

**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

**ORDER REQUESTING FURTHER BRIEFING AND EXTENDING DEADLINE FOR
COMMISSION RULING**

This proceeding is before the Commission on Complaint Counsel’s appeal of an initial decision of the Chief Administrative Law Judge that recommended dismissing the Complaint in its entirety. The parties have briefed the appeal, and on September 12, 2022, the Commission heard oral argument. For the reasons stated below, and pursuant to Commission Rule 3.54(c), 16 C.F.R. § 3.54(c), the Commission has determined to request further briefing from the parties on the potential applicability of the *per se* rule and the inherently suspect standard to an alleged unlawful agreement between Respondents Altria Group, Inc. (“Altria”) and JUUL Labs, Inc. (“JLI”) for Altria to withdraw its e-cigarette products from the market.

The proceeding arises in relation to the December 2018 purchase by Altria of a 35% stake in JLI in exchange for a \$12.8 billion all-cash investment (the “Transaction”). Complaint Counsel allege that, in the Transaction documents and in an unwritten agreement leading up to the Transaction, Respondents unlawfully agreed that Altria would cease competing in e-cigarettes, in violation of Sherman Act Section 1 and FTC Act Section 5. Compl. ¶¶ 1-7, 46-69, 77-79.¹ Complaint Counsel also allege that the Transaction is an illegal acquisition in violation

¹ We use the following abbreviations in this Order:

Compl.	Complaint
Ans.	Answer and Defenses (Altria or Juul as indicated)
CC Br.	Complaint Counsel’s Appeal of the Initial Decision
IDF	Initial Decision Finding of Fact
Opp.	Respondents’ Answering Brief in Response to Complaint Counsel’s Appeal

of Clayton Act Section 7 and FTC Act Section 5. Compl. ¶¶ 80-82.

This Order addresses issues raised by the allegations of unlawful agreement under Section 1 of the Sherman Act, 15 U.S.C. § 1. Complaint Counsel assert that both an “unwritten agreement” for Altria to exit e-cigarettes and a written covenant not to compete that formed part of the Transaction documents caused anticompetitive effects. CC Br. 39 n.36. Complaint Counsel allege that the Respondents reached their agreements via various meetings and written communications during July 2018 – December 2018. Compl. ¶¶ 46-61. According to Complaint Counsel, before these negotiations began, Altria and JLI were horizontal competitors in the market for e-cigarettes. CC Br. 1. During the negotiations, Complaint Counsel maintain, JLI applied pressure on Altria to exit the market, making clear that a transaction was only possible if Altria exited its existing e-cigarette business and agreed not to compete with JLI in the future. CC Br. 6-8. Altria did, in fact, withdraw some of its e-cigarette products from the market in October 2018 and its remaining e-cigarette products in December 2018. IDF ¶¶ 650, 687. The final withdrawal took place less than two weeks before Respondents executed the Transaction. IDF ¶¶ 13, 687; Compl. ¶ 6; Ans. (Altria) ¶ 6; Ans. (Juil) ¶ 6; Opp. 12. Complaint Counsel assert that Altria’s withdrawal was part of an unwritten understanding with JLI. CC Br. 9. Complaint Counsel evaluated this conduct under the Rule of Reason. Compl. ¶ 79; CC Br. 39-41.

Respondents oppose all aspects of Complaint Counsel’s claims. With respect to the alleged unwritten agreement by Altria to withdraw its products, Respondents assert that the evidence fails to demonstrate the existence of an agreement; that Altria demonstrated independent business reasons for its decision to withdraw the products; and that Complaint Counsel failed to demonstrate harm from the alleged agreement. Opp. 18-39. Regarding the written non-compete agreement, Respondents state that it is “perfectly ordinary and has a plain procompetitive rationale”: specifically, it assertedly facilitated the provision of regulatory assistance by Altria to JLI by protecting JLI’s confidential information from misuse. *Id.* at 41.

In the course of the briefing, Complaint Counsel raised an issue that has not yet been fully developed. Complaint Counsel assert that Respondents’ conduct not only violated the rule of reason, but “may well amount to a *per se* violation [of Sherman Act Section 1] or be unlawful under the ‘inherently suspect’ standard.” CC Br. 40 n.37. Complaint Counsel observed that market allocation agreements among actual or potential competitors are typically *per se* violations. *Id.* (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) and *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (*per curiam*)). Complaint Counsel’s presentation on these issues was confined to a single footnote and Respondents’ Answering Brief did not address the substance of these claims.

Commission Rule 3.54(c) provides that, where the Commission believes that it should have further information or additional views of the parties as to the content of an order to be issued, the Commission may, in its discretion, withhold final action pending receipt of such additional information or views. 16 C.F.R. § 3.54(c). We believe that this proceeding would benefit from our receiving the views of the parties on the potential applicability of the *per se* rule and the inherently suspect standard to the Respondents’ alleged unwritten agreement. Specifically, we have determined to request that Complaint Counsel and Respondents submit briefs that address the following questions:

1. If we find that JLI and Altria entered an unwritten agreement prior to the closing of the challenged Transaction on December 20, 2018, for Altria to take steps to cease e-cigarette operations, would it be proper, as a matter of substantive antitrust law, to analyze that agreement under a *per se* theory of liability as opposed to the rule of reason? Would it be proper, as a matter of substantive antitrust law, to analyze that agreement under the inherently suspect theory of liability as opposed to the full rule of reason?
2. Does the history of this proceeding pose any impediment to applying either a *per se* or inherently suspect theory of liability to an unwritten agreement entered prior to the closing of the challenged Transaction on December 20, 2018, for Altria to take steps to cease e-cigarette operations? If so, what steps are necessary to remove the impediment?
3. If we find that prior to the closing of the challenged Transaction on December 20, 2018, JLI and Altria entered an unwritten agreement for Altria to take steps to cease e-cigarette operations, what are the factual and legal elements for assessing the agreement under a *per se* analysis and under an inherently suspect analysis?

The parties shall be permitted to file opening and reply briefs addressing the above questions. The parties' opening briefs shall be filed on or before December 5, 2022 and shall abide by the word limits set forth in Commission Rule 3.22(c) for dispositive motions, with each brief not to exceed 10,000 words. Any reply briefs shall be filed on or before December 20, 2022 and shall not exceed 5,000 words. Word count limitations shall be calculated as set forth in Commission Rule 3.22(c).

To facilitate full consideration of the issues presented, the Commission's deadline for ruling on Complaint Counsel's appeal from the initial decision in this proceeding, currently 100 days after the oral argument, will be extended to 100 days after the deadline for filing the reply briefs specified above.

Accordingly,

IT IS HEREBY ORDERED THAT Complaint Counsel and Respondents shall file on or before December 5, 2022 briefs that address the possible application of the *per se* rule and inherently suspect standard in this matter, responding to the questions set forth in numbered paragraphs 1-3 above;

IT IS FURTHER ORDERED THAT Complaint Counsel and Respondents may file reply briefs on or before December 20, 2022.

IT IS FURTHER ORDERED THAT the parties' opening briefs shall not exceed 10,000 words and the parties' reply briefs shall not exceed 5,000 words, calculated in the manner set forth in Commission Rule 3.22(c); and

IT IS FURTHER ORDERED THAT the Commission's deadline for ruling on Complaint Counsel's appeal from the initial decision in this proceeding is extended to 100 days after the deadline for filing reply briefs, as specified above.

By the Commission.




April J. Tabor
Secretary

SEAL:
ISSUED: November 3, 2022