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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**

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT ALTRIA GROUP, INC.'S MOTION FOR OFFICIAL NOTICE OF TERMINATION OF THE NON-COMPETE

Respondent Altria Group, Inc.'s ("Altria") motion effectively asks the Federal Trade Commission ("the Commission") to absolve Altria of antitrust liability for entering an illegal Transaction four years ago because it voluntarily terminated its written non-compete with Respondent JUUL Labs, Inc. ("JLI"). Both the Sherman Act and the Clayton Act prohibit harm to competition—specifically, the type of harm that occurred when, as part of Altria's 35 percent investment in JLI for $12.8 billion (the "Transaction"), competitors Altria and JLI illegally agreed that Altria would exit e-cigarettes and not compete against JLI in the future. Although the written non-compete violated the antitrust laws, the anticompetitive effects of the Transaction are not undone simply because Altria walked away from this one provision. The lost competition between JLI and Altria has not suddenly been restored. Moreover, Altria still owns a 35 percent

stake in JLI, its former competitor in e-cigarettes, and JLI and Altria remain free to re-enter the written non-compete at any time.

Complaint Counsel does not oppose Altria's motion for official notice of its SEC Form 8- K filing. However, Complaint Counsel files this response to rebut certain flawed and misleading assertions in Altria's motion.

FACTS

In its motion, Altria mischaracterizes its illegal agreement with JLI by focusing on only one part of that agreement: the written non-compete. But the antitrust violations at issue here are much broader. Altria and JLI agreed (1) that Altria would exit its existing e-cigarette business; and (2) that Altria would not compete in e-cigarettes in the future. CC Post-Trial Br. 28; CC Post-Trial Reply Br. 49-50; CC Appeal Br. ("CCAB") 1. Altria fulfilled the agreement by removing its e-cigarette products from the market and entering into the written non-compete with JLI. CCFF ¶¶ 987-1015. Complaint Counsel has never argued that the written non-compete was the sole basis for its Sherman Act Section 1 claims; instead, Complaint Counsel has consistently argued that it should prevail even if the Commission considers *only* the written non-compete. *See* Oral Arg. Tr. 6:7-7:14; CC Post-Trial Reply Br. 50; CC Post-Trial Br. 68-72; CCAB 39 fn. 36.

ARGUMENT

I. Altria's Opt-Out of the Written Non-Compete Does Not Undo the Harm Caused by the Transaction

Altria's decision to opt-out of the written non-compete does not undo the anticompetitive effects arising from the Transaction for which Altria remains liable. It is clear from the record that with Altria's exit, consumers lost the benefits of Altria's price, innovation, and shelf space competition. CCFF ¶¶ 1527-87; CC Post-Trial Br. 60-65, 77-83; CCAB 41. The written non- compete— standing alone and while in effect—also harmed competition in the closed

system e-cigarette market. { } the "Rolls Royce" of e-vapor products, VEEV, because it had entered the written non- compete. CCFF ¶¶ 1651-86, 1694-96; CCAB 41. As a result, { } was lost. Altria's opting out of the written non-compete does nothing to remedy these past harms. And, without an Order from the Commission, Altria and JLI could reenter this written non-compete at any time.[1]

Moreover, terminating the non-compete does not impact Altria's 35 percent equity stake in JLI, its former competitor, that it acquired as part of the Transaction. CCFF ¶¶ 33-36. The alignment of JLI and Altria's incentives alone means Altria and JLI will compete less vigorously than they would have without this common ownership. *See* CCFF ¶ 1525.

All of these anticompetitive effects remain actionable under Section 1 of the Sherman Act and Section 7 of the Clayton Act. Altria's opting out of the written non-compete now, after the competitive damage is done, does not absolve it of legal liability. The evidence shows that Altria's claim that competition has been restored is simply false.

