief, Complaint Counsel noted once more that it was "proceeding" under the rule of reason. CCRB 16 n.20.

At oral argument, the Chair of the Commission asked Complaint Counsel its position as to "whether this agreement, presumably the unwritten agreement, should be evaluated under either the quick look framework or the *per se* theory." OA Tr. 3. Complaint Counsel responded:

> Chair, our position is straightforward on that particular issue. The Commission voted out a complaint under the rule of reason. The counts, as articulated in the Complaint, was under the rule of reason and Complaint Counsel presented a case at trial under the rule of reason. The purpose of the footnote was simply to indicate to the Commission that in the private litigation, the private litigants have asserted a *per se* violation. We believe the evidence adduced [at] trial, substantiates a violation of Section One under the rule of reason.

OA Tr. 3. Asked to clarify if it believed the agreement "also would warrant a *per se* analysis," Complaint Counsel "defer[red] to the Commission as to whether or not there's a violation. Complaint Counsel was instructed by the Commission to pursue a Section One claim under the rule of reason, and that's what Complaint Counsel did." OA Tr. 3.

[3] "Because the 'quick-look' and 'inherently suspect' approaches are similar," these terms are used indistinguishably. *See, e.g.*, *1-800 Contacts, Inc.* v. *FTC*, 1 F.4th 102, 115 n.5 (2d Cir. 2021).

On November 3, the Commission *sua sponte* invoked Rule 3.54(c) and requested further briefing on three questions concerning the *per se* and inherently suspect theories as applied to the alleged unwritten agreement. ORFB 3. The Commission does not question application of the rule of reason to the noncompete in the actual transaction agreement. *See* ORFB 2.

Respondents will first address Question 2, as numbered in the Commission's Order, *see* Part I, *infra*. In the interest of clarity and convenience, Respondents will then address Questions 1 and 3 in a combined section, *see* Part II, *infra*.

ARGUMENT

I. There are insurmountable impediments to applying new theories of liability now.

The Commission asks whether the history of this proceeding raises impediments to the application of the *per se* or inherently suspect ("quick look") theories to an alleged unwritten agreement between Altria and JLI. ORFB 3. In a word: yes. The Complaint was voted out on a rule of reason theory, the case was litigated on that theory, and Complaint Counsel presented at trial a different version of the alleged unwritten agreement than the Commission hypothesizes now. To change legal and factual theories, and to find the existence of an unwritten agreement that contradicts Judge Chappell's determinations and the case presented at trial, would represent a flagrant violation of Respondents' due process rights. These are not obstacles the Commission can sidestep.

A. Application of the *per se* or quick look theories at this stage would violate Respondents' due process rights.

The Due Process Clause of the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act ("APA") "require that an agency setting a matter for hearing provide parties 'with adequate notice of the issues that would be considered, and ultimately resolved, at that hearing.'" *Pub. Serv. Comm'n of Ky.* v. *FERC*, 397 F.3d 1004, 1012 (D.C. Cir.

2005) (citing *Williston Basin Interstate Pipeline Co*. v. *FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999)); 5 U.S.C. § 554(b)(3).

Due process thus requires that "an administrative agency . . . give the party charged a clear statement of the theory on which the agency will proceed with the case." *Yellow Freight Sys., Inc.* v. *Martin*, 954 F.2d 353, 357 (6th Cir. 1992). That is what the Commission did when it issued the Complaint. The Complaint provided a "clear statement," *id.*, that its case was brought "under rule of reason analysis," Compl. ¶ 79, not the *per se* or quick look theories.

A deviation now would violate the Constitution and the APA. "[I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968); *NLRB* v. *Tamper, Inc.*, 522 F.2d 781, 787 (4th Cir. 1975) ("Fair play, a fair trial, and the requirements of due process of law demand that defendant be permitted to find out in advance of trial what the case is all about."); *Yellow Freight*, 954 F.2d at 357 (Congress "incorporated" the Constitution's "fundamental elements" of due process in the APA).

Courts have long found shifts like the one proposed here to violate the APA and due process. In *Bendix Corp.* v. *FTC*, for example, the Sixth Circuit vacated an order finding a violation of Section 7 of the Clayton Act under a "toehold" theory because the respondent "had no notice that it was charged under the toehold theory of illegality and was accorded no opportunity to present evidence in defense against this theory." 450 F.2d 534, 537 (6th Cir. 1971). Similarly, in *Rodale Press*, "[t]he theory under which the complaint was issued and under which" the administrative trial took place "differed from the theory upon which the complaint was ultimately sustained by the Commission." 407 F.2d at 1253-55. Because this "midstream"

shift deprived the respondents of due process, the D.C. Circuit vacated the Commission's order. *Id.* at 1257.

Should the Commission proceed by applying the *per se* or quick look theories, it will be taking the same procedurally defective path. "That th[is] case was consistently prosecuted" on a rule of reason "theory" is "clear," *id.* at 1256, and "at no time during the [trial] was there any misunderstanding as to what was the basis of the [Commission's] [C]omplaint," *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938). *See Bendix*, 450 F.2d at 542 ("Bendix's case was prepared and presented in response to certain enumerated theories. The witnesses were questioned and cross-examined in terms of these issues. The documentary proof was keyed to these theories."). Indeed, Complaint Counsel clarified at oral argument that it had "presented the case" on a rule of reason theory. *Rodale Press*, 407 F.2d at 1256; OA Tr. 3. It said the same in its pre- and post-trial briefs and at trial. *See* CCPTB 51 n.299 (Complaint Counsel's "case will proceed under [the rule of reason]"); CCB 58 n.17 (same); Tr. 35, 64 (Complaint Counsel confirming that it "alleged that the agreement between Altria and JLI violates the rule of reason").

If a "subsequent change in theory at the Commission level" occurs, "all this is turned upside down." *Rodale Press*, 407 F.2d at 1256. By "substituting an issue . . . for the one framed by the pleadings," the Commission would "deprive[] [Respondents] of both notice and hearing on the substituted issue." *Id*. at 1256-57; *Clark & Wilkins Indus., Inc.* v. *NLRB*, 887 F.2d 308, 315 n.16 (D.C. Cir. 1989) (collecting cases overturning agency decisions for "grounding [their] finding[s] of liability in a *theory* other than that alleged").[4]

[4] That some of the evidence adduced before the ALJ may be relevant to the *per se* or quick look theories is immaterial. "[E]vidence introduced at a hearing that is relevant to a pleaded issue as

Equally improper is the potential change not only in legal theories, but in factual theories—a change that would irretrievably compound the prejudice that Respondents would suffer here and would itself amount to reversible error. Complaint Counsel insisted at the outset that "[t]he 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). At trial and in its post-trial briefing, Complaint Counsel argued something different:

> [T]he fact that JLI may not have known exactly how and when Altria would comply with its demand to exit e-cigarettes does not save Respondents from liability. JLI's witnesses testified that they told Altria that it had to exit e-cigarettes, that ***what they 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. ***JLI did not care whether Altria divested its existing e-cigarette products, shut them down, or contributed them to JLI***. The path that ***Altria [chose]*** to comply with JLI's demand that it exit e-cigarettes was, of course, ceasing to operate its e-cigarette business.

CCB 37 (emphases added and internal citations omitted).

Complaint Counsel pivoted to this new theory and "seemingly . . . abandoned" the agreement alleged in the Complaint, ID 66 n.20, because it recognized that the evidence could not prove the existence of that agreement. Nevertheless, the Commission's Order asks Respondents to presume that it may find the existence of "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. That is neither what the Complaint alleged nor what Complaint Counsel sought to prove at trial.

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well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case." *Yellow Freight*, 954 F.2d at 358; *see Henry Bierce Co.* v. *NLRB*, 23 F.3d 1101, 1107 (6th Cir. 1994) (parties cannot be deemed to have impliedly consented to trial when no one "understood the evidence to be aimed at the unpleaded issue[s]").

That Respondents would be prejudiced by these "midstream" changes is obvious. *See Transp. Leasing Co.* v. *Dep't of Emp. Servs.*, 690 A.2d 487, 489 (D.C. 1997). Respondents confronted the theory Complaint Counsel presented, both in terms of the prosecution of this case as a "rule of reason" case and the nature of the actual agreement alleged. Had the Complaint pleaded *per se* or quick look theories, or had Complaint Counsel tried the version of the alleged unwritten agreement that the Commission now proffers, there are numerous ways in which Respondents could have proceeded differently. For example, Respondents could have adduced evidence that no unwritten agreement of the kind the Commission's Order hypothesizes was ever reached and substantially more evidence regarding the overall scope of the parties' transaction and the ancillary nature of the noncompete term to their legitimate business integration. They could have called different witnesses to rebut these theories. And they could have retained different or additional expert witnesses, including to address why the alleged agreement is not of a class that qualifies for *per se* treatment from an economic perspective. *See Dell Inc.* v. *Acceleron, LLC*, 818 F.3d 1293, 1301 (Fed. Cir. 2016) (vacating in part agency decision because raising an issue at oral argument "presented no opportunity" for the defendant "to supply evidence, whether expert or lay or documentary evidence," in response). Respondents should not be made to have litigated under the wrong pretense. *See Bendix*, 450 F.2d at 541 ("If there would have been any difference in defending the action" based on a different theory, "Bendix was entitled to an opportunity to defend against the theory upon which the Commission acted.").