II. Altria's Opt-Out of the Written Non-Compete Does Not Moot Antitrust Liability Under Section 1 of the Sherman Act

Altria's argument that walking away from the written non-compete moots that aspect of the Section 1 case is baseless. *See* Altria Mot. at 2. Voluntary cessation of illegal conduct does

[1] The Commission has entered orders preventing companies from re-engaging in allegedly illegal conduct. *See* Exhibit A, *In re Axon Enterprise, Inc, et al,* F.T.C. Dkt. 9389 (June 16, 2020), *Press Release: FTC Approves Final Order Settling Charges that VieVu's Former Parent Company Safariland Entered into Anticompetitive Agreements with Body-Worn Camera Systems Seller Axon* ("Since the Commission's complaint was issued on Jan. 3, 2020, Safariland and Axon have rescinded the non-compete and non-solicitation provisions that the complaint alleged were anticompetitive. The final order, which settles all charges against Safariland, ensures that Axon and Safariland do not enter into new agreements with similar anticompetitive provisions."), *available at* https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-approves-final-order-settling-charges-vievus-former-parent-company-safariland-entered; *see also* Exhibit B, *In re Coca Cola Company,* F.T.C. Dkt. 9207 (May 18, 1995), *Press Release* (describing Commission settlement order preventing Coca Cola Company from acquiring any rights to the Dr. Pepper brand in the United States without first obtaining Federal Trade Commission antitrust clearance for ten years), *available at* https://www.ftc.gov/news-events/news/press-releases/1995/05/coca-cola-company.

not moot any part of Complaint Counsel's case. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000); *United States v. Concentrated Phosphate Exp. Ass'n, Inc.*, 393 U.S. 199, 202-203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave (t)he defendant free to return to his old ways.") (cleaned up) (citing *United States v. W. T. Grant Co*., 345 U.S. 629, 632 (1953); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1067–68 (9th Cir. 2015); *United States v. Realty Multi-List, Inc*., 629 F.2d 1351, 1387–88 (5th Cir. 1980) ("It is well-settled that, in a suit for injunctive relief, the voluntary cessation of allegedly illegal practices in an attempt to avoid suit does not moot the controversy they present.") (internal citations omitted). As the Supreme Court stated, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur;" here, however, Altria has not met this "heavy burden." *Friends of the Earth,* 528 U.S. at 189 (citing *Concentrated Phosphate*, 393 U.S. at 203). It is far from "absolutely clear" that Altria will not re-enter the written non-compete with JLI again, especially in light of its continuing ownership of the 35 percent equity stake.

CONCLUSION

For the foregoing reasons, Complaint Counsel files this response to Altria's motion.

Dated: October 24, 2022

Respectfully submitted,

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EXHIBIT A

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Your Information

FTC Approves Final Order Settling Charges that VieVu's Former Parent Company Safariland Entered into Anticompetitive Agreements with Body-Worn Camera Systems Seller Axon

June 16, 2020

Tags: Competition | Bureau of Competition | Merger | Technology | Government

Following a public comment period, the Federal Trade Commission has approved a final order settling charges that Safariland, LLC, which manufactures and sells equipment for the law-enforcement, military, and recreational markets, entered several anticompetitive agreements with body-worn camera system seller Axon.

Safariland entered into these agreements when Axon acquired Safariland's VieVu body-worn camera systems division, the complaint alleged. According to the administrative complaint, the anticompetitive agreements barred Safariland from competing with Axon on all of Axon's products, limited solicitation of customers and employees by either company, and stifled potential innovation or expansion by Safariland.

First announced in April 2020, the settlement is part of a larger case challenging Axon's consummated acquisition of former competitor VieVu. Since the Commission's complaint was issued on Jan. 3, 2020, Safariland and Axon have rescinded the non-compete and non-solicitation provisions that the complaint alleged were anticompetitive. The final order, which settles all charges against Safariland, ensures that Axon and Safariland do not enter into new agreements with similar anticompetitive provisions. Litigation against Axon continues.

The Commission vote to approve the final order was 4-0-1, with Commissioner Rebecca Kelly Slaughter not participating.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Press Release Reference

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VieVu's Former Parent Company Safariland Agrees to Settle Charges That It Entered into Anticompetitive Agreements with Body-Worn Camera Systems Seller Axon

FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments

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EXHIBIT B

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

Coca-Cola Company

May 18, 1995

The Coca-Cola Company has agreed not to acquire any rights to the Dr Pepper brand in the United States without first obtaining Federal Trade Commission antitrust clearance. Coca- Cola also will notify the FTC before acquiring any entity that has annual branded carbonated soft-drink sales over 10 million 192-ounce case equivalents. These provisions, which would be in effect for 10-years, are designed to permit the FTC to review certain soft-drink acquisitions that might substantially reduce competition and raise consumer prices, and are part of a proposed settlement of nine-year-old litigation between the FTC and Coca- Cola.