In addition, the Initial Decision may have included different findings and credibility determinations. For example, if this case had proceeded under a quick look standard, the procompetitive justifications may have received more attention from Judge Chappell. Respondents presented extensive evidence in this regard through numerous witnesses. *See* RB

129-31 (describing testimony of Pritzker, Valani, Murillo, and Gardner). But Judge Chappell did not need to reach the issue once he found no competitive harm. His view of the credibility of that witness testimony is now lost.

B. The proposed shift would violate the Commission's own rules and forgive a waiver that would never be excused in federal court.

The Commission's proposed course is further erroneous for the independent reason that, if adopted, the Commission would be violating its own rules, thus engaging in arbitrary and capricious action. *Boyd* v. *Sec'y of Agriculture*, 459 F. Supp. 418 (D.S.C. 1978); *see Campos* v. *INS*, 70 F. Supp. 2d 1296, 1307-08 (S.D. Fla. 1998) ("When an agency fails to act in compliance with its own regulations, such actions are 'not in accordance with law.'"); 5 U.S.C. § 706(2)(A), (D). Moreover, if litigants—including the U.S. government—took similar actions in federal court, their arguments would be deemed waived. The question is not a close one. For the Commission to nonetheless proceed with this new theory would only underscore the significant constitutional issues implicated by the structure of the Commission's administrative process. *See* RB 136-38.

1. The Commission's proposed shift would violate its own rules.

Rule 3.15(a)(1) sets out the process for amending an administrative complaint, requiring an amendment at the Commission's direction whenever—as here—a new theory not "reasonably within the scope of the original complaint" is proffered. *See* 16 C.F.R. § 3.15(a)(1); *In re Champion Home Builders Co.*, 1982 FTC LEXIS 52, at *2-3 (Mar. 9, 1982) (ALJ may grant amendments to "clarify the allegations" but not "a proposed amendment alter[ing] the 'underlying theory' of the original complaint").

A failure by the Commission to comply with its own rules "merit[s] invalidation of the challenged agency action without regard to whether the alleged violation has substantially

prejudiced the complaining party." *Leslie* v. *Att'y Gen. of U.S.*, 611 F.3d 171, 180 (3d Cir. 2010); *see id.* at 175 ("[R]ules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency."). And Rule 3.15(a) has not been followed here. The Complaint has not been amended, neither Complaint Counsel nor the Commission has proposed doing so, and it is no longer an option.[5]

If Complaint Counsel had wished to press the *per se* or quick look theories, it was required to seek amendment under Rule 3.15(a). But Complaint Counsel chose not to. Now, eighteen months after a three-week trial, it would be improper for the Commission to cause the Complaint to be amended. Respondents are not aware of a single case in which the Commission *sua sponte* amended a complaint to add an unpleaded theory after a full administrative trial and without complying with Rule 3.15(a). *See In re James Carpets, Inc.*, 1972 WL 128887, at *2 (F.T.C. Nov. 29, 1972) (granting amendment where respondents would be "adequately apprised of the charges laid against them," "not . . . surprised," and not "deprive[d] . . . of the opportunity to answer the charges . . . or present a defense"); *Vacu-Matic Carburetor Co.* v. *FTC*, 157 F.2d 711, 711-12 (7th Cir. 1946) (allowing amendment "[a]fter considerable evidence had been heard" where the charge "in the original complaint [had been] abandoned and the hearing proceeded and was concluded upon the issue raised by the allegations of the amended

[5] Nor can the Commission invoke Rule 3.15(a)(2) to "conform [the Complaint] to the evidence." 16 C.F.R. § 3.15(a)(2). That rule permits "issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint" to "be treated in all respects as if they had been raised" when they are "tried by express or implied consent of the parties." *Id.* A new theory, however, is not within the scope of the Complaint, *see In the Matter of Century 21 Commodore Plaza*, 1977 WL 188998 (F.T.C. Apr. 20, 1977), and Respondents did not consent to trying the *per se* or quick look theories. All parties understood the evidence to be "aimed at" the rule of reason, *Henry Bierce*, 23 F.3d at 1107, and Complaint Counsel expressly disavowed the *per se* theory, ID 15 n.11 (citing CCB 58 n.17); OA Tr. 3. Rule 3.15(a)(2) only confirms that the Commission's discretion to inject new theories and issues is cabined under the Part 3 rules.

complaint."); *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F.2d 499, 501 (D.C. Cir. 1961) (finding no error where "[a]mple time was given for preparation of a defense" following amendment, and a "[f]ull hearing was held"); *see also In the Matter of Daniel Chapter One*, 2009 WL 871702, at *4 (F.T.C. Mar. 9, 2009) (denying leave to amend less than two months *before* a trial date, and noting that a "belated amendment" would be "unduly prejudicial" to Respondents, "the adjudicative process, and consequently, the public interest").

2. Other litigants could not excuse their own waiver.

Another clear indication that the Commission should not apply the *per se* or quick look theories now is that there is no question other litigants, both in this forum and in federal court, could not do so. If the Commission made an exception for itself, this would only confirm the significant constitutional defects Respondents have already raised in regard to this proceeding.

In a civil action, if a litigant chose to bring a case under the rule of reason, only to try and assert a *per se* or quick look theory after losing at trial, that theory would be waived. Courts "have repeatedly held" that the "absence of . . . development of an argument constitutes a waiver on appeal." *Always Towing & Recovery, Inc.* v. *City of Milwaukee*, 2 F.4th 695, 707 (7th Cir. 2021). And courts have so held specifically with respect to antitrust theories. *Id.*; *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 7 n.2 (2006) (declining to review Section 1 claim under rule of reason because plaintiffs pleaded a *per se* theory).

The quick look theory has not featured in this litigation at all, and Complaint Counsel has suggested only in cursory fashion that Respondents' conduct "may well amount to a *per se* violation of Section 1." CCPTB 31 n.299; CCB 58 n.17; OB 40 n.37. But an "underdeveloped argument" that some conduct "may have violated" a law merely "sounds in speculation." *Dearborn Tree Serv., Inc.* v. *Gray's Outdoorservices, LLC*, 2014 WL 6886330, at *7 (E.D. Mich. Dec. 4, 2014). At oral argument, Complaint Counsel even explained that "[t]he purpose of

the footnote" in its appeal brief was purely informational. It was there "simply to indicate to the Commission that in the private litigation, the private litigants have asserted a per se violation." OA Tr. 3.

The U.S. government would suffer the same fate in federal court as the private litigant. "[G]overnment agencies are to be treated as would any other litigant while before the courts." *Bostic* v. *Harris*, 484 F. Supp. 686, 688 (S.D.W. Va. 1979). If "the United States cannot maintain a per se or quick look claim" when its allegations are premised on those theories, it "will then be without recourse to the rule of reason." *United States* v. *eBay, Inc.*, 968 F. Supp. 2d 1030, 1038 (N.D. Cal. 2013) (collecting cases); *see also AT&T Corp.* v. *JMC Telecom*, *Inc.*, 470 F.3d 525, 531 (3d Cir. 2006) (affirming dismissal after finding *per se* analysis inapplicable because "[plaintiff] could have argued that the restraint at issue ought to be analyzed under the traditional rule of reason rather than attempt to squeeze the restraint into the per se realm. [Plaintiff], however, did not.").

The principle applies equally whether the shift is from a *per se* theory to the rule of reason or vice versa. When it elects the "strategy" of proceeding under one theory, even the government "must abide by the consequences of its pleading decisions." *eBay, Inc.*, 968 F. Supp. at 1037-38. The same is true of Complaint Counsel's decision to "abandon[]" the version of the unwritten agreement alleged in the Complaint, ID 66 n.20, in favor of a rendition of the agreement pursuant to which JLI "did not care" when or how Altria ceased competing, CCB 37. There is no constitutional basis for why the FTC should fare any better in its own forum than the DOJ does when bringing antitrust claims in federal court or than the FTC itself does when suing for an injunction in federal court. To the extent the Commission immunizes itself from waiver principles for the sake of applying a new legal theory to a new alleged agreement, it will only

confirm the unfairness and lack of due process inherent in the processes that Respondents are challenging. *See* RB 133-38.

Finally, if *Respondents* were to shift theories before the Commission at this late stage, they would be prevented from doing so. The Commission has, with an uncomplicated analysis, prevented the addition of claims after trial. In *In the Matter of LabMD*, the respondent "assert[ed] for the first time in passing"—in a post-trial brief—a "new argument" that challenged the constitutionality of the Commissioners' removal protections. 2015 WL 5608167, at *2 (F.T.C. Sept. 14, 2015). The Commission decided that the respondent "did not properly raise this argument, which appear[ed] neither in its motion for leave to amend its affirmative defenses nor in the affirmative defense itself," and "[c]onsequently," deemed the argument waived. *Id.*; *In the Matter of 1-800 Contacts, Inc.*, 2018 WL 6078349, at *53 (F.T.C. Nov. 7, 2018) ("Respondent did not raise this issue in its pleadings or while the matter was pending before the ALJ, but rather waited until the ALJ had ruled against it before first challenging the constitutionality of his functions in a single sentence on appeal. By waiting until this late date, Respondent has waived this claim."). The shoe may now be on the other foot, but that is no basis for the Commission to take a course of action that Respondents could not.