The settlement involves modifying the prior-approval and prior-notification provisions contained in an order issued by the Commission last June, and which Coca-Cola appealed to the U.S. Court of Appeals for the D.C. Circuit. Both Coca-Cola and the FTC will ask the D.C. Circuit to dismiss the appeal and send the case back to the Commission to allow the agreed upon changes to be made.

Coca-Cola is based in Atlanta, Georgia.

The modified order stems from charges filed by the FTC in federal district court in Washington, D.C. in 1986, alleging that Coca-Cola's planned acquisition of one of its largest competi- tors, the Dr Pepper Company, would violate the antitrust laws. The order would ensure that the FTC has the opportunity to review and, if necessary, to seek a court order to block potentially problematic acquisitions by Coca-Cola. Specifically, it would require Coca-Cola, for 10 years, to obtain Commission approval before acquiring:

- more -

Coca-Cola--05/18/95

- any rights to the Dr Pepper or diet Dr Pepper brand in the United States or any brand, name or trademark associated with producing, marketing, selling or distributing these brands in the United States; or
- any interest in any entity that holds, owns or otherwise controls the Dr Pepper or diet Dr Pepper brand, name or trademark in the United States.

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In addition, the modified order would require Coca-Cola, for 10 years, to give the FTC advance written notice before acquiring certain large branded carbonated soft-drink manufacturers. The floor for this provision would be acquisitions by Coca-Cola of companies with sales exceeding 10 million, 192-ounce case equivalents in each of the three years preceding the transaction. Under the Hart-Scott-Rodino Act HSR Act), Coca-Cola is required to notify the FTC and the Department of Justice before acquiring more than $15 million in assets or voting securities from an entity worth more than $10 million. Thus, the ceiling for the modified order's prior-notification requirement would also meet HSR Act filing thresholds.

As was the case with the June 1994 order, the modified order would not affect acquisitions of bottlers by Coca-Cola. Finally, the order would include various reporting provisions designed to assist the FTC in monitoring Coca-Cola's compliance
The modified order will end the litigation that began in 1986 when the federal district court, at the FTC's request, issued a preliminary injunction to prohibit Coca-Cola from acquiring Dr Pepper pending an administrative hearing. Coca-Cola later abandoned the transaction, but refused to agree that it would not attempt the same or a similar transaction in the future. On grounds that future Coca-Cola acquisitions of branded concentrate firms could raise competitive concerns given the conditions in the soft-drink market, the Commission issued a complaint charging that Coca Cola's agreement to acquire Dr Pepper violated the antitrust laws and sought an order requiring prior-approval for certain transactions. Although Administrative Law Judge Lewis F. Parker upheld the FTC charges, he refused to enter a prior-approval order. Both complaint counsel and Coca- Cola appealed his decision to the full Commission, which again upheld the charges in a June 1994 decision. The Commission order accompanying that decision required Coca-Cola, for 10 years, to obtain Commission approval before acquiring:

- any interest in an entity that manufactures or sells branded concentrate or syrup, or that licenses the brand, name or trademark for a branded concentrate or syrup, in the United States; or

- any brand, name or trademark associated with the production, sale or distribution of branded concentrate, branded syrup or branded carbonated soft drinks in the United States.

Coca-Cola appealed the Commission decision and order to the D.C. Circuit on Aug. 26, 1994. Under the settlement, Coca-Cola and the FTC will ask the D.C. Circuit to dismiss Coca-Cola's petition for review and to remand the case back to the FTC so that the FTC can modify the June 1994 order.

The Commission vote to accept the proposed settlement for filing in court was 3-0, with Commissioners Mary L. Azcuenaga and Roscoe B. Starek, III recused.

NOTE: This agreement is for settlement purposes only and does not constitute an admission by The Coca-Cola Company that it violated the law. When the Commission issues the modified order, it will carry the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of $10,000.

Copies of proposed settlement agreement and other documents associated with this case are available from the

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FTC's Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

FTC Docket No. 9207

Nos. 94-1595, 94-1596, 95-1086, 95-1087 D.C. Cir.))

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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