C. The impediments to Complaint Counsel's changing theories cannot be overcome.

The Commission has asked whether the history of this proceeding poses an impediment to applying the *per se* or quick look theories. It does, and the impediments discussed above cannot be overcome. Due process requires an "opportunity to present argument under the new theory of violation," and a change in theory would deprive Respondents of this opportunity. *Rodale Press*, 407 F.2d at 1257. The Supreme Court held nearly a century ago that the "right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to

know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *see also Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1012 (for due process purposes, "[c]onsidering petitioners' arguments . . . is not the same thing as allowing them to present evidence"). Moreover, as described above, that there is real prejudice here is clear. *See Transp. Leasing Co.*, 690 A.2d at 489-90.

Furthermore, as explained below, *see infra* pp. 20-21, the *per se* and quick look theories operate as doctrinal shortcuts. But the time for shortcuts has passed: a three-week trial occurred, and based on a vast record and his observation of live witness testimony, Judge Chappell determined that there was "substantial credible evidence, including contemporaneous documents," of "Altria's independent decision making, based on demonstrated business reasons." ID 63, 79. He also found lack of competitive harm. ID 94. These findings are entitled to appropriate deference. *In the Matter of Horizon Corp.*, 1981 WL 389410, at *300 n.77 (F.T.C. May 15, 1981). The Commission cannot unring the bell and ignore them.

II. There is no basis to apply either the *per se* or quick look theories, and the elements are not met here.

The Commission asks if there is a substantive basis to apply either the *per se* or inherently suspect theories (Question 1) and, if so, what the elements of such theories are (Question 3). Those tests clearly do not apply, and their elements are not met here.

The Supreme Court has long held that the Sherman Act must be read to prohibit only *unreasonable* restraints of trade. *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 60 (1911). In a small subset of cases, the challenged restraint "so obviously threaten[s] to reduce output and raise prices that [it] might be condemned" as unreasonable without a full rule of reason analysis. *Alston*, 141 S. Ct. at 2156. The *per se* rule thus "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the

industry involved." *Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.* (*BMI*), 441 U.S. 1, 8 n.11 (1979) (quoting *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958)). The inherently suspect or "quick look" theory is intended to achieve the same short-cut approach. *See, e.g.*, *Cal. Dental Ass'n*, 526 U.S. at 770.

But, here, the "complicated and prolonged" investigation that these theories seek to bypass has already taken place, and Judge Chappell concluded that the transaction caused no competitive harm. Specifically, Judge Chappell determined that "Altria was not a meaningful competitor with Elite," ID 94, that MarkTen was in an increasingly obsolete 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: prices fell, output increased, and concentration "significantly *decreased.*" ID 101-04. There is no justification for applying a shortcut after the fact to avoid Judge Chappell's extensive conclusions on competitive harm by retroactively lowering Complaint Counsel's burden. That course would require turning a blind eye to mountains of evidence, weeks of testimony, and detailed post-trial findings—inviting the Commission into error with a final order unsupported by, and contrary to, substantial evidence. *See* 5 U.S.C. § 706(2)(E).

In addition to these serious threshold issues, neither the *per se* nor quick look doctrines apply to this case as a matter of law: the prerequisite conditions are not satisfied, and even if they were, key elements are unmet.

A. As a matter of substantive antitrust law, neither theory applies.

The Supreme Court has held that "[w]hether a restraint is undue . . . 'presumptively' calls for a 'rule of reason analysis.'" *Alston*, 141 S. Ct. at 2151 (quoting *Dagher*, 547 U.S. at 5). Thus, a tribunal must typically "conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition." *Id.* (citing *Ohio* v. *Am.*

Express Co., 138 S. Ct. 2274, 2284 (2018)) (internal quotation marks omitted). Only when a restraint meets specific requirements may the tribunal apply an abbreviated analysis like the *per se* or quick look theories. Here, none of those requirements are met, so neither analytical shortcut applies. Indeed, it would be particularly problematic to use the *per se* or inherently suspect theories to prosecute nascent, pre-agreement discussions set out in lawyer-drafted term sheets exchanged between transacting parties—term sheets that expressly contemplated the divestiture of the products at issue under Commission supervision—while at the same time conceding that the rule of reason applies to the noncompete found in the actual transaction agreement signed by the parties. Such a finding by the Commission would risk chilling the very procompetitive conduct that the Commission seeks to protect.[6] It would also make no sense because it would be impossible to disentangle any transitory competitive effects from the alleged unwritten noncompete to those attending the actual, written noncompete that kicked in shortly thereafter—the latter of which indisputably requires rule of reason analysis.

1. *Per Se* Rule

The *per se* rule applies only to naked agreements that fall into one of the few, specific categories enumerated by the Supreme Court—a list that has shrunk as the Supreme Court has demanded more caution in applying the rule. *See, e.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 907 (2007) (vertical minimum price restraints); *Ill. Tool Works Inc.* v. *Indep. Ink, Inc.*, 547 U.S. 28, 42 (2006) (tying arrangements for patented products); *State Oil Co.* v. *Khan*, 522 U.S. 3, 7 (1997) (vertical maximum price restraints). Here, the *per se* rule cannot apply because the alleged unwritten agreement hypothesized by the Commission does not fall

[6] In addition, as Respondents have repeatedly explained, nonbinding term sheets cannot constitute an "agreement" for Section 1 purposes. RB75 (citing *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 217 (E.D.N.Y. 2003)); RRB 30.

into any enumerated category and because it would, in any event, be ancillary to a procompetitive transaction.

a. The hypothetical "unwritten agreement" suggested by the Commission does not fall into a *per se* category.

"In light of the potency of the per se rule," the Supreme Court has "re-emphasized that the invocation of this conversation-stopper must be limited to those situations which fairly fall within its rationale." *Realty Multi-List, Inc.*, 629 F.2d at 1363; *see, e.g.*, *Alston*, 141 S. Ct. at 2151 (explaining the "presumpti[on]" that "rule of reason analysis" applies). The Commission's Order supposes that Respondents had 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." *See* ORFB 3. Whatever such an ill-defined agreement might entail, it does not fall within one of the few categories of restraint subject to the *per se* rule.

Specifically, the *per se* rule applies only when "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan*, 522 U.S. at 10; *see, e.g.*, *Dagher*, 547 U.S. at 5 (horizontal price fixing); *Palmer* v. *BRG of Georgia*, *Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam) (market allocation); *United States* v. *Rose*, 449 F.3d 627, 630 (5th Cir. 2006) (bid rigging). "Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements, [courts] take special care not to deploy these condemnatory tools until [they] have amassed considerable experience with the type of restraint at issue." *Alston*, 141 S. Ct. at 2156 (internal quotation marks omitted). By contrast, "[w]hen the Courts are uncertain of the competitive significance of a particular type of restraint, they decline to apply the per se label." *Realty Multi-List, Inc.*, 629 F.2d at 1365.

Here, none of the categories of restraints eligible for *per se* treatment apply. The Commission's Order observes that "market allocation agreements . . . are typically *per* se violations." ORFB 2. But there was no market allocation here. Altria was investing in JLI and agreeing to an ancillary noncompete.

Moreover, as Complaint Counsel recognized, a market allocation agreement must "eliminate[] *all* forms of competition on every dimension." CCB 59 (citing *Blue Cross & Blue Shield United of Wis.* v. *Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995)); *see also Impax Labs., Inc.* v. *FTC*, 994 F.3d 484, 493 (5th Cir. 2021); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014) (explaining that a noncompete that did not permit any competition, as opposed to one that permitted some competition, would constitute *per se* market allocation). Yet Respondents' alleged agreement to "take steps to cease e-cigarette operations" is by definition something less than an agreement for competition to cease. Indeed, the term sheets at issue contemplated that Altria's products might be divested under Commission supervision. In other words, even if the Commission were to ignore the ALJ's 1,000-plus factual findings and find that Respondents reached some agreement for Altria to "take steps," that is not an agreement to eliminate all forms of competition, as required for the agreement to be considered *per se* unlawful. *See Impax Labs*, 994 F.3d at 493. Neither the market allocation category nor any other *per se* category applies here.

b. Ancillary agreements are not subject to *per se* treatment.

Even assuming that an unwritten agreement to "take steps to cease [Altria's] e-cigarette operations" could be a market allocation, it is black letter law that the *per se* rule does not apply because any such agreement was ancillary to the broader transaction. Courts have for decades recognized that "the rationale of the [*per se*] generalization is not applicable" where the agreement "appeared potentially to be reasonably ancillary to procompetitive, efficiency-creating

endeavors and therefore not a naked restraint of trade." *Realty Multi-List*, 629 F.2d at 1365; *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) (explaining that the "recognized benefits of reasonably enforced noncompetition covenants are by now beyond question"); *see also* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1509c (4th and 5th eds. 2013-2020 & 2021 Cum. Supp.) ("It should be clear that per se condemnation is appropriate for restraints that are properly classified as 'naked.'"). Indeed, under the Commission's own competition guidance, agreements ancillary to an "efficiency-enhancing integration of economic activity" are subject to rule of reason analysis, even if they are "of a type that might otherwise be considered per se illegal." FTC & U.S. D.O.J., *Antitrust Guidelines for Collaborations Among Competitors* 8 (Apr. 2000). Complaint Counsel's briefing in this case recognized the same. CCPTB 58-59.

Respondents never entered into an unwritten agreement, but even were the Commission to mistakenly find one under its new theory, such an agreement would be ancillary to Altria's investment in JLI and thus not subject to the *per se* rule. There has never been a contention that Altria and JLI entered into an agreement, unwritten or written, to require Altria to exit the relevant market independent of a potential transaction that involved many other components and, in particular, the procompetitive provision of Altria's services and expertise to JLI. Even the Commission's Order acknowledges that such an agreement would have been made in order to facilitate the broader transaction. ORFB 2-3. The hypothetical unwritten agreement posited by the Commission must thus be viewed as "reasonably ancillary" to the transaction. *Realty Multi-List, Inc.*, 629 F.2d at 1365.

Nor is there any basis for treating the alleged unwritten agreement any differently from the written noncompete in the transaction documents, as the Commission's Order suggests it is

contemplating. Both agreements would ultimately 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 JUUL. *See, e.g.*, Pritzker (JLI) Tr. 820-21. And, as with the written noncompete, there is no serious argument that Respondents would have reached any such agreement outside the context of the transaction.

2. Quick Look

For the same reasons as above, the "quick look" or "inherently suspect" theory would likewise not apply to the hypothetical unwritten agreement. "Although the Commission uses the term 'inherently suspect' . . . under the Commission's own framework, the rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the *close family resemblance* between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram Holding, Inc.* v. *FTC*, 416 F.3d 29, 36-37 (D.C. Cir. 2005) (emphasis added). As explained above, the Commission's theoretical unwritten agreement does not resemble any of the restraints that have been condemned as naked, anticompetitive conduct. Instead, the restraint would plainly be ancillary to a procompetitive transaction, the likes of which have long been upheld under the rule of reason. *See Nat'l Soc. of Prof. Engineers* v. *United States*, 435 U.S. 679, 688-89 (1978) (citing an English court in 1711 as one of "the earliest of cases applying the [r]ule of [r]eason" to uphold a covenant not to compete); *see also Cincinnati, P., B., S. & P. Packet Co.* v. *Bay*, 200 U.S. 179 (1906); *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (explaining that covenants not to compete are regularly upheld when they are agreements by "the buyer of property not to use the same in competition with the business retained by the seller"), *aff'd as modified*, 175 U.S. 211 (1899); *Lektro-Vend-Corp.*, 660 F.2d at 268-69.

Thus, even if Complaint Counsel had proven an unwritten agreement, a full rule of reason analysis would be required. Abbreviated approaches are "only permissible when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *1-800 Contacts, Inc.* v. *FTC*, 1 F.4th 102, 115 (2d Cir. 2021) (quoting *Cal. Dental Ass'n*, 526 U.S. at 770). The anticompetitive effects must be so obvious as to be identifiable in the "twinkling of an eye." *Alston*, 141 S. Ct. at 2155. The five Commissioners who voted out the Complaint—who certainly possess far more than a "rudimentary understanding of economics"—did not see it that way. They saw the need for a fulsome analysis of the charged restraints. *See* Compl. ¶ 79; OA Tr. 3 ("Complaint Counsel was instructed by the Commission to pursue a [Section 1] claim under the rule of reason, and that's what Complaint Counsel did."). And as discussed above, Judge Chappell concluded after a three-week trial that there *was* no anticompetitive harm resulting from Altria's exit. ID 94. Accordingly, any anticompetitive harm was not only far from obvious but also counterfactual.

B. Even if the Commission were to find that an unwritten agreement "to take steps" existed, the elements of the new theories are not satisfied.

To prove an "unlawful agreement under Section 1 of the Sherman Act," ORFB 2, Complaint Counsel must prove two elements: (1) "a contract, combination, or conspiracy"—or, simply put, 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, 959 (6th Cir. 2004). Even assuming the *per se* rule or the quick look framework applies, Complaint Counsel satisfies neither element.

First, there can be no Section 1 violation without an actual *agreement* between Respondents. *Id.*; *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007). The ever-shifting

nature of the alleged "unwritten agreement," *see supra* p. 13, demonstrates why Complaint Counsel cannot prove that any exists. Neither the *per se* nor the "inherently suspect" framework can apply without a defined agreement. *Worldwide Basketball & Sport Tours, Inc.*, 388 F.3d at 959. The hypothetical unwritten agreement the Commission suggests leaves unclear exactly what Respondents allegedly agreed to when Altria supposedly agreed to "take steps to cease e-cigarette operations." ORFB 3. These types of nebulous "agreements" lack the "unity of purpose" required to establish the most fundamental element of a Section 1 violation. *Am. Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). Indeed, it is not clear how there could be any agreement for Altria to "take steps" to exit the market when Complaint Counsel insisted that JLI "did not care" what actions Altria would take, CCB 31, 37, and when Judge Chappell found that Altria had "demonstrated business reasons" for its "independent decision making" and that JLI had no prior notice of any decisions by Altria to remove its products from the market, ID 63, 79; IDF 898-99, 900-07, 937-38. And it would be egregiously unfair to find that JLI committed a *per se* violation for exchanging term sheets through counsel that contemplated divestiture under Commission supervision, while having no knowledge of what Altria was planning to do before signing an agreement.

Second, under any theory of liability, Complaint Counsel cannot show that its alleged unwritten agreement "unreasonably restrained trade in the relevant market." *Worldwide Basketball & Sport Tours, Inc.*, 388 F.3d at 959. Under *per se* analysis, courts find that a restraint is categorically unreasonable and is thus "conclusively presumed illegal without further examination." *BMI*, 441 U.S. at 8. But as discussed above, *see supra* pp. 24-26, even if Complaint Counsel could show that this unwritten agreement could theoretically fall into a valid *per se* category, it would still be unable to prove that such an agreement was a naked one not

"reasonably ancillary" to a procompetitive transaction, *see Realty Multi-List*, 629 F.2d at 1365. Complaint Counsel's reliance on nonbinding term sheets to support its ever-shifting unwritten agreement confirms that any such agreement must be considered ancillary to the broader transaction, thereby precluding a finding that any agreement was *per se* unreasonable.

As for quick look, that framework employs burden-shifting to determine whether a restraint is unreasonable. Respondents would first need to offer "some plausible (and legally cognizable) competitive justification" for the restraint, such as an explanation why it "may not be expected to have adverse consequences in the context of the particular market in question," or "why the practices are likely to have beneficial effects for consumers." *Polygram Holding, Inc.*, 416 F.3d at 36. At that point, Complaint Counsel "must address the justification," either by "explain[ing] why it can confidently conclude, without adducing evidence, that the restraint very likely harmed consumers," or by offering "sufficient evidence to show that anticompetitive effects are in fact likely." *Id.* If Complaint Counsel succeeds, "the evidentiary burden shifts to [Respondents] to show the restraint in fact does not harm consumers or has 'procompetitive virtues' that outweigh its burden upon consumers." *Id.*

As discussed above, *see supra* pp. 26-27, the quick look framework does not apply because "economic learning and the experience of the market" have not demonstrably shown that an unwritten agreement to take steps to discontinue products to facilitate a broader transaction with a procompetitive rationale would "likely impair[] competition " in virtually all instances. *Id.* But even assuming that this framework does apply, Respondents easily clear the first hurdle because the record shows plausible procompetitive justifications for the restraint, thereby shifting the burden back to the government to prove anticompetitive effects or explain why it does not need to adduce evidence to do so. Specifically, the noncompete facilitated the

provision of critical regulatory services to JLI, which were "literally existential" for JLI in light of its need to secure PMTA approval from FDA in order to market its products domestically. RRB 76. These services allowed JLI to file a timely PMTA application, which JLI would "[a]bsolutely not" have been able to do "without Altria." RRB 78. At bottom, Altria's and JLI's collaboration was aimed at keeping JUUL, the "best-selling e-cigarette in the United States" in 2018, on the market: an indisputably procompetitive endeavor. IDF 79, 1038.

By contrast, Complaint Counsel cannot meet its burden in response because it cannot show that "the restraint very likely harmed consumers." *Polygram Holding, Inc.*, 416 F.3d at 36. As discussed above, *see supra* pp. 7-8, 27, Judge Chappell determined that Altria's removal of its e-cigarette products from the market had no anticompetitive effect. ID 94.

In view of these facts, Complaint Counsel cannot meet its burden at the second step of the quick look analysis. And even if it could, the balancing inquiry at the third step would favor upholding the restraint, with substantial procompetitive effects outweighing whatever anticompetitive harm was too insubstantial to be credited by Judge Chappell after a full trial.

* * *

The Commission's suggestion that it may now apply the *per se* or quick look theories to a new alleged agreement would be a serious violation of Respondents' due process rights. Even assuming the existence of the agreement the Commission hypothesizes, nothing about such an agreement warrants treatment under those theories. Judge Chappell rejected the agreement Complaint Counsel proffered at trial and further found that Altria's withdrawal of its e-cigarette products was not anticompetitive. Judge Chappell made these findings on the basis of credibility determinations of live witness testimony and documentary evidence presented at trial. It would be improper to give Complaint Counsel a do-over on a new factual theory and an unpleaded legal one.

CONCLUSION

The Commission should not apply the *per se* or quick look theories. It should decide this case, as it was pleaded and litigated, under the rule of reason. And it should sustain Judge Chappell's thorough and well-reasoned decision.

Dated: December 5, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 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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I also certify that I caused the foregoing document to be served via email to:

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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 5, 2022

s/ Beth Wilkinson
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